LET THE SELLER BEWARE: NEW JERSEY HOLDS REMOTE REAL PROPERTY VENDOR STRICTLY LIABLE FOR PAST ENVIRONMENTAL SINS

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I. INTRODUCTION

More than a century ago, New Jersey courts were confronting environmental issues.[1] By the 1980s, the number of confrontations had escalated exponentially as New Jersey industry generated more hazardous waste than any other state.[2] In the latter half of the twentieth century, the pressure on New Jersey courts to settle the growing number of environmental suits

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[1] *See, e.g.*, Grey v. City of Paterson, 58 N.J. Eq. 1, 42 A. 749 (Ch. 1899) (City of Paterson enjoined from increasing amount of raw sewage discharged into the Passaic River); Beach v. Sterling Iron and Zinc Co., 54 N.J. Eq. 65, 33 A. 286 (Ch. 1895) (mining company enjoined from discharging clay residue into Wallkill River in Sussex County), *aff'd sub. nom.* Sterling Iron and Zinc Co. v. Sparks Mfg. Co., 55 N.J. Eq. 824, 41 A. 1117 (N.J. 1896); Board of Health v. Lederer, 52 N.J. Eq. 675, 29 A. 444 (Ch. 1894) (North Brunswick Board of Health found to have authority to abate nuisance of odors and gases from a fat-rendering plant even though health hazard only threatened residents of neighboring New Brunswick); State v. Freeholders of Bergen, 46 N.J. Eq. 173, 18 A. 465 (Ch. 1889) (denying injunction sought by Hackensack Board of Health to halt discharge of raw sewage from Bergen County buildings into Hackensack Creek on grounds that public nuisance not shown), *aff'd*, 48 N.J. Eq. 294, 48 A. 294 (N.J. 1891); State v. Lowery, 49 N.J.L. 391, 8 A. 513 (Sup. Ct. 1887) (upholding criminal conviction for violation of North Bergen township ordinance prohibiting the dumping within township limits of soil and waste removed from septic tanks and cesspools); Butterfoss v. State, 40 N.J. Eq. 325 (N.J. 1885) (upholding permanent injunction prohibiting tomato canning factory from discharging tomato waste into creek); Weil v. Ricord, 24 N.J. Eq. 169 (Ch. 1873) (Newark Board of Health held without authority to prohibit business of salting and curing hides without showing of public nuisance); Attorney General v. Steward & Taylor, 20 N.J. Eq. 415 (Ch. 1869) (hog-slaughtering business enjoined from discharging hogs' blood into river); Holsman v. Boiling Spring Bleaching Co., 14 N.J. Eq. 335 (Ch. 1862) (company bleaching and finishing cotton and woolen goods enjoined from discharging chemicals and other wastes into the Passaic River).

[2] Zazzali & Grad, *Hazardous Wastes: New Rights and Remedies? The Report and Recommendations of the Superfund Study Group*, 13 SETON HALL L. REV. 446, 449 n.12 (1983) [hereinafter *Superfund Report*].

spawned precedent-setting case law.[3] The latest environmental contamination decision by the New Jersey Supreme Court, *T & E Industries v. Safety Light Corp.*,[4] is such a landmark case.[5] The opinion addressed two issues: vendor liability for contamination of the sold property, and the application of the common-law doctrine of strict liability for property damage due to contamination.

Until the *T & E* decision New Jersey law was unsettled, and opinions from other jurisdictions conflicted[6] as to whether strict liability was a valid cause of action against a vendor for pollution of the transferred land. The doctrine of caveat emptor, or "let the buyer beware," was alive in New Jersey prior to *T & E*, but barely breathing. Caveat emptor stipulated that a seller was not liable to the purchaser of land or to third parties for injuries due to conditions on the land which existed at the time of transfer, absent fraud or an express agreement of assumption of liability.[7] Numerous exceptions to the rule, however, eroded the absolute protection accorded to transferrors of property. These exceptions included claims brought under theories of public or private nuisance, where the vendor created a condition interfering with the public's rights or with an individual's use and enjoyment of neighboring lands.[8] Another exception imposed vendor liability where the vendor knew of a dangerous condition on the land, failed to disclose it and knew or should have known that the buyer would most likely not discover the condition or its danger-

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[3] *See, e.g.*, State, Dep't of Envtl. Protection v. Ventron Corp., 94 N.J. 473, 468 A.2d 150 (1983) (applying strict liability to corporate successor of business responsible for mercury pollution). For a discussion of *Ventron*, *see infra* note 10 and accompanying text.

[4] 123 N.J. 371, 587 A.2d 1249 (1991).

[5] The day after the decision was released, a Wall Street Journal article declared that the New Jersey Supreme Court had "giv[en] purchasers of contaminated sites a potent new weapon in the conflict over waste cleanup." The Wall Street Journal, March 28, 1991, at B9, col. 2. The newspaper reported that the decision to apply strict liability against a property vendor was the first decision by any state supreme court that: (1) did not limit the applicability of the doctrine to neighboring landowners, and (2) allowed the doctrine to be applied by purchasers against vendors of contaminated property. *Id.*

[6] *See* Note, *Liability for Generators of Hazardous Waste: The Failure of Existing Enforcement Mechanisms*, 69 GEO. L.J. 1047, 1061–64 (1981).

[7] *See* RESTATEMENT (SECOND) OF TORTS § 352 comment a (1977) [hereinafter RESTATEMENT]. *See also* Levy v. C. Young Constr. Co., 46 N.J. Super. 293, 297-98, 134 A.2d 717, 719-20 (App. Div. 1957) (holding seller not liable for damage causing defects in premises, in the absence of fraud, concealment or express warranty), *aff'd*, 26 N.J. 330, 139 A.2d 738 (1958).

[8] *See* Sarnicandro v. Lake Developers, Inc., 55 N.J. Super. 475, 481, 151 A.2d 48, 53 (App. Div. 1959) (vendor of real estate not liable for injuries from construction defect where purchaser was aware of defect at time of purchase).

ous nature.[9] In the precedent setting *State, Dep't of Envtl. Protection v. Ventron Corp.*,[10] the New Jersey Supreme Court imposed strict liability upon the corporate successor of a mercury processing plant which had dumped mercury wastes into Berry's Creek, contaminating both the water and neighboring land. While *Ventron* recognized the vitality of strict liability in environmental contamination actions, it left unanswered whether the seller of contaminated property could be held strictly liable to the vendee, despite adjacent land not being effected.

Decisions rendered after *Ventron* also reflected the judicial controversy over whether the handling of toxic wastes should be considered a per se abnormally dangerous activity or whether a case-specific analysis utilizing the factors from section 520 of the Restatement (Second) of Torts should be applied.[11] In addition,

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[9] *See* RESTATEMENT, *supra* note 7, § 353. *See also* O'Connor v. Altus, 67 N.J. 106, 114, 335 A.2d 545, 549 (1975) (vendor's liability continues only until the vendee has had a reasonable time and opportunity to discover and respond to the condition).

[10] 94 N.J. 473, 468 A.2d 150 (1983).

[11] *Compare, e.g.*, Amland Properties Corp. v. Aluminum Co. of America, 711 F. Supp. 784, 806 (D.N.J. 1989) (holding that *Ventron* and subsequent decisions did not require a finding that the disposal of hazardous wastes was abnormally dangerous as a matter of law) *with* Prospect Indus. Corp. v. Singer Co., 238 N.J. Super. 394, 400, 569 A.2d 908, 911 (Law Div. 1989) (Restatement analysis not required because under *Ventron* the handling of toxic wastes is per se abnormally dangerous even if defendant did not know that the substance was toxic).

The principle of strict liability for abnormally dangerous activities is stated in section 519 of the Restatement which provides:

> (1) 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.
>
> (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

See RESTATEMENT, *supra* note 7, § 519. Strict liability claims hinge upon two threshold questions: (1) whether the defendant was engaged in an abnormally dangerous activity; and (2) whether the plaintiff's injury resulted from that activity. The Restatement provides factors for determining whether an activity is abnormally dangerous, namely the:

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

See RESTATEMENT, *supra* note 7, § 520. The Restatement makes it clear that all six factors are to be considered in the analysis. *See id.*, § 520 comment f.

questions existed as to how the doctrine of strict liability should be applied in individual cases.

This article will examine the *T & E* decision and suggest approaches to certain issues left unanswered by the court, namely whether knowledge of the risk of harm and the foreseeability of harm are appropriate defenses to a strict liability claim in an environmental contamination suit.

II. FACTUAL BACKGROUND

The issues in the *T & E* case centered on radium-contaminated property owned by the plaintiff in Orange, New Jersey.[12] The site was first leased by T & E Industries (T & E) in 1969 and subsequently purchased in 1974. Prior to T & E's ownership, the site had been owned by United States Radium Corporation (USRC).[13] Between 1917 and 1926, USRC processed radium to manufacture luminescent paint for instrument and watch dials. The radium was extracted from carnotite ore of which only eighty percent of the ore could be successfully converted into radium.[14] USRC buried the remaining twenty percent of unprocessed ore, called "tailings," on an unimproved section of the plant site.

While the scientific link between radon and cancer was not generally accepted until the 1960s, both USRC and the scientific community suspected the hazards of radon exposure much earlier.[15] During USRC's first year of operation, one of its employees was assigned to calculate both the amount of radium retrieved from the ore and the measure of its radioactivity. This employee would later testify that she knew not to touch radium and to always wear protective clothing which included a lead-

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[12] T & E Indus. v. Safety Light Corp., 123 N.J. 371, 375, 376, 587 A.2d 1249, 1251-52 (1991).

[13] *Id.* at 375, 587 A.2d at 1251. USRC was the predecessor corporation to all of the defendants. In 1943, USRC sold the property to a plastics manufacturer, Arpin, and there were several interim owners until T & E took possession in 1969. Neither Arpin nor the subsequent owners were named parties.

[14] Carnotite ore is primarily composed of Uranium-238, radium and vanadium. As Uranium-238 decays, other elements are produced, including Radium-226. Radium-226 decays into Radon-222 and emits gamma rays during the decaying process. Gamma-ray exposure is linked to bone cancer and leukemia. Radon-222 decays into radon "daughters" which adhere to most surfaces including walls, ceilings and dust particles. Inhaling radon can cause lung cancer. *Id.* at 376, 587 A.2d at 1252.

[15] Concerted study of epidemiological radon risks did not begin until the mid-1950s. *Id.* The problems created by radioactive tailings were not discovered until the late 1960s, and federal regulation of tailings disposal did not occur until 1978.

lined apron. In another instance, when radium accidently lodged beneath the fingernail of USRC's president, he "hacked" off the fingertip because he feared the dangers of radium.[16]

In the early 1920s, additional evidence of radium exposure hazards became known to USRC when many of its employees began developing cancer. These workers applied the luminous paint to the products sold by USRC and would routinely sharpen the tips of their paint brushes in their mouths, thereby ingesting small amounts of radium. USRC eventually posted employee warnings against this practice.

In 1926, USRC ceased production at the Orange site and vacated the premises. In 1943, USRC sold the property to a plastics manufacturer, Arpin, and terminated all connection to the site. USRC did not remove the tailings which had been buried on the site, despite USRC's suspicions about radium's harmful effects.[17] Arpin, hoping to extract valuable uranium from the tailings, built an addition which rested on a portion of the area where tailings had been buried. Arpin sold the site in 1950 and title passed several times until T & E purchased the property in 1974.

Between 1926 and 1943, the health risks attendant to radium exposure became increasingly obvious. In 1932, the American Journal of Cancer published an article addressing the health risks associated with radon inhalation.[18] In 1940, Drs. Evans and Goodman, experts on radiation and its health risks, published an article that discussed how radon was produced during the refining process of radioactive material and examined the relationship between radon exposure and lung cancer.[19] The physicians concluded that radon exposure should be limited because of the known health risks of inhaling radon gas.

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[16] *Id.* at 377, 587 A.2d at 1252. Another employee testified that he knew enough about the health risks of radium "to keep away from it as much as possible." *Id.* The employee wore protective clothing, including rubber aprons, gloves and shoes, as a precaution against radium and the chemicals used in the extraction process. The employee eventually became sterile from radiation exposure.

[17] Arpin was aware of USRC's previous radium processing operations and the disposal of the tailings. Arpin did not perceive the magnitude of the health risks, however, nor did the laboratory hired by Arpin to sample the tailings. T & E Industries v. Safety Light Corp., 227 N.J. Super. 228, 232, 546 A.2d 570, 572 (App. Div. 1988).

[18] The article was entitled "Cancer of the Lung in the Miners of the Jackymon." *T & E*, 123 N.J. at 378, 587 A.2d at 1252-53.

[19] The article published by Drs. Evans and Goodman was entitled "Determination of the Thoren Content of Air and its Bearings on Lung Cancer Hazards in the Industry." *Id.*

One year later, the United States Department of Commerce published a pamphlet entitled "Safe Handling of Radioactive Luminous Compound."[20] The handbook was prepared by a committee of scientists and industry members, including a representative from USRC, and provided guidelines on the handling of radioactive materials. The document warned that radon exposure in the workplace should be limited because of the health risks.[21]

In 1943, the president of USRC requested from the War Department a price increase for the uranium that USRC was supplying to the government. The request detailed the dangers of radium and radon exposure and concluded that a health hazard existed, despite the absence of an exact formula to determine the possible extent of injury which might be caused by non-continuous exposure to radioactive materials.[22] USRC justified the requested increase based on the radon-related deaths of USRC employees and the procedures necessary for employee protection.[23]

When T & E purchased the Orange property in 1974, it was unaware of the buried tailings until five years later when the New Jersey Department of Environmental Protection (DEP) inspected the facility.[24] The inspector found elevated levels of gamma radiation inside the building, in the parking lot and on the vacant

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[20] *Id.*

[21] *Id.* at 378, 587 A.2d at 1253. The pamphlet contained:

> detailed information on the effects of ingestion or inhalation of solid radioactive luminous compound, on the results of inhalation of radon liberated from [the] compound into the air, and on the consequences of exposure of the whole body to gamma radiation. According to the handbook, '[t]he continued inhalation of radon may produce carcinoma of the lungs.' Recognizing that 'serious injury and even death may result from the injudicious handling of [radioactive luminous] compound[s],' the handbook provided safety guidelines for the handling of such materials . . . .

Id. (citation omitted).

[22] *Id.* at 379, 587 A.2d at 1253.

[23] In the request, USRC's president cited four employee deaths which had resulted from exposure to radium. A chief chemist died after his lungs became contaminated from inhaling radioactive dust or radon gas; another employee died from external gamma radiation exposure; and both a technical director and a USR[C] officer died from radon gas inhalation and gamma radiation exposure, the latter developing lung cancer. T & E Industries v. Safety Light Corp., 227 N.J. Super. 228, 236, 546 A.2d 570, 574 (App. Div. 1988).

[24] The inspection was required under the Uranium Mill Tailings Radiation Control Act, 42 U.S.C. §§ 7901-42, which was enacted in 1978. The Act was enacted to implement a comprehensive program to regulate and control mill tailings production and disposal to protect the public health and welfare and the environment. 42

property to the rear of the building. Soil samples revealed levels of radon, radon progeny and gamma radiation sources which exceeded state and federal limits. The most severe levels were in the "oven room," which Arpin had constructed directly above the tailings burial ground. The DEP ordered T & E to begin immediate remedial activities.[25]

Upon request by the DEP, the United States Environmental Protection Agency (EPA) placed the Orange property on the National Priorities List in 1981.[26] Although not required to abandon the property, T & E decided to close the facility and relocate. Under New Jersey's Environmental Cleanup Responsibility Act (ECRA), T & E could not sell the site until the contamination had been removed.[27]

III. THE LOWER COURTS

In 1981, T & E sued USRC's successor corporations, alleging claims of misrepresentation and fraud, negligence, nuisance, and strict liability for engaging in an abnormally dangerous activity.[28] Separate trials were ordered for each defendant with Safety

U.S.C. § 7901 (1978). An initial mandate of the Act was to inspect and evaluate all known tailings processing sites. *Id.*

[25] The company hired a health physicist, Dr. Stiedly, who confirmed the State's findings. Stiedly recommended the sealing of all openings in the oven room and the installation of fans for ventilation. He warned that these were only interim measures and that complete site decontamination required removal of all soil from around and beneath the building. *T & E*, 123 N.J. at 380, 587 A.2d at 1253–54.

Based upon expert physician's findings, T & E improved ventilation in the oven room, limited employee exposure and monitored exposure rates. Dosimeter readings indicated that an employee working for 30 hours a week in the oven room would reach the state radon exposure limit in 10.8 years. *T & E*, 227 N.J. Super. at 233-34, 546 A.2d at 572-73. A worker in the assembly area would have reached the outer limits of exposure in 3.18 years. The experts also recommended the removal of all soil surrounding and under the building. The soil removal was not performed because that would have required the demolition of the building.

[26] *T & E*, 123 N.J. at 380, 587 A.2d at 1254. The National Priorities List contains those sites which have been determined by the EPA to require immediate attention because their toxicity poses the most significant risks to human health. *Id.*; *and see* 42 U.S.C. § 9605(a)(8)(B) (1988) (directing the establishment of a national contingency plan for waste disposal and setting priorities based on the relative risks to people).

[27] Under New Jersey's Environmental Cleanup Responsibility Act, N.J. STAT. ANN. §§ 13:1K-6 through -14 (West Supp. 1991), contaminated commercial property cannot be transferred until the contamination is remedied. N.J. STAT. ANN. § 13:1K-7.

[28] T & E Industries v. Safety Light Corp., 123 N.J. 371, 380-81, 587 A.2d 1249, 1254 (1991). The defendants included Safety Light Corporation, USR Industries, USR Lighting Products, Inc., USR Chemical Products, Inc., USR Metals, Inc., U.S. Natural Resources, Inc., GAF Corporation, and Mitsubishi Chemical Industries.

Light Corporation (Safety Light) designated as the first defendant.[29]

At trial, the jury found Safety Light negligent as to T & E Industries.[30] The trial court overturned the verdict, however, and ruled that caveat emptor precluded T & E's recovery.

On appeal, the appellate division reversed in a harshly worded opinion that made the handling of toxic materials a per se ultrahazardous activity.[31] Under the appellate court's ruling, a

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[29] The remaining defendants agreed that any damages assessed against Safety Light would be binding on them in the subsequent trials. *Id.* at 381, 587 A.2d at 1254. For clarity, the term "defendant" herein refers to Safety Light.

[30] *Id.* at 383, 587 A.2d at 1255. The trial court originally granted T & E's pretrial motion for partial summary judgment based upon its holding that USRC had disposed of hazardous wastes on the property. The court denied Safety Light's summary judgment motion as to strict liability, reasoning that "radium is a per se 'abnormally dangerous substance' within the meaning of *State v. Ventron* . . . and [section 520 of] the Restatement . . ., and that the depositing of the same in an amount dangerous to health and life is an abnormally dangerous activity within the meaning of [those authorities]." *Id.* at 381, 587 A.2d at 1254. Safety Light's motion had been based upon the premise that *Ventron* and section 520 did not provide for a claim by a successor in title against a former owner. T & E Industries v. Safety Light Corp., 227 N.J. Super. 228, 237, 546 A.2d 570, 574 (App. Div. 1988).

Despite its pretrial rulings, the trial court reversed its position as to Safety Light's summary judgment motion on strict liability. *T & E*, 123 N.J. at 381, 587 A.2d at 1254. The court granted Safety Light's motion, concluding that strict liability could only be imposed if the defendant had known, at the time they were engaged in the activity, that the activity was, in fact, abnormally dangerous, because USRC had no such knowledge at the time it buried the tailings. The remaining claims were dismissed leaving only the issue of negligence, for failure to warn unsuspecting purchasers, to be decided by the jury.

The jury was given the following interrogatories:

> 1. [W]as U.S. Radium negligent in not warning the purchaser of the Orange premises in 1943 that the presence of radioactive tailings on the premises constituted a potential risk to the health or property?
> 2. Was U.S. Radium's negligence in 1943 a proximate cause of plaintiff's damages?
> 3. Subsequent to 1943 should U.S. Radium have learned that the tailings deposited on the Orange, New Jersey, premises constituted a potential risk to health or premises?
> 4. [W]as U.S. Radium negligent in not warning plaintiff before its purchase of the property in 1974 that the tailings on the Orange, New Jersey, premises constituted a potential risk to health or premises?
> 5. [W]as U.S. Radium's negligence in or prior to 1974 a proximate cause of plaintiff's injury?

227 N.J. Super. at 238, 546 A.2d at 575. The sixth question asked for the amount of damages. *Id.*

[31] *T & E*, 227 N.J. Super. at 239-40, 546 A.2d at 575-76. The appellate division panel interpreted the supreme court's decision in *Ventron* as holding that handling toxic waste was, as a matter of law, an abnormally dangerous activity. *Id.* at 239, 546 A.2d at 575. The appellate court relied upon the *Ventron* court's language which read:

> we conclude that mercury and other toxic wastes are 'abnormally dan-

plaintiff only had to prove that a defendant had engaged in the processing, handling or disposal of toxic materials which polluted the property that was the subject of the suit. This per se ruling eliminated the need for any analysis under the Restatement factors.[32] Additionally, the appellate division rejected Safety Light's contention that only the owner of nearby or adjacent property, and not a successor to the contaminated property, had standing to assert a strict liability theory.[33] The appellate court dealt the death blow to the doctrine of caveat emptor, holding that a property owner had the right to sue anyone in the chain of title who was responsible for the contamination, including his own vendor.[34]

> gerous,' and the disposal of them, past or present, is an abnormally dangerous activity. We recognize that one engaged in disposing of toxic waste may be performing an activity that is of some use to society. Nonetheless, 'the unavoidable risk of harm that is inherent in it requires that it be carried on at his peril, rather than at the expense of the innocent person who suffers harm as a result of it.'

Id. (quoting State, Dep't of Envtl. Protection v. Ventron Corp., 94 N.J. 473, 493, 468 A.2d 150, 160 (1983) (citations omitted)).

On the same day that T & E filed its appeal, it also filed a complaint in federal court seeking declaratory relief and response costs under section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. §§ 9601-75 (West Supp. 1991) (CERCLA). T & E Indus. v. Safety Light Corp., 680 F. Supp. 696, 700 (D.N.J. 1988). The court held Safety Light liable for any future clean-up costs under CERCLA. *Id.* at 709.

[32] *See supra* note 11 and accompanying text.

[33] *T & E*, 227 N.J. Super. at 241, 546 A.2d at 576. Safety Light relied upon the first English law case where strict liability was imposed, Rylands v. Fletcher, L.R. 1 Ex. 265 (1866), *aff'd*, L.R. 3 H.L. 300 (1868), as well as *Ventron* and section 520 of the Restatement, to argue that strict liability could not be imposed upon it. According to Safety Light, all three sources dealt solely with a landowner's liability for damage to or interference with neighboring land. The appellate court rejected the restrictive reasoning urged by the defendant, stating that there was "no practical or legal distinction between the rights of a successor in title to use and enjoy its land and the rights of a neighboring property owner. Both have rights and both can suffer injury through the acts of a prior owner." *Id.*

[34] For a discussion of the doctrine of caveat emptor, *see supra* notes 6-8 and accompanying text. The appellate division observed that the doctrine of caveat emptor had outlived its usefulness in today's complicated society and had been generally scrapped in many situations. *T & E*, 227 N.J. Super. at 241-42, 546 A.2d at 576-77. The court rejected Safety Light's attempts to insulate itself through caveat emptor, concluding that " 'the underlying considerations of reasonableness, fairness and morality rather that the formulary labels to be attached to the plaintiff's causes of action or the legalistic classifications in which they are to be placed,' " preempted such a defense. *Id.* at 243, 546 A.2d at 577 (citations omitted).

The appellate court also acknowledged that the policy reasons behind legislative attempts to impose strict liability upon hazardous waste handlers supported its position. *Id.* at 243-44, 546 A.2d at 578 (citing the Spill Compensation and Control Act, N.J. STAT. ANN. §§ 58:10-23.11 through 58:10-23.24, (the Spill Act), in

IV. THE *T & E* DECISION

The New Jersey Supreme Court granted both Safety Light's petition for certification and T & E's cross-petition on the issue of damages. Writing for a unanimous court, Justice Clifford affirmed the appellate division's finding that strict liability could be applied to a remote vendor.[35] The Justice reversed, however, the lower court's holding that the disposal of hazardous wastes was a per se abnormally dangerous activity. Ruling that the Restatement factors must be considered on a case-by-case basis, the court applied those factors and found Safety Light strictly liable for USRC's disposal of radium tailings. On the issue of damages, Justice Clifford remanded to the trial court for consideration of all losses which resulted from USRC's inappropriate disposal of radioactive matter.

A. Vendor Liability

Prior to the appellate division's decision in 1988, New Jersey courts had not addressed whether predecessor owners should be held strictly liable for an abnormally dangerous activity.[36] The Court of Appeals for the Third Circuit, however, had addressed related issues in *Philadelphia Electric Co. v. Hercules, Inc.*[37] The circuit court found that caveat emptor and historical common law development prohibited a nuisance claim against a former owner for contamination on the purchased property. Writing for the

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particular, § 58:10-23.11g(c)). The appellate opinion emphasized the New Jersey courts' broad application of strict liability under the Spill Act. *Id.* (citations omitted). The court concluded that:

> Absolute liability is necessary to protect the innocent purchaser as much as to protect society itself. Whenever possible, the party creating the toxic waste hazard should be the party responsible for the clean-up of that hazard and any damage proximately caused by that hazard, whether or not that damage was foreseeable at the time the hazard was created. . . . '[T]hose who poison the land must pay for its cure.'

Id. (quoting State, Dep't. of Envtl. Protection v. Ventron Corp., 94 N.J. 473, 493, 468 A.2d 150, 160 (1986) and citing Inmar Assoc., Inc. v. Carlstadt, 214 N.J. Super. 256, 268, 518 A.2d 1110, 1116 (App. Div. 1986)).

[35] Justices Garibaldi and Pollock recused themselves. The case was heard by a full court with Superior Court, Appellate Division Judges Bilder and Stein sitting by designation. *T & E*, 123 N.J. at 402, 587 A.2d at 1265.

[36] *Id.* at 384, 587 A.2d at 1255-56. Safety Light argued that any dispute between a former and current property owner should be governed solely by contract law. *Id.*, 587 A.2d at 1256.

[37] 762 F.2d 303 (3d Cir.), *cert. denied*, 474 U.S. 980 (1985). In *Philadelphia Electric*, the purchaser of property with ground water contamination sued the vendor's successor corporation for clean-up costs under various common law theories.

court, Judge Higginbotham observed that the caveat emptor rule applied where parties with roughly equal bargaining powers contract for the purchase of industrial property. The Third Circuit also held that an owner of property upon which a nuisance was found could not sue a former owner because only a neighboring landowner had standing to raise a nuisance claim.[38]

1. Predecessor Owner's Liability

Relying upon *Philadelphia Electric*, Safety Light suggested that successors in title could not assert strict liability claims for abnormally dangerous activities on the transferred land and that such claims were reserved to neighboring property owners.[39] Safety Light argued that, unless a purchaser inspected the property or demanded a warranty deed, the purchaser has no cause of action.[40] Justice Clifford rejected the defendant's attempted analogy to private nuisance law. The court held that the public policy underlying the doctrine of strict liability required its application to a seller of property who did the environmental damage, regardless of where the contamination is found.

The court's public policy reasons were based on legal history and marketplace economics. The supreme court observed that strict liability developed as a gap-filler. According to Justice Clifford, the torts of trespass and nuisance failed to protect a landowner from the damage to his property rights that often resulted from pollution on another's property.[41] The court cited the Eng-

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38 762 F.2d at 314. The *Philadelphia Electric* court observed that its holding was compatible:

> with the historical role of private nuisance law as a means of efficiently resolving conflicts between *neighboring*, contemporaneous land uses. . . . All of the very useful and sophisticated economic analyses of private nuisance remedies published in recent years proceed on the basis that the goal of nuisance law is to achieve efficient and equitable solutions to problems created by *discordant* land uses. In this light[,] nuisance law can be seen as a complement to zoning regulations . . . and not as an additional type of consumer protection for purchasers of realty. Neighbors, unlike the purchasers of the land upon which a nuisance exists, have no opportunity to protect themselves through inspection and negotiation.

Id. (emphasis in original).

39 *T & E*, 123 N.J. at 384-85, 587 A.2d at 1255-56.

40 *Id.* at 385, 587 A.2d at 1256.

41 *Id.* at 386, 587 A.2d at 1257. Justice Clifford posited that strict liability evolved to supplement the existing "system for redressing unlawful interference with a landowner's right to the possession and quiet enjoyment of his land." *Id.* at 385, 587 A.2d at 1256-57 (quoting State, Dep't of Envtl. Protection v. Ventron Corp., 94 N.J. 473, 488, 468 A.2d 150, 157 (1986)). The court explained that tres-

lish case of *Rylands v. Fletcher*,[42] which involved water that escaped from a mill owner's reservoir and damaged a neighboring coal mine. Justice Clifford noted that since strict liability was first imposed in *Rylands*, courts have been increasingly willing to impose liability upon a defendant engaged in geographically inappropriate or unduly dangerous activities.

More significantly, the court recognized the strict liability doctrine's emphasis upon the challenged activity's dangerousness and inappropriateness[43] and stressed the need to allow the marketplace to spread the cost of harm. Justice Clifford noted the doctrine reflected a policy that enterprises engaged in unusual and highly dangerous activities should bear the costs of injuries which are attributable to those activities.[44] The court concluded that although the hazardous activity would be allowed by law, the enterpriser engaged in the activity must pay its way.[45] The court additionally acknowledged a second economic consideration by expressing that the enterprises were better situated to administer the unusual and hazardous risk by passing the costs onto the consumer.[46] The court concluded that because the prior owner whose activities caused the risk of damage might have been the best situated to distribute the costs of injury, liability for the harm incurred was not extinguished upon the sale or transfer of the property.[47]

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pass applied only when the plaintiff's property was actually invaded as a direct result of the defendant's actions, whereas nuisance only covered activities on the defendant's property that continually interfered with the plaintiff's use and enjoyment of the land. *Id.* at 386, 587 A.2d at 1256-57.

42 L.R. 1 Ex. 265 (1866), *aff'd*, L.R. 3 H.L. 330 (1868).

43 *T & E*, 123 N.J. at 386, 587 A.2d at 1257 (citing W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS, § 78, 551 (5th ed. 1984) [hereinafter PROSSER]).

44 *Id.* at 387, 587 A.2d at 1257 (citing PROSSER, *supra* note 43, § 78, at 555).

45 *Id.* (citing Berg v. Reaction Motors Div., Thiokol Chem. Corp., 37 N.J. 396, 181 A.2d 487 (1962)). The *Berg* action was brought by property owners who lived adjacent to a rocket-engine testing area. The complaints included claims of negligence, nuisance and trespass. The jury awarded compensatory and punitive damages. The supreme court certified the defendant's appeal on its own motion. The court rejected the defendant's claims that its activities were socially useful and that the jury charge, which also instructed on nuisance as an abnormally dangerous activity, was prejudicial error. *Berg*, 37 N.J. at 405-06, 181 A.2d at 492. The court compared the rocket testing to cases involving dynamite blasting and held that an enterprise engaged in an abnormally dangerous activity should pay its own way, even if the activity was socially useful and even though all precautions were observed. *Id.* at 410-11, 181 A.2d at 495.

46 *T & E*, 123 N.J. at 387, 587 A.2d at 1257 (citing PROSSER, *supra* note 43, § 75, at 537).

47 Justice Clifford observed that neither the cost-based or market-bearing poli-

2. Caveat Emptor

The court also declined to absolve Safety Light of liability through the doctrine of caveat emptor.[48] After discussing the traditional applications and exceptions to the doctrine in real estate contexts, the Justice noted that the doctrine had been eroded in other consumer areas.[49] The court observed that where an innocent buyer was involved, notions of equity and fair play dictated that the doctrine not be applied.[50] Justice Clifford asserted that the same rationale should apply in real estate transactions where the seller, who disposed of an abnormally dangerous activity's byproducts by dumping the byproducts onto the property, sells the land.[51] The supreme court concluded that the seller, armed with the knowledge of its own activities, was in the best position to prevent future problems. Justice Clifford further

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cies relied upon property right theories. The justice opined that the first policy induced businesses to "internalize" the external cost, while the second shifted the loss onto the party best able to absorb it. The court concluded that "[b]ecause the former owner of the property whose activities cause the hazard might have been in the best position to bear or spread the loss, liability for the harm caused by the abnormally dangerous activities does not necessarily cease with the transfer of property." *Id.*

48 *See supra* note 7 and accompanying text for a discussion of the "buyer beware" doctrine in New Jersey.

49 *T & E*, 123 N.J. at 388, 587 A.2d at 1258. The court cited to McDonald v. Mianecki, 79 N.J. 275, 398 A.2d 1283 (1979) (new home purchase); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969) (rental of commercial property); Santor v. A&M Karagheusian, 44 N.J. 52, 207 A.2d 305 (1965) (recovery for defective rug); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965) (new home purchase); and Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (purchase of a defective car).

50 The court noted a prior decision, in which it concluded that lack of contract privity should not bar recovery, and that:

> 'the obligations of the manufacturer thus becomes what in justice it ought to be—an enterprise liability, and one which should not depend upon the intricacies of the law of sales. The purpose of such liability is to insure that the cost of injuries or damage, either to the goods sold or to other property, resulting from defective products is borne by the makers of the products who put them in the channels of trade, rather than by the injured or damaged persons who ordinarily are powerless to protect themselves.'

T & E, 123 N.J. at 388-89, 587 A.2d at 1258 (quoting *Santor*, 44 N.J. at 65, 207 A.2d at 305).

51 *Id.* at 389, 587 A.2d at 1258. The court referred to its decision in McDonald v. Mianecki, 79 N.J. 275, 398 A.2d 1283 (1979), in which it held a developer liable for non-potable water. In *McDonald*, the court rejected the application of caveat emptor and found that the implied warranty of habitability included good water. *Id.* at 298, 398 A.2d at 1294-95. The *McDonald* court opined that the caveat emptor doctrine was an "outmoded concept" which should be relegated to the pages of history. *Id.* at 299, 398 A.2d at 1295.

reasoned that allowing a buyer to recover placed liability on the proper party—the party who created the hazard and then sold the contaminated land.[52] Finally, the court rejected Safety Light's argument that such a holding would "destroy the real estate market," responding with a terse: "Not likely."[53] The Justice observed that the defense to any strict liability claim was the buyer's voluntary and knowing assumption of the risk. The court opined that "as is" contracts did not provide a valid defense, concluding that non-disclosure of the abnormally dangerous hazard or activity did not immunize the seller who created the hazard or participated in the activity.

B. The Doctrine of Strict Liability Applied to Hazardous Waste Treatment

The supreme court held that the determination as to whether a particular activity constituted an abnormally dangerous activity must be made on a case-by-case basis.[54] The court, however, declined to decide whether a defendant's liability was contingent upon either its knowledge or the foreseeability of the risk.[55]

Safety Light argued that the level of a defendant's knowledge of the risk should be assessed as of the time the activity was undertaken, and that liability should not be found if the danger was scientifically undiscoverable at that time.[56] The court responded that this state-of-the-art "availability" argument, though interesting, was not at issue because it disagreed that knowledge,

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[52] The court also suggested that its reasoning "echoe[d] the underlying policy of the abnormally dangerous activity doctrine: certain enterprises should bear the costs attributable to their activities." *T & E*, 123 N.J. at 371, 587 A.2d at 1249 (citing Berg v. Reaction Motors Div., Thiokol Chem. Corp., 37 N.J. 397, 410, 181 A.2d 487, 494 (1962); Kenney v. Scientific, Inc., 204 N.J. Super. 228, 248, 497 A.2d 1310, 1320-21 (Law Div. 1985)).

[53] *Id.* at 390, 587 A.2d at 1258.

[54] *Id.* at 391, 587 A.2d at 1259. The court chided the appellate division for reading the *Ventron* decision too broadly in holding that T & E's radium processing and byproduct disposal was, as a matter of law, an abnormally dangerous activity. *Id.* (citing T & E Indus. v. Safety Light Corp., 227 N.J. Super. 228, 240, 546 A.2d 570, 576) (App. Div. 1988)).

[55] *Id.* at 393, 587 A.2d at 1260. Safety Light argued that without knowledge of the abnormally dangerous character of an activity, a defendant is without the ability to make the cost-benefit analysis needed to spread the risk to the marketplace.

[56] Safety Light urged that it could only be found strictly liable if USRC knew in 1926 of the specific dangers posed by discarded tailings. It contended that general knowledge of the dangers associated with the handling and processing of radium was insufficient. *Id.* at 392, 587 A.2d at 1260.

under Safety Light's narrow definition, was a requirement for sustaining a strict liability claim.

While recognizing that a minority of commentators suggested that the Restatement factors for abnormally dangerous activities implied the foreseeability of the risk of harm,[57] the court maintained that the issues of foreseeability and knowledge suggested negligence and may not be appropriate when dealing with strict liability.[58] Justice Clifford concluded that the court need not decide the issues of knowledge and foreseeability because even if applicable, Safety Light's constructive knowledge of the risks of radium processing and tailings disposal would fully satisfy any knowledge requirement.

The court then moved to an analysis of whether USRC's actions constituted an abnormally dangerous activity under the Restatement factors and concluded that Safety Light was strictly liable. The Justice specifically found that radium was an extraordinarily dangerous substance which posed a great risk of harm to health; that radium processing was not a common activity; that radium could not be safely disposed of by simply dumping it on an urban lot; that the processing and disposal of radium in an urban area was inappropriate; and that the usefulness of radium did not outweigh the risk of harm.[59] The court found that the plaintiff's injury had been proximately caused by the defendant's abnormally dangerous activity, stating that T & E had vacated the premises because of health concerns—exactly the kind of harm

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[57] *Id.* (citing the *Superfund Report*, *supra* note 2, at 462) (stating that the Restatement formula requires the weighing of numerous factors such as the activity's utility, the appropriateness of the activity's locale and the foreseeability of harm); Ginsberg & Weiss, *Common Law Liability for Toxic Torts: A Phantom Remedy*, 9 HOFSTRA L. REV. 859, 918 (1981) (both versions of Restatement include a foreseeability requirement); Comment, *Absolute Liability for Ultrahazardous Activities: An Appraisal of the Restatement Doctrine*, 37 CAL. L. REV. 269, 272 (1949) (Restatement (First) impliedly requires foreseeability of risk)).

[58] *Id.* at 393, 587 A.2d at 1260 (citing Special Report to Congress, *Injuries And Damages From Hazardous Wastes — Analysis And Improvement of Legal Remedies, In Compliance With Section 301(c) Of The Comprehensive Environmental Response Compensation And Liability Act of 1980 By the 'Superfund Section 301(e) Study Group*, Vols. I & II, 105 to 106 (reprinted as Comm. Print for the Senate Comm. on Envtl. & Pub. Works, Serial No. 97-12, 97th Cong., 2d Sess., 1982) ("Whenever a balancing of factors is required under a strict liability theory, a notion of duty of care, responsibility or fault is easily implied as to choice of location or means and strict liability begins to sound more like negligence")).

[59] *Id.* at 394, 587 A.2d at 1261. In reaching these conclusions, the court addressed all six Restatement factors. *See supra* note 10 for a discussion of the Restatement analysis.

considered by the Restatement as rendering Safety Light's activity abnormally dangerous.

Justice Clifford further rejected Safety Light's assertion that under strict liability theory, USRC needed to know of the precise dangers associated with the disposal of radium, rather than its general knowledge of the dangers associated with the handling and processing of radium.[60] The court pointed out that USRC had direct knowledge that exposure to radium was fraught with peril. Justice Clifford found it unlikely that USRC had actually believed that these well-known dangers ended once the radium was buried in a vacant corner of its property and concluded that the defendant knew enough to be charged with the hazards of disposal.[61]

C. *Assessment of Damages*

Having determined that Safety Light was strictly liable, Justice Clifford next addressed the measure of damages which could be assessed. The trial court had ruled that T & E could only recover for the loss of value in the Orange property. The trial judge concluded that T & E could not recover for the price of a new building or the cost of improvements to it, any business-interruption losses, compensation for the president's time in addressing the contamination problem, or the cost associated with maintaining the contaminated property until cleanup.[62] T & E was also denied its indemnity claim for future clean-up costs that may have been assessed by the government. On appeal, the ap-

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[60] *Id.* at 395, 587 A.2d at 1261. The court noted that Safety Light cited no authority for its narrow inquiry. According to Justice Clifford, Safety Light knew that: (1) it was handling an element with hazardous potential; (2) its employees should be protectively clothed; (3) several employees had suffered cancer as a result of radium ingestion; and (4) before the sale of the property, radon inhalation could cause lung cancer. *See also supra* notes 54-57 and accompanying text.

[61] *Id.* Justice Clifford made clear that if knowledge was a necessity, Safety Light knew enough to be charged with it. The court, after reviewing the "wealth of knowledge" that USRC possessed concerning the hazards, stated that the defendant's argument that:

> [Safety Light] could not have known that disposal of the radium-saturated by-products behind the plant would produce a hazard . . . . appears to rest on the idea that somehow the radium's potential for harm miraculously disappeared once the material had been deposited in a vacant corner of an urban lot, or at the least that one might reasonably reach that conclusion — a proposition that we do not accept.

Id.

[62] *T & E*, 123 N.J. at 396, 587 A.2d 1261. The loss of value was set at $225,000 by the trial judge. The judge also limited the maintenance costs for the Orange property to a six-month period, for a total damages award of $372,100.

pellate division remanded for a new trial on all the damages issues. T & E argued before the supreme court that the appellate division should have allowed the indemnification claim as a matter of law and that any remand should be limited to those damages disallowed by the trial court.[63]

1. Indemnity

Safety Light argued that the indemnity claim was premature because no clean-up of the property had been compelled by any government agency. Justice Clifford responded that, although styled as an indemnification claim, the plaintiff was really seeking a declaratory judgment determining the liability for any future costs.[64] The court held that a declaratory judgment in T & E's favor was appropriate because the law was clear that it would be entitled to recover those costs, when incurred. Justice Clifford held that, as between an unsuspecting buyer and a seller who polluted the property as a result of engaging in abnormally-dangerous activities, the seller should bear the clean-up costs.[65]

2. Consequential Damages

The court, recognizing that an injured party should be adequately compensated for those injuries or losses which are proximately caused by another's acts, found that T & E's expenses incurred in relocation were a direct result of Safety Light's wrongful acts. Justice Clifford, however, disapproved of T & E's

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63 *Id.*

64 The court also referred to the federal court decision declaring that Safety Light was liable for any response costs under CERCLA. *See* T & E Indus. v. Safety Light Corp., 680 F. Supp. 696, 709 (D.N.J. 1988) (imposing clean-up cost liability upon Safety Light under CERCLA).

65 *T & E*, 123 N.J. at 396, 587 A.2d at 1261 (citing State, Dep't of Envtl. Protection v. Ventron Corp., 94 N.J. 473, 493, 468 A.2d 150, 150 (1983)). The court did not order the parties to relitigate the damages previously awarded by the jury. The court also noted, with approval, the Restatement of Restitutions which provides:

> [a] person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct.

RESTATEMENT OF RESTITUTIONS § 76 (1937).

The court rejected Safety Light's assertion that the award of declaratory relief allowed double recovery because the plaintiff had also been awarded compensation for the diminution in the property's value. Justice Clifford modified the jury award, holding that the plaintiff could not recover the $31,500 that was the assessed value of the contaminated land because T & E had been awarded clean-up costs. The court ruled, however, that in the event the building must be demolished during remediation, T & E could recover the building's $185,000 assessed value.

claim for its president's time spent addressing the pollution problem, finding that a president's normal duties entailed handling the daily problems of a business, regardless of the unusual nature of the problems. Thus, the case was remanded to the trial court solely for consideration of the damages associated with the relocation, the maintenance of the Orange site and the business-interruption expenses.[66]

D. The Court's Final Comments

In an unusual comment on the court's decision driven by "an abundance of caution born of the occasional experience of having our opinions overread,"[67] Justice Clifford warned that the opinion should be read as an adjudication of an unusual and highly dangerous human activity and not as the opening of the floodgates for a finding of strict liability in every contaminated property complaint brought by a property owner.[68] The justice cautioned that statutory liability did not automatically equate to common-law strict liability.

The supreme court concluded by dismissing the supposition that its opinion would result in the market place finding it impossible to regulate its affairs with any certainty. Reiterating that its ruling was limited to the rare conduct which satisfied the Restatement factors, the court rationalized that any conveyance of industrial property in today's regulatory climate would surely address environmental issues.[69]

V. CONCLUSION

New Jersey's extraordinary environmental problems require extraordinary judicial action and analysis. The *T & E* decision provides such an analysis. The elimination of caveat emptor and the application, in appropriate circumstances, of strict liability to a real property vendor is the only fair and equitable remedy for

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66 *Id.* at 399-400, 587 A.2d at 1263-64.

67 *Id.* at 400, 587 A.2d at 1264.

68 *Id.* at 401, 587 A.2d at 1264. Justice Clifford used as an example the situation of a gasoline tank buried as part of a mom-and-pop general store business in the 1940s. The court stated that while the former owners might be statutorily compelled to assume clean-up responsibility, this would most likely not be a strict liability situation because the Restatement criteria could not be satisfied. In this context, the Justice observed that "what we perceive as a toxic substance today may have been a familiar household commodity in years past." *Id.*

69 *Id.* (citing Dixon Venture v. Joseph Dixon Crucible Co., 122 N.J. 228, 584 A.2d 797 (1991)).

the innocent purchaser who later finds the land to be not only unsalable, but potentially unusable, by the actions of a previous owner.

The New Jersey Supreme Court applied the careful and circumscribed analysis necessary to prevent the type of "overreading" it deplored. The decision, however, leaves unaddressed the important issues of possible defenses based upon a defendant's "knowledge of the risk" and the "foreseeability of harm," and portends a future visit by the court to address these questions.[70] The nature of environmental suits for both personal injury and clean-up cost recovery requires a strict liability analysis that includes a defendant's knowledge of the risk.

While declining to address whether a defendant must have some knowledge of the risk of harm inherent in its activity in order to be strictly liable, the court hinted that a defendant's knowledge may not be relevant.[71] Such an interpretation would undermine both the equity and fairness, which the court sought to establish in *T & E* and the economic policies underlying the court's analysis.

Because of the unique factual attributes of environmental actions, the absence of both knowledge or foreseeability analyses would place an extraordinary burden upon defendants. Many environmental problems involve a long latency period between the damaging activity and the discovery and realization of the activity's resultant harm.[72] As practitioners specializing in environmental litigation readily recognize, contamination from activities by a prior property owner may not be discovered for decades. The facts of the *T & E* case provide a classic example.

The court's analysis of the doctrine of strict liability in economic terms was appropriate and buttressed by commentators and long-standing tort theories.[73] Those policies of cost-spread-

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70 The New Jersey Supreme Court declined to address the questions of knowledge and foreseeability because of the specific facts before it. As the court noted, even if those issues were relevant, USRC had sufficient notice of the dangers of radium handling and processing. *Id.* at 393, 587 A.2d at 1260. These issues are better left for a future case whose facts will lend themselves to the detailed analysis needed to clarify the law in New Jersey.

71 The court stated that "requirements such as 'knowledge' and 'foreseeability' smack of negligence and may be inappropriate in the realm of strict liability." *Id.* at 393, 587 A.2d at 1260.

72 *See, e.g., The Superfund Report, supra* note 2, at 455. While the Report comments that most personal injuries which arise from toxic waste exposure occur a long time after exposure, the same is, of course, true for property contamination.

73 As one legal treatise has explained:

ing and risk assumption by enterprises, however, necessarily require that the enterprises have the opportunity to make those economic choices. The policies enunciated by the *T & E* court have little applicability to a business, if the business operates without knowledge that its central activity presents a risk of environmental harm.

The *T & E* court alluded to the correct analysis and factual inquiry to determine a defendant's knowledge of the risk and the foreseeability of the harm. The relevant knowledge does not have to be actual knowledge. Constructive knowledge based upon scientific studies and knowledge within the industry at the time of the activity would suffice. Further, knowledge and foreseeability should only be successful defenses in those rare instances where a substance which is hazardous by today's standards, was completely unsuspected of posing any health risks at the time of its production or disposal.

As the challenged activity and the resultant injury move closer in time, however, the knowledge inquiry becomes less relevant. In the past 20 years, the dangers of improper handling and disposal of hazardous materials has become widely known,[74] and the promulgation of cost-recovery suits have put all commercial enterprises on notice that such activities must be conducted with attention to the growing number of environmental regulations.

> The courts have tended to lay stress upon the fact that the defendant is acting for his own purposes, and is seeking a benefit or a profit from such activities, and that he is in a better position to administer the unusual risk by passing it on to the public than is the innocent victim. The problem is dealt with as one of allocating a more or less inevitable loss to be charged against a complex and dangerous civilization, and liability is imposed upon the party best able to shoulder it. The defendant is held liable merely because, as a matter of social adjustment, the conclusion is that the responsibility should be so placed.

PROSSER, *supra* note 43, § 75, at 537.

The Restatement also relies upon this economic policy, stating that "[t]he defendant's enterprise, in other words, is required to pay its way by compensating for the harm it causes, because of its special, abnormal and dangerous character. RESTATEMENT, § 519 comment (d).

74 *See Report of Supreme Court Committee On Environmental Litigation, reprinted in* 125 N.J.L.J. 57 (1990). The report quoted Senator Edmund Muskie as noting "that it was only in the late 1960s that the United States confronted 'the terrible prospect that the American dream of a good life may turn out to be a nightmare. Our efforts to improve our lives may have created hazards from which there is no escape.' " *Id.* The report further noted that New Jersey has "experienced hazards from which there was no easy escape: the dangerous dumping of hazardous waste at the Chemical Control plant in Elizabeth . . . traces of dioxin contamination in the streets of Newark . . . garbage polluting our coastal waters . . . medical waste fouling our beaches." *Id.*

These enterprises are readily capable of indulging in exactly the type of economic analysis upon which the *T & E* court relied.

The same cannot be readily said about the businesses operating in the early or even middle part of this century. Complaints filed today can present instances where the dangers of a particular substance or processing activity were unknown at the time of processing or disposal. As noted by Justice Clifford, in these instances the enterprise would have had no inkling of the economic burdens it would be required to shoulder and would not have been in a "position to administer the unusual risk by passing it onto the public."[75]

The Restatement also suggests that knowledge and foreseeability are relevant considerations. While not specifically referring to those terms, the Restatement factors themselves must be analyzed in terms of *when* the activity occurred.[76] Therefore, a defendant's knowledge of whether there is a high degree of risk and the attempts to exercise the utmost care imply both knowledge and foreseeability.[77] The Restatement provides that a defendant is liable, notwithstanding the degree of care exercised to prevent harm to the plaintiff, because of the abnormal and inherent danger and risk of resulting harm of the activity itself.[78] As one commentator has stated:

This emphasis on foreseeability suggests that courts deciding

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[75] *T & E*, 123 N.J. at 387, 587 A.2d at 1257 (quoting PROSSER, *supra* note 43, § 75 at 537).

[76] The *T & E* court implied that analysis of the Restatement factors would take place in the context of the time frame in which the activity was occurring. 123 N.J. at 401, 587 A.2d at 1264 (stating that "[w]e are mindful that what we perceive as a toxic substance today may have been a familiar household commodity in years past"). This time frame is appropriate. It would be unfair, for example, to hold a defendant liable for an activity which was engaged in during the 1920s, based upon a risk analysis which considered the scientific knowledge and societal mores and practices of the 1990s.

[77] *See Superfund Report*, *supra* note 2, at 462 (stating that "[t]he Restatement's (Second) strict liability, adopting an 'abnormally dangerous' activity test, requires a balancing of numerous factors such as the utility of the activity, the foreseeability of harm, and the appropriateness of the locale of the activity' ").

The Superfund Report also suggests that the *Ventron* decision eliminated these considerations by focusing on a "magnitude of the risk" analysis and de-emphasizing factors such as the activity's locale or the foreseeability of harm. In drawing this conclusion, the report inferred that this new approach would not encourage a case-by-case analysis which complicates and prolongs litigation. The *T & E* court found that this conclusion and the elimination of the consideration of the Restatement factors was an incorrect assumption, and specifically mandated that a case-by-case approach was required. 123 N.J. at 391, 587 A.2d at 1259 (citing State, Dep't of Envtl. Protection v. Ventron Corp., 94 N.J. 473, 468 A.2d 150 (1983)).

[78] RESTATEMENT, *supra* note 7, § 519 comment (d).

> inactive, hazardous waste disposal site cases will look to the time of disposal in order to determine whether strict liability is appropriate. It further suggests that where the nature and magnitude of the risk could not be anticipated at the time of disposal because the locale was undeveloped (and, arguably, appropriate) and the harmful potential of the substances was scientifically unascertainable, strict liability for . . . abnormally dangerous activity will not be invoked.[79]

In rejecting the suggestion that the *T & E* decision would make it impossible for businesses to regulate their affairs, Justice Clifford concluded:

> almost without exception, any conveyance of industrial property today would be made not in a vacuum but in full appreciation of regulatory requirements that would surely embrace a condition such as the one on the [Orange] property. . . . Parties to such transactions will be able to accommodate themselves to the necessities of the situation. A seller of land dealing in an abnormally-dangerous activity such as the processing of radium can . . . arrange to have the cost of cure shifted to a purchaser and obtain indemnification from such purchaser against any downstream claims. Although the recording of such an agreement might not create a bar to third-party claims, it will surely alter the equities in respect of any claim of benefit-of-the-bargain damages by a successor in the chain.[80]

This same type of risk-allocating equity consideration should be applied by courts in assigning strict liability for yesterday's commercial practices. Only with the knowledge attributed to commercial parties by the court in the above discussion will former owners have the opportunity to protect themselves against the future economic liabilities posed by the handling of hazardous substances.

The environmental policy in New Jersey which dictates that "[t]hose who poison the land must pay for its cure"[81] is applauded. Future courts administering this policy should not do so narrowly. The application of strict liability is a valuable weapon in the plaintiff's arsenal and should remain viable. A strong common-law cause

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79 Ginsberg & Weiss, *Common Law Liability for Toxic Torts: A Phantom Remedy*, 9 HOFSTRA L. REV. 859, 918-19 (1981). Ginsberg and Weiss also suggest that this analysis will often result in no compensation for the plaintiff. This foreshadowing has been belied by the *T & E* decision, in which the plaintiff was able to supply abundant evidence of the industry's and scientific community's knowledge of risk and danger, as well as the defendant's.

80 123 N.J. at 401-02, 587 A.2d at 1264-65 (citations omitted).

81 State, Dep't. of Envtl. Protection v. Ventron Corp., 94 N.J. 473, 493, 468 A.2d 150, 160 (1983).

of action allows plaintiffs to move quickly, within the recognized limitations of today's overburdened court systems, to recover costs and to aid the state in reclaiming damaged natural resources. In this sense, private-party plaintiffs act as private attorneys general to enforce and supervise clean-up activities. But, like any police action, the power must not be abused. The plaintiff's available weaponry must be tempered by the basic notions of fair play and equity. Absolute lack of knowledge of the harm and the impossibility to foresee future risks will provide such equity without weakening the significant tool that the New Jersey Supreme Court has fashioned for private plaintiffs in environmental suits.