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Stephen E. Roady

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REMEDIES IN ADMIRALTY FOR OIL POLLUTION

STEPHEN E. ROADY*

I. INTRODUCTION

During the closing days of 1976 and the first week of 1977, seven accidents occurred involving tankers transporting oil to United States ports.¹ Two of these incidents resulted in spills in close proximity to shore,² and one, the grounding of the *Argo Merchant* off the southeastern coast of Nantucket, Massachusetts, produced a massive 7,600,000 gallon oil spill that may do significant damage to the fertile Georges Fishing Bank.³

In the wake of such maritime disasters, owners of shoreline property may seek to recover damages for tanker oil pollution. This article will explore the admiralty remedies available to such owners residing in states which lack the statutory protection afforded Floridians by the Pollutant Spill Prevention and Control Act.⁴

II. THE PROBLEM

While recent events graphically illustrate the threat to shoreline

* Associate, Duncan, Brown, Weinberg & Palmer, Washington, D.C. B.A., Davidson College, 1971; J.D., Duke University, 1976.

1. In order of occurrence the accidents were:

Dec. 15—The . . . *Argo Merchant* ran aground 27 miles southeast of Nantucket Island [Mass.] and broke up six days later, spilling 7.6 million gallons of oil into the Atlantic.

Dec. 17—The . . . *Sansinena* exploded in Los Angeles Harbor, leaving nine dead, and 50 injured.

Dec. 24—The . . . *Oswego Peace* spilled 2,000 gallons of oil in the Thames River near Groton, Conn.

Dec. 27—The . . . Olympic Games ran aground in the Delaware River near Philadelphia, spilling 133,000 gallons of oil and [affecting] the shorelines of three states.

. . . .

Dec. 29—The . . . *Daphne* ran aground in Guauanilla Bay, Puerto Rico, but spilled no oil.

. . . .

Jan. 4—The . . . *Universe Leader* ran aground in the Delaware River and was refloated [one day later] with no spill reported.

Jan. 5—The . . . *Austin* spilled 2,100 gallons of oil into San Francisco Bay while loading at Martinez, Calif.

123 CONG. REC. S421 (daily ed. Jan. 11, 1977) (remarks of Sen. Kennedy quoting from Wash. Post, Jan. 6, 1977).

2. 123 CONG. REC., *supra* note 1, with specific reference to the spills occurring on Dec. 24 and Dec. 27.

3. 123 CONG. REC., *supra* note 1, with specific reference to the spill occurring on Dec. 15.

4. FLA. STAT. ch. 376 (1975).

property owners posed by oil tanker transportation, these events do not begin to reveal the true dimensions of the problem. The United States Coast Guard estimates that there were approximately 1,543 spills from tank ships and barges into the waters of the United States in 1973, totalling 6,066,313 gallons of released oil.⁵ For the year 1975, Coast Guard and Environmental Protection Agency files contain reports of approximately 12,000 oil spills totaling nearly 22,000,000 gallons of released oil; "[t]wenty of these spills accounted for [sixteen] million gallons of spillage."⁶ In the seven years prior to December 1976, major spills had occurred off the coasts of Maine,⁷ California,⁸ New York,⁹ and Connecticut,¹⁰ as well as Florida.¹¹

Yet accidental spills account for only a small proportion of the total amount of oil that annually enters the oceans. The National Academy of Sciences asserts that while approximately 142,000,000 gallons of crude oil is spilled each year as a result of tanker accidents, more than 710,000,000 gallons are discharged annually as a result of "routine" deballasting and cleaning operations.¹² Residents of the Florida Keys felt the effects of just such a routine operation in July 1975 after the tanker *Garbis* flushed over 40,000 gallons of oil and cleaning solution into the Florida Straits. When the resulting slick washed ashore, over forty miles of coastline were affected, necessitating a two-month cleanup operation which cost nearly \$400,000.¹³

The effects of an oil spill can be both economically debilitating and environmentally disastrous. The government of Bermuda reportedly spends \$100,000 a year sifting the sands of its public beaches for tar balls, the result of frequent tanker flushing practices.¹⁴ And although one study commissioned by the American Petroleum Institute concluded that the life cycles of certain marine life remain unaffected by

5. U.S. DEPT OF JUSTICE, 94TH CONG., 1ST SESS., METHODS AND PROCEDURES FOR IMPLEMENTING A UNIFORM LAW PROVIDING LIABILITY FOR CLEAN-UP COSTS AND DAMAGES CAUSED BY OIL SPILLS FROM OCEAN RELATED SOURCES 12 (Comm. Print 1975) [hereinafter DEPT OF JUSTICE REPORT].

6. 123 CONG. REC. S1579 (daily ed. Jan. 28, 1977) (remarks of Sen. Stafford quoting from Wash. Post, Oct. 25, 1976).

7. See *Burgess v. M/V Tamano*, 382 F. Supp. 351 (S.D. Me. 1974).

8. See *Oppen v. Aetna Ins. Co.*, 485 F.2d 252 (9th Cir. 1973).

9. See Comment, *The Import-Export Clause and the Control of Oil Pollution: Regulatory Fees Imposed Pursuant to the Police Power*, 54 B.U. L. REV. 610, 610 n.1 (1974).

10. See Comment, *Admiralty Remedies for Vessel Oil Pollution of Navigable Waters*, 7 TEX. INT'L L.J. 121 (1971) [hereinafter *Admiralty Remedies*].

11. *Id.* at 121 n.3.

12. 123 CONG. REC. E193 (daily ed. Jan. 17, 1977) (remarks of Rep. Lent quoting from NEWSDAY, Jan. 10, 1977).

13. N.Y. Times, Nov. 8, 1975, at 1, col. 8.

14. 123 CONG. REC., *supra* note 6, at S1580.

the celebrated Santa Barbara Channel oil platform blowout of 1969,¹⁵ a report by the Woods Hole Oceanographic Institution on the effects of a spill that same year at the west end of Buzzards Bay, Massachusetts, showed that within one week the marine population of a nearby harbor had fallen from 200,000 to 2 animals per square meter.¹⁶ A report prepared by the United States Department of Justice for the Senate Committee on Commerce states:

[T]he organisms potentially affected by an oil spill are closely inter-related, especially in the estuaries, and . . . an impact on any species or groups within this system will affect the entire system. The resulting impact on the system may disrupt it for several years or in the case of loss of physical habitat may be permanent.¹⁷

III. THE FEDERAL RESPONSE

The federal government has not provided a complete remedy for private beach property owners who suffer damage from oil spills. The Deepwater Port Act of 1974¹⁸ and the Trans-Alaska Pipeline Authorization Act¹⁹ hold the owners and operators of vessels which spill oil liable for any resulting damage. However, the provisions of the Trans-Alaska Pipeline Act apply to oil which has passed through the Trans-Alaska pipeline,²⁰ and the Deepwater Port Act only covers vessels which have received oil at a "deepwater port."²¹

Two federal statutes currently authorize the United States government to institute actions against oil polluters. Section 13 of the Rivers and Harbors Appropriation Act of 1899²² has been uniformly interpreted to allow the government to collect fines²³ for oil pollution,²⁴ while Section 311 of the Federal Water Pollution Control Act Amendments of 1972²⁵ expressly states that the owner or operator of any vessel responsible for oil pollution shall be liable to the United States for civil penalties and costs of removal.²⁶

15. *Id.*

16. *Id.*

17. DEP'T OF JUSTICE REPORT, *supra* note 5, at 9.

18. 33 U.S.C. §§ 1501-1524; 43 U.S.C. § 1333 (Supp. V 1975).

19. 43 U.S.C. §§ 1651-1655 (Supp. V 1975).

20. *Id.* at §§ 1651, 1653(c).

21. 33 U.S.C. § 1501 (Supp. V 1975).

22. 33 U.S.C. § 407 (1970).

23. 33 U.S.C. § 411 (1970).

24. *See, e.g.*, United States v. White Fuel Corp., 498 F.2d 619 (1st Cir. 1974).

25. 33 U.S.C. § 1321 (Supp. V 1975).

26. *Id.* at (b), (f). United States v. Independent Bulk Transp., Inc., 394 F. Supp. 1319 (S.D.N.Y. 1975); United States v. W.B. Enterprises, Inc., 378 F. Supp. 420 (S.D.N.Y. 1974); *see* United States v. Le Beouf Bros. Towing Co., 537 F.2d 149 (5th Cir. 1976). *See also* Gulf Refining Co. v. United States, 69 F.R.D. 300 (E.D. Tex. 1976). In one particularly

The most serious failings of these acts are that they do not extend jurisdiction over oil pollution beyond the waters of the United States or its contiguous zone,²⁷ nor have they been interpreted as grants of private causes of action for oil pollution.²⁸ In *Burgess v. M/V Tamano*,²⁹ it was held that neither the Rivers and Harbors Appropriation Act of 1899 nor the Water Quality Improvement Act of 1970³⁰—the direct predecessor of the Federal Water Pollution Control Act Amendments of 1972—would support such a claim when private parties seek to recover damages against the federal government for allegedly negligent cleanup operations subsequent to a spill.³¹ And in *Parsell v. Shell Oil Co.*,³² it was specifically determined that section 13 of the Rivers and Harbors Appropriation Act “does not create a private

interesting series of cases, the government sought first to force large operators to cease pollution on a public nuisance theory, *United States v. Ira S. Bushney & Sons, Inc.*, 346 F. Supp. 145 (D. Vt. 1972), then later obtained an injunction against such pollution. *United States v. Ira S. Bushney & Sons, Inc.*, 363 F. Supp. 110 (D. Vt. 1973), *aff'd mem.*, 487 F.2d 1393 (2d Cir. 1973).

27. 33 U.S.C. § 407 (1970); 33 U.S.C. § 1321(b)(1) (Supp. V 1975); 33 U.S.C. § 1362(7), (9) (Supp. V 1975).

United States Senators Edmund D. Muskie and William D. Hathaway of Maine have introduced legislation designed to extend United States jurisdiction over oil pollution outward to a point 200 miles from shore. 7 ENVIR. REP. (BNA) 1463 (1977). The legislation is in two parts: one bill would amend § 311 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1321 (Supp. V 1975); the other would amend the Ports and Waterways Safety Act of 1972, 33 U.S.C. §§ 1221-1227 (Supp. V 1975). These bills have been under consideration by two Senate Committees: Environment and Public Works; and Commerce, Science, and Transportation.

Other recent Congressional developments in the aftermath of the *Argo Merchant* and its companion mishaps include the introduction of S. 182 by Sen. Edward Kennedy of Massachusetts to amend the Ports and Waterways Safety Act of 1972. S. 182, 95th Cong., 1st Sess. (1977). This bill would provide for the establishment of a traffic control system for oil tankers (§ 3(b)(A)), as well as mandatory navigational equipment and construction standards (§ 3(b)(B)-(F)), with existing tankers being retrofitted over a five year period (§ 3(b)(G)). In addition, S. 182 prohibits discharges of oil “into the aquatic and terrestrial environment,” which is defined to include the navigable waters of the United States, its adjacent shorelines, the waters of the contiguous zone, the waters within the safety zone around a deepwater port, and the waters superadjacent to the Continental Shelf (§§ 503-04). Hearings were held on the bill in the Senate Committee on Commerce, Science, and Transportation from June 9 through June 20, 1977. The hearings were adjourned subject to the call of the chairman.

28. Some writers have suggested that private citizens should urge the courts to derive such rights of action from the statutes. *See, e.g., Comment, Oil Pollution of the Sea*, 10 HARV. INT'L L.J. 316, 349 (1969) [hereinafter *Oil Pollution of the Sea*].

29. 373 F. Supp. 839 (S.D. Me. 1974).

30. 33 U.S.C. §§ 1321-1361 (Supp. V 1975).

31. 373 F. Supp. at 844, 845. *See M/V Tamano Actions*, 1975 Am. Mar. Cases 2174 (D. Me. 1975). *But cf. Sierra Club v. Morton*, 400 F. Supp. 610, 624 (N.D. Cal. 1975), wherein the court noted that certain private rights of action are “necessary to effectuate the purposes intended to be served by the [Rivers and Harbors Act of 1899]”

32. 421 F. Supp. 1275 (D. Conn. 1976).

cause of action under the laws of the United States so as to provide an independent basis for federal jurisdiction outside of admiralty."³³

IV. THE STATE RESPONSE

The Supreme Court, in *Askew v. American Waterways Operators, Inc.*,³⁴ recognized that there is room for state involvement in the creation of remedies for vessel oil pollution. *Askew* upheld the constitutionality of the Florida Oil Spill Prevention and Pollution Control Act,³⁵ the forerunner of the current Florida Pollutant Spill Prevention and Control Act [hereinafter Florida Act].³⁶

The state response to *Askew* has been striking. As of July 1975, each of the twenty-two coastal states and Puerto Rico had enacted laws allowing some types of recovery for pollution damage.³⁷ Some states, including Florida, allow for recovery of damages for injuries to persons or property beyond the costs recoverable for cleanup and removal of the oil.³⁸

Under the Florida Act persons claiming pollution injury can pursue their remedies either through administrative proceedings³⁹ or through the courts.⁴⁰ Persons opting for the administrative route would be required to file an application containing a sworn statement of damages with the Florida Coastal Protection Trust Fund.⁴¹ The claimants and the person identified as responsible for the pollution by the executive director of the fund could either negotiate a settlement or submit the claim to arbitration.⁴² In each case, payment would be made directly to the claimant from the fund.⁴³

Persons deciding to sue the alleged polluter are the recipients of a special advantage under the Florida Act. In such an action the plaintiff need not "plead or prove negligence in any form or manner."⁴⁴

33. *Id.* at 1280.

34. 411 U.S. 325 (1973).

35. Ch. 70-244, 1970 Fla. Laws 244.

36. FLA. STAT. ch. 376 (1975).

37. DEP'T OF JUSTICE REPORT, *supra* note 5, at 35. In *Evans v. Atlantic Richfield Co.*, 97 S. Ct. 729 (1977) (*mem.*), *appeal docketed sub nom. Ray v. Atlantic Richfield Co.*, No. 76-930 (Mar. 1, 1977), Justice Rehnquist granted a stay of a permanent injunction pending the Court's consideration of whether WASH. REV. CODE ANN. § 88.16.170-.190 (Supp. 1975), which attempts "to decrease the likelihood of oil spills on Puget Sound and its shorelines," is preempted by the Port and Waterways Safety Act of 1972, 33 U.S.C. §§ 1221-1227 (Supp. V 1975), 46 U.S.C. § 391a (1970).

38. DEP'T OF JUSTICE REPORT, *supra* note 5, at 37.

39. FLA. STAT. § 376.12 (1975).

40. *Id.* § 376.205.

41. *Id.* § 376.12(2).

42. *Id.* § 376.12(2)(a), (b).

43. *Id.* § 376.12(2)(a), (e).

44. *Id.* § 376.205.

Once the person proves the fact of the prohibited discharge, the defendant can rely on only four defenses as an excuse: (1) an act of war, (2) an act of government, (3) an act of God, and (4) an act or omission of a third party.⁴⁵

There are, however, four coastal states whose statutes relating to oil pollution merely codify the common law remedies:⁴⁶ Georgia,⁴⁷ Alabama,⁴⁸ Louisiana,⁴⁹ and California.⁵⁰ Residents of these states seeking to bring actions against owners whose vessels have spilled oil onto their beaches must grapple with the existing remedies available to them in admiralty and at common law. This paper will explore their admiralty remedies.

V. ADMIRALTY REMEDIES

A. Jurisdiction

The Extension of Admiralty and Maritime Jurisdiction Act expanded admiralty jurisdiction to include "all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."⁵¹ The courts are in agreement that this language allows persons seeking damages for oil pollution to sue in admiralty.⁵²

In *California v. S.S. Bournemouth*,⁵³ a federal district court ruled that the Jurisdiction Act did not allow a state to sue in admiralty for a tort where the damage occurred to the water itself and was not "done or consummated on land . . ."⁵⁴ However, the court went on to hold

45. *Id.* §§ 376.205, .12(4)(a)-(d).

46. DEPT OF JUSTICE REPORT, *supra* note 5, at 49 n.14. Although the Dept't of JUSTICE REPORT cited Massachusetts as lacking any other than common law remedies for private parties suffering oil pollution, the state now provides for specific private remedies. MASS. ANN. LAWS ch. 91, § 59A (Supp. 1977-78), provides that any person negligently depositing crude petroleum or any of its products into tidal water or flats shall be liable in tort for double damages to the person whose property is harmed. MASS. ANN. LAWS ch. 21, § 27(14) (Supp. 1977-78), provides that persons discharging oil into state waters shall be jointly and severally liable to the commonwealth and to other persons for damages to real and personal property.

47. GA. CODE ANN. § 17-517 (1971). Section 17-521.2 (Supp. 1977) establishes the mechanism by which the state can impose civil penalties.

48. ALA. CODE tit. 8, § 320(d) (Supp. 1973). This provision, which took effect on Jan. 19, 1974, is part of Alabama's general attempt to preserve and develop coastal areas. ALA. CODE tit. 8, §§ 312-320 (Supp. 1973).

49. LA. REV. STAT. ANN. § 56:1446(D) (Supp. 1977).

50. CAL. WATER CODE § 13350(D) (Supp. 1977). For a recent California case interpreting the provisions of this section see *Younger v. Superior Court*, 544 P.2d 1322 (Cal. Super. Ct. 1976). See also CAL. HARB. & NAV. CODE §§ 151-152 (Supp. 1977).

51. 46 U.S.C. § 740 (1970).

52. See, e.g., *Burgess v. M/V Tamano*, 370 F. Supp. 247 (S.D. Me. 1973).

53. 307 F. Supp. 922 (C.D. Cal. 1969).

54. *Id.* at 925.

that an oil spill, even if it never reaches land, is itself a maritime tort of a nature sufficient to give rise to a maritime lien, so that an *in rem* admiralty action can be maintained.⁵⁵

The admiralty claimant can bring his action *in personam* against the vessel owner, *in rem* against the vessel, or *in personam* against the owner and *in rem* against the vessel.⁵⁶ If the claimant cannot obtain jurisdiction over the owner or the vessel, he can bring an *in personam* action with a prayer for attachment. This last procedure enables the claimant to attach any of the defendant's property in the hands of third party obligors or garnishees which is within the court's jurisdiction.⁵⁷ Once jurisdiction of some sort has been obtained, the admiralty claimant faces two problems: successfully asserting a theory of recovery and preventing or circumventing the owner's attempt to limit his liability.

B. Theories of Recovery

(1) *Common Law*.—Pollution caused by an oil spill into United States waters is a maritime tort.⁵⁸ In constructing the law of such torts, admiralty courts have drawn on the general maritime law of the United States and common law tort principles, which provide three theories for recovery in oil pollution cases: trespass, nuisance, and negligence.⁵⁹

a. Trespass

In *Esso Petroleum Co. v. Southport Corp.*,⁶⁰ plaintiffs brought an action in trespass, nuisance, and negligence against the master and owners of the *S.S. Inverpool*, a small tanker which had run aground on the revetment wall past Salter's Buoy off the coast of England in heavy weather in December, 1950. In order to preserve both the vessel and its crew, the master jettisoned approximately 400 tons of his fuel oil cargo which eventually washed up onto plaintiffs' foreshore.⁶¹ The trial judge held that the plaintiffs had causes of action in trespass and nuisance,⁶² however, they had to prove that the defendants had been negligent.⁶³ This ruling was eventually upheld by the House of Lords, but Lord Tucker took the occasion to observe that in his opinion there was *not* a good cause of action in trespass, "as the discharge of

55. *Id.* at 928-29.

56. *Admiralty Remedies*, *supra* note 10, at 128-29.

57. *Id.* at 129-30.

58. *Burgess v. M/V Tamano*, 370 F. Supp. at 249.

59. *Oil Pollution of the Sea*, *supra* note 28, at 347-48.

60. [1956] A.C. 218 (1955).

61. *Id.* at 218, 220.

62. *Id.* at 225.

63. *Id.* at 232.

the oil was not done directly on to the foreshore but outside in the estuary."⁶⁴

Although no American cases have addressed the issue of recovery for oil pollution on a trespass theory, recent commentators agree that the intent to intrude on the plaintiff's land is difficult to demonstrate.⁶⁵ Given this fact, potential plaintiffs would be well advised to focus their claims for relief on theories of nuisance and negligence.

b. Nuisance

Plaintiffs seeking to recover damages for an oil spill under a nuisance theory face three burdens: they must show that they have suffered "special" damage, they must demonstrate that the spill is properly termed a "nuisance," and they must prove that the spill resulted either from defendant's negligence or intentional actions. When a nuisance affects the public at large, as it would in the case of a significant oil spill, the plaintiff must demonstrate that his damage is different from that suffered by the public.⁶⁶ This burden has been met in several cases.

In *Burgess v. M/V Tamano*,⁶⁷ plaintiffs were commercial fishermen, commercial clam diggers, and owners of motels, campgrounds, and other business establishments. All had suffered from oil damage after the tanker *M/V Tamano* struck a ledge and spilled 100,000 gallons of Bunker C oil into Hussey Sound, Maine, on July 22, 1972.⁶⁸ The court reasoned that the fishermen and clam diggers had no individual property rights with respect to the waters and marine life harmed by the spill and that they could therefore recover only if they could successfully maintain private damage actions for the invasion of a public right.⁶⁹ For such a showing, these plaintiffs were required to demonstrate damage different in kind rather than degree from that suffered by the general public.⁷⁰ The court concluded that the plaintiffs could make such a showing based on their status as persons whose very livelihood was drawn from the affected waters.⁷¹

The court further noted that the businessmen who did not own beachfront lots "complain only of loss of customers indirectly resulting from alleged pollution of the coastal waters and beaches in which

64. *Id.* at 244.

65. Post, *A Solution to the Problem of Private Compensation in Oil Discharge Situations*, 28 U. MIAMI L. REV. 524, 527 (1974); Sweeney, *Oil Pollution of the Oceans*, 37 FORD. L. REV. 155, 170-71 (1968).

66. Post, *supra* note 65, at 530-31.

67. 370 F. Supp. 247 (D. Me. 1973).

68. *Id.* at 248-49.

69. *Id.* at 250.

70. *Id.*

71. *Id.*

they do not have a property interest," and dismissed their claims.⁷² It retained jurisdiction over the claims of those businessmen who were beachfront property owners and whose property was physically injured by the spill.⁷³

The *Burgess* court did not clarify whether it would be willing to award damages to private parties who own beachfront property but do not use it for commercial purposes. However, in *In re Petition of New Jersey Barging Corp.*,⁷⁴ a court awarded damages to 155 beachfront owners, some of whom were not using their property for commercial purposes,⁷⁵ "for such annoyance, inconvenience and discomfort suffered by particular claimants [after almost 2,000 barrels of tanker oil had been spilled into New Haven Harbor⁷⁶] to the extent of and in an amount commensurate with the annoyance and discomfort proven."⁷⁷ In addition, the Ninth Circuit, in *Oppen v. Aetna Insurance Co.*,⁷⁸ has ruled that physical damage to plaintiffs' pleasure boats, caused by the Santa Barbara oil platform blowout, probably constituted a sufficiently different injury to support a recovery for private nuisance.⁷⁹ Damages were recoverable, however, under a negligence theory.

At least one court has held that an oil spill cannot be classified a "nuisance" because it is not an event of a continuing nature. In *Maryland v. Amareda Hess Corp.*,⁸⁰ State of Maryland sued for the cost of abating the "nuisance" resulting from the rupture of an oil transfer line connecting the S.S. *Kadmos* and a shore terminal owned by Amerada Hess. In denying the state's claim, the court ruled that nuisance could not be found to exist absent "an ongoing phenomenon consisting of some recurring act or acts and/or a continuous condition,"⁸¹ and held that "a single occurrence oil spill does not now and has never in the absence of legislation amounted to a common law nuisance"⁸²

In granting the right to a nuisance-based recovery for oil spill damage, the *Burgess*, *New Jersey Barging*, and *Oppen* courts did not specifically address the question of whether the spill had to be a con-

72. *Id.* at 251.

73. *Id.*

74. 144 F. Supp. 340 (S.D.N.Y. 1956), *comm'r's report adopted*, 168 F. Supp. 925 (S.D.N.Y. 1958).

75. 168 F. Supp. at 938.

76. 144 F. Supp. at 340.

77. 168 F. Supp. at 937.

78. 485 F.2d 252 (9th Cir. 1973).

79. *Id.* at 260.

80. 350 F. Supp. 1060 (D. Md. 1972).

81. *Id.* at 1068 (footnote omitted).

82. *Id.* at 1069.

tinuing problem. One writer has suggested that the *New Jersey Barging* decision can be based on the principle that where the harm is "instantaneous and substantial," a nuisance action can be maintained irrespective of the nuisance's duration.⁸³ Potential plaintiffs in oil spill actions should note that several courts have been willing to ignore the "continuing phenomenon" in granting nuisance-based relief.

Finally, the general rule is that a claimant must show either negligence or intentional conduct on the part of the defendant in order to recover under a nuisance theory.⁸⁴ This fact has apparently presented little problem in three American oil spill cases where nuisance recovery has been granted or allowed. In *Petition of New Jersey Barging Corp.*,⁸⁵ the court merely recited the facts and concluded that the negligence of a tanker crew member was clear. The question of negligence on the part of the defendants was never broached in *Burgess v. M/V Tamano*,⁸⁶ perhaps because the rulings were made on motions to dismiss. However, the court did refer to defendant's "tortious" interference with the livelihood of the clam diggers and fishermen.⁸⁷ And in *Oppen v. Aetna Insurance Co.*, the only reference to negligence was made in the same sentence which left the way open for nuisance recovery: "[t]he plaintiffs' physical damages are recoverable in negligence and probably also constitute such special injury as to present them with a cause of action for these damages in nuisance."⁸⁸

c. Negligence

Under common law negligence principles, a plaintiff can recover damages from oil pollution if he can establish that the defendant owed him a duty to conform to a certain standard of conduct in dealing with the oil, that the defendant failed to conform to that standard, and that defendant's failure was the proximate cause of plaintiff's own damage.⁸⁹

One writer has commented that:

As a practical matter, it is virtually impossible to prove negligence on the part of the owners of the tanker. The problem of proving faulty construction of a tanker built, perhaps, in Japan, Germany, Norway or Greece, or faulty seamanship by a vessel flying the Liberian or Panamanian flag and carrying a multi-national crew,

83. Post, *supra* note 65, at 529-30.

84. W. PROSSER, LAW OF TORTS § 87, at 575 (4th ed. 1971).

85. 144 F. Supp. at 341.

86. 370 F. Supp. at 249.

87. *Id.* at 250.

88. 485 F.2d at 260.

89. W. PROSSER, *supra* note 84, § 30, at 143.

is beyond the ability of a property owner whose shoreline is ruined by oil spillage.⁹⁰

This observation notwithstanding, four of the six courts which have explicitly addressed the negligence issue in the oil spill context have found the vessel owners and operators guilty of negligent conduct.⁹¹

In *Petition of New Jersey Barging Corp.*,⁹² the tanker *Perth Amboy No. 1* was loading a cargo of fuel oil in New Haven Harbor during the late evening and early morning of September 26 and 27, 1954. The owner's employee, who had the duty of advising the pump house once the tanker was full, went to sleep while the loading was in progress. Approximately 2000 barrels of oil overflowed into the harbor.⁹³ The United States District Court for the Southern District of New York concluded that "[o]n the evidence in this case there can be no question as to the negligence of the tankerman [the employee], and that the immediate result was the oil spill."⁹⁴ The *Perth Amboy* was held liable *in rem*, although the court allowed the owner's petition for limitation of liability.⁹⁵

The House of Lords, in *Overseas Tankship (U.K.), Ltd. v. The Miller Steamship Co.*,⁹⁶ found the vessel owner and its operators negligent on the following facts. In the early hours of October 30, 1951, the tanker *Wagon Mound* had been taking in bunkering oil while moored at a wharf in Morts Bay, Sydney Harbor, Australia. The court found that by reason of the carelessness of the *Wagon Mound* engineers, a large quantity of this oil overflowed into the bay and eventually spread under the claimant's wharf.⁹⁷ The proceedings in this case and *Overseas Tankship, Ltd. v. Morts Dock & Engineering Co.*,⁹⁸ a predecessor, were devoted largely to the question whether the vessel owners could be held liable for a fire which resulted from molten lead falling on inflammable material and igniting the oil under the claimant's dock—but the threshold issue of negligence for the spill itself was never in question.

Both *New Jersey Barging* and *Miller Steamship* involved situations where negligence was rather easily proved: in both cases the offending

90. Avins, *Absolute Liability for Oil Spillage*, 36 BROOKLYN L. REV. 359, 366 (1970).

91. See also *Union Oil Co. v. Oppen*, 501 F.2d 558, 560 (9th Cir. 1974), where the court held the defendant operator of an oil drilling platform had stipulated to his own negligent conduct.

92. 144 F. Supp. 340.

93. *Id.*

94. *Id.* at 341.

95. *Id.* at 341-42.

96. [1967] 1 A.C. 617 (P.C. 1966) (commonly referred to as *Wagon Mound II*).

97. *Id.* at 502.

vessel was moored at a dock receiving oil as cargo. Two more recent cases, however, involved less obvious fact situations, and the courts nonetheless ruled that the vessel owners had been negligent.

In the *Ocean Eagle*,⁹⁹ the tanker had broken in half near its No. 6 cargo tank at the entrance to San Juan harbor, spilling oil into the surrounding waters. In the proceeding brought by the owners to limit their liability, the United States District Court of Puerto Rico conducted an exhaustive analysis of the facts and denied "exoneration or limitation of liability"¹⁰⁰ on the twin grounds of unseaworthiness and negligence.¹⁰¹ The court found that the *Ocean Eagle* had been 650 tons overloaded when she sailed into the harbor and that the master and the chief mate each intended to overload the vessel. They "did so blindly, without the aid of a loading manual, at the direction of the owners . . ." ¹⁰² In addition, the court found that the vessel had a history "not unknown to the owners"¹⁰³ of traveling in an overloaded condition and that the nature of the load's distribution was such that it "would have tended to sag the vessel in the way of the No. 6 cargo tanks . . ." ¹⁰⁴

The court found further that a November 1966 American Bureau of Shipping (A.B.S.) survey of the *Ocean Eagle* had revealed "pipe damage on deck and 'fractures in underdeck longitudinal frames and girders in [three] cargo tanks,' . . . and 600 leaking rivets in the same tanks."¹⁰⁵ The A.B.S. report of the survey stated that "the repairs . . . commenced . . . and had been completed," but nothing verified that every recommended repair had been made.¹⁰⁶ The estimated stress on the *Ocean Eagle*, its history of repairs and wastage, the absence of the loading manual (essential to guide the master in eliminating stress), and the sixteen- to twenty-foot waves at the time of the incident "support the [court's] conclusion that the vessel was overstressed to the breaking point and that all that was lacking was the unfortunate combination of events of rough seas and inexperienced navigation to send her to the bottom."¹⁰⁷

The court ruled that the owners had breached their "non-delegable duty . . . to furnish the Master with means by which he could deter-

98. [1961] A.C. 388 (P.C.) (commonly referred to as *Wagon Mound I*).

99. [1974] Am. Mar. Cases 1629 (D.P.R.).

100. *Id.* at 1659.

101. *Id.* at 1655, 1659.

102. *Id.* at 1645.

103. *Id.* at 1645, 1647.

104. *Id.* at 1650.

105. *Id.* at 1648.

106. *Id.*

107. *Id.* at 1653.

mine loading stress and arrangement of cargo."¹⁰⁸ It termed the overloading and improper loading willful negligence and found that the abandonment of the vessel with no attempt to stop the flow of oil or to clean it up constituted willful and wanton negligence chargeable to the owners.¹⁰⁹ The claimants were entitled to recover from the negligent owners "the natural and probable losses resulting from the breaking of the ship."¹¹⁰ The decision is significant because the vessel owners were held liable to private individuals.

The court in *California v. S.S. Bournemouth*¹¹¹ applied the doctrine of *res ipsa loquitur* to hold the vessel owners negligent. In that case, the *S.S. Bournemouth* docked at Long Beach Harbor shortly after midnight on October 3, 1969. At about ten o'clock the next morning, a spill was located approximately 700 feet from the vessel. The California Department of Fish and Game subsequently had the vessel seized and attempted to recover its cleanup costs in an *in rem* action.¹¹²

In order to recover, the state had to convince the court that the *Bournemouth* was the actual source of the pollution and that the spill had been negligently or intentionally caused.¹¹³ With regard to the source of the pollution, the court found three factors persuasive: (1) the spill was located directly downwind from the vessel, (2) the *Bournemouth* was the only vessel operating in the vicinity of the spill for approximately fifteen hours prior to its discovery, and (3) three separate comparative analyses established to a "scientific probability" that the oil on the water and the oil from the *Bournemouth* came from the same source.¹¹⁴

The state had no direct evidence that the oil spill was caused by the negligent or intentional acts of omissions of the crew. Therefore, it relied upon the doctrine of *res ipsa loquitur*, *i.e.*, an event can be attributed to the negligence of the defendant when it is one that does not occur in the absence of negligent conduct, when it is caused by an agency or instrumentality within the exclusive control of the defendant, and when it is not due to any voluntary action or contribution by the plaintiff.¹¹⁵

The court concluded that each element of the doctrine had been

108. *Id.* at 1654.

109. *Id.* at 1658-59.

110. *Id.* at 1659.

111. 318 F. Supp. 839 (C.D. Cal. 1970); 307 F. Supp. 922 (C.D. Cal. 1969). The facts recited are taken from both opinions.

112. 307 F. Supp. at 923-24.

113. 318 F. Supp. at 840.

114. *Id.* at 841.

115. W. PROSSER, *supra* note 84, § 39, at 214; 3 L. & POL. INT'L BUS. 210, 216 n.33 (1971).

satisfied: the spill could only occur in a limited number of ways and could not have occurred absent negligence;¹¹⁶ the ship was under the exclusive control of the defendant; and no state action contributed to the spill. The court found the vessel owners negligent and entered a judgment against them for the cleanup costs incurred by the state.¹¹⁷ *Bournemouth* is important because it establishes precedent for reliance on the doctrine of *res ipsa loquitur*. Furthermore, since the state chose not to invoke a relevant statute as a basis for its action, the case may be applicable to an admiralty action by a private party.

Two older cases in which vessel owners were *not* liable for negligence can be profitably compared with the *Ocean Eagle* and *Bournemouth*. In *Salaky v. Atlas Tank Processing Corp.*,¹¹⁸ the Second Circuit ruled that the plaintiff had failed to show negligence because it had not adequately demonstrated that the two barges involved were the sources of the spill.¹¹⁹ The advanced state of chemical analysis evidenced in *Bournemouth*, however, indicates that the identification problem may no longer pose an insurmountable problem.

The other vessel oil pollution case in which liability for negligence was not found, *Esso Petroleum Co. v. Southport Corp.*,¹²⁰ can be reconciled with the *Ocean Eagle*. In *Ocean Eagle*, the United States District Court of Puerto Rico held the owners liable on the dual theory that their negligence had led to an unseaworthy vessel, and that their employees had wantonly failed to curtail the flow of oil. In *Esso Petroleum*, the House of Lords concluded that the only issue raised by the plaintiff's pleadings was whether the master of the *Inverpool* had behaved negligently in entering the estuary channel in heavy weather, knowing that he was suffering from a steering defect.¹²¹ It concluded that the master's behavior was not negligent—but observed in dicta that the issue of unseaworthiness had *not* been raised.¹²²

This survey of court response to the common law theories of trespass, nuisance, and negligence as means of recovering damages for vessel oil pollution suggests the following conclusions:

- (1) Trespass actions are not favored.
- (2) A plaintiff who can convince the court that his injury is different in kind from that of the public will generally be allowed to make his argument for damages on a nuisance theory.

116. 318 F. Supp. at 841.

117. *Id.* at 842.

118. 120 F. Supp. 225 (E.D.N.Y.), *rev'd*, 208 F.2d 174 (2d Cir. 1953).

119. 208 F.2d at 175.

120. [1956] A.C. 218 (1955).

121. *Id.* at 220, 235-37.

122. *Id.* at 237, 243.

- (3) Despite the fact that negligence actions present problems of proof, negligence can often be shown.
- (4) In the absence of any evidence of negligence, the doctrine of *res ipsa loquitur* can be employed.

(2) *Admiralty*.—Admiralty law offers at least two unique theories aside from the traditional theories of common law recovery for oil pollution: the doctrine of unseaworthiness and the Pennsylvania Rule.

Under the doctrine of unseaworthiness, the vessel owner traditionally has been held strictly liable for damages occurring as a result of some defect in either the vessel or its equipment to those in privity of contract with him and to those performing the historical functions of seamen.¹²³ Two United States district courts have addressed whether this doctrine should be expanded to make vessel owners liable to persons harmed by oil spills resulting from some unseaworthy condition and have reached opposite results.

In *Maryland v. Amerada Hess Corp.*,¹²⁴ the federal district court emphasized the differences between the nature of the hazards meant to be protected by the doctrine and those involved in oil spills. It concluded that it “ha[d] no intention of extending the coverage of the doctrine of seaworthiness so as to encompass a situation where, as in the case at bar, an oil spill is alleged to have occurred in the waters of a state due to the actions of a vessel.”¹²⁵

However, in *Ocean Eagle*, the Puerto Rico District Court held that the vessel owners had a nondelegable duty “to exercise due diligence to furnish a seaworthy ship”¹²⁶ and that a breach of that duty resulting in oil pollution damage gave rise to a cause of action for damages by private parties.¹²⁷ The importance of this holding lies in the fact that an owner held liable under the doctrine of unseaworthiness would not be able successfully to petition to limit his liability in the aftermath of an oil spill.¹²⁸

In the *Ocean Eagle*, the court was forced to conduct an exhaustive review of the facts before it concluded that the owners had breached their duty to provide a seaworthy vessel. One writer has suggested an alternative method for establishing that such a breach has occurred.¹²⁹ Under his theory the court would be requested to extend the *Kernan*

123. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946).

124. 350 F. Supp. 1060 (D. Md. 1972).

125. *Id.* at 1071.

126. [1974] Am. Mar. Cases at 1655 (D.P.R.).

127. *Id.* at 1654, 1659.

128. Sweeney, *supra* note 65, at 169.

129. *Id.* at 185–86.

doctrine to oil spill cases.¹³⁰ Once the government had instituted proceedings against the owner for violation of a regulatory statute, the vessel would, under *Kernan*, be deemed unseaworthy and the claimant could then use this fact in an action for damages from a spill emanating from that vessel.¹³¹ The difficulty with this reasoning is that *Kernan* was a personal injury action and its holding was firmly rooted in an analysis of the history of the Federal Employee's Liability Act.¹³² Thus, the policy reasons mitigating in favor of recovery in *Kernan* would not appear to control in an action for oil spill damage.

The same writer who advocates the novel application of the *Kernan* doctrine has suggested that the "Pennsylvania Rule" be invoked to hold a vessel liable for oil pollution damage.¹³³ Under the Pennsylvania Rule, a vessel involved in a collision and found in violation of a statute or regulation governing its conduct must demonstrate not only that the violation did not contribute to the collision but that it could not have contributed to it.¹³⁴ The argument is made that this rule "suggests a holding that evidence of a criminal violation [of an oil pollution statute or regulation] creates a presumption of fault thereby shifting to the shipowners the burden of proving that the violation could not have contributed to the damage."¹³⁵ No court has yet adopted this theory of liability for oil pollution.

VI. LIMITATIONS OF LIABILITY

Even if the plaintiff convinces a court that he should recover damages in an oil spill action, he faces the prospect of a severely

130. *Id.* This doctrine springs from the holding in *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958). In *Kernan*, a seaman was killed as a result of an explosion and fire traceable to the violation of a Coast Guard regulation. The Court reasoned that where a statute or regulation had been violated, the owner of the vessel should be held strictly liable for ensuing damages "without regard to whether the injury flowing from the violation was the injury the statute sought to guard against." *Id.* at 438. Thus, applying the *Kernan* doctrine to oil spill cases, once the government has initiated proceedings against the polluting vessel's owner for violating any regulation, whether or not related to pollution prevention, the person claiming damages might rely upon the government's action to establish strict liability for the spill.

131. *Id.*

132. 45 U.S.C. § 51 (1970).

133. Sweeney, *supra* note 65, at 185-86.

134. *The Pennsylvania*, 86 U.S. (19 Wall.) 125 (1873). In this case, the owners of two vessels which had collided in dense fog were held equally liable for damages. It was observed, however, in dicta that "when . . . a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, . . . the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been." *Id.* at 136.

135. Sweeney, *supra* note 65, at 186.

limited recovery fund. The Federal Limitation of Liability Act¹³⁶ allows the owner of a vessel to petition to limit his liability for damages to the value of the vessel and her freight following a spill not within his "privity or knowledge."¹³⁷ In four petitions to limit liability which have been reported in United States courts since 1956, each court has relied heavily on its perception of the equities of the situation, and the decisions are evenly split.

In *Petition of New Jersey Barging Corp.*,¹³⁸ the federal district court at the outset found that the spill had resulted from the negligence of an employee, but it went on to note that the employee "was a certified tankerman and there is not a scintilla of evidence to show that he was not completely qualified and competent as such prior to the night of the oil spill."¹³⁹ The court then examined the petitioner's actions subsequent to the spill and found that its agent had acted reasonably in attempting to carry out cleanup operations. The court concluded that while the negligence of the employee precluded the petitioner from exoneration, the petitioner's positive efforts subsequent to the spill supported its claim for limitation.¹⁴⁰

The other successful petition was granted in *Complaint of Harbor Towing Corp.*¹⁴¹ In *Harbor Towing*, the barge *Shamrock* was being loaded with 7,000 barrels of heavy fuel oil by Humble Oil Company in Baltimore Harbor. The federal district court found that "either through the negligence of Harbor Towing [the owner] and/or Humble Oil, 68,000 gallons of oil were discharged into the harbor."¹⁴² Resulting claims in excess of \$1,000,000 were filed, and *Harbor Towing* sought to limit its liability to the value of the barge and its freight.

The court relied on the "privity or knowledge" language of the Limitation of Liability Act in reaching its decision. Pointing out that the Act expressly allowed limitation when the owner lacked such knowledge, and finding that "[i]n the present case, the owner was apparently unaware of the condition causing the loss," the court ruled that the petition to limit liability should be allowed.¹⁴³

Courts have denied the petition to limit liability in the two cases involving oil spills by vessels in transit. In the first case, the charterer

136. 46 U.S.C. §§ 181-189 (1970).

137. *Id.* § 183(a).

138. 144 F. Supp. 340 (S.D.N.Y. 1956), *comm'r's report adopted*, 168 F. Supp. 925 (S.D.N.Y. 1958).

139. 144 F. Supp. at 341.

140. *Id.* at 341-42.

141. 335 F. Supp. 1150 (D. Md. 1971).

142. *Id.* at 1152.

143. *Id.* at 1154.

of the *S/T Torrey Canyon* petitioned for limitation after the tanker ran aground on March 18, 1967, sixteen miles off the coast of England and spilled 15,000,000 gallons of oil, contaminating from 75 to 175 miles of beach and triggering a cleanup operation costing over \$16,000,000.¹⁴⁴ In ruling on the petition, the Court of Appeals for the Second Circuit first observed that the Limitation Act restricts the ability to limit liability to owners and bareboat charterers. Next it noted that Union Oil Company, the charterer in this case, was operating under a *time* charter,¹⁴⁵ and that it was not being proceeded against as an owner but rather as an entity which had been involved in the manufacture and design of the vessel. Based on these facts, the court held that Union would not be allowed to limit.¹⁴⁶

The Second Circuit's decision has been strongly criticized on the ground that it ignored the reality of Union's relationship to the *Torrey Canyon*:

The vessel was placed in service as an integral part of Union's tanker fleet, with her stack and bow painted with Union's insignia, and flying Union's house flag. . . . Union Oil was responsible for all costs of procuring, enlarging, and operating the *Torrey Canyon*

Union expressly reserved the right to demand the discharge of the master or officers if "dissatisfied" with their conduct. . . .

. . . .

Although title to the ship was retained by Barracuda Tanker Corporation, the status of Union Oil, when viewed substantively and not solely as a matter of form, is that of a *de facto* owner or demise charterer, a beneficial owner, or a charterer deemed to be an owner within 46 U.S.C. § 186 (1964).¹⁴⁷

But even if the true nature of the relationship between Union and the *Torrey Canyon* was *not* lost on the Second Circuit, its decision

144. *In re Barracuda Tanker Corp.*, 281 F. Supp. 228 (S.D.N.Y. 1968), *rev'd in part*, 409 F.2d 1013 (2d Cir. 1969). Although the actual cleanup costs for the oil spill exceeded \$16,000,000, the claims were ultimately settled for \$7,200,000. Note, *Liability for Oil Pollution Cleanup and the Water Quality Improvement Act of 1970*, 55 CORNELL L. REV. 973, 982 (1970). See *Admiralty Remedies*, *supra* note 10.

145. A *time* charter differs materially from a bareboat charter. Under a *time* charter, the owner is responsible for manning and operating the vessel. Under a bareboat charter, the charterer is vested with responsibility and control over the vessel for the duration of the voyage. GILMORE & BLACK, *THE LAW OF ADMIRALTY* 229-30, 239-40 (2d ed. 1975).

146. 409 F.2d at 1015. The trial court allowed Barracuda Tanker Corp., the tanker owner, to limit its liability. That ruling was not appealed.

147. *Admiralty Remedies*, *supra* note 10, at 139-40 n.151.

can be explained by its acknowledged desire to restrict the scope of the Limitation of Liability Act.¹⁴⁸

Such an attitude is also reflected in the most recent oil spill limitation decision, *Ocean Eagle*.¹⁴⁹ Faced with a spill totalling 3,500,000 gallons and cleanup claims amounting to \$700,000, the federal district court painstakingly reconstructed the history of the vessel and concluded that her owners had been negligent, that such negligence had resulted in an unseaworthy vessel, and that the owners were therefore unable to limit their liability.¹⁵⁰ In marked contrast to the situation in *New Jersey Barging*, the vessel owner's agents in *Ocean Eagle* had made no effort to mitigate the oil damage once the spill had occurred—behavior which the court deemed to be willfully and wantonly negligent.¹⁵¹ One express ground for its denial of limitation was “public policy and equitable consideration.”¹⁵²

Since the outcome appears to hinge on the particular actions of the owner and his agents in each case, plaintiffs in an oil spill action should explore methods for combatting limitation petitions. The most direct approach would be to convince the court, as was done in *Ocean Eagle*, that the spill resulted from an unseaworthy vessel. Faced with such a ruling “the owner would be unable to meet his statutory burden of proving that [the] unseaworthy condition occurred without his privity or knowledge.”¹⁵³

Should it be impossible to establish unseaworthiness, the plaintiff might consider initiating a direct action against the insurer of the vessel. Residents of Louisiana, for example, could employ their direct action statute in an effort to reach a larger fund than would normally be available to them after an owner had successfully petitioned for limitation.¹⁵⁴

The application of the Louisiana statute to marine insurance was upheld by the Supreme Court in *Maryland Casualty Co. v. Cushing*.¹⁵⁵ Under the procedure approved in that case, direct actions against

148. See 409 F.2d at 1015.

149. [1974] Am. Mar. Cases 1629 (D.P.R.).

150. [1974] Am. Mar. Cases at 1655, 1659.

151. *Id.* at 1658–59.

152. *Id.* at 1657.

153. Sweeney, *supra* note 65, at 169.

154. LA. REV. STAT. ANN., tit. 22, § 655 (West Supp. 1977). For a suggestion that a direct right of action against a marine insurer might be available in Florida as well, see Note, *The Applicability of Florida Direct Action in the Law of Admiralty*, 1 FLA. ST. U.L. REV. 335 (1972).

155. 347 U.S. 409 (1954). More recent cases which involve the Louisiana direct action statute are *Olympic Towing Corp. v. Nebel Towing Co.*, 419 F.2d 230 (5th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970); *In re Sincere Navigation Corp.*, 317 F. Supp. 1 (E.D. La. 1970).

the insurer must be delayed until after the conclusion of limitation proceedings. At that time claimants could file suit for the balance of the insurance proceeds remaining after the owner had been reimbursed by the insurer for the amount he paid into the limitation fund.¹⁵⁶ This procedure would be particularly appealing where because of damage to or destruction of the vessel, the limitation fund was minimal.

VII. CONCLUSION

This article has been written from the perspective of a private beach owner seeking admiralty remedies for damages caused by an oil spill. A review of the relevant cases leads to the following conclusions:

- (1) Modern identification techniques, coupled with the availability of the doctrine of *res ipsa loquitur*, increase the probability that a private party could succeed in establishing liability on the part of the offending vessel and her owners.
- (2) The prospects for avoiding limitation of liability problems are uncertain. Unless the claimant can rely upon a statutory right of direct action against the insurer of the vessel, he may be frustrated in his recovery.

In sum, the current state of admiralty law should spur concerned beachowners in Georgia, Alabama, Louisiana, and California to endeavor to persuade their legislators to enact protective legislation similar to that now in force in Florida.

156. 347 U.S. at 425, 427. (Clark, J., concurring).