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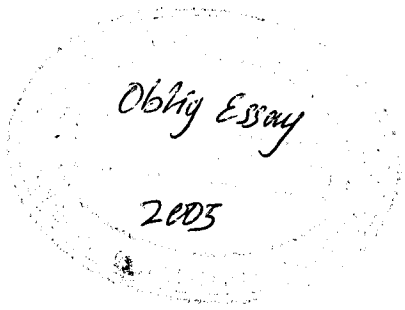

PUBLIC NUISANCE IN LINE WITH ENVIROMENTAL LAW: IS LEGISLATION IN PLACE ADEQUATE / EFFECTIVE FOR REGULATION AND CONTROL.

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2003.

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Being a paper submitted to the University of Zambia, Faculty of Law in partial fulfilment of the requirements for the Bachelor of Laws Degree.

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I recommend that this obligatory essay prepared under my supervision:

By:

HARRIET KAPAMPA KAPEKELE

Entitled:

PUBLIC NUISANCE IN LINE WITH ENVIRONMENTAL LAW: IS LEGISLATION IN PLACE ADEQUATE / EFFECTIVE FOR REGULATION AND CONTROL.

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements relating to format as laid down in the regulations governing obligatory essays.

Date: 10/12/2003 **Supervisor:** .....

Justice K. Chanda (Rtd)

DEDICATION

To my mother Victoria Tambatamba Kapekele, thank you for teaching me to be a goal getter; learning and accepting responsibility for the actions I undertake in life. Thank you for helping me become what I am today and for not having limited my ambitions but instead you opened my mind and eyes to opportunities that have seen me through to this stage in my life.

To my father Stanslous Ng'andu Kapekele, the discipline you instilled in me has helped me to accept that working hard pays off, thank you for believing in me and making me an achiever.

John Kayamba, thanks for being my strength when I felt like giving up during my academic life, for the time you took in helping me get back on track, I thank you.

ACKNOWLEDGMENTS

Special thanks to my heavenly father, God, who has seen me through all situations I perceived to be impossible, for watching over me and enabling me learn through all the different experiences both, that I had, and those that others whom I saw go through at UNZA each with a lesson tag attached to it.

Thanks to my friends: Mweetwa 'child', thanks for being, *inter alia,* a sister to me and tolerating my craziness and pulling me out of my low times, I needed a study partner like you; Namangolwa, for those relaxing time at the 'neighbourhood' and being my 'plaza six' partner, I thank you; Eta I am humbled by the manner in which you gave me great strength to see myself in, I would not have made it in time had it not been for your PC, printer and everything; Karen for being there for me and making my life at UNZA worth living for. Lastly, my room-mate, Luyando thanks for not making my room 'hell on earth' but homely and worth coming back to at all times during my stay at UNZA.

My supervisor, Justice K. Chanda, you have been like a father to me through out my stay in law school, thank you for your advice and guidance.

PREFACE

For a long time, especially in Zambia, noting or little has been done to abate the problem of public nuisance. The usual excuse has been that it is an injury affecting the community as a whole. But this does not change the fact that injury has been done and that the affected will for a long time suffer in silence without any recourse unfortunately.

Nkusuwila Nachalwe expounded on the gravity of the problem of pollution, which I submit is a direct connection to public nuisance. This inspired me to look at the problem at a more advanced level in that, in addition to her submission, I want to focus on the individual rights of the victims of such environmental problems.

In other jurisdictions which have been faced with similar environmental problems, headway has been made in the sense that an action through the tort of public nuisance has been utilised, through reasonable interpretation of the special injury rule, to curb such social problems, and also in dealing with the problem, if not imaginary, of multiplicity of actions.

In the light of the foregoing statement, this research endeavours to show that the problem does not go away by declaring an injury 'community'. It further seeks to address Zambia's vigilance to the problem of public nuisance, essentially pollution; looking at the legislation in place – whether it has been effective or not; and what should be done next if the legislation in place is inadequate, that is, where does the courts come in?

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INTRODUCTION

For the past few years, tort and environmental law commentators have touted the state common law tort of public nuisance as a potentially powerful and flexible remedy for community-based social and environmental problems. Particularly where the statutory avenues for redress are incomplete, weak, or under siege, attention has turned toward restoring the vitality of public nuisance as a supplemental or alternative cause of action.

Wade, expressing hope added that "judicial growth and development" of public nuisance doctrine will "meet the mounting problems of protecting the environment."[1] Another important contribution came from Goodson, describing public nuisance as inherently flexible and uniquely capable of application to abate pollution, clean up contaminated sites, and recover damages.[2]

Unfortunately two doctrines historically have limited the utility of public nuisance as a cause of action to redress community problems: the thoroughly entrenched "special injury rule" and its constant companion, the strict "different -in- kind" test.

Commentators have long criticized the traditional rule and test as unduly restrictive and illogical, barring worthy tort cases and preventing judicial inquiry into merits of the plaintiffs' allegations of injury to the community values the tort protects.

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[1] J. W. Wade, **Environmental Protection: The law of Nuisance and the Restatement of Torts,** (1972) 8 Forum 165. 170

It has further been argued that the special injury rule/different-in-kind doctrine – attributed to ancient English case law and adapted almost universally by United States Courts – is an anomaly in tort law. It limits up front the type of plaintiff who can bring a tort action. Only those who can first prove some injury that is "special," "particular," or "peculiar," as defined as "different-in-kind" and not just "different-in-degree" from the general public who might also be affected by the nuisance, be it a house of prostitution or a polluting factory, may bring an action.

In the foregoing argument, it is quite apparent that in Zambia today and in the past where there has not even been an attempt to bring an action in the tort of public nuisance, the only remedy that is afforded to community injury is legislation. The issue therefore to be addressed in this paper will be determining whether an aggrieved can have more recourse in the courts of law where the legislation in place is inadequate. In this context this article will endeavour to study the aspect of public nuisance in the light of the arguments advanced above by various scholars. It will therefore tackle the questions of whether there is need for another avenue other than legislation; whether the legislation in place has been adequate; and the possibility of judicial redress for the injured. In addition, from the environment perspective, how public nuisance can have drastic effects if goes unchecked. The paper is divided into four parts.

Chapter one, deals with the definition and description of the problem of public nuisance, focusing on its special injury rule. A brief history of Nuisance Law will also be looked at.

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[2] G. Goodson, **5 Natural Resources and Environment,** (1990)

This discussion aims at facilitating a general understanding of the special injury rule and its effect on a private plaintiff and the community's interest as well.

The second chapter tries to look at how this public nuisance contributes to one of the environmental set-backs that Zambia experiences, that is pollution. Various types of pollutants will be discussed. Lastly this discussion will look at the various statutes put in place as watch dogs over such environmental problems, and the role of the courts independent of the environmental statutes.

Chapter three will look at the way in which other jurisdictions have approached the issue of public nuisance. For instance, the United States judicial response to public nuisance. Particularly, some of the decisions that have been passed on the same and the general court's view on the traditional rule of nuisance. Furthermore, this chapter will look at the various arguments that have been advanced in relation with the special injury rule and how public nuisance can be applied to solve some of the environmental problems.

Lastly Chapter four endeavours to conclude the study. It attempts to make suggestions, recommendations, and revision of legal framework will be made if it is to achieve its intended objective. Finally a call for a different approach to public nuisance and the problem of pollution by the courts and its officers will be made.

Chapter 1: Defining the Problem of Public Nuisance

It would be highly unjust and unequitable to say that he has no right of redress in a private action on the ground merely that the injury had resulted from an act which is a public nuisance in itself, and because other persons might have been injured and damaged in the same manner and to the same extent.

Antolini 2001.

(a) Definition of Public Nuisance

Public Nuisance has traditionally been known to be one of the kinds of the tort of nuisance. Nuisance is basically that branch of the law of tort most closely concerned with protection of the environment. There are private nuisances and public nuisances, although this paper is only dealing with the latter. A public nuisance is usually a crime. The use of the word 'usually' here is a deliberate one to indicate that an injured plaintiff, subject to the special injury rule talked about in detail in a little while, can bring an action independently other than the usual way of doing so through the Attorney General. Winfield and Jolowicz define a public nuisance as:

> One which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects who come within the sphere or neighbourhood of its operation.[1]

It should be noted that the question whether the number of persons affected is sufficient to be described as a class is one of fact. In the case of ***Attorney General V. P. Y. A. Quarries Ltd***[2] it was established that one test is to ask whether the nuisance is so widespread in its range or indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings to stop it as distinct from the community at large. Examples of the crime of public nuisance are organising a festival of pop music which generates large-scale noise, traffic, and apprehension, obstructing a high way, or making

[1] W. V. H. Rogers, **Winfield and Jolowicz on Tort,** 12th ed, (1984) London, Sweet & Maxwell. P. 378
[2] [1957] 2 QB 169, 184

it dangerous for traffic. Salmond writes that public nuisances are met by an indictment or by an action by the Attorney-General or a local authority where an injunction is desired to put an end to the public nuisance.[3]

So long as the public only or some section of it is injured no civil action can be brought by a private individual for nuisance. Some writers have argued that where a public highway is obstructed one cannot sue the obstructor for nuisance if he can prove no damage beyond being delayed on several occasions in passing along it and being obliged either to pursue his journey by a devious route or to remove the obstruction, for these are inconveniences to everyone else.[4]

(b) PUBLIC NUISANCE AND SPECIAL INJURY RULE

The past thirty years, tort and environmental law commentators have touted the state common law tort of public nuisance as a potentially powerful and flexible remedy for community-based social and environmental problems, as well as an important interstitial remedy to complement the increasingly complex framework of federal and state statutory schemes. Particularly where the statutory avenues for redress are incomplete, weak, or under siege, attention has turned toward restoring the vitality of public nuisance as a supplemental or alternative cause of action.

[3] R. F. V. Heuston and R. A. Buckley, **Salmond & Heuston on the Law of Torts,** 12th ed, (2002), New Delhi, Universal Law Publishing Co. Pvt. Ltd. P. 58

[4] W. V. H. Rogers, **Winfield and Jolowicz on Tort,** 12th ed, (1984) London, Sweet & Maxwell. P. 379

Unfortunately, two doctrines historically have limited the utility of public nuisance as a cause of action to redress community problems: the thoroughly entrenched "special injury rule" and its constant companion, the strict "different-in-kind" test. Commentators have long criticised the traditional rule and test as unduly restrictive and illogical, barring worthy tort cases and preventing judicial inquiry into the merits of the plaintiffs' allegations of injury to the community values the tort protects.

It has been advanced that nuisance law has advantages over modern environmental statutes and therefore should be preserved as a supplemental remedy.[5]

(i) A Brief History of Nuisance

Modern Zambian nuisance law has its roots in medieval England, which gave birth to the tort as a judicial response to community conflicts caused by changing land use patterns and social conditions. As early as the twelfth century in England, the only remedy for common nuisance, known then as "purprestures," was a criminal writ brought by the Crown. This was a police-power based remedy for interference with the rights of the sovereign. Eventually, this right of the sovereign was partially shared with private citizens as urbanization and the dawn of the industrial age generated or increased both conflicts among land uses and adverse external effects that impinged on the property rights of nearby residents and on the basic quality-of-life "rights" (for example, open

[5] Andrew J. Heimert, **Keeping Pigs Out of Parlors: Using Nuisance Law To Affect the Location of Pollution**, *27* ENVTL.L. 403 (1997)

waterways, clear roads, wholesome air, and civil society) enjoyed by neighbours and the general public.[6]

Nuisance provided a flexible judicial remedy to address these conflicts between land use and social welfare, and, surprisingly, plaintiffs often won their individual legal battles against the relentless march of social and economic progress. Centuries later, the Zambian states incorporated the notion of public nuisance both through common law and by statute. The states enacted broad statutes making nuisance a crime and covering a wide range of activity offensive to health, safety, and welfare, and morals. Specific types of nuisances, such as "houses of ill-repute," unsanitary housing, and fireworks, were targeted for criminal sanctions as common nuisances.

The Zambian system also inherited from English law *civil* or common-law public nuisance, enforceable both by the government and by qualified private plaintiffs. By the sixteenth century, the English courts had begun to recognize civil actions brought by private plaintiffs for "crimes" against the public. Historically, the type of conduct proscribed by all three kinds of nuisance has been difficult to define. Numerous scholars have expressed exasperation in their attempts to describe the boundaries of this "mongrel" tort.

[6] Denise E Antolini, **Modernising Public Nuisance: Solving the Paradox of the Special Injury Rule,** (2001), University of California. P. 769

Medieval English cases focused on purprestures—such as obstructions of the highways and waterways—but, over time, "the principle had been extended to cover such other invasions of general public rights as interference with a market, smoke from a lime-pit, and diversion of water from a mill." The term "nuisance" came to "mean all things to all men, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie."[7]

(ii) The Actual Community Injury Rule and a Tripartite Rationale

In order to recover damages in an individual action for a public nuisance, one must have suffered *harm of a kind different* from that suffered by other members of the public exercising the right common to the general public that was the subject of interference. The longstanding tripartite rationale for the different-in-kind rule is that it preserves the role of the sovereign to enforce the law, prevents multiplicity of actions, and discourages trivial lawsuits. Although this Article focuses only on the hybrid nuisance action, a brief discussion of the basic nature of nuisance law and public nuisance in particular is warranted to provide context for the paradox of the special injury rule.

The traditional doctrine presents a paradox: the broader the injury to the community and the more the plaintiff's injury resembles an injury also suffered by other members of the public, the *less* likely that the plaintiff can bring a *public* nuisance lawsuit. Thus, if the rule is applied rigidly, it prevents plaintiffs with otherwise cognizable injuries from

[7] Denise E Antolini, **Modernising Public Nuisance: Solving the Paradox of the Special Injury Rule,** (2001), University of California. P. 770

proceeding if many others in the community actually or theoretically share the injury. Many courts interpret the doctrine as requiring the plaintiff to prove a "unique" injury, not only widening the gap between the plaintiff's personal stake and that of the public's, but also directly undermining a plaintiff's ability to be a "representative" of the threatened public interests.[8] Courts perceived a need to prevent multiplicity of similar actions in order to protect defendants' resources, conserve courts' resources, and prevent trivial suits.

While this tripartite rationale made sense in medieval times when the concept of a "public" lawsuit was in its nascent stage, it has substantially less appeal in the context of the modern Zambian legal system that is now accustomed to the private attorney general concept and has a sophisticated judicial process. The "ancient" doctrine has become an anomalous technical defence in tort law, acting as an unduly strict gatekeeper rather than honouring the fundamental purpose of public nuisance—to protect public values from tortuous injury.

> [T]he better is the defence of wrongdoers, the more numerous the persons whom they have injured, and the more extensive and wide spread the consequences of their injurious acts. A principle like this would undoubtedly be grateful to all wrongdoers; but it would hardly commend itself to the sufferers.[9]

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[8] Ibid. P.763
[9] Ibid. P. 765

To date, however, serious criticism of the traditional doctrine and calls for liberalization by distinguished torts and environmental scholars—from William L. Prosser to William H. Rodgers, Jr.—as well as the bold rejection of the doctrine for injunctive actions in the *Restatement (Second) of Torts* Section 821C, have utterly failed to penetrate the case law.[10]

It would be highly unjust and unequitable to say that he has no right of redress in a private action on the ground merely that the injury had resulted from an act which is a public nuisance in itself, and because other persons might have been injured and damaged in the same manner and to the same extent.

Many thoughtful commentators have criticized the special injury rule and bemoaned its entrenchment. A few critics have suggested that it be eliminated entirely, and a distinguished handful has proposed alternative formulations. In light of the unique ability of public nuisance to be a flexible community-based remedy for community-based problems in state courts and given the puzzling persistence of the special injury rule and different-in-kind test, it is important to seek a deeper understanding of why these calls have gone unheeded and whether it is possible, as a practical matter, to modernize this important cause of action with an alternative approach to the doctrine.

Justice Holmes observed that an understanding of the law first requires a study of its history: It is a part of the rational study, because it is the first step toward an enlightened

[10] Ibid. P. 762

scepticism, that is, toward a deliberate reconsideration of the worth of those rules. When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what his strength is. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal.[11]

This Holmesian critique proves liberating, as it suggests that the history of the special injury rule actually provides support for a more liberal alternative interpretation—either a "different-in-degree" approach, an "actual (pecuniary) damages" test, or, as this paper suggests, a new "actual community injury" rule. By luring the dragon into the open and examining it carefully, we can take a fresh look at the prospects for positive developments in the future of the doctrine. Taming or killing the dragon of legal history is essential to developing alternative approaches to the rule and to modernizing public nuisance.[12]

[11] Oliver W. Holmes, **The Path of the Law**, 10 HARV. L. REV. 457, 469 (1897).
[12] Denise E Antolini, **Modernising Public Nuisance: Solving the Paradox of the Special Injury Rule,** (2001), University of California. P. 764

Chapter 2: Public Nuisance as Pollution

A condition of the ambit air arising wholly or partly from the presence of one or more pollutants in the air that endangers the health, safety, or welfare of persons or that interferes with the normal enjoyment of life or property or that endangers animal life or that causes damage to plant or property.

Section 35 of Chapter 204

(a) PUBLIC NUISANCE AS POLLUTION

There is generally a difficulty in comprehensively defining pollution. However, suffice to say pollution literally refers to any form of environmental impairment. Defined as such, pollution essentially leads to public nuisances. Having said that one would wonder what constitutes a pollutant. Barros Johnstone writes that a pollutant is deemed to refer to human activities inevitably and increasingly introduce material and energy into the environment, when that material or energy endangers or is liable to endanger man's health, his well-being or his resources, directly or indirectly.[1]

Pollutant has further been defined as:

> Substances or energy introduced by man into the 'marine' environment which result in or are likely to result in harm to living resources and marine life, hazards to human health, hindrance to marine activities, impairment of quality, for use of water and reduction of amenities.[2]

In Zambia, section 2 of the Environmental Protection and Pollution Control Act, Chapter 204 of the Laws of Zambia defines pollutant as:

> As the presence in the environmental of one or more contaminants in such quantities and for such duration and under such conditions as may cause discomfort to or endanger the health, safety and welfare of persons, or which may cause injury or damage to plants or animal life or property, or which may interfere unreasonably with the normal enjoyment of life or use of property or conduct of business.

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[1] ***International Law of Pollution*** (1974) New York, The Free Press, P.4
[2] Meng Qing-Nan, ***Land-based Marine Pollution*** (1987) London, Graham and Trotman Limited

(i) Common Pollutants

Common pollutants in Zambia are displayed in the following table[3]:

POLLUTANT	PRINCIPAL MAN-MADE SOURCE	DISTRIBUTION IN THE ENVIRONMENT
CARBON DIOXIDE CO_2	Carbonaceous fuel combustion for energy production, heating and transport.	Water and Air
CARBON MONOXIDE CO	Incomplete combustion of carbonaceous matter (motor vehicles, industrial processes, solid waste disposal, forest fires).	Air
SULPHUR DIOXIDE SO_2	Energy and heat production from sulphur containing fuel. Industrial process.	Air
OXIDES OF NITROGEN Nox	Oxidation of atmospheric nitrogen at high temperatures (internal combustion engine, furnaces, and incinerators) forest fires and industrial processes.	Air
FLUORIDES	Industrial processes (production of aluminium, steel, phosphate, fertilizers, fluorinated hydrocarbons, Brick making), combustion of coal, industrial liquid wastes and agricultural run-offs.	Air, Water, Soil and Food
ODOROUS AIR POLLUTANTS	Industrial processes. Fuel combustion. Processing of animal products. Improper disposal of liquid and solid wastes.	Air
MERCURY Eg LEAD Pb	Chlor-alkali plants. Mercurial catalysts. Pulp and paper industry (slimicide) seeds treatment. Mining and refining processes. Medical and research laboratories	Air
CADMIUM Cd	Anti-knock ingredients of motor fuels. Lead smelting. Chemical industry. Pesticides. Burning of fossil. Lead paints, glazes and enamels.	Air, Water and Food
SOLID WASTES	Mining and metallurgy (lead, copper and zinc smelters). Chemical industry (alkaline accumulators, alloys, paints and plastics)	Air, Soil, and Water
	Domestic commercial, industrial and agricultural activities.	Fresh water and Land

Figure 1: Substance that contribute to pollution

[3] Nkusuwila Nachalwe, ***The Zambian Legislation Regulating Pollution and its Effectiveness in Pollution Control: An Analysis.*** 2001, UNZA. P. 7

(b) GENERAL EFFECTS OF POLLUTION

By and large, uncontrolled pollution can entail substantial costs to human health, physical property and agricultural production. It is imperative at this juncture to recognise the different ways in which pollution affects man in general, directly or indirectly.

(i) Direct Effects Includes:

- Acute effects from exposure to a toxic pollutant reaching man through air, water and food.
- Long-term effect due to prolonged exposure to a pollutant at levels lower than those giving rise to overt toxic effects.
- Acute or long-term effects due to synergistic interaction between pollutant and such factors as malnutrition and disease.
- Genetic effects that a pollutant may induce in the germ cell of an exposed
- Individual but that manifest themselves in his descendants sometimes several generations removed.

(ii) Indirect Effects:

May result from reduction of the food supply, deterioration of the habitat or alteration of the climate. These include:

- Actual reduction of the food supply when a pollutant kills food plant or animals, renders them liable to disease, or makes the production unfit for consumption;
- Elimination by a pesticide or herbicide of the natural enemies of a hitherto harmless species, allowing it to proliferate and become a pest;

- Damage to human habitat resulting from air pollution that destroys vegetation or corrodes buildings; from oil that fouls rivers or industrial wastes that make inland waters unusable for recreation;
- Alteration of the global climate from a number causes.[4]

(iii) Effects of Air Pollution

Air pollution can have acute, chronic adverse effects on human health. It is for this reason that emphasis be placed on major gaseous air pollutants found in industrial and mining towns of Zambia.

Sulphur Dioxide SO_2

Irritant pollutants like sulphur dioxide have detrimental effects on human health. It causes acute discomforts such as eye, throat and nose irritation. It is easily soluble in nasal passages so that most of the time its irritant effects are restricted to the upper respiratory tracts and the eyes. It dissolves in the mucous lining of the air tracts.

The same has been the case for residents around the smelters, like Roan mine township in Luashya, Kankoyo and Butondo mine townships in Mufurila, Nkana west, Wusakili and Ndeke townships in Kitwe, who are exposed to the choking, pungent smell of sulphur dioxide emissions.[5] These are prone to the diseases highlighted above. Like humans, vegetation is susceptible to sulphur dioxide. Crops such as barley, cotton, cabbage, potatoes and corn if exposed to sulphur dioxide. Sulphur dioxide limits the distribution of Lichen vegetation and in some cases lichen

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[4] Barros Johnstone, **The International Law of Pollution,** (1974) New York, The Free Press
[5] Nkusuwila Nachalwe, ***The Zambian Legislation Regilating Pollution and its Effectiveness in Pollution Control: An Analysis.*** 2001, UNZA. P. 9

have used as indicators of sulphur dioxide pollution.[6] Lichens are lowly plants, which normally grow, attached to such solid objects as trees, rocks, walls and roofs. They do not flourish where the atmosphere carries some type of smoke pollution.

Carbon Monoxide, CO

Carbon monoxide is one of the most dangerous pollutants. Carbon monoxide poisoning can cause headache, dizziness, vomiting, and difficulty in breathing and unconsciousness.[7] Exposure to carbon monoxide from automobile exhaust pipes to other sources of incomplete combustion of fossil or other fuels like coal and charcoal can cause brain damage within minutes. The symptoms are produced by the fact the haemoglobin combines more readily with carbon monoxide than oxygen. Carbon monoxide thus, prevents haemoglobin from transporting oxygen from the lungs to the tissues.

(c) LEGAL FRAMEWORK IN PLACE TO CONTROL POLLUTION

There are a number of statutes in place to control pollution. These include, *inter alia*: the supreme law of the land itself – The Constitution, Chapter 1; The Natural resources Conservation Act, Chapter 315; The Water Act, Chapter 198; The Mines and minerals Act, Chapter 213; and The Public Health Act, Chapter 295, The Environmental Protection and Pollution Control Act, Chapter 204 of the Laws of Zambia. For the purposes of this paper, attention will be given to The Constitution,

[6] Kapungwe E. M. et al **Assessment of the Effect of Air Pollution on the Environment in Mufurila on the Copperbelt Province of Zambia,** (2001) P. 4
[7] Wilfrid Bach, **Atmospheric Pollution** (1972) Hawaii, Mc.Graw-Hill Book Co

Public Health Act, Water Act, and The Environmental Protection and Pollution Control Act.

(i) The Constitution, Chapter 1

The validity of any statute is dependent upon its consistency with the supreme law of the land as affirmed in the Constitution.

> This Constitution is the Supreme law of Zambia and if any other law is inconsistent with this Constitution that other shall, to the extent of the inconsistency, be void.[8]

Thus, any analysis of a statute has to stem from reference to the Constitution. Relevant for our purpose is Part IX of the Constitution that deals with the citizen. Article 12 enjoins the State to:

> (d) The state shall endeavour to provide clean and safe water...
> (h) The State shall strive to provide a clean healthy environment for all
> (i) The State shall promote sustenance, development and public awareness of the need to mange the land, air and water resources in a balanced and suitable manner for the present and future generation.

The directive principles are however, not justiciable and are not legally enforceable in any court, tribunal or administrative institution. They are principles to guide the executive, legislature and the judiciary in the development of national policies, enactment of laws and the application of the Constitution or any other law.

[8] Article 1(3)

(ii) Public Health Act, Chapter 295

This act was enacted in 1930 and has been amended from time to time. Its main objective has been to provide for the prevention and suppression of diseases, and generally to regulate all matters connected with the public health in Zambia.

The Act provides for environmental sustenance from a public health point of view. It thus prohibits *inter alia* any person from causing a nuisance or condition liable to be injurious or dangerous to health. The Act vests the minister with powers to promulgate the regulations. One such example is The Public Health Drainage and Latrine Regulations which cater for the drainage and sewerage provisions, constructions of drains, waste pipes and wastewater fittings, septic tanks and sewage filters installation.

(iii) The Water Act, Chapter 198

This Act being put in place in 1949 had and to date the objectives of providing for ownership, control and use of water excluding water of the Zambezi, Luapula and a portion of Luangwa rivers, constituting a boundary between Zambia and Mozambique. The act creates an offence to pollute water or render it harmful to man, animal and vegetation. It provides that:

> Any person who wilfully or through negligence pollutes or fouls any public water so as to render it harmful to man, beast, fish or vegetation shall be guilty of an offence.[9]

[9] Section 55

Section 56 (1) requires that the water officer if satisfied that water is being polluted, can direct the person responsible to take adequate measures to prevent further pollution. It stipulates that:

> Should the water officer be satisfied that public water is being fouled or polluted, he shall in the prescribed form, call upon the person responsible therefore to take adequate measures to prevent such fouling or pollution within a specified period

On the failure to prevent pollution subsection (2) provides penalties.

Notwithstanding the above, the Water Act has not been adequate and effective in curbing pollution. The major weakness of the Act is that the provisions for measures to address floods, soil erosion, situation of dams and watercourses, sanitation and water pollution are insufficient. Further it does not provide for the control and use of water that is part of the international boundaries.

Secondly, water pollution standards are not elaborated under the Act and the monitoring system is almost non-existent. Moreover, this Act appears not to recognise water rights appropriated under customary arrangements.

Lastly, there has not been a comprehensive incorporation of international instruments to reflect current trends for instance in water resource management.

In the light of the foregoing, therefore, there is need to amend the Water Act so as to incorporate provisions that will:

- clearly define private and public waters adequately so that the ground water use can be controlled;
- establish elaborate standards on water pollution with reference to the EPPCA

(iv) The Environmental Protection and Pollution Control Act, EPPCA, Chapter 204,

The EPPCA was enacted in 1990 as a consequence of the adoption of the National Conservation Strategy which recognised that the powers and enforcement in the existing legislation were weak and that there were inadequate provisions relating to the power to make regulations for the control and monitoring of pollution in the environment.[10]

This piece of legislation saw the elimination of the lacuna that existed in the laws, concerning pollution control. Its main objectives include protection of the environment through provisions on natural resources management as well as for pollution control under the powers of the Environmental Council of Zambia. This Act has since been the umbrella Act that covers pollution control in Zambia.

The Environmental Council of Zambia, ECZ

The enactment of the EPPCA saw the birth of ECZ which is established under part II as an autonomous body, a body corporate with perpetual succession and a common seal, capable of suing and being sued.

[10] Section 75

Functions of the ECZ

The Council is mandated by the EPPCA to do all such things as are necessary to 'conserve' the environment, prevent and control pollution, so as to provide for the health and welfare of persons, animals, plants and the environment.

The duties of the Council *inter alia* are as follows:

- Advise the government on the formulation of policies relating to sustainable management of natural resources and the environment.
- Recommend measures aimed at preventing and controlling pollution resulting from industrial processes or otherwise.
- Advise on the need to conduct and promote research analysis, surveys, studies, investigations and training of personnel in the field of environmental conservation, prevention and control of pollution.
- Conduct studies and make recommendations on standards relating to the improvement of the environment and the maintenance of a sound ecological system.
- Monitor trends in the use of natural resources and their impact on the environment.
- Request for information on the quality, quantity and, management methods of natural resources and environment conditions from any individual or organisation anywhere in Zambia.
- Carry out any other activities relating to the management of the environment, prevention and control of pollution which are necessary or conducive to the better performance of its function under the Act.

The Council in carrying out these functions is assisted by a directorate to which it delegates its daily activities, an inspectorate, and Administration constitute the directorate.

General implementation and Enforcement of the Act

Each part of the Act creates offences in relation to the matter which it addresses. For instance, parts IV and V relating to water and air respectively create offences where conditions of the licences and provisions of the Act and the statutory instruments have been derogated.

The enforcement mechanism undertaken by the council is two fold:

The first one is that concerning a licensed offender to whom the ECZ is authorised to issue the enforcement notice. Where it is found that the person to whom an enforcement notice has been served does not refrain, and continues in defiance of the notice, and in the event that he admits guilt, the ECZ can impose a summary fine in accordance with section 91E (1) of the Amendment Act.

Further, if he continues the violations and takes no steps whatsoever in mitigating the damage, or refrain from the same, it is within the ECZ's power to revoke the licence of such an operator. Depending on the gravity of the breach, the offender will be liable to a fine as well as imprisonment for a period ranging from one to three years.

The second mechanism is that designed for unlicensed offenders, to whom no summary fine is imposed, but criminal proceedings are instituted by way of arrest.[11]

[11] Section 23

The ECZ is the lead agency on matters of environment. To which it plays advisory, regulatory consultative, co-ordination and information dissemination roles. Its main objective is to provide for a clean and health environment for all (persons, animals and plants) by working with everybody from government institutions to the individual.

It is empowered by the Act to identify projects, plans and for which the Environmental Impact Assessment (EIA)[12] are necessary and ensure that the same is done in line with the provisions of EIA regulations. Its responsibilities include managing the EIA process, sponsoring a decision and ensuring that management occurs in accordance with the decisions made. In this regard, the ECZ establishes the terms of reference for project assessments, reviewing reports including the prospectus, EIA and follow-up monitoring reports. The council also helps the proponent to establish a public consultation process.

[12] EIA involves a thorough investigation of conditions within the environment of the proposed development followed by an assessment of the impact that the development will have on the environment in its totality, i.e physical, biological and social economic aspects.

Chapter 3: Judiciary and Public Nuisance Control

There was a "growing awareness in the courts of the need for environmental controls." The Supreme Court's decisions in the new standing cases would prove to be "inevitable tool(s)" for public law litigators, especially environmental lawyers who were learning to use the Administrative Procedure Act, enabling acts for federal agencies, and the then-recently enacted National Environmental Policy Act. Congress was in the mood to give citizens a greater role in ensuring that government agencies fulfilled their conservation responsibilities.

Hanks and Hanks (1969-1970).

(a) GENERAL DEBATE ON PUBLIC NUISANCE

As America adapted English common law for its own use in the late 1800s and early 1900s, American decisions demonstrated variability, flexibility, and confusion in articulating the special injury rule and applying the appropriate test.[1] Antolini adds that although a distinct trend toward the stricter different-in-kind test began to emerge in state decisions in the late 1800s, early American decisions also exhibited an intriguing divergence of views between state and federal courts. While state courts favoured the more conservative different-in-kind test purportedly adhered to in the English cases, federal courts tended to follow the different-in- degree test.[2]

(i) Jeremiah Smith's Criticism

Overall, American case law exhibited more conflict than that of England about the meaning of "special" injury and the appropriate test, whether different-in-kind or different-in-degree, or something else.[3] As the early American state court trend began to tilt strongly toward adoption of the restrictive different-in-kind test, a prominent critic— Harvard Law School Dean Jeremiah Smith— urged courts to liberalize the rule.[4] Several decades later, Boalt Hall School of Law Dean William L. Prosser revived Smith's critique and offered his own intellectual misgivings about the rule.[5]

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[1] Denise E. Antolini, ***Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule,*** (2001) University of California. P. 805
[2] Ibid.
[3] In an analysis done by Antolini in his book ***Modernizing Public nuisance.*** P. 807
[4] Jeremiah Smith, ***Private Action for Obstruction to Public Right of Passage*** (pts I & II), (1915)15 COLUM. L. REV. 1, 7, 142
[5] Antolini, ***Modernizing Public Nuisance.*** P. 806

> Despite the weighty criticism, however, the rule became considerably more entrenched in the twentieth century.[6]

Ultimately, Prosser's own "post-realist" "Consensus Thought" approach to the issue led him to abandon his own concerns and to reinterpret the case law to enshrine the traditional doctrine into a now-classic black letter *Restatement* rule.[7]An examination of Smith's critique of the special injury rule illuminates the jurisprudential journey of the traditional doctrine from early England to America. Smith's views also lay the foundation for review of the doctrinal developments in the influential *Restatement Second* project and the distinctive imprimatur of Prosser on this issue.

Although his views on the public nuisance issue may have, until recently, disappeared into the dustbin of legal history, in 1915, Jeremiah Smith, one of "the leading torts theorists of the late nineteenth century," published a pointed indictment of what he called the "erroneous" different-in-kind rule.[8] Ultimately, he rejected both the different-in-kind and different-in-degree interpretations and instead proposed an alternative reading that he believed was better grounded in the case law and tort law generally: an actual damages test. Despite Smith's great influence in other areas of tort law, his pragmatic and early realist views on the different-in-kind rule did not prevail.

His critique is, nonetheless, worth examination both because it further confirms that the different-in-kind rule is not unassailably grounded in early English and American cases

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[6] Ibid.
[7] Ibid.
[8] Ibid. P. 807

and because it provides weighty doctrinal criticism that pre-dates, and thereby adds scholarly legitimacy to, the current push for liberalization by environmental scholars and advocates. Smith took a fresh approach to interpreting the holdings of the English and early American cases, finding that the elemental rule underlying them was that "no private action can be maintained at common law, unless the plaintiff has sustained *actual damage*."[9]

In his view, the more restrictive different-in-kind test was justified neither doctrinally nor on the basis of triviality or multiplicity. Smith vigorously attacked the idea that the damage to the plaintiff must be exclusive. His concern was not only that many cases had been misinterpreted, but that the more restrictive test led to confusion and was simply bad law. With regret, Smith noted that the early views of *Coke on Littleton*, *Williams' Case*, and the 1535 case had heavily influenced courts, causing them to deny recovery to a plaintiff who had suffered very substantial damage when that damage did not fall within certain exceptional classes.[10]

Smith focused his criticism on two of the common justifications for the different-in-kind rule. First, as to triviality, he suggested that the danger was "purely imaginary."[11] In tort, there was already a natural barrier to such frivolous suits because a plaintiff can "sue only to recover for actual damage which he has individually sustained."[12] As to multiplicity, he noted the concerns were about hardship on defendants "who may be overwhelmed by

[9] Smith, Private ***Action.*** P. 2
[10] Ibid. P 2-3
[11] Ibid P. 4
[12] Ibid.

an infinity of suits" and "[i]ncumbering the courts – clogging the dockets with a large number of 'trivial' suits, thus hindering the progress of more important litigation.

(ii) William L. Prosser

Without doubt, William L. Prosser has been the dominant figure in the development of black letter tort law in the United States from the 1940s until the present, despite his death in 1972. Prosser's strong scholarly views on the issue of the special injury rule and the different-in-kind test evolved from scepticism to resigned orthodoxy. Despite his earlier misgivings about the strict test and his own critical treatment of the issue in drafting the *Restatement (Second)*, Prosser's work ultimately enshrined the strict black letter test. Prosser's *Handbook on Torts*, first published in 1941,281 single-handedly revised for four editions until his death 1972, and still alive through his posthumous co-editors, remains the definitive treatise of the modern tort law era.[13]

Having restated the rule and the rationale given by early courts, Prosser then proceeded, in his characteristic fashion, to look critically at how the courts had applied the rule. Like Smith, Prosser acknowledged that judicial application was often inconsistent and illogical, suggesting a fundamental flaw in courts' interpretation of the rule or, perhaps, in the rule itself. Courts had recognized that "special damages" could range from obstruction of public access to personal injury or injury to property, and perhaps even to interference with contract and pecuniary loss.[14] While noting these cases represented "[t]he weight of authority," Prosser pointed out the existence of numerous conflicting

[13] William Prosser, ***Private Action for Public Nuisance***, 52 VA L. REV 997. (1966) 1010
[14] Ibid.

decisions. Prosser also expressed his concern that courts were struggling with the split in the tests. To point out the paradox of the traditional different-in-kind test, Prosser used an example of a public nuisance creating widespread community losses from an obstructed public way: if a defendant wrongfully obstructed a navigable stream, the owners of a steamboat line could not recover under a difference-in-kind theory because the entire community had also suffered the lost use of the river, a similar-in-kind injury.

Prosser stated that one additional justification for the different-in-kind test was judicial convenience: it was easier to distinguish injuries by kind rather than degree. Judicial inquiry into degrees of injury would, the argument went, pose greater difficulty and perhaps result in more arbitrary line-drawing by courts. Courts faced this line-drawing problem in inconvenience and annoyance cases. The ends of the spectrum—a complete blockage of highway access or a remote obstruction that was only slightly inconvenient—were easy to spot.[15] The cases in the middle, however—where the obstruction was relatively close and the detour long, or the obstruction far and the detour short—tested courts' ability to draw legitimate lines. At least on the surface, judicial decision making was simpler under the different-in-kind test: "The fact that the plaintiff has occasion to use a highway or a navigable stream five times as often as anyone else gives him no private right of action when it is obstructed."[16]

This "ease of judicial decision making" justification failed to convince Prosser. According to Prosser, "the whole matter" of distinguishing "kind" from "degree" was

[15] Ibid
[16] Ibid

surrounded by confusion and hypocrisy. Ultimately, he suggested that the doctrinal entanglement could be solved simply by "allowing recovery to anyone who suffers *actual damage*," the proposal offered twenty-three years earlier by Dean Smith. He observed that a "strong minority of the courts have rejected 'kind' and 'degree' as an artificial distinction, and have held that it is sufficient that the damage is materially greater than that of the ordinary person entitled to exercise the same public right, although it may be of the same kind." Like Smith, he was confident that the risk of a flood of trivial cases was minimized by the fundamental rule of nuisance law that the harm be "substantial."[17]

(b) THE UNITED STATES JUDICIAL RESPONSE TO PUBLIC NUISANCE

United State courts are quite enamoured with the traditional special injury doctrine and exhibit virtually no interest in exploring alternatives.[18] This judicial entrenchment probably persists for several reasons, ranging from the compulsion to follow strong precedent, to judicial economy, jurisdictionalism, and a generally conservative approach to the balancing of private property rights and public values. To succeed, alternative formulations must be sensitive to these jurisprudential constraints. The primary reason courts continue to adhere to the traditional doctrine seems to be the self-fulfilling prophecy of *stare decisis*, particularly where, as with this issue, the case law is perceived to have been virtually unanimous in its strict approach for almost four centuries.

State courts have at their disposal decades of public nuisance cases from their own jurisdictions that adopt the traditional doctrine, which hardly leave room for innovation.

[17] Antolini, ***Modernizing Public Nuisance***. P. 836
[18] Ibid. P. 553

The unusual court that has any inclination to look beyond the cases would most likely turn to Prosser's *Handbook*[19] for guidance. There, it will find not only the traditional doctrine enshrined but no mention of the modified *Restatement* rule. Indeed, the current Keeton edition argues against the legitimacy of public nuisance as a tort altogether. For this reason, of the three alternative formulations, the different-in-degree test could be the most attractive to the courts *if* the courts could be convinced that the early legal history of public nuisance supports a different-in-degree approach as well as, if not better than, it supports the different-in-kind test.

Although a court may be reluctant to reinterpret supposedly "ancient" case law, preferring instead to rely on a well-established majority rule enshrined in modern American case law, if a court's blind faith in the "ancient" nature of the traditional doctrine can be shaken, then it may be persuaded to delve further into the debate over the traditional doctrine and approach the issue with a fresh perspective and a modern lens.[20] Similar to the conservative pull of *stare decisis*, the tendency of courts to favour the law of their own jurisdiction may also play an important role in the success of the traditional doctrine and the failure of the *Restatement* modification.

By referring judges to "standing" law, Prosser advises state court judges to look to federal standing case law and follow authority outside of their state's own common law. Particularly in a localized tort case, this may be an unappealing exercise for a state court judge likely to be concerned about state sovereignty and federalism. In unfamiliar

[19] Discussed above.
[20] Antolini, ***Modernizing Public Nuisance***. P. 797

territory that involves conflicts between community values and private property, judicial psychology may predispose judges to follow what is supposedly ancient, familiar, and traditional.[21] Although impossible to prove, this factor may have played a role in the failure of the *Restatement* approach. The actual community injury rule proposal seeks to overcome this psychological stumbling block by encouraging state courts in public nuisance cases to look not at federal but at their own state law in more familiar administrative and environmental cases.

> If state courts can be guided by their own state's standing case law, they might be more inclined to bring public nuisance up to the state's public law standards.[22]

Another factor that may explain the conservative approach of state courts to the traditional doctrine is that they may believe that strict application of the traditional doctrine, although not always easy, is much easier and more convenient than attempting to wrestle with the complex issues presented by a formal "standing" inquiry or a controversial environmental case. Yet, in many ways, the traditional rule encourages judicial contortion because of its inherent paradox. In contrast, courts may prefer the actual community injury rule because it is more harmonious with the basic purpose of public nuisance.[23]

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[21] Ibid
[22] Ibid
[23] Ibid

(c) THE ROLE OF JUDICIARY

Given that the fundamental purpose of public nuisance is to protect community values against privately created risk, a court viewing a plaintiff whose injury is shared by others and therefore not unique should find it intellectually acceptable to allow that plaintiff to proceed in a lawsuit designed to protect those shared values. By requiring the plaintiff to set herself apart from the community, the traditional doctrine forces courts into the paradox.[24]

Concerns about retaining control over cases, the proper judicial role, and protection of institutional legitimacy may also constrain courts from adopting a more liberal formulation of the rule. The traditional doctrine strengthens the role of the judge in public nuisance cases by presenting a dispositive threshold question of access.[25] It prevents certain plaintiffs at the margins of the traditional tort law model from ever getting to a jury that might sympathize with the plaintiff's view of deteriorating community conditions.

Without the different-in-kind test, the legitimacy of plaintiff's claim is much more likely to go to the jury, in other jurisdictions the judge (as is the case for Zambia), a jury or court that will deliberate on the substantiality of the problem and express the community's sense of the appropriate balance among conflicting values. Judicial reluctance to liberalize the traditional doctrine may reflect deep concerns about how such

[24] Ibid P. 750
[25] Ibid.

a move would erode the judge's ability to act as a gatekeeper, particularly in public nuisance cases that involve broad community conflict.[26]

On the other hand, the very purpose of public nuisance is to protect public rights. Denying access conflicts with the very purpose of the ancient tort. Although retaining legitimacy and moral force while handling public law-like cases may be, in light of the active judicial role required, more challenging for courts than handling the traditional private law docket, modern state courts handle a wide range of cases that involve complex and politically challenging issues, including not only mass torts and class actions, but difficult statutory and constitutional cases.[27] Another reason why state courts may adhere to the traditional doctrine and might be hostile to a more liberal test is that state courts today may be increasingly conservative in their view of the judicial role in addressing broader social problems.

Courts are unlikely to move away from the traditional doctrine *sua sponte*, but they might consider the issue seriously if prompted by counsel who bring the trial and appellate courts compelling new reasons for reform. This section explores the range of reasons why practitioners and plaintiffs fail to recognize the potential promise of liberalized versions of the special injury rule.[28]

Particularly during the conservative movement of the 1980s, legal observers noted "preliminary signs of a countermovement" to the liberalized standing decisions of the

[26] Ibid P. 825
[27] Abram Chayes, ***The Role of the Judge in Public Law Litigation***, 89 HARV. L.REV. (1976) 1281, 1316.
[28] Antolini, ***Modernizing Public Nuisance,*** P. 867

1960s and 1970s, a sentiment that resonated with state courts. The "reforms " supported by a coalition of the bar, judges, political conservatives, and Congress ultimately discourage litigation in the public interest by those "outside the political and cultural mainstream who are challenging prevailing legal, political, and social norms." The Ninth Circuit's ***Exxon Valdez*** decision of 1989, which affirmed the traditional doctrine, may exemplify this countermovement. The massive eleven-million gallon *Exxon-Valdez* oil spill in Prince William Sound, Alaska in 1989 contaminated thousands of miles of Alaskan waters and beaches, causing untold environmental, economic, and cultural damage to Alaska residents. The largest oil spill in North American history prompted a similarly large number of lawsuits, including civil litigation by the State of Alaska and the federal government that resulted in a complex consent decree for natural resources damages that totaled over $1 billion. Injuries to sports fishers (for damage to their recreational activities), to Alaska Natives (for damage to their subsistence fishing), and to commercial fishers (for damages to their livelihood), however, were not included directly within the government settlement. Using public nuisance theory and other causes of action, these three groups pursued their claims outside of the governmental litigation.[29]

In the first suit, the Alaska Sports Fishing Association and several individuals filed a public nuisance class action complaint, alleging injuries totaling $31 million to over 130,000 persons in the class who used the affected area for sport recreation. In 1993, the district court overseeing the *Exxon Valdez* cases reaffirmed the traditional special injury rule and different-in-kind test for damages claims and dismissed the sport fishers' claims because they were "common to the general public." Concerned about the breadth of the

[29] Antolini, ***Modernizing Public Nuisance***. P. 778

class and the potential for duplication of claims already paid by Exxon to the government, the court hinged its decision on a classic application of the special injury rule for public nuisance. The court ruled that the "only losses the governments did not settle and receive damage for are those that accrued to individuals that are different in kind and not just degree from those suffered by the public." The sport fishers had not alleged unique damage, such as soiled fishing gear, and, therefore, the court barred their claims.[30]

One year later, the same court rendered a similar decision applying the traditional special injury rule and strict different-in-kind test to a claim by Alaska Natives for loss of cultural and subsistence rights that the governments' civil suits also did not cover. In the "Alaska Natives" case, the plaintiffs brought a class action lawsuit on behalf of 3,455 Alaska Natives for injury to their non-economic "subsistence way of life" caused by the oil spill. The court granted judgment in their favor on certain claims for the commercial value of their fishing losses, but the plaintiffs sought additional compensation for their distinct cultural losses

It should be observed that although public nuisance is a broad and flexible cause of action with great promise as a remedy for community injury, the discussion above illustrates that American courts have used the strict different-in-kind test as an unduly rigid gatekeeper to control broad access to this powerful tort. In conclusion, a range of institutional, doctrinal, and political reasons may help explain courts' continued invocation of the traditional doctrine. These considerations will also affect the judiciary's

[30] Ibid.

attraction to alternative formulations of the rule. Nevertheless, the community injury rule possesses qualities capable of allaying some of these concerns while resolving paradoxes in the application of the public nuisance tort.

Chapter 4: Discussion, Conclusion and Recommendations

Judicial action only achieves . . . legitimacy by responding to, indeed by stirring, the deep and durable demand for justice in our society.

Abram Chayes 1976

DISCUSSION

Effectiveness of the Legal Framework

In as much as the Council has power of enforcement and implementation, this power is not absolute. As the Council is fettered in a number of ways, as will be alluded to later on. Firstly, as correctly observed by Nkusuwila Nachalwe, the Council is not totally independent of government control. Despite being a legal entity created by statute, it is not autonomous body in practice, as it is directly under the Ministry of Environment and Natural Resources.[1]

This is evident in the Act, which empowers the minister in section 4 to appoint members of the Council as it were. The Council permanent secretaries as representatives from the various government ministries. The minister has the discretion to determine who should be appointed to the Council. This is a fetter on the Council, as such power is bound to be abused.

Secondly, the Council's role is limited to that of advising the government on drafting and enacting any subsidiary legislation on environmental matters. As already alluded to, the Regulations passed pursuant to the Act have all been done by the minister responsible for the environment and natural resources ministry. The Council has no mandate to promulgate at its own instance any legislation governing environmental matters.[2] Yet it is well vested with the environmental problems and related issues.

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[1] Nkusuwila Nachalwe, ***The Zambian Legislation Regulating Pollution and its Effectiveness in Pollution Control: An Analysis.*** 2001, UNZA. P. 61
[2] Ibid. P. 62

Furthermore, the Council is constrained where finances are concerned. From the wording of section 14 (1) the Council is funded by moneys appropriated by Parliament for its purposes, or by grants or donations and fees paid to it. But by virtue of the same provision in subsection (2) the Council cannot accept any such funds, unless approval of the minister is sought. And a similar approval is required in order for the Council to embark on raising of loans, for the discharge of its functions. All these factors operate to hinder the effectiveness of implementing and enforcing the Act by the Council.

Other Contributing Factors

The other factors to be considered are those relating to the Act itself. Take for instance section 40, provides for emergency situations covering hazardous air pollutants, the inspectorate is granted authority to take and advise on appropriate measures for the protection of persons and the environment. This is far as the provision can go. The provision seems to be inadequate in addressing emergency situations, which in certain case do result in loss of life, depending on the toxicity of the pollutant involved.[3]

These emergency measures too should be able to vest the inspectorate with diverse powers to control any catastrophe in the shortest possible time to avoid further damage. The unfortunate part is that the same provisions are not available for water. There are no emergency powers whatsoever for the water unit inspectorate to take any measures in order to remedy any damage caused by water pollutants.

[3] Ibid.

To compound this problem further, the statutory power of control normally backed by criminal sanctions, under the various Acts considered, given to the relevant authorities makes it impossible for an individual to have a right a right of objection to a proposed discharge of effluent. In no case has he a right of action for breach of a statutory duty against the person who exceeds the permitted standards.

This leaves such a person with only an action in nuisance, which has also been curtailed by the strict application of the special injury rule discussed in chapter one and three above. As endeavoured to show in the previous chapters this tortuous liability is quite difficult to establish, especially where air pollution is concerned.

If our law is to serve the two functions of ensuring acceptable standards of environment quality, and compensating those who suffer damage where public nuisance occurs, and with the consistency that justice naturally demands, these two systems must at least be based on one coherent theory of man's legal rights and duties towards those who share his environment.

In exercising discretions given by the Acts, such discretion as to grant licences or permits under the EPPCA, the authorities concerned have a duty to attempt to balance the interest of those members of the public who stand to be affected by public nuisance against the interest of the industry, remembering that a viable industry is a matter of public interest as well.

But an observation has been drawn that authorities often refrain from prosecuting, even in the face of repeated breaches, where they are convinced that the polluter is

taking reasonable steps to remedy the breach, and that prosecution will serve no useful purpose. Thus, the intermediate standards that have been devised and implemented by the Council in regulation (9) of the Air Pollution (Licensing and Emission Standards) Regulations, 1996.

Policy making in Zambia has had an influence on environmental issues. Some of which greatly undermine the efficacy of environmental laws. The consequence of this is that public nuisance as pollution control and regulation is hindered. An incidence of this is that pertaining to the "Environmental Liabilities Agreement 2000" between the Zambian government and Konkola Copper Mines (KCM), whereby the former undertakes to indemnify the latter on environmental losses. The agreement states in Clause 3.1 that:

> GRZ undertakes to and covenants with KCM under this Deed to indemnify and hold harmless KCM against any and all environmental losses suffered or incurred by it, provided that, if the acts or omissions giving rise to environmental losses have or may have occurred over a period of time part of which is before and part of which is after the Indemnity Termination Date, this indemnity shall not apply to that portion which occurs prior to the Indemnity Termination Date.

The result of these provisions are that notwithstanding the environmental pollution caused by mining operations, KCM shall not be liable for the same.

CONCLUSION

Every action we do in our every day lives creates some legal relations with the people we meet. For example it could be cutting down all the trees in our yards or erecting

wall fences for privacy and protection. Both as individuals living in our homes and as members of an industrial and agricultural community, we all produce waste. If this waste could be disposed of without affecting others, no problem arises. But as soon as the disposal affects others, directly or indirectly, we are faced with a social problem. These have been elaborated in Chapter 1 and the definition of public nuisance has therein been stated.

The common law nuisance does protect the individual from some direct and obvious forms of interference by pollution such as noise, smoke, etc. However, with the current interpretation of the special injury rule in an action for public nuisance the law has failed to arrest the tendency of men to pollute the environment to the detriment of their neighbours. The problem of control arising from the task of disposing of waste on a large scale, common law was never designed to meet.

The community must dispose of its sewerage and it is also dependent on the industry producing large volumes of waste to do the same. The task of controlling public nuisance falls into three interrelated parts, the first being to decide what degree of pollution to accept, that is, what standard of environmental quality we intend to maintain. In making this decision, the following have to be taken into account:

- The damage caused by pollution;
- The benefits to be derived from the activity which produce it;
- The cost of alternative methods of pollution waste control;
- The importance of the activity which produces the waste;
- The extent to which the polluter is able to bear further loss.

The second part of the task is to improve technical methods of waste control disposal, so that high standard may be achieved. Lastly, to enforce the standards which have been set.

From the discussion, it has been observed that in Zambia, standards of environmental quality are maintained by controlling the rates of emission or discharge of polluting matter. What has been a challenging task is to find a satisfactory balance between damage and benefits, which will give reasonable rates of emission or quality standards, as it depends on evaluating the damage and economic analysis of costs and benefits. This may be an exercise too expensive in monetary terms as well as the time, to carry out in the fields of the various types of pollution.[4]

Chapter 3 has discussed the various arguments that have been advanced in modernising the tort of public nuisance in response to environmental problems. These arguments range from triviality to multiplicity of actions. Bottom line it should be observed is that tort actions in public nuisance with the correct approach is an indispensable tool in solving some of the environmental problems facing society today.

The traditional special injury doctrine naturally appealed to judges disposed toward formalism: it purported to provide a restrictive bright line test for determining who could bring a public nuisance claim; it helped to limit the judicial role in cases that presented unusual demands on courts to intervene in community conflict; and it provided judges a method for limiting the tort of nuisance, which was incongruous

[4] Nkusuwila Nachalwe, ***The Zambian Legislation Regulating Pollution and its Effectiveness in Pollution Control: An Analysis.*** 2001, UNZA. P. 66

with the growing dominance of negligence law.[5] Although courts often struggled with application of the doctrine because of the difficulty of drawing the different-in-kind line, on the surface the doctrine resonated with formalists because it provided an objective, seemingly clear, and purportedly historically justified way to weed out extraneous and "improper" plaintiffs.[6]

Given early English commentary's entrenched conservative interpretation of the case law and many American states' firm adoption of the doctrine in the late 1800s to early 1900s, the direction for a judicial formalist was well mapped out: follow the ample authority that reiterated the traditional rule. Moreover, for the formalist, the very idea of a private person acting as a private attorney general was contrary to the common law system. The formalist view was *laissez faire*—leave private parties to their own devices. Such has been the trend in Zambia that the government is not fundamentally implicated in the processes and outcomes of private life. Instead, society is governed by individual free decisions and voluntary collaborative efforts.

All three alternative formulations of the rule derive strength from the "realist" perspective. Legal realism— popular from the early 1900s to the 1940s and still highly influential through its modern successors such as critical legal theory— attempted to unmask formalism. It suggested that "judges should make law based on a thorough understanding of contemporary social reality" and:

> fit the law to social practice and to satisfy the felt needs of society to achieve a 'satisfying working result.'" Rules should not be applied

[5] Denise E. Antolini, ***Modernising Public Nuisance: Solving the Paradox of the Special Injury Rule,*** (2001) University of California. P. 711
[6] Ibid.

> "regardless of their social consequences" but rather with an eye toward the purposes of the law, social goals, and practical effects.[7]

The different-in-degree test represents a departure from the formalist/scientific mode of the traditional doctrine and is more realist in approach. It offers greater judicial flexibility, recognizes the artificiality of bright line tests, and considers the historical and policy context of the early case law. The strict doctrine is a reflection of the larger formalist scientific view that dominated American law at least until the mid-1900s, when the advent of realism set the stage for a transformation away from the rigidity of the early common law.[8] At the same time, the arrival of "public law" offered another challenge to the traditional private law model. Exploring its application to nuisance law helps to explain the unique nature of the special injury doctrine.

Concerned with the tripartite rationale of sovereignty, multiplicity, and triviality, the English courts struggled for three hundred years to devise a rule that would control the nature and number of plaintiffs who could make use of what is essentially the sovereign's police power. The traditional doctrine reinforces the private, bi-polar, and retrospective nature of private torts, by allowing those claimants who most closely resemble the private law model greatest access to the courts.

The different-in-degree test alters this balance, but not radically. It retains language and doctrine from the ancient English cases but still acts as a gatekeeper that favours the private law model.

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[7] Ibid. P. 755
[8] Ibid.

In contrast, the *Restatement*[9] rebels contended that the litigation tools such as standing and class actions that evolved from polycentric and prospective cases at the federal level should be the new gatekeepers. The *Restatement* proposal sought to realign the gate consistent with these new public law concepts and move public nuisance closer to the public law world of environmental litigation.[10] The actual community injury rule would similarly move public nuisance closer to the public law model, but on a parallel, not merging, track—it would be based on common law principles of actual damages and administrative law standing.

Courts may prefer the actual community injury rule because it is more harmonious with the basic purpose of public nuisance. Given that the fundamental purpose of public nuisance is to protect community values against privately created risk, a court viewing a plaintiff whose injury is shared by others and therefore not unique should find it intellectually acceptable to allow that plaintiff to proceed in a lawsuit designed to protect those shared values. By requiring the plaintiff to set herself apart from the community, the traditional doctrine forces courts into the paradox.

Finally, this chapter in conclusion has endeavoured to discuss the efficacy of the legal framework. The vigilance of the Council regulating, implementing, and enforcing the laws has been addressed. It has further attempted to streamline the problems and hindrances encountered by the authorities in regulating and controlling pollution. This being said it is prudent to note that clearly legislation has not been inadequate to address environmental problems in Zambia, as such the more reason for calls in

[9] Referred to Above in Chapter 3, Submission by ***Prosser***.
[10] *Denise E. Antolini,* ***Modernising Public Nuisance: Solving the Paradox of the Special Injury Rule,*** (2001) University of California. P. 800

modernizing the tort of public nuisance which can be a powerful tool in achieving the above aim.

RECOMMENDATIONS

The importance of the recommendations that have been laid down by Nkusuwila Nachalwe cannot be overemphasized. However, it is a deliberate policy of this article to build on what she stated and expand. Nkusiwila looked at the Council, The Mines and other Industries, and the Government in making her recommendations. In agreeing with her submission on this, more emphasis will be placed on the Individual Citizen to which she made brief reference.

The Court and its Officials

Concerns about retaining control over cases, the proper judicial role, and protection of institutional legitimacy may also constrain courts from adopting a more liberal formulation of the rule. The traditional doctrine strengthens the role of the judge in public nuisance cases by presenting a dispositive threshold question of access. It prevents certain plaintiffs at the margins of the traditional tort law model from ever getting to a jury that might sympathize with the plaintiff's view of deteriorating community conditions. Without the different-in-kind test, the legitimacy of plaintiff's claim is much more likely to go to the jury, a jury that will deliberate on the substantiality of the problem and express the community's sense of the appropriate balance among conflicting values.

Judicial reluctance to liberalize the traditional doctrine may reflect deep concerns about how such a move would erode the judge's ability to act as a gatekeeper, particularly in public nuisance cases that involve broad community conflict.

On the other hand, the very purpose of public nuisance is to protect public rights. Denying access conflicts with the very purpose of the ancient tort. Although retaining legitimacy and moral force while handling public law-like cases may be, in light of the active judicial role required, more challenging for courts than handling the traditional private law docket, modern state courts handle a wide range of cases that involve complex and politically challenging issues, including not only mass torts and class actions, but difficult statutory and constitutional cases.

A new "actual community injury" test, which would require a private plaintiff in public nuisance cases to show shared, not unique, injury should be advocated by practitioners and scholars and adopted by courts. It is more harmonious with the fundamental purpose of public nuisance and contemporary notions of community injury. The very point of public nuisance is to protect and to vindicate shared community values, yet the traditional doctrine runs afoul of these concepts.

The actual community injury rule honors the unique legal and social role of public nuisance and discourages those claims that are truly private in nature. In this way, the remedy of *public* nuisance directly matches the evil of community injury. By adopting this new rule, the judiciary would be facilitating rather than discouraging the vindication of community values. The actual community injury test would reasonably broaden access to public nuisance as a community remedy, make such claims more

attractive to practitioners, and should render them more palatable to the state common law courts. Relaxed standing may also enhance environmental protection, particularly at the local level.

When political winds shift at the national level to disfavor statutory avenues of access such as environmental citizens suits, a renewed focus on state common law remedies can provide important supplemental paths for community and environmental justice.

> If the actual community injury rule can be used to cut the Gordian knot created by the crusty historical paradox of the special injury doctrine, public nuisance may continue to thrive in its vital role as a flexible community remedy throughout this new century.[11]

The Council

- ⇨ The ECZ should be granted full powers to draft regulations that are enabling to carry out effective pollution and monitoring; as opposed to current advisory and consultative role it plays, in the drafting and enabling of the various regulations. The Council is well vested with the issues and problems that need remedying pertaining to the environment.
- ⇨ In order to enhance its autonomy and impartiality, all appointments to the Council should not be carried out by the minister. The process of appointment should not be on merit, upon different individuals applying for the posts, subject to being advertised in the local print and electronic media. The majority of other members should not be drawn from various government

[11] Denise E. Antolini, ***Modernising Public Nuisance: Solving the Paradox of the Special Injury Rule,*** (2001) University of California. P. 893

ministries, but instead should be drawn from a host of other stakeholders like the private sector, the general public, business houses and other professions.

- ⇨ The funding to the Council must be revisited, so that it maintains the funds appropriated by parliament as one means. The ministerial approval requisite when accepting donations and grants should be done away with. The Council should be free to obtain loans from any institution without obtaining ministerial consent, if it deems the loan necessary for the better carrying on of its mandate.
- ⇨ All pollution control functions must be rationalized into the ECZ as one body, so that scarce, highly trained expertise can be used efficiently and the shunting of pollution between media (water, land and air) can be effectively controlled.
- ⇨ Pollution control at national and local government level must be effectively integrated for the same reasons. Adequate resources must be allocated to train or employ qualified staff.
- ⇨ The Council's threats to withdraw pollution permits must be made public. The emergency measures to be undertaken by the inspectorate outlined in section 40, should be elaborated, in order to give the inspectorate a mandate to take any measures it deems necessary in an emergency situation, to remedy the situation, at its own instance. Thus, regulation to this effect should be promulgated.

The Mines and other Industries

- ⇨ The mines should construct a number of sulphuric acid plants as a way of recovering the sulphur dioxide and sulphur particulates. The mines should

look at the possibility of using scrubbing method, which involve application of alkalines of potassium and sodium to form neutral sulphates salts, that is potassium sulphate and sodium sulphate as opposed to acidic ones.

- ⇨ The mines should embark on the environmental cleaning which include the reprocessing of slag; covering of the mine rock dumps and abandoned tailing dams; and planting of trees on derelict lands.
- ⇨ The industries in general and mines in particular should consider resuscitating the poorly maintained control equipment, which in most instances are non-operational. Because most of the industries lack the capacity to install the pollution monitoring systems, because they are an expense, a major one at that, the government should give them a tax rebate or allowance on the machinery, plant and equipment that can enhance reduction of sulphur dioxide and other emissions, and the recovery of other solid particulates (for example, the dust from cement works) as a way of promoting cleaning technology production.
- ⇨ Thus, emission control will be based on source control without reference to the receiving environment.

The Government*

- ⇨ As custodian and guarantor of the citizens' rights, the government should adopt policies that will seek to balance individual interest against public interest against public interest, bearing in mind that industrial advancement and development are crucial to the country's economy.

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* As expounded by Nkusuwila Nachalwe, ***The Zambian Legislation Regulating Pollution and its Effectiveness in Pollution Control: An Analysis.*** 2001, UNZA. P. 70

- ⇨ Pollution legislation must therefore include penalties (carrot and stick) to encourage industries to apply managerial strategies and state of the art technology to control pollution.
- ⇨ Much cab be done by good planning to prevent or reduce the ill effects of pollution. Air or water pollution should be considered adequately in planning the placement of industries and residential areas. Factories can be sited where the effects of discharges to water will be minimised, or if due to meteorological conditions their discharge to air will be dispersed rather than concentrated. Environmental planning should be integrated into the development co-operation protocols. The placement of environment officers by ECZ at the Ministry of Finance should be implemented.
- ⇨ A programme should also be set up train the legal profession in pollution cases in the light of modernising the tort of public nuisance.
- ⇨ Penalties under the existing body of legislation should be revised from time to time, to take into account the growing industrial concern with the issue of climate change and global warming which results from uncontrolled pollution. We recommend that the penalties should be stiffer and harsh, as a deliberate move to discourage air pollution.
- ⇨ An environmental court should be established and there should be enough legal expertise in the pollution inspectorate to ensure that polluters are prosecuted.

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