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Eliminating Ultrahazardous Activity Liability In Enviro Cases

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Igniting high explosives involves a serious, nonpreventable risk of bodily harm to anyone unfortunate enough to be in the immediate vicinity. For that reason, blasting remains the textbook example of an ultrahazardous activity for which strict liability is imposed. The theory is that when people ignite explosives — regardless of how carefully they do so — they intentionally undertake an activity they know is dangerous. Thus, the law imposes strict liability on the blaster rather than the innocent bystander for any injuries that result.

However, in toxic tort or environmental cases, both the causal chain and the equities at stake are markedly different, since it may take decades for the alleged harm to materialize after the activity takes place. Such cases raise the question of whether an activity involving no known serious risks at the time it was carried out can give rise to strict liability decades later. In those cases, imposing strict liability absent contemporary knowledge of a present danger arbitrarily shifts costs to unsuspecting — and duly careful — defendants, and undercuts the policies behind a fault-based tort system.

The common law imposes strict liability on those who engage in an ultrahazardous activity. The Restatement (First) of Torts defines an ultrahazardous activity as one that "necessarily involves a risk of serious harm ... which cannot be eliminated by the exercise of the utmost care, and is not a matter of common usage."[1] The Restatement (Second) of Torts largely incorporates the elements from the Restatement (First) as factors "to be considered" and also considers the "inappropriateness of the activity to the place where it is carried on" and the "extent to which its value to the community is outweighed by its dangerous attributes."[2]

Aside from blasting, other examples of ultrahazardous activities include fumigating with cyanide gas[3] and test firing a rocket motor.[4] By contrast, activities such as maintaining high-voltage power lines,[5] Fourth of July fireworks displays,[6] and irrigating farmland[7] have been held to be too commonplace to be ultrahazardous. And activities such as transporting sulfuric acid,[8] transmission of natural gas,[9] and parachute jumping[10] have been held to be nonultrahazardous because they can be performed safely with due care.

The doctrine of strict liability without fault "is predicated upon the theory that the actor *realizing the hazard* of his undertaking nevertheless assumes the risk connected therewith,"[11] and "[a]lthough the actor's conduct is not so unreasonable as to constitute negligence itself, it is sufficiently anti-social that,

as between two innocents, the actor and not the injured should pay for mishaps."[12]

Stated differently, the problem of an individual engaging in ultrahazardous activities "is dealt with as one of allocating a more or less inevitable loss to be charged against a complex and dangerous civilization, and liability is placed upon the party best able to shoulder it."[13] And courts have been reluctant to require "the innocent [bystander] to bear the loss" rather than the "defendant, who is engaged in the enterprise for profit" and can include the cost of any future loss in the price to the consumer.[14]

Numerous courts have rejected the application of strict liability to environmental or toxic tort cases because the activity at issue could be performed safely if done with reasonable care. A federal court in Nebraska observed that "a key consideration in a [strict liability] case ... is whether the risk of harm can be controlled or eliminated in the exercise of due care."[15]

Thus, in Marmo v. IBP Inc., because the "plaintiffs' expert agree[d] that the covering of the anaerobic lagoons has made the [hydrogen sulfide] emission levels dramatically drop and the offensive odor dissipate," the court held that the operation of a wastewater treatment facility was not an ultrahazardous activity.[16] It also rejected the plaintiffs' reliance on "some federal laws" that view "hydrogen sulfide ... a pollutant or hazardous substance," because under that logic "'virtually any commercial o[r] industrial activity involving substances which are dangerous only in the abstract automatically would be deemed abnormally dangerous'" — a result that would be "'intolerable.'"[17]

A federal court in Virginia likewise rejected a strict liability claim for operating underground gas storage tanks because "[o]nly those activities that remain dangerous despite the exercise of all reasonable precautions warrant imposition of strict liability."[18] In the same vein, the Seventh Circuit has held that "the manufacture of PCBs cannot be considered abnormally dangerous under Indiana law since the risks therefrom could have been limited by [the defendant's] reasonable care."[19]

Other courts have rejected strict liability in environmental or toxic tort cases because the activity at issue was commonplace. The Eastern District of Virginia has held that operating a gas station with underground tanks is not ultrahazardous because it is "commonplace,"[20] and the Utah Supreme Court reached the same conclusion because it is "common, appropriate and of significant value to the community."[21]

The Washington Supreme Court has held that the underground transmission of natural gas is not ultrahazardous because of its common usage.[22] And the New York Appellate Division has held that use of propane tanks is not ultrahazardous "[i]n view of the widespread use of propane gas as a commercial consumer and household product."[23] Similarly, the Colorado Court of Appeal held that it was "aware of no authority supporting the proposition that dispensing gasoline at a service station is an ultrahazardous activity," and the court saw "no reason to extend the doctrine to reach such an activity."[24]

Because strict liability is liability without fault, some courts have made statements suggesting that a defendant may be strictly liable for injuries even under circumstances where the defendant lacks "actual knowledge of the *true extent of the danger* involved in proceeding with an ultrahazardous activity."[25] Thus, in Garcia v. Estate of Norton, the court imposed strict liability when a worker used a blow torch to cut an oil tank attached to a truck that he mistakenly believed had been steam cleaned, but which in fact contained explosive waste oil.[26]

However, the court limited its statement that knowledge is not required by retaining traditional elements of proximate causation and limiting liability to those people "whom the actor *reasonably should* recognize as likely to be harmed by a miscarriage of [an] ultrahazardous activity."[27]

Thus, in a case seeking to impose liability based on, for example, chemical exposures not known at the time to pose a serious risk of injury, Garcia is distinguishable because it would not be reasonable for the defendant to recognize that serious harm was likely to occur. And the fact that Garcia dealt with a mistake as to whether the activity had been made safe by cleaning the oil tank arguably sounds more in negligence than strict liability, because by definition, an ultrahazardous activity cannot be made safe even "by the exercise of the utmost care."[28]

Closer to the hypothetical environmental case, in T & E Industries Inc. v. Safety Light Corp, the Supreme Court of New Jersey analyzed but did not decide whether knowledge of the harm was necessary before imposing strict liability for contamination arising from a radium processing plant. There, the court found that a defendant who had operated the radium plant was strictly liable to the subsequent owner for contaminants left behind.[29] The defendant operated the plant from 1917 to 1926.

"It was not until the mid-1950s, however, that the scientific community engaged in any serious study of the epidemiological risks associated with" radium or its byproducts.[30] The defendant argued that it could not be held strictly liable because "the risk of harm from the activity was scientifically unknowable at that time," and, absent knowledge, "the policy basis for imposing strict liability on those who engage in abnormally dangerous activities, namely, cost spreading, cannot be realized."[31]

The court noted the lack of authority governing whether knowledge is required to impose strict liability. It cited the statement from Garcia that "actual knowledge of the true extent of the danger" is not required, but noted that many commentators had opined that the law may require "foreseeability of harm."[32] Ultimately, the court fell short of deciding the issue.[33]

Instead, the court held that the "defendant should have known about the risks of its activity, and that its constructive knowledge would fully satisfy any such requirement."[34] As examples of the defendant's constructive knowledge, the court discussed an incident where an employee was so concerned about "radium lodged beneath his fingernail" that he "immediately 'hacked' off his fingertip" and, prior to the sale of the property to the plaintiff, the defendant "knew that the inhalation of radon could cause lung cancer."[35]

Strict liability for ultrahazardous activities fulfills its purpose only when a defendant knowingly engages in a dangerous activity and voluntarily assumes the risk. In that way, the defendant can "spread the risk and engage in the optimal level of activity" by, for example, increasing the price of its goods to account for any injuries, obtaining insurance to protect itself from the risk, and reducing the activity to the extent necessary to balance the benefits with the risk.

But where strict liability attaches without knowledge of the risk, it does nothing to influence a defendant's actions and operates merely as a "tool of social engineering to mandate" that a defendant "bear the entire risk and costs of injuries."[36] The defendant would be left bearing potentially ruinous liability for risks it did not appreciate, and could not have avoided.

Indeed, it is impossible to foresee which of today's household substances or activities could be considered ultrahazardous many years down the road — in the face of such one-sided hindsight bias, one could only avoid liability through prescience. Moreover, given the existence of other common law

claims, such as nuisance, trespass and negligence, there is no need to expand ultrahazardous activity liability to cases involving unknown and unknowable dangers.

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[1] Restatement (First) of Torts § 520.

[2] Restatement (Second) of Torts § 520.

[3] Luthringer v. Moore, 31 Cal. 2d 489, 498 (1948).

[4] Smith v. Lockheed Propulsion Co., 247 Cal. App. 2d 774 (1967).

[5] Pierce v. Pacific Gas & Electric Co., 166 Cal. App. 3d 68, 85 (1985).

[6] Ramsey v. Marutamaya Ogatsu Fireworks Co., 72 Cal. App. 3d 516, 527 n.2 (1977).

[7] Clark v. DiPrima, 241 Cal. App. 2d 823, 829 (1966).

[8] Edwards v. Post Transportation Co., 228 Cal. App. 3d 980, 986-87 (1991).

[9] New Meadows Holding Co. by Raugust v. Wash. Water Power Co., 102 Wash. 2d 495, 501-02 (1984).

[10] Husley v. Elsinore Parachute Center, 168 Cal. App. 3d 333, 345-46 (1985).

[11] Motzer v. Paoli, 110 Cal. App. 2d 141, 143-44 (1952) (emphasis added).

[12] Chavez v. S. Pac. Transp. Co., 413 F. Supp. 1203, 1207 (E.D. Cal. 1976).

[13] Id. at 1208 (quoting Prosser, Law of Torts, (2d ed. 1955) at 318).

[14] Id. at 1208-09.

[15] Marmo v. IBP Inc., 362 F. Supp. 2d 1129, 1133 (D. Neb. 2005).

[16] Id. at 1134.

[17] Id. at 1134 (quoting City of Bloomington, Ind. v. Westinghouse Elec. Corp., 891 F.2d 611, 616-17 (7th Cir. 1989)).

[18] Arlington Forest Associates v. Exxon Corp., 774 F. Supp. 387, 391 (E.D.Va. 1991).

[19] City of Bloomington, Ind. v. Westinghouse Elec. Corp., 891 F.2d 611, 616-17 (7th Cir. 1989).

[20] Arlington Forest Associates v. Exxon Corp., 774 F. Supp. 387, 391 (E.D.Va. 1991).

[21] Walker Drug Co. Inc. v. La Sal Oil Co., 902 P.2d 1229, 1233 (Utah 1995).

[22] New Meadows Holding Co. by Raugust v. Washington Water Power Co., 102 Wash. 2d 495, 502 (1984).

[23] Searle v. Suburban Propane Division of Quantum Chemical Corp., 263 A.D. 2d 335, 339 (N.Y.App.Div. 2000).

[24] Walcott v. Total Petroleum Inc., 964 P.2d 609, 614 (Colo. Ct. App. 1998).

[25] Garcia v. Estate of Norton, 183 Cal. App. 3d 413, 420 (1986) (emphasis added).

[26] Id.

[27] Id.

[28] Restatement (First) of Torts § 520.

[29] T & E Indus. Inc. v. Safety Light Corp., 123 N.J. 371, 376 (1991).

[30] Id.

[31] Id. at 391-92.

[32] Id. at 392.

[33] Id. at 393.

[34] Id.

[35] Id. at 377, 395.

[36] Buckingham v. R.J. Reynolds Tobacco Co., 142 N.H. 822, 826 (1998).