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Memorandum 69-38

Subject: Study 52 - Sovereign Immunity (Liability for Ultrahazardous Activities)

Review of the substantive rules of liability (particularly those relating to concussion and vibration (Memorandum 69-37) and escaping chemicals (Memorandum 69-39)) in conjunction with the study on inverse condemnation has revealed a significant area of liability--liability for ultrahazardous activities--that appears to have been overlooked in the drafting of the Governmental Liability Act. Certainly, such liability is not expressly covered in the Act and as indicated below existing bases for liability in the Act and elsewhere because of their various exceptions and immunities simply cannot be reconciled with liability predicated on such grounds. The staff believes that the remaining hiatus is one that should be filled and offer therefore a tentative solution in the form of a draft statute (Exhibit II--pink sheets) that we ask the Commission to consider.

The general principle applicable to ultrahazardous activities is that one who carries on such an activity is subject to liability for harm resulting from the activity even though he has exercised the utmost care to prevent such harm. (The principle and its exceptions and qualifications are discussed in some detail in the attached Exhibit I. Exhibit I is an edited version of Chapter 21 of the latest Tentative Draft of the Restatement of Torts, Second, relating to "Abnormally Dangerous Activities" (formerly "Ultrahazardous Activities").) "The liability arises out of the abnormal danger of the activity itself, and the risk which it creates, of harm to those in the vicinity. It is founded upon a policy of the law which imposes upon anyone who, for his own purposes, creates such an

abnormal risk of harm to his neighbors, the responsibility of making good that harm when it does in fact occur. The defendant's enterprise, in other words, is required to pay its way by compensating for the harm it causes, because of its special, abnormal and dangerous character." Restatement, Torts, Second § 519, Comment d. In short, as applied to public entities, it would require the distribution of losses resulting from abnormally dangerous (or ultrahazardous) activities to be spread to the public generally rather than be left to absorption by an unfortunate few.

Existing law probably fails to provide similar relief. The Governmental Liability Act imposes liability on a public entity for the acts of its employees (Govt. Code § 815.2) and provides that public employees in turn are liable for injury to the same extent as a private person (Govt. Code § 820). However, the Act expressly immunizes both an entity and its employee from liability for acts resulting from the exercise of discretion by the employee. The precise scope of this immunity awaits case-by-case judicial definition, but it would appear that its potential reach would embrace and protect discretionary decisions to engage in certain ultrahazardous activities. Moreover, the emphasis for this source of liability is on "acts"; a major area of liability for ultrahazardous activities is concerned with maintenance of dangerous conditions. The Governmental Liability Act deals directly with dangerous conditions of public property, but its provisions are completely inconsistent with a theory of strict liability for ultrahazardous activities. Assuming the basic conditions of liability under the Act are met (Govt. Code § 835), the Act provides two special defenses that eliminate ultrahazardous liability. The first of these is the plan or design immunity (Govt. Code § 830.6). This immunity is discussed in Memorandum 69-40; suffice it to say here

that many dangerous conditions (water tanks, storage facilities for explosives, gas, oil, and so on) will be the product of an approved plan or design and thereby removed as a source of liability. More devastating, certainly in theory, is the ability of the entity to defend its activity by showing the reasonableness of its acts in protecting against the risk of injury created by the activity (condition). Govt. Code § 835.4. The very essence of ultrahazardous liability is strict liability despite a showing of utmost care on the part of the defendant. If negligence could be shown, there would be no need to rely on a theory of strict ultrahazardous liability in the first place.

Two alternative bases of liability offer some relief from the foregoing rules. Inverse condemnation provides liability for property damage resulting from a deliberate plan or construction. However, the failure to cover personal injury and the requirement of deliberateness severely limit inverse applicability. Alternatively, relief might be predicated on a nuisance theory of liability. Professor Van Alstyne suggests that Government Code Section 815 was intended to eliminate any public entity liability for damages on the ground of common law nuisance. California Government Tort Liability § 5.10 at 126 (Cal. Cont. Ed. Bar 1964). Nevertheless, Section 815 provides governmental immunity except where provided by statute (any statute). Civil Code Sections 3479 (defining nuisance), 3491, and 3501 (authorizing civil actions) arguably provide the necessary exceptions permitting nuisance liability. Moreover, the extremely broad statutory definition of nuisance--

> Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, . . . is a nuisance. (Civil Code Section 3479)--

would, it seems, encompass most ultrahazardous activities. Nonetheless,

Chapter 21

ABNORMALLY DANGEROUS ACTIVITIES

Note to Institute: As to the substitution of this term, see the Note under § 520.

§ 519. GENERAL PRINCIPLE

(1) ONE WHO CARRIES ON AN ABNORMALLY DANGEROUS ACTIVITY IS SUBJECT TO LIABILITY FOR HARM TO THE PERSON, LAND OR CHATTELS OF ANOTHER RESULTING FROM THE ACTIVITY, ALTHOUGH HE HAS EXERCISED THE UTMOST CARE TO PREVENT SUCH HARM.

(2) SUCH STRICT LIABILITY IS LIMITED TO THE KIND OF HARM, THE RISK OF WHICH MAKES THE ACTIVITY ABNORMALLY DANGEROUS.

The limitation in Subsection (2), to the kind of harm within the risk, is supported by Madsen v. East Jordan Irrigation Co., (1942) 101 Utah 552, 125 P. 2d 794; Foster v. Preston Mill Co., (1954) 44 Wash. 2d 440, 268 P. 2d 645; Gronn v. Rogers Construction, Inc., (1960) 221 Or. 226, 350 P. 2d 1086, in all three of which blasting caused frightened mink to kill their young, and it was held that there was no strict liability. Also by Klepsch v. Donald, (1892) 4 Wash. 436, 30 P. 991, where blasting hurled a rock to an extreme distance, beyond anything that could possibly have been expected. See also Robinson v. Kilvert, (1889) 41 Ch. Div. 88, where the heat from defendant's mill damaged a very delicate type of paper on the plaintiff's premises; also Chicago, B. & Q. R. Co. v. Gelvin, (8 Cir. 1916) 238 F. 14, where the strict liability under a railroad fire statute was held not to extend to harm to cattle frightened into a stampede.

Comment:

a. The general rule stated in this Section is subject to exceptions and qualifications, too numerous to be included within a single Section. It should therefore be read together with §§ 520 to 524A, inclusive, by all of which it is limited.

b. As to the meaning of an "abnormally dangerous activity, see § 520.

~~d~~ c. The word "care" includes care in preparation, care in operation and skill both in operation and preparation.

d. The liability stated in this Section is not based upon any intent of the defendant to do harm to the plaintiff, or to affect his interests, nor is it based upon any negligence, either in attempting to carry on the activity itself in the first instance, or in the manner in which it is carried on. The defendant is held liable although he has exercised the utmost care to prevent the harm to the plaintiff which has ensued. The liability arises out of the abnormal danger of the activity itself, and the risk which it creates, of harm to those in the vici nity. It is founded upon a policy of the law which imposes upon anyone who, for his own purposes, creates such an abnormal risk of harm to his neighbors, the responsibility of making good that harm when it does in fact occur. The defendant's enterprise, in other words, is required to pay its way by compensating for the harm is causes, because of its special, abnormal and dangerous character.

Comment on Subsection (2):

e. Extent of protection. The rule of strict liability stated in Subsection (1) applies only to such harm as is within the scope of the abnormal risk which is the basis of the liability. One who carries on such an activity is not under strict liability for every possible harm which may result from carrying it on. For example, the thing which makes the storage of dynamite in a city abnormally dangerous is the risk of harm to those in the vicinity if it should explode. If an explosion occurs, and it does harm to persons, land or chattels in the vicinity, the rule stated in Subsection (1) applies. If, however, for some unexpected reason a part of the wall of the magazine in which the dynamite is stored falls upon a pedestrian on the highway upon which the magazine abuts, the rule stated in Subsection (1) has no application. In such a case the liability, if any, will be dependent upon proof of negligence in the construction or maintenance of the wall. So also, the transportation of dynamite or other high explosives by truck through the streets of a city is abnormally dangerous for the same reason as that which makes the storage of such explosives abnormally dangerous. If the dynamite explodes in the course of such transportation, a private person transporting it is subject to liability under the rule stated in Subsection (1), although he has exercised the utmost care. On the other hand, if the vehicle containing the explosives runs over a pedesyrian, he cannot recover unless the vehicle was driven negligently.

Illustration:

1. A, with reasonable care, carries on blasting operations in a closely settled rural district. The noise of the blasting frightend mink on B's near-by mink ranch, of whose presence A has no reason to know. The right causes the mink to kill their young. A is not liable to B for the loss of the mink.

§ 520. ABNORMALLY DANGEROUS ACTIVITIES

IN DETERMINING WHETHER AN ACTIVITY IS ABNORMALLY DANGEROUS, THE FOLLOWING FACTORS ARE TO BE CONSIDERED:

(a) WHETHER THE ACTIVITY INVOLVES A HIGH DEGREE OF RISK OF SOME HARM TO THE PERSON, LAND OR CHATTELS OF OTHERS;

(b) WHETHER THE GRAVITY OF THE HARM WHICH MAY RESULT FROM IT IS LIKELY TO BE GREAT;

(c) WHETHER THE RISK CANNOT BE ELIMINATED BY THE EXERCISE OF REASONABLE CARE;

(d) WHETHER THE ACTIVITY IS NOT A MATTER OF COMMON USAGE;

(e) WHETHER THE ACTIVITY IS INAPPROPRIATE TO THE PLACE WHERE IT IS CARRIED ON; AND

(f) THE VALUE OF THE ACTIVITY TO THE COMMUNITY.

Note to Institute: The Council, and all of the Advisers, agree with the change. The following observations are offered in explanation:

1. Volume 1 of the Restatement started out talking about an "extra-hazardous activity." In Volume III, for no visible reason, this became "ultrahazardous." The two were obviously intended to mean the same thing. But "ultra" does not mean extra, or even excessive. It means surpassing, going entirely beyond. The dictionary meaning of "ultta-hazardous" is something going beyond hazardous, surpassing all risk. It is the wrong word, since we are still in the field of risk, and the defendant is held liable only within the scope of the risk created. See the limitations on the liability in § 519. This is a minor objection to the term.

2. "Ultrahazardous," as it is defined in the old Section, is misleading. There is probably no activity whatever, unless it be the use of atomic energy, which is not perfectly safe if the utmost care is used--which would of course include the choice of an absolutely safe place to carry it on. Blasting is perfectly safe with the right explosives, if it is carried on with small enough charges in the right place. Supersonic jet aviation is quite safe, except for the participants, if it is carried on over an empty pary of the Pacific, or the Antarctic continent. The same is true of all of the other activities usually included within this category.

3. The thing which stands out from the cases is that the important thing about the activity is not that it is extremely dangerous in itself, but that it is abnormally so in relation to its surroundings. A magazine of explosives is a matter of strict liability if it is located in the midst of a city or other thickly settled area. Exner v. Sherman Power Const. Co., (2 Cir. 1931) 54 F. 2d 510; Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co., (1899) 60 Ohio St. 560, 54 N.E. 528; French v. Center Creek Powder Mfg. Co., (1913) 173 Mo. App. 220, 158 S.W. 723. It is not, if it is located in the middle of the desert. In re Dilworth's Appeal, (1879) 91 Pa. 247; Tuckashinsky v. Lehigh & W. Coal Co., (1901) 199 Pa. 515, 49 A. 308; Kleebauer v. Western Fuse & Explosives Co., (1903) 138 Cal. 497, 71 P. 617; Henderson v/ Sullivan, (6 Cir. 1908) 159 F. 46; Whaley v. Sloss-Sheffield Steel & Iron Co., (1909) 164 Ala. 216, 51 So. 419.

The same is true of the storage of gasoline, or other inflammable liquids, in large quantities. In a populated area this a matter of strict liability. Brennan Const. Co. v. Cumberland, (1907) 29 App. D.C. 554; Berger v. Minneapolis Gaslight Co., (1895) 60 Minn. 296, 62 N.W. 336; Whittemore v. Baxter Laundry Co., (1914) 181 Mich. 564, 148 N.W. 437; cf. Kaufman v. Boston Dye House, (1932) 280 Mass. 161, 182 N.E. 297. But in an isolated area it is not. Thomas v. Jacobs, (1916) 254 Pa. 255, 98 A. 863; Adams Co. v. Buchanan, (1920) 42 S.D. 548, 176 N.W. 512; Buchholz v. Standard Oil Co. of Indiana, (1922) 211 Mo. App. 397, 244 S.W. 973; Shell Petroleum Co. v. Wilson, (1936) 178 Okl. 355, 65 P. 2d 173; State ex rel. Stewart v. Cozad, (1923) 113 Kan. 200, 213 P. 654.

The blasting cases point in all directions, largely because of the initial distinction between trespass and case, and between thrown rocks and concussion, which is now pretyy well discredited. On their facts the cases divide fairly well along the lines that blasting in a city, or in close proximity to a highway or to very valuable property, is a matter for strict liability, while blasting on an uninhabited mountainside is not. This distinction has been made expressly in a good many cases. See Houghton v. Loma Prieta Lumber Co., (1907) 152 Cal. 500, 93 P. 82; McKenna v. Pacific Electric Co., (1930) 104 Cal. App. 538, 286 P. 445; Alonso v. Hills, (1950) 98 Cal. App. 2d 778, 214 P. 2d 50; Kendall v. Johnson, (1909) 51 Wash. 477, 99 P. 310; Freebury v. Chicago, M. & P.S. R. Co., (1914) 77 Wash. 464, 137 P. 1044; Carson v. Blodgett Const. Co., (1915)

189 Mo. App. 120, 174 S.W. 447; Whitman Hotel Corp. v. Elliott & Watrous Eng. Co., (1951) 137 Conn. 562, 79 A. 2d 591; City of Dallas v. Newberg, (Tex. Civ. App. 1938) 116 S.W. 2d 476.

Compare also the cases of oil and gas wells in the middle of thickly settled communities, which have been held to be a matter of strict liability. Green v. General Peyroleum Corp., (1928) 205 Cal. 328, 270 P. 952 (residential section of Los Angeles); Tyner v. People's Gas Co., (1892) 131 Ind. 408, 31 N.E. 61 (gas well in city); Berry v. Shell Petroleum Co., (1934) 140 Kan. 94, 33 P. 2d 953, rehearing denied, (1935) 141 Kan. 6, 40 P. 2d 359. The Texas and Oklahoma cases rejecting the strict liability all have arisen in open country, with no particularly valuable property near. Turner v. Big Lake Oil Co., (1936) 128 Tex. 155, 96 S.W. 2d 221; Cosden Oil Co. v. Sides, (Tex. Civ. App. 1931) 35 S.W. 2d 815; Tidal Oil Co. v. Pease, (1931) 153 Okl. 137, 5 P. 2d 389. Cf. East Texas Oil Refining Co. v. Mabee Consolidated Corp., (Tex. Civ. App. 1937) 103 S.W. 2d 795 (pipe line); Gulf Pipe Line Co. of Oklahoma v. Alred, (1938) 182 Okl. 400, 77 P. 2d 1155 (same); Gulf Pipe Line Co. of Oklahoma v. Sims, (1934) 168 Okl. 209, 32 P. 2d 902 (tanks and pipe line); Gulf Refining Co. v. Carruthers, (1939) 185 Okl. 96, 90 P. 2d 407 (pipe line).

The same distinction is found in the cases of water stored in quantity, as in a res ervoir. Rylands v. Fletcher was a case of a reservoir in Lancashire, which was primarily coal mining country; and the basis of the decision in the House of Lords was clearly that this was a "non-natural" use of the particular land. All the subsequent English decisions have borne out this interpretation of the case. Where water is stored in large quantity in dangerous location in a city, there was been strict liability. Cahill v. Eastman, (1871) 18 Minn. 324, 10 Am. Rep. 184 (water tunnel in heart of Minneapolis); Wiltse v. City of Red Wing, (1906) 99 Minn. 255, 109 N.W. 114 (reservoir on bluff over city); Bridgeman-Russell Co. v. City of Duluth, (1924) 158 Minn. 509, 197 N.W. 971 (same); Wilson v. City of New Bedford, (1871) 108 Mass. 261 (reservoir in midst of town); Baltimore breweries Co. v. Ranstad, (1894) 78 Md. 501, 28 A. 273 (brewery using large quantities of water in center of Baltimore); Weaver Merc. Co. v. Thurmond, (1911) 68 W. Va. 530, 70 S.E. 126 (tank over town); Nola v. Orlando, (1933) 119 Cal. App. 518, 6 P. 2d 984 (flume in city); Suko v. Northwestern Ice & Cold Storage Co., (1941) 166 Or. 557, 113 P. 2d 209 (tank over city of East Portland).

But where the water is collected in a rural area, with no particularly valuable property near, there has been no strict liability. Sutliff v. Sweetwater Water Co., (1920) 182 Cal. 34, 186 P. 766 (reservoir); Jacoby v. Town of Gillette, (1947) 62 Wyo. 487, 174 P. 2d 505 (drainage canal); Fleming v. Lockwood, (1907) 36 Mont. 384, 92 P. 962 (irrigation ditch); Anderson v. Rucker Bros., (1919) 107 Wash. 595, 183 P. 70, 186 P. 293 (logging dam); Turner v. Big Lake Oil Co., (1936) 128 Tex. 155, 96 S.W. 2d 221 (ponds collecting salt water from oil well).

4. In addition, there are a number of cases in which strict liability has been imposed upon activities not extremely dangerous in them-

selves, but abnormally so because of their location and relation to their surroundings. For example, the following:

Shipley v. Fifty Associates, (1869) 101 Mass. 251, affirmed in (1870) 106 Mass. 194, 8 Am. Rep. 318. Roof so constructed as to collect ice and shed it all at once onto the highway.

Hannam v. Pence, (1889) 40 Minn. 127, 41 N.W. 657. The same.

Gorham v. Gross, (1878) 125 Mass. 232, 28 Am. Rep. 224. Unsafe party wall so constructed as to fall onto plaintiff's land.

Shiffman v. Order of St. John, [1936] 1 All Eng. Rep. 557. Unsafe flagpole erected on public land where crowd expected to congregate, and children had access to it.

Chichester Corp. v. Foster, [1906] 1 K.B. 167. Ten ton traction engine driven along highway, which crushed conduits under the street.

Gas Light & Coke Co. v. Vestry of St. Mary Abbott's, (1885) 15 Q.B.D. 1. The same as to an exceptionally heavy steam roller.

Compare the following cases of "absolute nuisance," apparently decided on the same basis: Copper v. Dolvin, (1886) 68 Iowa 757, 28 N.W. 59 (projecting eaves shedding water onto adjoining land); Bixby v. Thurber, (1922) 80 N.H. 411, 118 A. 99 (building shedding water onto street, where it froze); Joseph Schlitz Brewing Co. v. Compton, (1892) 142 Ill. 511, 32 N.E. 693 (same); Davis v. Niagara Falls Tower Co., (1902) 171 N.Y. 336, 64 N.E. 4 (tower collecting ice and shedding it onto plaintiff's land).

The English courts have had little trouble with all this, because it has been recognized from the beginning that Rylands v. Fletcher is limited to a "non-natural" activity, and that "non-natural" means inappropriate to the place where it is carried on. Much of the rejection of that case by what is now a dwindling minority of the American jurisdictions has been due to the prevalence of the idea that activities must be classified as such, and that if there is strict liability for an activity at all, there must always be strict liability for it in all places and under all circumstances. This is certainly not yrue.

The Advisers and the Council all agree that "ultrahazardous" is to be discarded. Since it appears to be impossible to formulate a "definition" which will include both the use of atomic energy and a water tank in the wrong place, the decision has been: (1) to refer to "abnormally dangerous" activities, borrowing the term from § 509 as to domestic animals, and (2) to state this Section in terms of factors to be taken into account, replying on the Comments for explanation.

Comment:

a. This Section deals only with the factors which determine whether an activity is abnormally dangerous. The general principle of strict liability for abnormally dangerous activities is stated in § 519. The limitations upon such liability are stated in §§ 521-524A.

b. Distinguished from negligence. The rule stated in § 519 is applicable to an activity which is carried on with all reasonable care, and which is of such utility that the risk which is involved in it cannot be regarded as so great or so unreasonable as to make it negligence to carry on the activity at all. (See § 282). If the utility of the activity does not justify the risk which it creates, it may be negligence merely to carry it on, and the rule stated in this Section is not necessary to subject the defendant to liability for harm resulting from it.

c. Relation to nuisance. If the abnormally dangerous activity involves a risk of harm to others which substantially impairs the use and enjoyment of neighboring lands, or interferes with rights common to all members of the public, such impairment or interference may be actionable on the basis of a public or a private nuisance. (See § 822, and Comment a under that Section). The rule of strict liability stated in § 519 frequently is applied by many courts in such cases under the name of "absolute nuisance," even where the harm which results is physical harm to person, land or chattels.

d. Purpose of activity. In the great majority of the cases which involve abnormally dangerous activities, the activity is carried on by the actor for purposes in which he has a financial interest, such as a business conducted for profit. This, however, is not essential to the existence of such an activity. The rule here stated is equally applicable where there is no pecuniary benefit to the actor. Thus a private owner of an abnormally dangerous body of water who keeps it only for his own use and pleasure as a swimming pool is subject to the same liability as one who operates a reservoir of water for profit.

e. Not limited to the defendant's land. In most of the cases to which the rule of strict liability is applicable, the abnormally dangerous activity is conducted on land in the possession of the defendant. This, again, is not necessary to the existence of such an activity. It may be carried on in a public highway or other public place, or upon the land of another.

f. "Abnormally dangerous." For an activity to be abnormally dangerous, not only must it create a danger of physical harm to others, but the danger must be an abnormal one. In general, abnormal dangers arise from activities which are in themselves unusual, or from unusual risks created by more usual activities under particular circumstances. In determining whether the danger is abnormal, the factors listed in Clauses (a) to (f) of this Section are all to be considered, and are all of importance. Any one of them is not necessarily sufficient of itself in a particular case, and ordinarily several of them will be required for strict liability. Because of the interplay of these various factors, it is not possible to reduce abnormally dangerous activities to any exact definition. The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm which results from it, even though it is carried on with all reasonable care.

g. Risk of harm. In order for an activity to be abnormally dangerous, it must involve a high degree of risk of serious harm to the person, land or chattels of others. The harm threatened must be major in degree, and sufficiently serious in its possible consequences to justify holding the defendant strictly responsible for subjecting others to an unusual risk. It is not enough that there is a recognizable risk of some relatively slight harm, even though that risk might be sufficient to make the actor's conduct negligent if the utility of his conduct did not outweigh it, or if he did not exercise reasonable care in conducting it.

Some activities, such as the use of atomic energy, necessarily and inevitably involve such major risks of harm to others, no matter how or where they are carried on. Others, such as the storage of explosives, necessarily involve such risks unless they are conducted in a remote place, or to a very limited extent. Still others, such as the operation of a ten ton traction engine on the public highway, which crushes conduits beneath it, involve such a risk only because of the place where they are carried on. In determining whether there is such a major risk, it may therefore be necessary to take into account the place where the activity is conducted, as to which see Comment j.

Comment on Clause (c):

h. Risk not eliminated by reasonable care. A second important factor to be taken into account in determining whether the activity is abnormally dangerous, is the impossibility of eliminating the risk by the exercise of reasonable care. Most ordinary activities can be made entirely safe by the taking of all reasonable precautions; and when such safety cannot be achieved, there is good reason to regard the danger as an abnormal one.

There is probably no activity, unless it is perhaps the use of atomic energy, from which all risks of harm could not be eliminated by the taking of all conceivable precautions, and the exercise of the utmost care, particularly as to the place wher e it is carried on. Thus almost any other activity, no matter how dangerous, in the center of the Antarctic continent, might be expected to involve no possible risk to anyone except those who engage in it. It is not necessary, for the factor stated in Clause (c), that the risk be one which no conceivable precautions or care could eliminate. What is meant here is the unavoidable risk remaining in such activities, even though the actor has taken all reasonable precautions in advance, and has exercised all reasonable care in his operation, so that he is not negligent. The utility of his conduct may be such that he is socially justified in proceeding with his activity, but the risk of harm which is inherent in it after he has taken all reasonable precautions requires that it be carried on at his peril, rather than at the expense of the innocent person who suffers harm as a result of it. Thus the manufacture, in a city, of certain explosives may involve a risk of detonation in spite of everything that the manufacturer may reasonably be expected to do; and while he may not be negligent in manufacturing the explosives at all, he is subject to strict liability for an abnormally dangerous activity.

A combination of the factors stated in Clauses (a), (b) and (c), or sometimes any one of them alone, is commonly expressed by saying that the activity is "ultrahzardous," or "extra-hazardous." Liability for abnormally dangerous activities is not, however, a matter of these three factors alone, and those stated in Clauses (d), (e), and (f) must still be taken into account.

Comment on Clause (d):

i. Common usage. An activity is a matter of common usage if it is customarily carried on by the great mass of mankind, or by many people in the community. It does not cease to be so because it is carried on for a purpose peculiar to the individual who engages in it. Certain activities, notwithstanding their recognizable danger, are so generally carried on as to be regarded as customary. Thus automobiles have come into such general use that their operation is a matter of common usage. This, notwithstanding the residue of unavoidable risk of serious harm which may result even from their careful operation, is sufficient to prevent them from being regarded as an abnormally dangerous activity. On the other hand, the operation of a tank, of any other motor vehicle of such size and weight as to be unusually difficult to control safely, or to be likely to damage the ground over which it is driven, is not yet a usual activity for many people, and therefore the operation of such a vehicle is abnormally dangerous.

While blasting is recognized as a proper means of excavation for building purposes, or of clearing woodland for cultivation, it is not carried on by any large percentage of the population, and therefore it is not a matter of common usage. Likewise the manufacture, storage, transportation and use of high explosives, although necessary to the construction of many public and private works, are carried on by only a comparatively small number of persons, and therefore are not matters of common usage. So likewise, the very nature of oil lands and the essential interest of the public in the production of oil require that oil wells be drilled, but the dangers incident to the operation are characteristic of oil lands, and not of lands in general, and relatively few persons are engaged in the activity.

The usual dangers resulting from an activity which is one of common usage are not regarded as abnormal, even though a serious risk of harm cannot be eliminated by all reasonable care. The difference is sometimes not so much one of the activity itself, as of the manner in which it is carried on. 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, where a traction engine shooting out sparks in its passage along the public highway is clearly an abnormal danger.

Comment on Clause (e):

j. Locality. The fourth factor to be taken into account in determining whether an activity is abnormally dangerous is the place where it is carried on. If the place is one inappropriate to the particular activity, and other factors are present, the danger created may be regarded as an abnormal one.

Even a magazine of high explosives, capable of destroying everything within a distance of half a mile, does not necessarily create an abnormal danger if it is located in the midst of a desert area, far from human

habitation and all property of any considerable value. The same is true of a large storage tank filled with some highly inflammable liquid such as gasoline. Blasting, even with powerful high explosives, is not abnormally dangerous if it is done on an uninhabited mountainside, so far from anything of considerable value likely to be harmed that the risk, if it does exist, is not a serious one. On the other hand, the same magazine of explosives, the huge storage tank full of gasoline, or the blasting operations, all become abnormally dangerous if they are carried on in the midst of a city.

So likewise, the collection of large quantities of water in irrigation ditches, or in a reservoir in open country, usually is not a matter of any abnormal danger. On the other hand, if such a reservoir is constructed in a coal mining area which is honeycombed with mine passages, or on a bluff overhanging a large city, or if water is collected in an enormous tank standing above the same city, there is abnormal danger and strict liability when, without any negligence, the water escapes and does harm.

In other words, the fact that the activity is inappropriate to the place where it is carried on is a factor of importance in determining whether the danger is an abnormal one. This is sometimes expressed, particularly in the English cases, by saying there is strict liability for a "non-natural" use of the defendant's land.

There are some highly dangerous activities, which necessarily involve a risk of serious harm in spite of all possible care, which can only be carried on in a particular place. Coal mining must be done where there is coal; oil wells can only be located where there is oil; and a dam impouding water in a stream can only be situated in the bed of the stream. If such activities are of sufficient value to the community (see Comment k), they may not be regarded as abnormally dangerous when they are so located, since the only place where the activity can be carried on must necessarily be regarded as an appropriate one.

Comment on Clause (f):

k. Value to the community. Even though the activity involves a serious risk of harm which cannot be eliminated with reasonable care, and it is not a matter of common usage, its value to the community may be such that the danger will not be regarded as an abnormal one. This is true particularly where the community is largely devoted to such a dangerous enterprise, and its prosperity largely depends upon it. Thus the interests of a particular town, whose livelihood depends upon such an activity as manufacturing cement, may be such that cement plants will be regarded as a normal activity for that community, notwithstanding the risk of serious harm from the emission of cement dust. There is an analogy here to the consideration of the same elements in determining the existence of a nuisance, under the rule stated in § 831; and the Comments under that Section are applicable here, so far as they are pertinent.

Thus in Texas and Oklahoma, a properly conducted oil or gas well at least in a rural area, is not regarded as abnormally dangerous, while a different conclusion has been reached in Kansas and Indiana. California, whose oil industry is far from insignificant, has concluded that such a well drilled in a thickly settled residential area in the city of Los Angeles is a matter of strict liability.

In England, "a pluvial country, where constant streams and abundant rains make the storage of water unnecessary for ordinary or general purposes," a large reservoir in an inappropriate place has been found to be abnormally dangerous. In West Texas, a dry land whose livestock must have water, such a reservoir is regarded as "a natural and common use of the land." The same conclusion has been reached by many of the western states as to irrigation ditches.

Comment:

1. Function of court. Whether the activity is an abnormally dangerous one is to be determined by the court, upon consideration of all the factors listed in this Section, and the weight given to each which it merits upon the facts in evidence. In this it differs from questions of negligence. Whether the conduct of the defendant has been that of a reasonable man of ordinary prudence, or in the alternative has been negligent, is ordinarily an issue to be left to the jury. The standard of the hypothetical reasonable man is essentially a jury standard, in which the court interferes only in the clearest cases. A jury is fully competent to decide whether the defendant has properly driven his horse, or operated his train, or guarded his machiney, or repaired his premises, or dug a hole. The imposition of strict liability, on the other hand, involves a characterization of the defendant's activity or enterprise itself, and a decision as to whether he is free to conduct it at all without becoming liabke for the harm which ensues even though he has used all reasonable care. This calls for a decision of the court; and it is no part of the province of the jury to decide whether an industrial enterprise upon which the community's prosperity might depend is located in the wrong place, or whether such an activity as blasting is to be permitted without liability in the center of Chicago.

§ 520B. LIABILITY TO TRESPASSERS

A POSSESSOR OF LAND HAS NO STRICT LIABILITY TO ONE WHO PURPOSELY OR NEGLIGENTLY TRESPASSES ON THE LAND FOR HARM DONE TO HIM BY AN ABNORMALLY DANGEROUS ACTIVITY WHICH THE POSSESSOR CARRIES ON UPON THE LAND, EVEN THOUGH THE TRESPASSER HAS NO REASON TO KNOW THAT SUCH AN ACTIVITY IS CONDUCTED THERE.

Caveat: The Institute expresses no opinion as to whether there may be strict liability to those who trespass accidentally, inadvertently, or by an innocent mistake.

Note to Institute: This parallels § 511, as to dangerous animals. The rule should obviously be the same. Only two cases have been found bearing on this Section. McGehee v. Norfolk & Southern R. Co., (1908) 147 N.C. 142, 60 S.E. 912, and St. Joseph Lead Co. v. Prather, (8 Cir. 1956) 238 F. 2d 301, both involved trespassers shooting at stored dynamite. Both denied strict liability, although the second case allowed recovery on other grounds.

Comment:

a. The rule stated in this Section is based upon the same considerations as the rule stated in § 333, as to trespassers and negligence.

§ 520C. LIABILITY LICENSEES AND INVITEES

A POSSESSOR OF LAND IS SUBJECT TO STRICT LIABILITY FOR HARM RESULTING FROM AN ABNORMALLY DANGEROUS ACTIVITY WHICH HE CARRIES ON UPON THE LAND, TO PERSONS COMING UPON THE LAND IN THE EXERCISE OF A PRIVILEGE, WHETHER DERIVED FROM HIS CONSENT OR OTHERWISE.

Note to Institute: This parallels § 513, which states a similar rule as to dangerous animals. It seems obvious that the Sections should state the same rule. Cases under this Section are lacking. In Read v. J. Lyons & Co., [1947] A.C. 146, a government inspector in a plant manufacturing high explosives was injured when the place blew up. It was held that there was no strict liability to him, because the rule of Rylands v. Fletcher was limited to the "escape" of something from the defendant's land, and so to persons outside of it. There is no similar case in the United States. It looks like a case of assumption of risk. In E.I. Du Pont de Nemours & Co. v. Cudd, (10 Cir. 1949) 176 F. 2d 855, upon parallel facts, recovery was denied on that ground.

§ 521. ACTIVITY CARRIED ON UNDER PUBLIC SANCTION

THERE IS NO STRICT LIABILITY FOR AN ABNORMALLY DANGEROUS ACTIVITY IF IT IS CARRIED ON IN PURSUANCE OF A PUBLIC DUTY IMPOSED UPON THE ACTOR, OR A FRANCHISE OR AUTHORITY CONFERRING LEGISLATIVE APPROVAL OF THE ACTIVITY.

Note to Institute: This parallels § 517, on dangerous animals. See the Note to that Section. — This Note is attached to the end of this exhibit — JIH

Comment:

a. A public official a part of whose duties is to make or store high explosives in large quantities is not subject to the strict liability imposed by the rule stated in § 519. He is not liable unless he is negligent in the manufacture or keeping of the explosives, or has selected a place for storing them which makes their storage unnecessarily dangerous in the event of an explosion. On the other hand, he is liable if he negligently fails to exercise in these particulars that care which the highly dangerous character of the matter of which he has the custody requires him to exercise. So too, a common carrier, in so far as it is required to carry explosives offered to it for transportation, is not liable for harm done by their explosion, unless it has failed to take that care in their carriage which their dangerous character requires.

b. Even where there is no duty to engage in the abnormally dangerous activity, the defendant may be protected from strict liability by a sanction conferred by the legislature, under circumstances such as to indicate approval of the activity sufficient to confer immunity. Normally this is the case when, under a franchise given to such a defendant as a common carrier, it is authorized but not required to accept dangerous commodities for transportation. It may likewise be the case where the legislature grants to a defendant authority to engage in an activity of the abnormally dangerous kind, as where, in wartime, a defendant is authorized to construct and operate a plant making explosives in an area of special danger.

On the other hand, it is not every authorization or permission to engage in an activity which can be taken to confer immunity from strict liability, by giving such approval to the activity as to indicate an intent that the defendant shall not be liable. In the absence of special circumstances indicating such an intent, the normal interpretation of the act of the legislature in granting a franchise or authority to act in such a manner is that the defendant is authorized to proceed, but must be strictly responsible if the activity in fact results in harm to those in the vicinity.

§ 522. Contributing Actions of Third Persons, Animals and Forces of Nature.

One carrying on an ultrahazardous activity is liable for harm under the rule stated in § 519, 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.

Caveat: The Institute expresses no opinion as to whether the fact that the harm is done by an act of a third person which is not only deliberate but intended to bring about such harm, relieves from liability one who carries on an ultrahazardous activity.

Note to Institute: The Council, and nine of the Advisers, wish to retain this Section as it stands. This is consistent with the position taken in § 510, as to dangerous animals; inconsistent with that taken in § 504 as to animal trespass.

The Reporter, and three of the Advisers, wish to make the following change:

ONE WHO CARRIES ON AN ABNORMALLY DANGEROUS ACTIVITY HAS NO STRICT LIABILITY FOR HARM DONE BY THE ACTIVITY IF THE HARM IS BROUGHT ABOUT BY THE INTERVENTION OF THE UNFORESEEABLE

(a) OPERATION OF A FORCE OF NATURE,

(b) ACTION OF ANOTHER ANIMAL, OR

(c) INTENTIONAL, RECKLESS OR NEGLIGENT CONDUCT OF A THIRD PERSON.

With deference to the Council and the distinguished Advisers, the Reporter is unable to find any case which supports the old Section, here retained. The Explanatory Notes of the original Reporter ignore it. The only explanation for it is in the old Comments a and b below; and the only shadow of authority in support of it lies in the two or three confused and uncertain cases as to dangerous animals cited in the Note to § 510. Opposed to it, and supporting the proposed change, are the following cases:

1. Act of God:

Nichols v. Marsland, (1876) 2 Ex. Div. 1. Defendant's dam was washed out by a rainfall which was found to be beyond all reasonable expectation or foresight. It was held that there was no strict liability because of the intervening act of God.

Bratton v. Rudnick, (1933) 283 Mass. 556, 186 N.E. 669. The same.

Golden v. Amory, (1952) 329 Mass. 484, 109 N.E. 2d 131. Defendant's dike, restraining a river, was washed out by the 1938 hurricane. Held, no strict liability because of the act of God.

Murphy v. Gillum, (1898) 73 Mo. App. 487. An unprecedented frost caused seepage from defendant's dam embankment. Held, no strict liability because of the act of God.

Sutliff v. Sweetwater Water Corp., (1920) 182 Cal. 34, 186 P. 766. The defendant's reservoir was washed out by a flood resulting from extraordinary rainfall. One reason given for rejecting strict liability is that this was an act of God.

Jacoby v. Town of Gillette, (1947) 62 Wyo. 487, 174 P. 2d 205. The defendant's drainage canal overflowed because of a flood caused by melting snow. One reason for rejecting strict liability was that this was an act of God.

McDougall v. Snider, (Ont. 1913) 15 Dom. L. Rep. 111. Defendant's mill pond overflowed because of an extraordinary and unforeseeable rainfall. Held, no strict liability because of the act of God.

2. Animals:

Carstairs v. Taylor, (1871) L.R. 6 Ex. 217. A rat gnawed a hole in defendant's water box, and the water escaped and damaged plaintiff's goods. One reason given for rejecting strict liability was the intervening cause.

3. Acts of third persons:

Box v. Jubb, (1879) 4 Ex. Div. 76. Defendant's reservoir overflowed when the owner of another reservoir upstream released a large quantity of water. Held, no strict liability because of the unforeseeable intervening cause.

Rickards v. Lothian, [1913] A.C. 263. Defendant's lavatory basin overflowed when some malicious third person plugged it up and turned the water on full. The water damaged plaintiff's goods below. One reason given for rejecting strict liability was the unforeseeable intervening cause.

Smith v. Great Western R. Co., (1926) 42 Times L. Rep. 391. A shipper delivered a tank car full of oil to defendant carrier in bad condition, so that it leaked before defendant had any opportunity to remedy it. Held, no strict liability, because the act of the third party in delivering the car in such condition was the responsible cause.

Kaufman v. Boston Dye House, (1932) 280 Mass. 161, 182 N.E. 297. The defendant stored a quantity of a highly inflammable petroleum product. It escaped and flowed into a stream, where it was ignited by a gasoline engine operated by a third party. The fire damaged plaintiff's property. Held, no strict liability, because the act of the third party operated as an intervening cause.

Cohen v. Brockton Savings Bank, (1947) 320 Mass. 690, 71 N.E. 2d 109. A vandal got into defendant's basement, and opened the drainage valve of the steam heating system. This caused water to drain out, and an an automatic pump to pump it out so that it flowed onto plaintiff's land. Held, no strict liability, one reason given being the intervening act of the third party.

Kleebauer v. Western Fuse & Explosives Co., (1903) 138 Cal. 497, 71 P. 617. A Chinese murderer, pursued by the police, took refuge in the defendant's magazine of explosives, and committed suicide by blowing up the magazine to escape capture. One reason given for rejecting strict liability was that the harm was brought about by a cause "entirely outside of the defendant's control."

McGehee v. Norfolk & Southern R. Co., (1908) 147 N.C. 142, 60 S.E. 912. Defendant stored explosives in a building on its land. Plaintiff, standing on the highway, shot at the building without knowing what was in it. The explosion injured him. Held, no strict liability. One reason given was the unforeseeable character of the plaintiff's intervening act.

Langabaugh v. Anderson, (1903) 68 Ohio St. 131, 67 N.E. 286. Crude oil stored in large quantity escaped from defendant's premises, flowed past plaintiff's building into a creek, was ignited there by the fire of a third person, and burned back to plaintiff's building. One reason given for rejecting strict liability was that the fire of the third person was the responsible cause.

Davis v. Atlas Assurance Co., (1925) 112 Ohio St. 543, 147 N.E. 913. Under a statute providing strict liability for fires originating on railways. The escape of fire from a locomotive was caused by the release of gasoline vapor in the vicinity, by the employees of the plaintiff. Held, no liability in the absence of negligence. The court relied on the common law rule that there is no strict liability where the escape is due to the unforeseeable act of a third party.

Comment:

a. Rationale. The reason for imposing absolute liability upon those who carry on ultrahazardous activities is that they have thereby for their own purposes created a risk which is not a usual incident of the ordinary life of the community. If the risk

who take part in the activity or come within its range will be subjected. (See § 496D).

d. 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 which 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.

e. Likewise the risk is commonly assumed when the plaintiff, knowing that the activity is being carried on, and aware of the risk which it involves, voluntarily proceeds to encounter the risk by coming within range of it. Thus one who voluntarily enters land on which he knows that blasting is going on, and so brings himself within range of the abnormal risk which he knows to exist, must be taken to assume the risk of harm resulting from any unpreventable miscarriage of the activity, although he does not assume the risk of any negligence in the operation unless he knows of it.

f. As in other situations which involve assumption of risk, the plaintiff's acceptance of the risk must be voluntary, and he does not assume the risk where the defendant's conduct has forced upon him the choice of two unreasonable alternatives. (See § 496E). In particular, he is not required to forego the exercise of a valuable right or privilege merely because the defendant's activity has made it dangerour, unless the danger is so extreme that the continued exercise of the right or privilege is clearly quite unreasonable. A possessor of land is not required to abandon the land and move away from it, merely because the defendant has set up a powder mill in such proximity to it that there is danger in the continued use of the land. In such cases, however, the plaintiff may be entitled to assume, until he knows the contrary, that the danger has been reduced to a minimum by all reasonable precautions.

Illustrations:

1. A maintains a magazine of explosives in dangerous proximity to a public highway. Knowing of the presence of the magazine, B drives along the highway past it. While he is doing so he is injured by the explosion of the magazine. B is not barred from recovery from A by assumption of the risk.

2. A carries on blasting operations in dangerous proximity to the public highway. He posts a large warning sign, and stations a flagman to stop automobile drivers and inform them that there will be a delay of five minutes. B, driving on the highway, is stopped by the flagman, told of the blasting, and asks to wait. B refuses to wait, insists on proceeding on the highway, and is injured by the blasting. B is barred from recovery from A by his assumption of the risk.

g. A plaintiff who makes use of the services of a common carrier or other public utility may ordinarily assume that they involve no abnormal danger. His right, as a member of the public, to make use of such services is a factor to be considered in determining whether he voluntarily assumes the risk of anything abnormal. Where, however, the services rendered are of a kind which will necessarily involve an abnormally dangerous activity, and the plaintiff, knowing this, voluntarily elects to avail himself of them, with free alternatives open to him, he may still assume the risk. Thus a passenger who chooses to travel by air in an abnormally dangerous jet plane, still of experimental character, at supersonic speed, will assume the risk inseparable from that type of transportation, even though the plane is provided by a common carrier.

Illustration:

3. A operates a factory in which it is necessary to use electric current of very high voltage. He contractw with B Electric Company, a public utility, for the necessary current. B constructs high tension poles and wires which carry a current of 20,000 volts into A's plant. Without any negligence on the part of B, the current escapes and damages A's factory. A is barred from recovery from B Company by his assumption of the risk.

§ 524. CONTRIBUTORY NEGLIGENCE

(1) EXCEPT AS STATED IN SUBSECTION (2), THE CONTRIBUTORY NEGLIGENCE OF THE PLAINTIFF IS NOT A DEFENSE TO THE STRICT LIABILITY OF ONE WHO CARRIES ON AN ABNORMALLY DANGEROUS ACTIVITY.

(2) THE PLAINTIFF'S CONTRIBUTORY NEGLIGENCE IN KNOWINGLY AND UNREASONABLY SUBJECTING HIMSELF TO THE RISK OF HARM FROM THE ACTIVITY IS A DEFENSE TO SUCH LIABILITY.

Note to Institute: This parallels § 515, as to strict liability for animals.

Comment:

a. Since the strict liability of one who carries on an abnormally dangerous activity is not founded on his negligence, the ordinary contributory negligence of the plaintiff is not a defense to such an action. The reason is the policy of the law which places the full responsibility for preventing the harm which results from such abnormally dangerous activities upon the person who has subjected others to such abnormal risk.

Thus in the ordinary case the contributory negligence will not bar recovery on the basis of such strict liability. This is true where the plaintiff merely fails to exercise reasonable care to discover the existence or presence of the activity, or to take precautions against the harm which may result from it. Thus one who is inattentive while driving along the highway, and therefore fails to discover a sign which would warn him of blasting operations ahead endangering his passage, is not barred from recovery by such contributory negligence.

b. On the other hand, the plaintiff is barred by his voluntary assumption of the risk, as stated in § 523; and on the same basis, he is barred by his contributory negligence when he intentionally and unreasonably subjects himself to a risk of harm from the abnormally dangerous activity, of which he knows. This kind of contributory negligence, which consists of voluntarily and unreasonably encountering a known risk, frequently is called either contributory negligence, assumption of risk, or both. As to the relation between the two defenses, see § 496A.

Thus one who, without any necessity for doing so which is commensurate with the risk involved, knoingly brings himself within range of an abnormally dangerous activity, cannot recover against the person who carries on the activity. One who, driving along the highway, sees a sign and a flagman warning him that blasting operations are under way ahead which will endanger his passage, and nevertheless insists upon proceeding, cannot recover when he is injured by the blast.

1. A driving on the highway, attempts to pass a truck of the B Company on a narrow road. The truck is plainly marked "Danger, Dynamite," but A, being intent on the road and upon passing B, negligently fails to observe the sign. In passing, A negligently tries to drive through so narrow a space that he collides with the truck and causes the dynamite to explode. A's personal representative is not barred from recovery against B Company under a death statute.

2. The same facts as Illustration 1, except that A reads the sign. A's representative is barred from recovery.

§ 524A. PLAINTIFF'S ABNORMALLY SENSITIVE ACTIVITY

THERE IS NO STRICT LIABILITY FOR HARM CAUSED BY AN ABNORMALLY DANGEROUS ACTIVITY IF THE HARM WOULD NOT HAVE RESULTED BUT FOR THE ABNORMALLY SENSITIVE CHARACTER OF THE PLAINTIFF'S ACTIVITY.

Note to Institute: This Section is new. The Advisers agree that it should be added; also the Council. There are three cases clearly supporting the rule, in all of which the defendant's high tension electricity caused electrical interference with the plaintiff's telegraph communications. Eastern & South African Tel. Co. v. Cape Town Tramways Co., [1902] A.C. 38k; Lake Shore & M.S. R. Co. v. Chicago, L.S. & S.B. R. Co., (1911) 48 Ind. App. 584, 92 N.E. 989; Postal Telegraph-Cable Co. v. Pacific Gas & Elec. Co., (1927) 202 Cal. 382, 260 P. 1011. See also Robinson v. Kilvert, (1889) 41 Ch. Div. 88, where abnormal heat from the defendant's mill damaged a very sensitive type of paper which the plaintiff kept for sale on his premises, and recovery was denied on the same principle.

An analogous case in the field of nuisance is Amphitheatres, Inc., v. Portland Meadows, (1948) 184 Or. 336, 198 P. 2d 247, where light from the defendant's racetrack interfered with the plaintiff's outdoor motion picture theatre. This case cites and relies on the other four.

b. On the other hand, the plaintiff is barred by his voluntary assumption of the risk, as stated in § 523; and on the same basis, he is barred by his contributory negligence when he intentionally and unreasonably subjects himself to a risk of harm from the abnormally dangerous activity, of which he knows. This kind of contributory negligence, which consists of voluntarily and unreasonably encountering a known risk, frequently is called either contributory negligence, assumption of risk, or both. As to the relation between the two defenses, see § 496A.

Thus one who, without any necessity for doing so which is commensurate with the risk involved, knoingly brings himself within range of an abnormally dangerous activity, cannot recover against the person who carries on the activity. One who, driving along the highway, sees a sign and a flagman warning him that blasting operations are under way ahead which will endanger his passage, and nevertheless insists upon proceeding, cannot recover when he is injured by the blast.

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Comment:

a. Since the basis for the strict liability for abnormally dangerous activities is the unusual risk inflicted upon those in the vicinity, it is limited to such harm as may reasonably be expected to result from such an activity, or from its miscarriage, to normal conditions around it and the normal activities of others. The plaintiff cannot, by himself resorting to an abnormally sensitive activity, impose upon the defendant an additional burden of liability, even though the defendant is aware of the fact. Where the harm would not have resulted but for the abnormal and unduly sensitive character of the plaintiff's own activity, or conditions arising in the course of it, the defendant's strict liability does not extend to such a result, although he may still be liable for any negligence.

Illustrations:

1. The A Company maintains and operates an electric transmission line carrying a current of 20,000 volts. Without any negligence on the part of A Company the line causes electrical induction currents in B Compan y's telegraph wires in the vicinity, which interfere with the transmission of messages. A Company is not liable to B Company.

2. A, constructing a building, operates pile driving machinery which causes excessive vibration, abnormally dangerous to buildings in the vicinity. B, in an adjoining building, is conducting scientific experiments with extremely delicate instruments. Although the vibration causes no other harm to B or to the building, ir ruins the instruments and prevents the experiments. A is not liable to B unless he is found to be negligent in his operation.

§ 517. ANIMALS KEPT UNDER PUBLIC SANCTION

THERE IS NO STRICT LIABILITY FOR THE POSSESSION OF A WILD ANIMAL, OR AN ABNORMALLY DANGEROUS DOMESTIC ANIMAL, IF IT IS IN PURSUANCE OF A PUBLIC DUTY IMPOSED UPON THE POSSESSOR OR A FRANCHISE OR AUTHORITY CONFERRING LEGISLATIVE APPROVAL OF THE ACTIVITY.

Note to Institute: The old Section is sound as far as it goes. The defendant is not liable where he has undertaken the duty to the public, as in the case of the superintendent of the national zoo in Jackson v. Baker, (1904) 24 App. D.C. 100. This includes any public utility which has undertaken the positive duty of rendering the service, as in the case of a carrier which must accept the animal for transportation. See Actiesselskabet Ingrid v. Central R. Co. of New Jersey, (2 Cir. 1914) 216 F. 72 (carrier required to haul explosives); Gould v. Winona Gas Co., (1907) 100 Mass. 258, 111 N.W. 254 (gas pipes in the street); Schmeer v. Gas Light Co., (1895) 147 N.Y. 529, 42 N.E. 202 (same).

The cases indicate, however, that the defendant is also protected when he has assumed no positive duty, but merely has legislative sanction to go ahead if he wants to. Thus:

Mulloy v. Starin, (1908) 191 N.Y. 21, 83 N.E. 588. A carrier transporting bears. The majority opinion held that there was no strict liability because it was "warranted in so doing," and clearly goes on authorization rather than duty. One judge concurred on the ground that there was a duty to accept the bears; one dissented on the ground that there was no duty.

Stamp v. Eighty-Sixth St. Amusement Co., (1916) 95 Misc. 599, 159 N.Y.S. 683. Strict liability when performing lions got into a theatre orchestra. Dictum, distinguishing the Molloy case on the ground that the carrier there was authorized to carry the bears, and so had legislative sanction, although it was under no duty to do so.

Guzzi v. New York Zoological Society, (1920) 192 App. Div. 511, 182 N.Y.S. 257, affirmed (1922) 233 N.Y. 511, 135 N.E. 897. The Society had a charter from the legislature to conduct the zoo. It is not clear whether it assumed any duty to do so. The decision is put solely on the ground of legislative sanction in the charter. No strict liability.

Pope v. Edward M. Rude Carrier Corp., (W. Va. 1953) 75 S.E. 2d 584. Defendant, a truck carrier, was given the "right" to transport dynamite, although it could refuse to accept such a shipment. No strict liability, on the ground of legislative sanction.

McKinney v. City and County of San Francisco, (1952) 109 Cal. App. 2d 844, 241 P. 2d 1060. Defendant maintained a public zoo. This was held to be a governmental function, which left nuisance as the only possible ground of liability. Held, that it was not a nuisance, citing the Guzzi case above, and saying that there should be no liability "where the animals were maintained as a public enterprise under legislative authority for educational purposes and to entertain the public."

Hyde v. City of Utica, (1940) 259 App. Div. 447, 20 N.Y.S. 2d 335. The city maintained a zoo. Its charter did not authorize it to do so. It was held strictly liable. The court distinguished the Guzzi case, above, on the basis of sanction from the legislature.

On the other hand, although no cases have been found, it seems quite clear that the mere permit from a city council to hold a circus would not prevent strict liability. Certainly the ordinary dog license does not confer immunity from strict liability for dog bites. There must be such an authorization or sanction from the legislative body as will indicate an intent that the defendant may carry on his activity without liability so long as he uses proper care. What is needed is language to say this.

a. The rules of strict liability imposed upon the possessor of a wild animal, or an abnormally dangerous domestic animal, in §§ 507-515, do not apply to persons who as a part of their public duties are required to take the possession or custody of such animals. Thus there is no strict liability on the part of a common carrier which is required by law to accept a bear, or an abnormally vicious dog, for transportation. Likewise there is no liability on the part of an employee, such as a superintendent of a public zoo, who as a part of his official duties to the public has undertaken to be responsible for the possession or custody of such animals.

b. Even where there is no duty to receive possession of the animal, the defendant may be protected from strict liability by a sanction conferred by the legislature, under circumstances such as to indicate approval of the activity sufficient to confer immunity. Normally this is the case when, under a franchise given to such a defendant as a common carrier, it is authorized but not required to accept dangerous animals for transportation. It is likewise the case where the legislature grants to a city or other municipal corporation the authority to establish a public zoological garden. On the other hand, it is not every authorization or permission which can be taken to confer immunity, by giving such approval to the activity as to indicate that it is intended that there shall be no strict liability. Thus a permit from a city council to hold a circus will normally not prevent strict liability when one of the lions escapes, nor does the ordinary dog license confer any immunity whatever from strict liability for dog bites. The question is one of legislative intention in granting the authorization in question.

c. While public officers, common carriers, and others acting under legislative sanction are not subject to strict liability under the rules stated in §§ 507-515, they are nevertheless liable for negligence if they fail to exercise ordinary care commensurate with the dangers involved.

Memorandum 69-38 2/28/69

EXHIBIT II

DRAFT STATUTE

An act to add Chapter 8 (commencing with Section 880) to Part 2 of Division 3.6 of the Government Code, relating to ultrahazardous activities.

The people of the State of California do enact as follows:

Section 1. Chapter 8 (commencing with Section 880) is added to Part 2 of Division 3.6 of the Government Code, to read:

Chapter 8. Ultrahazardous Activities

Section 880. Classification as ultrahazardous activity a question of law

880. In any action that arises under this chapter, the question whether an activity is "ultrahazardous" shall be decided by the court.

Comment. Under Section 880, whether an activity is "ultrahazardous" is to be determined by the court, upon consideration of all the factors listed in Section 880.2, and the weight given to each which it merits upon the facts in evidence. Unlike the characterization of specific conduct as reasonable or negligent, the imposition of strict liability under Section 880.4 involves a characterization of the public entity's activity itself, and a decision as to whether it is free to conduct it at all without becoming liable for harm which results even though it has used all reasonable care. This calls for a decision of the court. See Restatement, Torts, Second § 520, comment l at 68 (Tentative Draft # 10, 1964).

Section 880.2. Determinative factors

880.2. In determining under Section 880 whether an activity is "ultrahazardous," the court shall consider the following factors:

(a) Whether the activity involves a high degree of risk of harm to the person or property of others;

(b) Whether the gravity of the harm which may result from it is likely to be great;

(c) Whether the risk cannot be eliminated by the exercise of reasonable care;

(d) Whether the activity is not a matter of common usage;

(e) Whether the activity is inappropriate to the place where it is carried on; and

(f) The value of the activity to the community.

Comment. Section 880.2 sets forth the factors which determine whether an activity is "ultrahazardous." The general rule of strict liability for ultrahazardous activities is stated in Section 880.4; certain specific limitations upon such liability are stated in Sections 880.6 and 880.8.

For an activity to be ultrahazardous, not only must it create a danger of injury to others, but the danger must be an abnormal one. In general, such dangers arise from activities which are in themselves unusual, or from unusual risk created by more usual activities under particular circumstances. In determining whether the danger is abnormal, each of the factors listed in this section is important and all must be considered. Any one of them is not necessarily sufficient of itself in a particular case, and ordinarily several of them will be required for strict liability. Because of the interplay of these various factors, is is not possible to reduce ultrahazardous

activities to any exact definition. The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm which results from it even though it is carried on with all reasonable care. For further discussion, see generally Restatement, Torts, Second § 520, comments g-k, at 64-68 (Tentative Draft # 10, 1964).

Section 880.4. Conditions of liability

880.4. Except as provided in this chapter, a public entity carrying on an ultrahazardous activity is liable for injury caused by such activity if the plaintiff establishes that the activity was ultrahazardous and that the injury was proximately caused by the ultrahazardous activity.

Comment. Section 880.4 states the basic rule of strict liability for public entities carrying on an ultrahazardous activity. For the factors determining whether an activity is ultrahazardous, see Section 880.2. This section supplements the existing statutory liability for dangerous conditions (Chapter 2 of this part) and for negligent or wrongful acts generally of public employees (Sections 815.2, 820). The latter statutory provisions contain or are subject to such exceptions, immunities, or defenses as to render them irreconcilable with a theory of strict libaility for ultrahazardous activities. See, e.g., Section 835.4 (no liability for dangerous condition created by reasonable act). For that reason, this chapter is intended to be self-contained, stating not only the basic rule of liability but also all applicable defenses. See Sections 880.6-881.4.

The liability stated in this section is not based upon any intent to inflict injury nor negligence in conduct. On the contrary, the entity is liable although it has exercised the utmost care. The liability arises out of the activity itself and the risk which it creates of harm to those in the vicinity and is based upon a policy which requires an ultrahazardous enterprise to pay its way by compensating for the injury it causes.

It should be noted that the rule of strict liability stated in this section is not only subject to specific defenses but also applies (by virtue of the requirement of proximate causation) only to such harm as is within the scope of the abnormal risk which is the basis of the liability. For example, the thing which makes the storage of explosives in a city ultrahazardous is the risk of harm to those in the vicinity if it should explode. If an explosion occurs, the rule stated in this section applies. On the other hand, if for some reason a box of explosives simply falls on a visitor, this section has no applicability. In such a case, the liability, if any, will be dependent upon the other provisions of this part.

Section 880.6. Contributing actions of third persons, animals, and forces of nature

880.6. A public entity is not liable under Section 880.4 for injury brought about by the intervention of the unforeseeable

(a) Operation of a force of nature,

(b) Action of another animal, or

(c) Intentional, reckless, or negligent conduct of a third person.

Comment. [For general discussion of this exception, see Restatement, Torts, Second § 522--Exhibit I.]

Section 880.8. Plaintiff's abnormally sensitive activity

880.8. A public entity is not liable under Section 880.4 for injury which would not have resulted but for the abnormally sensitive character of the plaintiff's activity.

Comment. [For general discussion of this exception, see Restatement, Torts, Second § 524A--Exhibit I.]

Section 881. Liability to trespassers

881. A public entity is not liable under Section 880.4 for injury to one who purposely or negligently trespasses on public property for injury done to him by an ultrahazardous activity which the public entity carries on upon its property even though the trespasser has no reason to know that such an activity is conducted there.

Comment. [For general discussion of this exception, see Restatement, Torts, Second § 520B--Exhibit I.]

Section 881.2. Assumption of risk

881.2. A public entity is not liable under Section 880.4 for injury to one who assumes the risk of injury from the ultrahazardous activity.

Comment. [For general discussion of this exception, see Restatement, Torts, Second § 523--Exhibit I.]

Section 881.4. Contributory negligence

881.4. (a) Except as provided in subdivision (b), the contributory negligence of the plaintiff is not a defense to the liability imposed by Section 880.4.

(b) The plaintiff's contributory negligence in knowingly and unreasonably subjecting himself to the risk of harm from the ultrahazardous activity is a defense to the liability imposed by Section 880.4.

Comment. [For a general discussion of this exception, see Restatement, Torts, Second § 524--Exhibit I.]