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NO. 83-

IN THE
SUPREME COURT OF THE STATE OF MARSHALL
OCTOBER TERM, 1983

WILLIAM DUFFY,
Appellant/Cross-Appellee,
- vs. -
LINCOLN COUNTY STATE BANK CORPORATION,
Appellee/Cross-Appellant.

On Appeal
From the Appellate Court of the
State of Marshall

BRIEF FOR APPELLANT

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September 26, 1983⊥

QUESTIONS PRESENTED

I. WHETHER LINCOLN COUNTY STATE BANK'S STORAGE OF LARGE VOLUMES OF PERSONAL FINANCIAL INFORMATION IN A COMPUTER SHOULD BE DECLARED AN ABNORMALLY DANGEROUS ACTIVITY.

II. WHETHER LINCOLN COUNTY STATE BANK SHOULD BE LIABLE FOR NEGLIGENT DISCLOSURE OF WILLIAM DUFFY'S PERSONAL FINANCIAL RECORDS.

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BRIEF FOR APPELLANT

TO THE SUPREME COURT OF THE STATE OF MARSHALL:

Appellant, William Duffy, who was the Appellee in Cause No. 82-999 before the Appellate Court of the State of Marshall, respectfully submits this brief in support of his request for a declaration that Lincoln County State Bank's storage of large volumes of personal financial information in a computer is an "abnormally dangerous activity"; and, in the alternative, that Lincoln County State Bank should be liable for negligent disclosure of Appellant's financial records.⊥ ⊥xiii

Appellant requests an affirmance of the judgments below consistent with these declarations.

OPINIONS BELOW

The memorandum order of the Circuit Court for the County of Lincoln, State of Marshall, is reproduced in Appendix A and appears in the Record on Appeal. (R.10-12). The opinion of the Appellate Court of the State of Marshall is reproduced in Appendix B and also appears in the Record on Appeal. (R.13-16).

JURISDICTION

The jurisdictional statement is waived in accord with the Rules for the 1983 Competition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This is a case of first impression in the State of Marshall and is not governed directly by any constitutional provisions or statutes.

STATEMENT OF THE CASE

I. NATURE OF THE PROCEEDINGS

This Court granted petitions to appeal and cross-appeal the opinion of the Appellate Court of the State of Marshall in cause no. 82-999. (R.17).

The case originated in the Circuit Court for the County of Lincoln, State of Marshall, in cause no. 81-101. (R.1). The Appellee, defendant below, filed a motion to dismiss the complaint of the Appellant, plaintiff below. (R.6). In a Memorandum Order dated February 12, 1982, Judge G. B. Watkins denied the defend-
⊥xiv⊥ant's motion to dismiss and upheld plaintiff's theories of recovery predicated upon strict liability and negligent disclosure principles. (R.10-12).

Pursuant to the Rules of Appellate Practice of the State of Marshall, the case was appealed to the Appellate Court since Judge Watkins found that there was "a substantial ground for difference of opinion on questions of law" and that "an immediate appeal will materially advance the ultimate termination of the litigation." (R.12,13). Because of this, there was no finding of fact nor trial on the merits in the courts below.

On December 3, 1982, the Appellate Court reversed the Circuit Court's ruling on the strict liability issue but affirmed the ruling on the negligent disclosure issue. (R.13-16). Further, the Appellate Court held that the doctrine of *res ipsa loquitur* should apply to establish negligent disclosure. (R.16).

On April 15, 1983, this Court issued an Order granting Leave to Appeal in order to resolve these complex legal issues. (R.17).

II. SUMMARY OF FACTS

William Duffy, Appellant, alleges he was injured in an amount in excess of $800,000 because of the inadvertent disclosure of his confidential financial records by a defective computer owned by the Appellee, Lincoln County State Bank (hereinafter called "Lincoln" or the "Bank"). (R.1-5).

During 1980 and part of 1981, William Duffy was a regular customer of the bank controlled by Lincoln. In 1980, Lincoln extended a $150,000 unsecured line of credit to Mr. Duffy. (R.3). In addition, William Duffy maintained both a personal savings account and a checking account at the Bank. (R.1).⊥ ⊥xv

On April 11, 1981, pursuant to a State of Marshall Securities Commission investigation, a Commission investigator informally requested that Lincoln send to her a list of William Duffy's account numbers and types of accounts. (R.2,14).

Lincoln stores all customers' information in a computer. (R.1). This information includes records of all account transactions, as well as other financial and personal information. (R.1). Lincoln's computer is also equipped with a capability that is able to automatically mail out such information to third parties. (R.2).

It is stipulated that the correct search data was entered into the computer in response to the informal request of the investigator. (R.10). However, instead of sending a list of William Duffy's account numbers and types of accounts, the computer erred and automatically mailed to the Commission complete and detailed records of all of William Duffy's financial transactions from January 15, 1981 to April 15, 1981. (R.2,14).

Prompted by the information received through the computer's errant disclosure, the Commission instituted a formal investigation of William Duffy. (R.13, 14). Shortly after the Bank learned of this formal investigation, the Bank cancelled Mr. Duffy's $150,000 line of credit. (R.3).

On July 14, 1981, Mr. Duffy was cleared of all suspicion of impropriety by the State of Marshall Securities Commission and its investigation was terminated. (R.3,14). However, as a result of the unauthorized computer disclosure of his financial records, William Duffy alleges he was damaged in an amount in excess of $800,000. (R.4,5).⊥ ⊥xvi

William Duffy filed a complaint in the Circuit Court in an effort to recover these damages. (Cause No. 81-101). (R.1). In his complaint, Mr. Duffy alleged that "Lincoln's use of a computer for the purpose of maintaining large quantities of highly sensitive, personal financial information is an ultrahazardous or abnormally dangerous activity and that Lincoln is strictly liable for any harm flowing from such activity." (R.3). Mr. Duffy further complained that Lincoln had a duty not to make unauthorized disclosures of such information to third parties, that Lincoln breached this duty and that an inference of negligence should be raised against Lincoln. (R.5).

Lincoln, as defendant in the Circuit Court, filed a motion to dismiss this complaint. (R.6). William Duffy filed a response in opposition to defendant's motion to dismiss, alleging that public policy demanded the adoption of the theory of strict liability and the adoption of the duty of banks to protect the confidentiality of customer information. (R.8).

Judge G. B. Watkins of the Circuit Court issued a Memorandum Order on February 12, 1982 denying the defendant's motion to dismiss. (R.10-12). In that order, Judge Watkins held that "[f]or public policy reasons, strict liability should apply to record-keepers who maintain large quantities of sensitive, personal financial information in computer data banks." (R.11-12). Judge Watkins also held that, "[i]mplicit in the imposition of strict liability . . . is recognition of the bank's duty to its customers to act with care in maintaining [their personal financial] information" and therefore, upheld William Duffy's negligent disclosure ⊥xvi pleading. (R.12). The case was appealed to the Appellate⊥ Court of the State of Marshall. (R.13).

On December 3, 1982, Chief Justice Mink issued the Opinion of the Appellate Court. (R.13-16). In that Opinion, the court held that "as a matter of public policy the application of strict liability for the use of computers to process personal information would impose an unreasonable burden upon record-keepers" and that the activity in question was not ultra-hazardous or abnormally dangerous. (R.15). However, the court also held that a bank "has a duty to its customers to act with care regarding the maintenance of sensitive personal financial information about them" and that "the bank breached this duty." (R.15). The court further held that "the doctrine of *res ipsa loquitur* should apply to establish the negligent disclosure of personal information through a computer." (R.16). Thus, the Appellate Court affirmed in part and reversed in part the order of the Circuit Court. (R.16).

On April 15, 1983, this Court issued the Order Granting ⊥xviii Leave to Appeal. (R.17).⊥

SUMMARY OF ARGUMENT

I.

Computer-related harm is an all too frequent occurrence in our society. Oftentimes, when a computer malfunctions and causes damage, its innocent victim is left without adequate legal remedy. This threat is magnified when, as here, the computer has the potential to effect great personal and financial harm.

The computer owned by Appellee, Lincoln County State Bank, is a storehouse of vast quantities of intimate information relating to Lincoln's customers. The risk that such information may escape and cause financial ruin or personal hardship is an abnormal danger. This danger is intensified by the fact that this risk cannot be eliminated, even with the exercise of reasonable care. If Lincoln is to continue to operate this computer in spite of the abnormal risk, then as a matter of public policy, Lincoln should be held strictly liable for any harm flowing from the operation of the activity.

Appellant, William Duffy, urges this Court to apply the principle of *Rylands v. Fletcher*, which established strict liability in tort. The most recent American interpretation of this principle is found in the *Restatement (Second) of Torts* § 519, 520 (1977). That interpretation provides six factors to be considered by a court in determining whether to declare an activity "abnormally dangerous" and hence, strictly liable. Careful analysis reveals that Lincoln's computer satisfies all six factors. However, it is not necessary to meet all six factors to prevail and Lincoln could still be held strictly liable in the absence of one or more factors.⊥ ⊥1

Moreover, imposition of strict liability upon Lincoln is sound from a public policy standpoint. It is more socially responsible to place the burden of loss upon the one whose enterprise created the abnormal risk, rather than on the innocent victim who suffered harm because of it. Also, if strict liability is not placed upon Lincoln, Mr. Duffy may be without legal remedy with which to redress the wrong.

II.

Alternatively, Appellant urges this Court to allow a negligent disclosure theory of liability.

Lincoln had a duty arising from Mr. Duffy's rights of privacy to prevent disclosure of his confidential records. Although this is a case of first impression, numerous other jurisdictions have already addressed this issue. Through statutes and court decisions, they have unanimously proclaimed that a bank does owe

a duty of confidentiality to its customer. Further, due to the extreme threats to individual privacy posed by newer and more sophisticated computer data-gathering systems, adoption of this duty is essential.

Recognition of this duty allows a cause of action for a negligent act or omission which constitutes breach of the duty. It is widely recognized that the typical computer malfunction results from negligence. However, due to the complexities of computer technology, it is extremely difficult to identify specific acts of negligence. Therefore, this Court should permit an inference of negligence under the doctrine of *res ipsa loquitur* against Lin-
⊥2 coln so that Mr. Duffy may have his day in court.⊥

ARGUMENT AND AUTHORITIES

I. LINCOLN COUNTY STATE BANK'S STORAGE OF LARGE VOLUMES OF PERSONAL FINANCIAL INFORMATION IN A COMPUTER SHOULD BE DECLARED AN ABNORMALLY DANGEROUS ACTIVITY AS A MATTER OF PUBLIC POLICY.

The advent of the computer age has brought with it a host of unchecked risks and dangers. The early fear of computers has been realized. Each day, men become more and more dependent on computer systems. And each day, those who operate computers escape liability for harm caused to men by computer malfunction.

It is time for this Court to assert that those who operate computers will no longer escape liability but will be held strictly liable when those computers cause harm. "In this computerized age, the law must require that men in the use of computerized data regard those with whom they are dealing as more than a perforation on a card." *Ford Motor Credit Co. v. Swarens*, 447 S.W.2d 53, 57 (Ky. 1969).

The fear of dependence upon computers and "automation" is no longer science fiction. Our newspapers and magazines are filled with tragic reports of human harm caused by computer error. Jurists and legal scholars, who did not have to confront these issues thirty years ago, are now increasingly being forced to explore new legal rules and concepts with which to address computer-related harm. *See, e.g., Federal Computer Systems Protection Act: Hearings on S. 1766 Before the Subcomm. on Crim. Laws and Proc. of the Senate Comm. on the Judiciary*, 95th Cong., 2nd Sess. 56 (1978) (Statement of Don Parker).

A survey of reported computer malfunctions and the harm caused by them discloses a pattern of serious and often uncon-

trolled abuse. Less than two years ago, a computerized robot⊥ ⊥3 killed a 37 year old factory worker in Japan. *Robots: The Dangers*, N.Y. Times, Dec. 13, 1981, § 3 at 27.[1] A computer error caused a near-collision of two passenger airplanes. *CPU Fails, Two Jets Nearly Collide*, Computerworld, Nov. 12, 1979, at 1. A computer malfunction caused a nuclear power plant to shut down. *Computer Error Closes Nuke Plants*, Indianapolis Star, March 6, 1979, at 1. Another computer error threatened the lives of American astronauts by causing a serious waste of fuel during the last critical moments of Skylab's descent. *NASA Jumbles Skylab Flight Data*, Computerworld, July 9, 1979, at 1. Yet another computer malfunction caused the false alert of another world war. *Norad Systems Goofs, Calls Missle Alert*, Computerworld, Nov. 19, 1979, at 1. *See also U.S. Aides Recount Moments of False Missle Alert*, N.Y. Times, Dec. 16, 1979, § 1 at 25. Most recently, it has been suggested that a computer malfunction caused a Korean airliner to stray more than one hundred miles off course, leading 269 passengers to their death in Soviet territory. *Explaining the Inexplicable*, Time Magazine, September 19, 1983 at 25.

But the harm threatened by computer malfunction is not confined to personal injuries. The harm pervades all aspects of our society. Every American has felt the disruptive influence of computer error in problems with bills, telephone connections, credit accounts, banking transactions, and so forth. *See e.g.*, Robinson, *System Design Errors Impact My Existence*, Computerworld, March 24, 1980 at 31.

Serious financial harm can also result from computer malfunction. A wholesaler dependent upon a computer watched helplessly⊥ as computer error all but destroyed his business.⊥4 *An Errant Computer Throws Wholesaler's Business into Turmoil*, The Wall St. J., March 27, 1968, at 1. Another computer error caused a school system to be underinsured when fire devastated a school building. *Independent School District No. 454, Fairmont, Minnesota v. Statistical Tabulating Corp.*, 359 F. Supp. 1095 (N.D. Ill. 1973). The Arkansas Supreme Court cancelled a $28,000 note because a computer error caused a mortgage company to charge a usurious rate of interest. *Cagle v. Boyle Mortgage Co.*, 261 Ark. 437, 549 S.W.2d 474 (1977). A faulty computer caused a retailer's business records to be jumbled for over a year. *Carl Beasley Ford, Inc. v. Burroughs Corp.*, 361 F. Supp. 325 (E.D. Pa. 1973) *aff'd mem.*, 493 F.2d 1400 (3d Cir. 1974). And a natural gas supplier, which "relied uncritically upon its computer," sent mistaken shut-off notices to its customers,

1. The text of this article is reproduced in Appendix C.

many of whom were poor, in the midst of winter in Ohio. *Palmer v. Columbia Gas Co. of Ohio*, 342 F. Supp. 241, 243 (N.D. Ohio 1972).

Banks, like the Appellee Lincoln State Bank, are not immune from such computer malfunctions that can cause serious financial and personal harm. A computer error erased all of the records of one bank's transactions. *Fallible Computer Unbalances a Bank*, N.Y. Times, Dec. 1, 1965, at 1. A computer malfunction caused an improper payment of over $200,000 to another bank. *Port City State Bank v. American National Bank, Lawton, Okla.*, 486 F.2d 196 (10th Cir. 1973). Another computer malfunction caused an improper payment of over $74,000. *Sun River Cattle Co. v. Miner's Bank of Montana*, 164 Mont. 237, 521 P.2d 679 (1974).

And here, the Lincoln County State Bank computer in er-
⊥5 ror⊥ released complete and detailed financial information about Mr. Duffy which caused him damage in an amount in excess of $800,000. (R.5,14).

From the standpoint of sound public policy, it is no longer reasonable for the users of computers to escape liability when a computer malfunction causes harm. It is incumbent upon this Court to declare that owners and operators of computers will bear the full weight and responsibility for the harm caused by these computers. Without such a declaration, the innocent victims of computers will continue to suffer unjustly and without redress.

William Duffy, Appellant, urges that this Court recognize the abnormal dangers posed by computers and impose strict liability principles upon the computer malfunction that caused him harm. Although this Court has never before considered the strict liability principles of the English case of *Rylands v. Fletcher* [1868] L.R. 3 H.L. 330 or of the *Restatement (Second) of Torts* §§ 519, 520 (1977),[2] an examination of the facts of this case and of the risks inherent in computer technology demands the application of those principles here.

Although some would call for strict liability for all computers, Appellant asks that the Court prudently limit the liability to the facts of this case. *See Restatement (Second) of Torts* § 520, Comment 1 (1977).[3] Appellant asks this Court to declare that the storage and use of large volumes of personal financial
⊥6 information in a computer, such as was done by Lincoln, is⊥ an

2. *See* Memorandum of the 1983 Competition, August 25, 1983 at 2.

3. The text of *Restatement (Second) of Torts* § 519 and § 520 are reproduced in Appendix D.

abnormally dangerous activity and that Lincoln should be held strictly liable for any harm flowing from that activity.

Not only will such a declaration assure protection of innocent victims such as Mr. Duffy, but also it will establish a sound public policy foundation with which to deal with future cases involving computer malfunction. *See generally*, Nycum, *Liability for Malfunction of a Computer Program*, 7 Rut. J. Comp. & Tech. L. 1 (1979).

Careful analysis of the American principles of strict liability and public policy support the Appellant in his prayer for a declaration of strict liability.

A. *The American Interpretation Of The Principle Of Rylands v. Fletcher Supports The Imposition Of Strict Liability Upon The Activity Of Lincoln County State Bank.*

The doctrine of strict liability in tort was conceived over a hundred years ago in the English case of *Rylands v. Fletcher* [1868] L.R. 3 H.L. 330. In that case, a millowner, without intention to do harm, constructed a reservoir on his property to supply his mill with water. The water seeped down into some abandoned mine shafts and in turn flooded his neighbor's coal mine. The millowner was held strictly liable for the damage caused.

The rule of strict liability was first stated in the Exchequer Chamber by Justice Blackburn:

> . . . that the person who for his own purpose brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.

Fletcher v. Rylands [1866] L.R. 1 Ex. 265, 279.

The House of Lords affirmed and applauded this new rule of law but Lord Cairns limited it to what he termed "non-natural" use⊥ of the land. *Rylands v. Fletcher* [1868] L.R. 3 H.L. at 339. ⊥7

These two opinions caused great confusion in America. A leading commentator notes that the rule was often "misstated, and as misstated was rejected, in cases in which it had no proper application in the first place." W. Prosser, J. Wade, & V. Schwartz, *Cases and Materials on Torts* 717 (7th ed. 1982).

The first American attempt to restate the *Rylands* rule was the "ultrahazardous activity" test of *Restatement of Torts* §§ 529, 520 (1938). As stated, an activity is "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 utmost care, and
b) is not a matter of common usage.

Restatement of Torts § 520 (1938).

If it was determined by a court that the activity was ultrahazardous, then the person engaged in the activity would be held strictly liable for any harm caused. Following the promulgation of this test, the *Rylands* rule "gained added currency." *Yukon Equipment, Inc. v. Fireman's Fund Insurance Co.*, 585 P.2d 1206, 1208 (Alaska 1978).

However, the "ultrahazardous activity" test met with much criticism. It was said to have "limited" the *Rylands* rule and ignored the emphasis of American case law. W. Prosser, *The Law of Torts* § 78 at 512 (4th ed. 1971).

These problems were resolved in the second American attempt to restate the rule in *Rylands v. Fletcher*. *Restatement (Second) of Torts* §§ 519, 520 (1977). Activities are now classified as "abnormally dangerous" based upon a flexible six factor balancing test "which allows courts to consider many relevant envi-
⊥8 ronmental,⊥ social and economic factors usually left unexplored by courts utilizing the more mechanical 'ultrahazardous' test." Note, *Strict Liability for Hazardous Enterprises, Returning to a Flexible Analysis*, 9 UCLA-AL L. Rev. 67, 68 (1979).

This new interpretation of the *Rylands* rule has been roundly applauded and quickly adopted.[4] Dean Prosser, who was critical of the ultrahazardous test, indicates that the new rule is more aligned with *Rylands* principles. W. Prosser, *Law of Torts* § 78 at 512 n.47 (4th ed. 1971). The Supreme Court of Massachusetts hailed the new *Restatement* approach as "sound and [it] comports well with the basic theory underlying the strict liability rule." *Clark-Aiken Co. v. Cromwell-Wright Co., Inc.*, 367 Mass. 70, 323 N.E.2d 876, 887 (1975). The rule has been found "particularly useful" in addressing the complex issues surrounding the imposition of strict liability. *Doundoulakis v. Town of Hempstead*, 42 N.Y.2d 448, 451, 368 N.E.2d 24, 27, 398 N.Y.S.2d 404, 407 (1977). In addition, the new approach will "enlarge the circumstances under which the rule of strict liability will apply." *Yommer v. McKenzie*, 255 Md. 220, 257 A.2d 138, 140 (1969).

Since the "abnormally dangerous" activity test is the more authoritative interpretation of the principles of strict liability,

4. A listing of the jurisdictions that have adopted the "abnormally dangerous activity" test of *Restatement (Second) of Torts* is contained in Appendix E.

Appellant asks this Court to apply it to the facts of this case.[5] Lincoln's storage of large amounts of intimate financial data in ⊥⊥9
a computer easily satisfies all six factors of the *Restatement* balancing test and should be declared an abnormally dangerous activity. The inherent risks of harm in this activity significantly outweigh any social interest claimed by the Bank.

1. *Lincoln's activity satisfies all six factors of the Restatement's balancing test and should be declared abnormally dangerous.*

Appellee, Lincoln County State Bank, maintained large quantities of information in its computer, including detailed personal and financial information on its customers. (R.3). In processing a routine request, the Lincoln computer malfunctioned and caused the escape of a vast amount of Appellant William Duffy's personal financial information. (R.2). This escape was facilitated by the computer's ability to automatically mail out such information, without human intercession. (R.2). The errant disclosure of Appellant's financial information caused Mr. Duffy great financial harm. (R.5).

It is important to bear these facts in mind when considering whether Lincoln's activity should be declared "abnormally dangerous"—for the determination of abnormally dangerous is based upon the facts of each case. *Clark-Aiken Co. v. Cromwell Wright Co., Inc.*, 323 N.E.2d 876, 887 (Mass. 1975); *Restatement (Second) of Torts* § 520, Comment 1 at 42 (1977).

The "abnormally dangerous" approach allows for a "balancing of social interests." *Langan v. Valicopters, Inc.*, 88 Wash.2d 855, 859, 567 P.2d 218, 223 (1977). The approach presents six factors for this Court to consider.

All of the six factors weigh in favor of declaring Lincoln's ⊥⊥10
maintenance of personal information in a computer as an "abnormally dangerous activity."

The factors which are to be considered include:

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;

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5. Appellant has pleaded that the activity in question should be declared either "ultrahazardous" or "abnormally dangerous." (R.3). It will be shown that the activity meets the elements of both tests. *See*, Section I(A)(1) at —, *infra*.

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.

Restatement (Second) of Torts § 520 (1977).

In considering the first factor, it is clear that the inadvertent disclosure of personal financial information from a computer will inevitably cause some harm, whether it be a person's privacy interests or whether it be to his or her livelihood. The harms that may befall a victim of such a disclosure have been indicated in a recent government publication:

> There may be many reasons for wishing to withhold information about oneself, other than concern about Government encroachment on civil liberties. Information may expose one to censure or punishment; it may threaten one's reputation, social status or self-esteem; it may give others some advantage or power over oneself, or lessen one's advantage over others in competitive situations. Information concerning income, debts, or financial transactions may in some situations do all these things.

Selected Electronic Funds Transfer Issues: Privacy, Security and Equity Background, Office of Technology Assessment, U.S. Con-
⊥11 gress, Library of Congress Card No. 82-600524 (1983) at 30.⊥

The high degree of risk of some harm is further intensified by the great volumes of information now stored on computers. Information which formerly was destroyed is now kept in the computer for years because "it is cheaper today to store information than to destroy it." Linowes, *Must Personal Privacy Die in the Computer Age?*, 65 A.B.A.J. 1180, 1182 (1979). The risk that such information will be released and produce some harm is very high.

The second factor considers the likelihood that the harm that will result will be great. This means that the threatened harm will be "major in degree, and sufficiently serious in its possible consequences." *Restatement (Second) of Torts* § 520, Comment g at 38 (1977).

In this competitive free enterprise system, personal financial information can be regarded as volatile and explosive, and inadvertent disclosure of that information can cause as much or more hardship and ruin than those activities traditionally considered to be subject to strict liability. *Smith v. Board of County Road Comm'rs of Chippewa County*, 5 Mich. App. 370, 146 N.W.2d 702 (1966) (water collected in quantity in a dangerous

place); *Exner v. Sherman Power Construction Co.*, 54 F.2d 510 (2nd Cir. 1931) (explosives); *Davis v. L. & W. Construction Co.*, 176 N.W.2d 223 (Iowa 1970) (blasting); *Sachs v. Chiat*, 281 Minn. 540, 162 N.W.2d 243 (1968) (pile driving); *Young v. Darter*, 363 P.2d 829 (Okla. 1961) (crop dusting); *Luthringer v. Moore*, 31 Cal.2d 489, 190 P.2d 1 (1948) (fumigation of part of a building with hydrocyanic acid); *et al.*

One can easily surmise that in this day and age it would be just as likely for Mr. Fletcher's coal mine to be ruined by⊥ dis- ⊥12
closure of his personal financial information as it was for it to be ruined by Mr. Ryland's reservoir. Although great harm will not always result from disclosure of private financial data, it is enough that great harm *may* result from the activity. *Restatement (Second) of Torts* § 520, Comment g at 38 (1977). Inadvertent disclosure of one's financial information can cause bankruptcy, severe financial difficulties and other extreme hardships. Indeed, the Appellate Court asserted below that "the disclosure of [personal] information can effectively change a person's life." (R.15). This potential for great harm satisfies the second factor of the test.

The third factor is that the risk cannot be eliminated by reasonable care. This factor is easily satisfied by Lincoln's computer activity.

There are many reasons why a computer might fail to perform as expected, most of which are not widely understood. A computer might fail due to a programming or "software" error. *See e.g.*, *Security Leasing Co. v. Flinco, Inc.*, 23 Utah 2d 242, 461 P.2d 460 (1969). A computer might fail due to faulty parts or "hardware" error. *See e.g.*, *D. P. Failure Not Cause of "Near-Collision": FAA*, Computerworld, Jan. 28, 1980, at 9 (FAA alleged failure "was caused by a storage element malfunction in the reading display channel processor"). Even outside influences such as a power failure or cosmic rays can alter data or the program by changing switch settings. See *Bad Bits*, Scientific American, Feb., 1980, at 70.

In addition to the above, there is no way to make a computer "error-free." As one commentator has noted, "the only⊥ error- ⊥13
free program is one that will never be run again." A. Pietrasanta, *Program Test Methods* (W. Hertzel ed. 1973). It has also been noted that it is impossible to write a computer program to check whether other computers are performing as intended. *See* Charlesworth, *Infinite Loops in Computer Programs*, 52 Mathematics Magazine 284 (1979). Because of new and even more sophisticated equipment, the potential for computer error has dramatically increased. Miller, *Personal Privacy*

in a Computer Age: Challenge of the New Technology in an Information-Oriented Society, 67 Mich. L. Rev. 1091, 1158 (1969). And even "a correct program may work perfectly for a time only to fail catastrophically later without any lack of proper care on anyone's part." Gemignani, *Product Liability and Software*, 8 Rut. J. Com. & Tech. L. 173, 191 (1981).

The failure rate of computers also leads to the conclusion that the risk cannot be eliminated even with utmost care. Four years ago, in a Federal District Court case, a computer expert testified that 40% of all computer installations fail. *Chatlos Systems v. National Cash Register Corp.*, 497 F. Supp. 738, 748 (D.N.J. 1979), *modified* 635 F.2d 1081 (3rd Cir. 1980). Further, in a large scale exercise designed to test the capability of our network of defensive security computers, failure rates were as high as 85%. *Pentagon Computers Huff, Puff, Bluff*, N.Y. Times, March 16, 1980, § E at 7.

It is clear that this third factor of the balancing test is met here. Even with all reasonable care, the risks inherent in Lincoln's computer cannot be eliminated.

⊥14 The fourth factor concerns whether the activity is a matter⊥ of common usage. The *Restatement* comments that "[a]n 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: *Restatement (Second) of Torts* § 520, Comment i at 39 (1977). Under this analysis, automobiles, though inherently dangerous, would not be considered abnormally dangerous because they are used by the "great mass of mankind." Although blasting is widely used in the construction industry, it is a specialized activity and is carried out by a comparatively small number of people. Thus, blasting is not considered a matter of common usage.

The Washington Supreme Court, in applying this analysis to crop dusting, stated, "[A]lthough we recognize the prevalence of crop dusting and acknowledge that it is ordinarily done in large portions of the Yakuma Valley, it is carried on by only a comparatively small number of persons . . . and is not a matter of common usage." *Langan v. Valicopters, Inc.*, 88 Wash.2d 855, 859, 567 P.2d 218, 223 (1977).

The California Supreme Court also used this approach in declaring that fumigation of a building with a lethal gas was subject to strict liability. The fumigant "may be used commonly by fumigators, but they are relatively few in number and are engaged in a specialized activity." *Luthringer v. Moore*, 31 Cal.2d 489, 496, 190 P.2d 1, 8 (1948). The court concluded that fumigation was not a matter of common usage. *Id.* at 8.

As with fumigation and cropdusting, those who maintain large volumes of personal financial data in a computer are "few in number and engaged in a specialized activity." Since the activity is not engaged in by the "great mass of mankind," Lincoln's storage⊥ of vast amounts of personal financial⊥15 information in a computer is not a matter of common usage.

The four factors discussed above were considered the "elements of the old "ultrahazardous activity" test. *Restatement of Torts* §§ 519, 520 (1938); *see Restatement (Second) of Torts* § 520, comment h at 39 (1977). Should this Court wish to apply the "ultrahazardous" rationale in preference to the "abnormally dangerous" balancing test, it need go no further. Lincoln's activity satisfies all the elements of the first *Restatement* and may, as a matter of law, be declared an "ultrahazardous activity" and therefore subject to strict liability.

However, the "abnormally dangerous" test, which allows for a more flexible balancing of conflicting interests, is now considered a more suitable analysis. *See* Reynolds, *Strict Tort Liability: Has "Abnormal Danger" Become a Fact?*, 34 Okla. L. Rev. 76 (1981). The abnormally dangerous analysis mandates consideration of two additional criteria.

The fifth factor of the balancing test is whether the activity is inappropriate to the place where it is carried on. This factor derived from Lord Cairn's "non-natural use" distinction in *Rylands v. Fletcher* and has been the subject of some confusion. It does not mean that the activity is an inappropriate one, for certainly it is appropriate for a millowner to construct a millpond as in *Rylands* or for a crop duster to dust crops as in *Langan v. Valicopters, Inc.*, 567 P.2d at 218. Rather, the inappropriateness deals with the way the activity is carried out. *Cities Service Co. v. State*, 312 So.2d 799, 803 (Fla. Dist. Ct.⊥ App. 1975). It involves ⊥16 any activity that is "extraordinary, exceptional, or unusual" in relation to the location where the activity is carried on. *McLane v. Northwest Natural Gas Co.*, 255 Or. 324, 326, 467 P.2d 635, 637 (1970).

When the facts in this case are considered, it is apparent that the type of computer used was totally inappropriate to its location. Lincoln County State Bank is a financial institution whose reputation and survival is based, it must be assumed, upon its financial integrity. However, they used a type of computer that "automatically mailed" out financial information. (R.2). To use an "automatic mail-out" computer when dealing with such sensitive personal information as a bank customer's financial records is blatantly inappropriate.

Finally, the last factor to be considered is the value to the community. An otherwise abnormally dangerous activity may escape strict liability if it can be shown that the survival of the community depends upon the enterprise. *Restatement (Second) of Torts* § 520, Comment k at 42 (1977). Thus, the *Restatement* comments:

> . . . the interests of a particular town whose livelihood depends upon such an activity as manufacturing cement may be such that cement plants will be regarded as a normal activity for that community notwithstanding the risk of serious harm from the emission of cement dust.

Id. at 42.

This sixth factor, value to the community, relates to situations "where the dangerous activity is the primary economic activity of the community in question." *Yukon Equipment, Inc. v. Fireman's Fund Insurance Co.*, 585 P.2d 1206, 1201 (Alaska 1978).

⊥17 It cannot be argued that Lincoln Bank's computer activity⊥ is the "primary economic activity of the community" nor that the livelihood of the community depends upon it. The risk of harm here outweighs the value to the community, and the sixth factor should be decided in favor of the Appellant, William Duffy.

Because the activity of Lincoln in storing large volumes of personal financial data in a computer satisfies *all* six factors of the *Restatement*'s balancing test, that activity should be declared an abnormally dangerous activity and Lincoln should be held strictly liable for any harm caused by it.

2. *Should one or more factors of the balancing test weigh in favor of Lincoln, this Court may yet declare that Lincoln was engaged in an abnormally dangerous activity.*

The mere fact that an activity fails to satisfy one or more factors of the balancing test does not require a conclusion that the activity is *not* abnormally dangerous. Rather, the factors are guidelines that may or may not be applied based upon the facts of each case. The drafters of the *Restatement (Second) of Torts* § 520 (1977), explain:

> 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

> necessary that each of them be present, especially if others weigh heavily.

Id. Comment f at 37.

Several jurisdictions have followed this approach.

In *Cities Service Co. v. State*, 312 So.2d at 799, the Florida District Court of Appeals considered whether the storage of billions of gallons of phosphate slime behind earthen walls was an⊥ abnormally dangerous activity. The dam broke and one bil- ⊥18
lion gallons of slime were inadvertently released into a river, killing large numbers of fish and inflicting other damage. The defendant, Cities Service, filed an affidavit with the court which claimed, among other things, that phosphate mining was a natural use of the land and had great value to the community. *Id.* at 801. The court acknowledged that when the factors were balanced, "the first four weigh in favor of the State while the last two favor Cities Service." *Id.* at 803. Nevertheless, due to the "magnitude of the activity and the attendant risk of enormous damage," the court held that the activity was abnormally dangerous and imposed strict liability. *Id.*

In *Yukon Equipment, Inc. v. Fireman's Fund Insurance Co.*, 585 P.2d at 1206, the Supreme Court of Alaska considered whether the storage of explosives was an abnormally dangerous activity. The storage magazine was leased from the government and located on government land. The defendants argued that the activity was entirely appropriate to its locale and had significant value to the community. The court concluded that although the fifth factor was "arguably not present" and the sixth was "debatable," the activity was abnormally dangerous. *Id.* at 1210.

In *Siegler v. Kuhlman*, 81 Wash.2d 448, 502 P.2d 1181 (1973), the Supreme Court of Washington considered whether transportation of several thousand gallons of gasoline on a public highway was an abnormally dangerous activity. A tanker truck crashed and released gasoline on the highway. The gasoline exploded and injured the plaintiff. The court ruled that the "nonnatural use" distinction (factor 4) was "irrelevant to the transportation of⊥ gasoline" and held the defendants strictly liable. ⊥19
Id. at 1184.

The case at bar contains facts analogous to the cases noted. In the above cases, a dam broke, a storage magazine burst, a truck crashed—all releasing a destructive agent that caused injury. In this case, a computer malfunctioned, releasing private confidential records that caused William Duffy severe financial loss.

Even if this Court should somehow find that Lincoln's storage of personal financial information in a computer did not sat-

isfy one or more factors of the balancing test, the risk, harm, and difficulty of eliminating the risk cry out for the imposition of strict liability.

B. *Sound Public Policy Demands The Imposition Of Strict Liability Upon Lincoln County State Bank.*

As one court has noted, there may be other factors to consider as well as the principles of "abnormally dangerous activity." *Doundoulakis v. Town of Hempstead*, 42 N.Y.2d 440, 368 N.E.2d 24, 27, 398 N.Y.S.2d 404 (1977). Essentially, declaration that an activity is abnormally dangerous is a public policy decision. It is an "adjustment of conflicting interests" which asks who should bear the loss between two relatively innocent parties. *Langan v. Valicopters*, 88 Wash.2d 855, 567 P.2d 218, 221 (1977).

Many courts have imposed strict liability based upon a risk-distribution analysis. This analysis, simply put, holds that for various societal reasons, hazardous activities must "pay their own way." *Cities Service Co. v. State*, 312 So.2d at 801.

Moreover, public policy demands that those innocently harmed be accorded adequate remedies. A brief review of the
⊥120 theories of liability available to the Appellant reveals that⊥ strict liability is the only legal theory which provides sufficient compensation for the harm caused by computer malfunction.

1. *Based upon risk-distribution theories, Lincoln is better able to bear the risk of loss.*

The central theme behind the imposition of strict liability for abnormally dangerous activities is that 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 harm as a result of it." *Restatement (Second) of Torts* § 520, Comment h at 38 (1977). This philosophy holds that the "one who caused harm to another makes good the loss, regardless of any fault or intent to injure on the part of the actor." *Taylor v. City of Cincinnati*, 143 Ohio St. 426, 28 Ohio Ops. 369, 55 N.E.2d 724, 727 (1944).

It is socially and economically more desirable to place the risk of loss on the hazardous enterprise—for that enterprise is in a better position to distribute the loss among the general public. *Chavez v. Southern Pac. Transportation Co.*, 413 F. Supp. 1203, 1208 (E.D. Cal. 1976). Through risk-distribution, the impact on each individual is lessened. *Lubin v. Iowa City*, 131 N.W.2d 765,

770 (Iowa 1964); *see also* Keeton, *Is There A Place for Negligence in Modern Tort Law?*, 53 Va. L. Rev. 886, 892 (1967).

Furthermore, shifting the risk of loss places the burden on the party best able to avoid the loss. *General Telephone Co. of Southwest v. Bi-Co Pavers, Inc.*, 514 S.W.2d 168, 174 (Tex. Civ. App. 1974). Shifting this burden can also act as a deterrent to future losses. If the imposition of strict liability in this case⊥⊥21 would make Lincoln County State Bank more careful in its use of a computer and in how it handles its customers' financial records, then that alone would justify its application. *See Escola v. Coca-Cola Bottling Co.*, 24 Cal.2d 453, 462, 150 P.2d 436, 440-441 (1944) (Traynor, J., concurring).

The line must be drawn. This Court must unequivocably hold that strict liability will be imposed when a helpless victim suffers overwhelming loss from a danger against which he could not and should not be expected to take adequate precautions. *See Pecan Shoppe, Inc. v. Tri-State Motor Transit Co.*, 573 S.W.2d 431 (Mo. App. 1978). The burden should be shifted onto Lincoln County State Bank, the one who created the risk, rather than on William Duffy. *See McLane v. Northwest Natural Gas Co.*, 255 Or. 325, 327, 467 P.2d 635, 638 (1969).

2. *Strict liability is the only legal theory that properly addresses cases of computer malfunction.*

Although liability for computer malfunction may be predicated on a number of theories, no court decision thus far has made a distinction on the applicability of any one theory. It is conceivable that plaintiffs may seek to use a negligence theory, a contracts theory, a products liability theory, a professional malpractice theory, or, as here, a strict liability theory. One resourceful plaintiff recently pled a new tort called "computer malpractice" and also a cause of action for strict liability, although neither cause of action was upheld. *Chatlos Systems, Inc. v. National Cash Register Corp.*, 479 F. Supp. 738 (D.N.J. 1979), *modified* 635 F.2d 1081 (3rd Cir. 1980).

All of the theories upon which one can plead liability⊥ for⊥22 computer malfunction are, however, inadequate, with the exception of strict liability.

If one seeks to plead negligence, there are extremely difficult problems of proof due to the complexity and uncertainty inherent in computers. Gemignami, *Legal Problems for Computer Software: The View from '79*, 7 Rut. J. of Comp. & Tech. L. 269 (1980). Moreover, there is a great risk, due to the complexity of computers that any evidence of negligence may be destroyed

with the whirl of a disc. *See Siegler v. Kuhlman*, 81 Wash.2d 448, 451, 502 P.2d 1181, 1185 (1972).

A contracts theory would also face great odds. In contracts between computer manufacturers and computer users there are generally exculpatory provisions. Freed, *Products Liability in a Computer Age*, 12 Forum 461, 477 (Wint. 1977). In addition, an innocent third party, such as William Duffy, would have to overcome the requirement of "privity of contract." Further, the Uniform Commercial Code would be of no help here since the relationship of bank to depositor is not one of buyer and seller, to which the UCC applies. *See* U.C.C. § 2-102 (1972).

A products liability theory, although frequently urged by scholars for computer malfunction, would also probably fail. One Federal District Court has already ruled that software programs are not tangible personal property. *District of Columbia v. Universal Computer Associates, Inc.*, 465 F.2d 615 (D.C. Cir. 1972). Moreover, since computer programs are generally tailor made for the user, they would not seem to be a product introduced into the stream of commerce, as is required in products
⊥23 liability. *See* ⊥ Freed, *Products Liability in the Computer Age*, 12 Forum 461, 475 (1977).

A professional malpractice theory will fail because no court has ever recognized that programmers or computer users are professionals. One legal writer has pointed out that no state has yet to require that programmers be licensed. Nycum, *Liability for Malfunction of a Computer Program* Comp. & Tech. L. 1, 10 (1979). It is doubtful, due to the experimental nature of computers, that those who operate computers would be held to a higher standard of care.

Therefore, strict liability in tort is the only adequate theory with which to deal with computer function. It has advantages over other legal theories because it is easier to administer. *See* Epstein, *A Theory of Strict Liability*, 2 J. Leg. Studies 151, 177-89 (1973). Each case may be judged on its facts to determine whether strict liability is required. *McLane v. Northwest Natural Gas Co.*, 467 P.2d at 635. Moreover, on a risk distribution analysis, it is sound public policy to impose it. *Luthringer v. Moore*, 31 Cal.2d 489, 190 P.2d 1 (1948).

Innocent persons like the Appellant William Duffy need to be protected from the great harm they face from errant computers. This Court must recognize, due to the inadequacy of other legal theories and due to the benefits of risk distribution, that the innocent must no longer suffer and that strict liability must be imposed as a matter of sound public policy. Since this activity satisfies the Restatement balancing test and the general

principles espoused in *Rylands v. Fletcher*, strict liability can be imposed under the theory of abnormally dangerous activity.⊥ ⊥24

II. LINCOLN COUNTY STATE BANK SHOULD BE LIABLE FOR NEGLIGENT DISCLOSURE OF WILLIAM DUFFY'S PERSONAL FINANCIAL RECORDS.

Should this Court somehow find that Lincoln's storage of vast amounts of sensitive personal financial data in a computer was not an abnormally dangerous activity, Lincoln may still be held liable under a theory of negligent disclosure.

Both the Circuit Court and the Appellate Court below recognized that Lincoln had a duty to prevent disclosure of Appellant's financial records. (R.12,15). In its Opinion, the Appellate Court recognized the threat of harm posed by computer technology and concluded that a bank "has a duty to its customers to act with care regarding the maintenance of sensitive personal financial information about them." (R. 15).

Cognizant of the need to protect bank customers' privacy interests and following the lead of numerous other jurisdictions, this Court should adopt a duty of confidentiality as between a bank and its customer in the State of Marshall.

Once this duty is recognized, Lincoln is liable for breach of duty. However, due to the difficulty of establishing fault in cases of computer malfunction, William Duffy asks this Court to allow an inference of negligence against Lincoln. Such an inference was granted in the Appellate Court. (R.16).

For these reasons, Appellant urges this Court to affirm the decision below regarding the negligent disclosure issues.

A. *Lincoln Had A Duty To Prevent Disclosure Of William Duffy's Confidential Records.*

In this day of computer access to sensitive personal information, courts must be particularly mindful of the need to protect⊥ the privacy of individuals. This need is dramatically⊥25 evident in the case at bar.

William Duffy, who had every reason to believe that Lincoln Bank would keep his financial transactions confidential, became the victim of a unauthorized disclosure by the Bank's defective computer. (R.1-5). Detailed records of all of Mr. Duffy's financial transactions for a four month period were released to a third party.[6] (R.2). This disclosure not only caused Mr. Duffy emo-

6. Appellant only contests the unauthorized disclosure of his financial records. We recognize that disclosure pursuant to legal process is justified. *See State v. McCray*, 15 Wash. App. 810, 510 P.2d 1376 (1976).

tional and mental distress but it also caused him severe financial loss. (R.4). These facts alone mandate the recognition by this Court that Lincoln Bank had a duty to prevent such disclosure.

This duty arises out of the need to protect a person's inherent right to privacy. *See* Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1880). That right to privacy faces tremendous threats from vast information-gathering data banks, such as the one operated by Lincoln Bank. *See* A.F. Westin and M. A. Baker, *Data Banks in a Free Society* (1972). If a duty to prevent unauthorized disclosure is not demanded of Lincoln, then it is conceivable that innocent persons will be divested of their privacy rights. All will be subject to the capricious exposure of intimate secrets by uncaring and unreliable computers.

Moreover, American statutory and common law recognizes and supports the imposition of a duty of confidentiality in this case. Legislatively and judicially, numerous jurisdictions have adopted this duty of confidentiality as between a bank and its ⊥26 customer.⊥

1. *Lincoln's use of a computer to store personal information threatens privacy interests and demands recognition of a duty of confidentiality.*

Prior to the use of computers in banking, a bank customer did not experience great concern over threats to his privacy. Record-keeping and information dispersal techniques were inefficient and customer information was decentralized. Privacy Protection Study Commission, *Personal Privacy in an Information Society* 3-4 (1977). Since privacy rights were seldom jeopardized, there was no need to demand a duty of confidentiality. *See*, Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 Mich. L. Rev. 1091, 1158-59 (1969).

However, threats to individual privacy have greatly increased with the advent of modern, computerized banking practices. Today, routine decisions are made by computers without personal input from the people affected by such decisions. An individual no longer has any control over the content, accuracy, or use of information collected about his life. Linowes, *Must Personal Privacy Die in the Computer Age?*, 65 A.B.A.J. 1180, 1181 (1979). The individual is further removed from the information about his life by the increased emphasis on centralization and shared data banks. Congressional Research Service, *Privacy: Information Technology Implications*, Issue Brief No. IB74105 (1982).

These threats posed by computers to individual privacy were noted by the United States Congress in the Preamble to the Privacy Act of 1974, where it was said that "the increased use of computers magnifies the harm to the individual that can occur from collection, use or dissemination of information." Privacy Act of⊥ 1974, 5 U.S.C. § 522A (1976). Indeed, the thrust of a great ⊥27 deal of recent federal legislation has been directed toward protection of an individual's privacy interests.[7]

The United States Supreme Court has also spoken on this most urgent public concern. In *Whalen v. Roe*, 429 U.S. 589 (1977), Justice Stevens acknowledged that "the threat to privacy [is] implicit in the accumulation of vast amounts of personal information in computerized data banks. . . ." *Id.* at 605. In *Sampson v. Murray*, 415 U.S. 61 (1974), Justice Marshall continued that "we live in an Orwellian age in which the computer has become the heart of a surveillance system that will turn society into a transparent world." *Id.* at 96 n.2 (Marshall, J., dissenting).

State courts have also addressed the issue of computer intrusion upon the rights of privacy. Mosk of the California Supreme Court, writing for a unanimous bench, noted that:

> [d]evelopment of photocopying machines, electronic computers and other sophisticated instruments have accelerated the ability of government to intrude into areas which a person normally chooses to exclude from prying eyes and inquisitive minds.

Burrows v. Superior Court of San Bernardino County, 13 Cal.3d 238, 244, 529 P.2d 590, 596, 118 Cal. Rptr. 166, 172 (1974).

Banks like the Appellee Lincoln County State Bank are some of the most visible transgressors on an individual's right to privacy. Banks routinely share customer information with other banks and often provide financial information without consent of the customer to landlords, employers, credit agencies and other third parties. Linowes, *The Privacy Invaders*, Barristers, Fall, 1978 at⊥ 12. A survey of 130 of the largest commercial ⊥28 banks conducted in 1979 revealed, among other things, that:

—85% of the banks surveyed did not inform their customers that information may be released to other customers

—76% did not notify or ask for approval from the customer when disclosing to third parties

—74% of the banks did not tell the customer about expected routine disclosures.

D. Linowes, *A Research Study of Privacy and Banking* (1979).

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7. A survey of recent federal legislation enacted to protect the right of privacy is contained in Appendix F.

Because of the cavalier attitude that banks display toward sensitive, confidential information, the Privacy Study Commission concluded that controls were necessary in order to protect individual privacy interests from bank intrusion. Privacy Protection Study Commission, *Personal Privacy in an Information Society*, 72-100, 106-124 (1977).

It has long been held that the proper forum for imposing controls on institutions to protect individual privacy interests lies in the state, rather than federal courts. The United States Supreme Court in *Katz v. United States*, 389 U.S. 347 (1967) held that the common law of the states, rather than the United States Constitution, protects the general privacy rights of the individual. *Id.* at 350-51. State courts are a particularly appropriate forum from which to address causes of action based upon disclosure of confidential information. Lower federal courts, in recent opinions, have ruled that disclosure of confidential information, even by government agencies, is subject to state law and is not subject to federal constitutional protection. *J. P. v. DeSanti*, 653 F.2d 1080, 1087 (6th Cir. 1981); *Crain v. Krehbiel*, 443 ⊥29 F. Supp. 202, 207-08 (N.D. Cal. 1977).⊥

For these reasons, this Court must recognize that Lincoln Bank had a duty to prevent the disclosure of William Duffy's personal financial information. Lincoln inexcusably permitted its computer to intrude upon Mr. Duffy's privacy interests and it should be liable for any harm caused by that intrusion. Because of the increased use of sophisticated technology in the banking industry, an individual's fragile privacy interests are extremely vulnerable to the vagaries of a computer. Such an inequitable circumstance demands the imposition of a duty upon Lincoln in the case at bar.

2. *American statutory and common law recognize a duty of confidentiality between a bank and its customer.*

American common law has long recognized that a bank owes a duty of confidentiality to its customers. Graham and Barkus, *Controlling Financial Misconduct by Bank Employees: The Effect of Financial Privacy Laws*, 98 Banking L.J. 117, 130 (1981); A. Michie, *Banks and Banking* § 1 (1973). Indeed, every jurisdiction that has spoken on the issue has determined, either as a rationale for the holding or in dictum, that banks owe such a duty.[8]

8. A survey of the jurisdictions that have spoken on this issue is contained in Appendix G.

This study has always been considered part and parcel of the bank's relationship with its customer. Indeed, that relationship hinges upon the expectation of confidentiality. It has been said that:

> [t]here is perhaps no more treasured or time honored element of a financial institution's relationship with its customer than the customer's firm and abiding belief that the intimate details of his financial affairs that⊥ he ⊥30
> has entrusted to his banker will be maintained in the strictest confidence. The banking industry has always been most sensitive to its obligation to preserve and protect the financial privacy of its customers.

LaValley and Lancy, *The IRS Summons and the Duty of Confidentiality: A Hobson's Choice for Bankers*, 89 Banking L.J. 979, 979 (1972).

Appellant asks this Court to recognize this duty of confidentiality as between a bank and its customer. Other jurisdictions, under diverse theories and fact patterns, have specifically adopted this duty as a matter of public policy.

In *Valley Bank of Nevada v. Superior Court of San Joaquin City*, 15 Cal.3d 652, 542 P.2d 977, 125 Cal. Rptr. 553 (1979), the Supreme Court of California declared that, "it is the general rule in other jurisdictions that a bank implicitly agrees not to divulge confidential information without the customer's consent unless compelled by court order." *Id.* 542 P.2d at 979.

In *Suburban Trust Co. v. Walker*, 44 Md. 335, 408 A.2d 758 (Md. Ct. Spec. App. 1979), a Maryland Appellate court stated, "[c]ourts have recognized the special considerations inherent in the bank-depositor relationship and have not hesitated to find that a bank impliedly warrants to maintain, in strict confidence, information regarding its depositors' affairs."

The most frequently cited case concerning the duty of confidentiality is *Peterson v. Idaho First National Bank*, 83 Idaho 578, 367 P.2d 284 (1961).[9] Like the case at bar, *Peterson* was a case of first impression which considered whether to impose a duty⊥ of⊥31 confidentiality. In that case, an officer of plaintiff's employer asked the local bank to provide him with any information about company employees that might discredit the company. Subsequently, the bank manager wrote the officer concerning the deteriorating finances of the plaintiff. *Id.* 367 P.2d at 286. The court, in holding for the plaintiff based upon an implied contract of confidentiality, said, "[i]nviolate secrecy is one of the inher-

9. It is noted that this case has been cited favorably by all the courts that have considered the issue. *See* Appendix G.

ent and fundamental precepts of the relationship of the bank and its customers or depositors." *Id.* 367 P.2d at 290.

This Court, in approving Appellant's theories, will simply be recognizing the established common law duty that a bank owes to its customers to prevent disclosure of confidential information entrusted to its care. The great weight of the common law and judicial precedent militates in favor of recognition of this duty in this case of first impression.

Any reliance by the Appellee on the case of *United States v. Miller*, 425 U.S. 435 (1975), is misplaced. Although the Supreme Court held that the plaintiff had no standing to contest the bank disclosure of his financial records, *Miller* dealt with a disclosure pursuant to a valid subpoena duces tecum. The court noted that when there is an absence of legal process, constitutionality protected rights could be impinged. *Id.* at 445 n.7, *see also Id.* at 447-455 (Brennan, J., dissenting).

Moreover, *Miller* has been statutorily overruled by Congress. Congressional reaction to the Miller ruling was to enact the Right to Financial Privacy Act of 1978, 12 U.S.C. § 3401-3422 (Supp. II 1979). *See* H.R. Rep. No. 1383, 95th Cong., 2d Sess. 34 (1978) (legislative history shows that the Act was passed due
⊥32 to⊥ Congressional disagreement with *Miller*). The Congress specifically protected the right of an individual bank customer from unauthorized disclosure by a bank. *See Hancock v. Marshall*, 86 F.R.D. 209, 210 (1980) (the act restricts the scope of *Miller*).

Therefore, this Court should follow the judicial and statutory precedent and affirm the rulings of both the Circuit Court and the Appellate Court in holding that Lincoln Bank had a duty not to disclose the confidential personal financial records of the Appellant, William Duffy.

B. *Lincoln County State Bank Should Be Held Liable For Breach Of Its Duty Of Confidentiality Under The Doctrine Of Res Ipsa Loquitur.*

Once this Court recognizes that Lincoln had a duty to prevent disclosure of William Duffy's personal finances, then Lincoln can be held liable for the unauthorized disclosure that caused Mr. Duffy harm.

However, this case is unusual—for the disclosure was caused by a computer malfunction. When dealing with such complex and unpredictable machinery, there are acute problems of identifying the specific negligence acts that caused the disclosure. These problems were specifically recognized by the Appellate Court in its ruling below. (R.16). There, Justice

Mink held "that due to the state of the art of computer technology and the difficulty of proving a breach under such circumstances, one doctrine of *res ipsa loquitur* should apply to establish the negligent disclosure of personal information through a computer." (R.16).

Res ipsa loquitur is a rule of circumstantial evidence that⊥ ⊥33
allows a plaintiff an inference of negligence sufficient to get to the jury. *Sweeney v. Erving*, 228 U.S. 233 (1913). The negligence is inferred from the mere facts surrounding the incident made the basis of the suit, without requiring the plaintiff to plead and prove specific acts of negligence. *Johnson v. Foster*, 202 So.2d 520, 524 (Miss. 1967). It is a tool of tort law which allows a plaintiff to withstand "no-evidence" dispositive motions, such as the Appellee's contested motion to dismiss, and to reach the discovery and evidence gathering phase of the lawsuit. *See* D. Louisell and H. Williams, *Trial of Medical Malpractice Cases* § 15.01 at 464-65 (1960). In cases such as the one now before the court, where proof of negligence is extremely difficult, economically prohibitive, or impossible, the inference of negligence allows a jury to determine, based upon the facts of the case, whether the defendant's conduct violated a reasonable person standard. *See Brannon v. Wood*, 251 Or. 349, 351, 444 P.2d 558, 560 (1968).

This classic tort doctrine is accepted and applied in every state of the union and the District of Columbia.[10] It has a sound public policy heritage, because in many cases, if the doctrine was not allowed, the plaintiff would not be able to pursue a legal remedy for harms suffered.

The doctrine has been applied to many diverse circumstances. *See e.g.*, *Griffin v. Manice*, 166 N.Y. 188, 59 N.E. 925 (1901) (falling elevators); *George Foltis, Inc. v. City of New York*, 287 N.Y. 108, 38 N.E.2d 455 (1941) (escape of gas from mains); *Ross⊥ v. Double Shoals Cotton Mills*, 140 N.C. 115, 52⊥34
S.E. 121 (1905) (sudden starting of machinery); *Bustamonte v. Carborundum Co.*, 375 F.2d 688 (7th Cir. 1967) (industrial accident with machinery); *Moore v. Douglas Aircraft Co.*, 282 A.2d 625 (Del. Super. Ct. 1971) (landing gear breakage on airplane).

The doctrine is particularly appropriate here, as the Appellate Court indicates, because it involves a case of computer malfunction.

Computers, with all their efficiency and automation, still require human operation and programming. Consequently, errors by the various users, programmers, technicians and other per-

10. For a complete survey of the method in which *res ipsa loquitur* is applied in the fifth states, *see* Appendix H.

sonnel probably account for the majority of computer malfunctions. *See generally* De Rensis, *The Civil Liabilities of Data Base Operators*, 24 Prac. Law. 25, 27 (1978); Brannigan & Payhoff, *Liability for Personal Injuries Caused by Defective Medical Computer Programs*, 7 Am. J. L. & Med. 123, 178 (1982). Liability has been imposed on users of computers who fail to act carefully in the interpretation and use of computer information. *See Neal v. United States*, 402 F. Supp. 678, 680 (D.N.J. 1975) (users of computer negligent because of failure to operate with safeguards to insure reliability and accuracy); *Ford Motor Credit Co. v. Hitchcock*, 116 Ga. App. 563, 158 S.E.2d 468 (1967) (credit company liable for failing to inspect the accuracy of erroneous information; *State Farm Mutual Insurance Co v. Bockhorst*, 453 F.2d 533 (10th Cir. 1972) (insurer's computer error resulted in mistaken reissuance of plaintiff's policy). Insurer liable even though "actual processing of the policy was carried out by an ⊥35unimaginative mechanical device . . ."). *Id.* at 536.⊥

Once the duty of a computer user to act carefully is established, it is necessary that liability attach for breach of this duty. However, the complexities of computers often create an impossible evidentiary burden for the plaintiff. Because of the difficulty in tracing the precise moment and method that the error occurred, res ipsa loquitur should be applied to the instant case.[11]

Furthermore, the facts of this case meet the test for the application of res ipsa loquitur. We can infer that the injury that Mr. Duffy suffered was caused by the defendant's negligence when:

(a) the event is of a kind which ordinarily does not occur in the absence of negligence;

(b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and

(c) the indicated negligence is within the scope of defendants' duty to the plaintiff.

Restatement (Second) of Torts § 328D(1).[11]

The first element requires the plaintiff to show that the injury causing event was more probably the result of negligence. Restatement (Second) of Torts § 328D, Comment e at 159. The consensus of modern cases apply res ipsa according to a "balancing of probabilities" test. *See, e.g., Hakenensen v. Ennis*, 584 P.2d 1138, 1139 (Alaska 1978); *Riedissen v. Nelson*, 111 Aiz. 542, 544, 534 P.2d 1052, 1054 (1975). Moreover, the plaintiff does not

11. This *Restatement* section is reproduced in Appendix I.

need to negate all other theories of causation except the defendant's negligence. *Danville Community Hospital v. Thompson*, 186⊥ Va. 746, 43 S.E.2d 882 (1947). ⊥36

Here again, common experience with computers indicates that defective performance is ordinarily the result of human error. Human error may occur during input of information program designs or in interpreting the results of the output. DeRensis, *Civil Liabilities of Data Base Operators*, at 27. Although the disclosure may have occurred by some other factor, the inference in computer cases is that it "ordinarily" was the result of someone's negligence. Therefore, the first element of res ipsa is met here.

The second element deals with whether the other possible causes of the disclosure have been eliminated. Certainly, based on the facts of this case, William Duffy could not have contributed to the computer disclosure. Although other causes may have contributed, there are no other causes that have been brought to the attention of this Court. *Paust v. Benton County Public Utility, Dist. No. I*, 13 Wash. App. 473, 535 P.2d 854 (1975). The Supreme Court of Montana, relying on this section of the Restatement, held that "concurrent causes may exist and yet not foreclose reliance upon res ipsa loquitur." *Tomkins v. Northwestern Union Trust Co.*, 645 P.2d 402, 406 (Mont. 1982). The disclosure of William Duffy's financial records by Lincoln, in the absence of any other rational explanation, must have been due to Lincoln's negligence.

The third element is whether the negligence is within the scope of the defendant's duty to the plaintiff. If this Court imposes a duty upon Lincoln to prevent disclosure of William Duffy's financial records, the negligent disclosure of those⊥ ⊥37 records is clearly within the scope of that duty.

Thus, since all elements of the Restatement test are met, this Court may rely upon it to establish the inference of negligence against the Appellee. While Lincoln may, through the introduction of affirmative evidence, successfully rebut this inference, the doctrine of *res ipsa loquitur* will still allow William Duffy to have the merits of his cause of action determined by a jury of his peers. Appellant respectfully requests that this Court affirm the Appellate Court's holding and apply an inference of negligence to Lincoln's disclosure of Appellant's confidential information by its errant computer.

CONCLUSION

For the reasons stated above, Appellant William Duffy respectfully prays that this Court reverse the decision of the Ap-

pellate Court on the strict liability issue and reaffirm the decision of the Appellate Court on the negligent disclosure issue.

Respectfully submitted,

_____

_____

_____

(Signatures omitted pursuant to Rule III(g) of the 1983 Benton National Moot Court Competition)⊥

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APPENDICES

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APPENDIX A

IN THE CIRCUIT COURT
FOR THE COUNTY OF LINCOLN, STATE OF MARSHALL

WILLIAM DUFFY, Plaintiff, vs. LINCOLN COUNTY STATE BANK CORPORATION, Defendant.	NO. 81-101

MEMORANDUM ORDER

This court having proper jurisdiction over the parties, WILLIAM DUFFY (DUFFY), Plaintiff, and LINCOLN COUNTY STATE BANK CORPORATION (LINCOLN), Defendant, and the subject matter of this action, denies Defendant's Motion to Dismiss.

The Defendant's Motion to Dismiss raises two questions of law in a case of first impression before this court. Construing the facts most favorably for the non-moving party, this court finds that the Defendant disclosed information about Plaintiff's personal banking transactions to the State of Marshall Securities Commission pursuant to an informal request of its investigator concerning the account numbers and types of accounts maintained by DUFFY at LINCOLN. LINCOLN's disclosure of DUFFY's personal⊥ bank records was made through LIN-⊥A-1
COLN's computer. At a hearing on the Motion to Dismiss, the parties stipulated that proper research instructions had been entered into the computer terminal.

DUFFY alleges in Count 1 of his Complaint that LINCOLN is liable to DUFFY for any injuries to him arising out of LINCOLN's unauthorized release of sensitive, personal financial information from its computer. DUFFY asks that this court apply strict liability to the activity of maintaining large volumes of such personal information in computer data systems. This cause of action, if it so exists, is based on the characterization as ultrahazardous or abnormally dangerous, the activity of maintaining, in computer information systems, large quantities of sensitive, personal financial information.

In support of the application of strict liability to injuries resulting from the maintenance of large volumes of personal infor-

mation in computer data banks, DUFFY cites the rule in *Rylands v. Fletcher*, the famous English case which applied strict liability against a miller who constructed a millpond and, without fault on his part, allowed water to run through the land and flood his neighbor's mineshaft. The rule from the case, articulated by Judge Blackburn, is "that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape." *Fletcher v. Rylands* (1866), L.R. 1 Ex. 265, 279.

⊥A-2 Banking and financial institutions regularly collect and⊥ maintain large volumes of very sensitive, personal information from and about their customers. Although customers have no property interest in such records, most of the data given to the banks comes directly from its customers, who have an expectation that the bank will not disclose the information except with the customer's consent or for service to the customer.

The computer allows banks to maintain and access larger amounts of personal information than any manual system has ever made possible. Computer technology also permits information to be maintained in great detail and specificity. Significant harm might accrue to customers if such information escapes from the computer system. For public policy reasons, strict liability should apply to record-keepers who maintain large quantitites of sensitive, personal financial information in computer data banks. What constitutes "large quantities" of personal information is a question of law for the court to determine on a case-by-case analysis. The facts here indicate that LINCOLN's computer system contains complete and detailed records of DUFFY's financial transactions, and that activity justifies the application of strict liability. Therefore, Defendant's Motion to Dismiss Count 1 of DUFFY's Complaint is denied.

DUFFY alleges in Count II of his Complaint that LINCOLN is liable for negligently allowing disclosure, through its computer, of personal information. Implicit in the imposition of strict liability for the unauthorized release of personal financial information from computer data systems, is recognition of the bank's duty to its customers to act with care in maintaining ⊥A-3that⊥ information. Therefore, LINCOLN's Motion to Dismiss Count II of DUFFY's Complaint is denied.

This court finds that there is a substantial ground for difference of opinion on questions of law; therefore, an immediate appeal will materially advance the ultimate termination of the litigation.

SO ORDERED.

ENTERED: February 12, 1982 /s/ Judge G. B. Watkins⊥⊥A-4

APPENDIX B

IN THE APPELLATE COURT
OF THE
STATE OF MARSHALL

LINCOLN COUNTY STATE BANK,
CORPORATION,
Appellant,

vs.

NO. 82-999

WILLIAM DUFFY,
Appellee.

OPINION

Decided December 3, 1982
Before Mink, Barry, and Johnston, Judges
Mink, Chief Judge, delivered the opinion of the Court:

This case presents several questions of first impression to this Court. Circumscribing the issues raised in the instant action is the broader question of what impact computer technology will have on the quality of life in this State. These issues challenge traditional modes of legal analysis.

This case has been brought on appeal before this Court pursuant to the Rules of Appellate Practice of the State of Marshall allowing for leave to appeal where the trial judge finds that there ⊥B-1is substantial ground for difference of opinion on questions⊥ of law on which the trial judge has ruled, and that an immediate appeal will materially advance the ultimate termination of the litigation. This court finds that the parties below and before this court met all the procedural prerequisites.

WILLIAM DUFFY is a controlling shareholder in Baker Properties, Inc. (Baker) which experienced a corporate reorganization. Ms. Barnes, an attorney and investigator from the offices of the State of Marshall Securities Commission (Commission) initiated an investigation into Baker's corporate reorganization. Ms. Barnes informally requested that LINCOLN COUNTY STATE BANK CORPORATION (LINCOLN) send a list of DUFFY's personal account types and account numbers maintained at LINCOLN. The facts agreed upon indicate that although a correct search instruction was put into the computer, the computer instead caused complete and detailed information

concerning transactions from DUFFY's personal accounts to be disclosed. The personal information received by the Commission prompted an investigation into DUFFY's financial dealings with Baker. The Commission requested further information from LINCOLN pursuant to a subpoena. LINCOLN complied with that request. Wary of future dealings with DUFFY, LINCOLN cancelled a $150,000.00 unsecured line of credit to him. The Commission later terminated its investigation, finding no impropriety on DUFFY's part. The Commission returned the bank records to DUFFY.

DUFFY filed a two count complaint in the Circuit Court for the County of Lincoln.

Under the first count of DUFFY's complaint, the Circuit Court ruled as a matter of law that DUFFY stated a valid claim⊥ ⊥B-2 against LINCOLN under a strict liability theory for any damages resulting from the unauthorized release of personal records about him. We do not agree and reverse. DUFFY asks that we apply the rule of strict liability as first articulated in *Fletcher v. Rylands* (1866), L.R. 1 Ex. 265, 279 "that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape." On appeal, Lord Cairns limited the rule to non-natural uses of land. *Rylands v. Fletcher* (1968), L.R. 3 H.L. 330, 338-39. However narrowly construed, the rule of *Rylands* is not applicable to a computer user's liability.

We hold that as a matter of public policy the application of strict liability for the use of computers to process personal information would impose an unreasonable burden upon recordkeepers. Modern society requires the free flow of information. Commerce would be seriously impaired if the flow of information were to be constrained by the imposition of strict liability. Therefore, we conclude that the maintenance of personal financial information in a computer is not an ultra-hazardous or abnormally dangerous activity.

In the second count of DUFFY's complaint, he alleges that LINCOLN negligently disclosed personal information to the Commission. The circuit court below sustained DUFFY's negligence allegation, finding a duty implicit in the acceptance of a theory of strict liability. We do not accept strict liability in this case, but must now consider DUFFY's negligence count.⊥ ⊥B-3

As DUFFY has skillfully articulated to this Court, never before has so much information about an individual been so readily available to so many people. These circumstances have

been created by computer technology which allows rapid access to and dissemination of large volumes of personal information. The disclosure of this information can effectively change a person's life.

In this case of first impression this Court recognizes the potential harm that may befall an individual by an unauthorized disclosure of personal information. Therefore, a record-keeper, such as a bank, has a duty to its customers to act with care regarding the maintenance of sensitive personal financial information about them. Customers expect their bank to hold information about them in confidence and to disclose it only with the customer's consent or for a legally justified reason.

Under the facts of this case, LINCOLN, as a matter of law, did not breach any duty to prevent disclosure of confidential information when it complied with a subpoena mandating such disclosure. However, when LINCOLN released DUFFY's detailed financial records to the Commission, pursuant only to Ms. Barnes' informal request, the bank breached this duty. LINCOLN argues that no facts indicating its negligence were alleged and it did not breach this duty; further, it is agreed that the research request entered into the computer terminal was correct. This Court holds that due to the state of the art computer technology and the difficulty of proving a breach under such circumstances, the doctrine of *res ipsa loquitur* should apply to establish the negligent disclosure of personal information through a computer. That is, the Complaint is sufficient if the
⊥B-4Plaintiff alleges that the Defendant⊥ had control over the instrumentality of the disclosure, the computer, and that this disclosure would not have happened but for the Defendant's negligence.

AFFIRMED in part, REVERSED in part, and REMANDED
⊥B-5for further proceedings consistent with this opinion.⊥

APPENDIX C

From *Robots: The Dangers*, N.Y. Times, Dec. 13, 1981 § 3 at 27

It was a Luddite's nightmare come true. "Man killed by robot," was the story that first appeared in the Japanese newspapers here and was then carried around the world.

On Major news service, apparently seeking to instill the tragedy with a provocative measure of machine-versus-man emotionalism, prefaced its account with the headline, "Worker Stabbed in Back by Robot, Dies."

In fact, a 37-year-old factory maintenance worker at Kawasaki Heavy Industries Ltd. was crushed to death against a machine by a robot. The accident took place last July 4 along the plant's processing line for automobile gears, but was only made public last week after an investigation was completed. The death was the first recorded fatal accident involving a factory worker and a robot.

According to a report by the Labor Ministry's Bureau of Standards, the victim of the mishap at Kawasaki's Akashi factory, near Kobe in western Japan, was "careless." The Government investigators found that Kenji Urata entered a restricted zone when machines were in operation. He apparently saw something wrong with one of the machines on the line, according to press reports here, and became so engrossed with fixing the machine that he did not notice the approach, from behind, of a transport robot that delivered parts to the machine.

But the Government also said that safety measures at the plant were inadequate and called for improvements.

Some safety measures are needed, according to Paul H. Aron, a professor at the New York University Business School. Mr. Aron, a robot expert, recently completed a tour of automated plants in Japan.

"From what I've seen, the Japanese companies may be counting too heavily on the intelligence of the human operator," Mr. Aron said. "We all sometimes forget ourselves and go someplace without thinking. The people need to be protected from the robots."

At the Yamazaki plant outside Nagoya, Tsunehiko Yamazaki explained that technology should be applied with safety in mind.⊥ He pointed to a big transport robot in his plant ⊥C-1 that can heft 16-ton loads and, appropriately enough, sports a caricature of the cartoon character, "Popeye.

> The big yellow robot has electronic sensors, Mr. Yamazaki noted, so that if a person gets in its path it will stop automatically. He directed a reporter to stand next to one of the maching centers, in the robot's path, and see if it stopped as it was sup-
> ⊥C-2posed to. The reporter did. Popeye stopped.⊥

APPENDIX D

JURISDICTIONS THAT HAVE ADOPTED THE ABNORMALLY DANGEROUS TEST OF THE RESTATEMENT (SECOND) OF TORTS §§ 519, 520 (1977)

State Supreme Court Cases:

Iowa

National Steel Service Center, Inc. v. Gibbons, 319 N.W.2d 269 (Iowa 1982)
Activity involved: explosion of derailed propane gas

Maryland

Yommer v. McKenzie, 255 Md. 220, 257 A.2d 138 (1969)
Activity involved: gasoline storage

Massachusetts

Clark-Aiken Corp. v. Cromwell-Wright Corp., 323 N.E.2d 876 (Mass. 1975).
Activity involved: broken dam

New York

Doundoulakis v. Town of Hempstead, 42 N.Y.2d 448, 368 N.E.2d 24, 398 N.Y.S.2d 404 (1977)
Activity involved: hydraulic landfilling project

Oregon

McLane v. Northwest Natural Gas Co., 255 Or. 324, 467 P.2d 635 (1970)
Activity involved: liquified gas storage tank explosion

South Carolina

Hatfield v. Atlas Enterprises, Inc., 274 S.C. 247, 262 S.E.2d 900 (1980)
Activity involved: fire works⊥ ⊥D-1

Washington

Langan v. Valicopters, Inc., 88 Wash.2d 855, 567 P.2d 218 (1977)
Activity involved: crop dusting

West Virginia

Peneschi v. National Steel Corp., 295 S.E.2d 1 (1982)
Activity involved: gas explosion

Appellate Court Cases:

Arizona

Correa v. Curbey, 124 Ariz. 480, 605 P.2d 458 (Ct. App. 1979)

Activity involved: explosives

Florida

Cities Service Co. v. State, 312 So.2d 799 (Fla. Dist. Ct. App. 1975)

Activity involved: phosphatic wastes escaping into public water

Kansas

John T. Arnold Assoc. v. City of Wichita, 5 Kan. App. 2d 301, 615 P.2d 814 (Ct. App. 1980)

Activity involved: broken water main

New Mexico

Otero v. Burgess, 84 N.M. 575, 505 P.2d 1251 (Ct. App. 1973).

⊥D-2 Activity involved: blasting⊥

APPENDIX E

RESTATEMENT (SECOND) TORTS §§ 519, 520 (1977) ABNORMALLY DANGEROUS ACTIVITIES

§ 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 form the activity, although he has exercised the utmost care to prevent the harm.

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

§ 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.⊥ ⊥E-1

APPENDIX F

SUMMARY OF FEDERAL LEGISLATION ENACTED TO PROTECT RIGHTS OF PRIVACY

The Fair Credit Reporting Act of 1970, 15 U.S.C. § 1681 *et seq* (1977)

Scope: Regulates investigative and regular reports on consumers and provides the consumer with access to the nature and sources of information contained in the files of consumer reporting agencies.

The Crime Control Act of 1973, 42 U.S.C. § 3789g (Supp II 1980)

Scope: Limits the use of criminal history files by the authorities and provides individuals with the opportunity to review their own records and to correct erroneous information.

The Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (1977)

Scope: Regulates school records of all educational institutions receiving federal funds and vests the right to inspect and object to the information in the parents or pupil.

Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq* (1977)

Scope: Outlaws credit discrimination on the basis of age, race, color, religion, national origin, sex or marital status while allowing the creditor to inquire about these areas as part of any application information.

The Privacy Act of 1974, 5 U.S.C. § 552a (1977)

Scope: Gives any individual a measure of control over information maintained about him or herself by the Federal
⊥F-1 Government.⊥

Section 1202 of the Tax Reform Act of 1976, 26 U.S.C. § 6103 (1977)

Scope: Provides that tax returns and return information are confidential and not subject to disclosure to Federal or State agencies.

The Right to Financial Privacy Act of 1978, Title XI of the Financial Institutions Regulatory and Interest Rate Control Act of 1978, U.S.C. § 3401 *et seq* (Supp II 1979)

Scope: Limits access to bank records by Federal authorities. Restricts banks from providing any Federal authority with access to financial records of any customer unless the Government notifies the customer and the customer has an opportunity to challenge the Government's action.

Privacy Protection Act of 1980, 42 U.S.C. § 2000aa-11 *et seq* (Supp IV 1981)

Scope: Protects journalists from search and seizure. Requires the Attorney General to issue guidelines to be used in obtaining evidence from non-journalists who are not suspected of criminal activity.⊥ ⊥F-2

APPENDIX G

SURVEY OF FINANCIAL DISCLOSURE CASES

The following cases address the liability of financial institutions for disclosing customer's personal financial information.

California

Burrows v. Superior Court of San Bernardino County, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974) (en banc)

Facts:	Plaintiff moved to suppress evidence the state had obtained from his personal bank accounts which his bank had surrendered without legal process.
Holding:	Plaintiff had a reasonable expectation that the bank would maintain the confidentiality of those papers that originated with him in check form and of bank statements of his checking account.
Rationale:	"A bank customer's reasonable expectation is that, absent compulsion by legal process matters he reveals to the bank will be utilized by the bank only for internal banking purposes."

Colorado

Charles v. DiGiacomo, Colo., 612 P.2d 1117 (Colo. 1980) (en banc)

Facts:	Attorney General, filed a motion for a subpoena duces tecum requesting plaintiff's bank to relenquish plaintiff's financial records. From an order denying his motion to quash the subpoena, Plaintiff appeals.
Holding:	Plaintiff depositor has a reasonable expectation of privacy in the bank records of his financial transactions.

Rationale: The United States and Colorado constitutions protect an individual's reasonable expectation of privacy from unreasonable governmental intrusion.⊥ ⊥G-1

Florida

Milohmich v. First National Bank of Miami Springs, 224 S.2d 795 (Fla. Dist. Ct. App. 1969)

Facts: Individual and corporate depositors sued bank for alleged breach of contractual duty not to disclose depositors financial information to third parties.

Holding: Complaint was sufficient to sustain breach by bank of implied contractual duty to depositor by negligently disclosing information concerning depositor's accounts to individual third parties.

Rationale: "A bank should, as a general policy, consider information concerning its customers as confidential, which should not disclose to others without clear justification."

Idaho

Peterson v. Idaho First National Bank, 83 Idaho 578, 367 P.2d 284 (1961).

Facts: Plaintiff depositor filed a cause of action to recover damages for an alleged violation of his right of privacy.

Holding: The bank had an implied duty not to disclose any information concerning a depositor's account to third persons unless authorized by law or by the depositor.

Rationale: It is inconceivable that a bank would at any time consider itself at liberty to disclose the intimate details of its depositors accounts.

Maryland

Surburban Trust Company v. Waller, 44 Md. App. 335, 408 A.2d 758 (1979).

Facts: Plaintiff depositor brought action against bank for damages due to plaintiff's mistaken arrest ultimately resulting from information disclosed to police department by the bank.

Holding: Bank held liable for breach of confidence due to disclosures concerning a depositor's account without the express or implied consent of the depositor.⊥

⊥G-2

Rationale: "Courts have recognized the special considerations inherent in the bank-depositor relationship and have not hesitated to find that a bank implicitly warrants to maintain in strict confidence, information regarding its depositor's affairs."

Virgin Islands

Peoples Bank of Virgin Islands v. Figueroa, 559 F.2d 914 (3rd Cir. 1977)

Facts: Action was brought by lending bank against borrower and endorsers for repayment of amount of loan.

Holding: The banks failure to reveal to endorsers information about borrower's financial condition was not basis for discharging endorsers from their obligations.

Rationale: "The bank could hardly have volunteered financial information (or even acceded to an unauthorized request from prospective endorsers to disclose such data) without breaching duties of confidentiality and privacy in its dealings with its customers."

Washington

State v. McCray, 15 Wash. App. 810, 551 P.2d 1376 (1976).

Facts:	Plaintiff defendant was convicted of grand larceny on the basis of non-sufficient fund checks. Plaintiff appeals.
Holding:	A call by the police to a bank for the purpose of ascertaining the status of an account does not violate the constitutional right of privacy.
Rationale:	A bank has an obligation to its customers to at least not unnecessarily disclose their financial condition.⊥ ⊥G-3

APPENDIX H

SURVEY OF ACCEPTANCE OF RES IPSA LOQUITUR IN THE UNITED STATES

Alabama

Doctrine gives rise to a presumption of negligence.
Holmes v. Birmingham Transit Co., 270 Ala. 215, 166 S.2d 912 (1959)

Alaska

Doctrine gives rise to an inference of negligence.
Crawford v. Rogers, 406 P.2d 189 (Alaska Sup. Ct. 1965)

Arizona

Doctrine allows for an inference of negligence.
O'Donnell v. Maves, 103 Ariz. 88, 436 P.2d 577 (1968)

Arkansas

Doctrine gives rise to a presumption of negligence.
Sherman v. Mountaire Poultry Co., 243 Ariz. 301, 419 S.W.2d 619 (1967)

California

Doctrine allows for an inference of negligence.
Quintal v. Laurel Grove Hospital, 62 Cal.2d 154, 41 Cal. Rptr. 577, 397 P.2d 161 (1964)

Colorado

Doctrine gives rise to a presumption of negligence.
⊥H-1 Weiss v. Axler, 137 Colo. 544, 328 P.2d 88 (1958)⊥

Connecticut

Doctrine allows for an inference of negligence.
Lowman v. Housing Authority, 150 Conn. 665, 192 A.2d 883 (1963)

Delaware

Doctrine allows for an inference of negligence.
Scott v. Diamond State Tel. Co., Del., 239 A.2d 703 (1968)

District of Columbia

Doctrine allows for an inference of negligence.
Martin v. United States, 96 App. D.C. 294, 225 F.2d 945 (D.C. Cir. 1955)

Florida

Doctrine allows for an inference of negligence.
Messina v. Baldi, 120 So.2d 819 (Fla. Dist. Ct. App. 1960)

Georgia

Doctrine allows for an inference of negligence.
Bowers v. Fred W. Amend Co., 72 Ga. App. 714, 35 S.E.2d 15 (Ga. Ct. App. 1945)

Hawaii

Doctrine allows for an inference of negligence.
Cozine v. Hawaiian Catamaran, Ltd., 49 Hawaii 77, 412 P.2d 669 Reh. Den. 49 Hawaii 267, 414 P.2d 428 (1966)

Idaho

Doctrine allows for an inference of negligence.
Whitt v. Jarnagin, 91 Idaho 181, 418 P.2d 278 (1966).⊥ ⊥H-2

Illinois

Doctrine allows for an inference of negligence.
Drewick v. Interstate Terminals, Inc., 42 Ill.2d 345, 247 N.E.2d 877 (1969)

Indiana

Doctrine allows for an inference of negligence.
New York, Chicago & St. Louis R.R. Co. v. Henderson, 27 Ind. 456, 146 N.E.2d 531 (1957)

Iowa

Doctrine allows for an inference of negligence.
De Moss v. Darwin T. Lynner Constr. Co., 159 N.W.2d 463 (Iowa 1968)

Kansas

Doctrine allows for an inference of negligence.
Stroud v. Sinclair Refining Co., 144 Kan. 74, 58 P.2d 77 (1936)

Kentucky

Doctrine allows for an inference of negligence.
Thompson v. Kost, 298 Ky 32, 181 S.W.2d 445 (1944)

Louisiana

Doctrine allows for an inference of negligence.
Sharette v. Fontcuberta, 246 So.2d 867 (La. Ct. App. 1971)

Maryland

Doctrine allows for an inference of negligence.
Munzert v. American Stores Co., 232 Md. 97, 192 A.2d 59
⊥H-3 (1963)⊥

Massachusetts

Doctrine allows for an inference of negligence.
Rosciono v. Columal Beacon Oil Co., 294 Mass. 234, 200 N.E. 883 (1936)

Michigan

Doctrine allows for an inference of negligence.
Indiana Lumbermen's Mut. Ins. Co. v. Matthew Stores, Inc., 349 Mich. 441, 84 N.W.2d 755 (1957)

Minnesota

Doctrine allows for an inference of negligence.
Hoffman v. Nasland, 274 Minn. 521, 144 N.W.2d 580 (1966)

Mississippi

Doctrine allows for an inference of negligence.
J.C. Penney Co. v. Evans, 172 Miss. 900, 160 So. 779 (1935)

Missouri

Doctrine allows for an inference of negligence.
Cunningham v. Hayesm, 463 S.W.2d 555 (Mo.Ct. App. 1971)

Montana

Doctrine allows for an inference of negligence.
Krohmer v. Dahl, 145 Mont. 491, 402 P.2d 979 (1965)

Nebraska

Doctrine allows for an inference of negligence.
Benedict v. Eppley Hotel Co., 161 Neb. 280, 73 N.W.2d 228 (1955)⊥ ⊥H-4

Nevada

Doctrine allows for an inference of negligence.
Garibaldi Brothers Trucking Co. v. Waldren, 321 P.2d 248 (1958)

New Hampshire

Doctrine allows for an inference of negligence.
Gobbi v. Moulton, 108 N.H. 183, 230 A.2d 747 (1967)

New Jersey

Doctrine allows for an inference of negligence.
Gould J. Windkur, 98 N.J. Super. 554, 237 A.2d 916, (N.J. Super. Ct.App. Div. 1969)

New Mexico

Doctrine allows for an inference of negligence.
Pack v. Read, 77 N.M. 76, 419 P.2d 453 (1966)

New York

Doctrine allows for an inference of negligence.
Wendover v. State, 63 Misc.2d 368, 313 N.Y.S.2d 287 (N.Y. Ct. Cl. 1970)

North Carolina

Doctrine allows for an inference of negligence.
McGraw v. Southern R. Co., 206 N.C. 873, 175 S.E. 286 (1934)

North Dakota

Doctrine allows for an inference of negligence.
Bergley v. Mann's, 99 N.W.2d 849 (N.D. 1959)⊥ ⊥H-5

Ohio

Doctrine allows for an inference of negligence.
Taxicabs of Cincinnati, Inc. v. Kohler, 111 Oho App. 225, 12 Ohio Ops.2d 366, 165 N.E.2d 244 (Ohio Ct. App. 1959)

Oklahoma

Doctrine allows for an inference of negligence.
Hardware Mut. Ins. Co. v. Rukken, 372 F.2d 8 (10 Cir. 1967)

Oregon

Doctrine allows for an inference of negligence.
Centennial Mills Inc. v. Benson, 234 Or. 512, 383 P.2d 103 (1963)

Pennsylvania

Doctrine allows for an inference of negligence.
Haddon v. Lotito, 399 Pa. 521, 161 A.2d 160 (1960)

Rhode Island

Doctrine allows for an inference of negligence.
Scittadell v. Providence Gas. Co., 415 A.2d 1040 (R.I. 1980)

South Carolina

Doctrine gives rise to a presumption of negligence.
Sweeney v. Carr/Puter Intern. Corp., 521 F. Supp. 276 (D.C.S.C. 1981)

South Dakota

Doctrine allows for an inference of negligence.
⊥H-6 Larson v. Loucks, 69 S.D. 60, 6 N.W.2d 436 (1943)⊥

Tennessee

Doctrine allows for an inference of negligence.
Sullivan v. Crabtree, 36 Ten. App. 469, 258 S.W.2d 782 (Tenn. Ct. App. 1953)

Texas

Doctrine allows for an inference of negligence.
Morris v. Texas & M.O.R. Co., 269 S.W. 565 (Tx. Civ. App.—Beaumont 1954)

Utah

Doctrine allows for an inference of negligence.
Jordan v. Coca-Cola Bottling Co., 117 Utah 578, 218 P.2d 660 (1950)

Vermont

Doctrine allows for an inference of negligence.
McDonald v. Montgomery Ward & Co., 121 Vt. 221, 154 A.2d 469 (1959)

Virginia

Doctrine gives rise to a presumption of negligence.
Easterling v. Walton, 208 Va. 214, 156 S.E.2d 787 (1967)

Washington

Doctrine allows for an inference of negligence.
Tuengel v. Stobbs, 59 Wash.2d 477, 367 P.2d 1008 (1962)

West Virginia

Doctrine allows for an inference of negligence.
Holley v. Purity Bailing Co., 128 W.Va. 531, 37 S.E.2d 729 (1946)⊥ ⊥H-7

Wisconsin

Doctrine allows for an inference of negligence.
Beaudoin v. Waterman Memorial Hospital, 32 Wis. 2d 132, 145 N.W.2d 166 (1966)

Wyoming

Doctrine allows for an inference of negligence.
Sayre v. Allemand, 418 P.2d 1006 (Wyo. 1966)⊥ ⊥H-8

APPENDIX I

RESTATEMENT (SECOND) TORTS § 328D (1977) RES IPSA LOQUITUR

§ 328 D. Res Ipsa Loquitur

(1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when

(a) the event is of a kind which ordinarily does not occur in the absence of negligence;

(b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and

(c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.

(2) It is the function of the court to determine whether the inference may reasonably be drawn by the jury, or whether it must necessarily be drawn.

(3) It is the function of the jury to determine whether the inference is to be drawn in any case where different conclusions ⊥I-1 may reasonably be reached.⊥