5-2023

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CONNECTICUT
LAW REVIEW

VOLUME 55 MAY 2023 NUMBER 3

Essay

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Judge Richard A. Posner's opinion for the Seventh Circuit in Indiana Harbor Belt Railroad Co. v. American Cyanamid Co.*, concerning a spill of the hazardous chemical acrylonitrile at a railyard near Chicago, is considered the definitive statement on the abnormally dangerous activity doctrine. That doctrine (also known as the ultrahazardous activity doctrine) holds that one who engages in an abnormally dangerous activity is strictly liable for harm caused to others, regardless of negligence. However, Judge Posner's opinion suggests that strict liability should rarely displace the negligence standard, even for commercial activities that externalize high degrees of risk. That approach leads courts to avoid invoking the doctrine by failing to classify activities as abnormally dangerous.*

Indiana Harbor *has been enormously influential. It is included in most Torts casebooks, imbibed by future lawyers and judges, lauded by commentators, and frequently cited. The unfortunate result has been to unduly constrict use of the abnormally dangerous activity doctrine.*

It is not hyperbole to say that Richard Posner is a genius; yet, as this Essay demonstrates, his reasoning in Indiana Harbor *is deeply flawed. The chasm between the decision's reputation and its real quality is so enormous that the opinion deserves to be named the worst torts decision in American history. By revealing* Indiana Harbor*'s flaws, this Essay opens a way to reconsider and revive a potentially valuable torts doctrine.*

ESSAY CONTENTS

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CARL T. BOGUS [*]

INTRODUCTION

A court opinion has to be extraordinary to earn the distinction of being the very worst in the history of American tort jurisprudence. No run-of-the-mill decision can qualify. Over the course of centuries, mediocre judges—and worse—may have penned countless poorly reasoned and badly written opinions; but there is no reason to sort through them, for none of those could compete with *Indiana Harbor Belt Railroad Co. v. American Cyanamid Co.*[1] Here is the paradox: *Indiana Harbor* is a well-written opinion by a brilliant judge. It represents the unanimous opinion of a panel of the United States Court of Appeals for the Seventh Circuit. It is widely cited and greatly admired.[2] Indeed, it is considered so definitive a statement about a particular doctrine—strict liability for abnormally dangerous activities—that it appears in leading Torts casebooks and is absorbed by nearly everyone who attends a U.S. law school.[3] And yet, I shall attempt to persuade you that the attractiveness of *Indiana Harbor* is entirely superficial, and what appears to be sound reasoning is just the reverse.

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[*] Professor of Law, Roger Williams University School of Law. Because I started and suspended work on this project several times over a period of many years, I am grateful to four alumni of our law school who worked on this project while they served as my research assistants. They are, in chronological order, Amy Goins, Hannah Pfeiffer, Edward Gencarelli, and Matthew Cavanagh. I am also grateful to Nicole Dyszlewski of our law library, who obtained copies of the briefs filed in the Seventh Circuit from the National Archives and Records Administration.

[1] 662 F. Supp. 635 (N.D. Ill. 1987), *rev'd*, 916 F.2d 1174 (7th Cir. 1990). It is the Seventh Circuit opinion that I call the worst torts decision in American history and critique in this Essay. Except when specifically mentioned otherwise, when I refer to *Indiana Harbor*, I am referring to the Seventh Circuit opinion. The District Court opinion, which I shall argue decided the case correctly, was written by Judge James Byron Moran.

[2] According to Westlaw, *Indiana Harbor* has been cited more than five hundred times. Regarding the wide admiration for *Indiana Harbor*, see, e.g., David Rosenberg, Commentary, *The Judicial Posner on Negligence Versus Strict Liability:* Indiana Harbor Belt Railroad Co. v. American Cyanamid Co., 120 HARV. L. REV. 1210, 1221–22 (2007) (stating that Posner—through "crucial insight" and "trenchant analysis"—"fundamentally changed the portrayal of strict liability" in his opinion).

[3] *E.g.*, MEREDITH J. DUNCAN ET AL., TORTS: A CONTEMPORARY APPROACH 712 (3d ed. 2018); MARC A. FRANKLIN ET AL., TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 533 (11th ed. 2021); VICTOR E. SCHWARTZ ET AL., PROSSER, WADE, AND SCHWARTZ'S TORTS: CASES AND MATERIALS 801 (14th ed. 2020) [hereinafter PROSSER CASEBOOK]; AARON D. TWERSKI ET AL., TORTS: CASES AND MATERIALS 637 (5th ed. 2021). Even casebooks that do not include *Indiana Harbor* as a principal case include excerpts from its opinion. *E.g.*, JAMES A. HENDERSON, JR. & DOUGLAS A. KYSAR, THE TORTS PROCESS 502, 516 (10th ed. 2022).

I do not take on the opinion's author, Richard A. Posner, lightly. Judge Posner is much smarter than I. Then again, Posner is smarter than just about anyone else, too. I have already called him brilliant. That is not hyperbole. He graduated summa cum laude from Yale College and then first in his class from Harvard Law School.[4] He clerked for Justice William J. Brennan, Jr.[5] He was a law professor at Stanford and Chicago before becoming a judge on the United States Court of Appeals for the Seventh Circuit in 1981.[6] He served as Chief Judge on that court from 1993 to 2000 and retired from the bench in 2017.[7] He is the author of more than three thousand court opinions, hundreds of articles and book reviews, and more than forty books.[8] He is, by a wide margin, the most-cited legal scholar of all time.[9] Moreover, his writings have appeared not only in the leading law reviews—including the *Journal of Legal Studies*, which he founded—but also in such popular venues as *The Atlantic*, *The New Republic*, *The New York Times*, and *The Wall Street Journal*.[10] Some of his books are landmark works in American law.[11] Others, such as *A Failure of Capitalism*, were widely reviewed in the popular press, highly acclaimed, and reached large audiences.[12] He has been both a towering figure within American law and a leading public intellectual of his day. His books and essays have been translated into at least a dozen languages.[13] I do not believe that, throughout all of American history, any other judge or legal scholar has achieved that level of influence both within the law and outside of it.[14]

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[4] Curriculum Vitae of Judge Richard A. Posner 4 (July 24, 2016), *available at* https://www.law.uchicago.edu/sites/default/files/cv/posner-2017.pdf. This is the principal source for my biographical information about Judge Posner.

[5] *Id.*

[6] *Id.*

[7] Jason Meisner & Patrick M. O'Connell, *Richard Posner Announces Sudden Retirement from Federal Appeals Court in Chicago*, CHI. TRIB. (Sept. 1, 2017, 7:13 PM), https://www.chicagotribune.com/news/breaking/ct-judge-richard-posner-retires-met-20170901-story.html.

[8] Curriculum Vitae of Judge Richard A. Posner, *supra* note 4, at 4; *Richard A. Posner*, UNIV. OF CHI. L. SCH., https://www.law.uchicago.edu/faculty/posner-r; Lincoln Caplan, *Rhetoric and Law: The Double of Richard Posner, America's Most Contentious Legal Reformer*, HARV. MAG., Jan.–Feb. 2016, at 54. If one counts new editions separately, Posner has written more than sixty books. *Id.* at 50.

[9] Fred R. Shapiro, *The Most-Cited Legal Scholars Revisited*, 88 U. CHI. L. REV. 1595, 1602 (2021).

[10] Curriculum Vitae of Judge Richard A. Posner, *supra* note 4, at 4, 28–48.

[11] *E.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (9th ed. 2014) (1973). The fact that this book is now in its ninth edition is a testament to its continuing popularity.

[12] *E.g.*, RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION (2009); *see, e.g.*, Jonathan Rauch, *Capitalism's Fault Lines*, N.Y. TIMES (May 14, 2009), https://www.nytimes.com/2009/05/17/books/review/Rauch-t.html (reviewing *A Failure of Capitalism* and calling Posner "the country's most omnivorous and independent-minded public intellectual").

[13] Robert F. Blomquist, *Introduction* to THE QUOTABLE JUDGE POSNER: SELECTIONS FROM TWENTY-FIVE YEARS OF JUDICIAL OPINIONS 1, 3 (Robert F. Blomquist ed., 2010).

[14] A leading scholar wrote: "With Learned Hand and Henry Friendly, Richard Posner is one of the three greatest lower federal court judges in American history." Michael C. Dorf, Book Review, 66 J. LEGAL EDUC. 186, 186 (2016). But as Professor Dorf observes, that evaluation is based solely on Posner's judicial role, and neither Hand nor Friendly achieved anything approaching Posner's level of influence as either a law professor or a public intellectual. *Id.*

Among the areas on which Judge Posner has great influence is the common law generally and torts specifically. One leading scholar has called Posner "the most influential common-law judge of the last 35 years," and observed that it is ironic that Posner was a federal judge, that is, someone who was duty-bound to apply state law, not make it.[15] Another leading scholar has called Posner "the most able judge in the history of tort law."[16] Even more specifically, this scholar observed that "Posner's impact in answering the question of negligence versus strict liability is greater than that of any judge in the last seventy-five years."[17] That brings us to the subject of this Essay. It is, in significant part, for *Indiana Harbor* that Posner earned his reputation as the master of the question of when strict liability should—and should not—displace negligence law.[18]

I am here to tell you that this portion of Posner's reputation is undeserved. Posner is brilliant, but his *Indiana Harbor* opinion is not. Far from it. *Indiana Harbor* is, in fact, dreadfully reasoned. What appears sensible on the surface is, upon examination, nonsensical; what seems at first blush to be logical is, in reality, illogical. A close examination of *Indiana Harbor* is surprising—it may not be too strong to say, shocking—but that is not the principal reason to undertake it. *Indiana Harbor* plunged a dagger into the heart of what, by rights, should be a valuable and robust legal doctrine, namely, the doctrine of strict liability for abnormally dangerous activities. My object in this Essay is to explain why *Indiana Harbor* is so flawed, thereby removing Posner's dagger and giving courts and scholars reason to think anew about a doctrine that American tort law needs.

Part I of this Essay will describe the doctrine of abnormally dangerous activities and illuminate why it is potentially so useful. Part II will present the underlying facts of *Indiana Harbor*. Part III will critique Judge Posner's opinion and explain why *Indiana Harbor* is the quintessential example of a case in which it should have been employed.

This will not take long.

I. THE ABNORMALLY DANGEROUS ACTIVITY DOCTRINE

The abnormally dangerous activity doctrine could not be simpler. It holds: "An actor who carries on an abnormally dangerous activity is subject to strict liability for physical harm resulting from that activity."[19] That statement of the general principle comes from the Third Restatement of Torts.

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[15] John C.P. Goldberg, *Benjamin Cardozo and the Death of the Common Law*, 34 TOURO L. REV. 147, 153 (2018).

[16] Saul Levmore, *Richard Posner, the Decline of the Common Law, and the Negligence Principle*, 86 U. CHI. L. REV. 1137, 1137 (2019).

[17] *Id.* at 1138.

[18] *See id.* at 1149–50.

[19] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 20 (AM. L. INST. 2010).

When Posner decided *Indiana Harbor* in 1990, the Second Restatement was still in effect, and its statement of the general principle, although not quite so streamlined, is essentially identical. Section 519 of that Restatement provides: "One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm."[20] Section 520 sets forth a list of factors to consider when determining whether an activity should be categorized as abnormally dangerous.[21]

The concept under either definition is that those who, for their own purposes, engage in activities that create an unusually high risk to others should be strictly liable for harm that results to others. At times such activities were termed "ultrahazardous."[22] Today the more popular term is "abnormally dangerous."[23] The nomenclature does not matter; the two terms are considered synonymous.[24]

The rationale for the principle is based on a fundamental societal value: those who benefit from an activity should pay the cost of that activity, and not foist those costs off on others. According to a widely consulted torts hornbook, "The idea is not necessarily to deter such activities altogether but to make them 'pay their way' by charging them with liability for harms that are more or less inevitably associated with the activity."[25] What the treatise authors are stressing is that imposing strict liability on the activity does not represent a judgment that the activity is not socially desirable, nor is it a judgment that the activity should be prohibited. Rather, the doctrine seeks to ensure that those who choose to carry on such activities pay the costs,

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[20] RESTATEMENT (SECOND) OF TORTS § 519(1) (AM. L. INST. 1977).

[21] The six 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.

Id. § 520.

[22] *See, e.g.*, Perkins v. F.I.E. Corp., 762 F.2d 1250, 1254–55, 1255 & n.9 (5th Cir. 1985) (referring to "ultrahazardous activities" despite citing to the Second Restatement's definition of "abnormally dangerous activities").

[23] *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 20 reporters' note to cmt. d ("What is now the Second Restatement's rule on strict liability for "abnormally dangerous" activities began, in §§ 519–520 of the first Restatement of Torts, as a rule of strict liability for "ultrahazardous activities."). Judge Posner once brushed off the change in terminology by referring to "an abnormally hazardous activity (what used to be called an 'ultrahazardous' activity, changed we know not why)." G.J. Leasing Co. v. Union Elec. Co., 54 F.3d 379, 386 (7th Cir. 1995).

[24] *See, e.g.*, *In re* Chi. Flood Litig., 680 N.E.2d 265, 279 (Ill. 1997); Fitzpatrick v. US W., Inc., 518 N.W.2d 107, 115 (Neb. 1994) (both stating the terms are considered synonymous).

[25] DAN B. DOBBS ET AL., HORNBOOK ON TORTS § 32.5, at 784 (2d ed. 2016).

including the costs of harm that befall others. That objective is often called the cost-internalization principle.[26]

One of the best ways to appreciate the policy objective of the abnormally dangerous activity doctrine is to consider one of the activities that English and American courts first made subject to strict liability, namely, keeping wild animals. Those who choose to keep a lion, tiger, or bear (oh my!) for their own benefit must compensate anyone outside the activity who is injured by the animal.[27] The liability will be strict, that is, tort law will pay no attention to how careful the person who possessed the animal was.[28] Nor will tort law make a judgment about whether the person should have possessed the animal. That person may have been a zookeeper, a zoologist, a veterinarian, or a medical researcher. The law, in essence, says: "If you want to keep a lion, go ahead. But lions are very dangerous, and there is always the possibility that—no matter how well you may try to guard against it—the lion will escape and harm others. If that happens, you will have to pay for the harm, regardless of how careful you may have been."[29] If this seems to make intuitive sense, it is because it reflects deep-seated societal views about fundamental fairness.

Beyond this cost-internalization rationale, there is another compelling policy justification for the abnormally dangerous activity doctrine, namely, deterrence. Under either a negligence or strict liability regime, the law seeks to incentivize actors to do what is reasonable to reduce injuries to others.[30] What is reasonable depends on the probability and magnitude of possible harm.[31] This is often represented by the famous Learned Hand formula, $B < PL$, where B is the burden of taking adequate precautions to avoid the harm, P is the probability of harm, and L is the magnitude of harm or loss.[32]

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[26] *See, e.g.*, Paula J. Dalley, *A Theory of Agency Law*, 72 U. PITT. L. REV. 495, 498 (2011) (stating that the cost-internalization principle "is based not only on an economic cost-internalization principle, but also on the moral principle that a person cannot justly retain the benefits of her actions while refusing to pay the costs").

[27] WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 514 (3d ed. 1964).

[28] *Id.* at 513.

[29] Naturally, there may be other laws or ordinances prohibiting or regulating the keeping of lions. I am speaking only of tort law. I am also speaking about keeping a lion in a place, like the United States, where lions are not indigenous. If one chooses to keep an alligator in rural Florida, where alligators are indigenous, and the alligator escapes, strict liability will not apply because the escaped alligator is no more dangerous than those which have not previously been held in captivity. RICHARD A. EPSTEIN, TORTS § 13.2, at 337 (1999). That is, in the United States, one increases risk to others by keeping a lion, but one does not increase risks to others by keeping an alligator in areas where alligators are common.

[30] DOBBS ET AL., *supra* note 25, § 12.5, at 275 ("the purpose of weighing of costs and benefits of the defendant's conduct is to generate a rule of liability that gives actors incentives to invest an appropriate amount in safety").

[31] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 (AM. L. INST. 2010) (listing as factors in determining reasonable care: "the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm").

[32] The formula was originally propounded in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). It has become a staple of tort law. *See, e.g.*, DOBBS ET AL., *supra* note 25, § 12.4, at 271.

The formula stands for the proposition that it is reasonable to incur costs of precautions up to the point where the burden of the precautions becomes greater than the probability of harm multiplied by the magnitude of the harm.[33] A reasonable person will take greater precautions to ensure that a mean-spirited pit bull does not get loose than to ensure that a genial cocker spaniel does not get loose.

Under the negligence regime, the standard of care always remains the same: a reasonable person will take precautions that are commensurate with the foreseeable risks of harm.[34] What shifts is the degree of care that is reasonable under the circumstances.[35] As the risk of harm increases, so does the reasonable degree of care. Thus, someone who owns a vicious pit bull is negligent if they only employ the degree of care that would have been reasonable for keeping a tame cocker spaniel. This does not mean that there is a different standard of care. The standard is that one must take whatever care is commensurate with the risk. Thus, the legal standard—"reasonable care"—remains constant while the degree of care that should be taken increases as the risk of harm increases.[36] Where the foreseeable harm is exceedingly high, the reasonable degree of care is also exceedingly high. It is sometimes said that under those circumstances one must take extraordinary care, but this only means that when danger is extraordinarily high, the appropriate degree of care is extraordinarily high, too.

By definition, an abnormally dangerous or ultrahazardous activity imposes a high risk of harm. At the upper ends of the degree of risk/reasonable care continuums, it becomes difficult for judges and juries to discern whether actors employed the requisite degree of care, even though they failed to prevent harm to others. For such activities, there is much to be said for a doctrine that essentially presumes that if the actor failed to prevent harm to others, then the actor was not sufficiently careful. It can be thought of as "the proof is in the pudding" approach. We do not describe the doctrine that way. We say that strict liability imposes liability regardless of fault.[37] But the doctrine works much in the same way as an irrebuttable presumption that the actor must have been at fault. It is helpful to recognize this is because the doctrine is, in significant part, designed to incentivize actors to figure out how to reduce the risk of harm as much as feasible. Even when a defendant argues it did everything conceivable to prevent its lion from escaping, and when a judge does not know what more the defendant could reasonably have

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[33] *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 cmt. e ("Conduct is negligent if its disadvantages outweigh its advantages, while conduct is not negligent if its advantages outweigh its disadvantages.").

[34] DOBBS ET AL., *supra* note 25, § 10.6, at 216.

[35] *Id.* at 216–17.

[36] *Id.* at 216–18 ("The *standard* of care is the same . . . , but the amount of attention or energy called for by that standard will vary with the circumstance of heightened danger.").

[37] *Id.* § 32.1, at 777.

done, we believe that the people who keep lions can figure out better, cost-effective ways of keeping them from escaping.

The law's role is not to tell lion keepers what to do; it is to provide sufficient incentive to stimulate them to figure out how to reduce harms. It is, after all, the people who are engaged in an activity who have, or should have, the greatest expertise about how to reduce risk. When actors are required to internalize the cost of harms caused to others, they have an incentive to find ways to reduce those harms. Sometimes actors find simple fixes based on existing technology.[38] But even when actors complain that there is nothing more they can do to reduce risks under the present state of technology, forcing them to internalize the costs of the harm they are causing may stimulate them to develop new technologies.[39] And as one court famously put it: "The 'state-of-the-art' at a given time is partly determined by how much industry invests in safety research."[40] Tort law should provide an especially strong incentive for actors to find ways to reduce harm from abnormally dangerous activities. The doctrine accomplishes that by making defendants strictly liable for the harm they caused even when they were not negligent—or, perhaps more frequently, when plaintiffs are unable to prove they were negligent.[41] Experienced litigators understand how difficult it can be to establish a defendant was negligent. Plaintiffs are dependent upon what they learn through discovery and are often frustrated by stonewalling defendants and recalcitrant witnesses.[42] Sometimes plaintiffs have so little information they do not even know what questions to ask and what discovery angles to pursue.

Michael Crichton's bestselling novel *Jurassic Park*,[43] which was also made into a famous movie,[44] can colorfully illustrate the plaintiffs'

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[38] *E.g.*, The T.J. Hooper, 60 F.2d 737, 739–40 (2d Cir. 1932) (holding that, to learn of approaching storms, tugboats should have been equipped with receiving radio sets which were available, though not generally adopted by tugboat operators, at the time); Boatland of Hous., Inc. v. Bailey, 609 S.W.2d 743, 748 (Tex. 2019) ("Even if a safer alternative was not being used, evidence that it was available, known about, or capable of being developed is relevant in determining its feasibility.").

[39] Speaking about the benefits of strict products liability, one tort scholar observed: "The imposition, or the threat, of tort liability also has led to beneficial technology-forcing. Product sellers have found that, like Dr. Johnson's hangman, the prospect of liability wonderfully concentrates the mind, requiring scrutiny of designs with an eye to safety." Marshall S. Shapo, *Millennial Torts*, 33 GA. L. REV. 1021, 1032 (1999).

[40] Beshada v. Johns-Manville Prods. Corp., 447 A.2d 539, 548 (N.J. 1982).

[41] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 20 cmt. b (AM. L. INST. 2010).

[42] *See, e.g.*, Ybarra v. Spangard, 154 P.2d 687 (Cal. 1944) (regarding an arm and shoulder injury sustained by an anesthetized patient during an appendectomy, and the difficulty of determining who—among the doctors and nurses who were present at the time—injured the patient).

[43] MICHAEL CRICHTON, JURASSIC PARK (1990).

[44] JURASSIC PARK (Universal Pictures 1993). The film was directed by Steven Spielberg, won three Oscars, and has spawned five sequels to date. *Jurassic Park*, IMDB, https://www.imdb.com/title/tt0107290/ (last visited Mar. 12, 2023); *Franchise: Jurassic Park*, BOX OFF. MOJO,

difficulties. In the novel, a firm known as International Genetic Technologies (InGen), owned by an entrepreneur named John Hammond, develops a method of cloning dinosaurs.[45] For anyone not familiar with the story, here is how InGen accomplishes this. During the Jurassic period, insects sucked the blood of dinosaurs.[46] Some of these insects landed on trees and became covered with sap.[47] The sap hardened into amber, preserving those insects and the dinosaur blood inside them for hundreds of millions of years.[48] In the present day, InGen scientists develop a process of cloning dinosaurs from the preserved blood.[49] They bring dinosaurs back to life on an island one hundred miles off the coast of Costa Rica, which they plan to turn into a resort, theme park, and free-range zoo.[50] Among the dinosaurs they clone are two tyrannosaurs and eight velociraptors, perhaps the two most fearsome species ever to have walked the Earth.[51] If ever there was an ultrahazardous activity, this is it.

But while the dinosaurs are able to roam across large tracts of land on the island, InGen takes many precautions. The dinosaurs are contained *both* by moats that are at least twelve feet deep and by fifty miles of twelve-foot-high, electrified fences.[52] A dinosaur that touches the fence receives a ten-thousand volt jolt and quickly learns to avoid the fence in the future.[53] Additionally, ninety-two percent of the land available to the dinosaurs is equipped with motion sensors, so that InGen knows where the animals are at any point in time.[54] Computers use the sensors to count the dinosaurs automatically every few minutes.[55] The InGen computer system, which controls the sensors, the electrified fences, and much more, does not communicate with outside computers and cannot be hacked.[56] It has its own independent power and backup systems.[57] InGen also employs three separate measures to ensure that the dinosaurs cannot breed: first, they clone only females; second, they irradiate all the dinosaurs so that they are sterile; third, InGen scientists insert a specific gene into all of the dinosaurs that makes them incapable of producing the amino acid lysine, which is necessary to sustain life.[58] InGen

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https://www.boxofficemojo.com/franchise/fr2571603717/ (last visited Mar. 12, 2023) (listing the sequels and showing the film franchise has grossed over $2.2 billion). While the screenplay is largely faithful to the novel, it differs in some respects. I describe the plot as set forth in the novel.

[45] CRICHTON, *supra* note 43, at 61, 67–68.

[46] *Id.* at 101. The movie identifies these insects as mosquitos. JURASSIC PARK, *supra* note 44.

[47] *Id.*

[48] *Id.*

[49] *Id.* at 101–02.

[50] *Id.* at 38, 67–68.

[51] *Id.* at 129, 184.

[52] *Id.* at 55, 131, 145.

[53] *Id.* at 131.

[54] *Id.* at 128–31.

[55] *Id.* at 129.

[56] *Id.* at 131–32.

[57] *Id.* at 132.

[58] *Id.* at 110–11, 115.

feeds the dinosaurs lysine tablets, but if it withholds lysine the dinosaurs will go into a coma within twelve hours.[59] And as previously mentioned, all of this occurs on an island more than one hundred miles from the mainland.[60]

One particularly interesting character is Ian Malcolm, a mathematician specializing in chaos theory. InGen brings Malcolm and a couple of paleontologists to the island to assess safety for InGen's investors.[61] Malcolm is unimpressed by all of the precautions. Chaos theory teaches that even apparently simple systems are inherently unpredictable, he says.[62] He tells InGen that small, unknown, and unpredictable effects will "overpower your careful calculations," and the enterprise is, therefore, "an accident waiting to happen."[63] John Hammond and his InGen personnel are unimpressed; Malcolm's opinion is based on mathematical theory and nothing more. He can't point to a single glitch, flaw, or oversight in the system.[64]

Of course, the dinosaurs get out, gobbling up people along the way.[65] They even procreate and find a way to the mainland.[66] Let us suppose lawsuits ensue; and let us further suppose that negligence is the applicable legal regime. Can plaintiffs who were injured establish that InGen was negligent?

Ian Malcolm would argue that cloning dinosaurs is negligence all by itself, but that is just another way of arguing for the abnormally dangerous activity doctrine. Under negligence doctrine, a reasonable person must take precautions that are commensurate with the foreseeable risks.[67] The higher the foreseeable risks, the greater the level of care that is required; but as one leading commentator has put it, "[t]he standard does not change even if the situation is fraught with danger."[68] InGen knew that cloning dinosaurs was exceedingly dangerous, and it was being exceedingly careful. Its scientists worked hard to foresee every eventuality and built redundant safety features into every aspect of the park. Their precautions were impressive. That does not mean a negligence action would be impossible. To prevail, however, plaintiffs would have to show how the dinosaurs got loose and what InGen should have done but failed to do to prevent their escape.

The dinosaurs reproduced and reached the mainland through a confluence of factors, but one factor was sine qua non for their escape: a rival firm had bribed a disgruntled InGen contractor—a man named Dennis Nedry, who designed and operated the facility's complex computer

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[59] *Id.* at 115.
[60] *Id.*
[61] *Id.* at 50–52, 73.
[62] *Id.* at 75–77.
[63] *Id.* at 77.
[64] *Id.* at 74, 77.
[65] *Id.* at 177, 195–96, 302–04.
[66] *Id.* at 14, 26–28, 167, 209, 399.
[67] DOBBS ET AL., *supra* note 25, § 10.6, at 216.
[68] *Id.*

systems—to steal fifteen dinosaur embryos from InGen.[69] To accomplish this act of industrial espionage, Nedry told his InGen colleagues he was rebooting computers to fix some bugs.[70] He said the reboot would take about fifteen minutes or so, during which time the outside phone lines would be down.[71] Meanwhile, he was going to run down to the commissary for a Coke. In fact, Nedry turned off all of the facility's security systems in order to make his way through the otherwise locked security doors to the laboratory where dinosaur DNA was stored.[72] He placed small vials containing the embryos into a container that looked exactly like a Gillette shaving cream can, but the vials would keep the embryos at a very low temperature for thirty-six hours.[73] Nedry then jumped into a jeep, speeding past the usually locked and electrified gates toward a waiting boat.[74] He had also programmed the system to require a password that only he knew to turn everything back on.[75] While he expected all of this to take about fifteen minutes, his jeep slipped off the road in a storm.[76] When Nedry got out of the jeep, he became the dinosaurs' first human meal.[77] Other InGen personnel soon discovered that all of the security measures were down—gates open and fences not electrified, among other things—but without the password, they were unable to quickly turn them back on.[78]

The first obstacle hypothetical plaintiffs would face would be discovering what Nedry did. Even after the dust settled, InGen itself had only a fragmentary knowledge of what happened. And it had strong incentives to conceal what it did know.[79] A firm's incentive to conceal facts is strongest under a negligence regime because liability hinges upon what potential plaintiffs can learn about what the firm did and did not do. (Firms may also have incentives to conceal facts if the abnormally dangerous activity doctrine governs, but the incentives are related to public relations concerns, not legal liability.) Moreover, federal practice requires that plaintiffs set forth in their complaint facts showing that a defendant was negligent; bare conclusory allegations of negligence are not sufficient.[80]

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[69] CRICHTON, *supra* note 43, at 70–72, 107, 174–77.

[70] *Id.* at 174–75.

[71] *Id.* at 174.

[72] *Id.* at 174–76.

[73] *Id.* at 176. In the movie it's Barbasol shaving cream, perhaps because Barbasol paid a product placement fee. JURASSIC PARK, *supra* note 44.

[74] CRICHTON, *supra* note 43, at 193.

[75] *Id.* at 230.

[76] *Id.* at 193–94.

[77] *Id.* at 195–96.

[78] *Id.* at 230, 299–302.

[79] *Id.* at xi.

[80] *E.g.*, Korff v. City of Phoenix, No. CV-13-02317-PHX, 2014 WL 12889794, at *2–3 (D. Ariz. Mar. 26, 2014) ("Plaintiff's allegations merely recite the elements of negligence without providing specific facts explaining how the City of Phoenix was directly liable for negligence or gross negligence."); Burch

Unless plaintiffs can do that, they will not earn the right to discovery. Thus, even before square one, plaintiffs face a steep hurdle in finding out how and why the dinosaurs escaped.

And that is just the beginning. Even if plaintiffs learned all relevant facts, they may still have a difficult time establishing liability. They would still need to show that InGen was negligent in either engaging Nedry in the first place or in not supervising him more closely.[81] Nedry's competence was not in question; the focus would have to be on his trustworthiness. In the novel, Nedry was angry with InGen because of a dispute over whether InGen owed him compensation for modifications it wanted him to make to the original system.[82] His anger over this dispute—combined with his greed—provided the incentive to collaborate in the industrial espionage plot.[83] Should InGen have reasonably concluded that Nedry was so upset by the dispute that he could no longer be trusted? That would be a tough argument because these kinds of contract disputes are common. What about arguing that InGen should have been supervising Nedry more closely? In fact, one InGen official mistrusted Nedry and was keeping a close eye on him.[84] Nedry, however, was extremely skilled with information technology and successfully concealed his preparations to take control of the security systems.[85]

In light of the many impressive precautions InGen did take—all of which would be admissible in a lawsuit based on negligence—no one can say with certainty how a negligence-based action would fare. Does that make sense for this kind of case? If a firm brings dinosaurs to life—including tyrannosaurs and velociraptors—lawsuits for resulting harm should be as simple and certain as possible. Plaintiffs[86] should only have to prove: (1) the defendant engaged in an abnormally dangerous activity, and (2) they were harmed as a result.[87] The simplicity and certainty of the litigation is the central point.

Admittedly, *Jurassic Park* is an exotic example. I used it because it vividly, if a bit playfully, illustrates the core rationales for the abnormally

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v. Freedom Mortg. Corp., No. 18-CV-2731-M-BH, 2019 WL 3208803, at *6 (N.D. Tex. June 27, 2019) ("These assertions read more like a recitation of the elements of a gross negligence claim than specific allegations of wrongdoing."). Both cases cite *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

[81] Because Nedry was a contractor, not an employee, InGen will not be vicariously liable for his conduct. *See* DOBBS ET AL., *supra* note 25, § 31.5, at 764 ("Employers are not vicariously liable for the torts of carefully selected independent contractors . . . . As the courts see it, it is the contractor's business, the contractor's tort, and the contractor's liability.").

[82] CRICHTON, *supra* note 43, at 175–76. In the movie, Nedry was angry with John Hammond for not loaning him money to help cover personal debts. JURASSIC PARK, *supra* note 44.

[83] CRICHTON, *supra* note 43, at 175–76, 193.

[84] *Id.* at 142.

[85] *Id.* at 228–30, 238–39.

[86] For purposes of this hypothetical, assume that plaintiffs have no connection to the InGen enterprise. They may be people on the mainland who were killed or injured by escaped dinosaurs, but they were not InGen workers, contractors, or customers.

[87] *See supra* note 19 and accompanying text.

dangerous doctrine. One of those core rationales is the cost-internalization principle, which is a fundamental value in a democratic and capitalistic society. Another core rationale is to reduce the difficulties and uncertainties in litigation involving abnormally dangerous activities to incentivize the appropriate level of care.

This brings us to *Indiana Harbor*.

II. *INDIANA HARBOR*: THE FACTS

On January 2, 1979, the Tuesday after a long holiday weekend, the American Cyanamid Company filled a railroad tank car with 20,000 gallons of acrylonitrile. It wanted to transport the liquid from its manufacturing facility in Louisiana to another of its facilities in New Jersey.[88]

Acrylonitrile is very useful. It is used to make acrylic fibers and other products.[89] But it is also extremely hazardous. It is poisonous when ingested and toxic when inhaled or absorbed through the skin.[90] It is so toxic, in fact, that in the past it was used as a pesticide.[91] It is carcinogenic and either ingesting it or inhaling it can cause cancer.[92] It is also explosive and flammable, with a flash point of thirty degrees Fahrenheit.[93] That means, as the plaintiff explained in its brief, that if the temperature is above the flash point, "[a] person passing through an area where vapors are in the air while smoking could be destroyed before he knew what happened."[94]

Cyanamid leased the railroad tank car from the North American Car Corporation.[95] In this case, therefore, it was both the manufacturer and the shipper of this hazardous chemical. Moreover, the lease required Cyanamid to inspect the tank car for defects or damage, to make any repairs itself or return the car to North American for repairs, and to maintain the car in good repair during its use of the car.[96] Cyanamid filled the tank car with

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[88] Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co., 916 F.2d 1174, 1175 (7th Cir. 1990).

[89] *Id.*; Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co., 662 F. Supp. 635, 637 (N.D. Ill. 1987); *Acrylonitrile*, CTRS. FOR DISEASE CONTROL & PREVENTION: NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH (NIOSH) (June 21, 2019), https://www.cdc.gov/niosh/topics/acrylonitrile/default.html.

[90] *Indiana Harbor*, 662 F. Supp. at 638; 29 C.F.R. § 1910.1045 app. C(I) (2021).

[91] *Acrylonitrile*, *supra* note 89.

[92] *Indiana Harbor*, 662 F. Supp. at 638. More precisely, acrylonitrile is known to cause cancer in rats and mice. The primary organ affected is the brain. Acrylonitrile is classified as a possible human carcinogen. *Addendum to ICH M7*, Food Drug Cosm. L. Rep. ¶ 310,916 (CCH) (Sept. 25, 2015), 2015 WL 7788047.

[93] *Indiana Harbor*, 662 F. Supp. at 638–39.

[94] Brief of Indiana Harbor Belt Railroad Co., Plaintiff-Appellee, Cross-Appellant at 13, Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co., 916 F.2d 1174 (7th Cir. 1990) (Nos. 89-3703, 89-3757) [hereinafter Plaintiff's Brief].

[95] *Indiana Harbor*, 916 F.2d at 1175.

[96] *Id.* at 1181; *Indiana Harbor*, 662 F. Supp. at 637.

acrylonitrile itself.[97] The Missouri Pacific Railroad picked up the filled tank car from Cyanamid's siding on the following day, January 3.[98]

No railroad line ran directly from Louisiana to New Jersey.[99] The Missouri Pacific transported the tank car to the Blue Island railroad yard of the Indiana Harbor Belt Railroad, a switching facility located in the Village of Riverdale, Illinois, which is south of and adjacent to Chicago.[100] The tank car containing acrylonitrile was one of ninety-six cars in the train.[101] When it reached the Indiana Harbor facility, the tank car would be switched to Conrail, which would transport it to New Jersey.[102] But that never happened.

The Missouri Pacific train arrived at the Blue Island yard at 8:40 a.m. on January 9.[103] Two Indiana Harbor employees inspected the train shortly after arrival. One inspected the east half of the ninety-six-car train, which included the tank car in question. He could not go underneath or between the cars because the tracks of incoming trains were in service, but he could look underneath the cars.[104] He testified at deposition that if he had seen anything amiss, he would have filed a form noting that with his foreman.[105] He did not file such a form. The two men completed their inspection by 9:45 a.m.[106]

At 12:30 p.m., two other Indiana Harbor employees drove past the train while returning from lunch and saw a car leaking fluid.[107] From its color, they thought the liquid was fuel oil.[108] They stopped, wrote down the train number, and immediately reported what they saw to the yardmaster, who instructed them to see whether they could stop the leak.[109] As they approached the car, they saw an outlet cap dangling under the car and liquid pouring out "pretty fast."[110] As they drew closer, spray from the leak hit one of the men in the face, knocking the breath out of him.[111] They radioed the yard foreman to find out what the car contained.[112] The yard foreman said an answer would take him a few minutes.[113] The other worker squatted under the car to see whether he could put the cap back on the outlet.[114] As he

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[97] *Indiana Harbor*, 662 F. Supp. at 637.

[98] *Id.*

[99] *Id.*

[100] *Indiana Harbor*, 916 F.2d at 1175.

[101] Brief and Appendix of American Cyanamid Co., Defendant-Appellant, Cross-Appellee at 13, *Indiana Harbor*, 916 F.2d 1174 (Nos. 89-3703, 89-3757) [hereinafter Defendant's Brief].

[102] *Indiana Harbor*, 916 F.2d at 1175.

[103] Defendant's Brief, *supra* note 101, at 12.

[104] *Id.* at 13.

[105] *Id.*

[106] *Id.*

[107] *Id.* at 13–14.

[108] *Id.* at 14.

[109] *Id.*

[110] *Id.* at 15.

[111] *Id.*

[112] *Id.* at 14–15.

[113] *Id.* at 15.

[114] *Id.*

wrestled with the outlet cap, the liquid sprayed him over his face and body, fully soaking his clothes.[115] He was unable to replace the cap, but he saw that it was "rusted," "corroded," and "broken."[116] Within about four minutes, the yard foreman radioed back. According to one of the two men on the scene, the foreman "hollered back over the radio, . . . [telling] us to get the hell away from that car, that stuff could kill us."[117]

Both of the workers who were exposed to acrylonitrile went to the emergency room at Ingalls Hospital. They were told to take cold showers and burn their clothing.[118] Meanwhile, the Indiana Harbor office called the Riverdale Fire Department.[119] The fire chief and another firefighter trained in hazardous materials rushed to the site and approached the train car with winds to their backs.[120] They saw that a weld had failed on the reducer for the bottom valve and liquid was pouring onto the snow beneath the car.[121] Upon learning that the tank car contained acrylonitrile, the fire department looked up the chemical in a hazardous materials emergency action guide and put into action their chemical spill procedures.[122] The department also notified the EPA, OSHA, and CHEMTREC, an emergency hazardous spill call center provided by the American Chemistry Council.[123] Luckily, the temperature in Chicago did not rise above twenty degrees Fahrenheit that day. Nor did it reach thirty degrees, the flash point of acrylonitrile, until January 13.[124]

The Fire Department moved the car to the far western side of the Blue Island train yard to get it as far away as possible from a residential area adjoining the eastern side of the yard.[125] The wind was shifting and began blowing from the car to the nearby residential and business area, causing the Fire Department to evacuate 3,000 residents from their homes.[126]

Although it is not directly relevant to our central thesis, a jaw-dropping comment in Cyanamid's brief cannot go unmentioned. Cyanamid wanted to argue that transporting acrylonitrile was good not only for society as a whole but specifically for the Village of Riverdale. To that end, it wrote: "The

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[115] *Id.* This worker, James Sanders, sued for personal injuries as a result of his exposure to acrylonitrile. Ind. Harbor Belt R.R. v. Am. Cyanamid Co., 517 F. Supp. 314, 315 (N.D. Ill. 1981).

[116] Defendant's Brief, *supra* note 101, at 15.

[117] *Id.* at 15–16.

[118] *Id.* at 16 n.10.

[119] *Id.* at 17.

[120] *Id.*

[121] *Id.*

[122] *Id.* at 18.

[123] *Id.* At the time, the ACC was known as the Chemical Manufacturers Association. *History*, CHEMTREC, https://www.chemtrec.com/about-chemtrec/who-we-are/history (last visited Mar. 13, 2023).

[124] *Chicago, IL Weather History: January 1979*, WEATHER UNDERGROUND, https://www.wunderground.com/history/monthly/us/il/chicago/KMDW/date/1979-1 (last visited Mar. 13, 2023).

[125] Plaintiff's Brief, *supra* note 94, at 15.

[126] *Id.* at 17; Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co., 662 F. Supp. 635, 642 (N.D. Ill. 1987).

presence of a viable industry in the midst of an economically depressed area makes the operation of [the Indiana Harbor] freight yard of importance" to the Riverdale community.[127] That sentence is stunning. It makes one wonder how grateful the two lawyers from the distinguished law firm who signed that brief would have been for a railroad yard in their neighborhood, from which vapors from acrylonitrile were wafting toward their families.

Other statements by Cyanamid are also amazing. One such statement is its claim that the evacuation was "solely attributable to the admitted overzealousness of the Riverdale Fire Department."[128] Its support for that conclusion was a comment the Fire Chief made at deposition. The Chief said: "For protective precautionary [reasons], we went further than what the book stated."[129] The Fire Chief—the man on the scene with responsibility to protect the safety of the community—had to make quick judgments based on limited information. I do not know what reference his department consulted to brief him, but it may have been the OSHA Emergency Rules for Acrylonitrile, which included the following: "Unusual fire and explosion hazards: Acrylonitrile is a flammable liquid. Its vapors can easily form explosive mixtures with air."[130] It also advised: "Toxic gases and vapors . . . may be released in a fire involving acrylonitrile."[131] The Chief said he made his decision to evacuate for two reasons: the wind was shifting and starting to blow vapors toward the homes; and when a firefighter struck the tank car with a brass hammer, there was an echo, which suggested that the entire 20,000 gallons of acrylonitrile may have run out of the car.[132] There was no gage or other device showing how much liquid remained in the tank car.[133] As it turned out, 4,000 gallons had leaked.[134] The direction of the wind was just one of many uncertainties; another was when the ambient temperature might rise above acrylonitrile's flash point.

At 2:40 p.m., an Indiana Harbor superintendent climbed on top of the tank car, broke a seal, removed a cover, and turned a wrench that stopped

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[127] Defendant's Brief, *supra* note 101, at 43.

[128] *Id.* at 41.

[129] *Id.* at 20 n.16.

[130] Plaintiff's Brief, *supra* note 94, at 4.

[131] *Id.*

[132] *Id.* at 17–18.

[133] *See id.* at 17–18 (discussing how it was unknown exactly how much had leaked when the firefighters were on the scene).

[134] District Judge Moran originally held that between 2,000 and 4,000 gallons leaked. Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co., 662 F. Supp. 635, 637 (N.D. Ill. 1987). However, in its appellate brief, Indiana Harbor said: "It was not an assumption that 4,000 gallons escaped thru the bottom outlet of the tank car. When the contents of the car were transferred to tank trucks after the accident, there were only 16,000 gallons remaining." Plaintiff's Brief, *supra* note 94, at 33. Judge Moran accepted that figure on remand. Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co., No. 80 C 1857, 1991 WL 206079, at *2 (N.D. Ill. Sept. 27, 1991).

the leak.[135] Five minutes later, the Fire Department allowed residents and business workers to return.[136]

Why did Cyanamid bother armchair-quarterbacking the Fire Chief's evacuation decision? The evacuation lasted only a few hours, and as far as I know no one asserted a claim for damages related to the evacuation. Cyanamid engaged in that exercise because it was seeking to minimize the seriousness of the spill. In fact, it criticized the district court for using the word "spill."[137] What happened, insisted Cyanamid, was merely a "leak."[138] The company did not explain when a leak ends and a spill begins, leaving readers to puzzle over whether four thousand gallons is not awfully large for a "leak."

Because the water table was about four feet, the spill (if I may call it that) not only contaminated the soil but also threatened the water supply for both the villages of Riverdale and Calumet Park, Illinois.[139] The Illinois Environmental Protection Agency ordered Indiana Harbor to remediate the contamination.[140] Indiana Harbor sued Cyanamid for $981,022.75, the cost it incurred for the cleanup.[141] The district court granted Indiana Harbor's motion for summary judgment on the abnormally dangerous activity doctrine, and Cyanamid appealed.[142]

III. *INDIANA HARBOR*: JUDGE POSNER'S OPINION

The central core of Judge Posner's reasoning boiled down to two points. First, the default regime is negligence, and it is only appropriate to switch to strict liability when negligence is inadequate. "The baseline common law regime of tort liability is negligence. When it is a workable regime, because

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[135] Defendant's Brief, *supra* note 101, at 19.

[136] *Id.*

[137] *See id.* at 56 ("From the fact of leakage, the court assumed a 'spill' . . . .").

[138] *Id.* at 57 ("The leak was not a spill.").

[139] *See* Plaintiff's Brief, *supra* note 94, at 16 (regarding the water table); *Indiana Harbor*, 662 F. Supp. at 637 (regarding the threat to the water supply).

[140] Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co., 916 F.2d 1174, 1175 (7th Cir. 1990).

[141] *Id.*

[142] *Id. at* 1175–76. There was, as a technical matter, a cross-appeal, too. Indiana Harbor had sued both on strict liability under the abnormally dangerous activity doctrine and on negligence. From his discussions with counsel, the district judge believed that neither party wanted to try the case on negligence "if it could be avoided" and that a final answer on the strict liability claim would likely resolve the matter, whether by affirming the judgment or through settlement if the judgment was reversed. Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co., No. 80 C 1857, 1991 WL 206079, at *1 (N.D. Ill. Sept. 27, 1991). To create an appealable final judgment, the district court dismissed Indiana Harbor's negligence claim. Indiana Harbor appealed that dismissal, and the parties agreed that if the district court was reversed on the strict liability claim the negligence claim should be reinstated. *Indiana Harbor*, 916 F.2d at 1175–76, 1183. The Seventh Circuit accepted this approach. In his opinion throwing out Indiana Harbor's strict liability claim, Judge Posner wrote: "[W]e trust the parties will find it possible now to settle the case. Even the Trojan War lasted only ten years." *Id.* at 1183. The Indiana Harbor litigation was settled only after, on remand, the district court denied the plaintiff's motion for summary judgment on negligence and held the case would have to be tried on that claim. *Indiana Harbor*, 1991 WL 206079, at *3, *5–6. It had outlasted the Trojan War by a full two years.

the hazards of an activity can be avoided by being careful (which is to say, nonnegligent), there is no need to switch to strict liability," he wrote.[143] Second, negligence is suitable for this case because if everyone exercises due care, an accident of this kind rarely, if ever, happens. Judge Posner put it this way:

> For all that appears from the record of the case or any other sources of information that we have found,[144] if a tank car is carefully maintained the danger of a spill of acrylonitrile is negligible. If this is right, there is no compelling reason to move to a regime of strict liability, especially one that might embrace all other hazardous materials shipped by rail as well.[145]

The first thing to observe about this reasoning is that it does not follow applicable law. The proper inquiry was not whether the negligence regime was inadequate; it was whether the activity in question should be classified as abnormally dangerous. I do not want to make too much of this point because much of Judge Posner's opinion is ostensibly devoted to whether shipping acrylonitrile is abnormally dangerous.[146] Yet, I do not want to ignore this point either because identifying the proper inquiry is fundamental. That is why I just said much of Judge Posner's opinion is *ostensibly* devoted to whether shipping acrylonitrile is an abnormally dangerous activity. When there is even some confusion about the lodestar the court should be attempting to follow, it is difficult to tell if the court has drifted off course.

Before we get to the main criticisms of Judge Posner's opinion, there is a minor point that we should get out of the way. Illinois tort law applied to the case. According to an Illinois intermediate appellate court, Illinois had adopted the general principle reflected by the Restatement but not the six factors[147] that the Restatement said should be considered in determining

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[143] *Indiana Harbor*, 916 F.2d at 1177.

[144] Note Judge Posner's suggestion that he consulted "other sources of information." He is famous—or more appropriately, infamous—for going outside the record. *See* Caplan, *supra* note 8, at 54–55 (stating that Posner often does his own research about the facts of a case "to the great irritation of lawyers in the case and sometimes to his colleagues"). One of the problems with this is that an appellate court winds up relying on facts that have not been subjected to the rigors of examination through the adversary process—facts that a party might have demonstrated were erroneous, misunderstood, or irrelevant. The practice is improper when dealing with adjudicative facts, yet not uncommon. *See generally* Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1 (2011). Gorod argues the practice is worthy of research. I will take a stab at what researchers might discover: that appellate judges who indulge most often in this practice litigated few cases as practitioners and were never trial judges.

[145] *Indiana Harbor*, 916 F.2d at 1179.

[146] *See id.* at 1181–82.

[147] RESTATEMENT (SECOND) OF TORTS § 519–520 (AM. L. INST. 1977); *see supra* notes 20–21 and accompanying text.

whether an activity is abnormally dangerous.[148] That subtle point seems to have been lost on both Judge Moran of the district court and Judge Posner, both of whom simply assumed without discussion that Illinois had—or perhaps would—adopt section 520 of the Second Restatement lock, stock, and barrel.[149]

Moran made this assumption in a 1981 decision.[150] Five years later, the Illinois Appellate Court declared: "Illinois has long recognized strict liability for damages caused by engaging in an ultrahazardous activity, although it has never explicitly relied on the Restatement's factors in determining whether a given activity is abnormally dangerous."[151] Subsequently, a different division of the same appellate court handed down a decision in which it cited Judge Moran's 1981 opinion and set forth the six factors of section 520 without any discussion about whether Illinois had—or should—rely on them.[152]

Judge Posner, in turn, cited—but harshly criticized—both of these appellate court opinions. He said they were "careless" because they characterized Judge Moran's 1981 opinion as having held acrylonitrile was unreasonably dangerous when Judge Moran had merely denied a motion to dismiss the plaintiff's strict liability count for failure to state a cause of action.[153] Judge Posner dismissed much of their discussion as dicta—and "not even considered or well-reasoned dicta"—which "cannot be considered reliable predictors of how the Supreme Court of Illinois would rule if confronted with the issue in this case."[154] But then he, himself, blundered by saying the opinions agree "that the Supreme Court of Illinois would treat as authoritative the *provisions* of the Restatement governing abnormally dangerous activities," and that this provides "substantial support" for him

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[148] Fallon v. Indian Trail Sch., 500 N.E.2d 101, 102 (Ill. App. Ct. 2d Oct. 31,1986) ("Illinois has long recognized strict liability for damages caused by engaging in an ultrahazardous activity, although it has never explicitly relied upon the Restatement factors in determining whether a given activity is abnormally dangerous.") The court noted that Illinois had adopted the abnormally dangerous doctrine in *City of Joliet v. Harwood*, 86 Ill. 110, 111 (1877), which held that those who engage in "intrinsically dangerous" activities are liable for resulting harm "however skillfully" they carry on the activity. *Fallon*, 500 N.E.2d at 102.

[149] Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co., 662 F. Supp. 635, 640–41 (N.D. Ill. 1987); *Indiana Harbor*, 916 F.2d at 1176–77.

[150] Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co., 517 F. Supp. 314, 320 (N.D. Ill. 1981) (denying Cyanamid's motion to dismiss Indiana Harbor's strict liability claim). In this opinion, Judge Moran cites both sections 519 and 520 of the Restatement, apparently unaware that Illinois had not adopted section 520.

[151] *Fallon*, 500 N.E.2d at 102–03.

[152] Cont'l Bldg. Corp. v. Union Oil Co. of Cal., 504 N.E.2d 787, 789–90 (Ill. App. Ct. 1st Jan. 27, 1987). *Continental Building*, which does not cite *Fallon*, was decided only three months after *Fallon* and was likely briefed and argued before *Fallon*. Five years after Posner's *Indiana Harbor* decision, another Illinois appellate case cited *Fallon* and used the six-factor test of section 520, ignoring *Fallon*'s statement that Illinois had never adopted section 520. Miller v. Civ. Constructors, Inc., 651 N.E.2d 239, 244 (Ill. App. Ct. 2d 1995); *see also infra* notes 215, 217–18 and accompanying text (discussing Miller substantively).

[153] *Indiana Harbor*, 916 F.2d at 1176.

[154] *Id.*

doing so as well.[155] In fact, at best those cases disagree about one of those two provisions, namely, section 520.[156] Oblivious to that disagreement, Judge Posner went on to rely heavily on section 520.[157] This is not a minor matter. The six factors of section 520 were highly controversial.[158]

The cascading assumptions are interesting not only because they illustrate how law can develop by happenstance; they are also pertinent to our inquiry because the Restatement's six factors were, in fact, terrible.[159] The American Law Institute must have eventually realized that the six factors were unhelpful because it eliminated them in the Third Restatement.[160] Lists of factors are generally problematic because they can lead to a knee-jerk checking of boxes rather than a critical analysis of whether applying a doctrine will achieve the policy objectives of the doctrine in the particular circumstances of the case.[161] For Judge Posner, the critical inquiry in *Indiana Harbor* should have been whether a finding that transporting acrylonitrile was an abnormally dangerous activity would well serve the policy objectives of the doctrine.

Richard Posner was too good a judge to succumb to mindlessly checking boxes. He was also too determined a judge to do that, by which I mean he often had a strong sense of how a case should turn out, and why. Lists of factors present a menu of considerations from which a determined decision maker may select factors that support a particular decision and give the rest of the list short shrift.[162] That is what Judge Posner did. "There are, of course, the six factors in section 520," he wrote. "They are related to each other in that each is a different facet of a common quest for a proper legal regime to govern accidents that negligence liability cannot adequately

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[155] *Id.* (emphasis added).

[156] I say that "at best" the cases disagree because the *Continental Building* court does not appear to consciously disagree with *Fallon*. Rather, it appears to simply miss the question entirely. *See supra* note 152.

[157] *Indiana Harbor*, 916 F.2d at 1176–79.

[158] See, e.g., EPSTEIN, *supra* note 29, § 13.3 at 349–50 (criticizing a number of the section 520 factors).

[159] This judgment is not mine alone. For example, Richard Epstein observed that the factor of whether the activity is a matter of common usage "raises genuine questions as to why the many should be forced to subsidize the few." EPSTEIN, *supra* note 29, § 13.3 at 349 (1999). As to whether the activity is valuable to the community, Epstein wrote: "[T]he real issue is not whether the activity is appropriate for the locale, or for the benefit of the community at large, but whether it makes sense for its costs to be borne by its practitioner or someone else." *Id.* at 350.

[160] *Compare* RESTATEMENT (SECOND) OF TORTS § 520 (AM. L. INST. 1977), *with* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 20 (AM. L. INST. 2010).

[161] Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 41 (2007) ("When judges excessively rely on multifactor tests, as well as on scripts and checklists, there is a risk of mechanical jurisprudence. Excessive rigidity may unduly restrict judges from tailoring their analysis to the case.").

[162] *Id.* ("[J]udges sometimes employ heuristics to circumvent the multifactor analysis by relying on just a few of the factors in making their decision, thereby diminishing the value of the test as a corrective device."). As leading commentators have noted in the abnormally dangerous activity context, courts "may find it easy to characterize the activity as common and thus to support a conclusion that liability must be based upon fault." DOBBS ET AL., *supra* note 25, § 32.6 at 789.

control. The interrelationships might be more perspicuous if the six factors were reordered."[163] He turned to the third factor—"the inability to eliminate the risk by the exercise of due care"[164]—and put it to use as the linchpin of his decision.

Judge Posner interpreted that factor to mean that if in a particular activity accidents can be prevented by using reasonable care, then negligence should apply.[165] That may seem like a sound proposition at first, and it is consistent with the third factor of section 520. Yet, just a little thought reveals that the factor is, in fact, boneheaded. Let us remember that the negligence standard calibrates care with danger, that is, the greater the dangers posed by an activity, the greater the care that must be taken to constitute reasonable care.[166] With that in mind, the reality of the world is that just about every accident could have been prevented with the exercise of reasonable care. And if only we had perfect information, we could fix responsibility for every accident.

A lion escapes from a zoo. Did it escape because a worker failed to properly lock the cage? Was it because the lock on the cage was faulty? Was it because another worker intentionally and maliciously released the lion? Was it because vandals or terrorists gained entry to the zoo and released the lion? With perfect information, we would know why the lion escaped and what the zoo could have done to prevent the escape. And with perfect information we would likely be able to mount a credible argument that the zoo was negligent. Maybe it should have used a more reliable lock, or a tamper-proof lock, or a lock with a red light that shows when it is not fully locked. Maybe the zoo should have used a redundant locking system, so that two locks had to fail for the lion to escape. Maybe it should have more rigorously vetted or supervised its workers. Maybe it should have better guarded the zoo against penetration by vandals or terrorists. And so on, and so on. Even if the lion escaped because an earthquake damaged the lock, it would be possible to credibly argue that—given the propensity for earthquakes in the region—the zoo negligently failed to use an earthquake-resistant cage.

If we were omniscient, we would always know how the accident happened and what someone could have done to prevent it. Moreover, if the harm was great enough—or more accurately, could have been great enough given the nature of the activity—then the person or persons who could have prevented the accident should have prevented the accident. And by definition, potential harm is always great from abnormally dangerous activities.

Someone will argue that taking precautions is not always efficient. Learned Hand's formula teaches that the efficient level of precautions does

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[163] *Indiana Harbor*, 916 F.2d at 1177.

[164] RESTATEMENT (SECOND) OF TORTS § 520(c).

[165] *Indiana Harbor*, 916 F.2d at 1179.

[166] *See supra* notes 34–36 and accompanying text.

not exceed the probability of harm times the potential magnitude of harm.[167] The Hand formula works perfectly in theory, and it works sufficiently well for most activities. But there are good reasons for a rule that says when harm results from an abnormally dangerous activity, the law will not try to assess whether the degree of care used was sufficient. One reason is practical: by definition, the level of care had to be so high that it is difficult for a fact finder to discern whether it was truly adequate.[168] Another reason has to do with societal values and mores: Those who choose to engage in an abnormally dangerous activity for their own profit should pay the full costs of their activity, including the inevitable costs of harm to others, and do so regardless of whether the harm was preventable.[169] A third reason is that the law should strongly incentivize prevention for abnormally dangerous activities, and because of the vagaries of the litigation system, negligence-based deterrence will not be strong enough.[170]

In perhaps the most damning sentence of his opinion, Judge Posner wrote of the spill in this case:

> It was caused by carelessness—whether that of the North American Car Corporation in failing to maintain or inspect the car properly, or that of Cyanamid in failing to maintain or inspect it, or that of the Missouri Pacific when it had custody of the car, or that of the switching line itself in failing to notice the ruptured lid, or some combination of these possible failures of care.[171]

True enough. Yet, staring Judge Posner in the face is, in his own words, the explanation of why *Indiana Harbor* is a quintessential example of a case in which the negligence regime is not adequate. In theory, Judge Posner is correct: someone was negligent, so let the negligent party or parties pay for the cost of the cleanup. The case, however, did not arise from a theoretical world. It arose from the messy real world where information is imperfect—and as Judge Posner wrote above, no one knows who was negligent.

In his District Court opinion, Judge Moran wondered why Indiana Harbor did not move for summary judgment on its negligence claim as well as its strict liability claim. He wrote:

> Summary judgment for a plaintiff in a negligence action is rare, but not impossible. . . .
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> On the surface, at least, [Indiana Harbor] would appear to have a very solid claim for negligence against Cyanamid. The more

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[167] *See supra* notes 32–33 and accompanying text.
[168] *See supra* pp. 656–57.
[169] *See supra* notes 25–26 and accompanying text.
[170] *See supra* notes 29–30 and accompanying text.
[171] *Indiana Harbor*, 916 F.2d at 1179.

> dangerous the activity, the more care a person must take to be reasonable and prudent. Obviously, acrylonitrile is a dangerous chemical. If it leaks out of its container it can explode, contaminate soil and water, and give off toxic fumes. Given the law of gravity, it is difficult to see how a reasonable and prudent manufacturer could ship it in a tank car with both a loose and defective bottom outlet valve control, and a pressure-bearing weld on the bottom outlet assembly.[172]

The judge then added this sentence: "Since we do not know exactly how the car came to be leaking, [Cyanamid] contends, an issue of fact must exist about who is legally responsible for damage from the spill—*as if the leak needs to be someone's fault before liability can be imposed*."[173] It is interesting the judge made that comment while discussing negligence, for it seems more suitable for strict liability. It is hard to know what he was driving at. To prevail on a negligence claim, a plaintiff must show the defendant was negligent and that defendant's negligence proximately caused the harm.[174] Negligence is, of course, a form of fault; thus, Indiana Harbor would have had to show that Cyanamid was at fault to prevail on a negligence theory. What is quite clear, however, is that Judge Moran thought Indiana Harbor had a strong negligence claim—so strong that he thought it might have prevailed on a motion for summary judgment on that theory. Following the appeal, Indiana Harbor did move for summary judgment on its negligence theory.[175] Four years had passed, and Judge Moran now had the benefit of arguments about whether he should grant summary judgment on negligence. He denied Indiana Harbor's motion because he believed that some material facts were in dispute.[176] "Resolving the issue of who was at fault, if anyone, falls within the province of the jury," he then wrote.[177] That is not surprising, even in light of his earlier comments. Negligence claims are, after all, fact-intensive, which is why, as Judge Moran originally observed, granting a plaintiff's motion for summary judgment on a negligence claim is rare.

I have suggested that one of the benefits of the abnormally dangerous activity doctrine is that it makes the plaintiff's claim much easier and therefore increases the likelihood of liability and, thereby, deterrence.[178] This benefit did not concern Judge Posner because he was convinced that there was nothing to deter. What he was focusing on, through his

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[172] Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co., 662 F. Supp. 635, 639 (N.D. Ill. 1987).

[173] *Id.* (emphasis added).

[174] *See supra* note 167.

[175] Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co., No. 80 C 1857, 1991 WL 206079, at *1 (N.D. Ill. Sept. 27, 1991).

[176] Among the facts in dispute, wrote Judge Moran, were Indiana Harbor's contention that Cyanamid had used the wrong kind of tank car to transport acrylonitrile and Cyanamid's contention that Indiana Harbor should have spotted the leak earlier. *Id.* at *3, *6.

[177] *Id.* at *5.

[178] *See supra* text accompanying notes 41–42.

law-and-economics perspective, was whether imposing strict liability on Cyanamid would affect how it conducted activities—in this case, the activity of transporting acrylonitrile by train through a switching facility located within a large metropolitan area.[179] Judge Posner made his very greatest error here by believing he knew whether Cyanamid could have reduced risk by doing something different.

He started down that path with this curious observation. "[T]he plaintiff," he wrote, "overlooks the fact that ultrahazardousness or abnormal dangerousness is, in the contemplation of the law at least, a property not of substances, but of activities: not of acrylonitrile, but of the transportation of acrylonitrile by rail through populated areas."[180] That sentence encapsulates all the logic of the slogan "Guns Don't Kill People; People Kill People."[181] It is, of course, people with guns who shoot people. A gun without someone to pull the trigger presents no risk of shooting someone, and neither does a person without a gun. Similarly, acrylonitrile sitting alone in an environment that cannot be polluted—on an asteroid, perhaps—is not hazardous. It is the combination of acrylonitrile and some human activity that creates risk, but that hardly means that strict liability analysis is unconcerned with the properties of acrylonitrile as a substance. In fact, within the largest area of strict liability—products liability—it is commonly said that "the focus is on the product, not conduct,"[182] although some courts have observed that distinguishing between the two is "nothing more than semantic."[183] While by definition the abnormally dangerous activity doctrine is concerned with activity, when the question is whether transporting acrylonitrile by rail is abnormally dangerous, it is nonsensical to say that the law is "a property not of substances, but of activities." Cyanamid was not shipping cornflakes.

Judge Posner then proceeds on with this statement: "The relevant activity is transportation, not manufacturing and shipping."[184] His point was that Cyanamid was so involved with how its product would be transported that it could be considered a "shipper-transporter" rather than a mere shipper who consigns property to a carrier for transportation to a particular location without dictating the method and details of the transportation.[185] Cyanamid bore no resemblance, for example, to a passive shipper who might send a package via UPS, leaving the method, route, and other aspects of

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[179] Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co., 916 F.2d 1174, 1181 (7th Cir. 1990).

[180] *Id.*

[181] *See, e.g.*, David Kyle Johnson, *"Guns Don't Kill People, People Do?,"* PSYCH. TODAY: A LOGICAL TAKE (Feb. 12, 2013), https://www.psychologytoday.com/us/blog/logical-take/201302/guns-don-t-kill-people-people-do.

[182] A March 15, 2023, Westlaw search of the phrase "focus is on the product" and "products liability" yielded 433 results, including 84 cases. *See, e.g.*, Kerns v. Engelke, 390 N.E.2d 859, 862 (Ill. 1979) ("in cases of strict liability, 'focus is on the product,' not the conduct").

[183] *E.g.*, Prentis v. Yale Mfg. Co., 365 N.W.2d 176, 184 (Mich. 1984). One activity is a prerequisite to any products liability action, namely, sale of the product.

[184] *Indiana Harbor*, 916 F.2d at 1181.

[185] *Id.*

transportation up to UPS. By contrast, Cyanamid not only decided to ship its product to New Jersey via rail, it selected the kind of tank car in which its chemical would be carried, leased the car, inspected the car (or at least was contractually responsible for doing so), loaded the chemical into the tank car, placed the car at a railway siding to be collected by Missouri Pacific, and presumably also determined the route, the switching yard, and the second carrier.[186] In emphasizing this, Judge Posner was demonstrating that—even though Cyanamid made all of these decisions and exercised all of this control—there was nothing more it could have done to decrease risk of an accident along the way. Posner wrote:

> It is easy to see how the accident in this case might have been prevented at reasonable cost by greater care on the part of those who handled the tank car of acrylonitrile. It is difficult to see how it might have been prevented at reasonable cost by a change in the activity of transporting the chemical.[187]

In these two sentences, Judge Posner is suggesting two things. First, he can easily imagine how the accident could have been prevented through greater care by Missouri Pacific, by Indiana Harbor, or even by Cyanamid itself when it loaded acrylonitrile into the tank care. Second, he cannot imagine how Cyanamid could have prevented the accident by changing the method, means, or other details of transportation.

Judge Posner offered the following example: "The district judge and the plaintiff's lawyer make much of the fact that the spill occurred in a densely inhabited metropolitan area."[188] But that, wrote Judge Posner, was inevitable. The railroad system is a network of hubs and spokes. Railroads travel along the spokes and connect at the hubs, and the hubs are located in metropolitan areas.[189] "Chicago's railroad yards handled the third highest volume of hazardous-material shipments in the nation," Judge Posner observed.[190] If the train car was not switched in Chicago, it would have to have been switched in another metropolitan area, perhaps at the East St. Louis hub, which handled the second highest volume.[191] "It is no more realistic to propose to reroute the shipment of all hazardous materials around Chicago than it is to propose the relocation of homes adjacent to the Blue Island switching yard to more distant suburbs," Judge Posner wrote.[192] Then he added a throwaway line that equaled Cyanamid's callousness[193] toward

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[186] *Id.* Judge Posner was ambiguous about whether Cyanamid determined the route. He only wrote: "A shipper can in the bill of lading designate the route of his shipment . . . ." *Id.* at 1180.

[187] *Id.* at 1180–81.

[188] *Id.* at 1180.

[189] *Id.*

[190] *Id.*

[191] *Id.*

[192] *Id.* at 1181.

[193] *See supra* note 127 and accompanying text.

the Riverdale residents: "Brutal though it may seem to say it, the inappropriate use to which land is being put in the Blue Island yard and neighborhood may be, not the transportation of hazardous chemicals, but residential living. The analogy is to building your home between the runways at O'Hare."[194] Brutal indeed. And gratuitous. This was not a lawsuit by residents, who had in this instance—at great cost[195]—been protected by a rapid response and a cleanup mandated by the Illinois Environmental Protection Agency. Would those residents be insulted if they knew Judge Posner suggested that they were inappropriately using land by living near a railyard? And as a practical matter, could they afford to move?

There are great advantages to being a genius, but there is a downside: hubris. As Samuel Johnson observed long ago: "No estimate is more in danger of erroneous calculation than those by which a man computes the force of his own genius."[196] Judge Posner badly stumbled believing he knew whether Cyanamid could readjust its activities to reduce the risks of transporting acrylonitrile. Posner knew enormous amounts about law, jurisprudence, economics, and literature, but brilliance does not confer mastery of all fields and endeavors. Judge Posner was not a chemist, safety engineer, transportation specialist, or railroad expert. It was not the court's job to determine whether or how Cyanamid might adjust its activities to reduce the inherent risks of transporting acrylonitrile. That is Cyanamid's job. No one knew more about acrylonitrile than it did, and it was in a position to consider all kinds of questions. Should it ship acrylonitrile in different kinds of railroad tank cars or in cars with different kinds of outlets? Should it manufacture acrylonitrile in New Jersey to eliminate the need to transport it there? Should its inspection protocol of tank cars be changed? Frankly, I do not even know the right questions to ask. Neither did Judge Posner.

The court's job was to determine whether Cyanamid was engaged in an abnormally dangerous activity. The law had already decided that if the answer were yes, strict liability should be imposed.[197] Strict liability would do two things: (1) it would internalize inevitable costs of engaging in the activity, and (2) it would incentivize the person engaging in the activity—and who knew the most about the activity—to reduce the risk of harm to others.

Undoubtedly, Judge Posner thought his reasoning was in service of determining whether Cyanamid was carrying on an abnormally dangerous activity. But, in fact, that is not what he was doing. The question of whether

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[194] *Indiana Harbor*, 916 F.2d at 1181.

[195] According to a standard inflation calculator, the cleanup cost of $981,022.75 in 1979 is equivalent to $4,055,780.23 in 2022. THE INFLATION CALCULATOR, https://westegg.com/inflation/ (last visited Mar. 15, 2023).

[196] THE INTERNATIONAL THESAURUS OF QUOTATIONS 573 (Rhoda Thomas Tripp ed., 1987) (quoting SAMUEL JOHNSON, THE RAMBLER NO. 154 (1751)).

[197] RESTATEMENT (SECOND) OF TORTS § 519 (AM. L. INST. 1977).

transporting acrylonitrile thousands of miles by rail is abnormally dangerous is not the same as the question of whether Cyanamid can reduce the risks of that activity. To return to the *Jurassic Park* example,[198] the question of whether opening a free-range zoo with tyrannosaurs and velociraptors is abnormally dangerous is different than whether the zoo has done everything possible to reduce risks. It would make no sense for a court to decide that bringing dinosaurs to life was not abnormally dangerous because the zoo was, in fact, already doing everything feasible to reduce risks—or that negligence was an adequate regime because someone must have been negligent.

Judge Posner made much of the fact that a reference source listed 125 hazardous materials carried by rail and designated acrylonitrile as the fifty-third most hazardous on that list. "The plaintiff's lawyer acknowledged at argument that the logic of the district court's opinion dictated strict liability for all 52 materials that rank higher than acrylonitrile on the list," and perhaps for all 125 substances on the list.[199] By putting it this way, Judge Posner suggests this was a "gotcha moment" at oral argument. I don't see why. The full list of 125 hazardous substances must comprise a tiny percentage of all of the many different goods carried by rail. Moreover, imposing strict liability on a product does not mean it will be driven off the market. It only means the shippers will have to pay for the cost of accidents that occur along the way—accidents, that is, that cause harms resulting from the hazardousness nature of the substances.[200] The more socially valuable those substances are, the greater the demand for them will be; and the greater the demand, the better able sellers will be to absorb the costs of accidents. Of course, substances of marginal social value and products that cause a great deal of harm might be driven from the market. But isn't that a good thing?[201]

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[198] *See supra* pp. 658–61.

[199] *Indiana Harbor*, 916 F.2d at 1178.

[200] *See, e.g.*, Foster v. Preston Mill Co., 268 P.2d 645, 647 (Wash. 1954) ("strict liability should be confined to consequences which lie within the extraordinary risk whose existence calls for such responsibility").

[201] In fact, in another case Judge Posner himself suggested one of the benefits of the abnormally dangerous activity doctrine is to end activities that cannot pay the costs of externalized harms. He wrote:

> Keeping a tiger in one's backyard would be an example of an abnormally hazardous activity. The hazard is such, relative to the value of the activity, that we desire not just that the owner take all due care that the tiger not escape, but that he consider seriously the possibility of getting rid of the tiger altogether; and we give him an incentive to consider this course of action by declining to make the exercise of due care a defense to a suit based on an injury caused by the tiger—in other words, by making him strictly liable for any such injury.

G.J. Leasing Co. v. Union Elec. Co., 54 F.3d 379, 386 (7th Cir. 1995). The only problem with Judge Posner's formulation is that a court should not weigh the hazard "relative to the value of the activity." Rather, it should impose strict liability on all abnormally dangerous activities. It is for the market, not judges, to weigh the harm relative to the value of the activity. Activities will continue if their value

The district judge made much of the fact that the spill occurred at a railyard within a densely populated area. He did so because one of the six factors the Second Restatement listed for consideration was "inappropriateness of the activity to the place where it is carried on."[202] Judge Posner, in turn, argued that the Blue Island yard was not an inappropriate locale because all switching yards are located in metropolitan areas, and therefore the Blue Island yard was not an inappropriate locale because it was a necessary locale.[203] I have already mentioned that I believe the Restatement factors were poorly calibrated for the task of determining whether something was abnormally dangerous,[204] but it was one factor that the Restatement said to consider, so the district judge can hardly be faulted to considering it, and Judge Posner cannot be blamed for responding to that consideration. Nevertheless, both courts made the mistake of focusing on Blue Island yard because it was where the spill occurred. Where did Cyanamid decide to carry on its activity of transporting acrylonitrile? The answer is: over 1,700 miles of railways, running from Louisiana to New Jersey, via a connection in Chicago.[205] That the spill occurred (or was first observed) at the Blue Island yard does not make Blue Island the one place where Cyanamid carried on the activity of transporting acrylonitrile.

In fact, it may have been fortuitous that the spill occurred at Blue Island because the leak was observed, stopped, and remediated. Suppose the tank car leaked out its entire contents of 20,000 gallons of acrylonitrile along a one-hundred-mile stretch of railway through pristine countryside—unobserved and unremediated? Suppose acrylonitrile poured into streams and rivers as the tank car crossed railroad bridges; suppose it seeped into groundwater at different points; suppose its vapors blew onto crops and onto a school playground during recess? None of this may have been known, except when an empty tank car arrived at the Cyanamid facility in New Jersey. The costs of that spill for human and animal health and the environment may have been enormous, even though no authorities were alerted, no one who was affected learned they were affected, and no money changed hands. Should this and other possibilities be taken into account in determining whether transporting acrylonitrile is an abnormally dangerous activity? The answer should be yes. Whether an activity is abnormally dangerous should be determined by what might reasonably go awry, not merely what did go awry.

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exceeds their risks because they will be able to pay their way. In the context of Judge Posner's example, people who want to keep tigers in their backyards may find the insurance costs prohibitive while zoos will likely be able to afford those costs.

[202] RESTATEMENT (SECOND) OF TORTS § 520(e).

[203] *Indiana Harbor*, 916 F.2d at 1180–81.

[204] *See supra* text accompanying notes 159–60. With respect to the "inappropriateness of the activity to the place where it is carried on" factor, consider the *Jurassic Park* example again. If there was a place to bring dinosaurs back to life, a deserted island one hundred miles off the coast is probably as appropriate as any. But the activity was still abnormally dangerous.

[205] Ind. Harbor Belt R.R. v. Am. Cyanamid Co., 662 F. Supp. 635, 637 (N.D. Ill. 1987).

CONCLUSION

American courts have long given the abnormally dangerous activity doctrine a crabbed interpretation. Or as courts themselves put it, they interpret the doctrine narrowly or sparingly.[206] Moreover, with a significant assist from *Indiana Harbor*, their interpretations have continually narrowed over time.[207]

In the United States, the doctrine is most associated with blasting cases—the one place where courts apply the doctrine enthusiastically. It is often said that blasting remains dangerous "even when all reasonable care is exercised,"[208] but that probably has never been taken literally. There have always been things contractors can do to reduce or even eliminate risks from blasting, including evacuating surrounding areas, erecting barriers to contain flying debris and to reduce vibrations, and calibrating the intensity of the blasts as appropriate for the area.[209] The United States Bureau of Mines has safety standards for how to do those things.[210] In the 1950s, one court wrote: "It is nevertheless rare that damage [from blasting] is caused to adjoining property, if the blaster uses reasonable care that the law requires that he should use. This is common knowledge to every schoolboy and to every adult citizen."[211]

Nevertheless, the vast majority of jurisdictions came to classify blasting as an abnormally dangerous activity.[212] One motivating factor was the difficulty of determining in individual cases whether harm resulted from negligence, that is, whether the contractor should have taken greater precautions and whether such precautions would have been effective.[213] Probably even more influential was a sense of fairness. Although they may not have said so expressly, courts concluded that it should not matter whether a defendant was negligent—or, more precisely, whether a plaintiff could prove that a defendant was negligent. It is fair that those who engage in

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[206] *See, e.g.*, A.O.A. v. Rennert, 350 F. Supp. 3d 818, 841 (E.D. Mo. 2018) ("Missouri courts have applied the tort of strict liability for ultrahazardous or abnormally dangerous activities 'very narrowly.'"); Caveny v. Raven Arms Co., 665 F. Supp. 530, 532 (S.D. Ohio 1987) (stating that courts give the doctrine a "narrow" interpretation); Knight v. Weise, No. CV095012638, 2010 WL 5188779, at *3 (Conn. Super. Ct. Dec. 3, 2010) (stating that Connecticut appellate courts interpret the doctrine "sparingly"); Warner v. Norfolk & W. Ry. Co., 758 F. Supp. 370, 373 (W.D. Va. 1991) (stating that the Virginia Supreme Court interprets the doctrine "sparingly").

[207] Mary Elliott Rollé, Note, *Unraveling Accountability: Contesting Legal and Procedural Barriers in International Toxic Torts Cases*, 15 GEO. INT'L ENV'T L. REV. 135, 147 (2003).

[208] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 20 cmt. e (AM. L. INST. 2010).

[209] Dyer v. Me. Drilling & Blasting, Inc., 984 A.2d 210, 213 (Me. 2009).

[210] *Id.* at 213.

[211] Cratty v. Samuel Aceto & Co., 116 A.2d 623, 627 (Me. 1955).

[212] *See Dyer*, 984 A.2d at 215–17 (noting that Maine would become the forty-second state to classify blasting as an abnormally dangerous activity).

[213] For example, the majority and dissenting opinions in *Dyer* debated exactly this point. *Compare id.* at 218, *with id.* at 223 (Alexander, J., concurring in part and dissenting in part).

blasting either ensure that no one is harmed or insure against whatever harm results. As a comment in the Third Restatement puts it, "It is . . . the plaintiff's status as a wholly innocent and uninvolved third party, and the defendant's choice to engage for its own advantage in an activity that it knows to be inevitably risky, that makes blasting a paradigm case for strict liability."[214]

Blasting may be the paradigm abnormally dangerous activity, but it is not the only abnormally dangerous activity. Courts should not restrict the doctrine to blasting, tyrannosaurs, and velociraptors. Yet, they are not far from that position. Consider this: If strict liability applies when someone is struck by a rock flying out of a blast site, why should it not also apply when someone in a public area is hit by a stray bullet from a gun range? And yet, courts have drawn a line between the two. In one well-known case, a bullet struck someone traveling in a truck on a public road.[215] In another case, a bullet struck someone at a public fairground.[216] In both instances, the bullets came from firing ranges. In the first case, the court wrote: "The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability even though the activity is carried on with all reasonable care."[217] It answered that question in the negative because it said, "[t]he doctrine of strict or absolute liability is ordinarily reserved for abnormally dangerous activities for which no degree of care can truly provide safety."[218] In the second case, the court acknowledged that firing ranges present a high degree of risk and a likelihood that resulting harm will be great, but—citing the first case—held that "the risks of harm to persons or property, even though great, can be virtually eliminated by the exercise of reasonable or even 'utmost' care under the circumstances."[219]

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[214] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 20 cmt. e (AM. L. INST. 2010).

[215] Miller v. Civ. Constructors, Inc., 651 N.E.2d 239, 241 (Ill. App. Ct. 1995). The opinion appears in PROSSER CASEBOOK, *supra* note 3, at 797, along with *Indiana Harbor*. Curiously, the *Miller* opinion cites *Indiana Harbor*, but one of the district court's opinions rather than the Seventh Circuit opinion. In *Miller*, the firing range was a quarry that the local police department used as a firing range. 651 N.E.2d at 241, 245. The bullet that struck the plaintiff ricocheted off a rock. As the accident itself demonstrates, quarries are unsuitable for use as a firing range, yet the court expressly assumed the location was appropriate for that purpose. *Id.* at 245. Will strict liability put responsible firing ranges out of business? I doubt it. Surely, they are insured, and their insurance companies and trade associations will advise them about reducing risks to an affordable level. Strict liability may, however, discourage landowners from allowing gravel pits and other unsuitable sites to be used as firing ranges.

[216] Rokicki v. Putnam Fish & Game Club, Inc., No. WWMCV116003596S, 2012 WL 2334786, at *5 (Conn. Super. Ct. May 21, 2012). The court wrote: "Firearms are deadly weapons. They are dangerous and harmful. The harm posed, however, comes from the misuse of firearms rather than from their inherent nature alone." *Id.* at *5 (citation omitted). I have already commented on this kind of reasoning. *See supra* note 182 and accompanying text.

[217] *Miller*, N.E.2d 239 at 244.

[218] *Id.* at 245.

[219] *Rokicki*, 2012 WL 2334786, at *4.

As we have already seen, probably every activity can be conducted safely if everyone exercises reasonable care at all times. Of course, when an activity is abnormally dangerous, reasonable care means a "high degree" of care or "utmost" care. If courts can reject the abnormally dangerous doctrine whenever they find that an activity can be safe if everyone exercises a high degree of care at all times, they will be able to reject the doctrine in every case.

When someone on a public road or fairgrounds is struck by a stray bullet from a nearby firing range, courts should not be dealing with metaphysical questions about whether such accidents can be avoided if everyone exercises utmost care at all times. Nor should courts throw the victim out of court for a failure to prove what the firing range should have done differently. The role of courts should be to incentivize firing ranges to ensure that people outside their range are not shot. Strict liability does that best. Once a court has determined that an activity presents a very high degree of risk, courts should hold that the abnormally dangerous doctrine applies.[220] In short, the linchpin of the abnormally dangerous doctrine should be the degree of risk the activity presents, and nothing more.

Judges err when they try to determine whether it is possible to carry on an activity more safely or how that should be done. The role of tort law is to provide an incentive for those who carry on the activity to figure that out. If preventing harm to others is not feasible, the costs of those harms should be paid by those who benefit directly from the activity.

The chasm between its reputation and its actual quality is so enormous that *Indiana Harbor* deserves to be named the worst torts decision in American history. Judge Posner's opinion can serve a useful purpose, however, because recognizing its flaws can lead to reconsidering the abnormally dangerous doctrine—a reconsideration that is well overdue.

[220] Oregon's Supreme Court made this determination in McLane v. Nw. Nat. Gas Co., 467 P.2d 635, 637 (Or. 1970).