

Note from Professor: This case is about the abnormally dangerous activities. The court discusses all six of the Restatement factors, including the common usage exception. As you read the case, look for the discussion of the requirements and why the court finds that fireworks are not an abnormally dangerous activity.

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446 Md. 543

Court of Appeals of Maryland.

Andrew David TOMS

v.

CALVARY ASSEMBLY OF GOD, INC., et al.

No. 26, Sept. Term, 2015.

Feb. 29, 2016.

In this case, we address whether noise emanating from the discharge of a fireworks display constitutes an abnormally dangerous activity, which would warrant the imposition of strict liability.

Petitioner, Andrew David Toms (“Toms”), operates a dairy farm in Frederick County, Maryland, and maintains a herd of approximately 90 head of cattle. On September 9, 2012, a church-sponsored fireworks display took place on property adjacent to Toms’ dairy operation. A permit to discharge fireworks had been obtained, and the event was supervised by a deputy fire marshal. No misfires or malfunctions took place. According to Toms, the fireworks display was so loud that it startled his cattle, and caused a stampede inside his dairy barn. The stampede resulted in the death of four dairy cows, property damage, disposal costs, and lost milk revenue.

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FACTUAL AND PROCEDURAL BACKGROUND

Toms operates a dairy farm on 69 acres of leased property near Walkersville, Frederick County, Maryland. The farm includes a barn and a herd of approximately ninety dairy cows. Auburn Farms, Inc., at the time of the incident, possessed the adjacent 40 acre property. Calvary sought and obtained permission from Auburn Farms, Inc. to use its property to host a fireworks display celebrating a church youth crusade.² Calvary then hired Zambelli, a professional fireworks company, to handle the fireworks.

Pursuant to Md.Code (2003, 2011 Repl.Vol.), § 10–104(b) of the Public Safety Article, an application for a permit to discharge fireworks was submitted to the Office of the State Fire Marshal. The application identified the date, time, and location of the anticipated fireworks display, as well as the size and number of fireworks shells that would be used. It also identified Mr. Lindberg as the Zambelli employee who would be responsible for discharging the fireworks, and included his “State shooter permit” information, and proof of Zambelli’s insurance for the event. Deputy Fire Marshal Glen Ruch inspected Auburn Farms, Inc. and approved the location. He testified that, based on the number of shells, the State required a firing radius of 250 feet around the firing site. However, he noted that, in the application, Mr. Lindberg included an aerial photo with notations indicating he planned to extend the firing radius to 300 feet. The application was approved, including the 300 foot firing radius, and a permit to discharge fireworks was obtained by the respondents.

The event was open to the public, and advertised in radio interviews, a newspaper ad, and on a banner located on Calvary’s property on Route 194. Toms recalls seeing the banner, but states he had no notice of the event’s time or location. On September 9, 2012, the day of the event, Mr. Lindberg accidentally drove onto Toms’ farm, and Toms assisted him in locating the entrance to Auburn Farms, Inc. Mr. Lindberg testified that he identified himself and his purpose when speaking to Toms. The fireworks display took place at 8:30 p.m., and Senior Deputy Fire Marshal Michael Guderjohn was onsite to supervise the event. Apparently, 250 shells were discharged over a fifteen-minute period without any misfires or duds. According to the parties’ Agreed Statement of Facts submitted in their briefs to this Court, there is no dispute that Toms’ barn was at least 300 feet away from the firing location.

At the time of the event, Toms’ cattle were inside the barn. Toms, however, arrived at the barn a few minutes after Mr. Lindberg began discharging fireworks. Toms states that the explosions startled his dairy cows, and caused them to stampede inside the barn. No witnesses, however, actually saw the stampede because no one was inside the barn with the cattle at the time the event started. The stampede, Toms states, resulted in the deaths of three cows shortly thereafter, and injuries to a fourth cow that ultimately led to its death, because it had to be “culled” from the herd a few weeks later. In addition to the loss of four dairy cows, Toms sustained property damage to fences and gates, disposal costs, and lost milk revenue. Toms sent a demand letter to Calvary outlining the damages, but Calvary and Zambelli denied liability.

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DISCUSSION

Maryland has long recognized the doctrine of strict liability, which does not require a finding of fault in order to impose liability on a party. The doctrine is derived from the famous 1868 English case of *Rylands v. Fletcher*, which recognized that, under certain circumstances, no-fault liability could be imposed. ...

The modern formulation of the strict liability doctrine is found in the Restatement (Second) of Torts §§ 519–520 (1977). This Court adopted that formulation in *Yommer*, while the Restatement (Second) of Torts was still in its tentative draft. In *Rosenblatt v. Exxon Co., U.S.A.*, we discussed the evolution of the doctrine: “Unlike the rule first enunciated in *Rylands*, this definition does not limit applicable activities to those causing an ‘escape’ of something onto the land of another; it requires only that there be harm to the person or property of another resulting from the abnormally dangerous activity.”

Restatement (Second) of Torts § 519 defines strict liability for an abnormally dangerous activity:

One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.... This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

To determine whether an activity is abnormally dangerous, a court uses six factors. 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.

RESTATEMENT (SECOND) OF TORTS § 520 (AM. LAW INST. 1977). As the Restatement (Second) of Torts reminds us:

Because of the interplay of these various factors, it is not possible to reduce abnormally dangerous activities to any definition. The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding

it, as to justify the imposition of strict liability for the harm that results from it, even though it is carried on with all reasonable care.

RESTATEMENT (SECOND) OF TORTS § 520 cmt. f (AM. LAW INST. 1977). The Reporter's Note for this section identifies typical abnormally dangerous activities, such as the storage of large quantities of water or explosives in dangerous locations, and conducting blasting operations in the middle of a city.

In Maryland, we weigh each factor independently. More emphasis is placed on the fifth factor: the appropriateness of the activity in relation to its location. *Yommer*, 255 Md. at 226, 257 A.2d at 140. "The thrust of the doctrine is that the activity be abnormally dangerous in relation to the area where it occurs." "Yommer emphasized that the appropriateness of the activity in the particular place was the most crucial factor."...

"We accept the test of appropriateness as the proper one: that the unusual, the excessive, the extravagant, the bizarre are likely to be non-natural uses which lead to strict liability." *Yommer*, 255 Md. at 226, 257 A.2d at 141.

In applying the six factors, it is not necessary to have all six factors weigh in favor of a particular party. "Any one of them is not necessarily sufficient of itself in a particular case, and ordinarily several of them will be required for strict liability. On the other hand, it is not necessary that each of them be present, especially if others weigh heavily." RESTATEMENT (SECOND) OF TORTS § 520 cmt. f (AM. LAW INST. 1977).

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Whether fireworks discharge constitutes an abnormally dangerous activity is a case of first impression in Maryland, because fireworks liability normally arises in the context of nuisance and negligence litigation. Some jurisdictions, however, have addressed the issue of whether fireworks are abnormally dangerous. As evidenced by the cases below, litigation often came to fruition due to a malfunction or misfire at a fireworks display, which resulted in spectator injuries. Although fireworks liability cases often share similar facts, jurisdictions disagree on whether discharging fireworks is an abnormally dangerous activity, as evident by the split of legal authority on the matter.

The highest appellate court in Washington, for instance, held pyrotechnicians strictly liable when a shell exploded improperly and injured spectators at a public fireworks show. It stated that Restatement factors (a) through (d) weighed in favor of imposing strict liability, because discharging fireworks creates a "high risk of serious bodily injury or property damage" due to the possibility of a malfunction or similar issue.. "The dangerousness ... is evidenced by the elaborate scheme of administrative regulations with which pyrotechnicians must comply[.]" including licensing and insurance requirements.. Under factor (d), it further determined that discharging fireworks was not a matter of common usage, because the licensing scheme restricts

the general public from engaging in that activity.. In addition to the high risk discharging fireworks creates, that court determined that public policy and fairness warranted strict liability. Otherwise, the injured spectators would have been subject to the “problem of proof” because “all evidence was destroyed as to what caused the misfire of the shell that injured the Kleins.”

Other jurisdictions, however, have come to the opposite conclusion, and have held that the level of risk involved with a fireworks discharge does not warrant strict liability. In *Haddon v. Lotito*, Pennsylvania’s highest appellate court applied the ultrahazardous activity test, and determined that strict liability—referred to as absolute liability—did not apply in a case involving spectator injuries at a public fireworks display. Critically, that court distinguished lawful from unlawful fireworks displays:

[A] public fireworks display, handled by a competent operator in a reasonably safe area and properly supervised (and there is no proof to the contrary herein), is not so dangerous an activity.... Where one discharges fireworks illegally or in such a manner as to amount to a nuisance and causes injury to another, some jurisdictions have held that liability follows without more. But the production of a public fireworks display, under the circumstances presented herein, is neither illegal nor a nuisance and, consequently, liability, if existing, must be predicated upon proof of negligence.

Other courts have ruled similarly. In *Litzmann v. Humboldt Cty.*, California’s intermediate appellate court determined that “the handling and discharge of fireworks ... were not such as to come within the definition of ultrahazardous activities.” In that case, an undischarged firework was negligently discarded on fairgrounds, and a minor was severely injured when he found and ignited it. After applying the Restatement factors, that court declined to impose strict liability, because “[i]t was the failure of care that caused the injuries and not the nature of the risks involved.”

...

Fireworks Liability in Maryland

In the instant case, Toms asks this Court to expand the strict liability doctrine and hold that noise emanating from a fireworks discharge is abnormally dangerous to livestock. The Restatement factors we consider 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.

RESTATEMENT (SECOND) OF TORTS § 520 (AM. LAW INST. 1977).

...

We apply the Restatement factors to the instant case:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others. Special events requiring the use of large, professional “display fireworks” are heavily regulated in Maryland pursuant to §§ 10–101 et seq. of the Public Safety Article. In accordance with § 10–104, each fireworks display requires a permit to discharge fireworks. ... In order to obtain a permit, an individual must submit an “Application for Public Fireworks Display” to the State Fire Marshal. The application requires, among other things, event information, and the size and number of shells to be used. It also requires the firework company’s contact information, proof of insurance, and its agent-shooter’s name and the shooter’s permit number. Additionally, prior to submitting the application, the site must be inspected and approved by an authority having jurisdiction. Here, the site was found to be an appropriate location, and it was approved.

We hold that a lawful fireworks display does not pose a high degree of risk, because the statutory scheme in place is designed to significantly reduce the risks associated with fireworks, namely mishandling, misfires, and malfunctions. Furthermore, the required firing radius of 250 feet was voluntarily extended by Mr. Lindberg to 300 feet. Critically, in enacting the Public Safety Article, the General Assembly did not regulate the audible effects of display fireworks, which indicates that any risk associated with the decibel level of a fireworks discharge is minimal or non-existent.

Lawful fireworks displays do not pose a significant risk because “[a] person who possesses or discharges fireworks in violation” of the permitting process “is guilty of a misdemeanor and on conviction is subject to a fine not exceeding \$250 for each offense.” Md.Code (2003, 2011 Repl.Vol.), § 10–111(a) of the Public Safety Article. To impose a relatively light penalty for an unlawful fireworks display is telling. If an unlawful fireworks display is only a misdemeanor offense with no possibility of incarceration, why then should strict liability be imposed for risks associated with a lawful fireworks display?

(b) likelihood that the harm that results from it will be great. This factor also weighs in favor of not imposing strict liability, because the purpose of a 300 foot perimeter surrounding the firing location is to mitigate the likelihood of harm. ... The statutory scheme regulating the use of fireworks is specifically designed to reduce risk. “The harm threatened must be major in degree, and sufficiently serious in its possible consequences to justify holding the defendant strictly

responsible for subjecting others to an unusual risk. It is not enough that there is a recognizable risk of some relatively slight harm....” Because Toms’ dairy barn, and therefore his cows, were not located within the fall out zone, the likelihood of harm to the public and property was significantly reduced. The 300 foot firing radius was effective because no shells fired that night malfunctioned, and no debris littered Toms’ property.

(c) inability to eliminate the risk by the exercise of reasonable care. We are reminded that:

It is not necessary, for the factor stated in Clause (c) to apply, that the risk be one that no conceivable precautions or care could eliminate. What is referred to here is the unavoidable risk remaining in the activity, even though the actor has taken all reasonable precautions in advance and has exercised all reasonable care in his operation, so that he is not negligent.

RESTATEMENT (SECOND) OF TORTS § 520 cmt. h (AM. LAW INST. 1977). We disagree with Toms that reasonable care cannot reduce the risk of harm to livestock to acceptable levels. In enacting §§ 10–101 et seq. of the Public Safety Article, the General Assembly took care to implement sufficient precautions so as to ensure that lawful fireworks displays can be a safe and enjoyable activity. ...The requirements of mandatory insurance coverage, a physical site inspection, and event supervision is evidence of reasonable care that reduces the risk of harm. The site inspection and prior approval of an authority having jurisdiction ensures that the firing location is appropriate and that injury is unlikely. Importantly, additional measures are required if other properties are located within the fall out zone, including notice and permission from that property owner for their property to be used in the fall out zone.

The 300 foot firing radius is sufficient. Furthermore, notice to Toms was not necessary, because his dairy barn was located beyond the firing radius. In our view, the Restatement does not require the elimination of all risk, and because the risks inherent with a fireworks discharge can be reduced to acceptable levels, this factor does not support a conclusion of an abnormally dangerous activity.

d) **extent to which the activity is not a matter of common usage.** “An activity is a matter of common usage if it is customarily carried on by the great mass of mankind, or by many people in the community.” We recognize that the discharging of lawful fireworks displays is a matter of common usage. In a letter dated July 3, 1776, John Adams wrote about the pomp and circumstance that should surround the celebration of our Nation’s independence: “I am apt to believe that it will be celebrated, by succeeding Generations.... It ought to be solemnized with ... Bonfires and Illuminations from one End of this Continent to the other from this Time forward forever more.” As stated in § 10–101 of the Public Safety Article, fireworks are designed “to produce a visible or audible effect” for the benefit of spectators. Therefore, we define “common usage,” as it pertains to this case, broadly to include not only the professionals who discharge fireworks, but also the spectators who partake in the fireworks display. Almost by definition, lawful fireworks displays involve two parties: the shooter and the audience. We conclude that

lawful fireworks displays are a matter of common usage.

(e) inappropriateness of the activity to the place where it is carried on. When this Court adopted the Restatement (Second) of Torts' multi-factor test for abnormally dangerous activities, this particular factor was identified as being the most crucial.. "The thrust of the doctrine is that the activity be abnormally dangerous in relation to the area where it occurs." Implicit in the granting of a permit to discharge fireworks, is the lawfulness of that proposed fireworks display. ... After all, pursuant to § 10–103(c)(1) of the Public Safety Article, a permit to discharge fireworks "does not authorize the holder of the permit to possess or discharge fireworks in violation of an ordinance or regulation of the political subdivision where the fireworks are to be discharged...." In sum, we do agree that a lawful fireworks display does not fall within the context of "the unusual, the excessive, the extravagant, the bizarre non-natural uses which lead to strict liability."

(f) extent to which its value to the community is outweighed by its dangerous attributes. Here, a church-sponsored fireworks display celebrated a youth crusade, and the event was open to the public. As a symbol of celebration, fireworks play an important role in our society, and are often met with much fanfare. The statutory scheme regulating its use minimizes the risk of accidents, thus, reinforcing the popularity of these displays. This Court recognizes that not all segments of the population may enjoy fireworks displays, especially those with noise sensitivities, however, we conclude that the social desirability of fireworks appear to outweigh their dangerous attributes.

Policy considerations. We are mindful that the doctrine of strict liability for abnormally dangerous activities is narrowly applied in order to avoid imposing "grievous burdens" on landowners and occupiers of land. Toms argues that we should expand the factual application of this doctrine, however, the Restatement factors do not support such a position. The use of fireworks, especially in public fireworks displays, is heavily regulated pursuant to §§ 10–101 et seq. of the Public Safety Article. Under § 10–103, a permit to discharge fireworks cannot be obtained unless the State Fire Marshal determines that proposed fireworks display will "not endanger health or safety or damage property...." In light of this policy, the respondents cannot be held strictly liable, because they lawfully complied with the conditions of the permit as well as applicable laws. We are persuaded by the rationale in Haddon: "a public fireworks display, handled by a competent operator in a reasonably safe area and properly supervised (and there is no proof to the contrary herein), is not so dangerous an activity."

At issue in this case is a lawful fireworks display that was implemented pursuant to the requirements of the Public Safety Article. At trial, Toms did not present any evidence concerning what noise levels should be appropriate for public fireworks display. Sufficient evidence was not presented to the trier of fact that a lawful fireworks display was abnormally dangerous to livestock. Thus, as a matter of law and on a case-by-case basis, we do not extend the doctrine of strict liability for abnormally dangerous activities under the circumstances.

CONCLUSION

Accordingly, we affirm the judgment of the Circuit Court. Lawful fireworks displays are not an abnormally dangerous activity, because the statutory scheme regulating the use of fireworks significantly reduces the risk of harm associated with the discharge of fireworks. Furthermore, it is not the province of the Judiciary, but rather, the Legislature to determine zoning classifications and enact noise ordinances that would further regulate the use of fireworks.