

Note from Professor: This case is about abnormally dangerous activities. As you read it, look for the discussion of the six restatement factors, and the court's finding about being able to eliminate the risk with the use of due care.

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228 Cal.App.3d 980, 279 Cal.Rptr. 231

CHARLES EDWARDS, Plaintiff and Appellant,

v.

POST TRANSPORTATION COMPANY, Defendant and Respondent.

No. D010783.

Court of Appeal, Fourth District, Division 1, California.

Mar. 21, 1991.

Charles Edwards (Edwards) appeals from a defense verdict and judgment rendered in his action for personal injuries against Post Transportation Company (Post). His case was presented to the jury on theories of negligence. His sole ground of appeal is that the court refused to permit him to argue, in addition to the negligence theory, a claim of strict liability based on Post's participation in an ultrahazardous activity.

Factual Background

At the time of his injury Edwards was an employee of Norris Industries (Norris), a manufacturer of zinc-plated cartridge cases. Norris had constructed a waste treatment facility to dispose of certain emulsions from its plating plant. Part of the new facility consisted of two storage tanks: one for sodium bisulfite and one for sulfuric acid. Because of the differing natures of these chemicals, the pipe leading to the sodium bisulfite tank was to be constructed of plastic, while the pipe leading to the sulfuric acid tank was required to be of stainless steel.

Through error in construction, the pipes were switched, the plastic pipe being hooked to the sulfuric acid tank and vice versa. When this was noticed it was concluded the easiest remedy would be to change the identity of the tanks, the tanks themselves apparently being interchangeable. Although this was done, the tanks were inadequately labeled. As a result, the driver for Post, when delivering a tank truck of sulfuric acid, was directed to pump the acid into the wrong pipe. The material was thus introduced into the sodium bisulfite tank, which unfortunately contained a residue of sodium bisulfite and water. A severe and immediate chemical reaction followed which resulted in toxic gas being released from the tank. Edwards, who was working in an adjacent part of the Norris plant, was overcome by the gas and suffered severe injuries.

The negligence or other fault of Norris was not in issue. By virtue of his employment status, Edwards's recourse against Norris was limited to **workers' compensation**. Since Edwards had no relationship with Post, however, he was free to bring a common law action for personal injuries. This case resulted.

Issue

The sole issue on appeal is whether, under the factual circumstances presented, Edwards should have been permitted to assert liability of Post based on the strict liability principles of the doctrine of ultrahazardous activity. ([1]) This doctrine, first enunciated in *Rylands v. Fletcher* (1868) L.R. 3 H.L. 330, imposes liability for damage proximately caused by one who carries on an "ultrahazardous" activity. As defined by the California restatement of the doctrine, "An activity is ultrahazardous if it (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 (b) is not a matter of common usage. ..."

It is established that whether an activity is an ultrahazardous activity is a question of law for court decision. The trial court was therefore correct, after having heard the evidence presented at trial on the subject, in issuing its ruling determining the matter. The issue having been resolved as a matter of law, the scope of appellate review is not limited, and we are not bound by the preliminary determination of the trial court.

Discussion

The California utilization of the doctrine of ultrahazardous activity relies upon the exposition which has been contained in the Restatement of Torts, and is now set forth in sections 519 and 520 of the Restatement, Second Edition. Since there is no case directly addressing sulfuric acid use in terms of its nature as an ultrahazardous activity, we must resort to the guidelines set forth in the Restatement. Using the term "abnormally dangerous" rather than "ultrahazardous," the Restatement sets forth six factors which are to be considered. They 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.” (Rest.2d Torts, § 520.)

As explained in comment (f) to section 520, the several factors are to be considered together; establishment of one factor alone is usually not sufficient to categorize an activity; several factors will ordinarily be required.

We commence our analysis of the factors and our application of them to the use of sulfuric acid by dealing with those that are easily resolved. We are satisfied, for instance, that sulfuric acid is “not a matter of common usage.” Although the substance is no doubt regularly used in certain industries, like the use of dynamite, it is not carried on by any large percentage of the population. Although it can be argued that sulfuric acid is commonly used in various chemical applications, we believe this not to be the sense in which this factor is intended to be applied. Factor (d), we think, is more for the purpose of exclusion of an activity from classification as ultrahazardous than it is for inclusion. There are many activities in our modern society which, although clearly very hazardous, like automobile driving, we accept because they are so commonly utilized. Sulfuric acid does not fit this concept, and we think factor (d) weighs in plaintiff’s favor.

Similarly, factor (f) is resolved, we believe, in favor of a finding of ultrahazard. Sulfuric acid, though unquestionably a useful and beneficial chemical, is not so necessary to society that we would insulate its users from strict liability, if we otherwise decide strict liability should be imposed. Factor (e) we find not to be of significant importance in our analysis. Although appellant argues that Edwards, working in a part of the Norris plant not related to the waste treatment facility, should not have been subject to exposure from the sulfur gas, we think use of chemicals, generally, in modern manufacturing plants is an activity reasonably to be expected. It is not like drilling an oil well in a residential district.

The factors we have examined to this point, although certainly factual in nature, are closely related to questions of public policy. In the usual case we would assume the court would largely draw upon its own knowledge of the community and its values to determine them. The first three factors, however, pertain more to the characteristics of the activity itself and would, in the usual case and in this case, require establishment by evidence introduced at trial. We look, therefore, to the evidence bearing on the danger involved in using sulfuric acid and the **potential of risk elimination through the exercise of care.**

Experts at trial testified that the gas created by the mixed chemicals would cause a chemical burn-that it would attack any human tissue. The chemical is highly toxic, very reactive, and will attack most materials. It is listed as a "hazardous material" by several governmental agencies. One expert, when asked to categorize the hazard of using sulfuric acid as slight, medium or severe, responded: "It is ... severe-it is [a] highly dangerous chemical." We conclude that the plaintiff by a preponderance of the evidence satisfied Restatement factor (a)-that the use of sulfuric acid involves a "high degree of risk," and factor (b)-that if it comes in contact with humans the resulting harm is likely to be great.

Plaintiff loses his case, however, with the application of factor (c). The issue posed by factor (c) is whether the risk involved in an admittedly dangerous activity can be eliminated through the exercise of reasonable care. The same experts who testified to the dangerous attributes of the acid were in agreement that the actual risk of harm to people could be eliminated by the use of proper handling procedures. One plaintiff's expert, a civil engineer and "sanitarian," agreed that "If ... sulfuric acid is handled in a proper fashion, it is no danger." Since sulfuric acid is governmentally classified as a hazardous material, its transporters must be specially classified or registered. It appears, however, that such regulation, including special training, is designed to and does eliminate the special risk related to handling the acid. The fact that the material "requires special handling" and one must "be careful with it," as plaintiff's expert testified, leads to the logical conclusion that risk can be eliminated through care.

This conclusion undermines the argument that the use of sulfuric acid should lead to strict liability. The theory of imposition of strict liability for ultrahazardous activity is that the danger cannot be eliminated through the use of care. Since the activity is in some sense beneficial, useful or necessary to society, the actor is not deemed negligent simply for engaging in it. Damage resulting to others, however, is taxed to the actor because he is the person who most logically should bear the cost. Where the activity is dangerous only if insufficient care is exercised, ordinary rules of fault are sufficient for allocation of the risk. There is no need for liability without proof of fault, because definitionally if there is damage it will have resulted from negligence and will be compensable.

Disposition

The judgment is affirmed.