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private compensation for injuries sustained by the discharge of oil from vessels on the navigable waters of the united states

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Private Compensation for Injuries Sustained by the Discharge of Oil from Vessels on the Navigable Waters of the United States

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PREFACE

The Sea Grant Colleges Program was created in 1966 to stimulate research, instruction, and extension of knowledge of marine resources of the United States. In 1969 the Sea Grant Program was established at the University of Miami.

The outstanding success of the Land Grant Colleges Program, which in 100 years has brought the United States to its current superior position in agriculture production, helped initiate the Sea Grant concept. This concept has three primary objectives: to promote excellence in education and training, research, and information services in sea related university activities including science, law, social science, engineering and business faculties. The successful accomplishment of these objectives, it is believed, will result in practical contributions to marine oriented industries and government and will, in addition, protect and preserve the environment for the benefit of all.

With these objectives, this series of Sea Grant Technical Bulletins is intended to convey useful studies quickly to the marine communities interested in resource development without awaiting more formal publication.

While the responsibility for administration of the Sea Grant Program rests with the National Oceanic and Atmospheric Administration of the Department of Commerce, the responsibility for financing the Program is shared by federal, industrial and University contributions. This study, Private Compensation for Injuries Sustained by the Discharge of Oil from Vessels on the Navigable Waters of the United States, is published as a part of the Sea Grant Program and was made possible by Sea Grant support for the Ocean Law Program.

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INTRODUCTION

Public awareness of and dissatisfaction with environmental pollution has in recent years sparked local, state and federal agencies to new and greater efforts in the prevention and abatement of pollution, and even the reclamation of our polluted ecosystems. Unfortunately, however, few comparable efforts have been directed toward helping the individual who has suffered special damages as a result of pollution. Rather, his only recourse has been some form of a civil action, with all its ramifications, to obtain compensation for his injury.

This study examines the methods by which private persons may seek compensation for the damage they sustain as a result of the discharge of oil from vessels on the navigable waters of the United States. An assessment of the available means of compensation is undertaken throughout the discussion and suggested alternatives,which should lead to more adequate and equitable compensation,are put forth.

For the purpose of this study, the term -

(1) "discharge" includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting or dumping,[1] except where it is otherwise defined by the various legislation discussed herein;

(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,[2] except where it is otherwise defined by the various legislation discussed herein;

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[1] Water Quality Improvement Act of 1970, U.S.C.A. § 1161 (a) (2) (1970).

[2] See, Coastal Conveyance of Petroleum Act of 1970, MAINE REV. STAT. ANN. tit. 38 § 542 (Supp. 1971).

(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,[3] except where it is otherwise defined by the various legislation discussed herein;

(4) "navigable waters of the United States" shall be construed to mean those waters of the United States, including the territorial sea adjacent thereto, the general character of which is navigable, and which, either by themselves or by uniting with other waters, form a continuous waterway on which boats or vessels may navigate or travel between two or more States, or to or from foreign nations.[4]

While the injuries that result from the discharge of oil from vessels on the navigable waters of the United States occur in sufficient numbers due to the current state of development in vessel use to warrant an investigation into this particular area of the pollution problem, it is hoped that the possible avenues to private compensation for pollution damage examined herein will prove helpful either by way of direct application or by analogy in other areas of the pollution menace.

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[3] MAINE REV. STAT. ANN tit. 38 § 542 (Supp. 1971).

[4] 33 C.F.R. § 2.10 - 5 (1917); U.S.C.A. § 2.10-5 (Supp. 1971).

Chapter I

SCOPE OF THE PROBLEM

A. Sources of Maritime Oil Discharges

Vessels contribute to the oil pollution of the world's waters in numerous ways. The primary source of this pollution results from the transportation of oil in bulk.[5] At present, the world's annual oil production is approximately 1,800 million metric tons, and is increasing by about four percent each year.[6] Of this annual production some sixty percent, or better than 1,000 million metric tons, is transported at sea.[7] Recent estimates indicate that the oil pollution resulting from this transportation alone amounts to one million metric tons per year.[8] The majority of such pollution comes from the thousands of insidious incidents of minor discharges occurring in the form of tanker leaks or spills, or resulting from deliberate tanker operations such as emptying salt water ballast, cleaning oil tanks, or transferring and handling cargo.[9]

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[5] See M. Edwards, "Oil Pollution and the Law", in OIL POLLUTION - PROBLEMS AND POLICIES 23 (S. Degler ed. 1969).

[6] MARINE SCIENCE AFFAIRS - SELECTING PRIORITY PROGRAMS, ANNUAL REPORT OF THE PRESIDENT TO THE CONGRESS ON MARINE RESOURCES AND ENGINEERING DEVELOPMENT, TOGETHER WITH THE REPORT OF THE NATIONAL COUNCIL ON MARINE RESOURCES AND ENGINEERING DEVELOPMENTS 21 (1970).

[7] Id.

[8] Id.

[9] M. Edwards, supra note 5.

Frequently more dramatic and destructive in the short term are the oil discharges occasioned by the collision, grounding or sinking of vessels. Accidental discharges of fuel and lubricating oil, and even the pumping of bilge water containing oily emulsions from pleasure craft, merchant and navy vessels, also add to the oil contamination of the waters of the world.

B. Trends in Increasing Tanker Size

As man's demand for oil has increased, the growth of the world's oil tanker fleet has spiraled until it now comprises some forty percent of the world's ocean traffic.[10] In order to appreciate the increasing role of tankers in transporting oil at sea a brief examination of their development over the past thirty years is in order. Prior to 1940 a 12,500 dead weight ton (dwt)[11] tanker was considered large, yet by World War II the average tanker capacity had increased to 16,000 dwt.[12] By 1965 that average had risen to 27,000 dwt and in 1966 the new tankers delivered averaged about 76,000 dwt.[13] It was not until the following year, however, that the

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[10] V. Nanda, "The Torrey Canyon Disaster: Some Legal Aspects", 44 DENVER L. J. 400, 401-402 (1971).

[11] Deadweight tonnage is a measure of weight. It is the most meaningful figure in talking about tankers because, while the density of crude oil varies a bit the variation is obviously nothing like that which occurs on general cargo ships. Deadweight tonnage refers to the weight of cargo, stores, water, bunker (fuel) and even crew members. A ship's deadweight tonnage - or dwt - is the weight that will bring a ship down to the Plimsoll mark, the deepest it can legally be loaded. Deadweight tons are long tons of 2,240 pounds. E. Cowan, OIL AND WATER 20-21 (1968).

[12] Comment, "Oil Pollution of the Sea" 10 HARV. INT'L L. J. 316, 317 (1967).

[13] Id.

world was to first fully appreciate the inherent dangers that lay in the new monstrous tankers. In 1967 one of the largest tankers then afloat, the Torrey Canyon, a vessel of 118,285 dwt carrying 880,000 barrels of crude oil, ran upon a reef near the English Channel.[14] The cleanup costs alone for the oil that was discharged as a result of that grounding cost the English and French governments over $16 million.[15]

Yet the fate of the Torrey Canyon did not deter the oil transportation industry in its quest to utilize jumbo tankers; for in 1968 there were on order more than sixty tankers of 150,000 dwt or more throughout the world.[16] Furthermore, tanker growth over the past 30 years seems only to have sparked the metamorphosis of the oil tanker into the Gargantuan vessel of the future. Indeed, the World War II tankers appear to have been only bathtub toys in comparison to some of todays tankers and those envisioned for the near future.

To date, six tankers of more than 300,000 dwt have undergone construction in Japan and four of these are now operating.[17] These tankers are presently the world's largest vessels, but there is no real expectation that they will continue to hold that title very long.[18] In fact, tankers of five

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[14] Comment, "Post Torrey Canyon: Toward a New Solution to the Problem of Traumatic Oil Spillage", 2 CONN. L. REV. 632 (1970).

[15] Note, "Liability for Oil Pollution Cleanup and the Water Quality Improvement Act of 1970", 55 CORNELL L. REV. 973, 982 (1970).

[16] Comment, supra note 12, at 317.

[17] R. Cooke, "Oil Transportation by Sea", in OIL ON THE SEA 93, 95 (D. Hoult ed. 1969).

[18] Id.

hundred thousand, eight hundred thousand[19] and even one million[20] dwt are on today's drawing boards.

The tremendous increase in tanker size has resulted from attempts to ship more oil and to ship it at reduced costs. The oil transportation industry has been applying the basic economics of scale formula: the larger the tanker the smaller the unit cost of transporting oil.[21]

Unfortunately, however, the gigantic increase in vessel size has reduced the ability of ships to maneuver, which enhances the probabilities of mishap. For example the Universe Island, a ship of 312,000 dwt, requires three miles of the ocean in which to stop, making it mandatory for the master to have sufficient time to "plan ahead" in order to avoid calamity.[22] Furthermore, the magnitude of destruction that could be caused as a result of an accident involving one of these jumbo tankers is tremendous. As

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[19] Comment, supra note 12, at 317

[20] 1 PANEL REPORTS OF THE COMMISSION ON MARINE SCIENCE, ENGINEERING AND RESOURCES III-67 (1969) [hereinafter cited as 1 PANEL REPORTS].

[21] The overriding reason for the rise of the supertanker has been its ability to deliver oil at lower cost. Studies showed that the operating costs of a ship did not keep pace with size, especially considering the advances in automation. Moreover, the capital cost of a ship rises less rapidly than its size and the hull weight goes up proportionately less than carrying capacity. In short, the bigger the ship, the cheaper it is to move a ton of crude oil. Comment, supra note 14, at 634, 635.

[22] Note, "A Proposal to Protect Maine From the Oilbergs of the 70's", 22 MAINE L. REV. 481,482 (1970).

indicated previously the cleanup cost alone resulting from the Torrey Canyon incident amounted to $16 million and the Torrey Canyon was a vessel of only 118,285 dwt. Consider for a moment the potential damage that could be caused by a vessel of 800,000 to 1,000,000 dwt.

Just as the size of tankers have grown so too have their numbers. In 1950, for example, there were 2,138 tankers plying the oceans.[23] By 1966 that number had jumped to 3,500[24] and in 1970 an estimated 4,071 tankers were engaged in the transportation of oil.[25] Regrettably, this increase in number results in a commensurate increase in the possibility of tanker disasters.

C. Effect of Oil Discharges

In relation to this study one of the most significant properties of oil is that on water it spreads quickly, covering vast areas. This tendency to spread is the result of two physical forces: the force of gravity which causes lighter oil to seek a constant level by spreading horizontally, and the surface tension force of water.[26] As little as 100 barrels of oil dis-

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[23] New York World-Telegram and Sun, THE WORLD ALMANAC AND BOOK OF FACTS FOR 1952 640 (H. Hansen ed. 1952).

[24] R. Cooke, supra note 17, at 95.

[25] Navel Review Issue, Vol. 97 UNITED STATES NAVEL PROCEEDINGS 353 (May 1971).

[26] J. Fay, "The Spread of Oil Slicks on a Calm Sea", in OIL ON THE SEA 53 (D. Hoult ed. 1969).

charged into a calm sea can cover eight square miles in less than a week.[27] The consequences of this process become evident when one realizes that as many as 1,200 barrels of oil may be discharged into the ocean when the tanks of a 50,000 dwt tanker are cleaned.[28]

In general, actual and potential damage from oil pollution falls within two categories: damage to the living resources of the sea and damage to the aesthetic, economic and property interests of man.

1. On the living resources of the sea

The destructive effect of oil on the living resources of the sea can be immense. For example, when off the coast of Rhode Island 31,000 gallons of oil were discharged from the tanks of the grounded tanker P.W. Thirtle in an effort to refloat her, the entire oyster fishing industry of Narragansett Bay was virtually destroyed.[29] Then too, surface feeding fish may die when they swim into certain types of floating oil, such as fuel oil, and even if the hydrocarbons present in crude oil do not kill the fish outright, they may accumulate in their tissues, rendering the fish unpalatable to man.[30] Additionally, oil contamination tends to disturb incredibly complex

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[27] N. D. Shutler, "Pollution of the Sea by Oil", 7 HUSTON L. REV. 415, 416 (1970).

[28] Id.

[29] Comment, supra note 12, at 321.

[30] O. Schachter and D. Serwer, "Marine Pollution Problems and Remedies", 65 AM. J. OF INT'L LAW 84, 89 (1971).

marine life cycles which may have a disastrous effect on the amount of protein that will be available from the sea.[31] The uncertainty as to the specificity of damages done to the living resources of the sea by oil vitiation makes it difficult to measure the economic and social effect of such damage. But the importance of the fishing industry to the world economically and as a source of protein is not in doubt; it is steadily rising.[32] Therefore, damage resulting from oil pollution which impairs this industry will have progressively greater consequences.

2. On man

The damage people suffer as a result of oil pollution varies in kind and degree. Such contamination may have certain effects on an entire populus or specific effects on certain individuals or businesses which are distinct from those of the public in general.

The common aggravation of the aesthetic senses brought on by the sight of oil-coated beaches and waters, both in those who live along the water's edge and those who travel to it seeking relaxation or recreation, is representative of the common damage the public as a whole receives as a result of oil pollution. Likewise, the destruction of a fishery or other marine industry as a result of oil pollution, in addition to causing havoc within that industry, would affect the public in general vis-a-vis unemployment and a diminished food or resource supply. While the present effects of oil pollution may be severe enough, in the future its broad effects may be far

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[31] N. Shutler, supra note 27, at 418.

[32] See, C.P. Idyll, THE SEA AGAINST HUNGER 1-28 (1970).

more serious to larger segments of the public, particularly if man is compelled to rely upon artificial desalination as a major source of his domestic and industrial water supply, for oil contamination may well impair his process.[33]

Of primary concern in this study, however, are the specific types of damages suffered by private parties as a result of oil pollution. A few examples will serve to illustrate these damages.

Actual damage may occur to shoreline beaches, to piers or property, to other vessels, or to leased or privately owned submerged land or ponding areas in which individuals have a property interest upon which they may base a private claim for relief for cleanup costs and/or loss of property value.

Oil pollution may also cause damage to the economic interests of private persons. For example, those who are in the business of catering to tourists may not only suffer aesthetic and property damage, but a loss of business profits as well. This is true whether one is a resort owner whose befouled beaches repel tourists or a restaurant or gas station owner a few blocks away whose business depends less directly, but just as heavily, on clean local beaches and water. Then too, severe and prolonged economic damage may be brought upon those whose profession it is to harvest marine life if the productivity of the water in their area of operation is destroyed by oil pollution.

Once the nature of a pollution claimant's damage has been determined it will be up to the practitioner to decide what avenue of approach he will

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[33] V. Nanda, supra note 10, at 404.

take in attempting to win compensation for his client for those damages.

D. Prognosis for the Future

What does the future hold? Obviously as the size and numbers of oil tankers swell, so does the risk of catastrophic oil discharges. Furthermore, as the dimensions of the national navies and merchant marines increase, and the number of recreational vessels continues to multiply,[34] the greater the oil contamination potential becomes. Yet, because man is so dependent on the transportation of oil at sea and upon national navies and merchant marines, and because of the enjoyment he finds in recreational boating, he will have to rely on his ingenuity to develop mechanisms to prevent and laws to deter oil discharges. Unfortunately, however, history has shown that while the technological achievements of man are seemingly unlimited, they are at the same time subject to accident and unexpected human error; and laws enacted with great purposes in mind are often violated.

Hence, there is a need for methods to compensate injured private parties who suffer damages when an oil discharge does occur.

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[34] Recreational boats in the United States total about 8 million and projections indicate that the number of boating participants will more than double by the year 2000. 1 PANEL REPORTS, supra note 20 at 111-17, 18.

Chapter II

BASES UPON WHICH LIABILITY MAY BE ASSERTED

Before discussing the specific actions available to the pollution claimant seeking compensation for damages resulting from the discharge of oil from vessels, it will be useful to review three standards of liability - fault (intentional and negligent), strict, and absolute - that may be imposed upon the polluter under various legal doctrines.

To establish a cause of action under any of the three standards of liability, a pollution claimant must show the "fact" and the "cause" of his injury. Where absolute liability provides a basis for his claim, the "fact" and the "physical cause" of his injury are all that he must show to recover. To establish strict liability, proof of the "fact" of injury is the same, but a slightly narrower "cause" than "physical cause" must be shown since liability is limited to those injuries which are a materialization of the specific extra hazard created by the voluntary acts of the defendant which give rise to the strict liability.[35] Proof of such "fact" and "cause" will allow recovery under strict liability doctrine, barring the defense of a sufficiently extraordinary or unexpectable occurrence constituting an "Act of God", or the defense of an independent act by a third person, which the defendant could not have foreseen or prevented.[36]

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[35] N. Shutler, supra note 27, at 427.

[36] W. Prosser, LAW OF TORTS 520-522 (4th ed. 1971).

With regard to fault liability, however, the burden is on the claimant to prove "fault" as well as the "fact" and the "cause" of his injury. To establish intentional fault liability the claimant must prove that the defendant intended to commit the act which resulted in the plaintiff's damage; whereas to establish negligent fault liability the claimant must prove the defendant breached a duty owed to the plaintiff (i.e., deviated from a proper standard of care) in order to recover. The "cause" to be shown is legal or proximate cause, which requires that the injury be foreseeable. In appropriate cases negligent tort liability may be supplemented by the doctrine of res ipsa loquitur to approximate strict liability. However, under res ipsa loquitur principles, a showing of contributory negligence or an "Act of God" may be a defense; but even in the absence of such a showing a finding of guilt is not compulsory.[37]

To illustrate the effect of these theories of liability on the shipowner-defendant, consider the following variations of the defenses of wind and wave action and personal fault in the production of an oil discharge (see Table 1): (1) winds or waves beyond ordinary human foresight, e.g., a sudden storm; (2) winds or waves constituting "Acts of God," e.g., hurricanes, tidal waves; (3) negligence on the part of the defendant; and (4) the independent act of a third person, which the defendant could not have foreseen or prevented. Under an absolute standard of liability none of these defenses would be adequate. Yet under a strict standard, the defense

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[37] N. Shutler, supra note 27, at 428, 429.

of an extraordinary storm, or the independent act of a third person, which the defendant could not have foreseen or prevented would excuse the defendant from liability. As for negligent tort liability all of the defenses other than when the defendant was actually negligent would be valid. For intentional tort liability, all the enumerated defenses would suffice.

Table 1

Adequacy of Defenses Under Theories of Liability

	Standard of Liability Fault			
Defense	Absolute	Strict	Negligent	Intentional
Winds or waves beyond ordinary human foresight; e.g., a sudden storm.	No	No	Yes	Yes
Winds or waves constituting "Acts of God," e.g., hurricanes, tidal waves.	No	Yes	Yes	Yes
Negligence on the part of the defendant.	No	No	No	Yes
The independent act of a third person, which the defendant could not have foreseen or prevented.	No	Yes	Yes	Yes

Source: This Table has been adapted from a similar one found in an article by Professor N.D. Shutler "Pollution of the Sea by Oil" 7 Houston Law Review 415, 428 (1970). Modifications contained in this table have been made for the purpose of a more generalized approach to the problem of liability.

Chapter III

CHOICE OF FORUM

A. Effect of the Constitutional Delegation of Admiralty and Maritime Jurisdiction

The competence of the courts of the United States to administer the maritime law derives 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".[38] This constitutional grant was implemented by Congress in Section 9 of the Judiciary Act of 1789:

> ... the district courts... shall also have exlusive original cognizance of all civil causes of admiralty and maritime jurisdiction ... saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it....[39]

Historically, the scope of this jurisdiction has been defined generally as extending to all torts and injuries occurring on the navigable waters of the United States, and to all contracts whose subject matter is maritime.[40] Congress, however, has the power to extend the scope of that definition

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[38] U. S. Const. Art. III, §2.

[39] Judiciary Act of 1789, 1 Stat. 76-77. This provision has been carried over, in somewhat modified language into 28 U.S.C. 1333 (1964) which now reads:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

[40] G. Gilmore & C. Black, THE LAW OF ADMIRALTY §1-9 (1957).

within the broad limits of the admiralty grant. That is exactly what it did when it passed the Admiralty Extention 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 waters, notwithstanding that such damage or injury be done or consummated on land.[41]

It is thus 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 or structures on the navigable waters, to the navigable waters themselves, to property on land or to land itself, an action will lie for the maritime tort.[42]

Traditionally, federal district courts sitting in admiralty do not use juries, so the oil pollution claimant may wish to rely on the "saving to suitors clause"[43] to bring his tort action in a forum which does.[44] In this regard, the state courts or the federal district courts sitting on a jurisdictional basis other than admiralty may be open to the claimant.[45] However, due to the maritime nature of a vessel's discharge of oil on the navigable waters of the United States, overlying principles relating to substantive maritime law will be applicable in all private suits arising out of the discharge, no matter in what

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[41] 46 U.S.C. § 740 (1964).

[42] 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; Petetion of New Jersey Barging Corp., 168 F. Supp 925, (S.D. N.Y. 1958) damage to land.

[43] Supra at note 39, 28 U.S.C. 1333 conjers 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."

[44] Comment, supra note 12, at 346.

[45] G. Gilmore & C. Black, supra note 40, at § 1-13.

judicial forum they are presented or on what legal theory or statute they are based.

B. Effect of Claimant's Ability to Proceed In Rem or In Personam

The ability of an oil pollution claimant to recover compensation for the damage he has suffered as a result of a vessel's discharge of oil on the navigable waters of the United States may well depend on his ability to proceed in rem[46] against the vessel responsible for his damage on the basis of a maritime lien,[47] or in personam[48] against the owner of the vessel. If the claimant desires to proceed against the vessel, he must do so in the federal district courts convened on the basis of their admiralty jurisdiction (thus ruling out a jury trial); because, since 1789, when the Judiciary Act first gave them power, federal district courts sitting in admiralty have exercised exclusive jurisdiction over actions in rem against vessels arising on the basis of maritime liens.[49] On the other hand, suits in personam can be initiated by the maritime claimant in the federal district courts, sitting

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[46] An action in rem is:

> ...a suit directed against a specific thing (as a vessel) irrespective of the ownership of it, to enforce a claim or lien upon it, or to obtain, out of the thing or out of the proceeds of its sale, satisfaction for an injury alleged by the claimant.

BLACK'S LAW DICTIONARY 47 (rev. fourth ed. 1968).

[47] A maritime lien is: "A privileged claim on a vessel for...an injury caused by it in navigable waters, to be carried into effect by legal process in the admiralty court." Id. at 1121.

[48] An action in personam is: "An action directed against a particular person who is charged with the liability." Id. at 47.

[49] G. Gilmore & C. Black, supra note 40, at § 1-13.

either in admiralty or on other jurisdictional bases, or in the state courts, unless otherwise provided by federal statute.[50]

In the United States, both domestic and foreign citizens and corporations are subject to civil suit in personam only when they are validly served with process[51] or choose to appear voluntarily.[52] Likewise, their vessels are subject to proceedings in rem on the basis of a maritime lien in the federal district courts only while they are within the territorial ambit of the court's jurisdiction.[53] Hence, a vessel outside the territory of the United States cannot be proceeded against in the district courts. Furthermore, if a vessel owner is not validly served with process and does not choose to appear voluntarily in a suit, courts within this country cannot obtain jurisdiction over him for the purposes of private civil actions. Thus a pollution claimant may well be precluded from compensation by lack of anything or anyone to proceed against.

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[50] Id.

[51] F. James, CIVIL PROCEDURE § 12.1 (1965).

[52] Id. at § 12.6.

[53] 2 AM. JUR. 2d. Admiralty § 96 (1962).

Chapter IV

EFFECT OF PRINCIPLES OF SOVEREIGN IMMUNITY

The oil pollution claimant may also be forestalled in seeking compensation by principles of sovereign immunity which generally protect a sovereign from proceedings against him in personam or against his vessels in rem.[54] The general principle that a sovereign cannot be sued without his consent applies in admiralty and extends to the vessels employed by the sovereign for public purposes.[55] Thus, although a vessel is regarded as a person, in an in rem proceeding, when the question of its exemption based on sovereign immunity is involved, the personality of the vessel cannot be severed from that of its sovereign owner.[56]

A. Foreign Sovereignty

The policy that a "public vessel"[57] in the possession and service of a friendly foreign government is exempt from admiralty jurisdiction in the United States is well entrenched.[58] However, in view of the growing

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[54] Id. at § 36.

[55] Id.

[56] Id.

[57] "public vessel" as used herein means a vessel owned or bare-boat chartered and operated by the United States, or by a State or political subdivision theory, or by a foreign nation, except when such vessel is engaged in commerce.

[58] T. Thommen, LEGAL STATUS OF GOVERNMENT MERCHANT SHIPS IN INTERNATIONAL LAW 9 (1962).

practice of several nations of owning and operating large numbers of merchant ships, the question of the extent to which sovereign immunity should be attached to these vessels has become one of great importance. Prior to the time when governments began operating ships for commercial purposes, it was generally recognized that the principle of immunity of warships as expounded in the case of The Schooner Exchange v. M'Faddon and others[59] was applicable to all government ships without distinction.[60] The modern trend, though, is that if a government elects to engage in commercial activity (as opposed to political or public activity) and trades as a shipowner, it ought to submit to the same legal actions and claims as any other shipowner.[61] This restrictive theory of sovereign immunity was applied by a United States Court of Appeals in the case of Victory Transport, Inc. v. Comisaria General de Abastecimentos Y Transportes[62] and has been adopted by the Restatement (Second) of Foreign Relation Laws of the United States.[63]

B. The United States

The United States by statute has effected a general waiver from in

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[59] 11 U. S. (7 Cranch) 116, 3 L. Ed. 287 (1812).

[60] T. Thommen, supra note 58, at 9.

[61] C. Colombos, INTERNATIONAL LAW OF THE SEA 271 (6th ed. 1967) However, this view has not yet been explicitly acknowledged by the Supreme Court.

[62] 336 F. 2d 354 (2d Cir. 1964), Cert den. 381 U.S. 934, 85 S.Ct. 1763 14 Ed. 2d 698 (1965).

[63] RESTATEMENT (SECOND) OF FOREIGN RELATION LAWS OF THE UNITED STATES § 69 (rev. 1965), comments and reporters notes.

personam actions for wrongs committed by merchant vessels owned and operated by the government, although the vessels themselves retain their immunity from in rem actions.[64] In addition, the government has waived immunity from in personam actions for damages caused by "public vessels" of the United States, but again in rem actions against such vessels are prohibited.[65]

C. State and Local Governments

The Supreme Court of the United States has indicated that the symmetry and uniformity characteristic of the rules of maritime law are not desanctified by exempting the states from suits against them by individuals in courts possessing admiralty jurisdiction.[66] The states are thus immune to in personam actions against them, in the absence of their waiver of immunity, for damages arising out of their ownership or operation of "public vessels". Further, it is clear that "public vessels" belonging to the states are immune to in rem actions.[67]

The immunity to in personam suits in admiralty that American states enjoy applies equally to such subdivisions as counties, but generally does

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[64] Suits in Admiralty Act of 1920, 46 U.S.C. § § 741-752 (1964).

[65] Suits in Admiralty Act of 1925 (Public Vessel Act) 46 U.S.C. § § 781-790 (1964).

[66] Ex parte New York, 256 U.S. 490, 65 L. Ed. 1057, 41 S. Ct. 588 (1921).

[67] 2 AM. JUR. 2d Admiralty § 38 (1962).

not apply to cities.[68] Further, because seizure of property used for public or governmental purposes is against public policy, vessels belonging to either counties or cities are also immune to proceedings in rem.[69]

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[68] Id.

[69] Id.

Chapter V

AVAILABILITY OF COMPENSATION

A. Compensation Based on Traditional Concepts of Tort Liability

1. Common law and/or maritime concepts of tort liability

As a general proposition, if a case is one that arises within the admiralty jurisdiction, it will be governed primarily by a body of substantive federal maritime law that may differ radically from state law.[70] This is true despite the fact that such a case may be brought in a state court or in a federal court on jurisdictional grounds other than admiralty. Further, the existence of this body of substantive law may preempt state legislation on maritime matters if that legislation interferes with the uniform working of the federal maritime legal system.[71] Yet in constructing the law of maritime torts, a portion of substantive maritime law, admiralty courts have necessarily drawn on the tort law principles developed in the common law of the States.[72] Therefore, the portals to actions based upon the traditional common law concepts of trespass, negligence and nuisance are open to provide relief for the claimant who has suffered damage as a result of a vessel's discharge of oil on the navigable waters of the United States.[73] Moreover, actions based

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[70] Comment, supra note 12, at 347; MAINE LAW AFFECTING MAINE RESOURCES 875 (1970).

[71] G. Gilmore & C. Black, supra note 40, at § 1 - 19.

[72] Comment, supra note 12, at 347.

[73] Id. at 347, 348.

on these concepts may be initiated either in the federal courts on the basis of their admiralty jurisdiction or in the state courts or in the federal courts on jurisdictional bases other than admiralty.

a. trespass

Traditionally, at common law every unauthorized, unintended, non-negligent entry onto the property of another was actionable under the writ of trespass quare clausum fregit.[74] Furthermore, every voluntary action or enterprise that interfered with land in the possession of another imposed strict or absolute liability upon the wrongdoer.[75] Unfortunately for many 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, negligence, or an abnormally dangerous activity.[76]

The prevailing view of trespass, then, is that liability can be based only on fault or result from the engagement in an abnormally dangerous activity.[77] Since the carriage of oil at sea has not yet been declared by the courts to be an abnormally dangerous activity, the oil pollution claimant

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[74] J. Sweeney "Oil Pollution of Oceans" 37 FORDHAM L. REV. 155, 169 (1968).

[75] W. Prosser, supra note 36, at 63, 64.

[76] 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 or to a thing or third person in whose security the possessor has a legally protected interest. RESTATEMENT (SECOND) OF TORTS §166 (1964); W. Prosser, supra note 36, at 64, 65.

[77] W. Prosser, supra note 36, at 64, 65.

will have the burden of proving fault if he seeks recovery for damage resulting from an oil discharge on a theory of trespass. Trespass thus completely fails as a remedy for property owners whose land has been invaded by oil resulting from an unintentional and non-negligent discharge.

Yet, because past experience has shown that most oil spills occur because of negligence or intentional action,[78] trespass would appear to be a means for recovering compensation for oil-damaged beachfront property, piers, oyster beds or seafarms, or other boats. Owing to the problems inherent in proving that a discharge of oil from a vessel was intentionally or negligently caused, however, many pollution claimants may be discouraged from bringing a trespass action, and those that do may find it quite expensive.[79]

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 this theory to recover for their annoyance and loss of use of the adjacent water.[80] Yet if beachfront owners can show some property interest

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[78] J. Sweeney, supra note 74, at 195 (1968).

[79] As a practical matter, it is virtually impossible to prove negligence on the part 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 Panamamian flag and carrying a multi-national crew, is beyond the ability of a property owner whose shoreline is ruined by oil spillage.
A. Avins, "Absolute Liability for Oil Spillage", 36 BROOKLYN L. REV. 359, 366 (1970). J. Sweeney, supra note 74, at 195.

[80] Comment, supra note 12, at 348.

in these adjacent waters, such as the right to raise oysters or other marine life there under a lease from a state or under the protection of specialized state statutes, then they may validly claim relief on the basis of trespass.[81]

The same entry requirement would also prevent nonbeachfront owners from using the trespass theory to recover for lost business profits due to neighboring oil-polluted beaches.[82]

Anomalously, where an action in trespass lies, not only may recovery be had for property damage, but also if the loss of business profits are arguably a consequence of the property damage they may also be recovered;[83] for once liability for trespass is established, the defendant's liability extends to all the damages which are the natural and probable consequence of trespass, without regard to whether they would otherwise be actionable.[84]

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[81] In Alabama for example,

> ...[t]he Director of Conservation is authorized to lease any bottom 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. (Citation ommited)

Comment, "Oil and Oysters Don't Mix: Private Remedies for Pollution Damage to Shellfish", 23 ALA. L. REV. 100, 103 (1970).

[82] N. Shutler, supra note 27, at 435.

[83] Id.

[84] W. Prosser, supra note 36, at 236-290.

b. negligence

Negligence is one of the principal means for recovering damages for the maritime tort of oil pollution.[85] It has been defined as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm"[86] or alternatively as "conduct which involves an unreasonably great risk of causing damage."[87] In a traditional negligence action the plaintiff is required to present proof of the following elements: (1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached this duty through some act or omission, (3) that actual loss or damage resulted to the plaintiff, and (4) that the legal or proximate cause of the plaintiff's damage was the defendant's act or omission.[88]

Assuming that the oil pollution claimant is able to show the factual cause of his injury (which often is 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 nonbeachfront owner.[89] In fact, it has been suggested that a beachfront resort owner may have 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

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[85] N. Shutler, supra note 27, at 435.

[86] RESTATEMENT (SECOND) OF TORTS § 282 (1965).

[87] W. Prosser, supra note 36, at 145.

[88] Id. at 143.

[89] J. Sweeney, supra note 74, at 174, 175; N. Shutler, supra note 27, at 435.

owner of recovering solely his loss of business profits under negligence doctrine.[90] This is so because while the loss of business profits are arguably a consequence of property damage in the case of the former, their recovery on the basis of negligent interference with the contracts rights in the latter case is difficult. This is due to the problem of establishing in legal or proximate causation because intentional interference is usually required to recover for interference with contract rights.[91] The policy considerations behind this differentiation are that the risk of pecuniary loss to nonbeachfront owners could not be foreseen by a negligent shipowner, whereas risk of property damage might well be foreseen, and further that the loss of such profits would be too speculative.[92]

When it appears that an oil pollution claimant will have a very difficult time in proving 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. To establish a res ipsa loquitur claim the claimant must show the following: (1) exclusive control of the instrumentality from which the damage was wrought by the defendant, (2) ordinarily, nonoccurrence of the injury without the fault of the party in control, and (3) no contribution to the injury on the part of the plaintiff.[93] Some courts

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[90] N. Shutler, supra note 27, at 435.

[91] Id.; J. Sweeney, supra note 74, at 174.

[92] J. Sweeney, supra note 74, at 174.

[93] W. Prosser, supra note 36, at 214.

even require that the true explanation of the occurrence be more readily accessible to the defendant than to the plaintiff before the claimant is allowed to proceed on a res ipsa loquitur theory.[94]

A showing of res ipsa loquitur does not, however, necessitate finding for the claimant; it merely allows him to submit his case to the jury.[95] Furthermore, a defendant can rebut the inference of negligence established on the basis of res ipsa loquitur if he can show the injury resulted from an "Act of God" or contributory negligence.[96]

Finally, the use of res ipsa loquitur does not in any way eliminate the problems of foreseeability that certain oil pollution claimants, particularly nonbeachfront business and property owners, will have to hurdle in order to be compensated for damages such as the loss of business profits or the reduction of nonbeachfront property value following as consequences of an oil discharge.

c. nuisance

Nuisance is a theory which one might not normally consider appropriate to recover for damages resulting from the discharge of oil by a vessel. The reason for this is that nuisance theory usually connotes a continuing or recurring interference with some real property interest over a considerable period of time.[97] Yet this is not always necessary. Where harm to a claimant

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[94] Id.

[95] Id. at 228, 229.

[96] N. Shutler, supra note 27, at 428.

[97] W. Prosser, supra note 36, at 579, 580.

has been instantaneous and substantial, case law indicates that the claimant may maintain a nuisance action for his damage.[98] Thus, nuisance doctrine may serve as a possible theory upon which compensation may be sought by claimants whose damages are attributable to a single instance of a vessel's discharge of oil.

Historically, nuisance doctrine has taken two lines 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.[99] A private nuisance is a civil wrong, based on a disturbance of private rights in land, and is actionable by individual persons.[100] Liability for creating a private nuisance may be predicated on an intentional invasion of the plaintiff's interests, a negligent one, or conduct unsuited to its surroundings.[101] Furthermore, once the invasion of a private property interest is established, the owner of the interest may recover for the consequentual damages he suffers arising from the invasion.[102] A public nuisance, on the other hand, is a species of catch-all criminal offense, consisting of an interference with the rights of the community at large; thus, its redress may be sought only by public officials.[103]

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[98] Id.; "Where the invasion affects the physical condition of the plaintiff's land, the substantial character of the interference is seldom in doubt". Id. at 578.

[99] Id. at 572.

[100] Id.

[101] Id. at 574.

[102] Id. at 594.

[103] Id. at 573.

Various forms of hybrid nuisance also exist, since a variety of public harms affect both public and private interests.[104] When such a situation arises, it is the practitioner's duty to plead and prove that his client's damage is distinct from that of the public at large, in kind rather than degree, or face dismissal of his client's action.[105] 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 damage can in some way be distinguished from that sustained by the general public.[106]

In this regard, it should be noted that the pecuniary losses suffered by commercial fisheries as a result of polluted waters have been held to be sufficiently distinct from the damages the polluted waters presented to the public at large, to allow compensation for the fisheries.[107] On the other hand, where pecuniary loss is common to an entire community or a substantial part of it, it has been regarded as no different in kind from the common misfortune and private action has not been permitted.[108] This would seem to rule out the possibility of nonbeachfront restaurant, hotel, gas station owners, etc., obtaining compensation for lost profits due to a slump in tourism as a result of an oil spill's effect on local beaches.

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[104] Note, "Private Remedies for Water Pollution", 70 COLUM. L. REV. 734, 739 (1970).

[105] Id.; W. Prosser, supra note 36, at 586.

[106] W. Prosser, supra note 36, at 586.

[107] Id. at 590.

[108] Id. at 591.

Beachfront owners whose property is actually invaded, however, would undergo an injury distinct from the general public, thus it would appear that they would be allowed compensation. Further, a recent case suggests that 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.[109]

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 that it will be of any value to the nonbeachfront owner as an aid to recover lost business profits resulting from the same spill. Furthermore, the problems a claimant is faced with in proving the origin of an oil discharge and that it was either intentionally or negligently caused still must be overcome.

d. unseaworthiness

A private party suffering damage as a result of a vessel's discharge of oil on the navigable waters of the United States may have another basis for asserting liability outside common law tort concepts. If a private claimant's injury is a consequence of such a discharge, and that discharge resulted from some defect in a vessel or its equipment, it has been suggested that the vessel owner may be held liabile for the claimant's damage under the traditional unseaworthiness doctrine of maritime law.[110] If this doctrine were to apply

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[109] Petition of New Jersey Bargin Corp., 168 F. Supp. 925, (S.D. N.Y. 1958).

[110] J. Sweeney, supra note 74, at 167-169.

to such a situation, as it is predicated on strict liability, the vessel owner could quash his liability only by proving that the defect which produced the oil pollution was itself occasioned by an "Act of God".[111]

Whether or not the doctrince of unseaworthiness can be extended to those damaged by an oil discharge occasioned by a defect in a vessel remains for the courts to decide. Traditionally, however, the doctrine has applied only to seamen and longshoremen who have suffered personal injury or cargo owners who have sustained cargo losses as a result of an unseaworthy vessel.[112]

2. Inadequacies in actions based on maritime and common law concepts of liability

From the claimant's standpoint there are several inadequacies in the actions he may bring based upon maritime and common law concepts of liability for the damage he has suffered as a result of a vessel's discharge of oil on the navigable waters of the United States. To begin with, under maritime and common law concepts of liability, a shipowner will not be liable to private parties on any basis for damage wrought when a seaworthy vessel encounters an extraordinary peril which results in a non-deliberate and non-negligent discharge of oil or petroleum products.[113] Even when this is not the case, the claimant will still have the burden of proving that the discharge

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[111] J. Sweeney, supra note 74, at 167.

[112] See generally, G. Gilmore & C. Black, supra note 40, at § § 3-22, -3-35; § § 6-1, -6-64.

[113] J. Sweeney, supra note 74, at 168, 169.

which caused his injury was either intentionally or negligently caused, or, if the doctrine of unseaworthiness is applicable to such situations, that the discharge was a result of an unseaworthy condition. This burden may be particularly onerous considering the complex nature of maritime enterprise and activity, and especially if the particulars associated with a given situation are also of a complex nature.[114]

Finally, under the federal Limitation of Liability Act,[115] the liability of the owner of any vessel for damage resulting from the operation of such vessel occasioned without "the privity of knowledge" of the owner may be limited to the "value of the interest of such owner in such vessel, and her freight then pending".[116] The Supreme Court has held that the value of an owner's interest in a vessel and its pending freight is to be appraised at the termination of each voyage.[117] Thus, if the aggregate amount of the various pollution claims that result from a vessel's discharge of oil exceed the value of the vessel, and limitation of liability is allowed, many claimants may go without full compensation for their damage.[118] 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 hope of compensation altogether.

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[114] Supra note 79.

[115] 46 U.S.C. § § 183-189 (1964).

[116] 46 U.S.C. § 183 (1964). For a detailed discussion of the phrase "Privity or knowledge" consult G. Gilmore & C. Black, supra note 40, at § § 10 - 20, 24.

[117] The City of Norwich, 118 U.S. 468, 6 S. Ct. 1150, 30 L. ed. 134 (1886).

[118] 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).

B. Compensation Based on Federal Anti-Pollution Statutes

1. Private action not explicitly provided for by federal statutes

Congress, in the exercise of its sundry powers, can affect matters of a maritime nature directly or indirectly.[119] In this regard, it has created statutes which prohibit the discharge of oil from vessels on the navigable waters of the United States. These federal anti-pollution statutes do not, however, explicitly provide for private civil relief. Rather, they merely attempt to control oil pollution by deterring it or providing for its abatement once it has occurred. Obviously, neither of these approaches helps to compensate the pollution victim for the damage he suffers in the interval between an actual oil discharge and its subsequent removal.

An excellent example of the deterrent-abatement approach to the problem of oil pollution can be found in the Water Quality Act of 1970.[120] The deterrent approach is also readily recognizable in the Refuse Act of 1899.[121]

a. Water Quality Improvement Act of 1970

The Water Quality Improvement Act prohibits the discharge of oil by vessels[122] into or upon the navigable waters of the United States or the

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[119] G. Gilmore & C. Black, supra note 40, at § 1-16.

[120] Pub. L. No. 91-224, Title I (Apr. 3, 1970), 84 Stat. 91, 33 U.S.C.A. § 1161 (1970).

[121] 33 U.S.C. § § 407, 411-413(1964).

[122] The term vessels as used in this Act does not include "public vessels" i.e.,those vessels "owned or bare-boat chartered and operated by the United States, or by a State or political subdivision thereof, or a foreign nation except when such vessel is engaged in commerce," which are exempt from the Act. 33 U.S.C.A. § 1161 (a) (1970).

waters of the contiguous zone except when permitted either by Presidential regulation or the 1954 International Convention for the Prevention of Pollution of the Sea by Oil as amended.[123] Knowingly discharging oil into or upon such waters is punishable by a civil penalty of not more than $10,000,[124] 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.[125]

The Act 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.[126]

When the United States government does proceed with cleanup operations, however, except where the owner or operator of the vessel in question 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 Government, or (d) an act or ommision 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,

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[123] International Convention for the Prevention of Pollution of the Sea by Oil, 1962, Sept. 9, (1966) 1966 2 U.S.T. 1523, T.I.A.S. No. 6109, 600 U.N.T.S. 332.

[124] 33 U.S.C.A. § 1161 (b) (5) (1970).

[125] 33 U.S.C.A. § 1161 (b) (4) (1970).

[126] 33 U.S.C.A. § 1161 (c) (1) (1970).

such owner or operator is notwithstanding any other provision of law, liable to the United States Government for the actual cost incurred by the government for the removal of the oil. This amount may not exceed $100 per gross ton of the vessel or $14,000,000, whichever is the lesser, 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. Should this occur such owner or operator shall be liable to the United States for the full amount of the cleanup costs. Such cost may be assessed against the owner or operator in an in personam action or against the vessel in an in rem action.[127]

To help ensure recovery, the Act provides that:

> Any vessel over three hundred gross tons, including any barge of equivalent size, 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. Financial responsibility may be established by any one of, or a combination of, the following methods acceptable to the President: (A) evidence of insurance, (B) surety bonds, (C) qualification as a self-insurer, or (D) other evidence of financial responsibility. Any bond filed shall be issued by a bonding company authorized to do business in the United States.[128]

In respect to private rights, the Act provides that it shall not affect or modify in any way the liability of any shipowner or operator to any person

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[127] 33 U.S.C.A. § 1161 (f) (1970).

[128] 33 U.S.C.A. § 1161 (p) (1) (1970).

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.[129]

Hence, 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 suffer as a result of a vessel's discharge of oil on the navigable waters of the United States.

b. Refuse Act

The Refuse Act of 1899[130] provides that it is an offense to discharge or cause to be discharged from any floating craft "refuse matter of any kind or description whatever"[131] into the navigable waters of the United States, unless a permit for such a discharge has previously been obtained from the Secretary of the Army.[132] Every person or corporation that violates or knowingly aids in the violation of Section 407 is guilty of a misdemeanor, for which conviction is punishable by a fine of not less than 500 dollars nor more than 2,500 dollars, or by imprisonment (if the offender is a natural person) for not less than thirty days nor more than one year, or by both

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[129] 33 U.S.C.A. § 1161 (o) (1) (1970).

[130] 33 U.S.C. § § 407, 411-413 (1964).

[131] On several occasions, oil discharged into the navigable waters of the United States has been termed, "refuse" by the courts. United States v. Ballard Oil Co., 195 F. 2d 369 (2d Cir. 1952); La Merced, 84 F. 2d 444 9th Cir. 1936); United States v. Standard Oil Co., 384 U.S. 224, 86 S. Ct. 1427.

[132] 33 U.S.C. § 407 (1964).

fine and imprisonment.[133] The Department of Justice is designated as the enforcement agency under the Act.[134]

Among the enforcement provisions of the Act is the proviso that the court may "in its discretion" pay one-half of any fine levied on an offender to persons giving information leading to the offender's conviction.[135] Persons eligible to receive this "reward" are not restricted to those who have undergone actual damage as a result of the discharge. Moreover, when a pollution victim is the informer, any reward he receives will not be based on the damage he may have suffered. Furthermore, if the informer's information should cause the government to bring an in rem action against a vessel from which refuse was discharged, rather than an in personam action against the person responsible for the discharge, the informer's reward will be precluded, as the reward is authorized only when an in personam action results in a fine.[136]

Finally, in light of recent cases it is now clear that a private person may not bring a qui tam[137] action for the criminal penalties provided for

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[133] 33 U.S.C. § 411 (1964).

[134] 33 U.S.C. § 413 (1964).

[135] 33 U.S.C. § 411 (1964).

[136] 33 U.S.C. § 412 (1964).

[137] A qui tam action is defined as:

> An action brought by an informer, under a statute which establishes a penalty for the commission or omission of a certain act, and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such action and the remainder to the state or some other institution....

BLACK'S LAW DICTIONARY 1414 (4th ed. rev. 1968).

in the Rivers and Harbors Act.[138] The Act contains no expressed authority for qui tam actions, and because the penalties provided for under the Act depend upon the institution of criminal actions rather than civil actions qui tam actions are inappropriate.[139]

2. Private actions implied from federal statutes

While the current federal anti-pollution statutes which prohibit in some way oil pollution on the navigable water of the United States do not explicitly provide for private civil relief, it has been suggested that implied causes of action may be available to oil pollution claimants on the basis of some of this legislation in any event.[140] This argument is based on the premise that in other areas of federal regulatory legislation where private civil actions have not been specifically provided for, and in the absence of a clause in the legislation prohibiting private civil relief, the courts have allowed civil actions by members of the class of persons who were "intended to be protected" by such legislation.[141]

In Texas & Pacific R.R. v. Rigsby[142] the Supreme Court justified the judicial implication of private relief from a federal statute as follows:

> [D]isregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose

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[138] Bass Anglers v. U.S. Plywood 324 F. Supp. 302 (S.D. Tex. 1971); Mathews v. Florida Vanderbilt 326 F. Supp. 289 (S.D. Fla. 1971); Mattson v. Northwest Paper 327 F. Supp. 87 (D.C. Minn. 1971).

[139] Bass Anglers v. U.S. Plywood 324 F. Supp. 302 (S. D. Tex. 1971).

[140] Comment, supra note 12, at 349; Comment, supra note 81, at 125-133. It appears that the Refuse Act of 1899 will for the present be the main source of such relief.

[141] Id.; See also, Note, "Implying Civil Remedies from Federal Regulatory Statutes", 77 HARV. L. REV. 285 (1963).

[142] 241 U.S. 33, 36 S. Ct. 482, 60 L. Ed. 874 (1916).

> especial benefit the statute was enacted, the right to recover the damages from the party in default is implied....[143]

It has been suggested that the courts could provide the desired private relief by creating a new cause of action - one not based on traditional common law - by using the prohibitions of the federal regulatory statute as the standard of liability. The creation of this new cause of action would, however, require certain judicial determinations relating to venue, periods of limitation, various defenses and other factors which would be an arduous task for the judiciary to undertake. Thus, it appears unlikely that pollution claimants will find this theory a facile avenue to recovery.[144]

However, two alternatives to creating a totally new implied cause of action from the federal regulatory statutes exist which may aid the claimant. Under the first approach the courts might utilize the federal 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 negligence, one of the essential elements of the action. Yet to recover, the claimant would still be required to prove each of the other elements of the action, such as proximate cause. Likewise 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 other elements of this action, such as

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[143] Id. at 241 U.S. 33, 39.

[144] Note, "Implying Civil Remedies from Federal Regulatory Statutes", 77 HARV. L. REV. 285, 286 (1963).

special injury, would again be required. The second alternative, which may be termed the evidentiary theory, reasons that breach of the federal statute provides only evidence, not exclusive proof, to aid the claimant in establishing the standard of conduct required in a common law action.[145]

Despite the existence of theories utilizing federal anti-pollution statutes to facilitate recovery for oil pollution damage, very few private pollution suits have been initiated based upon them; accordingly, no judicial consensus has evolved to indicate which concept is applicable in a particular situation.[146]

The lack of pollution litigation based on these concepts, coupled with the longevity of existing implied cause of action theories, attest to the fact that practicioners are reluctant to use this means of seeking pollution recovery because of the nebulousness inherent in the area. Further, the "judicial legislation" that would result from the use of these theories may subject violators to liability disproportionate to that intended by statute.[147] And it is clear that even the theory most likely to receive general acceptance by the courts (as it is the least judicially legislative in nature), the evidentiary theory, would still leave it incumbent on the pollution claimant to prove all the elements of a traditional action. Finally, because an action arising from a vessel's discharge of oil on navigable waters would be governed by overlying principles of substantive maritime law, a claimant might be precluded from a complete recovery or perhaps any recovery at all, due to the federal

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[145] Id.

[146] Comment, supra note 81, at 127.

[147] Id. at 126.

Limitation of Liability Act, even if he were allowed to pursue his claim on implied cause of action concepts.[148]

C. Compensation Based on State Anti-Pollution Statutes

1. Three methods of recovery

Several states have created anti-pollution legislation which may be advantageous to the claimant seeking to recover for the damge 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 jurisdiciton of a particular state. On the basis of existing state legislation a claimant may seek compensation, depending on the statute he is attempting to proceed under, in one of three ways:

(1) by proceeding according to the 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.

a. arbitral procedure provided for by state statute

The state of Maine recently enacted a precedential statute dealing with

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[148] See discussion of effects of federal Limitation of Liability Act supra page 34.

oil pollution and the coastal conveyance of petroleum.[149] This statute establishes a state fund, administered by a state commission,[150] out of which the claimant may seek compensation for oil pollution damage by proceeding according to the following arbitral procedures provided for in the statute:

> 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. The commission shall prescribe appropriate forms and details for such applications. The commission may, upon petition, and for good cause shown, waive the 6 months limitation for filing damage claims.
>
> A. If the claimant, the commission and the person causing the discharge can agree to the damage claim, the commission 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.

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[149] An Act Relating to Coastal Conveyance of Petroleum, ch. 572 § § 541-57 (Supp. 1970) Me. Laws 35, ME. REV. STAT. ANN. tit. 38 § § 541-57 (Supp. 1971).

[150] ME. REV. STAT. ANN. tit. 38 § § 543, 546, 551 (Supp. 1971).

> 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.[151]

The statute further 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.[152]

The approach Maine has taken 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. And 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 in a minimal period of time. Furthermore, because compensation is sought outside a forum over which substantive maritime law would be applicable, the federal Limitation of Liability Act,[153] will not effect any award given to the claimant by the arbitral panel. In fact, the claimant is guaranteed full compensation despite the financial status of the owner of the vessel which caused the claimant's damage, or the condition or value of the vessel itself.

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[151] ME. REV. STAT.ANN. tit. 38 § 551 (2) (Supp. 1971).

[152] ME. REV. STAT. ANN. tit. 38 § 551 (3) (Supp. 1971).

[153] 46 U.S.C. § 183-189 (1964).

b. private action explicitly provided for by state statute

The second method by which a claimant may seek compensation for oil pollution damage on the basis of a state anti-pollution statute, can be illustrated by examining a recently established act of the state of Washington[154] which, among other things, provides:

> Any person owning oil or having control over the same 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 any 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]. [155]

It is clear from this provision that the statute explicitly gives to a claimant in the state of Washington a private right upon which he may institute a civil action for the damage he sustains as a result of a vessel's discharge of oil within state waters. Moreover, 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.

c. private action implied by state statute

The state of Michigan's Water Pollution Control Act of 1970[156] can be

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[154] An Act Relating to Water Pollution (title supplied by writer) REV. CODE WASH. ANN. tit. 90 § § 90.48.315 - 90.48.910 (Supp. 1970).

[155] REV. CODE WASH. ANN. tit. 90 § 90.48.336 (Supp. 1970).

[156] Water Pollution Control Act of 1970, MICH. COMP. LAWS ANN. § § 323.331 - 323.342 (Supp. 1971).

cited to illustrate the third method by which a claimant may seek compensation for oil pollution damge arising from a vessel's discharge of oil on the basis of state anti-pollution statutes. Among its provisions the Michigan statute declares:

> (1) A person owning, operating or otherwise concerned in the operation, navigation or mangement 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.[157]

The legislation does not, however, explicitly provide a private right upon which the oil pollution claimant may seek recovery. Yet, because the statute does not specifically declare that the legal rights arising from it inure solely to the state, it is possible that an oil pollution claimant may be able to seek recovery for his damage by initiating a civil action on the basis of a private right implied by the statute on implied cause of action principles.

Unfortunately for the pollution claimant, he may be precluded from

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[157] MICH. COMP. LAWS ANN. § 323.337 (Supp. 1971).

the complete recovery of any award adjudged due him, arising out of an action brought on the basis of the Washington or Michigan statutes or the like statutes of other states. This is because the federal Limitation of Liability Act[158] may be applicable to judgements awarded on the basis of these statutes. The question of its applicability is explored in more detail in the following discussion of the constitutionality of the new state anti-pollution statutes.

2. Constitutional problems of the state anti-pollution statutes

The validity of state oil pollution statutes may well depend upon whether they run counter to federal law. It is well established that state legislation is clearly invalid where it actually conficts with the general maritime law[159] or preemptive federal legislation,[160] or where it unduly burdens interstate or foreign commerce.[161] Even a Congressional effort to delegate legislative power in admiralty matters to the states may be rejected by the Supreme Court where the Court finds that a need for national uniformity in the matter exists.[162]

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[158] 46 U.S.C. § § 183-189 (1964).

[159] G. Gilmore & C. Black, supra note 40, at § 1-17.

[160] Erie R. Co. v. New York, 233 U.S. 671, 34 S. Ct. 756, 58 L.Ed. 1149 (1914).

[161] Bib v. Navajo Freight Lines, Inc., 359 U.S. 520, 79 S. Ct. 962, 3 L. Ed. 2d. 1003 (1959).

[162] Washington v. W. C. Dawson & Co., 264 U.S. 219, 44 S. Ct. 302 68 L. Ed. 646 (1924).

On the other hand, if a maritime matter is of local interest the states may legislate so long as their legislation is not inconsistent with valid federal legislation and does not interfere with the proper harmony or uniformity of federal law (including substantive maritime law) in its international and interstate operation.[163] In this regard the case of Huron Portland Cement Co. v. City of Detroit[164] is significant. In this action a corporation engaged in operating federally licensed steam vessels in interstate commerce sought to enjoin the enforcement against it of a city's Smoke Abatement Code, under which the corporation's vessels could not, without undergoing structural alterations, perform necessary cleaning of their boilers within the city limits. The U.S. Supreme Court in a 7 to 2 decision upheld the ordinance and held that the code could constitutionally be applied to the corporation's ships, rejecting the arguments that federal statutes relating to inspection, approval, and licensing of steam vessels in interstate commerce preempted the area, or that the code unconstitutionally burdened interstate commerce. In delivering the opinion of the Court, Mr. Justice Steward said:

> The ordinance was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government. [Citations omitted].[165]
> ....

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[163] 2 AM. JUR. 2d Admiralty § 7 (1962).

[164] 364 U.S. 440, 80 S. Ct. 813, 4 L. Ed. 2d 852 (1960).

[165] Id. at 362 U.S. 442.

> In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when "conferring upon Congress the regulation of commerce,... never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution. [Citations omitted].[166]

The question of whether states may regulate maritime commerce so as to prevent oil pollution and provide for the full compensation of those injured by it when it does occur is yet to be decided. In actuality such a decision may depend on the extent to which such legislation may impose burdens on interstate and foreign commerce, or conflict with federal statutes or substantive maritime law. Thus, it is possible that State oil pollution statutes in conflict with the Water Quality Improvement Act[167] may be unconsitutional, despite the disclaimer of preemption in the Act which provides:

> 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 into any waters within such State. (Emphasis Added)[168]

The reason for this is that Congress may not have had the power to make such a broad disclaimer.

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[166] Id. at 362 U.S. 443, 444.

[167] 33 U.S.C.A. § 1161 (1970).

[168] 33 U.S.C.A. § 1161 (o) (2) (1970).

Conflict between state statutes and the Water Quality Improvement Act are exemplified by recently enacted Florida legislation[169] which creates absolute legal and unlimited financial liability for oil pollution,[170] as contrasted with the strict legal and limited financial liability of the Water Quality Improvement Act.[171] Furthermore, the Florida legislation requires compliance with its financial responsibility regulations as a condition for using the state's ports.[172]

World shipping interests have expressed distress over the Florida statute for a number of reasons. They claim it is impossible to procure insurance to cover absolute liability and an unlimited amount of financial responsibility. Secondly, they emphasize that the administrative costs of showing financial responsibility under the Water Quality Improvement Act are so great that they cannot afford to take on the additional administrative work that would be required to show financial responsibility in Florida and/or any other states. Thirdly, they argue that if each state can establish regulations relating to liability and financial responsibility, or to a vessel's pollution gear which conflict with or simply differ from each of the others or from the federal law, the ocean carriers will be severely hampered in their ability to conduct efficient, economical, and logistically feasible operations. The result of this would be detrimental not only to the carriers

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[169] Oil Spill Prevention and Pollution Control Act, Fla. Laws 1970, ch. 70 - 244; FLA. STAT. § § 376.011 - 376.21 (Supp. 1970).

[170] FLA. STAT. § 376.12 (Supp. 1970).

[171] 33 U.S.C.A. § 1161 (f) (1970).

[172] FLA. STAT. § 376.14 (Supp. 1970).

themselves, but ultimately to all those who depend on them.[173]

More importantly, if the owners of a vessel can successfully show that the wrongful acts which caused an oil pollution incident were without their privity and knowledge, the unlimited financial liability provisions of the Florida Act may be inappropriate, for it is not clear whether the disclaimer of preemption in the Water Quality Improvement Act has any effect on the application of the federal Limitation of Liability Act to state statutes. Likewise, the liability of a vessel owner under other state anti-pollution statutes may be affected by the applicability of the federal Limitation of Liability Act to judgments arising from claims brought on the basis of those statutes. Thus, a pollution claimant who obtains a judgment on the basis of one of those statutes may find to his consternation that complete satisfaction of his judgement will be impossible.

If the various state oil pollution statutes prove to be consitutional they may offer real salvation to certain pollution claimants. However, pollution victims residing in states lacking such legislation will be forced to rely on the other remedies previously discussed, with all their inherent defects. In addition, because the various state statutes tend to differ, equivalent remedies may not always be provided for; 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.

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[173]United States Coast Guard, LEGAL, ECONOMIC AND TECHNICAL ASPECTS OF LIABILITY AND FINANCIAL RESPONSIBILITY AS RELATED TO OIL POLLUTION 4-3, (1970).

D. Compensation Based on International Conventions

On the international level, no Convention presently ratified by the United States explicitly provides for the 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[174] which the United States has signed, but not yet ratified, offers such a possibility. The Convention deals with the civil liability of ship owners to both governments and third parties for the cost of cleanup in areas of the territorial sea and the coast caused by the escape or discharge of persistent oils carried in any seagoing craft actually carrying oil in bulk as cargo.[175] Thus, the Convention would not only cover tankers, but also dry cargo vessels carrying oil as cargo in a deep tank or other compartment. Article III of the Convention provides that the owner of a ship shall be liable for any pollution damage caused by oil which has escaped or been 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, insurrection 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

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[174] 9 INT'L. LEG. MAT. 45 (1970).

[175] Id. at 45-47.

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, or

(d) resulted wholly or partially either from an act of 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.[176]

Under the Convention all liability would be channeled through the registered owner of the vessel, but there would be a right of recourse reserved to the owner of the carrying vessel against third parties.[177] The liability of the shipowner would be limited to 2,000 francs (approximately $135.00) per gross ton or a total of 210 million francs (approximately $14 million) for a single incident, whichever would be the lesser amount, 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 respondent superior doctrine.[178] However, if the spill resulted from the owner's personal fault or privity, he would be liable without limit.[179]

Article V of the Convention provides that for the purpose of availing

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[176] Id. at 46-47.

[177] Id.

[178] Id. at 48-51..

[179] Id.

himself of the benefit of the limitation of liability discussed above, the shipowner of a Contracting State shall constitute a fund for the total sum representing the limit of this liability.[180] Then, under Article IX, the courts of any Contracting State in which the pollution occurred would have jurisdiction to hear and determine claims for liability on behalf of the government and private persons.[181] However, only the courts of the state in which the fund was constituted would have competence to determine all matters relating to the apportionment and distribution of the fund.[182] But under Article X, any judgment obtained from a court with proper jurisdiction in the state where the pollution occurred and enforceable there, would be recognized by the Contracting States holding the fund.[183] Exceptions would be (1) if the judgment was obtained by fraud, or (2) if the defendant was not given reasonable notice and a fair opportunity to present his case.[184]

Article VII provides for the maintenance of proof by each ship of its owner's financial responsibility as set forth in Article V, by requiring each ship to carry a certificate attesting that insurance or other financial security is in force.[185] The same article provides for direct actions against the insurer or guarantor, but preserves to him whatever defenses (other than

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[180] Id.

[181] Id. at 56.

[182] Id.

[183] Id. at 56, 57.

[184] Id. at 56.

[185] Id. at 52-55.

the bankruptcy or winding up of the owner) the owner himself would have had if the action for pollution damage had been brought against the owner rather than the insurer. It also provides that the traditional defense of willful misconduct is preserved for the insurer.[186]

It has been argued that the Senate should ratify the Convention because without an international system directed toward controlling and preventing pollution, the regulation of marine pollution and efforts to achieve effective compensation for costs of removing discharged oil and compensating for resulting damages will be dependent upon a confusing multitude of national laws, which will undoubtedly differ substantially in terms of the nature of liability, the amount of compensation, and a number of other related aspects both substantive and procedural in nature.[187]

Even if the Convention were to be ratified, however, it would not provide the blanket protection that is needed to cover all types of oil discharges since it deals only with discharges of oil from vessels shipping oil in bulk. Further, because the fund from which claimants may seek compensation is limited, if the damages resulting from an oil discharge exceed the amount in the fund, not everyone will be fully compensated for his injury.

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[186] Id.

[187] DEPARTMENT OF TRANSPORTATION, OIL POLLUTION LIABILITY AND FINANCIAL RESPONSIBILITY: A REPORT TO THE PRESIDENT AND THE CONGRESS 7 (1970).

Chapter VI

ALTERNATIVES WHICH WILL YIELD MORE ADEQUATE AND EQUITABLE COMPENSATION

What, then, can be done to enhance the availability of effective compensation to persons who suffer damages as a result of the discharge of oil from vessels on the navigable waters of the United States when either current interpretations of maritime or common law, or current statutes or conventions, force them to carry an all too onerous burden of proof in order to be compensated, or fail to provide them with a means of compensation altogether?

A. More State Statutes

One solution is for the individual states to enact legislation to protect their residents. In this regard a number of state oil pollution statutes offering various degrees of relief to private persons already exist and, where appropriate, they may serve as patterns for other states. In many cases, however, the constitutionality of this legislation has been bitterly attacked. Thus, there is no guarantee that such far-reaching legislation as exemplified by the recently enacted Coastal Conveyance of Petroleum Act[188] of the state of Maine will prove to be the panacea that many people desire.[189]

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[188] ME. REV. STAT. ANN. tit 38 § § 544 - 46 (Supp. 1971).

[189] The statute is currently being challenged as an unreasonable burden on interstate and foreign commerce and as imposing a direct conflict with the Federal Water Quality Improvement Act of 1970. American Oil Co. et al v. Environmental Improvement Commission et al, No. 99 (Supp. Ct. Kennebee County, Maine, filed May 11, 1970).

B. Judical Declaration that the Carriage of Oil at Sea in Bulk is an Abnormally Dangerous Activity

The Restatement (Second) of Torts declares:

> One who...as a result of an abnormally dangerous activity, [previously designated as an "ultra hazardous" or "extra hazardous" activity in the Restatement of Torts]...[190] causes a thing...to enter [land in the possession of another] is subject to liability to the possessor if...the presence of the thing... upon the land causes harm to the land...[191]

This means that if a person is engaged in an abnormally dangerous activity and as a result of such activity he causes damage to the property of another, he is legally responsible for that damage even though he acted as carefully as possible, and caused the damage without any fault on his part.

A judicial declaration that the bulk carriage of oil at sea is an abnormally dangerous or, equivalently, an ultra hazardous activity, could help property owners recover for damages to their property if they are not capable of proving that oil discharged from a vessel was either intentionally or negligently caused, because the vessel owner would be strictly liable for the resulting damages.[192]

An ultra hazardous activity has been defined by the Restatement of Torts to be one which "necessarily involves a risk of serious harm to the

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[190] RESTATEMENT (SECOND) OF TORTS § 520, Note to Institute (No. 1) (Tent. Draft No. 10, 1964).

[191] RESTATEMENT (SECOND) OF TORTS § 165 (1964).

[192] See, W. Prosser, supra note 36, at 517.

person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and is not a matter of common usage".[193] In regard to the matter of common usage a Restatement comment asserts: "An activity is a matter of common usage if it is customarily carried on by the great mass of mankind or by many people in the community..."[194]

Tentative Draft No. 10 of the Restatement (Second) of Torts removes the ambiguity lurking in the terminology of the Restatement of Torts in regard to ultra hazardous activities by substituting the words "abnormally dangerous" or "ultra hazardous" and pointing out that in the Restatement the words "ultra hazardous" and "extra hazardous" were meant to be equivalent.[195]

With regard to the liability that should be imposed on those who engage in abnormally dangerous activities, the Tentative Draft provides that:

> (1) one who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent such harm.
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> (2) such strict liability is limited to the kind of harm, the risk of which makes the activity abnormally dangerous.[196]

In determining whether an activity is abnormally dangerous the Tentative Draft points out that the following factors should be considered:

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[193] RESTATEMENT OF TORTS § 520 (1934).

[194] Id. at comment e.

[195] Supra note 190.

[196] RESTATEMENT (SECOND) OF TORTS, § 519 (Tent. Draft No. 10, 1964).

(a) whether the activity involves a high degree of risk of some harm to the person, land or chattels of others;
(b) whether the gravity of the harm which may result from it is likely to be great;
(c) whether the risk cannot be eliminated by the exercise of reasonable care;
(d) whether the activity is not a matter of common usage;
(e) whether the activity is inappropriate to the place where it is carried on; and
(f) the value of the activity to the community.[197]

In regard to the bulk carriage of oil at sea, it certainly is evident that factors (a), (b) and (c) above coincide with the activity. The applicability of the remaining factors is not so obvious, but this is primarily the result of nebulous terms. A reading of the comments of the Tentative Draft would suggest that the bulk carriage of oil at sea is not a matter of common usage, because relatively few persons are engaged in the activity;[198] moreover, the activity may be inappropriate to the place where it is carried on, when a vessel carrying oil in bulk plies the coastal waters of a populated area or enters various ports, where the vessel's discharge of oil could create substantial damage.[199] Further, the comments of the Tentative Draft indicate that unless a community's prosperity is largely devoted to an enterprise, even though it is of substantial value to the community, the enterprise may be considered as an abnormally dangerous activity.[200] Thus, in communities not primarily dependent upon the oil

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[197] Id. at § 520.

[198] See generally, RESTATEMENT (SECOND) OF TORTS § 520, comment i (Tent. Draft No. 10, 1964).

[199] Id. at comment j.

[200] Id. at comment k.

transportation industry the bulk carriage of oil at sea could well be considered by the courts to be an abnormally dangerous activity.

Other conditions and activities which have been considered abnormally dangerous by the courts are numerous. Professor Prosser states that they include:

> ...water collected in quantity in a dangerous place, or allowed to percolate; explosives or inflammable liquids stored in quantity in the midst of a city; blasting; pile driving; the fumigation of part of a building with cyanide gas; crop dusting with a dangerous chemical likely to drift; drilling oil wells or operating refineries in thickly settled communities; an excavation letting in the sea; factories emitting smoke, dust or noxious gases in the midst of towns... (citations omitted)[201]

In comparing the transportation of oil at sea to activities which have already been labeled ultra hazardous by the courts, one writer, Dr. Alfred Avins, has stated:

> The bringing of large quantities of oil onto the ocean, although a normal and useful economic activity, is fraught with speical risk in case of damage to the tanker. There is no difference in principle between the storage of large amounts of water on the land and the storage of large quantities of oil on the sea. If either escapes, it can cause harm. There is also no difference in essence with the confinement of dangerous animals. Surely unchecked oil in the sea can be more expensive to catch and confine than a wild animal which has escaped its captors. The same thing can be said of escaping fire or debris and shock from blasting.

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[201] W. Prosser, supra note 36, at 509-510.

> The analogy between escaping chemical spray from an airplane doing crop-dusting and escaping oil is also quite close.[202]

If property damage resulting from an oil discharge occurs without fault, the oil transportation industry is in a better position to insure against it than is the innocent property owner. Part of the income derived from the industry can be disignated to provide insurance to cover these costs, rather than allowing them to fall on bystanders. Although cheap oil is desirable, it must be priced to reflect all of its costs, including the costs of cleaning up pollution, which unfortunately in many cases today are frequently borne by others. Another reason for imposing strict liability upon the oil transportation industry,is that to the extent that it is possible to prevent discharges, vessel owners are in a much better position to do so than are private individuals. Once shipowners realize that they will be responsible for the errors of their builders and crew they will be motivated to take extra measures of care designed to reduce the possibilities of oil discharges.[203]

Surely these factors, considered in light of the catastrophic consequences of the Torrey Canyon, Ocean Eagle and other tanker disasters, the state legislative pronouncements that transfers of oil between vessels, between onshore facilities and vessels within the jurisdiction of the states are hazardous undertakings, and the imposition of strict liability by

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[202] A. Avins, "Absolute Liability for Oil Spillage", 36 BROOKLYN L. REV. 359, 366 (1970).

[203] Id. at 367.

the United States government upon vessel owners for the cleanup costs resulting from the discharge of oil from their vessel, should be sufficient to support a court declaration that the carriage of oil at sea in bulk is an abnormally dangerous activity.

What courts could declare the bulk carriage of oil at sea to be ultra hazardous? Certainly federal courts whose job it is to interpret and fashion maritime law are in a position to make such a declaration. Likewise, state courts, which can extrapolate substantive maritime law to fill any gaps existing in that law, could proclaim the activity to be ultra hazardous.

While it appears that no court has yet been motivated to make such a declaration, the traditional admiralty concept of unseaworthiness may be sighted to demonstrate that strict liability as a concept has found acceptance in maritime law. Therefore, it would not be inappropriate for a court to consider extending strict liability to areas of ultra hazardous activity falling under maritime jurisdiction.

The advantage of such a declaration to the pollution claimant would be in the reduction of his burden of proof from a fault standard to a strict liability standard. Furthermore, such a declaration might enlarge the class of claimants who could receive compensation for damages resulting from an oil discharge from a tanker or other vessel carrying oil in bulk.

While pollution claimants might gain a right to compensation under an ultra hazardous theory, their remedy may be precluded, to some extent,

by the effect of the federal Limitation of Liability Act.[204] Yet, when the aggregate amount of the various pollution claims does not exceed the value of a particular vessel, limitation would not harm the claimant's interests.

C. A Proposal for New Federal Relief

The federal government could establish a fund to provide compensation for damages suffered by private parties as the result of discharges of oil from vessels. A separate fund could be provided for this purpose, or the scope of the fund already established under Section 11 (k) of the Federal Water Quality Improvement Act could be enlarged to provide for the needed relief.[205] The fund could be designed to be all-encompassing so as to provide compensation for all persons determined to have suffered damages directly to real estate, personal property, or income as result of vessel oil discharges.

Substantively, recoveries might then be sought on the basis of one of two concepts: private parties might be allowed to choose between seeking recovery through the procedures established to furnish compensation under the fund, or resorting to any other common law of statutory remedy presently available to them; or, the fund might be fashioned on the basis of providing compensation for damages sustained by private parties whenever legitimate claims could not be compensated for through existing procedures.

Should the latter method be chosen, the fund could be designed to

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[204] 46 U.S.C. § § 183 - 189 (1964). For a discussion of the effects of the Act see supra page 34.

[205] 33 U.S.C.A. § 1161 (k) (1970).

provide compensation to 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 bare-boat 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.

The fund 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 to be placed on oil entering the United States the price of oil could be increased slightly to reflect this additional cost. In this way 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 damages that others may suffer as a result of its transportation 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 would 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 11 (f) of the Federal Water Quality Control Act.[206] Thus, only money expended from the fund for nonrecoverable damages would have to be provided from revenue derived from other sources.

Moreover, the institution of such a fund would 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 and thus help to keep the costs of transporting oil at the lowest possible level.

Most 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.

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[206] 33 U.S.C.A. § 1161 (f) (1970).

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