Caveat Emptor - Where Have You Gone?

Albert G. Besser

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/hplj

Part of the Property Law and Real Estate Commons

Recommended Citation

Available at: https://scholarlycommons.law.hofstra.edu/hplj/vol4/iss2/5

This Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Property Law Journal by an authorized editor of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
CAVEAT EMPTOR - WHERE HAVE YOU GONE?

Albert G. Besser*

I. INTRODUCTION

Caveat emptor no longer governs real estate sales in New Jersey. It has been replaced, in part, by the law of strict liability. In a case of first and singular impression, the New Jersey Supreme Court has extended the doctrine of strict liability to permit a current property owner to recover damages against a remote predecessor in title flowing from the latter's abnormally dangerous activities. A seller cannot escape the consequences of his past activities, not even by contract, when those activities have, with hindsight, been determined to be ultrahazardous. This article will show how this result stands in direct contradiction with the New Jersey Supreme Court’s stated purposes for its decision in T & E.

I. THE HISTORY OF THE T & E SITE

At its plant in Orange, New Jersey, the United States Radium Corporation (hereinafter “U.S. Radium”) crushed carnotite ore from 1915 until 1926, which it imported daily by railroad from Colorado and Utah. U.S. Radium then subjected the ore to a fractional

---

* Founding partner, Hannoch Weisman. B.A. 1946. Yale University (with highest distinction, Phi Beta Kappa); LL.B. 1949, Yale University School of Law. The author has litigated numerous cases in the criminal and civil areas before the New Jersey Supreme Court and the United States Supreme Court. Mr. Besser is also the author of numerous published articles. Mr. Besser was counsel for the losing party in T & E Indus., Inc. v. Safety Light Corp. This article should be read in that context.

1. “Let the buyer beware. The maxim summarizes the rule that a purchaser must examine, judge, and test for himself. This maxim is more applicable to judicial sales, auctions and the like, than to sales of consumer goods where strict liability, warranty, and other consumer protection laws protect the consumer-buyer.” Black’s Law Dictionary 222 (6th ed. 1990).


crystallization process which, ultimately, yielded radium 226. Some
the company sold commercially; the rest it retained for its own use in
the manufacture and application of luminous paints with which an
assembly line of female employees painted clocks, watches and other
instruments. Like artists, the employees sharpened their brushes by
licking them. Many of them, as well as workers engaged in similar
activities at other plants, contracted what later was diagnosed as leu-
kemia and other forms of cancer. The industry first blamed poor per-
sonal hygiene, smoking (a remarkably perceptive "excuse," but off
the mark in these cases), bad diets, and a host of other causes. How-
ever, Dr. Harrison S. Martland, the Chief Medical Examiner in Es-
sex County in 1930, ineluctably linked employee Irene La Porte’s
death to "occupational radium poisoning (osteogenic-sarcoma of
[the] pelvis) in the watch-dial industry” caused by her ingestion of
radium with each lick of the brush. Nonetheless, U.S. Radium was
absolved of negligence because “no one had considered the effect of
the radium substances on the workers. . . .” Before Martland’s
study, “there was neither knowledge of an occupational hazard in
the dial-painting industry nor, in the light of the knowledge concern-
ing radium, reason for the defendant to believe or to have known of
the hazard.”

U.S. Radium ceased its operations and vacated the premises in
1926 because of the discovery of a much richer ore in the Belgian
Congo. It leased portions of the plant to commercial tenants in the
mid-1930’s and finally sold the property in 1943. Four transfers of
title later, T & E purchased the site in 1973, after having leased it
for four years. U.S. Radium, however, continued to manufacture lu-
minoius paints in New York City, but it purchased its radium else-
where. When the plant was sold in 1943, U.S. Radium’s manage-
ment probably believed it was bidding farewell to Orange, New
Jersey; caveat emptor was, in those days, the rule. Decades later,
however, a new generation of U.S. Radium’s management would

4. T & E Indus., Inc. v. Safety Light Corp., 227 N.J. Super 228, 546 A.2d 570, modi-
 fied, 123 N.J. 371, 587 A.2d 1249 (1991)[hereinafter T & E Indus.]. This was an extraction
process which extracted about 80 percent of the radium from the carnotite ore. The by-prod-
ucts of this process were both liquid and solid waste. Id. From the thousands of tons of ore
imported daily, U.S Radium produced 25.6 grams of pure radium during the entire period of
the plant's operation.
7. Id. at 271.
8. Id. at 275.
learn that the plant’s sale was just the beginning.

The crystallization process had been only eighty percent efficient. Twenty percent of the radium that was contained naturally within the carnotite ore remained in the unusable by-products. The liquid by-products were flushed down the Orange sewer system. The solid by-products, commonly referred to as “tailings,” were, however, deposited on vacant portions of the site. They contained an infinitesimally small amount of radium, estimated by T & E’s expert at no more than a grain of sugar in one thousand tons of fill.

“Uranium 238, first in the radioactive decay chain, contains an unstable nuclide which results in a series of decays creating other elements, as the nucleus disintegrates by spontaneous emission of charged particles.” In 1600 years, one half of a given mass of radium will disintegrate into radon, a colorless and odorless gas, one half of which degenerates into bismuth, lead and polonium, in 3.8 days. Radium 226, which the dial painters ingested when they licked their coated brushes, emits gamma rays which penetrate solid substances but lose their potency very quickly over distance; hence, the leukemia and bone marrow diseases from which the dial painters died. Radon and its progeny emit ionized alpha particles which attach to walls, ceilings and dust particles and, in a confined atmosphere, are easily aspirated. Seventy percent of what is inhaled is exhaled, but the remaining thirty percent of the ionized alpha particles, at least in excessive amounts, can cause lung cancer.

The tenant who purchased the Orange, New Jersey plant from U.S. Radium was aware that the fill around the plant was radioactive. Indeed, he sent it out for analysis, not because of health fears, but, hopefully, to exploit it commercially. The minute amount of radium reported still in the soil discouraged the tenant from pursuing the matter. Needless to say, the lab report did not warn him of any latent health dangers. Then, in 1943, the plant’s new owner, in

10.  Id.
11.  Id.
13.  Id.
15.  How much and to what extent spawns the “threshold” versus “non-threshold” debate, discussed infra note 101.
18.  Id.
19.  Id.
his ignorance about the health risks inherent in the soil, extended the plant over the discarded tailings. Although he, and subsequent purchasers, did not realize it, the radon from the radium buried beneath this new section of the plant became concentrated in the plant’s boiler room, instead of dissipating harmlessly into the atmosphere. After three additional transfers of title, T & E leased the site in 1969 and purchased it in 1973. In March of 1979, the New Jersey Department of Environmental Protection (hereinafter NJDEP), visited the plant.

The NJDEP found that radon levels in the plant, especially in the assembly and oven rooms which had been built over the discarded tailings, substantially exceeded state regulatory levels for commercial areas. The primary concerns were one or two gamma radiation “hot spots” in the boiler room where gamma radiation from the radium itself far exceeded permissible limits prescribed by state regulations. The discarded tailings outside the plant posed no problem for the workers: as the radon therefrom dissipated into the air and the gamma emissions from the radium lost their potency a few feet from the ground, and the radon dissipated harmlessly into the atmosphere. Elsewhere, radon levels were below applicable standards, except for two places where the levels were marginally excessive. At one spot in the oven room, the radon measurements exceeded permissible levels for a forty-hour week exposure, but no T & E worker ever was in the oven room close to that length of time.

The NJDEP monitored the radioactivity in the plant for six months and in November of 1979, ordered T & E to take interim remedial action. In response to the order from the NJDEP, T & E restricted employee access to the oven room and monitored the use of that room. T & E also consulted with a health physicist and com-

20. T & E Indus., 227 N.J. Super at 228, 546 A.2d at 517.
21. Id.
22. The NJDEP was motivated not by complaints or public concern about the Orange plant, but, rather, by nationally circulated “alerts” distributed by the federal government concerning the potential dangers involved in discarded radioactive tailings. These alerts followed the passage of the federal Uranium Mill Tailings Radiation Control Act (“UMTRAP”). The NJDEP searched past history to determine if such discarded piles existed in New Jersey. Finding that U.S. Radium had once operated in Orange, the NJDEP descended on T & E.
24. T & E’s expert agreed that several hundred trips a day across the parking lot in a bent position were required to expose a person to excessive gamma radiation. The greatest danger, he speculated, might come from tomatoes if an enterprising gardener cultivated them in the radioactive soil. Id.
25. Id. at 381, 587 A.2d at 1253.
plied with his recommendations. The NJDEP warned T & E that if the site was not fully decontaminated, T & E might have to consider abandoning the site.

T & E implemented many of the NJDEP's recommended remedial measures, restricted access to the boiler room and, one year later, advised the NJDEP that these measures "ha[d] significantly reduced the [radiation] in all areas of the factory." The NJDEP acknowledged that the levels of radioactivity inside the plant had been greatly reduced, reporting that "the radon concentrations are now at levels approximating the residential standard" and that the gamma radiation in the oven room had been controlled by limiting access to that area.

The NJDEP never returned to the site and did not press T & E to move, apparently content with the remedial measures that had been taken. No employees quit and to this day there has been no reported case of cancer due to exposure at the plant. T & E enjoyed its best years ever in the two years immediately preceding the move from the site. T & E advised its customers that it was moving to "new and larger quarters" and that they were greatly expanded in both size and quality to better serve them. Nonetheless, the New Jersey Supreme Court found that T & E was "compelled to move" because of adverse publicity, concerns about workman's compensation claims and customer reaction.

Both buyer and seller were innocent in T & E. T & E apparently did not know that the discarded tailings were there, but a proper environmental investigation would have revealed their pres-
Extending the *Rylands* doctrine of strict liability for the consequences of ultrahazardous activity, the New Jersey Supreme Court held U.S. Radium absolutely liable for the economic consequences flowing from the polluted soil, thus shifting the loss from the "as is" purchaser to the party originally, although innocently, responsible for the toxic pollution.

III. THE TRADITIONAL ROLE OF STRICT LIABILITY

[T]he rule of *caveat emptor* [has been abolished] as to the sale of new homes by a builder-vendor and, in accordance with a national trend [and a] theory of implied warranties... [But we have] no doubt that where, as here, corporations of roughly equal resources contract for the sale of an industrial property, and especially where the dispute [is] over a condition on the land rather than a structure, *caveat emptor* remains the rule.

Under the ancient doctrine of *caveat emptor*, the original rule was that, in the absence of an express agreement, the vendor of land was not liable to his vendee or *a fortiori* to any other person, for the condition of the land existing at the time of transfer. As to sales of land this rule has retained much of its original force, and the implied warranties which have grown up around the sale of chattels never have developed. This is perhaps because great importance always has been attached to the deed of conveyance, which is taken to represent the full agreement of the parties, and to exclude all other terms and liabilities. The vendee is required to make his own inspection of the premises, and the vendor is not responsible to him for their defective condition, existing at the time of transfer.31

Under *T & E*, this is no longer the rule in New Jersey. The *T & E* court, invoking the doctrine of strict liability for damages resulting from abnormally dangerous activities, held U.S. Radium strictly liable for all damages suffered by *T & E* as a result of the 1979 discovery of radioactive fill on its premises. The *T & E* court reached this decision even though the danger of such discarded waste was not perceived until the late 1960's, long after U.S. Radium had sold the property and, indeed, several transfers of title af-

---

30. U.S. Radium and its successors were ignorant of the dangers associated with the abandoned processing by-products although clearly aware of the perils associated with the handling of or exposure to radium itself, due largely to the lady dial-painters' experiences. See, *supra* notes 5-8 and accompanying text.

Since *Rylands*, common law jurisdictions have imposed liability for abnormally dangerous activities which cause damages to another person or his property, regardless of the fault of the person engaging in the activity. Until *T & E*, however, this rule had never been applied for the benefit of a remote successor in title to the premises where that activity has been conducted. Uniformly, it has operated solely in favor of off-site neighbors, usually located on adjoining or distant properties, who, through no fault of their own, have been damaged by such intrinsically dangerous activities.

Restriction of this rule to innocent off-site neighbors is consistent with the rule's original rationale — to protect a freeholder's "right to possession and quiet enjoyment of his land," free from the unlawful interference or trespass of others. As *Rylands* stressed, a landowner has a unique responsibility to his neighbors. This was the issue which led to New Jersey's formal adoption of the *Rylands - Restatement* strict liability rule.

In *Ventron*, a long-departed operator of a mercury processing plant in the Meadowlands had dumped 268 tons of toxic mercury effluent into Berry Creek, a tidal estuary of the Hackensack River that flows through the Meadowlands. Consistent with its traditional application, the court applied the *Rylands - Restatement* rule to award damages to an adjacent property owner whose lands had been affected by the toxic mercury and who had been ordered by the NJDEP to clean up the mess against the original perpetrator. The court held that:

> [w]e believe that it is time to recognize expressly that the law of liability has evolved so that a landowner is strictly liable to others for harm caused by toxic wastes that are stored on his property and flow onto the property of others.

---

32. See *T & E*, 123 N.J. at 377-80, 587 A.2d at 1252-53 (discussing the various studies conducted by the scientific community involving the epidemiological risks associated with radon).
33. See infra notes 47-52 and accompanying text.
35. *Id.* Certainly this was the concern in that seminal case, where water from a reservoir broke through an abandoned mine shaft and escaped onto the adjoining land.
37. *Id.*
38. *Id.*
39. *Id.* 94 N.J. at 488, 468 A.2d at 157 (emphasis added). The vendor was liable to the vendee, not on strict liability, abnormally dangerous activity grounds, but because of the ven-
While expressly invoking the *Rylands - Restatement* rule of strict liability for an abnormally dangerous activity, the court in *Ventron* stressed that it was, in reality, giving another name to relief traditionally employed to “[redress] unlawful interference with a landowner’s right to the possession and quiet enjoyment of his land” where the more rigid remedies of trespass and nuisance did not fully compensate the injured party.\(^4\) Thus, the court in *Ventron* noted that such strict liability runs from a “land owner . . . to others for harm caused by toxic wastes that . . . flow onto the property of others.”\(^4\) The *Ventron* court cited several earlier New Jersey cases\(^4\) for support where, on varying rationale, similar relief had been granted to an aggrieved neighbor. The neighbors in these cases had all been damaged by the acts of an adjacent property owner without regard to the latter’s fault.\(^4\)

As between an innocent neighbor and the one causing the harm, albeit without negligence, placing liability on the actor is consistent with the original *Rylands* thesis. An adjacent property owner has done nothing, even unwittingly, to contribute to his damage and, historically, has had the absolute right to be protected against unsolicited invasions from abroad.\(^4\) After all:

> [m]atters happening within one’s own bounds are one thing and matters happening outside those bounds are an entirely different thing. In the latter case, the personal relation is absent and the occupier’s dominion over and right to use his land have to be reconciled with the rights of others to use or be present on adjoining lands not subject to his dominion.\(^4\)

A successor in title, however, is not a mere bystander injured by

---

\(^4\) Id., at 503-04, 468 A.2d at 166.
\(^4\) *Ventron*, 94 N.J. at 488-89, 468 A.2d at 157.
\(^4\) *Id.* (emphasis added). The court held that “[p]ollution from toxic waste that seeps onto the land of others and into streams necessarily harms the environment.” *Id.*
\(^4\) The court noted that, twenty-one years earlier, in *Berg v. Reaction Motors Div., Thiokol Chemical Corp.*, 37 N.J. 396 (1962), without reference to the *Rylands* rule, the New Jersey Supreme Court had held that “an ultrahazardous activity which introduces an unusual danger into the community . . . should pay its own way in the event it actually causes damage to others,” resulting in a judgment for adjacent residential property owners. *Id.* The adjacent owners had been injured by the defendant’s testing of a rocket engine. This rule of “fairness” was applicable to “neighboring properties” and “wholly innocent neighbors.” *Id.* at 410. All of the earlier cases which the court in *Berg* cited to support its holding involved injury to *off-site* plaintiffs.
\(^4\) *Id.*
\(^4\) *See Rylands*, L.R. 1 Ex. 265 (1866).
circumstances which he did not set in motion. First, in T & E’s case, the successor in title purchased the very site about which he now complains, a coincidental but, nonetheless, voluntary action, distinguishing it from the off-site neighbor who was not involved with the property owner on whose land the abnormally dangerous activity was taking place. The purchaser can and, in this environmentally conscious era, should inspect the property or subject it to an environmental investigation. The purchaser can scrutinize the property’s title search with an eye to clues concerning past activities which bear further investigation. Even the Restatement’s codification of the rule suggests that it runs only in favor of “another” who is harmed by the abnormally dangerous activity. Comment d to the Restatement explains that strict liability “arises out of the . . . risk that it creates, of harm to those in the vicinity.” This view is founded on the policy of the law that imposes upon anyone who, for his own purposes, creates an abnormal risk of harm to his neighbors the responsibility of relieving against that harm when it does in fact occur.

In other jurisdictions, the cause of action has been uniformly confined to off-site neighbors, starting with England, where the Rylands doctrine first arose. Thus, in one English case, the Chief Judge wrote that strict liability “is conditioned by . . . ‘escape’ from the land of something likely to do mischief if it escapes . . . .” The several concurring opinions in Read all stressed that “escape” to the lands of another was the underpinning for the strict liability rule. Commentators, who before T & E had uniformly opined that the rule was restricted to “escaping” activities damaging a neighbor, will have to change their thesis or, at least, acknowledge T & E with a footnote.

T & E purchased the U.S. Radium site in 1974, after leasing it for four years. Through its title search, T & E knew that U.S. Radium had once occupied the property, a fact that had prompted

46. Restatement (Second) of Torts, comment d.
47. Restatement (Second) of Torts § 519 (1977) (emphasis added).
51. T & E, 123 N.J. at 379, 587 A.2d at 1253.
the NJDEP to investigate the site in 1979.52 As the New Jersey Supreme Court acknowledged, there is no way a seller can contractually immunize itself against claims from subsequent buyers when an activity is perceived with hindsight to be abnormally dangerous.53 However, "[a purchaser] has a right to protect himself by contract . . . while a person who owns or occupies adjoining land does not enjoy this right."54 In short, the buyer is afforded ample means by which to protect himself such as by investigation, indemnification from the seller or, in the last analysis, by declining to purchase the premises. T & E availed itself of none of these opportunities, choosing instead to purchase the property "as is."

The New Jersey Supreme Court rejected these distinctions for policy reasons calculated to "internalize" the cost of an ultrahazardous business.55 The court rationalized its decision by citing recent examples where purchasers were entitled to recover from sellers who had failed to disclose a condition involving unreasonable risk to others56 and by citing product liability cases.57 However, these cases involved no startling deviation from past precedent; they simply allowed the ultimate consumer to recover damages for breach of implied warranty or merchantability despite lack of privity with the manufacturer.58 The New Jersey Supreme Court has held, for exam-

52. Id. Articles printed in 1932 in the American Journal of Cancer and in 1941 in a handbook published by the U.S. Department of Commerce, reporting that inhaling radon may cause carcinoma of the lungs, created a national warning of the dangers associated with discarded radioactive fill. Id. at 378, 587 A.2d at 1253. Accordingly, the NJDEP tested T & E's plant for radon and gamma radiation and concluded that the plant posed a "significant potential threat to human health because of [its] known . . . toxicity." Id. at 380, 587 A.2d at 1254.

53. T & E, 123 N.J. at 401, 587 A.2d at 1264.


55. Ultrahazardous businesses can internalize "the unusual risk by passing it on to the public" as a valid business expense. T & E, 123 N.J. at 387, 587 A.2d at 1257 (quoting Prosser & Keeton, supra note 50 at 537).


ple, that "we would not countenance a doctrine of 'buyer beware’ in the context of fraudulent concealment of infestation of property." In *Weintraub*, the seller of a residential home knew that the property was infested by cockroaches, but remained silent. U.S. Radium had no idea that there was a threat inherent in the discarded tailings; no one did in 1915-1925.

In Pennsylvania, the Third Circuit has held that a property owner could not recover cleanup costs and other damages from toxic waste contamination for which its predecessors in title had been responsible. On appeal, the plaintiff urged that the rationale should be extended to indemnify it against damages due to the former landowner's abnormally dangerous activities. Applying Pennsylvania law, the Third Circuit held that:

> [t]he parties have cited no case from Pennsylvania or any other jurisdiction, and we have found none, that permits a purchaser of real property to recover from the seller on a private nuisance theory for conditions existing on the very land transferred, and thereby to circumvent limitations on vendor liability inherent in the rule of *caveat emptor*.

Private nuisance liability for invading another's right to use and enjoy their own land is a "means of efficiently resolving conflicts between neighboring, contemporaneous land uses." Accordingly, the rule under *caveat emptor* was that the vendor of land was not liable to the vendee or to any other person, absent an express agreement, for the condition of the land to be transferred at the time of the transfer.

The New Jersey Supreme Court attempted to distinguish *Philadelphia Electric* on the grounds that Pennsylvania, unlike New Jersey, has more rigorously "premised the erosion of the doctrine of *caveat emptor* in the sale of realty solely on the inequality of bar-

---

61. *Id.* at 319.
63. *Id.* at 316.
64. *Id.* at 313 (emphasis in original).
65. *Id.* at 314 (emphasis in original).
66. *Id.* at 312 (quoting Reporter's Note to *RESTATEMENT (SECOND) OF TORTS* § 352 (1965)).
gaining power between the buyer and builder-seller." The court noted, however, that New Jersey stresses the desideratum of placing liability on the party responsible for the condition, thus encouraging more careful and thorough practices. For the policy reasons previously noted, however, it appears as though the T & E court simply opted to reject the result reached in Philadelphia Electric. Several other jurisdictions have followed the Third Circuit’s decision in Philadelphia Electric and Florida has expressly rejected the T & E result.

For example, in Massachusetts, Mobil Oil had released oil and other hazardous substances onto the premises of a gas station which it had operated from 1926 to 1987. Applying Massachusetts law, the court dismissed the purchaser’s nuisance claim against Mobil because:

[the law of private nuisance has historically involved conflicts between neighboring, contemporaneous land uses . . . . [A] private nuisance claim is actionable when a property owner creates, permits, or maintains a condition or activity on his property that causes a substantial and unreasonable interference with the use and enjoyment of the property of another.]

In Florida, Futura Realty expressly rejected the T & E holding. In that case, the current owners sued their vendor as well as a former owner for damage on their property due to the prior use of certain ultrahazardous chemicals. Rylands had long been followed by the Florida courts, but the court in Futura Realty declined to expand the Rylands holding to include “remote owners and the users of the land and [declined] to extend the cause of action from a claim available to neighbors to a claim available to subsequent owners of

67. T & E, 123 N.J. at 389, 587 A.2d at 1258.
68. Id.
70. See, e.g., Futura Realty v. Lone Star Bldg. Centers, Inc., 578 So. 2d 363, 365 (Fla. Dist. Ct. App. 1991) (a previous owner is not strictly liable to a subsequent purchaser of property because the latter could take measures to protect himself unlike an injured adjoining landowner).
73. Id. at 364.
the property.” That court held that:

[The commercial property vendor owes no duty for damage to the land to its vendee because the vendee can protect itself in a number of ways, including careful inspection and price negotiation. This is the vital legal and practical distinction between the duty owed a neighbor and the duty owed a successor in title which \textit{T & E Industries} failed to identify.\textsuperscript{76}

IV. \textit{T & E Conflicts With Federal and State Environmental Legislation}

\textit{T & E} rejected the concern that “holding a predecessor in title strictly liable for its abnormally-dangerous activities would destroy the real estate market,”\textsuperscript{77} because “a buyer can assume the risk of harm from . . . [such] . . . activity.”\textsuperscript{78} Other courts disagree. In Texas, the federal district court declared, in a slightly different context, that “in real estate transactions there would be chaos if vendors, after conveying ownership and control of the premises, could not delineate either the termination or limitation of their liability.”\textsuperscript{79} Moreover, in \textit{Philadelphia Electric}, the Third Circuit cautioned that:

[w]here, as here, the rule of \textit{caveat emptor} applies, allowing a vendee a cause of action for private nuisance for conditions existing on the land transferred — where there has been \textit{no fraudulent concealment} — would in effect negate the market’s allocations of resources and risks, and subject vendors who may have originally sold their land at appropriately discounted prices to unbargained-for liability to remote vendees.\textsuperscript{80}

Such determinations are better left to legislatures, particularly in areas such as “environmental pollution, where Congress and the state legislatures are actively seeking to achieve a socially acceptable

\textsuperscript{75.} See \textit{Futura Realty}, 578 So. 2d at 363.
\textsuperscript{76.} Id.
\textsuperscript{77.} \textit{T & E}, 123 N.J. at 390, 587 A.2d at 1258 (quoting the defendant’s argument).
\textsuperscript{78.} \textit{T & E}, 123 N.J. at 390, 587 A.2d at 1258. However, the assumption of risk must be very specific. As the New Jersey Supreme Court noted, an “as is” contract does not amount to a waiver of claims or indemnification of the seller against \textit{unknown} hazards. \textit{T & E}, 123 N.J. at 390, 587 A.2d at 1259. Moreover, if the risks are unknown, as was the case when U.S. Radium sold the plant, the parties, realistically, cannot negotiate the issue of who must bear or pay for those risks.
\textsuperscript{80.} \textit{Philadelphia Elec. Co.}, 762 F.2d at 313 (emphasis added).
definition of rights and liabilities." For example, the federal Comprehensive Environmental Responsibility Compensation and Liability Act has imposed strict liability on all parties responsible for the creation, depositing or disposition of hazardous substances for necessary remedial and removal action. CERCLA also provides that a private party may commence a cost recovery action against those responsible for necessary costs of response consistent with the national contingency plan. Companion state legislation provides similar relief.

Significantly, in Wellesley Hills Realty Trust, the federal district court in Massachusetts struck down a successor owner's common law nuisance claim against the original owner for hazardous substances that were later found on the land. In doing so, the court specifically recognized the successor owner's statutory claims against the same defendant under the Massachusetts Oil and Hazardous Material Release Prevention and Response Act, the Massachusetts equivalent of CERCLA. Furthermore, the Third Circuit has been careful to distinguish a property owner's claim against a vendor under CERCLA for clean-up costs from its holding in Philadelphia Electric. Reversing a district court's dismissal of the plaintiff's CERCLA claim on caveat emptor grounds, the Third Circuit distinguished Philadelphia Electric based on the vendor's common law claims which caveat emptor does not apply against a statutory remedy for strict liability.

Legislative relief to T & E-type plaintiffs, while generous, is still far more limited than the open-ended damages which T & E implicitly invites, assessed solely against the one responsible, albeit innocently, for the pollution. First, all responsible parties must share

84. Id. at § 9607(a)(4)(B).
85. See, e.g., New Jersey Environmental Cleanup Responsibility Act, N.J. STAT. ANN. §§ 13:1K-6 to 13:1K-14 (West 1991) [hereinafter "ECRA"]. Two months before the T & E case was decided, the same court held that, under ECRA, a purchaser could sue his vendor for damages stemming from the latter's failure to comply with its statutory cleanup responsibilities before transfer. Dixon Venture v. Joseph Dixon Crucible Co., 122 N.J. 228, 584 A.2d 797 (1991). Since this is a statutory cause of action and not a contractual one, it would, presumably, operate against all prior owners, as is the case under CERCLA.
86. Wellesley Hills Realty Trust, 747 F. Supp. at 93.
89. Id. at 89-90.
fairly in such costs under CERCLA. T & E was one such responsible party as an owner of a facility on which hazardous substances were found. Any allocation to a party such as T & E, who purchased the property without actual knowledge of the hazardous substances and did not contribute thereto, would consider these facts. On the other hand, the fact that a purchase was made "as is," such as T & E's, without conducting an environmental investigation would also be considered and might militate against the purchaser in any CERCLA apportionment of costs or any attempt to invoke the "innocent purchaser" defense under CERCLA and would, thus, allocate costs in a more equitable way.

Moreover, damages under CERCLA and mirror-like state legislation are more restrictive than damages that appear to be available under the T & E extension of the Rylands strict liability rule. The New Jersey Supreme Court, under T & E, would recognize, among other items, business interruption expenses, moving costs associated with any relocation without requiring the plaintiff to prove the need to move, and other unspecified "general and specific damages flowing from defendant's liability." None of these damages would have been allowed in the companion action under CERCLA, which T & E belatedly brought against the same defendants in its state court litigation which resulted in the dismissal of its case. Under CERCLA, only response costs consistent with the National Contingency Plan, intended for short-term and remedial expenses or those associated with long-term or permanent remedies, are recoverable. The federal district court rejected T & E's evacuation and relocation expenses, which totaled over $1,000,000, because, under CERCLA, the President had not determined that such relocation was more cost effective and environmentally preferable or were not categorized by

90. See 42 U.S.C.A. § 9613(f)(1). "In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as . . . are appropriate." Id. Without statutory authority the court in Dixon Venture achieved the same result by tailoring the damages remedy to the circumstances.


93. T & E, 123 N.J. at 396, 587 A.2d at 1261-62. The case was actually remanded for the retrial of these issues. T & E, 123 N.J. at 400, 587 A.2d at 1264.

94. Id.

the President as reimbursable response costs. Litigation costs and attorneys fees similarly were summarily dismissed.

V. THE T & E OBJECTIVES OF INDUCING THE ENTREPRENEUR TO ADOPT ALL POSSIBLE SAFEGUARDS AND INSURE AGAINST RISK CANNOT BE ACHIEVED IF THAT RISK IS UNKNOWN

The rule of absolute liability is a social and economic judgment such that the one conducting the abnormally dangerous activity should bear the economic consequences therefrom. As between the responsible party and an entirely innocent neighbor, "considerations of reasonableness, fairness, and morality rather than . . . formulary labels" dictate this result. As the Restatement notes, "let the enterprise . . . pay its way" by building into the charges for its goods and services the cost of insuring against such consequences.

This social and economic rationale for the strict liability rule does not, however, apply with equal logic when the actor is aware of the potential risk and, therefore, cannot insure against such consequences. Unless the entrepreneur is aware of, or should have been aware of, the potentially ultrahazardous character of the challenged activity, he is in no position to avoid the future consequences of that activity. The entrepreneur will never know to adopt more careful practices or make the cost-benefit analysis and risk-spreading pricing adjustments the New Jersey Supreme Court suggested were the calculated objectives of the strict liability rule. The policy predicate, according to T & E, for imposing strict liability on those engaged in ultrahazardous activities necessarily requires actual or, at least, constructive knowledge of the potential risk of harm at the time the

96. Id. at 707. See 42 U.S.C.A. § 9601(24) (statutory requirement under CERCLA). Compare this conclusion with the New Jersey Supreme Court's finding that T & E's move was compelled by the radioactive pollution. T & E, 123 N.J. at 371, 587 A.2d at 1249.

97. Id. at 707-08. On the other hand, the federal court held out some hope that T & E might recover reimbursement for the time spent by its president on the radiation situation. T & E Indus., 680 F. Supp. at 706-07. The New Jersey Supreme Court rejected this claim, as not representing a "corporate loss." T & E's president was paid a salary for handling all the "numerous problems that face a company each day." This included not only the routine but the extraordinary problems, as well. T & E, 123 N.J. at 399-400, 587 A.2d at 1263-64.

98. An abnormally dangerous activity involves (a) a high degree of risk of harm to others, (b) the likelihood that such harm will be great but (c) cannot be eliminated by reasonable care, (d) is unusual and (e) inappropriate where conducted and, finally, (f) its value to the community is perceived as being far outweighed by the inherent risks that the one responsible for such activity should bear the loss. RESTATEMENT (SECOND) OF TORTS § 520 (1977).


100. RESTATEMENT (SECOND) OF TORTS § 520 comment d (1977); see Berg, 137 N.J. at 410, 181 A.2d at 487; PROSSER & KEETON supra note 50 at 555.
entrepreneur is engaged in such activity. Subsequently acquired knowledge of the risk comes too late to achieve these objectives.\textsuperscript{101}

"It is clear . . . that unless a statute requires it, strict liability will never be found unless the defendant \textit{is aware of the abnormally dangerous activity, and has voluntarily engaged in or permitted it.}\textsuperscript{102} Most of the commentaries discussed by \textit{T \& E} with respect to this issue have recognized, at least impliedly, that some inquiry into the actor's state of mind is relevant.\textsuperscript{103} The \textit{Restatement}\textsuperscript{104} clearly suggests that knowledge or constructive knowledge of the potential risk, at the time, is necessary before the actor can be held strictly accountable for damage flowing from his ultrahazardous activities.\textsuperscript{105} Thus, section 519(2) limits liability "to the kind of harm, the possibility of which makes the activity abnormally dangerous."\textsuperscript{106} The \textit{Restatement} further explicated that the general principal of absolute liability "applies only to the harm that is within the scope of the

\textsuperscript{101} Earlier the New Jersey Supreme Court had noted the "spirited debate between the experts over the health risks from radiation exposure." This no-threshold opinion statistically extrapolates valid data from occurrences of extremely high radiation, such as the gamma fallout from the two atomic bombs dropped on Japan and the abnormally high radon concentrations in the close quarters of uranium mines in the United States, Canada and Europe. The same rate of increased cancers observed in these scientifically valid studies is applied to very low doses of radiation for which there are no studies. In its simplest form (and there are many variations), the linear no-threshold theory assumes that if 100 extra units of radiation cause 100 extra cases of cancer for each 100,000 persons, then one extra unit of radiation will cause one extra case of cancer for the same group. \textit{Id.} Empirically, however, as the untested trial proofs demonstrated, there are no data to prove the no-threshold hypothesis. As a result, \textit{T \& E}'s expert could only surmise that, as the amount of radiation exposure increases, health risks also increase. He agreed that no empirical data or government agency supports this thesis.

Nonetheless, the \textit{T \& E} court accepted with no further discussion, that the discarded fill, in fact, posed a danger to health which caused \textit{T \& E} to "vacate the premises." \textit{T \& E}, 123 N.J. at 381-82, 395, 587 A.2d at 1254-55, 1261. Yet, several federal cases have rejected the type of proof offered in \textit{T \& E} to demonstrate a cognizable link between toxic pollution and a threat to health. \textit{See Anderson v. W.R. Grace}, 628 F. Supp. 119, 1231 (D. Mass. 1986)(holding, in a toxic tort case, that "recovery depends on establishing a 'reasonable probability' that the [future illness] will occur"); \textit{In re "Agent Orange" Prod. Liab. Litg.}, 597 F. Supp. 740, 782 (E.D.N.Y. 1984)(holding that while plaintiffs suffered from various debilitating diseases, they could not prove the link between them and exposure to "small quantities" of toxin). At best, the plaintiffs in the "Agent Orange" case could offer the same no-threshold theory expounded in \textit{T \& E}. The \textit{T \& E} hypothesis that low amounts of increased toxic pollution pose a risk to health has been rejected by several courts. \textit{See}, e.g., Johnston v. United States, 597 F. Supp. 374 (D. Kan. 1984).

\textsuperscript{102} \textit{Prosser \& Keeton on the Law of Torts} § 79 (5th ed. 1984)(emphasis added).

\textsuperscript{103} \textit{See T \& E}, 123 N.J. at 391-92, 587 A.2d at 1260.

\textsuperscript{104} \textit{Restatement (Second) of Torts} § 519 (1977); \textit{see also Restatement (Second) of Torts} § 520 (1977).

\textsuperscript{105} \textit{Id.}

\textsuperscript{106} \textit{Id.} at § 520 (emphasis added).
abnormal risk.”"\textsuperscript{107} As in \textit{Rylands}, the “existence of a high degree of risk of some harm” and “likelihood that the harm that results from it will be great” are relevant factors in determining whether an activity is abnormally dangerous.\textsuperscript{108} Implicit in the terms “possibility,” “likelihood” and “scope” is the concept that all must be measured as of the time of the activity. Otherwise, one cannot evaluate the “possibilities” of harm occurring.

In the Tenth Circuit, a plaintiff brought an action for the recovery of damages caused by a flood from waters allegedly stored by the defendant in the tunnels and shafts of its mining property.\textsuperscript{109} In affirming summary judgment for the defendant, the court held:

\begin{quote}
[t]he essence of the rule of liability without fault is that if a person in the conduct or maintenance of an enterprise which is lawful and proper in itself deliberately does an act \textit{under known conditions and with knowledge that an injury will in all probability result} to another and injury is sustained by the other as a direct and proximate consequence of the act, the person doing the act and causing the injury is liable in damages even though he acted without negligence. Under the doctrine, liability rests not upon negligence but upon the \textit{intentional doing} of that which the person \textit{knows or should in the exercise of reasonable care know} may in the normal course of events reasonably cause loss to another. Liability is automatically imposed . . . even though there was no negligence.\textsuperscript{110}
\end{quote}

The New Jersey Supreme Court has forged new law in a related area by imposing liability on manufacturers of defective products.\textsuperscript{111} Manufacturers can be held liable for defective products which are injected into the stream of commerce for use by the consuming public, despite the public’s lack of privity with the manufacturer and the absence of specific warranties.\textsuperscript{112} Even those cases, however, recognize that the contemporaneous state of the art is a relevant inquiry. Such evidence “may support a judgment for a defendant.”\textsuperscript{113}

\begin{enumerate}
\item[107.] \textsc{Restatement (Second) of Torts} § 519 comment e (1977)(emphasis added).
\item[108.] \textsc{Restatement (Second) of Torts} § 520(a), (b)(1977)(emphasis added).
\item[109.] Zamp\textit{os v. United States Smelting, Refining and Mining Co.}, 206 F.2d 171 (10th Cir. 1953).
\item[110.] \textit{Id.} at 176 (emphasis added).
\item[112.] \textit{Id.}
\item[113.] O’Brien \textit{v. Muskin Corp.}, 94 N.J. 169, 184, 463 A.2d 298, 305 (1983)(superseded
New Jersey Supreme Court has held that, when a tetracycline manufacturer failed to warn of a side effect, even if a product’s utility outweighs its risk, the manufacturer must “produce . . . a product that is reasonably fit, suitable, and safe” for him to escape strict liability.\textsuperscript{114} However, the product need only be as safe as it could have been, given the prevailing state-of-the-art.\textsuperscript{116} “[G]enerally, conduct should be measured by knowledge [constructive or actual] \textit{at the time} the manufacturer distributed the product.”\textsuperscript{116}

The New Jersey Supreme Court in \textit{T & E} conceded that this “state of the art” argument was “interesting,” albeit unnecessary to decide.\textsuperscript{117} \textit{T & E} rejected the defendant’s “narrow” view of the “knowledge inquiry,” which focused on the industry’s knowledge, during 1915-1926, of the “dangers inherent in the discarded tailings, not simply of those associated with the processing and handling of radium.”\textsuperscript{118} In the court’s view, U.S. Radium should have known of the risks inherent in the tailings because of the ultrahazardous nature of radium and the experiences of the dial painters and other similar noted occurrences.\textsuperscript{119} For example, one laboratory worker had learned very early that she could not touch radium and that she should wear protective clothing when she was working with the radium.\textsuperscript{120} Another worker “knew enough about the health hazards of radium to keep away from it as much as possible.”\textsuperscript{121} The company’s president even “hacked off” his fingertip when radium lodged beneath a nail.\textsuperscript{122}

Based on this background, the New Jersey Supreme Court was incredulous that, “[d]espite the wealth of knowledge concerning the


\textsuperscript{115} Id. at 450, 479 A.2d at 385; Cf. Crispin v. Volkswagenwerk AG, 248 N.J. Super. 540, 553, 591 A.2d 966, 973 (1991)(“although state of the art might be dispositive on the facts of a particular case, it does not constitute an absolute defense apart from its appearance as one of the components of balancing risk and utility factors.”).

\textsuperscript{116} Id. at 452, 479 A.2d at 385-86 (emphasis added).

\textsuperscript{117} T & E Indus., 127 N.J. at 391-92, 587 A.2d at 1260.

\textsuperscript{118} Id. at 392, 587 A.2d at 1260.

\textsuperscript{119} Id. at 393-94, 587 A.2d at 1260-61.

\textsuperscript{120} Id. at 377, 587 A.2d at 1252.

\textsuperscript{121} Id.

\textsuperscript{122} Id.
harmful effects of radiation exposure," the defendant in T & E could contend that it could not have known that the disposal of the radium-saturated by-products behind the plant would produce a hazard.\textsuperscript{123} The New Jersey Supreme Court held that "[t]hat contention appears to rest on the idea that somehow the radium's potential for harm miraculously disappeared once the material had been deposited in a vacant corner of an urban lot, or at least that one might reasonably reach that conclusion — a proposition that we do not accept."\textsuperscript{124} However, the anecdotal incidents, noted above, which impressed New Jersey's Supreme Court\textsuperscript{125} do not demonstrate that U.S. Radium recognized or should have even perceived the dangerous nature of the tailings and guard against it or charge for the risk. Despite the New Jersey Supreme Court's skepticism, and as simple as the proposition now seems, when radium was processed in this country, no one was that perceptive of the now recognized dangers and risks associated with discarded radioactive tailings. The recognized dangers and incidents had always been associated with physical proximity to radium but not the tailings, at the point of manufacture or application.\textsuperscript{126} Madame Curie died from the indiscriminate handling of radioactive substances.\textsuperscript{127} The U.S. Department of Commerce handbook on the subject, published by a committee on which a U.S. Radium officer had served, was, by its very title "Safe Handling of Radioactive Luminous Compound," concerned with the proper handling of the luminous paint used in the laboratory and plant.\textsuperscript{128} The handbook's text dealt solely with the proper handling of the compound in the assembly room and plant.\textsuperscript{129} The handbook made no reference to what was considered to be the proper disposition of the discarded tailings. When U.S. Radium's president during World War II had sought to justify a price increase for its products by citing the risks associated with its operations, he stressed to the War Department only the dangers inherent in the exposure of workers in the plant to radium and radon.\textsuperscript{130} U.S. Radium did not point out to future purchasers the risks inherent in the by-products buried

\begin{thebibliography}{99}
\bibitem{123} Id. at 394-95, 587 A.2d at 1261.
\bibitem{124} Id.
\bibitem{125} See supra text accompanying notes 120-22.
\bibitem{126} See supra text accompanying note 122.
\bibitem{127} 5 Encyclopaedia Britannica 371, 373 (15th ed. 1974).
\bibitem{128} The New Jersey Supreme Court in T & E found this handbook and its text to be "significant." T & E, 123 N.J. at 378, 587 A.2d at 1253.
\bibitem{129} Id.
\bibitem{130} Id.
\end{thebibliography}
in U.S. Radium's backyard because it was unaware of them.  
Robly Evans, T & E's expert, whom the New Jersey Supreme Court acknowledged as a contemporaneous expert in the field of radiation in the 1940's, told U.S. Radium's expert that, at the time the Commerce Department's handbook was published, neither he nor anyone else had the slightest foreboding about such tailings; a lack of prescience for which he simply had no explanation. Even, T & E's trial expert acknowledged that processing facilities throughout the country disposed of their tailings in at least as unconcernedly a manner as the defendant, U.S. Radium, allegedly did.

At the time, it was standard industry practice not only for the radium processing industry but for other generators of radioactive waste to discard that waste without regard to any future potential danger. New Jersey regulators have only begun to recognize and, subsequently deal with, the effects of these discarded tailings. The NJDEP, in its "Environmental Investigation of a Former Radium Site," acknowledged that the problem of sites where radioactive minerals were mined and radium processed has been only recently explored. Congress enacted the Uranium Mill Tailings Radiation Control Act of 1978 as a result of high levels of radiation, discovered accidentally during the mid-1960's, inside residential properties in Grand Junction, Colorado. Uranium tailings from nearby mines, which were extensively excavated during World War II to fuel the Manhattan Project, were simply dumped on the ground, available for free fill and for the manufacture of cement blocks during the post-World War II housing boom. As the House Committee Report, which antedated the adoption on UMTRAP, noted:

131. T & E, 123 N.J. at 379, 587 A.2d at 1253. Note, however, that the court does not speak to U.S. Radium's lack of knowledge concerning danger to the general public.
133. For example, the Manhattan Project during World War II spawned 35 radioactive dumps throughout the country, containing abandoned radioactive fill thousands of times more potent than that at plaintiff's site. See H.R. Rep. No. 1480, 95th Cong., 1st Sess., pt. 1, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 7433.
134. This dealt specifically with the T & E site.
135. Environmental Investigation of a Former Radium Site, New Jersey Department of Environmental Protection (1978)(stating that the radiological impact of wastes from industries which extract radioactive elements has been of recent concern to federal and state radiation agencies).
136. 42 U.S.C.A. §§ 7901-7942 (West 1983)[hereinafter "UMTRAP"].
138. See supra note 131 and accompanying text.
139. Id. at 11, 1978 U.S. CODE CONG. & ADMIN. NEWS 7433, 7454.
[f]rom the early 1940’s through the early 1970’s there was little official recognition of the hazards presented by these tailings. Federal regulation of the industry was minimal. As a consequence, mill tailings were left at sites, mostly in the Southwest, in an unstabilized and unprotected condition. Some of these tailings were used for construction purposes in the foundations and walls of private and public buildings. There, through the concentrated emission of radon gas, the hazard of the tailings and public exposure increased substantially.140

Following extensive investigation and recommendations promulgated by the United States Surgeon General,141 UMTRAP was formally passed, prescribing regulations for the handling and disposition of such tailings in 1978.

Because of the history recounted above, the trial jury absolved U.S. Radium of any negligence associated with the sale of its property in 1943 and its failure to warn the purchaser about the dangerous nature of the tailings.142 Yet, the New Jersey Supreme Court, with remarkable hindsight, held that “defendant [U.S. Radium] should have known about the risks of its activity” and that this constructive knowledge satisfied any possible requirement of knowledge of the risks involved with the tailings “in the context of a strict liability claim predicated on an abnormally dangerous activity.”143

It is unsettling to contemplate that a court, applying a “state of the art” analysis to determine the existence of an abnormally dangerous activity will apply more rigorous “hindsight” scrutiny to an entrepreneur’s activities than the reasonable man standard of simple negligence. In concluding that U.S. Radium had at least constructive knowledge of the dangers inherent in the discarded tailings, and articulating its incredulities that anyone could possibly think otherwise,

140. Id.
142. The trial judge reluctantly let the challenged negligence of U.S. Radium, in failing to warn T & E of such dangers in 1974, go to the jury, but then set this verdict aside on the ground that caveat emptor barred such recovery. The issue should never have been submitted to the jury. U.S. Radium had long since quit the radium processing business. There was, therefore, no basis for intimating and no proof offered to suggest that, in 1974, barely two years after the Surgeon General issued his first warnings about the safe handling of radioactive tailings, that U.S. Radium was so informed or should have been so informed.
143. T & E, 123 N.J. at 393, 587 A.2d at 1260.
the New Jersey Supreme Court has effectively undercut its professed rationale for imposing strict liability. In order to achieve the risk-saving and more careful manufacturing practices T & E professes to promote, the entrepreneur cannot be held to any degree of knowledge broader than that which exists at the time he is engaged in the questioned activity. Surely he cannot take care to guard or insure against that risk of which he is ignorant.

VI. CONCLUSION

In the era of Judges Weintraub, Hughes and Wilentz, the New Jersey Supreme Court has been at the cutting edge of molding common law tort concepts or fashioning new ones in order to effectuate the socio-economic policy of (1) protecting the completely innocent consumer or purchaser from unexpected loss; (2) holding purveyors of goods and services strictly accountable for their implied warranty that the goods are free from and fit for the purposes intended and the services properly rendered; and (3) adopting a "risk-reward" formula which inevitably thrusts upon manufacturers and distributors the ultimate economic responsibility for their products.

Against this background, the T & E result was, perhaps, foreordained. However, use of the ancient Rylands v. Fletcher doctrine to thrust all of the consequences of toxic pollution on the party innocently responsible was not required to equitably apportion the resulting economic loss. Indeed, the New Jersey Supreme Court was clearly uneasy with the implications of its decision. In an extraordinary caveat, "born of the occasional experience of having our opinions overruled," the court took pains to distinguish U.S. Radium from "the operators of a small general store who, in the 1940's, may have sunk a gas tank on their property." The court conceded that, in the T & E case, it had made a "qualitative judgment about the way such an actor would expect the societal risks posed by [its] conduct to be borne." But why should the innocent general store operator who sank a gas tank onto his property in the 1940's be exonerated or less likely to expect "the societal risks posed by that conduct to be borne" by him rather than U.S. Radium who, in an

144. The trial judge correctly predicted that the New Jersey Supreme Court would hold the strict liability doctrine applicable to successors in title, although he did not, personally, agree with this result. 123 N.J. Super. 228, 546 A.2d 570, 574.
145. 123 N.J. at 400-01, 587 A.2d at 1264.
146. Id.
even earlier era, had no cause to apprehend such liability? The only distinction would seem to be the “bigness” of the \( T \& E \) defendants as compared to the “small” general store proprietor.

Federal legislation, such as CERCLA, and its state counterparts, provide a much fairer apportionment of loss amongst all parties commensurate with their respective responsibilities for toxic pollution, particularly as between parties who are all related to the site where the activities occurred. In such allocations, the courts can balance all of the equities such as (1) did successor owners contribute to the condition, (2) could they have protected themselves, (3) how long did they occupy the affected sites, and (4) what have they done to alleviate the risk involved?

The New Jersey Supreme Court’s seemingly “black and white” approach confronts sellers of real estate with a no-win dilemma. The buyer may protect himself through the use of the appropriate investigation, price negotiation and indemnifications, or alternatively, by purchasing another site. The seller, however, who can contract away CERCLA liability can never immunize himself from his common law strict liability under \( T \& E \). As the New Jersey Supreme Court conceded, an indemnity or release by the buyer is not a definite bar against subsequent successors in title like \( T \& E \) who, someday with hindsight, discover that their property was damaged by the former’s abnormally dangerous operations.

Moreover, a general release or

147. *Id.*

148. On the other hand, strict liability in the classic *Rylands* sense does suggest a remedy for neighbors who may not have statutory causes of action against the entrepreneur whose abnormally dangerous activities have caused them harm. The off-site, “innocent” plaintiffs, on whose property tailings had allegedly been deposited in some unknown fashion from the old U.S. Radium plant, have no CERCLA cause of action. They cannot prove that U.S. Radium or its successors by “contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal” of the tailings onto their properties. 42 U.S.C.A. § 9607(a)(3). They are, however, “neighbors,” in whose favor the *Rylands* doctrine classically operates.

149. 42 U.S.C.A. § 9607(e)(1); see also *Mobay v. Allied Signal*, 761 F. Supp. 345 (D. N.J. 1991)(“in order to preclude recovery of response costs [under CERCLA], there must be a clear provision which allocates these risks to one of the parties ... [T]he agreement must at least mention that one party is assuming environmental-type liabilities.”); *Southland Corp. v. Ashland Oil, Inc.*, 696 F. Supp. 994 (D.N.J. 1988); *Chemical Waste Management, Inc. v. Armstrong World Indus., Inc.*, 669 F. Supp. 1285, 1294 (E.D. Pa. 1987)(must be an express provision which allocates risks). *But cf.* *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454 (9th Cir. 1986)(held liable for response costs because both parties were aware of potential incurrence).

150. *T \& E*, 123 N.J. at 402, 587 A.2d at 1264-65. It is not clear why the buyer’s indemnity to the seller “will surely alter the equities in respect of any claim of benefit-of-the-bargain damages by a successor in the chain.” *Id.* If the seller’s “innocence” concerning the
indemnity from the seller’s immediate vendee may not even protect the seller from the latter’s claim for what was unknown by both parties at the time title was conveyed. A buyer cannot be held to a waiver or release of damages from an unknown abnormally dangerous condition. “[S]trict liability may be avoided only by a knowing agreement to accept the risk of an abnormally hazardous activity . . . .” It is boilerplate contract law that waiver requires a knowing relinquishment of a known right. Such a knowing relinquishment was not possible in the T & E situation.

T & E’s “all or nothing” holding, which places the entire burden for the unpredictable tailings disaster on the unwitting seller, is difficult to reconcile with an earlier decision by the same court. There, the New Jersey Supreme Court held that “in a true post-ECRA transaction, . . . a buyer should not be limited to the rescission remedy” if the seller conveyed in violation of its ECRA responsibilities to clean up pollutants on the land. The buyer may sue for damages. However, in Dixon Venture, the contract of purchase had been executed before ECRA and, therefore, the seller was unaware of any ECRA obligations. These unique circumstances required tailoring the remedy to equitably reflect “the parties’ common understanding.” The New Jersey Supreme Court recognized that the seller and buyer, in their economic bargaining, did not build the cost of ECRA clean up into the purchase price because the seller could not know of ECRA’s requirements. The case was remanded so that the trial court could fashion a “remedy that should be in accordance with the economic realities of the situation,” the equivalent of the CERCLA law apportionment rule discussed

abnormally dangerous situation does not protect him, a contractual provision will not always serve the purpose intended by the T & E court. It is doubtful that the “innocent” seller, one who truly does not have any knowledge concerning any dangers on his property, by definition is concerned enough to ask the buyer for an indemnity. Otherwise, every seller will have to seek an indemnity from every buyer to be certain that the seller will be protected in the future.

151. Amland Properties Corp. v. Aluminum Corp. of America, 711 F. Supp. 784, 804 (D.N.J. 1989)(holding that an “as is” contract for the sale of property was insufficient to signify a release).
154. Dixon Venture, 122 N.J. at 234, 584 A.2d at 800.
155. Id.
156. Id.
157. Id. at 230, 584 A.2d at 798.
158. Id. at 234, 584 A.2d at 800.
159. Id.
above.\textsuperscript{160} It is illogical to deny a similar, more equitable allocation of damages when dealing with unforseen consequences and damages for which U.S. Radium was held strictly liable under common law.\textsuperscript{161}

Warnings about the chaos the \textit{T & E} result portends for the real estate market appear justified. Sellers of commercial real estate will never know where they stand as against third parties who may not even exist when they part with title to their properties. The dividing line that \textit{T & E} has drawn unfairly shifts the entire economic burden onto the one party who innocently and unknowingly caused the harm. The legislative approach, which fairly and equitably allocates responsibility according to the equities in each case and which limits recompense to necessary "response" costs, provides a better, more realistic remedy.

\textsuperscript{160} Dixon Venture, 122 N.J. at 232, 584 A.2d at 799.

\textsuperscript{161} The main distinction might very well be the New Jersey Supreme Court's contention that U.S. Radium was well aware of the damages from radium. However, Dixon Venture admittedly knew how it had polluted the ground. 122 N.J. at 230, 584 A.2d at 798. It did not foresee that, under ECRA, it was responsible for its cleanup and hoped that \textit{caveat emptor} would relieve it of liability in the absence of any contractual responsibility. U.S. Radium, when it sold, was aware of neither the dangerous nature of the tailings nor any statutory nor common law responsibility for the tailings.