1982

Establishing Liability for the Damages from Hazardous Wastes: An Alternative Route for Love Canal Plaintiffs

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COMMENT

ESTABLISHING LIABILITY FOR THE DAMAGES FROM HAZARDOUS WASTES: AN ALTERNATIVE ROUTE FOR LOVE CANAL PLAINTIFFS

In 1976, tests in homes near the abandoned Love Canal waste disposal site at Niagara Falls, New York, revealed the presence of unsafe levels of more than eighty toxic chemicals. In the following years, nationwide attention was drawn to the area as residents alleged that prolonged exposure to air, land and water polluted by manufacturers' discarded wastes


3. Manufacturers face the task of disposing of solid waste throughout the production cycle. Two factors have complicated their task. First, since production has increased, manufacturers have had to discard a greater volume of wastes. Second, as areas for receiving and storing this waste become scarce, manufacturers may be forced to dump wastes in greater proximity to residential areas. These factors increase the likelihood of personal injury from waste which is improperly disposed.

The general term, solid waste, has been defined by the Resource Conservation and Recovery Act (RCRA) as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities." 42 U.S.C. § 6903(27) (1976). "Solid waste" encompasses both hazardous and innocuous wastes. Hazardous wastes, which are the focus of this Comment, have been defined as:

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


- ten to twenty percent of all industrial wastes, excluding mining and agricultural
were the cause of significant incidences of miscarriages, birth defects, and certain types of cancer. As a result of the Love Canal tragedy, area residents have brought suit at the state level against the disposers and the City of Niagara Falls. In federal court, the United States has sued Hooker Chemical and Plastics Co., and Hooker has counterclaimed against the United States.

When hazardous waste victims seek judicial redress for their injuries, wastes, will be listed as hazardous. Thus, of the approximately 345 million tons of industrial wastes generated annually, some 46 million tons are hazardous. Perhaps 90% of these hazardous wastes, or 41 million tons, is being disposed of improperly.

4. See Kittle, supra note 2. A study conducted for the EPA found that 11 of 36 Love Canal residents tested had developed chromosomal damage linked to birth defects and spontaneous abortions. [1980] 11 ENV'T REP. (BNA) 78-79. Eight cases of cancer were discovered among residents of 15 houses on 96th Street, a few blocks from the canal. Kittle, supra note 2, at 32. But see Kolata, Love Canal: False Alarm Caused by Botched Study, 208 SCI. 1239 (1980), reprinted in CONSUMERS RESEARCH MAG., Sept. 1980, at 10. This article reports that three cytogeneticists, selected by the United States Department of Health and Human Services (HHS), doubted the reliability of the EPA study because they said the cells of the suspected population were not compared to a control sampling of a similar group. The EPA study conductor, Dante Picciano, said he compared the Love Canal group to a population he had studied earlier and which had no exposure to toxic chemicals. Picciano stated that the study was conducted without a simultaneous control population because EPA allocated too short a period in which to conduct the study. The other designer of the study, Dr. Beverley Paigen of Roswell Park Memorial Institute, said EPA underfunded the study. See [1979] 10 ENV'T REP. (BNA) 1559; [1980] 11 ENV'T REP. (BNA) 143; [1980] 11 ENV'T REP. (BNA) 355.

5. The suits are in various stages of litigation but several have been reported. See, e.g., In re Peter Urban v. Hooker Chem. & Plastics Co., 75 A.D.2d 720, 427 N.Y.S.2d 113 (1980); Synder v. Hooker Chem. & Plastics Co., 104 Misc. 2d 735, 429 N.Y.S.2d 153 (1980). In Urban, Hooker was ordered to produce one of its employees who had already been examined by the plaintiff, as well as a third employee, to give a description of the design, construction, use, maintenance, covering and closing of the Hooker Love Canal dump site. In Synder, the court denied plaintiffs' request that their claims be certified as a class action.

6. Mervak v. City of Niagara Falls, 101 Misc. 2d 68, 420 N.Y.S.2d 687 (1979). In that class action suit, plaintiffs requested that the court declare timely their filing of claims for damages for personal injuries, wrongful deaths, and declining real estate values. New York law requires that claimants filing suit against public corporations must give notice to those corporations within 90 days of the accrual of their claims. N.Y. GEN. MUN. LAW § 50-e(1)(a) (McKinney 1977). Plaintiffs sought to establish August 2, 1978, as the date of accrual for 900 claims arising from the Love Canal incident. On that date, the New York State Commission of Health declared that an emergency condition existed in the area contiguous to the canal between 97th and 99th Streets. The court held that the question of "timeliness" of a notice of claim which alleges personal injuries is not a subject matter for class action but one which must be dealt with on an individual case by case basis since the injuries are not identical and are not incurred at the same time. 101 Misc. 2d at 74, 420 N.Y.S.2d at 691-92. The court declared that the notices of claim for diminished real estate values were appropriate since, subsequent to the August 2, 1978 announcement of an emergency, all area property values could be found to have plummeted. 101 Misc. 2d at 74, 420 N.Y.S.2d at 692.

they must determine which parties are appropriate defendants and which theories of liability they will assert. These plaintiffs must consider which companies have caused their injury, whether a defendant company which may have dumped chemicals as long as three decades ago still exists, and, if it does, whether the company is capable of providing compensation. Because of the difficulty inherent in proving liability, commentators have questioned the viability of hazardous waste plaintiffs' suits against the disposers.*

Though the Federal Tort Claims Act (FTCA)* has not been utilized by hazardous waste plaintiffs, it has proven to be a fairly successful avenue for other tort plaintiffs who can demonstrate that the United States undertook a duty to protect them but failed in adequately providing this protection. Furthermore, where United States liability is established under the FTCA, indemnity from a joint tortfeasor is possible if the state in which the United States sues recognizes the theory of indemnity. In contrast to the troublesome task facing the private hazardous waste plaintiff, the United States government has successfully imposed liability on disposers based on a public nuisance theory** under the Resource Conservation and Recovery Act of 1976 (RCRA).***

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Lawyers acquainted with what little toxic substances injury law does exist may be discouraging about the prospects of recovery. Thus a self-fulfilling prophecy may be operating to discourage the filing of toxic substances claims. If people believe that they cannot obtain recovery, their belief becomes real in its consequences. They will, in fact, not seek recovery for their damages. Hence, there may be few cases brought because there are fewer cases showing the way.

9. 28 U.S.C. §§ 2671-2680 (1976). The Act provides that "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." Id. § 2674 (1976).


Based on these developments in the areas of negligence and nuisance, this Comment explores an alternative model to Love Canal plaintiffs' direct suits against the disposers. Under this proposal, which is applicable to suits by victims of other hazardous waste disposal,\(^\text{13}\) Love Canal plaintiffs would sue the United States under the FTCA\(^\text{14}\) claiming that the United States was negligent in its undertaking to supervise national disposal practices. Under such a theory, the plaintiff could expect that the United States would then file a third party claim for indemnification against the disposers of the hazardous wastes asserting the disposers' negligence\(^\text{15}\) and nuisance.\(^\text{16}\) The Comment analyzes the advantages and difficulties of such suits under New York law.

In their FTCA suit, the Love Canal plaintiffs may argue that the United States assumed the supervision of national waste disposal under the Public Service Act of 1944\(^\text{17}\) and that this constituted a "gratuitous undertaking" within the meaning of section 323 of the Restatement (Second) of Torts.\(^\text{18}\)

\(^{13}\) Although this Comment focuses on the hazardous waste problem of the Love Canal plaintiffs and discusses New York law as it applies to the Love Canal suits, it presents general theories of liability which may be used by hazardous waste plaintiffs in other jurisdictions.


\(^{15}\) See United States v. Illinois, 454 F.2d 297 (7th Cir. 1971), cert. denied, 406 U.S. 918 (1972) and infra notes 140-55 and accompanying text.

\(^{16}\) See, e.g., United States v. Solvents Recovery Serv. of New England, 496 F. Supp. 1127 (D. Conn. 1980) and see infra notes 156-62 and accompanying text.

\(^{17}\) The Public Health Service Act of 1944, ch. 376, § 301, 58 Stat. 691 (1944) (current version at 42 U.S.C. § 241 (1976)). The section states in pertinent part that the federal government, through the Surgeon General of the Public Health Service, undertook to encourage, cooperate with, and render assistance to other appropriate public authorities . . . and promote the coordination of research, investigations, experiments, demonstrations and studies relating to the causes, diagnosis, treatment, control, and prevention of physical and mental diseases and impairments of man, including water purification, sewage treatment, and pollution of lakes and streams. See also 42 C.F.R. § 02.205 (1944) which states that "the United States would develop standards for sewage disposal and conduct basic research on sewage and industrial waste disposal and engage in intensive factfinding regarding the national need for sanitary facilities in urban and rural areas." This Comment concentrates on one of the United States' earliest undertakings in the area of regulating waste disposal. For a discussion of framing United States' liability under the more recently enacted Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6978 (1976), Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-2629 (1976) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767 (1980), see Rosenblum, Hazardous Wastes: Regulatory Protection and the Government as Good Samaritan, TRIAL, January 1982, at 24 (synopsis) (complete article on file at American Trial Lawyers Ass'n).

\(^{18}\) The "gratuitous undertaking" doctrine recognizes that one who assumes to act, even though gratuitously, may become subject to the duty of acting carefully, if he or she acts at all. Glanzer v. Shepherd, 233 N.Y. 236, 239, 135 N.E. 275, 276 (1922). See RESTATEMENT (SECOND) OF TORTS § 323 (1965), which states:
By failing to exercise reasonable care in performing this undertaking, the United States breached its duty to protect the Love Canal plaintiffs. Since New York law allows indemnification between two tortfeasors, the United States may then file a third party claim for indemnity from the manufacturers who disposed of the Love Canal wastes.

This Comment concludes that hazardous waste plaintiffs will encounter several previously successful, but not insurmountable, United States’ defenses in their FTCA suit and that the United States may successfully impose liability on the disposers based on grounds of negligence under the FTCA and nuisance under the RCRA.

I. THE HAZARDOUS WASTE PROBLEM AT LOVE CANAL

In the 1930’s and early 1940’s, industrial wastes were dumped in free-form into the Niagara Falls, New York, sewage system. In a 1940 report

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other’s person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other’s reliance upon the undertaking.

Courts often refer to the “gratuitous undertaking” doctrine and the good samaritan doctrine interchangeably. The good samaritan doctrine encompasses both §§ 323 & 324A of RESTATEMENT (SECOND) OF TORTS § 324A (1965). Section 324A provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary to the protection of a third person or his things, is subject to liability to the third person for his physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

RESTATEMENT (SECOND) OF TORTS § 324A (1965). The distinction between the two sections thus lies in whether the person who was the intended beneficiary of an undertaking was injured or whether a third party, one not an intended beneficiary, was injured. Section 323 covers the first situation, whereas § 324A covers the latter. See infra notes 58-68 and accompanying text.

19. See McFall v. Compagnie Maritime Belge (Lloyd Royal), 304 N.Y. 314, 107 N.E.2d 463 (1952). In McFall, the court held that the Belgian Line, which had failed to warn a third-party of the dangers involved in loading drums of carbon tetrachloride, could be indemnified by the party who loaded the drums negligently. See infra notes 141-55 and accompanying text.

20. See 28 U.S.C. §§ 2680(a), (h) (1976). The defenses of discretionary function and misrepresentation are referred to under these sections respectively and are discussed at infra notes 114-39 and accompanying text.

21. See infra notes 141-55 and accompanying text.

22. See infra notes 156-62 and accompanying text.

23. “Free-form” wastes are those not contained in drums. Wastes are placed in drums
to the Mayor and City Council of Niagara Falls, consulting engineers commented that these practices continued in the absence of ordinances for the regulation of industrial waste disposal into the city's sewage system. The high concentration of industrial wastes in the system, the unpleasant odors, and the accompanying tear effects on sewage plant workers, however, led the engineers to recommend "[t]hat the City arrange conferences with plants, individually and collectively, to discuss the data presented in their report with a view specifically to . . . a better regulation of solids, acidity, and alkalinity, and the elimination of objectionable odors." The city granted Hooker Chemical Company permission to begin disposing chemical residue from their production plants at the Love Canal site in 1942. From that time until 1952, Hooker allegedly disposed of more than 21,000 tons of chemical wastes at that site. In 1947, Hooker purchased a 200-foot wide portion of the site for the purpose of dumping only for the disposer's handling ease. The drums are not expected to prevent leakage for an extended period of time. See Disposal Hearings, supra note 1, at 501.

24. Havens & Emerson, Survey of Industrial Wastes Discharged into the Sewerage System of Niagara Falls, Report to the Hon. Mayor and Council, New York (Nov. 1940) [hereinafter cited as Havens & Emerson].

25. Niagara Falls, New York, was certainly not the only city which suffered from lack of solid waste disposal legislation. Prior to the mid 1960's, waste management regulations consisted primarily of general health and safety ordinances applied to waste disposal sites. Less than half of the cities and towns in the United States with populations greater than 2,500 had programs for sanitary disposal of solid waste. Kovacs & Kluczynski, The New Federal Role in Solid Waste Management: The R.C.R.A. of 1976, 3 COLUM. J. ENVTL. L. 205, 213 (1977). Even in 1970, state laws concerning the various types of solid waste were fragmented and codified under various sections of each state code. For a comprehensive list of the sections of each of the 50 state's codes which pertain to solid wastes, see Autocomp, Inc., Solid Waste Laws in the United States, Territories (1970).

26. The report by Havens & Emerson, consulting engineers, states: With an estimated tributary population of 80,000 persons, the flow at the sewage plant evaluates to 990 gallons per capita per day, or about six to ten times that ordinarily found at municipal sewage works . . . . Among the industries contributing to the largest volume of wastes may be mentioned Hooker Electro-Chemical Co., the Mathieson Alkali Works, Inc., R. & H. Chemicals Department of DuPont, Kimberly-Clark Corp. and Union Carbide Co.

27. The engineers' report states that the gases which produce tears are of sufficient intensity at times to seriously affect the operator's working efficiency but cautiously notes, "[A]s to the effect on health, that is more a question for the physician than for the Engineer." Id. at 26.

28. Id.


The Niagara Board of Education discussed with Hooker the Board’s expectation of future residential development surrounding the Love Canal site in 1952. The Board of Education urged Hooker Chemical to sell them its portion of the Love Canal site and adjacent property so that a school could be built. The company allegedly warned the school board against construction in the area.\(^3\) When it became apparent to Hooker that the Board would acquire the property through condemnation proceedings, the company deeded the property to the Board for one dollar consideration, with a proviso disclaiming liability for any injuries from the chemicals.\(^2\) Once it became the owner of the property, the Niagara Board of Education built its elementary school on property adjoining the central section of the canal site. Later, the Board built a playground over the central portion of the canal which had not been used to dump chemical wastes, but which had been filled with municipal refuse, fly ash, and cinders. By 1964, there were more than 150 homes in the area, and by 1976, the number had increased to 200.\(^3\)

Although the problem of chemical seepage was not greatly publicized prior to 1976, Love Canal residents had reported injuries from the chemi-

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\(^3\) See Disposal Hearings, supra note 1, at 489 (testimony of Bruce D. Davis, Executive Vice President, Industrial Chemicals Group, Hooker Chemical Co.). From 1942 to 1947, Hooker utilized the northern section of the Love Canal site, and, from 1947 to 1952, Hooker disposed of its chemicals in the southern section of the site:

The practice employed by Hooker was to take the chemical residue materials from its operation and stage [sic] it at the plant property until they had an adequate amount of materials in drums. They then transported that material up to the canal site, excavated an additional 10-15 feet of clay from the bottom of the canal site, disposed of the drums in that minivault that had been constructed, and then covered the drums with approximately four feet of clay.

\(^3\) Id. at 489.

\(^3\) \textit{Id.} at 502. The deed contained this clause:

Prior to the delivery of this instrument of conveyance, the grantee herein has been advised by the grantor that the premises above described have been filled, in whole or in part, to the present grade level thereof with waste products resulting from the manufacturing of chemicals... [and] the grantee assumes all risk and liability incident to the use thereof. It is, therefore, understood and agreed that, as a part of the consideration for this conveyance and as a condition thereof, no claim, suit, action or demand of any nature whatsoever shall ever be made by the grantee, its successors or assigns, against the grantor, its successors or assigns, for injury to a person or persons, including death resulting therefrom or loss of damage to property caused by, in connection with or by reason of the presence of said industrial wastes. It is further agreed as a condition thereof that each subsequent conveyance of the aforesaid lands shall be made subject to the foregoing provisions and conditions.

\(^3\) \textit{Id.} at 504.
cals as early as 1958.\textsuperscript{34} In 1978, preliminary reports suggesting a link between the chemicals and incidences of disease prompted both local and national concern. Pursuant to an act of the New York State Legislature,\textsuperscript{35} over 200 families were evacuated from the area by 1979.\textsuperscript{36} On May 21, 1980, in response to uncertainty over the health and welfare of remaining residents, President Jimmy Carter declared a state of emergency in the Love Canal area and ordered the evacuation of families from 710 homes surrounding the Love Canal site.\textsuperscript{37}

II. LIMITATIONS OF TRADITIONAL TORT THEORIES IN HAZARDOUS WASTE PLAINTIFFS' SUITS AGAINST THE DISPOSER

Negligence and private nuisance theories have been criticized as inadequate vehicles to allow hazardous waste victims to impose liability on polluters and disposers.\textsuperscript{38} There are three theories of liability available to a plaintiff under a private nuisance cause of action. A plaintiff can allege that the defendant's conduct: (1) intentionally invades the plaintiff's interests; (2) negligently interferes with his interests; or (3) is abnormal and out of place in its surroundings and so falls fairly within the principle of strict

\textsuperscript{34} Id. at 665 (testimony of Mr. Wilkenfeld, Hooker Chemical Co.). In 1958, two children who were walking over the site heard loud popping noises which became louder and more frequent. The chemicals which were released from this "popping" action spread up their legs and bodies and necessitated hospital treatment for chemical burns. Mr. Wilkenfeld testified that parents would regularly call the nurses on duty at the Hooker dispensary to request medical advice for treating their children who had come into contact with the chemicals. Id. at 665. One mother of five children recalled, "The boys used to play on the baseball diamond beside the school and this bluish-blackish stuff would ooze up through the ground." See Kittle, supra note 2, at 32.

\textsuperscript{35} N.Y. PUB. HEALTH LAW § 1388 (McKinney Supp. 1981). That section provides:
In case of great and imminent peril to the health of the general public from such hazards as may be identified as resulting from exposure to toxic substances emanating from landfills, the commissioner may declare the existence of an emergency and take such measures and do such acts as he may deem reasonably necessary and proper for the preservation and protection of the public health.

\textsuperscript{36} See [1979] 10 ENV'T REP. (BNA) 905.

\textsuperscript{37} See [1980] 11 ENV'T REP. (BNA) 139.

liability.  

A hazardous waste plaintiff could frame his action within the first or second theory.

To maintain an action against a disposer for a private nuisance from an intentional interference, a hazardous waste plaintiff must allege that the disposer has substantially and unreasonably interfered with his interests in the use and enjoyment of his land. Proving the elements of substantiality and unreasonableness, however, presents special problems for such plaintiffs. Although a plaintiff may allege in a private nuisance action that a polluter has substantially interfered with his interests, measuring the amount of harm done to health and property by a particular hazardous substance is often difficult. Moreover, plaintiffs who allege an intentional interference with their interests in land must also demonstrate that a polluters' activity is unreasonable. Courts determine the reasonableness of an activity by balancing the harm to the plaintiff against the benefit of the defendant's activity. Under the reasonableness approach, a court might find that the utility of defendant's activity outweighs the harm suffered by the plaintiff and consider the pollution a necessary, albeit unfortunate, de-

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39. See W. Prosser, Handbook of the Law of Torts § 87 (4th ed. 1971). At § 88, Prosser distinguishes a private nuisance from a public nuisance in a particularly relevant analogy: "Thus the pollution of a stream which merely inconveniences a number of riparian owners is a private nuisance only, but it may become a public one if it kills the fish." The analogy demonstrates that a public nuisance is one which interferes with the community's exercise of its interests in general. Thus, the theory of public nuisance is especially appropriate for a suit by the United States against waste disposers. See infra notes 156-62 and accompanying text. In the same section, Prosser notes that if an action can be maintained both as a private and public nuisance, it often is preferable to bring it under a public nuisance since prescriptive rights, laches and the statutes of limitations do not run against it. See also Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. 997 (1966).

40. A plaintiff can allege that a defendant has intentionally interfered with his interests if he can demonstrate that the defendant knew that his conduct was resulting, or was likely to result, in an invasion of plaintiff's interests. See Restatement (Second) of Torts § 825 (1977). When a plaintiff frames his action within the second theory, that of a negligent interference, he must also demonstrate that the defendant's activity constitutes an unreasonable interference with his interests. W. Prosser, supra note 39, at § 87. Where there is an intentional interference, a plaintiff may maintain a cause of action if the defendant's conduct is unreasonable. Restatement (Second) of Torts § 826 (Tent. Draft No. 18, 1972). Cf. 44 Brooklyn L. Rev. 703, 706 (1978) (author suggests that in ruling on intentional nuisance cases, the courts will only allow plaintiff recovery if the gravity of the harm outweighs the utility of the defendant's activity). See infra note 44 and accompanying text.

41. W. Prosser, supra note 39, at § 88.


43. 1 F. Harper & F. James, Law of Torts § 1.24 (1956) notes that the "unreasonable harm to others . . . constitutes a private nuisance for which damages are recoverable . . . ." See also Restatement (Second) of Torts § 822 (1977).

44. F. Harper & F. James, supra note 43, at 73.
rivative of the defendant's activity.\textsuperscript{45}

In contrast, to maintain a suit against disposers based on negligence, a plaintiff must demonstrate the foreseeability of the harm resulting from the disposal activity and establish that the disposed chemicals caused plaintiffs' injuries. In hazardous waste suits brought to recover for injuries allegedly due from dumping over thirty years ago, it may be difficult to establish that defendants should have foreseen the hazards of their disposal activity.\textsuperscript{46} Disposers can be expected to raise the traditional argument that their activities were conducted in conformity with the current state of the art.\textsuperscript{47} The knowledge of the danger of disposal methods then in practice, however, might arguably be imputed to the United States which, pursuant to the Public Health Service Act of 1944, charged itself with the duty of investigating this area.\textsuperscript{48}

Plaintiffs seeking to recover under a negligence theory also face the problem of establishing legal causation. This was demonstrated in the case of \textit{Reserve Mining Co. v. EPA},\textsuperscript{49} where the court held, even after receiving an abundance of scientific testimony, that it could not know definitely whether the pollution particles caused residents' diseases. One author has suggested that judges who are faced with cases where such scientific evidence is necessarily presented will be tempted to gloss over scientific data which reaches different conclusions in a quest for the more familiar models of the reasonableness and balancing tests.\textsuperscript{50} Continual resort to such models without grappling with difficult scientific and policy questions could result in a failure to impose liability on the disposers.


\textsuperscript{46} See Proposal, supra note 38, at 706; \textit{but cf.}, Note, supra note 45, at 947 (author states that "[t]here is little difficulty in establishing knowledge of pollution dangers in industries discharging harmful substances such as fluorides, cyanides, lead, free chlorine, and beryllium, or arsenic . . . "). Proof of this element would not be as insurmountable a barrier in plaintiffs' suit against the United States because, arguably, the United States charged itself with the duty of investigating this field pursuant to the Public Health Service Act of 1944 (PHSA). See supra note 17 and accompanying text.

\textsuperscript{47} See Proposal, supra note 38, at 705-06; \textit{but cf. infra} note 186 and accompanying text (New York courts have recognized that methods employed in any trade cannot establish, as safe in law, that which is dangerous in fact).

\textsuperscript{48} The Public Health Service Act of 1944 (PHSA), ch. 376, § 301, 58 Stat. 691 (1944) (current version at 42 U.S.C. § 241 (1976)).

\textsuperscript{49} 514 F.2d 492 (8th Cir. 1975) (suit by residents alleging their respiratory diseases were caused by exposure to asbestos particles in air and water near Lake Superior in Michigan).

\textsuperscript{50} Proposal, supra note 38, at 709.
III. THE LEGAL FRAMEWORK OF UNITED STATES' RESPONSIBILITY FOR HAZARDOUS WASTE INJURIES

A. The Federal Tort Claims Act

In the face of the legal obstacles involved in seeking recovery from the disposers of chemical waste, the Love Canal plaintiffs may attempt to recover for their injuries by establishing United States' liability to them under the FTCA. The enactment of the Federal Tort Claims Act in 1948 created a new forum for private suits against the United States. Despite the waiver of sovereign immunity contemplated by the Act, there are substantial limitations placed on the types of suits that may be maintained against the United States. Whether plaintiffs can successfully impose liability on the United States is determined by the law of the state where the injury occurred. If that state recognizes the legal theory upon which liability is asserted, as well as a private citizen's liability to another for the same type of act allegedly committed by the United States, then the United States may be held liable. The FTCA expresses this concept by providing that the United States shall be liable “in the same manner and to the same extent as a private individual under like circumstances.”

B. Establishing a Gratuitous Undertaking Cause of Action Under the FTCA

One tort theory of liability which has been successfully asserted against the United States is the “gratuitous undertaking” theory. The theory is embodied in section 323 of the Restatement of Torts. Since United States' liability under the FTCA is always determined with reference to the tort law of the jurisdiction where the injury occurred, if a particular jurisdiction recognizes the “gratuitous undertaking” theory, plaintiffs suing in

54. United Scottish Ins. Co. v. United States, 614 F.2d 188, 192-94 (9th Cir. 1980). For example, § 323 of the Restatement (Second) of Torts, or the “gratuitous undertaking” doctrine, is recognized by many states. See Restatement (Second) of Torts § 323 reporter's notes (1966). Therefore, plaintiffs suing in states which recognize this theory of liability may assert it in their FTCA suits. But see Mosley v. United States, 456 F. Supp. 671 (E.D. Tenn. 1978), where the wife of a decedent sued when her husband was killed in a mine which was inspected by the United States. The court dismissed the suit because, under Tennessee law, there was no similar duty imposed on a mine inspector.
that jurisdiction can argue that theory against the United States. Significantly, New York courts have recognized the gratuitous undertaking theory. 57

In seeking to establish their prima facie case under section 323, all plaintiffs first must show that, by its activity, the United States intended to provide them with a direct service. 58 Secondly, plaintiffs must show that they relied on the United States' undertaking to their detriment, or, in the alternative, that the undertaking increased their risk of harm. 59 While the United States is to be held liable to the same extent as a private individual, in practice, federal courts that entertain FTCA suits often hold plaintiffs to a more stringent demonstration of the elements of a "gratuitous undertaking" than a state court would in imposing liability on a private individual. 60 Once hazardous waste plaintiffs successfully allege a section 323 action against the United States, they then must meet and overcome the affirmative defenses of the tolling of the statute of limitations, discretionary function, and misrepresentation. 61

1. Direct Service

When a plaintiff seeks to impose liability on the United States under section 323, courts have focused on the "rendering of services" language in the foreword of that section. In alleging a section 323 suit against the United States, a plaintiff first must demonstrate that, by its activity, the United States intended to render a direct service to the victim. The United States undertakes to provide services in the contracts it enters with certain parties and, on a much larger scale, provides services pursuant to the regulations and statutes it enacts. In either situation, where a beneficiary seeks

58. See supra note 18 and infra notes 65-85 and accompanying text.
59. See infra notes 86-92 and accompanying text.
60. See infra notes 93-104 and accompanying text.
61. One of the reasons courts dwell on this element may be due to their concern with imposing extensive liability on the federal government. This concern was succinctly noted in Clemente v. United States, 567 F. 2d 1140, 1150 (1st Cir.), cert. denied, 435 U.S. 1006 (1978): [T]here is a fine line but a vital and necessary one between the principle of holding the government responsible for conduct by which it carries out its affairs when federal employees negligently injure the public and the principle that the government may be turned to as a final source of relief from the tragedies of life.
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to hold the United States liable, the court must determine the true intent and extent of the United States' undertaking.

The United States can be found to render a direct service to individuals where it specifically contracts to protect persons against injury or damages and agrees to be responsible for damages caused by its failure to protect. In *Fentress v. United States*, the United States contracted to provide such a service to the employees of a construction company and was thus held liable when it failed to provide adequate scaffolding. Where the United States merely reserves the right to survey a construction project, however, it does not undertake to provide a direct safety service. In *Roberson v. United States*, for example, the United States obligated an independent contractor, Merritt-Chapman and Scott (MCS), to provide for its employees' safety but reserved the right to survey the project to determine whether MCS was complying with this obligation. The employees who fell from the scaffolding sued the United States claiming that by reserving the right to survey, the United States voluntarily assumed the duty of protecting them while they worked on the scaffolding. Finding that the reservation of the right to make safety inspections at the dam site was not a direct service to the MCS employees, the court denied the plaintiffs' recovery.

Compared with reserving a right to inspect under one or more contracts, the United States assumes a far greater undertaking when it imposes affirmative obligations on itself pursuant to federal statutes. Despite the greater number of beneficiaries and greater potential for liability in this latter type of undertaking, if the court finds that a statute required the United States to provide a service, the United States may be held liable for negligently performing the undertaking.

In *Clemente v. United States* and *Raymer v. United States*, plaintiffs respectively claimed that undertakings by the United States pursuant to an agency regulation and a federal statute demonstrated the United States' intent to provide them with a direct service. Plaintiffs in *Clemente* were denied recovery, while the *Raymer* court granted relief. *Clemente* involved an airplane crash in which all the passengers were killed, including major league baseball player Roberto Clemente. The First Circuit examined a regulation promulgated pursuant to the Federal Aviation Authority's (FAA) general grant of authority to provide for air traffic safety. The regu-

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65. 431 F.2d 824 (7th Cir. 1970).
66. *Id.* at 830.
67. 382 F.2d 714 (9th Cir. 1967).
68. *Id.* at 718. *See supra* note 18 and accompanying text.
lation required FAA employees to warn passengers on private aircraft when the aircraft was overweight or lacked a proper flight crew.\textsuperscript{71} Relatives and representatives of the passengers argued that the FAA regulation established a duty, the breach of which would support a claim under the FTCA. The court recognized that one of the purposes of the FAA was to promote air travel safety. According to the court, however, this general purpose would not support a finding that an internal regulation promulgated thereunder evidenced a legal duty to provide protective measures to a particular class of passengers.\textsuperscript{72} Despite its holding under these facts, the court declared that there could be no doubt that the mandate of a federal statute was a far stronger foundation for the creation of an actionable duty under the FTCA than the administrative directive at issue in the present case.\textsuperscript{73}

In light of this appellate declaration, the subsequent \textit{Raymer} court found that the federal statutory mandate in the Federal Coal Mine Health and Safety Act (FCMHSA) compelled it to impose liability on the United States. The \textit{Raymer} court compared the statutory language in the FCMHSA with that of the FAA statutory language presented in \textit{Clemente}. \textit{Raymer} reconciled the \textit{Clemente} decision by finding that the statutory authority of the FAA concerning the methods of implementing air travel safety was discretionary\textsuperscript{74} and thus fell short of the stringent demands of the FCMHSA, which imposed a strict duty on the United States to protect miners.\textsuperscript{75}

Once a court determines that a federal statute was enacted for the benefit of specific individuals, the FTCA requires that the court further determine whether an individual acting similarly to the United States would be held to a duty to the beneficiary of that activity.\textsuperscript{76} For example, in \textit{United Scottish Insurance Co. v. United States},\textsuperscript{77} plaintiffs sought to premise the United States' duty based on section 323. They claimed that had the FAA completely and carefully performed its undertaking to inspect their aircraft, the plane would not have crashed. The Ninth Circuit ruled that absent allegations by the plaintiffs or findings by the court that a good samaritan action was recognized under state law, the district court would have to dismiss the action for failure to state a claim under the FTCA.\textsuperscript{78}

\textsuperscript{71} Order No. S08430.20C. See 567 F.2d 1140, 1146.
\textsuperscript{72} Id. at 1145.
\textsuperscript{73} Id. at 1150.
\textsuperscript{74} 482 F. Supp. 432, 436 (W.D. Ky. 1979).
\textsuperscript{75} Id. at 436.
\textsuperscript{77} 614 F.2d 188 (9th Cir. 1980).
\textsuperscript{78} Id. at 199.
To ensure that his claim passes this test, a Love Canal plaintiff who sues the United States under the good samaritan theory in the federal district court of New York must demonstrate that New York recognizes the good samaritan theory. One of the unique values of this theory is that it may be used to assert liability on negligent actors in a jurisdiction which may lack on-point precedent for imposing such liability. In other words, a plaintiff must show only that the state has previously imposed liability on an actor who undertook to provide a benefit and then failed in that performance. The plaintiff would not need to show that the state has previously imposed liability on an actor undertaking the same type of service. New York has recognized this theory of liability and has stated that the lack of an on-point precedent should not deter courts in imposing liability.

The seminal New York case on the rendering of services element of the gratuitous undertaking doctrine is H.R. Moch Co. v. Rensselaer Water Co., where a water company contracted with a municipality to provide it with water for fire protection. Justice Cardozo articulated the key factor in considering whether to impose liability under the "gratuitous undertaking" doctrine. He stated, "If conduct has gone forward to such a stage that inaction would commonly result not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relation out of which there arises a duty to go forward." In finding that the company, through its contract with the city, undertook to provide services to residents in general, but did not assume a duty to residents individually, the court demonstrated its reluctance to impose an undue and indefinite

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79. This concept is elucidated in United States v. Gavagan, 280 F.2d 319 (5th Cir. 1960), where the United States was held liable for its failure to rescue the crew of a shrimper. The court in Gavagan recognized,

[T]o the extent that the activity is the same as that normally done by private persons the law (here the maritime law on salvage) would control. To the extent, however, that it is different then the case does not fail because of a void in legal precedents. The court trying the case has the obligation to determine an appropriate standard for what the law would be were there such a private person performing the unusual function.

Id. at 327.


81. In Schwartz v. Greenfield, Stein and Weisinger, 90 Misc. 2d 882, 396 N.Y.S.2d 582 (S. Ct. 1977), the court imposed liability on an attorney who volunteered to perfect a security agreement but failed to do so, and thereby lost a security interest of a client. Applying the "gratuitous undertaking" theory, the court imposed liability, although there was no exact precedent for doing so under the facts presented.


83. Id. at 167, 159 N.E. at 898.
extension of the zone of duty.\textsuperscript{84}

While New York has exhibited some hesitancy in imposing liability on public organizations, it has not exhibited this hesitancy where a single individual undertakes to provide a service.\textsuperscript{85} Since the United States' liability must be judged with regard to the liability of a private individual in the forum state, rather than a municipality or public organization, this recognition of private liability in New York would be of great benefit to a Love Canal plaintiff.

2. Detrimental Reliance

The reliance element is an integral part of the "gratuitous undertaking" analysis\textsuperscript{86} and requires, at minimum, proof that a party acted or refrained from acting with conscious reference to the action or inaction of others.\textsuperscript{87} The landmark case on the reliance element is \textit{Indian Towing Co. v. United States}.\textsuperscript{88} In that case, the Coast Guard was operating a lighthouse which failed to transmit its light due to the negligence of Coast Guard personnel in maintaining the lighthouse. As a result of this negligence, a freighter ran aground and its cargo was damaged. The court recognized that the United States' undertaking to operate a lighthouse was a discretionary function,\textsuperscript{89} and that the government's subsequent failure to keep the lighthouse working was a negligent act for which the United States could be liable. As the court noted,

\begin{itemize}
  \item \textsuperscript{84} Id. at 168, 159 N.E. at 899.
  \item \textsuperscript{86} United Scottish Ins. Co. v. United States, 614 F.2d 188, 195 (9th Cir. 1980).
  \item \textsuperscript{87} See, e.g., Rappenecker v. United States, 509 F. Supp. 1018 (N.D. Cal., 1981) (crew of S.S. Mayaguez, a private cargo vessel, was seized by Cambodian gunboats on May 12, 1975. Plaintiffs alleged that the United States had information about prior attacks by Cambodian gunboats but failed to show that they relied on the absence of a communication before proceeding in the area).
  \item \textsuperscript{88} 350 U.S. 61 (1955).
  \item \textsuperscript{89} 28 U.S.C. § 2680(a) (1976). The FTCA allows for a general waiver by the United States of its sovereign immunity. The Act does, however, provide that sovereign immunity shall be maintained for certain acts. These acts are referred to as exceptions to the Act. Section 2680(a) provides that:
    The provisions of this chapter and section 1346(b) of this title shall not apply to (a)
    Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

For further discussion of the important discretionary function exception, see infra notes 114-24 and accompanying text.
The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act.\(^9\)

New York holds a comparable view of this element. In *Zibbon v. Town of Cheektowaga*,\(^9\) a New York court found detrimental reliance by victims of threats of personal violence, who had been assured of adequate police protection. Plaintiffs relied on these assurances and were harmed by their reliance when the police withdrew protection without informing them. When reliance is engendered, but there occurs a subsequent withdrawal of the service, a breach of the duty to provide the service occurs and liability may be imposed under section 323.\(^9\)

3. Increased Risk of Harm: The “Worsening of Position” Element

As an alternative to a showing of detrimental reliance, courts will require proof that the defendant’s failure to exercise reasonable care in the performance of the undertaking has increased the risk of harm to another. Two maritime cases succinctly illustrate how courts have applied the increased risk of harm issue. *United States v. Gavagan*\(^9\) involved a federal undertaking pursuant to the 1956 National Search and Research Plan (NSAR). This plan was established pursuant to the Specific Recommendation No. 2 of the Civil Air Policy of May 1954.\(^9\) In *Gavagan*, the Coast Guard began a rescue of a disabled shrimper. Directors of the search on

\(^{90}\) 350 U.S. at 69.

\(^{91}\) 51 A.D.2d 448, 382 N.Y.S.2d 152 (1976); *but cf.* Stranger v. New York State Elec. and Gas Corp., 25 A.D.2d 169, 268 N.Y.S.2d 214 (1966). In *Stranger*, housing inspectors notified the owner and lessee of a building that if they failed to replace an unvented portable gas heater, their building would be condemned. The residents continued to use the heater, but the building was not condemned as threatened. When the heater exploded and burned the building, the lessee sued for personal injuries and property damage, claiming that the corporation was negligent in not condemning their building. The court did not hold New York State Electric and Gas liable because the lessee did not rely on the corporation’s inspection acts to their detriment. *Id.* at 173, 268 N.Y.S.2d at 217.

\(^{92}\) *Zibbon*, 51 A.D.2d at 453, 382 N.Y.S.2d at 156.

\(^{93}\) 280 F.2d 319 (5th Cir. 1960).

\(^{94}\) The Civil Air Policy, May 1954, at 44 states its purpose: “To provide an over-all Search and Rescue Plan (SAR) for effective utilization of all available facilities to include provisions for the control and coordination of all types of Search and Rescue.”
land called off the rescue attempt, however, based on erroneous reports that the shrimper was in no danger. The Fifth Circuit found that the facts of the case fully met the requirements of section 323. Even though the Coast Guard undertook the rescue attempt pursuant to a statute, the shrimper’s crew and other private boaters in the vicinity relied on the expertise of the Coast Guard in leading the rescue. Because of this reliance, private boaters had not made independent attempts to rescue the shrimper.

Two years later in United States v. DeVane, a case factually similar to Gavagan and involving a NSAR by the Coast Guard, the Fifth Circuit clarified the rationale of the holding in Gavagan. The lower court in DeVane had failed to make a finding on the issue of whether the victim’s position had worsened as a result of the undertaking. The district court based the United States’ liability solely on its affirmative duty under the plan and disregarded the plaintiff’s worsening of position in determining liability for negligence. The appellate court concluded that a finding on both issues is necessary. The court explained that although the decision to undertake or abandon a rescue effort is within the Coast Guard’s discretion, once the undertaking has engendered reliance, negligence in the operation would create liability if it was the proximate cause of loss or damage to one whose position had worsened in reliance on the undertaking.

The cases of Zibbon v. Town of Cheektowaga and Nallan v. Helmsley-Spear, Inc. demonstrate how the risk of harm element has been considered in New York. In Zibbon, the court found that the police department’s promises to protect the plaintiffs had actually increased plaintiffs’ risk of harm because the plaintiffs had been lulled into a false sense of security and, as a result, had taken no steps to ensure their safety. In Nallan, a union official was shot in the lobby of a midtown hotel as he signed in the hotel’s register. The desk attendant was not at his station when the incident occurred. At trial, the victim argued that the defendant’s employment of a desk attendant represented an undertaking, within the meaning of section 323, to provide protective services to the building’s tenants and their guests. The appellate court instructed that plaintiff’s mere assertion that the hotel commenced an undertaking would not subject the defendant to

95. 280 F.2d at 328.
96. Id.
97. 306 F.2d 182 (5th Cir. 1962).
98. Id. at 186.
99. Id.
100. 51 A.D.2d 448, 382 N.Y.S.2d 152 (1976).
102. 51 A.D.2d at 453, 382 N.Y.S.2d at 156.
liability for temporarily withdrawing or negligently performing these services. In remanding the case, the appellate court suggested that the plaintiff would have to further argue that the hotel's undertaking placed him in a more vulnerable position than if the hotel had not placed an attendant on duty.

To demonstrate the increased risk of harm element, a Love Canal plaintiff would have to make a similar argument. He would allege that by undertaking responsibility to supervise, investigate and study the waste disposal problem and then not adequately performing this undertaking, residents near disposal sites were persuaded that they were in no danger from the chemical dumping and, therefore, took no steps to ensure their safety.

C. United States' Defenses under the FTCA

In addition to ensuring that they have properly alleged the United States' liability under section 323, Love Canal plaintiffs, as well as other FTCA plaintiffs, must avoid certain defenses which the United States has successfully asserted to preclude recovery under the Act.

1. Statute of Limitations

The Federal Tort Claims Act prescribes a single statute of limitations period for all plaintiffs and, thus, dispenses with the need to refer to a particular state's limitations statute. The FTCA's establishment of a sin-

103. 50 N.Y.2d at 522, 407 N.E.2d at 459, 429 N.Y.S.2d at 614.
104. Id. at 522, 407 N.E.2d at 460, 429 N.Y.S.2d at 615.
105. 28 U.S.C. § 2401(b) (1976). The section states:
A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.
106. The question of when a claim accrues under the Act is one of federal law. Kossick v. United States, 330 F.2d 933 (2d Cir. 1964). This is beneficial to plaintiffs whose claims may be barred under state determination of when a claim accrues. Among other states, New York holds that the date on which a tort action accrues, for purposes of commencing the limitations period, is the date when a plaintiff is injured. This formula works well when the injury results from a sudden, definite act but is unfavorable to plaintiffs injured by latent disease. See Note, Accrual Dilemma: Statutes of Limitations in Hazardous Waste Cases, 45 ALBANY L. REV. 717 (1981); Victims of diethylstilbestrol (DES) also face the delayed manifestation of injury problem. See, Note, Delayed Manifestation Injuries: The Statute of Limitations as a Bar to DES Suits, 11 COLUM. HUM. RTS. L. REV. 127 (1980). In Thornton v. Roosevelt Hospital, 47 N.Y.2d 780, 391 N.E.2d 1002, 417 N.Y.S.2d 920 (1979), the court held that a plaintiff's cause of action for cancer accrued when she received her first injection of thorium dioxide, even though the cancer allegedly caused by this drug did not manifest
gle statute of limitations, in addition to the Supreme Court's rulings on the accrual of a claim issue under the Federal Employers' Liability Act (FELA) and the FTCA, assists plaintiffs whose claims would be barred under more stringent state laws.

The Supreme Court has addressed the perplexing issue of establishing when an injury accrues in *Urie v. Thompson*, a latent disease case, and in *Kubrick v. United States*, where a plaintiff's hearing loss was due to prior improper neomycin treatment. By foregoing a simple, yet mechanical, accrual rule in both cases, the result was more accommodating to the plaintiffs, neither of whose injuries were immediately apparent. In *Urie*, a plaintiff claimed that exposure to silica dust for a period of twenty-eight years caused him to contract silicosis, a slowly-debilitating lung disease. The Supreme Court held that to require Urie to bring his FELA suit within three years after his first exposure to a substance he was unaware was injuring him "would constitute [a] waiver of his right to compensation at the ultimate day of discovery and disability." Demonstrating its recognition of the distinction between injury from a sudden act and injury which arises slowly, the Court noted that "the injurious consequences of the exposure are the product of a period of time rather than a point of time; consequently the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves."

In *United States v. Kubrick*, the Supreme Court determined that the accrual of an FTCA claim for a veteran who had been improperly treated with neomycin occurred on the date that he knew both of the existence and the cause of his injury. This ruling curtailed the Third Circuit's extension of the accrual period to the date on which the plaintiff realized that a negligent act caused his injury. The Supreme Court's holding required Kubrick to determine whether an act of negligence caused his injury on the accrual date. Although the Supreme Court declined to push the statute of limita-

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112. 337 U.S. at 170.
tions deadline as far as the Third Circuit had deemed appropriate, its willingness to delay accrual of the claim until a plaintiff has knowledge of his injury demonstrates the continued vitality of the reasoning espoused in *Urie*. The Court demonstrated that at the base of its acceptance of the "discovery" approach was a concern for the unjustness of charging a plaintiff with knowledge of an injury before that injury is manifested. While *Kubrick* concerned medical malpractice, it is clear that these same manifestation problems face both medical malpractice and hazardous waste victims alike. Thus, the FTCA provides a more sympathetic forum for these plaintiffs than would a state court applying the stringent date of exposure rule. Under the FTCA, the day that the victims of hazardous wastes have both the knowledge of their diagnoses and knowledge that laboratory tests reveal the presence of maximum levels of certain chemicals in their bodies should be the date on which their injuries accrue.

2. Discretionary Function

If the plaintiff is successful in arguing the threshold statute of limitations issue, he may then expect to confront the discretionary function defense. The affirmative defense of discretionary function\(^1\) has been the government's most successful tool in precluding its liability under the FTCA.\(^2\) Under this defense, the United States is not liable for negligent acts or omissions based upon the exercise of a discretionary function or duty on the part of a federal agency or employee. Although the FTCA fails to define "discretionary function," courts have drawn the distinction between governmental activity at the policy or planning level and at the operational level.\(^3\) Activity at the former stage involves discretion and therefore precludes liability; negligence at the latter, operational stage, may be the basis for finding the United States liable.\(^4\)

The discretionary function defense was well-articulated in a FTCA claim arising from a disastrous explosion of ammonium nitrate fertilizer

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4. In construing the meaning of a discretionary act, the federal district court in *Blessing* v. United States, 447 F. Supp. 1160 (E.D. Pa. 1978), noted, as an example, that victims of flooding from backed-up waters of a federal dam would not be able to sue the United States based solely on the government's decision to implement the dam project. *Id.* at 1170 n.14. The court stated that this is the type of decision which is discretionary and which is exempted as a basis for imposing liability on the United States under the FTCA.
produced as part of the United States government's fertilizer export program. In *Dalehite v. United States*, men who were loading this fertilizer on ships bound for Japan and Germany were killed when explosives stored on the ships reacted with the nitrate and caused a fire. Plaintiffs sued the United States for negligence under the FTCA, seeking recovery for the death of a worker caused by the explosion. The plaintiffs premised the government's liability upon the participation of the United States in the manufacture and transportation of the fertilizer. Focusing upon the discretionary function exception, the Supreme Court denied recovery. The Court held that the discretionary function exception was more encompassing than the mere initiation of programs and activities and included determinations made by executives "in establishing plans, specifications, or schedules of operations." The Court noted that "[w]here there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable." The Court further cautioned that if subordinates' acts in implementing high-level policy decisions could be the basis for liability, "the protection of section 2680(a) would fail at the time it would be most needed, that is when a subordinate performs or fails to perform a casual step, each action or non-action being directed by the supervisor, exercising, perhaps abusing, discretion."

Even though an initial policy decision or a plan adopted pursuant to that decision may be discretionary, the government cannot remain immune if it negligently performs an activity. In *Indian Towing Co. v. United States*, a section 323 case, the Supreme Court defined the point beyond which the government could not claim immunity. In *Indian Towing*, the government voluntarily decided to operate a lighthouse. Vessels which had come to rely on the lighthouse for direction were damaged when the government failed to keep the lighthouse operating. The Court defined the government's initial policy decision to operate the lighthouse as one which involved discretion. The protection of the discretionary function defense could not extend, however, to protect the United States when it was subsequently negligent in implementing the decision. The United States would therefore be liable for damage resulting from its failure to perform

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119. Id. at 35-36.
120. Id. at 36.
121. Id.
123. Id. at 67.
To overcome the discretionary function defense, a Love Canal plaintiff needs to stress the operational negligence of the United States in failing to carry out the duties which it imposed on itself under the Public Service Act of 1944. Premising liability solely on the United States' decision to enact legislation concerning waste disposal is insufficient to overcome this defense. A Love Canal plaintiff must stress the subsequent failure of the United States to perform its undertaking with care.

3. Misrepresentation

Another defense which has been asserted by the government in FTCA suits is framed under the theory of misrepresentation. This theory shields the United States from liability where the tort arises not from an employee's conduct but from an employee's spoken word or failure to speak, upon which another party relies and accordingly alters their conduct. The United States has argued this defense when plaintiffs seek to hold it liable when it has reported its findings, certified a product as safe, and failed to warn. Because the government engages in a myriad

124. In Smith v. United States, 546 F.2d 872 (10th Cir. 1976), the court recognized that the discretionary function defense could be used by the United States in almost any circumstance. There, the court found the defense inapplicable and granted relief to a burned child's family. The child and his family had been visiting Yellowstone Park when he fell into a superheated, thermal pool. The family had just visited a developed area of the park where they had been given informational pamphlets warning them about bears and geothermal pools. The family read the bear brochure but neglected to read the latter brochure. In the developed area, park officials had posted signs telling visitors to stay on the boardwalks and had roped off the geothermal pools. The tragedy occurred later when the family visited an undeveloped area which contained no warning signs and in which the geothermal pools were not roped off. The United States claimed that it should not be liable to the plaintiffs for their son's injuries since the park's decision to keep some areas undeveloped and without directional signs was a discretionary decision implementing a congressional policy to conserve the scenery. The appellate court concluded that while this was a valid policy decision, "it does not follow that the Government, as a landowner, is absolved of all duty under state law to erect safety devices or signs cautioning about conditions which have been left undisturbed as a policy matter." Id. at 877. The court further noted that "if we were to accept the Government's broad interpretation of the discretionary exception, it is difficult to perceive which duties under tort law could not be avoided by a similar policy decision to ignore them." Id.

125. 28 U.S.C. § 2680(h) (1976). The section states: "The provisions of this chapter and section 1346(b) of this title shall not apply to . . . (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights . . . ."


129. Wenninger, 234 F. Supp. at 505.
of undertakings in which it inspects, certifies and issues warnings, the mis-
representation exception is a widespread shield from many potential
lawsuits.

In *United States v. Neustadt*,130 purchasers of a house relied on the Fed-
eral Housing Authority's (FHA) appraisal and paid in excess of its fair
market value. They then sought to recover from the United States under
the FTCA the difference between the fair market and appraisal values.
Reversing the two lower courts, the Supreme Court found this situation to
be covered by the misrepresentation exception. The Court acknowledged
that where there is any statute which requires disclosure, it "may be said
that the Government owes a 'specific duty' to obtain and communicate
information carefully. . . . While we do not condone carelessness by gov-
ernment employees in gathering and promulgating such information,
exther can we justifiably ignore the plain words . . . of Section 2680(h)
. . . ."131 The Court cautioned that its holding did not conflict with *Indian
Towing Co. v. United States*132 because, in that case, the government's neg-
ligent failure to maintain the beacon lamp in a lighthouse resulted from
negligent operations or conduct and was, therefore, distinguishable from
the situation in *Neustadt* where the tort was a communication of incorrect
information.133

Addressing the distinction between negligent conduct and misrepresen-
tation, the district court, in *Marival, Inc. v. Planes, Inc.*,134 deemed that
case to be a classic example of injury resulting from reliance on a misrep-
resentation. In *Marival*, airplane buyers relied on a certificate of airworthi-
ness prepared by an inspector of the FAA and sued when they discovered
the plane was in fact not airworthy. The court determined that what had
injured the purchasers was their reliance on the certificate; if they had not
relied on the certificate, the negligence of the inspector would not have
causethemanyinjury.135

In *Wenniger v. United States*,136 there was both negligent conduct and a
misrepresentation, but the court found that plaintiff's injury flowed from
the former. In *Wenniger*, the Air Force failed to warn a pilot of turbulence
in an area in which he was flying, and he was killed when his plane could

131. Id. at 710-11.
133. 366 U.S. at 711 n.26.
135. Id. at 860.
not negotiate the turbulence. On the Air Force’s failure to warn, the court commented, “A failure to warn of an existing danger, when a duty to do so exists, is in a sense an implicit assertion that there is no danger. For some purposes, at least, this may properly be characterized as a misrepresentation.” However, this lack of warning was more akin to a negligent failure to act, and thus the court concluded that this was not a misrepresentation which section 2680(h) was intended to cover.

These cases demonstrate that if a plaintiff alleges that his injuries result from reliance on a statement or absence of a statement, courts will be likely to find the misrepresentation defense applicable. The United States can be expected to raise the misrepresentation exception whenever a plaintiff claims that the United States failed to disclose or supplied false information on which a plaintiff relied. To prevent a court from finding this defense applicable, a plaintiff must argue that his injury resulted from negligent conduct. This exception is, therefore, one a Love Canal plaintiff must be aware of when he seeks to establish the United States’ duty to disclose the dangers of hazardous waste disposal under the Public Health Service Act of 1944. To overcome this defense, a Love Canal plaintiff must stress that his injury results from improper disposal practices which were sanctioned by the United States and not from the United States’ failure to warn them that the disposal practices were improper.

D. The United States’ Suit Against a Disposer

I. Negligence Theory

The FTCA not only mandates that United States’ liability shall be that of a private tort defendant but also provides that the United States may be able to file third party claims for indemnity against parties who share its culpability. The right of the government to bring a third party indem-

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137. 234 F. Supp. at 505.
138. Id. In a somewhat elusive manner, the court supported this conclusion by relying upon guidance provided by the Supreme Court in United States v. Neustadt, 366 U.S. at 711 n.26.
139. The Public Health Service Act of 1944, ch. 376, § 301, 58 Stat. 691 (1944) (current version at 42 U.S.C. § 241 (1976)). The United States’ liability will have to be determined with reference to the sewage and waste disposal statutory provisions in effect at the time the original injurious dumping took place.
141. 1 L. Jayson, supra note 51, § 164 at 5230 & n.13. See, e.g., United States v. Illinois, 454 F.2d 297 (7th Cir. 1971), cert. denied, 406 U.S. 918 (1972). Plaintiffs sued the United States under the FTCA for injuries sustained when a catwalk fell at the Green Berets’ demonstration. The United States brought a third party action against the State of Illinois for indemnity. The court found that a third party claim brought by the United States was proper under Rule 14. The court applied Illinois law and allowed United States to recover
nity action in a suit where a plaintiff premises United States liability on a negligently performed "gratuitous undertaking" has been recognized by the courts, at least in dicta. In *Ingham v. Eastern Air Lines*, a government air traffic controller failed to warn a landing commercial airplane about certain hazardous weather conditions. The court found that even though the government's failure to provide necessary weather information set in motion a chain of events that resulted in the deaths of twenty-five individuals, the airplane crew was partially responsible because it negligently approached the runway. Although the court recognized the government's right to indemnification, the court held that because the two parties could be found equally blameworthy, the United States was not entitled to indemnity.

Since the rights of the United States under the *FTCA* are to be the same as that of a private individual under similar circumstances, the common law of the state where the United States wishes to be indemnified must be reviewed to determine whether indemnity is recognized and how the United States must plead its right to indemnity. New York allows indemnity between joint tort-feasors as long as the party seeking indemnification proves the passive nature of its own negligence and the active nature of the negligence of the party from whom it requests indemnification.

New York has determined that passive negligence includes a failure to warn. In *McFall v. Compagnie Maritime Belge*, the Belgian Line chartered a vessel on which a third party was to load drums of carbon tetrachloride. The drums were stored in the bottom of the ship; when one longshoreman went down into the hull, he was overcome by fumes from the leaking drums. The court found that the Belgian Line should have warned the longshoremen of the properties of the gas or should have cautioned them to employ special care in handling the drums. The court real-

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142. 373 F.2d 227 (2d Cir. 1967).
143. *Id.* at 240.
148. *Id.*
ized that even though such a warning might not have prevented the careless handling, one could find that the failure to warn played an important role in causing the accident. The court noted that the decision as to who is the more actively negligent is best made after the submission to the court of all the facts including each party's act and the relation of the parties to each other. Comparing the delinquency of both parties, the court found the longshoreman who handled the drums to be actively negligent and the Belgian Line who had failed to warn to be passively negligent.149

When the Love Canal plaintiffs seek to impose liability on the United States for injuries they have sustained from hazardous wastes, the United States can be expected to seek to shift their liability to the disposers. The United States should be successful in doing so if they can demonstrate that their failure to warn is negligence of a passive nature and the disposers' actions demonstrated negligence of an active nature.

When the United States seeks indemnity from a joint tortfeasor, it must prove the same elements of duty, breach, causation and damages as would a private plaintiff.150 In arguing a disposer's duty to exercise care in dumping waste, the United States will be aided by New York cases which discuss a landowner's duty of care.151 In Miner v. Long Island Lighting Co.,152 the court found that stringing high-voltage lines between closely-spaced, private residences increased the risk of harm to residents to the highest order and correspondingly imposed upon the power company controlling the lines the duty to do so with due care.153 The defendant could, therefore, be held liable when injury resulted from his failure to make an inspection of these lines that were under his control for thirty years. In Meyer v. State,154 the state was held proportionately liable with a student who had leaned on and fallen from a dilapidated bridge on a back path of a state university campus. The court ruled that the foreseeability that students would use the back paths of the campus imposed a duty on the school to use reasonable care in maintaining the condition of the paths. That standard contemplated the school's conducting an inspection of the

149. Id. at 328-30, 107 N.E.2d at 471-72.
150. The focus of this Comment is on the United States' duty to the Love Canal plaintiffs as well as Hooker's duty to dispose of its wastes in a safe manner. For considerations of the elements of knowledge of the risk and causation, which will be important in a Love Canal plaintiff's suit against the United States and a United States' suit against a disposer, see infra note 186.
153. Id. at 379, 353 N.E.2d at 809, 386 N.Y.S.2d at 847.
area which would have disclosed the condition of the bridge. In its suit for indemnification based on negligence theory, therefore, the United States will not only rely upon the passive-active negligence line of cases but will also stress that the disposer's actions constitute a breach of the standard of care which New York has imposed on landowners.

2. Nuisance Theory

As an alternative theory for indemnification, the United States may elect to proceed under a nuisance theory. The United States has previously sought relief from polluters based on a public nuisance theory. A public nuisance claim is often brought by government officials to remedy an act which interferes with the rights of the general public. In hazardous waste pollution cases, the United States has brought suits pursuant to the Resource Conservation and Recovery Act of 1976 (RCRA). Section 7003 of the Act permits the Administrator of the Environmental Protection Agency (EPA) to bring a suit for injunctive relief and any other relief against a handler of hazardous waste upon evidence that the handler's activity presents an imminent and substantial danger to the public health or to the environment. One of the relatively few courts which has interpreted section 7003, however, held that this section is a jurisdictional pro-

155. Id. at 997, 403 N.Y.S.2d at 424.
157. See generally W. PROSSER, supra note 39, at § 88.
159. Id. § 6973. The section reads:
Notwithstanding any other provision of this chapter, upon receipt of evidence that the handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste is presenting an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person for contributing to the alleged disposal to stop such handling, storage, treatment, transportation, or disposal or to take such other action as may be necessary. The Administrator shall provide notice to the affected State of any such suit. The Administrator may also, after note to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and the environment.
160. See ALI-ABA, supra note 8, at 143-75. See, e.g., United States v. Chem-Dyne, No. C-1-79-703 (S.D. Ohio, filed Dec. 19, 1979) (1.5 million gallons of hazardous chemical wastes were disposed of on a four acre site); United States v. Seymour Recycling Corp., No. IP-80-457C (S.D. Ind., filed May 9, 1980) (13-acre chemical treatment and storage facility, containing 40-60 thousand 55-gallon drums of hazardous materials, is located within 3,000 feet of residential dwellings); United States v. Diamond Shamrock Corp., No. C-80-1857 (M.D. Ohio, filed Oct. 7, 1980) (three-quarters of a million tons of chromate wastes were dumped on a 100-acre tract of land between 1931 and 1972).
vision and any obligations, duties, disabilities or liabilities which may be imposed are created by the federal common law of nuisance. Of significance to the United States under the procedure proposed in this Comment is judicial support for the theory that the United States may request damages when asserting a claim under the federal common law of nuisance.

IV. AN ALTERNATIVE ROUTE TO ESTABLISHING LIABILITY FOR HAZARDOUS WASTES

A Love Canal plaintiff may seek damages for his injuries from hazardous wastes by asserting the United States' liability to him under the FTCA. Under the framework of this Act, a plaintiff would argue that the United States' undertaking in the waste disposal area pursuant to the Public Health Service Act of 1944 (PHSA) was a "gratuitous undertaking." As such, it arguably established the United States' duty to them under section 323 of the Restatement (Second) of Torts. A Love Canal plaintiff would then demonstrate the following elements of a section 323 action: that the United States owed them a direct service and that they either detrimentally relied on this undertaking or that the undertaking increased their risk of harm.

To establish that the United States' undertaking was intended to provide a direct service, a Love Canal plaintiff should assert that this goal was clearly expressed in the statute and regulations promulgated thereunder. Under the PHSA, the United States undertook to "conduct research, experiments, demonstrations and studies regarding the methods of sewage disposal in sanitary landfills." Though couched in broad, philanthropic terms, the purpose of these undertakings was to benefit United States citizens.

162. United States v. Illinois Terminal R.R., 501 F. Supp. 18 (E.D. Mo. 1980). In this case, the United States sought to recover costs of removing an obstruction and to recover damages alleging that the obstruction was a nuisance. The court stated that equitable relief was not the exclusive remedy under a public nuisance theory.
163. The Public Health Service Act of 1944, ch. 376, § 301, 58 Stat. 691 (1944) (current version at 42 U.S.C. § 241 (1976)). While it has been alleged that the United States dumped wastes from the Manhattan project near the Love Canal site from 1944-1946, and the United States might theoretically be sued for those acts, this Comment focuses on a suit where Love Canal plaintiffs would premise United States liability solely on its negligence in carrying out its responsibilities under the PHSA. See [1981] 11 ENV'T REP. (BNA) 1927.
165. See supra notes 65-85 and accompanying text.
166. See supra notes 86-92 and accompanying text.
167. See supra notes 93-104 and accompanying text.
zens by studying the "causes, diagnoses and treatment of certain impair-
ments of man, among these namely, sewage treatment."169

The Act also provided that the United States render assistance on these
problems to local authorities.170 A court may be expected to examine this
particular undertaking, as the court did in Roberson v. United States171 to
determine whether the plaintiff or a third party was the intended benefici-
ary of this service. If a Love Canal plaintiff cannot demonstrate that he,
rather than the local authorities, was to be the intended beneficiary, then
his action will not survive past the direct service requirement. To deter a
court from finding that local health authorities were the intended benefici-
caries of the federal government's assistance, a Love Canal plaintiff
should stress that since he was the party who would suffer disease or im-
pairment from improper disposal practices, he was the intended benefici-
ary of the PHSA's undertaking.

When examining the direct service element of a Love Canal plaintiff's
suit, a court will engage in the same type of regulatory and statutory analy-
sis as the courts did in Clemente v. United States172 and Raymer v. United
States.173 A Love Canal plaintiff should stress that the United States' un-
dertaking pursuant to the PHSA is similar to the United States' undertak-
ing in the Federal Coal Mine Health and Safety Act (FCMHSA) reviewed
in Raymer. Both statutes evidence a mandate to provide protection for
United States' citizens. In contrast, the PHSA is much more oriented to-
ward a specific goal than the statute examined in Clemente which solely
granted the Administrator of the FAA the discretionary authority to pro-
mulgate air traffic safety regulations.

United Scottish Insurance Co. v. United States174 generally instructs that
a plaintiff who seeks to impose section 323 liability in federal court must
show that that action is recognized under state law. Such an action is rec-
ognized by New York courts.175 In Schwartz v. Greenfield, Stein and Weis-
ingner,176 for example, liability was imposed on an attorney who undertook to file a security agreement for a client, but failed to do so. The
attorney was required to make restitution to the client for the amount of
the security interest.

170. Id. § 241.
171. 382 F.2d 714 (9th Cir. 1967). See supra notes 18, 65-85 and accompanying text.
172. 567 F.2d 1140 (1st Cir. 1978). See supra notes 69-75 and accompanying text.
174. 614 F.2d 188 (9th Cir. 1979). See supra notes 77-78 and accompanying text.
175. See supra note 57 and accompanying text.
Once a Love Canal plaintiff has demonstrated that the PHSA was an undertaking of a direct service to him, he must demonstrate that he detrimentally relied on this service or that the service increased his risk of harm. *Indian Towing Co. v. United States*\(^{177}\) recognized that where the United States' conduct has engendered reliance and where a plaintiff has been harmed thereby, the United States may be liable. Where the undertaking doesn't involve an outward act, but rather a regulation or order, a plaintiff must allege his reliance on the acts required by that order.\(^ {178}\) A Love Canal plaintiff must therefore argue that he was harmed as a result of relying on the United States' undertaking to supervise national disposal practices and to study the impairments to them from this activity.\(^ {179}\) Of particular benefit to a Love Canal plaintiff in establishing detrimental reliance is the recognition in section 323 that courts have tended to seize upon almost any trivial and technical conduct of the defendant, to find that he has . . . 'entered upon' his undertaking. Thus the defendant is held liable where he has merely received a document . . . although such acts themselves have played no part in inducing the plaintiff's reliance or in causing harm to him.\(^ {180}\)

In analogizing the activities of the United States to that of private individuals, a Love Canal plaintiff should argue the similarity between the United States' undertaking and that of the defendants in *Zibbon v. Town of Cheektowaga*.\(^ {181}\) In that case, New York imposed liability on defendants who had assured plaintiffs protection and withdrew that protection without warning the beneficiaries. With regard to waste disposal in the 1940's and 1950's, the United States acted in a similar manner. Pursuant to the PHSA, it undertook to be the wellspring of investigative efforts in the waste disposal area. Despite this undertaking, the federal government did not conduct research, experiments, demonstrations or studies regarding the methods of sewage disposal in sanitary landfills. If such studies were undertaken, the federal government breached the duty it assumed by failing to warn of the dangers of existing disposal methods or by failing to advise

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179. Tactically, Love Canal plaintiffs may be able to demonstrate their reliance on these undertakings by introducing letters they had written to local or federal health authorities which questioned the safety or propriety of dumping practices.
180. *Restatement (Second) of Torts* § 323, Comment d (1965).
181. 51 A.D.2d 448, 382 N.Y.S.2d 152 (1976). *See supra* notes 100-02 and accompanying text.
the Love Canal residents that it was not providing the services it had undertaken.

As an alternative to demonstrating their detrimental reliance, a Love Canal plaintiff may premise section 323 liability by demonstrating that the United States' undertaking increased his risk of harm. United States v. Gavagan 182 and United States v. DeVane, 183 as well as the New York cases of Zibbon v. Town of Cheektowaga 184 and Nallan v. Helmsley-Spear, Inc., 185 generally instruct that a plaintiff demonstrates his increased risk of harm by arguing that he exercised few precautions because he relied on the defendant's undertaking. To demonstrate this element, therefore, a Love Canal plaintiff must argue that he failed to move from the area or take other precautions to ensure his safety because he relied on the investigatory and supervisory role which the United States undertook in this area pursuant to the PHSA. 186

182. 280 F.2d 319 (5th Cir. 1960). See supra notes 93-96 and accompanying text.
183. 306 F.2d 182 (5th Cir. 1962). See supra notes 97-99 and accompanying text.
186. See supra notes 125-39 and accompanying text. To successfully allege a tort action, a plaintiff must prove that the defendant owed him a duty, that the duty was breached, and that the breach caused him injury and the extent of his damages. While this paper focuses on establishing the United States' duty to a Love Canal plaintiff, a Love Canal plaintiff must also offer proof on the other elements of a tort.

Of particular importance to this action would be demonstrating that the dangers of improper dumping of chemicals wastes were capable of discovery. New York has long recognized that the risk reasonably to be perceived defines the duty to be obeyed. Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99 (1928). Since the United States can only be responsible for facts which it could have discovered, demonstrating the United States' knowledge of the dangers of current disposal practices is crucial to a finding of liability.

This will require that plaintiffs show that even in the 1940's, waste disposal authorities realized the potential danger of the current methods of industrial waste disposal and knew of precautions which could have been utilized. It will be easier to show this knowledge from the mid-1960's to 1976 because of increased legislation dealing with this specific problem. See generally Goldfarb, The Hazards of Our Hazardous Waste Policy, 19 NAT. RESOURCES J. 249 (1979); 3 R. POJASEK, TOXIC AND HAZARDOUS WASTE DISPOSAL 1-11 (1977). In the early 1960's, however, some authorities were aware of the potential danger in current disposal practices. For an article primarily concerning the hazards of chemicals from military and space programs but which mentions the greater potential for harm when these substances meet with industrial chemicals from civilian commerce, see Report to the Legislative Drafting Research Fund, On Credible Catastrophic Eventualities in Selected Areas of Government-Sponsored Activities, Columbia Univ., Sept. 1963. At that time, engineers recognized the migratory nature of certain wastes disposed in landfills and warned of the dangers in disturbing the waste deposits by too rapid development or construction in the area. R. Ross, INDUSTRIAL WASTE DISPOSAL (1968). Ross states:

There are several factors which should be considered carefully before burial or open landfill is used as a means of disposal. The first consideration is that of ero-
B. Meeting the United States’ Defenses

After establishing a prima facie case, the Love Canal plaintiffs must

sion. Many types of mixed wastes are by nature porous. Therefore, unless this material is to undergo many years of natural compaction due to exposure to the elements and decay before the land is reclaimed for industrial or domestic building purposes, it is necessary to consider more than just the mere dumping of the waste into a land depression. If the area is to be reclaimed within a short period of time (several years after the land is used for disposal), then some artificial compaction method must be applied to increase the density of the area to prevent erosion of the subsurface and to fill the voids between the various materials used for land fill. This is strictly a problem of soil mechanics and requires a study of the water runoff in the area to be sure that the land fill operation produces the desired result.

The second important consideration is that of contamination. While garbage and many other types of domestic wastes have been used for land fill operations, the problems of odor and rodent control can be serious. More important, however, is possible contamination of the water shed or underground streams by the leaching operation of rainwater passing through the waste and removing toxic or other contaminative materials from the waste and depositing them in wells or springs within the area. Therefore, it should be a concern of the engineer involved in land fill operations to dump only those things which cannot cause such future contamination near the disposal area.

Id. at 260-61.

To establish that the dangers of disposal practices were recognized prior to the 1960’s, a Love Canal plaintiff may have to rely on local health reports and studies, such as the one conducted in Niagara Falls. See Havens & Emerson, supra note 24, at xi. Plaintiffs can expect the United States to assert the defense that waste disposal was accomplished in accordance with the then-current technology and state of the art. Plaintiffs who sued chemical companies for damages caused by diethylstilbestrol (DES) also faced the problem of showing their defendants’ knowledge of the lack of safety of their undertaking. Several DES plaintiffs successfully proved this in Bichler v. Eli Lilly & Co., 436 N.Y.S.2d 625 (App. Div. 1981). See Note, Market Share Liability: A New Method of Recovery for D.E.S. Litigants, 30 Cath. U.L. Rev. 551 (1981). Plaintiffs should argue that methods employed in any trade, business or profession, however long they have been used, cannot be established as safe in law when they are dangerous in fact. See Tug Ocean Prince v. United States, 584 F.2d 1151 (2d Cir. 1978); see also The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932).

Another crucial element for a Love Canal plaintiff to prove is that the improper disposal of chemicals caused his injury. Proving that the chemicals deposited at Love Canal have caused cancers, miscarriages and birth defects may be the most difficult task facing a plaintiff. See Tilitz, Judicial Attitudes Toward Legal and Scientific Proof of Cancer Causation, 3 Colum. J. of Envir. L. 344 (1977); McGarity, Finessing Causation: Three Novel Theories of Recovery for Carcinogenic Risk, ALA-ABA, supra note 8, at 326. To prove causation, the plaintiff must be able to isolate the harm-causing substance, trace its pathway of dispersal from the polluter to the victim, and show the etiology of the harm-causing substance. Theoretically, absent extensive data, causation cannot be firmly established. Even with a full-scale epidemiological study, defendants can usually produce their own experts who will testify that the disease or defect was caused by some other source. Proposasl, supra note 38, at 706. Despite these difficulties, courts have exhibited some degrees of willingness to recognize that drugs and man-made substances, see, e.g., Urie v. Thompson, 337 U.S. 163 (1949), can result in human disease. Alternatively, plaintiffs can point to the statutory definition of hazardous wastes which is contained in the Resources Conservation and Recovery Act (RCRA);
meet the United States' defenses of the statute of limitations, discretionary function and misrepresentation. The United States may be expected to raise the statute of limitations as its first defense. A plaintiff will be able to overcome this defense if he demonstrates that he presented his claim in writing to the appropriate agency within two years after the claim accrues or within six months after the date the agency mails the notice of its final denial of the claim. The issue that will prompt greater debate under the statute of limitations defense, however, is whether a plaintiff's claim accrues on the date he first comes into contact with a toxic substance or on the date that he discovers he has been injured. New York courts have held that a tort plaintiff's claim accrues on the former date while federal courts, in ruling on FELA and FTCA suits, have favored the latter date. A Love Canal plaintiff must argue that federal law governs when a claim accrues for FTCA statute of limitations purposes, and that the Supreme Court has addressed the issue of when a claim accrues in latent injury cases. As the Supreme Court has stated in Urie v. Thompson, the claim of a plaintiff who suffers a delayed manifestation injury doesn't accrue until he becomes aware of the injury. Expressing similar concern for a plaintiff's rights in a medical malpractice case under the FTCA, the Supreme Court in United States v. Kubrick held that a plaintiff's claim accrues when he learns of the injury and its suspected cause. At that point, the plaintiff was charged with the task of determining whether his injury was caused by negligence. Therefore, a Love Canal plaintiff must show that he has presented an administrative claim either within two years after learning of his injury and of the present contamination of his body by chemicals disposed at the site or within six months after his claim has been administratively denied. In arguing against application of New York's accrual of injury theory, a Love Canal plaintiff should stress that the Court's holding in Kubrick was based on the Urie rationale of fairness to a latent injury plaintiff.

The United States will next assert the discretionary function defense

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hazardous wastes are defined there to be those which cause certain diseases. See supra note 3 and accompanying text.

190. Kossick v. United States, 330 F.2d 933 (2d Cir. 1964). See supra notes 105-08 and accompanying text.
which has been its most successful defense under the FTCA. Specifically, the United States would stress that its enactment of the PHSA was a policy decision involving government discretion and that this should shield the United States from liability. To counter this defense, a Love Canal plaintiff should argue that despite the initial policy decision to enact the PHSA and to assume its duties, the United States was negligent on an operational level in failing to fulfill the duties imposed by the Act. As the Supreme Court held in Indian Towing Co., an initial exercise of discretion by the government would not excuse subsequent negligence in implementing that government policy. Thus, a Love Canal plaintiff must show that the United States was negligent in implementing the Act by disregarding disposal research and by failing to provide him directly, or via local health authorities, with information on the risks involved in current methods of disposal.

Finally, the United States can be expected to claim that a Love Canal plaintiff's cause of action is based on a theory of misrepresentation. The United States may acknowledge that its failure to warn residents was an implicit representation that the area was safe. It would then argue pursuant to the Supreme Court's holding in United States v. Neustadt that this misrepresentation is the cause of a Love Canal plaintiff's injury. As Neustadt made clear, if an injury results from reliance on a statement, the misrepresentation defense applies. To overcome this argument, a Love Canal plaintiff must assert that he has been injured by the United States' negligent conduct in allowing the dumping of hazardous wastes to continue. A Love Canal plaintiff would argue Neustadt's recognition that the misrepresentation defense does not shield the United States from liability where injury results from negligent conduct as it did in Indian Towing Co., where the United States failed to keep a lighthouse operating.

V. THE UNITED STATES' SUIT AGAINST THE DISPOERS

A. Negligence Theory

The FTCA allows the United States to seek indemnification from a joint tortfeasor if indemnity is recognized under state law. As the court in McFall v. Compagnie Maritime Belge described the application of this

194. See supra note 115 and accompanying text.
theory in New York, a passively negligent party, who has failed to warn, may seek indemnity from an actively negligent party as long as the passive party demonstrates the corresponding nature of both party’s acts. Under this framework, the United States would argue that though it may have passively sanctioned Hooker’s waste disposal by failing to warn area residents of the dangers involved in the chemical company’s activity, Hooker was the actively negligent party because it disposed of wastes in an improper manner.

Additionally, the United States would offer proof on each of the elements of the prima facie negligence case. In establishing Hooker’s duty to dispose of its wastes in a safe manner, the United States should argue cases discussing a landowner’s duty of care. In Miner v. Long Island Lighting, New York charged a landowner with the duty of making investigations of property under his control. Similarly, in Meyer v. State of New York, a landowner was required to keep objects on his property in good repair. The United States should argue that Hooker fell far short of these obligations when it continued to dump hazardous wastes at the Love Canal site, despite its knowledge that the chemicals were not being con-

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199. See supra notes 150, 186 and accompanying text.
200. See supra notes 151-55 and accompanying text.
203. See DISPOSAL HEARINGS, supra note 1, at 665. See Comment, Love Canal, supra note 8, at 143. On the element of Hooker’s foreseeability, this article states:

Chemical companies such as Hooker know, or at least should have reason to know on the basis of the training that every chemist, chemical engineer, and chemical technician receives, that no responsible chemical laboratory operation, whether under industrial, academic, or other auspices, would tolerate in its small-scale bench activities waste disposal practices analogous to the large scale plant-level dumping practices conducted at Love Canal. Chemistry and chemical engineering laboratories characteristically and routinely maintain safe disposal vessels for different classes and types of compounds. When landfill disposal must be resorted to for lack of any reasonable alternative, they specify procedures calculated to avoid or at least minimize the known or knowable risks of environmental contamination or health hazard. They insist on rigid preventive and corrective standards and procedures relative to any possibility of present or future hazards arising from fire, explosion, toxicity, spillage, radiation, electricity, and the like. (emphasis in the original).

Id. at 143 (citing H. STRAUSS, HANDBOOK FOR CHEMICAL TECHNICIANS § 10-6 (1976)).

On the issue of Hooker’s disclaimer of liability which it included in its deed to the School Board, see N.Y. GEN. OBLIG. LAW § 15108 (McKinney 1978) (where one tort-feasor executes a disclaimer, an injured party is not thereby prevented from suing another tort-feasor). Furthermore, at common law, New York has not allowed such disclaimers to exempt the executing party from liability where to do so would be against public policy. Bradley Realty Corp. v. State of New York, 54 A.D.2d 1104, 389 N.Y.S.2d 198 (1976).
tained and that they were leaching and causing physical injuries to neighboring residents.

B. Nuisance Theory

The RCRA allows the United States to seek injunctive and other necessary relief against a disposer whose activity presents an imminent and substantial danger to health and the environment. Since RCRA is arguably only a jurisdictional statute, the United States must allege a theory of liability against a disposer. In RCRA suits filed against hazardous waste disposers, the United States has asserted the federal common law theory of public nuisance. Utilizing this theory in the Love Canal context, the United States has specifically alleged that Hooker's activity presents an imminent and substantial endangerment to the health and welfare of the United States citizens. In addition to an injunction, the United States has prayed that the court order Hooker's compliance with a remedial plan requiring Hooker to construct grout curtain walls to prevent further leaching, pay for a health monitoring system and reimburse the United States for its remedial costs in the area.

V. Conclusion

Under the procedure suggested in this Comment, Love Canal plaintiffs, the federal government, and the Hooker Chemical Company will be attempting to apply traditional theories of liability to redress or defend injuries from a relatively newly discovered source. The FTCA has proven to be a satisfactory vehicle for recovery for plaintiffs who can weave their path through the twists and turns of its discretionary function and misrepresentation defenses. One advantage of the Act for a Love Canal plaintiff is the Act's reliance on federal law to determine the accrual date of an injury, because federal law has been more sympathetic than New York law to plaintiffs who have suffered latent injuries. The FTCA also provides the United States with the ability to argue its right to indemnity from Hooker. The United States' alternatives of suing for indemnity under the FTCA, or for equitable and compensatory relief under RCRA, should help to mitigate judicial concern about the chilling effect on future United States' un-

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205. See supra note 161 and accompanying text.
207. Id. at 40-45.
dertakings which might result from imposing extensive liability on the United States.

Valerie J. Stanley