

OBSTACLES TO ENVIRONMENTAL LITIGATION IN RUSSIA AND THE POTENTIAL FOR PRIVATE ACTIONS

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INTRODUCTION

In the past decades, plaintiffs' attorneys in the United States have promoted the use of private actions known as "toxic torts."¹ These private actions fill in the gaps of federal and state environmental statutes.² At the same time, the targets of this litigation, often large corporations,³ have pushed for limits on their liability and caps on potential recovery.⁴ Given that many of these large corporations have moved operations overseas, can toxic tort litigation also make this move?⁵

This article discusses the basis of toxic torts in the United States as compared to the scope of environmental and tort law in Russia. The article reviews the procedures and challenges that a potential plaintiff would encounter in litigating a case, and includes exemplary cases. Finally, the article suggests circumstances under which private environmental litigation could become a reality in Russia.

¹ See ALLAN KANNER, ENVIRONMENTAL AND TOXIC TORTS (2003) (stating that "toxic tort litigation" deals with those special kinds of situations that have arisen in post-World War II period, such as injuries resulting from asbestos, DES, fen phen, and toxic waste disposal).

² *Id.*

³ 151 CONG. REC. H723-01 (Fed. 17, 2005) (statement of Rep. Conyers). The testimony of Representative Conyers on the benefits corporations would get from reforming class actions (a frequent target of tort reform) is telling:

Now, you do not need to take my word for it. Let us just ask big business itself. The Nation's largest bank, Citicorp admits "the practical effect (of the bill will) be that many cases will never be heard. Federal judges facing overburdened dockets and ambiguities about applying State laws in a Federal court, often refuse to grant standing to class action plaintiffs. . . . The legislation will . . . make it more difficult for plaintiffs to prevail, since . . . federal courts are . . . less open to considering . . . class action claims."

Id.

⁴ For a further discussion of this issue, see THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY (2002).

⁵ There is substantial literature devoted to bringing toxic tort actions in U.S. courts on behalf of plaintiffs injured by U.S. corporations overseas. See, e.g. Beanal v. Freeport-McMoran, Inc., 969 F. Supp. 362, 373 (E.D. La. 1997). This article is devoted to bringing toxic tort actions in *Russian* courts on behalf of *Russian* plaintiffs.

I. THE SOURCE OF LAW

A. *The Basis of Toxic Torts in the United States*

In the United States, environmental law is not the legal theory behind toxic torts cases, although in many states the breach of an environmental statute may result in negligence *per se*.⁶ Rather, the legal system uses the more traditional common law tort actions, such as negligence, nuisance, and trespass, to remedy environmentally related damage to property and health.⁷ A number of explanations provide the rationale for this reliance on tort actions rather than environmental statutes.

One reason for relying on tort theories is their relative simplicity and accessibility. With the exception of statutes containing citizen suit provisions, administrative agencies enforce most environmental laws, often in administrative courts.⁸ In contrast, toxic tort plaintiffs may avoid some of the difficulties of litigating under certain environmental statutes and before administrative agencies, including sidestepping the issue of establishing standing.⁹ In addition, toxic tort plaintiffs may dodge the inconvenience of coordinating the case with a government agency.¹⁰ Another important reason for the success of private toxic tort law is that a polluter may still be liable to a plaintiff *even* if the polluter is in compliance with environmental statutes.¹¹ The

⁶ Harm may be considered negligence *per se* if it results from a violation of an environmental (or other) statute designed to protect the class of which plaintiff was a member. *E.g.*, *City of Portland v. Boeing Co.*, 179 F. Supp. 2d (D. Or. 2002) (allowing an action for public nuisance where the defendant's activities violated Oregon law and therefore amounted to a nuisance *per se*).

⁷ In fact, this was the *only* basis for "environmental" litigation before environmental statutes arose. *E.g.*, *Rylands v. Fletcher*, L.R. 1 Exch. 265 (Brit. 1866) (strict liability action awarding compensation for damage caused by flooding).

⁸ *Reiter v. Cooper*, 507 U.S. 258, 268 (1993). Even in private law-based toxic tort actions, the defense of "primary jurisdiction" (agency/administrative jurisdiction) is often raised. *Id.* This doctrine allows a judicial court to refer the case dealing with issues within the special competence of an administrative agency to the appropriate agency. *Id.* The court then stays further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling. *Id.*

⁹ *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (discussing requisites for standing in environmental cases); *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167, 180-88 (2000) (discussing requisites for standing in environmental cases).

¹⁰ Clean Water Act, 33 U.S.C. § 1365(b)(1)(A) (1994) (requiring plaintiff who plans to file citizen suit to first give notice to government of plaintiff's intent to sue). The agency that has jurisdiction over the issues can then prevent the plaintiff from filing suit by diligently prosecuting the violator. 33 U.S.C. § 1365(b)(1)(B) (1994).

¹¹ *See Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992) (noting that under Article VI of the Constitution laws of United States "shall be the supreme law of the land," but that consideration of issues "arising under the Supremacy Clause starts with the assumption that the historic police

toxic tort system allows for a broader basis of recovery than some environmental statutes. Finally, perhaps the most important reason for the rise of toxic tort claims is the profitability for plaintiffs' lawyers. Although some suits only provide injunctive relief, damages, particularly punitive damages, provide the ultimate thrust of toxic tort cases.¹² When plaintiffs' lawyers operate on a contingency fee and punitive damages are involved, these attorneys stand to make a tidy profit.

B. Basis of Environmental Law in Russia

Like the United States, Russia has enacted a full deck of environmental rights and laws. These rights arrived with the nation's change to democracy in 1991.¹³ Article 42 of the Russian Constitution of 1993 forms the fountainhead of all environmental rights, granting Russian citizens the right to a healthy environment, reliable environmental information, and compensation for pollution-related damage to health or property.¹⁴ The statutory scheme of Russian environmental law stems from these constitutional rights. Article 11 of the Russia's 1991 version of the Environmental Protection Statute ("EPS") granted every citizen the right to a clean environment, protection from environmental harm caused by industrial, governmental, or natural sources, reliable environmental information, and compensation for environmentally

powers of the States are not to be superseded by Federal Act unless that is the clear and manifest purpose of the Congress"); *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984) (acknowledging that state tort law had regulatory and police power effect).

¹² See, e.g., *State Farm v. Campbell*, 538 U.S. 408, 429 (2003). Although the Supreme Court and many state laws have placed caps on punitive damages in recent years, plaintiffs' lawyers have adapted their legal strategies to maximize the punitive awards that are still available. *Id.* For instance, plaintiffs' lawyers typically bring suit in small towns where juries are more likely to assess outside corporations with punitive damages. Teresa Baldas, *Small-Town Blues: Lawyers Say It's Tough to Get a Fair Trial in a Small Town, Especially, But Not Only, For Defense Attorneys in Torts*, BROWARD DAILY BUS. REV., June 9, 2005. In jurisdictions where certain types of punitive damages are capped, such as Texas, plaintiffs' lawyers may frame the defendants' misconduct as an action that should be exempt from the punitive damages cap. See Brenda Sapino Jeffreys, *Special Report: The Year in Review: The Impact Players: The Earle of Democracy: Busting the Cap?*, 20 TEX. LAW. REV. 31 (2004). Another strategy is to mask punitive damages in the form of large pain and suffering awards. See Victor Schwartz & Leah Lorber, *Twisting The Purpose Of Pain And Suffering Awards: Turning Compensation Into "Punishment"*, 54 S.CAL. L. REV. 47 (2002).

¹³ KONST. SSSR, art. 42 (1977). The Soviet Union had no system that could compare to the American toxic tort system, although the Soviet Constitution declared that all citizens had the right to health protection. *Id.* This right had to be provided for by methods of "environment enhancement," or the elimination of conditions harmful to human health. *Id.* The Soviet Statute said nothing about reimbursement for damage to human health. There were no norms establishing the procedure for such a recovery. *Id.* Further, all industries and businesses in the Soviet Union were owned by the state. At that time, it was impossible for injured parties to sue the State.

¹⁴ *Id.*

related damage.¹⁵ In addition, Article 8 of the Human Health and Welfare Statute and Article 7 of the Urban Construction Code state that citizens have a right to a clean environment that will not cause harm to human health and welfare.¹⁶

Initially, these rights seem to entitle a Russian plaintiff to broad relief. One commentator went so far as to suggest the possibility of pursuing damages from the Russian Federation itself, in cases where the plaintiff found it impossible to define a defendant.¹⁷ The commentator based this potential right on Article 2 of the Russian Constitution, which sets forth the constitutional obligation of the state to recognize, enforce, and protect the rights and freedoms of people and citizens.¹⁸ Additional support for this argument exists in Articles 21.4 and 89.4 of the EPS, which provide that the state must reimburse an injured party if it were impossible to find the defendant.¹⁹

However, in reality, these rights were restrictively applied. The revision of the EPS in 2002, during which both Articles 21.4 and 89.4 were eliminated, considerably narrowed these rights.²⁰ The declarative principle established in Article 2 of the Constitution was ultimately not strong enough to support a policy of governmental reimbursement in such situations. In 2005, the grim reality is that neither the Russian government nor its population has been doing much to vindicate environmental rights. Clearly there are many reasons for this, although the focus of this article is on the nature of laws themselves and the

¹⁵ Environmental Protection Statute, art. 11 (1991) (Russ.).

¹⁶ See GPK RF Statute No. 138-FZ; see also Zakon RSFSR ob Okhrane Okruzhayushei Sredy, [Environmental Protection Statute], ROSS. GAZETA, Mar. 3, 1992; Osnovy Zakonodatelstva Rossiyskoy Federatsii ob Ochrane Zdorovya Grazhdan [Basics of Russian Federation Legislation "On the protection of citizens' health"] Vedomosti Fed. Sobr. RF, 1993, No. 33, Item 1318; Federalnyi zakon o sanitarno-epidimiologicheskome blagopoluchii naseleniya [Statute "On the sanitary-epidemiological prosperity of the population"], Sobr. Zakonod. RF 1999, No. 14, Item 1650; Federalnyi Zakon o Radiatsionnom Blagopoluchii Naseleniya [Statute "On nuclear safety for citizens"], Sobr. Zakonod. RF, 1996, No. 3, Item 141; Federalnyi Zakon Ob Obshestvennykh Organizatsiyah [Statute "On non-governmental organizations"], Sobr. Zakonod. RF, 1995, No. 21, Item 1930; [Statute "On security"] ROSS. GAZETA, No. 103, May 6, 1992; Federalnyi Zakon O zashite naseleniya i territoriy ot chrezvichainykh situatsiy prirodnoho i tehnogennogo haraktera [Statute "On the protection of citizens and territories from emergency situations of natural and industrial character"], Sobr. Zakonod RF, 1994, No. 35, Item 3648; Obyazatelstva vsledstvie prichineniya vreda ["On obligations raised subject to the cause of damages"], GK RF, No. 59. Technical provisions that aid in defending citizens' rights in courts are found in the Russian Civil Procedural Code.

¹⁷ N.V. DANILOVA, ENVIRONMENTAL LAW OF RUSSIA (EDUCATIONAL-METHODOLOGICAL COMPLEX), Ch. 11 (2002), available at http://www.distance.ru/4stud/umk/ecol_pr/ecol_pr18.html (last visited Feb. 11, 2006).

¹⁸ Environmental Protection Statute, art. 2 (1991) (Russ.).

¹⁹ Environmental Protection Statute, arts. 21.4, 89.4 (1991) (Russ.).

²⁰ See Environmental Protection Statute (2002) (Russ.) (eliminating arts. 21.4, 89.4).

judicial system.²¹

In contrast to the original statute, the 2002 EPS does not provide a separate regime for recovery of damages.²² While Article 79 of the EPS states that “all harm to a person shall be recovered,” plaintiffs must rely on the Civil Code itself to determine what “all harm” entails.²³ In the sense that litigants rely on private law for remedies, environmental litigation in Russia parallels toxic torts in the United States. However, unlike American litigants, Russian litigants may not technically rely on previous jurisprudence to clarify the civil code because Russia is a civil law state such that Russian courts have no duty to adhere to prior case law.²⁴ Without this duty to follow earlier cases, a Russian litigant may not assume the Russian courts will follow their own precedent. Nevertheless, litigants may achieve results through good lawyering and clever interpretation of the code.

²¹ E.A. Koshkina, *Spread of alcoholism and drug abuse among Russia's population*, *Psychiatry and Psychopharmacotherapy*, Vol. 4, No. 3 (2002), available at http://www.consilium-medicum.com/media/psycho/02_03/87.shtml (last visited Oct. 3, 2005). As in many countries outside the “First World,” most Russians are too busy struggling with the effects of social instability and an ailing economy to even think about the environment. *Id.* Sometimes people are unaware that they live in dangerously contaminated areas, or that their health or property has been damaged. *Id.* Even if they know that their health has been damaged, few know of their environmental rights. Perhaps, few care. *Id.* Russia is notorious for high rates of alcoholism and drug abuse. *Id.* The average Russian consumes alcohol almost twice as much as an average American. *Id.* Added to this mixture of social ills is a healthy mistrust of the authorities and courts, left over from Soviet times. *Id.* Injured people simply do not believe in the independence of judges from those who have caused the injuries. *Id.* Finally, would-be plaintiffs are afraid of being beaten or just assassinated because of their attempts to protect their rights. *Id.* For example, the famous environmental lawyer M.M. Konstantinidi was arrested and sentenced to five years of imprisonment for the “fraud” of rendering legal services without being a bar member. *Id.* Technically, Konstantinidi did not render legal services, as the assistance he provided a group of citizens in court proceedings can be done by anybody regardless of bar membership. *Id.* This happened just after a group of citizens of Novorossiysk (a city located on the Black Sea shore) won a case against Caspian Pipeline Consortium, a consortium formed by large oil corporations, including ChevronTexaco, Shell, ExxonMobil, Lukoil, Rosneft, and the Russian Federation and Kazakhstan. Mr. Konstantinidi prepared the relevant judicial papers to be filed. See Ecojuris website, at http://webcenter.ru/~ecojuris/RNEWS/mk_free.htm (last visited Oct. 3, 2005).

²² See Environmental Protection Statute (2002) (Russ.)

²³ See Environmental Protection Statute, art. 79 (2002) (Russ.)

²⁴ See LA. CIV. CODE art. 2315 (2004) (negligente); LA. CIV. CODE, arts. 2318, 2321 (2004) (strict liability); LA. CIV. CODE arts. 667-669 (2004) (nuisance). An interesting comparison can be made to Louisiana, the one state in the U.S. that is based on civil law. Like every other state, Plaintiffs’ lawyers have relied on toxic torts to fight everything from oilfield pollution to cancer caused by toxic exposure. Toxic tort suits are based on the civil code itself, rather than jurisprudence. Although Louisiana courts are technically not bound by precedent, most commentators agree that Louisiana has evolved from a civil law state to a “mixed jurisdiction,” in which jurisprudence carries some weight. William Tetley, *Mixed Jurisdictions: Common Law vs. Civil Law (Codified and Uncodified)*, 60 LA. L. REV., 677, 697-99 (2000). This is not the case for Russia.

II. LITIGATING ENVIRONMENTAL INJURIES IN RUSSIA

The following section discusses the procedures and obstacles that plaintiffs pursuing a toxic tort claim in a Russian court might face. These procedures and obstacles include establishing standing, dealing with time limitations, petitioning for equitable relief, and calculating damages. The damages issue raises the additional problem of seeking damages caused by radiation.

A. Standing

Environmental litigants must face the first hurdle of establishing standing to bring a toxic tort case. In both Russia and the United States, a private tort action has the advantage of focusing on personal damages to health and property rather than on general damage to the environment. Article 89 of Russia's original 1991 version of the EPS created broad standing, allowing members of the injured party's family, the prosecutor, the authorized state body, and non-governmental organizations ("NGO") to file suit on behalf of the injured party.²⁵ Standing was allowed without any proof of receiving such authority from the injured party.²⁶

This meant that theoretically, environmental NGO's had the right to suit for any instance of environmental damage to any person in Russia without asking their permission. However, the new version of EPS in 2002 eliminated Article 89.²⁷ Russian litigants must now follow Article 3 of the Code on Civil Procedure, under which only interested parties, those who are injured or their guardians, have a right to file a claim.²⁸ NGOs must seek authority from the injured party in order to file on that person's behalf. Thus, this revision of the EPS had the effect of limiting the previously extremely broad basis of standing for a toxic tort litigant.

B. Time Limitations

Article 196 of the Civil Code sets forth a three year general statute of limitations to bring a toxic tort action.²⁹ Neither the EPS nor the provisions of the Civil Code contain any specific time limitations to supplant this three year limitation. Like most American jurisdictions, the Russian Civil Code provides for a "discovery rule" whereby the statute of limitations does not start until the day when the plaintiff learned, or should have learned about the violation of

²⁵ See Environmental Protection Statute, art. 89 (1991) (Russ.).

²⁶ *Id.*

²⁷ See Environmental Protection Statute (2002) (Russ.) (eliminating article 89).

²⁸ GPK RF art. 3 (Russ.).

²⁹ *Id.* art. 196.

their right.³⁰ Thus, a potential litigant should bring a toxic tort action within three years of learning of such a violation.

However, this general statute of limitations does not apply to limit every toxic tort claim. The Civil Code also contains protections for a plaintiff's personal non-property rights, such as health, and for other non-material values, such as environmental protection, which are *not* precluded by the statute of limitations.³¹ However, plaintiffs who sue after the three-year period can only recover the equivalent of three years worth of damages.³² Another limitation for plaintiffs is that they can not claim moral damages for injuries occurring before August 3, 1992, the date when moral damage legislation was first enacted.³³

C. Equitable Relief

Plaintiffs may seek equitable relief from the courts. An injured party can always petition the court for an injunction against a harmful activity, such as an activity underlying a toxic tort. However, the court need not grant an injunction if it finds that such equitable relief would contravene the public interest.³⁴ Though not legislatively defined, considerations of public interest typically include continued employment for a large number of people or the possibility of significant contribution to regional economic welfare.³⁵ If an injunction would put an industry out of business, a judge may impose the injunction only if the failure to enjoin the activity would hamper or make law enforcement impossible.³⁶

The possibility of obtaining an injunction may not actually provide a plaintiff with relief. Although mechanisms exist for securing an injunction in Russia, a court will rarely enjoin industrial activity. A court more likely would provide some form of damages, such as alternative housing for a plaintiff.³⁷ In

³⁰ *Id.*

³¹ *Id.* art. 208.

³² *Id.*

³³ See Decree of Plenum of Supreme Court, BIULL. VERKH. SUDA RF 3-9 (1994) (describing court practice in cases of compensation of personal injury damage) [hereinafter Personal Injury Damage Decree]. This limitation excludes plaintiffs who fall under the protection of the radiation statute discussed *infra*.

³⁴ See D. Tarasevich, *Kak pensioner ssudilsya s neftyanyimi korolyami. Imeyut pravo*, SOVETSKIY SAKHALIN (2001), available at <http://www.sakhalin.environment.ru/search.html?x=3229> (last visited Feb. 11, 2006).

³⁵ *Id.*

³⁶ See GPK RF arts. 139, 140 (Russ.). GPK RF art. 140.1 provides examples of injunctions, such as injunctions to compel an action (e.g. stop harmful emissions). The list is not exhaustive and a judge can impose any measures necessary. *Id.*

³⁷ See Tarasevich, *supra* note 24. The EPS does not provide for injunctions. *Id.* Parties must rely on the Russian Civil Code of Procedure (for natural persons) or the Commercial Code of

addition, if the monetary value of a claim is insignificant, a court will typically decline to impose an injunction.³⁸ Furthermore, courts may require plaintiffs to post a bond of up to 100% of the value of the claim in order to secure an injunction.³⁹ Putting up a bond creates problems when the defendant is a big industrial plant because suspension of a single day of operations can cost several million dollars. If a plaintiff is incapable of providing such a bond, the judge usually refuses to impose the injunction. However, a judge does possess the discretion to impose the injunction without requiring a bond. The caveat is that if the plaintiff ultimately loses the case, the defendant has the right to sue the plaintiff for damages caused by the injunction.⁴⁰ In sum, though technically available, many obstacles exist before a plaintiff may obtain equitable relief from the actions causing a toxic tort.

D. Damages

One of the explanations for the lack of toxic torts litigation in Russia is that damage awards often do not cover litigation costs. The former version of the EPS in Article 89.2 provided a list of possible losses and expenses which plaintiffs could claim as environmental harm, including: 1) loss of capacity to work; 2) costs of medical treatment; 3) lost professional opportunities; 4) moving costs; 5) lifestyle changes; and 6) moral damages.⁴¹ Moral damages are comparable to the American concept of general damages for pain and suffering.⁴² The new version of the EPS eliminated this list of possible damages, allowing the judge to decide how to execute the principle that "the harm must be compensated in full."⁴³ This generally means that plaintiff awards will only recover direct losses such as medical treatment and moral damages.⁴⁴ These damage awards may not provide sufficient funds to pay for litigation expenses, thus discouraging toxic tort litigation.

Procedure (Arbitrazhno-Protssessualnyy Kodeks, where both parties are legal entities). *Id.*

³⁸ *Id.*

³⁹ GPK RF art. 140.3 (Russ.).

⁴⁰ *Id.* art. 146.

⁴¹ See V.D. ERMAKOV AND A.Y. SUKHAREV, THE RUSSIAN ENVIRONMENTAL STATUTE, 99 (1997). In Russia, there is no such thing as punitive damages, which in the U.S. can comprise a large part of a victim's compensation. *Id.* In the mid-1990s, the State Congress (known as the Duma) discussed the possible adoption of a Statute entitled "On the reimbursement of damage caused by environmental crimes." *Id.* However, this Statute was not adopted. *Id.*

⁴² *Id.*

⁴³ See Environmental Protection Statute (2002) (Russ.).

⁴⁴ Decree of the Plenum of the Supreme Court of Russian Federation "Some issues on implementation of legislation on compensation for moral damage" *Biull. Verkh. Suda. RF*, 1995, No. 3, pp. 9-11 [hereinafter Moral Damages Decree].

As stated above, the Civil Code, Article 15, entitled "Compensation of damages," sets forth more clearly what damages a plaintiff may recover. A person whose rights have been violated can claim full compensation for damages sustained, provided there is no statute or contract that limits these damages.⁴⁵ Article 15 of the Civil Code defines "damages" as the expenses a person whose rights have been violated has or will sustain for reparation of personal damage, real damage to property, and economic loss.⁴⁶ Thus, a successful toxic tort plaintiff may recover damages according to this definition.

In addition, a plaintiff may also recover moral damages. Articles 1099-1101 of the Civil Code and a 1994 Supreme Court declaration contain the general rules for compensation of moral damages.⁴⁷ Specific instances that give rise to these damages include the wrongful death of one's relatives, the publication of a family or medical secret, the distribution of false information discrediting honor, dignity, or business reputation of a citizen, the temporary restriction or deprivation of any rights, and physical injury, including disease. In Russia, a judge, in contrast to a jury, defines the amount of moral damages.⁴⁸ This amount does not relate to the amount awarded for material damage, losses, or other material claims. The court must determine whether moral and physical damages exist, in what circumstances the moral damage was inflicted, the degree of responsibility of the defendant, and other facts relevant to settlement of the case. A judge has a duty to explain the reasons behind an award of a particular amount of money for compensation of moral damages.⁴⁹ Courts in Russia usually disfavor awards for moral damages, and when courts do award such damages, the sum is nominal. Moral damage awards usually range from 1,000 RUR to 100,000 RUR (35 USD-3,500 USD).⁵⁰

⁴⁵ See, e.g. *Sobr. Zakonod. RF*, 1999, No. 18, Item 2222 (Statute "On the protection of air" (establishing entirely separate regimes for compensation of damages based on particular mechanisms for calculations)).

⁴⁶ Indirect damages are usually claimed in terms of economic loss in business activities. It is not clear whether indirect damages could apply in personal injury cases.

⁴⁷ See Moral Damages Decree, *supra* note 30 (providing practical recommendations for determining the existence, amount, and nature of moral damage). Decrees are not laws or normative acts, but guidance aimed at unifying court practice in some areas. *Id.* They are issued to fill gaps in the law, or to interpret the intent of legislation. *Id.*

⁴⁸ Moral Damages Decree, *supra* note 30, Art. 8.

⁴⁹ Injury Damage Decree, *supra* note 23, Art. 36.

⁵⁰ This figure is based on the author's (Fedyayev's) own litigation experience with Russian insurance companies. During that six months in which he managed between 30 and 40 cases, the damages claimed ranged from \$200 to \$30,000. In none of these cases did the amount of moral damages awarded exceed \$1000.

E. Radiation Damages

Russian law provides compensation specifically for damages caused by radiation. Russian law provides social benefits to claimants who can prove: 1) they were affected by radiation from Chernobyl, Mayak or Semipalatinsk; and 2) as a result they suffer from health ailments.⁵¹ However, claiming compensation for the children and grandchildren of radiation victims creates problems for plaintiffs.

Litigation arising out of the Mayak radiation releases is one of the few examples of successful compensation. Many people associate the word "Chernobyl" with the catastrophic nuclear meltdown that occurred near Chernobyl, Ukraine, in 1986. One of the quieter legacies of the Soviet government is the nuclear activity of PO "Mayak," a factory in the Chelyabinsk region on the Techa River near the Ural Mountains.⁵² Between 1949 through 1951, Mayak dumped radioactive wastes into the Techa River and in 1957, an accident resulted in the release of 20 million curies of radiation into the environment.⁵³ Local inhabitants did not receive notice of this highly confidential emergency. To address the aftermath of this situation, the State forced local inhabitants and their children to assist in disassembling several buildings which were later used for construction of orphanages.⁵⁴ This "cleanup" effort exposed many people to radiation. The government did not compensate any of the victims, as it refused to officially regard the accident as a state of emergency.⁵⁵ Some of the victims of Mayak died prematurely, and some suffered from debilitating diseases and gene mutation.⁵⁶

⁵¹ Ved. RSFSR, 1991, No. 21, Item 699 ("On the social protection of citizens affected by radiation due to the Chernobyl Atomic Station emergency."); *Sobr. Zakonod. RF*, 1998, No. 48, Item 5850 [hereinafter *Mayak Victims Protection Statute*] ("On social benefits for citizens affected by radiation due to nuclear tests on Semipalatinsk fire range."); *Sobr. Zakonod. RF*, 2002, No. 2, Item 128. This legislation only protects victims from the Chernobyl Emergency, Mayak Emergency and nuclear tests on Semipalatinsk firing range. *Id.*

⁵² Renfrey Clarke, *Russia's other Chernobyl*, GREENLEFT WEEKLY, available at <http://www.greenleft.org.au/back/1996/233/233p14.htm> (last visited Oct. 4, 2005). Compare to the accident at Chernobyl, which released 50-80 million curies. See John M. LaForge, *Chernobyl: A Global Tragedy, Nuclear Amnesia*, EARTH ISLAND JOURNAL, Summer 1997, Vol. 12, No. 3, available at http://www.earthisland.org/eijournal/new_articles.cfm?articleID=188&journalID=47 (last visited Oct. 4, 2005).

⁵³ *Id.*

⁵⁴ E. Sidorova, *V Chelyabinske Lishayut Kompensatsiy Zhertv Avarii na PO "Mayak"*, OBSHAYA GAZETA (newspaper), Oct. 5, 2000, available at <http://goryachiy.narod.ru/ecohr/187.htm> (last visited Oct. 4, 2005).

⁵⁵ *Id.*

⁵⁶ *Id.*

In early 1990s, the new Russian Government acknowledged the existence of the Mayak radioactivity, adopting a statute for “the social protection of citizens affected by radiation due to the Chernobyl Atomic Station emergency” (“Chernobyl Victims Protection Statute”).⁵⁷ This statute granted uniform social benefits to the victims of Mayak and Chernobyl, recognizing Mayak as no less of an emergency than Chernobyl.⁵⁸ An additional statute “[o]n the use of nuclear energy” also provides citizens who suffered losses and damages as a result of radiation exposure the right to full compensation.⁵⁹

Unfortunately, the Chernobyl Victims Protection Statute only covers people alive in Mayak at the time of the dumping between 1949 and 1951, or who were exposed to the emergency in Mayak in 1957.⁶⁰ From this statute children and grandchildren of Mayak victims only receive the social benefit of free annual three to four week trips to Russian resorts for treatment.⁶¹ This benefit automatically expires on the child’s eighteenth birthday.⁶² The statute grants no remedy to children who died early as a result of birth defects.⁶³

One promising case for potential radiation plaintiff is *I.A. Nazhmutdinov et al v. PO Mayak*.⁶⁴ Plaintiff Denis Nazhmutdinov was born with serious defects, including one missing foot and missing fingers on both hands.⁶⁵ Anna Il’yina, a prominent Russian toxic torts lawyer, took up his case against Mayak when Denis was four years old.⁶⁶ Denis’ parents claimed moral damages for emotional distress, but they chose not to pursue any direct damages.⁶⁷ Due to the lack of money of both Denis’ family and his attorney, the Institute for Soviet

⁵⁷ Vedomosti S’ezda Narodnykh Deputatov RSFSR I Verkhovnogo Soveta RSFSR 1991, No. 21 Item 699. (Bulletin of the Congress of People’s Duputies of the Russian Federation and Supreme Council of the Russian Federation) [hereinafter Ved. RSFSR].

⁵⁸ Mayak Victims Protection Statute, *supra* note 51 (on social protection of Russian citizens affected by radiation of due to PO Mayak’s explosion in 1957 and dumping of radioactive wastes into the Techa river).

⁵⁹ Sobr. Zakonod. RF, 1995, No. 48, Item 455, Art. No. 15.

⁶⁰ Sobr. Zakonod. RF, 2002, No. 2, Item 128 [*hereinafter* Chernobyl Victims Protections Statute].

⁶¹ Natalia Ladushina, *Nepodsudniy "Mayak?"*, OPORTNIY KRAI (Sep. 20, 2001), available at <http://www.chelpress.ru/LANG=ru/newspapers/flagman/archive/20-09-2001/3/1.shtml> (last visited Oct. 4, 2005).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Opreделение Sudebnoi Kollegii po Grazhdanskim delam Chelaybinskogo Oblastnogo Suda (July 24, 1997).

⁶⁵ *Id.*

⁶⁶ The fact that Anna Il’yina was an attorney for both Denis Nazhmutdinov and Timur Islametdinov (*see infra*), and managed to win both these cases shows the importance of good lawyering.

⁶⁷ GK RF arts. 150, 151, 1099, 1100, 1101 (Russ.).

and American Relations (an environmental NGO) paid for a costly expert report from the Russian Academy of Sciences.⁶⁸ The results of the expert report confirmed that the genetic problems of Denis were a result of his parents' exposure to radiation. With this report, the plaintiffs were able to surprise and impress the court, which did not expect such a report, and therefore was not prepared to take the trial seriously. In response, the court ordered a significant moral damage award of 50,000 RUR. The *Nazhmutdinov* case was exceptional, because typically the cost of such a report is prohibitive.⁶⁹ The success of the *Nazhmutdinov* case may also be explained by the fact that plaintiffs did not sue for any material damages. The only compensation sought by plaintiffs and awarded by the court were moral damages.⁷⁰

Another prominent case in radiation law is *T. Islametdinov v. PO "Mayak"*.⁷¹ Plaintiff Timur Islametdinov's father, Nezam, lived in the village of Asanovo of the Argyashskiy district of the Chelyabinsk region.⁷² Some time after the Mayak emergency, Nezam and his family were evacuated from the contaminated territory.⁷³ Later, Timur was born extremely ill and spent all of his childhood in the hospital.⁷⁴ For thirteen years, none of his doctors could make a diagnosis.⁷⁵ Finally, the Institute of Immunology of Ministry of Health of the Russian Federation characterized Timur as "conditionally compatible with life," meaning that Timur could only survive with daily medication and monthly blood transfusions.⁷⁶

Timur Islametdinov, with the help of Anna Il'yina, brought suit against Mayak.⁷⁷ In the suit, Timur asked the court to compel Mayak to grant him a monthly pension in the amount of five times the minimal rate of labor payment.⁷⁸ Timur also asked for moral damages.⁷⁹ The case began to shift in

⁶⁸ *Id.*

⁶⁹ Eduard Meylakh, GIBLOE MESTO, 2002, available at <http://www.bellona.no/ru/international/ecopravo/33235.html> (last visited Oct. 4, 2005).

⁷⁰ Note that plaintiffs petitioned for 500,000 RUR and were awarded only 50,000RUR (about 1,700 USD at the contemporary exchange rate).

⁷¹ Verkh. Sud RF (May 16, 1995) at 21.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 23.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 26.

⁷⁸ The Minimal Rate of Labor Payment.(MROT) is a legal fiction used in Russia mostly by courts and social agencies to define amount of the compensation/payment/award etc. Between 2002 and 2005, 1 MROT was 88.4 RUR or about 3 USD. The 5 MROT for which Timur Islametdinov petitioned would have amounted to 442 RUR or about 15 USD at the contemporary exchange rate.

⁷⁹ Verkh. Sud RF (May 16, 1995) at 27.

Timur's favor when he obtained an expert report from the Chelyabinsk Regional Interdepartmental Expert Council.⁸⁰ This report stated that Timur's disease was caused by his parents' exposure to Mayak's radiation while they lived in the contaminated territory.⁸¹ The district court of the Chelyabinsk region awarded Timur Islametdinov a monthly pension at five times the minimal wages paid by Mayak but refused to award moral damages.⁸² This distinction from the *Nazhmutdinov* case demonstrates the vast discretion judges have in determining the appropriateness of moral damages.⁸³

After the trial court's decision, Mayak appealed to a higher court. The regional appeals court remanded the case back to the trial court, pointing out that the lower court did not specifically name the proper defendant.⁸⁴ The problem was similar to that encountered by United States plaintiffs trying to sort out parent and subsidiary companies. The State owned 100% of the shares of Mayak, but Mayak was a separate legal entity having its own property and bearing its own obligations and rights.⁸⁵ Under the Civil Code (and in the *Islametdinov* suit), Mayak was the party of interest.⁸⁶ Mayak's argued that the Russian Federation was the proper defendant.⁸⁷ Upon remand, the district court confirmed Mayak as the proper defendant and affirmed its original decision.⁸⁸ Mayak filed a new appeal.⁸⁹ Finally, the appeals court held that the proper defendant was Russian Federation.⁹⁰ Thus, the Russian Federation was obliged to pay Timur 442 RUR monthly.⁹¹

The defendants did everything possible to prevent "undesirable" precedents even though such precedent would not carry the same weight as United States jurisprudence.⁹² Mayak and the State were intent on preventing Timur from

⁸⁰ RIECs were established in almost all regions of Russia as special agencies responsible for establishment of the causation between exposure to radiation and disease. They issue special expert conclusions which serve as bases for qualification as a Chernobyl, Mayak, Semipalatinsk or other radiation explosion victim. These agencies consist of highly respected doctors in different areas of medicine, mostly in oncology and related areas. Thus, when the Chelyabinsk Council established causation between Timur parents' exposure to Mayak explosion and his disease, he practically won the case. The only issue left was to determine the proper defendant.

⁸¹ *Id.*

⁸² Verkh. Sud RF (May 16, 1995) at 29.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 30.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

being compensated through the court system, because there are potentially thousands of suits against Mayak on the part of Mayak's victims, and also their children and grandchildren.⁹³ One can envision a wave of litigation comparable to the asbestos litigation in the United States. Regardless of its effect on later cases, the significance of this case that it was one the first in post-Soviet Russia in which a plaintiff recovered damages for a toxic tort claim.⁹⁴ It was especially significant that plaintiff successfully linked his gene mutation with his parents' exposure to radiation. Perhaps the most important reason for the "success" of these two cases was the ability of the plaintiffs to secure excellent expert reports.

F. Causation and Burden of Proof

As in the United States, a significant hurdle in pursuing toxic torts in Russia is the difficulty of proving causation. Not only must a plaintiff show a nexus between pollution and personal injury, the plaintiff must also show a link between the pollution and the activities of the defendant. Problematically, there are usually several simultaneous sources, some of which may be far away from the place where the harmful consequences appear. New pollutants may form in the air or water as a result of chemical reactions of several pollutants. Furthermore, contamination often does not directly cause any specific death or morbidity, but rather aggravate existing health problems.⁹⁵

Under Article 56.1 of the Code of Civil Procedure, the plaintiff must prove *direct* causation between the activities of a defendant and the damage caused.⁹⁶ It is not enough to prove that an activity or an adverse substance *could* have inflicted such harm. Generally, a sufficient showing of causation requires three elements: 1) proof of contamination of a certain area showing a violation of permissible levels of harmful substances in the air, soil, and/or water of an area; 2) a statement of a medical examination made by an authorized medical organization or an excerpt from the autopsy of a patient confirming the existence of a health disorder as a result of environmental contamination; and 3) an expert report showing causation between the contamination or any other harmful influence and the health disorder or death of the injured party.⁹⁷ A plaintiff must prove each of these three elements to show direct causation.

⁹³ *Id.*

⁹⁴ Because Russia follows the continental system law, judges are supposed to the apply law as it is written in the acts, without regard to equitable considerations or prior interpretations.

⁹⁵ Danilova N.V., *supra* note 16.

⁹⁶ GPK RF 56.1.

⁹⁷ The Decree of Plenum of the Supreme Court of Russian Federation, No. 14, *Biull. Verkh. Suda RF, Postanovlenie Plenuma Verkhovnogo Suda RF O Praktike Primeneniya Sudami Zakonodatelstva ob Otvetstvennosti za Ekologicheskies Pravonarusheniya* (Jan. 1, 1999) (On Practice of Implementation by Courts of Legislation on Responsibility for Environmental Infringements).

Expert opinion may contribute to a finding of causation. Article 79.1 of Code of Civil Procedure requires courts to order expert reports in cases calling for special knowledge in various areas of science, including issues of causation in toxic torts.⁹⁸ Such assessments can be made by a court expert, independent experts, or by a group of experts.⁹⁹ In ordering the assessment, the court must state the questions to be answered by an expert. To avoid bias, the expert is not allowed to talk to the parties of the case.¹⁰⁰ The court does not have to accept the conclusion of the expert, but must explain the basis for the alternate conclusion.¹⁰¹

The existence of multiple possible polluters has a complicating effect on showing direct causation. When a single area includes several polluters and the plaintiff cannot prove the extent to which any one polluter is liable, a court will not shift the burden of proof to the defendant polluters. However, if direct causation between a particular activity and the plaintiffs' injury has already been proved, but it is impossible for the court to determine the degree of responsibility of each of the defendants, then the court may impose equal shares of responsibility on all the defendants.¹⁰² Thus, lack of absolute precision is allocating liability will not keep a plaintiff from recovery. A court also has the discretion to impose joint and several liability requiring any of the defendants to compensate plaintiff for the entire amount of damage.¹⁰³ This increases the chances of recovery by allowing the plaintiff to obtain the entire award from the most solvent defendant.¹⁰⁴

A plaintiff can claim reimbursement for treatment only if the plaintiff can provide proof of such costs. If the treatment was free through state or municipal medical organizations covered by the policy of obligatory free insurance, a plaintiff may not recover for these costs.¹⁰⁵ In addition, if the injured has received full salary payments for missed work as provided by the Russian Labor Code, the plaintiff is not entitled to additional recovery for lost wages.¹⁰⁶ But

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ GPK RF art. 85.2 (Russ.).

¹⁰¹ *Id.* art. 86.3.

¹⁰² *Id.* arts. 1080.2, 1081 (Russ.). *See also* The Decree of Plenum, *supra* note 64, at 2-6.

¹⁰³ *Id.* art. 1080.

¹⁰⁴ Danilova, *supra* note 16.

¹⁰⁵ The policy of obligatory free insurance is a social benefit granted to all Russian citizens of age sixteen and older. This policy is granted to every citizen and gives her a right to receive gratuitous services from state and municipal medical organizations. For citizens under sixteen, free medical services are rendered gratuitously under the policy of the parent or guardian. Biull. Norm. Akt. RF, Aktov No. 183 (1992).

¹⁰⁶ TK RF art. 183 (Russ.).

social services may not adequately cover the entire loss.¹⁰⁷ In that case, the injured party then has the right to recover any out-of-pocket expenses.¹⁰⁸ Sometimes moral damage compensation is the only compensation a plaintiff receives.

Another notable case in which a plaintiff recovered moral damages without proof of material damage is *Citizens of the Village of Georgievka, Tomsk Region v. Siberian Chemical Plant* ("SCP").¹⁰⁹ In 1993, SCP released a significant amount of radiation into the environment. Attorney Konstantin Lebedev, who represented the injured inhabitants of the nearby village, Georgievka, decided that it would not be fruitful to invest in an expert analysis that could link the radiation exposure to the harm to the health of Georgievka's people. Lebedev sought moral damages for the villagers on grounds that SCP had violated their rights to a clean environment. After eight years of litigation, the Tomsk District Court recognized that SCP had exposed plaintiffs to massive doses of radioactive substances.¹¹⁰ The plaintiffs' justification for moral damage was that watching the activities of SCP's personnel to clean up after the emergency caused the villages to be nervous, and afraid to live in this village. This condition was a violation of their right to live in a clean environment favorable to life and health. SCP argued that the plaintiffs did not provide any evidence of the harm to their health. However, the court did not take this argument into consideration, as the plaintiffs were not claiming material damage. The Court held "under the Statute, an award of moral damage is not subject to proof of material damage."¹¹¹ The court awarded each of the plaintiffs 25,000 RUR.¹¹²

Plaintiffs have had more trouble litigating for material personal injury damages. Such was the case in *Vyskrebetsev v. Sakhalinmorneftegas* ("SMNG")¹¹³, in which Plaintiff Vyskrebentsev, an inhabitant of Katangli,

¹⁰⁷ Most of the basic medical services and hospitalization costs in Russia are free for all citizens. People are charged only for specialized treatment, such as expenses for artificial limbs, certain types of expensive medicine, or a very complex operation like heart surgery. In these special cases, the policy of obligatory insurance would not cover all of the medical expenses. Another case in which Russian social services might be inadequate is where there is permanent or long-time loss of capacity to work. Biull. Norm. Akt. RF, Aktov No. 183 (1992).

¹⁰⁸ Danilova N.V., *supra* note 16.

¹⁰⁹ Reshenie Tomskogo Oblastnogo Suda, No. 02/10-2001 as of July 07, 2001 G.V. Raychenok, v. Siberian Chemical Plant, *available at* http://www.bellona.no/ru/international/russia/nuke_industry/siberia/seversk/22041.html (last visited Oct. 3, 2005).

¹¹⁰ *Id.*

¹¹¹ The court was adhering to GK RF 1099.3 (Russ.) which provides for moral damages without proof of material damage. EDUARD MEYLAKH, GIBLOE MESTO (2002), *available at* <http://www.bellona.no/ru/international/ecopravo/33235.html> (last visited Oct. 4, 2005).

¹¹² This amount was about 900 USD at the contemporary exchange rate.

¹¹³ Tarasevich, *supra* note 24.

brought suit against the oil company known as SMNG.¹¹⁴ Although federal law prohibits drilling for oil within 300 meters of any residence, SMNG began drilling operations only 80 meters from the plaintiff's home.¹¹⁵ Plaintiff, an employee of SMNG, decided to enforce his right to a clean environment by petitioning SMNG to provide him with alternative housing in another area.¹¹⁶ This was a claim for recovery of damages via specific performance.¹¹⁷ SMNG fired Vyskrebentsev while the case proceeded in district court.¹¹⁸ Plaintiff had a prima facie case against defendant in the sense that it was obvious that defendant was illegally located within the sanitary zone.¹¹⁹ In order to obtain new housing, he simply had to prove that his own house was uninhabitable.¹²⁰

To get health damages, plaintiff had to show that this contamination resulted in personal injury.¹²¹ Plaintiff lacked the funds to apply to Moscow Science Medical Institute for a comprehensive (and cumbersome) assessment of his health, so the assessment was made by a local expert.¹²² The assessment served as direct evidence of the health threat caused by defendant's activities.¹²³

To make his position more convincing, plaintiff decided to invite witnesses who could attest to problems with the oil rigs and the resulting oil spills.¹²⁴ He asked his former co-workers to provide witness testimony or to sign an affidavit confirming the oil spills, exposure to dangerous conditions, or problems with the oil rigs.¹²⁵ Workers refused to help plaintiff upon seeing what had happened when he filed suit.¹²⁶ The workers understood that SNMG was practically the only employer in the region.¹²⁷ The plaintiff's doctor testified that compared with previous years, the health of the plaintiff and his family members had declined.¹²⁸ Because the defendant's oil operations were the only source of local

¹¹⁴ Katangli is a village located in the northern part of Sakhalin Island. Located on the East Coast of Russia near Japan, it is the biggest Russian island by land mass. The island is famous for its oil and gas industry.

¹¹⁵ This 300-meter line constitutes the so-called "security zone." Reshenie Tomskogo Oblastnogo Suda, No. 02/10 (2001) (G.V. Raychenok v. Siberian Chemical Plant).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ For what it's worth, retaliatory firing is illegal in Russia. This does not prevent employers from coming up with a legal reason to fire someone. *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

pollution, the plaintiff could establish a link between defendant's activities and his health problems.

Ultimately, the district court found for Vyskrebetsev and ordered SMNG to provide him a new house within six months. Additionally, SMNG was ordered to pay Vyskrebetsev and his family 100,000 RUR as damages for pain and suffering. SMNG decided not to appeal the district court decision, but they did attempt to delay the enforcement of the court's decision. Finally, in 2002 they paid the plaintiff and his family enough compensation to purchase new housing in an unpolluted area in Katangli village.¹²⁹

G. Procuring Evidence

The evidence for environmental cases is often based on investigations of federal and local agencies in the area of environmental control.¹³⁰ These agencies establish the existence of an environmental violation by means of a standard assessment.¹³¹ After reviewing a case, the responsible agency issues a statement on the necessary remediation.¹³² If an injured party has access to the assessment and statement of the authorities, she or he will have an easier time proving the existence of a pollution problem.¹³³

In theory, it is always possible for a plaintiff to get access to information regarding the sources of pollution. Several statutes set forth the rights of citizens to trustworthy, timely and complete information on the environment and all the emergency situations occurring in nearby enterprises.¹³⁴ Moreover, all

¹²⁹ Report of Environmental Watch of Sakhalin NGO on Results of Activities (2002), available at <http://www.sakhalin.environment.ru/search.html?x=4327> (last visited Oct. 4, 2005).

¹³⁰ Article 11 of the Statute on Attorney General Office of the Russian Federation, *Vedomosti Syezda narodnykh deputatov RSFSR I Verhovnogo Soveta RSFSR, Zakon Rossiyskoy Federatsii O Prokurature Rossiyskoi Federatsii*, 1992, No. 8, Item 366 provides that specialized prosecutors are parts of Attorney General's office. These specialized environmental prosecutors exist in most Russian regions. They represent state interests in environmental cases. The evidence they collect can be simultaneously used by citizens in their cases if requested. Currently, as a result of major reorganization of federal agencies in 2000-2004, it is difficult to say what authority has responsibility for investigating violations or environmental statutes.

¹³¹ *Id.*

¹³² *Id.*

¹³³ Danilova, *supra* note 16.

¹³⁴ On the Protection of Citizens Health, Article 19, No. 5487-1 (July 22, 1993). All the citizens have the right to receive frequent, trustworthy, and timely information about factors that affect human health, including information about the health-epidemiological conditions of the surrounding area, and the maximum recommended levels for consumption of and exposure to various products. *Id.* Federal, state, and local authorities must publish this information. *Id.* *Osnovy Zakonodatelstva Rossiyskoy Federatsii ob Ohrane Zdorovya Grazhdan Vedomosti Syezda Narodnykh Deputatov RSFSR I Verhovnogo Soveta RSFSR*, No. 33, Item 1318 (1993). *Id.* Article 11 of *Federalniy Zakon o sanitarno-epidimiologicheskome blagopoluchii naseleniya Sobr. Zakonod. RF*, 1999, No. 14, Item 1650 provides that businesses and legal entities have to provide timely information to citizens and

entities whose activities are associated with harm to the environment *must* distribute information on their pollution without the need for any special requests.¹³⁵ However, a different statute contradicts this rule by mandating that information on industrial safety can be provided only after the approval of an executive body.¹³⁶

local health-epidemiological authorities on emergency situations, power outages, and lapses in production, creating danger to the health-epidemiological prosperity of citizens. *Id.* Federalnyi Zakon O Radiatsionnom blagopoluchii naseleniya," *Sobr. Zakonod. RF*, 1996, No. 3, Item 141, states that when dealing with radioactive substances, all enterprises must regularly inform their employees regarding radiation levels and exposure in their workplaces, and must timely inform federal agencies on emergency situations, on lapse in technological regulation that threaten environmental security. *Id.* at art. 11. "Federalnyi Zakon O Radiatsionnom blagopoluchii naseleniya" establishes higher security standards. *Id.* It states that both citizens and foreigners living in the Russian Federation have a right to protection from radiation. *Id.* In order to prevent radiation exposure above the stated limits to the human body, individuals and entities dealing with radiation sources must conform to standards of radiation security. *Id.* Under Article 23 of the present statute, citizens and NGOs have the right to get objective information from the organizations engaged in nuclear activities regarding their security and protection measures. *Id.* at art. 23. Members of NGOs have a right to access any facilities/buildings of the entity engaged in nuclear activities in accordance with the order and conditions established by legislation of the Russian Federation. *Id.*

¹³⁵ Federalnyi Zakon Ob Informatsii, Informatizatsii I Zashite Informatsii, *Sobr. Zakonod. RF*, 1995, No. 8, Item 609, available at <http://ombudsman.gov.ru/docum/specol.htm> (last visited Oct. 4, 2005) (On Information, Distribution of Information, and Protection of Information). The Ministry of Natural Resources, the Ministry of Health Protection, the Ministry on Emergencies, and the Federal Nuclear and Radiation Security Agency publish such information in the form of annual federal reports. *Id.* Only half of about 85 regional agencies responsible for publishing such information in their region publish it. *Id.* As for corporate entities, only Gazprom and several other entities publish such reports annually. *Id.*

Cite TRI and PPA here. Compared to the U.S.'s Toxics Release Inventory (TRI) or the Pollution Prevention Act (PPA), the TRI requires all polluters that use designated amounts of listed chemicals to report annual releases and transfers of these chemicals to the EPA. The EPA then releases the reports to the public. The PPA adds to the TRI by requiring that all TRI reports contain information on estimates of all chemical waste generated by a firm, regardless of whether that waste was released, treated, burned for energy, or recycled. See 42 U.S.C. §§ 11023, 13102(2), 13102(3), 13107 (2000). United States Environmental Protection Agency, What is the Toxics Release Inventory (TRI) Program, available at <http://www.epa.gov/tri/whatis.htm> (last modified June 14, 2004).

The Russian Code on Administrative Infringements provides for administrative liability for the concealment, distortion, or delayed provision of information on an environmental situation. *Sobr. Zakonod. RF* 1999, No. 5, Item 22.

¹³⁶ Decree of Government of Russian Federation, Art. 6, No. 526, (May 11, 1999) (citing rules providing information on safety of dangerous industrial activity); *Postanovlenie Pravitelstva RF Ob Utverzhdenii Pravil predstavleniya deklaratsii promyshlennoi bezopasnosti opasnykh proizvodstvennykh ob'ektov*, *Sobr. Zakonod. RF*, 1999, No. 20, Item 2445.

Moreover, industries can avoid information laws by declaring the information “confidential.”¹³⁷ For instance, on one occasion the Novolipetsk Metallurgical Plant officially reported less than the actual amount of emissions and concealed the real pollution situation both from citizens and from official bodies.¹³⁸ However, there are no instances of criminal prosecution for concealment or distortion of pollution information, as provided for in the Russian Criminal Code.¹³⁹

In her article devoted to the struggle of the inhabitants of the small town of Troitsk (Moscow Region) against deforestation of the territory of their town, Commentator N. E. Sidorkina describes a group of citizens who sent an information request to the local administration, and to the Government of the Moscow Region.¹⁴⁰ The authorities did not grant the requested information to the inhabitants of Troitsk on the deforestation.¹⁴¹ Ignoring requests is a typical mechanism of the authorities to impede citizen enforcement of their environmental rights. Theoretically, citizens can appeal inaction of state and local bodies, but the process is slow and cumbersome.

On the other hand, there are number of successful cases in which citizens have won the right to access information after a court battle. One example concerns a group of citizens of the Sakhalin region who requested an agency known as Dalmorneftegeofizika (hereafter, “DMNG”) for information obtained in preparation for a seismic survey of a shelf bottom in an area inhabited by gray whales.¹⁴² This information included environmental feasibility studies, the conclusions of a federal environmental assessment, and a copy of approval of Ministry of Natural Resources. DMNG maintained that the requested information was a commercial secret because DMNG was a contractor to Exxon

¹³⁷ This occurs in spite of the statutes on state secrets. *Zakon Rossiyskoi Federatsii O Gosudarstvennoi Taine Sobr. Zakonod. RF 1997 No. 41, Item 4673; Federalniy Zakon Ob Informatsii, Informatizatsii I Zashite Informatsii, Sobr. Zakonod. RF, 1995, No. 8, Item 609 (On Information, Distribution of Information, and Protection of Information) (prohibit defining as “confidential” any environmental or health-epidemiological information).*

¹³⁸ See Special Report of the Ombudsman of the Russian Federation, *On Environment and Violation of Citizens' Rights* (September 5, 2002), available at <http://ombudsman.gov.ru/doc/spdoc/0202.shtml> (last visited Oct. 11, 2005).

¹³⁹ UK RF art. 237 (Russ.).

¹⁴⁰ Nataliya E. Sidorkina, *Otmena Nezakonnogo Resheniya Organa Vlasti v Dobrovolnom Poryadke – Rezultat Pravovyh Deistviy Obshestvennosti (Changing the Illegal Decisions of the Legislature – The Result of Public Action)* available at Belloni, http://www.webcenter.ru/~ecojuris/RPUBLIC/B3/b3_4.htm, (last visited Oct. 3, 2005).

¹⁴¹ *Id.*

¹⁴² Tarasevich D.S. v. GUP Trest Dalmorneftegeofizika, *Reshenie Yuzhno-Sakhalinskogo Gorodskogo Suda po delu, No. 2-1248/02 (2002)*, available at <http://www.sakhalin.environment.ru/search.html?x=2954> (last visited Oct. 3, 2005).

Corporation involved in work under a Production Sharing Agreement.¹⁴³ DMNG also claimed that the plaintiffs' request was invalid as it violated the rights of a third party – Exxon. The court upheld the position of the plaintiffs, and compelled DMNG to grant all the requested documents to the plaintiffs¹⁴⁴.

H. Expenses

The last important issue concerns responsibility for litigation costs. There are two types of fees: state duties and the administrative costs related to the consideration of the case.¹⁴⁵ The state duty, paid before filing the claim, depends on the amount and type of damages claimed. For moral damages, a typical duty is 100 RUR or 3 USD, while for material damages, the duty ranges from one to four percent of the amount of the claim.¹⁴⁶ If a plaintiff loses a case, the duty paid is not returned to her.¹⁴⁷ Thus, a plaintiff may lose \$3 USD for losing a \$10,000 moral damage claim while a plaintiff may lose \$1,000 USD for losing a \$10,000 material damage claim. Administrative costs include the money to be paid to witnesses, experts, specialists and translators, transportation and living expenses of the litigants and third parties participating in the case, and attorneys' fees.¹⁴⁸

If a party requests the services of translators or experts, the party must deposit sufficient funds to a court registry in advance.¹⁴⁹ If a plaintiff cannot afford to pay the costs of an expert report in advance, this rule can make it impossible for the plaintiff to win the case. However, article 96.3 of the Code of Civil Procedure states that the court must take into account the parties' financial situations and may release an indigent party of the duty to cover such expenses or at least decrease their amount.¹⁵⁰

Article 98 of the Code of Civil Procedure covers the distribution of expenses among the parties.¹⁵¹ The loser must cover all the expenses of the winner except in situations when the court takes into account the indigence of the losing party.¹⁵² In addition, the loser must compensate the court for its relevant expenses.¹⁵³ If one of the parties does not agree with the distribution of

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ GPK RF art. 88.1 (Russ.).

¹⁴⁶ NK RF art. 333.19 (Russ.).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ GPK RF art. 96.1 (Russ.).

¹⁵⁰ GPK RF art. 96.3 (Russ.).

¹⁵¹ GPK RF art. 98 (Russ.).

¹⁵² *Id.*

¹⁵³ *Id.*

the expenses imposed by the court she has a right to appeal court's decision on fees distribution to the higher court.¹⁵⁴

III. THE OUTLOOK FOR TOXIC TORTS IN RUSSIA: ROOM FOR IMPROVEMENT

A. *The Value of a Stable Economy*

Toxic torts are sustainable in the U.S. because large verdicts against polluting entities will not cause a collapse in the economy. Even where punitive damages are assessed, the objective is not to put companies out of business, but to deter wrongful activity.¹⁵⁵ Further, toxic torts can flourish because it is profitable for plaintiffs' lawyers to invest in these cases. As the Russian GDP increases it is possible that the economy will become sufficiently stable for toxic torts to become a reality.¹⁵⁶

Several factors contribute to a rising GDP. The first is increased consumerism. For instance, Mobile TeleSystems, a Russian mobile communications operator now listed on the New York Stock Exchange, began with but a few thousand subscribers in 2000.¹⁵⁷ In 2005, there were over 44 million.¹⁵⁸

If Russia joined the World Trade Organization (WTO) Russia's economy could become more globalized (and presumably more stable).¹⁵⁹ In February 2005, presidents Bush and Putin entered into negotiations on this issue, and announced that, "The results of the negotiations will enhance commercial opportunities between our two countries, support economic reforms that Russia has made a priority, and further integrate Russia into the world economy."¹⁶⁰

The two presidents have also expressed interest "in increasing U.S. commercial investment in Russia, so as to create additional capacity for liquefied natural gas (LNG) in Russia, and also with the aim of increasing LNG

¹⁵⁴ GPK RF art. 104 (Russ.).

¹⁵⁵ See A. Mitchell Polinsky and Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. (1998), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=11357 (last visited Oct. 4, 2005).

¹⁵⁶ The Russian economy has now entered its seventh year of expansion, following an average real GDP growth of just under 6.8% per annum during 1999-2004. Rudiger Ahrend and William Tompson, *Russia's economy: Keeping up the good times*, THE OECD OBSERVER, No. 249, May 1, 2005, at 14.

¹⁵⁷ Jaime Levy Pessin, *Global Offices Survey: Law firms find opportunity in Russia's growing economy*, CHICAGO LAWYER, Sept. 2005.

¹⁵⁸ *Id.*

¹⁵⁹ *Joint statement by President George W. Bush and President Vladimir V. Putin: Russia's Accession to the World Trade Organization*, 8 WEEKLY COMP. OF PRES. DOC. 4 (Feb. 28, 2005).

¹⁶⁰ *Id.* at 321.

exports to U.S. markets.”¹⁶¹ In February 2005, the two presidents planned for increasing imports from Russia to the United States, and expanding mutual investments in the energy sectors of both countries.¹⁶²

The fact that Russia has one of the world’s largest oil supplies and the largest natural gas deposits in the world may help turn these goals into fruitful investment opportunities. Oil prices tripled between 1999 and 2005, allowing Russia to build gold and currency reserves to values of 139 billion USD as of March 31, 2005.¹⁶³ In early 2005, the government settled all of Russia’s remaining obligations to the IMF.¹⁶⁴ In the aftermath of the August 2005 Hurricane Katrina, the importance of Russia’s oil supplies should make the country ripe for increased international investment.¹⁶⁵

In taking advantage of its oil wealth, Russia will have to work delicately to meet investors’ expectations of a society characterized by the rule of law and respect for property rights.¹⁶⁶ The negative psychological impact of the government’s dismantling of the largest Russian oil company, Yukos, and its persecution of the entity’s former head, Mikhail Khodorkosvky, frightened not only other oligarchs but also foreign investors.¹⁶⁷ At this point, the government’s actions remain inconsistent, with initiatives intended to reassure investors coinciding with actions such as the recent back-tax demands to the oil company TNK-BP.¹⁶⁸

B. *The Value of a Stable and Accessible Court System*

There are some indications that the Russian judicial system is in fact, evolving into a modern institution. The country’s civil code and procedural code for the commercial courts were both enacted in phases throughout the

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Hans Belcsak, *Hot Spots: Russia*, 107 BUS. CREDIT 6 (June 1, 2005) at 53; *How Much Oil and Gas is Left?*, available at Society of Petroleum Engineers, http://www.spe.org/spe/jsp/basic/0,,1104_1008218_1109511,00.html (last updated 2005).

¹⁶⁴ *Id.*

¹⁶⁵ Pessin, *supra* note 104.

¹⁶⁶ Berkowitz and Karen Clay, *American Civil Law Origins: Implications for State Constitutions*, 7 AM. L. & ECON. REV. 62 (2005) (suggesting that civil law system is inherently less stable than common law system). The authors note the example of the Louisiana Constitution, which has far more specific provisions than many other American state constitutions, and has been rewritten 11 times. *Id.* at 63. Authors suggest that the relative instability of civil law systems relates to uncertainty regarding property rights, which may result from the perceived risk of great change in government administration. *Id.* at 64.

¹⁶⁷ Rudiger Ahrend and William Tompson, *Russia's Economy: Keeping up the good times*, THE OECD OBSERVER 249 (May 1, 2005) at 14.

¹⁶⁸ *Id.*

1990s, but have been updated or revised as recently as 2002.¹⁶⁹ Although these laws continue to function as works in progress, they at least create a guideline for what litigants can expect.¹⁷⁰ The Russian court system is better funded than before, and judges are now better paid.¹⁷¹ Victories for plaintiffs in consumer protection, wage disputes and other categories of civil cases are increasing.¹⁷²

In establishing an environment where toxic torts can flourish, a major obstacle is the vast degree of judicial discretion overlaying a judicial reluctance to grant meaningful awards. As this article has discussed, it is up to the judge to determine damages, the financial status of parties, the necessity for an environmental assessment, evidentiary issues, and other judicial determinations.¹⁷³

On top of this vast discretion, a judge may act upon his or her own bias in a manner that seems to contravene the facts of the case. A judge can block practically all of the procedural tactics of a plaintiff, as in the case of *Citizens of Russian Federation v. Russian Federation and Ministry of Natural Resources of Russian Federation*.¹⁷⁴ In that case, the plaintiffs sought to prohibit Production Sharing Agreements between the Russian Federation and the oil companies Shell and Exxon on the shelf of Sakhalin Island.¹⁷⁵ Plaintiffs argued that these classified agreements harmed gray whales, which are classified as endangered species in Russia and worldwide.¹⁷⁶ Plaintiffs filed a motion to compel the production of documents from the defendants, but the judge denied the motion.¹⁷⁷ The plaintiffs then filed a motion to present the testimony of court specialists who had been watching gray whales for several years and had observed deterioration in their health.¹⁷⁸ The judge again denied the motion.¹⁷⁹ The plaintiffs filed a motion to appoint an expert, but yet again the judge denied the motion.¹⁸⁰ Finally, the plaintiffs filed a petition to recuse the judge on

¹⁶⁹ WILLIAM BURNHAM, LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION (3d ed., 2004).

¹⁷⁰ Pessin, *supra* note 104.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ See *supra* notes 21, 36, 94 and accompanying text.

¹⁷⁴ *Citizens of Russ. Fed. v. Russ. Fed. and Min. of Nat. Resources of Russ. Fed.*, *Sobr. Zakond. RF No. 10* (2001); Evgeniy Komarov, *Sud ne zashitil kitov*, *NOVIE IZVESTIYA*, No. 82 (May 2002), available at <http://www.hro.org/editions/press/0502/21/21050232.htm> (last visited October 4, 2005).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

grounds of bias. The judge also denied this motion as she found no bias.¹⁸¹ The judge dismissed the action reasoning that plaintiffs did not prove that sustaining these motions would help to resolve the case properly.¹⁸²

Although the lack of *stare decisis* may limit litigants' ability to establish precedent, it should be noted that litigants do pay close attention to prior cases. Since *Konsultant* and *Garant*, two main legal data bases on Russian law, have started publishing the decisions of the Supreme Court and the Circuit Courts, lawyers preparing to file a case check the relevant practice to see which legal theories have been successful, and which have not.¹⁸³ It is also possible that successful cases can become "precedent" in the social consciousness of litigators.¹⁸⁴ On the other hand, the lack of precedent leaves the field open for new and ever-evolving environmental theories.

The Russian judicial system will also need to address the problem of access to information. While the Russian Code of Civil Procedure contains the same tools for discovery that are provided in the U.S. Federal Rules of Civil Procedure, the rules are not followed.¹⁸⁵ For instance, in many American states,

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *E.g.*, Cámara Nacional en lo Contencioso Administrativo, Sala III, (Aug. 9, 1994); Schroder, Juan Estado Nacional Secretaria de Recursos Naturales s/Amparo (E.D. Dec. 14 1994) (establishing a generalized standing for defense of environmental rights); Camara Nacional, C.F. (prohibiting illegal hunting). This suggestion is based on my own law school experience in Argentina, a country with a similar code and no *stare decisis*. In environmental courses, professors often used certain successful environmental cases as examples, and students perceived that it was possible to achieve similar results.

¹⁸⁵ Konst. RF, Art. 29.4 (1991). According to Article 29.4 of Constitution, a litigant has the right to freely seek, obtain, transfer, produce and distribute information by any legal way. *Id.* If a plaintiff lacks some documents or information because these documents and information are possessed by a defendant, and the defendant refuses to grant this information to a plaintiff voluntarily, then a plaintiff has a right, in accordance with the Article 35.1 of the Civil Code of Procedure, to ask the court to compel the defendant to produce this evidence. *Id.*; GPK RF, Art. 35.1.

If the exact names of the documents are unknown, a litigant can request documents using their general names. For a court to grant such a motion, a party asking for help must indicate four things: (a) what documents or other evidence she needs, (b) what elements of the case the documents will prove, (c) why the plaintiff cannot get these documents personally, (d) the location of the evidence (which is usually the office of the defendant). *Id.* The court then considers whether the inclusion of these documents in the case is necessary and whether a party has the ability to collect these documents herself. If the court grants the motion, it orders the holder of the evidence to produce it. *Id.* The producing party must send the evidence directly to the court or forward it to a court-appointed official who is assigned to collect the documents. GPK RF art. 57.2. (Russ.)

A court may take judicial notice of circumstances that are common knowledge. *Id.* art. 61.1. Thus, if an area is declared an emergency zone by federal government or if an emergency situation relating to a factory is officially recognized by authorities, then the court must take judicial notice of these circumstances. *Id.*

if a litigant unlawfully refuses to turn over necessary evidence, an adverse presumption arises against the litigant.¹⁸⁶

One gets the impression that the Russian system is designed to protect private industry at the expense of protecting the rights of private individuals. Indeed, polluters have the *right* to pollute the environment up to the maximum established limits.¹⁸⁷ Fortunately, this does not necessarily exclude all actions against those who are polluting within the legal limit. Rather, it gives the polluter the right to implead the state on the basis that the polluter relied on the state to establish appropriate limits.¹⁸⁸ However, while this law allows the private individual to obtain some relief, there is clearly a limit to how much the State will be able to indemnify all of the Russian industries.¹⁸⁹ Thus, even when a plaintiff is able to win his or her case, the current law limits the scope of relief.¹⁹⁰

C. Incentives for Plaintiffs' Lawyers

The scope of relief also depends on the willingness of plaintiffs' lawyers to invest large sums of money into a case, and wait several years for a return. While American plaintiffs' lawyers have several tools to make this investment valuable, Russian toxic tort plaintiffs' lawyers are basically doing pro-bono work. This is because the only possible source of income for these lawyers is sharing the moral damages award with victims. However, because moral damages are so meager, there is little to share.

The first advantage that American plaintiffs' lawyers have over plaintiffs' lawyers in other countries is their use of the contingency fee. Assuming a lawyer has a reasonable chance of winning (or better yet, settling) a case, the contingency fee allows the lawyer to attract more business and take a bigger cut of the award.

The second advantage that American plaintiffs' lawyers have is the use of the class action. While recent Supreme Court cases and revisions to the Federal Rules of Civil Procedure¹⁹¹ have sought to limit the abuse of this device by

¹⁸⁶ See, e.g., *Nasrallah v. Davilla*, 762 N.E.2d 25 (Ill. App. 2001); *Allstate Ins. Co. v. Ford Motor Co.*, 772 So.2d 339 (La. App. 2000).

¹⁸⁷ Environmental Protection Statute, art. 23 (Russ.) (establishing general regulations on norms and limits for dumping and emissions of adverse substances to environment). Specific limits are set by the Government's decrees. Industrial enterprises have to pay the state for permits to emit. *Id.*

¹⁸⁸ *Id.* art. 16 (establishing basic rule that the polluters have a right to pollute inside the allowed limits, provided they pay the required fees. Other acts establish the precise norms of pollution.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997) (refusing to let an asbestos class action go forward where claims arose under disparate state law, involving different patterns of harm

plaintiffs' lawyers, the simple economy of scale of bringing many claims under a single action is hard to beat.

Russian legislation does not provide express provisions for class actions. However, Russian law provides for combined actions of plaintiffs or defendants. A group of plaintiffs and/or a group of defendants can be represented by the same attorney (or the same group of attorneys) before the court. Thus, several people injured by the same defendant can file a common suit, or one plaintiff can file one suit against all of the defendants. This is called a "procedural fellowship," which is similar to a joinder in the US.¹⁹²

However, procedural fellowships do not result in the economy of scale that American class actions offer. If a Russian court allows a procedural fellowship, each of the plaintiffs and the defendants must act independently towards other parties during the proceedings. The result is that the procedural fellowship does not really act as a unit.

The case of *Citizens of the Village of Georgievka v. Siberian Chemical Plant* serves as an example of successful joinder on the side of plaintiffs.¹⁹³ In this case, attorney Konstantin Lebedev sued on behalf of all inhabitants of the small village of Georgievka against SCP.¹⁹⁴ The suit was based on a radioactive explosion in the village.¹⁹⁵ Prior to the explosion, the population of the village was about 30 people.¹⁹⁶ After the explosion people with children left the village, and the 15 remainders joined as plaintiffs.¹⁹⁷ Because of the small number and close geographic proximity, sharing information was not a problem.¹⁹⁸

to individuals.) This case dealt a major blow to massive, multi-state class action settlements. *Id.*

The Class Action Fairness Act 28 U.S.C. § 1332(d)(2) (2005) (expanding scope of federal jurisdiction over class actions, making it harder for plaintiffs' lawyers to maintain cases in small state courts with plaintiff-friendly juries. The new rules allows defendants to remove a case to federal court if there are 100 or more class members; the aggregate amount of the class members' claims exceeds \$5 million, and a single defendant is a citizen of a state different from that where the case was filed. *Id.* The rule also limits lawyers' fees in coupon cases to the value of the redeemed coupons, as opposed to the number of coupons mailed. 28 U.S.C. § 7112 (2005).

¹⁹² GPK RF art. 40.1 (Russ.). There are three situations when a plaintiff or a defendant can pursue procedural fellowship: (1) the subject matter of the dispute concerns common rights or obligations of several plaintiffs or defendants; (2) the rights and obligations of several plaintiffs or defendants have the same basis; (3) the subject matter of the dispute is homogenous rights and obligations. *Id.*

¹⁹³ Reshenie Tomskogo Oblastnogo Suda, No. 02/10-2001 (2001); G.V. Raychenok v. Siberian Chemical Plant, *available at* Bellona, http://www.bellona.no/ru/international/russia/nuke_industry/siberia/seversk/22041.html (last visited Oct. 3, 2005).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

A third advantage the American plaintiffs' lawyers have over plaintiffs' lawyers in many countries is that there is no "loser pays" rule. Because each litigant pays her own way, there is less risk for plaintiffs to invest in a case. This is not the case in Russia, where the loser pays for all of the other party's costs.¹⁹⁹

The notorious generosity of American juries, combined with the availability of punitive damages, adds to the profitability of taking on a plaintiff's case in the U.S. Not only is there no concept of a jury in Russia, there is no concept of large damage awards.²⁰⁰ Compensation for moral damages, which usually does not exceed \$1,000 USD, is too low to cover the real moral damages of a plaintiff. It is understandable that judges want to avoid unjust enrichment of an injured party, and that they take into consideration the average salary in Russia (\$300 USD).²⁰¹ Nevertheless, it is also clear that an injured party did not ask to be injured and a larger amount of moral compensation would both punish the wrongdoer and fully compensate an injured party.²⁰²

CONCLUSION

Environmental litigants in Russia have had some success in their use of the tort-like provisions of the Russian civil code—especially in securing moral damages. However, the Code of Civil Procedure has confounded tort litigants with strict requirements for direct evidence and injunctions, as well as required expenses to which a plaintiff must commit before the case can even be considered.

Is it possible that Russian plaintiffs' lawyers could combine their knowledge of domestic and local law, along with their relatively cheap salary requirements, with sufficient foreign investment to provide for expensive export reports and bonds? It is noteworthy that, in spite of the shaky investment climate in Russia and the problems of the Russian judiciary system, American and other foreign law firms have invested in Russian offices. Today there are

¹⁹⁹ GPK RF art. 98 (Russ.).

²⁰⁰ LA. CIV. CODE, art. 2315.3 (2004). Louisiana, the only civil law state in the union, has virtually eliminated punitive damages. *Id.* Currently, these damages are only available in cases of child molestation, drunk driving, and the improper storage, handling, or transportation of toxic material that occurred between 1984 and 1996. It is interesting to compare Louisiana's problems with pollution (e.g., the pollution caused by petrochemical industries in "Cancer Alley" and the Lake Charles area) with Russia's problems. In both Louisiana and Russia, industries have less incentive than they might have in other states to avoid harmful pollution.

²⁰¹ Red Line Media, analytical section of August 1, 2005, available at <http://www.redlinemedia.ru/news.php?id=61303> (last visited Oct. 11, 2005).

As of June 2005 the average salary in Russia was 8,655 RUR or about 300 USD. *Id.*

²⁰² *Id.*

more than 50 foreign firms in Moscow.²⁰³ Many of these firms have only just arrived, including Jones Day (2004), Winston & Strawn (2005), and DLA Piper Rudnick Gray Car (2005).²⁰⁴ Although most of these firms are outposts for international business rather than fountainheads for Russian tort reform, the opportunity exists for teamwork. Such a combination would be a more effective method for pursuing profitable torts than either foreign lawyers or Russian lawyers working alone.

²⁰³ Marie-Anne Hogarth, *Western Law Firms Flocking to Russia*, 232 THE LEGAL INTELLIGENCER 133 (2005) at 4.

²⁰⁴ *Id.*