



# Strict Liability

Torts  
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**STRICT  
LIABILITY**

# **STRICT LIABILITY**

## Basic ideas:

- It doesn't matter how careful the defendant is.
- If you choose to engage in the activity, you're on the hook if someone or something gets hurt.
- But remember that the negligence defenses apply. So if the plaintiff really brought it on themselves, the defendant can avoid liability.
- Doctrinal structure: It's just like negligence, but duty and breach of duty are swapped for the existence of an absolute duty of safety.

## Negligence

- Duty of care owed to plaintiff
- Breach of duty
- Actual causation
- Proximate causation
- Injury (Damages)

# **STRICT LIABILITY**

## **Absolute duty of safety**

- Actual causation
- Proximate causation
- Injury (Damages)

# **STRICT LIABILITY**

## **Absolute duty of safety**

- Keeping of wild animals
- Trespassing livestock
- Domesticated animals with known, dangerous propensities
- Ultrahazardous (a/k/a abnormally dangerous) activities
- Defective products

**STRICT LIABILITY**

**Absolute duty of safety**

**Keeping of wild animals**

- "Wild" depends on the species, not the individual animal.
- "Wild" means not domesticated.
- Domestication takes place over generations, not one lifetime.
- Wild animal strict liability even applies to "mild" wild animals; e.g., baby deer.

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**Trespassing livestock**

Some generalities:

- Livestock are animals raised as part of a farming or ranching operation, including animals raised for meat, milk, eggs, wool.
- Dogs and cats aren't livestock.
- Archetypally this is about escaped livestock eating a neighboring farmer's crops.

Note there are two variations:

- fence-in/fence-out

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**Trespassing livestock**

- Fence in
  - This is the default rule.
  - Typical for "farm country."
  - The livestock keeper has a duty to fence in livestock.
  - Livestock keeper is strictly liable for livestock that escapes.
- Fence out
  - Typical for "ranch country."
  - The farmer of crops has a duty to fence out roaming livestock.
  - The livestock keeper is strictly liable for livestock that penetrates the fence.
- Fence-in/fence-out rules may be set by ordinance at the county level or portion of a county.

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**Domestic animals with known vicious propensities**

- Largely concerns dog bite injuries (but applies to other animals as well).
- If a domestic animal is known to the owner to be vicious, then the owner is strictly liable for injuries it causes.
- Having bit someone previously would be sufficient for "known vicious," but a bite is not necessary.
- This is not the only way dog bites create liability! There's also regular negligence, negligence per se, and often statutory causes of action.

## **STRICT LIABILITY**

### **Absolute duty of safety**

## **Ultrahazardous activities**

- "Ultrahazardous activities" and "abnormally dangerous activities" are two names for the same thing.
- Whether an activity qualifies is generally a question of law (meaning, for a judge to decide).
- Not about magnitude of harm: Something that is dangerous to just one person can qualify.
- Remember: This is not just for personal injury, it's for property damage too.

## **STRICT LIABILITY**

### **Absolute duty of safety**

## **Ultrahazardous activities**

Some key examples held to be ultrahazardous:

- blasting
- oil drilling
- fireworks (making, using, storing, transporting)
- explosives (making, using, storing, transporting)
- highly toxic chemicals (making, using, storing, transporting)
- crop dusting
- fumigation
- things involving radioactivity or nuclear reactions

## STRICT LIABILITY

### Absolute duty of safety

## Ultrahazardous activities

- No hard and fast rule about what activities qualify.
- Some oft-repeated, key ideas:
  - Danger cannot be eliminated even with utmost care
  - Uncommonness of activity
- "Ultrahazardous activities and substances all fall into the class where small triggers, physical or chemical, can release far larger forces." –Richard A. Epstein

## STRICT LIABILITY

### Absolute duty of safety

## Ultrahazardous activities

Restatement (Second) of Torts, § 520 factors, quote:

- 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.

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## Ultrahazardous activities

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One view of the § 520 factors: These are useful as a list of things to talk about in working through the policy choice, but they seem manipulable and not very determinative ...

## Query: crop dusting

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## Query: letting your 16-year-old drive your car to the movie theater

Restatement (Second) of Torts, § 520 factors, quote:

- a) existence of a high degree of risk of some harm to the person, land, or chattels of others;
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So instead of or in addition to the § 520 factors, you can reason by analogy from the list of key examples of ultrahazards ...

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Review ...

**Ultrahazardous activities**

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## STRICT LIABILITY

## Important context note

### Simultaneous availability of multiple theories of recovery

- As with all of tort law (and law generally), the availability or applicability of one cause of action does not preclude others!
  - (Footnote/caveat: There is such a thing in law called “preemption,” where a statute can preempt conflicting or encroaching common law, or where federal law can preempt encroaching/conflicting state law. But that’s an exception to the general rule, and it doesn’t apply here.)
- So on the same set of facts, a plaintiff could for instance sue on theories of regular negligence, negligence per se, and strict liability for domestic animals with known vicious propensities — all in the same lawsuit.
- That’s why Bard v. Jahnke is such a strange case. It violates general principles of common law jurisprudence and is clearly erroneous under accepted principles.
- So don’t take the majority in Bard as being representative of the law!
- But do take Bard as a warning that you never can know when a court will depart from the law and do something surprising—even incomprehensible.