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Comments

ABSOLUTE LIABILITY FOR ULTRAHAZARDOUS ACTIVITIES: AN APPRAISAL OF THE RESTATEMENT DOCTRINE

In the recent California case of *Luthringer v. Moore*,¹ plaintiff was injured upon his entry into an office building by inhaling hydrocyanic acid gas fumes which had escaped while defendant, a commercial fumigator, was fumigating the basement of the building. The supreme court held defendant liable without proof of negligence, and quoted at length from sections of the Restatement of Torts on absolute liability for the miscarriage of ultrahazardous activities.² As this indicates at least approval of that doctrine by the court, and may foreshadow outright acceptance, a reappraisal of that doctrine seems in

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

² RESTATEMENT, TORTS §§ 519-524 (1938).

order. This comment will pursue the following general outline: (1) a brief introduction to the field of absolute liability; (2) an investigation and evaluation of the Restatement definition of "ultrahazardous activity"; (3) a discussion of the policy considerations in this field; (4) a description and appraisal of the exceptions and defenses to absolute liability; and (5) in conclusion, an analysis of what change, if any, the *Luthringer* case has made in California law.

Trespass by domestic animals, harm done by wild or dangerous domestic animals, removal of lateral support of land, inadvertent publication of defamatory matter, injuries caused by acts of agents within the doctrine of *respondeat superior*, and the harm resulting from the sale of defective goods within the doctrine of warranty³ are all matters for which the common law has long imposed liability without fault.⁴ Workmen's compensation acts are an instance where similar liability has been imposed by statute. The increasing liability without fault imposed on persons for the acts of their independent contractors,⁵ and upon manufacturers, in addition to retailers, for harm caused by impure food,⁶ are examples of the continuing growth in this field. Even within the doctrine of negligence the enforcement of stricter standards of care, the use of presumptions and inferences, and the shifting of the burden of proof to the defendant have frequently imposed liability which is in effect absolute. The doctrine of nuisance is also used to impose absolute liability.⁷

Still another example of absolute liability is the doctrine associated with the famous English case of *Rylands v. Fletcher*.⁸ It is this doc-

³ See Carpenter, *The Doctrine of Green v. General Petroleum Corp.*, (1932) 5 So. CALIF. L. REV. 263, 265.

⁴ Although the term "absolute liability" will be used throughout this comment to conform to the terminology of the Restatement of Torts, the terms "strict liability" or "liability without fault" appear somewhat more descriptive of the nature of the liability imposed. Ames, *Law and Morals* (1908) 22 HARV. L. REV. 97-100; Winfield, *The Myth of Absolute Liability* (1926) 42 L. Q. REV. 37.

⁵ PROSSER, HANDBOOK OF THE LAW OF TORTS (1941) 484.

⁶ Klein v. Duchess Sandwich Co. (1939) 14 Cal. (2d) 272, 93 P. (2d) 799; Jeanblanc, *Manufacturers' Liability* (1937) 24 VA. L. REV. 134; (1945) 33 CALIF. L. REV. 637.

⁷ King v. Columbian Carbon Co. (C.C.A. 5th 1945) 152 F. (2d) 636; United Electric Light Co. v. Deliso Const. Co. (1943) 315 Mass. 313, 52 N.E. (2d) 553; Dixon v. Trap Rock Corp. (1944) 293 N.Y. 509, 58 N.E. (2d) 517; RESTATEMENT, TORTS Chapter 40; WINFIELD, A TEXT-BOOK OF THE LAW OF TORT (1946 3rd ed.) §§ 133-138; Friedman, *Nuisance, Negligence & the Overlapping of Torts* (1940) 3 MOD. L. REV. 305; Comment (1935) 23 CALIF. L. REV. 427. It has been suggested that the doctrine of nuisance is often used to impose absolute liability by courts which refuse to recognize any express doctrine of absolute liability. (1942) 20 TEX. L. REV. 399.

⁸ (1866) L. R. Ex. 265, *aff'd*, (1868) L. R. 3 H. L. 330. Water from defendants' reservoir burst through an ancient filled-up shaft and flooded plaintiff's colliery. Although defendants' contractor had been negligent in constructing the reservoir, this negligence was not imputed to defendants; instead, the Court of Exchequer imposed liability on the ground "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

trine that the Restatement took as a guide in formulating a rule to regulate the liability for activities too dangerous to be governed by the general law of negligence, yet too useful to society to be penalized as nuisance.⁹ Section 519 states the basic rule as follows:

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

Section 520 defines ultrahazardous activity as follows:

An activity is ultrahazardous if it

(a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of utmost care, and

(b) is not a matter of common usage.

This definition of "ultrahazardous" raises four fundamental problems: (1) What degree of risk is required? (2) Must that risk be foreseeable? (3) What is the significance of the term "activity"? (4) What is meant by "common usage"?

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." On appeal the opinions in the House of Lords limited use of the rule to situations involving a "non-natural" use of land. See generally, 3 COOLEY, LAW OF TORTS (4th ed. 1932) 98-102; PROSSER, *op. cit. supra* note 5, at 449-456; SALMOND'S LAW OF TORTS (10th ed., Stallybrass 1945) 513-535; Boblen, *The Rule in Rylands v. Fletcher* (1911) 59 U. OF PA. L. REV. 298, 373, 423; Friedman, *Modern Trends in the Law of Torts*, (1937) 1 MOD. L. REV. 39, 49; Pollock, *Duties of Insuring Safety: The Rule in Rylands v. Fletcher* (1886) 2 L. Q. REV. 52; Smith, *Tort and Absolute Liability—Suggested Changes in Classification* (1917) 30 HARV. L. REV. 241, 319, 409; Thayer, *Liability Without Fault* (1916) 29 HARV. L. REV. 801.

⁹ RESTATEMENT, TORTS, EXPLANATORY NOTES (Boblen) §§ 519-520 (Tent. Draft No. 12, 1935). Section 520, comment a, of the Restatement indicates that the activities covered by sections 519-524 include those where "... the risk unavoidably involved in carrying it on cannot be regarded as so unreasonable as to make it negligent to carry it on..." and those where there is no "... risk to others which is both out of proportion to its utility and so great as to substantially impair the use and enjoyment of neighboring lands..." See also Thayer, *op. cit. supra* note 8, at 811-812; Comment (1935) 23 CALIF. L. REV. 427.

The recent case of *Read v. J. Lyons & Co.* (1946) 2 All Eng. 471, modified earlier accepted interpretations of the doctrine of *Rylands v. Fletcher*. The plaintiff had been ordered by the Ministry of Labor & National Service to work as an inspector in defendant's munitions factory. While in a shell-filling shop pursuant to her duties, she was injured by the explosion of a shell from an unknown cause. *Held*: The doctrine of the *Rylands* case was not applicable because there was no escape from defendant's land. Tyler, *The Restriction of Strict Liability*, (1947) 10 MOD. L. REV. 896; (1947) 9 CAMB. L. J. 380; (1945) 33 CALIF. L. REV. 642; (1947) 35 CALIF. L. REV. 316; (1947) 63 L. Q. REV. 160; (1947) 8 LA. L. REV. 155; (1947) 95 U. OF PA. L. REV. 565; (1947) 22 TULANE L. REV. 205.

Degree of risk

Section 520 states that there must be a "risk of serious harm . . . which cannot be eliminated by the exercise of utmost care." Risks of minor harm, not warranting the social costs involved in shifting the loss, thus do not result in absolute liability. The requirement of an irremovable risk seemingly is relative, and must mean irremovable under existing economically feasible methods; thus a risk removable only at prohibitive cost should be considered irremovable.

The requirement that the risk be irremovable, even if impliedly qualified as suggested, seems too stringent; all that should be required is a risk of serious harm. If the risk can be removed by reasonable means, failure to remove it is negligence, and there should be liability on that ground. On the other hand, if there is a serious risk which cannot reasonably be removed, there should be absolute liability if the other requisite factors are present.

Foreseeability of risk

The Restatement states no specific requirement of foreseeability of the risk, but does indicate that the actor is liable only to those persons whose person or property he "should recognize as likely to be harmed."¹⁰ It would be difficult to "recognize" what persons might be harmed unless it were possible to foresee the risk which may do the harm. Thus the Restatement seems impliedly to require an objective test of foreseeability.¹¹ The nature of this foreseeability will be considered more fully below in relation to the meaning of the term "activity."

Significance of "Activity"

It is upon the concept of "activity" that the rationale of the absolute liability doctrine, unlike that of negligence, is based. One is absolutely liable because of the nature of his *activity*; one is liable for negligence, not for the nature of his *act*, but for the manner in which he has performed it. The Restatement does not define "activity";¹² the term, however, seems necessarily to imply some degree of regularity from which the operator can forecast generally, as opposed to the single or occasional *act* from which only particular forecasts are possible. Thus when one goes into business, by the application of the law of averages he can foresee that certain accidents are likely to occur over the years, but he cannot foresee which *act* will result in the harm, unless the *act* is done negligently. His only possible *act* of

¹⁰ RESTATEMENT, TORTS § 519.

¹¹ Writers advocating absolute liability are in accord. Stallybrass, *Dangerous Things and the Non-Natural User of Land*, (1929) 3 CAMB. L. J. 376; Comment (1941) 8 U. OF CAL. L. REV. 729.

¹² RESTATEMENT, TORTS § 520, comment *f*. The Restatement merely notes that non-profit as well as profit-making activities are included under the doctrine.

"fault"—or "quasi-fault"—is the *act* of creating a risk by carrying on the activity under his control.¹³

"Common usage" limitation

Although an activity is in every real sense ultrahazardous, the Restatement doctrine exempts it from absolute liability if it is a "matter of common usage."¹⁴ This result is achieved by the device of defining "ultrahazardous" so as to require an element not logically related to danger—lack of common usage. This limitation seems to have had its origin in the limitation stated by Lord Cairns in *Rylands v. Fletcher* that an activity, to be subjected to absolute liability, must involve a "non-natural" use of land.¹⁵ The English courts have interpreted this to mean "extraordinary" uses of land, and excepted from absolute liability "ordinary" uses.¹⁶ The "common usage" limitation of Section 520(b) was intended to be similar to the English one, but was chosen as more clearly expressing the nature of the desired restriction.¹⁷ The term, however, seems extremely vague. To be such, must an activity be carried on by the public generally or by just one class? If it need only be carried on by one class or group, how small may that class be, and how common must the activity be among that class?

Why, on policy grounds, should absolute liability be limited to activities not of common usage? The harm resulting is just as great to the person suffering it, and the loss to society as a whole is likely to bulk much larger where the activity is a common one. For example, the social cost of the injuries of pedestrians struck by automobiles¹⁸ is in excess of that resulting to ground installations from airplane accidents.¹⁹ One explanation offered is that, "Unless there is a special danger created by a small segment at the expense of the general public, absolute liability would merely substitute a risk of liability for a risk of loss."²⁰ Seemingly, this assumes that "common usage" means

¹³ Comment (1941) 8 U. OF. CHI. L. REV. 729.

¹⁴ RESTATEMENT, TORTS § 520 (b).

¹⁵ (1868) L. R. 3 H. L. 330, 338.

¹⁶ *Rickards v. Lothian* (1913) A. C. 263; *Stallybrass*, *op. cit. supra* note 11, at 390 *et seq.*; *Friedman*, *op. cit. supra* note 8 at 49 *et seq.*

¹⁷ RESTATEMENT, TORTS, EXPLANATORY NOTES (Bohlen) §§ 59-520; (Tent. Draft No. 12; 1935).

¹⁸ RESTATEMENT, TORTS § 520 comment b; (1931) 9 TENN. L. REV. 240. A statute imposing liability without fault for personal injuries in automobile accidents has been suggested. Ballantine, *Compensation for Automobile Accidents*, (1932) 18 A.B.A.J. 221; *Compensation for Automobile Accidents: A Symposium*, (1932) 32 COL. L. REV. 785; Lewis, *The Merits of the Automobile Accident Compensation Plan*, (1936) 3 LAW & CONTEMP. PROB. 583.

¹⁹ RESTATEMENT, TORTS § 520 comment g; Reiber, *Some Aspects of Air Carriers' Liability* (1946) 11 LAW & CONTEMP. PROB. 524; (1947) 22 IND. L. J. 221; (1946) 19 TEMP. L. J. 496.

²⁰ Comment (1948) 61 HARV. L. REV. 515, 520.

use by nearly everyone, since a "mere" substitution would occur only when the class subject to risk of loss and the class subject to risk of liability are substantially identical. So interpreted, activities of "common usage" are rare; their exemption would thus leave a broad area open for the imposition of absolute liability.

A possible historical explanation is that matters of uncommon usage are those which are abnormal, new or unusual; as society has in the past often required such activities, for instance railroads, to pay their own way, it is normal to do so now.²¹ This may have been the basis of the non-natural use concept of Lord Cairns, and as such may historically explain the limitation. If unusualness or newness were the sole reasons for imposing absolute liability, this explanation might suffice, but, as will be seen below, other reasons exist. This explanation is a justification for imposing absolute liability on uncommon activities rather than for exempting common activities.

Having considered the fundamental points of the Restatement doctrine, we will now consider what policies should and do have weight in this field. Professor Stallybrass, in his study of the use of the term "dangerous things" in the law of torts,²² notes that few things are dangerous under all circumstances. His conclusion is that the principle of law behind the cases imposing liability on the ground that a thing or activity is "dangerous" is one of policy, that if a man takes a risk which he should not take without assuming responsibility for its consequences, he will be liable.²³ This is, of course, question-begging, but it conveys the thought. The same difficulties inhere in defining "ultrahazardous activity." The term seems actually a legal conclusion based upon policy. The courts, however, have been reluctant expressly to base their decisions upon policy grounds, despite the fact that policy should have great influence in all branches of the law of torts.

Ultimately, society must bear all losses. It is the function of the law of torts "properly" to distribute these losses among society's members. In many instances the cost to society will be minimized if the loss is borne by the one upon whom it falls in the first instance, as higher standards of care may thereby be induced and the expenses of redistributing the loss may exceed any benefits to society resulting from its redistribution. It seems *morally* right, moreover, that persons

²¹ McCleary, *The Basis of the Humanitarian Doctrine Reexamined* (1940) 5 Mo. L. Rev. 56, 84. It should be noted that the early rejection of the *Rylands* doctrine in the United States was at least in part based upon the belief that a growing nation should foster new activities and not discourage them by the imposition of absolute liability. PROSSER, *op. cit. supra* note 5, at 451; Bohlen, *op. cit. supra* note 8.

²² Stallybrass, *op. cit. supra* note 11 at 376.

²³ *Id.* at 387.

who cause harm to themselves through their own gross negligence should pay for it.

Today most individuals are unable to assume the burden of unexpected losses, unless they are of a minor nature. Often a whole family, innocent of fault, will be disastrously affected unless the loss is at least partially shifted.²⁴ In an era of large scale enterprise combined with modern insurance, however, it is normally possible for activities to bear the losses which can reasonably be anticipated as a consequence of their being carried on, without disastrous results. Reserves may be set aside, based on past experience, or liability insurance may be obtained, and the cost covered by the price charged for the goods or services supplied. If absolute liability is imposed on such activities, then, ultimately those who enjoy the goods and services will pay for the losses which result from making them available.²⁵ Since foreseeability of the risk as an inherent part of carrying on the activity is essential to the establishment of proper reserves or insurance to cover losses without disrupting the continued operation of the activity, it must be present before absolute liability can reasonably be imposed, and therefore is a necessary element in any adequate absolute liability doctrine.

It has been argued that absolute liability is likely to discourage socially necessary or desirable activities,²⁶ particularly when the activity is in a competitive field. The weight to be given this factor depends on the balance between the need to support the activity and the need to spread the loss from its miscarriage. Even if the balance is in favor of encouraging the activity, it may be doubted whether the best way to subsidize the activity is to force innocently injured individuals to bear the cost of continued operation. In any event the cost of absolute liability will rarely be large enough to hamper continued operation of socially necessary activities.

By shifting all losses to the activity despite its lack of fault, a reduction in net social loss may result, as an incentive is given for safer

²⁴ PROSSER, *op. cit. supra* note 5, at 26; Corstvet, *The Uncompensated Accident & Its Consequences*, (1936) 3 LAW & CONTEMP. PROB. 466. Where personal injury results in death or permanent disability, or where irreplaceable property is destroyed, it is of course impossible to shift adequately all the loss by means of money damages.

²⁵ Burke, *Rylands v. Fletcher in Illinois* (1944) 22 CHI-KENT REV. 103, 116; Carpenter, *The Doctrine of Green v. General Petroleum Corp.* (1932) 5 SO. CALIF. L. REV. 263, 271; James, *Accident Liability: Some Wartime Developments* (1946) 55 YALE L. J. 365; McCleary, *op. cit. supra* note 21, at 83; Comment, (1948) 61 HARV. L. REV. 515, 521; Comment (1941) 8 U. OF CHI. L. REV. 729, 735.

²⁶ See note 21 *supra* and (1932) 20 CALIF. L. REV. 665. See Mr. Justice Traynor, dissenting, in *Dierman v. Providence Hospital* (1947) 31 CAL. (2d) 290, 308, 188 P. (2d) 12, 17, (1948) 5 WASH. & LEE L. REV. 282. Compare Mr. Justice Traynor, concurring, in *Escola v. Coca Cola Bottling Co.* (1944) 24 CAL. (2d) 453, 461, 150 P. (2d) 436, 440.

operating methods.²⁷ To the extent that personal injuries, which cannot be assigned an accurate monetary value, are reduced, society may benefit even though the cost of reduction exceeds the monetary costs of the injuries.²⁸

Historically, the courts have assumed that the governing policy of the law of torts is the imposition of liability for fault.²⁹ There is, however, a growing recognition that indemnification of individuals for losses in accord with the economic and social needs of society should also be considered in determining the existence of liability, a recognition illustrated by the cases involving manufacturer's liability for impure food.³⁰

Finally, stare decisis is a strong policy factor in all jurisdictions against imposing absolute liability, and has been a determining factor in many instances.³¹ There is justifiable hesitancy in embarking upon judicial innovation, as the stability and certainty of the law is thereby reduced. But stare decisis should not prevent needed alterations in the law to meet changed economic and social conditions.³² A tendency exists to use the doctrine of nuisance,³³ or procedural devices such as *res ipsa loquitur*,³⁴ or to require a very high standard of care,³⁵ to achieve results which in effect impose absolute liability. Greater instability and uncertainty may result from such precedent-stretching

²⁷ HOLMES, *THE COMMON LAW* (1881) 116-117; Carpenter, *op. cit. supra* note 25 at 271.

²⁸ See note 24 *supra*.

²⁹ HOLMES, *THE COMMON LAW* (1881) 119-123.

³⁰ See note 6 *supra*.

³¹ Pound, *The Economic Interpretation and the Law of Torts* (1940) 53 HARV. L. REV. 365.

³² "The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow." HOLMES, *THE COMMON LAW* (1881) 36. See also, *Helvering v. Hallock* (1940) 309 U. S. 106, 119; *Hurtado v. California* (1884) 110 U. S. 516, 530.

³³ *King v. Columbian Carbon Co.* (C. C. A. 5th 1945) 152 F. (2d) 636; *Kleebauer v. Western Fuse Co.* (1903) 138 Cal. 497, 71 Pac. 617; *United Electric Light Co. v. Deliso Const. Co.* (1943) 315 Mass. 313, 52 N.E. (2d) 553; RESTATEMENT, TORTS, EXPLANATORY NOTES (Bohlen) §§ 519-520 (Tent. Draft No. 12, 1935); (1942) 20 TEX. L. REV. 399; Comment (1947) 95 U. OF PA. L. REV. 781.

³⁴ *Dierman v. Providence Hospital* (1947) 31 Cal. (2d) 290, 188 P. (2d) 12, (1948) 5 WASH. & LEE L. REV. 282; *Escola v. Coca Cola Bottling Co.* (1944) 24 Cal. (2d) 453, 150 P. (2d) 436; *Judson v. Giant Powder Co.* (1895) 107 Cal. 549, 40 Pac. 1020; PROSSER, *op. cit. supra* note 5 at 470; (1948) 61 HARV. L. REV. 515, 517.

³⁵ *Polk v. City of Los Angeles* (1945) 26 Cal. (2d) 519, 155 P. (2d) 931; *Noone v. Perlberg Inc.* (1945) 268 App. Div. 149, 49 N.Y.S. (2d) 460, *aff'd* 294 N.Y. 680, 60 N.E. (2d) 839; *Lee v. Gas Service Co.* (1949) Kan., 201 P. (2d) 1023; Clark, *Let the Maker Beware* (1945) 19 ST. JOHNS L. REV. 85; Friedman, *Modern Trends in the Law of Torts* (1937) 1 MOD. L. REV. 39, 57; Comment (1941) 8 U. OF CHI. L. REV. 729.

than from open rejection of earlier cases and outright recognition of absolute liability.

A flexible definition of "ultrahazardous activity" is necessary if these policy factors are to be given proper weight. From this standpoint, the Restatement's "common usage" formula seems inadequate. If intended to express but one policy factor, it unexplainably omits mention of all others. If intended to reflect an assumed balance of all policy considerations, it seems too rigid and inelastic. The relevant policy factors which do or should influence the courts in determining whether an activity is ultrahazardous deserve express recognition³⁶—without the intervention of an obfuscating formula. The parties affected deserve an opportunity to argue or refute the pertinence of these factors to the case at hand. Express recognition would also aid in predicting what activities may in the future be judicially declared ultrahazardous.

After determination that an activity is ultrahazardous and subject to absolute liability, it is still necessary to determine what sort of injuries caused thereby result in liability and what defenses exist. The discussion of the following points will be directed at these problems.

First, the Restatement imposes absolute liability only for harm resulting from the risk which makes the activity ultrahazardous.³⁷ Thus, if one fell over a container of hydrocyanic acid gas which was being used to fumigate a building, there would be no absolute liability, as the risk of falling over the container was not the risk which made the activity ultrahazardous.

Second, Section 519 expressly covers harm to person, land or chattels. In the recent case of *Read v. J. Lyons & Co.*³⁸ the House of Lords indicated doubt whether or not the *Rylands* doctrine covered personal injury. Such a limitation seems indefensible, and it is doubtful that even the English courts will so limit the doctrine in practice.³⁹

Third, the Restatement in Section 519 makes one who carries on an ultrahazardous activity liable "to another whose person, land or chattels the actor should recognize as likely to be harmed. . . ." Section 523 expresses an exception to this as follows:

The rule stated in § 519 does not apply where the person harmed by the unpreventable miscarriage of an ultrahazardous activity has reason to know of the risk which makes the activity ultrahazardous and

(a) takes part in it, or

³⁶ Mr. Justice Traynor, concurring in *Escola v. Coca Cola Bottling Co.* *supra* note 34; Burke, *op. cit. supra* note 25, at 115-116.

³⁷ RESTATEMENT, TORTS § 519 comment b.

³⁸ *Supra* note 9.

³⁹ Tyler, *supra* note 9.

- (b) brings himself within the area which will be endangered by its miscarriage
 - (i) without a privilege, or
 - (ii) in the exercise of a privilege derived from the consent of the person carrying on the activity, or
 - (iii) as a member of the public entitled to the services of a public utility carrying on the activity.

This apparently denies protection under the doctrine to all trespassers, licensees, and business visitors of the operator of the activity if they have reason to know of the risk when they enter the "endangered area." The owner of nearby land and his licensee or business visitor are, however, protected.⁴⁰ The basis of the Restatement position appears to be that one who voluntarily, knowing of the danger, puts himself in the danger area without privilege, or with a privilege derived only from the consent of the operator of the activity, assumes the risk of harm which may result from its miscarriage. This seems to be the usual defense of assumption of risk by voluntary assent or exposure to a known danger, incorporated in the ultrahazardous activity doctrine.⁴¹

*Read v. J. Lyons & Co.*⁴² held that the harm done must be the result of the escape of something from the defendant's land to an area outside his control. There is no apparent policy reason for such a restriction, and the Restatement has not adopted it. The *Read* doctrine and the rule of Section 523 seem to eliminate from coverage trespassers, licensees, and business visitors of the operator who know of the danger, but the *Read* doctrine applies also to those who have no reason to know of the danger and therefore do not voluntarily assume the risk. There may be reason to doubt the advisability of the assumption of risk doctrine in the light of past experience in the field of industrial accidents, and certainly there is no reason to adopt the more stringent escape from land doctrine.⁴³

Fourth, the Restatement, with but two exceptions, rejects the defense of contributory negligence,⁴⁴ although it does recognize the

⁴⁰ RESTATEMENT, TORTS § 523 comment c.

⁴¹ PROSSER, *op. cit. supra* note 5, at 462-464.

⁴² *Supra* note 9.

⁴³ In *Read v. J. Lyons & Co.*, *supra* note 9, the assumption of risk doctrine apparently would have been inadequate, as the plaintiff had been conscripted by the government to work in the munitions factory.

⁴⁴ RESTATEMENT, TORTS § 524. This section, entitled "Effect of Contributory Fault," is somewhat confusing. Subsection (2) provides that "a plaintiff is barred from recovery . . . if, but only if (a) he intentionally or negligently causes the activity to miscarry, or (b) after knowledge that it has miscarried or is about to miscarry, he fails to exercise reasonable care to avoid harm threatened thereby." What does "if, but only if" mean? In view of § 521, exempting performance of public duty by public officers from absolute liability, and § 523, specifying other exceptions to absolute liability, it cannot

closely related doctrine of assumption of risk. This may in part be due to the general dissatisfaction with the present doctrine of contributory negligence,⁴⁵ and in part to the fact that in most cases where absolute liability will be imposed, the operator of the activity is better able to spread the loss.⁴⁶

The Restatement's exceptions do bar an action where the injured person intentionally or negligently *caused* the activity to miscarry,⁴⁷ or where after the miscarriage he did not use reasonable care to avoid injury.⁴⁸ Some courts seem to have adopted this defense.⁴⁹

Fifth, Section 522 of the Restatement states that:

One carrying on an ultrahazardous activity is liable for harm . . . although the harm is caused by the unexpected

- (a) innocent, negligent or reckless conduct of a third person, or
- (b) action of an animal, or
- (c) operation of a force of nature.⁵⁰

This view has not been accepted by American courts in absolute liability cases;⁵¹ the English courts likewise have allowed both the intervention of an act of God⁵² and the interference of a stranger⁵³ to bar recovery under the *Rylands* doctrine. The Restatement position appears to be more in line with the general policy of spreading the risk of an ultrahazardous activity and of making it pay its own way.⁵⁴ The person injured is no better able to bear the loss because the activity miscarried due to an act of God. The policy behind absolute liability does not require foreseeability of the particular event which

mean that no other factor will bar recovery. In view of the title of the section, it must mean that *no other contributory negligence* will bar recovery.

Not every case falling within the literal scope of § 524(2) bars recovery, as § 524(1) specifically provides that "A plaintiff is not barred from recovery for harm done by the miscarriage of an ultrahazardous activity caused by his failure to exercise reasonable care to observe the fact that the activity is being carried on. . . ."

⁴⁵ PROSSER, *op. cit. supra* note 5, at 462.

⁴⁶ Cooley, *Problems in Contributory Negligence* (1941) 89 U. OF PA. L. REV. 335, 350.

⁴⁷ With the exception mentioned in note 44 *supra*.

⁴⁸ RESTATEMENT, TORTS § 524 (2) (a) and (b).

⁴⁹ *E.g.*, *Rozewski v. Simpson* (1937) 9 Cal. (2d) 515, 71 P. (2d) 72; *see*, *McFarlane v. City of Niagara Falls* (1928) 247 N. Y. 340, 160 N. E. 391.

⁵⁰ Note that the Restatement, § 522 comment *a*, expresses no opinion on liability where the act of a third person is done deliberately and with the intent to bring about the harm caused.

⁵¹ *E.g.*, *Cohen v. Brockton Sav. Bank* (1947) 320 Mass. 690, 71 N. E. (2d) 109; *Bratton v. Rudnick* (1933) 283 Mass. 556, 186 N. E. 669. *See also*, HARPER, A TREATISE ON THE LAW OF TORTS (1933) 345; Carpenter, *Proximate Cause, Part IV* (1941) 15 SO. CALIF. L. REV. 187, 195; Comment (1948) 61 HARV. L. REV. 515.

⁵² *Nichols v. Marsland* (1876) 2 EX.D. 1; WINFIELD, *op. cit. supra* note 7, § 142; *Friedman, op. cit. supra* note 8, at 56.

⁵³ *Box v. Jubb* (1879) 4 EX.D. 76.

⁵⁴ Goodhart, *Restatement of the Law of Torts, Volume III: A Comparison Between American and English Law* (1941) 89 U. OF PA. L. REV. 265, 271.

causes the miscarriage, but only an ability to foresee that there is a risk of serious harm in carrying on the operation that may result in actual harm due to the operation of any one of a number of factors.⁵⁵

Sixth, Section 521 of the Restatement exempts from absolute liability ultrahazardous activities carried on in pursuance of a public duty by a public officer, employee or common carrier. To the extent that public officers or employees would bear the loss themselves and could not spread the burden of the loss, there seems to be valid reason for this exemption. To the extent, however, that the state would otherwise bear the loss, this exception would seem unnecessary on policy grounds, as the government can equitably shift losses by taxation. The state's liability, however, is limited to the extent of its waiver of sovereign immunity.⁵⁶

The reason for exempting common carriers is less apparent. They are subject to strict liability by statute in many cases for damage to goods,⁵⁷ and a very high degree of care for their passengers is always demanded.⁵⁸ There is no reason to suppose they cannot normally spread their losses through increased rates.

Although the Restatement doctrine has frequently been discussed and cited in legal periodicals,⁵⁹ the courts have given it scant notice.⁶⁰ The California Supreme Court, in holding a fumigator liable for personal injuries caused by the escape of hydrocyanic acid gas,⁶¹ appears to be the first to stress the Restatement in imposing absolute liability on an activity which previously had not been subject to such liability. How closely does the California law, as announced in the *Luthringer* case, correspond to the Restatement doctrine?

⁵⁵ Text, *supra* at note 13.

⁵⁶ RESTATEMENT, TORTS §§ 887, 888 comment c, 890 and 891; PROSSER, *op. cit. supra* note 5, at 1063-1079.

⁵⁷ *E.g.*, CAL. CIV. CODE § 2194.

⁵⁸ *E.g.*, *Brandenburg v. Pac. Gas & Elec. Co.* (1946) 28 Cal. (2d) 282, 169 P. (2d) 909; PROSSER, *op. cit. supra* note 5, at 305.

⁵⁹ Goodhart, *supra* note 54, at 271; Winfield, *Restatement of the Law of Torts—Volume III* (1939) 17 N.Y.U.L.Q. REV. 1, 6; for others see, RESTATEMENT IN THE COURTS (Permanent ed. 1932-1944).

⁶⁰ *Dehaney v. Travelers Ins. Co.* (C.C.A. 3rd 1941) 121 F. (2d) 838 (mentioned Restatement rule in dictum); *Richard v. Kaufman* (E.D. Pa. 1942) 47 F. Supp. 337 (cited § 519 in holding defendant absolutely liable for damages due to vibration from blasting); *Harclerode v. Detwiler* (Pa. 1947) 61 Dist. & County Rep. 541 (discussed § 519 in refusing to impose absolute liability for concussion in blasting); *Midwest Oil Co. v. Aberdeen* (1943) 69 S.D. 343, 10 N.W. (2d) 701 (refused to hold a water main ultrahazardous); *Brown v. L. S. Lunder Const. Co.* (1942) 240 Wis. 122, 2 N.W. (2d) 859 (held blasting ultrahazardous); *Read v. J. Lyons & Co., Ltd.*, *supra* note 9.

⁶¹ *Luthringer v. Moore* (1948) 31 Cal. (2d) 489, 190 P. (2d) 1. Although other cases have arisen on the use of fumigating gases, this appears to be the first where the user of the gas has been held absolutely liable for resulting harm. *Davis v. Grace S. S. Co. et al.* (E.D. Pa. 1935) 10 F. Supp. 285; *Ellis v. Orkin Exterminating Co.* (1939) 24 Tenn. App. 279, 143 S.W. (2d) 108, (1941) 16 TENN. L. REV. 756; *Harder v. Maloney et al.* (1947) 250 Wis. 233, 26 N.W. (2d) 830.

The Court endorses the Restatement rule requiring that the judge, and not the jury, determine whether the activity is "ultrahazardous."⁶² In reviewing the lower court's determination that fumigating with hydrocyanic acid gas involves a risk of serious harm which is unavoidable, reliance is placed largely upon two factors: (1) expert testimony as to the penetrating power and lethal nature of this gas, and (2) a statute relating to the licensing of fumigators which defined the gas as a "dangerous or lethal chemical."⁶³

The court seems to infer the defendant's ability to foresee this type of risk from (1) the nature of the gas and (2) the fact that the defendant had in fact foreseen it, shown by the care taken by him to seal off the basement and post warning notices. This conclusion is supported by the practice of vacating an entire building when any part of it is fumigated. The issue, however, is not expressly discussed.⁶⁴

The court held the activity was not a matter of "common usage," saying: "[hydrocyanic acid gas] may be used commonly by fumigators, but they are relatively few in number and are engaged in a specialized activity. It is not carried on generally by the public, especially under circumstances where many people are present, thus enhancing the hazard, nor is its use a common everyday practice."⁶⁵ The court strictly construes "common usage" and thereby leaves a relatively large number of "ultrahazardous activities."⁶⁶

The *Luthringer* case expressly rejects the dicta in the *Read*⁶⁷ case that the doctrine of absolute liability does not extend to personal injuries. Although the "escape from land" doctrine of the *Read* case is not discussed, the stress on the Restatement, along with the public policy justification for the doctrine of absolute liability, indicates rejection is likely.⁶⁸ The opinion likewise rejects contributory negligence,⁶⁹ and apparently inevitable accident,⁷⁰ as defenses in absolute liability cases.

⁶² RESTATEMENT, TORTS § 520 comment *h*.

⁶³ CAL. BUS. & PROF. CODE § 8513.

⁶⁴ The lower court did instruct the jury that it was necessary to find that the defendant "should have recognized" that persons in nearby parts of the building were likely to be harmed if the gas escaped. This deals with the foreseeability of the class which may be harmed and is apparently for the jury, rather than with the foreseeability of the ultrahazardous risk in the activity, which would appear to be part of the court's determination of whether or not the activity is ultrahazardous.

⁶⁵ To the extent that this indicates a requirement that many people be exposed to the risk of miscarriage before the activity is one of "common usage," it is a requirement that is not expressed in the Restatement. *Supra* note 61 at 500; 190 P. (2d) at 8.

⁶⁶ *Supra* note 61, at 500, 190 P. (2d) at 8.

⁶⁷ *Supra* note 9, at 475, 480, 481.

⁶⁸ Massachusetts rejected it at an early date. *Shipley v. Fifty Associates* (1870) 106 Mass. 194.

⁶⁹ "Error is urged in the refusal to give Moore's instructions on contributory negli-

The trial court drew heavily upon the Restatement in framing instructions for the jury, and the supreme court at least impliedly approved them. After quoting at length from the Restatement and setting out the almost meaningless rule of *Green v. General Petroleum Corp.*,⁷¹ the court made the following generalization:

" . . . there can be no doubt that the case of *Green v. General Petroleum Corporation*, supra, enunciated a principle of absolute liability which is applicable to the instant case. It is not significant that a property damage, as distinguished from a personal injury, was there involved. The important factor is that *certain activities under certain conditions may be so hazardous to the public generally, and of such relative infrequent occurrence* that it may well call for strict liability as the *best public policy*." (Emphasis added.)⁷²

Despite adherence to the general approach of the Restatement, the court seems ultimately to rely on the *Green* case, and avoids express acceptance of the Restatement language. The statement that public policy is the basis of the doctrine of absolute liability may indicate an intent to leave the doctrine, at least for the present, in a more flexible form than the Restatement. It is, of course, as yet impossible to ascertain what, if any, effect the *Luthringer* case will have upon the older

gence of plaintiff phrased in the language used in an ordinary negligence case. Such an instruction was improper. . . ." *Supra* note 61, at 501, 190 P. (2d) at 8.

⁷⁰ "Moore claims error in respect to the refusing of instructions offered by him dealing with inevitable accident. . . . Manifestly such instructions are not appropriate in a case of strict liability." *Supra* note 61, at 501, 190 P. (2d) at 8. But some older cases on escape of artificially collected water indicate that an act of God is a defense. *Suthiff v. Sweetwater Water Co.* (1920) 182 Cal. 34, 186 Pac. 766, (1920) 8 CALIF. L. REV. 192; see *Nola v. Orlando* (1932) 119 Cal. App. 518, 520, 6 P. (2d) 984, 985; *Kall v. Carruthers* (1922) 59 Cal. App. 555, 558, 211 Pac. 43, 44, (1923) 11 CALIF. L. REV. 197. Perhaps *Kleebauer v. Western Fuse etc. Co.* (1903) 138 Cal. 497, 71 Pac. 617, may be explained on the ground that the act of a third party caused the stored powder to explode.

⁷¹ "Where one, in the conduct and maintenance of an enterprise lawful and proper in itself, deliberately does an act under known conditions, and with knowledge that injury may result to another, proceeds, and the injury is done to the other as the direct and proximate consequence of the act, however carefully done, the one who does the act and causes the injury should, in all fairness, be required to compensate the other for the damage done." (1928) 205 Cal. 328, 333, 270 Pac. 952, 955. Under this rule the court held the driller of an oil well in an area of known high gas pressure absolutely liable for damage to nearby property caused by falling debris when the well blew out. The court relied heavily upon the maxim *sic utere tuo ut alienum non laedas*. The rule set out in the case seems far too broad to be applied literally, yet no exceptions were spelled out. Presumably not every injury, but just "legal injury," would be covered. To apply the rule, therefore, one would first have to determine whether a legally protected interest was invaded. But that is what a proper rule should tell us. *Carpenter, The Doctrine of Green v. General Petroleum Corp.* 5 So. CALIF. L. REV. 263; (1929) 17 CALIF. L. REV. 188; (1929) 13 MINN. L. REV. 520; (1929) 27 MICH. L. REV. 351; (1931) 10 ORE. L. REV. 192.

⁷² *Supra* note 61, at 500, 190 P. (2d) at 8.