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Indiana Court of Appeals Examines Strict Liability in Byproduct of Steelmaking Process

This week we return to a topic that has been a frequent basis for discussion here on the Hoosier Litigation Blog: the allocation of fault for injuries. Most recently, we discussed this topic in the context of the Indiana Supreme Court's rejection of the very duty doctrine. This week we will be taking a different bend from our usual discussions on the topic, in so much as we are not focusing on distinguishing between comparative fault and contributory negligence. Instead, we are looking at the concept of strict liability through the recent Indiana Court of Appeals case *Fechtman v. U.S. Steel Corp.*

In *Fechtman*, the plaintiff, Mr. Fechtman, brought the case as the personal representative of the Estate of Mr. Hernandez. While Mr. Hernandez survived the incident at issue in the case, he now resides at a rehab center "and will likely remain in such an institution for the rest of his life." Consequently, in order to prosecute the case, it was necessary to create an estate and prosecute it on his behalf.

Although I typically try to avoid delving too heavily into the facts of a case, it is necessary for our discussion to take a look at what happened. Mr. Hernandez was employed by Roger & Sons. Roger & Sons was contracted by U.S. Steel Corp. to

conduct maintenance at the U.S. Steel's manufacturing plant in Gary, IN. On the night in question, Mr. Hernandez was joined by two co-workers to clean a sidewalk and roadway near a dust catcher for the plant. Instead of fully exposing how little I know of the steel manufacturing process, I will quote the court's description of the blast furnace's dust catcher.

A dust catcher is a large, vertical structure. Gases from the blast furnace enter the dust catcher from the top where they decelerate, causing the coarser particles to fall to the bottom of the catcher, where they collect in a funnel-shaped hopper at the bottom, while the gases flow out through a lateral outlet located in the upper portion of the catcher. The collected dust can then be discharged from the catcher through a lock at the bottom of the hopper. When a blast furnace is brought back online, the dust catcher needs to be emptied or "dumped," a process which releases large amounts of carbon monoxide gas.

On the night of January 17, 2005, Mr. Hernandez and the other two workers were in close proximity to the dust catcher when it was dumped. The three men lost consciousness from the exposure to carbon monoxide and were rushed to a hospital.

Mr. Hernandez suffered serious life altering injuries. He filed a negligence suit against U.S. Steel within two months of the injuries. The case progressed to a jury trial. At the close of the trial, Mr. Hernandez's attorney tendered a jury instruction to the judge concerning strict liability. Specifically, the instruction sought to inform the jury:

- (1) One who carries on an abnormally dangerous activity, such as releasing poisonous gas into the atmosphere, 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.

The trial judge refused to give the instruction. The jury returned a verdict for Mr. Hernandez finding damages of \$4,657,792.87 and allocating the fault among the parties as five percent to Mr. Hernandez, fifteen percent to U.S. Steel, and eighty percent to Roger & Sons. As Roger & Sons was not made a party to the case, this allotment of fault reduced the recovery for Mr. Hernandez from north of \$4 million to \$698,669.93 as the apportioned liability of U.S. Steel. Mr. Hernandez appealed the denial of the strict liability instruction.

Strict liability is an instrumentality of both criminal and civil law. If it applies, the person whose actions resulted in the injury of another is liable for that harm regardless of any level of culpability or fault. Under Indiana law, the concept of strict liability is limited to a handful of circumstances. One such circumstance is where the action that causes the injury is “abnormally dangerous.” In order to define the parameters of what constitutes an “abnormally dangerous” activity, Indiana courts have looked to the Restatement (Second) of Torts §§ 519 & 520. Section 519 states:

(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.

As you may notice, the language of the tendered jury instruction is an almost verbatim recitation of section 519. Section 520 provides guidance as to when an activity is abnormally dangerous by enumerating factors to be considered in the determination. Section 520 provides:

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.

In considering the factors of section 520, “[t]he essential question is whether the risk created is so unusual, either because of its magnitude or because of the

circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even though it is carried on with all reasonable care.”

In order to determine whether the trial court had erred in excluding the jury instruction on strict liability, the court of appeals had to determine whether the dumping of the dust collector is an abnormally dangerous activity. The court made its determination by evaluating the facts through the lens of each of the six factors of section 520.

A. *Existence of a High Degree of Risk of Some Harm.* The court determined that the carbon monoxide is an unavoidable byproduct of steelmaking and is accompanied by the impossibility to predict where the gas will travel once released. The court determined that while it is not necessarily possible to eliminate all risk, the true issue is whether the activity “is so dangerous that ‘despite any usefulness it may have for the community, it should be required . . . to pay for any harm it causes, without the need of a finding of negligence.’” Without elaborating in great detail, the court concluded that “there remains a certain degree of risk of harm” from the dumping.

B. *Likelihood of Great Harm.* The court concluded that “releasing a substantial amount of carbon monoxide at one time does involve a likelihood of considerable harm.”

C. *Inability to Eliminate Risk.* This third factor is what Indiana courts consider to be the core of the abnormally dangerous strict liability analysis. While Mr. Hernandez focused on the fact that the production of carbon monoxide is an inherent and necessary byproduct of steelmaking and argued that it was therefore incapable of elimination, the court sided with U.S. Steel who outlined a series of safety protocols that are in place to limit the harm including sirens, necessity for onsite work permits, and dumping at night. Consequently, the risk “is not the sort of ‘unavoidable risk remaining in the activity’ that should subject U.S. Steel to liability regardless of the level of care it exercised.”

D. *Common Usage.* This factor broke heavily in favor of Mr. Hernandez. Though the dumping of a dust catcher is routinely done at U.S. Steel, it is not a common everyday activity for most people.

E. *Inappropriateness of the Activity to the Place Where it is Carried On.* This factor, unlike the common usage factor, was heavily in favor of U.S. Steel and not applying strict liability. The dumping at U.S. Steel’s “enormous, 3,000-acre” facility was deemed as “wholly appropriate” due to the size and industrial nature of the setting.

F. *Value to the Community vs. Dangerous Attributes.* This factor was the single strongest factor in favor of U.S. Steel and against applying strict liability. The court rattled off a laundry list of the societal benefits derived by the steel manufacturing process and stressed that the value could not be understated.

After balancing the factors, the court concluded that the dangers in the dumping did not trump the societal benefits and the ability to mitigate the harm of the dumping. An interesting point upon which the court gave much emphasis was that because the jury found Roger & Sons eighty percent at fault, without the negligence of his employer Mr. Hernandez and his co-workers would not have been harmed. Because the factors cut against applying strict liability, the court of appeals found no error in the exclusion of the strict liability instruction.

I fully suspect that Mr. Hernandez will seek review of this matter by the Indiana Supreme Court. If I had to guess, I would say that the Supreme Court will deny the petition for transfer. However, I am far less confident that the court will deny review than I am that review will be sought. The fact that a balancing of factors is necessary to the determination makes review by the Supreme Court more likely, as it is not a simple matter of a black letter law that the court of appeals applied correctly or misapplied. It is a matter subject to the varying opinions of judges. In light of the growing trend by the Indiana Supreme Court to grant oral argument on petitions for transfer prior to deciding whether to grant transfer, I think this is a prime case to hear argument prior to determining whether the case will even be decided anew by the Supreme Court.

Another fact that makes review seem more likely is that the court of appeals rejected consideration of an Oregon decision cited by Mr. Hernandez. The case, *McLane v. Northwest Natural Gas Co.*, determined that the storage of a large amount of natural gas near a populated area was sufficiently abnormally dangerous to trigger the strict liability standard. Because the Indiana Court of Appeals found, in its opinion, sufficient support in Indiana law, it gave no consideration to the *McLane* case. While the Supreme Court may be as quick to dismiss *McLane*, it remains a strong support for reexamining this case.

Join us again next time for further discussion of developments in the law.

Sources

- [*Fechtman v. U.S. Steel Corp.*](#), ---N.E.2d ---, No. 45A04-1209-CT-474, 2013 WL 5350938 (Ind. Ct. App. Sept. 25, 2013).

- [*McLane v. Northwest Natural Gas Co.*](#), 476 P.2d 636 (Or. 1970).

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