ENVIRONMENTAL CLAIMS - A CLAIMANT'S PERSPECTIVE

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CAUSES OF ACTION IN ENVIRONMENTAL CLAIMS

1. The principal causes of action in environmental claims are:

   - Negligence
   - Breach of Statutory Duty
   - Public and Private Nuisance
   - Claims under the Human Rights Act 1998

Claims in Negligence

2. The ingredients of the tort of negligence are duty of care, breach of duty, damage, causation and foreseeability. In ***Re Corby Group Litigation*** [2009] EWHC 1944 (TCC), a claim brought on behalf of children born with limb disorders allegedly caused by toxic waste, the group litigation order required the court to consider and address 5 specific issues which were generic and common to the claimants. The 5 specific issues were (1) whether in the management and execution of the reclamation works, Corby Borough Council ("CBC") owed a duty of care to the claimants to take reasonable care to prevent the airborne exposure of the claimants' mothers to toxic waste before and/or during the embryonic stage of pregnancy; (2) in the event that such a duty was owed, whether CBC was in breach of that duty; (3) whether any such breach had the ability to cause upper and/or lower limb defects to the claimants of the type complained of; (4) whether any alleged loss arising out of such breach was foreseeable; and (5) whether, in the alternative, CBC was liable to the claimants in public nuisance or under the Environmental Protection Act 1990.

3. As to issue no. 1, whether the defendant owed the claimants a duty of care, the trial judge, Mr Justice Akenhead, said:

> "680. There is no real dispute between the parties as to the duty of care owed in tort by CBC. CBC admits in paragraph 115 of the Defence that a duty of care was owed by it to the Claimants and their mothers to take reasonable care in the execution of the works to avoid injury to the Claimants and their mothers. It is unnecessary to elaborate on their duty and the admission by CBC was properly made."

4. Akenhead J went on to deal with the standard of care, breach of duty and foreseeability in these terms:

> "681. The standard of care to be exercised by CBC is that of an ordinary careful local authority embarked on reclamation works of the type involved in Corby. The duty is to be judged by reference to the standards known or reasonably ascertainable and knowledge available at the time. Thus, if standards had materially changed over the period within which this claim is concerned, any breach of the duty would be determinable by reference to the standards applicable at the time of the breach, and not by the later standards.
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> 682. This case is necessarily and obviously concerned with the dispersal of toxic substances from the CBC site. Primarily, the Court must be concerned therefore with any breaches of the duty that caused the dispersal of such substances into areas in which the Claimants' mothers might have ingested or inhaled such substances.
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> 683. So far as foreseeability is concerned, it is not necessary that CBC would or could reasonably have foreseen the precise type of birth defect suffered by the Claimants. It is enough that it was reasonably foreseeable that harm or damage might be caused to embryos or foetuses being carried by the mothers at the material time. It was argued by CBC initially that it had to be established that it was reasonably foreseeable to the Defendant that it's wrongful act would be likely to cause injury of the types sustained by the Claimants concerned. However, it was accepted in argument, properly, that the formulation referred to above was sufficient."

5. The Claimants pleaded that the land reclamation programme and the presence of poisonous waste presented a significant health risk. The poisonous waste was ultra-hazardous which was likely to cause personal injury to persons in the surrounding area, and CBC was under a non-delegable duty at common law to take all reasonable measures to ensure that contaminated waste and toxic chemicals did not escape or cause personal injury to persons living in the surrounding area.

6. As to this the judge said:

> "684. It is generally the case, in negligence, that, provided that the defendant in question has selected independent contractors with reasonable care and skill, that defendant will not be liable for the negligence of those independent contractors save to the extent that it had been negligent itself in supervising and monitoring the

> work of those contractors. The exception to that, as has been accepted properly by CBC, is that if an employer has engaged or contracted others to carry out work, which by its very nature, involved in the eyes of the law special danger to another, the employer will be liable for the negligence of its contractor. Support for that proposition is contained in *Charlesworth and Percy on Negligence* 11th Edition at paragraphs 2-388. The issue of delegation does not arise in this case for two reasons. The first is that the negligence as found in this judgment primarily lies in CBC's own negligence and breach of statutory duty. Secondly, the evacuation, transporting and depositing of seriously contaminated wastes was essentially and specially dangerous to workers and the public at large."

7. In ***Re Buncefield Litigation***, ***Colour Quest Limited and Others v. Total Downstream UK Plc and Others*** [2009] EWHC 540 (Comm), the claim was brought in the main by local residents and businesses affected by the explosion at the Buncefield Oil Storage Depot in December 2005. Summary judgment was given for the claimants in the light of admissions made by Total and Hertfordshire Oil Storage Limited, the operator of the Buncefield site under Total's control, that either one or the other was vicariously liable for various acts of negligence by the relevant supervisor on duty at Buncefield at the time of the explosions.

8. The Defendant's admissions were subject to the questions of the foreseeability of any loss, the recoverability of economic loss and the proof of title to sue, and quantum. The issue of foreseeability was abandoned very early in the trial and the claimants' participation thereafter was largely confined to arguments regarding the recoverability of economic loss under one or more of the causes of action relied upon. The main focus of the hearing before Mr Justice David Steel became the dispute between Total and Chevron Limited (a 40% shareholder in Hertfordshire Oil Storage Limited) as to the identity of the relevant defendant for liability purposes, the nature and scope of that liability and the consequential distribution of responsibility between Total and Chevron.

Breach of Statutory Duty

9. In the *Corby* claim, group particulars of claim were served on behalf of the claimants who alleged that their mothers, who lived or worked close to the former steelworks site, were exposed during the embryonic stage of their pregnancies to toxic

materials. The birth defects were shortened or missing arms, legs and fingers in the main and said to have been caused as a result of ingestion or inhalation of harmful substances generated by the reclamation works and spread in various ways through the town of Corby. The case was originally pleaded in negligence, and by amendment in June 2006 the claimants served additional points of claim in which they introduced allegations of breach of statutory duty (sections 33(1)(c) and/or 34(1)(b) of the Environmental Protection Act 1990) and public nuisance.

10. The claim for breach of statutory duty, which the trial judge found was established, was pleaded in the Additional Points of Claim in these terms:

> "Contrary to section 33(1)(c) of the Environmental Protection Act 1990 disposing of waste in a manner likely to cause pollution of the environment or harm to human health and/or causing or permitting the same and/or contrary to section 34(1)(b) of the 1990 Act and/or failing to take all measures reasonable in the circumstances to prevent the escape of waste."

11. Section 33(1)(c) of the Environmental Protection Act 1990 (which came into force on 1st April 1992 and therefore could only apply to breaches of duty occurring after that time) provides that a person shall not dispose of controlled waste in a manner likely to cause pollution of the environment or harm to human health. It is a defence under section 33(7) for a person charged with an offence under this section "to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence." Section 34(1)(c) provides that it should be the duty of any person who disposes of controlled waste "to take all measures applicable to him in that capacity as are reasonable in the circumstances to prevent the escape of the waste from his control or that of any other person." Section 73(6) of the 1990 Act provides for a breach of section 34 to give rise to a civil claim of damages.

12. In relation to the claim for breach of statutory duty, Akenhead J said:

> "696. In my judgment, the civil duty adumbrated by the statute is in effect and practice a duty to exercise reasonable care and skill. The use of the expression in Section 34(1) that the person owing the duty has to take all such measures applicable to him in that capacity "as are reasonable in the circumstances" supports that view. Whilst there might in theory (and exceptionally) be a case in which the exercise of reasonable care is insufficient to do what is "reasonable in the circumstances", in practical terms there is no

difference between the statutory and the tortious test. (Counsel for the Claimants) did not press the contrary firmly if at all in oral argument.

697. As issue arose as to whether the statutory duty on CBC was one in which the onus was on it to prove that it had exercised all reasonable care, reliance being had by analogy with Section 33(7). That sub-section however is related to the criminal offence and is comparable with the Health & Safety legislation which reverses the burden of proof for some offences in that way. I do not consider that one can transfer the shifting of the statutory burden in criminal cases to the civil proceedings envisaged by the Act: the Act would and should have so legislated if that had been the intention. It is comprehensible that for the civil proceedings a balance of probabilities standard is to be achieved by the claimant. Section 73(6) provides some additional defences to a defendant in the civil proceedings but it does not reverse the burden or proof."

Public or Private Nuisance

13. A clear distinction needs to be drawn between a claim in private nuisance and in public nuisance.

Private nuisance

14. It is established law that an action in *private* nuisance is brought in respect of acts directed against the claimant's enjoyment of his rights over land, so that, generally, only a person with an interest in land may sue; *Hunter and others v. Canary Wharf Limited, Hunter and others v. London Docklands Development Corporation* [1997] AC 655 and *Transco Plc v. Stockport Metropolitan Borough Council* [2004] 2 AC 1. The essence of the right that is protected by the tort of private nuisance is the right to enjoy one's property. It does not extend to a licensee: see *Hunter's* case [1997] AC 655.

15. There is no doubt that damages for personal injury cannot be recovered for private nuisance. This is because private nuisance is a tort based on the interference by one occupier of land with the right of enjoyment of land by another. The same applies to claims under the rule in *Rylands v. Fletcher* (1868) LR 3 HL 330: see *Transco* per Lord Bingham of Cornhill at [19] who said "the claim cannot include a claim for death or personal injury, since such a claim does not relate to any right in or enjoyment of land." See also Lord Hoffmann at [34] - [35] who said that: "It must, I think, follow that damages for personal injuries are not recoverable under the rule".

16. The rule in *Rylands v. Fletcher* (1868) LR 3 HL 330 is a sub-species of private nuisance, and thus being itself based on a tort concerning the interference by one occupier of land with the right in or enjoyment of land, the remedy in such action is for damages to land or interests in land: see *Transco Plc v. Stockport* [2004] 2 AC 1 per Lord Bingham of Cornhill at [9] and Lord Hoffman at [39]. The rule which Blackburn J formulated in the Exchequer Chamber (1866) LR 1 ex 265, 279 and afterwards approved by the House of Lords LR 3HL 330, 339-340 was in these terms:

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

17. In the House of Lords, Lord Cairns LC at pp338-339 put the matter in this way:

> "On the other hand if the defendants not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land, and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water going to escape and to pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril; and, if in the course of their doing it, the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the plaintiff and injuring the plaintiff, then for the consequence of that, in my opinion, the defendants would be liable."

18. In *Transco Plc v. Stockport* [2004] 2 AC 1 the House of Lords held that the provision of a water supply to a block of flats by means of a connecting pipe from the water main, though capable of causing damage in the event of an escape, did not amount to the creation of a special hazard constituting an extraordinary use of land; and that accordingly, the facts upon which the claimant relied fell outside the ambit of the rule. In *Cambridge Water Co v. Eastern Counties Leather Plc* [1994] 2 AC 264 the House of Lords held that the use of a solvent in a manufacturing process and storage constituted a non-natural use of the defendants' land, but since the plaintiffs were not able to establish that pollution of their water supply by the solvent was in the circumstances foreseeable, the action failed applying *Overseas Tankship (UK)*

Limited v. Miller Steamship Co Pty (The Wagon Mound (No 2)) [1967] 1 AC 617 PC. Thus foreseeability of harm of the relevant type which the defendants suffered was a prerequisite of the recovery of damages both in nuisance and under the rule in *Rylands v. Fletcher*.

Public nuisance

19. A *public* nuisance, on the other hand, is committed where a person does an act not warranted by law, or omits to discharge a legal duty, and the effect of the act or omission is to endanger the life, health, property or comfort of the public, or to obstruct the public in the exercise of rights common to everyone: *R v. Rimmington, R v. Goldstein* [2006] 1 AC 459. A public nuisance is both a crime, and a tort, the ingredients of each being the same.

20. It is a question of fact whether the matter complained of in each case sufficiently affects the public to constitute a public nuisance. It is not necessary to prove that every member of the class or neighbourhood has been injuriously affected; it is sufficient to show that a representative cross-section of the class or neighbourhood has been so affected; see *Attorney General v. PYA Quarries Limited* [1957] 2 QB 169 at 184, a case which Lord Bingham in *Rimmington* at [18] described as the leading modern authority on public nuisance. A common injury which affects a section of the community will suffice: Lord Rodger of Earsferry at [47] – [48]. Public nuisance is concerned with the effect of the act complained of: see *Gillingham Borough Council v. Medway (Chatham) Dock Co Ltd* [1993] 343, 356 – 358.

21. In *Wandsworth London Borough Council v. Railtrack Plc* [2002] QB 756, Chadwick LJ at [32] - [33] identified three elements for liability in public nuisance, namely, knowledge of the existence of a nuisance on or emanating from the defendant's land, means reasonably open to the defendant to prevent or abate it, and failure to take those means within a reasonable time. If the defendant is aware of it, has the means to abate it, and has chosen not to do so, then he is liable.

22. In *Jan de Nul (UK) Limited v. NV Royale Belge* [2000] 2 Lloyd's LR 700, dredging operations in one area of Southampton Water caused silting in the vicinity of commercial wharfs and oyster beds of the parties. Moore-Bick J summarised the claim in public nuisance as follows at para 96:

> "Liability in public nuisance, however, raises more difficult questions. Although it does sometimes arise for consideration in the context of an interference with the plaintiff's use and enjoyment of land similar to that which would support a claim in private nuisance (see, for example, *Attorney-General v. PYA Quarries Limited* [1957] QB 169), that is not its essential nature. Perhaps it is most commonly encountered in the context of obstruction of the highway or of a navigable waterway interfering with the public right of passage, but, as the editors of *Clerk & Lindsell* point out in para 18-05, the scope of public nuisance is wide and the acts and omissions to which it applies are all unlawful. Private nuisance, on the other hand, is only concerned with interference with the use and enjoyment of land and may be committed by doing acts which are not necessarily unlawful in themselves."

23. Moore-Bick J at p716 recognised that in public nuisance general damages may be awarded if an injury has been suffered which cannot be precisely measured in monetary terms, and that the basis on which damages are awarded for pain and suffering in an action for negligence causing personal injury could apply in a proper case where liability arises in public nuisance if the claimant can show that he has suffered some direct and substantial injury over and above that suffered by the public generally. The learned judge said that once the claimant can show that he has suffered some direct and substantial injury over and above that suffered by the public at large he could see no reason in principle why the Court should not be able to award general damages in respect of it and he respectfully agreed with Sholl J for the reasons given in *Walsh v. Ervin* [1852] VLR 361 that the authorities did not preclude it from doing so.

24. Historically where a claimant was able to show that the defendant's public nuisance had caused him personal injuries, the courts have never had any difficulty in holding that particular damage is proved; see Kodilinye, *Public Nuisance and Particular Damage in the Modern Law* (1986) 6 Legal Studies 182-183 citing *Paine v. Partrich* (1691) Carth 191 and other examples; Newark, *The Boundaries of Nuisance* (1949) 65 LQR 480 at p484 citing *Fowler v. Sanders* (1617) Cro Jack 446, 79 ER 382, and *Payne v. Rogers* (1794) 2H.Bl.350; *Salmond and Heuston on the Laws of Torts*, 21st Edition (1996) at page 87; Buckley, *The Law of Nuisance*, 2nd Edition (1996) at page 76; and Buckley, *The Law of Negligence*, 4th Edition (2005) at para 14.01 where the author states that "In contrast with private nuisance, it appears to have been long accepted that damages for personal injury are recoverable in public nuisance".

25. Examples of modern cases where damaged for personal injury have been awarded by the courts in public nuisance include *Castle v. St Augustine's Links Limited* (1922) 38 TLR 615; *Slater v. Worthington's Cash Stores (1930) Limited* [1941] KB 488; *Holling v. Yorkshire Traction Co Limited* [1948] 2 All ER 663; *Trevett v. Lee* [1955] 1 WLR 113; *Dymond v. Pearce* [1972] 1 KB 496; *Ryan v. Corporation of the City of Victoria* [2000] 3 LRC 17; and *Mistry v. Thakor* [2005] EWCA Civ 953. However, the matter had never been conclusively determined in this country.

26. *The American Law Institute, Restatement of the Law, Second, Torts 2d* (1979) provides that damages for personal injury are recoverable in public nuisance. Chapter 40, paragraph 821C states: "Where the public nuisance causes personal injury to the plaintiff or physical harm to his land or chattels, the harm is normally different in kind from that suffered by other members of the public and the tort may be maintained."

27. In ***Re Corby Group Litigation*** [2009] QB 335 the Court of Appeal (Ward, Dyson and Smith LJJ) held that damages for personal injury are recoverable in the tort of public nuisance, and it is not necessary for the claimant to have an interest in land to bring such a claim. The Court held that the long-established principle that damages for personal injury can be recovered in public nuisance had not been impliedly reversed by either *Hunter v. Canary Wharf* or *Transco Plc v. Stockport.* The Court said it was important to have in mind the true nature of public nuisance as set out in the speech of Lord Bingham of Cornhill in *R v. Rimmington* [2006] 1 AC 459.

28. Dyson LJ, with whom Ward and Smith LJJ agreed, said:

> "29. …The essence of the right that is protected by the crime and the tort of public nuisance is the right not to be adversely affected by an unlawful act or omission whose effect is to endanger the life, safety, health etc of the public. This view is reflected in the *American Law Institute, Restatement of the Law, Torts,* 2d (1979), section 821B(h) which states: "Unlike a private nuisance, a public nuisance does not necessarily involve interference with use and enjoyment of land."
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> 30. In these circumstances, it is difficult to see why a person whose life, safety or health has been endangered and adversely affected by an unlawful act or omission and who suffers personal injuries as a result should not be able to recover damages. The purpose of the law which makes it a crime and a tort to do an unlawful act which endangers the life, safety or health of the public is surely to

> protect the public against the consequences of acts or omissions which do endanger their lives, safety or health. One obvious consequence of such an act or omission is personal injury. The purpose of this law is not to protect the property interests of the public. It is true that the same conduct can amount to a private nuisance and a public nuisance. But the two torts are distinct and the rights protected by them are different."

Distinction between negligence and nuisance

29. One of the principal differences between an action for nuisance and an action for negligence is the burden of proof. In an action for nuisance, once the nuisance is proved and the defendant is shown to have caused it, then the legal burden is shifted on to the defendant to justify or excuse itself: per Denning LJ in *Southport Corporation v. Esso Petroleum Co Ltd and another* [1954] 2 QB 182 at 197; *Dymond v. Pearce* [1972] 1 QB 496 at 501-502; See further Buckley, *The Law of Nuisance*, 2nd Edition (1996), pages 78-81; Buckley, *The Law of Negligence*, 4th Edition (2005) paras 14.21 - 14.24.

30. Further, in *Transco*, Lord Walker of Gestingthorpe, at [97], said that in nuisance's extensive territory, negligence (in the sense of a demonstrable failure to take reasonable care) has traditionally been regarded as irrelevant. If the noise and smell from the stabling for two hundred horses (used to pull trams) is intolerable in a densely-populated residential neighbourhood, it is no defence that the defendant had used all reasonable care to minimise the annoyance: *Rapier v. London Tramways Co* [1893] 2 Ch 588, 600. There is no reason to approach the matter as though it were a claim in negligence or private nuisance: see *Wandsworth v. Railtrack* [2002] QB 756 per Kennedy LJ at [22].

31. In the *Corby* case, Akenhead J at [688] said:

> "The question arises as to whether negligence is an essential part of the tort of public nuisance, at least where personal injuries or as in this case birth defects are said to arise. In a sense it matters not given the findings of fact which are made in this judgment. The essence of a case in public nuisance in the context of this case is, as set out in Dyson LJ's judgment, that a person permits a public nuisance if by his unlawful act he endangers the life, health or safety of the public. The pleaded cases relate to the escape of toxic material and the spread of such materials onto public highways thereby endangering the health of the public. Strictly speaking, negligence or breach of statutory duty is not essential in public nuisance although, if there is negligence or a breach of statutory duty

which causes life or health to be endangered, there will be a public nuisance."

Particular or special damage

32. A private individual has a right of action in respect of public nuisance only if he can prove that he has sustained "particular damage or special damage" other than and beyond the general inconvenience and injury suffered by the public, and the particular or special damage which he has suffered is direct and substantial; *Benjamin v. Storr* (1874) LR 9 C&P 400; *Fritz v. Hobson* (1880) 14 Ch D 542; *Walsh v. Ervin* [1952] VLR 361; *Halsey v. Esso Petroleum Co Ltd* [1961] 2 All ER 145 (noxious smuts on the plaintiff's car on the public highway and the concentration of moving vehicles at night in a small area of the public highway was an unreasonable use of the highway and caused special damage to the plaintiff); *Jan de Nul (UK) Limited v. NV Royale Belge* [2000] 2 Lloyd's LR 700, 714-715 at [42] - [44]; and *Mitchell and others v. Milford Haven Port Authority* [2003] EWHC 1246 (A).

33. In *Anderson et al v. WR Greene & Co* 628 F Supp 1219 (D Mass 1986) the administrators of minors who died of leukaemia allegedly caused by exposure to contaminated water and others who had contracted leukaemia or other alleged illnesses brought an action against the defendant for causing wrongful death, pain and suffering, and personal injury. The Court held that the alleged contamination fell within the category of a public nuisance, and the plaintiff having sustained special or peculiar damage had standing to maintain an action in public nuisance for compensation for personal injury. At [21] - [23] the Court said that injuries to a person's health are by their nature "special and peculiar" and as the plaintiffs alleged that they had suffered a variety of illnesses as a result of exposure to the contaminated water, they had standing to maintain the action. At [27] the Court said that the plaintiffs' claims for damages for personal injury may well be duplicative of their negligence claims, but the plaintiffs were entitled to present alternative theories of liability to the jury so long as they did not obtain double recovery for any element of damage.

34. In *AB and others v. South West Water Services Limited* [1993] QB 507 a quantity of about 20 tonnes of aluminium sulphate was accidentally introduced into the

defendant's drinking water system at their treatment works at Camelford in Cornwall. The plaintiffs, of whom there were about 180, drank the contaminated water and suffered a variety of ill-effects as a result. Claims were brought in negligence, breach of statutory duty under the Water Act 1945 and public nuisance, and breach of an EEC Water Quality Directive. The Court of Appeal held that while the plaintiffs were entitled to recover the ordinary measure of compensatory damages for all they had suffered as a direct result of the defendant's breach of duty, the claims for aggravated and exemplary damages would be struck out.

Statutory authority

35. In neither *Corby* nor *Buncefield* was any defence of statutory authority involved. In *Allen v. Gulf Oil Refining Limited* [1981] AC 1001 following complaints by villagers, living close to the oil refinery at Milford Haven, a test case was brought in nuisance and negligence alleging noxious odours emanating from the defendant's refinery, vibrations and offensive noise levels. The defendants relied on the defence of statutory authority. The House of Lords held that the Gulf Oil Refining Act 1965 expressly or by necessary implication gave authority to construct and operate on the land a refinery, and, accordingly, such statutory authority conferred on the defendants immunity from proceedings for any nuisance or alternatively negligence which might be the inevitable result of constructing a refinery on the land.

36. Similarly, in *Marcic v. Thames Water Utilities Limited* [2004] 2 AC 42 the House of Lords held that a cause of action in nuisance would be inconsistent with the statutory scheme of regulation under the Water Industry Act 1991. The statutory scheme provided a procedure for making complaints to an independent regulator which the plaintiff had chosen not to pursue; a balance had to be struck between the interests of a person subject to sewer flooding and the interests of those, including other customers of the sewage undertaker, who would have to finance the cost of constructing more sewers; such a balancing exercise was better undertaken by an industry regulator than a court; and the common law should not impose on a sewerage undertaker obligations which would be inconsistent with the statutory scheme since that would run counter to the intention of Parliament.

Claims under the Human Rights Act 1998

37. In *Marcic v. Thames Water Utilities Limited* [2004] 2 AC 42 the plaintiff's garden had repeatedly been flooded and his house adversely affected by sewage discharged from sewers operated and maintained by the defendant. The House of Lords held that he had no claim in respect of interference with his private life and his home under article 8(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, or the right to peaceful enjoyment of his possessions under article 1 of the First Protocol to the Convention. The House of Lords held that the statutory scheme of regulation under the Water Industry Act 1991, which included an independent regulator with powers of enforcement, was compatible with the plaintiff's rights under the Convention; and that, accordingly, the plaintiff could not sustain a claim under the Human Rights Act 1998.

38. In *Dobson and others v. Thames Water Utilities Limited* [2009] 3 All ER 319 the claimant and some 1,300 other residents of Isleworth and Twickenham brought proceedings against the defendants alleging that odours and mosquitoes from the Mogden sewage treatment works at Isleworth had caused a nuisance, caused by the negligence of the defendant, and that the defendant had breached the claimants' rights under article 8 of the Convention. Some claims were brought by or on behalf of persons who had no proprietary interest in land.

39. The Court of Appeal held that it was most improbable, if not inconceivable, that damages of common law would be exceeded by any award to the same claimant for infringement of article 8. Accordingly, an award of damages at common law to a property owner would normally constitute just satisfaction for the purposes of section 8(3) of the Human Rights Act 1988 and no additional award of compensation under that Act would normally be necessary. As to a person living in the same household with no proprietary right, the court held that an award of damages in nuisance to a person or persons with a proprietary interest in the property would be relevant to the question whether an award of damages was necessary to afford just satisfaction under article 8 to a person who lived in the same household. The role of damages in human rights litigation had significant features which distinguished it from the approach to an award of damages in a private contract or tort action. The Convention principally served public law aims

and the principal objective was to declare any infringement and to put a stop to it. Compensation was ancillary and discretionary. The interests of the individual were part of the equation, but so too were those of the wider public. The vital question would be whether it was necessary to award damages to another member or whether the remedy of a declaration that article 8 rights had been infringed sufficed, alongside the award to the landowner.

TYPES OF CLAIMS

The Corby Group Litigation

40. Between 1983 and 1989, CBC acquired approximately 680 acres of land in Corby, Northamptonshire from the British Steel Corporation. The land was heavily contaminated with toxic waste and was the site of the former steelworks complex. CBC acquired the land for redevelopment, and carried out a programme of reclamation (removal of waste from the site and restoring the area) and decontamination (removal of the effects of pollution of toxic waste) arising from the former use of the site.

41. The claim related to birth defects said to have been caused to a group of 18 children born with serious deformities as a result of negligence, breach of statutory duty and public nuisance on the part of CBC and its statutory predecessor Corby District Council.

42. The trial centred upon issues (2) and (3) of the group litigation order, namely, breach of duty and whether any such breach had the ability to cause birth defects of the type complained of. The court was not required at this stage to find that CBC was liable in damages to any individual claimants. Akenhead J's overall factual conclusions about the reclamation works are contained in paragraph 679 of the judgment. The learned judge found that from 1983 onwards, CBC's approach was to "dig and dump", or put another way, CBC decided in practice that all the waste and more or less contaminated materials from the sites would be disposed of on the self same sites. Almost invariably, this material was taken to one particular quarry at the north-eastern part of the site. Between 1.5 million and 2 million cubic metres

of contaminated material was so disposed between 1983 and 1997. Very substantial quantities of dust were created by the reclamation and associated operations. That dust came from operations and materials actually on the site as well as from materials dropped or blown on to roads by or from lorries. It was more than possible that some of the mud on the road and dust in the air was from time to time from sources other than the old British Steel sites being reclaimed by CBC. However, the bulk of the mud and dust on the roads was from the former British Steel site and operations. There was no evidence before the court that there were any other sources of relevant contaminated materials.

43. Finally, there were no effective wheel washing facilities for vehicles leaving the sites owned and being reclaimed by CBC at any time and the many thousands of lorries which left the CBC sites with contaminated materials on them were not sheeted until the final reclamation works. CBC at no time employed any person at senior or middle management level who had any relevant experience or training in running or managing or supervising reclamation operations involving contaminated sites.

44. The judge found that the claimants had established a number of specific allegations pleaded in the additional points of claim: that CBC caused the windborne escape of toxic material into the atmosphere, allowed the site to remain contaminated notwithstanding reclamation works, failed to carry out any adequate or effective decontamination of toxic waste at the site, failed to prevent contaminated liquids and sludges being deposited by dump trucks during the entire length of the haul road leading from the site to the tip, and permitted dozens of lorries to be used to transport substantial quantities of contaminated waste from the site along public roads and the haul road (both close to residential and community areas). A specific finding of negligence was CBC's failure to undertake any adequate assessment or management of the potential risks to health caused by the reclamation works despite growing evidence throughout the late 1980s and early 1990s that the site contained high levels of contaminated waste and toxic chemicals and that unsafe exposure by the reclamation works at the former steelworks complex had the potential to cause injury to unborn children during their mother's pregnancy.

45. The judge also found that CBC failed to institute any adequate plan or system to avoid causing some personal injury to the claimants and their mothers during the

reclamation works and decontamination of toxic waste at the former steelworks complex. These findings amounted to negligence, breach of statutory duty and a public nuisance.

46. In his concluding remarks, Mr Justice Akenhead said that it was of course for others to judge the impact of the judgment on future works and practices on contaminated sites. The Corby reclamation was, however, in some senses at least, a "one-off" reclamation involving a very large contaminated steelwork site which was very close to a town centre. Whilst there will remain "brown-field" sites in the UK which are contaminated, there will be very few which are so large or so extensively contaminated as the Corby site.

The Buncefield Litigation

47. The cause of the explosions at the Buncefield Oil Storage Depot in December 2005 was the ignition of an enormous vapour cloud that had developed from the spillage of some 300 tonnes of petrol from a storage tank. There ensued a large fire which engulfed a further 20 fuel storage tanks.

48. The Buncefield depot was a large and strategically important fuel storage site. Fuels were stored in tanks and distributed by pipeline or road tanker to London and South East England. In addition the terminal acted as the main pipeline transit point meeting much of Heathrow's and Gatwick's demand for aviation fuel. On the day of the explosion, the site contained over 35 million litres of petrol, diesel and aviation fuel.

49. There were an enormous number of claimants. Some 2000 people were evacuated from their homes and the nearby M1 motorway was closed. Mercifully there were no fatalities. Apart from damage to a large proportion of the Buncefield site, significant damage was also caused to both commercial and residential properties outside the perimeter of the depot. There was a substantial impact on the adjacent industrial estate. This was home to 600 businesses employing about 16,500 people. All these businesses suffered disruption. The premises of 20 businesses employing 600 people were destroyed and the premises of another 60 businesses employing 3,800 were heavily damaged and unusable. The incident also damaged a great

amount of housing throughout the St Albans district. The claims were said to total in excess of £750 million.

50. Claim forms were issued on behalf of the various claimants and for case management purposes they were divided into two groups - those outside the perimeter fence of the Buncefield site and those within the perimeter fence.

51. The Court (Mr Justice David Steel) held that Total was wholly responsible for the site notwithstanding that it was operated through a joint venture company owned by Total as to 60% and Chevron as to 40%. All the staff at the site were engaged and paid by Total. They were all subject to Total's promotion and disciplinary arrangements. Their place of work was allocated by Total. All instructions relating to the safe operation of the Buncefield site were promulgated by Total in accordance with standards adopted by Total for all terminals which it regarded as being operated by Total. Accordingly David Steel J had no difficulty in concluding that Total rather than the joint venture company Hertfordshire Oil Storage Limited was wholly responsible for the negligence which led to the explosions.

52. Having determined the liability of Total, David Steel J turned to the claims by the claimants. Total accepted that it was prima facie liable to claimants outside the perimeter fence of the Buncefield site under *Rylands v. Fletcher*. As to the claimants' claims in private nuisance, an issue arose as to whether an "isolated escape" such as occurred at Buncefield could give rise to liability under *Rylands v. Fletcher*. Total submitted that it could not: a private nuisance, it contended, can only rise from a "state of affairs". Mr Justice David Steel at [410] said that before looking at the authorities, he confessed to having some difficulty in identifying the borderline between an isolated escape on the one hand and a state of affairs on the other. It was simply a matter of degree.

53. At [411] he said:

> "It is accepted that *Rylands v. Fletcher* liability is a species of nuisance. But in my judgment the criteria or ingredients of the two causes of action are in some important respects different. In particular nuisance is dependent on establishing unreasonable user giving rise to a foreseeable escape whilst *Rylands v. Fletcher* is concerned with long-natural or extraordinary user leading to an escape whether foreseeable or not. It did not appear that Total disputed this broad analysis of the disparity between the two

causes of action. What was contended by Total, however, was that *Ryland v. Fletcher* was an extension of the law of nuisance into the realm of isolated escapes where liability would not otherwise arise."

54. After reviewing *Midwood v. Manchester Corporation* [1905] 2 KB 597, *Charing Cross Electricity Supply Co v. Hydraulic Power Co* [1914] 3 KB 772, *Read v. Lyons & Co* [1947] AC 156, *Attorney General v. PYA Quarries* [1952] 2 KB 169, *Halsey v. Esso Petroleum* [1961] 1 WLR 683, *British Celanese Limited v. Hunt* [1969] 1 WLR 959, *Cambridge Water Co v. Eastern Counties Leather Plc* [1994] 2 AC 265 and *Transco Plc v. Stockport* [2004] 2 AC 1 the judge concluded that the authorities, taken as a whole, did not support Total's submission that an "isolated escape" could not give rise to liability under *Rylands v. Fletcher,* and that a "state of affairs" was required.

55. The learned judge at [421] said:

> "The position is that on appropriate facts there can be liability in private nuisance for a single or isolated escape as opposed to a state of affairs where there is both unreasonable or negligent user of land and foreseeability of escape. The claimants, subject to proof of damage, have such a claim."

56. The judge went on to hold that Total was also liable to the claimants inside and outside the perimeter fence in public nuisance under both limbs of *R v. Rimmington* [2006] 1 AC 459, namely, (1) an act not warranted by law which interferes with rights of the public, and (2) an obstruction of the public highway.

57. At [434] David Steel J said:

> "It is accordingly difficult to discern any difficulty in categorising the incident at Buncefield as a public nuisance within the first limb (interference with the rights of the public). The explosion was caused by negligence. A very large number of people were affected. Those who had an interest in land suffered private nuisance. The explosion endangered the health and comfort of the public at large. Subject to establishing a loss which was particular, substantial and direct (which is an issue for another day) there is a claim in public nuisance."

58. As to the second limb, the learned judge at [459] said:

> "I conclude that there is long-standing and consistent authority in support of the proposition that a claimant can recover damages in public nuisance where access to or from his premises is obstructed so as to

> occasion a loss of trade attributable to obstruction of his customers' use of the highway and liberty of access."

59. Total denied liability to the claimants inside the perimeter fence on the grounds of alleged consent to the bringing of oil products on to the site and its accumulation there. This defence was rejected by Mr Justice David Steel.

60. The learned judge said that the relevant law on the issue of consent was set out by Singleton LJ in *A Prosser & Son Limited v. Levy and others* [1955] 1 WLR 1224 at 1230:

> "If the plaintiff has consented to the source of danger and there has been no negligence on the part of the defendant, the defendant is not liable, and the same applies if the water is maintained for the common benefit of both the plaintiff and the defendant."

Thereafter having cited various examples Singleton LJ went on at p1233:

> "From these judgments it appears that there are two important elements for consideration, namely, negligence and consent. In the case of an ordinary water supply in a block of premises each tenant can normally be regarded as consenting to the presence of water on the premises if the supply is of the usual character. It cannot be said that he consents to it if it is of quite an unusual kind, or is defective or dangerous, unless he knows of that… It appears to us that they cannot be said to have consented to the set-up or installation as it existed at the time the damage was caused. Over and above this, negligence on the part of the defendants which causes or contributes to the damage takes the case out of the exception to the rule in *Rylands v. Fletcher*. It cannot be disputed that the leaving of the pipe in the condition in which it was constituted negligence, as the judge said."

61. David Steel J at [405] – [406] held that the "exception" to the rule in *Rylands v. Fletcher* referred to was that of consent. Thus where there is negligence there is no defence available because the consent is vitiated. This view is consistent with the earlier authorities. There is no basis for the proposition that where there is negligence the entire cause of action itself is no longer available. In his judgment there was no defence of consent available to Total in regard to the claimants inside the fence.

THE HANDLING OF CLAIMS: GROUP LITIGATION ORDERS OR LEAD ACTIONS

62. Part 19 of the Civil Procedure Rules 1998 govern group litigation. Rule 19.10 provides that a Group Litigation Order ("GLO") means an order made under rule 19.11 to provide for the case management of claims which give rise to common or related issues of fact or law.

63. Rules 19.10 to 19.15 of Part 19 are designed to achieve the objectives of providing access to justice where large numbers of people have been affected by another's conduct, bur individual loss may make an individual action economically unviable. The rules are supplemented by a Practice Direction. However, the rules and practice direction cannot be treated as a complete guide to the appropriate court procedures for conducting every group action. The rules establish a framework for the case management of claims which give rise to common or related issues of fact or law. They are intended to provide flexibility for the court to deal with the particular problems created by these cases.

64. **CPR r19.11** provides as follows:

> "**(1) The court may make a GLO where there are or are likely to be a number of claims giving rise to the GLO issues. (The practice direction provides the procedure for applying for a GLO.) A GLO must –**
>
> **(a) contain directions about the establishment of a register (the "group register") on which the claims managed under the GLO will be entered;**
>
> **(b) specify the GLO issues which will identify the claims to be managed as a group under the GLO; and**
>
> **(c) specify the court (the "management court") which will manage the claims on the group register.**
>
> **(2) A GLO may –**
>
> **(a) in relation to claims which raise one or more of the GLO issues (i) direct their transfer to the management court (ii) order their stay until further order; and (iii) direct their entry on the group register;**

(b) direct that from a specified date claims which raise one or more of the GLO issues should be started in the management court and entered on the group register; and

(c) give directions for publicising the GLO."

65. Environmental or personal injury claims are typical examples of circumstances in which the handling of claims involving multiple parties give rise to common or related issues of fact or law. Examples are cases involving sudden disasters, industrial disease or accident, product liability claims involving the taking of medicines, or the use of defective products.

66. In brief outline the rules provide that where claims which give rise to common or related issues of fact or law emerge, the court has power to make a Group Litigation Order enabling the court to manage the claims covered by the order in a co-ordinated way. The GLO will contain directions about the establishment of a "group register" on which the claims to be managed under the GLO will be entered and will specify the management court which will manage the claims on the register. Judgments, orders and directions of the management court will be binding on all claims within the GLO. The court's case management powers enable it to deal with generic issues, for example, by selecting particular claims as test claims.

67. The court's case management powers are contained in rule 19.13. This provides:

"**Directions given by the management court may include directions –**

(a) varying the GLO issues;
(b) providing for one or more claims on the group register to proceed as test claims;
(c) appointing the solicitor of one or more parties to be the lead solicitor for the claimants or defendants;
(d) specifying the details to be included in a statement of case in order to show that the criteria for entry of the claim on the group register have been met;
(e) specifying a date after which no claim may be added to the group register unless the court gives permission; and
(f) for the entry of any particular claim which meets one or more of the GLO issues on the group register."

68. In addition to rule 19.3(b) providing for tests claims, rule 19.15 specifically provides:

> "**(1) Where a direction has been given for a claim on the group register to proceed as a test claim and that claim is settled, the management court may order that another claim on the group register be substituted as the test claim.**
>
> **(2) Where an order is made under paragraph (1), any order made in the test claim before the date of substitution is binding on the substituted claim unless the court orders otherwise.**"

69. Neither the rule nor the practice direction provide any guidance on when and how test cases might be selected. In fact group litigation can be case managed in a number of different ways, including division of the group into subgroups, identification of generic or common issues, use of a master pleading, trial of particular issues, and some investigation of a sample of all individual claims, as well as the test case approach. By only referring to test cases the rule implies that this is the preferred option.

70. In the *Corby* litigation, a GLO was made at an early stage. Such an order was appropriate in view of the common issues of fact and law that were likely to arise in the litigation. Despite 18 individual claims being issued under CPR Part 7 on behalf of individual children born with limb defects no directions were made by the management court for any individual claim on the group register to proceed as a test claim. While the five specific issues which were expressly the subject of the Group Litigation Order were largely by agreement amplified by the addition of a further 25 sub-issues, the central GLO on the issue of causation was in the following terms: "Whether any such breach (of duty) had the ability to cause upper and/or lower limb defects to the Claimants of the type complained of."

71. In contrast no GLO was made in respect of the *Buncefield* proceedings. Although the claimants involved several parties with closely related claims many claimants were content to await the outcome of the trial between Total and Chevron. In the event two claimants' groups emerged to represent claimants outside the fence made up of one group appearing for companies situated in the local industrial estate and a second group representing individual claimants from the Hemel Hempstead area. Inside the fence were companies such as BP Oil Limited, Shell UK Limited and the

owners of a substantial warehouse on the ex-Shell site. A Case Management Conference took place in the Commercial Court which made provision for a trial of preliminary issues. The order called for an exchange of lists of proposed issues for approval by the court. It was further ordered that all findings of fact or rulings of law were to be binding on all parties in the Buncefield actions.

THE ROLE OF EXPERTS

72. In the *Buncefield* litigation there were three areas of expertise on which oral evidence was called:

    (a) Data analysis. The focus here was on the information and database tables stored on computer drives. Chevron called a specialist in mechanical engineering with particular expertise in the investigation of fires and explosions. Total called a senior project engineer with particular experience in electronic control analysis.

    (b) Operational negligence. Chevron relied on a Logistics Support Operation Manager at its Aldermaston Petroleum Storage depot. Total relied on a consultant safety engineer with Vectra Group Limited.

    (c) Accountancy. Total called a chartered accountant who had examined Total's accounting records so as to determine whether any premiums incurred in effecting the Total group insurance programme had been charged to the joint venture company Hertfordshire Oil Storage Limited.

73. In the *Corby* litigation the claimants and CBC both relied on expert scientific, medical and epidemiological evidence. More than a year before the trial, directions were made by the court for experts in the fields of management of waste disposal programmes, toxicology, foetal development, epidemiology, and air pollution science and safety risk management, to hold discussions and produce joint statements in accordance with CPR 25.12 on issues arising in their common fields, and to exchange reports in their like fields.

74. At trial the epidemiological evidence concentrated upon a consideration of whether or not there was a "cluster" of limb reduction defects in Corby. In his judgment Akenhead J said:

> "708. It is an unfortunate fact of life that children are born with birth defects for some known reasons but generally for unknown reasons. Science and statistics have not been able at this stage of history to identify the causes of the defects in each case or indeed in many cases. In some cases, there is a genetic throwback for a particular defect in the child's family. Sometimes, abusive substances, such as cocaine, cause defects. Thalidomide, to which various experts have referred, was a prime example of a prescribed drug causing birth defects.
>
> 709. It therefore becomes of interest and use to determine whether something out of the ordinary has happened in any given case or whether what has happened is an unfortunate chance event or series of events. It is in that context that the epidemiological experts address the available statistics.
>
> …
>
> 715. It is however clear that the epidemiological evidence, whatever I find, is not directly or fully probative. As both experts accepted, the outcome of the epidemiological debate in this case is at best simply a pointer, albeit it may be a strong one. It does not prove conclusively that the cause of all or some of the claimants' problems was a cause which was specific to Corby (such as the reclamation works). However, it does become increasingly important to the extent that other areas of the evidence show the existence of circumstances which point to something specifically present or happening in Corby at the relevant times."

75. After a review of the epidemiological evidence Akenhead J concluded:

> "731. Congenital limb reduction defects are relatively rare events which, current statistics indicate, affect about 5 in 10,000 babies. The aetiology is often difficult to determine but it is established that teratogenic substances can cause such defects; there can often be a genetic component as well. Given that there have been a number of reports and investigations, for instance in the area of landfill sites in the UK and Europe, it is scientifically plausible that there is or at least may be a connection between contaminants of one sort or another and the creation of birth defects."

76. After examining the tables of the number of births in Corby and elsewhere in the Kettering Health Authority Akenhead J found at [737] "that the rate of upper limb

reduction defects in Corby was significantly higher than elsewhere in KHA for 1989-1998 whilst it was even higher for the later five-year period, 1994-1998".

77. As to the toxicological evidence, the learned judge held that embryos and foetuses are much more sensitive to toxic chemicals than adults. The dosage of a teratogen required to induce birth defects can be much lower than that which would be required to cause toxic effects in adults and, although its teratogenic effects may be the result of induction by high doses, they may also be induced by low level exposures. Most known teratogens have been identified through experimental animal studies. It is not ethical for any teratogenic tests to be done on pregnant mothers let alone on embryos and foetuses. A problem with this is that there is no exact or mathematical correlation between what will affect a mouse foetus and a human foetus.

78. Notwithstanding these difficulties, the judge concluded at:

> "767 … that it is more probable than not that the human birth defects complained of in this case were capable of being caused by the mother's exposure to some or a mixture of PAHs, dioxins and heavy metals (in particular Cadmium, Chromium and Nickel) and there is no reason why they could not be capable of causing limb defects of the type complained of in this case.
>
> …
>
> 770. It is unnecessary for me to decide if any individual Claimant's birth defects were caused by the teratogens present on the CBC site being disturbed or moved during the period 1984 to 1999. What I can do and do conclude is that the PAHs, dioxins, Cadmium, Nickel and Chromium were capable of causing the birth defects complained of by the Claimants."

79. After reviewing the engineering and waste management evidence and the air pollution and safety risk management evidence, the judge considered the foetal medicine and neonatal evidence. In relation to the latter, the judge recorded:

> "873. It is accepted by the experts that the period of greatest risk to the foetus or embryo of suffering significant abnormalities to organs and limbs is in the third to the eleventh week of pregnancy during the period of organogenesis, which is while the foetal organs and limbs are forming. It is also, rightfully, accepted that the impact of terotagens on a given foetus or embryo may well vary widely. A given mother may have built up a certain amount of terotagenic

> substances in her body. A given mother, foetus or embryo may for a wide variety of reasons have more or less resistance to a given substance or combination of substances."

80. The judge concluded at [882]:

> "There is no doubt that all these substances (Cadmium, Chromium, Nickel, PAHs and dioxins) can cause birth defects in animals of a similar or not dissimilar type to most of those reported by the Claimants. There is no reason to think, other than the lack of literature, that birth defects could not be caused in human embryos or foetuses by the introduction of such substances during the early stages of pregnancy. There is of course no certainty that animal experiments will replicate exactly human experience; for instance, thalidomide was tested on animals before it was made generally available but it was established later that it was on the wrong type of animals (wrong in the sense that the young of the particular type of animals experimented upon did not exhibit birth defects), albeit that when retested on different animals comparable birth defects were demonstrated. Although there is no certainty that animal experiments, which do or do not demonstrate that particular types of birth defects may happen following the introduction of given substances in the early stages of pregnancy, will be replicated in the human condition, it stands to reason and is supported by the evidence which I accept that the introduction of any of these substances either on their own or together with other substances could realistically cause birth defects of the types complained of."

81. The judge concluded that it was very much a combination of findings which led him to his overall findings. There was a statistically significant cluster of birth defects. Toxicologically there were present on and from the CBC sites the types of contaminants which could cause the birth defects complained of by the Claimants. There was negligence and breach of statutory duty on the part of CBC which permitted and led to the extensive dispersal of contaminated mud and dust over public areas of Corby and into and over private homes with the result that contaminants could realistically have caused the types of birth defects of which the complaint has been made by the Claimants. The foetal medical evidence showed that it was feasible for the identified contaminants to cause most of the birth defects in question.

82. Accordingly CBC was liable in public nuisance, negligence and breach of statutory duty, obviously subject to it being established in later proceedings by individual Claimants that their particular conditions were actually caused by the defendants identified by the learned judge.

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