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LOVE CANAL: COMMON LAW APPROACHES TO A MODERN TRAGEDY

By
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I. Introduction

Reports of indiscriminate and sometimes clandestine disposal of chemical wastes[1] continue to surface, documenting the heavy penalties society incurs for the benefits of modern chemical technology.[2] Economic growth, dependent on such technology, requires that waste management systems be cost-effective. Yet historically, industrial managers have failed to consider the additional costs of long range environmental damage. This shortsight-

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1. "A [chemical] dump is a waste disposal site that has been used without regard to pollution control and aesthetic impact." General Electric Co., Solid Waste Management Technology Assessment 261 (1975) [hereinafter GE Report]. The GE Report analyzes all the various solid waste processing and disposal methods now being used or considered. Section 7 covers the subject of sanitary landfills and deals with the following topics: types of landfills, technical considerations (e.g., site selection, landfill design, operation, equipment selection); ecological impact (e.g., land and water pollution, public relations); landfill economics; and the closing of dumps. The GE Report concludes that

> ground disposal of industrial chemical wastes should be avoided. Chemical wastes can be handled in concrete-lined vaults or can be treated in other ways, depending on their composition. This is usually a complex problem beyond the capability of any landfill operation. In areas with a high water table, or where leachate could become a potential problem, appropriate liners (clay or synthetic materials), together with a leachate collecting system, should be incorporated in the construction of the site.

Id. at 268.

2. *See* Nordland & Friedman, *Poison at Our Doorsteps*, Philadelphia Inquirer, Sept. 23-28, 1979, at 1.

edness is responsible for the onerous and inequitable distribution of both economic and social costs on today's society.

The magnitude of the problems is awesome. "[T]he country's 53 largest chemical companies have put 762 million tons of chemical wastes in 3,383 locations since 1950 . . . 94 percent [of which] has been disposed of on . . . the companies' property, . . . where it escapes regulation."[3] Even this represents only 6.7 percent of an estimated total of 51,000 sites throughout the country that are receiving chemical wastes at the rate of 35 million tons per year.[4]

Beyond the environmental and aesthetic damage, there remains the inequitable distribution of economic loss and personal injury caused by such chemical waste mismanagement. This Comment suggests common law remedies available to redress such damage, especially where statutory relief is nonexistent or not retroactively available.

A classic example of the problem is the Love Canal tragedy. After developing the salient facts of Love Canal, this Comment will explain the elements of a common law cause of action which might be brought by one or a class of the injured individuals. Three general lines of defense are developed which might reasonably be anticipated, namely, the applicable statutes of limitations, the state of the art as a limitation on duty, and the assumption of risk. Counterarguments appropriate to each defense will then be suggested.

II. The Love Canal[5]

William T. Love's dream was to build a model industrial city with convenient access to cheap hydroelectric power and major markets. In 1892, he proposed the development of such a project in Niagara Falls, New York, based upon a federal government feasibility survey which had been conducted fifty-six years earlier.

3. Epstein. *Dump Study Shows Scope of Problem*, Philadelphia Inquirer, Nov. 2, 1979, at 1, col. 1.

4. Jasen, *Major Risks are Posed by Years of Dumping of Industrial Wastes*, Wall St. J., May 22, 1979, at 1, col. 6.

5. N.Y. State Dep't of Health, Love Canal - Public Health Time Bomb (1978) [hereinafter cited as Love Canal Report]. *See* L. Ember, *Uncertain Science Pushes Love Canal Solutions to Political, Legal Arenas*, 58 Chem. & Engineering News 22 (Aug. 11, 1980).

Love envisioned the construction of a six- to seven-mile long navigable canal connecting the two branches of the Niagara River above and below the great cataract. A 300-foot water drop at the Niagara Terrace could be tapped for power generation, and the adjacent waterways in both directions would then provide the requisite transportation capability.

An advantageous feature of the area was the proximity of the projected power source to the anticipated site of power consumption. At that time, the only known method of power transmission was via direct current equipment; direct current cannot be transmitted efficiently over long distances.

Within two years, Love had successfully lobbied for a grant of an extremely liberal state charter and arranged for extensive financial backing in New York City. A factory had opened at the site and other industrial concerns clamored for space along the projected waterway; work began on the canal.

Then economic disaster struck. First, an economic depression dried up the financial backing, then Nikola Tesla invented the means to transmit electricity cheaply and efficiently over long distances by means of alternating current. Deprived of both funds and *raison d'être*, the project came apart. By 1910 its only vestige was a partially dug section of canal where children of the area went swimming.

Between the late 1920s and the early 1950s, the excavation was used as a disposal site, at first for municipal wastes, but later and during most of the period, for assorted chemical wastes. Hooker Chemical Company (Hooker), then owner of the property, generated most of the latter. In 1953, Hooker filled the excavation, capped it with a clay cover, and sold the property with its periphery (a total of sixteen acres in roughly rectangular form) to the Board of Education (Board) of the City of Niagara Falls (City) for one dollar. According to Hooker, the deed of sale included a warning "that chemicals were buried there and that Hooker would not be responsible for any injuries which might occur."[6] The Board of Education later reconveyed approximately six and one-half acres at the north end of the area to the city and six acres at the south end to a private developer, but retained three and one-half acres in the center on which to construct

6. Wall St. J., Sept. 5, 1979, at 37, (full page advertisement).

school. Developers built homes along the north and south edges of the canal excavation.

For a number of years, this "Public Health Time Bomb"[7] lay dormant and incubatory, although recent statistics reveal that, particularly among families living in the older homes in the southern sector of the area throughout that period, the frequencies of stillbirths, miscarriages, congenital malformations, and substandard birth-weights were higher than the accepted norms.[8]

In the fall of 1976, after a period of heavy rains, chemical odors became noticeable in home basements in the area. Shortly thereafter, chemical leachates were found to be seeping into the basements. Extensive publicity followed,[9] prompting a state investigation which identified more than eighty chemical compounds in the leachate samples and more than ten, including known carcinogens, in basement air samples.[10]

An Act of the New York Legislature in the spring of 1978[11] had, by the summer of 1979, resulted in the evacuation of some 239 families;[12] more evacuations are anticipated.[13] The State Department of Health ordered the school closed.[14] Finally, early in 1979, the Environmental Protection Agency (EPA) awarded a $4 million demonstration grant to the New York Department of Environmental Conservation, matched by an equal amount in state funds, to be applied to cleaning up the Love Canal.[15]

Discovery of the hazards associated with Love Canal and

7. *See* LOVE CANAL REPORT, *supra* note 5.

8. [1979] 10 ENVIR. REP. (BNA) 905.

9. *See* M. BROWN, LAYING WASTE (1979). Brown, at that time an investigative reporter for the Niagara Gazette, unearthed the story.

10. Some of the more important of these species included (in the leachates): benzene, toluene, benzoic acid, lindane, trichloroethylene, dibromoethane, benzaldehydes, methylene chloride, carbon tetrachloride, and chloroform; and (in the air): chloroform, benzene, tricholoroethylene, toluene, tetrachloroethylene, chlorobenzene, chlorotoluene, xylenes, and trichlorobenzene. LOVE CANAL REPORT, *supra* note 5, at 12, 29.

11. *Id.* at 26. 1978 N.Y. LAWS, ch. 487, §§ 1-3 (codified at N.Y. PUB. HEALTH LAW §§ 1385-87).

12. [1979] 10 ENVIR. REP. (BNA) 905.

13. Brown, *supra* note 9, at 54-58; Wall St. J., May 22, 1980, at 3, col. 4.

14. LOVE CANAL REPORT, *supra* note 5, at 25, 27-32.

15. [1979] 10 ENVIR. REP. (BNA) 3-4.

similar sites elsewhere,[16] plus the resulting publicity, have led to numerous federal and state legislative responses in addition to the New York enactment. These include the federal Resource Conservation and Recovery Act of 1976 (RCRA),[17] and the projected "superfund" amounting prospectively to billions of dollars funded jointly by government and industry.[18] Representative John J. LaFalce and Senator Daniel P. Moynihan of New York have jointly proposed a substitute "superfund," the Toxic Wastes and Torts Act,[19] which is intended to accomplish the same purpose, only retroactively as well as prospectively. Beyond this, no legislation now exists which offers relief to individual victims of Love Canal situations. While governmental proceedings against illegal chemical waste disposal appear to be on the way to realization,[20] there presently is no compensatory relief available to individual claimants.

III. A CAUSE OF ACTION AT COMMON LAW

The following develops the case of a Love Canal plaintiff who seeks money damages as compensation for personal injury and loss of property value allegedly suffered as a result of the nuisance inherent in (or developing from) the chemical waste disposal procedures practiced by Hooker. The case may be developed on a strict liability theory in the operation of an ultrahazardous or abnormally dangerous activity, or in the alternative, on a negligence theory.

16. *See* notes 3-4 *supra;* M. BROWN, *supra* note 9, at 99-221; J. Raloff, *Abandoned Dumps: A Chemical Legacy,* 115 SCIENCE NEWS 348 (1979).

17. 42 U.S.C. §§ 6901-6987 (1976). RCRA mandates elimination of open dumping of chemical wastes, regulation of landfills, and a "cradle-to-grave" inventory system for all hazardous materials. *See* Deland, *EPA Regulates Hazardous Waste,* 14 ENVT'L SCI. & TECHNOLOGY 777 (1980).

18. [1979] 10 ENVIR. REP. (BNA) 4, 223, 279, 522, 724, 766, 1744, 2263. "Superfund" is a proposed federal program, now under congressional consideration, to be jointly financed by the federal government and the chemical industry. Its general objective is to fund the cleanup of the numerous chemical waste dumps throughout the country. *See* Budiansky, *The Superfund Rides Again,* 14 ENVT'L SCI. & TECHNOLOGY 775 (1980); Ignatius, *Measure Creating Superfund to Cleanup Chemical Wastes is Voted by Senate Panel,* Wall St. J., June 30, 1980, at 8, col. 2.

19. H.R. 3797, 96th Cong., 1st Sess. (1979). The bill allows punitive damages for individuals exposed to hazardous wastes. *See* [1979] 10 ENVIR. REP. (BNA) 27, 39-40.

20. *See* notes 17 and 18 *supra.*

A. *Strict Liability in the Context of Love Canal*

The historical development of the strict liability doctrine for ultrahazardous or abnormally dangerous situations has been summarized by Professor Prosser.[21] Originating in the English case of *Rylands v. Fletcher*,[22] strict liability in tort places an onus for damages upon the defendant who, in the course of some "non-natural" use of his land, maintains a source of potential mischief which subsequently escapes and causes injury to the person or property of another.

The doctrine's modern formulation, as presented in the *Restatement (Second) of Torts*,[23] states that, given judicial characterization of an activity as "abnormally dangerous," liability of the actor for any resultant harm to the person, or to the real or personal property of another, follows as a matter of law,[24] notwithstanding either "utmost care to prevent the harm"[25] on the part of the actor, or his demonstrable lack of either intent or negligence[26] in any aspect of his conduct or management of the activity. Thus, in jurisdictions which recognize the doctrine, the preliminary question is whether the activity at issue may be characterized as "abnormally dangerous." The court answers this

21. W. PROSSER, LAW OF TORTS 505 (4th ed. 1971).

22. Fletcher v. Rylands, 159 Eng. Rep. 737 (1865), *rev'd* L.R. 1 Ex. 265 (1865), *aff'd*, L.R. 3 H.L. 330 (1868). In *Rylands*, defendant's reservoir failed and flooded plaintiff's land owing to the presence of several abandoned coal mine shafts lying long-forgotten beneath defendant's land. Defendant failed to discover the mine shafts during construction of the reservoir.

23. *See* RESTATEMENT (SECOND) OF TORTS §§ 519-524A (1976). Section 519 states:

> In determining whether an activity is abnormally dangerous, the following factors are to be considered:
>
> (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.

24. *Id.*, comment d.

25. *Id.*

26. *Id.* § 520, Comment b (1976).

question as a matter of law[27] on the basis of several factors, all of which are to be considered, but not all of which must be present.[28]

An abnormally dangerous activity is one which by its very nature or character entails a strong element of risk of harm, coupled with the probability that any harm thus incurred will be of major proportions.[29] The risk may well be of such a nature that no amount of reasonable care could be expected to eliminate it entirely.[30] The activity which creates this risk ought not to be one which is in common practice in the particular community;[31] it should be inappropriate to the place where it is being conducted.[32] Finally, there ought not to be any overriding or extenuating circumstances, with respect to the location where the activity is carried on, by reason of economic or other benefit to the community.[33] The stress on the location of the activity with respect to each of the enumerated factors, represents the American counterpart to the English concept of "non-natural" use of land as a prerequisite to the application of strict liability doctrine.[34]

According to the American formulation

> it is not possible to reduce abnormally dangerous activities to any definition. The essential question is whether the risk created is so unusual . . . as to justify the imposition of strict liability for the harm that results from it . . . [notwithstanding] all reasonable care. In other words, are its dangers and inappropriateness for the locality so great that, despite any usefulness it may have for the community, it should be required as a matter of law to pay for any harm it causes, without the need of a finding of negligence.[35]

In determining whether a given activity is "abnormally dangerous," the dominant consideration is the activity's relation to the totality of the circumstances; it must be judged by the relevant environmental, economic, and societal parameters within which it is carried on. The characterization of an activity as "ab-

27. *Id.*, Comment l.

28. *Id.*, Comment f. *See* note 23 *supra*.

29. *Id.*, Comment g.

30. *Id.*, Comment h.

31. *Id.*, Comment i.

32. *Id.*, Comment j.

33. *Id.*, Comment k.

34. *Id.*, *see* Comment j.

35. *Id.*, Comment f.

normally dangerous" is not contingent on some inherent quality or intrinsic property of the activity in isolation, or on some preconceived judicial notion of the meaning of "danger" in the abstract sense.

This formulation of the doctrine has still not been universally accepted in the United States. As of 1971,[36] it had been accepted in some form by thirty jurisdictions,[37] and explicitly rejected in seven others, including New York.[38] In 1971, in *Cities Service Co. v. Florida*,[39] the Florida Supreme Court considered and applied the *Rylands* doctrine to a situation markedly similar to both *Rylands* and Love Canal. The abnormally dangerous activity consisted of maintaining a settling pond for phosphate slimes produced as mine wastes. The slimes broke through a dam and contaminated state waterways. In affirming the trial court's partial summary judgment in the state's favor, the court quoted liberally from *Rylands* and concluded that "[a]dmitting the desirability of [the underlying activity], the rights of adjoining landowners and the interests of the public in our environment *require* the imposition of a doctrine which places the burden upon the parties whose activity made it possible for damages to occur."[40]

The New York Court of Appeals, in *Losee v. Buchanan*,[41] expressly rejected the *Rylands* doctrine. The rejection, however, was limited to the particular fact patterns of *Rylands* and *Losee* and to situations where there is no showing of defendant's negligence. (In *Losee*, a steam boiler explosion rained debris on plaintiff's

36. W. PROSSER, *supra* note 21.

37. *See, e.g.*, Berg v. Reaction Motors Division, Thiokol Chemical Corp., 37 N.J. 396, 181 A.2d 487 (1962); Enos Coal Mining Corp. v. Schuchart, 243 Ind. 692, 188 N.E.2d 406 (1962); Loe v. Lenhardt, 227 Or. 242, 362 P.2d 312 (1961); Wallace v. A.H. Guion & Co., 237 S.C. 349, 117 S.E.2d 359 (1960); Thigpen v. Skousen & Hise, 64 N.M. 290, 327 P.2d 802 (1958); Central Exploration Co. v. Gray, 219 Miss. 757, 70 So. 2d 33 (1954); Healey v. Citizens Gas & Electric Co., 199 Iowa 82, 201 N.W. 118 (1924).

38. Losee v. Buchanan, 51 N.Y. 476, 10 Amer. Rept. 623 (1873). *See also* Reynolds v. W.H. Hinman Co., 145 Me. 343, 75 A.2d 802 (1950); Jacoby v. Town of City of Gillette, 62 Wyo. 487, 174 P.2d 505 (1947); Turner v. Big Lake Oil Co., 128 Tex. 155, 96 S.W.2d 221 (1936); Gulf Pipe Line Co. v. Sims, 168 Okl. 209, 32 P.2d 902 (1934); Brown v. Collins, 53 N.H. 442, 16 Amer. Rept. 372 (1873).

39. 312 So. 2d 799 (Fla. 1975).

40. *Id.* at 804 (emphasis added).

41. Losee v. Buchanan, 51 N.Y. 476, 10 Amer. Rept. 623 (1873).

property.) New York cases decided after *Rylands* and *Losee* purportedly distinguished these cases on negligence grounds. These later cases have for the most part involved both planned[42] and accidental[43] explosions. For example, the New York Court of Appeals has overruled a trial court which held a defendant not liable for mere concussion damage caused by his blasting.[44] As Professor Prosser has observed "even the jurisdictions which reject *Rylands v. Fletcher* by name have accepted and applied the principle of the case under the cloak of various theories. Most frequently, . . . the same strict liability is imposed upon defendants under the name of nuisance."[45]

The blasting cases are relevant to Love Canal. Both involve legitimate industrial and commercial activity which is potentially abnormally dangerous considering the relevant environmental, economic and societal parameters.

In the Love Canal, the unseen nature of the underground chemical reactions enhances the danger. With respect to the blasting cases, Professor Prosser writes:

> [T]he strict liability is entirely a question of the relation of the activity to its surroundings; . . . the use of explosives on an uninhabited mountainside is a matter of negligence only, while any one who blasts in the center of a large city does so at his peril, and must bear the responsibility for the damage he does, despite all proper care.[46]

The disposal of chemical wastes in remote sites may yet involve some degree of negligence, but those who dump such materials in an urban milieu, notwithstanding any care assertedly taken in the process, do so at their own peril and should be strictly liable for damages which ensue. The explosion of dynamite or nitroglycerine is merely a fast chemical reaction of well-known chemical and physical characteristics and consequences. The

42. Sullivan v. Dunham, 161 N.Y. 290, 55 N.E. 923 (1900); St. Peter v. Denison, 58 N.Y. 416, 17 Amer. Rept. 258 (1874); Hay v. Cohoes Co., 2 N.Y. 159, 51 Am. Dec. 279 (1849).

43. Heeg v. Licht, 80 N.Y. 579, 36 Amer. Rept. 654 (1880).

44. Spano v. Perini Corp., 25 N.Y.2d 11, 250 N.E. 2d 31, 302 N.Y.S.2d 527, *on remand*, 33 App. Div. 516, 304 N.Y.S.2d 15 (1969).

45. W. PROSSER, *supra* note 21, at 512.

46. *Id.* at 514. *See* RESTATEMENT (SECOND) OF TORTS § 520, Comment j (1976) (incorporating the parable of the "uninhabited mountainside").

teractions of unneutralized and unsegregated chemical wastes discriminately mixed together (or even stored contiguously in ums which will inevitably rupture and leak) in a common disal site, especially where water is readily accessible to facilitate ixing of the wastes (as well as corrosion of the drums), make up congeries of slow chemical reactions having generally unspecifile but potentially disastrous consequences over long periods of me. Such chemical disposal sites constitute an abnormally dangrous condition and those responsible should be held strictly ible.

B. *Negligence in the Context of Love Canal*

The traditional elements of a negligence action are: (1) a ty recognized by law requiring the actor to conform to a certain andard of care to protect others from unreasonable risks; (2) a lure by the actor to conform to the standard; (3) proximate use; and (4) actual damage.[47]

Addressing the elements in reverse order, there is first no estion that plaintiffs have received actual injuries to both per- n and property. The report prepared by the New York Office of blic Health amply documents this element.[48]

Plaintiffs must also establish a causal connection between the fendant's conduct and the actual harm. This requires a showing proximate cause (legal cause)[49] which involves three compoents: cause-in-fact (the direct connection between cause and effct), foreseeability of the injurious effect as a result of the torus cause, and demonstrable absence of intervening causes.

The cause-in-fact element involves factual determinations d is therefore a jury question.[50] In the case of Love Canal, no ner contributory or causative events have ever been documented. Hooker acknowledges[51] that the chemical wastes were

47. W. PROSSER, *supra* note 21, at 143.
48. *See* LOVE CANAL REPORT, *supra* note 5, at 6-15.
49. W. PROSSER, *supra* note 21, at 236.
50. *Id.* at 237.
51. *See* Wall St. J., *supra* note 6. Hooker acknowledged the presence of the micals in Love Canal in a letter to the editor of the New York Times respondto an editorial which labeled Hooker's disposal practices at Love Canal as reless." The Wall Street Journal reprinted the letter in a full page advertiset on September 5, 1979.

present in the excavation. A state commission has reported the concentrations and identities of most of the chemical compounds[52] and has made statistical evaluations of injuries.[53] This report has been verified by a joint Federal HEW/EPA panel.[54] Since the chain of privity of title to the property is unattenuated,[55] an evidentiary basis for a finding of cause-in-fact seems iron-clad.

The next element of proximate cause is foreseeability of the risk. Chemical companies such as Hooker know, or at least should have reason to know on the basis of the training that every chemist, chemical engineer, and chemical technician receives, that no responsible chemical laboratory operation, whether under industrial, academic, or other auspices, would tolerate in its *small-scale* bench activities waste disposal practices analogous to the *large-scale* plant-level dumping practices conducted at Love Canal. Chemistry and chemical engineering laboratories characteristically and routinely maintain safe disposal vessels for different classes and types of compounds. When landfill disposal must be resorted to for lack of any reasonable alternative, they specify procedures calculated to avoid or at least minimize the known or knowable risks of environmental contamination or health hazard. They insist on rigid preventive and corrective standards and procedures relative to any possibility of present or future hazards arising from fire, explosion, toxicity, spillage, radiation, electricity, and the like.[56]

Since such hazards are well known at the laboratory level, it is reasonable to hold that they are foreseeable at the large-scale plant level. Thus, foreseeability in the Love Canal case is attributable to Hooker on the basis of its acknowledged expertise in chemical engineering and chemistry. Foreseeability at the time of sale of the property may also be inferred from the terms of the disclaimer clause which Hooker inserted in its deed to the Board.[57]

52. LOVE CANAL REPORT, *supra* note 5, at 12, 29. *See* note 10 *supra*.
53. *Id.* at 13-15.
54. [1979] 10 ENVIR. REP. (BNA) 905.
55. *See* note 6 *supra;* M. BROWN, *supra* note 9, at 8.
56. H. STRAUSS, HANDBOOK FOR CHEMICAL TECHNICIANS § 10-6 (1976).
57. *See* note 6 *supra*. One commentator has noted:
> The courts, of course, will decide who was liable for monitoring and maintenance: Hooker, which no longer owned the land, but which knew the nature

Regarding the possibility of intervening causes, two aspects of the case must be considered. First, in addition to Hooker's use of the excavation as a dump, the City had been using it for municipal wastes.[58] While municipal wastes, even when poorly handled, have been known to breed many ills (e.g., vermin, insects),[59] these have not included miscarriages, stillbirths and birth defects. Most municipal waste matter is biological in nature and therefore naturally degradable, or metallic and therefore subject primarily to chemical attack, or combustible and therefore periodically set afire under municipal control.[60] There is no information yet as to whether different parts of the site were used by the City and by Hooker, or whether the two types of waste were co-deposited. Neither has it been revealed whether the city practiced outmoded or unhealthful disposal methods or used recommended sanitary landfill procedures.[61] Nevertheless, regardless of which disposal options were utilized by the City, whether sanitary or not, segregated or co-deposited, the compounds detected in the home basements at Love Canal are of a type which could only have emanated from the chemical wastes placed there by Hooker.

There is also the question of possible intervening causes arising during the years between 1953, when the dump was closed, and 1976, when the effects became manifest. Hooker can assert that it placed a clay cover over the excavation at the time of closing the dump, and that this must have been disturbed afterward.[62] The plaintiffs can counterclaim that the manner in which Hooker closed the dump proved pitifully inadequate.[63] If one accepts Hooker's account, the clay cover should have precluded the operation of any intervening causes, except for occasional "ill-advised"[64] or temporary breaches of the cover. However, no new agency is named by which any intervening cause might have been introduced during these occasional lapses. In short, Hooker's argument that it had set up a passive preventive means of containing the contents of the dump and its failure to point out any agency responsible for adding materials in significant quantities during breaches of its clay cover effectively counter its claims of intervening causation during the period 1953-1976, or since.

It remains to be shown whether Hooker was under a duty of reasonable care and whether it failed to fulfill that duty. "Reasonable care in the use of a destructive agency imports a high degree of vigilance."[65] These words by Judge (later Justice) Cardozo succinctly define the duty owed in the management of potentially dangerous operations. In the Love Canal, Hooker had a duty to the community where its plant was located to use at least the same level of reasonable care and vigilance with respect to the foreseeable dangers of chemical contamination of the neighborhood over a reasonable length of time as would normally be practiced in its laboratories and other internal facilities with respect to equally dangerous and foreseeable conditions which might pose present or future health threats to its employees.

The unreasonably low standard of Hooker's care in the management and disposal of their chemical wastes is manifest in the equally low standard of their vigilance. The evidence indicates that common laboratory health and safety standards and procedures[66] were deliberately set aside by a presumably knowledgeable chemical corporation, upon going from laboratory scale to plant-scale operations. Harmful practices[67] which would not be

of the chemicals it buried there, and had the expertise to monitor and analyze for migrating chemicals; or the board of education and the city of Niagara Falls, which owned the land and developed it, but which might not have fully comprehended the nature of the chemicals disposed by Hooker, nor had the expertise and perhaps even the understanding to acquire outside expertise to monitor the site. Or the courts may find all liable.

L. Ember, *supra* note 5, at 26-27.

58. LOVE CANAL REPORT, *supra* note 5, at 3.

59. GE REPORT, *supra* note 1, at 261.

60. *Id.* at 217.

61. *Id.* at 217-69.

62. In his letter to the editor, Hooker's president said the company had "reason to believe [that the migration of chemicals] was due to the disturbance of the surface caused by ill-advised road construction." *See* note 51 *supra*.

63. The inadequacy of the dump closing is shown by the documented health hazard. [1979] 10 ENVIR. REP. (BNA) 905. Nevertheless, Hooker claims that its disposal practices conformed to the state of the art in the 1950s. *See* note 6 *supra*.

64. *See* note 6 *supra* where Hooker's president stated:

You say Hooker knew for years that wastes were escaping from the Love Canal. Not so. You have confused some isolated incidents in the late 1950s when some chemicals were uncovered after disturbance of the clay cap during ill-advised road construction, with the later and more serious issue of chemical migration which we have reason to believe was due to the disturbance of the surface.

65. Adams v. Bullock, 227 N.Y. 208, 210, 125 N.E. 93 (1919) (dictum).

66. *See* note 56 *supra*.

67. Examples would be storage of hazardous waste materials in open or leaking containers, careless admixture of materials of unknown compatibility, tolera-

wingly tolerated in defendant's laboratories became common-
ce once outside the operational sphere of Hooker's plant. The
asure of Hooker's failure in the fulfillment of its duty is the
elopment of the conditions which finally invaded the homes
lives of innocent people.

In future cases where the elements of negligence might not be
lear as in Love Canal, the doctrine of *res ipsa loquitur* might
employed as a means of showing negligence circumstantially.[68]
doctrine might be employed to demonstrate that injuries of
type affecting residents of the Love Canal area do not ordina-
take place absent negligence, that only Hooker had any con-
over the chemical wastes, that no contributory activity on the
of plaintiff homeowners could have occurred, and that defen-
t had greater access than plaintiff to knowledge of the true
ure of the agency or instrumentality, that is, the chemical
te dump, which caused plaintiff's injuries.

IV. Affirmative Defenses and Counterarguments

Aside from those lesser defensive arguments referred to in
foregoing section, which are directed toward specific aspects
he claims, three general lines of affirmative defense may be
vn: (1) the New York statute of limitations has run and there-
has foreclosed the suit; (2) reasonable care was taken to
ly maintain the excavation and its contents, that is, the mea-
s undertaken were consistent with the state of the art prior to
3 and Hooker's duty ceased when it sold the property, thereby
unizing Hooker from liability to any future owners; and (3)
ker gave adequate notice in its deed of sale that chemical
es were present on the property and since buyers and their
essors in title accepted title to the land and developed it not-
standing such notice, they either knowingly assumed the risk,
cked privity of contract with defendant, or both.

A. *The New York Statute of Limitations*

A statute of limitations is designed to accommodate conflicting pol-
icy considerations. On one hand, it seeks to achieve ultimate repose
at some point in time. On the other hand, it is designed to give the

f noxious fumes, and indifference to the presence of readily combustible or
aneously ignitable materials. *See* M. Brown, *supra* note 9, at 6.
8. W. Prosser, *supra* note 21, at 211.

injured party a reasonable length of time within which to assert his or her claim.[69]

The State of New York imposes a three-year statute of limitations on actions to recover damages for injury to property, for personal injury other than intentional torts, for professional malpractice, and in four other instances not relevant here.[70] The meaning of the three-year statute must be derived from another section of the New York law which specifies that "[t]he time within which an action must be commenced . . . shall be computed from the time the cause of action accrued to the time the claim is interposed."[71] The issue is: When does a cause of action "accrue"? As a rule, "knowledge of the cause of action is not required . . . [T]he statute of limitations is not tolled by ignorance."[72] In other words, in New York, a cause of action in tort accrues at the moment of injury whether or not the victim has knowledge of that fact. Consequently, it is possible for the statute to run before the injury is discovered.

The situation is further confounded by another subsection of New York law, which allows two years beyond the point of "actual or imputed discovery" of the cause of action before the statute of limitations expires.[73] This section limits the telling of the statute to instances where plaintiff discovers "or, in the exercise of reasonable diligence, could have discovered" his cause of action.[74] In practice however, this liberalization applies primarily to cases of fraud. Had the New York rules been otherwise, so that the basic three-year statute of limitations would have been tolled April 25, 1978,[75] when the state "discovered" and officially acknowledged the existence of a hazardous condition at Love Canal, Hooker could not have set up a statute of limitations defense until April 25, 1981. However, current interpretations of New York law would hold that the statute ran in 1956, three years after the last "injury" to persons before Hooker capped the excavation.

69. Phillips, *An Analysis of Proposed Reform of Products Liability Statutes of Limitations*, 56 N.C.L. Rev. 663, 665 (1978).
70. N.Y. Civ. Prac. Law § 214 (McKinney Supp. 1979).
71. *Id.* § 203(a).
72. *Id.* § C203:1 (McKinney 1972).
73. *Id.* § 203(f) (McKinney Supp. 1979).
74. *Id.* § C203:12 (McKinney 1972).
75. Love Canal Report, *supra* note 5, at 23.

New York is one of the jurisdictions not following the "discovery rule," the antithesis of the statutory provisions and interpretations quoted above. Under the discovery rule, a tort does not arise (or is not complete) and the ensuing cause of action does not "accrue," until the injured party *discovers* the injury. It is often invoked in medical malpractice suits, especially in cases of bodily ills involving long incubation times. Jurisdictions following the discovery rule recognize that, "[s]ince diseases are not as readily manifested to the injured plaintiff as are accidental injuries, it would seem that there should be a different accrual time for disease cases."[76] The same reasoning should apply to other injuries where the observable results take time to mature.

At least six different accrual times for diseases have been proposed: (1) when the negligent act occurs (the New York rule); (2) when the injury can reasonably be ascertained or manifests itself (by diagnosis); (3) when the latest exposure occurs (assuming continuous negligent activity); (4) when the disease occurs; (5) when the disease is discovered; and (6) when the dangerousness of the disease is discovered.[77] Analogizing these times to the Love Canal case, the statute of limitations might be said to run from these occasions: (1) when Hooker first began depositing the wastes; (2) when a chemist might first have recognized the danger; (3) when Hooker last deposited wastes; (4) when the chemical leachates and fumes invaded the homes; (5) when homeowners first noticed the chemical invasion; and (6) when public health officials recognized the full scope of the abnormal danger.

Reasonableness justifies the discovery rule. In *Urie v. Thompson*,[78] the Supreme Court pointed out the fundamental inequity of New York-type rules in a case where plaintiff contracted silicosis on the job. Justice Rutledge observed that such rules would imply "that at some past moment in time, unknown and inherently unknowable even in retrospect, [plaintiff] was charged with knowledge of the slow and tragic disintegration of his lungs. . . ."[79] The Court held that a plaintiff should not lose the compensation which was his due under the Federal Employers'

76. Comment, *Products Liability—Accrual and Limitations of Actions*, 35 TENN. L. REV. 335, 339 (1968).

77. *Id.*

78. 337 U.S. 163 (1948).

79. *Id.* at 169.

Liability Act (FELA) merely because of his "blameless ignorance."[80]

Two silicosis cases involving New York plaintiffs, decided prior to *Urie*, reached opposite results under different statutes. In *Pieczonka v. Pullman Co.*,[81] the case was tried in federal court under the New York State Labor Law. Plaintiff lost under the court's interpretation of New York's statute of limitations. The Court limited any recovery by plaintiff to actual injury inflicted during the three-year period of limitation. Long-term inhalation of dust which caused injury prior to the period was not recoverable. In *Sadowski v. Long Island Railroad Company*,[82] the case was tried in the state courts under FELA. The plaintiff there prevailed on a theory that defendant owed a continuing nondelegable duty "to furnish plaintiff with a reasonably safe place in which to work and reasonably safe appliances with which to do the work . . . [in] safety."[83]

Following these silicosis cases, the discovery rule continued to be invoked as a rule of reason in industrial inhalation cases involving berylliosis[84] and more recently, asbestosis,[85] but always in jurisdictions other than New York. The discovery rule has been expressly characterized as a rule of equity in a case involving deleterious side-effects of oral contraceptives.[86] However, in an allergy case where plaintiff waited well beyond the statutory period *after* having been apprised of the probable connection between her allergic reaction and a medication she was taking, the court held that even under the discovery rule, plaintiff had exhausted the two-year Texas statute of limitations.[87]

Other than by new legislation, the most likely way a statute of limitations defense in a Love Canal adjudication might be

80. *Id.* at 170. *See Developments in the Law - Statutes of Limitations*, 63 HARV. L. REV. 1177, 1204 (1950).

81. 89 F.2d 353 (2d Cir. 1937).

82. 292 N.Y. 448, 55 N.E.2d 497 (1944).

83. *Id.* at 457, 55 N.E.2d at 501.

84. Brush Beryllium Co. v. Meckley, 284 F.2d 797 (6th Cir. 1960); Ricciuti v. Voltarc Tubes, Inc., 277 F.2d 809 (2d Cir. 1960); Sylvania Elec. Products, Inc. v. Barker, 228 F.2d 842 (1st Cir. 1955).

85. Marjala v. Johns-Manville Products Corp., 523 F.2d 155 (8th Cir. 1975); Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973).

86. Raymond v. Eli Lilly & Co., 117 N.H. 164, 371 A.2d 170 (1977).

87. Roman v. A.H. Robins Co., Inc., 518 F.2d 970 (5th Cir. 1975).

overcome and the discovery rule introduced into New York would appear to be by direct attack in the courts, using the cases cited above and the inherently contradictory results of *Pieczonka* and *Sadowski* as departure points. In addition, a more recent New York decision, *Thornton v. Roosevelt Hospital*,[88] could conceivably provide another way to overturn New York's limitation doctrine.

In 1954, Sharon Thornton received treatment for chronic sinusitis at Roosevelt Hospital in New York City. As an aid to X-ray diagnostic visualization of her sinus cavities, doctors injected or implanted a small amount of radioactive thorium dioxide into her left maxillary region. Under New York law, the statute of limitations on her husband's eventual wrongful death action began to run at that moment. The statute ran in 1957, but it would be fifteen years before Mrs. Thornton or her doctors were aware of a fatal carcinoma. The trial court held her widower's wrongful death action to be "time-barred."[89] In a vigorous dissent, Judge Fuchsberg argued for the overruling of two earlier cases upon which the majority of the New York Court of Appeals and the courts below had relied as precedent.[90] Judge Fuchsberg cited cases from discovery-rule jurisdictions as well as law review articles calling for liberalization of the New York rule. He quoted an earlier dissenting opinion by two chief judges of the Court of Appeals who had reasoned that "it would be unreasonable and perhaps unconstitutional to hold that [the] time to sue expired before it was possible for [the plaintiff] to learn of the wrong."[91]

> The policy to be applied is akin to the powerful one governing infants' cases. We all recognize that it is wrong for a child too immature or too unaware of his or her right to act to be barred on that account. The adult victim of a drug whose injurious effect, like that of a time bomb, is either delayed or unknowable, is clearly as helpless to act as an infant. To the extent that there very well may be some awareness in the case of the infant, but none in the case of an adult in circumstances like those now before us, there may be even more reason for the law to extend its protection to the adult.[92]

Judge Fuchsberg closed by urging that the duty to reform New York judicial policy in this area rested upon the judiciary rather than upon the state legislature.

Relying on *Thornton* and other medical malpractice cases, it is possible to construct an argument which accepts the existing New York view on limitation of actions insofar as it applies to the medical cases, but distinguishes Love Canal situations sufficiently to bring them within the ambit of the special statutory provision so far applicable only to fraud cases.

Given the *Thornton* facts, it should first be recognized that in 1954, Mrs. Thornton had no reason to believe that she was being exposed to possible harm, nor perhaps did her doctors or Roosevelt Hospital.[93] None of the parties could have known at the time that the "invasion" of thorium dioxide would ultimately prove tortious. However, in terms of Love Canal situations, Hooker, as a technologically-based corporation possessing admitted expertise in chemistry and chemical engineering, may certainly be charged with at least constructive knowledge of: (1) the deleterious effects on human beings of the individual chemical substances being deposited; (2) the probability of production over time of other substances by chemical interactions among these substances plus the additional probability that the resulting chemical reaction products would also have deleterious effects on human beings; and (3) the proportional magnification of all these deleterious chemical effects according to the amounts of materials being deposited. Since Hooker undertook steps (although of doubtful sufficiency) to contain the chemical wastes and to bar trespassers while it held title to the site,[94] one might go so far as to conclude that Hooker had more than constructive knowledge.

Hooker knew, or reasonably should have known, at the time

88. 47 N.Y.2d 780, 391 N.E.2d 1002, 417 N.Y.S.2d 920 (1979).

89. *Id.* at 781, 391 N.E.2d at 1003, 417 N.Y.S.2d at 922. *Cf.* Thrift v. Tenneco Chemicals, Inc., Heyden Div., 381 F. Supp. 543 (N.D. Tex. 1974) (same substance administered but discovery rule applied).

90. Thornton v. Roosevelt Hospital, 47 N.Y.2d at 785, 391 N.E.2d at 1005, 417 N.Y.S.2d at 924. The cases cited: Schwartz v. Heyden Newport Chemical Corp., 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714 (1963); Schmidt v. Merchants Despatch Transp. Co., 270 N.Y. 287, 200 N.E. 824 (1936).

91. Schwartz v. Heyden, 12 N.Y.2d at 219, 188 N.E.2d at 146, 237 N.Y.S.2d at 719. Chief Judge Desmond and Judge (later Chief Judge) Fuld dissented citing, *inter alia*, Urie v. Thompson, 337 U.S. 163 (1948).

92. Thornton v. Roosevelt Hospital, 47 N.Y.2d at 785, 391 N.E.2d at 1005, 417 N.Y.S.2d at 924.

93. Doctors might not have fully appreciated the risks associated with radiation at that time. The literature on radiation effects was sparse and they might reasonably have believed that the dosage administered was harmless.

94. LOVE CANAL REPORT, *supra* note 5, at 28.

deposited the chemicals and afterward, that Love Canal was othing less than a tort waiting to occur. Indeed, a Hooker repre-ntative has revealed that the company has known about the ealth risks for at least twenty-two years, that is, five years after ne company closed and sold the dump, but kept quiet for fear of eing sued by the Board.[95] On the other hand, the lay population, ne Board, and the future homeowners, had no reason at that me to know that their future interests were, like Mrs. Thorn-on's body, being "invaded."

There is a critical distinction between the two situations. In *hornton*, none of the doctors could properly be charged with uilty knowledge of a tortious act when they implanted the radio-ctive substance in Mrs. Thornton's body. In the Love Canal situ-tion however, Hooker knew, or had reason to know, the long-rm impact of their conduct. Further, by installing the clay cover rior to conveying the property, the company effectively pre-nted discovery until a time well past the statutory period. An ridentiary showing that Hooker was cognizant of the impact of s actions and affirmatively sought to mask the meaning and ex-nt of the wrong, while admitting in its deed of sale only "that nemicals were buried there," should make out a prima facie case fraud. If so, plaintiffs could then invoke the two-year "alterna-ve" statute of limitations provision. While this argument might ell succeed in overcoming a statute of limitations defense under ne law as it currently exists in New York, the better solution ould be to adopt the discovery rule.

Besides the unfairness of the New York rule, two judges have so questioned its constitutionality. Dissenting in *Schwartz v. eyden Newport Chemical Corp.*, Chief Judge Desmond and dge Fuld characterized the result of the state's policy on limita-on of actions as "perhaps unconstitutional [under the New York onstitution]." Chief Judge Desmond reasoned that "[s]tatutes ncluding limitation laws) are not to be construed so as to deny e right to sue for a common law wrong."[96] The difficulty with is argument is that statutes of limitation, in their roles as stat-es of repose, are considered only to cut off the remedy, and not

95. [1979] CHEM. REG. REP. (BNA), at 29.

96. Schwartz v. Heyden, 12 N.Y.2d at 219, 188 N.E.2d at 146, 237 N.Y.S.2d at

the cause of action.[97] Hence the "right to sue for a common law wrong" is not denied by the statute; it is merely rendered inconsequential as to remedy.

B. Reasonable Care in View of the State of the Art, and a Reasonable Termination of Duty

A state-of-the-art defense is not applicable to the doctrine of strict liability. "The rule . . . is applicable to an activity that is carried on with all reasonable care, and that is of such utility that the risk . . . cannot be regarded as so great or so unreasonable as to make it negligence to carry on the activity at all."[98] "The justification for strict liability . . . is that useful but dangerous activities must pay their own way."[99]

However, the state of the art argument does provide a defense to a negligence action. Hooker might argue that up until the time it capped the site in 1953, it fulfilled its duty to act reasonably under the then existing state of the art. Further, it should not be held responsible for changes in the methods of chemical disposal since that time. Finally, there is a lack of proximate cause between the company's acts and the resulting injuries because such injuries were not foreseeable under the then existing state of the art.

If, during the time prior to 1953, the state of the art respecting chemical waste disposal had truly been nothing more than the measures taken by Hooker, as to both the operation and the covering of the Love Canal disposal site, a valid case might be made regarding reasonable care. However, as has been pointed out, common chemistry and chemical engineering laboratory practices have classically adhered to a standard or state-of-the-art which far exceeds the standard adhered to by Hooker concerning safety in the operational area.

These standard laboratory practices amount to a long-standing "custom" or "usage" within the context of those operational spheres frequented by professional chemists and chemical engineers almost since the days of the alchemists.[100] Nevertheless, one

97. N.Y. STATE LAW § 59 (McKinney 1972).

98. RESTATEMENT (SECOND) OF TORTS § 520, Comment b at 36 (1976).

99. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 614.4 (Supp. 1968).

100. *See* note 56 *supra*.

ght argue that the mere existence of superior standards at the oratory-level does not by itself impose the same standards on large scale industrial operations, at least absent other evi-nce of industry-wide adoption of such standards. Judge Hand's nion in the case of *The T.J. Hooper*[101] exposes the flaw in this ument.

The "T.J. Hooper," an ocean-going tugboat, hauled coal ges along the New Jersey coast. A barge it was towing sank er a sudden storm and a trial court held the tugboat owners ble for the loss. Affirming on appeal, Judge Hand pointed out t the "Hooper's" crew was unaware of storm warnings which d been broadcast by radio because the owners had failed to uip the "Hooper" with radio reception facilities. The tugboat possess transmission capability. The court held that the boat d been operating in an unseaworthy condition. Even though the k of any radio reception equipment aboard the boat conformed h then-existing federal regulations and with prevailing custom ong most tugboats, Judge Hand insisted that "when some have ught a device necessary, at least we may say that they were nt, and the others too slack. The statute does not bear on this uation at all."[102] Regarding the duty owed, Judge Hand argued t although

> in most cases reasonable prudence is in fact common prudence; . . . it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required.[103]

Likewise, in the Love Canal, the whole chemical industry y have "unduly lagged" in the modernization of its waste dis-al practices. If this is the case, Hooker should still be liable ause "there are precautions so imperative that even their *uni-sal* disregard will not excuse their omission."[104]

Hooper continues to be invoked as a counterargument to the ionalizations characterizing usual state-of-the-art arguments.[105]

101. 60 F.2d 737 (2d Cir. 1932).
102. *Id.* at 740.
103. *Id.*
104. *Id.* (emphasis added).
105. Hricko, *T.J. Hooper and the Air Bag*, 27 FED'N INS. COUNSEL Q. 233 7).

Further, "judicial action along the lines of the *T.J. Hooper* decision . . . could make it too expensive . . . to continue to ignore providing [the benefits of new advances]."[106] This incentive effect may be crucial since "[b]ased on historical precedent, voluntary action . . . is probably the least likely way in which change will occur. In the present climate of increasing . . . litigation and multimillion dollar judgments, however, manufacturers may wish to consider breaking historical precedent."[107]

Regarding Hooker's duty after it conveyed the Love Canal site to the Niagara Falls Board of Education in 1953, it is significant that Cardozo's definition of the duty of reasonable care[108] relied in part on his citation of *Braun v. Buffalo Gen. El. Co.*[109] *Braun,* like Love Canal, involved an abnormally dangerous instrumentality in an urban setting. Some fifteen years before the death of plaintiff's decedent, defendant had strung electric power lines above a vacant lot in Buffalo, New York. The insulation was rated to last only three years, and defendant failed to inspect the wires which in time became exposed. A carpenter working on a construction project at the site was electrocuted when he came into contact with the wires. The issue in the case revolved around defendant's duty where title to the vacant lot had changed hands during the intervening years, but where the abnormal danger continued to inhere in the situation created, ignored, and perhaps forgotten by defendant. A near-unanimous New York Court of Appeals held that

> a company maintaining dangerous wires should not be relieved on the ground of expense from the affirmative duty of exercising a reasonable degree of care to maintain proper insulation and thereby prevent accidents reasonably to be apprehended to those lawfully coming in the neighborhood of such wires.[110]

The main difference between the "affirmative duty" set forth above and that which would seem applicable in Love Canal is that in the former case, defendant continued to own and supply power to its lines (although the property beneath changed ownership), while in the latter situation, defendant ostensibly conveyed

106. *Id.* at 242.
107. *Id.* at 243.
108. *See* note 65 *supra.*
109. 200 N.Y. 484, 94 N.E. 206 (1911).
110. *Id.* at 490.

title to its wastes along with the excavation site and surrounding property. However, this difference is not a valid distinction. To demote the level of Hooker's duty relative to that of the Buffalo General Electric Company is almost to say that one may with impunity invest another with title to a ticking time bomb, while assuring the other that it is only an ordinary alarm-clock, and then walk away absolved of all further duty or responsibility for the other's safety.

Where an "affirmative duty," of the type asserted by the court in *Braun*, arises with respect to abnormally dangerous instrumentalities, such duty survives in time as long as the danger persists. The creator of such danger may convey its situs, but he cannot sell the danger itself. This is especially so when the creator of the danger possesses such a degree of expertise, as compared to that of the buyer, that he alone knows, or should reasonably be expected to know, the extent and degree of the danger.

C. *Assumption of the Risk by Buyers, and Lack of Privity with Subsequent Grantees*

The doctrine of *caveat emptor* in land sales has yielded slowly to the concept of implied warranties.[111] Two major reforms have resulted. There is a duty to disclose concealed dangers to purchasers, and sellers hold a residual liability for continuing risks (but only to those outside the premises conveyed).[112] In Love Canal, Hooker might claim either exception. Disclosure of a sort was effected within the deed of sale, and plaintiffs are homeowners and others who sustained their asserted injuries and losses within the boundaries of Hooker's original title.

Hooker might also argue that, having accepted conveyance despite the disclaimer, neither the Board nor its subsequent grantees can now be heard to assert lack of notice as to the risk. Furthermore, "[i]t is not necessary that [plaintiff] know or understand all of the causes or elements of the risk. . . . It is enough that he knows that there is an abnormal risk of serious harm. . . ."[113] Thus, even an understated disclaimer (that chemicals were buried there and that Hooker would not be responsible

111. *See* W. PROSSER, *supra* note 21, at 412.
112. *Id.* at 412-13.
113. RESTATEMENT (SECOND) OF TORTS § 523, Comment c (1976).

for any injuries which might occur) might be sufficient as to the Board, which plainly assumed the risk notwithstanding this warning. But was the buyer aware that there was an *"abnormal* risk" involved?

As to the subsequent grantees, the City, the independent developer, and the individual purchasers of homes, it could be argued they were not in privity with Hooker, and Hooker owed no duty to them. Rather, the Board, having received the warning, was itself under a duty to relay that warning to its buyers. Hooker has asserted just such a claim of lack of privity against plaintiff-homeowners, arguing that the company "had no responsibility to inform each subsequent nearby homeowner of the potentially dangerous chemicals buried in the vicinity."[114] Thus we are faced with the twin defenses of assumption of the risk with respect to the Board, and lack of privity with respect to all subsequent purchasers.

With respect to the assumption of the risk argument, plaintiff may counter with the argument that the land-sale transaction was unconscionable.

> The term 'unconscionable' does not have a fixed content. It is 'a general term encompassing a wide variety of factual situations.' It has been suggested that an unconscionable contract is one 'such as no man in his senses and not under delusion would make on the one hand, and no honest or fair man would accept, on the other.'[115]

Unconscionability has been related to unequal bargaining power, as when "a stronger party . . . has control of the negotiations due to the weaker party's ignorance, . . . unsophistication . . . or general naivete."[116] Unequal bargaining power need not, however, relate to bargaining power solely in an economic sense, as is usually the case.[117] It seems quite reasonable to assert that the "weaker party" may be weaker in a relative sense of inferior command or understanding of scientific or engineering technicalities involved in the bargain. Even a board of education may qualify in this respect. Ordinary citizens sitting on such a body are quite unlikely to have more than a lay comprehension of chemistry, and, faced with the "bargain" price of $0.0625 per acre, might

114. [1979] CHEM. REG. REP. (BNA), at 9.
115. J. CALAMARI & J. PERILLO, CONTRACTS 112 n.55 (1970).
116. *Id.* at 113.
117. *Id.* § 56.

be prone to overlook or to accept at face value the mildly written disclaimer, along with any verbal assurances which defendant may have offered, as sufficient justification for accepting the deal. In addition, the extremely small consideration is by itself grounds to suspect that the transaction was unconscionable.[118] Thus, where the "notice" contained in the deed concealed more than it revealed, and where only a nominal consideration was paid for sixteen acres, the entire transaction may be deemed a sham. A court would have to make such a finding as a conclusion of law.[119]

Since *MacPherson v. Buick Motor Co.*,[120] the privity doctrine has lost significance in the mixed tort-contract sphere, particularly in the areas of chattels,[121] and buildings,[122] although it remains strong in the area of undeveloped land. The privity defense has already been countered by the *Braun* argument discussed above relative to the continuing duty of Hooker with respect to the location of the risk which it created. The duty associated with an abnormally dangerous hazard should continue to inhere in the creator of that hazard despite the fact that he later sells the property. The privity defense must give way to the more imperative duty and subsequent reconveyances should be held irrelevant.

V. Summary and Conclusions

Love Canal is only one example of the burgeoning national problem of chemical waste disposal. This Comment has suggested the elements which might be argued in a common law cause of action, in situations where statutory relief is unavailable.

Such a cause of action, whether framed in strict liability for an abnormally dangerous condition or in negligence, is critically dependent upon a showing that defendant is an organization possessing acknowledged expertise in chemistry and chemical engineering. Consequently, defendant cannot be heard to claim ignorance of the likelihood that indiscriminate mixing of chemical wastes will create abnormal danger when deposited within urban limits; nor can defendant claim a lack of foreseeability or knowledge as to the results of the negligence involved in following less

118. *Id.* § 58.
119. U.C.C. § 2-302.
120. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).
121. W. Prosser, *supra* note 21, at 622.
122. *Id.* at 639.

than safe disposal standards for chemical wastes outside the plant than within their own laboratories.

Several lines of general defense have been offered along with the arguments with which to counter them. A state-of-the-art defense is negated in part by the long-standing existence of safe laboratory practices as a "custom" or "usage" of the chemistry and chemical engineering professions, which should have provided guidance for safe plant practices, and, in part, by Judge Hand's reasoning in *Hooper* that the omission of certain types of cautionary measures may not be countenanced on the basis of novelty or rarity. A termination-of-duty defense is countered by the argument derived from *Braun* that companies creating abnormal dangers have an ongoing duty to oversee them. An adequate notice defense fails for unconscionability of the sale contract, and a lack-of-privity defense runs head-on into *MacPherson*, or else into the imperative of continuing duty inferred from *Braun*.

Only a statute-of-limitations defense seems viable, and this only in a jurisdiction which, like New York, has thus far spurned application of the discovery rule. Here an argument designed to mount a direct attack upon the New York judicial position on limitation of actions has been offered. This argument derives from comparative analyses of the medical malpractice cases, involving long-term incubating illnesses as found in *Thornton*. In *Thornton*, general ignorance of the relevant phenomenology at the time of statutory accrual of the injury might arguably be presumed, whereas in Love Canal, given the expertise available to the defendant company, no such presumption could reasonably go unrebutted. Indeed, the presumptions might even suggest the opposite, that is, that Hooker deliberately and perhaps fraudulently withheld requisite information and knowledge in order to conduct its operations and abdicate its duty free of restrictions and at minimal expense. Unless the legislature acts, acceptance of the discovery rule in New York depends on a continuation of the themes advanced by Judges Desmond, Fuld, and Fuchsberg, concentrating on the absurdities of the present New York rule.

An adequate basis exists for a cause of action at common law against Hooker. The viability of such an action would be enhanced by acceptance in New York of the doctrine of strict liability for abnormally dangerous conditions; however, even without that doctrine, a credible case can be made out in negligence. Ei-

fective counterarguments exist against almost every conceivable defense. The sole exception is the statute-of-limitations argument which under the existing New York rule may be avoided by a showing of fraud. Nevertheless, the preferred solution requires the overruling of the present New York interpretation of its limitations law in favor of the more equitable principles embodied in the discovery rule.[123]

123. A bill is pending in the New York legislature which would make an exception to the statute of limitations in cases where personal injury or injury to property results or arises from "contact or exposure to a hazardous waste." In such cases, actions for damages may be commenced "within three years from the date of such injury, or . . . within two years from the earlier of either the date of the discovery of such injury or from date of discovery of fact which would reasonably lead to such discovery." 8789-A, 203d Sess. (Jan. 30, 1980).

RECENT DEVELOPMENTS

McLain v. Real Estate Board of New Orleans, Inc., 100 S. Ct. 502 (1980)

McLain v. Real Estate Board of New Orleans, Inc.[1] addresses the issue of whether section 1 of the Sherman Act[2] reaches an agreement among real estate brokers to fix commissions on the sale of property within their area.[3] *McLain* is important because it sets forth a more liberal version of the effect on commerce test under which section 1 litigants can establish jurisdiction.[4]

The Sherman Act was passed in 1890 pursuant to Congress' power under the commerce clause.[5] Congress then believed that the commerce power was a narrow one,[6] but intended, in passing the Act, to exercise that power to the utmost extent.[7] On the Senate floor before its passage, Senator George, a member of the Senate Judiciary Committee which redrafted the Act, said: "The bill has been very ingeniously and properly drawn to cover every case which comes within what is called the commercial power of Congress . . . ."[8] Representative Stewart expressed similar feelings immediately prior to unanimous adoption by the House of Representatives when he stated: "The provisions of this trust bill are just as broad sweeping and explicit as the English language can make them to express the power of Congress over this subject

1. 100 S.Ct. 502 (1980).

2. 15 U.S.C. § 1 (1976). This statute provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among several states . . . is hereby declared to be illegal . . . ."

3. McLain v. Real Estate Bd. of New Orleans, Inc., 100 S. Ct. 502, 505 (1980).

4. A litigant can also attempt to establish jurisdiction under the in commerce test. *See* text accompanying note 16 *infra*.

5. "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . . " U.S. Const. art. I, § 8, cl. 3.

6. *See, e.g.*, H.R. Rep. No. 1707, 51st Cong., 1st Sess. 1 (1890); Slater, *Antitrust and Government Action: A Formula for Narrowing* Parker v. Brown, 69 Nw. U. L. Rev. 71, 84 (1974).

7. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553 (1943).

8. *Id.* at 558 n.46, citing 21 Cong. Rec. 3147 (1890).