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# Peculiar Risk in American Tort Law

Ellen S. Pryor\*

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## I. INTRODUCTION

American tort law includes a significant strand of liability tied to an intriguing concept variously termed “peculiar risk,” “special danger,” and “special risk inherent in the work,” among others.<sup>1</sup> Both England and the United States endorsed early forms of the doctrine in the late nineteenth and early twentieth centuries.<sup>2</sup> By 1935 the boundaries of the doctrine were similar in America and England. Yet, by 1965 American and English tort law had diverged on the doctrine. The *Restatement (Second) of Torts* in 1965 basically carried forward the *First Restatement’s* enunciation of the doctrine, reflecting the dominant American view.<sup>3</sup> But by 1965 the doctrine had been severely limited in England and rejected in several other common law countries, and it remains in disfavor outside the United States.

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1. See *infra* text accompanying notes 10–33.

2. See *infra* text accompanying notes 34–86.

3. Sections 413, 416, and 427 of the *Restatement (Second) of Torts* articulate the doctrine. For more detail, see *infra* text accompanying notes 21–26. These sections are similar to sections 413, 416, and 427 of the *First Restatement of Torts*.

The divergence is notable given the extent of litigation involving the doctrine and the seemingly distinctive role of the doctrine. Since 1965, over 900 American cases have cited the doctrine.<sup>4</sup> Peculiar risk presents a basis for liability different from other standards or actions that trigger liability in tort law—it is different from intent, recklessness, negligence, nuisance, and abnormally dangerous activity.<sup>5</sup>

The divide between the American approach and treatment of the doctrine outside the United States is a puzzle. In the countries that have rejected or severely limited the doctrine, the critiques have included lack of definition, decisional indeterminacy, and shaky historical and normative justifications. Yet a doctrine subject to these criticisms elsewhere has remained well accepted in the United States in the last thirty years—a thirty-year period, as we all know, characterized by extensive tort reform across the bandwidth of tort law.

This article focuses on three points about this divide between American tort law and the tort law of many common law countries. First, this article discusses when and how the divide occurred.<sup>6</sup> Second, this article asks why the doctrine remained well accepted in America despite the intensity and duration of American tort reform.<sup>7</sup> Third, this article closes with some thoughts about whether the American version of the doctrine offers lessons for tort law outside the United States.<sup>8</sup> Before addressing these three points, this article briefly explains the doctrine and why it matters.<sup>9</sup>

## II. PECULIAR RISK IN BRIEF

In America, the peculiar-risk doctrine is one piece of the law relating to when someone who retains an independent contractor can be liable for the harms caused by the contractor. The starting principle in this area of law is that a person who retains an independent contractor is not subject to liability for harm caused by the negligence of the independent contractor—subject to exceptions.<sup>10</sup> The exceptions fall into two categories.<sup>11</sup> One

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4. A Westlaw search on December 28, 2010, in the Cases database for the term “peculiar risk” yielded 947 cases since 1965.

5. See *infra* text accompanying notes 10–33.

6. See *infra* Part III.

7. See *infra* Part IV.

8. See *infra* Part V.

9. See *infra* Part II.

10. See RESTATEMENT (SECOND) OF TORTS § 409 (1965). This section states the “general principle” that, subject to exceptions that follow the general principle, “the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.” *Id.* In this context, “employer” is the term used for one who hires an independent contractor but is not in an employer–

category applies when the person who retains the contractor is himself negligent<sup>12</sup>—for example, in negligent hiring.<sup>13</sup> The other category consists of pockets of vicarious liability.<sup>14</sup> These pockets include, among others, nuisance,<sup>15</sup> abnormally dangerous activity,<sup>16</sup> maintenance of highways and other public places,<sup>17</sup> and precautions required by statute or regulation.<sup>18</sup> One of the vicarious-liability pockets is peculiar risk.<sup>19</sup> If work involves a peculiar risk and the contractor is negligent, the hirer is subject to vicarious liability.<sup>20</sup>

Multiple shadings of the peculiar-risk doctrine appear in hundreds of state and federal cases. Most variations, however, are similar to language in the *First* and *Second Restatements*.<sup>21</sup> Several sections in the *Restatement (Second)* contain definitions of “peculiar risk” and “inherent danger.” Section 416 imposes vicarious liability for the negligence of an independent contractor when an actor retains an independent contractor “to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are

employee relationship. Multiple exceptions follow this rule. See *id.* §§ 410–29.

11. Comment b to section 409 states, “[i]n general, the exceptions [to the basic principle of no liability] may be said to fall into three very broad categories . . .” *Id.* § 409 cmt. b. But the primary distinction between the exceptions is that some relate to instances in which the hirer himself has been negligent, and some relate to circumstances in which the hirer, even if not negligent, will be vicariously liable for the negligence of the independent contractor. Thus, all the exceptions in Chapter 15 of the *Restatement* appear either under Topic 1 (when the harm is caused by the fault of the hirer) or Topic 2 (when the harm is caused only by the negligence of the independent contractor).

12. *Id.* ch. 15, topic 1, intro. note (explaining that the exceptions in this Topic are all situations in which “the employer’s liability must be based upon his own personal negligence”).

13. See *id.* § 411 (negligence in selecting the contractor).

14. *Id.* ch. 15, topic 2, intro. note (noting that the rules under Topic 2 “do not rest upon any personal negligence of the employer” but are “rules of vicarious liability, making the employer liable for the negligence of the independent contractor, irrespective of whether the employer has himself been at fault”).

15. *Id.* § 427B.

16. *Id.* § 427A.

17. *Id.* § 418.

18. *Id.* § 424.

19. Peculiar risk also appears as a basis for direct liability. See *id.* § 413. For a discussion of the relationship between peculiar risk as a basis for direct liability and as a basis for vicarious liability, see *infra* Part IV. This article primarily relates to peculiar risk as a basis for vicarious liability, although some of the criticism and case law relating to peculiar risk apply to the doctrine whatever its effect.

20. See *infra* text accompanying notes 105–11.

21. Compare RESTATEMENT (SECOND) OF TORTS ch. 15 (basically carrying forward the *First Restatement’s* formulations), with RESTATEMENT (FIRST) OF TORTS ch. 15 (1934) (continuing to reflect judicial articulations of the rule).

taken . . . .”<sup>22</sup> Section 427 imposes vicarious liability for the negligence of an independent contractor on “[o]ne who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work . . . .”<sup>23</sup>

Despite the different statements, both sections have the same substantive meaning. Comment a to section 416 notes that sections 416 and 427 “represent different forms of statement of the same general rule.”<sup>24</sup> In addition, the “rules stated in the two Sections have been applied more or less interchangeably in the same types of cases.”<sup>25</sup> The difference, if any, is that section 416 is more commonly used when the type of precaution is “specific,” and section 427 is more commonly applied when the dangers of the work call for a number of “precautions.”<sup>26</sup> In any event, conceptually, the *Restatement* views these as reflecting the same notion.

The *Restatement* explains what constitutes a peculiar risk:

[S]pecial risks, peculiar to the work to be done, and arising out of its character, or out of the place where it is to be done, against which a reasonable man would recognize the necessity of taking special precautions. The situation is one in which a risk is created which is not a normal, routine matter of customary human activity, such as driving an automobile, but is rather a special danger to those in the vicinity, arising out of the particular situation created, and calling for special precautions. “Peculiar” does not mean that the risk must be one which is abnormal to the type of work done, or that it must be an abnormally great risk. It has reference only to a special, recognizable danger arising out of the work itself.<sup>27</sup>

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22. RESTATEMENT (SECOND) OF TORTS § 416.

23. *Id.* § 427.

24. *Id.* § 416 cmt. a.

25. *Id.*

26. *Id.*

27. This description appears not in a comment to either section 416 or 427, but in comment b to section 413. Section 413 is the first reference to peculiar risk. *See id.* § 413 cmt. b. This section is one of the sections in Chapter 15 that set out variants of ways in which the person who hires the independent contractor can himself be negligent. Section 413 is important, then, in setting out the definition of peculiar risk. But, operationally, it is less significant than sections 416 and 427 because the latter two sections impose vicarious liability.

Most states follow this doctrine.<sup>28</sup> They impose vicarious liability on the hirer for the independent contractor's negligence when the activity constitutes a peculiar risk, special risk inherent in the activity, or inherent danger. Further, most states draw heavily on the *Restatement* in defining which activities fit within this category.<sup>29</sup> A vast range of activities have been involved in peculiar-risk litigation—all manner of construction work, transportation, recreation, and use of products.

In both the *Restatement* and in the extensive case law, the concept of peculiar risk remains distinct from negligence and from the definition of abnormally dangerous activity.<sup>30</sup> Although an abnormally dangerous activity and a peculiar risk both share some dimension of unusual or uncommon risk, a key difference is that the abnormally dangerous activity poses a highly significant risk even when reasonable care is exercised.<sup>31</sup> By contrast, a peculiar risk is one that poses a special danger "unless special precautions are taken."<sup>32</sup>

An activity posing a peculiar risk, then, is located on a spectrum of activities. Any activity that poses risk to others can be the basis

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28. See *Fike v. Peace*, 964 So. 2d 651, 654–58 (Ala. 2007) (recognizing section 427 and noting earlier rulings stating that Alabama law is consistent with the principles in section 416); *Vertentes v. Barletta Co.*, 466 N.E.2d 500, 502–04 (Mass. 1984) (citing both section 416 and section 427 in ruling that liability under either does not extend to the employee of an independent contractor); *Bosak v. Hutchinson*, 375 N.W.2d 333, 339 (Mich. 1985) (citing both sections and noting that they overlap); *Matteuzzi v. Columbus P'ship, L.P.*, 866 S.W.2d 128, 130 (Mo. 1993) (referring to the "inherently dangerous" activity doctrine and citing section 413 and section 416); *Beckman v. Butte-Silver Bow Cnty.*, 1 P.3d 348, 351 (Mont. 2000) (noting that Montana holds employers vicariously liable for the torts of subcontractors arising out of work that is inherently dangerous and that Montana courts have looked for guidance to section 416 and section 427 in determining what is inherently dangerous); *Kime v. Hobbs*, 562 N.W.2d 705, 713 (Neb. 1997) (citing section 416 and section 427); *Mavrikidis v. Petullo*, 707 A.2d 977, 989–90 (N.J. 1998) (noting that New Jersey recognizes a doctrine allowing vicarious liability for inherently dangerous activities and that the definition of "inherently dangerous" activity "comports with the discussion in sections 413, 416, and 427" of the *Restatement*).

29. See cases cited *supra* note 28.

30. An abnormally dangerous activity can serve as the basis for a finding of strict liability on the one who engages in it. See *RESTATEMENT (THIRD) OF TORTS* § 20 (2010). In addition, in independent contractor scenarios, one who hires an independent contractor to carry out an abnormally dangerous activity is vicariously liable to the same extent that the contractor would be liable (that is, strictly liable). See *RESTATEMENT (SECOND) OF TORTS* § 427A.

31. One element of an abnormally dangerous activity is that "the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors." *RESTATEMENT (THIRD) OF TORTS* § 20.

32. *RESTATEMENT (SECOND) OF TORTS* § 413. As noted in the text, section 416 of the *Restatement* specifically states that comment b of section 413 provides the "meaning of both 'peculiar risk' and 'special precautions.'" *Id.* § 416 cmt. b.

of a negligence claim. And an activity is abnormally dangerous only if it is uncommon and poses a highly significant risk that remains even if reasonable precautions are taken.<sup>33</sup> Activities posing a special risk sit somewhere between the ends of this spectrum.

### III. WHEN AND HOW THE PATH SPLIT

In the first half of the nineteenth century, the common law in both England and the United States wrestled with the principles that should govern liability for the acts of independent contractors. A wonderful case illustrating the difficulty of crafting these principles is the 1799 English case of *Bush v. Steinman*.<sup>34</sup> The facts were simple:

A. having a house by the road side, contracted with B. to repair it for a stipulated sum; B. contracted with C. to do the work; and C. with D. to furnish the materials. The servant of D. brought a quantity of lime to the house and placed it in the road, by which the Plaintiff's carriage was overturned.<sup>35</sup>

Although a divided court held that A. was liable for the harm, the judges set out vastly different principles for the outcome.<sup>36</sup>

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33. RESTATEMENT (THIRD) OF TORTS § 20.

34. *Bush v. Steinman*, (1799) 126 Eng. Rep. 978 (C.P.) 979.

35. *Id.* at 978.

36. One opinion favoring liability viewed the relationship of the contractor as sufficiently connected to A.'s work to justify the attribution of responsibility to A.

It is sufficiently established that masters are civilly answerable for the neglect of their servants, though absent at the time of the injury committed. . . . The house in this case was undergoing repair for the Defendant, and the act which caused the injury complained of, was an act done for his benefit, and in consequence of his having authorised others to work for him. Though the person by whose neglect the accident happened was the immediate servant of another, yet for the benefit of the public he must be considered as the servant of this Defendant.

*Id.* at 978 (Cockell and Shepherd JJ.). The judges opposing liability noted the absence of control as the key factor:

Now clearly it was not in the power of this Defendant to control the agent by whom the injury to this Plaintiff was effected. He was not employed by the Defendant but by the lime-burner: nor was it in the Defendant's power to prevent him, or any one of the intermediate subcontracting parties, from executing the respective parts of that business which each had undertaken to perform.

*Id.* at 979 (LeBlanc and Marshall JJ.). The chief judge also favored liability but acknowledged uncertainty about the principle that governed:

I am disposed to concur with [the judges favoring liability]: though I am ready to confess that I find great difficulty in stating with accuracy the grounds on which it is to be supported. The relation between master and servant as commonly exemplified in actions brought against the master is not sufficient . . .

English and American cases in the fifty years following *Bush v. Steinman* were critical of the decision and continued to grapple with shaping rules relating to liability for the acts of independent contractors.<sup>37</sup> Indeed, American and English courts were working through these issues at the same time and sometimes cited each others' decisions.<sup>38</sup> An example is the 1855 opinion of the Massachusetts Supreme Court in *Hilliard v. Richardson*.<sup>39</sup> One heading in the opinion was devoted to English cases in the past fifty years: "Has the doctrine of the case of *Bush v. Steinman* been affirmed in England, or has it been overruled and its authority impaired?"<sup>40</sup> The court concluded that *Bush v. Steinman* was no longer solid authority.<sup>41</sup>

By the mid-nineteenth century, both American and English

*Id.* at 979 (Eyre C.J.). The judge found some connections—though not exact analogy—in several cases involving injury caused by home repair on the owner's property or involving home repair work that had generated a nuisance. Thus, "[u]pon the whole case therefore, though I still feel difficulty in stating the precise principle on which the action is founded, I am satisfied with the opinion of my Brothers." *Id.* at 980. Still another judge reasoned that the master-servant relationship did not mark the boundaries of vicarious liability:

It has been strongly argued that the Defendant is not liable, because his liability can be founded in nothing but the mere relation of master and servant; but no authority has been cited to support that proposition. Whatever may be the doctrine of the civil law, it is perfectly clear that our law carries such liability much further.

*Id.* at 980 (Heath J.). Finally, another opinion emphasized that the injury had occurred on the premises.

He who has work going on for his benefit, and on his own premises, must be civilly answerable for the acts of those whom he employs. . . . [H]e has a control over all those persons who work on his premises, and he shall not be allowed to discharge himself from that intendment of law by any act or contract of his own. He ought to reserve such control, and if he deprive himself of it, the law will not permit him to take advantage of that circumstance in order to screen himself from an action.

*Id.* at 981 (Rooke J.).

37. See *Overton v. Freeman*, (1852) 138 Eng. Rep. 717 (C.B.) 718–19 (Maule J.); *id.* at 719 (Cresswell J.); *Reedie v. London & N.W. Ry.*, (1849) 154 Eng. Rep. 1201 (Exch.) 1204–05 (Knowles & Hall JJ.) (discussing cases that help cast doubt on the rule of *Bush v. Steinman*). An even fuller account of how later English cases cast doubt on *Bush v. Steinman* appears in an 1855 decision of the Massachusetts Supreme Judicial Court. See *Hilliard v. Richardson*, 69 Mass. (3 Gray) 349, 357–64 (1855). Several English cases criticizing *Bush v. Steinman* are *Overton v. Freeman*, (1852) 138 Eng. Rep. 717 (C.B.) 720 and *Barker v. Herbert*, [1911] 2 K.B. 633 (Eng.).

38. Examples of American cases exploring the English cases on the topic are *Hilliard v. Richardson*, 69 Mass. (3 Gray) at 357–64; *Cunningham v. Int'l R.R. Co.*, 51 Tex. 503, 508–09 (1879) and *Blake v. Ferris*, 5 N.Y. 48, 58–65 (1851) (citing multiple English cases).

39. 69 Mass. (3 Gray) 349.

40. *Id.* at 357.

41. *Id.* at 361.



courts endorsed a general principle of no liability along with a number of specific exceptions.<sup>42</sup> According to Professor Atiyah, these situations mainly involved the breach of a statutory duty or the hirer's own negligence.<sup>43</sup> American courts had recognized exceptions for nuisance, injury on the property of the hirer, or an act done under public authority.<sup>44</sup> By the end of the nineteenth century, other recognized exceptions included work done in public places and work done pursuant to a public charter or franchise.

In both England and the United States, an exception triggered by an inherently or intrinsically dangerous activity began to emerge in the late nineteenth and early twentieth centuries.<sup>45</sup> A number of American cases enunciated such an exception.<sup>46</sup> Sometimes, the facts or language in these cases overlapped with other principles, such as abnormally dangerous activity or nuisance.<sup>47</sup> Still, the notion of an inherently dangerous activity appeared as a distinct concept in numerous American cases. In 1876, the English case of *Bower v. Peate*<sup>48</sup> included a broad statement that has proven seminal in this area.<sup>49</sup>

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42. See P.S. ATIYAH, VICARIOUS LIABILITY IN THE LAW OF TORTS 327–332 (1967).

43. See *id.* at 328–32. Professor Atiyah reviews the English cases before 1876 and concludes that with the exception of one case,

[A]ll the cases down to the last quarter of the last century, followed a clear and consistent pattern. The general rule of no-liability for the acts of an independent contractor was well established, and regularly followed, but it was also well established that a person might be liable: (1) where he had himself been negligent, despite his employment of the contractor, or had otherwise made himself liable as a secondary party, or (2) where he was himself under some direct and peremptory statutory duty.

*Id.* at 330.

44. A good statement of this rule and exceptions, as well as detail from both English and American cases, appears in *Hilliard v. Richardson*, 69 Mass. (3 Gray) at 357–64. The point in text does not mean that the law in the area was fully settled.

How far owners of real estate, or personal property, are answerable for injuries which arise in carrying into execution that which they have employed others to do, has been a subject much discussed in England and this country since the case of *Bush vs. Steinman*, 1 Bos. & Pul., 404. All the cases recognize fully the liability of the principal where the relation of master and servant, or principal and agent exists; but there is a conflict of authority in fixing the proper degree of responsibility where an independent contractor intervenes.

*City of Chi. v. Robbins*, 67 U.S. 418, 425–26 (1862). Rather, the point in text is that the general rule and some basic exceptions were established.

45. See ATIYAH, *supra* note 42, at 371–72.

46. See *id.*

47. See *id.* at 331.

48. (1876) 1 Q.B.D. 321 (Eng.).

49. The *Restatement (Second)* states that *Bower v. Peate* marked the “first departure from the old common law rule” that one who hires an independent contractor is not liable for the harms caused by the negligence of the contractor. RESTATEMENT (SECOND) OF TORTS § 409 cmt. b (1965).

The answer to the defendant's contention [that he is not liable for the act of a contractor employed by the defendant] may, however, as it appears to us, be placed on a broader ground, namely, that a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else. . . . There is an obvious difference between committing work to a contractor to be executed from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which injurious consequences will arise unless preventative measures are adopted.<sup>50</sup>

Notwithstanding some critiques of the holding,<sup>51</sup> American courts in the late nineteenth and early twentieth centuries continued to recognize and develop an exception for activities "intrinsically dangerous" or "inherently dangerous."<sup>52</sup> Some of these courts decided the case according to an exception involving an intrinsically/inherently dangerous activity, no matter how skillfully done.<sup>53</sup> But other courts used a crucial variation: intrinsically dangerous if proper care is not taken.<sup>54</sup> Many of the cases involved

50. *Bower*, 1 Q.B.D. at 326–27.

51. For instance, in a classic article, Professor Morris argued that the language and holding of *Bower v. Peate* had created confusion about the conditions for imposing liability on independent contractors. See Clarence Morris, *The Torts of an Independent Contractor*, 29 ILL. L. REV. 339, 348–52 (1934).

52. At least a few cases cited *Bower v. Peate* as one precedent, although by then there were other American cases as well. See *St. Louis & S.F.R. Co. v. Madden*, 93 P. 586, 586 (Kan. 1908).

53. See *City of Joliet v. Harwood*, 86 Ill. 110, 113 (1877) (Scott, J., dissenting) (noting an exception to the rule that hirers are not liable for the work of independent contractors "where the work is dangerous in itself, no matter how skillfully done. In such cases the party at whose instance the work is undertaken is regarded as the author of the mischief that flows from it, although he may have let the contract to another."); *Watson v. Miss. River Power Co.*, 156 N.W. 188, 193 (Iowa 1916) ("The work [of blasting] being intrinsically dangerous, and, even when properly done, liable to be attended with injurious, if not destructive, results to buildings and property in the city in the immediate neighborhood of which the blasting was to be done, defendant could not relieve itself from liability by delegating the work to a contractor."). Not all courts, however, recognized an exception relating to intrinsic danger (however phrased) in blasting cases. In these cases, the hirer of the independent contractor was not liable.

54. See *Freebury v. Chi., M. & P.S. Ry. Co.*, 137 P. 1044, 1045 (Wash. 1914) (in a blasting case, noting that one of the well-settled exceptions to the general rule of no

explosives and blasting, although some involved fire or construction.<sup>55</sup>

Thus, by the time of the *First Restatement*, American and English law in this area appeared quite similar. Although the general principle was one of no liability for the acts of independent contractors, a number of exceptions existed.<sup>56</sup> In addition to the more well-known exceptions relating to nuisance and statutory duty, an exception for inherently dangerous activity seemed to have support in American and English cases.<sup>57</sup>

The *First Restatement* included this doctrine in section 427, which imposes vicarious liability for the contractor's negligence on one who "employs an independent contractor to do work which is inherently dangerous to others."<sup>58</sup> This section's use of "inherently dangerous" drew on a number of cases that, as noted above, had enunciated this principle.<sup>59</sup>

The *First Restatement* also included a separate provision relating to peculiar risk: "One who employs an independent contractor to do work, which the employer should recognize as necessarily requiring the creation during its progress of a condition involving a peculiar risk of bodily harm to others unless special precautions are taken, is subject to liability for bodily harm" caused by the contractor's failure to exercise reasonable care.<sup>60</sup>

At the time of the *First Restatement*, the phrase "peculiar risk" did not appear in the case law relating to liability for the acts of independent contractors. Yet this phrase was not intended to announce a principle different from the concept of an inherently dangerous activity. Rather, the Reporters' notes cited *Bowers v. Peate* and a handful of American cases involving scenarios that would necessarily result in harm if precautions were not taken.<sup>61</sup>

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liability is "where the work to be done is inherently or intrinsically dangerous in itself, and will necessarily or probably result in injury to third persons, unless measures are adopted by which such consequences may be prevented"); *Walton v. Cherokee Colliery Co.*, 73 S.E. 63, 63 (W. Va. 1911) (in a case involving damages caused by debris from railroad work, stating that the general rule of no liability for harm caused by independent contractors "is subject to this important exception: If the work is intrinsically dangerous, and is of such character as will likely produce injury to third persons, if proper care should not be taken, the owner cannot avoid liability by delegating its performance to an independent contractor").

55. See cases cited *supra* note 54.

56. See *ATIYAH*, *supra* note 42, at 327.

57. See *id.* at 371.

58. RESTATEMENT (FIRST) OF TORTS § 427 (1934).

59. See *supra* note 54.

60. RESTATEMENT (FIRST) OF TORTS § 416.

61. RESTATEMENT (FIRST) OF TORTS app., explanatory notes (Tentative Draft No. 6, 1931). The Reporter for the *First Restatement* was Professor Francis H. Bohlen. *Id.* at 1. In these explanatory notes, Professor Bohlen summarized cases supporting the draft sections of the *Restatement*. *Id.* at 57. As to section 286—the provision that became section 416 in the later drafts of the *First Restatement*—the Reporter's first citation was

Thus, sections 416 and 427, taken together, were meant to express the current boundaries of American law. These boundaries were not broader than those of the English common law at the time.

Indeed, Reporter Frances Bohlen viewed the English cases as being somewhat more expansive than American law on the liability of independent contractors. In his preface to the preliminary draft, Professor Bohlen noted that the draft did not extend liability for the acts of independent contractors as far as the English cases even though the draft had been revised more expansively than earlier versions.<sup>62</sup>

In sum, by 1934, after almost a century of addressing principles of liability for the acts of independent contractors, American law and English law had similar boundaries. Indeed, by some views, English law was slightly more expansive in the area of liability for harms caused by independent contractors. In addition, no American decision cited either section 416 or section 427 until the late 1940s.

Just after the appearance of the *First Restatement*, a 1934 English case, *Honeywill & Stein Ltd. v. Larkin Bros.*,<sup>63</sup> applied the “inherently dangerous” doctrine to attribute liability for the negligence of an independent contractor to the company that had retained it. The case attracted severe criticism, both for its application of the doctrine and the doctrine itself. *Honeywill*, a specialist in acoustical work, had done some acoustic work on the interior of a theatre owned by a cinema company.<sup>64</sup> When the work was completed, *Honeywill* obtained permission of the cinema company to have photographs taken of the complete interior.<sup>65</sup>

to the “leading case of *Bower v. Peate*.” *Id.* at 66. The Reporter also emphasized that “the principle stated in this Section does not apply unless a danger requiring particular precautions will necessarily be created by the work as ordered.” *Id.* at 67.

62. See RESTATEMENT (FIRST) OF TORTS (Preliminary Draft No. 40, 1930). Professor Bohlen noted that he and the Advisors “were not satisfied” that the earlier draft submitted to the Council

carries the liability, imposed upon the employer of a contractor for harm caused by the contractor’s negligence, as far as it should have been carried. The English cases have gone so far that, as was said in *Halliday v. National Telephone Co.* (1898), 2 Q. B. 212, p. 218, it is practically impossible to have work done by a contractor in a public place without being answerable for the manner in which the contractor does the work. While, perhaps, it is not possible to go to this extent merely because English courts have so done, the Reporter believes that any American authority, even though in a pronounced minority, which extends the employer’s liability should be followed.

*Id.* at 3. Professor Bohlen then gave several adjudicative and policy reasons to support this view. *Id.* at 3–6.

63. [1934] 1 K.B. 191 (Eng.).

64. *Id.* at 191–92.

65. *Id.* at 192.

Honeywill retained Larkin, commercial photographers, for this purpose.<sup>66</sup> Larkin's employees negligently placed the camera too close to the curtain, which caught fire from the ignition of the magnesium powder used in a tray above the camera lens.<sup>67</sup> Damage to the theatre resulted.<sup>68</sup> The cinema company made a claim against Honeywill for the damage, which paid the damage amount and then tried to recover this amount from the photography company essentially on a subrogation theory.<sup>69</sup> The photography company's defense was that Honeywill's payment was purely voluntary and not legally required.<sup>70</sup> That is, in a suit filed by the cinema company against Honeywill, Honeywill could have defended itself entirely "on the ground that the damage was caused by the negligence [of the photographers], who were independent contractors, and not servants or agents of [Honeywill] . . . ."<sup>71</sup>

The court, however, applied the exception for "extra-hazardous or dangerous operations" and reversed the trial court's judgment dismissing the claim.<sup>72</sup> The trial court's decision

ignore[es] the special rules which apply to extra-hazardous or dangerous operations. Even of these it may be predicated that if carefully and skillfully performed, no harm will follow: as instances of such operations may be given those of removing support from adjoining houses, doing dangerous work on the highway, or creating fire or explosion: hence it may be said, in one sense, that such operations are not necessarily attended with risk. But the rule of liability for independent contractors' acts attaches to these operations, because they are inherently dangerous, and hence are done at the principal employer's peril.<sup>73</sup>

*Honeywill* had severe flaws that attracted criticism of long duration. As an application of precedent, *Honeywill* too broadly interpreted earlier cases relating to hazardous activity. These cases, scholars and later courts have pointed out, did not support a full exception to the doctrine that hirers are not liable for the negligence of independent contractors. Rather, these cases related to interference with easements or withdrawal of support.<sup>74</sup>

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66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 192.

72. *Id.* at 200.

73. *Id.* at 200–01.

74. An extensive critique appears in *Biffa Waste Servs. Ltd. v. Maschinenfabrik Ernst Hese GmbH*, [2009] Q.B. 725 at 748–52 (Eng.). See also Glanville Williams, *Liability*

In addition, the doctrine was said to be either overly broad or highly indeterminate; what activity does not have an inherently dangerous quality to it? The question had special force given the unspectacular nature of the risk in *Honeywill*.

Another important factor was the appearance of an influential critique in Professor Atiyah's seminal book, *Vicarious Liability in the Law of Torts*, published in 1967.<sup>75</sup> Though focused on English law, the book drew on cases from other jurisdictions, including the leading cases from Scotland, Australia, New Zealand, and a large amount of material from the United States.<sup>76</sup> One chapter was devoted to the "dangerous operations doctrine"—essentially the peculiar-risk/inherently dangerous activity doctrine. Professor Atiyah strongly criticized the doctrine, which at that time primarily appeared in frequent dicta in English cases.<sup>77</sup> "It must also be admitted that this doctrine seems to be well established in America, Scotland, and in Canada."<sup>77</sup> Nevertheless, he continued, "the whole doctrine is so manifestly unsatisfactory that one may be permitted to hope that if the House of Lords is ever called upon to consider it the House will reject it altogether."<sup>78</sup> A primary criticism is "the sheer impossibility of producing any satisfactory criteria for deciding" which activities fall within the doctrine.<sup>79</sup>

In 2009, an English court of appeals decision, recounting these criticisms and Professor Atiyah's analysis, stated: "[I]n our judgment the doctrine enunciated in the *Honeywill* case is so unsatisfactory that its application should be kept as narrow as possible. It should be applied only to activities that are exceptionally dangerous whatever precautions are taken."<sup>80</sup>

Thus, in England and other common law countries, the early case law favoring an exception for extra-hazardous or inherently dangerous activity drew attention to the concept in a weak factual context, exposing its flaws and drawing influential critiques.<sup>81</sup>

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for *Independent Contractors*, 1956 CAMBRIDGE L.J. 180, 186 (criticizing *Honeywill* as lacking normative justification and noting that the "result of the decision . . . may well be to cause grave hardship"); J. A. Jolowicz, *Liability for Independent Contractors in the English Common Law—A Suggestion*, 9 STAN. L. REV. 690, 705–06 (1957) (noting the "much criticized decision in *Honeywill* . . .").

75. ATIYAH, *supra* note 42, at 371–73.

76. *Id.* at 372.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Biffa Waste Servs. Ltd. v. Maschinenfabrik Ernst Hese GmbH*, [2009] Q.B. 725 at 752 (Eng.).

81. For other readings to the same effect, see R.F.V. HEUSTON, SALMOND ON THE

Meanwhile, in America, at about the time of the *Honeywill* decision, the *First Restatement* made its appearance. It contained provisions on inherent danger and peculiar risk.<sup>82</sup> The correspondence and discussion relating to the *First Restatement* make clear that the doctrine of inherent danger or peculiar risk was not viewed as especially bold or controversial.<sup>83</sup> Perhaps the American doctrine, as expressed in the *Restatement*, seemed less dramatic or problematic because one of the main terms—peculiar risk—was a phrase that had already appeared in over 100 American cases by the time of the *First Restatement*.<sup>84</sup> Notably, the vast bulk of these cases were not independent contractor cases.<sup>85</sup> Rather, the cases mainly involved litigation under the still-new workers' compensation statutes sweeping the country.<sup>86</sup> The "peculiar risk" phrase appeared as a way to explicate the crucial requirement that the injury be connected to the work.<sup>87</sup> Thus, at about the time when the *Honeywill* decision announced a controversial (and probably unnecessary) concept for imposing tort liability on the hirer of an independent contractor, the *First Restatement* enunciated a similar doctrine that was tied to a concept—peculiar risk—widely familiar from a different context.

#### IV. WHY THE SPLIT PERSISTED, EVEN THROUGH AMERICAN TORT REFORM

The story in the previous section explains how the doctrine gained a solid footing in America just as it was losing it elsewhere. But, in the United States and especially during these past thirty-five

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LAW OF TORTS 657 (15th ed. 1969) (noting that later cases and statements by the House of Lords go in the other direction from *Honeywill*); Gilbert Kodilinye, *Independent Contractors and Extra-Hazardous Operations*, 11 TRENT L.J. 31, 33 (1987) ("[T]he principle of strict liability for extra-hazardous operations has thus been expressly rejected by the Australian courts and, it seems, by the majority of the English authorities.").

82. See *supra* text accompanying notes 60–63.

83. See *supra* text accompanying notes 60–63.

84. A Westlaw search on December 28, 2010, in the Cases database for the term "peculiar risk" yielded 101 cases before 1934.

85. Only nine of the cases from the Westlaw search, *supra* note 84, involved independent contractors.

86. See Cent. Ill. Pub. Serv. Co. v. Indus. Comm'n, 126 N.E. 144, 145, (Ill. 1920) (stating that "[i]t was not the intention of the Legislature to make the employer an insurer against all accidental injuries which might happen to an employee while in the course of the employment, but only for such injuries arising from or growing out of the risks peculiar to the nature of the work in the scope of the workman's employment or incidental to such employment . . . ." (quoting Mueller Constr. Co. v. Industrial Bd. of Ill., 118 N.E. 1028, 1030 (Ill. 1918)); Schemmel v. T.B. Gatch & Sons Contracting & Bldg. Co., 166 A. 39, 44 (Md. 1933) (stating that "[a]n injury may be said to arise out of the employment when it results from risks or perils peculiar to and inherent in the nature and scope of the work and its obligations . . ." (emphasis added)).

87. See *supra* note 86.

years of tort reform, why has the doctrine largely escaped the critiques that halted the doctrine elsewhere and that have been repeated by courts outside the United States as recently as several years ago? I suggest that the doctrine, as operationalized in the United States, has been tamer and less far-reaching than the black letter of the doctrine might suggest. Two factors have been key.

First, in the last thirty years, American courts have spoken on an issue that greatly affects the extent of the doctrine in actual operation. The issue is whether the independent contractor's own employee may recover against the hiring entity or person under any of the avenues of vicarious liability. The courts have overwhelmingly answered this question in the negative.<sup>88</sup> This answer has drastically curtailed the potential exposure posed by the peculiar-risk doctrine. Many of the risks that arguably could be peculiar risks occur in the workplace. And, in construction or other workplace contexts, almost anyone potentially injured by what might be a peculiar risk is an employee—of the enterprise or of a contractor or subcontractor.

Second, especially after the *Restatement (Second)*, the doctrine's development ended up following narrower boundaries. "Peculiar risk" did not mean just a risk unique to or particular to the activity. This notion of special or peculiar was akin to the use of peculiar risk in the hundreds of cases interpreting early workers' compensation or other scope issues. Thus, dropping a paint can on someone could not be a risk peculiar to the activity of painting.<sup>89</sup>

88. In the vast majority of cases, when the plaintiff is an employee of a contractor, courts reject vicarious liability on the part of the hirer. The core rationale for these decisions is the interaction of any such liability with the workers' compensation system. Given the exclusive remedy provision in all workers' compensation schemes, the employees of independent contractors generally may not sue their own employer (the independent contractor) for any negligence by the independent contractor. Rather, an injured employee's recourse for an injury within the course and scope of employment and arising from the employment is a workers' compensation claim. Against this well-established system, allowing the injured worker to recover against the hirer of the independent contractor on a vicarious liability theory seems to conflict with and undermine the purposes of the exclusive remedy provisions. For cases rejecting the availability of vicarious liability to employees of the independent contractor, see *Monk v. V.I. Water and Power Auth.*, 53 F.3d 1381, 1392 (3d Cir. 1995) (applying law of the Virgin Islands); *Privette v. Superior Court*, 854 P.2d 721, 730 (Cal. 1993) (en banc); *Dillard v. Strecker*, 877 P.2d 371, 385 (Kan. 1994); *Matteuzzi v. Columbus P' ship, L.P.*, 866 S.W.2d 128, 131-32 (Mo. 1993) (en banc); *Sierra Pac. Power Co. v. Rinehart*, 665 P.2d 270, 273 (Nev. 1983); *Valdez v. Cillessen & Son, Inc.*, 734 P.2d 1258, 1263 (N.M. 1987); and *Wagner v. Cont'l Cas. Co.*, 421 N.W.2d 835, 841 (Wis. 1988).

89. This example appears in *RESTATEMENT (SECOND) OF TORTS* § 427, cmt. d, illus. 1 (1965). The title of section 427 uses the phrase "danger inherent in the work" rather than "peculiar risk," but the *Restatement* notes that courts use these formulations interchangeably. See *id.* cmt. a (stating that the rule set out in section 427 "is closely



Rather, a showing of peculiar risk required proof that the risk was uncommon relative to the risks posed by common varieties of negligence.<sup>90</sup> Thus, special or peculiar risk became a “light” version of abnormally dangerous activity, not a risk that is specific to a particular line of work.<sup>91</sup> Dropping a paint bucket might qualify as a risk specific to painting, but it does not come close to an uncommonly risky activity.

These two factors have greatly minimized the exposure presented by the notion of peculiar risk. Operationally, the doctrine has been tamed into an avenue of liability much less significant and conceptually worrisome than the doctrine rejected and limited outside the United States. Given the exclusion for employees of independent contractors, the doctrine is off the table as an avenue of recovery for most industry risks. And the emphasis on an uncommon risk has narrowed the avenue for other possible plaintiffs.

We can also gain insight into the operation of the doctrine from an insurance lens. If peculiar risk in operation posed significant and indeterminate liability, one would expect to see corresponding developments in the insurance market.<sup>92</sup> Specifically, we can

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related to, and to a considerable extent a duplication of, that stated in § 416, as to work likely to create a peculiar risk of harm to others unless special precautions are taken”).

90. This standard draws on RESTATEMENT (SECOND) OF TORTS § 416, cmt. d (“A ‘peculiar risk’ is a risk differing from the common risks to which persons in general are commonly subjected by the ordinary forms of negligence which are usual in the community.”).

91. For cases applying a standard that requires that the risk be an uncommon one, see *Kime v. Hobbs*, 562 N.W.2d 705, 713 (Neb. 1997) (citing sections 416 and 427); *Mavrikidis v. Petullo*, 707 A.2d 977, 990 (N.J. 1998) (stating that “[a] peculiar risk is different ‘from the common risk to which persons in general are commonly subjected by the ordinary forms of negligence,’” (citing section 416, comment d)); and *Marshall v. Se. Pa. Transp. Co.*, 587 F. Supp. 258, 262 (E.D. Pa. 1984) (applying Pennsylvania law).

92. As a wide variety of literature explains, significant and indeterminate liability can undermine the mechanism of liability insurance. See Kenneth S. Abraham, *Environmental Liability and the Limits of Insurance*, 88 COLUM. L. REV. 942, 948–49 (1988); Randall R. Bovbjerg, *Liability and Liability Insurance: Chicken and Egg, Destructive Spiral, or Risk and Reaction?*, 72 TEX. L. REV. 1655, 1668 (1994) (“Insurers, on the other hand, are willing to assume defined liability (or other) risks only to the extent that they find them predictable or controllable. Insurers demand a predictable flow of future claims and other costs; if expenses are too uncertain, they will not risk their stakeholders’ assets.”). Professor Abraham, in tracing the problems that have afflicted environmental liability insurance, explains how generalized uncertainty can undermine liability insurance:

This factor—excessive uncertainty as to the frequency and severity of the losses that may be suffered—impedes the diversification of risk sought by all risk-averse actors. Self-insured individuals and enterprises therefore are affected by the problem of uncertain liability just as severely as commercial insurance companies and their policyholders. . . . [E]xcessive uncertainty regarding possible future losses will trouble all risk bearers, including self-insurers who do not participate in the risk pooling that constitutes market insurance.

Abraham, *supra*, at 948–49.

examine how injuries caused by independent contractors are handled by standard and specialized insurance policies. In addition, we can look for any changes in the insurance market that might indicate problems tied to this area of liability.

One standard slice of an enterprise's insurance coverage is a policy that covers workers' compensation and employers' liability.<sup>93</sup> In virtually all states, employers are obligated to provide workers' compensation insurance (in a few states, employers can opt out and be subject to tort law). Standard policies that cover injuries to employees contain two categories of coverage.<sup>94</sup> One is workers' compensation; that is, insurance that covers the benefits required under the state's workers' compensation law.<sup>95</sup> The second (Part B) is employer's liability insurance, which covers the employer's legal obligation to pay damages sustained by an

93. See *infra* note 95.

94. These policies are standardized within jurisdictions, given the heavy regulation of the required workers' compensation coverage. Basic workers' compensation policies (including both parts of the coverage) are similar across many states. A majority of states designate the National Commission on Compensation Insurance (NCCI) as a licensed rating and statistics organization for the state. See *NCCI State Map*, NCCI HOLDINGS, INC., <https://www.ncci.com/nccimain/AboutNCCI/StateMap/Pages/default.aspx> (last visited Dec. 29, 2010) (showing the states designating the NCCI as the licensed rating and statistics organization). The NCCI drafts standardized policy forms that form the basis of the forms used in many states. For instance, the standard policy in Wisconsin, which appears on the Wisconsin Compensation Board's website, is a form that draws on NCCI forms. See *Workers Compensation and Employers Liability Insurance Policy*, Form WC 00 00 00 B, WISCONSIN COMPENSATION RATING BUREAU, [https://www.wcrb.org/WCRB/Forms/WC\\_00\\_00\\_00\\_B-WorkersCompensationAndEmployersLiabilityInsurancePolicy.pdf](https://www.wcrb.org/WCRB/Forms/WC_00_00_00_B-WorkersCompensationAndEmployersLiabilityInsurancePolicy.pdf) (last visited Dec. 29, 2010) [hereinafter *Insurance Policy*]. A good description of these two standard coverage sections appears in *La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co.*, 884 P.2d 1048, 1052–53 (Cal. 1995) (citations omitted):

Workers' compensation policies generally contain two types of coverage: The first is workers' compensation insurance (part 1 in the policy at issue in this case), "under which the insurer agrees to pay all workers' compensation and other benefits that the employer must legally provide to covered employees who are occupationally injured or disabled." The second, which is optional, is employers' liability insurance (Part 2 in the policy at issue in this case). This insurance "protects employers against lawsuits by employees who are injured in the course of employment, but whose injuries are not compensable under the workers' compensation laws." This coverage "also indemnifies employers against civil suits brought by employees." "[E]mployers' liability insurance is traditionally written in conjunction with workers' compensation policies, and is intended to serve as a 'gap-filler,' providing protection to the employer in those situations where the employee has a right to bring a tort action despite the provisions of the workers' compensation statute or the employee is not subject to the workers' compensation law. . . . Generally, these two kinds of coverage are mutually exclusive."

95. See *La Jolla Beach & Tennis Club*, 884 P.2d at 1051–53 (describing standard workers' compensation component); *Insurance Policy*, *supra* note 94, Part One.

employee by accident or disease.<sup>96</sup> Part B is tort coverage, which comes into play only if the employee has a tort suit against his employer.<sup>97</sup>

Another standard insurance policy is commercial general liability (“CGL”) insurance.<sup>98</sup> Through various exclusions, CGL policies exclude coverage for injuries arising out of and in the scope of employment; that is, injuries covered by workers’ compensation or employers’ liability policies.<sup>99</sup> The CGL policy is the policy that would potentially be tapped when an enterprise that retains an independent contractor is liable (directly or vicariously) for harms to a third person caused by the independent contractor. If this category of exposure proved troublesome to insurers, one might see underwriting changes or policy changes tied to these concerns. (For example, the evolution in the pollution exclusion in the standard CGL policy reflects the continuing problems presented by asbestos and pollution exposures through the past fifty years.)<sup>100</sup> A potential tort exposure could pose problems from an insurance perspective for several reasons: indeterminacy about the frequency and size of the loss, potential for correlated losses, moral hazard, or other factors that might undermine effective risk-pooling.

Yet, over the past several decades, the standard CGL policy has not changed in ways that seem tied to risks associated with independent contractor exposure.<sup>101</sup> Currently, the standard CGL policy contains exclusions for expected or intended injury, contractual liability, liquor liability, workers’ compensation, employer’s liability to employees of the insured, aircraft or

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96. *Insurance Policy*, *supra* note 94, Part Two.

97. See *La Jolla Beach & Tennis Club*, 884 P.2d at 1052–53 (describing standard employer’s liability component).

98. See ROBERT H. JERRY II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW 517 (4th ed. 2007). “The CGL provides general liability coverage for businesses; individuals receive their liability coverage through other policies, such as homeowners or renters policies, automobile policies, and umbrella policies.” *Id.*

99. See *Am. Motorists Ins. Co. v. L-C-A Sales Co.*, 713 A.2d 1007 (N.J. 1998). *American Motorists* discussed and applied several standard CGL policy exclusions, including exclusion d (“d. Any obligation under a workers’ compensation, disability benefits or unemployment compensation law or any similar law”) and exclusion e (“e. ‘Bodily injury’ to: (1) An employee of the insured arising out of and in the course of employment by the insured . . . .”). *Id.* at 1009. The court noted that these two exclusions together reflect that “the objective of the CGL policy was to exclude from coverage all claims—whether falling within or beyond the workers’ compensation system—‘arising out of and in the course of’ Picciallo’s employment.” *Id.* at 1013.

100. See *generally* KENNETH S. ABRAHAM, ENVIRONMENTAL LIABILITY INSURANCE LAW 145–63 (1991) (exploring the pollution exclusion and its evolution from 1970 through various versions).

101. For a discussion of the extent of, and reasons for, standardization of insurance forms, see ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW § 2.8(a) (1988). For insightful analysis of the standardization process and analogies to private legislation, see Jeffrey W. Stempel, *The Insurance Policy as Statute*, 41 MCGEORGE L. REV. 203, 206–13 (2010).

watercraft, pollution, and others. Some of these have changed or been added in various versions of the standard policy.<sup>102</sup> But the standard policy has never included an exclusion for liability tied to acts of an independent contractor.

#### V. DOES THE AMERICAN DOCTRINE OFFER LESSONS OUTSIDE THE UNITED STATES?

Does the American doctrine of peculiar risk offer any lessons for tort law outside the United States? One possible response is that the story of peculiar risk in the United States supports the skepticism in other countries about the doctrine. Under this view, peculiar risk has remained a manageable doctrine in the United States only because its operation has been dramatically limited. The range of its application generally does not extend into workplace injuries. When it applies, the doctrine is quite similar to the concept of abnormally dangerous activity. Thus, even when plaintiffs prevail on peculiar-risk theory, often it is when another theory—such as abnormally dangerous activity or premises liability or nuisance—would have been available anyway.

Possibly, though, the story of peculiar risk in American tort law offers a different lesson: that peculiar risk can be shaped into a meaningfully distinct doctrine that avoids the problems that other common law countries feared would result from a doctrine of special risk. Yes, the doctrine is a pretty narrow one. But, under this view, the doctrine is nonetheless a meaningful one for two reasons. First, the doctrine captures a slice of activity that sits between activities posing only a risk of harm and activities posing harms that are highly significant and that cannot be prevented by the use of reasonable care (that is, abnormally dangerous activities). Second, normative rationales support the application of vicarious liability as to this slice of activities. The rest of this subpart will explore this “narrow but meaningful” account of peculiar-risk doctrine.

We have already seen that the doctrine can capture a distinctive category of activity, though the category may indeed be quite limited in operation. Even granting that peculiar-risk recovery will not be available for employees of independent contractors, these boundaries provide a path of vicarious liability recovery that is not available for merely risky activities and that is less demanding than

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102. For a discussion of major changes and issues in the CGL over the past thirty years, see JERRY & RICHMOND, *supra* note 98, at 516–43.

the doctrine of abnormally dangerous activity.

The next step in exploring the “narrow but meaningful” case is to examine the normative justifications for vicarious liability in peculiar-risk contexts. One important goal is corrective justice. Although corrective justice might not *generally* support vicarious liability for the acts of independent contractors,<sup>103</sup> this theory could favor vicarious liability in the context of peculiar risks. A peculiar risk presents a non-reciprocal risk that is identifiable at the outset by the hirer who sets the activity into motion.<sup>104</sup>

Another normative theme is optimal deterrence, which includes achieving the cost-justified or optimal level of activity, optimal precautions by the hirer, and optimal precautions by the independent contractor.<sup>105</sup> Several factors can bear on the deterrence effects of vicarious liability: whether employer/hirer

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103. There is no standard theory of corrective justice in tort. See Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 60 (1993) (noting that there is “no canonical conception of corrective justice”). In an important article, Professor Wells discusses, among other issues, whether and how corrective justice can provide a convincing theory for tort law. Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2349–61 (1990). Professor Gary Schwartz evaluated corrective justice considerations within the context of employer–employee vicarious liability. See Gary Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1749–55 (1996). According to Professor Schwartz’s analysis, corrective justice theories do not provide a convincing explanation for employer–employee vicarious liability, either normatively or descriptively. See *id.* at 1754. Corrective justice would provide even less support for vicarious liability in general as applied to the acts of non-employees.

104. This argument rests on Professor Fletcher’s “nonreciprocal risk” principle as a “medium of doing justice between the parties.” George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 540 (1972). According to Professor Fletcher:

The general principle expressed in all of these situations [negligence, extra-hazardous risks, and pockets of strict liability] . . . is that a victim has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant—in short, for injuries resulting from nonreciprocal risks.

*Id.* at 542.

105. Professor Richard Epstein notes that the rationales for vicarious liability, though more robustly developed today in, for instance, economic analysis, have remained the same for over a century. See Richard A. Epstein, *Vicarious Liability of Health Plans for Medical Injuries*, 34 VAL. U. L. REV. 581, 584 (2000). Still, from the 1980s on, optimal deterrence as seen from an economic perspective has been a key theme in the law and economics literature on vicarious liability. Key contributions include the following: Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CALIF. L. REV. 1345 (1982); Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563 (1988); Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231 (1984) [hereinafter Sykes, *Economics*] and Note, *An Efficiency Analysis of Vicarious Liability Under the Law of Agency*, 91 YALE L.J. 168 (1981). In addition, leading books on economic analysis of law and tort law included discussions of vicarious liability. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987); STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 170–75 (1987).

precautions are difficult to identify,<sup>106</sup> the ability of the employer/hirer to monitor employee/agent precautions,<sup>107</sup> and solvency or partial solvency of the employee/contractor.<sup>108</sup> As

106. For instance, suppose that an employee is a truck driver who causes serious injury to another because he is texting on his cell phone while driving. Reasonable care on the employer's part could require training or warnings about company policy against texting while driving. Yet the employer contends that this is regularly stressed in monthly training sessions, and this is difficult to disprove. The employer's knowledge that some reasonable precautions will go undetected might prevent the employer from taking those precautions. A rule of vicarious liability, however, will correct this disincentive. In Professor Sykes's view, this benefit is significant. When vicarious liability does reduce loss-avoidance, "any associated inefficiency is likely to be offset by more efficient risk sharing and by a more efficient scale of operation." Sykes, *Economics*, *supra* note 105, at 1252.

107. To the extent that the employee's risky behavior is difficult to monitor or detect, a rule of employer vicarious liability arguably will reduce desired precautions. Knowing that the employer will be liable for harms that the employee negligently causes, the employee might relax his level of care, speed, take shortcuts, etc. However, several factors mitigate this concern. The employer might provide incentives (bonuses or penalties) tied to safe results. *Cf.* Sykes, *Economics*, *supra* note 105, at 1253–54 (noting the efficiency value of such incentives when an agent's risk-related behavior is not cheaply observable). If the employee is solvent or has sufficient assets to be threatened by the prospect of civil liability, the employee has reason to take care. Theoretically, the employee's incentives are reduced according to the level of solvency for the judgment. As Gary Schwartz argued, however, the employee with some level of reachable assets, as a practical matter, will have incentives to take care. *See* Schwartz, *supra* note 103, at 1757. The employee also might fear fines, tickets, having the accident on his or her record, etc. Finally, the employer retains a right of indemnity if the employer is vicariously liable, although the practical incentive this creates is unclear because indemnity suits against individual employees are uncommon.

108. For a general discussion about how insolvency or partial solvency affects the analysis of vicarious liability, see A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 132–33 (3d ed. 2003) and Schwartz, *supra* note 103, at 1759–64. Lack of solvency reduces the employee's incentive to use proper (cost-justified) precautions. *See* Sykes, *Economics*, *supra* note 105, at 1244 (stating that "an efficient allocation of resources requires the agent to invest in loss avoidance to the point where the marginal cost of further investment . . . exactly equals the marginal reduction of expected damages," and that the insolvent agent "has less incentive (overall and at the margin) to invest in loss avoidance than he would if he could pay damages in full").

Vicarious liability on the employer will not directly cure this problem. Practically, the employer often will not be able to alter the particular action or decision by the employee. At times, of course, the employer may be able to take appropriate precautions (such as training or directing of the employee) that would prevent the harm. Yet, the employer would be subject to negligence liability for failure to take such precautions. In theory, then, adding a rule of vicarious liability would not alter the employer's behavior relative to negligence liability. Yet, there might be some safety-related steps that the employer could take that would improve safety but that would not be required under a rule of negligence. For instance, an employer might give safety recognitions or awards for safe records. *Cf.* POLINSKY, *supra*, at 131 (noting the possibility of internal sanctions not explicitly tied to agent conduct, such as reducing compensation when harm occurs); Sykes, *Economics*, *supra* note 105, at 1246 (noting that, when the principal can cheaply observe precautions by the agent, the principal can induce the agent to take those precautions). Even when the employee is not insolvent, individuals are sometimes unable

applied to independent contractor contexts, these factors generally add up to a much weaker case for vicarious liability in independent contractor settings than in employer–employee contexts.<sup>109</sup>

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to conform to the negligence standard of reasonable care. A rule of vicarious liability might promote deterrence for this area of behavior because the employer might be able to improve safety with precautions such as bonuses, prevention programs, etc. For elaboration of this argument, see Steven P. Croley, *Vicarious Liability in Tort: On the Source and Limits of Employee Reasonableness*, 69 S. CAL. L. REV. 1705, 1730–32 (1996). Many such actions might be cost-justified but, if undertaken, would not be tenable as the basis for a negligence claim. A rule of vicarious liability would provide incentives to take such actions.

Even if the employer can take no other steps to reduce the level of harm, the rule of vicarious liability provides an economic deterrence advantage. When the employee is not fully solvent, then the rule of vicarious liability places on the employer the full costs of the activity. This arguably incentivizes the employer to engage in the activity at levels that take account of the activity's full cost. See POLINSKY, *supra*, at 133 (“even if the principal can't prevent the agent from taking insufficient care, having to pay for the full harm will cause the principal to appropriately reduce her participation in harm-creating activities”); Sykes, *Economics, supra* note 105, at 1244 (noting that “when agents are potentially insolvent, the perceived costs of production for each principal-agent enterprise understate the true economic costs of production”).

Stated differently, vicarious liability eliminates the chance that the enterprise, shielded from having to pay the full costs of its actions, will operate at a higher rate than it should. In Professor Sykes's view, this benefit is significant. When vicarious liability does reduce loss-avoidance, “any associated inefficiency is likely to be offset by more efficient risk sharing and by a more efficient scale of operation.” *Id.* at 1252.

109. Consider first the factor of insolvency or partial solvency. As previously explained, a rule of vicarious liability on an employer does not directly address an insolvent employee's reduced incentive to use care, but vicarious liability might still improve deterrence in two areas: giving employers incentives to use safety measures not required by negligence, and tying the level of activity to its full costs. See *supra* note 108. Likewise, when the independent contractor is insolvent, a rule of vicarious liability, in theory, cannot give the hirer incentive to take additional cost-justified precautions; the hirer already will have the incentives provided by the rule of negligence. The arguments for why vicarious liability could improve safety when the employee lacks solvency (safety measures not required by negligence, and tying the activity to its full cost) in theory could apply in the independent contractor setting. As with the employer, a hirer concerned about the potential lack of care by a contractor could use bonuses or penalties not required by the law of negligence. Likewise, if the hirer is vicariously liable for the negligence of an independent contractor, the hirer will be required to take into account the full costs of the activity. The strength of these arguments, in either employer–employee or independent contractor settings, varies according to the nature of the enterprise. At least in broad brushes, it seems that these safety improvement arguments for vicarious liability—incentives and activity levels—are probably weaker in the independent contractor setting as a whole than for employers as a whole. Certainly, in many independent contractor settings, these theoretical arguments seem unlikely to materialize in practice. See Sykes, *Economics, supra* note 105, at 1246–47.

Consider the hirer's ability to monitor safety precautions. In all contexts, vicarious liability reduces employee/agent/contractor precautions when monitoring or establishing the lack of proper precautions is difficult. Consider truck drivers who text while driving. This activity is difficult for the employer to monitor and thus to sanction. In addition, the employer will be vicariously liable if the texting driver causes harm, and, generally speaking, employer indemnity suits against the employee are rare. Thus, the employee is shielded from the costs of the activity. Granted, the driver may fear for his job or license if an accident happens and the evidence shows that the timing of the texting overlapped with the accident. And the driver also has incentives for his own safety, and to avoid harming others. In sum, whatever the adverse deterrent effects are of vicarious liability,

Does the case improve when the independent contractor is engaged in an activity posing a peculiar risk? For the most part, the answer is no. Possibly, one consideration favoring vicarious liability is stronger in instances of peculiar risk. The consideration relates to instances when the contractor may be insolvent or only partially solvent. In such cases, the contractor's insolvency reduces its incentive to use proper precautions.<sup>110</sup> One question, then, is whether vicarious liability can result in improved monitoring and incentives by the employer or hirer aimed at improving employee or contractor safety. Even aside from this question, though, vicarious liability provides a deterrence benefit because it requires the employer or hirer to bear the full costs of an activity, costs that otherwise would be understated to the degree that the employee or contractor is insolvent. Indeed, the hirer of an independent contractor may have more power than an employer to see that the contractor is solvent with respect to the harm that is caused. The hirer can require insurance or other proof of solvency, or else select another contractor.<sup>111</sup> The crucial effect of this is not just a

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when employee precautions are difficult to monitor, the adverse effects will be even greater under a rule of vicarious liability for the acts of independent contractors. The hirer's ability to monitor and sanction for lack of precautions seems generally lower than that of employers. See LANDES & POSNER, *supra* note 105, at 121.

Finally, consider the degree to which we can monitor the hirer's own level of precautions. As seen above, employer vicarious liability has a benefit if some employer precautions, though cost-justified, are difficult to identify. A rule of vicarious liability provides the incentive for the employer to take these precautions and avoids the litigation costs associated with demonstrating these "elusive" precautions (to use Professor Gary Schwartz's term). See Schwartz, *supra* note 103, at 1760. This benefit is more significant in employer-employee settings than in independent contractor settings. Notwithstanding disagreements about the doctrinal and theoretical lines between independent contractors and employees, the hirer of an independent contractor has turned the project over to the independent contractor. The linkage between precautions that the hirer might take and the accident caused by the independent contractor is more attenuated. It is less likely that the hirer would be in a position to undertake precautions that could have reduced the risk of harm. See RESTATEMENT (SECOND) OF TORTS § 413 (1965).

110. Most actors are solvent for small injuries, and even wealthy or well-insured actors can be insolvent for the largest harms. Because actors do not know, *ex ante*, the injury or judgment that will follow from their actions, there is not a "solvent" set of actors and an "insolvent" set of actors. But, actors can form a rough sense of range of likely harm and be conscious of the liability risk this creates for them. The prospect of liability will not deter to the extent the actor believes he is judgment-proof. See Stephen P. Giles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 609 (2006).

111. Indeed, employers might have fewer options than hirers of independent contractors to ensure that the employee faces the full costs of his or her unreasonably risky behavior. An employer could not feasibly require proof that the employee's own wealth is sufficient to satisfy judgments for the employee's negligence. The insurance market currently does not provide insurance products that employees can purchase for injuries they cause on the job. See JERRY & RICHMOND, *supra* note 98, at 515. To be



determination of who eventually pays—the contractor initially, or the contractor after third party claim from hirer. Rather, the crucial effect is that the contractor, being financially responsible for the loss (via its own assets or through insurance), will have appropriate incentives to use care. Even if this consideration is not considered sufficient for a general rule of vicarious liability as to work performed by independent contractors, it could bolster the case for vicarious liability in pockets of activity involving peculiar risk.

The goal of cost-spreading is also important in analyzing vicarious liability. Effective loss-spreading reduces the costs of the inevitable harms because, when spread effectively, the costs of a given accident are less dislocating and burdensome than when borne entirely by one actor. The consideration of cost spreading tends to favor vicarious liability for employers rather than only personal liability for employees. In general, employers are better self-insurers or better able to obtain insurance than employees. This consideration does not support vicarious liability for independent contractors.

This conclusion does not change when we posit that the contractor is involved in a peculiarly risky activity. First, in many situations, the independent contractor is almost certainly the better cost-spreader. These situations include contractors for infrequent or intermittent services not closely tied to the individual's or small business's expertise (e.g., taxi service, cleaning service, yard service, nighttime private security service, or package delivery service). It also includes contractors within the same general area of enterprise whose work represents a specialty or subcategory of the enterprise (e.g., independent diagnostic laboratories, construction subcontractors). From an insurance perspective, liability insurance would be available to all these contractors. More importantly, liability insurance provided along contractor lines would generally be more efficient than liability insurance provided according to enterprises.

## VI. CONCLUSION

Throughout the nineteenth century, both American and English courts recognized a doctrine of peculiar risk as one of several avenues for tort recovery against the hirers of independent

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sure, this probably stems from the structure of current liability rules. Because the employer is vicariously liable, the employer's CGL coverage includes coverage for harms caused by the employees. *See id.* at 517. The incentives do not exist, in the insurance market, for insurance purchased by the individual insured and covering his or her job-related torts. By contrast, the insurance market for independent contractors is robust, and those who retain independent contractors can ascertain whether the contractor has adequate wealth or insurance coverage. *See supra* notes 91–102 and accompanying text.

contractors. Yet, after the *First Restatement* enunciated the doctrine in a form that was thought to be no broader than the English doctrine, the doctrine fell into disfavor in England, even as litigation in America solidified the doctrine. The specific avenues of English and American litigation in this area help explain why reaction turned negative in England, but not in America, in the years between the *First* and *Second Restatements*. A bigger puzzle is why this avenue of recovery, whose breadth and indeterminacy spelled its disfavor elsewhere, retained a solid hold in American tort law throughout years of tort reform activity in America.

This article posits that the doctrine persisted without much controversy in America because the doctrine evolved to capture a specific and narrow category of activity on the spectrum between ordinarily risky activities and abnormally dangerous activities. Further, during the last forty years, and for reasons not specific to the peculiar-risk theory, the doors of vicarious liability recovery firmly closed shut on one category of potential victims most likely to bring serious lawsuits on the basis of this theory—employees of independent contractors.

At this point, neither American tort law nor tort law outside the United States has much new to learn from the other's experiences with the peculiar-risk doctrine. American peculiar-risk doctrine has already developed in a way that avoids the serious critiques that the doctrine attracted in England. Conversely, the American law of peculiar risk suggests a lesson that the peculiar-risk doctrine need not become unbounded and indeterminate. The case for this doctrine, and its practical reach, however, are probably too minimal to cause any change of course in tort law elsewhere.

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