Reducing Risk By Creating Accountability

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Introduction

The Walkerton Inquiry's Expert Meeting on Guiding Principles for Drinking Water Safety was supposed to address risk management issues, including accountability. The agenda posed the following question: "What are the requirements for accountability for various actors, and, in particular, how does (or should) a risk management approach distribute accountability among the actors?" The notes on the meeting indicate that there was very little discussion in this area. The silence is unfortunate, since the distribution of accountability is at the heart of risk management.

The distribution of accountability is, in essence, the allocation of risk. It governs who is responsible and, ultimately, who will pay the price if things go wrong. But accountability is not merely about punishment: More important, it is about prevention. The distribution of accountability affects the level of care that is taken by various parties. Different accountability regimes assign different levels of responsibility to the regulator, the provider, the polluter, and the public. One challenge of the Walkerton Inquiry is to identify and promote accountability regimes that increase the level of care, and thus reduce risk.

The current accountability regime in Ontario does little to increase the level of care or to minimize the risks inherent in the treatment and distribution of drinking water and the collection, treatment, and disposal of wastewater. It is rare for polluters, providers, or regulators to be held accountable for the costs and risks of their actions or inactions. Risks are all too often borne by consumers, down-streamers, and taxpayers. The Walkerton tragedy illustrates the perversities of such a distribution of risk. Local consumers bore the health risks and provincial taxpayers bore the financial risks, even though neither group was in a position to prevent the tragedy. Those that could have done so – the polluters of the groundwater, the providers of the tainted water, and the regulators of the system – have yet to be held accountable.

Many would argue that specific risks should be allocated to the parties that have the greatest control over them and that can most effectively and efficiently reduce them. A detailed examination of which parties should bear which risks is beyond the scope of this submission. Certainly those who foul sources of drinking water should be held accountable for their pollution. And certainly regulators who fail to do their jobs should be called to account. But this submission focusses on the providers of water and wastewater services, who often have the most complete knowledge of risks and the clearest means to minimize them. We argue that the providers of water and wastewater services should be held accountable for the provision of these services. They should bear the health, environmental, and financial risks of poor performance. Even if providers can't directly bear health and environmental risks, they can and should bear the costs, both preventative and corrective, associated with such risks.

Creating Accountability through Legal Liability

The best way to promote accountability is to assign full legal liability for the adverse health and environmental impacts of water and wastewater operations. The threat of liability for poor performance creates powerful incentives to reduce risks by performing well. Indeed, incentives and deterrence are at the heart of liability. As law and economics professor Michael Trebilcock explained of tort liability, "law and economics scholars more or less universally view the purpose of damage awards as creating appropriate incentives to take precautions on the part of injurers to avoid accident costs to potential victims."[1] Under a liability regime, a utility – or an individual employee – doesn't avoid harm simply because some regulation requires it to do so. On the contrary, it avoids harm because doing so is in its financial interest. In minimizing risks, it minimizes potential costs. Liability, in other words, internalizes the risks and costs of water supply and sewage treatment. It ensures that utilities' owners and operators bear the consequences of their chosen methods of treatment, testing, and delivery. Under a liability regime, the pressure to perform well comes from within.[2]

In order to maximize liability's deterrent value, the consequences of poor performance must be immediate and direct. Liability most powerfully influences those who will bear financial responsibility for their actions – the operator or manager who will lose his job, the municipality that will face stiff fines, the firm that will lose both profits and clients, or the shareholders who will lose their shirts. Few such penalties now apply to public-sector providers; in some cases, they do not even apply to private-sector providers. Policy reforms are needed to increase the effectiveness of a liability regime in both the public and private sectors.

The penalties for doing harm differ somewhat under our two different legal traditions. They may result from prosecutions under public law, in which case they generally take the form of fines for violating statutes or regulations. Alternatively, they may result from law suits brought under private tort law. Under this long established but now frequently weakened form of liability, a party that violates others' common law property rights – usually, by creating a nuisance – may face an injunction or may be required to pay damages to its victims. While both prosecutions under public law and law suits under tort law are primarily reactive (unlike regulation, which is proactive), both are powerfully prophylactic. Unfortunately, in Ontario, the providers of water and wastewater services have rarely been held accountable under either public or private law.

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[1] Michael Trebilcock, testifying as an expert at *Energy Probe et al. v. The Attorney General of Canada*, October 14, 1993, Transcript Volume 3, 283, 27-30.

[2] Experience in diverse fields confirms that strict liability – under which non-negligent defendants are held liable – increases incentives for responsible behaviour. Stricter product liability laws in the United States have led to the improved safety of many products. Similarly, increased medical malpractice premiums have prompted doctors to change their procedures. Michael Trebilcock and Ralph Winter, *The Impact of the Nuclear Liability Act on Safety Incentives in the Nuclear Power Industry*, Exhibit 967 in *Energy Probe et al. v. The Attorney General of Canada*, April 29, 1993, pp. 9-12, 22-5.

Before the Walkerton tragedy, successive Ontario governments rarely held the owners or operators of water or wastewater systems liable for poor performance.[3] As is documented in the last two chapters of *The Promise of Privatization*, Energy Probe Research Foundation's first submission to the Walkerton Inquiry, governments laid charges for only a tiny fraction of utilities' frequent violations of statutes and regulations. In the paper, we suggest that this failure of regulation is to be expected in a publicly operated and publicly funded system, since governments are naturally reluctant to prosecute themselves and to require expensive repairs and upgrades that they will ultimately have to pay for. We propose privatization as a way to reduce this conflict of interest and to free up governments to regulate. In *Guiding and Controlling Ontario's Future Water and Wastewater Services*, our second submission to the Walkerton Inquiry, we propose establishing an Ontario Environmental Protection Agency, under the Minister of the Solicitor General, to enforce environmental laws and regulations. In creating distance between policy-making and abatement on one hand, and policing on the other, such a change could correct some of the reasons behind the province's long-standing failure to enforce public law.

Public law is not alone in its failure to provide accountability. Private law, too, has failed. Private citizens are not restrained by the conflicts of interest or policy considerations that paralyse governments. Yet, private citizens seem no better than governments at holding utilities accountable. They almost never sue over the commonplace violations of their property rights. This is not because they would not like to do so. Instead, it is because a number of factors shield utilities – especially, but not exclusively, those that are publicly owned and operated – from full liability.

Barriers to Liability Under Private Law

Historically, the law shielded the Crown from liability for most of the harms it caused. The traditional

[3] In contrast, the United States has begun holding the owners and operators of water and wastewater facilities liable for poor performance. In August 2000, in an unprecedented decision, a US District Court granted motions holding Robert and Natholyn Adcock personally liable for violating the Safe Drinking Water Act. The Adcocks, owners of 11 drinking water systems serving more than 20,000 Californians, had been accused of violating regulations regarding microbiological contaminants, lead, and copper and of falsifying lab reports to hide the violations. They had argued that any liability that did exist should attach not to themselves but to their corporation. The court replied that the US Congress had clearly intended to impose liability on persons or entities directly responsible for violating the SDWA. "Nothing in the SDWA," it explained, "suggests that Congress intended persons directly responsible for violations to be shielded from liability because they were employed by or acting on behalf of the corporation which actually owned the water system." The court found that it had sufficient evidence to hold the Adcocks liable on the basis of their personal conduct. The ruling left the Adcocks facing fines of up to US$27,500 per day for each violation. (United States Environmental Protection Agency, "Monterey County Water Suppliers Face Drinking Water Penalties," Region 9 news release, September 13, 2000; and United States District Court for the Northern District of California, San Jose Division, Order granting plaintiff's motions for partial summary judgment in *United States of America v. Alisal Water Corporation et al*., August 23, 2000.) That year, several sewage polluters also faced large personal fines for their wrongdoings.

common-law doctrine of Crown immunity was rooted in the divine right of kings and the belief that the king could do no wrong. In the last half-century, a number of statutes have limited this ancient doctrine, repealing many of the immunities it conferred. In Ontario, the Crown continues to benefit from broad protections. It enjoys considerable immunity from statutes, being bound by them only when expressly stated or necessarily implied. It also enjoys special protections from remedies available under tort law: The *Proceedings Against the Crown Act* forbids courts from granting injunctions against the Crown or its servants and from making orders for specific performance.[4] Furthermore, although no such legislation prevents courts from awarding significant punitive damages against the Crown, they may be reluctant to do so, knowing that taxpayers, rather than the wrongdoers themselves, will ultimately have to foot the bill.[5]

Courts also grant governments immunity from the consequences of policy making. Governments, they rule time and again, should not be held liable under tort law for the results of decisions based on social concerns, economic expediency, or political practicability. Such decisions, at the heart of the political process, are not to be interfered with by the judiciary. Of course, courts do not give governments complete freedom to create harm. They distinguish between harms resulting from policy decisions and those resulting from operational decisions, condoning the former but condemning the latter. Lawyer William Bishop described the distinction as one between "a legally authorized imposition of loss and unauthorized sloppiness in the course of doing the authorized task."[6]

A case regarding sewer backups in Thunder Bay illustrates the distinction between harms associated with governing and those associated with supplying services. The trial judge found that the city's failure to separate its storm and sanitary sewers stemmed from a lack of funds and therefore qualified as a policy decision; the city would not be liable for the resulting damages. On the other hand, the city's failure to enforce its policy of disconnecting rainwater leaders from the sewer system was not a policy decision. The judge, explaining that "inaction for no reason cannot be a policy decision," found the city negligent on this count.[7]

Statutory protections go even further to protect municipal governments' utilities from liability under tort law. Ontario's *Municipal Act* shields municipalities, council members, and municipal employees and agents from common-law liability for poorly operating water and sewage systems by forbidding

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[4] Government of Ontario, *Proceedings Against the Crown Act*, Section 14.

[5] Kirk M. Baert, "Class Actions and Other Legal Considerations in Cases of Environmental and Other Mass Disasters," Paper delivered at *Guaranteeing Safe and Clean Drinking Water for Your Community*, Strategy Institute conference, Toronto, September 27-29, 2000, pp. 52, 73.

[6] William Bishop, "The Rational Strength of the Private Law Model," (1990), *40 University of Toronto Law Journal*, pp. 663-9 at p. 664.

[7] *Oosthoek v. Thunder Bay (City)* (1995), 24 M.P.L.R. (2d) 25.

nuisance proceedings in connection with the escape of water or sewage from water or sewage works.[8]

Even when governments or their employees are held liable for the harm they cause, the consequences for perpetrators may be minimal. Those responsible rarely suffer. Union rules and a culture of secure tenure within governments reduce the risk of dismissal. Ontario's *Municipal Act* protects municipal employees from other risks through both the provision of liability insurance and the payment of damages or costs awarded against them.[9] Furthermore, if damages are awarded against a city, taxpayers or ratepayers will generally bear the costs. This off-loading of financial responsibility reduces the deterrent value of liability. Indeed, some scholars believe that governments' monopolies on services and their powers to tax themselves out of financial binds largely desensitize them to the incentives otherwise associated with liability. According to law professor David Cohen, "while the government might appear to be acting like a private firm, there is no reason to think that it will respond to economic signals when it is not constrained by private capital, product, and labour markets. Thus, a primary idea behind tort law – that both actors bear the full cost of the activity that generated the loss – is inapt when the government is one of the actors."[10] Others counter that punitive damage awards preserve liability's deterrent value. Even otherwise cost-insensitive governments may be managed by politicians or departments that want to minimize the tax burden or maximize their own budgets by reducing the waste resulting from large damage awards. In Mr. Bishop's words, "There is always a margin somewhere, a margin that the law can play on."[11]

Although governments do enjoy many special privileges, they are not the sole beneficiaries of limits on liability. Albeit less frequently, both statute law and tort law also protect private operations and the people overseeing them. Ontario's *Proceedings Against the Crown Act* grants protections not just to the Crown but also to independent contractors employed by the Crown. Whether those protected from common-law liability under Ontario's *Municipal Act* include water and sewage contractors is unclear. Neither the *Municipal Act* nor the *Interpretations Act* defines "agent." Should the term include independent contractors employed by the Crown, liability for faulty operations would apply to fully privatized utilities but not to those whose operations are merely contracted out to the private sector.

In tort law, both public and private utilities can, under some circumstances, use the "defence of statutory authority" to elude responsibility for nuisances they create.[12] This defence indemnifies a party

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[8] Government of Ontario, *Municipal Act*, Section 331.

[9] Government of Ontario, *Municipal Act*, Section 50.

[10] David Cohen, "Suing the State," (1990), 40 *University of Toronto Law Journal*, pp. 630-62, at p. 661.

[11] Bishop, *op. cit*., p. 664.

[12] The following paragraphs draw on Elizabeth Brubaker, *Property Rights in the Defence of Nature*, London: Earthscan, 1995, pp. 93-112.

from liability if its activity has been authorized by statute and if the nuisance is an inevitable result of exercising that authority. In order to earn the defence, the party needs to prove that there were no alternative methods of carrying out the harmful work and that it was practically impossible to avoid creating a nuisance. Courts, in determining whether governments have indemnified particular activities, generally distinguish between permissive and mandatory statutes. Under the former, which maintain industries' discretion over operating methods and locations, industries are expected to act in conformity with private property rights and cannot claim the defence of statutory authority. Only when the harm is an inevitable consequence of a legislatively authorized activity does the defence apply. In mandating an activity or authorizing something to be done in a specific manner or location, the reasoning goes, the legislature sanctions all of its unavoidable consequences, including those that would have previously been forbidden.

While tort law allows the defence of statutory authority only when harm inevitably results from an activity mandated by statute, Ontario's legislators have made the defence more broadly available to the operators of sewage works in the province. The protections date back to 1956, when the provincial government passed *An Act to amend The Public Health Act*.[13] The new law was the government's response to two court cases regarding sewage pollution.[14] In both cases, the defendant municipalities had argued that they were operating under statutory authority. The courts rejected these arguments, explaining that regardless of whether the government had approved their sewage treatment plans, water pollution was neither an anticipated nor an inevitable result; the municipalities, albeit at great expense, could have installed larger or better plants. The courts therefore issued injunctions forbidding the municipalities from dumping raw sewage into local rivers. The decisions alarmed the government, which feared that they would set an expensive precedent. It knew that 65 other polluting municipalities would be vulnerable to similar injunctions, that many lacked the capital – or the credit to borrow money – to pay for necessary repairs, and that it would likely have to foot the bill for any upgrades required by the courts. The government took the easier route: It dissolved the injunctions against the two polluting communities. It then extended protection to other polluting communities by deeming any sewage project approved by the Department of Health to be operated by statutory authority. These protections still exist: They now reside in the *Ontario Water Resources Act*.[15] As long as the works are in compliance with the *Ontario Water Resources Act* and the *Environmental Protection Act*, they are deemed to be operated by statutory authority. They are thus effectively immune to tort law challenges.

The different liability exemptions discussed above have one thing in common: They all externalize the costs of poor performance. Taxpayers or the affected public are asked to pick up the tab for harm

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[13] For a detailed discussion, see Brubaker, *op. cit.*, pp. 83-92.

[14] *Burgess v. The City of Woodstock*, [1955] O.R. 814; and *Stephens v. The Village of Richmond Hill*, [1955] O.R. 806, aff'd [1956] O.R. 88.

[15] Government of Ontario, *Ontario Water Resources Act*, Section 59.

wrought by the utility. In short, liability exemptions are subsidies. And they are particularly dangerous subsidies at that, since, in shifting the costs of poor performance, they increase the likelihood of harm occurring. Where safety and environmental measures cost money, owners and operators must find it hard to justify large expenditures if their liability is limited. As economics professors Richard Stroup and Roger Meiners explained, "When accountability is not achieved by liability, the incentive to use resources efficiently and to avoid harm to others is weakened. This is especially true when the law weakens the relationship between a faulty decision and payment of resulting costs by the decision-maker. The result is a poorer economy."[16] Another result is increased risk to public health and the environment.[17]

Strengthening Liability Under Public and Private Law

Clarifying and strengthening the liability of those who own and operate water and wastewater facilities would, more than any other single change, promote compliance with provincial regulations. But it would also do more: It would promote responsible performance beyond that required by regulation. The regulators of water and wastewater utilities can only achieve so much. The best regulators, no matter how attentive, will never match the best managers in regard to their knowledge of system operations. They will never as completely understand the effects on performance of operational changes or new investments. They will never as fully grasp the costs and benefits of selected methods, or as precisely determine the most efficient use of resources. Nor will regulators ever completely control the day-to-day operations of the systems they oversee. They will never be as well equipped to foresee and avoid specific risks. It is therefore necessary to go beyond writing rules and regulations telling utilities how to operate. It is crucial to establish incentives for utility owners and operators to perform well along with disincentives for them to perform poorly – regardless of the regulatory environment in which they operate. Assigning wide-ranging legal liability for poor performance establishes such incentives. As law and economics professors Michael Trebilcock and Ralph Winter said of a different industry, "managerial incentives do matter: Increasing the relative benefits faced by management from increased safety will improve safety in a way that cannot be duplicated by regulation."[18]

Liability should therefore not be limited to its role in ensuring compliance with regulations. It should also

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[16] Richard L. Stroup and Roger E. Meiners, *Cutting Green Tape: Toxic Pollutants, Environmental Regulation and the Law*, New Brunswick (USA): Transaction Publishers, 2000, p. 14.

[17] Experience in other fields confirms that immunizing people or industries from risk and responsibility decreases their level of care. After Quebec adopted a no-fault automobile insurance system in 1978, automobile fatalities rose; Australia's no-fault scheme similarly increased fatalities. Likewise, industries that, thanks to government regulation, do not bear the costs of environmental destruction are unlikely to invest adequately in systems that preserve clean air, land, and water. Trebilcock and Winter, *op. cit.*, pp. 10, 22.

[18] Trebilcock and Winter, *op. cit.*, pp. 39-40.

be restored under private law. Provincial legislators should ensure that nothing in provincial acts legalizes utilities' nuisances, thus maintaining citizens' common-law rights to sue. Regulators should replace permits granting absolute power to pollute – permits that sanction not just the polluting activity but the necessary consequences of that activity – with those permitting activities on the condition that they do not violate others' rights. Such conditions were common in nineteenth-century England, where early sanitation statutes maintained common-law rights by specifying that they did not legalize nuisances or other unlawful acts.[19] They remain common in the United States, where many statutes include "savings clauses" which preserve plaintiffs' rights to bring tort actions against those who harm them. For example, the Federal Clean Water Act specifies that "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief."[20]

There are a number of arguments for supplementing regulation with tort law. Unlike regulation, tort liability compensates those who have been harmed. Although regulatory fines punish violators, they rarely help victims. Thus, justice is more fully served under tort liability. In many circumstances, justice is also more likely to be pursued. Private parties are often better placed than regulators to know when harms have occurred. Since they are directly affected, they often have greater incentives to stop the harms. The promise of a damage award strengthens their incentives to launch cases under tort law rather than statutory law. Furthermore, the standard of proof is lower under the former than the latter. In a tort action, the standard of proof is "the balance of probabilities" while in a statutory prosecution, it is "beyond a reasonable doubt."[21] For these reasons, private parties are, in some circumstances, more likely than regulators to challenge water and wastewater utilities, and they are more likely to launch private law suits than statutory prosecutions. By restoring full tort liability for the owners and operators of water and wastewater utilities, we can tap into a vast regulatory resource: the public.

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[19] Joel Franklin Brenner, "Nuisance Law and the Industrial Revolution," *Journal of Legal Studies* 3, no. 2 (June 1974), pp. 403-33 at p. 423. One act establishing sewage works is described in *Pride of Derby and Derbyshire Angling Association Ld. and Another v. British Celanese Ld. and Others*, [1953] 1 Ch. 149. The 1901 Derby Corporation Act, while establishing sewage disposal works, had specifically prohibited nuisances: "The sewage disposal works constructed . . . shall at all times hereafter be conducted so that the same shall not be a nuisance and in particular the corporation shall not allow any noxious or offensive effluvia to escape therefrom or do or permit or suffer any other act which shall be a nuisance or injurious to the health or reasonable comfort of the inhabitants of Spondon."

[20] Jo-Christy Brown and Roger E. Meiners, *Common Law Approaches to Pollution and Toxic Tort Litigation*, in Stroup and Meiners, *op. cit*., pp. 99-127, at p. 119.

[21] David Estrin and John Swaigen, *Environment on Trial: A Guide to Ontario Environmental Law and Policy*, Third Edition, Toronto: Emond Montgomery Publications, 1993, p. 79.