

**Utilizing Scientific Testimony—
ENVIRONMENTAL HEALTH
—The ATL Monograph Series—**

Edited by

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UTILIZING SCIENTIFIC TESTIMONY— ENVIRONMENTAL HEALTH

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APPENDIX

§ 1 Natural resources as trust—balancing of interests

MR. VICTOR YANNAKONE*: Ladies and gentlemen. This morning I have to go to court to ask for a preliminary injunction, to protect what I will tell you about this morning, which is that certain natural resources are held in trust for the citizens of the United States.

There are three problems in what we are now calling environmental law. The first is the problem of natural resources. What is a natural resource? Is it something that can be dug up out of the ground, used for private gain, used for private profit only, or is it something that belongs to each of us as a private citizen?

And the second problem is what to do. What do you do about a toxicant like DDT, which is ubiquitous in this world? Every plant, every home contains some quantity of DDT. What do you do about something causally rated to produce a particular injury in a particular individual? What do you do about balancing the need for supersonic aircraft as against the need of people to have a certain amount of privacy against the effect of sonic booms? What do you do when the Army engineers decide to build in the Grand Canyon and do not know why? When they need a new dam on the Red River Gorge, on the Kentucky, to make up for the one they sold? What do you do in these cases? I tell the citizens who come to me with these problems that they must sue somebody.

The third problem concerns who, and how, and for what purpose. Defending the environment is like defending an indigent criminal. If you are rich, well-established, have a massive

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law firm, and the criminal case is of much significance, it can be done. If you don't have all those advantages going for you, it becomes an obligation and an onerous duty.

§ 2 Defending the environment—the class action

Since the environment belongs to everybody, nobody wants to pay for it. Since it depends in some measure on a balancing of interests, nobody is sure who is going to benefit from your acts. If you are going to defend, you must do it outside the realm of torts, no private damage actions.

The problem in defending environment is: What do we do about those environmental problems which cannot be immediately transferred to a group of scientists and citizens who have decided to take legal action? They don't lobby; they don't educate; they don't politic. The technique is the class action.

§ 3 Broadening Environmental Defense Fund

The Environmental Defense Fund must be broadened. The Environmental Defense Fund was late in its application of the class action techniques to DDT and to the defense of the Florissant fossil beds, which are this afternoon in danger of bulldozing. And on behalf of all those of this generation and future generations and *of their right of enjoyment without destruction of the land by the activity using the land*, we assert that every piece of land that can be shown to be a unique natural resource—or as we say in our litigation, you need "natural" natural resource—is covered with a trust for the benefit and use of the people to be used wisely for their benefit.

§ 4 Lawsuits against DDT—necessity of private damage

Some of the exploitations like DDT need to show cause why the entire world should be contaminated. All those lawsuits need to show private damage of significance to justify stopping a major industry or occasion some kind of economic loss to the defendants.

Dr. Gordon, who will speak to you sometime this morning, is a botanist. He is now probably one of the world's leading authorities on air pollution. And because of the failure of the

existing standards in air pollution, to justify certain types of damage actions, we have had to go to plants as indicators of the world wide problems of contamination.

§ 5 —Inadequacy of legislative solution

Dr. Wurster, who was going to speak to you this morning about the pesticide problem, is now in California testifying before a special committee of the California State Legislature, trying to convince them that the problem will not be solved by a two-line bill that says the sale and manufacture of DDT in the State of California shall be banned, and that the problem is much deeper than that. And the problem is not confined to DDT. Any chemical that is loosed on the world becomes ubiquitous; any chemical that cannot be degraded in a reasonable period of time is an affront, a toxic insult to the people.

§ 6 Problem of burden of proof—proximate cause

The problem, as you will also hear from some of the other speakers this morning, is that of burden of proof. In a tort action, which we all bring and on which I used to make my living two and a half years ago, the plaintiff is required to prove with some preponderance of evidence that the complained of activities of the defendants will cause damage to the plaintiff, and he must prove that the activities are the cause of the damage, the proximate cause in most states.

You cannot do that with DDT. You cannot do that with the damming of the Red River Gorge. You cannot do that with drying up the Everglades. You cannot do that with the Miami jet port. You cannot do that with damming the Grand Canyon. You cannot do that because any damage that any individual might suffer can probably be recompensed with money.

§ 7 Damage must not be recompensable by money

The Federal Aviation Administration, we understand, is prepared to pay a million dollars a day in damage claims due to supersonic plane damage. Yes, the problem is not the damage that can be recompensed with money, but the damage that cannot be recompensed with money.

How is one citizen's damage going to be weighed against the need for the public for high speed transportation? It is not. But the people, with a capital P, in a class action do have standing and can do it.

§ 8 Two types of damage—against individual and against environment

This morning the one message the environmental fund will have and the one message that some of the environmental lawyers that are involved in this type of work would like to leave with all of you, is that the time has come to recognize there are two types of damage that can be found in the world today, due to modern technology.

Gentlemen, there is the damage that is directly expended against an individual, which could be compensated with the application of our existing tort law. And, there is the damage, the toxic insults to the environment itself, with a capital E, which belong to no one in particular but everyone in general.

If we keep chopping the trees and bringing tort actions individually as the damage gets that serious, before long people like Dr. Gordon can show you there just isn't going to be enough environment worth living in to make it possible for us to continue our way of life.

Therefore, we of the trial bar must do something.

Well, a year ago I went to the Ford Foundation, the Rockefeller Foundation, and a number of other foundations. And I asked them for help in bringing these class actions. One of their eminent Wall Street counsel told me that he could not recommend to the Foundation that they support our activity, because, "My God, Yannacone, if you win one of those cases, there's no telling who you'll sue next." This is true.

Some of you may have noticed that we brought three DDT suits and we won two and lost one. And DDT is on its way out.

§ 9 Relation of class actions to private damage actions

We have air pollution cases of the same type. In the wake of declaratory judgments asserting the public's right, as the data comes out from the scientists, as the public records are

finally exposed, class actions ultimately will follow the wave of private damage actions. But until the declaratory judgment actions establish the right to breathe, the right to drink clear water, the right to have the Red River Gorge preserved for all the people, rather than the water supply of some small town—until these rights are established, there is no place to go.

Gentlemen, as I run over to the courthouse and try to save a thirty-four million year old fossil bed from a private speculator's bulldozer, I leave you with a challenge, call it what you will. Please, in your other areas, look around you; and as a duty, the same as you defend an indigent criminal, do something to improve the quality of your environment.

§ 10 Saving a thirty-four million year old fossil bed

Seventeen miles outside of Colorado Springs, there is a thirty-four million year old fossil bed. Nobody knows what ultimately will be the value of that unique natural resource. There is a bill pending in Congress—the final hearings are tomorrow—seeking to have it designated as a national monument.

A few weeks ago four men bought the land and decided they were going to bulldoze roads through thirty-four million year old fossil beds for speculative development. We went to court and said: "You can't bulldoze thirty-four million years of geologic history in order to build thirty-year A-frame recreational housing. This is like using the Dead Sea Scrolls to wrap fish." The learned District Court held that you can't abridge the absolute right of private property ownership and yes, indeed, if you own the Dead Sea Scrolls, you can wrap fish in them.

Fortunately, the Circuit Court of Appeals felt that time should be given to everybody to develop their positions and a temporary restraining order was granted.

This morning the application is back before the original court on the question of whether or not there should be a preliminary injunction issued while Congress continues its deliberations.

There is no private damage in that case, but every individual in this room and everybody in the world will suffer a little bit if those fossil beds are bulldozed. The history of civilization has been a history of disasters. The salvation of civilization, genera-

tion after generation, has been some trial lawyer who stuck his neck on the line and did something. Thomas Becket and Thomas More lost their heads. Others have died.

§ 11 Need for environmental scientists, lawyers

If we wait for the Wall Street Bar to do it through legislation, as Ralph Nader said in Playboy and I think you all know the comment, "We'll have no environment to save."

Each and every one of you in your own hometown should look around for the gravest environmental insult. If you find a couple of local, sophisticated scientists who are willing to become what we now call environmental scientists and to get out of their particular specialty and to say, "My specialty relates to the whole world, and if you damage this particular piece of our environment without good cause, you are damaging me and every other citizen." State your right to a salubrious environment. You can establish that right by knocking on the door of every courthouse in the country.

THEN those of you who are interested in making money on the wave of private damage suits and tort litigation can follow. But until the rights are established, until every lawyer is willing to assert a basic constitutional right on behalf of the people, with a capital P, and on behalf of a salubrious environment, there isn't going to be anything worth fighting over in a few years. Gentlemen, the court calls. Thank you all.

§ 12 Role of environment in head-on crashes

DR. HORACE CAMPBELL*: It has been a rather stale truism that the present factors in traffic are the driver, the car and the road. Well, when we say the road we ought to say the environment. And that's how we come into this picture.

Now, probably the most damaging thing to one car is another car going in the opposite direction but in the same environment. Head-on crashes account for forty per cent of our traffic fatalities. The head-on crash is particularly serious because sometimes two, four, six, eight or even ten people are killed in one head-on crash. So these crashes which are occurrences in the environment

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