

# Strict Liability for Abnormally Dangerous Activity: The Negligence Barrier

GERALD W. BOSTON\*

## TABLE OF CONTENTS

I.	INTRODUCTION .....	598
II.	EVOLUTION OF THE DOCTRINE: <i>RYLANDS</i> AND THE RESTATEMENTS .....	601
	A. <i>Origin of Strict Liability</i> .....	601
	B. <i>The Restatement of Torts</i> .....	604
	C. <i>The Restatement (Second) of Torts</i> .....	616
	1. <i>Bohlen v. Prosser</i> .....	624
	2. <i>Keeton v. Prosser</i> .....	627
III.	DOCTRINAL BARRIERS TO STRICT LIABILITY .....	628
	A. <i>Introduction</i> .....	628
	B. <i>The Decisions Demand the Impossibility of Proving Negligence</i> .....	631
	C. <i>Additional Reasons for the Insurmountability of Section 520(c)</i> .....	639
	1. <i>Due Care Need Only Eliminate the High Risk, Not All Risk</i> .....	639
	2. <i>Applicable Government Regulations Support a Finding that the         Risk Can Be Minimized with Due Care</i> .....	641
	3. <i>Noncompliance with Governmental Regulations May         Support a Negligence Per Se Claim</i> .....	644
	4. <i>The Flexibility of Negligence Allows a Higher Degree         of Care for Dangerous Activities</i> .....	645

---

\* Professor of Law, Thomas M. Cooley Law School. J.D. 1967, Harvard University; B.A. 1964, Ohio Wesleyan University. Member of American Law Institute and Member, Consultative Group, Restatement (Third) of Torts, Apportionment and General Principles projects.

5. <i>The Availability of Res Ipsa Loquitur Also Obviates the Need for Strict Liability</i> .....	647
6. <i>Defining the “Activity” Broadly Defeats Strict Liability</i> .....	649
7. <i>The Immunity Conundrum Demands Reliance on Section 520(c)</i> .....	653
D. <i>The Risk of Harm: Clauses (a) and (b)</i> .....	655
E. <i>Common Usage and Locational Appropriateness</i> .....	659
F. <i>Value of the Activity to the Community</i> .....	662
IV. FINAL THOUGHTS .....	668

## I. INTRODUCTION

My main thesis is that the doctrine of strict liability for abnormally dangerous activity (which I sometimes refer to by the acronym SLADA), memorialized in sections 519 and 520 of the Restatement (Second) of Torts,<sup>1</sup> has evolved to the point of near extinction because courts have concluded that the negligence system functions effectively to deter the serious risks posed by the activities involved. The Restatement (Second) provides that strict liability is inapplicable when the high degree of risk can be eliminated by the exercise of reasonable care.<sup>2</sup> The evidence demonstrates that courts are increasingly making precisely that finding, usually without any reliance on record evidence, but instead on a judicial sense that very few risks are incapable of being

---

1. RESTATEMENT (SECOND) OF TORTS §§ 519-520 (1977). Sections 519 and 520 read as follows:

Section 519. General Principle

- (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 such harm.
- (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

Section 520. Abnormally Dangerous Activities

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;
- (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.*

2. *See id.* § 520(c).

rendered safe by reasonable precautions. This movement away from strict liability and toward negligence I refer to as “the negligence barrier.”

I began my research with the intention of examining decisions applying sections 519 and 520 to develop a case for some clarification to those sections to reflect evolving authority since they were first published thirty years ago. My working hypothesis was that the requirements of those sections had erected substantial barriers to sustaining a claim of strict liability for abnormally dangerous activities. I further hypothesized that the definitions and factors set forth in sections 519 and 520 needed some tinkering in a Restatement in order to recapture some of the tort law’s origins in *Rylands v. Fletcher*<sup>3</sup> and to address several issues that have divided the courts in the last twenty years or so. I set out to answer these questions and others by reviewing roughly 100 decisions—a sampling, albeit a large one, decided over the last thirty-five years—with special emphasis on the decisions rendered subsequent to 1980. The research reveals that rarely do plaintiffs succeed in asserting claims for abnormally dangerous activity. The statements of hostility to the doctrine abound, as will be shown below. This discovery then prompted a deeper question: Why have courts been so reluctant to embrace SLADA? The answer largely resides in the fact that courts reject strict liability because they conclude that the negligence system can function effectively in enforcing safety concerns associated with the activity.

In Part II, I briefly capsule the evolution of SLADA, beginning with *Rylands* and tracing the standards employed in the Restatement of Torts published in 1934 and in the Restatement (Second) of Torts, first published as a draft in 1964 but not formally issued until 1977. Part II concludes with an opinion of how the conception of the doctrine formulated by Francis Bohlen, the Reporter for the First Restatement, differed from that formulated by William Prosser, Reporter for the Restatement (Second).

Part III of the Article examines decisions that have interpreted and applied the six “factors” set forth in section 520 of the Restatement (Second), which are to be considered in determining whether an activity is an “abnormally dangerous” one. Part III.B especially focuses on section 520(c) and its proposition that the risk must be one which the

---

3. 3 L.R.-E. & I. App. 330 (H.L. 1868).

exercise of “all reasonable care” would not have eliminated. What Part III.B demonstrates is that the section 520 “factors” really contain one overriding element—not a mere balancing factor that enters the equation—namely, that the plaintiff prove that it is not possible to prove negligence. Part III further explores the doctrinal barriers in greater detail, asking why it is that plaintiffs generally cannot prevail with regard to the factors of the Restatement (Second). While the Restatement (Second) stipulates that all six factors are important, and none is indispensable to the weighing process,<sup>4</sup> the decisional reality is different. Courts quote the stipulation, but then proceed to rule that, because the plaintiff cannot demonstrate that due care would not have minimized the danger, SLADA is held inapplicable. Literally dozens of recent decisions come down squarely for the proposition that the plaintiff has failed to sustain its burden (usually on a motion to dismiss or summary judgment) of proving that this activity involved the kind of unavoidable risk that no amount of care, even the utmost care, could minimize. What the courts are saying is that virtually *all* risks can be reduced to acceptable levels with the exercise of reasonable care—even risks from activities normally considered “abnormal” or “ultrahazardous.”

In fact, whereas section 520(c) of the Restatement (Second) refers to the inability to “eliminate” the high risk of the activity by exercising due care, the cases rule that the relevant inquiry is whether the high risk can be “reduced” to an acceptably small level, not “eliminated.” Moreover, in defining what is the relevant “activity” to which the section 520 factors are to be applied, most courts opt for a broad definition of the activity, rather than defining an activity more narrowly as the injury-causing event or as the injurious result itself. Thus, for example, the activity is not “leaking underground storage tanks” but rather “the placement of petroleum products in underground tanks.” While no amount of care can prevent harm from already “leaking” tanks, reasonable care can most certainly avoid risks of harm from placing petroleum in nondefective tanks. Other examples of this phenomenon are pointed out in Part III.C.

Additionally, courts apply numerous negligence principles that broaden the reach of negligence liability and thereby obviate the apparent need for strict liability in this area. Part III.C demonstrates that courts invoke negligence per se, the presence of a regulatory scheme, *res ipsa loquitur*, and the inherent flexibility of negligence to address highly risky activities—all with the purpose and effect of avoiding the imposition of strict liability.

---

4. See RESTATEMENT (SECOND) OF TORTS § 520 cmt. f (1977).

Parts III.D and III.E examine the other factors that section 520 of the Restatement (Second) of Torts calls for in identifying an abnormally dangerous activity. Here the research discloses that these factors are rarely ever outcome-determinative, because the controlling factor is virtually always the negligence barrier.

Many commentators have advocated and anticipated that liability for abnormally dangerous activities would expand and that new activities would be subject to its strict enterprise liability.<sup>5</sup> Those beliefs and predictions have come to naught. In the last twenty years the evidence reveals that liability under sections 519 and 520 has contracted, not expanded, and that the range of activities subjected to strict liability has narrowed; indeed, even jurisdictions reflecting the most aggressive application of the doctrine—California, Alaska, and Washington—have indicated a more recent retrenchment. By far the most pervasive explanation for these developments is that plaintiffs cannot satisfy the burden imposed by section 520(c) of demonstrating that the risks of the activity are ones which cannot be eliminated or reduced to acceptable levels by exercising reasonable care. This is the negligence barrier.

## II. EVOLUTION OF THE DOCTRINE: RYLANDS AND THE RESTATEMENTS

### A. *Origin of Strict Liability*

The origins of SLADA are found in one of the most famous cases in the law of torts, so well known and much written about that I am reluctant to even discuss it—let alone quote from it—but discuss it and quote it I must. *Rylands*,<sup>6</sup> now over 130 years old, presented remarkably simple facts. Defendant mill owners constructed a reservoir upon their land. The water broke through into the disused and filled-up shaft of an abandoned coal mine, and flooded along connecting passages into the

---

5. See, e.g., Virginia E. Nolan & Edmund Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. REV. 257 (1987) (the title notwithstanding, there has been no revitalization); see also Albert A. Ehrenzweig, *Negligence Without Fault*, 54 CAL. L. REV. 1422 (1966); William K. Jones, *Strict Liability for Hazardous Enterprise*, 92 COLUM. L. REV. 1705 (1992); Joseph H. King, Jr., *A Goals-Oriented Approach to Strict Liability for Abnormally Dangerous Activity*, 48 BAYLOR L. REV. 341 (1996). But see Mark Geistfeld, *Should Enterprise Liability Replace the Rule of Strict Liability for Abnormally Dangerous Activities?*, 45 UCLA L. REV. 611 (1998).

6. *Fletcher v. Rylands*, 159 Eng. Rep. 737 (1865), *reversed*, *Fletcher v. Rylands*, 1 L.R.-Ex. 265 (1866), *affirmed*, *Rylands v. Fletcher*, 3 L.R.-E. & I. App. at 330.

adjoining mine of the plaintiff. The actual work was performed by independent contractors, who were likely negligent, but prevailing legal doctrine requiring privity presumably precluded any direct cause of action by the plaintiff against the contractors. The arbitrator who stated the case found that the defendants themselves were ignorant of the existence of the old coal workings and, therefore, were not negligent themselves. Moreover, the facts did not quite fit into the existing tort pigeonholes: there was no trespass because the damage from flooding was indirect and consequential, as opposed to direct and immediate,<sup>7</sup> and there was no nuisance, absent evidence of something “hurtful or injurious to the senses” or of damage of a continuous or recurring nature.<sup>8</sup> In the Exchequer Chamber the judgment for defendants was unanimously reversed. The opinion of Justice Blackburn, one of the most influential English common-law judges of the nineteenth century, in one of the most quoted passage in tort jurisprudence, declared,

We think that the true rule of law is, that the person who for his own purposes brings on his lands 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 prim[a] facie answerable for all the damage which is the natural consequence of its escape. . . . The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour’s reservoir, or whose cellar is invaded by the filth of his neighbor’s privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor’s alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour’s, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law whether the things so brought be beasts, or water, or filth, or stench.

---

7. The court wrote,  
I think the true criterion of trespass . . . that to constitute trespass the act doing the damage must be immediate, and that if the damage be mediate or consequential (which I think the present was), it is not a trespass. . . .

. . . .  
. . . I entertain no doubt that if the defendants directly and by their immediate act cast water upon the plaintiff’s land it would have been a trespass, and that they would be liable to an action for it. But this they did not do.

*Id.* at 745-46 (Martin J.).

8. *Id.* at 745 (Martin, J.) (“Secondly, I think there was no nuisance in the ordinary and generally understood meaning of that word, that is to say, something hurtful or injurious to the senses. The making of a pond for holding water is a nuisance to no one.”).

9. Fletcher v. Rylands, 1 L.R.-Ex. at 279-80.

As the above statement makes clear, Justice Blackburn did not think he was making new law, but rather believed he was merely describing accepted principles, principles closely aligned to the law of nuisance.

The House of Lords affirmed the decision, but circumscribed the reach of Blackburn's principle. Lord Cairns wrote,

My Lords, the principles on which this case must be determined appear to me to be extremely simple. 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, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the Plaintiff, the Plaintiff could not have complained that that result had taken place.

This statement is ambiguous because of its reference first to "natural user of that land" and later to the "laws of nature." Subsequent English decisions made it abundantly clear that, by "natural," Lord Cairns meant merely ordinary, appropriate, or customary, given the character of defendant's and surrounding properties.<sup>11</sup> Thus, liability under the rule of *Rylands* would extend only to those activities that are "extraordinary," "exceptional," or "abnormal."<sup>12</sup> As Lord Moulton explained, there must be "some special use bringing with it increased danger to others, and must not merely be the ordinary use of land or such a use as is proper for

10. *Rylands v. Fletcher*, 3 L.R.-E. & I. App. at 338-39. Lord Cairns continued,

On the other hand if the Defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land,—and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the Plaintiff, then it appears to me that that which the Defendants were doing they were doing at their own peril; and, if in the course of their doing it, the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the Plaintiff and injuring the Plaintiff, then for the consequence of that, in my opinion, the Defendants would be liable.

*Id.* at 339.

11. See, e.g., *National Tel. Co. v. Baker*, 2 Ch. 186 (1893) (Kekewich, J.); *West v. Bristol Tramways Co.*, 2 K.B. 14 (1908) (Farwell, J.).

12. See *Rainham Chem. Works v. Belvedere Fish Guano Co.*, 2 App. Cas. 465, 471 (H.L. 1921) (Buckmaster, J.); *Barker v. Herbert*, 2 K.B. 633, 645 (1911) (Farwell, J.); *Noble v. Harrison*, 2 K.B. 332, 342 (1926) (Wright, J.); *Barker*, 2 K.B. at 644 (Moulton, J.).

the general benefit of the community.”<sup>13</sup> The “reasonable use of property in the way most beneficial to the community” was not within the purview of the rule.<sup>14</sup> Therefore, applying the lexicon of modern American decisions, what *Rylands* calls for is examining the “locational appropriateness” of the activity and the “commonality of usage,” which, as noted, are among the factors incorporated into the Restatement (Second) of Torts.<sup>15</sup>

### B. *The Restatement of Torts*

William Prosser has traced the response of American courts to *Rylands*, which response resembles a swinging pendulum.<sup>16</sup> Two jurisdictions accepted the *Rylands* principle almost immediately, followed by outright repudiation in the 1870s by New York, New Hampshire, and New Jersey.<sup>17</sup> Prosser explains that result as deriving from a misinterpretation of the case as holding a defendant absolutely liable in all cases whenever anything under its control escapes and causes harm.<sup>18</sup> Several more jurisdictions followed suit by the early 1900s, each repudiating the SLADA rule.<sup>19</sup> Despite those early setbacks, gradually the principle took hold and, by the 1930s, close to half of the American jurisdictions had adopted either the rule of *Rylands* itself (that is, the House of Lords’ narrower version) or some derivation thereof.<sup>20</sup>

In 1934 the American Law Institute (ALI) commenced the project to publish the Restatement of Torts, with Francis Bohlen as the Reporter. Bohlen, who had previously written about *Rylands*,<sup>21</sup> proposed a liability rule that in certain respects went beyond the narrower principle of

---

13. *Rickards v. Lothian*, 1 App. Cas. 263, 280 (P.C. 1913) (Moulton, J); *Sedleigh-Denfield v. O’Callaghan*, 1 App. Cas. 880, 888 (H.L. 1940) (Wright, J.); *Read v. J. Lyons & Co.*, 2 All E.R. 98 (1944).

14. *Nichols v. Marsland*, 10 L.R.-Ex. 255, 259 (1875) (Bramwell, J); *Blake v. Woolf*, 2 Q.B. 426, 428 (1898) (Wright, J).

15. William Prosser concluded: “In short, what emerges from the English decisions as the true ‘rule’ of *Rylands* is that the defendant will be liable when he damages another by a thing or activity inappropriate to the place where it is maintained, in the light of the character of that place and its surroundings.” WILLIAM LLOYD PROSSER, *The Principle of Rylands v. Fletcher*, in *SELECTED TOPICS ON THE LAW OF TORTS* 135, 147 (1953).

16. *See id.* at 150-58.

17. *See Losee v. Buchanan*, 51 N.Y. 476 (1873); *Brown v. Collins*, 53 N.H. 442 (1873); *Marshall v. Welwood*, 38 N.J.L. 339 (1876).

18. *See* PROSSER, *supra* note 15, at 152.

19. *See, e.g.*, *Triple-State Natural Gas v. Wellman*, 70 S.W. 49 (Ky. 1902); *Pennsylvania Coal Co. v. Sanderson*, 6 A. 453 (Pa. 1886); *Gulf C. & S.F. Ry. Co. v. Oakes*, 58 S.W. 999 (Tex. 1900).

20. *See* PROSSER, *supra* note 15, at 152-54.

21. *See* Francis H. Bohlen, *The Rule of Rylands v. Fletcher*, 59 U. PA. L. REV. 423 (1911).



*Rylands*, and that also went beyond most of the American decisions considering some form of strict liability derivative from the English authority. Published in 1938, the governing sections provided for strict liability for so-called “ultrahazardous” activities as follows:

Section 519. Miscarriage of Ultrahazardous Activities Carefully Carried On.

Except as stated in §§ 521-4, one who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm.

Section 520. Definition of Ultrahazardous Activity.

An activity is ultrahazardous if it necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and is not a matter of common usage.

In Bohlen’s first Preliminary Draft to the Advisors of the ALI,<sup>24</sup> prepared in 1934, he included a note which indicated that “the Reporter has *not* stated the effect of the rule announced” in *Rylands*.<sup>25</sup> The note concluded with this statement:

The later English cases have extended the rule of *Rylands v. Fletcher* to include any form or kind of highly dangerous activity carried on for a purpose purely personal to the actor, the purpose being one *not normal to the average man*. It is this later development of *Rylands v. Fletcher* which is here stated.

Concerning Bohlen’s work, several observations are apparent. First, even a cursory examination reveals that the Restatement went well beyond the holding in *Rylands*, especially that of the House of Lords, because it does not by its terms incorporate the “non-natural user” principle. Instead it incorporates a notion of an activity not being “a matter of common usage”—a much different and broader idea, since an activity might be compatible with its surroundings but not constitute a common usage, “normal to the average man.” Second, the doctrine of ultrahazardous activities is not limited to adjacent land owners (the circumstances of *Rylands*). Third, Bohlen cited English authorities for the proposition that, while the English cases spoke in terms of “land,”

---

22. RESTATEMENT OF TORTS § 519 (1938).

23. *Id.* § 520.

24. RESTATEMENT OF TORTS (Preliminary Draft No. 69, 1934).

25. *Id.* at 74 (emphasis added).

26. *Id.* at 75 (emphasis added).

the word “land” is used in the broader sense of any place where “an abnormally dangerous instrumentality, physical condition or operation is used, created or carried on.”<sup>27</sup> Fourth, as Bohlen candidly admitted, apart from innumerable blasting cases, “*there are only a comparatively few cases . . . which support the rule stated in this Section.*”<sup>28</sup> Assuming that Bohlen favored a regime affording expansive protection for accident victims, this comment would seem to constitute a sort of admission against interest. In any event, the comment was deleted from the next draft and it was also absent in the final Reporter’s Notes when the Restatement of Torts was approved and published by the Institute.<sup>29</sup>

Bohlen’s notes<sup>30</sup> reveal that he placed especial reliance on an opinion written by Chief Justice Knowlton of the Massachusetts Supreme Judicial Court in *Ainsworth v. Lakin*.<sup>31</sup> Knowlton articulated the following rule:

There is a class of cases in which it is held that one who, for his own purposes, brings upon his land noxious substances or other things which have a tendency to escape and do great damage, is bound at his peril to confine them and keep them on his own premises. This rule is rightly applicable *only to such unusual and extraordinary uses of property* in reference to the benefits to be derived from the use and the dangers or losses to which others are exposed as should not be permitted except at the sole risk of the user. The standard of duty established by the courts in these cases is that every owner shall refrain from these unwarrantable and *extremely dangerous uses of property* unless he provides safeguards whose perfection he guaranties. . . . That there are uses of property not forbidden by law to which this doctrine properly may be applied is almost universally acknowledged.<sup>32</sup>

Ironically, except as implicitly incorporated in the common-usage idea, the black letter law of the Restatement included no such limitation. The facts, however, in *Ainsworth* hardly reflected an unusual use since the damage was occasioned by the collapse of a wall to a building that had previously been gutted by fire. On the other hand, Knowlton’s reference to “extremely dangerous uses” was clearly incorporated into the Restatement rule in section 520A.

Bohlen was also much enamored with an opinion by Judge Augustus Hand of the Second Circuit in *Exner v. Sherman Power Construction*

---

27. RESTATEMENT OF TORTS §§ 7001-7002 explanatory notes at 9 (Preliminary Draft No. 72, 1934).

28. *Id.* note at 81 (Preliminary Draft No. 69, 1934) (emphasis added).

29. Compare RESTATEMENT OF TORTS §§ 519-520 (Notes to Tentative Draft No. 12, 1935) (comment included), with RESTATEMENT OF TORTS §§ 519-520 (comment deleted).

30. RESTATEMENT OF TORTS topic 4 note at 75-76 (Preliminary Draft No. 69, 1934).

31. 62 N.E. 746 (Mass. 1902).

32. *Id.* at 747 (emphasis added).

*Co.*<sup>33</sup> In *Exner*, the court extended strict liability beyond blasting to the storage of explosives, and beyond damage caused by debris cast on the land of another to damage caused by concussion.<sup>34</sup> The court, citing *Rylands* but not discussing it, explained that defendant's liability was not founded upon negligence, since none was proved, nor violation of a statute, since plaintiff's dwelling was not within the distance prohibited by law for the storage of dynamite, but "upon the ground that the use of dynamite is so dangerous that it ought to be at the owners' risk."<sup>35</sup> Accordingly, Judge Augustus Hand wrote,

We can see no reason for imposing a different liability for the results of an explosion, whether the dynamite explodes when stored or when employed in blasting. To be sure there is a greater likelihood of damage from blasting than from storage, but in each case the explosion arises from an act connected with a business conducted for profit and fraught with substantial risk and possibility of the gravest consequences. . . .

Frequently as much as one thousand pounds of dynamite were stored by the defendant near a group of dwellings, factories, and a hotel. The fact that the explosion was severe enough to kill three men, blow up the hut, unsettle and damage the plaintiff's house, over nine hundred feet away, and that even then, one hundred pounds of dynamite still remained unexploded, shows that there must have been a large amount of dynamite in or about the hut at the time of the accident. When a person engages in such a dangerous activity, useful though it be, he becomes an insurer.

Furthermore, the imposition of absolute liability is not out of accord with any general principles of law. . . . Although liability for injury to the person has not in most instances survived except where there has been fault, there still remains absolute liability for trespasses to real estate and for actionable wrongs committed by servants no matter how carefully they are selected by the master. The extent to which one man in the lawful conduct of his business is liable for injuries to another involves an adjustment of conflicting interests. The solution of the problem in each particular case has never been dependent upon any universal criterion of liability (such as "fault") applicable to all situations. If damage is inflicted, there ordinarily is liability, in the absence of excuse. When, as here, the defendant, though without fault, has engaged in the perilous activity of storing large quantities of a dangerous explosive for use in his business, we think there is no justification for relieving it of liability, and that the owner of the business, rather than a third person who has no relation to the explosion, other than that of injury, should bear the loss.<sup>36</sup> The blasting cases seem to afford ample analogies and to justify this conclusion.

The quoted language from *Exner* highlights the dangerousness of the activity but also implies some relevance for the proximity of the activity

---

33. 54 F.2d 510 (2d Cir. 1931).

34. *See id.* at 514.

35. *Id.* at 513.

36. *Id.* at 514.

to a populated area. However, an even stronger theme can be seen in Judge Hand's commitment to strict enterprise liability—i.e., to the notion that a “business conducted for profit and fraught with substantial risk” should pay for the losses it causes.<sup>37</sup> In that regard, *Exner* represents strong authority for the Restatement.

Bohlen also looked<sup>38</sup> to *Bridgeman-Russell Co. v. City of Duluth*,<sup>39</sup> where a principal water main leading from a reservoir burst near plaintiff's premises, causing extensive damage.<sup>40</sup> The Minnesota Supreme Court declined to base liability on trespass, but instead relied squarely on *Rylands*.<sup>41</sup> After noting the “immense quantities” of water necessitated by large cities, the nature of “water systems on a vast scale,” and the severe damage inflicted on the plaintiff, the court concluded,

In such a case, even though negligence be absent, natural justice would seem to demand that the enterprise, or what really is the same thing, the whole community benefitted by the enterprise, should stand the loss rather than the individual. It is too heavy a burden upon one. The trend of modern legislation is to relieve the individual from the mischance of business or industry without regard to its being caused by negligence.<sup>42</sup> Our safety appliance acts and workmen's compensation acts are examples.

This quotation reveals the court's endorsement of strict enterprise liability and loss spreading, with virtually no prerequisite to potential liability other than the implicit and inherent potential for extreme damage should the main burst.

Finally, Bohlen cited repeatedly<sup>43</sup> the opinion of the California Supreme Court in *Green v. General Petroleum Corp.*,<sup>44</sup> involving the blow-out of an oil well which cast oil, gas, mud, and rocks onto the property located 200 feet from the well, destroying much of the plaintiff's property.<sup>45</sup> The court found that defendant was not negligent because it used experienced workers and the best equipment, and because the blow-out occurred at a depth much higher than previously experienced in the area. After also rejecting liability based on nuisance per se, the court nevertheless found liability without reliance on *Rylands*. The court found liability based on a principle broader even than that of Judge Blackburn in *Rylands*, writing,

---

37. *Id.*

38. *See* RESTATEMENT OF TORTS §§ 519-520 (Reporter's Notes, 1938).

39. 197 N.W. 971 (Minn. 1924).

40. *See id.* at 972.

41. *See id.*

42. *Id.*

43. *See* RESTATEMENT OF TORTS §§ 519-520 (Reporter's Notes, 1938).

44. 270 P. 952 (Cal. 1928).

45. *See id.* at 953.

Where one, in the conduct and maintenance of an enterprise lawful and proper in itself, deliberately does an act under known conditions, and, with knowledge that injury may result to another, proceeds, and injury is done to the other as the direct and proximate consequence of the act, however carefully done, the one who does the act and causes the injury should, in all fairness, be required to compensate the other for the damage done. The instant case offers a most excellent example of an actual invasion of the property of one person through the act of another. The fact that the act resulting in the 'blow-out' was lawful, and not negligently done, does not, in our opinion, make the covering of respondents' property with oil, sand, mud, and rocks any less an actual invasion of and a trespass upon the premises.

It ought to be, and we are of the view that it is, the rule that, where an injury arises out of, or is caused directly and proximately by the contemplated act or thing in question, without the interposition of any external or independent agency which was not or could not be foreseen, there is an absolute liability for the consequential damage, regardless of any element of negligence either in the doing of the act or in the construction, use, or maintenance of the object or instrumentality that may have caused the injury. In our judgment, no other legal construction can be placed upon the operations of the appellant in this case than that, by its deliberate act of boring its well, it undertook the burden and responsibility of controlling and confining whatever force or power it uncovered. Any other construction would permit one owner, under like circumstances, to use the land of another for his own purpose and benefit, without making compensation for such use. We do not conceive that to be the law.

The foregoing represents the handful of decisions which Bohlen used to develop the SLADA rule in the First Restatement of Torts. What can be gleaned from these decisions are the following observations: (1) a plaintiff could recover even though defendant was not negligent (i.e., despite evidence that the defendant exercised due care); (2) the defendants found liable were all engaged in activities that proved to be highly destructive (e.g., involving the inundation of plaintiff's home by a bursting water main, an explosion of dynamite that destroyed plaintiff's home and killed three people, the destruction of a plaintiff's dwelling by a four to seven inches thick layer of rock and mud, or the collapsing of a wall that damaged plaintiff's property); (3) oil drilling and dynamite storage activities, each done in close proximity to residential housing, were deemed to be inappropriately located; (4) a utility company may be liable for damages resulting from a broken water main despite having located the main in an appropriate place; (5) none of the activities from which liability accrued was for a purpose "normal to the average man" (i.e., the activity was not a matter of common usage); and (6) while the activities of oil drilling and dynamite storage might be regarded as

---

46. *Id.* at 955.

creating a high risk of harm to others, a fire-gutted house and broken water mains do not inherently suggest highly dangerous activity.

But what one really carries away from these decisions is a strong sense of a burgeoning rule of strict enterprise liability.<sup>47</sup> The opinion of the California Supreme Court in *Green* and of Augustus Hand in *Exner* both exhibit strong inclination toward treating injuries inflicted on innocent persons as a cost of doing business without regard to fault. Moreover, returning to Bohlen's article on *Rylands*, it seems quite clear that he too espoused precisely such a view. After observing that the progeny of *Rylands* represented a compromise between conflicting conceptions of public justice (liability only for fault and liability without fault) and that such a compromise was indicative of a transition period in the development of the law (which he likens to a bridge), Bohlen wrote,

[T]hey seem rather to be a bridge between the old conception and some new solution of the problem of the proper distribution of the loss necessarily caused by the individual activities of civilized mankind, each in pursuit of his own interests. And as no one indefinitely remains upon a bridge, but either passes over it upon his way or returns to the shore he has left, so it is to be expected that the courts, which have in these cases parted company with the idea that no person need make good the loss he innocently causes, will either return to that principle, abandoning the position they now occupy, or that they will go on in the path on which they have started and will work out some new principle for the distribution of the loss, which will satisfy the more highly socialised [sic] modern sense of justice.

---

47. See generally Nolan & Ursin, *supra* note 5 (undertaking a careful consideration of enterprise liability).

48. Bohlen, *supra* note 21, at 453. Bohlen makes this observation:

To throw the whole of the loss upon one member of the public, simply because it is his misfortune that his property should be situated near to the place which the defendant selects to carry on the business, tending to increase the general prosperity, is, it seems to the writer, to throw upon him a loss altogether out of proportion to his share in the benefit derived from the encouragement of the industry.

If the public be interested, let the public as such bear the loss, but if the neighbors have such profit by the business by reason of the fact that the right to carry on such business adds value to their land, or because the value of their land is enhanced by the character of the locality due to the presence of the defendant's enterprise, then, they being peculiarly benefited, may be properly singled out to bear the loss. Nor is it to the public interest to allow the business even though it be one which conduces to the general prosperity, to be carried on at the cost of the neighbor or of the public, unless the risks be so great that no person be expected to engage in it on any other terms. The margin of profit in a particular kind of business, which may be essential for the satisfaction of some general want, may be so small, or this sort of business so in its infancy, that certain privileges may well be accorded to it, but it is certainly not to the public interest that he who carries on any business should be relieved from bearing the burden of the damage which that business does, as part of the cost of its operation, merely that his profits may be increased.

*Id.* at 444-46 (footnotes omitted).

Does the black letter rule of the Restatement show fidelity to the decisions it purports to “restate?” Does it carry out a theory of strict enterprise liability? Sections 519 and 520 of the First Restatement imposed strict liability on one who carried on an “ultrahazardous activity.”<sup>49</sup> An activity was considered ultrahazardous “if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage.”<sup>50</sup> The Restatement provided that,

[O]ne who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm.

The first important consideration is the treatment of the exercise of due care by the defendant. As noted above, in the pre-Restatement decisions, and indeed in *Rylands* itself, the plaintiff was unable to prove negligence—the record in those cases simply didn’t support such a finding. Section 519 accurately reflects that authority because it imposes strict liability “although the utmost care is exercised to prevent the harm.”<sup>52</sup> But section 520 takes that point one step further by requiring that the risk be one “which cannot be eliminated by the exercise of the utmost care.”<sup>53</sup> This point is developed in detail in Part III because it is central to understanding the current rules under the Restatement (Second). Suffice it to observe that the decisions relied on by Bohlen stated that the plaintiff did not prove negligence in those cases and was not required to do so, not that it would have been *impossible* for him to do so. I think this is an incredibly important distinction that finds virtually no support in the decisions since 1938. In other words, it is one thing to say that the plaintiff was unable to prove negligence; it is quite another to require that plaintiff establish that it is impossible to prove negligence. The comments to the First Restatement offer only a bit of clarification. Comment “a” to section 520 states:

---

49. See RESTATEMENT OF TORTS §§ 519-520 (1938).

50. *Id.* § 520.

51. *Id.* § 519.

52. *Id.*

53. *Id.* § 520.

The rule stated in this Section is applicable to an activity which is of such utility that the risk unavoidably involved in carrying it on cannot be regarded as so unreasonable as to make it negligent to carry it on, as the word "negligence" is defined in § 282. If the utility of the activity does not justify the risk inseparable from it, merely to carry it on is negligence, and the rule stated in this Section is not necessary to subject the actor to liability for harm resulting from it.

Comment "d," titled "Ultrahazardous conditions of operation" reads in part, "An activity may be ultrahazardous because it is of a sort which must be carried on under conditions which cannot be predicted at the time it is entered upon and which, if they arise, *are incapable of being so provided against as to make the activity safe.*"<sup>55</sup>

These comments provide a glimpse of a rationale for the requirement that the activity be one incapable of being made safe by the exercise of utmost care. Bohlen uses aviation in several of the comments to illustrate an activity that is ultrahazardous precisely because, in Bohlen's words, "even the best constructed and maintained aeroplane *is so incapable* of complete control that flying creates a risk that the plane even though carefully constructed, maintained and operated, may crash to the injury of persons, structures and chattels on the land over which the flight is made."<sup>56</sup> Similarly, the storage and transportation of explosive substances qualifies under section 520 for strict liability because "no precautions and care can make it reasonably certain that they will not explode."<sup>57</sup> These illustrations suggest that it is the inherent, unavoidable, unpreventable risk that essentially renders the activity ultrahazardous. Without doubt *Rylands* contains no such principle because the reservoir in that case contained no such unpreventable risk, and Bohlen cites precious little authority to sustain the rule.

The second thing that jumps out from the First Restatement is the demand that the activity "necessarily involve[ ] a risk of serious harm"<sup>58</sup> Here again the insistence on extreme or excessive danger goes beyond *Rylands* (there being nothing of excessive danger inherent in a reservoir); and, outside of the blasting cases (and perhaps the blow-out of the oil well), the characterization of an activity as extremely dangerous is not an essential ingredient in many pre-1938 cases. The only examples of activities that qualify as an ultrahazardous activity given in the comments are blasting, the storage, transportation, and use

---

54. *Id.* § 520 cmt. a.

55. *Id.* § 520 cmt. d (emphasis added).

56. *Id.* § 520 cmt. b (emphasis added).

57. *Id.* § 520 cmt. c.

58. *Id.* § 520.



of explosives, aviation, and the blow-out of oil wells.<sup>59</sup>

The third observation, which is especially surprising, is the failure to incorporate any requirement that the activity be unusual or inappropriate to the place or surroundings where it is carried on. Not once do the comments even allude to the non-natural user principle of *Rylands*.<sup>60</sup> Moreover, Bohlen apparently excluded the principle despite cases such as *Exner*, involving a magazine storing dynamite within a few hundred feet of residential dwellings, and *Green*, with the oil well drilled less than 200 feet from a home, that support the idea of locational inappropriateness. In his article Bohlen makes very little reference to the non-natural user principle even though the decisions, especially the English ones, regard that point as central to whole basis of liability.<sup>61</sup> Prosser, writing about the First Restatement in 1953, renders this criticism:

This [Restatement] goes beyond the English rule in ignoring the place where the activity is carried on and its surroundings, and falls short of it in the insistence on extreme danger and the impossibility of eliminating it with all possible care. This shift of emphasis to the nature of the activity itself rather than its relation to its surroundings is not reflected in the American cases, which have laid quite as much stress as the English ones upon the place where the thing is done.<sup>62</sup>

Decisions rendered subsequent to the publication of the Restatement of Torts have been vocal in their criticism of the rules' failure to explicitly incorporate a locational appropriateness factor. Thus, a New Mexico appellate court in a case involving storage of explosives stated:

---

59. *See id.* § 519 cmts. b-e. In his article, Bohlen refers repeatedly to "every excessive use of a private right which in its nature threatens harm to others" and "[t]he question whether the particular use is to be regarded as excessive or improper." Bohlen, *supra* note 21, at 431-32.

60. Recall that Bohlen candidly acknowledged in the early drafts that the "Reporter has not stated the effect of the rule announced" in *Rylands*. RESTATEMENT OF TORTS at 75 (Preliminary Draft No. 69, 1934).

61. *See* Bohlen, *supra* note 21, at 428-29. Bohlen continues, "Since the defendant's liability arises from the fact that he had in the course of an unnatural use of his property and for purposes of his own, peculiar to himself, collected thereon substances likely to escape and injurious if they do escape, it follows that the plaintiff cannot recover where his only injury is the interference with his equally unnatural and peculiar use of his own land."

*Id.*

62. PROSSER, *supra* note 15, at 158. Prosser would rectify the omission when he became the Reporter for the Restatement (Second) of Torts, which is described *infra* Part II.C.

We hold that strict liability in the storage of dynamite depends on the relation of the storage to the surroundings; specifically, the storage must be "... inappropriate to the place where it is maintained, in the light of the character of that place and its surroundings."

....

These [first] <sup>65</sup>restatement rules seem to ignore the relation of the storage to the surroundings.

Other cases have been equally committed to the locational consideration, despite the First Restatement's exclusion of such a factor.<sup>64</sup>

The final consideration is the requirement of section 520 that the activity not be a matter of common usage. Comment "e" to section 520, before pointing out that blasting, the storage and use of explosives, and oil drilling are not matters of common usage, explains:

An activity is a matter of common usage if it is customarily carried on by the great mass of mankind or by many people in the community. It does not cease to be so because it is carried on for a purpose peculiar to the individual who carries it on. Certain activities may be so generally carried on as to be regarded as customary. Thus, automobiles have come into such general use that their operation is a matter of common usage. This, together with the fact that the risk involved in the careful operation of a carefully maintained automobile is slight, is sufficient to prevent their operation from being an ultrahazardous activity. However, the use of an automotive vehicle of such size and weight as to be incapable of safe control and to be likely to crush water and gas mains under the surface of the highway is not as yet a usual means of transportation and, therefore, the use of such an automobile is ultrahazardous.

Furthermore, the Reporter's Notes state, "In the following cases emphasis was laid upon the fact that the instrumentality which the defendant used or the conditions which he created were used or created for the defendant's own purposes and were not those which are commonly used or created by the community at large."<sup>66</sup>

But the quotations and authorities Bohlen includes to support that proposition are all English cases and appear to deal primarily with distinguishing between the abnormal, unusual, non-natural use of land, and the "ordinary"<sup>67</sup> or "normal"<sup>68</sup> use of the land. The kind of common

---

63. *Otero v. Burgess*, 505 P.2d 1251, 1255-56 (N.M. Ct. App. 1973) (quoting WILLIAM PROSSER, LAW OF TORTS 508 (4th ed. 1971)).

64. *See, e.g., Yommer v. McKenzie*, 257 A.2d 138 (Md. 1969) (holding that a leaking underground storage tank was ultrahazardous despite Restatement provisions because of its location near residential wells); *Wheatland Irrigation Dist. v. McGuire*, 537 P.2d 1128 (Wyo. 1975) (holding that where an irrigation ditch ruptured no strict liability existed since it was in an appropriate location).

65. RESTATEMENT OF TORTS § 520 cmt. e (1938).

66. RESTATEMENT OF TORTS §§ 7001-7002 explanatory notes at 12 (Preliminary Draft No. 72, 1934).

67. *See Rickards v. Lothian*, 1 App. Cas. 263 (P.C. 1913) (appeal taken from Austl.).

68. *See Wilkins v. Leighton*, 2 Ch. 106 (1932); *West v. Bristol Tramways Co.*, 2

usage principle that is included in the black letter rule of section 520—not a factor, but an essential condition—appears to differ from the non-natural user principle that derived from *Rylands*. Later the Reporter's Note refers to the storage of explosives as entailing absolute liability because "it brings into the neighborhood an unpreventable risk which is not usual to the community,"<sup>69</sup> citing *Exner v. Sherman Power Construction Co.*<sup>70</sup> In addition, the Reporter explains that New York's and New Jersey's early rejection of the rule from *Rylands* occurred in cases involving steam generated from a boiler in an engine, which had become a matter of common usage at the time of those decisions.<sup>71</sup>

It appears, therefore, that Bohlen attempted to use the idea of "common usage" as a substitute for, or better expression of, the non-natural user principle that had been so prominent in the English cases and which also received, as Prosser argued, substantial emphasis in American decisions. But in doing so, Bohlen failed to capture the importance of location or placement in relation to the land, person, or chattels of others. Moreover, "common usage," defined as activities "customarily carried on by the great mass of mankind,"<sup>72</sup> embraces so few activities that, outside of automobile driving (the only example he gives) and perhaps railroads, the provision really excludes very little. In other words, taken literally, the provision rarely limits the range of activity qualifying as ultrahazardous. Presumably, of course, that is precisely what Bohlen had intended.

The common usage provision has also been subjected to criticism by those who felt that the Restatement should have been applied to *all* activities reasonably deemed ultrahazardous, especially those most common ones such as the operation of railroads, which were the cause of the greatest harm to society.<sup>73</sup>

In the aggregate, all four of the attacks leveled at the First Restatement of Torts' effort to develop a hard rule of strict liability suggested a rocky road ahead.

K.B. 14 (1908); *Mayer v. Foster*, 1 K.B. 167 (1905).

69. RESTATEMENT OF TORTS §§ 7001-7002 explanatory notes at 19 (Preliminary Draft No. 73, 1935).

70. 54 F.2d 510 (2d Cir. 1931). Also cited is *Bradford Glycerine Co. v. St. Marys Woolen Mfg. Co.*, 54 N.E. 528 (Ohio 1899).

71. See *Loosee v. Buchanan*, 51 N.Y. 476 (1873); *Marshall v. Welwood*, 38 N.J.L. 339 (1876).

72. RESTATEMENT OF TORTS § 520 cmt. e. (1938).

73. See Ehrenzweig, *supra* note 5, at 1452; Nolan & Ursin, *supra* note 5, at 266.

### C. *The Restatement (Second) of Torts*

William Prosser was the Reporter for the Restatement (Second) of Torts. The first revisions he presented of sections 519 and 520 appear in Preliminary Draft No. 9, dated December 19, 1958, submitted to the Advisory Committee of the ALI.<sup>74</sup> Of course, given Prosser's harsh criticism of the First Restatement one could reasonably predict that he would undertake a substantial rewriting of the rules—and that he did. Prosser's first draft read as follows:

#### Section 519. General Principle

- (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 such harm.
- (2) The liability stated in subsection (1) is limited to
  - (a) Persons whom the actor should recognize as likely to be harmed by the activity, and
  - (b) The kind of harm which he should recognize as likely to result from it.

#### Section 520. Definition of Abnormally Dangerous Activity

An activity is abnormally dangerous if it

- (a) Necessarily involves a risk of serious harm to the person, land or chattels of others, which cannot be eliminated by the exercise of all reasonable care, and
- (b) Is not a matter of common usage, and
- (c) Is inappropriate to the place where it is carried on.<sup>75</sup>

Several observations warrant mention. First, he dropped the term "Ultrahazardous" in favor of "Abnormally Dangerous," which he believed better described the concept. Second, he deleted the term "miscarriage" from section 519 on grounds that miscarriage was the wrong word since "[i]t is not necessary that anything should go wrong with the activity" and "[i]f the harm results from its normal and ordinary operation, there is still strict liability."<sup>76</sup> Third, in comment "d" to section 519 he clarified the rationale for imposing strict liability,<sup>77</sup> writing,

The liability stated in this Section is not based upon any intent of the defendant to do harm to the plaintiff or to affect his interests, nor is it based upon any negligence, either in attempting to carry on the activity itself in the first instance, or in the manner in which it is carried on. The defendant is held liable although he has exercised the utmost care to prevent the harm to the plaintiff

---

74. See RESTATEMENT (SECOND) OF TORTS, ch. 21, *Abnormally Dangerous Activities* (Preliminary Draft No. 9, 1958).

75. *Id.* at 56 (including Reporter's handwritten notes).

76. *Id.* § 519 at 55.

77. *See id.*

that has ensued. The liability arises out of the abnormal danger of the activity itself, and the risk that it creates, of harm to those in the vicinity. 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.

This statement, of course, represents a classic expression of strict enterprise liability. Fourth, he preserved the scope of liability provision from the First Restatement that limits strict liability to the kind of harm that made the activity ultrahazardous or abnormally dangerous.<sup>79</sup>

Fifth, Prosser kept intact the provision that the plaintiff is excused from establishing negligence ("although [the defendant] has exercised the utmost care to prevent the harm").<sup>80</sup> Finally, Prosser carries over an explicit requirement of foreseeability, at least as to the identity of the injured person ("persons whom the actor should recognize as likely to be harmed by the activity").<sup>81</sup> Considering all of these points, it would be fair to say that Prosser's first draft constituted a major revision to section 519.

As to section 520, there were also some important changes. Prosser, citing his article on *Rylands*,<sup>82</sup> first supports the substitution of "abnormally dangerous" for "ultrahazardous."<sup>83</sup> In that connection, he rejects the language of "utmost care," in favor of "all reasonable care," on the grounds that "[t]here is probably no activity, outside of the use of atomic energy, which is not perfectly safe if the *utmost* care is used."<sup>84</sup>

Second, Prosser's inclusion of an explicit requirement for locational inappropriateness is significant. Prosser tells the advisers that "[i]t stands out like a sore thumb from the cases that the important thing about the activity is not that it is extremely dangerous per se, but that it

78. RESTATEMENT (SECOND) OF TORTS § 519 (1977). Although the quoted statement is taken from the Restatement (Second) of Torts, Section 519, as published in 1977, apart from minor word corrections, this statement has remained intact since 1958.

79. This requirement has not proved to be particularly contentious. Both Bohlen and Prosser believed that a proximate or legal causation principle similar to that applied in negligence was essential. Compare RESTATEMENT OF TORTS § 519 cmt. b (1938) with RESTATEMENT (SECOND) OF TORTS § 519 cmt. e (1977).

80. RESTATEMENT (SECOND) OF TORTS § 519 cmt. d (1977).

81. RESTATEMENT (SECOND) OF TORTS § 519 (Preliminary Draft No. 9, 1958).

82. See PROSSER, *supra* note 15.

83. See RESTATEMENT (SECOND) OF TORTS § 520 (Preliminary Draft No. 9, 1958).

84. *Id.* at 58.

is abnormally so in relation to its surroundings.”<sup>85</sup> Prosser then marshals substantial authority, including of course *Rylands* itself, to support such a revision to the black letter rule, drawing distinctions between the storage of explosives in the city as compared to the middle of the desert, the storage of large quantities of gasoline in a populated area versus in an isolated area, the operation of oil and gas wells in thickly settled communities versus in the open country, and the storage of water in a dangerous place in a city rather than in a rural area.<sup>86</sup> Further, Prosser points out that “there are cases in which strict liability has been imposed upon activities not extremely dangerous in themselves, but abnormally so because of their location and relation to their surroundings.”<sup>87</sup> Thus, drawing on a careful reading of the cases and his incredible talent at classification, Prosser restored the “non-natural” user principle of *Rylands* that Bohlen had omitted, such effort reflecting Prosser’s firm conviction that such consideration is essential in determining liability.<sup>88</sup> He concludes by stating that “we should discard ‘ultrahazardous,’ and the ideas associated with it, and bring the Restatement into line with the English rule.”<sup>89</sup>

Third, it is important that Prosser chose to retain the requirement that the activity’s risk be one that “cannot be eliminated by the exercise of all reasonable care.”<sup>90</sup> He explained that “[w]hat is meant here is the unavoidable risk remaining even though the actor has taken all reasonable precautions, and has exercised all reasonable care, so that he is not negligent.”<sup>91</sup> Like Bohlen, he never points to any authority that supports the proposition that the activity be one which involves risks that are not preventable by exercising reasonable care, or that the plaintiff must prove that negligence cannot be proved. This is especially surprising given his criticism of the First Restatement for “fall[ing] short of [the English rule] in the insistence on . . . the impossibility of eliminating it with all possible care.”<sup>92</sup>

---

85. *Id.*

86. *See id.* at 65.

87. *Id.*

88. *See id.* at 58-60. In comment “h,” he declares:

It is not sufficient for the application of the rule of strict liability that the activity involves the kind of risk stated in Clause (a), and that it is not a matter of common usage, as stated in Clause (b). *It must also be carried on in a place inappropriate to the particular activity.*

*Id.* at 65 (emphasis added).

89. *Id.* at 61.

90. *Id.* at 63.

91. *Id.* Prosser points to blasting with dynamite and transporting it on a public highway as abnormally dangerous “because of the unavoidable risk of explosion, even if all reasonable care is used.” *Id.*

92. PROSSER, *supra* note 15, at 158.

Fourth, Prosser, with little comment, also retains the requirement that the activity not be a matter of common usage. In this draft he adopts Bohlen's comment on common usage virtually verbatim, and makes no additional comments to the Advisers.<sup>93</sup>

The next version of sections 519 and 520 appeared in 1963 and was titled "Council Draft No. 15."<sup>94</sup> Section 519 had undergone a bit of tinkering since 1958, but nothing substantial or substantive, other than deletion of an explicit foreseeability requirement. Section 519 read as follows:

Section 519. General Principle

- (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 such harm.
- (2) Such strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

In contrast, section 520 had undergone very substantial revisions since 1958. It read as follows:

Section 520. Abnormally Dangerous Activities

In determining whether an activity is abnormally dangerous, the following *factors* are to be considered:

- a. The fact that the activity involves a high degree of risk of some harm to the person, land or chattels or others;
- b. The fact that gravity of the harm which results from it is likely to be great;
- c. The fact that the risk cannot be eliminated by the exercise of reasonable care;
- d. The fact that the activity is not a matter of common usage;
- e. The place where it is carried on; and
- f. The value of the activity to the community.<sup>96</sup>

In his note to the council, Prosser points out that the advisers agreed with his substantial changes.<sup>97</sup> After making his case for including locational inappropriateness and for reinstating the "non-natural user" principle of *Rylands*, Prosser concluded with this powerful observation:

---

93. See RESTATEMENT (SECOND) OF TORTS § 520 at 64-65 (Preliminary Draft No. 9, 1958).

94. RESTATEMENT (SECOND) OF TORTS, ch. 21, *Abnormally Dangerous Activities* (Council Draft No. 15, 1963).

95. *Id.* § 519 at 66.

96. *Id.* § 520 at 69 (emphasis added).

97. See *id.* at 72.

The Advisers all agree that “ultrahazardous” should be discarded. Since it appears to be impossible to formulate a “definition” which will include both the use of atomic energy and a water tank in the wrong place, the attempt is made to state the Section in terms<sup>98</sup> of factors to be taken into account, relying on the comments for explanation.

Thus, in one brief statement he explains an extremely significant transformation from listing the two essential elements of ultrahazardous activity in the First Restatement to a six factor weighing process in determining if an activity is abnormally dangerous in the Restatement (Second). The only reason he offers for such a significant change is that it is “impossible to formulate a ‘definition’” which will cover the myriad kind of cases potentially involved.<sup>99</sup>

The official comments to section 520 as set forth in Council Draft No. 15 and those later approved and published in 1977 are virtually identical.<sup>100</sup> For that reason the discussion that follows makes reference solely to the final official comments. Likewise, the final rules of the Restatement (Second) contain only stylistic changes from those of Draft No. 15. Sections 519 and 520 of the Restatement (Second) read as follows:

#### Section 519. General Principles

- (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 such harm.
- (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

#### Section 520. Abnormally Dangerous Activities

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;
- (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.

---

98. *Id.*

99. *Id.*

100. A Tentative Draft No. 10 was submitted to the full American Law Institute, and was the version debated by the membership at its annual meeting in 1964. *See* RESTATEMENT (SECOND) OF TORTS, ch. 21, §§ 519-520 at 52-68 (Tentative Draft No. 10, 1964) (containing no changes from Council Draft No. 15).

101. RESTATEMENT (SECOND) OF TORTS § 519 (1977).

102. *Id.* § 520.



In May, 1964, the Institute membership considered and approved the above language.<sup>103</sup> As to section 520, Prosser explained that he had initially sought to fashion the section as a set of requirements with the “primary test” being the “inappropriateness of the activity to the place where it is carried on.”<sup>104</sup> However, the Advisers had convinced him that because nuclear fission is dangerous regardless of where it is undertaken, that a locational test could not be an absolute requirement in every case.<sup>105</sup> Therefore, he opted for a set of factors to be weighed, with the core idea being that the activity must be “substantially dangerous,” “not slightly dangerous”—i.e., the activity must represent an “abnormal danger . . . not usually encounter[ed].”<sup>106</sup> Prosser stated that he believed the multi-factor approach was “unsatisfactory” and that he did “not like this section” because of its indefiniteness, but that the Council “felt rather helpless as to doing anything to improve it.”<sup>107</sup> Once he got beyond that point, the remainder of the discussion dealt entirely with section 520(f), the value of the activity to the community, which met with substantial opposition, but nevertheless was approved.<sup>108</sup> The substance of that debate is further discussed below.<sup>109</sup>

Various portions of the official comments to section 520 warrant some discussion. To begin with, Prosser emphasized that the activities to which this section applies are typically unusual because the concept of abnormal dangers implies atypicality or at least unusual risks associated with usual activities.<sup>110</sup> The point is that the strict liability of section 520 reaches the unusual, rare activity, not the commonplace.<sup>111</sup> Second, Prosser emphasized the interdependence of the six factors, making the following often-quoted statement:

In determining whether the danger is abnormal, the factors listed in Clauses (a) to (f) of this Section are all to be considered, and are all of importance. *Any one of them is not necessarily sufficient* of itself in a particular case, and ordinarily several of them will be required for strict liability. On the other hand, it is not

---

103. See 41 A.L.I. PROC. 449-65 (1964). The discussion of Section 519 was uneventful other than a short debate over the scope of the risk and the extent to which the harm must be foreseeable. See *id.* at 451-55.

104. *Id.* at 455.

105. See *id.* at 455-56.

106. *Id.* at 456.

107. *Id.* at 457.

108. *Id.* at 458.

109. See *infra* notes 129-38 and accompanying text.

110. See, e.g., RESTATEMENT (SECOND) OF TORTS § 520 cmts. a, g (1977).

111. See 41 A.L.I. PROC. 456-58 (1964).

necessary that each of them be present, especially if others weigh heavily. Because of the interplay of these various factors, it is not possible to reduce abnormally dangerous activities to any definition. The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even though it is carried on with all reasonable care. In other words, are *its dangers and inappropriateness for the locality so great* that, despite any usefulness it may have for the community, it should be required as a matter of law to pay for any harm it causes, *without the need of a finding of negligence*.

As will be shown later, although the foregoing comment states that no one factor is essential, in fact courts have treated factors (a), (b), and (c), and especially (c), as indispensable, whereas (d), (e), and (f) have received more mixed applications. But the quoted statement also, in the last sentence, makes clear Prosser's strong commitment to the locational inappropriateness of the activity, coupled with its dangerousness, which together constitute for Prosser the core principles. The last sentence is also significant because it does not say "negligence is incapable of being proved," rather only that negligence is not necessary to be proved. As was pointed out earlier, these are two different ideas, and Prosser does not carefully draw the distinction between them.

Comment "g" ("Risk of harm")<sup>113</sup> explains clauses (a) and (b) of section 520. It speaks of a "high degree of risk of serious harm."<sup>114</sup> Prosser again points out that, in determining if a given activity imposes a major risk, it may be "necessary to take into account the place where the activity is conducted."<sup>115</sup>

Comment "h" ("Risk not eliminated by reasonable care")<sup>116</sup> recognizes the centrality of negligence law. Most activities, after all, can be rendered safe by exercising reasonable care, and, if they cannot be made safe with such care, that fact alone implies an abnormal danger. But section 520, it continues, does not mean that "the risk be one that no conceivable precautions or care could eliminate,"<sup>117</sup> but rather what is intended is that there be some residual risk *after* the exercise of due care, the actor therefore being non-negligent.<sup>118</sup> Thus, the activity is assumed to be of high utility and wholly justified, there being by definition no negligence in carrying it on. The inherent, unavoidable risk, however,

---

112. RESTATEMENT (SECOND) OF TORTS § 520 cmt. f (1977) (emphasis added).

113. *Id.* § 520 cmt. g.

114. *Id.*

115. *Id.* The comment uses as an illustration a ten-ton tractor engine on a public highway that crushes the conduits beneath it, which is covered by strict liability only because of its location. *See id.*

116. *Id.* § 520 cmt. h.

117. *Id.*

118. *See id.*

“requires that it be carried on at his peril, rather than at the expense of the innocent person who suffers harm as a result of it.”<sup>119</sup>

The “common usage” factor is explained in comment “i.”<sup>120</sup> This comment indicates that an ultrahazardous activity does not include one carried on by “the great mass of mankind or by many people in the community.”<sup>121</sup> Prosser illustrates this notion by distinguishing between the driving of regular automobiles (a matter of common usage that possesses a residue of unavoidable risk of serious harm, but is nonetheless exempt from strict liability) and the driving of some other vehicle of such size and weight as to be too difficult to control or drive safely.<sup>122</sup> So too blasting, the manufacture, storage and use of explosives, and oil drilling are all matters that are deemed to be not commonly engaged in.<sup>123</sup>

Prosser’s emphasis on locational inappropriateness is addressed in comment “j,”<sup>124</sup> which points out that even blasting or a magazine of high explosives is not abnormally dangerous if located where the risk of harm to others would be minimal.<sup>125</sup> Calling the factor one of “importance,” the comment seeks fidelity to the English cases and the principle of non-natural uses.<sup>126</sup> Finally, the comment points out that some dangerous activities, such as oil drilling and coal mining, can only be conducted at particular locations.<sup>127</sup> As to these activities, they are said to be not necessarily abnormally dangerous if they are of significant value to the community,<sup>128</sup> a notion more fully flushed out in section 520(f).

Section 520(f), which asks whether the value to the community outweighs the risks of the activity, engendered substantial opposition among the Institute’s members.<sup>129</sup> Comment “k”<sup>130</sup> notes that if the activity occupies some importance to the community and the community’s prosperity depends upon it, then notwithstanding the

- 
119. *Id.*  
 120. *Id.* § 520 cmt. i.  
 121. *Id.*  
 122. *See id.*  
 123. *See id.*  
 124. *Id.* § 520 cmt. j.  
 125. *See id.*  
 126. *See id.*  
 127. *See id.*  
 128. *See id.*  
 129. *See* 41 A.L.I. PROC. 458-60 (1964).  
 130. RESTATEMENT (SECOND) OF TORTS § 520 cmt. k (1977).

serious risks posed, the activity will escape strict liability.<sup>131</sup> At the Annual Meeting debating this section Professor Fleming expressed concern that factor (f) “might actually become the lever for destroying the whole purpose of this strict liability.”<sup>132</sup> The Vice President of ALI expressed a similar sentiment, observing that the reservoir in *Rylands* had value to the community but the opinion took no account of it.<sup>133</sup> Prosser responded that the reason coal mining in Pennsylvania and oil wells in Texas are not subject to strict liability is because of their importance to the community.<sup>134</sup> While admitting that he “would be happy to throw it out,” the cases would not support his doing so.<sup>135</sup> Professor Page Keeton joined in the attack, arguing that the whole rationale for strict liability is that socially desirable enterprises should pay for the injuries they cause and that “the comments on 520 almost wipe out strict liability for a socially desirable enterprise.”<sup>136</sup> Professor Robert Keeton contended that factor (e) (concerning locational appropriateness) already protects community interests, thereby rendering factor (f)’s separate consideration of value to the community unnecessary.<sup>137</sup> Following a statement by Mr. Eldridge in support of Prosser arguing that the cases clearly require inclusion of the value of the activity to the community, the motion to delete section 520(f) was defeated on a voice vote.<sup>138</sup>

### 1. *Bohlen v. Prosser*

It may be useful to compare and contrast the first and second Restatements, with a view to recognizing the different conception which Bohlen and Prosser had of what should be the purpose and goals of the doctrine. First, it is clear that Bohlen’s conception of ultrahazardous activities was considerably broader than the English conception epitomized by *Rylands* and its domestic progeny. In England, strict liability was limited to adjacent land owners; the doctrine of *Rylands* was and is viewed as a species of nuisance. In contrast, Bohlen’s perception was that the “Americanized” version was not limited to nuisance-type cases, but reached harm to “person, land, or chattels” of

---

131. *See id.*

132. 41 A.L.I. PROC. 458 (1964).

133. *See id.* at 459-60 (“I fear this subparagraph (f) may be relied upon . . . by a court, to destroy the effect of the other factors . . .”).

134. *See id.* at 461.

135. *Id.*

136. *Id.* at 462. Page Keeton moved that factor (f) be removed from section 520. *See id.*

137. *See id.*

138. *See id.* at 463.

another wholly apart from interests in real property. This explains why Bohlen's note to the advisers made it abundantly clear at the outset that ultrahazardous-activity liability was not based on *Rylands*. In contrast, Prosser believed in a closer fidelity to *Rylands* and nuisance situations. His criticisms of the First Restatement are leveled at Bohlen's departure from the central holding of *Rylands*. Prosser's affinity to nuisance is reflected in his declaration that, even in states not expressly adopting *Rylands*, an equivalent holding existed under the banner of absolute nuisance.<sup>139</sup>

Bohlen's inclusion of a common usage element also reflects his belief that liability for ultrahazardous activities should not be limited to nuisance-type cases. The non-natural user doctrine of Lord Cairns was manifestly directed toward use of real property and the propriety of defendant's activities in relation to contemporaneous and neighboring land uses. Therefore, Bohlen had to articulate a broader principle that would extend beyond landowner situations to reach those injured in contexts unrelated to real property. This he accomplished through the use of the phrase, "not a matter of common usage," although that expression does not appear in the cases to embrace *both* the locational inappropriateness idea of *Rylands* and dangerous activities unrelated to real property. But the common-usage formulation was also necessary to exempt automobiles and railroads and perhaps steam boilers from liability. The English authorities never would have applied *Rylands* to such activities in the first place because such activities do not inextricably involve nuisance principles.

Prosser, of course, attacks Bohlen for ignoring the locational inappropriateness and the non-natural user ideas.<sup>140</sup> It isn't that Bohlen so much ignored them, as that he viewed them as inadequate to the task of limiting a much broader basis of liability. Prosser, therefore, felt compelled to reincorporate the nuisance principle of an activity's relationship to surrounding property as a separate element (or factor).<sup>141</sup> Prosser reiterated his belief that locational appropriateness or inappropriateness is the *core* concept behind both *Rylands* and, more importantly, the later American decisions.<sup>142</sup> But if that's true, why did

---

139. See W. PAGE KEETON ET AL., *THE LAW OF TORTS* § 78, at 552 (5th ed. 1984) [hereinafter PROSSER & KEETON].

140. See PROSSER, *supra* note 15, at 147.

141. See RESTATEMENT (SECOND) OF TORTS § 520(d) (1977).

142. See *id.* § 520 cmts. g, h; PROSSER, *supra* note 15, at 147.

he carry forward the “not a matter of common usage” factor? Because Prosser wanted to accurately reflect the decisional authority subsequent to 1938 that had relied on the common usage formulation, he begrudgingly, in my view, had to retain Bohlen’s formulation. But, of course, one method of minimizing the influence of the common-usage qualification was to relegate it to the status of a “factor,” rather than making it a requirement as did the First Restatement.

Bohlen’s formulation of ultrahazardous activity contained no consideration, at least explicitly, for the value of the activity to the community, beyond the common usage test. Prosser in contrast, as we have seen, believed that separate consideration of the public benefits conferred by the activity was necessary to faithfully reflect the decisions—especially decisions that had *rejected* the doctrine of *Rylands*. In this effort, he met strong opposition from his colleagues.<sup>143</sup> Bohlen, as we have also seen, held to a strong commitment to strict enterprise liability.<sup>144</sup> In his 1911 article, he flatly declared that if the activity produced substantial public benefits, then all the more reason that the public should compensate the innocently-injured plaintiff by rendering the defendant liable.<sup>145</sup> While Prosser certainly manifested his own commitment to strict enterprise liability (such manifestation being most frequently associated with section 402A of the Restatement (Second)),<sup>146</sup> and, while the comments to section 519 and section 520 do reveal a bit of that philosophy, quite clearly Prosser felt that the decisional authority warranted only a very constrained version of strict liability.

In summary, Bohlen’s conception of strict liability was bolder, more revolutionary, and closer to that which would illuminate products liability thirty years later; Prosser’s conception was more rooted in history, more limited, more of a true “restatement” of the law. After all, Bohlen acknowledged that little authority supported his formulation for ultrahazardous activity,<sup>147</sup> a fact that produced heavy criticism from Prosser and from some courts. Prosser may have been willing to stake out a near revolutionary position on products liability,<sup>148</sup> but he was not willing to do so as to abnormally dangerous activities.

In the decisions that followed in the wake of the Restatement (Second), it is evident that the American judiciary had embraced Prosser’s more modest doctrine. The cases which we will soon consider have confined strict liability under sections 519 and 520 to a relatively

---

143. See *supra* notes 129-38 and accompanying text.

144. See *supra* note 48 and accompanying text.

145. See *supra* note 48 and accompanying text.

146. See RESTATEMENT (SECOND) OF TORTS § 402A (1977).

147. See *supra* note 28 and accompanying text.

148. See RESTATEMENT (SECOND) OF TORTS § 402A (1977).

narrowly defined set of activities, and have otherwise looked to the law of negligence as the basis of liability for such matters.

## 2. *Keeton v. Prosser*

In 1984 Page Keeton revised Prosser's treatise.<sup>149</sup> In the section covering this topic he retained what Prosser had included in the 1971 edition, but then added a couple of pages entitled, "Recent Developments and Reviser's Comments."<sup>150</sup> In his comments Keeton states that the Restatement (Second)'s attempt to combine Prosser's commitment to the "non-natural" user principle with those contained in the First Restatement was "unsatisfactory."<sup>151</sup> He lodged essentially three basic criticisms. First, he prefers the First Restatement's "well-understood" requirements to the Restatement (Second)'s set of factors, which, he notes, defeat predictability and therefore promote unnecessary litigation.<sup>152</sup> Second, consistent with his remarks at the ALI proceedings twenty years earlier, he strongly objects to the inclusion of factor (f)—value of the activity to the community—on the grounds that these are obviously useful activities, otherwise it would be unreasonable to carry them on, and that their value to the community is "irrelevant on whether or not a risk should be allocated to the defendant because of the dangerousness, as such, of the activity."<sup>153</sup> Thus, Keeton writes, the net

---

149. See PROSSER & KEETON, *supra* note 139.

150. *Id.* § 78, at 554-56.

151. *Id.* at 555.

152. See *id.* at 555-56.

153. *Id.* at 555. Keeton's objection here is shared by the other leading torts treatise. See 3 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 14.4, at 213-14 (2d ed. 1986). This treatise states,

Among the factors to be considered, one deserves special note, the value of the activity to the community. In a sense this factor has already been discounted in making the decision to impose strict liability on an activity. Thus in Comment *b* to § 520 it is explained, in distinguishing strict liability from negligence: "The rule stated in § 519 is applicable to an activity which is carried on with all reasonable care, and which is of such utility that the risk which is involved in it cannot be regarded as so great or so unreasonable as to make it negligence to carry on the activity at all. . . . If the utility of the activity does not justify the risk which it creates, it may be negligence merely to carry it on, and the rule stated in this Section is not necessary to subject the defendant to liability to harm resulting from it."

The justification for strict liability, in other words, is that useful but dangerous activities must pay their own way. There is nothing in this reasoning that would exempt very useful activities from the rule, as is shown by the granting of compensation even where the activity is of such paramount

result of Prosser's six factors is to render the whole legal undertaking as "virtually the same thing as is done with the negligence concept."<sup>154</sup>

Keeton's third objection is more philosophical: Keeton is clearly committed to a broader scope of enterprise responsibility than Prosser, and rejects the host of qualifications and limitations set forth in the Restatement (Second) that frustrate his distributive beliefs. After endorsing a broad principle of enterprise responsibility, he concludes that such a rule "seems to best describe the result of most recent cases."<sup>155</sup> As is shown below, this conclusion in fact finds modest support at most from the recent cases. The inference is unmistakable that Keeton would take the theory of liability much closer to Bohlen's conception than Prosser's. The courts, however, as is demonstrated below, have moved in just the opposite direction.

### III. DOCTRINAL BARRIERS TO STRICT LIABILITY

#### A. Introduction

Virtually every law student is exposed to SLADA and to sections 519 and 520 of the Restatement (Second). But it is readily apparent to the student of these provisions that "strict liability" in this context isn't so "strict." The purpose of this section is to discuss the difference between (a) negligence (what a SLADA plaintiff need not—and indeed cannot—prove, (b) SLADA strict liability, and (c) what might be called "true" strict liability.

Certainly section 519 purports to apply a strict liability principle

---

importance to society that it justifies the exercise of eminent domain. And if the law were to embrace wholly the principle of strict liability and its underlying rationale, there would be no place for the consideration of this factor. But this is not the present case. Tort law today contains two opposing strains or principles, strict liability and liability based on fault. It is not surprising, therefore, that any attempt to draw a line between them (which is being done in § 520) should contain factors that would be irrelevant if one principle or the other alone were being consistently pursued.

*Id.* (footnotes omitted) (emphasis in original).

154. PROSSER & KEETON, *supra* note 139, at 555.

155. *Id.* at 556. Keeton states,

If an enterpriser deliberately and consciously engages in an activity that is highly dangerous even when reasonable care is exercised and if the activity is one that is not the kind commonly engaged in such as automobile driving, then such intentional exposure of another to great danger, however socially desirable the activity, can generally be regarded as a sound basis on which to allocate the risk of loss to the person or entity engaging in that ultra-hazardous and abnormally dangerous activity. This seems to best describe the result of most recent cases.

*Id.*



because, in cases where the defendant has engaged in an activity that is classified as “abnormally dangerous,” the plaintiff is explicitly excused from the burden of proving negligence. Section 520, as we have seen, provides the criteria by which this class of activities is to be determined. A cursory glance at these six considerations reveals that this form of strict liability crafted by Prosser is a strange one at that. The factors set forth in subsections (d), (e), and (f) clearly manifest a weighing of sorts that allows the defendant to offer an array of exculpatory evidence—a situation contrary to the usual notion of strict liability.

It is one thesis of this Article that factors (d) and (e) are entirely appropriate for inclusion in the adjudicatory calculus, but that factor (f) is not; and that, on examination, the decisions in the last thirty years support precisely that conclusion. The reason why factors (d) and (e) are appropriate is that both bear immediately upon the question of the excessively dangerous nature of the activity. Further, an examination of the evolution of the doctrine of SLADA reinforces the propriety of these considerations. By contrast, factor (f)—concerning the consideration of the general utility to the community—finds little historical basis and even less doctrinal justification. As discussed, clause (f) of section 520 was adopted in the face of substantial opposition. However, while incorporation of the degree of common usage and locational propriety is appropriate, and courts do give them some deference, in the ultimate analysis these factors are rarely ever outcome-determinative. The reason is that factor (c)—the inability to eliminate the risk by due care—drives both the analysis and the outcome. As we shall see, when this factor weighs in favor of applying strict liability, the courts will generally apply strict liability.

A glance at factors (a), (b), and (c) reveals a striking similarity to the *Carroll Towing*<sup>156</sup> test in which negligence is to be assessed under the  $PL > B$  calculus, where “P” is the probability or likelihood of the harm occurring, “L” is the gravity of that harm if it does occur, and “B” is the burden or effort required to reduce or eliminate that risk of harm.<sup>157</sup> Like the plaintiff in a negligence action, the SLADA plaintiff is obligated to prove the “P” and “L”—but with a difference: the “P” and “L” here must be extremely high. That is, the plaintiff must show that the activity poses a “high degree of risk of some harm” and that the resulting harm “will be great.” Accordingly, the SLADA plaintiff must offer evidence

---

156. *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d. Cir. 1947).

157. *See id.* at 173.

from which a court can reasonably infer that the activity is one that is “abnormally” or “unusually” or “atypically” dangerous, a situation not demanded by the law of negligence. Negligence law does not require that PL be particularly high before a cause of action can accrue. Rather, the law of negligence simply affords a remedy whenever the defendant causes some harm and the cost to have prevented the harm is less than PL—this without regard to the magnitude of PL.

Factor (c) exhibits some of the flavor of negligence law by addressing the burden of preventing the harm. However, in the SLADA context, the “B” from the formula is by definition infinite. That is to say, no amount of care, no expenditures for prevention or precaution, would be wholly successful in preventing the harm. Thus, a SLADA plaintiff must offer evidence of burden as in a negligence case, but that evidence, instead of pointing toward minimal burdens points in the opposite direction—toward excessive, even impossible burdens. Therefore, using *Carroll Towing* terms, “PL” is less than “B” ( $PL < B$ ). In other words, in the SLADA context, the point isn’t that plaintiff *should not* have to prove negligence; rather, it is that a plaintiff *cannot* prove negligence. It is quite clear that such a requirement differentiates SLADA from other pockets of strict liability in the law of torts where a plaintiff is excused from proof of negligence for essentially policy reasons, as in strict products liability for manufacturing defects,<sup>158</sup> or strict liability in public nuisance cases,<sup>159</sup> or in statutory actions, such as workers’ compensation<sup>160</sup> and CERCLA.<sup>161</sup> In the SLADA context, unlike in any other area of strict liability, the plaintiff must prove that negligence *cannot* be proved. In this sense SLADA is a kind of default liability that is only triggered when a negligence regime is ruled out—not on the basis of policy, but on the basis of the evidence in the case. It seems pretty clear that the availability of a SLADA cause of action will be fairly limited because, in the vast majority of situations, a plaintiff will be able to prove negligence because some amount of care exercised by the defendant would have prevented the injury.

One final point bears mention. Virtually all courts and both Restatements have taken the position that whether an activity qualifies as ultrahazardous or abnormally dangerous is a question of law for the court.<sup>162</sup> This, too, is a strange phenomenon because it relegates to the jury the issue of damages only. I think that this fact—i.e., that courts

---

158. See RESTATEMENT (SECOND) OF TORTS § 402A (1977); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2a (1998) (manufacturing defects).

159. See RESTATEMENT (SECOND) OF TORTS § 821 (1977).

160. See 3 FOWLER V. HARPER ET AL., *supra* note 153, § 14.4.

161. See 42 U.S.C. §§ 9601-9675 (1994 & Supp. III 1997).

162. See RESTATEMENT OF TORTS § 520 cmt. h, l (1977).

rather than juries resolve the SLADA liability issue—has also contributed to the limited utility of the SLADA doctrine.

I now examine those decisions decided under the Restatement (Second) of Torts to assess how the courts have dealt with each of the factors set forth in section 520.

*B. The Decisions Demand the Impossibility of Proving Negligence*

We now turn to the core issue of this Article: the propriety of the limiting by definition the range of abnormally dangerous activities to those for which the risk cannot be eliminated by the exercise of due care. Stated differently, is the non-preventable nature of the risk merely a factor for consideration or is it an indispensable requirement for finding that an activity is abnormally hazardous? A review of the cases reveals overwhelmingly that this is the crux of the liability issue—“where the rubber meets the road.” As discussed, the plaintiff bringing a SLADA claim must prove that she *cannot* prove negligence—i.e., that the negligence regime would necessarily be inadequate under the circumstances. In reality this is an incredible burden that the vast majority of litigants cannot surmount. What began in *Rylands* as the plaintiff’s *failure* to prove negligence has unquestionably hardened into a rule that negligence must be *impossible* to prove before a court will allow a SLADA claim. Bohlen’s little twist on the holdings became, in time, a virtual bar to liability under the SLADA doctrine. But why?

Let’s look at a sample of the decisions that have explicitly considered this question with some thoughtfulness. Perhaps the most exhaustive treatment of factor (c) of section 520 and the interrelationship between SLADA and negligence is Judge Richard Posner’s opinion in *Indiana Harbor Belt Railroad v. American Cyanamid Co.*<sup>163</sup> A railroad switching line brought suit against a chemical manufacturer to recover the costs of decontamination measures ordered by the Illinois Department of Environmental Protection when a railroad tank car containing the highly toxic chemical acrylonitrile leaked and spilled. The district court held that the shipper of the chemical was strictly liable under the terms of sections 519 and 520. The Seventh Circuit reversed. At the outset Judge Posner explained that the six factors of section 520 represent a “common quest for a proper legal regime to govern accidents that

---

163. 916 F.2d 1174 (7th Cir. 1990).

negligence liability cannot adequately control.”<sup>164</sup> He, however, *started* with section 520(c), pointing out that the “baseline common law regime of tort liability is negligence. [And when] it is a workable regime, because the hazards of the activity can be avoided by being careful (which is to say, non negligent), there is no need to switch to strict liability.”<sup>165</sup> He continued,

By making the actor strictly liable—by denying him in other words an excuse based on his inability to avoid accidents by being more careful—we give him an incentive, missing in a negligence regime, to experiment with methods of preventing accidents that involve not greater exertions of care, assumed to be futile, but instead relocating, changing, or reducing (perhaps to the vanishing point) the activity giving rise to the accident.<sup>166</sup>

Finding precedent unhelpful, he continued his analysis of why clause (c) cannot be met in this case:

To begin with, we have been given no reason, whether the reason in *Siegler* or any other, for believing that a negligence regime is not perfectly adequate to remedy and deter, at reasonable cost, the accidental spillage of acrylonitrile from rail cars. Acrylonitrile could explode and destroy evidence, but of course did not here, making imposition of strict liability on the theory of the *Siegler* decision premature. More important, although acrylonitrile is flammable even at relatively low temperatures, and toxic, it is not so corrosive or otherwise destructive that it will eat through or otherwise damage or weaken a tank car’s valves although they are maintained with due (which essentially means, with average) care. No one suggests, therefore, that the leak in this case was caused by the *inherent* properties of acrylonitrile. It was caused by carelessness—whether that of the North American Car Corporation in failing to maintain or inspect the car properly, or that of Cyanamid in failing to maintain or inspect it, or that of the Missouri Pacific when it had custody of the car, or that of the switching line itself in failing to notice the ruptured lid, or some combination of these possible failures of care. Accidents that are due to a lack of care can be prevented by taking care; and when a lack of care can (unlike *Siegler*) be shown in court, such accidents are adequately deterred by the threat of liability for negligence.

... The question is, how likely is this type of accident if the actor uses due care? For all that appears from the record of the case or any other sources of information that we have found, if a tank car is carefully maintained the danger of a spill of acrylonitrile is negligible. If this is right, there is no compelling reason to move to a regime of strict liability, especially one that might embrace all other hazardous materials shipped by rail as well.<sup>167</sup>

This lengthy quotation demonstrates beyond doubt that section 520 liability is available *only* in those rare instances when the plaintiff

---

164. *Id.* at 1177.

165. *Id.*

166. *Id.*

167. *Id.* at 1179 (citations omitted). The reference is to *Siegler v. Kuhlman*, 502 P.2d 1181 (Wash. 1972) (en banc), in which the court imposed strict liability on a truck carrying gasoline that blew up, killing the driver, and destroying, as a result of an explosion, any evidence necessary to prove negligence.

demonstrates the impossibility of proving negligence. In *Indiana Harbor Belt* the plaintiff simply failed to show that due care would not have prevented the accident causing plaintiff's harm.

The Wisconsin Supreme Court, in a somewhat briefer analysis holding that contamination from underground storage tanks (USTs) was not subject to strict liability, declared:

USTs, while admittedly disfavored under today's environmental laws, are not inherently dangerous. Absent negligence or application of an outside force, use of a UST does not create a high degree of risk of harm to the person, land[,] or chattels of another. Moreover, those risks that do exist *can be minimized by the exercise of reasonable care* by the owner or possessor of the tank. As one court has noted: "If an activity can be performed safely with ordinary care, negligence serves both as an adequate remedy for injury and a sufficient deterrent to carelessness. Strict liability is reserved for selected uncommon and extraordinarily dangerous activities for which negligence is an inadequate deterrent or remedy."<sup>168</sup>

The New York Court of Appeals, in a case involving damage to plaintiffs' properties from a hydraulic landfill project, concluded that the record contained insufficient evidence for making the determination of whether the city's activity was abnormally dangerous.<sup>169</sup> In criticizing the absence of record evidence and the lower courts' conclusions that strict liability did apply to the landfill method used by defendant, it commented,

There is little if any information, for example, of the degree to which hydraulic landfilling poses a risk of damage to neighboring properties. Nor is there data on the gravity of any such danger, or the extent to which the danger can be eliminated by reasonable care. Basic to the inquiry, but not to be found in the record, are the availability and relative cost, economic and otherwise, of alternative methods of landfilling.<sup>170</sup>

What is significant is that the New York court held that the record must contain substantial evidence regarding alternative methods of landfilling as a predicate to deciding if the due care could have avoided the risks of harm and, therefore, as a precondition to finding the activity abnormally dangerous.

---

168. *Grube v. Daun*, 570 N.W.2d 851, 857 (Wis. 1997) (quoting *Arlington Forest Assoc. v. Exxon Corp.*, 774 F. Supp. 387, 390 (E.D. Va. 1991)) (emphasis added).

169. *See Doundoulakes v. City of Hempstead*, 368 N.E.2d 24 (N.Y. 1977).

170. *Id.* at 27. The court did observe that "strict liability treatment may be appropriate." *Id.* However, on remand the issue of negligence was to be submitted to the jury, and its resolution would determine if strict liability could be applied. *See id.* at 30.

Consider the New Hampshire Supreme Court case of *Bagley v. Controlled Environment Corp.*,<sup>171</sup> involving the release of hazardous chemicals from defendant's property that contaminated plaintiff's soil and groundwater. In an opinion by Justice Souter (now a U.S. Supreme Court Justice), the court explained the critical role of proving the unavailability of negligence, stating,

Good arguments could have been made for the existence of abnormal danger in the operation of the amusement ride in *Siciliano*, the maintenance of the high voltage power line in *Wood* and, probably, the maintenance of the dam in *Moulton*. We nonetheless refused to extend strict liability to cover the claims of the plaintiffs in each of those cases, and we held in effect that the abnormally dangerous nature of the activity could be addressed adequately *either in determining the precaution that reasonable care would demand, or in requiring conformance to statutory mandates.*

We follow those cases today and decline to impose strict liability *in the absence of any demonstration that the requirement to prove legal fault acts as a practical barrier to otherwise meritorious claims.* With respect to the dumping of the waste products and the leakage of gasoline in this case, *there is no apparent impossibility of proving negligence.*<sup>172</sup>

This language couldn't be clearer: The plaintiff must demonstrate that proving negligence is an evidentiary impossibility.

Consider also the ruling of a California Court of Appeal in *Edwards v. Post Transportation Co.*<sup>173</sup> Here, in a personal injury action, the plaintiff alleged that he was injured when one of defendant's drivers pumped sulfuric acid into the wrong tank in a waste treatment facility, leading to a severe chemical reaction that released toxic gas. In affirming the trial court's refusal to submit the strict liability issue to the jury, the court resoundingly declared the preeminence of clause (c) of section 520, and, after having found that clauses (a) and (b) were satisfied in this case, wrote,

Plaintiff loses his case, however, with the application of factor (c). The issue posed by factor (c) is whether the risk involved in an admittedly dangerous activity can be eliminated through the exercise of reasonable care. The same experts who testified to the dangerous attributes of the acid were in agreement that the actual risk of harm to people could be eliminated by the use of proper handling procedures. One plaintiff's expert, a civil engineer and "sanitarian," agreed that "If . . . sulfuric acid is handled in a proper fashion, it is no danger." Since sulfuric acid is governmentally classified as a hazardous material, its transporters must be specially classified or registered. It appears, however, that such regulation, including special training, is designed to and does eliminate the special risk related to handling the acid. The fact that the material "requires special handling" and one must "be careful with it," as plaintiff's expert

---

171. 503 A.2d 823 (N.H. 1986).

172. *Id.* at 826 (citing *Siciliano v. Capitol City Shows, Inc.*, 475 A.2d 19 (N.H. 1984); *Word v. Public Service Co.*, 317 A.2d 576 (N.H. 1974); *Moulton v. Groveton Papers Co.*, 289 A.2d 68 (N.H. 1972)) (emphasis added).

173. 279 Cal. Rptr. 231 (Ct. App. 1991).

testified, leads to the logical conclusion that risk can be eliminated through care.

This conclusion undermines the argument that the use of sulfuric acid should lead to strict liability. *The theory of imposition of strict liability for ultrahazardous activity is that the danger cannot be eliminated through the use of care.* Since the activity is in some sense beneficial, useful or necessary to society, the actor is not deemed negligent simply for engaging in it. Damage resulting to others, however, is taxed to the actor because he is the person who most logically should bear the cost. Where the activity is dangerous only if insufficient care is exercised, ordinary rules of fault are sufficient for allocation of the risk. There is no need for liability without proof of fault, because definitionally if there is damage it will have resulted from negligence and will be compensable.

Finally, an Indiana Court of Appeals also barred strict liability when plaintiffs sustained injuries from raw chlorine gas that escaped from defendant's plant that used chlorine gas in the manufacture of liquid household bleach. In *Erbrich Products Co. v. Wills*,<sup>175</sup> after pointing out that liability under section 519 is premised on activities "presenting risks which cannot be eliminated by reasonable care,"<sup>176</sup> the court wrote,

Unlike blasting operations or crop dusting where the chances of damage or injury are *inevitable despite the amount of care taken*, the manufacture of household bleach with chlorine gas does not encompass the same unavoidable mishaps. The exercise of reasonable care would negate the risk of chlorine gas escaping into the atmosphere. At oral argument, counsel for the plaintiffs contended that the incident on October 12, 1984, would not have occurred but for Erbrich's fans within their plant which blew the chlorine gas outside. This reinforces our opinion that reasonable care could have avoided the incident. Therefore, strict liability under Restatement (Second) of Torts § 519 is inapplicable.

The foregoing cases are merely illustrative of dozens of recent opinions that contain similar declarations, albeit more briefly or with little analysis, establishing that section 520(c) is outcome-determinative because strict liability applies—but only if the negligence system cannot operate on the facts of the case.<sup>178</sup> It is particularly interesting that in

174. *Id.* at 234-35.

175. 509 N.E.2d 850 (Ind. Ct. App. 1987).

176. *Id.* at 856.

177. *Id.* at 857. In a footnote the court stated: "Although we do not ignore the other factors enumerated in Section 520, we feel that the concept of § 520(c) is at the core of § 519 liability." *Id.* at 857 n.3.

178. In the following decisions (listed chronologically), all of which were decided subsequent to publication of Tentative Draft No. 10 of the Restatement (Second) of Torts section 519 and section 520 (approved by the ALI in 1964), the courts have explicitly considered section 520(c) and the relationship to negligence. *See Beck v. Bel Air Properties, Inc.*, 286 P.2d 503, 508 (Cal. Ct. App. 1955); *Liber v. Flor*, 415 P.2d 332 (Colo. 1966); *Yommer v. McKenzie*, 257 A.2d 138, 140 (Md. 1969); *Siegler v.*

*Erbrich Products* and *Edwards* what sunk the plaintiff's strict liability claims under sections 519 and 520 was expert testimony that due care could have prevented the accident. While some alternative theories of liability are not mutually exclusive (for example, trespass and private nuisance) and thus proof of one does not preclude the other, the unique form of SLADA under the Restatement (Second) formulation, as a practical matter, renders strict liability inapplicable in any case where the plaintiff offers proof of negligence or could have done so.

In a few recent decisions, the application of section 520(c) has not stood as a bar to strict liability. Thus, in a couple of opinions by the Washington Supreme Court, one involving crop dusting and the other an

---

Kuhlman, 502 P.2d 1181, 1186-87 (Wash. 1972) (en banc); *Cities Serv. Co. v. Florida*, 312 So. 2d 799, 803 (Fla. Dist. Ct. App. 1975); *Hudson v. Peavy Oil Co.*, 566 P.2d 175, 177-78 (Or. 1977); *Doundoulakis v. Town of Hempstead*, 368 N.E.2d 24, 27-28 (N.Y. 1977); *Rodgers v. City of Loving*, 573 P.2d 240, 241 (N.M. Ct. App. 1977); *Langan v. Valicopters, Inc.*, 567 P.2d 218, 222 (Wash. 1977) (en banc); *Yukon Equip., Inc. v. Fireman's Fund Ins. Co.*, 585 P.2d 1206, 1209-10 (Alaska 1978); *Kent v. Gulf State Util. Co.*, 418 So. 2d. 493, 498 (La. 1982); *State DEP v. Ventron Corp.*, 468 A.2d 150 (N.J. 1983); *Mahowald v. Minnesota Gas Co.*, 344 N.W.2d 856, 862-63 (Minn. 1984) (by implication); *New Meadows Holding Co. v. Washington Water Power Co.*, 687 P.2d 212, 216 (Wash. 1984) (en banc); *Bagley v. Controlled Env't Corp.*, 503 A.2d 823, 826 (N.H. 1986); *Erbrich Prods. Co. v. Wills*, 509 N.E.2d 850, 855-56 (Ind. App. 1987); *Crosby v. Cox Aircraft Co.*, 746 P.2d 1198, 1201 (Wash. 1987) (en banc); *Sprinkle v. Bower Ammonia & Chem. Co.*, 824 F.2d 409, 415-16 (5th Cir. 1987) (applying Mississippi law); *Indiana Harbor Belt R.R. v. American Cyanamid Corp.*, 916 F.2d 1174, 1177-79 (7th Cir. 1990); *Matomco Oil Co. v. Arctic Mechanical Inc.*, 796 P.2d 1336, 1341 (Alaska 1990); *Fortier v. Flambeau Plastics Co.*, 476 N.W.2d 593, 607-08 (Wis. Ct. App. 1991); *Edwards v. Post Transp. Co.*, 279 Cal. Rptr. 231 (1991); *Arlington Forest Assoc. v. Exxon Corp.*, 774 F. Supp. 387, 390 (E.D. Va. 1991); *Green v. Ensign-Bickford Co.*, 595 A.2d 1383, 1387 (Conn. App. 1991); *Klein v. Pyrodyne Corp.*, 810 P.2d 917, 920 (Wash. 1991) (en banc); *T&E Indus., Inc. v. Safety Light Corp.*, 587 A.2d 1249 (N.J. 1991); *Arawana Mills Co. v. United Tech. Corp.*, 795 F. Supp. 1238, 1250-52 (D. Conn. 1992); *Richmond, Fredericksburg & Putman Ry. v. Davis Indus., Inc.* 787 F. Supp. 572, 575-76 (E.D. Va. 1992); *In re Tutu Wells Contamination Litig.*, 846 F. Supp. 1243, 1269 (D.V.I. 1993); *Schwartzman, Inc. v. General Elec. Co.*, 848 F. Supp. 942, 945 (D.N.M. 1993); *Buggsi, Inc. v. Chevron, USA*, 857 F. Supp. 1427, 1432 (D. Or. 1994); *Rosenblatt v. Exxon Corp.*, 642 A.2d 180, 185-88 (Md. 1994); *Triffler v. Hopf*, No. 92 C 7193, 1994 WL 643237, at \*9 (N.D. Ill. Nov. 4, 1994); *Hagen v. Texaco Ref. & Mktg., Inc.*, 526 N.W.2d 531, 539 (Iowa 1995); *Smith v. Weaver*, 665 A.2d 1215, 1219-20 (Pa. Super. Ct. 1995); *Walker Drug Co. v. La Sal Oil Co.*, 902 P.2d 1229, 1233 (Utah 1995); *Miller v. Civil Constructors, Inc.*, 651 N.E.2d 239, 244-45 (Ill. App. Ct. 1995); *Koger v. Ferrin*, 926 P.2d 680 (Kan. App. Ct. 1996) (by implication); *Splendorio v. Bilray Demolition Co.*, 682 A.2d 461, 465-66 (R.I. 1996); *Foster v. City of Keyser*, 501 S.E.2d 165, 174-75 (W. Va. 1997); *Albahary v. City & Town of Bristol*, 963 F. Supp. 150, 155 (D. Conn. 1997); *Grube v. Daun*, 570 N.W.2d 851, 857 (Wis. 1997); *Thompson v. Mindis Metals, Inc.*, 692 So. 2d 805, 807 (Ala. 1997); *Cadena v. Chicago Fireworks Mfg. Co.*, 697 N.E.2d 802, 815 (Ill. App. Ct. 1998); *Diffenderfer v. Staner*, 722 A.2d 1103, 1107-08 (Pa. Super. Ct. 1998); *Price v. Keeney*, No. CV 94 0542469, 1998 WL 417591, at \*8-9 (D. Conn. July 10, 1998); *Taylor v. Hesser*, No. 91140, 1998 WL 764811, at \*4 (Okla. Ct. App. Sept. 15, 1998); *National Tel. Coop. Assoc. v. Exxon Corp.*, No. Civ.A. 96-02504 (CKK), 1998 WL 966144, at \*6 (D.D.C. Nov. 19, 1998); *Thompson v. Jump River Elec. Coop.*, 593 N.W.2d 901 (Wis. Ct. App. 1999).



explosion of spilled gasoline from a truck, the court concluded that the evidence supported a finding of strict liability in large part because reasonable care could not have eliminated the risk of the activity. In *Langan v. Valicopters, Inc.*<sup>179</sup> the court cited law review commentators to support its determination with respect to clause (c). The court wrote,

It is undisputed among the authorities cited to us that crop dusting involves an element of risk of harm. In Note, *Crop Dusting: Legal Problems in a New Industry*, the author points out that the drift of chemicals is virtually unpredictable due to three "uncertain and uncontrollable factors: (1) the size of the dust or spray particles; (2) the air disturbances created by the [applying aircraft]; and (3) natural atmospheric forces." The author discusses these three factors in detail and notes: "In the opinion of leading scientists who are working to alleviate the dangers of crop dusting, it is impossible to eliminate drift with present knowledge and equipment. Experience bears this out." The author states further that the problem of drift is reduced but not eliminated by the use of helicopters. Subsequent commentators have made the same observations about the uncontrollability of drift. In this case, there is no evidence that it is possible to eliminate the risk of drift in crop spraying.<sup>180</sup>

While the court discussed the other factors set forth in section 520, it is evident that the core rationale for imposing strict liability was the court's finding that "it is impossible to eliminate drift with present knowledge and equipment." What is important for our purposes was the central position occupied by the "uncontrollability" of the risk and the absence of any evidence that reasonable care could have prevented the destruction of plaintiff's organic crops.

In *Siegler v. Kuhlman*<sup>181</sup> the same court held that strict liability was applicable to render the owner of a gasoline trailer liable for the wrongful death of a motorist. The victim died in flames from a gasoline explosion when her automobile encountered a pool of spilled gasoline on the highway from the defendant's gasoline trailer, which had broken away from the truck towing it and had rolled down a hill onto the highway. The opinion emphasized two points. First, the fact that the explosion itself had literally destroyed all of the evidence necessary to prove negligence by the truck owner argued in favor of strict liability. After all, the court reasoned, one rationale for applying the doctrine is the problem of proof that often accompanies blasting, falling aircraft,

---

179. 567 P.2d 218 (Wash. 1977) (en banc).

180. *Id.* at 222 (citations omitted) (emphasis added) (citing Comment, *Crop Dusting: Two Theories of Liability?*, 19 HASTINGS L.J. 476, 477-79 (1968); Note, *Crop Dusting: Legal Problems in a New Industry*, 6 STAN. L. REV. 69, 72-75 (1953)).

181. 502 P.2d 1181 (Wash. 1973) (en banc).

and explosions, as in this case—which problem ought not fall on the innocent plaintiff, but rather should fall on the one engaging in the activity.<sup>182</sup> Second, the court seemed to take judicial notice of the potential for catastrophe inherent in carrying 5000 gallons of gasoline by truck over a crowded highway. The court wrote,

Nor will the exercise of due and reasonable care assure protection to the public from the disastrous consequences of concealed or latent mechanical or metallurgical defects in the carrier's equipment, from the negligence of third parties, from latent defects in the highways and streets, and from all of the other hazards not generally disclosed or guarded against by reasonable care, prudence and foresight. Hauling gasoline in great quantities as freight, we think, is an activity that calls for the application of principles of strict liability.<sup>183</sup>

In any case, it is evident that the *Siegler* court clearly regarded clause (c) of section 520 as critical to the analysis.<sup>184</sup> One might quarrel with the validity of the court's finding that reasonable care could not protect against the risks of carrying gasoline, but it is beyond dispute that such a finding was central to the court's reasoning in finding strict liability applicable.

There are a handful of recent decisions, unmistakably a minority, that eschew any reliance on section 520(c). A decision that exemplifies this approach is *T&E Industries, Inc. v. Safety Light Corp.*<sup>185</sup> Here, the New Jersey Supreme Court held that the disposal of radium tailings in the early twentieth century on property later purchased by the plaintiff was an abnormally dangerous activity. The court focused not on the Restatement factors but on the issue of foreseeability and knowledge—that is, on whether an actor can be strictly liable even though at the time of the activity the dangers it posed to others were not known. Ultimately, the Court inferred constructive knowledge of the dangers by the defendant. In its only possible reliance on clause (c), the court simply stated that “one cannot safely dispose of radium by dumping it onto the vacant portions of an urban lot.”<sup>186</sup>

---

182. See *id.* at 1185 (quoting Cornelius J. Peck, *Negligence and Liability Without Fault in Tort Law*, 46 WASH. L. REV. 225, 240 (1971)).

183. *Id.* at 1187.

184. See also *Klein v. Pyrodyne Corp.*, 810 P.2d 917 (Wash. 1991) (en banc), in which the court held that setting off public fireworks displays is an abnormally dangerous activity justifying imposition of strict liability; the activity entails existence of a high degree of risk of some harm to person, land, or chattels of others; the likelihood that harm that results from it will be great; there is an inability to eliminate the risk by the exercise of reasonable care, and the activity is not of common usage. See *id.* at 920. It stated, “Furthermore, no matter how much care pyrotechnicians exercise, they cannot entirely eliminate the high risk inherent in setting off powerful explosives such as fireworks near crowds.” *Id.*

185. 587 A.2d 1249 (N.J. 1991).

186. *Id.* at 1261.

Notwithstanding the minority approach, the weight of authority holds that, in order to establish the abnormally dangerous nature of an activity, the plaintiff must show that due care by the defendant would not have prevented the harm suffered by the plaintiff. Stated differently, the Court must find that the demonstration of negligence as a proximate cause of the harm is not possible. Effectively, the plaintiff carries a burden of proving that it cannot prove negligence.

### *C. Additional Reasons for the Insurmountability of Section 520(c)*

Closely related to the daunting challenge of section 520(c) to any plaintiff asserting a SLADA claim are several other considerations which have accentuated the plaintiff's difficulty. These are now discussed in turn.

#### *1. Due Care Need Only Eliminate the High Risk, Not All Risk*

Carefully parsed, the language of section 520 can be interpreted to mean that it is only the high risk, the extra or abnormal level of risk, that needs to be alleviated by due care before strict liability becomes inapplicable. Thus, it does not have to be true that *all* of the risk can be removed by due care to disqualify the strict liability claim; once the abnormal level of risk is deemed preventable, the SLADA doctrine becomes inapplicable because the plaintiff cannot satisfy the requirements of section 520(c). The argument is that "the risk" referred to in section 520(c) that cannot be eliminated is the "existence of a high degree of risk" set forth in clause (a). In other words, the antecedent of "the risk" in (c) is the "high degree of risk" in (a). Further, the phrase, "it will be great" in section 520(b) is interpreted as also referring back to the "high degree of risk of some harm" in section 520(a). The comments to section 520, quoted earlier in Part II, seem to support this construction of the black letter rule.<sup>187</sup> Indeed, Prosser refers in comment "h" to the "residual risk after the exercise of care," implying that if due care removes that residual risk, no strict liability attaches.<sup>188</sup> Regardless of the merits of this interpretation, the opinions have so construed section 520(c).

Consider the Washington Supreme Court case of *New Meadows*

---

187. See RESTATEMENT (SECOND) OF TORTS § 520 cmt. h (1977).

188. *Id.*

*Holding Co. v. Washington Water Power Co.*<sup>189</sup> This case involved an action against a natural gas utility company to recover damages arising out of a fire allegedly caused by a gas line that was damaged by a telephone cable. After first concluding that factors (a) and (b) were satisfied given the explosive nature of natural gas, the court turned to a consideration of clause (c), writing,

A[s] to factor (c), the phrase “the risk” plainly refers to the “high degree of risk” mentioned in factor (a). Thus, factor (c) addresses itself to the question of whether, through the exercise of ordinary care, the risk inherent in an activity can be reduced to the point where it can no longer be characterized as a “high degree of risk[.]”[ ]

Some degree of risk of natural gas pipeline leaks will always be present. This does not mean, however, that the “high degree of risk” with which section 520 is concerned cannot be eliminated by the use of reasonable care with regard to the dangerous character of the commodity. Gas companies are subject to strict federal and state safety regulations. Programs for corrosion control, pipeline testing, gas leak investigation, and awareness of construction work near gas company facilities must be maintained. Odorizers are placed in the gas itself to increase the likelihood of detection in those rare instances when natural gas does escape. In light of all this, we believe the high degree of risk involved in the transmission of natural gas through underground<sup>190</sup> lines can be eliminated by the use of reasonable care and legislative safeguards.

Thus, *New Meadows* unequivocally supports that construction of section 520(c) which requires only that the high degree of risk be preventable by due care. *New Meadows*, moreover, does not stand alone. For example, a Wisconsin appeals court, in a case involving high voltage transmission lines, ruled that “the risk of injury need not be eliminated, just minimized.”<sup>191</sup>

Likewise, a federal district court, applying Virginia law to a leaking underground storage tank case, held that the test of section 520(c) “does not contemplate that all risk be capable of elimination by due care,” since “[a]bsolute safety is not required.”<sup>192</sup> The court observed that the language of section 520(c) was “ambiguous,” but preferred a “straight forward reading” that treated the reference to “the risk” in clause (c) to be the “high degree of risk” in clause (a).<sup>193</sup> After pointing out that negligence law provides a sufficient deterrent against leaking tanks, the court concluded:

---

189. 687 P.2d 212 (Wash. 1984) (en banc).

190. *Id.* at 216 (citations omitted).

191. *Estate of Thompson v. Jump River Elec. Coop.*, 593 N.W.2d 901, 905 (Wis. Ct. App. 1999). The Court stated that “[t]he test . . . is whether the risk of injury can be minimized.” *Id.* at 906 (citing *Wagner v. Continental Cas. Co.*, 421 N.W.2d 835, 840 (Wis. 1988)).

192. *Arlington Forest Assoc. v. Exxon Corp.*, 774 F. Supp. 387, 390 (E.D. Va. 1991).

193. *Id.* at 390 n.4.

Maintained, monitored, and used with due care, underground gasoline storage tanks present virtually no risk of injury from seepage of their contents. They are not abnormally dangerous. Sound tanks, timely replacement of impaired tanks, modern corrosion control techniques, and adequate testing for leakage can eliminate all but a tolerably small amount of risk. The injury alleged in this case apparently occurred because the tanks fell into a preventable state of disrepair. Only those activities that remain dangerous despite the exercise of all reasonable precautions warrant imposition of strict liability.<sup>194</sup> Here, reasonable precautions would have sufficed to prevent the harm.

No decisions have explicitly rejected the foregoing proposition, at least not as a matter of interpretation.<sup>195</sup> In any event, it is clear that, by only requiring the minimization of risk to acceptable levels, the modern courts have resisted the imposition of strict liability where it otherwise might apply.

## 2. *Applicable Government Regulations Support a Finding that the Risk Can Be Minimized with Due Care*

In many recent cases the activity under consideration has been the subject of government regulations that prescribe how the activity is to be safely undertaken. Roughly a half dozen decisions have stated or implied that such regulations strongly support the inference that due care can produce reasonable safety, so that the activity is not abnormally dangerous. Thus, a federal district court, in analyzing the disposal of hazardous substances at a Superfund site, concluded that “[a]lthough hazardous material and petroleum products may present a substantial degree of risk when mishandled . . . [these] risks can be eliminated through the exercise of reasonable care.”<sup>196</sup> As its rationale it offered this: “Indeed, the premise of many environmental laws . . . is that proper handling and disposal of these materials minimizes or eliminates the risk of their use.”<sup>197</sup> In the *Arlington Forest* case cited earlier (involving leaking underground storage tanks), the court made the rather obvious observation that “[a]dvances in technology and safety standards continue to enhance safety.”<sup>198</sup>

---

194. *Id.* at 390-91 (footnote omitted).

195. *But see* Klein v. Pyrodyne Corp., 810 P.2d 917 (Wash. 1991) (en banc) (stating that the *entire* risk must be eliminated in context of fireworks display).

196. Schwartzman, Inc. v. General Elec. Co., 848 F. Supp 942, 945 (D.N.M. 1993).

197. *Id.* at 945 (referring to the RCRA, Toxic Substances Control Act, 15 U.S.C. §§ 2601 et seq. (1994 & Supp. III 1997), and the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136 et seq. (1994 & Supp. III 1997)).

198. *Arlington Forest Assoc. v. Exxon Corp.*, 774 F. Supp. 387, 390 n.5 (E.D. Va.

A Connecticut superior court in *Sanchez v. General Urban Corp.*<sup>199</sup> refused to apply strict liability in connection with premises containing lead-based paint largely because of the extensive regulations governing the abatement of dangers posed by such painted surfaces. Although the plaintiffs argued that the regulatory scheme demonstrated the unavoidable risk of harm to minor children, the court rejected that position, writing,

The “regulations . . . demonstrate that the dangers associated with lead-based paint can be avoided, so long as landlords comply with the statutory and regulatory schemes governing lead-based paint.” Thus, since the landlord, in the exercise of reasonable care, is able to eliminate the risk of lead-based paint through inspection and abatement of defective surfaces, the doctrine of abnormally dangerous activity is inapplicable.<sup>200</sup>

As to the display of fireworks and the effect to be given to government regulation of that activity, an Illinois appellate court also rejected the position that regulation implies ultrahazardousness. The court wrote,

Plaintiffs’ argument that the Illinois legislature has regulated the use of fireworks, however, supports the opposite conclusion. While plaintiffs are correct in stating that under the Fireworks Regulation Act, and the Fireworks Use Act, the Illinois legislature has regulated the use of fireworks, the legislature did not, when passing these acts, determine that the displaying of fireworks should be considered ultrahazardous, and we also, as discussed above, do not find them ultrahazardous.

Note that this court expressly declined to follow *Klein v. Pyrodyne Corp.*,<sup>202</sup> which held that fireworks displays are an abnormally dangerous activity. In *Klein*, the Washington Supreme Court viewed the elaborate scheme of regulation as proof of the dangerousness of fireworks displays.<sup>203</sup> It wrote,

Pyrodyne argues that if the regulations are complied with, then the high degree of risk otherwise inherent in the displays can be eliminated. Although we recognize that the high risk can be reduced, we do not agree that it can be eliminated. Setting off powerful fireworks near large crowds remains a highly risky activity even when the safety precautions mandated by statutes and regulations are followed. The Legislature appears to agree, for it has declared that in order to obtain a license to conduct a public fireworks display, a pyrotechnician must first obtain a surety bond or a certificate of insurance, the amount of which must be at least \$1,000,000 for each event.

---

1991).

199. No. LPLCV 950378774S, 1997 WL 78176 (Conn. Super. Ct. Feb. 6, 1997).

200. *Id.* at \*8 (citation omitted).

201. *Cadena v. Chicago Fireworks Mfg. Co.*, 697 N.E.2d 802, 814-15 (Ill. App. Ct. 1998) (citations omitted).

202. 810 P.2d 917 (Wash. 1991) (en banc).

203. *See id.* at 920.

204. *Id.* at 921. In a footnote, it observed that, “The fact that the Legislature has

Interestingly, in the *New Meadows* decision quoted earlier, the same court which decided *Klein* relied on the extensive regulation of natural gas pipelines as a reason for *not* finding strict liability, reasoning that “the high degree of risk involved in the transmission of natural gas . . . can be eliminated by the use of reasonable care and legislative safeguards.”<sup>205</sup>

Therefore, of the decisions that have expressly considered the issue, the clear majority concludes that applicable governmental safety regulations cut against the imposition of strict liability because arguably compliance with such regulation substantially eliminates the dangers of the activity. The idea is that, the more the activity is subjected to regulatory dictates, the more compelling the inference that due care and regulatory compliance will reduce the risks of the activity to acceptable levels.<sup>206</sup> Moreover, this argument seems especially well suited to the field of environmental contamination where current laws are designed to substantially abate the dangers of air emissions,<sup>207</sup> water emissions,<sup>208</sup> and the treatment and disposal of hazardous wastes.<sup>209</sup>

There are, however, contrary decisions finding that a regulatory regime *increases* the prospects for an activity to be abnormally dangerous. Examples include the New Jersey Supreme Court case of *State Department of Environmental Protection v. Ventron Corp.*<sup>210</sup> and the Utah Supreme Court case of *Branch v. Western Petroleum, Inc.*<sup>211</sup> In *Ventron*, the Court suggested that the state’s policy, evident in a strict liability statute called the Spill Compensation and Control Act, bolstered the arguments for strict liability in connection with the disposal of mercury.<sup>212</sup> And in *Branch*, Utah’s laws protecting surface and

mandated a \$1,000,000 liability policy for pyrotechnicians, however, does suggest that the Legislature views public fireworks displays as involving a high risk even when the appropriate safety precautions are taken.” *Id.* at 921 n.3.

205. *New Meadows Holding Co., v. Washington Water Power Co.*, 687 P.2d 212, 216 (Wash. 1984) (en banc).

206. After all, noncompliance with the standards will often constitute negligence per se. See *infra* Part III.C.3.

207. See Clean Air Act, 42 U.S.C. §§ 7401-7671 (1994 & Supp. III 1997).

208. See Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1994 & Supp. III 1997).

209. See Resource Conservation & Recovery Act, 42 U.S.C. §§ 6901-6992 (1994 & Supp. III 1997); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (1994 & Supp. III 1997).

210. 468 A.2d 150 (N.J. 1983).

211. 657 P.2d 267 (Utah 1982).

212. See *Ventron*, 468 A.2d at 160.

subterranean waters from oil pollution were cited to support a finding of abnormally dangerous activity.<sup>213</sup> But these decisions do not alter the basic point that many courts—certainly a majority that have expressly addressed the matter—rely on a regulatory program as a further justification for disallowing claims of strict liability under sections 519 and 520 of the Restatement (Second) of Torts.

### 3. *Noncompliance with Governmental Regulations May Support a Negligence Per Se Claim*

Government regulations also have another impact on the erosion of strict liability in the SLADA context. In cases where the defendant has violated a government safety standard, that violation may support a negligence per se claim, which in turn obviates the need for any application of SLADA principles. Illustrative of this phenomenon is *Bagley v. Controlled Environmental Corp.*,<sup>214</sup> in which, as quoted earlier, the court rejected strict liability because there was no showing of the impossibility of proving negligence. However, Justice Souter found that the plaintiff's case was saved by virtue of the defendant's violation of New Hampshire's waste disposal laws. Indeed, he used the statutory violation as a justification for not applying strict liability. He explained,

While we therefore affirm the dismissal of the count in strict liability, it does not follow that the dangers of hazardous waste will have no particular recognition in the law of the State, because we do hold that the plaintiff has stated a cause of action predicated on a statutory violation. "It is well established law in this State that a causal violation of a statutory standard of conduct constitutes legal fault in the same manner as does the causal violation of a common-law standard of due care, that is, causal negligence. In both instances liability is imposed because of the existence of legal fault, that is, a departure from a required standard of conduct."<sup>215</sup>

In other words, section 519 and section 520 must be read to incorporate any basis for a negligence action, including those predicated on negligence per se. This makes sense: only if plaintiff can prove no form of negligence is reliance on strict liability warranted. After all, who needs SLADA and its complex set of factors if a claimant can sustain a cause of action resembling "true" strict liability by establishing negligence per se?

The Connecticut Supreme Court employed similar reasoning in an action brought by minor children against a landlord for alleged

---

213. See *Branch*, 657 P.2d at 273.

214. 503 A.2d 823 (N.H. 1986).

215. *Id.* at 826 (quoting *Moulton v. Groveton Paper Co.*, 289 A.2d 68, 71 (N.H. 1972)).



poisoning from lead-based paints.<sup>216</sup> Here a statute provided that the presence of paint containing lead in excess of federally prescribed standards (or the presence of certain flaking or peeling paint constituting a “health hazard”) renders a premises uninhabitable and imposes a duty on the landlord to correct the deficiency.<sup>217</sup> Finding that the landlord’s non-compliance constituted negligence per se, the court simply avoided the consideration of SLADA liability under either the common law or applicable statutes.<sup>218</sup>

#### 4. *The Flexibility of Negligence Allows a Higher Degree of Care for Dangerous Activities*

Another consideration that serves to undermine the availability of SLADA is the inherent flexibility of the negligence concept. Negligence principles do not require the same amount of care under all circumstances; the amount of care that must be exercised to avoid being negligent is commensurate with the riskiness of the activity. Therefore, for activities that are likely to be dangerous, those that are candidates for strict liability, the standard of care (which never changes) is flexible enough to require defendant to take additional precautions just because of the dangers posed.

A few decisions have used precisely this rationale for rejecting the application of strict liability. For example, the Minnesota Supreme Court, in a case involving damage from a leak in a natural gas pipeline, refused to apply strict liability in part because of its view that the law of negligence was adequate for regulating such an activity.<sup>219</sup> The Court explained,

All jurisdictions, with minor variation, impose a high standard of care on the gas distributor—*care commensurate with the risk involved*. In the case of escaping natural gas, the risk is great because it is invisible, highly dangerous to person and property and, when it has leached through the soil, odorless.<sup>220</sup>

Likewise, the West Virginia Supreme Court of Appeals adopted similar reasoning, also in a natural gas transmission case, stating that “a party engaged in such activities or employing a dangerous instrumentality was

---

216. See *Gore v. People’s Sav. Bank*, 665 A.2d 1341 (Conn. 1995).

217. See *id.* at 1351.

218. See *id.*

219. See *Mahowald v. Minnesota Gas Co.*, 344 N.W.2d 856 (Minn. 1984).

220. *Id.* at 861 (emphasis added).

held to ‘the highest degree of care, a standard commensurate with the dangerousness to be avoided.’”<sup>221</sup>

Moreover, this approach is not limited to cases involving public utilities. An Illinois appellate court in an action brought against target shooters by an injured bystander refused to apply SLADA.<sup>222</sup> Instead, the court marshaled an impressive array of authority for the proposition that the standard of care imposes an obligation on the users of firearms to exercise special precautions commensurate to the risks inherent in the activity and, therefore, a rule of strict liability was unnecessary.<sup>223</sup> In discussing clause (c) of section 520, it held that the risks from firearms, even though great, “can be virtually eliminated by the exercise of reasonable or even ‘utmost’ care under the circumstances.”<sup>224</sup> It concluded,

The doctrine of strict or absolute liability is ordinarily reserved for abnormally dangerous activities for which no degree of care can truly provide safety. There is a clear distinction between requiring a defendant to exercise a high degree of care when involved in a potentially dangerous activity and requiring a defendant to insure absolutely the safety of others when engaging in ultrahazardous activity.

Several cases have applied precisely this reasoning in concluding that the use of chlorine gas as a purifier in the town’s water supply,<sup>226</sup> and as part of the manufacturing process for making liquid bleach, did not

---

221. *Foster v. City of Keyser*, 501 S.E.2d 165, 174 (W. Va. 1997) (quoting *Peneschi v. National Steel Corp.*, 295 S.E.2d 1, 7 (W. Va. 1982)).

222. *See Miller v. Civil Constructors, Inc.*, 651 N.E.2d 239, 241 (Ill. App. Ct. 1995).

223. *See id.* The Court explained,

This standard or degree of care is evidently a flexible one which varies according to the particular circumstances. Imposing a duty of ordinary care, even where it may become a high degree of care under the particular circumstances, is quite different from imposing strict or absolute liability by classifying the activity ultrahazardous. Our review of the authorities thus discloses that the discharge of firearms resulting in injury ordinarily presents a question of negligence and that the standard of care is ordinary care—one which may be equated to a high degree of care because of the particular circumstances presented.

*Id.* at 244.

224. *Id.* at 245 (citation omitted).

225. *Id.* *See also* *Jacoves v. United Merchandising Corp.*, 11 Cal. Rptr. 2d 468 (Ct. App. 1992) (holding no ultrahazardous activity warranting imposition of absolute liability, but highest standard of due care applied); *Reida v. Lund*, 96 Cal. Rptr. 102 (Ct. App. 1971) (stating that leaving a rifle accessible was issue of negligence; use of firearms not ultrahazardous activity resulting in imposition of absolute liability); *Mikula v. Duliba*, 464 N.Y.S.2d 910, 913 (1983) (holding that although firearms are dangerous instrumentalities, their use while hunting is not abnormally dangerous activity requiring imposition of strict liability).

226. *See Kajiya v. Department of Water Supply*, 629 P.2d 635, 639 (Haw. Ct. App. 1981).

constitute an abnormally dangerous activity.<sup>227</sup>

The Restatement (Second) itself also contemplates this sliding scale of care to reflect the dangerousness of the activity. Comment “h” to 520, quoted earlier in its entirety, states, “What is referred to here is the unavoidable risk remaining in the activity, even though the actor has taken *all reasonable precautions* in advance and has exercised *all reasonable care* in his operation, so that he is not negligent.”<sup>228</sup> Thus, language requiring the exercise of “all reasonable care” and the provision of “all reasonable precautions” may impose obligation of varying magnitude under negligence law. This fact, in turn, can preclude the application of strict liability if the risk involved is one which can be minimized to acceptable levels through the exercise of a relatively high level of care. Indeed, section 519 refers to the “utmost care”—providing that liability can attach for harm caused by an activity “although [defendant] has exercised the *utmost care* to prevent the harm.”<sup>229</sup> Prosser’s use of this language might be interpreted to mean that a defendant’s obligation under a negligence standard will be pushed to the edges of the available technology and precaution. Such an implication might then lead to the conclusion that, before strict liability is triggered, the defendant must have exercised this highest degree of care. Unquestionably such a threshold would serve to drastically reduce the occasions in which a plaintiff could bring a strict liability claim under the law of the Restatement.

##### 5. *The Availability of Res Ipsa Loquitur Also Obviates the Need for Strict Liability*

Yet another well-established principle of negligence law that stands as a barrier to the application of strict liability is the doctrine of *res ipsa loquitur*. Illustrative is the reasoning of the West Virginia Supreme Court of Appeals in the context of a national gas explosion, where the Court refused to permit a strict liability claim, writing,

We believe that the combination of the high standard of care which must be observed in the transmission of natural gas . . . coupled with the availability of the doctrine of *res ipsa loquitur* in appropriate cases to a party seeking to prove negligence in the conduct of such transmission . . . should ordinarily make it unnecessary to apply the doctrine of strict liability in cases involving explosions

---

227. See *Erbrich Prods., Inc. v. Wills*, 509 N.E.2d 850, 854-55 (Ind. Ct. App. 1987).

228. RESTATEMENT (SECOND) OF TORTS § 520 cmt. h (1977) (emphasis added).

229. *Id.* § 519(1) (emphasis added).

caused by leaking natural gas transmission lines.<sup>230</sup>

The court engaged in an extensive discussion of why *res ipsa* was applicable, frequently noting the close relationship between *Rylands* and *res ipsa*.<sup>231</sup> According to the court, if the injury-causing event is one which does not usually occur in the absence of negligence, then *res ipsa* provides the basis of liability and the plaintiff may not recover on a strict liability claim.<sup>232</sup> Thus, according to such reasoning, just as sections 519 and 520 disallow a strict liability claim when a negligence *per se* claim can be made, so also these sections disallow a strict liability claim when a *res ipsa* claim can be made.<sup>233</sup>

Consider next the Washington Supreme Court case of *Siegler v. Kuhlman*.<sup>234</sup> Here the court imposed strict liability for an explosion caused from gas spillage from a tanker truck, also on the theory of *res ipsa loquitur*.<sup>235</sup> The court held that it was error for the trial court to refuse to give a *res ipsa* instruction to the jury.<sup>236</sup> While the court did not rely on *res ipsa* to bar the availability of strict liability, the opinion does illustrate the close affinity between the two doctrines. Moreover, in *Indiana Harbor Belt Railroad v. American Cyanamid Co.*,<sup>237</sup> Judge Posner seemed to imply that the real basis of liability in *Siegler* was *res ipsa* because the explosion had destroyed direct evidence of

---

230. *Foster v. City of Keyser*, 501 S.E.2d 165, 175 (W. Va. 1997).

231. *See id.* at 178. The court cited the following words as authority:

[I]n *res ipsa* cases as well as in *Rylands* negligence need not be proven. When we speak in *res ipsa* terms, we are speaking of negligence: because of the *res ipsa* rule of circumstantial evidence, negligence is presumed until the defendant rebuts the presumption. On the other hand, in *Rylands*-type cases, the basis of the liability is not negligence, but rather the defendant's intentional behavior in exposing others to a risk.

*Id.* (quoting *Peneschi v. National Steel Corp.*, 295 S.E.2d 1, 7 (W. Va. 1982)).

232. *See id.* at 185.

233. *See also Mahowald v. Minnesota Gas Co.*, 344 N.W.2d 856 (Minn. 1984). The court refused to apply strict liability to a natural gas explosion but instead ordered retrial on a *res ipsa* theory, stating,

In the ordinary course of events, natural gas does not escape from gas mains in public streets so as to cause explosion. When it does so escape and does result in an explosion, an inference of fault on the part of the gas distribution company is justifiable. Even though the gas company may be faultless, in view of its superior knowledge of the gas distribution system, its access and opportunity to identify persons acting in the vicinity of the gas mains, its inspection and control over the mains, and its responsibility for the safety of the persons and property in the community, the gas company should have the obligation to show it was not negligent or to establish who was.

*Id.* at 863.

234. 502 P.2d 1181 (Wash. 1972) (en banc).

235. *See id.* at 1184.

236. *See id.*

237. 916 F.2d 1174 (7th Cir. 1990).

negligence.<sup>238</sup> By invoking *res ipsa*, the plaintiff clearly derives some of the same benefits which are afforded by strict liability. The plaintiff is permitted to use circumstantial evidence to establish a *prima facie* case; in these cases, the theory that events do not ordinarily happen in the way they did absent negligence substitutes for direct evidence. If the instrumentality causing the injury was in the control of the defendant (which is typically true in dangerous activity cases), the plaintiff gets to the jury without proof of specific acts of negligence. This, in essence, reverses the burden of production, and comes very close to being the equivalent of strict liability.<sup>239</sup>

### 6. *Defining the "Activity" Broadly Defeats Strict Liability*

Strict liability applies to abnormally dangerous "activities." Therefore, how the "activity" being evaluated is described by the court will greatly influence the outcome of the analysis under section 520. By defining the activity at the greatest level of generality, the probability of finding strict liability is reduced. Consider, for example, the case of *Indiana Harbor Belt*, where Judge Posner asserted that the activity of shipping is the relevant activity, writing,

In emphasizing the flammability and toxicity of acrylonitrile rather than the hazards of transporting it, as in failing to distinguish between the active and the passive shipper, the plaintiff overlooks the fact that ultrahazardousness or abnormal dangerousness is, in the contemplation of the law at least, a property not of substances, but of activities: not of acrylonitrile,<sup>240</sup> but of the transportation of acrylonitrile by rail through populated areas.

Moreover, Posner made much of the fact that the substance in this case is ranked fifty-third among the most 125 hazardous materials shipped in high volume on the nation's railroads.<sup>241</sup> Further, he stressed that, if strict liability were to apply in this case, then "[e]very shipper of any of these materials would therefore be strictly liable for the consequences of a spill or other accident that occurred while the material was being shipped through a metropolitan area."<sup>242</sup> Framed in this manner, the ultimate holding of the case seems inevitable: No court could stake out

238. *See id.* at 1179.

239. *See Escola v. Coca Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944) (Traynor, J., concurring).

240. *Indiana Harbor Belt*, 916 F.2d at 1181.

241. *See id.* at 1178.

242. *Id.*

such a broad proposition of strict liability.

A couple of Pennsylvania decisions also make the point that defining the activity is crucial to the disposition. In *Smith v. Weaver*,<sup>243</sup> the court rejected the plaintiff's argument that a leaking underground storage tank was abnormally dangerous.<sup>244</sup> The court recognized the crucial importance of how the activity would be defined, writing,

The buyers would urge us to consider not whether underground tanks are abnormally dangerous, but rather whether underground storage tanks which are *leaking a hazardous substance*, are abnormally dangerous. By so phrasing the issue the buyers are seeking to have us view the *results of the activity*, instead of the activity itself. Although a dangerous condition may have later developed, or harm may have occurred, the proper focus is on the activity itself, the storage of potentially hazardous substances in an underground tank.<sup>245</sup>

This analysis is performed antecedent to applying the factors of section 520, but it dictates the outcome. The court easily finds that gasoline and other petroleum products can be stored and dispensed safely with reasonable care.<sup>246</sup> In another case the court considered whether the storage of Thimet, a highly toxic pesticide, in a barn (which storage activity ultimately caused the contamination of cow feed and the death of several dairy cows) was an abnormally dangerous activity.<sup>247</sup> The court reversed the trial court, finding a jury instruction to be in error because it "focused the strict liability claim on the leaking of the pesticide, not on its storage."<sup>248</sup> The court, looking to the Restatement factors, pointed out that storing pesticides in a barn does not pose a high degree of risk to others, and, based on expert testimony at the trial, concluded that "the risk of storing Thimet can be eliminated with the exercise of reasonable care."<sup>249</sup>

The Rhode Island Supreme Court applied similar reasoning in holding that an engineering firm that undertook an asbestos remediation project as part of a building demolition that released asbestos fibers onto plaintiff's property was not engaged in an abnormally dangerous activity.<sup>250</sup> The court emphasized that strict liability applied only to activities, not to dangerous materials.<sup>251</sup> The court explained, "[I]f the rule were otherwise, virtually any commercial activity involving substances which are dangerous in the abstract automatically would be

---

243. 665 A.2d 1215 (Pa. Super. Ct. 1995).

244. *See id.* at 1219-20.

245. *Id.* at 1219 (emphasis added).

246. *See id.* at 1220.

247. *See* *Diffenderfer v. Staner*, 772 A.2d 1103 (Pa. Super. Ct. 1998).

248. *Id.* at 1106.

249. *Id.* at 1108.

250. *See* *Splendoria v. Bilray Demolition Co.*, 682 A.2d 461 (R.I. 1996).

251. *See id.* at 465-66.

deemed as abnormally dangerous. This result would be intolerable."<sup>252</sup>

A federal district court in an underground storage tank case undertook a considerable discussion of this issue.<sup>253</sup> In the *Arlington Forest* case the court criticized a plaintiff for characterizing the relevant activity as the leaking of moribund underground tanks, rather than assuming for the purpose of defining the activity the "normal and nondefective condition of underground tanks."<sup>254</sup> The court explained that plaintiff's particularized approach was objectionable because it would "enable plaintiffs to invoke strict liability for all negligently-conducted activity."<sup>255</sup>

Two New Jersey Supreme Court opinions are often cited as showing the potential reach of the Restatement (Second) doctrine. Both couched the description of the relevant activity in terms that allowed the imposition of strict liability despite the language of section 520(c). In *State Department of Environmental Protection v. Ventron*,<sup>256</sup> the court overruled a century-old decision, and adopted the doctrine of *Rylands*. *Ventron* involved a processing plant from which mercury-laden effluent had escaped and reached a creek and a tidal estuary. The court adopted a sweeping proposition that "a landowner is strictly liable to others for harm caused by toxic wastes that are stored on his property and flow onto the property of others."<sup>257</sup> After tracing the history of the *Rylands*

252. *Id.* at 466 (quoting *G.J. Leasing Co. v. Union Elec. Co.*, 854 F. Supp. 539, 568 (S.D. Ill. 1994) (quoting *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611, 615-17 (7th Cir. 1989)). *Accord* *Richmond, Fredericksburg & Potomac R.R. v. Davis Indus., Inc.*, 787 F. Supp. 572, 575 (E.D. Va. 1992) (finding that the manufacture, storage and disposal of air conditioners containing PCBs was not an abnormally dangerous or ultrahazardous activity).

253. *See* *Arlington Forest Assoc. v. Exxon Corp.*, 774 F. Supp 387 (E.D. Va. 1991).

254. *Id.* at 392.

255. *Id.* The court continued,

Any plaintiff in a negligence action could simply characterize the offending behavior as incapable of being safely performed even with due care, thus bringing it within the scope of strict liability. For example, the activity of "driving a car" can be made sufficiently safe by the exercise of reasonable care. But "driving a car at an excessive rate of speed" cannot be made safe except by ceasing to drive too fast. Clearly this approach would extend the reaches of strict liability far beyond the bounds of the law and of common sense. The Court does not doubt that the injury inflicted in this case stems from the presence of moribund storage tanks; however, this fact properly relates to the issue of negligence.

*Id.* at 392-93.

256. 468 A.2d 150 (N.J. 1983), *overruling* *Marshall v. Wood*, 38 N.J.L. 339 (N.J. Sup. Ct. 1876).

257. *Id.* at 157.

rule in New Jersey, the court adopted the Restatement (Second) formulation which it believed incorporated the standard of *Rylands*.<sup>258</sup> As to clause (c), the entire analysis consisted of this statement: “With respect to the ability to eliminate the risks involved in disposing of hazardous wastes by the exercise of reasonable care, no safe way exists to *dispose of mercury by simply dumping it onto land or into water*.”<sup>259</sup> By characterizing the activity and focusing on the end result—“dumping it onto land or into water”—the court could easily find that due care at that point in the sequence of events could not possibly prevent harm from occurring. Thus, *Ventron* demonstrates the other end of the definitional spectrum—using a particularized description of the activity *after* the harm has occurred. Again, how the case comes out depended upon the characterization of the activity.

The New Jersey Supreme Court used the same post hoc characterization in *T&E Industries v. Safety Light Corp.*,<sup>260</sup> a case involving disposal of radium tailings. The court never really purported to undertake a factor-by-factor analysis under section 520; instead, it simply wrote,

Furthermore, although the risks involved in the processing and disposal of radium might be curtailed, *one cannot safely dispose of radium by dumping it onto the vacant portions of an urban lot*. Because of the extraordinarily-hazardous nature of radium, the processing and disposal of that substance is particularly inappropriate in an urban setting. We conclude that despite the usefulness of radium, defendant’s processing, handling, and disposal of that substance, under the facts of this case constituted an abnormally-dangerous activity.<sup>261</sup>

In spite of these New Jersey cases, it is evident that many courts describe the “activity” in its benign, pre-injury-causing condition, and as a consequence conclude that reasonable care could have prevented the risk of harm. In both *Ventron* and *T&E Industries*, if the activity were viewed as management of mercury or radium in the manufacturing processes, then the court could find that the exercise of reasonable care

---

258. *See id.*

259. *Id.* at 160 (emphasis added).

260. 587 A.2d 1249 (N.J. 1991).

261. *Id.* at 1261 (emphasis added). *See also* *Albahary v. City & Town of Bristol*, 963 F. Supp. 150, 155-56 (D. Conn. 1997). The *Albahary* court wrote,

Because hazardous materials are an instrumentality capable of producing harm, and because the circumstances and conditions of its disposal into a municipal landfill, irrespective of a lawful purpose or due care, involve a substantial risk of probable injury to the person or property of others, the Court concludes that disposal of hazardous and toxic wastes at a landfill may constitute an abnormally dangerous or ultrahazardous activity sufficient to maintain a cause of action for strict liability . . . .

*Id.* at 156.



might have avoided the harm suffered by the plaintiffs. On the other hand, the court is probably correct in its conclusion that, once radium or mercury is dumped into the soil or groundwater, reasonable care can't eliminate the high degree of risk. The real issue is which characterization of the activity makes more sense.

Sections B and C of Part III are intended to demonstrate several points. First, factor (c) of section 520 is not outweighed by other factors which support application of strict liability. Rather, the overwhelming majority of decisions regard proof of the inability to eliminate the risk as indispensable. These courts reason that, if negligence law can provide sufficient incentive to prevent the risk of harm, "who needs strict liability?" Second, the real effect of section 520(c) is bolstered by a variety of negligence doctrines such as negligence per se, *res ipsa loquitur*, and care commensurate with risk, which in the aggregate serve to reduce even further those situations where negligence law might be inadequate. Finally, by describing the relevant "activity" with a degree of generality and before the injury takes place, and by not addressing "substances" themselves, the courts have clearly decreased the probability that a plaintiff will prevail on the issue of section 520(c).

#### 7. *The Immunity Conundrum Demands Reliance on Section 520(c)*

A last consideration explains why the controlling inquiry in nearly all cases is whether the risks of the activity can be prevented by the exercise of reasonable care. Let us assume that a plaintiff maintains that an activity, call it activity *x*, is subject to strict liability under sections 519 and 520. What options are available to the court regarding the applicable liability rule? The first option, and the one most often exercised, is to hold that the negligence system can function to eliminate or reduce the risks of the activity to acceptable levels. In most cases, as is shown above in Parts III.B and III.C, the court concludes that it is not impossible for the plaintiff to proceed with a negligence theory. Even though a negligence claim may not prevail on the merits, the courts point to the nature of the activity itself and the resultant harm, holding that the purpose of tort law is adequately served by the application of negligence principles. But what happens if the court concludes that the negligence system cannot operate to reduce the risks of this activity sufficiently? If the court resolves section 520(c) favorably to the plaintiff, can the court nevertheless reject a strict liability finding because of the impact of the other factors under section 520? Stated differently, which party should

be made to bear the cost of the “unavoidable accident” in the context of an abnormally dangerous activity? In my view, the only acceptable answer in an enlightened and just society is that the party engaged in the activity causing the harm must compensate its victim. To rule otherwise would essentially confer tort immunity to a private actor or activity. This would be a strange rule indeed. Apart from governmental immunities or congressionally-conferred narrow immunities (as in the operation of nuclear energy plants), modern courts do not invoke judicially-created immunities for private enterprises causing harm, regardless of the benefits to the community that undertaking the activity might generate.

Nineteenth century and some earlier twentieth century courts were not embarrassed by protecting an activity or enterprise from tort liability,<sup>262</sup> but no self-respecting contemporary court would do so. What this means is that the court, having ruled out negligence liability *must not also* reject strict liability. This realization leads to an important observation concerning the analysis of the other factors in section 520. Having found that section 520(c) cuts in the plaintiff’s favor, the court should have little or no leeway in applying the other factors. Stated more bluntly, once the court rejects recovery under the negligence regime, the court should be obliged to render whatever post-hoc rationalizations it deems advisable to support the imposition of strict liability. I believe that the immunity conundrum in essence forces courts in one of two directions. First, the court can apply any doctrines of the law of negligence that might fit the case (whether or not raised by the parties or the record in the case)—in which case strict liability does not apply per the proviso of section 520(c). Alternatively, once recovery is denied under a negligence regime, the court should find that strict liability governs, making whatever findings are essential along the way under sections 520(d), (e), and (f).

Is there any escape from the conundrum besides recognizing an immunity? Yes. In some cases, the court might conclude that the law of trespass or nuisance could rescue the plaintiff and avoid immunity for defendant’s activity. Therefore, the correct statement of my proposed rule would be this: If a court finds that the risks of the activity are not preventable or are not capable of substantial reduction by the exercise of reasonable care, and if negligence cannot be shown in any form, and if *no other basis of liability can be found* (e.g., trespass or nuisance), then the court should simply find the activity to be abnormally dangerous. Under such a rule, two results follow: First, the court will not reject all

---

262. Examples would include cases involving immunity for a charitable organization.

theories of liability (because it cannot). Second, the *only* factor under section 520 that really matters is section 520(c).

*D. The Risk of Harm: Clauses (a) and (b)*

In this section I look briefly at how the courts have applied section 520(a) and (b). The comments to section 520 evidence an intent that the sections interplay so that a small probability of great harm could yield the finding of an abnormally dangerous activity (e.g., Three Mile Island) or, alternatively, a higher probability of significant, but lesser, harm could produce the same conclusion (e.g., fireworks display). There is no question that many of the decisions actually finding SLADA involve highly dangerous activities pursuant to the Restatement (Second) formula (such as the use of explosives, the impounding of 500 million gallons of phosphate, or the disposal of hazardous substances containing mercury into a sensitive estuary). But not all of the decisions are so obvious because they involve activities that to a lay person simply do not conjure up a sense of excessive danger. For example, is crop dusting really highly dangerous? The following discussion considers a small sample of those cases which explicitly address factors (a) and (b) of section 520.

First of all, one looks in vain for a decision that sustains SLADA that doesn't treat factors (a) and (b) as essential, not merely "factors" or "considerations." After all, the title "abnormally dangerous" clearly connotes some level of risk not normal or usual. Clauses (a) and (b) address that concern directly rather than obliquely as is done in Clause (e) (concerning locational appropriateness). As is shown below, although some courts have upheld a SLADA claim despite the absence of clauses (d), (e), or (f), no court in my research ever did so in the face of a negative determination pursuant to clauses (a) and (b). Moreover, these considerations were not "factors" in the First Restatement—they were required elements. So, courts were obviously accustomed to regarding them as obligatory.

In the cases found, the discussions of the risks posed by the activity are typically brief and are highly conclusory. Thus, "to explode [fireworks] in the presence of large crowds of people, a high risk of serious personal injury or property damage is created."<sup>263</sup> But is that conclusion so obvious? The court offers no record evidence to support

---

263. Klein v. Pyrodyne Corp., 810 P.2d 917, 920 (Wash. 1991) (en banc).

that proposition, and another court, on similar facts, reached precisely the opposite finding.<sup>264</sup> On the other hand, in *Klein*, the Washington Supreme Court cited an elaborate scheme of administrative regulations applicable to pyrotechnicians as support for the finding of the dangerousness of the activity.<sup>265</sup>

A Florida court held that the impoundment of billions of gallons of phosphate slime behind earthen dams (in connection with a phosphate mining operation) was abnormally dangerous.<sup>266</sup> The court focused on the magnitude of the danger and discounted all of the other factors, writing,

In the final analysis, we are impressed by the *magnitude of the activity and the attendant risk of enormous damage*. The impounding of billions of gallons of phosphatic slimes behind earthen walls which are subject to breaking even with the exercise of the best of care strikes us as being both "ultrahazardous" and "abnormally dangerous," as the case may be.

This is not clear water which is being impounded. Here Cities Service introduced water into its mining operation which when combined with phosphatic wastes produced a phosphatic slime which had a high potential for damage to the environment. If a break occurred, it was to be expected that extensive damage would be visited upon property many miles away. In this case, the damage, in fact, extended almost to the mouth of the Peace River, which is far beyond the phosphate mining area described in the Cities Service affidavit. We conclude that the Cities Service slime reservoir constituted a non-natural use of the land such as to invoke the doctrine of strict liability.<sup>267</sup>

In this decision it is the magnitude of the risk that compelled the court to apply strict liability, this factor dwarfing all others. But the court also relied on the fact that that risk could not be contained even with the best of care, thereby adding as support for the decision factors (a), (b), and (c). At that point, the other factors apparently became largely irrelevant.

Some courts attempt to sum up the whole theory of SLADA in a few phrases that capture the essence of all six factors. For example, the Oregon Supreme Court declared,

We have come to the conclusion that when an activity is extraordinary, exceptional, or unusual, considering the locality in which it is carried on; when there is a risk of grave harm from such abnormality; and when the risk cannot be eliminated by the exercise of reasonable care, the activity should be classed as abnormally dangerous.<sup>268</sup>

Here the court concluded that operation of a service station was not

---

264. See *Cadena v. Chicago Fireworks Mfg. Co.*, 697 N.E.2d 802, 814-15 (Ill. App. Ct. 1998).

265. See *Klein*, 810 P.2d at 920-21.

266. See *Cities Serv. Co. v. State*, 312 So. 2d 799, 803 (Fla. Dist. Ct. App. 1975).

267. *Id.* at 803 (emphasis added).

268. *Hudson v. Penny Oil Co.*, 566 P.2d 175, 177 (Or. 1977) (quoting *McLane v. Northwest Natural Gas*, 467 P.2d 635, 637-38 (Or. 1970)).

“extraordinary, exceptional, or unusual” and harm to be anticipated from underground seepage was not “grave.”<sup>269</sup>

A survey of cases analyzing factors (a) and (b) reveals little consistency. The Fifth Circuit concluded that storage of anhydrous ammonia was not abnormally dangerous because it is poisonous only in large concentrations, so the likelihood that storage would lead to great harm was “small,” thereby not qualifying as an abnormally hazardous activity under factors (a) and (b).<sup>270</sup> By contrast, the Washington Supreme Court in *Langan v. Valicopters Inc.*<sup>271</sup> and *Siegler v. Kuhlman*<sup>272</sup> evidenced greater awareness of the dangers inherent in crop dusting and in the transporting of 5000 gallons of gasoline by truck, relying in both cases on both record evidence and judicially noticed facts. Thus, in *Langan*, the Court wrote,

Whether there will be great harm depends upon what adjoining property owners do with their land. For example, one property owner may grow wheat (a narrow-leaved crop) and his neighbor may grow peas (a broad-leaf crop). The wheat farmer may wish to spray his crop with the chemical herbicide (weed killer) 2,4-D, which kills only broad-leaved plants. If the 2,4-D drifts onto the pea farmer's property, his entire crop could be destroyed since peas are broad-leaved plants. . . .

As the present case illustrates, it is economically damaging for an organic farmer who is a member of NOFPA to apply non-organic materials to his crops because he would lose the association's certification. There was substantial evidence before the trial court that, once an organic farmer loses his certification, it is highly unlikely that he will be able to sell his crops on the regular commercial market due to his failure to enter into contracts with commercial produce buyers before the season begins, and, even if he could sell his crops to a commercial produce buyer, the farmer would be unable<sup>273</sup> to command as high a price for his goods as he could on the organic market.

---

269. *Id.* at 178.

270. *See Sprankle v. Bower Ammonia & Chem. Co.*, 824 F.2d 409, 415-16 (5th Cir. 1987) (applying Mississippi law).

271. 567 P.2d 218 (Wash. 1977) (en banc).

272. 502 P.2d 1181 (Wash. 1973) (en banc).

273. *Langan*, 567 P.2d at 222 (citations omitted); *see also Siegler*, 502 P.2d at 1187. The *Siegler* court painted a picture based largely on general community knowledge, writing,

Contrast, however, the quiet, relatively safe, routine procedure of installing and maintaining and using underground water mains . . . with the activity of carrying gasoline as freight in quantities of thousands of gallons at freeway speeds . . . through cities and towns and on secondary roads in rural districts. In comparing the quiescence and passive job of maintaining underground water mains with the extremely heightened activity of carrying nearly 5,000 gallons of gasoline by truck, one cannot escape the conclusion that hauling gasoline as cargo is undeniably an abnormally dangerous activity

In its analysis here the court cited a chemistry treatise, a law review article, judicial decisions, and record evidence—all to arrive at its disposition with regard to factor (b).<sup>274</sup> The Washington Supreme Court's willingness to go beyond judicially noticed generalities is extraordinary indeed. The vast majority of opinions do nothing even approaching that degree of analysis.

Consider also the New Jersey Supreme Court case of *Department of Environmental Protection v. Ventron Corp.*<sup>275</sup> In considering the dangerousness of disposal of mercury-laden wastes, the court cited reports to the U.S. Congress as well as law review articles, both of which recognized that the disposal of toxic wastes could cause substantial environmental harms.<sup>276</sup> Based on these authorities, the court concluded that "mercury and other toxic wastes are 'abnormally dangerous,' and the disposal of them, past and present, is an abnormally dangerous activity."<sup>277</sup> Likewise, a Wisconsin appeals court looked to various letters from the state environmental agency to support its finding that the placement of volatile organic compounds (commonly called "VOCs") in a municipal landfill created a likelihood of great harm.<sup>278</sup> By contrast, the Illinois Supreme Court, in affirming the lower courts' holdings that pile driving under the Chicago River was not abnormally dangerous, merely quoted another opinion which distinguished blasting from pile driving,<sup>279</sup> undertaking itself no independent scrutiny of the activity based on the record evidence.

---

and on its face possesses all the factors necessary for imposition of strict liability as set forth in the Restatement (Second) of Torts § 519 (Tent. Draft. No. 10, 1964), above.

Transporting gasoline as freight by truck along the public highways and streets is obviously an activity involving a high degree of risk; it is a risk of great harm and injury; it creates dangers than cannot be eliminated by the exercise of reasonable care. That gasolines cannot be practicably transported except upon the public highways does not decrease the abnormally high risk arising from its transportation.

*Siegler*, 502 P.2d at 1187.

274. See *Siegler*, 502 P.2d at 1185-87.

275. 468 A.2d 150 (N.J. 1983).

276. See *id.* at 159-60 (citing Staff of Senate Comm. on the Envtl & Pub. Works, 97th Cong., Special Report on INJURIES AND DAMAGES FROM HAZARDOUS WASTES—ANALYSIS AND IMPROVEMENT OF LEGAL REMEDIES IN COMPLIANCE WITH SECTION 301(E) OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE COMPENSATION AND LIABILITY ACT OF 1980 (Comm. Print 1982). See also W. Stopford & L.J. Goldwater, *Methylmercury in the Environment, A Review of Current Understanding*, 12 ENVTL. HEALTH PERSP., 115, 115-18 (1975); J. Zazzali & F. Grad, *Hazardous Wastes: New Rights and Remedies?*, 132 SETON HALL L. REV. 446, 449 n.112 (1983).

277. *Ventron*, 468 A.2d at 160.

278. See *Fortier v. Flambeau Plastics Co.*, 476 N.W.2d 593, 605 (Wis. Ct. App. 1991).

279. See *In re Chicago Flood Litig.*, 680 N.E.2d 265, 280 (Ill. 1997).

The central point to discern from these decisions is that the judicial analysis of factors (a) and (b) is usually not illuminating. Such decisions are typically devoid of record evidence, and are generally based largely on judicial notice of community knowledge. Moreover, in very few cases, apart from the typical blasting and explosive cases, is the consideration of factors (a) and (b) dispositive. Rather, it is section 520(c) once again that controls the judicial determination of whether an activity is abnormally dangerous.

### *E. Common Usage and Locational Appropriateness*

Clauses (d) and (e) of section 520 have also served to circumscribe the scope of liability, but have not had nearly the impact of section 520 (c). As we saw earlier, Prosser was extremely anxious to reincorporate the non-natural user principle of *Rylands* into the black letter rule, and he did so in section 520(e). He also retained the common usage test that Bohlen had formulated. A sampling of decisions shows genuine consideration of the location of the activity, but, as a general rule, neither the common-usage factor nor the locational-setting factor is outcome determinative.<sup>280</sup>

Consider first the cases dealing with underground storage tanks. In *Yommer v. McKenzie*,<sup>281</sup> for example, Maryland's highest court ruled that a service station's placement of underground storage tanks in close proximity to residential water wells did create strict liability under section 520.<sup>282</sup> The court wrote,

The fifth and perhaps most crucial factor under the Institute's guidelines as applied to this case is the appropriateness of the activity in the particular place where it is being carried on. No one would deny that gasoline stations as a rule do not present any particular danger to the community. However, when the operation of such activity involves the placing of a large tank adjacent to a well from which a family must draw its water for drinking, bathing and laundry, at

---

280. See *Yommer v. McKenzie*, 257 A.2d 138 (Md. 1969); see also *Tutu Wells Contamination Litig.*, 846 F. Supp. 1243 (D.V.I. 1993). The court in *Tutu Wells* wrote,

It may well be, as Defendants contend, that operation and ownership of service stations is a matter of common usage and that it is not unusual today to find service stations in residential areas. But where, as here, the risk of seepage is contamination of the area's precious and limited water supply, locating the storage tanks above the aquifer created an abnormally dangerous and inappropriate use of the land.

*Id.* at 1269.

281. 257 A.2d 138 (Md. 1969).

282. See *id.* at 140-42.

least that aspect of the activity is inappropriate to the locale, even when equated to the value of the activity.<sup>283</sup>

As pointed out in Part III.B, a number of decisions involving underground storage tanks decided subsequent to *Yommer* have held that reasonable precautions could have prevented their leakage, thereby avoiding the application of strict liability.<sup>284</sup> Moreover, a Maryland appellate court itself narrowly interpreted *Yommer* in a later toxic contamination case, emphasizing its concern over placing onerous burdens on landowners.<sup>285</sup> In contrast, the Kansas Supreme Court held that the drilling and operation of natural gas wells is not abnormally dangerous because the operation of wells in “the Hugoton Gas Field is a ‘matter of common usage’ and is an appropriate activity for the place it is carried on—i.e., it does not constitute a ‘non-natural use’ of the land.”<sup>286</sup> So, too, a Pennsylvania court held that the storage of a highly toxic pesticide was a matter of common usage, and hence was not an abnormally dangerous activity, relying on the testimony that four million of thirty-six million acres of U.S. farmland treated with any pesticide were treated with Thimet.<sup>287</sup>

How about fireworks? An Illinois appellate court held that “under

---

283. *Id.* at 140. The court gave almost no consideration to factor (c) other than to say that “it is proper to surmise that this risk cannot, or at least was not, eliminated by the exercise of reasonable care.” *Id.*

284. *See, e.g.,* *Arlington Forest Assoc. v. Exxon Corp.*, 774 F. Supp. 387, 391 (E.D. Va. 1991); *Hudson v. Peavey Oil Co.*, 566 P.2d 175, 178 (Or. 1988); *Smith v. Weaver*, 665 A.2d 1215, 1219-20 (Pa. Super. Ct. 1995); *Walker Drug Co. v. La Sal Oil Co.*, 902 P.2d 1229, 1233 (Utah 1995); *Grube v. Daun*, 570 N.W.2d 851, 856-57 (Wis. 1997). Unlike archetypical abnormally dangerous activities such as blasting, there is no evidence to suggest “that the risk of seepage [from USTs] cannot be eliminated by the exercise of reasonable care, or that the harm to be anticipated from the underground seepage of gasoline is ‘grave.’” *Hudson*, 566 P.2d at 178; *see also Smith*, 665 A.2d at 1220 (stating that “[g]asoline and other petroleum products can be stored and dispensed safely with reasonable care”); *Walker Drug*, 902 P.2d at 1233 (stating that “we are not convinced that the risk cannot be eliminated by the exercise of reasonable care”); *Grube*, 570 N.W.2d at 857. The *Walker Drug* court stated,

Absent negligence or application of an outside force, use of a UST does not create a high degree of risk of harm to the person, land or chattels of another.

Moreover those risks that do exist can be minimized by the exercise of reasonable care by the owner or possessor of the tank.

Perhaps because reasonable care will typically guard against any harm that USTs may inflict, “the storage of [gasoline] in tanks is a common use and is valuable to a modern society.” *Smith*, 665 A.2d at 1220; *see also Walker Drug*, 902 P.2d at 1233 (stating “the operation of a gas station is common, appropriate, and of significant value to the community”); *Arlington Forest*, 774 F. Supp. at 391 (holding that gasoline stations fulfill essential transportation needs in modern society).

285. *See Rosenblatt v. Exxon Corp.*, 642 A.2d 180 (Md. 1994) (refusing to apply strict liability to relationships between successive owners of the same property).

286. *Williams v. Amoco Prod. Co.*, 734 P.2d 1113, 1123 (Kan. 1987).

287. *See Diffenderfer v. Staner*, 722 A.2d 1103, 1108 (Pa. Super. Ct. 1998).



factor (d), while displaying fireworks is not a common activity undertaken by a large amount of individuals, certainly many individuals view them and many municipalities display fireworks. Thus, fireworks displays *are* a matter of common usage.”<sup>288</sup> Although the Washington Supreme Court in *Klein v. Pyrodyne Corp.*<sup>289</sup> held to the contrary as to the common-usage issue, the point is that the common usage factor did not represent the controlling consideration. And in each case the court concluded that the fireworks display *was* conducted at an appropriate location.<sup>290</sup>

The Alaska Supreme Court held that storage of 80,000 pounds of explosives in a suburban area was inappropriately located, despite the fact that storage took place on land designated for that purpose by the United States government, because the population of the area had grown since the designation.<sup>291</sup> But a New Mexico court of appeals rejected that view, holding that the storage of explosives, as opposed to blasting, was not inappropriately located, despite being placed near electrical boxes.<sup>292</sup>

We saw earlier that some courts (particularly in New Jersey) have held that disposal of hazardous wastes constituted an abnormally dangerous activity, placing emphasis on the dangerousness of waste disposal in general and the location of the defendant’s specific activities in particular.<sup>293</sup> By contrast, a Wisconsin appeals court, focusing on the degree of knowledge of the dangers posed by disposal of hazardous materials at a landfill, concluded that “depositing compounds containing VOCs at the landfill was a matter of common usage.”<sup>294</sup> Indeed, when the defendants continued to deposit such materials after regulations

288. *Cadena v. Chicago Fireworks Mfg. Co.*, 697 N.E.2d 802, 814 (Ill. App. Ct. 1998).

289. 810 P.2d 917 (Wash. 1991) (en banc). The court wrote, Pyrodyne argues that the factor stated in clause (d) is not met because fireworks are a common way to celebrate the 4th of July. We reject this argument. Although fireworks are frequently and regularly enjoyed by the public, few persons set off special fireworks displays. Indeed, the general public is prohibited by statute from making public fireworks displays insofar as anyone wishing to do so must first obtain a license.

*Id.* at 921.

290. *Klein*, 810 P.2d at 921 (holding that fairgrounds are appropriate places for fireworks displays); *Cadena*, 697 N.E.2d at 814 (same).

291. *See Yukon Equip., Inc. v. Fireman’s Fund Ins. Co.*, 585 P.2d 1206, 1210 (Alaska 1978).

292. *See Otero v. Burgess*, 505 P.2d 1251, 1254 (N.M. Ct. App. 1973).

293. *See, e.g., Department of Env’tl. Protection v. Ventron Corp.*, 468 A.2d 150 (N.J. 1983); *see also T&E Indus. v. Safety Light Corp.*, 587 A.2d 1249 (N.J. 1991).

294. *Fortier v. Flambeau Plastics Co.*, 476 N.W.2d 593, 607 (Wis. Ct. App. 1991).

made it unlawful to do so, it was still deemed “part of a common usage.”<sup>295</sup> However, because the landfill license did not permit such disposal, “the companies’ use of the landfill was inappropriate to the place it was carried on.”<sup>296</sup>

And finally, how about the impoundment of billions of gallons of phosphate slime behind earthen walls in connection with the mining of phosphate rock? Clearly the earthen walls could break—even with the best of care—and thereby cause extensive damage to property located even miles away. The Florida court upheld strict liability because of the scale of the activity and the magnitude of its attendant risk, despite accepting defendant’s contention that the activity was a suitable use of the specific land chosen for such activity.<sup>297</sup>

The preceding discussion points to one conclusion: Liability does not rise or fall on common usage or locational suitability; rather the cases are “all over the map” with regard to these factors.

#### F. *Value of the Activity to the Community*

As we have already seen, some commentators have been especially hostile toward the inclusion of section 520(f) in the definition of abnormally dangerous activities. The cases are mixed. Judge Posner in *Indiana Harbor Belt*<sup>298</sup> makes virtually no mention of clause (f), and one is left with the impression that perhaps he too regards it as superfluous to the analysis. Because in his view the inability to prove negligence is dominant to the inquiry, Posner may never have felt the need to address clause (f).

Few cases discuss clause (f) in any depth, and, when discussed, the weighing of “value” reflects more a matter of judicial notice than factual analysis. For example, the Pennsylvania Superior Court simply summarily declared that gasoline service stations are “valuable to modern society,”<sup>299</sup> a statement that seems nothing more than a truism. Another Pennsylvania decision was equally unenlightening, simply announcing that the community value of a reservoir outweighed its

---

295. *Id.*

296. *Id.* at 607-08.

297. *See* *Cities Serv. Co. v. State*, 312 So. 2d 799, 801 (Fla. Dist. Ct. App. 1975).

298. *Indiana Harbor Belt R.R. v. American Cyanamid Co.*, 916 F.2d 1174 (7th Cir. 1990).

299. *Smith v. Weaver*, 665 A.2d 1215, 1220 (Pa. Super. Ct. 1995) (finding underground storage tanks not an abnormally dangerous activity); *see* *Walker Drug Co. v. LaSal Oil Co.*, 902 P.2d 1229, 1233 (Utah 1995) (stating that a gas station is “of significant value to the community”); *Grube v. Daun*, 570 N.W.2d 851, 857 (Wis. 1997) (stating, “at the time the allegedly hazardous activity took place, the value to the community of having USTs was believed to outweigh any danger from their use”).

dangerous attributes.<sup>300</sup> The Rhode Island Supreme Court, in a case involving the release of asbestos fibers as part of a building demolition and cleanup project, reached a similar conclusion, writing,

Finally, and perhaps most importantly, the value to the community of Certified's activities far outweighed its dangerous attributes. "[C]leanup operations serve the valuable and essential social function of *reducing* the danger" of potentially harmful substances such as asbestos. Therefore, public policy, as well as the other factors listed in Restatement (Second) of Torts § 520, support our conclusion that Certified<sup>301</sup> could not on the facts present in this case be held strictly liable for its activities.

A federal district court in Kansas, where landowners sought to recover cleanup costs associated with contamination resulting from defendant's use of solvents to degrease metal parts used in the manufacture of small planes, invoked an incredibly broad sense of public value in dismissing the strict liability count, writing,

PMC's manufacturing activities are indispensable to the economy of Wichita. Metal fabrication is a necessary part of the manufacturing process of airplanes. The aviation industry employs tens of thousands of workers in Wichita. The location of PMC's activities was appropriate. They were carried on in an industrialized area of Wichita, Kansas.<sup>302</sup>

The Illinois Supreme Court in *In re Chicago River Flood Litigation*,<sup>303</sup> an action brought against the city of Chicago and contractors for flooding damage under the Chicago River, affirmed the lower courts' decisions that pile driving and the maintenance of the tunnel works under the riverbed were not abnormally dangerous activities.<sup>304</sup> The court described the community utility of such activities, writing,

Regarding the sixth factor, the appellate court correctly noted that the Loop is accessible only by many of the bridges that link it with the rest of the city, and that the piling replacement project was necessary to maintain the bridges as part of the public transportation system. The appellate court also correctly

300. See *Albig v. Municipal Auth.*, 502 A.2d 658 (Pa. Super. Ct. 1985); see also *Cadena v. Chicago Fireworks Mfg. Co.*, 697 N.E.2d 802, 815 (Ill. App. Ct. 1998) (stating that the "value of fireworks displays to the community does . . . outweigh their dangerous attributes" with no explanation).

301. *Splendorio v. Bilray Demolition Co.*, 682 A.2d 461, 466 (R.I. 1996) (citation omitted); accord *Ganton Techs., Inc. v. Quadion Corp.*, 834 F. Supp. 1018, 1020-21 (N.D. Ill. E.D. 1993) (holding that cleanup of PCBs from an industrial site is not an abnormally dangerous activity that warrants the application of strict liability because of its importance to the community).

302. *Greene v. Product Mfg. Corp.*, 842 F. Supp. 1321, 1327 (D. Kan. 1993).

303. 680 N.E.2d 265 (Ill. 1997).

304. See *id.* at 281.

noted that “the management of underground tunnels [specifically, we note, tunnels under riverbeds] to move freight, transport commuters, house utility lines, and disperse waste is a necessary urban activity.”<sup>305</sup>

Finally, a Wisconsin court, in considering contamination of water wells from a landfill at which defendants had deposited VOCs (which after 1969 violated regulatory standards), concluded that the activity was not abnormally dangerous because “[t]he fact remains . . . that after 1969 the value to the community of the use of the landfill for VOC-waste continued as before to outweigh its dangerous attributes.”<sup>306</sup> That conclusion appeared to be based on the fact that the landfill continued to accept waste from all sources (commercial and household) and served a population exceeding 12,000.<sup>307</sup> At least here the court relied on record evidence in making its finding under section 520(f).

These few statements demonstrate the futility of requiring courts to render a finding regarding the value of the activity to the community and regarding whether such value outweighs the danger of the activity. The statements are of such generality, usually without support in the record, that there appears little justification for their inclusion in the analysis. What is also evident from the decisions is that rarely, if ever, is the analysis or conclusion under section 520(f) determinative of the outcome. Perhaps that was the point Keeton, Fleming, and others made at the ALI proceedings in 1964 in opposing the inclusion of factor (f). Years ago courts offered much more spirited defenses of industry to defeat strict liability, rather than the bland, innocuous statements typically offered in connection with the consideration of factor (f).<sup>308</sup>

---

305. *Id.*

306. *Fortier v. Flambeau Plastics Co.*, 476 N.W.2d 593, 608 (Wis. Ct. App. 1993).

307. *See id.*

308. *See, e.g., Rose v. Socony-Vacuum Corp.*, 173 A. 627 (R.I. 1934). Factually, *Rose* involved a claim for damages by Rose against a neighboring oil refinery arising from the refinery’s contamination and pollution of subsurface waters under its land. The refinery’s contaminated and polluted subsurface waters had seeped under an adjoining refinery roadway and then into the water supply on Rose’s nearby land that was used by Rose not only for domestic purposes but also for his farm business that included a piggery and hennery. Despite proving contamination of his subsurface waters and that he had to obtain water from other sources for his domestic wants and that he had lost 136 hogs and 700 hens, and thereby the ability to continue at his farm business, this state supreme court in 1934 disposed of his claim by stating,

It will be observed that in jurisdictions holding that, even though there is no negligence, there is liability for the pollution of subterranean waters, the predominating economic interest is agricultural.

Defendant’s refinery is located at the head of Narragansett Bay, a natural waterway for commerce. This plant is situated in the heart of a region highly developed industrially. Here it prepares for use and distributes a product which has become one of the prime necessities of modern life. It is an unavoidable incident of the growth of population and its segregation in restricted areas that individual rights recognized in a sparsely settled state have

Many recent decisions suggest that factor (f) will continue to be largely irrelevant. For example, in *Green v. Ensign-Bickford Co.*<sup>309</sup> a case involving damage resulting from an explosives manufacturer's experimentation with a highly explosive chemical, the court did hold that such experimentation was an ultrahazardous activity.<sup>310</sup> It reasoned that "[t]he record is devoid of facts to satisfy this [factor]," and, since "all six factors do not need to be satisfied," it could find the activity abnormally dangerous without ever making a value-determination under factor (f).<sup>311</sup> Likewise, the New Jersey Supreme Court in *Department of Environmental Protection v. Ventron Corp.*<sup>312</sup> made only a cursory and oblique reference to section 520(f), commenting,

We recognize that one engaged in the disposing of toxic waste may be performing an activity that is of some use to society. Nonetheless, "the unavoidable risk of harm that is inherent in it requires that it be carried on at his peril, rather than at the expense of the innocent person who suffers harms as a result of it."<sup>313</sup>

This statement too is full of truisms. Perhaps the court is really saying that, whatever community value may be associated with dumping mercury-laden wastes into a waterway, that value is irrelevant to strict enterprise liability for dangerous activities. That interpretation finds support in *T&E Industries v. Safety Light Corp.*<sup>314</sup> Here the same court discussed the lack of common usage and locational appropriateness in the dumping of radium tailings, but never cited section 520(f) nor considered the value to the community, but instead recited, at some length, the principle of enterprise responsibility.<sup>315</sup> It is quite clear that

---

to be surrendered for the benefit of the community as it develops and expands. If, in the process of refining petroleum, injury is occasioned to those in the vicinity, not through negligence or lack of skill or the invasion of a recognized legal right, but by the contamination of percolating waters whose courses are not known, we think that public policy justifies a determination that such harm is *damnum absque injuria*.

*Id.* at 631-32.

309. 595 A.2d 1383 (Conn. App. Ct. 1991).

310. *See id.* at 1386-87.

311. *Id.* at 1388.

312. 468 A.2d 150 (N.J. 1983).

313. *Id.* at 160 (quoting RESTATEMENT (SECOND) OF TORTS § 520 cmt. h (1977)).

314. 587 A.2d 1249 (N.J. 1991). *See also In re Tutu Wells Contamination Litig.*, 846 F. Supp. 1243, 1270 (D.V.I. 1993) (concluding that "the community's interest in a clean water supply far outweighs the benefits of the service stations to the community").

315. *See T&E Indus.*, 587 A.2d at 1257. The court wrote,

The rule reflects a policy determination that such "enterprise[s] should bear the costs of accidents attributable to highly dangerous [or unusual

whatever value to the community might have been assigned to defendant's activities, that factor would not have influenced the court's holding one iota.

Some courts dispose of clause (f) by simply interpreting its relevance very narrowly. Consider, for example, the Alaska Supreme Court case of *Yukon Equipment, Inc. v. Fireman's Fund Insurance Co.*<sup>316</sup> While articulating a preference for the First Restatement formulation over the Restatement (Second) (in the context of the storage of explosives), the Court interpreted section 520(f) to refer to only those situations where "the dangerous activity is the primary economic activity of the community."<sup>317</sup> Recall in this regard that Prosser himself pointed to oil drilling in Texas as an example of an activity possessing significant value to the community,<sup>318</sup> an illustration that perhaps supports the Alaska court's interpretation of section 520(f).

The analysis of the Washington Supreme Court in *Langan v. Valicopters, Inc.*,<sup>319</sup> a crop dusting case holding that the activity was abnormally dangerous, contains the most direct criticism concerning the "value" factor. The court wrote,

As a criterion for determining strict liability, this factor has received some criticism among legal writers. . . . [T]he authors suggest that § 520(f) is not a true element of strict liability: "The justification for strict liability, in other words, is that useful but dangerous activities must pay their own way."

There is no doubt that pesticides are socially valuable in the control of insects, weeds and other pests. They may benefit society by increasing production. Whether strict liability or negligence principles should be applied amounts to a balancing of conflicting social interest [of] the risk of harm versus the utility of the activity. In balancing these interests, we must ask who should bear the loss caused by the pesticides.

In the present case, the Langans were eliminated from the organic food market for 1973 through no fault of their own. If crop dusting continues on the adjoining property, the Langans may never be able to sell their crops to organic food buyers. Appellants, on the other hand, will all profit from the continued application of pesticides. Under these circumstances, there can be an equitable balancing of social interests<sup>320</sup> only if appellants are made to pay for the consequences of their acts.

These sentiments mirror the views of Page Keeton, who criticized Prosser and the Restatement (Second) for incorporating this

---

activities]." Because some conditions and activities can be so hazardous and of "such relative infrequent occurrence," the risk of loss is justifiably allocated as a cost of business to the enterpriser who engages in such conduct.

*Id.* (citations omitted).

316. 585 P.2d 1206 (Alaska 1978).

317. *Id.* at 1210. The court also concluded that utilizing this factor was "debatable."

*Id.*

318. See RESTATEMENT (SECOND) OF TORTS § 520 cmt. h (1977).

319. 567 P.2d 218 (Wash. 1977) (en banc).

320. *Id.* at 223 (citations omitted).

consideration into the strict liability scheme.

Finally, a substantial number of recent decisions involve courts that have figuratively thrown up their hands over the matter. These cases are totally silent regarding the application of section 520(f) to the facts of the case.<sup>321</sup> In some such cases the courts find no strict liability principally because of section 520(c); in others they apply strict liability to the activity; but in none does the court give any consideration, pro or con, to the activity's value to the community.

It is my conclusion that section 520(f) is rarely outcome determinative on the question of abnormally dangerous activity. The analysis, if any is undertaken, reflects generalities and banalities, offered without any evidence on the issue, these seldom warranting much respect. Keeton's and Fleming's apprehension that this factor would come to dominate the analysis as did the nineteenth century notion of *laissez-faire* has not been borne out. But Prosser's sense that this consideration should play a major role in the determination is also not borne out in the decisions. Rather, section 520(c)—the inability to eliminate the risk with carefulness—has emerged as the dominant factor, normally being by itself outcome determinative. This dominance is particularly common in cases where the court finds that the activity in question is not abnormally dangerous. Moreover, sections 520(d) and (e)—concerning whether the activity is a common usage and is locationally suitable—are afforded a modest level of importance in a few cases, but are rarely determinative of the ultimate finding. Finally, section 520(f) is a wash: it simply does not affect the ultimate decision.

---

321. *See, e.g.* (in chronological order), *Branch v. Western Petroleum, Inc.*, 657 P.2d 267, 274 (Utah 1982) (holding that percolation of oil into neighbor's water supplies was abnormally dangerous; value to community not discussed); *Bunyak v. Clyde Yancey Dairy, Inc.*, 438 So. 2d 891, 894 (Fla. Ct. App. 1983) (holding that dairy farmer's liquid cow manure abnormally dangerous; no discussion of value of activity to community); *Matomco Oil Co. v. Arctic Mechanical, Inc.*, 796 P.2d 1336, 1341 (Alaska 1990) (holding that welding of petroleum tanker not ultrahazardous—risk can be eliminated by due care; value to community irrelevant); *Arlington Forest Assoc. v. Exxon Corp.*, 774 F. Supp. 387, 391-92 (E.D. Va. 1991) (holding that underground storage tanks not abnormally dangerous); *Hagen v. Texaco Ref. & Mktg. Inc.*, 526 N.W.2d 531, 539 (Iowa 1995) (stating that drilling of monitoring wells is not abnormally dangerous; opinion focuses on fact that reasonable care would have prevented harm; value to the community not considered); *Evans v. Mutual Mining Co.*, 485 S.E.2d 695, 702 (W. Va. 1997) (holding company strictly liable for damages suffered by owners when sediment pond maintained by company broke, sending water, mud and debris down mountain onto owner's property; no discussion of section 520(f)); *Clay v. Missouri Highway & Transp. Comm.*, 951 S.W.2d 617, 624 (Mo. Ct. App. 1997) (holding that blasting for highway project subject to strict liability; no discussion of section 520(f)).

#### IV. FINAL THOUGHTS

Had strict liability been subjected to jury control as are findings of negligence, one suspects that its evolution might have been different. Instead, the determination of whether an activity is abnormally dangerous has been characterized as a question of law. Because of that fact, courts have taken considerable liberty in relying on extra-judicial data (typically judicially noticed generalities) in arriving at the ultimate legal conclusion. The decision of whether an activity is a matter of common usage or whether it is being conducted at a suitable place turns not so much on adjudicative facts, but more on legislative or policy judgments. After all, what kind of record evidence could possibly answer these inquiries? Similarly, whether the value of the activity to the community outweighs its dangerousness is an inquiry that only marginally lends itself to traditional fact-finding. The judge has enormous discretion in responding to these questions because she is not bound by the record in the case. That explains why one court finds that, for fireworks displays, the value exceeds the danger, while another court finds just the opposite.<sup>322</sup> It also explains how one court can find the placement of underground storage tanks to be a matter of common usage, while another finds it is not.<sup>323</sup> Moreover, it explains how one court can conclude that blasting is locationally suitable in one case, while most courts historically have found otherwise.<sup>324</sup> My considered opinion is that the factors in section 520 (d), (e), and (f) simply do not guide the analysis but instead are applied to fit the outcome already determined pursuant to section 520(c).

But, of course, the determination in the abstract of whether the risks of an activity are capable of being managed with reasonable oversight is itself another policy-laden determination. Because it reflects a kind of intuitive judgment about community experience, it is not a finding that could be made solely or even primarily on the basis of record evidence (how could a jury answer such a question except by relying on their own experiences outside of the courtroom?). So judges are called upon to

---

322. Compare *Cadena v. Chicago Fireworks Mfg. Co.*, 697 N.E.2d 802, 814-15 (Ill. App. Ct. 1998) (no strict liability for exploding fireworks), with *Klein v. Pyrodyne Corp.*, 810 P.2d 917, 920 (Wash. 1991) (en banc) (automatic strict liability for activity of exploding fireworks).

323. Compare *Grube v. Daun*, 570 N.W.2d 851, 857 (Wis. 1997) (no strict liability for placing storage tanks underground), with *Yommer v. McKenzie*, 257 A.2d 138, 140-42 (Md. 1969) (automatic strict liability for placing storage tank adjacent to drinking well).

324. Compare *Otero v. Burgess*, 505 P.2d 1251, 1255 (N.M. Ct. App. 1973) (no automatic strict liability for activity of storing explosives), with *Exner v. Sherman Power Constr. Co.*, 54 F.2d 510, 514 (2d Cir. 1931).



answer the questions required of them under the Restatement (Second)'s tests. Those answers have increasingly embraced the view that the negligence system by itself can accomplish the proper and desirable results.

