LECTURE 4

THE RECOVERABILITY OF PURE ECONOMIC LOSS IN PUBLIC NUISANCE

INTRODUCTION

Public nuisance serves as a critical legal framework for recovering economic losses, particularly in cases where other legal remedies are unavailable under English law. This is especially relevant in situations where public policy restricts recovery through negligence claims. Such cases are frequently associated with environmental disasters, including major oil spills like the Sea Empress incident. These events typically result in widespread harm affecting entire communities, often through acts or omissions that "endanger life, health, property, or public comfort" or obstruct public rights, as paraphrased from Archbold. In pollution-related cases, the economic impact is often extensive, with businesses and individuals across the affected regions suffering financial losses.

THE ROLE OF PUBLIC NUISANCE IN ADDRESSING ECONOMIC LOSS

A defining characteristic of public nuisance, whether at common law or under statutory provisions, is the element of inconvenience or disruption. Although modern environmental regulations have reduced the significance of common law remedies, public nuisance claims remain valuable where compensatory damages are necessary. The adaptability of public nuisance law in addressing economic losses caused by widespread pollution underscores its importance as a modern legal remedy.

DISTINCTION FROM NEGLIGENCE CLAIMS

Under negligence law, economic losses stemming from damage to property owned by another party are generally not recoverable. This principle is summarized as follows:

"*No duty is owed by a defendant who negligently damages property belonging to a third party to a claimant who suffers loss due to dependence on that property or its owner.*"

However, public nuisance claims have traditionally allowed for the recovery of pure economic losses. For example, economic harm caused by obstructions on highways or waterways—such as trade losses from blocked roads or impeded navigation—has historically been recoverable, provided there is a direct causative link between the nuisance and the harm suffered. Courts have assessed such claims pragmatically, ensuring fairness and justice.

CASE LAW ILLUSTRATING ECONOMIC LOSS RECOVERY IN PUBLIC NUISANCE

Several cases illustrate the courts' approach to recovering economic loss in public nuisance claims:

1. **Blundy Clark** & **Co Ltd v London and North Eastern Railway Co (1931)** – Vendors of gravel and sand suffered losses when a canal used for transportation was blocked. The Court of Appeal ruled that the loss of business earnings constituted particular damage and was therefore actionable.

2. **Gravesham Borough Council v British Railways Board (1978)** – Local authorities sought an injunction against service reductions on ferry routes critical for workers. While the claims ultimately failed due to insufficient impact, the Court confirmed that pure economic loss was actionable in public nuisance cases.

3. **Colour Quest Ltd v Total Downstream UK (Buncefield Explosion, 2005)** – Businesses affected by an explosion sued for losses, including those outside the immediate vicinity. The Court rejected the argument that economic loss had to be tied to proprietary rights, affirming that the sufficiency of the causative link was the determining factor.

4. **Tate** & **Lyle Industries Ltd v Greater London Council (1983)** – The construction of adjacent terminals caused silting, obstructing a sugar jetty. Despite lacking a proprietary right in the riverbed, the claimant successfully recovered economic losses for additional dredging costs under public nuisance.

5. **Sea Empress Oil Spill Litigation (2002–2004)** – Claims arose following an oil spill, with affected parties arguing for compensation based on public nuisance. The courts reinforced the principle that pure economic loss is recoverable in such cases.

The recoverability of pure economic loss in public nuisance claims remains a well-established principle in English law. Case law consistently supports the notion that financial losses resulting from public nuisances—particularly those affecting businesses due to obstructions or environmental harm—are actionable. Courts have rejected attempts to limit such claims strictly to property rights, instead focusing on the sufficiency of causation. As environmental disasters and large-scale disruptions continue to occur, public nuisance remains a vital legal mechanism for securing economic redress.

Following the vessel's grounding, numerous claims for compensation related to pollution damage were filed against multiple parties, including the 1971 Fund, the shipowners' Protection & Indemnity (P&I) Club (Skuld), and the vessel owners. The owners secured a decree under the Merchant Shipping Act 1995 to limit their liability to claimants. Most pollution claimants received compensation from the 1971 Fund and the P&I Club, collectively forming the First Claimants in the legal proceedings. However, several claimants who had not received compensation from either entity were categorized as the Second Claimants. The 1971 Fund itself became the Third Claimant, while the P&I Club was the Fourth Claimant.

The 1971 Fund pursued claims against the Milford Haven Port Authority (MHPA) in two capacities: first, as an assignee of the First and Second Claimants, and second, on its own behalf. Initially, the claim was framed solely on the grounds of negligence and statutory breach, alleging that MHPA failed in its common law duty of care and statutory obligations. This implied that the damages sought were directly caused by MHPA's negligence or statutory breaches and were legally foreseeable. However, a significant issue arose as many claims involved pure economic loss, particularly those related to hotel, tourism, and fisheries industries.

To address this challenge, the 1971 Fund asserted a direct claim, arguing that MHPA had a duty of care to prevent pollution damage affecting individuals eligible for compensation from the Fund. This novel argument contended that marine oil polluters had a special proximity relationship with the Fund, justifying a duty of care that would enable the Fund to recover amounts paid to claimants unable to claim independently due to the legal limitations on pure economic loss recovery.

Following a change in legal representation, the Fund sought to amend its claim to include public nuisance as an additional cause of action, covering pure economic loss claims. However, the limitation period had expired, necessitating an application under CPR part 17.4.2, which required the amendment to arise from the same facts as the original claim. MHPA opposed the amendment on multiple grounds, including the argument that claims for pure economic loss were legally unviable, even under public nuisance.

MHPA's position relied on historical case law, including ***Iveson v Moore*** (1699), asserting that many First and Second Claimants' claims, especially those dependent on fisheries and tourism, were too remote for recovery. MHPA referenced the Court's rejection of a similar argument in ***Gravesham Borough Council v British Railways Board*** (1978), which involved business interference claims.

The application was heard by ***Justice Aikens in Mitchell*** & ***Others v Milford Haven Port Authority*** (2003), where he dismissed MHPA's objections, ruling that no legal principle rendered claims for pure economic loss irrecoverable under public nuisance. He analyzed various claims, categorized into fourteen groups, ranging from clean-up costs and property damage to lost tourism revenue and fisheries-related losses. Examples included a shellfish processor's losses due to a fishing ban and a hotel owner's reduced bookings following a decline in tourism.

MHPA argued that claims in categories related to tourism and fisheries-dependent businesses were purely economic and thus legally indefensible under public nuisance. They contrasted these with more direct claims, such as clean-up costs, property damage, and oil contamination losses. However, the court rejected this argument, emphasizing that public nuisance claims depend on the directness of the causal connection rather than the type of loss.

Aikens J highlighted ***Benjamin v Storr*** (1874), a precedent involving economic loss from public nuisance, where a coffeehouse owner successfully claimed for business losses caused by obstructive and unsanitary auction house operations. The ruling clarified that the core issue in public nuisance is whether the loss is sufficiently direct, assessed on a case-by-case basis. Applying this reasoning, a claim by a hotelier overlooking an oiled beach was deemed directly linked to the pollution, whereas a claim from a distant hotelier whose guests canceled due to the incident faced causation difficulties.

The amendments were ultimately allowed, and the dispute was settled through mediation in 2004. MHPA agreed to pay €20 million against the €31.24 million paid out by the Fund. While physical loss and clean-up claims constituted the majority, the public nuisance framework helped mitigate quantum disputes. Since the 1971 Fund had already assessed the direct connection between claimants' losses and the pollution, MHPA's scope to challenge compensation amounts was limited.

A relevant precedent supporting the Fund's position was ***Alagrete Shipping Inc. v International Oil Pollution Fund*** (2003), where a whelk processor's claim was denied due to lack of proximity. Chadwick LJ upheld the Fund's decision, affirming that its expertise in oil pollution compensation claims carried significant weight in assessing causation.

The case also underscored the procedural advantages of public nuisance claims. Unlike negligence claims, where plaintiffs must prove duty and breach, public nuisance shifts the burden onto defendants once the nuisance is established. This principle was evident in ***Southport Corporation v Esso Petroleum Co Ltd*** (1954), where an oil spill was deemed a public nuisance, and the defendants had to justify their actions. The ruling illustrated that public nuisance offers a more claimant-friendly burden of proof, reinforcing its strategic use in pollution-related litigation.

The shipowners argued that once the vessel had run aground on the sea wall, the subsequent release of oil was a necessary action taken by the master to preserve the ship. However, Denning LJ ruled that in a negligence claim, Southport Corporation would need to prove that the vessel ended up on the wall due to negligence. In contrast, in a public nuisance claim, the burden shifted to the vessel to demonstrate that the oil spill and all preceding circumstances were an unavoidable necessity. He stated:

"*Applying these principles, I conclude that the defendants can only avoid liability if they prove that the oil discharge was an unavoidable necessity—meaning a necessity that arose entirely without their fault. In other words, they must establish that no negligence on their part contributed to it." Based on the presented evidence, he found that the defendants failed to meet this burden.*

Morris LJ, while disagreeing with the final decision, concurred with the analysis of the burden of proof in a public nuisance context. However, he did not believe the case should be classified as such, given the plaintiffs' stance at trial. He noted that had the plaintiffs merely alleged deliberate oil discharge near the shore, shifting the burden of proof onto the defendants to justify their actions, the case may have unfolded differently. Instead, the plaintiffs outlined their claims and attempted to substantiate them.

The House of Lords ultimately overturned the Court of Appeal's decision. They held that the plaintiffs' claims were solely based on negligence allegations against the master, making the shipowners vicariously liable. As a result, the defendants were not required to refute any alternative allegations, such as the vessel's unseaworthiness, as these had not been raised in the pleadings or trial. The issue of public nuisance was not formally considered, though Lord Radcliffe remarked:

"*Regarding nuisance, I concur with Denning LJ that the appellants were not responsible for a private nuisance in the usual sense. While their actions might have constituted a public nuisance that caused specific harm to the respondents, it appears conceded that a defense to such a claim would be proving that the oil discharge was reasonably necessary to prevent loss of life—unless the appellants' own negligence had created that risk. Consequently, the core issue again revolves around negligence.*"

Establishing liability in public nuisance remains complex. Courts have varied in their assessments based on the specific allegations in each case. The approach taken in highway obstruction cases illustrates these differences clearly.

In ***Farrell v. John Mowlem*** & ***Co***, a claimant tripped over a pipe laid across a pavement during construction work. Devlin J held the defendants liable for public nuisance, rejecting the argument that negligence was required. He asserted:

"*Negligence need not be proven. If someone actively creates a nuisance, they are responsible for its consequences, regardless of whether they acted negligently. If the nuisance exists on their property, further questions arise regarding their knowledge and responsibility to remove it. However, if they are the direct cause, they cannot argue that they took care or failed to foresee the harm.*"

Conversely, in ***Maitland v. Raisbeck***, where a lorry was driven without lights during a blackout and caused a collision, the Court of Appeal ruled that merely creating an obstruction did not constitute public nuisance unless negligence was involved. Lord Greene MR explained:

"*Using a highway entails exercising due care, but if an obstruction arises through no fault of the user, it does not automatically constitute a nuisance. . Liability depends on whether the obstruction remains unaddressed for an unreasonable duration or under unreasonable conditions. Each case must be assessed on its facts. Otherwise, all drivers would effectively be insurers against unforeseen mechanical failures.*"

A similar issue arose in ***Dymond v. Pearce***, where a lorry was parked on a highway overnight and later caused an accident. Although the claim was ultimately dismissed due to the claimant's own negligence, the Court of Appeal suggested that liability for nuisance might arise even without negligence. Sachs LJ noted:

"*It is unnecessary to determine whether a lorry left without negligence, but later obscured by unexpected weather changes, could still constitute a nuisance. If so, liability might fall on the person responsible for creating the nuisance rather than solely on other road users.*"

Stephenson LJ expressed a similar view, stating that even if the lorry driver was not negligent, the mere act of obstructing the highway could still be a public nuisance unless justified by a legal right.

These cases suggest that liability depends on whether the obstruction was deliberately caused. If a person intentionally blocks a roadway or places hazards, liability may arise regardless of negligence. Conversely, if the obstruction results from an unforeseen event—such as a breakdown—negligence becomes a factor.

Denning LJ in Morton v. Wheeler highlighted the connection between negligence and public nuisance, emphasizing that:

"*Public nuisance claims focus on the state of affairs rather than the defendant's conduct. If the situation presents a danger to the public, it constitutes a nuisance, and the person responsible is liable unless they can justify or excuse it.*"

The inconsistency in case law complicates the principles governing public nuisance claims. Spencer summarized the uncertainty:

"*It remains unclear what level of fault, if any, a plaintiff must establish. Must the defendant have acted intentionally or negligently, or does liability arise merely from creating the nuisance? Courts have provided conflicting answers, particularly in highway cases. Some rulings impose liability even without negligence, while others require fault. The legal position appears to depend on the source of the nuisance and its impact on others.*"

The decision in ***The Wagon Mound*** (No. 2) further added to these complexities. In that case, the defendant's ship leaked oil into Sydney Harbour, which later caught fire and caused extensive damage. The Privy Council ruled that foreseeability was crucial in determining liability, rejecting the lower court's approach that had disregarded it. Lord Reid emphasized that, unlike some forms of nuisance where strict liability applies, cases involving hazards in public spaces require an element of foreseeability.

Ultimately, nuisance law covers a wide range of tortious conduct, and negligence is not always required. However, foreseeability and fault often play a role in determining liability, particularly when assessing hazards in public spaces. The evolving case law continues to shape the principles governing public nuisance claims.

It is inconsistent to differentiate between various nuisance cases by requiring foreseeability as a factor in determining damages in some instances while considering it necessary for liability in others. The logical approach is to either treat foreseeability as a requisite element in all nuisance cases or in none. In the view of their Lordships, the parallels between nuisance and other torts governed by ***The Wagon Mound*** (No. 1) outweigh any distinctions, leading them to conclude that the appealed judgment is flawed. The fact that the respondents' vessels suffered direct injury from the nuisance is insufficient if the harm was not foreseeable in the relevant sense.

Lord Reid's approach in The Wagon Mound, which linked foreseeability of harm with fault, has been criticized for unnecessarily intertwining the torts of negligence and nuisance. In 1985, Abecassis argued that despite The Wagon Mound, there is no binding precedent suggesting a shift in the traditional foundation of nuisance. He asserted that Lord Reid's remarks should either be regarded as obiter dicta, applicable only to the specific context of establishing foreseeability in nuisance, or as limited to highway-related cases requiring proof of negligence for liability. Courts have shown no inclination to merge negligence and nuisance into a unified doctrine, implying that serious pollution incidents—whether accidental or not—may still warrant claims for public nuisance damages without requiring proof of negligence.

Nevertheless, modern legal trends increasingly reject rigid distinctions between negligence and nuisance, particularly in private nuisance cases. In ***Delaware Mansions v. Westminster City Council*** (2001), concerning tree root encroachment, the House of Lords stated that distinguishing between nuisance and negligence was less significant than ensuring fairness and justice in neighborly duties. If strict liability originated from private nuisance and public nuisance evolved from it, then recent shifts in private nuisance law suggest that Lord Reid's perspective was insightful.

Abecassis' argument may also overlook that in criminal public nuisance cases, the required mental state includes knowledge or foresight of the nuisance resulting from the activity. In ***R v. Rimmington and R v. Goldstein***, the House of Lords considered the necessary mental element when a defendant sent salt through the mail as a joke, which inadvertently caused an anthrax scare. Lord Bingham clarified that a defendant is accountable for a nuisance if they knew or ought to have known (given the available means of knowledge) that their actions would lead to public nuisance. This principle was affirmed in cases like R v. Shorrock, where the defendant was responsible for a nuisance he should have foreseen.

A pragmatic resolution to this complex issue is suggested by Professor Buckley, who recommended focusing on the burden of proof rather than attempting to define fault strictly. Following Denning LJ's reasoning in ***Southport Corporation v. Esso***, the defendant should bear the burden of justifying or excusing their actions once a nuisance is established and their role in causing it is proven. Different scenarios may warrant different approaches. For instance, if a vessel discharges oil at sea, it should be required to explain its actions.

Similarly, if a tanker wrecks and spills its cargo, its owners should bear the burden of explanation and defense. However, where a third party, such as a port authority, is alleged to have indirectly caused a nuisance through negligence, the claimant must prove fault in the usual manner.

ESSENTIAL ELEMENTS OF PUBLIC NUISANCE

The most concise formulation of public nuisance elements remains that of Brett J in Benjamin v. Storr (1874). A claimant must establish three key factors beyond the existence of the public nuisance itself:

1. A particular injury suffered beyond what is experienced by the general public.
2. The injury must be direct, not merely consequential.
3. The harm must be substantial, not fleeting or insignificant.

Aikens J in Mitchell & Others v. Milford Haven Port Authority reaffirmed these principles, specifying that claimants must prove:

1. The existence of a public nuisance.
2. Particular injury beyond that suffered by the general public.
3. Direct, rather than consequential, damage.
4. Injury of substantial character.

A potential fifth requirement arises from The Wagon Mound (No. 2), suggesting that the specific damage must have been reasonably foreseeable. However, this might be better interpreted as an extension of the requirement that harm be direct rather than consequential.

ESTABLISHING PUBLIC NUISANCE

A claimant must first demonstrate that the event or conditions constitute a public nuisance, meaning the act or omission either unlawfully affects public rights or creates a widespread hazard. According to Attorney General v. PYA Quarries Ltd (1957), a nuisance qualifies as "public" if it significantly disrupts the reasonable comfort and convenience of a class of the public. The threshold for determining whether a sufficient number of people are affected is a factual question in each case.

Denning LJ emphasized that public nuisance should be assessed based on the extent and indiscriminate impact of the interference rather than the number of individuals affected. For example, obstruction of a public highway affects everyone entitled to use it, regardless of how many people actually do.

In pollution cases like the Sea Empress spill or the Buncefield explosion, proving public nuisance is relatively straightforward. Fisheries, navigation, and shore access may all be disrupted, causing widespread impact. Even in smaller incidents, public nuisance can be established if there is significant interference with public rights, such as the silting of navigation routes in Jan de Nul (UK) Ltd v. NV Royal Belge.

The courts have upheld that interference with public rights—whether highways or waterways—constitutes public nuisance if substantial. In Jan de Nul, dredging operations led to silting, impacting navigation. The court ruled that interference with a public right does not require proof that many people were affected; rather, it suffices that a public right was significantly impeded.

Public nuisance is a legal concept that arises when an act or condition causes harm to the general public, rather than affecting just a few individuals. A key element of this offense is that the act must impact a broader community or a significant portion of the public. As articulated by Lord Bingham in ***R. v Rimmington; R. v Goldstein***, public nuisance entails a common injury suffered by the public due to interference with their collective rights. Similarly, in ***Colour Quest Ltd v Total Downstream UK***, Justice David Steel emphasized that public nuisance involves simultaneous interference with the rights of a substantial segment of the community.

Typical examples of public nuisance include the release of smoke or fumes affecting a village or neighborhood or excessive noise disrupting a local area. Such occurrences impact the public collectively. When examined closely, public nuisance often comprises multiple private nuisances happening simultaneously. This perspective was reinforced in ***Attorney General v PYA Quarries Ltd*** (1957), where the court issued an injunction against quarry operations that caused flying splinters, dust, and vibrations, affecting nearby residents. The court acknowledged that while private individuals might experience specific inconveniences, the cumulative effect on the community as a whole constituted a public nuisance.

Justice Romer, in the same case, noted that while some public nuisances, such as river pollution, can be demonstrated without individual testimony, most cases rely on the collective impact on the affected community. Evidence from multiple residents helped illustrate how repeated quarry explosions disturbed the neighborhood. Justice Steel reiterated this point in ***Colour Quest Ltd v Total Downstream UK,*** explaining that while private property rights differ from public rights, an unlawful interference affecting multiple individuals concurrently qualifies as a public nuisance.

The scale of the affected area plays a crucial role in determining whether an incident qualifies as a public nuisance. For example, in Southport Corporation v Esso Petroleum Co Ltd, an oil spill extended over a considerable distance, leading the Court of Appeal to assume it constituted a public nuisance. However, smaller pollution incidents affecting only a few individuals may not meet this threshold. A minor oil deposit washing up on a secluded private beach may not constitute a public nuisance, whereas pollution in a widely used harbor or marina likely would.

Justice Denning in ***Attorney General v PYA Quarries Ltd*** suggested that when only a few property owners are affected, they should seek private legal remedies rather than expect community-wide legal intervention. Each case requires a factual assessment to determine whether the impact is widespread enough.

For instance, a Canadian court ruled that noise from a speedway track, disturbing seven families in a rural area, constituted a public nuisance due to the lack of other disturbances in the vicinity.

However, there are instances where disturbances, though significant, do not qualify as public nuisances because too few people are affected. ***Lloyd's Case*** (1802) rejected a claim where a noisy tin-man's business only disrupted three attorneys in Clifford's Inn. The court held that such limited impact did not amount to a public nuisance.

The question of whether a claimant has suffered particular damage beyond what the general public endures is critical in public nuisance cases. The legal principle, dating back to ***Sowthall v Dagger*** (1535), establishes that a person who suffers harm exceeding what others experience has grounds for legal action. An example given in legal history is that of a person falling into an unlawfully dug ditch, sustaining injuries greater than the general inconvenience caused by the obstruction.

This principle has been applied in various cases, such as ***Benjamin v Storr*** (1874), where Justice Brett stated that a claimant must demonstrate unique harm beyond general public inconvenience. Conversely, cases like ***Hubert v Groves and Winterbottom v Lord Derby*** dismissed claims where businesses suffered losses due to road obstructions but could not prove damage distinct from that endured by others.

The test for particular damage is generally straightforward. If an individual experiences physical harm from industrial pollution or financial loss due to public nuisance, they may have a valid claim. In ***Colour Quest Ltd v Total Downstream UK***, the court recognized that loss of business due to oil pollution, even indirectly caused by reputational damage, constituted recoverable harm.

However, legal interpretations on particular damage vary. For instance, in ***Martin v London County Council***, the court rejected a shop owner's claim of lost business due to a street closure, ruling that the inconvenience affected all traders equally. By contrast, in the Australian case of ***Walsh v Ervin***, a farmer's prolonged inability to access a highway due to an obstruction was deemed sufficient to support a public nuisance claim.

The assessment of whether particular damage has been suffered is largely fact-dependent. In some cases, a group of affected individuals may experience similar losses, making it difficult to establish unique harm. However, businesses such as fisheries, hotels, and restaurants suffering financial losses due to environmental pollution often have stronger claims.

Ultimately, public nuisance claims hinge on the scale of the impact on the community and whether specific individuals or businesses suffer harm distinct from the general public inconvenience. Cases involving oil spills, industrial pollution, and infrastructure obstructions illustrate the nuanced application of these legal principles.