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OSHA's General Duty Clause: Its Use is Not Abuse—A Response to Morgan and Duvall

Larry Drapkin†

The author asserts that the general duty clause need not be construed as narrowly as Morgan and Duvall suggest in the preceding article. He rejects their arguments on congressional intent, notice and rulemaking, and argues that a broad application of the general duty clause is necessary to effectuate the mandate of the OSH Act.

I
INTRODUCTION

The bottom line of the movement for increased occupational safety and health in this country must be the prevention of work-related injuries, illnesses and deaths. When considering the proper scope and effect of the Occupational Safety and Health Act, then, we must take seriously the language of the Act's most basic provision, the so-called general duty clause. That provision requires that the employer "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[1]

In this issue of the Industrial Relations Law Journal, Donald L. Morgan and Mark N. Duvall[2] have argued that this clause must be read in a very narrow and relatively unprotective manner. Before considering some of the specific legal issues raised by these authors, two very basic points should be stressed. First, it must be recognized that it is impossible to ensure workplace safety and health solely through the promulgation and enforcement of specific regulations. As occupational safety and health expert Lawrence Bacow has reminded us, "Workplaces differ—sometimes only slightly and sometimes drastically . . . . Each firm has a different production technology, market position and ability (and willingness) to respond to government regulation. In ef-

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flect, each firm has a slightly different health and safety problem.”\(^3\) Thus, “to solve the occupational safety and health problem we must find a way to eliminate hundreds of thousands of different risks.”\(^4\)

Complete standardization of hazards and exposures is unattainable. Both the diversity of hazards and the inherent limitations of administrative rulemaking make it naive to argue that effective health and safety protection can be provided simply by specific regulation.

A second preliminary point is that authors Morgan and Duvall, along with some industry groups, wish to weaken OSHA’s effectiveness in abating those hazards which it cannot cite under current regulations. In essence, they advocate that we severely limit the agency’s power to protect workers from serious occupational hazards.

On the preceding assumptions, this response examines the issue of the proper breadth of the general duty clause. I will argue that the congressional intent does not impel us to severely restrict the enforcement of the clause. I will also defend the legality of a broadly construed general duty clause, paying particular attention to the authors’ arguments on fair notice to employers and the primacy of rules and rulemaking. Finally, I will address the need for an expansive general duty clause and the consequent bankruptcy of Morgan and Duvall’s proposals for alternatives to the use of the clause.

II

CONGRESSIONAL INTENT

The starting point for any analysis of legislative intent is the official congressional declaration of purpose. Section 1(b) of the Act states unequivocally that “the Congress declares it to be its purpose and policy . . . to assure so far as possible every man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . .”\(^5\) Other specific provisions, apart from the general duty clause, also evince a congressional recognition of and a concern with the severe occupational safety and health hazards facing the American worker,\(^6\) and the need for strong measures to alleviate them. For example, Congress empowered OSHA inspectors to seek federal-court injunctions where employment conditions present imminent danger to

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workers. Congress also prohibited discrimination against employees who express concern for their safety or exercise their rights under the Act.

While it is true Congress preferred that where possible OSHA regulate via standard setting and rulemaking, the legislative history shows that Congress also wanted a broad general enforcement provision in the Act. It was clear even at that time that the increasing number of new hazards would far outstrip the agency's ability to regulate them. Indeed, the Senate Labor and Public Welfare Committee recognized "that precise standards to cover every conceivable situation will not always exist. This legislation would be seriously deficient if any employee were killed or seriously injured on the job simply because there was no specific standard applicable to a recognized hazard which could result in such a misfortune." In fact, the Senate Labor and Public Welfare Committee approvingly cited the testimony of Governor Howard Pyle, former President of the National Safety Council, on the desirability of a broad general duty provision:

If national policy finally declares that all employees are entitled to safe and healthful working conditions, then all employers would be obligated to provide a safe and healthful workplace rather than only complying with a set of promulgated standards. The absence of such a general obligation provision would mean the absence of authority to cope with a hazardous condition which is obvious and admitted by all concerned for which no standard has been promulgated.

In the Conference Committee, the general duty clause was specifically amended and its coverage broadened to require that an employer keep the workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees." This language expanded the duty contained in the Steiger bill, which would have covered only "readily apparent" hazards. The difference is clear. Readily apparent is what one can perceive; recognized is not only what can be seen but what should be known to a prudent individ-

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7. 29 U.S.C. § 662 (1976). Under this provision, OSHA may shut down work areas and machinery deemed to constitute an imminent danger.
10. Senate Report, supra note 9, at 10, reprinted in Legis. Hist., supra note 9, at 150.
ual engaging in a particular type of endeavor.\textsuperscript{14} Congress thus rejected a version of the clause that would have severely limited its reach.

At the heart of Morgan and Duvall's discontent with OSHA, one suspects, is the substantial costs of compliance that a broadly construed general duty clause imposes on employers. But as one commentator has remarked, the general duty clause embodies an entire new philosophy of employer-employee relations with regard to safety.\textsuperscript{15} Congress did not mean to cut corners, or to require only the cheapest or least intrusive worker protection. Senator Ralph Yarborough addressed the issue of employer costs:

One may well ask too expensive for whom? Is it too expensive for the company who for lack of proper safety equipment loses the services of its skilled employees? Is it too expensive for the employee who loses his hand or leg or eyesight? Is it too expensive for the widow trying to raise her children on a meager allowance under workmen's compensation and social security? And what about the man—a good hardworking man—tied to a wheelchair or hospital bed for the rest of his life? That is what we are dealing with when we talk about industrial safety. We are talking about people's lives, not the indifference of some cost accountants.\textsuperscript{16}

In gauging the intent of Congress in adopting the general duty clause, it is important to bear in mind Senator Yarborough's impassioned declaration that this act is intended to protect the potential victims of industrial carnage. Adequate protection requires that all potentially hazardous exposures be covered, not just those amenable to standardization. No less could sufficiently implement the specific declarations of duty and purpose set forth in this act.

Courts that have considered the legislative history have interpreted the Act's mandate broadly. While the Supreme Court itself has not specifically passed on the scope and breadth of the general duty clause, it has emphasized more than once that the OSH Act was meant to be far-reaching and, at times, costly and intrusive. This interpretation of the Act is consistent with the rule that "safety legislation is to be liberally construed to effectuate the congressional purpose,"\textsuperscript{17} and with the fact that Congress placed no specific limit on the general duty clause in the OSH Act.

In \textit{American Textile Manufacturers Institute v. Donovan},\textsuperscript{18} for example, the Supreme Court acknowledged that Congress fully intended

\textsuperscript{14} Id. at 1007.


\textsuperscript{16} \textit{Legis. Hist.}, supra note 9, at 510.


\textsuperscript{18} 452 U.S. 490 (1981).
the OSH Act to have a far-reaching and costly impact on employers. The Court stated that the "legislative history demonstrates conclusively that Congress was fully aware that the Act would impose real and substantial costs of compliance on industry and believed that such costs were part of the cost of doing business." In holding that OSHA is not required to analyze the costs and benefits of its proposed standards, the Court favorably cited Senator Yarborough's comments regarding the cost of achieving a safer working environment. The Court thus made clear that cost to employers is not, in itself, a valid objection to rules and regulations promulgated under the OSH Act.

In Whirlpool Corp. v. Marshall, the Supreme Court looked to the general duty clause as a justification for an OSHA regulation prohibiting employer retaliation against workers who refuse to perform hazardous work. The Court maintained that the right of refusal helped to implement the clause's "mandatory obligation independent of the specific health and safety standards to be promulgated by the Secretary." The Whirlpool Court again looked to Senator Yarborough's declaration that preventing illness and injury should take precedence over the avoidance of cost. Circuit courts have also refused to narrowly construe the purpose of the general duty clause. In American Smelting and Refining Co. v. Occupational Safety and Health Review Commission, the Eighth Circuit declared:

We . . . think that the purpose and intent of the Act is to protect the health of the workers and that a narrow construction of the general duty clause would endanger this purpose in many cases. To expose workers to health dangers that may not be emergency situations and to limit the general duty clause to dangers only detectable by the human senses seems to us to be a folly.

The court interpreted Congress' choice of the term "recognized hazards" over "readily apparent hazards" as a conscious decision to expand the reach of the general duty clause. Other courts of appeals have also recognized the essential role the general duty clause must play in the Congressional scheme to prevent and remedy occupational injury.

19. Id. at 514.
20. Id. at 520.
22. Id. at 11.
23. Id. at 13.
24. Id. at 12.
25. 501 F.2d 504 (8th Cir. 1974).
26. Id. at 511.
27. Id.
28. See, e.g., Bristol Steel & Iron Works, Inc. v. OSHRC, 601 F.2d 717, 721 (4th Cir. 1979); Irvington Moore Div. v. OSHRC, 556 F.2d 431, 435 (9th Cir. 1977).
III
THE LEGAL BASIS FOR A BROAD AND POWERFUL
GENERAL DUTY CLAUSE

Morgan and Duvall suggest that Congress intended only a narrow, primarily symbolic, general duty clause. This, as we have seen, is not necessarily so. The authors also suggest that a broad general duty clause will violate the due process and fair-notice rights of employers, and that rulemaking is to be preferred over case-by-case adjudication under the clause. In addition, they claim that where specific standards are directed at a hazard, the general duty clause should be completely preempted. This section will briefly examine these points.

A. Fair Notice

Morgan and Duvall have written at length of the unfairness of OSHA’s enforcement of the general duty clause. They argue that the agency’s broad interpretation of the clause deprives employers of effective notice of the standard of care to which they will be held. But none of the interpretations of the clause advanced by OSHA or the courts establishes any duty of care that would take a prudent and thorough employer by surprise.

In *National Realty and Construction Co. v. OSHRC*, a landmark case interpreting the general duty provision, the D.C. Circuit held that “any statute or rule of law imposing general obligations raises certain problems of fair notice. . . . With respect to the general duty clause itself, the Commission can ameliorate the fair notice problem by attending carefully to the statutory definition of a ‘serious violation.’ ” The court went on to cite the statutory language:

[A] serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation. The court thus looked to what the reasonable employer, exercising diligence, should know about the hazards within its control. The court made the standard of care an objective one. Actual knowledge of the condition is not crucial; rather, a recognized hazard “is a condition that is known to be hazardous, and is known not necessarily by each and

30. 489 F.2d 1257 (D.C. Cir. 1973).
31. *Id.* at 1268 (emphasis supplied).
every individual employer but is known taking into account the standards of knowledge in the industry.\textsuperscript{33}

To be struck down for vagueness a statute or regulation must fail "to give a person of ordinary intelligence fair notice that his contemplated conduct" is forbidden.\textsuperscript{34} A standard of care utilizing the level of knowledge and prudence of the industry as a whole surely affords this level of notice to employers.

Even if OSHA interprets "recognized hazards" to include hazards recognized in related industries or in the scientific literature,\textsuperscript{35} as it arguably should, employers still would receive adequate notice of their obligations. As the National Realty court's reference to "reasonable diligence" suggests, the standard of care under the general duty clause is not unlike the duty imposed on all individuals by tort law. In fact, both the Review Commission and the courts have drawn upon the reasonableness standard of tort law in interpreting OSHA regulations.\textsuperscript{36} For example, the court in \textit{McClean Trucking Co. v. OSHRC},\textsuperscript{37} in discussing both a specific regulation and the general duty clause, stated: "In effect the legislative and regulatory standards call for the 'reasonable man' test and the application of this classic criterion eliminates to a large degree the alleged facial invagueness."\textsuperscript{38}

An analogy to tort law suggests that it is proper not only to require an employer to be aware of the scientific knowledge of its own industry, but to make efforts to gather new information. Under tort law, individuals marketing goods and services have an affirmative duty to discover dangers of which they may not be informed. "As scientific knowledge advances, and more and more effective tests become available, what was excusable ignorance yesterday becomes negligent ignorance today."\textsuperscript{39} Moreover, the standards of a profession cannot insulate a practitioner from liability where reasonable precautions were not taken.\textsuperscript{40}

\textsuperscript{33} \textit{Id.} at 1265 n.32. \textit{See also} Whirlpool Corp. v. OSHRC, 645 F.2d 1096, 1098 (D.C. Cir. 1981); Titanium Metals Corp. of America v. Usery, 579 F.2d 536 (9th Cir. 1978).

\textsuperscript{34} Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (quoting United States v. Harriss, 347 U.S. 612, 617 (1954)); \textit{see} Donovan v. Royal Logging Co., 645 F.2d 822, 831 (9th Cir. 1981); \textit{see also} Arkansas-Best Freight Systems, Inc. v. OSHRC, 529 F.2d 649, 655 (9th Cir. 1976); Cape Vineyard Div. v. OSHRC, 512 F.2d 1148, 1152 (1st Cir. 1975); McClean Trucking Co. v. OSHRC, 503 F.2d 8, 10-11 (4th Cir. 1974); Truck Lines, Inc. v. Brennan, 497 F.2d 230, 233 (5th Cir. 1974).

\textsuperscript{35} \textit{See} Morgan & Duvall, \textit{supra} note 2, at 303-05.

\textsuperscript{36} \textit{See}, \textit{e.g.}, Bristol Steel & Iron Works, Inc. v. OSHRC, 601 F.2d 717, 723 (4th Cir. 1979); Brennan v. Smoke-Craft, Inc., 530 F.2d 843, 845 (9th Cir. 1976); Cape & Vineyard Div. v. OSHRC, 512 F.2d 1148, 1152 (1st Cir. 1975); McClean Trucking Co. v. OSHRC, 503 F.2d 8, 10-11 (5th Cir. 1974); S & H Riggers, 7 O.S.H. Cas. (BNA) 1260 (1976).

\textsuperscript{37} 503 F.2d 8 (5th Cir. 1974).

\textsuperscript{38} \textit{Id.} at 10-11.

\textsuperscript{39} \textit{PROSSER, LAW OF TORTS} 161 (4th ed. 1971).

\textsuperscript{40} Helling v. Carey, 83 Wash. 2d 514, 519 P.2d 981 (1974).
As Learned Hand explained:

[I]n most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages . . . . [T]here are precautions so imperative that even their universal disregard will not excuse their omission.41

It cannot be questioned that these accepted tort principles supply individuals with adequate notice of their social responsibility to learn of and guard against the possible dangers their activities present to the public. There is thus no reason why an analogous general duty standard, requiring employers to keep abreast of scientific developments in their field, should pose any graver notice problems. Indeed, the rationale for rejecting a standard of industry knowledge under the OSH Act is the same as in the tort cases: such a standard would allow an entire industry to avoid liability by maintaining inadequate knowledge.42

B. Rulemaking or Adjudication

To enforce employers’ general duty, OSHA may go beyond simply enforcing specific standards promulgated through the rulemaking process. As already noted, occupational safety and health legislation must “be liberally construed to effectuate the congressional purpose”43 of providing workers safe and healthful working places. Absent an explicit statutory limitation on OSHA’s exercise of its granted powers, the courts must afford the agency leeway in carrying out its mandate. A flexible and adaptable general duty clause may be utilized even though in an easier world hard and fast standards covering all possible hazards would be preferable.

It is an established principle that, barring a specific proscription, an administrative agency may act on a case-by-case adjudicative basis. In Securities and Exchange Commission v. Chenery Corp.,44 the Supreme Court gave administrative agencies broad discretion to choose between rulemaking and adjudication. The Court reasoned that problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible to capture within the

41. The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932) (citations omitted).
42. See Bristol Steel, 601 F.2d at 723; Smoke-Craft, 530 F.2d at 845; Cape & Vineyard, 512 F.2d at 1152.
44. 332 U.S. 194 (1947).
boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, \textit{ad hoc} litigation is one that lies primarily in the informed discretion of the administrative agency.\textsuperscript{45}

\textit{Chenery Corp.} is highly relevant to the concerns of Morgan and Duvall, who suggest that OSHA may be overstepping its powers by invoking the general duty clause rather than promulgating standards. Given the multitude of hazards and the diversity among workplaces, OSHA is a particularly appropriate beneficiary of the flexible discretion authorized by \textit{Chenery Corp.} A general duty citation is not intended to establish rules of widespread application. Rather, a decision under that clause almost always turns on the peculiar facts and circumstances of the particular case. To deny OSHA this flexible means of enforcement amounts to a renunciation of the Court’s reasoning in \textit{Chenery Corp.}

\section*{C. Pre-emption of the clause}

Morgan and Duvall also argue that the broad general duty requirement should be preempted when specific standards partly address hazards which could also be cited under the general duty clause.\textsuperscript{46} This is a deceptive and overly simplistic statement of the law.

It is true that when a standard is intended to, and does, cover specific hazards addressed by a general duty clause citation, the specific standard will preempt the citation.\textsuperscript{47} However, it is “incumbent on the employer to point out such a standard. There is no burden on the Secretary to prove inapplicability.”\textsuperscript{48} That a standard concerns a hazard also addressed by a general duty clause citation, however, does not necessarily make the clause inapplicable. Numerous decisions by the Occupational Safety and Health Review Commission and appellate courts tell us that the general duty clause citation will not be vacated when hazards “are interrelated and not entirely covered by any single standard.”\textsuperscript{49}

Perhaps the most important use of the general duty clause in this context is where the scope of the problem addressed by the two ap-

\begin{thebibliography}{49}
\bibitem{45} Id. at 202-03 (citation omitted).
\bibitem{46} Morgan & Duvall, \textit{supra} note 2, at 311-14.
\end{thebibliography}
proaches varies. For instance, standards which specify interim or short
term protection cannot displace a more effective, longer term duty of
care imposed by the general duty clause. 50 Further, various forms of
abating the hazards may be applied simultaneously, as set forth under
both a specific standard and a general duty clause obligation.

In *Peter Cooper Corps.*, 51 for example, the Occupational Safety
and Health Review Commission held that a general duty clause cita-
tion does not duplicate a citation under a specific regulation that re-
quires other precautions. The case involved *bacillus anthracis*, a
bacteria which causes the Anthrax disease. This potentially deadly dis-
ease can be prevented by immunization. However, the Review Com-
mission held that a specific citation under a standard for failure to
provide protective clothing and respirators did not preempt a general
duty citation for failure to immunize, since immunization is a form of
protection separate from, and necessary to supplement, the require-
ment for protective clothes and equipment. 52 Thus, when no standard
or combination of standards affords the necessary protection, the power
to cite under the general duty provision is not preempted.

Specific standards simply cannot cover all the complex and diverse
hazards present in American work places. Standards are thus often in-
adequate to afford the complete protection mandated by the OSH Act.
The general duty clause ultimately must fill the gaps. 53

IV
THE BANKRUPTCY OF THE MORGAN-DUVELL PROPOSALS

Conservative estimates indicate that there were as many as twelve
thousand toxic substances in commercial use in the United States in the
1970's. 54 We are only beginning to understand the hazards posed by
such substances. But the magnitude of known chemical hazards faced
by workers is, in itself, a sufficient basis to justify a comprehensive gen-
deral duty clause. For example, cancer causes at least 370,000 U.S.
deaths per year. 55 The United States government has estimated that
anywhere between twenty and forty percent of the cancers found in all
people are caused by workplace exposures to chemical substances. 56 If
twenty-five percent of all cancers are caused by work hazards, work-

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52. *Id.* at 1211.
53. *See supra* note 3. *See also* Bristol Steel & Iron Works, Inc. v. OSHRC, 601 F.2d 717, 721
   (4th Cir. 1979).
54. N. ASHFORD, supra note 6, at 15.
55. *Id.* at 38; N.Y. ACADEMY OF SCIENCES, CANCER AND THE WORKER 1 (1977).
56. National Cancer Institute, National Institute of Environmental Health Sciences & Na-
tional Institute for Occupational Safety and Health, Estimates of the Fraction of Cancer in the
place exposures would be responsible for more than ninety thousand cancer deaths per year.

Even more ominous for those concerned about workplace health and safety is that "the rate of increase of new substances for which standards must be set is much greater than the rate at which we are able to improve our standard-setting or enforcement ability."57 While the number of products and substances that should be regulated increases by leaps and bounds, the difficulty of adopting standards in a timely fashion precludes reliance solely upon regulations. For example, in attempting to promulgate a cotton dust standard pursuant to its informal rulemaking power, OSHA received 263 comments and 109 notices of intent to appear at the hearings. The accumulated record totaled some 105,000 pages. The standard, occupying sixty-nine pages in the Federal Register, was finally promulgated over a year and a half after OSHA had published its proposed standard.58

Morgan and Duvall propose that we limit the general duty clause and rely instead on the development of specific standards.59 Yet these authors must realize that, given OSHA's inability to act expeditiously in setting standards, their proposal would cripple the protective mandate of this law.60 If we wait for the promulgation of specific standards, we might as well forget about protecting workers from the array of new and continuing hazards which constantly plague the workplace. Morgan and Duvall seek to wrap a legal veneer around an obvious attempt to gut the broad worker protections afforded by the OSH Act.

Moreover, Morgan and Duvall suggest voluntary employer compliance as an alternative to the general duty clause.61 While it is true that many health and safety problems could be solved through the cooperative efforts of labor, management, and government, these efforts will remain optional, and will give no assurance that those problems which most need solving will even be addressed.62

57. N. ASHFORD, supra note 6, at 15.
60. In 1979, OSHA attorney Herrold J. Engel stated that the government must cite employers under the general duty clause instead of relying solely on standards because "it is impossible to protect employees without" the enforcement of the general duty clause. 9 O.S.H. REP. (BNA) 495-96 (1979).

See D. BERMAN, supra note 6, in which the author argues that the development of new standards "has proceeded extremely slowly because of deliberate OSHA obstruction. A memo from OSHA's chief administrator to President Nixon's 1972 election staff recommended that the promulgation of highly controversial standards (i.e., for cotton dust, etc.) be avoided and that 'four more years of properly managed OSHA' should be used 'as a sales point for fund raising and general support by employers.'" Id. at 33-34.
62. See 47 Fed. Reg. 29,025 (1982), which sets forth OSHA's implementation of voluntary
Perhaps their suggestion of reliance on voluntary efforts most forcefully symbolizes the entire thrust of the views of these authors. Unfortunately for workers, reliance on the good faith of employers delayed all too long the implementation and enforcement of occupational health and safety laws. Now we are told that the most effective and far-reaching aspects of the law finally enacted to remedy the epidemic of workplace injuries and illnesses should be administratively and legally curtailed. In its stead Morgan and Duvall suggest that we turn to the good intentions of employers. Our industrial history shows such reliance to be folly at best.

V

Conclusion

In this response, I have sought to demonstrate that the general duty clause is necessarily a broad provision intended to effectuate the purpose and goals of worker protection set forth in the OSH Act. It is in fact the backbone of the Act. Any argument to reduce the scope of this provision is really an argument to return to pre-OSH Act days. Such a regression, achieved by repealing the OSH Act itself, or by gutting its most important provision, would again place worker health and safety in the hands of "market forces." But only the countless victims of occupational accidents and diseases can really tell us what that means.