The Weakest Link? Evaluating Private Nuisance Liability in Ontario’s Environmental Law Context

by

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A thesis submitted in conformity with the requirements for the degree of Master of Laws
Faculty of Law
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Abstract

The Court of Appeal for Ontario’s decision in Smith v Inco Ltd illustrates the degree to which the law of private nuisance and Rylands v Fletcher liability has evolved over the last hundred and fifty years from strict(ish) liability tort doctrines to fault-based means of recovery. Inco also offers an opportunity to consider whether this evolution has left some wronged landowners behind.

This work considers the evolution of private nuisance and Rylands liability into the tort doctrine(s) they are today, and illustrates the Province of Ontario’s statutory response to that evolution in the environmental contamination context. Ontario’s common law and statutory environmental compensation regime is then evaluated in the context of four distinct measures of wrongfulness from two theoretical schools of liability. Where Ontario’s regime is found to permit wrongful loss without recovery, statutory changes to extend rights of compensation to all landowners suffering wrongful loss are proposed.
Acknowledgments

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Introduction

Life in society with other humans is never short of variety or difficulty. All sorts of things happen. Cricket balls happen. Dogs happen. Iron particles happen. Highway salt, tall buildings, malicious neighbours, and lumber mills all happen. Ice and fire happen too. If one is particularly unlucky in one’s lot in life, sewage leaks, tobacco-processing odours, and noxious alkali fumes can all occur in one’s general vicinity. As the residents of Port Colborne, Ontario discovered, nickel particulate emitted from nearby refineries can also happen. After decades of living cheek-by-jowl with a nickel refinery operated by Inco Ltd., residential properties in Port Colborne were found to have substantial concentrations of nickel particulate as a result of the emissions produced by the refinery. Despite convincing evidence that the nickel contamination had resulted in diminished market value for their homes, the homeowners of Port Colborne were ultimately unsuccessful in their attempts to obtain compensation for their losses from Inco. The Court of Appeal for Ontario concluded that these losses gave rise to no private law cause of action.

For most of us, like the homeowners of Port Colborne, finding ourselves in the sorts of situations described above would almost immediately raise the question “who pays for this?” And, to be sure, in each of the above circumstances, someone will, in fact, pay for the loss in question. Much of the time, however, that person turns out to be, as was the case in Inco, the person suffering the loss. The objective of this study is to place the Court of Appeal’s decision in its historical jurisprudential and contemporary statutory context, and to consider whether the outcome in Inco, which allowed all of the losses associated with the contamination of the homeowners’ properties to rest where they fell, can be theoretically justified. This examination

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1. Miller v Jackson, [1977] 3 All ER 338 (CA).
4. Schenck v Ontario (1984), 49 OR (2d) 556 (CA).
9. Elk River Timber Co v Bloedel, Stewart & Welch Ltd (1941), 56 BCR 484 (CA).
10. Roberts v Portage la Prairie (City), [1971] SCR 481.
12. St Helen’s Smelting Co Ltd v Tipping (1865), [1861-73] All ER Rep Ext 1389 (HL) [St Helen’s Smelting].
will permit extrapolation of its conclusions to the broader corpus of Ontario’s private law environmental compensation regime.

Losses which must be borne by those who suffer them are referred to as *damnum absque injuria*.\(^{14}\) That, at least, is how things are supposed to work. *Damnum*, or loss, captures every minute moment of inconvenience, vexation, pain, frustration and distress imaginable within the human experience. It is, in short, anything that anyone might prefer, under ideal conditions, not to happen. Obviously, not all such disagreeable circumstances give rise to an entitlement to compensation; for the vast majority of *damnum*, the individual suffering loss must bear it as the reasonable cost of life in society.

However, not all losses are left to lie where they fall. Where *damnum*, or factual loss, intersects with *injuria*, or legal wrongfulness, the sufferer of loss will be entitled to be compensated by the wrongdoer. The business of private law, which governs the interpersonal relations between legal actors, is to delineate the boundary between compensable loss and non-compensable loss. Central to the private law inquiry, therefore, is whether the interest in relation to which the plaintiff claims loss was, in fact, protected against the defendant’s interference.

Private law legal protection, in the Canadian common law context, can spring from one of two sources. The first, common law, offers a system of private law protections rooted in centuries of English and Canadian judge-made law, which has evolved over time to accommodate changing social contexts. The second source of private law is statute, enacted by legislatures either to create new legal protections or for the express purpose of rebalancing the protections available at common law. Common law presumptively encompasses the entirety of legally-significant interpersonal relationships, except in those contexts in which its jurisdiction has been ousted by statute.

Although the private law, in Canada, looks to common law and statute for its cues as to wrongfulness (and therefore compensability), it is not satisfactory to conclude that *injuria* is no more and no less than what those sources of law identify as such. While perhaps sufficient for a person asking “what is the law?”, it does not suffice for one asking “what should the law be?” *Injuria*, in this conception, becomes the essential prerequisite for concluding that a particular

loss should be compensable at law. Damnum absque injuria should not, in principle, be a concern for any member of a liberal society governed by the rule of law. Wrongful loss which does not give rise to an entitlement to compensation (or injuria absque restitutio), however, should concern everyone.

Over the past six decades, the formulation of the tort of private nuisance (and its subsidiary, Rylands v Fletcher\(^\text{15}\)) has changed substantially, becoming significantly more fault-oriented in the process. As a result, it is more difficult for landowners to obtain compensation for interferences with their interests in land, as the homeowners of Port Colborne discovered. In Ontario, the provincial legislature has responded, in the specific context of environmental contamination, by enacting a statutory cause of action for use exclusively in relation to the emission of pollutants causing loss to others. The express intention of this enactment was to expand upon and clarify private law liability available at common law. Ontario’s private law compensation regime for environmental contamination, therefore, is comprised primarily (though not exclusively)\(^\text{16}\) of the contemporary formulations of private nuisance, Rylands liability, and the statutory cause of action set out in the Environmental Protection Act.\(^\text{17}\)

Arguably, the decision in Inco is the latest development in the long-term narrowing of compensation available pursuant to the doctrines of private nuisance and Rylands liability, inasmuch as slowly-accruing contamination, according to Inco, will almost never be compensable. As such, the facts in Inco offer a useful opportunity to assess the degree to which Ontario’s private law compensation regime for environmental contamination currently leaves wrongful loss uncompensated.

To determine if the losses suffered by the landowners in Inco should have been understood as wrongful, and therefore compensable, this inquiry will proceed in four stages. First, it will examine the historical basis and recent development of the traditional common law doctrines protecting interests in land, being private nuisance and Rylands liability, tracing the evolution of the former from a strict(ish) basis of private law liability into a fault-based tort, and the latter from an independent head of liability into a subsidiary doctrine of private nuisance. Second,

\(^{15}\) (1866) LR 1 Exch 265 [Rylands] and (1868) LR 3 HL 330.

\(^{16}\) Although the law of negligence would clearly offer some degree of protection for landowners suffering loss as a result of environmental contamination, negligence will not form a part of the inquiry pursued in this work.

\(^{17}\) RSO 1990, c E19 [the Act].
this inquiry will examine the development and use of Ontario’s statutory response to the common law’s inability to provide compensation to victims of environmental contamination.

Having outlined the doctrinal bases of private law compensation for environmental contamination in Ontario, this work will outline four distinct theoretical justifications for civil liability from two schools of legal thought. Both moral and economic theories of liability will be considered, so as to provide a broad theoretical basis of legal wrongfulness against which the facts in Inco and Ontario’s compensation regime can be evaluated; this evaluation will form the basis of the fourth and final portion of this work. Having evaluated the degree to which Ontario’s environmental compensation regime leaves sufferers of wrongful loss uncompensated (and having found that it likely does, on several of the theoretical frameworks considered, leave wrongful loss uncompensated), this study will conclude by suggesting statutory reform which could operate to extend private law liability to include all possible instances of injuria.
Chapter 1
The Decline of Private Nuisance

1 The Decline of Private Nuisance

An assessment of the adequacy on Ontario’s private law compensation framework for environmental contamination must include examination of both the common law and statutory liability regimes. Although in no way forming a hierarchy of relief, the relationship between these two sources of civil liability is clear and well-known. The common law, as the accumulated normative content of centuries of human experience, applies in all cases but for those in which legislatures have, through statute, modified or ousted common law jurisdiction. The relationship being what it is, it seems sensible to begin the exploration of Ontario’s system of environmental compensation where and when it started (or as close as can reasonably be done in a project of this sort). This first chapter, therefore, traces the development of the two common law liability doctrines most closely associated with the protection of land and interests in it, being the tort of private nuisance and the rule in *Rylands v Fletcher*.

1.1 Private Nuisance in Historical Context

The tort of private nuisance is nothing if not old. As discussed by Newark, private nuisance was, in essence, a fully-formed basis of liability in English private law as early as the 12th and 13th centuries.\(^\text{18}\) The early common law jurists Ranulf de Glanvill and Henry de Bracton, Newark noted, not only demonstrated a clear knowledge of nuisance as an element of English law, but also had no doubt as to its content, forming as it then did (and arguably still does) one corner of a tripod of doctrines, the focus of which is the protection of interests in land.\(^\text{19}\) In the Latin preferred by legal scholars of their day, Bracton\(^\text{20}\) and Glanvill\(^\text{21}\) understood the doctrine of *nocumentum* as prohibiting conduct which interfered, short of physical trespass onto the land in question, with the exercise of rights of property.\(^\text{22}\) *Nocumentum*, together with the doctrines of *disseisina* (addressing conduct depriving an owner of any and all use of her land) and *transgressio* (trespasses to property short of outright disseisin), formed a comprehensive

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\(^\text{18}\) FH Newark, “The Boundaries of Nuisance” (1949) 65 LQR 480 at 481.

\(^\text{19}\) Ibid.


\(^\text{21}\) *A Translation of Glanvill*, trans J Beames (London: W Reed, 1812) [*Glanvill*].

framework of legal protections for the exercise and enjoyment of rights over land, a fundamental civil right throughout much of the history of the common law.

It bears noting, at this point, precisely what did and did not constitute a private nuisance at this early stage of the tort’s development, if only for the purpose of emphasizing the speed with which modern jurisprudence (and modern private law theories) have succeeded in bringing doubt and disruption to a legal doctrine well-understood nine centuries ago. First and foremost, arising as it does from interferences with the exercise of rights of property, private nuisance has always been actionable only by the owner of the interest alleged to have been interfered with. Therefore, although less-often emphasized in contemporary private nuisance jurisprudence, the first element of a successful claim in private nuisance must be demonstration that the plaintiff is the owner of an interest in real property. As such, while many tenants pursuant to contractual leases may have no standing to bring an action in private nuisance (to the extent that most leases are no longer considered to convey a demised interest in the land in issue), the owner of a right of way, easement or profit a prendre over the property of another would have standing to bring an action in relation to interference with that right.

A second important aspect of private nuisance relates to the type of injury for which compensation could be obtained pursuant to the tort. As an interference with the exercise of a right in relation to property, private nuisance claims could not historically form the basis of recovery for personal injury. Rather, the injuria in issue in a private nuisance suit is the interference with the exercise of a right by one entitled to exercise it; the damages recoverable in such circumstances must, as a result, be only those flowing from the inability of the owner to exercise the right. Damages in private nuisance claims, therefore, often take the form of either compensation for diminution in land value (if, for instance, the defendant’s conduct has permanently impaired the right in issue) or compensation for the costs of remediation of land.

The non-compensability of personal injury in private nuisance was, for a time, cast into doubt as a result of the difficult birth of the private action in public nuisance. As Newark recounts, the

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23 Bracton, supra note 20, vol III at 190.
24 Ibid.
25 Ibid.
26 Newark, supra note 18 at 482.
27 Consider, for instance, the decisions in Canada Paper Co v Brown (1921), 63 SCR 243 and Boomer v Atlantic Cement Co Inc (1970), 309 NYS 2d 312, 257 NE 2d 87 (CA) [Boomer].
jurisprudential distinction between the interference with a private right, such as the obstruction of a private easement or right of way, and the interference with a public right, such as the obstruction of a public highway, proved to be, from an early date, beyond the capacity of many required to deal with it.\textsuperscript{28} It was also a well-known rule that the vindication of public rights, such as those shared by all travellers to pass and repass along a public highway, was the sole preserve of the Crown acting upon indictment.\textsuperscript{29} The declaration, in 1535, that a private cause of action would arise in respect of injuries caused by interference with public rights to the extent that those injuries constituted a “greater hurt or inconvenience than any other man had,”\textsuperscript{30} together with Fitzherbert J’s illustration of this principle with a horse-and-rider-fall-into-a-trench-across-the-highway parable\textsuperscript{31} (remarkably similar to the facts in issue in Canada’s leading case on the private action in public nuisance, \textit{Ryan v Victoria (City)}\textsuperscript{32}), raised the possibility that personal injuries could be compensated through actions in nuisance.

However, if we are able (unlike the English bar of four centuries ago) to maintain the distinct theoretical bases of civil liability arising from private nuisances and public nuisances, the confused situation confronted by Newark becomes substantially less so. Ignoring cases arising in relation to the obstruction of public rights of way as relevant, in a precedential sense, to the tort of private nuisance, it can confidently be stated that compensation for personal injury has been, and remains, beyond the scope of private nuisance liability.

One additional point bears reference in discussing the pre-modern scope of private nuisance liability. A recurrent theme of private law emphasizes the necessity that individuals, if they are to live in a functioning society, must sometimes (or perhaps often) yield to the minor interferences incidental to living amongst their rights-bearing equals.\textsuperscript{33} Regardless of the specific circumstances involved, life in society by necessity involves non-compensable

\textsuperscript{28} Newark, \textit{supra} note 18, at 482 – 483.
\textsuperscript{29} \textit{Ibid} at 483.
\textsuperscript{31} \textit{Ibid}.
\textsuperscript{32} [1999] 1 SCR 201.
\textsuperscript{33} Consider, for example, the statement of the Court of Appeal for Ontario in its decision in \textit{Inco, supra} note 13 at para 39:

People do not live in splendid isolation from one another. One person’s lawful and reasonable use of his or her property may indirectly harm the property of another or interfere with that person’s ability to fully use and enjoy his or her property. The common law of nuisance developed as a means by which those competing interests could be addressed, and one given legal priority over the other. Under the common law of nuisance, sometimes the person whose property suffered the adverse effects is expected to tolerate those effects as the price of membership in the larger community.
inconvenience, interference or loss, all of which is understood as *damnum absque injuria*. Perhaps more so than in the context of other legally-protected interests, incidental or transitory interferences with the enjoyment of rights in relation to property generally will not be sufficient to give rise to a right of recovery in private nuisance. Where actionable however, the distinction between intangible interferences and physical injuries to property has until very recently formed an essential element of most private nuisance jurisprudence. That distinction was best elaborated by the House of Lords in *St Helen’s Smelting Co Ltd v Tipping.*

1.2 Foundations of Liability: *St Helen’s Smelting* and *Rylands*

Although far from the first prominent decision in the area of what is now identified as private nuisance, the decision of the House of Lords in *St Helen’s Smelting* is easily the most influential decision on the subject from the mid-19th century. As noted, private nuisance was certainly well established before *St Helen’s Smelting* was decided in 1865, but Lord Westbury LC’s formulation of the tort in two branches has proved to be the animating force of the majority of private nuisance jurisprudence over the last hundred and fifty years, and which was ultimately brought to an end by the Supreme Court of Canada in *Antrim Truck Centre Ltd v Ontario.* As such, to a great extent, the purchase of the Bold Hall estate by William Tipping in 1860 is the appropriate starting point of the modern story of private nuisance.

The Bold Hall estate was adjacent to the defendant’s copper smelting establishment, and, though Tipping had previously been made aware of the smelter’s chimneys, he was not aware as to whether the smelting works were in active use prior to his purchase of the estate. After Tipping purchased Bold Hall, he discovered that the smelting works’ emission of “large quantities of noxious gases, vapours, and other noxious matter” sometimes caused injury to vegetation, livestock, and, in exceptional circumstances, people on the estate. Tipping commenced an action against the defendant as a result, claiming interference with use and enjoyment of Bold Hall, as well as diminution in the value of the estate lands.

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34 *Supra* note 12.
35 2013 SCC 13, [2013] 1 SCR 594 [*Antrim*].
36 *St Helen’s Smelting*, *supra* note 12 at 1390.
37 *Ibid*.
38 *Ibid*.
At trial, the enjoyment of Bold Hall was determined to have been sensibly diminished by the defendant’s conduct, a verdict the Exchequer Chamber approved of on appeal. The further appeal to the House of Lords focussed on the proper formulation of the test for private nuisance, and its relationship to the defendant’s allegedly reasonable conduct in operating a copper smelter at the location in question.\textsuperscript{39} Lord Westbury LC’s pivotal opinion for the first time delineated a qualitative distinction between interference producing sensible personal discomfort and interference producing material injury to the plaintiff’s property.\textsuperscript{40}

The significance of this distinction was the requirement that purported nuisance causing only personal discomfort must be tolerated to a reasonable extent as an ordinary incident of human co-existence.\textsuperscript{41} However, as Lord Westbury LC noted, material injury to property would never be tolerable, and would give rise to liability in nuisance in all circumstances where “sensible injury to the value of the property” resulted.\textsuperscript{42} On the basis of this opinion, Lord Westbury LC dismissed the appeal, stipulating that no activity, no matter how reasonable, could be carried on with impunity where it resulted in physical injury to neighboring land.\textsuperscript{43}

It may be that the common law’s intolerance for physical injury to land, as suggested by Lord Westbury LC’s reasons in \textit{St Helen’s Smelting}, is the true basis for the decisions of the Exchequer Chamber and the House of Lords in \textit{Rylands v Fletcher}.\textsuperscript{44} While Blackburn J’s opinion in the Exchequer Chamber in \textit{Rylands} has frequently been regarded as the jurisprudential foundation for a distinct basis of private law liability arising from the catastrophic release of collected dangerous materials, recent jurisprudence in both England and Australia has brought the independence of \textit{Rylands} liability into doubt.\textsuperscript{45} That said, to the extent \textit{Rylands} remains an independent ground of liability in Canadian law, its development and decline should be mentioned in some detail here.

\begin{itemize}
\item \textsuperscript{39} \textit{Ibid} at 1393.
\item \textsuperscript{40} \textit{Ibid} at 1395 – 1396.
\item \textsuperscript{41} \textit{Ibid}.
\item \textsuperscript{42} \textit{Ibid}.
\item \textsuperscript{43} \textit{Ibid}.
\item \textsuperscript{44} \textit{Supra} note 15.
\item \textsuperscript{45} See, for example, \textit{Cambridge Water Co Ltd v Eastern Counties Leather plc}, [1994] 2 AC 264 [\textit{Cambridge Water}] and \textit{Burnie Port Authority v General Jones Pty Ltd}, (1994) 179 CLR 520 (HC).
\end{itemize}
At issue in Rylands was damage caused to the plaintiffs’ mineshafts by the defendant’s construction on his own land of a reservoir to be used in powering a mill. The mineshafts in issue interconnected with disused shafts beneath the defendant’s property, the entrances of which had been improperly closed prior to the construction above them of the reservoir. At some point in the course of filling the reservoir, water entered the disused shafts and, having travelled through them to the plaintiffs’ property, flooded their mineshafts and caused substantial damage. In the appeal in the Exchequer Chamber, Blackburn J noted that the plaintiffs had been unsuccessful in making out a cause of action in the Exchequer of Pleas, and considered what the appropriate resolution should be for cases wherein neither the plaintiff nor the defendant had misconducted themselves. Concluding that, absent liability, plaintiffs in such circumstances would be left to bear their losses without a means of recovery, Blackburn J determined, in the decision’s best-known passage,

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.

Perhaps the primary reason this conclusion was viewed as a novel basis of liability is the fact that a claim in private nuisance had been dismissed in the Exchequer of Pleas as not making out a valid cause of action. However, Blackburn J was clear in his opinion that the basis of liability itself was not new, even if the particular circumstances to which he applied it were. Analogizing the destructive escape of water intentionally collected upon the defendant’s property to the doctrine of trespass with cattle, Blackburn J indicated that no principled distinction existed for allowing recovery for damage caused by the latter, for which there was substantial jurisprudential support, but not the former. Blackburn J noted that, like livestock, the owner of water held in a reservoir must not permit his property to ‘trespass’ upon the land of another, and will be held strictly liable for any damage done should such a trespass take place.

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46 Rylands, supra note 15 at 267.
47 Ibid at 269.
48 Ibid at 279.
49 Ibid at 278.
50 Ibid at 280.
51 Ibid.
Considered in the context of the now-obscur e tort of ‘trespass with cattle’, the rule in *Rylands v Fletcher* takes on a more familiar shape. In this understanding, the property of the defendant functions as a juristic extension of the defendant, such that trespass upon the plaintiff’s property by the defendant’s property (be it livestock, water or petroleum) is treated as a trespass by the defendant herself. If no actual injury is caused by the trespass, the defendant would remain liable for nominal damages; however, for any injury caused in the course of the trespass, the defendant would be held strictly liable. Unlike private nuisance, however, this rule was expressly extended by Blackburn J to include personal injury under circumstances in which the likelihood of the property in question causing particular types of injury is known to the defendant (Blackburn J gave the example of a “beast” with “a vicious propensity to attack man”). According to Blackburn J, those types of injury would be compensable. In general, Blackburn J concluded that the correct rule was that the owner of land who keeps upon it things likely to cause injury if they escape is responsible for all injuries known to the owner to be the likely consequences of such escape. As a result, while personal injuries caused by the escape of a beast known to be of vicious propensity would be compensable, the presumption would be that personal injuries arising from escaped animals would not be compensable, given the long-held understanding that it was not in the nature of domesticated animals to cause injury.

In *Rylands*, therefore, a development in the jurisprudence of injury to land is already observable, as the test laid down by Blackburn J diverges from that generally applicable in private nuisance inasmuch as it required foreseeability of the injury caused by escape. As a distinct ground of private law liability, the impact of this innovation may have been limited but for Blackburn J’s reference in his reasons to circumstances clearly not of the same class as the catastrophic releases he went on to discuss. Having outlined several possible grounds of excuse for an owner of escaping injurious personal property, Blackburn J went on to state:

The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour’s reservoir, or whose sewer is invaded by the effluvia of his neighbour’s privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour’s alkali works, is damned without any fault of his own; and it

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52 *Ibid* at 282.
53 *Ibid* at 280.
54 *Ibid*.
55 *Ibid*.
56 *Ibid* at 281.
seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour’s, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property.\(^{57}\)

Clearly, according to Blackburn J’s analysis, instances of trespass with cattle, flooding of the sort in issue in *Rylands*, or a catastrophic privy failure are easily viewed as of a kind. Fumes emitted by alkali works, however, are a more difficult fit, given the unlikelihood that a court could classify such vapours (or, for that matter, the vapours in issue in *St Helen’s Smelting*) as property forming a juristic extension of the defendant, and therefore subject to an analysis akin to *transgressio*. Rather, such emissions are more easily understood as indirect interferences arising from the defendant’s conduct upon her own property, giving rise to an ordinary suit in private nuisance, as it did in *St Helen’s Smelting*, where the House of Lords made no reference to the foreseeability of the type of injury done to the Bold Hall estate.

Nonetheless, the link between *Rylands* liability, with its inherent requirement of foreseeability of harm, and private nuisance had been made, and was subsequently endorsed by the House of Lords.\(^{58}\) This was, perhaps, the first step in the contemporary movement toward a fault-based tort of private nuisance, but would certainly not be the last, as decisions from the House of Lords in subsequent decades would depart substantially from the foundations of private nuisance and *Rylands* liability in *nocumentum* and *transgressio*. As had been the case previously, much of the motive force for the introduction of novel concepts into the tort of private nuisance arose out of a questionable comparison to public nuisance.\(^{59}\) However, unlike the Victorian confusions over the compensation of personal injury in private nuisance, the developments of the 20\(^{th}\) century were undertaken by jurists with eyes wide open.

### 1.3 Diminishing Strictness: *Wagon Mound (No 2), Cambridge Water* and *Hunter*

On the afternoon of November 1, 1951, Sydney Harbour caught fire. Hot metal cuttings produced by the oxyacetylene torches used by workers on Mort’s Dock at Sheerlegs Wharf fell into the harbour below, igniting inflammable floating debris which, in turn, ignited a scum of

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57 *Ibid* at 280.
58 See *supra* note 15.
59 Newark, *supra* note 18 at 485.
floating bunker oil which had been spilled from the vessel Wagon Mound. The resulting conflagration caused extensive damage to Mort’s Dock, Wagon Mound, and several other vessels. The spilled bunker oil, which had resulted from the carelessness of Wagon Mound’s engineers, gave rise to several prominent civil proceedings, both of which were concluded by advice of the Judicial Committee of the Privy Council. This analysis will focus on the second, Overseas Tankship (UK) Ltd v The Miller Steamship Co (Wagon Mound (No 2)).

In Wagon Mound (No 2), the Privy Council considered an appeal and cross-appeal from the decision of Walsh J of the Supreme Court of New South Wales, who had determined that the charterers of Wagon Mound were liable in public nuisance for the damage done to two vessels owned by Miller Steamship in the course of the fire. Overseas Tankship, one of the charterers, appealed the finding of liability, claiming that the loss suffered by Miller Steamship had not been foreseeable, and that foreseeability of injury was an essential element of the private action in public nuisance. Miller Steamship’s cross-appeal, which is not relevant to this inquiry, sought to reverse Walsh J’s decision to the effect that Overseas Tankship was not liable in negligence for the losses caused by the burning bunker oil.

The Privy Council, having reviewed relevant public nuisance jurisprudence, found no consensus therein as to the role of foreseeability, if any, in the context of public nuisance liability. Turning to “principle” to resolve the issue, Lord Reid seized upon the dictum of Lord Denning MR in Morton v Wheeler, which explained that public nuisances relating to dangerous conditions adjacent to highways relied by their nature on foreseeability of injury as the primary content of conditions which can be understood as “dangerous”. Having determined that foreseeability of injury was an indispensable element of liability in the particular class of public nuisances considered by Lord Denning MR in Morton, Lord Reid concluded, with curious hostility to nuance and context, that

It could not be right to discriminate between different cases of nuisance so as to make foreseeability a necessary element in determining damages in those cases where it is a necessary element in determining liability, but not in others.

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60 [1967] 1 AC 617 (PC) [Wagon Mound (No 2)].
61 Ibid at 632.
62 Ibid.
63 Ibid.
64 Ibid at 634.
65 CA, No 33 of 1956, January 31, 1956 (unreported) [Morton].
66 Wagon Mound (No 2), supra note 60 at 640.
So the choice is between it being a necessary element in all cases of nuisance or in none.\footnote{Ibid.}

On this basis, Lord Reid determined that foreseeability of injury must form an essential element in all claims arising in relation to public nuisance. Having done so, the Privy Council was then, in essence, bound to grant Overseas Tankship’s appeal by virtue of Walsh J’s prior finding that the ignition of the floating bunker oil scum would not have been reasonably foreseeable by those for whom Overseas Tankship was in law responsible.\footnote{Ibid at 641 and 643.} While this decision was limited in its strict application to private actions in public nuisance, Lord Reid’s ‘all nuisances or no nuisances’ conception of tort principles could not be ignored forever in relation to the doctrine of private nuisance.

The privileged position enjoyed by landowners (in contrast to almost all other tortiously-wronged persons) came to an abrupt end in 1993 with the decision of the House of Lords in \textit{Cambridge Water Co v Eastern Counties Leather plc}.\footnote{Supra note 43.} In \textit{Cambridge Water}, the plaintiff, a statutory entity responsible for providing drinking water to the English municipality of Cambridge, purchased a new property, Sawston Mill, in order to expand the supply of drinking water for its system. At the time the property was purchased, the water available at Sawston Mill met the relevant standards required for use as drinking water.\footnote{Ibid at 292.} Unbeknownst to Cambridge Water, however, the defendant’s leather tannery, operating at some distance from Sawston Mill but within the same groundwater catchment, had for decades previous been making somewhat casual (but intensive) use of degreasing agents in the leather-production process.\footnote{Ibid at 291.} It is important, for these purposes, to note only that the typical usage of these agents involved a machine which required periodic refilling, a process which, for many years, involved manually pouring barrels of degreasing agent into an open tank.\footnote{Ibid.} As might be expected, this process resulted in more than a negligible amount of spillage of degreasing agent onto the floor of the defendant’s facility. While recognized by the defendant as posing a potential threat to the health of its employees in the form of off-gassing from particularly large spills, the spilled degreasing agent was not regarded as an environmental danger, partly in light of prevailing
attitudes toward environmental contamination of the day, and partly in light of the known propensity of the degreasing agent to rapidly evaporate on exposure to air.\textsuperscript{73}

What the defendant did not realize, however, was that a fair amount of the spilled degreasing agents were, rather than evaporating as expected, seeping through the concrete floor of the tannery and into the soil below.\textsuperscript{74} Over the course of years, the defendant’s activities caused a substantial amount of degreasing agents to enter the aquifer below the tannery, eventually making its way ‘downstream’ and into the water supply accessed at Sawston Mill. As a result of testing prompted by the adoption of new standards relating to acceptable levels of organic compounds in drinking water, Cambridge Water was required to remove Sawston Mill from production, subsequently acquiring another property, Hinxton Grange, for development of a new pumping station ‘upstream’ of the defendant’s property.\textsuperscript{75} Cambridge Water sought compensation from Eastern Counties Leather for its out-of-pocket expenses in acquiring and developing the Hinxton Grange site, claiming in negligence, private nuisance, and \textit{Rylands} liability.\textsuperscript{76}

At trial, Cambridge Water’s claims in private nuisance and negligence against Eastern Counties Leather were dismissed because, according to the trial judge, the actions of the defendant over fifteen years prior to trial had not at that time been actionable, a point that would be crucial in the ultimate appeal to the House of Lords.\textsuperscript{77} Cambridge Water, on appeal from the decision of the trial judge, sought only to overturn the trial decision in relation to the determination, on the question of \textit{Rylands} liability, that Eastern Counties Leather’s use of its facilities had not been non-natural, a conclusion which was not addressed by the Court of Appeal.\textsuperscript{78} For the purpose of this paper, the decision of the Court of Appeal is largely of no consequence, but for the fact that, to a large extent, it relied on its previous decision in \textit{Ballard v Tomlinson}\textsuperscript{79} for its conclusion that Eastern Counties Leather should be held strictly liable for its conduct in that it interfered with a natural right incidental to the ownership of land, being the right to abstract percolating water.\textsuperscript{80} As such, despite there being no appeal in relation to the action in private nuisance, the

\textsuperscript{73} \textit{Ibid} at 292.
\textsuperscript{74} \textit{Ibid}.
\textsuperscript{75} \textit{Ibid} at 294.
\textsuperscript{76} \textit{Ibid}.
\textsuperscript{77} \textit{Ibid} at 291.
\textsuperscript{78} \textit{Ibid} at 276.
\textsuperscript{79} (1884), 29 ChD 115 (CA).
\textsuperscript{80} \textit{Cambridge Water, supra} note 43 at 275.
Court of Appeal determined that Eastern Counties Leather was strictly liable on the basis of the physical injury branch of private nuisance.\textsuperscript{81}

The House of Lords, considering all of the circumstances in dispute, came to several novel conclusions. First, Lord Goff confirmed the applicability to private nuisance of Lord Reid’s conclusion in \textit{Wagon Mound (No 2)} that all bases of public nuisance required foreseeability of loss in order to give rise to liability.\textsuperscript{82} Second, in the course of extending this conclusion to strict liability, Lord Goff confirmed that, rather than an independent head of liability, \textit{Rylands} liability was, in fact, a subspecies of private nuisance.\textsuperscript{83} As a result, the requirement of foreseeability of injury of the relevant type was extended to both private nuisance and \textit{Rylands} liability in one swoop; coupled with the conclusion that Eastern Counties Leather could not have reasonably foreseen the loss its conduct would eventually cause to Cambridge Water (either the flow of degreasing agent into the aquifer feeding the Sawston Mill pumping station or the regulatory change which would render the Sawston Mill unusable as a source of drinking water), the House of Lords allowed the appeal.\textsuperscript{84}

After the decision in \textit{Cambridge Water}, therefore, the law of private nuisance arguably offered far less protection to landowners than it had previously. In confirming that foreseeability of loss formed an integral element of private nuisance liability, the House of Lords essentially abandoned any pretense to strict liability for the indirect injury of land. While maintaining the \textit{St Helen’s Smelting} bifurcation between physical injury nuisance and amenity nuisance, the introduction of overt considerations of fault into the analysis of private nuisance put paid to the notion that the integrity of land continued to occupy a special place in the common law. It was, perhaps, predictable that the introduction of fault-based concepts into the law of private nuisance would be followed, at some point, by heightened judicial scrutiny of those elements of strict liability which remained.

In the course of determining that Lord Reid’s conclusions as to foreseeability of injury in the context of public nuisance applied equally in private nuisance, Lord Goff offered a telling analysis of the motivation for much of the contemporary thinking on the tort of private nuisance. Perhaps unsurprisingly, Lord Goff’s reasoning on this issue was influenced, as so much of

\textsuperscript{81} \textit{Ibid}.
\textsuperscript{82} \textit{Ibid} at 301.
\textsuperscript{83} \textit{Ibid} at 306.
\textsuperscript{84} \textit{Ibid} at 309.
modern tort jurisprudence has been, by the revolution sparked by the decision of the House of Lords in *Donoghue v Stephenson*. In a legal era dominated by conceptions of fault and misconduct, a tort focussed so acutely on the almost unconditional protection of interests in land could not escape judicial scrutiny. Such was the case in *Cambridge Water*, where Lord Goff explained that

 […] it is still the law that the fact that the defendant has taken all reasonable care will not of itself exonerate him from liability, the relevant control mechanism being found within the principle of reasonable user. But it by no means follows that the defendant should be held liable for damage of a type which he could not reasonably foresee; and the development of the law of negligence in the past 60 years points strongly towards a requirement that such foreseeability should be a prerequisite of liability in damages for nuisance, as it is of liability in negligence. For if a plaintiff is in ordinary circumstances only able to claim damages in respect of personal injuries where he can prove such foreseeability on the part of the defendant, it is difficult to see why, in common justice, he should be in a stronger position to claim damages for interference with the enjoyment of his land where the defendant was unable to foresee such damage.

It may have been inevitable, in the modern world, that tort doctrines providing compensation in relation to property injury could not sustain a stricter standard of liability than those applying in circumstances of personal injury. The shift away from preferential treatment of land may, however, have raised questions as to the continued relevance of other aspects of the tort of private nuisance which emanated from preferential treatment of property relationships.

If any such questions were raised, however, the decision of the House of Lords in *Hunter v Canary Wharf* would have put them to rest, but did nothing to answer broader questions as to the precise justification for or role of the tort of private nuisance in contemporary Anglo-Canadian tort law. In *Hunter*, the House of Lords considered claims in private nuisance arising from the construction of One Canada Square, the centrepiece of the Canary Wharf business district development. One Canada Square was alleged to cause interference with some plaintiffs’ reception of television signals, and the construction of roadworks associated with the Canary Wharf development was alleged to have emitted dust which settled on the property of

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86 *Cambridge Water, supra* note 43 at 300.
87 *Supra* note 5.
88 *Ibid* at 722.
some other plaintiffs. Both of these alleged interferences were framed as actions in private nuisance. However, the pertinent issue raised in Hunter, for the purposes of this work, was the standing of various plaintiffs to bring claims in private nuisance given their positions as non-owners of the lands in respect of which they claimed unlawful interference.

Lord Goff, once again contributing to private nuisance jurisprudence, saw no reason to depart from the well-established rule that standing to bring claims in private nuisance was contingent on possession of a right in the land affected by the alleged interference. Relying extensively on Newark’s commentary in The Boundaries of Nuisance, Lord Goff concluded that, as a tort distinctly aimed at the protection of property and rights of enjoyment associated with the ownership of property, private nuisance should remain the exclusive preserve of those having the exclusive right of possession in respect of interests in land. As a result of the decisions in Cambridge Water and Hunter, therefore, Lord Goff presented private nuisance as a tort doctrine which should operate on the same bases as fault-based doctrines such as negligence, while still focussing not on blameworthy conduct, but rather on the rights of property owners. One may have expected that, if faulty conduct is truly a motive principle of private nuisance, such conduct would be actionable by any individual suffering a loss as a result of that conduct, regardless of whether the loss relates to land or person. Clearly, on the basis of the decisions in Cambridge Water and Hunter, no such theoretical consistency is currently available in the context of private nuisance. The effect of these decisions has been a narrowing scope of liability focussed on wrongful conduct (by compensating foreseeable loss only) while retaining the tort’s curious preference for losses suffered by the owners of real property.

1.4 Faulty Components, Faulty Product: Inco

The Court of Appeal for Ontario, in its decision in Inco, followed the trend established by the House of Lords in Cambridge Water and Hunter. At issue in Inco were the legal consequences arising from the long-term operation by the defendant of a nickel refinery in the community of Port Colborne. In the course of its ordinary operation, Inco’s refinery emitted a large amount of nickel particulate into Port Colborne’s airshed, which subsequently settled on the town’s

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89 Ibid at 683 – 684.
90 Ibid at 684.
91 Ibid at 694.
92 Supra note 18.
93 Hunter, supra note 5 at 692.
residential properties. In 2002, after monitoring the accrual of nickel particulate in the soil of the impacted properties over a period of thirty years, Ontario’s Ministry of the Environment ordered Inco to remediate twenty-five of the two hundred monitored properties to nickel concentrations below 8,000 parts per million, a level identified by the Ministry as unlikely to pose any threat to human health.

Despite Inco’s remediation efforts, the landowners of Port Colborne instituted a class proceeding in relation to the nickel particulate emitted by Inco’s Port Colborne refinery. Although the landowners initially claimed in relation to adverse human health effects, by the time of trial the claim sought only damages for diminished land value caused by the stigma of contamination suffered by class members as a result of Inco’s operations. The class proceeding was advanced on the basis of private nuisance, public nuisance, Rylands liability, and trespass.

At trial, the claim in relation to private nuisance was successful, with the trial judge accepting the argument that the contamination with nickel particulate of land owned by class members constituted physical injury. Accepting the St Helen’s Smelting formulation of private nuisance, the trial judge refrained from engaging in the ‘reasonableness’ analysis required in relation to personal discomfort nuisance. However, had such an analysis been required, the trial judge indicated that the presence of nickel particulate in the soil of class members’ properties rising to such a level as to diminish their value would have constituted an unreasonable interference giving rise to a claim in private nuisance.

The Court of Appeal for Ontario accepted that private nuisance claims relating to physical injuries required no reasonableness analysis, but took issue with the trial judge’s conclusion that the simple presence of nickel particulate in the soil of the properties in question could, without more, be considered physical injury. Rejecting the definitions of physical injury nuisance developed by St Helen’s Smelting and its progeny as “outdated and inappropriate,” the Court of

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94 Inco, supra note 13 at paras 7 – 8.
95 Ibid at paras 10 – 16. It bears noting that concentrations as low as 200 parts per million were identified as sufficient to pose a threat to the health of particularly sensitive plants. See ibid at para 11.
96 Ibid at para 21.
97 Ibid at para 22.
98 Ibid at para 34.
99 Ibid.
100 Ibid at para 35.
101 Ibid at para 55.
Appeal in *Inco* adopted “material, actual and readily ascertainable” as a more workable delineation of physical injury private nuisances.\(^{102}\) On this basis, the Court of Appeal determined that only an injury which was more than trivial, crystallized and not so “minimal or incremental as to be unnoticeable as it occurs” would give rise to successful physical injury nuisance claims.\(^ {103}\)

As such, the Court of Appeal concluded that the simple fact of nickel contamination could not by itself be considered injury absent detrimental effect to the land itself or on some right associated with the land as a direct consequence of the contamination. The Court of Appeal also indicated that a detrimental effect of this sort arises only where the interference complained of diminishes the capacity the land in question to be put to its intended use.\(^ {104}\) Despite the fact that the record indicated that plant life could be interfered with by nickel contamination above two hundred parts per million, the Court of Appeal determined that no claim in private nuisance would arise on the facts as found by the trial judge in the absence of at levels posing a substantial threat to human health.\(^ {105}\) The Court of Appeal, as a result concluded that the class members in *Inco* had sustained no substantial injury as a result of contamination by nickel particulate.

Having concluded, on the basis of the new standard it developed for physical injury nuisances, that the class members had suffered no material injury to their land, the Court of Appeal indicated that any ‘stigma’ damages caused to the market value of the claimants’ properties was not actionable loss because it was not causally linked to actual interference with or injury to interests in land.\(^ {106}\) On this point, the Court of Appeal opined, the trial judge’s decision that ‘stigma’ alone, as evidenced by diminished market value, constituted actionable private nuisance, would extend “the tort of private nuisance beyond claims based on substantial actual injury to another’s land to claims based on concerns, no matter when they develop and no matter how valid, that there may have been substantial actual injury caused to another's land.”\(^ {107}\)

\(^{102}\) *Ibid* at para 49.
\(^{103}\) *Ibid* at para 50.
\(^{104}\) *Ibid* at para 57.
\(^{105}\) *Ibid* at para 58.
\(^{106}\) *Ibid* at para 67.
\(^{107}\) *Ibid* at para 59.
The Court of Appeal’s opinion in *Inco*, in light of the House of Lords’ decision in *St Helen’s Smelting*, sets in stark relief the extent to which private nuisance has evolved over the past hundred and fifty years. There seems to be no doubt that, had Lord Westbury LC considered the facts in *Inco*, a claim in private nuisance would have succeeded, particularly given that *St Helen’s Smelting* was predicated on the impact of “noxious vapours” on the Bold Hall estate’s vegetation. The heightened standard for physical injury imposed by the Court of Appeal in *Inco*, as a result, has substantially limited the usefulness of private nuisance as an environmental tort.

**Conclusion**

The contemporary tort of private nuisance, and its sub-tort, *Rylands* liability, has changed substantially over the last six decades. While it may not be that these doctrines remained as well-understood in the mid-20th century as they had been in the times of Bracton and Glanvill, as Newark comprehensively illustrated in *The Boundaries of Nuisance*, to the extent that private nuisance remained distinguishable from public nuisance, it was conclusively a tort dealing with land and external interferences with it. Regardless of the position one assumes fault plays in the law of tort, there can be no doubt that the private nuisance and *Rylands* liability doctrines inherited by Newark’s generation assigned liability without any substantial consideration of the blameworthiness of the actor or her conduct.

Without doubt, this position changed dramatically during the latter half of the 20th century. Consistently focussed on the need for coherence in principle in tort law, and unable to see beyond the role of fault in negligence, the judicial and academic establishment of the last six decades has, by forcing private nuisance into the fault paradigm (and *Rylands* liability into the ambit of private nuisance), made it much more difficult for landowners to recover for interference to their interests in land. Going further, despite the enhanced emphasis on fault and its pivotal role in the allocation of tort liability, private nuisance remained limited in its scope to interferences with land, actionable only at the suit of its owner. Arguably, the fault-based private nuisance of the early 21st century makes less sense than did the non-fault species it supplanted.

In any event, the doctrines of private nuisance and *Rylands* liability available to the homeowners of Port Colborne were not capable of providing them with an entitlement for compensation in
relation to the diminished market value of their homes. As noted, it seems unlikely that a court applying the ancient doctrine of private nuisance even a century ago could have reached that conclusion, but the long-term narrowing of the tort doctrines of private nuisance and *Rylands* liability had clearly, by the time of the Court of Appeal’s decision in *Inco*, placed losses such as those imposed upon the homeowners of Port Colborne beyond the reach of those torts.

The shift to fault-based indicia of liability in private nuisance, and the consequent narrowing of that tort, was already well under way by the late 1970s, when the government of Ontario recognized a need for clearer lines of civil liability in the province’s burgeoning industrial sector, specifically in relation to the creation, transportation and storage of pollutants. The government responded, albeit at a curiously ponderous pace, with a statutory regime purportedly intended to return strictness to the protection of interests in land.
Chapter 2
Ontario’s Statutory Response

2 Ontario’s Statutory Response

Having reviewed the evolution of the tort doctrines of private nuisance and Rylands liability into narrow, fault-based doctrines of redress, it remains to consider the government of Ontario’s statutory response to that shift. The increasingly fault-based common law doctrines which had traditionally protected landowners from interference emanating from neighboring properties had, during the 1970s, clearly become inadequate, both as a means of ensuring compensation for injured landowners and as a means of internalizing the costs of contamination within the businesses causing it.\(^\text{108}\) Interestingly, the eventual statutory response to these developments would attempt to directly address the shifting basis of private nuisance and Rylands liability, seeking to reinforce a species of strict liability by statute in a space the common law was in the process of vacating.

2.1 Promise and Prevarication: The Long Birth of Ontario’s ‘Spills Bill’

On December 14, 1978, Harry Parrott, Ontario’s Minister of the Environment, introduced amendments to the Act which would, in time, become section 99.\(^\text{109}\) In a brief introductory speech in the course of moving first reading of the draft amendments on the penultimate day of the legislative session, Dr Parrott noted that the government sought to address two key concerns. First, the amendments were intended to empower the Ministry of the Environment to take charge of the remediation of any “spills of toxic substances or contaminants into the natural environment”, allowing questions of responsibility and allocation of costs to be dealt with after the fact.\(^\text{110}\) The second concern to be addressed by the proposed amendments was to “create liability […] for damage resulting from a spill which clarifies and extends the right to compensation at common law.”\(^\text{111}\) Although the provisions empowering the Ministry to assume control of any remediation efforts were no doubt significant developments in the province’s


\(^{109}\) Ibid.

\(^{110}\) Ibid.

\(^{111}\) Ibid.
environmental protection regime, for reasons that will be elaborated below, they will not be treated here in any degree of detail.

The statutory right of action proposed by Dr Parrott in 1978, on the other hand, forms one of the primary points of inquiry of this work. In introducing this right of action, Dr Parrott went on to note that it was intended to place equal responsibility for spilled contaminants on both their owners and those who stored, transported and housed them. Imposing a statutory basis of liability would, according to Dr Parrott, both reduce the number of spills and hasten the cleanup of those spills which occurred, ultimately ameliorating the burden such spills placed on the natural environment. Interestingly, in light of the uses to which the statutory cause of action would subsequently be put, Dr Parrott emphasized the risks posed to the environment primarily as a result of the transportation of pollutants, noting that, as of late 1978, “several million gallons of industrial products [were] transported in Ontario each year, out of which 1,000 spills occur”, with the 600 such spills reported to the Ministry totalling 1.25 million gallons of petroleum products, non-petroleum oils, toxic chemicals and other hazardous materials.

The emphasis on transportation should not, however, be taken to indicate that the shortcomings in common law tort doctrines were limited to questions of legal responsibility for bailed products or other such picayune details. In explaining the function of the statutory cause of action and the problem it was proposed to address, Dr Parrott left no doubt as to the nature of the liability gap he sought to bridge with the draft amendments. In a statement echoing the reasons of Bramwell B in *Bamford v Turnley*, Dr Parrott explained the motivation for the statutory cause of action as follows:

> I believe those who create the risk should pay for restoration as a reasonable condition of doing business; it is not up to an innocent party whose land or property has been damaged. At present, persons

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112 Ibid.
113 Ibid.
114 Ibid.
115 Ibid.
116 (1860), 3 B&S 62, 122 ER 25, in which Bramwell B stated:
> It is for the public benefit that trains should run, but not unless they pay their expenses. If one of these expenses is the burning down of a wood of such value that the railway owners would not run the train and burn down the wood if it were their own, neither is it for the public benefit that they should if the wood is not their own. If, though the wood were their own, they still would find it compensated them to run trains at the cost of burning the wood, then they obviously ought to compensate the owner of such wood, not being themselves, if they burn it down in making their gains.
manufacturing and handling contaminants are not legally responsible in the absence of fault or other legal ground of liability. Common law and the existing provisions of the Environmental Protection Act are inadequate in spelling out the necessary procedures to control and clean up spills and restore the natural environment.\textsuperscript{117} (Emphasis added)

Introduced as it was on the penultimate day of the legislative session, the draft amendments were not intended to be enacted immediately. Rather, the intention was to secure first reading prior to the legislative recess, during which time the Ministry intended to consult stakeholders on the impact the draft amendments would have.\textsuperscript{118} As a result of those consultations, Dr Parrott introduced revisions to the draft amendments on March 27, 1979, noting that the amendments would still operate to “impose clear responsibility for control, cleanup and restoration [of spilled pollutants]”\textsuperscript{119} and to establish liability for spills “which clarifies and extends the right to compensation at common law.”\textsuperscript{120} It is clear, however, that Dr Parrott’s consultations with stakeholders elicited some degree of uncertainty and, perhaps, resistance, prompting the Minister to include in the revised amendment provisions for regulations which would permit the designation of particular types of contaminant discharge as “abnormal”, and therefore a spill for the purposes of the Act.\textsuperscript{121}

In the course of debate on the motion for second reading of the revised amendments, on May 15, 1979, Dr Parrott, responding to queries from several members of the legislature, pointed out that a statutory cause of action, if enacted with retroactive effect, would be difficult to justify in a society governed by the rule of law.\textsuperscript{122} In this context, Dr Parrott noted that the cause of action would not require retroactive or retrospective effect in order to apply to circumstances of ongoing pollutant discharge, stating that “[a]ny discharge that might be going on now on a continuing basis, and therefore will be discharging after the bill comes into force, is of course subject to the terms [of the proposed amendments].”\textsuperscript{123} If this was, in fact, the intention of the legislature in eventually adopting and proclaiming the draft amendments (which did not finally

\begin{itemize}
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\item \textsuperscript{117} Ontario, Legislative Assembly, \textit{Official Report of Debates (Hansard)}, 31st Legis, 2nd Sess, No 151 (14 December 1978) at 6178 (Hon Harry Parrott).
\item \textsuperscript{118} \textit{Ibid}.
\item \textsuperscript{119} Ontario, Legislative Assembly, \textit{Official Report of Debates (Hansard)}, 31st Legis, 3rd Sess, No 8 (27 March 1979) at 255 – 266 (Hon Harry Parrott).
\item \textsuperscript{120} \textit{Ibid}.
\item \textsuperscript{121} \textit{Ibid}.
\item \textsuperscript{123} \textit{Ibid}.
\end{itemize}
transpire until November 29, 1985), the decision of Nordheimer J in *Pearson v Inco Ltd*¹²⁴ (a precursor case to *Inco*), discussed below, will be of considerable use in assessing the success of those amendments.

Having proceeded through the committee review process at a leisurely pace, the draft amendments returned to the legislature for third reading on December 11, 1979, at which point Marion Bryden, a New Democratic Member of Provincial Parliament, delivered a scathing critique of the changes made to the statutory cause of action in committee. Several points raised by Ms Bryden are interesting for the purposes of this work. First, Ms Bryden alleged that a variety of exceptions had been added at the behest of the insurance industry and the Canadian Manufacturers’ Association, including exclusions relating to spills caused by war, insurrection, terrorism, natural phenomena and unknown third parties, as well as a due diligence exclusion, all of which will be examined below.¹²⁵ Second, Ms Bryden noted that the committee had seen fit to permit the removal of the phrase “absolute liability” from a section stipulating that liability pursuant to the statutory cause of action would not require proof of fault or negligence.¹²⁶ These developments, Ms Bryden suggested, had substantially diluted the clear lines of responsibility which Dr Parrott had suggested the draft amendments would create.¹²⁷

Despite receiving royal assent on December 20, 1979,¹²⁸ the amendments to the Act relating to statutory spills liability were not proclaimed until over five years later, on July 5, 1985.¹²⁹ Evidently, the Progressive Conservative governments led by William Davis and Frank Miller were unable to formulate regulations to address concerns from both the manufacturing and insurance sectors as to the definition of ‘spills’, the only controversial element of the statutory regime contemplated to be addressed through regulations. Upon taking office in 1985, however,

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¹²⁴ [2001] OTC 918, [2001] OJ No 4950 (Sup Ct Jus) [*Pearson*].
¹²⁶ Ibid.
¹²⁷ Ibid.
David Petersen’s Liberal government immediately proclaimed the amendments to the Act, which came into effect on November 29, 1985.\(^{130}\)

### 2.2 Abnormal Acts: The Statutory Cause of Action in Practice

As discussed above, the rehabilitation scheme of the *Environmental Protection Act* contains operational elements of two primary sorts. The first is comprised of discretionary powers vested in the Minister of the Environment, available upon the occurrence of a spill to permit the Minister to either direct employees or agents of the Ministry to conduct remediation activities or to order any or all of a broad category of actors to do the same.\(^{131}\) Similarly, the *Act* also provides that municipalities and members of a designated class of persons may act on their own initiative to remediate spills.\(^{132}\) The second type of operational element provided by the *Act* provides a right of action to any person, including the Crown in right of Canada and in right of Ontario, in relation to loss or damage incurred as a direct result of a spill or in relation to any costs associated with efforts undertaken pursuant to a Ministerial order or directive, or for remediation costs incurred by those entitled to act on their own initiative in relation to spills.\(^{133}\)

Clearly, the tools available pursuant to the *Act* in the event of a spill are broad and comprehensive. That said, however, it is equally clear that, to a substantial degree, some of these tools are dependent upon the exercise of discretionary authority by governmental actors or agents. As noted at the outset, however, this is a study of the theoretical adequacy of Ontario’s rules of private law liability in the environmental compensation context. As such, to the extent that the remedies available to injured landowners are dependent upon the discretionary exercise of statutory authority by political actors, they can form no part of an assessment of Ontario’s private law framework; they are not private law remedies. Rather, such an assessment must focus on legal consequences individual landowners are entitled by law to bring about on their own initiative. As such, this analysis will focus on the independent right of action provided by the *Act* to those who suffer loss or damage as a result of spills, rather than the discretionary remediation powers the *Act* vests in municipalities and the Minister.


\(^{131}\) *Act*, supra note 17, at ss 94 and 97.

\(^{132}\) Ibid at ss 94 and 97.

\(^{133}\) Ibid at s 99.
The distinctions (and overlap) between the statutory right of action and the torts of private nuisance and Rylands liability are both striking and informative. The most prominent distinction, in light of the discussion of private nuisance and Rylands liability above, is the express capacity of claimants pursuant to the statutory right of action to obtain compensation in relation to almost any conceivable type of loss or damage, including personal injury and lost income. As will be discussed further below, this broad definition of the types of loss recoverable pursuant to the statutory cause of action renders a claim for personal injury, which would, according to Newark, never be compensable through an action in private nuisance, at least plausible if brought pursuant to the Act.

Despite the capacity of the right of action provided for in the Act to compensate for, in essence, any type of injury arising from a ‘spill’, that liability is distinct from contemporary private nuisance and Rylands liability in one significant way. Unlike modern private nuisance and Rylands liability, which, as set out above, has become much more focussed on indicia of fault over the past six decades, liability for ‘spills’ pursuant to the Act is expressly stipulated as having no relation to or dependence upon the fault or neglect of the person responsible for the ‘spill’. This, then, produces an interesting circumstance, in which the increasingly fault-based tort doctrines of private nuisance and Rylands liability are unable to provide compensation for all types of injury arising from faulty conduct, while the statutory cause of action is capable of compensating any and all types of losses despite the complete absence of blameworthy conduct.

That this state of affairs exists has been recognized by the courts of Ontario, although the theoretical difficulty it presents has not. In the decision in Shallow v Red Rock (Township), the Ontario Superior Court of Justice considered a claim relating to personal injuries sustained by the plaintiff in the course of slipping on a patch of ice which had developed overnight on the defendant’s sidewalk. The plaintiff claimed in “nuisance”, Rylands liability and pursuant to the Act, claiming that the overnight leakage of drinking water from a buried water line constituted a ‘spill’ for the purposes of the Act.

Kozak J determined that, even if the leakage of drinking water could be considered a ‘spill’ for the purposes of the Act, the plaintiff could not recover. This conclusion rested on Kozak J’s

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134 Ibid at s 99(6).
136 Ibid at para 4.
137 Ibid at para 2.
dubious reasoning that the plaintiff’s injury had been caused, not by the escape of drinking water from the defendant’s distribution system, but by the patch of ice which resulted from that escape. 138 On the allegations of Rylands liability and “nuisance”, Kozak J noted that “[l]iability for nuisance may be based either on something the defendant has done or has omitted to do when under a duty to take affirmative action. The defendant in this case has exculpated itself by demonstrating that there was no measure of fault on its part.” 139 Suffice it to say, this appears to be a novel application of any test of nuisance, but it is nonetheless noteworthy for its emphasis on blameworthy conduct in the context of tort doctrines which have, until relatively recently, had no conceptual relationship to blameworthiness.

It perhaps goes without saying that the statutory definition of ‘spill’ will figure prominently in any analysis of the cause of action provided for in the Act. For the purpose not only of assigning civil liability, but also of circumscribing the discretionary authority granted to the responsible Minister in relation to the issuance of Orders and Directions, the Act defines a ‘spill’ (and the related term ‘pollutant’) as follows:

“pollutant” means a contaminant other than heat, sound, vibration or radiation, and includes any substance from which a pollutant is derived;

[...] 

“spill”, when used with reference to a pollutant, means a discharge,

(a) into the natural environment,

(b) from or out of a structure, vehicle or other container, and

(c) that is abnormal in quality or quantity in light of all the circumstances of the discharge,

and when used as a verb has a corresponding meaning; 140

These definitions provide the context required to assess the circumstances to which the cause of action provided by the Act will apply, but several points bear consideration prior to doing so.

First, it is clear that any discharge of a pollutant into the natural environment which complies in quality, quantity and location with regulations promulgated pursuant to the Act could not

138 Ibid at para 51.
139 Ibid at para 53.
140 Act, supra note 17 at s 91(1).
reasonably be considered ‘abnormal’ so as to give rise to spill liability under the Act. Similarly, to the extent that regulations promulgated pursuant to the Act deem any discharge of a particular substance ‘abnormal’, as the Lieutenant Governor-in-Council is empowered to do, liability will arise as a function of that deemed abnormality. As such, while the term ‘abnormal’ may appear at first blush to provide a reasonably-cognizable basis upon which spill liability may be assessed, this will only be the case to the extent that political determinations (evidenced by regulations promulgated by the Lieutenant Governor-in-Council) have not short-circuited the fact-finding process in advance.

Assuming, for the moment, that no such determination applies in a particular context, it remains to consider the manner in which the pivotal term ‘abnormal’ has been treated by courts and commentators. In her comprehensive annotation of the Act, Saxe has for some time maintained the position that steady, long-term emissions of pollutants from any particular source could not, by definition, be considered abnormal. As such, in the context of the ordinary emissions of any particular industrial or transportation installation, for instance, it would be Saxe’s opinion that no spill liability could possibly be assigned pursuant to the Act. Saxe has also maintained that the mere migration of a pollutant from the location of a prior discharge to a new location, or from one medium (i.e. the soil) to another (i.e. a stream or groundwater), could not constitute a spill. Taken together, these limitations impose substantial strictures on the scope of circumstances in which spill liability pursuant to the Act will arise. Perhaps unsurprisingly, these limitations have not gone unchallenged in Ontario jurisprudence.

In Mortgage Insurance Co of Canada v Innisfil Landfill Corp, Farley J considered a motion seeking leave to bring an action against Price Waterhouse Limited, the receiver and manager of the assets of the defendant, in relation to the contamination of land adjacent to the defendant’s landfill operation. Farley J, in considering whether the proposed causes of action satisfied the applicable test for leave, determined that leachate emanating from a landfill which proceeded to contaminate adjacent properties was, in essence, a continuing tort, such that “each day that

142 Ibid at X-2.
143 Ibid.
144 (1996), 20 CELR (NS) 37, [1996] OJ No 1760 (Gen Div) [Innisfil].
145 Leave was required in order to bring an action against Price Waterhouse as a result of its status as a court-appointed receiver / manager of the landfill operation in issue.
the garbage dump produces leachate which is allowed to escape from the specific site of the dump, there is a ‘fresh’ spill" for the purposes of the Act. Although Farley J also found that the Act could not be used to ground liability in relation to events prior to November 29, 1985 (as will be discussed further below) he did come to the conclusion that Saxe’s view of migrating contaminants was unjustifiably narrow.

Further, in Hollick v Toronto (Metropolitan), Jenkins J considered whether normal emissions, specifically in the form of odoriferous gasses, debris and vibrations, could give rise to a cause of action in relation to the operation of a landfill by the defendant municipality. Referring to the defendant’s reliance on Saxe’s argument in relation to ordinary emissions, Jenkins J took the position that such a narrow view of the statutory cause of action, absent jurisprudential support, was not justifiable. As such, the emissions arising from the ordinary operation of the defendant’s landfill were determined to form a prima facie basis for the statutory cause of action provided for in the Act.

However, Jenkins J’s conclusion on this issue, arising as it did from a class action certification motion, was of relatively limited precedential value, as was demonstrated in Nordheimer J’s decision in Pearson. In Pearson, an early iteration of the litigation relating to Inco’s Port Colborne refinery that would eventually produce the Court of Appeal’s decision in Inco, Nordheimer J considered whether the plaintiff’s claims could be founded on the cause of action provided for in the Act. In determining that the Act provided no relief in the circumstances, Nordheimer J concluded, with express reference to the decisions in Innisfil and Hollick and the opinion of Saxe discussed above, that the ordinary meaning of the word ‘abnormal’ could not allow liability to extend to the long-term effects of ordinary operations of an emitter of pollutants. Considering that the plaintiff made clear reference to the fact that the injuries alleged to have been suffered by the properties of class members arose from the routine emissions of the refinery over the course of several decades, Nordheimer J found that the cause

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147 Innisfil, supra note 144 at para 18.
148 Ibid.
149 (1998), 63 OTC 163, [1998] OJ No 1288 (Gen Div) [Hollick].
150 Ibid at para 38.
151 Ibid.
152 Pearson, supra note 124 at paras 22 – 23.
of action provided for in the Act had no application.\footnote{Ibid.} As a result, the plaintiffs’ claim pursuant to the Act was struck out.

The scope of the liability provided for in the Act in relation to spills is not the only area that has been subject to judicial dispute. The precise temporal scope of the statutory liability has also been the subject of conflicting decisions. As a statutory basis of liability, the cause of action provided for in the Act would not ordinarily have application to events occurring prior to the date upon which the relevant provisions of the Act came into force, being November 29, 1985.\footnote{Supra note 130.} That said, as Conant J noted in Sun Life Trust Co v Scarborough (City),\footnote{[1994] OJ No 2447 (Gen Div) [Sun Life].} there is a line of jurisprudence which permits retrospective application of statutes in circumstances in which the consequences of retrospectivity “serve primarily as protection for the public rather than punishment of the person in question.”\footnote{Ibid at para 15.}

In Sun Life, Conant J considered an application by the defendant municipality to strike out a claim grounded on the cause of action provided for by the Act in relation to hydrocarbon contamination which occurred prior to the date upon which the provisions relating to the statutory cause of action came into force.\footnote{Ibid.} As a motion to strike out, the legal standard to be applied by Conant J was not a high one; the fact that the motion to strike out failed can illustrate only that a claim premised on retrospective application of the Act’s provisions in relation to spills liability was not, in essence, certain to fail.\footnote{Ibid at para 8.} As such, the decision in Sun Life serves in this respect only as an \textit{entrée} into the discussion of temporal scope, although it will be discussed further below in the context of spatial scope.

Interestingly, the decision in Sun Life was not the first to engage with the temporal scope of the Act’s provision for spills liability. Despite being almost four years older than the decision in Sun Life, the decision of the Court of Appeal for Ontario in McCann v Environmental Compensation Corporation\footnote{1990), 5 CELR (NS) 247, [1990] OJ No 1649 (CA) [McCann].} was not cited in the context of the later decision. In McCann, the Court of Appeal considered an appeal relating to a spill alleged to have taken place not later than 1979, circumstances which the Court of Appeal determined could not form the basis of a
claim pursuant to the Act.\textsuperscript{160} This line of reasoning (to the effect that the Act’s provisions relating to spill liability could have no application to events alleged to have occurred prior to the date upon which those provisions were proclaimed in force) was subsequently followed by Farley J in Innisfil.\textsuperscript{161}

One other aspect of the temporal scope of Ontario’s statutory spills liability bears noting. In his decision in Sun Life, Conant J made passing reference to a further distinguishing feature of the Act’s provision for spills liability. As noted above, Conant J considered a motion to strike out claims relating to contamination of land over which the plaintiff, Sun Life Trust, held a mortgage.\textsuperscript{162} The interesting twist in Sun Life is that the land in issue had previously been owned by each of the defendants in that action, and the contamination event complained of resulted from the installation on the same property of underground petroleum storage tanks by the defendant municipality, the City of Scarborough, during its period of ownership.\textsuperscript{163} The plaintiff argued that its current interest in the property in issue (i.e. as the mortgagee of a mortgage in default) had suffered injury as a result of the conduct of one or more of that property’s predecessors in title during their respective periods of ownership.\textsuperscript{164} While it is clear that, in accordance with the Court of Appeal’s decision in McCann, the claim advanced in Sun Life would not likely be successful to the extent that the contamination events in question arose prior to November 29, 1985, Conant J seemed to have no difficulty with the plaintiff’s attempt to litigate in relation to the historical conduct of predecessors in title.\textsuperscript{165} Needless to say, such a claim would certainly be beyond the scope of any contemporary or historical formulation of either private nuisance or Rylands liability.

One point of similarity between the common law doctrines of private nuisance and Rylands liability and the statutory spills liability provided for in the Act is the type of factual circumstances which will operate to negate potential liability. Paralleling private nuisance and Rylands liability, the Act expressly provides that no liability will attach where persons in control of pollutants are, in effect, demonstrably not responsible for their escape.\textsuperscript{166} In this context, the

\textsuperscript{160} Ibid at para 2.
\textsuperscript{161} Innisfil, supra note 144 at para 18.
\textsuperscript{162} Sun Life, supra note 155 at paras 1 – 3.
\textsuperscript{163} Ibid at para 4.
\textsuperscript{164} Ibid.
\textsuperscript{165} Ibid at para 16.
\textsuperscript{166} Act, supra note 17 at s 99(3).
Act provides for statutory defences akin to the common law concept of force majeure / vis major (including supervening acts both natural and unnatural), as well as a statutory defence equivalent to the defence of ‘act of unknown third party’ in private nuisance and Rylands liability, excusing those in control of pollutant where spills are caused “wholly” by such supervening events.\(^\text{167}\) Despite the Act’s clear stipulation that statutory spills liability does not depend on the existence of fault or neglect, therefore, it is equally clear that persons in control of pollutants are not intended to be held liable for spills arising from events beyond the reasonable control of any similarly-situated actor.

That said, however, the Act also provides for what is, in effect, a statutory defence of due diligence. In contrast to the traditional conceptions of private nuisance and Rylands liability, the Act stipulates that no liability will attach to spills in circumstances in which the person in control of the pollutant can establish that all reasonable steps were taken to prevent the spill in issue.\(^\text{168}\) As has been noted above, it is clear that the traditional formulation of private nuisance and Rylands liability would have been incompatible with a due diligence-type defence. The statutory spills liability provided for in the Act, therefore, is a peculiar admixture of concepts, stipulating liability only in the case of damage arising from the failure of a person in control of a pollutant to exercise due diligence, while simultaneously disclaiming any suggestion that liability arises from fault or negligence. Given the fact that the failure to exercise due diligence is, in some circumstances, tantamount to negligence at common law,\(^\text{169}\) it is unclear how the due diligence defence was intended to interact with the disclaimer of wrongfulness as a prerequisite of liability. Suffice it to say, there has been no jurisprudential clarification of this relationship.

Conclusion

The statutory cause of action provided for by the Act is, as illustrated above, clearly a sui generis basis of liability. Despite the stated intention motivating the creation of the statutory cause of action, being to expand and clarify the liability for spilled pollutants available at common law, which had developed to a point essentially necessitating the demonstration of fault or neglect, the manner in which courts and litigants have employed the Act’s cause of action over the last three decades has produced decidedly mixed results. Although it was intended to

\(^{167}\) Ibid.
\(^{168}\) Ibid.
form a basis of liability independent of concepts of fault or neglect, the statutory cause of action nonetheless permits a due diligence-type defence to liability, raising legitimate questions as to the degree to which the revisions made to the draft amendments in committee effectively hobbled the statutory cause of action before it was enacted. Furthermore, while the statutory cause of action was expressly intended by the Minister who introduced it to be, while not having retroactive or retrospective application, an effective means of modifying the future conduct of long-term emitters, the decision of Nordheimer J in *Pearson* would suggest that precisely the opposite outcome has occurred.

Much of the difficulty arising in relation to the statutory cause of action stems from the compromises evident in the sections relating to ‘no fault’ liability and the definition of ‘spills’, each of which hinder the cause of action’s usefulness as a means of securing compensation for the innocent owners of contaminated land. By limiting the availability of statutory liability in the context of owners of pollutants who have exercised due diligence in their storage, use or transportation, the statutory cause of action arguably offers no better protection than does the contemporary tort of negligence, to the extent that the failure of an owner of pollutants to take “all reasonable steps to prevent” a spill would itself constitute negligent (and, therefore, actionable) conduct. While it could be that the statutory cause of action arguably provides for the recovery of broader damages than does the tort of negligence (i.e. all direct damage as compared to all reasonably foreseeable damage), it remains a far cry from the protection historically offered to landowners by private nuisance and *Rylands* liability.

Without doubt, any normative system will by necessity provide for some circumstances of non-compensable loss. *Damnum absque injuria* has always been a part of common law, and remains so today. As has been noted previously, the object of this work is to assess the degree to which Ontario’s regime of environmental compensation permits *injuria absque restitutio*, using the facts and outcome in *Inco* for context, as a result of the increasingly fault-based contemporary formulations of private nuisance and *Rylands* liability referenced by Dr Parrott in the course of introducing the statutory liability amendments to the *Act*.\(^\text{170}\) To do so, it must first establish a means of distinguishing between mere *damnum*, for which no compensation should be available, and *injuria*, which should give rise to remedial entitlements.

Chapter 3
Competing Indicia of *Injuria*

3  Competing Indicia of *Injuria*

The primary preoccupation of private law legal theorists has typically been the examination and understanding of the rights and duties imposed upon individuals under particular normative systems. Legal theories, whether limited to explanation or extending to prescription, must provide a cogent basis by which the interpersonal obligations imposed by any particular normative system can be justified. As such, theories of liability can be based on many possible assumptions, and can proceed from those assumptions in manifold directions. In doing so, these analyses seek to provide a reasoned basis by which incidental loss may be distinguished from wrongful loss, the distinction being that the former, mere *damnum*, gives rise to no obligation or right of compensation, while the latter, *injuria*, connotes by virtue of its wrongfulness an obligation on the wrongdoer to compensate.

Rather than merely accepting the regime itself as dictating, by its operation, whether any particular class of loss is wrongful or not (in essence, reverse-engineering the wrongful / innocent distinction on the basis of whether compensation is presently available at law), it is essential that those losses for which compensation is not available in Ontario are interrogated in the context of systemic external frameworks, by which the sufficiency of Ontario’s contamination compensation regime can be judged. While not contended to constitute a comprehensive representation of all theoretical bases of liability, this work will make use of two very different forms of legal analysis in evaluating the degree to which Ontario’s pollution compensation regime allows for non-compensable injury.

The first, broadly identified as moral analysis, takes as a starting point a conceptual entitlement of each member of society to a standard of conduct shared in common with all other members.\(^{171}\) From this conception of juristic equality, according to moral theorists, springs an ordered system of reciprocal rights and obligations among individuals, the violation of which triggers obligations of compensation which brings about a return to the *ex ante* state of juristic equality. On a moral analysis of private law, it is the necessarily-reciprocal standard of conduct

which provides the metric against which any particular loss may be judged. Losses which arise from conduct which trenches upon the foundational equality of the parties to any particular transaction are readily identifiable as wrongful (and therefore normatively compensable). While generally cognizable as comprised of scholars of corrective justice, rights theory, interpretivism and other theories, the field of moral legal analysis is broad and heterogenous, perhaps to the point of confusion.\footnote{\textit{Ibid} at 95.}

The second theory of liability to be utilized in this work, broadly identified as law and economics analysis, is as distinct from a moral legal analysis as could be imagined. Rather than founding rights (and, consequently, liabilities) on an intrinsic normative equality between participants to a transaction, a (normative) law and economics analysis inquires as to whether particular aspects of a proposed transaction would tend to make the parties to it perceive themselves, or society in general, as better off.\footnote{Michael Trebilcock, “An Introduction to Law and Economics” (1997) 23 Monash U L Rev 123 at 132.} It is, therefore, a form of legal analysis which eschews any distinctly legal basis for allocating interpersonal rights and obligations, determining the appropriate allocation of rights and obligations among legal actors on the basis of the systemic efficiency of the outcome those rights and obligations produce by their breach.\footnote{Hedley, \textit{supra} note 171 at 99.}

As noted above, these two justifications of liability are not presented as representative of all theoretical understandings of normative systems. That said, they clearly offer thoroughly distinct formulations for assessing the justifiability of assigning (or failing to assign) liability in any particular transaction between legal actors. As such, an analysis of Ontario’s contamination compensation regime utilizing these two theories should be capable of supporting conclusions as to the theoretical adequacy of that regime.

\section*{3.1 Moral Theories of Private Law: Hegel and Weinrib}

Moral theories of private law, while manifold, share among them the assumption (or derived conclusion) that the individual actors governed by private law are entitled to be treated by each other in accordance with certain standards, the violation of which triggers a right of recompense, a right to be returned to the position of equality disrespected by the violation. The difference between moral theories of private law and economic theories (if there can truly be said to be
One\(^{175}\) is the source of the normative content of each. While economic theories measure the impacts of liability rules in accordance with an external source of ‘goodness’ (that is, efficiency), moral theories look to the internal ordering of private law itself, or even the internal order of the primary subjects of private law, humans, for both a source of obligations and a measure against which conduct can be adjudged right or wrong. While Hegel and Weinrib offer very different metrics of wrongfulness, they nonetheless share a focus on understanding private law primarily as a means of regulating the private relationships of juristic equals.

### 3.1.1 Hegel’s Theory of Abstract Right

One of the earliest modern theorists of the nature of interpersonal rights and obligations in a society of free equals, Hegel outlined a systemic approach to private law in *Philosophy of Right*.\(^{176}\) Hegel’s theory of abstract right, which underpins the reciprocal rights and obligations of juristic equals in a pre-political (that is, non-legislative) state, is premised on an understanding of an inherent normative equality shared by all legally-significant actors. That foundational normative equality arises, for Hegel, from the common possession by all legally-significant actors (“persons”, in Hegelian terms) of the capacity for free will.\(^{177}\)

The theory of abstract right is founded on the normative assumption that, through the exercise of free will, all individual actors share an inherent normative equality, and, as a result, have equal entitlement freely act in the material world.\(^{178}\) In order to be free, the will of an individual cannot be subjected to external limitation. In this sense, right is understood as both the means of an individual’s free indeterminacy (being free of external compulsion) and as freedom itself.\(^{179}\) In Hegel’s conception, free will by necessity entails both pure indeterminacy (i.e. freedom from compulsion) and singular determinacy (i.e. willed choice), both of which manifest in the chosen negation of indeterminacy embedded in the chosen particular.\(^{180}\) As such, the dialectic of universality and particularity, in the context of the will, culminates in freely-chosen self-limitation.\(^{181}\) In the material world, free will’s particular substance is right, and the consciously

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\(^{175}\) See generally *ibid*.


\(^{177}\) *Ibid* at para 29.

\(^{178}\) *Ibid* at para 4.

\(^{179}\) *Ibid*.

\(^{180}\) *Ibid* at para 7.

\(^{181}\) *Ibid*. 
free will (expressing freedom in the material world through chosen conduct) is a person.\textsuperscript{182} The person, being consciously free and wilful, is the theory of abstract right’s foundational legal actor. As a result, abstract right revolves around personality alone, having no regard for material and social distinctions among persons.\textsuperscript{183} Under this framework, obligations and liability alike can only be distributed in a fashion justifiable in a society of free equals.

Rights and obligations in the context of the theory of abstract right are related to each other reciprocally. Being a person’s expression of freedom in the material world, right can only be limited by the rights of others.\textsuperscript{184} As a result, the central role of personality, to “[b]e a person and respect others as persons,”\textsuperscript{185} recognizes that individual right, as both freedom itself and the facilitator of freedom in the material world, implies an obligation to respect the freedom of others. Free will, as such, is limited only to the extent required to foster the broadest sphere of freedom amenable to co-existence with normative equals sharing identical entitlements to free action. In this conception, infringing the right of another effectively undermines the capacity of all persons to express freedom in the material world.

Right, being the particular substance of free will, first manifests in the material world, according to Hegel, in a purely self-relational fashion, where persons exercise control over things (being non-persons, without free will).\textsuperscript{186} Things, as unfree and unwilful, are susceptible to control by persons, and in fact exist only for that purpose.\textsuperscript{187} The assertion by a person of willed control over a thing person expressly negates the thing’s capacity to express freedom, and, as a result, converts it into personal property.\textsuperscript{188} Once property, a thing remains in that relationship to its owner until it is wilfully destroyed, abandoned or alienated, and only then becomes available to become the property of another person.\textsuperscript{189} The property relationship between person and thing, permits an owner to put property to any use desired (or to no use at all), but also, as an expression of the freedom of the owner in the material world, is an act of right which must be respected by all other persons.

\textsuperscript{182} \textit{Ibid} at paras 29 and 36.
\textsuperscript{183} \textit{Ibid} at para 37.
\textsuperscript{184} \textit{Ibid} at para 36.
\textsuperscript{185} \textit{Ibid}.
\textsuperscript{186} \textit{Ibid} at para 44.
\textsuperscript{187} \textit{Ibid} at para 59.
\textsuperscript{188} \textit{Ibid} at para 44.
\textsuperscript{189} \textit{Ibid} at para 65.
Once appropriated, a thing owned by a free person must always be susceptible to a return to its prior unowned state, either by abandonment or by transfer to the ownership of another person. The mutually-willed transfer between persons of property simultaneously asserts the free equality of each party to the transaction, each of whom is posited as having equal capacity to both appropriate and alienate things, while mutually asserting the transferred thing’s status as entirely subject to its owner’s will. As such, by exchanging property, the parties to the transfer create a contractual relationship, which implicitly validates and expressly recognizes each party as normatively equal to each other, while negating the normative equality of the transferred thing.

While both of the relationships (property and contractual) described above are recognizable (as expressions of free will in the material world) as manifestations of right, contractual relationships are in one way unique. Property, being entirely self-relational, necessarily imposes no strictures, present or future, on its owner. Property, as an expression of freedom, is both the freedom to control a thing and to be without it. An owner can put her property to an inherently unlimited variety of uses, and the assertion of control over a thing does not oblige the owner in any way in relation to future conduct. It follows inextricably that even the passive continuation of a property relationship, including the beginning, continuation and end of any specific use, is itself an expression of free will and, therefore, an exercise of right.

Relationships of exchange between equals, however, represent the highest expression of free will, to the extent that they not only bind the person to a present position (as any property relationship does), but, by way of the bilateral nature of offer and acceptance, intentionally submit each party (and their respective wills) to each other’s will by creating a common will they share. The reciprocal and free submission of will to will binds the future conduct of the parties to a contract. By creating a contractual relationship, the future conduct of a person in relation to the contract’s subject matter is definitively defined; the common will the parties establish through the contractual relationship becomes the metric governing the future conduct of the parties.

\[\text{\textsuperscript{190}} \text{Ibid.}\]
\[\text{\textsuperscript{191}} \text{Ibid at para 71.}\]
\[\text{\textsuperscript{192}} \text{Ibid at paras 81 and 82.}\]
In Hegel’s conception, the interaction between expressions of freedom by normative equals establishes a principle of rightness.\textsuperscript{193} Interpersonal conduct which respects expressions of freedom by others through the manifestation of right is, as a result, understood as according with the principle of rightness, while conduct which does not respect the freedom of a normative equal is wrongful (being the opposite of right).\textsuperscript{194} However, despite the fact that Hegel’s analysis of wrong is an extension of, and emphasizes, wrongfulness in contractual relationships, the capacity of persons to infringe upon property rights in the absence of contractual relationships (i.e. by intentional misappropriation or unwitting assertion of control over previously-appropriated property) illustrates the fact that interpersonal relationships mediated by property rather than contract must also give rise to instances of wrongdoing.

However, in the context of an interpersonal relationship defined by property rather than contract, the parties to the relationship have posited no common will against which the rightness of their conduct can be measured. In such circumstances, there can be no principle of rightness but for the central rule of personality itself; as a result, the only obligation of persons to each other in relationships defined by property is to respect each other’s rights by refraining from impairing the expression of freedom embodied in the creation and maintenance of a thing as property. The assertion of control over the property of another undermines the basis of the property relationship itself, and produces a normative entitlement to redress in favour of the wronged party.

\textbf{3.1.2 Weinrib’s Theory of Corrective Justice}

In \textit{Corrective Justice},\textsuperscript{195} Weinrib considered many of the same questions as did Hegel (and Kant before him), seeking to discern the “most abstract unifying conceptions implicit in the doctrinal and institutional arrangements of private law.”\textsuperscript{196} Like Hegel, Weinrib examined the private law as he found it, and sought to reduce it to its irreducible constituent elements, in order to arrive at a theoretical justification of the existing scheme of private ordering independent of external or utilitarian considerations. While Weinrib’s implicit intention is clearly a challenge to the instrumentalist doctrines which dominated 20\textsuperscript{th} century legal scholarship, such as the law and economics approaches which will be discussed below, the theoretical framework set out in

\textsuperscript{193} \textit{Ibid} at para 82.
\textsuperscript{194} \textit{Ibid} at para 81.
Corrective Justice is also firmly grounded in a rich intellectual heritage stretching back as far as Aristotle.\textsuperscript{197}

It is from Aristotle that Weinrib takes the title both of his theoretical approach to private law and the eponymous work in which that approach is spelled out. Corrective justice, in Aristotle’s conception, stands as one component of a bipolar theory of justice.\textsuperscript{198} In contrast to distributive justice, which is concerned with the proportionate allocation of burdens and benefits among all members of a particular polity, corrective justice is concerned with the just distribution of burdens and benefits as between normative equals.\textsuperscript{199} Corrective justice, therefore, is focussed on ensuring that parties to transactions (whether voluntary, as in contract, or involuntary, as in tort) retain their status as normative equals after the completion of that transaction. In transactions in which both parties experience equal normative gains and losses, they balance, such that neither party experiences disproportionate gain or loss.\textsuperscript{200}

However, where one of the parties to a transaction benefits to an extent disproportionate to her loss, corrective justice identifies that person as having obtained a normative gain, while the party experiencing disproportionate loss is understood to have suffered a normative loss.\textsuperscript{201} In his “line analogy”, Aristotle explained that corrective justice ensures that the normative gain obtained through a transaction by the disproportionate beneficiary (i.e. the amount by which the beneficiary’s normative capacity is extended) translates into an obligation to restore to the wronged party a precisely equal normative amount (i.e. the amount by which the wronged party’s normative capacity has been reduced).\textsuperscript{202} By ensuring that disproportionate normative transactions give rise to entitlements of normative restitution, corrective justice restores the parties to their original positions of normative equality.

It is important to note that, unlike distributive justice, which ensures that each individual is benefited or burdened to the extent of their desert in accordance with a criterion shared (possibly to greater and lesser degrees) in common with all other members of the polity, corrective justice

\textsuperscript{196} Ibid at 13.
\textsuperscript{197} Consider, for example, Aristotle’s exposition of justice in \textit{Aristotle: The Nicomachean Ethics}, trans JAK Thomson (London: Penguin Classics, 2004).
\textsuperscript{198} Ibid at 118.
\textsuperscript{199} \textit{Corrective Justice}, supra note 195 at 16.
\textsuperscript{201} Ibid at 285 – 286.
\textsuperscript{202} Ibid.
is not concerned with desert, or need, or desire. It simply and solely seeks to ensure that the status of the parties as equally capable of entering into normative (that is, legally significant) transactions, both voluntary and involuntary, is not diminished as a result of these transactions. The stuff of corrective justice, therefore, is not equality of possessions, but an equality of the capacity to possess.

In examining contemporary private law doctrines, Weinrib identified two underlying normative components which form the basis of his own theory of corrective justice. The first, correlativity, is firmly grounded in Aristotelian corrective justice, dealing as it does with the specific structural nature of the relationship of liability between plaintiff and defendant. The second, personality, is grounded in the works of Kant and Hegel, and provides corrective justice with its normative force, identifying as it does those aspects of individual interaction which are significant from the perspective of a regime of legal liability. Each of these constituent elements of Weinrib’s corrective justice will be discussed below in greater detail.

Correlativity, in Weinrib’s conception, is the structural foundation of private law and, pivotally, private law liability. Drawing on Aristotle’s corrective justice framework, Weinrib identifies the rectificatory function it performs as the foundational connection between the parties to a legally-significant transaction. In the course of correcting an unjust transaction (that is, a transaction which has produced disproportionate normative gains and losses), corrective justice binds the two parties irrevocably to each other. The normative gain obtained by the defendant is unavoidably equal to the normative loss suffered by the plaintiff, and the rectification of this unjust state of affairs can only occur through a recovery by the plaintiff equal to the defendant’s wrongful gain. Going further, Weinrib also notes that there is no justice, in a corrective justice framework, in only depriving the defendant of a disproportionate gain or in only compensating the plaintiff for disproportionate loss. In order to fulfill corrective justice’s rectificatory function, both must take place; otherwise, one of the parties will be left in a position of normative inequality, having incurred a disproportionate normative gain or loss, as a

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203 Corrective Justice, supra note 195, at 22.
204 Ibid at 15.
205 Ibid.
206 Ibid at 16 and 17.
207 Ibid at 17.
208 Ibid at 18.
result of the unjust transaction.\textsuperscript{209} The inescapable structural aspect of private law, to Weinrib, is that it acts simultaneously and correlatively in relation to both of the parties to an unjust transaction, binding them together through the mechanism of liability, which directly correlates the normative loss of the plaintiff to the normative gain of the defendant.\textsuperscript{210}

By itself, however, correlativity does no more than structure the relationship between the doer of a wrong and the sufferer of a wrong. While adequately conceptualizing the consequences of wrongdoing in legally-significant relationships, correlativity cannot provide itself (or, for our purposes, us) with normative content.\textsuperscript{211} Without more, correlativity describes the mechanism of redress for civil wrongs, but cannot assist in describing the nature of those wrongs. For that, according to Weinrib, one must refer to a second foundational element of private law, one which gives normative content to the positions of parties within a correlative framework. The second element identified by Weinrib, like Kant and Hegel before him, is personality.\textsuperscript{212}

Weinrib’s personality forms the second irreducible abstraction presumed by private law in the corrective justice paradigm. As with the analysis of correlativity, Weinrib offers personality not as the basis for novel claims as to the nature of private law, but rather presents it as the unavoidable product of any exercise of extrapolation from the manifold rights and duties entrenched in private law, reducing them to the “feature that is pervasive in and presupposed by all of them.”\textsuperscript{213} What Hegel described as the capacity for free will, Weinrib identifies as the capacity of individuals for purposiveness, and, as a consequence, capacity for rights as against, and duties in favour of, their equals.\textsuperscript{214} Like Hegel, Weinrib’s conception of personality specifies that the legally-significant aspect of individual action is confined entirely to the doing of things, rather than the purposes for which those things are done. An actor’s motivation in acting is irrelevant for the purposes of determining the legal quality of the act; rather, as Weinrib notes, the “law responds merely to the external indicia of an exercise of purposiveness.”\textsuperscript{215}

Weinrib’s personality also limits legal consequences to conduct which impedes the capacity for purposiveness of others, such that the obligations and duties attaching to legally-competent

\textsuperscript{209} \textit{Ibid.}
\textsuperscript{210} \textit{Ibid} at 16.
\textsuperscript{211} \textit{Ibid} at 21.
\textsuperscript{212} \textit{Ibid} at 25.
\textsuperscript{213} \textit{Ibid} at 23.
\textsuperscript{214} \textit{Ibid} at 24.
\textsuperscript{215} \textit{Ibid.}
individuals extend no further than the negative correlates of the rights of personality. In this context, therefore, Weinrib’s understanding of personality, like Hegel’s, sees the primary basis of legal liability as the reciprocal preservation of an environment which fosters the capacity to act purposively in human society. As such, personality provides corrective justice with normative content, outlining the bases on which legal responsibility for loss will be attached to the actor causing those losses by stipulating the boundaries of acceptable conduct without which correlativity would be meaningless. For Weinrib, correlativity does no more than provide the structure within which the consequences of rights and duties are worked out; personality provides a coherent framework by which the content of those rights and duties may be determined.

However, unlike Hegel and Kant, Weinrib’s understanding of personality does not proceed from a position prior to the legal system he seeks to analyze. Rather than founding personality on an *a priori* equality arising from the shared faculty of rational agency, as the natural law theorists did, Weinrib derives personality from the regime of liability as he finds it, defining the contours of legal capacity only in the context of private law’s own multifaceted framework of rights and responsibilities. Weinrib’s personality, as such, does not form an external basis by which the private law’s schema of liability may be measured. Rather, personality in the corrective justice context is no more and no less than a distillation of the normative content of private law’s own doctrines of liability, offering a basis by which any particular private law doctrine may be measured, not against an external metric of justifiability, but for coherence in the context of the private law’s system of liability as a whole.

### 3.2 The Economic Analysis of Private Law: Two Measures of Efficiency

As with any other theoretical approach to law, economic analysis is not monolithic. Despite in many cases sharing the same fundamental assumptions as others engaged in analyzing the efficiency impacts of the assignment of liability to different classes of individual, one of the major points of distinction among economic scholars of the law is the metric employed in that analysis. In essence, the distinction is one that can be reduced to one question: can efficient

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216 *Ibid* at 25.
outcomes produce both winners and losers, or is an efficient outcome one that produces winners only? Depending on the answer to this question, the scope of the efficiency inquiry can vary widely.

As will be discussed below, these two metrics of efficiency, Kaldor-Hicks efficiency and Pareto efficiency, offer distinct bases against which to assess the economic impacts of the allocation of liability, the defining feature of law and economics as a discipline. In the context of private law, Kaldor-Hicks efficiency arises from an allocation of liability which provides gains to beneficiaries sufficient to permit them to compensate those rendered worse off by the allocation (and thus making them economically indifferent to the allocation) while retaining some benefits for themselves. A Pareto efficient allocation of liability, on the other hand, expressly requires those made better off by a transaction to compensate those made worse off as a result.

Needless to say, these metrics of efficiency represent very different perspectives on social welfare and personal autonomy, and would in many circumstances support different allocations of liability on the same facts. While other measures of efficiency are occasionally brought to bear on questions of optimal private law ordering, there is no doubt that Pareto efficiency and Kaldor-Hicks efficiency are the two most-used measures of efficiency in the private law context. As such, they will form the basis of the economic analysis element of this project.

### 3.2.1 Kaldor-Hicks Efficiency

In *The Problem of Social Cost*, Ronald Coase laid one of the foundation stones in the economic analysis of law, presenting a thorough analysis of what he saw as the economic rationale underlying and animating many of the private law doctrines of the common law. Of central importance to Coase’s analysis was the conception of private law disputes as essentially reciprocal, an analysis which exposes the fundamental irrelevance of traditional fault- and harm-based justifications of liability. According to Coase, a determination that the party whose act causes harm to another should be held liable for that loss essentially ignores the fact that, in assigning liability to the active party, the law endorses the loss inflicted by the inactive party on

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220 *Ibid*.
221 Trebilcock, *supra* note 173 at 132.
222 (1960) 3 J Law & Econ 1.
223 *Ibid* at 2.
the active party.\textsuperscript{224} In any legal dispute, therefore, the assignment of legal rights operates, in Coase’s approach, to determine which of the two parties is entitled to cause harm to the other. In a dispute between an owner of livestock and a grower of wheat, for Coase, the important decision is less one of who should be liable as it is, at bottom, between meat and crops.\textsuperscript{225} A legal regime which favours one, such as the farmer, will necessarily penalize the other, the outcome of which, in social terms, is more expensive meat and less expensive wheat, as the cattle-raiser is made to internalize all of the costs of the interaction between cows and grains.

The function of legal rights, in this concept, is to define the terms of transactions which operate to achieve an optimal distribution of resources. The cattle-raiser, if made to internalize all of the costs of cow-grain conflict, will, supposedly, operate within those market parameters, incurring the cost of fencing only at the point where fencing becomes cheaper than compensation for crops destroyed by her herds.\textsuperscript{226} In a market populated by rational self-interested actors and characterized by no or low transaction costs, economic analysis assumes that resources will tend to gravitate toward their most valuable use. In this context, liability, and more particularly the decision as to where liability should fall, functions to shape the incentives governing particular economic actors, rendering some activities sustainable and others less so.

Recognizing the impact legal rights (and, therefore, liability) can have on markets operating in the context of positive transaction costs, Coase set out to illustrate the position that, in essence, liability should be structured in such a way as to facilitate the optimal distribution of resources without regard for initial distributions. As such, circumstances in which the assignment of liability operates to incentivize (and, in essence, subsidize) suboptimal distributions should, according to Coase, be recognized for the distortions they are, and avoided by a rational distribution of rights.\textsuperscript{227} Where, for instance, a railway produces efficiencies for society as a whole despite causing damage to adjacent crops, but would be unsustainable if compelled to compensate farmers for crop damage, Coase asserts that the decision as to liability for crop losses should be reached on the basis of whether the benefits produced by the enterprise outweigh the losses.\textsuperscript{228} Importantly, Coase argues that this analysis, in order to completely capture all relevant considerations, must take into account not only the benefits of the operation

\textsuperscript{224} Ibid.
\textsuperscript{225} Ibid.
\textsuperscript{226} Ibid at 3.
\textsuperscript{227} Ibid at 19.
\textsuperscript{228} Ibid at 44.
of the railway, but also the benefits arising from the uses to which farmers would put resources reallocated from the cultivation of crops adjacent to the railway, which would become uneconomic if no liability for crop damage attached to the operation of the railway.\textsuperscript{229} Where the operation of the railway produces net benefits under these circumstances, Coase argues that the railway should not be held liable for crop damage.\textsuperscript{230} Where the net benefits do not outweigh the costs produced by the operation of the railway, Coase would suggest that liability should attach to the railway, as its continued operation would produce a less-than-optimal distribution of resources.

It should be clear, at this point, that Coase’s approach assumes the existence of a functioning market populated by rational self-interested actors, and that activity within that market is voluntary and benefit-maximizing for their participants. In this framework, therefore, liability, like transaction costs and market dominance, becomes a possible vector of market distortion, and decisions in which liability is in issue should, as such, be responsive to the impact such distortions will have. Rather than an inherent consequence of a wrongful incursion upon the sphere of freedom of a juristic equal, as in a moral analysis, liability in the context of economic analysis is merely one of a manifold variety of levers, the manipulation of which under any given factual circumstance renders the market more or less efficient.

Coase’s approach, by incorporating all costs and benefits arising from an activity across all members of society, and permitting the involuntary reallocation of resources from less-profitable to more-profitable applications (at least, in the aggregate), draws on a Kaldor-Hicks model of efficiency. The significance of Kaldor-Hicks efficiency, for the purposes of this project, is that it is finely tuned in its formulation to the particular circumstances of tort law. By, in effect, endorsing the involuntary reallocation of resources (which is the ultimate result of any \textit{damnum absque injuria}, after all) in circumstances where doing so renders the market as a whole more efficient, a legal analysis employing Kaldor-Hicks efficiency carries the central assumption of economic analysis (that legal liability has developed, and/or should develop, in a way which supports the efficient allocation of scarce societal resources) to its logical conclusion, subordinating all legal rules (such as, in Coase’s example, the right to cultivate one’s own land without external interference) to the test of societal efficiency or utility. An

\textsuperscript{229} \textit{Ibid} at 33.
\textsuperscript{230} \textit{Ibid} at 33 – 34.
interesting consequence of this model is that, in analyzing the market impacts of the assignment of liability, Kaldor-Hicks efficiency adheres to fundamental economic practice by permitting no externalities of any sort, but insists that the knock-on effects on both sides of the liability equation be incorporated into that analysis.

3.2.2 Pareto Efficiency

As noted above, the fundamental defining aspect of Pareto efficiency is that it places intrinsic value on each market participant’s existing resource allocations, which must be assumed to be, in accordance with basic economic theory, the most beneficial allocation available to those individuals.\(^{231}\) Pareto efficient transactions, unlike Kaldor-Hicks efficient transactions, do not permit individuals to be made worse off by a transaction, focussing, to some extent, on individual welfare rather than the welfare of society as a whole (welfare, in this circumstance, being equated with utility or benefit). While Kaldor-Hicks efficiency admits of no legal precept which should not be subject to, and subordinated by, broader social utility, Pareto efficiency preserves for individual actors a sphere of voluntariness and agency within which their own aggregate utility is paramount. While not rendering individual market participants immune to involuntary conversion of one type of resource into another (damaged crops into currency, for instance), Pareto efficiency does, at bottom, insist that such conversions take place as a necessary element of any involuntary transaction.

Pareto efficiency has been identified by legal scholars as essentially placing value on individual autonomy which a Kaldor-Hicks measure (or, for that matter, any other welfarist model) would discount.\(^{232}\) In a response to Calabresi’s strident critique\(^{233}\) of the usefulness of Pareto efficiency in informing the economic analysis of law, Geistfeld notes that the Pareto measure of efficiency is, in effect, one which requires actual consent from all members of society, either as a result of the benefit they would obtain or as a result of the fact that they are made no worse off (and therefore have no reason to oppose the change).\(^{234}\) To the extent that the only functional distinction between a Pareto measure of efficiency and a Kaldor-Hicks measure of efficiency is the value the former places on consent, Geistfeld argues that the value of Pareto efficiency as a

\(^{231}\) Trebilcock, *supra* note 173 at 132.


\(^{234}\) Geistfeld, *supra* note 232 at 169.
metric is most clearly evident in circumstances of risky conduct likely to result in involuntary compensatory exchanges.\textsuperscript{235}

A Kaldor-Hicks analysis of such activities may well conclude (as in the case of the hypothetical railway put forward by Coase) that the risky conduct is beneficial on the whole, particularly when the utility derived from the reallocation of the injured party’s resources to other (individually suboptimal) activities is considered. However, in circumstances in which involuntary compensation arises from conduct which inherently devalues individual autonomy, Geistfeld suggests that a decision rule derived from Pareto principles should be applied.\textsuperscript{236} Where risky conduct does not inherently challenge or devalue the autonomy of individual actors (such as the operation of motor vehicles), a Kaldor-Hicks analysis would appear, in Geistfeld’s approach, to be appropriate, but only inasmuch as the conduct in question is not intended to flout individual autonomy.\textsuperscript{237}

The structure implied by Pareto efficiency is significant, and permits a clear contrast to be drawn with Kaldor-Hicks efficient transactions. In assigning primacy to individual welfare over social utility, Pareto efficiency assigns value to individual agency and choice, thereby recognizing voluntariness (or at least constructive market indifference) as an essential component of justifiable transactions. While a Pareto efficient transaction may provide less benefit or utility to society as a whole than would a Kaldor-Hicks efficient transaction, a Pareto efficient transaction would also likely feature enhanced uniformity of perceived utility among its parties than would a Kaldor-Hicks efficient transaction. In essence, the choice between these competing metrics is reducible to a decision between the maximization of social utility (Kaldor-Hicks) and the preservation of individual perceived utility (Pareto).

It should also be noted that Pareto efficiency, as a conceptual framework, is not without weaknesses. What has previously been noted as the primary functional distinction between Kaldor-Hicks efficiency and Pareto efficiency, being the susceptibility of existing allocations of resources to involuntary adjustment in favour of enhanced aggregate social utility, also forms the basis of the primary critique of Pareto efficiency. By stipulating that existing individual aggregate utility is immune to reallocation in favour of more systemically-beneficial

\textsuperscript{235} \textit{Ibid} at 172.
\textsuperscript{236} \textit{Ibid}.
\textsuperscript{237} \textit{Ibid} at 174.
distributions, Pareto efficiency, in essence, accepts existing distributions as *de facto* optimal, which may serve to entrench suboptimal (or outright inequitable) distributions.\(^{238}\) To draw again on Coase’s hypothetical, the operation of the railway through farmland would only be recognized as Pareto efficient if the owners of the farmland themselves were made no worse off thereby, even if the farmland in question formed the basis of a broken market (through, for example, monopoly ownership of food production) which the railway would serve to rectify.

To be clear, there remains much debate within the law and economics field as to the circumstances (if any) in which Pareto efficiency is the appropriate basis of evaluation.\(^{239}\) Interesting though it is, that debate is far from this work’s purpose. If the economic analysis of Ontario’s environmental contamination regime illustrates a distinction between what a Pareto efficient liability regime and a Kaldor-Hicks efficient liability regime would compensate, it will not be for this project to analyze which offers the preferable allocation of rights. Rather, as has been noted throughout, the objective of this work is only to investigate whether, and under what theoretical assumptions, the current law of Ontario treats *injuria*, however defined, as non-compensable *damnum*. Both Pareto efficiency and Kaldor-Hicks efficiency offer adequately-theorized bases from which to draw those conclusions.

**Conclusion**

Clearly, the four approaches for identifying wrongfulness in private law outlined above offer a broad background against which the theoretical adequacy of Ontario’s environmental contamination compensation regime may be measured. As discussed at the outset of this work, of central importance to this inquiry is the fact scenario presented in *Inco*, where no liability was found despite the clear physical alteration of the plaintiffs’ properties (even if only at the molecular level) and the consequent limitation of uses imposed (given the likelihood those alterations would be incompatible with some plant growth) and diminution of market value caused as a result. Having sketched four distinct theoretical bases for the identification of wrongfulness and the consequent allocation of civil liability, it remains to consider the facts of *Inco* against those measures.

\(^{238}\) Trebilcock, *supra* note 173 at 134.
\(^{239}\) Consider, for instance, Calabresi, *supra* note 233, and Geistfeld, *supra* note 232.
Chapter 4
Rights and Wrongfulness: Assessing *Inco* and the *Act*

4 Rights and Wrongfulness: Assessing *Inco* and the *Act*

Having outlined the scope of liability for environmental contamination in Ontario pursuant to both the common law doctrines of private nuisance and *Rylands* liability and a statutory regime implemented specifically to address the shortcomings of common law, it remains to determine the degree to which those modifications are adequate in the contemporary context to ensure that compensation flows to those suffering losses in all appropriate circumstances. The previous chapter, in reviewing four different bases for identifying legal wrongs from two distinct theoretical schools, provides appropriately broad criteria against which Ontario’s regime for the private redress of environmental damages may be assessed.

Several items bear noting at the outset of this analysis. First, this inquiry acknowledges the importance and relevance of factors beyond the scope of legal scholarship to the process of public policy formulation. These factors include, but are not limited to, political, ideological, financial and pragmatic considerations taken into account by legislatures in the development and promulgation of statutes and regulations. Despite the clear, and perhaps pivotal, influence these factors exert on the implementation and modification of regimes of private compensation, as a work of legal scholarship these factors are beyond the scope of the analysis which can be provided here. The conclusions drawn below are, by their nature, the product of legal analysis which does not (and, perhaps, cannot) account for the manifold considerations of public policy and politics which find no basis in the legal academy.

Second, given the varied theoretical perspectives advanced as possible metrics of private legal wrongdoing and the distinctions within and between them, it is entirely possible that particular fact scenarios may be assessed as giving rise to liability according to one metric while producing no legally-significant loss (and therefore no liability) according to another. While such a circumstance of legitimate normative dissonance would pose no great difficulty for this work, it would shed some measure of light on the origin of the stasis which has gripped this area of Ontario law for the last thirty-five years. There seems to be no less disagreement within society at large as to the proper basis upon which civil liability should rest (i.e. dignity or...
efficiency) than exists within the legal, philosophical and economic academies. Suffice it to say, if no such disagreement existed, the utility of a work such as this, however measured, would be marginal at best.

In light of the above, this analysis will consider the facts as presented for the consideration of the Court of Appeal for Ontario (and lower courts) in *Inco*, and will determine the extent to which the losses suffered by the plaintiffs therein ought to have been compensable in accordance with each of the theoretical grounds of liability outlined above. It will then examine the degree to which the statutory cause of action outlined above operates to align Ontario’s private law liability rules with the theoretical bases of liability considered herein.

At the outset, it must be recalled that the plaintiffs in *Inco* initially claimed compensation pursuant to the Act as well as private nuisance and *Rylands* liability. Despite the stated intention of the Minister who introduced the amendments that would become the Act’s statutory cause of action, Nordheimer J’s decision in *Pearson* eliminated any possibility that the Act could constrain the conduct of long-term emitters such as Inco. To be clear, this outcome was firmly rooted in the text of the Act itself, specifically through the requirement of “abnormality” in the definition of “spills”. If the analyses below suggest that the common law doctrines considered by the Court of Appeal in *Inco* have evolved in such a way as to deny compensation to landowners in circumstances in which they have suffered wrongful loss, it will remain to consider how the Act might profitably be modified to ensure that future instances of *injuria absque restitutio* are avoided.

4.1 *Inco* in Moral Context

As discussed above, both moral theoretical approaches to legal analysis arise, in their own fashion, from a conception of fundamental legal actors as juridical equals, from which position of equality flows a reciprocal and self-sustaining normative system. For Hegel’s theory of abstract right, the normative system of rights, as the areas of free self-determination within which external compunction is intolerable, informs by logical extension the content of wrong. Wrongs must be understood as such in order to maintain and enforce the continued capacity of freely-willing individuals to act independently. A wrongful act, in Hegel’s view, invalidates the wrongful actor’s claims to free self-determination by undermining the reciprocal inviolability required to preserve that free self-determination.
Weinrib, unlike Hegel, derives the foundational juridical equality at the heart of the theory of corrective justice not from a pre-legal understanding of the human condition, but rather from the doctrine and structures of private law itself. For Weinrib, normative equality is not so much a characteristic of human beings as it is a characteristic of legal systems which have developed over time to regulate the private (i.e. interpersonal) conduct of those human beings. As such, the normative thrust of Weinrib’s theory of corrective justice flows not from a conception of wrongfulness anchored in the essential elements of humanity so much as from a system the sole purpose of which is to delineate the contours of wrongful conduct. Systemic consistency and coherence, rather than the maintenance of a capacity for free determination, is the ultimate basis of civil liability in the context of corrective justice.

4.1.1 Hegel’s Theory of Abstract Right

The theory of abstract right emphasizes that wrongful conduct is conduct which undermines the capacity of any legally-significant actor to exercise the fullest range of free self-determination compatible with the capacity of all others to do so as well. In the context of the exercise of rights in relation to property, which are by definition willed acts of free self-determination, it is apparent that any limitation thereby imposed on the ability of others to exercise their own rights in relation to property is recognizable as incompatible with a system of reciprocal rights. This conception of wrongfulness accords well with the historical strictness of private nuisance, which held landowners liable for interference despite the absence of ordinary indicia of fault, so long as the interfering action was itself an intentional act of the owner of the land from which the nuisance emanated.240

The theory of abstract right’s basis of liability also accords well with the traditional conception of Rylands liability. Clearly, the collection upon one’s property of a thing likely to do mischief upon escaping to neighboring lands is itself a positive exercise of property rights, such that losses arising as a result should be considered wrongful pursuant to the theory of abstract right. As with the doctrine of private nuisance, the traditional delineation of Rylands liability would excuse the owner of the collected hazardous thing in circumstances in which the direct cause of a neighbour’s loss is the act of an unknown third party rather than the collection itself.241 That

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240 Consider, for instance, the “unknown third party or trespasser” defence to private nuisance: *Crown Diamond Paint Co v Acadia Holding Realty Ltd*, [1952] 2 SCR 161.

said, however, there is a passive aspect to the traditional scope of Rylands liability which differentiates it from traditional private nuisance. In private nuisance, it goes without saying that wrongful interference arises directly from positive actions on the part of the defendant landowner. In Rylands liability, the causal link between doing and suffering is much less direct, such that it is readily susceptible to critique as liability for nothing more than the non-negligent creation of risk which comes to fruition. Nonetheless, the positive act of collection necessary to trigger Rylands liability seems sufficient to ground that cause of action in a rights-based theory of private ordering.

Perhaps unsurprisingly, the evolution of both the doctrine of private nuisance and Rylands liability over the last five decades has diminished the capacity of those bases of civil liability to ensure the vindication of a reciprocal system of rights. If the function of fault-based indicia of wrongfulness in the context of negligence liability is to differentiate between wholly fortuitous loss and legally-significant loss, those indicia should not be necessary in the context of loss arising from positive exercises of rights, as both private nuisance and Rylands liability traditionally have. In those circumstances, the positive act of infringement upon another’s sphere of freedom was historically sufficient to trigger liability, the function of which (in Hegelian terms) is to vindicate the plaintiff’s sphere of free action in the face of an external act of compulsion.

If indicia of fault actually function to delineate fortuitous loss (i.e. damnum) from legally-cognizable injury (i.e. injuria) only in the context of damage arising from an alleged lack of due care, it would be predictable that grafting such indicia of fault onto conduct already understood as wrongful would narrow the field of circumstances in which that conduct would give rise to an obligation of compensation. As an example, the effect of the decision of the House of Lords in Cambridge Water was to confirm a higher standard of liability, such that it was no longer sufficient (as it had been for centuries previous) for Eastern Counties Leather to cause loss to a neighbouring landowner in the course of exercising its rights in relation to property. As a result of Cambridge Water, the loss in question became compensable only if both caused by the exercise of property rights as well as being foreseeable at the time those rights were exercised. Rather than vindicating the inviolability of individual spheres of freedom from all external acts of compulsion, Cambridge Water, in essence, stipulated that individual spheres of freedom are secure only as against external acts of compulsion which bear an additional indicia of fault (i.e.
beyond merely being an external act of compulsion, which would itself be wrongful according to abstract right).

The right of action provided for in the Act seems to address this problem to some extent, expressly imposing liability in circumstances where no indicia of fault exist. Nonetheless, the value of this provision is somewhat limited by the fact that due diligence-type defences are also expressly provided for in the Act, such that, while fault is not necessary to ground liability pursuant to the Act, faultlessness operates as, in essence, a complete defence. While this aspect of the statutory cause of action may be, to some extent, shared by the traditional doctrines of private nuisance and Rylands liability, it has the effect of rendering the statutory cause of action, in essence, a dead letter. Unsurprisingly, the Act’s statutory cause of action has rarely been invoked successfully since its proclamation almost thirty years ago.

This, then, brings the analysis back to its point of commencement, the decision of the Court of Appeal for Ontario in Inco. The doctrine of private nuisance applied in Inco was that developed through the decisions of the House of Lords in Cambridge Water and Wagon Mound (No 2), but further restricted private nuisance liability to circumstances in which contamination rises to a level sufficient to pose an actual interference with the existing use of the contaminated property. In the case of residential property, therefore, the Ontario law of private nuisance after Inco imposed liability only for threats to human health reasonably foreseeable to the polluter at the time of the contamination event. In the case of long-term contamination events, such as that in issue in Inco, it would seem that this definition of private nuisance would be likely to render most contamination non-compensable, given the fact that most of the contaminant in question was likely emitted at a point in the past (i.e. prior to the installation of modern emission control measures) when the potential adverse effects of many contaminants would have been largely unknown (as was the case, in most respects, in Cambridge Water).

The Court of Appeal for Ontario concluded that the losses suffered by the homeowners of Port Colborne were not wrongful, and therefore were not compensable. It does not appear, however, that this conclusion is tenable in the context of the theory of abstract right. The Court of Appeal’s decision was framed very much on the basis of the existing uses to which the residential properties in issue were put at the time the nickel particulate accrued thereon. Limited thusly, the conclusion that no actionable interference took place in Inco was a cogent
one. However, the unavoidable effect of this conclusion is that the owners of those properties are, in essence, frozen in their existing uses. More precisely, by limiting the inquiry to existing uses, the Court of Appeal permitted the future uses of the residential properties in issue to be, in effect, limited to those compatible with the contamination placed upon them by the defendant.

This confiscation of future incompatible uses cannot be reconciled with the theory of abstract right. The individual spheres of freedom of each plaintiff landowner in relation to their own property was diminished by Inco’s conduct to the extent that their future ability to freely exercise their rights of property in ways different from the current uses at the time of contamination was limited by Inco’s unilateral acts. Abstract right, by definition, permits only voluntary self-determination, such that legally-significant limitations on the future acts of persons can only be secured by a mutual exchange of promised self-determination (i.e. a contract). As such, while the theory of abstract right would have permitted Inco to effectively purchase the plaintiffs’ rights to the future exercise of property rights incompatible with the presence of nickel contamination, it was not open to Inco to unilaterally impose such a limitation. By doing so, Inco brought its own capacity to act within its own sphere of freedom, and the reciprocal structure of abstract right itself, into question. The private law doctrines applied in Inco, including private nuisance and Rylands liability, cannot, therefore, be reconciled with the theory of abstract right, inasmuch as they leave wrongful loss uncompensated.

4.1.2 Weinrib’s Theory of Corrective Justice

Corrective justice offers another morality-based metric against which Ontario’s environmental compensation regime, particularly as manifested in Inco, can be measured. As noted above, corrective justice stipulates that transactions between legal actors, whether voluntary or involuntary, must not produce for either party a normative gain or loss. While fortuitous interactions may produce actual losses for one party or another, normative loss (and correlative normative gain) can only arise from interactions which diminish the defendant’s capacity for self-determining freedom. In Weinrib’s conception, legally-significant transactions involve the exercise of rights, being juridical manifestations of the parties’ self-determining freedom in relation to each other.\textsuperscript{242} The correlative structure of rights and duties forms the judicially-

\textsuperscript{242} Corrective Justice, supra note 195 at 87.
cognizable foundation for the content of private law under corrective justice, and provide a normative structure against which the imposition of liability may be analyzed.

The degree to which Weinrib rejects the analysis extrapolated above from Hegelian abstract right should not be understated. By permitting the rights of the injured party to determine the scope of the relationship between plaintiff and defendant, Weinrib argues that a strict liability congruent with abstract right unduly polarizes the inquiry as to the normative content of the bilateral relationship between equals inherent in all private law contexts.\(^{243}\) For Weinrib, the sort of liability outlined above in relation to the theory of abstract right is right without correlative duty, such that only one of the parties to the relationship is entitled to autonomy.\(^{244}\) Strict liability, therefore, provides plaintiffs with a right (i.e. the right not to suffer loss) without imposing a correlative duty on the defendant until the moment the plaintiff suffers loss.\(^{245}\)

Despite the theoretical incompatibility of corrective justice with strict liability writ large, Weinrib concedes that the common law as currently structured manifests some doctrines which are difficult to reconcile with his conception of corrective justice on this basis.\(^{246}\) While expressing doubt that the common law ever permitted strictly cause-based (as opposed to fault-based) liability on any kind of systemic basis, Weinrib argues that both private nuisance and Rylands liability actually do conform with the underlying logic of corrective justice, such that fault, being the breach of a duty arising from the right of an equal, remains viable as an organizing principle of common law liability.\(^{247}\)

Pivotal in Weinrib’s discussion of Rylands liability is the understanding that the ordinary defences to that form of liability, discussed at various points above, serve to illustrate the underlying basis upon which it operates. The fact, for example, that the owner of a collection of hazardous things is not liable for injury caused by their escape where that escape is the result of vis major or the act of an unknown third party illustrates, for Weinrib, that culpability, rather than mere causality, is indeed operative where Rylands liability is invoked.\(^{248}\) The conclusion Weinrib draws as a result is that the creation of higher-order risk (that is, risk of violation of


\(^{244}\) *Ibid* at 178 – 179.

\(^{245}\) *Ibid* at 179.

\(^{246}\) *Ibid* at 184.

\(^{247}\) *Ibid*.

\(^{248}\) *Ibid* at 188.
rights in such a manner as to result in loss of extraordinary magnitude) imposes upon its creator a correspondingly-heightened duty, the effect of which is to relieve the plaintiff of the need to identify a specific faulty act upon which to ground liability.\textsuperscript{249} Abnormally dangerous activities, and the risks that accompany them, essentially carry with them an obligation to be abnormally careful in their performance, such that the materialization of loss as a result constitutes proof that the defendant has not taken sufficient care.

Weinrib is also able to reconcile the traditional understanding of private nuisance with the theory of corrective justice. In this analysis, it is argued that private nuisance operates so as to evaluate the parties’ competing uses against the most general use pertinent to the dispute.\textsuperscript{250} This approach accords with Weinrib’s understanding that personality provides content to private law rights by abstracting both parties’ respective uses to a common context applicable to each and arising from the understanding that property rights (the legal basis of permissible uses) should permit the broadest possible non-conflicting uses of land in order to offer the maximum protection to individual freedom of action.\textsuperscript{251} As such, the doctrine of private nuisance rightly operates so as to prefer ordinary uses to extraordinary uses.\textsuperscript{252}

This understanding of the operation of rights of property, as a “juridical expression of the agent’s freedom,”\textsuperscript{253} permits the broadest possible freedom for legal actors simply (and crucially) by placing the ‘ordinary’ at the centre of its analysis, making uses conflicting with the ordinary, by definition, marginal. Nonetheless, those uses remain permissible (as expressions of the freedom of such users) in any circumstances in which they do not interfere with ordinary uses, such as in localities in which the marginal use is, in fact, an ordinary use, or in circumstances where the ordinary use is interfered with only as a result of the abnormal (i.e. non-ordinary) sensitivity of the inconvenienced user.\textsuperscript{254}

Weinrib’s corrective justice, therefore, accounts entirely for the traditional doctrines of private nuisance and \textit{Rylands} liability. Furthermore, in light of the emphasis corrective justice places on the role of fault in liability, it seems likely that Weinrib would be unconcerned with the

\textsuperscript{249} Ibid at 189.
\textsuperscript{250} Ibid at 191.
\textsuperscript{251} Ibid at 192.
\textsuperscript{252} Ibid.
\textsuperscript{253} Ibid at 192.
\textsuperscript{254} Ibid at 193.
evolution of private nuisance into a more explicitly fault-based form of liability. That said, however, it seems unlikely that the decision in \textit{Inco} would align with the demands of corrective justice. As was the case in relation to the theory of abstract right, the decision in \textit{Inco} freezes the plaintiffs’ properties in their existing uses, taking no account of the impact of Inco’s activities on the capacity of the plaintiffs to make use of their land in ways which would not be compatible with Inco’s deposit of nickel particulate thereupon, while still remaining within the boundaries of what one might reasonably understand as an “ordinary use”. For instance, there was some evidence that nickel concentrated at the levels in issue in \textit{Inco} could pose some hazard to plant life. Nonetheless, despite the diminished capacity of the plaintiffs under such circumstances to put their properties to use for the purpose of domestic vegetable production, Inco’s conduct was not considered to constitute unreasonable interference.

It is clear that, on Weinrib’s analysis, the plaintiffs’ property rights could not be understood to form the sole basis for delineating the legal boundaries of the relationship between Inco and the surrounding landowners. Put another way, corrective justice would examine the bilateral relationships involved to ensure that the outcome in fact accounted for the rights and duties attaching to both parties. That said, Weinrib’s analysis of private nuisance, if not \textit{Rylands} liability, would seem likely to prefer the broadest uses (i.e. those of the residential landowners) over the extraordinary ones, such as Inco’s industrial nickel refinery. While it may well be that the damage incurred by the landowner plaintiffs was nominal (particularly in relation to the impact on uses not considered central to the ‘residential’ category considered by the Court of Appeal), this should raise no real issue for corrective justice. Where a normative loss has occurred, even a slender nominal loss should be sufficient to trigger a corrective transaction.

Similarly, there should be no concern with the traditional threshold of reasonableness in considering whether the plaintiffs in \textit{Inco} ought to have been required to bear the inconvenience caused by Inco without compensation. Rendering the property of a neighbour unsuitable for a use she is entitled to put it to (though she does not now do so) should not be dismissed as the ordinary consequence of social cohabitation. The fact that she does not presently put her land to the foreclosed or diminished use cannot undermine her right to do so in the future without unreasonable interference from her neighbours. The impact of an alleged nuisance on possible future activities should not, therefore, enter into the reasonableness analysis, but should rather be weighed as an aspect of the determination of damages.
4.1.3  Inco and the Moral Theorists

In summary it would appear that neither abstract right nor corrective justice would identify the losses incurred by the plaintiffs in Inco as mere non-compensable *damnum*. Clearly the theory of abstract right as outlined above would offer greater protection for the plaintiff landowners in Inco than would corrective justice, with its focus on fault as the basis for liability in bilateral legal relationships, but the decision in Inco would seem to raise questions under either approach. Distinct from the economic analyses that will follow, the quantum of damages that might be awarded to the plaintiffs in accordance with these moral approaches is irrelevant to the analysis of whether a compensable wrong has occurred. As such, though the landowners in Inco sought compensation equal to the diminished market value of their properties as a result of the contamination in issue, under those particular circumstances it seems unlikely that either abstract right or corrective justice would have left the plaintiffs wholly successful. While not all of the losses claimed by the plaintiffs in Inco could be considered *injuria* pursuant to abstract right and corrective justice, the point is that not all of those losses were *damnum*, though the plaintiffs received no compensation at all.

4.2  Inco in Law and Economics Context

As noted above, the amount of loss incurred by the plaintiffs in Inco was functionally irrelevant to the determination of where liability should fall in relation to the moral analyses considered herein. In contrast, the factual losses (and gains) produced by any particular transaction are central to the determination of appropriate liability rules through an economic analysis. As outlined above, two discrete metrics of efficiency have featured prominently in the economic analysis of legal doctrines. Kaldor-Hicks efficiency inquires as to whether a proposed liability rule operates to produce sufficient gains for those benefitting from the transaction to (hypothetically) compensate all of those made worse off by the transaction (thereby making them functionally indifferent to whether the transaction takes place or not) while still retaining some of the gains for themselves. This measure of efficiency, in effect, determines whether society (or a particular market) as a whole would benefit from a contemplated change, and, while countenancing involuntary reallocations which promote more efficient distributions, has the virtue of ascribing no inherent value to existing (and possibly unjustifiable) distributions.
Pareto efficiency, on the other hand, identifies optimal transactions as those which provide benefit to at least one individual while making no other individual worse off. Pareto efficiency, therefore, protects market participants from the possibility of uncompensated involuntary transactions determined to be beneficial at the societal level, but, unlike Kaldor-Hicks efficiency, is incapable of supporting reallocation of existing distributions, regardless of the degree to which those distributions are (or are not) economically or socially justifiable. As such, while land reform designed to break the economic power of a landed aristocracy may produce a Kaldor-Hicks efficient outcome even in the absence of compensation, a Pareto efficient outcome would require the payment of compensation for expropriated lands.

4.2.1 Kaldor-Hicks Efficiency

As discussed above, the primary functional effect of the evolution of the doctrines of private nuisance and Rylands liability over the last six decades has been to make the successful prosecution of a claim founded on those doctrines more difficult, as plaintiffs are now required to prove not only the fact of a loss or interference arising from the defendant’s conduct, but must also demonstrate that conduct to have been blameworthy. In economic terms, the more difficult it is for plaintiffs to obtain compensation, the more susceptible they are to redistribution of resources through involuntary transactions. While this observation is not determinative of the analysis to be applied in this work, it bears consideration in this context.

Turning to the facts in issue in Inco, some assumptions must be made in order to ground the analysis. First, could the refinery have been operated economically without emitting nickel particulate? If the costs of preventing the emission of nickel particulate exceeded the benefit provided by operation of the Port Colborne refinery as compared to the next-best refining option available to Inco, the analysis must consider the refinery operation as a whole. If not, the analysis could be more contained, focusing only on the cost of emission prevention against the losses caused by those emissions. Both scenarios will be considered below.

If the emission of nickel particulate could be prevented without rendering the Port Colborne refinery uneconomical (that is, more expensive than an available alternative), that cost would be borne, ultimately, by Inco’s customers in the form of more expensive product. There would, however, be a limit to the amount to which Inco would be able to pass along additional costs, given the likely existence of a market competitive on price for refined nickel. If, as we assume,
the Port Colborne refinery remained economically viable, however, this assumption carries with it the assumption that the market will bear enough of Inco’s increased costs for Inco to continue to obtain a profit. The costs of operating the Port Colborne refinery without the production of emissions, therefore, are easily understood as the total costs of the installation, operation and maintenance of the emission-prevention measures, all of which will result in more expensive nickel and, by extension, more expensive products making use of nickel.

On a Kaldor-Hicks analysis, the imposition of liability on Inco for losses caused by the emission of nickel particulate will be understood as efficient if the costs of preventing the emission of nickel particulate are less than the losses the emission of nickel particulate would cause. If the costs associated with preventing losses resulting from the emission of nickel particulate were greater than the losses which would be prevented, the imposition of liability on Inco would be, according to the Kaldor-Hicks measure, inefficient, as the benefit to be obtained by Inco (i.e. the cost savings associated with allowing nickel particulate to be emitted) would be greater than the costs to be avoided (i.e. the losses incurred by adjacent landowners). Considered in the broader context of high transaction costs likely to apply to the relationship between Inco and the many neighbouring landowners likely to be in some way impacted by the emission of nickel particulate (that is, given the high costs of identifying all impacted landowners, measuring the degree to which each landowner is, in fact, impacted, and negotiating agreements with each impacted landowner to permit the continued emission of nickel particulate), it would also be reasonable to anticipate that the Kaldor-Hicks analysis would favour allowing the resulting damages to be borne by the landowners rather than Inco.

If, on the other hand, the costs of emission prevention were such as to render the operation of the Port Colborne refinery uneconomical, the entire economic impact associated with the operation of the refinery would have to be, in accordance with Coase’s approach in *The Problem of Social Cost*, considered in determining whether liability should attach to those emissions. It could be assumed, for instance, that Inco’s next-best option for the refining of nickel would be more expensive than the existing costs associated with the Port Colborne refinery, so Inco and its customers would bear some increase in costs as a result of the refinery’s closure. Assuming that the operation of the refinery is the most valuable use of Port Colborne’s labour resources, it could also be assumed that any industrial replacement for Inco’s refinery would pay less for labour than did Inco, with predictable downward knock-on effects for real estate prices in the
Port Colborne area (inasmuch as the lower wages offered by the industrial replacement would be predicted to result in diminished competition in the local real estate market). Even in the presence of a competitive labour market, it could be assumed that the diminished local demand for labour arising from the closure of Inco’s Port Colborne refinery would exert downward pressure on local real estate prices. As such, if the operation of the Port Colborne refinery became uneconomical as a result of a liability rule rendering Inco responsible for losses caused by the emission of nickel particulate, it seems likely that the best possible outcome for landowners in the area would be a reduction in the market value of their land by an amount less than would be caused by the deposit of nickel particulate.

The difficulty, of course, in analyzing the assignment of liability in the manner set out above is that this type of analysis is extremely fact-specific, and therefore difficult to systematize. While the Kaldor-Hicks analysis might determine that no liability should attach to the emission of nickel particulate in a locale such as Port Colborne, the opposite may well be true in an area characterized by generally higher land value, such that the losses caused by the emission of nickel particulate would be magnified. Nonetheless, it may be that this is how judges operate in the ordinary course of determining disputes over conflicting land uses (justified, perhaps, on the basis of the differing character of neighbourhoods), silently weighing the economic costs and benefits to be allocated among litigants. Such an approach would not be unprecedented in the law of private nuisance, in light of the trend in American jurisprudence toward a “permanent damages” approach to private nuisances in preference to the traditional injunction.255 If this is, in fact, the analysis applied by judges in determining cases such as Inco, an overt economic analysis of the relative impacts of two competing liability rules would at least, in such circumstances, have the virtue of transparency and honesty as to the analytical approach by which liability rules are selected.

4.2.2 Pareto Efficiency

A Pareto analysis of either of the two factual contexts assumed for the purposes of the Kaldor-Hicks analysis above would produce, unsurprisingly, substantially different outcomes. Given the stipulation that Pareto efficient transactions must make no market participant worse off, a defendant’s ability to compel redistribution of resources through involuntary transactions is

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limited. As such, regardless of how much better off Inco would be made as a result of the emission of nickel particulate (primarily measured, as above, as the avoided cost of installation, operation and maintenance of emission-prevention systems), the transaction caused by those emissions (i.e. the transfer of costs from Inco to the nearby landowners) will be Pareto efficient only if the costs arising from the emission of nickel particulate are both less than the cost of emission-prevention systems and great enough to allow Inco to compensate those made worse off thereby while preserving some of the benefit for Inco. The only possible Pareto efficient liability rule in such circumstances would require Inco to fund the costs arising from the particulate emissions, such that the decision between prevention and compensation becomes, for Inco, a simple choice as to which leaves it with more residual benefit.

While this analysis, like that employing the Kaldor-Hicks measure above, is complicated by the necessity to account for the high transactions costs likely to characterize the relationship between Inco and its neighbours, it is, to some extent, more straightforward. In determining whether compensation or prevention provides it with greater residual benefit, Inco would have to incur significant transaction costs, such as identifying impacted landowners, measuring the physical and economic impact of nickel contamination on each individual property, and identifying the available technology for prevention of different levels of contamination, in order to assess the true extent of damage caused by its emission of nickel particulate. Given that these costs would need to be incurred regardless of whether Inco chose to prevent or compensate emission-related loss, a Pareto-efficient transaction would require Inco to benefit to an extent sufficient to both account for its emission of nickel particulate (either through prevention or compensation) as well as the transaction costs involved in selecting its means of accounting, while still retaining surplus for itself.

The Pareto inquiry, in effect, compels Inco to internalize all of the costs associated with the emission of nickel particulate from its refinery, thereby making the compensation / prevention analysis an honest one. As would also be the case in the Kaldor-Hicks analysis, without a liability rule internalizing the costs of nickel particulate to Inco, the costs associated with particulate emissions would not factor into the compensation / prevention choice, such that Inco would choose, under most circumstances, to continue emitting, thereby shifting a portion of its cost of production to its neighbours. While that transaction between Inco and the nearby landowners would certainly benefit Inco, it would also leave those landowners worse off than
they were before, a Pareto inefficient outcome. As such, a liability rule which makes nearby landowners whole (and therefore economically indifferent to the decision Inco makes) would render any decision on the compensation/prevention spectrum Pareto efficient.

Not surprisingly, the outcome of the Pareto efficiency inquiry does not change depending on the potential social costs and benefits produced by the assignment of liability to Inco or the landowners. Regardless of the scope of benefits obtained by society at large through the operation of the nickel refinery and consequent emission of nickel particulate, the transactions through which those benefits would be obtained could not be Pareto efficient without ensuring that those market participants made worse off thereby obtained commensurate compensation.

The Pareto efficiency analysis raises an interesting question, one of which formed the basis of the decision of the Court of Appeal in Inco. On the facts in issue in Inco, there was no dispute as to whether the emission of nickel particulate from the Port Colborne refinery resulted in nickel contamination accruing on the property of neighbouring landowners. The primary point of contention, from the perspective of private nuisance, was whether that contamination could be considered to impose a loss on those landowners. Ultimately, the Court of Appeal determined that the existing uses of the properties in issue were not incompatible with the existence in the soil of nickel contamination at concentrations below those which would threaten human health. The diminished market value of the impacted homes was a result of what the Court of Appeal considered a misperception in the market that the existing contamination was somehow incompatible with the use of the properties in issue for residential uses. The Court of Appeal considered this to be something other than real loss, simply on the basis that the causal relationship between the contamination and the market impact was premised on faulty logic.

The Court of Appeal’s conclusion as to the reality of the losses caused by the nickel contamination should not, however, be an issue for the Pareto analysis. If the Court of Appeal’s logic were followed, a liability rule which allowed Inco to continue emitting nickel particulate would be Pareto efficient because Inco would benefit from continuing to emit particulate, while the resulting contamination would not make the landowners worse off. Knowing the degree to which the impacted properties were contaminated with nickel particulate, and having easy access to the information relating to the threats posed by nickel contamination at different concentrations, the relevant market determined that the price of the properties contaminated
with nickel particulate should be discounted. Regardless of the Court of Appeal’s opinion as to whether this was a rational discount, an economic analysis should have no difficulty in resorting to the market as the best source for data relating to consequential benefits and losses.

The corollary of this conclusion, of course, is that courts should be equally willing to refrain from attaching legal consequences to circumstances in which the market is indifferent to actual risk or uncertainty, thereby depriving an impacted landowner of the capacity to recover anything but nominal damages. While this approach would certainly run afoul of a theory of liability premised on moral theories of the sort examined above, it should pose no serious challenge to an economic analysis. On any measure of efficiency, a liability rule which denied landowners recovery in circumstances of market indifference (that is, where the market value of the land in issue is not impacted by the interference complained of) would be satisfactory, as the landowner remains no worse off than she was prior to the interference. A contamination event, under such circumstances, becomes merely a matter of preferences (does one prefer to live on contaminated land or non-contaminated land?). If the landowner prefers not to live on contaminated land, and the market is indifferent to the presence of the contamination, she is at any time free to obtain alternative, non-contaminated accommodations and be no worse off than before (assuming, of course, that she incurs no transaction costs in the course of doing so; on this analysis, it may be that a Pareto efficient liability rule would allow recovery of the transaction costs incurred in the course of relocation, but nothing more).

4.2.3  *Inco* and the Legal Economic Approach

The economic analyses of the decision in *Inco* presented above offer a glimpse into the process of determining the assignment of liability on the basis of two distinct measures of efficiency. To be sure, the degree to which economic analysis turns on the specific facts in issue makes these analyses somewhat more abstract than would be ideal, but the force of their conclusions remains largely intact. It seems likely that *Inco* would be considered correctly decided pursuant to a Kaldor-Hicks analysis, thereby endorsing both the approach and the conclusion of the Court of Appeal. This analysis, in recognition of the benefits obtained by society as a whole (i.e. those market participants other than the damaged landowners) through the continued operation of the Port Colborne refinery and the continued production of nickel at a lower price, would likely permit the continued costless (to Inco) emission of nickel particulate. Such was the outcome of
the foundational decision of the New York Court of Appeals in *Boomer v Atlantic Cement Co Inc*,

wherein landowners suffering clear physical interference were, in essence, refused injunctive relief in light of the disparity between the losses suffered by the plaintiffs and the broader losses likely to arise from imposition of an injunction against a large industrial undertaking, permitting the payment of “permanent damages” to, in effect, licence the ongoing nuisance.

A Pareto analysis would likely come to a different conclusion. Given the inability of any single market participant to compel others to incur uncompensated involuntary resource allocations (even those likely to produce net social benefits) in a Pareto efficient transaction, Inco would in all circumstances be required to make the damaged landowners whole in the course of operating its refinery. Failure to impose liability on Inco in such circumstances, by compelling the landowners to bear some of the cost of nickel production, must be identified as endorsing a Pareto inefficient transaction.

While this is the extent of the economic analysis to be applied in this work, it does raise interesting questions for possible future consideration. For instance, does the ability to spread losses factor into the determination of liability on either of the analyses above? Inco would arguably be better positioned to spread the costs associated with compensation for (or prevention of) nickel particulate emission than would be the neighbouring landowners, but how should this factor be incorporated? On the other hand, the landowners themselves could be considered better positioned to know the value of their properties and their exposure to diminished land values, thereby putting them in better positions to insure against the possibility of damaging environmental contamination. Should they therefore be left to bear the loss in order to incentivize them to purchase adequate insurance? These and other questions, all pertinent to an economic inquiry into the appropriate assignment of liability on the facts in *Inco*, will be left for others to investigate.

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256 *Supra* note 27.

4.3 No More Tears? Considerations For A New Statutory Regime

As the analyses above illustrate, there is at least some doubt as to the degree to which Ontario’s existing environmental compensation framework ensures recovery for landowners suffering wrongful loss at the hands of their neighbours. On three of the four theoretical justifications for liability considered above, it would seem that the existing framework, comprised of private nuisance, Rylands liability and the Act’s statutory cause of action, leave some landowners (specifically, those who find themselves in circumstances analogous to the facts in Inco) to bear losses they should not, in theory, be made to bear. In light of the continuing trend animating contemporary Anglo-Canadian jurisprudence on private nuisance and Rylands liability, it seems unlikely that the common law will be capable of rectifying this situation in the near future. As such, if Ontario’s environmental compensation regime is to be altered to extend remedies in circumstances such as those in issue in Inco, it is most likely to be in the form of statutory change, specifically as amendments to the Act’s statutory cause of action.

One must exercise caution, however, in considering the nature of possible amendments in light of two higher, related laws which govern all human creations: Murphy’s Law and the Law of Unintended Consequences. For example, in light of the analysis above, the most obvious candidate for amendment to align the statutory cause of action with the theoretical justifications of liability considered above would be the Act’s definition of wrongful “spills” as discharges “abnormal” in quality or quantity. While deleting the reference to “abnormality” would clearly undermine Nordheimer J’s primary reason for dismissing the statutory claim against Inco in Pearson, such an amendment would reduce the statutory definition of compensable “spills” to mere discharges of pollutants into the natural environment from a structure, vehicle or other container. While a statutory cause of action thus defined would surely have permitted the plaintiffs in Pearson and Inco to obtain compensation for their losses, it would also permit, given the Act’s broad definition of compensable losses and its rejection of indicia of fault as prerequisites of liability, recovery in many other circumstances, some of which may be as theoretically unjustifiable as the status quo.

It should go without saying that treating damnum as injuria is as unsatisfactory as the other way around. Amendments which reduced the statutory definition of compensable spills to mere emissions would almost certainly do so in the absence of additional amendment to the Act’s
definition of compensable loss, which would also have unforeseeable knock-on effects. How, then, could the Act be amended to ensure a right of recovery to landowners in circumstances analogous to those in Inco without exposing all emitters of pollutants to theoretically unjustifiable liability?

The past may hold the solution. As noted above, it seems clear that the traditional definition of private nuisance would likely have identified the losses suffered by the landowners in Inco as actionable. It may be that one of the reasons for the declining strictness of private nuisance liability is the presumptive entitlement of a successful claimant to injunctive relief, a concern which has undoubtedly weighed on the minds of many judges, including those who decided Boomer, who felt constrained by precedent to pay lip service to that entitlement.258 Legislators however, are under no such limitations, and are greatly aided by the fact that the Act currently offers no entitlement to injunctive relief. The opportunity is available, therefore, to refashion the Act into a private nuisance version of Lord Cairns’ Act,259 matching a traditionally-strict standard of liability with a modern “license-fee” approach to damages.

The standard of liability set out in the Act is, in many ways, already well-suited to this role. But for the statutory defence of due diligence, the Act’s rejection of indicia of fault as prerequisites for recovery shares much in common with the tort known to Bracton and Glanvill. As such, it would not be difficult to, in essence, codify the tort doctrines of private nuisance and Rylands liability for the purposes of ensuring compensation for environmental injuries to land.

In light of the above, two minor amendments to the Act could ensure compensation for landowners suffering environmental losses as a result of their neighbours’ conduct, specifically as follows:

91. (1) In this Part,

[...]

“spill”, when used with reference to a pollutant, means a discharge,

(a) into the natural environment,

(b) from or out of a structure, vehicle or other container,

and

258 Boomer, supra note 27.
259 Chancery Amendment Act, 1858 (UK), 21 & 22 Vict c 27.
(c) except in relation to loss or damage to land or interests in land, that is abnormal in quality or quantity in light of all the circumstances of the discharge,

and when used as a verb has a corresponding meaning;\textsuperscript{260}

[...]

99. (3) An owner of a pollutant or a person having control of a pollutant is not liable under subsection (2) if they establish that they took all reasonable steps to prevent the spill of the pollutant except in relation to loss or damage to land or interests in land or if they establish that the spill of the pollutant was wholly caused by,

(a) an act of war, civil war, insurrection, an act of terrorism or an act of hostility by the government of a foreign country;

(b) a natural phenomenon of an exceptional, inevitable and irresistible character; or

(c) an act or omission with intent to cause harm by a person other than a person for whose wrongful act or omission the owner of the pollutant or the person having control of the pollutant is by law responsible,

or any combination thereof.\textsuperscript{261}

These amendments would serve to impose, in the context of discharges of pollutants only, a standard of liability very much like that which animated the doctrine of private nuisance until recent decades. Combined with a damages-only remedy such as that provided for in the Act, this statutory cause of action could offer an attractive balancing of the competing legal and economic interests of polluters and their neighbours. It would operate to internalize the costs imposed by emitters of pollutants on other landowners, while ensuring that unavoidable emissions do not form the basis for exposure to injunctions. In short, the suggested amendments would render the outcome in \textit{Boomer} the ordinary statutory regime in Ontario for instances of environmental contamination, permitting (and, in fact, requiring) polluters to purchase the right to injure their neighbours in the ordinary course of industrial operation, while ensuring that innocent landowners are not left out-of-pocket as a result of their neighbour’s activity.

\textsuperscript{260} \textit{Act, supra} note 17 at s 91(1).

\textsuperscript{261} \textit{Ibid} at s 99 (3).
Perhaps the most convincing argument for such a framework was advanced by Bramwell B over a century and a half ago in *Bamford v Turnley*.\(^{262}\) Surely the people of Ontario benefited from the operation of Inco’s refinery in Port Colborne, but no one would say the same if the losses imposed by its operation on its neighbours exceeded the amount of broader social benefit. An industrial operation which produces less social benefit than social cost is not, in Bramwell B’s formulation, of public benefit. The only sure means of discerning between undertakings producing net social benefits and net social losses is to ensure that all profits and losses appear on a single balance sheet.

\(^{262}\) *Supra* note 116.
Conclusion

Owning land is a riskier proposition in the 21st century than it was in the 19th century. Gone, perhaps forever, are the days in which land ownership brought with it legal status and privileges denied to others. Contemporary landowners, it is clear, are required to endure a far greater degree of interference with both the use and enjoyment of their land and the physical integrity of their land than at any time in common law history. Indeed, the Supreme Court of Canada’s recent decision in Antrim has conclusively and expressly abolished the legal distinction between amenity nuisance and physical injury nuisance which has formed the backbone of Anglo-Canadian private nuisance jurisprudence since St Helen’s Smelting. Accommodation and forbearance seems to be the new normal in the paradigm of conflicting property rights.

Even in this new context, however, the system of private law liability governing interpersonal relationships must, to be justifiable as a normative system, be both internally coherent and explicable. A system which assigns liability otherwise must be critiqued as arbitrary.

There are explanations for the assignment of liability other than those considered in this work, and its conclusions are certainly open to critique through those alternative lenses. If, however, one accepts either moral theory or economic theory as contributing to the normative thrust of private law, the shortcomings of Ontario’s environmental compensation regime as illustrated in Inco cannot be ignored. While some measures of efficiency might well endorse a liability rule which permits socially-beneficial undertakings to, in essence, expropriate an interest in their neighbours’ land in support of the broader social benefit, formulating private law on that basis must be overt if it is to be justified.

If we are to have a system of private law that is more than an arbitrary patchwork, circumstances in which wrongful loss must lie where it falls must be addressed. Statutory reform of the sort described herein offers an opportunity for targeted liability reform without exposing the liability system itself to unknowable future ‘principled’ modification, such as that pursued by Lord Reid in Wagon Mound (No 2). Although a return to the historical strictness of private nuisance liability may not be practicable or desirable in contemporary society (a fact best illustrated, perhaps, by Lord Reid’s evident distaste for the traditional private nuisance standard as

263 Antrim, supra note 35.
compared with liability in negligence), there is ample justification to do so in the specific context of environmental contamination arising from the industrial production, transportation and storage of pollutants. A regime which ensures that industrial undertakings internalize the entire tangible cost of their emissions would protect the interests of neighbouring landowners while aligning the interests of emitters with the contamination-reduction interests of society as a whole.
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