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**The Revitalization of Hazardous  
Activity Strict Liability**

by

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# THE REVITALIZATION OF HAZARDOUS ACTIVITY STRICT LIABILITY

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*Guided by the policies that sparked the strict products liability revolution of the past quarter century, courts today are fashioning a doctrine of hazardous activity strict liability with far-reaching implications. Although many observers have equated this doctrine with the Restatement of Torts and have viewed it as moribund, Professors Nolan and Ursin argue that courts are covertly and overtly rejecting the Restatement approach and that this strict liability doctrine is alive and well, with a variety of potential applications for attorneys and courts to consider. The authors trace these developments, discuss the contours of this doctrine, and suggest especially promising new applications.*

## I. INTRODUCTION

During the past quarter century courts have embraced strict tort liability in an unprecedented fashion. Premised on articulated concerns of fairness, safety, the compensation of accident victims, and the spreading of accident costs, strict products liability has swept the nation.<sup>1</sup> Since the California Supreme Court's pioneering pronouncement of strict tort liability for defective products in its 1963 decision in *Greenman v. Yuba Power Products, Inc.*,<sup>2</sup> courts, commentators, and attorneys have considered whether strict products liability represents a precursor to a wider enterprise liability, and, if so, what form that wider enterprise liability might take.<sup>3</sup> Proposals have been made for various new strict lia-

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1. See generally PROSSER & KEETON ON THE LAW OF TORTS §§ 93-104A (W. Keeton 5th ed. 1984) [hereinafter PROSSER & KEETON] (extensive discussion of products liability law); see also Ursin, *Judicial Creativity and Tort Law*, 49 GEO. WASH. L. REV. 229, 299-304 (1981) (nationwide acceptance of strict products liability).

2. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). In the landmark case of *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), the New Jersey Supreme Court extended warranty recovery to plaintiffs not in privity with the defendant. *Greenman* made clear that strict products liability is essentially a tort cause of action. *Greenman*, 59 Cal.2d at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

3. See R. EPSTEIN, C. GREGORY & H. KALVEN, *CASES AND MATERIALS ON TORTS* 88-89 (4th ed. 1984); Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963, 975-76 (1981); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 375-76 (1965); Ursin, *Strict Liability for Defective Business Premises—One Step Beyond Rowland and Greenman*, 22 UCLA L. REV. 820 (1975); see also *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 437, 191 N.E.2d 81, 83, 240 N.Y.S.2d 592, 595 (1963) (Burke, J., dissenting) (discussing implications of rationale for strict products liability); *Wights v. Staff Jennings, Inc.*, 241 Or. 301, 405 P.2d 624 (1965) (discussing implications of loss spreading policy).

bility doctrines, including, among others, strict liability for certain medical accidents,<sup>4</sup> for injuries on defective business premises,<sup>5</sup> and for injuries caused by dangerously defective leased premises.<sup>6</sup> In the midst of these proposals for new areas of strict liability, relatively little attention has focused on an existing doctrine of strict liability—hazardous activity strict liability. This oversight is unfortunate because this doctrine in recent years has been revitalized by the infusion of tort policies first articulated in the products liability cases.

Since its origin in the nineteenth-century case of *Rylands v. Fletcher*,<sup>7</sup> the hazardous activity strict liability doctrine has had a colorful life. American courts initially reacted with overt hostility to this doctrine because they viewed the *Rylands* decision's expansive theory of liability as "an obstacle in the way of progress and improvement."<sup>8</sup> The doctrine survived, however, like a weed in an unwelcoming garden. The doctrine even achieved some legitimacy in the 1930s when the first Restatement of Torts approved a strict liability rule for "ultrahazardous activity."<sup>9</sup> Courts, in turn, have employed the Restatement in defining this strict liability cause of action.<sup>10</sup>

By mid-century some commentators viewed the doctrine of hazardous activity strict liability as ripe for expansive application. Citing public sentiment favoring "protection against ordinary hazards of life"<sup>11</sup> and the "growth of liability insurance as an institutional means of risk-bearing and loss shifting,"<sup>12</sup> Professor Charles Gregory in 1951 argued that "it is high time for our courts to proceed on the basis of this theory openly and to stop compromising it with analogies which stifle its scope and leave us in doubt concerning the state of the law and its expression in the form of clearly understandable legal principles."<sup>13</sup> A decade after Gregory's article appeared, American courts, embracing a loss spreading philosophy, began to adopt strict liability rules in an unprecedented manner. These developments, however, occurred in the area of products liability, not hazardous activity liability. Today, many commentators share the perception that the hazardous activity strict liability doctrine lies moribund.<sup>14</sup>

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4. See, e.g., *Clark v. Gibbons*, 66 Cal. 2d 399, 414, 426 P.2d 525, 535, 58 Cal. Rptr. 125, 135 (1967) (Tobriner, J., concurring).

5. See, Ursin, *supra* note 3.

6. Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, 1975 WIS. L. REV. 19; see Ursin, *supra* note 3, at 837-38 n.82. In *Becker v. IRM Corp.*, 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985), the California Supreme Court adopted a rule of landlord strict liability. The authors of this Article coauthored an amicus brief in *Becker* for the California Trial Lawyers Association. For the authors' views on the *Becker* decision and landlord strict liability, see Nolan & Ursin, *Strict Tort Liability of Landlords: Becker v. IRM Corp. in Context*, 23 SAN DIEGO L. REV. 125 (1986).

7. 3 L.R.-E. & I. App. 330 (1868).

8. *Brown v. Collins*, 53 N.H. 442, 448 (1873).

9. RESTATEMENT OF TORTS § 519 (1938).

10. E.g., *Gallin v. Poulou*, 140 Cal. App. 2d 638, 642, 295 P.2d 958, 960 (1956); *Beck v. Bel Air Properties*, 134 Cal. App. 2d 834, 841, 286 P.2d 503, 508 (1955); see 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW § 801 (8th ed. 1974).

11. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 382 (1951).

12. *Id.* at 384.

13. *Id.* at 395.

14. Professor Gary Schwartz, for example, wrote in 1978 that "[a]lthough ultrahazardous activity liability is interesting theoretically, it is of almost no practical importance." Schwartz, *Con-*

The thesis of this Article is that the hazardous activity strict liability doctrine is alive and well. Announcement of its death is premature; to the contrary, a reinvigorated doctrine has appeared in leading decisions of recent years. This doctrine, which draws on contemporary perceptions of tort policy most clearly articulated in the products liability cases, awaits creative use by attorneys and courts.

The Article first sketches briefly the troubled history of the hazardous activity strict liability doctrine in America.<sup>15</sup> It argues that one reason why this doctrine has developed more slowly than some expected can be found in the first Restatement of Torts, promulgated in 1938. Although the Restatement recognized this strict liability doctrine, a less obvious fact about the Restatement is that it effectively stifled the doctrine's development. The Restatement ensured that the doctrine would have little significant application by excluding from its scope activities that are a matter of "common usage."<sup>16</sup> This posture comported well with attitudes shared by legal scholars who, during the 1930s, viewed tort law as synonymous with negligence. During this period loss spreading concepts not only were seen as substantively wrong, but were ridiculed as inappropriate for judicial consideration. The subtle tactic chosen by the Restatement to limit strict liability proved successful for decades. Courts that focused on the Restatement's forthright promulgation of a strict liability rule were less cognizant of the built-in limitations they accepted when they "adopted" the Restatement.

During the past two decades, however, courts in products liability cases have grown accustomed to strict liability rules and the contemporary tort policies that they reflect. Loss spreading considerations, for example, have emerged from a status of questionable respectability, becoming a dominant stimulus for the adoption of strict liability rules. As this Article explains, courts in recent years also have employed these policy perspectives in hazardous activity cases.<sup>17</sup> Courts increasingly recognize that the restrictions on strict liability of the Restatement, and of the more recently promulgated Restatement (Second),<sup>18</sup> conflict with contemporary concerns of fairness and safety, as well as with the loss spreading policy. In response, courts are covertly and overtly rejecting the Re-

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*tributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 700 n.17 (1978). Schwartz reiterated this position in 1981, concluding that "the ultrahazardous rule has stagnated in the courts . . ." Schwartz, *supra* note 3, at 976. "[A]s a matter of the realities of litigation, ultrahazardous cases seem few and far between. In recent years, very few activities have been newly designated by the judiciary as ultrahazardous or abnormally dangerous; if anything, courts tend to reject ultrahazardous arguments in a rather perfunctory way." *Id.* at 970-71.

The extent of uncertainty over the hazardous activity strict liability doctrine is indicated by the fact the Prosser and Keeton hornbook presents both Prosser's 1971 interpretation of the case law, PROSSER & KEETON, *supra* note 1, § 78, at 548-54, and the "Reviser's Comments," *id.* at 554-56, in which the authors, contrary to Prosser, *id.* at 551, endorse the first Restatement as "the best way of articulating and describing the requirements that ought to be met for applying strict liability to dangerous activities." *Id.* at 555.

15. See *infra* notes 22-129 and accompanying text.

16. RESTATEMENT OF TORTS § 520(b) (1938).

17. See *infra* notes 240-296 and accompanying text.

18. See RESTATEMENT (SECOND) OF TORTS §§ 519, 520 (1977).

statement approach.<sup>19</sup> In so doing they are creating a revitalized doctrine of hazardous activity strict liability independent of the Restatement. This Article discusses the contours of that doctrine<sup>20</sup> and suggests several promising new applications.<sup>21</sup>

## II. HISTORICAL ORIGINS: FROM *RYLANDS V. FLETCHER* THROUGH THE RESTATEMENT (SECOND) OF TORTS

### A. *Rylands v. Fletcher and Its Initial Reception in America*

The modern doctrine of strict liability for hazardous activities derives from *Rylands v. Fletcher*,<sup>22</sup> a nineteenth-century English case. To understand the contemporary law of hazardous activity strict liability properly, it is essential to understand *Rylands* and the early American reaction to its holding. *Rylands* proclaimed a potentially far reaching doctrine of strict liability to which American courts initially reacted negatively. The modern doctrine of strict liability for hazardous activities developed when American courts covertly—and later overtly—embraced a *Rylands*-like strict liability theory that they initially had rejected.

In *Rylands* independent contractors had constructed a reservoir on defendant mill owner's land. Unknown to defendant, ancient coal mining shafts existed beneath the reservoir. When the reservoir was filled, the water burst into the shafts, flowed through them, and eventually flooded the nearby coal mines of plaintiff.<sup>23</sup> In *Fletcher v. Rylands*<sup>24</sup> the Court of Exchequer held that plaintiff could not recover. Trespass and nuisance claims were inapplicable, and defendant was free from blame.<sup>25</sup> On appeal to the Exchequer Chamber, however, judgment was entered for plaintiff under a strict liability theory that carried potentially far reaching implications. Justice Blackburn wrote that

the true rule of law is, that the person who for his own purposes brings on his lands 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 *primâ facie* answerable for all the damage which is the natural consequence of its escape.<sup>26</sup>

The opinion also stated an alternative rule, that one

who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does

19. See *infra* notes 130-239 and accompanying text.

20. See *infra* notes 297-381 and accompanying text.

21. See *infra* notes 382-437 and accompanying text.

22. 3 L.R.-E. & I. App. 330 (1868).

23. *Id.* at 332.

24. 13 L.T.R. 121 (Ex. 1865), *rev'd*, 3 L.R.-Ex. 265 (1866), *aff'd*, 3 L.R.-E. & I. App. 330 (1868).

25. *Rylands*, 3 L.R.-E. & I. App. at 339.

26. *Rylands*, 3 L.R.-Ex. at 279.

not succeed in confining it to his own property.<sup>27</sup>

The House of Lords, hearing the case as *Rylands v. Fletcher*,<sup>28</sup> affirmed the judgment of the Exchequer Chamber, thus endorsing this new strict liability theory. Lord Cairns quoted approvingly the above language of Justice Blackburn and added an alternative gloss of his own, referring to defendant's use of his land as "a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it."<sup>29</sup> Lord Cranworth, in turn, also concurred in Justice Blackburn's opinion but added his own statement: "If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril."<sup>30</sup>

It is possible to grasp the potential implications of the *Rylands* doctrine for nineteenth-century American tort law by considering its application to the railroad industry. Industrialization was a dominant theme in nineteenth-century America. Although the railroad made economic integration of the nation and its industrial explosion possible,<sup>31</sup> it also exacted an enormous toll: "[T]rains were also wild beasts; they roared through the countryside, killing livestock, setting fire to crops, smashing passengers and freight."<sup>32</sup> It takes no great leap of imagination to apply a *Rylands*-like principle to sparks that "escape" from a passing railroad and set fire to fields adjacent to the railroad tracks.<sup>33</sup> Moreover, after accepting such a strict liability rule, American courts might then have applied that rule to injured bystanders, to passengers injured in derailments, and to persons injured in railroad crossing accidents.

Of course, these implications of the *Rylands* principle did not materialize in nineteenth-century American tort law. Instead, *Rylands* and its strict liability theory received a hostile reception in American courts, as reflected in two well-known cases decided in 1873. In *Brown v. Collins*<sup>34</sup> Chief Justice Charles Doe of New Hampshire rejected the *Rylands* doctrine in no uncertain terms. He warned that the adoption of *Rylands* would "impose a penalty upon efforts, made in a reasonable, skillful, and careful manner, to rise above a condition of barbarism."<sup>35</sup> No friend of barbarism, Doe concluded that it "is impossible that legal principle can throw so serious an obstacle in the way of progress and improvement."<sup>36</sup>

Similarly, in *Losee v. Buchanan*<sup>37</sup> New York's highest court stated that the

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27. *Id.* at 280.

28. *Rylands*, 3 L.R.-E. & I. App. at 339.

29. *Id.*

30. *Id.* at 340.

31. See T. COCHRAN & W. MILLER, *THE AGE OF ENTERPRISE* 56-57 (1961); J.W. HURST, *LAW AND CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES* 82-83 (1956); Schlesinger, *Ideas and Economic Development*, in *PATHS OF AMERICAN THOUGHT* 111 (A. Schlesinger, Jr. & M. White ed. 1963); see also D. BOORSTIN, *THE AMERICANS* 40 (1965) (discussing problems the railroads presented to nineteenth-century American common law).

32. L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 410 (1973).

33. See Ehrenzweig, *Negligence Without Fault*, 54 CALIF. L. REV. 1422, 1450 (1966).

34. 53 N.H. 442 (1873).

35. *Id.* at 448.

36. *Id.*

37. 51 N.Y. 476 (1873).

general rule "that I must so use my real estate as not to injure my neighbor [is] much modified by the exigencies of the social state."<sup>38</sup> The court then specified these "exigencies": "We must have factories, machinery, dams, canals, and railroads. They are demanded by the manifold wants of mankind, and lay at the basis of all our civilization."<sup>39</sup> The court concluded that "[i]f I have any of these upon my lands, and they are not a nuisance and are not so managed as to become such, I am not responsible for any damage they accidentally and unavoidably do my neighbor."<sup>40</sup> In the court's view strict liability was not only undesirable but also unnecessary. The injured neighbor "receives his compensation for such damage by the general good, in which he shares, and the right which he has to place the same things upon his lands."<sup>41</sup> Referring to *Rylands*, the court concluded that "[i]t is sufficient . . . to say that the law, as laid down in [that case], is in direct conflict with the law as settled in this country."<sup>42</sup> The *Losee* court concluded "that the rule is, at least in this country, a universal one, which, so far as I can discern, has no exceptions or limitations, that no one can be made liable for injuries to the person or property of another without some fault or negligence on his part."<sup>43</sup>

It is not surprising that American courts reacted with hostility toward *Rylands* and its strict liability principle. During much of the nineteenth century industry was in its infancy in America; there were few transportation or communication networks, and critical shortages of investment capital.<sup>44</sup> Courts persistently responded to the perceived need to protect infant industry from "excessive" liability.<sup>45</sup> Of course, by the end of the nineteenth century the social

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38. *Id.* at 484.

39. *Id.*

40. *Id.* at 484-85.

41. *Id.* at 485.

42. *Id.* at 486-87.

43. *Id.* at 491.

44. See authorities cited *supra* note 31.

45. See L. FRIEDMAN, *supra* note 32, at 410; M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 85-99 (1977); L. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 164 (1957); see also W. NELSON, *AMERICANIZATION OF THE COMMON LAW* 144 (1975) (decline of the colonial legal system and the new freedom of individuals to choose their own values influenced the acceptance of competition and materialism). Some scholars have placed less emphasis on the link between industrialization and tort law. See, e.g., E. WHITE, *TORT LAW IN AMERICA* 3 (1980). Although goals other than economic growth also shaped the development of nineteenth-century tort law, the perceived desirability of economic growth was a dominant value of that era, and the law reflected this value. See J.W. HURST, *supra* note 31, at 19. For a recent contribution to the literature, see Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981).

After examining the nineteenth-century tort law of New Hampshire and California, Professor Gary Schwartz recently has questioned the conventional interpretation of nineteenth-century tort history. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717 (1981). In the conventional view "no duty" rules limited even the negligence liability of specific activities. *Id.* at 1717, 1766. Schwartz argues, however, that "[f]ar from erecting a duty prerequisite to every tort claim, the Courts easily recognized that everyone owes a duty to everyone else to abstain from negligent conduct." *Id.* at 1773.

As the authors of this Article have discussed elsewhere, Nolan & Ursin, *supra* note 6, at 142 n.116, Schwartz's arguments are unpersuasive. First, Schwartz concedes that important limitations on negligence liability existed in the area of governmental tort liability and in employee accident cases. Schwartz, *supra*, at 1769-73. With respect to other types of cases, such as suits against charities and product accident cases, Schwartz unpersuasively claims that nineteenth-century tort law was

and economic conditions that might have justified this judicial posture had changed. Industry had advanced beyond infancy, and the nation's values and priorities had changed. Small, struggling enterprises had evolved into large-scale corporations,<sup>46</sup> and these business enterprises now had the capacity to absorb tort liability and spread liability costs among the public as part of the price of goods and services. Tort law reform did not, however, come quickly to the American judiciary.<sup>47</sup>

Nevertheless, an American doctrine of strict liability for hazardous activities developed in spite of an initially hostile reaction to *Rylands*. At first, courts employed "covert" means to impose strict liability on hazardous activities such as blasting. They acted covertly both because of uncertainty about the doctrine's contours and because of precedents such as *Brown* and *Losee* that completely rejected the doctrine of strict liability. Thus, courts often resorted to artful, if perhaps disingenuous, uses of outdated and obscure doctrines to recognize implicitly strict liability.<sup>48</sup>

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free of special no duty and immunity rules. Schwartz writes, for example, that in California "the only suit against a product seller for an injury caused by a product defect led to victory for the nonprivity product victim." *Id.* at 1766. It would be incorrect, however, to infer that nineteenth-century California case law anticipated Judge (later Justice) Benjamin Cardozo's landmark 1916 decision in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), which overturned the well-established privity barrier to negligence liability established by *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. 1842). Schwartz's footnote citation to the California case reveals that it is not a *MacPherson*-type case at all. Schwartz, *supra*, at 1776 n.365. The case, *Lewis v. Terry*, 111 Cal. 39, 43 P. 398 (1896), allowed a tenant to recover against a retailer who had willfully misrepresented the safety of a folding bed to the buyer landlord. Indeed, the *Terry* court cited with approval the *Winterbottom* rule and American cases following it. *Id.* at 44, 43 P.2d at 399.

46. See R. HOFSTADTER, *THE AGE OF REFORM 229-30* (1955); J.W. HURST, *supra* note 31, at 71-72; Schlesinger, *supra* note 31, at 118-19.

47. See Ursin, *supra* note 1, at 263-87. Indeed, it was not until 1916 that *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), suggested that manufacturers owed a duty of due care absent privity of contract.

Courts also exhibited hostility toward legislative reform of restrictive nineteenth-century tort rules. For example, in *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 94 N.E. 431 (1911), New York's highest court held that a recently enacted workers' compensation plan violated both the state and federal constitutions. *Id.* at 317, 94 N.E. at 448. The *Ives* opinion resembles the *Losee* opinion in its hostility toward the abrogation of the requirement that injured plaintiffs prove negligence and in its view of social policy. The *Ives* court viewed fault or negligence as an immutable principle. Thus, the workmen's compensation statute, "judged by our common-law standards, is plainly revolutionary." *Id.* at 285, 94 N.E. at 436. It followed for the court that this "liability unknown to the common law . . . plainly constitutes a deprivation of liberty and property under the Federal and State Constitutions." *Id.* at 294, 94 N.E. at 439. The court succinctly stated its perspective in the following passage:

If the legislature can say to an employer, "you must compensate your employee for an injury not caused by you or by your fault," why can it not go further and say to the man of wealth, "you have more property than you need and your neighbor is so poor that he can barely subsist; in the interest of natural justice you must divide with your neighbor so that he and his dependents shall not become a charge upon the state?"

*Id.* at 295-96, 94 N.E. at 440. And according to the *Ives* court, in the "final and simple analysis that is taking the property of A and giving it to B, and that cannot be done under our Constitutions." *Id.* at 296, 94 N.E. at 440.

48. See, e.g., *Hay v. Cohoes Co.*, 2 N.Y. 159, 161-162 (1849); Ehrenzweig, *supra* note 33, at 1426-27.

With respect to the New York Court of Appeals, Professor Charles Gregory concluded that the tactic of New York's highest court was "to maintain a 'bootleg' conception of absolute liability without fault where it thought it could cover its tracks by mentioning the ancient and outworn



By the 1930s some American courts had made faltering starts toward articulating a strict liability rule for hazardous activities. For example, courts had applied strict liability principles to blasting<sup>49</sup> and, occasionally, to escaping water<sup>50</sup>—the latter application suggested, of course, by *Rylands*. Three decisions suggested particularly far-reaching implications. In 1924 the Minnesota Supreme Court in *Bridgeman-Russell v. City of Duluth*<sup>51</sup> extended the *Rylands* strict liability rule beyond reservoirs to the escape of water from the principal main leading from a reservoir. The court wrote that “[i]n such a case, even though negligence is absent, natural justice would seem to demand that the enterprise, or what is really the same thing, the whole community benefited by the enterprise, should stand the loss rather than the individual.”<sup>52</sup> This language suggests a broad theory of enterprise liability—that strict liability properly applies to business enterprises that benefit from hazardous activities and can spread losses among the whole community.<sup>53</sup> Thus, although the *Bridgeman-Russell* court limited its holding to the principal main leading from a reservoir,<sup>54</sup> its rationale could support further extensions of strict liability, such as the application of strict liability to other water mains,<sup>55</sup> to gas pipelines,<sup>56</sup> and to numerous other hazardous activities of business enterprises.<sup>57</sup>

In *Green v. General Petroleum Corp.*<sup>58</sup> the California Supreme Court in 1928 extended strict liability beyond blasting and explosives to the nonnegligent operations of an oil company when an oil well had “blown out,” casting debris on plaintiff’s property. As in several other cases of this period, the court declined to endorse *Rylands* openly and instead relied in part on misapplied notions of trespass.<sup>59</sup> The *Green* court, however, fashioned a broad principle of strict liability:

Where one, in the conduct and maintenance of an enterprise lawful and proper in itself, deliberately does an act under known conditions, and, with knowledge that injury may result to another, proceeds, and injury is done to the other as the direct and proximate consequence of the act, however carefully done, the one who does the act and causes the injury should, in all fairness, be required to compensate the other for the injury done.<sup>60</sup>

The breadth of this statement, coupled with the court’s elliptical reference to an

concept of unintended trespass and could thus seem to avoid consorting with the theory of absolute liability.” Gregory, *supra* note 11, at 378-379.

49. See *Hay v. Cohoes Co.*, 2 N.Y. 159 (1849).

50. See, e.g., *Parker v. Larsen*, 86 Cal. 236, 24 P. 989 (1890).

51. 158 Minn. 509, 197 N.W. 971 (1924).

52. *Id.* at 511, 197 N.W. at 972.

53. See generally Ehrenzweig, *supra* note 33, at 1452-53 (discussing enterprise liability).

54. *Bridgeman-Russell*, 158 Minn. at 511-12, 197 N.W.2d at 972.

55. See *infra* text accompanying notes 419-34.

56. See *infra* note 435.

57. See *infra* note 435.

58. 205 Cal. 328, 270 P. 952 (1928).

59. See Gregory, *supra* note 11, at 388-89.

60. *Green*, 205 Cal. at 333-34, 270 P. at 955. The court went on to stress the “actual invasion” of plaintiff’s property. *Id.* at 334, 270 P. at 955.

enterprise theory of liability, suggested that the California Supreme Court might have entertained further applications of strict liability.

Three years later a prestigious panel of the United States Circuit Court of Appeals for the Second Circuit, consisting of Judges Swan, Learned Hand, and Augustus N. Hand, rendered another significant decision in this area. In *Exner v. Sherman Power Construction Co.*<sup>61</sup> the court extended strict liability beyond blasting to the storage of explosives, and beyond damage caused by debris cast on the land of another to damage caused by concussion. Again, the early stirrings of an enterprise liability theory appear in the court's opinion. The court stated that the extent to which one is liable for injuries to another absent negligence "involves an adjustment of conflicting interests."<sup>62</sup> Then the court held:

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.<sup>63</sup>

Taken together, the *Bridgeman-Russell*, *Green*, and *Exner* decisions might have set the stage for further extensions of the hazardous activity strict liability doctrine. In fact, however, the likelihood of an expansive strict liability doctrine was diminished when the first Restatement of Torts appeared in the 1930s.<sup>64</sup> As discussed in the next section of this Article, the Restatement's treatment of hazardous activity liability effectively stifled the growth of the strict liability doctrine.

#### B. *The Restatement of Torts: Stagnation of the Hazardous Activity Strict Liability Doctrine*

The American Law Institute's promulgation of the Restatement of Torts in the 1930s represents the most conspicuous early American development in the area of hazardous activity strict liability.<sup>65</sup> Sections 519 and 520 of the first Restatement imposed strict liability on one who carried on an "ultrahazardous activity."<sup>66</sup> An activity was considered ultrahazardous "if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of utmost care, and (b) is not a matter of common usage."<sup>67</sup> The Restatement provided that

one 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

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61. 54 F.2d 510 (2d Cir. 1931).

62. *Id.* at 514.

63. *Id.*

64. See RESTATEMENT OF TORTS §§ 519, 520 (1938).

65. See *id.*

66. *Id.* § 519.

67. *Id.* § 520.

although the utmost care is exercised to prevent the harm.<sup>68</sup>

By embracing a strict liability rule for ultrahazardous activities, the Restatement could have encouraged courts to adopt an expansive strict liability doctrine. As previously noted, American courts that had embraced strict liability results often had done so in a covert manner, relying on antiquated and misapplied doctrines such as unintended trespass.<sup>69</sup> Professor Albert Ehrenzweig characterized the Restatement, in contrast, as "[c]ourageously abandoning the language of traditional strict liabilities (where there is still much talk of presumptions of negligence or violations of duty)."<sup>70</sup> In 1951 he wrote that "[w]ith its liability for 'ultrahazardous activities' the American Law Institute has taken a further and, potentially at least, decisive step towards the recognition of a new rationale of enterprise liability."<sup>71</sup> Moreover, by offering a generally stated rule of strict liability, the first Restatement suggested the expansion of strict liability beyond the already established categories of strict liability such as blasting and the escape of artificially collected water.<sup>72</sup>

Thus, it is paradoxical that the Restatement of Torts on its own terms actually precluded any significant expansion of strict liability by its definition of ultrahazardous activity. The first part of that definition focused on the dangerousness of the activity.<sup>73</sup> The Restatement also required, however, that an activity not be "a matter of common usage."<sup>74</sup> In other words, strict liability would not attach to activities that were quite hazardous but a matter of common usage.

Commenting on the Restatement, Professor Ehrenzweig noted that the "rule would admirably fit all kinds of mechanical enterprise *if it could be applied to every ultrahazardous activity.*"<sup>75</sup> Under such a rule, "a railroad would be liable for fire caused in a distant cottage by a spark from its engine. For, harm of this type was 'likely' to result from this 'unpreventable miscarriage' of its activity."<sup>76</sup> This rule would provide the rationale for liability "of mechanical enterprise for unpreventable calculable harm."<sup>77</sup> Such a rule, however, was precluded by the first Restatement's common usage exception. As Ehrenzweig noted, "railroads . . . are excluded as 'of common usage' and, therefore, are within the generally recognized domain of the negligence rule."<sup>78</sup>

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68. *Id.* § 519.

69. Gregory, *supra* note 11, at 378.

70. Ehrenzweig, *supra* note 33, at 1452.

71. Ehrenzweig, *supra* note 33, at 1452.

72. See Comment, *Absolute Liability for Ultrahazardous Activities: An Appraisal of the Restatement Doctrine*, 37 CALIF. L. REV. 269, 277-83 (1949) (discussing California cases in light of the Restatement).

73. RESTATEMENT OF TORTS § 520(a) (1938). For the relevant language, see *supra* text accompanying note 67.

74. RESTATEMENT OF TORTS § 520(b) (1938).

75. Ehrenzweig, *supra* note 33, at 1452 (emphasis added).

76. Ehrenzweig, *supra* note 33, at 1452.

77. Ehrenzweig, *supra* note 33, at 1453.

78. Ehrenzweig, *supra* note 33, at 1453. Although the first Restatement's authors undoubtedly intended to exclude from strict liability such "common" activities as the railroad, the Restatement itself contains some confusion on this point: an "activity is a matter of common usage if it is custom-

By its exclusion of strict liability for activities that were a matter of common usage, the Restatement in effect assured that the strict liability rule which it "recognized" would have little practical application. The Restatement's authors viewed its strict liability rule as applicable to blasting; to the manufacture, storage, transportation, and use of explosives; to the drilling of oil wells that results in gushers; and to aviation.<sup>79</sup> Because the case law supported these applications of strict liability, the authors had little choice. However, the Restatement's common usage exclusion would seem to cast doubt on even these applications of strict liability.<sup>80</sup> In any event, the ultimate effect of the Restatement's common usage criterion was to discourage the application of strict liability to new areas, such as the railroad accidents of which Ehrenzweig wrote. Similarly, use of the automobile, a prominent hazardous activity of this century, is not "ultrahazardous" because it has "come into such general use that [its] operation is a matter of common usage."<sup>81</sup>

The Restatement's restrictive posture is easily explained. Nineteenth-century judges were not the only Americans hostile to strict liability. Throughout the first half of the twentieth century an impressive body of legal scholarship stood in opposition to judicial acceptance of rules of strict liability, and of course legal scholars played a key role in formulating the Restatement. Most scholars tended to view tort law as synonymous with the negligence principle, which they accepted as a given and from which they could deduce subsidiary rules.<sup>82</sup> Although *Rylands* may have required commentators to discuss strict liability, this discussion usually treated strict liability as an anomaly to be puzzled over, criticized, rationalized, and limited.<sup>83</sup>

Professor Thayer, in an article appearing in 1916, stated that "after making all allowance for precedent and practical confusion alike, such a result as *Ry-*

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arily carried on by the great mass of mankind or by many people in the community." RESTATEMENT OF TORTS § 520 comment e (1938). This definition could have led to new applications of strict liability more expansive than those envisioned by the drafters of the first Restatement. For example, railroading could be seen as an activity not carried on by the great mass of mankind or by many in the community, even though railroads are common.

In fact, however, courts and commentators have recognized the intent of the drafters of the Restatement to preclude the application of its strict liability rule to activities that are common. *E.g.*, *Ramsey v. Marutamaya Ogatsu Fireworks Co.*, 72 Cal. App. 3d 516, 140 Cal. Rptr. 247 (1977); *Beck v. Bell Air Properties*, 134 Cal. App. 2d 834, 286 P.2d 503 (1955); C. GREGORY, H. KALVEN & R. EPSTEIN, *CASES AND MATERIALS ON TORTS* 502-03 (3d ed. 1977); see also *infra* note 80.

79. RESTATEMENT OF TORTS § 520 comments b & e (1938).

80. For example, drilling for oil, especially in communities where oil is likely to be found, could be seen as a matter of common usage. Indeed, the first Restatement comments provide that 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. *Id.* comment e. Drilling for oil, where oil is likely to be found, could well be an activity carried on "by many people in the community." See *supra* note 78; *infra* notes 192-94 and accompanying text.

81. RESTATEMENT OF TORTS § 520 comment e (1938).

82. See, e.g., Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372, 375, 39 COLUM. L. REV. 20, 23, 48 YALE L.J. 390, 393 (1939) [hereinafter Seavey, *Cardozo*; citation to HARV. L. REV. only]; Seavey, *Principles of Torts*, 56 HARV. L. REV. 72 (1942) [hereinafter Seavey, *Principles*].

83. See, e.g., Seavey, *Cardozo*, *supra* note 82, at 375; Seavey, *Principles*, *supra* note 82, at 85-87. A notable exception, of course, was Dean Leon Green. See, e.g., Green, *The Duty Problem in Negligence Cases II*, 29 COLUM. L. REV. 255, 282 (1929).

*lands v. Fletcher* produces in our system is not tolerable, and those courts have done well who have flatly refused to have anything to do with it."<sup>84</sup> Then, stating that although he did not necessarily agree with the notorious holding of New York's highest court that workers' compensation statutes were unconstitutional,<sup>85</sup> Thayer concurred with that court "as to the fundamental proposition of the common law which links liability to fault."<sup>86</sup> In 1920 Professor Jeremiah Smith analyzed the New York blasting cases.<sup>87</sup> Smith's aversion to the theory of strict liability led him to propose a means whereby tort law could avoid the unseemly intrusion of strict liability. He simply, and naively,<sup>88</sup> classified all blasting conducted within a given distance from the interests of others as, by definition, negligent, no matter how carefully done.<sup>89</sup>

In 1942, after the promulgation of the first Restatement's provision regarding ultrahazardous activity, Professor Warren Seavey, noted with satisfaction that "[w]ith minor exceptions, a person who does not intentionally interfere with the interests of another and who acts carefully and lawfully is not liable for the unexpected harmful consequences of his act."<sup>90</sup> Among these "minor exceptions," Seavey included, as the only one of any importance, the doctrine of strict liability for ultrahazardous activity, which he saw as applicable only to blasting, the keeping of explosives, and the operation of airplanes.<sup>91</sup> According to Seavey, the ultrahazardous strict liability rule thus properly constituted a minor exception to the dominant negligence principle. Moreover, Seavey's view of tort law would not countenance the suggestion that strict liability expand in response to the ability of business enterprises to distribute accident costs through insurance and increased prices. Indeed, Seavey denigrated the loss spreading policy as a basis for tort reform. He praised judges who "did not become the protector of the injured merely because the defendant had ample funds to meet a judgment or had an ability to spread the loss."<sup>92</sup> Seavey viewed the loss spreading policy as not only substantively undesirable, but even inappropriate for judicial consideration—as "sentimental justice" as opposed to "legal justice."<sup>93</sup>

Viewed from the perspective of the 1980s, the antipathy of the first Restatement and of scholars such as Seavey toward strict liability and loss spreading concepts appears antiquated. During the past quarter century courts have brought about sweeping reforms of tort law, including the adoption of strict liability rules in products cases. Insurance and loss spreading concepts have

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84. Thayer, *Liability Without Fault*, 29 HARV. L. REV. 801, 814 (1916).

85. See *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 94 N.E. 431 (1911). For a discussion of *Ives*, see *supra* note 47.

86. Thayer, *supra* note 84, at 814-15.

87. Smith, *Liability for Substantial Physical Damage to Land by Blasting—The Role of the Future*, 33 HARV. L. REV. 542 (1920); see *Hay v. Cohoes Co.*, 2 N.Y. 159 (1849).

88. See Gregory, *supra* note 11, at 380.

89. Smith, *supra* note 87, at 548.

90. See Seavey, *Principles*, *supra* note 82, at 85.

91. Seavey, *Principles*, *supra* note 82, at 86.

92. Seavey, *Cardozo*, *supra* note 82, at 373.

93. Seavey, *Cardozo*, *supra* note 82, at 373.

emerged from a shadow of questionable respectability<sup>94</sup> to become the dominant stimuli for tort law reform,<sup>95</sup> both in the adoption and elaboration of strict products liability rules<sup>96</sup> and in the judicial assault on traditional doctrines that immunized even negligent defendants from tort liability.<sup>97</sup>

Because of the first Restatement's restrictive approach, however, the tort revolution until recently<sup>98</sup> has left the hazardous activity strict liability doctrine almost untouched. Courts relied on the Restatement in deciding cases, and they viewed its provisions as stating the elements of the strict liability cause of action.<sup>99</sup> Although the Restatement's open adoption of a strict liability rule appeared progressive at the time, the more subtle effect, discussed previously,<sup>100</sup> was to exclude activities regarded as "common usage" and thus to assure that hazardous activity strict liability would have little practical application. When courts looked to the Restatement for guidance, they received a message that required a restrictive application of strict liability rules.<sup>101</sup>

In the decades following the adoption of the first Restatement, however, the case law continued to develop. Courts applied strict liability principles to new

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94. See Ursin, *supra* note 1, at 295-304. Professors Gregory and Kalven have stated that only in the late 1950s and early 1960s did loss distribution and insurance emerge as "respectable" topics in tort law. C. GREGORY & H. KALVEN, *CASES AND MATERIALS ON TORTS* 694 (2d ed. 1969).

95. See *infra* text accompanying notes 246-50.

96. See, e.g., *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (defective design theory); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) (warranty theory); see also *Becker v. IRM Corp.*, 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985) (strict landlord tort liability). For a discussion of the role of the loss spreading policy in contemporary tort law, see *infra* notes 246-69 and accompanying text.

Prior to *Henningsen* and *Greenman* commentators frequently assumed that strict liability, which for years had applied to food products, would not apply in other products cases. See, e.g., Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 442-43 (1959). This assumption enabled commentators to avoid discussing the merits of strict products liability. *Id.* It also precluded them from sensing the monumental changes that soon would occur in products liability. *Id.* In a 1957 symposium discussing whether strict liability should extend beyond food products, only Professor Fleming James argued for such an extension. See James, *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923, 926 (1957). For contrary views, see Green, *Should the Manufacturer of General Products Be Liable Without Negligence?*, 24 TENN. L. REV. 928, 984 (1957); Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963, 1017-18 (1957); Plant, *Strict Liability of Manufacturers For Injuries Caused By Defects in Products—An Opposing View*, 24 TENN. L. REV. 938, 940 (1957). In 1960 Dean Prosser approved of the extension of strict liability beyond food products. See Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1124 (1960). He wrote, however, that extension beyond products for bodily use "is likely to proceed . . . slowly . . . . After many . . . accretions, we may arrive at a 'general rule' of strict liability for all products, with certain specified exceptions; but these things are still of uncertain and indefinite future." *Id.* at 1139-40.

97. See, e.g., *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) (contributory negligence no longer bars plaintiff's recovery); *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968) (landowner must act as a reasonable person; traditional landowner immunity rules abrogated); *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961) (governmental immunity abolished).

98. See *infra* notes 130-239 and accompanying text.

99. E.g., *Gallin v. Poulou*, 140 Cal. App. 2d 638, 295 P.2d 958 (1956); *Beck v. Bel Air Properties*, 134 Cal. App. 2d 834, 286 P.2d 503 (1955); see 4 B. WITKIN, *supra* note 10, § 801.

100. See *supra* text accompanying notes 65-81.

101. See, e.g., *Ramsey v. Marutamaya Ogatsu Fireworks Co.*, 72 Cal. App. 3d 516, 527 n.2, 140 Cal. Rptr. 247, 253 n.2 (1977) (concluding, under RESTATEMENT OF TORTS § 520 (1938), that "a fireworks display is not an ultrahazardous activity").

activities, such as fumigation,<sup>102</sup> crop dusting,<sup>103</sup> and, more recently, the hauling of gasoline by tanker trucks.<sup>104</sup> None of these decisions *appeared* to make a sharp break from either previous case law or the Restatement. However, when examined more carefully—and in the context of contemporary judicial attitudes toward tort policy—these decisions point to a revitalized strict liability doctrine, one sharply at odds with the Restatement's restrictiveness. Before turning to a detailed examination of these decisions, this Article first examines the Restatement (Second) of Torts and compares it to the first Restatement of Torts.

The Restatement (Second) of Torts appeared in draft form in the 1960s<sup>105</sup> and was formally adopted in 1977.<sup>106</sup> In their reassessment of the first Restatement's treatment of the ultrahazardous activity doctrine, the drafters of Restatement (Second) had the opportunity to build on the new applications of strict liability that had emerged since the first Restatement—such as the California Supreme Court's 1948 decision in *Luthringer v. Moore*,<sup>107</sup> in which the court applied strict liability to fumigation. The drafters also had an opportunity to assess the implications for the hazardous activity doctrine of tort policies, including the loss spreading policy, underlying the tort revolution of the 1960s and 1970s. Instead, the Restatement (Second), under the guidance of Dean William Prosser, not only retained restrictive features of the first Restatement but also added more restrictive features of its own and implied that the loss spreading policy is irrelevant in hazardous activity cases.<sup>108</sup>

The language of the Restatement (Second) differs considerably from that of the first Restatement. Referring to its strict liability rule as applying to "abnormally dangerous activity," section 519 provides that "[o]ne 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."<sup>109</sup> Section 520 then lists six factors to be considered in determining whether an activity is abnormally dangerous:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;

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102. *Luthringer v. Moore*, 31 Cal. 2d 489, 498-500, 190 P.2d 1, 6-8 (1948).

103. *See Loe v. Lenhardt*, 227 Or. 242, 362 P.2d 312 (1961); *Langan v. Valicopters, Inc.*, 88 Wash. 2d 855, 567 P.2d 218 (1977).

104. *Siegler v. Kuhlman*, 81 Wash. 2d 448, 502 P.2d 1181 (1972), *cert. denied*, 411 U.S. 983 (1973).

105. *E.g.*, RESTATEMENT (SECOND) OF TORTS (Tent. Draft No. 10, 1964).

106. RESTATEMENT (SECOND) OF TORTS (1977).

107. 31 Cal. 2d 489, 190 P.2d 1 (1948).

108. Some observers have viewed the Restatement (Second) as adopting a posture toward strict liability more expansive than the first Restatement. *See, e.g.*, *Yommer v. McKenzie*, 255 Md. 220, 257 A.2d 138 (1969). As this Article will explain, this view is mistaken. Nevertheless, courts wishing to expand the ambit of strict liability have appropriately emphasized "expansive" language contained in the Restatement (Second). As discussed *infra* notes 130-381 and accompanying text, courts in fact are rejecting the frameworks of the Restatement and the Restatement (Second), and are instead developing a more expansive framework of their own.

109. RESTATEMENT (SECOND) OF TORTS § 519 (1977).

- (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.<sup>110</sup>

The first three of these factors refer to the hazardousness of the activity. With respect to these "hazardousness" criteria, the changes made from the first Restatement appear largely cosmetic. For example, the Restatement (Second) abandons the term "ultrahazardous" and instead refers to "abnormally dangerous activity." The comments to the Restatement (Second) explain that the term "ultrahazardous" was the "wrong word" and "misleading" and that it had been adopted in the first Restatement for "no visible reason."<sup>111</sup> The first Restatement had spoken of the "miscarriage"<sup>112</sup> of the abnormally dangerous activity; however, the Restatement (Second) observes: "It is not necessary that anything should go wrong with the activity. The liability is all the clearer when the harm is brought about by its normal and ordinary operation."<sup>113</sup> Finally, the first Restatement required, for the imposition of strict liability, "a risk of serious harm . . . which cannot be eliminated by the exercise of utmost care."<sup>114</sup> The Restatement (Second) observes that this statement "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."<sup>115</sup> Therefore, the Restatement (Second) requires an "inability to eliminate the risk by the exercise of reasonable care."<sup>116</sup>

Significantly, the Restatement (Second) retains the common usage factor which curtailed the expansion of strict liability under the first Restatement. Unlike the first Restatement, however, the Restatement (Second) does not state this element as an absolute requirement. Rather, common usage—as well as the other five factors—is simply "to be considered [in] determining whether an activity is abnormally dangerous."<sup>117</sup> The comments to the Restatement (Second), however, make clear that common usage is sufficient to place an activity outside the strict liability doctrine: "The usual dangers resulting from an activity that is one of common usage are not regarded as abnormal, even though a serious risk of harm cannot be eliminated by all reasonable care."<sup>118</sup> This conclusion also finds support in the examples of activities in the Restatement (Second) that are subject to strict liability and those that are not. The examples of activities subject to strict liability include blasting; the manufacture, storage, transportation, and use of explosives; and oil well drilling.<sup>119</sup> Examples of activ-

110. *Id.* § 520.

111. RESTATEMENT (SECOND) OF TORTS § 520 notes 1-2 (Tent. Draft No. 10, 1964).

112. RESTATEMENT OF TORTS § 519 (1938).

113. RESTATEMENT (SECOND) OF TORTS § 519 note 2 (Tent. Draft No. 10, 1964).

114. RESTATEMENT OF TORTS § 520 (1938).

115. RESTATEMENT (SECOND) OF TORTS § 520 note 2 (Tent. Draft No. 10, 1964).

116. RESTATEMENT (SECOND) OF TORTS § 520(c) (1977).

117. *Id.* § 520.

118. *Id.* § 520 comment i.

119. *Id.*



ities that are not subject to strict liability include the operation of automobiles and railway engines.<sup>120</sup> Thus, the Restatement (Second) reiterates the insistence of the first Restatement that strict liability does not attach to activities that are a matter of common usage.

In addition, the Restatement (Second) creates new obstacles for courts that might otherwise want to recognize innovative applications of hazardous activity strict liability. Dean Prosser, the reporter for the Restatement (Second), had criticized the first Restatement because its ultrahazardous rule extended beyond *Rylands* in ignoring the relation of the activity to its surroundings.<sup>121</sup> Under Prosser's guidance, the Restatement (Second) added, as one of the six factors that courts should consider, the appropriateness of the place where the activity is carried on. The comments to the Restatement (Second) state

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.<sup>122</sup>

As with the common usage factor, the appropriateness to the place factor may suffice to defeat strict liability. As an illustration, the Restatement (Second) states that blasting, which otherwise would subject a party to strict liability, "is not abnormally dangerous if it is done on an uninhabited mountainside."<sup>123</sup> And it further notes that

[t]here are some highly dangerous activities, that necessarily involve a risk of serious harm in spite of all possible care, that can be carried on only in a particular place. . . . [If] these activities are of sufficient value to the community . . . , 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.<sup>124</sup>

The Restatement (Second) introduces a second new factor that reveals much regarding its approach to strict liability. This factor directs inquiry into the "extent to which [the activity's] value to the community is outweighed by its dangerous attributes."<sup>125</sup> Although comments to the Restatement (Second) elsewhere observe that its strict liability rule "is applicable to an activity that is carried on with all reasonable care, and that 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 merely to carry on the activity at all,"<sup>126</sup> the value to the community factor saps this statement of its meaning and converts the strict liability rule of

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120. *Id.*

121. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 78, at 512 (4th ed. 1971).

122. RESTATEMENT (SECOND) OF TORTS § 520 comment j (1977).

123. *Id.*

124. *Id.*

125. *Id.* § 520(f).

126. *Id.* § 520 comment b.

the Restatement (Second) into a theory similar to negligence.<sup>127</sup> The Restatement (Second) comment on this factor makes clear that an activity's value suffices to preclude strict liability even though the activity is hazardous and complies with the requirement that it not occur as a matter of common usage: "Even though the activity involves a serious risk of harm that 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."<sup>128</sup> Thus, an activity that might have been subject to strict liability under the first Restatement is not subject to such liability under the Restatement (Second) if it is of sufficient value to the community.

Because it excluded activities that are a matter of common usage, the first Restatement had effectively precluded the extensive application of strict liability rules to the hazardous activities of commercial enterprises. With its added factors, the Restatement (Second) implies that even though an activity involves high risk of harm, a likelihood of great resulting harm, and inability to eliminate the risk by exercising reasonable care, strict liability may be precluded (1) if the activity is a matter of common usage, or (2) if it is appropriate to the place where it occurs, or (3) if it is of great value to the community. Rather than attempting to identify activities that warrant strict liability treatment and develop rules to guide future law development, the Restatement (Second) sought to freeze an already frozen body of law, and even sought to convert the vocabulary of this area of law to that of negligence.<sup>129</sup> In so doing, the drafters of the Restatement (Second) chose to ignore the policies underlying the tort revolution of the past quarter century, and they made no attempt to apply those policies to the area of liability for hazardous activities.

### III. TOWARD A CONTEMPORARY DOCTRINE OF STRICT LIABILITY FOR HAZARDOUS ACTIVITIES

In response to the Restatement's restrictive doctrinal framework, courts in recent years have developed an impressive body of case law that pays little heed to this framework. Moreover, courts have begun to reject both the Restatement framework and its specific provisions. In place of that restrictive framework, courts are creating an expansive new body of hazardous activity doctrine premised on contemporary tort policies. Part A of this section of the Article analyzes the case law that rejects the Restatement. Part B discusses the perceptions

127. See *Yukon Equip. v. Fireman's Fund Ins. Co.*, 585 P.2d 1206, 1211 (Alaska 1978); Schwartz, *supra* note 3, at 970. The authors of the Prosser and Keeton hornbook argue that the value to the community factor "is irrelevant [to the question] whether or not a risk should be allocated to the defendant because of the dangerousness, as such, of the activity." PROSSER & KEETON, *supra* note 1, § 78, at 555.

128. RESTATEMENT (SECOND) OF TORTS § 520 comment k (1977).

129. The authors of the Prosser and Keeton hornbook conclude:

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, except for the fact that it is the function of the court to apply the abnormally dangerous concept to the facts as found by the jury.

PROSSER & KEETON, *supra* note 1, § 78, at 555; see *supra* note 127.

of contemporary tort policy on which this case law rests. Part C discusses the criteria that are emerging to define this newly-invigorated hazardous activity doctrine and discusses possible new applications of the doctrine.

### A. *The Case Law Rejecting the Restatement and the Restatement (Second)*

Like their nineteenth-century counterparts,<sup>130</sup> contemporary courts in hazardous activity cases at times disguise what they are doing. Although purporting to follow the Restatement, these decisions have "interpreted" it to achieve results inconsistent with and more expansive than those envisioned by the Restatement. Moreover, in several recent cases courts have explicitly declared their dissatisfaction with the Restatement and rejected its framework. The methodology employed in these decisions is as important as their precise holdings. Increasingly, courts have relied on the loss spreading policy, which has animated the products liability revolution of the past quarter century, to impose strict liability in hazardous activity cases.

Two decisions of the Washington Supreme Court illustrate this trend. In its 1973 decision in *Siegler v. Kuhlman*<sup>131</sup> the court applied strict liability to a gasoline explosion caused when defendant trucker's gasoline trailer overturned. The *Siegler* court, after reciting the six Restatement (Second) factors,<sup>132</sup> stated that "one cannot escape the conclusion that hauling gasoline as cargo is undeniably an abnormally dangerous activity and *on its face possesses all of the factors necessary for imposition of strict liability as set forth in the Restatement (Second).*"<sup>133</sup> The court then described defendant's activity as "involving a high degree of risk; it is a risk of great harm and injury; it creates dangers that cannot be eliminated by the exercise of reasonable care."<sup>134</sup> That description arguably established that the hazardousness criteria—the first three Restatement (Second) factors—were met.<sup>135</sup> But what of the last three Restatement (Second) factors? A defendant in this situation could argue that its activity was a matter of common usage<sup>136</sup> (carried on by many people in the community), that it was appropriate to the place<sup>137</sup> (trucking was appropriate on highways), and that it was of value to the community<sup>138</sup> (which obviously depended on the delivery of gasoline). The *Siegler* court's statement that all Restatement factors are met thus would seem to call for *some* explanation by the court. Only one relevant sentence appears in the opinion: "That gasoline cannot be practicably transported except upon the public highways does not decrease the abnormally high

130. See *supra* notes 48-50 and accompanying text.

131. 81 Wash. 2d 448, 502 P.2d 1181 (1972), *cert. denied*, 411 U.S. 983 (1973).

132. See *supra* text accompanying note 110 (listing six factors).

133. *Siegler*, 81 Wash. 2d at 459, 502 P.2d at 1187 (emphasis added).

134. *Id.*

135. RESTATEMENT (SECOND) OF TORTS § 520(a)-(c) (1977); see *supra* text accompanying note 110.

136. RESTATEMENT (SECOND) OF TORTS § 520(d) (1977).

137. *Id.* § 520(e).

138. *Id.* § 520(f).

risk arising from its transportation."<sup>139</sup> This sentence, however, does not suggest that the last three Restatement factors are met, but instead that the hazardousness of the activity calls for strict liability even if they are not met. By virtually ignoring the last three Restatement (Second) factors, the *Siegler* court implied that they are of little or no significance in determining whether a particular hazardous activity should be subject to strict liability. Finally, *Siegler* also marks the explicit introduction of the loss spreading policy into Washington's hazardous activity case law.<sup>140</sup> In a concurring opinion, joined by three other justices, Justice Rosellini stated that "a good reason to apply [strict liability], which is not mentioned in the majority opinion, is that the commercial transporter can spread the loss among his customers—who benefit from the extrahazardous use of the highways."<sup>141</sup> Thus, the loss spreading policy, which has played a prominent role in strict products liability developments,<sup>142</sup> was also seen as important to hazardous activity cases.

A subsequent decision of the Washington Supreme Court similarly stands at odds with the Restatement (Second). In its 1977 decision in *Langan v. Valicopters, Inc.*<sup>143</sup> the court applied strict liability to the activity of crop dusting when defendant's pesticide had settled on a neighbor's organic farm. The court stated that it had previously "adopted the Restatement (Second) . . . , [that it had] considered each of the factors listed in the Restatement . . . , [and that] in this case, each test of the Restatement is met."<sup>144</sup> This is a remarkable conclusion. The court, in its opinion, "[recognized] the prevalence of crop dusting and [acknowledged that] it is ordinarily done in large portions of the Yakima Valley [and that] 287 aircraft were used in 1975."<sup>145</sup> These acknowledged facts cast doubt on the applicability of the last three Restatement (Second) factors.<sup>146</sup> A

139. *Siegler*, 81 Wash. 2d at 459, 502 P.2d at 1187.

140. See *infra* text accompanying note 157 (discussing a later case relying on this concurring opinion).

141. *Siegler*, 81 Wash. 2d at 460, 502 P.2d at 1188 (Rosellini, J., concurring). In his *Siegler* concurrence Justice Rosellini suggested that strict liability should not apply when an explosive substance escapes due to the intervention of an "outside force beyond the control of the manufacturer, the owner, or the operator of the vehicle hauling it"—for example, due to a collision with another vehicle that is negligently driven. *Id.* But see RESTATEMENT (SECOND) OF TORTS § 522 (1977) (rejecting such a limitation on strict liability). In *New Meadows Holding Co. v. Washington Water Power Co.*, 102 Wash. 2d 495, 504, 687 P.2d 212, 217 (1984) (Rosellini, J., dissenting), Justice Rosellini urged the court to apply strict liability to the escape of natural gas from pipelines. In that case the leak in the gas line might have been caused by a company that years earlier had laid underground telephone cable. *Id.* at 497, 687 P.2d at 214. Justice Rosellini urged the application of strict liability because of the "risks that may occur [due to] negligent excavators . . . ," analogizing those risks to the risks in the "transport of natural gas [due to] negligent drivers." *Id.* at 505, 687 P.2d at 218 (Rosellini, J., dissenting). For a description of the applicability of strict liability to the escape of natural gas, see *infra* note 435.

142. See *infra* note 250 and accompanying text.

143. 88 Wash. 2d 855, 567 P.2d 218 (1977).

144. *Id.* at 860-61, 567 P.2d at 221-22 (emphasis added).

145. *Id.* at 864, 567 P.2d at 223.

146. RESTATEMENT (SECOND) OF TORTS § 520(d)-(f) (1977); see *Bennett v. Larson Co.*, 118 Wis. 2d 681, 348 N.W.2d 540 (1984) (rejecting strict liability for pesticide spraying); see also *Koos v. Roth*, 293 Or. 670, 682, 652 P.2d 1255, 1263 (1982) ("If there is an appropriate location for aerial crop dusting it is over open agricultural fields."); 3 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 14.16, at 338 (2d ed. 1986) (noting that "[a]s the sprays have become better known, their application has become more and more a matter of 'common usage'").

Careful analysis of the *Langan* court's treatment of these factors demonstrates that *Langan*, like the earlier *Siegler* case, stands for the proposition that the Restatement (Second) is not the proper focus for strict liability analysis.

Regarding the requirement that an activity not occur as a matter of common usage, the *Langan* court first quoted the Restatement (Second) definition: "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."<sup>147</sup> The court then recited the above quoted facts and simply characterized the presence of 287 aircraft as indicative that crop dusting was "carried on by only a comparatively small number of persons."<sup>148</sup> It thus concluded that crop dusting was "not a matter of common usage."<sup>149</sup> The court offered no more than this terse explanation, and it did not attempt to explain why the operation of so many aircraft did not constitute common usage. When read in conjunction with the *Siegler* trucking case,<sup>150</sup> *Langan* suggests that common usage, at least as that term normally would be defined, does not defeat strict liability.

Similarly, the *Langan* court's treatment of the appropriateness to the place criterion suggests that this factor also has no place in contemporary strict liability analysis. Although conceding that crop dusting was prevalent and done in large portions of the Yakima Valley,<sup>151</sup> the court's entire statement on the appropriateness to the place factor appears in one sentence: "Given the nature of organic farming, the use of pesticides adjacent to such an area must be considered an activity conducted in an inappropriate place."<sup>152</sup> In effect, the court found strict liability despite the common sense intuition that crop dusting may be quite appropriate in a valley in which its use by farmers is prevalent. In tandem with the earlier application of strict liability to trucking on highways,<sup>153</sup> the *Langan* decision suggests that the Washington Supreme Court implicitly applies strict liability to hazardous activities that are appropriate to the place in which they occur.

The *Langan* court's treatment of the final Restatement (Second) factor, which assesses an activity's value to the community, suggests that this factor also does not constitute a part of that court's strict liability analysis. Again, the court asserted that this factor was met, but its analysis suggested not only that the court ignored this factor but also that the loss spreading policy played a role in its decision. The *Langan* court stated, "There is no doubt that pesticides are socially valuable in the control of insects, weeds and other pests. They may benefit society by increasing production."<sup>154</sup> Unembarrassed by its departure from Restatement analysis, the court went on to define the Restatement (Sec-

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147. *Langan*, 88 Wash. 2d at 864, 567 P.2d at 223 (quoting RESTATEMENT (SECOND) OF TORTS § 520 (Tent. Draft No. 10, 1964)).

148. *Id.*

149. *Id.*

150. See *supra* notes 131-41 and accompanying text.

151. *Langan*, 88 Wash. 2d at 864, 567 P.2d at 223.

152. *Id.*

153. See *supra* notes 131-41 and accompanying text (discussing *Siegler*).

154. *Langan*, 88 Wash. 2d at 865, 567 P.2d at 223.

ond) value to the community factor so that, contrary to the intent of the Restatement (Second), it did not limit liability but became instead a vehicle for implementation of the loss spreading policy.

First, the *Langan* court hinted at its hostility toward the restrictive approach of the Restatement (Second):

As a criterion for determining strict liability, [the value to the community] factor has received some criticism among legal writers. [Professors Harper and James in their 1968 supplement] suggest that [this factor] is not a true element of strict liability: "The justification for strict liability, in other words, is that useful but dangerous activities must pay their own way."<sup>155</sup>

The court then converted this Restatement (Second) factor into an inquiry entailing loss spreading and enterprise liability considerations. The court stated that in choosing between strict liability and negligence, "we must ask who should bear the loss caused by the pesticides,"<sup>156</sup> citing for this proposition Justice Rosellini's concurring opinion in *Siegler*, which had relied on the loss spreading policy.<sup>157</sup> The *Langan* court then noted the harm to plaintiff, and contrasted the fact that defendants, "on the other hand, will all profit from the continued application of pesticides. Under these circumstances, there can be an equitable balancing of social interests only if [defendants] are made to pay for the consequences of their acts."<sup>158</sup>

The Washington Supreme Court's *Siegler* and *Langan* decisions illustrate a developing body of strict liability doctrine, which focuses on the hazardousness of an enterprise's activity and the loss spreading policy. This case law has developed independently of and more expansively than the Restatement.<sup>159</sup> Although the Washington court purported to adhere to the Restatement (Second),<sup>160</sup> other jurisdictions have explicitly rejected the restrictions of the Re-

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155. *Id.* at 864, 567 P.2d at 223 (quoting 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 14.4 comment (Supp. 1968)).

156. *Id.* at 865, 567 P.2d at 223.

157. *Siegler*, 81 Wash. 2d at 448, 502 P.2d at 1188 (Rosellini, J., concurring); see *supra* text accompanying note 141.

158. *Langan*, 88 Wash. 2d at 865, 567 P.2d at 223. For further discussion of *Langan*, see *infra* text accompanying notes 359-62.

159. In *Cities Serv. Co. v. State*, 312 So. 2d 799 (Fla. Dist. Ct. App. 1975), a Florida appellate court applied strict liability to the operation of a phosphate rock mine in which defendant collected phosphate slimes in settling ponds. Approximately one billion gallons of slime had escaped due to a dam break. The court imposed strict liability even though defendant's property was located in an area that is the largest producer of phosphate rock in Florida, even though Florida produces 80% of the nation's marketable phosphate rock and one-third of world production, and even though the storing of phosphate slimes in diked settling ponds is an essential part of the traditional method of mining phosphate rock. Conceding that the appropriateness to the place and value to the community factors cut against strict liability, the court wrote:

In the final analysis, we are impressed by the magnitude of the activity and the attendant risk of enormous damage. The impounding of billions of gallons of phosphatic slimes behind earthen walls which are subject to breaking even with the exercise of the best of care strikes us as being both 'ultrahazardous' and 'abnormally dangerous,' as the case may be . . . . We conclude that the Cities Service slime reservoir constituted a nonnatural use of the land such as to invoke the doctrine of strict liability.

*Id.* at 803.

160. In *New Meadows Holding Co. v. Washington Water Power Co.*, 102 Wash. 2d 495, 687

statement and Restatement (Second), together with their underlying premises.

The Oregon Supreme Court has expressly deviated from the Restatement approach in two important decisions. In *Loe v. Lenhardt*,<sup>161</sup> a 1961 crop dusting case cited by the Washington Supreme Court in *Langan*,<sup>162</sup> the Oregon Supreme Court flatly rejected the proposition that common usage could defeat the claim that crop dusters should be held strictly liable for their activities: "However common may be the practice of spraying chemicals by airplane, the prevalence of the practice does not justify treating the sprayer and the 'sprayee' as the law of negligence treats motorists, leaving each to fend for himself unless one can prove negligence against the other."<sup>163</sup>

In *Koos v. Roth*<sup>164</sup> the Oregon court in 1982 expressed dissatisfaction with the Restatement (Second), specifically with the value to the community and appropriateness to place factors. In *Koos* the court applied strict liability to a farmer who employed field burning as an agricultural technique. Defendant and amici curiae had "press[ed] upon [the court] the economic importance of the grass seed industry, which makes extensive use of field burning, and of the forest products industry, which is concerned about the potential implications for its practices of burning trash and debris."<sup>165</sup> The court, however, expressly rejected the Restatement (Second) value to the community factor. It found "at least two reasons not to judge civil liability for unintended harm by a court's view of the utility or value of the harmful activity."<sup>166</sup> First, "[u]tility and value often are subjective and controversial. They will be judged differently by those who profit from an activity and those who are endangered by it, and between one locality and another."<sup>167</sup> Second, the court noted that "the conclusion does not follow from the premise."<sup>168</sup> The court pointed out that "[i]n an action for damages, the question is not whether the activity threatens such harm that it should not be continued."<sup>169</sup> Rather, the

question is who shall pay for harm that has been done. The loss has

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P.2d 212 (1984), the Washington Supreme Court refused to apply strict liability to the underground piping of natural gas. The majority wrote that in Washington "[s]trict liability is imposed when the conditions of the Restatement (Second) . . . are met," *id.* at 500, 687 P.2d at 215, and concluded they were not met in this case. *Id.* at 501, 687 P.2d at 216. Justice Rosellini, joined by two other justices, dissented, writing that

the court in *Siegler* did not feel compelled to slavishly total the number of factors in favor of imposition against those that did not. Instead, the court recognized the extreme hazard involved with the handling of this product and concluded sound policy dictated imposition of strict liability. In the same way, sound policy considerations dictate imposition of strict liability here.

*Id.* at 505-06, 587 P.2d at 218 (Rosellini, J., dissenting). For a discussion of *New Meadows*, which suggests that courts are likely to apply a strict liability rule to the underground piping of natural gas, see *infra* note 435.

161. 227 Or. 242, 362 P.2d 312 (1961).

162. *Langan*, 88 Wash. 2d at 860, 567 P.2d at 220-21.

163. *Loe*, 227 Or. at 253, 362 P.2d at 318.

164. 293 Or. 670, 652 P.2d 1255 (1982).

165. *Id.* at 679, 652 P.2d at 1261.

166. *Id.*

167. *Id.*

168. *Id.* at 680, 652 P.2d at 1262.

169. *Id.*

occurred. It is a cost of the activity whoever bears it. To say that when the activity has great economic value the cost should be borne by others is no more or less logical than to say that when the costs of an activity are borne by others it gains in value.<sup>170</sup>

The *Koos* court also disapproved of the Restatement (Second) appropriateness to place factor. It emphasized that "the focus in our cases has been on assessing abnormal hazards by their potential for harm of exceptional magnitude or probability despite the utmost of care."<sup>171</sup> The court recognized that "[t]his potential may, of course, differ with the place where the activity is conducted."<sup>172</sup> However, the court made clear that "an activity is not otherwise immune from strict liability because it is 'appropriate' in its place."<sup>173</sup>

In 1978 the Alaska Supreme Court contributed to the growing body of contemporary hazardous activity cases. In *Yukon Equipment, Inc. v. Fireman's Fund Insurance Co.*<sup>174</sup> the court reached the unremarkable conclusion that strict liability should be applied to the detonation of a magazine of explosives.<sup>175</sup> The path the court took to reach this conclusion, however, is significant. Defendant argued that the last two factors of the Restatement (Second)—appropriateness to the place and value to the community—should preclude strict liability.<sup>176</sup> The court disagreed and concluded that the Restatement (Second) could justify strict liability in such a case.<sup>177</sup> The opinion, however, reached beyond this relatively limited conclusion.

The *Yukon* court expressly disapproved of the appropriateness to the place factor of the Restatement (Second), and employed an analysis apparently influenced by enterprise liability considerations. The court stated that the

reasons for imposing absolute liability on those who have created a grave risk of harm to others by storing or using explosives are largely independent of considerations of locational appropriateness. We see no reason for making a distinction between the right of a homesteader to recover when his property has been damaged by a blast set off in a

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170. *Id.*

171. *Id.* at 680, 652 P.2d at 1263. Even more recently, in *Burkett v. Freedom Arms, Inc.*, 299 Or. 551, 704 P.2d 118 (1985), the court stated that it "has never explicitly relied upon the six Restatement factors in determining whether a given activity is abnormally dangerous." *Id.* at 556, 704 P.2d at 120 (design, marketing, and sale of easily concealed handgun not abnormally dangerous activity). The court wrote that it "does not necessarily adhere to the six factors listed in section 520 when determining whether an activity qualifies as abnormally dangerous." *Id.* at 557, 704 P.2d at 121. With respect to *Burkett's* handgun holding, compare *Kelley v. R.G. Indus.*, 304 Md. 124, 497 A.2d 1143 (1985) (manufacturer and marketer of "Saturday Night Special" strictly liable, though not on abnormally dangerous theory); see also *Richman v. Charter Arms Corp.*, 571 F. Supp. 192 (E.D. La. 1983) (manufacture and marketing of handguns can constitute ultrahazardous activity), *aff'd in part and rev'd in part*, *Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985) (marketing of handguns not ultrahazardous activity).

172. *Koos*, 293 Or. at 682, 652 P.2d at 1263.

173. *Id.* For a discussion of the court's treatment of the "hazardousness" concept, see *infra* notes 342-48 and accompanying text. For further discussion of *Koos*, see *infra* text accompanying notes 342-47, 369-75.

174. 585 P.2d 1206 (Alaska 1978).

175. *Id.* at 1211-12.

176. *Id.* at 1209.

177. *Id.* at 1211-12.



remote corner of the state, and the right to compensation of an urban resident whose home is destroyed by an explosion originating in a settled area.<sup>178</sup>

The court suggested an enterprise liability rationale for this position: "In each case, the loss is properly to be regarded as a cost of the business of storing or using explosives."<sup>179</sup>

By explicitly disapproving of the appropriateness to place factor of the Restatement (Second), the Alaska court joined the Oregon court in making explicit that which was implicit in Washington's *Siegler* and *Langan* decisions.<sup>180</sup> The Alaska Supreme Court, however, went even further and expressed fundamental dissatisfaction with the entire Restatement (Second) framework of analysis. The court correctly perceived that the Restatement (Second) factors resemble negligence considerations, restrict the growth of strict liability rules, and thwart enterprise liability principles. It stated that the "Restatement (Second) approach requires an analysis of degrees of risk and harm, difficulty of eliminating risk, and appropriateness of place, before absolute liability may be imposed. Such factors suggest a negligence standard."<sup>181</sup> In the court's view

[a]bsolute liability is imposed on those who store or use explosives because they have created an unusual risk to others. As between those who have created the risk for the benefit of their own enterprise and those whose only connection with the enterprise is to have suffered damage because of it, the law places the risk of loss on the former.<sup>182</sup>

Based on this perspective the *Yukon* court rejected the entire Restatement (Second) framework in explosives cases: "[W]e do not believe that the Restatement (Second) approach should be used in cases involving the use or storage of explosives."<sup>183</sup> The court preferred to rest its strict liability holding on existing case law, "adher[ing] to the rule of *Exner v. Sherman Power Construction Co.*<sup>184</sup> and its progeny imposing absolute liability in such cases. . . . [I]n cases involving the storage and use of explosives we take [the] question to have been resolved by more than a century of judicial decisions."<sup>185</sup>

Even though the California Supreme Court has not ruled on the applicability of the hazardous activity strict liability doctrine since 1948, it has contributed significantly to the expansive body of case law that stands in contrast to the restrictive Restatement approach.<sup>186</sup> Two of its early cases, *Green v. General*

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178. *Id.* at 1211.

179. *Id.*

180. See *supra* notes 131-58 and accompanying text. The authors of the Prosser and Keeton hornbook, citing *Yukon*, argue that appropriateness to the surroundings "is of doubtful importance on the question of whether one should be strictly liable when engaging in a highly dangerous activity." PROSSER & KEETON, *supra* note 1, § 78, at 555.

181. *Yukon*, 585 P.2d at 1211.

182. *Id.* at 1212.

183. *Id.* at 1211.

184. 54 F.2d 510 (2d Cir. 1931) (A. Hand, J.) (imposing absolute liability on storage and use of explosives).

185. *Yukon*, 585 P.2d at 1211.

186. See Levy & Ursin, *Tort Law in California: At the Crossroads*, 67 CALIF. L. REV. 497, 498-500 (1979).

*Petroleum Corp.*,<sup>187</sup> decided in 1928, and *Luthringer v. Moore*,<sup>188</sup> decided in 1948, still represent leading precedents in this area of the law.<sup>189</sup> Like the decisions previously discussed, they appear inconsistent with the Restatement. Moreover, because *Green* was decided prior to the promulgation of the first Restatement and *Luthringer* prior to the Restatement (Second), these cases suggest that both Restatements fail to "restate" the law. Developments in California subsequent to *Luthringer* confirm that California, under the influence of the loss spreading policy, rejects the Restatement approach.

In *Green* the California Supreme Court in 1928 extended strict liability beyond blasting and explosives cases to the nonnegligent operations of an oil company when, despite due care, the company's oil well had "blown out" and had cast debris on plaintiff's property. The breadth of the *Green* court's previously quoted strict liability principle,<sup>190</sup> together with its hint of an "enterprise" liability rationale, stand in marked contrast to the first Restatement. Furthermore, the *Green* holding itself appears inconsistent with the Restatement's common usage criterion.<sup>191</sup>

Drilling for oil, especially in an area where oil is prevalent, might be considered a matter of common usage and might well be carried on "by many people in the community."<sup>192</sup> The *Green* court's holding predated the first Restatement, which accordingly "explained" that "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 thereto are characteristic of oil lands and not lands in general."<sup>193</sup> However, this "explanation" demonstrates tension between *Green* and the Restatement approach. It could easily have been said that the very nature of railroads and the essential interest of the public in railroad transportation of goods require that railways be constructed, but the dangers incident thereto are characteristics of railroads and not lands in general. But, of course, the drafters of the first Restatement did not envision imposing strict liability on railroads.<sup>194</sup>

The 1948 *Luthringer* decision extended the strict liability rule to a professional fumigator. In *Luthringer* gases had escaped from a fumigated basement into an adjoining pharmacy, injuring plaintiff.<sup>195</sup> The court, approving strict liability in this situation, quoted extensively from the first Restatement.<sup>196</sup> Its holding, however, went beyond previous applications of strict liability. Moreover, although the court discussed both *Rylands v. Fletcher*<sup>197</sup> and the Restatement, it phrased its opinion carefully so that it was independent of both lines of

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187. 205 Cal. 328, 270 P. 952 (1928).

188. 31 Cal. 2d 489, 190 P.2d 1 (1948).

189. See R. EPSTEIN, C. GREGORY & H. KALVEN, *supra* note 3, at 590.

190. See *supra* text accompanying note 60.

191. See RESTATEMENT OF TORTS § 520(b) (1938).

192. RESTATEMENT OF TORTS § 520 comment e (1938).

193. *Id.*

194. See *supra* notes 73-81 and accompanying text.

195. *Luthringer*, 31 Cal. 2d 489, 492-94, 190 P.2d 1, 3 (1948).

196. *Id.* at 498-500, 190 P.2d at 6-8.

197. 3 L.R.-E. & I. App. 330 (1868). *Rylands* is discussed *supra* text accompanying notes 22-30.

authority. Indeed, one commentator at the time suggested that the court intended to leave its doctrine in "a more flexible form than the [first] Restatement."<sup>198</sup>

In its discussion of *Rylands* the *Luthringer* court noted that subsequent English cases had limited the doctrine of strict liability. The court then carefully declined to rest its decision on *Rylands*.<sup>199</sup> The court also quoted at length from the first Restatement.<sup>200</sup> However, in reaching its decision to apply strict liability to fumigation, the court returned to the broad pre-Restatement language of *Green*: "[T]here can be no doubt that the case of *Green v. General Petroleum Corp.* . . . enunciated a principle of absolute liability which is applicable to the instant case."<sup>201</sup> Regarding what that principle of strict liability entailed, the court first quoted the broad language from *Green* that has been previously set out.<sup>202</sup> The *Luthringer* opinion then placed its own gloss on this statement of law and policy: "The important factor is that certain activities under certain conditions may be so hazardous to the public generally, and of such relative infrequent occurrence, that it may call for strict liability as the best public policy."<sup>203</sup>

The *Luthringer* holding,<sup>204</sup> like that of *Green*, appears inconsistent with the Restatement's admonition that strict liability not apply to activities that are a matter of common usage.<sup>205</sup> Like the Washington Supreme Court's *Siegler* and *Langan* decisions a quarter of a century later,<sup>206</sup> however, the court in *Luthringer* purported to find its holding consistent with the common usage criterion.<sup>207</sup> Fumigation, however, would seem to be a matter of common usage, as demonstrated by the frequency with which "tented" houses are fumigated, let alone the frequency of less conspicuous forms of fumigation.<sup>208</sup> The *Luthringer* court stated that although gas "may be used commonly by fumigators, . . . they are relatively few in number and are engaged in a specialized activity. It is not carried on generally by the public, especially under circumstances where many people are present, thus enhancing the hazard, nor is its use a common everyday practice."<sup>209</sup> This quoted language on its face would apply to railroad as well as fumigator activities. Although railroad companies commonly use trains, trains are relatively few in number and railroad companies are engaged in a specialized activity. This activity is not carried on generally by the public. Tension thus exists between the *Green* and *Luthringer* holdings and the Restatement's re-

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198. Comment, *supra* note 72, at 282.

199. *Luthringer*, 31 Cal. 2d at 500, 190 P.2d at 8.

200. *Id.* at 498-500, 190 P.2d at 7-8.

201. *Id.* at 500, 190 P.2d at 8.

202. See *supra* text accompanying note 60.

203. *Luthringer*, 31 Cal. 2d at 500, 190 P.2d at 8.

204. *Id.*

205. RESTATEMENT OF TORTS § 520(b) (1938).

206. See *supra* notes 131-58 and accompanying text.

207. *Luthringer*, 31 Cal. 2d at 500, 190 P.2d at 8.

208. See R. EPSTEIN, C. GREGORY & H. KALVEN, *supra* note 3, at 581.

209. *Luthringer*, 31 Cal. 2d at 500, 190 P.2d at 8.

quirement that activities subjected to strict liability not occur as a matter of common usage.

Furthermore, the holdings of *Green* and *Luthringer*, which predate the Restatement (Second), conflict with its final two factors—appropriateness to the place and value to the community.<sup>210</sup> Clearly, both oil wells and fumigation are of value to the community. Similarly, one only drills for oil where it is thought to exist, and fumigation is only conducted where structures are thought to need fumigating. Indeed, there is no indication that either the *Green* or the *Luthringer* court viewed the activity in question as inappropriate to the place. Taken together, *Green* and *Luthringer* suggest not only that contemporary courts are charting a course independent of the Restatement, but also that the Restatement does not “restate” earlier leading cases.

In two important respects, *Green* and *Luthringer* also lay the groundwork for the introduction of the loss spreading policy into hazardous activity cases. First, the *Green* court broadly stated its strict liability rule and used the term “enterprise” to characterize oil drilling activity.<sup>211</sup> This language suggests an emerging “enterprise liability” rationale that would extend beyond the traditional applications of strict liability, such as blasting and storage of explosives, to other activities.<sup>212</sup> Second, the California Supreme Court in *Green* supported its strict liability rule by stating that the oil drilling defendant “should, in all fairness, be required to compensate the other for the damage done.”<sup>213</sup> Then in *Luthringer*, twenty years later, the court offered a new formulation to explain the desirability of strict liability: “The important factor is that certain activities under certain conditions may be so hazardous to the public generally, and of such relative infrequent occurrence, that it may well call for strict liability as the best public policy.”<sup>214</sup> The shift from the *Green* court’s emphasis on “fairness” to the *Luthringer* court’s emphasis on “public policy” might seem relatively innocuous. *Luthringer*, however, was a 1948 decision of the California Supreme Court whose leading member, Justice Roger Traynor, just four years previously had urged the adoption of strict products liability rules premised on the “public policy” that accident costs should be spread among the public.<sup>215</sup>

The *Luthringer* court’s reference to public policy was a harbinger of things to come. With the ascendancy of the loss spreading policy during the tort revolution of the past quarter century, it was inevitable that this policy would also take hold in California hazardous activity cases. In a 1967 decision, *Smith v. Lockheed Propulsion Co.*,<sup>216</sup> the California Court of Appeal applied hazardous activity strict liability to the test firing of a rocket motor that resulted in damage to nearby property. The *Smith* court recognized the significance of the *Luthr-*

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210. RESTATEMENT (SECOND) OF TORTS § 520(e) & (f) (1977).

211. See *supra* text accompanying note 60.

212. See *infra* notes 327-437 and accompanying text.

213. *Green*, 205 Cal. at 334, 270 P. at 955 (emphasis added).

214. *Luthringer*, 31 Cal. 2d at 500, 190 P.2d at 8 (emphasis added).

215. *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 461-62, 150 P.2d 436, 440 (1944) (Traynor, J., concurring).

216. 247 Cal. App. 2d 774, 56 Cal. Rptr. 128 (1967).

inger court's emphasis on public policy; after determining that the rocket test firing entailed an inherent risk that defendant could not eliminate by the exercise of due care, the court, citing *Luthringer*, stated that "[i]n these circumstances, public policy calls for strict liability."<sup>217</sup> The court then elaborated on what "public policy" meant in 1967: "Defendant, who is engaged in the enterprise for profit, is in a position best able to administer the loss so that it will ultimately be borne by the public."<sup>218</sup>

The implications of these California cases were made clear in a 1975 federal court decision. In *Chavez v. Southern Pacific Transportation Co.*<sup>219</sup> the United States District Court for the Eastern District of California, applying California law, placed heavy emphasis on the loss spreading policy and rejected a specific Restatement restriction on strict liability. *Chavez* demonstrates the similarity of California hazardous activity law to the law of the states previously discussed. In *Chavez* defendant railroad was hauling bombs pursuant to a naval contract when the bombs exploded. Defendant pointed out that the first Restatement, the Restatement (Second), and the apparent weight of judicial authority specifically precluded strict liability when common carriers are required to transport explosives due to their status as common carriers.<sup>220</sup> The *Chavez* court had to determine whether California courts would adhere to this "public duty exception" to strict liability.<sup>221</sup> After an extensive survey of California tort law and policy, the court concluded "that California would . . . find that carriers engaged in ultrahazardous activity are subject to strict liability," despite the clearly contradictory Restatement rule.<sup>222</sup>

The *Chavez* court employed a particularly illuminating methodology to reach its conclusion. The court first traced the history of hazardous activity strict liability in California law. It viewed the 1928 *Green*<sup>223</sup> case as adopting a strict liability rule based on a "fairness" rationale.<sup>224</sup> This fairness rationale, however, "has been undergoing a metamorphosis."<sup>225</sup> The 1948 *Luthringer*<sup>226</sup> case justified its "result by reference to an unspecified public policy."<sup>227</sup> *Smith v. Lockheed*,<sup>228</sup> in turn, "gave substance to the vague reference in *Luthringer* to the 'best public policy,' and provided California courts with a rationale other

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217. *Id.* at 785, 56 Cal. Rptr. at 137 (citing *Luthringer*, 31 Cal. 2d at 500, 190 P.2d at 8).

218. *Id.*

219. 413 F. Supp. 1203 (E.D. Cal. 1976).

220. *Id.* at 1213; see *Indiana Harbor Belt Ry. v. American Cyanamid Co.*, 517 F. Supp. 314 (N.D. Ill. 1981) (applying strict liability to carrier of hazardous chemical); RESTATEMENT OF TORTS § 521 (1938) (stating rule); RESTATEMENT (SECOND) OF TORTS § 521 (1977) (stating rule); see also *EAC Timberline v. Pisces, Ltd.*, 745 F.2d 715 (1st Cir. 1984) (applying negligence standard to ship carrying explosives).

221. *Chavez*, 413 F. Supp. at 1207-12.

222. *Id.* at 1214.

223. 205 Cal. 328, 270 P. 952 (1928).

224. *Chavez*, 413 F. Supp. at 1213-14.

225. *Id.* at 1207.

226. 31 Cal. 2d 489, 190 P.2d 1 (1948).

227. *Chavez*, 413 F. Supp. at 1207.

228. 247 Cal. App. 2d 774, 56 Cal. Rptr. 128 (1967).

than the primitive appeal to 'fairness.'"<sup>229</sup> Thus, the *Chavez* court concluded that "one public policy now recognized in California as justifying the imposition of strict liability for the miscarriage of an ultrahazardous activity is the social and economic desirability of distributing the losses, resulting from such activity, among the general public."<sup>230</sup> The court also analyzed the California products liability cases from Justice Traynor's 1944 concurrence in *Escola v. Coca-Cola Bottling Co.*<sup>231</sup> through the strict products liability developments of the 1960s and 1970s.<sup>232</sup> After documenting the central role of the loss spreading policy in California strict products liability, the *Chavez* court concluded that "the risk distribution justification for imposing strict liability is well suited to claims arising out of the conduct of ultrahazardous activity."<sup>233</sup>

After concluding that California law recognized a hazardous activity strict liability rule premised on the loss spreading policy, the *Chavez* court assessed the Restatement's exclusion of strict liability for common carriers acting under a public duty. The court first disposed of the argument that it must apply the Restatement's exclusion because California "adopted" the Restatement of Torts in *Luthringer*. The court correctly recognized that "[a]lthough [the California Supreme Court in *Luthringer*] quoted at length from the Restatement of Torts . . . , it reached its decision in reliance on the case of *Green v. General Petroleum Corp.* [and] by reference to . . . public policy . . . ."<sup>234</sup> Thus, the *Chavez* court concluded that the California Supreme Court has not adopted either the Restatement generally or its specific public duty rule.<sup>235</sup> It conceded, however, that if strict liability was "predicated . . . solely upon the 'fairness' rationale appearing in the *Green* case, it might well find that strict liability was inappropriate."<sup>236</sup> A fairness rationale suggests that strict liability is imposed because "an antisocial act is being redressed. Where the carrier has no choice but to accept dangerous cargo and engage in an ultrahazardous activity . . . [t]he carrier is innocent."<sup>237</sup> The *Chavez* court observed, however, that the loss spreading policy had supplanted the fairness rationale in California. The court concluded that

there is no logical reason for creating a "public duty" exception when the rationale for subjecting the carrier to absolute liability is the carrier's ability to distribute the loss to the public. Whether . . . free to reject or bound to take the explosive cargo . . . [defendant] is in a position to pass along the loss to the public.<sup>238</sup>

*Chavez* thus demonstrates the implications of contemporary judicial methodology in hazardous activity strict liability cases. As courts increasingly recog-

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229. *Chavez*, 413 F. Supp. at 1208.

230. *Id.*

231. 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J. concurring).

232. *Chavez*, 413 F. Supp. at 1208-09.

233. *Id.* at 1209.

234. *Id.* at 1207.

235. *Id.* at 1212-14.

236. *Id.* at 1213.

237. *Id.* at 1213-14.

238. *Id.* at 1214.

nize the applicability of the loss spreading policy to hazardous activity cases, they are likely to reject Restatement restrictions on strict liability and to apply strict liability in situations in which it would be precluded by the Restatement.<sup>239</sup>

### B. Contemporary Tort Policy

As this Article has explained,<sup>240</sup> when the idea of imposing strict liability on hazardous activities first surfaced in the nineteenth century, it met a hostile reception in courts that saw even negligence liability as a threat to the nation's economic well being.<sup>241</sup> The drafters of the first Restatement, in turn, were hostile to strict liability and to the loss spreading policy that could lead to the adoption of new strict liability rules.<sup>242</sup> The Restatement's restrictions on strict liability may have fairly represented the bulk of case law through the 1930s, even if they conflicted with the expansive implications of cases such as *Bridgeman-Russell, Green, and Exner*.<sup>243</sup>

The first Restatement,<sup>244</sup> and the even greater restrictiveness of the Restatement (Second),<sup>245</sup> however, contrast sharply with tort developments of the past quarter century. During this period courts have expanded tort liability dramatically in an attempt to protect individuals from unexpected hazards.<sup>246</sup> In the context of these developments, the treatment of the Restatement by contemporary courts is hardly surprising.

The strict products liability decisions serve as the most conspicuous example of this modern development; these decisions also articulate most clearly the policies that guide the development of contemporary tort law.<sup>247</sup> Courts have emphasized that strict products liability serves the loss spreading policy. As Justice Traynor stated in his classic *Escola* concurrence, the "cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."<sup>248</sup> During the past quarter century, this loss spreading policy has moved from a status of

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239. The Iowa Supreme Court in *National Steel Serv. Center, Inc. v. Gibbons*, 319 N.W.2d 269 (Iowa 1982), adopted the *Chavez* result and rejected the common carrier exception. Like the *Chavez* court, the Iowa Supreme Court based its holding on the loss spreading policy: "We believe it is more likely in the generality of cases that a carrier will be better able to bear the loss than the party whose property is damaged. Moreover, the carrier is in a position to spread the risk of liability among the beneficiaries of its services." *Id.* at 272. In addition, the "carrier was in a better position to investigate and identify the cause of the accident. When an accident destroys the evidence of causation, it is fairer for the carrier to bear the cost of that fortuity." *Id.* Finally, "the carrier is in a superior position to develop safety technology to prevent such accidents, and assessment of accident costs is one means of inducing such developments." *Id.*

240. See *supra* text accompanying notes 22-33.

241. See *supra* text accompanying notes 34-47.

242. See *supra* text accompanying notes 65-93.

243. For discussion of these cases, see *supra* text accompanying notes 51-63.

244. See RESTATEMENT OF TORTS §§ 519, 520 (1938).

245. RESTATEMENT (SECOND) OF TORTS §§ 519, 520 (1977).

246. See Schwartz, *supra* note 3, at 963.

247. Levy & Ursin, *supra* note 186, at 501-04.

248. *Escola*, 24 Cal. 2d at 462, 150 P.2d at 441 (Traynor, J., concurring).

questionable legitimacy<sup>249</sup> to wide acceptance as a justification for strict products liability.<sup>250</sup> In addition, courts have viewed strict products liability as intrinsically fair because it recognizes contemporary expectations of safety by awarding compensation when a product defect violates these expectations.<sup>251</sup> Finally, strict liability creates desirable economic incentives for product safety.<sup>252</sup> Courts have emphasized that public policy "demands that responsibil-

249. See Seavey, *Cardozo*, *supra* note 82, at 373; Ursin, *supra* note 1, at 287-95; see generally Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959) (expressing skepticism toward loss spreading policy).

250. Courts and commentators have widely accepted the loss spreading policy articulated by Justice Traynor in his seminal *Escola* concurring opinion, 24 Cal. 2d at 462, 150 P.2d at 441 (Traynor, J., concurring), as a justification for strict products liability. See, e.g., PROSSER & KEETON, *supra* note 1, § 98 at 692-94; Ursin, *supra* note 1, at 301-03. California Supreme Court justices have expressly reiterated the loss spreading rationale in leading tort decisions and opinions. See, e.g., *Sindell v. Abbott Laboratories, Inc.*, 26 Cal. 3d 588, 611-14, 607 P.2d 924, 936-37, 163 Cal. Rptr. 132, 144-45 (Mosk, J.) (imposing industry-wide liability for the drug DES), *cert. denied*, 449 U.S. 912 (1980); *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 736-38, 575 P.2d 1162, 1168-69, 144 Cal. Rptr. 380, 386-87 (1978) (Richardson, J.) (applying comparative fault to strict products liability); *Ray v. Alad Corp.*, 19 Cal. 3d 22, 29-34, 560 P.2d 3, 8-11, 136 Cal. Rptr. 574, 579-82 (1977) (Wright, J.) (liability of successor corporation); *Haft v. Lone Palm Hotel*, 3 Cal. 3d 756, 765-66, 478 P.2d 465, 469-70, 91 Cal. Rptr. 745, 749-50 (1970) (Tobriner, J.) (shifting burden of proof on causation to defendant); *Price v. Shell Oil Co.*, 2 Cal. 3d 245, 248, 466 P.2d 722, 723, 85 Cal. Rptr. 178, 179 (1970) (Sullivan, J.) (extending strict liability to commercial bailors); *Clark v. Gibbons*, 66 Cal. 2d 399, 420-21, 426 P.2d 525, 540, 58 Cal. Rptr. 125, 140 (1967) (Tobriner, J., concurring) (proposing strict liability rule for specified accidents during medical treatment); *Seely v. White Motor Co.*, 63 Cal. 2d 9, 20-21, 403 P.2d 145, 152-53, 45 Cal. Rptr. 17, 24-25 (1965) (Peters, J., concurring in part and dissenting in part) (arguing for applicability of strict liability to economic harm); *Greenman Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 62-63, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963) (Traynor, J.) (adopting strict products liability); see also *Hoyem v. Manhattan Beach School Dist.*, 22 Cal. 3d 508, 524-27, 585 P.2d 851, 861, 150 Cal. Rptr. 1, 11-12 (1978) (Clark, J., concurring in part and dissenting in part) (lamenting role of loss spreading policy).

The loss distribution goal, if followed to its logical conclusion, suggests mechanisms for dealing with accident losses that would obviate the need for tort law. See P. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW 540-49, 628-31 (3d ed. 1980); G. CALABRESI, THE COSTS OF ACCIDENTS 46 (1970). Indeed, New Zealand recently has replaced its tort system with a comprehensive social insurance system for accident compensation. See Palmer, *Accident Compensation in New Zealand: The First Two Years*, 25 AM. J. COMP. L. 1 (1977). Courts, however, have relied on this policy to move tort doctrine away from its nineteenth-century bias against compensation and into conformance with contemporary values. 2 F. HARPER & F. JAMES, THE LAW OF TORTS 1069-70 n.5 (1956).

251. See *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 426, 573 P.2d 443, 455, 143 Cal. Rptr. 225, 237 (1978); Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function & Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974).

252. See, e.g., *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 262-63, 391 P.2d 168, 171-72, 37 Cal. Rptr. 896, 899-900 (1964); see also *Sindell v. Abbott Laboratories, Inc.*, 26 Cal. 3d 588, 611, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144 (1980) (safety incentives justify reducing plaintiff's burden of proving cause-in-fact), *cert. denied*, 449 U.S. 912 (1980). This posture toward the safety incentive effects of strict liability is largely consistent with the economic analysis of Professor Calabresi. See, e.g., Calabresi & Hirschhoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972). Courts, however, appear not to have relied heavily on technical economic analysis in their development of strict liability rules. See Traynor, *supra* note 3, at 366. Moreover, contemporary economic theory does not supply definitive answers regarding the safety incentive effects of strict liability, as opposed to negligence, rules. Compare Calabresi & Hirschhoff, *supra*, (economic theory supports strict liability) with Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205, 221 (1973) (economic theory provides no basis for preferring either negligence or strict liability). For views skeptical of economic analysis, see Gilmore, *Product Liability: A Commentary*, 38 U. CHI. L. REV. 103 (1970); Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905 (1980).

Another justification advanced for strict liability is that, even when present, negligence may be difficult to prove. See, e.g., *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 462-63, 150 P.2d 436, 443 (Traynor, J., concurring). The difficulty of proving negligence may, in turn, support the safety incentive argument for strict liability. A realistic view of the tort system suggests that a negligence



ity be fixed wherever it will most effectively reduce the hazards of life and health inherent in defective products that reach the market."<sup>253</sup> Product manufacturers are in a position to minimize the potential accident toll, and strict liability has created economic incentives for them to do so.<sup>254</sup>

Strict products liability does not represent a unique and isolated doctrinal development. The tort policies articulated in the products cases have influenced courts to expand liability throughout the tort system. Activities that nineteenth-century courts sheltered even from negligence liability now no longer receive such immunity.<sup>255</sup> Similarly, strict liability has expanded beyond manufacturers to include retailers,<sup>256</sup> wholesalers,<sup>257</sup> and even lessors of products.<sup>258</sup> Since the adoption of strict products liability in the 1960s, various proposals for new areas of strict liability have appeared,<sup>259</sup> and courts have rendered decisions that suggest such new applications.<sup>260</sup> Recently, the California Supreme Court adopted a new rule of landlord strict liability,<sup>261</sup> premised on the loss spreading, fairness, and safety considerations of the products cases.<sup>262</sup>

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standard often will not result in liability even when negligence, in fact, exists. Thus, in practice, strict liability is better suited to creating incentives for safety. See Calabresi & Hirschoff, *supra*, at 1060; Ursin, *supra* note 3, at 829-30; see generally PROSSER & KEETON, *supra* note 1, § 98, at 693 (difficulty of proving negligence as a reason for strict liability).

253. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 129, 501 P.2d 1153, 1159, 104 Cal. Rptr. 433, 439 (1972) (quoting *Escola*, 24 Cal. 2d at 462, 150 P.2d at 440 (Traynor, J., concurring)).

254. See Calabresi & Hirschoff, *supra* note 252, at 1055 *passim*.

255. Among the "immunity" doctrines that have been abolished are the following: Traditional governmental immunity, e.g., *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); charitable immunity, e.g., *Malloy v. Fong*, 37 Cal. 2d 356, 232 P.2d 241 (1951); intrafamily immunity, e.g., *Gibson v. Gibson*, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971) (parental immunity); contributory negligence, e.g., *Li v. Yellow Cab. Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); and land occupier rules, e.g., *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

256. See, e.g., *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); see also PROSSER & KEETON, *supra* note 1, § 100, at 706-07 (discussing retailer strict liability).

257. *Canifax v. Hercules Powder Co.*, 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965).

258. *Price v. Shell Oil Co.*, 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970); *Cintrone v. Hertz Truck Leasing and Rental Serv.*, 45 N.J. 434, 212 A.2d 769 (1965). In *Price* the court reasoned that lessors "are able to bear the cost of compensating for injuries resulting from defects by spreading the loss through an adjustment of the rental." *Price*, 2 Cal. 3d at 252, 466 P.2d at 726, 85 Cal. Rptr. at 182. Moreover, "the imposition of strict liability upon [the lessor] serves . . . as an incentive to safety." *Id.* at 252, 466 P.2d at 727, 85 Cal. Rptr. at 183. The court concluded that "the paramount policy to be promoted by the [strict products liability] rule is the protection of otherwise defenseless victims of manufacturing defects and the spreading throughout society of the cost of compensating them." *Id.* at 251, 466 P.2d at 725-26, 85 Cal. Rptr. at 181-82. The Prosser and Keeton hornbook concludes that strict liability of lessors "would be the generally accepted view today because there is no visible reason for any distinction between those engaged in the business of renting and those engaged in the business of selling." PROSSER & KEETON, *supra* note 1, § 104, at 719, § 104A, at 722.

259. See *Clark v. Gibbons*, 66 Cal. 2d 399, 414-21, 426 P.2d 525, 535-40, 58 Cal. Rptr. 125, 135-40 (1967) (Tobriner, J., concurring) (certain medical accidents); *Love*, *supra* note 6 (landlords); Traynor, *supra* note 3 (strict liability beyond products cases); Ursin, *supra* note 3 (business premises).

260. E.g., *Clark v. Gibbons*, 66 Cal. 2d 399, 426 P.2d 525, 58 Cal. Rptr. 125 (1967) (Tobriner, J., concurring); *Garcia v. Halsett*, 3 Cal. App. 3d 319, 82 Cal. Rptr. 420 (1970).

261. *Becker v. IRM Corp.*, 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985).

262. In support of its holding the court in *Becker* reiterated the policy themes that had supported its products liability holdings, finding them also applicable to landlords. Thus, the court reemphasized that the "paramount policy of the strict products liability rule remains the spreading

This remarkable expansion of tort liability is best understood as part of broader legal and societal changes. Indeed, as Professor Grant Gilmore has demonstrated, "a comparable expansion of liability has been going on, notably since 1900, over the whole spectrum of our law of civil obligations, alike in contract and in tort."<sup>263</sup> During this period, "the legal rules and doctrines which successfully immunized actors or enterprisers from liability have been in the process of breakdown."<sup>264</sup> These common-law developments, in turn, mirror broader societal changes. During the nineteenth century, economic conditions, the perceived needs of industrialization, and the values of individualism<sup>265</sup>—the "felt necessities"<sup>266</sup> of the time—may have supported the Holmesian view that the "general principle of our law is that loss from accident must lie where it falls."<sup>267</sup>

During the twentieth century, in contrast, American society has become dissatisfied with this simple solution to the complex problem of injuries in an industrial society. As a society we seek to protect individuals from unexpected catastrophes. This century has seen a proliferation of programs and plans aimed at affording this protection. Various forms of health, disability, liability, and other insurance have bloomed. Similarly, legislative enactments, dating back to the turn of the century, have included workers' compensation, social security, compulsory automobile liability insurance, Medicare, and no-fault automobile plans. Although hardly a comprehensive system, these programs demonstrate a commitment to provide compensation to protect individuals from the overwhelming economic loss that may result from vicissitudes of life such as acci-

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throughout society of the cost of compensating otherwise defenseless victims of manufacturing defects." *Id.* at 466, 698 P.2d at 123, 213 Cal. Rptr. at 220. The court premised strict landlord tort liability on considerations that have led to the development of strict products liability: the recognition of legitimate expectations of safety, promotion of safety, and the compensation of accident victims by spreading accident costs throughout society. "Absent disclosure of defects," the court wrote, "the landlord in renting the premises makes an implied representation that the premises are fit for use as a dwelling . . ." *Id.* at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219. Safety considerations also point to a strict liability rule: "The tenant purchasing housing for a limited period is in no position to inspect for latent defects in the increasingly complex modern apartment buildings or to bear the expense of repair whereas the landlord is in a much better position to inspect for and repair latent defects." *Id.* at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219. From this realistic perspective, it is clear that the "tenant renting the dwelling is compelled to rely upon the implied assurance of safety made by the landlord." *Id.* at 465, 698 P.2d at 123, 213 Cal. Rptr. at 220.

Finally, compensation of the accident victim is desirable because "the landlord by adjustment of price at the time he acquires the property, by rentals or by insurance is in a better position to bear the costs of injuries due to defects in the premises than the tenants." *Id.* Summarizing these perceptions the court paraphrased the *Greenman* formulation, which provided that "the purpose of [strict] 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." *Id.* at 465, 698 P.2d at 123, 213 Cal. Rptr. at 220 (citing *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963)). The *Becker* court concluded that "strict liability . . . must be applied to insure that the landlord who markets the product bears the cost of injuries resulting from the defects 'rather than the injured persons who are powerless to protect themselves.'" *Id.*

263. Gilmore, *supra* note 252, at 111.

264. Gilmore, *supra* note 252, at 112.

265. See *supra* note 45.

266. O.W. HOLMES, *THE COMMON LAW* 5 (Howe ed. 1963).

267. *Id.* at 76.

dent, old age, sickness, and unemployment.<sup>268</sup> The adoption of strict products (and now strict landlord) liability, as well as the expansion of tort and civil liability generally, constitute "part and parcel of [this] great shift" in societal values.<sup>269</sup>

Viewed against the backdrop of the evolution of tort law and social policy during this century, it is thus no surprise that courts have recently adopted an expansive approach toward liability for hazardous activity, often rejecting Restatement restrictions.<sup>270</sup> For several decades these courts have engaged in an extended effort to bring tort law into confluence with contemporary values by expanding the reach of strict liability and tort liability generally. From this perspective it appears anomalous that the hazardous activity strict liability doctrine lay dormant for as long as it did. Of course, the first Restatement greatly influenced this dormancy. It was inevitable, however, that the policy perspectives of contemporary tort law would be brought to bear on the hazardous activity doctrine. And when this occurred, the consequence was predictable. Loss spreading, fairness, and safety considerations strongly support applications of strict liability that conflict with the restrictions of the Restatement.<sup>271</sup>

Consider, for example, applications of the hazardous activity doctrine discussed in the preceding section of this Article: oil drilling, fumigation, crop dusting, commercial fuel hauling, agricultural field burning, and using explosives in isolated areas.<sup>272</sup> Fairness, safety, and loss spreading considerations all clearly support the application of strict liability to such activities whether or not they meet Restatement criteria such as not being a matter of common usage.<sup>273</sup> Each of these activities endangers individuals who create no similar risk to others and who often are powerless to affect the risk created by the hazardous activity. In other words, these activities typically exhibit a "one-sidedness"<sup>274</sup> of risk creation.

Fairness considerations support the application of strict liability to such activities. It has long been recognized that the perceived fairness of a negligence standard is based largely on a mutuality of risk creation between the plaintiff and the defendant—that "mutuality of risk is one of the great foundation stones on which the main structure of the law of negligence has been erected."<sup>275</sup> In

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268. See 2 F. HARPER & F. JAMES, *supra* note 250, at 759.

269. Gilmore, *supra* note 252, at 115; see R. EPSTEIN, C. GREGORY & H. KALVEN, *supra* note 3, at xxxii-xxxiv; Traynor, *supra* note 3.

270. See *supra* text accompanying notes 130-239.

271. The products liability cases illustrate the readiness of courts to extend strict liability beyond the reach of the Restatement. See *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433, 501 (1972) (rejecting Restatement (Second) approach to defect concept because of conflict with strict liability principles and policy); see also *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978) (reaffirmation of *Cronin* and new definition of defect). Compare *Elmore v. American Motors Corp.*, 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652, (1969) (extension of strict liability to bystanders) with RESTATEMENT (SECOND) OF TORTS § 402A (1977) (taking no position on bystander issue).

272. See *supra* text accompanying notes 130-239.

273. See RESTATEMENT (SECOND) OF TORTS § 520(d) (1977).

274. See Vold, West & Wolf, *Aircraft Operator's Liability for Ground Damage and Passenger Injury*, 13 NEB. L. BULL. 373, 380 (1935).

275. *Id.*

the absence of such mutuality, however, "negligence doctrine loses its attraction as being inherently fair."<sup>276</sup> Thus, "where there is no reciprocity of risk . . . absolute liability is apt to follow."<sup>277</sup>

The fairness of a strict liability rule is also evident when one considers who benefits from and who bears the risk of harm from these hazardous activities. Typically, the entity conducting the hazardous activity derives economic benefit from it. In contrast, innocent bystanders or neighbors, who do not directly benefit from the activity, risk injury or harm.<sup>278</sup> Under negligence principles, as articulated in the Learned Hand test,<sup>279</sup> the value of the activity provides a reason not to require the defendant to compensate injured victims, because the risks must outweigh the benefits for conduct to be deemed negligent. The unfairness of the negligence requirement in such circumstances has been long and widely noted.<sup>280</sup> The negligence regime, in effect, provides that "the defendant's benefits from his own conduct [form] a valid excuse for not paying the plaintiff for harm that such conduct has caused."<sup>281</sup> In contrast, the strict liability rule reflects basic concerns of fairness:

[I]f the gains derived from certain activities are indeed as great as the defendant contends, there is all the more reason why he should pay for the harm those activities caused to the person or property of another, for, as against an innocent plaintiff who has nothing to do with the creation of the harm in question, it is only too clear that the defendant who captures the entire benefit of his own activities should, to the extent the law can make it so, also bear its entire costs.<sup>282</sup>

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276. *Id.*

277. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. [continued as NW. U.L. REV.] 151, 156 (1946) (discussing Vold, West & Wolf, *supra* note 274). More recently, Professor George Fletcher has urged that hazardous activity cases can be explained by a "rationale of nonreciprocal risk-taking." Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 547 (1972). "[D]angerous activities, like blasting, fumigating, and crop dusting stand out as distinct, nonreciprocal risks in the community. They represent threats of harm that exceed the level of risk to which all members of the community contribute in roughly equal shares." *Id.* For further discussion of Fletcher's view, see *infra* note 378.

Distinct fairness considerations also support the application of strict liability in hazardous activity cases. For example, the event causing injury also often results in "the destruction of cogent evidence from which negligence or want of it may be proved or disproved." *Siegler v. Kuhlman*, 81 Wash. 2d 448, 454, 502 P.2d 1181, 1185 (1972), *cert. denied*, 411 U.S. 983 (1973). Fairness suggests that the defendant whose activity endangers the plaintiff should not escape responsibility simply because his or her activity destroys the plaintiff's ability to prove negligence. *Id.*; see Peck, *Negligence and Liability Without Fault in Tort Law*, 46 WASH. L. REV. 225, 240 (1971). Similarly, "where the abnormally dangerous activity involves high risk of explosions, the one engaged in that activity has a better opportunity to determine the cause of the incident and can therefore seek indemnification. The injured plaintiff can prove negligence as to a third party only with great difficulty." *New Meadows Holding Co. v. Washington Water Power Co.*, 102 Wash. 2d 495, 506, 687 P.2d 212, 218 (1984) (Rosellini, J., dissenting); see also *National Steel Serv. Center, Inc. v. Gibbons*, 319 N.W.2d 269, 272 (Iowa 1982) (fairness of strict liability based on relative ability of parties to identify cause of accident when evidence destroyed).

278. Vold, West & Wolf, *supra* note 274, at 382.

279. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (L. Hand, J.).

280. See *Green v. General Petroleum Corp.*, 205 Cal. 328, 334, 270 P. 952, 955 (1928); *Bridgeman-Russell Co. v. City of Duluth*, 158 Minn. 509, 511, 197 N.W. 971, 972 (1924); R. EPSTEIN, *MODERN PRODUCTS LIABILITY LAW* 27 (1980); Vold, West & Wolf, *supra* note 274, at 382.

281. R. EPSTEIN, *supra* note 280, at 27.

282. R. EPSTEIN, *supra* note 280, at 27.

The strict liability rule also derives support from safety considerations. Advocates of an expansive doctrine of hazardous activity strict liability traditionally have justified their position, in part, on the ground that strict liability will create added incentives for safety on the part of enterprises engaged in hazardous activities.<sup>283</sup> The same one-sidedness of risk creation that points to the fairness of strict liability also supports this safety rationale. To minimize risks courts should look to the enterprise that creates those risks, not the innocent bystander or neighbor.<sup>284</sup> The increased emphasis on safety considerations in the case law and academic literature of the past quarter century gives new force to these arguments.<sup>285</sup> Courts increasingly have recognized that public policy "demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health."<sup>286</sup> Enterprises engaged in hazardous activities, not their potential victims, are in the best position to know of or learn about potential risks and to act to minimize those risks.<sup>287</sup> And this is true whether or not the Restatement criteria are met.<sup>288</sup>

Finally, the loss spreading policy strongly supports a vigorous doctrine of hazardous activity strict liability. Decades ago the loss spreading policy was advanced as a reason to "stop compromising . . . [and stifling the] scope"<sup>289</sup> of this doctrine. At that time courts and commentators viewed the loss spreading policy with suspicion, or even hostility.<sup>290</sup> During the strict products liability revolution, however, the loss spreading policy has achieved widespread recognition as a premise for tort law reform.<sup>291</sup>

This policy finds ready application in hazardous activity cases. Entities subject to strict liability have the capacity to spread accident costs in the course of their business activities. Fumigators, crop dusters, commercial haulers of explosive fuels and the like all undoubtedly carry liability insurance, precisely because of the potential for injury intrinsic in these activities.<sup>292</sup> Recognizing the

283. See Vold, West & Wolf, *supra* note 274, at 382.

284. See Vold, West & Wolf, *supra* note 274, at 380; see generally Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 541-43 (1961) (discussion of hazardous activity strict liability).

Judge Richard Posner, usually a critic of strict liability rules, see Posner, *supra* note 252, has seen a safety rationale in hazardous activity strict liability cases.

In some cases it may be reasonably clear that only injurers, or only victims, can be looked to for advances in safety technology or other adjustments that might minimize accident costs . . . . This analysis might explain the major pockets of strict liability in the law. These include liability for damage caused by 'ultrahazardous' activities . . . . All are cases where the potential victims of the injury are not in a good position to make adjustments that might in the long run reduce or eliminate the risk of injury.

R. POSNER, *ECONOMIC ANALYSIS OF LAW*, § 6.11, at 140-41 (2d ed. 1977).

285. See *supra* notes 252-54 and accompanying text.

286. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 129, 501 P.2d 1153, 1159, 104 Cal. Rptr. 433, 439 (1972) (quoting Escola v. Coca-Cola Bottling Co., 24 Cal.2d 453, 462, 150 P.2d 436, 440 (1944) (Traynor, J., concurring)).

287. See Calabresi & Hirschoff, *supra* note 252, at 1067-74.

288. See Calabresi, *supra* note 284, at 542-43.

289. Gregory, *supra* note 11, at 395; see Vold, West & Wolf, *supra* note 274, at 383, 389-90.

290. See *supra* notes 82-97 and accompanying text.

291. See *supra* note 250 and accompanying text.

292. Undoubtedly, a widely-shared perception exists that such activities *should* insure against

"social and economic desirability of distributing the losses, resulting from [hazardous] activity, among the general public,"<sup>293</sup> courts are concluding that the "risk distribution justification for imposing strict liability is well suited to claims arising out of the conduct of [hazardous] activity."<sup>294</sup>

The ready application of contemporary tort policy to hazardous activities explains the willingness of courts in recent years to expand strict liability.<sup>295</sup> It also explains why courts have disregarded or expressly rejected<sup>296</sup> Restatement restrictions on strict liability. It becomes evident, however, that fairness, safety, and loss spreading considerations suggest applications of strict liability beyond those adopted by courts to date. The question thus arises as to what criteria should guide courts in deciding future applications of strict liability.

### C. The Emerging Hazardous Activity Doctrine

#### 1. The Question of Line Drawing

The expansive implications of contemporary hazardous activity case law and policy have yet to be fully realized. To date, courts, on a case by case basis, have covertly and overtly rejected Restatement restrictions on strict liability, while applying strict liability in a manner more expansive than that envisioned by the Restatement.<sup>297</sup> These decisions suggest that courts also may apply strict liability to other hazardous activities that today remain in the realm of negligence law.<sup>298</sup> Once it is widely recognized that courts have abandoned the Re-

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injuries they may cause. See Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 441 (1959).

293. *Chavez v. Southern Pac. Transp. Co.*, 413 F. Supp. 1203, 1208 (E.D. Cal. 1976).

294. *Id.* at 1209.

295. This Article focuses on the developing hazardous activity strict liability case law. While some courts are expanding the reach of strict liability overtly, other courts are reaching "strict liability" results by creative interpretation (or manipulation) of negligence doctrines such as *res ipsa loquitur*. See, e.g., *Mahowald v. Minnesota Gas Co.*, 344 N.W.2d 856, 864 (Minn. 1984) (*res ipsa loquitur* applicable to escape of natural gas).

Some commentators have interpreted cases that have sanctioned *res ipsa loquitur* to imply that strict liability would not apply to the activities involved in those cases. See PROSSER & KEETON, *supra* note 1, § 78, at 558; D. DOBBS, *TORTS AND COMPENSATION* 522 (1985). They cite the doctrinal ground that *res ipsa loquitur* applies only to accidents that do not ordinarily occur in the absence of negligence. See, e.g., *Newing v. Cheatham*, 15 Cal. 3d 351, 359, 540 P.2d 33, 38-39, 124 Cal. Rptr. 193, 198-99 (1975). In contrast, the Restatement and Restatement (Second) of Torts apply strict liability only when the defendant cannot eliminate a risk of harm by an exercise of the specified degree of care. See *supra* text accompanying notes 113-16; see also *infra* text accompanying notes 329-52 (discussing an alternative approach). In fact, however, expansive applications of *res ipsa loquitur* and other negligence doctrines represent interim steps ultimately leading to overt application of strict liability rules. See 3 F. HARPER, F. JAMES & O. GRAY, *supra* note 146, § 14.4, at 207-211. This process does not constitute a new phenomenon, nor is it confined to hazardous activity cases. See *Escola v. Coca-Cola Bottling Co.*, 28 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring) (products liability); Ursin, *supra* note 3, at 846 (landowner cases).

296. See *supra* text accompanying notes 130-239.

297. See *supra* text accompanying notes 130-239.

298. Until recently observers have spoken uncertainly about the applicability of strict liability to such obvious candidates as the hauling and storage of toxic wastes. See, e.g., Ginsberg & Weiss, *Common Law Liability for Toxic Torts: A Phantom Remedy*, 9 HOFSTRA L. REV. 859, 913-20 (1981); Note, *Strict Liability for Generators, Transporters and Disposers of Hazardous Wastes*, 64 MINN. L. REV. 949, 969-76 (1980). In 1983, however, the New Jersey Supreme Court held a landowner strictly liable for harm caused by toxic wastes that it had stored on its property and that

statement approach, important questions will arise: What activities will courts subject to strict liability? And what criteria will courts use to make that determination?

An analysis of the applicability of strict liability to various forms of transportation demonstrates how these related questions could arise. Consider, for example, an airliner that crashes into a schoolhouse, a train that derailed and crashes into a nearby convenience store, a gasoline loaded tanker truck that overturns, explodes and incinerates a nearby car, and, finally, a routine traffic accident involving two automobiles. For more than a century courts have applied negligence rules to railroad<sup>299</sup> and traffic accidents.<sup>300</sup> Early decisions imposed strict liability on the venturesome activity of flying airplanes when their crashes caused damage to persons or objects on the ground.<sup>301</sup> As air travel has become common and the safety record has improved, however, courts have tended to refuse to impose strict liability on air traffic,<sup>302</sup> despite a special section of the Restatement (Second) endorsing strict liability.<sup>303</sup>

Recent hazardous activity decisions, however, suggest increased application of strict liability to various forms of transportation. In a later section<sup>304</sup> this Article considers the issue of ground damage caused by aircraft as an example of the expansive implications of hazardous activity doctrine and contemporary tort policy. Fairness, safety, and loss spreading considerations clearly support strict liability in this situation, and the case law unambiguously points in this direction. This case law and policy also suggest the applicability of strict liability to the train derailment and tanker truck accidents.

If public policy and hazardous activity case law support the application of strict liability to the aircraft, railroad, and tanker truck examples, the question then arises whether courts will also apply strict liability to the routine traffic accident. If courts, as expected, are reluctant to do so, the question will arise whether criteria can be articulated to distinguish the routine traffic accident from the other examples. After briefly discussing the apparent reluctance of courts to apply strict liability rules to routine traffic accidents,<sup>305</sup> this Article will examine the criteria for the application of hazardous activity strict liability that are emerging in the case law.<sup>306</sup> These criteria would allow courts to distin-

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flowed onto the property of others. *State Dept. of Envtl. Protection v. Ventron Corp.*, 94 N.J. 473, 488, 463 A.2d 893, 900 (1983).

299. *E.g.*, *Louisville & Nashville R.R. v. Gower*, 85 Tenn. 465, 471, 3 S.W. 824, 826 (1887); see Ehrenzweig, *supra* note 33, at 1430.

300. *See, e.g.*, *Maloney v. Rath*, 69 Cal. 2d 442, 444, 445 P.2d 513, 514, 71 Cal. Rptr. 897, 898 (1968) (Traynor, C.J.); *Hammontree v. Jenner*, 20 Cal. App. 3d 528, 531, 97 Cal. Rptr. 739, 741 (1971).

301. *See, e.g.*, *Rochester Gas & Elec. Corp. v. Dunlop*, 148 Misc. 849, 851-52, 266 N.Y.S. 469, 472-73 (1933); see also Baldwin, *Liability for Accidents in Aerial Navigation*, 9 MICH. L. REV. 20 (1910) (advancing the strict liability position).

302. *See, e.g.*, *Boyd v. White*, 128 Cal. App. 2d 641, 276 P.2d 92 (1954); PROSSER & KEETON, *supra* note 1, § 78, at 557-558.

303. RESTATEMENT (SECOND) OF TORTS § 520A (1977).

304. *See infra* text accompanying notes 384-413.

305. *See infra* notes 307-25 and accompanying text.

306. *See infra* notes 327-81 and accompanying text.

guish the routine traffic accident from the aircraft, railroad, and tanker truck examples.

Even courts at the cutting edge of strict liability developments have balked at the suggestion that they should apply strict liability rules to routine traffic accidents.<sup>307</sup> As a matter of policy and doctrine, this reluctance might appear puzzling. On a doctrinal level, the hazardousness of the automobile<sup>308</sup> has suggested to observers the difficulty of formulating a strict liability rule that would apply to aircraft but not to automobiles.<sup>309</sup> On a policy level, the existence of widespread (and often compulsory) liability insurance suggests that loss spreading considerations support strict liability in automobile accidents. Fairness concerns also come into play, especially when pedestrians or other bystanders are injured by the hazardous activity of driving automobiles.<sup>310</sup> Finally, strict liability may promote safety by making drivers more aware of the true costs of their activity; even if increased insurance rates fail to affect decisions made while driving, people might choose to drive less because of the increased cost, thereby reducing the accident toll.<sup>311</sup>

On the other hand, it may be argued that individual drivers of automobiles differ significantly from operators of airlines. Commercial enterprises such as airlines will treat liability costs as part of their overall business costs and make adjustments in a manner different from individuals. Thus, the safety incentive argument may have more force when applied to the operation of an airline.<sup>312</sup> Similarly, the airline passes on its accident and insurance costs to the public through its fares. Thus, loss spreading has a different meaning in this context than it does in the automobile context, raising fairness concerns as well.<sup>313</sup>

In fact, judicial reluctance to adopt strict liability rules in the context of the routine traffic accident may have less to do with "theoretical" concerns regarding loss spreading, safety, and fairness than with more pragmatic concerns. Indeed, the movement of no fault automobile insurance plans from academic speculation to legislative reality in many states supports policy arguments in favor of strict liability rules.<sup>314</sup> Nevertheless, courts have remained reluctant to adopt strict liability rules in this area. Justice Traynor made perhaps the clear-

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307. See, e.g., *Maloney v. Rath*, 69 Cal. 2d 442, 444, 445 P.2d 513, 514, 71 Cal. Rptr. 897, 898 (1968); *Hammontree v. Jenner*, 20 Cal. App. 3d 528, 531, 97 Cal. Rptr. 739, 741 (1971).

308. See RESTATEMENT (SECOND) OF TORTS § 520 comment i (1977).

309. See C. GREGORY, H. KALVEN & R. EPSTEIN, *supra* note 78, at 504-05.

310. Fairness arguments for strict liability are less persuasive when a "mutuality of risk" exists—e.g., when each motorist "is exposing the other to the risk his vehicle will get out of hand." Vold, West & Wolf, *supra* note 274, at 380; see Fletcher, *supra* note 277, at 548.

311. See Calabresi, *Fault, Accidents and the Wonderful World of Blum and Kalven*, 75 YALE L.J. 216, 223 (1965).

312. See Blum & Kalven, *The Empty Cabinet of Dr. Calabresi*, 34 U. CHI. L. REV. 239, 250 (1967).

313. See *id.*

314. See Spencer, *Motor-Cars and the Rule in Rylands v. Fletcher: A Chapter of Accidents in the History of Law and Motoring*, 42 CAMBRIDGE L.J. 65 (1983) (discussion of strict liability and use of automobiles in England). See generally O'Connell, *Alternatives to the Tort System for Personal Injury*, 23 SAN DIEGO L. REV. 17, 22-26 (1986) (discussing no fault alternatives to tort law).



est statement of the ground for this reluctance in 1968. In *Maloney v. Rath*<sup>315</sup> the California Supreme Court, the pioneer in the adoption of the doctrine of strict products liability, refused to apply strict liability to routine traffic accidents. Writing for the court, Justice Traynor did not reject the desirability of strict liability on the merits. Indeed, he expressly noted his "[awareness] of the growing dissatisfaction with the law of negligence as an effective and appropriate means for governing compensation for the increasingly serious harms caused by automobiles."<sup>316</sup> The reason the court refused to adopt a strict liability rule was a pragmatic, "legal process," reason.<sup>317</sup> A rule "of strict liability would require its own attendant coterie of rules to allocate risk and govern compensation among co-users of the streets and highways."<sup>318</sup> Judicial adoption of a strict liability rule "without also establishing in substantial detail how the new rule should operate would only contribute confusion to the automobile accident problem."<sup>319</sup> The court thus concluded that it would defer to the legislature under such circumstances;<sup>320</sup> the legislature could "avoid such difficulties by enacting a comprehensive plan for the compensation of automobile accident victims."<sup>321</sup>

Whatever their reasons, courts to date have declined to adopt strict liability rules in automobile accident cases,<sup>322</sup> even when they have adopted ambitious strict liability rules in products cases<sup>323</sup> and provocative approaches to hazardous activity cases.<sup>324</sup> This reluctance continues despite the recognition that driving automobiles is hazardous, even when done carefully.<sup>325</sup> This reluctance thus raises the question whether the hazardous activity case law that points to strict liability rules for the aircraft, railroad, and tanker truck examples also suggests criteria for distinguishing the routine traffic accident. The next section of this Article examines this case law and discusses the doctrinal criteria for the

315. 69 Cal. 2d 442, 445 P.2d 513, 71 Cal. Rptr. 897 (1968) (Traynor, C.J.).

316. *Id.* at 445, 445 P.2d at 514, 71 Cal. Rptr. at 898.

317. For a critique of legal process objections to judicial innovation in tort law, see Ursin, *supra* note 1, at 234-43.

318. *Maloney*, 69 Cal. 2d at 445-46, 445 P.2d at 515, 71 Cal. Rptr. at 899.

319. *Id.* at 446, 445 P.2d at 515, 71 Cal. Rptr. at 899.

320. The court's decision in 1968 to defer to the legislature does not mean that adoption of strict liability rules for traffic accidents is beyond judicial competence in all historical contexts. For a discussion of early English cases that "came within a whisker of imposing strict liability upon the owner of a motor-car," see Spencer, *supra* note 314, at 65. See also *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 828, 532 P.2d 1226, 1243 119 Cal. Rptr. 858, 875 (1975) (comparative fault adopted over legal process objections).

321. *Maloney*, 69 Cal. 2d at 446, 445 P.2d at 515, 71 Cal. Rptr. at 899. *But cf.* *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 828, 532 P.2d 1226, 1243, 119 Cal. Rptr. 858, 875 (1975) (adopting comparative negligence despite traditional arguments that only legislature could take this step because of necessity to develop coterie of subsidiary rules); see also *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978) (adopting subsidiary rules).

322. See, e.g., *Maloney v. Rath*, 69 Cal. 2d 442, 444, 445 P.2d 513, 514, 71 Cal. Rptr. 897, 898 (1968); *Hammontree v. Jenner*, 20 Cal. App. 3d 528, 531, 97 Cal. Rptr. 739, 741 (1971).

323. See, e.g., *Sindell v. Abbott Laboratories, Inc.*, 26 Cal. 3d 588, 597-98, 607 P.2d 924, 928, 163 Cal. Rptr. 132, 136 (1980); see also *Becker v. IRM Corp.*, 38 Cal. 3d 454, 458-64, 698 P.2d 116, 118-22, 213 Cal. Rptr. 213, 215-19 (1985) (landlord strict liability).

324. See, e.g., *Green v. General Petroleum Corp.*, 205 Cal. 328, 334, 270 P. 952, 954 (1928).

325. See RESTATEMENT (SECOND) OF TORTS § 520 comment i (1977).

imposition of strict liability suggested by this caselaw.<sup>326</sup> On examination, the leading hazardous activity cases suggest doctrinal criteria that would allow courts to exclude the routine traffic accident from the purview of the expanding strict liability doctrine. Under these criteria courts could sanction applications of strict liability in new areas—including plane crashes, train derailments, and tanker truck overturnings—while distinguishing the routine traffic accident.

## 2. The Emerging Criteria

Leading hazardous activity decisions suggest not only that courts are rejecting the Restatement's restrictions on strict liability,<sup>327</sup> but also that they are articulating their own criteria to guide future applications of strict liability to hazardous activities. Increasingly, courts have viewed the loss spreading capacity of enterprises engaged in particular activities as an important factor in determining whether to impose strict liability.<sup>328</sup> The hazardousness of an activity, obviously, also constitutes an important factor. However, courts have relied on a "hazardousness" concept distinct from that of the Restatement. Courts are developing their own definition of the hazardousness necessary to subject an activity to strict liability. Hazardousness alone, however, even as thus defined, is not a sufficient condition for the imposition of strict liability. Rather, the case law suggests that strict liability is appropriate only when the risk of harm created by a hazardous enterprise is unlike the risks that individual citizens routinely create as part of their everyday activities. In other words, courts are applying strict liability to "commercial hazards," as distinct from routine, everyday hazards typically created by individual citizens.

As previously discussed,<sup>329</sup> the first Restatement offered one definition of hazardousness in the 1930s and the Restatement (Second) offered another in the 1970s. The first definition focused on whether activities "necessarily [involve] a risk of serious harm . . . which cannot be eliminated by the exercise of utmost care."<sup>330</sup> The second definition considered "(a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; [and] (c) inability to eliminate the risk by the exercise of reasonable care."<sup>331</sup> Each of these definitions, both undoubtedly prompted by the early identification of blasting as subject to strict liability,<sup>332</sup> has the unfortunate characteristic of directing attention to whether a defendant can eliminate the risk of harm by exercising some degree of care.

This inquiry has confused courts and led to a rejection of strict liability in cases in which it should have been applied.<sup>333</sup> Under the Restatement ap-

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326. See *infra* notes 327-81 and accompanying text.

327. See *supra* notes 130-239 and accompanying text.

328. See, e.g., *Chavez v. Southern Pac. Transp. Co.*, 413 F. Supp. 1203, 1208 (E.D. Cal. 1976); see *supra* notes 211-62 and accompanying text.

329. See *supra* notes 65-128 and accompanying text.

330. RESTATEMENT OF TORTS § 520 (1938).

331. RESTATEMENT (SECOND) OF TORTS § 520 (1977).

332. See RESTATEMENT OF TORTS § 520 comments c & e (1977).

333. E.g., *Bennett v. Larson Co.*, 118 Wis. 2d 681, 706, 348 N.W.2d 540, 554 (1984) (pesticide

proach, if a court finds that strict liability is improper for a particular activity because the defendant, exercising the requisite degree of care, could have eliminated the risk of harm, it leaves future accident victims with the burden of proving negligence. In reality, however, even if negligence in fact exists, it may be difficult or impossible to prove.<sup>334</sup> Moreover, the initial determination that the risk could have been eliminated by some degree of care may have been mistaken. Thus, reliance on the Restatement approach compounds the injustices for victims of accidents caused by a hazardous activity.

Contrary to the dictates of both the Restatement and the Restatement (Second), the inquiry should focus on whether the activity is hazardous either because negligence may occur or because harm may occur even in the absence of negligence.<sup>335</sup> If under this criterion the activity attains the requisite degree of hazardousness, courts should apply strict liability without resort to the Restatement criteria. Several decisions previously discussed<sup>336</sup> suggest this approach.

The California Supreme Court's *Green v. General Petroleum Corp.*<sup>337</sup> and *Luthringer v. Moore*<sup>338</sup> decisions, for example, suggest that to be subject to strict liability an activity need not present the sort of intrinsic grave danger of harm associated with activities such as blasting. *Green* and *Luthringer* suggest a more expansive application of strict liability. Indeed, the *Luthringer* opinion refers to activities that "under certain conditions" may be hazardous.<sup>339</sup> The *Luthringer* court applied strict liability to fumigation,<sup>340</sup> just as the *Green* court had applied strict liability to the drilling of oil wells.<sup>341</sup> Thus, the hazardousness factor in California law points to the application of strict liability to activities that are hazardous in the sense that fumigation and drilling for oil are hazardous.

A 1982 decision of the Oregon Supreme Court, *Koos v. Roth*,<sup>342</sup> which applied strict liability to the burning of fields for agricultural purposes,<sup>343</sup> assists in refining this hazardousness concept. The *Koos* court stated that "[w]hether the danger is so great as to give rise to strict liability depends both on the probability and on the magnitude of the threatened harm."<sup>344</sup> Thus, if "the consequences of a mishap are potentially lethal or highly destructive of health or property, a

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spraying); see also *Boyd v. White*, 128 Cal. App. 2d 641, 655, 276 P.2d 92, 98 (1954) (strict liability inapplicable to ground damage caused by aircraft).

334. See *Siegler v. Kuhlman*, 81 Wash. 2d 448, 455-56, 502 P.2d 1181, 1185 (1972), cert. denied, 411 U.S. 983 (1973).

335. Under this approach an activity might exhibit the requisite degree of hazardousness because negligence frequently causes mishaps. In this case the strict liability rule avoids litigation on the negligence issue, while ensuring victim compensation. On the other hand, an activity might exhibit the requisite degree of hazardousness even though negligence rarely causes mishaps. In such a case traditional Restatement and Restatement (Second) grounds support strict liability.

336. See *supra* notes 130-239 and accompanying text.

337. 205 Cal. 328, 333-34, 270 P. 952, 954-55 (1928).

338. 31 Cal. 2d 489, 190 P.2d 1 (1948).

339. *Id.* at 500, 190 P.2d at 8 (emphasis added).

340. *Id.* at 496-500, 190 P.2d at 5-8.

341. *Green*, 205 Cal. at 331-35, 270 P.2d at 954-55.

342. 293 Or. 670, 652 P.2d 1255 (1982). For other discussion of *Koos*, see *supra* text accompanying notes 164-73; *infra* text accompanying notes 369-75.

343. *Koos*, 293 Or. at 682-86, 652 P.2d at 1263-65.

344. *Id.* at 678, 652 P.2d at 1260.

slight likelihood that they will occur suffices."<sup>345</sup> And this strict liability rule applies "even if the harm in the actual occurrence is less severe."<sup>346</sup> On the other hand,

even when the risk "only moderately threatens economic activities rather than harm to life, health, or property or environment," the activity may carry strict liability if the consequences are highly probable or . . . if the activity can be carried on "only with a substantially uncontrollable likelihood that damage will sometimes occur."<sup>347</sup>

As an example of an activity in this latter category, the *Koos* court cited crop dusting cases in which "the likely harm to any person from the aerial dissemination of chemicals was moderately severe but substantially uncontrollable."<sup>348</sup>

The case law indicates that hazardousness, even as thus defined and even when accompanied by a loss spreading capacity, does not constitute a sufficient condition for the imposition of strict liability. Courts and commentators, for example, have recognized that automobiles create a "residue of unavoidable risk of serious harm that may result even from . . . careful operation."<sup>349</sup> Despite this hazardousness and a clear loss spreading capacity (especially when liability insurance is compulsory), courts have stated clearly their reluctance to impose strict liability in the ordinary automobile accident case.<sup>350</sup> Thus, for example, the Oregon Supreme Court, in applying strict liability to crop dusting, emphasized that "[h]owever common may be the practice of spraying chemicals by airplane, the prevalence of the practice does not justify treating the sprayer and 'sprayee' as the law treats motorists, leaving each to fend for himself unless one can prove negligence against the other."<sup>351</sup>

The case law, in fact, suggests a criterion for strict liability—in addition to hazardousness—that distinguishes between the automobile accident and other activities to which courts have applied strict liability. Under this criterion, strict liability does not apply unless a defendant creates a "commercial hazard," a hazard unlike those that individual citizens routinely create as part of their everyday activities. Thus, the crop duster is strictly liable, but the automobile driver is not. Unlike crop dusting, driving an automobile is an activity that citizens routinely engage in as part of their everyday activities. Similarly, a

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345. *Id.*

346. *Id.* at 678, 652 P.2d at 1260-61.

347. *Id.* at 678, 652 P.2d at 1261 (quoting *Bella v. Aurora Air, Inc.*, 279 Or. 13, 24, 566 P.2d 489, 495 (1977)). The authors of the Prosser and Keeton hornbook offer a similar formulation:

An activity can be ultrahazardous for two reasons: first, because although harm from a mishap may not be very serious, and the social utility of the conduct may outweigh the danger, a mishap resulting in some harm to the plaintiff is very likely to occur; second, because the activity involves an appreciable chance of causing serious injury.

PROSSER & KEETON, *supra* note 1, § 78, at 556.

348. *Koos*, 293 Or. at 678, 652 P.2d at 1261 (citing *Loe v. Lenhardt*, 227 Or. 242, 362 P.2d 312 (1961); *Martin v. Reynolds Metals Co.*, 221 Or. 86, 342 P.2d 790 (1959)).

349. RESTATEMENT (SECOND) OF TORTS § 520 comment i (1977).

350. See, e.g., *Maloney v. Rath*, 69 Cal. 2d 442, 444, 445 P.2d 513, 514, 71 Cal. Rptr. 897, 898 (1968); *Hammontree v. Jenner*, 20 Cal. App. 3d 528, 531, 97 Cal. Rptr. 739, 741 (1971).

351. *Loe v. Lenhardt*, 227 Or. 242, 253, 362 P.2d 312, 318 (1961) (also discussed *supra* text accompanying notes 161-63).

tanker truck that jackknives on a freeway and spews burning fuel across the road has, because of the size, cumbersomeness, and explosiveness of its cargo, created a "commercial hazard," distinct from the routine, everyday hazards created by individual citizens.<sup>352</sup>

Before turning to an examination of the case law that suggests this "commercial hazard" criterion, it is worth emphasizing that this criterion differs greatly from the Restatement's common usage criterion. Indeed, the Oregon crop-dusting case that drew the dichotomy between motoring and crop dusting rejected the notion that common usage should negate strict liability.<sup>353</sup> The Restatement's common usage criterion precludes strict liability for activities carried on by many people in the community.<sup>354</sup> In contrast, the "commercial hazard" criterion would not preclude strict liability simply because an activity is common or engaged in by many people in the community. Under this criterion it is irrelevant that in a particular community many people drill for oil, fumigate homes and offices, or engage in other activities that have been held subject to strict liability. These activities, regardless of the number of people who engage in them, differ from automobile driving because they create risks of harm unlike the risks of harm routinely created by individual members of the public who pursue their everyday activities. Moreover, the strict liability rule applies even if these hazardous enterprises themselves create such risks as a part of *their* common everyday business practices.

The commercial hazard criterion finds both explicit and implicit recognition in the case law. At times courts have articulated this criterion explicitly in applying strict liability and in explaining which activities are subject to strict liability. At other times courts have employed this criterion implicitly while "interpreting" the Restatement criteria so as to impose strict liability. An early formulation of the commercial hazard criterion appears in the 1948 *Luthringer v. Moore*<sup>355</sup> decision. The *Luthringer* court emphasized that the "important factor is that certain activities under certain conditions may be so hazardous to the public generally, and of such relative infrequent occurrence, that it may well call for strict liability as the best public policy."<sup>356</sup> And the court stated that fumigation is not a matter of common usage because "[i]t is not carried on generally by the public . . . nor is its use a common everyday practice."<sup>357</sup> Thus, *Luthringer* suggests as a criterion for the invocation of strict liability that courts inquire whether the activity creates a hazard unlike those generally created by individual members of the public pursuing their everyday activities. Unlike the

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352. According to a news report, interstate trucks are involved in twice as many fatal accidents per mile traveled as automobiles. San Diego Tribune, April 22, 1985, § A, at 2, col. 1.

353. *Loe*, 227 Or. at 251, 362 P.2d at 317.

354. RESTATEMENT OF TORTS § 520 comment e (1938).

355. 31 Cal. 2d 489, 190 P.2d 1 (1948).

356. *Id.* at 500, 190 P.2d at 8; see also PROSSER & KEETON, *supra* note 1, § 78, at 556 (stating criterion similar to those found in *Luthringer*, although not citing *Luthringer*).

357. *Luthringer*, 31 Cal. 2d at 500, P.2d at 8. The *Luthringer* court, of course, also attempted to explain why the first Restatement's common usage test was met. See *supra* text accompanying notes 207-09.

Restatement's common usage requirement,<sup>358</sup> the *Luthringer* criterion supports the application of strict liability to the hazardous activity of fumigation, regardless of how commonly fumigation occurs or the number of fumigators in the community.

The commercial hazard criterion also helps explain more recent applications of strict liability. It suggests, for example, why the Washington Supreme Court in *Langan v. Valicopters, Inc.*<sup>359</sup> had little difficulty in applying strict liability to crop dusting,<sup>360</sup> despite an apparent conflict with the Restatement's common usage requirement. The court blithely announced that all the Restatement (Second) factors were met, despite its recognition of "the prevalence of crop dusting," which was "ordinarily done in large portions of the Yakima Valley" employing, in 1975, 287 aircraft. The court simply characterized the activity as one "carried on by a comparatively small number of persons" and concluded that crop dusting was thus "not a matter of common usage."<sup>361</sup> On its face, this conclusion appears highly questionable.<sup>362</sup> In light of the previous analysis, however, the result is easily explained. Regardless of the number of crop dusters in the community and the prevalence of this practice, crop dusting creates risks of harm unlike those created by individual members of the community pursuing their everyday activities.

This analysis is supported by the Washington Supreme Court's decision in *Siegler v. Kuhlman*<sup>363</sup> which applied strict liability to the transportation of gasoline by a tanker truck.<sup>364</sup> The *Siegler* court emphasized the commercial hazards present in such a situation. The court noted that gasoline "[s]tored in commercial quantities" presented special dangers.<sup>365</sup> It thus followed that strict liability was appropriate for the even "more highly hazardous act of transporting it as freight upon freeways and public thoroughfares."<sup>366</sup> In this vein the court stated that

[w]hen gasoline is carried as cargo—as distinguished from fuel for the carrier vehicle—it takes on uniquely hazardous characteristics . . . . Dangerous in itself, gasoline develops even greater potential for harm when carried as freight—extraordinary dangers deriving from sheer quantity, bulk and weight, which enormously multiply its hazardous properties.<sup>367</sup>

The *Siegler* court's analysis suggests how courts applying strict liability to

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358. See RESTATEMENT OF TORTS § 520(b) (1938).

359. 88 Wash. 2d 855, 567 P.2d 218 (1977).

360. *Id.* at 860-65, 567 P.2d at 221-23.

361. *Id.* at 864, 567 P.2d at 223. *Langan* is also discussed *supra* text accompanying notes 143-58.

362. See *Bennett v. Larson Co.*, 118 Wis. 2d 681, 704, 348 N.W.2d 540, 553 (1984) (refusing to apply strict liability to pesticide spraying because it occurs commonly).

363. 81 Wash. 2d 448, 502 P.2d 1181 (1972), *cert. denied*, 411 U.S. 983 (1973). *Siegler* is also discussed *supra* text accompanying notes 131-42.

364. *Siegler*, 81 Wash. 2d at 459-60, 502 P.2d at 1187.

365. *Id.* at 457, 502 P.2d at 1186.

366. *Id.*

367. *Id.* at 454, 502 P.2d at 1184.

tanker trucks can, because of the commercial hazard criterion, stop short of applying strict liability to routine traffic accidents. The driving of automobiles creates inevitable hazards, including the possibility that an automobile's fuel tank will explode in an accident, thus injuring bystanders. The commercial hazard criterion is not met in such a situation, however, because the public generally drives automobiles as a common everyday activity. In contrast, strict liability is proper when a tanker truck overturns and causes a gasoline explosion, because the transport of gasoline in commercial quantities as cargo creates risks unlike those created by individual members of the community pursuing their everyday activities.

Oregon case law also supports this analysis. As previously mentioned, in applying strict liability to crop dusting, the Oregon Supreme Court rejected the notion that common usage defeats strict liability, at the same time that it expressly excluded automobile accidents from the ambit of its strict liability rule.<sup>368</sup> This posture implicitly reflects the commercial hazard concept.

More recently, in *Koos v. Roth*<sup>369</sup> the Oregon Supreme Court applied strict liability to the agricultural technique of field burning, despite its appropriateness to the location where it was conducted.<sup>370</sup> The court distinguished field burning from activities not subject to strict liability,<sup>371</sup> and in so doing it articulated a criterion for strict liability virtually identical to the commercial hazard criterion that this Article has discussed. In the court's view strict liability would not apply to an activity, despite its dangerousness, if the activity occurs as a "widespread and accepted individual practice," one which "nearly everyone routinely does . . ." <sup>372</sup> Just as the commercial hazard criterion distinguishes between routine traffic accidents and overturning tanker trucks, so did the *Koos* court distinguish between agricultural field burning and the individual "backyard burner."<sup>373</sup> The agricultural field burner creates hazards "beyond the ordinary risks associated with common uses of fire that are readily avoided by due care."<sup>374</sup> The court concluded that field burning would expose a defendant to

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368. *Loe v. Lenhardt*, 227 Or. 242, 252, 362 P.2d 312, 318 (1961).

369. 293 Or. 670, 652 P.2d 1255 (1982). *Koos* is also discussed *supra* text accompanying notes 164-73, 342-48.

370. *Koos*, 293 Or. at 683-86, 652 P.2d at 1263-65.

371. *Id.* at 685, 652 P.2d at 1265.

372. *Id.* at 682, 652 P.2d at 1263. *Koos* also suggests an alternative test—whether the activities in question are "essential service activities." *Id.* The court viewed this test as an "extension" of the common usage criterion. *Id.* Strict liability would be precluded for an activity "if nearly everyone routinely does it or expects to have it done for him." *Id.* Apparently the *Koos* court intended this alternative definition to exclude the application of strict liability to the distribution of water, gas, electricity, and other common goods. See *id.* This restriction on strict liability would seem to run afoul of Washington's application of strict liability to the hauling of gasoline as freight, *Siegler v. Kuhlman*, 81 Wash. 2d 448, 502 P.2d 1181 (1972), *cert. denied*, 411 U.S. 983 (1973), and perhaps to California's application of strict liability to fumigation, *Luthringer v. Moore*, 31 Cal. 2d 489, 190 P.2d 1 (1948), and oil drilling, *Green v. General Petroleum Corp.*, 205 Cal. 328, 270 P.2d 952 (1928). Unless carefully qualified, the *Koos* court's alternative definition would seem both unsound and in conflict with the California and Washington approaches. For a discussion of the extension of strict liability to such activities as the distribution of water and gas, see *infra* notes 419-35 and accompanying text.

373. *Koos*, 293 Or. at 685, 652 P.2d at 1265.

374. *Id.*

strict liability because it is not "an ordinary activity that many people routinely expect to do for themselves, like [burning a] domestic fire."<sup>375</sup>

The case law thus appears not only to impose strict liability in a manner inconsistent with the Restatement but also to suggest an alternative to the Restatement's common usage criterion. Under this commercial hazard criterion, even "hazardous" activities would not subject a defendant to strict liability unless they create risks unlike those routinely created by individual members of the community pursuing their everyday activities.<sup>376</sup> Or, as the *Koos* court suggested, strict liability would not apply to widespread and accepted individual practices that everyone routinely engages in.

From a policy perspective, this criterion achieves beneficial results. It identifies activities that typically endanger persons who create no similar risk to others and who are powerless to protect themselves.<sup>377</sup> The fairness<sup>378</sup> of im-

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375. *Id.* at 686, 652 P.2d at 1265.

376. Under the commercial hazard criterion, enterprises are strictly liable when they create risks of harm unlike those that individual citizens routinely create as part of their everyday activities. Thus, strict liability would apply to ground damage from airplane crashes but not to routine traffic accidents. See *infra* notes 382-413 and accompanying text. Similarly, strict liability would apply to a water company's water mains, but not to water pipes in an individual's residence. See *infra* text accompanying notes 419-34. Under this criterion, however, the water company would not be strictly liable for activities that create risks which are similar to those individual citizens routinely create. Thus, the water company would not be strictly liable under the hazardous activity doctrine for injuries that occur when a customer's chair collapses in the company's lobby under the customer's weight. The chair in the lobby does not constitute a commercial hazard. *But cf.* Ursin, *supra* note 3 (suggesting strict liability under different theory).

Under the commercial hazard criterion the professional fumigator would be strictly liable for escaping gas, but the homeowner would not be strictly liable in his or her use of ant sticks or flea bombs. If an individual creates risks of harm that meet the commercial hazard criterion, however, strict liability would apply. Thus, an individual who uses professional strength poisons to fumigate his or her residence would be strictly liable for resulting harms. Similarly, an individual who uses dynamite to blast tree stumps in his or her back yard would be strictly liable because the risk created is unlike those routinely created by individual citizens pursuing their everyday activities.

377. The strongest case for strict liability arises when enterprises that create commercial hazards injure individuals who do not create similar risks. When those injured engage in the same or similar activity, however, strict liability is nevertheless desirable. The *Koos* court noted that in the case before it plaintiff was a neighbor who farmed adjacent fields. The court stated as follows:

If the accidentally impoverished neighbor is told that in the long run the losses will balance out, he may answer, like one economist, "that in the long run we are all dead." Society has other ways to lighten the burdens of costly but unavoidable accidents on a valued industry than to let them fall haphazardly on the industry's neighbors.

*Koos*, 293 Or. at 681, 652 P.2d at 1262 (quoting Pigou, *John Maynard Keynes* 1883-1946, 32 *PROC. BRIT. ACAD.* 395, 407 (1946)).

378. The fairness of a strict liability rule in such circumstances has long been recognized. See *supra* notes 272-82 and accompanying text. In the 1930s, for example, Professor Vold described the appropriateness of strict liability for activities that exhibit a "one-sidedness" of risk creation. See Vold, West & Wolf, *supra* note 274, at 380-82. In the absence of such "mutuality of risk," strict liability becomes appealing. *Id.* Professor Malone, in discussing Professor Vold's criterion, suggested that a lack of "reciprocity of risk" could lead to strict liability. Malone, *supra* note 277, at 156. These formulations share with the commercial hazard criterion the characteristic of suggesting the appropriateness of strict liability for business enterprises that create risks unlike those routinely created by individual members of the community.

More recently, Professor George Fletcher has formulated his own version of the reciprocal risk criterion. See Fletcher, *supra* note 277. He states that a plaintiff deserves to recover "for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant." *Id.* at 542. This formulation requires a comparison of risks created by the plaintiff and defendant and would, presumably, lead to a rejection of a strict liability claim by one farmer against another when both engage in field burning but only one is injured. The commercial



posing strict liability on such activities is especially apparent when one recognizes that the economic benefits from the hazardous activity accrue to the enterprise engaged in the activity.<sup>379</sup> That enterprise is also in the best position to maximize safety, and strict liability creates an economic incentive for it to do just that.<sup>380</sup> Furthermore, strict liability has the desirable effect of distributing the cost of the hazardous activity among the public, rather than leaving the burden of accident costs on innocent bystanders or neighbors.<sup>381</sup> Finally, the commercial hazard criterion ensures that strict liability does not necessarily attach to everyday activities that individuals pursue, such as driving automobiles or lighting fires in fireplaces.

### 3. Expansive Implications

The emergence of an alternative framework, focusing on what this Article has called "commercial hazards," is likely to accelerate the expansion of strict liability. As courts increasingly recognize that they can apply strict liability in contravention of the Restatement without the specter of a boundless strict liability doctrine, they are likely to consider favorably new applications of strict liability, which, to date, they have been reluctant to accept. To illustrate this point, this Article next discusses the issue of strict liability for ground damage caused by aircraft.<sup>382</sup> To further illustrate the expansive implications of the hazardous activity case law and policy, it then considers other likely applications of the strict liability rule.<sup>383</sup>

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hazard criterion does not necessarily lead to this result. See *supra* note 377. Fletcher's criterion also at times appears synonymous with the common usage criterion. See Fletcher, *supra* note 277, at 541-42; Schwartz, *supra* note 3, at 989. The commercial hazard criterion is distinct from the Restatement's common usage factor. See *supra* text accompanying notes 353-54. Nevertheless, Fletcher's discussion of his criterion lends support to the commercial hazard criterion. He writes, for example, that "[d]angerous activities, like blasting, fumigating, and crop dusting stand out as distinct, nonreciprocal risks in the community. They represent threats of harm that exceed the level of risk to which all members of the community contribute in roughly equal shares." Fletcher, *supra* note 277, at 547.

379. See *supra* text accompanying notes 278-82.

380. See *supra* text accompanying notes 283-88.

381. See *supra* text accompanying notes 289-94.

382. The issue of aircraft ground damage is a useful focal point because it has caused so much confusion among courts and scholars. The discussion in the Prosser and Keeton hornbook exemplifies this state of affairs. The authors suggest that "[i]t is reasonable to argue that physical harm accidentally caused by airplane crashes should be a cost borne by those engaged in that kind of undertaking since it is not as yet an activity in which people are generally engaged." PROSSER & KEETON, *supra* note 1, § 78, at 557. Yet they also write:

One possible suggestion as to the ultimate outcome is that strict liability might be retained as to what may be called "abnormal" aviation including all such things as stunt flying, crop dusting and experimental aircraft and military planes not designed primarily for safety, and "sonic booms," while "normal" aviation, including all common commercial flights, might require proof of negligence.

*Id.* at 558. And then they conclude that "[r]apid technological changes would, however, make such a classification extremely difficult to maintain." *Id.*

383. See *infra* text accompanying notes 414-37.

## a. Ground Damage Caused by Aircraft

Despite some early strict liability decisions<sup>384</sup> and a special section of the Restatement (Second) endorsing strict liability,<sup>385</sup> the trend of the decisions is to reject strict liability in aircraft ground damage cases.<sup>386</sup> As this section of the Article explains, however, the case for the application of strict liability is so compelling—both in terms of policy and in terms of case precedents—that it is a source of curiosity why courts have been hesitant to accept strict liability. One reason for the trend against strict liability in this area undoubtedly can be found in the Restatement. Despite the special provision in the Restatement (Second) approving of strict liability in ground damage cases, the Restatement's general criteria for the imposition of strict liability clearly suggest the inappropriateness of strict liability in aircraft ground damage cases. Regarding the Restatement's common usage requirement, a commentator has asked rhetorically, "if the requirement is to be taken seriously, how could it be said that aviation . . . [is] not [a matter] . . . of common usage, if not in 1934, then surely today?"<sup>387</sup> With respect to the additional Restatement (Second) criteria, airplanes appropriately fly in the air and are of value to the community. Thus, to the extent to which courts have accepted the Restatement (Second) criteria, they would hesitate when asked to impose strict liability on aircraft for ground damage.

The Restatement criteria also discourage courts from adopting a strict liability rule for cases of ground damage by aircraft in a more subtle manner. The criteria suggest that such a rule would necessarily entail the adoption of a strict liability rule for automobile accidents. Thus, one commentator has stated:

The obvious source of the difficulty is that the Restatement rule makes the probability of injury or harm from the carrying out of the activity one of the central determinants of whether or not it is ultrahazardous. Yet the problem with this formulation is that, at least since the end of the Second World War, more lives have been lost per passenger mile in automobile accidents than in airplane accidents. It is by no means easy to construct a rationale for strict liability for ultrahazardous activities which excludes expressly some activities which by any standard are

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384. See *supra* text accompanying note 301.

385. RESTATEMENT (SECOND) OF TORTS § 520A (1977). For a discussion of the debate regarding this provision, see 3 F. HARPER, F. JAMES & O. GRAY, *supra* note 146, § 14.13, at 311-12.

386. See, e.g., *Boyd v. White*, 128 Cal. App. 2d 641, 276 P.2d 92 (1954). For a discussion of the development of tort law in this area, see PROSSER & KEETON, *supra* note 1, § 78, at 556-58.

The Uniform Aeronautics Act, which the Commissioners on Uniform State Laws promulgated in 1922, proposed a strict liability rule for aircraft ground damage. UNIF. AERONAUTICS ACT § 5, 9 U.L.A. 17 (1932) (act withdrawn 1943). Even states adopting the Uniform Act have not necessarily adopted the strict liability provision. "Several of the states which have adopted it have eliminated, repealed or modified the section providing for strict liability for ground damage." PROSSER & KEETON, *supra* note 1, § 78, at 557. Some of these statutes state that "ordinary rules of law" should apply. *Id.* at n.52. However, in an era when courts apply strict liability expansively, strict liability arguably is an "ordinary rule of law" properly applied to aircraft ground damage as well as other hazardous activities.

387. C. GREGORY, H. KALVEN & R. EPSTEIN, *supra* note 78, at 502; see also R. EPSTEIN, C. GREGORY & H. KALVEN, *supra* note 3, at 582-84 (later edition in which authors discuss the new provision—RESTATEMENT (SECOND) OF TORTS § 520A (1977)—dealing with liability for ground damage).

more dangerous than others which are included.<sup>388</sup>

Unlike the Restatement, the hazardous activity doctrine that is emerging in the case law differentiates between the automobile accident and the airplane crash, and it points unambiguously to the desirability of applying strict liability in the latter situation. Airplanes fall squarely within the definition of hazardousness suggested by the case law. Like the fumigation involved in *Luthringer v. Moore*,<sup>389</sup> aviation "under certain conditions" (such as downdrafts or unexpected mechanical failure) may "be so hazardous to the public generally, and of such relative infrequent occurrence"<sup>390</sup> that strict liability is appropriate. Similarly, aviation meets the hazardousness standard articulated by the Oregon Supreme Court in *Koos v. Roth*: "If the consequences of a mishap are potentially lethal or highly destructive of health or property, a slight likelihood that they will occur suffices . . . ."<sup>391</sup>

Automobiles also involve great potential for hazardousness. Application of strict liability to aviation, however, does not necessarily point to a regime of strict liability rules for routine traffic accidents. The automobile fails the commercial hazard test, but the airplane clearly meets it. Hazards associated with the automobile are precisely those to which individual citizens routinely expose themselves and others as part of their everyday activities. In contrast, the aircraft, with its potential to crash into and destroy homes and workplaces, creates risks of harm unlike those routinely created by individual citizens as part of their everyday activities.

Recognition of the commercial hazard criterion thus will allow courts to assess the merits of the application of strict liability to cases of ground damage caused by aircraft without a misplaced apprehension that a decision in favor of strict liability will necessarily carry over to auto accidents. When the issue of strict liability for airplane crashes is assessed on its own merits, the case for strict liability is compelling; the case law and policy point unambiguously to that result.

The Washington Supreme Court's hazardous activity decisions, for example, point directly to strict liability of airplane operators for the ground damage they cause. If a crop duster faces strict liability for harm caused by chemicals that poison an adjacent organic farm, as the court held in *Langan v. Valicopters, Inc.*,<sup>392</sup> it would appear anomalous not to hold the crop duster strictly liable when his or her plane crashes into an adjacent farmhouse. Similarly, if, as was held in *Siegler v. Kuhlman*,<sup>393</sup> a commercial trucker faces strict liability for harm caused by the explosion of fuel carried as cargo, it would appear anomalous not to apply strict liability when a commercial aircraft with its thousands of

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388. C. GREGORY, H. KALVEN & R. EPSTEIN, *supra* note 78, at 504. *But cf.* RESTATEMENT (SECOND) OF TORTS § 520 comment i (1977) (automobile operation not abnormally dangerous because a matter of common usage).

389. 31 Cal. 2d 489, 190 P.2d 1 (1948).

390. *Id.* at 500, 190 P.2d at 8.

391. *Koos*, 293 Or. at 678, 652 P.2d at 1260.

392. 88 Wash. 2d 855, 567 P.2d 218 (1977).

393. 81 Wash. 2d 448, 502 P.2d 1181 (1972), *cert. denied*, 411 U.S. 983 (1973).

pounds of unburned fuel crashes into a schoolhouse, causing the fuel to explode. Furthermore, no reason exists to distinguish the latter case from a situation in which a massive airliner crashes into and demolishes the schoolhouse without its fuel exploding.

Loss spreading considerations also strongly support strict liability in these cases. Indeed, *Boyd v. White*,<sup>394</sup> a leading 1954 California decision *rejecting* strict liability, recognized the existence of

a strong public policy argument to the effect that the risk of damage to third parties owning property over which airplanes are driven, at least by student pilots, should be borne by the owners of planes, who can and should insure themselves against such risk, and not by the innocent property owner.<sup>395</sup>

Writing from the perspective of an intermediate appellate court in the legal milieu of the 1950s, the *Boyd* court concluded that this loss spreading argument "should be addressed to the Legislature and not to the courts."<sup>396</sup>

As discussed throughout this Article, however, the loss spreading policy has subsequently emerged as an important factor in hazardous activity cases. Indeed, in *Smith v. Lockheed Propulsion Co.*,<sup>397</sup> which applied strict liability to the test firing of a rocket motor, a California appellate court held that "public policy calls for strict liability," concluding that "[d]efendant, who is engaged in the enterprise for profit, is in a position best able to administer the loss so that it will ultimately be borne by the public."<sup>398</sup> Thus, the very loss spreading policy that the *Boyd* court noted in the aviation context now has been applied to create strict liability for rocket testing.

The fairness and safety considerations that have permeated the hazardous activity case law also support the imposition of strict liability on aircraft for ground damage.<sup>399</sup> The one-sidedness of the risk created by aviation makes clear that, to promote safety, strict liability should be imposed.<sup>400</sup> Similarly, this one-sidedness supports the fairness of strict liability, which recognizes the reasonable safety expectations of persons who have the misfortune to have an aircraft descend on them or their homes.<sup>401</sup> The *Smith* court viewed the

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394. 128 Cal. App. 2d 641, 276 P.2d 92 (1954).

395. *Id.* at 655, 276 P.2d at 100.

396. *Id.*

397. 247 Cal. App. 2d 774, 56 Cal. Rptr. 128 (1967).

398. *Id.* at 785, 56 Cal. Rptr. at 137.

399. See Vold, West & Wolf, *supra* note 274, at 374.

400. See *supra* text accompanying notes 283-88.

401. See *supra* text accompanying notes 273-82; see also R. EPSTEIN, C. GREGORY & H. KALVEN, *supra* note 3, at 543-44 (strict liability supported on fairness grounds under causation analysis); Fletcher, *supra* note 277, at 543-40 (supporting strict liability rule for airplane crashes on fairness grounds).

The fairness of a strict liability rule is underlined by the fact that airplanes may be designed so that if an engine fails, it will drop off the aircraft "to avoid damage to the plane." Cushman, *Jet Lands Safely After an Engine Rips from Plane Over New Mexico*, Los Angeles Times, April 17, 1985, § 1, at 2, col. 5. Even if such a design is reasonable in light of the avoidance of damage to the airplane and injury to the passengers, persons on the ground injured by the falling engine should be compensated.

landowners, whose property was damaged by adjacent rocket testing, in this manner. The court wrote that "[t]here is no basis, either in reason or justice, for requiring the innocent neighboring landowner to bear the loss."<sup>402</sup> This same principle, of course, would apply to persons on the ground who suffer harm from airplane crashes.

The Washington Supreme Court in *Siegler* expressed a similar concern with the magnitude and one-sidedness of the risk created by those who haul gasoline as freight. The court emphasized the nature of the activity that caused injury: "carrying of gasoline as freight in quantities of thousands of gallons at freeway speeds."<sup>403</sup> This characterization clearly suggests that aircraft present an even more compelling case for strict liability. Indeed, the Restatement (Second) emphasizes "the gravity of the harm resulting when a few tons of flaming gasoline descend upon a dwelling" as a result of a plane crash.<sup>404</sup> And it notes that "those on the ground have no place to hide from falling aircraft and are helpless to select any locality . . . in which they will not be exposed to the risk . . ."<sup>405</sup>

The desirability of applying hazardous activity strict liability to aviation ground damage cases can further be appreciated if one approaches the issue from a different perspective—that of products liability law and policy. When a commercial airliner crashes because of a defective instrument, injured plaintiffs have a strict products liability action against the manufacturer of the airplane, assuming the plane was defective when manufactured.<sup>406</sup> An action under strict products liability would not be available against the airline, however, because the airline is neither the manufacturer nor an entity, such as a retailer, that is in the chain of marketing and distribution of the airplane.<sup>407</sup> This result appears anomalous. Under products liability doctrine, injured plaintiffs have a strict lia-

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402. *Smith*, 247 Cal. App. 2d at 785, 56 Cal. Rptr. at 137.

403. *Siegler*, 81 Wash. 2d at 459, 502 P.2d at 1187.

404. RESTATEMENT (SECOND) OF TORTS § 520A comment c (1977).

405. *Id.* The New Jersey Supreme Court recently has endorsed the application of strict liability to the owner of an aircraft that caused ground damage even when the plane was used without the owner's permission. *Torchia v. Fisher*, 95 N.J. 43, 468 A.2d 1061 (1983). The source of this strict liability rule, however, was a statute and not the common law. The court construed the statute to apply in stolen aircraft cases, *id.* at 47-48, 468 A.2d at 1062-63, and then upheld its constitutionality. *Id.* at 48-49, 468 A.2d at 1063-64.

In a previous decision the court had upheld the statute as it applied to cases in which an airplane was flown with the owner's permission. *Adler's Quality Bakery, Inc. v. Gaseteria, Inc.*, 32 N.J. 55, 159 A.2d 97 (1960). The *Adler* court found that one of the statute's goals was to shift the risk associated with ground damage from the victim to the plane owner who is a better risk bearer. *Id.* at 69-70, 159 A.2d at 104. In *Torchia* the court concluded that "[t]he same reasoning applies to the owner of a stolen airplane, who will in many cases be the better risk bearer than the injured victim." *Torchia*, 95 N.J. at 49, 468 A.2d at 1063. The court emphasized that the "owner derives profit or pleasure from ownership of the airplane . . . . As between an unsuspecting homeowner or person on the ground and the plane's owner, the Legislature could rationally decide to place the loss on the owner, for whom the plane served some purpose." *Id.* at 49, 468 A.2d at 1064. The policy considerations to which the court alluded in upholding the New Jersey statute are precisely those policy considerations that would support a common-law rule of strict liability in the absence of a statute.

406. See, e.g., *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 437, 191 N.E.2d 81, 83, 240 N.Y.S.2d 592, 595 (1963) (implied warranty theory of recovery). *Goldberg* is discussed *infra* text accompanying notes 409-13.

407. See *Goldberg*, 12 N.Y.2d at 440, 191 N.E.2d at 84-85, 240 N.Y.S.2d at 597-98 (Burke, J., dissenting).

bility action against retailers as well as manufacturers. This extension of liability beyond manufacturers has been justified on the ground that it serves the loss spreading policy and on the ground that safety is promoted because the retailer can take safety precautions or exert pressure for safety on the manufacturer.<sup>408</sup> An airline has a loss spreading capacity similar to or greater than that of the typical product retailer and is in an even better position to take safety precautions or to exert pressure on airplane manufacturers.

In *Goldberg v. Kollsman Instrument Corp.*,<sup>409</sup> an important early strict products liability decision, the dissenting judges argued that imposing strict liability on the airline is preferable to imposing strict liability on the airplane manufacturer. In their view the purpose of strict liability is to

remove the economic consequences of accidents from the victim who is unprepared to bear them and place the risk on the enterprise in the course of whose business they arise. The risk, it is said, becomes part of the cost of doing business and can be effectively distributed among the public through insurance or by a direct reflection in the price of the goods or service.<sup>410</sup>

Regarding airline crashes, these dissenting judges concluded that "the enterprise to which accidents such as the present are incident is the carriage of passengers by air—[the airline]."<sup>411</sup> They emphasized that the airline "is not merely a conduit for the distribution of the manufacturer's consumer goods but assumes the responsibility of selecting and using those goods itself as a capital asset in the conduct of a service enterprise such as common carriage."<sup>412</sup> Thus, the dissenting judges concluded that

any claim in respect of an airplane accident that is grounded in strict enterprise liability should be fixed on the airline or none at all. Only in this way do we meet and resolve, one way or another, the anomaly presented by the reasoning of the majority, which, through reliance on warranty incident to sales, grants a recovery to a passenger injured through a nonnegligent failure of equipment but denies it to one injured through a nonnegligent failure of maintenance or operation.<sup>413</sup>

When a product defect causes an airplane crash and resulting ground damage, policy considerations suggest that strict *products* liability should apply to the airline. The reason that it does not is undoubtedly doctrinal: strict products liability would then extend into services. Because of the uncharted implications of such an extension, courts have declined to apply strict products liability to airlines despite the clear applicability of strict products liability policies. However, these policies also support the application of *hazardous activity strict liabil-*

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408. *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 262-263, 391 P.2d 168, 171-172, 37 Cal. Rptr. 896, 899-900 (1964).

409. 12 N.Y.2d 432, 437, 191 N.E.2d 81, 83, 240 N.Y.S.2d 592, 595 (1963) (Burke, J., dissenting, joined by Van Voorhis, J., and Scileppi, J.).

410. *Id.* at 440, 191 N.E.2d at 85, 240 N.Y.S.2d at 598.

411. *Id.*

412. *Id.* at 441, 191 N.E.2d at 85, 240 N.Y.S.2d at 598.

413. *Id.* at 441-42, 191 N.E.2d at 86, 240 N.Y.S.2d at 599.

ity to aviation, and courts can take this step without creating doctrinal confusion in strict *products* liability doctrine.

#### b. Other Applications

The previous section of this Article focused on the issue of strict liability for ground damage caused by aircraft because that issue has confused courts and commentators for years. The case for strict liability is compelling. That analysis suggests, however, that strict liability also would apply to injuries caused by other forms of commercial transportation, such as railroads and tanker trucks. These activities meet the criterion of hazardousness.<sup>414</sup> They also create hazards unlike those created by individual members of the public pursuing their everyday activities.<sup>415</sup> And these activities can and should bear the accident costs they create and spread these costs among the users of their services.<sup>416</sup> Fairness considerations suggest the appropriateness of strict liability when a train derailed or an out-of-control tanker truck plummets over an embankment, injuring innocent bystanders.<sup>417</sup> The safety incentives of strict liability also should attach to such risk-creating activities.<sup>418</sup>

It also seems clear that new applications of strict liability are unlikely to be exhausted by the transportation cases. Loss spreading, fairness, and safety incentive considerations point to the application of strict liability to other types of activities that are hazardous and meet the commercial hazard criterion but which, in the past, have been insulated from strict liability. Consider, for example, the liability of water companies when an underground main bursts and causes flooding that injures innocent bystanders. The great weight of authority today rejects strict liability in cases of such damage.<sup>419</sup> As early as 1924, however, the Minnesota Supreme Court in *Bridgeman-Russell Co. v. City of Duluth*<sup>420</sup> applied strict liability when the principal main leading from a reservoir broke. In 1964 the Iowa Supreme Court in *Lubin v. City of Iowa City*<sup>421</sup> followed *Bridgeman-Russell* and extended its strict liability holding beyond the principal main leading from a reservoir, stating that it could "see no logical distinction between mains leading from a reservoir and other mains. Damage

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414. See *supra* text accompanying notes 329-48; see also *supra* note 352 (hazardousness of trucking).

415. See *supra* text accompanying notes 352-76.

416. See *supra* text accompanying notes 289-94.

417. See *supra* text accompanying notes 274-82.

418. See *supra* text accompanying notes 283-88.

419. See, e.g., *Pacific N.W. Bell Tel. Co. v. Port of Seattle*, 80 Wash. 2d 59, 491 P.2d 1037 (1971) (underground water mains do not constitute an abnormal condition warranting strict liability); see also PROSSER & KEETON, *supra* note 1, § 78, at 550 (underground water mains do not constitute an abnormal condition warranting strict liability); Comment, *The Rylands v. Fletcher Doctrine in America: Abnormally Dangerous, Ultrahazardous, or Absolute Nuisance?*, 1978 ARIZ. ST. L.J. 99, 129 (American courts generally have not imposed strict liability for the escape of water.).

420. 158 Minn. 509, 197 N.W. 971 (1924). *Bridgeman-Russell* is also discussed *supra* text accompanying notes 51-57.

421. 257 Iowa 383, 131 N.W.2d 765 (1964).

may utterly ruin an individual financially in either case."<sup>422</sup> And in 1969 a New York trial court in *Bierman v. City of New York*<sup>423</sup> applied strict liability when a water main ruptured in front of plaintiff's house.<sup>424</sup> Although most courts—including the New York appellate court<sup>425</sup> that rejected the *Bierman* strict liability holding<sup>426</sup>—still hesitate to extend strict liability to bursting water main cases, this apparent hesitancy should abate once courts correctly perceive the commercial hazard criterion that is emerging in the case law.<sup>427</sup>

In the past courts may have been concerned that a rule of strict liability for water pipelines would apply not only to water companies and their mains but also to homeowners and water pipes in their houses that burst causing injury to guests or neighbors.<sup>428</sup> Indeed, Dean Prosser lumped these two categories ("household pipes . . . [and] authorized utility mains")<sup>429</sup> together in concluding that strict liability should not apply in such situations. Yet the case law suggests that strict liability would not apply against the homeowner when household pipes burst. The homeowner is an individual pursuing common everyday activities; he or she does not create what this Article terms a commercial hazard.<sup>430</sup> In contrast, the water company through its potentially dangerous mains of various sizes transports tons of water thus creating hazards unlike those that individual citizens routinely create as part of their everyday activities.

Once courts recognize that a rule applying strict liability to the water company would not necessarily apply to the homeowner, the case for the strict liability rule appears compelling. In *Bridgeman-Russell* the Minnesota Supreme Court described the potential hazardousness of water distribution systems in modern society:

Congestion of population in large cities is on the increase. This calls for water systems on a vast scale either by the cities themselves or by strong corporations. Water in immense quantities must be accumulated and held where none of it existed before. If a break occurs in the reservoir itself, or in the principal mains, the flood may utterly ruin an

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422. *Id.* at 392, 131 N.W.2d at 771. Minnesota subsequently refused to extend strict liability to breaks in service lines. *Quigley v. Village of Hibbing*, 268 Minn. 541, 129 N.W.2d 765 (1964).

423. 60 Misc. 2d 497, 302 N.Y.S.2d 696 (N.Y. Civ. Ct. 1969), *modified*, 66 Misc. 2d 237, 320 N.Y.S.2d 331 (N.Y. App. Term 1970).

424. *Id.* at 498-99, 302 N.Y.S.2d at 697-698.

425. *Bierman*, 66 Misc. 2d 237, 320 N.Y.S.2d 331.

426. *Id.* at 238, 320 N.Y.S.2d at 332.

427. In 1971 the Washington Supreme Court refused to apply strict liability to the rupture of an underground water main. *Pacific N.W. Bell Tel. Co. v. Port of Seattle*, 80 Wash. 2d 59, 491 P.2d 1037 (1971). The court was strongly influenced by the Restatement (Second) of Torts. *See id.* at 63-64, 491 P.2d at 1039-40. As this Article has discussed, however, subsequent Washington decisions have shown a willingness to depart from the Restatement (Second), *see supra* text accompanying notes 131-60, and in fact suggest the analysis put forth in this Article. *See supra* text accompanying notes 359-67. Moreover, two justices dissented in the *Pacific N.W. Bell* decision. *Pacific N.W. Bell*, 80 Wash. 2d at 68-69, 491 P.2d at 1042-43 (Finley, J., dissenting, joined by Rosellini, J.).

428. *See, e.g.*, *Pacific N.W. Bell Tel. Co. v. Port of Seattle*, 80 Wash. 2d 59, 64-65, 491 P.2d 1037, 1040 (1971) (quoting Dean Prosser's statement that both "household pipes" and "authorized utility mains" constituted a "natural" use of land).

429. PROSSER & KEETON, *supra* note 1, § 78, at 550.

430. *See supra* notes 352-76 and accompanying text.



individual financially.<sup>431</sup>

Safety incentive, fairness, and loss spreading considerations support strict liability in this context. The safety incentive effects of strict liability appropriately are directed at water companies because they—as opposed to innocent bystanders—are in the best position to gauge what safety precautions can be taken. Similarly, the *Bridgeman-Russell* court emphasized that “even though negligence be absent, natural justice would seem to demand that the enterprise, or what really is the same thing, the whole community benefited by the enterprise, should stand the loss rather than the individual.”<sup>432</sup>

These considerations also prompted the Iowa Supreme Court's strict liability holding. In *Lubin* the court thought it neither “just nor reasonable” to “deliberately and intentionally plan to leave a water main underground beyond inspection and maintenance until a break occurs and escape liability.”<sup>433</sup> From a policy perspective,

[t]he risks from such a method of operation should be borne by the water supplier who is in a position to spread the cost among the consumers who are in fact the true beneficiaries of this practice and of the resulting savings in inspection and maintenance costs. When the expected and inevitable occurs, they should bear the loss and not the unfortunate individual whose property is damaged without fault of his own.<sup>434</sup>

The application of strict liability to commercial transportation and water pipelines undoubtedly will suggest even further applications of strict liability. The escape of natural gas from pipelines serves as an obvious example, and it appears increasingly likely that courts will reconsider the uniform rule rejecting strict liability.<sup>435</sup> The creation, transportation, and storage of toxic wastes

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431. *Bridgeman-Russell*, 158 Minn. at 511, 197 N.W. at 972.

432. *Id.*

433. *Lubin*, 257 Iowa at 390, 131 N.W.2d at 770.

434. *Id.* More recently, the Iowa Supreme Court reiterated its view that the loss spreading policy supports the development of hazardous activity strict liability rules. *National Steel Serv. Center v. Gibbons*, 319 N.W.2d 269, 272-73 (Iowa 1982); see also *supra* note 239 (discussing *Gibbons*).

435. A typical situation in which such a strict liability rule would apply arose in *New Meadows Holding Co. v. Washington Water Power Co.*, 34 Wash. App. 25, 659 P.2d 1113 (1983) (rejecting strict liability), *aff'd in part and rev'd in part*, 102 Wash. 2d 495, 687 P.2d 212 (1984) (en banc) (rejecting strict liability). In that case plaintiff attempted to light an oil stove in his home. Unknowingly, he ignited natural gas that had leaked into his home underground from a damaged gas line several blocks away. Plaintiff sustained serious burns, and the home was destroyed by fire. *New Meadows*, 34 Wash. App. at 27, 659 P.2d at 1115.

The conclusion that courts are likely to apply strict liability to the escape of natural gas from pipelines may seem surprising in light of the fact that the uniform rule rejects strict liability, see *Mahowald v. Minnesota Gas Co.*, 344 N.W.2d 856, 861 (Minn. 1984), and that two state supreme courts recently have rejected strict liability. See *id.* at 862; *New Meadows*, 102 Wash. 2d at 503, 687 P.2d at 217. Nevertheless, an examination of these recent cases suggests that courts may be willing to reconsider strict liability in this context. In the Washington intermediate appellate court decision *Judge Munson*, writing for the court, flatly rejected strict liability. *New Meadows*, 34 Wash. App. at 33-34, 659 P.2d at 1118. Judge Green concurred on the limited ground that “the majority opinion . . . accurately applies current decisional law.” *Id.* at 35, 659 P.2d at 1119 (Green, J., concurring). Judge McInturff dissented and urged the adoption of a strict liability based on policy reasons similar to those articulated in this Article. *Id.* at 42-43, 659 P.2d at 1122-23 (McInturff, J., dissenting).

The Washington Supreme Court also rejected the strict liability rule. *New Meadows*, 102 Wash. 2d at 501-03, 687 P.2d at 216-17. In that court, however, three of nine justices dissented and urged

presents another inviting area for the application of strict liability. Indeed, the New Jersey Supreme Court recently held a landowner strictly liable for harm caused by toxic wastes that he had stored on his property and that flowed onto the property of others.<sup>436</sup> Such new applications of strict liability will, no doubt, require courts to grapple with new doctrinal questions.<sup>437</sup> With the hesitancy

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the adoption of a strict liability rule. *Id.* at 504-06, 687 P.2d at 217-18 (Rosellini, J., dissenting, joined by Williams, C.J., and Dore, J.). These justices analogized the transmission of natural gas to the transportation of gasoline by tanker truck and urged that *Siegler v. Kuhlman*, 81 Wash. 2d 448, 502 P.2d 1181 (1972), *cert. denied*, 411 U.S. 983 (1973), supported application of strict liability. *New Meadows*, 102 Wash. 2d at 505, 687 P.2d at 218 (Rosellini, J., dissenting). The dissenters relied on the policy reasons discussed in this Article:

First, principles of risk allocation support the premise that between two innocent parties, the one benefiting from an activity should bear the risk of loss. Having received a benefit, that party is then in a position to spread the risk of loss to consumers of the products.

Furthermore, where the abnormally dangerous activity involves high risk of explosions, the one engaged in that activity has a better opportunity to determine the cause of the incident and can therefore seek indemnification. The injured plaintiff can prove negligence as to a third party only with great difficulty.

Finally, the imposition of strict liability here will spur the natural gas companies to greater safety precautions, such as periodic inspections and supervision of excavating activities within the vicinity of their lines.

*Id.* at 505-06, 687 P.2d at 218 (Rosellini, J., dissenting).

Finally, the Minnesota Supreme Court also rejected the application of strict liability to the escape of natural gas from gas company pipelines. *Mahowald*, 344 N.W.2d at 862. The court, however, moved toward a strict liability rule by holding that plaintiff could use the doctrine of *res ipsa loquitur* despite the contention that the gas company had not exercised exclusive control over the pipeline. *Id.* at 862, 864; *see supra* note 295 (discussing expansive use of *res ipsa loquitur* as an intermediate step toward strict liability). As in the Washington case, three justices dissented and urged the application of strict liability. *Mahowald*, 344 N.W. 2d at 864, 869 (Todd, J., dissenting). The dissenters quoted extensively from the Washington Court of Appeals dissent, discussed *supra*. They concluded that "[c]onsidering the nature of franchise held by the gas company and its ability to distribute its losses, if any, among a broad group of ratepayers, [a strict liability rule] . . . is not only equitable, but is demanded by modern concepts of liability without fault." *Id.* at 864.

Analogies to other applications of strict liability also support its application to leaks from natural pipelines. *See, e.g., City of Northglenn v. Chevron U.S.A., Inc.*, 519 F. Supp. 515 (D. Colo. 1981) (storage of large amounts of gasoline in residential area); *Yommer v. McKenzie*, 255 Md. 220, 257 A.2d 138 (1969) (gasoline station's storage tank); *McLane v. Northwest Natural Gas Co.*, 255 Or. 324, 467 P.2d 635 (1970) (storage of large amounts of natural gas in populated area).

The application of strict liability to the escape of natural gas from pipelines would, in turn, suggest a strict liability rule when, for example, a mechanical failure in an electric utility transformer sends 7000 volts of electricity into a home. *Pierce v. Pacific Gas & Elec. Co.*, 166 Cal. App. 3d 68, 212 Cal Rptr. 283 (1985) (strict liability on products theory but not on hazardous activity theory); *see also Ferguson v. Northern States Power Co.*, 307 Minn. 26, 239 N.W.2d 190 (1976) (arguments for strict liability, including loss spreading, convincing; however, decision left to legislature); *Wirth v. Mayrath Indus., Inc.*, 278 N.W.2d 789 (N.D. 1979) (recognizing validity of arguments in favor of strict liability, but leaving the decision to the legislature); *see generally supra* note 171 (cases discussing strict liability of handgun manufacturers).

436. *State Dept. of Envtl. Protection v. Ventron Corp.*, 94 N.J. 473, 463 A.2d 893 (1983); *see supra* note 298.

437. For example, one obvious issue is whether courts, once they apply strict liability in aircraft ground damage cases, will allow injured passengers to invoke strict liability rules. The substantive argument that passengers have somehow "assumed the risk" of such accidents is unpersuasive. *See* 3 F. HARPER, F. JAMES & O. GRAY, *supra* note 146, § 14.13, at 290 n.8. And the policies that support strict liability would apply in this context. *See Ursin, supra* note 3, at 846 n.114. The issue is complicated in the case of international flights because the United States adheres to the Warsaw Convention of 1929, which regulates liability to injured passengers. *See* 3 F. HARPER, F. JAMES & O. GRAY, *supra* note 146, § 14.13, at 298-307.

and confusion generated by the Restatement behind them, however, courts should be able to resolve these issues in an orderly fashion.

#### IV. CONCLUSION

This Article has described the process through which a revitalized doctrine of hazardous activity strict liability has appeared in the case law. For decades the doctrine was limited in scope due to the restrictive influence of the Restatement of Torts.<sup>438</sup> In recent years, however, the policies that originally led to the strict products liability revolution have surfaced in hazardous activity cases.<sup>439</sup> As a consequence, courts today are covertly and overtly rejecting the Restatement as a guide in hazardous activity cases. Instead, courts are applying strict liability in a manner inconsistent with Restatement restrictions.<sup>440</sup> The expansive implications of this case law have not yet fully materialized.

As courts begin to perceive the criteria that are emerging in the case law,<sup>441</sup> they are likely to endorse new applications of strict liability. This Article discussed the example of aircraft ground damage to illustrate this point.<sup>442</sup> It is remarkable that, in an era of expanded strict liability, the apparent trend is to reject strict liability in this situation. The case for strict liability is compelling, despite the fact that airplanes are common, appropriately flown in the air, and of value to the community.<sup>443</sup> Elementary fairness and safety concerns suggest that an airline whose plane crashes into a home should compensate innocent victims and spread the loss among its shareholders and patrons.

Moreover, existing case law supplies a doctrinal framework that supports this application of strict liability. Aircraft create risks unlike those routinely created by individual members of the community pursuing their everyday activities. Thus, under the commercial hazard criterion, which this Article has identified in the case law,<sup>444</sup> strict liability would apply when an aircraft causes ground damage. Under this criterion, courts could distinguish the routine automobile accident from the airplane crash—as well as from the overturning tanker truck or train derailment. Similarly, courts could apply strict liability to bursting water mains, natural gas pipelines, and agricultural field burning, while distinguishing bursting household water and gas pipes, and fireplace fires.

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438. See *supra* notes 65-129 and accompanying text.

439. See *supra* notes 240-96 and accompanying text.

440. See *supra* notes 130-239 and accompanying text.

441. See *supra* notes 297-381 and accompanying text.

442. See *supra* notes 384-413 and accompanying text.

443. See RESTATEMENT (SECOND) OF TORTS § 520(d)-(f) (1977).

444. See *supra* notes 349-81 and accompanying text.