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# A Solution to the Problem of Private Compensation in Oil Discharge Situations

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# A SOLUTION TO THE PROBLEM OF PRIVATE COMPENSATION IN OIL DISCHARGE SITUATIONS

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## I. INTRODUCTION

The discharge of oil from vessels on the navigable waters of the United States[1] causes our environment to suffer and people as well. This study examines the question of whether those who are damaged by such discharges can adequately obtain compensation for their injuries.

It is not necessary to review the environmental aspects of oil pollution or even the development of the maritime oil transportation industry or the casualty history of that industry.[2] This discussion simply requires that one be cognizant of the consequences that people suffer as a result

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1. For the purposes of this study, except where otherwise provided by legislation discussed herein, the term—(1) "'discharge' includes, but is not limited to any spilling, leaking, pumping, pouring, emitting, emptying or dumping;" Federal Water Pollution Control Act, 33 U.S.C.A. § 1321(a)(2) (Supp. 1974); (2) "oil" means oil of any kind in any liquid form including, but not limited to, petroleum, fuel oil, sludge, oil refuse, oil mixed with water, crude oil, and all other liquid hydrocarbons regardless of specific gravity; Coastal Conveyance of Petroleum Act of 1970, ME. REV. STAT. ANN. tit. 38, § 542 (Supp. 1973); (3) "'vessel' includes every description of watercraft or other contrivance used, or capable of being used, as a means of transportation on water, whether self-propelled or otherwise . . . ." *Id.*; (4) "'navigable waters of the United States' shall be construed to mean those waters of the United States, including the territorial seas adjacent thereto, the general character of which is navigable, and which, either by themselves or by uniting with other waters, form a continuous waterway which boats or vessels may navigate or travel between two or more States, or to or from foreign nations." 33 C.F.R. § 2.10-5 (1973); for a judicial interpretation of navigability, see The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870) and The Montello, 87 U.S. (20 Wall.) 430 (1874).

2. For a discussion of these aspects see Post, *Private Compensation for Injuries Sustained by the Discharge of Oil from Vessels on the Navigable Waters of the United States: A Survey*, 4 J. MARITIME L. & COMMERCE 25 (1972).

of a vessel's discharge of oil. Basically, these injuries vary in kind and degree, for oil spills may have wide ranging effects on an entire populace as well as specific effects on certain individuals and businesses.

The common aggravation of the aesthetic senses provoked by the sight of oil-coated beaches and waters, both to those people living along the water's edge and to those traveling to it seeking relaxation or recreation, is representative of the damage the public bears as a consequence of oil pollution. Likewise, the destruction of a fishery or other marine industry as an aftermath to an oil discharge, in addition to causing havoc within that industry, may affect the public in general through unemployment and a diminished food or resource supply. While the present ramifications of oil pollution may be severe enough, its pervasive effects may be far more deleterious to the masses in the future, particularly if man is compelled to rely upon artificial desalinization as a major source of his domestic and industrial water supply.[3]

A few examples will serve to illustrate the specific injuries that private parties may sustain as a result of an oil discharge. Damage may occur to beaches, to piers, to buildings, to vessels, or to leased or privately owned submerged land and ponding areas. Spills causing such damage may give rise to a private claim for cleanup costs as well as for loss of property value. Private parties may also undergo damage to their economic interests as a result of oil pollution. For example, those who are in the business of catering to tourists may suffer not only aesthetic and property damage, but a loss of profits as well. This is true whether one is a resort owner whose befouled beaches repel tourists or a gas station or restaurant owner a few blocks away whose business depends less directly, but just as heavily, on clean beaches and water. Then too, severe and prolonged economic damage may befall those whose occupation it is to harvest marine life if the productivity of the water in their area of operation is destroyed by an oil spill.

## II. A Forum for Relief

Unfortunately, in the vast majority of states today, injured persons have to rely almost exclusively on traditional concepts of tort liability to recover for the damages they suffer as a result of a vessel's discharge of oil. In so doing, they are faced with the initial problem of whether to institute their suits in the federal courts or in the state courts.

The competence of the federal courts to administer maritime law arises from article III, section 2 of the Constitution, which extends the judicial power of the United States to "all Cases of admiralty and maritime Jurisdiction."[4] The scope of this jurisdiction has historically been rather generally defined as extending to all torts and injuries occurring

3. Nanda, *The "Torrey Canyon" Disaster: Some Legal Aspects*, 44 Denver L.J. 400, 404 (1967).

4. U.S. Const. art. III, § 2.

on the navigable waters of the United States, and to all contracts whose subject matter is maritime.[5] Congress, however, has the power to expand the scope of that definition within the pervasive limits of the Constitution's admiralty grant. Congress did this when it passed the Admiralty Extension Act of 1948, which provides:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.[6]

Thus, it is apparent that when the discharge of oil from a vessel on the navigable waters of the United States is a civil wrong, and it results in damage to other watercraft, to structures on the navigable waters, to the navigable waters themselves, to structures on land, or to the land itself, an action will lie for the maritime tort.[7]

For numerous reasons, which may range from simple inconvenience to crafty forum shopping, a claimant may not desire to bring his action in a federal forum. Therefore, he may wish to rely upon the "saving to suitors clause"[8] and institute his suit in a state court. Yet, as a general proposition, if a case is one that arises within admiralty jurisdiction, it will be governed primarily by a body of substantive federal maritime law, which may differ radically from state law.[9] In fact, the existence of this body of law may preempt state legislation which interferes with the uniform working of the federal maritime legal system.[10] Thus, uniform principles of substantive maritime law will be applicable in all private actions arising out of a discharge on navigable waters of the United States, regardless of the judicial forum in which they are presented.

Nonetheless, in developing the law of maritime torts, the courts have utilized the tort law principles developed in the common law of the states. Therefore, the portals to actions founded upon the traditional common law concepts of trespass, negligence, and nuisance are open to claimants seeking relief for damages occasioned by a vessel's discharge of oil on

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5. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY §§ 1-9 (1957) [hereinafter cited as GILMORE].

6. 46 U.S.C. § 740 (1970).

7. *E.g.*, Salaky v. Atlas Tank Processing Corp., 120 F. Supp. 225 (E.D.N.Y. 1953) (damage to other vessels); California v. S.S. Bournemouth, 307 F. Supp. 922 (C.D. Cal. 1969) (damage to waters); *In re* New Jersey Barging Corp., 168 F. Supp. 925 (S.D.N.Y. 1958) (damage to land).

8. 28 U.S.C. § 1333 (1970) confers on the district courts original and exclusive jurisdiction of cases coming within the admiralty and maritime jurisdiction, "saving to suitors in all cases all other remedies to which they are otherwise entitled."

9. Pope & Talbot v. Hawn, 346 U.S. 406 (1953); Chelentis v. Luckenback S.S. Co., 247 U.S. 372 (1918); Stevens, *Erie R.R. v. Tompkins and the Uniform General Maritime Law*, 64 HARV. L. REV. 246 (1950); GILMORE, *supra* note 5, at §§ 1-16 to 18.

10. Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917).

navigable waters.[11] Actions based on these concepts may be initiated in either the federal courts on the basis of admiralty jurisdiction, or in the state courts.

## III. Compensation Based on Traditional Concepts of Tort Liability

### A. *Trespass*

Under ancient common law, every unauthorized, unintended, non-negligent entry onto the property of another was actionable under the writ of *trespass quare clausum fregit*.[12] Moreover, every voluntary action or enterprise that interfered with land in the possession of another imposed strict liability upon the wrongdoer.[13] Where strict liability provided a foundation for a claimant's action, the "fact" and "physical cause" of his injury were all that claimant had to establish, along with the amount of his damage, in order to recover. Regretably, for a number of today's innocently damaged property owners, under modern tort theory, causing an object to enter land is actionable as a trespass only where it is the result of an intentional intrusion, a negligent intrusion, or an intrusion arising from an abnormally dangerous activity.[14]

Thus, under the prevailing view of trespass, liability can be based only on fault or participation in an abnormally dangerous activity.[15] Since the courts have yet to declare that the carriage of oil at sea is an abnormally dangerous activity, the oil pollution claimant will necessarily have to prove fault if he seeks recovery for damage resulting from an oil discharge on a theory of trespass. Trespass then fails as an effective remedy for property owners whose land has been invaded by oil resulting from an unintentional and non-negligent discharge.

However, because past experience has shown that most oil spills occur because of negligence or intentional action,[16] trespass would appear to be a means for recovering compensation for oil-damaged property. Nevertheless, due to the problems encountered in establishing intent or negligence, many pollution claimants may be discouraged from instituting a trespass action, and those that do may find it expensive and time consuming.[17]

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11. Comment, *Oil Pollution of the Sea*, 10 Harv. Int'l L.J. 316, 347 (1967).

12. W. Prosser, Law of Torts 63 (4th ed. 1971) [hereinafter cited as Prosser].

13. *Id.* at 63-64.

14. Except where the actor is engaged in an abnormally dangerous activity, an unintentional and non-negligent entry on land in the possession of another, or causing a thing or third person to enter the land, does not subject the actor to liability to the possessor, even though the entry causes harm to the possessor to a thing or third person in whose security the possessor has a legally protected interest. Restatement (Second) of Torts § 166 (1965). *See also id.* §§ 158, 165 for discussion of intentional intrusions and negligent intrusions respectively.

15. Prosser, *supra* note 12, at 64-5.

16. Sweeney, *Oil Pollution of the Oceans*, 37 Fordham L. Rev. 155 (1968) [hereinafter cited as Sweeney].

17. As a practical matter, it is virtually impossible to prove negligence on the part

Because one of the elements of trespass is an actual entry or intrusion onto property, beachfront owners whose property is not actually invaded but whose use of adjacent waters may be diminished would seemingly be precluded from using the trespass theory to recover for their annoyance and loss of use of the adjacent water. However, if beachfront owners can show some property interest in these adjacent waters, such as the right to raise oysters or other marine life under a lease from a state or under the protection of special state statutes, they may validly claim relief on the basis of trespass.[18] This same entry requirement would also prevent non-beachfront businessmen from using the trespass theory to recover for lost business profits due to pollution of neighboring beaches.

Conversely, where an action in trespass lies, recovery may be awarded not only for property damage, but also for the loss of business profits resulting from the property damage. Once liability for trespass is established, the defendant's liability extends to all damages which are the natural and probable consequence of trespass, without regard to whether they would otherwise be actionable.[19]

### B. *Negligence*

One of the principal theories relied upon to recover damages for the maritime tort of oil pollution is negligence. Provided that the oil pollution claimant can show the factual cause of his injury, often an extremely difficult task in itself, his greatest burden may be proving the existence of the legal or proximate cause of his damage, particularly if he is a non-beachfront property owner.[20] In fact, it has been suggested that a beach-

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of the owners of the tanker. The problem of proving faulty construction of a tanker built, perhaps, in Japan, Germany, Norway or Greece, or faulty seamanship by a vessel flying the Liberian or Panamanian flag and carrying a multi-national crew, is beyond the ability of a property owner whose shoreline is ruined by oil spillage. Avins, *Absolute Liability for Oil Spillage*, 36 BROOKLYN L. REV. 359, 366 (1970).

18. In Alabama, for example,

> [t]he Director of Conservation is authorized to lease "any bottom of the waters of the state in a natural oyster bed or reef" to any Alabama citizen or corporation. In addition, Alabama has recognized the right of persons who own lands fronting waters where oysters may be grown to plant and gather them to a distance of 600 yards from the shore. The rights appurtenant to ownership of waterfront property have been recognized as property rights to which the incidents of ownership attach and which may be assigned, transferred, or leased. Thus, because of the relative immobility of oysters and the ability of the landowner to retain more than nominal dominion over them, the oysterman holds the sort of protected property right which is necessary for the assertion of a claim for private relief.

Comment, *Oil and Oysters Don't Mix: Private Remedies for Pollution Damage to Shellfish*, 23 ALA. L. REV. 100, 103 (1970) (citations omitted); *accord*, Collins v. Texas Co., 267 F.2d 257 (5th Cir. 1959); Doucet v. Texas Co., 205 La. 312, 17 So. 2d 340 (1944).

19. Ragland v. Clarson, 259 So. 2d 757 (Fla. 1st Dist. 1972); Hughett v. Caldwell County, 313 Ky. 85, 230 S.W.2d 921 (1950); Harrison v. Petroleum Surveys, Inc., 80 So. 2d 153 (La. 1955); Academy of Dance Arts, Inc. v. Bates, 1 N.C. App. 133, 161 S.E.2d 762 (1968). Damages which are the immediate consequence of the trespass may be awarded for inconvenience, for injury to health or to business. 87 C.J.S., *Trespass* § 108 (1954).

20. *See* Cauley v. United States, 242 F. Supp. 866 (E.D.N.C. 1965); Schubowsky v. Hearn Food Store, Inc., 247 So. 2d 484 (Fla. 3d Dist. 1971); Continental Oil Co. v. Hinton,

front resort owner has a better chance of recovering his loss of business profits, as well as property damage, under either a theory of trespass or negligence than does a nonbeachfront owner of recovering solely his loss of business profits under negligence doctrine.[21] This situation exists because in the case of the beachfront owner, loss of business profits may be recovered as a consequence of the property damage, whereas in the case of the nonbeachfront owner, recovery of lost profits must be based on an action for interference with contract rights wherein intentional interference must be shown.[22] The policy considerations behind this differentiation are that the risk of pecuniary misfortune to nonbeachfront owners cannot, under the law, be adequately foreseen by a negligent shipowner, and further, the loss of intangible profits is too speculative; whereas, risk of property damage may well be foreseen under the law.[23]

Where it is apparent that an oil pollution claimant will be unable to prove that his injury is attributable to the negligent discharge of oil from a vessel, because evidence concerning the discharge lies wholly with the shipowner, the claimant may find it to his advantage to rely on the doctrine of *res ipsa loquitur*. The use of this doctrine does not in any way eliminate the problems of foreseeability that many claimants, particularly nonbeachfront business and property owners, will have to overcome in order to win compensation for damages such as the loss of business profits or the reduction of nonbeachfront property value as a consequence of an oil discharge.

### C. *Nuisance*

An action based on nuisance theory is one which might not initially appear appropriate to recover damages resulting from a vessel's discharge of oil. The reason for this is that nuisance theory generally connotes a continuing or recurring interference with a claimant's use and enjoyment of his property for an extended period of time.[24] Yet this is not a uniform requirement of every state. As case law of the various states indicates, where harm to a claimant is instantaneous and substantial, the claimant may often maintain a nuisance action for his damage.[25]

253 Miss. 233, 175 So. 2d 512 (1965); Sunray Mid-Continent Oil Co. v. Tisdale, 366 P.2d 614 (Okla. 1961).

21. Shutler, *Pollution of the Sea by Oil*, 7 HOUSTON L. REV. 415, 435 (1970).

22. Small v. United States, 333 F.2d 702 (3d Cir. 1964); Sinram v. Pennsylvania R.R., 61 F.2d 767 (2d Cir. 1932); Taylor Imported Motors, Inc. v. Smiley, 143 So. 2d 66 (Fla. 2d Dist. 1962).

23. Sweeney, *supra* note 16, at 174.

24. Maryland v. Amerada Hess Corp., 350 F. Supp. 1060 (D. Md. 1972); Smillie v. Continental Oil Co., 127 F. Supp. 508 (D. Colo. 1954).

25. E. Rauh & Sons Fertilizer Co. v. Shreffler, 139 F.2d 38 (6th Cir. 1943); Ambrosini v. Alisal Sanitary Dist., 154 Cal. App. 2d 720, 317 P.2d 33 (1st Dist. 1957); "Where the invasion affects the physical condition of the plaintiff's land, the substantial character of the interference is seldom in doubt." Prosser, *supra* note 12, at 578. *See In re* New Jersey Barging Corp., 168 F. Supp. 925 (S.D.N.Y. 1958); Wiegand v. Duval-Wright Eng'r. Co., 23 Fla. Supp. 35 (1964).

Thus, the nuisance doctrine may serve as a concept upon which compensation may be sought by certain claimants whose damages are attributable to a single discharge of oil.

The nuisance doctrine has historically taken two tracks of development: One narrowly restricted to the invasion of an interest in the use or enjoyment of real property, and the other extending to virtually any form of annoyance or inconvenience interfering with common public rights.[26] A private nuisance is a civil wrong, based on a disturbance of private rights in land (*i.e.*, one's right to use and enjoy his property), and is actionable by individual persons.[27] A public nuisance, on the other hand, is a type of criminal offense consisting of an interference with the rights of the community at large; thus, its redress may be sought only by public officials.[28]

Since a variety of public harms affect both public and private interest, various forms of hybrid nuisance also exist.[29] When a situation of this type arises, it is the claimant who must plead and prove that his damage is different in kind from that of the public at large.[30] This qualification is the result of the uniform opinion that a private individual cannot initiate an action for the invasion of a purely public right unless his injury can in some way be distinguished from that suffered by the general public.[31]

In this respect, the pecuniary losses sustained by commercial fisheries due to polluted waters have been held to be sufficiently distinct from the damages sustained by the public at large, to allow compensation for the fisheries.[32] On the other hand, where pecuniary loss is common to an entire community or a substantial part of a community, it has been regarded as no different in kind from the common misfortune.[33] This would seem to preclude the possibility of nonbeachfront hotel owners, restaurant

26. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997-99 (1966).

27. Dahlstrom v. Roosevelt Mills, Inc., 27 Conn. Supp. 355, 238 A.2d 431 (Super. Ct. 1967); Cox v. Ray M. Lee Co., 100 Ga. App. 333, 111 S.E.2d 246 (Div. 1 1959); Lederman v. Cunningham, 283 S.W.2d 108 (Tex. Civ. App. 1955).

28. Morse v. Liquor Control Comm., 319 Mich. 52, 29 N.W.2d 316 (1947); Gibbons v. Hoffman, 203 Misc. 26, 115 N.Y.S.2d (Sup. Ct. 1952); Hampton v. North Carolina Pulp Co., 223 N.C. 535, 27 S.E.2d 538 (1943).

29. *See* Hill v. Stokely-Van Camp, Inc., 260 Minn. 315, 109 N.W.2d 749 (1961); Ballenger v. City of Grand Saline, 276 S.W.2d 874 (Tex. Civ. App. 1955); Costas v. Fond Du Lac, 24 Wis. 2d 409, 129 N.W.2d 217 (1964).

30. Wade v. Campbell, 200 Cal. App. 2d 54, 19 Cal. Rptr. 173 (4th Dist. 1962); Pearman v. Wiggins, 103 Miss. 4, 60 So. 1 (1912); Gibbons v. Hoffman, 203 Misc. 26, 115 N.Y.S.2d 632 (Sup. Ct. 1952); Hampton v. North Carolina Pulp Co., 223 N.C. 535, 27 S.E.2d 538 (1943).

31. Dozier v. Troy Drive-In Theaters, Inc., 265 Ala. 93, 89 So. 2d 537 (1956); Missouri Veterinary Medical Ass'n v. Glisan, 230 S.W.2d 169 (Mo. 1950); Bouquet v. Hackensack Water Co., 90 N.J.L. 203, 101 A. 379 (1916); PROSSER, *supra* note 12, at 586.

32. Carson v. Hercules Powder Co., 240 Ark. 887, 402 S.W.2d 640 (1966); Hampton v. North Carolina Pulp Co., 223 N.C. 535, 27 S.E.2d 538 (1943); Columbia River Fisherman's Protective Union v. City of St. Helens, 160 Ore. 654, 87 P.2d 195 (1939).

33. Hohman v. City of Chicago, 140 Ill. 226, 29 N.E. 671 (1892); Smedberg v. Moxie Dam Co., 148 Me. 302, 92 A.2d 606 (1952).

owners, gas station owners, etc., from obtaining compensation for lost profits due to a slump in tourism as a result of an oil spill's effect on local beaches.

Beachfront owners whose property is actually invaded, however, would undergo an injury distinct from that of the general public; thus they should be allowed compensation. Further, as a comparatively recent case suggests, recovery may be possible on the basis of nuisance where beachfront property is not actually invaded, but a property owner's littoral or riparian rights, such as fishing, swimming and boating, are impaired by an oil discharge.[34]

While a nuisance action may be a perfectly appropriate remedy for the beachfront owner who has undergone direct invasion of his property by oil attributable to a ship's discharge, it does not appear to be of any value to the nonbeachfront owner in recovering lost business profits resulting from the same spill. Furthermore, the problems a claimant encounters in proving the origin of an oil discharge, and either intent or negligence, must still be surmounted.

## IV. Inadequacies in Actions Based on Traditional Concepts of Tort Liability

Examination of the common law concepts of tort liability from the claimant's standpoint reveals that there are numerous pitfalls and inadequacies in the actions he may bring based upon these concepts for the damage he has suffered as a result of a vessel's discharge of oil on navigable waters. To begin with, under these age old theories, a shipowner will not be liable to private parties for damage wrought when a vessel encounters an extraordinary peril which results in a non-deliberate and non-negligent discharge of oil or petroleum products. Even when this is not the case, the claimant will still have the burden of proving that the discharge which caused his injury was either intentionally or negligently caused and this burden may be particularly onerous considering the complex nature of maritime enterprise and activity.

More importantly perhaps, under the Federal Limitation of Liability Act,[35] the liability of the owner of any vessel for damage resulting from the operation of such vessel occasioned without "the privity or knowledge" of the owner may be limited to the "value of the interest of such owner in such vessel, and her freight then pending."[36] The United States Supreme Court has held that the value of an owner's interest in a vessel and its pending freight is to be determined at the termination of each voyage.[37] Thus, if the aggregate amount of the various pollution claims

34. *In re* New Jersey Barging Corp., 168 F. Supp. 925 (S.D.N.Y. 1958).

35. 46 U.S.C. §§ 181-96 (1970).

36. 46 U.S.C. § 183 (1970). For a detailed discussion of the phrase "privity or knowledge" consult Gilmore, *supra* note 5, at §§ 10-20, 10-24.

37. City of Norwich, 118 U.S. 468 (1886).

that result from a vessel's discharge of oil exceed the value of the vessel, and limitation of liability is allowed, many claimants may receive only partial compensation for their damage. Moreover, if a vessel in the process of discharging oil sinks, or is so completely destroyed as to be worthless, or nearly so, and the owner is allowed to limit his liability, pollution claimants may be left without any hope of compensation.[38]

## V. Compensation Based upon Maritime Concepts of Liability

As a novel approach to the problem of private compensation, it has been suggested that the maritime doctrine of unseaworthiness be utilized in an effort to recoup damages occasioned by a vessel's discharge of oil.[39] Theoretically, it is argued that if a claimant's injury is the consequence of a discharge which resulted from some defect in a vessel or its equipment, then the vessel owner might be held liable for the claimant's damage under principles of unseaworthiness. Moreover, as this doctrine is predicated on strict liability, a vessel owner could avoid liability only by proving that the defect which produced the oil pollution was itself occasioned by an act which would amount to a defense under strict liability principles, such as an act of God or war.[40]

Historically, however, the doctrine of unseaworthiness has applied only to seamen and longshoremen who have suffered personal injury,[41] or cargo owners who have sustained cargo losses[42] as a result of an unseaworthy vessel.[43]

Until very recently, no American cases existed dealing with the employment of the doctrine in oil discharge situations, although an English court had suggested its applicability.[44] In the 1972 case of *Maryland v. Amerada Hess Corp.*,[45] it was held that the doctrine of unseaworthiness was not available to the State of Maryland to recover for damages to the waters of Baltimore Harbor resulting from the rupture of an oil transfer line between a tanker and a storage facility. The court relied on the fact that traditionally, the doctrine has been limited to privity of contract

38. For an example of the limitation provision in an oil discharge case, see *In re* New Jersey Barging Corp., 144 F. Supp. 340 (S.D.N.Y. 1956).

39. Sweeney, *supra* note 16, at 167-69.

40. *Id.* at 167.

41. The absolute duty of ship owners to provide a seaworthy vessel to seamen was established by the Supreme Court in The Osceola, 189 U.S. 158 (1903) and was extended to longshoremen and maritime workers performing the historical functions of seamen in Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

42. Application of unseaworthiness principles in connection with cargo can be seen in provisions of both the Harter Act, 46 U.S.C. §§ 190-96 (1970) and the Carriage of Goods by Sea Act, 46 U.S.C. § 1300 *et seq.* (1970).

43. *See generally* Gilmore, *supra* note 5, at §§ 3-22, 3-35, 6-1, 6-64; McCoy, *Oil Spill and Pollution Control: The Conflict Between State and Maritime Law*, 40 Geo. Wash. L. Rev. 97, 108 (1971).

44. Esso Petroleum Co. v. Southport Corp., [1956] A.C. 218 (1955).

45. 350 F. Supp. 1060 (D. Md. 1972).

situations or has run to the benefit of those performing the historical functions of seamen. It refused to extend the absolute duty to provide a seaworthy vessel for the benefit of the State of Maryland, indicating that the relationship between the state and the defendant tanker corporation did not entail the type of hazards that would necessitate imposing such a duty.[46]

Certainly, conservationists and ecologists might take issue with the decision, and perhaps if they can demonstrate the gravity of the states' need for such protection, future decisions may allow such a claim. Likewise, the courts may look more sympathetically upon those private parties who undergo substantial injury as a result of a vessel's discharge of oil; yet, it appears that utilization of the doctrine of unseaworthiness will not prove a facile avenue to recovery if, in fact, it is not a dead end street.

## VI. Present Non-Availability of Relief under International Conventions

On the international level, no convention presently ratified by the United States explicitly provides for recovery by private persons of damages resulting from the discharge of oil from vessels. However, the International Convention on Civil Liability for Oil Pollution Damage of 1969 and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 1971, both offer such a possibility.[47] The United States has signed both of these Conventions but, as yet, has ratified neither.

The Liability Convention deals with the civil liability of shipowners to both governments and private persons. Owners of seagoing craft registered in or flying the flag of a contracting state and actually carrying oil in bulk as cargo may be liable for damages caused in the territory or territorial sea of contracting states by the escape or discharge of persistent oils.[48] Thus, while the Liability Convention covers tankers and dry cargo vessels carrying oil as cargo in a deep tank or other compartment, it does not apply to large segments of the shipping industry, such as passenger shipping.

Article III of the Liability Convention provides that the owner of a vessel falling under scrutiny of the Convention, shall be liable for any pollution damage caused by oil which escapes or is discharged from the ship except that no liability for pollution damage shall attach to the owner if he proves that the damage:

(a) resulted from an act of war, hostilities, civil war, insurrec-

46. *Id.* at 1070-71.

47. The Conventions are hereinafter referred to, and cited respectively, as the Liability Convention and the Fund Convention. The text of the Liability Convention may be found at 1 J. Mar. L. & Comm. 373 (1970). For the text of the Fund Convention, see 3 J. Mar. L. & Comm. 624 (1972).

48. Liability Convention art. I-V, *supra* note 47.

> tion or a natural phenomenon of an exceptional, inevitable and irresistible character, or
>
> (b) was wholly caused by an act or omission done with intent to cause damage by a third party, or
>
> (c) was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.[49]

Additionally, if the owner proves that the pollution damage resulted wholly or partially from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the owner may be exonerated wholly or partially from his liability to such person.[50]

All liability under the Liability Convention would be channeled through the registered owner of the discharging vessel, but there would be a right of recourse reserved to the owner of such vessel against third parties.[51] The liability of the shipowner would be limited to 2,000 Poincare francs (approximately $170) per gross ton or a total of 210 million Poincare francs (approximately $18 million) for a single incident, whichever would be less, unless the pollution was the result of the owner's so-called "actual fault or privity," *i.e.*, his personal fault, as distinguished from the fault of the master or the crew imputed to him under the respondeat superior doctrine.[52] Yet, if the spill resulted from the owner's personal fault or privity, he would be liable without limit.[53]

For the purpose of availing himself of the benefit of the limitation of liability discussed above, the Liability Convention provides that the shipowner need only constitute a fund for the total sum representing the limit of his liability in any one of the states experiencing pollution damage.[54] Yet, the courts of any contracting state in which pollution occurred would have jurisdiction to hear and determine both governmental and private claims.[55] However, only the courts of the state in which the fund was constituted would have competence to determine matters relating to the apportionment and distribution of the fund;[56] but, any judgment obtained from a court with proper jurisdiction in the state where the pollution occurred and which would be enforceable in that state would be recognized by the contracting state holding the fund, unless the judg-

49. *Id.* art. III.
50. *Id.*
51. *Id.*
52. *Id.* art. V.
53. *Id.*
54. *Id.*
55. *Id.* art. IX.
56. *Id.*

ment was obtained by fraud, or the defendant was not given reasonable notice and a fair opportunity to present his case.[57]

Each ship covered by the Liability Convention is required to maintain proof of its owner's financial responsibility by carrying a certificate attesting that insurance or other financial security is in force.[58] The Liability Convention further provides for direct actions against the insurer or guarantor, but preserves to him whatever defenses (other than the bankruptcy or winding up of the owner) which the owner himself would have been entitled to invoke if the action for pollution damage had been brought against the owner rather than the insurer.[59] It also provides that the traditional defense of willful misconduct is preserved for the insurer.[60]

The Fund Convention is designed to supplement the Liability Convention by expanding the scope of compensable oil discharges and by making more money available to claimants (*i.e.*, governments and private persons) with respect to oil discharges thereby covered.[61] Moreover, the Convention does all this while at the same time reducing the shipowners personal financial burden under the Liability Convention.[62]

There is one exception to the generality that the Fund Convention supplements the Liability Convention: the Fund Convention will not supplement the Liability Convention in respect to damage resulting from the discharge of animal and vegetable oils. For, under the Liability Convention, "oil" is defined as "any persistent oil such as crude oil, fuel oil, heavy diesel oil, lubricating oil and whale oil"[63] whereas under the Fund Convention, the definition of "oil" is confined to any "persistent hydrocarbon mineral oils."[64]

The Fund Convention would establish a "fund" of approximately thirty six million dollars composed mainly of revenues derived from contributions computed on the basis of a fee on the amount of oil carried by sea to the various contracting states.[65] The Fund would then be used to pay compensation to any person suffering damage as a result of a discharge of any persistent hydro-carbon mineral oil, if that person is unable to obtain full and adequate compensation for the damage under the terms of the Liability Convention,

> (a) because no liability for the damage arises under the Liability Convention;

57. *Id.* art. X.
58. *Id.* art. VII.
59. *Id.*
60. *Id.*
61. For a discussion of this supplemental aspect of the Fund Convention see Doud, *Compensation for Oil Pollution Damage: Further Comment on the Civil Liability and Compensation Fund Conventions*, 4 J. MAR. L. & COMM. 525 (1973) [hereinafter cited as Doud].
62. Fund Convention art. V, *supra* note 47.
63. Liability Convention art. I, *supra* note 47.
64. Fund Convention art. II, *supra* note 47.
65. *Id.* art. IV, X.

> (b) because the owner liable for the damage under the Liability Convention is financially incapable of meeting his obligations in full and any financial security that may be provided under Article VII of that Convention does not cover or is insufficient to satisfy the claims for compensation for the damage; an owner being treated as financially incapable of meeting his obligations and a financial security being treated as insufficient if the person suffering the damage has been unable to obtain full satisfaction of the amount of compensation due under the Liability Convention after having taken all reasonable steps to pursue the legal remedies available to him; or
>
> (c) because the damage exceeds the owner's liability under the Liability Convention as limited pursuant to Article V, paragraph 1, of that Convention or under the terms of any other international Convention in force or open for signature, ratification or accession at the date of this Convention.[66]

However, the Fund would incur no obligation under the preceding paragraph if:

> (a) it [is proven] that the pollution damage resulted from an act of war, hostilities, civil war or insurrection or was caused by oil which has escaped or been discharged from a warship or other ship owned or operated by a State and used, at the time of the incident, only on Government noncommercial service; or
>
> (b) the claimant cannot prove that the damage resulted from an incident involving one or more ships.[67]

Thus, the only defenses retained by the Fund, once there is proof that the damage was caused by a ship carrying bulk oil as cargo, are that the incident was caused by an act of war or other hostilities or that the ship discharging the oil was a government owned noncommercial vessel.

While it is true that neither of these Conventions has yet been ratified by the United States, the Senate Foreign Relations Committee has reported the Liability Convention to the floor of the Senate with the recommendation that advice and consent to ratification be given but with the proviso that the Senate should not take final action until it also acts on the Fund Convention.[68] It remains but a matter of speculation then, as to if or when these Conventions will be ratified by the United States. Even if these Conventions were to be ratified, however, they would not provide the blanket protection that is needed to cover all types of oil discharges since they deal only with discharges of oil from vessels shipping oil in bulk as cargo.

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66. *Id.* art. IV.
67. *Id.*
68. Doud, *supra* note 61, at 525.

## VII. NON-AVAILABILITY OF COMPENSATION UNDER FEDERAL WATER POLLUTION CONTROL ACT

The primary thrust of the Federal Government's involvement with the discharge of oil from vessels on the navigable waters of the United States has been to attempt to prohibit discharges under provisions of the Federal Water Pollution Control Act.[69] This act does not, however, provide for private relief when a spill does take place. Rather, it merely attempts to control oil pollution by deterring it or providing for its abatement once it has occurred. Obviously, neither of these approaches help to compensate the pollution victim for the damage he suffers in the interval between an actual oil discharge and its subsequent removal.

The Act as amended in 1972 prohibits the discharge of oil by vessels[70] into or upon the navigable waters of the United States or the waters of the contiguous zone except when permitted either by the 1954 International Convention for the Prevention of Pollution of the Sea by Oil[71] or by Presidential Regulation.[72] Knowingly discharging oil into or upon such waters in violation of the Act is punishable by civil penalty of not more than $5,000,[73] and failure by any person in charge of a vessel from which oil is discharged to notify the appropriate governmental agency of a prohibited discharge is punishable by a fine of up to $10,000 and one year imprisonment.[74]

The federal law further provides that when oil is discharged into or upon the navigable waters or shorelines of the United States or into the waters of the contiguous zone, the President is authorized to have the oil removed unless he determines that removal will be properly undertaken by the owner or operator of the offending vessel.[75]

Where the United States Government does proceed with cleanup operations, the owner or operator will be liable to the Government for the actual cost incurred for the removal of the oil. There will be no liability to the United States Government, however, where the owner or operator of the vessel can prove that the discharge was caused solely by (a) an act of God, (b) an act of war, (c) negligence on the part of the United States

69. 33 U.S.C.A. §§ 1251-1376 (Supp. 1974).

70. The term "vessel" as used in the statute means "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water other than a public vessel," and the term "public vessel" means "a vessel owned or bareboat-chartered and operated by the United States, or by a State or political subdivision thereof, or by a foreign nation, except when such vessel is engaged in commerce." 33 U.S.C.A. § 1321(a) (1974).

71. International Convention for the Prevention of the Pollution of the Sea by Oil of 1954. The 1954 text as ratified by the United States in 1961 appears at [1961] 12 U.S.T. 2989, T.I.A.S. No. 4900. The 1962 amendments as ratified by the United States in 1966 appear at [1966] 17 U.S.T. 1523, T.I.A.S. No. 6109.

72. 33 U.S.C.A. § 1321(b)(3) (Supp. 1974).

73. 33 U.S.C.A. § 1321(b)(6) (Supp. 1974).

74. 33 U.S.C.A. § 1321(b)(5) (Supp. 1974).

75. 33 U.S.C.A. § 1321(c)(1) (Supp. 1974).

Government, or (d) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing causes. The total liability may not exceed $100 per gross ton of the vessel or $14,000,000, whichever is less, except where the United States can show that the discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner. If this occurs, such owner or operator is liable to the United States for the full amount of the cleanup costs. Finally, costs may be assessed against the owner or operator in an in personam action or against the vessel in an in rem action.[76]

To aid the prospects of governmental recovery, the Act provides that:

> Any vessel over three hundred gross tons, including any barge of equivalent size, but not including any barge that is not self-propelled and that does not carry oil or hazardous substances as cargo or fuel, using any port or place in the United States or the navigable waters of the United States for any purpose shall establish and maintain under regulations to be prescribed from time to time by the President, evidence of financial responsibility of $100 per gross ton, or $14,000,000 whichever is the lesser, to meet the liability to the United States which such vessel could be subjected under this section. In cases where an owner or operator owns, operates, or charters more than one such vessel, financial responsibility need only be established to meet the maximum liability to which the largest of such vessels could be subjected.[77]

With regard to private rights, the Act explicitly provides that it shall not affect or modify in any way the liability of any shipowner or operator to any person or agency under any provision of law for damages to any publicly-owned or privately-owned property resulting from a discharge of any oil or from the removal of that oil.[78] Therefore, while the deterrent-abatement effect of the Act is clear, it is equally clear that the Act will be of no benefit to private parties in attempting to recover compensation for the damages they undergo as a result of a vessel's discharge of oil on the navigable waters of the United States.

## VIII. Availability of Compensation under State Statutes

While the Federal Water Pollution Control Act[79] does not itself provide a means by which private parties may be compensated for the injuries they receive as a result of vessel oil discharges, it does allow the states to provide such relief by declaring in section (o) that:

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76. 33 U.S.C.A. § 1321(f) (Supp. 1974).
77. 33 U.S.C.A. § 1321(p)(1) (Supp. 1974).
78. 33 U.S.C.A. § 1321(o)(1) (Supp. 1974).
79. 33 U.S.C.A. §§ 1251-1376 (Supp. 1974).

(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency *under any provision of law for damages to any publicly owned or privately owned property* resulting from a discharge of any oil or hazardous substance or from the removal of any such oil or hazardous substance.

(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing *any requirement or liability* with respect to the discharge of oil or hazardous substance into any waters within such State.

(3) Nothing in this section shall be construed as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore or offshore facilities under this chapter or any other provision of law, *or to affect any State or local law not in conflict with this section.*[80]

In this regard, several states have enacted anti-pollution legislation which may be advantageous to the claimant seeking to recover for the damage he sustains as a result of a vessel's discharge of oil on the navigable waters of the United States, where these waters are concurrently under the jurisdiction of a particular state. To date, on the basis of this existing state legislation, a claimant may seek compensation, depending on the statute under which he is attempting to proceed, in one of three ways: (1) by proceeding according to the administrative or arbitral procedure provided for in a given statute; (2) by initiating a civil action on the basis of a private right explicitly provided for in a given statute; or (3) by initiating a civil action on the basis of a private right implied by a given statute.

In 1970, the State of Maine enacted a precedential statute dealing with oil pollution and the coastal conveyance of petroleum.[81] This statute established a "non-lapsing, revolving fund" limited to four million dollars.[82] Its initial funding is derived primarily from an annual license fee of one-half cent per barrel of petroleum products transferred over water during the licensing period.[83] The license fee is imposed on "oil terminal facilities" which include shore facilities used for the offloading or onloading of petroleum products and certain vessels involved in vessel-to-vessel transfers of petroleum products taking place within the 12 mile

80. 33 U.S.C.A. § 1321(o) (Supp. 1974) (emphasis added).

81. Oil Discharge Prevention and Pollution Control Act of 1970, ME. REV. STAT. ANN. tit. 38, §§ 541-57 (Supp. 1973).

82. *Id.* § 551.

83. *Id.*

limit established by the statute.[84] When the four million dollar limit is attained, the license fee drops to a level sufficient to meet the continuing administrative expenses, unreimbursed charges,[85] and the cost of authorized research and development.[86]

A state commission administers the fund,[87] out of which a claimant may seek compensation for oil pollution by proceeding according to arbitration procedures provided for in the statute.[88] The statute also provides that determinations made by a majority of a three member board of arbitration shall be final, and such determinations may be subject to judicial review only as to matters relating to abuse of discretion of the board.[89]

Maine's approach to the problem of providing compensation to persons suffering damage as a result of a vessel's discharge of oil is an entirely new one. Yet from the claimant's standpoint, it is a most adequate one, for not only are the damages that can be recovered under the new statute extremely comprehensive, but also the claimant can be compensated for his injury within a minimal period of time. Moreover, because compensation is not sought in a forum in which substantive maritime law is applicable, the Federal Limitation of Liability Act,[90] will not affect any award given to the claimant by the arbitral panel. In fact, the claimant is guaranteed full compensation despite the financial status of

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84. *Id.* § 542(7).

85. Cleanup expenses for which the Fund will not be reimbursed include: (1) "mystery spills where it is impossible to assign liability"; (2) the first $15,000 expended to clean up a spill "promptly reported" by a licensee; and (3) costs associated with a spill for which reimbursement is waived. *Id.* § 551.

86. *Id.*

87. *Id.* §§ 543, 546, 551.

88. Third party damages. Any person claiming to have suffered damages to real estate or personal property or loss of income directly or indirectly as a result of a [prohibited] discharge of oil, petroleum products or their by-products . . . may apply within 6 months after the occurrence of such a discharge to the commission stating the amount of damage he claims to have suffered as a result of such discharge. . . .

A. If the claimant, the board and the person causing the discharge can agree to the damage claim, the board shall certify the amount of the claim and the name of the claimant to the Treasurer of State and the Treasurer of State shall pay the same from the Maine Coastal Petroleum Fund.

B. If the claimant, the commission and the person causing the discharge cannot agree as to the amount of the damage claim, the claim shall forthwith be transmitted for action to the Board of Arbitration as provided in this subchapter.

C. Third party damage claims shall be stated in their entirety in one application. Damages omitted from any claim at the time the award is made shall be deemed waived.

D. Damage claims arising under the provisions of this subchapter shall be recoverable only in the manner provided under this subchapter, it being the intent of the Legislature that the remedies provided in this subchapter are exclusive.

*Id.* § 551(2).

89. *Id.* § 551(3).

90. 46 U.S.C. §§ 181-96 (1970).

the owner of the vessel which caused the claimant's damage, or the condition or value of the vessel itself.

A second method by which a private party may seek compensation for oil pollution damage on the basis of a state anti-pollution statute, can be illustrated by examining a recently enacted Washington statute[91] which, among other things, provides:

> Any person owning oil or having control over oil which enters the waters of the state in an unexcused manner shall be strictly liable, without regard to fault, for the damages to persons, or property, public or private, caused by such an entry. In an action to recover such damages, said person shall be relieved from strict liability, without regard to fault, if he can prove that oil to which the damages relate entered the waters of the state (as a result of: a) an act of war or sabotage, or b) negligence on the part of the United States government, or the State of Washington).[92]

From this provision, it is clear that a claimant in the State of Washington has an explicit private right upon which he may institute a civil action for the damage he suffers as a result of a vessel's discharge of oil within the state's waters. Furthermore, the strict liability placed by the statute upon persons having control over oil will aid the claimant in recovering compensation for his injury by reducing his burden of proof.

Massachusetts has also created by statute a new, private cause of action which may benefit some of the residents of that commonwealth who incur damage as a result of a vessel's discharge of oil.[93] The statute provides that all persons responsible for any spillage, seepage, or other discharge of oil into any waters of the commonwealth or into any offshore waters which may result in damage to the waters, shores or natural resources utilized or enjoyed by citizens of the commonwealth, and all persons who owned or controlled the oil, or who owned, controlled or leased the vessel, tank, pipe, hose or other container in which the oil was located when the spillage, seepage or discharge occurred, shall be jointly and severally liable to any other person for any damage to his real or personal property.[94] Unfortunately, however, this statute is not as pervasive as the Washington statute, for it provides assistance only to those suffering actual physical damage to real or personal property, and it is unclear whether a strict liability standard is to be applied in private civil actions. Perhaps more important to a particular claimant, however, is the fact that he might be precluded from complete recovery due to the applicabil-

91. Washington Water Pollution Control Act, WASH. REV. CODE ANN. §§ 90.48.315-.336 (Supp. 1973).

92. *Id.* § 90.48.336.

93. Massachusetts Clean Waters Act, MASS. GEN. LAWS ANN. ch. 21, § 27 (1973).

94. *Id.*

ity of the Federal Limitation of Liability Act[95] to the particular circumstances of his injury.[96]

The third method by which a claimant may seek compensation on the basis of state anti-pollution statutes can be illustrated by the Michigan Water Pollution Control Act of 1970.[97] The Michigan legislation does not explicitly provide a private right for the oil pollution claimant. Yet, because the statute does not specifically declare that the legal rights arising from it rest solely with the state, it is possible that an oil pollution claimant may be able to seek recovery on the basis of a private right implied under the statute.

Basically, the implied cause of action theory suggests that the courts could provide the desired private relief by creating a new cause of action, not based on traditional common law, by using the prohibitions of the state regulatory statute as the standard of liability. The creation of this new cause of action would, unfortunately, require certain judicial determinations relating to venue, periods of limitation, various defenses and other factors which would be an arduous task to undertake. Hence, it appears unlikely that pollution claimants will find this theory a simple one to utilize.

However, two alternatives to creating a totally new implied cause of action from state regulatory statutes exist which may assist the claimant. The first approach suggests that the courts utilize the state pollution statute to conclusively set the standard of conduct required in a common law action. If this theory were accepted, the oil pollution claimant could bring, for example, a common law negligence action and rely upon the defendant's violation of the statute to establish by negligence per se the defendant's breach of duty, one of the essential elements of the action. In order to recover, the claimant would still be required to prove each of the other elements of the action, such as proximate cause. Similarly, the pollution claimant could utilize this theory in a common-law private nuisance action by relying upon the statute's violation to establish the existence of a nuisance. However, proof of the remaining elements of a nuisance action, such as special injury, would be required.

95. 46 U.S.C. §§ 181-96 (1970).

96. See discussion of the Federal Limitation of Liability Act section V *supra*.

97. (1) A person owning, operating or otherwise concerned in the operation, navigation or management of a watercraft operating on the waters of this state shall not discharge or permit the discharge of oil or oily wastes from the watercraft into or onto the waters of this state if the oil or oily wastes threaten to pollute or contribute to the pollution of the waters or adjoining shorelines or beaches.

(2) The owner or operator of any watercraft who, whether directly or through any person concerned in the operation, navigation or management of the watercraft, discharges or permits or causes or contributes to the discharge of oil or oily wastes into or onto the waters of this state or adjoining shorelines or beaches shall immediately remove the oil or oily wastes from the waters, shorelines or beaches. If the state removes the oil or oily wastes which were discharged by an owner or operator, the watercraft and the owner or operator are liable to the state for the full amount of the costs reasonably incurred for its removal. The state may bring action against the owner or operator to recover such costs in any court of competent jurisdiction.

MICH. COMP. LAWS ANN. § 691.1201-07 (1970).

The second alternative, which may be designated as the evidentiary theory, reasons that breach of the state statute provides only evidence, not conclusive proof, to aid the claimant in establishing the standard of conduct required in a common law action.[98] Again, however, just as in the case of a claimant who is able to bring suit on the basis of a statute explicitly providing for a private cause of action, the claimant who relies on implied cause of action principles to bring his suit may be precluded from complete recovery by virtue of the Federal Limitation of Liability Act.[99]

## IX. Recent Cases Construing the Constitutionality of State Oil Discharge Statutes

The foregoing discussion of various new state oil spill statutes demonstrates the concern of many states and their residents for obtaining compensation for damage resulting from oil discharges. Since the adoption of these statutes, however, a number of questions relating to their constitutionality have arisen. The Florida Oil Spill Prevention and Pollution Control Act of 1970[100] can be cited to illustrate many of these concerns.

The Florida Act imposes upon the owners or operators of any terminal facility or waterfront facility used for drilling for oil or handling the transfer or storage of oil, their agents or servants and any vessel destined for or leaving such facility, absolute and unlimited liability for any damage incurred by the state or private persons as a result of an oil spill in Florida waters.[101] Moreover, each owner or operator of a terminal facility or ship subject to liability under the Florida Act must establish evidence of financial responsibility in an amount satisfactory to the state

98. Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 Harv. L. Rev. 285, 286 (1963).

99. 46 U.S.C. § 181-96 (1970). See discussion of effect of the Act, section V *supra*.

100. Fla. Stat. §§ 376.011-21 (1973).

101. Fla. Stat. § 376.12 (1973). This section provides:

> Because it is the intent of this chapter to provide the means for rapid and effective cleanup and to minimize damages, *any licensee and its agents or servants including vessels destined for or leaving a licensee's terminal facility*, who permits or suffers a prohibited discharge or other polluting condition to take place within state boundaries *shall be liable to the state for all costs of cleanup or other damage incurred by the state and for damages resulting from injury to others. In any suit to enforce claims of the state under this chapter*, it shall not be necessary for the state to plead or prove negligence in any form or manner on the part of the licensee or any vessel. If the state is damaged by a discharge prohibited by this chapter *it need only plead and prove the fact of the prohibited discharge* or other polluting condition and *that it occurred*. . . . (emphasis added).

Currently there exists the additional question of whether Florida can constitutionally bring an action for the damages suffered by her residents, in light of the Supreme Court's rulings that states may not bring *parens patriae* claims in a disguised attempt to recover damages on behalf of individual citizens who are the real parties in interest. *See* Oklahoma *ex rel.* Johnson Bank Comm'r v. Cook, 304 U.S. 387 (1938); Louisiana v. Texas, 176 U.S. 1 (1900). Hawaii v. Standard Oil Co., 301 F. Supp. 982 (D. Hawaii 1969), *rev'd on other grounds*, 431 F.2d 1282 (9th Cir. 1970), *aff'd*, 405 U.S. 251 (1972).

by means of insurance, surety bonds, qualification as a self-insurer, or other acceptable evidence of financial responsibility.[102]

It is from this Florida Act, the Federal Water Quality Improvement Act of 1970[103] (recently incorporated almost in entirety in the Federal Water Pollution Control Act as amended in 1972),[104] and the federally protected tenets of maritime law that the suit of *Askew v. American Waterways Operators, Inc.*[105] arose. In that controversy, a three judge district court[106] held the Florida Act unconstitutional as an intrusion into the domain of federal maritime law, but on appeal, the Supreme Court of the United States in a unanimous decision upheld the Florida Act stating:

> We find no constitutional or statutory impediment in permitting Florida, in the present setting of this case, to establish any 'requirement or liability' concerning the impact of oil spillages on Florida's interests or concerns. To rule as the District Court has done is to allow federal admiralty jurisdiction to swallow most of the police power of the States over oil-spillage—an insidious form of pollution of vast concern to every coastal city or port and to all the estuaries on which the life of the ocean and the lives of the coastal people are greatly dependent.[107]

Initially, the Supreme Court pointed out that clearly the Federal Water Quality Improvement Act did not preclude, but allowed state regulation in the oil discharge situations covered by the Florida Act, citing section 1161(o) of the Federal Act.[108] The Court indicated that while the Federal Act related to the federal government's costs in cleaning up an oil spill, the damages specified in the Florida Act related to the state's costs for its part in cleaning up the spill and for the damages to the residents of the state resulting from the spill. These provisions the Court pointed out are a part of an integrated whole to compensate for the total costs of an oil discharge.[109]

In regard to the applicability of the Federal Limitation of Liability Act[110] to the Florida Act, the Court stated:

> So far as *vessels* are concerned the [F]ederal Limitation of Liability Act, *extends* to damages caused by oil spills even

102. FLA. STAT. § 376.14 (1973).
103. 33 U.S.C.A. § 1161 (Supp. 1974).
104. 33 U.S.C.A. §§ 1251-1376 (Supp. 1974).
105. 411 U.S. 325 (1973).
106. American Waterways Operators, Inc. v. Askew, 335 F. Supp. 1241 (M.D. Fla. 1972).
107. Askew v. American Waterways Operators, Inc., 411 U.S. 325, 328-29 (1973). For a detailed discussion of this case see 28 U. MIAMI L. REV. 209 (1973).
108. Presently the provisions of section 1161(o) of the Federal Water Quality Improvement Act of 1970 are included in those of section 1321(0) of the Federal Water Pollution Control Act as amended in 1972, 33 U.S.C.A. §§ 1251-1376 (Supp. 1974). *See* note 80 *supra* and accompanying text.
109. Askew v. American Waterways Operators, Inc., 411 U.S. 325, 330-31 (1973).
110. 46 U.S.C. §§ 181-96 (1970).

> where the injury is to the shore. That Act limits the liabilities of the owners of vessels to the "value of such vessels and freight pending."[111]

Yet, stating that the questions were premature, the Court refused to answer whether the damages the state could recover from a polluter are limited to those specified in the Federal Act and whether, in turn, the Federal Act removed the pre-existing limitation of liability in the Limitation of Liability Act.[112] "It is sufficient," the Court said, "for this day to hold that there is room for state action in cleaning up the waters of a State and recouping, at least within federal limits so far as vessels are concerned, her costs."[113]

The remaining question with which the Supreme Court dealt was whether a state constitutionally may exercise its police power respecting maritime activities concurrently with the federal government. In answer to this, the Court reiterated the traditional concept that a state, in the exercise of its police power, may establish rules applicable on land and water within its limits, even though these rules incidentally affect maritime affairs; provided that the state action does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in international and interstate relations.[114]

Specifically, the Court pointed out that sea-to-shore pollution, historically within the range of the police power of the state, was not silently taken away from the states by the Admiralty Extension Act[115] which the Court said, does not purport to supply the exclusive remedy.[116] For, as the Court stated:

> While Congress has extended admiralty jurisdiction beyond the boundaries contemplated by the Framers, it hardly follows from the constitutionality of that extension that we must sanctify the federal courts with exclusive jurisdiction to the exclusion of powers traditionally within the competence of the States.[117]

It is beyond question now, therefore, that states do have the right to develop legislation to provide compensation for themselves and their residents for damages which they suffer resulting from the discharge of oil from vessels on the navigable waters of the United States, where the waters are concurrently state waters. The statutory liability might

111. Askew v. American Waterways Operators, Inc., 411 U.S. 325, 330 (1973) (citations omitted) (emphasis added).

112. *Id.* at 332. Those same questions would now be applicable to the Federal Water Pollution Control Act as amended in 1972, for the provisions of the Federal Water Quality Improvement Act which gave rise to the questions originally, have been adopted in the 1972 Act.

113. *Id.* at 332.

114. *Id.* at 337-40.

115. 46 U.S.C. § 740 (1970).

116. Askew v. American Waterways Operators, Inc., 411 U.S. 325, 343 (1973).

117. *Id.* at 341.

perhaps be without limit where such legislation provides for procedures against non-vessel owners (*i.e.*, terminal facility owners and the like), and it may extend at least to the limits of the Federal Limitation of Liability Act when the legislation provides for procedures against vessels or vessel owners responsible for a discharge.

The Supreme Court of Maine in the recent case of *Portland Pipe Line Corp. v. Environmental Improvement Commission*,[118] shed additional light on the problems facing the states in providing for state and private compensation in oil discharge situations. In that action the plaintiffs challenged Maine's Oil Discharge Prevention and Pollution Control Act[119] as violating various provisions of both the United States and Maine Constitutions; however, the Maine court upheld its constitutionality after an exhaustive study.

In an extremely enlightening decision, the court indicated that the license fees imposed by the Act violated neither the due process nor equal protection guaranty of either the Maine Constitution or the United States Constitution.[120] Further, the court held that the fees were not prohibited by the import-export clause of the United States Constitution because they were imposed upon the off-loading of oil rather than upon the oil itself, and thus, were not a direct tax on the oil.[121] Moreover, the court held that the arbitration procedure,[122] provided for under the Maine Act for resolving third party damage claims, did not infringe on any federal interest, but in fact, satisfied the state's objective of providing rapid compensation for individuals damaged by an oil discharge and was a proper form of relief within the scope of the "savings clause" of the Federal Judiciary Act.[123]

Finally, the Maine Court reiterated the decision of the United States Supreme Court in *Askew v. American Waterways Operators, Inc.*,[124] that Congress, by enacting the Federal Water Quality Improvement Act[125] (now incorporated almost in entirety in the Federal Water Pollution Control Act)[126] did not intend to prohibit state action to control the evil of oil pollution.[127]

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118. 307 A.2d 1 (Me. 1973).

119. ME. REV. STAT. ANN. tit. 38, §§ 541-57 (Supp. 1973). For a more complete discussion of the Maine Act, *see* section VIII *supra*.

120. Portland Pipe Line Corp. v. Environmental Imp. Comm'n, 307 A.2d 1, 14-31 (Me. 1973).

121. *Id.* at 31-40.

122. ME. REV. STAT. ANN. tit. 38, § 551(2) (Supp. 1973).

123. 28 U.S.C. § 1333 (1970); Portland Pipe Line Corp. v. Environmental Imp. Comm'n, 307 A.2d 1, 41-42 (Me. 1973).

124. 411 U.S. 325 (1973).

125. 33 U.S.C.A. § 1161 (Supp. 1974).

126. 33 U.S.C.A. §§ 1251-1376 (Supp. 1974).

127. Portland Pipe Line Corp. v. Environmental Imp. Comm'n, 307 A.2d 1, 43-45 (Me. 1973).

## X. Practical Problems with the Approach of Myriad State Statutes

World shipping interests are expressing increasing distress over the development of a multitude of differing state statutes relating to oil spills. They argue that if each state can establish regulations relating to liability and financial responsibility, or to a vessel's gear, which conflict or differ with one another or with the federal law, the ocean carriers will be severely hampered in their ability to conduct efficient, economical, and logistically feasible operations. Moreover, they claim that in terms of costs and time alone, they can neither afford nor provide the additional administrative skill necessary to comply with the diverse state statutes, in addition to the federal law. Thirdly, they emphasize that it is impossible to procure insurance to cover absolute liability and unlimited financial responsibility as created by certain state acts.[128]

The result of all this, say the carriers, is their inability to operate in states having such severe laws as that of Florida,[129] and this, they say, only proves detrimental to the residents of such states who depend on ocean transportation.[130]

On the other hand, while it now appears beyond question that the states may enact legislation designed to compensate their residents for oil spill damage, there is no guaranty that they will do so. Moreover, even though a number of states may pass various statutes to deal with the problem, equivalent remedies may not always be provided; thus, there may be a disparity in the degree of compensation two claimants with similar damages may receive merely because they reside in different states, even though both states have statutes providing for private relief.

## XI. An Alternative—A Federal Fund to Provide for Total Compensation

What then, can be done to enhance the availability of effective compensation for victims of a vessel's discharge of oil on the navigable waters of the United States when current statutes, conventions and interpretations of maritime or common law either force them to carry an all too onerous burden of proof or fail to provide them with a means of compensation altogether? Moreover, what can be done to correct the situation which presently exists, where several states have statutes relating to the compensation problem, but none of them combats it in exactly the same way so that disparities result between the rights of

128. United States Coast Guard, Legal, Economic and Technical Aspects of Liability and Financial Responsibility as Related to Oil Pollution 4-3 (1970) [hereinafter cited as Coast Guard].

129. Oil Spill Prevention and Pollution Control Act, Fla. Stat. §§ 376.011-.21 (1973).

130. Coast Guard *supra* note 128.

residents of various states, and, shipping interests are hard pressed to satisfy all of the requirements?

One solution might be the establishment by the federal government of a fund to provide compensation. A separate fund could be created for this purpose, or the scope of the fund already established under section 311(k) of the Water Pollution Control Act[131] could be enlarged to provide the needed relief. The fund could be designed to be all encompassing so as to provide compensation for all persons who suffer damage directly to real estate, personal property, or income as the result of such discharges.

Substantively, recovery might then be sought on the basis of one of two concepts: private parties might be allowed to seek recovery through procedures (perhaps arbitral) established to furnish compensation under the fund as a sole method of recovery, or, as a somewhat less satisfactory alternative, the fund might be fashioned to ensure compensation for damages sustained by private parties whenever legitimate claims could not be sustained through existing procedures.

If the latter approach were chosen, the fund could be designed to compensate persons suffering damage as a result of a vessel's discharge of oil if any of the following situations should arise: (1) The source of the oil is unknown; (2) the person causing the discharge has successfully raised the defense of either an Act of God or an act of war; (3) the person causing the discharge has successfully raised the defense of an act of a third party who is judgment proof, bankrupt or has satisfied only a portion of the claim, is financially incapable of meeting his obligation, in full, or is unknown; (4) the person causing the discharge is judgment proof, bankrupt, has satisfied only a portion of the claim, or is financially incapable of meeting his obligation, in full; (5) the claimant has been barred in recovery, either in whole or in part, by the operation of a limitation of liability provision as set forth in a federal statute or an international convention, or (6) the oil results from a discharge from a public vessel, *i.e.*, a vessel owned or bareboat chartered and operated by the United States, or by a state or political subdivision thereof, or by a foreign nation, except when such vessel is engaged in commerce.

Moreover, this latter approach is not completely novel in the Community of Nations. Canada, for example, has adopted this concept in an amendment to the Canada Shipping Act.[132] The Act provides for the establishment of a Maritime Pollution Claims Fund,[133] which is to be built and maintained primarily by a levy (presently 15 cents),[134] on each ton of oil imported to and exported from Canada.

131. 33 U.S.C.A § 1321(k) (Supp. 1974).

132. An Act to Amend the Canada Shipping Act, CAN. REV. STAT. c. 27 (2d Supp. 1970).

133. *Id.* § 737.

134. Canada Gazette, Part II, Vol. 106, No. 4, Feb. 3, 1972, P.C. 1972-185, SPR/72-33, Reg. 3.

Under the Canadian Act when a claimant, whether governmental or private, has employed his best efforts to the satisfaction of either the Administrator of the Claims Fund or an admiralty court, depending on the situation, in determining the identity of the polluter and recovery, to the extent that he is able, the claimant is entitled to receive full compensation from the Claims Fund in consideration for assigning his right of action or judgment to the Claims Fund.[135]

Should the United States establish a broad scope fund along the lines of either concept, it could be maintained by revenues derived from the importation of oil into the United States or, alternatively, from revenues derived from other sources. If an impost were placed on oil entering the United States, the price of oil could be increased slightly to reflect this additional cost. In this manner, the American public, which in fact is the beneficiary of the transportation of oil, would properly purchase it at a cost reflecting its true price, *i.e.*, one that includes the costs of injuries that others may suffer as a result of its carriage prior to use.

Money expended from the fund to compensate private persons for the damage they sustain as a result of a vessel's discharge of oil could perhaps be repaid to the fund whenever the United States is able to obtain recovery from the responsible vessel owner. Recovery could be sought on a basis similar to the recovery of costs incurred by the federal government in the removal of discharged oil presently provided for in section 311(f) of the Water Pollution Control Act.[136] Hence, only money expended from the fund for non-recoverable damages would have to be provided from revenue derived from the impost or alternative sources.

Furthermore, the establishment of such a fund, particularly if it were developed along the lines of the first alternative so that it provided the sole method of recovery, might make it practical for the federal government to preempt the field of liability for oil pollution resulting from the discharge of oil from vessels on the navigable waters of the United States. This action would eliminate the burden of multiple state regulations on the subject, thus helping to keep the costs of transporting oil at the lowest possible level.

Additionally, should the proposed International Convention on Civil Liability for Oil Pollution Damage of 1969, and the International Convention in the Establishment of an International Fund for Compensation for Oil Pollution Damage of 1971,[137] become ratified by the United States and otherwise go into effect, the fund's structure could be designed to supplement these Conventions, thus eliminating some of their shortcomings.[138] For example, it could include compensation for damage re-

135. CAN. REV. STAT. c. 27, §§ 744-45 (2d Supp. 1970).

136. 33 U.S.C.A. § 1321(k) (Supp. 1974).

137. See note 47 *supra*.

138. Doud, *supra* note 61, at 531.

sulting from all forms of oil pollution, not just persistent hydrocarbon mineral oil, and could provide for compensation in excess of the present limits of those conventions.

More importantly, however, the institution of such a fund would provide an adequate means by which private persons could be compensated for the damages they suffer as a result of the discharge of oil from vessels on the navigable waters of the United States.