Encouraging Pollution: The Perils of Liability Limits
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Introduction

When the Deepwater Horizon drilling rig exploded at BP's Macondo well in the Gulf of Mexico on April 20, 2010, the economic and environmental impacts may not have been immediately evident. Yet in the following weeks and months, as failed attempts to stop the flow of oil into the Gulf dominated news coverage across the world, the damage lay bare. This served to magnify public discussion of the responsibility for both the failure of the well and compensating victims of the failure. Of particular concern to many was the possibility that responsible parties would be protected by law from fully compensating victims of the disaster.¹

In January 2011, the Presidential Commission investigating the BP oil spill released its final report.² It found that the Macondo well blowout was “the product of human error, engineering mistakes, and management failures,”³ including the failure to adequately evaluate and manage risk.⁴ Of particular note, the Commission identified a series of decisions made by BP, Haliburton and Transocean that saved them time and money, but failed to fully identify and appreciate the associated risks.⁵ Commission co-chairman Bob Graham noted in a separate statement that “[t]his disaster likely would not have happened had the companies involved been guided by an unrelenting commitment to safety first.”⁶ Furthermore, the report asserted that the “blowout was not the product of a series of aberrational decisions,” but rather was the product of systemic safety failures in industry management and government oversight.⁷ The Commission called for the oil and gas industry to undertake sweeping internal reforms aimed at fundamentally transforming its safety culture.⁸

The full extent of environmental damage caused by the spill will take decades to assess.⁹ The U.S. government estimates that more than 170 million gallons of oil leaked into the Gulf.¹⁰ And while the environmental impacts themselves are deeply upsetting, the economic impacts of the spill are of equal concern. Current estimates on total economic losses are in the tens of billions.¹¹ It is therefore troubling to note that the liability of those responsible for the spill is

² National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Report to the President (January 2011) [Presidential Report].
⁴ Ibid.
⁵ Ibid., at 223.
⁷ Presidential Report, supra note 2 at 122.
⁸ Ibid., at 217.
⁹ Press Release, supra note 3 at 4.
¹⁰ Ibid.
¹¹ Presidential Report, supra note 2 at vi.
significantly less than the estimated damage. Under the Oil Pollution Act of 1990, parties responsible for off-shore oil spills must pay for cleanup and containment costs in their entirety, but so long as there is not gross negligence, regulatory violations or acts of war, liability for private damages is limited to $75 million. At President Obama's urging, BP agreed to voluntarily waive the $75 million liability cap, and created a $20 billion escrow fund to help address financial losses resulting from the spill. Yet the Commission noted that if a less well-capitalized company had caused the spill, the funds needed to compensate victims and restore injured resources would likely have been unavailable.

In its report the Commission identified two major problems with the current liability cap: it distorts the incentives to adopt cost-effective safety precautions and it provides inadequate compensation for damages. The Commission noted that “[t]he relatively modest liability cap and financial responsibility requirements provide little incentive for oil companies to improve safety practices.” In order to address these problems, the Commission recommended that “Congress significantly increase the liability cap and financial responsibility for offshore facilities.” There has been mixed reaction to this proposal, leaving doubt as to whether Congress will heed this recommendation, especially in light of increased industry lobbying efforts.

While the BP oil spill serves as a dramatic reminder of the existing liability limits for oil spills, examples of limited liability for diverse environmental harms abound in both the U.S. and Canada. In contexts including oil and gas extraction, production and transportation, other maritime pollution, nuclear incidents, water pollution from industry, municipalities and farms, and numerous other sources of pollution, legislation protects those engaged in risky behaviour from full responsibility for the harm they create. Such laws subsidize environmentally harmful activities by shifting costs to both victims (who are not fully compensated by the responsible party) and taxpayers (who may be left to cover the gap). Moreover, by limiting the costs of environmental degradation to the polluter, they encourage more risky behaviour.

In this paper we discuss the foundations of and question the legitimacy of schemes which limit the liability of parties responsible for environmental damage in Canada. We begin the paper with a discussion of the historically robust common law protections against environmental harm. We then explore various justifications for imposing full liability on those causing others harm. Next we present several examples of Canadian statutory regimes that limit the liability imposed on environmental polluters. Finally we present and critique the justifications for such limits, and advocate for change.

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12 Ibid., at 245.
13 BP has already paid claims measuring in the billions. Supra note 2 at 185, 284.
14 Ibid., at 283.
15 Ibid., at 284.
16 Ibid.
17 Ibid.
Liability for Environmental Property Damage: History and Purposes

At common law, dating back to the late Middle Ages, landowners’ property rights protected them from interference with or invasion of their land. Three primary doctrines evolved to protect landowners from unlawful interference with their property: trespass, nuisance and riparian law. A trespass is any invasion of another's land, regardless of intention, by people, flood-waters, structures or pollutants. The law of nuisance requires that in using one's own property, another's enjoyment must not be compromised. Finally, riparian law holds that those who own or occupy land beside lakes and rivers have “the right to the natural flow of water beside or through their property, unchanged in quantity or quality.” In addition to these traditional bases of tort liability, a new strict liability offense was introduced in 1869 in the seminal case of *Rylands v Fletcher*. Thereafter, an individual who makes non-natural use of her land is held responsible for any damage caused by the escape of anything onto her neighbour's property.

There have traditionally been two remedies for violations of these common law property rights: an injunction (forbidding the polluting activity that violates the rights), and damages (compensating rights-holders for the damage that has been or is done). The injunction remedy is much more robust, ensuring property owners’ continued enjoyment of their land, which may not be attainable through economic compensation. Nonetheless, it is also, by nature, extremely prohibitive, and as such may conflict with other public interests, in particular the government's declared interest in promoting industries and protecting jobs.

At their core, liability rules “shift a loss from the person initially suffering it to another person that is responsible for it.” In the following discussion we present some of the justifications for holding those who wrongfully cause harm responsible for compensating the victims for their losses.

The Presidential Commission investigating the BP oil spill emphasized the importance of compensating victims for their losses, and rightly so. Victim compensation is an essential characteristic of tort law, and not just in cases of environmental disasters. It is easy to understand why. There is an instinctive unfairness to requiring people to bear the costs associated

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21 Ibid.
22 Ibid., at 41.
23 Ibid., at 54.
24 *Rylands v Fletcher* (1869), LR 3 HL 330, affirming (1866) LR 1 Ex 265.
25 Lewis N Klar, *Tort Law, 3rd ed* (Toronto: Thomson-Carswell 2003) at 555 [Klar]. The interpretation of non-natural use has ranged from any use which introduces special dangers to the neighbourhood, to a use which is hazardous and unusual or special.
26 The merit of this public interest argument is debatable, as the preservation or creation of jobs in a certain sector is often achieved at the expense of others. The job-creation argument is often put forth for political, rather than economic reasons. For a seminal discussion of the economic folly of destructive activity, see Frederic Bastiat’s essay on the broken window in “What Is Seen and What Is Not Seen” (1850), online: <http://bastian.org/en/twisatwins.html>.
28 We will set aside the non-instrumentalist view of tort law which holds, roughly, that tort law is ill-explained in terms of instrumentalist goals of punishment, compensation, deterrence, etc. See Ernest J Weinrib, *The Idea of Private Law* (1995: Cambridge, MA).
with outcomes from conduct for which they were not responsible. Yet victim compensation is only a part of a rights-based or justice-oriented account of tort law. This is clear from the observation that our liability system does not allow recovery against just anybody, or against any injurer—it provides for recovery from the specific injurer of the victim. Liability in tort may also require (albeit not in cases of strict liability) that the harm be the result of wrongful conduct of some sort, be it intentional, reckless, negligent, etc. Additionally, only certain types of damage are compensable, not all damage, though exclusions are only rarely significant. It is said that compensation is merely a product of, or remedy offered by, a fault-based tort law system. Nonetheless, when making legislative changes to tort law, the ability of victims to be fully compensated for wrongs committed against them is an important consideration.

Liability plays an important role in achieving civil justice. There are several different, yet related, values which inform the justice component of tort liability. These includes notions of fairness (that it is fair to require the person who causes a loss to repair it), of punishment (that, although the act is not criminal, justice is served by penalizing the wrongdoer), and of personal accountability (that the ability to control one's actions is only meaningful if one assumes responsibility for those actions). Much of this is captured in the statement that a “defendant should pay because he chooses to use up plaintiff's resources for his own ends, and he chooses to do so if he subjects the plaintiff to an abnormally high risk to get some benefit for himself.”

In addition to rights-based or justice-focused accounts, tort law sits on a strong foundation of economic objectives. Cost-internalization as a means of promoting economic efficiency is a paramount objective of liability regimes. In the context of the environment, pollution represents an externality—a cost that is unfairly imposed on others. The concern is that failure to have polluters internalize these costs leads to inefficient resource allocation and diminished welfare. This idea has been formalized in the environmental context through the polluter pays principle, which has the support of both the Supreme Court of Canada and the international community. Essentially the principle “assigns polluters the responsibility for remedying contamination for which they are responsible.”

Another economically motivated goal of tort liability is the idea that the party that has the greatest control over the risks, and can reduce them most effectively, should be assigned liability. Generally the mitigation of risks requires investment in information about the risks. This can be

\[^{30}\text{One theory of corrective justice identifies a goal to “eliminate, rectify, or annul wrongful (or unjust) losses.” See Jules L Coleman, “The Mixed Conception of Corrective Justice” (1992) 77 Iowa Law Review 427 at 429.}\]

\[^{31}\text{Bergkamp, supra note 27 at 71.}\]

\[^{32}\text{Klar, supra note 25 at 11.}\]

\[^{33}\text{Bergkamp, supra note 27 at 71.}\]

\[^{34}\text{Klar, supra note 25 at 11.}\]

\[^{35}\text{Ibid., at 12.}\]

\[^{36}\text{Ibid.}\]

\[^{37}\text{Gordley J. Tort Law in the Aristotelian Tradition. In: Owen DG (editor). Philosophical Foundations of Tort Law, as cited in Bergkamp, supra note 27 at 112.}\]

\[^{38}\text{Bergkamp, supra note 27 at 73.}\]

\[^{39}\text{For instance, if costs are artificially reduced as a result of externalization a business might erect a factory in an inappropriate place, use unsustainable technologies, or simply produce more of a particular good than would be demanded if all costs were internalized.}\]

\[^{40}\text{Imperial Oil Ltd v Quebec (Minister of the Environment), 2003 SCC 58, [2003] 2 SCR 624 [Imperial Oil].}\]


\[^{42}\text{Imperial Oil, supra note 40 at para 24.}\]

\[^{43}\text{Michael Trebilcock and Ralph A Winter, “The Economics of Nuclear Accident Law,” 17 Intl Rev of Law and}\]
achieved more efficiently by, for example, an industrial entity than by consumers and members of the community, whose efforts would be duplicative.\textsuperscript{44} Imposing liability on parties who are in the best position to mitigate risks provides incentives to do so.

Relatedly, another important objective of liability is the deterrence of carelessness. Many scholars argue that a liability regime should create incentives for actors to take due care and reduce the risks associated with their actions.\textsuperscript{45} Law and economics professor Michael Trebilcock has testified that “apart from the purely compensation function, law and economics scholars more or less universally view the purpose of damage awards as creating appropriate incentives to take precautions on the part of injurers to avoid accident costs to potential victims.”\textsuperscript{46} In the context of nuclear power production, to be discussed below, Trebilcock has argued that the internalization of accident costs is key to improving safety incentives.\textsuperscript{47} This was also central to the BP Commission’s findings regarding the limited liability regime, where they noted that “any damages cap that limits liability well below levels that may actually be incurred...distorts the incentives of industry participants to adopt cost-effective safety precautions.”\textsuperscript{48} There is, nonetheless, considerable debate about the limits of this deterrent function, especially in light of the existence of liability insurance, which reduces the financial impact of wrongdoing.\textsuperscript{49} While empirical studies fall on both sides of the debate, it seems likely that the threat of increased insurance premiums will still give individuals, businesses and professionals reason enough to consider the potential costs of different avenues of action.\textsuperscript{50}

Our liability regime is a product of all of these factors, and common to them all is the importance of full liability in effecting their aims. Nonetheless, in the following section we will see how the government has created limited liability regimes to protect polluters from full liability.

**Limited Liability Regimes in Canadian Law**

Over the last century, governments have often diluted or overridden common law rights and remedies. In order to promote growth and to protect the economic interests of certain industries and those employed by them, they have limited the liability of a host of polluters. In some cases, they have instructed courts to consider the economic consequences of ruling against polluters. In others, they have overturned court-ordered injunctions or forbidden courts to issue injunctions.\textsuperscript{51} In still others, they have imposed limits on the damages courts may award. In the

\textsuperscript{44} A related idea is that of a lowest cost avoider. When costs are imposed on a liable party it will protect against them by either taking steps to avoid an accident, or insuring against an accident (these are related, as the threat of higher insurance premiums encourages parties to take preventative steps). Introduced by prominent legal scholar Guido Calabresi, the idea is that between the injurer and the victim, liability should be imposed on the party who is in the best position to avoid the accident. However, this fails to account for the injustice of requiring those whose rights would be infringed in the event of an accident to incur the costs of prevention.

\textsuperscript{45} Bergkamp, supra note 27 at 86.

\textsuperscript{46} Energy Probe’s direct examination of Michael Trebilcock in Energy Probe et al v The Attorney General of Canada (14 October 1993) at 283.

\textsuperscript{47} Trebilcock and Winter, supra note 43 at 225.

\textsuperscript{48} Presidential Report, supra note 2 at 284.

\textsuperscript{49} Klar, supra note 25 at 15.

\textsuperscript{50} Ibid., at 15-16.

\textsuperscript{51} Two instances in particular stand out. In the mid-1940s the Kalamazoo Vegetable Parchment Company (KVP) operated a pulp and paper mill in Espanola, Ontario. Its daily habit of releasing 3.5-5 tons of chemically contaminated wood fibres into the local Spanish River rendered the water unsuitable for drinking, even by
19th century, liability limitations commonly benefited railroads, whose noise, smoke and sparks threatened neighbouring land owners. Polluting sawmills were another early beneficiary, followed in the 20th century by smelters, pulp mills, sewage polluters, miners, and farmers.

Examples of limited liability regimes in Canadian and Ontario legislation now abound. Even potentially catastrophic accidents, such as those related to oil and gas production and shipping or nuclear power generation, are covered by rules limiting liability. The following pieces of legislation set out which parties are liable for pollution, which costs they are liable for, as well as any defences that apply, and limitations on liability.

**Canada Oil and Gas Operations Act**

The Canada Oil and Gas Operations Act (COGOA) governs liability in relation to exploration, drilling, production, processing, and transportation of oil and gas in areas under federal jurisdiction. In the event of a “discharge, emission or escape of gas that is authorized by regulation, or any spill” in these areas, the person who was required to get authorization under the Act for the work or activity in question is liable, and faces strict liability, without proof of fault or negligence.

The person who obtained the authorization is liable in the event of a discharge or spill for “all actual loss or damage incurred by any person as a result” and for the reasonable costs and expenses of the Crown or by any person in response, subject to limits. This person is also liable in relation to any debris for all “actual loss or damage” the debris causes and for the reasonable costs and expenses of remedial action by the Crown that it necessitates.

Liability for spills is limited by s. 3 of the Oil and Gas Spills and Debris Liability Regulations under the Act and varies based on geographic area: (a) $40 million on land or submarine areas adjacent to arctic waters south of the 60th parallel, (b) $40 million in submarine areas north of the 60th parallel and to which (a) does not apply, (c) $25 million in any area of the Yukon Territory or Northwest Territories covered by or less than 200m from any body of inland water and to which (a) does not apply, (d) $10 million in any area within the Yukon Territory or Northwest Territories to which neither (a) nor (c) applies, and (e) $30 million in any other area to which the Act applies. These amounts fall far short of the amount a significant accident could be expected to cost; as noted above, for example, the BP spill is expected to have a price tag in the tens of billions. Offshore activities in Nova Scotia and Newfoundland are governed by the Canada-Newfoundland Atlantic Accord Implementation Act and Canada-Nova Scotia Offshore Livestock, or for other uses. A group of citizens launched successful lawsuits against KVP, and were awarded an injunction and damages. In response the government, influenced by a major lobbying effort by mill management, labour unions and several municipal associations, introduced An Act respecting the KVP Company Limited which dissolved the injunction in the name of preserving the means of employment for the community. Similarly, in the 1950s there were two cases involving municipalities that were dumping raw sewage into local rivers because their sewage plants were no longer equipped to handle the waste of their growing populations. In response to the injunctions issued by the courts, legislators introduced An Act to amend The Public Health Act which dissolved the injunctions against both municipalities and went further by effectively removing the courts power to grant such injunctions in the future (by deeming any sewage project approved by the Department of Health to be operated by statutory authority). For more detail see Brubaker, supra note 20 at 71-92.

52 Canada Oil and Gas Operations Act, RSO 1985, c. O-7 [COGOA], s. 3. These areas consist of the Northwest Territories, Nunavut, and Sable Island, and submarine areas not within provinces in Canada's internal waters, territorial sea, and continental shelf.

53 Ibid., s. 26(1)(a).

54 Ibid., ss. 26(1)(a)(i)-(ii).

55 Oil and Gas Spills and Debris Liability Regulations, SOR/87-331, s.3.
Petroleum Resources Accord Implementation Act, which are in substance the same as COGOA and set out the same limits on liability. Additionally, “double liability” is not permitted; if the person required to obtain authorization could also be found liable under another law, he or she is liable for the greater of the two possible amounts, not both.

In addition to this strict liability regime, any persons whose fault or negligence causes such a discharge or spill, or who are legally responsible for such persons, are liable for “all actual loss or damage,” to an extent determined based on the degree to which they were at fault or negligent. They are also liable in relation to debris, both for all “actual loss or damage” it causes to any person and for all reasonable costs and expenses of remedial action by the government, based on the degree of their fault or negligence. This could include the person authorized for the work or activity. There is no fixed limit for liability in these circumstances.

Marine Liability Act

The federal Marine Liability Act (MLA) implements the International Convention on Civil Liability for Oil Pollution Damage (the Civil Liability Liability Convention, or, CLC) and the International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunkers Convention) into Canadian law. It creates a regime of strict liability, without proof of fault or negligence, for ship owners in the event of oil pollution from ships, subject to certain defences. Persons other than ship owners will not face liability unless the damage was caused by “their personal act or omission, committed with the intent to cause such damage, or recklessly and with the knowledge that such damage would result,” which appears to require knowledge by that party that the specific loss in question would probably result, making it difficult to hold anyone but a ship owner liable.

Ship owners are liable for oil pollution damage, for the reasonable costs of actions by the government, a response organization, or any other person to “prevent, repair, remedy or minimize” such damage, and for the reasonable costs of environmental restoration. They will not be held liable if certain defences apply. The MLA exempts the owner from liability if the problem was the result of an act of war or comparable hostilities or of “a natural phenomenon of an exceptional, inevitable and irresistible character,” and if the government or another authority responsible for navigational aids is negligent. The CLC adds to this list acts or omissions by third parties intending to cause damage, and the Bunker Convention adds a fourth defence of acts or omissions by the injured party with the intent to cause damage.

Liability is limited to amounts calculated based on ships’ tonnage, or, cargo capacity. For ships with 5000 or fewer units of tonnage, maximum liability is 4,510,000 units of account, and for each unit of tonnage over 5000, 631 units of account are added, up to a maximum of

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57 COGOA, s. 26(2.1).
58 Ibid., s. 26(b).
59 Ibid., s. 26(2)(b).
60 International Convention on Civil Liability for Oil Pollution Damage, 1992 (concluded at London 27 November 1992) [CLC], Article 1, 4.
61 This phrase was interpreted in this way in Gundersen v. Finn Marine Ltd., [2008] B.C.J. No. 2366 (B.C. Sup. Ct) at 63, 65.
62 Marine Liability Act s. 77. The CLC and Bunkers Convention have provisions covering the same costs.
63 MLA s. 77(3)
89,770,000. In Canadian dollars, these caps are equivalent to between approximately $6,866,159 and $136,668,541.\textsuperscript{65} Limits will not apply if the damage results from the owner’s “personal act or omission, committed with the intent to cause such damage, or recklessly and with the knowledge that such damage would probably result.”\textsuperscript{66} As noted above, such phrasing would make this provision difficult to apply, and even more so given the requirement that omission must be the owner’s personal one, excluding the possibility of vicarious liability. It makes the limit on the ship owner’s liability “virtually unbreakable.”\textsuperscript{67}

\textit{Arctic Waters Pollution Prevention Act}

The federal \textit{Arctic Waters Pollution Prevention Act} governs waters adjacent to the mainland and islands of the Arctic and outlines civil liability for deposits of waste.\textsuperscript{68} Absolute liability, without proof of fault or negligence, applies to persons “engaged in exploring for, developing or exploiting any natural resource on any land adjacent to the arctic waters or in any submarine area subjacent to the arctic waters”; to persons carrying on “any undertaking” on the arctic mainland, islands, or waters; and owners of ships navigating within arctic waters and owners of these ships’ cargo.\textsuperscript{69} These persons are liable in connection with the deposit of any waste in arctic waters or on the mainlands or islands under conditions where it may enter arctic waters, in relation to their activity, undertaking, or ship.\textsuperscript{70}

Liability includes “all actual loss or damage incurred by other persons” and for the reasonable “costs and expenses of and incidental to” actions directed by the government to remedy conditions caused by the deposit, or to “reduce or mitigate any damage to or destruction of life or property that results or may reasonably be expected to result from such a deposit.”\textsuperscript{71} Liability does not include costs, expenses or actual loss or damage suffered by a party whose actions caused the deposit, nor a party whose actions contributed to such a deposit, to the degree that that party’s conduct contributed to it.\textsuperscript{72} Owners of part of a ship’s cargo owners are exempted from liability if they can demonstrate that a deposit of their cargo and “any other cargo of the same nature that is carried by the ship” would not have contravened the Act.\textsuperscript{73}

The \textit{Arctic Waters Pollution Prevention Regulations} under the Act introduce limits of liability for several scenarios: sewage operations, pipeline operations, operations for the storage of solids in bulk, operations for the storage of fluids, and operations for the impounding of mill tailings; formulas are given for the calculation of liability according to the volumes handled by

\textsuperscript{65} The “unit of account” refers to the Special Drawing Right as defined by the International Monetary Fund. IMF, “SDRs per Currency unit and Currency units per SDR—last five days,” online: <http://www.imf.org/external/np/fin/data/rms_five.aspx> (accessed 1 April 2011).

\textsuperscript{66} CLC Article V, 2.


\textsuperscript{68} This is defined as internal waters and waters of the territorial sea and exclusive economic zone of Canada, within the area enclosed by the 60\textsuperscript{th} parallel, 141\textsuperscript{st} meridian, and the outer limit of the exclusive economic zone (which will be substituted with the international boundary where the international boundary between Canada and Greenland is less than 200 nautical miles from the baseline of Canada’s territorial sea). \textit{Arctic Waters Pollution Prevention Act}, RSC 1985, c. A-12, s. 2.

\textsuperscript{69} \textit{Ibid.}, s. 6(1).

\textsuperscript{70} \textit{Ibid.}, s. 4(1), s. 6(2).

\textsuperscript{71} \textit{Ibid.}, s. 6(3).

\textsuperscript{72} \textit{Ibid.}, s. 7(1).

\textsuperscript{73} \textit{Ibid.}, s. 7(4).
the operations. The Regulations also reflect the COGOA limit for liability in relation to exploration, development or exploitation of oil and gas, of $40 million.

**Nuclear Liability Act**

Under the Nuclear Liability Act, operators of nuclear facilities face strict liability, without proof of fault or negligence, for the breach of their duty to ensure that there is no injury to another person or damage to another person’s property caused by the properties of nuclear material in the installation in question, nuclear material formerly in that installation which has not subsequently been in another operated by another person, or nuclear material in carriage from outside Canada to the installation in question or in storage during carriage. There are some exceptions which preclude liability of operators: accidents caused by war or other armed conflict; injuries or damage to a person whose “unlawful act or omission…done or omitted…with the intent to cause injury or damage” resulted in the injuries or damage; damage caused to the installation itself or property on its premises by the incident in question; and damage to the means of carriage or location of storage in the event of a nuclear incident during carriage or storage during carriage. Because the duty to prevent damage and injury is that of the operator, no other person is liable for injury or damage resulting from a breach of this duty imposed on the operator. Nuclear designers, manufacturers, and suppliers would not be liable, even in the event of negligence or willful misconduct.

Liability is limited to $75 million. The Act does not outline any exception to this limit for operators who are at fault or negligent. Given the potentially extremely high costs of nuclear accidents, there have been several attempts to update the Act. A federal bill which received its first reading in April 2010 proposed to raise the limit to $650 million. When a federal election was called in March 2011, this bill died on the order paper. For comparison, the British government is in the process of conducting public consultation on amending the Nuclear Installations Act to implement 2004 amendments to the Paris and Brussels Conventions on nuclear third party liability which would, among other changes, increase the liability of an operator of a nuclear site from the current limit of £140 million to €1.2 billion.

**Environmental Protection Act**

Ontario’s Environmental Protection Act (EPA), in s. 99(2)(a), makes the owner of a pollutant and the person in control of it liable, in the event of the spill of a pollutant causing or likely to cause adverse effects, for compensation of the Crown or any other person who suffers loss or damage as a result for all loss or damage suffered, including “personal injury, loss of life,

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74 *Arctic Waters Pollution Prevention Regulations*, CRC, c. 354 s. 8(a)-(e).
75 Ibid. s. 8(f).
76 Nuclear Liability Act, RSC 1985, c. N-28 ss. 3-4.
77 Ibid., ss. 7-9.
78 Ibid., s. 11.
79 Ibid. s. 31.
loss of use or enjoyment of property and pecuniary loss, including loss of income,” which is “a direct result of” the spill. They are also liable under s. 99(2)(b) for all reasonable costs and expenses incurred in carrying out or trying to carry out orders or directions in relation to spills. These parties face strict liability, regardless of fault or negligence. Additionally, in the event that a pollutant is spilled, the owner or person in charge may be ordered to pay the Minister of Finance “any reasonable costs or expenses incurred” by the Crown to “prevent, eliminate, or ameliorate any adverse effects or to restore the natural environment,” or to “prevent or reduce the risk of future discharges” of any pollutant owned or controlled by that person.

As the EPA provides for strict liability, as opposed to absolute liability, a defence is available if the party otherwise liable can establish that they took “all reasonable steps to prevent the spill.” The party otherwise liable is also exempted from liability if it can establish that the spill was caused by an act of war or comparable hostilities, by “a natural phenomenon of an exceptional, inevitable and irresistible character,” or “an act or omission with intent to cause harm” by a person for whom the owner or person in control is not responsible. The owner or person in control is still liable for loss or damage directly caused by their own neglect or default in carrying out an order or direction under Part X. This person is also still liable for all costs and expenses under s. 99(2)(a) of doing “everything practicable to prevent, eliminate and ameliorate the adverse effect,” or under s. 99(2)(b) for all reasonable costs and expenses of doing “everything practicable to restore the natural environment.”

The limitations of liability under the EPA and its regulations are industry-specific exceptions and limits for the agricultural industry. The provisions dealing with liability for spills do not apply to disposal of animal waste according to “normal farming practices.” There is also a specific limitation of liability for spills for farmers who own or have control of pollutants under the Act’s regulations. The Spills regulation under the Act provides that farmers’ liability is limited to the greater of $500,000 or the equivalent of the total of all limits of liability under the farmer’s various insurance policies which insure against liability for spills under the Act.

**Evaluating Rationales for Limited Liability**

Rationales for liability limits focus on the possibility that, without these limits, the extent of potential liability may deter important resource development or industrial activity (and perhaps threaten jobs in affected industries), is not necessary to deter risk-taking, and will burden the public with higher prices. These concerns, however, fail to fully account for the harmful consequences of limits, including that they interfere with compensation, that they may encourage risky behaviour, and that they subsidize harmful activities at the expense of taxpayers and victims of pollution, contradicting the polluter pays principle and rights-based approaches to these problems.

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83 *Environmental Protection Act*, RSO 1990, c. E.19, s. 99(1)-(2)(a).
84 Ibid., s. 99(2)(b).
85 Ibid., s. 99(6).
86 Ibid., s. 99.1(1).
87 Ibid., s. 99(3).
88 Ibid., s. 99(3).
89 Ibid., s. 99(4).
90 Ibid., s. 91(4).
91 Ibid., s. 123.
Rationale: Without protection from liability, no one will develop, participate in, or invest in risky projects or industries.

Proponents of limits argue that energy companies, support services, equipment manufacturers, suppliers and others will be hesitant to develop, participate in, or invest in inherently risky projects that could be subject to unlimited liability in the event of an accident. They argue that liability limits are important to promote these actors’ participation in industries such as the nuclear industry. Proponents are also concerned that smaller operators could be shut out of industries including offshore oil exploration, as they have limited capacity to insure and may not be able to demonstrate financial responsibility, which is usually proven by an insurance certificate. Smaller operators and their investors who are unwilling or unable to face the increased risk would be shut out and drilling activity would become dominated by the major oil companies. There are additional concerns that if insurers are still willing to participate, the market for offshore energy insurance has a finite capacity for liability insurance, which could present problems if liability limits are eliminated, creating increased demand for insurance that could exceed the limited amount available.

Industries that are less vulnerable to catastrophic accidents likewise argue that unlimited liability increases the costs of doing business, puts them at a competitive disadvantage, and deters investment and participation, putting the industry at risk. Industries warn that if their increased costs result in decreased activity, jobs could be lost and local economies that depend heavily on certain industries could suffer.

Response: Second thoughts due to potential liability for high-risk projects might be a good thing, and insurance will still be available, where risks are not excessive.

The fact that higher limits or unlimited liability might make companies hesitant to develop, participate in, or invest in projects in high-risk industries can be seen in a positive light. If the extent of the potential for liability from some high-risk activities is deemed unacceptable by companies and investors, it may be for the best that these activities are not pursued, particularly by parties unable to bear the potential liability. Torts scholar Richard Epstein sees a “tough liability system” in the context of offshore oil drilling as “sort[ing] out the wheat from the chaff,” preventing “companies with weak safety profiles” from carrying out this risky work.

Regarding insurance, limits may encourage not only producers and investors to take risks, but also insurers. In the context of offshore oil, for example, it has been suggested that a removal of liability limits would align the incentives of drillers and insurers to take risks into account, and that insurance markets may ultimately deem deep water drilling with current methods to be too risky. In terms of the limited capacity for insurance of activities such as offshore drilling, increases to or removal of caps on liability for disasters such as oil spills would likely increase support for “a more efficient pre-disaster risk-financing approach” to dealing with large-scale disasters, and various alternative risk transfer mechanisms are available which “could in theory

93 Rawle O. King, “Deepwater Horizon Oil Spill Disaster: Risk, Recovery, and Insurance Implications,” Congressional Research Service (12 July 2010), at 15 [King].
94 Ibid. at 2, 15, 16.
96 Bailey, supra note 1.
provide the added capital needed in the insurance marketplace” to cover increased liability.⁹⁷

**Rationale: There are other incentives for prevention and compensation, and there is no proof that liability limits increase risk.**

Proponents of liability limits argue that there are existing incentives, other than unlimited liability, for preventing and avoiding accidents. Additional deterrents might include the potential for investor and pension fund losses, fines, increases in insurance costs, increases in regulatory surveillance, and damage to the company’s reputation.⁹⁸ Additionally, the fact that liability is often unlimited in cases of negligence may serve as a deterrent to negligent behaviour.

Proponents of liability limits argue that the necessary deterrents to risk-taking already exist, and that removal of limits would not change industries’ behaviour. A 1994 constitutional challenge to the Nucleur Liability Act under the Charter’s section 7 right to life, liberty and security of the person, on the grounds that members of the public could not seek compensation through the court system if damages from an incident exceeded $75 million, was unsuccessful in part because the trial judge found that there was not sufficient evidence that the Act’s limitation of liability caused reactors to be operated in a less safe manner.⁹⁹

The question of whether liability limits even matter in the face of severe financial consequences, such as plunging share prices, has been raised.¹⁰⁰ Proponents also argue that corporations are motivated by concern with their public image to provide compensation beyond what liability limits require, and point to BP’s promise to pay “all legitimate claims” associated with the Deepwater Horizon spill and its statement that the $75 million cap under the American Oil Pollution Act is “irrelevant.”¹⁰¹

**Response: Limited liability does not provide the necessary incentives and deterrents.**

Environmental lawyer Dianne Saxe has written that “[o]ne of the biggest ways that our legal system contributes to enormous, high-risk accidents is to allow those responsible to limit their financial liability.”¹⁰² Liability limits remove a massive financial incentive to take precautionary measures and avoid risk-taking, decreasing the level of care. As Trebilcock and Winter have noted, limited liability “inefficiently dampens incentives to take precaution.”¹⁰³ This may be particularly true in situations like Deepwater Horizon, where historical experience suggests a low probability of disaster but a high degree of risk should one occur. Liability limits may increase the risk of damage by making it “economically attractive to take risks” and removing disincentives to participate in risky economic activity.¹⁰⁴

Other incentives cannot compensate for the effects of limited liability. Neither concerns for the company’s image nor its financial well-being can be relied on as sufficient motivation for

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⁹⁷ King, *supra* note 93 at 17, 2.
¹⁰³ Trebilcock and Winter, *supra* note 43 at 216.
¹⁰⁴ Will Amos and Julian Daller, “Who pays when an oil spill occurs off Canada’s coasts? Answer: the Canadian taxpayer,” Ecojustice memorandum (5 July 2010) at 3 [Amos and Daller].
risk avoidance or investments in safety. Proponents of liability limits point to BP’s financial woes following Deepwater Horizon spill, and to the negative publicity the company has faced, as indications of incentives and deterrents that make greater liability unnecessary. However, companies rebound, and public backlashes are temporary. The large and highly-publicized Exxon Valdez oil spill in 1989, for example, caused little lasting financial damage for Exxon. BP’s share price, a year after the spill, has not returned to its pre-spill level but has been on a slow and steady upward climb since hitting its lowest point early in the summer of 2010. Its climb has been slow due in part to ongoing legal uncertainty, particularly potential corporate manslaughter charges. BP has also recently sought permission from US regulators to resume drilling in the Gulf of Mexico.

This relationship between liability and risky behaviour is apparent from results in other contexts: stricter product liability laws demonstrably improve safety, higher medical malpractice premiums change the way doctors carry out procedures, and no-fault automobile insurance schemes result in higher fatalities. In the environmental context, BP provides a useful case study. The National Commission on the spill found that it was due in part to management failures, including inadequate evaluation and management of risk and a tendency to prioritize savings of time and money over other considerations, particularly safety. Questions surrounding BP’s safety record in relation to its operations in the Gulf suggest that the existing regime may not provide sufficient incentives to take precautions and to avoid risk, but rather that it may encourage risk-taking and shortcuts that prioritize saving time or money over safety.

By lowering the cost of paying for spills and other pollution, liability limits make industry more willing to tolerate risk. Without liability limits, polluting industries would have to internalize costs. If choosing safe practices over cheaper ones was more cost-effective for industry than paying for the results of pollution, there would be an incentive to spend money on prevention. The Commission on the Deepwater Horizon spill stated that relatively low limits provide “little incentive…to improve safety practices” and that higher limits would be “a powerful incentive” for greater attention to safety, including investment in safer technology. If the price of paying for the effects of pollution was substantially higher than it currently is, there would be a strong deterrent from risky behaviour.

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110 Eric Reguly, “Congress accuses BP of cutting corners to create ‘nightmare well’“, Globe and Mail (15 June 2010); Presidential Report, supra note 2 at 2, 223.
111 Presidential Report, supra note 2 at 246, 284.
Rationale: The public will pay.

Another argument for liability limits concerns costs to the public associated with unlimited liability. For example, additional safety-related expenditures or higher insurance premiums could be passed down to consumers in the form of higher energy prices.

Response: Under limited liability, the public pays through higher taxes and uncompensated damages.

In most cases compensation exceeding liability limits is provided in full or in part by the government. Otherwise those affected go without compensation. In either case, liability limits do not lower costs – they merely shift the burden for costs from industry to taxpayers or to people and communities affected by pollution. By allowing companies to “escape the prospective costs of a disaster and to anticipate the shifting of such costs onto the public,” liability limits function as a subsidy.

This subsidization may also have the effect of helping environmentally or economically unviable industries survive at the expense of other, more promising ones. In the context of energy, removing caps could encourage investment in alternative energy sources. It also goes against a rights-based approach to liability, and basic ideas of fairness. The Commission on the Deepwater Horizon spill stated that victims and taxpayers should not have to “pay the bill for industry’s shortcomings.” Torts professor Richard Epstein recommends a “tough liability system,” based on the argument that “[t]he legal system should never allow self-interested parties to keep for themselves all the gains from dangerous activities that unilaterally impose costs on others.”

In doing so, liability limits violate the polluter pays principle. The 1992 Rio Declaration introduced the polluter pays principle into international environmental law. Principle 16 stated that “national authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution.” In Imperial Oil Ltd. v. Quebec (Minister of the Environment), the Supreme Court of Canada held that this principle “assigns polluters the responsibility for remedying contamination for which they are responsible and imposes on them the direct and immediate costs of pollution,” and that the principle “has become firmly entrenched in environmental law in Canada,” being “found in almost all federal and provincial environmental legislation.” Liability limits violate this principle by shifting the burden for costs beyond liability limits onto taxpayers and the affected communities or individuals.

In sum, it is obviously true that expanded liability for producers increases the costs of production and, therefore, raises prices for consumers. However, it ensures that the costs of

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112 Under some regimes, such as the Marine Liability Act regime for oil spills from ships, domestic or international funds may be accessed to provide compensation beyond the extent of liability limits. In cases of severe accidents, however, these may still be insufficient to provide full compensation.
113 Amos and Daller, supra note 104 at 3.
114 Brubaker, supra note 20 at 105.
116 Presidential Report, supra note 2 at 246.
117 Epstein, supra note 95.
118 Rio Declaration, supra note 41, Principle 16.
119 Imperial Oil, supra note 40 at paras 23-24.
potentially harmful activities are internalized by the producers and consumers of a product, rather than victims of pollution and the public at large. If these costs prove excessive, the decreased demand for such products will ultimately lead to decreased production, and reduction of the threats posed by it.

Conclusion

The ongoing problem of liability limits has received increased attention since the BP disaster, which has dramatically illustrated the problem and the need for reform. Liability limits present two major problems: they encourage risky behaviour, and they subsidize harmful activities, placing the burden of costs in excess of limits on taxpayers and victims of pollution. They violate the widely accepted polluter pays principle, and also fail to fully recognize established economic and rights-based principles of tort law.

It is apparent that the current system of limited liability, with limits that in some cases fall far short of the potential costs, is in need of reform. Changes, especially dramatic ones, could face strong resistance, but some basic recommendations can be made. We present two minimum recommendations. First, no new liability limits should be introduced, and second, liability limits must be raised to reflect potential costs and damages. Raising limits, and especially eliminating limits, would be controversial, given that industries subject to liability limits have made substantial investments based on the promise of such limits and have developed a reliance on the current regime. Small companies in particular may face dramatic effects from an abrupt change. Such reform is needed, however, and it may be possible to gradually introduce reform in ways that would minimize these problems. For instance, the National Commission on the Deepwater Horizon Spill suggested phasing in a series of increases to liability limits in order to allow for an adjustment period for the insurance industry and also to permit Congress to re-assess the situation. A similar approach to liability reform under the various Canadian regimes limiting liability would begin to address the many failings of the current system.

Ultimately it is necessary and just for those engaging in risky behaviour to bear the costs of their behaviour. If industry insists that it cannot afford to accept financial responsibility for the consequences of its actions, then we should all reconsider the ultimate viability of these activities.

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120 Presidential Report, supra note 2 at 285.