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## In Search of Adequate Compensation for Toxic Waste Injuries: Who and How to Sue

*That civil liability should arise from the wrongful dumping of toxic wastes cannot be doubted. However, the various jurisdictions are far from uniform as to what is the appropriate legal theory for recovery. This comment will explore the alternatives for imposition of civil liability and analyze the plaintiff's chances for recovery.*

### I. INTRODUCTION: THE POISONING OF AMERICA UNCOVERED

Hazardous waste production and dumping is now recognized to be a grave national danger. Scholars have warned us that "the potential dangers toxic wastes pose to the country's land, water, air, public health, and economy are second only to the threat of nuclear war."<sup>1</sup>

Accompanying the marked increase in the number of victims' claims against waste dumpers, mounting media attention to the industry's unsafe disposal methods,<sup>2</sup> and the ever-increasing number of additions to the Environmental Protection Agency's "national priority list" of dumps posing the most serious danger to public health,<sup>3</sup> has been a recent increase in public awareness. This increase in concern centers primarily on two important issues: first, how to prevent future environmental and human injury; and second, how to compensate victims of past unsafe waste dumping practices.

The purpose of this article is to suggest a method of resolving the difficulties associated with compensating innocent third parties who have become victims of hazardous waste exposure. The method involves: first, identifying the source of the toxic waste exposure and suing the owner of the property from which it has escaped; second, proving that the injuries suffered were caused by the waste; and third, determining who the producer of the waste was and imputing liability to him as well.

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1. *The Toxic-Waste Crisis*, NEWSWEEK, Mar. 7, 1983, at 20 (citing Dr. Samuel Epstein).

2. See, e.g., *id.* at 20-23.

3. N.Y. Times, Sept. 2, 1983, at A16, col. 4 (EPA added 133 sites to the "national priority list," bringing the total to 546. In the last two and a half years, since the cleanup program began, only five sites had completed the cleanup).

## II. THE THEORY: USING TRADITIONAL TORT THEORIES TO THEIR POTENTIAL

When a waste generator disposes of his own wastes on his own property, an injured victim has several tort theories available for use in seeking recovery.<sup>4</sup> Once a viable theory is chosen (the theory selected will vary between jurisdictions), it is still incumbent on the plaintiff to prove causation<sup>5</sup> (and in some jurisdictions to overcome statute of limitations problems<sup>6</sup>). If a plaintiff can carry his burden of proof, a waste generator will generally be sufficiently capitalized to provide adequate compensation.<sup>7</sup>

A more formidable obstacle is encountered by the plaintiff who is exposed to toxins which have leaked from an abandoned waste site, from a waste dump operated by a significantly undercapitalized depositor, or from the negligence of other minimally solvent or insolvent middlemen involved in the transporting or depositing process.<sup>8</sup> In these situations, simply obtaining a judgment against the most proximate offender does little in providing redress to an injured plaintiff. Many alternatives have been suggested as methods of imputing liability to the financially solvent generators of wastes in these situations. However, the majority of those methods require major revisions of traditional tort theories.<sup>9</sup> Since, in most cases, a plaintiff must ask a court to strain traditional theories of causation (both scientific and proximate),<sup>10</sup> and perhaps the statute of limitations,<sup>11</sup> in order to reach a plaintiff's verdict, the court is in a much better position to justify stretching in those areas if the underlying theories of liability propounded by the plaintiff are as palatable to the court as possible.

Of the several theories which have recently been proposed to im-

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4. See *infra* notes 15-58 and accompanying text.

5. See *infra* notes 59-68 and accompanying text.

6. See *infra* notes 69-82 and accompanying text.

7. Note, *Hazardous Waste Disposal: Is There Still a Role for Common Law?*, 18 TULSA L.J. 448, 451 n.12 (1983) (the chemical industry is booming; worldwide chemical sales for the top fifty producers reached approximately \$90 billion in 1979).

8. Note, *The Development of a Strict Liability Cause of Action for Personal Injuries Resulting from Hazardous Waste*, 16 NEW ENG. L. REV. 543, 548 n.29 (1981) [hereinafter referred to as *Strict Liability Cause of Action*] (45.7 million tons of hazardous waste have been disposed of off of generator's property over the last thirty years); Note, *Hazardous Waste: Third-Party Compensation for Contingencies Arising from Inactive and Abandoned Hazardous Waste Disposal Sites*, 33 S.C.L. REV. 543, 558 (1982) [hereinafter referred to as *Hazardous Waste*] (problems such as finding that the parties who are primarily responsible for the dump site are minimally solvent, insolvent, or out of the jurisdiction are common to hazardous waste litigants).

9. See, e.g., *infra* notes 102-09 and accompanying text for a discussion of the products liability theory.

10. See *infra* notes 59-68, 110-19 and accompanying text.

11. See *infra* notes 69-82 and accompanying text.

pute liability on generators of toxic wastes,<sup>12</sup> the theory of vicarious liability appears to be the most judicially acceptable in the present legal climate.<sup>13</sup> Of course, before the theory of vicarious liability is of any value to a plaintiff, the liability of the intervening actor must be established.<sup>14</sup> In the field of toxic waste disposal, the intervening actor is the disposer of the waste.

### III. LIABILITY OF THE TOXIC WASTE DEPOSITOR

Generally, there are four theories available upon which a depositor<sup>15</sup> of toxic wastes may be found liable for injuries to third parties. The first, and best when available, is the theory of strict liability; the second is nuisance; the third is negligence; and the fourth is statutory (currently available in four states). A discussion of each follows.

#### A. Strict Liability

*Rylands v. Fletcher*<sup>16</sup> articulated the theory of strict liability for landowners who injure others as a result of the "non-natural" use of their property.<sup>17</sup> Most states have adopted *Rylands* as a method of allowing injured parties to recover damages in situations very similar to those faced by the toxic waste plaintiff.<sup>18</sup> *Rylands* is particularly

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12. See *infra* notes 102-09 and accompanying text for discussion of the products liability theory.

Attempts have been made to recover toxic waste damages under the tort theory of trespass. Use of the trespass theory is limited to situations where the toxic material physically invades a plaintiff's property and in so doing interferes with a possessory interest in his land. Zazzali & Grad, *Hazardous Wastes: New Rights and Remedies?*, 13 SETON HALL L. REV. 446, 461 (1983).

Some suggest the use of *res ipsa loquitur* by toxic injury plaintiffs. Comment, "Close Encounters of the Toxic Kind"—Toward an Amelioration of the Substantive and Procedural Barriers for Latent Toxic Injury Plaintiffs, 54 TEMP. L.Q. 822, 836-41 (1981) [hereinafter referred to as Comment, "Close Encounters of the Toxic Kind"]. This theory would probably not prove suitable for most plaintiffs until medical science can distinguish between the illnesses and ailments caused by toxic waste exposure, and those resulting from natural causes. See *infra* notes 59-68 and accompanying text for a discussion of the difficulty in proving causation.

13. See *infra* notes 85-101 and accompanying text.

14. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 458 (4th ed. 1971).

15. Also applies to generators who dispose of their wastes on their own property.

16. 3 L.R.-H.L. 330 (1868), *aff'd* 1 L.R.-Ex. ch. 265 (1866).

17. *Id.* *Rylands* involved the collapse of a reservoir which the defendants had built over the plaintiff's mine shaft. The water in the reservoir flooded the mine and thus damaged the plaintiff's property. The court held the defendants liable, without proof of negligence; ruling that when a person uses his land for a non-natural purpose, bringing a dangerous substance on it, and that substance escapes injuring another, the defendant is strictly liable for the other's injury. *Id.*

18. See Note, *Strict Liability for Generators, Transporters, and Disposers of Haz-*

well suited to meet the realities of contemporary toxic waste injuries.

Despite the state of New Jersey's repeated rejection of *Rylands*, a case involving toxic waste exposure convinced the court that recognition and application of *Rylands* would be the most effective solution to that state's growing toxic waste problem.<sup>19</sup> In *State Department of Environmental Protection v. Ventron*,<sup>20</sup> the New Jersey court felt the time had come to adopt *Rylands*, and in so doing, the court recognized that "the law of liability has evolved so that a landowner is strictly liable to others for harm caused by toxic wastes that are stored on his property and flow onto the property of others."<sup>21</sup>

The only obstacle involved in the application of *Rylands* to the toxic waste scenario is meeting the "non-natural" use requirement.<sup>22</sup> In some jurisdictions this means meeting the Restatement's "ultra-hazardous activity" standard,<sup>23</sup> while in others it could be the "abnor-

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*ardous Wastes*, 64 MINN. L. REV. 949, 969-70 (1980). *Rylands v. Fletcher* has been approved by name, or by statement of principle founded upon it, in over thirty jurisdictions. The number of states accepting the principle continues to increase at the rate of approximately one state per year. PROSSER AND KEETON ON THE LAW OF TORTS 549 (W. Keeton 5th ed. 1984) (Maine, New Hampshire, New York, Oklahoma, Rhode Island, Texas, and Wyoming still reject *Rylands* by name). California follows the *Rylands* principle of strict liability based on the foundation of *Green v. General Petroleum Corp.*, 205 Cal. 328, 270 P. 952 (1928), and its progeny. *Green* involved an explosion during the defendant's oil drilling operation. As a result of the explosion, the plaintiff's property was injured. Although there was no negligence on the defendant's part, the supreme court imposed absolute liability on the defendant. *Id.* at 331-33, 270 P. at 953-55.

19. See *Department of Env'tl. Protect. v. Ventron Corp.*, 94 N.J. 473, 488, 468 A.2d 150, 157 (1983).

20. 94 N.J. 473, 468 A.2d 150 (1983) (toxic substances from defendant's forty-acre waste dump, containing approximately 268 tons of toxic waste, seeped into and irreversibly toxified a state waterway).

21. The defendant was held strictly liable due to the "abnormally dangerous" nature of the wastes. The court stated:

We believe it is time to recognize expressly that the law of liability has evolved so that a landowner is strictly liable to others for harm caused by toxic wastes that are stored on his property and flow onto the property of others. Therefore, we overrule *Marshall v. Welwood* and adopt the principle of liability originally declared in *Rylands v. Fletcher*.

*Id.* at 488, 468 A.2d at 157. It was a toxic waste case, *Cities Serv. Co. v. State*, 312 So. 2d 799 (Fla. Dist. Ct. App. 1975), which led a Florida court to conclude that "[t]he doctrine of *Rylands v. Fletcher* should be applied in Florida." *Id.* at 801.

22. Note, *supra* note 18, at 970.

23. RESTATEMENT OF TORTS § 519 (1938) states:

[O]ne who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm.

While *Green v. General Petroleum Corp.*, 205 Cal. 328, 270 P. 952 (1928), did not establish a specified standard for application of strict liability, it has been deemed to have provided a standard for ultrahazardous activity. Thus, California courts normally require plaintiffs to meet this standard. *Gallin v. Poulou*, 140 Cal. App. 2d 638, 644, 295 P.2d 958, 961 (1956). Justice Carter, speaking for the court, declared "certain activities under certain conditions may be so hazardous to the public generally, and of such rela-

mally dangerous" test of the second Restatement.<sup>24</sup> One thing is clear: regardless of the standard applied, if the dangers and risks associated with exposure to toxic waste materials are seriously considered by the court, it will find the adequate degree of danger exists to warrant strict liability.<sup>25</sup>

The policy behind strict liability is the belief that spreading the costs of injuries among those who enjoy the benefits which result from the dangerous use of property is preferable to imposing those costs on the innocent victims who suffer because of it.<sup>26</sup> Strict liability simply involves determining who is better able to allocate the costs, insure against the risks, and warn others about the dangers involved in the hazardous activities, and then shifting the costs of the activity to them.<sup>27</sup> It has been suggested that the long range effect of imposing strict liability on toxic waste dumpers would be the invest-

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tive infrequent occurrence, that it may well call for strict liability as the best public policy." *Luthringer v. Moore*, 31 Cal. 2d 489, 500, 190 P.2d 1, 8 (1948).

24. RESTATEMENT (SECOND) OF TORTS § 519 (1976) states:

- (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 the harm.
- (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

The factors which a court must consider to determine if a given activity is abnormally dangerous are outlined in RESTATEMENT (SECOND) OF TORTS § 520 (1976) as follows:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

See generally *supra* note 14, at 509; Note, *supra* note 18, at 974-76.

25. *Ashland Oil, Inc. v. Miller Oil Purchasing Co.*, 678 F.2d 1293, 1308 (5th Cir. 1982) (court found the disposal of hazardous waste to be both abnormally dangerous and ultrahazardous); *Cities Serv. Co. v. State*, 312 So. 2d 799, 803 (Fla. Dist. Ct. App. 1975) (phosphate mining operation which contaminated public waters with more than one billion gallons of phosphate slimes found to be both ultrahazardous and abnormally dangerous); *Department of Env'tl. Protect. v. Ventron Corp.*, 94 N.J. 473, 468 A.2d 150 (1983) (mercury processing operation which polluted public waters with mercury deemed abnormally dangerous) "[T]oxic wastes are 'abnormally dangerous,' and the disposal of them, past or present, is an abnormally dangerous activity." *Id.* at 493, 468 A.2d at 160.

26. *Beshada v. Johns-Manville Prods. Corp.*, 90 N.J. 191, 206, 447 A.2d 539, 547 (1982); Note, *The Development of a Strict Liability Cause of Action for Personal Injuries Resulting from Hazardous Waste*, 16 NEW ENG. L. REV. 543, 569 (1981).

27. "The justification for strict liability . . . is that useful but dangerous activities must pay their own way." *Cities Serv. Co.*, 312 So. 2d at 803 (quoting 2 F. JAMES, THE LAW OF TORTS § 14.4 (Supp. 1968)). See also Note, *supra* note 26, at 569-70.

ment of private funds into the development of more efficient and safer disposal methods since improper disposal would no longer be profitable.<sup>28</sup>

Although strict liability is not "absolute" liability,<sup>29</sup> the "fault" defenses of negligence are not available.<sup>30</sup> If the conduct involved is determined to be unreasonably dangerous, as is toxic waste disposal, then strict liability applies without regard to what excuse the defendant might have for not being aware of the danger,<sup>31</sup> and without reference to the many defenses available under other tort theories.<sup>32</sup> Also, a verdict in strict liability against a depositor would set up the liability at the direct causation level which would allow the plaintiff to seek recovery from the generators, whose waste the depositor was storing.<sup>33</sup> For these reasons, in those many jurisdictions where strict liability is available, it is fairly clear that this is the most viable method of suing toxic waste dumpers and setting up a claim against the toxic waste generators.<sup>34</sup>

## B. Nuisance

If the plaintiff happens to be a neighboring landowner to a toxic waste disposal site, nuisance is nearly as effective as strict liability for imposing liability on depositors of toxic wastes. Like strict liability, "nuisance is predicated upon unreasonable injury rather than upon unreasonable conduct."<sup>35</sup> The theory of nuisance has been used effec-

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28. See Note, *supra* note 18, at 968.

29. A defendant who is carrying on an ultrahazardous activity is only strictly liable for harm resulting from "that which makes the activity ultrahazardous." RESTATEMENT (SECOND) OF TORTS § 519(2) (1977). See, e.g., *Foster v. Preston Mill Co.*, 44 Wash. 2d 440, 268 P.2d 645 (1954) (defendant who operated blasting operations, an ultrahazardous activity because there is a danger of propelling rocks and debris onto adjoining property, was not strictly liable for interruptions to the plaintiff's mink farming when the mink were disturbed by the blasting noises).

30. *Clark v. Di Prima*, 241 Cal. App. 2d 823, 827, 51 Cal. Rptr. 49, 51 (1966). See also *Beshada v. Johns-Manville Prods. Corp.*, 90 N.J. 191, 447 A.2d 539 (1982) (asbestos case). The New Jersey Supreme Court rejected the "state-of-the-art" defense as it is incompatible with strict liability. Despite the fact that the defendant may not have known of danger involved in the activity, once the plaintiff established a strict liability case, the defendant could not raise any "fault" type defenses. *Id.* at 204, 447 A.2d at 546.

31. For general discussion of strict liability and its defenses, see Keeton, *Products Liability—Inadequacy of Information*, 48 TEX. L. REV. 398, 408 (1970).

32. See *infra* notes 42-46 and accompanying text. A common negligence defense is that the industrial community lacked knowledge of risk and took reasonable precautions to prevent the injury based on their existing knowledge. See, e.g., *Beshada v. Johns-Manville Prods. Corp.*, 90 N.J. 191, 447 A.2d 539 (1982).

33. See *supra* note 14.

34. E.g., *Zazzali & Grad*, *supra* note 12, at 461, 463; cf. Comment, *Hazardous Waste Liability and Compensation: Old Solutions, New Solutions, No Solutions*, 14 CONN. L. REV. 307, 320 (1982) [hereinafter referred to as *Old Solutions*]; Note, *supra* note 7, at 473.

35. *Wood v. Picillo*, — R.I. —, 443 A.2d 1244, 1247 (1982).

tively in hazardous waste cases. In the case of *Village of Wilsonville v. SCA Services, Inc.*,<sup>36</sup> a group of plaintiffs brought a class action suit and were awarded an injunction against a hazardous waste landfill operator under a nuisance theory. Similarly, in *Department of Transportation v. PSC Resources, Inc.*,<sup>37</sup> a hazardous waste disposer was sued under a nuisance theory and the court found that the discharge or storage of hazardous wastes was a nuisance per se. Therein, the court recognized that an activity as hazardous and dangerous as that of storing toxic wastes must be treated as "a nuisance at all times and under all circumstances regardless of location or surroundings . . . [and] incurs absolute liability."<sup>38</sup>

The major difficulty in utilizing a nuisance theory to establish liability is that nuisance is dependent upon the plaintiff's ownership of property.<sup>39</sup> Thus, a plaintiff who is injured but does not have a property interest in a nearby property would be precluded from using the nuisance theory of liability. This would bar nuisance actions by school children who happen to be going to school on property infiltrated by toxic substances; it would exclude employees whose work premises were being invaded by hazardous substances;<sup>40</sup> and it would be a bar to a multitude of similar situations where the injured parties were not the owners of the property where they were exposed.

Additionally, under a nuisance theory, courts may at times grant permanent damages, but not abate the nuisance itself. This, in effect,

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36. 86 Ill. 2d 1, 426 N.E.2d 824 (1981).

37. 175 N.J. Super. 447, 419 A.2d 1151 (Super. Ct. Law Div. 1980) (defendant found liable for nearly five million dollars spent on cleanup for the dumping of waste water containing oil, solids, soluble organic compounds, heavy metals, sodium hydroxide, and sodium silicate into a state-owned lake).

38. *Id.* at 462, 419 A.2d at 1159.

39. The necessity of property ownership in nuisance cases was summarized as follows: "The essence of a private nuisance is interference with the use and enjoyment of land' and ' . . . without it, the fact of personal injury, or other interference with some purely personal right, is not enough for such a nuisance.'" *Brown v. Petrolane Inc.*, 102 Cal. App. 3d 720, 726, 162 Cal. Rptr. 551, 555 (1980) (quoting W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 611 n.91 (3d ed. 1964)); *Culwell v. Abbott Constr. Co.*, 211 Kan. 359, 362, 506 P.2d 1191, 1194 (1973); Comment, *supra* note 34, at 320; Note, *supra* note 7, at 455.

Actions for public nuisance are ordinarily left to appointed representatives of the community and may not be maintained by private individuals unless "the public nuisance is specially injurious to him." *Brown*, 102 Cal. App. 3d at 725, 162 Cal. Rptr. at 554; CAL. CIV. CODE § 3493 (West 1970).

40. *Page v. Niagara Chem. Div. of Food, Mach. & Chem. Corp.*, 68 So. 2d 382 (Fla. 1953) (railroad employees were denied an injunction based on private or public nuisance to protect them from dangerous chemicals and gasses which were escaping from a chemical manufacturing factory neighboring their workplace).



merely requires the defendant to pay a premium for a continuing right to pollute.<sup>41</sup>

Thus, the nuisance theory has serious limitations as an effective means of both imposing liability on waste depositors as well as abating the nuisance itself. However, if the plaintiff has an interest in the affected property and the jurisdiction does not recognize a strict liability claim, nuisance may be the best approach for suing a depositor.

### C. Negligence

Establishing a cause of action in negligence is, of course, much more difficult than under a strict liability or nuisance theory. In negligence a plaintiff is required to prove: (1) that the defendant was under a duty to conform to a standard of care; (2) that the defendant breached that duty of care; and (3) that the defendant's conduct was the proximate cause of the plaintiff's injury.<sup>42</sup>

As a result of the significant problems involved in proving a negligence cause of action, some commentators consider this to be the least effective method of establishing liability on the part of toxic waste depositors.<sup>43</sup> In order to establish the duty required to support a cause of action in negligence the plaintiff is often required to prove that the risk of the type of injury suffered was foreseeable to the defendant at the time the alleged negligence occurred.<sup>44</sup> The older the deposit, the harder it is to prove foreseeability.

The difficulty of establishing a duty on the part of the defendant has led some plaintiffs to rely on legislation, such as the Federal Hazardous Substances Labeling Act,<sup>45</sup> in an attempt to claim negligence per se based on the violation of a statute.<sup>46</sup> However, since the burden of proof in a negligence action is a heavy one, the plaintiff may be best advised not to rely on a negligence theory in jurisdictions recognizing strict liability or where a nuisance cause of action is possible.

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41. See *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970) (upon payment of one time "permanent" damages to neighboring landowners who brought nuisance actions, defendant was allowed to continue cement plant operations indefinitely, despite the fact that the plant still gave off dust and noise beyond a level which neighbors could tolerate).

42. Zazzali & Grad, *supra* note 12, at 461; Note, *Inactive or Abandoned Hazardous Waste Disposal Sites: Coping with a Costly Past*, 53 S. CAL. L. REV. 1709, 1720 (1980).

43. Note, *supra* note 42, at 1720.

44. *Id.* at 1720 n.79.

45. 15 U.S.C. §§ 1261-1276 (1982).

46. See *Steagall v. Dot Mfg. Corp.*, 223 Tenn. 428, 446 S.W.2d 515 (1969) (court indicated in dictum that it would have been willing to find negligence per se based on violation of the Federal Hazardous Substances Labeling Act, 15 U.S.C. §§ 1261-1276 (1982), but, since plaintiff could not prove that had defendant followed the labeling requirement he would not have been injured, the court let stand a lower court's dismissal of the plaintiff's claim. *Id.* at 439, 446 S.W.2d at 520).

*D. Statutory Liability*

There are no federal statutes which expressly provide for a personal injury remedy for a plaintiff exposed to hazardous wastes.<sup>47</sup> Four states have enacted legislation which is designed, at least in part, to create a cause of action for individual plaintiffs. These states are Oregon,<sup>48</sup> Alaska,<sup>49</sup> South Carolina,<sup>50</sup> and New Jersey.<sup>51</sup>

The South Carolina and New Jersey statutes are similar to the federal "Superfund" legislation, in that they provide administrative agencies with recourse against generators, transporters, and depositors of hazardous wastes, but they also attempt to provide hazardous waste victims with compensation for their injuries through a fund created by the statute.<sup>52</sup> However, unlike the New Jersey statute, the South Carolina statute requires that victims of "a closed permitted" site attempt to recover judgments against any responsible parties still in existence before they are able to avail themselves of the state fund.<sup>53</sup> Neither the South Carolina nor the New Jersey statutes provide plaintiffs with additional causes of action against the generators, transporters, or disposers of hazardous wastes.<sup>54</sup>

In Oregon, if an individual can show that the person in control of the toxic wastes violated the statute by unreasonably handling or dis-

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47. The Comprehensive Environmental Response, Compensation, and Liability (Superfund) Act of 1980, 42 U.S.C. §§ 9601-9657 (1982), provides that polluters must pay for damages to natural resources and are strictly liable for cleanup reimbursement, 42 U.S.C. § 9607(a) (1982), but provides no remedy for personal injury plaintiffs. Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901-6987 (1982), preserves an individual's right to sue under common law, but provides no relief under its own provisions. 42 U.S.C. § 6972(f) (1982). The Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-2629 (1976), likewise provides no compensatory right of action to individual plaintiffs. Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §§ 1251-1376 (1976) (amended as The Clean Water Act of 1977 (CWA), PUB. L. NO. 95-217, 91 Stat. 1566 (1977)), provides that the EPA can seek reimbursement of cleanup costs from generators, transporters, and disposers, 33 U.S.C. § 1321(f) (1982), but no private right of action is authorized. For an overview of federal statutes dealing with this topic, see generally Zazzali & Grad, *supra* note 12, at 458-60.

48. OR. REV. STAT. § 459.685 (1983).

49. ALASKA STAT. § 46.03.822 (1982).

50. S.C. CODE ANN. §§ 44-56-160 to -190 (Law. Co-op. Supp. 1983).

51. N.J. STAT. ANN. § 58:10-23.11g, h (1982).

52. N.J. STAT. ANN. § 58:10-23.11g(a) (1982) (fund for all direct and indirect damages, without regard to who sustained damages); S.C. CODE ANN. § 44-56-160 (Law. Co-op. Supp. 1983) ("fund for the purpose of mitigating any contingencies arising from the operation of permitted land disposal facilities in this state"). See also Note, *Hazardous Waste*, *supra* note 8, at 557.

53. S.C. CODE ANN. § 61-79.5c(2)(c)(iii) (Law. Co-op. 1982).

54. In fact, the New Jersey statute specifically limits recovery of damages to those authorized by common or statutory law. N.J. STAT. ANN. § 58:10-23.11g(b) (1982).

posing of the waste, the defendant is deemed liable under the act.<sup>55</sup> Also, under the Oregon statute, the plaintiff is relieved of the burden of establishing a duty of care; however, he is still required to prove breach of duty and causation.<sup>56</sup>

The Alaska statute goes even further than the Oregon statute in providing that the polluter is strictly liable for personal injuries incurred by the victim.<sup>57</sup> Thus, if the victim is able to establish causation, there is no requirement under the Alaska law that he prove that the discharge of the waste was negligently performed.<sup>58</sup>

#### IV. THE DOUBLE-EDGED SWORD OF SCIENTIFIC CAUSATION: LINKING THE EXPOSURE WITH THE INJURY

The problems associated with causation in the toxic waste arena can create what is in fact a double-edged sword for toxic tort litigants. The discrepancy which can occur due to the unique problems of causation in this field are exemplified by two cases which are in stark contrast to one another. The first is the much publicized situation involving the Love Canal victims.

In the late 1970's and early 1980's, 1,431 residents of the Niagara Falls, New York area brought claims against Occidental Petroleum Corporation and other defendants for personal injuries. The residents suffered injuries which were claimed to have been the result of exposure to toxic chemical residues dumped by the defendants. In October of 1983, 1,345 of the original Love Canal claimants reportedly settled their claims for no more than an average of \$20,000 each.<sup>59</sup> That settlement was dramatically less than their original demands which, for the group, totaled in excess of \$16 billion and averaged over \$11 million each.<sup>60</sup>

In the Love Canal cases, there was no problem in proving the existence of the hazardous waste, that the hazardous waste had escaped into the environment, or even in proving that the plaintiffs were exposed to the waste. The difficulty was in scientifically proving that the illnesses and injuries suffered by the plaintiffs were caused by exposure to the toxic waste and not by other sources or causes.<sup>61</sup>

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55. OR. REV. STAT. § 459.685(1) (1983).

56. See Note, *Hazardous Waste*, *supra* note 8, at 550.

57. ALASKA STAT. § 46.03.822 (1982).

58. *Id.* See also Note, *Hazardous Waste*, *supra* note 8, at 550.

59. Wall Street Journal, Oct. 11, 1983, at 43. The direct liability of Occidental was limited to \$5 or \$6 million in self-insurance costs. However, additional funds necessary to meet the proposed settlement costs would be paid through insurance coverage. *Id.*

60. L.A. Times, Oct. 11, 1983, § 1, at 1.

61. See New York Times, May 18, 1983, § 1, at 1. A government study conducted by the Center for Disease Control in Atlanta and two other national laboratories concluded that "no specific relationship existed between exposure to chemical agents in

Contrast the dramatic decrease in worth of the New York Love Canal cases with the *Lowe v. Norfolk and Western Railroad*<sup>62</sup> case decided on August 5th, 1982 in Madison County, Illinois. In *Lowe*, the group of plaintiffs were railroad workers who, at the time of trial, did not show any objective symptoms of any illness or disease from exposure to hazardous chemicals. The plaintiffs had been working on the cleanup of a derailed tank car which may have contained up to one-half of a teaspoon of tetrachlorodibenzodioxin, a toxic chemical. Soil tests in the area did not disclose a trace of the chemical, however, the possibility that the chemical may have been there could not be denied. Because of the possibility that these plaintiffs could have been exposed to toxic wastes which could result in serious injury or death at some future date, the jury awarded the group a total of \$58 million in damages.<sup>63</sup>

These cases provide us with graphic examples of how the causation requirement, when dealing with a case involving latent injuries, can destroy an otherwise substantial plaintiff's claim; while at the same time, before a more receptive court, can provide an appealing argument to the jury about hidden prospective injuries which could occur due to the plaintiff's exposure to hazardous substances. The *Lowe* case is currently on appeal, and if the appellate courts in Illinois follow the general rule of causation, the verdict will be overruled. The general rule of causation is that the mere possibility that the defendant caused or will cause injury to the plaintiff is not sufficient proof to impose liability.<sup>64</sup>

The *Lowe* case is valuable to help us recognize the difficulties involved in proving causation when the injuries which a plaintiff suffers take years to fully manifest themselves. The toxic tort plaintiff is faced with the dilemma of either suing at the first sign of the slightest injury or, as was the case in *Lowe*, before injury has manifested itself. If the plaintiff chooses the latter course, he faces not being able to prove the entire extent of his damages. However, by waiting until the injury fully develops, the plaintiff risks the possibil-

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the Love Canal area and increased frequency of chromosome damage." *Id.* Other governmental studies have indicated "no firm evidence of increased disease incidence or mortality" in the area. *Id.*

62. Am. Law., Apr. 1983, at 88, col. 1, *rev'd on other grounds*, 124 Ill. App. 3d 80, 463 N.E.2d 792 (1984).

63. *Id.*

64. Comment, *Personal Injury Hazardous Waste Litigation: A Proposal for Tort Reform*, 10 B.C. ENVTL. AFF. L. REV. 797, 821-26 (1982-83); Comment, "Close Encounters of the Toxic Kind," *supra* note 12, at 848.

ity that the defendant will no longer be available or financially viable.

Clearly, there are evidentiary problems in linking the plaintiffs' injuries in these cases to the toxic exposure itself.<sup>65</sup> As one medical authority has noted: "[t]here is not a classic set of symptoms for chemical diseases."<sup>66</sup> Sometimes the symptoms of lengthy or repeated exposure to small amounts of toxic wastes are very difficult to trace, in that they may resemble the natural aging process or common diseases.<sup>67</sup> But, whatever the effect, generally the symptoms do not appear until several years after the initial exposure.<sup>68</sup>

## V. THE APPLICATION OF STATUTES OF LIMITATIONS IN TOXIC INJURY CASES

When the problems of proving scientific causation are combined with strict enforcement of the statute of limitations, the dilemma facing plaintiffs is multiplied.

Although many states have adopted some type of a discovery rule<sup>69</sup> as to when the statute of limitations commences in cases of latent injury, there are several states which commence the running of the statute of limitations at the time of injury.<sup>70</sup> The United States Supreme Court recognized the unfairness involved in imposing a

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65. See generally Comment, "Close Encounters of the Toxic Kind," *supra* note 12, at 848.

66. TIME, *The Toxicity Connection*, Sept. 22, 1980, at 63 (quoting Dr. Irving Selikoff, Mt. Sinai Medical Center).

67. Perham, *Legacy of Poisons*, EPA J., vol. 4 n.5, July-Aug. 1979, at 4. Dioxin exposure can cause chloracne in the skin, but so can allergies to certain plants. Diseases like leukemia and bone cancer can be caused by ingestion of the radium and radon dust produced during uranium mine operations, or they may also be caused by benzene exposure. TIME, *supra* note 66, at 63. See also H. CALDICOTT, NUCLEAR MADNESS 11-39 (1978).

68. Note, *supra* note 26, at 550; Note, *Denial of a Remedy: Former Residents of Hazardous Waste Sites and New York's Statute of Limitations*, 8 COLUM. J. ENVTL. L. 161 (1982) [hereinafter cited as *Denial of a Remedy*]. "There is a twenty- to thirty-year latency period between the initial exposure to a carcinogen and the appearance of most types of cancer." *Id.* at 163.

69. The discovery rule is simply that the cause of action does not accrue, and thus, the statute of limitations does not commence to run "until the plaintiff knows or should reasonably know of the causal connection between his injury and the defendant's wrongdoing . . . ." *Raymond v. Eli Lilly & Co.*, 117 N.H. 164, 169, 371 A.2d 170, 173 (1977) (citing *Lopez v. Swyer*, 62 N.J. 267, 272, 300 A.2d 563, 565 (1973)).

California is typical of many states in that it has judicially adopted the discovery rule in most cases where "the pathological effect occurs without perceptible trauma and the victim is 'blamelessly ignorant' of the cause of injury . . . ." *Pereira v. Dow Chem. Co.*, 129 Cal. App. 3d 865, 873-74, 181 Cal. Rptr. 364, 369 (1982) (quoting *Searle & Co. v. Superior Court*, 49 Cal. App. 3d 22, 25, 122 Cal. Rptr. 218, 220 (1975)) (plaintiff had come in contact with DER 599, a toxic substance, at work and twenty months later discovered the possible connection to his kidney damage).

70. *Steinhardt v. Johns-Manville Corp.*, 54 N.Y.2d 1008, 430 N.E.2d 1297, 446 N.Y.S.2d 244 (1981), *appeal dismissed and cert. denied*, 456 U.S. 967 (1982) (for asbestosis, the statute runs from date of last exposure). For a discussion detailing the statute

strict application of the statute of limitations to cases involving latent injuries in the case of *Urie v. Thompson*.<sup>71</sup> That case involved a claim under the Federal Employer's Liability Act (which had a three-year statute of limitations).<sup>72</sup>

In *Urie*, the claimant had been exposed to silicon dioxide dust for about thirty years. He eventually developed silicosis from the exposure. Urie's employer argued that either: (1) the silicosis must have been contracted during the first twenty-eight years of exposure and thus the three-year statute of limitations barred his recovery; or, (2) that each breath of silicon dioxide dust was a separate injury and thus Urie could only claim damages for injuries caused by the past two years' exposure and not the prior twenty-eight.<sup>73</sup>

The Court rejected the first argument, holding that if Urie was barred by the statute of limitations from bringing a claim for an injury which was inherently unknowable, then the federal remedy would be delusive and the intent of Congress to provide a remedy would be foiled.<sup>74</sup> The defendant's second argument, that a separate cause of action existed with each exposure, was similarly rejected. The Court held that such an approach would produce consequences which could not be reconciled with the traditional purpose of statutes of limitations;<sup>75</sup> such an application of the statute would work to limit the claimant's damages to those which could be proven to have been caused only by the most recent exposure. Such construction would also wholly bar a claimant from suit if he had left employment over three years ago or had been transferred to a position where he was no longer exposed to the chemical over three years before the disease appeared.<sup>76</sup>

Several states which do not normally apply the discovery rule have adopted it in cases of exposure to products and substances which cause latent effects similar to toxic wastes.<sup>77</sup> The policy behind the

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of limitations problems faced by New York plaintiffs, see *Denial of a Remedy*, *supra* note 68.

71. 337 U.S. 163 (1949).

72. *Id.* at 168.

73. *Id.* at 169 (plaintiff filed the action one year after ceasing to work for the defendant).

74. *Id.*

75. *Id.* at 170. The traditional purposes were said to "require the assertion of claims within a specified period of time after notice of the invasion of legal rights." *Id.* (emphasis added).

76. *Id.*

77. *E.g.*, *Louisville Trust Co. v. Johns-Manville Prod. Corp.*, 580 S.W.2d 497 (Ky. 1979); *Harig v. Johns-Manville Prod. Corp.*, 284 Md. 70, 394 A.2d 299 (1978); *Raymond*

imposition of a statute of limitations is to prevent plaintiffs from resting on their claims and to better insure just and reliable verdicts rather than ones based on lost records and faded memories.<sup>78</sup> In toxic waste exposure cases, as in all latent injury cases, the discovery rule does more to advance that policy than does a strict application of the statute. The plaintiffs cannot be said to be resting on their claims when they are not yet aware of the existence of a claim. So far as just and reliable verdicts are concerned, if a plaintiff is forced to sue before his injury has developed, either his case will be dismissed due to lack of injury, or the jury will be forced to speculate as to the extent of his damages (as was illustrated by *Lowe*<sup>79</sup>).

Where the realities of latent injury conflict with strict application of the statute of limitations, they combine to deny victims of hazardous waste injuries access to the courts. In such cases, the plaintiffs are in effect being denied their rights to due process of law. The Supreme Court has held that the "right of action to recover damages for an injury is property" is not to be legislatively destroyed.<sup>80</sup> In addition, the Court has found that the Constitution requires "free access to [the courts] for a length of time reasonably sufficient to enable an ordinary diligent man to institute proceedings for [the protection of his rights]."<sup>81</sup>

Thus, it follows that the states cannot avoid unconstitutional results in latent injury cases without a discovery rule. The trend has been to simply extend the date from which the statute of limitations begins to run until the plaintiff's injuries have manifested themselves and the plaintiff is reasonably aware of the causal connection between those injuries and the defendant's actions.<sup>82</sup> If justice is to be served, this trend must continue until all states have adopted a discovery rule.

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v. Eli Lilly & Co., 117 N.H. 164, 371 A.2d 170 (1977); *Atlas Chem. Indus., Inc. v. Anderson*, 514 S.W.2d 309 (Tex. Civ. App. 1974), *aff'd and rev'd in part*, 524 S.W.2d 681 (Tex. 1975).

78. *Denial of a Remedy*, *supra* note 68, at 166.

79. *Lowe v. Norfolk & W. Ry.*, Am. Law., Apr. 1983, at 88, col. 1; *Strickland v. Johns-Manville Corp.*, 461 F. Supp. 215 (S.D. Tex. 1978). "It would be unreasonable to dismiss the plaintiff's suit because there was no injury and then not allow him to bring the suit years later when asbestosis develops on the ground that the claim is barred by the statute of limitations." *Id.* at 217.

It should also be noted that this causation problem undoubtedly will be reduced as medical science develops in the toxic disease area. See Comment, *Personal Injury Hazardous Waste Litigation: A Proposal for Tort Reform*, 10 B.C. ENVTL. AFF. L. REV. 797, 830 (1982-83).

80. *Angle v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 151 U.S. 1, 19 (1893).

81. *Canadian N. Ry. v. Eggen*, 252 U.S. 553, 562 (1920).

82. *Old Solutions*, *supra* note 34, at 321.

## VI. IMPUTING LIABILITY ON THE GENERATOR OF THE WASTE

Establishment of liability against the depositor still does not guarantee that a plaintiff will be adequately compensated.<sup>83</sup> Because the generator of waste will often be stronger financially than the waste depositor, the plaintiff will want to name him as a defendant as well. Under a theory of imputed liability, a recovery from the generator gives the plaintiff his best chance of an adequate award.<sup>84</sup> Some have suggested other methods to impute liability such as by-products liability, but methods such as this require a very liberal court and significant modification to be viable alternatives. The most practical theory of imputed liability is that of vicarious liability.

A. *Vicarious Liability: Overcoming the Independent Contractor Rule*

Under a vicarious liability theory, the plaintiff is best able to defend against the independent contractor rule,<sup>85</sup> which shields the generator from liability for the negligent acts of the independent transporters and depositors of toxic wastes.<sup>86</sup> The principle exception to the independent contractor rule deals with demonstrating that the activities which the independent contractor is hired to perform are inherently dangerous.<sup>87</sup>

Surprisingly, the most serious difficulty facing plaintiffs appears to be convincing the court that hazardous waste disposal is inherently dangerous. A case on point is *Ewell v. Petro Processors, Inc.*<sup>88</sup> In that case the depositor had a very small waste disposal operation. A leak developed in the disposal system which resulted in injury to the plaintiff. The court recognized the inherently dangerous activity exception to the independent contractor rule, but refused to classify

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83. See Note, *Hazardous Waste*, *supra* note 8 and accompanying text.

84. *Id.*

85. The independent contractor rule, simply stated, is that an employer of an independent contractor, unless he is himself negligent, is not vicariously liable for the torts of the contractor. See RESTATEMENT (SECOND) OF TORTS § 426 (1965). See, e.g., *Risley v. Lenwell*, 129 Cal. App. 2d 608, 622, 277 P.2d 897, 907 (1955); *Ewell v. Petro Processors of La., Inc.*, 364 So. 2d 604 (La. Ct. App. 1978), *writ denied*, 366 So. 2d 575 (La. 1979).

86. See Note, *Hazardous Waste*, *supra* note 8, at 561-62.

87. *Chesapeake & Potomac Tel. Co. of Md. v. Chesapeake Util. Corp.*, 436 A.2d 314, 326-27 (Del. 1981); *A.M. Holter Hardware Co. v. Western Mortgage & Warranty Title Co.*, 51 Mont. 94, 99, 149 P. 489, 490 (1915); *Ewell v. Petro Processors of La., Inc.*, 364 So. 2d at 606; RESTATEMENT (SECOND) OF TORTS § 427 (1965).

88. 364 So. 2d 604 (1978), *writ denied*, 366 So. 2d 575 (1979).



toxic waste disposal as inherently dangerous.<sup>89</sup> The court took the view that if the work is such that any precaution could render it safe, the employer could be held liable only if he authorized, expressly or impliedly, the particular unsafe manner in which the work was performed.<sup>90</sup>

The *Ewell* court is in stark contrast with most other authorities that classify certain activities as inherently dangerous without reference to precautions that would render the activity "safe."<sup>91</sup> The *Ewell* ruling places the burden on a plaintiff seeking to impose liability on an employer for a contractor's actions of showing that *no* method existed by which the activity could have been rendered totally safe. Where the scientific information on the hazard and the available means of eliminating it varies, the plaintiff may often find this burden insurmountable.<sup>92</sup>

The majority of cases and the Restatement would clearly deem toxic waste disposal to be inherently dangerous. The majority view deems an activity to be inherently dangerous if the activity cannot be carried out safely absent the taking of special precautions or care.<sup>93</sup> The Missouri Supreme Court described the rule as follows:

"[I]f the doing of the work necessarily causes dangers which must be guarded against, then the employer must see to it that such dangers are guarded against, and cannot relieve himself by casting this duty on an independent contractor. If, however, the work is dangerous only by reason of negligence in doing it, then the liability falls only on the independent contractor. In the one

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89. *Id.* at 607.

90. *Id.* at 606.

91. See *infra* notes 93-98 and accompanying text. See, e.g., *LaCount v. Hensel Phelps Constr. Co.*, 79 Cal. App. 3d 754, 145 Cal. Rptr. 244 (1978) (found that trial court was justified in holding employer liable for the actions of an independent contractor due to the inherently dangerous nature of a job involving the operation of a crane to lift girders and ballasts weighing from eight to one hundred tons); *Smith v. Lucky Stores, Inc.*, 61 Cal. App. 3d 826, 132 Cal. Rptr. 628 (1976) (store would be liable for independent contractor's actions if the sign being lowered by independent contractor above the store's entrance fell in the process of being lowered due to the inherent danger involved in such a project).

92. While some courts have found working with highly flammable substances and coal mining not to be inherently dangerous, others have found such activities as highway construction and painting above a sidewalk to be inherently dangerous. Note, *supra* note 8, at 563.

93. Despite its expression in terms of "inherent" danger, "[i]t is not . . . necessary to the employer's liability that the work be of a kind which cannot be done without a risk of harm to others . . ." Indeed, application of the rule is predicated on the negligent failure of either the employer or the contractor to take appropriate special precautions. *Henderson Bros. Stores v. Smiley*, 120 Cal. App. 3d 903, 913, 174 Cal. Rptr. 875, 880 (1981) (quoting RESTATEMENT (SECOND) OF TORTS § 427, comment b). An inherently dangerous activity is one "which can be carried on safely only by the exercise of special skill and care, and which involves grave risk of danger to persons or property if negligently done." *Majestic Realty Assocs., Inc. v. Toto Contracting Co.*, 30 N.J. 425, 435, 153 A.2d 321, 326 (1959).

For a survey of activities deemed to be inherently dangerous by California courts, see *Henderson Bros. Stores*, 120 Cal. App. 3d at 911 n.3, 174 Cal. Rptr. at 878 n.3.

case the doing of the work creates danger and requires active care to counter-act the danger. In the other there is no danger unless created by negligence. The one starts with danger and requires preventive care to make safety, while the other starts with safety and requires negligence to make danger."<sup>94</sup>

The Restatement (Second) of Torts declares that an activity may be inherently dangerous without "the work being of a kind which cannot be done without a risk of harm to others . . . ." <sup>95</sup>

Hazardous waste disposal clearly meets the requirements under the majority's definition as well as under the Restatement's approach. Presumably, the disposal of toxic substances meets even the extreme test suggested by the *Ewell* court. It can be argued that toxic waste simply cannot be disposed of without a "high degree of risk to persons and property which cannot be totally eliminated by reasonable care."<sup>96</sup> A large part of that risk is based upon the nature of many of the waste products themselves. For example, toxic heavy metals will not degrade, and the EPA has seriously questioned whether even our most advanced designs in waste disposal can be maintained and safely operated for long periods of time.<sup>97</sup>

In the end, the question of whether or not to impute vicarious liability on the generators comes down to a question of public policy. As the Michigan Supreme Court put it, "where to draw the line between so-called 'delegable' and 'nondelegable' tasks and duties becomes a question of policy."<sup>98</sup> The court indicated that in determining tort policy it was obligated to consider both "compensation to victims" as well as the encouragement of "the implementation of reasonable safeguards against risks of [future] injury."<sup>99</sup> The decision of whether to impose vicarious liability must also consider the high potential for harm to public health and safety if improvement in

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94. *Smith v. Inter-County Tel. Co.*, 559 S.W.2d 518, 522 (1977) (quoting *Carson v. Blodgett Constr. Co.*, 189 Mo. App. 120, 126, 174 S.W. 447, 448 (1915)).

95. RESTATEMENT (SECOND) OF TORTS § 427 comment b (1965). The text of § 427 reads as follows:

One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.

96. Note, *supra* note 26, at 565-66. See also Note, *Hazardous Waste*, *supra* note 8, at 563.

97. See Note, *Hazardous Waste Disposal: Is There Still a Role for Common Law*, 18 TULSA L.J. 448, 460 n.63 (1983).

98. *Funk v. General Motors Corp.*, 392 Mich. 91, 101, 220 N.W.2d 641, 645 (1974).

99. *Id.* at 104, 220 N.W.2d at 646.

safeguards are not encouraged.<sup>100</sup> Finally, since the primary beneficiary of waste disposal is the generator, and since the generator is in the best position to distribute the costs of proper waste disposal, it is only appropriate that he, rather than innocent victims, should pay the costs when the waste is not properly disposed of.<sup>101</sup>

### *B. By-Products Liability: The Theory of the Future?*

Although a strict products liability approach to toxic waste has yet to be accepted as a valid theory for imputing liability to generators of toxic by-products, it has been suggested that, with some modification, it could be a very viable solution to many of a plaintiff's problems.<sup>102</sup>

The policies underlying products liability are quite obviously applicable to hazardous waste exposure injuries: (1) the individual victim is generally in no position to bear the costs of the injury, while the manufacturer can spread the loss to the customers who benefit from the process; and (2) the party who introduced the risk into society should be the one to bear its costs.<sup>103</sup> If a products liability type of action could be brought by waste exposure victims, perhaps called "by-products liability," it would be a very useful tool for insuring that the victim would have a direct action for recourse against the generator. Despite any claims by a generator concerning independent contractor shields, or lack of control over the by-product after it leaves their property, a generator would be liable for the injuries caused by the by-product so long as the use to which it was being put was foreseeable.<sup>104</sup> Foreseeability even includes the possible misuse of the product.<sup>105</sup>

Indeed, a by-products liability theory would provide plaintiffs with a very effective tool for imputing liability to the generators of toxic waste. As products liability law currently exists, however, several modifications would be required in order to establish a functional "by-products liability" theory.

First, products liability deals with special liabilities between "sell-

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100. *Washington Suburban Sanitary Comm'n v. Grady Dev. Corp.*, 37 Md. App. 303, 319, 377 A.2d 557, 565 (1977).

101. Note, *Hazardous Waste*, *supra* note 8, at 562.

102. Note, *supra* note 18, at 980-83.

103. *Beshada v. Johns-Manville Prod. Corp.*, 90 N.J. 191, 205-06, 447 A.2d 539, 547 (1982); Note, *supra* note 18, at 983; Note, *Hazardous Waste*, *supra* note 8, at 568.

104. *Hall v. E.I. du Pont De Nemours & Co.*, 345 F. Supp. 353 (E.D. N.Y. 1972), *aff'd sub nom. Ball v. E.I. du Pont De Nemours & Co.*, 519 F.2d 715 (6th Cir. 1975) (children were injured by blasting caps manufactured by the defendant). The defendant was held liable under a products liability theory for the injuries to the plaintiffs despite the claim that a third party gave the children the blasting caps and the products were not properly used. The court found that it was foreseeable that children could get the caps and that the caps might be used improperly, resulting in the type of injury the plaintiffs suffered. *Id.* at 361-66.

105. *Id.* at 363.

ers" and "users or consumers."<sup>106</sup> The generator of toxic waste does not "sell" the waste, nor does the victim truly qualify as a "user" or "consumer." Despite these difficulties in characterizing the parties, the scope of products liability has recently been moving away from a strict application of these labels in some areas. For example, many jurisdictions are redefining the terms "user" and "consumer" to include mere bystanders injured by another's use of the product.<sup>107</sup> Likewise, applying the classification of seller to the generator of the dangerous by-products would not run entirely counter to the products liability theory, since a generator does recognize economic gain from his activities when the finished product is sold.<sup>108</sup>

Finally, in order to establish a claim in products liability, the product must be defective either in design, manufacture, or warning.<sup>109</sup> The failure of a generator to adequately warn of the dangers of improper disposal of the waste and failure to monitor that disposal may be sufficient to meet this test, but modification is nonetheless required.

Quite clearly, the adoption of a by-products liability cause of action requires a court to do some re-thinking of the products liability law and tailor it to the toxic waste situation. Because serious problems exist in more vital areas of a plaintiff's case, it may be too much to ask a court to make the required changes at this point.

## VII. THE BATTLE OF OWNERSHIP: TYING THE GENERATOR TO HIS WASTE

The final major hurdle to recovery from the generator of toxic waste is proving that the plaintiff was exposed to waste which that particular defendant generated.<sup>110</sup> Where there is only one generator depositing waste in the dump to which the plaintiff was exposed

106. See, e.g., RESTATEMENT (SECOND) OF TORTS § 402A (1965).

107. W. PROSSER, *supra* note 14, at 662-63. E.g., *Elmore v. American Motors Corp.*, 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969) (bystander was killed when defective drive shaft caused a driver to lose control of her automobile and crash into a bystander's vehicle). The court held:

The public policy which protects the driver and passenger of the car should also protect the bystander, and where a driver or passenger of another car is injured due to defects in the manufacture of the automobile and without any fault of their own, they may recover from the manufacturer of the defective automobile.

*Id.* at 586, 451 P.2d at 89, 75 Cal. Rptr. at 657.

108. Note, *supra* note 18, at 979.

109. *Id.*

110. *Old Solutions*, *supra* note 34, at 322-25.

there is no causation problem; but, where several generators have deposited at the dump site, or where there are no records available to tell which toxic waste generator dumped there, the plaintiff faces a very difficult hurdle indeed.

In the situation where several generators deposit at the site, if the plaintiff can establish that any of them contributed to his injury he can recover the entire amount of his damages from any of those contributors under principles of joint and several liability.<sup>111</sup> Of course, those defendants who paid for the plaintiff's damages would generally have a cause of action for contribution or indemnity by any of the other defendant generators also held liable.<sup>112</sup>

The most serious problem exists in situations where none of the waste generators can be identified. The only remedy available to plaintiffs under these circumstances is to seek the joint liability applied by the California Supreme Court in *Sindell v. Abbott Laboratories*.<sup>113</sup> In *Sindell*, the plaintiff brought a products liability suit against eleven major drug manufacturers for injuries which she suffered as a result of her mother's taking the drug DES during her pregnancy. Although she could not prove which of the more than two hundred DES manufacturers actually produced the particular drug her mother took, she did prove that the eleven defendants in court had produced at least ninety percent of the DES on the market at the time of her mother's consumption of the drug. Although the court recognized the general rule of causation which requires a plaintiff to identify the defendant which caused the harm,<sup>114</sup> it noted that "[o]nce the plaintiff has met her burden of joining the required defendants," representing a "substantial share" of the market, the defendants are in a better position to prove that they could not have produced the drug taken by the plaintiff's mother than the plaintiff

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111. *E.g.*, *Department of Env'tl. Protect. v. Ventron Corp.*, 94 N.J. 473, 502-03, 468 A.2d 150, 165-66 (1983) (joint and several liability for cleanup and removal of toxic waste); *Velsicol Chem. Corp. v. Rowe*, 543 S.W.2d 337 (Tenn. 1976) (chemicals were emitted into the air and deposited onto the plaintiff's property from a group of nearby chemical manufacturers; court found that, since the injury could not be apportioned with reasonable certainty as to any of the individual manufacturers, all of the wrongdoers were jointly and severally liable for the entire damages and the injured party could proceed for judgment against any one of the wrongdoers separately); *Landers v. East Tex. Salt Water Disposal Co.*, 151 Tex. 251, 248 S.W.2d 731 (1952) (oil companies which used a pipeline to carry salt water and oil to their operations let more than 10,000 barrels escape into the plaintiff's fresh water fish pond; court held that the wrong could not be apportioned and thus all wrongdoers were jointly and severally liable for the entire amount of the damages and the plaintiff could proceed to judgment against any one of them separately or against all of them together).

112. *See, e.g.*, Note, *Joint and Several Liability under Superfund*, 13 LOY. U. CHI. L.J. 489, 514-15 (1982).

113. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980).

114. *Id.* at 597, 607 P.2d at 928, 163 Cal. Rptr. at 136.

is to prove that they did.<sup>115</sup> The court concluded that "as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury."<sup>116</sup> Because "the manufacturers of a substantial share of the DES which her mother might have taken" were named in the action, each defendant would be "held liable for the proportion of the judgment represented by its share of the market unless it demonstrated that it could not have made the product which caused the plaintiff's injuries."<sup>117</sup>

Thus, under this theory of "market share" joint liability, a toxic waste exposure victim might also be able to recover in situations where the specific generators are unknown if he can isolate the generators who produce a "substantial share" of the type of waste by which he was injured.<sup>118</sup> Once identified, each waste generator would similarly need to exonerate himself or be found liable for the same proportion of the plaintiff's damages as its share of the waste represents its share of the market.

Although the "market share" theory of joint liability has received a mixed welcome in other jurisdictions,<sup>119</sup> it is certainly as applicable in toxic waste exposure cases as it is in products liability.

### VIII. CONCLUSION

The most significant obstacles to a toxic waste victim's recovery are proving scientific causation, overcoming the independent contractor rule, and in many cases proving that the generator(s) named as defendants produced the waste which injured the plaintiff. If an accepted theory of liability is proven against the disposer of the waste, and the theory of vicarious liability is used in penetrating the in-

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115. *Id.* at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

116. *Id.* at 610-11, 607 P.2d at 936, 163 Cal. Rptr. at 144.

117. *Id.* at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

118. Note, *Hazardous Waste*, *supra* note 8, at 571-74.

119. *E.g.*, *Morton v. Abbott Labs.*, 538 F. Supp. 593 (M.D. Fla. 1982) (causation cannot be established on a theory of market share liability); *Starling v. Seaboard Coast Line R.R.*, 533 F. Supp. 183 (S.D. Ga. 1982) (recognition of market share liability theory would result in an unprecedented departure from traditional Georgia tort law); *Prelick v. Johns-Manville Corp.*, 531 F. Supp. 96 (M.D. Pa. 1982) (the identity of at least one defendant who actually caused the injury precludes the use of market share liability, therefore the question of whether Pennsylvania would accept the theory has not yet been reached); *Mizell v. Eli Lilly & Co.*, 526 F. Supp. 589 (D.S.C. 1981) (market share liability is contrary to public policy of South Carolina).

dependent contractor shield, then a court is in the best possible position to meet causation challenges with appropriate flexibility.

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