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"The Wrong Approach at the Wrong Time?": Maine Adopts Strict Liability for Abnormally Dangerous Activities in *Dyer v. Maine Drilling and Blasting, Inc.*

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“THE WRONG APPROACH AT THE WRONG TIME?”:
MAINE ADOPTS STRICT LIABILITY FOR
ABNORMALLY DANGEROUS ACTIVITIES IN *DYER*
V. MAINE DRILLING AND BLASTING, INC.

Matthew Cobb

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I. INTRODUCTION

In 2009, the Maine Supreme Judicial Court, sitting as the Law Court, held in *Dyer v. Maine Drilling and Blasting, Inc.*¹ that strict liability should be applied to abnormally dangerous activities in accordance with the *Restatement (Second) of Torts* §§ 519-20.² In doing so, the court expressly overruled its decision in *Reynolds v. W.H. Hinman Co.*,³ which had rejected a strict liability approach to blasting cases in favor of a negligence-based standard.⁴

In *Dyer*, a majority of the Law Court vacated the trial court’s grant of summary judgment for Maine Drilling and Blasting, Inc. (Maine Drilling)⁵ and held that strict liability should be applied in cases that involve abnormally dangerous activities.⁶ The majority explained that policy approaches regarding strict liability had shifted in the more than fifty years since the court’s decision in *Reynolds* and that almost every other state now applied strict liability in abnormally dangerous activity cases.⁷ Furthermore, the majority maintained that because the

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1. 2009 ME 126, 984 A.2d 210.

2. RESTATEMENT (SECOND) OF TORTS §§ 519-20 (1977). §§ 519-20 provide, in relevant part: §519. General Principle

(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

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

§ 520. Abnormally Dangerous Activities

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.

3. 145 Me. 343, 75 A.2d 802 (1950).

4. *Id.* at 361, 75 A.2d at 811.

5. *Dyer*, 2009 ME 126, ¶ 37, 984 A.2d at 220.

6. *Id.* ¶ 18, 984 A.2d at 216.

7. *Id.*

legal basis upon which *Reynolds* was decided had “fallen into jurisprudential disrepute . . . [the court] must allow that rule to change.”⁸ The dissents, however, contended that there was no need to adopt a strict liability standard because it was very likely the Dyers could recover damages by showing causation under *Reynolds*’s negligence standard⁹ and, therefore, principles of stare decisis weighed against needlessly overturning viable precedent.¹⁰

Although “blasting [is regarded] as a paradigm of the abnormally dangerous activities category” under the theory of strict liability,¹¹ the dissents were correct that there was no need to overturn *Reynolds* because it was very likely that the Dyers could have recovered under the negligence standard established by that decision. Moreover, as many courts and commentators have argued, strict liability should only be applied in an abnormally dangerous activities case when the plaintiff has demonstrated that proving negligence would be impossible.¹²

Part II of this Note will examine the Law Court’s prior opinions in blasting cases and Part III will analyze the *Dyer* decision. Part IV will then demonstrate that the dissents properly brought into question the rationales the majority utilized as justifications for imposing strict liability. Part IV will also examine how section 520 should be applied in future cases and will argue that whether strict liability should be imposed on a given activity is a decision best left to the discretion of the Legislature. This Note will conclude by maintaining that the scope of common law strict liability in Maine should remain limited.

II. AN OVERVIEW OF BLASTING CASES IN MAINE

In the 1950 case of *Reynolds*, the Law Court declined to impose strict liability on blasting activities in favor of a negligence-based standard of care.¹³ In that case, the plaintiffs alleged that their home had been damaged by seismic vibrations from W.H. Hinman’s blasting operations during a public construction project along Route 1 in Bath, Maine.¹⁴ The court found that it was unnecessary to adopt strict liability “in order to do justice to a plaintiff” because if “proper emphasis is laid on the test of *due care according to the circumstances*, then the theory of negligence will generally be sufficient” to allow the plaintiff to recover for injuries incurred from blasting.¹⁵ The court also noted that there were “no unanimously approved rules or criteria” that could be employed to distinguish between dangers that require ordinary care and those that are deemed extra hazardous.¹⁶ Even so, the court reasoned that juries, when presented with the question, would usually find that the degree of care “will increase in proportion to the danger to be apprehended

8. *Id.* ¶ 28, 984 A.2d at 218 (citations omitted).

9. *Id.* ¶ 41, 984 A.2d at 221 (Alexander, J., dissenting).

10. *Id.* ¶¶ 45-47, 984 A.2d at 222.

11. See Kenneth W. Simons, *The Restatement (Third) of Torts and Traditional Strict Liability: Robust Rationales, Slender Doctrines*, 44 WAKE FOREST L. REV. 1355, 1364 (2009).

12. See Gerald W. Boston, *Strict Liability for Abnormally Dangerous Activity: The Negligence Barrier*, 36 SAN DIEGO L. REV. 597, 631-40 (1999).

13. *Reynolds*, 145 Me. at 361, 75 A.2d at 811.

14. *Id.* at 343, 75 A.2d at 802-03.

15. *Id.* at 351, 75 A.2d at 806 (citation omitted).

16. *Id.* at 349, 75 A.2d at 805 (citations omitted).

in case of neglect,” and that accordingly “the amount of care required of a blaster” will be very high.¹⁷ Five years later, the Law Court applied this negligence standard in two blasting cases: *Albison v. Robbins and White, Inc.*¹⁸ and *Cratty v. Samuel Aceto and Co.*¹⁹

In *Albison*, a group of homeowners claimed that their properties had been damaged by the defendant’s blasting of ledge for a sewage tunnel as part of a general contract with the city of Waterville.²⁰ The homeowners alleged that Robbins and White’s superintendent had been informed that vibrations from the blasts were causing severe damage to their property and that he had responded by stating he was using the smallest charges of dynamite possible, even though he never attempted to determine if he could remove the ledge effectively with a lesser charge.²¹ Thereafter, he continued to use the same methods and the same amount of dynamite as before, causing further damage to the homeowners’ properties.²² The court, citing its decision in *Reynolds*, explained that “ordinary care depends on the circumstances of each particular case. Where the risk is great a person must be especially cautious.”²³ Accordingly, the court found that the “defendant was indifferent to probable consequences, which is the highest form of negligence” and that “a slower method with more moderate charges of the explosive, would (if it had been tried) have caused little or no damage.”²⁴ The court reaffirmed that “[t]here is no absolute liability for damage by blasting. There is liability for damage which takes place from blasting carried on in a negligent manner.” Two days later, the court further developed this negligence standard with its decision in *Cratty*.

Similar to the facts in *Albison*, the plaintiff in *Cratty* claimed that his home’s foundation had been cracked by shockwaves from the defendant’s blasting, which had taken place within 200 feet of his house, in connection with the laying of a sewer line for the Waterville Sewage District.²⁵ However, unlike in *Albison*, *Cratty* could not establish either the amount of dynamite being used or the methods employed by Samuel Aceto and Co., or that the blasters had any knowledge of the property damage they had allegedly caused.²⁶ Despite this lack of evidence, the Law Court found that to establish negligence in a blasting case “[i]t may not be necessary for a plaintiff to show . . . evidence as to the amount of explosive being used or the method or manner of its use” and that negligence may be proven “by any evidence that is relevant and material, although it may be circumstantial.”²⁷ The court further explained that the doctrine of *res ipsa loquitur* could be employed by a plaintiff in situations “where the circumstances are, as here, most uncommon, unusual, unexpected and extraordinary, and the damage is such that it would not

17. *Id.* at 351, 75 A.2d at 806 (citation omitted).

18. 151 Me. 114, 116 A.2d 608 (1955).

19. 151 Me. 126, 116 A.2d 623 (1955).

20. *Albison*, 151 Me. at 117, 116 A.2d at 610.

21. *Id.*

22. *Id.*

23. *Id.* at 122, 116 A.2d at 612.

24. *Id.* at 125, 116 A.2d at 613.

25. *Cratty*, 151 Me. at 126, 116 A.2d at 624-25.

26. *Id.* at 128, 116 A.2d at 625.

27. *Id.* at 131, 116 A.2d at 626 (internal quotations omitted).

ordinarily have occurred if the user of the dangerous instrumentality had the required knowledge, and proper care had been exercised in its use."²⁸

The court, in crafting its opinion, maintained that it is "rare that damage is caused to adjoining property[] if the blaster uses the reasonable care that the law requires that he should use. This is common knowledge to every school boy and to every adult citizen."²⁹ This negligence-based approach, established in *Reynolds* and expanded upon in *Albison* and *Cratty*, remained firmly fixed in Maine law over the next fifty years and was still being applied as recently as the 2007 case of *Maravell v. R.J. Grondin and Sons*.³⁰

In *Maravell*, the plaintiff claimed that she had sustained hearing damage from blasts conducted as close as eighty-five feet from her office during the construction of a shopping mall.³¹ She contended that Grondin, the general contractor, had "negligently failed to exercise reasonable care in 'implementing, contracting for, and overseeing' the blasting."³² The Law Court, citing *Albison* and *Cratty*, noted that "the standard of care of a blasting contractor may lie within common knowledge,"³³ but went on to explain that because "a layperson could not say precisely what provisions a general contractor is required to make for the taking of precautions[,] [e]xpert testimony is, therefore, necessary to establish the duty of a general contractor."³⁴

A report produced by Maravell's expert witness concluded that the subcontractor could have better controlled the ground vibrations, air blasts, and noise from the blasting "by, among other things, decreasing the hole depth and diameter; reducing the number of holes per blast and pounds per delay; providing ear protection; and constructing artificial noise barriers."³⁵ The court concluded that a "fact-finder could reasonably infer that Grondin was required to exercise reasonable care to ensure" that the subcontractor took the precautions mentioned in the report.³⁶

The court also dealt with the issue of whether W/S Biddeford Properties, LLC could be held liable as the owner of the property upon which the blasting took place.³⁷ After explaining that a landowner can be held liable for the activity of a third party that takes place on the landowner's property if they are aware that the activity will cause harm and the landowner fails to exercise reasonable care to prevent the injury,³⁸ the court found:

Here blasting, an inherently dangerous activity, was being conducted within eighty-five feet of Maravell's office, apparently with no sight, sound, or blast

28. *Id.* at 133, 116 A.2d at 627.

29. *Id.* at 131, 116 A.2d at 627.

30. 2007 ME 1, 914 A.2d 709.

31. *Id.* ¶ 2, 914 A.2d at 711.

32. *Id.* ¶ 3, 914 A.2d at 711. Maravell also commenced actions against McGoldrick Brothers Blasting Services, Inc, which was subsequently settled, and against the shopping mall's property owners, W/S Biddeford Properties, LLC, who were made parties to this appeal. *Id.*

33. *Id.* ¶ 12, 914 A.2d at 713.

34. *Id.*

35. *Id.* ¶ 13, 914 A.2d at 713.

36. *Maravell*, 2007 ME 1, ¶ 13, 914 A.2d at 711.

37. *Id.* ¶ 16, 914 A.2d at 714.

38. *Id.*

barrier in between. Because W/S Biddeford's knowledge of that risk may be imputed, the only issue in dispute is whether the risk was unreasonable. The record, as it presently stands, does not permit the court to conclude, as a matter of law, that there is no dispute as to material fact that the risks of injury from blasting eighty-five feet from Maravell's office were not unreasonable. As there remain disputes as to this material fact regarding W/S Biddeford's liability, the summary judgment in their favor must be vacated.³⁹

Despite the fact that the Law Court had consistently applied the negligence standard to blasting cases for over fifty years, just three years after the *Maravell* decision the court rejected that standard with its opinion in *Dyer*, overruling *Reynolds* and its progeny in favor of a strict liability approach to abnormally dangerous activities.⁴⁰

III. THE *DYER* DECISION

A. *Factual Background and Procedural History*

Vera Dyer's home in Prospect, Maine is thought to be over seventy-years-old and has a cement floor and foundation.⁴¹ In the fall of 2004, Maine Drilling gave Ms. Dyer notice that it would be blasting rock near her home as part of a construction project in connection with the replacement of the Waldo-Hancock County Bridge.⁴² Maine Drilling conducted a pre-blast survey of the Dyer home and the surveyor noted concrete deterioration in one of the walls and cracking of the concrete flooring.⁴³ Ms. Dyer's son, Richard Dyer, also documented the condition of the home by videotape prior to the blasting.⁴⁴ Subsequently, Maine Drilling "conducted over 100 blasts between October 2004 and early August 2005. The closest blast was approximately 100 feet from the Dyer home."⁴⁵ Although Ms. Dyer was visiting Florida when most of the blasting took place, she was in the home when two of the blasts were set off and she felt the entire house shake.⁴⁶ In the spring of 2005, after the blasting had begun, Ms. Dyer's sons, Paul and Richard, checked on the house and noticed several changes in the condition of the home, including: a three inch drop in the center of the basement floor; new and enlarged cracks in the foundation; and a sagging support beam that caused the first floor to be noticeably unlevel.⁴⁷ According to a seismograph placed adjacent to the Dyer home, at least six of the blasts exceeded guidelines set by United States Bureau of Mines (USBM), which are intended to create a "safe operating

39. *Id.* ¶ 17, 914 A.2d at 714.

40. *Dyer*, 2009 ME 126, ¶ 15, 984 A.2d at 215.

41. *Id.* ¶ 3, 984 A.2d at 212.

42. *Id.* ¶ 4, 984 A.2d at 212-13. The Dyer family has already endured a great deal of hardship related to the replacement of the Waldo-Hancock County Bridge: the restaurant that the family had owned and operated for over fifty years along Route 1 in Prospect was seized by the Maine Department of Transportation pursuant to that agency's eminent domain powers and was subsequently demolished. See *Dyer v. Dep't of Transp.*, 2008 ME 106, 951 A.2d 821.

43. *Dyer*, 2009 ME 126, ¶ 5, 984 A.2d at 213.

44. *Id.*

45. *Id.* ¶ 6, 984 A.2d at 213.

46. *Id.*

47. *Id.* ¶ 7, 984 A.2d at 213.

envelope" in order to minimize property damage from seismic vibrations.⁴⁸ Mark Peterson, an expert in ground engineering consulted by the Dyers, testified at a deposition that blasts conducted within the "safe operating envelope" were unlikely to cause damage to structures within a building, but also opined that if the building was underlain with uncontrolled fill, as opposed to engineered fill,⁴⁹ the home could potentially have been damaged even if the blasts were within the established guidelines.⁵⁰

The Dyers filed a complaint against Maine Drilling that included causes of action based on negligence and strict liability.⁵¹ Maine Drilling subsequently filed a motion for summary judgment, which the trial court granted.⁵² On the issue of strict liability, the trial court observed that in several decisions "the Law Court has expressly held that blasting activities do not expose the actor to strict liability" and that even though the Dyers argue those rulings are obsolete, "that caselaw remains binding authority that controls this court's formulation of the law."⁵³ With respect to the Dyers' negligence claim, the trial court found that the USBM guidelines were sufficient as a basis for identifying a standard of care and that the "record includes evidence that six of the blasts that Maine Drilling conducted exceeded [those] guidelines."⁵⁴ However, the trial court found that there was no triable issue regarding causation, reasoning that because there was no evidence as to the actual nature of the fill under the house, Peterson could only speculate as to how blasting would affect the home in relation to the fill.⁵⁵ The trial court also maintained that summary judgment for Maine Drilling was warranted because "the record does not include an expert opinion that the blasting conducted by Maine Drilling was a legal cause of cracking in the house."⁵⁶ Shortly thereafter, the Dyers filed an appeal to the Law Court.

B. Arguments to the Law Court

On appeal, the Dyers argued that the Law Court should overrule the *Reynolds* line of cases and "hold that actors who conduct abnormally dangerous activities, like Defendant's blasting in this case, are subject to strict liability."⁵⁷ The Dyers observed that even though the issue of strict liability was not raised in *Maravell*, the court had characterized blasting in that case as "an inherently dangerous

48. *Id.* ¶¶ 9-10, 984 A.2d at 213-14.

49. "According to Peterson, engineered fill refers to subgrade under a structure's foundation that is layered, compacted, or placed in a way so as 'to avoid deformation after it was placed[.]'" whereas uncontrolled fill "is 'fill that's from an unknown source and of unknown characteristic and placed in an unknown way.'" *Dyer*, 2009 ME 126, ¶ 9 n.2, 984 A.2d at 213 (citation to footnote only).

50. *Id.* ¶ 9, 984 A.2d at 213.

51. *Id.* ¶ 12, 984 A.2d at 214.

52. *Id.* ¶ 13, 984 A.2d at 214.

53. *Dyer v. Me. Drilling and Blasting, Inc.*, No. CV-07-11, 2009 WL 558278 (Me. Super. Feb. 3, 2009).

54. *Id.*

55. *Id.*

56. *Id.*

57. Brief of Appellants at 6, *Dyer v. Me. Drilling and Blasting, Inc.*, 2009 ME 126, 984 A.2d 210 (No. WAL-09-116) [hereinafter Brief of Appellants].

activity.”⁵⁸ Accordingly, they argued that “Maine law relative to the application of strict liability to blasting is antiquated and obsolete” and that the court “should join the vast majority of jurisdictions who have adopted the Restatement view relative to blasting.”⁵⁹

Additionally, the Dyers contended that the trial court committed legal error when it found there was no triable issue as to causation.⁶⁰ They argued that the court had failed to consider the six blasts that exceeded the USBM guidelines; an error that was particularly significant given that the court had focused on those guidelines as a basis for identifying a standard of care.⁶¹ The Dyers also emphasized that they had observed noticeable changes in the condition of the home after the blasting took place, and that under Maine law expert testimony was not required to establish legal causation in a blasting case.⁶²

In response, Maine Drilling asserted that the trial court was correct in holding that the *Reynolds*, *Cratty*, and *Albison* line of cases were controlling and that strict liability did not apply to blasting under Maine law.⁶³ Maine Drilling acknowledged that the *Maravell* court had characterized blasting as “inherently dangerous,” but argued that precautionary steps and safety procedures could be employed to “substantially eliminate the danger,” whereas similar measures could not be utilized to eliminate the risk of more serious harms arising from abnormally dangerous activities.⁶⁴ Moreover, Maine Drilling claimed that pursuant to the principle of *stare decisis*, the court should only depart from established precedent under “the most extraordinary circumstances” and that the Dyers had not pointed to any “changed conditions so as to justify a departure” from the negligence standard.⁶⁵

Furthermore, Maine Drilling contended that the grant of summary judgment on the issue of causation had been proper because Peterson “admitted the cause of the alleged damages are ‘unknown,’ ‘speculative,’ and he had no opinion as to causation.”⁶⁶ Maine Drilling also maintained that the Dyers did not establish a time relationship between the blasting and the discovery of the alleged damage to the home and that prior to the blasting, the Dyer home “had cracks in the floor and protruding from the chimney.”⁶⁷

C. Decision of the Law Court

Justice Silver, writing for a majority of the Law Court, adopted the Second Restatement’s application of strict liability to abnormally dangerous activities and

58. *Id.* at 7 (citation omitted).

59. *Id.* at 8.

60. *Id.* at 10.

61. *Id.* at 12.

62. *Id.* at 17-18.

63. Brief of Appellee at 8, *Dyer v. Me. Drilling and Blasting, Inc.*, 2009 ME 126, 984 A.2d 210 (No. WAL-09-116) [hereinafter Brief of Appellee].

64. *Id.* at 11.

65. *Id.* at 13 (citation omitted).

66. *Id.* at 18 (citation omitted).

67. *Id.* at 2.

expressly overruled *Reynolds* and its progeny.⁶⁸ The court then remanded the case to the trial court “to determine if the blasting . . . was an abnormally dangerous activity under the Restatement’s six-factor test.”⁶⁹ The court explained that the rationales for not adopting strict liability in *Reynolds* had been undermined in the last half-century, particularly by a nationwide shift in policy approaches that had lead “almost every other state to adopt strict liability in blasting and abnormally dangerous activity cases.”⁷⁰ Moreover, the court noted that blasting is “inherently dangerous” and argued that “most courts have recognized that this inherent danger cannot be eliminated by the exercise of care.”⁷¹ In support of this assertion, the court demonstrated that “[t]he Dyers’ expert testified that blasting may cause damage even when it is within the [USBM] guidelines.”⁷² The court further justified imposing strict liability by contending that “although blasting is a lawful and often beneficial activity, the costs should fall on those who benefit from the blasting, rather than on an unfortunate neighbor.”⁷³ The court reasoned that because blasters are required to carry liability insurance by many town ordinances and by the rules of the Maine Department of Public Safety, “a strict liability scheme should not greatly increase costs for these businesses.”⁷⁴

On the issue of causation, the court found that the Dyers had produced sufficient evidence to defeat Maine Drilling’s summary judgment motion.⁷⁵ The majority pointed out that six of the blasts had exceeded the USBM guidelines and concluded that a fact-finder could infer that the changes observed by the Dyers “over a short period of time[,] in a home over seventy-years-old, were not likely to be caused” by natural processes.⁷⁶ The court also explained that *Cratty* had held expert testimony was not required “to prove negligence, including causation, in a blasting case.”⁷⁷

D. The Dissents

Justice Alexander, in a dissent joined by Chief Justice Saufley, argued that there was no need to overrule *Reynolds* and establish a new common law rule of strict liability in blasting cases because the Dyers could recover damages by showing causation under the existing negligence standard.⁷⁸ The dissent noted that “[s]tare decisis helps to assure that an appellate judge’s view that a prior decision may have been wrongly decided is, standing alone, insufficient to justify overruling the decision.”⁷⁹ Furthermore, the dissent maintained that adherence to viable precedent provides consistency in the law and that past decisions should only be

68. *Dyer*, 2009 ME 126, ¶ 15, 984 A.2d at 215.

69. *Id.*

70. *Id.* ¶ 18, 984 A.2d at 216.

71. *Id.* ¶ 19, 984 A.2d at 216.

72. *Id.*

73. *Id.*

74. *Dyer*, 2009 ME 126, ¶ 20, 984 A.2d at 216.

75. *Id.* ¶ 33, 984 A.2d at 219-20.

76. *Id.* ¶¶ 34-35, 984 A.2d at 220.

77. *Id.* ¶ 35, 984 A.2d at 220 (citation omitted).

78. *Id.* ¶ 41, 984 A.2d at 221 (Alexander, J., dissenting).

79. *Id.* ¶ 46, 984 A.2d at 222 (citing *Alexandre v. State*, 2007 ME 106, ¶ 35, 927 A.2d 1155, 1164).

overruled “after careful analysis and based on a compelling reason.”⁸⁰ In demonstrating that there was no need to supplant Maine’s negligence standard with a strict liability approach to blasting cases, Justice Alexander explained:

Here the trial court has already determined that there is sufficient evidence to avoid summary judgment on the standard of care and breach of the standard of care issues. Thus, the only dispute for resolution on this appeal is whether there remain disputed facts relating to the issue of causation. The Court holds, and I agree, that the Dyers have produced sufficient evidence to survive Maine Drilling’s motion for summary judgment on the causation issue incident to their negligence claim. Thus, based on the Court’s reasoning, and with the trial court having found fact disputes regarding the standard of care and breach of the standard of care, the Dyers’ negligence claim may proceed to trial.⁸¹

The dissent also recognized that *Cratty* was factually on point with the Dyers’ situation and that it provided proper guidance on the issues of negligence and causation in blasting cases. As a result, Justice Alexander concluded by stating that the court “should leave resolution of this claim to the trial court, based on our existing body of law,”⁸² and furthermore, “should leave it to the Legislature, as a matter of policy, to determine whether or not to adopt an expanded rule of strict liability for all cases of damage caused by blasting.”⁸³

Chief Justice Saufley also issued a dissent and initially observed that under strict liability financial damages are imposed without any proof of fault or wrongdoing.⁸⁴ Recognizing that for the last half-century Maine businesses and insurers have had the expectancy that blasters will only be held liable for their negligence, the dissent maintained that the majority’s “expansion of fiscal responsibility to cases where there has been *no wrongdoing* changes a long-established financial business equation.”⁸⁵ The dissent also criticized the majority for expanding liability “without any factual demonstration of the need for such change or the potential effect on Maine’s economy”⁸⁶ and concluded by stating that “[a]s a matter of jurisprudential policy, this is the wrong approach at the wrong time.”⁸⁷

IV. ANALYSIS

A. *Questionable Rationales*

The majority invoked two familiar rationales for imposing strict liability in *Dyer*: (1) that the risk of harm from blasting could not be eliminated by the exercise of reasonable care,⁸⁸ and (2) that the economic loss should fall on the party

80. *Dyer*, 2009 ME 126, ¶¶ 45-46, 984 A.2d at 222.

81. *Id.* ¶ 49, 984 A.2d at 222 (Alexander, J., dissenting) (citation omitted).

82. *Id.* ¶ 54, 984 A.2d at 224.

83. *Id.* ¶ 53, 984 A.2d at 224.

84. *Id.* ¶ 56, 984 A.2d at 224 (Saufley, C.J., dissenting).

85. *Id.*

86. *Dyer*, 2009 ME 126, ¶ 57, 984 A.2d at 224.

87. *Id.* ¶ 58, 984 A.2d at 224.

88. *Id.* ¶ 19, 984 A.2d at 216 (majority opinion).

benefiting from the dangerous activity.⁸⁹ Justice Alexander’s dissent demonstrated that the first rationale could not be used to justify strict liability based on the facts presented in *Dyer*⁹⁰ and Chief Justice Saufley’s dissent questioned the wisdom of imposing strict liability’s cost-spreading scheme on Maine businesses.⁹¹

1. Maine’s Negligence Standard Was Viable and Equitable in Dyer

The majority explained that most courts have found that the danger inherent in blasting “cannot be eliminated by the exercise of care” and then reasoned that strict liability should be applied in this case because “[t]he Dyers’ expert testified that blasting may cause damage even when it is within the [USBM] guidelines.”⁹² However, Justice Alexander’s dissent convincingly maintained that there was no need to impose strict liability in this case because the Dyers could recover under Maine’s negligence standard. As the dissent pointed out, the facts in *Dyer* were very similar to those presented in *Cratty*, where the plaintiff noticed cracking in his basement floor after blasting took place within 200 feet of his home.⁹³ The Law Court held in *Cratty* that a lack of evidence regarding the amount of explosives used or the blasting methods employed by the defendant did not prevent *Cratty*’s claim from proceeding to trial because negligence could be proven “by any evidence that is relevant and material, although it may be circumstantial.”⁹⁴ The dissent observed that in this case, the blasting occurred within 100 feet of the Dyers’ home and that, unlike in *Cratty*, a potential standard of care existed in the form of the USBM guidelines with evidence that that standard was breached on at least six occasions.⁹⁵

Despite the fact that the majority disagreed with the trial court and found that the Dyers had produced evidence sufficient to survive summary judgment on the issue of causation,⁹⁶ the majority reached out to address the strict liability issue even though the case could have simply been remanded back to the trial court for further exploration of the negligence claim. Although the majority argued it *could* address the strict liability issue,⁹⁷ it never articulated *why* it was necessary to address that issue in this case. The trial court’s analysis of the negligence claim ended when it determined that there was no triable issue as to causation.⁹⁸ As a result, the majority’s analysis should have ended when it found that the Dyers had indeed produced evidence sufficient to survive summary judgment on that issue.⁹⁹

Furthermore, in ruling on Maine Drilling’s motion for summary judgment, the trial court found that “if this is a case where the Dyers would be required to present evidence of a standard of care, the evidence includes a basis on which the Dyers

89. *Id.*

90. *Id.* ¶ 49, 984 A.2d at 222 (Alexander, J., dissenting).

91. *Id.* ¶¶ 56-57, 984 A.2d at 224 (Saufley, C.J., dissenting).

92. *Dyer*, 2009 ME 126, ¶ 19, 984 A.2d at 216 (majority opinion).

93. *Id.* ¶¶ 43-44, 984 A.2d at 221-22 (Alexander, J., dissenting).

94. *Cratty*, 151 Me. at 131, 116 A.2d at 626.

95. *Dyer*, 2009 ME 126, ¶ 44, 984 A.2d at 221-22 (Alexander, J., dissenting).

96. *Id.* ¶ 37, 984 A.2d at 220 (majority opinion).

97. *Id.* ¶ 15, 984 A.2d at 215.

98. *Id.* ¶ 13, 984 A.2d at 214.

99. *Id.* ¶ 37, 984 A.2d at 220.

can argue that Maine Drilling breached the applicable standard and duty of care.”¹⁰⁰ This demonstrates that the applicable standard of care issue was still in question, but that the evidence in the record would be sufficient to survive a motion for summary judgment on that issue. Thus, the USBM guidelines only served as a potential standard of care against which Maine Drilling’s actions could be measured. Despite this reality, the majority proceeded to justify the adoption of a “no fault” rule of liability based on one expert’s speculation that this potential standard of care may be inadequate under a particular set of circumstances to prevent some unspecified type of damage. Interestingly, in finding that there was a triable issue as to causation, the majority pointed to the six blasts that exceeded the USBM guidelines as evidence that would allow a fact-finder to infer that Maine Drilling had caused damage to the home.¹⁰¹ This position seems to be inconsistent: denying that the risk of harm can be eliminated with the exercise of due care and than finding that damage occurred because due care was not properly exercised.

2. Was the Cost-Spreading Approach Justifiable or Prudent?

Cost-spreading can be viewed as an economic rationale or as a fairness rationale.¹⁰² As the majority explained, “strict liability seeks to encourage . . . cost-spreading”¹⁰³ and that “although blasting is a lawful and often beneficial activity, the costs should fall on those who benefit from the blasting, rather than on an unfortunate neighbor.”¹⁰⁴ Even so, given the fact that it was very likely the Dyers could recover under a negligence theory on remand, the majority failed to explain how the “costs” of Maine Drillings’ blasting activities were likely to fall on the “unfortunate” Dyers in this case. The majority further reasoned that because blasters are required to carry liability insurance in many circumstances, “a strict liability scheme should not greatly increase costs for these businesses.”¹⁰⁵ However, no empirical evidence was ever provided in the opinion to support this assumption; nor did the majority seem to be troubled by the fact that cost-spreading has increasingly drawn criticism as being “open-ended” and “highly expansive” in its allocation of tort liability.¹⁰⁶

Accordingly, Chief Justice Saufley was correct to be concerned in her dissent that the majority had “exercised its authority to expand liability without any factual demonstration of the need for such change or the potential effect on Maine’s economy.”¹⁰⁷ In fact, several issues that were never addressed by the majority are raised in the *Restatement (Third) of Torts*’s rejection of the cost-spreading rationale as a justification for applying strict liability to abnormally dangerous activities:

The appeal of strict liability . . . does not depend on any notion that the defendant

100. *Dyer v. Me. Drilling & Blasting, Inc.*, No. CV-07-11, 2009 WL 558278 (Me. Super. Feb. 3, 2009) (emphasis added).

101. *Dyer*, 2009 ME 126, ¶ 37, 984 A.2d at 220.

102. Simons, *supra* note 11, at 1373.

103. *Dyer*, 2009 ME 126, ¶ 20, 984 A.2d at 216.

104. *Id.* ¶ 19, 984 A.2d at 216.

105. *Id.* ¶ 20, 984 A.2d at 216.

106. Simons, *supra* note 11, at 1374.

107. *Dyer*, 2009 ME 126, ¶ 57, 984 A.2d at 224 (Saufley, C.J., dissenting).

is in a better position than the plaintiff to allocate or distribute the risk of harm; indeed, the defendant may be a small business enterprise; the property damage suffered by the plaintiff may be no more than moderate, and the plaintiff as a property owner may already be insured for the loss that that damage entails.¹⁰⁸

Moreover, Chief Justice Saufley drew attention to the fact that the majority’s shift in policy from holding blasters liable when they are negligent, or at fault, to “[t]he expansion of fiscal responsibility to cases where there has been *no wrongdoing* changes a long-established financial business equation” because for over half-a-century “it has been the settled expectation of [Maine] businesses and insurers that blasters . . . will be held responsible if they are negligent.”¹⁰⁹ Although the majority maintained that it is the proper role of the court to continually shape and define the scope of liability for blasters,¹¹⁰ the Law Court has previously held and reaffirmed the principle that long-established policy approaches should only be changed “when [the policy] operates erratically and produces undesirable results in frequently recurring kinds of situations.”¹¹¹ Given the fact that in *Reynolds*, *Albison*, *Cratty*, *Maravell*, and, as argued above, *Dyer*, the plaintiffs’ cases were able to proceed past summary judgment under Maine’s negligence standard, the majority failed to demonstrate how the existing liability standards in blasting cases had been operating “erratically” or how they had been producing “undesirable results.” Thus, even though the majority articulated a familiar rationale for imposing strict liability on blasting, it failed to provide a compelling reason for why it was necessary to address the strict liability issue in *Dyer*. Above all, the issues raised by the dissents are of particular relevance now that the Law Court has opened the door to future litigation concerning what activities should be considered abnormally dangerous under Maine law.

B. The Application of Section 520’s Six-Factor Test to Future Cases

The Law Court’s holding in *Dyer* did not expressly impose strict liability on blasting: “We adopt today the Second Restatement’s imposition of strict liability for abnormally dangerous activities, and remand to the court to determine if the blasting in this case was an abnormally dangerous activity under the Restatement’s six-factor test.”¹¹² Given this pronouncement, strict liability can now be applied to any situation where a court finds that an activity meets the Restatement’s six-factor test. Inevitably, the Law Court will be compelled in future cases to decide whether a given activity is abnormally dangerous and therefore warrants the application of strict liability under the Second Restatement. In doing so, the court should recognize that that issue should be determined as a matter of law. The court should

108. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 20, cmt. e. (Proposed Final Draft No. 1, 2005); *but see* Simons, *supra* note 11, at 1374 (questioning the rejection of the cost-spreading approach).

109. *Id.*

110. *Id.* ¶ 27, 984 A.2d at 218 (majority opinion).

111. *Myrick v. James*, 444 A.2d 987, 992 (Me. 1982) (quotation marks and citations omitted); *see also* *Bourgeois v. Great N. Nekoosa Corp.*, 1999 ME 10, ¶5, 722 A.2d 369, 371 (“We do not disturb a settled point of law unless the prevailing precedent lacks vitality and the capacity to serve the interests of justice.”) (citing *Myrick*, 444 A.2d at 1000)).

112. *Dyer*, 2009 ME 126, ¶ 15, 984 A.2d at 215.

also be aware that most courts have found that factor (c)—whether the risk of harm can be eliminated by the exercise of reasonable care—controls the legal analysis and the legal conclusion in cases applying section 520’s six-factor test.¹¹³

1. Whether an Activity is an Abnormally Dangerous One is a Question of Law

After adopting strict liability for abnormally dangerous activities, the *Dyer* court remanded the case to the trial court “to determine if blasting in this case was an abnormally dangerous activity under the Restatement’s six-factor test.”¹¹⁴ However, the court did not clearly state whether the trial court should make this determination as a matter of law or whether resolution of the issue should be left to the jury.¹¹⁵ Comment L to section 520 of the Second Restatement directs courts to decide this issue as a matter of law and explains how the determination of this issue differs from questions arising under a negligence standard:

The standard of the hypothetical reasonable man is essentially a jury standard, in which the court interferes only in the clearest cases. A jury is fully competent to decide whether the defendant has properly driven his horse or operated his train or guarded his machinery or repaired his premises, or dug a hole. The imposition of strict liability, on the other hand, involves a characterization of the defendant's activity or enterprise itself, and a decision as to whether he is free to conduct it at all without becoming subject to liability for the harm that ensues even though he has used all reasonable care. This calls for a decision of the court; and it is no part of the province of the jury to decide whether an industrial enterprise upon which the community's prosperity might depend is located in the wrong place or whether such an activity as blasting is to be permitted without liability in the center of a large city.¹¹⁶

As the comment demonstrates, the reasonable person standard is used in negligence cases to determine whether a defendant’s actions fall within acceptable community norms of conduct. Alternatively, the decision to apply strict liability to certain activities is a policy determination best left to a court’s discretion rather than a jury’s. A number of appellate courts have embraced this position and have held that whether an activity is abnormally dangerous, and therefore warrants the imposition of strict liability, is an issue that should be decided as a matter of law.¹¹⁷

2. The Six-Factor Test Ultimately Asks Whether the Situation Can be Resolved Under a Negligence Standard

In applying the Second Restatement’s six-factor test to determine if an activity is abnormally dangerous, a number of courts have found that the “crux of the liability issue” turns on whether the risk of harm can be eliminated by the exercise

113. Boston, *supra* note 12, at 631.

114. *Dyer*, 2009 ME 126, ¶ 15, 984 A.2d at 215.

115. *Id.*

116. RESTATEMENT (SECOND) OF TORTS § 520, cmt. 1 (1977).

117. See Boston, *supra* note 12, at 630 (“Virtually all courts and both Restatements have taken the position that whether an activity qualifies as ultrahazardous or abnormally dangerous is a question of law for the court.”).

of due care.¹¹⁸ For example, in *Indiana Harbor Belt Railroad v. American Cyanamid Co.*,¹¹⁹ Judge Richard Posner explained that "[t]he baseline common law regime of tort liability is negligence"¹²⁰ and that when "the hazards of an activity can be avoided by being careful (which is to say, nonnegligent), there is no need to switch to strict liability."¹²¹ In that case, Cyanamid, a manufacturer of the hazardous chemical acrylonitrile, had been held strictly liable by the trial court when a railroad tank car containing 20,000 gallons of the chemical spilled.¹²² In reversing the trial court's holding that shipping acrylonitrile through a metropolitan area was an abnormally dangerous activity under section 520, Judge Posner noted that the court had "been given no reason . . . for believing that a negligence regime is not perfectly adequate to remedy and deter, at reasonable cost, the accidental spillage of acrylonitrile from rail cars."¹²³ He went on to conclude that based on all the available information "if a tank car is carefully maintained the danger of a spill of acrylonitrile is negligible. If this is right, there is no compelling reason to move to a regime of strict liability."¹²⁴

Similarly, in *Bagley v. Controlled Environmental Corp.*,¹²⁵ former United States Supreme Court Justice David Souter, writing for the majority as a member of the New Hampshire Supreme Court, explained that the court would "decline to impose strict liability in the absence of any demonstration that the requirement to prove legal fault acts as a practical barrier to otherwise meritorious claims."¹²⁶ In that case, it was argued that Environmental Corp. should be held strictly liable under section 520 for the contamination of the plaintiff's soil and ground water, which had been caused by the release of gasoline and waste materials into a neighboring property.¹²⁷ The court affirmed the trial court's dismissal of the strict liability claim and observed that "[w]ith respect to the dumping of the waste products and the leakage of gasoline in this case, there is no apparent impossibility of proving negligence."¹²⁸ In support of this position, he noted that "the facts pleaded in this case present no problems of identifying the person who may have breached a duty, or of tracing causation for harm to one among several defendants, each of whom breached a duty."¹²⁹

This reluctance to abandon the negligence standard may also be attributable, in part, to the reality that legislatures, rather than appellate courts, are in a better position to gather information on certain dangerous activities and to weigh policy arguments both for and against the imposition of strict liability on those activities.¹³⁰

118. *Id.* at 631.

119. 916 F.2d 1174 (7th Cir. 1990).

120. *Id.* at 1177.

121. *Id.*

122. *Id.* at 1175.

123. *Id.* at 1179.

124. *Id.*

125. 503 A.2d 823 (N.H. 1986).

126. *Id.* at 826.

127. *Id.* at 824.

128. *Id.* at 826.

129. *Id.* (citations omitted).

130. See Boston, *supra* note 12, at 668.

C. Strict Liability Issues Are More Readily Addressed by the Legislature

Increasingly, the Maine Legislature has taken on the role of applying strict liability, as a matter of policy, in a number of instances, including natural gas explosions,¹³¹ injuries from defective products,¹³² and for hazardous waste and oil spills.¹³³ Prior to the Law Court's decision in *Dyer* the application of common law strict liability in Maine had been limited to damages caused by wild animals¹³⁴ and owners of domestic animals in certain situations.¹³⁵ Although blasting is regarded as a "paradigm of the abnormally dangerous activities category" under the theory of strict liability,¹³⁶ the Law Court may find it much more difficult in future cases to apply the Restatement's six-factor test to other activities. As Professor Gerald Boston noted in his study of cases where section 520 was applied, courts have been forced to rely on "extra-judicial data . . . in arriving at the ultimate legal conclusion"¹³⁷ because, for example, "[t]he decision of whether an activity is a matter of common usage or whether it is being conducted at a suitable place turns not so much on adjudicative facts, *but more on legislative or policy judgments.*"¹³⁸ Professor Boston went on to explain that this is why "one court can conclude that blasting is locationally suitable in one case, while most courts historically have found otherwise."¹³⁹ In order to avoid similarly erratic results, the Law Court should adhere to Justice Alexander's admonition that "[the court] should leave it to the Legislature, as a matter of policy, to determine whether or not to adopt an expanded rule of strict liability."¹⁴⁰ The Law Court should also recognize that the Legislature is in a far better position to assess the financial and economic impacts of strict liability schemes on Maine businesses and insurers.

V. CONCLUSION

In *Dyer*, the Law Court adopted the Second Restatement's application of strict liability to activities that are found to be abnormally dangerous.¹⁴¹ The majority justified this decision by asserting that the risk of harm from blasting cannot be eliminated by the exercise of reasonable care¹⁴² and that notions of fairness associated with cost-spreading also served as justifications for imposing strict liability on blasters.¹⁴³ However, Justice Alexander's dissent convincingly maintained that because there was sufficient evidence in the record for the *Dyers* to recover under a negligence theory, there was no need to impose strict liability,¹⁴⁴

131. 14 M.R.S.A. § 165 (2003).

132. 14 M.R.S.A. § 221 (2003).

133. 38 M.R.S.A. §§ 1319-J, 552(2) (2001).

134. *See* *Byram v. Main*, 523 A.2d 1387, 1390 (Me. 1987).

135. *See* *Henry v. Brown*, 495 A.2d 324, 325 (Me. 1985).

136. *See* *Simons*, *supra* note 11, at 1364.

137. Boston, *supra* note 12, at 668.

138. *Id.* (emphasis added).

139. *Id.*

140. *Dyer*, 2009 ME 126, ¶ 53, 984 A.2d at 224 (Alexander, J., dissenting).

141. *Id.* ¶ 15, 984 A.2d at 215 (majority opinion).

142. *Id.* ¶ 19, 984 A.2d at 216.

143. *Id.* ¶ 20, 984 A.2d at 216.

144. *Id.* ¶ 49, 984 A.2d at 222 (Alexander, J., dissenting).

and Chief Justice Saufley’s dissent provided valid criticism of the majority’s expansion of liability to cases where blasters have not engaged in any wrongdoing without providing a compelling reason for doing so.¹⁴⁵

Only a small number of activities have been found to be abnormally dangerous and deserving of strict liability under the Second Restatement.¹⁴⁶ The Law Court, in future cases, should continue this narrow application of strict liability. This can be achieved in large part by heeding the concerns voiced by the dissents in *Dyer* and by continuing to adhere to the principle that settled points of law will not be disturbed “unless ‘the prevailing precedent lacks vitality and the capacity to serve the interests of justice.’”¹⁴⁷

145. *Id.* ¶ 56, 984 A.2d at 224 (Saufley, C.J., dissenting).

146. *See generally* Boston, *supra* note 12.

147. *See Bourgeois*, 1999 ME 10, ¶ 5, 722 A.2d at 371 (quoting *Myrick*, 444 A.2d at 1000).