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Strict Liability for Generators, Transporters, and Disposers of Hazardous Wastes

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Strict Liability for Generators, Transporters, and Disposers of Hazardous Wastes

I. INTRODUCTION

The Department of Justice and the Environmental Protection Agency (EPA) consider the improper disposal of hazardous wastes generated by private industry to be the “most serious environmental problem of the day.” The incident at the Love Canal area of Niagara Falls, New York, dramatically demonstrates the serious threat that these wastes pose to a broad range of people and interests. In August 1978, President Carter declared that area a national disaster after chemical wastes buried thirty years earlier seeped out of a landfill and

1. Hazardous wastes are solid wastes that cause serious illness or death in humans and that, when unmanaged, pose substantial present or potential threats to the environment. Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6903(5) (1976) [hereinafter cited as RCRA]. Hazardous waste generation means the act or process of producing hazardous wastes. Id. at § 6903(6).

The Minnesota Law Review wishes to thank Peter Ehrhardt, a researcher for the Minnesota Pollution Control Agency, for his assistance in the preparation of this Note.


3. Some victims of improper hazardous waste disposal are homeowners who, because of the proximity of their property to hazardous waste disposal sites or spill sites, suffer damage to their health and property. See note 4 infra. See also Weingarten, A Tiny Town Cries Foul, Nat. L.J., Oct. 22, 1979, at 1, col. 2 (description of effects of toxic chemical spill from freight train derailment near Sturgeon, Missouri); 10 ENVIR. REP. (BNA) 1796-97 (1980); 9 ENVIR. REP. (BNA) 1782 (1979); 9 ENVIR. REP. (BNA) 662 (1978) (descriptions of clandestine dumping of PCB-laced oil-waste chemicals along 211 miles of roads in North Carolina). Other victims are workers who handle the wastes. See Rosenbaum, Chemical Wastes Pose Real Danger, Minneapolis Tribune, Aug. 26, 1979, § D, at 1, col. 1 (description of the death of a 19-year-old truck driver from his inhaling lethal fumes as he unloaded his cargo of “spent industrial caustics”). Also affected are farmers who unknowingly purchase and use products contaminated by hazardous wastes. See note 5 infra.
caused major damage to property and human health.\textsuperscript{4} The hazardous waste problem is not limited to isolated incidents like that at Love Canal, however.\textsuperscript{5} The EPA has estimated that of the forty-six million tons of hazardous wastes generated in the United States in 1978, forty-one million tons were disposed of improperly.\textsuperscript{6}

Despite widespread publicity concerning the problem, gov-
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An environmental response has been slow and inadequate. Ironically, congressional attempts to regulate hazardous waste disposal may have inadvertantly contributed to the problem. Because compliance with federal statutes results in a substantial increase in the cost of disposal,7 generators, transporters, and disposers are under additional economic pressure to dispose of hazardous wastes in illegal, and often secretive, ways. In October 1979, a special section within the Justice Department was established to prosecute illegal disposers of hazardous wastes. Only ten attorneys, however, are assigned to the section.8

The American legal system often fails to provide adequate compensation to victims of improper hazardous waste disposal. This Note first discusses the inadequacies of current remedies, including remedies available under existing legislation and the

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7. According to EPA estimates, the costs for merely upgrading waste disposal to meet newly enacted federal statutes will average $1.65 per ton. 10 ENVIR. REP. (BNA) 1549 (1979). Estimates for the total cost of proper disposal of hazardous wastes vary from $.10 to $1.00 per gallon, “depending on the type of waste and the method of disposal.” Rosenbaum, supra note 3, at 6, col. 1. Even if companies are willing to pay the high costs, they may have difficulty finding an approved site. Are Waste Disposal Sites Just Some Dots on a Map?, CHEMICAL WEEK, Nov. 1, 1978, at 67.

8. 10 ENVIR. REP. (BNA) 1275 (1979).
most often used common law theories of recovery for injuries caused by other types of pollution. This Note then suggests that strict liability is a viable theory on which victims of improper hazardous waste disposal can base claims for compensation against producers, transporters, and disposers of such wastes.

II. STATUTES REGULATING HAZARDOUS WASTES: AN OVERVIEW

A. Federal Statutes

Although approximately twenty federal statutes regulate solid waste, only five of these have a significant impact on hazardous waste disposal, and none expressly provide for compensating hazardous waste victims. The five statutes merely provide a private citizen with the right to sue for enforcement of the statutory provisions and authorize compensation for clean-up costs in a few limited cases.

The Resource Conservation and Recovery Act of 1976 (RCRA) sets forth the primary federal regulatory scheme for nonradioactive waste disposal. Its "cradle to grave" regulatory scheme includes a procedure for identifying hazardous substances and subjecting the generators, transporters, and


13. 42 U.S.C. § 6921(b) (1976). Once identified, potentially harmful substances are placed on an official list. Id. The law requires the EPA to develop criteria for determining the characteristics of regulated hazardous substances. Id. § 6921(a). See Committee on Environmental Controls, ABA Section of Corporation, Banking, and Business Law, The Resource Conservation and Recovery Act of 1976—The Newest Environmental "Sleeper," 33 Bus. Law. 2555, 2559 (July 1978) [hereinafter cited as ABA Section, RCRA]. The law also allows any state
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disposers of such substances to a comprehensive manifest system. 14 Under the Act, the EPA is authorized to initiate court action to force the cleanup of an abandoned site that poses an imminent hazard to the environment or the public health. 15 The statute expressly preserves a private individual’s right to seek relief under existing statutes or common law, but it does not provide an explicit compensatory right of action. 16

governor to petition the EPA administrator “to identify or list a material as hazardous waste.” 42 U.S.C. § 6921(c) (1976).

14. 42 U.S.C. §§ 6922-6924 (1976). All generators, transporters, and disposers of hazardous substances must keep detailed records of hazardous substance storage; each owner or operator of a treatment, storage, or disposal facility is required to apply for and obtain a permit to operate the facility. 42 U.S.C. § 6925(a) (1976). See Andersen, supra note 12, at 650.

The Act authorizes the EPA to regulate the construction, maintenance, and financial support of waste disposal sites. 42 U.S.C. § 6924(4) (1976). These regulations may apply to both owners and operators of hazardous waste treatment, storage, and disposal facilities (TSDF). Id. See Andersen, supra note 12, at 657.


16. 42 U.S.C. § 6972 (1976). The legislative history indicates that the primary concern of the authors of the bill was prevention of future harm rather than compensation for past harms. The Act was clearly a response to perceived problems, including the scarcity of land-fill sites, state bans on importation of wastes, the balance of trade deficit, and the effects of discarded hazardous wastes. H.R. Rep. No. 1491, supra note 5, at 3-4, reprinted in [1976] U.S. Code Cong. & Ad. News 6238, 6240-41. The goal of the Act was primarily to counterbalance the economic pressures to dispose of hazardous wastes in environmentally unsafe manners. Compensation of victims is not mentioned in the official House Report, id. In looking back, one House committee has stated that Congress simply did not anticipate the problems associated with abandoned sites and victim compensation. HAZARDOUS WASTE DISPOSAL, supra note 2, at 47.

The Toxic Substances Control Act of 1976 (TSCA)\(^7\) regulates the manufacture and distribution of new chemicals that may ultimately harm the environment or public health and requires monitoring of all such chemicals currently in use.\(^8\) The Act empowers the EPA to require testing\(^9\) or special handling of suspected dangerous chemicals as well as to seize them or ban their use.\(^20\) Because the passage of RCRA was uncertain, Congress authorized the promulgation of regulations concerning the disposal of hazardous materials in TSCA.\(^21\) Like RCRA, TSCA does not provide private individuals with a compensatory right of action.\(^22\)

The Clean Water Act of 1977 (CWA)\(^23\) requires that the "best available technology economically achievable" be applied...
to prevent water pollution, mandates more conservation of nutrients and other materials, and establishes maximum levels of pollutants. Section 311 of the Act authorizes the EPA to require reporting of spills of hazardous materials into waterways and cleanup for which the federal government may seek reimbursement from the generator, transporter, or disposer. The Act does not, however, provide a private individual with a compensatory right of action, nor does it provide funds to clean up abandoned or inactive hazardous waste disposal sites.

The Safe Drinking Water Act of 1974 sets drinking water standards that are primarily administered by the states. Unlike the four other statutes, this Act is aimed at both aesthetics and safety. The Act provides for a uniform, systematic sampling program and requires notification to customers if a water system fails to meet the standards. In addition, the Act provides for a uniform, systematic sampling program and requires notification to customers if a water system fails to meet the standards.

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29. For an analysis of the effectivness of the civil penalties imposed by the Clean Water Act, see Comment, The Use of Civil Penalties in Enforcing the Clean Water Act Amendments of 1977, 1978 U.S.F. L. REV. 437. The CWA § 311 clean-up fund contains only $35 million. The Mexican oil spill that hit Texas beaches in August 1979 may use up to $15 million of this fund. Id. See 10 ENVIR. REP. (BNA) 1086 (1979). A ceiling of $50 million is placed on recovery of clean-up costs unless the spill was due to willful negligence. Id. at 1085.
One EPA official has criticized the amendments for their failure to cover spills onto the ground, gaseous spills into the air, spills contaminating groundwater, and chemicals not on the EPA list. Id. at 1086. EPA Assistant Administrator Thomas C. Jorling views use of section 311 funds as merely a stop-gap measure effective until Congress passes a "superfund" to reimburse victims of hazardous wastes. Id. For discussion of "superfund" proposals, see notes 40-41 infra.
31. The standards apply to all public water systems having fifteen or more service connections or regular service to twenty-five or more people. 42 U.S.C. § 300f(4) (1976).
regulates underground injection wells, which some generators and disposers use for disposal of hazardous wastes. Although private citizens may sue for enforcement of the Act's provisions, the Act does not provide victims of improper waste disposal with a right of action for compensation.

The Hazardous Materials Transportation Act of 1975 authorizes the Department of Transportation (DOT) to develop criteria for labeling, shipping, and handling of hazardous materials. RCRA incorporates DOT regulations established under this Act by requiring "that any hazardous waste which meets the DOT criteria for a hazardous material must be handled in accordance with the provisions of the DOT hazardous materials regulations in addition to EPA regulations." The Hazardous Materials Transportation Act provides for civil and criminal penalties, not for citizen enforcement or compensation suits.

In addition to benefitting from the existing federal statutes, hazardous waste victims may someday benefit from several bills now before Congress, including a number of "superfund" proposals which would create a large indemnification fund. The proposals differ radically from each other in approach and coverage, but several of them would impose strict liability on disposers and generators of hazardous waste. Formidable ob-

35. Id. § 300j-8. See Costle, supra note 10, at 671-72.
37. Id. § 1804. The Act defines hazardous materials quite broadly as "substance[s] or material[s] in a quantity and form which may pose an unreasonable risk to health and safety or property when transported in commerce." Id. § 1802(2). The Act also authorizes the Secretary of Transportation to designate which forms and quantities of substances are hazardous. Id. § 1803. See generally Frye, Recent Developments in the Transportation of Hazardous Materials, 10 TRANSP. L.J. 97 (1978).
38. Frye, supra note 37, at 102.
41. Several bills have been introduced to provide indemnification for various groups of people and various types of injuries. President Carter's proposal provides for cleanup of both oil and hazardous substances spills and abandoned hazardous waste sites by adding a new section to the Federal Water Pollution Control and Solid Waste Disposal Acts. The scheme would be funded by federal, state, and local governments as well as industry. The bill would allow third parties to recover limited damages. Oil, Hazardous Substances, and Hazardous Waste Response, Liability and Compen-
stables must be overcome before a comprehensive compensation fund can be realized.\textsuperscript{42} It is, therefore, unlikely that such a fund will be available in the near future to provide relief for victims.

B. STATE STATUTES

Many states have regulations that apply to hazardous wastes. A recent National Wildlife Federation survey of state toxic waste programs, however, concluded that such state regulatory schemes fail to solve the problems posed by hazardous wastes.\textsuperscript{43} As of the first quarter of 1979, only seven states had laws governing specific toxic substances and only thirteen

\begin{itemize}
  \item Congressman James J. Florio introduced a bill, H.R. 5790, 96th Cong., 1st Sess. (1979), that provides only for cleanup of abandoned hazardous waste sites. Florio's proposal would raise $1.3 billion over a four-year period from industry fees (75\% of the fund) and federal government appropriations (25\% of the fund). This bill would not explicitly provide third-party damages to victims but would change liability requirements to make court recovery easier. 10 EnviR. Rep. (BNA) 1477 (1979).
  \item Congressman Bob Eckhardt has proposed a bill that would use only federal appropriations to pay for cleanup of abandoned sites and impose an industry fee system to pay for cleanup of future sites. 10 EnviR. Rep. (BNA) 1819 (1980). Eckhardt's bill would impose strict liability on owners and operators of future sites. \textit{Id.} at 1820.
  \item Senators Edmund Muskie and John Culver have proposed a bill, S. 1480, 96th Cong., 1st Sess. (1979), that would provide a fund of $500 million for cleanup of hazardous substances spills and abandoned hazardous waste disposal sites. \textit{Id.} at 19. The Muskie-Culver proposal, like those of Carter and Florio, would impose some measure of strict liability on generators, transporters, and disposers of hazardous wastes. \textit{Id.} at 15. A proposed revision would place several limitations on the bill, including: (1) a six-year statute of limitations from the date of initial exposure (under common law, the statute generally would not toll until the plaintiff should have reasonably discovered the injury); and (2) liability limited to the portion each party contributed to the spill instead of the original joint, several, and strict liability. 10 EnviR. Rep. (BNA) 1976-77 (1980).
\end{itemize}

Many issues remain unresolved, \textit{see} 10 EnviR. Rep. (BNA) 1242 (1979), and many industry officials remain opposed to any such legislation. \textit{See id.} at 1163-65, 1425. Even if a superfund bill is passed, it is unlikely to be comprehensive: No piece of legislation, especially in a new and problematic area, can hope to ameliorate all current grievances. The gaps in legislation have always been the domain of the courts; where private persons are aggrieved by violations of pollution laws, a pragmatic remedy must be made available as an alternative to an administrative hearing.

\textit{Note, Private Remedies for Water Pollution,} 70 Colum. L. Rev. 734, 749 (1970).

\textsuperscript{42} The chemical industry strongly opposes such proposals. \textit{See} 10 EnviR. Rep. (BNA) 2001 (1979); \textit{id.} at 1163-65.

states had granted an agency or official overall responsibility for regulating toxic substances. More than a third of the states do not hold waste generators liable when damage caused by the toxic wastes occurs after the wastes are turned over to a licensed waste disposal firm, and more than a quarter of the states exempt on-site hazardous waste disposal from requirements that would apply if the wastes were stored off-site. Al- most half the states do not require an assessment of the chemical content of wastes destined for landfills, and approximately three-quarters of the states fail to require labels for waste containers disposed of in landfills.

Federal and state legislation, no matter how extensive, is likely to leave gaps that only courts can fill. The history of RCRA provides a clear example. The House Committee that recommended passage of RCRA claimed optimistically "that the approach taken by this legislation eliminates the last remaining loophole in environmental law." Three years after the Act was passed, however, it was apparent that several loopholes remained. The chairman of the subcommittee conducting RCRA's reauthorization hearings recognized that the Act "does not contain authority to deal with the serious health and environmental threats posed by inactive and abandoned dumpsites for hazardous wastes." Furthermore, gaps in recovery are likely to remain—even if the "superfund" legislation is en-

44. Id. at 2. Colorado, for example, currently has no safe disposal site for hazardous wastes nor any state agency with overall authority to regulate hazardous wastes. 10 ENVIR. REP. (BNA) 1902 (1980). Several states, however, are in the process of adopting hazardous waste laws modeled after RCRA, including, for example, Kentucky, see 10 ENVIR. REP. (BNA) 1498 (1979); Massachusetts, see id. at 1695; and Missouri, see id. at 1294. For a general overview and comparison of Minnesota laws with proposed federal regulations under the RCRA, see HAZARDOUS WASTE MANAGEMENT, supra note 6, at III-49 to -69.
45. Kamlet, supra note 43, at III.
46. Id. at 4.
47. Id.
48. Id.
49. Note, supra note 41, at 734-35. "While the Federal Water Pollution Control Act and its local progeny have made great advances in formulating workable criteria for pollution control, private remedies must still be utilized in the face of ineffective administrative enforcement." Id. (footnotes omitted).
acted—because administrative enforcement may be ineffective and because of the amounts recoverable may be limited.

III. TORT THEORIES OF RECOVERY

Because statutory remedies often fail to provide victims of improper hazardous waste disposal with compensation, such victims must turn to common law theories of relief. Unfortunately, the customary theories—trespass, nuisance, and negligence—offer little help for such victims.

A. TRESPASS

An action for trespass is usually limited to protection of a plaintiff's present possessory interest in land. To prevail in a trespass action, a plaintiff must prove a direct physical invasion of his property. Liability is imposed both for intentional invasions and for unintentional, non-negligent invasions that are caused by an abnormally dangerous activity. Once a plaintiff

52. There are many cases in which private landowners have sued oil, gas, and mining companies for damages caused by improper disposal of wastes. See generally Davis, Groundwater Pollution: Case Law Theories for Relief, 39 Mo. L. Rev. 117, 147-56 (1974); Comment, Private Actions for Damages Resulting from Offshore Oil Pollution, 2 COLUM. J. ENV'T'L L. 140, 151-69 (1975). Cases involving improper disposal of hazardous wastes generated by private manufacturers, however, are relatively rare. Because of the threat of extensive damage awards and widespread publicity, most companies prefer to settle claims out of court. A recent $15 million to $20 million out-of-court settlement between the state of Michigan and Hooker Chemical Company illustrates the lengths to which hazardous waste generators are willing to go to avoid trial. See 10 ENV'T'L REP. (BNA) 1482 (1979). Hooker agreed to construct clay vaults to store chemical wastes that had been improperly disposed of at its 800-acre Montague, Michigan plant site. In addition, the company agreed to monitor the vaults for at least fifty years and to give the Michigan attorney general "a permanent right to approve all future uses of the disposal site." See also Consent Order of Settlement and Dismissal, New Jersey v. Union Carbide Corp., No. C-1587-75 (N.J. Super. Ct. Ch. Div. Apr. 21, 1977) (on file with the Minnesota Law Review) (agreement by Union Carbide to pay up to $60,000 for testing and treating water contaminated by its allegedly improper disposal of hazardous chemical wastes) (complaint summarized in ENV'T'L L. REP. (Pending Litigation) (E.L.L) 65310 (April 1976)).

53. For a brief but valuable discussion of the problems posed by traditional tort litigation in cases involving toxic wastes, see Soble, supra note 22, at 703-14. See also Milholin, supra note 40, at 5-12.


55. RESTATEMENT (SECOND) OF TORTS § 166 (1965).

56. W. PROSSER, supra note 54, § 69, at 63-65. Cf. notes 106-115 infra and accompanying text (extension of strict liability to hazardous waste cases). One commentator describes the relationship between trespass and strict liability: "Originally, the trespass action offered the important advantage of imposing strict liability . . . . Today, the old rule is 'almost at its last gasp in the United States,' and the prevailing position requires an intentional intrusion, neglig-
establishes a trespass, the defendant is liable for any tangible damage that the trespass has caused to the possessor's person, family, or chattel, even though such damage might not have been foreseeable.\textsuperscript{57}

Plaintiffs bringing trespass actions have had limited success in pollution cases\textsuperscript{58} and will probably have little success in hazardous waste suits. Obviously, trespass theory will not aid victims who are injured on land not in their possession.\textsuperscript{59} Even owners of land have had difficulty winning compensation under the trespass theory, since they must establish that their land was directly invaded.\textsuperscript{60} Although at least one court has allowed recovery under a trespass theory for gas and particulate emissions from a manufacturing plant,\textsuperscript{61} most courts treat such cases as nuisance actions.\textsuperscript{62}

B. NUISANCE

Trespass theory protects a landowner's right to exclusive possession of land; private nuisance theory protects a landowner's right to the use and enjoyment of land.\textsuperscript{63} To prevail in

\begin{footnotes}
\item[57] W. Prosser, \textit{supra} note 54, § 13, at 67.
\item[58] See, e.g., Curry Coal v. Arnoni, 1 Envir. Rep. Cas. 1428, 1429, 1431 (1970) (sanitary landfill operator, who continued to dump industrial sludge above a coal mine after receiving notice of harm it was causing, liable for intentional trespass damages; but independent contractor and steel company that contracted for sludge removal not liable, since coal company failed to establish that independent contractor did not use due care).
\item[59] See note 5 \textit{supra}.
\item[60] For example, most of the damage at the Love Canal site was caused by seepage of chemicals. See note 4 \textit{supra}. Faced with a similar fact situation, most courts would probably fail to find that a trespass had occurred. See Note, \textit{The Viability of Common Law Actions for Pollution-Caused Injuries and Proof of Facts}, 18 N.Y.L.F. 935, 939 (1973).
\item[62] See Note, \textit{supra} note 60, at 939.
\item[63] See W. Prosser, \textit{supra} note 54, § 89, at 591-92. This Note does not discuss public nuisance, which protects a wide variety of interests common to the general public, because it is largely unavailable as a theory of recovery for private citizens. Plaintiffs must prove special damages under a public nuisance cause of action. See Comment, \textit{Groundwater Pollution in the Western States—Private Remedies and Federal and State Legislation}, 8 LAND AND WATER REV. 537, 545 (1973). Restrictive standing requirements imposed by courts also limit the availability of this action to public officials or private individuals who suffer harm different in kind from that suffered by the general public. See W. Prosser, \textit{supra} note 54, § 88, at 586-87. The standing requirement is based on the rationale that public officials can best represent the public's interest. See Illinois v. City of Milwaukee, 599 F.2d 151 (1979). See also Prosser, \textit{Private Action for Public Nuisance}, 52 VA. L. REV. 997, 1004-08 (1966).
\end{footnotes}
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a private nuisance action, a plaintiff must prove substantial interference with his "interest in the private use and enjoyment of land" by conduct that is either "intentional and unreasonable" or "unintentional and otherwise actionable." Compared with trespass actions, private nuisance actions reach a wider variety of invasions, including loud noises, obnoxious smells, unsightly views, and interferences with physical comfort and health. Unlike trespass liability, however, nuisance liability requires proof of some injury beyond mere physical invasion of land.

Private nuisance theory offers limited aid to hazardous waste victims. Nuisance theory does not aid victims who do

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64. Restatement (Second) of Torts § 822 (1979). To be otherwise actionable, the unintentional invasion must be caused by negligent or reckless conduct or by an abnormally dangerous activity to which strict liability applies. Id. See generally Comment, Elements of a Private Nuisance—Copart Industries, Inc. v. Consolidated Edison Co. of New York, Inc., 44 Brooklyn L. Rev. 703 (1978). For a history of the origins of nuisance law, see generally McRae, The Development of Nuisance in the Early Common Law, 1 U. Fla. L. Rev. 27 (1948).

65. See Note, supra note 60, at 940-41. Another advantage of nuisance theory is that some courts are willing to hold employers or lessors liable for nuisances created by their employees or lessees. See Daigle v. Continental Oil Co., 277 F. Supp. 875 (W.D. La. 1967) (holding lessor liable for nuisance damage caused by lessee's carbon black plant when lessor knew of proposed use); Bleeda v. Hickman-Williams & Co., 44 Mich. App. 29, 37, 205 N.W.2d 85, 90 (1972) (holding employer liable for nuisance created by independent contractor in coke screening process when employer knew or had reason to know nuisance was the likely result of process).

66. W. Prosser, supra note 54, at 577-80.

67. See generally Note, Private Nuisance Law: Protection of the Individual's Environmental Rights, 8 Suffolk U.L. Rev. 1162 (1974). Village of Wilsonville v. Earthline Corp., 11 Envir. Rep. Cas. 2137 (Ill. Cir. Ct. 1978), aff'd sub nom. Village of Wilsonville v. SCA Servs., Inc., 13 Envir. Rep. Cas. 1809 (Ill. App. 1979), offers a dramatic but isolated contrast to the ineffectiveness of nuisance theory. The court in Earthline granted an injunction prohibiting further waste disposal in a landfill site near Wilsonville, Illinois, and requiring the removal of hazardous chemical wastes and any contaminated soil from the area. Village of Wilsonville v. Earthline Corp., 11 Envir. Rep. Cas. at 2148-49. The case is unusual because the court ruled that the plaintiffs need not establish that the harm was likely to occur but merely that if it did occur, the harm would be substantial. Id. at 2147. The court seemed to ignore testimony of EPA officials that the disposal operation met all statutory standards and that without the facility "midnight dumpers" were likely to dispose of hazardous wastes illegally. See Village of Wilsonville v. SCA Servs., Inc., 13 Envir. Rep. Cas. at 1818. See also Toxic Materials: Industry Tries to Clean Up its Act, supra note 17, at 440-44P.

Most jurisdictions have not been willing to extend nuisance law this far. See, e.g., McQuail v. Shell Oil Co., 40 Del. Ch. 416, 183 A.2d 581 (1962) (upholding dismissal of action to enjoin construction and operation of oil refinery because complaint only alleged apprehension of nuisance); Hays v. Hartfield L-P Gas, 159 Ind. App. 297, 306 N.E.2d 373 (1974) (upholding denial of injunction to stop planned operation of bulk liquid propane tanks and holding that mere fear
not own or possess land. Furthermore, even landowners can have difficulty recovering under a nuisance theory because they must establish both a substantial and unreasonable interference. Although most hazardous waste victims would have no difficulty demonstrating a substantial interference, they might have difficulty establishing that the interference was unreasonable. For example, if the plaintiff moved into an area knowing it was near a hazardous dump, a court might conclude that an invasion was not unreasonable since the plaintiff had “come to the nuisance.”

Even if a plaintiff establishes the necessary private nuisance elements, the court may limit the remedy by “balancing the equities.” Boomer v. Atlantic Cement Co. illustrates some of the difficulties of this balancing process. In Boomer, the trial court found that the defendant cement company’s emission of dust and other pollutants constituted a nuisance even though the plant had taken “every available and possible precaution” to prevent such emissions. The Court of Appeals of New York, however, balanced the private harm to nearby citizens against the economic interests of the community and the company and refused to shut down the plant immediately. The court instead granted an injunction conditioned on defendant’s payment of permanent damages to the plaintiffs.

Applying the principles of Boomer, a court in a hazardous waste case might find a nuisance, yet deny injunctive relief if the injunction would cause more harm to the defendant or society than the continuation of the nuisance would cause to the plaintiff. In addition, because the toxic effects of hazardous wastes are not readily apparent, it may be difficult for a plaintiff to obtain an injunction on the basis of an immediate and

of explosion from 30,000 gallon liquid propane gas tank located within 300 feet of plaintiff’s home did not establish a nuisance). Nevertheless, a court has granted injunctive relief where the defendant’s storage of explosive chemicals did not merely create an apprehension but did severely limit the plaintiff’s actual use of his land. See Hilliard v. Shuff, 260 La. 384, 390-91, 256 So. 2d 112 (1971) (injunctive relief granted to landowner who could not safely operate an auto, truck, or power-mower on his own property within at least fifty feet of crude oil storage tanks located on defendant’s adjacent land).

68. See Note, supra note 67, at 1167-68.
69. Id. at 1171-72. But see Note, supra note 41, at 744 (identifying a “prevalent trend to disregard” the coming-to-the-nuisance rule).
72. 26 N.Y.2d at 225, 257 N.E.2d at 873, 309 N.Y.S.2d at 316-17.
73. See Note, supra note 67, at 1175-83.
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certain threat. If temporary damages are granted in lieu of an injunction, the plaintiff may obtain further relief only by returning to court. If permanent damages are granted, the defendant will have little incentive to clean up existing pollution or change current operating procedures. In effect, the court will have sold the defendant a "license to pollute."

C. NEGLIGENCE

Common law negligence and negligence based on statutory duty and on implied rights of action under federal statutes offer closely related theories on which hazardous waste victims can seek compensation. Groundwater pollution cases, which are analogous to hazardous waste cases, illustrate some of the problems presented by negligence actions. In the typical groundwater case, the plaintiff has to demonstrate that the defendant had a duty not to pollute, that a causal connection existed between the pollution and the defendant's failure to perform his duty, and that the plaintiff suffered actual loss.

Traditional negligence theory imposes a difficult burden of proof on plaintiffs in hazardous waste cases, as a recent Louisiana case illustrates. In *Ewell v. Petro Processors of Louisiana, Inc.*, plaintiffs, who owned land adjoining an industrial waste disposal site, brought a negligence suit against the corporation that operated the site and the corporate customers who generated the waste, alleging damage caused by leakage of waste onto the plaintiffs' land. The Louisiana Court of Appeals held the site operator liable for negligently permitting the toxic materials to escape, but refused to find any waste generators negligent absent a showing that that generator knew or had reason to know of the leakage. On the facts presented at trial, the court held only one of the waste-generating customers liable. In addition, the court applied the independent contractor rule, which cuts off an employer's liability for the harm caused by a hired contractor unless the activity is intrinsically danger-

74. See generally Soble, *supra* note 22, at 703-14; Milhollin, *supra* note 40, at 11-12 (discussing analogous problem with statutes of limitations).
75. Note, *supra* note 60, at 1168.
77. Davis, *supra* note 52, at 120. See W. PROSSER, *supra* note 54, § 30, at 143 (elements of cause of action founded upon negligence).
80. *Id.* at 607.
81. *Id.* at 608.
The court refused to rule that hazardous waste disposal is intrinsically dangerous.

In most cases, the requirement that the plaintiff prove the generator's knowledge of the risk of harm presents a formidable barrier to recovery. Waste generators often assiduously avoid the appearance of such knowledge in order to prevent liability, and evidence of their knowledge is often destroyed. The plaintiff's inability to use the "intrinsically dangerous" exception to the independent contractor rule is a further barrier. A corporate customer may be in a better financial position to compensate victims of improper disposal than the contractor who actually disposes of the wastes. In Ewell, for example, the contractor was a small company, but its corporate customers included Humble Oil & Refining, Dow Chemical, and Uniroyal.

The difficulties presented by traditional negligence theory can overcome in part by using a statutory standard of negligence. In a majority of jurisdictions a violation of a statutory standard of care is treated either as conclusive evidence of the defendant's breach of a duty of care or as negligence per se. In other jurisdictions a statutory violation is treated merely as evidence upon which the trier of fact can infer a breach of a duty of care or as a rebuttal presumption of negligence.

82. Id. at 606. See W. Prosser, supra note 54, § 71, at 470-73. See also Restatement of Torts § 427A (1938).

83. 364 So. 2d at 606-07. The Ewell court limits the employer's liability exception for inherently dangerous activities to only those activities that no precaution can render safe or to those activities that can be done safely but that are in fact done in an unsafe manner expressly or impliedly authorized by the employer. The court concludes that hazardous waste disposal falls in the latter category and thus requires the employer's express or implied authorization of the improper method of disposal. This requirement creates a difficult burden of proof for the plaintiff.

84. In many cases evidence of negligence will be destroyed at the time the plaintiff is harmed by hazardous wastes. For example, a spill might result in a fire or explosion that destroys any sign of the cause of the accident. See also Siegler v. Kuhlman, 81 Wash. 2d 448, 455-56, 502 P.2d 1181, 1185, cert. denied, 411 U.S. 983 (1973) (imposing strict liability on transporter of gasoline that exploded after spilling from trailer that had broken away from truck and crashed; discussing the burden-of-proof problems under a negligence theory in such cases).

85. 364 So. 2d at 606.

86. See W. Prosser, supra note 54, § 36, at 190.

87. Id. at 200-01. For an early application of the principle of negligence per se, see Osborne v. McMasters, 40 Minn. 103, 41 N.W. 543 (1889). One author has recently suggested the possibility of using FWPCA and RCRA as the per se standard for negligence in municipal sludge composting enterprises. See Passman, Composting Municipal Sludge: Public Health and Legal Implications, 3 Harv. Envt'l L. Rev. 381, 396 (1979). Prosser summarizes negligence per se as follows:
In order to use a statute to establish a standard of care, the plaintiff must show that he is a member of the class protected by the statute, and that his injury is the type of harm the statute was designed to prevent. In addition to establishing both the statute's applicability and the defendant's violation of the statute, the plaintiff must still establish injury and cause in fact. In some jurisdictions, defendants are allowed to assert excuses for the violation or raise the affirmative defenses of contributory negligence and assumption of risk. Hazardous waste victims can effectively assert a negligence claim based on the violation of a statute in those jurisdictions that recognize statutory violations as conclusive proof of unreasonable conduct. Although precedent is almost nonexistent, one recent case suggests in dictum that federal statutes should be used to extend common law liability.

Courts often give one or more of the following rationales for adopting a statutory standard of care: 1) the legislature decides what is reasonable conduct in the particular circumstances and embodies that conduct in a statute; 2) the legislature presumably investigates and considers issues more broadly than the courts do, therefore, the courts should defer to the legislative determination; 3) the adoption of the statutory standard provides greater predictability and certainty than an undefined reasonable person standard. All of these policies would be furthered by using the standards developed under RCRA, TSCA, FWPCA, and HMTA as the benchmarks of reasonable conduct in hazardous waste cases.

Few state courts have discussed the possibility of utilizing these federal statutes to define negligent conduct. The court in

Once the statute is determined to be applicable—which is to say, once it is interpreted as designed to protect the class of persons in which the plaintiff is included, against the risk of the type of harm which has in fact occurred as a result of its violation—the great majority of the courts hold that an unexcused violation is conclusive on the issue of negligence, and that the court must so direct the jury.

W. Prosser, supra note 54, § 36, at 200 (footnotes omitted).

88. Id. at 192-97.
89. Id. at 201.
90. Id.
91. See Comment, supra note 52, at 153.
92. See City of Bridgeton v. B.P. Oil, Inc., 146 N.J. Super. 169, 177, 369 A.2d 49, 53-54 (1976): "In view of our developing insight into the impact of pollution upon the environment because of the nature of this activity and the statutory prohibition against pollution, this is the proper time to extend the concept of strict liability in this State to those who store ultra-hazardous or pollutant substances." (emphasis added).
93. See, e.g., Clinkscales v. Carver, 22 Cal. 2d 72, 136 P.2d 777 (1943).
Steagall v. Dot Manufacturing Corp.\(^{94}\) indicated in dictum that it would be willing to infer negligence per se from a federal statute, the Federal Hazardous Substances Labeling Act,\(^{95}\) but on the particular facts of the case found no proximate cause.\(^{96}\) Occasionally, federal courts in diversity actions have assumed that state courts use a federal statute to establish negligence per se.\(^{97}\)

In non-diversity suits, some federal courts have been willing to find an implied right of action in federal statutes.\(^{98}\) In Cort v. Ash,\(^{99}\) the Supreme Court outlined the factors that courts should consider in deciding whether to infer a private right of action from a statute: 1) whether the plaintiff is a member of a class the statute intended to benefit; 2) whether there is legislative intent to create or deny such a remedy; 3) whether inferring such a right from the statute is consistent with the statute's purpose; and 4) whether the remedy is one traditionally left to state law.\(^{100}\)

Arguably, a court could find an implied federal right of action based on the federal statutes governing hazardous waste disposal discussed previously.\(^{101}\) The legislative history of RCRA reveals that Congress' "overriding concern" in passing that statute was to minimize "the effect on the population and the environment of the disposal of discarded hazardous

94. 223 Tenn. 428, 446 S.W.2d 515 (1969).
96. 223 Tenn. at 432, 446 S.W.2d at 517.
98. Such rights of action have most often been found in securities cases, see, e.g., J.I. Case Co. v. Borak, 377 U.S. 426 (1964), and in civil rights cases, see, e.g., Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971). See Cort v. Ash, 422 U.S. 66 (1975). The Supreme Court in Cannon v. University of Chicago, 441 U.S. 677 (1979), stressed that statutes that benefit a specific class of individuals were more likely to be the basis for implied rights of action than statutes that merely prohibit a general type of action. Id. at 1954-55. See also Note, Emerging Standards for Implied Actions Under Federal Statutes, 9 U. Mich. J. L. Ref. 294 (1976).
100. Id. at 78.
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Similarly, the legislative history of TSCA indicates that its purpose "is to prevent unreasonable risks of injury to health or the environment associated with the manufacture, processing, distribution in commerce, use, or disposal of chemical substances. [TSCA] is designed to fill a number of regulatory gaps which currently exist." Judicial consideration of other factors, however, might persuade a court not to find such an implied right. A court might rule that the statutes were intended to benefit the general public and thus confer no special right on a particular class of individuals. Alternatively, a court might hold that since pollution damage has historically been litigated in state courts, it is inappropriate to infer a federal right of action.

It is difficult to predict whether a court might treat violation of a statute as conclusive evidence of negligence or might infer a private right of action from existing statutes. Strict liability treats aggrieved parties more equitably than either these or common law theories. In the past, courts have expanded strict liability to new classes of defendants when plaintiffs demonstrate both the need for a new remedy and the factual and policy parallels to other areas in which courts presently impose the theory.

IV. STRICT LIABILITY FOR GENERATORS AND DISPOSERS OF HAZARDOUS WASTES

Many commentators suggest that the impetus for the trend to expand the availability of strict liability is a shift in attitudes concerning the environment and business. As aware-

105. See text accompanying note 91 supra.
107. See Avins, Absolute Liability for Oil Spillage, 36 BROOKLYN L. REV. 359
ness of the environmental spoliation caused by industry has increased, legislatures and courts have begun to favor strict liability as a method of forcing an industry to bear all the costs and risks of its economic activity.\textsuperscript{108}

Extending strict liability to hazardous waste cases would effectuate the statutory policy underlying TSCA\textsuperscript{109} and RCRA.\textsuperscript{110} Although these statutes evince a congressional policy to eliminate improper hazardous waste disposal and protect the environment and public health, the resources appropriated by statute are inadequate to accomplish these goals.\textsuperscript{111} By imposing strict liability, courts would, in effect, force generators and disposers of hazardous wastes to spend private funds to develop more efficient and safer disposal practices; improper disposal would no longer be economically attractive.\textsuperscript{112}

Standards established by these federal statutes could aid a court in determining when to impose strict liability.\textsuperscript{113} For ex-

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\textsuperscript{108} See e.g., United States v. Marathon Pipe Line Co., 589 F.2d 1305 (7th Cir. 1978); United States v. Tex-Tow, Inc., 589 F.2d 1310 (7th Cir. 1978); Federal Water Pollution Control Act, 33 U.S.C. § 1321(b)(6) (1976). For a discussion of the preceding cases, see Valadez-Ferreira, Liability Without Fault Under the Federal Water Pollution Control Act, 19 NAT. RESOURCES J. 687 (1979). Even without statutory authority, courts have imposed strict liability on specific activities. See e.g., Green v. General Petroleum Corp., 205 Cal. 328, 270 P. 952 (1928) (imposing strict liability upon a nonnegligent oil drilling company for damage caused to an adjacent landowner by an oil drilling blowout).


\textsuperscript{111} Although RCRA authorized $25 million in hazardous waste grants each year for 1978 and 1979, over half of that amount was spent for surveys of abandoned hazardous waste disposal sites. See 9 ENVIR. REP. (BNA) 1302, 1343 (1978).

\textsuperscript{112} See Goldfarb, supra note 6, at 257. If new facilities that meet RCRA's criteria are not developed and RCRA is enforced, the New England Regional Commission predicts there will be loss of jobs and loss of new business as well as continued illegal dumping of wastes. See 10 ENVIR. REP. (BNA) 1515 (1979).

\textsuperscript{113} See W. Rodgers, supra note 6, at 162. Rodgers suggests that toxic pollutants and hazardous substances designated under the FWPCA and the Clean Air Act may be products of abnormally dangerous activities.
ample, by using the standards of RCRA for the identification of hazardous wastes, a court would not need to hear extensive evidence on whether a certain substance is hazardous. Application of these statutes could aid courts in analyzing cases under several theories of strict liability, including those theories represented by *Rylands v. Fletcher*,\(^\text{114}\) sections 519 and 520 of the *Restatement of Torts*, sections 519 and 520 of the *Second Restatement of Torts*, and finally, section 402A of the *Second Restatement of Torts*. Although many courts fail to distinguish among these theories,\(^\text{115}\) they are founded on different rationales, and accordingly warrant separate discussion.

### A. Theories of Liability for Dangerous Activities

1. *Rylands v. Fletcher*

The theory of strict liability articulated in *Rylands v. Fletcher*\(^\text{116}\) appears to be the most logical basis for extending liability to generators, transporters, and disposers of hazardous wastes. Most modern courts view *Rylands* as imposing liability for the escape of substances likely to cause great harm and for a dangerous nonnatural use of land.\(^\text{117}\) Despite initial judicial hostility in the United States,\(^\text{118}\) most states now accept some

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114. L.R. 3 H.L. 330 (1868).


116. L.R. 3 H.L. 330 (1868). The defendant mill owners had built a large reservoir on their own land to collect water for their business. Because the reservoir was built unknowingly over an abandoned mine shaft, water leaked out and flooded the plaintiff’s mine tunnels on adjoining property. Reasoning by analogy to the strict liability imposed on owners of trespassing cattle and dangerous animals and the strict liability imposed under an absolute nuisance theory, the court allowed the plaintiff to recover. See W. Prosser, supra note 54, § 78, at 505; Avins, supra note 107, at 260.

117. See Comment, supra note 107, at 102.

118. Many American courts were hostile toward *Rylands* because they incorrectly assumed that it imposed absolute liability for any escape that caused damage. See W. Prosser, supra note 54, § 78, at 508-09. See also Muskie, supra note 105, at 482.
form of the *Rylands* rule.\(^{119}\)

A major limitation to a plaintiff's use of the *Rylands* doctrine in the hazardous waste context is the requirement that the activity involved be "nonnatural."\(^{120}\) In pollution suits courts have been reluctant to declare polluting industrial activities in industrial areas "nonnatural." The Texas Supreme Court's ruling in *Turner v. Big Lake Oil Co.*\(^{121}\) is typical. The *Turner* court held that oil drilling was not a nonnatural use of land in Texas, and thus refused to impose strict liability for damage caused by the escape of salt water wastes from oil drilling operations.\(^{122}\) Under the principles of *Turner*, strict liability for improper disposal of hazardous wastes should not be imposed in areas of large-scale chemical manufacturing,\(^{123}\) such as New Jersey, Michigan, and Louisiana.

In *Fritz v. E.I. DuPont de Nemours & Co.*,\(^{124}\) the Delaware Supreme Court applied a rationale similar to that in *Turner* to the chemical industry. In *Fritz* the court refused to hold DuPont strictly liable for an employee's permanent injuries caused by the escape of chlorine gas:

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119. See W. PROSSER, supra note 54, § 78, at 509 n.98. By 1978 only five states explicitly rejected *Rylands* by name and even those states covertly recognized the more limited appellate court opinion in *Rylands*, under the guise of nuisance or trespass theory. See Comment, supra note 107, at 100.


121. 128 Tex. 155, 96 S.W.2d 221 (1936). See W. RODGERS, supra note 6.

122. 128 Tex. at 165-66, 96 S.W.2d at 226. The court, however, also noted that Texas does not impose strict liability for other activities almost universally classed as nonnatural (blasting and keeping wild animals) because such liability is "unsuited to our conditions." Id. at 161-62, 96 S.W.2d at 224. *Turner* was followed more recently in a case upholding the repudiation of *Rylands*. *Sun Pipe Line Co. v. Kirkpatrick*, 514 S.W.2d 789, 792 (Tex. Civ. App. 1974). The court held that the plaintiff must establish negligence to recovery property damages caused by defendant's crop dusting activities. In addition, the court showed a great reluctance to hold even dangerous activities "inherently dangerous" as a rule of law and thus refused to apply the exception to the independent contractor rule. Id. at 794. See notes 82-83 supra and accompanying text.

123. There may be an additional problem in jurisdictions such as Texas that refuse to find a harmful activity nonnatural or intrinsically dangerous; a generator of hazardous wastes might be able to cut off his liability by independently contracting for disposal. See note 82 supra and accompanying text. Some courts have, however, been unwilling to allow delegation of responsibility for dangerous activities. Thus, when there is evidence of a deliberate attempt to cut off liability by incorporating subsidiaries, courts have been willing to pierce the corporate veil. See, e.g., United States v. Ira S. Bushey & Sons, Inc., 363 F. Supp. 110, 119 (D. Vt.), aff'd mem., 487 F.2d 1383 (2d Cir. 1973), cert. denied, 417 U.S. 976 (1974).

124. 43 Del. 427, 75 A.2d 256 (1950).
In the present case it was not unlawful for DuPont to have on its premises chlorine gas, nor was its presence there unusual, and it cannot be said that the mere possession of chlorine gas by DuPont without more was dangerous per se in the light of recognized industrial use. To say that any corporation or individual possessing or using dangerous substances upon its or his premises should be held liable as an insurer in the event of injury to others by reason of the mere possession, use, or escape thereof would be but to strangle corporate and individual enterprise . . . .

The Fritz court did not, however, entirely foreclose the application of strict liability to practices that have a "history of doing injury to others or . . . their property." Thus, a court could expand strict liability to include hazardous waste disposal if a plaintiff provided a carefully documented history of injury connected with the disposal of the particular hazardous wastes involved.

Despite the possible expansion of strict liability suggested by Fritz, such expansion is dependent on considerations of location. The same court that denied liability in Fritz extended strict liability to blasting activities in Catholic Welfare Guild, Inc. v. Brodney Corp. The court distinguished the two cases on the basis of location by noting that in Fritz the DuPont plant was in an isolated rural area but that in Brodney the blasting had taken place in a confined urban area.

One court, ostensibly finding liability under Rylands, has imposed strict liability on the generator of wastes despite the prevalence of mining in the area. In Cities Service Co. v. State, a Florida court held a mining company strictly liable when a phosphate slime reservoir broke and allowed approximately one billion gallons of slime to escape. Although the court recognized that the area was suited to mining, that mining had great economic importance to the area, and that Cities Service had followed accepted mining practices, the court found that Cities Service's mining was a nonnatural use of

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125. Id. at 437-38, 75 A.2d at 261.
126. Id. at 438, 75 A.2d at 261.
127. Hazardous waste designation by the federal government under TSCA and RCRA should create a strong presumption on the issue. See notes 101-105 supra and accompanying text.
128. 58 Del. 246, 208 A.2d 301 (1964).
129. Id. at 249-50, 208 A.2d at 302-03.
131. 312 So. 2d at 801. Florida produced over one-third of the world's phosphate in 1973.
Citing changes in society from early frontier days, the court set forth a new basis for liability:

In early days it was important to encourage persons to use their land by whatever means were available for the purpose of commercial and industrial development. . . . Today our life has become more complex. Many areas are overcrowded, and even the non-negligent use of one's land can cause extensive damages to a neighbor's property. Though there are still many hazardous activities which are socially desirable, it now seems reasonable that they pay their own way. It is too much to ask an innocent neighbor to bear the burden thrust upon him as a consequence of an abnormal use of the land next door.133

_Cities Service_ is an important precedent for cases in which hazardous wastes are stored either on the generator's premises or in an independent disposer's facility.134 The court's willingness to classify the storage of phosphate slime as a nonnatural use of the land despite the importance of the mining industry to Florida suggests a new approach for determining what is nonnatural. In effect, the court determined the nonnatural character of the activity by assessing the size of the risk involved.135 Using this approach, a court could classify the storage of hazardous wastes in industrial areas as a nonnatural use of land if the disposal site is large and the risks it presents are great. Certainly, a situation like that at the Love Canal would

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132. The decision in _Cities Service_ is based on both the _Rylands_ nonnatural use of the land rationale and the _Restatement's_ ultrahazardous and abnormally dangerous activity rationales. Although the court fails to clearly distinguish among the three, it appears to give decisive weight to the nonnatural use of the land rationale. See 312 So. 2d at 803-04. In an earlier case cited in _Cities Service_, _Ague v. American Agricultural Chem. Co._, 5 Fla. Supp. 133 (Cir. Ct. Hillsborough County 1953), the court, noting the repudiation of _Rylands_ in other states, rejected the application of _Rylands_ to the escape of phosphate slime from a reservoir. However, the same Florida court, acknowledging the judicial ambivalence toward acceptance of the _Rylands_ rule in the United States, reversed itself in _Caldwell v. American Cyanamid Co._, 32 Fla. Supp. 163 (Cir. Ct. Hillsborough County 1969), and held impoundment of phosphate slimes a nonnatural use within the meaning of _Rylands_. _Id._ at 165.

133. 312 So. 2d at 801 (emphasis added). Despite the _Cities Service_ court's conclusion that the activity was nonnatural, the opinion does not provide any new criteria for determining what constitutes nonnatural use of land. Instead, the court simply concludes that dangerous activities should "pay their own way." _Id._ This rationale appears to be an application of enterprise liability theory, see notes 166-194 _infra_ and accompanying text, rather than a traditional _Rylands_ liability theory.

134. Figures vary for on-site disposal. Results of a survey conducted during the summer of 1979 by the House Subcommittee on Oversight and Investigations, indicate that 94% of the chemical wastes were disposed of on the plant site by fifty-three of the largest domestic chemical manufacturers. 10 ENVR. REP. (BNA) 1338 (1979). Earlier data from the EPA suggest that 80% of wastes are stored on the site where they are generated. 9 _id._ 2035.

135. _See_ 312 So. 2d at 803.
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meet the Cities Service standard.\textsuperscript{136}

Despite the refinement offered by Cities Service, problems remain with a Rylands-based action. It is unclear, for instance, whether a court following the Cities Service approach would impose liability on a generator that does not store the wastes on its own premises.\textsuperscript{137} In such a case, a victim of improper waste disposal might not recover any damages if the independent contractor-disposer were bankrupt or minimally solvent. In addition, there is no consensus of authority on whether liability under Rylands is limited to situations in which pollutants spill onto land adjoining the disposal site or is applicable whenever pollutants escape from a storage place.\textsuperscript{138} If the former is true, Rylands would not apply to transporters of hazardous wastes nor authorize compensation to passers-by. Because it is possible that courts will adopt the pro-business stance of the Turner decision and because some courts refuse to apply the Rylands theory unless adjoining land is involved, Rylands is by itself an inadequate theory on which to base hazardous waste compensation cases.

2. Restatement of Torts Sections 519 and 520

Often confused with the Second Restatement of Torts "abnormally dangerous activity" approach, the original Restatement of Torts limits liability to "ultrahazardous activity." Section 519 of the Restatement provides:

[O]ne 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.\textsuperscript{139} Section 520 defines an ultrahazardous activity as one that "(a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage."\textsuperscript{140}

Although the Restatement criteria derive from Rylands, most commentators view the ultrahazardous activity test as both narrower and broader than the test in Rylands—narrower

\begin{footnotesize}
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  \item \textsuperscript{136} See note 4 supra and accompanying text.
  \item \textsuperscript{137} Cf. Ewell v. Petro Processors of La., Inc., 364 So. 2d 604 (La. Ct. App. 1979) (waste generators found not liable although disposal site operator liable in negligence for toxic leakage), explained in text accompanying note 80 supra.
  \item \textsuperscript{138} See Comment, supra note 107, at 105.
  \item \textsuperscript{139} RESTATEMENT OF TORTS § 519 (1938).
  \item \textsuperscript{140} \textit{Id.} § 520.
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because the test requires extreme danger, and broader because it ignores the location of the activity.\(^{141}\) The classification of activities under the Restatement as ultrahazardous is a more mechanical process than that used under Rylands or the Second Restatement. Courts have found strict liability applicable when the specific enterprise presents unusual and unavoidable risks.\(^{142}\) Activities traditionally included in this category are blasting,\(^{143}\) storing of large quantities of dynamite,\(^{144}\) keeping of wild animals,\(^{145}\) flying of airplanes,\(^{146}\) and crop dusting.\(^{147}\) Like these activities, hazardous waste disposal may result in serious injury despite precautions. Victims of improper hazardous waste disposal are usually as helpless to protect themselves from injuries as are victims of crashing airplanes or exploding dynamite. Hazardous waste disposal should therefore be considered an ultrahazardous activity. One major problem under this theory, however, is that liability is usually not imposed for an otherwise ultrahazardous activity if the activity involves a public duty or is done by a common carrier.\(^{148}\) Thus, transporters have historically been exempted from liability under an ultrahazardous activity analysis.\(^{149}\)

3. Second Restatement of Torts Sections 519 and 520

The Second Restatement substitutes an "abnormally dangerous activity" test\(^{150}\) for the ultrahazardous activity test of the original Restatement. The Second Restatement lists six factors courts should consider in applying the test. Factors (a),

\(^{141}\) See Comment, supra note 107, at 102; W. Rodgers, supra note 6, at 161.

\(^{142}\) Morris, Hazardous Enterprises and Risk Bearing Capacity, 61 Yale L.J. 1172, 1174 (1952). See also Avins, supra note 107, at 361.


\(^{144}\) See Restatement of Torts § 520, comment e (1938).

\(^{145}\) See, e.g., Copley v. Wills, 152 S.W. 830 (Tex. Civ. App. 1913) (monkeys).

\(^{146}\) See, e.g., United States v. Kesinger, 190 F.2d 529, 531 (10th Cir. 1951).

\(^{147}\) See, e.g., Chapman Chem. Co. v. Taylor, 222 S.W.2d 820 (1949).

\(^{148}\) See Restatement of Torts § 521 (1938).

\(^{149}\) This exemption has been overturned in a few jurisdictions. See Comment, Common Carriers and Risk Distribution: Absolute Liability for Transporting Hazardous Materials, 67 Ky. L.J. 441, 442-43 (1978-1979).

\(^{150}\) (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.
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(b), and (d) are similar to factors in the Restatement, but the others differ significantly:

(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. 151

The Second Restatement imposes strict liability for a broader range of activities than does the original Restatement: the Restatement would find defendants liable for activities that create a risk of harm that even utmost care fails to eliminate; the Second Restatement would impose liability for a risk of harm that reasonable care fails to eliminate. Another difference between the two views is that the Second Restatement includes a balancing test similar to that used in nuisance theory. 152 In most hazardous waste cases this test will favor the defendant waste-generator, because termination of the activity will adversely affect jobs, taxes, and products. 153

The storage, and sometimes the disposal, of large amounts of toxic wastes is an abnormal use of land within the scope of the Second Restatement. The storage and disposal of hazardous wastes present a) a high degree of risk of harm to the person, land, and chattels of others; b) a likelihood that the resulting harm will be great; c) an inability to eliminate risk by reasonable care; and d) an uncommon use of land. 154 Disposal of hazardous wastes may not in all cases, however, meet the remaining two Second Restatement criteria: e) inappropriateness to the place where the activity is carried on, and f) more danger than benefit. The dangers from these hazardous wastes may be considered less important than the economic benefits provided by the industries. Even these last two criteria, however, will be met in many cases. 155 The inappropriateness criterion presents considerations similar to those posed by the “nonnatural” use

151. Restatement (Second) of Torts § 520 (1976).
152. Comment, supra note 107, at 102-03.
153. See Comment, supra note 107, at 103. In some instances, however, even when the defendant's activity benefits a community the risk of harm to the community inherent in the activity will outweigh the benefit and plaintiff will prevail. See Yommer v. McKenzie, 255 Md. 220, 226, 257 A.2d 138, 141 (1969).
154. See notes 3-5 supra.
155. A poorly located disposal site can be quite costly. For example, the water supplies in fifteen towns in Massachusetts were contaminated by leakage from hazardous waste disposal sites into the groundwater. The estimated cost of purification is $25 million. The problem is further complicated because the state has 4500 industries which produce toxic wastes, but not enough facilities
Presumably, in cases in which a use would be considered nonnatural under a \textit{Rylands} analysis, the use would also be considered inappropriate under an abnormal use analysis. The criterion of greater danger than benefit will often be satisfied by a showing of the serious and widespread consequences of improper disposal of hazardous wastes.

4. \textit{Traditional Defenses to Strict Liability}

Strict liability is not absolute liability. Even if hazardous waste victims can establish the elements necessary under one of these three forms of strict liability, they may be denied recovery because of one or more defenses, including contributory negligence, assumption of risk, plaintiff's unusual sensitivity, the defendant's public duty, and intervening acts of third persons, animals, or God. Use of these defenses varies among jurisdictions. Under the original \textit{Restatement}, the defendant's public duty to perform an ultrahazardous activity and the plaintiff's assumption of risk bar recovery in strict liability, but the plaintiff's contributory negligence and the intervening acts of third parties, animals, or God do not. Under the \textit{Second Restatement}, strict liability is barred by the defendant's public duty to perform abnormally dangerous activity, the plaintiff's assumption of risk, unusual sensitivity, or intentional trespass onto defendant's land, or by acts of God. Recovery in strict liability is not barred, however, by the plaintiff's contributory negligence or the intervening acts of third parties.

The most complete and common bar to strict liability is the plaintiff's assumption of risk. This defense requires a showing that the plaintiff fully knew of and appreciated the risk, and

\begin{thebibliography}{99}
\item[156.] See notes 116-123 supra and accompanying text.
\item[157.] See notes 3-5 supra.
\item[158.] See Comment, supra note 107, at 105. See also Chicago & N.W. Ry. v. Tyler, 482 F.2d 1007, 1009-11 (8th Cir. 1973); Wheatland Irrigation Dist. v. McGuire, 537 P.2d 1128, 1131-43 (1975); see generally \textit{Restatement (Second) of Torts} §§ 521-524A (1976); Noel, \textit{Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk}, 25 \textit{VAND. L. REV.} 93 (1972); Westra, \textit{Re-structuring the Defenses to Strict Products Liability—An Alternative to Comparative Negligence}, 19 \textit{SANTA CLARA L. REV.} 355 (1979).
\item[159.] \textit{Restatement of Torts} §§ 521-524 (1938).
\item[160.] \textit{Restatement (Second) of Torts} §§ 521-524A (1976).
\item[161.] See Noel, supra note 158, at 119; Westra, supra note 158, at 368. The most recent trend in jurisdictions recognizing comparative fault has been to treat comparative negligence, implied assumption of risk, and misuse of product as defenses to strict liability as well as to negligence actions. Whether the plaintiff's conduct bars or merely reduces recovery is a question of fact for the
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acted voluntarily. In some jurisdictions this defense bars recovery even for the defendant's violation of statute. Neverthe less, this defense will clearly not bar recovery for many victims of hazardous waste disposal. Some of the residents of the Love Canal area, for instance, knew their land had once been a dump site, but had no appreciation of the risks involved. In other situations hazardous waste victims possess no knowledge of the hazard, since the EPA itself has no comprehensive listing of disposal sites.

The theories expressed in Rylands, the original Restatement, and the Second Restatement offer compensation to many hazardous waste victims. The federal statutes that demonstrate a legislative judgment concerning the proper treatment of hazardous wastes can aid in determining what is a non-natural, ultrahazardous, or abnormal use. Extension of traditional theories, even if aided by the federal statutes, will not reach all injured victims who desire compensation. A court's consideration of both the dangerous nature and the location of defendant's activities can still bar compensation for a large class of hazardous waste victims. Thus, a broader theory is necessary to ensure compensation for all innocent victims of improper disposal.

B. PRODUCTS LIABILITY THEORY BASED ON SECTION 402A OF THE SECOND RESTATEMENT OF TORTS

Strict liability under section 402A of the Second Restatement of Torts is premised on an enterprise rationale: "losses historically recognized as compensable when caused by an enterprise, or activity... ought to be borne by those persons who have some logical relationship with that enterprise or activity." Inherent in this rationale is an attempt to make the...
price of a product reflect its "true" costs.168

In addition to determining whether the enterprise did in fact cause the victim's injury, courts often analyze three factors: whether the enterprise failed to meet normal expectations of safe operation, whether one party is better able to prevent future injuries, and whether one party is better able to spread the cost of either prevention or insurance.169 Products liability170 judgments imposing strict liability are the most common application of the enterprise rationale. In a products liability suit, the plaintiff must establish that the product was defective and unreasonably dangerous and that it caused the plaintiff's injury.171

law. Id. at 175. See also Bridgeman-Russell Co. v. City of Duluth, 158 Minn. 509, 511, 197 N.W. 971, 972 (1924).

168. See Klemme, supra note 167, at 159-60. Losses caused by products are often shifted either by the producer through raised prices reflecting self-insurance or purchased insurance, or by the victim through medical and property insurance. See Morris, supra note 142, at 1176-78.

169. See Klemme, supra note 167, at 173.

170. Prosser defines products liability as the "name currently given to the area of case law involving the liability of sellers of chattels to third persons with whom they are not in privity of contract." W. Prosser, supra note 54, § 96, at 641 (footnotes omitted). Most cases are based upon negligence or strict liability. Id. RESTATEMENT (SECOND) OF TORTS § 402A (1965) sets forth the criteria for strict products liability:

Special Liability of Seller of Product for Physical Harm to User or Consumer
(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
   (a) the seller is engaged in the business of selling such a product, and
   (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
(2) The rule stated in Subsection (1) applies although
   (a) the seller has exercised all possible care in the preparation and sale of his product, and
   (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.


171. RESTATEMENT (SECOND) OF TORTS § 402A (1965), quoted at note 170 supra. Very few pollution suits have been based on a products liability rationale. The plaintiffs in one such case, City of Chicago v. General Motors Corp., 467 F.2d 1262 (7th Cir. 1972), unsuccessfully argued that their automobiles were defective and unreasonably dangerous because of the high level of air pollutant emissions. The court dismissed the suit by holding that the establishment of emission standards was a matter for Congress and that individually the cars were not defective. Id. at 1268-69. Neither of these rationales apply in the haz-
Several problems concerning the applicability of section 402A to the hazardous waste context are immediately evident from the title of the section, "Special Liability of Seller of Product for Physical Harm to User or Consumer." Actions for products liability have traditionally been restricted to cases involving the sale of a product. Thus, transporters and independent contractors who merely dispose of wastes would not be strictly liable unless they also sell a product, such as barrels or other containers, with their services, or unless their business includes sale of products recycled from the wastes.

Even if transporters or independent disposers are not held liable under this theory, it is clear that generator-manufacturers should be liable for their pollution. Although courts would need to expand their definition of product sale in order to hold such generators liable, such an interpretation would do no real violence to the rationale of section 402A. The essential element of sale is always present in hazardous waste cases because the generator produces the waste in the process of manufacturing products for sale. That the sale occurs only when the finished product is sold makes no difference; the generator still realizes economic gain from his activities.

A more serious problem with using section 402A lies in its requirement that the product be the focus of liability. Unless the wastes are themselves sold as a product, the traditionally required "product" is missing. Policies underlying the recent

ardous waste context, since a court can be guided by the standards Congress adopted in RCRA and TSCA, and since most hazardous waste accidents are individually caused by some failure to follow safe procedures.

172. Restatement (Second) of Torts § 402A (1965) (emphasis added).

173. Liability has been imposed on a defendant who was primarily performing a service but whose service included the sale of a product. Newmark v. Gimbel's Inc., 54 N.J. 585, 258 A.2d 697 (1969) (holding that the fee charged by defendant beauty parlor included both the sale of hair lotion and a service). See also Mallor, Liability Without Fault for Professional Services: Toward a New Standard of Professional Accountability, 9 Seton Hall L. Rev. 474 (1978); Reynolds, Strict Liability for Commercial Services—Will Another Citadel Crumble?, 30 Okla. L. Rev. 298 (1977).

174. See note 5 supra (recycling of oil containing PCBs).

175. Wastes are sold when recovered and reprocessed into useable products. A dramatic increase in resource recovery has occurred. Although ten years ago almost no resource recovery facilities existed in the United States, thirty such facilities now operate and process eight million tons of solid waste annually. In addition, sixteen million tons of glass and metal are recovered annually. 10 Envr. Rep. (BNA) 1681 (1979) (Rocco Petrone, President of the National Center for Resource Recovery). See also Passman, supra note 97, at 396-97 (suggesting RCRA might aid in determining dangerousness of compost made from municipal sludge and sold to greenhouses, landscapers, and farmers).
federal legislation, however, support a broader definition of "product." Statutes regulating hazardous materials are intended to shift the generator's focus from the finished product to the entire manufacturing process and thereby to encourage elimination of as much waste as possible in the design stages. A similar shift in judicial focus would further that congressional goal. As Congress has explicitly recognized, the finished product should not be viewed in isolation from the energy used to produce it or from the wastes it generates.

Defects in hazardous waste disposal occur in one of three contexts: 1) the design of the manufacturing and waste disposal process, 2) the actual operation of the process, or 3) the failure of the manufacturer to warn against improper handling or monitoring of the wastes. If the defect lies either in the operation of a safely designed disposal procedure or the failure to warn about dangers in handling, traditional products liability cases provide clear models. If the defect lies in the design of the disposal process, however, courts may be reluctant to engage in lengthy and complex investigations of alternative processes. Criteria from federal statutes like RCRA and TSCA can aid the court in determining what is an unreasonably dangerous disposal design. Although the use of these criteria might appear to be a retroactive application of law, such use is merely one method of defining reasonable safety.

One commentator has suggested that the proper test for an unreasonably unsafe design is whether "a reasonable person would conclude that the magnitude of the scientifically perceivable danger as it proved to be at the time of trial outweighed

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176. See notes 11-39 supra and accompanying text.
177. See Andersen, supra note 12, at 638, 647-48.
178. This defect is analogous to the "unit defect" in a traditional products liability case: the overall design is sound but a specific unit is flawed due to a deviation from standard manufacturing procedures.
the benefits of the way the product was so designed and marketed. The key factor in this test is not the manufacturer's knowledge at the time of his action, but his subsequent knowledge of the danger and harm resulting. An application of this test, though not conclusive of unreasonable dangerousness, would be a significant factor to consider along with other factors, such as the utility of the product, the cost of its disposal method, and the infeasibility or additional cost of designing a safer process. Thus, through the use of scientifically derived statutory criteria, the generators and disposers would be protected from the automatic and potentially non-uniform application of new standards. The plaintiff would still bear the burden of persuading the factfinder that the costs of the disposal design, including the accident costs, exceeded the benefits.

A less serious problem concerning the applicability of section 402A to the hazardous waste context is presented by "the user or consumer" scope of the section. In jurisdictions that narrowly interpret that language, many hazardous waste victims would fail to recover, since many such victims do not literally use or consume hazardous wastes or associated products. In many jurisdictions, however, these terms have been interpreted quite broadly to permit recovery by mere bystanders. This language, therefore, would not seem to bar the application of section 402A to hazardous wastes.

Strict liability under section 402A is not, however, absolute liability. The three most significant defenses to a products liability action are assumption of risk, abnormal use of the product, and, in some jurisdictions, the plaintiff's contributory negligence. The latter two defenses create special problems

181. Keeton, supra note 179, at 38 (emphasis in original).
182. Id. See Wade, supra note 179 at 837-38 (suggesting several additional factors to consider in analyzing the reasonable safety of a particular product, such as the usefulness of the product and the availability of a substitute product).
183. Henderson, supra note 179, at 775.
184. In jurisdictions where liability is based on contractual warranties, rather than on the Second Restatement of Torts § 402A, problems of privity might prevent application of strict liability, because no sale has taken place between the victim and the disposer or generator of waste.
185. W. Prosser, supra note 54, at 662-63. See Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969) (holding that bystander could recover in strict liability from the manufacturer of a defective automobile). The drafters of the Second Restatement did not specifically include or exclude bystanders, but did include others who were passively enjoying a product's benefits. Restatement (Second) of Torts § 402A, caveat and comment 1 (1965).
186. See Noel, supra note 158, at 93-95. See also Phillips, supra note 161, at
in the hazardous waste context. Generally, a manufacturer is
liable for harm that results from a foreseeable misuse but not
for unforeseeable abnormal use of his product.\footnote{187} Abnormal
use might arise in various ways in the hazardous waste con-
text. For example, oil contaminated with PCB might, with
proper warnings, be legitimately sold for a limited purpose but
then be used for an unintended purpose.\footnote{188} The prior warn-
ings, if adequate, would insulate hazardous waste generators
from liability. A successful contributory negligence defense
would be rare in jurisdictions that adhere closely to the 402A
formulation of strict products liability,\footnote{189} but would be likely in
jurisdictions that allow comparative negligence.\footnote{190} In light of
the policies for imposing strict liability, contributory negligence
should not bar the plaintiff's recovery, since fault is not an is-

\footnote{187} Legomsky, supra note 179, at 82-83.
\footnote{188} If the farmer who used recycled oil to soak rubbing pads for his cattle,
see note 5 supra, had been adequately warned not to use the oil on livestock
but then did so anyway, the seller would not be liable for the farmer’s misuse
of the product.
\footnote{189} Noel, supra note 158, at 105 (citing Williams v. Brown Mfg. Co., 45 Ill. 2d
418, 425-27, 261 N.E.2d 305, 308-09 (1970)).
\footnote{190} Courts, legislatures, and commentators are divided over the question
whether comparative fault should be allowed as a defense in strict liability
suits. Recent Minnesota Cases, 62 MINN. L. REV. 1209, 1325 (1978). The Minne-
sota Supreme Court in Busch v. Busch Constr., Inc., 262 N.W.2d 377 (Minn.
1977), held that a plaintiff’s ordinary contributory negligence is a defense to a
strict products liability suit and may be compared with the product manufac-
turer's strict liability under Minnesota's comparative fault statute, MINN. STAT.

One explanation for the split in authority concerning the appropriateness
of the comparative negligence defense in strict products liability cases is that
the jurisdictions differ in their views of the primary purpose of strict liability.
Jurisdictions allowing a comparative negligence defense view strict liability as
a form of negligence per se or hidden fault, but jurisdictions denying such a de-
fense view strict liability as a means of distributing risks and imposing costs of
harm on the party that introduces a defective product into the marketplace. Re-
cent Minnesota Cases, supra, at 1326-27.

\footnote{191} This is essentially the position taken in comment n of the Second Re-
statement of Torts § 402A.

Strict liability based on enterprise theory has also been attacked on constitu-
tional grounds with little success. Typically, these arguments focus on the
fifth amendment right to due process and the fourteenth amendment right to
equal protection. See, e.g., Neely & Hines, The Unconstitutionality of the Doc-
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reduce recovery under comparative negligence principles.192

The policies of strict products liability strongly support extending strict liability to hazardous waste cases. In his concurring opinion in *Escola v. Coca Cola Bottling Co.*,193 Justice Traynor set forth several of these policies: 1) to force even non-negligent manufacturers to take steps to prevent future harm; 2) to spread the costs of injury—costs that might overwhelm an individual—to the manufacturers who can insure against the risk or pass the higher costs on to their customers; 3) to fix responsibility on the party who introduced the risk into the marketplace and who is thus most likely to have evidence to refute negligence charges and evaluate the product’s safety; and 4) to place responsibility on those who induce reliance on their reputations.194 Despite the lack of privity between the manufacturer and the victim in *Escola*, Traynor concluded that these policies justified the imposition of strict liability. The manufacturer, Traynor asserted, is responsible for any injury its defective product caused to "any person who comes in lawful contact with it."195

Three of Traynor’s four policies directly apply to the hazardous waste context. First, strict liability would encourage generators and disposers to prevent harm resulting from even nonnegligent acts. Although courts would use the federal statutes such as RCRA as a starting point in considerations of liability, and thereby benefit from the availability of legislative standards, courts would not be rigidly bound by those criteria. In extreme cases the imposition of strict liability could be used to force generators and disposers to go beyond statutory minima to ensure that the disposal methods were not unreasonably dangerous.

Imposition of strict liability would further Traynor’s second policy: cost spreading. Individual homeowner’s insurance usually does not cover property damage from seepage or spillage of

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192. Daly v. General Motors Corp., 20 Cal. 3d 725, 737-39, 575 P.2d 1162, 1169-70, 144 Cal. Rptr. 380, 387-88 (1978). This case has been sharply criticized for confusing liability based on negligence and strict liability. See, e.g., Westra, supra note 158, at 355, 377-78. See also Recent Minnesota Cases, supra note 190, at 1327.


194. 24 Cal. 2d 453, 461-68, 150 P.2d 436, 440-44 (1944) (concurring opinion). These policies have been analyzed by various commentators. See generally Fischer, supra note 179; Keeton, supra note 179; Wade, supra note 179.

chemical wastes. The generator, however, can either insure against this liability or recover the costs of preventing such injuries by passing the costs on to consumers in the form of higher prices for its products. Since consumers benefit from having such products available, it is more equitable that they, rather than innocent hazardous waste victims, bear the full costs associated with the products.

Justice Traynor's third policy, alleviation of proof problems for plaintiffs, also applies to the hazardous waste context. The Ewell case\textsuperscript{196} demonstrates the difficulty of proving the defendant's knowledge of unreasonable risk. Although the intricacies of the manufacturing and disposal processes are well known to the generator and, in some cases, the disposer, only with difficulty can the plaintiff-victim ascertain those intricacies. The victim often must pay for costly and sophisticated tests simply to determine what chemical has caused his injury. The victim may have further difficulty tracing that chemical to a particular manufacturer if the chemical was disposed of in an independently operated site. The threat of a strict liability lawsuit would encourage both the manufacturer and the generator of hazardous wastes to keep better records of the chemicals generated and the methods and places of disposal. The plaintiff would benefit from these comprehensive records that may provide proof of the generator's or disposer's knowledge of an unreasonable risk.

Justice Traynor's fourth policy, placing responsibility on those who induce reliance on their reputation, is less relevant in the hazardous waste context but clearly has some application. Courts have allowed bystanders to recover although they have not relied personally on the manufacturer's reputation.\textsuperscript{197} Traynor's reliance policy is a more generalized concept than that of warranty or misrepresentation. There may be some question whether a generator-manufacturer makes any meaningful representation about the way it handles its products' wastes, but the essential element of a commercial transaction, as in traditional warranty cases, is still present. Although the community benefits from the taxes paid and the salaries generated by the manufacturer, the community also relies on the manufacturer to conduct itself in a safe manner and does not

\textsuperscript{196} 364 So. 2d 604 (La. Ct. App. 1978). See notes 79-85 supra and accompanying text.

\textsuperscript{197} See W. Prosser, supra note 54, § 100, at 662-63.
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normally anticipate and provide for the costs of unsafe manufacturing practices.

A cause of action for hazardous waste victims based on section 402A is well suited to the policies set forth by Justice Traynor. To effectuate these policies, however, courts must be willing to expand their concepts of product and sale. Generators of hazardous wastes will not be absolutely liable, since the plaintiff must establish that the disposal practices were both defective and unreasonably dangerous. In addition, traditional strict liability defenses remain. Even under section 402A some gaps in compensation will remain in jurisdictions where the independent disposer is not held liable because he merely provided a service, because the victim is a bystander, or because a transporter is the responsible party.

V. CONCLUSION

Victims of improper disposal of hazardous wastes are growing in number as more wastes are generated and as the increased costs of proper disposal create economic pressures clandestinely and illegally to dispose of hazardous wastes. Traditional tort remedies, plagued by problems of proof, are ineffective tools for compensating hazardous waste victims. Strict liability offers the only viable method of providing common law compensation to victims.

To maximize their chance of success, victims must base their claims on a combination of strict liability theories. Although a theory based on Rylands presents the closest parallel to some hazardous waste cases, this theory may be unavailable to victims injured in industrial areas. A theory based on the original Restatement of Torts offers victims compensation only in those jurisdictions willing to identify hazardous waste disposal as an ultrahazardous activity. Some jurisdictions may be more willing to classify hazardous waste disposal as an abnormal use of land under the Second Restatement of Torts than as an ultrahazardous activity under the original Restatement, but the Second Restatement theory raises a further hurdle by including a nuisance-like consideration of the activity's value to the community. Liability based on section 402A of the Second Restatement requires the most significant departure from traditional theory, but offers hazardous waste victims the greatest potential for full compensation. If courts are willing to broaden the definitions of product and sale, victims will be able to seek
compensation from a chain of potential defendants who are in some way responsible for the victims' injuries. Recently enacted federal statutes will aid courts in determining whether strict liability should be applied. Although generators and disposers will argue against retroactive application of these statutory standards, their application can ease the plaintiff's burden of proof and provide the court with a well-considered guide. As one Eighth Circuit judge has commented, "[t]he common law is not sterile or rigid and serves the best interests of society by adapting standards of conduct and responsibility that fairly meet the emerging and developing needs of our time."¹⁹⁸ In order to shift the full costs of activities generating hazardous wastes to those who profit or benefit from them, strict liability should be imposed on the generators, disposers, and transporters of hazardous wastes.

¹⁹⁸ Larsen v. General Motors Corp., 391 F.2d 495, 506 (8th Cir. 1968) (Gibson, C.J.).