CIVIL LITIGATION AND ENVIRONMENT DAMAGE: LITIGATING CASES WITH OLD AND NEW CAUSES OF ACTION IN THE 1990's

Raymond G. Colautti
PAROIAN, RAPHAEL, COUREY, COHEN & HOUSTON
Windsor, Ontario .

Contrary to conventional wisdom, environmentally related litigation is not new. What is new is the growing willingness on the part of the public to resort to the courts to enforce them.

In the past, the enthusiasm to use civil litigation to enforce environmental causes of action has been dampened by the prohibitive cost of litigation, the risk of exposure to costs, and the relatively modest scale of compensation.

However, recent changes to the Environmental Protection Act, and proposed legislation such as the Class Proceedings Act, the move towards allowing contingency fees, and the proposed Environmental Bill of Rights, together with the increasing trend to pierce corporate veils is leading to ever increasing reliance on the courts to adjudicate actions respecting the recover of damages resulting from environmental contamination.

The purpose of this paper is to explore, in the context of private litigation different causes of action of liability for environmental contamination. I will survey of recent case law, and explore traditional causes of action in order to illustrate how they are currently being used to impose liability for environmental contamination. I will then speculate on how these causes of action will continue to have utility in the future. An examination of these causes of action is of assistance in determining how recent legislation, such as Part IX of the Environmental Protection Act will be utilized by litigants in the 1990's.

After exploring how plaintiffs may utilize causes of action in environmental litigation, we will take a look at whether defendants will be able to resort to the use of their insurance policies in the face of evermore common pollution exclusions.

Finally, we will have a brief look at some methods which may be utilized in the gathering of evidence in an environmental case.

CAUSES OF ACTION

A survey of recent cases reveals that plaintiffs have utilized the following common law causes of action in environmentally related lawsuits:

1. Nuisance
2. Negligence
3. Trespass
4. Deceit or Fraudulent Misrepresentation.

Under the general head of Negligence, the most interesting development has been a recent tendency to hold governmental regulatory authorities who have some duties or responsibilities arising from environmental legislation, contributory negligent where in certain cases what it has been shown they failed in enforcing or responding to the statutory duties imposed upon them.

COMMON LAW NUISANCE

GENERAL PRINCIPLES AND FOCUS

The principles of nuisance, though ancient, is uniquely suited, to supporting claims by plaintiffs for environmental contamination. As a tort, it was designed to repel the invasion of an occupier's interest in the beneficial use and enjoyment of his or her land. Nuisance has always been primarily concerned with adjusting conflicts arising from competing uses of land between neighbours.

It is important, from the outset, to keep clear the distinction between nuisance and negligence. They are fundamentally different in scope and effect. Professor J.P.S. McLaren in an annotation to the case of **Royal Anne Hotel Co. Ltd. v. Corporation of the Village of Ashcroft** 1 C.C.L.T. 299 at 300 discusses the difference. He points out that the law of negligence, with its focus on standard of care, reasonable foreseeability, and the neighbour concept, is focussed on the

conduct of the defendant. Nuisance on the other hand, is concerned with the impact of the defendant's activities on the plaintiff's interest:

> *"... It is the impact of the defendant's activity on the plaintiff's interest which is the focus of attention and not the nature of the defendant's conduct. The interference must be unreasonable in the sense that the plaintiff should not be required to suffer it, not that the defendant failed to take appropriate care. By the same token, if the level of interference is unreasonable, it is irrelevant that the defendant was taking all possible care. Furthermore, it makes no difference that in his mind he was making reasonable use of his land, or that his operation was beneficial to the community.* ***The plaintiff satisfies the substantive requirement of the tort if he can point to tangible damage resulting from the defendant's activity or a significant degree of discomfort or inconvenience.***"

In Ontario, several decisions of McRuer, C.J.H.C. in **Walker v. McKinnon Industries Ltd.** [1949] O.R. 549 aff'd. [1950] O.W.N. 309 and **Russell Transport Ltd. v. Ontario Malleable Iron Co.** [1952] O.R. 621 are leading cases on the law of nuisance.

The **McKinnon** case actually went to the Privy Council (see [1951] 3 D.L.4. 577). It can be considered to be the quintessential forerunner of the environmental contamination case. The plaintiff grew flowers for sale. He complained of damage caused by fumes and sulphur dioxide gas emitted from the defendant's factory. The court held the defendant liable to nuisance and awarded a permanent injunction as well as damages, because the evidence supported a finding that it was possible for the defendants to prevent the discharge of the obnoxious fumes on the plaintiff's property. The court suspended the operation of the injunction for a specified period in order to allow the defendant to install abatement procedures.

The gist of the tort can thus be summarized in the following principles (see generally Fleming, Law of Torts, 6th ed., chapter 18 :

1. Annoyance or discomfort caused by the activities of the defendant must be substantial and unreasonable. A balance must be struck between competing claims of land owners. The Court must decide whether, in all of the circumstances, the defendant was making a reasonable user of his property. The plaintiff can only suceed where the defendant makes an excessive use of his

property thereby causing inconvenience beyond what his or her other neighbours in the vicinity can be expected to bear having regard to the prevailing standard of comfort existing in the subject locality. As Fleming suggests, the question is, is the defendant using his or her property reasonably, having regard to the fact that he is a neighbour.

2. Some consideration will be given to the utility of the defendant's conduct. In other words, it is a factor for the court to consider, in deciding whether the defendant is making a reasonable use of its lands, as to whether that offensive enterprise is essential and unavoidable in a particular locality. Courts have, however, tended to downplay this consideration considerably, and it is, in my view, not in and of itself determinative.

3. The gravity of the harm imposed upon the plaintiff must be sufficiently severe to warrant the intervention of the court. As Fleming expresses it:

> *"In order to be an actual nuisance, there must be an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant and dainty habits of living, but according to plain and sober notions ..."*

The character of the neighbourhood will often have an important bearing on this principle. Fleming once again succinctly describes this consideration at page 349:

> *"The character of the neighbourhood has an important bearing on the standard of comfort to which the plaintiff is entitled. Certain districts, by reason of random growth or conscious planning have come to be devoted to industrial, others to residential or agricultural purposes. The more exclusively the area is given to one type of enterprise, the more likely that a different activity is unsuited to it ... A man who makes his home in an industrial area, which is inevitably noisy and smoke producing cannot expect the same standards of immunity from pollution as a person living in a residential district, although he must not be subjected to an unreasonable increase in the amount of discomfort."*

A recent case in which I was involved, demonstrates the interplay of all of these principles. In **340909 Ontario Limited v. Huron Steel Products** (1990), 73 O.R. (2d) 641, the plaintiff constructed its apartment building a short distance from the defendant's factory, which had been in existence for well over 50 years.

The factory had, through at least 40 years continuously, been engaged in stamping of parts from coiled steel utilizing heavy presses. The stamping had, through the course of the existence of the defendant's factory, produced noise and vibrations. However, in 1980, the defendant installed a new press which the court, in a finding of fact, ultimately decided materially increased the amount of noise and vibration over that which previously existed. The interesting factor in this case was that the immediately locality of the defendant's factory and the plaintiff's apartment building was of mixed use. Heavy industrial use existed virtually side by side and was interspersed with residential uses. Notwithstanding this fact, the court held that the increase in the noise caused by the installation of the new press was a nuisance and materially interfered with the plaintiff's use of its property and led to a diminution in the rental incomes the plaintiff received.

NO NECESSITY TO SHOW NEGLIGENCE

Once again, it is important that negligence is not a consideration when determining if a defendant is liable in nuisance: see **Portage La Prairie v. B.C.P. Growers Ltd.** [1966] S.C.R. 150, 54 D.L.R. (2d) 503 (S.C.C.). The standard employed in determining whether a defendant's activity is an unreasonable interference is an objective one.

HYPERSENSITIVITY

The defendant need only govern his conduct with reference to normal persons in the locality and not with respect to the idiosyncrasies of any particular plaintiff: see Linden, **Canadian Tort Law,** 3d, at 545. This principle is graphically demonstrated in the case of **Devon Lumber Co. Limited v. McNeil** (1987), 42 C.L.L.T. 192 (N.B.C.A.). This case stands for the proposition that even a possessory title or right on the part of the plaintiff will constitute an interest in land sufficient to ground an action in nuisance. However, the case is important because it demonstrates that a plaintiff cannot, however, recover damages for hypersensitivity. Consequently, where the plaintiff's wife and children suffered from an allergic reaction to a fine cedar dust produced by the defendant's nearby mill which had invaded the plaintiff's home, the plaintiff could not recover damages referable to their pre-existing allergic condition. The rationale for this proposition was that no action for nuisance could lie for harm or a person of normal sensibilities would have sustained no negative harm at all.

DEFENCE OF CONSENT TO CONTINUATION OF NUISANCE

If a plaintiff consents to the establishment of the activity which gives rise to the complaint of nuisance, he will, logically, be deprived of his right to complain at a later date. Thus, in **Pattison v. Prince Edward Region Conservation Authority** (1988), 3 C.E.L.R. (N.S.) 212 (Ont. C.A.), 30 C.C.L.T. 305 (Ont. H.C.) where the plaintiff had consented in writing to the construction of a dam which eventually caused severe flooding of his lands, the plaintiff could not succeed in an action for nuisance. The plaintiff, by his conduct, had encouraged the defendant Authority to build a dam and acquiesced in the consequences of the dam's design and construction.

PERSONAL LIABILITY.

Where a defendant corporation creates a nuisance, the controlled mind behind the corporation may also be found to be personally liable for the establishment or maintenance of the nuisance. Thus, in **Sullivan et al v. Desrosiers** (1986), 40 C.C.L.T. (N.B.C.A.), the plaintiff complained of a substantial and continuing stench arising from a manure lagoon which had been constructed by a farmer to receive liquid manure from a barn. The complaints of the plaintiffs were that they were unable to enjoy their outdoor yards and verandas, they were unable to let their children play outside, they were unable to air and dry their laundry and they had to keep their windows closed, particularly in the summer time. They also complained of loss of sleep and generally complained of obtaining less enjoyment from their semi-rural property. The court found that the almost unanimous complaints established by witnesses called from the neighbourhood showed that the plaintiffs were not suffering from some abnormal sensitivity to normal rural smells. The defendant attempted to rely on certificates of compliance issued by governmental officials in the Departments of Health, Agriculture and Environment, all of which showed he had built his piggery in accordance with approved practices. The defendant was nevertheless held liable. The court noted that compliance with governmental objectives and regulations, could not give the defendant a licence to create a nuisance. The defendant corporations were held liable, but more importantly the defendant farmer himself bore personal liability as the principal employee with responsibility of the day to day operations for the acts done, even though done on behalf of his company.

LOSS OF AESTHETICS.

Where a defendant's operations on its lands creates a circumstance where there is an "eyesore", is this sufficient to constitute nuisance? In **Muirhead v. Timbers Brothers Sand and Gravel Limited** (1977), 3 C.C.L.T. 1 (Ont. H.C.), the plaintiff complained of the operations of certain gravel pits located immediately adjacent to their lands. The plaintiff claimed for an injunction and damages arising from nuisances allegedly created by the defendant's operations. The court held the plaintiff had no right to complain that the gravel pit sites were unaesthetic because a person is under no duty to preserve the appearance of his lands for the benefit of his neighbours. The operation of one of the defendants did, however, constitute actionable nuisance as the noise from a crusher machine operated in close proximity to the plaintiff's land in contravention of municipal by-law was an unreasonable interference sufficient to amount to a nuisance.

PHYSICAL DAMAGE TO PROPERTY

Perhaps the most significant case in the law of nuisance to arise in the last 10 years has been the well known case **Schenck et al v. The Queen** (1981), 34 O.R. (2d) 595, aff'd. 15 D.L.R. (4th) 320, aff'd. 50 D.L.R. (4th) 384 (S.C.C.). This case is certainly destined to become a leading authority on nuisance law. In my view, it is a forerunner of the future "toxic tort" type of case which will undoubtedly arise when it is discovered that substances, previously widely used in society, have harmful side effects on the environment and on personal health and safety. The significance of the Schenck case is that even though the plaintiffs did not succeed in applying strict liability under the principle of **Rylands v. Fletcher** and further failed to show that the defendants were negligent in applying salt as a de-icing agent on provincial highways, they were still successful in establishing that the application of salt on highways immediately adjacent to their orchards which have the effect of damaging fruit trees, did constitute nuisance. A key feature of the case was that the plaintiff's land, that is his fruit trees, suffered substantial **physical** harm. The case is also an interesting example of how a common and widely accepted practice that is using salt for de-icing can, under the tort of nuisance, still constitute a cause of action.

Both the Court of Appeal accepted and adopted the reasons of the trial judge. Robbins, J. found that the claim of negligence failed because the plaintiff did not prove that the defendant had used excessive quantities of salt, or that the

use of salt itself rather than some other alternative de-icing agent, was negligent, or that abatement measures could have solved the problem. **Rylands v. Fletcher**'s strict liability doctrine did not apply because the use of salt was not "abnormal or non-natural" and the activity was not inherently dangerous or extra-hazardous.

Because of the existence of physical harm to the plaintiff's property, the ordinary principle that the court must balance the substantial harm to the plaintiff against the social utility of safe and convenient highway travel, did not apply. The principle of "give and take" was inapplicable because the plaintiff's property had suffered substantial physical harm unique to them and other local fruit farmers. The balancing of interests is inappropriate where there is substantial physical harm.

The court found that the decision of the government to use salt in the de-icing of roads was not in and of itself an unreasonable one. The key point concerning the effect in law of physical property damage suffered by the plaintiff appears in the following passage at page 604:

> *"Applying the principles applicable to common law nuisances to a similar case as between adjoining private property owners, it is well established that protection would be afforded in nuisance to a property owner who suffers actual material injury of this kind by reason of an activity conducted on an adjoining property, regardless of the social utility of the defendant's conduct, the absence of negligence on his part or the inapplicability of the rule in Rylands v. Fletcher ...*
>
> *The same protection should be afforded as between the parties to the instant case. I do not agree that the plaintiff's property interest may be infringed with impunity. Giving full recognition to the importance of proper highway maintenance to the public at large, in my opinion the plaintiffs are entitled to vindication and damages against the continuing intrusion on their lands. The interference with use and enjoyment in the present circumstances is sufficiently peculiar, sufficiently direct and of sufficient magnitude to support an action for nuisance. On a balancing of conflicting interests appropriate to this department of the law, it would be unreasonable to compel these plaintiffs to continue to suffer this interference for an indeterminate time, as the government would have it, without compensation. In reality, their injury is the cost of highway maintenance and harm suffered by them is greater than they should be required to bear in the circumstances, at least without compensation. Fairness between the citizen and state demands that the burden imposed be borne by the public generally and not by the plaintiff fruit farmer alone."*

HEALTH RISKS AND NUISANCE

So much for physical damage to property. Would the tort of nuisance respond to the threat of physical injury to the health or safety of a plaintiff? It is clear beyond doubt that it would. As an example, I refer to **Palmer et al v. Nova Scotia Forest Industries** 26 C.C.L.T. 22. In this case, an aerial spraying program, allegedly exposing nearby land owners to exposure to TCDD, a dioxin. The trial judge made findings of fact, after a careful consideration of a lengthy record of evidence, that the risk arising from the proposed spraying program was infinitesimally small. It was therefore held that the court would not grant an injunction in view of the failure of the plaintiffs to prove the existence of a health risk or that they would be exposed to anything more than miniscule amounts of TCDD. In the circumstances, the court found that there was therefore no probability of a nuisance and no proven likelihood of a trespass and no basis for invoking strict liability under the principle of **Rylands v. Fletcher**, since neither the danger of the substance or the likelihood of its escape onto the plaintiff's land had been established in the evidence. However, running through the Nova Scotia Supreme Court decision is the clear proposition that if the dangers had been proven to the desired degree of probability, the result would have been different. Nunn, J. states this at page 126:

> *"In the present case, the allegation is that the offending chemicals, if they get to the plaintiff's land, will interfere with the health of the plaintiffs, thereby interfering with their enjoyment of their lands. Clearly such an inference if proved, would fall within the essence of nuisance. As a serious risk of health, if proved, there is no doubt that such an interference would be substantial. In other words, the grounds for the cause of action in nuisance exist here, provided that the plaintiffs prove that the defendants will actually cause it, ie that the chemicals will come to the plaintiff's lands and that they will actually create a risk to their health. ..."*

A strong factor in the court's decision was that the plaintiff was seeking a *quia timet* injunction. The plaintiff had the onus of proof of showing, by a sufficient degree of probability, that the feared injury would be substantial and would be continued repeated or committed at no remote period and that damages would not suffice.

REGULATORY STANDARDS AND NUISANCE.

Most environmental legislation such as the Environmental Protection Act and Regulations passed pursuant thereto, contain sections which regulate the emission of deleterious substances beyond certain prescribed levels. Where it is shown that the defendant has exceeded such level, and that the plaintiff is effected thereby, is that in and of itself sufficient to constitute a nuisance?

To answer this question, one must first observe that the Supreme Court of Canada in **Regina v. Saskatchewan Wheat Pool** (1983), 23 C.C.L.T. 121, 143 D.L.R. (3d) 9, held that the breach of such a statutory or regulatory provision is not in and of itself actionable as a nominate tort of statutory breach:

> *"For all of the above reasons I would be adverse to the recognition in Canada of a nominate tort of statutory breach. Breach of a statute, where it has an effect upon civil liability, should be considered in the context of the general law of negligence. Negligence and its common law duty of care have become pervasive enough to serve the purpose evoked or invoked for the existence of the action of the statutory breach.*
>
> *It must not be forgotten that the other elements of tortious responsibility equally apply to situations involving statutory breach, ie principles of causation and damages. To be relevant at all, the statutory breach must have caused the damage of which the plaintiff complains. Should this be so, the violation of the statute should be evidence of negligence on the part of the defendant."*

Mr. Justice Dickson propounded five principles in his judgement:

1. Civil consequences of breach of statute should be subsumed in the law of negligence.

2. The notion of statutory breach giving a right to recovery merely on proof of breach and damages should be rejected.

3. Proof of statutory breach, causative of damages, may be evidence of negligence.

4. The statutory formulation of the duty **may afford a specific, and useful, standard of reasonable conduct.**

The above quotation from Dickson, J.'s judgment is equally applicable, in my view, to the law of nuisance. I suggest that where there is a statutory regulatory provision restricting or regulating the emission of a contaminate beyond a prescribed level, where a defendant exceeds the prescribed or suggested level, the breach may be cogent and perhaps conclusive evidence of an

unreasonable user sufficient to ground an action for nuisance without proof of negligence on the part of the defendant. Several recent cases demonstrate this point.

In **Banfai et al v. Formula Fun Center Inc.** , (1984) 51 O.R. (2d) 361, the Plaintiffs were the owners of several motels which surrounded an automobile racing amusement ride on adjacent lands owned by the Defendant. The Plaintiffs and their customers complained of noise emanating from the amusement ride, which was operated by the Defendant's tenant. The court held that an owner of land who leases it knowing a tenant is going to use it for a purpose which may create a nuisance is liable for damages caused by the nuisance in those circumstances. In arriving at its conclusion that the noise generated by the racing car activity was unreasonable, the court accepted the evidence of a witness employed by the Ontario Ministry of the Environment. The court noted that the position of the Ministry of the Environment was that noise levels from a particular noise source, measured separately, must not exceed the ambient or neighbourhood noise level without the noise from a particular source. If the noise level from a particular source exceeds the neighbourhood noise level then according to the Ministry of the Environment the noise was unacceptable. The court noted that the noise levels created by the track exceeded the standard by 10 decibels on a number of occasions. The court utilized that evidence in arriving at its conclusion that the Defendant's interference was unreasonable.

In the **Huron Steel** case (supra), the Plaintiff relied on a series of noise level measurements which had been taken showing that the offending stamping press was producing noise level 5-10 decibels higher than a "model municipal noise control bylaw" propounded by the Ministry of the Environment. The model bylaw had not been adopted by the municipality where the press was located, and did not have the force of law, and neither was it a regulatory standard. However, the court did accept the standards proposed in the model municipal noise control bylaw as establishing a reasonable standard against which the offending activity could be measured to determine whether the activity was unreasonable.

The model municipal noise control bylaw was also applied to the same effect as evidence of a reasonable standard against which the Defendant's activity

could be measured in an unreported decision of O'Driscoll, J. in Konarnicky et al v. Warren Bithulithic Limited (unreported) July 14, 1980.

DAMAGES

What kind of damages are awarded where the Plaintiff shows that there has been a substantial interference with his or her use and enjoyment of their premises but the damage is intangible? The short answer is that as such damages although not sufficiently large to constitute a "gold mine" for the Plaintiffs, are not insignificant. An example is **Nippa v. C.H. Lewis,** an unreported case released May 16, 1991 (Ontario General Court) Flynn, J. [1991] O.J. no. 1140. This was an action brought by the Plaintiffs against the owner of an adjacent landfill. The Plaintiff had complained, over the course of 13 years, of the following matters:

a) Litter, blown by wind, being deposited on the Plaintiff's land. There was evidence the Plaintiff spent 20 minutes of each day picking up at least a garbage bag full of refuse from its property. This was shown graphically by video tape evidence.

b) Odor, especially on summer nights, arising from uncovered garbage. This made the Plaintiff's unable to enjoy the outside, especially in the evenings. They found they had to retreat inside and close their windows.

c) Noise, emanating from the operation of a landfill at all times of the day and night. There were irregular hours of operation.

d) Smoke and fire arising from deliberately set or spontaneous combustion of garbage in a landfill.

The Plaintiff showed all these problems with graphic video tape evidence. There was evidence that the Defendant had undergone an earlier appeal to the Environmental Appeal Board where it had been severely castigated by the Board for its sloppy practices in the operation of a landfill. The court awarded damages under the following headings:

1. For loss of income due to damage to the Plaintiff's crop. In this respect, the court was persuaded that there was a substantial loss but felt that the Plaintiff's evidence of quantum was speculative and unrealistic. The court therefore assessed the damages at best they could at $35,000.00 (the Plaintiff had claimed it had suffered a loss of $125,000.00).

2. The Plaintiff was awarded damages to compensate it for their labour in picking up litter every day for 13 years. The Plaintiff was awarded $3,500.00 for its labour and trouble.

3. General damages to compensate the Plaintiff for loss of use and enjoyment of their rural way of life for 13 years for many hours each year. The court assessed this damage at $20,000.00.

4. The court also awarded punitive damages against the Defendant as a result of the Defendant not learning its lesson in the earlier proceeding before the Environment Appeal Board and for not improving its practices as a result thereof. Punitive damages were assessed at $25,000.00. The Plaintiff was also awarded party-party costs.

DEFENCES TO NUISANCE

A Defendant can resist the Plaintiff's claim in several ways. Firstly, it can adduce evidence and make submissions designed to show the Plaintiff has not met the requisite elements of the tort, in other words, establishing that the Plaintiff was abnormally sensitive, or was making an abnormally sensitive use of its land and therefore cannot be heard to complain of the Defendant's activity. Furthermore, the Defendant can seek to show, that due to the character of the neighbourhood and the importance of the activity it carries on on its lands, that its user is not unreasonable and therefore does not constitute a nuisance.

Aside from resisting the proof of the Plaintiff's case under these substantive elements of the tort, what specific defences may be available to a defendant assuming that a Plaintiff can show that the Defendant's activities have created a nuisance?

Under certain restricted circumstances, if a Defendant can show that the nuisance did not arise from his own activities but from the activities of a third party or by the operation of nature, he may be able to escape liability. In **Wayden Diners Ltd. v. Hong Ying Tong Ltd**. (1987) 39 C.C.L.T. 176, Opell, J. of the British Columbia Supreme Court held that where a person by his activities **creates** a particular situation which unreasonably interferes with his or her neighbours' use and enjoyment of land sufficient to amount to a nuisance, liability follows without proof of negligence on the part of the Defendant. Consequently, it does not matter that the Defendant took all necessary steps to avoid the offending activity, or that the harm visited upon the Plaintiff was not foreseeable. Where the Defendant has created the nuisance by its activities, these factors are not relevant. However, on the other hand, the court held that where the nuisance arises not directly from the activities of the Defendant, but rather from the activities of a third party, such as vandalism or nature, then ignorance of the facts constituting the nuisance are a defence **provided that** the Defendant, with reasonable diligence, could not have discovered those facts. Therefore, where, in the Wayden case, a water pipe on premises owned by the Defendant H.Y.T. had burst, causing water to leak into the Plaintiff's basement, and where the burst pipe was located beneath the concrete floor in the Defendant's property, the Defendant did have a defence to the Plaintiff's action of nuisance when he showed that he had no knowledge of the break.

Historically, one of the most problematic defences to a Plaintiff's nuisance action has been the defence of statutory authority. This principle of law holds that if the offending activity is an inevitable consequence of an undertaking which is authorized by expressed statutory authority, the nuisance is thus implicitly legalized and the Plaintiff cannot succeed in a cause of action for nuisance. The burden of proving that the activity falls within the defence of statutory authority lies on the Defendant.

The Supreme Court of Canada in Tock et al v. St. John's Metropolitan Area Board, 1 C.C.L.T. (2d) 113 has recently clarified the very confusing state of the law in this area. In that case, Wilson, J. laid out the following principle which determine whether the defence applies:

> 1. If the legislation imposes a duty to construct or do the thing complained of, and the nuisance complained of is the inevitable consequences of discharging that duty, the nuisance itself must be

considered as legislatively authorized, and there can be no recovery in the absence of negligence.

2. If the legislation, even though it confers merely a power or authority, is specific as to the manner or location of the activity so authorized, and if the nuisance is an inevitable consequence of doing the thing authorized in that way or that location, then again the nuisance must itself be considered as authorized and there can be no recovery unless negligence is shown.

3. If the legislation confers a power which gives the public body a discretion not only whether or not to do the thing authorized but also how to do it, and where, then if that public body decides to do the thing authorized, it must do it in a manner and at a location which will avoid the creation of a nuisance. Consequently, if the public authority uses its power in a way which does create a nuisance, the public body will be liable for it whether or not there has been negligence. In this circumstance, the inevitable consequences doctrine has no application.

In the circumstance where, as in the Desrosiers case (supra), the nuisance complained of arises from a farming practice, a further statutory defence may now be available to farmers. Under the **Farm Practices Protection Act**, S.O. 1988, c. 62, which has received Royal assent and was proclaimed in force as of December 15th, 1988, farmers are exempted from the common law of nuisance and from any legal action resulting from odor, noise or dust arising from any normal farming practice unless the operation contravenes the Environmental Protection Act or certain other statutory provisions. A normal farming practice is defined as one that is conducted in a manner consistent with proper and accepted customs or standards as established and followed by similar agricultural operations under similar circumstances. The Farm Practices Protection Board is established. Any person aggrieved by an odor, noise or dust from an agricultural operation may apply to the Board for a ruling. The Board can consider whether the activity complained of is a normal farming practice. If not, the Board can order the farmer to cease or modify the complained of practice so that it is consistent with normal farming practice. If the complained of practice is, however, found to be normal, the Board must dismiss the complaint.

If the practice is found to be normal, then even if it creates a nuisance, the right of action against the farmer is barred.

STRICT LIABILITY: RYLANDS v. FLETCHER

Rylands v. Fletcher (1868) L.R. 3 H.L. 330 established the principle that, per Blackburn, J.:

> *"..... the person who for his own purposes brings on his lands and collects and keeps thereon anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, his prima facie answerable for all the damage which is the natural consequence of its escape."*

This doctrine has application to the situation where the Defendant has brought or compiled on its property a substance which is hazardous or toxic.

The principle of Rylands v. Fletcher is separate and distinct from the law of nuisance. **Salmond on Torts**, 16th Edition at p. 322 lists four differences between the tort of nuisance and the principle of Rylands v. Fletcher. Principally, the principle of Rylands v. Fletcher is usually applicable to a single disastrous escape of a whereas nuisance is applicable to a continuous state of affairs which produces the undesired effect upon the Plaintiff.

It is essential to keep in mind, when discussing the doctrine of strict liability in Rylands v. Fletcher, that although it normally has application to hazardous or inherently dangerous substances or activities carried on by the Defendant, it also may have application to an activity or substance compiled by the Defendant on its own land which, although not in and of itself inherently dangerous, becomes so when it escapes and does damage to the Plaintiff. This point is demonstrated in two cases.

In **Carmel Holdings Limited v. Aitkens** 2 C.C.L.T. 227 (B.C.S.C.), the court, at page 237 states:

> *"In determining whether to apply the rule, courts have distinguished also, between things which are inherently dangerous and things which are not inherently dangerous. If the thing which escapes from the land is inherently dangerous and harm results, then there is strict liability under the rule Rylands v. Fletcher. If the thing which escapes the land is not inherently dangerous, there is not liability under this rule unless there has been a non-natural use. Water is not an inherently dangerous thing and if water escapes from an occupier's normal domestic water supply, the rule will not apply. On the other hand, if an occupier accumulates or stores a*

large amount of water on his land and it escapes, this is a non-natural use and he is liable for harm."

This case held that the storage of 1,200 gallons of fuel oil on the Defendant's property for its furnace, which tank ruptured, causing the furnace oil to flow into the Plaintiff's premises, was a sufficient non-natural user of the land to invoke the principle of Rylands v. Fletcher. The court, however, made it clear that this distinction between what is an unnatural, extraordinary or abnormal or special use of property is a perplexing issue:

"Whether there has been a non-natural, unreasonable, extraordinary, abnormal or special use of property is in many cases a perplexing issue. A decision on any particular case may tend to be arbitrary. Often the distinction between what is classified as unnatural use and what is classified as a non-natural use is simply a matter of degree. The Defendant Aitken operates an apartment building. He must supply heat and hot water for his tenants. Obviously, he must store fuel oil on his property in order to have a supply always available. Is the storage of 1,200 gallons of fuel oil a natural use of the land? Would the storage of a much larger amount, say 6,000 gallons, be a non-natural use of the land, haven regard to the size of the building and the number of tenants? On the other hand, the Defendant knew or ought to have known that if 1,200 gallons of fuel oil escaped from the tank it would cause damage to the owners of adjoining properties and inconvenience in the form of nauseous smell. Moreover, the Defendant Aitken was aware of the fact that his tanks were embedded in sand on rock and that the rock sloped downward through the Plaintiff's property and that, therefore, if anything should happen to either tank the natural flow would be to the Plaintiff's property. In these circumstances there should be a strong onus on the Defendant to ensure that the oil does not escape to the Plaintiff's property."

The case of **Chu v. Dawson** (1984) 31 C.C.L.T. 146 (B.C.C.A.) is a further illustration of what constitutes a "non-natural" user of land sufficient to invoke the rule in Rylands v. Fletcher. In this case the British Columbia Court of Appeal confirmed that where the Plaintiff can establish the Defendant's activity, even though not necessarily per se inherently dangerous, is nevertheless a non-natural use of land and the Defendant's use causes damage to his neighbour's property through an escape of substance he has compiled on his or her land, he will be strictly liable for damages suffered by the neighbour. The facts of this case were interesting. The Defendant had bought a service lot on high ground at the top of the edge of a cliff. To the rear of the Defendant's lot at its western edge was a steep bank. A municipality owned title to the steep bank. To the west of the bank beyond the foot of the cliff lay the Plaintiff's home. When the Defendant had originally constructed its home 200 cubic yards of excavated soil

was spread out on the top edge of the cliff by the Defendant, along the western extremity of its lot. Eleven years later there was an exceptionally heavy rainfall. This fill became saturated with water and caused the top of the bank to give way, resulting in a mud slide damaging the Plaintiff's property. The court specifically held that the Defendant could not have reasonably foreseen what would happen when they deposited the fill. Negligence was therefore not a factor in this decision. The key point was that the placement of the fill in the particular location was a non-natural use of the land. In fact, the placement of the fill had become a hazard. The Defendant was held liable to compensate the Plaintiff for the damage to its property.

OTHER CASES ON NUISANCE AND STRICT LIABILITY

The question of whether, in any given case, the principles of Rylands v. Fletcher or the common law of nuisance will apply is entirely a question of fact. It is impossible to lay any general guideline down other than the general principles discussed above. It is often useful however, in deciding how to draft pleadings or in delivering an opinion to a prospective Plaintiff or Defendant, to review the circumstances under which, in other cases, there has been a finding of nuisance or no nuisance. I have therefore appended to this paper, as an Appendix "A", a list of the best known cases in this area.

In my view, these two principles still have great utility event in the advent of further legislation such as the provisions of Part IX of the Environmental Protection Act (Spills) and the proposed Environmental Bill of Rights.

Litigation in this area is, however, likely to continue to be curtailed by reason of the cost of pursuing this kind of case, particularly where the question of emission or non-emission is a complex one. The Law of Costs will also continue to be a severe impediment to Plaintiffs pursuing actions for environmental contamination in nuisance and in strict liability. However, in a proper case, as has been seen, these causes of action have great utility and can be used to great effect.

OTHER CAUSES OF ACTION: TRESPASS

To intentionally throw a foreign substance on the property of another, and particularly in doing so to disturb the enjoyment of the Plaintiff in his property is

an unlawful act and constitutes a trespass: See **Freezon v. Forest Protection Ltd.** (1978) 22 N.B.R. (2d) 146, 4 R.P.R. 58 (S.C.C.). The Freezon case concerned damage caused by spraying. Dixon, J. at page 161-62 stated:

> *"Trespass may be described as a wrongful act done in disturbance of the possession of property of another or against the person of another against his will (38 Halisbury, 3rd Edition, at p. 734). And again, every unlawful action by one person on land in possession of another is a trespass for which an action lies although no actual damage is done. And that a person does not know an act to be wrongful makes him no less a trespasser. To throw a foreign substance on the property of another, and particularly in doing so, to disturb his enjoyment of his property is an unlawful act. The spray deposited here must be considered such a foreign substance, and its deposit unquestionably amounted to a disturbance, however slight it may have been, of the owner's enjoyment of their property. I therefore must conclude that the Defendant in depositing this spray did in fact commit what would, in the absence of statutory authority, be considered a trespass. This, of course, does not involve any question of whether or not the spray may have been toxic or non-toxic, because even to have thrown water or garbage or snow or earth tippings or any substance on the property would equally have amounted to an act of trespass."*

The action in trespass may be useful in the particular circumstance where no real harm or damage has yet resulted to the Plaintiff's land but the Plaintiff wishes to bring an action for injunctive relief to prevent any further deposit of deleterious substances on its lands.

DECEIT, MISREPRESENTATION AND NEGLIGENCE

Obviously the most widely utilized cause of action for environmental contamination lies in the tort of negligence. A Plaintiff would have to show that a Defendant breached a standard of care in emitting or releasing a deleterious substance, noise or vibration. The Plaintiff bears the onus not of proving a breach of a reasonable standard of care, but that damage also accrued as a result of the breach. The Plaintiff also bears the onus of proving that he or she was within the ambit of persons to whom a Defendant knew or ought to have known would be affected by the breach of duty.

The problems of negligence in environmental cases is amply demonstrated by the **Schenck** case (supra). The Plaintiff was unable to show that the use of salt by the Defendant Department of Highways in that case breached any standard of care, or that in all of the circumstances that it was

foreseeable. In the Chu v. Dawson case (supra), the Plaintiff could not establish that the deposit of fill along the bank on the western edge of its property could foreseeably cause damage to the Plaintiff. If either of these Plaintiffs had relied exclusively on the law of negligence, their actions would have not succeeded.

As discussed above, the focus of the law of negligence is on the **conduct** of the Defendant, rather than on the activity of the Defendant and its effect upon the Plaintiff, as is the case in the law of nuisance. Nevertheless, Plaintiffs have been successful in pursuing Defendants in recovering from them damages for environmental contamination. Two important recent cases highlight the continuing utility of the law of negligence in the area of environmental contamination. The most interesting feature of these cases is the continuing tendency on the part of the courts to hold governmental authorities responsible for regulating the conduct of contaminators, liable for negligence in failing to fulfill their regulatory responsibilities.

Both **Heighington v. The Queen** (1987), 2 C.E.L.R. (N.S.) 93, aff'd. 4 C.E.L.R. (N.S.) 65 and **Sevidal et al v. Chopra et al** (1987), 2 C.E.L.R. (N.S.) 173, arose out of a common set of facts involving the Malvern Subdivision in Scarborough Ontario. Prior to the creation of the subdivision, back in time in 1945 and 1946, refining of radioactive material (radium) took place on a farm, which was later subdivided and became the Malvern Subdivision. The circumstances under which the radium came on to the farm were interesting. Several individuals who had been employed by El Dorado Mines were involved in an illegal scheme to divert radium and sell it from the company's refinery in Port Hope, Ontario. In order to cover their trail, they carried on a private refining activity in Toronto and at the farm in Scarborough, where they burned radioactive scrap consisting of rags inundated with radium. The rags were burned in a pot belly stove in one of two small farm out-buildings to reduce and concentrate radium in the ashes. Amounts of radioactive material were lost on the site as a result of these activities. In the **Heighington** case, it was discovered that some of the ashes has been scattered on the fields of the farm as fertilizer.

The farm was expropriated by the Province in 1953 and subsequently transferred to the Ontario Housing Corporation in 1972, along with some other neighbouring lands. In 1973, the Province instituted a plan where the subdivision lots were leased to builders who assigned the leases to individuals who contracted with builders to construct the houses.

DECEIT AND MISREPRESENTATION

The **Sevidal** case was tried first. The Sevidal's had entered into an agreement to purchase a lot in the subdivision with the defendant, Chopra in April of 1981. Evidence which emerged showed that the subject lands which were the object of the agreement of purchase and sale between the plaintiff, Sevidal and the defendant, Chopra, were located on McClure Crescent, which was constructed in the Malvern Subdivision. The subdivision was developed in 1974. The agreement of purchase and sale between Sevidal and Chopra was signed in 1981. In 1975, the Atomic Energy Control Board ("AECB") conducted an investigation of the original farm where the radium had been processed. AECB undertook some testing in the McClure Crescent area, but at that time, no evidence of contaminated soil was found. However, it was shown that AECB in 1975 did not conduct any tests at the actual locations of the out-buildings where the radium had been processed. There was an apprehension over some residual radioactive contamination however. In 1980, a radioactive "hot spot" was found in the backyard of a lot located immediately across from Chopra's lands. When this was discovered, AECB retained an engineering firm to take borehole samples in the area of the hot spot to ascertain the depth of contamination. The test taken by this engineering firm showed significant radioactive contamination in the hot spot, and other contamination at a lower level in other areas. AECB had come to the conclusion that the original top soil in the subdivision had been scraped off the farm, stored and then redistributed thus spreading contamination. It came to the conclusion that all contaminated material should be removed. Further borehole testing was conducted prior to the end of January, 1981.

The defendant, Chopra, as vendor to the plaintiff, Sevidal, admitted that they knew of the discovery of radioactive contamination in the McClure Crescent area by November and December of 1980. The agreement of purchase and sale was signed in April, 1981, therefore, at the time the agreement was signed, the defendant, Chopra, knew that radioactive material had been discovered in yards and houses in the area, but failed to disclose this to the plaintiff or their real estate agent. The plaintiff subsequently discovered in the newspaper that there was radioactive soil in the area of the house that they had purchased. They consulted with their lawyer about this transaction. They also called an employee of the AECB whose duties were to provide information to the public and deal

with concerns about radiation. The AECB employee told the plaintiffs that the contaminated soil in the area would be removed within two months and that radiation levels were safe. The employee had neglected to tell the plaintiff that the testing had not in fact been complete and that the plaintiff's lot was near the original storage site for the radioactive materials and was therefore suspect. Prior to closing, tests in the backyard of the subject townhouse revealed the presence of radioactive contamination. The defendant, Chopra, was notified by the AECB. The defendant, Chopra, however did not disclose this information to the plaintiff. The plaintiff was notified of this fact only after closing. The plaintiffs, now saddled with a house that bore the stigma of radioactive contamination, sold their house three years later at a loss. They brought action against the defendant, Chopra, the AECB, the real estate agent and the lawyer who acted for them on the purchase transaction.

The trial judge made a finding of fact that the Chopra's had deliberately and intentionally failed to disclose to the Sevidal's, prior to closing, the existence of radioactive contamination in the backyard at the subject house. The trial judge also made findings of fact that radium 226 was a prescribed substance under the Atomic Energy Control Act and the Atomic Energy Control Regulation. She found that the AECB through its director, had required that soil at the subject house should have been removed, and it would have been removed if a disposal site could have been found. She further found as a fact that the amount of radioactive material found in the backyard and in the area of McClure Crescent was sufficient to be a potential risk and hazard, and therefore was a potential danger to the plaintiffs as new owners, even though it did not constitute an immediate risk or hazard to the owners.

Based on these findings of fact, the trial judge assessed liability as follows:

1. The Chopra's were liable for damages caused to the plaintiffs by reason of fraudulent misrepresentation arising from the suppression of the truth. The radioactive contamination in effect was a latent defect which had to be disclosed to the purchaser. Suppression of the information by Chopra was an act of concealment. The trial judge found that the Chopra's had been guilty of such suppression in two respects: first, being aware of, but failing to disclose at the time the agreement was signed that property in the immediate area and not the property itself was subject to radioactive contamination:

> *"...Dealing first with the issue of whether the Chopra's should have disclosed existence of radioactive material in the area prior to entering into the agreement of purchase and sale, I find, based on the principles annunciated in the cases to which I have referred, that they should have. They knew about the potentially dangerous latent defect prior to the signing of the agreement. The fact that at the time the agreement was signed the latent defect was known only to be on the property in the immediate area not on the property itself provides no excuse for non-disclosure. The Chopra's were guilty of concealment of facts so detrimental to the Sevidal's that it amounted to a fraud upon them and therefore the Chopra's are liable in deceit."*

Secondly, the trial judge found that the defendant Chopra had a duty to disclose the fact that radioactive contamination had been found on the subject lands, which constituted a change of circumstances to the Plaintiff. They had a duty to disclose this prior to closing. In this circumstance, while the defendant Chopra's were guilty of concealment of facts so detrimental to the plaintiffs that it amounted to a fraud.

Regulatory Negligence

The trial judge held AECB liable in damages for negligent misrepresentation. She referred to section 8 of the Atomic Energy Control Act which provides that AECB was in power to disseminate information relating to atomic energy to such an extent and in such manner as the Board may deem to be in the public interest. Consequently, AECB assumed responsibility for disseminating information about radioactivity in the McClure Crescent area. The dissemination of that information by the AECB employee to the plaintiffs was not correct and constitute negligent misrepresentation because:

1. The plaintiffs had been told that there was no contaminated soil on the subject property.

2. The plaintiffs had been told the problem with respect to a disposal site would be solved in two months, wherein that fact was not correct.

3. The plaintiffs were incorrectly told that the radioactive readings were safe.

4. The plaintiffs were not told that the testing had not been completed.

5. The plaintiffs were not told of some of the essential background information on how the radioactive contamination had occurred in the subdivision.

6. The AECB failed to warn the plaintiffs that not all the facts concerning radioactive contamination had been gathered and that investigations were continuing.

The trial judge then considered whether the AECB, as a public authority, had a duty of care to the Sevidal's. The AECB had argued that as a public authority, the scope of its duty of care was limited and that it could not be held liable because it formulated one policy of operation rather than another. It argued that the AECB as a public authority, in setting its policy concerning dissemination of information, had struck a sound balance between the rights of owners, the rights of prospective purchasers and the rights of the public and that as such, this was not a question for the court to decide. The trial judge relied on a quote from a leading case of **Anns v. Merton London Borough Council** [1978] A.C. 728 at 754:

> *"Most, indeed probably all, statutes relating to public authorities or public bodies contain in them a large area of policy. The courts call this discretion, meaning that the decisions are one for the authority or body to make and not for the courts. Many statutes also prescribe or at least pre-suppose the practical execution of policy decisions: a convenient description of this is to say that in addition to the area of policy or discretion, there is an operational area. Although this distinction between the policy area and the operational area is convenient and illuminating, it is probably a distinction of degree; many operational powers or duties have in them some element of discretion. It can safely be said that the more operational a power or duty may be, the easier it is to superimpose upon it a common law duty of care."*

And further at page 758:

> *"...Quite apart from such consequences as may flow from an examination of the duties laid down by the particular statute, there may be room, once one is outside the area of legitimate discretion or policy, for a duty of care in common law. It is irrelevant to the existence of this duty of care whether what is created by the statute is a duty or power: the duty of care*

may exist in either case. The difference between the two lies in this, that, in the case of the power, liability cannot exist unless the act complained of lies outside the ambit of the power."

Consequently the Oyen, J. found that:

"On the reasoning of the Anns case, where there is an allegation that the defendant public authority failed to act even where there is no statutory provision requiring the defendant to act, a common law duty of care can exist which can be breached by the failure to act.

The Anns case has the effect of enlarging the potential liability of public authorities given sufficient proximity because prima facie, there will be a duty of care.

There was a sufficient relationship of proximity due to AECB's assumption of responsibility to provide information to the public regarding radioactivity in the McClure Crescent area. It was within the contemplation of Duff and Eaton as employees of AECB that carelessness on their part would likely cause damage to the Sevidal's. Accordingly, a prima facie duty of care arose."

At page 203 (2 C.E.L.R. (N.S.)), the trial judge continues to specify the breaches of the duty of care by AECB in this case:

"In this case, Duff as an employee of the AECB provided some incomplete and inaccurate positive information to a member of the public without advising that person of the policy of the AECB with respect to disseminating negative information. As a result, the employee did not alert that person to the need to make other inquiries and to the danger of relying on the information given without qualification. In addition, Eaton as an employee of the AECB, failed to act to correct the incomplete and inaccurate information once he became aware of the contaminated soil at 63 McClure Crescent. The actions of the AECB almost set a trap for the unwary purchasers. Parliament certainly never intended a public authority to exercise its policy making powers in such a way that non-disclosure of the policy would mislead a member of the public who made an appropriate inquiry.

I find that the AECB through its employees Duff and Eaton, owed a duty of care to the Sevidal's and were negligent in the performance of that duty. The Sevidal's suffered loss because of this negligence in the same way as they did for negligent misrepresentation."

The trial judge also held that the real estate agent was negligent in inducing the plaintiffs to waive a condition related to financing before a

mortgage had been applied for. The trial judge's reasoning was that if the agent had not prevailed upon the plaintiffs to waive the financing condition, the plaintiffs' lawyer would have had not difficulty in getting the plaintiffs out of the purchase transaction once the radioactivity problem in the area was discovered. By her action therefore, the real estate agent prevented the plaintiffs from using the condition in the manner in which it could have been used to prevent a loss to them.

The plaintiffs' solicitor was held not to be negligent in the circumstances.

In the **Heightington** case, the plaintiffs brought action against the provincial government on the theory that the provincial government was negligent in failing to remove a contaminated material which had been deposited on the farm which preceded the Melbourne Subdivision and against the Ontario Housing Corporation, as the seller of the lots in the subdivision on the theory that there was a breach of warranty. The facts showed that in 1945 the radium processing operations were investigated by both the federal and provincial officials. Reports were done which showed the dangerous nature of the radium ashes which existed at the location and the fact that they should be cleaned up. The trial judge made a finding of fact that the province, through its employees, knew that activities involving radioactive material were being conducted at the Ivan Enco Farm which preceded the subdivision, and that they had been concerned at the time about the danger to health of those involved, but did not seem to be particularly concerned about making sure that any radioactive material waste or contaminated earth was safely disposed of in 1945 or 1946. Mr. Justice R.E. Holland made the following finding as to liability and negligence against the provincial government:

> "Were these officials negligent in not making sufficient inquiries and not ensuring the clean up of the radioactive material and contaminated soil? With hindsight, it is easy to say that they were negligent because if they had made a thorough investigation in 1945 and 1946, and if the radioactive material and contaminated soil had been safely cleared up at that time, then there would have been no problem today. Although standards in 1945 were not as strict as they are today, the danger of radioactivity was well-recognized.
>
> In all the circumstances, I have come to the conclusion that the provincial officials were negligent in failing to ensure that any

> radioactive material, including contaminated earth, was safely removed after the operations at the farm ceased. It was foreseeable that if such material was not removed the health of the future occupants of the land would be in danger. Development of the land into a subdivision for a residential dwelling was permitted. This surely would not have occurred if the contaminated earth and material had been located in 1945 and 1946 and not removed. The province had a statutory duty when considering a draft plan of subdivision to have regard to the 'health safety ... and welfare of the future inhabitants' including 'the suitability of land for the purposes for which it is to be subdivided': see Planning Act, R.S.O. 1970, c. 349, s. 33(4)(c)."

The trial judge, however, found that the provincial officials were not negligent in 1975 when information about the 1945 activities on the lands re-emerged and federal officials investigated, but were unable to locate areas of radioactive contamination. A journalism student, using a hand-held geiger counter, had subsequently found the radioactive "hot spot" on the subdivision. The trial judge had this to say:

> "In my opinion the provincial officials were not negligent in 1975. The Ivan Enco Farm was not the only investigation being undertaken at the time and staff was limited. Dr. Aitken had good reason to believe that any contaminated material had been widely spread and there was no health hazard. He decided that, in the circumstances, he was not warranted in unduly alarming the residents by any invasive investigation. Although subsequent events proved him wrong, I cannot find him negligent for this exercise of judgment."

The trial judge went on to dismiss the action as against the Ontario Housing Corporation for breach of any warranty because, at the time of the sale, although the properties did contain a latent defect due to the radioactive contamination

The Ontario Housing Corporation was not found liable because at the time they had sold the property, it was not aware of the radioactive contamination.

Another good example of how deceit and fraud and misrepresentation can be used as causes of action in an environmental lawsuit is **CRF Holdings Ltd. v Fundy Chemical International Ltd.**, 19 C.C.L.T. 263 (B.C.C.A) leave to the Supreme Court of Canada refused (1982) 42 N.R. 358. In that case, a vendor has

represented to a purchaser in 1974 that a certain slag piled on the property would make excellent fill. The vendor did not tell the purchaser that the slag was radioactive waste containing thorium, a dangerous radioactive substance. The purchaser, relying on the vendor's representation, spread the material all over his property. A warehouse was constructed over the fill. The defendant had omitted to tell the plaintiff that the slag was radioactive waste containing thorium which was a prescribed substance the possession of which required a licence. In December of 1986, officials from the AECB who were searching for low grade radioactive material, found the existence of it beneath the plaintiff's warehouse and yard. The AECB visit was well-publicized and was followed by three years of intensive investigation of paper work which the trial judge noted showed "... expressions both of governmental disapproval and reassurance concerning the presence of radioactive waste in a populous Vancouver suburb." The government however had taken no action to do anything about the problem other than to express on a number of occasions its concern over the existence of the radioactive contamination. Inevitably, politics raised its ugly head as described further by the trial judge:

> *"While a substantial amount of public money has been spent on departmental investigations and demonstration of interest, actual removal of the waste has proved politically impossible. The federal government position is that the material ought to have gone to an approved radioactive waste disposal site. The only such disposal site in Canada is at Chalk River, Ontario and the Ontario government position is that it is not to be used as a dumping ground for nuclear waste from other provinces. The position of the government of British Columbia to date is that it will not authorize disposal of radioactive waste anywhere in this province. The position of the Federal Atomic Energy Control Board, as explained at trial, is that it will take away the slags stored in drums if it can find somewhere to put it, but it has given no undertaking with respect to the material under Mr. Fassler's plant. The Board has insisted that the latter material does not represent a health hazard. The Board's effort to discover and expose the material have suggested to some, however, that it does and there are those, too, who wonder why the Board would undertake to remove the material stored in drums if it did not. The plaintiff says the principle result of governmental activity to date has probably been to render his land the least desirable piece of industrial property in the lower mainland, and thus destroy most of its value."*

The plaintiff therefore brought an action in deceit to recover damages. The defendant was held liable in deceit for the half-truths and incomplete disclosure of the essential nature of the fill he had sold to the purchaser. At trial, the trial judge assessed damages as including any consequential losses whether

or not those losses were foreseeable. Damages were assessed by reference to initial cost of restoring the land to the condition it would have been in had the defendant's representations been true. $400,000 was awarded on this footing. A further $15,000 was awarded to compensate for the respective dislocation of the plaintiff's business if a clean-up operation were conducted and a further $39,500 for the injurious affects sustained by the plaintiff's other properties. On an appeal, the finding as to liability was upheld, but the court ordered a reassessment of the damages. The British Columbia Court of Appeal held that the proper measure of assessment of damages was the difference between the price paid and the actual value of the property which was purchased, having regard to the defect herein on radioactive contamination. Damages for consequential loss were also assessed, but not in such a way as to put the plaintiff into the position he would have gained had the representation been true. Consequential losses would only be awarded to put the plaintiff in a financial position they would have enjoyed had the representation not been made.

What then do these cases show? I suggest that they are quite significant because they demonstrate that governments and other regulatory authorities will be held liable in negligence for failing to fulfill their regulatory responsibilities. The nature of the negligence in both of these cases was a failure to pass on relevant information and a duty to warn persons who might be affected by the environmental contamination.

The Chopra case, I suggest, is also noteworthy because it held a vendor liable in deceit not only for failing to disclose, once the information came to his or her attention, that the subject property was environmentally contaminated, but furthermore, that even apart from this element of deceit, it was also fraudulent misrepresentation to suppress information that other property in the immediate **neighbourhood** might be environmentally contaminated. I suggest that the repercussions from these points are far reaching indeed.

Furthermore, these cases are noteworthy because they impose liability for damages where there arguably had not been physical damage to the property, and even though the contamination did not render the property unusable or necessarily even impose an immediate serious health risk. It was the public attention focussed or rising out of the discovery of the contamination which was the gist of the cause of action in both of these cases. Together with the C.F.R.

Holdings case, it was the public notoriety arising out of the environmental contamination which actually caused the damage and loss of market value to the property. Public perception, rather than reality, is what is important.

OTHER SOURCES OF LIABILITY IN ENVIRONMENTAL CASES

There are two areas in the Environmental Protection Act, R.S.O. 1980, c. 141, which will be the source of much action in future cases.

Section 147(a) of the Environmental Protection Act creates a statutory duty of care on the part of officers and directors of the corporation. It provides as follows:

> *"Every director or officer of the corporation that engages in an activity which may result in the discharge of a contaminant into the natural environment contrary to this Act or Regulations, has a duty to take all reasonable care to prevent the corporation from causing or permitting such unlawful discharge."*

Although, in the absence of this provision, it is certainly arguable that even under the common law, directors and officers of the corporation had such a responsibility, the clarity with which this is enunciated in the Act will encourage courts in future cases to pierce the corporate veil with alacrity. It clearly demonstrates that quite apart from the duty of care owed by the corporation to ensure all reasonable steps have been taken to prevent the corporation from causing or permitting pollution, if it can be shown that corporate officials failed to inform themselves fully of the hazards arising out of operations, and failed to heed warnings by governmental agencies and environmental staff within the corporation, or failed to give adequate policy directions, training and supervision to employees, then they will be held personally responsible for breach of this duty of care. The basis of this liability is separate and apart from that of the corporation itself and will be useful and important when the corporation is insolvent or bankrupt. It is also something to consider when acting for or advising officers and directors of their responsibilities in the case of environmental contamination. This may be particularly important in the case of a spill where there is some reluctance to expend funds or to take immediate action to report the spill and commence clean up operations, or to follow directions issued by the Minister to clean up a spill.

Another whole source of liability lies under part IX of the Environmental Protection Act (the Spills Bill). Sections 87, 88 and 89 of the Act are a complete code of procedure in the case of a spill. Spill is defined in section 79(1)(j) as being a discharge into the natural environment from or out of a structure, vehicle or other container that is abnormal in quality or quantity, in light of the circumstances of the discharge. Pollutant is defined as being a contaminant other than heat, sound, vibration or radiation and includes any substance from which a pollutant is derived. "Contaminant", which is a constituent part of the pollutant definition, means any solid, liquid, gas, odor, heat, sound, vibration, radiation or combination of any of them resulting directly or indirectly from human activities that may cause an "adverse effect". "Adverse effect", in turn, being a constituent part of the definition of contaminant means:

i) Impairment of the quality of the natural environment for any use that can be made of it;

ii) Injury or damage to property or to plant or animal life;

iii) Harm or material discomfort to any person;

iv) Adverse effects on the health of any person;

v) Impairment of the safety of any person;

vi) Rendering any property, plant or animal life unfit for use by man;

vii) Loss of enjoyment of normal use of property;

viii) Interference with the normal conduct of business.

Putting all of these broad definitions into place one can see that a spill can consist of virtually any substance released into the natural environment from or out of a structure, vehicle or container that is abnormal in quality or quantity.

Exemptions: There are, however, some spills to classified under O.Reg. 618/85, sections 18 to 22 that are exempted from all or part of Part IX of the act. These types of spills include water from reservoirs where the spill is caused by a natural events, pollutants from fires of a limited size, and spills that comply with

certificates of approval issued under the EPA or the Ontario Water Rescources Act or Pesticides Act.

Section 80 of the Act creates another statutory duty of care to give notice on the part of the person having control of the pollutant when there is a spill. Notice must be given not only to the Ministry but to the municipality where the spill occurs, to the owner of the pollutant if that person is ascertainable. The duty is imposed on the person who spills or causes or permits the spill of the pollutant and it arises immediately when the spill comes to his knowledge - see Section 89(2).

Arguably then, if a person or property is injured as a result of the failure to warn or delay in warning, there would seem to have been a breach of this duty of care, which may be sufficient to form a basis of liability for negligence.

Other statutory duties of care appear in Part 9 of the Environmental Protection Act. Section 81, for instance, provides for a duty on the part of the owner of a pollutant or a person having control of a pollutant to act:

> *"The owner of a pollutant and the person having control of the pollutant that is spilled that causes or is likely to cause an adverse effect shall forthwith do everything practicable to prevent, eliminate and ameliorate the adverse effect and restore the natural environment."*

The duty to act is immediate: see Section 81(2). Section 82 of the Act provides that where the Minister gives directions for the clean up of the spill, and the owner of the pollutant or person in control of the pollutant must respond immediately. Once again, if there is a failure to do so and that failure harms a third party, evidence of the breach of duty of care can be used to support a negligence claim.

Section 85(2) creates a strict statutory liability and provides an absolute right to compensation for certain persons affected by a spill:

> *"Her Majesty in Right of Ontario or in Right of Canada or* ***any other person*** *has the right to compensation,*
>
> *a) For loss or damage incurred as a result,*
>
> *i) the spill of a pollutant that causes or is likely to cause an adverse effect,*

ii) the exercise of any authority under subsection 88(1) or the carrying out of or attempting to carry out a duty imposed or an order or direction made under this part, or,

iii) neglect or default in carrying out a duty imposed or an order or direction made under this part;

b) For all reasonable costs and expense incurred in respect of carrying out or attempting to carry out an order or direction of this part, from the owner of the pollutant and the person having control of the pollutant".

It is important to note that under the Section 87 cause of action, loss or damage includes personal injury, loss of life, loss of use or enjoyment of property, pecuniary loss, including loss of income. This means that claims for pure economic loss are embraced by this section. Section 87(3) does establish certain defences which may be available to persons against whom an action is brought under Section 87(2) where it can be established that the spill of the pollutant was wholly caused by a acts of war or terrorism, acts of God or the intervention of a wrongful act or omission caused by a person other than a person for whose wrongful act or omission. **The owner and controller of a pollutant can also escape liability if they can prove that they took all reasonable steps to prevent the spill.** The owner of the pollutant or the person having control of the pollutant is by law responsible (in other words, vandalism). Where there is more than one person who is the owner of the pollutant or in control of the pollutant, then liability is joint and several.

Contribution and indemnity as between persons who may be responsible is provided under Section 87(7).

Section 87(13) provides for several limitation periods for this cause of action. Such an action must be commenced within two years. There is a shorter limitation period for contribution and indemnity as between persons who may have been responsible for the spill, which is limited to the commencement of an action within one year.

Section 87, 88 and 89 provide a virtually complete code of conduct for actions related to spills. I think it is safe to equate "spills" with the term "sudden escape" which is so familiar to common law concepts embodied in the Ryland v. Fletcher rule. As previously pointed out, this is distinct from the sort of gradual

long-term discharge of a deleterious substance, gas or odor into the environment. In that circumstance, the discharge would not likely amount to a spill as that is defined.

In circumstances where there has been a sudden escape of a deleterious substance or gas, these section clarify a cause of action for direct recovery of losses resulting from the spill by persons affected by that loss as against persons who have been responsible for generating, possessing and handling the substance complained of. It also provides for a system of recovery, contribution and indemnity as between the parties who may have been jointly and severally liable for the discharge or spill.

In view of what has been previously discussed in this paper, I suggest that vis a vis an innocent party effected by the spill, the statutory cause of action is a partial codification of the common law of strict liability as embraced by **Rylands v. Fletcher** with two significant points of departure. The first distinction is that **section 87 provides for recovery of pure economic** loss, including a business loss, even where there may not have been physical damage to property or persons resulting directly from the spill. This therefore opens up a whole new vista of claims for pure lost profits and downtime where a business has been shut down, or employees laid off as a result of the spill.

The second distinctive, and from a plaintiff's standpoint, less desirable feature of the s 87 action is that the defendant can escape liability by showing he or she was not negligent and took all proper precautions to prevent the spill. Although this imposes a reverse onus of disproving negligence on the defence, it is not as advantageous to a plaintiff as strict liability under Rylands v Fletcher in which absence of negligence is not a defence, as we have seen.

Because of its obvious similarity and connection with the Rylands v. Fletcher doctrine, I suggest that the courts will continue to use it as a handy reference. As such, the old case law will continue to be useful and important.

The cause of action for pure economic loss resulting from a sudden escape or spill, warrants a careful review. Let me provide an example. Suppose an industry produces as a by-product of its operations, a waste product. Assume that the waste product is taken by a waste hauler under contract with that industry to dispose of the waste. The product is then sold by the waste hauler or

otherwise transfered to a third party who uses the waste product in an recycling operations, combines it with other material to form a new product. The new product is sold to other consumers. It is later discovered that the waste product produced by the industry contained a substance which is actually reactive with air or water, and as such produces a hazardous gas. The existence of this gas arising out of the recycled product in turn creates an environmental danger. I suggest that if one can fit this situation into the definition of "spill" or within the concept of a sudden escape which, I suggest, equates to spill, this may create a strict liability for the consequences of the escape to all of the parties who are effected down the chain of possession that I have described. The original generator of the waste and all the persons who had control of the pollutant may be strictly liable to those who were ultimately exposed to the adverse consequences of the recycled product, unless the generator or controller of the pollutant proves that he took all reasonable steps to prevent the spill in the first place. The onus is on the generator or to controller to prove such due diligence. In essence, sections 87, 88 and 89 impose a "cradle to grave" responsibility on the part of the generator of the pollutant. **Liability for pure economic losses may therefore accrue even though the persons who ultimately received this substance and were exposed to its consequences, may not have suffered physical property or personal injury.**

GENERAL LIABILITY INSURANCE POLICIES AND POLLUTION EXCLUSIONS

At this point in our examination of civil litigation and environmental law, I turn to examine the question of whether an insured, against whom an action is brought for one of the causes of action for environmental contamination examined heretofore, can now obtain a defence and indemnity from his or her insurer.

The short answer to this question is that it is unlikely he or she can, unless the contamination is due to a "sudden escape" type of circumstance arising from an unexpected, fortuitous event not intended by the insured. Consequently, if the type of contamination at issue is one of a long term seepage or discharge of a deleterious substance, then depending on the wording of the policy, the insurer will not likely receive a defence or indemnification.

There is a dearth of Canadian cases on the pollution exclusion clause. In fact I have been able to find only four of any substance.

There are generally two similar, but not identical, type of exclusion clauses that have been litigated.

The more common type provides, that as an exclusion to the obligation on the part of the insurer to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damage because of injury to or destruction of property, that such coverage is excluded in the following circumstance:

> *"It is agreed that this policy does not apply:*
>
> *to injury, sickness, disease, death or destruction, including the loss of use of property, arising out of the discharge, dispersal, release or escape of smoke, vapours, soot, fumes, acids, alkalies, toxic chemicals, liquids or gases, waste materials, or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental."*

It is the exception to the exclusion of liability which has been problematic.

The second type of clause is similar, but not identical because of the absence of the temporal element, is the following exclusion which appears in **Regina v. Kansa General Insurance Company** 6 C.E.L.R. (N.S.) 5:

> *"This policy shall not apply to claims arising out of:*
>
> *i) the discharge, dispersal, release or escape of smoke, vapours, soot, fumes, acids, alkalies, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water of any description no matter where located or how contained, or into any water course, drainage or sewage system, but this exclusion does not apply if such discharge, dispersal, release or escape is caused by accident insofar as the insured is concerned."*

These exclusion causes raise three general issues:

1. What is accidental?
2. What is sudden?

3. How does the potential for the third party loss claim effect the insurer's obligation to defend?

U.S. Authorities

These types of exclusion clauses have been widely litigated in the United States. I suggest that the following general principles can be drawn from the U.S. authorities:

1. Accident is the undesigned event and the natural consequences of a negligent act are not therefore precluded. Thus the negligent installation or maintenance of a storage tank could result in an accidental discharge or escape of gasoline which would both be sudden and accidental even though it was undetected for a substantial period of time: **Allstate Insurance Co. v. Klock Oil Co.** 426 N.Y.S. (2d) 603 at 605.

2. The word "sudden" does not equate to "sudden and unintended". The word "sudden" includes a temporal component of briefness and means brief, momentary or lasting only a short time. This is the opposite of "gradual". Therefore, where the discharge or the release of a pollutant is brief or lasts only a short time, it comes within the meaning of the first element of sudden and accidental: **Fireman's Fund Insurance Co. v. Ex-cell-o Corp.** 702 F. Supp. 1317.

3. A sudden and accidental event is one which is unexpected, unintended and occurs over a short period of time: **Technicon Electronics Corp. v. American Home Assurance Co.** 533 N.Y.S. (2d) 91.

4. Thus where the pollution in question had to be carried on over a considerable period of time, it did not fall within the temporal element of the word "sudden": **Hayes v. Maryland Casualty Co.** 688 F. Supp. 1513.

5. Sudden means a happening without previous notice or on very brief notice, unforeseen, unexpected and unprepared for. Thus if a pollution event occurred over an extended period of time, e.g. 20 years, it was not consistent with the word "sudden" within the exception to the exclusion: **State of New York v. Amro Realty Corp.** 697 F. Supp. 99.

6. Sudden means a combination of the ideas of "unexpected" and "quick": **U.S. Fidelity and Guaranty Co. v. Murray Ohio Manufacturing Co.** 693 F. Supp. 617.

7. It is not possible to define "sudden" without reference to a temporal element that joins together the ideas of immediate and unexpected. The focus of the sudden and accidental exception to the general pollution exclusion clause is on the nature of the discharge of the pollution itself, not on the nature of the damages caused: **U.S. Fidelity and Guaranty Co. v. Starfire Coals** 856 F. (2d) 31.

Canadian Authorities

In **Zatco et v. Patterson Spring Service Limited** [1986] I.L.R. 1-1997, there was seepage from an oil tank located on the defendant's property which contaminated the plaintiff's lands. The plaintiff made a claim on the defendant, which was eventually settled by the defendant's insurer. After the settlement, the same oil seepage problem re-occurred and the plaintiff brought action against the defendant. The defendant brought a motion to determine if the claim was covered under its policy.

The court looked at the cause for the original escape. It applied **Allstate Insurance Company v. Klock Oil Company** supra holding that the escape of gasoline from a storage tank could result in an accidental discharge or escape which would be both sudden and accidental, although undetected for a substantial period of time. The evidence shows that the defendant, when they had heard the original complaints, acted fairly promptly and arranged to have the tank drained. The tank was tested and was excavated, but no evidence of oil leaking was found from the tank, although tests, particularly, pressure tests, had indicated the leak. The defendants had received a number of letters from governmental authorities putting them on notice that they had a positive obligation to stop the seepage and to take such preventative measures as were necessary in order to ensure that it did not recur. Mr. Justice R.E. Holland held that in the circumstances, after the second oil seepage, the claim did not fall within the policy:

> *"The Patterson's knew that the leak was continuing, but being satisfied, so they thought, that the leak was not emanating from their oil tank, did nothing. In my opinion, they could have anticipated problems in the*

future, and, in my opinion, as Mr. McKeon put it, there is no obligation on an insurer to buy a licence to pollute the property."

In the result, he found that the subsequent damage was not caused as a result of a sudden and accidental leak and was not covered by the terms of the policy.

One Canadian case has been relatively generous to the insured in the applicability of the pollution exclusion clause. In **Murphy Oil Co. Limited et al v. Continental Insurance Co.** 33 O.R. (2d) 853, oil or gas escaped from a tank on property owned by the defendants. A neighbouring property owner had sought damages arising out of the contamination of her well. An application was made by the defendants to determine when the loss was within the terms of idemnity coverage under its liability policy. The insurer relied on the pollution exclusion clause taking the position that the discharge, dispersal or release or escape was not sudden in that the petroleum product leaked out on a gradual basis and found its way into the well on the adjacent property. The County Court judge held that it was important to keep in mind that the emission in question must be sudden and accidental, not the damages resulting therefrom in order to afford the plaintiff's coverage under the policy. He found that the leak which was caused by a lose pipe or fitting, could nevertheless be considered to be sudden and accidental at page 857:

"The question reduces itself to this: with the cause of the emission, which I found to be leakage, be sudden and accidental? The Oxford Dictionary defines sudden as follows:

'occurring or come upon or made or done unexpectedly or without warning, abrupt, abnormally rapid, hurry.'

If a leak occurs on a pipe, I would think that, whether it be minor or major in extent, it occurs suddenly for whatever reason. At one point the pipe is not defective and is properly serving the purpose intended, ie to contain the substance. At another point in time, the pipe becomes defective in that it "springs" a leak (as common parlance describes it). I cannot bring myself to believe that a leak in a pipe is caused in anyway other than "suddenly". In this context, it is not necessary to consider the cause of the leak. If the pipe was in some way weakened by corrosion or loosening at the connections, then so be it. The defendant undertook to ensure the plaintiff's installation as it was and there was nothing in the policy to require the plaintiff to renew the installation periodically. If the plaintiff's installation was made some years ago, then the plaintiff could have, if it wished, refused to issue a policy of insurance. Obviously it chose to take the risk."

The court went on to then consider the word "accidental" and noted that it implied the intervention of some cause which is brought into operation by chance and therefore can be described as fortuitous. Since there was no evidence that the leakage from the pipe was deliberately caused, it fell within the concept of "accidental". As such, the loss was covered.

The problem with this approach is that it seems to disregard the important temporal element inherent in the concept of "sudden". Consequently, when the court did examine the temporal concept very closely in **BP Canada Inc. v. Comco Service Station and Construction and Maintenance Ltd. et al** 73 O.R. (2d) 317 (Sutherland, J. June 5, 1990), the court came to a different conclusion. In that case, the insured sold gasoline through a BP retail gasoline outlet located on their property. There was a leak in the underground fuel storage tank which contaminated the soil and groundwater of both the insured's property and neighbouring properties. BP had cleaned up the contamination and sued the insured in tort and contract for the damages incurred. A motion was brought for an order declaring that the insured was not entitled to a defence by its insurers. One of the insurers refused to defend based on the pollution exclusion clause in the policy.

Sutherland, J. looked at the evidence which indicated that gas had leaked from a cracked coupling in the storage system and that the coupling had been defective from the time of its installation in 1967 (the action had been commenced in 1989) and showed that the leak had been going on for considerable though unspecified period of time. Mr. Justice Sutherland found that the term "sudden and accidental" in the exception to the environmental exclusion and one policy included a temporal element and was not to be extended to include unintended consequences that were not sudden. Because the evidence showed that the leak had been going on for a period of time, it was excluded from the coverage and the claim did not fall within the exception to the exclusion to coverage.

Perhaps the most recent and interesting case in the area is **Regina v. Kansa General Insurance Co.** This case concerned the application of a second type of exclusion clause cited above. The facts of the case disclosed that one Kreiser was a part owner of property situated in North York Ontario. Kreiser was sued by the owners of adjoining piece of property for damages resulting

from contamination of their property by pollutants emanating from Kreiser. Kreiser commenced third party proceedings against the Crown claiming indemnity. In his third party claim, Kreiser alleged that Crown officers were aware or should have been aware that pollution had occurred and was continuing and that Crown officers were negligent in failing to respond to the pollution problem and breached their duties pursuant to the Environmental Protection Act to advise the defendants of any spill, to deal appropriately with spills occurring and to prevent further spills.

The issue in the application as to whether the claims made by the plaintiff fell within the pollution exclusion set out above, and specifically whether Kansa had a duty to defend the third party claim on behalf of the Crown. Zelinski J., held that, after a review of a number of American authorities, coverage ought not to be excluded on the basis of proximate cause. (The theory of proximate cause states that where there has been damage to property as a consequence of pollution therefore there is no coverage because of the application of the pollution exclusion.) Rather, he held that the pollution exclusion should be interpreted in relation to the activities and conduct of the insured:

> At page 14:
>
> *"Persons down the chain from actual dumpers will have to be considered in light of the facts applicable to them.* ***For the pollution exclusion to apply, those facts, must in my view, establish that the persons intended to be excluded have a connection to the pollution such that their intentional and/or irresponsible acts or conduct must disentitle them to coverage on the basis that it would be contrary to responsible environmental behaviour to permit them to pass off financial responsibility for their actions or conduct to an insurer.*** *The should not benefit simply because they sought protection from personal liability for only a small cost of an annual premium. ... Thus in my opinion, i****t is reasonable to expect that the pollution exclusion will apply to insured persons who should bear responsibility for the pollution to which they have contributed, or in which they have acquiesced by wilfullness or indifference, or from which they are seeking an opportunistic benefit.***
>
> *It is for Kansa to establish that the allegations against HMQ cast HMQ within the pollution exclusion in this way. This necessitates that it establish that the Kreiser allegations disentitle HMQ to coverage by reason of its irresponsible acts, wilfullness or indifference to the required degree ..."*

In the result , Zelinski J., held that the insurer had a duty to defend the Kreiser claim but without prejudice to its right to dispute liability to indemnify under the policy of the correct time.

In terms of the third issue, as to obligation to defend an action, the Supreme Court of Canada in **Nichols v. American Home Assurance Co.** [1990] 1 S.C.R. 801 has applied the following principles:

1. The duty to defend arises where a suit is brought against the insured alleging an act or omission under the policy and seeking damages which are or may be payable under the terms of the policy.

2. The duty is confined to claims which potentially fall within the indemnity coverage to the policy.

3. The issue then is whether the action which gives rise to the duty to defend claims concerns damages which **may** be payable under the policy.

4. Where the damages claimed are not damages payable under the policy, there is no duty to defend.

5. The duty to defend is broader than and independent from the duty to indemnify. The duty to defend arises where the claim alleges acts or omissions falling within the coverage, while the duty to indemnify arises only where these allegations are proven at trial.

GATHERING EVIDENCE PRIOR TO AND THROUGH THE DISCOVERY PROCESS

What I am about to discuss in this section of the paper is not an exhaustive treatise on the conduct of environmental lawsuits for all purposes. It is meant to be a rough and ready check list of some sources of proof that may be gathered during the discovery process. Needless to say, one should take care to tailor these suggestions to the particular facts in each case.

Prior to Discoveries

Before attending at the examination for discoveries, depending on the magnitude of the contamination problem and the amount at issue, there are some extensive investigations that can be undertaken. I list hereafter a few ideas for some sources of preliminary information which can be utilized in formulating questions to be put during the examination for discovery:

1. **Police and Fire Department reports:** particularly if these authorities were involved in a particularly acute spill. These reports may be valuable because they will show what security may have been in place prior to the spill, what the physical layout of a facility was immediately prior to the spill, how the spill was uncovered, identify potential witnesses, etc.

2. **Further Witness Statements:** One may wish to follow up the initial police reports identifying witnesses with specific investigation by a private investigator to track down anyone who may have information concerning the circumstances which caused the contamination.

3. **Title Search:** A property search at the Registry Office may disclose clues as to when the facility was constructed, financing in place, the various prior owners, long term leases, etc. This would give you some idea as to how old the facility is and how long the property has been used for its present purposes.

4. **Planning and Site Plan Searches:** Search at the Planning Department and Building Department of the local municipality may also prove fruitful in establishing when a facility may have been built, what site plans were filed to obtain approvals as to building permits, zoning, site plan control, etc. Area zoning maps are useful to delineate neighbouring property uses in juxtaposition to the facility in question. Development agreements may have been entered into wherein certain promises or undertakings may have been given that are relevant to the contamination problem.

5. **Freedom of Information Legislation:** Searches and requisition of public data under Freedom of Information statutes are a fruitful source of information. Specifically, the **Freedom of Information and Privacy Act**, S.O. 1987, c. 25, the **Municipal Freedom of Information and Privacy Act**, S.O. 1989, c. 63, and their federal counterparts provide extensive access to governmental files. Through this mechanism, one can access local Ministry of Environment investigation files, complaints on file with the Ministry of the Environment, clean up plans filed

under the Spills Bill, consultants reports filed with the Ministry of the Environment delineating the nature and extent of the spill and attempts which have been made to clear it up. Other municipal and provincial governmental departments such as the Fuel Safety Branch of the Ministry of Consumer and Corporate Affairs concerning inspections of fuel facilities, may also be a fruitful hunting ground for useful information.

Information filed by with the Ministry of the Environment to obtain a certificate of approval of the particular process which is in question, may also be useful. There may have been undertakings made in support of a certificate of approval application that there not followed or were materially departed from at some stage.

6. **Media Search:** A newspaper search can be done by computer. This may disclose that a particular defendant has had a similar problem in other facilities, either in Ontario, elsewhere in Canada or in the United States. The newspaper search can be conducted from your own office through a computer. Several such databases are contained within Quick Law. Similar newspaper databases can also be accessed through CBA Net and through Public Information Utilities in the United States, such as Compuserve.

7. **INFORMATION SEARCH:** Similar public databases can be accessed through CBA Net and Compuserve to search magazines and periodical literature concerning the problem at issue. Similarly , one can make from one's own computer a Dunn & Bradstreet search, Standard and Poors public disclosure database for the US SEC filings or the OSC filings made here in Ontario, in the case of publicly traded companies. This may disclose valuable background information as to who the corporate officers are, assets, sales, liabilities and perhaps even other litigation involving the defendant.

8. **Experts:**I think it is also essential to retain at the earliest possible time, an environmental expert such as an environmental engineer. This expert can assist you in processing some of the information you receive back. He may be able to gather certain technical information from a literature search that would give you some fundamental information on the nature of the hazardous material at issue, its characteristic properties and contamination levels. He may also be able to steer you onto other specific experts from whom you will wish in due course to obtain reports. This expert may also be useful in helping you to critique a

consultant's report which may have been filed with the Ministry of Environment to probe for weaknesses in analysis and conclusions for use during the course of litigation. In short, this expert can give you a great deal of guidance in the type of questions to answer. I found this kind of expert particularly useful in guiding me through the requirements of Ontario Regulation 309, which deals with the waste generation requirements and characterization of wastes in the province of Ontario.

At The Examination for Discovery

During the course of the examination for discovery, you might consider asking questions directed at the following subject areas:

1. A description of the personnel of the facilities in question and their areas of responsibility.

2. In the overall, chain of command, who is responsible for pollution control and periodic reporting to any relevant public authority. Specifically, who is responsible for the waste generation requirements reporting under Ontario Regulation 309.?

3. What reports, memorandum, or forms were filed characterizing waste produced by the facility in question?

4. Was the waste product, which is the subject matter of the action, tested to determine its consistency - were there any lab reports prepared or filed with any other authority?

5. Was the factory or process which produced the deleterious substance at issue based on a design similar to another facility built elsewhere? Were tests done or reports made of similar waste produced by those kinds of model plants?

6. Obtain a detailed description of the process that produces the waste or harmful by-product at issue. What studies were done concerning the elimination or reduction of the waste or harmful by-product at issue?

7. Obtain a complete description of the raw products going in to the facility, how they are processed, what stresses or procedures were they subjected to, and

how they were changed in the process. Were there some waste products produced by the process that ought to have been foreseen at the time of the original design?

8. Are there industry standards or standard designs that were employed to construct the facility in the first place? Were there any studies done on an industry -wide basis to see what by-products would be produced by the facility in question?

9. Was any inspection carried out in the plant by the Ministry of the Environment prior to its commissioning or by any other agency to approve the waste handling procedure?

10. In 1986, with the imposition of waste registration requirements and waste characterization imposed by Ontario Regulation 309, pursuant to the Environmental Protection Act, what characterization, reports, analysis, forms, memoranda, etc. were generated concerning the characterization and generation of the waste at the facility in question?

11. Did the pollution control arm of the industry establish an engineering protocol or procedure concerning the standardized testing of waste material? Was this followed?

12. Were specifications issued to other companies disposing of the waste on behalf of the facility that generated it? What were those specifications? What did they show as to the consistency of the waste material?

13. What internal investigation was done as a result of the spill or contamination problem? What reports were filed with the Ministry of the Environment? What reports were filed concerning the clean up plan? Were there any consultant reports? Were there any follow up reports? Were there any drafts to any reports that were vetted by the polluter prior to their submission to the Ministry of the Environment?

I hope that a listing of these areas above will stimulate counsel's imagination and perhaps assist in directing the prosecution or defence of the environmental contamination case.

CONCLUSION

We have examined the traditional common law causes of action for environmental law litigation in this jurisdiction. I have made the observation that the principles which have evolved from the many cases litigated over the last 50 years are still applicable and will guide the courts through the application and interpretation of some of the newer causes of action which have arisen under the Environmental Protection Act and related legislation. I have made the observation that one of the major impediments to plaintiffs pursuing their causes of actions in the courts in the past has not been the state of the law as to liability, the problem proof, nor the effectiveness of the remedies available to the court. I have observed that in my experience, the major impediment to environmental litigation from a plaintiff's point of view is the lack of funding on the part of a number of individual plaintiffs who may, taken alone, have suffered some modest monetary damage. Both the law of costs and the economics of proceeding with a protracted law suite that may result in the award of damages on a relatively modest scale, has discouraged many plaintiffs from proceeding with the environmental lawsuit.

There is no doubt that that situation will change dramatically in the very near future with the advent of the Class Proceedings Act and the new Proposed Environmental Bill of Rights. The Class Proceedings Act in and of itself may prove a quantum leap in the type and level of litigation which will occur between private litigants.