

CEE Special Symposium

A Discussion on the Tolerability
of Critical Infrastructure Risks

Legal Fallout: *Effectuating change in
acceptable risk determinations*

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Negligence

- Legal duty of care: A “shorthand expression of the sum of public policy considerations which lead the law to protect a particular plaintiff from harm.”

A balancing of considerations

- ***Foreseeability of harm***—is the general harm “likely enough in the setting of modern life.”
- Policy considerations may dictate no duty no matter how foreseeable the risk: (a) liability vastly out of proportion to fault; (b) no ability of D to “privately order” the risk load; (c) where D is not an “efficient” absorber of the risk.

- Closeness of connection between P's injury and D's conduct.
- "Moral blame" attached to D's conduct.
- Prevention of future harm.
- Extent of burden on D.
- Consequences to community of imposing liability on the D.
- Availability of insurance.

Strict Liability

- Doctrine “derives from *judicially perceived public policy considerations*” —
 - (a) enhancing public safety; (b) maximizing protection of the injured P; and (c) apportioning costs among Ds.

Strict Liability (products)

- *Design defect:*

“**Consumer expectation**” test: Product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.

“**Risk/benefit**” test: Benefits of challenged design, when balanced against such factors as the feasibility and cost of alternative designs, outweigh its inherent risk of harm.

- *Manufacturing defect.*
- *Failure to warn.*

Strict Liability (ultra-hazardous activity)

- Risk “is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability from the harm that results from it, even though carried on with due care.”

Applicability of Strict Liability

- Electricity ***can be a “product”*** subject to principles of strict liability ***in “appropriate cases.”***
- Once it passes the meter box, a “product” has been delivered. (Same for natural gas?)

- Does not apply “to defective electric transmission lines or defects anywhere along the distribution lines.” (Same for natural gas transmission lines?)
 - Electricity at this point *used only by the utility*, not a consumer.
 - Heavily regulated utilities may *not be able to “pass the burden.”*
 - *Questionable* whether strict liability “will provide an *economic incentive* to improve product safety” since most facets of operating transmission lines are regulated.
 - **Doubtful “burden of proving negligence by a public utility is so onerous that strict liability is required to achieve fairness.”**

Inverse condemnation

- ***Strict liability:*** Agency improves its property, triggering event causing damage to neighboring property.
- ***Reasonableness standard:***
 - (1) overall public purpose served by the improvement;
 - (2) degree to which P's loss is offset by reciprocal benefits;
 - (3) feasibility of alternatives with lower risks;
 - (4) severity of damage in comparison to risk-bearing capabilities;
 - (5) extent to which damage is considered a "normal risk" of land ownership;
 - (6) degree to which similar damage is distributed at large to other beneficiaries of the project or is peculiar only to P.

San Bruno Pipeline Rupture

Kills eight; injures more than 60.

Destroys 38 homes.

Extensive additional property damage,
including \$13 million in city infrastructure.

“A series of things went wrong.”*

(*taken from materials filed in court by plaintiffs)

Fabricated at “unknown” facility and built to “no known specifications.”

“An unknown” configuration of six “pups” welded together, but only externally—a “defect visible to the naked eye.”

No construction or as-built records.

No testing records.

A history of neglect^{*}

(*taken from materials filed in court by plaintiffs)

- Early 1970's, hydrostatic testing recommended—not done.
- By 1984, management knows about deferred pipeline safety projects, that Line 132 needs to be replaced and w/in 5 years b/c proximity to residential area
- In 1987, Bechtel warns pipeline records are incomplete and lines should be excavated.

- In 1999, US DOT issues report re benefits of using remotely controlled valves—not installed.
- 2003-08, series of explosions, reports chronicle many deficiencies in infrastructure, operations, response and protocols.
- 2007-08, internal audits of other lines reveal serious problems with inspections and records, even falsified records.

- In 2000, “Gas Pipeline Replacement Program” transferred to “Risk Management Program;” internal estimates of \$200 million in “savings” over 20 years in reduced testing and verification.
- From 2008-10, management reduces safety and compliance expenditures, deferring or eliminating integrity assessments and replacement.

On the other hand . . . *

(*taken from materials filed in court by plaintiffs)

Profits and executive compensation soar:

- SH equity and capitalization, \$11.2 billion and \$18.2 billion.
- Executive comp, over \$281 million.

*Cost to hydrotest segment of Line 132 that ruptured—**\$125,000***

The problem?^{*}

(*taken from materials filed in court by plaintiffs)

- “PG&E lacks a well defined documented risk policy/standard at the enterprise level.” One that explains:
 - “PG&E’s overall risk assessment *methodology*;
 - defines the lines of business roles and *responsibility*;
 - specifies the *requirements* for performing and documenting risks;
 - *links risk assessments* to controls, self-assessment, reviews and audits;
 - and specifies the requirements for *metrics* to track risks.”

The pivotal court ruling

- PG&E moves for summary judgment on punitive damages—we *may have been negligent*, but we ***didn't do anything bad enough*** to impose punitive damages.
- Court rules: “A corporate policy to maximize profits over safety can support an ***award of punitive damages.***”

Civil Liability

- Settles civil tort claims of 499 plaintiffs: **\$565 million**.

[Olympic pipeline explosion: settlement with two families, \$75 million (**\$98.8 million** in 2014 dollars)]

- Settles City's claims: **\$50 million** trust fund.
- SH lawsuit is next . . .

Civil Penalties

- CA PUC recommends: **\$2.25 billion**.

[Olympic penalties to federal and state agencies: **\$92 million**, including \$77 million for 5-year improvement plan.]

Criminal Liability

- Indicted for 12 violations of the Pipeline Safety Act
- But no individuals:
 - Prosecutors couldn't "connect the dots" to any one individual who ordered someone to do something that directly caused the explosion."
 - **It was the corporate culture that was established that emphasized shortchanging safety and appropriate regulatory responsibility that caused it to happen."** (Rep. Jerry Hill, San Mateo County)

- **Olympic:** Seven criminal counts (five felonies).
Federal Water Pollution Control Act, Hazardous Liquid Pipeline Safety Act, Rivers and Harbors Act

\$21 million in fines, extensive injunctive relief, “probation” for five years.

- **Olympic employees**

Vice-President and Chief Manager: Two counts (felony failure to have adequate training program and misdemeanor for initial leak). Faced six years; got **six months and a \$1,000 fine.**

Head of computer control: Three felony counts (operating and failing to correct valve that repeatedly malfunctioned and failing to provide adequate training). Faced 16 years; got **30 days and \$1000 fine.**

Computer operator: Misdemeanor release of gasoline. Faced one year; got **one year probation.**

Ultimately, the final risk/benefit analysis reflects the *community's* sense of **justice**

