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Another Way of Looking at the Kepone Issue

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standing to sue. Indeed there are some types of injuries which the law finds so difficult to calculate as to be not compensable. Yet we do not deny that an injury has been suffered. This article will suggest a supplemental theory for recovery of losses to the economy of Virginia, and to State resources, which under present analysis would seem not to be recom-pensable.

Those people directly affected by Kepone contamination in tidewater Virginia have brought civil actions for damages they allege to be the direct result of the contamination of the James River by Life Science Products Corporation and Allied Chemical Corporation. The number of persons with standing to bring a direct action is small when compared to the number of persons whose individual rights remain intact, but whose interests as citizens of Virginia have been infringed. It is left to the Commonwealth to protect those interests of its citizens that it holds in trust as sovereign.

The State Attorney General's office is preparing to bring an action to impose civil penalties against Life Science and Allied Chemical as authorized by the State Water Control Law, Va. Code Ann. § 62.1-44 et seq. The advantage of this type of action is that the Commonwealth need not prove damages; it simply must prove that the plant's operations produced a contaminant and that the contaminant was not properly controlled. The disadvantage of this form of action is that the State Water Control Law limits the penalty to only \$10,000 per offense, each day of violation constituting a separate offense. Depending on the number of days per year that the plant was in operation, the maximum penalty should be between \$2.5 and \$3.5 million a year. A computation of the damages to Virginia's environment, economy, and proprietary interests is beyond the scope of this article, but it is certainly conceivable that this amount recoverable would not be sufficient to reimburse the Commonwealth for its injuries. If it is insufficient, there is the alternative open to the Commonwealth of bringing an action in tort.

The term parens patriae describes the capacity of the sovereign, as "parent of the country," to protect the interests of those of its citizens who are not legally competent to protect their own interests. This doctrine has developed from the power of the state to protect the interests of juveniles and insane persons, into the power of a State to sue to protect the quasi-sovereign interests that it holds in trust for its citizens. What the courts have construed to be quasi-sovereign interests include: "the 'health, comfort and welfare' of the populace, interstate water rights, pollution-free interstate waters, protection of the air and earth from interstate pollutants, and general economy of the state." Note, State Protection of its Economy and Environment: Parens Patriae Suits for Damages, 6 Col. J. Law & Soc. Prob. 411, 412 (1970). A United States district court in Maine has recognized the standing of the State of Maine to bring an action as parens patriae to recover

ANOTHER WAY OF LOOKING AT THE KEPONE ISSUE

While the Environmental Practice News remains dedicated to publishing material of a practical applicability and general interest and import, there are nonetheless times when we will discuss issues which will in all probability never be seen in the general non-environmental practice. The problem of Kepone is such an issue. The attorney who does not practice in tidewater Virginia or work with the Attorney General's office will probably not deal with the legal issues surrounding Kepone. Still if one is a Virginian, he has suffered as a citizen as a result of the incident. To the extent that sales of seafood are decreased, that fishermen's incomes are lost, and that benefits need be paid to those unemployed fishermen and related personnel, the Commonwealth's tax revenues are decreased, and its welfare burdens increased. These revenues will have to be made up by alternate or higher taxes on other segments of the population, or else the scope and quality of services to citizens must be reduced, in order to balance the budget. To this extent we are all affected. We are bearing an indirect burden imposed by Kepone contamination. The citizen who is a lawyer knows that under present rules of standing his injury is not concrete or provable with sufficient certainty to give him

damages to its natural resources, State of Maine v. M/V Tamaro, 357 F. Supp. 1097 (1973). In the case of Marxii v. Standard Oil Co. of California, 405 U.S. 231 (1972), the Supreme Court recognized the parens patriae capacity of the State to recover damages for injury to its economy, but pointed out the limitation in this type of action, that in any situation where an individual or class has standing to sue, regardless of the impracticality of exercising that capacity, the State is precluded from claiming parens patriae standing. This complicates the already substantial problem of establishing the amount of damages in a tort action of this magnitude. Even though this latter problem is substantial, it is not insurmountable: with the state of the art in the field of economics, satisfactory evidence of damages can probably be supplied. See Note, State Protection of Its Economy and Environment, *supra*, at 419-23. The damages problem should not preclude the use of the parens patriae form of action to recover damages for injury to Virginia resources by the manufacturers of Kepone, or by the manufacturers or transporters of any contaminant who fail to keep it under control.

A more important legal question arises in regard to proving non-economic damages. For instance, who can recover for damages to flora and fauna generally, which are not per se a valuable or calculable part of the Virginia economy? The Commonwealth would clearly be the only party with standing to sue. But what is the measure of loss for injuries to a resource not directly related to the economy of the Commonwealth? Such resources would include but not be limited to wildlife killed by

oil spills or other contaminants, damage to aesthetics, and damage to a natural resource which is valuable or unique but unproductive economically. Clearly there is no dollar value for each bird killed by oil on the Eastern Shore last month. Repair or replacement of all of the flora and fauna of the James River basin is clearly impossible. Should this fact bar the Commonwealth from recovery and amount to a windfall to tortfeasors who are free to injure State resources, such as thousands of birds on the Eastern Shore, without full accounting? Tort theory should make the answer to this question "no."

Tort theory presently allows recovery in many areas where precision of computation is neither possible or desirable, e.g., pain and suffering, some libel, mental anguish, and nuisance. Consider also the case of punitive damages. Contrary to the announced theory of tort or contract recovery to make the injured party whole, the law nonetheless grants money to the plaintiff for the anti-social behavior of the defendant. It is not advocated that the Commonwealth be permitted recovery based upon punitive damages where the defendant's action has been only negligent. Rather it is suggested that punitive damage theory sets a precedent whereby recovery is possible even if such recovery is not based upon the scope or amount of the plaintiff's injury.

An objection to the parens patriae theory and tort recoveries advocated in this article,

is that such recovery may be so huge as to be unreasonable and unjust to the tortfeasor. This criticism is well taken; indeed we cannot afford to bankrupt going concerns in wholesale numbers. There are certain burdens we must bear for living in an industrialized society. Yet it seems that the doctrine of proximate cause may well prevent the types of gross recoveries which worry all of us, environmentalists and non-environmentalists alike. In short, a reasonable foreseeability test could be applied, so as to add a measure of fairness which will allow for the types of recovery advocated here. A member of the Environmental Law Group is in contact with the State Attorney General's office as to the feasibility of seeking recovery on a parens patriae theory. We hope that the reader will watch future issues of the E.P.E. for further developments in this area.