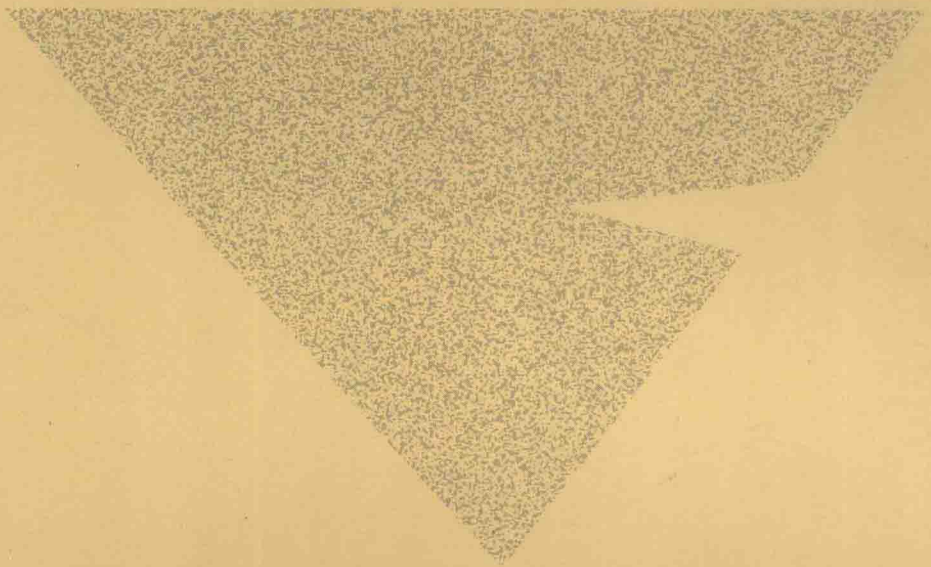
# Environmental ACCIDENTS



## Personal Injury and Public Responsibility

Richard H. Gaskins

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TEMPLE UNIVERSITY PRESS Philadelphia

Temple University Press, Philadelphia 19122

Published 1989
Printed in the United States of America

The paper used in this publication meets the minimum requirements of American National Standard for Information Sciences—Permanence of Paper for Printed Library Materials, ANSI Z39.48-1984

Library of Congress
Library of Congress Cataloging-in-Publication Data
Gaskins, Richard H.
Environmental accidents : personal injury and public responsibility / Richard H. Gaskins.
p. cm.
Bibliography: p.
Includes index.
ISBN 0-87722-609-1
1. Liability for environmental damages—United States. 2. Personal injuries—United States. 3. Accident law—United States. 4. Accidents—United States. I. Title.
KF1298.G37 1989
346.7303'23—dc19
[347.306323] 88-23661
CIP

For Elizabeth

# Preface

Near the end of the twentieth century, the United States remains the only country in the world where the judicial system dominates public perceptions of personal injury. We still view accidents as essentially *legal* events, defined by the doctrines, institutions, and professional perspectives of the law. But this monopoly now shows signs of weakening. Over the past decade, our complex social and industrial environment has been sending out disturbing new signals, suggesting that public prosperity is counterbalanced by substantial costs in personal security. Many collective risks of modern life may well be worth taking, but we are increasingly reminded that the costs fall randomly but inevitably on an indeterminate minority of Americans.

The problem of accidents underscores the fundamental interdependence of private individuals in industrialized societies. Our collective response to personal injury should be addressed in a wider forum than the traditional judicial process can provide; it belongs at the center of national debate about public health, safety, and welfare. The chapters below introduce a social or *environmental* definition of accidents to replace the outworn legal definition

Legal concepts and procedures are ideally designed to handle only a special subset of accidents: isolated events involving two people, played out against a background of self-evident moral duties. Since these conditions are rarely found outside the abstractions of philoso-

phers, the courts have struggled mightily to apply their traditional categories to contemporary reality. As we shall see, they are losing the struggle. The judicial system has now been stretched to the point of permanent crisis, giving rise to an unprecedented search for cures and alternatives.

Unfortunately, that search remains trapped in legal concepts. Instead of treating accidents as a *social* problem, we still see them as a special type of legal disturbance. Rather than connecting accidents with social policies on health, safety, and disability, we tinker with legal institutions and try to preserve their autonomy. Most of all, the adversarial combat of litigation has invaded the political arena, multiplying interest-group conflicts and paralyzing any prospects for effective public response. In the complex industrial environments of today, the legal definition of accidents has become a serious hazard in its own right. It needs to be assessed from an entirely new perspective.

In recent years, economic and moral concepts have gotten entangled in the legal definition of accidents. These themes too remain narrowly developed within the margins of standard legal categories. To be sure, some aspects of neoclassical economics and individualist moral theory fit neatly into the atomistic social model favored by the law; like an invisible helping hand, these theories can be used to rationalize the autonomy of legal institutions. But we have not yet begun to see what economics or moral philosophy might say about a different definition of accidents. In a concrete world of social interdependence, the problems of personal injury should invite much richer economic and moral speculation, along with fresh approaches to public policy. These will be the long-term benefits, I hope, from a new analysis of accidents.

Some central ideas in this book were formed over the past decade in discussions with my colleagues at Bryn Mawr's Graduate School of Social Work and Social Research, with its program in Law and Social Policy. I am especially indebted to Jane Kronick and William Vosburgh for their support and encouragement over many years, which began with their invitation to participate in a study of New Zealand's innovative social policy for accidents. I was challenged to reexamine many aspects of my legal training during those discussions, which also included Noel Farley, John Orbell and Miriam Vosburgh. That project received generous support from the National Science Foundation (the program on Ethics and Values in Science and Technology), along with the National Endowment for the Humanities. I should add that none

of the conclusions reached then, and none contained in the present volume, represent the opinions of either organization.

Let me also thank Mary Patterson McPherson, President of Bryn Mawr College, for her warm personal support, which included encouraging me to take the sabbatical leave that launched this project.

In spring 1987 I was able to spend several weeks at the Centre for Socio-Legal Studies at Oxford University. Over many years, the multidisciplinary research staff at the Oxford Centre has made important contributions to the analysis of compensation issues. I am indebted to Donald R. Harris and members of the Centre for their many suggestions, and for helping me locate materials for a comparative survey of national compensation policies. Jane Stapleton of Balliol College was also very generous with her time.

As for the University of Chicago, where this book was written, it is impossible to praise too highly the outstanding research facilities. The staff at the D'Angelo Law Library was especially helpful in making the collection accessible, despite the disruption of major building renovations.

I am grateful to Kenneth Avio of the University of Victoria, British Columbia, for commenting thoughtfully on an early version of this manuscript—as did Jane Kronick and William Vosburgh. The reviewers for Temple University Press also gave many probing and useful suggestions. I have greatly enjoyed working with Michael Ames and his excellent staff, and am pleased to acknowledge their efforts in seeing this book through.

Chicago
September 1988

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# ENVIRONMENTAL ACCIDENTS

# Introduction

## Accidents and the Environment

Accidents teach us about social interdependence. They are important and necessary reminders that plans laid out by even the most careful people quickly move beyond the narrow horizons of human vision. They are rude and sometimes catastrophic evidence that our ability to control events is fundamentally limited. Indeed, things almost never turn out exactly the way we plan them; life deviates from the most skillfully written script. After we have done our very best to anticipate the future, we can only watch—occasionally with horror—as unintended results unfold.

How much human injury, illness, and disability in modern societies can be associated with such unpredictable but inevitable turns of fate? That depends on how each society defines accidental events and organizes its response. The range of answers varies widely among countries, and varies in the same country over time. Our review of American approaches to personal injury will take us into a largely tacit and deeply ambivalent form of response. We cannot pretend that the United States has anything close to a formal social policy on accidents, but it surely has one of the most bizarre and confusing systems for responding to this major challenge faced by all complex societies.

Recently the American notion of accidents has been thrown into disarray by the discovery of latent dangers in our industrial environment. Given our pride in technological accomplishments, this has been an especially difficult and controversial lesson. Take that remarkable element, asbestos, which American know-how fashioned into a useful servant for many decades. Heralded as a miracle substance, it improved the performance of American battleships during World War II, insulated America's heating systems, and served as a fire retardant in countless schools and other public buildings throughout the country. We now know, however, that asbestos is an important cause of disabling and often fatal diseases that may wait twenty years to strike. Just who is susceptible and why is not entirely clear, but current evidence suggests that 200,000 persons may die from asbestos-caused diseases by the end of the century.

America's trust in its future is deeply challenged by the possibility that other materials in our environment hold the same lethal potential as asbestos. Studies cited by the U.S. Surgeon General in 1988 predict a comparable death toll from exposure to radon, a naturally occurring substance that can become trapped in today's tightly sealed, energy-efficient private homes and public buildings. Along with other nations, the United States has also acknowledged a health threat of unknown magnitude from depletion of ozone in the upper atmosphere. In addition, we face uncertain environmental costs from a global "greenhouse effect" traced to new technologies and patterns of economic development. Such examples blur the lines between accidents and disease and raise new political and social issues that may take decades to comprehend.

Meanwhile the American judicial system—to which we have always entrusted our primary institutional response to accidents—has weathered a series of highly publicized crises. Some of these episodes are explicitly tied to hazardous substances, like the asbestos cases, and the claims of Vietnam veterans exposed to dioxin in Agent Orange. But other crises such as medical malpractice and product liability also reflect the complex relation between modern technology and personal injury. Even the ongoing crisis of automobile accident liability, which spreads its costs through insurance premiums to nearly every household in the country, has its roots in technological and social patterns. In a sense to be defined more precisely in Chapter 2, all these events illustrate the critical impact of modern social environments on public health and safety. It is thus a tragic mistake to classify such problems as

institutional crises for the courts. The stunning failure of judicial processes, while significant, is merely the symptom of a deeper flaw in our traditional understanding of accidental events.

The message of this book is that *environmental accidents* compel us to review our whole understanding of the social order. They illustrate in unusually graphic fashion the reality of our social interdependence, and thus the limitations of a political and legal system still bound in many ways to the individualist premises of classical liberalism. Before they have finished with us, environmental accidents will require something entirely new: a systematic public response to personal injury. In short, the United States needs to develop a more comprehensive social policy on accidents.

Some outlines for such a policy are suggested later on in this study, but more important than another abstract model is the evidence that American responses to accidents have already undergone significant change over the past two decades. The survey of American policies in Part III will show the degree to which we have already watered down traditional judicial perspectives on personal injury—except for occasions when that view still meets the strategic interests of particular groups. Of course, like everything else, public policy development is subject to unforeseen events and strange twists of fate. Our prospects for a better policy—the best one can hope for in an imperfect world—depend on developing a sharper sense of where our perilous environment seems to be leading us.

## The View of Accidents in This Study

For at least a century the subject of accidents has been jealously protected by the legal profession, which dominates both its practical and theoretical dimensions. Far more than any other nation, the United States relies on its judicial structures, practicing attorneys, and law professors to organize, implement, and interpret the entire field. This monopoly of legal perspectives extends to the definition and even the pathology of the prevailing system. "Accidents" are what the courts define them to be. A "crisis" in accident policy is understood to be some failure of the judicial structure. Alternative systems are designed with judicial procedures as the constant reference point.

Owing to this esoteric structure and jargon, nonlawyers have often had trouble grasping the broader significance of accidents. A fuller

definition covers a much wider range of personal injuries, illness, and disability. The "crisis of accidents" is thus more serious than high legal fees, crowded courts, or unfair treatment of plaintiffs and defendants: it refers more poignantly to our profound ignorance about the personal impact of complex social forms. It demands a full assessment of public obligations for environmental regulation and social welfare.

Curiously, our deference to the professional perspectives of lawyers seems to be enhanced when the popular press focuses attention on the more ludicrous side of litigation. When juries award six-figure sums to plaintiffs for loss of psychic powers, or when irate sports fans file suit against referees for inaccurate officiating, it somehow adds to the mystery and majesty of the law. Attorneys, hardened to the fictions of their trade, quickly lose patience with their literal-minded critics. Although occasional defenders of the legal system still help themselves to the moral vocabulary of "fault," most lawyers take an utterly pragmatic approach to their field: if it works, it doesn't really matter how outlandish it seems to the layperson. Whether something truly works, however, depends on our initial expectations. The aims of most lawyers (even ignoring the matter of professional self-interest) are too modest to represent society's broader needs for accident policy. What works for them may not be working for us.

The efforts of legal academics provide a further challenge to any simple analysis of accident policy. Ever since Oliver Wendell Holmes's pathbreaking essay more than a century ago, legal commentators have been building a formidable intellectual apparatus to support and criticize the prevailing law of accidents. For decades the doctrinal structure of judge-made law has been measured by legal scholars against a shifting background of vaguely defined social purposes, ranging from the interests of emerging industrialism (Holmes) to the social welfare of uncompensated workers (the progressives) to "optimal" accident prevention (the law-and-economics movement). Despite the impressive intellectual resources invested in these and other analyses, they have often been narrowly addressed to other legal scholars and the occasional enlightened judge. The resulting debate—both ornate and parochial—has remained largely inaccessible to outsiders. These contributions are virtually the only commentary on current accident policy, however, and we have no choice but to consider them carefully.

Since new policies relating to accidents are conceived as alternatives to litigation, we must begin our study with the judicial process to see what is alleged to be wrong. This is actually a two-stage effort,