Using the Abnormally Dangerous Activity Doctrine to Hold Principals Vicariously Liable for the Acts of Toll Manufacturers

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USING THE ABNORMALLY DANGEROUS ACTIVITY DOCTRINE TO HOLD PRINCIPALS VICARIOUSLY LIABLE FOR THE ACTS OF TOLL MANUFACTURERS

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I. INTRODUCTION

Chemical manufacturers frequently enter into agreements with outside firms to process industrial grade materials into commercial products. These agreements are called tolling contracts. In a typical tolling contract, the chemical manufacturer (principal) supplies the raw materials and production specifications to the toll manufacturer who then supplies the labor and equipment to produce the product. The toll manufacturer is paid a "toll" or fee for its production services. Under a typical tolling arrangement the principal retains title to the raw materials during the processing period. Although tolling arrangements offer needed flexibility to the chemical industry, often lax safety standards by toll manufacturers lead to the release of toxic chemicals into the environment.

The problem caused by the release of toxic chemicals into the environment is exacerbated when the toll manufacturer does not have the financial resources to pay for the cost of cleaning up the environment. Often the toll manufacturer responsible for the release of hazardous materials will file for bankruptcy rather than pay for environ-

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* Solicitations Editor, 1993-94, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.
2 See id.
3 Id.
4 Id.
mental clean-up costs. In these situations, the principal that selected and hired the toll manufacturer is the only other party with any connection to the work that generated the toxic waste. Thus, in instances where the toll manufacturer is insolvent, a legal theory is needed to recover damages from the principal.

Federal and state authorities have made initial efforts to hold principals liable for the environmental damage caused by the toll manufacturers that they hire. In cases where a toll manufacturer does not have the resources to pay damages, the government has used the broad language of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to successfully hold principals liable for the clean-up costs associated with the environmental contamination caused by toll manufacturers. CERCLA and other public law remedies, however, are only a partial solution to the environmental problem that can be caused by toll manufacturers.

Although CERCLA is an effective vehicle for holding principal's liable for clean-up costs, private parties who are harmed by the practices of toll manufacturers may find it beneficial to seek redress under the common law. Because CERCLA is designed to recover clean-up costs, the injury suffered by a private party may not be compensable under CERCLA. In other cases a private party may not have the financial resources to undertake a private party response cost action under CERCLA. For these reasons a common law theory of recovery is needed so that harm to private individuals may be compensated.

Despite the environmental contamination that often results from lax safety standards, there are surprisingly few reported common law tort cases in which private party plaintiffs have sought to hold principals vicariously liable for damages caused by their toll manufacturers. This may be due to the legal relationship that exists between principal and toll manufacturer. For example, if a toll manufacturer falls under the legal definition of an independent contractor, a principal will not ordinarily be liable for the actions of that toll manufacturer.

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8 See Aceto, 872 F.2d at 1382; Velsicol, 701 F. Supp. at 143.
9 See infra notes 66–74 and accompanying text.
11 See infra note 66 and accompanying text.
12 See infra notes 69–73 and accompanying text.
under the common law.\textsuperscript{14} If a toll manufacturer is deemed to be an independent contractor, a private party must argue that a tolling arrangement falls within one of the exceptions to the independent contractor rule.\textsuperscript{15}

This Comment argues that the common law doctrine of vicarious liability for abnormally dangerous activities\textsuperscript{16} should make a principal liable when it hires a toll manufacturer to do work that involves the handling or generation of hazardous material. Section II discusses tolling arrangements generally, and reviews the cases that have applied CERCLA to the tolling context. Section III discusses the historical development of vicarious liability and the application of the abnormally dangerous activity doctrine to work with hazardous materials. Section IV argues that existing legal precedent and policy considerations support holding a principal liable for the acts of a toll manufacturer under the abnormally dangerous activity doctrine.

\section{II. TOLLING CONTRACTS}

\subsection{A. Background}

A “toll” is defined as compensation for services rendered.\textsuperscript{17} Tolling arrangements usually involve two manufacturers, a principal that supplies the raw materials and a toll manufacturer that processes those materials into a finished product.\textsuperscript{18} Generally, the principal retains ownership of the raw materials, work in process, and the finished product while the toll manufacturer processes them.\textsuperscript{19}

Tolling arrangements are common to many process industries, including chemical manufacturing, because of the economic advantages they offer.\textsuperscript{20} Contracting with a toll manufacturer to process raw materials allows a chemical company to avoid equipment modification or installation costs that are often necessary to produce a finished product.\textsuperscript{21} By avoiding the time required to retool, chemical producers

\textsuperscript{14} See infra notes 94–144 and accompanying text.
\textsuperscript{15} See infra notes 143–44 and accompanying text.
\textsuperscript{17} WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2405 (1986).
\textsuperscript{18} See Goldfarb, supra note 1, at 649.
\textsuperscript{19} See id.
\textsuperscript{21} Lowenstein, supra note 20, at 124.
can start production earlier, save time, and lower operating costs. Additionally, a principal that hires a toll manufacture to process raw materials frees up its own production capacity for other products, and is not left with useless machinery after production is complete.

There are also disadvantages to hiring a toll manufacturer. Hiring an outside firm may require the sharing of proprietary technology and formulas necessary to make the product. Additionally, a toll manufacturer may decide to cut corners to increase profit margins at the expense of safety and the environment. Industry analysts warn that before entering into a tolling arrangement, a principal should take precautions to make certain that the toll manufacturer has adequate equipment, staff, skills and financial stability.

The disastrous results that can occur when safety precautions are not taken is illustrated by Allied Chemical's experience with a toll manufacturer that it hired to produce Kepone in the 1970s. Allied's experience with Kepone illustrates both the reasons that motivate a company to hire a toll manufacturer and the harmful consequences that can occur when the toll manufacturer does not follow proper procedures for handling hazardous materials.

Kepone is a pesticide that was used primarily to protect potatoes in Europe and bananas in South America. Toxicity tests conducted by Allied pursuant to federal pesticide law revealed that Kepone, which is a chemical relative of DDT, was highly toxic to all species tested. In 1973, Allied was faced with a dilemma concerning its continued production of Kepone. Production demands in other areas at Allied's plant in Hopewell, Virginia, had recently increased, strain-
ing Allied’s manufacturing capacity.32 At the same time, the federal government began enforcing regulations that restricted Allied’s ability to dispose of Kepone process wastes.33 These dual pressures led to Allied’s decision to toll production of Kepone.34

Using a competitive bidding procedure, Allied selected Life Science Products Company (LSP) to be its toll manufacturer.35 The Allied/LSP tolling contract provided that Allied would supply LSP with all the raw materials necessary to produce Kepone.36 Allied retained ownership of the raw materials and determined production rates.37 In return, LSP produced Kepone for Allied at a cheap cost.38

In July of 1975 the first sign of trouble appeared when state officials investigated working conditions at LSP after an employee complained of “the shakes” and weight loss.39 The results of that investigation revealed a total lack of safety measures at LSP.40 Kepone dust lay several inches thick on the floor41 and seven out of ten production workers were immediately hospitalized.42 Additional investigation revealed seventy-five cases of severe Kepone poisoning among the workers at LSP and extensive contamination of the air, soil, and water near the LSP plant.43 As a result of Kepone contamination, the State of Virginia closed down 100 miles of the James River and its tributaries.44 In 1976, a federal grand jury indicted Allied for violations relating to the production of Kepone.45 Through plea bargaining, Allied disposed of most of the counts involving its direct violations of law but chose to contest the counts involving its vicarious liability for the acts of LSP.46
Without a formal opinion, the Judge found that the prosecution had not proved its case beyond a reasonable doubt and dismissed all counts involving vicarious liability against Allied. That decision allowed Allied to profit from the production of Kepone and to avoid the environmental costs associated with that production.

B. CERCLA and Tolling Contracts

In the years following the Kepone disaster, federal and state authorities have successfully used CERCLA to hold principals liable for the acts of toll manufacturers. The cases that have applied CERCLA to the tolling context both illustrate a public law solution to the tolling problem and suggest a common law theory of recovery for private party plaintiffs. Interpreting the broad language of CERCLA, courts have held that a principal is a potentially responsible party for the clean-up costs associated with the environmental contamination caused by toll manufacturers.

The case of United States v. Aceto Agricultural Chemicals Corp. was one of the first to hold that a principal can be liable for the acts of a toll manufacturer under CERCLA. The case was the result of a suit brought by the Environmental Protection Agency (EPA) and the State of Iowa against eight pesticide manufacturers. Each pesticide manufacturer had hired Aidex, a toll manufacturer, to process technical grade pesticides into commercial grade pesticides. While Aidex performed the actual mixing and formulation of the product, the pesticide manufacturers retained ownership of the technical grade pesticide while the materials were at the Aidex facility. The Aidex tolling operation also generated chemical process wastes that were allowed to seep into the soil and ground water. By hiring Aidex, the EPA claimed that six of the manufacturers had "arranged for" the disposal of hazardous substances within the statutory language of CERCLA.
In reaching its decision to hold Aidex liable, the court found that the common law abnormally dangerous activity doctrine was persuasive authority for the proposition that a principal can be liable for the actions of a toll manufacturer. The court reasoned that because the defendants could be deemed responsible parties under the common law, and the common law is an appropriate guide to interpreting CERCLA's language, a principal can also be liable under CERCLA.

The United States Court of Appeals for the Eighth Circuit affirmed the Aceto decision. While the appeals court noted that the abnormally dangerous activity doctrine did support the imposition of liability, the court also based its holding on the fact that the principal retained ownership of the hazardous materials and that the generation of toxic waste was inherent in the production process.

In the decisions that have followed Aceto, the courts have continued to hold that principals can be liable under CERCLA for the acts of toll manufacturers. These decisions, however, have not revisited the abnormally dangerous activity doctrine. Instead they have relied on the fact that a principal retains ownership of the raw materials and that disposal of hazardous materials was inherent in the production process as a basis for imposing liability.

Although the use of CERCLA to recover clean-up costs from principals is a partial solution to the tolling problem, it does not provide private parties with an adequate means of recovery. A private party who seeks recovery under CERCLA, faces many substantial hurdles. For example, CERCLA does not contain a provision that provides for

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60 Id.


62 Id. at 1382.

63 Id.


65 See id.
private party relief for personal injuries. Although CERCLA does provide for private party response cost actions, a plaintiff who proceeds along this avenue must negotiate several procedural barriers outlined in the statute.

Section 9607(a)(4)(B) of CERCLA provides for recovery of “any other necessary costs of response incurred by any other person consistent with the national contingency plan.” Courts interpret this section as a requirement that a private party must clean up the contaminated site using their own resources prior to seeking recovery from the responsible parties. Additionally, the response costs for which recovery is sought must be both “consistent with the national contingency plan” and “necessary.” This vague language has led to some uncertainty as to what costs are recoverable in a private party suit. The ambiguity of these terms combined with the substantial private investment required prior to litigation illustrate why private parties may find it preferable to bring a suit under the common law when they have suffered harm from the actions of toll manufacturers.

Pursuing an action under the common law has many other advantages. For example, the common law offers private litigants greater control over the course of litigation as well as the opportunity to more effectively tailor the remedy to the harm that has been suffered. Thus, while CERCLA is an effective tool for federal and state gov-

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74 PLATER ET AL., supra note 13, at 257 (noting for example that in the case of the Exxon-Valdez oil spill, “although more than a dozen state and federal statutes apply to oil production and transport . . . the State of Alaska’s litigation against the oil companies was non-statutory, based upon common law theories”).
ernments to address the environmental contamination caused by tolling arrangements, private parties may find their needs better met under the common law.

III. Vicarious Liability For Abnormally Dangerous Activities

Recent developments in the common law suggest that principals who hire toll manufacturers to work with hazardous materials may be strictly liable under the common law based on the abnormally dangerous activity exception to the independent contractor rule.75 To understand the recent case law developments, it is first necessary to examine the historical and policy foundations of vicarious liability and strict liability for abnormally dangerous activities. The scope and application of both of these doctrines has changed over time reflecting policy choices that reflect social and economic concerns.76 In recent years, some environmental case law has expanded the doctrine of vicarious liability for abnormally dangerous activities to include work that involves the handling of hazardous materials.77

A. Vicarious Liability

Vicarious liability is the "imposition of liability on one person for the actionable conduct of another."78 Liability is based on some relationship between the two parties.79 One common form of vicarious liability is the imposition of liability on an employer for the wrong committed by an employee.80 This type of liability is called respondeat superior.81 In the late 19th century the courts created an exception to the doctrine of respondeat superior, where the wrong was committed by an independent contractor rather than an employee.82 The independent contractor rule, in turn, has also been subject to numerous exceptions throughout the 20th century.83 One such exception is when the independent contractor's work is abnormally dangerous.84

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75 See discussion infra part III.D and supra part II.B.
76 See discussion infra parts III.A, III.C.
77 See discussion infra parts III.C, III.D.
78 BLACK'S LAW DICTIONARY 1566 (6th ed. 1990)
79 Id.
80 See id.
81 KEETON ET AL., supra note 16, § 69, at 499–500.
82 Id. § 71, at 509.
83 See infra notes 108–11 and accompanying text.
84 See discussion infra part III.B.
1. The Historical and Policy Foundations of Respondeat Superior

In order for employers to be vicariously liable, courts require that they retain control or the right of control over their agents. Historically, the right of control was used not only as a test for the imposition of vicarious liability but also as a justification for holding employers liable for the torts of their employees. In practice, however, the control test does not adequately explain the application of vicarious liability in the business context. Critics argue that the right of control is a legal fiction created by the courts to justify vicarious liability. In actuality, it is argued, courts hold employers vicariously liable to address certain policy concerns. These policy concerns include a growing concern for the “plight of uncompensated accident victims.” Additionally, the doctrine was justified by the superior ability of employers to pay and distribute losses.

Regardless of the historical debate, it is widely recognized today that application of vicarious liability is justified primarily because of “its effectiveness in achieving contemporary social objectives.” These objectives include: 1) accident prevention; 2) compensation for accident victims; and 3) equitable distribution of accident costs. The development of vicarious liability has also given rise to numerous exceptions to the rule.

2. The Independent Contractor Rule

One situation in which an employer is not held liable for the acts of an agent is when the agent operates as an independent contractor. Historically, the independent contractor rule did not appear in the courts until the turn of the 19th century. Industrial expansion in the 19th century led to an increase in the number and variety of independent contractors. Independent contractors often offered the best

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86 Id. § 26.3, at 11-12.
87 Id.
88 Id.
89 See Keeton et al., supra note 16, § 69, at 500.
90 5 Harper et al., supra note 85, § 26.5, at 18.
91 Id.
92 Id. § 26.2, at 10.
93 Id. § 26.5, at 21.
94 See Keeton et al., supra note 16, § 71, at 509.
96 Id.
means for a business enterprise to complete work and avoid liability.\(^9\) During this period, corporate charters with limited liability were difficult to obtain and the independent contractor rule created by the courts allowed business to achieve the same result.\(^8\)

Although these 19th century policy considerations were the implicit justification for the independent contractor rule, courts continued to frame the issue in terms of the control test.\(^9\) Under the control test, a business is not liable for the acts of an independent contractor because it exercises no control over the independent contractor.\(^10\) Courts look at a variety of factors to define the class of actors that are independent contractors.\(^10\) But just as the control test has proved inadequate to explain the imposition of vicarious liability in cases that involve an employer/employee relationship,\(^10\) critics charge that those same doctrinal reasons also fail to justify the independent contractor rule.\(^10\) The critics reason that if the fictitious control of an employer over an employee is an inadequate basis for holding the employer liable, then the transfer of fictitious control to an independent contractor is equally fictitious.\(^10\)

One policy rationale, not rooted in the needs of industrial expansion, is that an independent contractor stands in a better position than the employer to prevent accidents.\(^10\) A second justification for the rule is that an independent contractor is itself an enterprise and should be held liable for its own acts.\(^10\) Thus, the work contracted for is to be "regarded as the [independent] contractor's own enterprise," and the contractor "rather than the employer is the proper party to charge with the responsibility of . . . preventing [the accident]."\(^10\)

The independent contractor rule, however, has been subject to numerous exceptions during the last century.\(^10\) The Restatement (Second) of Torts devotes at least twenty sections to exceptions to the

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\(^9\) Id. at 512.

\(^9\) Id.

\(^9\) See Keeton et al., supra note 16, § 71, at 509.

\(^10\) See infra note 117 and accompanying text.

\(^10\) See supra notes 87–89 and accompanying text.


\(^10\) Id.


\(^10\) Restatement (Second) of Torts § 409 cmt. b (1965).

independent contractor rule. Commentators have complained that, because of these exceptions, the law is "unpredictable and inconsistent." Indeed, some courts have suggested that the exceptions have swallowed the rule.

a. Is a Toll Manufacturer a Servant or an Independent Contractor?

Before the exceptions to the independent contractor rule are discussed, it is necessary to assess whether an independent contractor relationship exists between principal and toll manufacturer. If a toll manufacturer is an employee or servant of the principal, rather than an independent contractor, then there is no need to rely on the exceptions to the independent contractor rule. If a toll manufacturer is the servant of the principal, under the common law the principal will be vicariously liable for the acts of the toll manufacturer.

Court decisions rarely discuss the nature of the legal relationship that arises between principal and toll manufacturer. Although the case law reveals the variety of contexts in which tolling contracts are used, the issues decided by courts rarely address the legal obligations created by tolling contracts. Although a few cases have suggested that a toll manufacturer is an independent contractor, the question has not been the subject of extended consideration or definitively answered by the courts.

An independent contractor is generally defined as one who "contracts to do a piece of work according to his own methods and is subject to his employer's control only as to [the] end product . . . of his work." The primary factor looked to by the courts in determining whether an independent contractor relationship exists is the hiring

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109 Restatement (Second) of Torts §§ 410–29 (1965).
110 See McHugh, supra note 108, at 662.
111 See Restatement (Second) of Torts § 409 cmt. b (1965) ("rule is now primarily important as a preamble to the catalog of its exceptions" quoting Pacific Fire Ins. Co. v. Kenny Boiler & Mfg. Co., 277 N.W. 226, 228 (Minn. 1937)).
112 See supra notes 78–84 and accompanying text.
party's right to control the manner and means by which the end product is to be produced. In conducting an inquiry into the degree of control, the following factors were cited by the United States Supreme Court in *Community for Creative Non-Violence v. Reid*:

> [T]he skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired parties.

Although the precise details of tolling relationships may vary, one feature common to most tolling contracts is that the principal normally supplies and retains ownership to the materials being processed by the toll manufacturer. Although this feature of a tolling contract is relevant to determining whether an independent contractor relationship exists, without more it is probably not a sufficient basis for a court to find that a toll manufacturer is a servant of the principal.

The primary focus of a court's inquiry is who exercises control over the manner and means of the work, while the issue of who supplies the materials is of secondary concern. For example in *Wimpey v. Otts*, the defendant contracted with a builder to install siding and paint the trim of his house and supplied that builder with some materials. The court held that the home owner was not liable for injuries suffered by the builder's employee during the course of the

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117 *Id.* at 751–52 (footnotes omitted).
118 See *supra* note 19 and accompanying text.
120 See, e.g., *Wimpey v. Otts*, 427 S.E.2d 34, 35 (Ga. Ct. App. 1993) (holding party was an independent contractor despite the fact that hiring party supplied some of the materials); *Peck v. Woomack*, 192 P.2d 874, 880–81 (Nev. 1948) (holding that fact that hiring party also supplied tools and material is not conclusive in determining whether independent contractor relationship exists).
121 See *Annotation, Elements Bearing Directly Upon the Quality of a Contract as Affecting the Character of One as Independent Contractor*, 20 A.L.R. 684, 780 (1922) ("[evidence that hiring party supplied the materials] is manifestly overcome, whenever the rest of the evidence points to the conclusion that the employer was not to exercise any control over the details of the work").
122 427 S.E.2d at 34.
123 *Id.* at 35.
work because the owner did not have "the right to, nor did they, direct the time, manner, methods, and means of his execution of the work, but rather asked him to produce a desired result." Thus, a toll manufacturer that receives raw materials from a principal but retains control over the details of the work will probably be found by the courts to be an independent contractor.

The conclusion that a tolling arrangement creates an independent contractor relationship is also supported by the few cases that have considered the issue. In *Pampanga Sugar Mills v. Trinidad*, for example, the United States Supreme Court held that a toll manufacturer was an independent contractor. The case concerned the application of a tax statute to a corporation that was engaged in the milling or tolling of sugar cane that was grown and owned by others. Under the contract, the toll manufacturer received one half of the sugar it produced from milling the cane as compensation for its services. The other half of the cane was returned to its owner. The toll manufacturer then sold the half it retained to third parties. The issue before the Supreme Court was whether the toll manufacturer could be taxed upon the income generated from the sales to third parties. The toll manufacturer argued that although the sugar was "physically manufactured" by the toll manufacturer, the grower and owner of the cane was the legal manufacturer of the sugar. The toll manufacturer characterized its roll as "being merely a servant hired by the grower to perform the service" and not a manufacturer "who sells articles of their own production." Without discussion, the Supreme Court rejected the toll manufacturer's characterization, holding that "[t]he corporation is in no sense a servant. It is an independent concern—a contractor." Consequently, the toll manufacturer was required to pay taxes on the income generated from its sales of sugar.

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125 279 U.S. 211 (1929).
126 Id. at 216.
127 Id. at 213.
128 Id.
129 Id.
130 Id.
131 Id. at 216.
132 Id.
133 Id.
134 Id. at 218.
A similar conclusion was reached in the more recent case of *United States v. Mirabile*. The facts of *Mirabile* involved a tolling agreement between Impervious Paint Industries (the principal) and Turco Coatings (the toll manufacturer). Under the agreement, Impervious supplied raw ingredients to Turco, and Turco processed those materials into paint. As a result of Turco's paint processing operation the land around the Turco site was contaminated with toxic wastes. Litigation ensued when the United States sought to recover clean-up costs from the current owners of the contaminated site under CERCLA after Turco declared bankruptcy.

The owners of the site attempted to join Impervious as a co-defendant based on its tolling relationship with Turco. The defendants argued that the tolling contract between Impervious and Turco constituted "indicia of ownership," and that by entering into the agreement Impervious participated in the management of Turco. The court rejected this assertion and noted that "[n]othing in the record reflects that Impervious was anything more than a customer of Turco" and was therefore not liable for the contamination caused by its toll manufacturer.

In sum, although a principal may supply materials to a toll manufacturer and retain ownership of those materials, the toll manufacturer is probably an independent contractor. Accordingly, a principal will not be liable for the acts of its toll manufacturer unless an exception to the independent contractor rule applies. The abnormally dangerous activity doctrine is one such exception.

**B. Vicarious Liability for Abnormally Dangerous Activities**

One who hires an independent contractor to do work that is deemed by the courts to be abnormally or inherently dangerous is vicariously liable for the acts of the independent contractor. Stated another way, one who hires an independent contractor "[w]ill not be permitted
to escape the responsibility for the abnormal danger created by the activity which he has set in motion.”146 The extension of liability in this context is based on considerations of equity and fairness with respect to innocent third parties that are injured as a result the work contracted for:147 Therefore, in the case of a tolling arrangement, if the activity contracted for is deemed by the courts to be abnormally dangerous, the principal is strictly liable to third parties for the torts of the toll manufacturer.

Applying this theory of common law liability to the tolling context was suggested by a federal district court in United States v. Aceto Agricultural Chemicals Corp.148 In that case, the court in dictum noted that a principal could be held liable for the environmental damage caused by a toll manufacturer on a theory that formulation of pesticides is an abnormally dangerous activity.149 A similar conclusion was reached in State v. Schenectady Chemicals, Inc.150 In that case, the court held that a chemical company can be liable for costs incurred during the cleanup of a dump site owned by an independent contractor.151 The chemical company had hired the independent contractor fifteen years ago to dispose of waste material.152 Although the plaintiff's cause of action was based upon a theory of private nuisance, the nuisance arose out of abnormally dangerous conduct.153 In sum, if work with hazardous materials is deemed to be an abnormally dangerous activity, a principal that hires a toll manufacturer to do such work will be liable for the torts of the toll manufacturer.

C. The Historical Development of the Abnormally Dangerous Activity Doctrine

To determine whether the handling or generation of hazardous materials is an abnormally dangerous activity, the historical development of the doctrine must be considered. The modern doctrine of strict liability for abnormally dangerous activities developed from the

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1 12 (W. Va. 1982). See also Restatement (Second) of Torts § 427A (1965) (“[o]ne who employs an independent contractor to do work which the employer knows or has reason to know to involve an abnormally dangerous activity, is subject to liability to the same extent as the contractor for physical harm to others caused by that activity”).
146 Restatement (Second) of Torts § 427A cmt. b (1965).
147 See Majestic Realty, 153 A.2d at 324–25.
148 699 F. Supp. 1384, 1389 (S.D. Iowa 1988). For further discussion of this case see supra notes 52–63 and accompanying text.
149 699 F. Supp. at 1389–90 (quoting Restatement (Second) of Torts § 427A (1965)).
151 Id. at 976–77.
152 Id. at 973.
153 Id. at 976.
English case of *Rylands v. Fletcher*, decided in 1868. American courts, although initially rejecting the doctrine, ultimately accepted the *Rylands* rule in most jurisdictions. In the 1930s, the Restatement of Torts adopted a limited version of the *Rylands* rule. The Restatement definition of an abnormally dangerous activity, which has been widely adopted in state courts, involves the use of a flexible standard that is applied on a case-by-case basis. In recent years, some courts have extended the doctrine to activities that involve the handling and processing of hazardous materials. These recent cases suggest that principals that employ toll manufacturers to work with hazardous material are strictly liable for the torts committed by those toll manufacturers under the abnormally dangerous activity exception to the independent contractor rule.

1. The *Rylands* Rule

The modern doctrine of strict liability for abnormally dangerous activities is rooted in the language used by Justice Blackburn in the English case of *Fletcher v. Rylands*. In that case, the defendants had a reservoir constructed on their property. Unknown to them, the land below the reservoir was riddled with passages and filled shafts of an abandoned coal mine. The waters of the reservoir broke through into the old mine shafts and surged through the passages into the working mine of the plaintiff.

The Exchequer Chamber, reversing a lower court ruling, held the defendant strictly liable for the damage to the plaintiff's mine shaft. In reaching its decision, the court first considered what level of care

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155 Keeton et al., supra note 16, § 78, at 545.
156 Id. § 78, at 548–49.
160 See cases discussed infra parts III.D.1, III.D.2.a.
161 See discussion infra part IV.
162 1 L.R.-Ex. 265 (1866), aff'd, 3 L.R.-E. & I. App. 330 (1868).
163 Id. at 267.
164 Id.
165 Id. at 268.
166 The lower court held that the plaintiff could not recover based on the common law doctrines of nuisance and trespass because they were inapplicable to the facts of the case. See Nolan & Ursin, supra note 157, at 260.
167 Rylands, 1 L.R.-Ex. at 279.
the law requires of a person in the defendant’s position. Specifically, the Exchequer Chamber asked if an individual who brings something on to his land is under a duty to “keep it in at his peril” or merely “to take all reasonable and prudent precautions” to prevent its escape. The Exchequer Chamber held that the duty was absolute. Justice Blackburn, writing for the court, articulated the following frequently cited formulation of the rule:

We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in 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.

On appeal, the House of Lords affirmed the Exchequer Chamber’s decision but limited its application to “non-natural uses” of land. The court distinguished non-natural uses from “any purpose for which it might in the ordinary course of the enjoyment of land be used.”

American courts initially rejected the Rylands rule due in part to economic considerations of industry in the booming post civil war economy. In New Hampshire, Chief Justice Doe rejected Rylands warning that it would “put a clog” on economic progress. Similarly, New York’s highest court rejected the Rylands rule in Losee v. Buchanan. In that case, a boiler exploded in the defendant’s factory causing injury to the plaintiff. The court refused to impose liability in the absence of negligence, noting “we must have factories, machinery, dams, canals and rail roads.”

In the first half of the 20th century, however, the initial rejection of Rylands gave way to gradual acceptance. The disappearance of the frontier and the development of the country’s natural resources, it is argued, weakened the policy concerns expressed in cases like Losee. In the 1920s, state court decisions gradually expanded the class of activities to which the Rylands rule would attach. Strict liability

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168 Id.
169 Id.
170 Id.
171 Id. at 279–80.
173 Id. at 338.
174 See KEETON ET AL., supra note 16, § 78, at 549.
176 51 N.Y. 476, 491 (1876).
177 Id. at 476.
178 Id. at 484.
179 See Nolan & Ursin, supra note 157, at 263–64.
180 KEETON ET AL., supra note 16, § 78, at 549.
was applied to activities including transporting water through a water main,\textsuperscript{182} drilling oil wells,\textsuperscript{183} and storage of explosives.\textsuperscript{184} These decisions, combined with the promulgation of the Restatement of Torts by the American Law Institute in the 1930s, signaled the acceptance of the \textit{Rylands} rule by American courts. Today, the rule is embraced by a large majority of the American jurisdictions that have considered it.\textsuperscript{185}

2. The Restatement Definition

The Restatement of Torts' first attempt to articulate the \textit{Rylands} rule called for strict liability for "ultrahazardous activities."\textsuperscript{186} The Restatement defined ultrahazardous activities as those activities that involved risk of serious harm that could not be eliminated by the exercise of the "utmost care."\textsuperscript{187} Additionally, the Restatement excluded from the definition those activities that were found to be a "matter of common usage."\textsuperscript{188}

In the 1960s, the American Law Institute made significant changes to this definition when drafting the Restatement (Second) of Torts which was formally adopted in 1977.\textsuperscript{189} The Restatement (Second) of Torts first replaced the term ultrahazardous with "abnormally dangerous."\textsuperscript{190} The definition was also altered to include six factors designed to guide a court in making a determination of what is an abnormally dangerous activity.\textsuperscript{191} These factors are:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes.\textsuperscript{192}

\begin{footnotesize}
\begin{enumerate}
\item See Nolan & Ursin, \textit{supra} note 157, at 264-65.
\item Bridgeman-Russell Co. v. City of Duluth, 197 N.W. 971, 972 (Minn. 1924).
\item Green v. General Petroleum Corp., 270 P. 952, 954-55 (Cal. 1928).
\item Exner v. Sherman Power Const. Co., 54 F.2d 510, 514 (2d Cir. 1931).
\item See Keeton \textit{et al.}, \textit{supra} note 16, § 78, at 549.
\item \textit{Restatement of Torts} §§ 519, 520 (1938).
\item \textit{Id.} § 520.
\item \textit{Id.} Common usage is defined as an activity that "is customarily carried on by the great mass of mankind or by many people in the community." \textit{Id.} § 520 cmt. e.
\item See Nolan & Ursin, \textit{supra} note 157, at 270.
\item See \textit{Restatement (Second) of Torts} § 519 (1977).
\item See \textit{id.} § 520.
\end{enumerate}
\end{footnotesize}
The comments to the Restatement encourage courts to use a flexible application of these six factors to any given activity. While one factor standing alone is not sufficient to create an abnormally dangerous activity, it is not necessary that each of the six factors be present, especially if others are weighed heavily. The test has been applied to a broad range of activities, and has lead to inconsistent results in state courts.

D. Abnormally Dangerous Activities and Hazardous Materials

Application of the abnormally dangerous activity doctrine by state courts to work with hazardous material has been mixed. Some state courts have imposed strict liability to activities that involve the use of hazardous materials, while others have adopted a more limited definition of what is an abnormally dangerous activity. New Jersey, which has experienced a wide range of environmental problems, has been at the forefront in this area.

1. The New Jersey Practice

Like most states in the 19th century, New Jersey initially rejected the Rylands rule of strict liability. New Jersey's position began to

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193 See Restatement (Second) of Torts, § 520 cmt. f (1977).
194 Id.
197 See, e.g., Green v. Ensign-Bickford Co., 595 A.2d 1383, 1388 (Conn. App. Ct.) (experimentation with highly explosive chemical is ultrahazardous activity), cert. denied, 597 A.2d 341 (Conn. 1991); T & E Indus., Inc. v. Safety Light Corp., 587 A.2d 1249, 1261 (N.J. 1991) (processing, handling, and disposing of radium constituted abnormally dangerous activity); Speer & Sons Nursery, Inc. v. Duyck, 759 P.2d 1133, 1134 (Or. Ct. App.) (spraying of chemical herbicide could be abnormally dangerous activity), review denied, 765 P.2d 814 (Or. 1988); see also cases cited infra part III.D.2.a.
shift in the early 1960s with the decision of Berg v. Reaction Motors Division.\textsuperscript{200} The court in that case, without reference to Rylands, held the defendant liable for property damage resulting from the testing of a rocket engine.\textsuperscript{201} The decision rested primarily on “considerations of reasonableness, fairness and morality.”\textsuperscript{202} Although the defendant’s activities may have been conducted with great care and were a source of great public utility, the court concluded that the defendant was engaged in an ultrahazardous activity and should “pay its own way” in the event damage was caused to others.\textsuperscript{203} Thus, the New Jersey Supreme Court held that the defendant must compensate the plaintiffs for damage to their homes caused by vibrations from the testing of the rocket engine.\textsuperscript{204}

New Jersey’s highest court did not explicitly adopt the Rylands rule until 1983 in the landmark case State, Department of Environmental Protection v. Ventron Corp.\textsuperscript{205} In Ventron, the New Jersey Supreme Court was presented with the question of whether or not the disposal of toxic wastes was an abnormally dangerous activity which should lead to strict liability.\textsuperscript{206} The defendants in Ventron operated a mercury processing plant on a tract of forty acres from 1929 until 1974.\textsuperscript{207} Throughout most of these years untreated waste material from plant operations was dumped onto the defendant’s land and mercury-laden effluent was pumped into open drainage ditches.\textsuperscript{208} In 1970, tests indicated that plant operations had pumped two to four pounds of mercury a day into a tidal estuary of the Hackensack River.\textsuperscript{209} Operations at the plant were suspended in 1974 when the land was sold to a developer who planned to build a warehouse on the lot.\textsuperscript{210}

The New Jersey Department of Environmental Protection sought to hold Ventron strictly liable using, among other theories, the abnormally dangerous activity doctrine.\textsuperscript{211} After reviewing the Rylands rule and prior New Jersey case law, the court embraced the Restate-
ment (Second) of Torts' doctrine of strict liability for abnormally dangerous activities.\textsuperscript{212}

The court then applied the six-factor test suggested by the Restatement and concluded that dumping mercury was an abnormally dangerous activity.\textsuperscript{213} The New Jersey Supreme Court noted that the activity in question created an "unavoidable risk of harm."\textsuperscript{214} The court also noted the variety, as well as the magnitude, of harms that could occur if toxic substances were introduced into the environment.\textsuperscript{215} These harms included ground and surface water contamination, and human poisoning via the food chain.\textsuperscript{216} In considering the appropriateness of the activity to the surrounding area, the court noted that the area where the mercury was dumped was an environmentally sensitive because of its proximity to arterial waterways.\textsuperscript{217} As a result the court concluded that it was an inappropriate place to dump hazardous materials.\textsuperscript{218} Finally, the court reasoned that the unavoidable risk created by the activity negated any value of the activity to society.\textsuperscript{219} Thus, the court concluded after considering the six factors suggested by the Restatement that mercury and other toxic wastes are abnormally dangerous and their disposal was an abnormally dangerous activity.\textsuperscript{220}

Following \textit{Ventron}, lower New Jersey state courts and federal courts applying New Jersey law expanded the class of activities that were deemed abnormally dangerous.\textsuperscript{221} The New Jersey Supreme Court, however, was not faced with issue again until \textit{T & E Industries, Inc. v. Safety Light Corporation}.\textsuperscript{222} In that case, the court affirmed a lower court decision that held that the processing, handling, and disposal of radium constituted an abnormally dangerous activity.\textsuperscript{223}

\textsuperscript{212} \textit{Id.} at 159--60.
\textsuperscript{213} \textit{Id.}
\textsuperscript{214} \textit{Id.} at 159.
\textsuperscript{215} \textit{Id.} at 160.
\textsuperscript{216} See \textit{id.}
\textsuperscript{217} \textit{Id.}
\textsuperscript{218} \textit{Id.}
\textsuperscript{219} See \textit{id.}
\textsuperscript{220} \textit{Id.}
\textsuperscript{222} 587 A.2d 1249 (N.J. 1991).
\textsuperscript{223} \textit{Id.} at 1261.
The T & E Industries litigation arose out of the sale of a radium-contaminated parcel of land owned by the plaintiff. The land had been owned previously by the United States Radium Corporation, which used the site to extract radium from carnotite ore from 1917 to 1926. The issue before the court was whether a predecessor in title of the site that was responsible for the contamination was strictly liable for the clean-up cost.

The New Jersey Supreme Court held that a predecessor in title is strictly liable for clean-up costs based on the abnormally dangerous activity doctrine. In reaching its decision, the court reaffirmed its holding in Ventron, but rejected the lower court’s conclusion that radium-processing is an abnormally dangerous activity as “a matter of law.” Instead, the New Jersey Supreme Court reasoned that “because of the interplay of [the] factors” used to define an abnormally dangerous activity, a class of activities can not as a matter of law be abnormally dangerous. The court held that such a determination must be made on a case-by-case basis by applying the six-factor test embraced in Ventron. After applying the test, the T & E Industries court concluded that the “processing, handling and disposal” of radium was an abnormally dangerous activity.

The result in T & E Industries arguably expanded the potential application of the abnormally dangerous activity doctrine. The court held that not only was the dumping of radium abnormally dangerous but also the processing and handling of the material was also an abnormally dangerous activity. This was a more expansive conclusion than the one reached in Ventron, where the court’s holding was limited to the disposal of mercury. While continuing to call for a case-by-case approach, T & E Industries suggests that activities involving the processing of hazardous materials also may be abnormally dangerous.

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224 See id. at 1251.
225 Id. at 1252.
226 Id. at 1251.
227 See id. at 1263.
230 Id.
231 Id.
232 Id. at 1260-61.
233 Id.
2. Decisions in Other Jurisdictions

The practice in other states with respect to the application of the abnormally dangerous activity doctrine to work with hazardous materials has been mixed. While no other state has developed the law in this area to the same extent as New Jersey, several lower state courts and federal courts applying state law have had occasion to address the issue of whether work with hazardous materials is abnormally dangerous. A survey of these opinions reveals that some state courts have moved towards adopting the position that work with hazardous materials is an abnormally dangerous activity while other courts have been reluctant to do so.

a. Courts Holding Hazardous Materials Work is Abnormally Dangerous

The courts that apply the abnormally dangerous activity doctrine to work with hazardous materials may be grouped in to two categories. Some courts follow the New Jersey practice and hold that work with hazardous material is abnormally dangerous. Other courts hold that a plaintiff's cause of action which is based on a theory of strict liability for abnormally dangerous activity may not be disposed of through summary proceedings.

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237 See infra notes 240, 258.

238 See discussion infra part III.D.2.a.

239 See discussion infra part III.D.2.b.

240 These cases have applied the abnormally dangerous activity doctrine to a variety of activities. See, e.g., Dickerson, Inc. v. United States, 875 F.2d 1577, 1583 (11th Cir. 1989) (under Florida law, transportation and disposal of PCBs); Crawford v. Nation Lead Co., 784 F. Supp. 439, 443 (S.D. Ohio 1989) (under Ohio law processing uranium is abnormally dangerous); Sterling v. Velsicol Chem. Corp., 647 F. Supp. 303, 306, 315 (W.D. Tenn.) (under Tennessee law, burial of hazardous chemicals is abnormally dangerous), aff'd in part reversed in part, 855 F.2d 1188 (6th Cir. 1988); Green, 595 A.2d at 1388 (research involving volatile chemicals is abnormally dangerous); Old Island Fumigation, Inc. v. Barbee, 604 So.2d 1246, 1247 (Fla. Dist. Ct. App. 1992) (fumigation with toxic gas is abnormally dangerous); Siegler v. Kuhlman, 502 P.2d 1181, 1187 (Wash. 1972) (transport of gasoline on highway is abnormally dangerous), cert. denied, 411 U.S. 983 (1973).

Those courts that hold that activities involving work with hazardous materials does fall within the abnormally dangerous definition do so after applying the Restatement's six-factor test. Like the New Jersey Supreme Court, these courts conclude that a proper consideration of the six factors leads to the conclusion that work with hazardous material is abnormally dangerous. In some cases, the courts apply the six-factor test in conclusory form with little or no analysis. In other cases the courts have not mandated the presence of all six factors.

The language of these decisions reveal that the courts are influenced by policy considerations when they apply the six-factor test. For example, a Florida appeals court noted that while historically it may have been desirable in a frontier society to encourage industrial development by limiting liability for accidents, in the present context of a more crowded and complex society it is reasonable for those activities that are abnormally dangerous to pay their own way. Other courts have cited evidentiary problems inherent in cases that involve injury caused by abnormally dangerous activities as further policy support for holding those who engage in such activities strictly liable.

Other courts addressing the application of the abnormally dangerous activity doctrine to work with hazardous materials hold that summary proceedings are inappropriate for claims based upon such grounds. These courts reason that the determination of what constitutes an abnormally dangerous activity involves questions of both law and fact. Because application of the doctrine to work with


244 See, e.g., Sterling, 647 F. Supp. at 316.

245 See, e.g., Green, 595 A.2d at 1388 (five out of six factors satisfied).


247 312 So.2d at 799.

248 Id. at 801.

249 See Siegler, 502 P.2d at 1185 (noting the difficulty of tracing the course followed by "gas or other poisons") (quoting Cornelius J. Peck, Negligence and Liability Without Fault in Tort Law, 46 Wash. L. Rev. 225, 240 (1971)).

250 See cases cited supra note 241.

hazardous materials is often a case of first impression, courts are faced with little legal precedent to guide their decision-making process. Due to the lack of legal precedent on point, courts often require a more fully developed factual record than is present in the parties' pleadings before allowing summary proceedings. In Ahrens v. Superior Court, for example, a California appeals court held that it was an error to grant defendant's motion for summary judgment because a more fully developed factual record was required with respect to the issue of whether the use of underground PCB containing transformers was a matter of common usage. The court reasoned that the "totality of surrounding circumstances" must be considered rather than "accepting bald assurances" of the defendant. Thus, while some jurisdictions have tentatively followed the New Jersey practice, the issue remains a question of first impression in many courts.

b. Courts that Apply a Reasonable Care Test to Work with Hazardous Materials

Several courts have held that work with hazardous materials is not an abnormally dangerous activity. Like the practice in New Jersey,

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252 See Hanlin Group, Inc. v. International Minerals & Chem. Corp., 759 F. Supp. 925, 934 (D. Me. 1990) (concluding that absence of state law precedent supported denial of defense motion to dismiss); Speer & Sons Nursery, 759 P.2d at 1134 ("[h]ere we have no legal sources to guide us").

253 There are, however, courts that will allow for summary proceedings on abnormally dangerous activity claims. See, e.g., City of Bloomington, Ind. v. Westinghouse Elec. Co., 891 F.2d 611, 617 (7th Cir. 1989) (motion to dismiss count relating to abnormally dangerous activity proper); Fortier v. Flambeau Plastics Co., 476 N.W.2d 593, 598, 608 (Wis. Ct. App.), review denied, 479 N.W.2d 172 (Wis. 1991) (lower court properly granted summary judgment in favor of defendant based on undisputed facts in parties briefs).


255 243 Cal. Rptr. at 420.

256 Id. at 428–29.

257 Id. at 428.

these courts also reach this conclusion after applying the Restatement's six-factor test.\textsuperscript{259} An examination of the cases reveals that these courts generally find application of two of the six factors persuasive in reaching the conclusion that work with hazardous materials is not an abnormally dangerous activity. Specifically, the courts look closely to see if the risk may be eliminated through the exercise of reasonable care\textsuperscript{260} or if the value of the activity to the community outweighs its dangerous attributes.\textsuperscript{261} Like the decisions that follow the New Jersey practice, these cases also reach their conclusion based in part on policy considerations.\textsuperscript{262}

One common approach that courts use in these cases is to examine whether the risk created by the activity in question can be eliminated through the exercise of due care.\textsuperscript{263} These courts treat this question as being dispositive of the abnormally dangerous question.\textsuperscript{264} The court's reasoning in \textit{Indiana Harbor Belt Railroad Co. v. American Cyanamid Co.}\textsuperscript{265} is representative of this approach. In that case, the Seventh Circuit considered whether or not the transportation of a toxic chemical by rail was an abnormally dangerous activity.\textsuperscript{266} The court concluded that the activity was not abnormally dangerous because the risk of accident during the transport of the chemical could be eliminated through the exercise of due care.\textsuperscript{267} Thus, the court reasoned that because due care could have prevented the accident, negligence, and not strict liability, was the proper tort regime to determine liability.\textsuperscript{268} In other words, strict liability is only appropriate when negligence liability can not effectively govern the accident.\textsuperscript{269}

These decisions also express the concern that by extending the doctrine, the law would place an undue burden on industry and commerce.\textsuperscript{270} Policy considerations are explicitly provided for under the

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  \item \textsuperscript{259} See, e.g., \textit{Fortier}, 476 N.W.2d at 604–06; \textit{Edwards}, 279 Cal. Rptr. at 233–35. For a discussion of the Restatement's six factor test see supra notes 191–96 and accompanying text.
  \item \textsuperscript{260} See, e.g., \textit{Avemco}, 976 F.2d at 1109.
  \item \textsuperscript{261} See \textit{Fortier}, 476 N.W.2d at 608.
  \item \textsuperscript{262} See \textit{Edwards}, 279 Cal. Rptr. at 234 (noting that factors are “closely related to questions of public policy”).
  \item \textsuperscript{263} See, e.g., \textit{Avemco Ins. Co. v. Rooto Corp.}, 967 F.2d 1105, 1109 (7th Cir. 1992) (applying Michigan law).
  \item \textsuperscript{264} See \textit{Avemco}, 967 F.2d at 1109 (whether risk may be eliminated with due care is “central concept” of abnormally dangerous analysis); \textit{Indiana Harbor Belt R.R. v. American Cyanamid Co.}, 916 F.2d 1174, 1177 (7th Cir. 1990).
  \item \textsuperscript{265} \textit{Id.} at 1174.
  \item \textsuperscript{266} \textit{Id.} at 1176.
  \item \textsuperscript{267} \textit{Id.} at 1180–81.
  \item \textsuperscript{268} \textit{Id.}
  \item \textsuperscript{269} \textit{Id.} at 1177.
  \item \textsuperscript{270} See \textit{Erbrich Prods. Co. v. Wills}, 509 N.E.2d 850, 856 (Ind. Ct. App. 1987) (noting the adverse
sixth factor of the Restatement test that directs courts to weigh the benefits of the activity against the risks.271 A few cases have relied on this factor to hold that an activity's utility removes it from the class of activities that are abnormally dangerous.272 In Fortier v. Flambeau Plastics Co.,273 for example, a Wisconsin appeals court held that the value to households, business, and industry of dumping volatile organic compounds in a landfill outweighed the dangerous attributes of the activity.274 Thus, while policy supports the extension of the doctrine to work with hazardous materials, it has also been used as an argument against applying the doctrine to work with hazardous materials.

IV. HOLDING PRINCIPALS LIABLE FOR THE ACTS OF TOLL MANUFACTURERS

Tolling arrangements provide the chemical industry with the flexibility needed to manufacture products.275 To measure the true utility of these arrangements, however, it is necessary to consider the harmful consequences to the environment that often flow from tolling contracts that involve work with hazardous materials.276 In situations where the toll manufacturer lacks the financial resources to remedy environmental damage, a legal framework is needed that can both assign responsibility to the principal that hired the toll manufacturer and provide an economic incentive to encourage the safe handling of hazardous materials.

The cases that have applied CERCLA to the tolling context are a first step towards establishing this legal framework.277 By successfully utilizing CERCLA to hold principals liable for the acts of toll manufacturers, state and federal authorities have addressed a substantial portion of the tolling problem.278 Because of the procedural hurdles that CERCLA imposes, however, it is not a suitable remedy for

impact on commercial and industrial activity that would result if activities involving hazardous materials were deemed abnormally dangerous).

271 See Restatement (Second) of Torts § 520 cmt. k (1977).
273 476 N.W.2d at 593.
274 Id. at 607–08.
275 See supra notes 21–23 and accompanying text.
276 See supra notes 5, 27–48 and accompanying text.
277 See supra notes 49–65 and accompanying text.
278 Id.
private parties that have suffered harm from toll manufacturers. It is in these situations that an additional theory of recovery is needed.

The common law can provide this additional theory of recovery. Applying common law remedies to the tolling context, however, also presents its own set of challenges. Because a toll manufacturer is probably an independent contractor, under ordinary circumstances a principal will not be liable for the acts of a toll manufacturer. This obstacle can be overcome. In most situations where environmental contamination has occurred, toll manufacturers have been hired to work with hazardous materials. A solid foundation of legal precedent exists to support the proposition that work with hazardous materials is an abnormally dangerous activity. Thus, if a principal hires a toll manufacturer to work with hazardous materials, under the doctrine of vicarious liability for abnormally dangerous activities the principal will remain liable for the acts of the toll manufacturer.

Applying the doctrine of vicarious liability for abnormally dangerous activities to the tolling context will complete the legal framework that is needed to address the environmental harm that can be caused by toll manufacturers. Although some states have reached a contrary conclusion, defining work with hazardous materials as an abnormally dangerous activity is warranted.

Application of the doctrine in this manner is consistent with the definition of abnormally dangerous activities that courts have adopted and applied. The cases that have declined to apply the doctrine to work with hazardous materials have not engaged in an honest or logical application of the abnormally dangerous activity doctrine. These cases reach their decision by primarily looking to the ability to eliminate the risk through reasonable care as the touchstone of their analysis. These cases reason that if the risk posed by the activity may be eliminated through the exercise of due care negligence and not the abnormally dangerous activity doctrine is the correct common law regime to proceed under.
This analysis, however, is deficient in two respects. First, the approach is inconsistent with the Restatement’s formulation of the abnormally dangerous activity doctrine that these courts purport to apply. No one factor or group of factors is to be considered dispositive of the question of what constitutes an abnormally dangerous activity all six factors must be taken into account. The Restatement explicitly provides that all factors should be weighed to determine whether an activity is abnormally dangerous and envisions situations where not all of the six factors would be present.

Secondly, as other commentators have noted, if a court determines that the risk created by the activity in question is capable of being eliminated through the exercise of reasonable care, then the fact that an injury did occur is itself proof that reasonable care was not exercised and the plaintiff is entitled to recovery. Instead of a proper application of the abnormally dangerous activity doctrine, these cases are perhaps better understood as reflection of policy considerations that are rooted in a concern for the economic burden such doctrine would have on business enterprises.

If a court is concerned with the potentially harmful economic consequences the abnormally dangerous activity doctrine would impose, a more appropriate justification for not applying the doctrine is through the sixth factor of the Restatement test that calls for the weighing of the community value created by the activity in question. For example, a town whose livelihood depends on a cement manufacturing plant may regard that enterprise as a normal activity despite the emission of cement dust. Most courts that have considered activities involving work with hazardous materials, however, have found that the value to the community is not sufficiently great so that the principal should be insulated from paying its own way. Due to the substantial and far reaching harm to the environment that can be caused by toll manufacturers that are hired to work with hazardous materials, the economic burden that may be caused by the imposition of strict liability for that type of work is fully justified. Additionally, in the tolling context, expanding principal liability in this

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288 See Restatement (Second) of Torts § 520 cmt. f (1977).
289 Id.
290 See Jones, supra note 192, at 1706-07.
291 See supra notes 270-74 and accompanying text.
292 Restatement (Second) of Torts § 520 cmt. k (1977).
293 Id.
manner would not lead to a substantial increase in the scope of potential liability for a principal that hires a toll manufacturer. Because a principal is currently liable for clean-up costs under CERCLA, holding a principal liable for damages to private parties would be a modest but logical step.

Holding a principal strictly liable for the acts of its toll manufacturer would also advance the policy objectives that justify the imposition of vicarious liability. In addition to providing compensation to private parties, imposition of vicarious liability would also create an economic incentive to encourage safer environmental practices on the part of toll manufacturers. One of the principal policy arguments advanced by the courts against the extension of strict liability is that it would place an undue economic burden on commerce and industry. This position, however, ignores the strong economic arguments that support extending the abnormally dangerous activity doctrine to the tolling context.

The economic analysis of vicarious liability advanced by some commentators offers compelling support for holding principals liable for the acts of toll manufacturers that work with hazardous materials. A common law liability regime that insulates a principal from liability may cause distortions in the market place, including inefficient allocation of resources, and may also create an incentive for principals to select toll manufacturers who engage in unsafe practices. As one commentator explains, when the risk of harm from an activity is great, a principal that is insulated from liability has an added incentive to hire an insolvent toll manufacturer. This is because a toll manufacturer that cannot pay the full amount of a damage award has less incentive to invest in safety measures because the expected loss to the toll manufacturer is smaller than the actual damages that will be caused by an accident. Alternatively, if the toll manufacturer can pay full compensation for the damage caused by an accident, the incentive (or cost) of not engaging in safe practices is higher and therefore more safety will be encouraged.

295 See supra notes 52–65 and accompanying text.
296 See supra notes 92–93 and accompanying text.
297 Erbrich Products Co. v. Wills, 509 N.E.2d 850, 856 (Ind. App. 1987).
300 Id. at 1272
301 Id. at 1244.
302 See id.
In sum, while extending the doctrine of abnormally dangerous activities to tolling arrangements does place a burden on principals, a rule that insulates principals from liability also has adverse economic consequences. When liability is placed solely on the shoulders of a toll manufacturer, the incentives to invest in environmentally safe practices are reduced and innocent third parties will be forced to bear the cost of harm caused by work with hazardous materials.

VI. Conclusion

The threat to the environment posed by the unsafe practices of under-capitalized toll manufacturers demands a legal framework to encourage greater attention and investment in the safe handling of hazardous materials. If a principal is not held legally responsible for the consequences of selecting an irresponsible toll manufacturer, principals will have a greater economic incentive to select toll manufacturers who have not invested in safe handling procedures for hazardous materials. State and federal authorities relying on the broad language of CERCLA have taken the first step towards holding principals liable for the unsafe practices of the toll manufacturers that they employ. Private parties also need a means of recovery. Existing legal precedents and policy consideration support the use of the abnormally dangerous activity doctrine to hold principals vicariously liable to private parties when they contract out work with hazardous materials. Extension of this doctrine to the tolling context would be both a modest and equitable application of the common law and a solution to a serious environmental problem.