

THE “NEW” TOXIC TORTS: AN ENVIRONMENTAL PERSPECTIVE

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PART 1 -- INTRODUCTION

Pesticides, radioactive materials, genetically modified organisms – the list of potentially harmful substances appears to be growing exponentially as we enter the 21st century. Pest control chemicals, nuclear energy, and biotechnology substances are pervasive in modern industrial society, although the ecological and socio-economic costs/benefits of such products continue to be hotly contested between their respective proponents and opponents.

Nevertheless, it is clear that the production, use, management, transportation, and disposal of such products poses risk to the environment and public health and safety. Whether the degree of risk is large or small remains subject to debate, but the existence of risk cannot be denied. Catastrophic environmental events during the past two decades have shown that the risks are real rather than speculative. Moreover, these events demonstrate that continuing public concern about these risks cannot be ignored, discounted or glossed over with glib assurances of engineering expertise or technological safeguards. As the Supreme Court of Canada recognized in 1995:

Recent environmental disasters, such as the Love Canal, the Mississauga train derailment, the chemical spill at Bhopal, the Chernobyl nuclear accident, and the *Exxon Valdez* oil spill, have served as lightning rods for public attention and concern. Acid rain, ozone depletion, global warming and air quality issues have been highly publicized as more general environmental issues. Aside from high-profile environmental issues with a national or international scope, local environmental issues have been raised and debated widely in Canada. Everyone is aware that, individually and collectively, we are responsible for preserving the natural environment.²

¹ Counsel, Canadian Environmental Law Association.

² *R. v. Canadian Pacific Ltd.* (1995), 17 C.E.L.R. (N.S.) 10 (SCC).

When potential risks are transformed into actual or imminent harm, aggrieved persons may turn to the courts for compensation, injunctive relief, punitive damages, or other appropriate remedies. However, it is clear that pesticides, radioactive materials, and genetically modified substances were unknown to, and unforeseen by, the common law courts of the 1800s and early 1900s. Indeed, any discussion of these modern substances seems light years removed from more mundane matters -- such as snails in beverage bottles,³ or impounded water flooding upon adjoining properties⁴ -- which confronted the common law judges of yesteryear.

In any event, the causes of action developed by the common law courts still remain available to plaintiffs who suffer injury, loss or damage arising from modern contaminants. When combined with statutory causes of action recently created by legislatures, these common law causes of action provide plaintiffs with wide-ranging theories of liability to plead and prove against the parties responsible for the contamination.

The question, however, is whether these existing causes of action are capable of obtaining judicial redress for plaintiffs embroiled in toxic tort litigation. This term generally refers to lawsuits (either individual actions or class proceedings) brought by plaintiffs who allege personal injury, property damage or pecuniary loss resulting from exposure to chemical, biological or radiological contaminants. From a public interest perspective, toxic tort litigation is particularly problematic where:

- the plaintiff seeks to enjoin future activities which, if undertaken, will (or may) expose the plaintiff to contaminants;

³ *Donoghue v. Stevenson*, [1932] A.C. 562 (HL).

⁴ *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330.

- the plaintiff seeks compensation for present injury (i.e. cancer) where causation is difficult to establish in light of lengthy latency periods and/or the existence of other intervening factors; or
- the plaintiff lacks present injury, but sues in relation to contaminant exposure which increases the fear/risk of incurring disease, future medical expenses, or property value depreciation.⁵

In such scenarios, it is tempting to suggest that new causes of action (or special evidentiary rules regarding the burden or standard of proof) should be developed by the courts (or legislatures) to ensure access to justice for victims of toxic torts. However, the chances of sweeping or radical reform appear somewhat unlikely, at least in the short-term. While the common law can and does evolve over time, judicial developments, for the most part, tend to occur in a careful, incremental manner. Accordingly, toxic tort litigants should not pin all their hopes on persuading courts to immediately adopt revolutionary theories of liability. Instead, consideration should be given to taking the existing causes of action, and tailoring them to fit the particular circumstances faced by toxic tort litigants.

Accordingly, the twofold purpose of this paper is to:

- briefly review the various causes of action which may be pleaded in toxic tort litigation in Ontario; and
- identify some environmental matters where toxic tort litigation may become increasingly frequent (eg. biotechnology, leaking underground storage tanks, and waste disposal sites).

⁵ Hughes et al., *Environmental Law and Policy* (2nd ed.) (1998), at pp.101-02.

Other important legal, evidentiary and strategic issues – such as costs, causation, limitations, expert witnesses, epidemiological studies, class proceedings, concurrent liability in contract – are beyond the scope of this paper, but must be carefully considered by counsel representing plaintiffs in toxic tort litigation.

PART 2 -- COMMON LAW AND STATUTORY CAUSES OF ACTION

2.1 – Common Law Causes of Action

The common law causes of action that may be applicable most often in toxic tort litigation are as follows:⁶

- (a) trespass;
- (b) nuisance;
- (c) negligence;
- (d) strict liability; and
- (e) riparian rights.

The essential elements of the foregoing common law causes of action are described below.

Trespass

Trespass generally refers to “an intentional, unauthorized physical act that results in a direct and immediate interference to the person, property or rights of another”.⁷

⁶ The doctrine of *res ipsa loquitur* may also be invoked by environmental plaintiffs, although the doctrine is an evidentiary rule regarding inferences of negligence, rather than a substantive cause of action: see Fleming, *The Law of Torts* (9th ed.) (1998), at p.353.

⁷ Faieta et al., *Environmental Harm: Civil Actions and Compensation* (1996), at p.65.

Trespass to the person includes, among other things, the sub-tort of battery, which can be invoked in the environmental context where a defendant knowingly exposes the plaintiff to unacceptable contaminant levels.⁸

Trespass to property is usually described as an unauthorized invasion upon the plaintiff's lands. Trespass to property is actionable even without proof of harm, and trespass includes the discharge or deposit of toxic or non-toxic substances upon the plaintiff's property. Examples of trespass in the environmental context include:

- discharge of saw mill dust, ash and smoke;⁹
- deposit of stones or fill;¹⁰
- aerial application of pesticides;¹¹ and
- escape of water onto adjoining lands.¹²

Nevertheless, the requirement to show both an "intentional act" and "direct interference" has tended to limit the utility of the tort of trespass in environmental actions.

Nuisance

The essence of nuisance is unreasonable interference with the use and enjoyment of property.¹³

However, the common law has developed a significant distinction between "private nuisance" and "public nuisance".

⁸ *MacDonald v. Sebastian* (1988), 81 N.S.R. (2d) 189 (N.S. T.D.)

⁹ *Kerr v. Revelstoke Building Materials Ltd.*, (1976), 71 D.L.R. (3d) 134 (Alta. S.C.).

¹⁰ *Philips v. California Standard Co.* (1960), 31 W.W.R. 331 (Alta. S.C.); *Athwal v. Pania Estates Ltd.* (1981), 11 C.E.L.R. 17 (B.C. S.C.).

¹¹ *Friesen v. Forest Protection Ltd.*, (1978), 22 N.B.R. (2d) 146 (N.B. Q.B.).

¹² *Pinder v. Sanderson* (1911), 18 O.W.R. 240 (Ont. K.B.).

¹³ Generally, see Bilson, *The Canadian Law of Nuisance* (1991).

The elements of “private nuisance” have been succinctly described as follows:

A private nuisance is usually defined as an unreasonable interference with the use and enjoyment of land that is owned or occupied by another person. Liability may be imposed even though the defendant did not intend and was not negligent in causing the interference. If the interference involves a form of physical damage to the land itself or personal injury to occupants, courts have been quick to conclude a finding of nuisance, given the substantial gravity of interference. Where the interference involves interference with the plaintiff’s enjoyment of the property – for example, by loud noises or noxious odours – courts will weigh various factors in determining whether a nuisance exists. Key factors include duration of the interference, gravity, the neighborhood (for example, industrial/urban versus rural), utility of the defendant’s activity, and whether the plaintiff has abnormal sensitivities.¹⁴

The courts have recognized that actionable interference “may take a variety of forms, ranging from actual physical damage to land to interference with the health, comfort or convenience of the owner or occupier of land”.¹⁵ Examples of private nuisance include:

- odour, noise, dust, and litter from a waste disposal site;¹⁶
- escape of methane gas from a waste disposal site;¹⁷
- aerial application of pesticides;¹⁸
- seepage from a sewage lagoon;¹⁹
- salt spray arising from winter highway maintenance;²⁰
- contamination of wellwater;²¹ and
- discharge of corrosive air contaminants.²²

¹⁴ Hughes et al., *Environmental Law and Policy* (2nd ed.) (1998), p.85

¹⁵ *Tock v. St. John’s Metropolitan Area Board*, [1989] 2 S.C.R. 1181 (SCC), at pp. 1190-91.

¹⁶ *Plater v. Collingwood*, [1968] 1 O.R. 81 (Ont. H.C.); *Nippa v. C.H. Lewis (Lucan) Ltd.* (1991), 7 C.E.L.R. (N.S.) 149 (Ont. Ct. Gen. Div.).

¹⁷ *Gertsen v. Metropolitan Toronto* (1973), 2 O.R. (2d) 1 (Ont. H.C.).

¹⁸ *Newman v. Conair Aviation Ltd.*, [1973] 1 W.W.R. 316 (B.C. S.C.); *Bridges Brothers Ltd. v. Forest Protection Ltd.* (1976), 14 N.B.R. (2d) 91 (N.B. Q.B.); *Freisen v. Forest Protection Ltd.* (1978), 22 N.B.R. (2d) 146 (N.B. Q.B.); *Paul v. C.A. McKay Ltd.* (1988), 55 Man. R. (2d) 151 (Man. Q.B.).

¹⁹ *Roberts v. Portage LaPrairie*, [1971] S.C.R. 481 (SCC).

²⁰ *Schenck v. Ontario* (1981), 34 O.R. (2d) 595 (Ont. H.C.); affd. (1984), 49 O.R. (2d) 556 (Ont. C.A.); affd. [1987] 2 S.C.R. 289 (S.C.C.).

²¹ *Jackson v. Drury Construction Co.* (1974), 4 O.R. (2d) 735 (Ont. C.A.).

²² *Russell Transport Ltd. v. Ontario Malleable Iron Co. Ltd.*, [1952] O.R. 621 (Ont. H.C.).

In contrast, “public nuisance” is usually defined as an unreasonable interference with a public right or interest, such as “obstructions of public highways, rights of way, or navigable waters...pollution of beaches and shoreline properties”.²³ One author has described “public nuisance” in the following terms:

The essence of public nuisance is a disturbance or infringement of rights enjoyed by the public in general. This infringement of public rights must be so widespread that no single individual could reasonably be expected to take action to prevent or stop it. The public nature of the nuisance means that the wrong complained of must affect more than a few individuals.²⁴

The potential utility of the “public nuisance” tort in the environmental context has been recognized as follows:

The common law has recognized a public right to clean air and to clean lakes, rivers and other watercourses. The courts have recognized that the imposition of statutory duties and obligations, enacted for the public’s benefit, also creates “public rights”...

It has long been recognized that the public has a right to unpolluted air. Noxious odours from a paper mill, a landfill site, a copper smelting works, and from second-hand tobacco smoke are a public nuisance...

Each member of the public enjoys various rights in rivers, streams, lakes and coastal waters. These public rights include a right of navigation and a right of fishing. Courts have also recognized that the public has a right to unpolluted natural watercourses and waterbodies. Therefore, an oil spill in a public navigable river, harbour or at sea is regarded as a public nuisance... The discharge of sewage into a stream in breach of a statutory duty is a public nuisance. The discharge of “poisonous waste”... that destroyed fish life was also a public nuisance. Finally, the discharge of ground wood and water into a river is a public nuisance.²⁵

At common law, however, a public nuisance action can only be commenced by the Attorney General, or by a person authorized to bring a “relator action” in the name of the Attorney General. However, persons who experience “special damage” (eg. personal injury or property

²³ Hughes et al., *Environmental Law and Policy*(2nd ed.) (1998), at p.93.

²⁴ Swanson et al., *The Price of Pollution: Environmental Litigation in Canada* (1990), at p.23.

²⁵ Faieta et al., *Environmental Harm: Civil Actions and Compensation* (1996), at pp.46-47.

damage that differs in kind or degree from the rest of the public at large²⁶) have standing to bring an action in public nuisance.²⁷ In Ontario, this public nuisance standing rule has been partially reformed by section 103 of the *Environmental Bill of Rights*, as described below.

Negligence

Negligence is arguably the most important, vibrant and flexible area of tort liability. Unlike nuisance or the strict liability doctrine, negligence did not originate as an environmental tort, but can, in certain circumstances, be pleaded by environmental plaintiffs.

While the essential elements of negligence have been articulated in different ways over the years, it is clear that a plaintiff must prove five things in order to succeed in negligence:

1. A duty, recognised by law, requiring conformity to a certain standard of conduct for the protection of others against unreasonable risks. This is commonly known as the “duty issue”.
2. Failure to conform to the required standard of care or, briefly, breach of that duty. This element usually passes under the name of “negligence”.
3. Material injury resulting to the interests of the plaintiff. Merely exposing someone to danger is not an actionable wrong if the hazard is averted in time. Nor is there any question here of vindicating mere dignitary interests or compensating fright or apprehension in the absence of ascertainable physical or psychiatric injury.
4. Not only must the defendant’s breach of duty have been a cause of the injury, it must have been a “proximate cause”. This is generally referred to as the question of “remoteness of damage” or “proximate cause”.
5. The absence of any conduct by the injured party prejudicial to his recovering in full for the loss he has suffered. This involves a consideration of two specific defences, contributory negligence and voluntary assumption of risk.²⁸

²⁶ *Cairns v. Canada Refining & Smelting Co.* (1913), 25 O.W.R. 384 (Ont. H.C.); rev. in part (1914), 6 O.W.N. 562 (Ont. C.A.).

²⁷ Faieta et al., *Environmental Harm: Civil Actions and Compensation* (1996), at pp.52-59.

²⁸ Fleming, *The Law of Torts* (9th ed.) (1998), at pp.115-16.

A defendant's breach of prescribed statutory standards (eg. requirements entrenched in environmental laws or regulations) may afford evidence of negligence.²⁹ Examples of where negligence claims have succeeded in environmental cases include:

- improper or careless application of pesticides;³⁰
- careless or insecure storage of hazardous substances;³¹
- discharge of acidic wastes into sewer works;³²
- failure to contain methane gas emissions from a landfill;³³
- failure to prevent sewer overflows or backups;³⁴ and
- negligent management of a contaminated property.³⁵

A subset of negligence that is growing in importance in the environmental context is the area of law commonly referred to as "regulatory negligence". In the leading case of *Just v. B.C.*, the Supreme Court of Canada held that the traditional tort law duty of care applies to "operational" decisions made by government agencies or officials.³⁶ This decision has been followed in Ontario where, for example, the Ministry of the Environment was held liable for negligence in inspecting and approving a defective septic system.³⁷ Similarly, liability has been imposed

²⁹ *Canada v. Sask. Wheat Pool*, [1983] 1 S.C.R. 205 (SCC).

³⁰ *Maurice v. Tiny (Township)* (1973), 2 C.E.L.R. 22 (Ont. C.A.); *Bridges Brothers Ltd. v. Forest Protection Ltd.* (1976), 14 N.B.R. (2d) 91 (N.B. Q.B.); *Siemens v. Pfizer C. & G. Inc.* (1988), 3 C.E.L.R. (N.S.) 157 (Man. C.A.).

³¹ *Walker v. Lenbro Holdings Ltd.* (1983), 13 C.E.L.R. 37 (Ont. Co. Ct.).

³² *North York v. Kent Chemical Industries Inc.* (1985), 33 C.C.L.T. 184 (Ont. S.C.).

³³ *Gertsen v. Metropolitan Toronto* (1973), 2 O.R. (2d) 1 (Ont. H.C.).

³⁴ *Oosthoek v. Thunder Bay* (1994), 24 M.P.L.R. (2d) 25 (Ont. Ct. Gen. Div.).

³⁵ *Bisson v. Burnette Holdings Ltd.* (1993), 15 C.E.L.R. (N.S.) 201 (Ont. Ct. Gen. Div.).

³⁶ *Just v. British Columbia*, [1989] 2 S.C.R. 1228 (SCC).

³⁷ *Gauvin v. Ontario* (1995), 22 C.E.L.R. (N.S.) 277 (Ont. Ct. Gen. Div.); *affd.* (1997), Doc. CA M20035 (Ont. C.A.).

where government officials had failed to warn homeowners of the presence of soil contaminated by radioactive materials.³⁸

How “regulatory negligence” will continue to be interpreted, applied or expanded by the courts remains unclear at this point, but it would be prudent for environmental plaintiffs to at least consider adding government agencies as defendants in appropriate cases:

The ever-expanding role of government officials in regulatory activities may lead to future lawsuits over the adequacy of official conduct in preventing or controlling polluting activities. The doctrine of Crown immunity which, historically, has provided protection against civil liability, has in recent years been significantly limited both by statutory provisions and judicial decisions.³⁹

Strict Liability

In recent years, the doctrine of strict liability (established in the leading case of *Rylands v. Fletcher*⁴⁰) has tended to merge with the tort of nuisance. At common law, however, the strict liability doctrine is a narrowly framed but important tort that has been particularly useful in the environmental context.

The essence of the strict liability doctrine has been summarized as follows:

The essential elements of the tort, therefore, can be broken down as follows:

1. the defendant is in lawful occupation of property;
2. a dangerous agent is stored on the defendant’s property which makes for a “non-natural” use of the land;
3. the agent “escapes” from the defendant’s property;

³⁸ *Heighington v. Ontario* (1989), 69 O.R. (2d) 484 (Ont. C.A.). See also *Sevidal v. Chopra* (1987), 2 C.E.L.R. (N.S.) 173 (Ont. H.C.) where liability was imposed for negligent misrepresentations made by regulatory officials about radioactivity levels on the plaintiff’s property.

³⁹ Hughes et al., *Environmental Law and Policy* (2nd ed.) (1998), at p.83.

⁴⁰ *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330 (HL). Generally, see Fleming, *The Law of Torts* (9th ed.) (1998), Chap. 16.

4. the agent causes damage to the plaintiff.⁴¹

It has been suggested, however, that a fifth element is the requirement that the damage be reasonably foreseeable before strict liability can be imposed.⁴² This suggestion is based on a recent English decision dealing with the escape of chlorinated solvents from a tannery,⁴³ but it remains to be seen whether, or to what extent, Canadian courts will add the requirement of foreseeability to the strict liability doctrine.

Environmental examples where the strict liability doctrine has been applied include:

- escape of manure contaminants into wellwater;⁴⁴
- escape of creosote into wellwater;⁴⁵
- escape of explosive methane gas from a landfill;⁴⁶
- escape of fire onto adjoining lands;⁴⁷
- escape of petroleum products from service stations;⁴⁸
- escape of aerially applied herbicide;⁴⁹ and
- escape of sewage.⁵⁰

⁴¹ Faieta et al., *Environmental Harm: Civil Actions and Compensation* (1996), at p.28.

⁴² *Ibid.*, at pp.35-38.

⁴³ *Cambridge Water Co. v. Eastern Counties Leather*, [1994] 2 A.C. 264 (HL).

⁴⁴ *Metson v. R.W. DeWolfe Ltd.* (1980), 117 D.L.R. (3d) 278 (N.S. S.C.).

⁴⁵ *O'Brien v. Nfld. Light & Power Co.* (1984), 51 Nfld. & P.E.I.R. 30 (Nfld. Dist. Ct.).

⁴⁶ *Gertsen v. Metropolitan Toronto* (1973), 2 O.R. (2d) 1 (Ont. H.C.).

⁴⁷ *McAliffe v. Hubbell* (1930), 66 O.L.R. 349 (Ont. C.A.).

⁴⁸ *Henry v. Irving Oil Ltd.* (1975), 19 N.S.R. (2d) 344 (N.S. S.C.); *B.C. Telephone Co. v. Shell Canada Ltd.* (1987), 13 B.C.L.R. (2d) 210 (B.C. S.C.); *Bisson v. Brunette Holdings Ltd.* (1993), 15 C.E.L.R. (N.S.) 201 (Ont. Ct. Gen. Div.).

⁴⁹ *Mihalchuk v. Ratke* (1966), 57 D.L.R. (2d) 269 (Sask. Q.B.); *Bartel v. Ector* (1978), 90 D.L.R. (3d) 89 (Sask. Q.B.); *Schunicht v. Tiede* (1980), 9 C.E.L.R. 134 (Alta. Q.B.).

⁵⁰ *Lyon v. Shelburne* (1981), 130 D.L.R. (3d) 307 (Ont. Co. Ct.).

In summary, the strict liability doctrine should be viewed as a useful tort in environmental cases:

It is readily apparent that the principle in *Rylands v. Fletcher* easily lends itself to application in the environmental context...

This principle has obvious application to the collection and/or storage of other agents potentially dangerous to the environment. Indeed, the accumulation of a significant quantity of any product may amount to a collection of a “dangerous thing” and a “non-natural use of land” because it increases the risk of harm to others that would be presented by the ordinary use of land. In other words, while strict liability principles might not apply to the collection of normal amounts of some products, they can apply to the collection and/or transportation of large quantities. It would seem that the collection of certain agents, in any quantity, must be viewed as a non-natural use of land.⁵¹

Riparian Rights

At common law, persons who own property bordered or bisected by watercourses have certain rights usually described as “riparian rights”. These rights are “usufructuary” in nature which means riparian rights holders do not ultimately own or control the water, but instead have temporary (and enforceable) rights to use water.

Riparian rights have been summarized as follows:

1. The right of access to the water;
2. The right to any land formed through natural accretion;
3. The right to protect riparian land from flooding or other adverse effects;
4. The right to the flow of water in its natural state; and
5. The right to make use of the water, providing that such use did not interfere with the riparian rights of others.⁵²

Of these various riparian rights, it is clear that the right to water in its natural quality and quantity can be particularly useful in the environmental context, especially in cases involving the

⁵¹ Faieta et al., *Environmental Harm: Civil Actions and Compensation* (1996), at p.29.

⁵² Swanson et al., *The Price of Pollution: Environmental Litigation in Canada* (1990), at p.40.

degradation of water quality due to pollution. Indeed, interference with riparian rights is actionable even if the plaintiff has not incurred any actual damages.⁵³

Examples where riparian rights have been successfully applied include:

- discharge of mine wastewater into a stream;⁵⁴
- discharge of paper mill effluent into a stream;⁵⁵
- storm sewer flows into a watercourse;⁵⁶ and
- discharge of untreated sewage into a watercourse.⁵⁷

Despite the potential strength of riparian rights, it should be noted that “the use of riparian rights at common law in modern environmental litigation has waned in recent times as statutes have infringed upon the common law remedy.”⁵⁸ Nevertheless, as the courts continue to narrow the defence of “statutory authority”, riparian rights can still provide a strong basis for asserting a plaintiff’s right to water quality and quantity:

Despite some statutory restrictions on the doctrine of riparian rights, the doctrine is still of some value in environmental litigation.⁵⁹

2.2 – Statutory Causes of Action

Ontario and federal environmental statutes have created certain statutory causes of action which may be applicable in toxic tort litigation, depending on the factual circumstances. It is beyond

⁵³ *McKie v. K.V.P. Co.*, [1948] 3 D.L.R. 201 (Ont. H.C.); affd. [1949] 1 D.L.R. 39 (Ont. C.A.); affd. [1949] S.C.R. 698 (SCC). See also *Gauthier v. Naneff* (1970), 14 D.L.R. (3d) 513 (Ont. H.C.), where the court enjoined future events (eg. speedboat races) which would have degraded water quality.

⁵⁴ *John Young and Co. v. Bankier Distillery Co.*, [1893] A.C. 691 (HL).

⁵⁵ *McKie*, *supra*, footnote 41.

⁵⁶ *Groat v. Edmonton*, [1928] S.C.R. 522 (SCC).

⁵⁷ *Stephens v. Village of Richmond Hill* (1956), 1 D.L.R. (2d) 569 (Ont. C.A.).

⁵⁸ Faieta et al., *Environmental Harm: Civil Actions and Compensation* (1996), at p.125.

⁵⁹ *Ibid.*, at p.126.

the scope of this paper to exhaustively identify and analyze all statutory causes of action which could potentially arise in toxic tort litigation. Instead, this section of the paper will focus on certain statutory causes of action that are most likely to be encountered in the environmental context. These statutory causes of action are contained within the following legislation:

- (a) *Canadian Environmental Protection Act*;
- (b) *Environmental Bill of Rights* (Part VI); and
- (c) *Environmental Protection Act* (Part X)

The essential elements of the foregoing statutory causes of action are described below.

(a) *Canadian Environmental Protection Act, 1999*

The new *Canadian Environmental Protection Act, 1999* (“CEPA”) is arguably the centrepiece of the federal government’s pollution control regime.⁶⁰

Significantly, Part 5 of CEPA sets out a comprehensive regime for identifying, assessing, and regulating “toxic substances” in Canada.⁶¹ In particular, CEPA provides that a substance is “toxic” if it is entering or may enter the environment in a quantity or concentration or under conditions that:

- (a) have or may have an immediate or long-term harmful effect on the environment or its biological diversity;
- (b) constitute or may constitute a danger to the environment on which life depends; or
- (c) constitute or may constitute a danger in Canada to human life or health.⁶²

⁶⁰ CEPA, S.C. 1999, c.33, which received Royal Assent on September 14, 1999.

⁶¹ Pesticides continue to be federally regulated under the provisions of the *Pest Control Products Act*, R.S.C. 1985, c.P-9, and are provincially licenced through the *Pesticides Act*, R.S.O. 1990, c.P.11.

⁶² CEPA, section 64.

To date, of the approximately 23,000 substances currently in use in Canada, approximately four dozen substances have been assessed, found to be “toxic”, and added to the Schedule I List of Toxic Substances.⁶³ Once added to the list, the toxic substance may be subject to regulations under CEPA which govern the import, export, use, processing, sale, storage, transportation, or release of the substance. CEPA also establishes a similar assessment process for reviewing and regulating “animate products of biotechnology” (eg. living organisms).⁶⁴

The regulation of toxic substances and biotechnology products under CEPA is significant because the Act provides the public with a number of legal tools to ensure compliance with CEPA and the regulations thereunder. For example, CEPA permits residents to formally request Environment Canada to investigate suspected offences under CEPA,⁶⁵ and residents are empowered to undertake an “environmental protection action” against the alleged offenders in certain circumstances.⁶⁶

Similarly, CEPA empowers affected (or potentially affected) residents to go to court for injunctive relief in order to enjoin the defendant(s) from contravening CEPA or the regulations.⁶⁷

In addition, affected persons may plead and rely upon the civil cause of action created by CEPA:

Any person who has suffered loss or damage as a result of conduct that contravenes any provision of this Act or the regulations may, in a court of competent jurisdiction, bring an action to recover from the person who engaged in the conduct

- (a) an amount equal to the loss or damage proved to have been suffered by the person; and

⁶³ See *Canada Gazette Part II, Vol. 134, No. 7, SOR/2000-109* (March 23, 2000). Schedule I includes well-known toxics such as PCB’s, CFC’s, lead, asbestos, mercury, vinyl chloride, dioxins, furans, and pulp mill effluent.

⁶⁴ CEPA, Part 6.

⁶⁵ CEPA, section 17.

⁶⁶ CEPA, section 22.

⁶⁷ CEPA, section 39.

- (b) an amount to compensate for the costs that the person incurs in connection with the matter and proceedings under this section.⁶⁸

This new statutory cause of action is additive to any other rights or remedies that the plaintiff may claim under law in Canada.⁶⁹

(b) Environmental Bill of Rights (Part VI)

Part VI of Ontario's *Environmental Bill of Rights* ("EBR")⁷⁰ was enacted to enhance public access to the civil courts for certain environmental matters.⁷¹

For example, Part VI of the EBR allows residents to go to court to protect "public resources" (eg. air, public watercourses, public land, wildlife, etc.) against "significant harm" (eg. contamination or degradation):

Where a person has contravened or will imminently contravene an Act, regulation or instrument prescribed for the purposes of Part V and the actual or imminent contravention has caused or will imminently cause significant harm to a public resource of Ontario, any person resident in Ontario may bring an action against the person in the court in respect of the harm and is entitled to judgment if successful.⁷²

The condition precedent for bringing such an action is that the plaintiff must file an Application for Investigation under Part V of the EBR, although it is not necessary to do so where there is serious, ongoing harm to the public resource.⁷³ This "public resource" action may not be framed as a class action.⁷⁴ If the action is successful, the court may grant an injunction, declaratory

⁶⁸ CEPA, section 40.

⁶⁹ CEPA, section 42.

⁷⁰ EBR, S.O. 1993, c.28.

⁷¹ Generally, see Muldoon & Lindgren, *The Environmental Bill of Rights: A Practical Guide* (1995), Chapter 7.

⁷² EBR, section 84(1).

⁷³ EBR, section 84(6).

⁷⁴ EBR, section 84(7).

relief, and costs, and the court may order the preparation of an environmental restoration plan to rehabilitate the degraded public resource.⁷⁵ However, the court may not award damages to a plaintiff suing under the EBR, primarily because it is a public resource – rather than the plaintiff’s property or health – that has been harmed by the defendant’s conduct.⁷⁶

However, Part VI of EBR assists plaintiffs who are attempting to recover damages for harm arising from public nuisances. In particular, the EBR partially reforms the standing rule in public nuisance cases (see above) by providing that lack of Attorney General consent, and lack of special damages, no longer bars certain public nuisance actions:

No person who has suffered or may suffer a direct economic loss or direct personal injury as a result of a public nuisance that caused harm to the environment shall be barred from being an action without the consent of the Attorney General in respect of the loss or injury only because the person has suffered or may suffer direct economic loss or direct personal injury of the same kind or to the same degree as other persons.⁷⁷

Thus, a plaintiff still must be able to demonstrate “direct economic loss”, or “direct personal injury”, in order to plead and rely upon this provision of the EBR.

(c) Environmental Protection Act (Part X)

Part X of Ontario’s *Environmental Protection Act* (“EPA”),⁷⁸ also known as the “Spills Bill”, establishes a comprehensive regime in respect of “spills” of “pollutants”.⁷⁹

⁷⁵ EBR, section 93.

⁷⁶ *Ibid.*

⁷⁷ EBR, section 103.

⁷⁸ EPA, R.S.O. 1990, c.E.19.

⁷⁹ “Pollutant” is defined as “a contaminant other than heat, sound, vibration or radiation”: see EPA, section 91(1).

A “spill” is defined under Part X as follows:

“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 and quantity in light of all of the circumstances of the discharge.⁸⁰

Where a spill occurs, the person who has control of the pollutant, and the person who causes or permits the spill, must report the incident “forthwith” to the Ministry of the Environment, the local municipality, and other parties.⁸¹ In addition, owners and controllers of spilled pollutants have a duty to “forthwith do everything practicable to prevent, eliminate and ameliorate the adverse effect and to restore the environment.”⁸² The Minister is also empowered to issue cleanup orders in respect of the spill.⁸³

For toxic tort litigants, the most significant provision of Part X of the EPA is the strict liability imposed for “loss or damage”⁸⁴ caused by a spill:

Her Majesty the Queen in right of Ontario or in right of Canada or any other person has the right to compensation,

- (a) for loss or damage incurred as a direct result of,
 - (i) the spill of a pollutant that causes or is likely to cause an adverse effect...
 - (iii) neglect or default in carrying out a duty imposed or an order or direction made under this Part...

from the owner of the pollutant and the person having control of the pollutant.⁸⁵

⁸⁰ EPA, section 91(1).

⁸¹ EPA, section 92.

⁸² EPA, section 93.

⁸³ EPA, section 97.

⁸⁴ “Loss or damage” is defined as “personal injury, loss of life, loss of use or enjoyment of property and pecuniary loss, including loss of income: see EPA, section 99(1).

⁸⁵ EPA, section 99(2).

This statutory right to compensation may be enforced by action in a court of competent jurisdiction,⁸⁶ and liability does not depend upon fault or negligence.⁸⁷

PART 3 -- EMERGING ENVIRONMENTAL ISSUES

At the local, provincial, national and international level, there are countless environmental issues which may be of interest or relevance to toxic tort litigants. It is beyond the scope of this paper to review all such issues. Instead, this paper focuses on three subject areas where toxic tort litigation may play an increasingly prominent role in Ontario and, presumably, elsewhere in Canada. These subject areas are as follows:

- (a) biotechnology products;
- (b) leaking underground storage tanks; and
- (c) waste disposal sites.

(a) Biotechnology Products

“Biotechnology” is a general term used to describe the use of living organisms (or parts thereof) for the production of goods and services.⁸⁸ Modern advances in biotechnology have led to the use of genetically modified organisms (“GMO’s”) in a wide variety of applications, including health care, waste treatment, bioremediation, forestry, agriculture, and mining.⁸⁹

⁸⁶ EPA, section 99(5).

⁸⁷ EPA, section 99(6).

⁸⁸ Estrin & Swaigen, *Environment on Trial* (3rd ed.) (1993), at p.237. Generally, see Mausberg et al., *The Citizen’s Guide to Biotechnology* (1995).

⁸⁹ Mandrusiak, “Playing with Fire: The Premature Release of Genetically Engineered Plants into the Canadian Environment” (2000), 9 J.E.L.P. 259, at p.260.

Nevertheless, numerous concerns have been raised about the environmental hazards and risks posed by the deliberate release (or accidental escape) of biotechnology products into the environment. These hazards and risks have been summarized as follows:

[T]he newly developed biotech procedures and products do create some unique dangers. As opposed to normal chemical pollution, the products of genetic engineering pose the following additional difficulties:

- many of the products of biotechnology are live organisms with the ability to grow, adapt to their environment, reproduce and spread;
- genetic engineering can result in the inadvertent introduction of a gene into another species with unanticipated harmful results;
- unlike chemicals, the products of biotechnology possess the capacity to transfer genetic material to other related and unrelated species...
- many of the products of biotechnology are living organisms capable of growing, reproducing, mutating and transferring genetic material, making control and containment after release costly and difficult if not impossible; and
- the technologies involved in genetic engineering are recent developments with an unproven track record, thereby making it difficult to evaluate the potential impact of biotech products on the environment.⁹⁰

Thus, even though biotechnology products are subject to federal regulatory review under CEPA (see above), there is residual concern about the regulators' ability to properly evaluate such products, given the substantive gaps in of scientific knowledge about how GMO's interact with the environment.

In any event, should the release of GMO's cause personal injury or property damage, it is open to the aggrieved party to utilize the common law and statutory causes of action outlined above. Trespass, nuisance, strict liability, and negligence may be available, provided, of course, that the plaintiff can demonstrate a causal link between the release of the GMO and the harm complained

⁹⁰ *Ibid.*, at pp.262-63.

of by the plaintiff. While causation issues (and limitations) are daunting in most toxic tort litigation, they may be particularly problematic with respect to GMO torts:

For new life forms released into the environment, it may be decades after the release before any impact on the ecosystem and humans is detected or fully understood. Moreover, the release of genetically engineered organisms may start a chain reaction of disturbances or consequences.⁹¹

With respect to statutory liability, it is clear that plaintiffs can rely upon the CEPA civil liability provisions (see above), to the extent that the defendant has produced, used or released a biotechnology product in contravention of CEPA or the regulations thereunder. The situation is less clear, however, with respect to potential “spills” liability under Part X of the EPA, particularly since the definitions of “pollutant” and “contaminant” under the EPA do not explicitly include new life forms.

(b) Leaking Underground Storage Tanks

It has been estimated that there are approximately 200,000 underground storage tanks in Canada containing various petro-chemicals and other substances, and that five to ten percent of such tanks are leaking into the environment.⁹² Even if older tanks are repaired or replaced, and even if the number of leaks and spills decrease over time, the subject of leaking underground storage tanks (“LUST”) will continue to be a ripe area for toxic tort litigation:

Nevertheless, leaks and spills from these newer systems will continue, although to a lesser extent, particularly as the systems age. In addition, many tanks that were abandoned with liquids in them have yet to be discovered and removed, and even where such tanks have been removed, historically, the contaminated soil around them was left. This soil will continue to be a source of potential water contamination and a source of

⁹¹ Valiante et al., “Biotechnology and the Environment: A Regulatory Proposal” (1985), 23 Osg. H.L.J. 359, at p.381.

⁹² Swaigen, *Toxic Time Bombs: The Regulation of Canada’s Leaking Underground Storage Tanks* (1995), at p.xvii.

litigation, particularly between vendors and purchasers, even in the absence of any migration of the contamination.⁹³

It is clear that personal injury or property damage caused by LUST contaminants are actionable under the common law causes of action described above, particularly trespass, nuisance, and the strict liability doctrine. Negligence may also be relevant insofar as storage tanks are subject to various design and operational standards and other statutory requirements, breach of which may afford proof of negligence. The statutory cause of action under Part X of the EPA may also be particularly useful, particularly since the egress of LUST contaminants are clearly “spills” for the purposes of Part X.⁹⁴

However, causation issues in LUST cases may be difficult for plaintiffs to overcome, as it can be exceedingly difficult for plaintiffs (or their experts) to ascertain the source of the contamination, or to demonstrate a link between the LUST contaminants and the damages complained of by the plaintiff.

(c) Waste Disposal Sites

Despite widespread public acceptance of the 3R’s (eg. reduce, reuse and recycle) as the preferred approach for waste management, the existing regulatory regime in Ontario seems more geared towards disposal than the 3R’s, especially in relation to hazardous waste. Accordingly, there are thousands of open and closed waste disposal sites scattered across Ontario, including landfills, dumps, incinerators, transfer stations and used tire sites.

⁹³ Faieta et al, *Environmental Harm: Civil Actions and Compensation* (1998), at p.525, f.n.1.

⁹⁴ *Ibid.*, at pp.531-35.

Landfills (both private and public) appear to be the most common form of waste disposal in the province, and a number of large-capacity, long-term “mega-sites” have been approved or proposed in southern and northern Ontario. If properly located, designed, and operated, landfills may produce fewer environmental and nuisance impacts than old-style garbage dumps, where waste was often burned and/or left largely uncovered. Nevertheless, even “modern” landfills can result in adverse environmental impacts, including:

- groundwater contamination;
- surface water contamination;
- landfill gas (eg. methane) emissions; and
- nuisance impacts (eg. odour, litter, noise, dust, traffic, insects, rodents).

Such impacts, in turn, may adversely affect public health and safety, and result in property value depreciation in the vicinity of the landfill.

Where such impacts occur, aggrieved persons can plead and rely upon the common law and statutory causes of action described above. Indeed, several of the recent trespass, nuisance, and strict liability cases have involved waste disposal sites (see above). In addition, plaintiffs should consider adding a statutory claim under Part X of the EPA, since the migration of landfill contaminants onto adjoining lands can be characterized as an escape from a “structure” or “container” within the meaning of Part X.⁹⁵ However, since most landfilling operations are subject to detailed certificates of approval issued under Part V of the EPA, plaintiffs should be mindful of the “statutory authority” defence likely to be invoked by defendants.

⁹⁵ *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1996), 20 C.E.L.R. (N.S.) 37 (Ont. Ct. Gen. Div.), at pp.49-51.

It goes without saying that landfill litigants still face the usual challenges of causation (and limitations) in proceeding with claims against the owners and operators of waste disposal sites. An additional consideration is whether the action should be framed as a class proceeding brought by a representative plaintiff, but caution is advised until the Supreme Court of Canada determines this issue in the pending appeal concerning a proposed class action in relation to the Keele Valley Landfill.⁹⁶

PART 4 – CONCLUSIONS

Unless special causes of action (or special evidentiary rules) are recognized by the courts, toxic tort litigants are, by necessity, forced to plead and rely upon the existing common law and statutory causes of action. Where demonstrable damages have occurred, these existing causes of action (and the associated remedies) are likely adequate for most plaintiffs.

However, where the injury complained of is somewhat prospective (eg. fear of developing future illness due to current exposure), or where causation is difficult to prove, then some toxic tort litigants may be denied judicial redress due to the complex and controversial nature of their claims. For this sub-group of toxic tort litigants, it is imperative that the legislatures and/or courts develop and apply appropriate theories of liability to ensure access to environmental justice for all.

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⁹⁶ *Hollick v. City of Toronto* (1999), 32 C.E.L.R. (N.S.) 1 (Ont. C.A.), leave to appeal to the SCC granted September 21, 2000.