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INTRODUCTION

Natural gas is a major source of energy in North America but is not often located near the point of demand or consumption and must be transported to where it can be used. This transportation usually is accomplished by pressurizing the gas to move it through pipelines. There are 263,000 miles[1] of natural gas transmission pipelines[2] in the United States and there is also an extensive network of these pipelines in Canada. Although pipeline transportation is relatively safe, accidents occur[3] and the potential for damage is high.[4]

This high potential for damage might be realized in an accident involving a large diameter pipeline transporting natural gas at high

1. 10 U.S. DEP'T OF TRANSP. NATURAL GAS PIPELINE SAFETY ACT ANN. REP. i (1977).

2. One definition of a transmission line is that it is a "pipeline, other than a gathering line, that (a) transports gas from a gathering line or storage facility to a distribution center or storage facility; (b) operates at a hoop stress of 20 percent or more of SMYS; or (c) transports gas within a storage field." 49 C.F.R. § 192.3 (1979). Definitions of most of these terms will also be found at 49 C.F.R. § 192.3 (1979).

3. There were 466 failures involving transmission and gathering lines in 1977 which were reported to the Department of Transportation. 10 U.S. DEP'T OF TRANSP. NATURAL GAS PIPELINE SAFETY ACT ANN. REP., *supra* note 1, at 3.

4. Extensive personal and property damage is common in accidents involving gas transmission pipelines. For two examples *see*, NAT'L TRANSP. SAFETY BD., U.S. DEP'T OF TRANSP., PIPELINE ACCIDENT REP. No. 75-3, S. UNION GAS CO. GAS TRANSMISSION PIPELINE-FAILURE NEAR FARMINGTON, N.M. 1 (1974); NAT'L TRANSP. SAFETY BD., U.S. DEP'T OF TRANSP., PIPELINE ACCIDENT REP. No. 76-7, SUN PIPELINE CO. RUPTURE OF EIGHT-INCH PIPELINE, ROMULUS, MICH. 1 (1975). Although most court decisions in both the United States and Canada refer to distribution lines or mains, the application of these cases to transmission lines poses no theoretical problems as distribution and transmission pipelines carrying natural gas expose people to hazards of the same type.

pressure. Such lines are common in both the United States and Canada.

This note compares the liability of the operator of a natural gas transmission line in the United States to one in Canada for a typical accident. One of the first issues to be addressed in the event of an accident would be the determination of the theory of liability under which an action might be brought against the operator of the pipeline. Here, liability is reviewed in terms of the applicable statutes, regulations and common law. Relevant United States statutes and regulations are reviewed and compared with the pertinent Canadian statutes and regulations, primarily those of Alberta which is Canada's major energy producing province. Due to the relative scarcity and narrow scope of regulations and statutes pertinent to liability, the emphasis of this note is on common law liability. Within this broad area this note chronologically reviews United States cases brought under negligence and strict liability theories. Canadian common law is then discussed chronologically and comparatively, emphasizing its distinctive features. From this comparison, this note concludes that if an accident occurred on non-Federal lands in the United States an action would be brought under a negligence theory, whereas if it occurred in Canada, an action would be brought under a strict liability theory.

STATUTES AND REGULATIONS IN THE UNITED STATES AND CANADA

While there are some United States Federal statutes and regulations pertaining specifically to liability, they have been in existence only a short time[5] and are surprisingly narrow in scope. Regulations[6] written under the authority of the Mineral Leasing Act of 1920,[7] as amended, delineate the liability of a gas transmission line operator for damage or injury incurred by the United States in connection with certain rights-of-way or temporary use permits[8] granted through Federal lands.[9] The holder of the right-of-way or use permit may be held strictly liable for activities determined to present a "foreseeable hazard

5. Regulations, which were authorized by a 1973 amendment to the Mineral Leasing Act of 1920, 30 U.S.C. § 185 (1976 & Supp. II 1978) were not promulgated until late 1979. *See*, 44 Fed. Reg. 58, 126 (1979) (to be codified in 43 C.F.R. § 2880).

6. 44 Fed. Reg. 58, 126 (1979) (to be codified in 43 C.F.R. §§ 2880 *et seq*).

7. 30 U.S.C. § 185(f) (1976 & Supp. II 1978).

8. 44 Fed. Reg. 58, 126; 58, 130 (1979) (to be codified in 43 C.F.R. § 2880.0-7).

9. 44 Fed. Reg. 58, 126; 58, 130 (1979) (to be codified in 43 C.F.R. § 2880.0-5(c)).

or risk of damage to the United States."[10] The extent of liability is however limited so as to be "commensurate with the foreseeable risks or hazards presented"[11] and in no case may it exceed $1,000,000.[12] Damages in excess of $1,000,000 are determined according to negligence concepts.[13] These regulations also state that holders of rights-of-way or use permits are "fully liable for injuries or damages to third parties resulting from activities or facilities on lands under Federal jurisdiction."[14] Such liability is to be determined in accordance with the law of the jurisdiction where the incident occurs.[15]

Another Federal statute[16] closely related to pipeline accidents states that it shall not "affect the common law or statutory tort liability of any person."[17] Regulations promulgated under this statute[18] emphasize the safety aspects of the design, construction, operation and maintenance of certain pipelines. At least one court has indicated that these regulations are not clear.[19] Thus, United States regulations which deal directly with liability are very limited in scope and apply only to pipelines through certain Federal lands. There are other Federal regulations close to the subject of pipeline accidents, but they are of questionable clarity and expressly do not affect liability.

In Canada, Federal energy activities are centered in the National Energy Board (NEB) and the Ministry of Energy Mines and Resources.[20] NEB authority over pipelines does not extend to matters of liability but is limited to several broad areas including requirement of preconstruction Certificate of Public Convenience and Necessity, ex-

10. 44 Fed. Reg. 58, 126; 58, 134-35 (1979) (to be codified in 43 C.F.R. § 2883.1-4(b).
11. *Id.*
12. *Id.*
13. *Id.*
14. 44 Fed. Reg. 58,126, 58,134-35 (1979) (to be codified in 43 C.F.R. § 2883.1-4(d)).
15. *Id.*
16. Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. §§ 1671-1686 (1976 & Supp. II 1978).
17. *Id.* § 1677(d).
18. Regulations for the Transportation of Natural and Other Gas by Pipeline, 49 C.F.R. §§ 191-192 (1979).
19. In *Karle* v. *Natural Gas Distrib. Corp.*, 448 F.Supp. 753 (W.D. Pa. 1978), the plaintiff was injured when defendant's 20 inch gas main leaked causing an explosion in the bank where plaintiff worked. The court stated "[a]lthough [defendant] has arguably violated two of these regulations, neither regulation so clearly applies . . . that we can base liability upon its alleged violation." *Id.* at 767. And it was noted that "[w]hen read together, 192.463(a) and 192.465 present an ambiguous statement . . . ." *Id.* at 768.
20. *See* OFFICE OF INT'L AFFAIRS U.S. DEP'T OF ENERGY, THE ROLE OF FOREIGN GOVERNMENTS IN THE ENERGY INDUSTRIES 36 (1977). The NEB was created by the National Energy Board Act, Can. Stat. 1959, c. 46. The Ministry of Energy is limited to coordinating and policy making activities whereas the NEB is a regulatory body.

propriation powers, leave of the NEB before commencement of operations, and regulation of tolls and tariffs.[21] Thus, Canada has no Federal statutes and regulations pertaining to liability.

Under the British North American Act of 1867[22] natural resources are controlled by individual provinces[23] and thus resources not moved outside provincial boundaries seem to be subject only to provincial regulation.[24] While each province has some statutes pertaining to pipelines,[25] only Alberta, which produces about 85 percent of Canada's gas and oil,[26] seems to have specific regulations which affect liability. For example, Section 26(2) of the Special Areas Pipe Line Regulations[27] states that the operator will be liable for all damage, and Section 27(2) of the Public Lands Pipe Regulations[28] makes a similar statement.

United States and Canadian Federal statutes and regulations are then similar to the extent neither deals with liability on non-Federal lands. While the United States regulations assign strict liability for accidents on Federal lands, Alberta provincial regulations also state operators are liable for all damage where pipelines are on public lands or in special areas. Thus, in most situations in each country the law regarding liability for pipeline accidents is to be found in the case law.

COMMON LAW THEORIES OF LIABILITY IN THE UNITED STATES

Negligence

The cases in most United States jurisdictions proceed on a negligence theory with the standard of care adjusted to obtain the desired result. One of the first United States cases to openly acknowledge the adjustment of the standard of care was *Sipple v. Laclede Gaslight Company*.[29] In that case, the plaintiff sued for the wrongful death of his father, who allegedly was asphyxiated by gas from defendant's leaking

21. Acorn, *Petroleum Supplement*, 3 ALTA. L. REV. 367, 372 (1964). The reader is directed to this article for a general discussion of Canadian governmental issues related to pipelines.

22. British North American Act, 1867, 30 & 31 Vict., c. 3.

23. OFFICE OF INT'L AFFAIRS U.S. DEP'T OF ENERGY, *supra* note 20, at 36.

24. *See* Acorn, *supra* note 21, at 377-81, 389-92 for a general discussion.

25. *See, e.g.*, Gas Pipe Line Act, MAN. REV. STAT. 1970, c. P70; The Pipe Lines Act, SASK. REV. STAT. 1965, c. 413; The Pipe Line Act. B.C. REV. STAT. 1960, c. 284; The Pipe Line Act, 1975, ALTA. STAT. 1975(2) c. 30.

26. *See* OFFICE OF INT'L AFFAIRS, U.S. DEP'T OF ENERGY, *supra* note 20, at 43.

27. Alta. Reg. 13/59.

28. Alta. Reg. 246/58 as amended by Alta. Regs. 91/59, 79/61, 264/61 and 251/64.

29. 125 Mo. App. 81, 102 S.W. 608 (1907).

gas main. The court noted that the burden of proving lack of due care devolved upon the plaintiff and that the plaintiff had not sustained his burden because he had failed to introduce direct proof showing a lack of due care.[30] The *Sipple* court acknowledged, however, that with regard to escaping gas, the burden of proving lack of due care was "much relaxed"[31] and that the requirement of ordinary care was "adjusted."[32] The court in *Sipple* thus openly acknowledged the adjustment of the standard of care.

Some cases of this period which adjusted or allowed flexibility in the standard of care used methods different than *Sipple's* frank recognition of the adjustment. One method was to allow jury instructions granting wide discretion on issues other than liability, but which directly affected liability. This flexibility was demonstrated in the case of *Barrickman v. Marion Oil Company*.[33] There, defendant's gas line was over-pressured when plaintiff's regulator failed and admitted high pressure gas to plaintiff's appliances, causing them to explode. Plaintiff's house was destroyed in an ensuing fire. The *Barrickman* court approved jury instructions relating the standard of care to the degree of danger involved and allowed the jury to decide the degree of danger from the evidence. The jury found gas to be an "extremely dangerous substance."[34] Thus, the court allowed the jury the flexibility to increase the standard of care based on the jury's determination of the degree of danger. This effectively increases the standard of care as the jury is likely to be sympathetic to the plaintiff in situations in which natural gas is involved.

At least one case from this period restricted the defendant's standard of care to a level approaching ordinary care. This case, *Triple State Natural Gas and Oil Company v. Wellman*,[35] is however, distinguishable from *Sipple* and *Barrickman*, *supra*, on its facts. In *Triple State*, the plaintiff was on the premises of a third party who had control and possession of a gas meter which was owned by the defendant. The third party accidently turned the wrong valve at the meter allowing high pressure gas from defendant's main to enter the meter. The meter exploded and injured the plaintiff. The primary factual difference is

30. *Id.* at 610.

31. *Id.* at 611.

32. *Id.* The court further noted that absent an intervening agent, proof of a break or leak from which gas escapes and presumably causes the loss was sufficient to sustain a jury's inference of negligence. *Id.*

33. 45 W. Va. 634, 32 S.E. 327 (1898).

34. *Id.* at 330-31.

35. 114 Ky. 79, 70 S.W. 49 (1902).

that in *Sipple* and *Barrickman, supra*, the instrumentality was in the control of the defendant, whereas in *Triple State* the instrumentality was in the control of a third party. Since there was a culpable third party, the court had little reason to find the defendant liable. In order to exonerate the defendant the court chose a lower standard of care than that used in *Sipple* and *Barrickman, supra.* This lower standard of care is shown by the *Triple State* court's statement that the defendant is "bound . . . to exercise such care . . . as the dangerous character . . . [of gas] . . . demand[s] of a person of *ordinary prudence*."[36] This standard, although it refers to the dangerous character of gas, is a lower standard than that in *Sipple* and *Barrickman, supra.*

The more recent decisions also reflect the same flexibility or adjustment of the standard of care in allowing for the desired recovery as seen in *Sipple, Barrickman*, and *Triple State, supra.* For example, in *Gas Consumers' Association v. Lely*,[37] the court stated that the defendant was "bound to exercise such care, skill, and diligence . . . as the difficulty, delicacy, and danger of [gas] requires."[38] In *Skelly Oil Company v. Holloway*[39] the court noted that "[i]n view of the highly dangerous character of the gas . . . a distributor of gas . . . must use a degree of care . . . commensurate with the danger of risk . . . ."[40] A 1978 case, *Karle v. National Fuel Gas Distribution Corporation*,[41] also adheres to this view. There it is stated that "[i]n delimiting the duty of care of gas . . . companies, . . . courts have emphasized the extreme danger . . . . [And] . . . . upon their purveyors the law imposes the 'highest standard of care practicable' . . . [citations]."[42]

These cases indicate that courts have recognized the dangerous nature of gas and have employed a flexible or adjustable standard of care to allow for the desired result. The adjustment has usually been to increase the standard of care due to the dangers involved. In some situations, however, the courts have reverted to what is essentially the ordinary care standard to protect worthy defendants. That is, in some situations, such as *Triple State*, *supra*, the dangerous nature of gas has

36. *Id.* at 51 (emphasis added).

37. 57 F.2d 395 (D.C. Cir. 1932). Gas Consumer's was an asphyxiation case.

38. *Id.* at 397.

39. 171 F.2d 670 (8th Cir. 1948). In Skelly a fire occurred in plaintiff's house as a result of a leak in defendant's gas main.

40. *Id.* at 674.

41. 448 F.Supp. 753 (W.D. Pa. 1978). *See* note 19 *supra* for a discussion of the factual situation.

42. *Id.* at 759.

not influenced the court and a person transporting gas has been held to act only as a person of ordinary prudence.

Strict Liability

Another theory of liability which has been employed in United States courts is strict liability. Perhaps the best discussion of the efforts to hold an operator strictly liable is in the early case of *Gould v. Winona Gas Company*.[43]

In *Gould*, plaintiff's trees allegedly were damaged by the escape of gas from defendant's gas mains. The lower court ruled for the defendant and plaintiff appealed from an order denying a new trial. Plaintiff contended the rules of negligence did not govern the case but that the principle of *Rylands v. Fletcher*[44] applied. That is, that defendants were strictly liable[45] for their acts. The Minnesota Supreme Court acknowledged that the principle of strict liability had been applied in the state[46] but stated that the application had been limited to things whose "natural tendency . . . was to become a nuisance or to do mischief if they escape."[47] The court reviewed the arguments other jurisdictions had used to deny application of strict liability principles. The main arguments were "that pipes have carried gas away from the company's own land"[48] and "that the gas company is a public service corporation engaged in furnishing an essential of modern city life."[49] The *Gould* court rejected the first argument against application of strict liability by noting that the ground where the pipe was laid was company property for the purpose of transporting gas;[50] the latter argument against application of strict liability was rejected by noting that the activity was a voluntary undertaking for profit.

Gould went on to discuss many cases requiring that negligence be shown to establish liability and concluded that

43. 111 N.W. 254 (Minn. 1907).

44. L.R. 3 H.L. 330 (1868). This case found defendants to be liable for damages when water in a reservoir they had constructed escaped into an abandoned coal mine. Defendants were free from all personal blame, but were nonetheless found liable. This decision is the basis of the doctrine of strict liability.

45. The terms strict liability and absolute liability are not distinguished in this Note.

46. Gould v. Winona Gas Co., 111 N.W. 254, 254.

47. *Id.*

48. *Id.* at 255. One interpretation of Rylands v. Fletcher requires the object to escape from the defendant's land. This statement thus implies that since the object is not on the defendant's land to begin with, Rylands v. Fletcher does not apply.

49. *Id.*

50. This statement seems to refer to the fact that the company had an easement in which to lay its pipe.

> [i]t is evident that the ultimate justification of the inapplicability of the rule of [strict liability] to cases of damage by gas escaping from mains lies . . . [not in] . . . doctrine, but [in] common sense. [The common law's] claim to distinction is to be found not in [its] logical consistency . . . but in [its] practical wisdom . . . . Finally, it is to be observed that the severity of the rule of [strict] liability . . . is opposed to the unmistakable tendency of the law . . . to rest responsibility . . . upon legal culpability.[51]

Thus, *Gould's* denial of strict liability was based on common sense rather than legal analysis or reasoning.

Since the *Gould* decision appeared in 1907, United States law governing strict liability has undergone an evolution. A further exploration of strict liability in the United States is therefore appropriate. It has been mentioned in some cases even though it has not been explicitly pled. In *Di Sandro v. Providence Gas Company*[52] a gas leak developed in a distribution main that apparently had been disturbed by recent sewer construction. The gas found its way into plaintiff's house, which was destroyed by an explosion when plaintiff entered his gas filled basement with a lantern. The court noted in dicta that a gas company "is not an insurer."[53] Another case where strict liability was mentioned was *Skelly Oil Company v. Holloway*, *supra*, where the court also concluded that the defendant was not an insurer.[54] The Minnesota Supreme Court in *De Vries v. City of Austin*[55] discussed *Gould* and then rejected the idea of a gas distributor as an "insurer of the safety of its operations."[56] A recent case in which the plaintiff pled strict liability is *Karle v. National Fuel Gas Distribution Corporation*, *supra*. There, defendant's 20 inch gas main leaked, resulting in an explosion which injured plaintiff. The court in *Karle* denied strict liability, but there appears to have been a pleading problem.[57] The case is also distin-

51. *Id.* at 256.

52. 102 A. 617 (R.I. 1918).

53. *Id.* at 620. Being an "insurer" refers to being strictly liable for one's actions. *See* PROSSER, LAW OF TORTS 517 (4th ed. 1971). The Rhode Island Supreme Court also denied application of the doctrine of res ipsa loquitur. It appears however, that the court may have denied res ipsa loquitur at least partly because of the number and significance of "objectionable" errors in plaintiff's brief.

54. 171 F.2d 670, 674 (8th Cir. 1948).

55. 110 N.W.2d 529 (Minn. 1961).

56. *Id.* at 538.

57. 448 F.Supp. 753, 767 (W.D. Pa. 1978). Plaintiff argued defendant was liable under section 402a Restatement Second of Torts for transporting gas in an unreasonably dangerous pipeline. To be liable the plaintiff had to plead or prove that the pipeline was unreasonably dangerous because of defective manufacture or design. The plaintiff failed to plead or prove defective manufacture or design. *Id.* at 767.

guishable from those discussed above as plaintiff's theory was that defendant's pipeline was a product unsafe for use rather than approaching strict liability from the standpoint of natural gas transportation being an abnormally dangerous activity.[58]

On the basis of these cases it is evident that United States courts are not willing to accept the application of strict liability to accidents relating to the transportation of natural gas. It should be noted, however, that only one recent case, *Karle*, *supra*, has addressed the subject and in that case there were pleading problems. It is suggested that a properly pled suit might be successful considering the trend of modern tort law.

COMMON LAW THEORIES OF LIABILITY IN CANADA

Some of the early Canadian cases are similar in some aspects to their United States counterparts. For example, *Garand v. The Montreal Light, Heat and Power Company*,[59] like *Sipple*, *supra*, involved an asphyxiation allegedly caused by escaping gas. They both emphasized the dangerous nature of gas and in each case the defendants were found liable. *Sipple*, however, was based on negligence, whereas *Garand* took a completely different approach and based liability on specific language in the charter under which the defendant operated his system.[60]

Some Canadian cases of this time period, however, required negligence like their United States counterparts. In *Harmer v. Brantford Gas Company*,[61] for example, a defendant was installing a main in the street near the plaintiff's building when an explosion occurred damaging the plaintiff's building. The court stated that "plaintiff must allege and prove negligence . . . ."[62] The circumstances and allegations, although not clear from the report, were insufficient to find liability. In a somewhat later Canadian case,[63] defendant had a 2 inch gas line in the

58. *See* RESTATEMENT (SECOND) OF TORTS, §§ 519-524A (1977) for a discussion of the concept of abnormally dangerous activities.

59. 33 Que. C.S. 414 (1908).

60. It is useful to see what is contained in the charter of the defendant with regard to their responsibility for damages. The statute of Canada, 1847, chap. LXXIX, sec. H, provides: "That the company, in the exercise of the power conferred upon it . . . shall indemnify the possessor and proprietor of houses and properties for all damages by them suffered." In I Edward VII, cap. LXVI, sec. 10, it is provided: "That the company may . . . construct . . . pipes . . . necessary for its business, provided that the company be responsible for all damages which it may occassion." *Id.* at 418.

61. 13 O.W.R. 873 (1909).

62. *Id.* at 878.

63. Employers Liability Co. v. Central Pipe Line Co., 27 Ont. W.N. 1 (1924).

street in front of plaintiff's house. A new sewer line recently had been installed under the gas line and the defendent knew of the construction. Gas leaked out of the gas line and percolated through the soil into the plaintiff's house where an explosion occurred. In finding the defendant liable, the court simply noted that "persons undertaking to deal with [gas] are . . . bound . . . to use all *reasonable diligence* to prevent an escape . . . ."[64] In the pre-1915 Canadian cases the reasonable diligence required was merely a negligence standard which was the same standard then used in United States courts.

Canadian cases after about 1915 diverge from those in the United States. Negligence was no longer the main theory used, but liability was based on a defendant's operating charter or franchise as it was earlier in *Garand*, *supra*. Two examples of later cases basing liability on a charter or franchise are *Raffan v. The Canadian Western Natural Gas, Light, Heat and Power Company*[65] and *Darbey v. Winnipeg Electric Company*.[66]

Raffan is especially important because of its interpretation of an ordinance[67] to imply strict liability as in *Rylands v. Fletcher*, *i.e.*, liability without proof of negligence. This interpretation comes about through the phrase "so as not to endanger the public health . . . ."[68] The *Raffan* court states that "[t]he statutory authority invoked by the company is not absolute, but qualified, and . . . they are legally *liable for all damage* . . ."[69] within the scope of that authority, here locating and constructing the gas system. As a justification for this holding the court states that "[t]he intention of the legislature could not have been . . . to give a remedy which already existed at common law if the company were guilty of negligence. The object of the qualifying section must have been to prevent the company from endangering the public health or safety in carrying out their undertaking."[70] Public health or safety was then determined to apply to individuals and not just the public at large as defendant claimed.[71] In a concurring opinion the

64. *Id.* at 2-3 (emphasis added).
65. 8 W.W.R. 676 (1915).
66. [1933] 4 D.L.R. 252.
67. The ordinance reads as follows: "[t]he company shall locate and construct its gas or water works or electric or telephone system, and all apparatus and appurtenances thereto belonging or appertaining or therewith communicating and wheresoever situated so as not to endanger the public health or safety." 8 W.W.R. 676, 677 (1915).
68. *Id.* at 678.
69. *Id.* at 677 (emphasis added).
70. *Id.* at 677-78.
71. *Id.* at 678.

applicability of strict liability is directly stated. "It follows . . . that the principle of *Rylands v. Fletcher* . . . applies to this case, and that if . . . defendants' gas pipes . . . 'endangered the public health or safety' . . . they are liable . . . without proof of negligence . . . ."[72] The court does, however, recognize as a defense the fact that the proximate cause was the voluntary act of a third party.[73]

It is important to note that the court did not state that gas distribution was a strict liability activity, but rather that a statute was interpreted to impose liability without fault.

Darbey, supra, confirms the use of liberal statutory interpretation to apply liability without fault to a defendant gas company, although in the particular factual situation the defendant was not liable. In *Darbey*, the plaintiff property owner contracted with defendant gas company to supply gas to her house. The plaintiff later built an addition onto her house and damaged some of the defendant's gas pipes located on plaintiff's property. Gas escaped into the plaintiff's house and plaintiff was injured.

The plaintiff contended that the defendant was liable with or without negligence,[74] by reason of the statute[75] under which defendant operated or under the actual rule of *Rylands v. Fletcher*, where liability rested on the escape of a mischievous thing from the owner's premises.[76] The *Darbey* court approvingly reviewed *Raffan* and stated that it was on that ground that the case must be decided.[77] However, *Darbey* also acknowledged the possibility of applying strict liability not only on the basis of the statute, but also on the actual premise of *Rylands v. Fletcher*, as the plaintiff had contended. The *Darbey* court denied defendant's liability on all grounds by recognizing as a defense to both approaches to strict liability the wrongful acts of third parties, here the plaintiff.[78] *Darbey* is thus one of the first cases to acknowledge that a cause of action may exist based not only on statutorily implied

72. *Id.* at 689.

73. *Id.*

74. [1933] 4 D.L.R. 252, 255.

75. Act of Incorporation of the Manitoba Electric, Gas and Light Company, 1880 Man. Stat. c. 86. §§ 25-30. *Id.* at 254.

76. *Id.*

77. *Id.* at 257.

78. "[Defendants] cannot be held liable under Fletcher v. Rylands nor under the special clause of their Act of Incorporation for the same reason. They . . . are not responsible for the act of a stranger which could not be anticipated or suspected, and of which they had no notice." *Id.* at 259.

strict liability, but also on strict liability according to *Rylands v. Fletcher*.

In 1935 a major Canadian decision was handed down. *London Guarantee and Accident Co. v. Northwestern Utilities Ltd.*[79] involved the usual cast of characters: gas distribution company, third party, and nearby property. The defendant's 12 inch gas main developed a leak as a result of sewer construction by the city. Gas leaked into the basement of plaintiff's insured's hotel and an explosion and fire resulted. Damages were claimed in excess of $320,000, a large sum for a depression era case. The defendant gas company claimed they were not responsible for and could not control the city's operations.

The major significance of the case lies in the court's succint statement that the carrying of gas is subject to the rule of strict liability if the gas escapes.

> That gas is a dangerous thing within the rules applicable to things dangerous in themselves is beyond question. Thus the appellants who are carrying in their mains the inflammable and explosive gas are *prima facie* within the principle of *Rylands v. Fletcher* [citations]; . . . though they are doing nothing wrongful in carrying the dangerous thing so long as they keep it in their pipes, they come *prima facie* within the rule of strict liability if the gas escapes; the gas constitutes an extraordinary danger created by the appellants for their own purposes, and the rule established by *Rylands v. Fletcher* . . . requires that they act at their peril and must pay for damage caused by the gas if it escapes, even without any negligence on their part. The rule is not limited to cases where the defendant has been carrying or accumulating the dangerous thing on his own land; it applies equally in a case like the present where appellants were carrying the gas in mains laid in the property of the city . . . in exercise of a franchise to do so . . . [citations].[80]

This case also involved the provisions of The Water, Gas, Electric, and Telephone Companies Act of Alberta.[81] The court avoided determining whether this statute itself applied an absolute duty on defendant by interpreting the defendant's acts as maintenance which was outside the scope of the act.[82] The court did note, however, that "where

79. [1935] 3 W.W.R. 446.

80. *Id.* at 450-51.

81. ALTA. REV. STAT. 1922, 1924c. 168, *as amended by* Alta. Stat. c. 3, § 21. *Id.* at.

82. *Id.* at 448. Section 11 stated: "The Company shall make satisfaction to the owners or proprietors of any building or other property or to the municipality or Minister of Public Works as the case may be for all damages caused in or by the execution of all or any of the said powers." Section 13 stated: "The company shall *locate* and *construct* its gas or water or

[gas companies] are acting under statutory powers it is a question of construction . . . of the statute whether they are only liable for negligence or whether they remain subject to the strict and unqualified rule of *Rylands v. Fletcher*."[83]

Another major aspect of the case is the court's discussion of defenses available to the defendant even when strict liability is applied. The first of these defenses might be called the statutory powers defense. On this subject the court stated "the rule of strict liability has been modified by admitting as a defense that what was being done was properly done in pursuance of statutory powers, and the mischief that has happened has not been brought about by any negligence on the part of the [gas company]."[84] Another defense accepted by the court is that damage was caused by the volitional independent act of a third party: "the rule of [strict liability] has been held inapplicable where the casualty is due to the act of God; or to the independent or conscious volition of a third party . . . and not to any negligence of the defendants."[85] A third defense which *London Guarantee* considered and which the court rejected was the common interest defense.[86] The court recognized that the defense might be acceptable in some situations, but that in the case before the court it was inapplicable since the defendant was engaged in a commercial undertaking and the plaintiff was merely availing himself of the service offered.[87]

The court in *London Guarantee* accepted the defendant's defense against strict liability, that the accident had resulted from the volitional act of a third party.[88] However, the court proceeded to consider whether the defendant was negligent for failing to foresee and guard

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electric or telephone system and all apparatus and appurtenances thereto belonging or appertaining or therewith connected and wheresoever situated so as not to endanger the public health or safety." *Id.* (emphasis added).

83. *Id.* at 452.

84. *Id.* at 451. For a general discussion of defenses to strict liability see PROSSER, LAW OF TORTS 523 (4th ed. 1971).

85. *Id.* at 451.

86. *Id.* at 452. *See* note 87 *infra.*

87. The court stated: "Reference was made to a further possible defense based on the contention that the appellants and the owners of the properties destroyed had a common interest in maintaining the potentially dangerous installation, or that these owners had consented to the danger. It is true that in proper cases such may be good defenses, but they do not seem to have any application to a case like the present where the appellants are a commercial undertaking though no doubt they are acting under statutory powers, while those whose property has been destroyed are merely individual consumers who avail themselves of the supply of gas which is offered. These facts do not constitute a common interest or consent in any relevant sense." *Id.*

88. *Id.* at 454-56.

against the consequences of the third party's acts.[89] In considering negligence the court noted that "[t]he degree of care . . . must be proportioned to the degree of risk . . . ."[90] The court also mentioned the "tremendous responsibility of carrying this highly inflammable gas"[91] and in finding the defendant liable in negligence noted that "[i]f they did not know of the city works, their system of inspection must have been very deficient. If they did know they should have been on their guard . . . ."[92] Thus, when the court couldn't use strict liability, it resorted to negligence with a variable standard of care as used in United States courts.

One additional case which is important in the development of Canadian common law is *Snyder v. Moncton Electricity & Gas*.[93] There, an explosion in the plaintiff's house allegedly was caused by leaking gas which migrated through the soil into the plaintiff's house. The main importance of *Snyder*, *supra*, lies in the gloss it adds to *London Guarantee*, *supra*, concerning statutory interpretation. The *Snyder* court concluded that when a statute is involved the court must examine the statute to see if there are "qualifying provisions imposing special liability."[94] In the absence of these provisions, acting within statutory powers is a defense to strict liability imposed as a result of the gas being a dangerous thing within the rule of *Rylands v. Fletcher*.

Recent cases follow *London Guarantee*. In *Weisler v. District of North Vancouver*[95] the municipality disturbed co-defendant gas company's main and gas leaked into plaintiff's supper club where an explosion occurred. The court followed *London Guarantee*, allowing the actions within statutory powers defense, and then applying negligence with a high standard of care.[96] The court noted in conclusion that on the basis of *London Guarantee* the defendant was liable.[97]

Similarly, *London Guarantee* was followed in the most recent pertinent case, *Fenn v. Corporation of the City of Peterborough*.[98] *Fenn* involved a factual situation almost identical to that in *London Guarantee*. A fracture in a gas line in the street in front of plaintiff's house

89. *Id.*
90. *Id.* at 458.
91. *Id.* at 459.
92. *Id.*
93. [1936] 2 D.L.R. 31.
94. *Id.* at 34.
95. 17 D.L.R.2d 319 (1959).
96. *Id.* at 325-27.
97. *Id.* at 329.
98. 73 D.L.R. 3d 177, 14 Ont.2d 137, 1 C.C.L.T. 90 (1976).

apparently was caused by a water line repair crew which replaced a defective water line in the area near the gas line. The gas allegedly leaked from the fracture and percolated through the soil into the plaintiff's basement where an explosion occurred killing several persons.

The *Fenn* court noted the applicability of the principles of *London Guarantee*, *supra*,[99] and when the defendant relied on the third party defense[100] to strict liability, the court stated that the defendant might still be liable in negligence.[101] In discussing the "tremendous"[102] responsibility of a party carrying gas it was noted that "the Gas Company should have had in mind at all times the danger . . . [of working with gas and] . . . the tremendous responsibility that rested upon them to . . . ensure that there be no escape of gas . . . ."[103] The standard of care as delineated in *London Guarantee* was then used by the court and the defendant was found liable.[104]

Thus, *London Guarantee* and recent cases hold that those who carry gas are "*prima facie* within the rule of strict liability if the gas escapes."[105] There are, however, two defenses which have been recognized: that the damage was caused by the "independent or conscious volition of a third party"[106] or that the company was acting within their statutory powers.[107] The second defense depends on the construction of the language of the statute and according to *Snyder*, unless there are "qualifying provisions imposing special liability"[108] the defense is valid and the plaintiff must show negligence. According to *London Guarantee* the plaintiff must likewise show negligence if the third party defense is valid.[109] The common interest defense, at least within the *London Guarantee* factual situation, is not valid.[110] When resort to negligence is necessary, *London Guarantee* establishes and recent cases agree, that the degree of care must be proportionate to the risk and that the risk of carrying gas is high.[111] The result of this reasoning is invari-

99. *Id.* at 186.
100. *See* notes 84-87 and accompanying text, *supra*.
101. *See* 73 D.L.R. 3d 177, 14 Ont.2d 137, 1 C.C.L.T. 90 (1976).
102. *Id.* at 189.
103. *Id.*
104. *Id.* at 188.
105. [1935] 4 D.L.R. 737, 741, 3 W.W.R. 446, 451.
106. *Id.* at 742.
107. *Id.*
108. [1936] 2 D.L.R. 31, 34.
109. [1935] 4 D.L.R. 737, 747, 3 W.W.R. 446, 457.
110. *See* note 87 and accompanying text *supra*.
111. [1935] 4 D.L.R. 737, 748, 3 W.W.R. 446, 458.

ably the establishment of a high standard of care which frequently leads to finding the defendant liable.

SUMMARY AND CONCLUSION

The early Canadian common law recognized the dangerous nature of gas[112] and some of the early cases required proof of negligence.[113] Further development on the Canadian common law, however, provided for judicial construction of charters and franchises and resulted in holding defendants strictly liable for their actions.[114] The main defense available was that the damage resulted from the independent volitional act of a third party.[115] Early United States cases developed along a different line.[116] The dangerous nature of gas was recognized quickly by the United States courts[117] as it had been by the Canadian courts. However, while the Canadian courts used charters or franchises as a means of finding strict liability, the United States courts used negligence, but adjusted the standard of care to suit the hazardous nature of gas.

The Canadian common law after about 1935 continued to emphasize strict liability. The basis of strict liability, however, shifted away from the charters and franchises as a result of the courts acknowledging that gas transportation was a strict liability activity within the concept of *Rylands v. Fletcher*. Along with this acknowledgement came the recognition of the defenses of acting within statutory powers and independent volitional acts of third parties. Where one of these defenses was allowed, a negligence standard with a high standard of care was applied. Since these defenses were frequently allowed, the negligence standard was the usual measure of liability. During this transitional period in the Canadian common law when the basis for strict liability was being redefined, the United States common law continued to use a negligence standard with an adjustable, but usually high standard of care.

Today, this distinction still exists with Canadian courts using strict liability as discussed above and United States courts using the negligence standard with an adjustable standard of care.

Thus, where a Canadian defendant gas transmission operator has

112. *See* note 59 and accompanying text *supra*.
113. *See* notes 61 and 62 and accompanying text *supra*.
114. *See* notes 65-78 and accompanying text *supra*.
115. *See* note 73 and accompanying text *supra*.
116. *See* notes 29-41 and 43-51 and accompanying text *supra*.
117. *See* notes 38-42 and accompanying text *supra*.

the valid defense of the damage having resulted from the independent volitional acts of a third party or that it was acting within statutory powers, negligence will be the applicable theory of liability. Similarly, negligence will be the applicable theory of liability for a defendant located in the United States if the incident is not on Federal lands. If the United States incident is on Federal lands and is within the regulations promulgated under the Mineral Leasing Act of 1920,[118] as amended, or if the Canadian defendant cannot avail itself of one of the defenses, the applicable theory of liability will again be similar, but will be strict liability.

118. 30 U.S.C. § 185 (1976 & Supp. II 1978). The regulations promulgated under this act are at 44 Fed. Reg. 58, 126 (1979) (to be codified in 43 C.F.R. 2880 *et seq.*). *See also*, notes 5-15 and accompanying text *supra*.