Environmental Law -- Private Remedies for Pollution of Navigable Waters

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The dramatic increase in public concern about our deteriorating environment has been reflected in numerous legislative and enforcement activities directed at environmental protection.[1] The primary thrust of these activities has been the correction and prevention of pollution problems, leaving the courts with the principal role in compensating the private victim of pollution.

The law of torts is a vehicle for the application of social and economic policy to the allocation of damages. Before pursuing the means of re-allocating damages from pollution of navigable waters, it is essential to make a threshold decision as to whether such re-allocation is a desirable goal. Succinctly, the question is whether the economic burden resulting from pollution of navigable water should be borne by those directly injured, by the public at large, or by the polluter.

It is suggested that this cost generally should be borne directly by the one who caused the pollution. Where the polluter is an industrial enterprise, it will redistribute the cost among those similarly engaged by insuring against the risk, after which it and its competitors will price the cost of the insurance into the product or service they furnish. This process of "cost-internalization" yields a market price which reflects more closely the true economic cost of the product or service.[2] More important, perhaps, is the expectation that cost-internalization coupled with the profit motivation of the industrial manager will result in significant

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[1]Because this note is concerned with private remedies, the applicable statutes are discussed only in the context of their utility in fashioning such remedies. Federal statutes which are related to the problem are the Rivers and Harbors Act of 1899, ch. 425, §§ 9-20, 30 Stat. 1121 (codified in and comprising most of 33 U.S.C. §§ 401-18 (1970)); the Federal Water Pollution Control Act, 33 U.S.C. §§ 1151-60, 1171-73 (1970); the Federal Water Quality Improvement Act of 1970, 33 U.S.C. §§ 1161-70 (1970); and the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-43 (1970).

For an oil industry attorney's perspective on this legislative panoply, see Keener, *Federal Water Pollution Legislation and Regulations with Particular Reference to the Oil Industry*, 4 NAT. RES. LAW. 484 (1971). Much helpful background on legislative activity is found in Mendelsohn, *Maritime Liability for Oil Pollution—Domestic and International Law*, 38 GEO. WASH. L. REV. 1 (1969). A model state statutory scheme is discussed in Note, *A Proposal to Protect Maine from the Oilbergs of the 70's*, 22 ME. L. REV. 481 (1970).

[2]Esposito, *Air and Water Pollution: What to Do While Waiting for Washington*, 5 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 32, 34-36 (1970) [hereinafter cited as Esposito]; Katz, *The Function of Tort Liability in Technology Assessment*, 38 U. CIN. L. REV. 587, 592-93 (1960) [hereinafter cited as Katz].

improvements in pollution-control technology and in more aggressive use of control tools presently available.

A survey of the present state of the law reveals that most of the conventional theories of tort law have limitations which impair their effectiveness when applied to water-pollution situations.[3] Negligence will support a cause of action[4] but poses serious and complex problems of proof of fault.[5] The law of nuisance,[6] suggested by numerous writers as a productive device,[7] has been rendered less effective by a judicial philosophy of weighing the benefits of the polluting enterprise against the private damage it inflicts—thus, in some cases, conferring a "license to pollute."[8] The doctrine of *Rylands v. Fletcher*,[9] the rule of strict liability for damages from abnormally dangerous activities,[10] and the statutory imposition of express strict liability[11] are limited to particular and specialized fact situations.

This note will suggest two alternatives which may succeed where the above methods may fail because of their limitations. The first is the theory of statutory fault under the Refuse Act of 1899,[12] and the second is a new form of enterprise liability called "process liability."

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[3]For comprehensive discussions of tort law in pollution applications, see Esposito; Katz; Reitze, *Private Remedies for Environmental Wrongs*, 5 SUFFOLK U.L. REV. 779 (1971).

[4]Phillips Petroleum Co. v. Hardee, 189 F.2d 205 (5th Cir. 1951); State v. S.S. Bournemouth, 307 F. Supp. 922 (C.D. Cal. 1969) (denying motion to dismiss). A negligence action may be brought in admiralty or on the civil side of either a federal district court or a state court.

[5]Reitze, *supra* note 3, at 810.

[6]For examples of recovery under nuisance theory, see Hampton v. North Carolina Pulp Co., 223 N.C. 535, 27 S.E.2d 538 (1943); *cf.* McElwain v. Georgia-Pacific Corp., 245 Ore. 247, 421 P.2d 957 (1966) (air pollution). *See also* W. PROSSER, THE LAW OF TORTS § 89 (4th ed. 1970) [hereinafter cited as PROSSER].

[7]*See, e.g.*, Esposito 35-37; Katz 608-22; Reitze, *supra* note 3, at 799-807; Note, *Private Remedies for Water Pollution*, 70 COLUM. L. REV. 734 (1970).

[8]*See, e.g.*, Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970); Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 83 S.W. 658 (1904).

[9]L.R. 3 H.L. 330 (1868) (strict liability for damages resulting from a non-natural use of land). *See also* Katz at 642.

[10]*See* Green v. General Petroleum Corp., 205 Cal. 328, 270 P. 952 (1928) (driller held liable under this doctrine when oil well "blew out" in a developed area ashore). *See also* RESTATEMENT (SECOND) OF TORTS §§ 519-20 (Tent. Draft No. 10, 1964).

[11]*See, e.g.*, 33 U.S.C. § 1161 (1970) (strict liability for oil spills).

[12]33 U.S.C. § 407 (1970). Because repeated references will be made to the statute later in this note, this section is set out here with certain omissions:

> It shall not be lawful to throw, discharge, or deposit . . . from or out of any . . . floating craft of any kind, or from the shore . . . any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any

The doctrine of liability based on violation of statutory law is well established.[13] Despite this, the relatively recent adoption of many statutes concerning water pollution accounts for a shortage of cases in which this theory of recovery has been advanced. There is, however, an old statute which may afford a very real opportunity for relief to the private plaintiff if an interesting anomaly in its application can be overcome. The statute is the venerable Rivers and Harbors Act of 1899.[14] The anomaly is that two of the basic sections of the Act have given rise to private remedies while the third section has not. Unhappily, it is the pollution prohibition section of the Rivers and Harbors Act, commonly called the Refuse Act,[15] which has failed to support a private cause of action based on statutory fault. It should do so. To show why, it is necessary to look at the three major sections of the Rivers and Harbors Act and the judicial treatment they have received.

Section ten[16] of the Rivers and Harbors Act prohibits the obstruction, dredging, or filling of navigable waters without a permit from the Chief of the Corps of Engineers. There is no express provision for private remedies. Through application of the doctrine of statutory fault, violation of the statute has given rise to an implied cause of action for damages resulting from the unlawful conduct.[17]

The second major provision of the Rivers and Harbors Act is section fifteen,[18] the so-called "Wreck Statute." Section fifteen makes it unlawful to sink or allow a vessel to sink "voluntarily or carelessly" and imposes an affirmative duty to mark any wreck. It also requires that the owner commence removal of the wreck immediately or be considered to

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navigable water . . . ; and it shall not be lawful to deposit . . . material of any kind in any place on the bank of any navigable water, or on the bank of any tributary . . . where the same shall be liable to be washed into such navigable water . . . whereby navigation shall or may be impeded or obstructed . . . *and provided* . . . That the Secretary of the Army [may issue permits for the discharge of refuse].

[13]PROSSER § 36. The essence of the theory is that violation of a criminal statute or ordinance gives rise to a civil cause of action against the violator by any person who is within the class to be protected by the statute and whose injury results from the violation. The evidentiary effect of the violation ranges from mere evidence of negligence to negligence per se.

[14]Act of Mar. 3, 1899, ch. 425, §§ 9-20, 30 Stat. 1121 (codified in and comprising most of 33 U.S.C. §§ 401-18 (1970)).

[15]33 U.S.C. § 407 (1970). *See* note 12 *supra.*

[16]33 U.S.C. § 403 (1970).

[17]Lauritzen v. Chesapeake Bay Bridge & Tunnel Dist., 259 F. Supp. 633 (E.D. Va. 1966); William B. Patton Towing Co. v. Spiller, 440 S.W.2d 869 (Tex. Civ. App. 1969) (violation held to constitute contributory fault).

[18]33 U.S.C. § 409 (1970).

have abandoned it to the United States. In the latter event, the responsibility for removal shifts to the United States.

Since 1927, failure to mark a wreck has constituted statutory fault which results in the imposition of civil liability on the owner when other vessels collide with the wreck.[19] The removal-or-abandonment provision of section fifteen has travelled a more tortuous route to civil liability. Until 1967, the owner's liability terminated when he abandoned the wreck.[20] In that year the spectacular case of *Wyandotte Co. v. United States*,[21] involving a lethal cargo of chlorine in a barge negligently sunk in the Mississippi River, reached the Supreme Court. The Court held the owner liable in personam to the federal government for three million dollars in removal costs. Thus encouraged, the Fifth Circuit in 1970 took the next step and imposed continuing liability based on statutory fault on an owner whose submerged wreck was struck by another vessel.[22]

Thus, since the courts have consistently allowed private recovery for damages resulting from violations of those sections of the Rivers and Harbors Act dealing with obstructions and wrecks, it would seem reasonable to expect that they would allow recovery under section thirteen, the Refuse Act, as well. Contrary to these expectations, the limited case law at this point seems to weigh against this proposition.[23]

Section thirteen contains two prohibitions. The first proscribes the deposit or discharge of refuse into navigable waters or their tributaries. The second makes unlawful the placing of refuse on the banks of such waters when the refuse may subsequently wash into the water and interfere with navigation. *United States v. Republic Steel Corp.*[24] gave the Supreme Court an opportunity to rule on the question of civil liability under the Refuse Act. The Court found a violation of section thirteen, but the judgment was based principally on the application of section ten

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[19]Eastern Transp. Co. v. United States, 272 U.S. 675 (1927).

[20]United States v. Bethlehem Steel Corp., 319 F.2d 512 (9th Cir. 1963); *accord*, United States v. Zubik, 295 F.2d 53 (3d Cir. 1961).

[21]389 U.S. 191 (1967).

[22]Humble Oil & Refining Co. v. Tug Crochet, 422 F.2d 602 (5th Cir. 1970).

[23]The Refuse Act has given rise to a flurry of litigation in which environmentalists have attempted to bring *qui tam* actions to enforce the criminal sanctions of the Act, but the courts have consistently closed the door on these efforts. *See, e.g.*, United States *ex rel.* Mattson v. Northwest Paper Co., 327 F. Supp. 87 (D. Minn. 1971) and cases cited therein, 327 F. Supp. at 93; Bass Angler Sportsman Soc. v. United States Steel Corp., 324 F. Supp. 412 (N.D. Ala. 1971), *aff'd mem. sub nom.*, Bass Angler Sportsman Soc. v. Koppers Co., 447 F.2d 1304 (5th Cir. 1971).

[24]362 U.S. 482 (1960) (5-4 decision).

and the finding of an obstruction to navigation.[25] Dicta appear in two federal district court opinions to the effect that violation of the Refuse Act will not give rise to a civil cause of action.[26] In another instance, a federal district court held that no cause of action was stated where a pier had deteriorated to the point of releasing debris which damaged a neighboring pier.[27] The rationale was that interference with navigation is a necessary element of a violation of the second clause of section thirteen. The plaintiff in the latter case then brought suit in a state court, alleging the magic words "interference with navigation," and the Minnesota Supreme Court upheld the cause of action based on violation of the federal statute.[28]

In addition to the Minnesota case, the Fifth Circuit apparently endorsed the theory of a private right of action based on violation of the Refuse Act in *Acme Boat Rentals, Inc. v. J. Ray McDermott & Co.*[29] The language of the court, however, was "negligence and statutory fault,"[30] which leaves room for speculation as to whether the case might have stood independently on negligence under the general maritime law. In addition, the federal government has been allowed to bring a civil action to enjoin pollution under the first clause of section thirteen.[31]

Against this background, two federal district courts have ruled quite recently on the private remedies question. Both denied a private cause of action based on violation of the Refuse Act in the absence of interference with navigation. One of the cases provides no explanation for its holding,[32] but the other, *Guthrie v. Alabama By-Products Co.*,[33] warrants analysis and criticism.

The plaintiffs in *Guthrie* were riparian property owners who claimed a loss of property values as a result of pollution from industrial waste discharged by the defendants. The heart of the court's reasoning

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[25]*Id.* at 492.

[26]United States v. Bigan, 170 F. Supp. 219, 224 (W.D. Pa. 1959); Maier v. Publicker Commercial Alcohol Co., 62 F. Supp. 161, 164 (E.D. Pa. 1945), *aff'd per curiam*, 154 F.2d 1020 (3d Cir. 1946).

[27]H. Christiansen & Sons, Inc. v. City of Duluth, 154 F.2d 205 (8th Cir. 1946).

[28]H. Christiansen & Sons, Inc. v. City of Duluth, 225 Minn. 475, 31 N.W.2d 270 (1948).

[29]424 F.2d 393 (5th Cir. 1970).

[30]*Id.* at 395.

[31]United States v. Armco Steel Corp., No. CA 70-H-1335 (S.D. Tex. Sept. 17, 1971) (3 E.R.C. 1067).

[32]Lavagnino v. Porto-Mix Concrete, Inc., 330 F. Supp. 323 (D. Colo. 1971).

[33]328 F. Supp. 1140 (N.D. Ala. 1971).

in granting a motion to dismiss was that the legislative history of the Refuse Act indicates that protection of navigation was the sole purpose of its enactment[34] and that those who are damaged by pollution alone without concomitant interference with navigation are not within the class of persons to be protected by the Act.[35] Some dicta in the opinion suggest that adequate remedies exist in "local statutory and common law" or perhaps in further federal legislation.[36]

The *Guthrie* court's interpretation of the Refuse Act and its legislative history is clearly at odds with the language of the Act itself, prior judicial interpretations, current legislative attitude, and current administrative application.

The Refuse Act contains two express and separate prohibitions.[37] The first forbids the discharge of refuse into navigable waters with no reference to interference with navigation. The second proscribes the deposit of refuse on banks when such refuse may subsequently wash into the water and interfere with navigation. At the risk of oversimplification, one could conclude that Congress would have included the qualifying clause as to interference with navigation in the first prohibition had it intended to so narrow its scope.[38] Thus, the language of the statute itself may have made the court's resort to legislative history superfluous.

Even if the Act is unclear, prior judicial interpretations are not. The Supreme Court upheld a criminal prosecution under the Refuse Act where the refuse discharged in no wise affected navigation,[39] explaining that "it is plain from its legislative history that the 'serious injury' to our watercourses . . . sought to be remedied was caused in part by obstacles that impeded navigation and in part by pollution . . . ."[40] This interpretation has been followed consistently in criminal prosecutions brought under the Refuse Act.[41]

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[34]*Id.* at 1146-47.

[35]*Id.* at 1145.

[36]*Id.* at 1149.

[37]*See* text of the statute note 12 *supra.*

[38]*See* United States v. United States Steel Corp., 328 F. Supp. 354 (N.D. Ind. 1970), in which the court states, "But the fact remains that the part of the statute under which defendant is charged says nothing about effects on navigation, and the vast majority of courts faced with the question have ruled that no such limitation exists." *Id.* at 357.

[39]United States v. Standard Oil Co., 384 U.S. 224 (1966).

[40]*Id.* at 228-29.

[41]*See, e.g.*, United States v. Pennsylvania Indus. Chem. Corp., 329 F. Supp. 1118 (W.D. Pa. 1971); United States v. United States Steel Corp., 328 F. Supp. 354 (N.D. Ind. 1970).

In subsequent legislation dealing with pollution, Congress has carefully provided that the force of the Refuse Act as an anti-pollution measure is unimpaired.[42] This strongly suggests that Congress and the Supreme Court agree that the Act does not deal with navigation problems alone.[43]

Finally, the *Guthrie* court relied on a 1968 administrative interpretation of the Act (directing that the effect on navigation was to be the criterion for issuance of permits)[44] to support its imposition of the interference-with-navigation limitation. The current implementing regulations for the permit program,[45] however, have omitted the navigation limitation and have imposed water-quality standards as a major criterion.

So the judicial scoreboard, though confusing, has to be read as indicating that those who would not allow the private action under the Refuse Act for pollution without a concomitant interference with navigation are in the lead. But there is most certainly not yet enough judicial authority to conclude that the ballgame is over. The clear state of the law allowing recovery for violations of other sections of the Rivers and Harbors Act is so inconsistent with this narrow view of the Refuse Act that there is a sound basis for predicting that the trend of the decisions will shift in favor of allowing the private action.[46] If so, judicial definitions of "refuse" as prohibited by the Act are broad enough to make the private action very effective.[47] The only type of pollution *not* unlaw-

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[42]33 U.S.C. § 1174 (1970).

[43]This conclusion is supported by the opinion in United States v. United States Steel Corp., 328 F. Supp. 354, 357-58 (N.D. Ind. 1970).

[44]328 F. Supp. at 1148, *citing* 33 C.F.R. § 209.395 (1968).

[45]36 Fed. Reg. 6564-70 (1971).

[46]The *Guthrie* case has been appealed to the Fifth Circuit Court of Appeals. That court has consistently upheld the private cause of action under the Rivers and Harbors Act. Acme Boat Rentals, Inc. v. J. Ray McDermott & Co., 424 F.2d 393 (5th Cir. 1970); Humble Oil & Refining Co. v. Tug Crochet, 422 F.2d 602 (5th Cir. 1970). Despite the fact that *Guthrie*, with its multiplicity of parties, will present difficult problems of proximate cause and proof of damages, the precedents suggest that the plaintiffs should be allowed to survive a motion to dismiss and to face their problems of proof.

[47]The Refuse Act has been held to prohibit the deposit of the following: valuable liquids which escaped through accident or negligence, United States v. Standard Oil Co., 384 U.S. 224 (1966); solids in suspension, United States v. Republic Steel Corp., 362 U.S. 482 (1960); wooden pilings, Acme Boat Rentals, Inc. v. J. Ray McDermott & Co., 424 F.2d 393 (5th Cir. 1970); liquids which have escaped inland and flowed some distance to navigable water, United States v. Esso Standard Oil Co., 375 F.2d 621 (3d Cir. 1967); chicken entrails, United States v. Maplewood Poultry Co., 327 F. Supp. 686 (D. Me. 1971); and thermal pollution, United States v. Florida Power & Light Co., 311 F. Supp. 1391, 1392 n.1 (S.D. Fla. 1970) (dictum).

ful under the Act is liquid effluent from streets and sewers. The Supreme Court further narrowed this exception by rejecting the argument of the defendants in *United States v. Republic Steel Corp.*[48] that liquid industrial waste from industrial sewers was exempt.

Assuming that the courts can be persuaded to accept the statutory fault concept,[49] the plaintiff must contend with common law rules in its application.[50] The most stringent of these requires the plaintiff to show that he is one of those persons intended to be protected by the statute. In addition, the evidentiary effect of the statutory violation will vary depending on the jurisdiction, ranging from mere evidence of negligence to irrebuttable negligence per se.[51] If the damage is caused by an oil spill, the plaintiff will probably encounter the argument that the clean-up and financial responsibility provisions of the Water Quality Improvement Act of 1970[52] supplant other remedies.[53]

Beyond the generally accepted theories discussed above lie some developing concepts in tort law which may have particular application in attacking the problems of pollution. The related *Rylands v. Fletcher* and "abnormally dangerous activity" rules, combined with some of the elements of private nuisance, seem to blend into an amalgam which has been described as "distinctive risk."[54] The theory is that when an actor elects a course of conduct which, however carefully conducted, imposes an unusual measure of risk of damage on the persons or property of

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[48]362 U.S. 482, 490 (1960).

[49]The industry which is releasing pollutants into navigable waters does indeed face problems which warrant understanding and judicial restraint. The complexities of the federal legislative and administrative plans are compounded by growing state activity. If the pollution prohibition in the Refuse Act were absolute, it would be unreasonable to impose civil liability even though the firm might be in substantial compliance with other legislation—particularly the Federal Water Quality Improvement Act of 1970, 33 U.S.C. §§ 1161-70 (1970). This apparent harshness in the application of statutory fault is tempered in two ways. First, the firm may apply for a permit under the Refuse Act. Under the current regulations, the permit should issue if the applicant is complying with the standards established under the 1970 Act. Judicial restraint could be applied if application has been made and the failure to obtain the permit is a result of administrative delay or indecision. Second, it is absolutely essential that the plaintiff in the civil action carry the burden of proof of damages. The firm which is in technical violation of the Refuse Act but whose contribution to pollution is minimal should be protected from harrassment by requiring plaintiffs to show that their damages are a direct result of the pollution and that they are substantial.

[50]PROSSER § 36.

[51]*Id.*

[52]33 U.S.C. § 1161 (1970).

[53]Keener, *supra* note 1, at 498.

[54]Katz, *supra* note 2, at 607.

others, it is reasonable to require him to carry the economic burden of the risk.

Similar reasoning led to the adoption of the rule of strict liability in tort for defective products.[55] As a matter of policy, the economic cost of injuries from defective products has been shifted from the victim of the injury to the manufacturing enterprise. A product defect occurs when some element of the manufacturing or distribution process goes awry. When an injury results, the manufacturer is held liable. Why, then, should the enterprise which inflicts harm by a mishap in its manufacturing *process* escape liability? Concededly, problems of establishing the defect, proximate cause, and definition of persons to be protected are less difficult in cases of product liability.

Nonetheless, the economic and social policies which led to development of product liability also apply to the parallel problem of injuries resulting from non-negligent occurrences which produce many of the typical cases of water pollution: a faulty refinery valve, a pipeline rupture, or the inadvertent grounding of a tanker. It is suggested that the courts might fashion such a rule, imposing strict liability on the enterprise engaged in extraction, manufacturing or distribution when improper, but non-negligent, operations produce injury to persons or property.[56] Just as product liability has been limited as to the persons protected, the type of strict process liability contemplated here would extend only to the protection of persons and property within the scope of reasonably foreseeable harm.

Until our regulatory bodies and courts have had an opportunity to prove the effectiveness of the rash of recent legislation in controlling pollution, the victim of pollution may be able to find adequate remedies within the framework of existing tort law. In particular, statutory fault under the Refuse Act may be a useful device. At some future time, it seems probable that a general doctrine of distinctive risk, encompassing

[55]Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

[56]Although the process liability concept is presented in this note as being new and innovative, consider the following quotation from Green v. General Petroleum Corp., 205 Cal. 328, 333-34, 270 P. 952, 955 (1928):

> Where one, in the conduct and maintenance of an enterprise lawful and proper in itself, deliberately does an act under known conditions, and, with knowledge that injury may result to another, proceeds, and injury is done to the other as the direct and proximate consequence of the act, however carefully done, the one who does the act and causes the injury should, in all fairness, be required to compensate the other for the damage done.

many pollution-causing activities, will evolve. Finally, a form of enterprise liability described here as *process* liability should be developed as a logical counterpart to *product* liability. Looking beyond the problem of the individual victim of pollution to the larger problem of a deteriorating environment, it is at least arguable that the polluter responsible for that deterioration will respond more positively to economic responsibility for damages than he will to regulatory directives and modest criminal penalties.

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