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Common Carriers and Risk Distribution: Absolute Liability for Transporting Hazardous Materials

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COMMON CARRIERS AND RISK DISTRIBUTION: ABSOLUTE LIABILITY FOR TRANSPORTING HAZARDOUS MATERIALS

INTRODUCTION

On the night of October 17, 1978, eighteen cars of an Illinois Central train derailed in Claxon, Kentucky, causing the explosion of two tank cars, each containing 22,000 gallons of vinyl chloride.[1] The conflagration necessitated the evacuation of forty-five families from the surrounding area.[2] Earlier in 1978, eight people were killed in Youngstown, Florida, when vinyl chloride burst from tank cars in a similar derailment.[3] Occurrences such as these illustrate the serious threat to the public posed by the transportation of hazardous materials; they also raise questions concerning the standard of care to be used in determining tort liability of common carriers who transport such materials. Courts have often been urged to impose absolute liability on common carriers on the theory that the party transporting hazardous materials for profit should bear the loss.[4] The doctrine of absolute liability has been uniformly rejected, however, because carriers have a public duty to accept such materials for transportation.[5] The rule tradition-

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[1] The Courier-Journal, Oct. 19, 1978, at 1, col. 1.

[2] *Id.*

[3] *Id.* at 12, col. 3.

[4] *See, e.g.*, Christ Church Parish v. Cadet Chem. Corp., 199 A.2d 707, 709 (Conn. Super. Ct. 1964); Pope v. Edward M. Rude Carrier Corp., 75 S.E.2d 584 (W. Va. 1953).

[5] *See, e.g.*, Note, *Carriers—Difference Between Private and Common Carriage in Respect to Motor Transportation of Goods*, 6 WIS. L. REV. 35 (1930). The Interstate Commerce Commission defined a common carrier in the Motor Carrier Act of 1935:

> The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to chapter I of this title, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to chapter I of this title.

49 U.S.C. § 303(a)(14) (1963).

Common carriers of property have been subjected to a high standard of care by the Carmack Amendment, 49 U.S.C. § 20(11) (1951), as well as by the common law. The burden of the risk of loss has been placed on the carrier when dealing with nonhazardous goods. Although the carrier's liability is not absolute, the areas of its

ally applied is that the carrier of an inherently dangerous substance owes to the public the duty to exercise care commensurate with the danger of its distribution.[6]

The firm judicial position that common carriers are exempt from the rule of absolute liability for harm caused by miscarriage of an ultrahazardous activity has been rejected in recent years by two courts employing different theories. The court in *Siegler v. Kuhlman*[7] ruled that as between two innocent parties—a common carrier and a girl who died in a violent

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liability are extensive. Carriers have attempted to limit their liability and to shift or allocate the risk of loss. For a discussion of the subject of carrier liability, *see* Skulina, *Liability of a Carrier for Loss and Damage to Interstate Shipments*, 17 CLEV.-MAR. L. REV. 251 (1968). For a thorough analysis of two of the most common devices utilized to allocate the risk of loss, *i.e.*, "benefit of insurance" and "hold harmless" clauses, *see* Hardman & Winter, *The Interstate Commerce Act and the Allocation of the Risk of Loss or Damage in the Transportation of Freight*, 7 TRANSP. L.J. 137 (1975).

[6] By applying this negligence standard to common carriers of hazardous materials, courts rejected the contention that transporting explosives amounted to an ultrahazardous activity; those courts which designated the activity as ultrahazardous, however, recognized the common carrier exception to absolute liability. The American Law Institute (hereinafter referred to as ALI) offers the following definition of an untrahazardous activity:

> An activity is ultrahazardous if it
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> (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and
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> (b) is not a matter of common usage.

RESTATEMENT OF TORTS § 520 (1938). The RESTATEMENT (SECOND) OF TORTS replaces the term "ultrahazardous" with "abnormally dangerous" and suggests the consideration of six factors in determining whether an activity warrants the imposition of strict liability:

> In determining whether an activity is abnormally dangerous, the following factors are to be considered:
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> (a) Whether the activity involves a high degree of risk of some harm to the person, land or chattels of others;
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> (b) Whether the gravity of the harm which may result from it is likely to be great;
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> (c) Whether the risk cannot be eliminated by the exercise of reasonable care;
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> (d) Whether the activity is not a matter of common usage;
>
> (e) Whether the activity is inappropriate to the place where it is carried on; and
>
> (f) The value of the activity to the community.

RESTATEMENT (SECOND) OF TORTS § 520 (Tent. Draft No. 10, 1964).

[7] 502 P.2d 1181 (Wash. 1972), *cert. denied*, 411 U.S. 983 (1973). For a collection of the cases discussing carrier liability incident to the transportation of petroleum products, *see* Annot., 32 A.L.R.3d 1169 (1970). *See also* Avins, *Absolute Liability for Oil Spillage*, 36 BROOKLYN L. REV. 359 (1970); Stone, *The Trans-Alaska Pipeline and Strict Liability for Oil Pollution Damage*, 9 URB. L. ANN. 179 (1975).

explosion of gasoline transported by the carrier—the one engaged in the ultrahazardous activity for profit should bear the economic loss. The court in *Chavez v. Southern Pacific Transportation Co.*[8] discovered an adequate reason for subjecting the common carrier to absolute liability in the theory of "enterprise liability"[9] as developed by Justice Traynor[10] and Professor Calabresi.[11] Essentially, the theory proposes that the person engaged in the enterprise should bear the initial loss when the enterprise miscarries, especially when the person is engaged in the enterprise for profit and is in a suitable position to administer the loss so that it will ultimately be borne by the public.[12]

An analysis of the *Siegler* and the *Chavez* cases will demonstrate that their basic premises are sound. Before turning to a consideration of those cases, however, it is important to examine briefly *Actiesselskabet Ingrid v. Central Railroad,*[13] the leading case enunciating the common carrier exception traditionally accepted by the courts. The arguments posited by the *Ingrid* court in support of the common carrier exception are largely nullified by the concept of enterprise liability as applied by the *Chavez* court. It should become apparent that the enter-

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[8] 413 F. Supp. 1203 (E.D. Cal. 1976). Since California had not developed any exception for common carriers, the federal district court had the "doubtful privilege of trying to 'guess' whether the California courts would except Southern Pacific from the general standard of strict liability imposed on those engaged in ultrahazardous activity." *Id.* at 1205.

[9] In its broadest terms the theory of enterprise liability in torts is that losses to society created or caused by an enterprise, or more simply, by an activity, ought to be borne by that enterprise or activity. Stated somewhat more precisely, the theory contemplates that losses historically recognized as compensable when caused by an enterprise, or activity, such as producing, distributing and using automobiles, ought to be borne by those persons who have some logical relationship with that enterprise or activity.

Klemme, *The Enterprise Theory of Torts*, 47 U. COLO. L. REV. 153, 158 (1976). Klemme derives his definition and description of the theory of enterprise liability from 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 13.1, at 760 (1956); Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948). *See also* Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951); Morris, *Hazardous Enterprises and Risk Bearing Capacity*, 61 YALE L.J. 1172 (1952).

[10] *See* text accompanying notes 51-59 *infra* for a discussion of Justice Traynor's theory of risk distribution.

[11] *See* text accompanying notes 60-66 *infra* for a discussion of Professor Calabresi's theory of risk distribution as the *Chavez* court interpreted and applied it.

[12] 413 F. Supp. at 1208-09.

[13] 216 F. 72 (2d Cir.), *cert. denied*, 238 U.S. 615 (1914).

prise theory of tort is a viable substitute for traditional negligence principles in this area of common carrier liability.

I. THE COMMON CARRIER EXCEPTION AND ITS REJECTION

Actiesselskabet Ingrid v. Central Rairoad[14] is based on the theory that it would be inconsistent to rule that common carriers must accept hazardous materials for transportation and also subject them to absolute liability for damages resulting from accidents inevitably arising from such an activity. In *Ingrid,* a shipowner maintained suit to recover for the loss of his ship, which had been destroyed when train cars loaded with dynamite exploded. The court followed the fundamental rule that "to sustain an action for a tort, the damage complained of must have come from a wrongful act."[15] Grievous injury to an individual, if resulting from an unavoidable accident involving no carelessness or negligence, does not give rise to an action for damages.[16] The reasoning of the court merits quoting in relevant part, since the *Chavez* court later considered this very reasoning in the process of deciding that common carriers should be held strictly liable for damages resulting from the miscarriage of ultrahazardous activities:

> We think there can be no doubt, so far as a common carrier is concerned, that such danger as necessarily results to others from the performance of its duty, without negligence, must be borne by them as an unavoidable incident of the lawful performance of legitimate business. . . . It certainly would be an extraordinary doctrine for courts of justice to promulgate to say that a common carrier is under legal obligation to transport dynamite and is an insurer against any damage which may result in the course of transportation, even though it has been guilty of no negligence which occasioned the explosion which caused the injury. It is impossible to find any adequate reason for such a principle.[17]

Although it recognized that the English case of *Rylands v. Fletcher*[18] supports imposing absolute liability on common car-

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[14] *Id.* at 76-78.

[15] *Id.* at 78.

[16] *Id.*

[17] *Id.*

[18] [1868] L.R. 3 H.L. 330. In *Rylands v. Fletcher,* the defendant mill owners were held absolutely liable for damages to an unused coal mine shaft caused by water

riers, the *Ingrid* court was unpersuaded by this doctrine. It noted that American courts "generally disapproved"[19] the application of *Fletcher* because it is in " 'direct conflict with the law as settled in this country.' "[20] The court further said, "[A rule which] 'casts upon an innocent person the responsibility of an insurer is a hard one at best, and will not be generally applied unless required by some public policy or the contract of the parties.' "[21]

A. Siegler *and the "Primitive Appeal to Fairness"*[22]

The *Ingrid* position was widely accepted[23] and remained

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escaping from a reservoir constructed upon their property. Justice Blackburn, in the Exchequer Chamber, stated the rule of the case, which was later rejected by American courts:

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

Fletcher v. Rylands, [1866] L.R. 1 Ex. 265, 279-80. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 78 (4th ed. 1971).

[19] 216 F. at 77.

[20] *Id.*, quoting Losee v. Buchanan, 51 N.Y. 476, 486.

[21] *Id.* at 78, quoting Pennsylvania Coal Co. v. Sanderson, 6 A. 453, 460 (Pa. 1886).

[22] *See* text accompanying notes 56-57 *infra* for an analysis of Smith v. Lockheed Propulsion Co., 56 Cal. Rptr. 128 (1967) which provides an illustration of the "fairness" rationale for subjecting a person engaging in ultrahazardous activities to absolute liability. "By so stating the Smith court gave reference in *Lutheringer* to the 'best public policy,' and provided California courts with a rationale other than the primitive appeal to fairness." 413 F. Supp. at 1208.

[23] In 1938, the ALI adopted the *Ingrid* position that strict liability should not be imposed where the carrier is acting pursuant to a public duty. The general rule adopted by the ALI provides that "one who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity . . . , although the utmost care is exercised to prevent the harm." RESTATEMENT OF TORTS § 519 (1938). The ALI carved out an exception to the general rule by providing that absolute liability "does not apply if the activity is carried on in pursuance of a public duty imposed upon the actor as a public officer or as a common carrier." *Id.* at § 521. This exception is explained in Comment (a) to § 521, which states that a "common carrier, in so far as it is required to carry such explosives as are offered to it for carriage, is not liable for harm done by their explosion, unless it has failed to take care in their carriage which their dangerous character requires." Thus, the ALI adopted a negligence standard for common carriers and declined to recommend strict liability where the ultrahazardous activity was required of the common carrier.

In Pope v. Edward M. Rude Carrier Corp., 75 S.E.2d 584, 595-97 (W. Va. 1953), the court quoted *Ingrid* at length to conclude that neither a contract carrier licensed by the Interstate Commerce Commission nor the shipper of high explosives was absolutely liable to third persons for injuries resulting from explosions which occurred while

unmodified until 1973, when it was rejected by the Supreme Court of Washington in *Siegler v. Kuhlman.*[24] The court applied the *Rylands v. Fletcher* doctrine[25] to find the defendant liable for the wrongful death of a motorist whose automobile exploded in gasoline spilled on the highway from the defendant owner's gasoline trailer.[26] The majority relied on two theories[27] in holding the defendant carrier strictly liable: that "as a matter of abstract justice," the burden should be put "upon the one of the two innocent parties whose acts instigated or made the harm possible,"[28] and that problems of proof—including the likely destruction of evidence when ultrahazardous activities miscarry—justify a strict liability standard.[29]

The *Siegler* court quoted from the *Restatement (Second) of Torts* the general rule that one who engages in ultrahazardous activity must bear absolute liability for damages resulting

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hazardous cargo was being transported. The court expressly rejected the doctrine of *Rylands v. Fletcher* in connection with the liability of common carriers for injuries resulting from explosives occurring without their negligence, and agreed that the carrier's liability should be based upon negligence. *Id.* at 596.

A more recent case, Christ Church Parish v. Cadet Chem. Corp., 199 A.2d 707 (Conn. Super. Ct. 1964), arose out of a chemical explosion which resulted in extensive property damage and the deaths of four firemen. The court, following the RESTATEMENT OF TORTS § 521, rejected the contention that the carriers were absolutely liable for the deaths and damage that resulted from the explosion of chemicals the defendants were transporting. Rather, the court held, the carrier "of an inherently dangerous substance owes to the public the duty to exercise care commensurate with the danger of its distribution." *Id.* at 708.

[24] 502 P.2d 1181 (Wash. 1972), *cert. denied,* 411 U.S. 983 (1973).

[25] *See* note 18 *supra* for a statement of the holding in *Rylands v. Fletcher.* The doctrine has been explained on the basis that the "defendant will be liable when he damages another by a thing or activity unduly dangerous and inappropriate to the place where it is maintained, in the light of the character of that place and its surrounding." W. PROSSER, LAW OF TORTS § 78 (4th ed. 1971). The *Siegler* court provides a good example of the way the doctrine of *Rylands v. Fletcher* is currently applied: "The basic principles supporting the Fletcher doctrine . . . control the transportation of gasoline as freight along the public highways the same as it does the impounding of waters and for largely the same reasons." 502 P.2d at 1184.

[26] 502 P.2d at 1184-87.

[27] These theories were taken by the *Siegler* court from Peck, *Negligence and Liability Without Fault in Tort law,* 46 WASH. L. REV. 225, 240 (1971). Also cited were Fletcher, *Fairness and Utility in Tort Theory,* 85 HARV. L. REV. 537 (1972) and Comment, *Liability Without Fault: Logic and Potential of a Developing Concept,* 1970 WIS. L. REV. 1201 (1970).

[28] 502 P.2d at 1185.

[29] *Id.* The court also noted the inherent difficulty of proving causation under a negligence standard. *Id.*

when such activity miscarries.[30] The court omitted, however, any consideration of section 521[31] and the established exception for common carriers expressed therein. For this reason the court's treatment of the dilemma is largely inadequate. Although the court provided an eloquent and persuasive description of the perils of transporting gasoline as freight along the public highways, it made no attempt to reconcile the common carriers' duty to accept hazardous materials for transportation with the strict liability which the court imposed. The court opined that as between the carrier who engaged in the enterprise for economic gain and the innocent girl who lost her life when the enterprise miscarried, abstract justice or fairness required the carrier to bear the loss.[32] This position recognizes that the carrier cannot by exercising "due and reasonable care assure protection to the public from the disastrous consequences of concealed or latent mechanical or metallurgical defects in the carrier's equipment . . . and from all of the other hazards not generally disclosed or guarded against by reasonable care, prudence, and foresight."[33] Largely because such accidents are unpreventable, the *Siegler* court rejected the negligence standard as inadequate to protect the public from the dangers inherent in transporting large quantities of exposives.[34]

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[30] *Id.* at 1186-87. The *Siegler* court pointed out that the RESTATEMENT (SECOND) OF TORTS § 519 was adopted as a rule of decision in Pacific Northwest Bell Tel. Co. v. Port of Seattle, 491 P.2d 1037 (Wash. 1971). However, in *Pacific North Bell,* the application of strict liability was rejected solely because the installation of underground water mains by a municipality was not, under the circumstances shown, an "abnormally dangerous activity." *Siegler v. Kuhlman,* 502 P.2d at 1187. The court continued to contrast the:

> relatively safe, routine procedure of installing and using underground water mains . . . with the activity of carrying gasoline as freight in quantities of thousands of gallons at freeway speeds . . . through cities and towns and on secondary roads in rural districts . . . . [O]ne cannot escape the conclusion that hauling gasoline as cargo is undeniably an abnormally dangerous activity and on its face possesses all of the factors necessary for imposition of strict liability as set forth in the *Restatement (Second) of Torts* § 519 (Tent. Draft No. 10, 1964) above.

Id.

[31] *See* note 23 *supra* for a discussion of the ALI position regarding the common carrier exception as reflected in the RESTATEMENT OF TORTS.

[32] 502 P.2d at 1185.

[33] *Id.* at 1187.

[34] *Id.* This conclusion represents a policy decision that where negligence cannot

B. Chavez *and Enterprise Liability*

In 1976 the Federal Court for the Eastern District of California decided *Chavez v. Southern Pacific Transportation Co.*,[35] in which recovery was sought for personal injuries and property damage caused when approximately eighteen bomb-loaded boxcars exploded in Southern Pacific's rail yard. Southern Pacific argued that under California law a common carrier could not be held strictly liable for damages resulting from the carriage of explosives insofar as it has a duty to carry them.[36] This argument was rejected by the court, which concluded that California would not "carve out an exception for common carriers engaged in a public duty. . . ."[37]

The *Chavez* analysis began with the proposition that the transportation of hazardous materials is an ultrahazardous activity; the defendant did not contest this designation, but based its argument on the common carrier exception developed by the ALI and the courts. However, the court noted that strict liability had been imposed in previous California cases involving ultrahazardous activities, the primary example being *Green v. General Petroleum Corp.*[38] In *Green,* the Supreme Court of California decided "that one engaged in oil-drilling in a residential area should be absolutely liable for damages resulting from an oil well 'blow-out.' "[39]

> Where one, in the conduct and maintenance of an enterprise lawful and proper in itself, deliberately does an act under known conditions, and, with knowledge that injury may result to another, proceeds, and injury is done to the other as the direct and proximate consequence of the act, however carefully done, the one who does the act and causes the injury

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be proved, the person who engages in the extrahazardous activity for profit should bear the loss.

[35] 413 F. Supp. 1203 (E.D. Cal. 1976).

[36] *Id.* at 1205-06.

[37] *Id.* at 1213. *See* note 23 *supra* for a discussion of the exception which the *Chavez* court thoroughly examined but rejected.

[38] 270 P. 952 (Cal. 1928). *See generally* Ehrenzweig, *Negligence Without Fault,* 54 CAL. L. REV. 1422 (1966); Foster & Keeton, *Liability Without Fault in Oklahoma,* 3 OKLA. L. REV. 1 (1950); Harper, *Liability Without Fault and Proximate Cause,* 30 MICH. L. REV. 1001 (1932).

[39] Chavez v. Southern Pac. Transp. Co., 413 F. Supp. 1203, 1207 (E.D. Cal. 1976).

> should, in all fairness, be required to compensate the other for the damage done.[40]

The *Chavez* court carefully considered whether this doctrine could be appropriately applied when the person engaging in the ultrahazardous enterprise is a common carrier. The court reasoned:

> If California predicated liability solely upon the "fairness" rationale appearing in the *Green* case, it might well find that strict liability was inappropriate. Where the carrier has no choice but to accept dangerous cargo and engage in an ultrahazardous activity, it is the public which is requiring the carrier to engage in the anti-social activity. The carrier is innocent.[41]

In this manner the court squarely faced the difficult issue which the *Siegler* court had ignored.

The justification for applying absolute liability to common carriers was found in a number of earlier California decisions adopting the risk distribution theory.[42] The *Chavez* court reasoned that since the public requires the carrier to engage in the anti-social activity, "there is no logical reason for creating a 'public duty' exception when the rationale for subjecting the carrier to absolute liability is the carrier's ability to distribute the loss to the public."[43] Simply stated, the public pays for requiring the carrier to engage in the activity which is by nature dangerous to the public. Consequently, "[t]he harsh impact of inevitable disasters is softened by spreading the cost among a greater population and over a larger time period."[44] The person engaged in the hazardous enterprise is in the most suitable position to pass the cost to the public and "the social and economic benefits which are ordinarily derived from imposing strict liability are achieved."[45]

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[40] Green v. Gen. Petroleum Co., 270 P. 952, 955 (Cal. 1928).

[41] 413 F. Supp. at 1213-14.

[42] *See* notes 50-57 *infra* and accompanying text for a discussion of the major California cases adopting the risk distribution theory.

[43] 413 F. Supp. at 1214.

[44] *Id.*

[45] *Id.*

II. COMMON CARRIERS AND THE RISK DISTRIBUTION RATIONALE

It has been pointed out that imposition of absolute liability "on one who intentionally engages in an activity which presents an unusual hazard to the community . . . reflects an unarticulated social policy determination as to who should bear the loss as between two parties when an accident occurs."[46] That traditional principles of negligence will sometimes give way to economic considerations was recognized nearly sixty years ago by Roscoe Pound when he wrote that "[t]here is a strong and growing tendency, where there is no blame on either side, to ask in view of the exigencies of social justice, who can best bear the loss."[47] This capacity to bear the loss has been defined as the corporate defendant's ability to "pass on" the cost of liability to the consumers of its services and products in the form of higher rates or prices. Professor Feezer, in his classic article on the subject, outlined the mechanics of the risk distribution process:

> The defendant upon whom is placed the burden of a money loss in a tort action may distribute the loss by insurance or by adding it to the cost of carrying on his business; in either case it is distributed ultimately upon society. In so far as society approves this distribution of loss, it would seem that it is admitting its ultimate responsibility for injuries which arise out of a civilization of increasing social inderdependence.[48]

This theory led the *Chavez* court to reject the common carrier exception to the general rule of absolute liability for engaging in ultrahazardous activities. Society, by imposing

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[46] Bergman, *No Fault Liability for Oil Pollution Damage*, 5 J. MAR. L. & COM. 1, 30 (1973-74). Bergman advocates applying strict liability on the basis of risk distribution for reasons similar to those which guided the *Siegler* and the *Chavez* courts:

> [The field of oil transport] has become an extra-hazardous activity, where the taking of reasonable precautions can in no way guarantee that the damage will be averted. The tortfeasor has a "deep pocket" and is able to distribute the risk among its customers, etc.

Id. at 21. Bergman applied the theories of Justice Traynor and Professor Calabresi in a manner similar to the *Chavez* court to conclude that the oil industry, *i.e.*, carriers and shippers, should be subjected to absolute liability for all "commercial and property damage caused by accidental offshore spillage, irrespective of fault." *Id.*

[47] R. POUND, THE SPIRIT OF THE COMMON LAW 189 (1921).

[48] Feezer, *Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases*, 78 U. PA. L. REV. 805, 809-10 (1930).

upon the common carrier the duty to transport hazardous materials, can fairly be said to admit "ultimate responsibility" for the calamities which result; under this theory the common carrier may "distribute the loss by insurance or by adding to the cost of carrying on his business."[49] The central element in this theory, as stated by *Chavez,* is that the public is the ultimate cost bearer. When viewed in this context, the public duty exception to common carrier liability becomes both irrelevant and unnecessary.

A. *Justice Traynor's Theory of Risk Distribution*

The *Chavez* court relied upon established California precedent in holding common carriers strictly liable for damages resulting from ultrahazardous activities. Although the common carrier issue had not been presented to California courts prior to *Chavez,* strict liability justified by the rationale of risk distribution had been applied in several other areas of tort law.[50] The first use of the risk distribution rationale for imposing strict liability in California came in Justice Traynor's often-cited concurring opinion in *Escola v. Coca Cola Bottling Co.*[51] While the majority affirmed the plaintiff's judgment on a res ipsa loquitur theory,[52] Justice Traynor reasoned that the same result could be reached with a theory of strict liability:

> Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and loss

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[49] *Id.* Bergman has a section which explains precisely what Professor Feezer meant by this statement:

> A factor which must be seriously considered in determining who should bear initial liability is the relative ability to insure against liability. This presumably would present no difficulty to the vessel owner as he is already carrying insurance to protect himself against other maritime mishaps, including, most probably, damage caused by *negligent* spills. Thus while absolute liability imposed on the oil company would involve it in an entirely new series of insurance constracts *[sic]* and transactions, the placing of the burden on the tanker company would simply entail an adjustment in insurance coverage and premiums, with the expense of the latter ultimately defrayed by the oil company nonetheless.

Bergman, *supra* note 46, at 39.

[50] The *Chavez* court admitted that there is no direct authority indicating whether California courts would accept or reject an exemption for common carriers based on some form of public authorization. 413 F. Supp. at 1206.

[51] 150 P.2d 436, 440-44 (Cal. 1944).

[52] *Id.* at 440.

> of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.[53]

"Justice Traynor," stated the *Chavez* court, "firmly imprinted this reasoning into California's strict liability law in the landmark case of *Greenman v. Yuba Power Products, Inc.* . . . in which California led other jurisdictions by finding that the products liability of a manufacturer was governed by the law of strict liability in tort, and not by the law of contract warranties."[54] Justice Traynor, in explaining this proposition, had noted, "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."[55]

This proposition was adopted in *Smith v. Lockheed Propulsion Co.*,[56] which involved property damage caused by tremors made when a solid fuel rocket motor was fired nosedown while fixed to a test stand. The court, after finding that this test firing involved an inherent risk of damage that could not be eliminated by the exercise of due care, concluded:

> In these circumstances, public policy calls for strict liability. There is no basis, either in reason or justice, for requiring the innocent neighboring landowner to bear the loss. Defendant, who is engaged in the enterprise for profit, is in a position best able to administer the loss so that it will ultimately be borne by the public. As Professor Prosser summarizes the rationale for the imposition of strict liability: "The problem is dealt with as one of allocating a more or less inevitable loss to be charged against a complex and dangerous civilization, and liability is placed upon the party best able to shoulder it."[57]

Based upon this reasoning, the *Chavez* court concluded that

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[53] *Id.* at 441.

[54] 413 F. Supp. at 1208.

[55] Greenman v. Yuba Power Prod., Inc., 377 P.2d 897, 901 (Cal. 1963). One of the most articulate recent statements of these criteria of enterprise liability as applied in the context of strict liability for defective products is that of the Wisconsin Supreme Court in Dippel v. Sciano, 155 N.W.2d 55, 63-65 (Wis. 1967).

[56] 56 Cal. Rptr. 128 (Ct. App. 1967).

[57] *Id.* at 137.

risk distribution was a suitable rationale for applying strict liability to common carriers which transport hazardous materials.[58] Simply stated, the theory of risk distribution enables the common carrier to " 'administer the loss so that it will ultimately be borne by the public,' "[59] and is in this manner consistent with the public duty imposed upon the carrier.

B. Chavez *and Calabresi's Theory of Risk Distribution*

The *Chavez* court supplemented its use of Justice Traynor's theory with the socio-economic underpinnings of risk distribution as developed by Professor Calabresi.[60] Professor Calabresi discerned two primary benefits resulting from the indirect imposition of liability on the public (which profits from and requires the dangerous activity):

> (1) the adverse impact of any particular misfortune is lessened by spreading its cost over a greater population and over a larger time period and (2) social and economic resources are more efficiently allocated when the actual costs of goods and services (including the losses they entail) are reflected in their price to the consumer.[61]

The court concluded that subjecting Southern Pacific to absolute liability would achieve both results.[62]

Central to Professor Calabresi's theory is the idea that society should produce the types and quantities of commodities that people desire, since it is assumed "that people know what is best for themselves."[63] The correlative to this principle is that people cast their "marketplace votes"[64] with the normal expectation that the goods or services they buy will not inade-

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[58] 413 F. Supp. at 1209.

[59] *Id., quoting* Smith v. Lockheed Propulsion Co., 56 Cal. Rptr. 128, 137 (Ct. App. 1967).

[60] *See* note 8 *supra* for a general definition of "enterprise liability." Other articles by Professor Calabresi on the general subject of risk distribution include Calabresi, *Does the Fault System Optimally Control Primary Accident Costs?*, 33 L. & CONTEMP. PROB. 429 (1968); Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965); and Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 Yale L.J. 499 (1961) [hereinafter cited as *Risk Distribution*].

[61] 413 F. Supp. at 1209.

[62] *Id.*

[63] *Risk Distribution, supra* note 60, at 502.

[64] *Id.* at 505.

quately perform or result in injuries to themselves. The central idea in Professor Calabresi's theory of risk distribution is that:

> [T]he most desirable system of loss distribution under a strict resource-allocation theory is one in which the prices of goods accurately reflect their full cost to society. The theory therefore requires, first, that the cost of injuries should be borne by the activities which caused them, whether or not fault is involved, because, either way, the injury is a real cost of those activities. . . . Second, the theory requires that among the several parties engaged in an enterprise the loss should be placed on the party which is most likely to cause the burden to be reflected in the price of whatever the enterprise sells.[65]

This price reflection idea is particularly meaningful when applied to common carriers engaged in the transportation of hazardous materials because, as the *Siegler* court pointed out, it is generally impossible to determine fault when an accident obliterates all of the evidence.[66] The party involved in the ultrahazardous activity is usually the logical person to distribute the loss evenly upon society; when it is impossible to determine whose negligence caused the accident, it is particularly appropriate that the person who engaged in the enterprise for economic gain be assigned the initial liability. The net result of this application is that the carrier will obtain greater amounts of insurance and increase its carriage rates, and that the shipper will in turn increase the price of the goods to the public.[67] This is the very mechanism contemplated by Profes-

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[65] *Id.* Professor Keeton would ground the fairness of this theory on the general principle of unjust enrichment. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 409 (1959). The Minnesota Supreme Court would apparently do the same, *see* Bridgeman-Russell Co. v. City of Duluth, 197 N.W. 971 (Minn. 1924), holding the city strictly liable for damages caused by a break in a large high-pressure water line.

> In such a case, even though negligence be absent, natural justice would seem to demand that the enterprise, or what really is the same thing, the whole community benefited by the enterprise, should stand the loss rather than the individual. It is too heavy a burden upon one.

Id. at 972.

[66] 502 P.2d at 1185. For other views of the merits of a strict liability theory as opposed to a fault theory as a means of preventing accidents, *see* Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205 (1973).

[67] *See* Bergman, *supra* note 46, at 31-33 for his application of the enterprise theory in the context of oil transporters; the same application should be made with regard to common carriers of hazardous cargo in general.

It is possible for a motor carrier to increase its carriage rates under 49 U.S.C. §

sor Feezer in 1930.[68]

CONCLUSION

The *Ingrid* court, in the traditional approach to common carrier liability, decided that those who are injured by accidents resulting from ultrahazardous activity must bear the loss as an unavoidable incident of the lawful performance of legitimate business. Further, the *Ingrid* court stated that it was impossible to find any adequate reason for subjecting common carriers, who operate under a legal obligation to transport hazardous materials, to absolute liability.

In sharp contrast, the *Chavez* court held that the cost of engaging in ultrahazardous activities must be initially borne by the party engaged in the enterprise for profit, that cost being an unavoidable incident of the lawful performance of legitimate business. The "adequate reason" sought by the *Ingrid* court was discovered by the *Chavez* court in the rationale underlying the risk distribution theory: The common carrier is in an ideal position to distribute the cost of an accident upon the public. It is appropriate that ultimate liability rest upon the public because the public requires the common carrier to engage in the ultrahazardous activity for society's benefit. The *Chavez* court properly concluded that there is no "logical reason" for creating a public duty exception when the theory behind subjecting the common carrier to absolute liability is the carrier's ability to pass the cost to the party which mandates the activity—the public.

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316 (1963) provided it can sustain the burden of showing that the proposed change is just and reasonable. *See, e.g.*, McLean Trucking Co. v. United States, 346 F. Supp. 349 (M.D. N.C.), *aff'd*, 409 U.S. 1121 (1973) and United States v. Burlington Truck Line, Inc., 356 F. Supp. 582 (W.D. Mo. 1973), *aff'd with modifications*, 501 F.2d 928 (8th Cir. 1974).

[68] *See* text accompanying note 48 *supra* for a description of Professor Feezer's concept of how the risk distribution mechanism should work.