FROM RESERVOIRS TO REMEDIATION: THE IMPACT OF CERCLA ON COMMON LAW STRICT LIABILITY ENVIRONMENTAL CLAIMS

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I. INTRODUCTION

Strict liability for environmental contamination has become a fact of life in the past twenty years since the 1980 enactment of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), and similar state laws imposing strict liability for the release of hazardous substances. Since that time, awareness of the widespread nature and risks of environmental contamination and the need for strong tools to remedy those conditions has permeated the public consciousness, the business community, and the courts. As a result, our society has come to live with the existence of widespread strict liability for environmental contamination under various federal and state statutes, even if many believe the current statutory liability scheme is misguided or ineffective.

Over the same period of time, however, some scholars have argued that courts have grown reluctant to apply common law strict liability in general under either the doctrine of Rylands v. Fletcher or Sections 519 and 520 of the Restatement (Second) of Torts, which impose strict liability for “abnormally dangerous activities.” These commentators conclude that, apart from cases involving blasting and a few other historic applications, the current trend is for courts to reject the expansion of strict liability in favor of negligence as the dominant tort theory.

The existence of these two seemingly divergent trends raises the question of whether CERCLA’s enactment and implementation have influenced courts’ willingness to impose common law strict liability in environmental

2. See, e.g., Andrew R. Klein, Hazardous Waste Cleanup and Intermediate Landowners: Reexamining the Liability-Based Approach, 21 Harv. Envtl. L. Rev. 337, 338-39 (1997) (stating that CERCLA has generated enormous transaction costs that have drained it of any vitality); Karen L. Demeo, Note, Is CERCLA Working? An Analysis of the Settlement and Contribution Provisions, 68 St. John’s L. Rev. 493, 517-18 (1994) (summarizing criticisms of CERCLA including that transaction costs are too high; the strict, joint and several liability standard is unfair; and cleanups are rarely completed); Tom Kuhnle, Note, The Rebirth of Common Law Actions for Addressing Hazardous Waste Contamination, 15 Stan. Envtl. L.J. 187, 190-91 (1996) (stating that CERCLA has “accomplished little at a huge expense” and arguing that state common law doctrines will replace CERCLA entirely for many types of actions).
5. See infra note 33 and accompanying text.
contamination cases, even if the doctrine is not otherwise expanding. This question is important because even though CERCLA provides a strong tool for holding defendants strictly liable for the release of hazardous substances, private parties are limited to recovering “response costs” (monies paid toward a cleanup) under CERCLA and cannot recover any damages associated with diminution in property value, lost profits, lost rents, personal injury, punitive damages, or other damages that are often associated with environmental contamination. 6 Only common law claims, including those for strict liability, provide a vehicle to recover those damages necessary for complete relief. Thus, claims for common law strict liability remain a crucial element of a plaintiff’s case, even if a statutory cause of action exits under state law, federal law, or both. 7

That CERCLA may be impacting common law strict liability is significant and somewhat unexpected because the Restatement (Second) of Torts does not identify the existence of a federal or state statute governing the conduct at issue as a factor to consider in determining whether the activity is abnormally dangerous. 8 In other words, if courts are being influenced by the existence of CERCLA and state strict liability statutes when considering application of the common law strict liability doctrine to environmental contamination cases, they are doing so for policy reasons beyond the black letter law of Rylands or the Restatement.

To properly analyze this issue, it was necessary to review published state and federal cases (and unpublished decisions

6. See infra notes 81-82 and accompanying text.


8. RESTATEMENT (SECOND) OF TORTS § 520 (1977). The provision states:
In determining whether an activity is abnormally dangerous, the following factors are to be considered:
(a) existence of a high degree of risk of some harm to the person, land or chattels of others;
(b) likelihood that the harm that results from it will be great;
(c) inability to eliminate the risk by the exercise of reasonable care;
(d) extent to which the activity is not a matter of common usage;
(e) inappropriateness of the activity to the place where it is carried on; and
(f) extent to which its value to the community is outweighed by its dangerous attributes.

Id.
available in electronic databases) involving environmental contamination that cited *Rylands* or the Restatement as the basis for a common law strict liability claim. The results were notable. Even though the existence of a state or federal strict liability statute is not one of the factors a court is directed to consider under the Restatement, time and time again, courts referred to the existence of such a statute or the general importance of addressing the hazardous waste problem in this country as a significant justification for finding the activity abnormally dangerous and the defendant strictly liable. Indeed, with the exception of cases involving petroleum contamination, which are not subject to CERCLA and most state analogs, a significant number of courts that have addressed common law strict liability claims in the context of environmental contamination have extended or reaffirmed the application of the strict liability doctrine. As such, while the prevailing trend among courts may be to reduce the reach of common law strict liability, the trend in environmental contamination cases appears to be the opposite.

Part II of this Article presents the development of common law strict liability in this country, starting with the initial applications of *Rylands* in various jurisdictions and continuing with the adoption of the first and Second Restatements of Torts. Part III contains a brief discussion of CERCLA and similar state statutes, including CERCLA’s legislative history and scope, with a focus on Congress’s justification for CERCLA’s strict liability provisions. Part IV analyzes cases throughout the country that have addressed common law strict liability claims in environmental contamination cases. Part V argues that it is both appropriate and desirable for courts to consider state and federal statutes and other indications of public policy when determining whether an activity is abnormally dangerous. This can be best accomplished by revising the current draft of the Restatement (Third) of Torts to include the existence of a state or federal statute imposing strict liability for the activity as a factor in determining whether or not the activity is abnormally dangerous under the common law.

II. HISTORICAL DEVELOPMENT OF STRICT LIABILITY: *RYLANDS* AND THE RESTATEMENTS

In order to appreciate the significant impact of CERCLA and similar environmental laws on the doctrine of strict liability for abnormally dangerous activities, a brief history of the doctrine’s application in the United States is necessary. This Part will first

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provide a basic definition of the doctrine and continue with a discussion of its application in the historic case of Rylands v. Fletcher and its subsequent development through the First, Second and draft Third Restatements of Torts.

A. Strict Liability Defined

“Strict liability” is generally defined as liability imposed on a defendant in the absence of a breach of a duty to exercise reasonable care. Although strict liability has been historically applied through common law and statutory developments in a wide range of areas including trespassing animals, employer liability, and workers’ compensation statutes, the focus of this Article is on the application of the common law doctrine to so-called abnormally dangerous activities, which has the most relevance to environmental contamination cases. From the beginning, the core of the debate over strict liability has been under what circumstances is it appropriate to hold a defendant liable even though he or she has not acted negligently. In such circumstances, the justification for imposing liability in the absence of negligence has generally been that, where there is no blame on either side and the defendant is engaged in the activity causing the harm for his own purpose or profit, the defendant is in the best position to bear the loss under principles of social justice. Or, stated another way, “[t]he

10. See W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 75, at 534 (5th ed. 1984) [hereinafter PROSSER & KEETON]. This treatise states:

“Strict liability” as that term is used in this chapter, and as that term is commonly used by modern courts, means liability that is imposed on an actor apart from either (1) an intent to interfere with a legally protected interest without a legal justification for doing so, or (2) a breach of a duty to exercise reasonable care, i.e., actionable negligence.

Id.

11. See id. § 76, at 538-43.

12. Id. § 80, at 568-80.

13. Id. § 80, at 572-80.

14. Id. § 75, at 536 (citations omitted) (“There is a strong and growing tendency, where there is blame on neither side, to ask, in view of the exigencies of social justice, who can best bear the loss and hence to shift the loss by creating liability where there has been no fault.”); see also Mark Geistfeld, Should Enterprise Liability Replace the Rule of Strict Liability for Abnormally Dangerous Activities?, 45 UCLA L. REV. 611 (1998) (discussing broad enterprise liability, which holds all businesses strictly liable for damages with the more limited version of strict liability in § 520 of the Second Restatement and concluding that the more limited version contained in § 520 is preferable if courts apply it more expansively); William K. Jones, Strict Liability for Hazardous Enterprise, 92 COLUM. L. REV. 1705, 1712 (1992) (rejecting the
defendant is held liable merely because, as a matter of social adjustment, the conclusion is that the responsibility should be so placed.\textsuperscript{15} How courts and commentators have attempted to determine which activities should be subject to this type of “enterprise liability” because they are ultrahazardous, abnormally dangerous, or otherwise outside the “norm” is discussed below.

\textbf{B. In the Beginning: The Reservoir of Rylands v. Fletcher}

The common law doctrine of strict liability for abnormally dangerous activities has its roots in the English case of \textit{Rylands v. Fletcher}.\textsuperscript{16} The case involved a defendant who built a reservoir on his land that, through no negligence on his part, burst, causing water to flood and damage the plaintiff’s neighboring coal mine.\textsuperscript{17} Although the contractors who built the reservoir for the defendant were potentially negligent, Justice Blackburn of the Exchequer Chamber held the defendant landowner liable without proof of negligence.\textsuperscript{18} In reaching this decision, Justice Blackburn stated:

\begin{quote}
We think 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 prima facie answerable for all the damage which is the natural consequence of its escape.\textsuperscript{19}
\end{quote}

The House of Lords affirmed the judgment of the Exchequer Chamber. In the opinion, Lord Cairns quoted approvingly of Justice’s Blackburn’s reasoning, but also placed emphasis on the fact that the defendant’s use of the land was “non-natural”:

[If the Defendants, not stopping at the natural use of their

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\textsuperscript{15} Prosser & Keeton, supra note 10, at 537.

\textsuperscript{16} L.R. 3 H.L. 330 (1868).

\textsuperscript{17} Id. at 332.

\textsuperscript{18} Fletcher v. Rylands, 1 L.R.-Ex. 265, 276-80 (1866), aff’d, Rylands v. Fletcher, 3 L.R.-E. & I. App 330 (H.L. 1868).

\textsuperscript{19} Id. at 279-80.
close, had desired to use it for any purpose which I may term a non-natural use, . . . and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the Plaintiff, then it appears to me that that which the Defendants were doing they were doing at their own peril . . . .

As the authors of one casebook have observed, while Justice Blackburn premised strict liability on any non-natural use of the land by bringing onto it some “mischief” which by nature was not present, Lord Cairns defined non-natural use more narrowly, by limiting it to activities which are “abnormal, not ordinary, uses of land, considering the character and general uses of the surrounding land.”

According to Dean Prosser, the emerging “rule” of *Rylands v. Fletcher* is that the defendant is liable where damage results from an activity that is “unduly dangerous and inappropriate to the place where it is maintained, in light of the character of that place and its surroundings.”

C. Initial American Response to Rylands

Although *Rylands* was immediately accepted in some U.S. jurisdictions, others rejected it, and the doctrine was subject to significant criticism. One of the main reasons given for hostility toward the new doctrine was that American courts were reluctant to place too heavy a burden on industrial development at the turn of the twentieth century, when promotion of progress and development in this country was a national priority. For example, in one New

21. GERALD W. BOSTON & M. STUART MADDEN, LAW OF ENVIRONMENTAL AND TOXIC TORTS: CASES, MATERIALS, AND PROBLEMS 114 (2d ed. 2001); see also PROSSER & KEETON, *supra* note 10, at 545-46 (stating that Lord Blackburn’s opinion was “sharply limited” in the House of Lords and “placed upon a different footing . . . . The emphasis was thus shifted to the abnormal and inappropriate character of the defendant’s reservoir in coal mining country, rather than the mere tendency of all water to escape”).
23. *Id.* at 548-49.
24. See id. at 549. The authors state:

Dangerous enterprises, involving a high degree of risk to others, were clearly indispensable to the industrial and commercial development of a new country and it was considered that the interests of those in the vicinity of such enterprises must give way to them, and that too great a burden must not be placed upon them.

*Id.* (citations omitted); see also Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 58 (1967) (noting that the courts “were anxious to see that the tort system of accident compensation did not add to the problems of new industry”); William R.
York case, *Losee v. Buchanan*, the court refused to impose liability in the absence of negligence when a boiler exploded in a factory, damaging the plaintiff's property. In reaching the decision, the court stated:

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 . . . . [The victim of an accident] receives his compensation . . . by the general good, in which he shares, and the right which he has to place the same things upon his lands.

However, this view was not universal among the states, and the doctrine was accepted immediately in Massachusetts and Minnesota. Moreover, as the perception of America as a nation with unlimited space and resources waned, courts began to not only adopt the doctrine, but also to articulate concerns regarding industrial development and resource limitations as reasons for its application. For instance, in *Bridgeman-Russell Co. v. City of Duluth*, the Minnesota Supreme Court reaffirmed that *Rylands* was the law in Minnesota, and that the rupture of a city water main from a reservoir causing damage to the plaintiff's property was subject to the doctrine of strict liability. In reaching that decision,


25. 51 N.Y. 476 (1873).

26. *Id.* at 484-85; see also *Rose v. Socony-Vacuum Corp.*, 173 A. 627, 631 (R.I. 1934) (rejecting *Rylands* and stating that “[i]t is an unavoidable incident of the growth of population and its segregation in restricted areas that individual rights recognized in a sparsely settled state have to be surrendered for the benefit of the community as it develops and expands”); *Boston & Madden*, supra note 21, at 114. Commentators have noted that many of the leading early cases rejecting *Rylands* involved ordinary steam boilers or other “natural” or “ordinary” uses to which the English courts would never have applied the *Rylands* doctrine in the first place. See Prosser & Keeton, supra note 10, at 548.

27. Prosser & Keeton, supra note 10, at 548; see, e.g., Kennedy Bldg. Assocs. v. Viacom, Inc., 375 F.3d 731, 738 (8th Cir. 2004) (stating that Minnesota was one of the first American jurisdictions to adopt *Rylands* and “was a leader in the development of the tort in this country”) (citing Jed Handelsman Shugerman, Note, *The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of Fletcher v. Rylands in the Gilded Age*, 110 Yale L.J. 333, 348 (2000)); Ball v. Nye, 99 Mass. 582, 584 (1868); Cahill v. Eastman, 18 Minn. 324, 336 (1872).

28. 197 N.W. 971 (Minn. 1924).

29. *Id.* at 972-73.
the court stated there was no reason to overrule the doctrine “unless its practical application under modern conditions has clearly demonstrated its unsoundness or injustice.”\(^{30}\) In considering that issue, the court proclaimed:

On the contrary, reason and the interest of justice seem to favor adherence rather than the reverse. 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 individual financially. In such a case, 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. It is too heavy a burden upon one.\(^{31}\)

In many ways, these two cases, Losee and Bridgeman-Russell Co., highlight the debate over the benefits and burdens of “enterprise” liability for hazardous activities that continues today. Those favoring strict liability argue, like the court in Bridgeman-Russell Co., that with very few exceptions, the business or individual conducting an activity for its own profit is in the best position to bear all damages flowing from the harm regardless of negligence and that any excess costs resulting from that liability are properly absorbed by the business or passed on to the public.\(^{32}\) By contrast, those favoring a negligence paradigm, like the court in

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\(^{30}\) Id. at 972.

\(^{31}\) Id.

\(^{32}\) See, e.g., Richard E. Epstein, A Theory of Strict Liability, 2 J. LEGAL STUD. 151, 203 (1973) (arguing that “the rules of strict liability based upon the twin notions of causation and volition provide a better answer than the alternative theories based upon the notion of negligence, whether explicated in moral or economic terms”); Jones, supra note 14, at 1779 (arguing that enterprise liability should apply, with a few exceptions, to all cases of accidental injury and that application of such a doctrine is fair and will result in greater care and greater selectivity in choosing among risk-creating activities); Nolan & Ursin, supra note 14, at 297 (arguing that courts are rejecting the limitations of hazardous activity strict liability in the Restatement, are comfortable with strict liability rules and the contemporary tort policies they reflect, and are increasingly finding hazardous activity strict liability independent of the Restatement); see also Kenney v. Scientific, Inc., 497 A.2d 1310, 1320-21 (N.J. Super. Ct. 1985); Atlas Chem. Indus. v. Anderson, 514 S.W.2d 309, 316 (Tex. App. 1974) (“The costs of injuries . . . must be internalized by industry as a cost of production and borne by consumers or shareholders, or both, and not by the injured individual.”), aff’d in part, rev’d in part on other grounds, 524 S.W.2d 681 (Tex. 1975).
argue that broad-based strict liability is unworkable, contrary to our historic system of liability based on wrongful conduct, and economically unsound. How this debate has played out in the context of environmental contamination cases is discussed in more detail in Part IV.

D. The Restatements of Torts

By the second half of the twentieth century, the Restatement of Torts, rather than Rylands, became the primary vehicle through which courts applied the strict liability doctrine. Although many U.S. courts were initially hostile to the Rylands doctrine, by the 1930s numerous states began to adopt the rule for activities that were “out of place,” abnormally dangerous, or inappropriate to their location. This trend continued, and by the end of the twentieth century, nearly every state had recognized the doctrine in at least limited circumstances. While the use of explosives remains the

33. See, e.g., Ind. Harbor Belt R.R. v. Am. Cyanamid Co., 916 F.2d 1174, 1177 (7th Cir. 1990) (reasoning that negligence regime is more efficient and preferable to strict liability in all cases except where it is impossible to conduct the activity safely); James A. Henderson, Jr., Why Negligence Dominates Tort, 50 UCLA L. REV. 377, 405 (2002) (arguing that negligence should remain the dominant principle of American tort law and attempts to hold commercial enterprises strictly liable for harm are not viable because such liability disputes would be unadjudicable, risks of loss would be uninsurable, and victims, who are purchasers and consumers, are the best parties to be responsible for insuring against residual accident losses); Richard A. Posner, Strict Liability: A Comment, 2 J. LEGAL STUD. 205, 221 (1973) (arguing that application of broad strict liability theory is not economically efficient and imposes unavoidable costs on society without sufficient social value); see also Gerald W. Boston, Strict Liability for Abnormally Dangerous Activity: The Negligence Barrier, 36 SAN DIEGO L. REV. 597, 598 (1999) (arguing that strict liability for abnormally dangerous activities “has evolved to the point of near extinction because courts have concluded that the negligence system functions effectively to deter the serious risks posed by the activities involved”).

34. See PROSSER & KEETON, supra note 10, at 549-51 (collecting cases); WILLIAM L. PROSSER, The Principle of Rylands v. Fletcher, in SELECTED TOPICS ON THE LAW OF TORTS, 135, 152-54 (1954) (stating that by the 1930s, eighteen states had adopted Rylands by name or some similar version of strict liability for abnormally dangerous activities).

classic activity triggering the doctrine, Prosser and Keeton found that as of 1984, strict liability had been applied to water collected in large quantities in a dangerous place, explosives, inflammable liquids stored in a city, blasting, pile driving, crop dusting, fumigation with cyanide gas, drilling oil wells, operating refineries in densely populated communities, factories emitting smoke, and dust or noxious gases in the middle of a town, among others. This increase in use led the American Law Institute (“ALI”) to include in the first Restatement of Torts, in 1938, a section governing “ultrahazardous” activities based on U.S. courts’ application of *Rylands*. As shown below, the Restatement of Torts governing ultrahazardous activities has been extremely influential in the development of the doctrine among the states. Accordingly, a discussion of the Restatement’s development through the years is necessary to understand how courts have justified applying the doctrine to environmental contamination cases.

1. The First Restatement

In 1938, the first Restatement of Torts incorporated the principles of *Rylands* with some modifications. The first Restatement stated that one who carries on an “ultrahazardous” activity is liable to another person harmed by that activity even though “the utmost care is exercised to prevent the harm.” Section 520 of the first Restatement defined an activity as ultrahazardous if it:

(holding defendant strictly liable for engaging in ultrahazardous activity in environmental case under absolute nuisance theory); Ins. Co. of N. Am. v. Sheinbein, 488 P.2d 1273, 1275-76 (Okla. 1971) (holding intentional grass fire not subject to strict liability under *Rylands*, but stating that an earlier Oklahoma case involving use of poisonous weed killer was appropriate application of *Rylands*); Splendorio v. Bilray Demolition Co., 682 A.2d 461, 465 (R.I. 1996) (reversing prior precedent and holding that Rhode Island law now recognizes strict liability under *Rylands* and Restatement (Second) of Torts § 520). *But see* Bagley v. Controlled Env’t Corp., 503 A.2d 823, 825-27 (N.H. 1986) (stating that strict liability under *Rylands* has traditionally met with disfavor in New Hampshire and that contamination from release of chemicals did not compel the court to depart from the precedent because it was not impossible for plaintiff to prove negligence); Wyrulec Co. v. Schutt, 866 P.2d 756, 761 (Wyo. 1993) (holding that Wyoming had consistently imposed a negligence standard rather than absolute liability under the *Rylands* doctrine and finding that the facts of the current case involving injuries from contact with power lines did not warrant departing from prior precedent).

37. *Restatement (First) of Torts* § 519 (1938).
38. *Id*.
39. *Id*.
necessary 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

(2) is not a matter of common usage.\(^{40}\)

As Dean Prosser noted with some disapproval, this configuration of the rule both extended the *Rylands* doctrine by declining to incorporate Lord Cairns’s focus on the appropriateness of the activity to its surroundings and limited it by requiring a risk of serious harm and the impossibility of eliminating that harm through reasonable care.\(^{41}\) The first Restatement thus focused on (1) the dangerousness of the activity; (2) the impossibility of eliminating danger by the exercise of utmost care; and (3) whether the activity is a matter of common usage.\(^{42}\)

2. The Second Restatement

The configuration of strict liability in the first Restatement was modified dramatically when the ALI published the Second Restatement in 1977, with Dean Prosser as Reporter.\(^{43}\) First, the Second Restatement substituted the term “abnormally dangerous activity” for “ultrahazardous activity.”\(^{44}\) More significantly, the Second Restatement substantially altered the criteria for finding an activity to be abnormally dangerous and subject to strict liability. Instead of the definition contained in Section 520 of the first Restatement, the Second Restatement sets forth six “factors” to be weighed by the court, providing as follows:

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40. *Id.* § 520.

41. PROSSER & KEETON, *supra* note 10, at 551; see also BOSTON & MADDEN, *supra* note 21, at 116; PROSSER, *supra* note 34, at 158 (“This shift of emphasis to the nature of the activity itself rather than its relation to its surroundings is not reflected in the American cases, which have laid quite as much stress as the English ones upon the place where the thing is done.”).

42. RESTATEMENT (FIRST) OF TORTS § 520; BOSTON & MADDEN, *supra* note 21, at 116.

43. For a detailed history of the development of Sections 519 and 520 of the first and Second Restatement of Torts, including the debates among William Prosser, Page Keeton, and others, see Boston, *supra* note 33, at 604-628.

44. The amended 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.” RESTATEMENT (SECOND) OF TORTS § 519(1) (1977).
§ 520. Abnormally Dangerous Activities

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

(a) existence of a high degree of risk of some harm to the person, land or chattel of others;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes.\(^45\)

Notably, the Second Restatement also provided that whether an activity is abnormally dangerous was a question of law for the court, and not a factual determination for the jury.\(^46\) Thus, judges throughout the country would apply these very open-ended factors based in large part on judicial notice and their own sensibilities.\(^47\) In explaining the thrust of the Second Restatement, Prosser stated that any single factor alone is not necessarily sufficient for a finding of strict liability, and conversely it is not necessary that each factor be present if other factors weigh heavily.\(^48\) He went on to summarize that

The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even though it is carried on with all reasonable care. In other words, are its dangers and inappropriateness for the locality so great that,

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\(^45\) Id. § 520.
\(^46\) Id. § 520 cmt. l.
\(^47\) See Boston, supra note 33, at 668 (“Had strict liability been subjected to jury control as are findings of negligence, one suspects that its evolution might have been different.”).
\(^48\) Restatement (Second) of Torts § 520 cmt. f.
despite any usefulness it may have for the community, it
should be required as a matter of law to pay for any harm it
causes, without the need of a finding of negligence.\footnote{49}

There has been much dissatisfaction with the Second
Restatement’s dramatic reconfiguration of strict liability. Professor
Page Keeton, who revised Prosser’s treatise in 1984, was quite
critical of the direction taken by the Second Restatement. According
to Keeton, the significant changes from the first Restatement were a
misguided attempt to combine Prosser’s original ideas on “non-
natural” or “extraordinary uses” with the concepts of the first
Restatement.\footnote{50} Keeton, and others, conclude that the result was
unsatisfactory for many reasons, including the inclusion of a factor
relating to the value to the community. This ran counter to the
principle that those who engaged in socially desirable, but
dangerous activities, should pay for injuries they cause. Another
concern was that with so many factors, widely inconsistent decisions
among jurisdictions might result as courts focused on different
factors in reaching results.\footnote{51} It also has been noted that the third
factor, the inability to eliminate the risk by the exercise of
reasonable care, tends to dominate all other factors, often resulting
in an insurmountable evidentiary bar for plaintiffs who find it
impossible to prove a negative.\footnote{52} Moreover, a plaintiff is often faced

\footnotesize{49. \textit{Id.}}
\footnotesize{50. See, e.g., \textit{PROSSER \& KEETON, supra} note 10, at 555.}
\footnotesize{51. See, e.g., \textit{id.} at 555-56; \textit{Boston, supra} note 33, at 624, 627-28.}
\footnotesize{52. See, e.g., \textit{Ind. Harbor Belt R.R. v. Am. Cyanamid Co.,} 916 F.2d 1174,
1181-82 (7th Cir. 1990) (dismissing strict liability claim by a railroad against a
shipper for contamination caused by the release of chemicals during transit on
grounds that the plaintiff could not establish that hazards could not be avoided
by the exercise of reasonable care); \textit{Bagley v. Controlled Env’t Corp.,} 503 A.2d
823, 826 (N.H. 1986) (rejecting strict liability in the absence of the plaintiff’s
demonstration that the requirement of proving legal fault is a practical barrier
to otherwise meritorious claims); \textit{BOSTON \& MADDEN, supra} note 21, at 122 (“By
far the most pervasive reason for the limited use of strict tort liability to
environmental tort actions is that plaintiffs cannot satisfy the burden imposed
by § 520(c) of demonstrating that the risks of the activity are ones which cannot
be eliminated or reduced to acceptable levels by exercising reasonable care.”);
\textit{Boston, supra} note 33, at 599 (stating that courts have rejected strict liability
because they have concluded that the negligence system effectively protects
safety concerns associated with the activity); \textit{Jones, supra} note 14, at 1752-53
(discussing Judge Posner’s decision in \textit{Indiana Harbor Belt} and stating that
“one of the common deficiencies of the negligence regime is unavailability of
proof to the injured party”); \textit{Joseph K. Brenner, Note, Liability for Generators of
Hazardous Waste: The Failure of Existing Enforcement Mechanisms,} 69 GEO.
L.J. 1047, 1063-64 (1981) (suggesting that § 520(c) of the Restatement poses a
significant barrier to a plaintiff’s ability to impose strict liability for
environmental harms).}
with a Catch-22 situation if he or she pleads negligence and strict liability in the alternative, as a few courts have held that any evidence that the defendant acted negligently or in violation of a regulatory safety standard is evidence that it was the lack of reasonable care, not the result of an abnormally dangerous activity, that caused the injury, thus defeating the strict liability claim.\(^5\)

Keeton's concern that the Second Restatement's six-factor analysis would lead to inconsistent results and thus unpredictable outcomes for litigants appears to have been validated both in environmental and non-environmental cases.\(^5\) This disparity of results is not surprising because the factors themselves are difficult to pin down and give judges enormous discretion to focus on factors thought most important, informed by their own policy preferences.\(^5\)

As set forth below, although the ALI has proposed to amend the Restatement, its efforts do not necessarily address the problem of inconsistent and unpredictable results in applying what purports to be a uniform standard.

3. The Emergence of Environmental Protection: From the Second Restatement to the Draft Third Restatement

A review of the Second Restatement with an eye toward environmental contamination cases reveals an interesting fact. Notably absent from the 1977 Comments to the Second Restatement is any specific reference to the application of strict liability to environmental contamination as a general activity category to which the Restatement factors have been applied, even though certain specific environmental cases were noted as containing a good


\(^5\) See RESTATEMENT (SECOND) OF TORTS app. § 520, Reporter's Note (1981) (showing wide range of results among jurisdictions); BOSTON & MADDEN, supra note 21, at 143 (“[T]he courts that have considered whether the disposal of hazardous wastes and chemicals is an abnormally dangerous activity are hopelessly inconsistent.”); PROSSER & KEETON, supra note 10, at 555-56; Boston, supra note 33, at 627-28.

\(^5\) See Boston, supra note 33, at 668. The author states:
The decision of whether an activity is a matter of common usage or whether it is being conducted at a suitable place turns not so much on adjudicative facts, but more on legislative policy judgments . . . . The judge has enormous discretion in responding to these questions because she is not bound by the record in the case.

\textit{Id.}
discussion of the factors.\textsuperscript{56} Instead, the few published cases involving what we would today call environmental contamination were generally limited to cases involving transportation of petroleum or oil and gas wells.\textsuperscript{57}

However, by the time Tentative Draft No. 1 of the Restatement (Third) of Torts covering abnormally dangerous activities was published in 2001, environmental contamination cases were no longer absent from the strict liability landscape. The Tentative Draft, which departs significantly from the Second Restatement, proposes to abandon the six-factor balancing test for a definition that is similar but not identical to the first Restatement:

Tentative Draft No. 1:

§ 20. Abnormally Dangerous Activities

(a) A defendant who carries on an abnormally dangerous activity is subject to strict liability for physical harm resulting from the activity.

(b) An activity is abnormally dangerous if:

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

(2) the activity is not a matter of common usage.\textsuperscript{58}

Tentative Draft No. 1 thus retains the Second Restatement requirements that a high degree of risk still exists even when reasonable care is exercised and that the activity not be a matter of common usage. However, it deletes specific reference to the appropriateness of the location and the value to the community and adds a specific requirement that the significant risk of harm be foreseeable.\textsuperscript{59} Unlike earlier Restatements, the draft Third

\textsuperscript{56} See \textit{Restatement (Second) of Torts} app. § 520, Reporter’s Note (1981) (listing the following activities as having been subject to judicial analysis: stored explosives in a settled area, inflammable liquids in a thickly settled area, transportation of gasoline in a tanker, blasting; oil and gas wells in thickly settled communities, and water stored in inappropriate places).

\textsuperscript{57} See \textit{id.} (citing cases involving oil and gas wells, transportation of gasoline in tankers, and storage of inflammable liquids).

\textsuperscript{58} \textit{Restatement (Third) of Torts} § 20 (Tentative Draft No. 1, 2001).

\textsuperscript{59} According to the Reporter’s Note, the foreseeability requirement was added to the draft Third Restatement based on the rationale that “[w]hen the
Restatement contains both an Illustration and a reference in the Reporters’ Note to environmental contamination.

Illustration 2 involves a computer manufacturer located in a residential community that generates a toxic chemical byproduct placed in storage bins prior to shipment to an off-site disposal facility. Even during proper operations, it is necessary to open the storage bins on a regular basis, and wind conditions may disperse the chemical to the residential neighbors’ properties. The toxic fumes from the bins can cause illness. The Illustration concludes that because the storage of the chemical is not a matter of common usage and the activity may create a highly significant risk of physical harm even when reasonable care is exercised, a court may conclude the activity is abnormally dangerous. The Reporters’ Note follows up on the Illustration by stating that Illustration 2 is based on the understanding that “the abnormally dangerous doctrine has a significant application in the context of environmental harms. That understanding receives general support from a considerable body of recent cases.

The Reporters’ Note goes on to cite numerous cases as examples in which strict liability has been applied to environmental contamination. Other than a note on aviation ground damage, no other “new” category of cases is singled out for special treatment. As argued below, the reasons for this sharp increase in visibility of the application of strict liability to activities resulting in certain types of environmental contamination between 1977 and 2001 are the enactment of CERCLA and similar strict liability state laws and the corresponding increase in public (and thus judicial) awareness of the need for strong tools to address environmental contamination.

While this recognition of environmental cases in the draft Third Restatement shows how far that body of law has developed, the defendant sincerely and reasonably believes that its activity is harmless, both the ethical arguments and the safety-incentive arguments in favor of strict liability lose persuasiveness.” RESTATEMENT (THIRD) OF TORTS § 20, Reporter’s Note, at 306. The Reporters then cite to the House of Lords’ 1994 decision in Cambridge Water Co. v. Eastern Counties Leather, [1994] 1 All E.R. 53 (H.L.), which held that under Rylands, a defendant could not be held strictly liable for damages resulting from the storage of chemicals on its land if, at the time of the storage, it could not foresee that those chemicals were likely to contaminate nearby property. Id. at 70-71.

60. RESTATEMENT (THIRD) OF TORTS § 20 cmt. k, illus. 2 (Tentative Draft No. 1, 2001).
61. Id.
62. Id.
63. RESTATEMENT (THIRD) OF TORTS § 20, Reporters’ Note, at 349.
64. Id. at 349-50.
65. See infra Parts III-IV.
draft does not address the continuing problem of unpredictability of results. This problem remains because the primary factors (whether the risk is “highly significant” and whether the activity is of “common usage”) are highly subjective. Although it is not unusual for the common law to differ from jurisdiction to jurisdiction, greater predictability is more desirable where courts across jurisdictions are all purporting to apply a single standard (the Restatement) rather than drawing on divergent precedents that have developed independently in each jurisdiction. The following Parts of this Article address whether reference to CERCLA and similar state and federal statutes might increase predictability in this area.

III. CERCLA: THE NATIONAL DEBATE OVER STRICT LIABILITY FOR ENVIRONMENTAL HARM

The passage of CERCLA\textsuperscript{66} marked a watershed event in the ability of governments and private persons to recover the costs associated with the cleanup of property contaminated with hazardous substances from parties responsible for the contamination. Although this Article will not attempt to provide a full legislative history of CERCLA,\textsuperscript{67} a discussion of its main provisions and the legislative history supporting its strict liability provisions illustrates how the debates leading up to CERCLA’s enactment, as well as its subsequent implementation, were critical in courts’ greater willingness to find that activities resulting in environmental contamination were subject to common law strict liability under \textit{Rylands} or the Restatement.

A. CERCLA’s Key Liability Provisions

As enacted in 1980 and as amended in 1986, CERCLA, also known as “Superfund,” creates a federal framework for addressing the problems associated with the existence of hazardous substances in the environment. The statute contains provisions addressing both the investigation and cleanup of property contaminated with hazardous substances and the recovery of costs associated with such


cleanups from “responsible persons.” The term “Superfund” came from the five-year, $1.6 billion Hazardous Substances Response Trust Fund created to finance cleanups.\(^6\) In 1986, Congress passed the Superfund Amendments and Reauthorization Act (SARA), which replenished the fund with $8.5 billion and addressed many of the problems identified since 1980 with both the statutory language itself and the mechanism for securing prompt and effective cleanups.\(^6\)

Under CERCLA, anyone who is found to be “responsible”\(^7\) for a release or threatened release\(^7\) of a hazardous substance\(^7\) from a facility\(^7\) that results in the incurrence of response costs\(^7\) is strictly, for a release or threatened release\(^7\) of a hazardous substance\(^7\) from a facility\(^7\) that results in the incurrence of response costs\(^7\) is strictly, for a release or threatened release\(^7\) of a hazardous substance\(^7\) from a facility\(^7\) that results in the incurrence of response costs\(^7\) is strictly,
jointly, and severally liable for reimbursing those costs and, in an action by the federal or state government, can also be compelled to conduct a cleanup at the direction of the governmental entity. Costs incurred by the EPA or a state government, by contrast, must simply be “not inconsistent with the national contingency plan,” thus placing the burden of proving that the costs are inconsistent on the defendant, rather than making it part of the plaintiff's prima facie case, as with a private party plaintiff. See Id. § 9607(a)(4)(A) (liability for costs incurred by government); see also United States v. NE Pharm. & Chem. Co., 579 F. Supp. 823 (W.D. Mo. 1984), aff'd in part, rev'd in part on other grounds, 810 F.2d 726 (8th Cir. 1986); COOKE, supra note 67, § 14.01[7][b] (explaining differing burdens of proof).

75. United States v. Hunter, 70 F. Supp. 2d 1100, 1104-05 (C.D. Cal. 1999) (noting that courts have recognized the United States’s ability to seek strict, joint, and several liability under CERCLA); 42 U.S.C. § 9606(a) (authorizing the EPA to issue “such orders as may be necessary to protect public health and welfare and the environment”); COOKE supra note 67, § 14.02[c] (“At a site presenting an imminent and substantial endangerment, the EPA can bring an action (or issue an administrative order) pursuant to Section 106 to compel private parties to undertake the required cleanup measures.”).

76. 42 U.S.C. § 9607(a).

77. Id. § 9606(a).

78. Id. § 9607(c)(3).

79. Id. § 9605(a).
Despite its broad liability provisions, CERCLA has significant limitations. Private parties are limited to recovering “response costs” or monies paid toward a cleanup. CERCLA does not provide a vehicle for private parties to recover damages associated with personal injury, diminution in property value (often called “stigma damages”), lost profits, lost rents, or other damages that are typically associated with contaminated property. As a result, CERCLA will never replace the common law and was never intended to do so. Thus, the continuing significance of common law claims, particularly strict liability claims, in environmental contamination cases cannot be overstated. Instead, to obtain full recovery of those damages not covered by the federal statute, CERCLA’s role has been, and can be, to serve as a model for courts to expand the doctrine of common law strict liability for cases involving environmental contamination in order to provide full and complete relief.

B. CERCLA’s Legislative History on Strict Liability

CERCLA has been subject to justifiable criticism that it is poorly drafted and vague, with its liability provisions and definitions

82. See Cooke, supra note 67, § 16.01[8] (collecting cases which hold that lost business profits and diminution in value to property are not within the definition of response costs); Falcone, supra note 7, at 60-61 (“CERCLA does not offer a private plaintiff the opportunity to collect damages other than those which are necessary to cover the clean up costs of the subject site.”); see also Roger W. Findley, Daniel A. Farber, & Jody Freeman, Cases and Materials on Environmental Law 842-45 (6th ed. 2003) (discussing the inability to recover for personal injury and property damage under CERCLA as well as the conclusions of the Superfund Study Group); James R. Zazzali & Frank P. Grad, Hazardous Wastes: New Rights and Remedies? The Report and Recommendation of the Superfund Study Group, 13 Seton Hall L. Rev. 446, 458-63 (1983) (summarizing a report of the Superfund Study Group conducted under § 301(e) of CERCLA to evaluate the adequacy of existing common law and statutory remedies and concluding that a private litigant faces substantial barriers to recovery for property damage and personal injury). However, Congress provided an explicit savings provision to ensure that those costs not recoverable under CERCLA could still be recovered under other statutes and the common law. See 42 U.S.C. § 9652(d); PMC, Inc. v. Sherwin-Williams Co., 151 F.3d 610, 617 (7th Cir. 1998) (noting that the purpose of 42 U.S.C. § 9652 “is to preserve to victims of toxic wastes the other remedies they may have under federal or state law”); see also infra note 139 and accompanying text (discussing CERCLA’s inapplicability to petroleum or natural gas contamination).
83. For a discussion of the continuing importance of common law claims in contaminated property cases, including strict liability claims, see generally Maloney, supra note 7; Falcone, supra note 7; Kuhnle, supra note 2.
labeled as circular, frustrating, and unenlightening. Indeed, even the U.S. Supreme Court has remarked that portions of CERCLA are “not a model of legislative draftsmanship” and are “at best inartful and at worst redundant.” The primary explanation for this is CERCLA’s legislative history. Congress had been attempting to enact federal legislation for several years to address what many in Congress and the public saw as a crisis of abandoned toxic waste sites. CERCLA, enacted in 1980, was a piece of compromise legislation put together in the last days of the lame-duck ninety-sixth Congress, before new leadership took control of both the White House and the Senate. As one court stated, “[t]he final version of the Act was conceived by an ad hoc committee of Senators who fashioned a last minute compromise which enabled the Act to pass. As a result, the statute was hastily and inadequately drafted. However, when it comes to CERCLA’s strict liability provisions, there is ample legislative history surrounding the justification for strict liability even though the statute itself does not expressly mention strict liability. Significantly, a review of CERCLA’s legislative history on strict liability reveals that its debates and justifications work as a one-of-a-kind nationwide application of the Second Restatement factors to activities resulting in hazardous

84. See Cooke, supra note 67, § 12.03[1]. For instance, the definition of “owner or operator” is anyone “owning or operating such facility.” 42 U.S.C. § 9601(20)(A).

85. Exxon Corp. v. Hunt, 475 U.S. 355, 363 (1986); see also Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1080 (1st Cir. 1986) (recognizing that “CERCLA has acquired a well-deserved notoriety for vaguely drafted provisions and an indefinite, if not contradictory, legislative history”) (quoting United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985)).

86. Cooke, supra note 67, § 12.03[1].


88. CERCLA § 101(32) defines “liability” to mean the standard of liability under section 311 of the Clean Water Act, 33 U.S.C. § 1321, and courts have uniformly agreed that this reference evidences Congress’s intent to impose strict liability under CERCLA. Pub. L. No. 96-510, 94 Stat. 2767 § 101(32) (1980); see United States v. Mexico Feed & Seed Co., 980 F.2d 478, 484 (8th Cir. 1992) (holding that CERCLA is a strict liability statute that focuses on responsibility, not culpability); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146, 1152-53 (1st Cir. 1989) (“The Congressional history of CERCLA makes it clear that strict liability was intended for releases or threatened releases which cause response costs.”); United States v. Monsanto Co., 858 F.2d 160, 167 (4th Cir. 1988) (“We agree with the overwhelming body of precedent that has interpreted [CERCLA] as establishing a strict liability scheme.”); Boston & Madden, supra note 21, at 570; Cooke, supra note 67, § 14.01[6][b] (collecting cases uniformly holding defendants strictly liable under CERCLA).
substance contamination. As such, CERCLA's legislative history not only justified the application of strict liability for CERCLA claims, but offered a rich evidentiary record for courts and litigants to justify the imposition of common law strict liability for activities that would also be covered by CERCLA. As a result, as shown in Part IV, courts more often have used their extensive discretion under the six Restatement factors to reach a result that is justified as much by the public policy determinations reached in CERCLA and similar state laws as by a mechanical application of the factors themselves. Indeed, in many cases, courts have relied on such public policy principles and CERCLA itself to allow plaintiffs in environmental cases to overcome the hurdles imposed by the Restatement factors, particularly the “negligence barrier” that prevents the application of strict liability in so many other cases.  

The evidence marshaled by proponents of CERCLA during its consideration in Congress is significant for two reasons. First, it illustrates how much the toxic waste crisis of the 1970s and 1980s had affected the public consciousness and, consequently, the public's representatives in Congress. Second, by expressly applying the “evidence” in the framework provided by Rylands and the Restatement, Congress created a wealth of national evidence that could then be applied going forward to individual cases of environmental contamination. This not only explains, but also fully justifies, courts' later references to CERCLA and public policy developments in applying strict liability to activities resulting in environmental contamination.

1. CERCLA's Procedural History

CERCLA's enactment in December 1980 was the result of six years of work in the House and three years of work in the Senate to enact legislation providing for liability and compensation for injuries and damages resulting from the release of hazardous substances. Four major Superfund bills were considered during the ninety-sixth Congress, and three of them, H.R. 85, S. 1480, and H.R. 7020, received full Congressional hearings, committee reports, amendments, and floor debates. The bill President Carter

89. See supra note 33 and accompanying text; Boston, supra note 33, at 598-99 (arguing that § 520(c) of the Restatement (Second) of Torts acts as a “negligence barrier” to the imposition of strict liability and predominates over the other Restatement factors).


91. Id. For a more detailed discussion of CERCLA's procedural history, see supra note 67 and accompanying text.
ultimately signed into law on December 11, 1980 was H.R. 7020, as amended by the Senate through the so-called Stafford-Randolph compromise.\textsuperscript{92} Although earlier bills presented in both the House and the Senate contained broader liability provisions, a larger superfund, and more extensive recoverable damages than the final bill, Congress was running out of time because the national elections in November 1980 had resulted in a change of power in both the White House and the Senate slated to begin in January 1981.\textsuperscript{93} Accordingly, the proponents of CERCLA passed what they could and left it to the courts to implement the law.\textsuperscript{94} In interpreting the various provisions of CERCLA, courts have most often turned to the legislative history of S. 1480 and H.R. 7020, both of which contain substantial discussions regarding the appropriate standard of liability under CERCLA.\textsuperscript{95}

2. Making the Case for CERCLA

Although the somewhat tortured legislative history of CERCLA leaves much to be desired, the legislative history surrounding Congress’s intent that liability under the statute be strict is both clear and based on a significant evidentiary record contained in committee reports and debates on the House and Senate floors. Proponents of CERCLA marshaled a massive amount of national evidence relevant to the Second Restatement factors and presented the case to Congress. This ultimately resulted in a national policy of strict liability for environmental contamination covered by the provisions of CERCLA. Just as members of Congress looked to the common law to justify the statutory imposition of strict liability for environmental contamination, so too have courts expressly or impliedly looked back to the evidentiary record compiled by Congress to justify the imposition of common law strict liability since the enactment of CERCLA.

As an initial matter, CERCLA’s legislative history is replete

\begin{footnotesize}
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\item \textsuperscript{93} \textsc{Needham \\& Menefee}, supra note 90, Vol. 1, at xviii.
\item \textsuperscript{94} For a discussion of the compromises specific to CERCLA’s strict liability provisions, see infra notes 125-32 and accompanying text.
\item \textsuperscript{95} \textit{See} New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985) (discussing Congressional reports and floor statements on subject of strict liability); E. Peyton Whitener, Comment, Cleaning Up the Confusion: Long Beach, Grand Trunk, and the Scope of Easement Holder Liability Under CERCLA, 45 Emory L.J. 805, 816-21 (1996) (discussing importance of S. 1480 and H.R. 7020 and citing to Congressional statements contained in legislative histories of those bills).
\end{itemize}
\end{footnotesize}
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with facts, statistics, and horror stories justifying the need for federal legislation to address what was seen as a major crisis of abandoned hazardous waste facilities. Rep. Florio stated on the House floor that with regard to hazardous waste sites, "[w]e do not believe it is an exaggeration to say it is the number one environmental challenge facing us in this decade." The Report of the Senate Committee on the Environment and Public Works, prepared in connection with S. 1480, stated that as of 1980, 43,000 chemicals were in commercial production with thousands of new ones being introduced each year, that chemical spills capable of inflicting environmental harm occurred about 3,500 times each year, and that an estimated $65 to $260 million was needed to clean them up. The report noted that the EPA had estimated that more than 2,000 dump sites containing hazardous chemicals posed threats to the public health and that the costs of containing their contents was estimated at $3.6 million per site.

The EPA also estimated that 57 million metric tons of hazardous wastes were produced annually in the United States and that the amount was growing at a rate of 3.5% per year. More than 90% of the waste was believed to be disposed in environmentally unsound ways. The Congressional Record of the House and Senate floor debates is replete with tables filled with data surrounding the types and amounts of hazardous substances found at sites around the country and both the personal anguish and financial harm they imposed on nearby residents, not to mention the impossible financial burden placed on state and local governments.

Throughout Congress's consideration of CERCLA, continual reference was made to "Love Canal" and "Valley of the Drums," which were the most notorious of the thousands of abandoned waste sites throughout the country deemed to pose a threat to human


98. Id.

99. Id. at 478.

100. Id.

101. See, e.g., 126 CONG. REC. 26,338-56 (1980).
health and the environment.\textsuperscript{102} Love Canal was located in Niagara County, New York. Hazardous chemicals were poured into a ditch that was ultimately covered over and became the site of a school and numerous homes.\textsuperscript{103} Experts estimated that 141 pounds of dioxin were buried at Love Canal, with another 2,000 pounds buried in other places in Niagara County.\textsuperscript{104} Residents of the area suffered numerous health problems that were attributed to toxic waste exposure.\textsuperscript{105} Over 200 residents ultimately abandoned their homes because of the contamination.\textsuperscript{106} The second site was located near Louisville, Kentucky, where, in 1978, officials found over 20,000 drums of rusting and leaking hazardous chemicals.\textsuperscript{107} The area became known as the “Valley of the Drums.”\textsuperscript{108} Members of Congress also argued that the nation’s hazardous waste problem was made more difficult by the fact that existing statutory authority, common law authority, and funding for cleanup of existing hazardous waste sites was woefully inadequate.\textsuperscript{109}

This is only a cursory overview of the types of evidence, data, and stories that made their way into the Congressional Record during the debates over the various bills that ultimately resulted in CERCLA. While this record was used to justify numerous provisions of CERCLA, its use in connection with the strict liability

\textsuperscript{102} 126 CONG. REC. 26,780 (1980) (statement of Rep. Dingell) (stating that Love Canal and Valley of the Drums “are but the headliners in a cast of thousands”); Cooke, supra note 67, § 12.02[2]; Needham & Meneffee, supra note 90, Vol. II, at 478, 480-81; see also Anthony DePalma, Love Canal Declared Clean, Ending Toxic Horror, N.Y. TIMES, March 18, 2004, at A1, C16 (detailing the history of the Love Canal site and stating that the tremendous size and scope of the problem at the site led President Carter to declare environmental emergencies and directly spurred Congress to enact CERCLA).

\textsuperscript{103} Needham & Meneffee, supra note 90, Vol. II, at 480.

\textsuperscript{104} Id. at 480-81.

\textsuperscript{105} Id.

\textsuperscript{106} Id.

\textsuperscript{107} Id. at 478.

\textsuperscript{108} Id.

\textsuperscript{109} Id. at 480-81; Boston & Madden, supra note 21, at 558. The authors state:

Congress concluded that the states, including state common law tort liability principles, were unable to respond adequately to the distinct national problem of mitigating the consequences of hazardous substance releases, and that a uniformly administered federal program that imposed a single liability standard would be more effective than a patchwork of differing state laws.

\textit{Id.}; Cooke, supra note 67, §§ 12.01[1], 12.02[3] (noting that the inability of governments and private citizens to obtain cleanup of notorious hazardous waste sites under RCRA, the Clean Water Act, and existing common law led Congress to recognize the existence of a “hazardous waste crisis” necessitating new federal legislation).
components of the law is most significant for purposes of this Article.

3. The Evidence Presented to Congress to Justify Strict Liability

The most extensive arguments in support of a strict liability standard for activities that resulted in hazardous substance releases were made by then-Representative Albert Gore, Jr. During the consideration of H.R. 7020, Rep. Gore introduced an amendment to ensure that responsible parties could not take advantage of a proposed “third-party defense” in section 3017(a)(1)(C) of H.R. 7020. As originally drafted, the third-party defense allowed a defendant to avoid liability if he or she could demonstrate that the release was caused solely by “an act or omission of a third party” and that the defendant “exercised due care with respect to the hazardous substances involved.” Gore argued that this language altered the common law rule of strict liability for abnormally dangerous/ultrahazardous activities that would otherwise be applicable to parties dealing with hazardous waste. His proposed amendment to the language was to require that in order for the third-party defense to apply, the release must not have occurred “in connection with a contractual relationship, existing directly or indirectly, with the defendant.” By proposing the amendment, Gore wished to close what he saw as a loophole that allowed a party

110. 126 Cong. Rec. 26,781-83 (1980). Rep. Gore’s amendments also included language setting forth six factors for the courts to apply when considering the imposition of joint and several liability under CERCLA: (1) the extent to which the party’s contribution to the release can be distinguished; (2) the amount of hazardous substances involved; (3) the degree of toxicity of the hazardous substance; (4) the degree of involvement exercised by the party in handling or disposing of the hazardous substance; (5) the degree of care exercised by the party with regard to the hazardous substance; and (6) the degree of cooperation by the party with government officials to prevent harm to public health or environment. Id. at 26,781. These factors, which have come to be known as the “Gore Factors,” passed in the House but ultimately were not included in the final version of CERCLA. However, they are commonly used by courts nationwide in allocating liability among responsible parties and have been codified into at least one state superfund statute. See, e.g., Minn. Stat. § 115B.08 (2000) (enumerating the six Gore factors and creating right to apportionment of liability among responsible parties under the Minnesota Environmental Response and Liability Act, Minn. Stat. § 115B.04 (“MERLA”), based on those factors); Boston & Madden, supra, note 21, at 729 (“There is no question that the Gore factors have emerged as the dominant allocation methodology [in CERCLA cases].”).
111. 126 Cong. Rec. 26,782.
112. Id.
113. Id. at 26,781-83.
engaged in hazardous waste disposal to avoid liability by contracting with a third party to dispose of the hazardous waste.\textsuperscript{114} Without the amendment, he argued, a defendant could escape liability simply by showing he or she exercised “due care” with respect to the hazardous substances, thus erecting “a negligence standard where one of strict liability would otherwise apply.”\textsuperscript{115}

Rep. Gore’s proposed amendment and accompanying justification presupposed, of course, that strict liability applied at common law to the release and disposal of hazardous substances. Gore used his time on the House floor to present a detailed and coherent argument that the activities covered by CERCLA easily meet the six-factor Second Restatement common law standard, and thus the imposition of strict liability under CERCLA would not be a departure from existing law.

Rep. Gore began by recognizing that there was little existing environmental case law that supported his premise, but stated his confidence that this new “crisis” posed by hazardous waste would quickly be found to be abnormally dangerous:

There can be little doubt that actions involving hazardous waste would be considered by the courts as abnormally dangerous or ultrahazardous activity sufficient to subject a responsible party to strict liability. While there may at present be no decision in which an individual has been held strictly liable to [sic] damages resulting from a release of hazardous waste, this is due to the “newness” of waste problems rather than a reticence on the part of the judiciary. The common law proceeds on the basis of analogy and by extrapolation of existing doctrine to new fact situations. Absence of case law on the specific issue of strict liability for hazardous waste in no way invalidates the conclusion of the doctrine’s applicability.\textsuperscript{116}

Gore then explained the doctrine and its history, starting with the \textit{Rylands} case and enumerating the Second Restatement factors. He then proceeded to make his case for a broad application of strict liability to the activities covered by CERCLA against the backdrop of the voluminous evidence gathered throughout the Congressional proceedings on CERCLA and discussed on the House and Senate floors. He argued first that as demonstrated by Love Canal and elsewhere, the release of hazardous waste “obviously posed great harm and danger to a community.”\textsuperscript{117} Second, release of waste can

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  \item \textsuperscript{114} \textit{Id.} at 26,783.
  \item \textsuperscript{115} \textit{Id.} at 26,782.
  \item \textsuperscript{116} \textit{Id.}
  \item \textsuperscript{117} 126 CONG. REC. 26,782.
\end{itemize}
occur despite the exercise of reasonable care.\textsuperscript{118} Third, “most activities that could result in a release of hazardous waste are not ‘customarily carried on by the great mass of mankind or by many people in the community.’”\textsuperscript{119} Locational appropriateness and value to the community were not discussed in detail but assumed to weigh in favor of strict liability in light of the large numbers of hazardous waste sites in residential areas imposing huge costs on society. Gore ended his analysis by stating that “[g]iven the above, it is inconceivable that actions involving hazardous waste would not be considered abnormally dangerous. Strict liability would thus be imposed upon anyone responsible for a release of such waste.”\textsuperscript{120}

Later in the House debate that same day, Gore returned to \textit{Rylands} and the Second Restatement in response to questioning on the amendment. He noted that in the more than 100 years since \textit{Rylands}, the law of strict liability “has progressed and expanded tremendously,” and that numerous activities far less dangerous than “the handling, generation and disposal of hazardous waste” have been held to be abnormally dangerous.\textsuperscript{121} He then cited favorably the 1979 New Jersey Superior Court case of \textit{Department of Environmental Protection} \textit{v. Ventron Corp.}\textsuperscript{122} as an indication of the trend that was just beginning among the courts to “add the generation and disposal of [hazardous] wastes to the list of ultrahazardous activities.”\textsuperscript{123}

On the Senate side, the rationale for imposing strict liability was made equally clear and was grounded in the same historic principles justifying common law strict liability under \textit{Rylands} and the various Restatements applicable to abnormally dangerous activities:

\begin{quote}
Strict liability, the foundation of S. 1480, assures that those who benefit financially from a commercial activity internalize the health and environmental costs of that activity into the costs of doing business. Strict liability is an important instrument in allocating the risks imposed upon society by the manufacture, transport, use, and disposal of inherently hazardous substances. To establish provisions of liability any less than strict, joint, and several liability would be to condone a system in which innocent victims bear the actual burden of releases, while those who conduct commerce in hazardous
\end{quote}

\begin{flushleft}
\textsuperscript{118} Id.  \\
\textsuperscript{119} Id. (quoting \textit{RESTATEMENT (SECOND) OF TORTS} § 520, cmt. i (1977)).  \\
\textsuperscript{120} Id.  \\
\textsuperscript{121} Id.  \\
\textsuperscript{123} 126 \textit{CONG. REC.} 26,782.
\end{flushleft}
substances which cause such damage benefit with relative impunity.\textsuperscript{124}

By making reference to “inherently hazardous substances” and expressing the desire that the business or “enterprise” rather than innocent victims bear the cost of hazardous waste, the Senate, like Rep. Gore, looked back to the rationales supporting strict liability generally and the principles governing abnormally dangerous activities specifically.

4. The Final Compromise Language on Strict Liability

Rep. Gore’s amendment ensuring a limited third-party defense passed the House and was incorporated into the final compromise bill that became CERCLA.\textsuperscript{125} However, the sponsors of H.R. 7020 and S. 1480 ultimately removed express language referring to strict, joint, and several liability in order to reach a compromise with members of Congress opposed to various portions of the proposed law.\textsuperscript{126} The proposed law’s sponsors replaced the express language contained in CERCLA’s primary liability section with a definition contained in section 101(32), which simply defined the terms “liable” and “liability” as “the standard of liability which obtains under section 1321 of Title 33,” which was section 311 of the Clean Water Act.\textsuperscript{127}

Significantly, section 311 of the Clean Water Act itself did not contain an express strict liability provision, but, at the time of CERCLA’s enactment, several courts had interpreted section 311 as imposing strict liability.\textsuperscript{128} Thus, this “compromise” really did

\textsuperscript{124} Needham & Menefee, supra note 90, Vol. II, at 483.
\textsuperscript{125} See 42 U.S.C. § 9607(b)(3).
\textsuperscript{126} Prior to the final compromise, both H.R. 7020 and S. 1480 contained express strict liability provisions. S. 1480 contained a provision entitled “Liability for Damages and Removal Costs,” which set forth the categories of persons liable under CERCLA and stated that such persons were “jointly, severally, and strictly liable” for various costs relating to hazardous substances. See S. 1480, 96th Cong., § 4(a) (1980), reprinted in Needham & Menefee, supra note 90, Vol. II, at 572-74. H.R. 7020’s liability section provided that “any person who caused or contributed to a release or threatened release shall be strictly liable for such costs, damages and losses.” See H.R. 7020, 96th Cong. § 3071(a) (1980), (as introduced), reprinted in Needham & Menefee, supra note 90, Vol. III, at 181.
\textsuperscript{127} See 42 U.S.C. § 9601(32) (defining “liable” or “liability”); see also 33 U.S.C. § 1321 (providing Clean Water Act liability provisions); Cooke, supra note 67, § 12.03[3].
\textsuperscript{128} See, e.g., Steuart Transp. Co. v. United States, 596 F.2d 609, 613 (4th Cir. 1979); United States v. Tex-Tow, Inc., 589 F.2d 1310, 1314-15 (7th Cir. 1978); Burgess v. M/V Tamano, 564 F.2d 964, 982 (1st Cir. 1977); see also New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985) (stating that
nothing to soften the liability standard CERCLA's sponsors intended and has been referred to as a “pretext” and a “sleight of hand” by some commentators.\textsuperscript{129}

In furtherance of their efforts to retain the original strict liability standard based on \textit{Rylands} and the Restatement, the proposed law’s proponents stated throughout the final proceedings that CERCLA’s liability remained strict, joint, and several. In summarizing the final Senate amendments to H.R. 7020, Rep. Florio noted that even though the liability provisions of the Senate bill did not expressly use the terms strict, joint, and several liability, “the strict liability standard already approved by this body is preserved.”\textsuperscript{130} Rep. Florio’s confidence was subsequently borne out by the courts, which have uniformly held that CERCLA imposes strict liability on responsible parties even in the absence of any express language to that effect. In reaching that conclusion, courts have relied heavily on the statements of Rep. Florio and others insisting that the intent of the law was to impose strict liability for the reasons provided during the earlier Congressional proceedings.\textsuperscript{131} As a result, despite the absence of an express strict

\textsuperscript{129} See \textsc{Allan J. Topol \\& Rebecca Snow, Superfund Law \\& Procedure} § 4.2 (1992) (“At the time that Congress engaged in this sleight of hand, Section 311 of the Clean Water Act had been construed by the courts as imposing strict liability upon certain designated parties, subject only to the defenses specifically enumerated in that statute.”); Whitener, \textit{supra} note 95, at 817 (“Although the Committee on Environment and Public Works deleted the term ‘strict liability’ to appease those Senators opposed to such a strong standard of liability, the deletion served as a pretext to get the much-needed environmental legislation passed.”).

\textsuperscript{130} 126 \textsc{Cong. Rec.} H11787, \textit{reprinted in} Needham \\& Menefee, \textit{supra} note 90, Vol. II, at 164; 126 \textsc{Cong. Rec.} H11788 (reproducing Justice Department letter to Rep. Florio dated December 1, 1980, confirming that courts have interpreted liability under the § 311 of the Clean Water Act to be strict and that amendments to H.R. 7020 will assure application of strict liability), \textit{reprinted in} Needham \\& Menefee, \textit{supra} note 90, Vol. II at 165.

\textsuperscript{131} See, e.g., \textsc{Shore Realty Corp.}, 759 F.2d at 1042 (relying on statements made by sponsors of the compromise bill in support of strict liability to reach conclusion that liability under Section 9607 of CERCLA is strict); \textsc{Chem-Dyne Corp.}, 572 F. Supp. at 805-08 (presenting a detailed summary of statements by members of Congress in support of strict liability and holding that “[i]t is proper to assume Congress was aware of the judicial interpretation of section 1321 as a strict liability standard”); \textsc{Topol \\& Snow, supra} note 129, § 4.2 (expressing concern that courts have not adequately dealt with the fact that express reference to strict liability was removed from the final bill and stating that “instead they have unanimously concluded that the appropriate standard under
liability provision and its replacement by reference to section 311 of the Clean Water Act, CERCLA's strict liability framework remains grounded in the common law principles of Rylands and the Restatement expressed by the law's original sponsors.\footnote{See, e.g., Ginsberg & Weiss, supra note 24, at 920 (discussing applications of strict liability for abnormally dangerous activity to environmental contamination and concluding that "notions of fault die hard" and courts appear reluctant to punish enterprises causing contamination by requiring them to pay for damages that might have been preventable); Maloney, supra note 7, at 151 (exploring common law theories of recovery for pollution...}

IV. CERCLA'S IMPACT ON COMMON LAW STRICT LIABILITY FOR ENVIRONMENTAL CONTAMINATION

At the time of CERCLA's enactment, many commentators were not as optimistic as Rep. Gore regarding courts' application of common law strict liability to contaminated property. In the years before CERCLA and for a few years after the statute's enactment in 1980, the common law theory of strict liability was seen as a potential vehicle to recover damages resulting from environmental contamination, but one that had fallen far short of its potential, as courts had been slow to accept such applications.\footnote{See, e.g., Ginsberg & Weiss, supra note 24, at 920 (discussing applications of strict liability for abnormally dangerous activity to environmental contamination and concluding that "notions of fault die hard" and courts appear reluctant to punish enterprises causing contamination by requiring them to pay for damages that might have been preventable); Maloney, supra note 7, at 151 (exploring common law theories of recovery for pollution...}

Moreo...
noted above, the prevailing wisdom today appears to be that strict liability as a general doctrine is waning in popularity among the courts, with a greater emphasis on negligence as the dominant tort theory. These two trends together would not seem to bode well for the application of common law strict liability to activities resulting in environmental contamination. However, as explained below, a review of the case law reveals that while the general trend may be moving to further limit the application of common law strict liability in favor of negligence, the trend for environmental contamination cases appears to be the opposite. As argued below, this is because courts are not only comfortable with imposing strict liability for environmental contamination as a result of CERCLA, but also are applying the Restatement factors against the backdrop of the public policy debate over the crisis of hazardous waste sites that CERCLA brought to the public consciousness over twenty years ago.

but stating that the limitation of strict liability to ultrahazardous or abnormally dangerous activities “has severely limited its usefulness”); Gary Milhollin, Long-Term Liability for Environmental Harm, 41 U. Pitt. L. Rev. 1, 7 (1979) (“It will not be possible to convince the courts that all or even most, polluting activities are ultrahazardous under a common law definition.”); Jon G. Anderson, Note, The Rylands v. Fletcher Doctrine in America: Abnormally Dangerous, Ultrahazardous, or Absolute Nuisance?, 1978 Ariz. St. L.J. 99, 124 (concluding that the Rylands rule has “seldom” been used in cases involving industrial waste); Brenner, supra note 52, at 1062-65 (concluding that under both Rylands and the Restatement, courts often decline to impose strict liability for environmental contamination); Mary Margaret Fabic, Note, Pursuing a Cause of Action in Hazardous Waste Pollution Cases, 29 Buff. L. Rev. 533, 551 (1980) (stating that common law tort theories are inadequate to adjudicate hazardous waste claims); Note, Strict Liability for Generators, Transporters, and Disposers of Hazardous Wastes, 64 Minn. L. Rev. 949, 969-77 (1980) (stating Rylands is inadequate to accomplish compensation for hazardous waste damages and that Restatement approach, while better, will still act to “bar compensation for a large class of hazardous waste victims”). Indeed, as late as 1992, one article discussing the application of various common law torts to environmental contamination stated that with regard to strict liability, “the recent decisions are relatively scant and the abnormally dangerous activities doctrine has acquired no more than a foothold in environmental cleanup litigation.” Jim C. Chen & Kyle E. McSlarrow, Application of the Abnormally Dangerous Activities Doctrine to Environmental Cleanups, 47 Bus. Law. 1031, 1032 (1992).

134. See supra note 33 and accompanying text.

135. But see Boston & Madden, supra note 21, at 122 (“By far the most pervasive reason for the limited use of strict tort liability to environmental tort actions is that plaintiffs cannot satisfy the burden imposed by § 520(c) of demonstrating that the risks of the activity are ones which cannot be eliminated or reduced to acceptable levels by the exercise of reasonable care.”); Boston, supra note 33, at 598.
A. Methodology

The cases analyzed in this Part were gathered from published decisions and unpublished decisions available in electronic databases that contained a common law strict liability claim for damages arising from environmental contamination.\textsuperscript{136} From this group, cases involving solely personal injury (as opposed to cases involving both personal injury and property damage) were excluded because CERCLA and state superfund laws do not generally cover these claims.\textsuperscript{137} Cases that involved releases during railroad transport were also excluded because railroads are typically not subject to strict liability claims for harm caused during transport of goods based on the theory that the carrier cannot refuse service to a shipper of a lawful commodity.\textsuperscript{138}

From this remaining group of cases, environmental contamination cases that involved (1) solely petroleum releases; (2)

\textsuperscript{136} To obtain relevant cases, the author reviewed case citations in the \textsc{Restatement (Second) of Torts} §§ 519-20 (current through May 2003) that involved environmental contamination, as well as cases involving strict liability and environmental contamination cited in numerous environmental treatises and casebooks. In addition, the author conducted searches in state and federal Westlaw databases for all fifty states and Puerto Rico and the Virgin Islands with the terms (“Rylands,” “Restatement § 520,” “strict liability,” and “contam!”). Finally, any cases cited in the cases obtained through the means described above were reviewed for relevancy.

\textsuperscript{137} Private parties are limited to recovering “necessary costs of response” under CERCLA’s statutory scheme. 42 U.S.C. § 9607(a)(4)(B) (2000). Response costs are defined generally as those costs relating to the investigation and cleanup of contaminated property. \textit{See Id.}, § 9601(23)-(25) (defining “respond,” “response,” “remove,” “removal,” “remedy,” or “remedial action”). Courts have overwhelmingly rejected plaintiffs’ efforts to recover medical monitoring costs or other relief for personal injury resulting from environmental contamination under CERCLA. \textit{See, e.g.}, Werlein v. United States, 746 F. Supp. 887, 903-04 (D. Minn. 1990) (rejecting claims for medical surveillance costs as not recoverable under CERCLA because CERCLA expressly created mechanisms for the Agency of Toxic Substances and Disease Registry to study health impacts of exposure to hazardous substances but deleted medical monitoring costs in sections dealing with response costs available to private litigants), \textit{vacated in part on other grounds}, 793 F. Supp. 898 (D. Minn. 1992); \textsc{Boston & Madden, supra} note 21, at 264-65 (collecting cases).

\textsuperscript{138} \textit{See} Ind. Harbor Belt R.R. v. Am. Cyanamid Co., 916 F.2d 1174, 1180 (7th Cir. 1990) (citing \textsc{Restatement (Second) of Torts} § 521); E.S. Robbins Corp. v. Eastman Chem. Co., 912 F. Supp. 1476, 1489-91 (N.D. Ala. 1995) (relying on \textit{Indiana Harbor Belt} and holding transportation of hazardous substances not subject to strict liability under Alabama law); \textsc{Restatement (Second) of Torts} § 521 (“The rules as to strict liability for abnormally dangerous activities do not apply if the activity is carried on in pursuance of a public duty imposed upon the actor as a public officer or employee or as a common carrier.”).
jurisdictions that do not recognize strict liability under any circumstances; and (3) claims by current property owners against prior owners of the same property were set aside. These cases were not analyzed because they neither support nor detract from the premise that CERCLA and similar laws have influenced the success of common law strict liability claims. With regard to petroleum releases, as stated earlier, Congress expressly excluded petroleum from the definition of “hazardous substances” under CERCLA, thereby removing petroleum contamination from CERCLA’s strict liability regime. Thus, the fact that many courts have found that the use and release of petroleum is not an abnormally dangerous activity is not relevant to the impact of CERCLA on common law strict liability claims because these cases are not within the purview of CERCLA in the first place.

139. See 42 U.S.C. § 9601(14). This section provides:

The term [hazardous substance] does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under paragraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

Id. Courts interpreting the exclusion have generally held that the petroleum exclusion covers crude oil, crude oil fractions, and hazardous substances that are indigenous to crude oil or are typically added to crude oil during the refining process, such as benzene, toluene, xylene, ethyl benzene, and lead. But see United States v. Gurley, 43 F.3d 1188, 1199 (8th Cir. 1994) (holding re-refined, used motor oil that picked up PCBs, sulfuric acid, and other contaminants during the re-refining process are not covered by the exclusion because PCBs and sulfuric acid do not occur naturally in crude oil); Cose v. Getty Oil Co., 4 F.3d 700, 705 (9th Cir. 1993) (finding the petroleum exemption did not apply to crude oil tank bottoms disposed on land where solids and liquids had separated from the crude oil); United States v. Alcan Aluminum Corp., 964 F.2d 252, 266-67 (3d Cir. 1992) (holding that the mineral oil emulsion that picked up traces of hazardous substance during the production process was not covered by exclusion because used oil was contaminated during production process); Wilshire Westwood Assoc. v. Atl. Richfield Corp., 881 F.2d 801, 810 (9th Cir. 1989) (finding the exclusion exempted refined, leaded gasoline from CERCLA coverage even though it contained substances which, on their own, would have met the definition of hazardous substance); Cooke, supra note 67, § 14.01[3][c][ii].

140. A partial list of cases that have found that activities related to the acquisition, use, and release of petroleum and natural gas are not ultrahazardous under Rylands or the Restatement includes Fletcher v. Conoco Pipe Line Co., 129 F. Supp. 2d 1255, 1261-62 (W.D. Mo. 2001) (holding that stray electricity from natural gas pipeline not subject to strict liability); Nat’l Tel. Coop. Ass’n v. Exxon Corp., 38 F. Supp. 2d 1, 9 (D.D.C. 1998) (holding that storage of petroleum in tanks not abnormally dangerous); Arlington Forest Assoc. v. Exxon Corp., 774 F. Supp. 387, 393 (E.D. Va. 1991) (holding that petroleum contamination from gas station not ultrahazardous); Hagen v.
Similarly, cases in jurisdictions that do not recognize strict liability as a viable claim under any circumstances are not relevant in determining CERCLA’s impact on the common law because neither CERCLA nor any other factor is allowed to have an impact—strict liability is barred in all cases. Finally, many jurisdictions bar claims by current property owners against prior owners of the same property as a matter of law, based either on the doctrine of caveat emptor or on the conclusion that Rylands and the Restatement intended to limit strict liability claims to cases involving neighboring properties. Thus, when a court dismisses a


141. See, e.g., Doddy v. Oxy USA, Inc. 101 F.3d 448, 462 (5th Cir. 1996) (stating that Texas rejects strict liability completely); Jones v. Texaco, 945 F. Supp. 1037, 1050 (S.D. Tex. 1996) (same); Wyrulec Co. v. Schutt, 866 P.2d 756, 761 (Wyo. 1993) (stating that Wyoming imposes standard of ordinary care in all circumstances); see also supra notes 34-35 and accompanying text.

142. See Kennedy Bldg. Assocs. v. Viacom, Inc., 375 F.3d 731, 742 (8th Cir. 2004) (dismissing strict liability claims by subsequent owner against prior owner based on court's prediction that Minnesota Supreme Court would bar such claim under Rylands doctrine); Andritz Sprout-Bauer, Inc. v. Beazer East, Inc., 12 F. Supp. 2d 391, 418 (M.D. Pa. 1998) (use of hazardous substances is abnormally dangerous but current owner barred from bringing claim against prior owner); Cross Oil Co. v. Phillips Petroleum Co., 944 F. Supp. 787, 790 (E.D. Mo. 1996) (no strict liability against prior owner for petroleum
strict liability claim on the basis that it involves a “vertical” relationship between the plaintiff and the defendant, it never reaches the issue of whether the activity is abnormally dangerous.

In sum, the cases analyzed below are environmental contamination cases that (1) would be covered by CERCLA; (2) contain a claim for common law strict liability; and (3) do not involve claims by subsequent owners against prior owners of the same property or claims against common carriers. What was most significant in reviewing these cases was the frequency with which courts relied upon CERCLA and public policy concerns involving environmental contamination to reach their result, rather than any particular Restatement factor.

B. Illustrations

This section reviews the impact of CERCLA and similar state laws on the success of common law strict liability claims in environmental cases. The discussion first analyzes cases decided prior to the enactment of CERCLA in 1980 in order to provide a contamination); Jones, 945 F. Supp. at 1047 (stating that even if Texas recognized the doctrine of strict liability, it would not provide a remedy for subsequent owners of land on which allegedly harmful activity was conducted); 325-343 E. 56th Street Corp. v. Mobil Oil Corp., 906 F. Supp. 669, 678 (D.D.C. 1995) (dismissing strict liability claim because claim by current owner against prior owner is not viable); Dartron Corp. v. Uniroyal Chem. Co., 893 F. Supp. 730, 740 (N.D. Ohio 1995) (holding that owner was barred from bringing strict liability claim for hazardous waste contamination against predecessor in interest under Ohio law); Wellesley Hills Realty Trust v. Mobil Oil Corp., 747 F. Supp. 93, 101-02 (D. Mass. 1990) (finding that Massachusetts recognizes strict liability but damage must be to property “of another”); Futura Realty v. Lone Star Bldg. Ctrs. (Eastern), Inc., 578 So.2d 363, 365 (Fla. Dist. Ct. App. 1991) (holding that claim for strict liability not available to subsequent owners of property); Rosenblatt v. Exxon Co., 642 A.2d 180, 188 (Md. 1994) (holding that Maryland recognizes strict liability but not claims by subsequent owners who are in a better position to avoid the harm than neighboring property owners); Hydro-Mfg., Inc. v. Kayser-Roth Corp., 640 A.2d 950, 958-59 (R.I. 1994) (finding no claim for strict liability for environmental contamination by current owner against prior owner). But see Interstate Power Co. v. Kansas City Power & Light Co., 909 F. Supp. 1224, 1240 (N.D. Iowa 1991) (denying motion to dismiss strict liability claim by purchaser of contaminated property because facts may show contamination was not obvious at time of purchase); Hanlin Group, Inc. v. Int’l Minerals & Chem. Corp., 759 F. Supp. 925, 934 (D. Me. 1990) (holding the purchaser of property contaminated with mercury and chlorine can maintain strict liability claim against predecessor under Maine law); T & E Indus., Inc. v. Safety Light Corp., 587 A.2d 1249, 1257-59 (N.J. 1991) (rejecting caveat emptor theory and upholding strict liability claim by current owner against prior owner for contamination related to disposal of radium tailings).

143. See supra notes 137-42 and accompanying text.
historical context. The discussion then turns to post-CERCLA cases that seek damages under a common law strict liability theory, where the court either reaches a final determination that the activity in question is (or is not) abnormally dangerous or rules on a defendant’s motion to dismiss the strict liability claim along with a more than perfunctory analysis of why the claim may (or may not) be viable at trial.  

1. Pre-CERCLA Environmental Cases

Courts’ application of strict liability to environmental contamination cases has a history that pre-dates CERCLA by nearly a century, but the cases prior to 1980 are not large in number. Although petroleum cases are excluded from the analysis of the post-CERCLA cases, the pre-CERCLA petroleum cases are included here for historical background.

One of the first cases to apply strict liability in an environmental context was an 1895 Minnesota case, Berger v. Minneapolis Gaslight Co. In that case, the plaintiffs sought to recover damages resulting from the release of petroleum from tanks on the defendants’ property that migrated onto the plaintiffs’ property and into their wells and cellars. The Minnesota Supreme Court affirmed the trial court’s instruction to the jury that the defendant was liable without proof of negligence for the consequences of the escaping oil, relying on Rylands and early Minnesota authority applying Rylands.

A few years later, in Brennan Construction Co. v. Cumberland, the U.S. Court of Appeals for the D.C. Circuit reviewed a case where the plaintiff had obtained a verdict in its favor for injury to its boats and other property on the Potomac River caused by petroleum residuum and coal tar that allegedly leaked from the defendant’s tanks located on the banks of the river. On appeal, the defendant argued that it was inappropriate to hold the

144. This group includes cases where the opinion does not expressly mention CERCLA but where the facts would appear to support a CERCLA claim.
145. As noted earlier, the 1977 Second Restatement of Torts did not even mention environmental cases as a separate category. See supra notes 56-57 and accompanying text.
146. See supra notes 139-40 and accompanying text.
147. 62 N.W. 336 (Minn. 1895).
148. Id. at 336.
149. Id. at 337-38; see also Berger v. Minneapolis Gaslight Co., 62 N.W. 336 (Minn. 1895); Cahill v. Eastman, 18 Minn. 324 (1872), overruled in part on other grounds.
150. 29 App. D.C. 554 (D.C. Cir. 1907).
151. Id. at 554-55.
company liable for the damage without proof of negligence. The court of appeals disagreed, cited to *Rylands*, and analyzed how to balance conflicting property interests in a developing society:

As civilization spreads and the golden rule becomes more and more the guide of human conduct, the rights of property and the rights of the individual are more and more subordinated to the rights of the public; the rights of the few to the rights of the many. . . . If one of two persons must suffer loss, no good reason can be found why the loss should be charged against the one who in no way has contributed thereto.  

A similar result was reached in a 1934 Kansas case, *Berry v. Shell Petroleum Co.*, where the plaintiff sued for damage to its water supply caused by seeping salt water when the defendant's oil and gas well was connected to the city's sewer system with the city's permission. The plaintiff received a verdict in its favor against the defendant without any allegation of negligence. On appeal, the Kansas Supreme Court quoted extensively from *Rylands* and stated that the simple fact that the business was a lawful one did not exempt the defendant from liability.

Published decisions involving strict liability and environmental contamination remained few and far between for the next several decades. In the 1960s and 1970s, courts in Florida, Texas, Indiana, and Maryland applied the doctrine in environmental

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152. *Id.* at 560-61 (noting that the *Rylands* rule had been adopted by Canadian courts and many courts in the United States, including Minnesota, Illinois, Kentucky, Massachusetts, and Maryland).

153. 33 P.2d 953 (Kan. 1934).

154. *Id.* at 955-56.

155. *Id.* at 957 (quoting *Helms v. E. Kan. Oil Co.*, 169 P. 208, 208 (Kan. 1917)).


157. Atlas Chem. Indus., Inc. v. Anderson, 514 S.W.2d 309, 314-15 (Tex. App. 1974) (applying strict liability under *Rylands* to discharge of pollutants into stream that crossed plaintiff's land), aff'd, 524 S.W.2d 681 (Tex. 1975). Oddly, numerous recent Texas decisions have stated that Texas does not recognize the doctrine of strict liability under any circumstances, but none of these cases appear to have overruled or distinguished the language in *Atlas* recognizing strict liability. *See supra* note 141 and accompanying text.

158. Mower v. Ashland Oil & Refining Co., 518 F.2d 659, 661-62 (7th Cir. 1975) (applying strict liability to discharge of oil from waterflood operations under Indiana law).

159. Yommer v. McKenzie, 257 A.2d 138, 140-41 (Md. 1969) (applying the Second Restatement factors to hold that the storage of large quantities of gasoline in close proximity to private residences is ultrahazardous and subject
cases, but this is hardly a groundswell. Indeed, it is no surprise that so many commentators were pessimistic about a consistent application of strict liability to environmental cases.\footnote{160}{See supra note 133 and accompanying text.}

These early cases are significant for at least two reasons. First, the paucity of cases prior to 1980 highlight how, prior to CERCLA, liability for environmental contamination was a rarity. Second, it is striking that many of the pre-CERCLA environmental cases imposing strict liability relate to petroleum, while the vast majority of post-CERCLA cases have held that the use of petroleum is not subject to strict liability.\footnote{161}{See supra note 140 and accompanying text.} This tends to support the impact of CERCLA on common law strict liability—once CERCLA drew a bright line excluding petroleum from the purview of CERCLA’s strict liability scheme, the common law, through application of the Restatement, appeared to follow Congress’ policy determination. By the same token, as shown below, after CERCLA’s enactment courts swiftly began to apply the Restatement in a manner that recognized common law strict liability for those activities that were included in CERCLA’s strict liability net.

2. \textit{Post-CERCLA Environmental Cases}

Following the enactment of CERCLA in 1980, both the number of decisions and the nature of the courts’ analyses began to change. With more investigation and awareness of the magnitude of environmental contamination brought about by publicity over the most notorious waste sites and the enactment of CERCLA itself, lawsuits began to proliferate. With a powerful federal statute now in place, courts grew more comfortable with strict liability in cases covered by CERCLA and began to refer to the statute in their analyses, even if they purported to simply apply the Second Restatement factors. The following sections illustrate this phenomenon.

a. \textit{The New Jersey cases}. No discussion of environmental contamination case law on a nationwide basis would be complete without a discussion of several New Jersey cases that were some of the first and most powerful judicial statements for the need for strong relief for the growing hazardous waste problem in this country. This may be in part because New Jersey appears to have a disproportionate number of toxic waste sites within its borders and, as a result, had one of the first state statutes on the books that provided for significant relief for environmental harm.\footnote{162}{See Dep’t of Envtl. Prot. v. Ventron Corp., 468 A.2d 150, 160 (N.J. 1983)}
The first and most often-cited of the New Jersey cases is *Department of Environmental Protection v. Ventron Corp.*, which the New Jersey Supreme Court decided in 1983. In that case, the state sued various corporations and individuals for cleanup of mercury pollution seeping from a forty-acre tract of land into Berry’s Creek, a tidal estuary of the Hackensack River that flows through the Meadowlands. The subsurface of the tract was saturated by approximately 268 tons of toxic waste and for a stretch of several thousand feet, the concentration of mercury in Berry’s Creek was the highest found in freshwater sediments in the world. The pollution was caused by mercury processing operations carried on at the site for almost fifty years, and the state sued to recover cleanup costs and damages. After several proceedings in the lower court, including a fifty-five-day trial, the New Jersey Supreme Court affirmed liability under theories of nuisance, strict liability, and violation of the New Jersey Spill Act.

In reviewing the strict liability claim, the court expressly overruled a prior case that had rejected *Rylands*, stating that “[w]e believe it is time to recognize expressly that the law of liability has evolved so that a landowner is strictly liable to others for harm caused by toxic wastes that are stored on his property and flow onto the property of others.” The court went on to analyze the history of the development of the doctrines of strict liability, trespass, and nuisance, both before and after *Rylands*, and concluded that the Second Restatement “incorporates” the theory developed in *Rylands*.

("[T]he dumping of untreated hazardous waste is a critical societal problem in New Jersey, which the Environmental Protection Agency estimates is the source of more hazardous waste than any other state.") (citing Zazzali & Grad, *supra* note 82, at 449 n.12). New Jersey’s first antipollution statute was enacted in 1899, a 1937 amendment imposed strict liability on anyone allowing pollution to escape into the water of the state and subsequent amendments, including a significant one in 1979, resulted in the modern New Jersey Spill Act, N.J.S.A. 58:10-23.11, et seq. (2003). The Act, like CERCLA, provides retroactive strict liability for discharge of a broad array of hazardous substances. *See Ventron Corp.*, 468 A.2d at 161-62 (detailing statute’s history).

163. *Ventron Corp.*, 468 A.2d at 150. The 1979 New Jersey Superior Court Chancery Division opinion in *Ventron* was cited with approval by Rep. Gore during the CERCLA Congressional debates. *See supra* notes 122-23 and accompanying text.

164. *Ventron Corp.*, 468 A.2d at 154.
165. *Id.*
166. *Id.*
167. *Id.* at 154, 160, 166.
168. *Id.* at 157 (overruling Marshall v. Welwood, 38 N.J.L. 339 (1876)).
169. *Id.* at 158-59.
In applying the Second Restatement factors to the case at hand, the court listed the factors but based its decision almost exclusively on the high degree of risk of harm, relying heavily on the findings contained in a special report to Congress completed in connection with monitoring CERCLA, and the EPA and other findings specifically noting the significance of the hazardous waste problem in New Jersey. The court conducted virtually no factor-by-factor analysis and, with regard to factor (c), inability to eliminate the risk by the exercise of reasonable care, simply stated that “no safe way exists to dispose of mercury by simply dumping it onto land or into water.”

The Ventron case was quickly followed by several other similar cases decided by state and federal courts in New Jersey. In each case, the facts supported a claim under the New Jersey Spill Act and CERCLA, and the court reaffirmed a broad theory of enterprise liability for activities resulting in environmental contamination. In reaching those decisions, the New Jersey courts referred often to the New Jersey Spill Act as justification for finding the activities in question abnormally dangerous. For instance, in Prospect Industries Corp. v. Singer Co., the New Jersey Superior Court held that the use and disposal of PCBs created by the use of hydraulic fluids during manufacturing was abnormally dangerous as a matter of

170. Id. at 159-60 (citing SUPERFUND SECTION 301(C) STUDY GROUP OF SENATE COMM. ON ENVTL. & PUB. WORKS, 97TH CONG., REPORT ON INJURIES AND DAMAGES FROM HAZARDOUS WASTES—ANALYSIS AND IMPROVEMENT OF LEGAL REMEDIES IN COMPLIANCE WITH SECTION 301(E) OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE COMPENSATION AND LIABILITY ACT OF 1980 (Comm. Print 1982), and Zazzali & Grad, supra note 82, at 449 n.12).

171. Id. at 160. For a discussion of how various courts have focused or not focused on factor (c) of the Second Restatement in their analyses of strict liability in environmental cases, see BOSTON & MADDEN, supra note 21, at 121-31.


173. See, e.g., Prospect Indus. Corp., 569 A.2d at 911 (holding that handling of toxic wastes is abnormally dangerous as a matter of law); Kenney, 497 A.2d at 1321 (“[A]n important argument in support of strict or absolute liability is that despite the economic hardship involved, the creators of abnormally dangerous substances are far better able than the victims to sustain the costs of the injuries resulting from those substances.”).

law, subjecting the defendant to strict liability. In reaching this decision, the court noted that “[s]trong public policy considerations support this view” based on the New Jersey Spill Act, which imposes strict liability without regard to fault for all cleanup and removal costs upon any responsible person. The court finished with a quote from Ventron: “Those who poison the land must pay for its cure.”

Similarly, in Russell-Stanley Corp. v. Plant Industries, Inc., the Superior Court held that a landlord may be liable to subsequent tenants under a strict liability theory for environmental contamination caused by a previous tenant. The decision contains a detailed discussion of prior New Jersey case law on the doctrine and cites to the New Jersey Spill Act as influencing the common law:

Finally, one must realize that the [Spill Act] had been asserted as the primary theory of liability in Ventron. This act provided for remedies beyond that of the more traditional common-law causes of action. Thus, by virtue of the assertion of the spill act claims, it was axiomatic that traditional common law claims were applicable to Ventron. Therefore, it follows that, in addition to holding landowners strictly liable for contaminating a site, Ventron also stands for the proposition that such landowners may be held liable under more traditional common-law doctrines.

These cases illustrate, in the years immediately following the enactment of CERCLA and similar state laws, the willingness of at least one jurisdiction to accept a broad theory of enterprise liability for the use, storage, and disposal of substances that result in environmental contamination. While the decisions were based on Rylands and the Restatement, the influence of the New Jersey Spill Act as well as CERCLA cannot be ignored. New Jersey courts used the policies expressed in these laws and the data collected to support their enactment to justify classifying a wide array of activities resulting in contamination as abnormally dangerous. As shown below, this reliance on state and federal statutory policy is reflected in the decisions of several other jurisdictions.

Although New Jersey is significant for being one of the first jurisdictions to broadly and consistently apply strict liability to environmental contamination, many other jurisdictions have followed suit. Like New Jersey, these jurisdictions generally look to

175. Id. at 911.
176. Id.
177. Id.
179. Id. at 540 (citations omitted).
the Restatement and *Rylands* as the basis for applying strict liability, but rely heavily on the development of CERCLA, state statutes, and the growing awareness of the hazardous waste crisis in this country as a large part of the analysis justifying application of the doctrine. The jurisdictions discussed below have been highlighted because the courts in those jurisdictions included the most extensive analyses of why strict liability was appropriate for activities causing environmental contamination. The facts of each case discussed would appear to support a CERCLA claim (whether or not one was actually pursued in the case), and the court’s reasoning in each case was based less on any specific Second Restatement factor and more on a general recognition of public policy supporting strict liability, driven largely by the existence of a CERCLA or a similar state statute.

b. **Maine.** In *Hanlin Group, Inc. v. International Minerals & Chemical Corp.*, the U.S. District Court for the District of Maine denied the defendant’s motion for judgment on the pleadings on the plaintiff’s strict liability claim in a case that involved property contamination caused by the prior owner’s operation of a chemical manufacturing plant. In the lawsuit, the plaintiff alleged claims under CERCLA as well as various common law theories, including strict liability. The court denied the motion and held that the defendant could be strictly liable to the subsequent owner for damages resulting from chemical contamination. In reaching the decision, the court rejected the defendant’s argument that an allegation of negligence was necessary for liability even where the defendant was engaged in abnormally dangerous activities, under a Maine blasting case from 1950, *Reynolds v. W.H. Hinman Co.*

The court distinguished *Reynolds*, which had held that blasting was not an ultrahazardous activity, and held instead that it was possible that the Maine Supreme Court would not require an allegation of negligence in a claim alleging strict liability for contamination resulting from the disposal of hazardous chemicals. In support of that decision, the court cited to, but did not analyze,

181. *Id.* at 934.
182. *Id.* at 926-27.
183. *Id.* at 933. *See also Reynolds v. W.H. Hinman Co.*, 75 A.2d 802 (Me. 1950). In *Reynolds*, the Maine Supreme Court held that a showing of negligence was required for liability for damages resulting from blasting because blasting was not only lawful but a reasonable use of property if done under proper conditions. The court thus held that blasting was not an abnormally dangerous activity and did not justify liability without fault. *Id.* at 811.
the Second Restatement factors, and focused instead on Maine statutory law and the numerous courts around the country that had found the use and disposal of hazardous chemicals to be abnormally dangerous under the Second Restatement. With regard to this justification, the court stated:

The legislature’s recognition of the concept of strict liability to the state for the cost of responding to the discharge of hazardous wastes, see 38 M.R.S.A. § 1319-J, or the creation of an uncontrolled hazardous substance site, see M.R.S.A. § 1367, provides an additional reason for concluding that an action for strict liability for disposing of hazardous chemicals is not foreclosed under Maine law.

Thus, the fact that the Maine legislature had seen fit to impose strict liability for discharging hazardous substances was given more significant attention in the opinion than the Second Restatement factors in determining that the same conduct would be subject to strict liability under common law.

c. Virgin Islands. In an extensive opinion addressing claims under CERCLA, Virgin Islands environmental statutes and the common law, the U.S. District Court for the District of the Virgin Islands was called upon to determine whether Virgin Islands precedent would allow a claim for strict liability for groundwater contamination caused by oil wells that released petroleum and hazardous substances. In In re Tutu Wells Contamination Litigation, the court denied the defendant’s motion to dismiss the plaintiffs’ strict liability claim on grounds that, even in the absence of Virgin Islands direct precedent, strict liability was available for activities causing this type of contamination. The court began its analysis with reference to the scholarly debates over risk distribution and enterprise liability in the context of strict liability.

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186. Id. at 933-34 n.13.
189. Id.
It then discussed the Second Restatement, *Rylands*, and available authority in the environmental contamination context, before concluding that activities that have a high risk of contaminating an aquifer trigger several of the Second Restatement factors. In its decision, the court placed great emphasis on the fact that the interest of the community in clean water was protected by the Virgin Islands Legislature through its Water Pollution Control Act and Solid and Hazardous Waste Management Act. The court concluded by holding that the rule of strict liability applied to the facts of the case.

d. *Louisiana*. In Louisiana, the U.S. District Court for the District of Louisiana was called upon in *Updike v. Browning-Ferris, Inc.* to determine whether strict liability was available to plaintiffs allegedly sustaining diminution in value to property caused by contamination released from a nearby hazardous waste disposal site. In denying the defendant’s motion to dismiss the strict liability claim, the court was explicit about its decision to rely upon public policy concerns and state statutory law to reach its decision. After articulating the standard for determining an ultrahazardous activity, the court recognized that “no matter how the analysis is refined, in the end, a policy decision is required.” The court went on to analyze whether the storage of hazardous waste in pits is an ultrahazardous activity and based its decision primarily on recent state legislation regulating the storage and disposal of hazardous waste. The court quoted extensively from the policy justification for

190. *Id.* at 1268 & n.11 (citing 3 HARPER ET AL., THE LAW OF TORTS, § 14.3, at 196 (2d ed. 1986); Guido Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 YALE L.J. 499, 544-45 (1961); W.T.S. Stallybrass, Dangerous Things and the Non-Natural User of Land, 3 CAMBRIDGE L.J. 376, 387 (1929)).

191. *Id.* at 1268-70.

192. *Id.* at 1270 (citing Water Pollution Control Act, 12 V.I. CODE ANN. §§ 181–198 (1998) and Solid and Hazardous Waste Management Act, 19 V.I. CODE ANN. §§ 1551-1564 (1995)). This emphasis on the legislature’s policy stands in contrast to the court’s discussion of whether the risk of release could be reduced by exercise of reasonable care (factor (c)), which was addressed with the simple statement that even reasonable care could not eliminate the risk.

193. *Id.*


195. *Id.* at 542-43.

196. Although the court did not rely on the Restatement to determine the standard for an ultrahazardous activity, it cited to PROSSER & KEETON ON THE LAW OF TORTS as well as Louisiana precedent similar to the Restatement factors, which required that the activity (1) relate to an immovable, (2) must cause the injury, and (3) must not require the substandard conduct of a third party to cause the injury. PROSSER & KEETON, *supra* note 10, at 541-42.

197. PROSSER & KEETON, *supra* note 10, at 543.
this legislation, including the following:

It is the determination of the legislature that Louisiana is particularly ill-suited both hydrologically and climatically to hazardous waste land disposal methods and past land disposal methods, siting criteria, and maintenance procedures have, despite the degree of stringency, been inadequate to insure the health of the citizens of the state and in maintaining the integrity of the environment generally and water resources specifically.\(^\text{198}\)

The court concluded by holding that the disposal of hazardous waste was ultrahazardous under Louisiana law based on precedent as well as the findings by Louisiana’s legislature.\(^\text{199}\)

e. Kentucky. In Fletcher v. Tenneco, Inc.,\(^\text{200}\) the plaintiff landowners sought partial summary judgment on their strict liability and nuisance claims against the defendant, who operated a natural gas pipeline and had used PCBs in a compressor station adjacent to the plaintiffs’ property.\(^\text{201}\) The PCBs leaked and migrated to the plaintiffs’ property, resulting in PCB contamination in their soil and in the fatty tissue of their cattle herd.\(^\text{202}\) In granting the plaintiffs’ motion for partial summary judgment on the strict liability claim, the U.S. District Court for the Eastern District of Kentucky first rejected the defendant’s argument that a strict liability claim is invalid if a viable negligence-based tort claim is available.\(^\text{203}\) The court distinguished Judge Posner’s Seventh Circuit opinion in Indiana Harbor Belt Railroad v. American Cyanamid Co.,\(^\text{204}\) which held that if the defendant could be held strictly liable for transporting a hazardous substance by rail that leaked during

\(^{198}\) Id. at 544 (citing LA. REV. STAT. ANN. § 30:2193) (emphasis in original). The court also cited to the legislative history of the statute, which included the declaration that “the handling, storage, and disposal of hazardous and solid waste is posing an ever increasing economic burden and environmental risk to the citizens of this state.” Id. at 544 n.2.

\(^{199}\) Id. at 544; see also Ashland Oil, Inc. v. Miller Oil Purchasing Co., 678 F.2d 1293, 1308 (5th Cir. 1982) (applying Louisiana law and holding that injection of hazardous waste into crude oil pipelines which resulted in explosion was ultrahazardous under the Restatement and Louisiana law).

\(^{200}\) No. Civ. A. 91-118, 1993 WL 86561 (E.D. Ky., Feb. 22, 1993). The published version of this opinion was originally found at 816 F. Supp. 1186, but was subsequently withdrawn from the bound volume at the request of the court as a result of a settlement between the parties. Telephone Conversation with W. Patrick Murray, counsel for plaintiffs (March 17, 2004).

\(^{201}\) Fletcher, 1993 WL 86561 at *1-*2.

\(^{202}\) Id. at *2.

\(^{203}\) Id. at *7.

\(^{204}\) 916 F.2d 1174 (7th Cir. 1990); see also infra notes 282-86 and accompanying text (discussing the Indiana Harbor Belt case).
transport, it would simply re-route the shipment, increasing the length of the journey and compelling the use of poorer tracks, whereas liability on negligence grounds would result in the defendant taking more care to avoid spills. The Fletcher court held that the result the Seventh Circuit feared in Indiana Harbor Belt would have welcome results in the present case, because it would force the defendant and others to stop disposing of waste directly on the ground and promote environmentally sound hazardous waste disposal practices.

The court went on to consider the strict liability claim and discussed both the Second Restatement factors and the precedent in environmental cases from New Jersey and other states. The court held that the “emerging body” of case law recognizing strict liability, coupled with the section 520 Restatement factors and public policy, supported a conclusion that Kentucky courts would find, as a matter of law, that Tenneco engaged in an ultrahazardous activity. The court concluded with a specific reference to CERCLA and state statutory law, noting that “[t]his ruling is not only consistent with decisions in other jurisdictions, but also with the Federal Government’s approach, and with the approach taken in Kentucky’s environmental protection legislation.”

f. California. California first applied the doctrine of strict liability for ultrahazardous or abnormally dangerous activities in 1928 and again in 1948. In Green v. General Petroleum Corp., the California Supreme Court addressed a claim related to the blowout of an oil well during drilling. Although the court did not mention Rylands by name, it rejected the defendant’s argument that it could not be held liable in the absence of negligence for engaging in a lawful business. Instead, the court held that even when the activity is carefully done, if it results in an invasion of the property of another and the risk of injury was known, “the one who does the act and causes the injury should, in all fairness, be required to compensate the other for the damage done.” In Luthringer v. Moore, this principle was applied to the release of toxic gas during

205. Fletcher, 1993 WL 86561 at *7.
206. Id.
207. Id. at *8-*9.
208. Id. at *8-*9 & n.17.
209. Id. at *9 & n.16-17 (footnotes omitted) (citing CERCLA and Kentucky’s Environmental Protection statutes, KY. REV. STAT. ANN. §§ 224.01-010-224.99-030 (Michie 2002)).
210. 270 P. 952 (Cal. 1928).
211. Id. at 953-55.
212. Id. at 955.
213. 190 P.2d 1 (Cal. 1948).
extermination activities and was based expressly on *Rylands* and the Restatement.\(^{214}\) Although the defendant argued that *Rylands* did not apply in California, the court looked to *Green* as the basis for absolute liability and reaffirmed 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.”\(^{215}\)

Against this backdrop, the California Court of Appeals addressed the issue of whether the use of PCBs in electrical transformers in a high rise office building was ultrahazardous and subject to strict liability in *Ahrens v. Superior Court*.\(^{216}\) In reversing the superior court’s dismissal of the strict liability claim, the court relied expressly on the Restatement and stated that the rationale for strict liability is “one of allocating a more or less inevitable loss to be charged against a complex and dangerous civilization, and liability is placed upon the party best able to shoulder it.”\(^{217}\) The court noted that whether California had completely adopted the Restatement had been the subject of much commentary, but the fact that several California decisions had applied the Restatement factors with approval (including *Luthringer*) led it to apply the Restatement in this case.\(^{218}\)

The court then turned to the evidence of whether the use of PCBs in transformers was a matter of common usage and posed an unreasonable risk. With regard to the latter issue, the court analyzed the regulation of PCBs by Congress and the EPA.\(^{219}\) The defendant and amicus curiae argued that the EPA’s decision to regulate, rather than ban, the continued use of PCBs in transformers meant that they did not present an unreasonable risk to public health or the environment.\(^{220}\) The court not only rejected this argument, but cited to other EPA statements warning of the risks to health and human environment of PCB-related fires which occur in or near buildings (like the present case) to reject the arguments that the risks were not unreasonable.\(^{221}\) The court then

\(^{214}\) *Id.* at 8.

\(^{215}\) *Id.*

\(^{216}\) 243 Cal. Rptr. 420 (Ct. App. 1988).

\(^{217}\) *Id.* at 423 (quoting Smith v. Lockheed Propulsion Co., 56 Cal. Rptr. 128, 137 (Ct. App. 1967)).

\(^{218}\) See *Ahrens*, 243 Cal. Rptr. at 424 n.6.


\(^{220}\) *Ahrens*, 243 Cal. Rptr. at 427.

\(^{221}\) *Id.* at 428. The court also stated that an agency decision to regulate, rather than ban, a particular substance is
remanded the case for further evidentiary proceedings on the Restatement factors.\textsuperscript{222} Thus, the California courts have also looked to federal environmental statutes (albeit TSCA rather than CERCLA) to both obtain evidence on the risks of the activity at issue and consider decisions made by Congress and the EPA based on that evidence.\textsuperscript{223}

\begin{itemize}
  \item \textbf{g. Utah.} In \textit{Branch v. Western Petroleum, Inc.},\textsuperscript{224} the Utah Supreme Court held that a defendant could be liable for pollution of plaintiff's water wells caused by percolation of oil well formation waters that the defendant had ponded on its property. In reaching its decision, the court recognized that this was the first time it had considered the legal principles governing liability for pollution of the groundwater by industrial wastes, and proceeded to analyze the various common law theories presented in the case, which included strict liability, trespass, public nuisance, private nuisance, and negligence, among others.\textsuperscript{225}

  With regard to strict liability, the court first noted that Utah is one of the most arid states in the nation and that the protection of purity of the water is of critical importance to the state, as evidenced by the legislature's enactment of laws protecting both surface and groundwater.\textsuperscript{226} The court went on to analyze \textit{Rylands} as well as cases from other states that had applied strict liability in similar circumstances.\textsuperscript{227} The court adopted the reasoning of the 1974 Texas Court of Appeals decision in \textit{Atlas Chemical Industries, Inc. v. Anderson},\textsuperscript{228} which had held that the common law rules of tort liability in pollution cases should be in conformance with the public policy of the state as declared by the state legislature in its pollution laws.\textsuperscript{229} Based on this analysis, the Utah Supreme Court held that

\begin{itemize}
  \item a decidedly different question from that presented in determining whether an activity is abnormally dangerous. Even though an activity has some utility, it is for the court to decide that its unusual danger requires, as a matter of policy, that the business engaged in the activity assumes the cost for the harm the activity causes.
  \end{itemize}

\textit{Id.} at 427-28 (citing \textsc{Restatement (Second) of Torts} § 520, cmt. f (1977)).

\textsuperscript{222} \textit{Id.} at 429.

\textsuperscript{223} \textit{But see In re Burbank Envtl. Litig.}, 42 F. Supp. 2d 976, 983 (C.D. Cal. 1998) (holding that a manufacturer is not strictly liable for contamination arising from use of solvents to clean metal parts because risks can be avoided through exercise of reasonable care).

\textsuperscript{224} 657 P.2d 267 (Utah 1982).

\textsuperscript{225} \textit{Id.} at 272.

\textsuperscript{226} \textit{Id.} at 273.

\textsuperscript{227} \textit{Id.} at 273-75 (citations omitted).

\textsuperscript{228} 514 S.W.2d 309 (Tex. App. 1974), aff'd in part, rev'd in part on other grounds, 524 S.W.2d 681 (Tex. 1975).

\textsuperscript{229} \textit{Branch}, 657 P.2d at 275 (citing \textit{Atlas Chem. Indus., Inc.}, 514 S.W.2d at
strict liability was appropriate in the case at bar.\textsuperscript{230} h. \textit{Rhode Island}. Public policy concerns of the state and nation also influenced the Rhode Island Supreme Court’s decision in \textit{Wood v. Picillo},\textsuperscript{231} which was decided two years after CERCLA’s enactment. In that case, the defendants appealed from a trial court judgment enjoining their continued operation of a hazardous waste dump site and ordering them to finance a cleanup.\textsuperscript{232} The defendants argued that it was improper to hold them liable without a finding of negligence.\textsuperscript{233} The court disagreed and provided a detailed description of the dump’s operation, which included open trenches with hazardous liquids; numerous drums of hazardous substances that were buried, tipped, partially full, and empty; terrible odors; and explosions.\textsuperscript{234} The court characterized the site as a “chemical nightmare.”\textsuperscript{235} In holding that negligence was not required for liability under a theory of absolute nuisance,\textsuperscript{236} the court overruled a 1934 decision and held that times had changed since the earlier case was issued:

\begin{quote}
[T]he science of groundwater hydrology as well as societal concern for environmental protection has developed dramatically. . . . Moreover, decades of unrestricted emptying of industrial effluent into the earth’s atmosphere and waterways has rendered oceans, lakes, and rivers unfit for swimming and fishing, rain acidic, and air unhealthy. Concern for the preservation of an often precarious ecological balance, impelled by the specter of “a silent spring,” has today reached a zenith of intense significance.\textsuperscript{237}
\end{quote}

The court concluded by holding that the “scientific and policy considerations” that had supported the court’s prior precedent were no longer valid and that the law going forward would be that negligence is not necessary for liability for activities that result in the pollution of soil and waters under an absolute nuisance theory.\textsuperscript{238} The court noted that the defendant might also be liable under a

\begin{itemize}
\item \textsuperscript{230} Id.
\item \textsuperscript{231} 443 A.2d 1244 (R.I. 1982).
\item \textsuperscript{232} Id. at 1245.
\item \textsuperscript{233} Id. at 1248.
\item \textsuperscript{234} Id. at 1245-46.
\item \textsuperscript{235} Id. at 1246.
\item \textsuperscript{236} Both strict liability and absolute nuisance are based on liability without fault. \textit{See} Prosser \& Keeton, \textit{supra} note 10, at 552-53 (stating that even jurisdictions that have rejected \textit{Rylands} by name have accepted and applied the principle under various other theories, primarily absolute nuisance).
\item \textsuperscript{237} \textit{Wood}, 443 A.2d at 1249.
\item \textsuperscript{238} Id.
\end{itemize}
theory of strict liability, citing *Rylands*, but that the court’s decision on absolute nuisance rendered an analysis of strict liability unnecessary.\footnote{Id. at 1249 n.7.} Although the case did not include a CERCLA claim (the case was filed and tried prior to CERCLA’s enactment), the facts would certainly have supported such a claim at the time the court issued its decision in 1982, and the public awareness over the hazardous waste crisis, including the court’s reference to Rachel Carson’s book, *Silent Spring*,\footnote{Rachel Carson, *Silent Spring* (1962). This book is commonly credited with being one of the primary catalysts in helping bring public attention to environmental issues in America and the often latent dangers of pesticides and other hazardous substances on human health and the environment. *See, e.g.*, United States v. Hooker Chems. & Plastics Corp., 850 F. Supp. 993, 1051 (W.D.N.Y. 1994) (“Books like Rachel Carson’s *Silent Spring* (1962) helped bring public attention to bear upon environmental issues.”).} forms the foundation of the opinion and the ultimate result.\footnote{Id. at 464.}

Although the Rhode Island Supreme Court did not need to decide the *Wood* case based on the doctrine of strict liability, it took the opportunity to address that issue directly sixteen years later in *Splendorio v. Bilray Demolition Co.*\footnote{682 A.2d 461, 465-66 (R.I. 1996).} In *Splendorio*, landowners whose land adjoined a wrecking yard sued an engineering firm that prepared, certified, and carried out an asbestos abatement plan. The plan resulted in the asbestos being brought to and crushed at the wrecking yard by a third party, allegedly causing damage to the plaintiffs’ property.\footnote{173 A. at 627 (R.I. 1934).} The plaintiffs brought claims for diminution in property value based on a theory of strict liability.\footnote{Id. at 464.} The trial court granted the defendant’s motion for summary judgment on grounds that Rhode Island precedent from 1934, *Rose v. Socony-Vacuum Corp.*\footnote{682 A.2d at 464-65 (citing *Rose*, 173 A. at 628-29).} had rejected strict liability under *Rylands* in a case involving damages from petroleum refining.\footnote{Id. at 463-64.} In its rejection, the Rhode Island Supreme Court had expressed the classic early twentieth-century argument against strict liability:

> It is an unavoidable incident of the growth of population and its segregation in restricted areas that individual rights
recognized in a sparsely settled State have to be surrendered for the benefit of the community as it develops and expands. If, in the process of refining petroleum, injury is occasioned to those in the vicinity, not through negligence or lack of skill or the invasion of a recognized legal right, but by the contamination of percolating waters whose courses are not known, we think that public policy justifies a determination that such injury is *damnnum absque injuria.*\(^{247}\)

In considering this precedent, the Rhode Island Supreme Court in *Splendorio* determined that *Rose* was no longer good law and that it “ha[d] succumbed to ‘the inaudible and noiseless foot of Time.’ . . . *Rose* is today inconsistent with present conditions. It has served us long and well, and we lay it now to final rest, holding its teachings no longer applicable in our law.”\(^{248}\)

The court went on to hold, however, that this change in the law did not assist the plaintiffs based on the facts of the case. The court found that based on the Restatement (Second) of Torts, it was the unanticipated actions of the third party who crushed the asbestos at the wrecking yard, not the actions of the contractor, that caused the harm and that the handling of asbestos can be performed, and often is performed, safely.\(^ {249}\) What is notable about the case is that even though the plaintiffs’ claims against the asbestos contractor appeared fairly weak, and thus likely could have been decided on much narrower grounds, the court took the opportunity to overrule prior precedent, leaving the door open for future strict liability claims in contaminated property cases.

i. New Mexico. The emphasis on the need to utilize strict liability to address modern-day concerns of environmental contamination was echoed by the U.S. District Court for the District of New Mexico in *Schwartzman, Inc. v. Atchison, Topeka & Santa Fe Railway Co.*\(^ {250}\) In that case, the plaintiff sought to recover alleged damage for diminution in value to its property from the defendant railroad, which had used the neighboring property to preserve wooden railroad ties, resulting in hazardous substance contamination.\(^ {251}\) On defendant’s motion to dismiss, the court rejected the defendant’s argument that New Mexico law does not recognize strict liability for activities other than blasting.\(^ {252}\) The court first cited the Second Restatement factors, but then recited a

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247. *Id.* at 465 (quoting *Rose*, 173 A. at 631-32).
248. *Id.* (quoting WILLIAM SHAKESPEARE, ALL’S WELL THAT ENDS WELL act 5, sc. 3).
249. *Id.* at 465.
251. *Id.* at 476.
252. *Id.* at 477-79.
lengthy history of New Mexico’s application of the doctrine of strict liability. Although decisions as recent as 1992 appeared to support the defendant’s position on New Mexico law, the court distinguished prior case law by stating that the New Mexico courts simply had not confronted a factual situation presenting a “persuasive” strict liability claim. The court further stated that the state courts “did not, and could not have intended to, forever freeze the development of strict liability doctrine in New Mexico.”

The court then cited to cases in numerous other jurisdictions that had recognized strict liability for the generation, disposal, and treatment of hazardous waste and stated that although a federal court should endeavor to apply current state law, “it should also not hesitate to contribute to the development of the forum state’s common law when sound reasons dictate advancement.” The court ultimately held that New Mexico law recognizes a strict liability claim for hazardous waste, generation, and disposal, but that more facts were necessary to reach a final decision.

The court’s concluding section summarized that “[t]he common law of strict liability has changed in response to changing conditions in American society. The storage and disposal of toxic chemical waste pose the same threat to health and welfare today as the detonation of dynamite and impoundment of waters posed in years past.”

This language is a long way from the skepticism over the utility of strict liability for environmental contamination expressed by

253. Id. at 476-78.
254. Id. at 477.
255. Id. at 478. In his analysis, Judge Burciaga also cited to a recent decision in a companion case, Schwartzman, Inc. v. General Electric Co., 848 F. Supp. 942, 945 (D.N.M. 1993), where Judge Mechem dismissed the plaintiff’s strict liability claim on the grounds that the risks of handling hazardous waste could be performed with reasonable care. Schwartzman, 842 F. Supp. at 477. Although Judge Burciaga clearly reached a different result, he cited Judge Mechem’s decision for the principle that “[t]he New Mexico Supreme Court has not foreclosed expansion of the [strict liability] doctrine where the § 520 criteria are met.” Id. (alteration in original) (quoting Schwartzman, 848 F. Supp. at 945).
257. Schwartzman, 842 F. Supp. at 479.
258. Id.
commentators prior to 1980\textsuperscript{259} and reflects how much CERCLA has changed the strict liability landscape for environmental contamination cases.

3. **Summary**

The courts in the cases discussed above placed particular emphasis on CERCLA and/or public policy concerns in extending the doctrine of strict liability to environmental contamination based on facts that would also support a CERCLA claim. However, these are not the only jurisdictions that have extended strict liability to environmental cases. Indeed, courts in Colorado, Iowa, New York, Minnesota, Tennessee, Ohio, Connecticut, and Florida have also extended the doctrine of strict liability to

\textsuperscript{259} See supra note 133 and accompanying text.

\textsuperscript{260} Daigle, 972 F.2d at 1544-45 (holding that creation of a toxic lake by manufacturers of chemical warfare agents and munitions is ultrahazardous under Colorado law and rejecting the implication that the law regarding ultrahazardous activities is “static” in Colorado).

\textsuperscript{261} See Interstate Power Co. v. Kansas City Power & Light Co., 909 F. Supp. 1224, 1240 (N.D. Iowa 1991) (denying defendant’s motion to dismiss and holding that deposit of tar residues by manufactured gas plant can be construed to be an abnormally dangerous activity under the Restatement and Iowa law).

\textsuperscript{262} See United States v. Hooker Chem. & Plastics Corp., 722 F. Supp. 960, 966 (W.D.N.Y. 1989) (holding in Love Canal case under absolute nuisance theory that defendant’s maintenance of hundreds of thousands of gallons of hazardous waste in corroding tanks was abnormally dangerous as a matter of law); Doundoulakis v. Town of Hempstead, 368 N.E.2d 24, 27 (N.Y. 1977) (stating that facts of hydraulic landfilling “strongly suggest[] that strict liability treatment may be appropriate” but remanding to trial court for additional fact-finding).

\textsuperscript{263} See Minnesota Mining & Mfg. Co. v. Travelers Indem. Co., 457 N.W.2d 175, 183 (Minn. 1990) (stating in insurance coverage case that liability for groundwater contamination has been recognized in Minnesota for many years, that Minnesota was one of the first jurisdictions to adopt the strict liability rule of Rylands, and that state has prohibited pollution of drinking water supplies by statute since 1895).

\textsuperscript{264} See Sterling v. Velsicol Chem. Corp., 647 F. Supp. 303, 315 (W.D. Tenn. 1986) (discussing Rylands, the Restatement, and Prosser, and holding that storage and disposal of hazardous substances in drums at 242-acre chemical waste burial site was abnormally dangerous and subject to strict liability under Tennessee law), aff’d in part, rev’d in part on other grounds, 855 F.2d 1188 (6th Cir. 1988).


\textsuperscript{266} See Albahary v. City of Bristol, 963 F. Supp. 150, 156 (D. Conn. 1997) (holding that disposal of hazardous and toxic wastes at landfill may constitute an abnormally dangerous activity).

\textsuperscript{267} Davey Compressor Co. v. City of Delray Beach, 613 So. 2d 60, 61-63
environmental contamination cases. In total, once cases involving petroleum contamination, personal injury, subsequent owners, common carriers, and jurisdictions rejecting strict liability completely are excluded, twenty-one out of twenty-seven jurisdictions that have squarely considered the issue have extended the doctrine of strict liability to activities resulting in environmental contamination.

Of the six jurisdictions that have refused to extend strict liability in environmental cases, some have looked to the “common usage” or “social benefit” criteria, while others have relied on the inability of the plaintiff to show the activity cannot be performed safely through the exercise of reasonable care. For instance, in *Fortier v. Flambeau Plastics Co.*, the Wisconsin Court of Appeals held that the disposal of hazardous substances at a city landfill was not subject to strict liability even though the activity could not be conducted safely through the exercise of reasonable care, because the use of the city landfill was previously a matter of common usage and was of value to the community. In *Ravan v. Greenville County*, the South Carolina Court of Appeals held that South Carolina recognizes strict liability only in a few narrowly defined categories and that the state legislature and the supreme court had not declared that handling of dangerous chemicals should be subject to strict liability.

(Fla. Dist. Ct. App. 1993) (affirming verdict in favor of plaintiff for damages resulting from toxic contamination of groundwater based on common law theories including strict liability).

268. See supra Part IV.A.

269. Research performed in connection with this Article located twenty-one jurisdictions (California, Colorado, Connecticut, Florida, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, New Jersey, New Mexico, New York, Ohio, Rhode Island, Tennessee, Utah, West Virginia, and the Virgin Islands) that applied the strict liability doctrine to environmental contamination; six jurisdictions (Delaware, Kansas, Illinois, New Hampshire, South Carolina, and Wisconsin) that addressed the issue and declined to extend strict liability to environmental contamination; and twenty-six jurisdictions (Alabama, Alaska, Arizona, Arkansas, District of Columbia, Georgia, Hawaii, Idaho, Indiana, Maryland, Michigan, Montana, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Vermont, Virginia, Washington, Wyoming, and Puerto Rico) that had not addressed the issue, had rejected strict liability because the doctrine is not recognized at all in the jurisdiction, or where the case involved solely petroleum contamination, a subsequent property owner, a common carrier, or personal injury. See also supra Part IV.A.


271. Id. at 605-08.


273. Id. at 304-05.
In Greene v. Product Manufacturing Corp., the U.S. District Court for the District of Kansas held that the use of solvents to degrease metal parts at an airplane manufacturing company was not abnormally dangerous based on an application of the Restatement factors. Specially, the court found that the parts cleaning process had been carried out for decades without harm and that the manufacturing activities were “indispensable” to the local economy.

The two cases that rely most heavily on section 520(c) of the Second Restatement (inability to eliminate the risk through the exercise of reasonable care) to reject strict liability in an environmental context contained facts that prevented a head-on consideration of the issue and have not been widely followed by other courts outside those jurisdictions in environmental cases. In the first case, Bagley v. Controlled Environment Corp., then state Justice Souter rejected an extension of the strict liability doctrine under New Hampshire law on the grounds that there was no evidence the plaintiff would be unable to prove that the disposal of petroleum and waste products that migrated to her property were not caused by negligence. In reaching its decision, the court noted that strict liability had historically met with disfavor in New Hampshire and had only been applied in consumer product cases. The court then declined to impose strict liability “in the absence of any demonstration that the requirement to prove legal fault acts as a practical barrier to otherwise meritorious claims.”

Although the express reasoning for declining to extend the doctrine of strict liability in Bagley was based on section 520(c) of the Second Restatement, two points are worth noting. First, it appears from the opinion that much of the contamination at issue was petroleum-related waste products, which would bring a large part of the case outside the purview of CERCLA and a similar state statute. Second, New Hampshire appears to be one of the states that remains most hostile to strict liability as a general matter, and

275. Id. at 1326-27.
276. Id. at 1327.
278. Id. at 826.
279. Id. at 825.
280. Id. at 826. The court reinstated the plaintiff’s negligence claim, which had been dismissed below, as well as a statutory claim for failure to obtain a permit for a hazardous waste facility. Id.
281. The court noted that RSA chapter 147-A (Supp. 1983) was apparently not available for petroleum-related damage. Id. at 826; see N.H. REV. STAT. ANN. §§147-A:1–147-A:20 (1996).
a case involving what appears to be straightforward petroleum and related waste contamination may not have been the most persuasive vehicle to argue for a radical re-shifting of state law.

In the second case, *Indiana Harbor Belt Railroad Co. v. American Cyanamid Co.*, supra note 21, the U.S. Court of Appeals for the Seventh Circuit rejected a strict liability claim by a railroad against a chemical manufacturer for contamination caused by a railcar spill of the car's contents (which were owned by the defendant) during transit. Although Judge Posner, like the court in *Bagley*, based his analysis on the plaintiff's failure to show the accident could not have been prevented through the exercise of reasonable care, a primary rationale for focusing on this requirement was the transportation element of the case. Judge Posner focused on the hazards of transporting the chemical (rather than the manufacture, shipping, or disposal of the chemical) and concluded that the hazards of shipping the chemical were not great, could be done safely with reasonable care, and that the shipping route used was appropriate and not within the control of the defendant.

In his analysis of section 520 of the Second Restatement, Judge Posner stated that the six Restatement factors "are related to each other in that each is a different facet of a common quest for a proper legal regime to govern accidents that negligence liability cannot adequately control." By this statement, the Seventh Circuit, like the *Bagley* court, set out a very narrow role for strict liability in modern tort law—one that puts a significant burden on plaintiffs to bring in statistical, historical, and technical expert evidence to essentially prove an impossible hypothetical: that no amount of care under any circumstances would allow the particular activity to be performed safely.

*Bagley* and *Indiana Harbor Belt* are often the central cases cited by commentators in support of their conclusion that courts have rejected any expansion of strict liability in favor of negligence as the

282. 916 F.2d 1174 (7th Cir. 1990).
283. *Id.* at 1175, 1182. In the suit, the plaintiff railroad, a small switching line with a contract with larger rail carriers, was seeking to recover costs it incurred when the Illinois Department of Environmental Protection ordered it to take decontamination measures after the spill of the defendant's product at a cost of over $900,000. *Id.* at 1175.
284. *Id.* at 1180-81.
285. *Id.* at 1177.
286. *See* BOSTON & MADDEN, supra note 21, at 128-29 (discussing burden on plaintiff under *Indiana Harbor Belt* and *Bagley* where strict liability is only available if the plaintiff proves that "negligence represents an evidentiary impossibility" and corresponding difficulty of obtaining proof necessary to establish negligence claim if strict liability is not available).
dominant tort theory. However, as shown above, many courts appear to have been silently carving out an exception to this trend in environmental contamination cases. Moreover, neither case presented a typical fact pattern for a head-on discussion of strict liability in a CERCLA-type case in that Bagley involved significant amounts of petroleum and Indiana Harbor Belt was a one-time spill that centered on transportation-specific concerns. Finally, Indiana Harbor Belt and Bagley do not appear to have been widely followed outside their jurisdictions in environmental cases. Instead, these cases seem to have become the exception rather than the rule in environmental cases that fall within the purview of CERCLA. Thus, even if it is true that courts are rejecting strict liability in favor of negligence theory as a general matter, the trend certainly appears to be in the opposite direction for environmental contamination cases. This phenomenon is evidenced in the Reporters’ Note to the draft Third Restatement, which contains a significant new discussion of the application of strict liability in environmental cases.

Moreover, the fact that so many courts have relied on the existence of CERCLA and similar state statutes to extend common law strict liability in environmental cases suggests strongly that, just as Congress relied on Rylands and the Restatement to argue for strict liability under CERCLA in 1980, courts have been looking back to CERCLA to expand the application of common law strict liability in environmental cases since 1980. Indeed, as noted by the Schwartzman court, if blasting was the classic example of strict liability in prior decades, disposal of hazardous substances may have become the textbook case for today.

V. CONCLUDING OBSERVATIONS AND A PROPOSAL FOR THE RESTATEMENT (THIRD) OF TORTS

A review of the case law decided since CERCLA’s enactment in 1980 reveals that Rep. Gore was correct in his prediction that it was only a matter of time before courts began applying the common law doctrine of strict liability for abnormally dangerous activities to the nation’s growing hazardous waste problem. Although general trends may be to disfavor strict liability in favor of negligence, these
trends simply do not apply to hazardous waste-related activities that would also be covered by CERCLA. As shown above, numerous courts appear to be rejecting a narrow application of the Second Restatement factors and are instead using their inherent power and discretion under the Restatement to essentially take judicial notice of the evidence amassed during the CERCLA hearings and the development of public policy since that time. Those courts then apply the Restatement factors against that backdrop and find that the Restatement factors are met. While some courts are more explicit in their reasoning than others, the analysis used across jurisdictions is very similar. In the end, the recognition of the need to take environmental contamination seriously and address it with as many tools as possible appears to be taking precedence over courts’ focus on section 520(c) relating to the exercise of reasonable care or any other specific Restatement factor. Although courts in general rarely discuss the jurisprudential foundation for reliance on statutory developments to justify a shift in the common law, the scholarly literature and the U.S. Supreme Court have historically both recognized and supported such reliance.

Moreover, as mentioned above, this method of analysis is perfectly appropriate in light of the broad discretion impliedly given to courts under the Second Restatement. As has been noted, when the Second Restatement made the determination of which activities are abnormally dangerous a question of law for the court rather than a mixed question of fact and law for the jury (as is done with negligence), it granted courts significant discretion to take judicial notice of extra-record facts in reaching a decision. Indeed, the Restatement factors themselves, which focus on the community at

293. See, e.g., Moragne v. States Marine Lines, Inc., 398 U.S. 375, 392 (1970) (stating that “[i]t has always been the duty of the common-law court to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherited body of common-law principles—many of them deriving from earlier legislative exertions”); Frank E. Horack, Jr., The Common Law of Legislation, 23 Iowa L. Rev. 41, 54 (1937) (arguing that courts should “use the statutory development as a guide in determining shifting social policy and shifting administrative demands”); James McCauley Landis, Statutes and the Sources of Law, in Harvard Legal Essays 213, 230 (1934) (arguing that common law courts should look to the legislative process to “strike a more favorable balance between legislative and judicial development of law”); see also Guido Calabresi, A Common Law for the Age of Statutes 81-92 (1982) (citing Landis and taking his position one step further to argue that courts should be able to exercise their common law powers over statutes by revising statutes where appropriate or forcing legislatures to act, rather than being limited to interpreting existing statutory language or invalidating statutes based on constitutional grounds); William N. Eskridge, Jr. & Philip P. Frickey, Cases and Materials on Legislation: Statutes and the Creation of Public Policy 398-416 (2d ed. 1995) (presenting Moragne, and the Landis and Calabresi proposals, in the context of discussing statutes as a source of policy norms).
large and social value of the activity, essentially require the court to go beyond the record to reach a decision, which necessarily turns “not so much on adjudicative facts, but more on legislative or policy judgments.” However, the problem of unpredictability of results still remains with such broad discretion and a multi-factored approach. This results in nearly identical activities being subject to strict liability in one jurisdiction and not in another, or, as in the Schwartzman cases in New Mexico, two courts within a single jurisdiction applying the same facts to the same legal standard and reaching completely opposite results within a matter of months. Thus, the problem lies more with the current unpredictability of results that arise through application of the current Restatement to similar facts than with inconsistency of results from one jurisdiction to another which, on its own, is neither troublesome nor surprising in our federal system of jurisprudence. Indeed, a revised approach that causes more predictable results within a jurisdiction, while at the same time causing more inconsistency between jurisdictions, because the revised approach leads to application of a clearer, albeit different, standard in each jurisdiction based on that jurisdiction’s statutory law, is not necessarily problematic.

With these principles in mind, what is a possible solution? First, courts themselves can promote predictability by expressly referring to the existence or absence of a state or federal strict liability statute both in environmental contamination cases and in other applications of strict liability, as has already been done in the cases discussed in this Article. Lawyers can best provide courts

294. Boston, supra note 33, at 668.
296. Indeed, predictability of results is a fundamental goal of our legal system both so that people have notice of what conduct will be actionable and to prevent the unnecessary litigation that arises when liability standards are not clear. See, e.g., KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 171-72 (1997) (stating that the disadvantage of the six-factor Restatement (Second) approach is not only that it is more complicated than prior frameworks but that it fails to encourage the formulation of strict liability at a comparably high level of generality capable of providing guidance in other cases); DAN B. DOBBS, THE LAW OF TORTS 22-25 (2001) (discussing importance of “process values” in tort law to avoid too much or too little flexibility in legal rules and allowing rules to guide lawyers’ investigations and arguments); RICHARD A. EPSTEIN, TORTS 349-50 (1999) (noting problems posed by the Restatement (Second) §§ 519-20, including increased ambiguity and ad hoc treatment of certain activities); PROSSER & KEETON, supra note 10, at 556 (stating that “there should be some rather well-understood requirements to be satisfied so that there can be some degree of predictability about when strict liability will be applicable”).
with the information they need by arguing strict liability cases with reference to statutes like CERCLA, and by presenting courts with the legislative history that justified those laws and arguing that the same facts and policies are evidence of a high degree of risk of harm, lack of value to the community, and lack of common usage.

For instance, litigants can cite to the information contained in CERCLA's legislative history regarding the human, environmental, and financial costs of hazardous substance generation, use, and disposal in this country to establish a highly significant risk of physical harm. More specialized reports are often available for the specific activity or chemical at issue—for instance, the risks posed by PCBs and the rebuilding of PCB-containing transformers, a practice which was ultimately prohibited by the EPA. Reliance on this type of evidence appeared to be very effective in the Ventron, Prospect Industries, Fletcher, In re Tutu Wells, Hanlin, and Updike cases discussed in Part IV.B. In these cases, the courts based their decisions to allow common law strict liability claims to proceed under the Second Restatement in part on information gathered during the federal and state legislative processes relating to certain environmental protection laws.

The ALI can also assist in this effort through its revision of the Restatement. In order to increase predictability and reflect the analysis that is already taking place in many jurisdictions, language should be inserted into section 20 of the draft Third Restatement directing courts to consider whether a strict liability statute covers

297. For an example of the facts and statistics used to support the enactment of CERCLA, see supra notes 96-109 and accompanying text.


the activity in question as part of the analysis of whether an activity is abnormally dangerous. One option is to insert such language in the main text of section 20 as follows:

(a) A defendant who carries on an abnormally dangerous activity is subject to strict liability for physical harm resulting from the activity.

(b) An activity is abnormally dangerous if:

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

(2) The activity is not a matter of common usage.

(c) In considering whether the activity creates a foreseeable and highly significant risk of physical harm and whether the activity is a matter of common usage, the court shall consider the existence or absence of a local, state or federal statute imposing strict liability for the activity at issue.

The other option is for the ALI to include the above-referenced additional language as a comment to the Restatement, as part of its discussion of Illustration 2 involving application of section 20 to environmental contamination claims. In this way, the Restatement would reflect the trend of the common law as it has developed in environmental contamination cases since the enactment of CERCLA over twenty years ago.

Including the existence of a strict liability statute as an express criterion for courts to consider in at least environmental cases will lead to more predictable results within a jurisdiction (or among jurisdictions with similar statutes), acknowledge the growing trend among courts throughout the nation of relying on such statutes, and reflect the vast increase in environmental awareness that has taken place throughout all sectors of society in this country. Such a change will enhance predictability of results in individual cases because, rather than referring to amorphous ideas of inability to eliminate risk, common usage, and value to the community, both sides can point to the presence or absence of a formal public policy determination to address the same issue and evidence already gathered in support of that policy.

In response to those who oppose any increase in the application

300. See supra notes 60-63 and accompanying text.
of strict liability as a policy matter, much of the criticism of strict liability theory is based on the concern that actions, and particularly contributorily negligent actions by the plaintiff, are often a partial cause of the injury or damage, and that imposing strict liability will not give plaintiffs any incentive to act with care.301 That simply is not the case in nearly all contaminated property cases covered by CERCLA and in many other applications of the Second Restatement involving hazardous conditions on land that impact neighboring properties.302 In nearly every case analyzed above, and most cases that would come under CERCLA’s liability provisions, the plaintiff had no control over the activity that caused the harm and, in the majority of cases, was not even aware of the defendant’s activity until that harm was done.303

Moreover, CERCLA itself has a response to potential critics who might argue that encouraging courts to consider state and federal strict liability legislation is tantamount to inserting a private right of action for damages into CERCLA itself, which Congress expressly rejected. Although Congress specifically did not allow for private damages under CERCLA (as opposed to recovery of response costs), it expressly provided a savings clause to ensure that those costs could be recovered under state law and common law.304 As such, CERCLA is in no way intended to be the last word on recovery of private damages for environmental contamination. Instead, it simply provides a retroactive strict liability scheme on a nationwide

301. See, e.g., Jones, supra note 14, at 1707-08, 1714-15 (limiting the scope of the Article proposing expansion of strict liability to those cases dealing with litigation between strangers, actions of business enterprises, and accidental injuries, thus avoiding application of strict liability where the plaintiff may have avoided the risk and stating that “it is difficult to imagine what precautions an ordinary person might take to guard against the harms inflicted by high explosives, radioactive emissions, bursting reservoirs, oil well ‘blow outs,’ or conflagrations of large accumulations of combustibles”); Posner, supra note 33 (using examples of farmer-shipper, buyer-seller, and consumer-manufacturer to conclude that negligence is more economically efficient than strict liability because it more efficiently considers the plaintiff’s contributory negligence).

302. Many courts have rejected the application of strict liability to cases involving claims by current property owners against prior owners precisely because there is a relationship between the parties and the plaintiff may have been in a position to avoid the harm. See cases cited at supra note 142.

303. Notably, section 25 of the draft Third Restatement expressly accounts for the possibility of a contributorily negligent plaintiff. See RESTATEMENT (THIRD) OF TORTS § 25 (Tentative Draft No. 1, 2001) (reducing the plaintiff’s recovery for physical harm caused by the defendant’s abnormally dangerous activity if the plaintiff has been contributorily negligent in failing to take precautions against the activity).

304. See supra note 82 and accompanying text.
basis to allow the recovery of certain costs that flow from activities that result in contamination. Nothing in CERCLA itself or its application in any way prevents courts from using CERCLA’s framework and its legislative history to provide factual or policy support for imposing state common law strict liability for activities resulting in environmental contamination.

Although some may argue that any expansion of strict liability is to be avoided in favor of a negligence or negligence per se paradigm, that case is difficult to make in the context of environmental contamination cases. Love Canal and the other environmental tragedies detailed in Part III, go a long way to establishing that the existing common law was simply not sufficient to address the growing crisis of environmental contamination in this country.305

The drawbacks of negligence theory that were evident to Congress over twenty years ago still exist today. As was detailed during the Congressional proceedings for CERCLA, much of the industrial activity that resulted in environmental contamination may have been reasonable at the time it was conducted and did not

305. To establish negligence, the plaintiff must prove, among other things, breach of the standard of care expected of a reasonable person acting under the same or similar circumstances present when the defendant’s acts or omissions occurred. See Prosser & Keeton, supra note 10, at 173-75. Negligence per se provides for a finding of negligence where the defendant has violated a statute designed to protect against the type of accident the actor’s conduct causes and if the plaintiff is within the class of persons the statute is designed to protect. See Restatement (Second) of Torts § 288B (1965); Restatement (Third) of Torts § 14 (Tentative Draft No. 1, 2001); Restatement (Third) of Torts § 39 (Tentative Draft No. 4, 2004). While determining these standards may be straightforward where the activity took place recently, where relevant laws were in place at the time of the conduct, or where society’s expectations have been clear over a long period of time (for instance, with regard to driving a car), this has never been true in the context of contaminated property cases, where conduct that was reasonable twenty years ago is now known to be dangerous, and when few laws or other guideposts to direct proper behavior were available at the time of the alleged conduct. See, e.g., Brenner, supra note 52, at 1060 (“In negligence actions, a plaintiff first must establish that the generator’s failure to exercise reasonable care led to the claimed injury, and then must overcome the generator’s probable defense that the state of the art at the time of the alleged act or omission was such that no greater care could have been exercised.”); Ginsberg & Weiss, supra note 24, at 886-95 (detailing the near impossibility of proving negligence on the part of the defendants in the Love Canal case in part because the reasonableness of conduct had to be evaluated in the context of the time in which it occurred, as well as problems of proximate and intervening cause); Zazzali & Grad, supra note 82, at 458-63 (evaluating ability of private plaintiff to bring action for damages under common law theories of negligence, nuisance, trespass and strict liability and concluding that strict liability was the most viable theory of recovery because of the dangerous nature of hazardous waste disposal and the limitations in the other causes of action).
necessarily violate any contemporaneous law or regulation.\textsuperscript{306} Similarly, reliance on res ipsa loquitur historically has been of limited use in environmental contamination cases.\textsuperscript{307} Although many more laws are in place today to help prove a negligence or negligence per se case for current conduct, the fact remains that the bulk of environmental contamination cases for years to come will arise from industrial activities that took place before these laws were enacted. Although CERCLA, on its own, was instrumental in putting in place a groundbreaking “polluter pays” system by imposing strict liability on a retroactive basis, courts have since recognized that the same facts and circumstances that led to the need for CERCLA in the first place justify application of these same principles to common law claims to recover damages. Although

\textsuperscript{306} The problems plaintiffs faced were not only that it was difficult to put together a factual case for negligence based on the passage of time or difficulty of proof, but also that the conduct, in many cases, was reasonable and legal at the time, thus making liability for conduct that resulted in serious harm to individuals and the public at large nonexistent without the change to a “status-based” liability brought about by CERCLA. See supra note 96 and accompanying text; Cooke, supra note 67, § 17.01[4][a] at 17-55 (noting that while causation may be difficult to prove in any environmental tort action, in negligence actions, the defendant can rely on additional defenses such as adherence to state of the art or the presence of intervening causes, causing courts to increasingly favor strict liability principles and other tort theories over negligence); Ginsberg & Weiss, supra note 24, at 886-95.

\textsuperscript{307} Under the doctrine of res ipsa loquitur,

\begin{quote}
\textit{[i]t may be inferred that harm suffered by the plaintiff is caused by the negligence of the defendant when (a) the event is of a kind which ordinarily does not occur in the absence of negligence; (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and (c) the indicated negligence is within the scope of the defendant’s duty to the plaintiff.}
\end{quote}

Restatement (Second) of Torts § 328D(1) (1965); see also Restatement (Third) of Torts § 17 (Tentative Draft No. 1, 2001) (“It may be inferred that the defendant has been negligent when the accident causing the plaintiff’s physical harm is the type of accident that ordinarily happens because of the negligence of the class of actors in which the defendant is the relevant member.”). Because both of these formulations of the doctrine are for the purpose of inferring that the defendant’s conduct was negligent, they are unhelpful in the typical environmental contamination case where the conduct, which usually occurred decades earlier, may have been reasonable at the time. The doctrine’s additional requirement that other possible causes be eliminated (or be limited to a “class of actors”) also causes problems in environmental contamination cases where activities on the property that may have caused contamination took place over the course of numerous owners engaged in different industrial or commercial activities. See Cooke, supra note 67, § 17.01[4][c] at 17-64 (noting that few reported toxic tort cases involve application of res ipsa loquitur, perhaps indicating “some judicial discomfort with use of dispositive circumstantial evidentiary rules in toxic tort cases, as well as recognition by plaintiffs and the courts that forms of action other than negligence may be better suited to resolution of toxic tort claims”).
Congress limited the federal remedy under CERCLA to cleanup costs only, the fact remains that courts around the country have found it appropriate to look to CERCLA to shape a remedy for common law damages under the Restatement. In light of the policy reasons that support this, as well as the growing number of courts that have embraced it, there is a sound basis for the Restatement to move in this direction, at least when it comes to environmental contamination cases.

Finally, although at first glance, one may see little difference between reference to a statute or regulation as part of a strict liability analysis and reference to a statute or regulation as part of a negligence per se analysis, the difference in focus and potential results has historically been significant in environmental contamination cases. While it would be inappropriate for a court to find a defendant negligent per se based on a statute or regulation enacted after the conduct in question, courts around the country have relied on CERCLA and similar state laws to find an activity abnormally dangerous even if the legislation relied on was enacted after the conduct in question took place. Courts have justified such results in various ways, but most often by referring to the growing problem of hazardous waste in this country and perhaps, to some extent, taking judicial notice that while the activities resulting in contamination may not have been per se illegal at the time, the fact that they were soon thereafter regulated implied that they were at the time not a matter of common usage, appropriate for their place and of value to the community. In this way, strict liability provides a more appropriate and effective mechanism for dealing with contaminated property cases than does negligence theory.

By amending and adopting a Third Restatement that directs reference to a state or federal statute, the ALI can formally recognize what has always been true: that strict liability imposes liability on the defendant “merely because, as a matter of social

308. See, e.g., Schwartzman v. Atcheson, Topeka & Santa Fe Ry., 842 F. Supp. 475 (D.N.M. 1993) (recognizing obligation of federal courts to contribute to development of state’s common law “when sound reasons dictate advancement” in case where conduct causing contamination began in 1908); Fletcher v. Tenneco, 1993 WL 86561 at *8-9 (E.D. Ky. Feb. 22, 1993) (relying on developments in Kentucky law and CERCLA to support finding that use of PCB-containing materials beginning in the 1950s was abnormally dangerous); Hanlin Group v. Int’l Minerals & Chem. Corp., 759 F. Supp. 925, 933-34 n.13 (D. Me. 1990) (relying in part on Maine’s enactment of hazardous waste legislation in 1981 to determine that conduct that took place starting in 1970 was abnormally dangerous); T & E Indus., Inc. v. Safety Light Corp., 587 A.2d 1249 (N.J. 1991) (holding that a foreseeability requirement and “state-of-the-art” defense were relevant only to negligence-based claims and finding that disposal of radium starting in 1917 was abnormally dangerous).
adjustment, the conclusion is that the responsibility should be so placed.\textsuperscript{309} While Congress and state legislatures are certainly not the final arbiters of determining what “social adjustment” is appropriate in a particular case, legislatures often generate a substantial evidentiary record that can provide useful information for litigants and courts. By encouraging litigants to present this information to courts and encouraging courts to rely on it, we can retain the flexibility courts currently have, increase predictability of results, and create a framework through the Restatement that reflects the growing trend of courts in deciding common law strict liability claims in environmental cases.

\textsuperscript{309} Prosser \& Keeton, \textit{supra} note 10, § 75, at 537.