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Torts -- Proximate Cause in Strict-Liability Cases

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Torts—Proximate Cause in Strict-Liability Cases

A recent Indiana case, *Galbreath v. Engineering Construction Corp.*,[1] represents a new approach to the problem of proximate cause in tort cases involving strict liability. Defendant in this case used dynamite to blast rock—an abnormally dangerous activity for which strict liability is imposed under Indiana law.[2] The explosion broke a high-pressure gas pipe, and the escaping gas ignited when it came into contact with a backhoe engine operating nearby. Plaintiff, who was repairing the broken pipe, was severely burned. He sought to hold defendant strictly liable for his injury, but the trial court sustained a demurrer to his complaint[3] on the ground that strict liability for blasting was limited to damage caused by vibrations or flying debris.[4] The Indiana Court of Appeals reversed and remanded, holding that strict liability should extend to any harm that is a reasonably foreseeable result of an abnormally dangerous activity.[5]

Strict liability has been gradually increasing in importance in tort law during the past century. Traditionally it has been imposed when damage is done by trespassing livestock[6] or by wild[7] or vicious[8] animals. Since the landmark case of *Rylands v. Fletcher*,[9] many courts have also imposed strict liability for harm resulting from "ultrahazardous"[10] or

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[1] ___ Ind. App. ___, 273 N.E.2d 121 (1971). Defendant's petition for transfer to the Indiana Supreme Court was denied. Letters from Frank E. Tolbert, counsel for defendant, to the writer, Jan. 24, 1972, and from J.T. Hillis, counsel for plaintiff, to the writer, Jan. 25, 1972.

[2] Enos Coal Mining Co. v. Schuchart, 243 Ind. 692, 188 N.E.2d 406 (1963).

[3] Plaintiff also alleged that defendant had conducted its blasting operations negligently. On this allegation the case went to the jury, and the verdict was for defendant, but the court of appeals held that there had been error in the judge's instructions to the jury. ___ Ind. App. at ___-___, 273 N.E.2d at 129-31.

[4] *Id.* at ___, 273 N.E.2d at 122.

[5] *Id.* at ___-___, 273 N.E.2d at 124-29.

[6] *E.g.*, Page v. Hollingsworth, 7 Ind. 317 (1855); Johnson v. Robinson, 11 Mich. App. 707, 162 N.W.2d 161 (1968) (per curiam); *see* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 76, at 496-99 (4th ed. 1971) [hereinafter cited as PROSSER]. A few courts have rejected strict liability for trespassing livestock. *E.g.*, Saldi v. Brighton Stock Yard Co., 344 Mass. 89, 92, 181 N.E.2d 687, 690 (1962); Bethune v. Bridges, 228 N.C. 623, 46 S.E.2d 711 (1948).

[7] *E.g.*, Collins v. Otto, 149 Colo. 489, 369 P.2d 564 (1962); Smith v. Jalbert, 351 Mass. 432, 221 N.E.2d 744 (1966); *see* PROSSER § 76, at 499-500. Again, a few courts have rejected strict liability in this situation. *E.g.*, Hansen v. Brogan, 145 Mont. 224, 400 P.2d 265 (1965).

[8] *E.g.*, Zarek v. Fredericks, 138 F.2d 689 (3d Cir. 1943); Hill v. Moseley, 220 N.C. 485, 17 S.E.2d 676 (1941); *see* PROSSER § 76, at 500-03.

[9] L.R. 3 H.L. 330 (1868), *aff'g* Fletcher v. Rylands, L.R. 1 Ex. 265 (1866).

[10] RESTATEMENT OF TORTS § 519 (1938).

"abnormally dangerous"[11] activities.[12] More recently, under the doctrine of *Greenman v. Yuba Power Products, Inc.*,[13] manufacturers and sellers have been held strictly liable for damage caused by defective products.[14]

Strict liability, like liability based on negligence, is limited by the requirement of actual causation. A defendant cannot be liable unless his conduct is an actual cause of the plaintiff's harm—that is, unless the plaintiff would not have been injured but for the defendant's conduct.[15] In many cases, however, both in negligence and strict liability, courts have found it necessary to adopt a further limitation, a rule that can be used to distinguish remote from proximate causes, so that a defendant will not be held responsible for every harmful result of his activities. In negligence cases, most courts have adopted foreseeability as a criterion for proximate cause: a defendant is liable only for harm that is a reasonably foreseeable result of his negligence.[16] In strict liability, on the other hand, no such consensus has developed, and courts have approached the question from several different viewpoints.

Before examining the various approaches that the courts have taken to the problem of proximate cause in strict-liability cases, it will be worthwhile to summarize the types of situations in which they have been faced with this problem. These situations may be divided roughly into two groups: a group of cases in which the plaintiff's harm did not result from the risk that led the courts to impose strict liability on the defendant, and another group in which the plaintiff's injury resulted from the defendant's conduct in an indirect manner.

Courts usually have not held the defendant liable when the plaintiff's injury does not result from the risk for which strict liability is

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[11]RESTATEMENT (SECOND) OF TORTS § 519 (Tent. Draft No. 10, 1964).

[12]*E.g.*, Guilford Realty & Ins. Co. v. Blythe Bros. Co., 260 N.C. 69, 131 S.E.2d 900 (1963); *see* PROSSER § 78, at 505-16. The rule of *Rylands v. Fletcher* is now accepted by about thirty states. *Id.* at 509. Many other states have imposed a similar strict liability for abnormally dangerous activities under an "absolute nuisance" theory. *Id.* at 512-13.

[13]59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

[14]*See* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A (5th ed. 1970); PROSSER § 98.

Probably the most important application of strict liability is in the field of workmen's compensation. However, workmen's compensation is not within the scope of this note, as it is based on statutory provisions rather than common law. For a discussion of the limitations on the extent of liability in workmen's compensation see Note, *Workmen's Compensation—What Is the Range of Compensable Consequences of a Work-Related Injury?* 49 N.C.L. REV. 583 (1971).

[15]*See* PROSSER § 41; Byrd, *Actual Causation in North Carolina Tort Law*, 50 N.C.L. REV. 261 (1972).

[16]*See* PROSSER § 43; *cf.* Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

imposed on the defendant. For example, the owner of trespassing livestock is strictly liable for damage that such animals ordinarily do, such as destruction of grass or crops,[17] or the breeding of a scrub bull with a pedigreed cow;[18] but ordinarily there is no liability for attacks on people.[19] If a person knows that an animal he owns has a vicious propensity, he is strictly liable for any damage that results from that propensity,[20] but usually not for damage caused by some other propensity of which he does not know.[21] The owner of a wild animal is not liable when it frightens other animals by its mere appearance.[22] It has been held that one who engages in an abnormally dangerous activity is strictly liable only for damage that comes within the risk that makes the activity abnormally dangerous.[23] Finally, a manufacturer or seller is usually not liable for harm resulting from a defective product if the consumer has used it in an abnormal manner.[24]

The courts have also tended to limit strict liability when the plaintiff's harm results too indirectly from the defendant's activity. For instance, when the defendant's cow trespassed in the plaintiff's barn and broke through the floor, creating a hole into which the plaintiff fell, the defendant was not held liable.[25] Courts have been especially reluctant to impose liability when there has been an intervening cause. An act of God,[26] the action of an animal other than defendant's,[27] and innocent[28]

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[17]*E.g.*, Page v. Hollingsworth, 7 Ind. 317 (1855).

[18]Crawford v. Williams, 48 Iowa 247 (1878); Kopplin v. Quade, 145 Wis. 454, 130 N.W. 511 (1911). *See also* Hilton v. Overly, 69 Pa. Super. 348, 353 (1918) ("we all know that [boars] almost invariably attack each other").

[19]Klenberg v. Russell, 125 Ind. 531, 25 N.E. 596 (1890); Leipske v. Guenther, 7 Wis. 2d 86, 95 N.W.2d 774 (1959); *cf.* Harvey v. Buchanan, 121 Ga. 384, 49 S.E. 281 (1904) (no liability when trespassing mule attacks goat); Fox v. Koehnig, 190 Wis. 528, 209 N.W. 708 (1926) (no liability when trespassing horse collides with car). *But cf.* McKee v. Trisler, 311 Ill. 536, 143 N.E. 69 (1924) (owner held liable when trespassing bull attacks mule).

[20]*E.g.*, Zarek v. Fredericks, 138 F.2d 689 (3d Cir. 1943); Hill v. Moseley, 220 N.C. 485, 17 S.E.2d 676 (1941).

[21]*E.g.*, Karlow v. Fitzgerald, 288 F.2d 411 (D.C. Cir. 1961); Fowler v. Helck, 278 Ky. 361, 128 S.W.2d 564 (1939).

[22]Bostock-Ferrari Amusement Co. v. Brocksmith, 34 Ind. App. 566, 73 N.E. 281 (1905); Scribner v. Kelley, 38 Barb. 14 (N.Y. Sup. Ct. 1862).

[23]Gronn v. Rogers Construction, Inc., 221 Ore. 226, 350 P.2d 1086 (1960); Foster v. Preston Mill Co., 44 Wash. 2d 440, 268 P.2d 645 (1954); *see* Madsen v. East Jordan Irrigation Co., 101 Utah 552, 125 P.2d 794 (1942).

[24]*See* notes 57-58 and accompanying text *infra*.

[25]Hollenbeck v. Johnson, 79 Hun 499, 29 N.Y.S. 945 (Sup. Ct. 1894).

[26]Golden v. Amory, 329 Mass. 484, 109 N.E.2d 131 (1952); Smith v. Board of County Rd. Comm'rs, 5 Mich. App. 370, 146 N.W.2d 702 (1966), *aff'd*, 381 Mich. 363, 161 N.W.2d 561 (1968); Murphy v. Gillum, 73 Mo. App. 487 (1898) (frost considered act of God); Nichols v. Marsland,

or negligent[29] or intentional[30] intervening conduct by a third person have all been held by some courts to relieve the defendant of liability.

Although these limitations on the extent of strict liability have not always been applied in a uniform manner, the approach taken by most courts, especially in cases involving animals and abnormally dangerous activities, has been a restrictive one. Courts have refused to find the defendant liable in situations that would certainly have called for liability under the foreseeability test used in negligence cases. In applying the same-risk limitation—the requirement that the plaintiff's harm result from the same risk that caused strict liability to be imposed—courts have often defined the risk narrowly so as not to include the damage suffered by the plaintiff. For example, in *Greeley v. Jameson*,[31] the defendant's horse kicked the plaintiff and broke his leg. It had bitten people in the past. The court required the plaintiff to show that the horse had a propensity to *kick* people (not just a propensity to *attack* them) and ruled that evidence of the earlier biting incidents did not subject the defendant to strict liability when the horse kicked.[32] In three cases,[33] the defendants were held not liable when their blasting operations fright-

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L.R. 2 Ex. D. 1 (1876).

[27]Madsen v. East Jordan Irrigation Co., 101 Utah 552, 125 P.2d 794 (1942); Carstairs v. Taylor, L.R. 6 Ex. 217, 220-21 (1871) (opinion of Kelly, C.B.).

[28]Kaufman v. Boston Dye House, Inc., 280 Mass. 161, 182 N.E. 297 (1932).

[29]*See* Davis v. Atlas Assurance Co., 112 Ohio St. 543, 147 N.E. 913 (1925); Langabaugh v. Anderson, 68 Ohio St. 131, 67 N.E. 286 (1903) (alternative holding). In *Davis* strict liability was imposed for fires caused by operating railroads. Heat produced by the defendant's engine set fire to gasoline fumes escaping from a railroad car that an employee of the plaintiff had opened. The defendant was relieved of liability by the intervening conduct of the plaintiff's employee. In *Langabaugh* a landlady leased her land to tenants who drilled for oil. The oil produced was stored in an elevated tank, but it escaped and flowed down a hill into some open fires. The landlady was held not liable because she had nothing to do with the storing of the oil, but the court said that even if this had not been so, still she would have been freed from liability by the tenants' negligence in failing to take measures against the escape of the oil.

[30]Cohen v. Brockton Savings Bank, 320 Mass. 690, 71 N.E.2d 109 (1947); *cf.* Kleebauer v. Western Fuse & Explosives Co., 138 Cal. 497, 71 P. 617 (1903) (case based on nuisance theory rather than strict liability); McGhee v. Norfolk & S. Ry., 147 N.C. 142, 60 S.E. 912 (1908) (same).

[31]265 Mass. 465, 164 N.E. 385 (1929).

[32]An even more extreme case is Bennett v. Mallard, 33 Misc. 112, 67 N.Y.S. 159 (Sup. Ct. 1900), in which it was held that the owner of a horse that had kicked people before in the road was not liable when it kicked the plaintiff in its stall.

Ewing v. Prince, 425 S.W.2d 732 (Ky. 1968), held that the owner of a mare that has kicked other horses is not liable when it kicks a person. In Karlow v. Fitzgerald, 288 F.2d 411 (D.C. Cir. 1961), the court ruled that notice that a dog has bumped people is not notice that it will bite.

[33]Gronn v. Rogers Construction, Inc., 221 Ore. 226, 350 P.2d 1086 (1960); Madsen v. East Jordan Irrigation Co., 101 Utah 552, 125 P.2d 794 (1942); Foster v. Preston Mill Co., 44 Wash. 2d 440, 268 P.2d 645 (1954).

ened minks on a mink ranch and caused them to kill their young. The risk that makes blasting abnormally dangerous was defined narrowly so as not to cover the harm to the minks.[34] Just as they have often restrictively applied the same-risk limitation, the courts have taken a similar attitude toward the limitation based on indirect causation, placing an extreme emphasis on intervening causes. In *Kaufman v. Boston Dye House, Inc.*,[35] the defendant stored a highly inflammable petroleum product called varnolene on its property—an abnormally dangerous activity. The varnolene escaped into a creek and caught fire when a gasoline engine operated by a third party backfired and emitted sparks. The defendant was held not liable because of the intervening cause. In similar situations in negligence cases, liability has been found although there was an intervening negligent[36] or even intentional[37] act—whereas here the act of the third party was not even negligent.

This restrictive approach seems quite unjustified and indeed is inconsistent with the reasons justifying the concept of strict liability itself. The purpose of the same-risk limitation is to avoid holding a defendant liable without negligence when, for instance, he transports explosives and his vehicle strikes a pedestrian who suddenly darts into his path,[38] or when he stores varnolene that escapes from his premises and, instead of starting a fire, merely turns the plaintiff's grass brown—situations that could have arisen just as easily if the defendant had been transporting paper or storing ordinary paint. The purpose of the limitation is defeated when it is used to relieve a defendant from liability for damage clearly caused by the dangerousness of his activity or the viciousness of his animal. If the law requires the owner of an ill-tempered horse to confine it or pay the price, he should be held liable for all its misconduct, whether its evil disposition manifests itself by a bite or by a kick.[39] If

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[34]This was the rationale used in the *Gronn* and *Foster* cases. In *Madsen* it was held that the minks' action in killing their young was an intervening cause that relieved the defendant of liability.

[35]280 Mass. 161, 182 N.E. 297 (1932). It is not entirely clear that this was the actual holding of the case rather than dictum. The court seems to have been reluctant to impose strict liability at all because it felt that the varnolene was not sufficiently dangerous. But if there was strict liability, it ruled, the plaintiff could not recover because of the intervening cause. The opinion does not make clear upon which of these two grounds the court rested its decision.

[36]*E.g.*, Watson v. Kentucky & Ind. Bridge & R.R., 137 Ky. 619, 126 S.W. 146 (1910).

[37]*E.g.*, Richardson v. Ham, 44 Cal. 2d 772, 285 P.2d 269 (1955).

[38]The illustration is from RESTATEMENT (SECOND) OF TORTS § 519, comment *e* at 54 (Tent. Draft No. 10, 1964).

[39]*See* G. WILLIAMS, LIABILITY FOR ANIMALS 302 (1939): "Would not it be much more satisfactory to say that any mischievous propensity to draw human blood . . . is enough?" Professor Williams' book is a comprehensive analysis of English animal law.

the law requires a blaster to pay for the damage his explosions cause, it should require him to do so regardless of whether the damage is to valuable houses or to valuable minks; in each case the damage was caused by the "non-natural,"[40] extraordinary nature of the defendant's blasting activity,[41] and in each case the blaster is equally able to insure against the loss or pass it on to his customers via higher prices.[42] Just as the purpose of the same-risk limitation is defeated by overly strict application, the same is true of the intervening-cause limitation. If, as in *Kaufman*, one who stores an inflammable substance is not liable when someone innocently causes it to catch fire, when will he ever be liable?[43] Fires do not ordinarily start by themselves. Such decisions, as Harper and James pointed out, "appear almost to subvert the theory of"[44] strict liability.

Because the courts enforce the limitations on strict liability so restrictively, plaintiffs often find it necessary—as did the plaintiff in *Galbreath v. Engineering Construction Corp.*[45]—to try to prove negligence on the part of the defendant even though their injuries were caused by a vicious animal or an abnormally dangerous activity. Only in this way can the chance of recovery be maximized. Surely this is an anomalous situation, for whenever the courts impose strict liability they have determined that the dangerous nature of the defendant's activity warrants holding him liable even without negligence.

While most courts have adopted a restrictive approach to proximate cause in strict-liability cases, a few cases reflect a quite different tendency in rejecting any limitations at all on strict liability. Decisions from several states have held that the owner of trespassing live-

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[40]Rylands v. Fletcher, L.R. 3 H.L. 330, 339 (1868).

[41]Possibly, however, the result reached in the mink-ranch cases can be supported on another ground—that the plaintiff's minks were abnormally sensitive to the effects of the defendants' explosions and the plaintiffs were not entitled to special protection for their abnormally sensitive activity. RESTATEMENT (SECOND) OF TORTS § 524A (Tent. Draft No. 10, 1964) provides that a plaintiff cannot recover if his harm results from the abnormally sensitive nature of his own activity. Several courts have adopted such a rule in nuisance cases. *E.g.*, Rogers v. Elliott, 146 Mass. 349, 15 N.E. 768 (1888); Amphitheaters, Inc. v. Portland Meadows, 184 Ore. 336, 198 P.2d 847 (1948).

[42]Concerning the availability of insurance as a reason for imposing strict liability *see* Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 440-41 (1944) (Traynor, J., concurring); PROSSER § 75, at 495.

[43]A similar situation has arisen in the cases involving reservoirs. *See* cases cited note 24 *supra*. The main danger involved in the storage of water in reservoirs is that the water may overflow or the dam or dike break in a heavy rainfall. If the rainfall is treated as an act of God that relieves the defendant of liability, very little is left of this area of strict liability.

[44]2 F. HARPER & F. JAMES, THE LAW OF TORTS § 14.5, at 811 (1956).

[45]___ Ind. App. ___, ___, 273 N.E.2d 121, 122 (1971).

stock is liable for any damage they do, including infection of other animals with disease[46] and attacks on other animals[47] and people,[48] regardless of whether the owner had notice of their vicious propensities. Similarly, a Missouri court held the owner of a vicious dog liable when it became rabid and bit a child, even though a vicious dog is no more likely than any other dog to catch rabies.[49] Courts in Louisiana[50] and more recently in Michigan[51] have held the owners of animals strictly liable despite the presence of intervening causes. The Louisiana court explained its decision: "There must be security against [wild animals] under all contingencies."[52]

Clearly this approach is weighted as heavily on one side as the prevailing tendency is on the other. If applied consistently to cases involving abnormally dangerous activities, it would frequently produce unjust results. A truck driver transporting explosives would be held to strict liability when he struck a pedestrian who suddenly stepped out into the street. A trespassing cow or a vicious dog that went to sleep on a railroad track would subject its owner to strict liability if a train hit it and derailed. Damage of this sort has nothing to do with the danger of explosives or the viciousness of the animal, and it seems probable that if faced with such a case even the courts that have adopted this unlimited-liability approach would retreat from it.

If the majority of courts have taken an unduly restrictive approach to the limitations on the extent of strict liability, and a minority have taken an impossibly liberal approach, then there is a need for a middle ground, a third alternative that will avoid the weaknesses of both. The significance of the *Galbreath* case is that it adopts such an alternative. The *Galbreath* court could have followed the mink-ranch cases and held that only damage caused by flying debris and vibrations lie within the risk that makes blasting abnormally dangerous. Or, following *Kaufman*, it could have held that the operation of the backhoe engine was an intervening cause that relieved defendant from strict liability. But it refused to do so, holding instead that the extent of liability in

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[46]Lee v. Burk, 15 Ill. App. 651 (1884).

[47]Decker v. Gammon, 44 Me. 322 (1857); Morgan v. Hudnell, 52 Ohio St. 552, 40 N.E. 716 (1895); Chunot v. Larson, 43 Wis. 536 (1878).

[48]Malone v. Knowlton, 15 N.Y.S. 506 (Sup. Ct. 1891); Nixon v. Harris, 15 Ohio St. 2d 105, 238 N.E.2d 785 (1968).

[49]Clinkenbeard v. Reinert, 284 Mo. 569, 225 S.W. 667 (1920).

[50]Vredenburg v. Behan, 33 La. Ann. 627 (1881).

[51]Johnson v. Robinson, 11 Mich. App. 707, 162 N.W.2d 161 (1968) (per curiam).

[52]Vredenburg v. Behan, 33 La. Ann. 627, 634 (1881).

strict-liability cases should be governed by the same rules that control in negligence cases.[53] Thus, instead of asking whether the burning of escaping gas was within the risk for which strict liability is imposed on blasters, it asked whether such an accident was foreseeable;[54] similarly, in dealing with the intervening cause, it asked whether the presence of an "igniting agent, such as a backhoe engine,"[55] was foreseeable. Its answer was that these occurrences were not unforeseeable as a matter of law. Therefore, it ruled, defendant's demurrer was improperly sustained and the case should have gone to the jury.[56]

The *Galbreath* court's use of the term "foreseeability" is not unprecedented. Many courts have used the terminology of negligence law in cases involving animals and abnormally dangerous activities. But *Galbreath* is the first case that has adopted the foreseeability test after careful consideration of the alternatives and proceeded to apply it with the same liberality that courts use in negligence cases.[57]

The approach that the Indiana court adopted for abnormally dangerous activities is the same approach that courts generally have followed in cases imposing strict liability for defective products. At first glance it seems surprising that courts have taken a different approach to strict liability for defective products than for other types of strict-liability cases, but the reason is not hard to find. Originally negligence was the basis of liability for defective products. Since then, products-liability law has passed from negligence to warranty to strict liability, as the courts have increased the duty of the manufacturer or seller from the ordinary duty of using reasonable care to the much more rigorous duty of actually eliminating all defects that may cause injury.[58] But while

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[53]The approach taken by the *Galbreath* court is similar to the one advocated in Harper, *Liability Without Fault and Proximate Cause*, 30 MICH. L. REV. 1001 (1932).

[54]___ Ind. App. at ___-___, 273 N.E.2d at 124-27.

[55]*Id.* at ___, 273 N.E.2d at 128.

[56]*Id.* at ___, 273 N.E.2d at 129.

[57]A few isolated cases dealing with vicious animals have applied the foreseeability test in the same realistic manner as in *Galbreath* but without the full discussion of the question that is found in the *Galbreath* opinion. Reynolds v. Hussey, 64 N.H. 64, 5 A. 458 (1886); Stamp v. Eighty-Sixth St. Amusement Co., 95 Misc. 599, 159 N.Y.S. 683 (Sup. Ct. 1916); Cockerham v. Nixon, 33 N.C. 269 (1850).

[58]This transition, like most changes in legal doctrine, has been a gradual process, and in many states it has not yet been completed. For instance, in North Carolina the strict-liability rule of *Greenman* has not been followed. Even the concept of implied warranty has been limited to cases in which the plaintiff and defendant are in privity of contract and to cases involving certain specific classes of products, including foods in sealed containers and advertised products. *Compare* Terry v. Double Cola Bottling Co., 263 N.C. 1, 138 S.E.2d 753 (1964), *with* Tedder v. Pepsi-Cola Bottling Co., 270 N.C. 301, 154 S.E.2d 337 (1967).

the level of duty has been raised substantially, the other provisions of products-liability law have not undergone great change. The rules pertaining to abnormal use and those determining when a manufacturer is relieved of liability by the seller's negligence were not found unsatisfactory in the negligence cases, and so the courts did not hesitate in carrying them over into warranty and strict liability. As a result, regardless of the theory on which liability is based, a manufacturer or seller is free from liability when the plaintiff's injury is caused by his unforeseeable abnormal use of a product[59] but not when the abnormal use can be foreseen by the defendant.[60] Again regardless of the theory used, a manufacturer is liable despite the foreseeable intervening negligence of a seller or some other third party,[61] though there may be an exception when the seller discovers the defect in the product and nevertheless delivers it to the plaintiff without warning him of the defect.[62]

Surely the approach adopted in *Galbreath* and the products-liability cases is much superior to either of the other two viewpoints the

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North Carolina products-liability law has been changed by the adoption of § 2-318 of the *Uniform Commercial Code*. N.C. GEN. STAT. § 25-2-318 (1965). This section provides that the seller of any defective product is liable for resulting personal injuries to the buyer, anyone in his family or household, or any guest in his home.

[59]*E.g.*, Schfranek v. Benjamin Moore & Co., 54 F.2d 76 (S.D.N.Y. 1931) (negligence); Preston v. Up-Right, Inc., 243 Cal. App. 2d 636, 52 Cal. Rptr. 679 (1966) (strict liability); Vincent v. Nicholas E. Tsiknas Co., 337 Mass. 726, 151 N.E.2d 263 (1958) (warranty).

[60]*E.g.*, Phillips v. Ogle Aluminum Furniture, Inc., 106 Cal. App. 2d 650, 235 P.2d 857 (1951) (negligence); Dunham v. Vaughan & Bushnell Mfg. Co., 86 Ill. App. 2d 315, 229 N.E.2d 684 (1967), *aff'd*, 42 Ill. 2d 339, 247 N.E.2d 401 (1969) (strict liability); McSpedon v. Kunz, 271 N.Y. 131, 2 N.E.2d 513 (1936) (warranty).

[61]*E.g.*, Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965) (strict liability: plaintiff collided with bus while driving truck with defective brakes which were manufactured by defendant; passengers in bus injured and plaintiff compensated them for their injuries; held, plaintiff entitled to indemnity from defendant); Steele v. Rapp, 183 Kan. 371, 327 P.2d 1053 (1958) (negligence: defendant sold fingernail polish remover without warning that it was explosive; plaintiff injured when fellow employee negligently dropped jar of it).

[62]The seller's discovery of the defect usually has been held to relieve the manufacturer of liability for negligence. *E.g.*, Stultz v. Benson Lumber Co., 6 Cal. 2d 688, 59 P.2d 100 (1936); Ford Motor Co. v. Wagoner, 183 Tenn. 392, 192 S.W.2d 840 (1946). Virtually no warranty or strict-liability cases have dealt with the question, but Professor Prosser has suggested that the same rules will be followed in these cases as in the negligence cases. PROSSER § 102, at 668; *cf.* 2 L. FRUMER & M. FRIEDMAN, *supra* note 12, § 16.01[4], at 3-32 (criterion should always be whether the intervening conduct is foreseeable).

In California it has been held that a manufacturer cannot avoid strict liability for a defective product by delegating the final stages of manufacturing and inspection to a seller. Thus he will not be relieved of liability by the seller's discovery of a defect, or by anything else the seller "did or failed to do." Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 261, 391 P.2d 168, 171, 37 Cal. Rptr. 896, 899 (1964).

courts have taken. Still, before concluding that it is the best approach and the one that all courts should follow, there is one other approach that should be examined, that adopted by the *Restatement (Second) of Torts*.[63] The *Restatement's* rules for limiting strict liability for defective products[64] and trespassing livestock[65] are fairly similar to those used in *Galbreath* and the products-liability cases. However, the *Restatement* differs from *Galbreath* in two important ways in its approach to strict liability for wild and vicious animals and abnormally dangerous activities. First, the *Restatement* restricts strict liability for abnormally dangerous activities to "the kind of harm, the risk of which makes the activity abnormally dangerous,"[66] and it limits the liability for vicious animals to "harm which results from the abnormal dangerous propensity of which the possessor knows or has reason to know";[67] in other words, it adopts the same-risk limitation that *Galbreath* rejected in favor of a foreseeability test. Secondly, the *Restatement* makes no provision for any limitation on liability based on indirectness of causation. In fact, two sections explicitly call for liability even when there is an unforeseeable intervening cause.[68]

Is there a need for a limitation based on indirectness of causation? The comments to the *Restatement* argue that because persons carrying on abnormally dangerous activities or keeping dangerous animals "have thereby for their own purposes created a risk which is not a usual incident of the ordinary life of the community,"[69] it is irrelevant whether

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[63]The sections of the *Restatement (Second) of Torts* dealing with strict liability have not yet been published in final form. Several sections are unchanged from the first *Restatement* and appear there in the third volume. The sections that have been changed are included in RESTATEMENT (SECOND) OF TORTS (Tent. Draft No. 10, 1964). *See* 41 ALI PROCEEDINGS 397-484 (1964), a transcript of the American Law Institute meeting at which the proposed changes were considered.

[64]RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[65]RESTATEMENT (SECOND) OF TORTS § 504 (Tent. Draft No. 10, 1964). The changes in this section were approved by the American Law Institute. 41 ALI PROCEEDINGS 419-34 (1964).

[66]RESTATEMENT (SECOND) OFTORTS § 519(2) (Tent. Draft No. 10, 1964).

[67]*Id.* § 509(2). Strict liability for wild animals is similarly limited in RESTATEMENT OF TORTS § 507 (1938), which is unchanged in the *Restatement Second.*

[68]RESTATEMENT OF TORTS §§ 510, 522 (1938). The American Law Institute rejected the changes that Prosser, the Reporter for the *Restatement Second,* proposed in these sections. *Compare* RESTATEMENT (SECOND) OF TORTS § 510, Note to Institute at 32 (Tent. Draft No. 10, 1964), *and id.* § 522, Note to Institute at 82, *with* 41 ALI PROCEEDINGS 419-41 (1964).

In two Caveats the *Restatement* leaves open the question whether a defendant should be relieved of liability by the intentional act of a third person who deliberately sets out to cause the injury to the plaintiff which in fact occurs. RESTATEMENT OF TORTS §§ 510, 522 (1938). *See also* RESTATEMENT (SECOND) OF TORTS § 524A (Tent. Draft No. 10, 1964), holding that a defendant is not liable for harm caused by the abnormally sensitive nature of the plaintiff's activity.

[69]RESTATEMENT OF TORTS § 522, comment *a* at 48 (1938). This section is concerned specifi-

the risk materializes in a foreseeable or unforeseeable manner. In addition, a second argument can be made in support of this position. When a defendant is held liable for foreseeable harm caused by his negligence, it is because the law considers him to have acted wrongfully in failing to provide against a risk of harm to others that he has created. When he is relieved of liability for unforeseeable harm, it is because he could not be expected to provide against a risk the existence of which he could never have realized. But strict liability is based on an entirely different ground; it is in the nature of an abnormally dangerous activity that a person *cannot* provide against the risks involved—without abandoning the activity, which the law does not require him to do. Instead, strict liability is based on a requirement that the defendant make compensation for *any* harm that his activity causes. The courts allow him to engage in his dangerous activity only on condition that he pay for all harm done, a condition that has nothing to do with foreseeability.

There is an answer to these arguments, however. It is based on the belief that the courts should not deal more harshly with conduct the law allows than with conduct the law condemns. Consider a type of negligent activity, such as drunken driving. This conduct is often at least as dangerous as an abnormally dangerous activity or the keeping of an abnormally dangerous animal. When an intoxicated person drives a car, he has certainly "for [his] own purposes created a risk which is not a usual incident of the ordinary life of the community";[70] and he is unable to provide against this risk, except by ceasing to drive while drunk. In other words, he is in virtually the same situation as one who carries on an abnormally dangerous activity. The only difference is that the law does not require a person to refrain from abnormally dangerous activities, but it does require a person to refrain from driving while drunk. Yet a drunken driver is not liable for the unforeseeable results of his negligent activity. Why should a broader liability be imposed by the courts on a person whose activity is permitted because it is socially beneficial despite its risks than on a person who creates a risk that is completely unjustified? As Professor Albert A. Ehrenzweig explained, strict liability is a substitute for negligence; courts give permission to engage in an activity instead of labeling it negligent, but "strict liability is the price an entrepreneur must pay for that permission. . . . [T]hat

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cally with abnormally dangerous activities. Similar language is used in connection with dangerous animals at *id.* § 510, comment *a* at 24.

[70]RESTATEMENT OF TORTS § 522, comment *a* at 48 (1938).

liability extends to all harm for the infliction of which he would be liable but for the permission . . . no less—no more."[71]

As for the *Restatement's* other difference from the *Galbreath* approach—the adoption of the same-risk limitation—this is certainly not a point in its favor. There is nothing wrong with the same-risk limitation as such, but, as discussed previously, it has been misapplied in cases such as *Greeley v. Jameson*[72] and the mink-ranch cases,[73] and thus it carries with it a series of dubious precedents. The foreseeability rule can adequately serve the same purpose as the same-risk rule (discoloring a neighbor's lawn is not a foreseeable result of storing an inflammable liquid; hitting a pedestrian who runs into the road is not a foreseeable result of transporting explosives) and it does not bear the burden of these unfortunate precedents.[74]

Thus the *Galbreath* approach is not only preferable to the restrictive and the unlimited-liability approaches; it also proves superior to that of the *Restatement* on both their points of difference. Hopefully future cases will adopt the *Galbreath* viewpoint, for that approach seems to be the best method for confining strict liability within reasonable limits while at the same time ensuring that technical and arbitrary distinctions will not deprive plaintiffs of its benefits.

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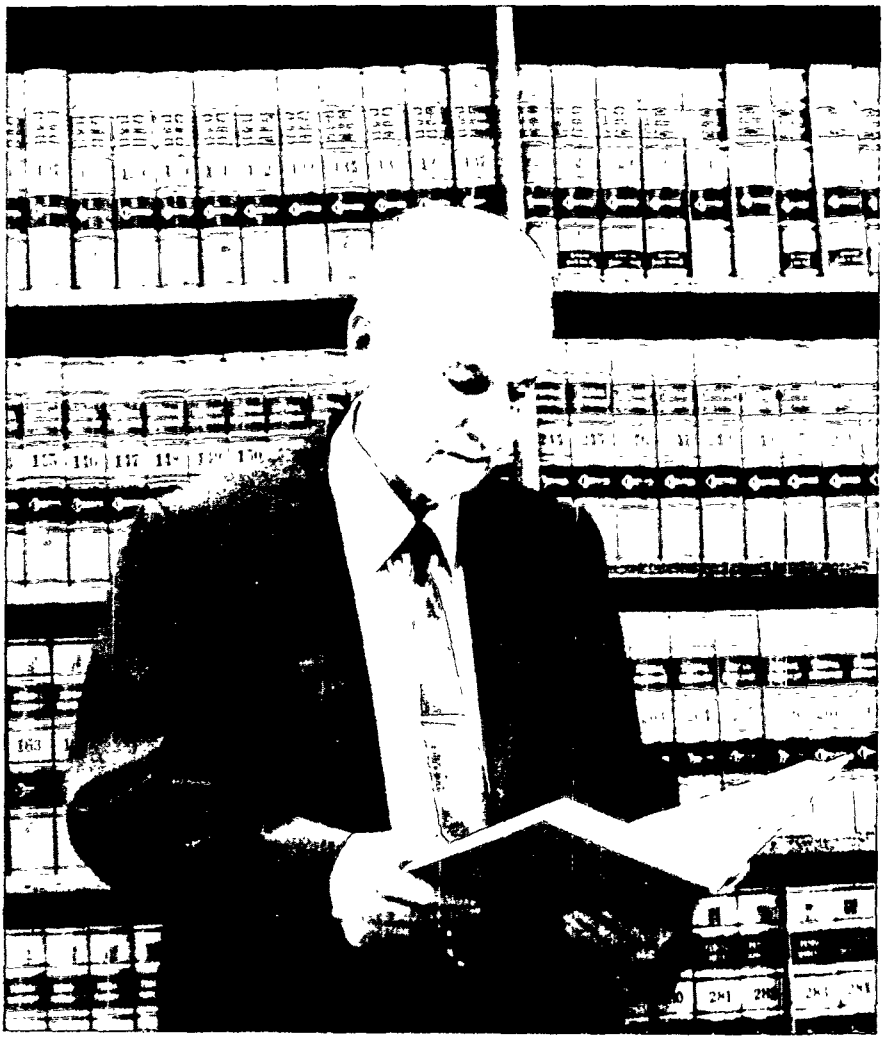
[71]A. EHRENZWEIG, NEGLIGENCE WITHOUT FAULT 50 (1951).

[72]265 Mass. 465, 164 N.E. 385 (1929).

[73]The *Restatement* endorses the mink-ranch cases. RESTATEMENT (SECOND) OF TORTS § 519, Note to Institute at 52 (Tent. Draft No. 10, 1964).

[74]It has been pointed out that the foreseeability rule is applied in a different manner in strict-liability cases than in negligence cases. In the latter, the question is whether "the risk can be foreseen at the time of the negligent act"; in strict liability, on the other hand, the defendant is liable if "the risk of harm can be seen at the time of embarking upon the activity." Note, *Strict Products Liability and the Bystander*, 64 COLUM. L. REV. 916, 935 (1964).



FRANK W. HANFT

This issue of the *North Carolina Law Review* is dedicated to Graham Kenan Professor of Law Frank W. Hanft, who is retiring this year after forty-one years at the School of Law.