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Hazardous Wastes and Strict Liability: A Case for Holding the Producers of Hazardous Wastes Responsible for Their Actions

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HAZARDOUS WASTES AND STRICT LIABILITY: A CASE FOR HOLDING THE PRODUCERS OF HAZARDOUS WASTES RESPONSIBLE FOR THEIR ACTIONS

I. INTRODUCTION — THE PROBLEM OF HAZARDOUS WASTES

The Resource Conservation and Recovery Act of 1976 (RCRA)[1] is one of the major pieces of federal legislation dealing with hazardous wastes.[2] The RCRA defines hazardous waste as any solid waste or combination of solid wastes that may "cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or . . . pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed."[3] Solid wastes may include garbage, refuse, sludge and other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations or from community activities.[4]

1. 42 U.S.C. §§ 6901-6987 (1976 & Supp. IV 1980). Other major legislative efforts dealing with hazardous wastes are the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1976 & Supp. IV 1980), the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. IV 1980) and the Hazardous Materials Transportation Act, 49 U.S.C. §§ 1801-1812 (1976 & Supp. IV 1980).

2. The objectives of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901-6987 (1976 & Supp. IV 1980), are to promote the protection of health and the environment and to conserve valuable resources by "regulating the treatment, storage, transportation, and disposal of hazardous wastes which have adverse effects on health and the environment." *Id.* § 6902(4).

3. *Id.* § 6903(5). The deleterious potential of such wastes is measured in terms of their quantity and concentration of physical, chemical, or infectious characteristics. *Id.*

4. *Id.* § 6903(27). Solid waste, however, does not include the following: Solid or dissolved material in domestic sewage; solid or dissolved materials in irrigation return flows; industrial discharges that are point sources under § 1342 of Title 33; and special nuclear or nuclear byproduct

Hazardous waste is more succinctly defined as any waste posing a present or potential hazard to human health because of toxicity, nondegradability, persistence in nature, or susceptibility to biological magnification.[5] Regardless of definition, however, modern American industrial society continues to produce and discard hazardous materials at an alarming rate.[6]

This Note examines the issue of liability for generators of hazardous wastes who either legally or illicitly, through the dumping practices of low-bid contract haulers, dispose of waste products.[7] When disposal of hazardous waste products results in potentially severe environmental harm, society should assure itself that the entitites producing these hazardous wastes dispense with them properly and that enterprises involving unusual hazards pay their own way.[8] This Note will discuss the generation of hazardous wastes as an abnormally dangerous[9] undertaking. This undertaking, when coupled with appropriate notions of enterprise liability, is sufficient to hold hazardous waste producers strictly liable for any resulting harms.

II. ESTABLISHING A BASIS FOR HOLDING OFF-SITE GENERATORS OF HAZARDOUS SUBSTANCES STRICTLY LIABLE FOR SUBSEQUENT HARM

A. STRICT LIABILITY IN THE USE OF LAND

The first case to consider in depth the issue of liability without fault as applied to the use of land was *Rylands v. Fletcher*.[10] In *Rylands v. Fletcher* the defendants constructed a reservoir on their own land to collect water. This particular land was located in coal mining country and the new reservoir was built above the shaft of an

material as defined by the Atomic Energy Act of 1954, as amended. *Id.*

5. ENVIRONMENTAL PROTECTION AGENCY, REPORT TO CONGRESS ON THE DISPOSAL OF HAZARDOUS WASTES 83, 87 app. (1974).

6. F. SKILLERN, ENVIRONMENTAL PROTECTION § 9.09, at 325 (1981). Professor Skillern warns that while wastes are being generated in increasing quantities, on-site disposal facilities are being used to their full capacity and many state sites are overused or unsuitable. *Id.*

7. The unfortunate consequences of such practices are duly recorded and include thousands of pollution incidents. W. RODGERS, ENVIRONMENTAL LAW 690 (1977). Specific incidents include improper arsenic disposal, cyanide and phenol disposal, poisoning of local water supply, unidentified toxic wastes, and ocean dumping of chemical waste. *Id.*

8. Department of Transp. v. PSC Resources, Inc., 175 N.J. Super. 447, 463, 419 A.2d 1151, 1159 (Super. Ct. Law Div. 1980). *PSC Resources* involved the alleged pollution of a lake. *Id.* at 447, 419 A.2d at 1151.

9. The Restatement (Second) of Torts states that "[f]or an activity to be abnormally dangerous, not only must it create a danger of physical harm to others but the danger must be an abnormal one." RESTATEMENT (SECOND) OF TORTS § 520 comment f (1977).

10. 159 Eng. Rep. 737 (Ex. 1865), *rev'd*, 1 L.R. 265 (Ex. Ch. 1866), *aff'd*, 3 L.R.-E. & I. App. 330 (H.L. 1868).

abandoned coal mine. When the reservoir was partially filled with water, the shaft gave way and water broke into the abandoned mine. The water flowed into the plaintiff's mine and caused damage.[11]

The Court of Exchequer rendered judgment for the defendants but the Court of Exchequer Chamber subsequently reversed the decision.[12] Lord Cairns acknowledged the controlling rule of law, stated by Mr. Justice Blackburn in the Court of Exchequer Chamber, that a person who brings onto his own land anything likely to do mischief if it escapes, does so at his own peril.[13] The court, however, limited this rule by stating that the principle of strict liability applied only to a nonnatural use of the defendants' land.[14] The court's emphasis, therefore, shifted to the abnormal and inappropriate character of the defendants' reservoir in coal mining country rather than the mere tendency of water to escape from confinement.[15]

The English decisions following *Rylands v. Fletcher* shaped the category of "nonnatural uses" to include uses of land deemed inappropriate or unusual and dangerous in the particular location and surroundings.[16] The strict liability found in British jurisdictions is frequently confined to activities that are "extraordinary," "exceptional," or "abnormal."[17] Thus, a

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11. Fletcher v. Rylands, 159 Eng. Rep. 737, 740 (Ex. 1865) *rev'd,* 1 L.R. 265, 268 (Ex. Ch. 1866), *aff'd,* 3 L.R.-E. & I. App. 330, 332 (H.L. 1868).

12. 3 L.R.-E. & I. App. at 330.

13. *Id.* at 339-40. Lord Cairns, quoting Mr. Justice Blackburn, stated:

> We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the Plaintiff's default; or, perhaps, that the escape was the consequence of *vis major,* or the act of God: but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient.

Id.

14. *Id.* at 338. Lord Cairns noted:

> The Defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if . . . there had been any accumulation of water, either on the surface or underground, and if . . . that accumulation of water had passed off into the close occupied by the Plaintiff, the Plaintiff could not have complained . . . . [But] if the Defendants, not stopping at the natural use of their close, had desired to use it for . . . a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it . . . and if in consequence of their doing so . . . the water came to escape . . . [then] that which the Defendants were doing they were doing at their own peril. . . .

Id. at 338-39.

15. *Id. See* W. PROSSER, LAW OF TORTS § 78, at 505-06 (4th ed. 1971).

16. Katz, *The Function of Tort Liability in Technology Assessment,* 38 U. CIN. L. REV. 587, 643 (1969).

17. W. PROSSER, *supra* note 15, at 506.

special use involving increased danger to others must exist. This special use must not be merely an ordinary use of land or a type of use proper for the general benefit of the community.[18] The principle emerging from the English decisions as the rule of *Rylands v. Fletcher* is that the defendant will be liable when he damages another by an activity that is unduly dangerous and inappropriate to the place where it is maintained, in the light of the character of that place and its surroundings.[19]

American jurisdictions follow this view.[20] In the United States today, however, the tenet of *Rylands v. Fletcher*, although still retaining some distinctiveness,[21] has been substantially absorbed into a larger concept of "extrahazardous," "ultrahazardous," and "abnormally dangerous" activities.[22]

The American Law Institute addressed "abnormally dangerous activities" in two sections of the Restatement (Second) of Torts.[23] Section 520 of the Restatement lists six factors considered in determining whether an activity is abnormally dangerous. One of these factors is the "inappropriateness of the

18. W. PROSSER, *supra* note 15, at 506. *See* Wirth v. Mayrath Indus., Inc., 278 N.W.2d 789 (N.D. 1979). The court in *Wirth* held that the provisions of the Restatement (Second) of Torts dealing with the imposition of strict liability on those engaged in abnormally dangerous activities did not apply to an electric company, which maintained an uninsulated high voltage power line. The court noted that electrical power is necessary to the well-being of the country and is becoming more important as other sources of energy become scarce. *Id.* at 794.

19. W. PROSSER, *supra* note 15, at 508. *See* Sachs v. Chiat, 281 Minn. 540, 162 N.W.2d 243 (1968). *Sachs* was an action against a landowner and housing contractor for damages and an injunction. *Id.* Damage to the plaintiff's land resulted from pile driver concussions and from water drainage from the defendant's lot onto plaintiff's lot. *Id.* at 544, 162 N.W.2d at 246. The court noted that pile driving inevitably transmits concussions to adjacent areas regardless of the reasonable precaution with which it is conducted. Pile driving is, therefore, an ultrahazardous activity. *Id.* The court held that it is the kind of activity that should not be permitted without liability for substantial property damage resulting from its performance. *Id. See also* Lowry Hill Properties, Inc. v. Ashbach Constr. Co., 291 Minn. 429, 436, 194 N.W.2d 767, 772 (1971).

20. W. PROSSER, *supra* note 15, at 509-12. *See, e.g.*, Chicago & North Western Ry. Co. v. Tyler, 482 F.2d 1007 (8th Cir. 1973) (collapse of a dam during a heavy rainstorm). The court in *Tyler* noted that the American view has reached the position that the rule is applied "only to the thing out of place, the abnormally dangerous condition or activity which is not a 'natural' one where it is." *Id.* at 1009 (citing W. PROSSER, LAW OF TORTS § 78, at 512 (4th ed. 1971)).

21. W. PROSSER, *supra* note 15, at 511-12. The American cases apply the principle of *Rylands* solely to the thing that is out of place. *Id.*

22. *See* Katz, *supra* note 16, at 643. The first term used was "extrahazardous." This term was superseded by "ultrahazardous," which in turn gave way to "abnormally dangerous." *Id.* n.143.

23. *See* RESTATEMENT (SECOND) OF TORTS §§ 519, 520 (1977). Section 519 states:

> (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.
>
> (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

Id. § 519. Section 520 states:

> In determining whether an activity is abnormally dangerous, the following factors are to be considered:
>
> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;

activity to the place where it is carried on."[24] The inclusion of this factor signifies acceptance of the principle of *Rylands v. Fletcher.* American cases considering instances of abnormally dangerous activities place as much stress upon the place where the activity is conducted as the English cases.[25]

Courts predicate liability for abnormally dangerous activities on the policy that anyone who, for his own purposes, creates an abnormal risk should bear the costs of damage when the risk is realized.[26] By extending the doctrine of *Rylands v. Fletcher*, a case may be made for imposing strict liability on the entrepreneur who brings hazardous wastes onto his own land.[27] One further step is necessary to extend liability to generators[28] of hazardous wastes. This second step applies the concept of "abnormally dangerous activities."[29]

(b) likelihood that the harm that results from it will be great;
(c) inability to eliminate the risk by the exercise of reasonable care;
(d) extent to which the activity is not a matter of common usage;
(e) inappropriateness of the activity to the place where it is carried on; and
(f) extent to which its value to the community is outweighed by its dangerous attributes.

Id. § 520.

24. *Id.* § 520(e).

25. W. PROSSER, *supra* note 15, at 512. *See* Mowrer v. Ashland Oil & Ref. Co., 518 F.2d 659 (7th Cir. 1975). In *Mowrer* the court found that a waterflood operation designed to force oil out of a well was an "abnormally dangerous activity." *Id.* at 662. This activity would render the defendant oil company strictly liable for damages sustained by adjacent property owners had they pursued that theory. *Id.* The court stated that "[t]he waterflood, an artificial and intentional invasion of plaintiff's property conducted as a part of a business, introduced a risk of serious harm to the land of others which could not be eliminated by the exercise of care and was not a matter of common usage." *Id.*

26. RESTATEMENT (SECOND) OF TORTS § 519 comment d (1977). Comment d affirms the principle that liability arises out of the abnormal danger of the activity itself and the risk that it creates to those in its vicinity. Comment d states the policy reason for the principle as follows:

> It is founded upon a policy of the law that imposes upon anyone who for his own purposes creates an abnormal risk of harm to his neighbors, the responsibility of relieving against that harm when it does in fact occur. The defendant's enterprise, in other words, is required to pay its way by compensating for the harm it causes, because of its special, abnormal and dangerous character.

Id.

27. *See* Cities Serv. Co. v. State, 312 So. 2d 799 (Fla. Dist. Ct. App. 1975). In *Cities Service* the court held that the doctrine of strict liability for damage resulting from a nonnatural use of land applies in Florida. *Id.* at 801. The court found that a leak in a phosphate slime reservoir operated by Cities Service Co. constituted a nonnatural use of land. Therefore, the court applied the doctrine of strict liability. *Id.* at 803-04.

28. The term "generator" in this Note signifies the originating source or producing entity responsible for the hazardous wastes. The term "entrepreneur," or some similar identifier, refers to others in the chain of possession of waste products distinct from generators.

29. The concept of strict liability for ultrahazardous activities is fortified by merging this concept with the analogous concept of enterprise liability. Enterprise liability is predicated on the notion that those who conduct an activity involving unusual hazards must pay for damage resulting from the activity. *See* Hall v. E.I. DuPont de Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972), *aff'd sub nom.* Ball v. E.I. DuPont de Nemours & Co., 519 F.2d 715 (6th Cir. 1975). *Hall* involved 18 separate accidents in which children were injured by blasting caps. The District Court noted that "[t]he allegations in this case suggest that the entire blasting cap industry and its trade association

B. ENTERPRISE LIABILITY AS A NECESSARY ADJUNCT

The Restatement (Second) of Torts declares that imposing strict liability involves "a characterization of the defendant's activity or enterprise itself, and a decision as to whether he is free to conduct it at all without becoming subject to liability for the harm that ensues even though he has used all reasonable care."[30] The reasoning behind this standard is that when a person suffers a loss, no good reason exists to charge the loss against anyone who did not contribute to it.[31] Perhaps the New Jersey[32] Supreme Court best expressed this view when it declared that "[w]e are here primarily concerned with the underlying considerations of reasonableness, fairness and morality rather than with the formulary labels to be attached to the plaintiffs' causes of action or the legalistic classifications in which they are to be placed."[33]

An examination of *Majestic Realty Associates, Inc. v. Toti Contracting Co.*[34] is helpful in understanding the rationale behind the evolving notion of strict enterprise liability. *Majestic Realty* affirms the principle that the social value of a duty to the community may be so significant that the law cannot allow it to be tansferred to another.[35] The court stated that "in the resolution of the conflicting interests of the innocent injured person and the landowner who chose the contractor, justice and equity demand recognition of [an] absolute duty."[36]

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provide the logical locus at which precautions should be taken and liability imposed." 345 F. Supp. at 378.

30. RESTATEMENT (SECOND) OF TORTS § 520 comment *l* (1977).

31. G. ARBUCKLE, ENVIRONMENTAL LAW HANDBOOK 20 (6th rev. ed. 1979). *See* Aretz v. United States, 604 F.2d 417, 433 (5th Cir. 1979) (Rubin, J., dissenting). In his dissent Justice Rubin notes that it is appropriate for courts to consider the means to distribute risks of injury among all of society instead of allowing the adverse consequences to fall only on "a luckless few." *Id.* at 437. *See generally* C. MORRIS, MORRIS ON TORTS 232-37 (2d ed. 1980) (discussing the policy analysis of enterprise liability without fault).

32. New Jersey is a state particularly beset by environmental woes brought on by industrialization. *See generally* Goldshore, *Trends in Environmental Litigation: A Survey of 1976 New Jersey Judicial Decisions,* 9 RUT.-CAM. L. REV. 21, 22 (1977) (because New Jersey has been a leader in the environmental protection movement, its courts have faced a variety of environmental conflicts and issues). *See also* Note, *The Regulation of Hazardous Waste Disposal: Cleaning up the Augean Stables with a Flood of Regulations,* 33 RUTGERS L. REV. 906 (1980). The student author notes that New Jersey, one of the major industrial states, has a disproportionate share of hazardous waste treatment and disposal problems. The EPA estimates that New Jersey generates more hazardous industrial waste than any other state — 4.6 million metric tons of chemical hazardous wastes yearly, or about eight percent of the total annual national production. *Id.* at 913.

33. Berg v. Reaction Motors Div., 37 N.J. 396, 405, 181 A.2d 487, 492 (1962). In *Berg* the court conceded that the testing of a rocket engine may be classified as ultrahazardous. *Id.* at 410, 181 A.2d at 494.

34. 30 N.J. 425, 153 A.2d 321 (1959). *Majestic Realty* involved an action brought against a city parking authority for damages resulting when a wall, which the city's independent contractor was demolishing, collapsed onto the roof of the plaintiff's adjoining building. Majestic Realty Assoc. v. Toti Contracting Co., 30 N.J. 425, 429, 153 A.2d 321 (1959).

35. *See id.* at 438, 153 A.2d at 328.

36. *Id.* at 439, 153 A.2d at 328. *See* Fettig v. Whitman, 285 N.W.2d 517 (N.D. 1979). In *Fettig* property owners brought a negligence action against a general contractor and others for damages arising from one owner's fall through a stairwell. *Id.* The court acknowledged the existence of

Furthermore, the court in *Majestic Realty* expressed the general rule that no liability attaches to an employer who delegates a task to a subcontractor.[37] The court, however, noted that certain exceptions exist based upon public policy considerations.[38] The three primarily recognized exceptions include the situation where the contracted activity constitutes a nuisance per se.[39] Dean Prosser notes that no American case applying *Rylands v. Fletcher* probably exists that is not duplicated in all essential respects by another American decision proceeding on a theory of nuisance.[40] Under that name the principle is universally accepted.[41] Regardless of the label chosen, Prosser further observes that "[i]t is difficult to suggest any criterion by which the non-delegable character of such duties may be determined, other than the conclusion of the courts that the responsibility is so important to the community that the employer should not be permitted to transfer it to another."[42] Stated somewhat differently, the source of exceptions to the general rule lies in situations in which the law views a duty as so important and so peremptory that it will be treated as nondelegable.[43]

C. EFFECT OF THE MERGER OF STRICT LIABILITY WITH CONCEPTS OF ENTERPRISE LIABILITY WHEN ENGAGING IN ABNORMALLY DANGEROUS ACTIVITIES.

The rule of *Fletcher v. Rylands*, as incorporated in the

significant policy considerations in the employment of independent contractors. The employer selects the contractor and is free to choose a responsible party. The employer also has indemnification rights against an actively negligent contractor. *Id.* at 523. Furthermore, it is arguable that the insurance necessary to distribute the risk is properly a cost of the employer's business. *Id.* Additionally, the court questioned whether an employer may insulate himself from liability for the negligent performance of his project by the mere manner in which he contracts for his labor. *Id.*

37. *Majestic Realty Assoc.*, 30 N.J. at 430-31, 153 A.2d at 324.

38. *Id.* at 431, 153 A.2d at 324. The court noted in a later passage:

> Inevitably the mind turns to the fact that the injured party is entirely innocent and that the occasion for his injury arises out of the desire of the contractee to have certain activities performed. The injured has no control over or relation with the contractor. The contractee, true, has no control over the doing of the work and in that sense is also innocent of the wrongdoing; but he does have the power of selection and in the application of concepts of distributive justice perhaps much can be said for the view that a loss arising out of the tortious conduct of a financially irresponsible contractor should fall on the contractee.

Id. at 432, 153 A.2d at 324-25.

39. *Id.* at 431, 153 A.2d at 324. The court acknowledged the following three exceptions to the rule: (a) when a landowner retains control of the manner and means of doing the work, (b) when a landowner engages an incompetent contractor, or (c) when the activity contracted for constitutes a nuisance per se. *Id.*

40. W. PROSSER, *supra* note 15, at 513.

41. W. PROSSER, *supra* note 15, at 513.

42. W. PROSSER, *supra* note 15, at 471.

43. F. HARPER & F. JAMES, THE LAW OF TORTS § 26.11, at 1406 (1956). The authors state that defendants under a nondelegable duty cannot avoid this duty by hiring a contractor. *Id.* (citing Hardaker v. Idle Dist. Council, 1 Q.B. 335, 340 (C.A. 1896)).

Restatement (Second) of Torts,[44] when merged with the concept of enterprise liability supplies a basis for holding the generators of hazardous wastes liable for damage resulting from the disposal of their products.[45] Section 520 comment *l* states that "[w]hether the activity is an abnormally dangerous one is to be determined by the court."[46] Additionally, the section 520 strict liability rule is applied even if the questioned activity is conducted away from the defendant's premises.[47] Therefore, because the production and transportation of hazardous wastes may be an "abnormally dangerous" or "ultrahazardous" activity, the strict liability provisions should apply to the problem of hazardous wastes. A remaining point to consider is the question of possible federal statutory preemption.[48]

D. THE QUESTION OF PREEMPTION

The supremacy clause of the United States Constitution declares, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ."[49] As mentioned previously, the chief law governing hazardous wastes is the Resource Conservation and Recovery Act of 1976 (RCRA).[50] A major objective[51] of the RCRA is regulating the "treatment,

44. RESTATEMENT (SECOND) OF TORTS §§ 519, 520 (1977) (acknowledging inappropriateness of the place where the activity is conducted as a factor in determining whether an activity is abnormally dangerous). For the text of §§ 519, 520, see *supra* note 23.

45. Hazardous wastes may be considered so deleterious to man and the environment that their disposal is always inappropriate under any but ideal conditions. Furthermore, hazardous waste production is so dangerous that producers must bear the burden of any damage caused by this production. *See* RESTATEMENT (SECOND) OF TORTS § 520 (1977).

46. RESTATEMENT (SECOND) OF TORTS § 520 comment *l* (1977).

47. *Id.* § 520 comment e. Comment e states:

> In most of the cases to which the rule of strict liability is applicable the abnormally dangerous activity is conducted on land in the possession of the defendant. This, again, is not necessary to the existence of such an activity. It may be carried on in a public highway or other public place or upon the land of another.

Id.

48. Congressional intent to preempt the area of hazardous waste legislation may be evinced in three ways. *See* Illinois v. Kerr-McGee Chem. Corp., 677 F.2d 571 (7th Cir.), *cert. denied,* 103 S. Ct. 469 (1982). Federal law will preempt state law in the following situations: When a statute expressly declares that federal authority over a subject is exclusive; when federal preemption can be inferred from the language or legislative history of a statute; or when federal and state law conflict. 677 F.2d at 579. *See also* Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd,* 405 U.S. 1035 (1972) (federal government has exclusive authority under doctrine of preemption to regulate construction and operation of nuclear power plants).

49. U.S. CONST. art. VI, § 2.

50. 42 U.S.C. §§ 6901-6987 (1976 & Supp. IV 1980).

51. *See* 42 U.S.C. § 6902 (1976) (listing objectives of the RCRA).

storage, transportation, and disposal of hazardous wastes which have adverse effects on health and the environment."[52] Because hazardous wastes have adverse effects on health and the environment,[53] the preemption issue is whether the RCRA expressly limits available sanctions for violations to the criminal penalties set out in the statute.[54]

The act provides that a citizen may bring a law suit to enforce the regulations and orders that are issued under the RCRA.[55] Furthermore, the Administrator of the Environmental Protection Agency (EPA) may bring suit in cases involving an imminent hazard.[56] None of these provisions delineate any public right to seek civil damages or other relief from violators. Section 6972(f), however, preserves in the citizenry the common law right to seek

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52. 42 U.S.C. § 6902(4) (1976).

53. ENVIRONMENTAL PROTECTION AGENCY, REPORT TO CONGRESS ON THE DISPOSAL OF HAZARDOUS WASTES 8 (1974). This report notes serious adverse physiological effects, such as cancers and birth defects, and also mentions other milder effects such as headaches, nausea, and indigestion. Fishkills, reduced shellfish production, or improper eggshell synthesis manifest the effects of hazardous wastes in the environment. *Id.*

54. 42 U.S.C. § 6928(d) (1976 & Supp. IV 1980). Section 6928(d) provides:

> Any person who—
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> (1) knowingly transports any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under section 6925 of this title (or section 6926 of this title in case of a State program), or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C. 1411 et seq.],
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> (2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter either—
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> (A) without having obtained a permit under section 6925 of this title (or section 6926 of this title in the case of a State program) or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C. 1411 et seq.]; or
>
> (B) in knowing violation of any material condition or requirement of such permit;
>
> (3) knowingly makes any false material statement or representation in any application, label, manifest, record, report, permit or other document filed, maintained, or used for purposes of compliance with this subchapter; or
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> (4) knowingly generates, stores, treats, transports, disposes of, or otherwise handles any hazardous waste (whether such activity took place before or takes place after October 21, 1980) and who knowingly destroys, alters, or conceals any record required to be maintained under regulations promulgated by the Administrator under this subchapter shall, upon conviction, be subject to a fine of not more than $25,000 ($50,000 in the case of a violation of paragraph (1) or (2)) for each day of violation, or to imprisonment not to exceed one year (two years in the case of a violation of paragraph (1) or (2)), or both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

Id.

55. *Id.* § 6972(a). Any person may commence a civil suit on his own behalf against any person, including the United States and any other governmental instrumentality or agency to the extent permitted by the eleventh amendment, or against the EPA Administrator when an alleged failure of the Administrator to perform any nondiscretionary act or duty exists. *Id.*

56. *Id.* § 6973. The Administrator of the EPA may bring suit on behalf of the United States in the appropriate district court to immediately restrain an imminent and substantial hazardous waste endangerment to health or the environment, or to take other action that may be necessary. *Id.* The Administrator shall also notify the affected state of any such suit. *Id.*

enforcement of any hazardous waste requirement or any other relief deemed necessary.[57] The broad language of this section evinces an unambiguous congressional intent to leave the area of hazardous waste management free of preemption.[58] Citizens, therefore, may bring suit against any violator and demand appropriate relief. The theory of strict liability for the abnormally dangerous activity of hazardous waste generation and subsequent disposal, combined with notions of enterprise liability, provides a common law basis upon which to institute such actions.

E. STATUTORY STANDARDS APPLICABLE TO GENERATORS OF HAZARDOUS WASTES

The Environmental Protection Agency's (EPA) rules establish broad standards applicable to generators of hazardous waste.[59] A person who generates a hazardous waste is subject to the non-compliance penalties of the RCRA if he does not comply with the EPA requirements.[60] Moreover, an owner or operator who ships hazardous waste must comply with the EPA standards.[61] Under part 262 of the Code of Federal Regulations (CFR) a generator must obtain proper EPA identification numbers.[62] Also, a generator must not offer hazardous waste to transporters or facilities that have not themselves received an EPA identification number.[63] Any generator who transports, or offers for

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57. *Id.* § 6972(f). Section 6972(f) states in part:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency).

Id.

58. *See* Illinois v. Milwaukee, 406 U.S. 91 (1972) (general federal question jurisdiction supports a federal common law of interstate pollution). One commentator has noted that "[a]pplication of the federal common law in the future requires the courts to be alert to whether Congress has made a clear choice in confining the range of available remedies." W. RODGERS, *supra* note 7, § 2.12, at 154. Section 6972(f) indicates that Congress made the choice in favor of broad relief when it is necessary. 42 U.S.C. § 6972(f) (1976 & Supp. IV 1980).

59. *See* 40 C.F.R. § 262.10 (1982). Generators may include the following: Persons who treat, store, or dispose of hazardous wastes on-site; persons who import hazardous wastes into the United States; farmers; owners or operators who initiate hazardous waste shipments from treatment, storage, or disposal facilities; and persons who generate hazardous wastes as defined by 40 C.F.R. pt. 261 (1982). *Id.*

60. *Id.* § 262.10(e). Generators of hazardous wastes as defined in § 261.3 are subject to the federal enforcement provisions of 42 U.S.C. § 6928 if they fail to comply with the requirements of Part 262 of the C.F.R. *Id.* For text of § 6928(d), see *supra* note 54.

61. *Id.* § 262.10(f). The regulation states that "[a]n owner or operator who initiates a shipment of hazardous waste from a treatment, storage, or disposal facility must comply with the generator standards established in this Part." *Id.*

62. *Id.* § 262.12.

63. *Id.*

transportation, hazardous waste for off-site treatment, storage, or disposal must prepare a manifest.[64] The manifest must contain the following information: A document number; the generator's name, mailing address, telephone number and EPA identification number; the name and EPA identification number of each transporter; the name, address, and EPA identification number of the designated destination and any alternate; a description of the hazardous waste involved; and the total quantity of hazardous waste and the type and number of containers loaded onto the transport vehicle.[65]

The generator must designate on the manifest a primary facility and may designate an alternate emergency facility permitted to handle the waste.[66] If the transporter is unable to deliver the hazardous waste to either facility, the generator either must designate another facility or instruct the transporter to return the waste.[67] There must be at least enough copies of the manifest to supply the generator, each transporter, and the owner or operator of the designated facility with one copy each for their records and another copy to be returned to the generator.[68] Section 262.23 of the Code of Federal Regulations (CFR) details the dispersal of manifest copies through the chain of possession of the hazardous materials.[69] Prior to transportation, the generator must comply with certain packaging,[70] labeling,[71] marking,[72] and placarding[73]

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64. *Id.* § 262.20(a).

65. *Id.* § 262.21(a). Section 262.21(a) requires that the following certification appear on the manifest: "This is to certify that the above named materials are properly classified, described, packaged, marked, and labeled and are in proper condition for transportation according to the applicable regulations of the Department of Transportation and the EPA." *Id.*

66. *Id.* § 262.20(b), (c).

67. *Id.* § 262.20(d).

68. *Id.* § 262.22.

69. *See id.* § 262.23. Section 262.23 requires that the generator sign the manifest certification by hand, obtain the handwritten signature of the first transporter and the date of acceptance on the manifest, and retain one copy. The generator must give the transporter the remaining copies of the manifest. *Id.* The section lists further manifest requirements relating to bulk shipments by water and rail shipments of hazardous wastes. *Id.*

Sections 263.20(e) and (f) include special provisions for rail or water transporters. *See id.* § 263.20 (1982).

70. *See id.* § 262.30. A generator must package hazardous waste according to the applicable Department of Transportation regulations on packaging under 49 C.F.R. pts. 173, 178, and 179. *Id.*

71. *See id.* § 262.31. A generator must label each package according to the applicable Department of Transportation regulations on hazardous materials under 49 C.F.R. pt. 172. *Id.*

72. *See id.* § 262.32. A generator must mark each package of hazardous waste according to the applicable Department of Transportation regulations on hazardous materials under 49 C.F.R. pt. 172. *Id.* § 262.32(a). A generator must mark each container of 110 gallons or less used in off-site transportation of hazardous waste with the following words and information: "HAZARDOUS WASTE — Federal Law Prohibits Improper Disposal. If found, contact the nearest police or public safety authority or the U.S. Environmental Protection Agency. Generator's Name and Address _____. Manifest Document Number _____." *Id.* § 262.32(b).

73. *See id.* § 262.33. Section 262.33 provides that "[a] generator must placard or offer the initial transporter the appropriate placards according to Department of Transportation regulations for hazardous materials under 49 C.F.R. Part 172, Subpart F." *Id.*

requirements.

The final set of duties required of the generator relate to recordkeeping and reporting.[74] Section 262.40 of the CFR, the main recordkeeping section, outlines the mandatory recordation duties for all generators.[75] Specific sections concerning annual reporting,[76] exception reporting,[77] and additional reporting[78] follow section 262.40. Finally, the regulations include sections dealing with special conditions pertaining to international shipments[79] and farmers.[80] The transporters must also comply with the manifest system at their end of the transaction.[81]

These duties are substantial steps toward responsible cradle-to-grave management of hazardous wastes. Yet circumstances abound when the system can be flouted. For example, one problem is determining whether the waste to be disposed is a hazardous waste. Part 261 of the CFR identifies and lists hazardous wastes.[82] These regulations specifically define which substances constitute hazardous waste[83] and which substances do not constitute hazardous wastes.[84] Section 261.33 lists specific hazardous wastes.[85] Problems arise when a hazardous waste not on the list appears in a place where it can cause damage. This situation, as well as the related problem of widespread collusion among waste producers, is addressed briefly below. Several cases considering what constitues an abnormally dangerous activity are also presented.

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74. *Id.* §§ 262.40 - 263.20.

75. *See id.* § 262.40. This section requires a generator to retain a copy of each manifest signed in accordance with § 262.23 for three years or until he receives a signed copy from the designated facility that received the waste. The signed copy must also be kept as a record for at least three years from the date the initial transporter accepted the waste. *Id.* Provision is similarly made for retention of annual reports, exception reports, test results, waste analyses, and other determinations. *See id.* The time periods referred to in the section are automatically extended during the course of any unresolved enforcement action regarding the regulated activity or as requested by the Administrator. *Id.*

76. *See id.* § 262.41.

77. *See id.* § 262.42.

78. *See id.* § 262.43.

79. *See id.* § 262.50.

80. *See id.* § 262.51.

81. *Id.* § 263.20. Transporters must maintain records of all transactions. Detailed requirements are prescribed for transporters who accept hazardous wastes at the generator's premises, deliver hazardous wastes to another transporter or to the designated facility, and who transport hazardous wastes out of the United States. *See id.*

82. *See id.* §§ 261.1 to .33.

83. *See id.* § 261.3. A solid waste is a hazardous waste if it is not excluded under § 261.4(b) and it meets any of a large list of criteria. *Id.* § 261.3. *See id.* § 261.11 (criteria for listing hazardous wastes).

84. *See id.* § 261.4(b). A long list of solid wastes have been statutorily declared to be non-hazardous. Examples of such solid wastes are wastes generated by the growing and harvesting of agricultural crops and wastes that are returned to the soil as fertilizers. *Id.* § 261.4(b)(2).

85. *See id.* §§ 261.30 to .33. Unless excluded under §§ 260.20 and 260.22, a solid waste listed under § 261.33 is a hazardous waste. *Id.*

III. CASE ANALYSES

A. ASHLAND OIL, INC. v. MILLER OIL PURCHASING CO.[86]

In a recent case Ashland Oil, Incorporated (Ashland Oil) sought damages from several defendants and third party defendants for a fire and explosion at its Kentucky refinery and the contamination of approximately two million barrels of crude oil.[87] In *Ashland Oil* the court found a series of events and transactions that led to the injection of hazardous chemical waste products into Ashland's crude oil pipeline caused the damages.[88] Although the prime mover behind the tortious activity was a waste disposal facility and not a hazardous waste generator,[89] the case is nonetheless important and instructive.[90] A rather lengthy discussion of the facts underlying the case is necessary because of its complexity.

Rollins Environmental Services, Incorporated (Rollins) accepted numerous waste materials from the oil and chemical plants in its business area.[91] Rollins contracted with E. I. DuPont de Nemours & Company (DuPont) to dispose of chemical waste products.[92] Among these waste products were certain chemical substances, identified as dichlorobutadiene, containing heavy concentrations of organic chlorides.[93] The EPA listed neither of these substances, identified by the symbols BR50 and BR68, as a hazardous waste.[94]

Pursuant to its agreement with DuPont, Rollins intended to incinerate the hazardous wastes. This intent, however, was frustrated when corrosion caused by the substances rendered the

86. 678 F.2d 1293 (5th Cir. 1982).

87. Ashland Oil, Inc. v. Miller Oil Purchasing Co., 678 F.2d 1293, 1296 (5th Cir. 1982).

88. *Id.* at 1296.

89. *Id.* at 1297-1303. The chief defendant in *Ashland Oil* represented itself "as an expert in the handling and disposal of chemical waste." *Id.* at 1298.

90. *Id.* at 1293. *Ashland Oil* is instructive because it provides insight into the problems of identifying hazardous wastes and the complexity of hazardous waste transactions. The facts of *Ashland Oil* show that not all hazardous wastes appear on the EPA lists and, thus, are not subject to regulation under the RCRA. *See* 40 C.F.R. §§ 261.30-261.33 (1982) (lists of hazardous wastes). The facts also show that industries sometimes do conspire to operate outside the law. *See* 678 F.2d at 1279-1303. Furthermore, *Ashland Oil* advances the theory of liability that is the theme of this Note: each defendant is liable under a theory of strict liability predicated upon involvement in an abnormally dangerous activity. *Id.* at 1308.

91. 678 F.2d at 1298. The Rollins facility was located in Baton Rouge, Louisiana. *Id.*

92. *Id.* A DuPont engineer informed Rollins of the chemical components and propensities of the waste. The engineer also warned Rollins that the chemicals were corrosive and should be disposed of by incineration. *Id.*

93. *Id.* at 1297. The court described the chemical substances involved as "toxic and harmful to persons on touch or inhalation, corrosive to metals and other materials, noxiously malodorous, and pollutants of ground and surface water and plant and animal life." *Id.* The substances do not appear on the EPA's lists of hazardous wastes. *See* 40 C.F.R. §§ 261.30-261.33 (lists of hazardous wastes).

94. *See* 40 C.F.R. § 261.11 (1982) (criteria for listing hazardous wastes).

incinerator inoperative.[95] Faced with an increasing amount of the waste on its premises, Rollins entered into an agreement with an independent contractor, Larry Young,[96] whereby Young would take the BR50 and BR68 from Rollins, despite Rollins' knowledge that the chemical substances were dangerous. Rollins was aware that the agreement would cause it to breach its contract with DuPont.[97] Therefore, Rollins took various precautions to avoid the possibility that anyone might trace the BR50 and BR68 to its facilities.[98]

Incredibly, the intrigue continued when Young, through his company, Alan Petroleum, Incorporated, entered into an agreement with Waco, Incorporated (Waco), a small oil reclaiming operation. The agreement provided that Waco would purchase "petroleum products" supplied by Young.[99] Waco sold some of the waste either in its original state or in a partially diluted state to Miller Oil Purchasing Company (Miller Oil).[100] Miller Oil contracted to sell Ashland Oil approximately 1,941 barrels of what it thought was merchantable crude oil, which Miller Oil obtained from Waco.[101] In actuality, the oil was contaminated with BR50 and BR68.[102]

Miller Oil pumped the hazardous substances into the crude oil gathering lines of Ashland Pipeline, a local oil carrier. On April 18, 1971, Ashland's crude oil supply containing BR50 and BR68 entered its Catlettsburg, Kentucky refining tanks as a part of a continuous flow of crude oil to the refinery.[103] On April 19, 1971, portions of the waste substances mixed with crude oil entered the refinery stream causing a fire and explosion, which damaged the refinery.[104] Additionally, the injection of the hazardous substances

95. 678 F.2d at 1298. Apparently, the heat from the fire accelerated the chemical breakdown of the substances and created, among other things, hydrochloric acid. *Id.*

96. *Id.* Although Young characterized himself as "one having been . . . in the fringe areas of the petrochemial industry," the court found that he was "not qualified, by education or experience, to responsibly handle the disposal of the BR50 and BR68." *Id.* at 1299.

97. *Id.* at 1298-99.

98. *Id.* at 1299-1300. Rollins required Young to assure it that the hazardous wastes would not be traced to their original source, the Rollins facility. *Id.* at 1299.

99. *Id.* at 1300-01. Young contracted with an independent hauling service to transport the waste from the Rollins plant; apparently either the hauler or Waco's employees then pumped approximately 2,016 barrels of the hazardous waste into Waco's two storage tanks. *Id.* at 1300.

100. *Id.* at 1301. Miller Oil tested its purchases from Waco to determine if the substance purchased was oil and if so, to determine its quality. Consistent with the factual history of this case, Miller Oil's terminal manager directed that the readings be falsified. *Id.* at 1301-02.

101. *Id.* at 1301-02. Although committed to selling Ashland only merchantable crude oil suitable for resale or processing. Miller Oil injected the hazardous substances into Ashland Pipeline's network knowing that such substances would become part of the continuous flow of crude oil destined for ultimate delivery to Ashland Oil's refinery in Kentucky. *Id.* at 1302.

102. *Id.* at 1302.

103. *Id.* at 1303.

104. *Id.*

into the pipeline system caused the contamination of approximately two million barrels of oil.[105]

The court in *Ashland Oil* considered sections 519 and 520 of the Restatement (Second) of Torts.[106] The court applied other factors to the conduct of Rollins and Young that might be considered in any examination of enterprise liability.[107] Applying these elements, the court held that the disposal of the BR50 and BR68 by Rollins and Young was an abnormally dangerous and ultrahazardous activity.[108] The court explicitly recognized that those engaged in this activity have created an inordinate risk for their own benefit.[109] The court added that should the risk be realized and injury sustained, it is immaterial that harm occurs through the unexpected action of another party.[110] Therefore, Rollins was held strictly liable even though it could not forsee that Miller would purchase the waste materials from Waco as "crude oil" and subsequently sell it to Ashland.[111]

This latter principle appears particularly germane to situations when independent haulers illegally dump an "innocent" producer's hazardous wastes. Logically, the principle could be extended to cases in which the third-party owners of dump sites are financially unable to reimburse proper plaintiffs for damages.

B. OTHER CASES FINDING ABNORMALLY DANGEROUS ACTIVITY

In *Hutchinson v. Capeletti Brothers, Inc.*[112] the Florida District Court of Appeals addressed the imposition of strict liability for the hazardous use of land.[113] Capeletti Brothers Construction Company (Capeletti Brothers), in the process of building a bridge for the Florida Department of Transportation, engaged in pile driving work that damaged the residence of Hutchinson.[114] The

105. *Id.*

106. *Id.* at 1307-08. *See* RESTATEMENT (SECOND) OF TORTS §§ 519, 520 (1977). For the text of §§ 519 and 520, see *supra* note 23.

107. 678 F.2d at 1307. The court stated that the following factors should be considered in determining whether liability attaches to an activity: " 'The law and customs, a balancing of claims and interests, a weighing of the risk and the gravity of harm, and a consideration of individual and societal rights and obligations.' " *Id.* (quoting Langois v. Allied Chem. Corp., 249 So.2d 133, 140 (La. 1971)).

108. 678 F.2d at 1308.

109. *Id.*

110. *Id.* The rule stated in § 522 of the Restatement (Second) of Torts is that "one carrying on an abnormally dangerous activity is subject to strict liability for the resulting harm although it is caused by the unexpectable (a) innocent, negligent or reckless conduct of a third person, or (b) action of an animal, or (c) operation of a force of nature." RESTATEMENT (SECOND) OF TORTS § 522 (1977).

111. 678 F.2d at 1308.

112. 397 So. 2d 952 (Fla. Dist. Ct. App. 1981).

113. Hutchinson v. Capeletti Brothers, Inc., 397 So. 2d 952, 953 (Fla. Dist. Ct. App. 1981).

114. *Id.*

court found that Capeletti Brothers was not negligent in conducting the work and that no suggestion of wanton or willful misconduct existed.[115] The court acknowledged that in this situation a tribunal must engage in a balancing process before liability for damage caused by nonnegligent conduct may be shifted from the damaged property owner to the nonnegligent actor.[116] The balancing approach adopted by the court consists of weighing the following factors: (1) whether the activity involves a high degree of risk of harm to the property of others; (2) whether the potential harm is likely to be great; (3) whether the risk can be eliminated by the exercise of reasonable care; (4) whether the activity is a matter of common usage; (5) whether the activity is inappropriate to the place where it is conducted; and (6) whether the activity has substantial value to the community.[117] As a result of this balancing, the court found that although the damage-causing activity had substantial value to the community, it also carried a high degree of risk of harm to the property of others.[118] For this reason the court held that the risk of loss shifted to Capeletti Brothers as a cost of doing business, which it may pass on to the ultimate user or insure against.[119]

In *Green v. General Petroleum Corp.*[120] the plaintiffs sought to recover damages for injuries to their property caused by an oil well blowout during the defendant's drilling operations.[121] The evidence amply supported a finding that the defendant had exercised ordinary care in drilling the well and, therefore, was not negligent.[122] The court, however, held that a judgment for the defendant was not justified simply because the defendant had properly put down and cared for the well.[123] Rather, the court found that absolute liability, regardless of any element of negligence, existed when the damage was caused by the act or thing

115. *Id.* In cases involving wanton or willful misconduct, liability, if any is to be imposed, must rest on some other rationale. *Id.*

116. *Id.* The court noted that the balancing process in which a court must engage when imposing strict liability for a hazardous use of land "originally emanated from the treatment of this subject in Tenative Draft No. 10 of the Restatement (Second) of Torts." *Id.*

117. *Id.* The relevant factors relied upon by the *Hutchinson* court are those found in § 520 of the Restatement (Second) of Torts. *Id.* (citing Cities Service Co. v. State, 312 So. 2d 799, 802 (Fla. Dist. Ct. App. 1975)). For the text of § 520, see *supra* note 23.

118. 397 So. 2d at 953.

119. *Id.* at 953-54.

120. 205 Cal. 328, 270 P. 952 (1928).

121. Green v. General Petroleum Corp., 205 Cal. 328, 330, 270 P. 952, 953 (1928).

122. *Id.* at 331, 270 P. at 953. The court noted that the drilling crew was skilled and experienced and used the best standard of equipment. *Id.* The court also noted that a careful study of the wells in the vicinity indicated that the drillers would encounter no oil or gas for at least 200 feet below the point where the blowout occurred. *Id.*

123. *Id.* at 333, 270 P. at 954. The court found that the case presented a "situation to which the doctrine of *'sic utere tuo ut alienum non laedas'* [one must so use his own rights as not to infringe upon the rights of another] may be applied in its broad and fundamental import." *Id.* at 333, 270 P. at 955.

in question.[124] The court clearly indicated that the defendant well drillers were responsible for controlling and confining whatever force or power they uncovered.[125]

In *Environmental Protection Department v. Ventron Corp.*[126] the New Jersey Department of Environmental Protection brought suit against several corporations and individuals based on mercury pollution of a state waterway.[127] F.W. Berk & Company (Berk) was the original owner and operator of a mercury processing plant from 1929 to 1960 on a forty-acre tract west of Berry's Creek.[128] Velsicol Corporation formed Wood Ridge Chemical Corporation (Wood Ridge) as a wholly-owned subsidiary in 1960. Wood Ridge then purchased Berk's assets, including the forty-acre tract containing the mercury processing plant.[129] During the operation of the mercury processing plant by Berk and Wood Ridge, mercury drained into Berry's Creek causing the pollution.[130]

The trial judge determined that Wood Ridge was guilty of discharging mercury, a hazardous and toxic substance, into a state waterway in violation of certain New Jersey environmental statutes.[131] Based on this determination the trial judge imposed liability against Wood Ridge for abatement of a public nuisance as defined by statute as well as under the common law principle of strict liability for unleashing a dangerous substance during a non-natural use of land.[132] On appeal, the New Jersey Superior Court upheld this imposition of liability.[133]

C. Case Law Application to Hazardous Waste Producers

The above cases clearly aver that in the proper context liability may be imposed regardless of fault. One proper context is engaging

124. *Id.* The court acknowledged that in the course of a lawful enterprise one may knowingly engage in an act that may injure another. The court stated that if one then proceeds in the act and injures another, no matter how carefully the act is carried out, the one who does the act should be held liable for the injury. *Id.*

125. *Id.*

126. 182 N.J. Super. 210, 440 A.2d 455 (Super. Ct. App. Div. 1981).

127. Environmental Protection Dep't v. Ventron Corp., 182 N.J. Super. 210, 210, 440 A.2d 455, 455 (Super. Ct. App. Div. 1981).

128. *Id.* at 217, 440 A.2d at 458. In *Ventron* Berk was in default and did not join in the appeal. *Id.*

129. *Id.* From 1960 until 1974 the mercury processing plant was operated by Wood Ridge. Wood Ridge merged with Ventron in 1974. At that time the plant was shut down. *Id.*

130. *Id.* at 217, 440 A.2d at 458-59. The trial judge concluded that "Berry's Creek . . . is heavily polluted and a public nuisance through the 'vast cumulative effect' of mercury pollution." *Id.*

131. *Id.* at 218, 440 A.2d at 459. The trial court found that Wood Ridge violated §§ 23:5-28 and 58:10-23.1 to .10 of the New Jersey Statutes Annotated. *Id.* at 219, 440 A.2d at 459. Sections 58:10-23.1 to .10 were subsequently repealed by the Spill Compensation and Control Act in 1977. 1976 N.J. Laws ch. 141, 621.

132. 182 N.J. Super. at 219, 440 A.2d at 459.

133. *Id.*

in abnormally dangerous activities. Courts will support the imposition of liability for engaging in abnormally dangerous activities on the added basis of enterprise liability. The Restatement (Second) of Torts defines enterprise liability as the liability imposed on one who enters into an activity for his own benefit despite the fact that the activity creates very definite risks to others.[134] Under the enterprise liability theory, a court may hold a defendant liable even though the defendant does not conduct the abnormally dangerous activity in a negligent manner.

Each defendant in these cases operated a business for profit that involved some risk. While the court in *Green* did not specifically find that the defendant was engaged in an abnormally dangerous activity, the court nevertheless held that the defendant had accepted the burden of controlling whatever risks it encountered.[135] The *Ventron Corp.* court, however, did not articulate an enterprise liability theory. Rather the court held the defendant accountable because he unleashed a dangerous substance during the non-natural use of land.[136] The court in *Hutchinson* adopted the view that pile driving work is an abnormally dangerous activity[137] while the *Ashland Oil* court categorically considered the defendant's activities to be abnormally dangerous.[138] Both the *Hutchinson* and *Ashland Oil* courts recognized the elements of enterprise liability.[139]

An analysis of the four cases reveals that courts are willing to vindicate harms caused by abnormally dangerous practices. In so doing, courts will consider factors bearing on the nature of the activity in question to decide whether the activity is abnormally dangerous. Courts also will place emphasis, either express or implied, on the enterprise liability theory to support any decision determining that an activity is abnormally dangerous. Courts logically could apply this analysis to hazardous waste litigation.

A generator creates hazardous wastes as part of a profit enterprise. For this reason a generator should be held responsible for any resulting damage. For several reasons this principle should apply regardless of who controls the wastes when they leave the generator's place of business. First, the generator is engaged in an activity for his own purposes that creates an inordinate risk.[140] Second, any additional cost may be viewed as a cost of doing

134. *See* RESTATEMENT (SECOND) OF TORTS § 519 comment d (1977).
135. *Green*, 205 Cal. at 334, 270 P. at 955.
136. *Ventron*, 182 N.J. Super. at 219, 440 A.2d at 459.
137. *Hutchinson*, 397 So. 2d at 953.
138. *Ashland Oil*, 678 F.2d at 1308.
139. *See, e.g., Hutchinson*, 397 So. 2d at 953; 678 F.2d at 1308.
140. *Ashland Oil*, 678 F.2d at 1308.

business, which the producer may pass on to the ultimate user or insure against.[141] Third, the generator is primarily responsible for unleashing a hazardous substance during a nonnatural use of land.[142] A brief consideration of the analogous area of products liability and statutory reinforcement supports this result.

IV. ADDITIONAL SUPPORT FOR GENERATOR STRICT LIABILITY

A. THE ANALOGY TO PRODUCTS LIABILITY

The concept of strict liability regardless of negligence, as developed in products liability law, is helpful in understanding why liability should be imposed on hazardous waste generators conducting abnormally dangerous activities. In *Herbstman v. Eastman Kodak Co.*[143] the New Jersey Supreme Court found that when a manufacturer presents goods to the public for sale, he represents that the goods are suitable for their intended use.[144] Therefore, the court held that to invoke the theory of strict liability in tort, a plaintiff must show that the product was defective when placed in the stream of commerce.[145]

The New Jersey Supreme Court decided *City of Bridgeton v. B.P. Oil, Inc.*[146] the following year. In *Bridgeton* the city brought an action against the owner and the lessee of property where an oil spill had occurred. The city sought the recovery of expenses incurred in preventing the spread of the spill.[147]

The *Bridgeton* court noted that it had applied the concept of strict liability regardless of negligence in *Herbstman*, but that the concept as yet had not been extended to cases dealing with the storage of ultrahazardous substances.[148] The court pointed out that the varying standard of care required in negligence cases depends on the degree of danger involved in the activity.[149] The court found

141. *Hutchinson*, 397 So. 2d at 953-54.

142. *Ventron*, 182 N.J. Super. at 219, 440 a.2d at 459.

143. 68 N.J. 1, 342 A.2d 181 (1975). In *Herbstman* a purchaser of a camera brought an action against the manufacturer alleging a breach of the implied warranties of merchantability and of reasonable fitness for the purposes for which it was to be used. Herbstman v. Eastman Kodak Co., 68 N.J. 1, 4, 342 A.2d 181, 184 (1975). The court held that the plaintiff could not recover under the Uniform Commercial Code warranty of merchantability because the defect did not exist at the time of sale. 68 N.J. at 1, 342 A.2d at 181. Furthermore, the plaintiff failed to show the cost of repair of the camera or the effect of the defect on its value. *Id.* Finally the court denied recovery because the action was brought against the manufacturer rather than the intermediate seller, who was not the maufacturer's servant, agent or employee. *Id.*

144. *Id.* at 7, 342 A.2d at 184.

145. *Id.*

146. 146 N.J. Super. 169, 369 A.2d 49 (Super. Ct. Law Div. 1976).

147. City of Bridgeton v. B. P. Oil, Inc., 146 N.J. Super. 169, 171, 369 A.2d 49, 53 (Super. Ct. Law Div. 1976).

148. *Id.* at 177, 369 A.2d at 53.

149. *Id.*

that because storing oil in quantity creates a substantial risk, a concomitant high standard of care exists.[150] The court also noted that coupling this common law criterion with standards of care imposed by statute required that the defendant exercise an extremely high degree of care.[151] The court found that storing ultrahazardous or pollutant substances was sufficient to warrant the extension of strict liability to this area of ultrahazardous activity.[152]

In a more recent New Jersey case,[153] the State Department of Transportation brought a suit against PSC Resources, Incorporated (PSC) for damages arising out of the alleged pollution of a lake.[154] The court found that the rationale for imposing strict liability in a defective product action was applicable.[155] The court noted that New Jersey fully embraced the strict enterprise liability theory as well as the policy of societal risk spreading.[156] Therefore, the court held that PSC was liable for the damage resulting from the discharge of pollutants onto the plaintiff's property.[157]

The nature of hazardous waste products, which are "defective" in the sense that they are inherently dangerous when produced, warrants the extension of strict liability to this area of endeavor.

B. STATUTORY AUTHORITY REINFORCING THE STRICT LIABILITY THEORY

The emerging public policy of respect for the environment and regard for human health is embodied in state as well as federal law.[158] One state statute broadly prohibits placing any hazardous substance where it may run into the waters of the state.[159] Although seemingly directed at the active wrong-doer, this statute is arguably

150. *Id.*

151. *Id.*

152. *Id.* at 177, 369 A.2d at 53-54. The court noted that strict liability has been applied to products liability cases. *Id.* at 177, 369 A.2d at 53. The court further explained its conclusion that strict liability existed by acknowledging the impact of pollution upon the environment and the statutory prohibition against pollution. Therefore, the court held that the concept of strict liability extended to those who store ultrahazardous or pollutant substances. *Id.* at 177, 369 A.2d at 54.

153. New Jersey Dep't of Transp. v. PSC Resources, Inc., 175 N.J. Super. 447, 419 A.2d 1151 (Super. Ct. Law Div. 1980).

154. *Id.* PSC purchased the assets of another corporation for cash. The court held PSC liable for damages caused by the environmental torts of its predecessor. *Id.* at 467, 419 A.2d at 1162.

155. *Id.* at 466, 419 A.2d at 1161. The court noted: "The refinery is in a better position to protect itself and bear the costs of a discharge of pollutants from its facility into bodies of water than would be the public. In addition, the refiner is the instrumentality to look to for improvement of the waste disposal process." *Id.*

156. *Id.* at 467, 419 A.2d at 1162.

157. *Id.* at 469, 419 A.2d at 1164.

158. *See* F. SKILLERN, *supra* note 6, at 266-99.

159. N.J. STAT. ANN. § 23:5-28 (1940 & Supp. 1983). The statute states in part:

> No person shall put or place into, turn into, drain into, or place where it can run, flow,

applicable to the negligent entrustor.[160]

An even broader source of possible waste generator liability is the New Jersey Spill Compensation and Control Act.[161] This Act imposes strict liability for all clean-up and removal costs on any person who discharges a hazardous substance into the waters of the state.[162] Liability extends to any person who is in any way responsible for the discharge of a hazardous substance.[163] When read with its broad definition of "discharge," the Act evidences a clear legislative intent to effectively curtail irresponsible hazardous waste disposal practices.[164]

Minnesota recently enacted the Waste Management Act of 1980.[165] This Act requires improved hazardous waste management planning and development.[166] The Act is apparently a direct

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wash or be emptied into, or where it can find its way into any of the fresh or tidal waters within the jurisdiction of this State any petroleum products, debris, hazardous, deleterious, destructive or poisonous substances of any kind. . . .

Id.

160. *See* State v. Jersey Cent. Power & Light Co., 125 N.J. Super. 97 (Super. Ct. Law Div. 1973), *aff'd*, 133 N.J. Super. 375 (Super. Ct. App. Div. 1975), *rev'd on other grounds*, 69 N.J. 102, 351 A.2d 337 (1976). In *Jersey Cent. Power* the court quotes part of a statement made at a public hearing by Senator Apy on behalf of Senator Beadleston, the sponsor of § 23:5-28. Senator Apy stated that "the object of the legislation is to say that anyone who permits [the introduction of] any injurious substances which have effects that are detrimental to the inhabitants of the waterways shall be responsible for doing it." 125 N.J. Super. at 100-01.

161. N.J. STAT. ANN. § 58:10-23.11 (1982 & Supp. 1983). The purpose of the act is expressed as follows: "[P]rohibiting the discharge of petroleum and other hazardous substances, providing for the cleanup and removal of any such discharge, establishing a spill compensation fund, providing for the raising of revenues therefor, all in order to protect the economy and environment of this State. . . ." 1976 N.J. Laws ch. 141, 621 (codified at N.J. STAT. ANN. § 58:10-23.11 (1982 & Supp. 1983)).

162. N.J. STAT. ANN. § 58:10-23.11g (c). The subsection states:

> Any person who has discharged a hazardous substance or is in any way responsible for any hazardous substance which the [Department of Environmental Protection] has removed or is removing pursuant to . . . this act shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs.

Id.

163. *Id.*

164. *Id.* N.J. STAT. ANN. § 58:10-23.11b(h). The statute states:

> "Discharge" means any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of hazardous substance into the waters of the State or onto lands from which it might flow or drain into said waters, or into waters outside the jurisdiction of the State when damage may result to the lands, waters or natural resources within the jurisdiction of the State. . . .

Id.

165. MINN. STAT. ANN. §§ 115A.01 to .72 (West Supp. 1983).

166. *Id.* § 115A.02. Section 115A.02 states:

> It is the goal of sections 115A.01 to 115A.72 to improve waste management in the state to serve the following purposes:
> (a) Reduction in waste generated;
> (b) Separation and recovery of materials and energy from waste;
> (c) Reduction in indiscriminate dependence on disposal of waste;
> (d) Coordination of solid waste management among political subdivisions;
> (e) Orderly and deliberate development and financial security of waste facilities

response to the growing hazardous waste problem.[167] One duty of the waste management board created under the Act[168] is to oversee the search for hazardous waste disposal sites within the state.[169] According to the results of questionnaires distributed by the board during public meetings in late 1980 and early 1981, a major consideration in the choice of any site is protection of groundwater.[170]

North Dakota also enacted into law a chapter of the North Dakota Century Code dealing with hazardous waste management.[171] This chapter creates a regulatory program[172] which provides that a citizen may institute suit or intervene to compel compliance with the statute.[173]

These statutes reflect growing concerns with the general quality of life and the specific problem of hazardous wastes.[174]

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including disposal facilities.

Id.

167. Grand Forks Herald, Sept. 19, 1982, at D1, col. 1. The article states that Minnesota produces about 150,000 tons of hazardous wastes yearly. Approximately 16 percent of the wastes are shipped to out of state disposal sites. The remaining wastes are unaccounted for. Officials believe that more than half of this waste is dumped illegally. The 1980 legislature passed the Minnesota Waste Management Act in an attempt to manage the waste situation. *Id.*

168. MINN. STAT. ANN. § 115A.04 (West Supp. 1983).

169. *Id.* § 115A.05(4). This section states in part:

> The board may direct the commissioner of administration to acquire by purchase, lease, condemnation, gift, or grant, any permanent or temporary right, title, and interest in and to real property, including positive and negative easements and water, air, and development rights, for sites and buffer areas surrounding sites for hazardous waste facilities approved by the board pursuant to sections 115A.18 to 115A.30 and 115A.32 to 115A.39. . . .

Id.

170. Grand Forks Herald, Sept. 19, 1982, at D1, col. 2. The *Herald* reported that "[n]inety-three percent of the participant groups named groundwater protection as a major consideration and said the facility should be placed in highly impermeable soil." *Id.*

171. *See* N.D. CENT. CODE §§ 23-20.3-01 to -10 (Supp. 1981 & Interim Supp. 1983).

172. *Id.* § 23-20.3-01. Section 23-20.3-01 states the following purposes of the chapter: (1) the protection of human health and the environment; (2) the establishment of a program to totally regulate hazardous waste; (3) the promotion of reduction of hazardous waste generation and reuse, recovery, and treatment as preferred alternatives to landfill disposal; and (4) the safe and adequate management of hazardous waste disposal sites within the state. *Id.*

173. *Id.* § 23-20.3-09(5)(a). This section states that "[a]ny person having an interest which is or may be adversely affected by a violation of this chapter may commence a civil action on his own behalf to compel compliance with this chapter, or any regulation, order, or permit issued pursuant to this chapter." *Id.* Section 32-40-06, however, states that "any person . . . aggrieved by the violation of any environmental statute, rule, or regulation of this state may bring an action . . . either to enforce such statute, rule, or regulation, *or to recover any damages that have occurred as a result of the violation, or for both such enforcement and damages.*" N.D. CENT. CODE § 32-40-06 (1976) (emphasis added). Section 32-40-06 appears to preserve in the citizenry the common law right to sue on grounds of strict liability for engaging in abnormally dangerous activities. *See* United Plainsmen v. North Dakota State Water Conservation Comm'n, 247 N.W.2d 457 (N.D. 1976). *United Plainsmen*is the only case to date that discusses chapter 32-40. The court in *United Plainsmen* stated, "We think the Public Trust Doctrine requires, as a minimum, evidence of some planning by appropriate state agencies and officers in the allocation of public water resources, and that the Environmental Law Enforcement Act (Chapter 32-40, NDCC) requires more than a plenary dismissal of the action." *Id.* at 463.

174. Most states have enacted hazardous waste management legislation. *See* ALA. CODE §§ 22 -30-1 to -24 (Supp. 1982); ALASKA STAT. §§ 46.03.250 to .311 (1982); ARIZ. REV. STAT. ANN. §§ 36

These statutes are a signal that the problem at long last has been recognized. The courts should interpret these statutes to reflect a policy of law that firmly deals with those who trade in hazardous wastes. To aid in the implementation of this policy, the courts should not hesitate to apply their previous interpretations under the theories of strict liability for abnormally dangerous activities and enterprise liability.[175]

V. CONCLUSION

This Note demonstrates that no single legal theory or formulation exists to charge the generators of hazardous wastes with strict liability for their actions. Yet as United States Supreme Court Justice Holmes said, "The life of the law has not been logic: it has been experience."[176] Experience and cases such as *Ashland Oil* have shown that reliance cannot be placed solely upon legislation such as the RCRA to assure that society is protected from the effects of mishandled hazardous wastes. Principles of enterprise liability and the concept of strict liability for those who engage in ultrahazardous activities, however, can achieve the desired result.

The unduly dangerous activity rule of *Rylands v. Fletcher* survives today. The rule is incorporated into section 520 of the

-2801 to -2806 (Supp. 1982); ARK. STAT. ANN. §§ 82-4201 to -4224 (Supp. 1981); CAL. HEALTH & SAFETY CODE §§ 25245 to 25249 (West Supp. 1983); COLO. REV. STAT. §§ 30-20-101 to -116 (1973 & Supp. 1982); CONN. GEN. STAT. ANN. §§ 22a-416 to -471 (West 1983); DEL. CODE ANN. tit. 7, §§ 6301 to 6317 (Supp. 1982); FLA. STAT. ANN. §§ 403.72 to .729 (West Supp. 1983); GA. CODE ANN. §§ 43-2901 to -2914a (Supp. 1982); IDAHO CODE §§ 39-4401 to -4422 (Supp. 1983); ILL. ANN. STAT. ch. 111½, §§ 1001 to 1007.1 (Smith-Hurd 1977 & Supp. 1983); IND. CODE ANN. §§ 13-7-8.5-1 to -8 (Burns 1981 & Supp. 1982); IOWA CODE ANN. §§ 455B.411 to .455 (West Supp. 1983); KY. REV. STAT. ANN. §§ 224.2201 to .265 (Supp. 1981); LA. REV. STAT. ANN. §§ 30.1131 to .1149.1 (West Supp. 1983); ME. REV. STAT. ANN. tit. 38, §§ 1301 to 1319-K (1978 & Supp. 1982); MD. HEALTH-ENVTL CODE ANN. §§ 7-201 to -268 (1982); MASS. ANN. LAWS ch. 21C, §§ 1 to 14; ch. 21D, §§ 1 to 19 (Michie/Law Co-op. 1981); MICH. COMP. LAWS ANN. §§ 299.501 to .551 (Supp. 1983); MINN. STAT. ANN. §§ 115A.01 to .72 (West Supp. 1983); MISS. CODE ANN. §§ 17-17-1 to -135 (Supp. 1982); MO. ANN. STAT. §§ 260.350 to .430 (Vernon Supp. 1983); MONT. CODE ANN. §§ 75-10-401 to -421 (1982); NEB. REV. STAT. §§ 81-1521.01 to .07 (1981); NEV. REV. STAT. §§ 444.700 to .778 (1981); N.H. REV. STAT. ANN. §§ 147-A:1 to -D:6 (Supp. 1981); N.J. STAT. ANN. §§ 13:1E-1 to -116; §§ 58:10-23.11 to .19 (West 1952 & Supp. 1983); N.M. STAT. ANN. §§ 74-4-1 to -12 (1981); N.Y. ENVTL. CONSERV. LAW §§ 27-0701 to -1319 (McKinney Supp. 1982); N.C. GEN. STAT. §§ 143 -215.75 to .94 (1983); N.D. CENT. CODE §§ 23-20.3-01 to -10 (Supp. 1981 & Interim Supp. 1983); OHIO REV. CODE ANN. §§ 3734.01 to .99 (Page 1980 & Supp. 1983); OKLA. STAT. ANN. tit. 63, §§ 1 -2001 to -2021 (West Supp. 1982); OR. REV. STAT. §§ 459.410 to .690 (1981); PA. STAT. ANN. tit. 35, §§ 6018.401 to .405 (Purdon Supp. 1982); R.I. GEN. LAWS §§ 23-19.1-1 to -22 (1979 & Supp. 1982); S.C. CODE ANN. §§ 44-56-10 to -200 (Law Co-op Supp. 1982); S.D. COMP. LAWS ANN. §§ 32-9-48 to 39-9-52 (Supp. 1982); TENN. CODE ANN. §§ 53-6301 to -6317 (Supp. 1982); TEX. WATER CODE ANN. §§ 26.261 to .307 (Vernon Supp. 1982); UTAH CODE ANN. §§ 26-14-1 to -18 (Supp. 1981); VT. STAT. ANN. tit. 10, §§ 6601 to 6613 (Supp. 1982); VA. CODE §§ 18.2-278.1 to .7 (1982 & Supp. 1983); WASH. REV. CODE ANN. §§ 70.105.010 to .140 (Supp. 1982); W. VA. CODE §§ 16-26-1 to -25 (1979 & Supp. 1983); WIS. STAT. ANN. §§ 144.60 to .74 (West Supp. 1982).

175. For a discussion of the reasons for extending strict liability to storage of ultrahazardous substances, see *supra* notes 143-57 and accompanying text.

176. O. W. HOLMES, THE COMMON LAW 1 (1881). Justice Holmes said that "[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." *Id.*

Restatement (Second) of Torts, which recognizes the inappropriateness of an activity to the place where it is conducted as one of the factors in determining whether an activity is abnormally dangerous.[177] Section 520 also lists the following as other factors considered in determining whether an activity is abnormally dangerous: Existence of a high degree of risk of some harm to the person, land or chattels of others; likelihood that the harm that results from the activity will be great; inability to eliminate the risk by the exercise of reasonable care; extent to which the activity is not a matter of common usage; and extent to which the activity's value to the community is outweighed by its dangerous attributes.[178] Many of these factors apply to the problem of hazardous waste liability.

The disposal of common and ordinary waste products or the operation of a landfill is not an unnatural use of land. Conversely, depositing hazardous materials, which may eventually cause health problems, on an ordinary parcel of land may be an unnatural use of the land. When considered in connection with the enterprise liability theory — risk-producing businesses should bear the costs of those risks — the party responsible for any damage caused by the hazardous waste is, logically, the producer of the waste.

Furthermore, the history of products liability law and the proliferation of state environmental protection statutes add substance to the argument that public policy is moving towards stricter control and greater accountability of hazardous waste generators.

Considering the tremendous harm that may result from a hazardous substance, even if legally disposed of, the time has come to charge enterprises involved in activities creating abnormally dangerous risks with responsibility for their actions.[179]

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177. *See* RESTATEMENT (SECOND) OF TORTS § 520(e).
178. *See id.* at § 520(a)-(d), (f).
179. The *Bridgeton* court perhaps stated the responsibility concept best:

> The developing stream of legal thought flows without difficulty and inexorably in the direction of such liability. As a society we are constantly made aware of the diminishing quantity and quality of our environment. Save, hopefully, in its ideals this is no longer the land of our fathers with its limitless bounty from sea to sea. This generation of Americans has seen its bounty wasted by mindless and reckless misuse. It has further seen the almost unchecked development of products whose misuse or improper employment leads to disfigurement and death. The law is not — or ought not be — so feeble as to exonerate those whose conduct causes harm to others by reason of such use or abuse.

City of Bridgeton v. B.P. Oil, Inc., 146 N.J. Super. 169, 177-78, 369 A.2d 49, 54 (Super. Ct. Law Div. 1976).