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Rhode Island Imposes Strict Liability for Contamination of Water by Percolation of Pollutants from Illegal Dump Site

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NOTES

RHODE ISLAND IMPOSES STRICT LIABILITY FOR CONTAMINATION OF WATER BY PERCOLATION OF POLLUTANTS FROM ILLEGAL DUMP SITE

Rhode Island has entered the mainstream of nuisance law by holding that a showing of negligence is not required to hold a defendant liable for pollution of water as a result of pollutants percolating through the soil. While the decision creates a strong deterrent to water pollution, the Rhode Island Supreme Court, by specifically limiting its holding to instances in which water is contaminated through percolation, declined to impose strict liability for water pollution in general. *Wood v. Picillo,* 443 A.2d 1244 (R.I. 1982).

INTRODUCTION

In 1977, a fire erupted on Piggy Hill in Coventry, Rhode Island, sending fifty-foot flames and huge billows of black smoke into the air and, naturally, attracting the attention of public authorities. The source of the fire was an illegal chemical dump site maintained by Picillo, one of the defendants in this action.[1] The defendants were responsible for dumping toxic chemical wastes into a trench on a pig farm at the top of the hill.[2] The trench, 200 feet long, 30 feet wide, and 20 feet deep, contained at least a six-inch "viscous layer of pungent, varicolored liquid" and its banks were lined with more than 100 drums of chemicals.[3] At the base of the hill were two homes and a marshy wetland that drained into several ponds and streams inhabited by fish and used for recreation and for commercial cranberry growing.

Despite the state fire marshall's order that the site be cleaned up, the dumping continued. In 1979, officials discovered a second dump site on the hill when " 'sink holes' emitting chemical odors opened in the earth."[4]

1. Wood v. Picillo, 443 A.2d 1244 (R.I. 1982).

2. The chemicals included toluene, xylene, chloroform, 1,1,1-trichloroethane, and trichloroethylene. 443 A.2d at 1246. Chloroform, trichloroethane, and trichloroethylene are "strong carcinogens that cause cirrhosis (cell death) of the liver and hepatoma (cancer of the liver)." *Id.* Toluene and xylene have a toxic effect on bone marrow and chloroform, when heated to 68°F, converts to phosgene gas, "a nerve gas of the type utilized in World War I." An expert witness testified that sunlight would provide enough heat to turn chloroform present in surface water into phosgene gas. *Id.* at 1246–47.

3. 443 A.2d at 1246.

4. *Id.*

Chemicals from both sites had percolated through the soil to the water below, causing a reddish discoloration and an oily surface. A chemical odor pervaded the area, and at one location "chemicals seeped out of the ground as if from a spring."[5] Inhalation of volatile organic chemicals from the dump caused nausea, headaches, and other discomforts in the nearby residents.[6] According to a Brown University professor of medicine, there is no safe level for human or animal exposure to some chemicals that were present at the site.[7]

The trial court, horrified by this "chemical nightmare," declared the dump site a public and private nuisance, and granted the plaintiffs relief by allowing them to arrange for clean-up at defendants' expense.[8] Defendants appealed the ruling directly to the Rhode Island Supreme Court, arguing that plaintiffs had failed to meet their obligation to show that defendants acted negligently in disposing chemical wastes on defendants' property. The Court found this argument without merit after observing that Rhode Island followed the widely recognized rule in nuisance cases that proof of negligence is not required to establish a defendant's liability.

THE GENERAL RULE AND ITS EXCEPTION

Generally, negligence need not be proved in a nuisance case because the original nature of the defendant's conduct becomes unimportant if the defendant, once notified of the nuisance, fails to eliminate the problem. The defendant, in continuing to allow the nuisance to exist, is presumed to act intentionally to the plaintiff's detriment. Therefore the defendant's original intent is largely irrelevant.[9] Nuisance, according to Prosser, "is not a separate tort in itself, subject to rules of its own."[10] Nuisances are types of damages, resulting from tortious conduct, whether negligent or not.

In establishing that Rhode Island usually follows the general rule, the Court examined the distinction between negligence and nuisance liability, as expressed in the 1934 case of *Braun v. Iannotti*,[11] where soot and smoke from defendant's furnace blew onto plaintiff's property. The *Braun* Court reasoned that the basis of defendant's liability was unreasonable injury rather than unreasonable conduct and, therefore, an allegation of

5. *Id.* at 1247, n. 3.

6. *Id.* at 1246.

7. *Id.* Dr. Nelson Fausto, a professor of medical sciences in the pathology division of the Department of Biological and Medical Sciences at Brown University, testified in *Wood* as an expert witness.

8. *Id.* at 1247. The defendants only had to finance the clean-up, probably because the State of Rhode Island, as a plaintiff, would control the operation.

9. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 87 at 576 (4th ed. 1971).

10. *Id.* at 577.

11. 54 R.I. 469, 175 A. 656 (1934).

negligence could be "discarded as surplusage."[12] The defendant was held liable for creating a nuisance, even though his conduct may have been reasonable, because the harm, not defendant's conduct, was the nuisance. Therefore, under the general rule, even a reasonably prudent defendant can be held liable for a nuisance.

THE EXCEPTION TO THE RULE

In *Rose v. Sacony-Vacuum Corp.*,[13] however, Rhode Island created an exception to the general rule. The facts in *Rose* are similar to those in *Wood*. Storage tanks at defendant's oil refinery discharged and leaked petroleum waste products into streams and ponds on the defendant's own property. The pollutants trickled through the soil and into plaintiff farmer's water supply, poisoning and killing 700 hens and 75 breeding sows. The plaintiff failed to plead negligence and merely argued that he was harmed by defendant's creation of a nuisance. The Court ruled that the defendant could not be held liable unless it had acted negligently because the refinery was a necessity of modern life, and individual rights of persons living near the refinery had to be compromised for the benefit of the community as a whole. The *Rose* Court stated that if,

> in the process of refining petroleum, injury is occasioned to those in the vicinity, not through negligence or lack of skill or the invasion of a recognized legal right, but by the contamination of percolating waters whose courses are not known, we think that public policy justifies a determination that such harm is damnum abseque injuria [a loss that does not give rise to an action for damages].[14]

The Court pointed out that jurisdictions imposing liability without a showing of negligence are primarily characterized by agricultural economies, perhaps referring to the importance placed on water in such jurisdictions, compared with a need in industrial economies to tolerate water pollution.[15] The *Rose* Court declined to impose strict liability on the defendant because of the importance of petroleum products to the local economy and because of the mystery of the courses of groundwater.

ROSE REJECTED

The *Wood* Court overruled *Rose* for several reasons. First, because of present sophisticated knowledge of hydrology, the flow of groundwater is no longer "obscure and mysterious." Scientific experts who testified

12. 54 R.I. at 471, 175 A. at 657.

13. 54 R.I. 411, 173 A. 627 (1934); a companion case with the same ruling is Rose v. Standard Oil Co., 56 R.I. 272, 185 A. 251 (1936).

14. 54 R.I. at ___, 173 A. at 631–32.

15. 54 R.I. at ___, 173 A. at 631.

in *Wood* demonstrated that the paths of underground water can be determined accurately.[16] Second, the Court reasoned that "[c]oncern for the preservation of an often precarious ecological balance, impelled by the spectre of a 'silent spring,' has today reached a zenith of intense significance."[17] Therefore, the Court determined that the scientific and policy considerations underlying the *Rose* decision are no longer valid.[18]

The Court overruled precedent on the basis of changed knowledge and social values. Essential to its rejection of *Rose* is that individual rights do not have to be set aside to allow pollution by an industry that benefits the public at large. The Court clearly recognized that the right of people living near an industrial site to enjoy their land is superior to the rights of the creator of a nuisance. Therefore, despite a community's economic dependence on an industry, that industry cannot be allowed to create a situation by which nearby residents are harmed.

In setting aside *Rose,* the Rhode Island Court recognized that the rights of these residents must be weighed against the value, or perhaps necessity, of allowing an industry to pollute local water supplies. The *Wood* Court determined that in the balance, the rights of individual residents to enjoy their land outweigh policy reasons for allowing an industry to pollute water with impunity even though the industry is important economically. The logical result of this balancing is that communities that depend on the industry, along with consumers of the industry's product, must pay the cost of preserving the nearby residents' right to use and enjoy their land and appurtenant water. The cost may be paid through loss of jobs and products if the industry is forced to cease operations, or through increased costs of those products due to the added expense of pollution controls.[19]

Although the Court observed the importance of preserving individual rights, despite the cost, the *Wood* decision will maintain those rights only in a circumscribed factual setting. The Court carefully limited its application of strict liability to cases in which water is contaminated by pollutants percolating through the soil. This constriction does not greatly diminish the importance of the Court's application of strict liability because *Wood* still applies to a large number of cases (i.e., those involving pollution of ground water through percolation).

There are several reasons which support the narrow ruling. The plaintiffs did not plead negligence, so the Court had to reach beyond the petition to find a theory under which to hold the defendants liable. The

16. 443 A.2d at 1249.
17. *Id.*
18. *Id.*
19. These costs would also apply to the nearby residents themselves.

Court could have allowed the plaintiffs to amend their complaint to include negligence, but chose instead to apply a theory of strict liability to deter improper chemical disposal. In support of its desire to employ strict liability as a deterrent, the Court cited widespread and serious public concern for the environment, and apparently took the position that current public policy favors strong measures in situations as dangerous as the dumping of chemical wastes which are potentially fatal to humans or animals.[20] By imposing strict liability, the *Wood* decision seeks to make improper chemical disposal less attractive to companies with otherwise strong economic incentives to dump illegally.

Another possible reason the Court did not require proof of negligence is that the plaintiffs only sought injunctive relief to stop further disposal of chemicals at the site and to have the site cleaned up. The plaintiffs did not demand money damages and were clearly not seeking financial gain or cessation of the business operation that produced the dangerous chemical wastes. They only asked that the site be cleaned up and that future chemical disposals be done properly at an appropriate place. Therefore, the Court was more willing to hold the defendants liable without requiring proof of negligence in addition to a showing of nuisance.

Finally, the public policy relied on in *Wood* favors measures to prevent improper chemical dumping when the pollution involved is so clearly and immediately dangerous. The public, however, would probably not support an application of the Court's holding to less immediately hazardous forms of contamination, especially when the benefits of allowing the pollution are generally seen to outweigh the costs of prevention. Pollution prevention in general may be an important issue in Rhode Island, but because the state is heavily industrialized, a broader holding by the *Wood* Court could have seriously harmed the state's economy.[21] It is clear,

20. 443 A.2d at 1249.

21. In 1977, Rhode Island had 3,107 manufacturing establishments in a state with a land area of 1,049 square miles, employing 125,100 persons out of a population of 947,154 (1980 estimate). The value added to the economy was $2,736,700,000. RAND McNALLY & CO., 1982 COMMERCIAL ATLAS & MARKETING GUIDE 479 (113th ed. 1982). Rand-McNally assigned Rhode Island 4,678 "Ranally Manufacturing Units." The Units are "based on value added by manufacture according to the 1977 Census of Manufactures. . . . Each Ranally Manufacturing Unit equals .0001% of the total United States value added by manufacture in 1977." *Id.* at 4. Therefore, in 1977 Rhode Island contributed almost 0.5% of the total United States value added by manufacture. The importance of Rhode Island manufacturing is increasing, as the State's number of Ranally Manufacturing Units increased 55.1% between 1972 and 1977. *Id.* at 479.

To further illustrate the extent of Rhode Island's industrialization, it may be compared with New Jersey, a state known for its industrial development. New Jersey is assigned 39,059 Ranally Manufacturing Units, has a population of 7,364,158 (1980) and covers a land area of 7,521 square miles. *Id.* at 394. New Jersey is more than seven times as large as Rhode Island in land area and population, and has more than eight times as many Ranally Manufacturing Units. Because the proportion of

then, that there may be circumstances in which the importance of continued manufacturing operations outweighs the rights of local residents to be free of a nuisance the industry creates. In these cases, alternatives to injunctive relief can be considered.

In nuisance cases where recovery damages are allowed, the general rule is that where "a nuisance is of such a permanent and unabatable character that a single recovery can be had, including the whole damage past and future resulting therefrom, there can be but one recovery. . . . [P]ermanent damages are allowed where the loss recoverable would obviously be small as compared with the cost of removal of the nuisance."[22] The *Wood* Court did not discuss the possibility of awarding damages to the plaintiffs, perhaps because one of the plaintiffs was the State of Rhode Island (interested only in clean-up). In addition, the dump site was illegal and potentially lethal to life in the area, and the plaintiffs' harm could have been prevented. Therefore, the Court stopped the dumping and ordered a clean-up at the defendants' expense instead of allowing the defendants the less expensive option of paying damages. Another similar alternative was issuance of an injunction conditioned on the payment of permanent damages by the defendants to the plaintiffs. The defendants, under such a ruling, could have chosen payment of damages instead of clean-up costs.

Other remedies not considered by the Court included forcing the defendants to buy the entire area it contaminated, or allowing the government to make the purchase, as was done recently in Times Beach, Missouri. These options could be impractical because of the nature of the chemical contamination, which had entered a water supply and traveled considerable distances. Additionally, these remedies would not serve as an adequate deterrent to improper chemical disposal in Rhode Island. Conceivably, chemical companies could appropriate land by dumping where it is convenient, knowing they would only have to buy the parcel or, better yet, that the government would pay the cost.

CONCLUSION

The Court's holding is more conservative than it first appears. The Court implied that a finding of negligence on the part of a defendant may

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population, land area, and Manufacturing Units between the states roughly correspond, it is clear the states are comparably industrialized.

It may be helpful to compare these two states with less industrialized states. New Mexico, with a land area of 121,412 square miles and a population of 1,299,968 (1980) had 1,255 Manufacturing Units in 1977, *Id.* at 401, while Vermont, with 9,267 square miles and 511,456 people (1980), had 1,796 Manufacturing Units, *Id.* at 515.

22. Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 226, 257 N.E.2d 870, 874, 309 N.Y.S.2d 312, 317–18 (1970).

be inherent in a trial court's determination that a nuisance exists. Nevertheless, the Court said a specific finding of negligence is not necessary to impose liability because the essential element of an actionable nuisance is that the plaintiff has suffered harm or been threatened with injuries he should not have to bear.[23] This reasoning is consistent with the notion that a defendant, once notified that a nuisance exists, harms a plaintiff intentionally if the nuisance is allowed to continue to exist. The *Wood* Court was unwilling to disrupt the state's economy for the sake of environmental concerns but, nonetheless, wanted to hold the defendants liable for the outrageous nuisance they created, and to deter similar behavior by requiring the clean-up of the dump even though less costly remedies were available. The *Wood* decision brought Rhode Island into line with most other states by abolishing the negligence requirement for a nuisance involving percolating waters.[24] As was evident in this case, the Rhode Island courts are aware of the great need for strict water pollution standards, and will not tolerate as serious a nuisance as was created in *Wood*. The courts, however, are not yet willing to impose strict liability for water pollution in general because of potential cases in which the adverse economic consequences to the community exceed the actual injuries to specific residents.

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23. 443 A.2d at 1247, *citing* Citizens for Preservation of Waterman Lake v. Davis, 420 A.2d 53, 59 (R.I. 1980) and Braun v. Iannotti, 54 R.I. 469, 471, 175 A. 656, 657 (1934).

24. For example, New York, as early as 1866, has held defendants strictly liable for allowing water to percolate onto plaintiff's property. Pixley v. Clark, 35 N.Y. 520 (1866). Even though this case did not involve pollution as a result of percolation, the principles are the same—damage caused as a result of fluids percolating. Similar cases are Goodyear Tire & Rubber Co. v. Gadsden Sand & Gravel Co., 248 Ala. 273, 27 So.2d 578 (1946); International & G.N.R. Co. v. Slusher, 42 Tex. Civ. App. 631, 95 S.W. 717 (1906); City of Barberton v. Miksch, 128 Ohio St. 169, 190 N.E. 387 (1934). *Rose* was Rhode Island's first case involving percolation.