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It's All Right to Kill People, But Not Trees: Landowners of Environmentally Unsafe Properties Must Be Held Strictly Liable for Personal Injuries Caused by Their Contaminated Land

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"[I]t's All Right to Kill People, but Not Trees": 1 Landowners of Environmentally Unsafe Properties Must Be Held Strictly Liable for Personal Injuries Caused by Their Contaminated Land

I. INTRODUCTION

Landowners have duties that are as fundamental as their right of ownership. Statutory and common law often define those duties to others according to the formal invitee, licensee, or trespasser designations; yet, modern jurisdictions increasingly turn to a single principle: protect the defenseless or unwary with reasonable care. 2 But even this emerging emphasis on landowner duties,

1 126 CONG. REC. 30,941-42 (1980). Senator George J. Mitchell of Maine made this comment in reference to the "Superfund" toxic waste bill that would allow recovery for property injury, but not personal injury. Senator Mitchell continued:

In this bill, we are telling the people of this country that under our value system a property interest is worth compensating but human life is not . . . . Suppose a little girl plays in a State park. She is exposed to a chemical leaching into the park from a dumpsite, and she develops symptoms associated with that chemical, such as kidney diseases or cancer. [Suppose further that] [t]he trees in the park die from exposure to this same chemical. Under the bill, . . . the State may be fully reimbursed from the fund for the cost of restoring new trees to its park. But what about the little girl? We have given her no recourse from the fund. She cannot recover the money it will take to give her proper medical care. She cannot be reimbursed in this bill for restoration of her kidneys or her nervous system or her eyesight.

Neither logic nor compassion, good government nor common sense compel this result. It is simply a failure of the will on the part of Congress to deal with what is the most serious part of the problem—injuries to persons.

Id.

For a discussion of Superfund legislation and its failure to compensate victims of personal injuries, see infra notes 27-47 and accompanying text. See also Grad, A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980, 8 COLUM. J. ENVTL. L 1 (1982).

2 The common law based a landowner's liability for injuries on whether the injured party was a trespasser, licensee, or invitee. The landowner's duty of care increased with each successive category. Modern jurisdictions have begun to alter these common law doctrines and to apply negligence principles to determine liability.

Two forces combined to threaten the survival of the common law system of possessors' liability: first, the mounting social pressures favoring compensation of accident victims as an end in itself; and second, the growing tendency in modern legal thought to view formality of any kind as an unnecessary impediment to achieving justice in every case.

Henderson, Expanding the Negligence Concept: Retreat from the Rule of Law, 51 IND. L.J.
rather than upholding ownership rights, does not adequately protect people from environmentally unsafe land. The following examples illustrate how tort law has failed to protect those personally injured by contaminated properties.

Arthur Stevens was a plumber by trade, but during World War II he worked at the Swan Island shipyard near Portland, Oregon. From 1943 to 1945 he covered ship pipes with asbestos-based products. The vessels, dubbed "Liberty Ships," carried munitions overseas. After the war, he returned to his trade as a plumber and never worked with asbestos products again. Mr. Stevens died in 1987 from mesothelioma, a lung cancer caused by asbestos inhalation. His widow, Maxine, netted $68,000 in settlements after an unsuccessful suit against more than two dozen of the nation's largest asbestos manufacturers.

467, 511-12 (1976).

For a discussion of how negligence principles supersede the common law distinctions of licensee, invitee, and trespasser, see S. SPEISER, C. KRAUSE & A. GANS, THE AMERICAN LAW OF TORTS §14:3 (1986) [hereinafter LAW OF TORTS]. The treatise cites as a representative case Shepler v. Weyerhaeuser, 279 Or. 477, 496, 569 P.2d 1040, cert. denied, 434 U.S. 1051 (1977), where the court denounced the common law classifications as "formalism." In Shepler, the Oregon Supreme Court en banc said "[t]his emphasis on categories and labels involves a high degree of formalism which experience has proved to be a fertile source of unrealistic distinctions, capricious results and all too many appeals on what should be questions of fact but are distorted into questions of law." Id. at 496, 569 P.2d at 1051. The seminal case for this holding, Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968), blamed the common law distinctions for producing "confusion and conflict" amid a "semantic morass." Id. at 116, 443 P.2d at 566, 70 Cal. Rptr. at 102.

Numerous law review articles have noted the trend to move away from common law classifications toward a negligence standard for possessors of land. See, e.g., Note, Land Occupier's Liability—the Duty of Reasonable Care to All, 37 LA. L. REV. 1174 (1977) (The standard for premises liability should be an answer to "what . . . a reasonable man would do in light of this entrant's anticipated presence"); Note, Liability of Owners and Occupiers of Land, 58 MARQ. L. REV. 609 (1975) (recommending jury instructions which employ a negligence standard on landowners for personal injury caused by their land); Note, The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?, 36 MD. L. REV. 816 (1977) (a foreseeability test within the negligence standard should reduce "arbitrary and harsh" results imposed by common law principles).

3 Telephone interview with Mark King, attorney, Ness Motley Loadholt Richardson & Poole, South Carolina (which represented Mr. Stevens and Mr. Wise in the two unreported cases to be noted in the introduction) (Dec. 21, 1990) [hereinafter KING]. Mr. King relayed all the facts from these cases.

4 Asbestos is a flaky, white mineral used for its heat-resistant and fire-retardant properties. During application of asbestos products, workers often contended with clouds of dust containing microscopic asbestos particles. The use of asbestos products was so prevalent—and the resulting dust clouds so pervasive—that an estimated 21 million American workers were exposed to the lethal mineral between 1940 and 1980. Labaton, The Bitter Fight Over The Manville Trust, N.Y. Times, July 8, 1990, § 3, at 1, col. 1.

Mr. Stevens could only identify Manville asbestos products, but that company's bankruptcy filing stayed all such claims against it. Since Mr. Stevens could not remember working with products made by any of the thirty asbestos manufacturers named in his suit, the jury acquitted them. More poignantly, Mr. Stevens' estate had to pay court costs. The estate initially received $132,000 in pre-trial settlements, but that amount was nearly halved by the vagaries of the legal system: $18,000 had to be repaid for Longshoremen's and Harbor Worker's Compensation Act (LHWCA) fund payments made while Mr. Stevens was alive; another $40,000 went to Mr. Steven's attorney for his costs; and $6,000 went to the asbestos manufacturers themselves as court costs.

* * *

For more than three decades, Clyde Wise worked as a maintenance man at Killian Manufacturing in Ohio. One of his respon-

6 Under the protection of Chapter 11 of the U.S. Bankruptcy Code, Manville Corp. placed all its asbestos-related liability in the Manville Personal Injury Settlement Trust. Once acclaimed as a visionary response for workers, the trust has become so financially decrepit that federal judges are now vying to take control of it to ensure a more equitable distribution. The trust began in 1988 with $815 million in cash and notes, plus as much as 80 percent of Manville's stock. Starting in 1991, the trust is to receive $75 million annually, and in 1992, the trust will receive as much as 20 percent of Manville's annual profit. The money is not enough. The company originally estimated 100,000 workers would file claims. As of March 31, 1990, 152,000 had already been filed, with hundreds of thousands more expected. The company also estimated a $25,000 average claim pay-out. Instead, the payout has averaged $42,000. With $1.5 billion in assets and $7.5 billion in expected claims, the projected shortfall is $6 billion.

Because of the shortfall, U.S. District Court Judges Jack Weinstein and Helen Freedman have ordered Manville Corp.'s bankruptcy court settlement reopened, with hopes of restructuring how victims will be paid. Weinstein has said publicly that all asbestos cases should be heard before one judge, with payment based upon victim needs. The trust now faces more than 90,000 suits scheduled in 500 state courts representing 374 different jurisdictions, as well as cases in all 96 federal district courts in the nation. See Galen, Back in Jeopardy at Manville, BUS. WEEK, June 25, 1990, at 28; Labaton, Complication on Asbestos, N.Y. Times, Aug. 13, 1990, at B1, col. 1.

Other asbestos manufacturers face similar trouble. Judge Weinstein recently agreed to a limited fund class plan for Eagle-Picher Industries Inc., which manufactured asbestos insulation products for 40 years. The Cincinnati-based company was facing an involuntary bankruptcy petition filed by a group of plaintiff attorneys. Despite the filing, Judge Weinstein created the settlement class and deemed the involuntary bankruptcy petition a nullity. Critics charge the settlement class will result in fewer payments than a standard bankruptcy petition. If successful, other asbestos manufacturers could similarly end their asbestos litigation without petitioning for bankruptcy protection. Blum, A Routine Hearing Turns Quickly Less So, Nat'l L.J., Dec. 24, 1990, at 8.
sibilities was to keep the boilers running. Those boilers, with their mass of asbestos-covered pipes, poisoned Mr. Wise. He died in 1987 from lung cancer. An autopsy revealed asbestos fibers in his lungs.\(^7\) His only known exposure to asbestos was from the boiler pipe insulation. So far, his widow Martha has received a $3,000 settlement from the boiler manufacturer, Babcock & Wilcox, but nothing else. Much like Arthur Stevens mentioned in the first example, Clyde Wise could not identify any specific asbestos products used to wrap the boiler pipes. His case, filed on behalf of the estate by his widow, Martha, in Dade County, Florida, is still pending.\(^8\)

* * *

MacNeal Hospital in suburban Chicago rarely treated asbestos diseases.\(^9\) Typically, Northwestern Memorial Hospital near Chicago's Gold Coast\(^10\) attracted the area's asbestos patient referrals, because it offered lung tests and other screenings to the city's legion of laborers exposed to the mineral during the post-war construction boom. From 1980 through 1984, however, MacNeal admitted more than six times the number of mesothelioma patients than it did from 1968 to 1974.\(^11\) The dramatic increase prompted an epidemiological study of MacNeal's thirty-two

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\(^7\) Mr. Wise's attorney must prove that his past exposure to asbestos substantially contributed to the lung cancer. The defendant asbestos manufacturers have claimed that Mr. Wise's exposure to their products did not constitute a significant enough exposure to have caused the cancer. Telephone interview with Alan Petrine, of counsel to Ness Motley Loadholt Richardson & Poole, representing Mr. Wise in Miami, Fla. (Feb. 11, 1991).

For the purpose of this Note, Mr. Wise's case represents those victims of a contaminated property who cannot identify the maker of the toxin, but who nonetheless know where they were contaminated. Holding the landowner strictly liable for the injury would shift the burdens of product identification away from victims. The landowner would then seek indemnification from the parties—in Mr. Wise's case the asbestos manufacturers—now named directly by the victims.


\(^9\) Wolf, Malignant Mesothelioma With Occupational and Environmental Asbestos Exposure in an Illinois Community Hospital, 147 ARCHIVES OF INTERNAL MED. 2145 (1987).

\(^10\) David W. Cugell, M.D., heads asbestos-related and other pulmonary research at Northwestern Memorial Hospital. One of the first doctors to pursue the lethal effects of asbestos was Irving J. Selikoff, M.D. In 1964, Selikoff published a seminal study of the mortality rate among insulation workers. P. BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL 103-04 (1985).

\(^11\) WOLF, supra note 9, at 2147.
mesothelioma patients from 1968 to 1984. To the researchers' surprise, only three of the fourteen women afflicted with the deadly cancer had work exposure to the lethal mineral. Four women were contaminated by family members who worked with asbestos and five women had no known exposure "other than residential proximity to [nearby] asbestos plants." The striking conclusion from this study was that "residential proximity to asbestos industries . . . may be causally related to the development of DMM [diffuse malignant mesothelioma]." In fact, twenty-seven of the thirty-two mesothelioma patients lived within a 3.2 kilometer radius of two asbestos plants.

* * *

Justice has eluded the victims in each of these three cases, because tort law has failed to accommodate the complex liabilities arising from poisoned properties. Mr. Stevens' only identified defendant has no money; Mr. Wise could not identify any singular defendant; and the MacNeal patients similarly face bankrupt defendants or a landowner/lessor who must be proven negligent. The following analysis of these plaintiffs' legal options shows why the legal system has failed them.

Product liability law offers the most logical and direct claim for the plaintiffs mentioned above. Unfortunately, a combination of dwindling asbestos manufacturer resources and often insurmountable legal obstacles typically thwart reasonable compensation. As an alternative, the plaintiffs can also file a claim against the owners of the respective premises. But under existing

12 Id.
13 Id. at 2148.
14 Id.
15 Id. One Chicago trial attorney, who represented the Local 14, Chicago Asbestos Union, said those "indirectly exposed" MacNeal patients died "because they raked their leaves, shoveled snow and put cherry pies on their window sills." Telephone interview with Terrence M. Johnson, Esquire, Chicago, Ill. (Dec. 28, 1990).
16 Id. The Unarco asbestos manufacturing plant on Chicago's South Side was a major source of contamination for the MacNeal patients. Unfortunately, Unarco filed for protection under Chapter 11 of the U.S. Bankruptcy Code in June, 1982, the same year as the Manville Corp.'s petition. KING, supra note 3.
17 See supra note 16.
18 The Manville Personal Injury Trust, for example, can only offer the current 130,000 claimants a promise of payment based on when the workers filed the claims, not on their financial need or severity of injury. Other asbestos manufacturers presumably will face similar financial difficulties. N.Y. Times, July 8, 1990, at F1, col. 1.
law, that strategy would probably meet with an equally unsuccessful result. For example, if the owner of the Swan Island shipyard were also Mr. Stevens' employer, the tort claim would be barred under the exclusivity clause of the LHWCA; Mr. Wise's claim against Killian Manufacturing—provided the premises were owned by his employer—likewise would be barred.

The residents near the asbestos manufacturing plants, however, could sue the landowner under premises liability law. If an asbestos manufacturer owned the land, the company would be liable to the residents for the "physical harm caused by ... artificial condition," provided 1) the manufacturer created the airborne asbestos and 2) the asbestos manufacturer knew or should have known of the consequent risk to the neighborhood. If the asbestos manufacturer leased the land, the landowner would not be liable "for physical harm caused by any dangerous condition" which occurred after the lessee took possession.

As the Restatement criteria illustrates, negligence is often the basis for landowner liability. In the context of contaminated property, the burden of proving landowner negligence could be overwhelming. But, even if a plaintiff was able to overcome the burden and convince a jury that the manufacturer knew of the asbestos dangers, the poor financial condition of the asbestos manufacturers would put the plaintiff in no better position than Mr. Stevens' estate. Similarly, if an asbestos manufacturer leased the land for its asbestos plant, it would be difficult to prove the requisite Restatement criteria against the lessor/landowner, namely, that the lessor was in control of the land, knew that asbestos was dangerous, and made no effort to alter emissions. In most cases, landowners who lease land to an industrial enterprise could reasonably argue that they were no longer in control of the pre-

20 For a discussion of exclusivity, see 2A A. LARSON, supra note 19, § 65.00.
21 RESTATEMENT (SECOND) OF TORTS § 364 (1977). For a general discussion of premises liability under the Restatement, see LAW OF TORTS, supra note 2, at 819.
23 Litigation against the asbestos industry is an exception to the difficulty of proving negligence. At least some of the manufacturers, principally the industry's two largest companies, Manville Corp. and Raybestos-Manhattan, knew of the dangers as early as the 1930's. See P. Brodeur, supra note 10, at 110-11. See also the discussion on disallowing a state-of-the-art defense for asbestos manufacturers, infra notes 107-16 and accompanying text.
mises, or were unaware of the tenant’s property contamination.\textsuperscript{24} The chances of proving the lessor liable for contamination from an industrial lessee might be slim indeed.

One way to bypass the difficulty of evaluating reasonable care in the context of contaminated properties is to dispense with the Restatement criteria altogether, and hold landowners strictly liable for personal injuries caused by contaminated toxic properties. Landowners would be required to control the toxins, reducing the risk of harm. The application of this duty can be traced through nuisance, admiralty, and products liability law. This duty has already been applied to residential landlords, but more significantly, some of the nation’s prominent lawyers and legal scholars already have recommended that Congress enact legislation to enforce this duty.

The original Superfund legislation authorized a study group to recommend to Congress how it should approach personal injuries caused by toxic waste sites.\textsuperscript{25} Dubbed the “301(e) Study Group” after the Superfund section creating it, the Study Group recommended that landowners be held strictly liable for personal injuries caused by the toxic waste sites.\textsuperscript{26} This Note substantiates the validity of that group’s recommendation with one significant alteration: contrary to the group’s conclusion, this Note proposes that worker’s compensation should not bar recovery under this duty.

Part I of this Note will discuss the “301(e)” congressional report, emphasizing its continued relevance. Part II explains the legal doctrines that support strict liability for contaminated properties: the \textit{Rylands} doctrine, warranty of habitability, unseaworthiness, products liability, and nuisance. Following these doctrinal comparisons, Part III discusses how Guido Calabresi’s economic theory of law, as well as George Fletcher’s notion of justice in the law, support strict liability in this context. Finally, Part IV discus-

\textsuperscript{24} In Amoco Oil Co. v. EPA, 543 F.2d 270 (1st Cir. 1976), the court of appeals refused to apply blanket vicarious liability to Amoco for the negligent acts of its retail dealers/lessees. The court summarized the state of the law and stated that “[t]raditionally, the rule has been that once control of the premises passes to the lessee, the landlord is not vicariously liable for accidents which occur thereon unless he has retained control over the premises.” \textit{Id.} at 276. \textit{See also id.} at 275 n.12. For an exception to this rule, see Green v. Asher Coal Mining Co., 377 S.W.2d 68, 70 (Ky. 1964) (when the condition or use of a premises “is so potentially harmful . . . the courts will not permit the owner to hide behind a lease.”).

\textsuperscript{25} 42 U.S.C. §§ 9601-57 (Supp. 1980).

\textsuperscript{26} \textit{See infra} notes 27-47 and accompanying text.
es why worker’s compensation law should not be a bar to recovery, and answers the expected criticisms concerning the enforcement of this duty.

II. A VOICE CRYING IN A POLLUTED WILDERNESS: CONGRESS IGNORES AN EMINENT PANEL’S PLEA FOR JUSTICE

In 1981 a group of the nation’s foremost environmental and tort attorneys recommended to Congress that property owners be held strictly liable in tort for injuries caused by toxic substances on their properties.\(^27\) Congress commissioned the “301(e) Study Group” to study the adequacy of statutory and common law in toxic tort personal injuries.\(^28\) The group concluded that the present law was inadequate.\(^29\) Ten years later, the law is still inadequate. As a result of the Study, Congress established the Agency for Toxic Substances and Disease Registry and enacted a federal discovery rule; however, none of the substantive recommendations have become law.\(^30\)

\(^{27}\) The members of the “301(e) Study Group” included: Hon. Charles D. Breitel, former Chief Judge of the New York Court of Appeals; Jeffrey O’Connell, Professor of Law, University of Virginia School of Law; Frank P. Grad, Professor of Law, Columbia University School of Law; Weyman I. Lundquist, Esq., Heller, Ehrman, White & McAuliffe, San Francisco; Frederick R. Anderson, Professor of Law, University of Utah College of Law; George Clemon Freeman, Jr., Esq., Hunton & Williams, Richmond, Virginia; Richard F. Gerry, Esq., San Diego, Calif., then President of American Trial Lawyers Association; Norman J. Landau, Esq., New York; Frederick M. Baron, Esq., Dallas; Rufus L. Edmisten, then Attorney General of North Carolina; Warren R. Spannaus, then Attorney General of Minnesota; James R. Zazzali, former Attorney General of New Jersey. Zazzali & Grad, Hazardous Wastes: New Rights and Remedies?, \(13\) SETON HALL L. REV. 446, 446 n.1 (1983). (James R. Zazzali, chairman of the Study Group, and Frank P. Grad, Group reporter, discuss the rationale behind the recommendations of the Study.)

\(^{28}\) See Pub. L. No. 96-510, § 301(e), 94 Stat. 2767, 2807 (1980) (codified at 42 U.S.C. § 9651(e) (Supp. 1980)). Under Title III—Miscellaneous Provisions: Reports and Studies, § 301(e)(1), Congress commissioned the panel to study “the adequacy of existing common law and statutory remedies in providing legal redress for harm to man and the environment caused by the release of hazardous substances into the environment.”


\(^{30}\) Telephone interview with Columbia University School of Law Professor Frank Grad (Nov. 2, 1990). For a discussion of the ATSDR, see infra note 32. The Superfund (CERCLA) statute of limitation/discovery provision was codified in 42 U.S.C. § 9612(d) (1988).
NOTE—ENVIRONMENTALLY UNSAFE PROPERTIES

The Study prompted an overwhelming response from representatives of the insurance and hazardous waste industries, among others, who claimed the recommendations were unjust, short-sighted, and would cripple these and other vital industries. After two successive years of hearings, Congress withdrew the victim compensation amendment from consideration. To date, the far-reaching Superfund legislation has no provision for personal injury. Ironically, the Superfund law holds property owners strictly liable for the costs of a clean-up and damage to property, but the law does not address the more salient issue of how to impose liability when those chemicals injure someone.

In its 860-page report, the Study Group made 10 recommen-

31 Implementation of the Superfund Program: Hearings Before the Subcommittee on Commerce, Transportation, and Tourism, House Energy and Commerce Committee, 99th Cong., 2d Sess. 120-81 (1983) (statement of Sheila L. Birnbaum, representing the American Insurance Association) [hereinafter SUPERFUND HEARING]. Birnbaum argued that "our traditional principles have been based on concepts of justice and fairness." She said enforcing strict liability and joint and several liability, plus the recommended presumptions of toxic waste disease causation, represented a "wholesale, radical abandonment" from the tort system. Such a move, she argued, would contravene "the goals of justice and accident prevention that have been built into our tort law." Id. at 134.

Five days later, before the same subcommittee, Kenneth Geiser, from the Tufts University Department of Urban and Environmental Policy, described the Study Group proposals as "too timid," and said: "The proposed liability for landowners and the fear of future court activity, court suits, is one of the best incentives for encouraging companies to reduce toxic chemicals and hazardous wastes." Id. at 263-66. For arguments supporting the Study, see Statements of Dr. Nicholas Ashford, Director, Center for Policy Alternatives, Massachusetts Institute of Technology; Leslie I. Boden, assistant professor, Harvard School of Public Health; and Edward L. Baker, M.D., M.P.H., Associate Professor of Occupational Medicine, Harvard School of Public Health, id. at 280-314. Ashford warned the subcommittee not to be "intimidated by the claims of an unscientific basis for the presumption" of a causal link between exposure and disease. Id. at 282. Ashford said that "we're dealing here with justice; we're dealing here with erring on the side of caution, and you must provide a democratic check on the scientific process to bolster your presumptions." Id.

32 Congress did, however, establish the Agency for Toxic Substances and Disease Registry (ATSDR) to "conduct periodic survey and screening programs to determine relationships between exposure to toxic substances and illness." Environmental Responses Act, Pub. L. No. 96-510, § 104(j), 94 Stat. 2767, 2778-79 (1980). The ATSDR compiles scientific data regarding effects of toxic exposure. For a reference to a recent ATSDR report, see infra note 208. The agency was commissioned to assist injured plaintiffs in overcoming some of the obstacles to proving causation, but Professor Grad said they have not as yet had an impact on toxic tort litigation. "That was my hope, but litigators are a peculiar lot. They sometimes would prefer to have people [in a jury] speculate about injury from exposure than to have limits set by these documents." Telephone Interview with Columbia University School of Law Professor Frank Grad (Nov. 2, 1990).

dations, the ninth entitled “Plenary State Court Actions: Removal of Obstacles and Barriers to Effective Court Actions for Personal Injuries Resulting from Exposure to Hazardous Wastes.” In the ensuing discussion, the Study Group chastised jurisdictions which allow statute of limitations defenses to thwart otherwise legitimate plaintiff claims. The Study Group’s recommendation also encouraged multiple-plaintiff suits, joint and several liability among successive owners of contaminated property, presumptions of law, and strict liability.

The “Plenary State Court Action” section of the report showed the group’s willingness to protect injured plaintiffs. With respect to strict liability, the Study Group did away with the notion of fault, duty of care, and responsibility. Instead, the Group focused on the “magnitude of the risk” associated with the use of toxic substances, arguing that since the damage could have such long-lasting effects, the liability must be a forceful counterbalance. Similarly, the Study Group’s recommended presumptions of law also reduced plaintiffs’ burden of proof. For example, if plaintiffs introduced evidence that they were exposed to a hazardous substance, and that the exposure was reasonably likely to have caused or contributed to the injury, then “such damages shall be presumed to have been caused by such exposure.”

The Study Group was concerned that if it did not adhere to the “magnitude of the risk” form of strict liability, then legal obstacles could defeat legitimate claims. The Study Group’s concern was to protect plaintiffs’ claims from being thwarted by the rigors of causation. The premise of the Report was that insidi-

34 II REPORT, supra note 29, at 255.
35 Id.
36 Id. at 255-56.
37 Zazzali & Grad, supra note 27, at 462.
38 I REPORT, supra note 29, at 266.
39 II REPORT, supra note 29, at 117. The Study Group supported the use of these presumptions for administrative hearings designed to handle less substantive injuries, commonly described as Tier One cases. For Tier Two cases, termed plenary state actions, the Study Group retreated from employing the presumptions, and recommended use of ATSDR reports (see supra note 32) which would aid courts in determining causation. Id. at 265.
40 Id. at 276.
41 The Study Group concluded that the essence of strict liability was “whether the activity is one which carries risks of such magnitude that even if carried on with reasonable care, the defendant should be held strictly liable for its consequences.” Id. at 274. In a criticism from within, group member Hon. Charles D. Breitel said some hazardous
ous and severe environmental damage justified drastic measures.\(^4\)

Study Group Chairman John Zazzali said the group specifically recommended "that forthcoming legislation expressly exclude injury due to occupational exposure;"\(^4\) yet, the chairman offered only two cites, a treatise and a law review article, as justification.\(^4\) Compared to the thorough discussion of strict liability,

substance users had no idea at the time of their use that the chemicals were dangerous. \(^{42}\) "In some cases, the users were specifically told the chemicals were utterly harmless or even beneficial or essential, which later, or tomorrow, were... discovered to be toxic singly or in synergistic relation with other substances." \(^{43}\) 

To support its argument for strict liability, the Study Group invoked cases involving property damages from hazardous substances. The rationale from those cases could apply to personal injury damages as well. For example, the linchpin for the Study Group's call for strict liability involved a New Jersey mercury-processing plant. Department of Envtl. Protection v. Ventron Corp., 182 N.J. Super. 210, 440 A.2d 455 (1981). The subsoil and groundwater surrounding the Ventron plant contained 268 tons of lethal mercury deposits. The New Jersey Supreme Court relied on the landmark Rylands v. Fletcher, 3 L.R.-E. 330 (H.L 1868) to justify holding the owners, and their successive entities, strictly, jointly, and severally liable for the clean-up and resultant damages to an adjoining tract. (For a discussion of Rylands, see infra notes 49-57 and accompanying text.) \(^{44}\)

\(^{42}\) "It seems that government and scientific sources agree that it will be impossible to produce an accurate estimate of the number of hazardous waste injuries likely to emerge." Zazzali & Grad, supra note 27, at 453.

\(^{43}\) "This generation of Americans has seen its boundary wasted by mindless and reckless misuse. It has further seen the almost unchecked development of products whose misuse or improper employment lead to disfigurement and death. The law is not—or ought not be so feeble as to exonerate those whose conduct causes harm to others by reason of such use or abuse."

\(^{44}\) Zazzali & Grad, supra note 27, at 465.
this simple reference seems inadequate for such a value-laden policy decision. Since the Study Group was bold enough to recommend "magnitude of the risk" strict liability in the face of adamant industry concern for "justice and fairness," it likewise should have boldly recommended that the doctrine supersede worker's compensation law. The same arguments the Study Group made a decade ago are relevant today, with one exception. Worker's compensation law should not bar recovery from a toxic tort claim. While the Study courageously defended the general rights of victims injured by toxins, it chose to accept present relief for those injured on the job, even though some bill proponents admitted that worker's compensation law was inadequate for handling widespread occupational disease.

45 tion and Employers' Liability, 21 GA. L. REV. 843 (1987) (exclusive remedy should be replaced by a double-protection system in which employees have a cause of action for employer negligence.) Ironically, Zazzali's cited Note concluded that workers' compensation plans "have poorly served those with work-related illnesses." Note, supra, at 937. The Note encouraged reform because of the "grim harvest" of workers (one-in-four) exposed to federally regulated hazardous substances while working. Id. at 916. The inadequacy of workers' compensation plans was a consistent theme in the Superfund hearings. Dr. Boden said that workers' compensation controverts more than half of the chronic occupational disease cases, and that "[p]roposed reforms are uncertain in effect and arbitrary in nature." SUPERFUND HEARING, supra note 31, at 301. For a discussion of the inadequacy of worker's compensation, see infra notes 47 and 169-96 and accompanying text.

46 Id. at 123. The text of the "Workman's Compensation" section of the failed bill proposed as a response to the report reads:

Section 1133. No person who is an employee covered by a State workman's compensation plan which compensates employees for injury, illness, or death arising out of and in the course of employment (or pursuant to similar tests of work-relatedness) may recover any amount under this subtitle for any such injury, illness, or death for which any compensation is available under such State law.

Id.

47 Id. at 283. Dr. Edward L. Baker, M.D., said workers' compensation programs must be changed or new systems designed to allow for occupational disease. "[T]here may be no satisfactory resolution to the problems of compensating occupational and environmental disease within the traditional cause-specific compensation framework." Id. at 285. Dr. Baker said physicians often must decide causation for worker claims, and, unfortunately, "[m]ost U.S. medical schools do not provide specific training in environmental toxicology and most physicians who have been in practice for a number of years fail to adequately review recent medical literature." Id. at 284. For a discussion of the inadequacy of worker's compensation in the context of contaminated workplaces, see supra note 44, and infra notes 169-96 and accompanying text.
III. **Five Separate Doctrines Support Strict Liability for Landowners of Poisoned Properties**

Victims of toxic torts are often helpless. Residents fleeing Love Canal or Three-Mile Island, school children studying under asbestos-covered pipes, for rural residents drinking contaminated well water are images which outrage our sense of fairness. Anger at the perceived injustice, however, does not necessarily help find the blameworthy party. Sometimes the instigator of the toxic exposure is untraceable or bankrupt, which leaves the victims unable to recover. But, if landowners had a duty to keep properties free from contaminants, then the victims would have legal redress. The burden of pursuing an alternatively blameworthy party would then fall on the landowner seeking indemnification, rather than on a helpless victim.

Landowners of environmentally unsafe properties must be responsible for injuries caused by contamination; otherwise, the law would allow ownership benefits at the expense of misery to others. In cases where the landowner did not know the property was contaminated, or did nothing unreasonable to cause the contamination, that landowner still must be responsible. Without strict landowner liability, unwary victims of toxic torts often would have no relief. The following analogies illustrate how the law consistently works to protect the helpless.

**A. Contaminated Properties are the Result of “Unnatural” Uses of Land Likely to Cause Harm**

Landowner liability typically is negligence based; yet, within

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49 In virtually all Anglo-American jurisdictions today, the owner or occupier of private premises may be held liable for personal injury or property damage occasioned by such owner's or occupier's negligence in the construction, maintenance, operation, and the like for such premises—(subject, still in some states, to various exceptions in the case of licensees or trespassers).

`LAW OF TORTS, supra` note 2, § 14:2.

In terms of protecting those outside a premises, “[t]he possessor of land is first of all required to exercise reasonable care, with regard to any activities which he carries
the tradition of demanding reasonable care lies a venerable use of strict liability, the *Rylands v. Fletcher* doctrine. In *Rylands*, the defendant mill owner hired independent contractors to build a reservoir on their land. When the reservoir broke, water flooded the shafts of an adjoining mine. Though the contractors were probably negligent, an arbitrator initially ruled the defendant free of blame. Justice Blackburn of the Exchequer Chamber, however, ruled in favor of the plaintiff:

> We think that the true rule of law is that the person who for his own purposes brings on his land . . . anything likely to do mischief if it escapes, must keep at his peril, and if he does not do so is prima facie answerable for all the damage which is the natural consequence of its escape.\(^{51}\)

The House of Lords upheld the decision, because the reservoirs represented a "non-natural use," distinguished from "any purpose for which it might in the ordinary course of the enjoyment of land be used."\(^{52}\) American courts have since limited the application of *Rylands* "only to the thing out of place, the abnormally dangerous condition or activity which is not a 'natural' one where it is."\(^{53}\)

As industrial contamination increasingly attacks our environment and work force, the notion of what is a "natural" use of land must be circumscribed. The use of dangerous chemicals and minerals might have been essential to our rapidly expanding nation sometime ago, but the repercussions now outweigh the benefits of unbridled expansion. Courts have begun to redefine what is a "natural" use of land to protect the environment and people from toxins. For example, in *City of Bridgeton v. B.P. Oil, Inc.*\(^{54}\) the New Jersey court held the owner of an oil storage tank strictly liable for a spill. What had once been considered a

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51 1 L.R.-Ex. 265, 279-80 (1865).


54 146 N.J. Super. 169, 369 A.2d 49 (1976). See also note 42. For a discussion of how the law of torts changed from a strict liability standard to a negligence standard "to create immunities from legal liability and thereby to provide substantial subsidies for those who undertook schemes of economic development," see M. Horwitz, *The Transformation of American Law 1780-1860*, 63-109, 100 (1977).
common use of land in this industrialized state—storing oil—was deemed dangerous:

In view of our developing insight into the impact of pollution upon the environment because of the nature of this activity, and the statutory prohibition against pollution, this is the proper time to extend the concept of strict liability in the State to those who store ultra-hazardous or pollutant substances.\textsuperscript{55}

Twenty years ago, Dean Prosser noted that the pendulum has swung in favor of applying the \textit{Rylands} doctrine to dangerous enterprises, rather than accepting such harmful activity as a necessary aspect of industrialization.\textsuperscript{56} He stated that a “hazardous enterprise, even though it be socially valuable, must pay its way, and make good the damage inflicted.”\textsuperscript{57}

Landowners of contaminated properties must make good on their duty to protect others from harm. Real property represents a basis of wealth, whether it is used as a landfill or a place of business. When that source of wealth is also the source of harm, then the landowner must pay. In \textit{Rylands}, the mill owner's reservoir was an important asset to his business; yet, he had to repay the party victimized by his injurious property. Any number of profitable or socially beneficial land uses could cause property contamination, but these societal benefits cannot relieve landowners from the duty to protect others from the contamination.

To counteract generations of environmental misuse, courts must now consider any use of toxins unnatural, since society has yet to fathom just how much mischief such land use has caused. The proliferation of environmental laws in federal, state and municipal jurisdictions shows an increasing legislative resentment. Poisoned properties represent a non-natural use, because society has become intolerant of these disastrous side-effects.

Just as the House of Lords in \textit{Rylands} considered the reservoir in an unacceptable location, so, too, should American courts consider property contaminants in a similarly unacceptable location. The defendant in \textit{Rylands} was liable for the harm caused by his property, even though the defendant/landowner himself was not negligent. In the same way, landowners of contaminated properties must be held strictly liable for the injuries caused by

\textsuperscript{55} \textit{Id.} at 176-77, 369 A.2d 53-54.

\textsuperscript{56} \textsc{W. Prosser, supra} note 49, § 78, at 509.

\textsuperscript{57} \textit{Id.}
those unnatural elements.

B. Contaminated Properties are Defective Premises Which Violate the Warranty of Habitability

By its own estimation, the Supreme Court of California took "an unprecedented leap" in Becker v. IRM Corp. and held residential landlords strictly liable in tort for injuries due to defective premises. In essence, Becker allowed tenants to claim strict liability in tort for breach of the implied warranty of habitability. The court in Becker applied products liability beyond the literal context of goods in the stream of commerce and accepted the analogy that a property can be considered a product.

58 Prior to the warranty of habitability, a landlord was not liable for injuries due to the defective condition of a premises, unless the landlord was guilty of fraud, concealment, or bound by a lease covenant. Besides traditional property concepts, caveat emptor similarly protected landlords, since the doctrine was based on the landlord's lack of possession and control of the premises. See Love, Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?, 1975 WISC. L. REV. 19 (1975). The common law rule gave the landlord a cloak of immunity, since the lease was considered a conveyance. The population shift from rural to urban settings forced changes from that general common law rule. Instead of instituting a wholesale restructuring of the law, however, the courts simply added exceptions. Id. at 51. One of the exceptions held landlords liable for the undisclosed latent defects. To apply that exception, landlords had to have known or had reason to know of the defect. Under the exception, the landlord was liable to third-parties as well. In that sense, property law consistently reflected products liability theory. The landlord was liable for the property defect to any who came to the premises, just as a manufacturer is strictly liable to any who use his product. Contrary to products liability, though, if the landlord told the tenant of the defect, then the landlord would not be liable to third-parties. Scholars have considered that limitation arbitrary. See 5 F. HARPER & F. JAMES, THE LAW OF TORTS 275 (2d Ed. 1986).

The doctrine of the warranty of habitability strips away any cloak of protection for a landlord. Under the doctrine, a landlord is liable for any damages resulting from his implied promise to make the premises habitable. The doctrine contradicts property law doctrine defining a lease as a transfer of land. Instead, the warranty treats the property transfer as something akin to the sale of goods, applying contract law principles like mutually dependent lease covenants. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 3:16 (1980). The first case invoking the principle was Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961) in which the court allowed student boarders to break the lease of a filthy house. The lightening rod for the doctrine, however, was Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970). Although Javins ultimately ruled the landlord in violation of housing regulations, courts frequently quoted its dicta, which eschewed long-standing property law for contract principles. See also Freyfogle, The Installment Land Contract as Lease: Habitability Protections and the Low-Income Purchaser, 62 N.Y.U. L. REV. 293 (1987) (courts should construe the residential installment land contract as a lease, imposing the same obligations on the vendor-landlord as on residential landlords).

60 Id. at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219.
61 Id.
California's highest court said landlords were "part of the 'overall producing and marketing enterprise,'" just like manufacturers of a consumable product.

Before Becker, California and other courts had held landlords liable for their tenants' injuries, but only when some product within the dwelling malfunctioned, like a heating system that caught fire, a couch in a furnished apartment that collapsed, or a wall-bed that tumbled off its hinges. In each of those instances, the court considered the dwelling's defective features as products within a dwelling. But in Becker, the dwelling itself was the product, not an amalgam of things—a faucet, couch or heater—that might separately be considered products. After Becker, the dwelling itself could be considered injurious.

In Becker, a tenant of an apartment complex slipped and fell against his frosted glass shower door. It broke and cut him severely. Had the landlord installed tempered glass, the injury would have been much less severe. In justifying an award to the plaintiff, the Becker court traced the development of strict liability theory, and compared its landmark Greenman v. Yuba Power Products decision to cases upholding relief for defective fixtures or for poorly manufactured new homes. In Greenman, a

62 Id. The Becker court based its application of strict liability in tort on the warranty of habitability doctrine, and ruled that "a landlord engaged in the business of leasing dwellings is strictly liable in tort for injuries resulting from a latent defect in the premises." Id. at 459, 698 P.2d at 118, 213 Cal. Rptr. at 215. The rationale was that landlords were part of an overall marketing scheme, and as such, "the fact that the enterprise is one involving real estate may not immunize the landlord." Id.

63 Kriegler v. Eichler Homes Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969) (builder of mass-produced homes liable for damages caused by a faulty heating system). In Kriegler, the court stated that the purchaser ordinarily does not have the means to protect himself either by hiring experts to supervise and inspect or by provision in the deed, and that the public interest dictates that the cost of injury from defects should be borne by the developer who created the danger and who is in a better position to bear the loss, rather than the injured party who relied on the developer's skill and implied representation.

67 Id.
68 Id.
70 38 Cal. 3d at 458, 698 P.2d at 118, 213 Cal. Rptr. at 215.
wood lathe malfunctioned, sending a piece of wood crashing into the victim's forehead. Since Mr. Greenman had been using the machine properly, the Supreme Court of California held the wood lathe manufacturer strictly liable.71 The court in Becker deemed Greenman relevant, since the earlier decision "was not that warranty law failed to adequately define the manufacturer's duty but that the 'intricacies of the law of sales' applicable to commercial transactions might defeat the obvious representation of safety for intended use made by the manufacturer."72

Presently, all but seven states have either a judicial or statutory warranty of habitability, imposing some form of liability on residential landlords.73 Despite the potential upheaval from Becker, or perhaps because of it, courts typically have restricted the doctrine to residential premises,74 and only Louisiana has held residential landlords strictly liable in tort for a breach of the warranty of habitability.75 Yet, imposing strict liability upon a

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71 59 Cal. 2d at 63, 377 P.2d at 901, 27 Cal. Rptr. 701.
72 38 Cal. 3d at 459, 698 P.2d at 118, 213 Cal. Rptr at 215.
73 Note, The Unwarranted Implication of a Warranty of Fitness in Commercial Leases—An Alternative Approach, 41 VAND. L. REV. 1057, 1066 (1988). The courts in Alabama, Florida, Idaho, Kentucky, Oregon, and South Carolina have declined to imply a warranty of habitability in residential leases. For a list of more recent cases adopting or applying the warranty of habitability, see SCHOSHINSKI, supra note 58, at 67 (Supp. 1990).
74 An overwhelming majority of courts reject the warranty of habitability in a commercial context. The following courts hold the minority view: Davidow v. Inwood N. Professional Group—Phase I, 747 S.W.2d 373 (Texas 1988) (commercial tenant allowed to withhold rent since landlord did not fulfill his mutually dependent duty to provide a suitable premise); Tusch Enter. v. Coffin, 113 Idaho 37, 740 P.2d 1022 (1987) (disclaimer and merger clauses invalid as court invokes implied warranty of habitability to protect purchaser of duplexes); Hodgson v. Chin, 168 N.J. Super. 549, 403 A.2d 942 (1979) (small-scale entrepreneurs protected by implied warranty after discovering building had structural defects — the court reserved judgment on whether it would extend the protection to large corporate purchasers); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969) (commercial tenant frequently flooded from premises allowed to vacate on basis of implied warranty). For extended citations holding the majority view, see Annotation, Commercial Lease Warranty, 76 A.L.R. 4TH 928 (1990). For a breakdown of implied warranty of habitability application by state, see Cherry, Builder Liability for Used Home Defects, 18 REAL EST. U.J. 115 (1989).
75 For a discussion of why courts should extend the warranty of habitability to landlords of commercial tenants, see generally Powell & Mallor, The Case for an Implied Warranty of Quality in Sales of Commercial Real Estate, 68 WASH. U.L.Q. 305 (1990). Powell and Mallor argue that commercial real estate purchasers often are no more financially astute than residential tenants. Since the warranty of habitability is a "creature of public policy," the authors argue:

Courts should encourage builder-vendors of commercial property to meet such standards because the health and safety of the person occupying the structure, including employees who occupy a nonresidential commercial structure, should be protected. To deny that protection to the ultimate user of the structure be-
landlord was by no means a novel concept for the Becker court. A civil court in the Bronx, New York, nine years earlier had dealt with similar facts and reached the same conclusion. Admitting the arguments against its decision were relatively forceful, the Bronx court held the landlord strictly liable for a tenant's injury in "the interests of justice." Indeed, the Restatement (Second) of Property the following year noted a "judicial and statutory trend... that no one should be allowed or forced to live in unsafe and unhealthy housing."

This same concern should and must be extended to unsafe and unhealthy properties generally. Unfortunately, judicial and

cause the owner purchased the property for investment purposes makes little sense.

Id. at 333.

76 Kaplan v. Coulston, 85 Misc. 2d 745, 381 N.Y.S.2d 634 (1976). In Kaplan, a kitchen cabinet fell on the plaintiff. The Kaplans originally sought relief claiming landlord negligence, but later attempted to amend the petition to seek strict liability under the implied warranty of habitability. New York had enacted a warranty of habitability statute nine months after the disputed incident. The statute was not retroactive, nor was it a declaration of the common law, so existing law presumably favored the defendants. Nevertheless, the court in Kaplan held the landlord strictly liable for the injuries. The court said its ruling "would best serve the interests of justice" for the following reasons: the landlord is in a better position to inspect and examine the premises; is in a better position to know when to repair or replace items; is in a better position to spread the loss; and makes a profit from the venture. 85 Misc. 2d at 749, 381 N.Y.S.2d at 638. Realizing it lacked the force of precedent, the court said "the development of the tort and lease aspects of our law seem to lead to this conclusion." Id. (emphasis added).

77 Id. at 753, 381 N.Y.S.2d at 638. The court in Kaplan quoted the reasoning of a New Jersey state appellate opinion in direct conflict with its decision. In Dwyer v. Skyline Apartments, Inc., 123 N.J. Super. 48, 301 A.2d 463 (1973), aff'd mem., 63 N.J. 577, 411 A.2d 1 (1973), the New Jersey Superior Court declined to hold a landlord strictly liable for defective premises. Mrs. Dwyer scalded herself when the bathtub hot water faucet pulled out of the tile. The corroded pipes were hidden behind the tile, and neither the landlord nor the tenant had any warning. The New Jersey court gave seven reasons why it would not apply strict liability: the landlord was not engaged in mass production of a product placed in the stream of commerce; the landlord did not create a product with a defect preventable at the time of manufacture; the landlord had no expertise about correcting the condition; many different artisans combine to construct an apartment, which then is subject to use and deterioration; an apartment is "wholly unlike" a product that must leave a manufacturer in a safe condition, with an implied representation relied upon by a consumer; the tenant cannot and does not expect an apartment to be "perfect;" and to apply strict liability would impose an unjust burden on property owners. The Dwyer court concluded that if a property owner cannot detect a defect, the property owner cannot prevent it. 123 N.J. Super. at 55-56, 301 A.2d at 467. And since the property owner cannot prevent a latent defect, strict liability would be inappropriate. Id. With judicial deference, the court in Kaplan termed these "quite compelling arguments," but ruled against them anyway. 85 Misc. at 749, 381 N.Y.S.2d at 637.

78 RESTATEMENT (SECOND) OF PROPERTY § 5 (Introductory Note 1976).
academic reaction to the ruling has shown a reluctance for any such expansion. The California appellate court was the first of many in that jurisdiction to reject an extension of the analogy allowed in Becker. In Muro v. Superior Court, the appellate court said "Becker was intended to be restricted to landlords of residential property. There is no public policy rationale warranting the extension of Becker beyond its obvious intent." The Muro court agreed that residential tenants can be considered powerless "to insure safe, adequate housing", but declined to classify commercial tenants as powerless. Like most opponents to extending Becker, the Muro court said the landlord of a residential premises is in the best position to bear the cost of providing a safe premise, but not so with a commercial landlord.

79 Even before Becker, there was substantial precedent denying a commercial plaintiff relief from a landlord under strict liability. In Kaiser Steel Corp. v. Westinghouse Elec. Corp., 55 Cal. App. 3d 737, 127 Cal. Rptr. 898 (1976), the California appellate court said the doctrine of products liability "does not apply to parties who: (1) deal in a commercial setting; (2) from positions of relatively equal economic strength; (3) bargain the specifications of the product; and (4) negotiate concerning the risk of loss from defects in it." Id. at 748, 127 Cal. Rptr. at 845. Post-Becker California rulings similarly denied relief to commercial tenants. Gentry Construction Co. v. Superior Court, 212 Cal. App. 3d. 181, 260 Cal. Rptr. 421 (1989) (commercial plaintiff denied application of strict liability to recover from co-defendant investment company); Mora v. Baker Commodities, 210 Cal. App 3d. 771, 258 Cal. Rptr. 669 (1989) (strict liability not applicable to lessors of commercial or industrial properties); Sumitomo Bank of California v. Taurus Developers Inc., 158 Cal. App. 3d 289, 240 Cal. Rptr. 736 (1986) (strict liability not applicable to lender in real estate transaction who bought defective construction project).

81 Id. at 1098, 229 Cal. Rptr. at 389.
82 Id. at 1096, 229 Cal. Rptr. at 387. The court in Muro adopted the reasoning in 4 MILLER & STARR, CALIFORNIA REAL ESTATE REVIEW 364-65 (1977):

There is no reason to extend the common law implied warranty of habitability to nonresidential premises. This warranty resulted from the necessity of protecting the health and safety of residential tenants who need adequate housing in a marketplace where satisfactory housing is difficult to locate and the tenant is unable to protect himself because of his lack of knowledge, ability and bargaining position. These factors are not present in the leasing of nonresidential premises where the tenant is more sophisticated, his bargaining position is more equal to that of the landlord and, in the usual case, the contents of the lease, including the obligation of maintenance, are negotiated between the parties.

Id.

Within the context of contaminated properties, however, these arguments are inapplicable. Employees, neighbors or others exposed to toxins rarely have such bargaining power with the landowner of an environmentally unsafe premise.

83 184 Cal. App. 3d at 1097, 229 Cal. Rptr. at 388. Another California appellate decision, however, stated in dicta that the commercial landlord did indeed have a responsibility to a tenant, though less than the duty demanded in Becker. In Mora v. Baker Commodities Inc., 210 Cal. App. 3d 771, 258 Cal. Rptr. 669 (1989), a refrigerant vessel
pellate court in *Muro* argued that commercial tenants can factor those added expenses into the cost of doing business.\textsuperscript{84}

Applying the *Muro* arguments in the context of contaminated properties would be short-sighted and insensitive. Those exposed to the unsafe premises — employees, visitors or those infected off-site — are as unprotected from toxins as Mr. Becker was when he leaned against his shower door, and perhaps more so. Tenants presumably can find other lodging and, so, leave the unsafe premises. Yet, the appellate court in *Muro* considered tenants unprotected. By the same criteria, an employee has even less ability to leave an unsafe workplace. If employees like Mr. Stevens and Mr. Wise, or neighbors like the MacNeal cancer patients (each discussed in the Introduction), must accept the contamination with little or no input about its conditions, then the party who owns the injurious property must be held strictly liable for the resultant injuries.\textsuperscript{85}

exploded in a slaughterhouse. The appellate court exonerated the commercial landlord, but at the same time offered some cautionary words to the exultant party:

\textquote{Contrary to respondent’s assertion, respondent, a commercial landowner, cannot totally abrogate its landowner responsibilities merely by signing a lease. As the owner of property, a lessor out of possession must exercise due care and must act reasonably toward the tenant as well as to unknown third parties . . . . When there is a potential serious danger, which is foreseeable, a landlord should anticipate the danger and conduct a reasonable inspection before passing possession to the tenant. However, if no such inspection is warranted, the landlord has no such obligation.}

\textsuperscript{Id.} at 781, 258 Cal. Rptr. at 675.

\textsuperscript{84} 184 Cal. App. 3d at 1098, 229 Cal. Rptr. at 388.

\textsuperscript{85} Even those legal scholars who have decried strict liability as "seriously defective" when applied to the warranty of habitability, admit the argument has merit in some applications. Browder, *The Taming of a Duty — the Tort Liability of Landlords*, 81 Mich. L. Rev. 99, 136 (1982). Browder would apply strict liability in cases where a tenant is injured by a defect unknown to both landlord and tenant, and that could not have been easily detected by either. Browder justifies landlord liability by assuming insurance will cover such costs. The implication, of course, is that few tenants could afford the necessary policies. The *Kaplan* court made much the same argument. See supra notes 76-77 and accompanying text.

While Browder supports negligence liability under a warranty of habitability, Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, 1975 Wis. L. Rev. 19, 145 (1975) argued much more forcefully for strict liability. Love predicted an "intolerable inconsistency" between tort law and landlord-tenant law, a gap that could be closed when "strict liability is imposed on landlords in the business of leasing." \textsuperscript{Id.} at 160.
C. Unseaworthiness and the Jones Act—Property Owners Held Strictly Liable in Tort for Personal Injuries

The duty of seaworthiness under general maritime law or the Jones Act\(^6\) offers a compelling analogy for holding landowners strictly liable for personal injuries caused by their properties. Under general maritime law:

[T]he shipowner's duty to furnish a seaworthy vessel is absolute; it does not require shipowner fault, and extends to conditions arising after the voyage has begun and to conditions created by the acts of third persons without any negligence or knowledge on the part of the shipowner or his employees.\(^7\)

Similarly, a claim under the Jones Act requires only a minimal

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Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right of remedy in cases of personal injury to railway employees shall apply; and in the case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.


The FELA and Jones Act adoption of common law remedies in tort contradict the assumption that worker's compensation law is adequate. The FELA remedy can be, at once, the most harsh and most lenient remedy, because, if the worker cannot prove employer negligence, no matter how disabling the injury, no remedy lies. See Brummer, Occupational Disease Litigation Under the Federal Employers' Liability Act, XIV FORUM 205 (1984). See also Amchan, "Callous Disregard" for Employee Safety: the Exclusivity of the Workers' Compensation Remedy Against Employers, 34 LAB. L.J. 683 (1983) (arguing for an Occupational Safety and Health Act amendment holding employers and co-employees liable for their willful, intentional, or grossly negligent conduct, notwithstanding any worker's compensation bar).

amount of negligence to allow a seaman to sue the vessel owner in tort.\textsuperscript{88} Each doctrine focusses on the inadequacies of the vessel as the place of employment. Seamen may sue in tort when that "place" is unsafe. The protection offered seamen on a vessel must be transferred inland. A landowner must be forced to have an environmentally safe, toxic-free property. By simple analogy, a property is a "vessel" in terms of liability, and when the property contains disease-causing toxins, it should be considered "unseaworthy." The property owner in that case, like the owner of an unseaworthy vessel under general maritime law, must be held strictly liable for any resulting personal injuries.

Courts already have allowed relief under the unseaworthiness doctrine for injuries which parallel those that would be covered under this landowner duty.\textsuperscript{89} In \textit{Petersen v. Chesapeake & Ohio}

\textsuperscript{88} Petersen v. Chesapeake and Ohio R.R. Co., 784 F.2d 732, 740 (6th Cir. 1986). The Fifth Circuit similarly held a reduced standard of liability for Jones Act claims. In Allen v. Seacoast Prod. Inc., 623 F.2d 355, 360 (5th Cir. 1980), the court of appeals stated that under the Jones Act, a seaman need only prove "slight negligence", which could be accomplished by very little evidence." \textit{See also} Bennett v. Perini Corp., 510 F.2d 114, 117 (1st Cir. 1975) ("The Jones Act is to be construed remedially, and . . . the threshold of evidentiary sufficiency is somewhat lower than in tort actions at common law."). For a discussion of the Fifth Circuit's application of "slight negligence" in admiralty law, see Miles, \textit{The Standard of Care in a Seaman's Personal Injury Action--Has the Jones Act Been Slighted?}, 13 TUL. MAR. L.J. 79 (1989).

\textsuperscript{89} For 26 years, the doctrine of seaworthiness had been moved inland via a single Supreme Court decision. The Court applied the unseaworthiness doctrine to inland workers in Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946). In \textit{Sieracki}, the Court awarded a stevedore damages against the shipowner, his employer, and others, after a shackles broke, causing a boom and tackle to fall on the plaintiff. Through \textit{Sieracki}, the Court extended the unseaworthiness protection to any person aboard a vessel engaged in work traditionally done by seamen. \textit{Id.} at 95. The ruling led to a somewhat confusing liability scheme in which stevedore employers would seek indemnification from the vessel for longshoremen injuries. The Third Circuit described longshoremen actions prior to the 1972 amendments as "a tortured liability triangle . . . played out on the wharves and piers of America." Derr v. Kawaski Kisen K.K., 885 F.2d 490, 492 (3d Cir. 1987).

Congress negated the \textit{Sieracki} triangle of liability in 1972 by amending the Longshoremen's and Harbor Worker's Compensation Act (LHWCA). Pub. L. No. 92-576, 86 Stat. 1251 (1972) (amending 33 U.S.C. \textsection{} 901-950 (1976 & Supp. 1980)). Section 905(b) holds that "liability of the vessel . . . shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred." The amendments abolished the judicially-created claim of unseaworthiness for longshoremen, as well as the stevedore's obligation to indemnify a shipowner if the shipowner were held liable under a third-party action. 33 U.S.C. \textsection{} 905(b) (1988). By eliminating the claim of unseaworthiness, Congress put a longshoreman "in the same position he would be if he were injured in non-maritime employment ashore." S. Rep. No. 1125, 92d Cong., 2d Sess. 10 (1972). As a compromise for increasing the barriers to recovery, Congress increased the statutory rates of compensation for longshoremen. For example, if a worker lost an arm, he would receive 66.7% of his average weekly wages, plus 312 weeks compensation, up
from the same percentage of compensation plus the previous 280 weeks of additional compensation. The loss of a leg netted 288 weeks compensation, compared with 248 weeks compensation. See 33 U.S.C. §§ 905, 906, 908 (1988).

Congress offered the following rationale for jettisoning the unseaworthiness doctrine for longshoremen:

The Committee believes that especially with the vast improvement in compensation benefits which the bill would provide, there is no compelling reason to continue to require vessels to assume what amounts to absolute liability for injuries which occur to longshoremen or other workers covered under the Act who are injured while working on those vessels.

1972 U.S. CODE CONG. & ADMIN. NEWS 4698, 4703.


In 1984, congressional amendments again curtailed liability under the LHWCA, this time by eliminating dual capacity claims. (The dual capacity doctrine, discussed infra note 179, holds an employer liable to an employee in tort despite worker's compensation exclusivity.) Pub. L. No. 98-426, 98 Stat. 1639, 1641 (1984). Section 5(a)(1) bars dual capacity claims which would implead employers as third-party defendants. The 1984 amendments settled the question of whether asbestos manufacturers, sued by LHWCA workers, had a right to indemnification against the workers' employers. Had the judiciary allowed indemnification, the rulings would have had the effect of holding landowners strictly liable for the personal injuries caused by the contaminated workplace. The circuit courts ultimately denied the indemnification.

To resolve the dispute, the circuit courts had struggled with the question of whether asbestos insulators on vessels could be considered seamen, and so, escape the worker's compensation bar to recovery in tort. The courts of appeals uniformly rejected asbestos-related products liability claims of harbor workers, because the appellate courts ruled asbestos insulators did not perform a duty they considered a traditional maritime job. See Drake v. Raymark Indus., Inc., 772 F.2d 1007 (1st Cir. 1985); All Maine Asbestos Litigation, 772 F.2d 1023 (1st Cir. 1985); Oman v. Johns-Manville Corp., 764 F.2d 224 (4th Cir. 1985), cert. denied, 106 S.Ct. 351 (1986); Woessner v. Johns-Manville Sales Corp., 757 F.2d 634 (5th Cir. 1985); Myrhan v. Johns-Manville Corp., 741 F.2d 1119 (9th Cir. 1984); Harville v. Johns-Manville Products Corp., 731 F.2d 775 (11th Cir. 1984); Austin v. Unarco Indus. Inc., 705 F.2d 1 (1st Cir. 1983), cert. dismissed, 463 U.S. 1247 (1983); Keene Corp. v. U. S., 700 F.2d 836 (2d Cir. 1983), cert. denied, 464 U.S. 864 (1983); Owens-Illinois Inc. v. U. S. Dist. Court 698 F.2d 967 (9th Cir. 1983). For a discussion of admiralty jurisdiction for asbestos insulators, see Gutoff, Admiralty Jurisdiction Over Asbestos Torts: Unknotting the Tangled Fibers, 54 U. CHI. L. REV. 512 (1987) (claiming the appellate courts mistakenly consider asbestos insulation outside admiralty jurisdiction).

None of the six circuits addressing the issue confronted the question of whether the available remedies for longshoremen were adequate. The discussion instead focussed on the definition of a maritime occupation. The decisions consequently were devoid of policy justifications for the rulings. For example, in All Maine Asbestos Litigation, the appellate court noted that the "[d]efendants have not cited us any authority that suggests that the Maine Supreme Judicial Court would likely recognize the dual capacity doctrine." 772 F.2d at 1030. The court noted that "there are no reported cases even hinting that Maine might deviate from the universal view." Id. at 1031. The unjustifiable lack of
the plaintiff died from asbestos inhalation while working on railway cars aboard ships. Mr. Petersen, a machinist, was a member of a railway car ferry crew which repaired equipment on board while the ships travelled between ports. A jury awarded Mr. Petersen's estate $235,500. The Sixth Circuit Court of Appeals upheld the award, ruling the plaintiff's classification as a seaman a matter of fact. The court of appeals similarly rejected the railway company's contention that it was unaware of the dangers of asbestos.

If the car ferry in Petersen can be considered the plaintiff's place of work — which it was — then the same rationale would apply to those injured by environmentally unsafe properties inland. Mr. Petersen worked in the car ferries, and the asbestos dust in those vessels caused his death. His estate recovered in tort from the owner of the lethal workplace. Because the Sixth Circuit upheld his status as a seaman, Mr. Petersen received compensation that would otherwise have been barred by worker's compensation law. Once the court placed the injury in admiralty law, Mr. Petersen could receive compensation for the fatal disease. Seamen need not be the only group that enjoys the privilege of recompense under worker's compensation law for occupational disease, and the overwhelming threat of asbestos disease to the work force, should have precluded the appellate courts from using precedent to support their decision. No prior situation could compare to the plight of so many asbestos insulators, so, no prior court decision could possibly be relevant. The appellate courts could be accused of using stare decisis and the maritime nexus as a ploy to avoid answering the more difficult question: Have these plaintiffs unjustly been denied a remedy in tort?

90 784 F.2d 732 (6th Cir. 1986).
91 Id. at 734.
92 Id.
93 Id.
94 Id. at 737-38.
95 Id. at 740. The court stated:

There was testimony that the relationship between asbestos exposure and lung disease was known in the early 1920's. Furthermore, there was testimony that in the early 1960's United States Coast Guard inspectors who came in contact with asbestos aboard the ferries used masks and respirators. This testimony would support an inference that the harmful consequences of asbestos exposure were foreseeable during the period decedent was employed aboard the car ferries.

96 The defendant railway company unsuccessfully argued that Mr. Petersen should receive compensation under the LHWCA, which would have barred his suit in tort. Id. at 738. Mr. Petersen's good fortune of being a machinist on board a ship, and the railway company's vehement defense that he was not a seaman, represent a microcosm of how worker's compensation law can be used to thwart justifiable tort damages. See supra notes 44 and 47, and infra notes 169-96 and accompanying text.
protection from a deadly property. The classification of seamen seems shockingly arbitrary when considering the basic right of freedom from contamination. The vulnerability of the human body to such invisible and potent substances demands the judicial protection afforded Mr. Petersen's estate.

D. Property Owners and Manufacturers Share the Same Strict Liability in Tort for Toxic Products

Just as product liability cases focus on the injurious product, as opposed to the conduct of the manufacturer or seller of that product (notwithstanding the modern tort tendency to introduce a negligence standard), so, too, must an injury from a poi-

97 The First Circuit faced the same issue when confronted with claims from asbestos insulators who worked on vessels, as opposed to those who worked on land. Unfortunately, the appellate court declined to make a definitive policy statement. In All Maine Asbestos Litigation, 772 F.2d 1023 (1st Cir. 1985), the appellate court declined to treat "workers injured by asbestos poisoning differently depending on whether they were installing asbestos in a ship or in an office building overlooking the harbor." Id. at 1030 (quoting Austin v. Unarco, 705 F.2d 1 (1st Cir. 1983)). The appellate court emphasized that the "state has an interest in providing uniform treatment to these two like workers," but the appellate court did not address the issue of whether its judicially imposed "uniform treatment" was equitable. Id. By contrast, the Supreme Court rejected an employer's plea for exclusivity under the LHWCA in Reed v. The Yaka, 373 U.S. 410 (1963). While not explicitly upholding the dual capacity doctrine, the Court nonetheless declined to deny relief based on artificial legal definitions:

[O]nly blind adherence to the superficial meaning of a statute could prompt us to ignore the fact that Pan-Atlantic was not only an employer of longshoremen but was also a bareboat charterer and operator of a ship, and, as such, was charged with the traditional, absolute, and nondelegable obligation of seaworthiness which it should not be permitted to avoid . . . . We think it would produce a harsh and incongruous result, one out of keeping with the dominant intent of Congress to help longshoremen, to distinguish between liability to longshoremen injured under precisely the same circumstances because some draw their pay directly from a shipowner and others from a stevedoring company doing the ship's service. Petitioner's need for protection from unseaworthiness was neither more nor less than that of a longshoreman working for a stevedoring company.

373 U.S. at 415 (footnotes omitted).

In Reed, a longshoreman filed suit against the ship for injuries sustained while unloading the vessel. The 1972 LHWCA amendments specifically denied the relief granted in Reed. At the time the Court ruled in Reed, of course, Congress offered no such direction, nor has Congress offered any direction to the circuits today regarding how to classify asbestos workers working on vessels. Yet, each of the circuits addressing the issue opted to impose the judicially-created definition of "maritime activity" to block relief.

98 In Brown v. Superior Court, 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412, (1988), the California Supreme Court declined to apply strict liability to manufacturers of DES, a drug used to prevent miscarriages, which injured patients when injected in utero. The court instead adopted a negligence standard, "because of public interest in
soned property focus on the injury-causing property, and not on the conduct of the property owner.

The essence of products liability, when uninfluenced by negligence principles, is that producers and sellers should be strictly liable for injuries caused by their goods.\footnote{99}{

That principle drove the landmark case of \textit{Greenman v. Yuba Power Products}\footnote{100}{\textsuperscript{100}}, and its progeny.\footnote{101}{ Courts and legal scholars alike have logically extended products liability principles to landowners of injurious properties. For example, products liability analogies played a key role in holding California residential landlords strictly liable for injuries caused by dwellings.\footnote{102}{ The 301(e) Study Group similarly used products liability doctrine to support the premise that landowners be strictly liable for toxic tort injuries.\footnote{103}{ The Study Group chose the analogy, because strict liability reduces a plaintiff’s “insuperable burden of proof, and because the imposition of liability on the manufacturer most readily and efficiently provides for cost internalization and for equitable distribution of the costs of product-caused injuries, and ideally, liability on the part of those best

\text{the development, availability, and reasonable price of drugs.” Id. at 1061, 751 P.2d at 477, 245 Cal. Rptr. at 418. See also Annotation, Products Liability: What is an ‘Unavoidably Unsafe’ Product, 70 A.L.R. 4TH 16 (1989).}


\footnote{99}{“There is no question that the strict liability, whether it is called warranty or declared outright in tort, extends to any kind of product which is recognizably dangerous to those who may come in contact with it.” W. KEETON, D. DOBBS, R. KEETON & D. OWEN, \textit{PROSSER AND KEETON ON TORTS} 694 (5th ed. 1984) [hereinafter \textit{PROSSER & KEETON}].

\footnote{100}{ 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

\footnote{101}{ In \textit{Cronin v. J.B.E. Olson Corp.}, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 493 (1972), the California Supreme Court cited \textit{Greenman} in rejecting the requirement of \textit{RESTATEMENT (SECOND) OF TORTS} \S 402A (1977). The Restatement argued that a product must be unreasonably dangerous to invoke strict liability. The \textit{Cronin} court argued that such a standard “rings of negligence.” 8 Cal. 3d at 132, 501 P.2d at 1161, 104 Cal. Rptr. at 441. Similarly, in \textit{Barker v. Lull Engineering Co.}, 20 Cal. 3d 413, 573 P.2d 448, 143 Cal. Rptr. 225 (1978), the same court applied the \textit{Greenman} rationale and ruled that a plaintiff should not have to prove a product was unreasonably dangerous to invoke strict liability against the manufacturer.

\footnote{102}{\textit{See supra} notes 58-85 and accompanying text for a discussion of the warranty of habitability.

\footnote{103}{ II \textit{REPORT}, \textit{supra} note 29, at 264.} } \textit{NOTE–ENVIRONMENTALLY UNSAFE PROPERTIES}}
able to prevent or reduce those risks." The report further argued that a products liability standard of liability would alleviate the difficult evidence questions posed by long latency periods or a lack of scientific proof.

Perhaps one of the purest applications of strict products liability in a toxic tort context involved the asbestos industry's unsuccessful attempt to use a state-of-the-art defense. Under the defense, the technological inability to discover a risk exonerates a product manufacturer. In Beshada v. Johns-Manville Product Corp., the nation's largest asbestos manufacturer invoked the defense against the plaintiff's claim of a failure to warn about the lethal effects of asbestos exposure. In rejecting the defense, the New Jersey Supreme Court separated negligence principles from products liability:

By imposing strict liability, we are not requiring defendants to have done something that is impossible . . . . [Such requirements] imply negligence concepts with their attendant focus on the reasonableness of defendant's behavior. However, a major concern of strict liability—ignored by defendants—is the conclusion that if a product was in fact defective, the distributor of the product should compensate its victims for the misfortune that it inflicted on them.

The court justified its decision with four reasons: victims of serious product risks should be compensated; manufacturer profits should pay for the risk of liability; the decision provides an incentive for safety research and development; and the decision would simplify the fact finding process, since parties would be spared the "complicated, costly, confusing and time-con-

104 Id. at 276.
105 Id. For a discussion of landowners as the most economically efficient party to bear the costs of cleaning properties, see infra notes 145-54 and accompanying text.
106 In a state-of-the art defense, courts deciding such cases have imputed knowledge of a product's defect to the manufacturer, regardless of whether existing technology could have discovered the defect. See PROSSER & KEETON, supra note 99, at 700:

The fact that a risk or hazard related to the use of a product was not discoverable under existing technology and in the exercise of utmost care or the fact that the benefits were overevaluated are both irrelevant if the product itself and not the defendant's conduct is being evaluated.
108 Id. at 204, 447 A.2d at 546.
109 Id. at 209, 447 A.2d at 546.
110 Id. at 205, 447 A.2d at 547
111 Id. at 207, 447 A.2d at 548.
suming" task of proving what a manufacturer knew or should have known at the time of production.\footnote{112}

While the decision sparked a maelstrom of criticism,\footnote{113} the court in Beshada v. Johns-Manville Product Corp., 90 N.J. 191, 447 A.2d 599 (1982), because it imposed a duty on manufacturers to warn against unknowable hazards. The court in Beshada relied on the risk/benefit theory propounded by Dean Wade.\footnote{112} Id. at 200, 447 A.2d at 544. Because Dean Wade agreed that the court in Beshada properly applied his risk/benefit rule, he reversed his position on the rule. Wade, On Effect in Product Liability of Knowledge Unavailable Prior to Marketing, 58 N.Y.U. L. REV. 734, 761-64 (1983). Wade also said that Beshada "appears to be straining too hard in [its] efforts to develop a different standard of product accountability for strict liability actions." Id. at 744. In an article in the same New York University Law Review issue, Dean Page dubbed the policy rationales of Beshada a "weak justification for a narrower rule of strict liability." Page, Generic Product Risks: The case Against Comment K and for Strict Tort Liability, 58 N.Y.U. L. REV. 853, 879 (1983). For other criticism of the ruling, see also Epstein, Commentary, 58 N.Y.U. L. REV. 853, 933 (1983) ("I regard the decision as indefensible . . . . If our only goal is compensation, we should not handle products liability cases through the tort system."); Gershonowitz, The Strict Liability Duty to Warn, 44 WASH. & LEE L. REV. 71 (1987) (Beshada created absolute liability, since courts will always consider it more reasonable to have given warning than to allow the possibility of an injury, even though the manufacturer could not have known of the possibility for the injury, and so, been motivated to warn.); Schwartz, The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine, 58 N.Y.U. L. REV. 892, 902 (1983) (Beshada is "unjustifiable on grounds of logic and public policy.") But see Lydon, Information Economics and Chemical Toxicity: Designing Laws to Produce and Use Data, 87 MICH. L. REV. 1795 (1989) (Beshada represents a judicial attempt to mandate safety research, using the "cheapest cost avoider" analysis); Note, Efficient Accident Prevention as a Continuing Obligation: The Duty to Recall Defective Products, 42 STAN. L. REV. 103 (1989) (though an efficient means of achieving product safety, Beshada runs the risk of producing excessive investment in pre-sale risk prevention). For a discussion of the relevance of manufacturer knowledge in products liability, see Annotation, Strict Products Liability: Liability for Failure to Warn as Dependant on Defendant's Knowledge of Danger, 33 A.L.R. 4TH 353 (1984).

The Beshada ruling fared little better in the judiciary. The New Jersey Supreme Court in Feldman v. Lederle Laboratories, 97 N.J. 429, 479 A.2d 374 (1984), limited the Beshada ruling to "the circumstances giving rise to its holding," but the court expressly
courts in other contexts have applied similar strict liability principles. In *Little v. PPG Industries, Inc.*, the Supreme Court of Washington cautioned that "the objective of strict liability with respect to dangerous products is defeated if a plaintiff is required to prove that the defendant was negligent, or the latter is allowed to defend upon the ground the he was free of negligence." *Little* was a wrongful death action brought by the widow of a steelworker who died while using a PPG chemical solvent. The state supreme court considered the lethal solvent unreasonably dangerous, and applied strict liability for the company's failure to warn of the product's deadly potential.

Whether denying a state-of-the-art defense as in *Beshada*, or denying the use of negligence principles as in *Little*, courts have applied products liability doctrine to protect those blind-sided by

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stated that "we do not overrule *Beshada.*" 479 A.2d at 388. The court in *Feldman* reversed the *Beshada* ruling, and allowed a drug manufacturer to plead a state-of-the-art defense against a failure to warn claim. Ms. Feldman suffered tooth discoloration after taking tetracycline. The court in *Feldman* said "[g]enerally, the state-of-the-art . . . and available knowledge are relevant factors," and that "generally, conduct should be measured by knowledge at the time the manufacturer distributed the product." 479 A.2d at 386. The Third Circuit distinguished the *Feldman* and *Beshada* rulings in In Re Asbestos Litigation, 829 F.2d 1233 (3rd Cir. 1987). The federal appellate court chastised the New Jersey courts for "imprecise" statements and held that "in New Jersey, *Beshada* does apply to asbestos cases but not to all products liability cases; and . . . *Feldman* does not govern asbestos cases but does not necessarily apply to all other products liability cases." Id. at 1241. For a discussion of *Feldman*, see Note, *Rise of the Phoenix - Feldman v. Lederle Laboratories: From the Remnants of State of the Art Evidence comes a New Standard for Design Defect - Failure to Warn Cases, 16 U. TOL. L. REV. 1053 (1985).


114 92 Wash. 2d 118, 594 P.2d 911 (1979). See also Dart v. Wiebe Mfg. Inc., 147 Ariz. 242, 248, 709 P.2d 876, 882 (1985) (when juries evaluate a manufacturer's conduct through the risk/benefit analysis, juries must also "impute to the manufacturer knowledge of the danger that has been revealed subsequent to distribution of the product"); Hayes v. Ariens Co., 391 Mass. 407, 462 N.E.2d 272 (1984) (defendant vendor of a snowblower is presumed to have been fully informed of all product defects at the time of sale, and state-of-the-art and culpability of defendant irrelevant).

115 92 Wash. 2d at 121, 594 P.2d at 914.

116 Id.
toxins. In upholding strict liability in tort, courts have correctly focussed on the injurious product, not on the conduct of the manufacturer. With contaminated properties, the focus must be on the injurious land. The conduct of the landowner, or any other negligence-based criteria like balancing the utility of a given toxin, has no place in this equation. The product, in this case a property, injured another and the product owner must be strictly liable for the damages.

E. Liability in Public Nuisance. The Common Law Held Landowners Strictly Liable for Personal Injuries Caused by Contaminated Properties

For public nuisance law to apply to landowners of contaminated properties, the toxic tort victim would have to show that the injury was 1) suffered at the expense of an “unreasonable interference with a right common to the general public” and 2) was of a different “kind” than any injury suffered by the public at large. When a public nuisance caused personal injury or physical harm to a property, then the plaintiff necessarily suffered a harm different in kind from others. In those cases, the plaintiff can bring a tort action under public nuisance law.

Although earlier public nuisance cases involving personal injury made no mention of the duties inherent in land ownership, courts nonetheless protected plaintiffs injured by industrial emissions. In 1911, the Eighth Circuit Court of Appeals upheld a $50 damage award for the “discomfort and sickness inflicted upon” the plaintiff and his family by a nearby smelter. The appellate court compared its decision to an earlier Supreme Court decision, which allowed damages to churchgoers for the “inconvenience and discomfort” caused by a nearby railroad machine shop.
The MacNeal cancer patients (discussed in the Introduction), who had no other contact with the lethal mineral other than living downwind of asbestos manufacturing plants, could invoke public nuisance law. But public nuisance law seemingly falls short of protecting Mr. Wise (also discussed in the Introduction), who contracted cancer from exposure to asbestos at work. Public nuisance claims generally involve a violation of a public right. In Mr. Wise's case, his injury occurred on private property, so no public right appears to be involved. The public does not have a right to enter private property, so, no public right is at stake. Nevertheless, courts have bypassed this doctrinal limitation in some instances, and have upheld a public nuisance claim for personal injuries occurring on private property. In *St. Joseph Lead Co. v. Prather* for example, the court held a mining company liable under public nuisance law for the death of an adolescent boy killed by dynamite. The boy was on the defendant's property when a concrete warehouse of explosives detonated. The court ruled that the warehouse of explosives was a public nuisance, and that the plaintiff's presence on the property should not preclude an action in public nuisance. The court dismissed the pro-

(1883).


Municipalities have also been held liable for injuries caused by a nuisance on the municipality's land: Hoffman v. City of Bristol, 113 Conn. 386, 155 A. 499 (Conn. 1931) (city maintaining beach for public use held liable for nuisance as a matter of law when plaintiff dove off board into shallow water—even though jurisdiction offered immunity for governmental functions). *But see* Bingham v. Bd. of Educ. of Ogden City, 118 Utah 582, 223 P.2d 432 (1950) (if not for governmental immunity, injury from negligently maintained incinerator could have been brought in nuisance); Flamingo v. City of Waukesha, 262 Wis. 219, 55 N.W.2d 24 (1952) (governmental immunity protected otherwise valid nuisance claim for injury from fall off a snow pile on defendant's property).

125 238 F.2d 301 (8th Cir. 1956).

126 *Id.* at 306. The court also stated that "[t]he maintenance of a house containing such a quantity of explosives as to endanger nearby private property and persons thereon and on an adjacent public road and railroad is a public nuisance as to all persons thereon, with resultant legal liability for personal injury or for damage to such property." *Id.* at 304 (emphasis added).
scriptions of traditional public nuisance doctrine, and concluded that a plaintiff can bring a claim for personal injuries under public nuisance, even though the injury occurred on the defendant's property.\textsuperscript{127}

Dynamite is a more volatile substance than asbestos or other toxins, but they all can be lethal. Victims of occupational disease, and others similarly poisoned while on another's premises, have died because of the toxin's presence on the land. Though the effects of a disease often take years to manifest, the results are as final as the dynamite in \textit{Prather}. The explosion in Mr. Wise's lungs took decades, but the result was the same as the boy in \textit{Prather}.

Courts similarly have stretched the traditional notion of private nuisance to accommodate a plaintiff's injury while on another's property.\textsuperscript{128} Private nuisance involves a "nontrespatory invasion of another's private use and enjoyment of his land."\textsuperscript{129} Despite this emphasis on interference with land rights, courts have granted relief for personal injury under private nuisance claims. These cases typically involve jurisdictions which statutorily deny a claim of public nuisance for the contested action. In \textit{Saari v. State},\textsuperscript{130} the plaintiff was a volunteer fireman working at the International Grand Prix auto race in Watkins Glen, New York. He and other spectators were injured when one of the race cars went off the track and struck them as they stood nearby watching the race. Since the municipality had a legal permit to operate the race on city highways, it could not be held liable under New

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\textsuperscript{127} Id.
\textsuperscript{128} For cases enforcing a private nuisance claim for personal injury on the defendant's premises, see Gesswin v. Beckwith, 35 Conn. Supp. 89, 397 A.2d 121 (1978) (defendant's demurrer against tenant's nuisance claim overruled on suit for injuries from fall off a defective ladder of tree house); Rothfuss v. Hamilton Masonic Temple Co., 34 Ohio St. 2d 176, 297 N.E.2d 105 (1973) (unguarded and unlighted window well on defendant's property was a nuisance and plaintiff could recover for injury from fall); McCabe v. Cohen, 268 A.D. 1064, 52 N.Y.S.2d 903 (1945) (liability for plaintiff's injury from stairway on defendant's property upheld, since defendant maintained a statutory nuisance). \textit{But see} Ayala v. B & B Realty Co., 32 Conn. Supp. 58, 337 A.2d 330 (1974) (tenant cannot sue in nuisance for a defect in demised premises if premises were under tenant's exclusive control); O'Neil v. Marulli, 21 Conn. Supp. 373, 155 A.2d 58 (1959) (claim of nuisance demurrable for employee's thumb injury from cupboard on employer's premises); Acme Laundry Co. v. Ford, 284 S.W.2d 745 (Tex. Civ. App. 1955) (glass panels forming solid wall were not so inherently dangerous to constitute a public nuisance, and owner owed no duty to business invitee who walked into glass).
\textsuperscript{129} \textit{LAW OF TORTS, supra} note 2, at 97.
\textsuperscript{130} 203 Misc. 859, 119 N.Y.S.2d 507 (1953).
\end{flushright}
York's public nuisance statute. The court in *Saari* left room, however, for a private nuisance claim for the personal injury: "[The race] did constitute a nuisance as to those persons particularly affected thereby, for which they have a private right of action."  

Like the Eighth Circuit in *United States Smelting Co. v. Sisam*, the New York court took the cue from the Supreme Court in *Baltimore and Potomac Railroad Company v. Fifth Baptist Church*, when it stated: "The legislative authorization [prohibiting a particular cause of public nuisance] . . . does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large."  

Similarly, in *Rosario v. Koss*, the New York appellate court set aside a verdict and ordered a new trial for a nuisance action based on a tenant's personal injuries. The record showed "beyond question that the condition of the premises was dangerous to human life [because it was] detrimental to health. Hence, it was such a nuisance as comes within the ambit of [state law] . . . even though it was a private nuisance rather than a public nuisance."  

Whether in public or private nuisance actions, case law supports personal injury claims against landowners of environmentally unsafe properties. The appropriate standard of liability for

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131 *Id.* at 872, 119 N.Y.S.2d at 521.
132 191 F. 293 (8th Cir. 1911).
133 108 U.S. 317 (1883).
134 *Id.* at 332.
136 *Id.* For a discussion of a landlord's strict liability for defective premises, see *supra* notes 58-85 and accompanying text.
137 This argument does not consider the impact of state nuisance statutes. As early as 1981, only 24 states expressly granted private rights of action for public nuisances. II *REPORT, supra* note 29, at 191. Some jurisdictions have been unwilling to embrace such a sweeping application of nuisance law. One recent decision expressly denied the proposition that landowners be held strictly liable for their contaminated properties:  

[M]ere ownership of property without anything more cannot and should not be the determinative factor in imposing liability . . . . In this industrial age ownership has no more relationship to the problems of pollution than did the theory of privity of contract to the problem of products liability. As the privity of contract theory prevented just results and enabled the party responsible for defects in products to escape, so would blind adherence to a theory making every landowner liable for pollution on his land regardless of the source of that pollution.  


The above contention — that strict liability for environmental hazards is as unjustifiable as the archaic use of privity of contract in products liability — is inapplicable. The
those landowners must be strict liability, since lethal toxins are ab-
normally dangerous per se. But applying the standard to all
landowners will be difficult. For example, some courts have re-
fused to apply strict liability for damages from hazardous waste
disposal, because safe methods of disposal do exist. Similarly,
a passive owner of a contaminated property might not be consid-
ered involved in an activity at all, rendering the abnormally dan-
gerous classification inapplicable. Present law does not support
holding the passive landowner liable for contamination caused by
a lessee, but courts have used strong rhetoric when bypassing
negligence standards in favor of strict liability for active polluters.
In Wood v. Picillo, the Rhode Island Supreme Court said "con-
cern for the preservation of an often precarious ecological bal-
ance" prompted strict liability in nuisance for the owner of a
chemical disposal site.

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potential for injury from our soiled environment transcends the New Jersey court's con-
cern for determining the source of pollution. For a litany of reports detailing the severi-
ty of environmental contamination, see Tuohey, Toxic Torts as Absolute Nuisances, 16 W.

138 Liability under nuisance law can be for negligent, abnormally dangerous, or inten-
tional invasions. PROSSER & KEETON, supra note 99, at 652-53.

139 Hingerty, Property Owner Liability for Environmental Contamination in California, 22
U.S.F. L. Rev. 31, 41 n.61 (1987). Because of a judicial reluctance to classify mere own-
ership of a contaminated property as an abnormally dangerous activity, strict liability in
nuisance in this context might prove "an imperfect tool for remediating contaminated
sites." Id. at 42. See also GINSBERG & WEISS, supra note 53, at 886 ("[T]he nuisance doctrine
will be impotent as a mechanism for gaining compensation unless negligence or a prop-
er case for strict liability can be established.")

For a discussion of strict liability nuisance claims, see Annotation, Landowner's or
Occupant's Liability in Damages for Escape, Without Negligence, of Harmful Gases or Fumes

140 "Except where he contracts to repair, a lessor of land is not liable to others out-
side of the land for physical harm caused by any dangerous condition on the land
which comes into existence after his lessee has taken possession." RESTATEMENT (SECOND)

141 443 A.2d 1244 (R.I. 1982).

142 Id. at 1249. For a discussion of the case's policy ramifications, and a list of cases
applying strict liability in nuisance, see Note, Negligence No Longer a Prerequisite for Nu-
isance Actions, 17 SUFFOLK U.L. REV. 461 (1983). For more recent cases applying strict
liability in nuisance for contamination, see Prospect Indus. Corp. v. Singer Co., 238 N.J.
Super. 394, 569 A.2d 908 (1989) (strict liability applied to successive landowners for
disposal of toxic waste (citing State Dept. of Envtl. Protection v. Ventron Corp., 94 N.J.
570 (1988) (ownership successors to radium processor were absolutely liable to
subsequent purchaser for damage, even though an intervening owner built a building on
the property and exacerbated dangerous condition); Kenny v. Scientific Inc., 204 N.J.
Super. 228, 497 A.2d 1310 (1985) (private generator of hazardous waste at landfill facing
potential absolute liability).
The potential potency of nuisance, and one cause of its amorphous application, is its emphasis on the damage done, rather than on any particular type of conduct. Tort liability under nuisance law often follows from the damage, and not the conduct which caused the damage. With the intensely significant policy considerations detailed in Woods, strict liability in nuisance law must converge to hold both the passive landowner and others engaged in otherwise "safe" industries strictly liable for damages caused by toxins.

IV. ECONOMICS AND JUSTICE: APPARENTLY CONTRADICTORY BASES FOR POLICY CONVERGE IN AGREEMENT ON THIS DUTY

This section will discuss how Guido Calabresi's economics of strict liability in tort and George P. Fletcher's standard of fairness support a landowner's duty to keep property environmentally safe.

For a discussion of strict liability in nuisance, see Annotation, Landowner's or Occupant's Liability in Damages for Escape, Without Negligence, of Harmful Gases or Fumes From Premises, 54 A.L.R. 2d (1957). See also Annotation, Tortious Radiological Harm, 73 A.L.R. 4TH 582 (1989).

143 Prosser, Nuisance Without Fault, 20 TEXAS L. REV. 399, 416 (1942). Prosser concluded the article by suggesting that Texas attorneys sue under nuisance whenever possible, since Texas courts have determined "[t]hat liability for what is called 'nuisance' very often rests upon a basis of strict liability, without proof of wrongful intent or negligence." Id. at 426. For a more recent application of this principle, see U. S. v. Hooker Chemicals & Plastics Corp., 118 F.R.D. 321, 324 (W.D.N.Y. 1987) ("Public nuisance actions do not depend on proof of actual harm but only the significant threat of injury to property, health, or safety.").

144 When applying strict liability in nuisance, courts often quote the late Benjamin N. Cardozo's statement in McFarlane v. City of Niagara Falls, 247 N.Y. 340, 160 N.E. 391 (1928): "Nuisance... has more meanings than one. The primary meaning does not involve the element of negligence as one of its essential factors. One acts sometimes at one's peril. In such circumstances, the duty to desist is absolute whenever conduct, if persisted in, brings damage to another" (footnotes omitted). See Morgan v. High Penn Oil Co., 238 N.C. 185, 77 S.E.2d 682 (1953) (oil refinery's noxious gases constituted private nuisance); Menolascino v. Superior Felt & Bedding Co., 13 Ind. App. 318, 40 N.E.2d 813 (1942) (dust emissions of nearby mattress factory constituted a public nuisance).

For a discussion of absolute liability in nuisance, see Tuohey, Toxic Torts As Absolute Nuisances, 16 W. ST. U. L. REV. 5 (1988). The Tuohey article is doctrinally consistent with Prosser, Nuisance Without Fault, 20 TEXAS L. REV. 399. Tuohey argues for absolute liability for toxic waste nuisances, because "toxins are life threatening, and not merely offensive to sensitivities nor interfering with use and enjoyment of property." 16 W. ST. U. L. REV. at 34. Tuohey recommends a strong public policy supporting nuisance-based liability for toxic clean-ups. He summarily defines toxic-generating or disposing industries as "ultrahazardous and abnormally dangerous activities." Id. at 61. For other law review articles supporting nuisance law liability for toxic torts, see Id. at 6 n.2.
Though these two scholars typically are at ideological odds, this duty gives them the unusual opportunity to agree.

A. Landowners as the “Cheapest Cost Avoiders”

Calabresi’s approach to tort law attempts to allocate losses to those who can most cheaply pay to reduce the risk of an accident, the search for the “cheapest cost avoider.” He refined his analysis, particularly with respect to assumption of the risk in products liability, in a jointly published article with John T. Hirschoff. The joint article was an attempt to explain “just where strict liability should stop.”

Calabresi and Hirschoff defined the notion of the cheapest cost avoider as the person who can best assess the costs and benefits of the action which caused the harm. This strict liability test does not require a court to evaluate a given party’s actual or projected costs of avoiding an accident. Instead, Calabresi and Hirschoff said the court merely has to choose the party that was in the best position to make that decision. This judicial approach requires no financial acumen per se, just an insight into who had

145 G. CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 26-136 (1970). Calabresi addressed environmental problems in his book as well. He hypothesized that the owner of a polluting smoke stack would be the lowest cost avoider, compared with those the smoke affects, since “it is almost certainly cheaper for the factory to bribe [affected] homeowners [to accept the pollution] than it is for homeowners to unite to bribe the factory [to stop the pollution].” Id. at 254. For a discussion of nuisance law and its applicability with this proposed duty, see supra notes 117-44 and accompanying text. For an analysis of Calabresi’s and other economics and law arguments, see OGUS AND VELJANOVSKI, READINGS IN THE ECONOMICS OF LAW AND REGULATION (1984); A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (2d ed. 1989).


147 CALABRESI & HIRSCHOFF, supra note 146, at 1056. For a discussion of Calabresi’s theory with respect to nuisance, see Calabresi & Melamed, Property Rules, Liability Rules and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089 (1972). The authors expand on the notion that both parties in the dispute are in some ways liable, and both must bargain to overcome the poor allocation of resources. For a related discussion of this insight, see also Coase, The Problem of Social Cost, 3 J. LAW AND ECON. 1 (1960).) Calabresi and Melamed further argue that in the absence of information as to who is the least cost avoider, then the party best able to bribe the other should be forced to so act. In our case, a landowner of a contaminated property is clearly in the best position to bribe those affected, especially if those injured are his employees.
the knowledge and expertise to have made the decision. "[T]he strict liability test would simply require a decision as to whether the injured or the victim was in the better position both to judge whether the avoidance costs would exceed foreseeable accident costs and to act on that judgment."148

As an example of a manufacturer being a cheapest cost avoider in a "failure to warn" tort claim, Calabresi and Hirschoff offered a hypothetical situation of a consumer buying a drug which had a .0001 probability of a deleterious side-effect — the loss of a leg. Since the drug producer can evaluate the cost of making a drug without the dangerous side effect, or the cost of developing a simple test which would identify those .0001 of consumers who could lose their legs, the authors concluded that the drug producer was the cheapest cost avoider. By contrast, "the consumer [wa]s not in a position to make this comparison."149

On the other hand, Calabresi and Hirschoff did not imply that "mere clarity of warning or mere percentages of likelihood of harm" resolved the issue of who would be the cheapest cost avoider. Such factors are only part of the analysis, which ultimately must decide "who was in the best position to make the cost-benefit analysis and act upon it."150

In the context of contaminated properties, landowners often would be in the best position to assess the relative costs and benefits of an act which might injure others through contamination. Consider the injuries of the MacNeal cancer patients mentioned in the introduction. If the landowner were a lessor, then that cost-benefit analysis could be included in the rental rate charged the asbestos manufacturer that leased the property. If the asbestos manufacturer itself owned the land, then the potential of such damage claims would be factored into a projected cost of doing business.

When toxins from a property injure a person, only an extreme situation would render the victim liable under this analysis. Calabresi and Hirschoff explained that in cases where the plaintiff's actions were "so unusual as to make the user more suit-

148 CALABRESI & HIRSCHOFF, supra note 146, at 1060. In a footnote, Calabresi and Hirschoff explained that if the party in the best position to perform the cost-benefit analysis is not the party in the best position to act on the analysis, then "the decision requires weighing comparative advantages." Id. at 1060 n.19.
149 Id. at 1062.
150 Id. at 1063.
ed to make the cost-benefit analysis than the manufacturer,"\textsuperscript{151} then liability applied to the injured party. But even when applying the strict liability test in such instances, the analysis does address potential unfairness to a poorer plaintiff. Calabresi and Hirschoff suggested that courts attach liability to encourage a societal goal, "such as greater wealth equality."\textsuperscript{152}

In any case, none of the three victims of contaminated properties mentioned in the introduction was in the best position to evaluate the benefits of being exposed, nor was their exposure the result of "so unusual" an action. Mr. Stevens and Mr. Wise were gainfully employed and wholly unaware that exposure to asbestos would have such a protracted latency period. Similarly, the MacNeal cancer patients did not know that living near the asbestos plants would expose them to a lethal mineral. In each case, the injured parties were decidedly not those best able to make a cost-benefit analysis. Victims of contaminated properties invariably suffer from an ignorance exacerbated by the pervasive nature of toxins.

In a related analysis, Calabresi and Hirschoff considered the doctrine of assumption of the risk "essential to an understanding of a non-fault world."\textsuperscript{153} The authors described the doctrine as a sort of strict liability against plaintiffs. For example, those who

\textsuperscript{151} Id. at 1064.
\textsuperscript{152} Id. at 1078. The strict liability test depends on identifying the party best able to determine and act upon the cost-benefit analysis of a given act, and the "best cost avoider" passing those costs onto the purchaser of the product or service, i.e. internalizing the costs. But nowhere do Calabresi and Hirschoff explain how to balance the choice of the best decider with the potential injustice of foisting cost internalization burdens on a poor party.

For a discussion of how Calabresi's strict liability test advances distributive and corrective justice considerations, see Attanasio, The Principle of Aggregate Autonomy and the Calabresian Approach to Products Liability, 74 VA. L. REV. 677, 744 (1988). If courts consider spreading both risks and wealth, the Calabresian theory probably will not result in victimizing poorer parties. With risk and wealth distribution as a concern, courts can mitigate the impartial nature of the "least cost avoider" designation. \textit{Id.} Attanasio does admit, however, that forcing a poorer party to "internalize" his costs sometimes leaves the Calabresian theory open to criticism about its regressive distributive justice.

Attanasio questioned the Calabresi and Hirschoff use of determining liability by categories of defendants. \textit{Id.} at 719. The two authors suggested that statistical calculations, rather than a case-by-case adjudication, can best aid courts in ascribing liability. Attanasio considered that notion contrary to autonomy, but did consider the possibility of using categories in toxic torts: "One area in which category remedies may more strongly connect with autonomy is toxic torts. Such massive litigation tends to be impersonal in any event, and a more category-focused approach may be the only feasible way to redress these profound autonomy infringements." \textit{Id.}

\textsuperscript{153} CALABRESI & HIRSCHOFF, supra note 146, at 1065.
attend a baseball game, facing the risk of being hit by a foul ball, are in the best position to undertake the cost-benefit analysis. In that situation, as in any with this analysis, "strict liability is imposed regardless of whether the other party 'ought' to have done what he did." 154

The victim who engaged in a non-natural use of land, or a zookeeper inside a tiger's cage to study its habits, both represent to the authors parties best able to evaluate the costs and benefits of their actions. Calabresi and Hirschoff move the decision away from what a party ought to do, and instead focus on who has access to the appropriate knowledge to best make the decision and act upon it. By contrast, victims of contaminated properties typically are unaware of the danger. Producing toxins invariably involves a "non-natural" use of land, and the injuries represent the resultant mischief. In most cases, the victim simply could not have prevented the exposure, since the contaminants are so often imperceptible. Even if a victim was to some degree aware of a dangerous exposure, only rarely would that informed victim also be in the best position to act upon that knowledge—the second prong of the strict liability test. For example, even if Mr. Stevens had an idea that his exposure to asbestos was impairing his health, his career options as a plumber during wartime were limited.

B. Contaminated Properties Create Nonreciprocal Risks

George P. Fletcher has been uneasy with the utilitarian sentiment of modern tort law, and in 1972 proposed a return to individual rights-based tort doctrine. 155 To Fletcher, determining an individual's rights, rather than searching for "the party who represents the least disutility," represented the appropriate moral basis of tort law. 156 Fletcher wanted to replace the judicial search for lowest cost avoiders with a search for "the rationale for and individual's 'right' to recover." 157

To accomplish the doctrinal shift, Fletcher argued for a "standard of fairness" as the basis of redistributing losses. He took exception to what he considered amoral considerations of "reasonableness" as the means of attaching liability. 158 Rather than hav-

154 Id.
156 Id. at 537.
157 Id. at 538.
158 Fletcher said appealing to a "reasonable man" standard to evaluate tortious con-
ing courts employ a utilitarian calculus, Fletcher wanted courts to determine liability on the basis of what was fair to the rights of each party.\(^{159}\) This standard of fairness revolved around the notions of "reciprocal" and "nonreciprocal" risk. If the defendant and plaintiff exposed each other to a similar degree of risk (created reciprocal risks), then no liability would apply. Conversely, if the defendant exposed the plaintiff to a greater risk, courts must hold that defendant liable. For example, driving in traffic is a reciprocal risk. If two careful drivers collided, no liability would attach, since the risk of one driver hitting another was reciprocal. But, if a person drove recklessly, then under Fletcher's standard of fairness, the reckless driver exposed the victim to an unreciprocal risk of harm, and should be liable.\(^{160}\)

\(^{159}\) Fletcher, supra note 155, at 540. CALABRESI & HIRSCHOFF, supra note 146, at 1079-80, criticized Fletcher's analysis of reciprocity as something that simply approximates which party would be most able to evaluate the costs and benefits of a given transaction. The authors further argued that Fletcher's emphasis on corrective justice — placing liability on who deserves it — is shortsighted. Id. The desire to distribute wealth has historically played a role in judicial decisions, and the authors criticize Fletcher for "writ[ing] off distributional considerations . . . with a reference to Aristotle and a comment that taxation is for legislatures and not for courts." Id. at 1081.

\(^{160}\) Fletcher, supra note 155, at 546. To bolster his argument, Fletcher reinterpreted older, often exotic, cases to show the versatility of his standard of fairness. Fletcher interpreted Rylands v. Fletcher, 3 L.R.E. & I. App. 330 (H.L. 1868), in light of his standard of fairness. He said the "Rylands "non-natural use" distinction could be interpreted as a risk to which the community was unaccustomed, and as such, represented a non-reciprocal risk. (For a discussion of Rylands, see supra notes 49-57 and accompanying text.) Fletcher similarly described the unsolicited use of a pier during a storm as creating a risk of harm to the plaintiff "of a different order" than any risk posed by the plaintiff. Vincent v. Lake Erie Transportation Co., 109 Minn. 456, 124 N.W. 221 (1910). In both cases, the defendants' actions created a harm of a different order that the risks
Fletcher’s rhetoric is uncommonly satisfying not just for its simplicity, but also for its focus on the vulnerability of the injured parties. Fletcher primarily invoked John Rawls’ first principle of justice that “we all have the right to the maximum amount of security compatible with a like security for everyone else.” Fletcher refused to sanction individuals who “knowingly and voluntarily create risks without responsibility for the harm they might cause.” In his words, an individual “cannot fairly be expected to suffer . . . in the name of a utilitarian calculus.”

Fletcher’s standard of fairness supports landowner liability for personal injury caused by a contaminated property. In Fletcher’s terminology, each of the plaintiffs described in the introduction were exposed to nonreciprocal risks. Mr. Stevens and Mr. Wise thought they were doing their jobs, but the land on which they

the plaintiff imposed on the defendant.

161 Fletcher admitted the theory’s shortcomings in applying the standard of fairness to actions which caused a nonreciprocal risk, but which were also socially useful. For example, “motoring, airplane overflights, air pollution, oil spillage, sonic booms — in short, the recurrent threats of modern life” would be difficult to categorize. Fletcher, supra note 155, at 570. Legal scholars have attacked his theory for this and other perceived weaknesses. Professor Attanasio argued that Fletcher’s definition of a reciprocal risk lacked the substance needed to decide just what actions should be free of liability. Attanasio, The Principle of Aggregate Autonomy and the Calabresian Approach to Products Liability, 74 VA. L. REV. 677, 705 (1988). In his own defense, Fletcher admitted that since no two people act exactly the same — not all dog owners have pit bulls — classifying risks as reciprocal will take some metaphorical leaps. Fletcher, supra note 155, at 572. But Fletcher correctly argued that metaphor is no less powerful than theories which rely on a purported scientific theory for support. Id. at 573.

Like Attanasio, Professor Stephen D. Sugarman was initially attracted by the simplicity of Fletcher’s standard of fairness, but ultimately deemed it incomplete. Sugarman, Doing Away With Tort Law, 73 CAL. L. REV. 555, 606 (1985). For Sugarman, Fletcher’s definition of nonreciprocal risks “leaves too much of tort law unexplained.” Preexisting relationships like non-negligent driver and injured passenger, or non-negligent doctor and injured patient involve nonreciprocal risks, but Sugarman argued that the negligence standard better explains the liability associated with those relationships. Sugarman also criticized the theory for its inability to assess the legal relationship between unequal parties, like a bicyclist injured by a motorcyclist or a cattle farmer injured by his crop dusting neighbor. Id. For a list of other articles critical of Fletcher’s standard of fairness, see Id. at n.229.

162 For a discussion of how Fletcher’s notion of reciprocal risks lends itself to the application of strict liability, see Honabach, Toxic Torts—Is Strict Liability Really the “Fair and Just” Way to Compensate the Victims?, 16 U. RICH. L. REV. 305 (1982). Honabach argued that the value of Fletcher’s theory is its insight into how we as a community associate with victims of non-reciprocal risks, and so, feel comfortable in applying strict liability. Id. at 320. Honabach warned against applying strict liability without a further assessment of its implications. Id. at 321.

163 FLETCHER, supra note 155, at 550.

164 Id. at 568.
worked was poisoning them. Conversely, those two workers did not expose the landowners to any reciprocal risks by virtue of their labors. With respect to MacNeal Hospital cancer patients, their passive exposure represents an even stronger example of a nonreciprocal risk. Those Chicago-area residents posed no threat whatsoever to the landowners of the asbestos plants.

Fletcher’s standard of fairness also took account of the defendant’s rights, and granted two exceptions for liability. Yet, even his exceptions would not relieve landowner liability for poisonous properties. Under Fletcher’s theory, a defendant could avoid liability, regardless of a plaintiff’s circumstances, if the defendant acted either out of “compulsion” or out of an “unavoidable ignorance.” A person is entitled to the “compulsive” exception when reacting to a dangerous situation. As an example, Fletcher used Cordas v. Peerless Transportation Co., in which a cab driver jumped from a moving cab to flee from a robber. Even though the driverless cab then struck unwary pedestrians, Fletcher contended the defendant’s rights superseded those of the injured pedestrians. The cab driver injured the plaintiffs as a result of an understandable “compulsive” act and, so, qualified for Fletcher’s exception.

Contaminated properties are not the result of a compulsive act. Neither the shipyard owner in Mr. Stevens’ case nor the asbestos plants near Chicago’s South Side used asbestos because of some calamity. Fletcher’s “compulsive” exception involved an emergency. The cab driver had little choice but to expose the pedestrians to danger. The landowners in the Introduction examples did have a choice. They were not forced to contaminate their

165 Professor Ernest J. Weinrib questioned the validity of separating the evaluation of the defendant’s act and the plaintiff’s injury. Weinrib, Understanding Tort Law, 23 VAL. U. L. REV. 485 (1989). To Weinrib, if a defendant’s excuse is morally irrelevant to the plaintiff, then it should not operate at the expense of a plaintiff’s right to recover. “[H]ow do the competing moral considerations that individually support the defendant’s obligations to pay and the plaintiff’s right to recover participate in a single mode of ordering?” Id. at 501. Weinrib specifically attacked the coherence of Fletcher’s excuses in Weinrib, Law as a Kantian Idea of Reason, 87 COLUM. L. REV. 472, 475 n.10 (1987).

Professor Jules Coleman is yet another legal philosopher who champions corrective justice for tort law, but who nonetheless has difficulty with Fletcher’s standard of fairness. “The problem with [Fletcher’s] view might then be that the notion of nonreciprocity of risk is too broad a characterization of wrongfulness to function within the principle of corrective justice.” Coleman, Corrective Justice and Wrongful Gain, 11 J. LEGAL STUD. 421, 435 (1982). See also Coleman, The Morality ofStrict Tort Liability, 18 WM. & MARY L. REV. 259 (1976).

properties. They were not held at a metaphorical gun-point and forced to pollute their properties.

To explain his "unavoidable ignorance" exception, Fletcher evaluated *Smith v. Lampe.* In *Smith*, an automobile driver noticed a tugboat coming dangerously close to the shore in a dense fog and honked the horn. Unfortunately, the captain interpreted the honk as the prearranged signal for guidance, and steered his tug toward the sound of the horn, causing a barge to hit rocky shallows and later sink. Since the "unavoidably ignorant" defendant could not have known about the prearranged signal, Fletcher would not hold him liable under the exception.

Fletcher's example of an unavoidable ignorant act involved an attempted good act. The defendant in *Smith* should have been exonerated, because he thought he was helping the tugboat captain. But with contaminated properties, landowners do not introduce lethal toxins into their land as a gesture of assistance. The bad act is not the result of good intentions gone awry. For example, toxic dumps do not store, nor do landfills dispose of, lethal substances. They merely recycle them back into the environment. No one is made safer by the contaminations. In the case of the passive landowner, the victim of a third party's contaminating acts, Fletcher's second exception does not even apply. The passive owner has not acted in ignorance. The owner simply has not acted. Invariably, a passive landowner's property becomes lethal because of just plain ignorance, not unavoidable ignorance.

V. WORKER'S COMPENSATION LAW SHOULD NOT BAR RECOVERY, AND LANDOWNERS MUST BE STRICTLY LIABLE FOR THE HARM.

Holding landowners strictly liable for the personal injuries caused by contaminated properties represents a judicial remedy that supersedes both premises liability and worker's compensation law. In its opposition to such established doctrines, the duty opens itself to two primary criticisms: worker injury from exposure to a contaminated property does not justify bypassing exclusivity, and, strict liability unnecessarily and unjustly burdens

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167 64 F.2d 201 (6th Cir. 1933), cert. denied, 289 U.S. 751 (1933).
168 The exclusivity clause of worker's compensation excludes all other remedies otherwise open for the employee and dependents. Under the clause, neither the employer nor the employer's insurance carrier are liable beyond worker's compensation payments. 2A A. LARSON, *supra* note 19, at § 65-67.60.
landowners of contaminated properties. These criticisms might be initially appealing, but upon examination they fall short of being persuasive. Courts have made exceptions to worker's compensation exclusivity for causes far less significant than personal injury from poisoned workplaces. In terms of strict liability, the ubiquitous threat of injury from property contamination warrants the most severe standard of liability.

A. Worker's Compensation, Though Expanding, Has Not Proven Flexible Enough to Handle Occupational Diseases

Worker's compensation coverage has expanded somewhat to address the ever-increasing incidence of occupational disease. Former obstacles to occupational disease claims—like demanding a minimum time of exposure to a toxin, or that the disease must manifest itself within a given period, or that the disease be medically distinguishable from non-occupational diseases—initially thwarted legitimate worker claims. Now, most states have significantly reduced such barriers. Worker's compensation laws, sometimes prompted by an active judiciary, have adopted relaxed statute of limitations periods, either expanding them or tying them to some form of discovery rule. Allowable claims now

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169 Frank Grad, 301(e) Study Group Reporter, described worker's compensation law as:

one of those things that deserved a study of its own. Worker's compensation law was a tremendous advance at the turn of the century, and in fact worked quite well until the advent of occupational diseases. Worker's compensation was originally designed for traumatic injuries. It was easy to have an administrative proceeding when a machine injured a worker. But when you've got an occupational disease, and a worker having seven prior jobs before contracting cancer, who is responsible? You run into employer objections and issues of fact which you never had in traumatic injury cases. Worker's compensation is a fine and wonderful approach. The only problem is [that] with occupational diseases, it is being used in ways not originally intended. Nobody could have dreamt of such complex situations at the turn of the century."

Telephone interview with Columbia University School of Law Professor Frank Grad (Sept. 20, 1990).

170 For a discussion of expanded worker's compensation coverage, see 1B A. LARSON, supra note 19, § 41.20; Peirce & Dworkin, Workers' Compensation and Occupational Disease: A Return to Original Intent, 67 OR. L. REV. 649; Note, Compensating Victims, supra note 44.

171 1B A. LARSON, supra note 19, § 41.30; Note, Compensating Victims, supra note 44, at 922-24.

172 1B A. LARSON, supra note 19, at § 41.30.

173 Leiberman & Dworkin, Time Limitations Under State Occupational Disease Acts, 36 HASTINGS L.J. 287, 328 (1985). The most restrictive statutes of limitation begin when the
include clearly nonoccupational diseases that nevertheless were transmitted in the workplace. For example, a telephone operator contracted tuberculosis from an infected mouthpiece and recovered under worker’s compensation.\footnote{Mason v. Y.W.C.A., 271 App. Div. 1042, 68 N.Y.S.2d 510 (1947). See 1B A. Larson, supra note 19, § 41.43 n.76.}

Despite this gradual advancement, worker’s compensation law has yet to expand fast enough to cover the increasing number of occupational diseases. Larson gave a sobering example that might explain why some industries have been so slow to react to occupational diseases. When the state of Wisconsin introduced full coverage for silicosis disease, investigators found that almost everyone who worked in dusty workplaces—granite works, mines, quarries—had silicosis to some degree. As a result of increased insurance premiums for monument workers, that industry had to close.\footnote{See Ramsey & Haberman, The Federal Black Lung Program—The View From the Top, 87 W. Va. L. Rev. 575 (1985); 1B A. Larson, supra note 19, § 41.90. Pub. L. No. 91-173, 83 Stat. 7923 (1969). The three subsequent amendments include: Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1643 (1981); Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11 (1977); and Black Lung Benefits Amendments of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972).}

On the other hand, proponents of worker’s compensation point to Black Lung legislation as a way of addressing occupational disease. These supporters of worker’s compensation say legislative action—like the Federal Coal Mine Health and Safety Act of 1969\footnote{See Solomons, A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of Its Unresolved Issues, 83 W. Va. L. Rev. 869 (1981).} and subsequent amendments—should be the guide for other occupational diseases. The Black Lung legislation came about as a result of inadequate worker’s compensation benefits;\footnote{Larson suggested that the way to understand the Black Lung legislation is “to abandon any thought of applying familiar workmen’s compensation concepts, definitions, or principles.” 1B A. Larson, supra note 19, § 41.92.} yet, in retrospect, few would offer such a targeted response to the broad range of occupational diseases.\footnote{177 See Solomons, A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of Its Unresolved Issues, 83 W. Va. L. Rev. 869 (1981).}

What worker’s compensation leaves us, then, is an alternative that either totally shuts down industry or inadequately compensates victims.

In the context of landowner liability for contaminated properties, the risk is that critical industry will go the way of the monument workers in Wisconsin. But fear of losing entire industries should not block appropriate legal action. Worker’s compensation
legislation like the Black Lung Act is too specific to handle the array of occupational diseases now in the workplace. The other alternative within a worker’s compensation framework is to accept the patently unjust status quo: denying benefits, while at the same time denying other judicial remedies for occupational diseases. This bleak range of alternatives leaves one solution: abandon worker’s compensation. It has proven inflexible and overwhelmed by injury claims from contaminated properties. The judiciary must impose strict liability on landowners, despite the worker’s compensation bar, because legislatures have been unable to resolve the injustice. The judiciary cannot delay in hopes that a legislature will work toward a solution. As the legislative response to the 301(e) Study showed, lawmakers do not always react to the demands of justice.

B. Exclusivity Impedes a Justified Recovery

In his Law of Workmen’s Compensation treatise, Arthur Larson defined the purest application of worker’s compensation law as a nonfault compensation remedy distributed in “the most efficient, most dignified and most certain form . . . which an enlightened community would feel obligated to provide.” Unfortunately, when faced with the daunting challenge of paying those injured by fouled properties, our enlightened community most often attempts to deny benefits. For example, no more than 33 percent of those that die from asbestos exposure have ever even filed a worker’s compensation claim, much less have been awarded benefits commensurate with the disability. Worker’s


180 For statements of health professionals in support of strict liability for landowners of environmentally unsafe property, see supra notes 44 and 47.

Frank Grad, 301(e) Study Group Reporter, described as typical Congress’ lack of legislative response to the report: “It’s the old story. While there indeed was considerable interest for the Report, when it comes time for legislation, nobody is anxious to spend money unless you can show a body count. There has not been the kind of rapid increases in injuries to encourage major legislation.” Telephone interview with Columbia University School of Law Professor Frank Grad (Sept. 20, 1990). For a related discussion, see Schroeder, Legislative and Judicial Responses to the Inadequacy of Compensation for Occupational Disease, 49 LAW & CONTEMP. PROBS. 151 (1986).

181 2A A. LARSON, supra note 19, at 7.

182 SUPERFUND HEARING, supra note 31, at 281.
compensation law seems equally as inadequate when dealing with occupational diseases in general. While worker's compensation efficiently handles over 90 percent of the standard accident injury claims administratively, "well over half" of the chronic occupational disease cases are controverted.\textsuperscript{183} The result of the contention: only 5 percent of those severely disabled by an occupational disease receive worker's compensation benefits.\textsuperscript{184}

Given such an inadequate response record to claims, courts must conclude that worker's compensation law is simply unable to handle occupational disease claims. Worker's compensation law has its limits, as illustrated by the traditional exceptions to exclusivity, and within two of those exceptions lies the legal justification for abandoning worker's compensation for toxic torts. When employees are intentionally injured, or are injured in a capacity other than as an employee, courts have allowed relief despite the worker's compensation bar. In both contexts, the dual capacity and the intentional tort exceptions reflect a concern for protecting the reasonable expectations of an employee.

In terms of the intentional tort exception, courts consistently have refused to apply venerable worker's compensation principles. Perhaps realizing how current worker's compensation law can victimize workers who, in turn, have been victimized by employers, the Supreme Court recently upheld a peculiar exception to exclusivity. In \textit{Adams Fruit Co. v. Barrett},\textsuperscript{185} the Court allowed an award for a migrant worker injured while being transported in an employer's van. The employer unsuccessfully argued that Florida's worker's compensation law barred Mr. Barrett's attempt to recover under the Migrant and Seasonal Agricultural Worker Protection Act.\textsuperscript{186} The Act allowed a claim in tort for an intentional violation.\textsuperscript{187} 

\textit{Adams Fruit} represented a chink in the armor of exclusivity.

\textsuperscript{183} \textit{Id.}
\textsuperscript{184} Peirce & Dworkin, \textit{supra} note 170, at 679 n.138.
\textsuperscript{185} 110 S. Ct. 1384 (1990).
\textsuperscript{187} In his comment about the case, Larson noted United States v. Demko, 385 U.S. 149 (1966), which barred a prisoner/plaintiff from relief under the Federal Tort Claims Act. The plaintiff was injured while performing a prison task. Contrary to \textit{Adams Fruit}, the Supreme Court in \textit{Demko} upheld worker's compensation exclusivity. Larson considered these rulings incompatible, and concluded that \textit{Adams Fruit} was unjustified. He argued that it was "difficult to believe that Congress meant to create a privileged class, the migrants, with rights superior to all other workers." 2A A. LARSON, \textit{supra} note 19, at 35 (Supp. 1990).
Though the injury did not compare to the types of injuries from contaminated properties, the holding showed that the exclusivity doctrine was by no means inviolate. The significance of the ruling was the ability of the court to overturn established doctrine for the sake of an injustice. Workers injured by contaminated properties face similarly unjust situations. Mr. Stevens and Mr. Wise, discussed in the Introduction, were as vulnerable to their hazardous workplaces as was the migrant worker in Adams Fruit. Employers often intend to use the toxic products in a workplace, and so, would be as liable as the employer in Adams Fruit. Yet, even if an employer did not intend to expose an employee to a toxin—perhaps because the employer inherited the contamination from a prior owner—policy concerns for worker safety should override a strict adherence to worker’s compensation exclusivity. By comparison, the migrant worker in Adams Fruit knew instantly the extent of his injury. It took decades for either Mr. Stevens or Mr. Wise to feel the lethal effects of the contamination. The crippling and pervasive effects of occupational disease demand the exception be applied even if the employer could claim lack of intent.

Larson rejected Adams Fruit’s claim that the ruling would encourage safer working conditions. “This sort of argument one used to hear fifty years ago against compensation acts generally. It stems from the naive idea that a bad safety record costs the employer nothing.”

Larson argued that employers with poor

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188 2A A. LARSON, supra note 19, at 33 (Supp. 1990). Despite Larson’s objections, legal scholars have argued that worker’s compensation has actually produced less safe workplaces. See Amchan, “Callous Disregard” for Employee Safety: The Exclusivity of the Worker’s Compensation Remedy against Employers, 94 LAB. L.J. 683 (1983) (a proposed amendment to the Occupational Safety and Health Act making employers liable for willful, intentional or grossly negligent acts or omissions). See also Bohyer, The Exclusivity Rule: Dual Capacity and the Reckless Employer, 47 MONT. L. REV. 157 (1986) (reckless employer conduct should not be barred from suit in tort); Note, Exceptions to the Excessive Remedy Requirements of Workers’ Compensation Statutes, 96 HARV. L. REV. 1641 (1983) (outdated bargain of employer/employee within worker’s compensation law warrants reasonable exceptions to exclusivity); Note, Workers’ Compensation: Expanding the Intentional Tort Exception to Include Willful, Wanton, and Reckless Employer Misconduct, 58 NOTRE DAME L. REV. 890 (1983) (worker’s compensation statutes were intended to cover accidents, not purposeful conduct).

Courts have been sensitive to the possibility of an employer using exclusivity to shield improper conduct. In Davis v. Rockwell Int’l Corp., 596 F. Supp. 780 (N.D. Ohio 1984), the federal district court denied the defendant summary judgment on the grounds of exclusivity. Mr. Davis crushed his hand when cleaning a machine on the job. After receiving state worker’s compensation benefits, he filed suit in tort against the employer for its alleged knowledge of the “dangerous and/or hazardous condition, thereby proximately causing the injuries.” Id. at 782. The court in Davis said worker’s compensation
safety records could be driven out of business. While these arguments might be applicable in the *Adams Fruit* context, they lose considerable force when dealing with contaminated properties. Those workplace injuries are insidious, pervasive, and as a result, much more threatening than a typical industrial accident. Using Larson’s own terminology, those injured by contaminated properties do not represent a privileged or special class. The sheer volume of contamination ultimately might make the vast majority of workers vulnerable. Asbestos alone infected more than twenty-one million workers.\(^8\)\(^9\) The devastation from such toxins will affect more than a company’s safety record, as Larson argued. Asbestos contamination, for example, made an entire industry insolvent, leaving the victims limited relief. The migrant worker exception in *Adams Fruit* was relevant, primarily as a recent indication of the Court’s willingness to bypass exclusivity.

The more established exceptions also support an employer/landowner’s liability for personal injury from contaminated property. For example, the doctrine of dual capacity,\(^190\) particu-

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\(^{189}\) N.Y. Times, July 8, 1990, at F6, col. 3.

\(^{190}\) The doctrine of dual capacity holds that an employer can be liable to an employee in capacities other than as an employer. While an employer might be protected by the exclusive remedy provision of worker’s compensation law in one capacity, the same accident could allow tort liability based on the employer’s other relationship to the worker. For example, an employee injured by an employer’s product could sue in two capacities—as an injured employee covered by worker’s compensation law and as a consumer of that product. Similarly, a company physician is not only a co-employee with the injured worker. The physician is also a professional potentially liable for malpractice. Dual capacity does not abrogate the exclusive remedy; rather, dual capacity allows suit against the person occupying a separate legal capacity—who is also the employer.

California boasted the original dual capacity case, *Duprey v. Shane*, 241 P.2d 78 (Cal. App. 1951), aff’d, 39 Cal. 2d 781, 249 P.2d 8 (1952), as well as numerous subsequent rulings. In 1982, however, the state legislature abolished the dual capacity exception to the exclusive remedy rule, while at the same time significantly increasing the worker’s compensation benefit scale. Cal. Lab. Code § 3602 (West 1982).

Critics consider the dual doctrine indefensible, since the contested injuries occur at work. Critics argue that by definition such claims are work-related and worker’s compen-
larly in the context of a company physician liable for malpractice to employees, is philosophically consistent with this duty.

Granting company physicians the protection of worker's compensation contradicts the objectives of the law. Most workplace injuries caused by co-workers—the kind contemplated by worker's compensation law—involve no-fault accidents implicitly connected with the workplace. Malpractice injuries from a company physician are neither no-fault nor do they represent an inherent risk of the workplace. One of the justifications for the no-fault aspect of worker's compensation is that a worker offers immunity to colleagues in return for the same protection. But a misdiagnosed worker, for example, has little or no chance of injuring the company physician. In that context, there is no legal justification for offering the physician immunity.

The law must be the exclusive remedy. Other arguments against dual capacity include: industrial accidents are risks inherent to employment; the dual status of the employer is coincidental to the work-related injury; and widespread employment of the doctrine could result in endless litigation. Note, The Dual Capacity Doctrine: Piercing the Exclusive Remedy of Worker's Compensation, 43 U. Pitt. L. Rev. 1013, 1028 (1982).

Besides those arguments, Larson contends that the doctrine encourages endless legal fictions, such as an employer being sued as the manufacturer of a product, because the employer repaired and altered a factory machine. Larson instead argues that dual capacity should be replaced by a "dual persona" rationale. Under a dual persona doctrine, an employer would be liable if it has a separate legal persona, which has legal obligations separate from the obligations to the employee. For example, the dual persona doctrine would apply when a defendant product manufacturer coincidentally acquire the employer of a plaintiff employee, who previously was injured by the new employer's product. Even though the manufacturer might have become the employer, the two legal personas were separate at the time of the accident; therefore, the employee in that limited context could sue its new employer.

Larson took particular exception to the dual capacity doctrine when applied to landowners or occupiers. An employer frequently owns or occupies the workplace, so, "if every action and function connected with maintaining the premises could ground a tort suit, the concept of exclusiveness of remedy would be reduced to nothingness." Id. § 72.82.

This argument does not apply to a landowner's strict liability for contaminated properties, since the duty relates to a specific responsibility, not something derived from "every action and function" related to property ownership.


In Cucote v. Albert, 521 So. 2d 399 (La. 1988), the Louisiana Supreme Court held an American Cyanamid physician liable for a misdiagnosis of an employee. The state supreme court distinguished the misdiagnosis from the type of injury contemplated under the state compensation law. The court refused to consider an injury from a company doctor as "an inevitable risk in the production process." Id. at 403.

Among the numerous cases upholding dual capacity, see McCall v. United States,
These same arguments support employer/landowner liability for an environmentally unsafe workplace. The worker injured by a company physician and the worker injured by a contaminated workplace typically have reasonable expectations that they are not in an inherently threatening situation. A patient does not expect to become more ill after seeing a doctor, and a worker does not, or should not, expect to contract a disease at a workplace.\(^{194}\) Allowing a company physician immunity violates the sense of fairness associated with the goals of worker’s compensation law.\(^{195}\)


Contrary to the Colorado Supreme Court approach in Wright, the Illinois and Wisconsin supreme courts interpret their respective worker’s compensation statutes as requiring employers to provide medical services. See McCormick v. Caterpillar Tractor Co., 85 Ill. 2d 352, 423 N.E.2d 876 (1981) and Jenkins v. Sabourin, 104 Wis. 2d 309, 311 N.W.2d 600 (1981).

194 The dissent in McCormick v. Caterpillar Tractor Co., 85 Ill. 2d 352, 423 N.E.2d 876 (1981), eloquently stated its basis for holding a company physician liable for medical malpractice: “Patients and doctors have deeply rooted expectations about their roles in our system of medical care and the legal aspects of their relation. If a private doctor attempted to disclaim liability for malpractice, the law would take a hard look at that agreement.” Id. at 360, 423 N.E.2d at 884.

195 Courts have expressed deeply rooted expectations about employer behavior when confronting employment discrimination. In Hart v. National Mortg. & Land Co., 189 Cal. App. 3d 1434 (1987), 235 Cal. Rptr. 68, the California appellate court rejected the exclusivity of worker’s compensation law and allowed an employee to sue for physical and emotional damages caused by the sexual harassment, assault, and battery from another employee. The court concluded that “when employers step out of their roles as such and commit acts which do not fall within the reasonably anticipated conditions of work, they may not hide behind the shield of worker’s compensation.” Id. at 75. See also Meninga v. Raley’s, 216 Cal. App. 5d 79, 81, 264 Cal. Rptr. 319, 322 (1989) (employer liable for emotional distress caused by a statutory violation of employment discrimination due to “unfair and outrageous behavior”). But see Van Biene v. ERA Helicopters, 779 P.2d 315 (Alaska 1989). The Alaska Supreme Court ruled that the exclusivity doctrine did not bar the plaintiff from bringing a suit against the worker’s compensation carrier for negligent safety inspection. On the other hand, the court in Van Biene barred the plaintiff from bringing a suit of intentional tort for company violations of federal sleep and rest requirements for pilots. The court in Van Biene said that the worker’s compensation carrier could be held liable if the insurer actually inspected the work conditions prior to the accident. For a discussion of insurance carrier liability, see 2A A. Larson, supra note 19, §§ 72.90-95.
Similarly, exposing a worker to an environmentally dangerous workplace, and then denying substantive legal redress, is precisely the kind of unfairness that led to the initial worker's compensation laws. Worker's compensation laws began as a means of guaranteeing relief, despite customary procedural and evidentiary burdens when suing employers. Unfortunately, the law has evolved into an obstruction to legitimate relief for those injured in an environmentally unsafe workplace.

C. This Duty Represents the Fairest and Most Expedient Way to Resolve Toxic Torts, Without Placing an Undue Burden on Landowners

Representatives of the American Insurance Association complained that holding landowners strictly liable for toxic tort personal injuries would be a "wholesale, radical abandonment" of tort principles. These insurers said the duty would thwart both justice and accident prevention, presumably because the added liability would financially overwhelm the landowner. Larson made a similar objection in discussing the dual capacity doctrine. He claimed that landowners must be protected from the potential avalanche of tort suits "if every action and function connected with maintaining the premises could ground a tort suit."

As the discussions of Rylands, warranty of habitability, maritime law, products liability and public nuisance illustrated, strict liability for injuries caused by contaminated properties is consistent with current legal trends, not an abandonment of them—wholesale, radical or otherwise. One of the appealing aspects of the duty is its specific focus. Unlike maritime law, for instance, where a ship could be considered unseaworthy for a dew-moistened deck or a short handrail, liability to landown-
ers attaches in only one context: contaminated property. Landowners must keep properties free from toxins.

By contrast, attaching the broad-based liability of unseaworthiness to landowners would prohibit businesses from owning property. 202 Strict liability claims for slip-and-fall accidents, for example, would unnecessarily expose business property owners to onerous liability. But in the context of protection from contaminated properties, both landowners and the judiciary would be aware of the breadth of liability. In enforcing the duty, courts could discern which environmentally-based tort actions justifiably supersede present common law and statutory landowner protection. To circumvent financial concerns, landowners would factor the cost of this potential liability into their sales price. Those properties free from contaminants will be significantly more valuable than those poisoned; furthermore, this price differential will induce landowners to clean the property prior to sale. Instead of crippling industry, the costs of liability will encourage an efficient land reclamation, rewarding the conscientious landowner with more valuable property and an absence of potential liability.

VI. CONCLUSION

All too often, the genesis for tort reform is catastrophe. Without a catastrophe in this context, the debate about liability for landowners of poisoned properties can lead to scientifically unanswerable questions about causation. For example, a 1978 Occupational Safety and Health Administration (OSHA) study conservatively estimated that carcinogens in the workplace caused 20 percent of deaths to cancer in our country. 203 A subsequent study published in the Journal of the National Cancer Institute dropped that estimation to 4 percent. 204 Regardless of whether the 4 percent or the 20 percent estimation is accurate (or, for that matter, the 90 percent estimated by yet another study), 205

202 See supra note 199.
204 Id. at 474.
205 Id. at 473. For standard criticisms of strict liability applications in toxic torts, see Rabin, Environmental Liability and the Tort System, 24 HOUS. L. REV. 27, 49 (1987). Rabin criticizes a strict liability compensation scheme for “1) its failure to discount adequately for victims contributory responsibility, such as heavy smoking; 2) its tolerance of transfer
the legal issue is the same. The insistence on scientific clarity for proof of injury disregards the fact that victims presently have little recourse when injured by a hazardous property. In toxic tort litigation, the existence of injury rarely is in dispute. What matters is who takes responsibility. Enforcing strict liability against landowners of contaminated properties answers that question, while at the same time, it motivates landowners to disinfect the contaminated workplaces.

Those wary of strict liability often argue that since the extent of personal injury from toxic properties is unknown, employing the legal system's most onerous standard of liability would be imprudent. They argue that strict liability would contravene basic principles of fairness. Such words of caution typically precede a suggestion that the plaintiff assume the onerous task of proving negligence or intent. When such discussions of prudence invoke notions of fairness, the root question is: "Fairness to whom?" The tort system has not been fair to the widows of Mr. Stevens and Mr. Wise. When our legal system offers limited relief for life-threatening injuries from contaminated properties, the basic principles of fairness simply are not working. Arguing against strict liability then becomes a way of perpetuating a basic unfairness.

Our nation faces an ominous threat from our spoiled properties. Our nation faces an ominous threat from our spoiled properties.

payments between responsible sources . . . due to problems of casual identification; 3) its restricted coverage of toxic substances and pollutants; 4) its inadequate precision in assigning prevention costs; and 5) its failure to achieve intramural fairness among victims of the same disease." Id.

206 See supra note 31.
207 For an argument against strict liability, see Honabach, Toxic Torts—Is Strict Liability Really the "Fair and Just" Way to Compensate the Victims?, 16 U. RICH. L. REV. 305 (1982). The author argued that the judiciary should not act until it "know[s] far more about the deterrent and spreading effects that strict liability would engender." Id. at 320. Honabach cautioned against casting toxic torts in an "us-them" context, since it might cloud the issue of fairness. He warned that this contentious perspective is merely a way of protecting those parties with whom we identify. Id. at 320 n.40. This argument contradicts the basic premise of an adversarial system, which absolutely demands an "us-them" confrontation. This tenet of tort law should not be abandoned, merely because the extent of liability from poisoned properties is unknown.

208 For example, the United States Agency for Toxic Substances and Disease Registry (ATSDR) issued a report in 1988 detailing the menace of lead poison to children. AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, U.S. DEPT. OF HEALTH AND HUM. SERVICES, THE NATURE AND EXTENT OF LEAD POISONING IN CHILDREN IN THE UNITED STATES: A REPORT TO CONGRESS (1988). This isolated contamination is a microcosm of the harm facing our society. Among the more startling findings: "[A]bout 2.4 million
tims like Mr. Stevens, Mr. Wise and the MacNeal cancer patients — each discussed in the Introduction — that have little or no legal recourse. The legal community must shift liability to protect these, and future, victims. Strict liability is one of the most potent judicial weapons, and the severity of this harm warrants its application.

Various strands of law should be bound together to provide a legal and philosophical justification to hold landowners strictly liable for personal injuries caused by their environmentally unsafe properties. An esteemed group of attorneys already recommended this to Congress; the California Supreme Court applied the same principles to residential landlords; the seaworthiness doctrine establishes the same liability for vessel owners; the duty parallels nuisance and products liability theory; and courts have already showed a willingness to preempt established legal theories—like worker's compensation law—in favor of a just resolution. Few problems are as significant as injuries caused by our fouled environment. The injuries have profound societal and ecological ramifications. The judiciary must act with courage to remedy the injustices by imposing this duty on landowners.

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white and black metropolitan children, or about 17 percent of such children . . . are exposed to environmental sources of lead at concentrations that place them at risk of adverse health effects.” Id. at 4. Since lead toxicity attacks the brain and central nervous system, even low-level exposure can delay brain development, lower IQ's and impair hearing. Id. at 1.

Detailing the harm contaminants cause our work force, the National Safe Workplace Institute estimated that occupational diseases killed as many as 95,000 Americans in 1987. Chicago Tribune, Aug. 31, 1990, at 1, col. 1. The Institute also estimated as much as 10 percent of all cancer deaths are related to occupational diseases. Id.