1992

As Time Goes By: The Effect of Knowledge and the Passage of Time on the Abnormally Dangerous Activity Doctrine

Christine M. Beggs

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlr

Part of the Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/hlr/vol21/iss1/5

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
COMMENT

AS TIME GOES BY: THE EFFECT OF KNOWLEDGE AND THE PASSAGE OF TIME ON THE ABNORMALLY DANGEROUS ACTIVITY DOCTRINE

T&E Indus. v. Safety Light Corp.,

I. INTRODUCTION

The decision of the New Jersey Supreme Court in T&E Indus. v. Safety Light Corp. ("T&E II")1 is one with great implications for the past, present and future of toxic tort litigation. In T&E II, New Jersey's high court, known for its environmental consciousness,2 has expanded the abnormally dangerous activity doctrine to hold a distant predecessor in title liable for such activities.3 This Comment reveals and discusses several of the problems and unclear aspects of this decision, as well as the significance of this holding for subsequent toxic tort cases.4

1. 587 A.2d 1249 (N.J. 1991) [hereinafter T&E II].
2. See, e.g., In re Kimber Petroleum Corp., 539 A.2d 1181 (N.J. 1988) (finding that any party even remotely responsible for pollution is a "responsible" party under New Jersey law); Ayers v. Jackson, 525 A.2d 287 (N.J. 1987) (holding that residents exposed to pollutants are entitled to medical screening costs resulting from such exposure); Department of Envtl. Protection v. Ventron, 468 A.2d 150 (N.J. 1983) (applying a N.J. statute retroactively in order to hold past, as well as present polluters liable). It should be noted that in Ventron, there was no timing problem because the activity was carried on until the time of the trial.
3. T&E II, 587 A.2d at 1251.
4. The T&E II decision is noteworthy in a few respects which will not be the primary focus of this comment. In T&E II, the court held that caveat emptor will act as a bar to plaintiff's action when the plaintiff lacks knowledge of the danger and the claim is based on an abnormally dangerous activity theory. Id. at 1256-58. The court distinguished Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303 (3d Cir.), cert. denied, 474 U.S. 980 (1985) (nuisance cause of action could not be brought against a successor corporation). The New Jersey court based the distinction on the fact that Philadelphia Electric was based on a
Following a brief description of the background of the case, this Comment focuses on how the long time-gap between defendant's act and the corresponding injury influences the determination of whether defendant's activity is "abnormally dangerous," as defined by the Restatement (Second) of Torts ("Restatement"). Further, the implications involved with choosing particular points in time to assess liability will also be discussed.

The second principal topic of this Comment focuses on a more complex issue: whether knowledge or foreseeability should be included as an element in a strict liability cause of action for abnormally dangerous activity. This section evaluates how a strict liability claim is altered when a timing problem is introduced by the facts of the case. For purposes of this Comment, a "timing problem" is defined as: a situation which arises when legal doctrines designed to assess liability for contemporaneous events are applied to cases where there is a long latency period between defendant's activity and plaintiff's realization of the resulting injury. In order to determine how this issue might be resolved, it will be helpful to look to strict products liability cases, many of which have a "timing problem" analogous to that in T&E II. In addition, it is necessary to examine New Jersey precedent, to discover if there might be a particular inclination this court to include or exclude such an element in abnormally dangerous activity cases.

Several optimal solutions to these issues arise from the policy nuisance theory, not an abnormally dangerous activity theory, which the New Jersey courts used expansively and supported vigorously. T&E II, 587 A.2d at 1256-59 (stating that policy reasons for adopting abnormally dangerous activity doctrine outweigh possible erosion of caveat emptor). For an opposing view, see Albert G. Besser, Caveat Emptor-Where Have You Gone?, 4 HOFSTRA PROP. L.J. 203 (1992).

A second and related issue was that a predecessor in title could collect on an abnormally dangerous activity theory. Previously, only adjacent landowners had been compensated by use of the theory, although it had been urged by some that compensation should be extended beyond neighboring property owners. See generally Jon G. Anderson, Comment, The Rylands v. Fletcher Doctrine in America: Abnormally Dangerous, Ultrahazardous or Absolute Nuisance?, 1978 ARIZ. ST. L.J. 99, 105 (1978). But see Besser, supra at 211 (subsequent purchaser unlike adjacent landowner can test property before buying so this is an expansion of the previous doctrine which only allowed neighbors to collect because their injury was completely involuntary).

reasons behind the Restatement sections 519 and 520, and the plain language of these sections. First, since section 520 of the Restatement focuses on the defendant’s activity, courts should evaluate whether the activity was abnormally dangerous from the perspective existing at the time when defendant chose to engage in it. If the time of activity perspective is used, then the defendant is not required to possess limitless foresight. Second, foreseeability should be an element in an abnormally dangerous activity case with a timing problem so that strict liability does not become absolute liability. In order to promote environmental policies while maintaining fairness to the defendant, courts should place the burden of proving foreseeability on the party with the best access to the information, the defendant.

II. BACKGROUND OF THE CASE

In T&E II, the plaintiff, T&E Industries, sued defendant, Safety Light Corporation (as a successor corporation of United States Radium Corporation ("USRC")) in order to collect indemnification for cleanup costs to land once owned by USRC, but presently owned by T&E.6 USRC processed radium at the site in question, between 1917 and 1926 for manufacturing purposes, and during these years disposed of the unprocessed radium tailings in a vacant portion of the lot.7 USRC rented the land to tenants during the 1930s and then sold it to Arpin in 1943, who, unaware of the danger of the tailings, expanded its plant to cover the portion of the lot where the tailings had been disposed of.8 Since 1943, the property has been sold several times, but at the time of litigation, it was owned by T&E.9 Over the decades, scientific knowledge of the dangers presented by radium tailings has continually increased.10 Today, the dangers are so widely recognized that T&E is mandated by both federal and state statute to clean up the land.11 Corresponsly, T&E seeks to have these costs

7. Id. (explaining that only 80% of the radium processed could be extracted from the ore, the remainder or "tailings" were disposed of on a vacant portion of the property).
8. Id. at 1252-53.
9. Id. at 1253.
10. The amount of knowledge about the dangers of radium available at different points in time will be detailed in the section which discusses whether knowledge should be a factor in a strict liability case. See infra notes 78-80 and surrounding text.
reimbursed by the party that created the hazardous condition on its property. The New Jersey Supreme Court held defendant liable for the results of the abnormally dangerous activity and therefore responsible for the cleanup costs.

In order to comprehend the distinction between this and other abnormally dangerous activity cases, a brief background of the doctrine’s development is necessary. The “abnormally dangerous” activity doctrine evolved from the landmark case, Rylands v. Fletcher. In Rylands, the defendant was held strictly liable for damages which were incurred when water from defendant’s reservoir broke through an abandoned mine shaft and flooded plaintiff’s land. The court stated that strict liability was only to be applied when defendant’s use of the land was “non-natural” (as opposed to an ordinary or common use of the land). The emphasis was placed on the abnormal and inappropriate character of the defendant’s activity, in that case, keeping a reservoir in coal mining country. As the Rylands rule developed, the term “non-natural” was replaced by the current term “abnormally dangerous,” which was more clearly defined.

Today, most jurisdictions have adopted strict liability for abnormally dangerous activity in some form. In 1976, sections 519 and 520 of the Restatement were drafted, codifying the rule and expanding the list of factors to be used in determining which activities are abnormally dangerous.

---

13. Id.
14. Id. at 338.
16. Over the decades, the general rule which has developed is that defendant is strictly liable for abnormally dangerous activity when his activity is “unduly dangerous and inappropriate to the place where it is maintained in light of the character of that place and its surroundings.” Id. at 547-48.
17. Id. at 549.
18. RESTATEMENT (SECOND) OF TORTS § 519 (1976) reads as follows:
   (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.
   (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

   RESTATEMENT (SECOND) OF TORTS § 520 (1976) states that in determining whether an activity is abnormally dangerous, the following factors are to be considered:
   (a) existence of a high degree of risk or some harm to the person, land or chattels of others;
The abnormally dangerous activity doctrine has been utilized to hold defendants strictly liable for a variety of activities including: blasting and storage of explosives, escape of water, pollution of a well, crop dusting, fireworks displays, gasoline transportation and storage, pile driving, rockets, and disposal or escape of various waste products. Even though the abnormally dangerous activity doctrine has been applied to an extremely broad variety of topics, in all these cases, the harmful activity and the corresponding injury occurred either simultaneously or virtually simultaneously. However, what makes the T&E case so important is that it is the first abnormally dangerous activity case to encounter a timing problem, since the activity occurred between 1917 and 1926 and the

(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.

injury plaintiff is seeking redress for occurred decades later.

III. STRICT LIABILITY IN AN ABNORMALLY DANGEROUS ACTIVITY CASE WITH A TIMING PROBLEM

The imposition of strict liability in an abnormally dangerous activity case, where a great deal of time has passed between the activity and the injury, has both benefits and disadvantages. An argument for imposing strict liability is that the imposition of strict liability makes it more likely that the individual or corporation who has damaged the land will be the party to clean it up. In an era where our environmental consciousness has been raised and the desire to restore land to a safe and usable condition has grown, it is certainly


Subsequent to the T&E II case, there have been a few interesting developments. Two cases have rejected the holding in T&E II to some extent. In Futura Realty v. Lone Star Bldg. Ctr., 578 So. 2d 363 (Fla. Dist. Cl. App. 1991), the court declined to extend the abnormally dangerous activity doctrine to cover a successor in title, holding that the doctrine of caveat emptor prohibited this (subsequent purchaser suing previous owner for pollution on purchased land). In Barras v. Monsanto Co., 831 S.W.2d 859 (Tex. Cl. App. 1992), the court declined to recognize strict liability for abnormally dangerous activity as a cause of action and chose not to apply the Restatement (new homeowners suing homebuilder and manufacturer for dumping toxic waste on property nearby the homesites). In Russell-Stanley v. Plant Indus., 595 A.2d 334 (N.J. Super. Cl. Ch. Div. 1991), an intermediate New Jersey court cited T&E II as presenting a portion of controlling law in its principles that the Restatement can be applied to cases which are beyond the ordinary scope of the abnormally dangerous doctrine and that caveat emptor is not a defense to an abnormally dangerous activity claim (subsequent tenants sued landlord under abnormally dangerous activity theory for leaking toxins). Other cases brought in intermediate and high state courts after T&E II are typical abnormally dangerous activity cases involving explosions, blasting, fireworks, fumigation, working with high voltage power lines, flooding et. al., none of which encounter the timing problem presented by T&E II.
arguable that whomever has caused an injury by engaging in a hazardous activity should rectify the damage, without regard to when it occurred. Utilizing strict liability makes it easier to bring the responsible party to justice. One of the goals of strict liability is to focus on the danger of the activity rather than the defendant's knowledge of the fault or the reasonableness attributable to defendant's conduct. Absent strict liability, it is more likely that a party who did not cause the dangerous condition will be left with the cleanup costs (i.e., here the current landowner).

On the other hand, there are some problems with the imposition of strict liability where a timing problem exists, particularly when it involves radioactive materials, as does the T&E II case. The court in T&E II held that the disposal of radium was abnormally dangerous, yet it seems unclear by what criteria this was determined. The court failed to indicate what level of radioactivity was necessary in order to find that disposal of a radioactive substance is an abnormally dangerous activity. Perhaps this is evaluated according to government standards, but such standards may not exist. Even in this case, "safe"

29. See generally KEETON ET AL., supra note 15, § 75. Some basic policy justifications for strict liability are that the defendant is choosing to engage in an activity that is so dangerous and he is exposing the public to such a great risk that it is fair to hold him liable for any resulting harm (this seems to imply an element of foreseeability because the fairness in imposing liability is because defendant was aware of the danger of the activity and chose to expose the public to its risks anyway). The rationale for this is that the defendant is in the best position to internalize costs associated with the risks posed and is also the party most able to bear those costs. Another rationale for imposing strict liability is that defendant weighed the cost of engaging in the activity versus the cost of possible litigation and defendant can only weigh the possible costs of foreseeable litigation. See infra Part V for more discussion on foreseeability as an element of strict liability.

30. Under the federal Superfund statute, hazardous sites are cleaned up by the federal government and then an individual or corporation, typically the property owner, is billed for the cleanup costs. In the T&E II case, the land was cleaned up under this statute, T&E was billed for the costs and then sought and received indemnification from Safety Light for the cleanup costs it had paid.

One problem which does not exist here but has arisen in Superfund or CERCLA cases is that lending institutions who played no role in creating dangers risked being forced to pay cleanup costs after they took over title to mortgaged land. Because the lender was then the legal titleholder, it might be obligated under the statute to pay cleanup costs if it participated in the day to day management of the property either before or after the business ceased operations and sought bankruptcy protection. Here, liability is only imposed on the party who created the abnormal danger and causation must be proven. See United States v. Fleet Factors Corp., 724 F. Supp. 955 (S.D. Ga. 1988), aff'd, 901 F.2d 1550 (11th Cir. 1990); see also Murray Drabkin et al., Bankruptcy and the Cleanup of Hazardous Waste: Caveat Creditor, 15 ENVTL. L. REP. 10168 (1985) (describing generally the problems created for creditors by CERCLA legislation).
levels of radium were not determined by the federal government until 1978, so what level would suffice had the case been brought before that date? Perhaps the government standards are merely minimum statutory standards which need to be met. There has been no indication or suggestion of whether a defendant would be strictly liable if an extremely low level of a highly dangerous radioactive substance were found on land once owned and used by him. Thus, it remains open to question whether a defendant would be held responsible regardless of how negligible the level of material might be.

The courts need to establish a formula for determining when cleanup is so vital as to mandate strict liability, and at what point this liability is cut off. Radioactive materials present some other problems because the half-life periods can be so long. The responsible party could be long extinct by the time the suit is brought, leaving a plaintiff with contaminated land and no recourse. It is also uncertain from the disposition of the T&E II case whether a defendant is responsible for his actions indefinitely (until the land is cleaned up) or whether his liability ceases at some point in time. The Appellate Court’s characterization of the disposal of radium as a "continuing tort" indicates that liability might last indefinitely. These are issues which will arise in any case dealing with removal of a radioactive substance. To the credit of the New Jersey Supreme

32. The state and federal standards might simply be minimal standards. In negligence cases, for example, compliance with a statute is not per se non-negligence; it only proves that the defendant met some minimal requirements imposed by law but does not necessarily preclude a finding that his failure to take additional precautions render him negligent. See Keyes v. Amundson, 391 N.W.2d 602 (N.D. 1986); Stone v. Sterling Drug, Inc., 490 N.Y.S.2d 468 (N.Y. App. Div. 1985).
33. One way of doing this might be to measure the costs of the cleanup against the severity of the danger and the probability of individuals being harmed by the substance.
34. T&E I, 546 A.2d at 571. (The ore used by USRC was made up of uranium, radium and vanadium. Uranium, which has a half-life of 4.5 billion years produces several by-products during its decay, one of which is radium 226. Radium 226 has a half-life of 1,600 years and as it decays produces radon 222, which is a radioactive gas, with a half-life of 3.8 days. This radon produces ionized particles which attach onto surfaces and may cause cancer when inhaled.)
35. Id. at 577.
36. It would be very interesting to see what the court would do with a radioactive substance with a very short half-life, which would create a danger for several days, weeks or months. Would the disposal of such a substance or its predecessor in the radioactive chain be enough to impose strict liability for abnormally dangerous activity, even if the danger were only for a short period of time and the paramount danger from such substance had passed?

http://scholarlycommons.law.hofstra.edu/hlr/vol21/iss1/5
Court, it vowed to follow a case by case determination when deciding which activities are abnormally dangerous. This method will allow testimony concerning the levels and dangerous propensities of different materials before a defendant will be held liable.

The New Jersey Supreme Court purports to be following the Restatement sections 519 and 520 in deciding to hold Safety Light strictly liable for an abnormally dangerous activity, but several problems are evident from the court’s dicta. Restatement section 519 imposes liability on a party who creates a harm as a result of an abnormally dangerous activity. However, the court speaks almost interchangeably about abnormally dangerous activities, abnormally dangerous conditions, and abnormally dangerous substances. If the plain meaning of these terms is considered, it is obvious that they refer to three distinct concepts which should be distinguished, rather than lumped together. The abnormally dangerous activity in this case is USRC’s processing and disposal of radium onto the Orange Street site. The abnormally dangerous condition is the unsafe level of radon on the plaintiff’s land, as a result of the defendant’s abnormally dangerous activity. The abnormally dangerous substance is radium and its by-products. The court spends a great deal of time talking about abnormally dangerous conditions and substances and yet it is never mentioned by what criteria the court is interpreting and assessing these issues. The Restatement does not define these theories, it only defines an abnormally dangerous activity. If the court is genuinely following the Restatement, all that is relevant is whether defendant engaged in an abnormally dangerous activity.

There are a few reasons why the court might have chosen to inject these terms into the case. On the simplest level, this court might only be stressing their prevailing belief that parties who engage in toxic or hazardous waste dumping should pay for their actions.

38. The case by case approach is far better than the per se rule of the Appellate Court which would impose liability in all cases. Deciding on a case by case basis allows for testimony on the levels and dangers of different radioactive substances as well as testimony about knowledge of foreseeability (if this is a factor).
39. Section 519 of the Restatement appears in its entirety in note 18, supra.
40. T&E II, 587 A.2d at 1258-61. (For example, the court discusses placing liability on the party responsible for the hazardous condition; refers to the presence of an abnormally dangerous condition; talks about radium as an abnormally dangerous substance; and mentions the hazardous nature of radium and concludes that defendant knew enough about the abnormally dangerous nature of the substance.)
41. See supra note 2.
While there might be an issue as to whether defendant's activity was abnormally dangerous, it is very clear from the facts that the resulting condition of the property was abnormally dangerous and that radium is an abnormally dangerous substance, regardless of the criteria used. Perhaps the use of these terms was not a conscious attempt to change the doctrine, but merely a reflection of the court's strong belief that defendant should pay because of the dangers it created. Similarly, the use of these terms might have been the result of a conscious choice on the part of the court to interpret the abnormally dangerous activity doctrine very broadly as New Jersey courts had done in the past. The incorporation of these concepts into the doctrine would allow the doctrine to be more easily applied to cases where radioactive materials are involved.

The most interesting possibility is that the use of these terms may have reflected the court's recognition that a timing problem existed in this case and that therefore terms in the current Restatement are inadequate to resolve some of the issues presented. The abnormally dangerous activity doctrine has typically been applied when the activity and the resulting harm are contemporaneous. Looking at this case in terms of the abnormally dangerous activity, the activity was the processing and disposal of radium that took place between 1917 and 1926. The fact that the activity took place in the distant past while the Restatement section 520 seems to define an activity in the present tense, raises the issue of how to apply the Restatement factors in a situation they do not quite fit: the abnormally dangerous activity case with the timing problem. On the other hand, the concepts "abnormally dangerous condition" and "abnormally dangerous substance" elude the timing problem because they existed throughout the relevant time span: from the time of the activity through the time of trial. The abnormally dangerous activity ceased

42. See infra notes 74-81 and accompanying text.
43. Whenever a court introduces new terms and concepts into an area of law, it should be careful to define and explain such terms so that they are not misused in future decisions. This court's failure to define these terms and how they should be used could result in another court using them in a way which was not intended. Although the danger of radium and the resulting condition on the property seem to be "abnormally dangerous" according to the facts of this case, the terms and concepts should be clarified so as to make the court's holding more explicit and serve as a guideline for future cases.
45. For a complete discussion of how the timing problem affects the Restatement § 520 factors, see infra notes 52-73 and accompanying text.
46. It is fascinating that the court chose the terms "condition" and "substance" which
in 1926. If the activity has ceased, it is logical to determine whether it was abnormally dangerous as of that date. If defendant ceased engaging in the activity without knowing of the long term risks posed by his prior act, he believes his exposure to liability has also ceased because any potential risks posed by the activity are gone and he is not making a conscious choice to expose the public to further danger. By using the two new concepts, the court evades the timing problem and creates an option of evaluating the danger of the "substance" and the "condition" at any point along the time spectrum, up to and including the time of trial.47

IV. APPLICATION OF THE TIMING PROBLEM TO THE RESTATEMENT SECTIONS 519 AND 520

Section 519 of the Restatement imposes strict liability on an individual or business carrying on an abnormally dangerous activity for "harm to the person, land or chattels of another resulting from the activity, although he has exercised utmost care to prevent the harm."48 Since this section focuses on the "harm" resulting from the activity, rather than the activity itself,49 the timing problem50 does not affect the application of this section to an abnormally dangerous

have been previously used by courts in product liability cases with timing problems (i.e. defective condition unreasonably dangerous; unreasonable dangerous substance). These terms are far broader than "activity" and enable the court to find danger at virtually any point in time. Conceivably, the use of these terms might indicate that the court recognized that the timing problem in this case was analogous to the timing problem which existed in various product liability cases. Purvis v. PPG Indus., Inc., 502 So. 2d 714 (Ala. 1987) (unreasonably dangerous condition); Kirk v. Michael Reese Hosp. & Medical Ctr., 513 N.E.2d 387 (Ill. 1987), cert. denied, 485 U.S. 905 (1988) (prescription drug can be unreasonably dangerous substance in unreasonably dangerous condition if no warning); Skonberg v. Owens-Corning Fiberglas Corp., 576 N.E.2d 28 (Ill. App. Ct. 1991) (asbestos in unreasonably dangerous condition when no warning of compound effect of smoking on asbestos exposure); Rice v. James Hansen & Sons, 482 N.E.2d 833 (Mass. App. Ct. 1985) (ureaformaldehyde is hazardous substance). See generally RESTATEMENT (SECOND) OF TORTS § 402A cmt. G (defective condition), K (unavoidably unsafe products generally drugs, which would also be considered substances) (1976).

47. See infra Part V for a full discussion of the time of trial and time of activity rules. Generally, the "time of activity" rule would assess defendant's liability as it existed while the activity was being carried on and the "time of trial" rule would determine his liability as of the trial date.


49. Section 520 of the Restatement unlike § 519, is affected by the timing problem because it focuses not on the "harm" to the plaintiff but on the "activity" of the defendant. While "harm" may by definition occur at a distant point in the future, "activity" only exists so long as it is being carried on.

50. See supra note 5 and accompanying text.
activity case. According to the plain meaning of section 519, if defendant caused the resulting harm, he may be held liable under this section whether the harm occurred immediately after defendant engaged in the abnormally dangerous activity or at some time in the future. In other words, because the Restatement is phrased broadly and does not pinpoint a time at which “harm” is determined, this section of the Restatement can still be applied regardless of the point we choose on the time continuum to assess the “harm” caused by the defendant’s activity.  

The application of Restatement section 520 in an abnormally dangerous activity case with a timing problem raises a far more complex question than the application of section 519, and it is one which is inadequately resolved in the T&E II decision. The court purports to be determining that processing radium is an abnormally dangerous activity according to the section 520 factors. Yet, the court never mentions how the lengthy time gap between the dangerous activity and the resulting harm affects the Restatement factors. Further, the court failed to make a decision on whether these factors are to be determined as of the 1920s (the time of the activity) or as of the 1980s (the time of the trial). It will become clear as these factors are discussed individually that the conclusion that an activity is or is not abnormally dangerous depends on the point in time that the court selects.  

Factor A of section 520 is “the existence of a high degree of risk of some harm to the person, land or chattels of others.” Factor

---

51. On the other hand, the issue of how to apply § 520 in such a case is problematic because the determination whether the activity is abnormally dangerous might produce different results depending on the point that the court chooses to assess liability.  

52. See Restatement (Second) of Torts § 520 (1976), stating that the factors to be considered are:

(a) the 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).

53. Even though this case might not be decided differently depending on what time is chosen, the court should realize that this distinction might be more significant in future cases. Since the problem was present here, the court should have made a ruling to promote consistent and equitable future decisions.

54. Restatement (Second) of Torts § 520 (1976) (emphasis added).
B is the "likelihood that the harm that results from it [the activity] will be great."\textsuperscript{55} Evaluation of these factors may yield different results depending on whether they are measuring the risk and likelihood of harm against knowledge and standards which existed at the time of the activity or against those that existed at the time of trial.\textsuperscript{56} The court will be more likely to affirm the presence of these factors if the risks are evaluated at the time of trial, because it can apply all that has been learned about the risks and probability of harm in the decades since the activity took place. Applying this hindsight approach allows the court to more accurately calculate the risks and the severity of harm attributable to the activity. In addition, using the time of trial rule has the benefit of simplicity, because no expert testimony is needed as to the knowledge and standards which existed during the time of the activity. On the other hand, if the time of trial rule is used, defendant may be held liable for risks attributable to his activity which were not known at the time when the choice to engage in the activity was made. Perhaps, if defendant knew what is known today about the risks and the possibility of harm presented by the processing and disposal of radium, he might have chosen to forsake the activity or at the very least to take far greater safety precautions. Thus, it seems unfair to use a hindsight approach if defendant had no way to know or foresee the potential harm to which he was exposing others, or the potential liability to which he was subjecting himself. To promote fairness to the defendant, the court may choose to hold him strictly liable only for risks which were known or foreseeable to him during the time he engaged in the activity. If factors A & B of the Restatement are meant to deter activities when the risk and cost of potential liability are too great, or if they are meant to force defendant into an analysis and balancing of the risks and benefits of the

\textsuperscript{55} Id. (emphasis added).

\textsuperscript{56} Although radium is clearly equally dangerous regardless of a defendant's knowledge of the danger, there are several reasons why a defendant's knowledge or foreseeability of knowledge is relevant to a case such as this one. First, because of the long latency period, a great deal of information has surfaced concerning the dangers of radium, which the defendant may not have had access to at the time he chose to engage in the activity. It seems unfair to impose strict liability on a defendant based on information gathered subsequent to the activity, the existence of which the defendant did not know. Second, the Restatement possesses a fairness component in comment G, in that there must be "justification" for holding defendant strictly liable. This shows that the Restatement does not take the imposition of strict liability lightly and that the court should tread carefully when expanding this liability. Using the knowledge of the risks at the time of the activity assures that strict liability is not unnecessarily expanded and that the true purposes of this doctrine are given effect.
activity, these purposes can only be effectuated by using the time of activity rule. Comment G of the Restatement, which elaborates on the "risk of harm" in factors A & B, states that the risk presented by defendant’s activity must be "major in degree and sufficiently serious in its potential consequences to justify holding defendant strictly liable for subjecting others to an unusual risk." Defendant can only evaluate the seriousness of the risk according to the danger known at the time of the activity. Unless the court uses the time of activity rule, the court is weighing the risks and benefits of the activity on a different scale than that used by defendant; they are balancing with information that the defendant was simply not privy to. In addition, by using the term "recognizable risk" in comment G, the Restatement indicates that defendant is only meant to be held liable for risks of which he knows or could reasonably foresee. Hence, if the court determines the existence and severity of the risk from the time of trial perspective, it is edging closer to imposing absolute liability rather than strict liability for those engaging in potentially hazardous activities.

Factor C is the "inability to eliminate the risk by the exercise of reasonable care." Factor C might also be influenced by the timing gap as it exists in T&E II. Again, as with factors A & B, the ability or inability to eliminate risk is a much simpler issue to decide on a hindsight basis, when there are decades of data presently existing on the dangers of radium. The ability or inability to eliminate the risk becomes clearer over the years as this data accumulates. However, if what is relevant is defendant’s ability to eliminate the risk, the appropriate time for the court to examine is the time of the activity. If the risk cannot be eliminated at the time of the activity, then the defendant, by engaging in the activity, is exposing himself to liability regardless of whether it can be subsequently reduced. Any safety advances made after defendant engaged in the activity would be irrelevant to defendant’s liability, and therefore defendant would not be able to claim that with contemporary technology he could “eliminate

57. If these provisions are meant to promote safety and provide true guidelines for potential defendants as to what is abnormally dangerous, the court should use the time of the activity. To do otherwise, renders the factors meaningless because defendants may not know future risks and will therefore either forsake the activity even if it may be beneficial or they will simply engage in the activity without regard to potential risks. The section then loses any deterrent or balancing benefit.
59. Id. § 520.
the risk” by using “reasonable care.” This is a common sense approach since what really matters is the safety of the activity at the time it was carried on and not how safe it might be if carried on today. In addition, the court needs to clarify precisely what “risk” defendant is liable for: the risk of the activity of which defendant is aware (those that are known or foreseeable) or all risks associated with the activity (without regard to the knowledge or foreseeability of the defendant). Realistically, only the former makes sense because it seems ludicrous to hold a defendant responsible for failing to eliminate risks that were not known at the time of the activity. No amount of “reasonable care” could eliminate risks which were not known or knowable at the time of the activity. If, then, defendant is only responsible for eliminating the risks he knows of, this rule would support the contention that the time of activity rule should be used and all subsequently discovered risks and safety advances disregarded.

Factor D is the “extent to which the activity is not a matter of common usage.” In applying factor D, the discrepancy presented by the timing problem becomes more clear. The factor would probably be decided the same way, regardless of the timing problem, simply because of the facts presented by the T&E II case. The processing and disposal of radium was not a commonplace activity either in the 1920s or the 1980s. However, were the facts slightly different, there could clearly be a problem with this factor. It is fairly easy to contemplate a situation where a manufacturing procedure or the storage of a chemical might be novel in the 1920s and therefore carried on by relatively few people (not a matter of common usage) but in the 1980s is a useful and profitable trade that has grown over the past six decades (and is now clearly a matter of common usage).

60. Id.
61. Here, this factor of the Restatement introduces the question which will be discussed in Part V, infra, whether knowledge and/or foreseeability should be a factor in determining strict liability for an abnormally dangerous activity with a timing problem. In fact, the court might not even have to include the knowledge element per se, if it takes knowledge into account when assessing the Restatement factors.
62. The words “reasonable care” imply a “reasonable man” standard. A reasonable man would only be able to eliminate the risks known at the time of the activity, therefore this factor implies that the time of activity rule and the foreseeability element play a role in this case. It is fair to hold defendant responsible for any risks which were reasonably foreseeable, however the court should not expect the defendant to foresee risks in the very distant future as if he had a crystal ball.
63. RESTATEMENT (SECOND) OF TORTS § 520 (1976) (emphasis added).
64. This scenario is analogous to that presented by many products liability cases; a product is invented and at first is used by relatively few. As the years go by, the product
is just as easy to visualize the opposite scenario, where the activity is a matter of common usage during the 1920s, but by the 1980s the number of people engaged in the trade has dropped to almost none. In terms of this factor, the time period selected by the court could easily be determinative of the result and therefore the court should select the pertinent time in order to avoid arbitrary and capricious results.

Factor E is the "inappropriateness of the activity to the place where it is carried on." The timing problem is also evident in examining factor E. The processing of radium on a plot of land would most likely be unaffected by the timing problem. However, the inappropriateness of the radium disposal could be drastically affected by the passage of time. A substance dumped in an uninhabited area in the 1920s could wind up in a booming metropolis or urban center of the 1980s as a result of population growth and changing demographics. Obviously, the dumping is far more inappropriate in the 1980s urban setting. Since there has been population growth in much of the nation over the past 60 years, the defendant is more likely to be held liable if the time of trial rule is used, because the site of the activity is more likely to be in an "inappropriate setting" by today's standards. Using the time of trial rule would mean assessing the danger of defendant's activity to today's community rather than the community which existed at the time the activity occurred. This rule would be unfair because a defendant could be held liable for "carrying on" an activity in an area which may have been appropriate at the time defendant acted, but became unsuitable at some future date due to proves to be profitable and meets with a series of improvements in both design and safety and correspondingly becomes a commonly produced product with far fewer dangers than existed at its inception (e.g., automobiles, lawnmowers).

65. This can also be paralleled to the products area. One clear example would be the DES market. In the 1950s and 1960s, DES was widely prescribed to prevent miscarriages. Subsequently, it was discovered that it was ineffective and caused cancer in some of the daughters of these patients. Thus, today, no DES is manufactured to prevent miscarriages.

An analogy can also be made to "moving to the nuisance." In these cases, a plaintiff may be barred from suing a defendant who is engaged in an activity which is a nuisance if plaintiff voluntarily chose to move to that location. McClung v. Louisville & Nashville R.R. Co., 51 So. 2d 371 (Ala. 1951); Lea v. North Carolina Bd. of Transp., 304 S.E. 2d 164 (N.C. 1983). Just as what may have been considered a nuisance has been changed by the actions of others, so too what may have once been a matter of common usage has been altered by the actions of the surrounding community.


67. It is unclear from the facts given in the T&E II case exactly what the surroundings were at the time of the activity and how those surroundings have changed over the years.
population growth and demographic changes which were both unforeseeable\textsuperscript{68} to the defendant and beyond his control. Further, using the time of trial rule presents an inconsistency in that a defendant would be held liable for "carrying on" an activity long after his activity has ceased, rather than being held accountable for his actions at the time they actually took place. This factor strongly indicates that the time of activity rule is the one that should be used because what is really relevant is whether a defendant's activity was inappropriate to the surroundings at the time he chose to engage in it. The demographic changes which take place after the activity has ceased evolve independently of the danger created by the defendant,\textsuperscript{69} and therefore should not be considered in evaluating the inappropriateness of the surroundings. The time of trial rule extends strict liability too far by holding the defendant responsible for environmental and demographic changes occurring in the distant future.

Factor F is the "extent to which its value to the community is outweighed by its dangerous attributes."\textsuperscript{70} The interpretation of this final factor may also be altered depending upon the perspective from which it is examined. Although the other factors of section 520 have some similarity to the products area, factor F has a direct parallel to the products area. Factor F can be readily compared with the risk-benefit analysis employed by Restatement section 402A, which imposes strict liability for products.\textsuperscript{71} The identity of the community which the court selects as being relevant to assessing this factor will weigh heavily on the result. The court must decide whether this factor is referring to the community which existed at the time of the

\textsuperscript{68} While it is reasonable to hold a defendant liable for foreseeable dangers attributed to his activity, the court should not expect that each individual who engages in a potentially hazardous activity has studied demographic patterns and therefore has foresight into the inappropriateness of his site to some future community.

\textsuperscript{69} In fact, the court could analogize this factor to the "moving to the nuisance" cases and hold that a defendant is responsible for any damages which occurred to the surrounding community at the time if his activity was "inappropriate" at that time, however, individuals who moved to the surrounding community subsequent to the activity could be barred from suing since they have voluntarily assumed certain risks by moving to a certain neighborhood. See McClung, 51 So. 2d at 371.

\textsuperscript{70} RESTATEMENT (SECOND) OF TORTS § 520 (1976).

\textsuperscript{71} See Id. § 402A. The risk-benefit test used in products cases, balances the utility of the product against its risks, much like the balancing test in Factor F of § 520. However, if § 520 is examined as a whole, what § 520 actually consists of is a more clearly defined risk-benefit analysis. What § 520 in its entirety does is lay out all the factors which would indicate to the drafters that the risk of this activity outweighed its benefits and therefore the defendant should be held strictly liable.
defendant's processing and disposal, or the community existing at the
time of trial. The community existing at the time of the activity de-
erved certain benefits from the defendant's processing. The radium
was used "primarily for medical purposes, but was also used on site
in a variety of commercial applications including the manufacture of
luminous paint." Defining the community as that which existed at
the time of the activity provides the court with a method of balancing
the value to the community against the dangerous attributes. If, how-
ever, the community is defined as it exists today, there are currently
no benefits being derived from the activity, only danger created by
the activity. As the years passed, the value to the community de-
creased and the knowledge concerning the dangerous attributes of the
activity have increased; therefore, the balance weighs more and more
heavily in favor of finding an abnormally dangerous activity. When
the defendant chose to engage in the activity, his decision was based
on the benefits and dangers of the activity of which he was aware at
the time, and not according to what the future might bring. If the
court applies the time of trial rule here, as with the evaluation of
factors A and B, the court is measuring the defendant's behavior ac-
cording to a different scale, a scale which the defendant did not have
the privilege of consulting. The defendant's choice was not made ac-
cording to today's standards, but rather by those known years ago,
and it is by those standards that the court should balance the utility
and the danger of the conduct.

V. THE KNOWLEDGE OR FORTSEEABILITY ELEMENT

Another major problem with the holding in T&E II is that the
court did not resolve the critical issue of whether knowledge or fore-
tseeability is an element in a strict liability cause of action for an
abnormally dangerous activity. Precisely, the issue is: Whether in
order to state a strict liability claim, a plaintiff must prove that defen-
dant either: (1) had knowledge that certain risks or dangers were

73. Defendant's choice to engage in the activity is made according to his assessment of
the Restatement factors at the time of the activity. If a defendant had the foresight of the
court, perhaps his assessment would be different. Defendant's conduct should not be judged
on a scale he had no access to. Defendant should be judged by what he in fact did, not by
what he would have done had he decided to engage in the activity today. Perhaps the most
convincing point is that using the time of trial rule would hold USRC to the same criteria as
a company that engaged in the same activity today, even though there have been many
changes in terms of risks and values.
74. Knowledge is defined as, "acquaintance with fact or truth." BLACK'S LAW DICTION-
associated with his activity, or (2) that a defendant could foresee\textsuperscript{75} that certain risks or dangers were attributable to his activity. The court avoided the issue by stating, "[w]e need not . . . determine whether knowledge is a requirement in the context of a strict-liability claim based on an abnormally-dangerous activity [because] [e]ven if the law imposes such a requirement, we are convinced . . . that defendant should have known about the risks of its activity."\textsuperscript{76} The procedural history of the case indicates that, contrary to the court's statement, there is a question of fact as to whether the defendant had sufficient knowledge of the risks posed by radium. There is some evidence that the defendant had some limited knowledge\textsuperscript{77} of the danger of radium during the time it was engaged in the activity.\textsuperscript{78} However, most of the knowledge of radium's danger did not arise until the 1940s, or at least fourteen years after the defendant ceased the production and disposal of radium at this site.\textsuperscript{79} Even though this

\begin{flushright}
NARY 784 (5th ed. 1979).

75. Foreseeability is defined as "the ability to see or know in advance; hence, the reasonable anticipation that harm or injury is a likely result of acts or omissions". \textit{Id.} at 584; \textit{see also supra} note 29 and accompanying text (discussing some of the policy justifications for applying strict liability).

76. \textit{T&E II}, 187 A.2d at 1260.

77. If knowledge of foreseeability is an element, a question arises as to how much knowledge a defendant must have had in order to satisfy the requirement (the substantive standard) and what weight of evidence is needed to prove this element.

78. \textit{T&E II}, 187 A.2d at 1252-53. When \textit{T&E} began processing radium in 1917, an employee, F. Hall, claimed she knew at the time that she should wear protective clothing when working with radium and that she should not touch it. Another employee of USRC wore protective clothing from 1923 to 1926. The court goes on to cite that some employees who painted watches with luminous paint produced from radium \textit{eventually} developed cancer (emphasis added). The court does not specify when these cancers developed. Clearly, if the cancers became apparent during the time of the production, this would indicate knowledge. However, if they developed after production ceased, they would be of limited value in assessing knowledge, particularly if the court evaluated the knowledge at the time of the activity. \textit{See infra}. The fact that warnings were posted seems to indicate that at least some of the cancers developed during the time of production. Evidence which contradicts the contention that USRC was aware of the danger posed by disposal of radium tailings is that it was common practice for industries at this time to dispose of radioactive by-products on property. \textit{See Besser, supra} note 4, at 223.

79. \textit{T&E II}, 187 A.2d at 1252-53. In 1932 and 1940, two articles were published describing the dangers of inhaling radon gas. "In 1941, the U.S. Dept. of Commerce published a handbook (H-27) entitled 'Safe Handling of Radioactive Luminous Compound' which contained information on the effects of inhalation of radon and providing safeguards which could be undertaken." \textit{Id.} In 1943, the president of USRC indicated in a letter that he had some knowledge of the hazards of radioactive materials, he included therein some examples of employees he believed to have died from exposure to radium. We should note here that this knowledge did not accumulate until after USRC had ceased production and disposal of radium at this site. \textit{See Besser, supra} note 4, at 222-23 (industry may have had some
knowledge did not exist until after production had ceased, the court held that the defendant could still be held liable because the dangers were foreseeable. In contrast, the jury at the trial level held that defendant was not negligent in its failure to warn with regard to the 1943 sale of the property. The jury’s finding contradicts the court’s holding that the defendant had sufficient knowledge of the risk posed by radium to be held liable. Rather, the jury found that the defendant was not unreasonable in failing to warn of radium’s dangers at the time of the sale. Since radium is such a dangerous substance, the most logical conclusion to be drawn from the jury’s finding is that the jury believed that the defendant possessed insufficient knowledge of radium’s dangers so that it would be unfair to require the defendant to warn the purchaser. Based on the conclusion reached by the jury, it is arguable that the knowledge question actually was presented by the facts of this case, and therefore the court should have addressed the question of whether knowledge is a factor in a cause of action for abnormally dangerous activity.

Clearly, the court in T&E II was aware of the ongoing debate as to whether knowledge or foreseeability should be an element in an abnormally dangerous activity case. Some have argued that the Restatement implies an element of foreseeability as a factor in strict liability. This argument is based on the wording of Restatement section 519 which states that a defendant should be held liable because of the abnormal danger of the activity and the risk to which he is exposing the public. According to this argument, if a defendant is

---

information on dangers of handling radium but there was no information or regulation of tailings).

What we are talking about here is not a failure to warn in regards to the 1943 sale, but an abnormally dangerous activity claim for the activity occurring between 1917 and 1926. Thus, if knowledge is found to be a factor and the time of activity rule is used, this knowledge is not controlling but might only be introduced to support the contention that such knowledge was foreseeable or scientifically knowable.

80. T&E II, 187 A.2d at 1255.

81. Because radium is such a dangerous substance, a reasonable person would probably be required to warn an unsuspecting purchaser of its dangers. Thus, since the jury held defendant did not act unreasonably in failing to warn the purchaser, the logical conclusion is that the jury believed defendant did not have the requisite knowledge which would require it to warn the purchaser.

82. Id. at 1255.

unaware of the risk of his activity, he is not making a real choice to expose the public to those risks because he could not properly evaluate them or take proper measures to reduce the potential for harm. Therefore, those who advocate this position would claim that failure to include a foreseeability element would expose a defendant to a greater liability than the drafters of the Restatement intended and would defeat the justification for imposing strict liability. These commentators argue that the purpose of strict liability is to regulate marketplace behavior based on the notion that a defendant is making an informed choice and accordingly justification for strict liability would only be satisfied if a defendant were held liable only for foreseeable risks. Others have countered that the imposition of a knowledge or foreseeability requirement defeats the policies on which strict liability is based and becomes too much like a negligence claim. Some commentators believe that strict liability is imposed solely to protect the public and that a defendant should not be excused from liability simply because he was unaware of the extent of the risks posed by his activity. These individuals believe that allowing evidence of foreseeability would undercut the public protection policy of strict liability.

This issue becomes far more complicated by the timing problem presented in this case. Should the court decide to include the knowledge/foreseeability element, it must also choose a point in time from which to assess this characteristic. Possible choices might be: the knowledge at the time of trial, the knowledge available at the time the property was sold, or the knowledge available at the time the defendant engaged in the activity. Courts in products liability cases with timing problems have generally used either the time of trial rule or the time of the activity rule. Professor Wade, in his

84. See James R. Zazzali & Frank P. Grad, Hazardous Wastes: New Rights & Remedies? The Report of the Superfund Study Group, 13 SETON HALL L. REV. 446, 462 (1983). This argument is that the liability is imposed due to the danger of the activity and not for the defendant's fault; therefore knowledge is irrelevant, and to include it would violate the policy of liability without excuse.

85. See Wade, supra note 5, at 754.

86. The time of trial rule would mean evaluating the knowledge of the risks posed by radium as they are known at the trial date. A similar rule is employed in the medical malpractice area in the time of discovery rule, which allows plaintiff to toll the statute of limitations until such time as the injury allegedly caused by the doctor is discovered or should have been discovered. See generally McEntire v. Malloy, 707 S.W.2d 773 (Ark. 1986); Werner v. American-Edwards Lab., 745 P.2d 1055 (Idaho 1987); Bonney v. Upjohn Co., 342 N.W.2d 551 (Mich. Ct. App. 1983). The time of discovery rule is temporally close
treatise on torts, argues that the time of trial rule simplifies the trial process and may increase safety precautions, but may also discourage useful activity or encourage withholding newly acquired information to avoid litigation. On the other hand, he argues that using the knowledge at the time of the act (time of activity rule) precludes strict liability from becoming absolute liability by making sure that the defendant is not held liable for unknowable risks. The time of activity would seem to be the proper perspective to use because it delves into the knowledge of the particular defendant and it also eliminates the problem of broadening liability too far, which would be the effect of using the time of trial rule because the court has the privilege of much more information and foresight than the defendant had. Further, if the court wants the knowledge element to have real substantive meaning, it should only charge the defendant for risks which were scientifically knowable at the time it chose to engage in the activity.

Other problems are associated with the implication of knowledge element into a case with a timing problem. Because of the long time gap, it will be more difficult for the court to ascertain exactly how much of the danger was known or knowable at the time the defendant chose to engage in the activity (assuming the court would evaluate according to the knowledge at the time of the activity). The timing problem increases the possibility that the defendant will actually be held liable for unknowable risks because much of the exposure to the substance is not taking place at the time of the activity but years in the future. In an abnormally dangerous activity case without the timing problem, the defendant is only liable for the present risks of his activity. When this twist is added, a defendant may be responsible for future risks as well. If the court chooses not to include the time of trial rule and it is the same in that it evaluates some aspect of the trial not at the time when the alleged act occurred but at some fixed later date.

87. The time of activity rule allows the court to look at precisely what knowledge existed or was foreseeable at the time when the defendant was actually engaged in the activity. This rule seems to be more appropriate because it looks to the knowledge of the defendant, which is what is really relevant in this case.

Another example of use of the time of activity rule is in medical malpractice cases: the doctor's fault is determined as of the time of the alleged malpractice. Grindstaff v. Coleman, 681 F.2d 740 (11th Cir. 1982) (applying the standard of care existing at the time of birth to determine obstetrician's negligence); Goodman v. Lipman, 399 S.E.2d 255 (Ga. Ct. App. 1990) (following requisite standard of care at the time of the alleged malpractice).

88. See Wade, supra note 5, at 754.
89. Id. at 756.
knowledge element, the defendant’s activity must be safe, not only according to the contemporaneous scientific standards at the time of the activity, but it must remain safe even as the definition of what is safe changes over the decades. Adding this element as a requirement in an abnormally dangerous activity case serves a fairness purpose because it absolves a defendant of liability when the dangers and risks of his activity are unknowable. If the court decides not to include a knowledge component in abnormally dangerous activity cases, such cases would be greatly simplified because no expert testimony would be needed about the state of scientific knowledge at the time of the activity. Also, absent the element, it is easier to prove that the party who created the hazard should be held responsible, and therefore a completely innocent party will not be left holding the cleanup bill. Defendants will be put on notice that they should be extremely careful when engaging in an activity that may be abnormally dangerous because they could be exposing themselves or their successor corporations to liability for an indefinite period of time. Putting industry on notice could be beneficial if it encourages safety precautions and thorough scientific investigation of the potential risks of the activity prior to engaging in it. On the other hand, companies might well decide that the risk of liability from what is scientifically unknowable at present but might be learned in the future is simply too great a risk to take. If that happens, potentially beneficial activities might not develop, and present activities involving certain risks as well as benefits might also cease.

What is meant by “safe” in the context of this discussion is not that the activity be without any risk, rather, the term is used here as the opposite of abnormally dangerous (i.e., benefits of the safe activity outweigh the risks while the risks of an abnormally dangerous activity outweigh the benefits).

The converse argument is that the defendant’s liability should not be determined by when the risks were known to the defendant but simply by when the risks actually occurred.

Expert testimony not only complicates the trial by increasing the complexity of the issues for the jury to decide, it lengthens the trial and also greatly increases the cost of litigation.

This is a serious problem in toxic torts cases because under Superfund, the federal government cleans up hazardous sites and then looks to be reimbursed for the cleanup costs. Often, as in this case, the current owner is the party to whom the government hands the bill.

A similar policy argument has been made in opposing the adoption of market share liability in DES cases. Deleting a knowledge element in strict liability cases might discourage manufacturing or storage of dangerous materials. These activities might be necessary and beneficial but companies may not engage in them if they are too unsure of what the future risks might be. Similarly, deleting the causation requirement under a market share theory

90. What is meant by “safe” in the context of this discussion is not that the activity be without any risk, rather, the term is used here as the opposite of abnormally dangerous (i.e., benefits of the safe activity outweigh the risks while the risks of an abnormally dangerous activity outweigh the benefits).

91. The converse argument is that the defendant’s liability should not be determined by when the risks were known to the defendant but simply by when the risks actually occurred.

92. Expert testimony not only complicates the trial by increasing the complexity of the issues for the jury to decide, it lengthens the trial and also greatly increases the cost of litigation.

93. This is a serious problem in toxic torts cases because under Superfund, the federal government cleans up hazardous sites and then looks to be reimbursed for the cleanup costs. Often, as in this case, the current owner is the party to whom the government hands the bill.

94. A similar policy argument has been made in opposing the adoption of market share liability in DES cases. Deleting a knowledge element in strict liability cases might discourage manufacturing or storage of dangerous materials. These activities might be necessary and beneficial but companies may not engage in them if they are too unsure of what the future risks might be. Similarly, deleting the causation requirement under a market share theory
Another alternative available to the New Jersey Supreme Court would be to include the knowledge element and impute it to the defendant, but allow the defendant the opportunity to rebut the knowledge presumption. If this approach is used, the plaintiff will be spared the burden of introducing evidence of scientific knowledge or foreseeability. The defendant will have the burden of proving the "state of the art" of knowledge as it existed at the time he engaged in the activity. The "state of the art" defense would allow the defendant to present evidence in an attempt to prove that at the time he engaged in the activity, he did not know and could not be expected to foresee the danger inherent in carrying out this activity. If the defendant presents sufficient evidence to show that the "state of the art" was such that he could not know or foresee the risks of his activity, then the defendant would not be held liable. The defendant's argument would be that it could not have known the nature and extent of the health risk and therefore should not be held liable for risks which could not be weighed and evaluated at the time of the activity. In terms of fairness, this is the optimal solution because the defendant should have better access to this information, and companies might be encouraged to keep detailed records on the state of the art to rely on in case litigation were to arise. Also, the chilling effect on industry would not be as great in instances where new but useful activities are being considered, because so long as sufficient research is done on the risks, companies will only be strictly liable for foreseeable dangers.

95. This approach has been used in strict products liability cases for failure to warn. See, e.g., Anderson v. Owens-Corning Fiberglas Corp., 810 P.2d 549 (Cal. 1991); Bernier v. Raymark Indus., Inc., 516 A.2d 534 (Me. 1986); Feldman v. Lederle Lab., 479 A.2d 374 (N.J. 1984). See generally KEETON ET AL., supra note 15, at 697-702.

96. Although the court in T&E II rejected the theory of cost-benefit analysis, this theory is viable here. The principle of cost-benefit analysis is that the defendant weighs the potential costs or liability from his activity against the benefits to society plus the profit he will make. According to this theory, the defendant will not engage in the activity unless the benefits exceed the costs. Unless the court allows the defendant to introduce evidence of knowledge, he will be held liable for costs he could not have contemplated in making his decision and this theory loses its value and predictability. If knowledge can be introduced, the model still works because the costs are limited by what is scientifically knowable. See generally James A. Henderson, Jr., Product Liability and the Passage of Time: The Imprisonment of Corporate Rationality, 58 N.Y.U. L. REV. 765 (1983) (detailing the problems involved in cost-benefit analysis when dealing with strict products liability cases with a timing problem).
While the knowledge element and the timing problem have never been brought together in an abnormally dangerous activity case, there is a wealth of commentary on how the timing problem affects products liability cases (particularly design defect and failure to warn). These commentaries reveal similar problems in the products area in deciding whether knowledge has a place in a strict liability cause of action, as well as how this decision is complicated by the passage of time. Some courts have chosen to include the knowledge element in products cases, citing that a failure to do so "would make a manufacturer a virtual insurer of its product's safe use, a result that is not consonant with established principles underlying strict liability." Other courts chose to exclude it because "[it] has no bearing on the outcome of a strict liability claim; the sole subject of inquiry is the defective condition of the product and not the manufacturer's knowledge, negligence or fault." Particularly relevant to this discussion are products cases involving asbestos and prescription drugs, because the timing gap in these cases is fairly lengthy. Most courts in asbestos cases allow evidence that the manufacturer knew or should have known of the risks posed by the substance before strict liability will be imposed. Knowledge has also been considered and state of the art evidence permitted in drug cases.

It is difficult to predict whether the New Jersey Supreme Court would have included knowledge or foreseeability as an element in an abnormally dangerous activity case, in light of its precedent. In

97. See, e.g., Wade, supra note 5.
98. See generally id. supra note 5, (providing a good analysis of the interplay between knowledge and the timing problem in products liability cases).
99. Anderson, 810 P.2d at 550; see also Thibault v. Sears Roebuck & Co., 395 A.2d 843, 847 (N.H. 1978) (plaintiff must show causation and foreseeability for strict liability to be imposed because the manufacturer is only required to warn of foreseeable dangers).
103. In the drug and asbestos cases there is a time gap between the time when the plaintiff was exposed to the product and when the corresponding injury occurred. These cases are analogous to the T&E II case because in T&E II there is a similar time gap between the time when the public was exposed to the risks posed by radium and the corresponding injury suffered by plaintiff.
104. See sources cited in Bernier, 516 A.2d at 539.
105. Feldman, 479 A.2d at 386.
Beshada v. Johns-Manville Products Corp., the court held that in a strict liability case for failure to warn, "there should be strict liability without reference to what excuse defendant might give for being unaware of the danger." The case goes on to comment that state of the art is a negligence defense, not a strict liability defense. The court also rejected the defendant's policy argument that it could not perform an accurate cost-benefit analysis if it could be sued for unknowable risks. The Feldman court took a different approach, imputing knowledge to the defendant on a strict liability claim that Declomycin had damaged plaintiff's teeth. Moreover, the court stated that defendants in design defect and failure to warn cases could introduce evidence of the state of the art in order to rebut the presumption of knowledge. Thus, the holding of Feldman comes to a different conclusion than Beshada and the court synthesized the two by holding that the Beshada decision is limited to its facts (i.e. asbestos cases). In Fischer v. Johns-Manville Corp., another asbestos case, the court reiterated that the state of the art defense was not available in such a case. The court went on to state that "the overriding goal of strict products liability is to protect customers and promote product safety [and] manufacturers are made responsible for injuries caused." What is obvious from these decision is that the Supreme Court of New Jersey is willing to interpret the law differently depending on the product and the risks that such product presents to the public. What is not clear from its precedent is whether the court would include a knowledge/foreseeability component in abnormally dangerous activity cases.

VI. CONCLUSION

The decision as to whether the Restatement section 520 factors will be evaluated from the time of trial perspective or the time of the activity perspective is one which is vital to the future of abnormally dangerous activity cases.

106. 447 A.2d 539 (N.J. 1982).
107. Id. at 546.
108. See supra note 96 (discussing the theory of cost-benefit analysis).
109. The court in T&E II also rejected the use of cost-benefit analysis. See supra note 96.
111. Id.
112. Id. at 388.
113. 512 A.2d 466 (N.J. 1986).
114. Id. at 546.
dangerous activity cases. The court should utilize the time of the activity perspective because the Restatement section 520 focuses on the defendant's activity and his decision to engage in such activity, as balanced against the situational factors existing at the time such decision was made. The time of trial rule is inconsistent with the Restatement's accent on the activity. Using the time of trial rule would impose more stringent requirements on defendants who engage in activities with long-term risks than on those whose activities involve short-term risks, because this approach shifts the focus away from the activity and onto the harm (Factors A & B). Factors C through F cannot be effective guidelines if they are applied at some unknown future date, because the amount of foresight required would be so extensive as to render them completely useless to a defendant deciding whether or not to engage in an activity. Since the Restatement factors are meant to be used by potential defendants as well as courts, the time of activity rule should be used to ensure that each entity is measuring the risks and benefits of the given activity according to the same standards.

The second principal issue raised by this case is whether knowledge or foreseeability will be included by the New Jersey Supreme Court as an element in forthcoming abnormally dangerous activity cases with a timing problem. Clearly, there are strong policy arguments to be made for both including and excluding the knowledge element. The strongest argument for inclusion is fairness to the defendant. Strict liability becomes absolute liability if industries are held liable for creating risks which were scientifically unknowable at the time of the activity. The defendant will be held liable even though there may have been no feasible way to make its activity safer at that time. There also may have been insufficient information for defendant to know the danger to which he was exposing the community or the liability to which he was exposing himself.

The arguments for excluding the knowledge element are equally compelling. Excluding knowledge as an element dramatically simplifies the case by eliminating the need for evidence as to what knowledge existed at the relevant points in time, thereby reducing both the length and cost of future trials. Also, industries that pollute or endanger society stand a greater chance of being held liable absent a foreseeability requirement. Correspondingly, an innocent subsequent purchaser of the defendant's land is less likely to be left with cleanup costs under Superfund or a similar state statute. Society as a whole will benefit from the cleaner and safer environment presented by the
restored property. In addition, society enjoys the benefit of bringing the polluter to justice, rather than sacrificing the tax dollars of the innocent majority. Finally, excluding the knowledge element eliminates many new issues and problems which would result should the element be included.

The best alternative is a compromise between the two previously discussed views. The court should resolve this issue by imputing the knowledge element to the defendant but allowing the defendant the opportunity to present evidence rebutting the presumption of knowledge. This is the optimal alternative because it places a heavy burden on industry to prove that it could not have known of the risks of its activity and yet if those risks were genuinely unknowable, a defendant has the opportunity to absolve itself of liability by presenting adequate proof of that fact. In addition, the defendant who engaged in the activity will have more access to information on knowledge existing at the time of the activity than an innocent plaintiff who probably knew little or nothing about such activity until the time of the lawsuit. Thus, this approach is more equitable because the party with greater access to the information, who may have created a hazardous condition, is the one who must come forward and prove the lack of this element. This approach also balances the policy considerations of the two aforementioned alternatives. If defendant cannot show a lack of knowledge of the risks posed by its activity at the time it chose to engage in such activity, it will be strictly liable for all resulting injuries. In this instance, society and the subsequent landowner will be compensated by the party who engaged in the activity and who cannot prove that the risks posed by its activity were beyond its comprehension. On the other hand, if a defendant can show that the risks posed by its activity were unknowable, they will not be strictly liable and the policy interest of fairness to the defendant is fulfilled. Since the burden on the defendant is so great, the majority of defendants will probably be held liable and thus the vital interest in the environment will be preserved in most cases. Only in cases where the defendant shared a lack of knowledge about the risks of the activity with the remainder of the population will the interest in fairness to the defendant prevail and the cleanup costs be distributed in a different manner. Defendant, in this second instance, is not forced to bear alone the price of its ignorance to the exclusion of the remainder of society. This solution balances the fairness and policy arguments, all of which are meritorious, raised by the previously mentioned options.

The T&E II decision is quite obviously a landmark one. The
New Jersey Supreme Court expanded the abnormally dangerous activity doctrine to encompass a distant predecessor in title. This holding will certainly benefit the environmental movement, as well as those individuals seeking to have their land restored to a safe condition. For defendants, however, the decision created more questions than it answered. Is knowledge or lack of scientific knowability a factor in the abnormally dangerous activity doctrine, or is the state of the art defense available? If knowledge is a factor, from what point in time is it evaluated? What policy considerations are paramount? From what perspective do we evaluate the section 520 factors, when there is a timing problem involved? How will the T&E II case and its rationale affect future abnormally dangerous activity cases? What is the legacy that T&E II and its successor cases will leave behind? What the answers will be to these questions, only time will tell.\textsuperscript{115}

\textit{Christine M. Beggs}\textsuperscript{*}

\textsuperscript{115.} No cases subsequent to \textit{T&E II} have answered any of these questions. However, \textit{T&E II} has been cited as precedent by New Jersey courts for some of the other principles stated therein. \textit{See} Russell-Stanley Corp. v. Plant Indus., Inc., 595 A.2d 534 (N.J. Super. Ct. Ch. Div. 1991) (explaining that one must consider \textit{Restatement} § 520 factors in ascertaining whether defendant’s activity is abnormally dangerous; the holding in \textit{T&E II} is not specific to toxic dumping; caveat emptor is not a defense to successor liability for abnormally dangerous activity).

Note that a district court in Florida rejected \textit{T&E II}'s argument that caveat emptor no longer is a defense in commercial purchases when an abnormally dangerous activity claim is raised. Rather, the court held that caveat emptor still applies because the purchaser can protect itself through contract or inspection and so the abnormally dangerous activity doctrine should not be extended to subsequent purchasers. \textit{See} Futura Realty v. Lone Star Bldg. Ctr., 578 So. 2d 363, 365 (Fla. Dist. Ct. App. 1991).

* I wish to thank Professor Vern Walker of the Hofstra University School of Law for his encouragement and support in the preparation of this Comment.