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PBS COALS: THE USE OF NON-FAULT-BASED LIABILITY IN ACID MINE DRAINAGE CASES

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PBS Coals, Inc. and Fetterolf Mining, Inc. conducted mining operations at adjoining sites near Petersburg, Somerset County, during the mid 1970s and 1980s.[1] Residents of the seven households and one dairy farm near the mines testified that their water quality had been good prior to the beginning of these mining operations.[2] Testimony at trial indicated that the contaminants found in the Petersburg water supply were those typically associated with mine drainage: high levels of sulfates and iron. In addition, the mines were on an upslope above the town; thus, topographically the ground water flowed from the mines down to Petersburg. Neither mining company's operations, however, could be identified as the source of the water contamination. Therefore, neither company could be held to be at fault. Judgment in favor of the Department of Environmental Resources (DER) was entered by the Common Pleas Court, and the Defendants appealed.[3] The issues presented to the Commonwealth Court were whether the coal companies may be held liable without a showing of fault and, if so, how such liability should be apportioned.[4] The Commonwealth Court held 1) that under Pennsylvania's Clean Streams Law no showing of fault was required to impose liability on defendants, and 2) that defendants could be classified as wrongdoers and as such should be held jointly and severally liable.

The mining of coal, both from surface mines and from deep mines, has been a part of Pennsylvania history for more than 150 years.[5] Legislative attempts to regulate the mining industry's impact on the environment are more recent and have taken many years to evolve into their present states. The two main pieces of Pennsylvania legislation concerned with the environmental problems created by coal mining are the Surface Mining Conservation and Reclamation Act[6] and the Clean Streams Law.[7] Originally, neither act dealt with the problem of mine drainage polluting the waters of the Commonwealth. Over time, however, both acts were amended to include provisions governing the discharge of mine water into Pennsylvania's waters. In particular, the Clean Streams Law was amended to include mine drainage in the category of industrial wastes, the discharge of which was prohibited under the act without a permit.[8] Discharging in violation of a permit or failure to obtain a permit constitutes a statutory public nuisance.[9] In addition, Section 316 was added to the Act in 1965.[10] This section allows the Department of Environmental Resources to order an owner or occupier of land to correct any source of pollution and/or any potential for pollution. Finally, amendments made to the Act in 1970 expanded the Act's coverage to discharges of acid mine water from mines that had ceased operations.[11]

In *Commonwealth v. Harmer Coal Company,*[12] the Pennsylvania Supreme Court began the process of interpreting the revised Clean Streams Law and its effect on the coal industry. The *Harmer* court, presented with a coal company that was discharging acid mine drainage from an inactive adjacent mine, applied Section 315(a) of the Clean Streams Law holding that the coal company was required to treat discharges from the entire site. The court pronounced that the public had an overriding interest in the cleaning up and prevention of acid mine drainage. Further, the court noted that, "[t]he public interest is not served if the public, rather than the mine operator, has to bear the expense of abating pollution caused as a direct result of profitmaking, resource depleting business of mining coal."[13]

In the following year, the Supreme Court was again called upon to decide a matter involving the discharge of acid mine drainage. In *Commonwealth v. Barnes and Tucker Company,*[14] the court found that discharge of fugitive mine water draining from a closed mine into an active mine, while not explicitly covered under Section 315, did constitute a public nuisance. The court noted that, "[t]he absence of facts supporting concepts of negligence, foreseeability or unlawful conduct is not in the least fatal to a finding of the existence of a common law public nuisance."[15] In addition, the court was presented with the problem of deciding whether a finding of liability for mine drainage from a closed mine constituted a violation of due process or an unconstitutional taking. The court found no violation of due process but remanded the case to the

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Commonwealth Court for additional consideration of the takings issue.

On remand, the Commonwealth Court determined that Barnes and Tucker did not produce sufficient evidence to establish a taking when "measured against the deleterious impact of untreated mine water entering the waters of the Commonwealth upon the health, safety and welfare of the citizens of the Commonwealth, not to mention the less obvious impact on the environment in general...."[16] Therefore, in light of the fact that the court found that Barnes and Tucker's mining activity was the dominant occurrence without which the public nuisance would not have been created, the court held that the company was responsible for the cost of the continued clean up of the fugitive mine water.

The next step in the development of case law involving the Clean Streams Law came in 1980 when the Pennsylvania Supreme Court decided the constitutionality of Section 316. In *National Wood Preservers v. Commonwealth*,[17] a non-mining case, the court held that the imposition of liability on a landowner under section 316 for pollution occurring on that land was a constitutional use of the state's police power. Further, the court noted that, "[i]t is also clear that the validity of an exercise of police power over land depends little upon the owner or occupier's responsibility for causing the condition giving rise to the regulation."[18] Thus, in cases where the owner of property knows of the pollution and has, through conduct, indicated no willingness to abate the problem, the state may impose liability under Section 316.

This progression of cases indicates the development of the method of application of the Clean Streams Law to polluters in Pennsylvania. In *McIntire Coal v. Dep't of Envtl. Resources*,[19] the Commonwealth court applied Section 315 of the Clean Streams Law and held that the company was liable for discharging acid mine water, despite the existence of a pre-existing deep mine, the primary source of pollution. The court also determined that the Commonwealth would have an independent basis for holding McIntire liable under Section 316.

In *Commonwealth of Pennsylvania, Dep't of Envtl. Resources v. PBS Coals, Inc.*,[20] a unique situation confronted the courts of Pennsylvania. Unlike previous cases, *PBS Coals* had more than one defendant charged with violating the Clean Streams Law. Since both PBS Coal and Fetterolf Mining Inc. had violated Section 315(a) of the Clean Streams Law by discharging acid mine drainage without a permit, they were both liable for creating a public nuisance under the terms of the statute.[21] The problem facing the court was how to apportion the liability between the two defendants. To answer this question the court turned to the doctrine of joint and several liability and a history of cases in which the doctrine had been applied to polluters whose conduct had resulted in a public nuisance.[22]

On appeal, PBS Coals and Fetterolf Mining raised the issue of whether the Common Pleas Court was correct in its imposition of joint and several liability.[23] The Common Pleas Court relied on the theory of alternative liability as set forth in Section 433B of the Restatement (Second) of Torts (1982).[24] The appellants argued that this section clearly requires some element of tortious conduct to be present before liability can be established. However, under the Clean Streams Law, fault or tortious conduct is not a necessary condition for finding the mining companies liable in nuisance for polluting the nearby wells. Because of the statute's silence on the question of tortious conduct, appellants contended that absent an express finding of fault or tortious conduct, Section 433B could not legitimately be applied.

The Pennsylvania Supreme Court had adopted section 433B of the Restatement in 1970.[25] However, the Commonwealth Court made it clear that the question of tortious conduct raised by PBS and Fetterolf was one of first impression in Pennsylvania.[26] The Commonwealth Court, unlike the Common Pleas Court, found the situation presented by the *PBS* case to be more suited to the application of the doctrine of independent concurring liability than the doctrine of alternative liability. The doctrine of independent concurring liability is set forth in Section 879 of the Restatement (Second) of Torts.[27] Even with the Commonwealth Court's application of a different theory of joint and several liability, the appellants' question of tortious conduct still remained because, like Section 433B, Section 879 requires a showing of tortious conduct before liability is imposed.

In its analysis of the appellants' question, the Commonwealth Court relied on three cases in which this rule had been applied. In *Landers v. East Texas Salt Water Disposal Corp.*,[28] the defendants, a salt water disposal company and an oil company, were held jointly and severally liable for independently polluting plaintiff's

lake. Although the defendants in *Landers* engaged in independent tortious acts and produced damages to the plaintiff that were theoretically divisible, as a practical matter the Texas Supreme Court reasoned that there existed a single indivisible injury.[29] The *Landers* court noted that:

> [w]here the tortious acts of two or more wrongdoers join to produce an individual injury, that is, an injury which from its nature cannot be apportioned with reasonable certainty to the individual wrongdoers, all of the wrongdoers will be held jointly and severally liable for the entire damages and the injured party may proceed to judgement against any one separately or against all in one suit.[30]

In *Michie v Great Lakes Steel Div., National Steel Corp.,*[31] the Sixth Circuit Court of Appeals ruled that the defendants could be held jointly and severally liable for maintaining a nuisance that resulted in damage to the plaintiffs' persons and property. The *Michie* defendants were three corporations whose plants emitted noxious pollutants into the air, creating a nuisance. The Sixth Circuit noted that in order to find the defendants jointly and severally liable, there must first be a finding that the injury to plaintiffs was indivisible. The Court noted that the harm may be theoretically divisible yet "single in a practical sense so far as the plaintiff's ability to apportion it among the wrongdoers is concerned (as where a stream is polluted as a result of refuse from several factories)."[32]

In *Velsicol Chemical Corp. v. Rowe,*[33] residents and homeowners brought an action in nuisance against a chemical company for damages resulting from the emission of pollutants. Here the chemical company filed a third-party complaint against five other manufacturers who also emitted pollutants into the air and water. The Supreme Court of Tennessee adopted the rule of joint and several liability stated in *Landers* and *Michie.* The court concluded that joint and several liability ought to be imposed "... when an indivisible injury has been caused by concurrent, but independent, wrongful acts or omissions of two or more wrongdoers, whether the case be one of negligence or nuisance."[34]

Pennsylvania adopted the doctrine of independent concurring liability as set forth in Restatement Section 879 in *Capone v. Donovan.*[35] In *Capone,* the Superior Court was presented with a situation in which three physicians negligently diagnosed and treated a football player's broken arm. Because the physicians' negligence was uncontested, the court in *Capone* was not called upon to address the issue of whether the doctrine of independent concurring liability could be applied to a group of defendants without a showing of tortious conduct. On the other hand, the Commonwealth Court was forced to decide this issue in *PBS Coals.*[36] Appellants, PBS Coals and Fetterolf Mining, maintained that neither Restatement (Second) of Torts, Section 433B, nor Section 879 could be applied without a showing of tortious conduct. In addition, appellants claimed that they had not intended to pollute the nearby wells and that such pollution was an inevitable consequence of mining. Therefore, the appellants' believed that neither company was at fault.

The Court in *PBS Coals* pointed out that fault was not the controlling element in the proper application of joint and several liability.[37] The courts in *Michie, Landers,* and *Velsicol* all concluded that the defendants in their cases could be classified as wrongdoers. It is the term "wrongdoer" that the Court in *PBS Coals* uses to bring the coal companies within the purview of Section 879. The Court began its analysis by stating that the appellants' violation of Section 315(a) of the Clean Streams Law implicated them as "nuisance creators;" logic dictates that a nuisance creator fall within the class of wrongdoers.[38] The court's method of approach included an analysis of the *Black's Law Dictionary* definitions of "wrongdoer," "tortfeasor," and "tort." The Court found that the terms "tortfeasor" and "wrongdoer" were synonymous because the definitions were interrelated.[39] In addition, the Court found that a tort had been committed when the coal companies invaded the Petersburg residents' state constitutional right to clean air and pure water.[40] The Court concluded that the perpetrators of such an invasion are by definition wrongdoers or tortfeasors. In addition, the Court stated that it believed the common usage of these terms connoted some degree of fault, but a strict definition of these terms did not necessarily mean that a party was at fault.[41] Therefore, the appellants could be classified as wrongdoers (guilty of creating a nuisance) without the existence of negligence, foreseeability or other common examples of fault-based conduct.

The Commonwealth Court also supported its characterization of PBS and Fetterolf as

wrongdoers by applying the provisions of the Clean Streams Law and the Surface Mining Conservation and Reclamation Act.[42] Under the provisions of these two comprehensive statutes the discharge of pollutants into the waters of the Commonwealth was declared to be a nuisance and was against public policy.[43] Thus, the weight of the statutory pronouncements against polluting the waters of the Commonwealth with acid mine drainage, combined with the Court's analysis of the definition of wrongdoers, brings the appellants within the scope of Restatement (Second) of Torts, Section 879. Finding that the tortious conduct element of Section 879 had been met, the Commonwealth Court held that the Chancellor's application of joint and several liability was without error.

In conclusion, *PBS Coals* provides attorneys presented with the problem of acid mine drainage with a framework for successful litigation. The Commonwealth Court has established that under Pennsylvania's Clean Streams Law liability does not have to be based on fault. In addition, the Court has determined that multiple defendants may be held jointly and severally liable in this non-fault based system. The result of combining these two concepts is a system that will enhance plaintiffs' chances for recovery in cases of acid mine drainage, and perhaps lay the groundwork for combating other forms of water pollution under Pennsylvania law.

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1 PBS Coals conducted surface mining at the easternmost of the three sites from 1975 to 1979 when reclamation was completed. Fetterolf acquired the two sites to the west of the PBS site in 1981. These areas had been mined by other companies since 1974. See, *Commonwealth of Pennsylvania, Dept of Envtl. Resources v. PBS Coals, Inc.* 112 Pa. Commw. 1, 5-9, 534 A.2d 1130, 1132-34 (1987), appeal denied, 520 Pa. 592, 551 A.2d 218 (1988).

2 PBS Coals' operation had caused prior contamination of groundwater, at which time PBS drilled replacement wells. See, *Commonwealth of Pennsylvania, Dept of Evtl. Resources v. PBS Coals, Inc.* 112 Pa. Commw. at 6, 534 A.2d at 1133.

3 112 Pa. Commw. at 4, 534 A.2d at 1131.

4 112 Pa. Commw. at 4, 534 A.2d at 1132.

5 Burcat and Geary, *Surface Mining Regulation in Pennsylvania,* 57 Temple L.Q. 1 (1984). (Hereafter Burcat).

6 52 P.S. § 1396 et. seq. (Supp. 1991).

7 35 P.S. § 691.1 et. seq. (Supp. 1991).

8 35 P.S. § 691.315(a) (Supp. 1991). This section presently reads:

> No person or municipality shall operate a mine or allow a discharge from a mine into the waters of the Commonwealth unless such operation or discharge is authorized by the rules and regulations of the department or such person or municipality has first obtained a permit from the department. Operation of the mine shall include preparatory work in connection with the opening or reopening of a mine, refuse disposal, backfilling, sealing, and other closing procedures, and other work done on land or water in connection with the mine. A discharge from a mine shall include a discharge which occurs after mining operations have ceased, provided that the mining operations were conducted subsequent to January 1, 1966, under circumstances requiring a permit from this Sanitary Water Board under the provisions of section 315(b) of this act as it existed under the amendatory act of August 23, 1965 (P.L. 372, No. 194). The operation of any mine or the allowing of any discharge without a permit or contrary to the terms and conditions of a permit or contrary to the rules and regulations of the department, is hereby declared to be a nuisance.

9 *Id.* See also 35 P.S. § 691.601 (Supp. 1991) and 52 P.S. § 1396.24 (Supp. 1991).

10 Burcat at 3.

11 Burcat at 4.

12 452 Pa 77, 306 A.2d 308 (1973).

13 452 Pa. at 101, 306 A.2d at 321. (quoting from *Survey: The Commonwealth Court's Environmental Decisions,* 76 Dick. L. Rev. 668, 684-690 (1972)).

14 455 Pa. 392, 319 A.2d 871 (1974). See also, Case Comment, *Commonwealth v. Barnes & Tucker – The Burden Of Treating Acid Mine Drainage,* 80 W. VA. L. Rev. 519 (1978). On remand the Commonwealth Court determined that of the 7.2 million gallons of mine water pumped from the mine daily, 6 million was fugitive mine water while only 1.2 million galls was from the mine in question.

15 455 Pa. at 414, 319 A.2d at 883.

16 23 Pa. Commw. 496, 353 A.2d 471, *aff'd* 472 Pa. 115, 371 A.2d 461 (1976). See also, 80 W. VA. L. Rev. 525, 527-528. Commonwealth Court indicates that it is applying the test used in *Harmer Coal* to fugitive mine water and focusing on the discharge and not the source of the mine water.

17 489 Pa. 221, 414 A.2d 37 (1980)

18 489 Pa. at 238, 414 A.2d at 45.

19 108 Pa. Commw. 443, 530 A.2d 140 (1987).

20 112 Pa. Commw. 1, 534 A.2d 1130 (1987), appeal denied, 520 Pa. 592, 551 A.2d 218 (1988).

23 *Id.*

24 See, *Velsicol Chemical Corp. v. Rowe,* 543 S.W.2d 337 (Tenn. 1976); *Michie v. Great Lakes Steel Div., National Steel Corp.,* 495 F.2d 213 (6th Cir. 1974) Cert. denied 419 U.S. 997, 95 S.Ct. 310, 42 L.Ed.2d 270 (1974), *Landers v. East Texas Salt Water Disposal Co.,* 151 Tex 251, 248 S.W. 2d 731 (1952).

23 *Id.*

24 Restatement (second of Torts § 433B(2) (1982). Section 433B reads in the pertinent part:
"(2) Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the grounds that the harm is capable of apportionment among them, the burden of proof as to apportionment is upon each such actor."

25 See generally, *Snoparsky v. Bear,* 439 Pa. 140, 266 A.2d 707 (1970).

26 112 Pa. Commw. at 18, 534 A.2d at 1138.

27 Restatement (Second) of Torts § 879 (1982). §879 states in the pertinent part:
"If the tortious conduct of each of two or more persons is a legal cause of harm that cannot be apportioned, each is subject to liability for the entire harm, irrespective of whether their conduct is concurring or consecutive."

28 151 Tex. 251, 248 S.W. 2d 731 (1952).

29 151 Tex. at 256, 248 S.W.2d at 734.

30 151 Tex. at 256, 248 S.W.2d at 734.

31 495 F.2d 213 (6th Cir. 1974).

32 495 F.2d at 218.

33 543 S.W.2d 337 (Tenn. 1976).

34 543 S.W.2d at 343.

35 332 Pa. Super. 185, 480 A.2d 1249 (1984).

36 112 Pa. Commw. at 20-21, 534 A.2d at 1139.

37 112 Pa. Commw. 21-22, 534 A.2d 1140.

38 112 Pa. Commw. at 15, 22, 534 A.2d at 1137, 1140.

39 112 Pa. Commw. at 21, 534 A.2d at 1140.

According to Black's Law Dictionary 1446, 1335 (5th Ed. 1979) a wrongdoer is "[o]ne who commits an injury; a tort-feasor. The term ordinarily imports an invasion of a right to the damage of the party who suffers such invasion." A tort-feasor is "[a] wrongdoer; one who commits or is guilty of a tort." A tort is "[a] legal wrong committed upon the person or property independent of contract. It may be either (1) a direct invasion of the legal right of the individual..."

40 112 Pa. Commw. at 22, 534 A.2d at 1140.

See also, Pa. Const. art. I, §27.

The people have a right to clean air, pure water, and to preservation of the natural, scenic, historic, and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Adopted May 18, 1971.

41 112 Pa. Commw. at 22, 534 A.2d 1140.

42 *Id.*

43 *Id.*