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Common Law Liability for Leaking Underground Storage Tanks

MICHAEL J. MAHER*

Nationwide, it is estimated that there are over two million underground storage tanks ("USTs") in 750,000 different locations with over 100,000 confirmed leaks.¹ The Illinois State Fire Marshal has estimated that in Illinois, there are an estimated 80,000 USTs, of which 75 percent have leaked, are leaking or will leak.² USTs containing substances ranging from innocuous to extremely toxic are located throughout the state in factories, tank farms, recycling centers, corner service stations, office buildings, municipal buildings, residences, apartment buildings and farms. One drop of gasoline can contaminate a gallon of water. Approximately 5.5 million Illinois residents rely on groundwater for their drinking water.³ Improper installation, operation or maintenance of a UST can pose a significant environmental risk to persons residing both near and far from the UST.

This article analyzes Illinois common law causes of action against owners and operators of USTs for releases or spills resulting in off-site migration. Where available, Illinois cases involving USTs will be cited. However, due to the relative dearth of such cases, the application of common law theories to USTs will be analyzed by analogy. Finally, a small compendium of common law cases from other jurisdictions will be provided following each section. This compendium is not intended to be exhaustive.

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1. David W. Ziegele & Jay A. Evans, *Regulating Underground Storage Tank Systems*, 27 TRIAL 34 (Sept. 1991).

2. OFFICE OF STATE FIRE MARSHAL NEWSLETTER (Ill. State Fire Marshal), Spring/Summer 1991.

3. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, GUIDANCE MANUAL FOR PETROLEUM-RELATED L.U.S.T. CLEAN-UPS IN ILLINOIS 3-1 (Spring 1990).

I. GENERAL PRINCIPLES

Under Illinois common law, monetary damages and injunctive relief are available to parties suffering personal injury or property damage. Money damages seek to place the injured party in, as nearly as possible, the same position the party would have enjoyed but for the injury or damage.⁴ In 1989, the Illinois Supreme Court ruled that a complaint containing allegations of friable asbestos in insulation materials within schools pled an action for property damage.⁵ Applying this holding in 1990, a Federal District Court ruled that a plaintiff sufficiently pled an action for property damage by alleging that soils on-site were contaminated with hazardous substances.⁶ It is suggested that cases involving leakage or spills of substances into nearby soils or property will probably follow the above cases where the complaints alleging contamination in adjoining soils state an action for property damage.

The compensation appropriate for property damage depends on whether the injury is permanent or temporary.⁷ The proper compensation for permanent injury is the loss in fair market value. The proper compensation for temporary injury is the cost of restoration.⁸ The rule is not applied in a rigid manner and, in appropriate cases, Illinois courts have assessed restoration costs,⁹ damages for loss of value,¹⁰ damages for inconvenience and discomfort,¹¹ punitive damages,¹² and have granted injunctive relief.¹³

Although the State of Illinois has promulgated extensive regulations governing USTs,¹⁴ the Illinois Environmental Protection Act¹⁵ does not preempt common law actions.¹⁶

4. See, e.g., *Roark v. Musgrave*, 355 N.E.2d 91, 94 (Ill. App. Ct. 1976).

5. *Board of Educ. v. AC&S, Inc.*, 546 N.E.2d 580, 590 (Ill. 1989).

6. *Quadion Corp. v. Mache*, 738 F. Supp. 270, 275 (N.D. Ill. 1990).

7. See *Hudlin v. City of East St. Louis*, 591 N.E.2d 541, 553 (Ill. App. Ct. 1992).

8. *Id.* (citing *Arras v. Columbia Quarry Co.*, 367 N.E.2d 580, 583-84 (Ill. App. Ct. 1977)).

9. See *Rodrian v. Seiber*, 551 N.E.2d 772, 774-75 (Ill. App. Ct. 1990).

10. *Tamalunis v. City of Georgetown*, 542 N.E.2d 402, 409 (Ill. App. Ct. 1989), *appeal denied*, 548 N.E.2d 1079 (Ill. 1989).

11. See *Van Brocklin v. Gudema*, 199 N.E.2d 457, 462 (Ill. App. Ct. 1964).

12. See *Freese v. Buoy*, 576 N.E.2d 1176, 1183 (Ill. App. Ct. 1991) (applying principles from *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353 (Ill. 1978)).

13. See *Ariola v. Nigro*, 156 N.E.2d 536, 543 (Ill. 1959).

14. See ILL. ADMIN. CODE tit. 35, §§ 731.110-901 (1992).

15. 415 ILCS 5/1-5/56.5 (1992).

16. 415 ILCS 5/2(v) (1992); 415 ILCS 5/22.18b (1992); *Monmouth v. Illinois Pollution Control Bd.*, 313 N.E.2d 161, 163 (Ill. 1974).

II. TRESPASS

A trespass is an invasion of the right of exclusive possession or physical condition of land.¹⁷ The distinction between an intentional trespass and negligence is important in determining not only the relief available, but also in determining the necessity of proving actual damages.¹⁸ Generally, every intentional trespass justifies the award of nominal damages without proof of actual damages.

In Illinois, three types of conduct give rise to trespass: (1) conduct purposefully intended to cause an intrusion on the premises; (2) negligent conduct resulting in an intrusion on the premises; and (3) ultrahazardous conduct resulting in an intrusion, such that liability is absolute.¹⁹ Actions based on negligent conduct or ultrahazardous activities will be addressed separately in a later section of this article.

In adopting Sections 158 and 165 of the Restatement (Second) of Torts, the Illinois Supreme Court ruled that a person is liable for trespass not only for his or her entry onto the land of another, but also if he or she causes a thing or third person to enter onto such land.²⁰ Liability for intentional trespass attaches when the defendant acts with knowledge that his or her conduct will, to a "substantial certainty," result in the entry of a foreign matter onto the premises of another.²¹ Although research has disclosed no reported Illinois cases finding liability in trespass for leaking USTs, Illinois courts have previously found liability for one farmer's usurping another's acreage,²² a landowner's removal of trees from a neighbor's property,²³ shooting bullets onto neighboring property,²⁴ a municipality's improper management of a municipal sewer resulting in raw sewage pouring onto another's land,²⁵ and for encroachment by construction on another's land.²⁶

17. *Colwell Sys., Inc. v. Henson*, 452 N.E.2d 889, 892 (Ill. App. Ct. 1983).

18. *Dial v. City of O'Fallon*, 411 N.E.2d 217, 220 (Ill. 1980).

19. *Id.*

20. *Id.* Other jurisdictions have also addressed trespass issues in UST cases. *Rushing v. Hooper-McDonald, Inc.*, 300 So.2d 94 (Ala. 1974); *Pan American Petroleum Co. v. Byars*, 153 So. 616 (Ala. 1934); *Adkins v. Thomas Solvents Co.*, 487 N.W.2d 715 (Mich. 1992). See also *Shockley v. Hoechst-Celanese Corp.*, 793 F. Supp. 670 (D. S.C. 1992) (applying South Carolina law).

21. *Dial*, 411 N.E.2d at 220.

22. *Freese v. Buoy*, 576 N.E.2d 1176 (Ill. App. Ct. 1991).

23. *Rodrian v. Seiber*, 551 N.E.2d 772 (Ill. App. Ct. 1990).

24. *Statler v. Catalano*, 521 N.E.2d 565 (Ill. App. Ct. 1988).

25. *Dial v. City of O'Fallon*, 411 N.E.2d 217 (Ill. 1980).

26. *Ariola v. Nigro*, 156 N.E.2d 536 (Ill. 1959).

It is suggested that factors directly impacting a defendant's "substantial certainty" that a foreign matter will discharge from a UST onto another's land should include the following: the distance of the USTs from the property line; the extent to which the UST owner or operator is charged with knowledge of the geology of the site or the hydrology of the groundwaters; the composition of the UST at issue, including manufacturer's instructions for installation and maintenance and warnings about useful life or possible corrosion; the frequency of product inventory accounting; the frequency of tank tightness testing; any history of leaks, spills or overfills during tank filling or product dispensing; any history of tank inspections; any failure to take precautions against leaks; and any failure to reclaim or recover product following known spills or releases.²⁷

In non-UST trespass cases, Illinois courts have issued injunctions against further trespasses, issued mandatory injunctions [*e.g.* ordered clean-up]²⁸ and have assessed restoration costs,²⁹ damages for the value of property taken,³⁰ nominal damages only³¹ and punitive damages.³² Moreover, the First Appellate District has allowed actions claiming loss of business profits resulting from a trespass.³³

III. NUISANCE

A private nuisance is a civil wrong based on an interference in the use or enjoyment of an individual's land whereas a public nuisance is an act or omission causing inconvenience or damage to the public.³⁴ Actions for private nuisance can overlap with actions in trespass. In appropriate cases, both actions may be maintained.³⁵ The difference between a private nuisance and trespass is that a trespass is an invasion upon the land, whereas a private nuisance is a non-trespassory interference in the use or enjoyment of the land.³⁶

27. William B. Johnson, Annotation, *Tort Liability for Pollution from Underground Storage Tanks*, 5 A.L.R.5th 1 (1992).

28. *Ariola v. Nigro*, 156 N.E.2d 536 (Ill. 1959).

29. *O'Brien v. City of O'Fallon*, 400 N.E.2d 456 (Ill. App. Ct. 1980).

30. *Rodrian v. Seiber*, 551 N.E.2d 772 (Ill. App. Ct. 1990).

31. *E.g.*, *Freese v. Buoy*, 576 N.E.2d 1176 (Ill. App. Ct. 1991).

32. *Statler v. Catalano*, 521 N.E.2d 565 (Ill. App. Ct. 1988).

33. *Miller v. Simon*, 241 N.E.2d 697, 700 (Ill. App. Ct. 1968), *appeal denied sub nom*, *Simon v. Miller*, 612 N.E.2d 523 (Ill. 1993); *Falejczyk v. Meo*, 176 N.E.2d 10 (Ill. App. Ct. 1961).

34. See *Village of Wilsonville v. S.C.A. Services, Inc.*, 426 N.E.2d 824, 834 (Ill. 1981) (citing WILLIAM J. PROSSER ET AL., TORTS §§ 86, 88 (4th ed. 1971)).

35. *Colwell Sys., Inc. v. Henson*, 452 N.E.2d 889, 892 (Ill. App. Ct. 1983).

36. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 821(d) (1979)).

Conduct constituting a private nuisance necessarily involves a "substantial interference" with the use or enjoyment of a plaintiff's land as measured by the sensibilities of the ordinary reasonable person. Consequently, the use to which a plaintiff puts the land cannot involve abnormal sensibilities.³⁷ In the context of USTs, the issue of a plaintiff's sensitivity will depend upon the substance being leaked (e.g. mineral water vs. soft drink syrup vs. petroleum vs. dioxin) and the methodology or mechanism of the interference (e.g. emission of noxious fumes vs. groundwater contamination of a shared aquifer). In sum, courts will consider whether an ordinary person would suffer substantial interference in the use or enjoyment of the property³⁸ and balance this interference against the benefits to the community from a defendant's activity and the suitability of the activity to the location where it is conducted.³⁹

In analyzing whether a nuisance exists, a court will determine whether the source of the nuisance is permanent or temporary. A permanent nuisance continues indefinitely where the source of the interference is a lawful structure or where the defendant has a legal right to engage in the complained of activity. In such a case the nuisance can reasonably be expected to continue. Damages for a permanent nuisance are, therefore, the reduction in fair market value due to the continuing nuisance. A temporary nuisance is one which is occasional, intermittent or recurrent and is remediable, removable or abatable.⁴⁰ Nuisances caused by negligent construction of a structure or negligent operation of a legal enterprise are generally temporary.⁴¹ Proper damages for a temporary nuisance are measured by the personal inconvenience, annoyance and discomfort suffered,⁴² including injury to rental value.⁴³ In Illinois, the discharge of sewage is an abatable nuisance.⁴⁴ Damages for a temporary nuisance, therefore, are appropriate. It is suggested that when Illinois courts find a

37. *Belmar Drive-In Theatre Co. v. Illinois State Toll Highway Comm'n*, 526 N.E.2d 788, 790-91 (Ill. 1966).

38. *See id.*; *see also* *Schatz v. Abbott Lab., Inc.*, 281 N.E.2d 323 (Ill. 1972).

39. *Pasulka v. Koob*, 524 N.E.2d 1227, 1238 (Ill. App. Ct. 1988), *appeal denied*, 530 N.E.2d 250 (Ill. 1988).

40. *Tamalunis v. City of Georgetown*, 542 N.E.2d 402, 409-10 (Ill. App. Ct. 1989) (citing 58 AM. JUR. 2D *Nuisances* §§ 117-18 (1971), *appeal denied*, 548 N.E.2d 1079 (Ill. 1989)).

41. *Id.* at 410.

42. *Schatz*, 281 N.E.2d at 325.

43. *N.K. Fairbanks Co. v. Nicolai*, 47 N.E. 360, 361 (Ill. 1897).

44. *See Dierks v. Comm'r of Highways*, 31 N.E. 496, 501 (Ill. 1892).

nuisance from leakage or discharge from USTs, the courts will treat it as a temporary nuisance.⁴⁵

Cases involving interference with the use of a home or residence will generally focus on the loss of enjoyment and the annoyance caused by the nuisance. Cases involving businesses alleging temporary nuisance will generally focus on the loss of use or loss of profits caused by the nuisance.⁴⁶ Allegations of loss of profits raise complex issues of proof and must be pled carefully.⁴⁷

One Illinois court recently addressed a UST case alleging nuisance.⁴⁸ In *Malone v. Ware Oil Co.*,⁴⁹ the plaintiff alleged that the defendant's gasoline had seeped through ground soils into the plaintiff's basement. The court ruled that the plaintiff failed to prove that the defendant intentionally or negligently caused the release which resulted in the strong odor of gasoline being present in the plaintiff's basement. In so doing, the court disregarded evidence that the tanks leaked gasoline at the rate of .127 gallons per hour because this amount complied with a municipal ordinance's limit. The court also disregarded testimony that a cup of gasoline was spilled during tank filling on an average of three times per week, because "[t]his amount of spillage was obviously so small as to be insignificant."⁵⁰ However, the amount of gasoline "lost" in one single year from these two events was in excess of 550 gallons. Moreover, gasoline is so toxic that one drop can contaminate a gallon of drinking water. This fact was part of the reason why Illinois promulgated extensive UST regulations designed to prevent product losses of this magnitude.⁵¹ In all fairness, the court's decision was published within weeks of federal UST regulations becoming effective⁵² and before Illinois had promulgated its own UST regulations.⁵³ Nevertheless, the court's opinion

45. See, however, *O'Brien v. City of O'Fallon*, 400 N.E.2d 456, 459-60 (Ill. App. Ct. 1980).

46. *Schatz*, 281 N.E.2d at 325-26.

47. See 20 ILLINOIS DIGEST 2d *Damages* §§ 99, 103, 117 (West Supp. 1993).

48. *Malone v. Ware Oil Co.*, 534 N.E.2d 1003 (Ill. App. Ct. 1989). Other jurisdictions have addressed nuisance issues in UST cases. *Citizens & Southern Trust Co. v. Phillips Petroleum Co.*, 385 S.E.2d 426 (Ga. Ct. App. 1989); *Mel Foster Co. Properties, Inc. v. American Oil Co.*, 427 N.W.2d 171 (Iowa 1988); *Exxon Corp. v. Yarema*, 516 A.2d 990 (Md. Ct. Spec. App. 1986); *Cornell v. Exxon Corp.*, 558 N.Y.S.2d 647 (N.Y. App. Div. 1990).

49. 534 N.E.2d 1003 (Ill. App. Ct. 1989).

50. *Id.* at 1007.

51. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, GUIDANCE MANUAL FOR PETROLEUM-RELATED L.U.S.T. CLEAN-UP IN ILLINOIS (Spring 1990). See also ILL. ADMIN. CODE tit. 35, §§ 731.110-731.901 (1992).

52. 40 C.F.R. § 280 (1992).

53. ILL. ADMIN. CODE tit. 35, §§ 731.110-731.901 (1992).

disregarded testimony of spills during tank filling, that periodic tank tightness tests would probably have detected such leakage, and that regular product inventory accounting could detect leakage that might, otherwise, migrate onto neighboring properties. It is suggested that this decision may not be the last word on this issue.

IV. NEGLIGENCE

The general rule of property ownership is that an owner (or operator) of real property retains the privilege to use his or her property for any legitimate purpose, subject to due regard for others.⁵⁴ In order to state a property-based action in negligence, a plaintiff must allege the existence of a duty, a breach of that duty and damages resulting therefrom.⁵⁵ Questions of breach and causation are fact issues, but whether a legal duty exists between a UST owner or operator and a plaintiff is a question of law.⁵⁶ The existence of a duty regarding off-site plaintiffs depends upon whether the source of injury is a natural condition.⁵⁷ In determining whether a duty exists, Illinois has adopted the Restatement (Second) of Torts, which at Section 364 provides as follows:

A possessor of land is subject to liability to others outside of the land for physical harm caused by a structure or other artificial condition on the land, which the possessor realizes or should realize will involve an unreasonable risk of such harm, if

- (a) the possessor has created the condition, or
- (b) the condition was created . . . with the possessor's consent or acquiescence . . . , or
- (c) the condition was created . . . without the possessor's consent or acquiescence, but reasonable care is not taken . . . after the possessor knows or should have known of it.⁵⁸

54. *Dealers Serv. & Supply Co. v. St. Louis Nat'l Stockyards*, 508 N.E.2d 1241, 1245 (Ill. App. Ct. 1987).

55. *Id.* at 1243 (citing *Curtis v. County of Cook*, 456 N.E.2d 116, 118 (Ill. 1983)).

56. Other jurisdictions have addressed negligence issues in UST cases. *Exxon v. Yarema*, 516 A.2d 990 (Md. Ct. Spec. App. 1986); *P. Ballantine & Sons v. Public Serv. Corp.*, 70 A. 167 (1908); *New York Telephone Co. v. Mobile Oil Co.*, 473 N.Y.S.2d 172 (N.Y. App. Div. 1984); *Masten v. Texas Co.*, 140 S.E. 89 (N.C. 1927); *Lerro v. Thomas Wynne, Inc.*, 301 A.2d 705 (Pa. 1973); *Cooper v. Whiting Oil Co.*, 311 S.E.2d 757 (Va. 1984).

57. *Curtis*, 456 N.E.2d at 119.

58. RESTATEMENT (SECOND) ON TORTS § 364 (1976).

An underground storage tank is clearly an artificial structure on the land of which the owner has or should have knowledge. Moreover, given extensive state and federal list regulations (governing such issues as design, construction, installation, monitoring, product inventory and leak detection) and the fact that USTs are designed to hold extremely toxic substances, it is possible that Illinois courts might rule, as a matter of law, that UST owners and operators have a duty to use due care to prevent the off-site migration of toxic substances. In a similar case, one Illinois court ruled that the owner/possessor of realty owed a duty to his adjoining landowners where the property was knowingly used to dispose of flammable wastes.⁵⁹ It is suggested that, at a minimum, UST owners and operators owe their neighbors a duty to comply with all applicable state and federal UST regulations, and failure to comply with these regulations may constitute a *prima facie* case of negligence (*i.e.* violation of statute or administrative regulation).⁶⁰ In Illinois, such pleadings are not conclusive proof of negligence, but do constitute circumstantial evidence of negligence which can be rebutted by evidence that the defendant acted reasonably under the circumstances — despite the violation.⁶¹

Another method of establishing negligence is by pleading an action pursuant to the legal doctrine of *res ipsa loquitur*. In affirming a jury instruction in *res ipsa loquitur* against a gas company whose gas lines had lain undisturbed for seven years prior to an unexplained explosion, the Illinois Supreme Court ruled: “[T]he doctrine of *res ipsa loquitur* . . . [allows] proof of negligence by circumstantial evidence when the direct evidence [of] cause of injury is primarily within the knowledge and control of the defendant.”⁶²

In *Metz*, the court noted that natural gas is a dangerous commodity, and the gas company owned and installed the gas main and was solely responsible for its maintenance.⁶³ Seventeen years later, the court set forth the essential requirements:

To avail itself of the doctrine [*res ipsa loquitur*], plaintiff . . . [must plead] that he was injured (1) in an occurrence that would not have occurred in the absence of negligence, (2) by

59. *Dealers Serv. & Supply Co.*, 508 N.E.2d at 1244-45.

60. *Davis v. Marathon Oil Co.*, 356 N.E.2d 93, 97 (Ill. 1976).

61. *Id.*

62. *Metz v. Central Illinois Elec. & Gas Co.*, 207 N.E.2d 305, 307 (Ill. 1965).

63. *Id.*

an instrumentality or agency under the [exclusive] control of the defendant . . . , and (3) . . . the injury was not due to any voluntary act or neglect on the part of . . . [plaintiff].⁶⁴

Fact situations involving leakage from USTs are unlikely to involve contributory negligence by the plaintiff. Also, owing to a flexible interpretation of "exclusive control" (this includes nondelegable duties), it is unlikely this will be an issue.

As noted above, one Illinois Appellate Court has stated in dicta that "substantial quantities of gasoline can, in the ordinary course of affairs, escape from . . . a service station . . . without negligence on the part of the owner or operator of the [service] station."⁶⁵ This language is partially explained by the fact that Illinois UST regulations had not yet been promulgated and federal UST regulations had only been in effect for six weeks at the time of the ruling. Nevertheless, the court's statement is inconsistent with the purpose, breadth and scope of these complicated regulations which govern every conceivable aspect of UST ownership and operation. The best approach may be to allow plaintiffs to plead an action pursuant to *res ipsa loquitur*, thereby allowing defendants to submit proof that the conduct complained of was reasonable under the circumstances.

The damages available in UST-based actions for negligence are compensatory, with punitive damages allowed under certain circumstances. In non-UST property-based actions for negligence, Illinois courts have assessed damages for inconvenience and discomfort due to temporary loss of water by adjoining residents, diminution in value (permanent injury) or restoration costs (temporary injury),⁶⁶ and in specific cases, punitive damages.⁶⁷

V. STRICT LIABILITY

Illinois has adopted the century-old rule of *Rylands v. Fletcher*,⁶⁸ which imposes liability without fault on owners and users of land for harm resulting to others from abnormally dangerous activities and

64. *Lynch v. Precision Machine Shop, Ltd.*, 443 N.E.2d 569, 572 (Ill. 1982).

65. *Malone v. Ware Oil Co.*, 534 N.E.2d 1003, 1007 (Ill. App. Ct. 1989).

66. *Hudlin v. City of East St. Louis*, 591 N.E.2d 541 (Ill. App. Ct. 1992).

67. *Kemner v. Monsanto Co.*, 576 N.E.2d 1146, 1152 (Ill. App. Ct. 1991) (citing *Loitz v. Remington Arms Co., Inc.*, 563 N.E.2d 397, 401 (Ill. 1990)).

68. *Rylands v. Fletcher*, 3 H.L. 330 (1868).

conditions on the land.⁶⁹ This rule has been applied in cases involving unreasonably dangerous products⁷⁰ and ultrahazardous activities resulting in property damage⁷¹ or personal injury.⁷² The rule has not yet been addressed in the context of a UST case, although it has been applied in numerous instances involving the use of flammables and explosives.⁷³ In sum, the Illinois rule states that one is strictly liable — irrespective of whether he or she exercised the utmost care — when his or her conduct injures another or damages another's property via a thing or activity which is unduly dangerous and inappropriate to the place where it is maintained, taking into consideration the character of that location and its surroundings.⁷⁴

In determining whether an activity is "unduly hazardous" such that strict liability is applicable, Illinois courts have defined "unduly dangerous" as an activity "dangerous in its normal or non-defective state."⁷⁵ Because USTs normally contain highly toxic substances (e.g. gasoline contains benzene, ethylbenzene, toluene, xylene, ethyl dibromide and sometimes lead), it is clearly hazardous in its normal state.⁷⁶ It is suggested, however, that the better analytical approach is to focus on the activity involved — rather than the nature of the substances themselves.⁷⁷ Having adopted the Restatement,⁷⁸ Illinois courts analyze the activity involved according to the following factors:

- (1) whether the activity involves a high degree of risk of harm to others or their property;

69. *City of Joliet v. Harwood*, 86 Ill. 110 (1877).

70. *Suvada v. White Motor Co.*, 210 N.E.2d 182 (Ill. 1965).

71. *Fitzsimons & Connell Co. v. Braun*, 65 N.E. 249 (Ill. 1902).

72. *City of Joliet*, 86 Ill. at 111-12.

73. *Central Trust & Savings Bank v. Toppert*, 554 N.E.2d 820 (Ill. App. Ct. 1990); *Opal v. Material Serv. Corp.*, 133 N.E.2d 733 (Ill. App. Ct. 1956).

74. *Continental Bldg. Corp. v. Union Oil Co.*, 504 N.E.2d 787 (Ill. App. Ct. 1987); WILLIAM J. PROSSER ET AL., *TORTS* § 78 (4th ed. 1971); *RESTATEMENT (SECOND) OF TORTS* § 519 (1976).

Other jurisdictions have addressed strict liability in UST cases. *City of Northglenn v. Chevron U.S.A., Inc.*, 519 F. Supp. 515 (D. Colo. 1981); *Yommer v. McKenzie*, 257 A.2d 138 (Md. 1969); *Exxon Corp. v. Yarema*, 516 A.2d 990 (Md. Ct. Spec. App. 1986); *City of Bridgeton v. B.P. Oil, Inc.*, 369 A.2d 49 (N.J. Super. Ct. Law Div. 1976); *Snyder v. Jessie*, 565 N.Y.S.2d 924 (N.Y. App. Div. 1990); *Hudson v. Peavey Oil Co.*, 566 P.2d 175 (Or. 1977).

75. *Fallon v. Indian Trail School*, 500 N.E.2d 101 (Ill. App. Ct. 1986).

76. John A. Chanin, Comment, *Lust On Your Corner: Strict Liability, Victim Compensation, and Leaking Underground Storage Tanks*, 62 U. COLO. L. REV. 365, 371 n.41 (1991).

77. *Indiana Harbor Belt R.R. v. American Cyanamid Co.*, 916 F.2d 1174, 1181 (7th Cir. 1990).

78. *Continental Bldg. Corp.*, 504 N.E.2d at 790.

- (2) whether the harm which may result will be great;
- (3) whether the risk can be eliminated by due care;
- (4) whether the activity is a matter of common usage;
- (5) whether the activity is appropriate to the location where it is conducted; and
- (6) the activity's value to the community.

All of the above factors need not be present for an activity to be unduly dangerous.⁷⁹ The most important factors appear to be numbers 1 and 5 above, with the question of appropriateness of location being the critical determinant.⁸⁰ Interestingly, Comment j to Section 520 of the Restatement states that storage of large quantities of a highly flammable liquid, like gasoline, is not an abnormally dangerous activity in an uninhabited area, but the same activity can be abnormally dangerous in the midst of a heavily populated city.⁸¹

The Seventh Circuit Court of Appeals has noted that the baseline of tort liability in Illinois is negligence, such that when an activity can be made safer by the exercise of due care there is little need to invoke strict liability.⁸² Conversely, when an injury or damage cannot be prevented or minimized by the exercise of due care, the application of strict liability creates an incentive to prevent accidents (not by using more care, but) by modifying the activity or relocating it.⁸³ In essence, the application of strict liability requires that if the activity cannot be made safe by applying due care, the activity or its location should be changed. However, this policy may be impractical for neighborhood service stations with gasoline USTs.

In rejecting the extension of strict liability to manufacturers of acrylonitrile for a spill in a residential neighborhood, the Seventh Circuit found it important that acrylonitrile is not so corrosive or otherwise destructive that it would "eat through" the railroad tank car where it was stored during the spill.⁸⁴ On the other hand, petroleum's corrosive action on bare steel underground tanks, in conjunction with oxidation (rust) from moisture in the surrounding soils, can

79. RESTATEMENT (SECOND) OF TORTS § 520 cmt. f (1976).

80. *Indiana Harbor Belt R.R. v. American Cyanamid Co.*, 662 F. Supp. 635 (N.D. Ill. 1987); *Indiana Harbor Belt R.R. v. American Cyanamid Co.*, 517 F. Supp. 314 (N.D. Ill. 1981); RESTATEMENT (SECOND) OF TORTS § 520 cmt. j (1976).

81. RESTATEMENT (SECOND) OF TORTS § 520 cmt. j (1976).

82. *Indiana Harbor Belt R.R.*, 916 F.2d at 1177.

83. *Indiana Harbor Belt R.R.*, 916 F.2d at 1177 (citing *Anderson v. Marathon Petroleum Co.*, 801 F.2d 936, 939 (7th Cir. 1986)).

84. *Indiana Harbor Belt R.R.*, 916 F.2d at 1179.

“eat through” the tank in an average of fifteen years.⁸⁵ The court further suggested that the substance’s manufacturer was an improper defendant for purposes of strict liability, implying that the shipper/transporters were more appropriate defendants. In the case of leaking USTs, the owners/operators would probably be the appropriate defendants in a legal action. The UST owners and operators are the individuals charged by state and federal regulations with responsibility to ensure that leaks and spills do not occur and to conduct a clean-up if a spill occurs.⁸⁶

Federal law already imposes strict liability for violation of federal UST regulations.⁸⁷ In 1987, the Illinois General Assembly directed the Illinois Pollution Control Board⁸⁸ to promulgate underground storage tank regulations for Illinois which were identical-in-substance with the federal UST regulations.⁸⁹ Although there are no cases specifically construing liability under Illinois’ UST regulations, it is presumed that the State’s identical-in-substance regulations also impose strict liability.

Finally, the Illinois Environmental Protection Act renders owners and operators of USTs liable to the state for all costs incurred by the state in preventing or correcting releases of petroleum⁹⁰ and liable for all costs of enforcing the State’s identical-in-substance regulations. Although the statute does not explicitly address intent, the plain language of the Act appears to be a pure cost recoupment mechanism, irrespective of fault. It would be ironic — although not unheard of — for the state to impose strict liability for its own costs and damages, but not for innocent third parties seeking to redress similar damages caused by the same event(s).

85. Heidi E. Brieger, Comment, *Lust and the Common Law: A Marriage of Necessity*, 13 B.C. ENVTL. AFF. L. REV. 521, 527 n.36 (1986) (citing Congressional Research Service, U.S. Congress, *Leaking Underground Storage Tanks: A Potential Environmental Problem*, Pub. No. 84-508 ENR (1984)).

86. 42 U.S.C. §§ 6901-6992 (1988); 40 C.F.R. § 280 (1992); ILL. ADMIN. CODE tit. 35, §§ 731.110-731.901 (1992).

87. 42 U.S.C. 6928(g) (1988); *United States v. Allegheny Metal Finishing Co.*, 696 F. Supp. 275, 287 (W.D. Mich. 1988); *United States v. Liviola*, 605 F. Supp. 96, 100 (N.D. Ohio 1985).

88. See Michael J. Maher & Karen Rosenwinkel, *A Guide Through Illinois’ Environmental Regulatory Maze*, 78 ILL. B.J. 18 (Jan. 1990).

89. 1987 ILL. LAWS 3607 (amending ILL. REV. STAT. ch. 111½ para. 1022.4(e)).

90. 415 ILCS 5/22.18a (1992), *repealed by* 1991 ILL. LAWS 1810.