CRISIS IN THE GULF OF MEXICO: IS NEW FEDERAL LEGISLATION THE ANSWER AND IF SO, TO WHAT QUESTION?

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The *Deepwater Horizon* well blowout was a disaster on many levels. The release of millions of gallons of petroleum into the Gulf of Mexico will have an impact on ecosystems in the Gulf for years to come. The release has also had a major impact on the economy of the states that border the Gulf, and on the business interests of the citizens of those states. Several pieces of federal legislation have been proposed with the intent to create a "fair and efficient" compensation system for those who have been injured by this event.[1] The assumption underlying these proposals is that the existing compensation systems, particularly the common law tort system, are either not "fair and efficient," or if they are generally "fair and efficient" they would not be a "fair and efficient" means to compensate those injured by the *Deepwater Horizon* well blowout. This paper will examine that assumption and attempt to provide some guidance regarding where the legal system should draw the line between common law compensation and compensation by federal legislation.

Our legal system has long had the means to deal with cases in which one party causes injury to another. All first-year law students study torts and understand it to be the common law means to determine whether an injured party is entitled to compensation, and if so, what compensation.[2] The law of negligence, a major branch of the law of torts, would examine whether the party alleged to have caused the injury owed a duty to the injured party, whether he or she had breached that duty, and whether that breach of duty

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[1] S. 3410, 111th Cong. § 101 (2010); S. 3461, 111th Cong. § 101 (2010); S. 3542, 111th Cong. § 101 (2010).

[2] PROSSER AND KEETON ON THE LAW OF TORTS 2 (W. Page Keeton et al. eds., 5th ed. 1984).

was the proximate cause of the injury.[3] A court would examine the extent to which the harm was reasonably foreseeable to determine whether there was a duty owed, and engage in a balancing of the risks and benefits to determine whether there was a breach.[4]

The *Deepwater Horizon* well blowout could fit easily into this system. The risk of a spill or release of significant quantities of petroleum was reasonably foreseeable, and many of the specific types of damage allegedly caused by the spill or release were similarly foreseeable. Thus, there is little doubt that in an action for negligence, a court could find that BP had a duty to prevent or to take reasonable steps to prevent the spill or release, and that the failure to take those steps was the proximate cause of the harm. If so, why is there so much discussion of the need for better laws and regulations to provide a remedy for injured parties?

I. WHY IS MOST ENVIRONMENTAL LAW BASED ON STATUTES AND REGULATIONS?

The first step in exploring the need for a statutory or regulatory response is a short discussion of why our legal system addresses environmental legal issues through statutes and regulations much more than through the common law. Prevention of harm is among the primary goals of negligence law.[5] Negligence law tends to deter risky behavior because it assumes that rational decision makers will take precautions to avoid liability when the cost or burden of the precautions is less than the probable liability.[6] Regulation is aimed at preventing harm more directly, by prohibiting people from, or creating disincentives to, creating or taking certain risks.[7] Regulation to prevent harm is necessary, however, only when the

[3] *Id.* at 164–65.

[4] Learned Hand's definition of negligence in the *Carroll Towing* case requires a balancing of the risks and benefits using the following formula: if the probability that injury will occur multiplied by the gravity of the injury is greater than the burden of adequate precautions, then the failure to take adequate precautions is negligent. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947). Judge Hand put it in "algebraic terms," stating, "if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B < PL." *Id.*

[5] *See* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 31 (1972); Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX L. REV. 1801, 1801 (1997); Christopher H. Schroeder, *Lost in the Translation: What Environmental Regulation Does That Tort Cannot Duplicate*, 41 WASHBURN L.J. 583, 587 (2001).

[6] *See* Posner, *supra* note 5, at 33; Schwartz, *supra* note 5, at 1819–20; Schroeder, *supra* note 5, at 587.

[7] Schroeder, *supra* note 5, at 589–90.

common law system is not preventing the harm at issue.[8] Thus, to understand the need for environmental regulation, we need to examine why the negligence system was not deterring the activities that created environmental harm.

There are at least four factors that make environmental harm different from the types of harm generally dealt with by the common law tort system. First, environmental harms tend to be long-term and indirect, making them less foreseeable. Second, environmental harm tends to affect many people at the same time, creating problems with regard to who may bring suit, and even when suit can be brought. This wide distribution of harm often creates difficulties of proof. Third, environmental harm can be the result of complex processes difficult for the average person to understand, which makes it difficult to determine what the duty is and when sufficient precautions have been taken (i.e., expertise is often needed to determine whether there has been a breach). Fourth, environmental law sometimes recognizes interests that may not have been known or appreciated at common law.

The National Environmental Policy Act ("NEPA"),[9] the first major federal environmental program,[10] illustrates the foreseeability issue. It requires federal agencies to examine environmental impacts when making decisions regarding major federal actions.[11] The legislative history specified a lack of information regarding the possible consequences as a reason for the law, stating: "we do not know the consequences of our actions until it is too late."[12] The legislative history also attributed the failure to identify the consequences of actions to lack of expertise.[13] Thus, where the

[8] There is a significant body of literature addressing the theoretical basis of regulation. For a good review of that literature, *see generally* Rena I. Steinzor, *Pragmatic Regulation in Dangerous Times*, 20 YALE J. ON REG. 407 (2003) (reviewing SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH (2002)); James J. Florio, *Congress as Reluctant Regulator: Hazardous Waste Policy in the 1980's*, 3 YALE J. ON REG. 351 (1986) (discussing Congress's role as regulator when agency action is absent).

[9] National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370f (2006).

[10] *See* Jerry L. Anderson, *The Environmental Revolution at Twenty-Five*, 26 RUTGERS L.J. 395, 396 (1995); Aaron Ehrlich, *In Hidden Places: Congressional Legislation That Limits the Scope of the National Environmental Policy Act*, 13 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 285, 285 (2007) (referring to NEPA as "the birth of the American environmental legislative revolution").

[11] Government agencies are required to "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of the proposed action." 42 U.S.C. § 4332(c)(i).

[12] H.R. REP. NO. 91-378 (1969), *reprinted in* 1969 U.S.C.C.A.N. 2751, 2756.

[13] *Id.* (discussing the complexity of the problems and the need to retain qualified experts).

reasonable person might not have foreseen the environmental consequences (and the common law might not impose a duty), the statute requires a specific examination of environmental consequences, which often requires the use of experts.[14]

The second problem can be illustrated by the Second Circuit's decision in *In re "Agent Orange" Product Liability Litigation*.[15] Agent Orange was a defoliant used during the Vietnam War by the military to remove jungle vegetation which was thought to provide cover to enemy troops.[16] Hundreds of thousands of veterans claimed to be injured by exposure to this substance.[17] A class action settlement was reached with the manufacturers, and claims of those who opted out of the class were dismissed on summary judgment.[18] One of the grounds for summary judgment was that "no opt-out plaintiff could prove that a particular ailment was caused by Agent Orange."[19] One of the problems with proving causation was the lack of epidemiological studies, which no single plaintiff could afford to fund, and which could take years to perform.[20] Such problems of proof could cause manufacturers to undervalue the risk, and thus fail to prevent harm.

Even in cases in which federal statutes define a duty to protect the environment, the widespread nature of the effects often makes it difficult for injured parties to get into court. The "standing" issue has been a major problem for private attempts to enforce environmental law. The Supreme Court in *Warth v. Seldin* summed up the standing issue as follows: "When the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction."[21] In other words, courts would redress individualized harms, not harms to society as a whole. And, where a party claiming injury would have a difficult time bringing a claim, there is a possibility that the person creating the risk will undervalue the risk and deterrence will fail.

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[14] *Id.*

[15] *In re* "Agent Orange" Prod. Liab. Litig. (*Third of Nine Opinions*), 818 F.2d 187 (2d Cir. 1987).

[16] *Id.* at 189–90.

[17] *In re* "Agent Orange" Prod. Liab. Litig. (*First of Nine Opinions*), 818 F.2d 145, 151 (2d Cir. 1987).

[18] *Id.* (explaining that the district court approved the settlement).

[19] *In re* "Agent Orange" (*Third of Nine Opinions*), 818 F.2d at 189 (citing *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1223, 1260–63 (E.D.N.Y 1985)).

[20] *See In re* "Agent Orange" (*First of Nine Opinions*), 818 F.2d at 149.

[21] Warth v. Seldin, 422 U.S. 490, 499 (1975).

The Toxic Substances Control Act ("TSCA")[22] may be seen as a response to this type of problem. TSCA prohibits the introduction of new chemical substances into commerce without prior studies to determine safety.[23] It requires manufacturers and importers to obtain the safety information before sale because the common law problems of proof might not have given manufacturers a sufficient incentive to obtain the information.[24] Once the information is obtained, TSCA plugs into common law concepts and permits the Environmental Protection Agency to prohibit the sale of products it deems to "present an unreasonable risk of injury to health or the environment."[25]

We can also see the various statutes that explicitly provide for private rights of action and citizen enforcement as a response to this issue. Where individuals may have had difficulty getting into court because the interest was a societal interest, statutes explicitly provide for the right of action and the remedy. TSCA,[26] the Clean Water Act,[27] the Solid Waste Disposal Act,[28] the Clean Air Act,[29] and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980[30] all have citizen suit provisions.

The enactment of the Endangered Species Act[31] illustrates a situation where the common law undervalued an environmental resource or failed to recognize a protectable interest.[32] In the case of endangered species, Congress stepped in to identify that protectable interest and to define the value of that interest, thus altering the balancing that would be done in a negligence action to determine whether there was a breach of duty. Indeed, the Supreme Court's decision in *Tennessee Valley Authority v. Hill* concluded that Congress had taken this balancing away from the courts.[33]

The Tennessee Valley Authority was close to completing the

[22] Toxic Substances Control Act, 15 U.S.C. §§ 2601–2962 (2006).

[23] 15 U.S.C. § 2603(a).

[24] *See, e.g.*, S. Rep. No. 94-698, at 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 4491, 4495 (explaining how the passage of TSCA would provide a means to discover adverse health and environmental effects prior to manufacturing certain substances).

[25] 15 U.S.C. § 2603(a).

[26] 15 U.S.C. § 2619.

[27] Federal Water Pollution Control Act § 505, 33 U.S.C. § 1365 (2006).

[28] Solid Waste Disposal Act § 7002, 42 U.S.C. § 6972 (2006).

[29] Clean Air Act § 304, 42 U.S.C. § 7604 (2006).

[30] Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 310, 42 U.S.C. § 9659 (2006).

[31] Endangered Species Act of 1973, 16 U.S.C. §§ 1531–44 (2006).

[32] *See, e.g.*, Tenn. Valley Auth. v. Hill, 437 U.S. 153, 159–60 (1978) (explaining the reasoning behind the passage of the Endangered Species Act).

[33] *Id.* at 194.

Tellico Dam project, and had already spent millions of dollars on construction of the dam,[34] when it was discovered that the dam would injure the habitat of an endangered species of fish called the snail darter.[35] Environmental groups sued "to enjoin completion of the dam and impoundment of the reservoir on the ground that those actions would violate the [Endangered Species] Act."[36] The defendant argued for a negligence-type test balancing the probability and gravity of the risk against the burdens, and further argued that the burden that would result from failure to complete the dam—the loss of tens of millions of dollars—outweighed the danger to the snail darter.[37] The Court, however, concluded that Congress had taken such calculations out of its hands by determining that the value of endangered species is incalculable.[38] The little fish could defeat the big dam (in the courts)[39] because Congress had altered the balancing of burdens required by a negligence analysis.

A fourth reason for regulation in an area where common law compensation could be used is where the risk is known, and the duty to take precautions is known, but a level of expertise may still be required to determine what specific precautions are needed to satisfy that duty. The common law would sort out this issue on a case-by-case basis and this could take many years. Legislation and regulations can create greater certainty more quickly regarding this duty element. The Occupational Safety and Health Administration ("OSHA") standards are a good example of this.[40] OSHA decided to specify the means to satisfy the duty rather than waiting for common law courts to sort that out on a case-by-case basis.[41] Most

[34] *Id.* at 158 n.5 (noting that at the time the injunction was entered, the TVA "had spent [approximately] $29 million on the project"). The district court found that if a permanent injunction were to be issued, the loss would be between $53 and $78 million. *Id.* at 166.

[35] The snail darter was a "previously unknown species of perch," and the Little Tennessee River appeared to be its only habitat. *Id.* at 158–59. The snail darter was formally designated as an endangered species on October 9, 1975, well after the dam project had begun. Amendment Listing the Snail Darter as an Endangered Species, 40 Fed. Reg. 47,505 (Oct. 9, 1975) (codified at 50 C.F.R. pt. 17, § 17.11).

[36] *Tenn. Valley Auth.*, 437 U.S. at 164.

[37] *Id.* at 169 ("TVA's position would require the District Court, sitting as a chancellor, to balance the worth of an endangered species against the value of an ongoing public works measure.").

[38] *Id.* at 184 ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.").

[39] Congress continued to fund the dam and it was "virtually completed," but was never opened. *Id.* at 157–58.

[40] *See generally* Occupational Safety and Health Standards, 29 C.F.R. § 1910 (2010).

[41] *See* 29 C.F.R. § 1910.2(f) (defining "standard" as actions that are "reasonably necessary or appropriate to provide safe or healthful employment or places of employment").

environmental statutes authorize promulgation of this type of regulation.

These four issues created a need for at least four types of regulatory schemes: those in which a statute or regulation defines the duty owed where the common law may not have imposed a duty; those in which a statute or regulation provides a remedy where the common law recognized a duty, but plaintiffs had difficulty proving their case; those in which a statute or regulation protects an interest not protected at common law; and those in which the common law recognized a duty, and the legislation defines the means for fulfilling that duty.

II. OIL POLLUTION ACT OF 1990

Before we examine which of the four reasons for regulation above may present a reason for regulation in the case of the *Deepwater Horizon* incident, we need to examine what Congress has already done in this area. Congress has added to or modified the common law liability system with regard to oil production facilities with the passage of the Oil Pollution Act of 1990 ("OPA").[42] The OPA provides that "each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, . . . is liable for the removal costs and damages."[43] The damages listed in the statute include damages to natural resources, real or personal property, subsistence use of natural resources, lost revenues, lost profits, and increased costs of public services.[44] A responsible party is defined broadly to include owners and operators of vessels, facilities, ports, and pipelines.[45] The OPA also includes a limit on liability—which varies by type of facility—but the limit for a deepwater port is $350,000,000.[46] This limitation does not apply to cases of gross negligence, willful misconduct, or violations of federal regulations.[47]

The OPA also requires a study of operational environmental risks and a rulemaking procedure in response to the study.[48] Among the regulations promulgated pursuant to the OPA were the Oil

[42] 33 U.S.C. §§ 2701–2762 (2006).
[43] 33 U.S.C. § 2702(a).
[44] 33 U.S.C. § 2702(b)(2).
[45] 33 U.S.C. § 2701(32).
[46] 33 U.S.C. § 2704(a)(4).
[47] 33 U.S.C. § 2704(c)(1).
[48] *See* 33 U.S.C. § 2761(c) (requiring the "establishment . . . of a program for conducting oil pollution research and development").

Pollution Prevention regulations published at 40 C.F.R. pt. 112, and a Spill Prevention Control and Countermeasure Rule (with the most recent update published on November 13, 2009).[49]

Among the changes to the common law compensation system made by the OPA are: the definition of a responsible party is broad enough to include investors who might not have had a common law duty; some of the types of damages that are listed, such as subsistence use of resources and lost revenues, were not generally recognized at common law; the requirement that safety regulations be promulgated reflects the problem we saw above regarding the need for expertise to define the duty element; and the limitation on liability reflects the decision by Congress to encourage drilling and exploration by relieving the responsible parties of some of the potential consequences of their actions. These changes could provide a better compensation system by: (1) adding responsible parties, such as owners, who do not operate. These people may have resources, should have the ability to influence the operators, and may not have had any duty at common law; (2) adding categories of damages that may not have been compensable at common law; and (3) better defining the duty element.

III. AMENDING THE OPA

Each of the proposed statutes that purports to create a "fair and efficient" compensation system would amend the OPA. The following discussion will examine whether any of the four reasons for a statutory response described above apply to the *Deepwater Horizon* incident. From a foreseeability perspective, a spill or release was reasonably foreseeable, as were the damages at issue. Thus, foreseeability of harm provides little reason to alter the common law system, unless there is a desire to better define the injuries that are deemed to be reasonably foreseeable.

Many of the damages claimed were clearly foreseeable. However, many of the damages are economic in nature, and common law negligence generally did not protect economic interests unless there was also physical harm to person or property.[50] The OPA dealt with

[49] 40 C.F.R. pt. 112 (2010); Requirement to Prepare and Implement a Spill Prevention, Control, and Countermeasure Plan, 74 Fed. Reg. 58,809 (Nov. 13, 2009) (codified at 40 C.F.R. pt. 112, § 112.3).

[50] *See, e.g.*, Louisiana v. M/V *Testbank*, 752 F.2d 1019, 1020 (5th Cir. 1985) (declining "to abandon physical damage to a proprietary interest as a pre-requisite to recovery for economic loss in cases of unintentional maritime tort"); Eileen Silverstein, *On Recovery in Tort for Pure Economic Loss*, 32 U. MICH. J.L. REFORM 403, 404 (1999) (examining "one of tort law's oldest

this by specifying that lost profits and lost revenues were compensable.[51]

Significant questions remain, however, regarding how far the chain of lost profits and revenues will be traced. If a fisherman could not fish, either because the boat could not go out into the spill or because the fish had been harmed, the fisherman probably has been harmed in a reasonably foreseeable manner. However, as the effects ripple through the economy and the damages become less direct, damages become more difficult to prove. For example, what about a restaurant that receives less business, in part because of the reduced number of tourists, and in part because unemployed fishermen have less money to spend in restaurants? Or, what about the real estate agent who claims to have lost sales due to the economic impact? These cases present interesting issues regarding where to draw the line. A statute to clarify these issues, or extend damages to additional parties, could present the opportunity for a more efficient means of determining whether such a claim should be compensated. However, none of the proposed statutes that were examined during the course of the writing of this article address that issue. Each would define the damages much the same way that the OPA defined the damages.

Does the *Deepwater Horizon* incident reflect a need to better define the duty owed? Revised safety regulations have already been promulgated.[52] However, it appears from the large settlements that have been reported that BP's duty was well-defined—without regard to whether the alleged breach was a breach of a regulatory duty, or a breach of the common law duty to act reasonably. If the duty was well-defined, then additional regulations specifying more detailed requirements may not be the best means of regulation.

Providing very detailed requirements regarding how to safely perform a task may create a new set of problems. It can prevent or hinder the development of new safety methods. It can also create an atmosphere where people are so focused on compliance that they forget to think about safety. I often advise clients that they have two duties that they should see as unrelated to each other. First, they have to obey the law; second, they have to make sure they do

doctrines: Unintentional conduct that causes physical harm to persons and property supports full compensation to the injured party, . . . but if the same conduct results in economic harm unaccompanied by physical injury, there is no recovery despite the magnitude of the loss").

[51] 33 U.S.C. § 2702(b)(2)(D), (E) (2006).

[52] *See* Requirement to Prepare and Implement a Spill Prevention, Control, and Countermeasure Plan, 74 Fed. Reg. at 58,809.

not take unreasonable risks. This second duty is often overlooked by those following regulations, and may have been overlooked here. Thus, while additional safety regulations may give some parties a greater incentive to comply, they do not always create greater safety.

Does the *Deepwater Horizon* reflect the existence of a protectable interest that may not have been recognized by the common law? Here is where the OPA plays a significant role. Congress recognized such an interest when it passed the OPA: it recognized a societal interest in promoting offshore drilling by protecting responsible parties from some of the consequences of their actions. The *Deepwater Horizon* incident may indicate a need to question that decision. Did Congress—by relieving responsible parties of the duty to fully compensate for harm they cause—reduce the incentive to reduce risk that would have existed at common law?

There has been discussion of lifting the cap on recoveries.[53] This could indicate a change in society's view of the value of these activities. It could indicate a need to make such entities pay for the damages they cause. A number of factors make lifting the cap at this time less likely. First, BP created a huge settlement fund that indicates the intent not to rely entirely on the cap.[54] Second, some think that raising the cap is unnecessary because plaintiffs may be able to prove "gross negligence," which is one of the statutory limitations on the cap.[55] And third, many believe that the country's energy needs still make such a limitation on liability an important tool to encourage exploration.[56]

Are there likely to be problems of proof that may require a statutory system? One could certainly argue that other disasters have not been dealt with efficiently by the courts. The *Exxon Valdez* spill litigation, which may have prompted passage of the

[53] *See e.g.*, Steve Hargreaves, *Cap on Oil Spill Damages under Fire*, CNNMONEY.COM (May 25, 2010), http://money.cnn.com/2010/05/25/news/economy/BP_liability/index.htm (citing the Obama Administration's support for lifting the cap).

[54] *See* Press Release, BP, BP Establishes $20 Billion Claims Fund for Deepwater Horizon Spill and Outlines Dividend Decisions (June 16, 2010), *available at* http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7062966.

[55] *See* Ben Rooney, *Anadarko Blasts BP for 'Reckless Actions*,*'* CNNMONEY.COM (June 18, 2010), http://money.cnn.com/2010/06/18/news/companies/BP_Anadarko/index.htm (discussing how BP's actions likely constituted gross negligence).

[56] Eliot Spitzer, *The Same Policy Mistake Caused Both the Wall Street Meltdown and the BP Spill*, SLATE (June 23, 2010), http://www.slate.com/id/2257955 (explaining the business community's argument that limits on liability are necessary for the encouragement of energy exploration).

OPA, took many years to resolve.[57] Nevertheless, there is no attempt in the current proposals to make dispute resolution more efficient. An administrative claims procedure could create greater efficiency, but where the results will be appealable to the courts, the results are likely to turn out more efficient for some, and less efficient for others.

IV. CONCLUSION

The *Deepwater Horizon* incident raises significant questions about whether the existing compensation scheme creates the appropriate safety incentives. The OPA added some duties not recognized by common law, mandated regulations to better define the duty, and relieved oil companies of some liabilities. Therefore, the OPA increased and reduced the safety incentives that existed at common law. The scope of the *Deepwater Horizon* damages requires a reexamination of the issues. However, unless the event is conceptually different from prior events (not just larger), or is an example of a systemic failure (not just a big garden variety accident), changes to the compensation system are not likely to create a safer environment. Additionally, if the event does represent a conceptually different type of event or evidence of a systemic problem, any Congressional response should be guided by understanding the specific conceptual difference or systemic problem so that the response can appropriately adjust the risks and burdens to create a system that is both fair and efficient.

[57] *In re Exxon Valdez*, 270 F.3d 1215, 1221 (9th Cir. 2001) (deciding punitive damage claims approximately twelve years after the incident).