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Judicial Protection of the Environment: A New Role for Common-Law Remedies*

Frank E. Maloney**

I. INTRODUCTION

There is a tendency today to look to the legislatures to provide the cure for all environmental maladies,¹ and to overlook or underrate the potential of common-law remedies to assist in the proper solution of these problems. Although it is undoubtedly true that in some jurisdictions the common-law remedies have been interpreted so restrictively as to make them practically useless as tools for environmental protection, a number of forward-looking courts are developing and applying the law in a way much more favorable to the environment. Other courts that have remained uncommitted may be in a position to follow current trends in the use of common-law remedies for environmental protection. Hopefully, this survey will suggest additional possibilities for relief in jurisdictions where the statutory remedies are failing, often because of insufficient funds for adequate enforcement. Furthermore, even in those jurisdictions with effective statutory remedies for the protection of the public interest, common-law remedies still may provide the best, or indeed the only, means by which an injured individual can be personally compensated.

* This article had its genesis in a paper presented at the Institute on Significant Developments in Tort Litigation, which was organized and inspired by Dean John Wade and held at Vanderbilt University School of Law on October 30, 1970. The material presented here is an expansion of that presentation.

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1. The following recent federal legislation requires systematic action by all federal agencies to ensure that environmental values are appropriately weighed in agency decision-making along with economic and technical considerations. Federal Power Act, 16 U.S.C. § 791 (1970); Fish and Wildlife Coordination Act of 1958, 16 U.S.C. §§ 661-64 (1970); Department of Transportation Act of 1966, Pub. L. No. 89-670, 80 Stat. 931 (codified in scattered sections of 19 U.S.C.); Federal-Aid Highway Act of 1968, 23 U.S.C. §§ 101-41, 205, 501, 511, 514 (1970); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, 4331-35, 4341-47 (1970); Environmental Quality Improvement Act of 1970, 42 U.S.C. §§ 4371-74 (1970). Federal agencies, however, sometimes seem less than enthusiastic in their efforts to enforce these laws. For a discussion of the difficulties faced by conservation groups seeking to obtain such enforcement see Note, *Standing To Challenge Administrative Action: The Concept of Personal Stake*, 39 GEO. WASH. L. REV. 570 (1971). There also has been speculation that the Refuse Act of 1899 provides standing for citizen suits to abate water pollution by allowing *qui tam* actions. E.g., Note, *The Refuse Act of 1899: New Tasks for An Old*

II. EARLY COMMON-LAW DEVELOPMENTS

As an aid to understanding the place of common-law remedies in environmental law today, it is appropriate to begin by examining their early development, along with the reasons for their frequent failure to adequately protect the public interest. This failure has been a contributing factor in legislative attempts to provide greater environmental protection. The inadequacy of this legislation, in turn, has led a number of courts to reexamine and refurbish the common-law remedies.

A. Nuisance

Most of the initial common-law cases aimed at the prevention of environmental pollution were either private or public nuisance actions. A private nuisance is an unreasonable interference with the use and enjoyment of real property,² and obtaining relief is dependent upon both proof of damage and a finding that the defendant's activities are "unreasonable."³ A public nuisance action, on the other hand, is available for injury to the public in the exercise of its common rights.⁴ The activity that constitutes a public nuisance is usually a crime, but the existence of criminal sanctions generally does not make the tort remedy unavaila-

Law, 22 HASTINGS L.J. 782 (1971). Seven recent federal district court decisions, however, have refused to permit *qui tam* actions under the Refuse Act, primarily because another section of the Act states that litigation will be brought by the Department of Justice. *Enquist v. Quaker Oats Co.*, 327 F. Supp. 347 (D. Neb. 1971); *United States ex rel. Mattson v. Northwest Paper Co.*, 327 F. Supp. 87 (D. Minn. 1971); *Durning v. ITT Rayonier, Inc.*, 325 F. Supp. 446 (W.D. Wash. 1970); *Bass Angler Sportsman Soc'y v. United States Steel Corp.*, 324 F. Supp. 412 (N.D. Ala. 1971); *Bass Anglers Sportsman's Soc'y v. U.S. Plywood-Champion Papers, Inc.*, 324 F. Supp. 302 (S.D. Tex. 1971); *Reuss v. Moss-American, Inc.*, 323 F. Supp. 848 (E.D. Wis. 1971); *Connecticut Action Now, Inc. v. Roberts Plating Co.*, 3 CCH CLEAN AIR & WATER NEWS 419 (1971). *See also* *United States v. St. Regis Paper Co.*, 3 CCH CLEAN AIR & WATER NEWS 419 (1971). There are as yet no reported appeals. If the unanimity of the district courts is any indication, however, it would appear that *qui tam* actions will probably not be allowed under the Refuse Act.

The standing problem, along with the presumption of correctness of administrative action, may lessen the potential effectiveness of these seemingly broad statutory remedies.

2. W. PROSSER, *THE LAW OF TORTS* § 89 (4th ed. 1971).

3. *Beckman v. Marshall*, 85 So. 2d 552 (Fla. 1956).

4. *Maier v. City of Ketchikan*, 403 P.2d 34, 38 (Alas. 1965).

ble.⁵ In some cases, involving an act that interferes both with common rights of the public and with private use and enjoyment of land, a private as well as a public nuisance action may be available,⁶ but a private individual may not maintain the public action in the absence of proof of special damage to him different in kind from that suffered by the public at large.⁷ Absent such special damage, the state, as protector of the public, is the proper plaintiff.⁸

The preferred relief against both public and private nuisances is the injunction because it furnishes a remedy before rather than after damage occurs. Moreover, in many cases injunctive relief may be the only effective sanction because provable injury to any one individual is so small that a judgment for damages would be valuable only to prevent the defendant from gaining a prescriptive right. An injunction, however, will be issued only if the plaintiff proves that injunctive relief is necessary because the threatened injury is irreparable. This would be the case if the injury could not be adequately compensated for by damages at law, or if a multiplicity of suits would result from failure to grant the injunction.⁹

An injunction may be refused for several reasons. In comparing the relative importance of the interests of the parties to determine whether to grant injunctive relief, a court may deny an injunction on the ground that the public interest in permitting a particular activity to continue is of overriding importance despite damage to the plaintiff. This defense to the issuance of an injunction is sometimes referred to as "the balance of convenience doctrine,"¹⁰ and is often raised in defense of municipal or governmental operations.¹¹ Another roadblock, at least against the prosecution of a public nuisance action, may be a claim that the state, either by legislative action or by constitutional amendment, has legalized a type of pollution, thereby lifting it out of the category of a public nuisance.¹² For example, in 1930 Florida added a section to its state constitution providing a fifteen-year tax exemption to particular indus-

5. *People v. Truckee Lumber Co.*, 116 Cal. 397, 48 P. 374 (1897).

6. *Hill v. Stokely-Van Camp, Inc.*, 260 Minn. 315, 109 N.W.2d 749 (1961).

7. *Strickland v. Lambert*, 268 Ala. 580, 109 So. 2d 664 (1959).

8. *See, e.g., J.H. Miles & Co. v. McLean Contracting Co.*, 180 F.2d 789 (4th Cir. 1950) (by implication).

9. *Holman v. Athens Empire Laundry Co.*, 149 Ga. 345, 100 S.E. 207 (1919).

10. *Cohen v. City of Houston*, 176 S.W. 809, 814 (Tex. Civ. App. 1915).

11. *See, e.g., Frost v. City of Los Angeles*, 181 Cal. 22, 31-32, 183 P. 342, 346 (1919).

12. *See Juergensmeyer, Common Law Remedies and Protection of the Environment*, 6 U.B.C.L. REV. 215 (1971); 25 TEXAS L. REV. 96 (1946).

tries as an inducement for establishing plants in Florida. In the case of *National Container Corp. v. State ex rel. Stockton*¹³ the Florida Supreme Court held that this exemption necessarily granted the polluter immunity from public nuisance suits. Similar results were reached by the Florida court in subsequent cases involving the drilling of oil wells in tidal waters pursuant to an oil lease statute¹⁴ and the operation of an airport under a municipal ordinance.¹⁵ This defense also has been applied to operations in areas zoned for commercial use.¹⁶

During the laissez-faire period, courts tended to overprotect the right to own and use private property and failed to recognize the ecological consequences of pollution. This led them, for the most part, either to deny the existence of the nuisance altogether,¹⁷ or to refuse an injunction because the economic importance of the polluter's operations caused the equities to be balanced in favor of the polluter. *Richard's Appeal*,¹⁸ which legalized the status of Pittsburgh as the "Smoky City,"¹⁹ is an early example of this propensity to deny the plaintiff all relief except a remedy by way of money damages, which is clearly inadequate.²⁰

The continued solicitude of the courts for the protection of private property rights at the expense of the environment also manifested itself in a series of New York cases involving air pollution caused by the huge Donner-Hanna Coke Plant at Buffalo. In the first of these cases, decided in 1931, the court classified pollution from 50 coke ovens as only a "petty annoyance" to a neighboring homeowner and reached the conclusion that air pollution is "indispensable to progress."²¹ Twenty-five years later, when the plant was operating 250 ovens, the same court held that so long as the plant contained properly operated "modern" control equipment, an unconstitutional taking of its properties would result

13. 138 Fla. 32, 189 So. 4 (1939).

14. *Watson v. Holland*, 155 Fla. 342, 20 So. 2d 388 (1944).

15. *Brooks v. Patterson*, 159 Fla. 263, 31 So. 2d 472 (1947) (decision also based on laches on the part of the plaintiff who did not complain until over \$1,000,000 had been spent on construction of the airport). For a discussion of recent cases finding inverse condemnation has taken place under similar circumstances see Note, *Airspace—Aircraft Noise—Inverse Condemnation Absent Overflight*, 8 NATURAL RESOURCES L. J. 561, 565-67 (1968).

16. *Gerring v. Gerber*, 28 Misc. 2d 271, 219 N.Y.S.2d 558 (Sup. Ct. 1961).

17. *Waschak v. Moffat*, 379 Pa. 441, 109 A.2d 310 (1954); *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 6 A. 453 (1886).

18. 57 Pa. 105 (1868).

19. *Id.* at 111-12.

20. If injunctive relief is available, damages for past harm can usually be obtained as the adjunct to the specific equitable relief given.

21. *Bove v. Donner-Hanna Coke Corp.*, 142 Misc. 329, 254 N.Y.S. 403 (Sup. Ct. 1931), *aff'd*, 236 App. Div. 37, 258 N.Y.S. 229 (1932).

from the limitation of its operations to comply with a Buffalo smoke ordinance.²² The emissions, therefore, were classified as "unavoidable,"²³ and the company continued to be safe from prosecution. In 1939 the New York Court of Appeals again applied this principle to smoke from the SS Queen Mary in *People v. Cunard White Star Ltd.*²⁴

Not all of the early cases, however, treated the environment so harshly. In 1907, for example, the Supreme Court partially enjoined operations of the Tennessee Copper Company at Copper Hill, Tennessee, insofar as they affected the State of Georgia and its citizens;²⁵ in the first major decision in this case the Tennessee Supreme Court had balanced the equities in favor of the polluter.²⁶ Moreover, in the 1913 case of *Whalen v. Union Bag & Paper Co.*,²⁷ the New York Court of Appeals ordered the closing of a multi-million dollar pulp mill to prevent the destruction of a small waterway, which it was polluting.

B. Other Common-Law Remedies

Although the nuisance action was the primary common-law weapon against environmental pollution, it was not the only one. Actions in trespass, negligence, strict liability, and for the protection of riparian rights were also used, but with relatively little success.

1. *Trespass*.—In theory at least the action for trespass to real property should have provided the best environmental protection, since neither proof of intent nor of negligence was required for a finding of liability.²⁸ While the trespass action was used successfully in a few cases,²⁹ two difficulties prevented wider utilization of this remedy. First, trespass was available only for direct invasions of a neighbor's land. A direct flow of water, for example, could result in a trespass action.³⁰ For the destruction or diversion of a stream that ultimately flooded the

22. *People v. Savage*, 1 Misc. 2d 337, 148 N.Y.S.2d 191 (Sup. Ct.), *aff'd mem.*, 309 N.Y. 941, 132 N.E.2d 313 (1955).

23. *Id.* at 342, 148 N.Y.S.2d at 196.

24. 280 N.Y. 413, 21 N.E.2d 489 (1939).

25. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907).

26. *Madison v. Ducktown Sulphur, Copper & Iron Co.*, 113 Tenn. 331, 83 S.W. 658 (1904).

27. 208 N.Y. 1, 101 N.E. 805 (1913), *modifying* 145 App. Div. 1, 129 N.Y.S. 391 (1911).

28. W. PROSSER, *supra* note 2, § 13.

29. *E.g.*, *W.G. Duncan Coal Co. v. Jones*, 254 S.W.2d 720 (Ky. 1953) (defendant allowed poisonous mine water deposited in a stream to overflow onto plaintiff's land); *McKee v. Delaware & H. Canal Co.*, 125 N.Y. 353, 26 N.E. 305 (1891) (overflow onto plaintiff's land caused by defendant's dam constitutes trespass).

30. *Whaler v. Norton*, 92 App. Div. 368, 86 N.Y.S. 1095 (1904).

plaintiff's land, however, the only remedy would have been an action on the case, generally in nuisance.³¹ Secondly, in order to find that an invasion was direct, it must have involved an object big enough to be seen with the naked eye.³² Interference with the plaintiff's possession resulting from the settling of invisible effluents could be reached only through the nuisance action.³³ Although these restrictions are under attack today, for centuries they relegated the trespass action to a minor role in environmental protection.

2. *Negligence*.—The negligence action is primarily a remedy designed to provide compensation to an injured individual rather than protection of the public interest, and, as such, normally does not result in injunctive relief. Thus, while the negligence action may result in a recovery of damages,³⁴ it has been of relatively little assistance in the overall fight against pollution.

3. *Strict Liability*.—The doctrine of strict liability affords another possible remedy for environmental damage. In the English case of *Rylands v. Fletcher*,³⁵ which established the strict liability concept, plaintiff was allowed to recover damages for the flooding of his property by waters flowing from defendant's property. In affirming this decision of the Exchequer Chamber, the House of Lords, emphasizing the abnormal and inappropriate nature of defendant's conduct,³⁶ limited the holding to things that escaped from defendant's land because of its "nonnatural use." Many of the nineteenth century American cases rejected the strict liability doctrine altogether as inappropriate to the development of a new country.³⁷ Later, however, a few courts allowed recovery of damages in cases involving ultrahazardous activities such as fumigation with cya-

31. *Butala v. Union Elec. Co.*, 70 Mont. 580, 226 P. 899 (1924); *Suter v. Wenatchee Water Power Co.*, 35 Wash. 1, 76 P. 298 (1904).

32. *E.g.*, *O'Neill v. San Pedro, L.A. & S.L. Ry.*, 38 Utah 475, 114 P. 127 (1911); *Burtlett v. Grasselli Chem. Co.*, 92 W. Va. 445, 115 S.E. 451 (1922).

33. *See Amphitheaters, Inc. v. Portland Meadows*, 184 Ore. 336, 198 P.2d 847 (1948).

34. *American Cyanamid Co. v. Sparto*, 267 F.2d 425 (5th Cir. 1959); *Hagy v. Allied Chemical & Dye Corp.*, 122 Cal. App. 2d 361, 265 P.2d 86 (1953). Another difficulty with the negligence remedy is the fact that even when negligence is established or conceded, it has often proved difficult to establish the necessary causal connection between the pollution and the harm to the plaintiff. *E.g.*, *Rogers v. Bond Bros.*, 279 Ky. 239, 130 S.W.2d 22 (1939).

35. 159 Eng. Rep. 737 (1865), *rev'd*, L.R. 1 Ex. 265 (1866), *aff'd*, L.R. 3 H.L. 330 (1868).

36. L.R. 3 H.L. at 338. For an extensive discussion of this case see W. PROSSER, *supra* note 2, § 78.

37. *E.g.*, *Everett v. Hydraulic Flume Tunnel Co.*, 23 Cal. 225 (1863); *Shrewsbury v. Smith*, 66 Mass (12 Cush.) 177 (1853); *Livingston v. Adams*, 8 Cow. 175 (N.Y. 1828); *see* W. PROSSER, *supra* note 2, § 78.

nide gas,³⁸ the drilling of oil wells,³⁹ or emission of noxious gases in urban areas.⁴⁰ Nevertheless, the limitation of this remedy to abnormally dangerous or ultrahazardous activities⁴¹ has severely limited its usefulness.

4. *Riparian Rights*.—Although it was not available as a remedy in all kinds of environmental suits, the assertion of riparian rights, at least in some states, provided an additional means of stopping stream pollution. Under the natural flow doctrine, which originally predominated in the Eastern states, each riparian owner was entitled to have water reach him undiminished in quantity and unimpaired in quality, subject to the domestic uses of upper riparians.⁴² This rule favored the development of mill dams as sources of power and, at the same time, created a cause of action for injunctive relief to prevent any pollution beyond that resulting from domestic uses, even if the lower riparian was not actually using the water.⁴³ With the advent of steam power, the natural flow doctrine was replaced in most jurisdictions by the doctrine of reasonable use, which permitted streams to be used as receptacles for municipal and industrial wastes. Under this latter doctrine, upper riparians can make reasonable consumptive uses of the water, and the lower riparian becomes entitled only to have his water kept free from unreasonable pollution.⁴⁴ The courts have not found pollution to be unreasonable unless the harm to lower riparians resulting from the polluter's conduct outweighs the utility of the activity. As a result, injunctions were denied in most of the early sewage disposal cases because of the supposed utility of the sewerage company's operations.⁴⁵ In the case of *Parker v.*

38. *Luthringer v. Moore*, 31 Cal. 2d 489, 190 P.2d 1 (1948).

39. *Green v. General Petroleum Corp.*, 205 Cal. 328, 270 P. 952 (1928); *Berry v. Shell Petroleum Co.*, 140 Kan. 94, 33 P.2d 953 (1934), *rehearing denied*, 141 Kan. 6, 40 P.2d 359 (1935).

40. *Waschak v. Moffat*, 379 Pa. 441, 109 A.2d 310 (1954); *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 6 A. 453 (1886).

41. RESTATEMENT OF TORTS §§ 519-20 (1938).

42. *Cole v. Bradford*, 52 Ga. App. 854, 184 S.E. 901 (1936); *Dougan v. Board of County Comm'rs*, 141 Kan. 554, 43 P.2d 223 (1935).

43. See, e.g., *Mann v. Willey*, 64 N.Y.S. 589 (App. Div. 1900); Note, *Statutory Treatment of Industrial Stream Pollution*, 24 GEO. WASH. L. REV. 302, 306 (1956).

44. See F. MALONEY, S. PLAGER, & F. BALDWIN, *WATER LAW AND ADMINISTRATION* 322 (1968). The following statement of this rule is found in an early Florida case involving pollution of an underground stream: "The right to the benefit and advantage of the water flowing past one owner's land is subject to the similar rights of all the proprietors on the banks of the stream to the reasonable enjoyment of a natural bounty, and it is therefore only for an unauthorized and unreasonable use of a common benefit that anyone has just cause to complain." *Tampa Waterworks Co. v. Cline*, 37 Fla. 586, 595, 20 So. 780, 782 (1896).

45. E.g., *State ex rel. Harris v. City of Lakeland*, 141 Fla. 795, 193 So. 826 (1940). See generally Maloney, *The Balance of Convenience Doctrine in the Southeastern States, Particularly as Applied to Water*, 5 S.C.L.Q. 159 (1952).

American Woolen Co.,⁴⁶ however, an injunction was granted in a jurisdiction following the reasonable use doctrine when serious pollution was caused by a woolen mill.

Once the switch from the natural flow to the reasonable use doctrine had been made, the legal criteria for relief from stream pollution became indistinguishable from the rules governing nuisance actions. Consequently, the courts began to employ nuisance terminology when dealing with stream pollution, and in 1970 the American Law Institute relegated pollution control to the field of nuisance.⁴⁷ In light of these changes, the usefulness of the riparian rights doctrine as a tool for pollution control has declined almost to the vanishing point.

III. REFURBISHING THE COMMON-LAW TOOLS

In the absence of effective statutory regulation,⁴⁸ conservationists increasingly fell back on private lawsuits during the 1960's in their attempts to protect the environment. They have been successful in a number of recent cases in which the courts appear to have reversed their traditional bias favoring exploiters of the environment. These cases have begun the process of revitalizing the common-law remedies.

One of the most important recent cases is *Martin v. Reynolds Metals Co.*,⁴⁹ decided by the Oregon Supreme Court in 1960. The complainant had brought a trespass action because invisible air-borne fluoride particulates were settling on his property. In holding for the plaintiff

46. 195 Mass. 591, 81 N.E. 468 (1907).

47. RESTATEMENT OF TORTS § 840 (Tentative Draft No. 16, 1970).

48. With the early failure of the common-law actions as tools for controlling pollution, aggrieved citizens turned to the state legislatures and Congress for relief. Numerous statutes were enacted prohibiting air and water pollution, but unfortunately they proved ineffective. For example, the Federal Rivers and Harbors Act, 33 U.S.C. §§ 401-13 (1970), has been in existence since 1899. The Act prohibits the discharge of "refuse matter other than that flowing from streets and sewers in a liquid state" into or on the banks of any navigable waters in the United States. 33 U.S.C. § 407 (1970). Until recently, however, the term "refuse" was construed so restrictively by the courts that the act was of little help. *E.g.*, *United States v. Delvalle*, 45 F. Supp. 746 (E.D. La. 1942) (accidental discharge of valuable fuel oil held not to constitute a discharge of refuse). Many of the state anti-pollution statutes, while containing criminal penalties, did not provide for injunctive relief. Polluters were happy to pay the small penalties as a cost of doing business. Moreover, until the 1960's, the tendency at both state and federal levels was to provide some legal authority but not the financial support necessary for effective enforcement. *See* F. Maloney, *Water Pollution Study for the State of Tennessee*, (1971) (unpublished study on file with the Tennessee Department of Public Health, Division of Water Quality Control).

49. 221 Ore. 86, 342 P.2d 790, *cert. denied*, 362 U.S. 918 (1960).

and rejecting what it called the "dimensional test" the court stated:

It is quite possible that in an earlier day when science had not yet peered into the molecular and atomic world of small particles, the courts could not fit an invasion through unseen physical instrumentalities into the requirement that a trespass can result only from a *direct* invasion [W]e may [now] define trespass as any intrusion which invades the possessor's protected interest in exclusive possession, whether that intrusion is by visible or invisible pieces of matter or by energy which can be measured only by the mathematical language of the physicists.⁵⁰

The court also decided that the invasion was direct rather than indirect or consequential,⁵¹ thus satisfying the old directness requirement of trespass. Furthermore, in holding that the intrusion constituted a trespass, the court stated that the characterization of the defendant's conduct as careless, wanton and willful, or entirely free from fault was immaterial.⁵²

This imposition of strict liability through the use of trespass in what traditionally has been regarded as a nuisance action opens a new door for environmental protection, but it has not occurred without criticism.⁵³ Perhaps foreseeing this criticism, the *Martin* court suggested the use of "a weighing process, similar to that involved in the law of nuisance" as a means of rejecting cases in which the complainant's injuries were de minimis.⁵⁴ Such reasoning, of course, flies in the face of centuries of jurisprudence that developed the absolute nature of trespass law,⁵⁵ and it indicates some of the dangers involved in utilizing the trespass remedy. Nevertheless, the Oregon court has not retreated from its position with regard to the trespass doctrine, as evidenced by the 1968 case of *Davis v. Georgia-Pacific Corp.*,⁵⁶ which also involved air pollution.

In the 1962 case of *Thornburg v. Port of Portland*,⁵⁷ the Oregon Supreme Court utilized another innovative technique involving the application of condemnation principles to the low-altitude flight of airplanes. The court held that airplanes flying low over and near the plaintiff's home, which was located some 6,000 feet from the end of a runway, constituted a compensable taking of his property. The result was based

50. *Id.* at 93-94, 342 P.2d at 793.

51. *Id.* at 101, 342 P.2d at 797.

52. *Id.* at 102, 342 P.2d at 797-98.

53. 45 CORNELL L.Q. 836 (1960); 39 TEXAS L. REV. 243 (1960). See also Comment, *Oregon's Statutory and Common-Law Efforts to Control Air Pollution: An Analysis and Comparison*, 50 ORE. L. REV. 85 (1970).

54. 221 Ore. at 98, 342 P.2d at 795-96.

55. See 1 F. HARPER & F. JAMES, TORTS 326 (1956); Note, *Torts—Remedy for Trespass Where No Injury Is Shown*, 39 KY. L.J. 99, 100 (1950).

56. 251 Ore. 239, 445 P.2d 481 (1968).

57. 233 Ore. 178, 376 P.2d 100 (1962).

on the theory that a nuisance could amount to a "taking" for which an injured landowner must be compensated under principles of inverse condemnation. This extended the inverse condemnation concept from cases involving taking by trespass⁵⁸ to taking by interference with the use and enjoyment of land. In a later reconsideration of the case the court held that, since the interference was substantial, it was error to instruct the jury to take into consideration the utility of the airport in determining the amount of damages to be awarded, because that sum should have been based solely upon the decrease in the fair market value of complainant's property.⁵⁹ Thus, in *Martin* the Oregon court surprisingly has suggested the appropriateness of a balancing process in trespass, but has refused to employ it in *Thornburg*, a nuisance suit, where such balancing is normally allowed.

The *Thornburg* case also illustrates the usefulness of the nuisance action in avoiding the defense of governmental immunity.⁶⁰ In some jurisdictions that still recognize this defense the nuisance approach may be used to counter a plea of municipal immunity in the performance of a governmental function, which might have been interposed if the action had been brought on a negligence theory.⁶¹ In the 1961 South Dakota case of *Greer v. Lennox*,⁶² for example, the court found that a city dump, operated so negligently as to breed large numbers of rats which overran the plaintiff's farm, was "a private nuisance, unprotected by governmental immunity."⁶³ This characterization of the nuisance as "private" rather than public also served to avoid the defense that governmental authorization of the dump excluded it from the category of a public nuisance. Other jurisdictions, however, have recognized the defense of governmental immunity in nuisance actions arising out of negligence.⁶⁴

58. *Griggs v. Allegheny County*, 369 U.S. 84 (1962). *Contra*, *United States v. Causby*, 328 U.S. 256 (1946); *Batten v. United States*, 292 F.2d 144 (10th Cir. 1961).

59. 244 Ore. at 74, 415 P.2d at 753; see 8 NATURAL RESOURCES J. 561 (1968).

60. For a current survey of the status of governmental immunity in all 50 states, with emphasis on changes since 1965, see 19 DEFENSE L.J. 607-32 (1970); Note, *Assault on the Citadel: De-Immunitizing Municipal Corporations*, 4 SUFFOLK U.L. REV. 832, 859 n.4 (1970). See also 18 E. MCQUILLEN, MUNICIPAL CORPORATIONS § 53.47 (3d ed. 1963); Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919.

61. E. MCQUILLEN, *supra* note 60; W. PROSSER, *supra* note 2, § 131.

62. 79 S.D. 28, 107 N.W.2d 337 (1971), noted in 7 S.D.L. REV. 174 (1962).

63. *Id.* at 32, 107 N.W.2d at 339.

64. *Sheeler v. Waterbury*, 138 Conn. 111, 82 A.2d 359 (1951); *Karnasiewicz v. New Britain*, 131 Conn. 691, 42 A.2d 32 (1945); see Wilbourne, *Municipal Nuisance Liability: A Problem in Characterization*, 38 CONN. B.J. 51 (1964).

Another problem that has faced those seeking to protect the environment has been the difficulty of satisfying the plaintiff's burden of proof. This frequently involves complicated scientific analysis of information in the control of the defendant polluter. A few courts have recognized this obstacle and are seeking to aid the plaintiff. In the 1963 case of *Renken v. Harvey Aluminum (Inc.)*,⁶⁵ a federal district court sitting in Oregon took the position that once the plaintiff proved damages, the burden of going forward with the evidence shifted to the defendant polluter, requiring a showing that the injury was either unavoidable or so prohibitively expensive to avoid that alleviating it would deprive the defendant of the use of its property.⁶⁶ The Supreme Court of New Jersey adopted a similar rule in a 1966 case involving condemnation of a right of way through a wildlife preserve.⁶⁷ These cases may reflect the beginning of a trend toward placing the burden on the knowledgeable party to come forward with technical evidence.

The issue of punitive damages against a polluter was considered in another significant case, *McElwain v. Georgia-Pacific Corp.*,⁶⁸ in which the Supreme Court of Oregon again broke new ground, approving an award of punitive damages after finding that the defendant intentionally emitted fumes from its paper mill that damaged the plaintiff's property.⁶⁹

An important development on another front is the recent definition of public nuisance by the American Law Institute (ALI) in section 821B of the *Restatement (Second) of Torts*. Although many of the older cases supported a proposed definition that would have restricted the public nuisance action to a "criminal" interference with a common right, Dean John W. Wade, in his capacity as the newly appointed Reporter, decided to substitute the adjective "unreasonable" to avoid unduly restricting the development of environmental law.⁷⁰ This substitution and Dean Wade's proposal for an addition to section 821C that would allow citizens to maintain proceedings to enjoin or abate a public nuisance if they had standing to sue as representatives of the general

65. 226 F. Supp. 169 (D. Ore. 1963).

66. *Id.* at 174.

67. *Texas E. Transmission Corp. v. Wildlife Preserves, Inc.*, 48 N.J. 261, 225 A.2d 130 (1966). On remand, however, *Texas Transmission* apparently met the burden imposed upon it, and the court upheld a finding in its favor. 49 N.J. 403, 230 A.2d 505 (1967).

68. 245 Ore. 247, 421 P.2d 957 (1966).

69. In *Davis v. Georgia Pacific Corp.*, 251 Ore. 239, 245, 44 P.2d 481, 484 (1968), however, the same Oregon court set aside an award of punitive damages because the trial court had failed to apprise the jury "of the utility of defendant's operations and its efforts, as compared with others similarly engaged, to prevent damage to surrounding properties."

70. RESTATEMENT (SECOND) OF TORTS, Explanatory Note § 821B, at 11 (Tent. Draft No. 17, 1971).

public or in citizens' actions,⁷¹ were both adopted by the ALI at its 1971 meeting. These developments should broaden the scope of the public nuisance action and also encourage courts and legislatures to expand standing to sue in such suits.

Another development in recent years has been increasing reexamination of the balance of convenience doctrine. In the *Renken* case,⁷² the federal court refused to withhold injunctive relief against the emission of fluoride gas from a 40,000,000 dollar aluminum plant with a gross annual payroll of 3,500,000 dollars even though the damage to any single orchard was substantially less than 10,000 dollars. The court conditioned continuation of operations upon the installation of expensive precipitators within a period of one year. Similarly, in *Department of Health v. Passaic Valley Sewerage Commission*,⁷³ a New Jersey court ordered the Commission to cease polluting the waters of Upper New York Bay, despite the high cost of purification devices. It is also significant to note that in both of these cases the courts held that the existence of antipollution statutes did not preempt injunctive relief under preexisting common-law remedies.⁷⁴ This treatment of statutory controls as an adjunct to and not a replacement of common-law remedies should provide further encouragement to environmentalists.

In the 1966 case of *Urie v. Franconia Paper Corp.*,⁷⁵ the Supreme Court of New Hampshire reinforced the nuisance remedy by holding that a statute allowing a polluter ten years to meet a statutory stream pollution standard did not bar equitable relief on the theory of private nuisance. The court further stated in dictum that legislation permitting the continuation of a private nuisance would be an attempt to sanction an unconstitutional taking of private property for a nonpublic purpose, and that an order requiring immediate cessation of all pollution might be entered if no other means of abating the private nuisance was available.⁷⁶ The case seems soundly decided since legislative pollution standards, like the legislative prohibitions used to set the standard of care in negligence actions, set only minimum requirements, and when more

71. RESTATEMENT (SECOND) OF TORTS § 821C, comment on subsection (2) at 18-19 (Tent. Draft No. 17, 1971).

72. *Renken v. Harvey Aluminum (Inc.)*, 226 F. Supp. 169 (D. Ore. 1963).

73. 100 N.J. Super. 540, 242 A.2d 675 (1968), *aff'd per curiam*, 105 N.J. Super. 565, 253 A.2d 577, *cert. denied*, 54 N.J. 561, 258 A.2d 13 (1969).

74. *Renken v. Harvey Aluminum (Inc.)*, 226 F. Supp. 169, 175 (D. Ore. 1963); *Department of Health v. Passaic Sewerage Comm'n*, 100 N.J. Super. 540, 546-48, 242 A.2d 675, 679-80 (1968).

75. 107 N.H. 131, 218 A.2d 360 (1966).

76. *Id.* at 134-35, 218 A.2d at 362-63.

care is required to meet the common-law standard, failure to exercise it quite properly results in liability.⁷⁷ Moreover, the result is a heartening one for environmentalists who have tired of "waiting for Washington"⁷⁸ or state antipollution agencies to provide satisfactory relief.

Although the previously discussed cases and the action by the ALI are encouraging from the standpoint of environmental protection, not all courts have adopted an enlightened approach. In *Crowther v. Seaborg*,⁷⁹ for example, the Court of Appeals for the Tenth Circuit recently refused to lighten the plaintiff's burden of proving irreparable damages from a proposed underground nuclear blast, which was designed to increase natural gas production. Moreover, when the complainants sought to prevent flaring of the gas contained within the cavity created by the permitted nuclear detonation, the federal district court again denied an injunction, testing the AEC action only by the requirement that it must not be "arbitrary, capricious, [or] an abuse of discretion."⁸⁰ This required the complainants to meet the extremely difficult burden of establishing that the AEC radiation protection standards were "not reasonably adequate to protect life, health and safety."⁸¹ Although the burden-shifting approach of the *Renken* case seems better calculated to protect the public health and safety when the information necessary to set standards is highly technical and peculiarly within the knowledge and expertise of the responsible agency, it is contrary to the normal presumption of regularity in agency action.⁸²

Another regressive opinion is found in a recent air pollution case, *Boomer v. Atlantic Cement Co.*,⁸³ in which the New York Court of Appeals balanced the equities in favor of a polluter with a 45,000,000 dollar investment and a large payroll. Employing a conditional injunction, the court licensed the pollution in perpetuity by authorizing pay-

77. See, e.g., *Mitchell v. Hotel Berry Co.*, 34 Ohio App. 259, 171 N.E. 39 (1929) (compliance with statutory requirements for hotel exits did not foreclose possibility of common-law negligence in providing inadequate exits); *Curtis v. Perry*, 171 Wash. 542, 18 P.2d 840 (1933) (motorist giving statutorily required hand signal did not necessarily exercise reasonable care).

78. E.g., Esposito, *Air and Water Pollution: What To Do While Waiting For Washington*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 32 (1970).

79. 415 F.2d 437 (10th Cir. 1969).

80. *Crowther v. Seaborg*, 312 F. Supp. 1205, 1220 (D. Colo. 1970).

81. *Id.* at 1235. A total of 500 to 1,000,000 standard cubic feet of gas was scheduled to be released into the atmosphere in the flaring program over a period of 9 to 12 months. *Id.* at 1222-23. Plaintiffs alleged that the safety standards set by the AEC and its plans for protecting the public from radiation hazards during the flaring were inadequate.

82. 4 K. DAVIS, ADMINISTRATIVE LAW § 30.10 (1958).

83. 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

ment of damages for future injury as an alternative to injunctive relief. As Judge Jason pointed out in a well-reasoned dissent, the majority was, in effect, wrongfully employing the doctrine of inverse condemnation,⁸⁴ which previously had been used only in behalf of such entities as the elevated railroads, whose operations were sufficiently in the public interest to justify direct condemnation proceedings.⁸⁵ In *Boomer*, however, the doctrine was applied to an activity operated primarily for private gain that could not have employed direct condemnation proceedings. The court also rejected the better-reasoned precedent in *Whalen v. Union Bag & Paper Co.*,⁸⁶ in which the proportionate damage to each of the parties was considered and an injunction granted to a plaintiff with substantial injuries even though dollar-wise they were infinitely smaller than the investment of the defendant. In protecting the defendant, the *Boomer* court emphasized economic disparity rather than the true equities of the case. While it is true, as emphasized by the majority, that the air pollution problem before the court was an industry-wide phenomenon, failure to impose even future sanctions on the defendant because of lack of a presently effective emission control system seems to sell out the right of the public to clean air much too cheaply. As Judge Jason so cogently stated, it eliminates "the incentive to alleviate the wrong."⁸⁷

Unfortunately, although the *Boomer* case has provoked a great deal of critical commentary,⁸⁸ it does not stand alone. In 1967 the Supreme

84. *Id.* at 230, 257 N.E.2d at 876, 309 N.Y.S.2d at 321.

85. *Pappenheim v. Metropolitan Elevated Ry.*, 128 N.Y. 436 (1891).

86. 208 N.Y. 1, 191 N.E. 805 (1913), *modifying* 145 App. Div. 1, 129 N.Y.S. 391 (1911); see text accompanying note 23 *supra*.

87. 26 N.Y.2d at 230, 257 N.E.2d at 876, 309 N.Y.S.2d at 321. For a telling criticism of the case on this basis see Note, *The Role of the Courts in Technology Assessment*, 55 CORNELL L. REV. 861, 873-75 (1970). It is, of course, true that the elimination of pollution, while usually possible, may be so expensive that other societal interests must be weighed before forcing immediate action. One estimate places the annual cost of adequate controls on air and water pollution in the United States at over \$5,000,000,000 in capital investments and approximately \$8,000,000,000 in operating costs. NEWSWEEK, Jan. 26, 1970, at 72. Is it necessary that this price be paid if we want clean air and water? The Attorney General of Michigan has estimated that a much lesser sum spent on research eventually could reduce costs by half, at which point society might be able to bear the price. Interview with Frank J. Kelley, Attorney General of Michigan, at Indiana University Indianapolis Law School, Oct. 16, 1970. A judicial tightening of the anti-pollution remedies might help encourage that research.

88. *E.g.*, Note, *Nuisance—Air Pollution—Permanent Damages Awarded in Lieu of Injunction*, 39 FORDHAM L. REV. 338 (1970); Note, *Individual's Rights to Injunction in a Private Nuisance Suit*, 19 KAN. L. REV. 549 (1971); Note, *Environmental Law—Nuisance—Injunctive Relief Denied in Private Action for Nuisance Caused by Industrial Pollution*, 45 N.Y.U.L. REV. 919 (1970); Note, *Comparative Injury Doctrine of Nuisance*, 49 N.C.L. REV. 402 (1971); Note, *No Injunctive Relief in New York Against a Private Nuisance When Defendant's Comparative Financial Hardship Outweighs the Injury to Complainant*, 21 SYRACUSE L. REV. 1243 (1970); 16 N.Y.L.F. 666 (1970).

Court of Iowa adopted a similar approach in *Bates v. Quality Ready-Mix Co.*,⁸⁹ by awarding a continuing payment so long as the pollution continued. This remedy is slightly better than that in *Boomer*, because it leaves some incentive to continue research on pollution control devices. Unless such payments are really substantial, however, they will do little to encourage investment in research looking toward technological improvements.

In a number of other recent cases, courts have employed the so-called "state of the art" test to refuse injunctive relief if the polluting industries were using the most modern antipollution control methods available.⁹⁰ Moreover, an Iowa case seems to say that an individual can surrender his right to pure air simply by electing to live in a city that has air pollution.⁹¹ These cases have removed all incentives for antipollution research and, hopefully, are on the wane.

Recent cases involving damage claims for personal injuries also demonstrate a more liberal attitude toward the use of common-law remedies. Such suits, of necessity, will not have as substantial an effect in bringing about pollution abatement as injunctive relief, but a more favorable judicial attitude toward injured plaintiffs will tend to encourage more care on the part of potential violators. In the negligence area, the 1958 case of *Greyhound Corp. v. Blakely*⁹² is a step in the right direction. In that case the Ninth Circuit liberally applied the doctrine of *res ipsa loquitur* to permit recovery by a plaintiff who suffered carbon monoxide poisoning while riding on defendant's bus. Refusing to require the plaintiff to establish the amount of carbon monoxide in the bus, the court found that the instrumentality causing the injury was the bus, which was clearly under the exclusive control of the defendant, rather than the carbon monoxide, which arguably was not. The court said, "Defendant was the only one who could explain the cause of the presence of the carbon monoxide in the bus,"⁹³ and, in effect, shifted to the defendant the burden of proving that it was not negligent. This use of *res ipsa loquitur*⁹⁴ is in refreshing contrast to the excessive burden placed on the plaintiff when an agency is being sued.

89. 261 Iowa 696, 154 N.W.2d 852 (1967).

90. E.g., *Koseris v. J.R. Simplot Co.*, 83 Idaho 263, 352 P.2d 235 (1960); *People v. Peterson*, 31 Misc. 2d 738, 226 N.Y.S.2d 1004 (Erie County Ct. 1961).

91. *Riter v. Keokuk Electro-Metals Co.*, 248 Iowa 710, 82 N.W.2d 151 (1957).

92. 262 F.2d 401 (9th Cir. 1958), noted in 7 CURRENT ED. 24 (Feb. 1960).

93. 262 F.2d at 408-09.

94. *Accord*, *Reynolds Metals Co. v. Yturbide*, 258 F.2d 321 (9th Cir. 1958).

Finally, the strict liability doctrine recently has begun to provide another avenue for recovering damages without proof of fault on the part of a polluter.⁹⁵ The traditional requirement that the activity not only be hazardous but also unusual or not well suited to the area,⁹⁶ along with the earlier reluctance of American courts to adopt the doctrine,⁹⁷ has made recovery on this theory infrequent in the past. Today, however, the strict liability theory is becoming another tool for environmental protection against harm resulting from improper use of pesticides⁹⁸ and other dangerous chemicals.⁹⁹ As nuclear reactors become more common, strict liability may provide a means of avoiding the otherwise difficult burden of proving negligence or fault in their operation.¹⁰⁰

IV. CONCLUSION

Common-law remedies administered by the judiciary have long provided a potential for pollution control. In the past, however, courts reflecting the popular mood at the time, were in general unwilling to use them. This reluctance usually led to a judicial balancing of the equities that favored industrial polluters. A new public awareness of the dangers involved in pollution has now led to a different order of priorities that is contrary to these judicial precedents. Does this mean that the judiciary has forfeited its opportunity for leadership in the present-day movement for a clean environment?

There are those who believe that court-developed remedies, designed for a simpler age, cannot cope with our present-day problems.¹⁰¹ Some think the ultimate answer to the ecology crisis is governmental regulation of resource allocation and development.¹⁰² Still others suggest that the best hope for pollution control lies in efficient enforcement of a statutory program.¹⁰³ On the other hand, some commentators so distrust

95. *Luthringer v. Moore*, 31 Cal. 2d 489, 190 P.2d 1 (1948) (fumigating with cyanide gas).

96. W. PROSSER, *supra* note 2, § 78. The use of chlorine gas in an industrial plant was found not to be unusual or extraordinary in *Fritz v. E.I. DuPont De Nemours & Co.*, 45 Del. 427, 75 A.2d 256 (1950).

97. See note 37 *supra* and accompanying text.

98. *Chapman Chem. Co. v. Taylor*, 215 Ark. 630, 222 S.W.2d 820 (1949); *Loe v. Lenhardt*, 227 Ore. 242, 362 P.2d 312 (1961).

99. *Luthringer v. Moore*, 31 Cal. 2d 489, 190 P.2d 1 (1948) (cyanide gas).

100. W. PROSSER, *supra* note 2, § 78. When cases involving nuclear energy reach the courts, the author predicts that no court will refuse to recognize and apply the principle of strict liability.

101. Reitze, *Wastes, Water and Wishful Thinking: The Battle of Lake Erie*, 20 CASE W. RES. L. REV. 5, 65 (1968).

102. Juergensmeyer, *supra* note 12, at 236.

103. Comment, *supra* note 53, at 96.

the ability of administrative agencies to represent the public interest in pollution control that they have overemphasized the role of private litigation.¹⁰⁴ One proposal, for example, urges legislative action aimed at by-passing the administrative process so that citizen complaints may be taken directly to the courts.¹⁰⁵

As is so often the case when there is a great divergence of opinion, the best approach may involve a blend of several ideas. In relation to the agencies charged with environmental protection, the judiciary occupies a distinctly secondary position. While the standing of individual citizens and citizens' groups to bring suit has been expanded greatly in recent years,¹⁰⁶ the ability to get into court does not in itself solve the underlying environmental problems.¹⁰⁷ Moreover, the difficult burden of proof on complainants,¹⁰⁸ together with the rule that requires affirmance of agency action if it is supported by substantial evidence in the record,¹⁰⁹ means that judicial review often provides only limited protection.¹¹⁰ This will continue to be true, despite legislation such as the National Environmental Policy Act¹¹¹ that requires federal agencies to consider the environmental impact of their actions before work is commenced rather than

104. Esposito, *supra* note 78, at 52. See also J. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION 115 (1970).

105. Such legislation, drafted by Professor Sax, was enacted in Michigan in 1970. MICH. STAT. ANN. § 14.528(202) (Supp. 1971). It has since been introduced in a number of other state legislatures, as well as in the United States Congress.

106. *E.g.*, Environmental Defense Fund v. HEW, 428 F.2d 1083 (D.C. Cir. 1970); Citizens Comm. for the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970), *aff'g* 302 F. Supp. 1083 (S.D.N.Y. 1969); Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 944 (1966); Sierra Club v. Hardin, 325 F. Supp. 99 (D. Alas. 1971); Crowther v. Seaborg, 312 F. Supp. 1205 (D. Colo. 1970); Road Review League v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967); Clean Air Amendments of 1970, 84 Stat. 1676 (codified in scattered sections of 42, 49, 50 U.S.C.). *But see* Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970).

107. For example, in 1965 environmentalists won what seemed to be a resounding victory in Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), when the Second Circuit held that they had standing to question the Commission's licensing of the Storm King pump-storage project. In 1970, however, the Commission again approved the project after taking a much closer look at available alternatives. See O. GRAY, CASES AND MATERIALS ON ENVIRONMENTAL LAW S-75 (Supp. 1971).

108. See Krier, *Environmental Litigation and the Burden of Proof*, in LAW AND THE ENVIRONMENT 105 (M. Baldwin & J. Page eds. 1970).

109. *E.g.*, Crowther v. Seaborg, 312 F. Supp. 1205 (D. Colo. 1970).

110. Reitze, *Private Remedies for Environmental Wrongs*, 5 SUFFOLK U.L. REV. 779, 790-98 (1971). For a statement of the values of judicial review of agency action see Comment, *The Role of the Judiciary in the Confrontation with the Problems of Environmental Quality*, 17 U.C.L.A.L. REV. 1070 (1970).

111. 42 U.S.C. §§ 4321, 4331-35, 4342-47 (1970).

only after the damage is done.¹¹² The fact that an agency's enforcement procedure may be drawn out over a period of several years, however, may lead to the use of agency standards as a basis for other sanctions, such as the common-law negligence action. Violation of a state or federal pollution control standard may constitute negligence per se or at least evidence of negligence,¹¹³ and in a proper case it also may be used to establish the maintenance of a public¹¹⁴ or private¹¹⁵ nuisance.

This brings us to the question of the environmental protection value of the common-law remedies. These remedies provide the only means by which injured individuals may recover damages, and in this regard they supplement agency enforcement procedures. Moreover, the Oregon cases,¹¹⁶ by opening the door for recovery of punitive damages, may serve as a further deterrent to pollution.

Of the common-law actions available, the nuisance action has been the most useful. The private nuisance suit may provide a means of suing a governmental entity that would be immune to other types of action.¹¹⁷ In most cases, however, the public nuisance action is more desirable because the collective detriment to the entire community affected must be considered and may make it less likely that the equities will be balanced in favor of the polluter.¹¹⁸ The public nuisance action has other possible advantages as well. For example, it may avoid the defense of prescription, since a polluter cannot gain a prescriptive right against the public.

Other common-law actions, including trespass, negligence, and strict liability are being allowed by sympathetic courts in some cases. While this approach has not yet been adopted by the majority of American courts, it may reflect the judiciary's willingness to lend its aid to environmental protection in appropriate cases. Furthermore, emphasis on the factor of danger to public health is beginning to tip the scales in

112. See *Calvert Cliff's Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971); *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970).

113. See W. PROSSER, *supra* note 2, § 36; cf. Rheingold, *Civil Cause of Action for Lung Damage Due to Pollution of Urban Atmosphere*, 33 BROOKLYN L. REV. 17 (1966).

114. Cf. *Department of Health v. Galazy Chem. Co.*, 1 *Envir. Rep. Cas.* 1660 (Md. Cir. Ct. 1970).

115. See Miller & Borchers, *Private Lawsuits and Air Pollution Control*, 56 A.B.A.J. 465 (1970).

116. *Davis v. Georgia-Pacific Corp.*, 251 Ore. 239, 445 P.2d 481 (1968); *McElwain v. Georgia-Pacific Corp.*, 245 Ore. 247, 421 P.2d 957 (1966).

117. See text accompanying notes 60-64 *supra*.

118. Reitze, *supra* note 110, at 805. See also *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 238 (1907) (indicates reluctance to apply a balancing concept when the interests of an adjoining state are involved).

favor of injunctive relief when balanced against economic interests.¹¹⁹ Although courts once considered only the interests of the immediate parties to the suit, they are now beginning to respond to the societal as well as the private issues involved.¹²⁰

Hopefully, the preceding materials have demonstrated that there is still an important role for the judiciary to play in protecting the environment. In any particular case the problem eventually comes down to selection of the best remedy. If an existing administrative agency has adequate legal tools, sufficient financing, and a willingness to do the job, the best remedy clearly may be an appeal to the agency.¹²¹ But if the agency is not obtaining results, the common-law remedies administered by a sympathetic judiciary may provide more adequate and timely relief. A complainant should not be discouraged by allegations of compliance with administrative pollution standards, since such standards usually are held only to set minimum requirements, and a court can require more of the polluter if it is reasonable to do so.¹²² In any event, it seems safe to say that until we reach the millenium, the common-law remedies will continue to play an important part in environmental protection.

119. See, e.g., *Department of Health v. Owens-Corning Fiberglas Corp.*, 100 N.J. Super. 366, 242 A.2d 21 (1968).

120. For an excellent discussion of this trend see Juergensmeyer, *supra* note 12, at 230-33.

121. For example, the thorough revision of the Tennessee water pollution laws, which resulted in the Tennessee Water Quality Control Act of 1971, TENN. CODE ANN. §§ 70-324 to -342 (Supp. 1971), has provided the necessary tools for prompt and adequate agency action.

122. W. PROSSER, *supra* note 2, § 36. Indeed, even a legislative waiver of the standards may not protect the polluter against a common-law action. See text accompanying notes 75-76 *supra*.

