Private Actions for Damages Resulting from Offshore Oil Pollution

I. Introduction

In March 1967, the S.S. *Torrey Canyon* ran aground off the southwest coast of England, discharging 25,000,000 gallons of crude oil into the ocean and fouling the shores of both England and France. The Union Oil Company, which had chartered the *Torrey Canyon*, agreed to pay damages totaling $7,200,000 to the governments of Great Britain and France; the claims, however, totaled almost twice this amount. As many as 30,000 seabirds and 2,500 acres of oysters were destroyed, and in Paris fish market sales declined 40 percent. Business at seaside resorts dropped precipitously.[1]

The *Torrey Canyon* disaster was only the first in a world-wide series of major spills resulting from oil tanker mishaps.[2] In the United States, public awareness of the potential consequences of offshore oil pollution is mainly attributable to a blowout beneath a drilling platform located on the outer continental shelf, in January 1969, from which approximately 3,000,000 gallons of oil were spilled into the Santa Barbara Channel and onto the California shoreline. By the end of April, oil had contaminated beaches as far as 90 miles to the northwest and 65 miles to the southeast of the original blowout site.[3] Damages to private interests were exten-

1. For a detailed account of the *Torrey Canyon* disaster, *see* J. Potter, Disaster by Oil 1-42 (1973).

2. In March 1968, only a year after the *Torrey Canyon* incident, the M.S. *General Colocotronis* discharged an estimated 1,000,000 gallons of oil after becoming stranded in Bahamian waters. In April and June 1968, the S.S. *Esso Essen* and S.S. *World Glory* spilled 1,000,000 and 2,000,000 gallons, respectively, off the South African coast. And in June 1968, the S.S. *Ocean Eagle* ran aground at the entrance of the San Juan, Puerto Rico harbor channel and broke in two, ruining the coast of Puerto Rico with 4,000,000 gallons of crude oil. Potter, *supra* note 1; A. Nash, D. Mann & P. Olsen, Oil Pollution and the Public Interest: A Study of the Santa Barbara Oil Spill 24 (1972). *See also* Bergman, *No Fault Liability for Oil Pollution Damage*, 5 J. Maritime L. & Com. 1, 2 (1973); Comment, *Oil Pollution of the Sea*, 10 Harv. Int'l L.J. 316, 316-20 (1969).

3. A. Nash, D. Mann & P. Olsen, *supra* note 2, at 22.

sive,[4] and claims in excess of $1,500,000,000 were filed.[5] Subsequently, at least three oil drilling blowouts off the Louisiana coast have exceeded in size the Santa Barbara spill.[6] Smaller spills number in the thousands, annually. In 1970, 3,711 oil spills were reported in American territorial waters, and by 1971 the figure had increased to 8,736.[7] The United States Environmental Protection Agency (EPA) has reported that as of 1974, over 10,000 spills occur annually in the United States.[8] Eight years after the *Torrey Canyon* disaster, oil pollution of coastal and interior waters continues to be a major source of injury to both private and public interests.

4. *Id.* at 28-31. The authors report that

> Businesses sustaining heavy losses from oil damage in the harbor area included boat brokers, some restaurants near the shore, charter fishing boats, boat rental companies, and marine and fishing supply companies. One of the supply companies reported that February 1969 was its worst month in eight years. Charter fishing and boat rentals were at a standstill and one large restaurant reported business off 50 percent. . . .
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> . . . .
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> By early summer of 1969 . . . [f]or the first time in many years, beachfront motels displayed vacancy signs in late June. The Santa Barbara City bed tax—calculated monthly according to the number of rooms rented in hotels, motels, and boarding houses—was off from the preceding year's intake by 8 percent in June, 12 percent in July, and 5½ percent in August. . . .
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> . . . [I]nterviews with real estate dealers knowledgeable in beach front property sales indicated a strong consensus that:
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> (1) The volume of beachfront property sales declined sharply from 1968 to 1969 and 1970;
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> (2) market values suffered a short-term decline in the range of 15-25 percent due to the oil spill . . . .
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> . . . .
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> Questionnaires distributed to a sample of 35 beachfront homeowners indicated that immediate direct damages by oil to seawalls, fences, gardens and residences exceeded $1,000 for many owners. Indirect losses mentioned far exceeded this amount. One respondent claimed a loss of $1,500 a month in rent and another claimed a $5,000 depreciation in the value of his home. The residents reported that they had paid extremely high prices for their property, as much as $1,000 per beachfront foot . . . [and that] they were being denied use of the beach—for which they had paid such high sums in the purchase price.

Id.

5. Nanda & Stiles, *Offshore Oil Spills: An Evaluation of Recent United States Responses*, 7 SAN DIEGO L. REV. 519, 528 n.64 (1970).

6. A. NASH, D. MANN & P. OLSEN, *supra* note 2, at 22.

7. U. S. COAST GUARD, POLLUTING INCIDENTS IN AND AROUND U.S. WATERS, CALENDAR YEAR 1971 (1972).

8. U.S. ENVIRONMENTAL PROTECTION AGENCY, CLEAN WATER, REPORT TO CONGRESS—1974, at 31 (1974).

In view of an increasingly severe domestic oil crisis, oil transport and offshore drilling activities can be expected to increase correspondingly. While there presently exists federal legislation aimed at deterring both accidental and intentional discharges, private actions for damages other than costs of abatement remain unaffected.[9] The deficiency in protection of private interests at the federal level is typified by regulations enacted pursuant to the Outer Continental Shelf Lands Act (Lands Act).[10] Immediately following the Santa Barbara spill, these regulations were amended to provide for "the reparation of any damage, to whomsoever occurring, proximately resulting" from the operations of oil drilling rights lessees.[11] Subsequently, the regulations were further amended to provide for absolute liability to third persons only for costs of

9. *See, e.g.*, Oil Pollution Act of 1961, *as amended*, 33 U.S.C. §§ 1001-15 (1970); Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-43 (1970) and regulations enacted pursuant thereto, 30 C.F.R. § 250 (1975); Federal Water Pollution Control Act, 33 U.S.C. § 1321 (Supp. IV, 1974). *See also* Refuse Act, 33 U.S.C. § 407 (1970).

10. 43 U.S.C. §§ 1331-43 (1970). Enacted in 1953, the Lands Act authorizes the Secretary of the Interior to grant mineral leases on the outer continental shelf, and "to prescribe such rules and regulations as may be necessary" to carry out his authority. 43 U.S.C. § 1334(a)(1) (1970). The outer continental shelf is defined by section 1331(a) to include all submerged lands lying seaward and outside of "lands beneath navigable waters," *i.e.*, beyond the three mile limit. *See* 43 U.S.C. § 1301(a) (1970).

Submerged lands within the three mile limit are regulated by the states under powers delegated by the Submerged Lands Act, 43 U.S.C. §§ 1301-15 (1970). Under 43 U.S.C. § 1311(a) (1970), each state is granted title to, ownership of and the right to lease in accordance with applicable state law the waters, submerged lands and natural resources located within the three mile limit. Regulations promulgated by the federal government, however, control all oil drilling activities on submerged lands lying between the three mile state and the twelve mile United States territorial boundaries.

In United States v. Maine, 420 U.S. 515 (1975), the Supreme Court recently held that the United States, to the exclusion of the Atlantic Coastal States, is entitled to exercise sovereign rights over the seabed and subsoil on the outer continental shelf beyond the three mile limit. With respect to the Submerged Lands Act, the Court stated:

> In that legislation, it is true, Congress transferred to the States the rights to the seabed underlying the marginal sea; however, this transfer was in no wise inconsistent with paramount national power but was merely an exercise of that authority.

Id. at 524. For cases reaching a similar result, *see* United States v. Texas, 339 U.S. 707 (1950); United States v. Louisiana, 339 U.S. 699 (1950); United States v. California, 332 U.S. 19 (1947).

11. 34 Fed. Reg. 2503-04 (1969), *as amended*, 30 C.F.R. § 250.43(c) (1975).

cleaning up the pollutant.[12] For other damages, liability "shall be governed by applicable law."[13]

Despite this gap in federal coverage (or because of it), private damage suits are being brought. The purpose of this Comment is to examine these suits, the relevant common law, and recent statutory developments at the state and international levels. Finally, recommendations are offered for legislation to remedy certain obstacles to recovery which are found to exist.

II. Jurisdiction and Applicable Law

Essential to an understanding of the likelihood of recovery for the private plaintiff is a knowledge of the bases for and the effect of a finding of admiralty jurisdiction. Under article III, section 2 of the United States Constitution, "the judicial Power" of the United States extends "to all cases of admiralty and maritime Jurisdiction." Congress implemented this constitutional grant in 1789,[14] and with minor changes, the same language applies today.[15]

A claim for damages is brought within admiralty jurisdiction when the defendant's alleged conduct has resulted in a maritime tort. It is now well-established that oil pollution of navigable waters can constitute such a tort.[16] Traditionally, in making maritime tort determinations courts have applied a locality test, in which "the jurisdiction of the admiralty [is] exclusively dependent upon the locality of the act."[17] The locality is the place where the injury takes effect.[18] Under this test, if the injury takes effect upon

12. 30 C.F.R. § 250.43(c) (1975).
13. 30 C.F.R. § 250.43(c) (1975).
14. Judiciary Act of 1789 § 9, 1 Stat. 76, *as amended,* 28 U.S.C. § 1333 (1970).
15. The provision has been codified in 28 U.S.C. § 1333 (1970):

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

16. California v. S.S. Bournemouth, 307 F. Supp. 922 (C.D. Cal. 1969); *In re* New Jersey Barging Corp., 168 F. Supp. 925 (S.D.N.Y. 1958); Salaky v. Atlas Tank Processing Corp., 120 F. Supp. 225 (E.D.N.Y.), *rev'd on other grounds sub nom.* Salaky v. Atlas Barge No. 3, 208 F.2d 174 (2d Cir. 1953).
17. Thomas v. Lane, 23 F. Cas. 957, 960 (No. 13,902) (C.C. Me. 1813) (Story, J.). The locality rule was most recently reaffirmed by the Supreme Court in Victory Carriers, Inc. v. Law, 404 U.S. 202, 205 (1971); *cf.* Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972).
18. T. Smith & Son, Inc. v. Taylor, 276 U.S. 179 (1928). *See also* Weinstein v. Eastern Airlines, Inc., 316 F.2d 758 (3d Cir.), *cert. denied,* 375 U.S. 940 (1963).

the high seas or navigable waters, the tort is maritime in nature, and admiralty jurisdiction is invoked.[19]

Two qualifications to this general rule must be noted. First, while suits requesting compensation for shore-based injuries fail to satisfy the locality test, Congress extended admiralty jurisdiction by the Admiralty Extension Act (Extension Act) in 1948[20] to land-based injuries caused by a vessel on navigable waters. However, the Extension Act is not applicable when injuries to shore result from offshore drilling or land-based terminal transfer operations.[21] Secondly, a "dual" test, imposing a "traditional maritime activity" requirement in addition to the well-established locality test, was recently promulgated by the Supreme Court in *Executive Jet Aviation, Inc. v. City of Cleveland*.[22] Under this test, the wrong must bear a significant relationship to a traditional maritime activity.[23] These activities appear to be those that involve navigation or commerce on navigable waters,[24] and include physical damage

19. Atlantic Transport Co. v. Imbrovek, 234 U.S. 52 (1914).

20. 46 U.S.C. § 740 (1970).

21. For an example of the problems land-based terminal transfer operations can cause, *see* N.Y. Times, Jan. 8, 1975, at 41, col. 5:

> The Fire Department and a private pumping company worked for more than 10 hours yesterday to clean 1,000 gallons of gasoline that spilled into Newtown Creek when a storage tank overflowed as it was being filled at the Gulf Oil Company storage terminal at 364 Maspeth Avenue, Brooklyn.
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> According to Fire Chief John Clennan who was on the scene, a gauge on a tank failed to register when the tank was full and caused 40,000 gallons of gasoline to spill into the retaining dike surrounding the tank. About 1,000 gallons seeped beneath the dike into the creek, which separates Long Island City, Queens, from the Greenpoint section of Brooklyn.

22. 409 U.S. 249 (1972).

23. In *Executive Jet*, an aircraft struck a flock of seagulls as it was taking off from an airport and crashed in the nearby waters of Lake Erie. The Supreme Court denied admiralty jurisdiction, concluding that,

> [u]nlike waterborne vessels, [aircraft] are not restrained by one-dimensional geographic and physical boundaries. For this elementary reason, we conclude that the mere fact that the alleged wrong "occurs" or "is located" on or over navigable waters—whatever that means in an aviation context—is not of itself sufficient to turn an airplane negligence case into a "maritime tort." It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity. We hold that unless such a relationship exists, claims arising from airplane accidents are not cognizable in admiralty in the absence of legislation to the contrary.

Id. at 268. *See also* Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969).

24. Oppen v. Aetna Ins. Co., 485 F.2d 252, 257 (9th Cir. 1973); Maryland v. Amerada Hess Corp., 356 F. Supp. 975, 976 (D. Md. 1973).

to vessels,[25] loss of navigation rights,[26] and reductions in fishermen's anticipated profits resulting from damage to marine life.[27]

The status of the maritime nexus requirement in offshore oil pollution cases is uncertain at the present time. In *Oppen v. Aetna Insurance Co.*,[28] owners of private pleasure boats sought recovery for physical damage to their boats and for loss of navigation rights caused by the Santa Barbara spill. A panel of three special masters had concluded that the plaintiffs' action was in admiralty, that federal maritime law controlled,[29] and that under maritime law, loss of navigation rights is not a compensable item of damages. Affirming the masters' decision, the Ninth Circuit concluded that, in light of *Executive Jet* "a resolution of the choice of law issue based on locality alone is not sufficient. We must also decide whether the wrong bears a 'significant relationship to traditional maritime activity.' "[30] Equally important was the court's interpretation of the "traditional maritime activity" requirement. Having ruled that the nature of defendants' activities was not dispositive, the court concluded that claims for physical injury to maritime vessels and for interference with navigation rights meet the relationship requirement.[31]

In *Maryland v. Amerada Hess Corp.*,[32] however, the district court of Maryland concluded that in oil pollution cases the locality test alone is sufficient. There, the transfer line between a tanker and shore terminal facility ruptured, discharging oil into Baltimore Harbor. In the original opinion, the district court applied the locality test and sustained admiralty jurisdiction. Three months later, the dual test of *Executive Jet* was enunciated by the Supreme Court, and defendants moved for relief from the final order. Upon reconsideration of its earlier ruling, the district court adhered to

25. 485 F.2d at 252.

26. *Id.*

27. Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974). *See also* California v. S.S. Bournemouth, 307 F. Supp. 922 (C.D. Cal. 1969).

28. 485 F.2d 252 (9th Cir. 1973).

29. Where the reference is to substantive law, the terms "admiralty" and "maritime law" are used synonymously by American courts. Substantive rules of federal maritime law control when a finding of admiralty jurisdiction is made. *See* notes 38-41 and accompanying text *infra*.

30. 485 F.2d at 256.

31. *Id.* at 257.

32. 356 F. Supp. 975 (D. Md. 1973), *denying motion for relief from final order*, 350 F. Supp. 1060 (D. Md. 1972).

the locality test.[33] Unwilling to give the Supreme Court's decision the broad reading subsequently given in *Aetna Insurance*, the court held that in *Executive Jet* "the Supreme Court did not reject the locality test for jurisdiction in admiralty cases, but merely held it to be insufficient in claims arising from airplane accidents."[34] While refraining from making the locality test a "talismanic" standard, deviation was felt to be appropriate only in the most unusual situations.[35]

As a practical matter, the consequences of the controversy for the private plaintiff injured by oil pollution appear minimal. In suits likely to be brought by private claimants, if the locality test is met, it is doubtful that the nexus requirement will bar jurisdiction.

A finding of admiralty jurisdiction affects determinations of the appropriate forum in which to bring the action, the substantive rules of law to be applied, and the availability of certain procedural devices. Federal district courts have original jurisdiction in admiralty, exclusive of state courts; but under the "saving to suitors" clause[36] of the Judiciary Act, concurrent state and federal jurisdiction of in personam maritime causes of action is permitted, provided a common law remedy exists. Thus, plaintiff may have the choice of instituting his action either in (1) state court, (2) federal district court sitting in admiralty, or (3) if diversity and the requisite jurisdictional amount are present, federal district court without reference to "admiralty."[37]

Regardless of choice of forum, when a finding of admiralty jurisdiction is made, substantive federal maritime[38] law becomes applicable. Potential conflicts between federal maritime law and state law are apparent. While the law in this area is confused and chang-

33. *Id.* at 975.

34. *Id.* at 976.

35. *Id.* at 977.

36. 28 U.S.C. § 1333 (1970) saves "to suitors in all cases all other remedies to which they are otherwise entitled." This language differs slightly from that originally used in section 9 of the Judiciary Act of 1789, 1 Stat. 76, which saved "to suitors, in all cases, the rights of a common law remedy, where the common law is competent to give it." Apparently no alteration of meaning was intended by this change in language. *See* Madruga v. Superior Court of California, 346 U.S. 556, 560 n.12 (1954). For a fuller discussion of this issue, *see* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 1-13, at 39 (2d ed. 1975) [hereinafter cited as GILMORE & BLACK].

37. GILMORE & BLACK, *supra* note 36, § 1-13 at 37.

38. *See* note 29 *supra*.

ing,[39] the general statement can be made that substantive rules of federal maritime law control, displacing conflicting state law.[40] This rule remains valid even in suits brought in state forums under the "saving to suitors" clause.[41]

It has been observed that the differences between the traditional actions afforded by state common law, and those available under maritime tort law are for the most part not significant.[42] Indeed, uncertainty exists as to exactly what the tort law is in admiralty.[43] The basic doctrines of negligence, nuisance and trespass are generally recognized in their common law form.[44] However, the potentially consequential doctrine of strict liability for ultrahazardous activities is not available in admiralty proceedings[45] since a showing of at least negligence is required to establish liability.[46] It should also be noted that in maritime tort actions

39. *See* GILMORE & BLACK, *supra* note 36, § 1-17 at 47-50.

40. All that can be said in general is that the states may not flatly contradict established maritime law, but may "supplement" it, to the extent of allowing recoveries in some cases where the maritime law denies them; that states may legislate freely on shipping matters that are of predominantly local concern, but that they may not so act as to interfere with the uniform working of the federal maritime legal system.

Id. § 1-17 at 49-50 (footnotes omitted). *See also* discussion of Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973), notes 206-24 and accompanying text *infra.*

41. GILMORE & BLACK, *supra* note 36, § 1-18 at 50-51; Post, *Private Compensation for Injuries Sustained by the Discharge of Oil from Vessels on the Navigable Waters of the United States: A Survey,* 4 J. MARITIME L. & COM. 25, 34 (1972). Typical of the numerous decisions in this area is Jansson v. Swedish American Line, 185 F.2d 212 (1st Cir. 1950):

> We take it now to be established by an impressive body of precedent that when a common law action is brought, whether in a state or in a federal court, to enforce a cause of action cognizable in admiralty, the substantive law to be applied is the same as would be applied by an admiralty court—that is, the general maritime law, as developed and declared, in the last analysis, by the Supreme Court of the United States, or as modified from time to time by act of Congress.

Id. at 216.

42. Sweeney, *Oil Pollution of the Oceans,* 37 FORDHAM L. REV. 155, 170 (1968).

43. GILMORE & BLACK, *supra* note 36, § 1-16 at 46.

44. *See, e.g., In re* New York Trap Rock Corp., 172 F. Supp. 638 (S.D.N.Y. 1959).

45. For discussion of the applicability of the doctrine of absolute liability for ultrahazardous activities to oil drilling and transport operations, *see* notes 153-61 and accompanying text *infra.*

46. United States v. Standard Oil Co., 217 F.2d 539 (6th Cir. 1954). *See generally* Shutler, *Pollution of the Sea by Oil,* 7 HOUSTON L. REV. 415, 423 (1970).

contributory negligence is not an absolute defense. Instead, the doctrine of comparative negligence is applied.[47]

In one very important respect, federal statutory law in the area of admiralty affects plaintiff's prospects of obtaining a meaningful recovery. If plaintiff's damages have been caused by a seagoing vessel, plaintiff may well be unable to obtain compensation, even assuming that liability is clearly established. The Limitation of Liability Act (Limitation Act),[48] limits liability of the owner of any vessel to the value of the vessel and her freight then pending, provided the damage is incurred without the privity or knowledge of the owner.[49] The shipowner need only show the exercise of due diligence in furnishing a seaworthy ship to satisfy the "privity or knowledge" requirement.[50] The Limitation Act extends to tort claims for damages to shore-based property,[51] and applies even where the tort is non-maritime in nature. While the statute is neutral on its face, it is now well established by judicial interpretation that the value of the vessel is determined after the loss rather than at the commencement of the voyage.[52] Moreover, insurance proceeds carried by the owner are not recoverable by the claimant.[53] Thus, when a tanker carrying millions of gallons of oil runs aground or collides with another vessel, discharges its cargo into the ocean, and then sinks, the value of the ship is reduced to zero, and under the Limitation Act plaintiffs will be unable to obtain any monetary recovery. As has been noted, "[i]f

47. Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953); Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942); The Max Morris, 137 U.S. 1 (1890); W.E. Hedger Transp. Corp. v. United Fruit Co., 198 F.2d 376 (2d Cir.), *cert. denied*, 344 U.S. 896 (1952).

48. 46 U.S.C. §§ 181-89 (1970).

49. 46 U.S.C. § 183(a) (1970). It is well established that damages resulting from oil pollution by vessels on navigable waters are subject to the Limitation Act. *In re* New Jersey Barging Corp., 144 F. Supp. 340 (S.D.N.Y. 1956); *In re* Harbor Towing Corp., 335 F. Supp. 1150 (D. Md .971).

50. GILMORE & BLACK, *supra* note 36 , 10-20 at 877.

51. Richardson v. Harmon, 222 U.S. 96, 106 (1911).

52. Norwich & N.Y. Transp. Co. v. Wright, 80 U.S. (13 Wall.) 104 (1871). For a complete review of judicial interpretation of the Limitation Act, *see* GILMORE & BLACK, *supra* note 36, §§ 10-1 to -49.

53. The City of Norwich, 118 U.S. 468 (1886); The Scotland, 118 U.S. 507 (1886); The Great Western, 118 U.S. 520 (1886). However, prospects for recovery of insurance proceeds may be improving. *See* Olympic Towing Corp. v. Nebel Towing Co., 419 F.2d 230 (5th Cir. 1969); GILMORE & BLACK, *supra* note 36, § 10-31 at 908-12.

a few strippings from the wreck and a life boat or two are saved, those may be solemnly handed over to a trustee or their value ascertained and a bond posted."[54]

As a result, plaintiff may well be without a practical remedy unless he is able to show that the shipowner has failed to meet the requirements of the Act. The only restriction on the owner's right to limit his liability is the requirement that he be without "privity or knowledge" of the cause of the loss.[55] While presently this condition is easily met, the flexibility and lack of fixed meaning in these words offers some hope to the private claimant that in light of an increasingly critical oil pollution situation, the courts may be persuaded to broaden the definition:

> Judicial attitudes shape the meaning of such catch-word phrases for successive generations. In the heyday of the Limitation Act it seemed as hard to pin "privity or knowledge" on the petitioning shipowner as it is thought to be for the camel to pass through the needle's eye. To the extent that in our own or a subsequent generation the philosophy of the Limitation Act is found less appealing, that attitude will be implemented by a relaxed attitude toward what constitutes "privity or knowledge". . . . The Act, like an accordion, can be stretched out or narrowed at will.[56]

The doctrine of respondeat superior may be one possible means of broadening the definition of "privity or knowledge" and extending liability.[57] Despite a rejection of this approach in the past,[58] the first indications of a trend narrowing the impact of the Limitation Act by an expansive reading of the "privity or knowledge" requirement are evident.[59] If increasing judicial hostility to the

54. GILMORE & BLACK, *supra* note 36, § 10-29 at 907. In the *Torrey Canyon* disaster, which caused millions of dollars in damages to the coastlines and territorial waters of England and France, exactly such an action was taken by the owner and charterer of the vessel. *See In re* Barracuda Tanker Corp., 281 F. Supp. 228 (S.D.N.Y. 1968).

55. 46 U.S.C. § 183(a) (1970).

56. GILMORE & BLACK, *supra* note 36, § 10-20 at 877.

57. *See* Mendelsohn, *The Public Interest and Private International Maritime Law*, 10 WM. & MARY L. REV. 783, 801 (1969).

58. *E.g.*, Coryell v. Phipps, 317 U.S. 406 (1943). Coryell is a good example of the extent of protection afforded the owner of a vessel by the Limitation Act.

59. In States S.S. Co. v. United States, 259 F.2d 458 (9th Cir. 1957), a port engineer (also serving as marine superintendent at the time of the accident) sent a vessel to sea in unseaworthy condition. The court found that the engineer had

Act continues, this requirement may not prove to be the crushing barrier it is today.[60]

Finally, there are certain procedural rules unique to admiralty proceedings. Many of the traditional rules were eliminated in the 1966 unification of the Admiralty Rules with the Federal Rules of Civil Procedure,[61] but certain distinctive features of actions in admiralty remain.[62] Most importantly, the action in rem has been preserved.[63] Traditionally, both the in rem and the in personam suit have been available to a plaintiff in admiralty. To take advantage of the in rem proceeding, a plaintiff must have acquired a maritime lien: "a right conceived of as a property interest in the tangible thing involved (usually but not always a ship) in the (often as yet unascertained) amount of the accrued liability."[64] The occurrence of a maritime tort is usually sufficient to create such a lien.[65]

In *California v. S.S. Bournemouth*,[66] the vessel discharged a quantity of bunker oil into the harbor, while moored at Long Beach. Defendant contended that only collision and personal injury claims were adequate to create maritime liens and that the tort of injury to the State's property (here, navigable waters and marine life) was not sufficient. Rejecting these arguments, the court held not only that a negligent discharge of oil into navigable waters constituted a maritime tort, but also that such a tort does

knowledge of the conditions resulting in unseaworthiness, held that the engineer was a managing agent, and imputed his knowledge to the shipowner. *See also In re* Republic of France, 171 F. Supp. 497 (S.D. Tex. 1959), *rev'd on other grounds sub nom.* Republic of France v. United States, 290 F.2d 395 (5th Cir. 1961), *cert. denied*, 369 U.S. 804 (1962).

60. GILMORE & BLACK, *supra* note 36, § 10-4(a) at 823, have optimistically commented that "if a third edition of this book is called for, the present chapter [on limitation of liability] will in all probability be of no more than historical interest."

61. *See generally* Note, *Admiralty Practice After Unification: Barnacles on the Procedural Hull*, 81 YALE L.J. 1154 (1972); Colby, *Admiralty Unification*, 54 GEO. L.J. 1258 (1966); Currie, *Unification of Civil and Admiralty Rules: Why and How*, 17 ME. L. REV. 1 (1965).

62. For a list of the procedures peculiar to admiralty which have been retained in the unification, *see* Note, *supra* note 61, at 1154 n.3.

63. Rule C, Supplemental Rules for Certain Admiralty and Maritime Claims, FED. R. CIV. PRO., 28 U.S.C. App. (1970).

64. GILMORE & BLACK, *supra* note 36, § 1-12 at 35.

65. *Id.* § 9-20 at 628-29.

66. 307 F. Supp. 922 (C.D. Cal. 1969).

create the requisite maritime lien.[67] The facts of the case illustrate the advantages of the action in rem to a plaintiff in oil pollution cases. In *Bournemouth*, the owner of the vessel, as is often the case, was not subject to personal service of process, and California law did not offer the action in rem.[68] If the in rem proceeding in admiralty had been unavailable, California's action would have been dismissed for lack of jurisdiction. It should be noted, however, that the "saving to suitors" clause is inapplicable to the action in rem.[69] Thus, this important method of proceeding is limited to use in federal courts sitting in admiralty.

The 1966 unification also retains the admiralty rule requiring trial by judge rather than by jury. For private plaintiffs this rule may be a substantial disadvantage in suits brought against sizable oil and shipping interests since juries of peers, apprehensive of future incidents, are likely to be more generous than judges in awarding damages. However, this limitation can be circumvented by recourse to the "saving to suitors" clause. By bringing his action in a state forum, or in a federal court on jurisdictional grounds other than admiralty, a plaintiff can preserve his valuable right to a jury trial.[70]

III. Traditional Theories of Liability

The increase in offshore oil pollution and in consequent private damage suits has offered a relatively new area for extensions of and innovation in traditional tort doctrine.[71] Plaintiffs have as-

67. *Id.* at 926.

68. In any case, state-created maritime liens can be enforced in rem *only* in federal admiralty court. *See* Gilmore & Black, *supra* note 36, § 9-28 at 650. *See also* note 69 and accompanying text *infra*. While other state in rem proceedings are available under the "saving to suitors" clause, such proceedings lack the distinctive features of the admiralty action in rem. The maritime lien is in many ways superior to liens obtained by levy or attachment in state proceedings.

> A maritime lien, unlike a lien at common law, may, in many cases, exist without possession of the thing, upon which it is asserted, either actual or constructive. . . . [W]hen the lien arises from torts committed at sea, it travels with the thing, wherever that goes, and into whosoever hands it may pass.

The Rock Island Bridge, 73 U.S. (6 Wall.) 213, 215 (1867). *See* Gilmore & Black, *supra* note 36, §§ 1-12, 1-13 at 34-40.

69. The Moses Taylor, 71 U.S. (4 Wall.) 411 (1867); Hine v. Trevor, 71 U.S. (4 Wall.) 555 (1867). *See* Gilmore & Black, *supra* note 36, § 1-13 at 37-40.

70. Post, *supra* note 41, at 34; Comment, *supra* note 2, at 346.

71. One of the earliest offshore oil pollution cases in the United States is the

serted liability based on a number of theories ranging from trespass[72] to unseaworthiness;[73] but negligence and nuisance represent the most important approaches. Despite a receptive attitude on the part of many courts, however, both the negligence and nuisance theories present the plaintiff with severe obstacles.

A. *Negligence*

Traditionally, negligence theory has predominated in tort actions arising out of land-based oil drilling activities.[74] Four basic requirements must be satisfied to establish such a cause of action. A plaintiff must show: (1) a duty requiring defendant to conform to a standard of conduct, (2) a breach of this duty, (3) proximate causation, and (4) actual loss or damage to the plaintiff.[75] The first two elements make up what is usually referred to by the courts as "negligence."[76]

Meeting these four requirements places a heavy burden of proof on the plaintiff. In view of the highly technical nature of oil transport and drilling activities, a showing of negligence is particularly difficult. One possible means of easing this burden is application of the doctrine of *res ipsa loquitur*.[77] The principle is particularly

relatively recent *In re* New Jersey Barging Corp., 168 F. Supp. 925 (S.D.N.Y. 1958). *See also* United States v. Ballard Oil Co., 195 F.2d 369 (2d Cir. 1952).

72. Maryland v. Amerada Hess Corp., 350 F. Supp. 1060 (D. Md. 1972), *motion for relief denied*, 356 F. Supp. 975 (D. Md. 1973).

73. *Id.*; Burgess v. M/V Tamano, 370 F. Supp. 247 (D. Me. 1973).

74. Keeton & Jones, *Tort Liability and the Oil and Gas Industry*, 35 TEXAS L. REV. 1 (1956).

75. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30, at 143 (4th ed. 1971) [hereinafter cited as PROSSER].

76. *Id.*

77. The doctrine of *res ipsa loquitur* is little more than an evidentiary technique that allows an injured person, who would not otherwise be able to do so, to show a *prima facie* case of negligence. Thus, when the doctrine's initial factors are shown and defendant is the person who had exclusive control of an instrumentality that injured plaintiff in a way that ordinarily would not have occurred unless there was negligence on the part of defendant, the burden shifts to defendant to disprove the inference of negligence or to show that he did not cause the damage.

Bianchini v. Humble Pipeline Co., 480 F.2d 251, 255 (5th Cir. 1973). The *Bianchini* case is considered at notes 160-61 and accompanying text *infra*. The finding that evidence as to the true explanation of the event is more readily accessible to the defendant than to plaintiff is a further factor increasing the likelihood that *res ipsa loquitur* will be applied by the courts. *See* PROSSER, *supra* note 75, § 39 at 214.

well suited to the offshore oil spill incident and has been applied by several courts. In *Skansi v. Humble Oil & Refining Co.*,[78] defendant oil company appealed from a judgment awarding plaintiff damages for loss of oysters through oil contamination allegedly caused by defendant's drilling operations. A defense witness testified that in reworking operations spillage is an indication of malfunction. Affirming the trial court's judgment, the court concluded that plaintiff had established negligence by showing that the pollution "would not have occurred except for some fault or negligence on defendant's part."[79]

More explicit reliance on the doctrine is evident in *California v. S.S. Bournemouth*.[80] There the court found that "[t]he theory of *res ipsa loquitur* as an evidentiary device has been repeatedly accepted in admiralty cases,"[81] and that plaintiff had sufficiently established its case despite failure to produce any evidence of the actual cause of the accident.

As an alternative approach to reducing his burden, plaintiff might utilize a per se theory of negligence based on federal and state water pollution legislation, or at least depend on breach of such statutes as evidence of negligence.[82] However, case law applying the per se or evidentiary doctrines to water pollution legislation is scarce. In one such case, *Burgess v. M/V Tamano*,[83] the complaint asserted liability on the basis of both section 13 of the Rivers and Harbors Act of 1899 (1899 Act)[84] and section 11(b)(2)

78. 176 So. 2d 236 (La. Ct. App. 1965).

79. *Id.* at 238.

80. 318 F. Supp. 839 (C.D. Cal. 1970).

81. *Id.* at 841, *citing* Johnson v. United States, 333 U.S. 46 (1948), and United Fruit Co. v. Marine Terminals Corp., 376 F.2d 1007 (9th Cir. 1967).

82. Under the per se theory,

> [o]nce the statute is determined to be applicable—which is to say, once it is interpreted as designed to protect the class of persons in which the plaintiff is included, against the risk of the type of harm which has in fact occurred as a result of its violation—the great majority of the courts hold that an unexcused violation is conclusive on the issue of negligence, and that the court must so direct the jury. . . .
>
> A considerable minority have held that a violation is only evidence of negligence, which the jury may accept or reject as it sees fit.

PROSSER, *supra* note 75, § 36 at 200-01.

83. 370 F. Supp. 247 (D. Me. 1973).

84. 33 U.S.C. § 407 (1970). Section 13 is generally known as the Refuse Act.

of the Federal Water Quality Improvement Act of 1970 (FWQIA),[85] as well as on traditional theories of tort liability.[86]

While a cause of action based on the theory that a private action can be judicially implied from a federal statute[87] offers an attractive complement to the traditional tort actions available to a plaintiff, the courts are unlikely to entertain such actions grounded on either the 1899 Act or the FWQIA. Section 13 of the 1899 Act[88] makes it unlawful to discharge or cause to be discharged "refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state" from vessels, shores, or manufacturing establishments into any navigable waters of the United States, "whereby navigation shall or may be impeded or obstructed." Section 16 of the Act[89] subjects violators to imprisonment for up to one year, or a fine not exceeding $2,500, or both. One-half of this fine is, at the court's discretion, payable to persons giving information which leads to conviction. Several courts have permitted private parties to seek *injunctive* relief against violations of the 1899 Act,[90] but no case law indicates a willingness to allow recovery to private plaintiffs for injuries resulting from violations of section 13. Even *qui tam* actions[91]—which would at least permit

85. 33 U.S.C. § 1161(b)(2) (1970), *as amended,* 33 U.S.C. § 1321(b)(3) (Supp. IV, 1974). The provisions of the Water Quality Improvement Act covering oil pollution were reenacted, only slightly altered, as section 311 of the Federal Water Pollution Control Act Amendments of 1972 [hereinafter cited as 1972 FWPCA Amendments], 33 U.S.C. § 1321 (Supp. IV, 1974).

86. The *Burgess* court did not, however, reach consideration of the claims asserted on the basis of the FWQIA and the 1899 Act.

87. For an example of this theory, *see* J.I. Case Co. v. Borak, 377 U.S. 426 (1964), in which the Court announced, with respect to section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) (1970):

> While this language makes no specific reference to a private right of action, among its chief purposes is "the protection of investors," which certainly implies the availability of judicial relief where necessary to achieve that result.

377 U.S. at 432. *Accord,* Mills v. Electric-Auto Lite Co., 396 U.S. 375 (1970). For a fuller treatment of this area, *see* Note, *Implying Civil Remedies from Federal Regulatory Statutes,* 77 HARV. L. REV. 285 (1963).

88. 33 U.S.C. § 407 (1970).

89. 33 U.S.C. § 411 (1970).

90. Alameda Conservation Ass'n v. California, 437 F.2d 1087 (9th Cir.), *cert. denied,* 402 U.S. 908 (1971); Neches Canal Co. v. Miller & Vidor Lumber Co., 24 F.2d 763 (5th Cir. 1928); River v. Richmond Metropolitan Authority, 359 F. Supp. 611 (E.D. Va. 1973); Sierra Club v. Leslie Salt Co., 354 F. Supp. 1099 (N.D. Cal. 1972).

91. The *qui tam* action is a civil action brought to collect a fine. The procedure originated in criminal law enforcement proceedings of nineteenth century England.

recovery of amounts equal to one-half of the meager fines leviable under section 16—have not been permitted.[92]

The 1899 Act may, however, be useful in establishing a standard of conduct for determining negligence when applied in conjunction with the per se theory. As noted,[93] reliance on the per se doctrine requires the plaintiff to establish that the statute invoked was intended to protect the class of persons of which plaintiff is a member against the type of harm which resulted. Recent judicial interpretation of section 13 will help a plaintiff meet these requirements, and contend with arguments that the Act was not intended as a water pollution control measure. The courts have held not only that oil is "refuse" for purposes of the Act,[94] but also that the discharged pollutants need not interfere with navigation to come within its provisions. In the leading case, *United States v. Standard Oil Co.*,[95] the Supreme Court concluded,

> it is plain from [the 1899 Act's] legislative history that the "serious injury" to our watercourses . . . sought to be remedied was caused in part by obstacles that impeded navigation and in part by pollution.[96]

Moreover,

> the word "refuse" includes all foreign substances and pollutants apart from those "flowing from streets and sewers and passing therefrom in a liquid state" into the watercourse.[97]

1 F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 3.03 at 3-72 (1973) [hereinafter cited as GRAD].

92. In Hughes v. Ranger Fuel Corp., 467 F.2d 6 (4th Cir. 1972), the court stated:

> [A]n informer, such as apparently the plaintiffs were, while entitled to share in the fine if there is a prosecution under Section 411, has no standing otherwise; the right of enforcement and prosecution under the Act is vested exclusively in the discretion of the Attorney-General (33 U.S.C., Section 412) [citations omitted]. In short, the right of an informer to participate in the fruits of a prosecution under the Act is dependent entirely on his ability to induce the Government to prosecute.

Id. at 8 n.1. *Accord,* Connecticut Action Now, Inc. v. Roberts Plating Co., 457 F.2d 81 (2d Cir. 1972); Jacklovich v. Interlake, Inc., 458 F.2d 923 (7th Cir. 1972).

93. *See* note 82 *supra.*

94. *See, e.g.,* United States v. Standard Oil Co., 384 U.S. 224 (1966); United States v. Ballard Oil Co., 195 F.2d 369 (2d Cir. 1952).

95. 384 U.S. 224 (1966).

96. *Id.* at 228-29.

97. *Id.* at 230. *Accord,* United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655 (1973); United States v. United States Steel Corp., 482 F.2d 439 (7th

Thus, unless the Federal Water Pollution Control Act Amendments of 1972 (1972 FWPCA Amendments)[98] come to be viewed by the courts as limitations on section 13 as a source of authority for general water pollution control,[99] the 1899 Act can be a useful tool for the private plaintiff. Utilized either as a standard of conduct, or, when violated, as evidence of negligence, section 13 can ease considerably the plaintiff's burden of proof.

Section 311(b)(3) of the 1972 FWPCA Amendments[100] prohibits "the discharge of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone in harmful quantities,"[101] from any vessel, or onshore or offshore facility. Violators are liable to the federal government for actual costs of removal of

Cir. 1973), *cert. denied*, 414 U.S. 909 (1973). *Contra*, Guthrie v. Alabama By-Products Co., 328 F. Supp. 1140 (N.D. Ala. 1971), *aff'd per curiam*, 456 F.2d 1294 (5th Cir. 1972), *cert. denied*, 410 U.S. 946 (1973).

98. 33 U.S.C. § 1251-1376 (Supp. IV, 1974).

99. *See* 1 GRAD, *supra* note 91, § 3.03 at 3-79. Thus far, the courts appear reluctant to adopt the view that section 13 has been restricted in scope by the 1972 FWPCA Amendments. In United States v. Ira S. Bushey & Sons, Inc., 363 F. Supp. 110 (D. Vt.), *aff'd mem.*, 487 F.2d 1393 (2d Cir. 1973), *cert. denied*, 417 U.S. 976 (1974), an action by the federal government for injunctive relief against corporate owners of vessels engaged in transporting oil, the court stated:

> [E]quitable relief has long been available under the Rivers and Harbors Act of 1899 or more specifically that section, 33 U.S.C. § 407, known as the Refuse Act, and there is no indication in the [1972 FWPCA Amendments] that Congress intended to limit the equitable powers of courts under the Refuse Act. When Congress in enacting the [1972 FWPCA Amendments] wanted to limit the scope of regulation under other acts dealing with pollution in navigable waters—specifically the Rivers and Harbors Act of 1910 and the Supervisory Harbor Acts of 1888—it spoke clearly in doing so. *See* 33 U.S.C. § 1371(b). It has *not* done so in the case of the Act of March 3, 1899.

Id. at 120 (footnote omitted; emphasis in original). *See also* United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655 (1973), in which the Court expresses a receptive attitude towards section 13, subsequent to passage of the 1972 FWPCA Amendments. *But see* GRAD, *supra* note 91, § 3.03 at 3-79, adopting the view that, "whatever its usefulness in the past, Section 13 is a simplistic and badly drafted piece of legislation, and the courts should, sooner or later, recognize that it has run its course."

100. 33 U.S.C. § 1321(b)(3) (Supp. IV, 1974).

101. Exceptions are granted for (1) discharges of oil into the contiguous zone which are permitted by Article IV of the International Convention for the Prevention of Pollution of the Sea by Oil, Done at London, May 12, 1954, 75 Stat. 402 (1961), T.I.A.S. No. 4900, 327 U.N.T.S. 3 (as amended), and (2) discharges which are determined by the President, by regulation, not to be harmful.

the oil, in an amount not to exceed $14,000,000 for vessels,[102] and $8,000,000 for onshore[103] or offshore facilities,[104] unless the owner or operator can prove that the spill was caused solely by an act of God, an act of war, negligence on the part of the federal government, an act or omission of a third party (regardless of whether such act or omission was negligent), or any combination of these causes.

Applicable to all sources of offshore oil pollution, the 1972 FWPCA Amendments could serve as a useful standard in determining negligence. Unfortunately, section 311(*o*)(1)[105] provides:

> Nothing in this section shall affect or modify in any way the obligations of any owner or operator . . . to any person or agency under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil . . . .

This language appears to preclude use of the Amendments for any purpose affecting liability for damages from a discharge of oil. Similarly, this section might bar any private actions for damages that might otherwise be implied from the Amendments. While citizen suits to enforce provisions of the Amendments are expressly permitted by section 505,[106] this section is not an authorization for citizen suits to recover general damages resulting from violations of the provisions.

Even assuming proof of "negligence" (*i.e.*, a duty to conform to a standard of conduct, and breach of this duty), it remains for the plaintiff to show that his injuries were proximately caused by defendant's conduct. The concept of proximate cause subsumes a number of distinct problems best considered separately.[107] In actions arising from offshore oil spillage, the problems of causation in fact and liability for unforeseeable consequences are likely to

102. 1972 FWPCA Amendments § 311(f)(1), 33 U.S.C. § 1321(f)(1) (Supp. IV, 1974).

103. 1972 FWPCA Amendments § 311(f)(2), 33 U.S.C. § 1321(f)(2) (Supp. IV, 1974).

104. 1972 FWPCA Amendments § 311(f)(3), 33 U.S.C. § 1321(f)(3) (Supp. IV, 1974).

105. 33 U.S.C. § 1321(*o*)(1) (Supp. IV, 1974).

106. 33 U.S.C. § 1365 (Supp. IV, 1974).

107. PROSSER, *supra* note 75, § 42 at 249-50.

be the most troublesome. When injuries result from major catastrophes such as the Santa Barbara blowout, causation in fact should not be difficult to prove. But with the decreasing magnitude of the spill, obstacles are likely to mount for the plaintiff. For example, demonstrating that diminished fish landings or oyster harvests are the result of a small spill imposes a difficult burden, often requiring expert testimony to prove that it was the oil, and not one of many extraneous factors which caused the decrease.[108]

Having shown causation in fact, the claimant must also establish that defendant could have foreseen the resulting injuries for which compensation is sought. In *Union Oil Co. v. Oppen*,[109] the court considered whether pecuniary loss to commercial fishermen caused by diminished aquatic life following the Santa Barbara spill was foreseeable. Adopting a tough attitude toward the polluting oil company, the court stated:

> To assert that the defendants were unable to foresee that negligent conduct resulting in a substantial oil spill could diminish aquatic life and thus injure the plaintiffs is to suppose a degree of general ignorance of the effects of oil pollution not in accord with good sense.
>
> An examination of the other factors mentioned in *Biakanja* only strengthens our conclusion that defendants in this case owed a duty to the plaintiffs. Thus, the fact that the injury flows directly from the action of escaping oil on the life in the sea, . . . the public's deep disapproval of injuries to the environment and the strong policy of preventing such injuries, all point to the existence of a required duty.[110]

In spite of this strongly worded language, the court emphasized plaintiff's direct use of a resource of the sea, and warned that liability for every decline in general land-based activity is not part of the court's holding.[111] If the injured party's direct use of the sea is the vital criterion, then the forseeability requirement appears to preclude recovery in negligence for a number of private claimants. For the businessman whose trade depends on tourists

108. For an example of this problem, *see* Doucet v. Texas Co., 205 La. 312, 17 So. 2d 340 (1944).

109. 501 F.2d 558 (9th Cir. 1974).

110. *Id.* at 569, *citing* Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958), and Askew v. American Waterways Operators, Inc., 411 U.S. 325, 333 n.5 (1973).

111. 501 F.2d at 570.

drawn by the area's proximity to the ocean, lost profits will not be recoverable under the *Union Oil* approach. In short, the foreseeability requirement can be a severe one.

B. *Nuisance*

Nuisance has been the most frequently asserted theory of liability for damages from offshore oil pollution. Unlike negligence, which focuses on the particular kind of conduct which led to the invasion of an interest, nuisance premises liability on the type of interest invaded. A nuisance can result either from intentional or negligent conduct, or from non-negligently carrying on abnormally dangerous activity.[112] In the field of offshore oil pollution, nuisances will rarely result from conduct which might be labelled intentional. The few instances of intentional conduct usually arise from activities connected with the cleaning of tanks and the resultant discharge of oily wastes. Similarly, nuisances resulting from the conduct of abnormally dangerous activities will be infrequent. At present, no jurisdiction views oil transport or terminal operations as ultrahazardous activities, although offshore drilling activities may fit within this category.[113] Most nuisance actions for oil pollution are predicated on negligent conduct.

Generally, to establish liability in nuisance, the case must be fitted within one of the above three categories.[114] Seemingly, a plaintiff would be faced with the same burdens that must be met in a negligence action if the cause of action is based on a negligently-created nuisance. There is apparent confusion in the courts on this issue, however, and as a practical matter the burdens may often be somewhat less stringent in a nuisance action.[115] A negli-

112. PROSSER, *supra* note 75, § 87 at 574.

113. *See* notes 153-61 and accompanying text *infra*.

114. PROSSER, *supra* note 75, § 87 at 574.

115. It *appears* that liability for nuisance escaped the transition to fault principles which characterized most areas of tort law in the nineteenth century, no doubt because of its close relationship to the principles of the law of property. "Nuisance" has remained an isolated island of liability without fault and courts have resorted to "nuisance" terminology to impose liability when prompted by policy considerations emerging from the idea of the inviolability of private property rights, enterprises involving high risks, and the notion that expanding industry with its high profits should make good for loss caused to innocent bystanders in the role of nearby property owners.

1 F. HARPER & F. JAMES, JR., THE LAW OF TORTS § 1.24, at 69 (1956) (emphasis

gently caused event can result in a suit brought on independent grounds of negligence and nuisance, and a plaintiff does well to argue both theories in the alternative. Although his action in negligence may fail, he might still succeed in a nuisance action based on a weak negligence theory.

A private action for nuisance may be based either on a private nuisance or a public nuisance. A private nuisance is an interference with the interest in the private use and enjoyment of land.[116] The nuisance action is well-suited for the private owner of shorefront property, and liability will be found whenever oil has come in contact with plaintiff's property.

To maintain a private nuisance action, there must be direct interference with a property right. This requirement precludes recovery for many claimants, particularly for the owners of resorts which are located in a shoreside community but which do not abut the water. Since the oil has caused no actual interference with the use and enjoyment of such owners' property, no action for private nuisance can lie. The limitation is exemplified in *Central Georgia Power Co. v. Pope*,[117] in which the plaintiff, proprietor of a mercantile business, sued for damages resulting from the erection of a dam by defendant. As a result of mosquitoes and malaria caused by the dam, plaintiff's customers died or moved away, and suit was brought for the loss of profits. The Supreme Court of Georgia denied recovery, stressing that "injury to property or property rights causing loss of custom in an established business is not the same as injury to customers claimed to result in damage to the property owners."[118] This same restriction is applicable to residents of shorefront communities who, although deprived of various advantages stemming from proximity to the shore, will be unable to establish an action based on private nuisance unless their land actually touches the ocean. While a private action based on public nuisance offers a possible alternative to the private nuisance action, severe restrictions exist under this approach as well.[119]

supplied). The authors fail to cite any authority supporting this statement, however, and their phrasing is perhaps somewhat overstated. *See* PROSSER, *supra* note 75, § 87 at 574. It might be more accurate to state simply that many courts attend to the elements of negligence perfunctorily in actions alleging a negligently-created nuisance. *But see* 1 GRAD, *supra* note 91, § 3.02[1][d] at 3-43.

116. PROSSER, *supra* note 75, § 89 at 591.

117. 141 Ga. 186, 80 S.E. 642 (1913).

118. *Id.* at 190, 80 S.E. at 644.

119. *See* notes 123-38 and accompanying text *infra*.

It is interesting to note that oyster fishermen, unlike other commercial fishermen, have been given a statutory private property right in oyster beds by a number of states. For example, in Alabama the owner of land fronting on water where oysters may be grown may plant and gather oysters to a distance of 600 yards from the shore.[120] *Havard v. State*[121] held that the statute conveys a private property right, and that the riparian owner may protect this right by recourse to an action in trespass. Alabama law also authorizes the State to lease any oyster beds to any Alabama citizen or corporation.[122] The mobility of fish would appear to preclude statutory attempts at the general vesting of similar property rights in the fishing industry. For the other commercial fishermen, the remedy lies in an action based on public nuisance or negligence.

A public nuisance, unlike a private one, is a crime and must interfere with an interest common to the general public. Nevertheless, it is the accepted rule that a public nuisance can also become a basis for tort liability if the plaintiff can show that "he has suffered damage particular to him—that is, damage different in kind, rather than simply in degree, from that sustained by the public generally."[123] Substantial interference with the use and enjoyment of land has generally been viewed as meeting this special damage requirement.[124] Thus, when the land of a private party is damaged by oil pollution which affects the entire community and constitutes a public nuisance, suit can be maintained on the theory of either public or private nuisance.

There are a number of important situations, however, when only the action based on a public nuisance will be available to the plaintiff. *Burgess v. M/V Tamano*[125] is one of "several cases in which commercial fisheries making a localized use of public waters have been allowed to recover where the ordinary citizen deprived

120. ALA. CODE tit. 8, § 113 (1958).

121. 220 Ala. 359, 124 So. 915 (1929).

122. ALA. CODE tit. 8, § 114 (1958).

123. Burgess v. M/V Tamano, 370 F. Supp. 247, 250 (D. Me. 1973). *Accord,* Prosser, *Private Action for Public Nuisance,* 52 VA. L. REV. 997, 1004-11 (1966); RESTATEMENT (SECOND) OF TORTS § 821C(1) (Tent. Draft No. 17, 1971), which states: "In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the public right which was the subject of interference."

124. Prosser, *supra* note 123, at 1018.

125. 370 F. Supp. 247 (D. Me. 1973).

of his occasional Sunday piscatorial pleasure could not do so."[126] In *Burgess*, defendants moved to dismiss suits brought by commercial fishermen, commercial clam diggers, and the owners of motels, restaurants, grocery stores and other commercial establishments whose business was dependent on the tourist trade, for damages resulting from a tanker spill in Casco Bay. The actions of the commercial fishermen and clam diggers could not be founded upon a personal property right, since the title to coastal waters, seabeds and marine life is vested in the State, and the individual citizen has no separate property interest therein.[127] Furthermore, the right to fish or harvest clams is a public right, held in trust by the State; consequently, a private nuisance action could not be brought for disruption of this right. However, the court held that "[t]he commercial fishermen and clam diggers in the present cases clearly have a special interest, quite apart from that of the public generally, to take fish and harvest clams from the coastal waters of the State of Maine."[128] The court applied the general rule that "pecuniary loss to the plaintiff will be regarded as different in kind 'where the plaintiff has an established business making a commercial use of the public right with which the defendant interferes.' "[129]

The result reached in *Burgess* was buttressed by *Union Oil*,[130] the suit brought by commercial fishermen for damages arising out of the Santa Barbara spill. While deciding the case on grounds of negligence rather than public nuisance,[131] the court in dictum concluded that defendants' negligence could constitute a public nuisance under California law, and that the alleged pecuniary loss was of a particular and special nature.[132]

Even though commercial fishermen may have the right to recover in theory, they still face a heavy burden of proving lost profits. For example, the Ninth Circuit in *Union Oil* required proof

126. Prosser, *supra* note 123, at 1014.
127. 370 F. Supp. at 249.
128. *Id.* at 250.
129. *Id., quoting* PROSSER, *supra* note 75, § 88 at 590. *See also* RESTATEMENT (SECOND) OF TORTS § 821C, comment h and illustration 11 (Tent. Draft No. 17, 1971).
130. 501 F.2d 558 (9th Cir. 1974).
131. *See* notes 109-11 and accompanying text *supra*.
132. 501 F.2d at 570.

> [t]hat the oil spill did in fact diminish aquatic life, and that this diminution reduced the profits the plaintiffs would have realized from their commercial fishing in the absence of the spill. This reduction of profits must be established with certainty and must not be remote, speculative or conjectural.[133]

In many instances the special damage requirement alone poses an insuperable barrier. The businessmen in Old Orchard, a resort community, were flatly denied any recovery in *Burgess*. While admitting that the businessmen's loss might have been greater in degree, "the injury of which they complain, which is derivative from that of the public at large, is common to all businesses and residents of the Old Orchard Beach area. In such circumstances, the line is drawn and the courts have consistently denied recovery."[134] The decision finds support in the *Restatement (Second) of Torts*[135] and in a caveat in *Union Oil*.[136]

The rule is equally stringent with respect to non-commercial interests. In *Oppen v. Aetna Insurance Co.*,[137] private pleasure boat owners brought suit for loss of navigation rights in the Santa Barbara Channel and harbor, as well as for physical damages to their boats. While the court held the physical damages were recoverable in negligence, and were probably sufficiently special to give rise to a nuisance action, damages suffered on account of the loss of navigation rights were not viewed as different in kind from those suffered by the public generally.[138]

Thus far, the discussion has assumed that any major oil spill disaster will suffice to make the nuisance doctrine applicable. This

133. *Id.*

134. 370 F. Supp. at 251.

135. RESTATEMENT (SECOND) OF TORTS § 821C, comment h and illustration 12 (Tent. Draft No. 17, 1971).

136. Finally, it must be understood that our holding in this case does not open the door to claims that may be asserted by those, other than commercial fishermen, whose economic or commercial affairs were discommoded by the oil spill of January 28, 1969. The general rule urged upon us by defendants has a legitimate sphere within which to operate. Nothing said in this opinion is intended to suggest, for example, that every decline in the general commercial activity of every business in the Santa Barbara area following the occurrences of 1969 constitutes a legally cognizable injury for which the defendants may be responsible.

501 F.2d at 570.

137. 485 F.2d 252 (9th Cir. 1973).

138. *Id.* at 260.

is not always the case, however. A number of courts require that the event be of a continuing or recurrent character.[139] The position taken in *Maryland v. Amerada Hess Corp.*[140] provides a good example of this restrictive approach. There, the spill resulted from the rupture of the transfer line between a tanker and the terminal facility. The State contended that the spill was a public nuisance. The court rejected the applicability of nuisance doctrine after reviewing Maryland case law and finding that each case "contained the element of an ongoing phenomenon consisting of some recurring act or acts and/or a continuing condition."[141] A single oil spill was not seen as satisfying this requirement. On the other hand, the *Burgess* court made no mention of a continuity requirement and applied public nuisance law to a single oil spill occasioned by the grounding of a tanker. Speaking in terms of private recovery in tort "for invasion of a public right"[142] rather than explicitly referring to public nuisance, the court clearly applied the special damage requirement which uniquely characterizes public nuisance.

Considerations of jurisdiction and choice of law aside, the continuity barrier might be removed by statutory enactment. If a certain event were declared a nuisance by statute, violation would suffice to establish a cause of action in either public or private nuisance. Where no statute expressly declares that offshore oil pollution constitutes a nuisance, a statute prohibiting oil pollution might be used to imply as much.[143] Such a "nuisance per se" approach resembles the per se theory of negligence under which the proven violation of a statute is viewed by some courts as conclusive on the issue of negligence. Invoking such an approach, a plaintiff might contend that violation of a statute overcomes the continuity requirement.

C. *Alternative Theories*

Most private causes of action for offshore oil pollution rely primarily on theories of negligence and nuisance. However, arguments

139. PROSSER, *supra* note 75, § 87 at 579.
140. 350 F. Supp. 1060 (D. Md. 1972).
141. *Id.* at 1068.
142. 370 F. Supp. at 250.
143. Walmsley, *Oil Pollution Problems Arising out of Exploration of the Continental Shelf: The Santa Barbara Disaster*, 9 SAN DIEGO L. REV. 514, 552-53 (1972).

based on trespass, unseaworthiness and strict liability for abnormally dangerous activities have also been advanced.

Unlike nuisance, defined as an interference with the interest in the private use and enjoyment of land, trespass results from an invasion of the interest in the exclusive possession of land.[144] Like nuisance, trespass focuses on the right invaded rather than the type of conduct. Originally, the trespass action offered the important advantage of imposing strict liability, and courts imposed liability for invasions neither negligent nor intentional. Today, the old rule is "almost at its last gasp in the United States,"[145] and the prevailing position requires an intentional intrusion, negligence, or some abnormally dangerous activity. There is, then, considerable overlap between nuisance and trespass making them far from mutually exclusive.[146] To date, evidence of judicial opinion on the use of trespass theory in offshore oil pollution cases is scarce. Insofar as nuisance requires only an interference with use and enjoyment, rather than with the somewhat more substantial interest of exclusive possession, a nuisance action is probably preferable in view of the almost total abandonment of the strict liability rule of trespass.

In cases of pollution caused by vessels on navigable waters, a plaintiff might assert the maritime doctrine of seaworthiness.[147] Maritime law imposes a duty of seaworthiness on the vessel's owner, requiring that the vessel be strong and fitted out with proper equipment and crew relative to the purposes of the voyage.[148] Breach of this duty imposes strict liability. Traditionally, however, the duty has extended only to those in privity of contract with the owner or to those performing the historical functions of seamen.[149]

Unseaworthiness has been asserted as a ground for liability in several oil pollution cases.[150] However, only one court has reached

144. RESTATEMENT (SECOND) OF TORTS § 821D, comment e (Tent. Draft No. 15, 1969).

145. PROSSER, *supra* note 75, § 13 at 64. *Accord,* RESTATEMENT (SECOND) OF TORTS § 166 (1965).

146. RESTATEMENT (SECOND) OF TORTS § 821D, comment f (Tent. Draft No. 15, 1969).

147. *See* Sweeney, *supra* note 42, at 168.

148. GILMORE & BLACK, *supra* note 36, § 3-27 at 150.

149. Maryland v. Amerada Hess Corp., 350 F. Supp. 1060, 1070 (D. Md. 1972), *motion for relief denied,* 356 F. Supp. 975 (D. Md. 1973).

150. *Id.*; Burgess v. M/V Tamano, 370 F. Supp. 247 (D. Me. 1973).

the merits of this claim. In *Maryland v. Amerada Hess Corp.*,[151] the court declined to extend the doctrine to include an obligation to the State for pollution of state waters. The district court held:

> The relationship of the defendant Harp Tanker and the State of Maryland does not entail the type of hazards and is not such as would necessitate imposing upon the defendant the duty of having to provide the State of Maryland with a seaworthy vessel. This Court knows of no case where such a duty has been imposed upon a seagoing vessel, and the Court has 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.[152]

In view of the strong historical limitations on the applicability of the doctrine, it seems likely the courts will follow the *Amerada Hess* approach and prove reluctant to extend a duty of seaworthiness to the private party damaged by oil pollution caused by vessels.

A final cause of action rests on the doctrine of strict liability for abnormally dangerous activities, first enunciated in *Rylands v. Fletcher.*[153] While the theory has not yet been applied to the offshore oil spill situation,[154] a number of states now impose absolute liability for damages resulting from land-based oil drilling activities. The leading case in this area is *Green v. General Petroleum Corp.*,[155] in which a blowout of the defendant petroleum company's oil well resulted in oil, gas, mud and rocks being thrown onto plaintiff's property to a depth of several inches, with consequent damage to plaintiff's dwelling and personal property. Despite a finding of due care and absence of negligence, the court stated:

> Where one, in the conduct and maintenance of an enterprise lawful and proper in itself, deliberately does an act under known conditions, and, with knowledge that injury may result

151. 350 F. Supp. 1060 (D. Md. 1972), *motion for relief denied,* 356 F. Supp. 975 (D. Md. 1973).

152. *Id.* at 1071.

153. L.R. 3 H.L. 330 (1868).

154. For a comprehensive treatment of the possible application of the doctrine of absolute liability to offshore oil pollution, *see* Bergman, *No Fault Liability for Oil Pollution Damage,* 5 J. MARITIME L. & COM. 1 (1973). Note, however, Bergman's opinion that "absolute liability for off-shore oil pollution remains at best a future development." *Id.* at 26.

155. 205 Cal. 328, 270 P. 952 (1928).

> to another, proceeds, and injury is done to the other as the direct and proximate consequence of the act, however carefully done, the one who does the act and causes the injury should, in all fairness, be required to compensate the other for the damage done.[156]

A number of courts have adopted the *Green* approach,[157] and in light of the precedent, offshore drilling would seem a promising area for expansion of the doctrine. Further extension to include oil transport and terminal activities is also possible, although there is no precedent in these areas.

Even assuming increasing judicial application of strict liability doctrine, certain limitations present severe obstacles to the plaintiff. With respect to oil pollution litigation, the most serious is the exception denying liability for damages resulting from unforeseeable intervening causes.[158] A defendant is not held liable for an act of God, nor is he liable for the independent act of a third person which he could not have foreseen or prevented.[159] Thus, even the doctrine of absolute liability offers plaintiff no remedy when the spill is caused by a violent storm, by a collision between vessels or an offshore oil rig and a vessel, by an earthquake on the geologically unstable California coast, or by an almost infinite variety of other possible catastrophies. *Bianchini v. Humble Pipe Line Co.*[160] exemplifies the problems a plaintiff is likely to encounter. There, plaintiffs sustained damages to oysters, oyster reefs and oyster leases as the result of oil emanating from a large pipeline submerged in the bay. A collision between an unknown vessel and the pipeline caused the leak. There was no negligence on the part of the defendant; rather, the collision resulted from negligent navigation on the part of the unknown pilot. The Fifth Circuit denied the plaintiffs' claims, stating that even assuming all the other conditions for liability without fault were present, the strict liability doctrine is " 'not applicable to occurrences of an unusual nature directly occasioned by human error,' especially that of an interven-

156. *Id.* at 333-34, 270 P. at 955.

157. *E.g.*, Divelbiss v. Phillips Petroleum Co., 272 S.W.2d 839 (Mo. Ct. App. 1954); Straight v. Hover, 79 Ohio St. 263, 87 N.E. 174 (1909). *See* Bergman, *supra* note 154, at 27.

158. PROSSER, *supra* note 75, § 79 at 521.

159. *Id.*

160. 480 F.2d 251 (5th Cir. 1973).

ing stranger."[161] It is clear, then, that even the strict liability theory does not ensure recovery, and that there are situations in which the plaintiff is without a remedy.

D. *Damages*

The general rules of damages apply in admiralty proceedings, as they do in proceedings controlled by state law.[162] Generally, the primary source of damage is the physical intrusion of oil onto the beachfront. Costs of abatement (*i.e.*, expenses incurred in removal of the oil) will clearly be recoverable in those situations where removal is not performed under state or federal legislation.[163] The effect of the oil is not permanent, and

> [i]n cases of temporary nuisance affecting real estate, the rule ordinarily applicable is that the plaintiff is entitled to recover the difference between the rental or usable value of the land as it would be without being subjected to the nuisance, and such value with the lands subject thereto.[164]

In *In re New Jersey Barging Corp.*,[165] the court confirmed a commissioner's finding that such a calculation will reflect the decline in value of the property attributable to loss of riparian rights, and will include compensation for the loss of use of the beach for swimming, sunbathing, fishing, boating, picnicking, and other shore-related activities. Additionally, defendant will be liable for any proximately caused consequential damages. Such injuries will include damages to houses, boats, domestic animals, the health of plaintiff and members of his family, and those damages "peculiar to the specific case."[166]

As to these "peculiar" injuries, it is likely that owners of resorts

161. *Id.* at 255, *quoting* Arrington v. Hearin Tank Lines, 80 So. 2d 167, 173 (La. Ct. App. 1955).

162. *In re* New Jersey Barging Corp., 168 F. Supp. 925, 934 (S.D.N.Y. 1958).

163. *See, e.g.*, 33 U.S.C. § 1321(c), (d) (Supp. IV, 1974); FLA. STAT. ANN. § 376.09 (1975); ME. REV. STAT. ANN. tit. 38, § 548 (Supp. 1973).

164. City of Harrisonville v. W.S. Dickey Clay Mfg. Co., 61 F.2d 210, 212-13 (8th Cir. 1932), *rev'd on other grounds*, 289 U.S. 334 (1933), *cited in In re* New Jersey Barging Corp., 168 F. Supp. 925, 936 (S.D.N.Y. 1958).

165. 168 F. Supp. 925 (S.D.N.Y. 1958).

166. *Id.* at 936 (emphasis omitted), *quoting* City of Harrisonville v. W.S. Dickey Mfg. Co., 61 F.2d 210, 212-13 (8th Cir. 1932), *rev'd on other grounds*, 289 U.S. 334 (1933).

located on shorefront property fouled by oil will be able to recover for lost profits resulting from a loss of customers. Although the paucity of case law makes any conclusion speculative, it has been stated that

> if by means of a nuisance one renders the place of business of another so unhealthy or unpleasant as to drive away customers or prevent their coming to it, the person creating the nuisance may be liable.[167]

This statement certainly appears applicable to the case of the resort beach owner; however, the only recent case touching on this question is *Seaway Hotels Ltd. v. Gragg (Canada) Ltd.*,[168] a negligence action. There, loss of the electric power supplied by the defendant caused direct damage to the plaintiff's property in the form of spoiled food. This direct damage was held sufficient to give rise to an actionable wrong, and the plaintiff was entitled to recover all consequential damages, including lost profits. This approach would be expected to dictate the same result in a private nuisance action.

IV. Recent Statutory Developments

A. *State*

The foregoing discussion amply indicates the numerous difficulties and burdens attendant on the private plaintiff seeking compensation for damages attributable to offshore oil pollution. The dangers of such pollution have now been recognized by several state legislatures, which have responded with oil pollution control measures of varying efficacy for third parties.[169] These state strategies can be classified under four headings. In the first group are statutes of little or no use to private plaintiffs even when used

167. Central Georgia Power Co. v. Pope, 141 Ga. 186, 190, 80 S.E. 642, 644 (1913).

168. [1959] Ont. 177, 17 D.L.R.2d 292 (High Ct.), *aff'd* [1959] Ont. 581, 21 D.L.R.2d 264 (Ont. Ct. App.).

169. For a recent discussion of state statutes providing for private compensation, *see* Post, *A Solution to the Problem of Private Compensation in Oil Discharge Situations*, 28 U. Miami L. Rev. 525, 538-43 (1974). *See also* 1 Grad, *supra* note 91, § 3.04[3] at 3-212 to -217.

as the basis for a private action implied from the statute,[170] or in conjunction with the per se or evidentiary theories for establishing negligence.[171] Such legislation may either require a showing of negligence[172] or contain vague exemptions from liability,[173] certain to generate endless litigation.

A second category of legislation, however, while failing to provide specifically for the interests of third parties, can be instrumental in recovery by serving as the basis for an implied private right of action, as a standard of conduct for determining negligence,

170. The possibility of implying private causes of action from federal water control statutes is discussed at notes 87-92 and accompanying text *supra*.

171. *See* notes 82-85 and accompanying text *supra*. *Cf.* the use of federal water control statutes to establish negligence, discussed at notes 93-106 and accompanying text *supra*.

172. *See, e.g.*, CAL. HARB. & NAV. CODE § 151 (West Supp. 1975); N.H. REV. STAT. ANN. § 146-A:10 (Supp. 1975). The New Hampshire statute can be beneficial to the private plaintiff, assuming he can surmount the initial barrier requiring proof of negligence. Section 146-A:10 contains an unusual provision, making the polluter "liable in tort to the person whose property is so damaged *in double the amount* of the damages sustained by him." (emphasis supplied).

173. *See, e.g.*, VA. CODE ANN. § 62.1-195(2) (1973), imposing liability for discharges from vessels "except in cases of emergency imperiling life or property, or unavoidable accident, collision or stranding, and except as otherwise permitted by any lawful regulation." For similar language, *see* MD. NAT. RES. CODE ANN. § 8-1410 (1974). *See also* DEL. CODE ANN. tit. 7, § 6119 (1975), an ambiguously drafted statute which is directed specifically at pollution resulting from offshore drilling activities. It prohibits

> *avoidable pollution* or *avoidable contamination* of the ocean and of the waters covering submerged lands, avoidable pollution or avoidable contamination of the beaches or land underlying the ocean or waters covering submerged lands, or any substantial impairment of and interference with the enjoyment and use thereof, *including but not limited to bathing, boating, fishing, fish and wildlife production, and navigation.*

DEL. CODE ANN. tit. 7, § 6119(a) (1975) (emphasis supplied). This enumeration of certain interferences with the use and enjoyment of the oceans is particularly useful to private parties in establishing that the statute was "designed to protect the class of persons in which plaintiff is included, against the risk of the type of harm which has in fact occurred." *See* note 82 *supra*. Thus, section 6119(a) lends itself well to actions based on the per se theory of negligence. This advantage is negated, however, by the narrow and uncertain definition of "avoidable pollution" or "avoidable contamination" to include only:

> (1) The acts or omissions of the lessee or its officers, employees or agents, or
> (2) Events that could have been prevented by the lessee or its officers, employees or agents through the exercise of a high degree of care.

DEL. CODE ANN. tit. 7, § 6119(b) (1975). From this definition, it appears that liability for pollution resulting from earthquakes, negligence on the part of third parties, or practically any unforeseeable event is not imposed by the statute.

or at least as evidence of negligence.[174] Many statutes of this type, although generally patterned after the oil liability provisions of the 1970 Federal Water Quality Improvement Act,[175] reflect an important advantage over the federal Act: the omission of a provision analogous to section 11(*o*)(1),[176] which precludes reliance on the federal Act to "affect or modify in any way the obligations of any owner or operator . . . to any person or agency under any provision of law for damages to any publicly owned or privately owned property."[177] A good example of such state legislation is the New Jersey Water Quality Improvement Act of 1971 (1971 NJWQIA).[178] Section 4[179] of the Act prohibits

> the discharge of hazardous substances, debris and petroleum products into, or in a manner which allows flow or runoff into or upon the waters of this State and the banks or shores of said water.

The polluter is liable for costs of removal not to exceed $14,000,000, unless the discharge is the result of an act of war or an act of

174. *See* notes 82-106 and accompanying text *supra;* Post, *supra* note 169, at 542.

175. Pub. L. No. 91-224, § 11, 84 Stat. 97, *as amended* 33 U.S.C. § 1321 (Supp. IV, 1974). *See also* notes 100-04 and accompanying text *supra.*

176. 1970 FWQIA, Pub. L. No. 91-224, § 11(*o*)(1), 84 Stat. 97, *as amended* 33 U.S.C. § 1321(*o*)(1) (Supp. IV, 1974). *See also* notes 105-06 and accompanying text *supra.*

177. *But see* ILL. ANN. STAT. ch. 85, § 1706 (Smith-Hurd Supp. 1975), providing that,

> nothing in this act shall affect or modify the liabilities of any owner or operator for damage to any publicly-owned or privately-owned property resulting from a discharge or removal of oil or other pollutants; nor shall this act be construed as affecting or modifying any other existing authority or act.

See also ALA. CODE tit. 22, § 140(12d)(r) (Cumulative Supp. 1973).

178. N.J. STAT. ANN. §§ 58:10-23.1 to .10 (Supp. 1975). Statutes similar in general design to the New Jersey Act, although somewhat less satisfactory, include: N.C. GEN. STAT. §§ 143-215.77 to .100 (Cumulative Supp. 1975), excepting discharges resulting from (1) negligence on the part of the United States government, North Carolina or its political subdivisions, (2) an act or omission of a third party, whether or not negligent, and (3) an act or omission by or at the direction of a law-enforcement officer or fireman, in addition to (4) an act of war or (5) an act of God, § 143-215.83; CONN. GEN. STAT. ANN. §§ 25-54bb to -54kk (1975), requiring that the pollution result in damages in excess of $5,000 before liability will be imposed for cleanup costs, § 25-54ee. *See also* MICH. COMP. LAWS ANN. § 323.337 (1975); WISC. STAT. ANN. §§ 147.02, .23 (1974).

179. N.J. STAT. ANN. § 58:10-23.4 (Supp. 1975).

God.[180] In cases of willful negligence or willful misconduct, however, liability is unlimited.[181]

Due to the numerous determinations required of the judiciary, including available defenses, venue, and period of limitation, the courts are often reluctant to imply private causes of action.[182] Moreover, while state legislation may ease plaintiff's burden of proof with respect to negligence, the remaining elements of the cause of action in negligence must still be determined,[183] including the difficult factor of proximate causation. Thus, state measures which fail to provide explicitly for recovery of damages by third parties are less than satisfactory.

A third, and more desirable legislative scheme, provides explicitly for private causes of action for damages caused by oil pollution. The Alaska statute[184] is concise, straightforward, and one of the better examples of such law-making.[185] The statute requires that

> [t]o the extent not otherwise preempted by federal law, a person owning or having control over a hazardous substance which enters in or upon the waters, surface or subsurface lands of the states is *strictly liable*, without regard to fault, for the damages to persons or property, public *or private*, caused by the entry . . . .[186]

Oil is made a "hazardous substance" under the statute,[187] and relief from liability is granted upon proof of one of the four grounds

180. 1971 NJWQIA § 10, N.J. STAT. ANN. § 58:10-23.10 (Supp. 1975). Even in cases where the discharge occurs as the result of one of these two exemptions, it will not relieve the person from the obligation of mitigating damages to the extent practicable.

181. 1971 NJWQIA § 7, N.J. STAT. ANN § 58:10-23.7 (Supp. 1975).

182. *See* Commentary, *Oil and Oysters Don't Mix: Private Remedies for Pollution Damage to Shellfish*, 23 ALA. L. REV. 100, 126 (1970). *See also* notes 87-92 and accompanying text *supra*.

183. *See* notes 75-76 and accompanying text *supra*.

184. ALASKA STAT. §§ 46.03.822 to .828 (Cumulative Supp. 1975).

185. For examples of other statutes directing that private parties have standing to sue for damages on the basis of violations of state oil pollution control legislation, *see* WASH. REV. CODE ANN. §§ 90.48.315 to .336 (Supp. 1974); MASS. ANN. LAWS ch. 21, § 27(14) (Supp. 1974); MD. NAT. RES. CODE ANN. § 8-1409 (1974). *See also* N.H. REV. STAT. ANN. § 146-A:10 (Supp. 1975).

186. ALASKA STAT. § 46.03.822 (Cumulative Supp. 1975) (emphasis supplied).

187. ALASKA STAT. § 46.03.826(3)(B) (Cumulative Supp. 1975).

borrowed by so many states[188] from the 1970 FWQIA. The Alaska plan, by imposing strict liability, substantially reduces the plaintiff's burden of proof. Equally important, Alaska has introduced a provision expanding the scope of liability imposed at common law. Even in actions based on strict liability the judicial doctrine of "proximate cause" is applied by the courts under a variety of names.[189] As a result, many private claimants have been denied recovery for damages which, although very real, have been viewed by the courts as caused only indirectly. Most notably, resort hotel owners and merchants suffering a loss of income as a result of decreased tourist volume would probably be unable to obtain compensation under the common law. In Alaska, however, oil pollution damages "include but are not limited to injury to or loss of persons or property, real or personal, *loss of income, loss of the means of producing income, or the loss of an economic benefit.*"[190] An "economic benefit" is broadly defined as "a benefit measurable in economic terms, including but not limited to the gathering, catching, or killing of food or other items utilized in a subsistence economy and their replacement costs."[191] Thus, the Alaska statute both

188. *Compare* Pub. L. No. 91-224, § 11(f)(3), 84 Stat. 95, *as amended* 33 U.S.C. § 1321(f)(3) (Supp. IV, 1974) *with, e.g.*, ALASKA STAT. § 46.03.822(1) (Cumulative Supp. 1975); N.C. GEN. STAT. § 143-215.83 (Cumulative Supp. 1975); ORE. REV. STAT. § 468.790 (1974). The four grounds specified in the 1970 FWQIA were (1) an act of God, (2) an act of war, (3) negligence by the federal government, and (4) an act or omission by a third party.

189. Where there is neither intentional harm nor negligence, the line is generally drawn at the limits of the risk, or even within it. This limitation has been expressed by saying that the defendant's duty to insure safety extends only to certain consequences. More commonly, it is said that the defendant's conduct is not the "proximate cause" of the damage.

PROSSER, *supra* note 75, § 79 at 517 (footnotes omitted).

190. ALASKA STAT. § 46.03.824 (Cumulative Supp. 1975) (emphasis supplied).

191. ALASKA STAT. § 46.03.826(2) (Cumulative Supp. 1975). Here, the Alaska legislature by codification has reached the result later reached by the Ninth Circuit in Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974) and by the district court of Maine in Burgess v. M/V Tamano, 370 F. Supp. 247 (D. Me. 1973), both discussed at notes 134-36 and accompanying text *supra*.

The Alaska statute defines "subsistence economy" as

an economy which utilizes on a regular basis an item which is owned in common by the people of the state, or the United States, including but not limited to fish, game, fur bearing animals, birds, timber or any part of the natural habitat *for noncommercial purposes.*

ALASKA STAT. § 46.03.826(b) (Cumulative Supp. 1975) (emphasis supplied). Thus, the Alaska statute provides for recovery by *noncommercial* fishermen or hunters

eases plaintiffs' burdens of proof and expands the class of plaintiffs entitled to compensation.

In 1970, two years prior to enactment of the Alaska statute, Florida passed the Oil Spill Prevention and Pollution Control Act (1970 Florida Act),[192] an ambitious program for protection of Florida's coastal waters. Although not drafted as explicitly as it might have been, the 1970 Florida Act can be read to fit within the third category of state oil pollution legislation, providing the private plaintiff with a cause of action for damages.[193] The Act required the licensing of terminal facilities,[194] provided for the adoption of regulations designed to prevent and control oil discharges by the State Department of Natural Resources,[195] set up the Florida Coastal Protection Fund, a nonlapsing, revolving fund for carrying out the purposes of the Act,[196] imposed strict liability on terminal operators and shipowners for costs of cleanup and any other damages occurring from a spill, including those of third parties,[197] and required "any person discharging pollutants . . . to undertake to remove the discharge to the department's satisfaction."[198]

For the private party, section 12 was the significant provision of the 1970 Florida Act:

> [A]ny licensee and its agents or servants including vessels destined for or leaving a licensee's terminal facility who permits or suffers a prohibited discharge or other polluting condition to take place within state boundaries shall be liable to the *state*

of damages which would be unrecoverable in private actions based on public nuisance because not sufficiently "different in kind" from those damages suffered by the public generally. *See* notes 134-36 and accompanying text *supra.*

192. Ch. 70-244, [1970] Laws of Florida 740, *as amended,* FLA. STAT. ANN. §§ 376.01 - .21 (1975). The 1970 Florida Act was amended in 1974 to incorporate important changes, and reentitled the Pollutant Spill Prevention and Control Act, Ch. 74-336, [1974] Laws of Florida 1050, FLA. STAT. ANN. §§ 376.011 - .21 (1975) [hereinafter cited as the 1974 Florida Amendments]. The changes are discussed at notes 248-53, 282 and accompanying text *infra.*

193. There is uncertainty whether the 1970 Florida Act did, in fact, give a cause of action against the polluter to the private plaintiff, or only a right to proceed against the State for damages, and to the State, in turn, a right to indemnification from the polluter for private claims brought against the State. *See* notes 199-200 and accompanying text *infra.*

194. 1970 Florida Act, § 6, *as amended,* FLA. STAT. ANN. § 376.06 (1975).

195. 1970 Florida Act, § 7, *as amended,* FLA. STAT. ANN § 376.07 (1975).

196. 1970 Florida Act, § 11, *as amended,* FLA. STAT. ANN. § 376.11 (1975).

197. 1970 Florida Act, § 12, *as amended,* FLA. STAT. ANN. § 376.12 (1975).

198. 1970 Florida Act, § 8(1), *as amended,* FLA. STAT. ANN. § 376.09(1) (1975).

> for all costs of cleanup or other damage incurred by the state *and for damages resulting from injury to others.* In any suit to enforce claims of the state under this act, it shall not be necessary for the *state* to plead or prove negligence in any form or manner on the part of the licensee or any vessel.[199]

It is not certain whether this section was intended to give a direct cause of action against the shipowner or licensee to the private plaintiff, or only intended to give the State a right to indemnification for private claims brought against the State.[200] While section 12 suggests that only the State has a direct cause of action against the polluter, the contrary is suggested by section 14(3):

> Any claim for costs of cleanup, civil penalties or damages by the state and any claim for damages by any injured person may be brought directly against the bond, the insurer, or against any other person providing evidence of financial responsibility.[201]

Despite this inconsistency, a good example of bad draftsmanship, it is clear that the 1970 Florida Act did impose strict liability for damages to third parties occasioned by offshore oil pollution. The uncertainty was only whether plaintiff's cause of action lay with the State, or directly against the polluter.[202]

It should be emphasized that the unforeseeable intervening cause defense,[203] available to the defendant in a common law action based on strict liability, was not guaranteed the polluter under the 1970 Florida Act. Section 11, providing for reimbursement to the Coastal Protection Fund by the polluter, gave the Department of Natural Resources the discretionary power to waive the right to reimbursement if the discharge was the result of an act of war, government, God, or an act or omission of a third party, without regard to

199. 1970 Florida Act, § 12, *as amended,* FLA. STAT. ANN. § 376.12 (1975) (emphasis supplied).

200. *See* Swan, *American Waterways: Florida Oil Pollution Legislation Makes It Over First Hurdle,* 5 J. MARITIME L. & COM. 77, 100 n.148 (1973).

201. 1970 Florida Act, § 14(3), *as amended,* FLA. STAT. ANN. § 376.14(2) (1975).

202. The courts have never construed or attempted to reconcile sections 12 and 14. Problems raised by the incongruity of the two sections were mooted by the 1974 Florida Amendments.

203. *See* notes 158-61 and accompanying text *supra.*

whether such act or omission was negligent.[204] This provision represented a significant departure from the design of the 1970 FWQIA, in which proof of any one of these defenses as the sole cause of the spill is sufficient to escape liability for costs of removal.[205] Because under the 1970 Florida Act the availability of these defenses was determined by the Department, costs of cleanup could have been imposed in situations where the 1970 FWQIA was unavailable. Furthermore, it is unclear whether these defenses were available at all with respect to private and State claims for additional damages under sections 12 and 14. Thus, the 1970 Florida Act imposed a stringent liability scheme on terminal facilities and vessels, and gave private claimants important advantages theretofore unavailable under federal or state law.

As might be expected, legislation as comprehensive as the 1970 Florida Act has faced a variety of challenges from the oil transport industry. In the leading case, *Askew v. American Waterways Operators, Inc.*,[206] a determination of the constitutionality of the 1970 Florida Act was sought in an injunctive action brought by shippers, operators of oil terminal facilities, and members of the Florida coastal barge and towing industry. A three-judge district court held that the Act was an unconstitutional intrusion into federal maritime jurisdiction, and enjoined its enforcement.[207] The Supreme Court reversed the district court and upheld the Florida Act, but left a number of important questions unanswered.

The Supreme Court first considered the issue of possible preemption by the 1970 FWQIA, and held:

> There is no conflict between § 12 of the Florida Act and § 1161 of the Federal Act when it comes to damages to property interests, for the Federal Act reaches only costs of cleaning up. As respects damages, § 14 of the Florida Act requires evidence of financial responsibility of a terminal facility or vessel—a provision which does not conflict with the Federal Act.[208]

204. 1970 Florida Act, § 11, *as amended,* FLA. STAT. ANN. § 376.12(4) (1975).

205. 1970 FWQIA, Pub. L. No. 91-224, § 11(f),(g), 84 Stat. 94, *as amended,* 33 U.S.C. § 1321(f),(g) (Supp. IV, 1974).

206. 411 U.S. 325 (1973), *noted in* 15 B.C. IND. & COM. L. REV. 829 (1974); 4 ENVIRONMENTAL LAW 433 (1974); 4 GA. J. INT'L & COMP. L. 216 (1974); Swan, *supra* note 200; 7 VAND. J. TRANSNAT'L L. 183 (1973); 28 U. MIAMI L. REV. 209 (1973).

207. 335 F. Supp. 1241 (M.D. Fla. 1971).

208. 411 U.S. at 331.

As to the power of the state to impose strict liability, the Court stated that "[s]o far as liability without fault for damages to state and private interests is concerned, the police power has been held adequate for that purpose."[209] An important question left open by the decision, however, is the effect of the limited liability provisions of the Federal Act[210] on the Limitation of Liability Act.[211] The Court said only that "[w]hether the amount of costs [Florida] could recover from a wrongdoer is limited to those specified in the Federal Act and whether in turn this new Federal Act removes the pre-existing limitations of liability in the [Limitation] Act are questions we need not reach here."[212] If the FWQIA was intended to remove only cleanup costs from the constraints of the Limitation Act, the private plaintiff is still considerably handicapped in actions arising from pollution by vessels on navigable waters. On the other hand, if the FWQIA completely abrogated the Limitation Act in oil pollution cases, private parties can recoup all proven damages, whether the action is brought pursuant to state statute, or in admiralty based on a maritime tort. Notwithstanding this uncertainty, *Askew* does make it clear that state legislation can impose unlimited liability against terminal facilities.

In the second part of its opinion, the Court considered whether the congressional waiver of preemption over maritime matters in the FWQIA is constitutionally valid. The federal Act provides that "[n]othing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State."[213] This provision raises a question of the extent to which maritime law is free from state interference, *i.e.*, "whether a State constitutionally may exercise its police power respecting maritime activities concurrently with the Federal Government."[214] The district court held that the 1970 Florida Act violated the *Jensen* uniformity requirement, which constitutionally requires that

209. *Id.* at 336.

210. 1970 FWQIA, Pub. L. No. 91-224, § 11(f), 84 Stat. 94, *as amended* 33 U.S.C. § 1321(f) (Supp. IV, 1974).

211. *See* notes 48-60 and accompanying text *supra*.

212. 411 U.S. at 332.

213. 1970 FWQIA, Pub. L. No. 91-224, § 11(*o*)(2), 84 Stat. 97, *as amended* 33 U.S.C. § 1321(*o*)(2) (Supp. IV, 1974).

214. 411 U.S. at 337.

the State not intrude into the domain of maritime law.[215] The Supreme Court[216] preferred the test first enunciated in *The City of Norwalk*,[217] a lower court decision approved by the Court in *Just v. Chambers*.[218] Under *The City of Norwalk* test,

> with respect to maritime torts . . . the State may modify or supplement the maritime law by creating liability which a court of admiralty will recognize and enforce when the State action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation.[219]

Thus, the Court concluded that state action in the maritime area is not completely prohibited.

The Court then went on to examine the effect on state law of the Admiralty Extension Act,[220] which imposes liability for ship-to-shore torts. The Court held that "sea-to-shore pollution—historically within the reach of the police power of the States—is not silently taken away from the States by the Admiralty Extension Act, which does not purport to supply the exclusive remedy."[221] And finally, the Court concluded that the Extension Act did not extend the *Jensen* uniformity requirement shoreward to oust state law from the ship-to-shore tort situation.[222]

As in the first part of the opinion, the second part also leaves unanswered a question of fundamental importance in establishing

215. The *Jensen* uniformity requirement evolved from a trilogy of workmen's compensation cases: Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924). In *Jensen*, the Court stated:

> If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other States may do likewise. The necessary consequence would be destruction of *the very uniformity in respect to maritime matters which the Constitution was designed to establish;* and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded. . . . The legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed.

244 U.S. at 214 (emphasis supplied).

216. 411 U.S. at 338.

217. 55 F. 98 (S.D.N.Y. 1893).

218. 312 U.S. 383 (1941).

219. *Id.* at 388.

220. 46 U.S.C. § 740 (1970). *See* note 20 and accompanying text *supra.*

221. 411 U.S. at 343.

222. *Id.* at 344.

guidelines for determining the constitutionality of state oil pollution legislation. By failing to apply the *The City of Norwalk* test to the Florida Act, the Court leaves the draftsmen of future legislation uncertain as to exactly where the boundary lies between state actions valid under the police power, and those unconstitutional because "hostile to the characteristic features of the maritime law." While *Askew* certainly removes the absolute barrier the *Jensen* line of cases presented to state legislation coming within admiralty jurisdiction, the decision leaves too much to future judicial interpretation. Even after *Askew*, it is an open question whether strict or unlimited liability to third parties for damages resulting from oil pollution on navigable waters only "incidentally affect[s] maritime affairs," or whether such state legislation instead "work[s] . . . prejudice to the characteristic features of the maritime law," and "interfere[s] with its proper harmony and uniformity in its international and interstate relations."[223] In view of the voluminous and diverse state legislation in the area of oil pollution, such interference is not an unlikely result. Nevertheless, in *Askew* the Supreme Court sustained a comprehensive state statute, noting:

> To rule as the District Court has done is to allow federal admiralty jurisdiction to swallow most of the police power of the States over oil spillage—an insidious form of pollution of vast concern to every coastal city or port and to all the estuaries on which the life of the ocean and the lives of the coastal people are greatly dependent.[224]

Even in those relatively few states where statutory law does impose strict liability and provide explicitly for a cause of action by private plaintiffs, litigational expenses may deter the institution of proceedings in as many instances as the burdens of proof in a negligence or nuisance action. Maine was the first state to recognize this potential barrier to recovery, and responded in 1970 with the Maine Oil Discharge Prevention and Pollution Control Act (Maine Act).[225] Although in many respects parallel to the scheme of the 1970 Florida Act, the Maine Act made an important

223. 312 U.S. at 389.
224. 411 U.S. at 328-29.
225. ME. REV. STAT. ANN. tit. 38, §§ 541-57 (Supp. 1973).

innovation by creating a Board of Arbitration to determine third party damage claims. Legislation containing this feature composes the fourth category of state statutory approaches to offshore oil pollution. For the private plaintiff, faced with the alternative of proceeding in court against the deep pockets of the oil production and transport industries, it is by far the most desirable of the four statutory schemes considered.

The key provision in the Maine Act is section 551,[226] which establishes the Maine Coastal Protection Fund, to be used by the State Environmental Improvement Commission as a nonlapsing, revolving fund for carrying out the purposes of the Act. Under this section,

> [a]ny person claiming to have suffered damages to real estate or personal property or loss of income directly *or indirectly* as a result of a discharge of oil, petroleum products or their by-products prohibited by section 543 may apply within 6 months after the occurrence of such discharge to the [Environmental Improvement Commission] stating the amount of damage he claims to have suffered as a result of such discharge . . .
>
> A. If the claimant, the [Board of Environmental Protection] and the person causing the discharge can agree to the damage claim, the board shall certify the amount of the claim and the name of the claimant to the Treasurer of the State and the Treasurer of State shall pay the same from the Maine Coastal Protection Fund.
>
> B. If the claimant, the commission and the person causing the discharge cannot agree as to the amount of the damage claim, the claim shall forthwith be transmitted for action to the Board of Arbitration as provided in this subchapter.
>
> . . . .
>
> D. Damage claims arising under the provisions of this subchapter shall be recoverable only in the manner provided under this subchapter, it being the intent of the Legislature that the remedies provided in this subchapter are exclusive.[227]

The Board of Arbitration consists of three persons, one chosen by the polluter, one by the commission to represent the public interest, and one by these first two to serve as a neutral arbitrator.[228] One Board hears all claims related to the same oil discharge inci-

226. ME. REV. STAT. ANN. tit. 38, § 551 (Supp. 1973).
227. ME. REV. STAT. ANN. tit. 38, § 551(2) (Supp. 1973).
228. ME. REV. STAT. ANN. tit. 38, § 551(3) (Supp. 1973).

dent,[229] and its determinations are final, subject to judicial review only on grounds of abuse of discretion.[230] The Board has the power of subpoena, but the hearings are to be informal and judicial rules of evidence are not binding.[231]

Thus, under the Maine Act the private claimant's remedy lies with the State Environmental Improvement Commission. In the event of disagreement, the Board of Arbitration is his exclusive remedy. Any award is disbursed from the Coastal Protection Fund, and the Fund in turn, is reimbursed by the person causing the prohibited discharge.[232] If the Fund's request for reimbursement is not paid within 30 days of demand, the request is turned over to the Attorney General for collection. In any resulting suit by the State for damages paid out by the Fund to third parties, strict liability is imposed on the polluter.[233] The Maine Act authorizes waiver of the State's right to reimbursement if the discharge was the result of an act of war, government, or God, but these defenses are discretionary with the Commission and not as of right.[234] Even if the Commission waives its right to reimbursement, the private claimant is not denied recovery. Rather, losses are borne by the State, to be recouped eventually through licensing fees.

The creation of the Board of Arbitration substantially reduces litigation expenses for the private party,[235] and spares him the burdens of a formal court proceeding. The difficulties of obtaining an ultimate recovery from the polluter are borne by the State. While a State recovery for third party damages may well be precluded by the Limitation Act, the arbitral award is paid by the Coastal Protection Fund. The substantive rules of maritime law are inapplicable, thus assuring the private plaintiff of a full recovery.[236]

229. ME. REV. STAT. ANN. tit. 38, § 551(3)(C) (Supp. 1973).

230. ME. REV. STAT. ANN. tit. 38, § 551(3)(E) (Supp. 1973).

231. ME. REV. STAT. ANN. tit. 38, § 551(3)(D) (Supp. 1973).

232. ME. REV. STAT. ANN. tit. 38, § 551(6) (Supp. 1973).

233. ME. REV. STAT. ANN. tit. 38, § 552(2) (Supp. 1973).

234. ME. REV. STAT. ANN. tit. 38, § 551(7) (Supp. 1973). The 1970 Florida Act contained a similar provision. *See* note 204 and accompanying text *supra*.

235. The costs of arbitration and arbitrators are borne by the Fund. ME. REV. STAT. ANN. tit. 38, § 551(5)(E) (Supp. 1973).

236. *See* Post, *supra* note 169, at 540. The author raises the important question of whether a state

> can constitutionally bring an action for damages suffered by her residents, in light of the Supreme Court's rulings that states may not bring *parens patriae*

Another advantage of the Maine Act is the generous legislative determination of compensable injuries. The State compensates private claimants not only for property damages and direct loss of income, both traditionally recoverable at common law, but also for indirect loss of income.[237] Consequently, the Act apparently reimburses not only commercial fishermen, but also commercial enterprises dependent on the tourist trade.[238]

In *Portland Pipe Line Corp. v. Environmental Improvement Commission*,[239] the constitutionality of the Maine Act was upheld, and by recourse to liberal statutory interpretation, the Board of Arbitration procedure was held valid. Section 551(3)(E), providing that determinations made by a majority of the Board shall be final, was attacked on grounds that it violated procedural due process and the right to a jury trial. The Supreme Court of Maine held that the demands of due process were satisfied, interpreting the Act to give oil terminal operators notice and opportunity to be heard on the issue of damages in the independent suit for reimbursement brought by the State.[240] The right to jury trial was also protected by the Act, according to the court, since a section 551(3)(E) determination of damages relates only to amounts to be paid to private parties from the Fund; in a reimbursement suit by the State, the polluter is entitled to a jury trial on the issue of amount of liability to the Fund.[241]

claims in a disguised attempt to recover damages on behalf of individual citizens who are the real parties in interest.

Id. at 543 n.101. While this remains an unanswered issue with respect to the 1970 Florida Act, Maine can constitutionally sue to recover all sums expended by it in payment of third party damage claims. Maine v. M/V Tamano, 357 F. Supp. 1097, 1099 (D. Me. 1973). In such actions the claim is based on the doctrine of subrogation, rather than *parens patriae*. *See* FLA. STAT. ANN. § 376.12(2)(d) (1975). On *parens patriae* generally, *see* Note, *State Protection of Its Economy and Environment: Parens Patriae Suits for Damages*, 6 COLUM. J.L. & SOC. PROB. 411 (1970).

237. ME. REV. STAT. ANN. tit. 38, § 551(2) (Supp. 1973). Another state statute significantly expanding the common law limits of liability for oil polluters is ALASKA STAT. § 46.03.824 (Cumulative Supp. 1975), discussed at notes 190-91 and accompanying text *supra*.

238. *Cf.* Burgess v. M/V Tamano, 370 F. Supp. 247 (D. Me. 1973) (denying recovery to those dependent on the tourist trade for business). The *Burgess* case is discussed at notes 125-29 and accompanying text *supra*.

239. 307 A.2d 1 (Me. 1973), *appeal dismissed*, 414 U.S. 1035 (1973).

240. *Id.* at 16.

241. *Id.* at 30.

It was also claimed that the state legislature, by imposing the arbitration procedure as an exclusive remedy,[242] violated the Admiralty Clause[243] by depriving the federal courts of admiralty jurisdiction. To uphold the validity of the Act, the court viewed the Board of Arbitration as "the 'exclusive' *state* forum for resolving damage claims arising from oil spills."[244] Thus, while the Board is the only state forum available to the private party, he is free to seek relief in federal court. The court further determined that ascertaining damages by means of an arbitration board, rather than by judge or jury, did not violate the "savings clause" since the remedy provided by the Board, a lump sum payment, is also a typical common law remedy.[245]

As might be expected, it was also contended that the Maine Act violated the uniformity requirement imposed on the states by the Constitution. Relying on *Askew*, the court without difficulty sustained the provisions regulating terminal facilities and imposing strict liability.[246] On the question of vicarious liability, the court merely followed in the direction indicated by *Askew*, by requiring uniformity "only when there is a *national* interest at stake";[247] it held that the imposition of vicarious liability violated no such interest.

In 1974 the Florida legislature, recognizing the superiority of an arbitration procedure for redressing private parties, followed the Maine example by amending the 1970 Florida Act.[248] The Florida Pollutant Spill Prevention and Control Act (1974 Florida Amendments) established the Florida Coastal Protection Trust Fund[249] and set forth a procedure for reimbursing private parties from this Fund.[250] The 1974 Florida Amendments adopt an arbitration pro-

242. ME. REV. STAT. ANN. tit. 38, § 551(2)(D) (Supp. 1973).

243. U.S. CONST. art. III, § 2.

244. 307 A.2d at 41 (emphasis in original).

245. *Id.* at 42. The savings clause is discussed at note 36 and accompanying text *supra*.

246. 307 A.2d at 43.

247. *Id.* at 44 (emphasis in original).

248. Ch. 74-336, [1974] Laws of Florida 1050, *amending* FLA. STAT. ANN. §§ 376.01-.21 (Supp. 1972) (codified at FLA. STAT. ANN. §§ 376.011-.21 (1975)). The new title of the Act is the Pollutant Spill Prevention and Control Act. The 1974 Florida Amendments are discussed in Comment, *Private Compensation for Oil Pollution: Florida's Practical Solution*, 27 U. FLA. L. REV. 546 (1975).

249. FLA. STAT. ANN. § 376.11 (1975).

250. FLA. STAT. ANN. § 376.12 (1975).

cedure almost identical to that of the Maine Act, subrogating to the Florida Department of Natural Resources any cause of action a claimant may have had against the polluter once the claimant accepts payment from the Fund.[251]

Only two significant departures from the Maine Act are evident. First, in actions by the Department against the polluter for reimbursement, the three defenses available to the defendant are absolute, rather than available only at the discretion of the Department.[252] Secondly,

> notwithstanding any other provision of law, nothing . . . shall prohibit any person from bringing a cause of action in a court of competent jurisdiction for all damages resulting from a discharge or other condition of pollution covered by this chapter. In any such suit, it shall not be necessary for the person to plead or prove negligence in any form or manner.[253]

Thus, unlike the situation in Maine,[254] a private party in Florida can proceed not only in a federal court, but in a state forum as well.

B. *International*

Following the *Torrey Canyon* disaster in 1967, efforts were commenced to establish international civil liability provisions for oil pollution damage caused by oil transport vessels. Under the auspices of the Intergovernmental Maritime Consultative Organization (IMCO), an agency of the United Nations, twin Conventions were drafted: the 1969 International Convention on Civil Liability for Oil Pollution Damage (Civil Liability Convention),[255] and the supplemental 1971 International Convention on the Establishment of an

251. FLA. STAT. ANN. § 376.12(2)(d) (1975).
252. FLA. STAT. ANN. § 376.12(4) (1975).
253. FLA. STAT. ANN. § 376.205 (1975).
254. *See* notes 242-44 and accompanying text *supra*.
255. *Opened for signature* Nov. 29, 1969, *reprinted in* 9 INT'L LEGAL MATERIALS 45 (1970). The Civil Liability Convention received the necessary number of ratifications and came into force on June 19, 1975. For a detailed consideration of the 1969 Convention, *see* Healy, *The International Convention on Civil Liability for Oil Pollution Damage*, 1 J. MARITIME L. & COM. 317 (1970). The Convention is strongly criticized in the testimony of Mendelsohn, *Hearings on S. 841 Before the Subcomm. on Oceans and International Environment of the Sen. Comm. on Foreign Relations*, 93d Cong., 1st Sess. (1973).

International Fund for Compensation for Oil Pollution Damage (Fund Convention).[256] At the time of this writing, neither Convention has been ratified by the United States.[257]

Under the Civil Liability Convention, the owner of a ship is strictly liable for pollution damage, but a number of defenses are allowed.[258] The owner is not subject to liability if the injury was the result of (1) an act of war, hostilities, civil war, or insurrection, (2) "a natural phenomenon of an exceptional, inevitable and irresistible character" (*i.e.*, an act of God),[259] (3) an act or omission wholly caused by a third party, done with intent to cause damage,[260] or (4) a negligent or any other wrongful act of any government or other authority responsible for the maintenance of lights or other navigational aids.[261] Additionally, contributory negligence is at least

256. *Opened for signature* Dec. 18, 1971, *reprinted in* 11 INT'L LEGAL MATERIALS 284 (1972). Article 40 provides that the Fund Convention will come into force upon ratification by eight States which have received a combined total of 750,000,000 tons of oil in the preceding calendar year. The Fund Convention is discussed in Hunter, *The Proposed International Compensation Fund for Oil Pollution Damage*, 4 J. MARITIME L. & COM. 117 (1972). For discussion of both IMCO Conventions, *see* Doud, *Compensation for Oil Pollution Damage: Further Comment on the Civil Liability and Compensation Fund Conventions*, 4 J. MARITIME L. & COM. 525 (1973); Lettow, *The Control of Maritime Pollution*, in FEDERAL ENVIRONMENTAL LAW 596, 614-25 (E. Dolgin & T. Guilbert ed. 1974).

257. For a discussion of past efforts at ratification in the United States, *see* Lettow, *supra* note 256, at 619, 623-24. On July 9, 1975, President Ford transmitted the Comprehensive Oil Pollution Liability and Compensation Act of 1975 to Congress for passage. Titles II and III of the Act would implement the Civil Liability and Fund Conventions, respectively. In his message to Congress, the President noted:

> In proposing implementation of the conventions, I am mindful of the fact that the Senate has not yet given its advice and consent to either of them. I urge such action without further delay. The 1969 convention came into force internationally on June 19, 1975, without our adherence, and the continuing failure of the United States to act on such initiatives may weaken or destroy the prospects of adequate international responses to marine pollution problems.

The President's Message to the Congress Transmitting Proposed Legislation, July 9, 1975, in 11 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 721, 722 (July 14, 1975).

The President's proposal was introduced into the House of Representatives on August 1, 1975 as H.R. 9294, 94th Cong., 1st Sess. (1975). Committee Hearings were commenced on October 29, 1975. The future status of the twin Conventions in the United States remains uncertain at the present time, however. *See* Hunter, *supra* note 256, at 137 n.80; GILMORE & BLACK, *supra* note 36, § 10-4(b) at 825-26.

258. Civil Liability Convention, art. III, para. 1.

259. Civil Liability Convention, art. III, para. 2(a).

260. Civil Liability Convention, art. III, para. 2(b).

261. Civil Liability Convention, art. III, para. 2(c).

a partial defense.[262] Negligent acts or omissions of third parties, however, do not exonerate the owner, who must pursue an indemnity action against third parties.[263] Thus, in the case of a spill resulting from a collision between a tanker and a negligently operated vessel,[264] the owner of the tanker is still liable and must himself seek reimbursement from the owner of the other vessel.

The Civil Liability Convention limits the owner's liability to 2,000 "Poincaré" francs (approximately $135) for each ton of the ship's tonnage, with an upper limit of 210,000,000 francs (approximately $14,112,000).[265] However, if the incident was caused by the "actual fault or privity of the owner," the limitation provisions are inapplicable.[266] The Convention also requires owners to provide adequate insurance or other financial security.[267]

By itself, the 1969 Civil Liability Convention is inadequate as it fails to provide adequate compensation in a number of situations.[268] The 1971 Fund Convention, to some extent, remedies this deficiency, establishing a Fund that guarantees a total of up to 450,000,000 francs[269] (approximately $30,000,000) will be available to satisfy claims which are unrecoverable under the terms of

262. Civil Liability Convention, art. III, para. 3.

263. Civil Liability Convention, art. III, para. 5.

264. For a recent example of such an incident, *see* N.Y. Times, Feb. 4, 1975, at 16, col. 1:

> The owners of the Liberian tanker Corinthos, blown up and set afire in an accident in the Delaware river last week, filed a $35-million lawsuit today against operators of an American chemical ship, charging "gross negligence" by reckless and careless navigation.
>
> The suit in United States District Court charged that the Corinthos, unloading a cargo of 17 million gallons of Algerian crude oil, was rammed before dawn Friday by the Edgar M. Queeny.
>
> . . . .
>
> Oil was still spilling into the river today, and environmental officials were keeping watch on some 30,000 birds that use the nearby Tinicum Wildlife Reserve.

265. Civil Liability Convention, art. V, para. 1.

266. Civil Liability Convention, art. V, para. 2.

267. Civil Liability Convention, art. VIII.

268. The 1971 Fund Convention recognizes three situations in which the injured party is unable to obtain full compensation: (1) no liability for the damage arises under the Liability Convention; (2) the owner liable for the damage under the Liability Convention is financially incapable of meeting his obligations; or (3) the damage exceeds the owner's liability under the Liability Convention. Fund Convention, art. 4, para. 1.

269. Fund Convention, art. 4, para. 4.

the Civil Liability Convention.[270] The major restrictions on the Fund are the requirements that the pollution damage occur "on the territory including the territorial sea of a Contracting State,"[271] and not result from an act of war,[272] nor from intentional or negligent conduct on the part of the injured party.[273] Moreover, the claimant must prove that the damage resulted from an incident involving one or more ships.[274] Thus, the Fund Convention eliminates important defenses available under the Civil Liability Convention.[275] In addition, even when the owner is exempted from liability because the spill is the result of a natural catastrophe, the Fund makes available up to $30,000,000 to private parties.

Under Article 7(1), actions by private claimants must be brought before courts competent under Article IX of the Civil Liability Convention. Article IX, in turn, requires that actions for damages be brought in the courts of the Contracting State in which the pollution damage occurred. The rights any compensated party has against the polluter under the Civil Liability Convention are subrogated to the Fund.[276]

The chief shortcoming of the Fund Convention is the Article 4(2)(b) requirement, noted above, that requires the claimant to prove that the damage resulted from an incident involving one or more ships. This provision places a heavy burden of proof on the private party in view of the expensive and complex measures that must be taken to identify sources of offshore oil pollution.[277] The Article 4(2)(b) requirement has been severely criticized by at least one commentator,[278] who suggests that the Fund take over the investigatory role in claims made under the 1971 Convention.[279] An important weakness characterizing both IMCO Conventions is their limited scope. Both fail to encompass many aspects of the offshore oil pollution dilemma, providing compensation to private

270. Fund Convention, art. 4, para. 1.
271. Fund Convention, art. 3, para. 1.
272. Fund Convention. art. 4, para. 2(a).
273. Fund Convention, art. 4, para. 2(b).
274. Fund Convention, art. 4, para. 3.
275. *See* Civil Liability Convention, art. III, para. 2, discussed at notes 258-64 and accompanying text *supra*.
276. Fund Convention, art. 9, para. 1.
277. *See* Hunter, *supra* note 256, at 126-27.
278. *Id.* at 124.
279. *Id.*

parties only for damages resulting from oil tanker discharges. For the present, the main initiative with respect to offshore drilling activities, terminal facility operations, and oil pollution from other types of vessels must lie at the state and federal levels.

V. CONCLUSION

The danger of oil spillage in United States waters remains substantial, despite recent federal and state legislation aimed at deterring such pollution.[280] The damage to private interests caused by oil pollution in coastal areas can be expected to increase significantly as America's energy demands require greater quantities of imported oil and a concomitant expansion of oil transport and terminal transfer operations.

The absence of a statutory solution, still the situation in a number of states, obliges the private claimant to rely on the remedies traditionally available in federal general maritime and state common law. Recovery is complicated not only by a heavy burden of proof and litigation expenses, but also by the confusing relationships between federal and state law in the admiralty area. The plaintiff is confronted by unfamiliar procedural and substantive rules, as well as jurisdictional questions which have yet to be resolved. He is further handicapped by the unfamiliarity of many courts with the rules of admiralty, often necessitating extensive briefing of relatively inconsequential issues. In cases where the damage is caused by pollution from unknown sources, recovery is entirely precluded.[281]

Several states have recently enacted legislation which in large part ameliorates the plight of the private party damaged by oil-polluted waters. For a number of reasons, however, state solutions are less than entirely satisfactory. First, the oil transport and producing industries can exert powerful political pressure and sustain

280. President Ford has stated that "in 1973 alone, there were 13,328 reported oil spills totalling more than 24 million gallons." The President's Message to the Congress Transmitting Proposed Legislation, July 9, 1975, in 11 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 721 (July 14, 1975) [hereinafter cited as The President's Message]. *See also* notes 287-88 and accompanying text *infra*.

281. "One-third of the oil spilled is from unidentified sources, where compensation cannot be obtained under existing law." *Id.*

extensive lobbying activity in those states initiating the most protective and responsible oil pollution legislation. Already, the transport industry has achieved success in reducing the impact of the original Florida Act.[282]

Second, state legislative responses to oil pollution result in an undesirable lack of uniformity in the regulation of the oil transport industry. Cleanup responsibilities, licensing requirements and liabilities to third parties vary widely among the states. The situation is unfair to both shippers and private plaintiffs. Shippers are unnecessarily burdened by an endless succession of inconsistent and often confusing state statutes in the course of a single voyage. Unfamiliarity with diverse statutes is likely to generate excess litigation when prohibited discharges do occur.[283] Moreover, oil distribution patterns are apt to be determined not only by individual state needs, as should be the case, but also by the cost of insurance in those states which have enacted the most stringent legislation. For private parties, dissimilar statutory schemes create a basic inequality: similarly situated plaintiffs are treated differently solely because their property interests lie in different states.

Third, the very real danger exists that as conflicting state regulatory schemes proliferate, the standard set down in *Askew* may be violated, resulting in the invalidation of much effective legislation. Ultimately, statutes which are permissible supplements to the substantive maritime law when viewed separately, may "work . . . prejudice to the characteristic features of the maritime law," and

282. While instituting an arbitration procedure for third party claims, the 1974 Florida Amendments, FLA. STAT. ANN. §§ 376.011-.21 (1975), also permit four absolute defenses to liability, defenses which were previously available only at the discretion of the State Department of Natural Resources. *Compare* FLA. STAT. ANN. § 376.12(4) (1975) *with* 1970 Florida Act, ch. 70-244, § 11(6)(c), *as amended*, FLA. STAT. ANN. § 376.12(4) (1975).

In addition, the unlimited liability provisions of the 1970 Act were replaced by limitations identical to those of the FWQIA. *Compare* FLA. STAT. ANN. § 376.12(1) (1975) *with* 33 U.S.C. § 1321(f) (Supp. IV, 1974). The 1974 Amendments were the result of continuous and heavy pressure from the oil lobby. *See* Comment, *supra* note 248, at 559 n.114.

283. The ability of claimants damaged by spills to seek and recover full compensation is further hampered by widely inconsistent federal and state laws. Various compensation funds have been established or proposed, resulting in unnecessary duplication in administration and in fee payments by producers and consumers.

The President's Message, *supra* note 280, at 721.

"interfere with its proper harmony and uniformity in its international and interstate relations"[284] when they are taken together.

Finally, state statutory schemes of necessity are limited by an important deficiency. State legislatures are not competent to regulate offshore drilling activity beyond the three mile limit, an increasingly important source of offshore oil pollution.[285]

An international approach to the oil spill crisis is an attractive possibility, but in the United States, the status of the twin IMCO Conventions is uncertain.[286] Even an early ratification will leave the problems of third parties largely unsolved. Limited in their scope, the Conventions apply to oil pollution emanating only from oil transport vessels on navigable waters; both onshore and offshore facilities as well as other types of vessels remain unaffected. Moreover, the requirement that the claimant prove the spill was caused by an incident involving one or more ships is certain to continue to impose heavy burdens of proof and concomitant litigation expenses on the private claimant. Even absent this weakness, legal expenses can be expected to remain substantial since the IMCO Conventions mandate court proceedings rather than arbitration.

Legislation at the federal level offers the most satisfactory and comprehensive accommodation of the conflicting interests of private claimants and oil transporters and producers. A federal statute should incorporate arbitration and compensation provisions similar to those of the Maine and Florida Acts, and establish a federal fund to replace the growing number of state-created funds.

There are indications that an omnibus federal act may soon be a reality. In July 1975, President Ford announced[287] his sending to Congress the Comprehensive Oil Pollution Liability and Compensation Act of 1975[288] (Oil Compensation Act), which would "establish a comprehensive and uniform system for fixing liability and

284. Just v. Chambers, 312 U.S. 383, 389 (1941). *See* notes 216-19 and accompanying text *supra.*

285. *See* 43 U.S.C. § 1301 (1970), discussed at note 10 *supra.*

286. *See* note 257 *supra.*

287. The President's Message, *supra* note 280, at 721.

288. The Oil Compensation Act was introduced in the House of Representatives on August 1, 1975 as H.R. 9294, 94th Cong., 1st Sess. (1975). The bill was referred jointly to the Committees on International Relations, Merchant Marine and Fisheries, and Public Works and Transportation. Hearings in the House on the bill were commenced on October 29, 1975.

settling claims for oil pollution damages in U.S. waters and coastlines."[289]

The Act is noteworthy in a number of respects. A sizable fund of $200,000,000 is to be established for carrying out the purposes of Title I of the Act.[290] Unlike the IMCO Conventions, limited to incidents on navigable waters involving one or more tankers, coverage extends to "any occurrence or series of occurrences, involving one or more vessels, ships, public vessels, onshore facilities, offshore facilities, or any combination thereof, which causes or poses an imminent threat of oil pollution,"[291] and also includes pollution of the high seas seaward of navigable waters.[292]

The Act contains a broad legislative determination of compensable injuries. Private parties who own or lease littoral or riparian real or personal property[293] may recover for injuries to the property which are the direct result of oil contamination, for lost profits or impaired earning capacity attributable to contamination of the property or natural resources, and for loss of use of the property or natural resources which directly results from the contamination.[294] If the private claimant does not own or lease the property, or directly utilize the natural resources, he is still eligible for recovery if he derives at least 50 percent of his earnings from activities which depend on the property or natural resources.[295] Thus, compensation is extended to owners of hotels and other businesses in resort areas, and to many other potential plaintiffs as well.

The fund is intended to cover all these damages, unless the injury was caused wholly by an act of war, or partially by the gross negligence or willful misconduct of the claimant.[296] Section 110

289. The President's Message, *supra* note 280, at 721. Title I of the Act would accomplish this announced purpose. Titles II and III would implement the Civil Liability and Fund Conventions, respectively; *see* note 257 *supra*.

290. H.R. 9294, 94th Cong., 1st Sess. § 102(a) (1975). *Compare* this amount *with* the meager $4,000,000 sum contained in the Maine Coastal Protection Fund, ME. REV. STAT. ANN. tit. 38, § 551 (Supp. 1973), *and* the $35,000,000 ceiling for the Florida Coastal Protection Fund, FLA. STAT. ANN. § 376.11 (1975).

291. H.R. 9294, 94th Cong., 1st Sess. § 101(d) (1975).

292. *Id.* § 101(*l*) (1975).

293. For the purposes of section 104, littoral or riparian personal property includes, but is not limited to, vessels and ships. *Id.* § 104(c) (1975).

294. *Id.* § 104(a)(5) (1975).

295. *Id.* § 104(a)(6) (1975).

296. *Id.* § 106 (1975). The fund is absolutely liable for removal costs, however.

specifies the procedures which must be followed for the recovery of damages. Where the source of the spill has been identified, the injured party must first present his claim to the polluter. In the event that the polluter denies liability or fails to settle the claim by payment within 90 days, "the claimant may elect to commence an action in court against the owner, operator, or other person providing financial responsibility, or present that claim to the fund, that election to be irrevocable and exclusive."[297] Where the source of the pollution is unknown, or is a public vessel, claims are presented directly to the fund.[298] If the fund, in turn, should deny liability for the claim or fail to settle by payment within 90 days, the claimant may submit the dispute to the Secretary of the Treasury, or commence an action in court against the fund.[299] In resolving any submitted disputes, the Secretary is authorized to appoint one or more panels, each composed of three individuals, to hear and decide the dispute, or the Secretary may refer the matter to an administrative law judge.[300] Thus, although utilized only at the option of the injured party, the Act makes available two simplified methods for the settlement of claims.

The Oil Compensation Act provides a much needed alternative to the inadequate courses of action presently available to the private party. Until a truly unrestricted and effective international agreement is forthcoming, reimbursement from a federal fund for damages established via a federally maintained settlement procedure is the most acceptable solution to the problem of private compensation for damages caused by offshore oil pollution.

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297. *Id.* § 110(c) (1975).
298. *Id.* § 109(c) (1975).
299. *Id.* § 110(d) (1975).
300. *Id.* § 110(h),(i) (1975).