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WHY ABSOLUTE LIABILITY UNDER *RYLANDS V. FLETCHER* IS ABSOLUTELY WRONG!

*Frank C. Woodside III**

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I know you believe you understand what you think I said, but I am not sure you realize that what you heard is not what I meant.

- Anonymous

I. INTRODUCTION

No poetry or prose could more aptly describe the nineteenth century English case of *Rylands v. Fletcher* than the anonymous quote noted above. For almost 150 years, many courts, commentators, and legal scholars have misunderstood the principle of liability set forth in *Rylands*. In short, multiple sources have cited the opinion by the House of Lords as holding the defendant "absolutely liable" for engaging in an abnormally dangerous activity. Such understanding is "absolutely" wrong.

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This article will revisit the written opinion of *Rylands v. Fletcher* and subsequent case law applying the doctrine to show that while *Rylands* may have established a form of strict liability for engaging in dangerous activities, the case and its progeny do not impose absolute liability upon a defendant. To this end, Section II of this article will revisit the factual background, procedural history, and written opinion of *Rylands v. Fletcher*.[1] Section III will focus on reasons why the *Rylands* doctrine does not establish absolute liability.[2] Specifically, Part A will discuss the early interpretations of *Rylands v. Fletcher* by American and English courts,[3] and Part B will detail the American Law Institute's efforts to articulate a rule in the Restatement of Torts stemming from the *Rylands* decision.[4] Finally, Section IV will outline a two-tier approach to assessing liability under the Restatement of Torts and *Rylands v. Fletcher*.[5] Part A will discuss whether an activity is ultrahazardous or abnormally dangerous,[6] and Part B will explain the limitations on a defendant's liability for engaging in such activity.[7]

II. THE CASE OF *RYLANDS V. FLETCHER*

Under early common law, English courts often imposed liability on those who caused harm, regardless of wrongful intent or negligence.[8] For instance, as early as the fifteenth century, an opinion from the King's Bench stated that, "if a man does a thing he is bound to do it in such a manner that by his deed no injury or damage is inflicted upon others."[9] At common law, trespass was the remedy for *all* direct and indirect injuries, whether to person or property.[10]

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[1] *Infra* nn. 8-23 and accompanying text.

[2] *Infra* nn. 24-93 and accompanying text.

[3] *Infra* nn. 28-56 and accompanying text.

[4] *Infra* nn. 57-93 and accompanying text.

[5] *Infra* nn. 94-171 and accompanying text.

[6] *Infra* nn. 98-132 and accompanying text.

[7] *Infra* nn. 133-171 and accompanying text.

[8] John H. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 Harv. L. Rev. 315, 383, 441 (1894).

[9] Anonymous, Y.B. 5 Edw. 4, fol. 7, pl. 18 (1466), *reprinted in* John W. Wade et al., Prosser, Wade and Schwartz's Torts 4-5 (10th ed. 2000).

[10] In its early stages, a distinction developed between the action of "trespass," which was maintained for all forcible, direct injuries, whether or not they were intended, and "trespass on the case," which was available for injuries intended but neither forcible nor direct. Wade, *supra* n. 9, at 4. From its inception, trespass on the case required some showing of culpability or negligence on the defendant's part, while liability might be imposed in trespass without regard to the defendant's culpability or negligence. Prior to the nineteenth century, negligence "had been used in a very general

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As the courts focused less on the direct or indirect nature of the act and more on the intent of the wrongdoer or his negligence, trespass and nuisance developed as causes of action available to a landowner suffering from an unauthorized intrusion on his land.[11] It was not until 1825 that negligence emerged as a separate tort.[12] Negligence focused on an objective standard of reasonable care, with liability limited by defenses such as contributory negligence and assumption of risk. A product of the Industrial Revolution in England, negligence arrived at a time when industrial machinery was not known for its safety.[13] In a short time, personal injury cases increased and consumed the greater portion of court dockets.[14] Cases concerning rights in land retreated into the background. This was the state of the common law in England when, in the 1860s, the English courts were struggling over *Rylands v. Fletcher.*[15]

A. *Factual Background of* Rylands v. Fletcher

John Rylands, a very successful entrepreneur, was the owner of a steam-powered textile mill. In order to supply the mill with more water, he hired a contractor to construct a reservoir upon the nearby land of Lord Wilton. Coal mines leased from Lord Wilton by Thomas Fletcher were located under lands close to but not adjoining the premises on which the reservoir was constructed. Fletcher worked his mines in the direction of the reservoir until he came upon certain old workings that had been abandoned for many years. These workings consisted of horizontal passages and vertical shafts, the latter filled with soil from the surrounding land.

Rylands employed a competent engineer and contractors to plan and construct the reservoir. In excavating for the bed of the reservoir, the contractors came upon five vertical shafts. While the walls of these shafts

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sense to describe the breach of any legal obligation, or to designate a mental element, usually one of inadvertence or inattention or indifference, entering into the commission of other torts." *Id.* at 129. Before it became an independent cause of action, the word "negligence" merely described the way in which one committed any tort. *Id.*

[11] *See New Jersey v. Ventron Corp.*, 94 N.J. 473 (1983) (citing William L. Prosser, *Handbook on the Law of Torts* §§ 13, 86 (4th ed., West 1971)); Page Keeton, *Trespass, Nuisance, and Strict Liability*, 59 Colum. L. Rev. 457, 462-65 (1959); Jon G. Anderson, Student Author, *The Rylands v. Fletcher Doctrine in America: Abnormally Dangerous, Ultrahazardous, or Absolute Nuisance?* 1978 Ariz. St. L.J. 99, 123. In their early forms, predating the development of negligence as a basis for liability, neither trespass to land nor nuisance required a showing of intentional wrongdoing or negligence as a prerequisite to liability. *Id.*

[12] Wade, *supra* n. 9, at 129.

[13] *Id.*

[14] *Summit Hotel Co. v. Natl. Broad. Co.*, 8 A.2d 302, 304 (Pa. 1939).

[15] *See* L.R.-E. & I. App. 330 (H.L. 1868), *aff'g*, *Fletcher v. Rylands*, 1 L.R.-Ex. 265 (1866), *rev'g*, *Fletcher v. Rylands*, 3 H. & C. 774, 159 Eng. Rep. 737 (1865).

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were made of timber, they were filled with soil of the same kind as that composing the surrounding ground, and neither the contractors nor Rylands suspected that they were abandoned mine shafts. The reservoir was completed in December 1860, and Rylands had it partly filled. On the morning of December 11, 1860, one of the vertical shafts gave way. The water of the reservoir flowed into the old passages and flooded the interlocking maze of mineshafts, forcing Fletcher to abandon his coal mining activities.

B. *Procedural History*

Fletcher successfully pursued an action for trespass and nuisance in 1861 at the Liverpool Summer Assizes.[16] By a subsequent order, an arbitrator was empowered to state a special case for the opinion of the Court of Exchequer. That court rendered a judgment in favor of defendant Rylands by a two-to-one vote. The court found there was no trespass, since the flooding was not direct and immediate. The court also found there was no nuisance, since there was nothing offensive to the senses and the damage was not continuing or recurring.[17] Moreover, Rylands was engaged in a lawful and reasonable act.[18]

Fletcher brought error to the appellate court, the Exchequer Chamber. Writing for a unanimous court of six justices, Justice Blackburn reversed the judgment of the Court of Exchequer and held that Rylands was liable for the damages.[19] The Exchequer Chamber relied on the existing rule of liability for damage done by trespassing cattle.[20] Rylands, thereafter, brought error to the House of Lords against the judgment of the Exchequer Chamber.

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[16] *Fletcher v. Rylands*, 1 L.R.-Ex. 265, 266 (1866).

[17] *See* Prosser, *supra* n. 11, , at 505 § 78.

[18] *Id.*

[19] *Fletcher*, 1 L.R.-Ex. at 286.

[20] "The case that has most commonly occurred, and which is most frequently to be found in the books, is as to the obligation of the owner of cattle which he has brought on his land, to prevent their escaping and doing mischief. The law as to them seems to be perfectly settled from early times; the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape; that is with regard to tame beasts, for grass they eat and trample upon, though not for any injury to the person of others, for our ancestors have settled that it is not the general nature of horses to kick, or bulls to gore; but if the owner knows that the beast has a vicious propensity to attack man, he will be answerable for that too." *Fletcher*, 1 L.R.-Ex. at 280.

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C. *Holding by the House of Lords*

The House of Lords, affirming the judgment for Fletcher, quoted with approval Justice Blackburn's opinion from the Exchequer Chamber:

> We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing [sic] that the escape was owing to the Plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God . . . .[21]

In so holding, Lord Cairns distinguished between the "natural" and "non-natural" use of land.[22] Hence, the House of Lords limited the applicability of this liability-without-proof-of-negligence to "non-natural" uses of land. Significantly, if an accumulation of water had occurred naturally, or had been created incident to a use of land for "any purpose for which it might in the ordinary course of the enjoyment of land be used," liability would not have been imposed.[23]

III. LIMITS TO THE APPLICATION OF *RYLANDS V. FLETCHER*: NO "ABSOLUTE LIABILITY"

When American courts apply "strict liability" to certain activities, they frequently identify *Rylands v. Fletcher* as providing the origin of the rule.[24] American courts have also characterized the liability under *Rylands* as "absolute."[25] Some courts and textbook authors use the terms "strict

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[21] *Rylands*, 3 L.R.-E. & I. App. at 339-40 (quoting *Fletcher*, 1 L.R.-Ex. at 279-280). *Vis major*, or a force majeure, is by definition unforeseen.

[22] *Id.* at 338-39.

[23] *Id.*

[24] *See e.g.*, *Anderson v. Farmland Indus., Inc.*, 136 F. Supp. 2d 1192, 1197 (D. Kan. 2001); *Indiana Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 517 F. Supp 314, 319 (N.D. Ill. 1981); *Yukon Equip., Inc. v. Fireman's Fund Ins. Co.*, 585 P.2d 1206, 1208 (Alaska 1978); *Great Lakes Dredging & Dock Co. v. Sea Gull Operating Corp.*, 460 So. 2d 510, 512 (Fla. 3d Dist. App. 1984); *Miller v. Civil Constructors, Inc.*, 651 N.E.2d 239, 241 (Ill. App. 2d Dist. 1995); *Natl. Steel Serv. Ctr. v. Gibbons*, 319 N.W.2d 269, 270 (Iowa 1982); *Clay v. Mo. Highway Trans. Commn.*, 951 S.W.2d 617, 623 (Mo. App. 1997).

[25] *See e.g.*, *Yukon Equip*, 585 P.2d at 1208; *Clark v. City of Chicago*, 410 N.E.2d 1025, 1028-29 (Ill. App. 1st Dist. 1980); *Miller*, 651 N.E.2d at 241; *C. Exploration Co. v. Gray*, 70 So. 2d 33, 36 (Miss. 1954); *Ptogar v. The Wash. Hosp.*, 49 Pa. D. & C.2d 485, 488 (Pa. Wash. County Ct. 1970); Gulf, Colorado & Santa Fe Ry. Co. v. Oakes, 58 S.W. 999, 1000 (Tex. 1900).

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liability" and "absolute liability" interchangeably to signify liability without proof of negligence or fault.[26]

"Strict liability" and "absolute liability," however, are not synonymous, and it is imperative that courts, attorneys and legal commentators understand how to properly distinguish them. The primary difference between the two concepts is that while there are defenses available to strict liability, there are apparently no defenses that will bar recovery on an absolute liability claim. While no federal or state decision has attempted to define and distinguish the two concepts, the well-recognized definition of "absolute" includes "having no restriction, exception, or qualification."[27] Strict liability, on the other hand, is limited in scope by such legal concepts as assumption of risk and comparative fault.

Like strict liability, and unlike absolute liability, the *Rylands* opinion sets forth various defenses to limit the application of the doctrine and the liability of a defendant.

A. *Early Interpretations of* Rylands v. Fletcher

In *Rylands v. Fletcher*, though the defendant was not liable for negligently constructing the reservoir or for trespass on plaintiff's property, Justice Blackburn in the Exchequer Chamber fashioned a theory to hold the defendant responsible for the damage incurred by the innocent plaintiff:

> [T]he true rule of law is, that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it 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.[28]

This "true rule" seems fair and just. The landowner who brings

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[26] *See e.g., Peneschi v. Natl. Steel Corp.*, 295 S.E.2d 1, 25 (W.Va. 1982). According to Dean Prosser, one who carries out an abnormally dangerous activity is strictly liable for any damage that proximately results from the dangerous nature of the activity. Wade, *supra* n. 9, at 682. The Pennsylvania Supreme Court's definition of absolute liability, however, is virtually identical to Prosser's definition of strict liability:

> In Pennsylvania, it is established that one who carries on an ultrahazardous activity is liable for injury to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity, when the harm results thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent it. This is known as the doctrine of absolute liability.

Haddon v. Lotito, 161 A.2d 160, 162 (Pa. 1960) (interpreting sections 519 and 520 of the first Restatement of Torts). *See also* 57A Am. Jur. 2d *Negligence* § 396 (2003).

[27] *Merriam Webster's Collegiate Dictionary* 4 (1994).

[28] *Fletcher*, 1 L.R.-Ex. at 279-80.

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something onto his land which escapes and injures an innocent party should be obliged to repair the damage at his expense. However, Justice Blackburn recognized the harshness of such an absolute statement and introduced exceptions to the rule:

> [The defendant] can excuse himself by shewing [sic] that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of vis major or the act of God . . . .[29]

As one American jurist later noted, "it can be seen that even as the rule was born, it came into the world of torts with the author's recognition that it was not conceived to be one of absolute liability — strict, yes — absolute, no."[30]

On appeal, the House of Lords affirmed but emphasized an even narrower rationale than that of Justice Blackburn. While Lord Cairns "entirely concur[red]" with Justice Blackburn's analysis, he amended the remedy articulated in the Exchequer Chamber to be applicable only to non-natural uses of a defendant's land, as distinguished from "any purpose for which [a defendant's land] might in the ordinary course of the enjoyment of land be used. . . ."[31]

Thus, Justice Blackburn and Lord Cairns, together, forged a legal remedy for the *Rylands* plaintiffs, but carefully indicated that exceptions to this rule exist where the escape is the consequence of an unforeseen force, an act of God, or plaintiff's own fault. Significantly, the courts declined to explore what exceptions would be sufficient (since it was unnecessary for the decision of the case).[32] This question of law left undecided by Justice Blackburn, as well as by the House of Lords, was revisited in a series of American and English cases arising out of similar circumstances, all decided before the promulgation of the Restatement of Torts in 1938.[33]

1. *Rylands v. Fletcher* & the American Courts: The Initial Split

Before English courts had a chance to comment on the *Rylands v.*

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[29] *Id.*

[30] *Wheatland Irrigation Dist. v. McGuire*, 537 P.2d 1128, 1133 (Wyo. 1975).

[31] *Rylands*, 3 L.R.-E. & I. App. at 338. Some American courts have recognized the limits of the true rule of *Rylands v. Fletcher. See e.g.*, *Bennett v. Malinckrodt*, 698 S.W.2d 854, 867 (Mo. App. 1985) (stating, "[t]he House of Lords limited the 'rule' by making it applicable only to non-natural uses of land.").

[32] Speaking of the above-named limitations, Justice Blackburn acknowledged that "nothing of this sort exists here." *Fletcher*, 1 L.R.-Ex. at 280.

[33] *See infra* nn. 48-56 and accompanying text.

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Fletcher decision, American courts in Massachusetts[34] and Minnesota[35] immediately adopted *Rylands*. In *Ball v. Nye*, animal manure retained in defendant's vault filtered through the soil and into the land of the plaintiff's adjoining lot. In affirming a directed verdict for the plaintiff, the Massachusetts Supreme Court, citing *Rylands*, stated, "[t]o suffer filthy water from a vault to percolate or filter through the soil into the land of a contiguous proprietor, to the injury of his well and cellar, where it is done habitually and within the knowledge of the party who maintains the vault . . . is of itself an actionable tort."[36] The court concluded that defendant's failure to retain the filth "is of itself negligence."[37]

The Supreme Court of Minnesota adopted the *Rylands* doctrine in the context of water escaping from a tunnel. In *Cahill v. Eastman*, defendants, for their own purposes, excavated a tunnel beneath plaintiff's property. The Mississippi River broke through the tunnel and damaged the plaintiff's adjoining land. The court found in favor of the plaintiffs, stating that, "[t]he use of land by the proprietor is not therefore an absolute right, but qualified and limited by the higher right of others to the lawful possession of their property. To this possession the law prohibits all direct injury, without regard to its extent or the motives of the aggressor."[38]

On the heels of the *Ball* and *Cahill* decisions, three leading American courts inexplicably rejected *Rylands* in its entirety: New York,[39] New Hampshire,[40] and New Jersey.[41] Both *Losee v. Buchanan* (New York) and *Marshall v. Welwood* (New Jersey) involved steam boiler explosions that caused damage to plaintiffs' property. After reviewing the facts in light of the *Rylands* doctrine, the courts found that neither defendant had breached a standard of care or was otherwise at fault. The *Losee* court stated that *Rylands*,

> is in direct conflict with the law as settled in this country. Here, if one builds a dam upon his own premises and thus holds back and accumulates the water for his benefit, or if he brings water upon his own premises into a reservoir, in case the dam or the banks of the reservoir give way and the lands of a neighbor are thus flooded, he is not liable for the damage without proof of some fault or

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[34] *Ball v. Nye*, 99 Mass. 582 (1868).

[35] *Cahill v. Eastman*, 18 Minn. 324 (1872).

[36] *Ball*, 99 Mass. at 584.

[37] *Id.*

[38] *Cahill*, 18 Minn. at 343-44.

[39] *Losee v. Buchanan*, 51 N.Y. 476 (N.Y. 1873).

[40] *Brown v. Collins*, 53 N.H. 442 (N.H. 1873).

[41] *Marshall v. Welwood*, 38 N.J.L. 339 (N.J. 1876).

negligence on his part.[42]

New York's highest court suggested that "be[ing] a member of civilized society" requires the sacrifice of some "natural rights."[43] The New Jersey Supreme Court joined in the repudiation of *Rylands*, unable to agree that a man is an insurer that "the acts which he does, such acts being lawful and done with care, shall not injuriously affect others."[44]

In *Brown v. Collins*, the court declined to apply the *Rylands* doctrine in an action for damages to property caused by runaway horses. The court concluded that *Rylands*-type liability was incompatible with the industrial age.[45]

Certainly, *Rylands* faced clear opposition from American courts. While some favored the concept of liability without proof of negligence, others refused to hold a defendant absolutely liable when such defendant was engaged in a lawful act done with proper care and skill.[46]

2. *Rylands v. Fletcher* Revisited by the English Courts

Like American courts, English courts faced the dilemma of applying the unfinished doctrine of *Rylands v. Fletcher*. For instance, in *Nichols v. Marsland*,[47] the defendant had constructed ornamental pools that contained large quantities of water. An extraordinary rainfall occurred, causing the pools to burst their dams, and the plaintiff's adjoining lands to be flooded. Like *Rylands*, the trial court found that the flood could not reasonably have been anticipated, and that there was no negligence in the construction of the pools. In contrast to *Rylands*, the Exchequer Chamber upheld a verdict in favor of the defendant. In so doing, Justice Mellish attempted to respond to the question left unanswered in *Rylands* and provide some indication of the "excuses" which would limit a defendant's liability:

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[42] 51 N.Y. at 487. Likewise, in the case of *Pennsylvania Coal Co. v. Sanderson*, the court, speaking of *Rylands v. Fletcher*, emphasized that "[a] rule which casts upon an innocent person the responsibility of an insurer is a hard one at the best, and will not be generally applied unless required by some public policy, or the contract of the parties." 6 A. 453, 460 (1878).

[43] *Losee*, 51 N.Y. at 484.

[44] *Marshall*, 38 N.J.L. at 343.

[45] *Brown*, 53 N.H. at 449-50.

[46] According to Prosser and Keeton, "[*Rylands v. Fletcher*] was treated as holding that the defendant is absolutely liable in all cases whenever anything under his control escapes and does damage. In other words, the law of the case was misstated, and as misstated rejected, on facts to which it had no proper application in the first place." Willam Lloyd Prosser & W. Page Keeton, *Prosser and Keeton on the Law of Torts* 548 (5th ed., West 1984).

[47] 2 L.R. 1 (Ex. D. 1876).

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> [T]he ordinary rule of law is that when the law creates a duty, and the party is disabled from performing it without any default of his own, by the act of God, or the King's enemies, the law will excuse him; but when a party by his own contract creates a duty, he is bound to make it good notwithstanding any accident by inevitable necessity. We can see no reason why that rule should not be applied to the case before us. The duty of keeping the water in and preventing its escape is a duty imposed by the law, and not one created by contract.
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> . . .
>
> [T]he present case is distinguished from that of [*Rylands v. Fletcher]* in this, that it is not the act of the defendant in keeping this reservoir, an act in itself lawful, which alone leads to the escape of the water, and so renders wrongful that which but for such escape would have been lawful. It is the supervening vis major of the water caused by the flood, which, superadded to the water in the reservoir (which of itself would have been innocuous), causes the disaster.[48]

In determining whether the defendant adequately proved that an act of God caused the escape of the water, the *Nichols* court noted:

> [The flood] could not reasonably have been anticipated . . . . However great the flood had been, if it had not been greater than floods that had happened before and might be expected to occur again, the defendant might not have made out that she was fault free; but we think she ought not to be held liable because she did not prevent the effect of an extraordinary act of nature, which she could not anticipate.[49]

Thus, the *Nichols* court incorporated a foreseeability element into the "act of God" defense, suggesting that if an extraordinary consequence cannot reasonably be anticipated, then a defendant cannot be held liable for the resulting damage.

This same principle is expressed in the case of *Box v. Jubb*.[50] The defendants had a reservoir on their land that was made to overflow, and such overflow caused damage to plaintiff's land. The defendants were not negligent in either the construction or maintenance of the reservoir, and the

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[48] *Id.* at 4-5.

[49] *Id.* at 5-6.

[50] 4 L.R. 76 (Ex. D. 1879).

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acts that caused the overflow were attributed to individuals over whom the defendants had no control. Finding for the defendants, the court adhered to *Nichols* and held:

> The matters complained of took place through no default or breach of duty of the defendants, but were caused by a stranger over whom and at a spot where they had no control. It seems to me to be immaterial whether this is called vis major or the unlawful act of a stranger, it is sufficient to say that the defendants had no means of preventing the occurrence.[51]

Justice Pollock's opinion expressly distinguishes *Box* from *Rylands* on the basis of who accumulated the water in the reservoir:

> "If indeed the damages were occasioned by the act of the party without more — as where a man accumulates water on his own land, but owing to the peculiar nature or condition of the soil the water escapes and does damage to his neighbor — the case of [*Rylands v. Fletcher*] establishes that he must be held liable." Here this water has not been accumulated by the defendants, but has come from elsewhere and added to that which was properly and safely there.[52]

According to Justice Pollock, where the water has not been accumulated by the actions of the defendant, the court, applying *Rylands*, will not impose liability.

Together, *Nichols* and *Box* represent the common law defense known as an intervening agent.[53] Specifically, English courts refused to impose "absolute" liability on a defendant when the water in a reservoir was not accumulated by that defendant's actions alone. The justification for this defense is clearly expressed in the *Rylands* opinion, where Lord Cairns and Justice Blackburn noted various exceptions to liability, such as unforeseen forces or acts of God.[54]

Clearly, the *Rylands* doctrine was never intended to stand as a doctrine of absolute liability. Yet, despite the efforts of English courts to clarify and

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[51] *Id.* at 79.

[52] *Id.* at 79-80.

[53] After *Nichols*, there have been many limitations imposed by the English courts upon the wide sweep of *Rylands v. Fletcher*. *See Wilson v. Newberry*, 7 L.R. 31 (Q.B. 871); *Ross v. Fedden*, 7 L.R. 661 (Q.B. 1872); *Box*, 4 L.R. 76; *Baker v. Snell*, 2 K.B. 352 (1908); *Rickards v. Lothian*, A.C. 263 (1913).

[54] *See e.g.*, *Rylands*, 3 L.R.-E. & I. App. at 340.

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restrict the breadth of *Rylands*,[55] American courts have too often misinterpreted and misapplied the *Rylands* decision.[56]

B. *The Restatement of Torts Did Not Codify the "True Rule" of* Rylands v. Fletcher

The true rule in *Rylands v. Fletcher* is more akin to "strict liability" in that it expressly permits the availability of defenses, such as the defense that the damage was caused by an act of God, the plaintiff, or an unforeseeable third party. Some American courts, however, have failed to acknowledge that these defenses were available to defendants who had engaged in lawful, but dangerous, activities. In fact, a significant number of judicial decisions in the United States have interpreted *Rylands* as imposing "absolute liability" on a defendant.[57] The confusion between "strict liability" and "absolute liability" has been exacerbated by the American Law Institute's ("ALI") attempt to codify *Rylands* and clarify the evolution of liability-without-proof-of-negligence.[58] Despite their best

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[55] Recently, the House of Lords revisited issues related to the basis for liability in *Rylands*-type situations. In *Cambridge Water Co. v. Eastern Counties Leather PLC*, Lord Goff, writing for a unanimous House of Lords, concluded that reasonable foreseeability of harm is an essential element in *Rylands*-type cases. Interestingly, Lord Goff specifically rejected the American "ultrahazardous" characterization. 2 A.C. 264 (1994).

[56] One court stated: "[t]he decisional law in this country regarding the application of the rule rests in utter confusion." *Fritz v. E.I. duPont De Nemours & Co.*, 75 A.2d 256, 259 (Del. Super. 1950). Even the English judiciary has had problems with the doctrine. As one commentator stated after reviewing English case law, "From this welter of cases it is impossible to extract any consistent principle . . . ." Arthur L. Goodhart, *Restatement of Law of Torts, Vol. III: A Comparison Between American and English Law*, 89 U. Pa. L. Rev. & Am. L. Register 265, 274 (1941).

[57] *See Yukon Equip*, 585 P.2d at 1206; *Clark*, 410 N.E.2d 1025; *Miller*, 651 N.E.2d 239; *Cent. Exploration Co.*, 70 So.2d 33; *Progar*, 49 Pa. D. & C.2d 485; *Gulf, Colorado & Sante Fe Ry. Co.*, 58 S.W. 999.

[58] While the ALI does not expressly state that the Restatement's articulation of liability for engaging in ultrahazardous or abnormally dangerous activities is an attempt to codify *Rylands*, most courts agree that this has been the intent of the authors. *See Valentine v. Pioneer Chlor Alkali Co.*, 864 P.2d 295, 297 (Nev. 1993) ("The doctrine of *Rylands* has been explained and codified in the Restatement (Second) of Torts, section 519 (1977)."); *Bunyak v. Yancy & Sons Dairy, Inc.*, 438 So.2d 891, 894 (Fla. 2d DCA 1983) ("In applying the *Rylands* doctrine, our court used the codification contained in the Restatement of Torts (Second), sections 519 and 520."); *N. Little Rock Transp. Co. v. Finkbeiner*, 243 Ark. 596, 608 (Ark. 1967) ("These sections [Speaking of the 1939 Restatement of Torts §§ 519, 520] are nothing more than a codification of the principle of *Rylands v. Fletcher* . . . ."); *Saiz v. Belen Sch. Dist.*, 113 N.M. 387, 397 n.8 (N.M. 1992) ("The principles expressed in the first and second editions of the *Restatement of Torts* are based upon the classic English case of *Rylands v. Fletcher* . . . ."); *Crawford v. Natl. Lead Co.*, 784 F. Supp. 439, 442 n.3 (S.D. Ohio 1989) ("The doctrine of strict liability for abnormally dangerous conditions and activities was derived from *Rylands v. Fletcher* . . . ."); *Albig v. Mun. Auth.y of Westmoreland County.*, 502 A.2d 658, 662 (Pa. Super. 1985) ("In 1938, however, the doctrine of *Rylands v. Fletcher* was incorporated into and articulated by the American Law Institute's Restatement of Torts."); *Branch v. W. Petroleum, Inc.*, 657 P.2d 267, 273 (Utah 1982)

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efforts, the ALI has enhanced the confusion rather than eliminated it.

1. "Ultrahazardous Activities" — First Restatement of Torts[59]

The first Restatement, promulgated in 1938, used the term "ultrahazardous" to describe activity that creates strict liability in tort:[60]

> [O]ne who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent harm.[61]

The Restatement defined an "ultrahazardous activity" as one that "[1] necessarily involves a risk of serious harm to the persons, land or chattels of others which cannot be eliminated by the exercise of the utmost care and . . . [2] is not a matter of common usage."[62] In determining whether a particular activity met this definition, the comments to the Restatement suggested a risk-utility analysis:

("That doctrine [*Rylands v. Fletcher*] was the genesis of § 519 of the Restatement of Torts . . . ."); *Klein v. Pyrodyne Corp.*, 117 Wash. 2d 1, 6 (Wash. 1991) ("The basic principle of *Rylands v. Fletcher* has been accepted by the Restatement (Second) of Torts (1977)."); *Peneschi*, 295 S.E.2d at 6 ("The *Restatement (Second) of Torts*, § 519 (1976), has accepted the principle of *Rylands* . . . ."); *Wyrulec Co. v. Schutt*, 866 P.2d 756, 761 (Wyo. 1993) ("The abnormally dangerous activity theory for imposing strict liability evolves from the doctrine in *Rylands v. Fletcher* . . . ."); *Yukon Equip*, 585 P.2d at 1208 ("[T]he particular rule of absolute liability for blasting damage received earlier and more general acceptance in the United States than the generalized rule of absolute liability for unusually dangerous activity which has its antecedents in [*Rylands v. Fletcher*]."); *Cropper v. Rego Distrib. Ctr., Inc.*, 542 F. Supp. 1142, 1149 (D. Del. 1982) ("As embodied in Restatement (Second) of Torts, § 519, [*Rylands v. Fletcher*] provides . . . ."); *Indiana Harbor Belt R.R.* Co. v. Am. Cyanide Co, 916 F.2d 1174, 1176 (7th Cir. 1999) ("Indiana Harbor II") ("The roots of section 520 are in nineteenth-century cases. The most famous one is *Rylands v. Fletcher* . . . ."); *Erbrich Prods. Co. v. Green*, 509 N.E.2d 850, 853 (Ind. App. 1987) ("Section 519, which evolved from *Rylands v. Fletcher* . . . ."); *Inland Steel v. Pequignot*, 608 N.E.2d 1378, 1384-85 (Ind. App. 1993) ("This doctrine [speaking of abnormally dangerous activities], which evolved from *Rylands v. Fletcher* . . . ."); *Great Lakes Dredging*, 460 So.2d at 512 ("Florida courts have adopted the doctrine of strict liability for ultrahazardous or abnormally dangerous activity as established by *Rylands v. Fletcher* . . . and reformulated by the *Restatement of Torts* . . . ."); *Natl. Steel*, 319 N.W.2d at 270 ("The doctrine [of strict liability for abnormally dangerous activities] stems from the famous English case of *Rylands v. Fletcher*."); *Clay*, 951 S.W.2d at 623 ("The doctrine of strict liability for abnormally dangerous activities such as blasting originated in the English case *Rylands v. Fletcher*."); *Ventron*, 94 N.J. at 491 (N.J. 1983) ("[Restatement (Second) of Torts] incorporates the theory developed in *Rylands v. Fletcher*.").

[59] The Restatement of Torts was adopted and promulgated by the American Law Institute on May 12, 1938.

[60] Restatement of Torts §§ 519-24 (1938).

[61] *Id.* at § 519.

[62] *Id.* at § 520.

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> The rule [or definition of ultrahazardous activity] . . . is applicable to an activity which is of such utility that the risk unavoidably involved in carrying it on cannot be regarded as so unreasonable as to make it negligent to carry it on . . . . If the utility of the activity does not justify the risk inseparable from it, merely to carry it on is negligence, and the rule . . . is not necessary to subject the actor to liability for harm resulting from it.[63]

Thus, when the utility of an activity outweighs the foreseeable risk, a plaintiff may recover under strict liability principles if such activity is determined to be ultrahazardous.

In addition to defining what constitutes an ultrahazardous activity, the Restatement authors specifically identified a few activities as "ultrahazardous:" flying;[64] blasting;[65] and the use, storage, and transportation of explosive substances.[66] The first Restatement also expressly distinguished between airplanes and automobiles, noting that while automobiles had become a matter of common usage, aviation had yet to become either a common or essential means of transportation and thus remained an ultrahazardous activity in its then-current stage of development in 1938.[67] By the 1960s, however, courts began to conclude that flying should no longer be deemed an ultrahazardous activity.[68]

During the tenure of the first Restatement, there were some activities that courts decided were not ultrahazardous.[69] For instance, despite what common sense would conclude involves a serious risk of harm which cannot be eliminated by the exercise of the utmost care, the Supreme Court of Pennsylvania concluded that a public fireworks display — handled by a competent operator in a reasonably safe area and properly supervised — is

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[63] *Id.* at § 520 cmt. a.

[64] "[A]viation in its present stage of development is ultrahazardous because even the best constructed and maintained aeroplane is so incapable of complete control that flying creates a risk that the plane even though carefully constructed, maintained and operated, may crash to the injury of persons, structures or chattels on the land over which the flight is made." *Id.* at § 520 cmt. b.

[65] "Blasting is ultrahazardous because high explosives are used and it is impossible to predict with certainty the extent or severity of its consequences." *Id.* at § 520 cmt. c.

[66] "The storage and transportation of explosive substances are ultrahazardous activities because no precautions and care make it reasonably certain that they will not explode and because the harm resulting from their explosion is almost certain to be serious." *Id.*

[67] *See id* at cmt. e.

[68] *See e.g., Wood v. United Air Lines, Inc.*, 32 N.Y. Misc. 2d 955 , 961-62 (N.Y. Sup. Ct. 1961).

[69] *See e.g., Blake v. Fried*, 95 A.2d 360 (1953) (discussing stock car racing); *Haddon*, 161 A.2d 160 (discussing public fireworks displays); *Becker v. Northland Trans. Co.*, 274 N.W. 180 (Minn. 1937) (discussing burning brush).

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not so dangerous an activity.[70] Since such displays are neither illegal nor a nuisance, liability must be predicated upon proof of negligence.[71]

In all of the situations labeled "ultrahazardous" in the first Restatement, the person engaged in the activity had, or should have had, prior knowledge that the activity could cause harm even if performed with the utmost care and caution. Thus, a defendant would be held strictly liable for resulting damages even in the absence of negligence or an intentional tort.

While the doctrine of "ultrahazardous activities" is arguably derivative of *Rylands v. Fletcher*, it would be careless to equate the two doctrines in their entirety.[72] Like *Rylands*, a court applying the Restatement approach could conclude that the accumulation of water on one's own land should be regarded as an ultrahazardous activity. The ALI, however, tried to avoid some of the controversy concerning *Rylands* by inserting a caveat to the comment on Clause (a) of Section 520: "The Institute expresses no opinion as to whether the construction and use of a large tank or artificial reservoir in which a large body of water or other fluid is collected is or is not an ultrahazardous activity."[73] Due to this comment, one has to wonder whether *Rylands* has *any* relation with the first Restatement's doctrine of

[70] *Haddon*, 399 Pa. at 523-24, 161 A.2d at 162. *But cf. Klein*, 117 Wash. 2d at 8-10 (conducting public fireworks displays is an abnormally dangerous activity justifying imposition of strict liability).

[71] *Haddon*, 161 A.2d at 162.

[72] Nowhere is this more evident than in the blasting cases. In 1931, a number of years before the ALI promulgated the first Restatement, Judge Augustus Hand in *Exner v. Sherman Power Constr. Co.*, 54 F.2d 510, 514 (2d Cir. 1931), articulated the following rule on liability for storage of explosives:

> If damage is inflicted, there ordinarily is liability, in the absence of excuse. When, as here, the defendant, though without fault, has engaged in the perilous activity of storing large quantities of a dangerous explosive for use in his business, we think there is no justification for relieving it of liability, and that the owner of the business, rather than a third person who has no relation to the explosion, other than that of injury, should bear the loss.

The quoted language from *Exner* emphasizes the dangerousness of the activity but does not necessarily imply any relationship to *Rylands*. In making his ruling, Judge Hand cited *Rylands* but did not discuss the opinion. American courts have consistently perceived users of explosives to be "insurer[s]" and "absolutely liable" for damages based on the "intrinsic dangerousness of explosives" irrespective of *Rylands*. *Exner*, 54 F.2d 510; *see e.g.*, *Bedell v. Guoulter*, 261 P.2d 842, 847 (Or. 1953); *Koos v. Roth*, 652 P.2d 1255, 1259 (Or. 1982).

Some courts have expressly distinguished *Rylands*-type liability from so-called "absolute liability" incurred by blasting. In *Whitney v. Ralph Myers Contracting Corp.*, the West Virginia Supreme Court of Appeals specifically noted that blasting cases are not the proper context in which to apply the *Rylands* doctrine. 118 S.E.2d 622 (W.Va. 1961), The court reasoned that the "blasting cases are not, as sometimes supposed, based upon the application of the doctrine of Rylands v. Fletcher, for the reason that the blasting is done intentionally; whereas, under the Rylands v. Fletcher doctrine the instrumentality causing the damages accidentally escapes." *Id.* at 626; *but cf. Peneschi.*, 295 S.E.2d 1, 9 ("This Court in *Whitney* incorrectly indicated that blasting is a unique kind of activity because one has 'complete control' over blasting operations.").

[73] *Restatement of Torts* § 520 cmt. c.

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"ultrahazardous activities."

2. "Abnormally Dangerous Activities" — Restatement (Second) of Torts

The Second Restatement used the term "abnormally dangerous," rather than "ultrahazardous," in identifying those activities to which strict liability applies.[74] During the ALI proceedings of May 23, 1964, Dean Prosser discussed the reasoning behind the change:

> A preliminary word upon the change in the title: The old Restatement started out in Volume 1 talking about extrahazardous activities, and subsequently that changed rather imperceptibly, through a period when both words were used indiscriminately, to "ultrahazardous activities" . . . .
>
> "Ultrahazardous" has always bothered me very much, because when I look it up in the unabridged dictionary, I find it means "beyond all hazards"; and since what we are dealing with here is obviously a matter of risk, and the liability is pretty definitely limited to things which are within the risk, a title of "Ultrahazardous" seems to be the wrong word.
>
> What they meant was extremely hazardous, a high degree of danger, and the old section defined "ultrahazardous" as activity that was so dangerous that with all conceivable care it could not be made safe.
>
> Actually, there probably is no such thing, unless it be possibly some forms of nuclear fission. I can think of nothing else which could not be made absolutely safe if all possible care were used, since that would necessarily involve the choice of a proper place to do it; and if you do anything whatever in the midst of the Antarctic Continent, unless it be nuclear fission, I think it is perfectly safe to anyone except those engaged in it.
>
> Now, this is mere objection to a term. Actually, however, when you come to deal with the cases, you find that the question is not so much one of extreme danger, nor of a danger which cannot be made safe, as it is of the relation of the particular activity to its

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[74] *See Restatement (Second) of Torts* § 519(1) (1965) ("One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.").

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> surroundings. A magazine of explosives in the midst of a large city is well within this chapter, whereas a magazine of explosives out in the midst of the Mojave Desert with no valuable property around it is not.
>
> This runs through the whole picture from start to finish, and it always has been involved in the *Rylands v. Fletcher* doctrine, since the original distinction made by Lord Cairns between natural activities — meaning those suitable for the particular land — and nonnatural activities, meaning those which are not.
>
> Consequently, we have thrown out "ultrahazardous" and picked up "abnormally dangerous" as the best phrase we could use.[75]

This comment by Prosser implies that the Second Restatement was intended to incorporate the principles of *Rylands v. Fletcher* into American jurisprudence.[76]

At least one court has suggested that, while the change in terminology was subtle, it created additional ambiguity.[77] "The older phrase[] — [ultrahazardous] — focus[ed] on the hazardous character of the activity, on its essentially [unlimited] potential for causing substantial harm."[78] The newer phrase — abnormally dangerous — mixed factual questions of harmful events and their probability despite all reasonable precaution with societal considerations of the value and utility of the harmful activity.[79] The question became: "[t]o what norm does 'abnormally' refer?"[80]

A change in terminology was not the only significant development. The Second Restatement also identified six factors to be considered in determining whether an activity was *abnormally dangerous*:

> (a) existence of a high degree of risk of some harm to the person,

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[75] *See Restatement (Second) of Torts* § 520 cmt. 1 (10th tent. Draft 1964).

[76] *See Valentine*, 864 P.2d at 297; *Bunyak*, 438 So.2d at 894; *N. Little Rock Transp. Co.*, 243 Ark. at 608; *Saiz*, 113 N.M. at 397 n.8; *Crawford*, 784 F. Supp. at 442 n.3; *Albig*, 502 A.2d at 662; *Branch*, 657 P.2d at 273; *Klein*, 117 Wash. 2d at 6; *Peneschi*, 295 S.E.2d at 6; *Wyrulec Co.*, 866 P.2d at 761; *Yukon Equip*, 585 P.2d at 1208; *Cropper*, 542 F. Supp. at 1149; *Indiana Harbor Belt R.R. Co.*, 916 F.2d at 1176; *Erbrich Prods. Co.*, 509 N.E.2d at 853; *Inland Steel*, 608 N.E.2d at 1384-85; *Great Lakes Dredging*, 460 So.2d at 512; *Natl. Steel*, 319 N.W.2d at 270; *Clay*, 951 S.W.2d at 623; *Ventron*, 94 N.J. at 491.

[77] *Koos*, 652 P.2d at 1260.

[78] *Id.*

[79] *Id.* Despite the differences between the first Restatement and Second Restatement, many courts continue to regard "ultrahazardous" and "abnormally dangerous" as synonymous. *See e.g.*, *Chi. Flood Litig.*, 680 N.E.2d 265, 279 (Ill. 1997).

[80] *Koos*, 652 P.2d at 1260.

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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.[81]

It has been suggested that these six factors were "related to each other in that each [was] a different facet of a common quest for a proper legal regime to govern accidents that negligence liability cannot adequately control."[82] However, these factors not only embraced the cause and effect inquiries noted above, but strongly suggested an inquiry similar to that in a negligence cause of action.[83] The six factors were the types of issues one would address in applying a risk-utility analysis to a given activity. Factors (a), (b), and (c) were directed at determining the risk associated with an activity, while factors (d) and (f) were aimed at the utility of the activity.

Even though the ALI authors suggested that no one factor was determinative, courts have developed a preference for particular factors. Numerous courts have opined that factor (c) — inability to eliminate the risk by the exercise of reasonable care — is key and central to the determination.[84] "The theory of imposition of strict liability for [engaging in an abnormally dangerous] activity is that the danger cannot be eliminated through the use of care."[85] If the risk involved in an admittedly dangerous activity can be eliminated through the exercise of reasonable care, then there is no basis for applying strict liability.[86] In fact, the Court of Appeals for the Seventh Circuit went so far as to suggest reordering the

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[81] *Restatement (Second) of Torts* § 520.

[82] *Indiana Harbor II*, 916 F.2d at 1177.

[83] *See Yukon Equip.*, 585 P.2d at 1211 ; *see also Prosser*, *supra n.* 46 ("When a court applies all of the factors suggested in the Second Restatement it is doing virtually the same thing as is done with the negligence concept . . . .").

[84] *See Arlington Forest Assn. v. Exxon Corp.*, 774 F. Supp. 387, 390 (E.D. Va. 1991); *Fletcher v. Conoco Pipe Line Co.*, 129 F. Supp. 2d 1255, 1261 (W.D. Mo. 2001).

[85] *Edwards v. Post Transp. Co.*, 279 Cal. Rptr. 231, 234 (Cal. App. 4th Dist. 1991).

[86] *Id.*

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factors with (c) being first.[87]

With regards to factor (d) — extent to which the activity is not a matter of common usage — many courts have concluded that if the activity is a matter of common usage, then strict liability is not applicable.[88] Factor (d) "is more for the purpose of exclusion of an activity from classification as [abnormally dangerous] than it is for [including it]."[89] There are many activities in a modern society that, although clearly dangerous (like automobile driving), are accepted because they are so commonly utilized. Indeed, the term "abnormally dangerous" suggests not that the activity is extremely dangerous or hazardous, as was the standard under the first Restatement, but that the danger or hazard is not normal. In other words, an activity may involve inherent risks of harm and still not be considered "abnormally dangerous" if the activity commonly occurs.[90]

Unlike the first Restatement, factor (e) takes into consideration the location where the activity occurs in determining whether a particular activity is abnormally dangerous. Section 520 comment (j) is illustrative: storage of large quantities of a highly flammable liquid like gasoline is not abnormally dangerous in an uninhabited area, but the same activity can be abnormally dangerous in the midst of a heavily populated city.[91] This emphasis on the relation of the activity to the locality harkens back to the true rule in *Rylands*, where the House of Lords distinguished between natural and non-natural uses of land.

It is also obvious that the six factors in the Second Restatement did not originate from the rule in *Rylands*. While factor (e) may have some hint of *Rylands*, the other elements are purely a creation of American common law. It is, therefore, wrong to suggest, as many courts have done, that the rule of *Rylands* was codified in the Second Restatement of Torts.

3. "Abnormally Dangerous Activities" — Restatement (Third) of Torts

The Third Restatement, while maintaining the "abnormally dangerous" label, applies two elements, rather than six factors, in determining whether an activity is abnormally dangerous:[92]

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[87] *Indiana Harbor II*, 916 F.2d at 1177.

[88] *See id.*; *Sprankle v. Bower Ammonia & Chem. Co.*, 824 F.2d 409 (5th Cir. 1987); *Arlington Forest Assn.*, 774 F. Supp. 387; *Walker Drug Co. v. La Sal Oil Co.*, 902 P.2d 1229 (Utah 1995).

[89] *See Edwards*, 279 Cal. Rptr. at 234.

[90] *Restatement (Second) of Torts* § 520 cmt. i.

[91] *Id.* at cmt. j.

[92] "Abnormally dangerous" under the Third Restatement and the definition of "ultrahazardous activity" in the first Restatement are surprisingly similar.

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(1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and

(2) the activity is not a matter of common usage.[93]

The first three factors of Section 520 in the Second Restatement have been simplified and reduced to the first element of Section 20 in the Third Restatement without losing any significance.

Factor (d) from the Second Restatement — extent to which the activity is not a matter of common usage — and element (2) from the Third Restatement are practically identical, but their importance has changed. The Second Restatement *considered* common usage in determining whether an activity is abnormally dangerous. The Third Restatement, in contrast, makes the "common usage" inquiry determinative in many instances. This is in line with those courts that, in applying the Second Restatement, concluded that if the activity is a matter of common usage, then the activity is not "abnormally" dangerous.

Finally, factors (e) and (f) have been removed from consideration in the Third Restatement. By removing factor (e), which took into consideration the location of the activity, the drafters of the Third Restatement have removed the only hint of a link between the Restatement and *Rylands v. Fletcher*.

4. The Need for an Alternative Approach

The ALI authors behind the Restatement, instead of clarifying and illuminating the law behind *Rylands v. Fletcher*, have controlled the development of the doctrine of liability for dangerous activities. The various courts have turned to the Second Restatement's version of the abnormally dangerous test because of its flexibility. This flexibility encourages courts to articulate the reasoning and policy behind its decisions. Most of these discussions culminate in a court stating that the Restatement is a codification of *Rylands*, and subsequently imposing strict *or absolute* liability where an injury is occasioned by an abnormally dangerous activity.

This is a serious problem. There is a clear distinction between requiring a defendant to exercise a high degree of care when involved in a potentially dangerous activity and requiring a defendant absolutely to

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[93] *Restatement (Third) of Torts* § 20(b) (1st tent. draft 2001). Comment (d) of § 20 addresses the application of the *Rylands* doctrine in American jurisprudence.

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insure the safety of others when engaging in an abnormally dangerous activity. Under the test(s) that the ALI authors have developed and extended, with *Rylands* supposedly serving as the underlying basis, recent decisions have interpreted the principle of liability for dangerous activities to include both strict *and absolute* liability. Indeed, where the doctrine of absolute liability for injuries caused by dangerous activities is recognized, or may be recognized, it would be advantageous to seek recovery on that ground instead of on the basis of negligence or strict liability. If absolute liability may be imposed, certain defenses such as assumption of the risk and contributory negligence are barred.

Courts' misunderstanding of the *Rylands* doctrine, and to a lesser extent the Restatement of Torts' version of the dangerous activities test, illustrates the need for further clarification of *Rylands*. The mere fact that an activity or instrumentality may become dangerous to others does not make its owner an insurer against injury to others thereby.

IV. A TWO-TIER APPROACH TO ASSESSING LIABILITY UNDER THE RESTATEMENT OF TORTS AND *RYLANDS V. FLETCHER*

It is difficult to determine the extent to which the *Rylands v. Fletcher* doctrine has been incorporated into American jurisprudence through the Restatement of Torts. While there certainly are differences between the House of Lords opinion in 1868 and the ALI's "abnormally dangerous" doctrine of the twentieth century, it is well-settled that "[w]hen American courts apply the rule of strict liability for abnormally dangerous activities, they frequently identify *Rylands* as providing the origin of the rule . . . ."[94]

The challenge for many courts is in understanding how to assess liability when a plaintiff seeks to recover from a defendant under the theories set forth in the Restatement of Torts or *Rylands*. This article proposes a two-tier approach to assessing the liability of a defendant who has engaged in a dangerous activity.

First, a court must determine whether the activity is ultrahazardous or abnormally dangerous by applying the appropriate factors or elements enunciated in the Restatement. In this regard, the Restatement authors, as well as Justice Blackburn and Lord Cairns, agree that an activity does not constitute an "ultrahazardous" or "abnormally dangerous" activity — and, therefore, strict liability does not apply — if such activity is a matter of common usage.[95] Moreover, neither *Rylands* nor the doctrines of

[94] *Restatement (Third) of Torts* § 20 cmt. d.

[95] *See infra* nn. 99-113 and accompanying text.

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ultrahazardous activities and abnormally dangerous activities will apply to causes of action premised on the inherent dangerousness of a product or instrumentality.[96]

If it is determined that the defendant, in fact, engaged in an ultrahazardous or abnormally dangerous activity, then the second step is to determine if the defendant's liability is limited or barred. Here, the Restatement considers whether the plaintiff assumed the risk associated with the activity or was contributorily and comparatively at fault.[97]

A. *First Tier: Is the Activity Ultrahazardous or Abnormally Dangerous?*

While the Restatements set forth numerous factors and/or elements to use in determining whether a particular activity is ultrahazardous or abnormally dangerous,[98] two key principles are worthy of discussion.

1. No Strict Liability for Matters of Common Usage

In determining whether an activity is ultrahazardous or abnormally dangerous, all three versions of the Restatement take into consideration the extent to which the activity is a matter of common usage,[99] which the Second Restatement defined as an activity "customarily carried on by the great mass of mankind or by many people in the community."[100] Significantly, whether a defendant will be held strictly liable is often determined by whether the activity is a matter of common usage. Many courts applying the Second Restatement's formulation have concluded that, if the activity is a matter of common usage, then strict liability is not applicable.[101] The ALI recognized this trend and made the "common usage" inquiry determinative in many instances under the Third Restatement.

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[96] *See infra* nn. 114-132 and accompanying text.

[97] *See infra* nn. 133-171 and accompanying text.

[98] *Restatement of Torts*; *supra* nn. 60-73 and accompanying text; *Restatement (Second) of Torts*; *supra* nn. 74-91 and accompanying text; *Restatement (Third) of Torts*; *supra* n. 93 and accompanying text.

[99] *Restatement of Torts* § 520(b); *Restatement (Second) of Torts* § 520(d); *Restatement (Third) of Torts* § 20(b)(2).

[100] *Restatement (Second) of Torts* § 520 cmt. i. Such an inquiry into common usage requires an analysis of the common behaviors within a community. What "community" were the Restatement authors referring to? Is it to be defined by geographic locale or by socioeconomic dimensions? Moreover, how would "community" be defined in the context of a consolidated trial or class action exercising jurisdiction over a large geographic area — sometimes even an entire State?

[101] *See e.g.*, *Edwards*, 279 Cal.Rptr. at 234 ("Factor (d)…is more for the purpose of exclusion of an activity from classification as [abnormally dangerous] than it is for inclusion.").

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There are many activities in a modern society that, although dangerous, are accepted because they are so common. In other words, an activity may involve inherent risks of harm and still not be considered "ultrahazardous" or "abnormally dangerous" if it is a matter of common usage.[102] The case for strict liability is weakened if an activity is common, as it is unlikely either that its dangers are perceived as great or that there is a lack of safety precaution available to minimize the risk.[103]

As the Second Restatement explained, regardless of the level of danger associated with an activity, if the activity is engaged in by a considerable portion of the population, then it should not be regarded as *abnormally* dangerous:

> Water collected in large quantity in a hillside reservoir in the midst of a city or in coal mining country is not the activity of any considerable portion of the population, and may therefore be regarded as abnormally dangerous; while water in a cistern or in household pipes or in a barnyard tank supplying cattle, although it may involve much the same danger of escape, differing only in degree if at all, still is a matter of common usage and therefore not abnormal. The same is true of gas and electricity in household pipes and wires, as contrasted with large gas storage tanks or high tension power lines. Fire in a fireplace or in an ordinary railway engine is a matter of common usage, while a traction engine shooting out sparks in its passage along the public highway is an abnormal danger.[104]

State and federal courts have applied the common usage exception of the Restatements as part of their analyses in determining whether an activity is abnormally dangerous such that strict liability should be imposed. In *Indiana Harbor Belt Railroad Company v. American Cyanamid Company*,[105] a railroad yard initiated an action to recover for clean-up costs resulting from a chemical spill involving the toxic substance acrylonitrile. As part of its defense, the defendant argued that shipping acrylonitrile was a matter of common usage "because it occurred almost daily."[106] The court stated that the defendant "misunderst[ood] the test" and explained: "'Common usage' in this context depends not on the frequency with which the activity occurs, but rather on the number of people who take

[102] *Restatement (Second) of Torts* § 520 cmt. i.

[103] *See Indiana Harbor II*, 916 F.2d at 1177.

[104] *Restatement (Second) of Torts* § 520 cmt. i.

[105] 662 F. Supp. 635.

[106] *Id.* at 643.

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part in it."[107] Emphasizing that very few people ship 20,000 gallons of acrylonitrile by tank car, the federal district court found such a shipment was not a matter of common usage.

In *Sprankle v. Bower Ammonia & Chemical Company*,[108] an employee filed suit against a chemical company for injuries arising out of the employee's exposure to anhydrous ammonia at the employer's work-site. The court held that the storage of ammonia did not constitute an abnormally dangerous activity, noting that, "since anhydrous ammonia is commonly used in a wide variety of agricultural, industrial and commercial applications, its storage, even in large quantities, can hardly be said to be 'not a matter of common usage.'"[109]

In *Arlington Forest Association v. Exxon Corporation*,[110] the owner of a service station filed suit for damages resulting from the alleged leakage of gasoline from underground storage tanks. The federal district court noted that, "the specific activity of storing and removing gasoline from commercial underground gasoline storage tanks is not carried on by the 'great mass of mankind.'"[111] Nevertheless, the court found more relevant the fact that "the presence and use of filling stations in and near residential areas is widespread and routine."[112] The activity was, therefore, deemed so commonplace as to be reasonably considered a matter of common usage.[113]

While "common usage" may have its ambiguities, it is clearly an element that a plaintiff must prove in any lawsuit alleging that a defendant is strictly liable as a result of engaging in an abnormally dangerous activity. The very language of the first and Third Restatement provisions makes this quite clear, and, as previously mentioned, some courts in effect read this requirement into the Second Restatement as well.

Thus, the Restatement does *not* establish "absolute liability" for engaging in inherently dangerous activities, because some such activity

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[107] *Id.* (citing *New Meadows Holding Co. v. Wash. Water Power Co.*, 687 P.2d 212, 216 (Wash. 1984)).

[108] 824 F.2d 409.

[109] *Id.* at 416.

[110] 774 F. Supp. 387.

[111] *Id.* at 391 (citing *Restatement (Second) of Torts* § 520 cmt. i.).

[112] *Id.*

[113] *Id.*; *see also Walker Drug*, 902 P.2d at 1233 (concluding that defendants' gas stations were located in an area where the operation of a gas station was common, appropriate, and of significant value to the community). *But cf. Anderson.*, 136 F. Supp. 2d 1192 (reading the "common usage" exception more narrowly than the courts in *Sprankle* and *Arlington Forest*). In *Anderson*, individuals living near a petroleum refinery brought an action alleging that operation of the refinery was an abnormally dangerous activity. The court noted that the product produced by the refinery was used commonly by a great number of people, but nonetheless found the refinery abnormally dangerous because the oil refining was not "something carried on by a large mass of people."

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may not qualify as abnormally dangerous. If (as some judges have said) the Restatement is a modern-day interpretation of *Rylands v. Fletcher*, then the *Rylands* doctrine likewise does not establish a standard of absolute liability.

2. No Liability for Abnormally Dangerous Products, Only Abnormally Dangerous Activities

Unsuccessful attempts have been made to expand the doctrine of *Rylands v. Fletcher* into the products liability area by arguing that when a product contains defects it automatically becomes an abnormally dangerous instrumentality.[114] This theory, closely akin to the Second Restatement of Torts, Section 402A strict liability, has been uniformly rejected.[115] Identifying the parameters of the principle of strict liability for "unreasonably dangerous" products under Section 402A is beyond the scope of this article.[116] However, it is worth noting that strict liability for an abnormally dangerous activity is conceptually distinct from strict products liability under Section 402A.

The doctrine of strict liability for injuries caused by a product was first recognized by the Supreme Court of California in *Greenman v. Yuba Power Products, Inc.*[117] As articulated by Justice Traynor in *Greenman*, the foundation of a defective product cause of action based on strict liability in tort is that the plaintiff's injury resulted from a condition of the product which rendered it unreasonably dangerous and that the condition existed when the manufacturer placed the product on the market.[118] Two years later, the Second Restatement of Torts Section 402A codified the *Greenman* decision:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the

[114] *See Indiana Harbor II*, 916 F.2d 1174; *Cropper*, 542 F. Supp. 1142; *Erbrich Prods. Co.*, 509 N.E.2d 850.

[115] *Indiana Harbor II.*, 916 F.2d 1174; *Cropper*, 542 F. Supp. 1142; *Erbrich Prods. Co.*, 509 N.E.2d 850.

[116] Just as there is no absolute liability for engaging in an abnormally dangerous activity, there is likewise no absolute liability for defective or unreasonably dangerous products. *See* 63 Am. Jur. 2d *Products Liability* § 522 (2002). The doctrine of strict liability "relates only to defective and unreasonably dangerous products, and does not make a manufacturer or seller an insurer that no injury will result from the use of its products . . . . The doctrine of strict liability has never meant absolute liability." *Id.*

[117] 377 P.2d 897 (Cal. 1963).

[118] *Id.* at 900-01.

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ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller[119]

Thus, where a defective condition makes a product unreasonably dangerous to the consumer, federal and state courts have found it just to impose "the loss on the one creating the risk."[120] Similarly, strict liability imposed under Section 519 (abnormally dangerous activities) is designed to shift the costs of the additional risk to the party conducting and benefiting from the dangerous activity.[121] So, there is a parallel between the underlying basis of strict liability for "unreasonably dangerous" products under Section 402A and strict liability for "abnormally dangerous" activities under Sections 519 and 520.

No court, however, has suggested that the rule applicable to abnormally dangerous activities has any applicability in a strict products liability cause of action. The court in *Indiana Harbor*[122] considered the question whether the shipper of a hazardous chemical, acrylonitrile, by rail should be strictly liable for the consequences of a spill or other accident to the shipment en route. The plaintiffs emphasized the "flammability and toxicity of acrylonitrile rather than the hazards of transporting it."[123] The court noted this distinction, stating that "ultrahazardousness or abnormal dangerousness is, in the contemplation of the law at least, *a property not of substances, but of activities*: not of acrylonitrile, but of the transportation of

[119] *Restatement (Second) of Torts* § 402A.

[120] *Suvada v. White Motor Co.*, 210 N.E.2d 182, 186 (Ill. 1965). *See also Greenman*, 377 P.2d at 901 ("The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."); *Indiana Harbor*, 517 F. Supp. at 318.

[121] *See e.g.*, *Arlington Forest Assoc.*, 774 F. Supp. at 393.

[122] 916 F.2d 1174.

[123] *Id.* at 1181.

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acrylonitrile by rail through populated areas."[124] In holding the defendant not strictly liable, the Seventh Circuit reasoned that, "the manufacturer of a product is not considered to be engaged in an abnormally dangerous activity merely because the product becomes dangerous when it is handled or used in some way after it leaves his premises even if the danger is foreseeable."[125]

In *Cropper v. Rego Distribution Center, Inc.*,[126] the plaintiff brought suit against multiple defendants to recover damages for injuries resulting from the use of an allegedly defective unloading riser. One of the named defendants, Swift Agricultural Chemicals Corporation, sold the riser to the plant where the injury occurred. Regarding plaintiff's strict liability claim against Swift, the court emphasized that "Swift was merely the vendor of an instrumentality which arguably permitted [the plant] to carry on an abnormally dangerous activity."[127] The court, finding no liability on Swift's involvement, held that "the doctrine of *Rylands* does not extend liability to any but those who conduct dangerous activities."[128]

In *Erbrich Products Company v. Wills*,[129] neighbors brought actions for injuries sustained when raw chlorine gas escaped from a nearby plant that used chlorine gas in its manufacture of liquid household bleach. Plaintiff urged the court to examine the characteristics of chlorine gas "in a factual vacuum to determine whether Section 519 liability [was] appropriate."[130] The court disagreed, stating that "[w]hen deciding whether to impose [Section] 519 strict liability, we must not look at the abstract propensities or properties of the particular substance involved, but must analyze the defendant's *activity* as a whole."[131] The court ultimately held that the use of chlorine gas in the manufacture of liquid household bleach was not an abnormally dangerous activity.[132]

Significantly, neither Sections 519 and 520 of the first and Second Restatement nor Section 20 of the Third Restatement include the term "product" in their respective articulations of what constitutes an ultrahazardous or abnormally dangerous activity. It is not the defendant's

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[124] *Id.* (emphasis added).

[125] *Id.*

[126] 542 F. Supp. 1142.

[127] *Id.* at 1153.

[128] *Id.*

[129] 509 N.E.2d 850.

[130] *Id.* at 856.

[131] *Id.* (emphasis added). "If the rule were otherwise, virtually any commercial or industrial activity involving substances which are dangerous only in the abstract automatically would be deemed as abnormally dangerous." *Id.*

[132] *Id.*

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product that is ultrahazardous or abnormally dangerous, but the defendant's activity in manufacturing, marketing, distributing, storing and/or selling the product. In *Rylands*, it was not the water that was found to be dangerous; rather, the act of accumulating large quantities of water in a reservoir ultimately led to defendant's liability. Therefore, plaintiffs injured by a defective product have no grounds for recovery under the strict liability doctrine for engaging in ultrahazardous or abnormally dangerous activities.

B. Second Tier: Limitations on the Liability for Engaging in an Ultrahazardous or Abnormally Dangerous Activity

If it is determined that the defendant, in fact, engaged in an ultrahazardous or abnormally dangerous activity, then the second step is to determine if liability is nonetheless limited or barred. Here, the Restatement considers whether the plaintiff assumed the risk associated with the activity or was contributorily and comparatively responsible for the damages sustained.[133]

In other words, contrary to popular misimpression, the Restatement does not establish a rule of "absolute liability" with respect to harm resulting from abnormally dangerous activity gone wrong. Indeed, the gravest misunderstanding of *Rylands v. Fletcher* is the notion, incorporated into the Restatement of Torts, that it establishes "absolute liability" for those engaged in dangerous activities. Absolute liability suggests that there are no defenses to a claim if it is decided that the defendant engaged in an "abnormally dangerous" activity. However, like those defenses permitted under the true rule of *Rylands*, the Restatement also identifies various defenses to a strict liability action resulting from "ultrahazardous" or "abnormally dangerous" activities.

Ordinarily, a plaintiff's contributory negligence will not bar recovery in a strict liability action. Since the strict liability of one who carries on an abnormally dangerous activity is not based on his negligence, ordinary contributory negligence in failing to exercise reasonable care to discover the existence of or to take precautions against the harm associated with the activity is not a defense. In *Rylands*, however, the English judiciary specified that if the plaintiff caused to escape the thing "likely to do mischief," then liability on the part of the individual who brought it onto

[133] Defendant's liability for engaging in an ultrahazardous or abnormally dangerous activity is also limited if (1) such activity is being carried on pursuant to a public duty [*Restatement of Torts* § 521; *Restatement (Third) of Torts* § 24(e)], (2) plaintiff is abnormally sensitive to the activity [*Restatement (Second) of Torts* § 524A], or (3) plaintiff is a trespasser on defendant's land [*Restatement (Third) of Torts* § 24(c)].

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his land would be excused.[134]

The Restatement authors subscribe to the true rule of *Rylands* in establishing that engaging in an ultrahazardous or abnormally dangerous activity should not result in absolute liability. Indeed, the actions of a person who voluntarily encounters the known risk associated with the activity should be taken into consideration. In other words, the plaintiff's assumption of the risk or contributory / comparative negligence may limit or completely bar recovery.

Liability under the first Restatement was barred when the person harmed by the unpreventable miscarriage of an ultrahazardous activity had *reason to know* of the risk which made the activity ultrahazardous:[135]

> [Significantly,] it is not necessary that he should know of all the causes of the risk inseparable from the activity. It is enough that he has reason to know that there is an unavoidable risk to which those taking part in the activity or coming within its reach will subject themselves.[136]

The first Restatement also provided that a plaintiff was barred from recovery for harm caused by the miscarriage of an ultrahazardous activity if "he intentionally or negligently causes the activity to miscarry, or after knowledge that it has miscarried or is about to miscarry, he fails to exercise reasonable care to avoid harm threatened thereby."[137]

The Second Restatement was even more direct: "[t]he plaintiff's *assumption of the risk* of harm from an abnormally dangerous activity bars his recovery for the harm."[138] In defining the nature of "assumption of risk," its authors emphasized that a plaintiff does not assume the risk unless he knows of its existence.[139] However, "[i]t is not necessary that he know or understand all of the causes or elements of the risk inseparable from the activity. It is enough that he knows that there is an abnormal risk of serious harm, to which those who take part in the activity or come within its range

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[134] *Rylands*, 3 L.R.-E. & I. App. at 339.

[135] *See Restatement of Torts* § 523. *But see id.* at § 522 ("One carrying on an ultrahazardous activity is [strictly] liable for harm . . . although the harm is caused by the unexpectable (a) innocent, negligent or reckless conduct of a third person, or (b) action of an animal, or (c) operation of a force of nature.").

[136] *Id.* at § 523 cmt. b.

[137] *Id.* at § 524.

[138] *Restatement (Second) of Torts* at § 523 (emphasis added).

[139] *Id.* "The risk inseparable from the great majority of [abnormally dangerous] activities is, however, a matter of such [common knowledge and] general notoriety that, in the absence of special circumstances, as where he has been misled by the [defendant] or when he is too young to [appreciate] the risk. . ." a plaintiff may often be found to have the knowledge notwithstanding his own denial. *Id.* at § 523 cmt.c.

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will be subjected."[140]

Robison v. Robison[141] is a classic example of a plaintiff assuming the risks associated with an abnormally dangerous activity, thereby depriving him of a strict liability claim. While the *Robison* defendants were using dynamite in constructing an irrigation ditch, the plaintiff, a curious neighbor, approached the construction site. Acting as more than just an innocent bystander or inquisitive observer, the plaintiff actually entered into the activities and made suggestions on how to place the dynamite.[142] Later, when the dynamite exploded, the plaintiff was injured by flying debris. When the plaintiff cited the "rule of absolute liability" to support his claim against the defendants, the court replied that the "so-called rule of 'absolute liability' is not absolute at all."[143] The defendants argued that "[o]n the issue of assumption of risk . . . inasmuch as plaintiff was aware of the blasting with dynamite, and was under no necessity of remaining there, but nevertheless chose to do so, and in fact participated in the activity himself, he assumed the risk of injury which occurred."[144] The court likened the situation to the rule applicable to the keeping of a wild animal, such as a chained bear: "[I]f the person injured has deliberately teased the animal, or been so reckless of his safety as to practically invite injury, he cannot recover."[145] Even the dissenting opinion, which would have affirmed the summary judgment for the defendants, noted that, "the plaintiff did have a bear by the tail, and voluntarily assumed the consequences."[146]

In *McLane v. Northwest Natural Gas Company*,[147] a worker was killed when gas from a liquefied gas storage tank escaped and exploded. The Oregon Supreme Court, applying the rule of *Rylands* and the Second Restatement of Torts, held as a matter of law that defendant was engaged in an abnormally dangerous activity. The court noted, however, that if the defendant could prove assumption of risk as outlined in the Restatement, plaintiff's recovery could be barred.[148]

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[140] *Id.*

[141] 394 P.2d 876 (Utah 1964).

[142] *Id.* at 877.

[143] *Id.*

[144] *Id.*

[145] *Id.* at 877 (internal citation omitted).

[146] *Id.* at 879 (C.J. Henroid, dissenting). Though the court vacated the summary judgment granted to defendants and remanded the case for jury trial, the court agreed with defendants' argument "if the evidence demonstrates those facts." *Id.* at 878.

[147] 467 P.2d 635 (Or. 1970).

[148] *Id.* at 642. The court noted, however, that "[t]he defense of assumption of risk is constrained by two requirements: (1) that the plaintiff must know and understand the risk he is incurring, and (2) that his choice to incur it must be entirely free and voluntary." *Id.* at 642, n. 8.

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When West Virginia adopted *Rylands* "as articulated in the Second Restatement of Torts" into the State's common law, the Supreme Court of Appeals noted the potential applicability of the assumption of risk defense.[149] In *Peneschi v. National Steel Corporation*,[150] the court said: "we believe that the Restatement articulates the correct Rule concerning assumption of risk . . . ":

> The risk is commonly assumed by one who takes part in the activity himself, as a servant, an independent contractor, a member of a group carrying on a joint enterprise or as the employer of an independent contractor hired to carry on the activity or to do work that must necessarily involve it. Thus a plaintiff who accepts employment driving a tank truck full of nitroglycerin, with knowledge of the danger must be taken to assume the risk when he is injured by an explosion.[151]

These cases and others support the position that, one who takes part in an activity assumes the risks associated with that activity, even if it is viewed as abnormally dangerous.[152] In other words, strict liability is not absolute liability, and a plaintiff's assumption of the risk operates to bar recovery.[153]

In addition to assumption of risk, the Second Restatement maintained the rule that "[t]he plaintiff's contributory negligence in knowingly and unreasonably subjecting himself to the risk of harm from the activity is a defense to strict liability."[154] To illustrate, one who is inattentive while driving along the highway and therefore fails to discover a sign warning him of blasting operations ahead is not barred from recovery by his contributory negligence.[155] On the other hand, one who, while driving along the highway, sees a sign and a flagman warning him of blasting operations ahead, but nevertheless insists upon proceeding, cannot recover when he is injured by the blast.[156]

Austin v. Raybestos-Manhattan, Inc.[157] involved a products liability

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[149] *Peneschi.*, 295 S.E.2d at 1, 11.

[150] *Id.*

[151] *Id.* (quoting Restatement (Second) of Torts § 523 cmt. d).

[152] *See e.g., G.J. Leasing Co., Inc. v. Union Elec.*, 854 F. Supp. 539, 569 (S.D. Ill. 1994) ("The risk is commonly assumed by one who takes part in the activity himself.").

[153] *See e.g., Hulsey v. Elsinore Parachute Ctr.*, 214 Cal. Rptr. 194, 201-202 (Cal. App. 4th Dist. 1985).

[154] *Restatement (Second) of Torts* § 524(2).

[155] *Id.* at § 524 cmt. a.

[156] *Id.*

[157] 471 A.2d 280 (Me. 1984).

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action arising from exposure to asbestos. The question certified to the Supreme Court of Maine was whether a comparative negligence statute applied to a strict liability claim. In determining whether "fault" on the part of a plaintiff in a strict liability action could be used against him, the court analyzed the defense of contributory negligence under Section 524 of the Second Restatement:

> [C]ontributory negligence consisting [mostly] in a failure to discover the defect in the product or to guard against the possibility of its existence is not "fault". . . . [O]n the other hand contributory negligence of a form commonly passing under the name of assumption of the risk, consisting in voluntarily and unreasonably proceeding to encounter a known danger, does constitute such "fault."[158]

The Court ultimately held that only contributory negligence in the form of assumption of the risk functions as a defense to a strict products liability claim.[159]

Both assumption of the risk and contributory negligence defenses in a strict liability action require a plaintiff to act voluntarily. Sections 523 and 524 of the Second Restatement require that the plaintiff willfully engage in a dangerous activity while understanding the existence of an abnormal risk of harm that the activity presents.[160] An "abnormally dangerous" veil will not shield the actions of the plaintiff from the court.

In the years following the adoption of the Second Restatement, many jurisdictions replaced contributory negligence with comparative negligence as a defense in negligence actions.[161] Between allowing contributory negligence to wipe out the plaintiff's claim or, alternatively, regarding contributory negligence as totally irrelevant, comparative negligence offered an appealing compromise. Adopting the term "comparative responsibility" in lieu of comparative negligence, the Third Restatement commentators agreed that "[t]his appeal extends to strict liability claims as well."[162]

> If the plaintiff has been contributorily negligent in failing to take precautions against an abnormally dangerous activity described in § 20 . . . the plaintiff's recovery for physical harm resulting from the contributory negligence is reduced in accordance with the share

[158] *Id.* at 286.
[159] *Id.*
[160] *Restatement (Second) of Torts* §§ 523-524.
[161] *Austin*, 471 A.2d at 286.
[162] *Restatement (Third) of Torts* § 25.

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of responsibility assigned to the plaintiff.[163]

Under the Third Restatement, the rule of "comparative responsibility" applies whenever the plaintiff fails to exercise reasonable care in order to protect him/herself.[164] With this provision, the Third Restatement maintains the view shared by the first and Second Restatements that strict liability for abnormally dangerous activities does not mean absolute liability.

Another important development is the Third Restatement's treatment of the assumption of risk defense, which is no longer recognized as a separate defense.[165] Rather, those situations that may have been covered under the assumption of risk defense in the Second Restatement are subsumed under the "scope-of-liability" limitation in Section 24(d) of the Third Restatement. That section provides that strict liability "does not apply to persons who suffer physical harm because they come into contact with or proximity to the defendant's . . . abnormally dangerous activity for the purpose of securing some benefit from that contact or that proximity."[166] As the Comments more fully explain:

> The rules of strict liability . . . are designed largely to protect innocent third parties or innocent bystanders. This classification cannot be accorded to the plaintiff who voluntarily comes into contact with or approaches the defendant's animal or activity in order to secure some benefit which contact or proximity to the animal or the activity provides. Such a plaintiff incurs injury because the plaintiff, in order to derive some benefit, has deliberately come within the range of danger entailed by the defendant's animal or activity.[167]

While such persons may have negligence claims, strict liability for engaging in an abnormally dangerous activity does not apply.[168] To illustrate, the ALI authors described a number of different scenarios in which strict liability (per Sections 20-23 of the Third Restatement) would be inappropriate, even though a dangerous activity resulted in injury, where the plaintiff sought to derive personal or financial benefit from that

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[163] *Id.*

[164] According to the Third Restatement commentators, "the adoption of comparative responsibility eliminates the need, encountered by the first Restatement and Second Restatement, to sharply distinguish between various forms of contributory negligence for purposes of determining whether there are particular instances of plaintiff misconduct that should serve to bar completely the plaintiff's claim." *Id.* at § 25 cmt. c.

[165] *Id.* at § 25 cmt. e.

[166] *Id.* at § 24(d).

[167] *Id.*

[168] *Id.* at § 24 cmt. d.

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activity.[169] The absence of any decisions cited within the comments to Section 24 does not detract from the sensible and logical result of the ALI authors' reasoning: the strict liability umbrella was designed to protect innocent bystanders, not those who voluntarily engage in an activity.

Further, although the Third Restatement does not offer an express assumption of risk defense, the ALI has effectively adopted it under the cloak of "comparative responsibility" in Section 24. Thus, when a plaintiff voluntarily comes into contact with the defendant's abnormally dangerous activity in order to secure a benefit offered by such activity, the defendant's liability is limited by the plaintiff's comparative responsibility.

Thus, the authors and commentators for the Third Restatement have reinforced the long-established understanding that the rule of strict liability for abnormally dangerous activities is not without limitations.[170] Most such limitations are delineated in Section 24.[171] Given the recent drafting of the Third Restatement, there are a scarcity of cases applying such exceptions to strict liability. Nevertheless, they clearly exist, lending further credence to the argument that "absolute" liability has no place in the Restatement of Torts.

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[169] *Id.* "For example, while certain jurisdictions impose strict liability on airlines when an airplane crash causes ground damage, claims by injured passengers against the airline are governed by negligence law. Because the passengers are deliberately benefiting from the activity of flying, the imposition of strict liability on the airline for passenger injuries would be inappropriate." *Id.* Similarly, if a defendant treats the plaintiff's home with an insecticide, the plaintiff has no strict liability claim if the insecticide injures the plaintiff. *Id.* Thus, according to the commentators, "[t]he airplane passenger may have a negligence claim against the airline and may be able to establish negligence by relying on *res ipsa loquitur*," or "the pest-control company may be liable for negligently failing to advise the client of the dangers of the insecticide and how to avoid them"; however, neither plaintiff may invoke strict liability. *Id.*

[170] *See e.g.*, *Restatement (Third) of Torts* § 20 cmt. a ("[e]ven in cases [involving abnormally dangerous activities], various limitations on liability apply and various defenses are available. . . .").

[171] The denial of strict liability leaves open the possibility of negligence liability. Section 24 delineates five (5) situations where denial of strict liability for abnormally dangerous activity would be appropriate:

> (a) physical harm that is not characteristic of the risk posed by the abnormally dangerous activities referred to in § 20. . . ;
>
> (b) physical harm brought about by the defendant's abnormally dangerous activity. . . that is due to the act of a third party in intentionally depriving the defendant of control over . . . the activity. . .;
>
> (c) physical harm suffered by [plaintiffs] while they are without appropriate permission upon the land owned or occupied by the defendant;
>
> (d) physical harm because [plaintiffs] come into contact with or proximity to the defendant's. . . abnormally dangerous activity for the purpose of securing some benefit from that contact or proximity;
>
> (e) Defendant . . . carries on the abnormally dangerous activity in pursuance of a duty imposed upon the defendant by law or legal order
>
> *Id.* at § 24.

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V. CONCLUSION

Courts which state that the origin of "absolute liability" is found in the 1868 English case of *Rylands v. Fletcher* are "absolutely" wrong. Courts which state that the Restatement of Torts has codified *Rylands* and likewise provides for the absolute liability of one engaging in an abnormally dangerous activity are also "absolutely" wrong.[172] While the doctrine of strict liability set forth in the Second and Third Restatements may have antecedents in *Rylands*, absolute liability is a distinct concept. Courts that use "strict liability" and "absolute liability" interchangeably fail to grasp the fundamental definitional differences between the two.

As distinguished from absolute liability, careful examination of the *Rylands* opinion and the Restatements yields one defining point: defenses are available to relieve a defendant of liability. Again, courts and legal commentators espousing "absolute liability" are blind to these existing defenses provided to those who engage in ultrahazardous or abnormally dangerous activities. Since liability is not absolute, two questions must be asked to determine a defendant's liability. First, is the activity abnormally dangerous? Second, if so, are there limitations to the defendant's liability for engaging in such activity? This approach will help courts understand when and how to apply the doctrine of *Rylands v. Fletcher* or its supposed American progeny.

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[172] *See Mowrer v. Ashland Oil & Refining Co.*, 518 F.2d 659 (7th Cir. 1975); *Haddon*, 161 A.2d 160; *Miller*, 651 N.E.2d 239; *Richardson v. Holland*, 741 S.W.2d 751 (Mo. App. 1988).

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