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BOOK REVIEW

Hazardous Waste Liability

By Warren Freedman. Michie Company, Charlottesville, Virginia, 1987. Pp. 845 $85.00 (hardcover, Supp. due 1988).

Warren Freedman of the New York Bar presents a splendid one volume synthesis of hazardous waste liability that together with Donald Stever's *Law of Chemical Regulation and Hazardous Waste*[1] will form the two pillars of the environmental practitioner's hazardous waste written resources.

In his prologue, Freedman aptly recognizes that hazardous waste liability may be considered the inscrutable underbelly of older tort and statutory remedies. Inscrutable until recently, that is, when modern revelations of hazards in longstanding industrial practices, preserved by nonexistent regulation, or quiet circumvention of inadequate regulation, pressed these concerns into public awareness and alarm.

Early in *Hazardous Waste Liability*, Freedman provides helpful definition to his subject matter. Hazardous wastes include "(a) inorganic compounds containing toxic or heavy metals; (b) inorganic chemical compounds without toxic or heavy metals; (c) organic chemicals containing toxic or heavy metals; (d) organic chemicals without toxic or heavy metals; (e) biological wastes; (f) flammable wastes; and (g) explosive wastes."[2] Because there is frequently a period of long latency between personal or property exposure to hazardous waste and the discovery of the resulting injury, and because there are often extraordinary problems in proving causation, Freed-

1. D. Stever, Law of Chemical Regulation and Hazardous Waste (1987).
2. W. Freedman, Hazardous Waste Liability at 3-4 (1987).

man delineates hazardous waste disposal as "an environmental risk that is not immediately controllable."[3]

The author approvingly quotes Talbor Page's description of these environmental risks in terms of ten characteristics:

> (1) when the risk is taken, there is inadequate knowledge of the mechanism by which potential harm may result;
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> (2) the potential costs of the harm risked are catastrophic;
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> (3) the costs are externalized at the time the decision to take the risk is made;
>
> (4) the benefits of taking the risk are relatively modest;
>
> (5) the benefits are internalized;
>
> (6) the harm risked is collective;
>
> (7) there is a low probability of the harm occurring;
>
> (8) the low probability is likely to be subjectively underestimated;
>
> (9) the harm risked will not occur for a substantial length of time after risky action is taken; and
>
> (10) the harm is irreversible.[4]

In a section entitled "The Apparent Failure of Governmental Regulation," Freedman castigates slow and labyrinthine state and federal enforcement procedures, laying at the door of public bodies responsibility for "the alarming result that years may elapse before the pollution is abated."[5] An imperfect but available solution is the private citizen action. In his chapter devoted to private rights of action,[6] Freedman observes:

> [c]ourts have generally been liberal in authorizing indi-

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3. *Id.* at 2.

4. *Id.* at 2-3. (quoting Page, A Generic View of Toxic Chemicals and Similar Risk, 7 Ecology L. Q. 207, 208-24 (1978)).

5. *Id.* at 52.

6. Ch. 5, The Role of Private Actions in Protecting Public Interests at 219.

> viduals and organizations representing individuals to bring private causes of action, where the individuals live in those areas affected by pollution which constitute the violations at issue. The organization must, however, demonstrate that it represents those individuals, or the court will hold that the organization lacks standing to sue. . . . [C]orporations showing an injury within their zone of interest which injury is protected by the statute have [also] been active plaintiffs.[7]

The author discusses the salutary effect on citizen standing to sue of such actions as *Silkwood v. Kerr-McGee Corp.*,[8] in which the Supreme Court held that the Atomic Energy Act does not preempt a private punitive damage award arising from a nuclear facility; and *Doralee Estates v. Cities Service Oil Co.*,[9] another affirmance of the imposition of punitive damages in a private action. *Doralee Estates* was brought by a property owner against the landlord of an oil terminal discharging petroleum waste onto the plaintiff's lake and lands in proximity to a bungalow colony.[10] The author also describes the public trust analytical underpinnings to the private right of action,[11] and makes reference to the unusual public trust embodiment in the Louisiana Constitution, which provides that "natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved and replenished insofar as possible and consistent with the health, safety and welfare of the people." In addition, the Lousiana Constitution mandates the legislature to enact laws to implement this policy.[12]

Concerning implication of a private right of action from a statute, the rule remains that a private right may be implied in a statute not expressly creating that right where (1) the in-

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7. Freedman, *supra* note 2, at 221 (citations omitted).
8. 464 U.S. 238 (1984).
9. 569 F.2d 716 (2d Cir. 1977).
10. Freedman, *supra* note 2, at 222.
11. *Id.* at 227-30.
12. La. Const. art. IX, § 1. *See also* Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n, 452 So. 2d 1152 (La. 1984).

jured party is a member of a group for whose special benefit the statute was enacted; (2) the primary purpose of the statute would be served by inferring a private right of action; (3) there is evidence of legislative intent to create a private right of action; and (4) the private right of action is one residing in what is traditionally an area of state, rather than federal, concern.[13] Of course citizen suits weigh in most effectively with the new generation of environmental laws that expressly provide for them. Given life in § 304 of the Clean Air Act,[14] a majority of federal environmental statutes now include comparable provisions.[15] Freedman discusses the common jurisdictional and injury-in-fact prerequisites of the principal statutes, and gives an illuminating discussion of the myriad obstacles, posed by the courts and defendants alike, to the vindication of plaintiffs' claims.

Later in the volume, the author devotes a chapter to an in-depth review of these issues and more. In Chapter 11, "Procedural Issues and Procedural Problems Revisited," Freedman provides, in the context of the pertinent decisional law, a thorough and readable exegis on plaintiff's complaint, responsive pleadings, the class action, discovery and pre-trial preparation, bifurcation, removal, jury selection, evidence (including expert testimony), and judicial review of agency action.

In two chapters, titled "Causation: Medical, Scientific and Legal" and "The Latent Injury, Disease or Death," Freedman offers an able analysis of some of the most vexing issues in environmental, personal injury and property damage litigation: proof of causation, and proof of perpetrator identification. The latter dilemma confronts the attorney whose cli-

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13. Freedman, *supra* note 2, at 231. *See* Texas & Pacific Ry. v. Rigsby, 241 U.S. 33 (1916) and Cort v. Ash, 422 U.S. 66 (1975).

14. 42 U.S.C. § 7604 (1982).

15. *E.g.*, Federal Water Pollution Control Act, 33 U.S.C. § 1365 (1982); Marine Protection, Research and Sanctuaries Act, 33 U.S.C. § 1415(g) (1982); Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (1985); Toxic Substances Control Act, 15 U.S.C. § 2619 (1982); Safe Drinking Water Act, 42 U.S.C. § 300j-8 (1982); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270 (1982); and Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a) (1982).

ent "has no idea of what product or substance . . . caused the injury, disease or death; [and where] the number of manufacturers, distributors or generators may be in the thousands . . . ."[16]

Of course, once the causative substance and the instrumentality are identified, the plaintiff must still show that the hazardous substance was the substantial cause of the injury, disease or property damage. The uneven efficacy of epidemiological evidence is described, together with a section titled "Reform of Causation Principles."[17] Of one proposal for a sliding scale burden of proof, pursuant to which a plaintiff alleging harm from a very risky and minimally beneficial activity would face a lower burden of proof than would the plaintiff claiming comparable harm from a beneficial activity, Freedman responds: "Such a proposal requires a court to make an extraordinarily difficult cost-benefit and risk-benefit decision, and at the same time encourages the plaintiff to overstate the risk of harm in order to take advantage of a lower burden of proof."[18]

A review can provide only a glimpse of the author's work, and, ideally, a vicarious appreciation of sound, practical scholarship, well executed and attractively presented. The author, the publisher, and the practitioner should savor the result.

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16. Freedman, *supra* note 2, at 291.

17. *Id.* at 296-98.

18. *Id.* at 296.

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