incurred in a "full accounting," conservation of authority (i.e., not calling on the cumbersome civil justice system backed by the authority of the state to redress every last little bit of injury), or maintaining "affordable" prices for goods and services by permitting some degree of cost externalization onto victims by denying them compensation for remote injuries. Assume that some or all of these justifications for limiting liability are embodied in the proximate cause inquiry. Does that provide any predictable standard regarding when the limit will be invoked to prevent recovery? Even if the policy-oriented aspect of the proximate cause inquiry seems almost devoid of a standard that can be clearly articulated, could tort law employ some better mechanism than proximate cause when dealing with those policy concerns?

D. REMEDIES IN ENVIRONMENTAL LITIGATION

Many novel issues arise in the context of environmental law remedies. The following sections explore equitable remedies, damages, restoration remedies, and natural resources remedies. Criminal penalties are considered in Chapter 20 and administrative sanctions in Chapter 21.

Section 1. EQUITY AND INJUNCTIONS

Zygmunt Plater, Statutory Violations and Equitable Discretion
70 California Law Review 524, 533–544, 545–546 (1982)

The exercise of equitable jurisdiction, particularly the availability of injunctions, has increased over the years. The anachronistic requirement of a property interest in order to invoke equity has been scrapped of necessity, and other impediments have been removed. Despite regular protestations to the contrary, the status of the injunction has become a common, widely used judicial remedy precisely because of its ability to fine-tune the requirements of private conduct in a complex, modern society. Its development parallels the expansion of cases [in environmental law and] in civil rights and other constitutional areas, where damage remedies are insufficient or miss the point....

When equity's application in traditional common law cases is subjected to careful analysis, some basic clarifications emerge. Analytically, it can be argued that the umbrella terms "balancing the equities" and "equitable discretion" obscure what are really three separate areas of balancing, three different functions fulfilled by three different types of equitable relativism. The three areas are:

1. *Threshold balancing*, based in both law and equity, tests whether plaintiffs can maintain their actions. This stage includes questions of laches, clean hands, other estoppels, the lack of an adequate remedy at law, proof of irreparable harm, and similar issues.

2. *Determination of contending conducts* ascertains which conduct will be permitted to continue and which will be subordinated. It often involves the question of abatement, a separate issue from the question of liability for past injuries to protected interests.

3. *Discretion in fashioning remedies* involves a process of tailoring remedies to implement the second stage determination of contending conducts.

Consider, for example, the relatively simple field of private nuisance torts where equity has traditionally played an active role. The classic *Ducktown Sulphur* case demonstrates all three of equity's distinctly different roles. In that turn-of-the-century case, 83 S.W. 658 (Tenn. 1904), the

court had to deal with an early example of an environmental tradeoff. The smelting industry was getting underway in the foothills of southeastern Tennessee and northern Georgia. It was likely to provide sizable revenues for the entrepreneurs of Atlanta and Chattanooga, jobs for local residents, and copper and other materials for the nation's industrial economy. The copper ore was mined in nearby hills, then smelted in large open-air piles layered with firewood and coal. This firing process, however, produced acidic "sulphurectic" air emissions that eventually turned nearly a hundred square miles of hills into a remarkably stark, denuded desert, its topsoil slowly washing away down sterile, chemical-laden streams. The plaintiffs were farmers whose fields and orchards began to die as the smelting got underway.

The Tennessee high court held that the smelting was a continuing private nuisance, but after long and careful deliberation allowed the defendant industries to continue operations despite their drastic impact upon the plaintiffs' land and livelihood. The court required only that the mills compensate the plaintiffs for their losses. In common parlance, it awarded legal compensatory damages but denied any injunctive remedy, based on a balancing of equities. The *Ducktown* court certainly balanced the equities. Analytically, however, it did so not once but thrice:

Threshold Balancing. The first type of balancing addresses threshold questions which plaintiffs must survive if a cause of action is to be heard. Some issues appear in the guise of affirmative legal defenses: laches and coming to the nuisance, for example, are legal defenses grounded in principles of equitable estoppel. Other issues — clean hands, additional estoppel principles, proof of irreparable harm, and the inadequacy of legal remedies — are more specifically equitable, brought to bear only where the plaintiff seeks equitable remedies. Each of these threshold issues involves comparisons and balances that are part of the longstanding discretionary processes of equity. The *Ducktown* court made several such determinations, excluding some plaintiffs on laches grounds as to certain defendants, confirming their rights to sue as to others, and noting injuries to land that analytically made equitable remedies potentially available on grounds of irreparability.

The Determination of Contending Conducts. After plaintiffs survive equity's threshold gauntlet, nonstatutory litigation moves to the application of rules of conduct. The major discretionary function of the equity court at this second stage is the determination of whether the defendant's conduct will be permitted to continue. To reach this abatement determination, however, courts must first consider issues of liability....

The initial question is whether defendants are liable at all, whether their conduct is "illegal" under the common law.... Plaintiffs in private nuisance cases and in other common law areas seek equitable remedies — particularly injunctions — as well as damages. In such cases, once tort liability is found, the court turns to the different question of whether defendant's conduct will be abated....

The *Ducktown* abatement question focused on the desirability and consequences of the competing forms of conduct, considering relative hardship between the parties, the balance of comparative social utility between the two competing conducts, and the public interest (which usually amounts to the same thing). The court declared:

> A judgment for damages in this class of cases is a matter of absolute right, where injury is shown. A decree for an injunction is a matter of sound legal discretion, to be granted or withheld as that discretion shall dictate, after a full and careful considerations of every element appertaining to the injury.

Citing a series of equity cases in which the utility of defendant's enterprises weighed against injunctions, the court's "careful consideration" began with a question that virtually answered itself:

> Shall the complainants be granted, by way of damages, the full measure of relief to which their injuries entitle them or shall we go further, and grant their request to blot out two great mining and manufacturing enterprises, destroy half of the taxable values of a county, and drive more than 10,000 people from their homes?...

The tort debts owed by one party to the other might be decided by uniformly applicable substantive tort principles, but questions of the life and death of farms and smelting plants — of who must stop and who may go on — were left to the flexible hands and heart of equity. In short, courts have used equity to define and exercise a separate judicial role, grounded upon a rational discretion and working beyond the rigid rules of the law.

Tailoring the Remedies.... At this point in a lawsuit, law and equity have determined all the substantive issues, and only the equitable function of implementation remains. If the court had decided in the second stage balance that defendant's conduct may continue, the award of legal damages for past injuries ends the question of remedy. In that situation no equitable remedy is necessary unless required to enforce payment of damages.

When the court determines that defendant's conduct may not continue, on the other hand, a full array of equitable options exists. If defendants agree to abate their activity voluntarily, the court has the option of not issuing any formal equitable remedy at all. This point...is taken for granted in the common law setting: an injunction need not issue if the court finds that the abatement decision will be implemented without it, but will usually issue where there is any doubt on the matter. Between these two extremes lies the declaratory judgment, a remedy slightly more formal and more assertive than the no-injunction option but similarly unenforceable through contempt proceedings. Yet in the case of good faith defendants, a declaratory judgment or less may be all that is necessary to implement the court's abatement decision.

The strength and flexibility of injunctions, however, makes them attractive as the remedy of choice in many cases. Equity courts shape injunctions in multifarious forms: injunctions to halt an enterprise completely, to shut down a particular component activity, to scale down overall activity by a certain percentage, to halt a specific offensive effect, to abate after a lapse of a specific term if certain performance standards are not achieved — these are but a few. Injunctions also serve different tactical ends. They can be wielded to drag a rambunctiously recalcitrant defendant into compliance, to tighten the reins on slipshod defendants whose compliance efforts may be sloppy, or merely to add a final reassuring level of certainty to a good faith defendant's compliance. In short, "the plastic remedies of the chancery are molded to the needs of justice."

COMMENTARY & QUESTIONS

1. **A range of equitable remedies.** The last paragraph offers a reminder that injunctions can be far more subtly crafted than mere cease-and-desist prohibitions. When Oscar Boomer went to his lawyer's office, he undoubtedly wanted to stop that cursed cement dust, and the remedy he instinctively favored for the factory was to shut it down. When most attorneys consider remedies beyond damages they are equally unsubtle; the only injunction they conceive of is an order halting the defendants in their tracks. Environmental attorneys can increase the force and effect of their litigation efforts, however, by considering a range of appropriate, innovative equitable remedies and proposing them to the court. Consider each of the following equity options available as remedies in settings ranging from localized pollution like *Boomer* to massive episodes like coastal oil spills:

- decrees encouraging technological innovation, like Judge Jasen's proposed order in *Boomer*, postponing shutdowns for a set term, to be effective thereafter unless clean technology can be applied;
- decrees ordering, say, a 30% cutback in production until cleaner technology is achieved;
- decrees restricting defendant's activity during times when weather conditions are particularly likely to cause pollution damage;
- decrees requiring ongoing corporate monitoring of offsite pollution;
- decrees requiring that defendants actively clean up their externalized pollution;
- decrees ordering installation of particular specified control technology;
- decrees ordering restitution of profits gained from avoidance of pollution controls;
- decrees requiring periodic reporting to the court;
- decrees ordering "restoration" of trees, soil, personal property, and natural resources;
- appointment of equitable trial masters under Fed. R. Civ. P. 53 for managing complex factual and procedural issues prior to judgment;
- appointment of post-decree monitors to oversee defendants' compliance with court orders, backed by subpoena powers and reporting to the courts;[29]
- environmental receiverships, so that where defendant firms can't or won't comply with environmental requirements, courts will take over and run them through appointed equitable receiverships; and other creative applications of this remarkable judicial power.

Injunctions decree whatever a court chooses to prescribe, and their prescriptive capabilities are given extra credibility by the criminal contempt-of-court penalties they carry with them.

When an injunction commands a halt to a polluting activity, it acts like a decisive statutory prohibition. Is that cost internalization? The more subtle equitable orders noted above can clearly improve the internalization process. In the Oregon aluminum factory cases cited in *Borland*, the courts prescribed precisely which pollution control devices defendants had to install and established strict schedules for the defendants to follow. What about cleanup or restoration orders? There is no doctrinal reason why equity cannot take sensitive account of the natural resource consequences of wrongful acts and remedy them in accord with modern public policy. Defendants' realization that they may have to pay restitution of profits or to clean or replace soil, trees, or other property drastically changes the economic calculus of industrial waste disposal and raises ecological consciousness.

2. **The balance of equities.** The *Boomer* case is perhaps most famous for its rejection of the traditional New York common law rule that an injunction would routinely issue to shut down a continuing nuisance, in favor of the more flexible balancing the equities

29. See Feldman, Post-Decree Judicial Agents in Environmental Litigation, 18 B.C. Envtl. Aff. L. Rev. 809 (1991). The classic *Ducktown* case had a court-appointed monitor remedy to police emissions limits, and the monitor was guaranteed full access to defendant's operations. See *Tennessee Copper*, 237 U.S. at 478, and 240 U.S. 650.

doctrine. Was the court undercutting environmental protection and sound policy when it reversed the automatic rule? In legal history terms, would you be surprised to find that for 50 years after the tough *Whalen* rule shut down a paper mill, the tendency of trial courts in New York had been to find no nuisance at all, knowing that any finding of nuisance liability would automatically trigger a complete shutdown of industrial operations?

A fundamental canon of equity law is that an equitable decree must do equity. That means it must be sensitive to public as well as private consequences of proposed restrictions. Under the *Ducktown* principle, it was surely fitting and relevant that the *Boomer* court considered public interests weighing in favor of continued plant operation. But what items were allowed into the balance of equities in *Boomer*? Do they appear to include all relevant information for a full-scale balancing? The court weighed items of both public and private concern affirmatively in favor of the defendant, against the proposed injunction. What did it weigh in favor of the injunction for plaintiffs? A more evenhanded approach might have allowed plaintiffs to present evidence of the cement plant's adverse impacts on the community at large. Why does the majority explicitly remove public health issues from its consideration? In light of the public interest element in equitable balancing, which he himself applied in favor of the defendant, doesn't Justice Bergan's refusal to intrude "broad public objectives" into a simple suit between "individual property owners and a single cement plant" ring hollow? How would you have argued the point?

Would the equities of the case have been different if the Boomers, well before construction of the cement plant, had repeatedly told Atlantic Cement Company that they feared the dust would escape and injure them, only to receive assurances that there would be no problem? See Smith v. Staso Milling Co., 18 F.2d 736 (2d Cir. 1927) (opinion by Learned Hand granting an injunction in such circumstances, under Vermont nuisance law).

Note that when courts balance the equities to determine what kind of order to issue, they are not restricted to facts and values incorporated in the elements of the cause of action, nor even to the evidence adduced on the trial record. This means that in appropriate cases the equitable balancing can include consideration of a broad range of public environmental concerns that could not be directly litigated, including a community's quality of life, ecological consequences to natural resources, and declared public policies of local, state, and federal governments.

3. **Constraints on equitable remedies.** In addition to equity's particular threshold and balancing requirements noted in the equitable discretion article excerpt, equity law presents other constraints to environmental litigants. One of the most interesting is the defense of "prospective" or "anticipatory nuisance" seen in the *Wilsonville* case. The traditional rule was that in order to get an injunction against proposed actions, one had to prove the probability of serious injury or that it was a "nuisance per se"; otherwise the law would "wait and see." But in environmental litigation, plaintiffs are often attempting to stop activities that have no legal track record. In Wallace v. Andersonville Docks, 489 S.W.2d 532 (Tenn. 1972), for example, a court refused on those grounds to

halt a cross-country motorcycle race through a state reserve. Or a case may pose a "zero-infinity" problem — release of a particular chemical or gene-altered organism may have only a small possibility of negative effects, but if they occur they may be catastrophic. As a result, the common law abdicated all such issues to the tender mercies of public authorities. There are signs, as in Judge Ryan's concurrence in *Wilsonville*, that the situation is changing. See Sharp, Rehabilitating the Anticipatory Nuisance Doctrine, 15 B.C. Envtl. Aff. L. Rev. 627 (1988).

4. **Other equitable actions.** The present focus on equitable remedies should not obscure the fact that although equity is usually employed to supply remedies for common law or statutory causes of action, some causes of action are themselves based on the traditional equity jurisdiction. Substantive equitable claims thus may have environmental importance in cases involving fraud, bankruptcy, and trust law. Does equity embody a creative free-floating cause of action? In other words, can a judge issue an injunction whenever she is convinced that a wrong is occurring? Conventional wisdom holds rather that plaintiffs must show injury to a legal right.

5. **Restoration remedies.** Modern environmental cases have brought new and expanded currency to the old remedy of restoration. The restoration concept has great environmental utility, but raises some knotty problems. When and for what kind of case are injunctions or damages based on restoration justified and desirable? Note the potency of the restoration remedy in *Schenectady Chemical* and *Wilsonville* where defendants were forced to remove polluted soils and restore the land. In the right settings, restoration can serve not only to restore the "status quo ante"[30] but also to protect human and ecological safety, and powerfully to deter. In deterrent terms, defendants face the prospect that ill-gotten profits quickly can be dwarfed by the costs of restoration. In a Michigan case, a neighbor, after the plaintiff refused to sell him part of her rural land for a subdivision project, "accidentally" destroyed plaintiff's private arboretum, clearcutting five acres of exotic imported trees. The defendant admitted the wrongful act but argued that damages were purely nominal since he had actually *improved* the plaintiff's development-based market value (a similar claim was made in *Borland*). Though the case never resulted in a reported decision, consider the abrupt change in defendant's position that occurs when a court allows consideration of restoration remedies, for example, a restoration order requiring replanting equivalent mature trees. See Verdiccio, Environmental Restoration Orders, 12 B.C. Envtl. Aff. L. Rev. 171 (1985); Cox, Reforming the Law Applicable to the Award of Restoration Damages as a Remedy for Environmental Torts, 20 Pace Envtl. L. Rev. 777 (2003) (arguing for broader availability of such awards coupled with application of equitable trust principles that could ensure awards are used for restoration and not mere enrichment of plaintiffs).

Equitable restoration orders tend to rehabilitate natural values that would be excluded from the usual monetary interests balanced in legal actions. Consider the effect of an order requiring Allied to cleanse the polluted sediments of the James River and

30. One of the traditional aims of legal damages and equitable orders has been to return innocent plaintiffs to the position they had held before the wrongdoing.