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# The Discovery Rule: Fairness in Toxic Tort Statutes of Limitations

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# THE DISCOVERY RULE: FAIRNESS IN TOXIC TORT STATUTES OF LIMITATIONS

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## I. INTRODUCTION

There are almost 50,000 inactive or abandoned hazardous waste disposal sites in the United States. Of these, 1200 to 2000 are believed to present an immediate threat to the health of millions of Americans.<sup>1</sup> The hazardous waste crisis, which has gone largely unnoticed by the public, now threatens to be today's most pressing environmental problem. The Environmental Protection Agency (EPA) estimates that approximately 750,000 hazardous waste generators are responsible for almost sixty million metric tons of hazardous contaminants every year.<sup>2</sup> Until recently, this waste was routinely disposed of in the cheapest way possible with

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<sup>1</sup> *Hazardous and Toxic Waste Disposal: Joint Hearings Before the Subcomm. on Env't. Pollution and Resource Protection of the Senate Comm. on Env't and Public Works*, 96th Cong., 1st Sess. 37 (1979).

<sup>2</sup> 45 Fed. Reg. 33,102 (1980).

little or no regard for the environment. As a result of this practice, as much as "90% of the hazardous waste generated has been managed 'in a manner which potentially threatens human health and the environment.'"<sup>3</sup> In fact, the "National Cancer Institute . . . estimates that 60 to 90 percent of the cancers occurring in this country are a result of environmental contaminants."<sup>4</sup> Although hazardous wastes make up only a portion of our environmental contaminants, it should be conceded readily that the harm threatened by carcinogenic, mutagenic and teratogenic wastes is unacceptable.

The costs associated with the disposal of toxic waste can be classified in two ways. The first category is made up of environmental losses such as the contamination of rivers, lakes, and ground water with the resulting destruction of aquatic life, wildlife, and vegetation and includes expenses incurred in cleanup. The second category is comprised of losses sustained by individuals and includes both property damage and physical injury resulting from direct or indirect contact with hazardous wastes. Injured individuals have two options in their pursuit of compensation: statutory and common law. This Article argues that statutory recourse is not only inadequate but also often precludes common law means of redress. The first section addresses the shortcomings of third-party restitution under past and present legislation. The remaining sections outline the problems and inequities of statutes of limitations in the adjudication of hazardous waste torts.

## II. BACKGROUND

### A. *Pre-Superfund Legislation*

In 1965, congressional recognition of the hazardous waste crisis led to the passage of the Solid Waste Disposal Act.<sup>5</sup> Primary responsibility for dealing with the problem was vested in the states. The Resource Conservation and Recovery Act (RCRA),<sup>6</sup> adopted eleven years later, embodied a different strategy. This Act was designed to insure the prudent management of toxic waste disposal through a national system with authority given to the EPA to implement state programs that met the exacting cri-

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<sup>3</sup> Note, *Hazardous Waste: Third-Party Compensation for Contingencies Arising from Inactive and Abandoned Hazardous Waste Disposal Sites*, 33 S.C.L. REV. 543, 544 (1982)(quoting 45 Fed. Reg. 33,084 (1980)).

<sup>4</sup> S. REP. NO. 698, 94th Cong., 2d Sess. 4, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 4491, 4494.

<sup>5</sup> Pub. L. No. 89-272, 79 Stat. 997 (1965) (current version at 42 U.S.C. §§ 6901-6987 (1982)).

<sup>6</sup> Pub. L. No. 94-580, 90 Stat. 2795 (1976)(current version at 42 U.S.C. §§ 6901-6987 (1982)).

teria of the federal plan.<sup>7</sup> It supplied the impetus for an array of both state and federal regulatory packages that attempted to provide for safer handling of toxic wastes by both generator and transporter through rigorous performance standards. RCRA also established a "cradle-to-grave" manifest system that tracked toxics from the generator to the disposal site; imposed reporting and monitoring requirements on the waste managers; and regulated treatment, disposal, and transportation through a permit process.<sup>8</sup>

The regulatory program outlined by the RCRA has led to considerable progress in the management of toxic waste; however, because it was enacted before attention was focused on the enormous hazards posed by abandoned sites, such as Love Canal, the Act was directed only at currently-operating sites.<sup>9</sup> To deal in part with this apparent oversight, federal financial responsibility standards were recently promulgated for hazardous waste facilities.<sup>10</sup> These standards are intended to insure that funds will be available for proper closure of facilities that receive toxic waste and for backup monitoring and other postclosure measures for waste sites. The legislation also establishes a pool of funds for use during the operating life of a facility which provides compensation for those injured by its operation.<sup>11</sup> These provisions for recovery, however, only apply to active disposal facilities;<sup>12</sup> they fail to compensate those injured from inactive and abandoned sites.

### B. Superfund Legislation

In response to the inadequacy of the RCRA, Congress enacted the Comprehensive Environmental Response Compensation, and Liability Act of 1980 (CERCLA).<sup>13</sup> By creating a \$1.6 billion hazardous waste "Superfund" (financed by an excise tax on inorganic toxics, petrochemical products and crude oil),<sup>14</sup> the Act is intended to rectify past statutory failures.<sup>15</sup> The purpose of this program is twofold: first, to help offset the enormous cleanup costs incurred; and second, to pay for damages to the

<sup>7</sup> 40 C.F.R. § 256.01 (1984).

<sup>8</sup> *E.g.*, 42 U.S.C. §§ 6902, 6922, 6925 (1982); 40 C.F.R. §§ 264.1 - 265.430 (1984).

<sup>9</sup> 126 CONG. REC. H9159 (daily ed. Sept. 19, 1980)(remarks of Rep. Gore); Note, *supra* note 3, at 547.

<sup>10</sup> See 40 C.F.R. §§ 264.140 - .151, 265.140 - .150 (1984).

<sup>11</sup> *Id.* §§ 264.147, 265.147.

<sup>12</sup> See, *e.g.*, *id.* § 264.147(a) ("An owner or operator of a hazardous waste treatment . . . facility . . . must demonstrate financial responsibility for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from the operations of the facility or groups of facilities.").

<sup>13</sup> Pub. L. No. 96-510, 94 Stat. 2767 (current version at 42 U.S.C. §§ 9601-9657 (1982)).

<sup>14</sup> 42 U.S.C. § 9631 (1982).

<sup>15</sup> See Note, *Joint and Several Liability for Hazardous Waste Releases Under Superfund*, 68 VA. L. REV. 1157, 1159-60 (1982).

environment caused by leakage. Due to congressional recognition that activities involving hazardous wastes are abnormally dangerous, those found responsible for past abuses will be held strictly liable to the fund for any disbursements made.<sup>16</sup>

While CERCLA is the most progressive step taken to date in effecting legislative control over this potentially devastating problem, this Act, like all others before it, unfortunately fails in one crucial regard: it does not provide for third-party compensation. The fund is not available to compensate those whose injuries are attributable to abandoned or inactive sites.<sup>17</sup> Moreover, Congress has failed to pass an equitable statute of limitations and has not delineated causation principles for common law toxic torts. This leaves private claimants to pursue state court remedies where litigation costs, statutes of limitation, and the lack of adequate medical evidence often preclude or severely hamper recovery. An examination of the legislative history of this Act reveals that several proposed Superfund packages did provide substantial relief to third parties but, dissuaded by the level at which the fund would have had to be maintained, Congress reached the present compromise.<sup>18</sup>

### III. STATUTES OF LIMITATIONS

The most serious obstacle faced by toxic tort victims is the barring of their claims because of the running of the applicable statute of limitations. In addition to the fact that the effects of exposure to hazardous chemicals do not manifest themselves for as long as twenty years or more after exposure, many of the traditional justifications for statutes of limitation do not apply. For example, while the memories of parties involved and witnesses may have faded, many hazardous chemicals do not; thus, the evidence will still be available. Indeed, the essential evidence for recovery—the injury or disease itself—is often not evident for years following exposure. Requiring claims to be made before the damage element of recovery can be shown places society in the untenable position of encouraging speculative claims, foreclosing meritorious ones due to lack of evidence, or imposing liability on the basis of evidence that shows only a possibility of future injury.

The traditional tort statute of limitations begins to run at the time of injury.<sup>19</sup> While a minority of jurisdictions still adhere to this rule with respect to hazardous substances, the majority have adopted a version of the discovery rule.<sup>20</sup> The variations of the discovery rule range from hav-

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<sup>16</sup> 42 U.S.C. § 9607 (1982).

<sup>17</sup> *Id.* § 9611.

<sup>18</sup> See Note, *supra* note 3, at 549-50.

<sup>19</sup> See PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 165 (5th ed. 1984).

<sup>20</sup> Thirty-nine jurisdictions have adopted the discovery rule. Some have done this by statute. See ALA. CODE § 6-5-502 (Supp. 1984); CONN. GEN. STAT. ANN. § 52-584 (West Supp.

ing the cause of action accrue when the plaintiff knows or should have known that he or she has suffered disease or injury,<sup>21</sup> to when the injured party ascertains or should have been able to ascertain the causal connection between the injury and the earlier exposure.<sup>22</sup> The latter construction is the most equitable for toxic tort causes of action because it provides for the great difficulty that a victim incurs in discovering his or her injury, how it was caused, and who caused it.

Despite this strong trend, two recent developments threaten to cloud progress. The first development is the enactment of statutes of repose which provide a maximum period of liability running from either the date of manufacture or from the time a product leaves the manufacturer's possession or control with no tolling provisions.<sup>23</sup> However, the interests of chemical-manufacturer defendants need not be protected in this way, not only due to the seriousness of their acts, but also because the latency of diseases caused by exposure has long been known.<sup>24</sup> Thus the potential for injury is foreseeable at the time of a defendant's actions. Statutes of repose raise serious constitutional and equitable questions as well. The Florida Supreme Court, for example, in *Overland Construction Co. v. Sir-*

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1984); KAN. STAT. ANN. § 60-513(b) (1983); N.C. GEN. STAT. § 1-15 (1983); OHIO REV. CODE ANN. § 2305.10 (Page Supp. 1983); S.C. CODE ANN. 15-3-535 (Law Co-op Supp. 1983); VT. STAT. ANN. tit. 12, § 518(a) (1973). Other states have adopted the rule by judicial decision. See *Williams v. Borden, Inc.*, 637 F.2d 731 (10th Cir. 1980) (applying Oklahoma law); *Thrift v. Tenneco Chems., Inc.*, 381 F. Supp. 543 (N.D. Tex. 1974) (applying Texas law); *Austin v. Fulton*, 444 P.2d 536 (Alaska 1968); *Sato v. Van Denburgh*, 123 Ariz. 225, 599 P.2d 181 (1979); *Midwest Mut. Ins. Co. v. Arkansas Nat'l Co.*, 260 Ark. 352, 538 S.W.2d 577 (1976); *Warrington v. Charles Pfizer & Co.*, 274 Cal. App. 2d 564, 80 Cal. Rptr. 130 (1969); *Owens v. Brochner*, 172 Colo. 525, 474 P.2d 603 (1970); *Oakes v. Gilday*, 351 A.2d 85 (Del. Super. Ct. 1976); *Burns v. Bell*, 409 A.2d 614 (D.C. 1979); *City of Miami v. Brooks*, 70 So. 2d 306 (Fla. 1954); *Forgay v. Tucker*, 128 Ga. App. 497, 197 S.E.2d 492 (1973); *Yoshizaki v. Hilo Hosp.*, 50 Hawaii 150, 433 P.2d 220 (1967); *Withrell v. Weimer*, 77 Ill. App. 3d 582, 396 N.E.2d 268 (1979); *Louisville Trust Co. v. Johns-Manville Prods.*, 580 S.W.2d 497 (Ky. 1979); *Corsey v. State Dep't of Corrections*, 375 So. 2d 1319 (La. 1979); *Williams v. Ford Motor Co.*, 342 A.2d 712 (Me. 1975); *Harig v. Johns-Manville Prods.*, 284 Md. 70, 394 A.2d 299 (1978); *Cannon v. Sears, Roebuck & Co.*, 374 Mass. 739, 374 N.E.2d 582 (1978); *Connelly v. Paul Ruddy's Co.*, 388 Mich. 146, 200 N.W.2d 70 (1972); *Dalton v. Dow Chem. Co.*, 280 Minn. 147, 158 N.W.2d 580 (1968); *Johnson v. St. Patrick's Hosp.*, 148 Mont. 125, 417 P.2d 469 (1966); *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979); *Raymond v. Eli Lilly & Co.*, 177 N.H. 164, 371 A.2d 170 (1977); *Lopez v. Sawyer*, 62 N.J. 267, 300 A.2d 563 (1973); *Adams v. Oregon State Police*, 289 Or. 233, 611 P.2d 1153 (1980); *Schaffer v. Larzere*, 410 Pa. 402, 189 A.2d 267 (1963); *Teeters v. Currey*, 518 S.W.2d 512 (Tenn. 1974); *Ohler v. Tacoma Gen. Hosp.*, 92 Wash. 2d 507, 598 P.2d 1358 (1979); *Morgan v. Grace Hosp.*, 149 W. Va. 783, 144 S.E.2d 156 (1965); *Duke v. Housen*, 589 P.2d 334 (Wyo.), cert. denied, 444 U.S. 863 (1979).

<sup>21</sup> See, e.g., ALA. CODE § 6-5-502 (Supp. 1984).

<sup>22</sup> See, e.g., VT. STAT. ANN. tit. 12, § 518(a) (1973).

<sup>23</sup> *Birnbaum, Statute of Limitations in Environmental Suits: The Discovery Rule Approach*, 16 TRIAL, Apr. 1980, at 38, 62 n.32.

<sup>24</sup> See Note, *The Fairness and Constitutionality of Statutes of Limitations in Toxic Tort Suits*, 96 HARV. L. REV. 1683, 1685 (1983).

mons, found a state statute of repose unconstitutional as applied because it barred the plaintiff's cause of action before it had accrued.<sup>25</sup>

Second, in 1979 the Supreme Court in *United States v. Krubrick*<sup>26</sup> held that under the Federal Tort Claims Act (FTCA), a cause of action accrues when the plaintiff knows of an injury and its cause, not when the plaintiff discovers that the injury was negligently inflicted. The Court was principally concerned, however, with the legislative intent under the FTCA regarding prompt legal action against the government.<sup>27</sup> That context—the pursuit of legislative intent—may prevent the application of that decision to the issue that is being examined here. In sum, the growing number of jurisdictions adopting the discovery rule, the questionable constitutionality of statutes of repose, and the limited reach of the Supreme Court's decision in *Krubrick* afford a basis for some optimism about reform of statutes of limitations as applied to chemical exposure claims.

#### IV. THEORETICAL JUSTIFICATION FOR COMPENSATING TOXIC TORT VICTIMS

In considering how our system of justice should treat injury to a member of society, two theories must be examined. First, the social utility of the action responsible for the harm must be assessed in order to determine its impact on individual rights. John Rawls,<sup>28</sup> as restated by Frank Michelman,<sup>29</sup> posits a mode of analysis that is particularly applicable in this context.<sup>30</sup> Second, capitalist economic theory also supplies a market justification for judicial action in this area.

##### A. *A Theory of Justice*

Rawl's *A Theory of Justice* supports a change from the accrual rule to the discovery rule by those jurisdictions that have not yet adopted it. In order to be considered just, a legal doctrine such as a statute of limitations (whether characterized by accrual or discovery) must be

consistent with principles which could command the assent of every member of a group of rational, self-regarding persons, convening under circumstances of mutually acknowledged equality and interdependence, to hammer out principles by which they will judge complaints against whatever rules and institutions may come to characterize their association.<sup>31</sup>

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<sup>25</sup> 369 So. 2d 572, 575 (Fla. 1979).

<sup>26</sup> 444 U.S. 111, 122-25 (1979).

<sup>27</sup> See, e.g., *id.* at 123.

<sup>28</sup> See J. RAWLS, *A THEORY OF JUSTICE* (1971).

<sup>29</sup> See Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1219-24 (1967).

<sup>30</sup> See Note, *supra* note 24, at 1686-90.

<sup>31</sup> Michelman, *supra* note 29, at 1219.

In Rawlsian terms, this hypothetical group of rational, self-regarding persons is in an "original position" or "behind a veil of ignorance."<sup>32</sup> Such persons do not know what role or what socioeconomic position they eventually will occupy in society, nor which sex, nor even which decade or century will be theirs. By way of this device, Rawls assures us, the rules that are created will be fair and just for everyone. Since each person in the original position eventually will be living in a society governed by these rules, it will be in his or her own self-interest to make certain that the rules operate to the benefit of those who are most disadvantaged by inevitable socioeconomic inequalities.<sup>33</sup>

The fairest outcome may be one in which toxic tort actions were never limited by a statute; but that approach fails to consider that statutes of limitations can serve legitimate judicial ends. Consequently, this Article advances an argument in favor of the discovery rule, as opposed to the accrual rule, and demonstrates that it fulfills the demands of Rawlsian analysis while providing the defendant, as well as the plaintiff, with a reasonable measure of protection. This inquiry begins with Professor Michelman's view that Rawls is making the following demands on legal doctrines such as statutes of limitations.

According to Michelman's interpretation, efficiency-motivated principles of justice, such as utilitarian or cost/benefit principles, that unequally affect individuals and groups by distributing losses or costs upon them, can never be permitted unless the inequality is fairly compensated, perhaps by way of a transfer payment or comparable means.<sup>34</sup> In addition, inequalities will not violate principles of justice if these inequalities are subjectively compensated or equalized.<sup>35</sup> For example, if a plaintiff, losing because of the discovery rule and not otherwise materially compensated, ought to appreciate that such a rule, consistently applied, reduces long term risk of loss to people like him or her, then the failure to compensate is still fair.

Regarding the first of these criteria—a prohibition against treating unequally a few individuals or groups in order for efficiency-oriented measures to increase the general material well-being of society—little need be said. In the absence of some compensatory measure, such as payment from a "Superfund" or at least a meaningful opportunity to bring a civil lawsuit, no self-interested person in the original position would consent to such treatment.<sup>36</sup> While benefits to others in return for the self-sacrifice of a few might motivate altruistic persons, Rawls finds that self-interest comes much closer than altruism to characterizing human nature. Hence,

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<sup>32</sup> J. RAWLS, *supra* note 28, at 19.

<sup>33</sup> *Id.* at 136-38.

<sup>34</sup> Michelman, *supra* note 29, at 1221.

<sup>35</sup> *Id.* at 1220.

<sup>36</sup> Note, *supra* note 24, at 1687.



he builds his edifice upon the perception of self-interest, certainly a more widely-recognized and predictable motivation. Beyond that, Rawls utilized the concept of reciprocity implicit in the Kantian proposition that rule makers should willingly invite the consequences of their rules upon themselves.<sup>37</sup> Knowing that they would some day be subject to the rules that were devised from within the original position, it simply does not follow that self-interested persons would willingly invite upon themselves the consequence of being deprived of legal redress even before they discovered that they had suffered a potentially compensable loss.

The second of Professor Michelman's observations—that the Rawlsian concept of justice will be violated unless the victim (a person deprived of the opportunity to bring a civil lawsuit and one who is not otherwise materially compensated) can identify with the proposition that this hardship reduces the long term risk to people like him or her—requires more elaborate justification. In fact, Michelman's interpretation itself is arguable. It proceeds on the assumption that a self-interested person deprived of material recompense or advantage ought not experience this as a loss if this deprivation has the effect over time of enhancing the well-being of other similarly-situated individuals by reducing the risk of loss to them. Michelman's reading qualifies the self-interest of Rawls' rule makers with something akin to altruism. So qualified, one can only speculate upon how far that line of thought can be extended until the value of Rawls' presupposition; i.e., self-interest, is dissipated to the point of being inoperative.

Given this critique and the admonition that Michelman's interpretation should be accorded no more than limited credence, it is nevertheless apparent that a statute of limitations that deprives a potential claimant of a cause of action even before the injury is discovered is not the type of rule that can subjectively compensate the victim by instilling him or her with confidence that risks will be reduced for others. In fact, it appears that the contrary would be true. What would motivate a firm in a competitive industry to install toxic control measures voluntarily and finance them with savings it would otherwise accumulate at the expense of victims? If the law does not uniformly compel all firms within that industry to contribute to a compensatory fund or to be accountable in court for toxic torts, voluntary or altruistic control measures would only increase a firm's costs relative to its rivals and make it less competitive within the industry. This scenario, which very closely parallels observed business behavior, hardly suggests the likelihood of reduced risk to others. Thus, a statute of limitations that precludes the chance of recovery even prior to the time injury is discovered is contrary to even Michelman's lenient reading of Rawls.

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<sup>37</sup> See KANT, *ETHICAL PHILOSOPHY* 37 (J. Ellington trans. 1983).

### B. Capitalist Economic Theory

Capitalist market economics also compels different legal treatment of toxic torts. Currently, our system of justice does not penalize toxic substances polluters until a victim litigates; however, victims rarely reach this point because of the high cost of litigation.<sup>38</sup> According to Jeffrey Trauberman, Director of the Toxic Substances Program of the Environmental Law Institute, "the existing legal system fails to allocate the costs of toxic substances injuries in a manner consistent with the goals of efficiency and equity."<sup>39</sup> The polluter profits disproportionately at the expense of others, which leads to economic externalities.<sup>40</sup> At this point, the legal system must decrease transaction costs otherwise imposed upon the injured victim, if it expects to transfer efficiently or allocate the costs of toxic substances pollution.<sup>41</sup> If the full societal cost of manufacture is not incorporated into the price of the waste producing product, these products will be artificially inexpensive and will have an unwarranted advantage in the marketplace.<sup>42</sup> In order to decrease transaction costs, not only must the toxic tort victim's cause of action accrue at the time of discovery so as to allow a greater period during which compensation may be obtained, but the legal requirement that the plaintiff must prove causation as well as defendant's fault also must be altered.<sup>43</sup> With such procedural and substantive improvements, polluters will be called more often to pay for the damages they have caused. However, the extended accrual period for toxic torts will still leave some externalities due to defunct or judgment-proof polluters. Additional measures are required to compensate victims with no present realistic legal recourse if the full cost of toxic chemical production and use is to be rationally allocated.

### V. CURRENT LEGISLATION

Although legislatures are not stampeding to pass innovative laws, several states recently have enacted legislation designed to remedy the legal difficulties faced by toxic tort victims. Among the solutions are the use of a rebuttable presumption of liability, creation of additional statutory causes of action, and establishment of compensation funds. Most at-

<sup>38</sup> Trauberman, *Statutory Reform of "Toxic Torts": Relieving Legal, Scientific, and Economic Burdens on the Chemical Victim*, 7 HARV. ENVTL. L. REV. 177, 184-85 (1983).

<sup>39</sup> *Id.* at 215.

<sup>40</sup> According to several authors, an "externality is present when, in competitive equilibrium, the . . . conditions of optimal resource allocation are violated." W. BAUMOL & W. OATES, *THE THEORY OF ENVIRONMENTAL POLICY* 17 (1975).

<sup>41</sup> Trauberman, *supra* note 38, at 185-87.

<sup>42</sup> Ginsberg & Weiss, *Common Law Liability for Toxic Torts: A Phantom Remedy*, 9 HOFSTRA L. REV. 859, 929 (1981).

<sup>43</sup> For an exhaustive discussion on decreasing transaction costs associated with toxic wastes, see Trauberman, *supra* note 38, at 207-15.

tempts to deal with the problem have been directed at hazardous wastes and not to the larger area of toxic substances exposure.

In Pennsylvania, the plaintiff's causation burden is eased by the use of a rebuttable presumption. The Pennsylvania law specifies that anyone storing, treating, or disposing of hazardous waste is liable for all damages incurred within 2500 feet of the area where the hazardous waste activities have been carried out.<sup>44</sup> A plaintiff need not prove "fault, negligence, or causation."<sup>45</sup> The defendant can overcome the presumption only by clear and convincing evidence that he or she did not contribute to the damage, contamination, or pollution.<sup>46</sup>

Oregon and Alaska also have statutory causes of action against hazardous waste polluters. Under the Oregon law, the plaintiff must show that the person in control of the waste acted unreasonably in handling it or violated a law;<sup>47</sup> in effect, the victim must establish a cause of action based upon negligence.<sup>48</sup> The Alaska statute holds a person in control of the waste strictly liable for resulting injuries.<sup>49</sup> The remedy is incomplete, however, because liability extends only to those *in control* of the waste at the time of discharge. This precludes recovery if the polluter is unknown or insolvent.<sup>50</sup>

Both South Carolina and New Jersey have created funds for toxic tort victims. The South Carolina fund<sup>51</sup> compensates victims harmed by abandoned sites upon a showing that a good faith effort was made to secure and enforce a valid judgment against the responsible party.<sup>52</sup> Not only will the requirement of a preexisting abandoned site probably preclude recovery where the polluter is identifiable but insolvent, but the fund would also be inaccessible to victims who cannot afford huge litigation costs in order to avail themselves of the fund. Even in those instances where default lowers litigation costs, such a response is not predictable, and such a suit does little efficiently to allocate societal costs. While the New Jersey legislature established its fund to compensate for oil spill discharges,<sup>53</sup> "its coverage may be broad enough to include at least some

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<sup>44</sup> PA. STAT. ANN. tit. 35, § 6018.611 (Purdon Supp. 1984).

<sup>45</sup> *Id.* The Supreme Court endorsed the use of a similar presumption contained in the Federal Black Lung Benefits Act. See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 27-28 (1976) (presumption that a coal miner with a certain number of years in the mines who suffers from pneumoconiosis contracted the disease from employment was constitutionally valid). See also Bartlett, *The Legal Development of a Viable Remedy for Toxic Pollution Victims*, 10 BARRISTER 41, 43 (1983).

<sup>46</sup> PA. STAT. ANN. tit. 35, § 6018.611 (Purdon Supp. 1984).

<sup>47</sup> OR. REV. STAT. § 459.685 (1983).

<sup>48</sup> See Note, *supra* note 3, at 550.

<sup>49</sup> ALASKA STAT. § 46.03.822 (1984).

<sup>50</sup> See Note, *supra* note 3, at 551.

<sup>51</sup> S.C. CODE ANN. § 44-56-160 (Law Co-op Supp. 1983).

<sup>52</sup> See Note, *supra* note 3, at 551 & n.42.

<sup>53</sup> N.J. STAT. ANN. §§ 58:10-23.11a to 11z (West 1982).

hazardous waste injuries.”<sup>54</sup> The fund which can reimburse for medical costs and loss of wages or salaries is financed by a tax on petroleum and petroleum products.<sup>55</sup> Since there is no credit or reduction to firms for payments into other funds whose purpose is to compensate claims which may be compensable under the Act,<sup>56</sup> oil companies in New Jersey have challenged the financing of the fund. The legislative intent of CERCLA, however, seems to allow funds which do not duplicate Superfund provisions.<sup>57</sup> In *Lesniak v. United States*,<sup>58</sup> the federal government stipulated that section 114(c) of CERCLA did not preclude New Jersey’s collection and expenditure of monies to compensate damage claims for which the Superfund did not provide reimbursement.<sup>59</sup> In *Exxon Corp. v. Hunt*,<sup>60</sup> the New Jersey Tax Court upheld the state taxation plan which finances the fund.

The California legislature recently created the Hazardous Substance Compensation Account.<sup>61</sup> The Account compensates individuals for medical and income-related costs incurred as a result of exposure to the release of a hazardous substance.<sup>62</sup> The claimant must prove that the release of the hazardous substance proximately caused the loss and one of the following: (a) that the source of the release or the party liable for it are unknown and indeterminable with reasonable diligence,<sup>63</sup> or (b) that the loss is not compensable because there is no liable party or the judgment received could not be satisfied.<sup>64</sup> Victims may present claims from January 1, 1982 or within three years of discovering injury, whichever date is later.<sup>65</sup>

<sup>54</sup> Note, *supra* note 3, at 552.

<sup>55</sup> N.J. STAT. ANN. §§ 58:10-23.11g to .11h (West 1982).

<sup>56</sup> *E.g.*, 42 U.S.C. § 9631 (1982).

<sup>57</sup> See U.S.C. § 9614(c)(1982); SENATE COMM. ON ENV’T L AND PUB. WORKS, 97TH CONG., 2D SESS., INJURIES AND DAMAGES FROM HAZARDOUS WASTES—ANALYSIS AND IMPROVEMENT OF LEGAL REMEDIES, PART 1: THE REPORT AND COMMENTS 83 (Comm. Print 1982) [hereinafter cited as INJURIES AND DAMAGES].

<sup>58</sup> 17 Env’t Rep. Cas. (BNA) 1455 (D.N.J. 1982).

<sup>59</sup> *Id.* at 1456. Section 114(c), as codified in 42 U.S.C. § 9614(c)(1982), states:

(c) Contributions to other funds; limitations, etc.

Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter. Nothing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to finance . . . preparations for the response to a release of hazardous substances which affects such State.

<sup>60</sup> 4 N.J. Tax 294 (1982), *aff’d*, 190 N.J. Super. 131, 462 A.2d 193 (1983).

<sup>61</sup> See CAL. HEALTH & SAFETY CODE §§ 25370-25395 (West 1984).

<sup>62</sup> *Id.* § 25375(a)-(b).

<sup>63</sup> *Id.* § 25372(a).

<sup>64</sup> *Id.* § 25372(b).

<sup>65</sup> *Id.* § 25376.

The newest and most comprehensive legislation for toxic tort victims is Minnesota's Environmental Response and Liability Act<sup>66</sup> which applies to hazardous substances released after July 1, 1983.<sup>67</sup> Owners or operators of waste treatment facilities or dumps and those who knew or *reasonably should have known* that the waste accepted for transport to a disposal or treatment facility contained a hazardous substance, pollutant, or contaminant and selected the facility or illegally disposed of the waste,<sup>68</sup> are held strictly liable, jointly and severally for, inter alia, all damages resulting from death, personal injury, or disease.<sup>69</sup> The plaintiff need not prove negligence at the time of exposure but must establish that the defendant is responsible for the release, that the plaintiff was exposed to the hazardous substance, that the release could reasonably have resulted in the plaintiff's exposure, and that the exposure caused or significantly contributed to death, injury, or disease.<sup>70</sup> Evidence to a reasonable medical certainty is not required in order to submit the issue of causation to the trier of fact.<sup>71</sup> Further, the Act preserves a plaintiff's common law remedies<sup>72</sup> and implements the discovery rule under its statute of limitations.<sup>73</sup> Despite the fact that the governor previously had vetoed a similar bill, claiming that it would destabilize the insurance market and discourage businesses from settling in Minnesota,<sup>74</sup> a recent survey of businesses indicates that during the first nine months of the Act's enforcement, no companies have left or decided against expanding in Minnesota due to the law.<sup>75</sup> In fact, several companies have voluntarily cleaned up sites or have announced plans to do so.<sup>76</sup>

## VI. PROPOSALS

After an exhaustive study of existing statutory and common law remedies for compensating toxic tort victims, the CERCLA study group concluded that:

Available remedies are inadequate in view of the substantial number of claims that may arise, and the factual and legal complexities that will be involved in their litigation . . . [E]xisting legal remedies and actions . . . [are] inadequate . . . to deal with the possibility of mass torts, or multiple exposures, and with

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<sup>66</sup> MINN STAT. ANN. § 115B.01-.24 (West Supp. 1984).

<sup>67</sup> *Id.* § 115B.15.

<sup>68</sup> *Id.* § 115B.03.

<sup>69</sup> *Id.* § 115B.05.

<sup>70</sup> *Id.* § 115B.07.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* § 115B.12.

<sup>73</sup> *Id.* § 115B.11.

<sup>74</sup> INJURIES AND DAMAGES, *supra* note 57, at 67-68.

<sup>75</sup> Broadcast on National Public Radio's Morning Edition (Apr. 2, 1984).

<sup>76</sup> *Id.*

claims by hundreds of victims . . . .<sup>77</sup>

Many procedural and substantive changes in existing remedies are necessary to eliminate the legal impediments which preclude or limit recovery by toxic tort victims. State legislatures must adopt the discovery rule for the running of statutes of limitations, causation burdens must be reduced, state procedural rules must specify that defendants are strictly liable jointly and severally, allow apportionment of damages, and evidentiary rules must be expanded.

New approaches for compensating victims must be devised. Suggested, but not yet widely tested, are requirements that hazardous substance generators and compensation funds obtain bonds or insurance to secure the availability of funds in the event of release. Such requirements would help compensate those victims who later obtain a judgment against an insolvent defendant. However, there are difficulties involved with this approach. How one should determine the amount of the bond or insurance coverage and for how long the bond or coverage must be good are as yet unanswered. Additionally, as one commentator pointed out: "[I]nsurance also might cause the industry to regard the premium as a substitute for careful operations."<sup>78</sup>

Many commentators believe that the existence of some type of compensation fund is essential to equitable, make-whole treatment of toxic tort victims.<sup>79</sup> Such funds hold out the dual promise of lower transaction costs than those incurred by litigation and compensation regardless of the economic status of the polluter while still shifting the burden of bearing toxic waste industry costs to those responsible or the class which benefits from the economic activities that generate the waste. Most persons conceptualize a fund for compensating losses linked to exposure to toxic substances that is based on sound economic as well as ethical principles.<sup>80</sup> Potential claimants would include victims physically or economically unable to bear the burdens of extensive litigation.<sup>81</sup> Legislatures could finance such a fund in numerous ways, but all involve contributions from the generators and disposers themselves. The rules governing such a fund should obviate the need for a claimant's showing of causation sufficient for the imposition of a judgment and should provide compensation for losses not covered by CERCLA or other state funds. The better reasoned approach would not limit the amount recoverable from such a fund since

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<sup>77</sup> INJURIES AND DAMAGES, *supra* note 57, at 193.

<sup>78</sup> Milhollin, *Long-Term Liability for Environmental Harm*, 41 U. PITT. L. REV. 1, 16 (1979).

<sup>79</sup> See, e.g., INJURIES AND DAMAGES, *supra* note 57, at 194-95; Ginsberg & Weiss, *supra* note 42, at 929-40; Milhollin, *supra* note 78, at 16-26; Trauberman, *supra* note 38, at 237; Note, *Hazardous Waste Pollution: The Need for a Different Statutory Approach*, 12 ENV'T'L L. 443 (1982).

<sup>80</sup> See, e.g., Ginsberg & Weiss, *supra* note 42, at 929.

<sup>81</sup> See, e.g., Note, *supra* note 3, at 575-76.

it is impossible to forecast the amount of damage toxic exposure will cause. However, damages for non-physical or non-pecuniary injuries such as pain and suffering should be left to private litigation or limited in some manner to protect the fund's ability to compensate more direct societal injuries. In order to maintain an adequate level of money, the fund itself must be subrogated to the rights that a claimant would have had against responsible parties.<sup>82</sup> Other methods of funding should also be considered particularly if the fund is to be available for compensation of claims against insolvent polluters. In addition to direct taxes on the industry, dedication of fines for violation of toxic waste statutes would be in keeping with the attempt to allocate societal costs rationally.

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<sup>82</sup> Trauberman, *supra* note 38, at 216, 279.