

## Muddying the Waters: Tort Law and the Environment from an English Perspective

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It is a commonplace of environmental law in England that tort law plays, and should play, little part in environmental protection. The leading texts on environmental law are largely dismissive of the use of tort law.<sup>1</sup> Leading theoreticians argue for enhanced regulation, rather than reliance on private law, or at least are very skeptical about the use of private law.<sup>2</sup> Some writers take a more positive view,<sup>3</sup> but most of the defenders of tort law admit that it will only become useful or acceptable if it undergoes major substantive and procedural reform, or else they advance tort law as a solution to merely contingent objections to the current regulatory regime, objections which might be better resolved by minor amendments to the regulatory regime or to public law rules such as those concerning standing.<sup>4</sup>

The purpose of the present article is to examine how far current English tort law can be defended as a major contributor to environmental law without having to rely on proposals for major reform of tort law itself or on contingent gaps in the current regulatory regime. We will concentrate on the objections to the use of tort law advanced by one of the leading texts, not because that particular list has more or less merit than any other list, but because it can be considered to be the standard view of English lawyers.

Before moving on to the objections themselves, however, it will clarify matters if we consider at a more general level the type of objection that might be leveled at tort law.

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1. See, e.g., DAVID HUGHES, *ENVIRONMENTAL LAW* 37 (3d ed. 1996); STUART BELL & DONALD MCGILLIVRAY, *ENVIRONMENTAL LAW*, 277 (5th ed. 2000).

2. See generally JOANNE CONAGHAN & WADE MANSELL, *THE WRONGS OF TORT* (2d ed. 1998); Donald McGillivray & John Wightman, *Private Rights, Public Interests and the Environment*, in *JUSTICE, PROPERTY AND THE ENVIRONMENT: SOCIAL AND LEGAL PERSPECTIVES* (Tim Hayward & John O'Neill eds., 1997); Owen McIntyre, *Statutory Liability For Contaminated Land: Failure of the Common Law?*, in *ENVIRONMENTAL PROTECTION AND THE COMMON LAW* (John Lowry & Rod Edmunds eds., 2000); Jenny Steele, *Assessing the Past: Tort Law and Environmental Risk*, in *LAW IN ENVIRONMENTAL DECISION-MAKING: NATIONAL, EUROPEAN, AND INTERNATIONAL PERSPECTIVES* (Tim Jewell & Jenny Steele eds., 1998); Jenny Steele, *Remedies and Remediation — Foundational Issues in Environmental Liability*, 58 *MOD. L. REV.* 615 (1995).

3. See generally David Campbell, *Of Coase and Corn: A (Sort of) Defence of Private Nuisance*, 63 *MOD. L. REV.* 197 (2000); John Murphy, *Noxious Emissions and Common Law Liability: Tort in the Shadow of Regulation*, in *ENVIRONMENTAL PROTECTION AND THE COMMON LAW* (John Lowry & Rod Edmunds eds., 2000); Keith Stanton & Christine Willmore, *Tort and Environmental Pluralism*, in *ENVIRONMENTAL PROTECTION AND THE COMMON LAW* (John Lowry & Rod Edmunds eds., 2000).

4. See generally Murphy, *supra* note 3.

There are four types of objection to the use of tort law in an environmental context, although in any specific substantive objection any number of them might be combined.

The first is that the content of the law is objectionable in itself. A standard response to such an objection is that the common law is flexible enough to change, so that content-based objections are merely contingent. Although that response is a powerful one, and one should certainly reject essentialism in law,<sup>5</sup> it is not one we shall avail ourselves of here, for the reason that it would obscure what English law currently is and might give a misleading impression of the chances of change. We shall limit ourselves to a plausible range of current interpretations given traditional methods of exposition, and shall therefore have to defend the content of the law as it stands.<sup>6</sup>

The second type of objection is to the nature of private law claims. Private law claims are to a very great extent under the control of the plaintiff, the person who makes the claim. Plaintiffs may, for example, decide to abandon a claim or to settle it in exchange for whatever they consider to be sufficient compensation. This contrasts with, for example, criminal law, in which the settling of claims is far more problematic. Defendants who offer a victim (or a prosecutor) money in exchange for calling off criminal proceedings may find themselves perceived not as attempting to “settle” but as attempting a “bribe,” and to have committed a further crime. Of course, it is possible to make some kinds of deal in the criminal law context, and even more so in a regulatory context, which is characterized by flexibility and individualization both of standard setting and of enforcement.<sup>7</sup> But rarely will the private interest of the prosecutor be seen as a proper motivation for the abandonment of a prosecution.

The objection to the private law nature of a tort claim is that to allow the victim to settle a claim means that the interests of other people are ignored. Our response to this objection will be, in essence,

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5. See generally David Howarth, *On the Question: What is Law?*, 6 RES PUBLICA 259 (2000).

6. One should not, however, underestimate the ability of the highest appellate courts to reshape the law even in the short term and even in England. For example, many academic writers have been extremely dissatisfied with the English approach to exemplary or punitive damages and especially with the extraordinary Court of Appeal decision *AB v. South West Water Servs. Ltd.*, [1993] 1 Q.B. 507, which ruled out punitive damages in most environmental tort claims by imposing the bizarre rule that punitive damages were not to be awarded in any cause of action for which no precedent existed for the award of such damages before 1964, the date of the House of Lords decision in *Rookes v. Barnard*, [1964] A.C. 1129 (H.L. 1964). See, e.g., PERCY HENRY WINFIELD ET AL., WINFIELD AND JOLOWICZ ON TORT 746 (15th ed. 1998); Murphy, *supra* note 3, at 69-71. See generally David Howarth, *Is There a Future for the Intentional Torts?*, in THE CLASSIFICATION OF OBLIGATIONS (Peter Birks ed., 1997). Cf. THE LAW COMMISSION, AGGRAVATED, EXEMPLARY AND RESTITUTIONARY DAMAGES (Report No. 247) (1997). The House of Lords overruled *AB v. South West Water* in *Kuddus v. Chief Constable of Leicestershire Constabulary*, [2001] 3 All E.R. 193, [2001] U.K.H.L. 29.

7. See BELL & MCGILLIVRAY, *supra* note 1, at 241.

that other people who are themselves victims will also have potential tort claims, so that the objection applies only to a very specific type of interest which is not connected with any living person.

The third type of objection is not so much to tort law itself, but to “common law” processes in general, as opposed to making statutes, regulations and codes. The core of the objection is that the common law operates on a case-by-case basis, which is inappropriate to the scale and nature of environmental problems. We will attempt to justify common law processes as, on the contrary, a reasonable way to respond to a number of environmental problems.

Finally, there is the objection to court-based adjudication of any type — not just in tort law but in any type of decision-making process — that it gives a significant role to judges and courts. This objection can be broken down further into objections based on the practical competence of courts (the type of evidence they can obtain given the adversary nature of the proceeding and the qualities of the participants, such as judges, lawyers and expert witnesses), and objections to the normative competence of the courts (to the propriety of assigning certain types of decision to unelected legal experts rather than to elected politicians or to bureaucrats at least nominally accountable to elected politicians). The response to this objection will be to claim that in some circumstances, (for like the law itself, institutions do not have essences, only boundaries for the time being), non-accountability can have distinct advantages and that, at least as a contingent historical fact about current day Britain, it is still more difficult to suborn or lobby a judge than a politician or a bureaucrat.<sup>8</sup>

#### I. THE OBJECTIONS TO THE USE OF TORT LAW FOR ENVIRONMENTAL PROTECTION

We will consider the discussion of the utility of private law for environmental protection put forward in Bell and McGillivray’s textbook on environmental law.<sup>9</sup> Bell and McGillivray say that there are “a number of general limitations on the use of private law (especially tort law) to protect environmental interests.”<sup>10</sup> They summarize their objections under the following six headings:

- Private law acts only as a protector of private interests
- Private rights are based on imprecise or unduly absolute standards
- Problems of proof
- Private law as a fault based system

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8. Cf. Michael Crew & Charlotte Twight, *On the Efficiency of Law: A Public Choice Perspective*, 66 *PUB. CHOICE* 15 (1990).

9. See BELL & MCGILLIVRAY, *supra* note 1, at 277-80.

10. *Id.* at 277

- Reactive Controls
- An environmental injustice<sup>11</sup>

We now proceed to examine each of these headings in turn.

A. “*Private Law Acts Only as a Protector of Private Interests*”

The accusation here is that tort law, indeed all private law, can only protect “private” interests (such as property rights) and cannot protect “environmental rights” as such. An alleged consequence is that the remedies obtained in tort law may satisfy the claimant but do not necessarily lead to environmental improvement. It is also alleged that the concentration on private rights narrows unduly the range of those who can sue, since they rarely give rights of action to all those who might benefit from an environmental improvement. For example, in the *Cambridge Water* case,<sup>12</sup> one of the most celebrated English cases concerning civil liability for environmental damage, the claimant, the Cambridge Water Company, wanted compensation for the cost of relocating a bore-hole from Sawston Mill to Hinxton Grange. It could no longer use the Sawston Mill bore-hole because it had been contaminated by chemicals which had traveled through the ground from the defendant’s leather goods factory (and because regulatory standards had changed so that what had been tolerable contamination was no longer tolerable). The Cambridge Water Company did not care about reversing the contamination of the original bore-hole and it had no intention of spending any of the damages on remediation. Other people who were concerned that the bore-hole was contaminated had no say in the case.

The private interests point is a fundamental objection since it goes to the central characteristic of tort law that tort actions are under the control of the victim and can be treated by the victim as a kind of property right to be traded at a price the victim is willing to accept. The point is sometimes expressed in the form that “private law will only lead to remediation . . . if this is the cheapest way for the plaintiff to be compensated,”<sup>13</sup> though this formulation seems to assume unerring courts or unerring negotiation by the parties and perhaps should be stated in a different way, that the outcome the defendant will be seeking in a private law action, other than to win outright, is the cheapest way to compensate the victim, and that cheapest compensation method may or may not involve remediation.

The objection assumes, of course, that remediation deserves an absolute priority, that only remediation adequately deals with the en-

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11. *Id.* at 277-80.

12. *Cambridge Water Co. v. E. Counties Leather Plc.*, [1994] 2 A.C. 264 (H.L. 1993).

13. *See* BELL & MCGILLIVRAY, *supra* note 1, at 277

vironmental damage. But that assumption, which sometimes appears to be an article of faith to environmental lawyers, can be challenged. If remediation is a more costly option, why should it be chosen? Why should we order resources to be wasted? Is that the best environmental option from a global environmental perspective?

An argument for privileging remediation might be that the problem with the private law action is that it only takes into account the losses to a subset of the victims, the subset which brings the action. The argument would continue that if all the losses to every possible victim, present and future, were taken into account, remediation would always be seen as the cheapest option. It would then say that there is no practical way to represent the interests of future victims yet unborn in a private law action, so that the private law route will always be in danger of choosing the wrong remedy.

But this argument is itself far from unimpeachable. Why should the inclusion of the interests of the unborn always lead to a convergence on remediation as the cheapest solution? Consider the *Cambridge Water* case again. What interests other than interests in the supply of water can one imagine the unborn having in the decontamination of the Sawston Mill aquifer? If the only interests are indeed in water supply, who is in a better position to judge the relevant future investment requirements than the Cambridge Water Company itself? There might well be a time when the cheapest investment option to meet rising demand for water is the decontamination of Sawston Mill. On the other hand, the costs of decontamination might be so formidable that such a position might never be reached. The Cambridge Water Company can take these possibilities into account in its demands for damages. If there is a real possibility that the decontamination of Sawston Mill will be required sooner or later, compensation which pays only for the opening of a new bore-hole will be insufficient. If so, the Cambridge Water Company could plausibly ask for more damages. But if such extra investment is unlikely, in view of all the evidence, why should remediation be encouraged, let alone paid for?

A different tack might be that the Cambridge Water Company will make systematic mistakes about the costs and benefits of remediation, mistakes which a governmental agency would not make. One source of error would be the existence of interests in remediation other than water supply, interests the Cambridge Water Company does not care about. But it is extremely difficult to see what these interests might be. The argument for remediation then becomes extremely speculative, an argument that there might appear, at some future date, interests which might justify the costs of remediation now.

One might equally say that there might appear at some future date some costs of attempts at remediation of which we are presently ignorant. In making decisions it is irrational to ignore any information we have. It is equally irrational to make assumptions about information we do not have.

The *Cambridge Water* case illustrates the point that the alleged difficulty with private law, that it protects only “private” interests, does not have universal validity. But that is not to say that the difficulty never applies. The question is not whether to use tort law at all, but for which sorts of case will tort law not be appropriate. Bell and McGillivray<sup>14</sup> take up a claim of Wightman<sup>15</sup> that English law, at least after *Hunter v. Canary Wharf Ltd.*,<sup>16</sup> protects only interests in land. But, as we shall see below, although English private nuisance law protects only interests in land, other torts protect other interests. Negligence law, for example, protects individuals against personal injury, including psychiatric illness, property damage and, in certain circumstances, pure economic loss. Public nuisance also protects against a wide range of invasions of the plaintiff’s interests.<sup>17</sup>

The particular example which Bell and McGillivray cite is, however, an interesting one.<sup>18</sup> Bell and McGillivray give as an example of an environmental interest which is not protected by English private law the interest leisure walkers have in keeping open a public footpath across private land. Interference with the highway, which is what interference with a public footpath amounts to, is plainly a public nuisance.<sup>19</sup> The problem for private plaintiffs in such a case, however, is that in public nuisance plaintiffs have to show “special damage,” which is to say damage greater than or different from the damage suffered by the public at large.<sup>20</sup> The question is whether leisure walkers would have suffered “special damage.” It is clear that interference which causes any financial loss is sufficient.<sup>21</sup> The financial loss need not be very specific. Disruption of a business through interfering with

14. *Id.* at 281.

15. *Id.* Drawing on John Wightman, *Nuisance — The Environmental Tort?*, 61 MOD. L. REV. 870 (1998).

16. *Hunter v. Canary Wharf Ltd.*, [1997] A.C. 655 (H.L. 1997).

17. See J. R. Spencer, *Public Nuisance — A Critical Examination*, 48 CAMBRIDGE L.J. 55 (1989). In *Hunter*, Lord Goff seems to suggest, in an obiter comment, that public nuisance should no longer protect individuals against personal injury and that claimants ought to be confined to claims in negligence. [1997] A.C. 655. As Lord Cooke points out in his dissent, however, there is such a long history of personal injury claims in public nuisance that unpicking the law would not be an easy task. *Id.* (Lord Cooke, dissenting). Furthermore, it is fundamentally misconceived to attempt to equate public and private nuisance. The whole point of public nuisance is that it protects interests beyond narrow property interests. See *infra* Part I.D.3.

18. See BELL & MCGILLIVRAY, *supra* note 1, at 281.

19. See generally *Wallasey Local Bd. v. Gracey*, (1887) 36 Ch. D. 593; *Tottenham Urban Dist. Council v. Williamson & Sons, Ltd.*, [1896] 2 Q.B. 353.

20. See generally *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co.*, [1967] 1 A.C. 617 (P.C. 1966).

21. *Tate & Lyle Indus. Ltd. v. Greater London Council*, [1983] 2 A.C. 509 (H.L. 1983).

the travel patterns of the business's employees counts.<sup>22</sup> Wasting the time of a person at work is sufficient.<sup>23</sup> Even the creation of potential financial liabilities can count.<sup>24</sup> Interference with the exercise of in any "private right"<sup>25</sup> is also sufficient, and includes, for example, getting to and from one's own property.<sup>26</sup> And any interference with the plaintiff's health has often been taken to be sufficient,<sup>27</sup> as has damage to property.<sup>28</sup>

The problem is that the leisure walker does not obviously suffer any sort of financial loss. Leisure walkers do not even suffer the loss of having their time wasted since their leisure time represents no lost production. As for "private rights," if they are not going to or from their own property at the point the footpath is obstructed it is difficult to see that any "private right" of theirs has been interfered with. And since leisure walkers could presumably take their exercise somewhere else, it is difficult to see how their health would be affected. Even public nuisance, therefore, appears not to protect the leisure walkers' "pure amenity" interest. The law, as if inspired by a puritan ethic, protects even tenuous interests which are related to production — to work and to take part in commerce — in addition to protecting health interests (which can also be seen as production-related), but it does not protect leisure or aesthetic interests unless they are associated with land values.<sup>29</sup> A pure amenity interest of this type is treated by English law in a way close to the way it treats pure emotional distress<sup>30</sup> — it is not a protected private interest. Victims of damage to pure amenity interests are obliged to rely on the public authorities to use their own distinct powers to initiate legal proceedings in public nuisance situations.<sup>31</sup>

22. See generally *Gravesham Borough Council v. British Ry. Bd.*, [1978] Ch. 379.

23. *Boyd v. Great N. Ry.*, [1895] 2 Ir. R. 555; *Blundy, Clark & Co. v. London & N.E. Ry. Co.*, [1931] 2 K.B. 334; *Blagrove v. Bristol Waterworks Co.*, (1856) 156 Eng. Rep. 1245.

24. *Medcalf v. R. Strawbridge, Ltd.*, [1937] 2 K.B. 102.

25. See, e.g., *Jan de Nul (U.K.) Ltd. v. N.V. Royale Belge*, [2000] 2 Lloyd's Rep. 700.

26. *O'Neil v. Harper*, 10 D.L.R. 433, [1913] 13 D.L.R. LEXIS 649.

27. See, e.g., *Mint v. Good*, [1951] 1 K.B. 517; *Jacobs v. London County Council*, [1950] A.C. 361 (H.L. 1950); *Lewys v. Burnett & Dunbar*, [1945] 2 All E.R. 555; *Dollman v. Hillman Ltd.*, [1941] 1 All E.R. 355.

28. *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co.*, [1967] 1 A.C. 617 (P.C. 1966); *Halsey v. Esso Petroleum Co.*, [1961] 2 All E.R. 145 (Q.B.D 1961).

29. Another aspect of *Hunter v. Canary Wharf Ltd.*, *Hunter v. London Docklands Dev. Corp.*, [1997] A.C. 655 (H.L. 1996), is the limited protection given to leisure or aesthetic interests even when they are associated with land values. There is no protection in private nuisance for views or prospects and no protection for television reception against mere obstruction by a building. There might, however, be protection for television reception against electromagnetic interference arising out of the defendants' activities.

30. See DAVID HOWARTH, *TEXTBOOK ON TORT* 234-37 (1995).

31. Originally the Attorney General was the appropriate person to bring such claims. See Spencer, *supra* note 17. Far more likely now is an action by the local authority, such as the City or Borough Council under section 222 of the Local Government Act 1972 (or section 130 of the Highways Act 1980 for a case concerning the highway, such as public footpath). See, e.g., *Rail-track Plc. v. Wandsworth London Borough Council*, [2002] Env. L.R. 9 (C.A. 2001), [2001] E.W.C.A. Civ. 1236.

There are similarities between the leisure walkers' case and situations in which a nuisance causes damage to a large number of people but the damage to each individual victim is not enough for any individual victim to risk the stress and expense of legal action. In those situations, however, the solution is group litigation.<sup>32</sup> In contrast, in the leisure walker problem, the issue is not merely the magnitude of the harm per victim, but whether the type of harm should be recognized at all as protected by a private right. The present law on pure amenity claims collectivizes the claims, as does group litigation for property claims of low value, but it also subjects them to a public interest test, in the form of requiring the approval of a public authority before claims proceed.

One must ask, however, how important this problem is. It arises only if all the potential claimants are purely leisure walkers so that no potential claimant suffers actionable special damage, or if the potential claimants who do suffer special damage settle their cases in ways which do not lead to the re-opening of the footpath to leisure walkers as well. The former possibility certainly exists, for example in the case of a footpath which enters the land of a single landowner and goes nowhere else, but it is hardly a major objection to the use of tort law in environmental cases generally. The latter possibility is near to inconceivable. One might just about imagine a landowner who is willing to settle a case against victims who wish to reach their own property or who use the footpath for commercial purposes by providing them with separate and gated access, while keeping the main footpath blocked to the general public. But the circumstances under which this will make sense for the landowner must be very rare. In the vast majority of cases, the general public will be able to take advantage of the effects of the injunction to remove the obstruction. The injunction might be a "private" remedy, but its use can produce positive externalities.

There are, however, other more serious cases in which there is the difficulty that the victims will not take into account all the harm. These are cases in which the interests of all the immediate victims are different from the *known* interests of the yet unborn. The known interests of the already born can be protected by their own rights to sue. The unknown interests of the yet unborn are too speculative to worry

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32. In 2000, new civil procedure rules were introduced in England which provide for "group litigation orders." See LORD CHANCELLOR'S DEPT., CIVIL PROCEDURE RULES 19.10-19.15 (Eng.). These rules go some way towards the introduction of an English class action suit, for example by allowing the court to order that subsequent group members are bound (to an extent determined by the court) by the results of test cases, but the underlying theory is still that individual cases are "grouped" for convenience. There is still no question of an action between the defendant and the class itself. Cf. David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913 (1998).

about. The difficulty is where both conditions apply — that the interests are known about and that they relate to the yet unborn.<sup>33</sup>

The best example is climate change. Although we now know that climate change will probably adversely affect the interests of many people already living<sup>34</sup> we also know that it will affect even more adversely the interests of generations yet unborn. In such a case, unless we can rely on existing victims of climate change or victims of other aspects of activities which themselves have an effect on climate change to take into account the interests of their yet unborn descendants, we might well see the wrong choice of remedy if we relied solely on private law. One might argue that non-human legal actors such as companies or universities might have a longer term perspective, but it is far from clear either whether that is so at all (the people who staff these organizations themselves are mortal even if the organizations are not) or whether such organizations would have interests which coincided sufficiently with those of the yet unborn victims (oil companies might think that climate change was not necessarily a negative development for them, for example).

Another example is biodiversity. Suppose that we know that a reduction now in biodiversity will at some future time adversely affect the interests of people then living, for example because they lose the chance to develop a new drug or foodstuff or perhaps because of the loss of an aesthetic experience. Can we rely on those who might be adversely affected now by some other aspect of the activities which reduce biodiversity to take biodiversity into account when coming to a settlement of their case? Consider, for example, the case of organic farmers adversely affected by the nearby cultivation of GM crops. The problem from the organic farmers' point of view is that the nearby cultivation of GM crops reduces the marketability of their organic products because of consumer resistance based on the risks of cross-contamination. The organic farmers are looking for solutions which will put them back into business. It is possible that the cheapest solution is also the one which promotes biodiversity, namely to close down the GM farm, and that a court might order such a solution. But it might also be the case that the cheapest and most acceptable solution for the GM farmer is to pay for the organic farmer to move to a site more distant from GM production, or merely for the GM farmer to pay money compensation equivalent to the income lost by the or-

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33. I am deliberately ignoring here any "interests" which are of no interest to any human being, dead, living or yet unborn. To speak of such "interests" as the interests of the "environment as such" strikes me as mystical.

34. See *CLIMATE CHANGE 2001: IMPACTS, ADAPTATION AND VULNERABILITY* (James J. McCarthy et al. eds., 2001) (contribution of Working Group II to the Third Assessment Report of the Intergovernmental Panel on Climate Change).

ganic farmer and that the parties settle on that basis. Perhaps the organic farmer is an idealist who believes in the importance of biodiversity and so holds out for the first solution, but there is no guarantee that the organic farmer would take the idealist line (or, indeed, that the court would find in the organic farmer's favor).<sup>35</sup> The effect is that there is a risk that biodiversity would not figure in the solution to the case the parties would produce.

There are, however, two further points that should be made in assessing the place of private law in this kind of environmental problem. The first is that the deterrent effect of the risk of private litigation might itself be sufficient to produce future improvements, so that the inadequacy of private law is not an argument for getting rid of the possibility of private litigation, only an argument for considering the use of other means in addition to private litigation. We take this point up in more detail below. Secondly, the inadequacy of private law in particular kinds of case is not a reason in itself for believing that governmental action would necessarily be more effective. Political actors in democracies tend to operate on an electoral cycle which is far more short term than the life cycle of the individual victims of environmental damage. A U.S. president working to a four year re-election schedule is acting on a far more short-term basis than twenty-five year-old residents of Cambridge who worry about the effects on their health and wealth over the next fifty years of increases in mean temperatures and sea-levels.

Bell and McGillivray's first objection is mainly an objection of the second type, an objection to the nature of a private law claim, combined with some objections of the first type, to the content of the law. The objection has substance in cases in which the known interests of the as yet unborn are at stake, but is otherwise over-stated.

B. *"Private Rights are Based on Imprecise or Unduly Absolute Standards"*

Environmental regulation often works by setting quantitative targets, for example a national target for emissions of a particular type, and then issuing specific quantitative licences to particular operators which aim at meeting the national target. The advantages of such an approach are said to be that policy-makers are able to control the overall effect of their decisions at an aggregate level and that officials charged with enforcement can monitor each operator accurately and unambiguously.

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35. Cf. *R. v. Sec'y of State ex parte Watson*, [1999] Env. L.R. 310 (C.A. 1998).

Even where regulation is not so precise in quantitative terms, as in the typical British integrated pollution control regime, which relies on authorizing polluters if they adopt the “best available technique not entailing excessive cost” (BATNEEC),<sup>36</sup> regulators are usually in a position to give detailed guidance to operators which can be translated into quantitative standards and which can be monitored objectively.

Tort law is accused of failing to produce quantitative standards susceptible to similar objective monitoring, and thus to encourage arbitrariness and costly uncertainty. Nuisance law and negligence law both use, in somewhat different ways, tests of “reasonableness” which involve imprecise balancing tests. When tort law does contain an objective standard, the accusation is that the standard does not relate to any particular quantitatively-based policy stance, and is thus said to be “unduly absolute.”

The situation is, however, rather more complex than this accusation implies. The idea that quantitative standards give rise to no difficulties of interpretation, enforcement and policy-making is too simple. Environmental quality standards (which are the type of measurement most relevant to victims and, presumably, most important for policy-makers) may be clear in themselves, for example that the water supply contains too much of a particular contaminant, but it will often be unclear against whom the standard should be enforced, since the failure to reach the required standard may have resulted from pollution from one or more different sources. Emission standards, in contrast, may be easy to enforce but might also be relatively unconnected with environmental quality. A noise standard, for example, measured at a standard distance from the source of the noise might be too strict for a factory located in the middle of nowhere but intolerably lax for a factory located next to housing.<sup>37</sup> A process standard, if backed by large amounts of detail, will often be out of date. It can only be kept up to date by relaxing the level of detail, or by incorporating a challenge procedure under which industry can challenge the regulator’s existing standards. Both options mean that the administration of the process standard will tend to converge with a tort law reasonableness or balancing test.

But there is a more fundamental riposte to the criticism of tort law that it is too imprecise or too absolute. The objection is that the

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36. See Environment Protection Act, pt. 1, 1990 (Eng.). BATNEEC is being replaced by “BAT” (Best Available Techniques) under the Pollution Prevention and Control Act 1999, but the combination of BAT with the European Community law concept of “proportionality” means that there is little practical difference between the two concepts in terms of the relevance of costs, although there might be other differences. See BELL & MCGILLIVRAY, *supra* note 1, at 384, 396-98.

37. Cf. *Murdoch v. Glacier Metal Co.*, [1998] Env. L.R. 732 (C.A. 1998).

criticism ignores how quantitative regulations come into being in the first place. The riposte claims that it is more illuminating in comparing regulation and tort law to treat the individual tort case as the equivalent not of the enforcement of a regulation but of the making of such a regulation. The court in, for example, a typical nuisance case is concerned not so much with setting penalties for past behavior as with establishing the terms of an injunction to control future behavior. It is norm-making rather than norm-enforcing. The tort law equivalent of the regulatory enforcement stage, in this comparison, is the enforcement of the injunction. In terms of clarity and ease of monitoring and enforcement, the critics of tort law have to show that not just liability rules but also injunctions in nuisance cases are vague, imprecise and difficult to monitor. Critics have not so far been able to do this, and even if they were able to do so, judges could remedy the situation quickly without undermining any common law doctrine by making injunctions more precise. Judges have all the weapons they need because injunctions can be expressed with precision either in terms of process or in terms of outcomes or both (that is, an injunction can say "Cease and desist from doing X" or it can say "Make it so that result Y no longer obtains"). Effectively, injunctions can enforce environmental quality standards, emission standards or process standards, or any combination of them, as seems most appropriate in the case.<sup>38</sup>

This change in the focus of comparison between regulation and tort law allows us to see the real contrast between the two. The tort law injunction may well be more precise and targeted than any regulation. The problem with the tort law injunction is not its lack of precision but its scope of application. The injunction applies only to the case at hand and gives only general guidance as to what might happen in a case on different facts. The uncertainty which tort law can produce is not the result of lack of precision in its requirements but in predicting in advance what might be required of a particular operator in particular circumstances. The injunction itself gives rise to a high degree of certainty, not only because it can be drafted in very precise terms, but also because it gives enforcement power to victims, the people most likely to use that power. The uncertainty is in the question of which set of requirements will apply to the operator in the first

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38. An outsider to U.S. debates on the use of tort law in environmental disputes is immediately struck by the absence of much discussion of the injunction as the plaintiff's remedy of choice. It is not entirely clear why lawyers in U.S. jurisdictions concentrate almost exclusively on damages remedies except in the field of the private enforcement of public standards. An outsider might suspect, however, that the reason lies in the American cost rule, the rule that litigants pay their own legal costs (as opposed to the English rule in which the loser pays the winner's costs) and the system of contingent fees. If litigation is funded principally by the prospect of awards of damages, suits for non-monetary remedies will tend to disappear. Where courts award costs to the winner, non-monetary suits become more plausible.

place. Regulation, in contrast, will be less tailored to the circumstances of the individual case and might give rise to absurdities, but it will give that information to a wider audience.<sup>39</sup>

Thus, case-by-case adjudication gives precise and highly appropriate information to a small number of people and imprecise information to a larger number. Regulatory norms give precise but potentially inappropriate information to a large number of people. It is far from clear whether either of these approaches can be said to be dominant over the other.<sup>40</sup>

The re-statement of the comparison also brings into focus a further question about regulation. To what extent can a potential breacher of an environmental regulation be sure that enforcement according to the breacher's understanding of the regulation will follow the apparent breach of that regulation? There are multiple sources of uncertainty which can be set against tort law's uncertainty. First, does the breacher have the same understanding of the regulatory requirement as the regulator, not just in semantic terms but also in practical terms?<sup>41</sup> For example if the breacher cannot easily make the same measurements as the regulator because of the cost of the equipment needed to make those measurements, the breacher's practical understanding of the regulation will necessarily be different from the regulator's understanding. Secondly, the regulator might not notice the breach. And thirdly, because the regulator is not a victim, the regulator might have little personal incentive to pursue the operator to the full extent made possible by the rules. It might be more important to the regulator to live a quiet life than to maximize compliance.

Again the balance of advantage and disadvantage is not clear cut. Different types of problem might yield different results. There is a similar picture when one looks at the long term tendencies of the two approaches. The main advantage of the regulatory approach is that total aggregated effects can be taken into account. Regulation can begin with a maximum tolerated level of emissions, for example, and then break the total down into individual level permissions. But the corresponding disadvantage is that individual organization level permissions are not sensitive to particular local adverse effects, and the

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39. Cf. Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J.L. ECON & ORG. 150 (1995). See generally Louis Kaplow, *General Characteristics of Rules*, in ENCYCLOPEDIA OF LAW AND ECONOMICS, VOLUME V THE ECONOMICS OF CRIME AND LITIGATION 502 (Boudewijn Bouckaert & Gerrit de Geest eds., 2000) [hereinafter *General Characteristics*]. Note that cases which give rise to injunctions are, in the jargon of the law and economics literature, both "rules" and "standards." They are "rules" for the parties and "standards" for the rest of the world. Regulatory norms can be either "rules" or "standards."

40. Cf. *General Characteristics*, *supra* note 39, at 502; James P. Rubin, *Judge-Made Law*, in ENCYCLOPEDIA OF LAW AND ECONOMICS, VOLUME V THE ECONOMICS OF CRIME AND LITIGATION 543 (Boudewijn Bouckaert & Gerrit de Geest eds., 2000) [hereinafter *Judge-Made*].

41. Cf. *General Characteristics*, *supra* note 39, at 505.

aggregate level decision is difficult to adjust downwards even if new evidence of adverse effects arises. Tort law is in the polar opposite position. It is difficult to use tort law to meet specific aggregate targets, but the appearance of new adverse effects will be reflected in the case law and it is possible for the whole system to be steered to lower aggregate levels of pollution by the accumulated effect of individual decisions.

Finally, and perhaps most important, the change in the focus of the comparison suggests that we should look more carefully into the way regulations are made by government. Are regulatory standards really based on "scientific" policy-making or are they, as seems far more likely, the result of a complex interaction between industry lobbying, environmental pressure group politics and the ideals and electoral interests of those in power?<sup>42</sup> Put crudely, in practice, and for the moment, it seems far more difficult to bribe a judge in Britain than to bribe a politician,<sup>43</sup> and although judges might have less access to expert advice than ministers, they are under much less political pressure to ignore or even to suppress that advice.<sup>44</sup>

One might argue, of course, that even if judges are less corruptible than politicians and officials, we should still prefer the assessments made by people who are politically accountable rather than those of unelected judges. After all, the creation of an environmental standard is not just a technical exercise. It involves the trading off of some interests against others. There are no neutral cost-benefit exercises. All such exercises involve normative judgments. But there are several persuasive counter-arguments. The courts already engage in cost-benefit assessments every time they make judgments about fault in negligence cases. Some of these judgments involve evaluations of inherently controversial matters, such as political or religious views.<sup>45</sup> No one suggests that all fault judgments in the law should be remitted to the politically accountable branches of government. Moreover, in those jurisdictions, unlike England, where such evaluations are still made by juries, one can argue that the court has a good claim to democratic legitimacy.<sup>46</sup> Calling a judgment "normative" or even "political" does not necessarily mean that it must not be taken by a court.

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42. See GEORGE MONBIOT, *CAPTIVE STATE: THE CORPORATE TAKEOVER OF BRITAIN* 127-61, 225-80 (2001).

43. Cf. Crew & Twight, *supra* note 8.

44. For a recent example of the suppression of advice, see Kevin Maguire, *Kiley Gets Gag on Tube Report Lifted*, *THE GUARDIAN WEEKLY*, Aug. 2, 2001.

45. For examples see HOWARTH, *supra* note 30, at 62-64.

46. By far the most important difference between English common law and its equivalents in the U.S. is the almost complete absence of the civil jury in England. When English lawyers argue for or against the use of common law remedies in environmental cases they are not, as U.S.-based lawyers tend to be, arguing for or against jury trial.

There is a further point. When assessing whether a decision should be assigned to a particular institution, the characteristics of that institution taken in isolation are not the only important factors. There is also how that institution interacts with the other relevant institutions. For example, when assessing the appropriateness of assigning a decision to a court rather than to a legislature it is important to ask about what happens if the legislature disagrees with the court. What degree of colloquy or mutual correction does the constitutional system allow? The dynamics of institutional competence are as important, perhaps more important, than the statics.<sup>47</sup>

In the British system, all court judgments are ultimately revisable by legislative fiat. There is no constitutional supremacy of the courts.<sup>48</sup> The Human Rights Act itself can be repealed by simple legislation, and parliament could, if it wanted to, renege on all Britain's commitments under the European Convention on Human Rights and under the Treaty of European Union.<sup>49</sup> There is even no *constitutional* guarantee against ex post facto laws or acts of attainder. In consequence, not only the rules used by the courts in deciding cases but even the results of individual cases in a sense subsist by the continuing permission of the legislature.

Perhaps paradoxically, one can argue that, as a consequence of legislative supremacy, the British courts are perhaps freer than courts elsewhere to engage the "political" branches of government in dialogue about the normative judgments that have to be made where various interests have to be balanced. British courts do not have to take

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47. The possible interactions between court and legislature are crucial to understanding the degree to which regulatory compliance defenses or their equivalent should be implied into statutory provisions in the absence of express words. It is often unclear whether a particular regulatory standard is meant by the legislature to be a minimum standard, in which case there would be no objection to the imposition by common law action of a more stringent standard, or meant to be a standing permission to act in accordance with the standard whatever the consequences for others, in which case more stringent common law standards should be excluded. Since the legislature is able to respond to a court decision that the standard is a minimum standard by explicitly providing in a second statute that the standard is permissive, there is little danger in adopting the rule that in the absence of express words to the contrary, a regulatory standard is taken to be a minimum standard, not a permissive standard. *See generally* Kenneth S. Abraham, *The Relation Between Civil Liability and Environmental Regulation: An Analytical Overview*, 41 WASHBURN L.J. 379 (2002) (presented at the Ahrens Advanced Tort Seminar, Washburn School of Law, Fall 2001).

48. Or, technically, no supremacy of the system of constitutional amendment, which defines the ultimate authority in systems in which legislation is subject to constitutional review.

49. The Human Rights Act 1998 will undoubtedly have an important impact on the development of the private law, even in the environmental field. The Human Rights Act, 1998, c. 42 (Eng.); *see* *Marcic v. Thames Water Util. Ltd.*, [2001] 3 All E.R. 698 (Q.B.D. 2001), *aff'd* [2002] E.W.C.A. Civ. 64 (failure to alleviate a persistent flooding problem gives rise to a direct private action based on the Human Rights Act, 1998 for failure to respect the plaintiff's private and family life under Article 8(1) and the plaintiff's right to peaceful enjoyment of possessions under Article 1 of the First Protocol). The Act is, however, in principle repealable. The government would still have difficulties at the international level (*see, e.g.,* *Hatton v. United Kingdom*, [2002] 34 E.H.R.R. 1 (E.C.H.R. 2001) (noise from airplanes flying at night can be a violation of Article 8)), but English law is dualist, not monist, in its view of the legal nature of international treaties.

the ultimate responsibility for those judgments. Their view only prevails if politicians want it to prevail. In such a system all “common law” judgments are therefore in an odd way inherently democratic, if only by default.

Admittedly, whenever it is politically awkward for politicians to overturn a court decision, assigning that type of decision to the courts, might tend to give the courts a decisive influence. But one should take care to recognize that lawyers and courts often make easy targets for politicians, for whom the stereotypes of the rich lawyer and the out-of-touch judge can be immensely useful.<sup>50</sup> When political pressure is high enough, even *ex post facto* laws have not been beyond the British legislature.<sup>51</sup> The question whether to assign a decision to the courts therefore becomes merely a question about whether courts should be allowed some access to a decision. The degree of influence that access will vary from case to case, but in a system of legislative supremacy it is never complete.

### C. “Problems of Proof”

Bell and McGillivray write:

Environmental regulation typically involves the setting of standards which, if exceeded, lead to a punishable breach. Standards may either be breached without damage to the environment (this may happen with “technical” breaches of process standards), or they are breached because some quantitative standard has not been met. The key point is that there will usually be some monitoring on the site recording the breach; only rarely does the regulator have to take samples from the environment and try to establish where the pollutant came from. This, however, is often what has to be done in environmental tort claims.<sup>52</sup>

The allegation is that proof of causation is typically required in a tort case but not in regulatory enforcement (or criminal law). Even if causation requirements are relaxed in some circumstances (for example reversing the burden of proof<sup>53</sup> or, perhaps more legitimately, adopting the “NESS” test in preference to the “but-for” test<sup>54</sup>) it is

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50. See, for example, the speech of David Blunkett (the British Home Secretary) on October 3, 2001 attacking the institution of judicial review as a “lawyers’ charter.” See Andrew Sparrow, *Blunkett Attacks Judiciary in Fight Over Terrorism*, DAILY TELEGRAPH, Oct. 4, 2001.

51. *E.g.*, War Damage Act, 1965 (retrospectively reversing the effect of *Burmah Oil Co. v. Lord Advocate*, [1965] A.C. 75 (H.L. 1964)). The British government announced that the Anti-terrorism, Crime and Security Bill 2001 would contain *ex post facto* criminal provisions concerning hoaxing. See Jane Merrick, *Anthrax Hoaxers Face Seven Years in Jail*, PRESS ASS’N., Oct. 21 2001. In the event the first draft of the Bill did not seem to contain such a provision (see clause 112 and clause 123(2)(h)).

52. BELL & MCGILLIVRAY, *supra* note 1, at 278.

53. Suggested in the European Civil Liability White Paper. Environmental Liability, White Paper for the European Commission, COM (2000) 66 final.

54. “NESS” stands for “necessary element of a sufficient set.” See J D Fraser & David Howarth, *More Concern for Cause*, 4 J. LEGAL STUD. 131 (1984); Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735 (1985); Richard W. Wright, *Causation, Responsibility, Risk,*

indeed the case that tort law typically requires factual causation — that the tort caused the relevant harm. This allegedly makes tort law difficult to use in cases in which pollutants might have come from different sources, especially when, as in cases concerning emissions from motor vehicles, there are a very large number of possible sources.

One response to this allegation is to point out that tort law has developed techniques to circumvent such problems. English law does not recognize the *Sindell v. Abbott Laboratories*<sup>55</sup> move of counting an entire industry as the unit of analysis and treating the question of the damages due from each company in that industry as a problem of valuation rather than causation.<sup>56</sup> It has never explicitly rejected such a move, but the lack of the availability of class action suits and the late development of other forms of group litigation mean that it has been unlikely to arise.<sup>57</sup> Nevertheless, English law has developed two methods to deal with the problem of multiple sources. The first might be called the combined effect rule, the second the collectivization of the defendant.

The combined effect rule is that where the combined effect of the actions of a number of people constitutes a nuisance, but the action of any one of those people would not have constituted a nuisance by itself, all are liable for the combined effect. The rule is an old one. In *Thorpe v. Brumfitt*,<sup>58</sup> James, L.J. said:

Suppose one person leaves a wheelbarrow standing on a way, that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent, and it is no defence to any one person among the hundred to say that what he does causes of itself no damage to the complainant.<sup>59</sup>

In *Blair & Sumner v. Deakin*,<sup>60</sup> the same principle was used in a pollution case. Kay, J. asked:

A riparian owner has, as I have already remarked, a natural right to the use of the water which passes him in the stream in its original pure condition as nature would send it to him. If he finds that it is no longer in such a condition; that it is impossible to use it for domestic purposes or for manufacturing purposes, and that it becomes a filthy sewer like this stream; and further, if he finds that that was produced by the combined acts of a number of riparian proprietors

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*Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001 (1988); Richard W. Wright, *Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 VAND. L. REV. 1071 (2001) [hereinafter *Once More*].

55. 607 P.2d 924 (Cal. 1980).

56. See Joseph H. King, Jr., *Causation, Valuation and Chance in Personal Injury Torts Involving Pre-existing Conditions and Future Consequences*, 90 YALE L.J. 1353 (1981).

57. See *supra* note 32.

58. [1872-73] L.R. 8 Ch. App. 650.

59. *Thorpe v. Brumfitt*, [1872-73] L.R. 8 Ch. App. 650, 656-66.

60. [1887] 57 L.T.R. 522.

above him, is he without remedy? Has he no remedy because each one of them can say: "It was not my doing. I only contributed a part, and the part I did contribute was not enough to do you damage?"<sup>61</sup>

Citing *Thorpe v. Brumfitt*, Kay, J. answered his own question in the negative. Such a plaintiff would certainly have a remedy.<sup>62</sup>

Furthermore, the combined effect rule cannot be used in reverse. Just because one defendant has admitted that the effect of its actions alone would have amounted to a nuisance, other contributing defendants are still liable even though their contributions would not in themselves have amounted to actionable nuisances.<sup>63</sup>

More recently, the trend towards the individuation of the harm might be seen as a threat to the combined effect rule. Individuation of the harm is the technique of conceiving the damage caused to the claimant not as one indivisible harm but as separable into different parts, so that the defendant's tort can be said to have caused a part of the harm even if the rest of the harm would have happened anyway. At its limit, the individuation technique can be used as a kind of marginal causation, that there is factual causation whenever the court believes, on the balance of probabilities, that the harm would have been less had the tort not been committed. The leading case is *Holtby v. Brigham & Cowan (Hull) Ltd.*<sup>64</sup> in which the claimant was exposed to asbestos at work. For about half the period of his exposure, his employer was the defendant. For the remainder of the time, he was employed by other employers doing similar work in similar conditions. He developed asbestosis and sued the defendant. The trial judge held that defendant had been negligent and in breach of statutory duty, but was liable only for the damage which it had caused, finding that the claimant's condition would have been less severe if he had only sustained exposure to asbestos dust while working for defendant. Accordingly, he reduced the damages. The plaintiff appealed, contending that he was entitled to recover all of his losses from defendant. The Court of Appeal decided that where a claimant suffered injury caused by two or more persons, but claimed only against one person, that person would be liable only to the extent that he had contributed towards the disability. Where the extent of the harm

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61. *Blair & Sumner v. Deakin*, [1887] 57 L.T.R. 522.

62. *See also Warren v. Parkhurst*, 92 N.Y.S. 725 (N.Y. App. Div. 1904). In his analysis of *Warren*, Richard Wright has demonstrated that the cumulative effect rule is an application of the NESS concept. *See Once More*, *supra* note 54, at 1106-07.

63. *Derby Angling Ass'n v. Celanese*, [1952] 1 All E.R. 1326, *aff'd* [1953] 1 Ch. 149. The situation might be different if the contribution is "insignificant." *See Cambridge Water Co. v. E. Leather Co. Plc.*, [1994] 2 A.C. 264 (H.L. 1993).

64. [2000] P.I.Q.R. 293 (C.A. 2000); *see also Rahman v. Arearose*, [2001] Q.B. 351 (C.A. 2000), *criticized by* T. Weir, *The Maddening Effect of Consecutive Torts*, 2001 CAMBRIDGE L.J. 237.

could be quantified and attributed to the defendant's particular tort, the court should hold the defendant liable only for the part of the harm the defendant caused. This result might appear to be incompatible with the combined effect rule because if one individuates the marginal harm caused by the defendant in the examples given in *Thorpe* and *Blair & Sumner* the resulting shares of harm will be too low to justify liability in the first place. The individuation technique, however, is compatible with the combined effect rule if it is conceived of as a rule governing the measure of damages alone, leaving liability itself untouched.

Collectivization of the defendant is also a recent development. It is the technique, which has developed mainly in medical negligence, of suing organizations, such as a hospital or a health authority, for their "direct" negligence (for example, failures of management) rather than suing individual practitioners for their "professional" failings.<sup>65</sup> The purpose of collectivization is precisely that it becomes less important to identify a particular person who acted badly. It also reinforces the cumulative effect rule.<sup>66</sup> The technique consists of looking for an organization with a broad enough sphere of influence that the acts of all (or even, in principle, merely most) of the individuals who might have caused the harm fall within it. The organization is liable for failing to organize those individuals so that they caused no harm to the claimant.

Although the use of the collectivization technique in environmental cases has not always been successful,<sup>67</sup> the decision in *Lippiatt v. South Gloucestershire Council*<sup>68</sup> illustrates that it can be done. In *Lippiatt*, the plaintiffs were farmers whose land spanned a main road. The plaintiffs sued the defendant local authority for damages, alleging that the defendant had committed nuisance when it failed to curb the activities of travelers who had occupied a large strip of land owned by the defendants on one edge of the road. The plaintiffs alleged that for three years, until their eviction by the defendant, the travelers frequently trespassed onto the farm and carried out various acts which

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65. See *Re R (A minor) (No 2)*, [1996] 33 B.M.L.R. 178; see also *Barrett v. Enfield London Borough Council*, [2001] 2 A.C. 550 (H.L. 1999).

66. See DAVID HOWARTH ET AL., *HEPPLE, HOWARTH AND MATTHEWS' TORT: CASES AND MATERIALS* 1023-24 (5th ed. 2000).

67. Especially in cases against non-occupying landlords for failing to control their nuisance-making tenants. See *Smith v. Scott*, [1973] Ch. 314 (Ch. D. 1972), approved in *Southwark London Borough Council v. Tanner*, [2001] 1 A.C. 1 (H.L. 1999), and followed in *Hussain v. Lancaster City Council*, [2000] Q.B. 1 (C.A. 1998); *Mowan v. London Borough of Wandsworth*, [2001] B.L.G.R. 228. In the last mentioned case, however, Sir Christopher Staughton described the effects of this rule, by which he nevertheless considered himself bound, as "deplorable." He added, "[A] remedy must be sought elsewhere." See Janet O'Sullivan, *Nuisance, Local Authorities and Neighbours From Hell*, 2000 CAMBRIDGE L.J. 11; J Morgan, *Nuisance and the Unruly Tenant*, 2001 CAMBRIDGE L.J. 382.

68. [2000] Q.B. 51 (C.A. 1999).

constituted nuisances, including obstructing access to a field, depositing rubbish and excrement, stealing timber and fences, damaging a stone wall, allowing dogs to chase the plaintiffs' sheep, acting "belligerently" towards the plaintiffs, their families, employees and neighbors and damaging crops. The Court of Appeal held that the plaintiffs had an arguable case against the defendant local authority. Although each act of the trespassers might not have constituted a nuisance, and although it was probably impracticable for the plaintiffs to sue each traveler individually, the defendant was liable. It may be that the nuisance liability in such cases is subject to a fault test in the sense that the claimant has to show that the defendant knew or ought to have known about the interference and ought reasonably to have done something to prevent the interference,<sup>69</sup> but the very possibility of liability is achieved by collectivization.

Thus the causation requirements of the common law are not as ferocious as environmental lawyers sometimes make them out to be. There is, however, a quite different response to Bell and McGillivray's accusation. Instead of merely pointing to the ways the common law has developed to reduce the apparent impact of its causation requirements in their strictest interpretation, one can ask whether it is entirely wise for regulatory enforcement or criminal law standards in environmental law themselves to omit causal requirements. What would be the point of regulating or rendering criminal conduct which had no adverse environmental effect? If the defendant's conduct causes no demonstrable environmental harm, why should it be subject to legal penalty? The answer, of course, is that the regulator or the legislature must have made a causal judgment in creating the rule. The particular instance of the application of the regulation or criminal law standard participates in the regulator's or the legislator's causal judgment and is only as good as that judgment. The comparison between regulatory and tort law causation is not, therefore, a comparison between the easy application of causation-free regulatory norms and the difficult application of causation-rich common law norms. It is rather a comparison between the causal judgments made by regulators and legislators and the causal judgments made by courts. The "problem of proof" objection is not an objection to the "private law" nature of tort. It is an objection of institutional competence connected with the "common law" and "court-based adjudication" points.

It is difficult, if not impossible, to establish any general propositions about institutional competence. Institutions do not have "essential" properties, only passing, more or less temporary characteristics.

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69. *Lippiatt v. South Gloucestershire Council*, [2000] Q.B. 51 (C.A. 1999) (citing *Sedleigh-Denfield v. O'Callaghan*, [1940] A.C. 880 (H.L. 1940)).

It is easier to state the relevant questions than to give any kind of stable, universal answer: Is the institution capable of making an honest judgment about the question at hand? Is the institution capable of giving an accurate answer to the question at hand and at what cost? Is the institution capable of correcting its mistakes (and at what speed)?

Whether it is easier for a lobbyist to corrupt a judge or government minister is also a question that has no stable, ahistorical answer. The quality of information available to different institutions and the quality of the decision-makers they employ are similarly far from unchanging. And whether it is easier to change a rule which has come to be perceived as incorrect if the rule was promulgated by a regulator, a government department, parliament or a court is not easy to judge and not clearly fixed. Moreover, even if we were to decide that it was worthwhile to try to evaluate the current performance of various institutions against these questions, we are far from having any agreed measures or methods.

Nevertheless, we can say that in the light of recent British political history, especially food safety crises culminating in the BSE crisis, fatal accidents on the rail system and public reaction to the prospect of genetically modified food, confidence in the objectivity and competence of politically accountable decision-makers — regulators, government departments, parliament — is not high. Although there are serious questions about the quality of information available to the courts as a result of their adversarial procedures and the quality of the decision-makers the courts use, the impartiality of judges is rarely called into question. It is significant that the British practice of using judges and other lawyers to chair public inquiries into major political controversies continues.<sup>70</sup>

The ability of litigants to use civil litigation to challenge the causal judgments made by the political authorities is one of the most powerful reasons for retaining civil liability.<sup>71</sup> The concentration of power to make causal judgments into the hands of politically account-

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70. Recent examples of official inquiries and investigations led, extra-judicially, by judges include Lord Saville on Bloody Sunday, Lord Nolan on the bribing of members of parliament, Sir Richard Scott on the arms to Iraq scandal and Sir William MacPherson on the Stephen Lawrence case.

71. See Stanton & Willmore, *supra* note 3. Stanton and Willmore express some apprehension that the capacity of civil litigation to facilitate challenges to official orthodoxy will be undermined by changes in the Civil Procedure Rules under which judges are empowered and apparently encouraged to oblige the parties to appoint a single common expert witness. LORD CHANCELLOR'S DEPT., CIVIL PROCEDURE RULES 35.7-35.8 (Eng.). It seems so far, however, that judges are saying that they should not use this power to suppress important differences of view. See *Oxley v. Penwarden*, [2001] C.P.L.R. 1 (stating that power should not be used where there are different schools of thought, e.g., on causation in a medical negligence case); see also *Walker v. D (a child)*, [2000] 1 W.L.R. 1382 (allowing parties to submit their own evidence even after a single expert has reported where it is not "fanciful" for the aggrieved party to seek more evidence).

able decision-makers, which is what Bell and McGillivray's position seems to favor, is therefore not likely to increase public confidence in the accuracy of those causal judgments.

D. *"Private Law as a Fault Based System"*

The fourth objection to the use of tort law in environmental cases is that tort is fault-based and that fault is an inappropriate basis for environmental regulation. Bell and McGillivray elaborate the point as follows:

[M]ost pollution . . . does not occur because of deliberate actions by careless and unthinking individuals. Most pollution incidents arise because a number of circumstances that would not normally be foreseeable but which give rise to damage. In the interests of doing justice to defendants, the common law does not always seek to redress any damage caused by such accidents. Clearly, this is contrary to the general thrust of the polluter pays principle.<sup>72</sup>

One strategy of challenging this objection would be to attempt to show that tort law as it applies to the environment is not "fault-based." There is some academic support for this strategy,<sup>73</sup> but, as will appear shortly, it is not a particularly convincing position to take once the detail of the law has been considered. A second, more promising strategy is to concede that tort liability is mostly fault-based but to show that "doing justice to defendants" is not necessarily a point of criticism of the law.

The claim to be defended here is that all five of the torts most used in environmental cases in England are now influenced to a significant degree by fault-based theories of liability. There is, however, some confusion in the terminology of "fault" and "strict liability," largely because there is no settled meaning of the term "strict liability."<sup>74</sup> For present purposes we will treat as crucial to "fault" whether it is possible for the defendant to argue that there should be no liability because the conduct required of the defendant if the plaintiff was to have avoided being harmed would have been too burdensome. That is, liability counts as "fault-based" if the defendant's case can legitimately include the argument that some or all the costs of preventive action are "too much." We deliberately leave open a number of variables: whether the relevant burden can be a burden to the defendant or is restricted to burdens on third parties; how one judges whether a burden is excessive (that is, "too much" compared to what?); whether the issue of excessive burdensomeness is judged *ex post* or *ex ante*; and on whom the burden of proof lies. The crucial

72. BELL & MCGILLIVRAY, *supra* note 1, at 279.

73. *See, e.g.*, Murphy, *supra* note 3.

74. *See* HOWARTH, *supra* note 30, at 396-97.

point is that burdensomeness is a potential argument for the defendant, not the details of its application. Where burdensomeness is not an available argument for the defendant in any form, we can say that there is “strict liability” of some type.<sup>75</sup>

Burdensomeness is clearly available to defendants in English negligence law.<sup>76</sup> Defendants can argue that they acted reasonably if the precautions which would have been required of them for the plaintiff to have been kept safe<sup>77</sup> would have been too costly for themselves or would have involved excessive risk to third parties.

It is also important to realize that English law recognizes neither the doctrine of negligence *per se* nor that of evidence of negligence. English law deals with the question of the relationship between statutory standards and private rights of action in a way which often seems to lawyers from other parts of the world to be strange.<sup>78</sup> English courts are hostile to the concept that statutory standards give rise to private rights of action. They ask of any particular statutory standard whether there was a legislative intention to create a private right to compensatory damages, and often find that there was no such intention.<sup>79</sup> There is no attempt to connect the statutory standard to common law negligence. Negligence and “breach of statutory duty” are separate torts.<sup>80</sup> The effect of the English approach is to eliminate many opportunities for introducing strict liability into negligence by the importation of statutory standards. Indeed, it has been suggested that the origin of English judicial hostility to attempts to introduce statutory standards into negligence is precisely that to do so would dilute the fault principle.<sup>81</sup>

The controversial issues are whether, or to what extent, burdensomeness is available in the other four torts: private nuisance, *Rylands v. Fletcher*, public nuisance and trespass to land.

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75. One can go on to distinguish between forms of strict liability on the basis, for example, of the extent to which “legal causation” arguments or even factual causation arguments are available to defendants.

76. See HOWARTH ET AL., *supra* note 66, at 320; HOWARTH, *supra* note 30, at 48-57.

77. Technically if the risk to the plaintiff had been reduced to a level that a reasonable person would have done no more about it. See HOWARTH, *supra* note 30, at 58.

78. See, e.g., *Queen in the Right of Canada v. Saskatchewan Wheat Pool*, [1983] 143 D.L.R. 3d 9 (English approach “painful,” “fictitious” and “inflexible”).

79. *O’Rourke v. Camden London Borough Council*, [1998] A.C. 188 (H.L. 1997).

80. See *X (Minors) v. Bedfordshire County Council*, [1995] 2 A.C. 633 (H.L. 1995). The origin of the “separate tort” approach lies probably in the perceived need in the late nineteenth century to evade the common law doctrine of common employment (the “fellow servant rule”) in cases concerning accidents at work. See *Groves v. Lord Wimborne*, [1898] 2 Q.B. 402 (C.A. 1898) (“It was said that the doctrine of common employment afforded a defence to the action . . . . [B]ut in my judgment the defence of common employment only applies where the action . . . is founded upon the negligence or misconduct of his fellow servant . . . . In the present case, which is an action founded upon the statute, there is no resort to negligence on the part of the fellow-servant or of anyone else.”).

81. HOWARTH, *supra* note 30, at 338-45. See particularly the judgment of Atkin, L.J. in *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 2 K.B. 832.

1. *Private Nuisance*

Let us begin with private nuisance. The view that nuisance is a “strict liability” tort in English law arises from the often stated rule that if the degree of interference in the plaintiff’s enjoyment of land is unreasonable, “the defendant will be liable even though he may have exercised reasonable care and skill to avoid it.”<sup>82</sup> But the view that this rule establishes that nuisance is a strict liability tort begs the question of what counts as an “unreasonable interference” in the plaintiff’s enjoyment. “Unreasonable interference” is usually thought of in conjunction with the “principle of give and take” between neighbors.<sup>83</sup> The “principle of give and take” includes the notion that reasonable people do not complain about ordinary conduct by their neighbors, just as they would expect their neighbors not to complain about their own ordinary behavior.<sup>84</sup> The necessary consequences of ordinary living cannot amount to a nuisance, even if they lead to substantial interference, as long as, in the words of Bramwell, B., in *Bamford v. Turnley*,<sup>85</sup> they are “conveniently done,” which, according to Lord Millett, in *Southwark London Borough Council v. Mills*, means “done with proper consideration for the interests of neighbouring occupiers.”<sup>86</sup> “Proper consideration” thus depends on the effects of one’s conduct on one’s neighbors. Lord Hoffmann remarked in the same case:

[I]t may be reasonable to have appliances such as a television or washing machine in one’s flat but unreasonable to put them hard up against a party wall so that noise and vibrations are unnecessarily transmitted to the neighbour’s premises.<sup>87</sup>

Given that the basic test for nuisance is “unreasonable interference” understood as depending on the “principle of give and take,” what can we say about the place of burdensomeness in nuisance? At

82. *Cambridge Water Co. v. E. Counties Leather Co. Plc.*, [1994] 2 A.C. 264, (H.L. 1993) (per Lord Goff). Note that where the nuisance is created by a third party or by natural causes, the test for liability is more straightforwardly influenced by considerations of fault. The test is whether the defendant knew or ought to have known about the nuisance and ought reasonably to have stopped it (perhaps taking into account the resources available to the defendant). See, e.g., *Goldman v. Hargrave*, [1967] A.C. 645 (P.C. 1966); *Sedleigh-Denfield v. O’Callaghan*, [1940] A.C. 880 (H.L. 1940); *Holbeck Hall Hotel Ltd. v. Scarborough Borough Council*, [2000] Q.B. 836 (C.A. 2000); *Leakey v. Nat’l Trust for Places of Historic Interest or Natural Beauty*, [1980] 1 Q.B. 485 (C.A. 1979).

83. *Cambridge Water*, [1994] 2 A.C. at 299 (per Lord Goff, based on Bramwell, B. in *Bamford v. Turnley*, [1862] 3 B. & S. 62).

84. *Southwark London Borough Council v. Mills*, [2001] 1 A.C. 1 (H.L. 1999) (the ordinary activities associated with living normal lives cannot amount to actionable nuisances — a principle grounded in reciprocity: According to Lord Goff, “I do not think that the normal use of a residential flat can possibly be a nuisance to the neighbours. If it were, we would have the absurd position that each, behaving normally and reasonably, was a nuisance to the other.”). See also *Halsey v. Esso Petroleum Co.*, [1961] 1 W.L.R. 683 (Veale, J.).

85. *Bamford*, [1862] 3 B. & S. 66.

86. *Southwark*, [2001] 1 A.C. 1.

87. *Id.* at 16.

first sight, burdensomeness is not an argument for the defendant in nuisance since the way in which an unreasonable interference comes about is not relevant. But it should now be clear that the reasonableness of the interference can depend on whether the defendant's conduct was ordinary activity for the locality<sup>88</sup> and on whether the defendant had shown "proper consideration" for the interests of the plaintiff. Burdensomeness can be seen as relevant to the underlying judgments of what counts as ordinary activity and whether the degree of "consideration" had been "proper." For defendants to be required not to carry on ordinary activities would be too burdensome, but being required to carry on those activities in ways which did not unnecessarily affect the plaintiff is to be required to carry a reasonable but not an excessive burden.

It is possible, of course, for the level of interference to be so low that there is no liability at all, on the ground that reasonable people do not complain about trivial interferences.<sup>89</sup> This is a separate argument from "give and take"<sup>90</sup> but it proceeds from the same principle. We would be imposing an unreasonable burden on defendants if we said that they should avoid causing inconveniences that reasonable people would tolerate. Similarly, the allegedly anomalous "malice" rule, that spitefulness on the part of the defendant can turn non-tortious interference into tortious interference,<sup>91</sup> is not an anomaly at all, but follows from the "proper consideration" test and in turn is explicable in terms of burdensomeness — it is not excessively burdensome to require the defendant to avoid actions which are motivated solely by spite. This account of the nature of the "malice" rule is confirmed by the "exception" to it in cases in which the plaintiff has no protectible interest, for example *Bradford Corp. v. Pickles*,<sup>92</sup> in which the House of Lords said that it was no nuisance for the defendant maliciously to extract water from an aquifer with the intention of substantially interfering with the plaintiff's enjoyment of its land. Where the plaintiff has no protectible interest in the first place, the burden on the defendant is irrelevant, not because burdens are generally irrelevant but in the same way that in negligence the standard of care is irrelevant where there is no duty of care.

It is also a separate question whether benefits and burdens to third parties can be taken into account. It might be thought to be odd if private costs to the defendant of preventative action were relevant

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88. Note that the locality aspect of the rule appears not to apply to physical damage to the plaintiff's property. See *St. Helen's Smelting Co. v. Tipping*, [1865] 11 H.L.C. 642.

89. *Walter v. Selfe*, [1851] 4 De G. Sm 315.

90. *Southwark*, [2001] 1 A.C. 1.

91. *Christie v. Davey*, [1893] 1 Ch. 316 (Ch. D. 1892); *Hollywood Silver Fox Farm, Ltd. v. Emmett*, [1936] 2 K.B. 468 (K.B.D. 1936).

92. [1895] 1 Ch. 145 (C.A. 1894).

but not social costs of preventative action, but the question goes only to the issue of the extent to which burdensomeness is relevant to nuisance, not to whether it is relevant at all.<sup>93</sup>

## 2. Rylands v. Fletcher

Nuisance is, therefore, guilty as charged — it is a fault-based tort. What of the *Rylands v. Fletcher* tort, a tort which Lord Goff, in the *Cambridge Water* case, took to be closely related to nuisance?<sup>94</sup> The *Rylands* tort is committed where the defendant, in the course of a “non-natural” use of land, accumulated something dangerous on the land which has escaped and caused damage. The plaintiff does not need to show that the defendant acted carelessly either in accumulating the dangerous things or in allowing the “escape.”<sup>95</sup>

*Rylands v. Fletcher* is seemingly far less fault-based than nuisance. The elements of the tort, however, provide several opportunities for the importation of burdensomeness arguments, although not all of them have been taken. An example of an opportunity which has not been taken is that the normally accepted definition of “dangerous” in *Rylands v. Fletcher* is “[something which] is liable to do mischief if it escapes”<sup>96</sup> rather than any definition which might have brought in the balancing of costs and benefits (such as a test of the type “was it as safe as people generally are entitled to expect”).<sup>97</sup>

But the opportunity provided by the “non-natural” use requirement has been too tempting to resist. It has often been said, for example, that, when deciding whether the use of the land was “non-natural,” the court should take into account the public benefit of the defendant’s activity (and thus the burdensomeness of preventative action). Lord Moulton said in *Rickards v. Lothian*:<sup>98</sup>

It is not every use to which land is put that brings into play that principle [*Rylands v Fletcher*]. It must be some special use bringing with it increased danger to others, and must not merely be the ordi-

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93. For the present author’s view of the law, that social costs are relevant except where the level of interference is intolerably high, see HOWARTH, *supra* note 30, at 502-03. It is worth adding to that account, however, that there is a locality element, not just a degree of interference element, in all the relevant cases. See, e.g., *Miller v. Jackson*, [1977] Q.B. 966 (C.A. 1977); *Adams v. Ursell*, [1913] 1 Ch. 269 (Ch. D. 1913); *Bellew v. Irish Cement*, [1948] I.R. 61.

94. Whether there is a close relationship between the torts is not as clear as many commentators suppose (for a representative example see McIntyre, *supra* note 2, at 119). See *infra* note 103.

95. The dangerous thing does not have to escape literally. An explosion is enough. See *Miles v. Forest Rock Granite Co.*, [1918] 34 T.L.R. 500.

96. *Fletcher v. Rylands*, [1856-66] L.R. 1 Ex. 265 (Blackburn, J.).

97. Cf. Consumer Protection Act, 1987 s 3(1) (Eng.).

98. [1913] A.C. 263 (P.C. 1912); see, e.g., *Read v. J. Lyons*, [1947] A.C. 156 (H.L. 1946) (manufacture of explosives in war-time not “non-natural”); *Dunne v. N. W. Gas Bd.*, [1964] 2 Q.B. 806 (C.A. 1963) (utilities such as gas and electricity supply not subject to *Rylands* liability).

nary use of the land or such a use as is proper for the general benefit of the community.<sup>99</sup>

On the other hand, in the *Cambridge Water* case, Lord Goff said of this passage:

If these words are understood to refer to a local community, they can be given some content as intended to refer to such matters as, for example, the provision of services; indeed the same idea can, without too much difficulty, be extended to, for example, the provision of services to industrial premises, as in a business park or an industrial estate. But if the words are extended to embrace the wider interests of the local community or the general benefit of the community at large, it is difficult to see how the exception can be kept within reasonable bounds.<sup>100</sup>

Nevertheless courts since *Cambridge Water* have continued to take wider community benefit into account.<sup>101</sup> It is, admittedly, difficult to reconcile this practice with Lord Goff's comments, but its existence is undeniable.

Another aspect of Lord Goff's account of "non-natural user" in *Cambridge Water* might herald an even more wholesale importation of burdensomeness arguments into the *Rylands* tort. Lord Goff says that Bramwell, B.'s account in *Bamford v. Turnley*<sup>102</sup> of unreasonable interference in nuisance should apply in *Rylands v. Fletcher*. The doctrinal basis for making such a close link between *Rylands* and nuisance can be questioned, since it has never been the purpose of *Rylands* merely to protect land values, as is now the accepted view of nuisance.<sup>103</sup> But Goff's argument went further than mere doctrine. He claimed that the *Bamford v. Turnley* restrictions were necessary since otherwise *Rylands* would develop into a general purpose strict liability tort, a direction English law had rejected as long ago as *Read v. J. Lyons*.<sup>104</sup> Goff proposed that since *Read* had restricted the *Rylands* tort by tying it to the defendant's use of land, the *Bamford v. Turnley* restrictions, which refer to land use, should apply.

Goff's reasoning is far from flawless. The objective of preventing the creation of a general strict liability tort for ultrahazardous activity,

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99. Rickards v. Lothian, [1913] A.C. 263 (P.C. 1912).

100. Cambridge Water Co. v. E. Counties Leather Co. Plc., [1994] 2 A.C. 264 (H.L. 1993) (Goff, L.).

101. See, e.g., Stockport Metro. Borough Council v. British Gas Plc., [2001] Env. L.R. 44 (C.A. 2001) (stating *Dunne* treated as good law); Ellison v. Ministry of Defence, [1996] 81 Build L.R. 101.

102. [1862] 3 B. & S. 62.

103. Hunter v. Canary Wharf Ltd., [1997] A.C. 655 (H.L. 1993). At the very least, the fact that in *Hunter v. Canary Wharf Ltd.*, the House of Lords restored the orthodox view that nuisance law protects only property interests, so that plaintiffs who do not hold property rights may not sue, can be seen as breaking the link between nuisance and *Rylands v. Fletcher*, since it has never been a requirement of the latter tort that the plaintiff be a property owner. See *Charing Cross Elec. Supply Co. v. Hydraulic Power Co.*, [1914] 3 K.B. 772 (C.A. 1914); *Miles v. Forest Rock Granite Co.*, [1918] 34 T.L.R. 500; *Halsey v. Esso Petroleum Co.*, [1961] 1W.L.R. 683.

104. *Read*, [1947] A.C. 156 (H.L. 1946).

and the means of doing so by restricting the tort to the consequences of the defendant's land use, can both be achieved without the importation of the *Bamford v. Turnley* restrictions. One can simply restrict liability to "accumulations on land." Nevertheless, the consequences of Goff's reasoning can be seen in the Court of Appeal case *British Gas Plc. v. Stockport Metropolitan Borough Council* in which Schiemann, L.J. said, *per curiam*:<sup>105</sup>

Strict liability does not arise where the defendant is lawfully using his land for any purpose for which it might in the ordinary course of the enjoyment of land be used (*Rylands v Fletcher*), for the supply of services of electricity, gas or water by commonplace methods (*Dunne v North Western Gas Board*, and *Cambridge Water*), or by doing those acts necessary for the common and ordinary use and occupation of land and houses provided he is acting reasonably (*Cambridge Water*).<sup>106</sup>

The implications of the final phrase ("provided he is acting reasonably") are important. "Common and ordinary" use and occupation of land can become potentially actionable only if the defendant acts "unreasonably." The equivalent in nuisance is the "proper consideration" rule — that it can be actionable to carry out everyday activities in an unnecessarily intrusive way. Since there is only one "intrusion" in *Rylands* cases, namely the destructive "escape," one can argue that the lack of consideration must be the creation of a risk of harm rather than an existing state of affairs. Even if one does not accept that point, the *Bamford v. Turnley* restrictions bring in a burdensomeness argument by themselves, since the ease or otherwise in acting differently cannot be excluded from the assessment of whether the defendant acted reasonably.

Thus, if on shaky doctrinal and intellectual foundations, fault-based arguments are rushing into *Rylands v. Fletcher*. One should also note that, quite apart from non-natural use arguments, Lord Goff in *Cambridge Water* imposed a requirement that, as in negligence and nuisance under the *Wagon Mound* doctrines,<sup>107</sup> there could be no liability in the *Rylands* tort for unforeseeable types of harm. Although distinct from the burdensomeness of preventative action in the sense of a taking into account the costs of specific alternative courses of action, the foreseeability of type of harm requirement can be seen as a kind of burdensomeness argument in its own right, since imposing liability for unforeseeable types of harm would create a powerful incentive to divert resources into trying to predict future consequences of

105. [2001] Env. L.R. 44, ¶4 (C.A. 2001), [2001] E.W.C.A. Civ. 212, ¶34.

106. *British Gas Plc. v. Stockport Metro. Borough Council*, [2001] Env. L.R. 44 (C.A. 2001), [2001] E.W.C.A. Civ. 212.

107. For the *Wagon Mound* doctrines see HOWARTH ET AL., *supra* note 66, at 400-22.

current activities and into activities the consequences of which are themselves already better understood.

### 3. Public Nuisance

The fourth environmental tort is public nuisance. Public nuisance is not an easy tort to understand.<sup>108</sup> It is primarily a crime, but a *common law* crime, on which private victims can base civil actions if they have suffered “special damage.”<sup>109</sup> One principally needs to ask, therefore, whether the *crime* of public nuisance includes notions of fault.

Some uncertainty surrounds the conditions under which public nuisance is committed, but it is clear from the comparatively recent case *R. v. Shorrock*<sup>110</sup> that at least negligence is required. In *Shorrock*, the defendant owned a farm. He let one of fields for a weekend for £2000 to three strangers and then went away for the weekend. The strangers organized a huge acid house party on the field. The party lasted fifteen hours and produced a great deal of noise. The police received more than 250 complaints about noise and disturbance, some from people living as far as four miles away. The party organizers were convicted of public nuisance, on the basis of the traditional definition that:

[A] person is guilty of an offence at common law, known as common nuisance, who (a) does an act not warranted by law, or, (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property, morals, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects<sup>111</sup>

The farmer was also convicted, but appealed on the ground that he did not know what the strangers were going to do and could do nothing about the disturbance once he had left for the weekend. The Court of Appeal, however, upheld the farmer's conviction. The Court of Appeal said that it was enough to be convicted of public nuisance that:

[E]ither he knew or he ought to have known, in the sense that the means of knowledge were available to him, that there was a real risk that the consequences of the licence granted by him in respect of his field would be to create the sort of nuisance that in fact occurred.<sup>112</sup>

The Court of Appeal also imported into public nuisance the test for liability for private nuisances committed by third parties,<sup>113</sup> namely

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108. See *Spencer*, *supra* note 17.

109. See *Hunter*, [1997] A.C. 655 (H.L. 1993).

110. [1994] Q.B. 279 (C.A. 1993).

111. *R. v. Shorrock*, [1994] Q.B. 279, 283 (H.L. 1993) (citing ARCHBOLD'S PLEADING EVIDENCE AND PRACTICE IN CRIMINAL CASES 3374, ¶¶ 31-40 (44th ed. 1992)).

112. *Id.* at 289.

113. See *supra* note 85.

that it has to have been reasonable for the defendant to have done something about the nuisance, a position the Court of Appeal confirmed in a subsequent civil liability case about public nuisances caused by natural causes (in that case, pigeons).<sup>114</sup>

It seems, therefore, that if it was very difficult (that is, burdensome) for the defendant to put him or herself in a position to know what the third parties were up to, the defendant is not guilty of the crime (and cannot, therefore, be liable for the tort). If it was reasonable for the defendant not to find out what the third parties were up to before a certain point in time, the defendant will still not be guilty if at that point there was nothing a reasonable person could do to stop the nuisance.

It is worth noting at this point that there is a widespread belief that public nuisance is simply private nuisance committed against a large number of people,<sup>115</sup> so that those who believe that private nuisance is a “strict liability” tort tend to think that “public nuisance” must also be a “strict liability” tort. As we have seen, private nuisance is fault-based, so that if there is such a link between private and public nuisance, the link imports private nuisance’s version of fault into public nuisance, rather than any “strict liability.” But in any case the relationship between private nuisance and public nuisance is not as simple a view that the commission of the former amounts to the latter if it affects many members of the public. The most important complication is that there is no requirement in public nuisance that the value of anyone’s land must be affected. This is the point of Blackstone’s remark that:

[N]uisances are of two kinds; public or common nuisances, which affect the public, and are an annoyance to all the King’s subjects; for which reason we must refer them to the class of public wrongs, or crimes and misdemeanours: and private nuisances; which are the objects of our present consideration, and may be defined, any thing done to the hurt or annoyance of the lands, tenements or hereditaments of another.<sup>116</sup>

The confusion of private and public nuisance has not been helped by another widespread belief<sup>117</sup> that private nuisance concerns only interferences which arise from “the defendant’s use of his land,” implying that the defendant must have an interest in the land from which the nuisance arises. This belief then facilitates the theory that public nuisance must be about nuisances which arise other than from the de-

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114. *Railtrack Plc. v. Wandsworth London Borough Council*, [2002] Env. L.R. 9 (C.A. 2001), [2001] E.W.C.A. Civ. 1236.

115. The perpetrator of this view seems to be Lord Denning. See *Attorney-General v. P.Y.A. Quarries Ltd.*, [1957] 2 Q.B. 169, 190-91 (C.A. 1957) (Denning, J.).

116. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 216 (1962).

117. See, e.g., McIntyre, *supra* note 2, at 118.

defendant's use of the defendant's land. There is, however, no such rule.<sup>118</sup> The judicial remark on which it is allegedly based is a misquotation. The rule is said to be based on a remark of Lord Denning in the Court of Appeal in *Southport Corp. v. Esso Petroleum Co.*<sup>119</sup> Lord Denning is alleged to have said that "the defendant must have used his own land" to be liable in private nuisance. What he actually said was that "the defendant must have used his own land *or some other land.*"<sup>120</sup>

Fortunately, on the basis of what Lord Denning actually said, the non-occupier in *Sedleigh-Denfield* is liable because the non-occupier "uses" someone else's land, namely that of the occupier.<sup>121</sup> With a little imagination, all cases can be construed as being about the use of someone's land in some way — for example those who drive motor vehicles on the highway can be said either to be using the land on which the highway is constructed or to be using their own land in the sense that they must be driving to and from somewhere.

But it ought to be doubted more generally whether the use of any land by the defendant should be a condition of liability in nuisance. Most nuisance cases involve competing land uses, and will often be about the use of neighboring or nearby plots, but there is no reason why the defendant's status as a user of land should make any difference. The real competition is about the use of the plaintiff's land, that is whether the defendant should be allowed to "use" the plaintiff's land in the sense of carrying on activities which impose costs on its use. As Devlin, J. said at first instance in *Southport Corp. v. Esso Petroleum, Co.*,<sup>122</sup> in a judgment, which, unlike that of Lord Denning in the Court of Appeal in the same case, received the approval of more than one member of the House of Lords:<sup>123</sup>

It is clear . . . that the nuisance must affect the property of the plaintiff, and it is true that in the vast majority of cases it is likely to

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118. See O'Sullivan, *supra* note 67; Morgan, *supra* note 67; HOWARTH ET AL., *supra* note 66, at 808-09.

119. [1954] 2 Q.B. 182 (C.A. 1954).

120. *Southport Corp. v. Esso Petroleum Co.*, [1954] 2 Q.B. 182, n.19 (C.A. 1954) (emphasis added). The only hint that some property right is involved comes from Lord Denning's quotation of a remark of Lord Wright in *Sedleigh-Denfield v. O'Callaghan*, [1940] A.C. 880 (H.L. 1940), that, "[T]he ground of responsibility is the possession and control of the land from which the nuisance proceeds." *Southport*, [1954] 2 Q.B. at n.9. But Lord Wright had also just remarked that there were exceptions to that idea and, in any case, he was not specifically adverting to the case of the liability of a non-occupier, but rather to the liability of an occupier for a nuisance created by a non-occupier. If the only possibility of liability in nuisance for non-occupier defendants is in public nuisance, in many cases there would be no liability, because the nuisance would not affect a sufficiently large proportion of the public for public nuisance to have been committed. In cases in which the occupier is also not liable, because, under *Sedleigh-Denfield*, it was reasonable either not to know of the nuisance or not to remove it, no-one would be liable for an admitted nuisance, which is surely a bizarre result.

121. See also *Halsey v. Esso Petroleum Co.*, [1961] 1 W.L.R. 683.

122. [1953] 2 Lloyd's Rep. 414.

123. [1956] A.C. 218 (H.L. 1955).

emanate from the neighbouring property of the defendant. But no statement of principle has been cited to me to show that the latter is a prerequisite to a cause of action, and I can see no reason why, if land or water belonging to the public or waste land is misused by the defendant, or if the defendant as a licensee or trespasser misuses someone else's land, he should not be liable for a nuisance in the same way as an adjoining occupier would be.<sup>124</sup>

#### 4. *Trespass to Land*

The fifth environmental tort is trespass to land. Here the rule is reasonably clear. In cases, for example, of land contamination or pollution from an oil spill, calling an action "trespass to land" makes no difference to the principles of law applicable to it. If the claimant does call the action "trespass," the claimant still has to prove that the defendant was negligent just as if the action was framed in "negligence." The rule begins with remarks of Blackburn, J. in *Fletcher v. Rylands*<sup>125</sup> that:

Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger.<sup>126</sup>

Such plaintiffs therefore cannot sue "without proof of want of care or skill occasioning the accident" whether they frame their action in trespass to land or otherwise.

The same judge added in *River Wear Commissioners v. Adamson*:<sup>127</sup>

Property adjoining to a spot on which the public have a right to carry on traffic is liable to be injured by that traffic. In this respect there is no difference between a shop, the railings or windows of which may be broken by a carriage on the road, and a pier adjoining to a harbour or a navigable river or the sea, which is liable to be

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124. For a possible source of further confusion, see *Hussain v. Lancaster City Council*, [2000] Q.B. 1 (C.A. 1998), which concerned the liability of a landlord for racial harassment carried out by the landlord's tenants at a nearby shop. See O'Sullivan, *supra* note 67; Morgan, *supra* note 67. The Court of Appeal says that there is no liability because the nuisance did not involve "the tenants' use of the tenants' land." If the Court of Appeal is saying that the tenants themselves did not commit a nuisance (rather than saying that the defendant landlord is not liable for the tenants' nuisance — see *Mowan v. London Borough of Wandsworth*, [2001] B.L.G.R. 228 — the Court's judgment is extraordinary and should be rejected. Cf. *Lippiatt v. South Gloucestershire Council*, [2000] Q.B. 51 (C.A. 1999). Even if one applies Lord Denning's test, the tenants used land either in the sense that they had to come to and from somewhere, or, at the very least, that they used the land on which the highway outside the plaintiff's shop is constructed. It is possible to interpret the Court of Appeal's remark in a different way, however, that the defendant landlords were not liable because the harassment had nothing to do with the tenants' tenancies in the sense that even if the tenants had been expelled from their tenancies, they would still have carried on with the harassment.

125. [1856-66] L.R. 1 Exch. 265.

126. *Fletcher v. Rylands*, [1856-66] L.R. 1 Exch. 265.

127. [1876-77] 2 App. Cas. 743, 767.

injured by a ship. In either case the owner of the injured property must bear his own loss, unless he can establish that some other person is in fault, and liable to make it good.<sup>128</sup>

In *Southport Corp. v. Esso Petroleum Co.*,<sup>129</sup> Devlin, J. extended the rule to cases of pollution from navigable waters and said that it benefitted those whose property was “proximate” not just those whose property “adjoined” the highway or watercourse. In *Fowler v. Lanning*,<sup>130</sup> Devlin, J. used Blackburn, J.’s examples as the basis of a general principle that whether a plaintiff sued in “trespass” or “negligence” should make no difference. *Fowler* was a case of personal injury and “trespass to the person,” but in *League Against Cruel Sports Ltd. v. Scott*,<sup>131</sup> Park, J. applied the same principle in a case concerning trespass to land, saying that, even in a case of trespass in which there was no physical damage, where the defendant effectively raised the defense of inevitable accident, the plaintiff could succeed only by showing lack of reasonable care (or intention to harm).

In *Southport*<sup>132</sup> the defendant was said not to have committed a trespass when its ship discharged 400 tons of oil, which subsequently fouled the plaintiff’s property because the master of the ship had discharged the oil in a reasonable attempt to lighten the ship so as to save the lives of the crew.<sup>133</sup> There was no trespass because of the burdensomeness, for the crew rather than for the defendant, of choosing the course of conduct which would have prevented the harm to the plaintiff.

Devlin, J., in *Southport*, also remarked that it was possible to reach the same result by invoking the defense of “necessity” rather than “inevitable accident,” but the question of the burden of proof in such a defense is apparently not the same. In “inevitable accident” the plaintiff has to prove negligence to defeat the defense. In “necessity,” the burden appears to be on the defendant throughout.<sup>134</sup> But, as in “inevitable accident,” “necessity” fails if the defendant acted unreasonably, either in the way the defendant responded to the situation or in creating the situation itself.<sup>135</sup>

The question arises as to whether there is any other difference between the two routes, inevitable accident or necessity. The contrast can be illustrated by comparing *Southport* with *Monsanto v. Tilly*,<sup>136</sup>

128. *River Wear Comm’rs v. Adamson*, [1876-77] 2 App. Cas. 743, 767.

129. [1953] 2 Lloyd’s Rep. 414.

130. [1959] 1 Q.B. 426 (Q.B.D. 1958).

131. [1986] 1 Q.B. 240 (Q.B.D. 1985).

132. [1953] 2 Lloyd’s Rep. 414.

133. The court also found that there was no negligence in the way the ship had been navigated, since such negligence itself would have founded liability. *Id.*

134. *Rigby v. Chief Constable of Northamptonshire*, [1985] W. W.L.R. 1242.

135. [1953] 2 Lloyd’s Rep. 414.

136. [2000] Env. L.R. 313 (C.A. 1999).

in which the plaintiff producer of GM crops sought injunctions and damages against a number of protestors who had engaged in a campaign of pulling up GM crops as they grew. The defendants invoked the defense of necessity, claiming that they were acting to safeguard the health and welfare of the public. The Court of Appeal rejected that defense (as well as refusing to recognize a new defense of “acting in the public interest”). The Court of Appeal said that the defense of necessity did not apply for a number of reasons: first, since the protestors pulled up only a few plants each, rather than destroying the whole field, their actions were symbolic rather than a genuine attempt to deal effectively with an immediate danger; secondly, it was unreasonable to take such action when there was an appropriate public regulatory agency in place to protect the public (although one could, of course, attempt to challenge the regulator’s determinations in public law); and thirdly, the danger was not immediate and readily perceptible (and the category of necessity in which these conditions do not apply, namely “agency of necessity” was irrelevant because the plaintiff was quite capable of communicating its refusal of consent). The defendants thus failed in their main aim, which was to be able to ask the Court to decide on a balancing or “proportionality” test, in other words a burdensomeness test, whether their campaign was a reasonable response to the dangers of GM crops.

One might ask, therefore, why the defendants did not take the “inevitable accident” route, which, as *Southport* shows, leads immediately to a negligence test?

The obvious answer to this question is that the protests in *Monsanto* were neither inevitable nor accidental. One can attack the obvious answer to a limited degree. For example, one can say that the protests in *Monsanto* are “inevitable,” in the sense that, given the politics of GM food and the penchant for “direct action” of some environmental protest groups, one would rate the probability of someone carrying out such attacks as very high. Moreover, pollution of the type which occurred in *Southport* is not necessarily “inevitable,” since given the right level of expenditure on precautions, the risk of such pollution might become extremely low. But the essential difference between the two situations is that in *Southport* the damage to the plaintiff’s property was a side-effect of another activity and thus “an accident,” whereas in *Monsanto* the damage was intrinsic to the defendants’ conduct, and was not “an accident” at all.

To summarize the position of trespass to land, at least in its guise as an environmental tort,<sup>137</sup> burdensomeness is a relevant argument

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137. Trespass to land has another role in the determination of rights to land. See HOWARTH, *supra* note 30, at 442-43.

for defendants in all cases except those in which their actions are directed towards harming the plaintiff, cases in which there is “fault” in a more general sense in any case.

### 5. *Fault and the English Environmental Torts*

Having considered each of the environmental torts, we can conclude that Bell and McGillivray are correct to say that tort law as it applies to the environment is fault-based. The crucial question is therefore whether they are also right to say that fault-based liability is inappropriate because it violates the “polluter pays” principle. A very great deal has been written about the “polluter pays” principle.<sup>138</sup> This is not the place to re-open all those debates. But it is worth saying that when analyzed more closely “polluter pays” is less of a principle than a convenient slogan.

There are two important questions which the principle tends to disguise — who counts as a “polluter” and what counts as “paying.” The best illustration of the first question is the most basic pollution problem of all — sewage. Who are the polluters with regard to sewage? Proponents of “polluter pays” tend to say that the water treatment companies, from whose pipes the end product of treated sewage flows, should count as the polluter. But the water treatment companies do not produce sewage. People do. Surely it is just as plausible to say that the general population is the “polluter,” rather than just the water treatment companies. Similarly, is it entirely clear that the “polluters” with regard to electricity production are the power generation companies rather than the households and firms who use electricity?

As for who “pays,” the final incidence of costs of any type in a market economy is very difficult to judge if, as normally happens, those to whom costs are initially allocated continue to trade.

More important than making the “polluter” pay is making the person pay who can most effectively and efficiently reduce the pollution in question. This might be a firm or a set of firms, but it might equally be a household or set of households or, indeed, the government.<sup>139</sup> Moreover, all of these can often plausibly be labeled the

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138. *E.g.*, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV L. REV. 1089 (1972); G. Majone, *Choice Among Policy Instruments for Pollution Control*, 2 POL'Y ANALYSIS 589, 600 (1976); S. Sykes, *Setting Precedents for EU Environmental Liability? The Polluter Pays Principle and the UK Cambridge Water Case*, 4 EUR. ENV'T 19, 19 (1994); Candice Stevens, *Interpreting the Polluter Pays Principle in the Trade and Environment Context*, 27 CORNELL INT'L L.J. 577 (1994); John C. O'Quinn, Note, *Not-So-Strict Liability: A Foreseeability Test For Rylands v. Fletcher And Other Lessons From Cambridge Water Co. v. E. Counties Leather Plc.*, 24 HARV. ENVTL. L. REV. 287 (2000).

139. *See, e.g.*, DONALD DEWEES ET AL., *EXPLORING THE DOMAIN OF ACCIDENT LAW: TAKING THE FACTS SERIOUSLY* 266-67 (1996) (summarizing the argument that victims of pollution should not be compensated for excessive harm they could themselves have avoided at a lesser cost).

“polluter.” Finally, note that “polluter” is a notion which inherently includes factual causation (a “polluter” is someone who *causes* pollution), so that it is inconsistent to herald non-tort regulation both as inspired by “polluter pays” and as free from the complications of causation.

Bell and McGillivray’s complaint therefore reduces to saying that it is always wrong for victims of pollution to have to continue to suffer from it and that victims should always be able to shift the costs of pollution to someone else. As they say, tort law, in the name of justice, allows defendants to win. The real question is therefore whether that is really so terrible a state of affairs?

Note first that Bell and McGillivray openly concede that their position is unjust — that they are prepared to allow what they admit is injustice if doing so benefits the victims of pollution. One wonders whether it is possible to maintain consent for a rule that even its proponents admit is unjust.

Moreover, it is noticeable how difficult even exponents of the polluter pays principle find it to avoid using the language of “responsibility,” not just factual causation, in describing the principle.<sup>140</sup> If the principle itself needs a concept of responsibility, surely it also admits of the possibility that defendants can win, and thus that victims can go away uncompensated.

Bell and McGillivray’s position is also economically inefficient, since if the victim of pollution turns out to be, in the circumstances of the case, the person best placed to prevent the pollution (which is the case where the victim is plausibly accused of making the situation worse), it wastes resources to make someone else liable.<sup>141</sup>

But the most important objection to Bell and McGillivray’s complaint is that, unless they are prepared to play definitional games with what counts as “pollution” (and thus merely to displace the problem) they are saying that plaintiffs should win cases such as *Southwark*<sup>142</sup> They are saying that no-one should have to tolerate substantial interferences even if they result from the kind of ordinary activities they themselves might engage in and even if their neighbours are acting

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140. *E.g.*, “Natural or legal persons governed by public or private law who are responsible for pollution must pay the costs of such measures as are necessary to eliminate that pollution or to reduce it so as to comply with the standard or equivalent measures.” CENTRE ON TRANSNATIONAL CORP., EMERGING TRENDS IN THE DEVELOPMENT OF INTERNATIONAL ENVIRONMENTAL LAW AT THE REGIONAL AND GLOBAL LEVEL: IMPLICATIONS FOR TRANSNATIONAL CORPORATIONS 1, 25 (1992).

“The Polluter Pays Principle is the notion that the person responsible for pollution should bear the direct and consequential costs of the pollution.” PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW I: FRAMEWORKS, STANDARDS, AND IMPLEMENTATION 213 (1995).

141. DEWEES ET AL., *supra* note 139, at 267.

142. [2001] 1 A.C. 1 (H.L. 1999).

with proper consideration for them. The unattractiveness of this position can be illustrated by applying Rawls's veil of ignorance test to the situation.<sup>143</sup> If people should choose the rule they would apply if they did not know which position they were to occupy in society (in this case, plaintiff or defendant in a nuisance case) it seems very unlikely that people would choose Bell and McGillivray's position in preference to the reciprocity rule chosen by the common law.

One might add that the idea that one can live entirely without interference from other people is incompatible with any form of urban life, ancient or modern. The Bell and McGillivray position risks turning concern for the environment into commitment to a lonely rural fantasy.

#### E. "Reactive Controls"

Bell and McGillivray's fifth complaint is that "private law controls are generally reactive and compensatory rather than preventive . . . . Private law does not offer continuing controls which might gradually improve standards over time."

The first part of this complaint, that tort operates *ex post* rather than *ex ante*, is one which has been countered on many occasions and it is not necessary to repeat those responses in detail here. Kaplow and Shavell have shown that reactive controls can be efficient because they use up resources only intermittently, as the need arises, whereas prospective controls can easily waste resources on monitoring people who would have complied anyway.<sup>144</sup> Moreover, even allegedly "preventive" controls are often in reality "reactive" in that the trigger for regulatory intervention, even non-aggressive intervention, is frequently a breach of the rules. Most important of all, the threat of a private law action is as much an *ex ante* control as the threat of criminal prosecution. Both work by threatening to impose costs on the objects of regulation. The difference between private law and regulation or criminal law is not whether they work *ex post* or *ex ante*. Each works in both ways. The difference is in who is doing the threatening, the victims or the state.

Bell and McGillivray may also have in mind what might be called the "quia timet" point, which is that orthodox doctrine in the law concerning injunctions, places formidable barriers in the way of plaintiffs who are claiming injunctions in advance of any damage actually taking place ("quia timet" injunctions).<sup>145</sup> In contrast, it is claimed, regula-

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143. JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* (Erin Kelly ed., 2001).

144. Louis Kaplow & Steven Shavell, *Property Rules versus Liability Rules: An Economic Analysis*, 109 HARV L. REV. 713 (1996).

145. See Stanton & Willmore, *supra* note 3.

tors can step in before any harm occurs, which is both less harmful for the environment and, usually, cheaper in terms of total costs because there are no clean-up costs. But, as Stanton and Willmore point out,<sup>146</sup> current doctrine allows the plaintiff to apply for a declaratory judgment, which does not suffer from the disadvantages of the quia timet injunction, and which puts the defendant on notice that the proposed action is unlawful and will attract an injunction or damages or both.

A variation on Bell and McGillivray's fifth complaint is that private law, because it is applied only occasionally by courts, is not systematic in its judgments. The obvious riposte is that the idea that regulators, especially those subject to political pressure, will always be significantly more systematic than courts is somewhat utopian. Indeed, in Britain "integrated pollution control" under the Environmental Protection Act, 1990 and the establishment of the Environment Agency in 1996 came about because of incoherence and inconsistency in the previous regulatory scheme.<sup>147</sup> Whenever a new environmental threat is identified, the tendency of government is to create a new agency to deal with it, thus undermining the coherence of the existing arrangements. For example, various food purity scandals in Britain have produced the Food Standards Agency. The possibility that food purity hazards might have environmental causes will inevitably lead to problems of coordination with other agencies. Another example occurred during the 2001 foot-and-mouth disease crisis when officials charged with culling diseased and other animals found themselves faced with objections to their activities from the Environment Agency, whose officials were concerned that buried carcasses might pollute water-courses and also that open-air burning of carcasses would create atmospheric pollution.<sup>148</sup>

"Systematic" in this context therefore seems to reduce to a preference for quantitative standards, which, as we have seen, is a preference which has its own problems. The earlier point about making the right comparisons applies here too. Bright line rules are potentially cheaper to enforce, but the costs to be compared are not just enforcement costs but rather the costs of rule making *plus* the costs of enforcement.<sup>149</sup> Making rules as and when they are needed is usually cheaper than trying to make rules in advance for every eventuality,

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146. *Id.*

147. See BELL & MCGILLIVRAY, *supra* note 1, at 379.

148. See, e.g., Simon de Bruxelles, *Red tape "delays burial in Devon"*, TIMES (London), Mar. 30, 2001; Kamal Ahmed et al., *Animal Pyres are Poisoning Britain*, OBSERVER, Apr. 1, 2001; Tim Reid & Gillian Harris, *Water Tainted by Cow Burial Blunder*, TIMES (London), Apr. 4, 2001; Paul Watson, *Culled Carcasses "Buried In Wrong Place"*, PRESS ASS'N NEWSFILE, Apr. 3, 2001.

149. See the discussion of "formulation costs" in *General Characteristics*, *supra* note 39, at 503-06.

much of the effort put into which is wasted since many of the rules are never needed. Moreover, common law adjudication can be seen as a way of building up a system of rules as a positive externality of the process of resolving individual disputes. It is arguable that these disputes would arise and would have to be resolved anyway, whether within the legal system or outside it, so that extracting more general rules from the process of resolving these disputes is, at the margin, a very inexpensive method of creating regulation. Admittedly, case law gathers information fairly slowly, which might be a disadvantage, although it can also be a strength when scientific views are changing and when it is therefore important not to enshrine a preliminary and relatively uncertain view in regulations which then become difficult to change as political and economic interests build up around them.<sup>150</sup> Also, commissioning a comprehensive study in advance of the occurrence of any problems, as a regulatory agency might do,<sup>151</sup> can suffer from being done too early, before the issues are clear and before the full range of facts are available.

It is, however, an inefficiency of the case law method that any modification of the law has to wait for an appropriate case to reach the courts, even though the relevant scientific knowledge might already have changed.<sup>152</sup> That inefficiency will nevertheless be mitigated by the interests of the litigants whose cases are strengthened by the new knowledge to initiate claims. The inefficiency will also be less in fields such as environmental law (and tort law in general) in which litigated disputes are not rare.

Bell and McGillivray seem to be on stronger ground when they point out that it seems difficult to employ tort law to make standards improve over time. "Technology-forcing" does not seem to be a function which tort law can claim as its own, especially English tort law with its commitment to the idea of "foreseeability," not only in negligence but also in nuisance and *Rylands v. Fletcher*.<sup>153</sup>

One can, however, exaggerate the importance of foreseeability. Certainly in some cases defendants might be able to escape liability because the type of harm was unforeseeable at the time the relevant incident happened, as in the *Cambridge Water* case. But in most nuisance cases, the activity the plaintiff objects to is continuing, as is the damage the plaintiff suffers, so that foreseeability is irrelevant. Everyone knows what is going on. Also, even in cases in which foreseeabil-

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150. But for the dangers of court-based treatment of scientific issues, see KENNETH R. FOSTER & PETER W. HUBER, *JUDGING SCIENCE: SCIENTIFIC KNOWLEDGE AND THE FEDERAL COURTS* (1997).

151. *Cf. General Characteristics*, *supra* note 39, at 512.

152. *Id.*

153. *See Cambridge Water Co. v. E. Counties Leather Co. Plc.*, [1994] 2 A.C. 264 (H.L. 1993).

ity matters for the result of the case at hand, as in negligence cases, the defendant knows much more as the result of the case itself, and so cannot claim lack of foreseeability in any future case. Rather like the old rules of benefit of clergy,<sup>154</sup> lack of foreseeability is, at least in the environmental context, an excuse a defendant can use only once.

The technology-forcing objection is therefore not so much an objection about the potential of tort law, when invoked, to change future behavior. It is rather an objection that tort law will not be invoked enough to bring about this effect because private plaintiffs are bound to lose the original case, the case which puts the defendant on notice, and therefore they have no particular incentive to bring the case. A partial answer to this point is that organized litigation strategies can overcome the problem — the first case is a form of pathfinder, which opens up the defendant to a large number of successful subsequent claims.<sup>155</sup> But it is only a partial answer since such strategies are not always plausible.

On the other hand, the technology-forcing potential of other forms of regulation is not as clear as sometimes supposed, and even if regulation can bring about technological change, it is also not necessarily the case that regulation is the most effective or efficient method of achieving the objective. Other techniques, subsidy for research and development, for example, might be more effective.<sup>156</sup>

#### F. “An Environmental Injustice”

Bell and McGillivray’s final criticism is that “social, political and economic reasons” lead to the under-use of common law methods. The most important of these are that legal action is expensive and therefore only open to the rich, that compensation is low and thus no great incentive to sue, and that large numbers of people are afraid of extra-legal reprisals by defendants.

The first criticism is not so much a criticism of tort law, for as we have seen, case-by-case regulation can be cheaper overall than comprehensive regulation, as it is criticism of the level of legal aid. Although there is some minor provision for legal aid in “public interest” cases in England,<sup>157</sup> the trend of government policy has indeed been to reduce expenditure on legal aid. This has now reached the point that there is no legal aid at all for environmental civil litigation except

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154. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 434 (1962).

155. Compare other strategies in which losing the case is part of the plan. See, e.g., CAROL HARLOW & RICHARD RAWLINGS, PRESSURE THROUGH LAW (1992).

156. DEWEES ET AL., *supra* note 139, at 308. In addition, in Britain as the law stands now, with its reliance on process standards such as BATNEEC, itself does not aim to force improvements in technology, but rather to encourage the adoption of the best technology currently available.

157. See Murphy, *supra* note 3, at 68.

for “public interest” cases.<sup>158</sup> Contingent fee arrangements are still not allowed (and in any case are of little use in injunction actions) although “conditional fee” arrangements are permitted under which lawyers charge nothing if they lose but up to double their normal fees if they win. The application of the loser-pays-all costs rule, however, means that these arrangements are different in their effects from contingent fee arrangements. The losing litigant under a conditional fee arrangement might not have to pay her own lawyer, but she will have to pay her opponent’s lawyer, a risk which is admittedly insurable but which is not cost free.<sup>159</sup>

If the law courts are open only to the rich, there is not only a problem of justice, there is also a problem of the trend of decision-making. If the cases coming before the courts deal only with the interests of the better-off, there is a danger that the law will bend in the direction of the interests of that group.<sup>160</sup>

The first criticism is indeed a problem for the use of tort law in environmental cases in England, but it is a contingent matter of government policy, rather than an objection to the content of the law, the nature of a private law claims, the nature of common law adjudication or the nature of courts.

The second criticism is largely misplaced. Plaintiffs in nuisance cases usually want injunctions, rather than compensation. They want the interference to stop. The prospect of stopping the nuisance is sufficient incentive in itself. Bell and McGillivray may, however, have in mind the different criticism that compensation levels might be insufficient in land contamination cases to pay for remediation, for restoration of the land to its previous state. This is because the underlying justification of nuisance is the protection of land values, so that, in theory, if a permanent injunction is issued which cuts off future harm, the measure of damages should be confined to any permanent loss of value of the land in its damaged state.<sup>161</sup> But the true position is rather more complicated. Restoration costs can be used to measure

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158. *Id.* at 67.

159. The lack of contingency fees and fully fledged class action suits, as well as, until recently, the lack of a clearly articulated charter of fundamental rights, mean that the conclusion reached by Paul H. Rubin in *Common Law and Statute Law*, 11 J. LEGAL STUD. 205 (1982), that lobbying efforts and organized litigation strategies are of comparable importance in legislation and common law adjudication, probably does not apply to England. *But cf.* HARLOW & RAWLINGS, *supra* note 155; David Feldman, *Public Interest Litigation and Constitutional Theory in Comparative Perspective*, 55 MOD. L. REV. 44 (1992).

160. *Cf.* Mark Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95 (1974); J. Hirshleifer, *Evolutionary Models in Economics and Law*, 4 RES. L. & ECON. 1 (1982); Martin Bailey & Paul H. Rubin, *A Positive Theory of Legal Change*, 14 INT’L REV. L. & ECON. 467 (1994).

161. *See* *Hunter v. Canary Wharf Ltd.*, [1997] A.C. 655 (H.L. 1997) (Lord Hoffmann).

loss of value. As the Court of Appeal set out in the trespass to land case *Scutt v. Lomax*,<sup>162</sup> the main applicable rules are as follows:

1. The claimant will ordinarily be entitled to the diminution in value of the property unless the reasonable claimant would have reinstated the land at less cost.
2. The claimant who has in fact reinstated the property will ordinarily be entitled to recover the reasonable cost of doing so, even if the cost is greater than the diminution in value, unless he has acted unreasonably in reinstating the property.
3. Where the claimant has not in fact yet reinstated the property, (subject to 4 and 5 below) he will ordinarily be entitled to recover the reasonable cost of reasonable reinstatement, even if it is greater than the diminution in value.
4. In assessing what is the reasonable cost of reasonable reinstatement, the court will consider whether the amount awarded is objectively fair; that is fair to both parties. In particular, the court will not award a sum which is out of proportion to the benefit conferred on the claimant.
5. In assessing what steps it is reasonable to take by way of reinstatement, the court will take account of the cost of the reinstatement. Thus it may not be reasonable fully to reinstate the property because the cost of doing so may not be justified. All will depend on the circumstances of the particular case.

Although *Scutt v. Lomax* is a trespass to land case, it explicitly takes into account cases from other torts, including a case in which there was liability both in negligence and in nuisance,<sup>163</sup> and there is no obvious reason, especially after *Hunter*,<sup>164</sup> for damages measures for harm to property to differ in nuisance and other torts.

As a result we can say that restoration costs are normally recoverable in nuisance unless they are excessive or unless the plaintiff evinces an intention never to carry out such restoration. Bell and McGillivray's complaint thus turns into a version of their first complaint. It is not that damage levels rule out restoration. Rather, whether restoration occurs is, within the limits of reasonableness, a matter for the plaintiff to decide. The underlying claim is that "the environment" stays unrestored because of a "private" choice. But, even apart from the earlier general remarks on the priority given to remediation, note that the *Scutt v. Lomax* rule 1 says that loss of market value will be awarded only if a *reasonable plaintiff* would *not* have carried out a restoration. A reasonableness standard implies that wider considerations, which is to say the interests of other people, can be taken into account in deciding on the measure of damages. We can say this because, if the test was purely subjective, namely a test in

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162. No. CCRTF 99/0159/B2, 2000 WL 394 (Royal Ct. Justice Jan. 25, 2000).

163. *E.g.*, *Dodd Properties (Kent) Ltd. v. Canterbury City Council*, [1980] 1 W.L.R. 433 (C.A. 1979).

164. *Hunter v. Canary Wharf Ltd.*, [1997] A.C. 655 (H.L. 1997).

which plaintiffs' estimation of their own best interests was the only standard, there would be no point having a reasonableness standard at all.

Thus Bell and McGillivray's claim about the inadequacy of damages is far from decisively made out. The third part of their final objection is, however, less easy to dismiss. Bell and McGillivray claim that private law cannot operate effectively to control damage to the environment because individual victims are too easily subjected to extra-legal pressure and intimidation. Physical intimidation is only one aspect of the problem. There is also economic intimidation — employees who are afraid of losing their jobs, tenants who are afraid of losing their homes, small businesses who are afraid of losing their customers. There is historical corroboration for this claim.<sup>165</sup> It is also an everyday experience of politicians that people who make complaints about environmental problems will often ask for anonymity. They look to the state to act on their behalf because they perceive the state as being able to stand up to intimidation and pressure in a way in which they as private individuals are unable to do.<sup>166</sup>

The heart of this objection is, once again, not so much that tort law will under-enforce, since that is also a problem with regulatory and criminal law when it is subject to political and lobbying pressure.<sup>167</sup> The heart of the objection is that since powerful plaintiffs, those who cannot be intimidated, will be more likely to bring legal actions than other plaintiffs, the long-term tendency of the law will be to favor the interests of the powerful. This time, however, unlike the point about the costs of bringing claims, the point goes to the nature of a private law claim rather than simply being a side-effect of government policy about something else, such as expenditure on legal aid.

One can certainly say in reply that the idea that the state cannot be intimidated is itself an over-optimistic one. Powerful private actors can effectively intimidate politicians and officials in many different ways, from physical violence to helping the election campaigns of rivals. But the state is undoubtedly less easy to intimidate than average citizens. Another rejoinder, albeit a partial one, might be that even though there is a risk that private law rights will tend to favor powerful victims, removing private law rights might be even worse for

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165. See, e.g., John P. S. McLaren, *Nuisance Law and the Industrial Revolution — Some Lessons From Social History*, 1983 OXFORD J. LEGAL STUD. 155; see A. W. BRIAN SIMPSON, *LEADING CASES IN THE COMMON LAW* 163-94 (1995).

166. Personal experience of the author. It should be added that complainants are often dismayed that officials ask them to keep records of the incidents that affect them so that the complainants can give evidence later. Many complaints collapse at this point. Undoubtedly, a state with infinite resources might be able to satisfy such complainants' desire for the state to gather all the necessary evidence by itself without involving any private individual, but in practice this can rarely happen.

167. Crew & Twight, *supra* note 8.

weaker actors than allowing such rights to develop. Strengthening the rights of the powerful might have the side-effect of also strengthening the rights of the weak against other powerful actors. There is a balance of risks to be assessed.

It must be admitted, however, that the intimidation objection reaches the bedrock of private law. The obvious point is that private law rights are valueless unless threats of the physical intimidation of litigants are not credible. This is a matter of the effectiveness of the system for maintaining public order. But perhaps more important is the threat of economic pressure. It is perhaps utopian to look for a society in which there are no economic dependency relationships. Indeed one can argue that the creation of mutual dependency relationships can be economically desirable by making possible long term productive relationships.<sup>168</sup> In addition, one might argue that economic inequality in itself is not of great concern if the least well-off have sufficient long-term security (which ultimately means wealth, including human capital)<sup>169</sup> that threats by the powerful cannot have a fundamental effect on their lives but amount instead only to inconveniences. The presence of great and persistent poverty, however, undermines the effectiveness and indeed the desirability of private law.

All one can say to this point is that regulation itself can be used to entrench the position of the powerful and is not necessarily redistributive in its effect. The disadvantages of the private law can be matched by the disadvantages of regulation. One can perhaps also say that it is worth keeping the idea of private law going in anticipation of the conditions which might make it more desirable and effective, since it would be very difficult to reinvent if it were lost. But Bell and McGillivray's final point is their most telling.

## II. ASSESSMENT

We are now in a position to assess Bell and McGillivray's account of the "general limitations on the use of private law (especially tort law) to protect environmental interests."

Tort law is not as constrained, as Bell and McGillivray claim, simply because it deals only with "private" interests. In principle, there is no human interest which cannot be protected by private law. Even the current law, which does not offer much protection against mere emotional distress and against damage to pure amenity interests, indirectly protects those interests because of the positive spillover effects

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168. Oliver E. Williamson, *Credible Commitments: Using Hostages to Support Exchange*, 83 AM. ECON. REV. 519 (1983); OLIVER WILLIAMSON, *ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* ch 7 & 8 (1985).

169. Cf. RAWLS, *supra* note 143.

of injunctions, which are the main remedy in environmental cases in England. Tort law, however, is unlikely to deal well with global environmental problems, such as climate change and maintaining biodiversity, because those problems engage the known interests of future generations.

Complaints that tort law uses “imprecise or unduly absolute” standards and that it is “reactive” both fail to compare like with like. If one treats tort law as a system for generating specific rules (injunctions) out of standards (previous cases), the correct comparison is not with the enforcement of regulatory rules but with the creation of regulatory standards and rules. There is no *a priori* reason to believe that tort law is inferior to regulation either in cost or in accuracy. Regulators might have better opportunities to take a wider view of a problem, but they are also, at least at present, more subject to lobbying pressure.

It is true that English private law is committed to fault-based standards across the environmental torts. Bell and McGillivray’s alternative, however, is both unjust and inefficient and it is therefore unlikely to be politically stable.

Most of the social, economic or political barriers to the use of tort law in environmental cases are the result of contingent governmental activity outside the law itself (such as levels of legal aid). Others, such as the availability of sufficient damages for remediation, result from misunderstandings of the law.

The criticism that private law cannot be fully just in an unjust society is valid. It is not, however, an argument in favor of removing private law rights, as some British commentators are keen to do.<sup>170</sup> Removing private law rights is likely to make for even more injustice. It is rather a reminder that although private law has political consequences and that politics influences the content of private law, private law, or law of any kind, cannot take the place of politics.

But then it has always been true that those who wish to make society just, and thus make private law fully just, have to engage themselves in more than legal analysis.

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170. See, e.g., P. S. ATIYAH, *THE DAMAGES LOTTERY* (1997).

