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Strict Tort Liability: Has Abnormal Danger Become a Fact

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COMMENTARY

Strict Tort Liability: Has "Abnormal Danger" Become a Fact?

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Slowly in some areas, more quickly in others, tort law is moving away from the concept of fault as a requisite of liability. Replacing fault is a theory of enterprise liability: losses caused by an enterprise or activity should be borne by that enterprise or activity.[1] It has been suggested that liability without fault should be applied whenever (1) a particular endeavor takes a more or less inevitable accident toll, *and* (2) many of the accident victims are ill-equipped economically to bear their losses.[2] It has also been noted that a system of "strict liability" (*i.e.*, liability without fault) has an advantage of ease in administration.[3]

Historically, tort law has employed strict liability in situations where harm is produced by highly dangerous activities. In addition to the above-stated general grounds for imposing liability without fault, such liability has been considered particularly appropriate in this instance because (1) it is fairer to impose losses on the perpetrator of a highly dangerous enterprise than on the innocent victim,[4] and (2) abnormally dangerous activities frequently destroy, by their very operation, all evidence of the manner in which they were conducted (as in the situation where explosives are intentionally detonated), thus making difficult any determination of fault.[5] Furthermore, strict liability

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[1] Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153 (1976).

[2] *See* James, *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923 (1957). *See also* Comment, *Liability Without Fault: Logic and Potential of a Developing Concept*, 1970 WIS. L. REV. 1201, analyzing the trend over the past seventy years toward strict *criminal* liability, without regard to the actor's state of mind.

[3] *See* Epstein, *A Theory of Strict Liability*, 2 J. LEG. STUDIES 151, 177-89 (1973).

[4] *See* Chavez v. Southern Pac. Transp. Co., 413 F. Supp. 1203 (E.D. Cal. 1976) (said to be consistent with strict liability in products cases); General Tel. Co. v. Bi-Co Pavers, Inc., 514 S.W.2d 168 (Tex. Civ. App. 1974) (one whose activities are accompanied by an extraordinary risk, such as user of explosives, keeper of dangerous animals, or manufacturer of products that are dangerous if defective, has better opportunity to avoid loss than does a potential victim). *Cf.* Galbreath v. Engineering Constr. Corp., 149 Ind. App. 347, 273 N.E.2d 121 (1971) (in products liability, no distinction made between direct and indirect effects; no such distinction should be made in ultrahazardous activity strict liability either).

[5] *See* Siegler v. Kuhlman, 81 Wash. 2d 448, 502 P.2d 1181 (1972), *cert. denied*, 411 U.S. 983 (1973); Peck, *Negligence and Liability Without Fault in Tort Law*, 46 WASH. L. REV. 225,

allows the loss from the dangerous activity to be spread, ultimately, among the general public, who are presumably also the recipients of the activity's benefits.[6]

In recent years, much of the expansion of the theory of strict liability in tort has been in such areas as products liability and/or through such devices as insurance plans, rather than through any growth in the older concept of liability without fault for dangerous activities. But the growth of this last-mentioned area has now received impetus from the adoption of a new *Restatement (Second)* definition of "abnormally dangerous activity,"[7] designed to increase the scope of strict liability;[8] to emphasize the requisite, for such liability, of non-natural or unusual activity;[9] and to add weight, in assessments of an activity's degree of peril, to the factor of the *location* in which the activity is performed.[10]

It has been stated in the past that the determination of what activities are "abnormally dangerous" is a question of law for the court.[11] This is declared to be the continuing rule in the Comments to

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240 (1971). *See generally* Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

[6] *See* Chavez v. Southern Pac. Transp. Co., 413 F. Supp. 1203 (E.D. Cal. 1976) (strict liability imposed partly because activity somewhat antisocial, *and* partly in order to distribute the loss among the public); Comment, *Common Carriers and Risk Distribution: Absolute Liability for Transporting Hazardous Materials*, 67 KY. L.J. 441 (1978-79). *See generally* Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Feezer, *Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases*, 78 U. PA. L. REV. 805 (1930).

[7] RESTATEMENT (SECOND) OF TORTS § 520 (1977) [hereinafter cited as RESTATEMENT]. Section 519 imposes strict liability on abnormally dangerous activities, and section 520 then lists the six factors to be considered in determining abnormal danger: the existence of a high degree of risk to the person or property of others; the likelihood that any resulting harm will be great; the inability to eliminate the risk even by the exercise of reasonable care; the extent to which the activity is not a matter of common usage; the inappropriateness of the activity to the place where it is performed; and the extent to which the activity's value to the community is outweighed by its dangerous characteristics. *See* Wade, *Second Restatement of Torts Completed*, 65 A.B.A.J. 366 (1979). On the difference between "strict liability" as applied to dangerous activities and as applied to defective products, *see* Cova v. Harley Davidson Motor Co., 26 Mich. App. 602, 182 N.W.2d 800 (1970).

[8] *See* Annot., *Applicability of Rule of Strict Liability to Injury from Electrical Current Escaping from Powerline*, 82 A.L.R.3d 218 (1978), noting increased likelihood that transmission of electricity will now be subject to strict liability. *Cf.* Yommer v. McKenzie, 255 Md. 220, 257 A.2d 138 (1969), saying the new *Restatement* definition provides more guidance than did the first *Restatement* on the question of strict liability, and holding strict liability applicable to a gas station near a residence.

[9] RESTATEMENT, *supra* note 7, § 520, Comment *i* on Clause (d) (1977). *See* W. PROSSER, SELECTED TOPICS ON THE LAW OF TORTS 146 (1954).

[10] *See* RESTATEMENT, *supra* note 7, Comment *j* on Clause (e).

[11] Smith v. Lockheed Propulsion Co., 247 Cal. App. 2d 774, 56 Cal. Rptr. 128 (Dist. Ct. App. 1967); Stroda v. State Highway Comm'n, 22 Or. App. 403, 539 P.2d 1147 (1975). *See* Reter v. Talent Irrigation Dist., 258 Or. 140, 482 P.2d 170 (1971).

the new *Restatement*.[12] But it has also been noted that the *Restatement* definition of "abnormally dangerous" points *away* from any notion of rigid categories of activities that are *always* highly dangerous and activities that are *never* highly dangerous.[13] Indeed, the whole process of deciding, under the new *Restatement*, what is extremely dangerous and what is not becomes one of weighing and balancing a considerable number of facts.[14] It is therefore submitted that the *Restatement* itself, and the precedents on which it relies, have transformed determinations of what is "abnormally dangerous" into questions of *fact*.[15] The process of determining strict liability for highly dangerous endeavors involves balancing not only in the initial determination of degree of danger but in the subsequent determination of scope of liability: the strict liability does not extend to harm "that would not have resulted but for the abnormally sensitive character of the plaintiff's activity."[16] Thus, there is clearly a need for establishing and applying community norms as to what is a usual, and an unusual, degree of danger *and* of sensitivity.

Though the *Restatement (Second)* lists, as above noted, a *number* of factors that are to be weighed in deciding what is "abnormally dangerous," cases have tended to give most weight to three elements: the activity is inappropriate to the locale where performed; the activity involves a degree of danger that cannot be eliminated even by the utmost care; and the activity is of an unusual nature. The first of these factors is particularly stressed by the new *Restatement*, while the latter two were the main points of emphasis under the prior *Restatement*. In any case, it is submitted that *all* three elements of "abnormally dangerous" involve questions of fact.

[12] RESTATEMENT § 520, *supra* note 7, Comment *l*, at 42.

[13] *See* RESTATEMENT (SECOND) OF TORTS, Tentative Draft No. 10, § 520, Note to the Institute, at 59 (1964). *Cf.* Langan v. Valicopters, Inc., 88 Wash. 2d 855, 567 P.2d 218 (1977) (essential question is whether risk created is so unusual, either because of its magnitude or because of factors surrounding it, as to justify liability despite exercise of reasonable care; crop-spraying ruled to be abnormally dangerous). *See generally* Note, *Regulation and Liability in the Application of Pesticides*, 49 IOWA L. REV. 135 (1964). *See also* Faust, *Strict Liability in Landowner Cases*, 42 OR. L. REV. 273, 288-89 (1963) (classification should depend on a number of issues, not merely the degree of risk involved).

[14] *See* RESTATEMENT, *supra* note 7, § 520 and Comment *f*.

[15] *See* Comment, *Torts—Strict Liability for Hazardous Use of One's Land*, 4 FLA. ST. L. REV. 304, 310-12 (1976) [hereinafter cited as Comment], suggesting that the distinction between "natural" and "non-natural" uses of property may best be drawn by the trier of fact, and that all the *Restatement* factors may at some point become factual issues.

[16] RESTATEMENT, *supra* note 7, § 524A, at 51. *See id.* Comment *a*; RESTATEMENT § 519 and Comment *e* on subsection (2) (strict liability applies only to harm that is within the scope of the abnormal risk that is the basis of the liability). It is *not* necessary to strict liability under the *Restatement* that defendant be conducting his activity for profit. RESTATEMENT § 520, Comment *d*. Nor that defendant be conducting the activity on his own property. *Id.* Comment *e*.

The location of an allegedly ultrahazardous activity is considered of great importance because strict liability is believed to be justified where an additional risk is created for persons in a particular area by some extraordinary or exceptional activity carried on therein. Thus, a gasoline station may be declared not abnormally dangerous *because* there are other such stations in the same area.[17] Water mains do not give rise to strict liability even when they burst *if* they are of a kind commonly used and if they are appropriately placed.[18] Even blasting has been said to create the possibility of strict liability only when conducted in a populated, as opposed to an isolated, area.[19]

It has been stated that the determination of what is abnormally dangerous *cannot* be made in the abstract: the spraying of a particular chemical becomes highly dangerous, for instance, only if it presents a serious risk to surrounding forms of life.[20] But, if we are *not* to create—in the abstract—categories of "abnormally dangerous activity," and are instead to look at the physical surroundings, then we are clearly looking to, and weighing the importance of, various facts.

Much reliance has also been placed on the inevitability of risk in "abnormally dangerous activities"—that is, the inability to eliminate, even by the exercise of reasonable care, a substantial element of danger. Thus, it has been held that, without regard to other factors, a failure to remove dirt-fill is not abnormally dangerous because risks of slippage, etc., can be controlled by reasonable caution.[21] On the other hand, the impounding of phosphate slimes has been ruled ultrahazardous—despite an appropriate location and despite the value of the

[17] Hudson v. Peavey Oil Co., 279 Or. 3, 566 P.2d 175 (1977).

[18] Pacific Northwest Bell Tel. Co. v. Port of Seattle, 80 Wash. 2d 59, 491 P.2d 1037 (1971).

[19] *See* Robison v. Robison, 16 Utah 2d 2, 394 P.2d 876 (1964). *Cf.* Southwick v. Mullen, Inc., 19 Utah 2d 430, 432 P.2d 56 (1967) (strict liability can apply if foreseeability of danger is great; negligence should apply if likelihood of harm is remote). *See generally* Comment, *Return to Anonymous: The Dying Concept of Fault*, 25 EMORY L.J. 163 (1976).

[20] Bella v. Aurora Air, Inc., 279 Or. 13, 566 P.2d 489 (1977) (aerial spraying found "ultrahazardous" and "abnormally dangerous"—court seems to use terms synonymously). *Cf.* Loe v. Lenhardt, 227 Or. 242, 362 P.2d 312 (1961) (liability based on unintentional trespass caused by abnormally dangerous activity). *See generally* Kennedy, *Liability in the Aerial Application of Pesticides*, 22 S.D.L. REV. 75 (1977).

[21] Nicolai v. Day, 264 Or. 354, 506 P.2d 483 (1973), applying the factors listed in RESTATEMENT, *supra* note 7, § 520, Tentative Draft No. 10 (Apr. 20, 1964). *Cf.* McLoone Metal Graphics, Inc., v. Robers Dredge, Inc., 58 Wis. 2d 704, 207 N.W.2d 616 (1973) (landfilling operation not so risky as to impose strict liability). *See also* Sun Pipe Line Co. v. Kirkpatrick, 514 S.W.2d 789 (Tex. Civ. App. 1974) (spraying a defoliant along easement not inherently dangerous so as to impose liability on defendant for acts of independent contractor, but plaintiff was also held to have waived this theory).

enterprise to the community—largely on the basis that the risk cannot be eliminated by care.[22] Pile-driving would seem similarly dangerous—unless performed in extremely remote regions—so that liability must attach despite the exercise of the utmost care.[23] But questions regarding inability to eliminate risk are clearly ones of *factual* possibilities versus impossibilities.

The final factor that has received emphasis in determining if an activity is "abnormally dangerous" is the unusual nature of the activity. If a practice is usual and normal in present-day society, it is hard to justify classifying it as *abnormally* risky because by definition it is part of everyday life. Thus, the transmission of electricity has been held a routine practice and therefore not ultrahazardous.[24] The same may be true nowadays of the storage of natural gas in pipes or mains.[25] But as with the factor of appropriateness, "common usage" cannot be determined in a vacuum; what is "common" in one locality may be quite extraordinary in another. Thus, the storage of large quantities of natural gas *in a populated area* may be considered abnormally dangerous.[26] This factor of the "unusual" nature of the activity is therefore similar to the appropriateness factor, with locality being important to each. Clearly, again, a community judgment is being made as to the frequency with which an activity can be expected to be encountered.

So many dangers are commonplace in modern society that some courts have shown themselves reluctant to apply such a term as "abnormally dangerous" to any but the very most hazardous activities. A court may refuse to characterize welding with an oxygen-acetylene torch as "inherently dangerous" despite the court's recognition that the welding involves many of the same dangers as blasting, to which strict liability *has* been applied.[27] However, persistent efforts to ex-

[22] Cities Serv. Co. v. State, 312 So. 2d 799 (Fla. App. 1975).

[23] *See* Vern J. Oja & Assoc. v. Washington Park Towers, Inc., 15 Wash. App. 356, 549 P.2d 63 (1976), *aff'd on appeal*, 89 Wash. 2d 72, 569 P.2d 1141 (1977). *Accord* that pile driving is subject to strict liability, Lowry Hill Properties, Inc. v. Ashbach Constr. Co., 291 Minn. 429, 194 N.W.2d 767 (1971); Cincinnati Terminal Warehouses, Inc. v. Contractor, Inc., 324 N.E.2d 581 (Ohio App. 1975).

[24] *See* Bosley v. Central Vermont Pub. Serv. Corp., 127 Vt. 581, 255 A.2d 671 (1969) (reasonable person standard applies to transmission of electricity, with res ipsa sometimes applied against electric companies).

[25] *See* Triple-State Nat. Gas & Oil Co. v. Wellman, 114 Ky. 79, 70 S.W. 49 (1902) (gas in meter); St. Mary's Gas Co. v. Brodbeck, 114 Ohio St. 423, 151 N.E. 323 (1926). *Cf.* Grace & Co. v. City of Los Angeles, 168 F. Supp. 344 (S.D. Cal. 1958), *aff'd*, 278 F.2d 771 (9th Cir. 1960) (water pipe); Midwest Oil Co. v. City of Aberdeen, 69 S.D. 343, 10 N.W.2d 701 (1943) (water main).

[26] McLane v. Northwest Nat. Gas Co., 255 Or. 324, 467 P.2d 638 (1970).

[27] Valley Elec., Inc. v. Doughty, 528 P.2d 927 (Colo. App. 1974) (not officially published). *See generally* Annot., *Liability for Injury or Damage Resulting from Fire Started by Use of*

pand strict liability have been made by plaintiffs' bar and seem certain to continue. The "abnormally dangerous" doctrine allows recovery, despite the reasonableness of the injury-producing activity, merely because "something went wrong" in the performance of the activity, and this doctrine is thus even more liberal toward plaintiffs than the "unreasonably dangerous" concept in strict products liability.[28] Even the passage of time does not necessarily lessen the tendency to characterize a past activity as extraordinarily dangerous.[29] But this still does not mean that the characterization can occur in a vacuum—the locale, and the ability or inability to eliminate serious risk *at that time and place*, must be weighed.

It is true, as recognized in the *Restatement* (*Second*) list of factors, that the value of an activity to society will inevitably enter the picture; that there may be justified reluctance to impose strict liability on certain essential services, such as those offered by utilities; and that courts may arguably be in a better position than jurors to decide what activities are so essential as to enjoy this freedom from strict liability.[30] Two qualifications on the importance of this "essential nature" factor should be noted. First, in some cases this factor has arisen not in connection with a determination of whether an activity is "abnormally dangerous" but with the issue of "privilege"—a long-recognized defense to strict liability enjoyed by those who offer services *specifically authorized by law*.[31] The scope of this defense is quite narrow, however, and in any case, it logically arises only *after* an activity has been found "abnormally dangerous" and thus a potential area of strict liability. Second, on the basic question of "abnormal danger" itself, the size, nature, importance, and resources of the defendant are generally of very limited relevance; it is the *risk* created by defendant's

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Blowtorch, 49 A.L.R.2d 368 (1956) (user of blowtorch may be liable for negligence but is not strictly liable).

[28] *See* McClellan, *Strict Liability for Drug Induced Injuries; An Excursion Through the Maze of Products Liability, Negligence and Absolute Liability*, 25 WAYNE L. REV. 1, 20-21 (1978), noting that absolute liability for abnormally dangerous activities shares with strict products liability a lack of concern for whether the actor's conduct was reasonable in light of foreseeable risks and benefits.

[29] *See* Cavan v. General Motors Corp., 280 Or. 455, 571 P.2d 1249 (1977), applying statute of "ultimate repose" and noting that strict products liability requires only a showing that product was unreasonably dangerous, not that it created an ultrahazardous condition.

[30] RESTATEMENT, *supra* note 7, § 520(f) and Comments *k & l*. *See* Ferguson v. Northern States Power Co., 307 Minn. 26, 239 N.W.2d 190 (1976) (strict liability *could* appropriately be imposed for uninsulated high-voltage electric line but would not be imposed because of severe economic consequences that such a rule would cause small electric utilities in the state). *Cf.* Dye v. Burdick, 262 Ark. 124, 553 S.W.2d 833 (1977) (no strict liability for dam that burst; strict liability might hinder utilization and development of state's natural resources).

[31] *See* W. PROSSER, TORTS 524-25 (4th ed. 1971). *Cf.* Laird v. Nelms, 406 U.S. 797 (1972) (no strict liability possible against United States under Federal Tort Claims Act).

conduct that gives rise to possible strict liability.[32] There *is* also an underlying idea that such liability arises when an "activity or thing is 'out of place' "[33] where the victims are particularly helpless in the face of a danger against which they cannot, and should not, be expected to take adequate precautions, and yet which may cause them overwhelming loss.[34] An activity may be considered less "out of place" in many instances, *e.g.*, if it is essential to the community, but no flat rule is possible because the exact location of the activity and its manner of performance must also be weighed. Similarly, there may be, in general, a greater duty on members of the community to guard against dangers from "essential" services, but the foreseeability of the particular risk that materialized must also be considered.

Social and/or economic value of an activity cannot, standing alone, immunize that activity from strict liability because such liability does not rest solely on the notion that the activity is antisocial but rests also on the rationale that the perpetrator of a highly risky endeavor is in the best position to pass losses on to the general public, who benefit from the activity and who should thus also have to share the costs it inflicts on others. Thus, there is even a tendency to restrict or eliminate the above-mentioned defense of "privilege"—there being, after all, no logical reason under the *loss-spreading* rationale for an exception to strict liability merely because an activity is specifically authorized by law.[35] In any case, the "privilege" question is, as has been noted, an issue that is separable from that of abnormal danger, which concerns immunity, and that is, at best, quite narrow in scope. It *can* be dealt with as a question of law since it basically involves statutory interpretation.[36]

[32] *See* the dissent in Magrine v. Spector, 100 N.J. Super. 223, 232, 241 A.2d 637, 642 (1968), discussing the history of products liability and saying, "Obviously we cannot determine the rule of liability on the basis of the size or resources of one of the parties." *See also* Thorne v. United States, 479 F.2d 804, 808 (9th Cir. 1973) (applying to United States government the rule that employer can be liable for negligence of independent contractor where "instrinsically dangerous" work involved; court says this rule should apply whenever activity carries with it extraordinary hazards to third persons).

[33] *See* Cairl v. City of St. Paul, 268 N.W.2d 908 (Minn. 1978) (strict liability inapplicable to high-speed chases by city police). *Cf.* Dye v. Burdick, 262 Ark. 124, 553 S.W.2d 833, 840 (1977) (dam burst; activity not inappropriate to location where conducted; no strict liability). *See generally* W. PROSSER, TORTS 507-12 (4th ed. 1971).

[34] *See* Pecan Shoppe Inc. v. Tri-State Motor Transit Co., 573 S.W.2d 431 (Mo. App. 1978).

[35] Chavez v. Southern Pac. Transp. Co., 413 F. Supp. 1203 (E.D. Cal. 1976) (no logical reason for a "public duty" exception to strict liability where common carrier was transporting explosives).

[36] *See* Pecan Shoppe Inc. v. Tri-State Motor Transit Co., 573 S.W.2d 431 (Mo. App. 1978) (strict liability inapplicable to motor carrier engaged in lawful transportation of ex-

The determination of "danger," however, is a judgment based on facts—facts that are mostly divorced from questions of social utility. Storage of natural gas in large quantities in a populated area may be socially useful but can still lead to strict liability, even as to a person working on the immediate premises.[37] Indeed, this has been held true despite any state authorization of the activity; the key question is the creation of a serious risk, considering the activity's locale.[38] As in any other area of the law, there will be occasional cases in which there are no questions of fact to be resolved, that is, no factual issues on which reasonable persons could differ. For example, it may be indisputably clear that blasting occurred in a residential area and was thus abnormally dangerous.[39] Or it may be so obvious that water mains are in common and appropriate use in cities, and that the danger of rupture is very slight, that strict liability's requisites can be held by the court to be unmet.[40]

Traditional authority has, however, gone beyond cases in which reasonable persons could not disagree on the degree of danger and has stated in general terms that the propriety of imposing strict liability is *always* a question of law for the court.[41] This has resulted in rather rigid restrictions and categories: the *use* of explosives can lead to strict liability but the *storage* of explosives cannot.[42] Even where the new *Restatement* delineation of strict liability is cited, courts sometimes rely heavily on precedent and therefore rule that an activity such as the discharge of a firearm cannot be classified as ultrahazardous because it never has been so classified in the past.[43] Yet it is also true that the courts have sometimes been *forced* to recognize changes in factual matters underlying the judicially created categories—for instance, the

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plosives where third party's criminal act caused explosion). The *Restatement* recognizes this defense of "privilege" only where defendant is a public officer or employee, or a common carrier, performing a "public duty"; no opinion is expressed as to whether mere legislative authorization or sanction can create "privilege." RESTATEMENT § 521.

[37] *See* McLane v. Northwest Nat. Gas Co., 255 Or. 324, 467 P.2d 638 (1970).

[38] *See id.* at 328-29, 467 P.2d at 638, stressing the importance, under the *Restatement*, of the locale in which an activity is performed, and disapproving a prior case that indicated locale was immaterial.

[39] *See* Balding v. D.B. Stutsman, Inc., 246 Cal. App. 2d 559, 54 Cal. Rptr. 717 (Dist. Ct. App. 1966) (court could find as a fact that blasting occurred in vicinity of dwellings and could thus impose strict liability as a matter of law). *Cf.* Cities Serv. Co. v. State, 312 So. 2d 799 (Fla. App. 1975), discussed in Comment, *supra* note 15 (impounding of phosphate slimes in reservoir held a nonnatural and ultrahazardous use of land in that district of Florida).

[40] *See* Pacific Northwest Bell Tel. Co. v. Port of Seattle, 80 Wash. 2d 59, 491 P.2d 1037 (1971).

[41] *See* Luthringer v. Moore, 31 Cal. 2d 489, 190 P.2d 1 (1948) (certain activities so hazardous and so relatively uncommon as to call for strict liability as matter of public policy).

[42] Liber v. Flor, 160 Colo. 7, 415 P.2d 332 (1966), stating this to be the law of Colorado.

[43] *See* Orser v. George, 252 Cal. App. 2d 660, 60 Cal. Rptr. 708 (Dist. Ct. App. 1967).

improvements in aviation safety so that ground damage by aircraft can no longer be considered a grave risk.[44]

It has also been necessary to set factual limits on the scope of responsibility in order to avoid unlimited and overwhelming liability: "the foreseeable orbit of harm" delimits the *extent* of strict liability.[45] Thus, factual questions—submissible to a jury—arise even if the use of strict liability is itself considered a question of law.[46]

It is submitted that, under the *Restatement (Second)*, the fundamental question of whether an activity is "abnormally dangerous" has become a matter of opinion based on the particular surrounding factual circumstances,[47] and thus should be regarded as a question of fact. When an activity is classified as a "nuisance"—even when the nuisance is based on strict liability—this treatment of the matter as a factual one has sometimes been the result anyway.[48] Like nuisances, "abnormally dangerous activities" cannot be reduced to exact definitions.[49] They are identified as ultrahazardous when they are uncommon and involve inevitably high risks of harm.[50] Both these elements—the frequency or "normality" of an activity, *and* the impossibility of eliminating risks therefrom—are factual matters that vary with changing times and circumstances. So is the factor—supposedly emphasized by the new *Restatement* delineation of strict liability—of the nature of the location in which an activity is conducted. Very often an activity,

[44] *See* Wood v. United Air Lines, Inc., 32 Misc. 2d 955, 223 N.Y.S.2d 692 (Sup. Ct. 1961) (flying no longer ultrahazardous). *But cf.* RESTATEMENT, *supra* note 7, § 520A (strict liability for ground damage by aircraft).

[45] *See* Mazza v. Berlanti Constr. Co., 206 Pa. Super. 505, 508, 214 A.2d 257, 259 (1965) (blasting case).

[46] Sometimes, of course, strict liability may be ruled inapplicable as a matter of law, but a jury question of *negligence* will be found to exist. *See* Anderson v. Green Bay Hockey, Inc., 56 Wis. 2d 763, 203 N.W.2d 79 (1973) (no violation of safe place statute, and question of possible ultrahazardous activity was not appealed; complaint *did* state a possible cause of action for negligence).

[47] *See* Nicolai v. Day, 264 Or. 354, 506 P.2d 483 (1973) (failure of uphill landowners to remove dirt fill did not constitute abnormally dangerous activity), *relying on* Loe v. Lenhardt, 227 Or. 242, 362 P.2d 312 (1961). Both cases emphasize the importance of the factual setting to a determination of whether an activity is abnormally dangerous, but both conclude the determination of whether the activity is that dangerous is for the court.

[48] *See* Mowrer v. Ashland Oil & Ref. Co., 518 F.2d 659 (7th Cir. 1975) (waterflood operations of oil company damaged adjacent land; liability predicated on nuisance found by jury; affirmed—nuisance and strict liability said to be amalgamated).

[49] *See* Langan v. Valicopters, Inc., 88 Wash. 2d 855, 567 P.2d 218 (1977) (crop dusting held to be matter of strict liability; all the *Restatement* factors must weigh equally in favor of characterizing an activity as abnormally dangerous; any *one* factor is not necessarily sufficient by itself).

[50] *See* Flanagan v. Ethyl Corp., 390 F.2d 30 (3d Cir. 1968) (ultrahazardous activity must be one that involves risk of serious harm, despite exercise of utmost care, *and* that is not a matter of common usage).

even if it poses grave risks, cannot be said to be *always* ultrahazardous, and thus it should not be ruled as a matter of *law* that it is such.[51] Whether an activity is *abnormally* dangerous depends on the surrounding circumstances.[52] The "unusual" or "nonnatural" characterization of the matter depends on community attitudes and thus should be made by a cross-section of the community—the jury.[53] Something is not *inherently* abnormal but becomes such only when a community norm is established and applied.

Of the factors mentioned in the *Restatement (Second)* and weighed in the court decisions on the question of what is "abnormally dangerous," only one factor—the social, economic and other value of the activity—could be considered to involve basically nonfactual, policy questions. Any such value of an activity must be viewed in light of the general rationale behind strict liability: that we hold liable the perpetrators of dangerous enterprises so that they may spread the costs among all who benefit therefrom, rather than let the disproportionately large loss be visited on the innocent victims. While this weighing may involve difficult questions of the policies behind the relevant laws, it is arguable that *even this* can and should be decided by a group of community members applying community standards. "[I]t seems just the kind of question to which a jury can provide the best answer: Was the [defendant] entitled to impose the risk of loss upon another without himself running the risk of paying any damages?"[54]

Since, at the very least, most of the factors to be weighed on the question of strict liability—if the *Restatement* definition is to be followed[55]—involve factual matters, there is no reason to depart from the usual tort rule: If reasonable persons could not differ on the conclusion, it can be reached, as a matter of law, by the judge acting alone. Otherwise, the determination of what is "abnormally dangerous" must be for the jury.

[51] *See* Schexnayder v. Bunge Corp., 508 F.2d 1069 (5th Cir. 1975) (storage of grain cannot be ruled ultrahazardous as a matter of law, at least where it occurs in a commercial neighborhood). "One cannot expect rural tranquility on the banks of the Mississippi River." *Id.* at 1076 n.9.

[52] *See* Stallybrass, *Dangerous Things and the Non-Natural User of Land*, 3 CAMBRIDGE L.J. 376, 389 (1929) (distinction is not between the dangerous and non-dangerous character of thing inherently, but between those circumstances in which defendant will be allowed to deny the dangerous nature of his act and those in which he will not).

[53] *See* Comment, *supra* note 15.

[54] Stallybrass, *Dangerous Things and the Non-Natural User of Land*, 3 CAMBRIDGE L.J. 376, 389 (1929).

[55] It may be that the *Restatement* definition of "abnormally dangerous" will eventually prove unworkable and that a definition will be adopted that lends itself more appropriately to application by the court. This article has taken the *Restatement* definition as "given." Certainly the definition's emphasis on the *locale* of the activity is in accord with the trend of judicial decisions over recent decades. *See* W. PROSSER, TORTS 511-12 (4th ed. 1971).