

ENVIRONMENTAL ACCIDENTS: PERSONAL INJURY AND PUBLIC RESPONSIBILITY

By Richard Gaskins.¹

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As it stands now, the only truly redeeming grace of the present system is that it provides a very good living for more lawyers than we could otherwise accommodate.²

In *Environmental Accidents: Personal Injury and Public Responsibility*, Richard Gaskins defines environmental accidents as "personal injuries that can be statistically associated with hazardous substances, human behavior, organizational structures, and geographic locations—but which cannot be satisfactorily resolved into personal encounters and single-impact events" (p. 14). These include injuries related to Agent Orange exposure of U.S. soldiers in Vietnam, Three Mile Island radioactivity injuries, side effects from Swine Flu vaccinations, and increased risk of cancer due to maternal use of the DES drug. Gaskins criticizes the application of tort law to environmental accidents in the U.S., stating that "the subject of accidents has been jealously protected by the legal profession" (p. 5). Rather than tort law, "environmental accidents will require something entirely new: a systematic public response to personal injury" (p. 5).

Gaskins' basic message is that U.S. tort law deals inefficiently with environmental accidents. Tort law fails despite creative judicial management techniques such as the consolidation of cases through multi-district litigation rules as occurred in the Agent Orange case (p. 183).³ Litigation is costly, and a disproportionately large amount of money must be spent on attorneys' fees, expenses, and court costs for every dollar that actually reaches injured plaintiffs. Further inefficiency arises when plaintiffs with very similar injuries and circumstances receive different damage awards.

According to Gaskins, the judicial system has three functions related to environmental accidents: (1) identifying who should be compensated; (2) identifying "culpable parties" who should pay; and (3) "avoid[ing]

1. Associate Professor, College of the University of Chicago.

2. Senator Pressler, Opening Remarks, *Hearings Before the Subcomm. on the Consumer of the Senate Comm. on Commerce*, 99th Cong., 2nd Sess. 6 (1986) (p. 77).

3. See *In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740 (E.D.N.Y. 1984).

depart[ure] from previously articulated [judicial] rules" (p. 29). These views of judicial function are based on the individualist concept that the defendant is not penalized unless there is a specific plaintiff to be compensated; and the plaintiff is not recompensed unless there is an identifiable defendant. However, as Gaskins points out, this concept does not consider that the government may litigate on its own or the public's behalf, eliminating the individual plaintiff or defendant. For example, the government can sue responsible parties for the money to clean up contaminated sites under the "Superfund" statute.⁴

A major problem in environmental accident litigation is the difficulty of proving causation. Causation can be especially problematic in delayed action claims such as those in the asbestos and Agent Orange litigation. In other cases, experts argue that accidents are no one's fault but are the inevitable result of complex interactions, as in the Three Mile Island accident (pp. 59-60). Even safety systems can malfunction. Their very presence increases the complexity of any operation (pp. 59-60). Accidents caused by complex chains of breakdowns are generally unforeseeable, inevitable, and difficult to counteract effectively.

According to Gaskins, the three goals of environmental accident policy are "*compensation of victims, regulation of dangerous conduct, and promoting economic efficiency*" (p. 87, emphasis in original). Manufacturers, however, may prefer to pay litigation or settlement costs rather than the sometimes higher costs of accident prevention. This preference is a problem if one believes that more than the "market cost" of injuries should be spent on prevention measures. According to Gaskins' formulation, legislation could set a higher-than-market value on environmental accident injuries as an incentive for companies to invest more in accident prevention. He states that at the moment the

single purpose for accident compensation mechanisms . . . [is] to deter future uneconomic behavior. It is not to deter accidents as such, but only those accidents for which costs are more expensive than their cure . . . [o]ptimal deterrence becomes the goal . . . compensation of injured parties is entirely incidental to this purpose (p. 114, emphasis in original).

Gaskins states that there are a number of trends in tort law that constitute a "progressive reform agenda." These trends include "relaxing the plaintiff's affirmative burdens," "requiring a wider class . . . of

4. 42 U.S.C. § 9607 (1988).

defendants," and "making it harder for defendants to use traditional defenses" such as contributory negligence and assumption of risk (pp. 33-34). The agenda also favors plaintiffs in several other ways. It increases the use of joint liability, under which one defendant can be liable for other defendants' actions (p. 41); and allows damages for pain and suffering that are hard for defendants to dispute factually (p. 43). Also, the agenda favors decreased use of the collateral source rule, under which a plaintiff's award is reduced by the amount the plaintiff received from social security, insurance, or other sources (p. 44).

Most changes in judicial doctrine have occurred in the area of consumer and worker injury by "easing the demands on plaintiffs . . . and expanding the legal duties of manufacturers" (p. 158). These changes have included a decline in contractual privity requirements for liability, an increase in "implied warranties of product safety," (p. 159) and an increased use of the "reasonable prudence test" (p. 159), all intended to encourage manufacturers to warn customers of safety hazards and to design safer products. One flaw of the duty to warn doctrine is that if warning was given, the defendant company is generally not liable. This loophole may be a problem, Gaskins says, if an AIDS vaccine is ever distributed.

Other problems with current judicial approaches to environmental accidents are illustrated by asbestos litigation. These cases have been plagued by long delays and high litigation costs. The many asbestos cases have not been consolidated into a class action because "self-interest of plaintiffs and defendants has discouraged the judicial system from using its most powerful techniques for better management of cases" (p. 171). Plaintiffs do not want a class action because different plaintiffs are using a variety of legal theories and do not want to be precluded if one theory is rejected by the courts. Plaintiffs also want the option to bring claims later to take advantage of new medical information as it becomes available. Defendants likewise want to avoid some judicial management techniques because they are reluctant to join other defendant companies and face problems of joint liability (p. 171). Thus, as the asbestos cases demonstrate, the interests of individual litigants often conflict with society's interest in expediting litigation to achieve economic efficiency.

At the same time, Gaskins' review of the Agent Orange settlement shows the danger of allowing society's interests in efficiency to control. Gaskins notes that the Agent Orange settlement was a feat not "likely to be repeated" in other litigation because it depended on "Judge Weinstein's willingness to reject plaintiffs' entire legal argument on grounds that precluded jury trials" (p. 181). Medical evidence was also

inconclusive at the time of the case. Gaskins is critical of the Agent Orange settlement, noting that each plaintiff received only a small sum. He implies that while the settlement ended the litigation, thus saving costs and legal fees, it may not have provided a just resolution to the Agent Orange controversy.

Since the judicial system is inefficient in applying tort law to environmental accidents, Gaskins considers legislatures as an alternative. He proposes a variety of political and legislative remedies for environmental accidents and reviews a number of alternatives to the traditional tort system such as administrative remedies and New Zealand's approach of treating personal injury like illness. He does not, however, give an in-depth discussion of methods of alternative dispute resolution or mediation, except in the specific case of asbestos litigation.⁵

The judiciary is limited to the deterrence rationale for awarding damages, Gaskins asserts. The legislature, however, can expand the goals of compensation to include retribution and prevention by not "confining compensation to specific instances where culpable, well-funded defendants are identified" (p. 79). Gaskins does not mention whether the legislature can use rationales such as victim compensation or reparation for harm done to society.

Gaskins states that the legislature's "[s]tatutory oversight of tort law is perhaps long overdue" (p. 192). He notes, however, that while many legislative lobbyists claim their motive is to decrease the uncertainty of judicial solutions, their real goal is "reducing the financial burden on defendants" (p. 195). "Legislative strategies," influenced by these lobbyists, include attempts to "control the courts' remedial powers" by withholding damages for pain and suffering, putting an "end to joint and several liability" (p. 195), and increasing the use of the collateral source rule.

Gaskins' analysis implies a potential problem with legislative remedies: defendants who are large companies are aware of the statistical risks of accidents and have the staff and resources to lobby legislators. Plaintiffs, in contrast, are likely to have fewer resources and little or no need to lobby *ex ante*. Unlike defendants, plaintiffs are not repeat players in environmental accidents. It is possible, however, that groups of consumers and environmental accident victims will undertake lobbying activities as the importance of environmental accident legislation grows.

5. Gaskins uses asbestos litigation to illustrate two possible alternatives to litigation. The Asbestos Claims Facility, formed to negotiate settlements, was not successful (pp. 175-77). Parties were also ordered to negotiate settlements with bankrupt defendant Johns-Manville, but plaintiffs had the option of seeking other remedies later (p. 177).

Gaskins argues that "concrete administrative procedures are a necessary supplement" to judicial and legislative responses to environmental accidents (p. 249). The primary example of such an administrative remedy is workers' compensation. This program decreases plaintiffs' burden of proving causation, but awards lower damages than the tort system. Gaskins sees workers' compensation as an exception to the "moderate pattern of political response" to environmental accidents (p. 8). Administrative remedies are also used with tort remedies as part of two-tiered processes. Tort law remains part of these remedies because both plaintiffs and defendants hope that litigation will be to their advantage. Therefore, both prefer not to give up the option of litigation in favor of mandatory administrative remedies (p. 247).

In Gaskins' view, litigation can and should be phased out and "recognized as an expensive and largely irrelevant adjunct to other ways of handling the problem of accidents" (p. 323). He states: "Even now, disability programs are meeting more of the compensation needs of injury victims than the tort system, and regulatory policy is a far more potent force for accident deterrence" (p. 322).

Gaskins packs a lot of information into *Environmental Accidents*. His analysis of specific examples, such as asbestos and DES litigation, the Agent Orange settlement, and the Three Mile Island accident, are interesting and insightful. However, attorneys will probably read this book more for policy arguments and Gaskin's persuasive opinions than for summaries of tort accident law. The theme that current responses of the legal system to environmental accidents may stress efficiency rather than injury prevention is disturbing and suggests that the legislature should guide the courts in this area. Gaskins believes that in the future, legislative and administrative, rather than judicial, solutions will (or should) be the primary mechanism for coping with inevitable environmental accidents.

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