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Chapter 25. Strict Liability for Animals and Ultrahazards

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25. Strict Liability for Animals and Ultrahazards

"Oooh.' 'Ah.' That's how it always starts. But then later, there's running and, and screaming."

– Dr. Ian Malcolm, *The Lost World: Jurassic Park*, 1997

A. Lead-in

The dominant form of legal action for compensation following an injury is the action for negligence. The action for negligence involves the injured plaintiff showing that the defendant was somehow blameworthy in causing the plaintiff's injury. In particular, laying blame is harnessed to a concept of carelessness. In the abstract wisdom of tort law, the thinking goes like this: Because the defendant was not appropriately careful, it is sensible to blame the defendant for injuries caused by that lack of care, thereby holding the defendant responsible for the injury. To put it another way, with negligence, the law is saying something like, "You are responsible for the damages caused by this incident because *you did something wrong*. And what you did wrong was *not being careful enough*."

Strict liability presents a stark contrast – it is missing the idea of blameworthiness that is at negligence's core. Where strict liability applies, the law will hold a defendant responsible *even though the defendant did nothing wrong* – that is, regardless of whether the defendant was being careful or not.

At first blush, it might seem extremely unfair that the law would make people responsible for accidents even when they did nothing wrong. And perhaps most of the time it would be. But strict liability only is available

under very particular circumstances. You might find, as many others do, that in these limited circumstances, liability without blameworthiness seems instinctively fair.

Let's jump into an example. Suppose you decide to hold a pyrotechnic demonstration in a crowded downtown area. Your plan is to wow a crowd of onlookers with fireballs created with a gasoline-air mixture and generous heaps of aluminum perchlorate as well as other fireworks ingredients. (Aluminum perchlorate is the same compound that was used for the Space Shuttle's solid rocket boosters.) In this situation, if someone gets hurt by an errant fireball, strict liability applies. Carefulness will be irrelevant.

To emphasize the point, you could hire a team of the world's leading chemists and pyrotechnics experts and give them an unlimited budget for safety. It still wouldn't change anything. That's strict liability: If you set off explosive fireballs in the middle of downtown, you are on the hook if anything goes wrong.

It is as if the law says, "I don't care how careful you say you were. It doesn't matter. You're the one who decided to stage a pyrotechnic display downtown. So, you are responsible if anyone gets hurt or anyone's property gets damaged."

There are defenses and limits to the doctrine. These are important to keep in mind because they do a lot of work to make strict liability conform to intuitive notions of fairness. If, for instance, at your downtown pyrotechnics display, some onlookers break past barricades and climb up a structure to get right up next to the fireballs, then the onlookers have brought the injury upon themselves, and you will be relieved of liability. (The defense of comparative fault or assumption of risk will do the trick.).

B. Strict Liability Basics, and Negligence Compared

Here are the elements of the cause of action for strict liability:

> A plaintiff can establish **a prima facie case for strict liability** by showing: (1) the defendant owed the plaintiff an absolute duty of safety in regard to some condition or activity, and that condition or activity was (2) an actual cause and (3) a proximate

> cause of (4) an injury to the plaintiff's person or physical property.

Compare that to the cause of action for negligence:

> A plaintiff can establish **a prima facie case for negligence** by showing: (1) the defendant owed the plaintiff a duty of due care, (2) the defendant breached that duty, and that breach was (3) an actual cause and (4) a proximate cause of (5) an injury to the plaintiff's person or physical property.

You can see that the first two elements of the negligence case (duty of care and breach) have been replaced by a single element of an "absolute duty of safety." The rest of the cause of action is exactly the same as negligence. Actual causation is the same. Proximate causation is the same. The requirement that the plaintiff prove the existence of damages is the same. And, as it turns out, the same defenses that apply in a negligence case generally apply in a strict liability case as well.

Since those topics have all been covered in this casebook under the heading of negligence, the main thing we have to do in this chapter is to investigate the first element – the "absolute duty of safety." After that, we will then look at the economics of strict liability, discuss how defenses and limitations constrain strict liability's scope, and finally we will see strict liability in action at trial.

C. The Absolute Duty of Safety

At the outset, a terminology note is in order. When it comes to talking about the "absolute duty of safety," some commentators take issue with the use of the word "absolute." They note that the duty is not technically "absolute." And they have a point. When it comes to law, almost nothing is truly absolute. Indeed, there are various limitations on strict liability, including proximate causation and comparative fault. Yet if you think of "absolute duty" as a term of art, there is no danger of confusion. The phrase "absolute duty" signifies that there is no need to show that the defendant did something wrong.

If you've become familiar with the cause of action for negligence, it might seem strange that the law would ever impose liability without fault. Indeed,

scholars and judges have puzzled over whether strict liability is justified – in particular, many have questioned whether it is economically sound.

For the moment, however, it is helpful to realize that there is, at least, an intuitive sense in which we all recognize that some situations are appropriate for responsibility without fault. We have all heard someone say something like, "Okay, you can do it, but if something goes wrong, it's your butt on the line." Strict liability is when tort law says this to society at large.

So when does the law give this eyebrow-raised admonition? Here are the five general categories where the absolute duty of safety is imposed:

- wild animals
- trespassing livestock
- domestic animals with known vicious propensities
- ultrahazardous activities
- defective products

These categories do the lion's share of work in bending strict liability doctrine to conform to our intuitions of fairness. You can see immediately that this list is quite circumscribed, yet the categories carved out by strict liability – particularly the last two – have considerable economic significance.

The category of defective products requires considerable elaboration, so it is the subject of its own chapter (*eodem*, infra), which follows immediately after this one. In this chapter, we focus on the first four categories.

D. Animals

D.1. Basics

Of the categories for the imposition of an absolute duty of safety, three of the five have to do with animals. Those are wild animals, trespassing livestock, and domestic animals with a known, vicious propensity.

D.2. Wild Animals

The first concerns **wild animals** – "ferae naturae" in Latin. If you keep a wild animal, then you are liable for whatever damage it causes. Memo to general counsels for zoos and circuses: If a lion escapes and hurts someone, you're on the hook.

What counts as a wild animal? Wild animals are defined in contradistinction to domestic animals: Wild animals are animals that are not domesticated. Domesticated animals – in Latin "domitae naturae" or "mansuetae naturae" – are those that have been bred to be helpful to humans. Some examples are dogs, cats, cows, pigs, and chickens. So, if it hasn't been bred to be helpful to humans, it is wild.

It is important to keep in mind that whether an animal is wild has nothing to do with whether it seems dangerous. A lion is wild, of course, but so is a baby deer. If the baby deer you are keeping somehow causes someone injury, then you are on the hook for the damage – notwithstanding whatever cuteness it may radiate.

Whether or not an animal is wild also has nothing to do with whether it is being kept as a pet. If you keep a non-domesticated animal as a pet, it's still wild. Stories occasionally pop up in the news about someone keeping a tiger as a pet. If you own a tiger, be aware that it doesn't matter if the tiger sits still while you dress it in funny outfits and has never eaten anything other than kibble from a bag: it's still a wild animal. And strict liability applies if it injures anyone.

An animal can be tamed and still be wild. Taming and domestication are two different things. An animal can be tamed during its lifetime, but a single animal cannot be domesticated. Domestication is something that happens over generations of animal breeding, and it is only this process that brings animals out of the realm of strict liability.

Of course, not all wild animals give rise to strict liability – only those that the defendant is keeping or possessing. A wild animal roaming across the defendant's property will not bring about strict liability. But doing something to keep the animal around – confining it, or maybe just feeding it and encouraging it to linger – will bring about an absolute responsibility for injuries it causes.

D.3. Trespassing Livestock

D.3.a. In general

The second category imposing an absolute duty of safety is **trespassing livestock**. The first example to leap to mind might be something like an escaped bull that gores a neighbor. Certainly those facts would bring about

the application of strict liability. But the rationale for the trespassing livestock doctrine is not so much that livestock are a threat to people, but rather that they are a threat to agriculture. That is, the archetypal injury in a strict liability action for trespassing livestock would be crops that have been eaten or trampled.

Suppose a farmer is growing corn. Next door, a rancher has 200 pigs. The pigs escape their pen and tear up the corn field, rendering the year's crop a total loss. The farmer can sue the rancher in strict liability, and the rancher is on the hook – no matter how careful the rancher was in attempting to confine the pigs.

D.3.a. Fence In vs. Fence Out

There is an important difference among jurisdictions in the application of strict liability in the case of trespassing livestock. The default is "fence in," meaning that it's up to keepers of livestock to keep their animals penned up – or else be liable for whatever damage they cause. In some places, however, the onus is on farmers to "fence out" marauding livestock. Respectively, these are *fence-in jurisdictions* and *fence-out jurisdictions.*

The fence-in/fence-out rule could be set at the level of the state, the county, or even a subdivision of a county. It's frequently a matter of statutory law. Roughly speaking, farm country tends to follow the fence-in rule, while ranch country tends to opt for the fence-out rule. So, in general, if you want to grow crops in ranch country, you'll need to build a fence. If you want to raise livestock in farm country, you'll need to pen them in.

A key point to remember is that "livestock" is a distinct categorization from "domesticated animals." Cattle qualify both as livestock and as domesticated animals. But dogs and cats, while domesticated, are not livestock. The distinction is important, because it means that trespassing cats and dogs do not give rise to strict liability under the common law.

What animals count as livestock? Cattle, sheep, pigs, and horses definitely count as livestock. Cats and dogs do not. In general, livestock are animals raised by people as part of a farming or ranching operation. But the exact definition of "livestock" is not entirely settled. Various cases, regulations, statutes, and other authorities define the term in different ways. Many definitions require animals to be domesticated to qualify as livestock. But not all. Non-domesticated elk, for instance, might qualify as "non-

traditional" livestock if they are raised for food. But at the end of the day, whether wild animals can be counted as livestock does not matter much for purposes of strict liability. If a wild animal escapes its enclosure and trespasses on someone else's property, it creates strict liability for its owner merely by virtue of being a wild animal. Its additional qualification as livestock for strict-liability purposes would be redundant.

D.4. Domestic Animals with Known, Vicious Propensities

The third category of animal-related strict liability concerns **domestic animals with known, vicious propensities**. Theoretically, this could apply to a number of creatures, but as a practical matter, we are really talking about dogs that bite people. This doctrine is the subject of an enormous amount of neighborhood lore. Some people – even some lawyers – call this the "one bite rule" and recite the doctrine as "every dog gets one free bite." But that description is highly inaccurate. The real rule is more complicated.

Strict liability applies under the common law when the keeper of the animal has subjective knowledge of some propensity of the animal to cause harm. Thus, if a dog has previously bitten a person without provocation, the dog's keeper has subjective knowledge such that the next person to be bitten will be able to recover under strict liability.

Where this departs from the "one free bite" idea is that, in reality, a dog does not need to bite someone in order to give that dog's keeper knowledge of its abnormal propensity to cause harm. For instance, if the dog was tied up and mistreated, and then exhibited abnormal aggression toward people, that might well be enough for strict liability to apply – even if the dog had yet to bite someone. Some courts have held that a "beware of dog" sign constituted evidence that an owner had the requisite knowledge of a dog's dangerous propensity.

Another problem with the free-bite paraphrasing is that it ignores the fact that a dog-bite victim can always sue in negligence. Suppose an untrained Rottweiler has a brand-new owner. Strict liability for a known dangerous propensity cannot apply because the owner has no knowledge about the dog – much less any knowledge of dangerous propensities. Thus, strict liability will not apply. But if the Rottweiler's owner leaves a small child alone with

the animal, and if the child is bitten, a jury would likely find the Rottweiler's owner liable in negligence because the reasonable person would not leave a small child alone with an untrained Rottweiler.

It also is frequently possible for dog bite victims to sue using the doctrine of negligence per se. For example, suppose an ordinance requires dogs to be leashed while in the city park. An injury caused by an unleashed dog in the park could then subject the dog's keeper to automatic liability via negligence per se.

The common law and ordinances are not the only important source of law on dog bites. In many states, statutory law specifically controls liability for dog bites. Frequently, such statutes dictate that dog owners are liable for all injuries their dog causes, with a few exceptions, such as that the victim was trespassing or that the victim provoked the dog.

It should be kept in mind that while strict liability for domestic animals with dangerous propensities is, in practice, mostly about dogs, it also applies to other domestic animals, including livestock. If a horse is known to have kicked people, then the horse's keeper may be held strictly liable for subsequent kicking injuries.

Finally, in many jurisdictions, it is important not just that the domesticated animal is known to be vicious, but that its vicious propensity is somehow abnormal. A bull, for instance, is *normally* dangerous. Given such a rule, a person injured by a charging bull (assuming the bull is not trespassing) cannot use strict liability to sue for injuries sustained in the charge. As a general matter, such a person could still recover using negligence – so long as they could prove all the elements, including a breach of the duty of due care. But as the next case shows, at least one court didn't see it that way.

D.5. Case: Bard v. Jahnke

D.5.a. Advance notes

The following case covers much of the law regarding strict liability for domestic animals. Additionally, it shows judges taking different sides on the issue of whether strict liability should entirely displace negligence in the domestic animal context.

D.5.b. Opinion

Bard v. Jahnke

Court of Appeals of New York
May 2, 2006

6 N.Y.3d 592. Larry BARD et al., Appellants, v. Reinhardt JAHNKE, Individually and Doing Business as Hemlock Valley Farms, Respondent, et al., Defendant. Counsel for appellants: John Scarzafava of the Law Firm of Scarzafava & Basdekis of Oneonta. Counsel for respondent: Thomas J. Hickey of Hickey, Sheehan & Gates, P.C. of Binghamton.

Judge Susan Phillips READ:

The accident underlying this litigation occurred on September 27, 2001 at Hemlock Valley Farms in Otsego County, a dairy farm owned and operated by defendant Reinhardt Jahnke and his wife in partnership with their two sons. At roughly 8:00 A.M., plaintiff Larry Bard, a self-employed carpenter, arrived at the farm to meet defendant John Timer, another self-employed carpenter. One of Jahnke's sons had asked Timer to repair ripped cow mattresses in a certain section—called the "low cow district"—of the farm's free-stall dairy barn. This large barn, which was divided into several sections, housed approximately 400 cows at the time, 130 of them in the low cow district. The repair work involved chiseling off the bolts fastening the damaged mattresses to the concrete base of a stall, stretching the mattresses and then refastening the bolts. Timer had asked Bard the day before if he would be interested in helping him carry out this task, and Bard had replied that he would.

Timer, who had performed carpentry and odd jobs on the farm for about four or five years, walked Bard through the dairy barn, pointing out some of the projects that he had completed and where the milking parlor was. Timer took Bard to the barn's low cow district, told him how to start the mattress repairs, and then left to complete another chore, planning to return shortly. Neither Timer nor Bard saw a bull; Bard testified that he saw no farm animals at all in the barn when he walked through it with Timer. From his previous work at the farm, Timer knew there was a bull at another barn about a quarter-mile distant from the dairy barn. Prior to Bard's accident, he did not know that at all times there was a bull present in the dairy barn's low cow district.

Bard retrieved some tools from his truck and started to work at about 8:30 A.M. He testified that a number of cows wandered into the

area as he was working. Further, he was "familiar with working in and around cows," which would "come up, drool on you, lick on you and everything else," and that he didn't "usually pay much attention to them." At about 9:00 A.M., as Bard was down on his knees removing bolts, he first noticed a bull "[w]hen he stepped in behind him" and "bellered" within a distance of two to three feet. Bard testified that he "slowly kind of looked around, and didn't know what to do at that point." As he "went to stand up," the bull "took [him] in the chest. [The bull] charged [him] then [and] proceeded to start slamming [him] into the pipes" in the stall. No one else was present in the low cow district at the time. Neither Jahnke nor anyone else associated with the farm knew ahead of time that Timer planned to repair the mattresses that day, or that Bard would be working for Timer to carry out this task.

Bard pulled himself outdoors through an opening at the bottom of the barn, and crawled over to his truck, where he lay for "quite awhile to get some wind and establish what was going on." He caught the attention of someone working in the field, whom he asked to call an ambulance. Bard's injuries included fractured ribs, a lacerated liver and exacerbation of a preexisting cervical spine condition.

The hornless dairy bull who injured Bard was named Fred. He was about 1½ years old, and had been the resident "cleanup" bull at the farm for at least six months prior to September 27, 2001.~ Fred was housed and roamed freely in the low cow district of the dairy barn so that he might impregnate cows stabled there who had failed to conceive by artificial insemination. Before this accident, Fred had concededly never threatened or injured any other farm animal or human being. As was the case with all the dairy bulls ever owned by Jahnke, a longtime dairy farmer, Fred was never chained, caged or barricaded within the barn. Prior to September 27, 2001, none of the bulls on any of the farms worked on or owned by Jahnke had ever acted aggressively toward, or injured, another farm animal or human being.

Bard, with his wife suing derivatively, commenced an action against both Jahnke and Timer to recover damages for his personal injuries, alleging causes of action sounding in strict liability and negligence.~ [The] Supreme Court granted defendants' motions for summary judgment~.

The Appellate Division affirmed~. Noting that a bull is a domestic animal as defined in Agriculture and Markets Law § 108(7) and citing our recent decision in *Collier v. Zambito,* 1 N.Y.3d 444 (2004), the Court concluded that Jahnke was not liable for Bard's injuries unless he knew or should have known of the bull's vicious or violent propensities. The

Court noted that the record contained no evidence of this, and "[t]o the contrary, it contains competent evidence establishing that, prior to [Bard's] accident, the subject bull had never injured another person or animal or behaved in a hostile or threatening manner."

Bard had submitted the affidavit of a professor of animal science, who opined that "bulls, in particular breeding bulls, are generally dangerous and vicious animals," and that therefore Jahnke should have restrained the bull or warned Bard of its presence. The Court found this affidavit unavailing, especially in light of its "consistent[ ], and recently[ ] reiterated" view that "the particular type or breed of domestic animal alone is insufficient to raise a question of fact as to vicious propensities."~

Only two years ago, in *Collier,* we restated our long-standing rule

> "that the owner of a domestic animal who either knows or should have known of that animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities. Vicious propensities include the propensity to do any act that might endanger the safety of the persons and property of others in a given situation."

Once this knowledge is established, the owner faces strict liability.<Our rule is virtually identical to Restatement (Second) of Torts § 509(1) (1977): "A possessor of a domestic animal that he knows or has reason to know has dangerous propensities abnormal to its class, is subject to liability for harm done by the animal to another, although he has exercised the utmost care to prevent it from doing the harm.">~

{W}hile knowledge of vicious propensities "may of course be established by proof of prior acts of a similar kind of which the owner had notice," a triable issue of fact as to whether the owner knew or should have known that its animal harbored vicious propensities may be raised by proof of something less. In *Collier,* a case in which a dog bit a child, we gave the example of evidence that a dog had, for example, "been known to growl, snap or bare its teeth," or that "the owner chose to restrain the dog, and the manner in which the dog was restrained." [Additionally, *Collier* states:] "~an animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensities—albeit only when such proclivity results in the injury giving rise to the lawsuit."

Here, Fred had never attacked any farm animal or human being before September 27, 2001. He had always moved unrestrained within

the limits of the barn's low cow district, regularly coming into contact with other farm animals, farm workers and members of the Jahnke family without incident or hint of hostility. He had never acted in a way that put others at risk of harm. As a result, Bard cannot recover under our traditional rule.

Bard therefore argues alternatively that he can recover under a common-law cause of action for negligence, as expressed in Restatement (Second) of Torts § 518, Comments *g* and *h.* This common-law cause of action is, he claims, separate and apart from and in addition to our traditional rule.

Section 518 provides generally that the owner of a domestic animal, which the owner does not know or have reason to know to be abnormally dangerous, is nonetheless liable if he intentionally causes the animal to do harm, or is negligent in failing to prevent harm. Comment *g,* "*Knowledge of normal characteristics "* provides that "[i]n determining the care that the keeper of a not abnormally dangerous domestic animal is required to exercise to keep it under control, the characteristics that are normal to its class are decisive, and one who keeps the animal is required to know the characteristics.~"

Comment *h,* "*Animals dangerous under particular circumstances*" states that "[o]ne who keeps a domestic animal that possesses only those dangerous propensities that are normal to its class is required to know its normal habits and tendencies. He is therefore required to realize that even ordinarily gentle animals are likely to be dangerous under particular circumstances and to exercise reasonable care to prevent foreseeable harm. Thus the keeper of even a gentle bull must take into account the tendencies of bulls as a class to attack moving objects~."

Building on these provisions and their specific references to bulls, Bard contends that because Fred was not only a bull, but a breeding bull housed with the herd over whom he exercised dominance, Jahnke was negligent in failing to restrain Fred, or to warn non-farm personnel of his presence. But this is no different from arguing that Jahnke was negligent in that he *should have known* of Fred's vicious propensities because—as plaintiffs' expert put it—"bulls, in particular breeding bulls, are generally dangerous and vicious animals."

As already noted, an animal's propensity to cause injury may be proven by something other than prior comparably vicious acts. As a result, a common shorthand name for our traditional rule—the "one-bite rule"—is a misnomer. We have never, however, held that

particular breeds or kinds of domestic animals are dangerous, and therefore when an individual animal of the breed or kind causes harm, its owner is charged with knowledge of vicious propensities. Similarly, we have never held that male domestic animals kept for breeding or female domestic animals caring for their young are dangerous as a class. We decline to do so now, or otherwise to dilute our traditional rule under the guise of a companion common-law cause of action for negligence. In sum, when harm is caused by a domestic animal, its owner's liability is determined solely by application of the rule articulated in *Collier.*

Accordingly, the order of Appellate Division should be affirmed, with costs.

Chief Judge KAYE and Judges CIPARICK and GRAFFEO concur with Judge READ.

D.2.c. Dissent by Smith

Judge ROBERT S. SMITH, dissenting:

Under the Restatement (Second) of Torts, the owner of a domestic animal who does not know or have reason to know that the animal is more dangerous than others of its class may still be liable for negligently failing to prevent the animal from inflicting an injury. This Court today becomes the first state court of last resort to reject the Restatement rule. I think that is a mistake.~

In this case, as the majority seems to recognize, a jury could have found Jahnke to be negligent, though he had no reason to think that Fred was any more dangerous than any other breeding bull. An expert's affidavit provides the unsurprising information that all breeding bulls are dangerous, because they "have high libido," and "will challenge or attack ... unknown individuals, in order to establish dominance over the herd." Jahnke knew that Fred was in the low cow district of the dairy barn, and a jury could have found that he was negligent in failing to impart this information to Timer; Jahnke knew that Timer worked in that barn from time to time, though he did not know that Timer had arranged for Bard to work there on the day of the accident. The record shows that, if Timer or Bard had known of Fred's presence, either of them could easily have erected a partition to exclude Fred from the area where Bard was working.

Thus, if ordinary negligence principles apply here, this case should not have been dismissed. The Restatement says that ordinary

negligence principles do apply~. Courts in at least 20 states appear to follow the Restatement rule~.

Before today, our Court's opinions were consistent with the Restatement rule. Our most recent case involving animal inflicted injuries, *Collier v. Zambito,* 1 N.Y.3d 444 (2004), did not address the question of whether general negligence principles were applicable in such cases. *Collier* involved the rule, correctly stated by the majority here, that an owner who knows or has reason to know of an animal's dangerous propensities faces strict liability~. The only issue in *Collier* was whether the defendant should have known of the dangerous propensities of her dog.~

No opinion of our Court before today announced the rule, now adopted by the majority, that the strict liability involved in *Collier* is the only kind of liability the owner of a domestic animal may face—that, in other words, there is no such thing as negligence liability where harm done by domestic animals is concerned.~

{I}n *Dickson v. McCoy,* 39 N.Y. 400, 401 (1868), a case involving a horse turned loose in a public street, Judge Dwight of our Court stated a rule like that of the Restatement: "It is not necessary that a horse should be vicious to make the owner responsible for injury done by him through the owner's negligence."~

The rule the majority adopts is contrary to simple fairness. Why should a person who is negligent in managing an automobile or a child be subject to liability, and not one who is negligent in managing a horse or bull? Why should a person hit by a subway train be able to recover and one hit by a breeding bull be left without a remedy? I think there are no good answers to these questions, and it is possible to imagine future cases that will put the rule adopted by the majority under strain. Suppose, for example, a variation on the facts of *Collier*: What if defendant there had encouraged a child to play not with a grown dog, but with a litter of puppies, thus predictably provoking an otherwise gentle mother dog to rage? Or suppose facts like those in *Duren v. Kunkel*, 814 S.W.2d 935 (Mo. 1991), where a bull was stirred to attack because his owner negligently caused him to be driven through an area where fresh blood was on the ground? In such a case, we could either deny recovery to a deserving plaintiff, despite negligence more blatant than what Jahnke is accused of here, or we could invent a "mother dog" exception or a "fresh blood" exception to the rule adopted in this case. I think it would be wiser to follow the Restatement rule, as has almost every other state that has considered the question.

Judges G.B. SMITH and ROSENBLATT concur with Judge R.S. SMITH.

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D.6. Check-Your-Understanding Questions About Strict Liability and Animals

A. Suppose an exotic rancher raises non-domesticated ostriches for meat, eggs, feathers, and leather. Some ostriches leave the ranch and enter a patio café where they seriously injure a patron. Can the injured patron recover in strict liability? Why or why not?

B. A plaintiff sues a zoo for injuries sustained because of an escaped boa constrictor. The snake did not actually touch the plaintiff. Instead, the snake killed the plaintiff's friend's pet cat. But because of the cat's death, the plaintiff's friend was not available to help the plaintiff repair a stair railing, as had been the plan. The plaintiff was injured when the railing collapsed because it hadn't been repaired. Can the plaintiff recover against the zoo in strict liability?

E. Ultrahazardous or Abnormally Dangerous Activities

E.1. Basics, Terminology Issues

In addition to the specific categories that the law sets out for strict liability in connection with animals, there is the large, general category of strict liability for "ultrahazardous" or "abnormally dangerous" activities.

This is another place where terminology might lead you to misunderstand the doctrine. Note that "ultrahazardous" and "abnormally dangerous" are not two different categories, but rather two different labels for one category. The courts employ the two terms about equally today. The American Law Institute favored "ultrahazardous" in its First Restatement of Torts, but then switched to "abnormally dangerous" for its Second Restatement. Both terms, however, have potential problems.

The danger posed by the term "abnormally dangerous" is that you might think the words mean what they say. That is, you might think that for an

activity to qualify as "abnormally dangerous," it needs to present a danger that is not normal. That, however, is not correct. There are many abnormal dangers that do not qualify for strict liability, and many familiar risks from common activities that do. "Abnormally dangerous" must be thought of as a term of art.

The hazard posed by the term "ultrahazardous" is that you might think that it is the magnitude of the potential harm that causes something to qualify as an ultrahazard. But something can be "ultrahazardous" even if it threatens only one person. What is good about "ultrahazardous" as a label, however, is that it is clearly a made-up word, and thus it is easily identifiable as a term of art.

In this book, we'll use both terms as synonyms.

E.2. What Activities Qualify as Ultrahazardous or Abnormally Dangerous?

E.2.a. Basics

What causes something to qualify as an ultrahazardous or abnormally dangerous activity for strict liability purposes? There is no simple, concise answer. With animals, the qualifications for strict liability are fairly specific. By contrast, the category of strict liability for ultrahazardous activities is a more recent development in the law, and its boundaries are considerably fuzzier.

The core idea is less about the characteristics of the activity and more about a policy judgment that people who undertake certain activities must be responsible for any harm that results, regardless of how much care is taken. The policy judgment inherent in the task mirrors the policy judgment involved in deciding whether a defendant owes a duty of care for purposes of a negligence action. And as is the case with the existence of a duty in negligence, whether an activity qualifies for strict liability is generally a legal question – to be determined by a court, rather than a jury.

E.2.a. Categories Held to Ultrahazardous

Here are some examples of activities that have been held to give rise to strict liability under the ultrahazardous classification:

- blasting

- fumigation
- crop dusting
- activities involving nuclear reactions or radioactivity
- pile driving
- oil drilling
- activities involving explosives or highly toxic chemicals (including manufacturing, transporting, storing, and using)

You can see that many of these activities are quite "normal" in the sense that they go on all the time. To the extent one could say that there is something abnormal about them, perhaps it is that relatively few people in society engage in them. There are many farmers, for instance, but there are comparatively few providers of crop-dusting services. And while everybody uses gasoline and other products derived from petroleum, very few people in society go drilling for petroleum.

E.2.a. Unifying Theories of the Ultrahazardous

There's no hard and fast rule about what activities qualify as ultrahazardous. Some oft-repeated, key ideas are that the danger cannot be eliminated even with utmost care and the uncommonness of the activity.

Legal scholar Richard A. Epstein has written, "There is no obvious conceptual line that walls off abnormally dangerous activities from their relatively benign counterparts." Nonetheless, Epstein sees a thread that binds them all together: "Ultrahazardous activities and substances all fall into the class where small triggers, physical or chemical, can release far larger forces." Richard A. Epstein, *Torts*, p. 348 (1999). That does seem like a useful way to try to conceptualize the pith of the doctrine.

Another way to try to make sense of strict liability for abnormally dangerous activities is to note the conceptual similarities with the doctrine of strict liability for wild animals. Take, for instance, Justice Blackburn's pronouncement in *Rylands*, below, that whoever "brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril." That language could be talking about a lion just as much as it could be talking about a huge volume of water or a concentration of radionuclides.

The authors of the Restatement have put together a list of factors that some courts have considered when deciding whether an activity should

qualify as ultrahazardous and thus giving rise to strict liability. The Second Restatement's factors are:

> (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.

Restatement (Second) of Torts, § 520. These factors are perhaps best thought of as a list of things to think about in working through the policy choice of whether to classify an activity as ultrahazardous. In that sense, they seem quite useful – they may help a court ensure they are thinking thoroughly about the issues.

But using the Restatement § 520 factors as a "test" seems perilous. The factors seem manipulable and not very determinative, nor do they seem very predictive of legal outcomes. Consider as candidates for ultrahazardous classification (1) crop dusting, and (2) letting your 16-year-old drive your car to the movie theater.

Crop dusting can pose a high degree of risk to people and to crops (if the wrong crops are sprayed). On the other hand, crop dusting is extremely common in farm country, extremely appropriate to the place (being farm country), stupendously valuable to the community (as it can fantastically increase yield and food production), and it's quite possible to eliminate risk by waiting for appropriate weather conditions, taking care with records and maps to spray only in the right places, and to ensure the area to be sprayed is clear of wandering people. The factors make crop dusting seem like it shouldn't be an ultrahazard, yet it is an archetypal example of an ultrahazardous activity giving rise to strict liability.

Meanwhile, giving your keys to your 16-year-old involves an unquestionably high degree of risk of potentially catastrophic harm to people and property. Arguably both the probability that something can go wrong and the magnitude of the potential loss greatly eclipse crop dusting,

especially when you consider that a single vehicular collision can kill many people. What's more, there's nothing you can do to reduce the risk. You'll say "Be careful!" of course. Even though you know it's more performative than precautionary. Of course, one can say laudatory things about the community value of teenagers driving to the movies. But anything that can be said will be feeble compared to food production. But an ultrahazard? Hardly.

At the end of the day, perhaps the best way of predicting whether an activity might be considered an ultrahazard is to reference the list of canonical examples of ultrahazardous activities and reason by analogy. That list is: blasting, fumigation, crop dusting, pile driving, oil drilling, and activities involving explosives, highly toxic chemicals, radioactivity, or nuclear reactions. If the candidate activity is not already on that list, how much is it like things already on the list?

E.3. Case: Rylands v. Fletcher

E.3.a. Advance notes

The case credited with starting the general doctrine of strict liability for ultrahazards is the classic English case of *Rylands v. Fletcher*.

E.3.b. Opinion

Rylands v. Fletcher

House of Lords
July 17, 1868

3 HL 330, [1868] UKHL 1. JOHN RYLANDS AND JEHU HORROCKS, PLAINTIFFS v. THOMAS FLETCHER, DEFENDANT.

The Lord Chancellor, Lord CAIRNS (Hugh Cairns, 1st Earl Cairns):

My Lords, in this case the Plaintiff~ is the occupier of a mine and works under a close of land. The Defendants are the owners of a mill in his neighbourhood, and they proposed to make a reservoir for the purpose of keeping and storing water to be used about their mill upon another close of land, which, for the purposes of this case, may be taken as being adjoining to the close of the Plaintiff, although, in point of fact, some intervening land lay between the two. Underneath the close of land of the Defendants on which they proposed to construct their

reservoir there were certain old and disused mining passages and works. There were five vertical shafts, and some horizontal shafts communicating with them. The vertical shafts had been filled up with soil and rubbish, and it does not appear that any person was aware of the existence either of the vertical shafts or of the horizontal works communicating with them. In the course of the working by the Plaintiff of his mine, he had gradually worked through the seams of coal underneath the close, and had come into contact with the old and disused works underneath the close of the Defendants.

In that state of things the reservoir of the Defendants was constructed. It was constructed by them through the agency and inspection of an engineer and contractor. Personally, the Defendants appear to have taken no part in the works, or to have been aware of any want of security connected with them. As regards the engineer and the contractor, we must take it from the case that they did not exercise, as far as they were concerned, that reasonable care and caution which they might have exercised, taking notice, as they appear to have taken notice, of the vertical shafts filled up in the manner which I have mentioned. However, my Lords, when the reservoir was constructed, and filled, or partly filled, with water, the weight of the water bearing upon the disused and imperfectly filled-up vertical shafts, broke through those shafts. The water passed down them and into the horizontal workings, and from the horizontal workings under the close of the Defendants it passed on into the workings under the close of the Plaintiff, and flooded his mine, causing considerable damage, for which this action was brought.~

My Lords, the principles on which this case must be determined appear to me to be extremely simple. The Defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the Plaintiff, the Plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving, or by interposing, some barrier between his close and the close of the Defendants in order to have prevented that operation of the laws of nature.

As an illustration of that principle, I may refer to a case which was cited in the argument before your Lordships, the case of *Smith v. Kenrick* in the Court of Common Pleas.

On the other hand if the Defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land, – and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the Plaintiff, then it appears to me that that which the Defendants were doing they were doing at their own peril; and, if in the course of their doing it, the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the Plaintiff and injuring the Plaintiff, then for the consequence of that, in my opinion, the Defendants would be liable. As the case of *Smith v. Kenrick* is an illustration of the first principle to which I have referred, so also the second principle to which I have referred is well illustrated by another case in the same Court, the case of *Baird v. Williamson*, which was also cited in the argument at the Bar.

My Lords, these simple principles, if they are well founded, as it appears to me they are, really dispose of this case.

The same result is arrived at on the principles referred to by Mr. Justice Blackburn in his judgment, in the Court of Exchequer Chamber, where he states the opinion of that Court as to the law in these words: "We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the Plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable

and just that the neighbour who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches."

My Lords, in that opinion, I must say I entirely concur. Therefore, I have to move your Lordships that the judgment of the Court of Exchequer Chamber be affirmed, and that the present appeal be dismissed with costs.

Lord CRANWORTH (Robert Rolfe, 1st Baron Cranworth):

My Lords, I concur with my noble and learned friend in thinking that the rule of law was correctly stated by Mr. Justice Blackburn in delivering the opinion of the Exchequer Chamber. If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.~.

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F. The Economics of Strict Liability

F.1. Discussion

Strict liability has been a focal point for theorists of law and economics. They question whether strict liability can be justified as sound economic policy.

Negligence, in general, does not face this criticism. The doctrine of negligence seems to lend itself to economic justification quite readily: We want to provide an incentive for people to engage in the appropriate level of care when undertaking their activities. Therefore, we hold them liable when injury results from their care falling below this level.

So, since we have negligence, why should we ever need strict liability? If we want to encourage transporters of explosives to engage in the appropriate level of care, then why not leave intact the requirement that plaintiffs prove negligence?

A response might be to say that there are some activities that are potentially so socially pernicious, we not only want people to be careful, we want them to think long and hard about whether they should engage in the activity at all. If people are responsible for all injuries caused by a certain activity – regardless of how careful they are – then people might engage in that activity less often, or they might move the location of their activity to someplace where less harm is likely to result if something goes wrong.

F.2. *[omitted from Beta]*

[omitted from Beta]

G. Defenses and Limitations on Strict Liability

G.1. Discussion

In general, the same defenses that apply to negligence also apply to strict liability, with one important exception: Contributory negligence, in those jurisdictions still using it, is generally *not* considered a viable defense in a strict liability action.

Other defenses apply as they would with negligence. Comparative negligence, in those jurisdictions following it, functions as a defense for strict liability as it does for negligence: The plaintiff's negligence will serve to reduce the total recovery. The only sticky issue is the name "comparative *negligence*." Indeed, comparative negligence is often called "comparative fault" – at least in part so that it does not seem out of place in the strict liability context.

Assumption of the risk also may be used as a defense in strict liability situations as well, and where it applies, it will bar recovery altogether.

There is also an important limitation on strict liability that grows out of the application of proximate causation. For strict liability to apply, there must be a tight connection between the means of injury and the reason for invoking strict liability.

An example will illustrate this: Suppose the defendant retail store is cleaning floors with a nuclear vacuum cleaner. The plaintiff trips over the vacuum when a careless employee pushes it into the plaintiff's path, and as a result the plaintiff suffers a broken arm. The plaintiff can sue in negligence, but a cause of action for strict liability will not apply. Why not? After all, nuclear technologies are generally categorized as ultrahazardous. The plaintiff's problem lies in proximate causation. Proximate causation is lacking for strict liability because the ultrahazardous nature of the activity is not germane to the injury. Stated in other terms: The strict liability case here fails the harm-within-the-risk test: Was the kind of harm suffered by the plaintiff the kind that caused the absolute duty of safety to arise? No, so strict liability does not apply.

Note that the plaintiff could still sue in negligence. Proximate causation will not be a problem in the negligence case, since there is a tight connection between the careless pushing of the vacuum cleaner and the plaintiff's broken bone.

Another limitation on strict liability comes out of a line of cases holding that strict liability for abnormally dangerous activities will not apply where the injury would not have occurred but for an abnormally sensitive plaintiff.

G.2. Case in Point: *Foster v. Preston Mill* (Wash. 1954)

(blast rattled mink ranch)

In the famous case of *Foster v. Preston Mill Co.,* 44 Wash.2d 440 (Wash. 1954), the defendant's blasting operations disturbed operations on a nearby mink ranch. The ranch's manager testified that after a blast rattled cages, mother minks would run back and forth and kill their kittens. Between 35 and 40 kittens were killed this way, according to testimony. The court refused to apply strict liability, writing:

> The relatively moderate vibration and noise which appellant's blasting produced at a distance of two and a quarter miles was no more than a usual incident of the ordinary life of the community. The trial court specifically found that the blasting did not unreasonably interfere with the enjoyment of their property by nearby landowners, except in the case of respondent's mink ranch.

> It is the exceedingly nervous disposition of mink, rather than the normal risks inherent in blasting operations, which therefore must, as a matter of sound policy, bear the responsibility for the loss here sustained. We subscribe to the view˜ that the policy of the law does not impose the rule of strict liability to protect against harms incident to the plaintiff's extraordinary and unusual use of land.

H. Strict Liability at Trial: *Silkwood v. Kerr-McGee*

H.1. Advance Notes

The following case nicely illustrates how strict liability can work to the benefit of a plaintiff by short-circuiting the many pitfalls of a negligence case. Unlike most of the case readings in this book, this is not a judicial opinion written by a judge. Instead, it is a neutral view of the facts, followed by the closing argument of one of the attorneys.

H.2. Background Facts

Silkwood v. Kerr-McGee

U.S. District Court for the Western District of Oklahoma
1979

Bill M. SILKWOOD, Administrator of the Estate of Karen G. Silkwood, deceased, Plaintiff, v. Kerr-McGee CORPORATION et al., Defendants. Civ. A. No. 76-0888-Theis. In the United States District Court for the Western District of Oklahoma. Hon. Judge Frank G. Theis, U.S. District Judge, District of Kansas, sitting by designation. Except for the first paragraph and the last two paragraphs, the facts derive nearly verbatim from James F. McInroy, "A True Measure of Exposure: The Karen Silkwood Story," 23 *Los Alamos Science* 252 (1995) (see remarks in Aftermatter at the end of this book).

The FACTS:

In August 1972, Karen Silkwood took a job as a technician at the Cimarron Fuel Fabrication Site in Crescent, Oklahoma, operated by Kerr-McGee Corporation. The plant produced mixed-oxide plutonium-uranium fuel for use in power-generating nuclear reactors. As a plant worker, Silkwood became involved in the Oil, Chemical & Atomic Workers Union and participated in a strike. Later, in the fall of 1974, Silkwood investigated health and safety issues on behalf of the union and reported serious violations to the Atomic Energy Commission.

On November 5, 1974, Silkwood was working in a glovebox in the metallography laboratory where she was grinding and polishing plutonium pellets that would be used in fuel rods. At 6:30 p.m., she decided to monitor herself for alpha activity with the detector that was mounted on the glove box. The right side of her body read 20,000 disintegrations per minute, or about 9 nanocuries, mostly on the right sleeve and shoulder of her coveralls. She was taken to the plant's Health Physics Office where she was given a test called a "nasal swipe," which measures a person's exposure to airborne plutonium, but might also measure plutonium that got on the person's nose from their hands. The swipe showed a radioactivity level of 160 disintegrations per minute ("dpm"), a modest positive result.

The two gloves in the glovebox Silkwood had been using were replaced. Strangely, the gloves were found to have plutonium on the "outside" surfaces that were in contact with Silkwood's hands; no leaks were found in the gloves. No plutonium was found on the surfaces in the room where she had been working, and filter papers from the two air monitors in the room showed that there was no significant plutonium in the air. By 9:00 p.m., Silkwood's cleanup had been completed, and as a precautionary measure, Silkwood was put on a program in which her total urine and feces were collected for five days for plutonium measurements. She returned to the laboratory and worked until 1:10 a.m., but did no further work in the glove boxes. As she left the plant, she monitored herself and found nothing. Silkwood arrived at work at 7:30 a.m. on November 6. She examined metallographic prints and performed paperwork for one hour, then monitored herself as she left the laboratory to attend a meeting. Although she had not worked at the glovebox that morning, the detector registered alpha activity on her hands. Health physics staff members found further activity on her right forearm and the right side of her neck and face, and proceeded to decontaminate her. At her request, a technician checked her locker and automobile with an alpha detector, but no activity was found.

On November 7, Silkwood reported to the health physics office at about 7:50 in the morning with her bioassay kit containing four urine samples and one fecal sample. A nasal swab was taken, and significant levels of alpha activity were detected (about 45,000 disintegrations per minute (dpm) in each nostril and 40,000 dpm on and around her nose). This was especially surprising because her left nostril had been almost completely blocked since a childhood accident. Other parts of her body also showed significant alpha activity (1,000 to 4,000 dpm on her

hands, arm, chest, neck, and right ear). A preliminary examination of her bioassay samples showed extremely high levels of activity (30,000 to 40,000 counts per minute in the fecal sample). Her locker and automobile were checked again, and essentially no alpha activity was found.

Following her cleanup, the Kerr-McGee health physicists accompanied her to her apartment, which she shared with another laboratory analyst, Sherri Ellis. The apartment was surveyed. Significant levels of activity were found in the bathroom and kitchen, and lower levels of activity were found in other rooms.

On November 13, 1974, when Silkwood was driving her white Honda Civic to meet a reporter from the New York Times to deliver documents concerning health and safety violations at the plant, she was killed in a suspicious accident. No other cars were involved. Many suspected that Silkwood was murdered.

The plaintiff's attorney was Gerry L. Spence of Spence, Moriarity & Schuster of Jackson Hole, Wyoming. Kerr-McGee was represented by William G. Paul of Crowe, Dunlevy, Thweatt, Swinford, Johnson & Burdick of Oklahoma City.

H.2. Closing Argument by Spence

GERRY L. SPENCE, Esq., delivered the plaintiff's CLOSING ARGUMENT:

~Well, what we're going to talk about here isn't hard. If a country lawyer from Wyoming can understand it – if I can explain it to my kids – if Mr. Paul [lead defense attorney] can understand it – and his kids – then we all can understand it.

"What's going on, and who proves what?" Well, we talked about "strict liability" at the outset, and you'll hear the court tell you about "strict liability," and it simply means: "If the lion got away, Kerr-McGee has to pay."

It's that simple. That's the law. You remember what I told you in the opening statement about strict liability? It came out of the Old English common law. Some guy brought an old lion on his ground, and he put it in a cage – and lions are dangerous – and through no negligence of his own – through no fault of his own, the lion got away.

Nobody knew how – like in this case, "nobody knew how." And, the lion went out and he ate up some people, and they sued the man. And they said, you know, "Pay. It was your lion, and he got away." And, the man says, "But I did everything in my power. I had a good cage, had a

good lock on the door. I did everything that I could. I had security. I had trained people watching the lion. And it isn't my fault that he got away." Why should you punish him? They said, "We have to punish him. We have to punish you; you have to pay. You have to pay because it was your lion – unless the person who was hurt let the lion out himself."

That's the only defense in this case. Unless in this case Karen Silkwood was the one who intentionally took the plutonium out, and "let the lion out," that is the only defense, and that is why we have heard so much about it.

Strict liability: If the lion gets away, Kerr-McGee has to pay. Unless Karen Silkwood let the lion loose.

What do we have to prove? Strict liability. Now, can you see what that is? The lion gets away. We have to do that. It's already admitted. It's admitted in the evidence. They admit it was their plutonium. They admit it's in Karen Silkwood's apartment. It got away. And, we have to prove that Karen Silkwood was damaged. That's all we have to prove.

Our case has been proved long ago, and I'm not going to labor you with the facts that prove that. It's almost an admitted fact, that it got away, and that she was damaged.

Does Silkwood prove how the lion got away? You remember this – Mr. Paul walking up to you and saying, at the beginning of the trial, "Listen, it's important to find out how the lion got away." Well, it is important, because they have to prove how. But we don't. And the court will instruct you on that. As a matter of fact, I think you will hear the court say exactly this, and listen to the instruction: It is unnecessary for you to decide how plutonium escaped from the plant – how it entered her apartment – or how it caused her contamination, since it is a stipulated fact – stipulated between the parties – that the plutonium in Silkwood's apartment was from the defendants' plant.

So, the question is, "Who has to prove how the lion got away?" They have to prove it. They have to prove that Karen Silkwood carried it out. If they can't prove that by a preponderance of the evidence, they've lost. Kerr-McGee has to prove that.

Why? Well, it's obvious. It's their lion – not Karen Silkwood's lion. It's the law. It's that simple.

Now, I told you there was only one legal defense, didn't I? That's defense of Karen Silkwood having supposedly taken this stuff from the plant. Well, I'll tell you a bigger defense than that, and that's getting drowned in mud springs. Now, that isn't an original statement by me.

One of my favorite – I guess my favorite – jurist, and one you know very well, has an old saying he has told us many times. He says if you want to clear up the water, you've got to get the hogs out of the spring. And, if you can't get the hogs out of the spring, I guarantee you can't clear up the water. And I want you to know that getting jurors confused is not a proper part of jurisprudence, and getting people down in mud springs is not the way to try a case.

Somehow, somebody has the responsibility, as an attorney, to help you understand what the issues are – to come forward and hold their hand out and say: These are the honest issues, this is the law, this is what you can rely on, because I am reliable, and I'm not going to confuse you with irrelevancies and number-crunching and number games and word games and gobbledy-gook and stuff and details – and on and on and on. And the thing that I say to you is: Keep out of the mud springs in your deliberations.

You are not scientists. I'm not a scientist – my only power is my common sense. Keep out of the mud springs. You'll be invited there. Use your common sense. You'll be invited to do number-crunching of your own. You'll be invited to play word games. You'll be invited to get into all kinds of irrelevancies. And I only say to you that you have one hope – don't get into mud springs. Keep your common sense, and take it with you into the jury room.~

SPENCE delivered the rebuttal for plaintiff's CLOSING ARGUMENT:

~The issue that seems to be one that everyone wants to talk about is not really an issue – it is the only possible defense that Kerr-McGee has, and it is one that they have talked about. We are right back where we started from: "If the lion gets away, Kerr-McGee has to pay."

You remember Mr. Paul was critical of me for not trying to explain to you how the lion got away. Do you remember his criticalness, his sort of accusation that somehow we had failed in our obligation?

It is like this – listen to the story: "My lion got away. Why is my lion on your property?" That is the question he asked me. "Why is my lion on your property? It is on your property. Tell me why my lion is on your property. Explain it."

And, I say, "But, ah hah, ah hah, ah hah." And, he says: "It wasn't there two hours ago. It wasn't there last night." And, he says, "Wait a minute. Your kids don't get along with my kids. That is why my lion is on your property." And, then he says, "Why did you let my lion eat you?

You let my lion on your property," he says. "I accuse you – I accuse you – I blame you, and why don't you explain it?"

And, I say, "But, it isn't my lion; it is your lion. It is your lion that got away."

Now, the court says – and I want this, I want to put it to rest, because I don't want you jumping in mud springs on this one – there are too many other places for you to jump into mud springs on. Please hear it. It is unnecessary for you to decide how plutonium escaped from the plant, how it entered her apartment, or how it caused her contamination, since it is a stipulated fact that the plutonium in Karen Silkwood's apartment was from the defendants' plant.

Now, Mr. Paul, that is why we haven't explained how your lion got on our property. The court says that is not our obligation. It is your lion, Mr. Paul. You must explain it.

[The law says] that it is for the defendants to prove to you, by a preponderance of the evidence, that it was Karen Silkwood who took it. Failing their proof – please hear the word "proof" – it is the word "proof" – failing which proof Kerr-McGee has to pay.

The lion got away, Karen Silkwood was damaged. Does Karen Silkwood prove how the lion got away? The court says no. You will hear it again tomorrow. Why? Because it is their lion.

So if the lion got away, and Kerr-McGee can't prove how, then Kerr-McGee has to pay. Now, that's the law, the law of strict liability, and it is that simple.

Now, I heard Mr. Paul say this: "My heart reaches out praying for answers based upon the evidence." "Praying for answers based upon the evidence."

I would think he would pray for answers based upon the evidence, because he hasn't got any.

He doesn't have any more now that he ever did. All that you ever heard Mr. Paul say, as he stood up here and pointed his finger toward Karen Silkwood – and I want you to stop and remember, ladies and gentlemen, please, that this is a free country – and the one thing that makes this country different from all the other countries in the world is that when somebody makes the accusation against a citizen of this country, alive or dead, they have to make the proof.

Mr. Paul doesn't have the right to come into a court and say, "I think this happened." and "I think that happened." and "Maybe this happened." and "Isn't it probable that that happened." and "I think the

circumstances of this, and the circumstances of that." And to take a whole series of unrelated events and put them together and try to tell you somehow that I have the responsibility that the judge and the law doesn't place upon me, and to mislead you in that fashion. And I'm angry about that.

I expect that when a corporation of the size of this one comes into this courtroom that they should bring to you honest, fair, documented evidence, that they shouldn't hide behind little people, and that they should bring you the facts that they know.

Now, listen. I have some problems here in being straight with you, and I want to put them right here on the table. If we want to play guess-um – that is, point the finger, the game of playing, of pointing the finger – I can play that game. But when I do that I become as bad as Mr. Paul. You want me to do that? Is that the way you want to decide the case? Tell me. If that is the way you think the case ought to be decided in a court of American jurisprudence, to see who can make the biggest accusations against the other one, then I'm willing to play that game. But, when I do it, I want you to know it isn't right, because I can't prove that any more than they can prove it.

I can give you motive. What was the motive for them to do that? "She was a troublemaker. She was doing union negotiations. She was on her way – she was gathering documents – every day in that union, everybody in that company, everybody in management knew that." Nobody would admit it, but they knew it.~

Compare the motive, just for the fun of it. Supposing that you've got to weigh those motives. Here is Karen Silkwood. The motive was she was furious. We found out that she wasn't furious. Their own witness, Mr. – what is his name – Phillip, says she was miffed, wasn't that the word? Their witness, under oath, said she was miffed. "Was she furious?" "No, she wasn't furious. She was miffed." "She was furious," he said.

Did Karen Silkwood – and you have listened to her voice talking in private to Steve Wodka {a union official} – did she sound like a kook to you? Did she sound nuts? Did she sound like she was acting under some kind of compulsive behavior that suggested it? There isn't any proof to that. It comes out of Mr. Paul's mouth. He says it over and over, and over, and over, and over again.

Compare that motive with the motive of people to stop her. "She knew too much." What would she do had she gotten to the New York Times? These people, if you want to talk about motives, had a motive to

stop her, and she was stopped. We are not to talk about her – I won't talk about it – but she never got there with her X rays.

Now, I don't think that is the way I want to defend my case. I don't think that is the way I want to present it to you. I've only brought these matters out because in the course of this trial it seems too patently unfair to continually point their finger at a woman who can't defend herself about matters that they have no proof of and never had any proof of to begin with, and knew from the beginning that they would never have any more proof of, as evidenced by Mr. McGee's initial letter: "It is not likely that the source of her contamination will ever be known."

He knew that. Mr. Paul knew it. It was the only thing available to them, and I congratulate them for making a lot out of that, but it is sad to me that they didn't call the witnesses that knew – they didn't give us the information, and that is sad to me.

It is sad to me that one of the mightiest – you know, in history it will go down, this case, I can see it in the history books: "One of the mightiest corporations of the United States of America, a multinational corporation, with, two billion dollars in assets, and two billion dollars in annual income, goes down in history with all that power, with all of those resources, with the only thing that they could do was to accuse, and not prove."

Well, the key – please forgive my raging, but you are listening to a man who is angry – the key, ladies and gentlemen, is simple. I will have to tell you what it is. It is proof. They have the burden of proving that she took it. The judge says they have the burden to proving it. They have to prove it by a preponderance of the evidence.

Now, that is something, that phrase "preponderance of the evidence," which you will hear His Honor use tomorrow, isn't just a phony phrase. It means the greater weight of the evidence. There isn't any evidence here that she did it, not one iota of evidence. There are only the accusations. But, if there was any evidence, it would have to be the greatest weight of evidence, not suspicions, not the greatest weight of suspicions, not the one who can accuse the worst – but the greatest weight of the evidence.

The burden of proof is on the defendant Kerr-McGee Nuclear Corporation to establish that Karen Silkwood took the plutonium from work to her apartment where she was injured. That is the court's instruction.

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H.3. Questions to Ponder About *Silkwood v. Kerr-McGee*

A. To the extent you can extrapolate from this example, how is a closing argument to a jury different from a judge's written opinion? How are they similar?

B. What was your reaction to this as a law student? Do you think your reaction would have been different if you had read this before beginning law school? What do you think your reaction would have been if you had sat through the entire trial and were watching it in person?

C. Mr. Spence uses a powerful metaphor for legally irrelevant arguments and evidence: He calls them "mud springs." What does Mr. Spence point out as being legally irrelevant on Kerr-McGee's side of the case? How much of that do you agree is actually irrelevant?

D. Does Mr. Spence lead the jury into mud springs himself? If so, how and for what purpose?

E. One might say that judges are not immune from getting into mud springs in their written opinions. Can you think of anything you've read in a judicial opinion that strikes you as mud springs?

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