

5-1-1992

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James Burke

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### Recommended Citation

James Burke, *The New Jersey Spill Compensation and Control Act as Model Hazardous Waste Legislation*, 1 *Penn St. Envtl. L. Rev.* 132 (1992).

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## THE NEW JERSEY SPILL COMPENSATION AND CONTROL ACT AS MODEL HAZARDOUS WASTE LEGISLATION

### I. INTRODUCTION

Public concern with the threat of environmental contamination first became acute in the mid 1970's.<sup>1</sup> At that time no state faced a more urgent toxic waste problem than New Jersey, and in response the New Jersey Legislature enacted a body of hazardous waste legislation<sup>2</sup> that still serves as a model system of environmental management.

Following several recent environmental disasters, including the pollution of Prince William Sound in Alaska and of Arthur Kill in New Jersey, environmental contamination is an issue once again at the fore of informed discussion. New Jersey's hazardous waste legislation and in particular the centerpiece of that legislation, the "Spill Compensation and Control Act" (Spill Act or Act),<sup>3</sup> demonstrates a successful response to the problems posed by hazardous waste and serves as an example for other states and for the federal government.<sup>4</sup> Much can be learned from New Jersey's experience in managing the discharge of toxic substances and from the successes and failures of the Spill Act.

In operation the Spill Act provides an immediate and thorough response to environmental contamination. Under its provisions the discharge of hazardous substances other than pursuant to a federal or state permit is illegal;<sup>5</sup> dischargers are subject to civil and criminal penalties<sup>6</sup> and are strictly liable without regard to fault for any discharge that may occur.<sup>7</sup> A central feature of the Act is the establishment of a Spill Fund<sup>8</sup> composed of revenue obtained by taxing the transportation of specified chemical substances within the state<sup>9</sup> and from pecuniary penalties levied in connection with the Spill Act.<sup>10</sup> The Spill Fund allows the New Jersey Department of Environmental Protection (NJDEP) to begin immediate cleanup of identified hazardous waste discharges or toxic sites and subsequently to obtain reimbursement for cleanup costs from the offending party or parties, all of whom are strictly, jointly and severally liable.<sup>11</sup> This amounts to an administrative policy of "pay

now, litigate later," which has been challenged with some success on the grounds that it violates the right to due process.<sup>12</sup>

### II. BACKGROUND

The gravity of New Jersey's environmental problem is indisputable. Nine-hundred seventy chemical plants in New Jersey produce 12.5% of the nation's chemicals, making New Jersey the second largest chemical producing state in the United States.<sup>13</sup> At approximately 350,000 tons per year, New Jersey generates 8% of the nation's total hazardous waste, more than any other state.<sup>14</sup> New Jersey leads the nation with 97 of the 888 hazardous waste sites identified by the Federal Superfund.<sup>15</sup> It is also home to the Lipari Landfill, rated by the federal government as "the worst toxic site in the nation."<sup>16</sup>

The problem is compounded by New Jersey's geological composition and geographic location, which make the state particularly vulnerable to environmental contamination. Much of the land in New Jersey is porous, sandy ground that facilitates the pollution of ground water.<sup>17</sup> Chemical waste that for many years was disposed of without treatment into streams and landfills has been absorbed by subsurface water sources and is now reappearing in many of the wells and potable water sources used by New Jersey communities. The contamination problem is further complicated by the state's location in the heart of the northeast corridor. Hazardous materials from out of state are routinely transported by train and truck through New Jersey and are subject to accidental discharge.

Concern for the environment was not the only impetus for the enactment of the Spill Act. The State Legislature established the Act in part to ensure the continued prosperity of New Jersey's tourist and recreation industries.<sup>18</sup> In response to the Arab oil embargo of 1973, the major oil companies planned exploratory petroleum drilling and increased oil super-tanker traffic off the coast of New Jersey.<sup>19</sup> The tourist trade, New Jersey's second largest industry, feared massive and disastrous contamination of the state's beaches from an oil spill.<sup>20</sup> At that time, hazardous waste regulation in New Jersey consisted of a largely ineffectual array of state regulations and local ordinances operating in combination with inadequate federal laws.<sup>21</sup> New Jersey clearly needed a comprehensive and effective law governing the illegal discharge of toxic

substances.

In direct response to the concerns of the tourist industry the New Jersey Legislature enacted the Spill Act,<sup>22</sup> which was originally intended only to protect state waters from petroleum and chemical contamination.<sup>23</sup> The Act was amended in 1980 to provide for the cleanup of hazardous waste dumpsites and discharges, and now provides compensation to those injured by the discharge of toxic waste.<sup>24</sup>

The federal government modeled its hazardous waste law on the New Jersey Spill Compensation and Control Act.<sup>25</sup> In 1980 the United States Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),<sup>26</sup> which is based on New Jersey's Spill Act.<sup>27</sup> CERCLA established the Federal "Superfund" that finances the cleanup of hazardous waste sites through taxes on the petroleum and chemical industries.<sup>28</sup> Revenues from the Superfund are used by the EPA to decontaminate hazardous waste sites. The parties responsible for the contamination are then strictly liable to the Superfund for cleanup costs and for damages to natural resources. The Superfund differs from the Spill Act mainly in that the Superfund is available to claimants at the discretion of the EPA, while the Spill Act is strictly liable to any party injured by the illegal discharge of a hazardous substance.

### III. SUMMARY OF THE ACT

The provisions of the Spill Act are divided into twenty-six sections designated "a" to "z." The legislative findings of the Act express concern for the resources of the state and for the welfare of its people.<sup>29</sup> The threat posed by petroleum products and other hazardous substances is acknowledged, as is the legislature's desire to ensure the continued prosperity of New Jersey's tourist and recreation industries. The essential purposes of the Act, as defined by the legislature, are the containment and removal of toxic pollution, and the establishment of a fund (called the Spill Fund) to provide "swift and adequate compensation" to parties injured by the discharge of hazardous waste.<sup>30</sup>

The Act prohibits the discharge of hazardous substances, except in compliance with a federal or state permit.<sup>31</sup> Owners or operators of major facilities<sup>32</sup> are required to provide the NJDEP with detailed descriptions of their operations, and to establish and register with the Department primary and contingency cleanup and removal plans.<sup>33</sup> Owners and operators of

major facilities are also required to file with the NJDEP evidence of their ability to finance the cleanup of possible future hazardous waste discharges.<sup>34</sup> Any person who may be liable for a discharge that occurred prior or subsequent to the effective date of the Act is required to notify the NJDEP of the discharge.<sup>35</sup>

A central feature of the Act is the establishment of the Spill Compensation Fund in the New Jersey Department of the Treasury.<sup>36</sup> The Spill Fund makes implementation of the Act possible by providing the financial resources necessary to fund cleanups and to compensate parties damaged by the discharge of hazardous waste.

The NJDEP may, at its discretion, remove hazardous waste and obtain reimbursement from the discharger, or may direct the discharger to perform the cleanup.<sup>37</sup> Failure to comply with a directive issued under the authority of the Spill Act subjects the offending party to treble damages.<sup>38</sup> The purposes for which Spill Fund monies may be expended are specific, and are limited to those enumerated in the Act.<sup>39</sup> Expenditures made by the NJDEP pursuant to the Spill Act constitute a first priority lien on the offending discharger's real and personal property, regardless of the discharger's solvency.<sup>40</sup>

A key but controversial feature of the Act is the establishment of strict joint and several liability for cleanup costs incurred by the NJDEP as a result of an unlawful discharge.<sup>41</sup> The Spill Fund itself is strictly liable to injured parties "for all cleanup and removal costs and for all direct and indirect damages,"<sup>42</sup> including damages for impaired income and loss of tax revenue by state or local governments, in addition to conventional property damages.<sup>43</sup> Discharging parties are in turn strictly, jointly and severally liable to the Fund for cleanup and removal costs. The defenses which dischargers may raise are specifically limited to acts or omissions caused "solely by war, sabotage, or God."<sup>44</sup> Certain of the above mentioned provisions have proved harsh in operation.<sup>45</sup>

The Act levies a special excise tax on the petroleum and chemical industries in order to establish the Spill Fund.<sup>46</sup> Penalties accumulated pursuant to the Spill Act are also credited to the Spill Fund. The Supreme Court of the United States has held that elements of the Spill Act's tax provisions are preempted by CERCLA, although the degree to which

CERCLA preempts New Jersey's Spill Act remains unclear.<sup>47</sup>

Claims against the Spill Fund must be filed within one year of the discovery of damage.<sup>48</sup> Upon receipt of a claim the administrator of the Fund must immediately inform all affected parties.<sup>49</sup> If a discharger can be identified it is the duty of the administrator to attempt to arrange a binding settlement between the injured party and the discharger.<sup>50</sup> If the source of the discharge cannot be determined, the administrator must attempt to settle any claims against the Fund.<sup>51</sup> If in either case no settlement can be reached the Act requires that an arbitrator resolve the dispute.<sup>52</sup>

Since the Fund is strictly liable to injured parties, it is possible that awards might exceed the balance of the Fund. In that event, payment would be made on an ongoing pro rata basis.<sup>53</sup> Incoming funds would be disbursed to those claimants not yet fully compensated until the entire amount of the proven damages have been paid.<sup>54</sup> As an exception to the general rule that payments exceeding the balance of the Fund are to be made on a pro rata basis, the administrator of the Fund is authorized to give priority to those claimants demonstrating extreme hardship.<sup>55</sup>

Strict penalties for noncompliance are characteristic of the Spill Act. The Fund is authorized to recover as much as fifty million dollars from owners or operators of major facilities that are strictly liable for discharges.<sup>56</sup> If it can be shown that a discharge was the result of gross negligence or willful misconduct, owners or operators of major facilities are subject to unlimited liability.<sup>57</sup> Any person that knowingly gives false information in response to a claim filed pursuant to the Spill Act or who violates any provision of the Act is subject to a penalty of up to \$25,000.<sup>58</sup> Continuing violations are considered distinct offenses for each day of their perpetuation.<sup>59</sup>

The Spill Act authorizes the NJDEP to obtain injunctive relief for any violation, in addition to the other legal remedies provided for by the Act.<sup>60</sup> The text of the Spill Act clearly states that no element of the Act precludes the pursuit by any party of other civil or injunctive relief, and that the provisions of the Act are in addition to the remedies provided by statutory and common law.<sup>61</sup> However, compensation obtained under other state or federal law precludes obtaining compensation for the same damages from the Spill Fund.<sup>62</sup> Finally, in

anticipation of CERCLA and other regulations likely to be enacted by Congress, the Act requires the NJDEP Commissioner to respond to relevant federal legislation by recommending appropriate amendments to the Spill Act.<sup>63</sup>

#### IV. ANALYSIS

Since its enactment the Spill Act has been an effective bulwark against hazardous waste pollution in New Jersey. The Act is generally regarded as a model response to traditionally uncompensable damages.<sup>64</sup> As the most important environmental law in New Jersey,<sup>65</sup> it is a main reason why that state is considered a vanguard of the environmental protection movement.<sup>66</sup> The Spill Act is an innovative approach to managing contamination caused by past discharges, and establishes methods for managing present and anticipated hazardous waste problems.

The Spill Act has been used as a model by several states and by the federal government.<sup>67</sup> The Act, however, is not without flaws that require legislative attention. The generally vague provisions of the Act have necessitated a high degree of judicial interpretation, a problem compounded by inconsistencies within the Act itself.<sup>68</sup> Even more problematic is the sometimes capricious and frequently harsh enforcement of the Act, especially considering its extensive liability and strict civil penalty provisions. Effective hazardous waste control requires tough legislation, but some of the more severe punitive elements of the Spill Act (most notably elements of the treble damages provision) are of debatable necessity.<sup>69</sup>

That portion of the Spill Act which imposes on culpable parties strict, joint and several liability has come under sharp attack.<sup>70</sup> New Jersey courts have extended the liability imposed by the Spill Act to parties "remotely responsible" for a discharge, including lessors and successor corporations.<sup>71</sup> Although it is arguably an unavoidable consequence of environmental legislation, the Spill Act has had a powerfully adverse effect on the corporate climate in New Jersey.<sup>72</sup> This is due mainly to the extensive liability imposed by the Act, and the expansion of that liability in the courts.

The current political climate makes it unlikely that New Jersey's Legislature will favor any amendments to the Spill Act that are likely to be perceived by the public as "soft on polluters." But without some revision, inequities within the Act will continue to work substantial injustice on the corporate community

and the people of New Jersey alike.

## V. CONCLUSION

The necessity of environmental protection and management in an industrial society is indisputable.<sup>73</sup> The catastrophes wrought on the environments of the former communist countries of Eastern Europe provide a vivid scenario of the effects of unrestrained pollution. Fortunately, the governing bodies in North America have generally responded posi-

tively to environmental concerns. Areas of the United States that have not yet established effective guidelines for the management of hazardous waste, whether because they have yet to encounter an acute problem or because no acceptable system of management appears available, would do well to examine New Jersey's experience in connection with the Spill Act.

*James Burke*

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## ENDNOTES

1. Around 1974 the environmental movement began to focus its attention on toxic contamination of the environment by industrial pollutants that had traditionally been disposed of with little or no treatment. A series of waste calamities, including those that occurred at Love Canal in New York and at Price's Pit and the Kin Buc Landfill in New Jersey drew national attention to the problem. See generally Hon. Jerry Fitzgerald English, *Hazardous Waste Regulation: A Prescription for Clean Water*, 13 SETON HALL L. REV. 229 (1983) (an account of the advent of widespread public concern with toxic waste dumping).
2. The Federal Resource Conservation and Recovery Act of 1976 defines hazardous waste as:
 

A solid waste, or combination of solid wastes which because of its quantity, concentration or physical, chemical or infectious characteristics may—(A) cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible, illness; or—(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5) (1982).
3. N.J. STAT. ANN. §§ 58:10-23.11 to 58:10-23.11z (West 1982 & Supp. 1991).
4. "Since New Jersey's enactment [of the Spill Act], many states have followed suit and the federal government has enacted a so-called "Superfund" under the Comprehensive Environmental Response, Compensation, and Liability Act (citation omitted)." *Buonviaggio v. Hillsborough TP. Committee*, 583 A.2d 739, 740 (N.J. 1991).
5. N.J. STAT. ANN. § 58:10-23.11c (West 1982).
6. *Id.* at §§ 58:10-23.11g and 58:10-23.11u.
7. *Id.* at § 58:10-23.11g(c).
8. *Id.* at § 58:10-23.11i.
9. *Id.* at § 58:10-23.11h.
10. *Id.* at § 58:10-23.11i.
11. *Id.* at § 58:10-23.11g(c).
12. See *Woodland Private Study Group v. Dep't of Env'tl. Protection*, 616 F. Supp. 794 (D.N.J. 1985). Alleged dischargers of hazardous waste who had refused an NJDEP order to finance cleanup efforts challenged the constitutionality of the treble damages that they were liable for as a result of noncompliance with N.J. STAT. ANN. § 58:10-23.11f (a.)
13. *In Re Matter of Kimber Petroleum Corp.*, 539 A.2d 1181, 1190-91 (N.J. 1988), *dismissed mem.*, 488 U.S. 935 (1988).
14. *Id.*

15. *Id.*
16. Anne F. Morris, *Hazardous Wastes in New Jersey: An Overview*, 38 RUTGERS L. REV. 623, 629 (1986).
17. *Id.* at 625.
18. The legislative findings as declared in subsection "a" of the Spill Act read in pertinent part as follows:

The Legislature finds and declares: that New Jersey's lands and waters constitute a unique and delicately balanced resource; that the protection and preservation of these lands and waters promotes the health, safety and welfare of the people of this State; *that the tourist and recreation industry dependent on clean waters and beaches is vital to the economy of this State*; that the State is the trustee, for the benefit of its citizens, of all natural resources within its jurisdiction; and that the storage and transfer of petroleum products and other hazardous substances between vessels, between facilities and vessels, and between facilities, whether onshore or offshore, is a hazardous undertaking and imposes risks of damage to persons and property within this State.

The Legislature finds and declares that the discharge of petroleum products and other hazardous substances within or outside the jurisdiction of this State constitutes a threat to the economy and environment of this State. The Legislature intends by the passage of this act to exercise the powers of this State to control the transfer and storage of hazardous substances and to provide liability for damage sustained within this State as a result of any discharge of said substances, by requiring the prompt containment and removal of such pollution and substances, and to provide a fund for swift and adequate compensation to *resort businesses* and other persons damaged by such discharge.

N.J. STAT. ANN. § 58:10-23.11a (West 1982) (emphasis added).

19. Francis E.P. McCarter, *New Jersey Clean Up Your "Act": Some Reflections on the Spill Compensation and Control Act*, 38 RUTGERS L. REV. 637, 642 (1986).
20. *Id.*
21. *Id.*
22. *Buonviaggio*, 583 A.2d at 740.
23. Senator Daniel Dalton, *Hazardous Waste Legislation in New Jersey: 1976-1986*, 38 RUTGERS L. REV. 619 (1986).
24. 1979 N.J. Laws 346.
25. "In 1977, the New Jersey legislature passed the Spill Compensation and Control Act, which provides for the identification and cleanup of uncontrolled toxic dump sites. This Act provided the model for the federal Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), which was enacted in 1980." Morris, *supra* note 16, at 628.
26. 42 U.S.C. §§ 9601-9657 (1982).
27. 1979 N.J. Laws 346.
28. For a general discussion of CERCLA provisions see Note, *Hazardous Waste Regulation: An Evaluation from an Historical Perspective*, 7 COLUM. J. ENVTL. L. 251 (1982).
29. See *supra* note 18.
30. N.J. STAT. ANN. § 58:10-23.11a (West 1982).
31. *Id.* at § 58:10-23.11c.
32. "Major facility" includes but is not limited to any refinery, storage or transfer terminal, pipeline, deep water port, drilling platform or any appurtenance related to any of the preceding that is used or is capable of being used to refine, produce, store, handle, transfer, process or transport haz-

ardous substances. A vessel shall be considered a major facility only when hazardous substances are transferred between vessels.

A facility shall not be considered a major facility for the purpose of this act unless it has total combined above-ground or buried storage capacity of—

(1) 50,000 gallons or more for hazardous substances which are other than petroleum or petroleum products, or

(2) 400,000 gallons or more for hazardous substances of all kinds.

*Id.* at § 58:10-23.11b(l) (West 1982).

33. *Id.* at § 58:10-23.11d (West Supp. 1991).

34. *Id.* at § 58:10-23.11e (West Supp. 1991).

35. *Id.*

36. See *id.* at § 58:10-23.11i. "The New Jersey Spill Compensation Fund is hereby established as a non-lapsing, revolving fund in the Department of the Treasury to carry out the purposes of this act."

37. Whenever any hazardous substance is discharged, the department may, in its discretion act to remove or arrange for the removal of such discharge or may direct the discharger to remove, or arrange for the removal of, such discharge. . . . Any discharger who fails to comply with such a directive shall be liable to the department in an amount equal to three times the cost of such removal.

*Id.* at § 58:10-23.11f(a) (1) (West 1982).

38. *Id.*

39. See *id.* at § 58:10-23.11o.

40. *Id.* at § 58:10-23.11f(f).

41. "Any person who has discharged a hazardous substance or is in any way responsible for any hazardous substance which the department has removed or is removing pursuant to subsection b, of section 7 of this act shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs." *Id.* at § 58:10-23.11g(c). See generally Note, *The Imposition of Vicarious Strict Liability on Off-Site Generators of Hazardous Waste*, 40 RUTGERS L. REV. 569 (1988).

42. N.J. STAT. ANN. § 58:10-23.11g(a) (West 1982).

43. *Id.* at § 58:10-23.11g(a)(1) to -23.11g(a)(5).

44. *Id.* at § 58:10-23.11g(d).

45. See *infra* notes 68 to 71 and accompanying text.

46. See N.J. STAT. ANN. §§ 58:10-23.11h and 58:10-23.11i (West 1982). Section 58:10-23.11h establishes the excise tax. Section 58:10-23.11i establishes the Spill Fund.

47. *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986). A group of taxpayers challenged New Jersey's right to tax them under the Spill Act for some of the same purposes for which they were being taxed under CERCLA. The Supreme Court agreed and found the Spill Act preempted in part by CERCLA.

48. N.J. STAT. ANN. § 58:10-23.11k (West 1982).

49. *Id.*

50. *Id.* at § 58:10-23.11i.

51. *Id.* at § 58:10-23.11m.
52. *Id.* at § 58:10-23.11n.
53. *Id.* at § 58:10-23.11r.
54. *Id.*
55. *Id.*
56. *Id.* at § 58:10-23.11g(b).
57. *Id.*
58. *Id.* at § 58:10-23.11u(a). It is unclear whether violations of Spill Act provisions must be "knowing" to be subject to penalty.
59. *Id.*
60. *Id.* at § 58:10-23.11u(b).
61. *Id.* at § 58:10-23.11v. This is a boilerplate provision.
62. *Id.*
63. *Id.* at § 58:10-23.11z.
64. Cynthia L. Chase, *Market Share Liability: A Plea for Legislative Alternatives*, 1982 U. ILL. L. REV. 1003, 1029.
65. Dalton, *supra* note 23, at 619.
66. N.J. Transp. Dep't v. PSC Resources, 419 A.2d 1151, 1158 (N.J. 1980). See generally Morris, *supra* note 16, at 623 (listing of New Jersey's major statutes and regulations applicable to hazardous waste management).
67. See *supra* notes 4 and 25.
68. McCarter, *supra* note 19, at 647.
69. See *id.* at 649-652 n. 78-92 and accompanying text. See also Kimber Petroleum, *supra* note 13. See generally Note, *Humbling the Spill Act? The Good Cause Defense in In Re Kimber Petroleum Corp. and In Re J.I.S. Industrial Service Co. Landfill*, 41 RUTGERS L. REV. 1459 (1989).
70. "The provision has often been cited as a major cause of the liability insurance crisis." Dalton, *supra* note 23, at 620.
71. That part of the Spill Act which applies strict liability, jointly and severally, without regard to fault to any person who is *in any way* responsible for the discharge of a hazardous substance has operated to extend liability to parties not directly responsible for discharges. See State, Dep't of Environmental Protection v. Ventron Corp., 468 A.2d 150 (N.J. 1983) Ownership or control over property at the time of a discharge will suffice to establish responsibility and liability pursuant to N.J. STAT. ANN. § 58:10-23.11g(c). Ventron Corp., 468 A.2d at 165. (In *Ventron Corp.*, strict liability applied jointly and severally to an original discharging corporation, the succeeding corporation, successor's original parent corporation, and the corporation into which successor eventually merged.)

Pursuant to N.J. STAT. ANN. § 58:10-23.11g(c) a lessor may be strictly liable for all cleanup and removal costs related to a discharge of hazardous substances. *Tree Realty, Inc. v. Dep't of Treasury*, 500 A.2d 1075 (N.J. Super. Ct. App. Div. 1985). The court in *Tree Realty* found that "dischargers are not the only ones responsible for DEP's cleanup and removal costs" and held a property owner whose lessee had discharged hazardous materials responsible for all cleanup and removal costs without regard to the property owner's fault. *Id.* at 348. See generally Note, *Imposition of Strict Liability on Off-Site Generators of Hazardous Waste*, 40 RUTGERS L. REV. 569 (1988).



72. The Spill Act was originally a compromise between greens and industry. Since then the corporate community has vehemently opposed in court several Spill Act provisions. See *GATX Term. Corp. v. N.J. Dep't of Environmental Protection*, 414 A.2d 980, 982 (N.J. 1980).

73. The court in *Bridgeton v. B.P. Oil, Inc.*, 369 A.2d 49 (N.J. 1976) phrased it as follows:

As a society we are constantly made aware of the diminishing quantity and quality of our environment. Save, hopefully, in its ideals this is no longer the land of our fathers with its limitless bounty from sea to sea. This generation of Americans has seen its bounty wasted by mindless and reckless misuse. It has further seen the almost unchecked development of products whose misuse or improper employment lead to disfigurement and death. The law is not—or ought not be—so feeble as to exonerate those whose conduct causes harm to others by reason of such use or abuse.

*Id.* at 54.