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Pollution, Law, Science, and Damage Awards

Thomas M. Schmitz*

Water, water, everywhere, and all the boards did shrink;
Water, water, everywhere, nor any drop to drink;¹

The classic “RIME OF THE ANCIENT MARINER” refers to mariners of the Middle Ages adrift without wind and confronted with only salty seawater to drink. The rime, however, may well be applicable to contemporary environmental pollution. Today, air and water pollution resemble the loathsome albatross which is constantly vexing mankind. If they are not removed they may eventually destroy all life on the earth.²

Environmental experts claim, for example, that Lake Erie has been aged 15,000 years over the past 50 years.³ The Cuyahoga River, a major tributary into Lake Erie, bisects the City of Cleveland and recently was described in The Wall Street Journal as being “... the oil-slicked Cuyahoga River, which oozes its way through the city to Lake Erie, catches fire periodically, earning it the dubious title of being the only body of water classified as a fire hazard.”⁴ More recently, twelve days was all that was necessary for a 250,000 gallon off-shore oil leak to despoil about 50 miles of California coastline.⁵ A blunder of this magnitude can hardly be passed over as the price of progress and a hazard of the trade.⁶ Air pollution likewise is a flourishing side effect of contemporary society, and the resulting economic losses are estimated to reach 11 billion dollars annually by 1974.⁷ Problems caused by thermal or heat pollution are recognized although such problems have not yet been clearly defined.⁸

Not unexpected, therefore, is the current public outcry against all environmental pollution, raising such questions as, “How far do we go in sacrificing the pleasantness of everyone’s surroundings for the short-term economic gains of a relative few?”⁹ Accordingly, promulgation of the concept that “Polluters-Must-Pay” is long overdue.¹⁰

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¹ Coleridge, The Rime of the Ancient Mariner.
³ Ibid.
⁴ Id. It caught fire, burned, and did fire damage, again, in mid-June 1969 (Editor’s note).
⁵ “Costly Lessons in Oil Disaster,” The Cleveland Plain Dealer (Feb. 9, 1969), p. 6-AA.
⁹ “Oil Pollution Fears Coming True,” The Cleveland Plain Dealer (Feb. 2, 1969), p. 4-A.
POLLUTION, AND DAMAGE AWARDS

History

Man-created environmental pollution is an ancient problem. The first smoke abatement law was passed in 1273, and in 1307 a Royal Proclamation was issued prohibiting the use of coal in furnaces. The following year a violator of the proclamation was executed for that offense. Even then, the seriousness of environmental pollution was firmly established.

Early in the present century, the United States Supreme Court proclaimed that a wrong or injury resulting from pollution, such as that of a stream, is not to be condoned merely because of the importance of such operation to either the public or to the operator, and that for such a wrong there is a remedy. In 1933, the same Court declared a municipal sewer treatment plant to be a permanent nuisance, generously granted the complainant $500 damages, and permitted the wrongdoer to pollute a stream undisturbed after paying his debt to society. Yet, the Court commented that $500 damages was cheaper for the wrongdoer than compelling him to install pollution abatement controls. Although this decision was handed down during the Depression, the Court thus had set an extremely dangerous precedent.

Many philosophies aimed at evaluating competing interests have evolved from the voluminous case law related to environmental pollution. A wide variety of circumstances surrounding individual cases and "relevant facts" has been laboriously considered by courts, to the extent that many of these factors have acquired the status of pseudo-defenses. The "Doctrine of Convenience," for example, is a curious theory wherein the name itself suggests an indifference to mischief created by polluters if such pollution is inconvenient to abate. Rigid theories related to "riparian land owners" caused many jurists to adopt a "Reasonable Use Doctrine," wherein upstream polluters are permitted to pollute water streams unobstructed if such pollution is not "unreasonable." Such pollutions, however, invariably continue and increase, leaving the problem of abatement to a future generation.

Many courts experience considerable difficulty in resolving the equities in view of contributions made by industry to communities, such

15 De Lahunta v. City of Waterbury, 134 Conn. 630, 59 A.2d 800 (1948).
as providing employment and paying taxes.\textsuperscript{18} For example, a steel galvanizing plant expelling noxious and injurious fumes,\textsuperscript{19} a coke plant belching harmful gases and odors,\textsuperscript{20} a chemical plant releasing deadly chlorine gas,\textsuperscript{21} and an aluminum smelting plant discharging corrosive fluorides,\textsuperscript{22} all were found to have value to the community and to provide security to the nation and, accordingly, their continued operations and pollution aggravation were held to supersede any public policy arguments for environmental health. Nominal damages, if any, were awarded, and injunctions were uniformly denied.\textsuperscript{23}

The result of these practices, therefore, has been to perpetuate and compound environmental pollution, to the detriment of future generations. Many polluters have blatantly adopted the callous attitude that it is cheaper to pay claims than to control pollution,\textsuperscript{24} and other industries have simply refused to abate pollution practices in any way whatsoever.\textsuperscript{25}

Environmental Pollution—Nuisance

Liability for environmental pollution has been based upon a variety of forms of actions, including negligence, nuisance, and trespass.\textsuperscript{26} Contemporary law stresses wrongful conduct, with due consideration as to whether an invasion of interest exists which is intentional, negligent or ultra-hazardous.\textsuperscript{27} The great majority of recent cases, however, characterize nuisance as an intentional invasion of the complainant's interests without regard to procedural technicalities associated with trespass and negligence.\textsuperscript{28}

A nuisance concept encompassing both tortious conduct and invasion of property interests has developed, in which a distinction has emerged between public and private nuisance. Both public and private nuisance,

\textsuperscript{19} Ibid. Although declared a nuisance, an injunction was denied and plaintiffs were awarded damages.
\textsuperscript{22} Arvidson v. Reynolds Metal Co., 236 F.2d 224 (9th Cir. 1956), affirming 125 F.Supp. 481 (W.D. Wash. 1954).
\textsuperscript{23} De Blois v. Bowers, supra note 18.
\textsuperscript{24} Reynolds Metal Company v. Lampert, 324 F.2d 465 (9th Cir. 1963).
\textsuperscript{26} Schindler v. Standard Oil Co. of Indiana, 207 Mo.App. 190, 232 S.W. 735 (Mo.App. 1921); Eastern Air Lines, Inc. v. American Cyanamid Co., 321 F.2d 683 (9th Cir. 1963); Reynolds Metal Company v. Martin, 337 F.2d 780 (9th Cir. 1964): Fluoride fumes and particles emitted held to be both a trespass and a nuisance, under Oregon law.
\textsuperscript{27} Haar, op. cit. supra note 11, at p. 95.
\textsuperscript{28} Prosser, Law of Torts 598 (3rd ed. 1964).
however, require a substantial interference and not merely an inconvenience or an offense to aesthetic senses. Accordingly, a commercial activity may diminish the value of land, but damages are not recoverable unless such activity is a nuisance.

Environmental pollution constituting a nuisance may be remedied by awarding damages; or, when damages at law are inadequate or irreparable harm is threatened, equitable relief or injunction are available.

**Damages**

Air and water pollution which is not readily corrected or abated is termed a permanent nuisance. Individuals specifically injured by uncontrollable pollution may recover damages, measured by diminution or depreciation in property value. Thus, an oil refinery wrongfully polluting a stream created a permanent nuisance and was assessed damages measured by the difference in market value of adjoining land immediately before and immediately after the injury. An incinerator operated by a furniture mill caused permanent damages to neighboring property justifying an award for depreciation in property value.

Environmental pollution due to an unreasonable use of property, causing substantial interference with another's interest, is termed a temporary nuisance. Temporary nuisances are abatable and, therefore, should be abated. A steel galvanizing plant emitting obnoxious fumes and odors, for example, constituted a temporary nuisance and was compelled to make all reasonable efforts to abate the nuisance. An aluminum reduction plant expelling corrosive fluorides into the air was com-

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31 Purcell v. Davis, 100 Mont. 480, 50 P.2d 255 (1935); Costa v. City of Fond Du Lac, supra note 16.

32 Roddenberry Co., Inc. v. Carter, 192 F.2d 448 (5th Cir. 1951).


36 Ritter v. Keokuk Electro-Metal Company, 248 Ia. 710, 82 N.W.2d 151 (1957); Jones v. Trawick, 75 S.2d 785 (Fla. 1954).

37 Commonwealth v. Hanzlik, 400 Pa. 134, 161 A.2d 340 (1960): the proper remedy is to abate the pollution and not merely regulate it.

pelled to install proper hoods and electronic precipitators despite the high cost of installing these controls. In addition to abatement, damages may be assessed for the loss of rental value or use value of the property affected. Thus, ammonia gas escaping unreasonably from an ice manufacturing facility was found to be a substantial interference with neighboring apartments and, accordingly, damages measured by loss of rental value were awarded. Continued pollution is a renewable wrong and, therefore, successive damages are recoverable until abated.

Special damages proximately caused by environmental pollution are recoverable for personal discomfort, annoyance or inconvenience, injury to health or reasonable expenses incurred. Thus, a chemical plant emitting carbon black into the atmosphere was found to be a nuisance, entitling the complainant to a $500 personal award of damages in addition to compensatory damages for depreciation of his property and for repainting of structures.

Punitive damages may be awarded when wrongful pollution is intentionally and persistently maintained with a reckless disregard for others. Intentional pollution of a stream by an oil refinery with full knowledge thereof was held to be malicious conduct warranting liability for punitive damages. Atmospheric pollution continued unabated despite numerous complaints and, therefore, an asphalt plant was held liable for punitive damages based on the willful disregard of surrounding homeowners' property. An aluminum smelting plant which was fully cognizant that corrosive fluorides were being expelled into the atmosphere further acknowledged a prevailing management view that payment of claims was cheaper than installation of proper pollution abatement equipment. Accordingly, treble punitive damages were assessed.

42 Reynolds Metal Company v. Wand, 308 F.2d 504 (9th Cir. 1962): the emission of noxious fumes and gases was abatable and, therefore, successive actions permissible.
43 Parsons v. Sious Falls, supra note 17: a $5,000 award was held to not be excessive damages to a riparian landowner for discomfort and annoyance.
45 Newman v. Nelson, 350 F.2d 602 (10th Cir. 1965): persistent maintenance of water pollution is a nuisance.
47 Claude v. Weaver Construction Co., 158 N.W.2d 139 (Iowa 1968).
48 Reynolds Metal Company v. Lampert, supra note 24: on cross-examination, the plant manager commented: "It is cheaper to pay claims than it is to control fluoride gases."
DAMAGES ARE RECOVERABLE FOR WRONGFUL POLLUTION EVEN THOUGH INJUNCTIVE RELIEF HAS BEEN GRANTED. Thus, environmental pollution may be enjoined and further proceeded against for damages at law and, therefore, the remedies are concurrent and not exclusive.

Equitable Relief

Equity will intervene and abate environmental pollution by injunction when such pollution is continuous and permanent, when the injury is irreparable, or when damages are an inadequate remedy. Mere diminution in property value without irreparable injury, however, is an insufficient basis for granting equitable relief. But equity, like relief at law, will not interfere with or enjoin an activity which merely offends the sentimental, psychological, aesthetic or artistic sensibilities.

A court of equity will intervene and prevent harmful gases and nauseating odors from being dispelled into the atmosphere to the detriment of surrounding property owners. Hence, an oil refinery may be enjoined from discharging nauseating gases into the air. Granting an injunction against a chemical company discharging deadly chlorine gas was held not to be an abuse of discretion when the wrongdoer would have continued releasing chlorine unless restrained. Notwithstanding substantial installation costs, an aluminum reduction plant was required to install available pollution abatement controls or, alternatively, be enjoined from continuing an operation which emitted excessive quantities of corrosive fluorides into the atmosphere.

When science and engineering provide methods for abating pollution, failure to employ such methods is a basis for enjoining a manufacturing operation. An equitable decree is confined to issuing an injunction, and the burden is upon the tortfeasor to engineer a method for abating the pollution. Although most states have enacted pollution control legis-

50 City of Northlake v. City of Elmhurst, 41 Ill.App.2d 190, 190 N.E.2d 375 (Ill.App. 1963).
54 Sarraillon v. Stevenson, 153 Neb. 182, 43 N.W.2d 509 (1950).
56 Christopher v. Jones Chemicals, Inc., supra note 51.
lation, administrative proceedings related therewith are not a condition precedent to obtaining equitable injunctive relief.\(^6^0\)

A private citizen may enjoin environmental pollution constituting a nuisance if a special injury not common to the community\(^6^1\) is suffered by the complainant. Two or more complainants may join in a class action to abate pollution when the property of each is similarly affected, even though the respective properties may be separate and distinct.\(^6^2\) Hence, a class action brought by six property owners joined to abate the emission of noxious fumes and smoke was not invalidated by a failure of other members of such class to join the action.\(^6^3\) Likewise, there was not a misjoinder of plaintiffs when 55 residents of a village sought to enjoin the operation of four stone quarries.\(^6^4\)

**Public Nuisances**

Air and water pollution interfering with the health and well-being of an entire community is a public nuisance for which the wrongdoer may be subjected to criminal prosecution.\(^6^5\) Generally, municipalities derive police power to abate environmental pollution from the State, either through a general statutory enactment or by the charter granted to the municipality.\(^6^6\) Accordingly, power to abate environmental pollution is a portion of the police power incident to, and necessarily vested in, municipalities by the State.\(^6^7\)

The law is well settled that municipalities are liable for environmental pollution created and maintained by them, even though such pollution may be pursuant to exercising a governmental function.\(^6^8\) Thus,


\(^6^2\) Griffin v. Hurt, 200 Tenn. 133, 291 S.W.2d 271 (1956).


\(^6^4\) Brainin v. Great Lakes Supply Corporation, 9 Ill.App.2d 560, 133 N.E.2d 730 (1956): there was no misjoinder with respect to injunctive relief; however, there was a misjoinder of defendants in regard to seeking damages since the four quarry owners had no connection.

\(^6^5\) Donley v. Amerada Petroleum Corporation, supra note 46: persistently calling the defendant oil company “criminals,” however, was unnecessary.

\(^6^6\) Penn-Dixie Cement Corporation v. City of Kingsport, 189 Tenn. 450, 225 S.W.2d 270 (1949); Ballen v. Nester, 164 S.W.2d 378 (Mo. 1942).

\(^6^7\) Nourse v. City of Russellville, 257 Ky. 525, 78 S.W.2d 761 (1935). See also Federal Clean Air Act, wherein the Dept. of Health, Education and Welfare is empowered to request the Dept. of Justice to initiate legal action when air pollution results from operations in another state. See Civil Case No. 19274 in the U.S. District Court for the District of Maryland.

\(^6^8\) 56 A.L.R.2d 1415, at 1419 (Sec. 3).
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Cities have been held liable for creating a nuisance by maintaining garbage dumps and sewer treatment plants.69

Municipalities, however, remain immune to liability for failure to abate environmental pollution created or maintained by third parties.70 The few exceptions to governmental immunity are limited to interferences with public right-of-ways or to nuisances existing on property owned or maintained by the municipality.71 It is conceivable that pollution of air or of a water-way may be so acute as to be an interference with a public right-of-way.72

A few jurisdictions have held that a municipality having power to abate a nuisance must exercise such power, and this accordingly reflects the view that a legislative mandate is imposed upon the municipality to discharge a municipal function.73 If the duty to abate environmental pollution is imposed by statute, a municipality may be held liable for a negligent failure to abate, since liability is predicated on failure to exercise a ministerial duty imposed by statute.74

Municipal officers are ordinarily immune from liability for negligence in carrying out "discretionary" duties as long as such duties are carried out in good faith.75 Duties imposed by law involving less personal judgment are classified as "ministerial," and municipal officers may be held liable for misfeasance and nonfeasance in carrying out such duties.76 Due consideration should be extended, therefore, to determining whether duties imposed upon public officials to enforce anti-pollution laws are discretionary or ministerial.

Statutes and ordinances directed against environmental pollution at the time of their enactment encounter strict constitutional restraints, wherein enacted laws must afford Due Process and provide Equal Protection to all citizens.77 City ordinances, for example, have been held unconstitutional and void on the basis of vesting unlawful discretion to summarily abate a smoke nuisance without defining the terms and con-

70 56 A.L.R.2d 1415, at 1422 (Sec. 4); Galleher v. City of Wichita, 179 Kan. 513, 296 P.2d 1062 (1956).
71 63 C.J.S., Municipal Corporations, Sec. 770 (1950); Fowler v. Board of County Commissioners of Prince George's County, 230 Md. 504, 187 A.2d 856 (1963).
72 Ibid. § 886. A municipality may be liable when sewage is emptied into a culvert by a third person with permission or by authority of the municipality. The municipality will become liable if it fails to abate the nuisance after having knowledge thereof.
74 Ibid.
75 Nelson v. Knox, 256 F.2d 312 (6th Cir. 1958).
76 Whitt v. Reed, 239 S.W.2d 489 (Ky. App. 1951): imperative or ministerial duties; Farmer v. State, 224 Miss. 96, 79 So.2d 528 (1955).
ditions under which abatement could be effected. Valid statutes and ordinances directed at abating environmental pollution practices, therefore, must prescribe definite standards to guide administrative agencies in exercising the power delegated.

Accordingly, due to constitutional restrictions, discretionary powers vested in public officials are limited and duties imposed by pollution abatement laws are primarily ministerial. The conclusion is apparent, therefore, that public officials charged with the duty of abating environmental pollution are susceptible to liability for neglect of their official duties.

Science and Pollution Laws

An interested citizens group in Montana recently brought suit to enjoin a paper pulp mill operation and compel the facility to "at least conform to the state of the art." Failure to utilize advanced engineering techniques is a sufficient basis for granting an injunction, and the burden of pollution abatement costs is not a defense. The United States Supreme Court upheld a Detroit air pollution ordinance and noted that expenditures for pollution controls were not unreasonable. Public pollution abatement laws, however, are invalid to the extent that compliance therewith is impossible due to nonavailability of modern abatement controls.

Although pollution abatement know-how allegedly trails scientific advancements, the fact remains that some industries install only those pollution controls that are forced upon them by governmental agencies. Although capital expenditures for pollution controls rarely produce a return on investments, scientific advancements continuously favor annual financial reports. The steel industry maintains, for example, that water pollution controls cost roughly ten percent of a one-billion dollar invest-

81 There is no doubt that there would be no immunity when neglect of duty was willful and malicious. See Prosser, op. cit. supra note 28, at 1013-1019.
82 "Right to Clean Air," Chemical and Engineering News (Feb. 10, 1969), p. 18. Basis of suit was that the "right to clean air" is one of the unnamed rights guaranteed by the 9th Amendment to the United States Constitution.
83 Herring v. Walker, supra note 58; Huron Portland Cement v. Detroit, supra note 80; The Ohio Engineer (March, 1969), pp. 21-24, notes that two of the "Seven Engineering Wonders of Ohio for 1968" were pollution control facilities.
84 Huron Portland Cement Co. v. Detroit, supra note 80.
85 Ibid. People v. Cunard White Star, 280 N.Y. 413, 21 N.E.2d 489 (1939): smoke regulation law valid only to the extent that compliance therewith is possible with modern appliances and practicable methods.
ment for a steelworking facility. Seldom mentioned, however, is the fact that scientific advancements such as the oxygen process for making steel have reduced the capital cost per ton of annual capacity to $15 per ton as compared with $40 per ton of open hearth capacity. Thus, expenditures for pollution controls may be deliberated only when placed in the correct perspective.

Although a manufacturing facility may be conducted in accordance with sound engineering principles, the mischief created thereby may still be so unreasonable as to constitute a nuisance and, therefore, create liability to a private citizen proximately injured. Hence, ammonia escaping from a modernly equipped ice manufacturing facility, and noxious odors released from a sewer treatment plant operated under general legislative authority and approved by competent engineers, were held liable for material injury inflicted upon neighboring property owners.

Accordingly, a deficiency in scientific know-how may be a good defense against enforcement of public pollution laws. However, a lack of suitable pollution controls is not a defense to a nuisance action initiated by a private citizen.

Conclusions

Environmental pollution, if not curtailed, eventually may destroy habitability of the earth. How far do we go in sacrificing the pleasantness of everyone's surroundings for the short-term economic gain of a relative few? Environmental pollution casts a new perspective on contemporary nuisance law and, accordingly, advocacy of the concept that "Polluters-Must-Pay" is long overdue.

Compensatory and punitive damages are recoverable in law for injuries caused by environmental pollution. Equity also will intervene and enjoin pollution practices which are continuous and permanent, when the injury is irreparable, or when damages are an inadequate remedy. Legal and equitable remedies are concurrent and, therefore, environmental pollution may be enjoined even though damages have been assessed.

Environmental pollution interfering with the health and well-being of an entire community is a public nuisance which may subject wrongdoers to criminal prosecution. Municipalities possess delegated police power to act against public nuisances.

87 The Wall Street Journal, op. cit. supra note 86.
89 Jones v. Rumford, 64 Wash.2d 559, 392 P.2d 808 (1964).
90 Garber v. Rubel Corporation, supra note 41.
91 Ryan v. City of Emmetsburg, 232 Iowa 600, 4 N.W.2d 435 (1942).
powers to abate pollution. Due to the acute increase in pollution, the duty of municipalities to abate public nuisances is rapidly becoming imperative. Hence, public officials charged with a duty to enforce pollution abatement laws are susceptible to liability for neglect of their official duties.

Public pollution laws are invalid to the extent that compliance therewith is impossible due to a lack of engineering know-how. Nonavailability of modern abatement controls, however, is not a defense to a tort action initiated by a private citizen. If a wrongdoer is made to pay damages, he will think twice before doing the same wrong again.