

**THE RIGHT TO TRIAL BY JURY IN ENVIRONMENTAL COST-  
RECOVERY AND CONTRIBUTION ACTIONS:  
UNITED STATES V. ENGLAND**

Jonathan L. Mayes<sup>1</sup>

The United States and England continue to limit the right to trial by jury. Courts have heavily restricted this right in environmental cost-recovery and contribution actions – a right that is mandated by the Seventh Amendment of the U.S. Constitution.<sup>2</sup> By limiting this constitutional right, courts have moved the jury trial – the last vestige of true democracy – to the outer fringes of the judicial process on the verge of obscurity. Citizens cannot sit idly by as courts whittle away at this great “bulwark of our liberties” – the trial by jury.<sup>3</sup>

Some of the greatest countries in history – Ancient Greece, Ancient Rome, England and the United States – included the jury trial in the construction of their democratic structures.<sup>4</sup> The strength of these nations and their use of the jury system is

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<sup>1</sup> J.D. candidate, 2005, Indiana University School of Law – Indianapolis; B.S., 2002, Indiana University. I would like to thank my family for their never failing love, support, and testimonies of the grace of God. I am a lesser man without you. Above all else, *solo deo gloria*.

<sup>2</sup> Christopher G. Smith, *The Right to Trial by Jury in CERCLA Cost-Recovery and Contribution Actions*, 25 ENVTL. L. REP. 10185 (1995): “Nearly all parties seeking to obtain trial by jury in a cost-recovery or contribution action under the Comprehensive Environment Response, Compensation, and Liability Act (CERCLA) have failed.” *Id.*

<sup>3</sup> WILLIAM BLACKSTONE, BLACKSTONE’S COMMENTARIES ON THE LAWS OF ENGLAND VOL. III p. 275 (Wayne Morrison, ed. 2001).

<sup>4</sup> LLOYD E. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY 1-114 (2nd ed. 1973); JOHN PROFFATT, A TREATISE ON TRIAL BY JURY §§ 4-40 (1876); SAMUEL W. MCCART, TRIAL BY JURY: A COMPLETE GUIDE TO THE JURY SYSTEM 1-20 (4th ed. 1970); CHARLES W. JOINER, CIVIL JUSTICE AND THE JURY 39-63 (1962). See generally MAXIMUS A. LESSER, THE HISTORICAL DEVELOPMENT OF THE JURY SYSTEM (1894); WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY (1875). While many scholars debate the origin of the jury system (LESSER, *supra*, at 6-9; FORSYTH, *supra*, at 1-5), the earliest record of a jury system appears to be the dikasteries of Athens. LESSER, *supra*, at 14-28; PROFFATT, *supra*, § 6. There may have been earlier trials of the Greek gods as set forth in Aeschylus’ play *Eumenides* where the patron

not coincidental. Jurist from around the world have waxed eloquent in describing the importance of the jury trial. Sir William Blackstone<sup>5</sup> said,

[The jury trial's] establishment however and use, in this island, of what date soever [sic] it be, though for a time greatly impaired and shaken by the introduction of the Norman trial by battel [sic], was always so highly esteemed and valued by the people, that no conquest, no change of government, could ever prevail to abolish it.<sup>6</sup>

Justice Joseph Story<sup>7</sup> remarked, "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy."<sup>8</sup> Alexis de Tocqueville also observed this romance with the jury system as he considered its importance in both England and America:

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goddess of wisdom is credited with the founding of the jury. MOORE, *supra*, at 1. However, the dikasteries appear to be the most tangible record of the earliest jury. *Id.* The Athenians would select panels of 500 citizens who had taken a solemn oath to judge the law and try facts in trials presided over by a magistrate who submitted the question at issue before the accused, the accuser, and their witnesses gave statements. *Id.* Around 450 B.C., Decemvirs introduced the Romans to the Athenian tradition of jury trials when he traveled to Athens to investigate the laws of Solon. MOORE, *supra*, at 2-3. The Roman system was similar to the Greek system in selection of the members and compensation but differed in the separation of law and fact, due process requirements, and the jury's indirect influence on the judgment. LESSER, *supra*, at 44. The Romans incorporated the practice of separating questions of law and fact into the Justinian Code. *Id.* at 45. The Roman Empire fell removing Roman rule from England and allowing the Celtics and others to rule various parts until the Anglo-Saxons triumphed wiping out the remnants of the Roman rule. *Id.* at 59. The Saxons continued the development of the jury trial. *Id.* at 74-86. However, in 1066 A.D., William the Conqueror defeated the Anglo-Saxons, but did not bring radical change to the institution of the jury as the Saxons did in their triumph. *Id.* at 89. The reign of William brought with it the foundation of English common law, which the U.S. adopted to a vast extent in the late eighteenth century. *Id.* at 87.

<sup>5</sup> Blackstone was both a judge and a jurist, but it is his works off the bench that has given him the most recognized name in Anglo-American jurisprudence. BIOGRAPHICAL DICTIONARY OF THE COMMON LAW 57 (A.W.B. Simpson ed., Butterworths 1984) [*hereinafter* Simpson]. Blackstone received his bachelor and doctorate degrees from Oxford and taught at Oxford. *Id.* The searching of "unreadable tomes" of legal history "left an indelible and distasteful mark on Blackstone and helped to persuade him of the need for a readable treatise on English law." *Id.* at 58. His four volumes of *The Commentaries on the Laws of England* provided readable treatises on English law and won him international fame. *Id.* at 60. Blackstone finished his career without accomplishing much in the House of Commons or on the bench. *Id.* at 60-61. He sat on the bench for the Court of Common Pleas from 1770-1780 where his tenure is described as "not distinguished." *Id.* at 59. Sir William Blackstone died in 1780 at age 57. Simpson, *supra* at 60.

<sup>6</sup> WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND III p. 349 (1768).

<sup>7</sup> Justice Story graduated second in his class from Harvard University in 1798 at the age of nineteen. [HTTP://www.law.umkc.edu/faculty/projects/ftrials/amistad/AMI\\_BSTO.HTM](http://www.law.umkc.edu/faculty/projects/ftrials/amistad/AMI_BSTO.HTM) (last visited November 15, 2003). Upon graduation, he served the state of Massachusetts in the legislature, Congress, and as Speaker of the Massachusetts House of Representatives. *Id.* At age 32, he was appointed by James Madison to the United States Supreme Court. *Id.* Oliver Wendall Holmes said of Story: "[He has] done more than any other English-speaking man in this century to make the law luminous and easy to understand." *Id.*

<sup>8</sup> *Parsons v. Bedford*, 28 U.S. 433, 446 (1830) (Story, J.).

I do not know whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial to those who decide the litigation; and I look upon it as one of the most efficacious means for the education of people which society can employ.<sup>9</sup>

Yet these warm remarks lie in stark contrast to the relentless assault on the storied jury systems in the United States and England.<sup>10</sup>

Jury trials have fallen on hard times.<sup>11</sup> Though England will not likely abolish the jury, English courts have drastically limited their use.<sup>12</sup> In contrast, U.S. courts have taken a much more liberal approach in expanding the use of civil juries,<sup>13</sup> but they have almost uniformly denied the right to trial by jury in contribution and cost-recovery actions under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (“CERCLA”).<sup>14</sup>

This Note addresses one main issue: whether or not a right to trial by jury under CERCLA cost-recovery and contribution actions, and their English counterpart(s), exists.

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<sup>9</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* I 290 (Rev. ed. 1899). De Tocqueville also noted the educational and historical importance of the jury trial:

When the English adopted trial by jury they were a semi-barbarous people; they are become, in course of time, one of the most enlightened nations of the earth; and their attachment to this institution seems to have increased with their increasing cultivation. They soon spread beyond their insular boundaries to every corner of the habitable globe; some have formed colonies, others, independent states; the mother-country has maintained its monarchical constitution; many of its offspring have founded powerful republics; but wherever the English have been they have boasted of the privilege of trial by jury. They have established it, or hastened to re-establish it, in all their settlements. A judicial institution which obtains the suffrages of a great people for so long a series of ages, which is zealously renewed at every epoch of civilization, in all the climates of the earth and under every form of human government, cannot be contrary to the spirit of justice.

*Id.* at 286.

<sup>10</sup> See generally PAULA DiPERNA, *JURIES ON TRIAL: FACES OF AMERICAN JUSTICE* (1984); ELLEN S. SWARD, *THE DECLINE OF THE CIVIL JURY* (2001).

<sup>11</sup> R.M. Jackson, *The Incidence of Jury Trial During the Past Century*, 1 *MODERN L. REV.* 132 (1937). “A glance at the *Index to Legal Periodicals* shows that attacks upon and defence [sic] of the jury system are frequent themes for legal writers.” *Id.* Jackson’s article presents empirical data of the decline of jury trials in England. See also DiPERNA and SWARD and *supra* text accompanying note 9.

<sup>12</sup> S.H. BAILEY *et al*, SMITH, BAILEY AND GUNN *ON THE MODERN ENGLISH LEGAL SYSTEM* 1035-1039 (4th ed. 2002)

<sup>13</sup> Montgomery Kersten, Note, *Preserving the Right to Jury Trial in Complex Civil Cases*, 32 *STAN. L. REV.* 99 (1979): “While the Court has *extended* the seventh amendment into areas it did not cover in 1791, the Court simply has not indicated a willingness to cut back on its scope.” *Id.* at 103.

<sup>14</sup> See *infra* text accompanying notes 100-105.

Past scholarly publications have discussed closely related issues offering helpful legal analysis, but their historical analysis of cost-recovery and contribution actions is somewhat abbreviated.<sup>15</sup> This Note fills the void providing a much needed, in-depth historical perspective, for it is the history of environmental laws that ultimately determines whether or not a Seventh Amendment right to trial by jury attaches.<sup>16</sup> Furthermore, the U.S. Supreme Court has yet to address the issue leaving the law even more unsettled in an increasingly important area of law.<sup>17</sup> The United States and England continue to conduct jury trials, but their developments of the doctrine greatly contrast.<sup>18</sup> Nevertheless, the analysis of the U.S. doctrine depends on the history of English law.

Comparing United States and English law accomplishes two objectives: first, it reveals the origins of United States' jury trial doctrine since the United States adopted English common law doctrine at the time of the drafting of the U.S. Constitution,<sup>19</sup> and, second, it tracks both countries' use of the jury trial in environmental-response actions. As the discussion will reveal, the analysis in the United States inevitably requires understanding of the history of English law, and the discussion of English law provides a basis to understand America's adoption of the English theories of law.<sup>20</sup>

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<sup>15</sup>See Smith, *supra* note 2; David Elbaum, *Judicial Review of Natural Resource Damage Assessments Under CERCLA: Implications of the Right to Trial by Jury*, 70 N.Y.U. L. REV. 352 (1995).

<sup>16</sup>*Infra* text accompanying notes 89-92.

<sup>17</sup> Smith, *supra* note 2, text accompanying n.3. David M. Driesen, *Thirty Years if International Environmental Law: A Retrospective and Plea for Reinvigoration*, 30 SYRACUSE J. INT'L L. & COM. 353 (2003). "[S]cholars and students began to recognize that international environmental law had become an important field . . ." *Id.* at 353. See generally Susan Hedman, *Expressive Functions of Criminal Sanctions in Environmental Law*, 50 GEO. WASH. L. REV. 889 (1991) (traces the emerging societal importance of prosecution of environmental crimes).

<sup>18</sup> PATRICK DEVLIN, TRIAL BY JURY 31 (3rd ed. 1966).

<sup>19</sup> *Dimick v. Schiedt*, 293 U.S. 474, 487 (1935): "[H]ere we are dealing with a constitutional provision which has in effect adopted the rules of the common law in respect of trial by jury as these rules existed in 1791." *Id.* Justice Story referred to the common law of England as "the grand reservoir of all our jurisprudence." *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812).

<sup>20</sup> From a look at present and past governments, England and its sister governments – including the U.S. – appear to remain the lone nations with jury trials available in judicial proceedings. MOORE, *supra* note 4, at 115-120. While many countries such as France, Germany, Belgium, and several Scandinavian countries

Part I will discuss the American response to the issue by exploring the origins of U.S. environmental law, the purpose of CERCLA, followed by application of canons of statutory interpretation to germane CERCLA statutes, examining the congressional record, and analysis of U.S. court decisions. Plaintiffs face a myriad of options through statutory or common-law actions when pursuing recompense for environmental actions,<sup>21</sup> but this Note focuses on claims under CERCLA<sup>22</sup> and its English counterpart(s). Specifically, the discussion will focus on sections 107 and 113 of CERCLA.<sup>23</sup> Courts have incorrectly analogized CERCLA actions to restitution actions instead of the proper eighteenth-century analogs – nuisance or trespass.

Part II discusses the English response to the presented issue by discovering the origins of the English environmental laws, finding the counterpart to CERCLA cost-recovery and contribution actions, and then examining trial by jury in the related English environmental actions. English common law dating back to before the eighteenth century provided the theoretical foundation for modern environmental acts. Proper analysis of these common law actions reveal the correct eighteenth-century analog to U.S. environmental actions, but this section continues to follow the environmental actions, and the use of juries in such actions, into the present.

Part III explores the implications of the trial by jury in environmental cost-recovery and contribution actions. Many scholars question the jury system's effectiveness in one way or another even though jury trials remain a common thread in

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have adopted a jury system at some point in their history, they all have failed to certain degrees and several of these countries have replaced the jury with a “lay assessors” system, quite different from the jury system. *Id.* However, the jury has survived in Scotland and continues to thrive in Ireland where many civil trials go before juries. *Id.* Even during the height of the use of juries, only a handful of countries retained the system and no continental country introduced the jury into their judicial system. *Id.*

<sup>21</sup> Plaintiffs may choose between common law nuisance or trespass claims or they may bring actions based in statutory law such as CERCLA. *Infra* text accompanying notes 29-45.

<sup>22</sup> Pub. L. No. 96-510, 94 Stat. 2767 (codified as 42 U.S.C. §§ 9601- 9675 as amended)

<sup>23</sup> 42 U.S.C. §§ 9607, 9613.

the legal fabric of the American and English legal systems.<sup>24</sup> The focus of the criticism attempts to explain that juries can no longer handle the now increasingly difficult task of sifting through esoteric legal terms and complex legal theories.<sup>25</sup> Critics argue theories of efficiency plead for a trial by a judge rather than a jury of peers.<sup>26</sup> However, courts can easily mitigate or eliminate these concerns.

## I. THE UNITED STATES

### *A Brief History of U.S. Environmental Laws*

Modern environmental law began to develop during the post-World War II decades of the 1950's and 1960's,<sup>27</sup> but common law actions, providing avenues of relief for environmental harm, existed before then. Common law actions, such as public nuisance and trespass claims inherited from the English courts of law, created the basis for legislative act that in turn laid the foundation for CERCLA<sup>28</sup>

The United States recognized the law of nuisance in the eighteenth century as an action in courts of law or equity<sup>29</sup> with nuisance law being a vehicle for recovery in

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<sup>24</sup> Jackson, *supra* note 11, at 132.

<sup>25</sup> Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 444 n.5 (1997)

<sup>26</sup> *Id.*

<sup>27</sup> MATTHEW BENDER, TREATISE ON ENVIRONMENTAL LAW § 1.01 (2002). For an insightful study on the development of natural resources environmental law in the U.S., see Jan G. Laitos, *Legal Institutions and Pollution: Some Intersections Between Law and History*, 15 NAT. RESOURCES J. 423 (1975).

<sup>28</sup> G. Nelson Smith, III, *Nuisance and Trespass Claims in Environmental Litigation: Legislative Inaction and Common Law Confusion*, 36 SANTA CLARA L. REV. 39 (1995).

<sup>29</sup> William Draper Lewis, *Injunctions Against Nuisances and the Rule Requiring the Plaintiff to Establish His Right at Law*, 56 U. PA. L. REV. 289 (1908); Note, *Trial by Jury in Suits to Enjoin Nuisances*, 25 COLUM. L.REV. 641 (1925); *Burrows v. Pixley*, 1 Root 362 (Conn. 1792) (a nuisance action lies when someone alters a navigable waterway to the detriment of another); *Nichols v. Pixly*, 1 Root 129 (Conn. 1789) (no action for nuisance lies if a person constructing a dam received a license to do so). Early recognition by the States of Sir William Blackstone's *sic utere tuo* rule ("causing injury to someone's enjoyment of property creates a cause for recovery") can be found in *Hay v. Cohoes Co.*, 2 N.Y. 159 (N.Y. 1849) (property owners have a right to construct a canal on their property, but they are not allowed to blast rocks onto neighboring land). H. Marlow Green, *Common Law, Property Rights and the Environment: A*

environmental claims.<sup>30</sup> Courts defined public nuisance as “a wrong affecting an interest ‘common to the general public, rather than to one peculiar individual or several.’”<sup>31</sup> These early cases typically involved pollution of a water source,<sup>32</sup> blasting of rocks onto property,<sup>33</sup> or other general violations of a citizen’s right to the natural use and enjoyment of his own property.<sup>34</sup> Nuisance claims sounded in law when claimants pursued monetary damages and in equity when they pursued injunctive relief.<sup>35</sup>

Similarly, plaintiffs brought trespass actions to recoup damages to land, an action distinct from nuisance. An action in trespass allowed landowners to recover for invasions which interfered with their right of exclusive possession of the land as a direct result from the acts of the defendant.<sup>36</sup> Nuisance involves merely interference with use and enjoyment.<sup>37</sup> Early cases in American history dealt with infringement caused by misplaced water flow,<sup>38</sup> damming of water,<sup>39</sup> and other forms of launching materials onto

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*Comparative Analysis of Historical Developments in the United States and England and a Model for the Future*, 30 CORNELL INT’L L. J. 541, 546-554 (1997).

<sup>30</sup> Susan Verdicchio, *Environmental Restoration Orders*, 12 B.C. ENVTL. AFF. L. REV. 171, 188 (1985); “The deepest doctrinal roots of modern environmental law are found in principles of nuisance. . . . Nuisance theory and case law is the common law backbone of modern environmental and energy law.” WARREN FREEDMAN, *HAZARDOUS WASTE LIABILITY* 120-121 (1992).

<sup>31</sup> L. Mark Walker & Dale E. Cottingham, *An Abridged Primer on the Law of Public Nuisance*, 30 TULSA L. J. 355, 357 (1994) citing WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 88, at 585 (4th ed. 1971).

<sup>32</sup> Walker, *supra* note 31, at 358.

<sup>33</sup> Green, *supra* note 29, at 548.

<sup>34</sup> *Id.*

<sup>35</sup> *N.A.A.C.P. v. A.A. Arms, Inc.*, 2003 WL 1049011 (E.D. N.Y. 2003):

It is well settled that nuisance claims seeking solely injunctive relief are equitable in nature. Cases and authorities cited by the defendant for the proposition that nuisance claims are historically legal are nuisance claims where money damages were sought in addition to injunctive relief or cases where the legal issue presented was not in actuality one of public nuisance. Plaintiff does not seek damages, but exclusively equitable relief.

*Id.* at 5 (citations omitted). See WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 220-22 (1765-69).

<sup>36</sup> WILLIAM L. PROSSER & W. PAGE KEETON, *THE LAW OF TORTS* 67 (5th ed. 1984).

<sup>37</sup> *Id.* at 70.

<sup>38</sup> *Id.* at 69.

<sup>39</sup> *Id.*

the land of another,<sup>40</sup> but later cases showed a trend towards allowing suit for environmental damages such as pollution caused by asphalt poisoning a pond<sup>41</sup> or projection of chemical compounds in gaseous or particulate form onto neighboring land.<sup>42</sup> The line separating nuisance actions from trespass actions when dealing with invisible gas or microscopic particles has become quite blurred.<sup>43</sup> Nevertheless, the truth remains that the common law ancestors of nuisance and trespass law produced the theoretical framework for modern environmental law.<sup>44</sup>

When common law actions failed to produce a solution to the growing problem of pollution, statutes such as CERCLA preempted nuisance and trespass actions.<sup>45</sup> The movement in the post-World War II era sprang from two separate purposes and groups: first, to conserve the creation around us and preserve it for posterity and, second, to protect the humans.<sup>46</sup> The first group began with the likes of President Theodore Roosevelt who sought to conserve the quality of life, natural resources, and the

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<sup>40</sup> *Id.* at 68.

<sup>41</sup> *Id.* at 71.

<sup>42</sup> PROSSER, *supra* note 36 at 71.

<sup>43</sup> *Id.*

<sup>44</sup> Smith, *supra* note 2, at 40: “Ironically, while the [current environmental law] statutes themselves are relatively new, they are based in the common law remedies of nuisance and trespass.”

<sup>45</sup> Verdicchio, *supra* note 30, at 183: “Before the enactment of state and federal environmental protection legislation, common law actions were the only vehicles for advancing environmental claims. Indeed, one of the reasons for enacting environmental laws was because private litigation was inadequate to protect the public interest inherent in natural resources.” *Id.* However, the actions of nuisance and trespass to land still may be used by plaintiffs in environmental damages cases. *See* Smith, III, *supra* note 28. There appears to be some dispute as to whether federal common law of nuisance exists. “In addition, even if this were an appropriate area for federal common law, any such common law has been preempted by the enactment of the RCRA and, more recently, [CERCLA].” *U.S. v. Price*, 523 F.Supp. 1055, 1069 (D.C. N.J., 1981), *aff’d* 688 F.2d 204 (3rd Cir. 1982). The court in *U.S. v. Argent Corp.*, 1983 WL 354 (D.N.M. 1983) held CERCLA did not preempt federal common law claims of nuisance because there was simply no federal common law nuisance theories. *Id.* However, that court failed to take notice of *Georgia v. Tennessee Copper Co.*, 205 U.S. 230 (1907), where the U.S. Supreme Court applied federal common law nuisance to a dispute between neighboring states. *Id.* *See also* *Missouri v. Illinois*, 200 U.S. 496 (1906). Furthermore, the Court in *Milwaukee v. Illinois*, 451 U.S. 304 (1981) recognized “new federal laws and new federal regulations may in time pre-empt the field of common law of nuisance” in holding that the Federal Water Pollution Control Act Amendments of 1972 pre-empted the federal common law of nuisance. *Id.* at 314.

<sup>46</sup> BENDER, *supra* note 27, § 1.01.

outdoors.<sup>47</sup> The second group primarily acted in the interests of public health.<sup>48</sup> The public became acutely aware of the risks involved in environmental harm as pollution of water sources, air pollution, and major oil spills began to raise public health concerns.<sup>49</sup> Necessity being the mother of invention, the legislature responded to the need for federal pollution control and enacted legislation beginning in 1956.<sup>50</sup> A plethora of environmental acts were passed during the 1960's and 1970's that covered solid waste,<sup>51</sup> air pollution,<sup>52</sup> toxic waste,<sup>53</sup> water pollution,<sup>54</sup> and established the Environmental Protection Agency ("EPA").<sup>55</sup> Then CERCLA arrived.

The purpose of CERCLA is quite clear: persons or entities that cause damage by releasing hazardous substances will pay for the clean up.<sup>56</sup> In expanding upon this view, courts have also interpreted the purpose:

[T]o encourage maximum care and responsibility in the handling of hazardous waste; to provide for rapid response to environmental emergencies; to encourage voluntary clean-up of hazardous waste spills; to encourage early reporting of violations of the statute; and to ensure that parties responsible for release of hazardous substances bear the costs of response and costs of damage to natural resources.<sup>57</sup>

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<sup>47</sup> *Id.* Bender refers to this camp as the "high-road environmentalists." *Id.*

<sup>48</sup> *Id.* Conversely, this camp was known as the "low-road environmentalists." *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> BENDER, *supra* note 27, § 1.01.

<sup>51</sup> 42 U.S.C. § 6901-6991 (Solid Waste Disposal Act of 1965).

<sup>52</sup> 42 U.S.C. § 7401 *et. seq.* (Clean Air Act revision in 1977).

<sup>53</sup> 15 U.S.C. § 2622 (Toxic Substance Control Act of 1976).

<sup>54</sup> 33 U.S.C. § 1367 (Clean Water Act revision of 1977).

<sup>55</sup> The EPA was established by President Richard M. Nixon in July of 1970 to consolidate the powers of the executive branch in regulation of environmental issues. *See Reorganization Plan No. 3 of 1970 at* <http://www.epa.gov/history/org/origins/reorg.htm> (last visited November 15, 2003).

<sup>56</sup> FREEDMAN, *supra* note 30, at 212-213; Lewis M. Barr, *CERCLA Made Simple: An Analysis of the Cases Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980*, 45 BUS. LAW. 923, 924-925 (1990).

<sup>57</sup> Barr, *supra* note 56, at 924 (citing *Chemical Waste Management v. Armstrong World Indus.*, 669 F.Supp. 1285, 1290 n.6 (E.D. Pa. 1987)). *See also* FREEDMAN *supra* note 30, at 120-121.

The Clean Air Act,<sup>58</sup> the Clean Water Act (“CWA”),<sup>59</sup> the Toxic Substances Control Act,<sup>60</sup> and the Resource Conservation and Recovery Act<sup>61</sup> designate toxic or hazardous substances, yet CERCLA has now become the “primary mechanism for governmental response actions” by offering a more comprehensive statutory coverage thereby eclipsing the other acts and other regulatory schemes.<sup>62</sup>

Due to the difficulty of CERCLA’s statutory language and the amount of evidence found in many of the CERCLA law suits, CERCLA actions have not only earned the label as complex litigation but also as some of the most complex cases brought in federal court.<sup>63</sup> Most plaintiffs name multiple potentially responsible parties (“PRP”) in search of one party to be jointly and severally liable creating complex procedures for parties to navigate.<sup>64</sup> As parties step through the procedures in complex CERCLA litigation, they face the decision of trial by jury.

### *Statutory Analysis of CERCLA Sections 107 and 113*

Two possible avenues for a right to trial by jury in the United States exist: either (1) the statutory basis of the claim explicitly announces a right to a jury trial, or (2) the guarantee of a right to a jury trial under the Seventh Amendment of the U.S. Constitution attaches because of the legal nature of the action and remedies.<sup>65</sup> “If Congress has

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<sup>58</sup> 42 U.S.C. §§ 7401-7642

<sup>59</sup> 33 U.S.C. §§ 1251-1376

<sup>60</sup> 15 U.S.C. §§ 2601-2629

<sup>61</sup> 42 U.S.C. §§ 6901-6987

<sup>62</sup> FREEDMAN, *supra* note 30, at 222-225.

<sup>63</sup> DAVID F. HERR, ANN. MANUEL COMPLEX LIT. 21.422 (3rd ed.).

<sup>64</sup> Elbaum, *supra* note 15, at 358.

<sup>65</sup> Morgan v. Ameritech, 26 F.Supp.2d 1087, 1090-91 (C.D. Ill. 1998) citing Curtis v. Loether, 415 U.S. 189 (1974). “A right to trial by jury may arise either by statute or *via* the Seventh Amendment to the U.S. Constitution.” *Id.* at 191-192 (citations omitted) (emphasis in original). Pandazides v. Virginia Bd. of Educ., 13 F.3d 823 (4th Cir. 1994). “The Seventh Amendment thus requires a jury trial upon demand if the

provided for the right to trial by jury in a statute, there is no need to examine the constitutional issue.”<sup>66</sup>

When interpreting statutes, the elementary rule is to first look at the plain language of the statute.<sup>67</sup> If the plain reading of the statute provides the clear answer to the question presented, the inquiry ends.<sup>68</sup> However, ambiguities often exist causing a controversy to be resolved by the courts.<sup>69</sup> Nevertheless, legislatures do not enact statutes within a vacuum.<sup>70</sup> Practitioners and judges alike have multiple resources, such as the congressional record, at their disposal to investigate the ambiguities and determine the true intent of the legislature.<sup>71</sup> These resources will be utilized in order to determine whether Congress, indeed, intended for a jury trial to attach.

Two provisions within CERCLA provide plaintiffs with the ability to recover expenses related to the clean up of hazardous waste. The first provision – section 9607 (also known as “CERCLA section 107”) – specifically outlines who is liable for which actions.<sup>72</sup> The second provision – section 9613 (also known as “CERCLA section 113”)

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statute creates legal rights and remedies that are ‘enforceable in an action for damages in the ordinary courts of law.’” *Id.* at 828.

<sup>66</sup> Morgan, 26 F.Supp.2d at 1090-1091. *Kobs v. Arrow Service Bureau, Inc.*, 134 F.3d 893 (7th Cir. 1998):  
[T]here are two possible sources of a right of trial by jury for a statutory cause of action. Congress may provide for trial by jury in the statute that creates the claim regardless of whether the claim involves rights and remedies of the type traditionally enforced in a court of law before a jury. Alternatively, if the claim involves rights and remedies of the type traditionally enforced in an action at law, the Seventh Amendment requires that the right of jury trial be preserved.

*Id.* at 896.

<sup>67</sup> *Caminetti v. United States*, 242 U.S. 470 (1917). “It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed.” *Id.* at 485. ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 9-16 (1997); NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45.01 (4th ed. 1984).

<sup>68</sup> MIKVA et al, *supra* note 67, at 9-16. *Blum v. Stenson*, 465 U.S. 886 (1984). “Where . . . the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.” *Id.* at 896.

<sup>69</sup> *U.S. v. Quarrell*, 310 F.3d 664, 669 (10th Cir. 2002).

<sup>70</sup> *Alexander v. Sandoval*, 532 U.S. 275, 313 (2001).

<sup>71</sup> *Shallus v. U.S.*, 162 F. 653 (4th Cir. 1908). “[T]o ascertain [the purpose of Congress] we are entitled to consider its records and debates upon the subject . . .” *Id.* at 656.

<sup>72</sup> 42 U.S.C. § 9607(a):

– allows plaintiffs to seek contribution from the liable parties.<sup>73</sup> The statutory language in CERCLA, including sections 107 and 113, fails to explicitly address whether Congress granted a jury trial.<sup>74</sup> However, statutory analysis does not end there because legislative history may provide further insight into whether Congress intended a right to a jury trial.<sup>75</sup>

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Covered persons; scope; recoverable costs and damages; interest rate; “comparable maturity” date Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section--(1) the owner and operator of a vessel or a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, *shall be liable for--(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.*

*Id.* (emphasis added).

<sup>73</sup> 42 U.S.C. § 9613(f):

(1) Contribution

*Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.*

*Id.* (emphasis supplied). For additional discussion on the nexus between §§ 107 and 113, see William D. Araiza, *Text, Purpose, and Facts: The Relationship Between CERCLA Sections 107 and 113*, 72 NOTRE DAME L. REV. 193 (1996).

<sup>74</sup> CERCLA §§ 107 & 113, *supra* notes 72 & 73. *American Cyanamid Co. v. King Industries, Inc.*, 814 F.Supp. 209 (D.R.I. 1993). “The statute does not expressly state whether an action under § 113(f)(1) is to be tried before a jury.” *Id.* at 212.

<sup>75</sup> *Waldrop v. Southern Co. Services, Inc.*, 24 F.3d 152 (11th Cir. 1994). “If the statute and its legislative history are silent regarding the right to a jury trial, then we must ask whether a jury trial is constitutionally required under the Seventh Amendment.” *Id.* at 155. *American Cyanamid Co.*, 814 F.Supp. at 212. “That the statute does not expressly provide for jury trials does not end the matter. Legislative intent, if discernible, must be consulted.” *Id.* (citations omitted).

CERCLA has a reputation not only for its comprehensive approach to environmental response, but also for its inept drafting. The U.S. Supreme Court has berated CERCLA's language as "poorly drafted, hastily considered, and bereft of a useful legislative history."<sup>76</sup> Even the legislators themselves conceded CERCLA leaves much to be desired.<sup>77</sup> CERCLA is far from "a model of legislative draftsmanship."<sup>78</sup> Vague provisions, indefinite or contradictory legislative history, lack of legislative history for certain provisions and lack of committee or conference reports plague the CERCLA sections of code.<sup>79</sup>

Notwithstanding these shortcomings, courts believe Congress made the general purpose of CERCLA quite clear.<sup>80</sup> Congress amended CERCLA in 1986 with the Superfund Amendments and Reauthorization Act ("SARA").<sup>81</sup> With the SARA amendment, Congress added section 113 to CERCLA, which did not exist in the original CERCLA provisions.<sup>82</sup> By enacting SARA, Congress sought to fill the holes in CERCLA

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<sup>76</sup> FREEDMAN, *supra* note 30, at 212 n.355 (citing *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)).

<sup>77</sup> Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 34 (1982)

<sup>78</sup> *Exxon v. Hunt*, 475 U.S. 355, 363 (1986); ALFRED R. LIGHT, *CERCLA LAW AND PROCEDURE COMPENDIUM I-1* (1992).

<sup>79</sup> LIGHT, *supra* note 78, at I-1. *See also* Beverly Z. Alexander, *CERCLA 1980-1985: A Research Guide*, 13 *ECOLOGY L. Q.* 311, 312 (1986).

<sup>80</sup> *Chemical Waste Management v. Armstrong World Indus.*, 669 F.Supp. at 1290 n.6 (1987).

<sup>81</sup> *American Cyanamid Co.*, 814 F.Supp. at 212. "Section 113(f)(1) was added to CERCLA by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) ("SARA"), and codified a right to contribution which had already been implied by numerous courts under federal common law." *Id.* For discussion on CERCLA § 9607, *see also* *California Dept. of Toxic Substances Control v. Alco Pacific, Inc.*, 217 F.Supp. 1028 (C.D. Cal. 2002); *U.S. v. Lang*, 870 F.Supp. 722 (E.D. Tex. 1994); *Hatco Corp. v. W.R. Grace & Co.*, 859 F.Supp. 769 (D. N.J. 1994), *aff'd* 59 F.3d 400 (3rd Cir. 1995) *reh'g and reh'g en banc denied*; *Town of Jaffrey v. Town of Fitzwilliam*, 846 F.Supp. 3 (D. N.H. 1994); *American Cyanamid Co. v. King Industries, Inc.*, 814 F.Supp. 209 (D. R.I. 1993); *U.S. v. Northern Plating Co.*, 685 F.Supp. 1410 (W.D. Mich. 1988), *aff'd on other grounds* 889 F.2d 1497 (6th Cir. 1989), *cert. denied* 494 U.S. 1057 (1990); *U.S. v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726 (8th Cir. 1986), *reh'g and reh'g en banc denied, cert. denied* 484 U.S. 848 (1987).

<sup>82</sup> *American Cyanamid Co.*, 814 F.Supp. at 212.

and provide a more adequate legislative history.<sup>83</sup> However, neither the legislative history of CERCLA nor its SARA amendment explicitly addresses the right to trial by jury.<sup>84</sup>

### *Seventh Amendment Analysis*

Since the plain language of CERCLA and legislative history fail to explicitly address the issue of jury trials, courts have invoked their right to interpret the statute under a Seventh Amendment analysis.<sup>85</sup> This section discusses the Seventh Amendment analysis used by U.S. courts and then examines how the courts have applied the analysis to CERCLA cost-recovery and contribution actions.

The Seventh Amendment provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.<sup>86</sup>

The ambiguity surrounding the issue arises from the phrase “Suits at common law.” In determining whether suits fall under the purviews of “Suits at common law,” the U.S. Supreme Court in *Tull v. United States*<sup>87</sup> laid out the two-prong Seventh Amendment analysis: (1) the court must first compare the statutory action to similar actions brought in eighteenth-century English courts prior to the merger of law and equity,<sup>88</sup> and (2) the

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<sup>83</sup> LIGHT, *supra* note 78, at I-2.

<sup>84</sup> American Cyanamid Co., 669 F.Supp. at 212-13.

<sup>85</sup> California Dept. of Toxic Substances Control v. Alco Pacific, Inc., 217 F.Supp. 1028 (C.D. Cal. 2002); U.S. v. Lang, 870 F.Supp. 722 (E.D. Tex. 1994); Hatco Corp. v. W.R. Grace & Co., 859 F.Supp. 769 (D. N.J. 1994), *aff'd* 59 F.3d 400 (3rd Cir. 1995) *reh'g and reh'g en banc denied*; Town of Jaffrey v. Town of Fitzwilliam, 846 F.Supp. 3 (D. N.H. 1994); American Cyanamid Co. v. King Industries, Inc., 814 F.Supp. 209 (D. R.I. 1993); U.S. v. Northern Plating Co., 685 F.Supp. 1410 (W.D. Mich. 1988), *aff'd on other grounds* 889 F.2d 1497 (6th Cir. 1989), *cert. denied* 494 U.S. 1057 (1990); U.S. v. Northeastern Pharmaceutical & Chemical Co., Inc., 810 F.2d 726 (8th Cir. 1986), *reh'g and reh'g en banc denied, cert. denied* 484 U.S. 848 (1987).

<sup>86</sup> U.S. CONST. amend. VII.

<sup>87</sup> 481 U.S. 412 (1987).

<sup>88</sup> *Id.* at 417-18.

court must examine the remedy sought to determine whether or not it sounds in law or equity.<sup>89</sup> At common law, courts of law granted jury trials to claims brought in their courts while courts of equity generally denied the right to a jury trial.<sup>90</sup> Under the current Seventh Amendment doctrine, when parties present both equitable and legal issues in one case, courts will recognize the right to a jury trial.<sup>91</sup> Therefore the action must be considered purely equitable for courts to deny the right to trial by jury under the Seventh Amendment analysis.<sup>92</sup>

Scholars and courts alike have criticized the first prong of the analysis because of its requirement to search the tomes of history. Many courts, including the U.S. Supreme Court, appear to discount the importance of viewing the action and remedy before them in light of eighteenth-century (or earlier) law and procedure.<sup>93</sup> The search into the historical developments of the courts for the closest analog to the present day case may appear “abstruse”<sup>94</sup> or “quite rare,”<sup>95</sup> but the Court *always* conducts the historical search.<sup>96</sup> At the conclusion of the search, the Court uses its findings as the basis for its decision in Seventh Amendment cases.<sup>97</sup> The Court ultimately attempts to find an analogous claim at

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<sup>89</sup> *Id.*

<sup>90</sup> PROFFATT, *supra* note 4, at 129.

<sup>91</sup> Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962).

<sup>92</sup> Marozan v. U.S., 90 F.3d 1284, 1291 (7th Cir. 1996) (“no right to a jury trial on purely equitable issues”); Lewis v. Anderson, 615 F.2d 778, 784 (9th Cir. 1979); Whiting v. Jackson State University, 616 F.2d 116, 123 n.3 (5th Cir. 1980); U.S. v. Articles of Drug Consisting of Following: 5,609 Boxes, 745 F.2d 105, 112 (1st Cir. 1984); Skippy, Inc. v. CPC Intern., Inc., 674 F.2d 209, 215 (4th Cir. 1982); Klein v. Shell Oil Co., 386 F.2d 659, 663 (8th Cir. 1967).

<sup>93</sup> Tull, 481 U.S. at 421; Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1979).

<sup>94</sup> Tull, 481 U.S. at 421.

<sup>95</sup> Great-West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204, 225 (2002) (Ginsburg, J., dissent).

<sup>96</sup> Great-West, 534 U.S. at 217. The historical analysis of the law-equity dichotomy will always be pursued by the Court in Seventh Amendment right to trial by jury cases. *Id.*

<sup>97</sup> Tull, 481 U.S. at 412; Great-West, 534 U.S. at 225.

common law where the action and the remedy correlate to the present action.<sup>98</sup> However, the Court has considered the second prong of the *Tull* analysis more important.<sup>99</sup>

Even though multiple federal courts have denied the right to trial by jury in CERCLA cost-recovery actions,<sup>100</sup> courts have acknowledged that parties can make a good argument for a right to a jury trial,<sup>101</sup> and the argument has been persuasive.<sup>102</sup> In denying the right to a jury trial, the courts have simply stated that the claims are equitable in nature and therefore are not guaranteed the right to a jury trial under the Seventh Amendment.<sup>103</sup> The syllogism used by these courts is as follows: the Seventh Amendment right does not attach to purely equitable claims; CERCLA cost-recovery and contribution actions are analogous to purely equitable restitution claims; therefore, CERCLA cost-recovery and contribution actions are equitable in nature without a right to trial by jury.<sup>104</sup> This widely adopted analysis appears, on the surface, pellucid, but fundamental flaws exist.

First of all, courts should not analogize CERCLA cost-recovery actions to restitution actions. CERCLA cost-recovery actions are statutory actions,<sup>105</sup> and restitution

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<sup>98</sup> *Tull*, 481 U.S. at 421 n.6.

<sup>99</sup> *Tull*, 481 U.S. at 421.

<sup>100</sup> *California Dept. of Toxic Substances Control v. Alco Pacific, Inc.*, 217 F.Supp. 1028 (C.D. Cal. 2002); *U.S. v. Lang*, 870 F.Supp. 722 (E.D. Tex. 1994); *Hatco Corp. v. W.R. Grace & Co.*, 859 F.Supp. 769 (D. N.J. 1994), *aff'd* 59 F.3d 400 (3rd Cir. 1995) *reh'g and reh'g en banc denied*; *Town of Jaffrey v. Town of Fitzwilliam*, 846 F.Supp. 3 (D. N.H. 1994); *American Cyanamid Co. v. King Industries, Inc.*, 814 F.Supp. 209 (D. R.I. 1993); *U.S. v. Northernair Plating Co.*, 685 F.Supp. 1410 (W.D. Mich. 1988), *aff'd on other grounds* 889 F.2d 1497 (6th Cir. 1989), *cert. denied* 494 U.S. 1057 (1990); *U.S. v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726 (8th Cir. 1986), *reh'g and reh'g en banc denied, cert. denied* 484 U.S. 848 (1987).

<sup>101</sup> *G.L. Industries of Michigan, Inc. v. Forstmann-Little*, 800 F.Supp. 695, 699 (S.D. Ind. 1991).

<sup>102</sup> *New York v. Lashins Arcade Co.*, 881 F.Supp. 101 (1995) *aff'd*, 91 F.3d 353 (2nd Cir. 1996). However, in affirming on other grounds, the Second Circuit footnoted their criticism of the District Court's recognition of a right to trial by jury under CERCLA § 107. *Lashins*, 91 F.3d at 362 n.7.

<sup>103</sup> *Northeastern*, 810 F.2d at 726.

<sup>104</sup> *Hatco*, 59 F.3d at 411-414.; *Northeastern*, 810 F.2d at 749.

<sup>105</sup> *International Clinical Laboratories, Inc. v. Stevens*, 710 F.Supp. 466, 470 (E.D. N.Y. 1989) *citing* *Mardan Corp. v. C.G.C. Music, Ltd.*, 600 F.Supp. 1049, 1055 (D.C. Ariz. 1984): "Mardan's lawsuit is based not upon warranty theory but rather upon the statutory cause of action created by Section 107(a) of CERCLA." *See also* FREEDMAN, *supra* note 56, at 329-332; *but cf.* *Trimble v. ASARCO, Inc.*, 83 F.Supp.

actions are common-law, quasi-contract actions, not statutory.<sup>106</sup> A statutory cause of action exists when a party violates the clear language of a constitutional provision, statute or regulation,<sup>107</sup> and CERCLA clearly provides a cost recovery action in section 107.<sup>108</sup> Both common-law tort actions and statutory actions stem from the same vein with the fundamental difference being that statutes create the legal duty,<sup>109</sup> and statutes such as CERCLA impose strict liability.<sup>110</sup> The U.S. Supreme Court in *Great-West Life & Annuity Ins. Co. v. Knudson*<sup>111</sup> stated,

Almost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for ‘money damages,’ as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant’s *breach of legal duty*.’ And ‘[m]oney damages are, of course, the classic form of *legal relief*.<sup>112</sup>

When parties breach their duty imposed by CERCLA and related regulations promulgated by the EPA, plaintiffs may seek money damages, a legal relief, in a cost-recovery or contribution action.<sup>113</sup> For courts to analogize CERCLA cost-recovery and

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2d 1034, 1039 (D. Neb. 1999) (held no statutory cause of action under CERCLA §§ 107 and 113 for private property owners); *Waste, Inc. Remedial Design/Remedial Action Group v. Cohn*, 60 F.Supp. 2d 833 (N.D. Ind. 1997) (standing for the proposition that citizens, as opposed to government entities, do not have a statutory cause of action under CERCLA §§ 107 or 113).

<sup>106</sup> GEORGE E. PALMER, *THE LAW OF RESTITUTION* 4 & 6 (1978) (the law of restitution developed from a quasi-contract theory and quasi-contract theory originates in early English common law); *U.S. v. P/B STCO* 213, ON 527 979, 756 F.2d 364, 375 n.14 (5th Cir. 1985); *Pan Am. Petroleum Corp. v. Superior Court of Del. In and For New Castle County*, 366 U.S. 656, 663 (1961) (restitution claims are common law claims that do not fall under federal statutory law).

<sup>107</sup> *Griggs v. Coca-Cola Employee’s Credit Union*, 909 F.Supp. 1066, 1069 (E.D. Tenn. 1995).

<sup>108</sup> *See supra* text accompanying note 72.

<sup>109</sup> *Curtis v. Loether*, 415 U.S. at 195 (1974) (“A damages action under the statute sounds basically in tort--the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant’s wrongful breach”); *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 375 (2001); *Carter v. U.S.*, 333 F.3d 791, 797 (7th Cir. 2003) (“An injury resulting from the violation of a statute (or other source of a legal duty, such as the regulation concerning treatment options on which the plaintiff relies) is actionable under tort law only if the statute was intended to avert the kind of injury that occurred”).

<sup>110</sup> *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2nd Cir. 1985). It is well settled law that CERCLA § 107 imposes a strict liability standard on defendants. *Id.* at 1043-44; FREEDMAN, *supra* note 30, at 219.

<sup>111</sup> 534 U.S. 204 (2002).

<sup>112</sup> 534 U.S. at 210 (citations omitted) (emphasis in original).

<sup>113</sup> *Id.*

contribution actions to restitution shows they accept the flawed premise that common-law actions and statutory actions are identical in nature when in fact they are quite different.<sup>114</sup> Courts should instead analogize CERCLA cost-recovery actions to common law nuisance or trespass claims – the predecessor actions of CERCLA.

Second, CERCLA cost recovery actions are not purely equitable in nature because the statutory language fails to focus on pure restitution. As seen from a plain reading of the language in CERCLA sections 107 and 113, plaintiffs may seek remedies aside from restitution.<sup>115</sup> CERCLA section 107 provides for compensation for damage to natural resources which sounds in tort or trespass and not restitution.<sup>116</sup> It is well-settled law that tort and trespass actions sound in law and not equity.<sup>117</sup> Since parties liable under section 107 may fall within section 113,<sup>118</sup> courts may reasonably infer the same focus of restitution and natural resource damage applies to section 113.<sup>119</sup> The courts, as previously mentioned, have held the Seventh Amendment protection fails only if the action is purely equitable in nature.<sup>120</sup> Since CERCLA cost-recovery actions are not purely equitable restitution actions and contain certain legal aspects, the Seventh Amendment should preserve the right to trial by jury.

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<sup>114</sup> *Infra* note 188. The crucial difference between suits at law and equity pivots on how they entered the judicial system. Suits at law found their bases in writs or statutes and suits at equity did not require such bases.

<sup>115</sup> *New York v. Lashins Arcade Co.*, 881 F.Supp. 101 (S.D. N.Y. 1995).

<sup>116</sup> *Lashins*, 881 F.Supp. at 104 (1995): “A plain reading of CERCLA reveals that pure equitable restitution of money is not the focus of Section 107.”

<sup>117</sup> *Id.*

<sup>118</sup> 42 U.S.C. § 9613(f)(1) *supra* note 73.

<sup>119</sup> *Hatco v. W.R. Grace & Co.*, 59 F.3d 400 (3rd Cir. 1995). Courts have recognized the nexus between section 107 and 113.

<sup>120</sup> *Marozan v. U.S.*, 90 F.3d 1284, 1291 (7th Cir. 1996) (“no right to a jury trial on purely equitable issues”); *Lewis v. Anderson*, 615 F.2d 778, 784 (9th Cir. 1979); *Whiting v. Jackson State University*, 616 F.2d 116, 123 n.3 (5th Cir. 1980); *U.S. v. Articles of Drug Consisting of Following: 5,609 Boxes*, 745 F.2d 105, 112 (1st Cir. 1984); *Skippy, Inc. v. CPC Intern., Inc.*, 674 F.2d 209, 215 (4th Cir. 1982); *Klein v. Shell Oil Co.*, 386 F.2d 659, 663 (8th Cir. 1967). *See supra* text accompanying notes 91 & 92 and *Dairy Queen, Inc. v. Wood*, 369 U.S. at 472-73.

Even though the Court has considered restitution actions purely equitable in the past,<sup>121</sup> the pendulum has swung as the Court now recognizes restitution as a claim with at least a hybrid nature.<sup>122</sup> The U.S. Supreme Court has most recently held in *Great-West* that restitution sounds in both law and equity. “Thus, ‘restitution is a legal remedy when ordered in a case at law and an equitable remedy . . . when ordered in an equity case,’ and whether it is legal or equitable depends on ‘the basis for [the plaintiff’s] claim’ and the nature of the underlying remedies sought.”<sup>123</sup> The Court embraced the analysis of *Reich v. Continental Casualty Co.*<sup>124</sup> in reaching its conclusion that restitution is equitable in an equity case and legal when used in a case at law.<sup>125</sup> This conclusion effectively elevates the first prong of *Tull*.

Third, the purpose of CERCLA – in addition to providing cost recovery – is to penalize.<sup>126</sup> If a site is determined to be in need of environmental cleanup, CERCLA section 104<sup>127</sup> has given government agencies several courses of action to accomplish the

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<sup>121</sup> *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710, (1999).

<sup>122</sup> *Great-West*, 534 U.S. at 213-14.

<sup>123</sup> *Id.* The Court also said, “However, not all relief falling under the rubric of restitution is available in equity.” *Id.* at 212.

<sup>124</sup> 33 F.3d 754 (7th Cir. 1994).

<sup>125</sup> *Great-West*, 534 U.S. at 213; *infra* note 188.

<sup>126</sup> Compare CERCLA § 107, *supra* note 72, and CERCLA § 104, *infra* note 127.

<sup>127</sup> 42 U.S.C. § 9604:

(a) Removal and other remedial action by President; applicability of national contingency plan; response by potentially responsible parties; public health threats; limitations on response; exception:

(1) Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment. When the President determines that such action will be done properly and promptly by the owner or operator of the facility or vessel or by any other responsible party, the President may allow such person to carry out the action, conduct the remedial investigation, or conduct the feasibility study in accordance with section

task. First, government agencies may order a party to “abate such a danger or threat” by issuing an administrative order.<sup>128</sup> Second, the agency may also seek injunctive relief in federal district court ordering the responsible party to clean up the site.<sup>129</sup> Finally, as previously discussed, the agency may itself abate the potential danger by cleaning up the site, and then, under section 107, bring suit against the PRP to recover the costs incurred.<sup>130</sup> If the PRP fails to comply with the administrative order or the injunctive relief granted by the court, the PRP could be held liable under section 107 and also may incur penalties under section 9606.<sup>131</sup> The penalties under section 9606 are substantial, as the fines can be up to \$25,000 per day and treble damages.<sup>132</sup>

The fact that CERCLA includes not only a basis for recovery of damages in connection to environmental harm, but also penalties if a defendant breaches a duty, communicates an intention by Congress to penalize offenders. The Court in *Tull* recognized penalties under the CWA as legal in nature.<sup>133</sup> This connection between the penalties in section 106 of CERCLA and the cost-recovery action in section 107 allows plaintiffs to bring both actions in tandem creating a mixture of an obvious legal action

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9622 of this title. No remedial investigation or feasibility study (RI/FS) shall be authorized except on a determination by the President that the party is qualified to conduct the RI/FS and only if the President contracts with or arranges for a qualified person to assist the President in overseeing and reviewing the conduct of such RI/FS and if the responsible party agrees to reimburse the Fund for any cost incurred by the President under, or in connection with, the oversight contract or arrangement. In no event shall a potentially responsible party be subject to a lesser standard of liability, receive preferential treatment, or in any other way, whether direct or indirect, benefit from any such arrangements as a response action contractor, or as a person hired or retained by such a response action contractor, with respect to the release or facility in question. The President shall give primary attention to those releases which the President deems may present a public health threat.

*Id.*

<sup>128</sup> 42 U.S.C. § 9606(a).

<sup>129</sup> *Id.*; U.S. v. Outboard Marine Corp., 789 F.2d 497 (7th Cir. 1986).

<sup>130</sup> *Supra* note 72

<sup>131</sup> 42 U.S.C. § 9606.

<sup>132</sup> 42 U.S.C. § 9606(b)(1); BENDER, *supra* note 27 § 4A.02(1)(c)(V).

<sup>133</sup> *Tull*, 481 U.S. at 422-23.

(the penalties) and one that courts view as equitable (cost recovery).<sup>134</sup> The court must grant a jury trial in such an event because it cannot refuse such a request when legal and equitable actions intermingle.<sup>135</sup>

The Seventh Amendment analysis applies to cost-recovery and contribution actions, but the nuances of CERCLA sections 107 and 113 present somewhat different results. Section 107 is considered to be antecedent to section 113.<sup>136</sup> Because of this connection, courts have often applied the section 107 Seventh Amendment analysis and then concluded that the section 113 action also fails because of the antecedent “equitable” claim.<sup>137</sup> Many of the courts that denied the right to trial by jury simply performed the mechanics of the Seventh Amendment analysis, but they failed to correctly conclude no action at common law is analogous to these modern section 113 contribution actions.<sup>138</sup> The court in *Hatco v. W.R. Grace & Co.*<sup>139</sup> performed an extensive, in-depth analysis of the eighteenth-century English courts’ treatment of “contribution” actions.<sup>140</sup> However, the court accepts the term “contribution” without considering the ramifications.

No analog to modern contribution actions exist because the common law courts rejected the doctrine of contribution among joint tortfeasors. Dean Prosser said “the common law rule [was] that there can be no contribution among those who are regarded as ‘joint tortfeasors.’”<sup>141</sup> The rule against contribution reigned for over one-hundred years where, during that time, only nine American jurisdictions contradicted the rule without

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<sup>134</sup> *Supra* text accompanying note 128.

<sup>135</sup> Tull, 481 U.S. at 417-418 and *supra* text accompanying notes 89 & 90.

<sup>136</sup> American Cyanamid Company, 814 F.Supp. 209 (D.R.I. 1993); Smith, *supra* note 15.

<sup>137</sup> American Cyanamid Company, 814 F.Supp. at 213-214 (1993).

<sup>138</sup> Hatco, 859 F.Supp. at 773; American Cyanamid Co., 814 F.Supp at 214; United States v. Shaner, 23 Env'tl. L. Rep. 20236 (E.D. Pa. 1992).

<sup>139</sup> Hatco, 59 F.3d 400.

<sup>140</sup> Hatco, 59 F.3d at 412-414.

<sup>141</sup> PROSSER, *supra* note 36 § 50.

legislation.<sup>142</sup> This rule prevailed until the 1970s when legislatures began accepting the “cogent criticism” against disallowing contribution.<sup>143</sup> “The great majority of our courts proceeded to apply [the rule] generally.”<sup>144</sup> With no state legislation enacted that allowed contribution in the eighteenth century, the general rule against contribution controlled.<sup>145</sup> Therefore, contribution actions essentially did not exist at common law and lack any common law analog.

One court has recognized a right to trial by jury in CERCLA contribution actions. The Federal District court in *United States v. Shaner*<sup>146</sup> held the right to trial by jury does exist because contribution actions are legal in nature.<sup>147</sup> Even though the court did not perform an extensive application of the Seventh Amendment analysis, it did perform an important part: examining whether the remedy sounds in law or equity.<sup>148</sup> The court said:

[I]t is plain that the obligation of a joint tort-feasor to contribute arises out of the tort and the fact that one seeking contribution has paid more than his fair and just share. The word ‘equitable’ as mentioned in the decisions does not mean a matter for chancery. It does not mean ‘equity’ as opposed to ‘law.’ It is founded upon natural justice, and when words ‘equitable’ or ‘equity’ are used, reference is made to an attempt to do right and to deal fairly between the parties. *Nonetheless, it is a legal right enforced in actions at law where the parties have a right to a jury trial.*<sup>149</sup>

The *Shaner* court also looked to *Palmer v. United States*<sup>150</sup> in support of its conclusion where the Ninth Circuit held that “[r]ecovery of damages is a remedy traditionally granted by common law courts”; therefore the right to trial by jury attaches because

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*; *Union Stock Yards Co. v. Chicago Burlington & Quincy Railroad Co.*, 196 U.S. 217 (1905).

<sup>145</sup> *Id.*

<sup>146</sup> 23 *Env'tl. L. Rep.* at 20236.

<sup>147</sup> *Id.* at 3.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* (emphasis supplied.)

<sup>150</sup> 652 F.2d 893, 895-896 (9th Cir. 1981), *overruled on other grounds*, *White v. McGinnis*, 903 F.2d 699 (9th Cir. 1990).

contribution actions sound in law.<sup>151</sup> Contribution actions more closely resemble natural resource recovery actions than cost-recovery actions, and other courts have indicated the Seventh Amendment right to trial by jury attaches to CERCLA contribution actions.<sup>152</sup>

As a procedural matter, some plaintiffs bring CERCLA sections 107 and 113 actions in tandem.<sup>153</sup> When plaintiffs pursue such a cause of action, the right to trial by jury attaches because courts have recognized either cost-recovery actions or contribution actions are legal in nature and bringing both equitable and legal actions does not waive the right to trial by jury.<sup>154</sup>

Thus far, the issue has been further refined: whether eighteenth-century analogs to cost-recovery and contribution actions sound in courts of law or courts of equity. By examining the U.S. history of environmental law, CERCLA statutes, congressional record, and the application of the Seventh Amendment analysis, eighteenth-century history of English courts holds the key to the answer. The Court has declared on numerous occasions this continues to be the polestar in the Seventh Amendment analysis.<sup>155</sup> Lower courts have held that the eighteenth-century analogs sound in equity, but did the court choose the proper analog? Did the analog action offer an identical or similar remedy?

## II. ENGLAND

### *CERCLA Section 107 and 113 Counterparts*

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<sup>151</sup> *Id.*

<sup>152</sup> Shaner, 23 *Env'tl. L. Rep.* at 4 n.2-4.

<sup>153</sup> *American Cyanamid Company*, 814 F.Supp. 209.

<sup>154</sup> *See Dairy Queen, Inc.*, 369 U.S. 469 (1962) and *supra* text accompanying note 91. For a more in-depth analysis of other important procedural differences between CERCLA §§ 107 and 113 such as standing, statute of limitations, and interaction with CERCLA § 122 contribution actions, see SUSAN M. COOKE, *THE LAW OF HAZARDOUS WASTE: MANAGEMENT, CLEANUP, LIABILITY AND LITIGATION* §16.01[4][a]-[c] (1999) and ALLAN J. TOPOL & REBECCA SNOW, *SUPERFUND LAW AND PROCEDURE* §10.1-2 (1992). *See also Araiza supra* note 73.

<sup>155</sup> *Great-West*, 534 U.S. at 217.

England has a proud history of environmental regulation, since it was one of the first countries to develop laws regulating the environment.<sup>156</sup> With the Industrial Revolution<sup>157</sup> producing mass amounts of pollution affecting England's towns and countrysides, the British faced the reality of environmental destruction.<sup>158</sup> The "dark satanic mills" dotting the landscape throughout Britain spewed plumes of soot and smoke, the evil side of the glorious Industrial Revolution where society worshipped innovation at its own expense.<sup>159</sup> The death rate in 1875 equaled the highest rate in England in its previous forty years while infant mortality remained at incredibly high levels.<sup>160</sup> Thankfully the cries of humanity opposing the exchange of the health of a great nation for the Almighty Pound awakened the consciences of the politicians.<sup>161</sup> With

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<sup>156</sup> SIMON BALL & STUART BELL, ENVIRONMENTAL LAW: THE LAW AND POLICY RELATING TO THE PROTECTION OF THE ENVIRONMENT 9 (3rd ed. 1991).

<sup>157</sup> The Industrial Revolution began in England in the eighteenth century and spread throughout the world. THE NEW ENCYCLOPAEDIA BRITANNICA, vol. 6, 304-305 (15th ed. 1997). The Revolution brought technological, socioeconomical, and cultural changes as the economies of nations changed from agrarian to machine and industrial. *Id.* From 1769 until 1830 the Revolution remained, for the most part, in England. *Id.*

<sup>158</sup> BALL & BELL, *supra* note 156, at 9.

<sup>159</sup> DAVID HUGHES, ENVIRONMENTAL LAW 3-8 ((2nd ed. 1992). One of the harshest critics of the Industrial Revolution was Charles Dickens, the most popular literary figure of his time. DANIELLE DUBAS, foreword pg. viii in CHARLES DICKENS (Dorset Press, N.Y. 1994). Dickens grew up during the height of the Industrial Revolution in England as he was born in 1812 in Portsea, England and died 58 years later in 1870:

From the stagecoaches in *The Pickwick Papers* to the belching smokestacks of Coketown in *Hard Times*, industry is forever on the rise throughout [Dickens'] books. The sign of industrialism – smokestacks, furnaces, locomotives – are always ominously connected with disillusionment, failure, even death. But the characters who are the most intensely steeped in this new industrialism either see the light, like Scrooge in *A Christmas Carol* and Gradgrind in *Hard Times*, or are defeated and demolished in true villain fashion, for Dickens was a moralist.

*Id.*

<sup>160</sup> HUGHES, *supra* note 159, at 3.

<sup>161</sup> *Id.*

public health problems increasing, Parliament responded by enacting the Public Health Act of 1875, a “landmark” act.<sup>162</sup>

Historians also credit Britain with establishing the world’s first “national public pollution control agency” when Parliament enacted the Alkali Act of 1863 that, in turn, created the Alkali Inspectorate, an agency created to control “atmospheric emissions primarily from the caustic soda industry.”<sup>163</sup> The enactment of the Public Health Act and the Alkali Act does not encompass all of English environmental law because English environmental law, like the United States, does not limit itself to statutory cause of actions; common law actions also exist to remedy environmental destruction.<sup>164</sup> This discussion will begin by looking to the origins of the English environmental law and observe the progress through the years ultimately discovering the CERCLA sections 107 and 113 counterpart(s).

Laws regulating the public environment date back to the beginning of English common law under the writ of trespass. An action of trespass would lie if a “man’s body, goods or land have been unlawfully touched.”<sup>165</sup> The writ of trespass – “the most general term that there is”<sup>166</sup> – separates into two separate types of actions: felonies to be prosecuted and lesser trespasses where a felony is not pleaded.<sup>167</sup> Actions under the writ of trespass originally concerned mostly criminal matters, but civil claims did exist.<sup>168</sup> Blackstone also recognized the action of trespass when a person damaged the “herbage”

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<sup>162</sup> BALL & BELL, *supra* note 156, at 9. The 1875 Act brought much needed uniformity to the regulation of public health in general providing a model governmental authorities would use in planning towns and communities around these health concerns. *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> Green, *supra* note 29, at 541-542.

<sup>165</sup> FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I* 526 (2nd ed. 1952).

<sup>166</sup> *Id.* at 512.

<sup>167</sup> *Id.* at 511.

<sup>168</sup> *Id.* at 511-12, 534.

or spoiled the corn of a neighbor.<sup>169</sup> These actions allowed the plaintiff to recover damages “however as the jury think proper to assess.”<sup>170</sup> The common law actions for environmental harm do not limit themselves to trespass actions, but also include nuisance.

The law eventually developed into nuisance where public nuisance became the cause of action for harm committed by a “direct encroachment” of a public right or property creating a common injury.<sup>171</sup> The use of nuisance law theory in environmental harm cases is not a novel idea.<sup>172</sup> One of the earliest cases involving nuisance, and arguably the first environmental law case, is *William Aldred’s Case*.<sup>173</sup> Long before Blackstone’s Commentaries were published from 1765-1769,<sup>174</sup> the King’s Bench in 1611 heard *William Aldred’s Case* involving a plaintiff affected by the noxious odors of swine on a neighbor’s property.<sup>175</sup> The defendant pleaded not guilty arguing “one ought not to have so delicate a nose, that he cannot bear the smell of hogs.”<sup>176</sup> The King’s Bench applied the law of nuisance holding the plaintiff should recover.<sup>177</sup> The court reached its holding by using an “environmental analogy”:<sup>178</sup>

And the building of a lime-kiln is good and profitable; but if it be built so near a house, that when it burns the smoke thereof enters into the house, so that none can dwell there, an action lies for it. So if a man has a watercourse running in a ditch from the river to his house, for his necessary use; if a glover sets up a lime-pit for calve skins and sheep skins so near the said watercourse that the corruption of the lime-pit has

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<sup>169</sup> BLACKSTONE, *supra* note 3, at 165.

<sup>170</sup> *Id.*

<sup>171</sup> H.G. WOOD, A PRACTICAL TREATISE ON THE LAW OF NUISANCES 38 (3rd ed. 1893).

<sup>172</sup> O’Neil, *infra* note 270, at 58.

<sup>173</sup> 5 Coke’s Reports 58 (K.B. 1611).

<sup>174</sup> BLACKSTONE, *supra* note 6, vol. I at iii.

<sup>175</sup> 5 Coke’s Reports 58 (1611).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> Smith, III, *supra* note 28, at 42-43.

corrupted it, for which cause his tenants leave the said house, an action on the case lies for it . . . <sup>179</sup>

The doctrine of *sic utere tuo ut alienum non laedes* (“one should use his own property in such a manner as not to injure that of another”) was born.<sup>180</sup> The English courts continued to apply the doctrine at the time of Blackstone: “[T]he rule is, ‘*sic utere tuo, ut alienum non laedes*’.”<sup>181</sup> In describing nuisance, Blackstone also said, “As to nuisance to one’s *lands*: if one erects a smelting house for lead so near the land of another, that the vapour [sic] and smoke kills his corn and grass, and damages his cattle therein, this is held to be a nuisance.”<sup>182</sup> England continued applying the strict liability standard of the *sic utere tuo* rule until the 1960s.<sup>183</sup>

This application of *sic utere tuo* continued into modern times. In the seminal 1868 case that resides in all modern torts casebooks, *Rylands v. Fletcher*,<sup>184</sup> the House of Lords reaffirmed the classic *sic utere tuo* common law rule.<sup>185</sup> However, in the 1960s, the House of Lords began using the doctrine of foreseeability to weaken the rule.<sup>186</sup> Nevertheless, the development of nuisance law created the means for private individuals to seek redress for environmental harm.<sup>187</sup> The remedies available include the costs of clean-up essential to restore the property to its previous condition, or the difference between the property value before the pollution and afterward.<sup>188</sup>

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<sup>179</sup> *Id.*; 5 Coke’s Reports 58 (1611).

<sup>180</sup> Green, *supra* note 29, at 547.

<sup>181</sup> BLACKSTONE, *supra* note 3, at 169.

<sup>182</sup> BLACKSTONE, *supra* note 3, at 170 (italics in original). Green, *supra* note 29, at 547.

<sup>183</sup> Green, *supra* note 29, at 548, 562.

<sup>184</sup> 3 L.R.-H.L. 330 (1868).

<sup>185</sup> Green, *supra* note 29, at 566.

<sup>186</sup> *Id.*

<sup>187</sup> BALL & BELL, *supra* note 156, at 9

<sup>188</sup> *Id.* at 190-191. The origins of trespass and nuisance found in writs and statutes differs from that of restitution. Courts of Chancery – discussed in *infra* text accompanying notes 253-261 – entertained claims of restitution which did not require a statutory basis. JOHN W. WADE, RESTITUTION: CASES AND MATERIALS 1 (1958). While restitution actions for recovery of something detained, or restoring the plaintiff, were considered legal, the procedural difficulties forced many to seek redress in the Court of

Apart from the common law, England has also developed statutory law protecting the environment. The Public Health Act of 1875 began a new era in English environmental law eventually producing numerous other acts designed to control pollution.<sup>189</sup> Parliament also passed the Rivers Pollution Prevention Act of 1876<sup>190</sup> and the Housing, Town Planning, etc. Act of 1909. These, however, were largely unenforceable in practice and contained non-obligatory regulations vesting control in local authorities.<sup>191</sup> Prior to these acts, the governmental agencies, set forth to enforce the laws during the Victorian era, failed to operate efficiently as the division of their responsibilities separated urban and rural authorities.<sup>192</sup> The administrative agencies lacked the cohesiveness and structure to effectively manage the responsibilities placed upon them by the various statutory acts.<sup>193</sup> Many of the legislative acts covered environmentally conscious issues such as “nuisances, sewage and sanitation, vaccination, [and] diseases,”<sup>194</sup> but compliance with the regulations was merely “permissive and not mandatory.”<sup>195</sup>

From these notions of public health came the more specific regulation of waste relating to pollution of water, air and land as the courts responded to discharges of waste that polluted the environment.<sup>196</sup> English law may have been the first in many different areas of environmental law, but they, like the proverbial hare in Aesop’s Fable “The Hare

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Chancery. *Id.* This further supports the classification of restitution as having a dual nature as discussed in *supra* text accompanying notes 121-125.

<sup>189</sup> BALL & BELL, *supra* note 156, at 14.

<sup>190</sup> *Id.* at 9.

<sup>191</sup> BALL & BELL, *supra* note 156, at 9.

<sup>192</sup> HUGHES, *supra* note 159, at 4.

<sup>193</sup> *Id.* at 3.

<sup>194</sup> *Id.* at 4.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*; BALL & BELL, *supra* note 156, at 9.

and the Tortoise,”<sup>197</sup> rested on their accomplishments and did little in the form of environmental law until the decades of the 1960s and the 1970s, when the United States began its development of statutory environmental law plodding steadily ahead of England.<sup>198</sup>

The 1960s and 1970s brought the modern age of environmental law into England, and England has rapidly changed ever since.<sup>199</sup> The focus of the modern environmental laws in England is “on the control of pollution, and the growing concern . . . [of] hazardous substances and processes, [and the] minimization and management of waste.”<sup>200</sup> The change of national focus vaulted environmental policy into a prominent place in English public policy.<sup>201</sup>

The current path of English environmental law is turning more towards preventing harm and consolidation of regulation.<sup>202</sup> Parliament passed the Environmental Protection Act of 1990<sup>203</sup> which became one of the predominant environmental statutes in England.<sup>204</sup> The 1990 Act promotes integration of pollution controls – considered the most important feature of the Act.<sup>205</sup> The 1990 Act also, among other things, “empowers the Secretary of State for the Environment to set statutory emission limits, restricting the concentration of any substance that may be released by a prescribed process, and enables him to establish quality objectives and standards for any environmental medium.”<sup>206</sup> The

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<sup>197</sup> <http://www.2020site.org/aesop/story5.html> (last visited November 22, 2003).

<sup>198</sup> *Infra* text accompanying notes 199-201.

<sup>199</sup> BALL & BELL, *supra* note 156, at 11.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 11, 14.

<sup>203</sup> Environmental Protection Act 1990, 1990 Chapter 43, et seq. (Eng.).

<sup>204</sup> *See* HUGHES, *supra* note 159, at 4.

<sup>205</sup> John Gibson, *the Integration of Pollution Control, in LAW, POLICY AND THE ENVIRONMENT* 29 (Robin Churchill, et al, ed. 1991).

<sup>206</sup> *Id.* at 22. The 1990 Act itself states a more comprehensive purpose:

An Act to make provision for the improved control of pollution arising from certain industrial and other processes; to re-enact the provisions of the Control of Pollution Act

1990 Act does provide the Secretary of State to recovery costs though the scheme is quite different from CERCLA section 107.<sup>207</sup> The costs recovered generally related to the regulation of companies.<sup>208</sup> Each new applicant must pay an initial fee when it seeks authorization for its processes; this enables the Secretary of State to recover their costs incurred in regulation.<sup>209</sup> England did not end its environmental regulation here since it followed the Act of 1990 with the Environment Act of 1995.<sup>210</sup>

Section 57 of the Environment Act of 1995 correlates with CERCLA sections 107 and 113.<sup>211</sup> In short, the 1995 Act, and related guidance (“the 1995 Act”), authorizes the

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1974 relating to waste on land with modifications as respects the functions of the regulatory and other authorities concerned in the collection and disposal of waste and to make further provision in relation to such waste; to restate the law defining statutory nuisances and improve the summary procedures for dealing with them, to provide for the termination of the existing controls over offensive trades or businesses and to provide for the extension of the Clean Air Acts to prescribed gases; to amend the law relating to litter and make further provision imposing or conferring powers to impose duties to keep public places clear of litter and clean; to make provision conferring powers in relation to trolleys abandoned on land in the open air; to amend the Radioactive Substances Act 1960; to make provision for the control of genetically modified organisms; to make provision for the abolition of the Nature Conservancy Council and for the creation of councils to replace it and discharge the functions of that Council and, as respects Wales, of the Countryside Commission; to make further provision for the control of the importation, exportation, use, supply or storage of prescribed substances and articles and the importation or exportation of prescribed descriptions of waste; to confer powers to obtain information about potentially hazardous substances; to amend the law relating to the control of hazardous substances on, over or under land; to amend section 107(6) of the Water Act 1989 and sections 31(7)(a), 31A(c)(i) and 32(7)(a) of the Control of Pollution Act 1974; to amend the provisions of the Food and Environment Protection Act 1985 as regards the dumping of waste at sea; to make further provision as respects the prevention of oil pollution from ships; to make provision for and in connection with the identification and control of dogs; to confer powers to control the burning of crop residues; to make provision in relation to financial or other assistance for purposes connected with the environment; to make provision as respects superannuation of employees of the Groundwork Foundation and for remunerating the chairman of the Inland Waterways Amenity Advisory Council; and for purposes connected with those purposes.

Environmental Protection Act 1990, Ch. 43, Long Title (Eng.).

<sup>207</sup> *Id.* at 26.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* The Secretary of State must authorize the processes of the company or else the operation of such unauthorized processes would be illegal. *Id.* at 22.

<sup>210</sup> Environment Act 1995, 1995 Chapter 25, et seq. (Eng.).

<sup>211</sup> Parliament explicitly announced the purpose of the statute:

An Act to provide for the establishment of a body corporate to be known as the Environment Agency and a body corporate to be known as the Scottish Environment Protection Agency; to provide for the transfer of functions, property, rights and liabilities

Environment Agency (“EA”) to seek reimbursement from the responsible parties and order the clean up of the contaminated land.<sup>212</sup> The 1995 Act also sets out statutory duties of property owners or occupiers to clean up the contaminated site.<sup>213</sup> Even though the origin of the contamination may go unknown, the 1995 Act imposes liability upon the current owner or occupier.<sup>214</sup>

The 1995 Act also defines the term “contaminated land” to assist governmental agencies in deciding whether the pollution qualifies as an environmental risk.<sup>215</sup> Local agencies must determine if a “significant possibility of significant harm” exists creating terms of art left for interpretation by the statutory guidance.<sup>216</sup> However, the 1995 Act gave agencies a decision matrix to use in analyzing the harm.<sup>217</sup> The pollution must have a source, “‘a receptor’ (a target which can be harmed) and ‘a pathway’ (a means of exposing the target to the pollutant).”<sup>218</sup> Without this “pollution linkage,” the land is not contaminated.<sup>219</sup>

Once the agency classifies the land as contaminated, the remediation process may begin. The local authority will issue a remediation notice to the targeted appropriate

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to those bodies and for the conferring of other functions on them; *to make provision with respect to contaminated land* and abandoned mines; to make further provision in relation to National Parks; to make further provision for the control of pollution, the conservation of natural resources and the conservation or enhancement of the environment; *to make provision for imposing obligations on certain persons in respect of certain products or materials*; to make provision in relation to fisheries; to make provision for certain enactments to bind the Crown; to make provision with respect to the application of certain enactments in relation to the Isles of Scilly; and for connected purposes.

Environment Act 1995, Ch. 25, Long Title (Eng.) (emphasis supplied).

<sup>212</sup> Valerie M. Fogleman, *English Law – Damage to the Environment*, 72 TUL. L. REV. 571, 582 (1997); Mark L. Wilde, *The EC Commission’s White Paper On Environmental Liability: Issues and Implications*, ENV. LAW 2001 13(21) n.36.

<sup>213</sup> *Contaminated Land – Remediation and Liabilities*, J.B.L. 172, 173 (R.G. Lee, ed., 1997) [hereinafter “Lee”].

<sup>214</sup> *Id.* at 173.

<sup>215</sup> *Id.* at 174.

<sup>216</sup> *Id.* at 174-175.

<sup>217</sup> *Id.* at 174.

<sup>218</sup> *Id.*

<sup>219</sup> Lee, *supra* note 213, at 174.

entities or persons responsible for the contaminated land if the appropriate entities do not report the contamination first.<sup>220</sup> The remediation notice lays out the procedures so the appropriate persons properly clean up the contaminated land.<sup>221</sup> Failure to comply with the remediation notice can result in penalties and fines, and the agency can take the appropriate persons to the High Court to enforce the remediation notice.<sup>222</sup> Also, the local authority may even clean up the contaminated land if the responsible person failed to comply, or if the contamination creates an “imminent danger,” and then recover the costs of the remediation.<sup>223</sup> The EA is equipped to perform the cleanup itself and then seek “reasonable costs” from the responsible parties with some limitation.<sup>224</sup> This is almost identical to CERCLA section 107.

The 1995 Act also provides for contribution between liable parties. The remediation process may take several years to finish, and even then the site may require continued observation.<sup>225</sup> Obviously, this process can drive up costs.<sup>226</sup> The 1995 Act provides for holding more than one party responsible for the remediation costs.<sup>227</sup> The 1995 Act gives local authorities guidelines in determining whether parties are liable and to what extent.<sup>228</sup> The local authorities may group parties according to their liability and may exclude certain parties if they satisfy one of six tests given by the 1995 Act.<sup>229</sup> The remaining Class A parties must then bear the costs of remediation to the exclusion of

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<sup>220</sup> *Id.* at 177.

<sup>221</sup> *Id.* at 178.

<sup>222</sup> *Id.* at 178-179.

<sup>223</sup> *Id.* at 179.

<sup>224</sup> Fogleman, *supra* note 212, at 582.

<sup>225</sup> Lee, *supra* note 213, at 180.

<sup>226</sup> *See id.*

<sup>227</sup> *Id.* at 181.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 182-184.

Class B parties.<sup>230</sup> The guidelines also allow apportionment within a class creating a contribution regime.<sup>231</sup> The local authorities must apply three factors in determining “relative contributions”: (1) “quantities of pollutant present”; (2) “different time periods of occupation”; or (3) “the areas of the site occupied by the parties in the liability group.”<sup>232</sup> The authorities may also require different class members to contribute.<sup>233</sup> This element of the 1995 Act correlates strongly with CERCLA section 113 since both allow contribution actions.<sup>234</sup>

It is clear that the Environment Act of 1995 is a counterpart to CERCLA sections 107 and 113. Both provide bases for cost-recovery and contribution actions for contaminated land clean-up costs. England’s legislation came twenty-five years after the U.S. Congress enacted CERCLA, but both countries now have statutory actions almost identical in these specific regards. Now the next issue to discuss is whether the substantive similarities transfer into the procedural by looking at England’s use of jury trials in its environmental actions.

### *English Origins of Trial by Jury in Environmental Actions*

To understand whether an environmental cost-recovery or contribution action under U.S. law sounds in law or equity as required under the proper Seventh Amendment analysis,<sup>235</sup> one must examine the types of actions in English courts at the end of the eighteenth century, since it is eighteenth century actions the Court will look to in finding a proper analog. Furthermore, the historical analysis of the courts reveals the differences

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<sup>230</sup> Lee, *supra* note 213, at 184.

<sup>231</sup> *Id.* at 184-185.

<sup>232</sup> *Id.* at 185.

<sup>233</sup> *Id.*

<sup>234</sup> Compare *supra* text accompanying note 233 with *supra* note 73.

<sup>235</sup> *Supra* text accompanying note 96.

between environmental law predecessors and restitution actions. Historical understanding not only benefits the analysis of the U.S. doctrine, but it also provides a foundation to realize the path England has chosen in substantially limiting its storied jury system.<sup>236</sup> This discussion will continue to follow the English jury system past the eighteenth century through its precipitous decline into the present.

At common law when the United States ratified the Constitution, the English court system consisted of four different types of courts: the Court of the King's Bench, the Court of Common Pleas, the Court of Exchequer, and the Court of Chancery.<sup>237</sup> The first three courts recognized the right to trial by jury while the Court of Chancery, developed from King's grant to a chancellor to fashion different types of equitable relief, did not.<sup>238</sup>

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<sup>236</sup> The jury system, as previously discussed, is recorded as far back as Ancient Greece (*supra* note 3), but the true modern form began taking place when the Normans conquered the Anglo-Saxons in 1066 A.D. DEVLIN, *supra* note 18, at 6. Until King Henry II's reign during the twelfth century and Pope Innocent III's rule at the end of the twelfth into the early part of the thirteenth century, courts rarely performed trial by jury and instead chose other alternatives. *Id.* at 7. ("If a single person could be thought of as creating the jury, [Henry II] would be that person." MOORE, *supra* note 4, at 34.) Henry II is credited with "introducing more far reaching legal changes than any other monarch that ever held that throne." *Id.* The numerous statutory enactments from his reign, including the Constitution of Clarendon and the Grand Assize, established legislative rights to trial by jury effectively eliminating trial by compurgation and duel in many cases. *Id.* at 35 & 38. ("Under the able hands of Henry II the shapeless dough was kneaded, until emerged as the loaf of a system for the determination of issues of fact." H.G. HANBURY & D.C.M. YARDLEY, ENGLISH COURTS OF LAW 85 (5th ed. 1979). The right to trial by jury was given by statute or writ including the Magna Carta. JOINER, *supra* note 4, at 41; MOORE, *supra* note 4, at 47. The development continued and the jury trial was expanded to include civil trials. JOINER, *supra* note 4, at 40. Trial by jury was limited to civil cases and very few criminal cases until Pope Innocent III's ruling in 1215 A.D. MOORE, *supra* note 4, at 39 & 50. In that writ, the Pope forbade the clergy from participating in trial by water or fire. *Id.* at 50. However, Pope Innocent III's ruling did not become implemented into the laws of England until King Henry III's writ in 1219. *Id.* While the Pope did not explicitly endorse or advocate trial by jury, his denouncing of traditional means of trial left the decision to the judges. *Id.* This writ, in addition to the legislative enactments of Henry II, proved to be the launching pad for the elevation of the jury trial as the means of decision making throughout England during the later part of the eighteenth century. *Id.* at 51.

<sup>237</sup> JOINER, *supra* note 4, at 54.

<sup>238</sup> *Id.*

The King's Bench possessed criminal jurisdiction and jurisdiction over inferior courts including civil suits.<sup>239</sup> The King's Bench was prohibited by the Magna Carta from hearing common pleas.<sup>240</sup> Since the King's Bench occupied itself with mainly criminal cases, trespass actions, appeals of felonies, and suits to correct errors made by lower courts (including the Court of Common Pleas), the caseload was quite small compared to Common Pleas.<sup>241</sup>

The Court of Common Pleas determined civil suits between two subjects,<sup>242</sup> and this jurisdiction was general.<sup>243</sup> These differed from the King's Bench because in common pleas the king had no interest.<sup>244</sup> William Holdsworth,<sup>245</sup> the great English law historian, divided the jurisdiction of the Common Pleas into four areas: (1) real actions where fines and recoveries are sought, (2) correction of errors of the local courts,<sup>246</sup> (3) issue prerogative writs (i.e. writs for habeas corpus), and (4) jurisdiction over its own officials.<sup>247</sup> It is within the Court of Common Pleas that actions from the writ of trespass, and its progeny nuisance, were brought.<sup>248</sup> Furthermore, the right to trial by jury attached because it was a court of law.<sup>249</sup>

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<sup>239</sup> JOSEPH A. SHEARWOOD, ACTION AT LAW 1 (1900)

<sup>240</sup> J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 39 (4th ed. 2002).

<sup>241</sup> *Id.* at 38-39

<sup>242</sup> SHEARWOOD, *supra* note 239, at 1

<sup>243</sup> 1 HOLDSWORTH at 87.

<sup>244</sup> BAKER, *supra* note 240, at 38.

<sup>245</sup> Simpson, *supra* note 5. Holdsworth is considered to be "Oxford's greatest law professor since Blackstone." *Id.* at 247. After earning a double degree from Oxford in history and law, Holdsworth worked in the chambers of the Court of Chancery. *Id.* He then returned to teaching and writing eventually mastering every subject within the curriculum and he taught courses on every subject. *Id.* While teaching, Holdsworth still had time to write, and he created his "magnum opus": the *History of English Law*. *Id.* at 248. These volumes on the *History of English Law* are considered the "most encyclopaedic treatise on English law to have been written by one man." *Id.*

<sup>246</sup> 1 HOLDSWORTH at 77. This differed from the King's Bench appellate jurisdiction as the Common Pleas court reviewed decisions by the county court, the hundred court, or the court baron. *Id.* This appellate jurisdiction declined as the use of these local courts waned. *Id.*

<sup>247</sup> 1 HOLDSWORTH at 76-78

<sup>248</sup> BAKER, *supra* note 240, Table A at 70 and 422-435.

<sup>249</sup> HANBURY & YARDLEY, *supra* note 236, at 65.

The Exchequer of Pleas tried cases concerning revenue matters and eventually civil suits.<sup>250</sup> During the late thirteenth century, the Exchequer heard common pleas, but Parliament soon limited this by legislative enactments.<sup>251</sup> The jurisdiction of the Exchequer during the fourteenth, fifteenth and early sixteenth centuries was limited to actions “by or against Exchequer personnel, sheriffs, and a few other officers who were bound to render accounts at the Exchequer.”<sup>252</sup>

Though the jurisdictions appeared rigid, by the eighteenth century, the three courts of the King’s Bench, Common Pleas, and Exchequer of Pleas overlapped substantially.<sup>253</sup> The King’s Bench continued to focus on appellate work, but the three courts were considered “equal in status and authority and function.”<sup>254</sup>

Recognizing that remedies at common law in the King’s Bench, Common Pleas, or Exchequer often failed to satisfy conscientious notions of justice, England developed the doctrine of equity.<sup>255</sup> The requirement of a right to trial by jury under a writ became more cumbersome as England developed economically and the expansion of writs did not

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<sup>250</sup> SHEARWOOD, *supra* note 239, at 1.

<sup>251</sup> BAKER, *supra* note 240, at 48.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 49-51.

The Exchequer continued its proper revenue jurisdiction. The Common Pleas kept a monopoly of the true real actions, because the King’s Bench bill procedure was confined to personal actions, and the Exchequer *quominus* was appropriate only to claims for money which could be applied in paying a national Crown debt. Yet in reality these restrictions had come to mean very little . . . The only actions, therefore, in which the Common Pleas retained a true monopoly were real actions for those types of property not recoverable by ejectment: [advowson, writ of dower, and unassigned widow’s third share of husband’s land].

*Id.* at 50.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 103.

Equity could award a complete remedy in each particular case. Thus it could shape its decree so as to wind up a partnership, or could compel a person specifically to carry out an agreement he had made [i.e. specific performance], instead of merely giving damages for the breach, which might be totally inadequate; or could prevent by injunction anything being done, attaching the person of anyone disobeying; as Equity acted upon the person by the writ of subpoena.

SHEARWOOD, *supra* note 239, at 3.

match the pace of the expansion of individual rights.<sup>256</sup> This is where the chancellor's duties filled a void.<sup>257</sup> The Court of Chancery granted the equitable relief fashioned in many different ways,<sup>258</sup> and the Chancery granted such relief only if the courts of law provided no remedy or the remedy was inadequate.<sup>259</sup> The Chancery mostly occupied itself with issues of "fraud, accident, and breach of confidence,"<sup>260</sup> but the court distributed the greatest amount of equity in the area of trusts.<sup>261</sup>

The distinction between law and equity is quite simple: courts of law awarded money damages after an event occurred whereas courts of equity granted relief before an event to prevent harm or wrongdoing.<sup>262</sup> Since the only remedy at common law was damages,<sup>263</sup> the injured party often found this remedy inadequate in the case of nuisance.<sup>264</sup> If the injury was the result of an ongoing activity, damages would not cause the harmful acts to cease.<sup>265</sup> The Court of Chancery would issue an injunction prohibiting the defendant from committing the actions that were the source of harm.<sup>266</sup> For instance, if the nuisance action for damages in a court of law was successful, the problem may have not been solved as the defendant may continue interfering with the plaintiff's property rights.<sup>267</sup> Therefore, damages, or the remedy at law, would be inadequate and an injunctive remedy available in Chancery, in addition to legal remedies, would suffice.<sup>268</sup>

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<sup>256</sup> JOINER, *supra* note 4, at 41.

<sup>257</sup> *Id.*

<sup>258</sup> *See* BAKER, *supra* note 240, at 103.

<sup>259</sup> HANBURY & YARDLEY, *supra* note 236, at 97.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> JOINER, *supra* note 4, at 42.

<sup>263</sup> HANBURY & YARDLEY, *supra* note 236, at 103.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *See id.*

<sup>268</sup> *See id.*

It is clear that eighteenth-century trespass and nuisance actions sounded in courts of law where trial by jury was guaranteed.<sup>269</sup> Both nuisance theory and the jury trial find their origins in the actions of Henry II.<sup>270</sup> Seeking to centralize the laws of England, Henry II created the assize of nuisance which provided a remedy for landowners who sought relief from “‘things erected, made, or done’ on the defendant’s land.”<sup>271</sup> While it originally sounded in criminal writ, since it was a branch of the writ of trespass,<sup>272</sup> arguable dicta in a 1535 case expanded the theory to personal actions.<sup>273</sup> The element which distinguished trespass from nuisance was where the defendant performed the act.<sup>274</sup> If the act was performed on the plaintiff’s land, then trespass was the action; dissimilarly, if the act occurred on the defendant’s land, but hurt the plaintiff, then an action for nuisance would lie.<sup>275</sup> Nevertheless, juries in the courts at common law still determined damages for the actions in trespass and nuisance.<sup>276</sup>

The decline in the use of trial by jury in England is legendary and well-documented.<sup>277</sup> Ironically, the deterioration of the jury system in England began its steep descent just as statutory environmental actions began passing through Parliament.<sup>278</sup> The criticism of the jury system began as a relatively innocent academic exercise that sparked

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<sup>269</sup> HANBURY & YARDLEY, *supra* note 236, at 65.

<sup>270</sup> Kathleen Ann O’Neil, *Chemical Nuisance: Application of Public Nuisance Theory as a Remedy for Environmental Law Violations*, 26 Suffolk U. L. Rev. 51, 54 (1992); *supra* note 236.

<sup>271</sup> O’Neil, *supra* note 270, at 54.

<sup>272</sup> BAKER, *supra* note 240, Table A at 70.

<sup>273</sup> F. H. Newark, *The Boundaries of Nuisance*, 65 L. Q. REV. 480 (1949).

<sup>274</sup> *Id.* at 482.

<sup>275</sup> *Id.* at 481-482.

<sup>276</sup> HANBURY & YARDLEY, *supra* note 236, at 65; BAKER, *supra* note 240, at 423.

<sup>277</sup> DEVLIN, *supra* note 18, at 130. “In [English] civil litigation there has been in the last century a marked decline not only in the popularity of trial by jury but also in the facilities that are afforded it.” *Id.* MOORE, *supra* note 4, at 183-212. “Trial by jury is an ancient and democratic institution. It will be seen later that it is also a declining one, particularly in civil cases.” *Id.* at 183. Moore also considers the trial by jury in the county courts to be “practically obsolete.” *Id.* at 197. *See also* SMITH, et al, *supra* note 12, at 1035.

<sup>278</sup> MOORE, *supra* note 4, at 123-137.

a fiery inferno engulfing the jury trial as was known by Blackstone, Coke, Glanville, and other jurists of old.<sup>279</sup>

A statute in 1854 appeared to make a minor change in the fact finding system of English courts, but this change began the erosion of trial by jury.<sup>280</sup> The act was the Common Law Procedure Act of 1854 which generally enabled judges to try facts without the help of a jury.<sup>281</sup> However, towards the end of the nineteenth century, the confidence placed in the jury system surprisingly was increasing.<sup>282</sup> As a matter of fact, England had extended the right to trial by jury in divorce cases and probate cases with fifty percent of the divorce cases decided by a jury of peers.<sup>283</sup> Even the United States did not decide divorce cases by a jury.<sup>284</sup> England further expanded the use of jury trials to minor civil suits tried in county courts, but this would be the height of its use.<sup>285</sup> The 1854 Act began to take its toll, for by the end of the nineteenth century juries tried only fifty percent of the civil trials whereas before the number was eighty or well-over ninety percent.<sup>286</sup> Within a matter of several decades, hundreds of years of expansion and development of the jury system came crashing down.

The 1854 Act simply enabled parties to leave fact finding to a judge and established that a decision by a judge would have the same impact as a jury verdict.<sup>287</sup> Moreover, the 1854 Act allowed parties to waive trial by jury in actions at Common Pleas where previously the courts only conducted jury trials.<sup>288</sup> This change appears innocuous,

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<sup>279</sup> LESSER, *supra* note 4, at 220.

<sup>280</sup> BAKER, *supra* note 240, at 92.

<sup>281</sup> *Id.*

<sup>282</sup> MOORE, *supra* note 4, at 124.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* at 125; *see also* Jackson, *supra* note 11, at 139.

<sup>287</sup> BAKER, *supra* note 240, at 92.

<sup>288</sup> MOORE, *supra* note 4, at 124.

but practitioners and judges saw otherwise: “The very existence of an option made the decision to ask for a jury suspicious.”<sup>289</sup> Such a decision placed counsel in a position to either offend the judges or choose a less desirable method of justice.<sup>290</sup>

The next hole in the bulwark of liberty was bored in 1883. In that year, Parliament limited the types of cases where trial by jury was a matter of course.<sup>291</sup> Parliament recognized six types of civil cases where the right to trial by jury attached: libel, slander, malicious prosecution, false imprisonment, seduction, and breach of promise of marriage.<sup>292</sup> This act restricting the use of juries was a “war measure.”<sup>293</sup> During this time, jury trials were available in other actions, but it required specific requests making jury trials the exception instead of the general rule.<sup>294</sup> This rule became ever more restrictive when England implemented time limits for jury trial requests.<sup>295</sup> This 1883 act was lifted in 1925, but new legislation continued the decline of jury trials.<sup>296</sup>

In 1933, Parliament enacted the Justice (Miscellaneous Provisions) Act that virtually eliminated the jury trial.<sup>297</sup> The Act took away any absolute right to a trial by jury, but allows juries in actions for fraud, libel, slander, malicious prosecution, false imprisonment, seduction, or breach of promise of marriage effectively adding one action to the 1883 act.<sup>298</sup> The 1933 Act also granted courts the power to order a jury trial<sup>299</sup>

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<sup>289</sup> BAKER, *supra* note 240, at 92.

<sup>290</sup> MOORE, *supra* note 4, at 124.

<sup>291</sup> DEVLIN, *supra* note 18, at 130.

<sup>292</sup> *Id.*

<sup>293</sup> MOORE, *supra* note 4, at 125-126. This “war measure” was put in place as an emergency act to expire six months after the World War I. DEVLIN, *supra* note 18, at 131.

<sup>294</sup> DEVLIN, *supra* note 18, at 130-131.

<sup>295</sup> *Id.* at 131.

<sup>296</sup> MOORE, *supra* note 4, at 126.

<sup>297</sup> *Id.*; Jackson, *supra* note 11, at 141.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

However, courts have interpreted this power to apply only in exceptional cases.<sup>300</sup> This newest act continued the assault and brought the number of jury trials in civil actions down to about twelve percent in 1935.<sup>301</sup> Eventually, the number tumbled to around two or three percent in 1988.<sup>302</sup>

This English trend in the use of juries clearly affected trial by jury in environmental actions because courts of law hearing nuisance and trespass claims granted trial by jury during the eighteenth century before the decline began in the later half of the nineteenth century.<sup>303</sup> Furthermore, the seven actions with qualified rights to trial by jury do not include any actions for environmental harm.<sup>304</sup> Both the United States and England have overwhelmingly denied the right to trial by jury, but the United States has not had the broad retreat of the jury system found in English law.<sup>305</sup> Yet another distinguishing fact about British law is how they have denied the right: England enacted statutes whereas the United States' denial comes from lower-level judicial rulings.<sup>306</sup> This contrast in jurisprudence stirs well-founded questions concerning the underlying policy

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<sup>300</sup> SMITH et al, *supra* note 12, at 1036. The courts have given several factors to take into account in determining whether the action qualifies as exceptional:

[1] [N]eed for uniformity in the award of damages in personal injury cases, the jury being ignorant of the conventional figures in comparable cases; [2] that in such cases the severity or unusual nature of the injuries are not exceptional circumstances, but if they are unique or nearly so, jury trial may be appropriate; [3] the possibility of dishonesty or deliberate lying; [4] the fact that the honour and integrity of the person applying for jury trial may be at stake; [5] the fact that trial without a jury is speedier and less expensive; [6] the proposition that, in the circumstances, trial by judge alone is 'more likely to achieve a just result than trial by jury.'

*Id.* at 1036-1037.

<sup>301</sup> DEVLIN, *supra* note 18, at 132.

<sup>302</sup> *Id.*

<sup>303</sup> See *supra* text accompanying notes 208-216.

<sup>304</sup> See *supra* note 298. An electronic search of English case law produced three cases where juries were mentioned by the courts in actions concerning the Environment Act of 1995. *Decra Plastics Ltd. v. Waltham Forest London Borough Council*, [2002] All ER (D) 223 (Dec); *R (on the application of Marchiori) v. Environment Agency*, [2002] EWCA Civ 03, (2002); *R (on the application of Lowther) v. Durham County Council and another*, Court of Appeal (Civil Division) (2001). These cases fail to address whether or not a right to trial by jury exists.

<sup>305</sup> See *supra* text accompanying note 13.

<sup>306</sup> See *supra* notes 100 and 241-253.

issue: what will be the outcome if the right to trial by jury in cost-recovery and contribution actions is granted?

### III. IMPLICATIONS OF RIGHT TO TRIAL BY JURY

If a right to a jury trial in cost-recovery and contribution actions exists, such a right will alter litigation strategies.<sup>307</sup> As a procedural matter, many judges (and parties for that matter) waive the right to trial by jury because many consider environmental cases so complex that juries would be inadequate decision makers.<sup>308</sup> Furthermore, with the increase of jury awards in civil litigation, the thought of a multi-million dollar verdict strikes fear into the heart of every defendant's counsel. Yet both of these concerns are either unfounded or the disadvantages could easily be mitigated.

The main thrust of the argument contending the jury's abilities in a complex civil case stems from the third factor of analysis for jury trials stated in *Ross v. Bernhard*: "the practical abilities and limitations of juries."<sup>309</sup> When courts consider the factors of length of trial, number of parties involved, number of issues involved, magnitude of the evidence, the complexity of the conceptual nature of the issue, and esoteric issues, they have found that a jury, even though the issues are firmly planted in law, could not issue a rational verdict because they could not understand the evidence, and could not make conclusions of law in an area completely foreign.<sup>310</sup> However, the judicial process could easily remedy these potential problems by implementing a few minor changes.

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<sup>307</sup> Smith, *supra* note 2.

<sup>308</sup> See Morris S. Arnold, *Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829, 829-830 (1980). See also *supra* note 13

<sup>309</sup> 396 U.S. at 538 n.10.

<sup>310</sup> Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 HARV. L. REV. 898, 899 & 907-908 (1979).

Faced with a jury trial in a complex litigation case such as a CERCLA action, judges may choose from a number of mechanisms to assist juries without sacrificing efficiency.<sup>311</sup> In distilling the issues down to the main points upon which the entire case turns, judges can encourage stipulations of facts, host pre-trial conferences to eliminate much of the procedural hurdles, and eliminate testimony irrelevant to the narrowed issues.<sup>312</sup> Likewise, in breaking the conceptual aspects of complex litigation into palpable sections, judges may use various tools such as appointing a special master under Federal Rule of Civil Procedure 53 who may summarize the expert witness testimony stating it in terms the average jury member could understand.<sup>313</sup> In addition to the special master, judges themselves could alleviate the difficulty by mediating between the jurors and counsel when misunderstanding arises and drafting succinct but helpful jury instructions.<sup>314</sup> These are just a few steps the judiciary can take in ensuring due process during a jury trial of environmental cost-recovery or contribution actions.

The judiciary may prevent the second problem of excessive jury verdicts in a number of ways. First, constitutional limitations placed on jury verdicts through the judge's discretion under remittitur eliminate much of the concerns surrounding excessive jury verdicts.<sup>315</sup> Second, if the defendant's oppose the judgment, they can seek a judgment n.o.v., new trial, or appeal the decision.<sup>316</sup> These avenues of justice ensure due process on both sides of the lawsuit while preserving the right to trial by jury.

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<sup>311</sup> See *supra* note 13, at 115.

<sup>312</sup> *Id.* at 116.

<sup>313</sup> *Id.* at 116-117.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at 118.

<sup>316</sup> *Id.* at 119.

#### IV. CONCLUSION

The right to trial by jury is the last remaining vehicle of true democracy preserved in the Seventh Amendment of the U.S. Constitution. U.S. citizens embrace their Seventh Amendment right and any denial of that right should undergo intense examination to ensure such a right was never intended by the framers of the Bill of Rights. A proper historical analysis of cost-recovery and contribution actions under CERCLA provides overwhelming proof that the Seventh Amendment protects the right to trial by jury in the discussed CERCLA actions.

When the current decisions by the federal courts denying the right to a jury are properly analyzed, the correct conclusion becomes apparent. Court should not analogize CERCLA actions to restitution actions because they are different in nature; nuisance or trespass claims are the proper analogs. Moreover, the Court has classified restitution as having both legal and equitable qualities. Ultimately, under the *Tull* two prong analysis, the eighteenth century analogs in English courts determine the outcome. English history offers tremendous guidance on this part.

English environmental law, as in the United States, grew out of actions in nuisance and trespass, but England's history is much deeper. Courts applied the law of nuisance – an ancestor to modern environmental law – as early as 1611. While the theory of law changed, the courts did not, for both nuisance and trespass actions seeking damages were heard in courts of law where the right to a jury attached. The continuity between the English and American systems continued, to a certain extent, from the eighteenth century until late in the nineteenth century when the jury system in England began eroding.

The decline of the English trial by jury reversed hundreds of years of legal thought and ultimately denies the right to jury in environmental actions. This development over the past 150 years stands in stark contrast to the United States. Thankfully the United States did not follow England's example.

It is in defense of this "bulwark"<sup>317</sup> and fear of its demise that courts should properly analyze the rights under the Seventh Amendment in CERCLA cost-recovery and contribution actions. Many advantages to the trial by jury exist and courts can implement procedural tools minimize the disadvantages. CERCLA offers a remedy at law, and under the Seventh Amendment, a jury of peers should determine the outcome.

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<sup>317</sup> BLACKSTONE, *supra* note 3, at 275.