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THE JUDICIAL POSNER ON NEGLIGENCE  
VERSUS STRICT LIABILITY: *INDIANA HARBOR BELT  
RAILROAD CO. V. AMERICAN CYANAMID CO.*

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Does Richard Posner lead a double life as scholar and judge? Posner's prodigious and prolific scholarship, developing and applying the functionalist, rational approach (he might call it economic or pragmatic) in virtually every field of law, ranks him among the greatest legal thinkers. It also places him at the forefront of the revolutionary assault on the formalist establishment's continuing dominance of the teaching, and therefore the practice, of law. Indeed, scholarly Posner seems to relish the role of provocateur; witness his recent contribution in these pages skewering the pontiffs of constitutional law.<sup>1</sup> But what of Judge Posner, now marking his twenty-fifth year on the Court of Appeals for the Seventh Circuit? In that time he has served a lengthy term as Chief Judge and authored volumes of opinions. Besides wondering how he does it all, I want to know how Posner squares the role of judge with that of scholar provocateur. Is he a judicial Clark Kent, passing himself off as a mild-mannered, droll, keen-witted judge, wearing glasses and a black robe as a disguise, only to throw them off to write seditious tracts and save the world? Some clues may be found in *Indiana Harbor Belt Railroad Co. v. American Cyanamid Co.*,<sup>2</sup> a Posner opinion that has become a basic staple of torts courses on the preeminent question of when it is better to use negligence or strict liability. After commenting on the importance as well as the problematics of this opinion, I surmise what he might actually be up to — all in tribute to the judicial Posner.

I.

A student of torts takes notice when Judge Posner, one of the transformational scholars in the field, opens his *Indiana Harbor Belt* opin-

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<sup>1</sup> Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31 (2005).

<sup>2</sup> 916 F.2d 1174 (7th Cir. 1990).

ion with the following question presented: “whether the shipper of a hazardous chemical by rail should be strictly liable for the consequences of a spill . . . en route.”<sup>3</sup> When he goes on to declare the question “novel” under governing Illinois law, the absence of helpful precedent from other jurisdictions, and the need therefore to develop an answer from the “ground up,” the reader anticipates the unfolding of a modern torts classic.<sup>4</sup>

The case before Judge Posner was a long-running litigation between one of the railroads involved in shipping a hazardous chemical, Indiana Harbor Belt Railroad (IHBR), and the chemical’s manufacturer, American Cyanamid. On January 9, 1979, four thousand gallons of Cyanamid’s shipment of acrylonitrile spilled from the broken bottom outlet of its tank car while it was parked in IHBR’s Blue Island rail yard outside Chicago.<sup>5</sup> Alleging negligence as well as strict liability, IHBR sued Cyanamid to recover the nearly \$1 million the railroad expended to comply with clean-up directives from the Illinois Environmental Protection Agency.<sup>6</sup>

The case reached Judge Posner on the strict liability count alone. Cyanamid was appealing the district court’s adverse summary judgment ruling that transport of acrylonitrile into the heavily populated Chicago metropolitan area constituted an abnormally dangerous activity subjecting the company to strict liability for the resulting harm. Focusing primarily on one of the six *Second Restatement of Torts* factors for determining whether an activity is abnormally dangerous, the district court found Cyanamid’s activity indisputably abnormal for being “singularly ‘inappropriate’ in the *Restatement* sense of the word, given the character of the area surrounding that yard.”<sup>7</sup> It was “fairer,” the court said, “to place the burden of the loss on the person

<sup>3</sup> *Id.* at 1176.

<sup>4</sup> *Id.* at 1176, 1179.

<sup>5</sup> The tank car, which Cyanamid leased from North American Car Company (NACC), was originally loaded with 20,000 gallons of acrylonitrile. *Id.* at 1179–80. The Missouri Pacific Railroad (MoPac) had hauled the car from Cyanamid’s plant in Louisiana to the Blue Island yard, where, following a short layover, IHBR was to switch the car to a Conrail train for the final leg of the journey to another Cyanamid facility in New Jersey. Several hours after the car’s arrival, IHBR employees noticed fluid gushing from the bottom outlet of the car, the lid and assembly of which were broken and hanging open. Unsure of how much had spilled, and since acrylonitrile is highly flammable, explosive, toxic, and possibly carcinogenic, the local authorities evacuated 3000 people from nearby homes and businesses while the car was removed to a remote part of the yard. *See id.* at 1175.

<sup>6</sup> *See Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 662 F. Supp. 635, 638 (N.D. Ill. 1987).

<sup>7</sup> *Id.* at 642; *see also* RESTATEMENT (SECOND) OF TORTS § 520 (1977) (listing as factors: (a) magnitude of the chance of accident; (b) severity of harm in the event of accident; (c) effectiveness of reasonable care in preventing the accident; (d) extent to which the activity is a matter of common usage; (e) appropriateness of the place where the activity was conducted; and (f) value of the activity to the community).

who created the inordinate risk than on someone who has no relation to the activity other than an injury from it.”<sup>8</sup>

Reversing, Judge Posner, writing for the court of appeals, overruled the abnormally dangerous finding as a matter of law, and remanded the case solely for further proceedings on the negligence count.<sup>9</sup> Judge Posner’s opinion, in classic form, boldly stated the general principles that should govern the resolution of the centuries-old question of negligence versus strict liability. Deterrence of unreasonable risk, Judge Posner declared, is the primary objective of tort liability, and therefore “the emphasis is on picking a liability regime (negligence or strict liability) that will control the particular class of accidents in question most effectively.”<sup>10</sup> In making this choice, negligence is the “baseline” because when the “hazards of an activity can be avoided by being careful (which is to say, nonnegligent), there is no need to switch to strict liability.”<sup>11</sup> “Sometimes,” however, the negligence rule will fail to eliminate all risk, and a need for strict liability may arise.<sup>12</sup>

Here, Judge Posner introduced the special role of strict liability, providing the opinion’s most important contribution to case law. Drawing on the leading functional literature, Judge Posner advanced what is commonly referred to as the activity-level justification for strict liability.<sup>13</sup> Essentially, this justification responds to problems that courts encounter when applying the negligence rule beyond the conventional, relatively straightforward questions of care, such as whether Cyanamid reasonably maintained and operated the tank car. Undertaking to assess the reasonableness of activity-level-type decisions, such as Cyanamid’s choices of when, where, and how much acrylonitrile to produce and ship by rail, risks overwhelming judicial resources. Indeed, courts often shy away from tackling this set of especially complex and elusive issues, thereby allowing actors to engage in excessive levels of risky activity free from the check of tort liability. Strict liability can remedy this problem. “By making the actor strictly liable,” Judge Posner explained, “we give him an incentive, missing in a negligence regime, to experiment with methods of preventing accidents that involve not greater exertions of care, assumed to be futile, but instead relocating, changing, or reducing (perhaps to the vanishing point) the activity giving rise to the accident.”<sup>14</sup>

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<sup>8</sup> *Ind. Harbor Belt*, 662 F. Supp. at 639.

<sup>9</sup> *Ind. Harbor Belt*, 916 F.2d at 1183.

<sup>10</sup> *Id.* at 1181–82.

<sup>11</sup> *Id.* at 1177.

<sup>12</sup> *Id.*

<sup>13</sup> *See id.* (citing Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1 (1980)).

<sup>14</sup> *Id.*

Accordingly, Judge Posner centered the inquiry under the *Restatement* on the factor assessing the extent to which an activity, even when undertaken with all reasonable care (in the conventional sense), entails an unavoidable residual risk and may therefore call for strict liability. On this analysis, the appropriateness of the activity's location, the factor of principal concern to the district court, becomes relevant only if the negligence rule proves inadequate. However, Judge Posner indicated that even if the question had been presented, he would not regard it as a one-sided matter of Cyanamid's unilaterally imposing a hazard on the adjacent community. The district court, he suggested, failed to recognize the problem of conflicting uses, and from this perspective, the land involved seemed better suited to rail transport than to residential development, which he analogized to "building your home between the runways at O'Hare."<sup>15</sup>

Finding no need to remand for an evidentiary hearing, Judge Posner concluded on the basis of the existing record, and his intuitions, that there was no warrant for using strict liability because "if a tank car is carefully maintained the danger of a spill of acrylonitrile is negligible."<sup>16</sup> Yet he entertained the possibility that despite the taking of reasonable care, a small chance of a catastrophic spill might remain, which would create a need for strict liability to "give[] the shipper [Cyanamid] an incentive to explore alternative routes."<sup>17</sup> This question prompted Judge Posner to undertake an extraordinary, and probably unprecedented, inquiry into the likelihood that strict liability would produce desirable activity-level effects in a case that would otherwise qualify under the *Restatement* as involving an abnormally dangerous activity.

Upon surveying Cyanamid's options to reduce its activity level, Judge Posner concluded that none was reasonable. He found that "shippers" (manufacturers), unlike "transporters" (railroads) of hazardous chemicals, generally lack the requisite experience and knowledge of railroading "to lay out the safest route by which to ship their goods."<sup>18</sup> Conjecturing that Cyanamid's control over the tank car made it more than "a passive shipper," Judge Posner ruled that no one,

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<sup>15</sup> *Id.* at 1181. By putting aside this question, Judge Posner avoided having to choose the rule that would best control both the plaintiff's and the defendant's risky conduct. Because the negligence rule effectively holds plaintiffs strictly liable for unavoidable residual risk, whereas strict liability imposes that risk only on defendants, the choice between the two rules often requires consideration of which one would produce better activity-level results in a given type of case.

<sup>16</sup> *Id.* at 1179. Cyanamid readily conceded that a bottom-outlet spill was virtually impossible without someone's negligence, but pointed the finger of responsibility at MoPac, NACC, and IHBR. See *Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 662 F. Supp. 635, 639, 641 (N.D. Ill. 1987).

<sup>17</sup> *Ind. Harbor Bell*, 916 F.2d at 1180.

<sup>18</sup> *Id.*

not even a full-fledged transporter, could devise a safer route for the simple reason that none exists.<sup>19</sup> The nation's railroad network is a "hub-and-spoke system," he observed, so if the car does not go to Chicago, it must go to some other metropolitan area because that is where hubs are located.<sup>20</sup> Rerouting to reduce residential exposure would be counterproductive, he posited, because the longer journeys and increased use of lower grade track would likely raise "the expected accident cost."<sup>21</sup> Applying strict liability to induce Cyanamid to ship acrylonitrile by truck likewise offered no benefit because highway hazards would remain even if a truck driver used all reasonable care, making spills virtually inevitable.<sup>22</sup> Judge Posner also dismissed the notion of using strict liability to induce Cyanamid to develop some less hazardous chemical replacement for acrylonitrile, a ubiquitous ingredient in a vast array of manufacturing processes and finished products. The infeasibility of this option was apparent to him from the fact that IHBR never even suggested the possibility.<sup>23</sup>

## II.

Despite its comprehensive and conclusive nature, Judge Posner's opinion prompts a number of questions. None, I hasten to add, concerns his functional approach, emphatic focus on deterrence, or explication of strict liability's role in policing those activity-level dimensions that courts cannot effectively oversee utilizing negligence. I do, however, return to these points in closing.

My present interest is with Judge Posner's application of the *Restatement* test for abnormally dangerous activities, in particular with two levels of inquiry, one that he expressly prescribed and conducted and another that he merely suggested but did not pursue. The first, I argue, would probably overtax judicial capabilities, and, in any event, is unnecessary and often self-defeating. Indeed, Judge Posner's own analysis leads to the conclusion that socially appropriate deterrence is generally better achieved simply by switching the "baseline" to strict liability and avoiding his inquiry altogether. The second, forgone inquiry has a compelling rationale — the potential for strict liability to increase litigation costs — which I believe really animated Judge Posner's analysis. Yet this inquiry entails a different, more extensive, and even more daunting cost-benefit analysis than the first, and in all probability courts would (and should) rarely undertake it.

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<sup>19</sup> See *id.* at 1181.

<sup>20</sup> *Id.* at 1180–81.

<sup>21</sup> *Id.* at 1180.

<sup>22</sup> See *id.* at 1181.

<sup>23</sup> See *id.*

Judge Posner's opinion thus stirs up more important questions than it resolves, and I conclude that it was all for naught. The basic torts question of negligence versus strict liability, and related issues of how to decide it, is not presented by *Indiana Harbor Belt*-type cases. The reason is that they are not torts cases — or more precisely, they should not be treated as such.

Based on an innovative gloss on the *Restatement*, the inquiry Judge Posner prescribed and conducted would have courts determine not only the extent to which the negligence rule leaves residual risk, but also the efficacy of strict liability in reducing that risk. The first determination is far from straightforward, especially if courts must delve into technological and operational details. The second, however, is likely beyond judicial capacities altogether. Testing the efficacy of strict liability by determining whether the defendant had reasonable options for reducing its activity level — in *Indiana Harbor Belt*, for example, rerouting chemical-laden tank cars — involves precisely the negligence-style cost-benefit analysis of activity level that generally proves too expensive and complex for courts to perform effectively and that justifies turning to strict liability in the first place.<sup>24</sup>

But even if courts were capable of conducting this inquiry, they should not proceed as Judge Posner prescribed. My objection arises in part from his problematic framing of the type of accident and available activity-level precautions at issue in highly specific terms. This framing choice dictated most of the costly analysis Judge Posner subsequently undertook, but he never explained the necessity for using this level of specificity. Equally troubling, narrowly defining accident type and available activity-level precautions effectively predetermined the inquiry, biasing it against finding the “need to switch to strict liability.”<sup>25</sup>

Thus, whereas the district court in *Indiana Harbor Belt* framed the accident type broadly to encompass acrylonitrile spilling from a tank car for any reason, Judge Posner specified the accident type in terms of the actual incident at Blue Island: acrylonitrile spilling from the car's bottom outlet. The district court's more generalized description aggregated the risks of spillage from all causes of containment breach and failure, including lightning strikes, vandalism, derailments, and collisions with trains or trucks, as well as from broken bottom outlets.<sup>26</sup> Judge Posner dismissed the lower court's concerns by finding that rea-

<sup>24</sup> See Stephen G. Gilles, *Rule-Based Negligence and the Regulation of Activity Levels*, 21 J. LEGAL STUD. 319, 337 (1992). Judge Posner recognized the “factual overlap” involved in deciding between the two regimes. *Ind. Harbor Belt*, 916 F.2d at 1183.

<sup>25</sup> *Ind. Harbor Belt*, 916 F.2d at 1177.

<sup>26</sup> See *Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 662 F. Supp. 635, 640 (N.D. Ill. 1987).

sonable care reduces the risk of bottom outlet spills to “negligible,”<sup>27</sup> but this determination did not address the lower court’s aggregate risk assessment.

Similarly, Judge Posner diminished the potential benefits of strict liability by describing only a limited set of possible activity-level precautions and by focusing on rather extreme options, such as avoiding rail hubs and ceasing to produce acrylonitrile. Indeed, Judge Posner recognized but then seemed to lose sight of the point that strict liability generally aims to “reduce[]” the frequency and amount of risky activity, not necessarily to end it.<sup>28</sup> Thus, he failed to consider Cyanamid’s options for incrementally moderating its risky activity, for example, by curtailing shipment of acrylonitrile in tank cars with bottom outlets, a practice Cyanamid and most other chemical manufacturers adopted following the *Indiana Harbor Belt* accident.<sup>29</sup> But specifying possible options does not seem to be the comparative advantage of judges. Surely even a Judge Posner is unlikely to know more about how and how much a chemical manufacturer might reasonably reduce risky activity than does the manufacturer itself, advised as need be by its railroad agents and the expert consultants it could hire.<sup>30</sup>

Specifying activity-level options and evaluating their efficacy thus seems to be an entirely wasted effort. Indeed, Judge Posner contradicted his own teaching about the “invisible hand” by which strict liability automatically and naturally effects continuous reductions in activity level by simply raising price.<sup>31</sup> Under strict liability, firms price their products to include not only the costs of production and reasonable care, as they would under the negligence rule, but also the cost of accidents from unavoidable residual risk. Higher price reduces demand and supply, and accordingly, the level of risky activity involved in production, distribution, and use of the product falls below the level it would have reached under a negligence regime. In *Indiana Harbor Belt*, the application of strict liability would have raised the price of acrylonitrile to reflect the unavoidable residual risk of tank car spills,

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<sup>27</sup> *Ind. Harbor Belt*, 916 F.2d at 1179.

<sup>28</sup> *Id.* at 1177.

<sup>29</sup> Indeed, IHBR argued that the industry’s changeover to tank cars that load and offload from the top, as well as Cyanamid’s apparent recommendation of their use even before the *Indiana Harbor Belt* accident, supplied added grounds for deeming Cyanamid’s activity abnormally dangerous. See Plaintiff’s Motion for Summary Judgment Versus Am. Cyanamid Co. at 10, 15, 17, 25, *Ind. Harbor Belt*, 662 F. Supp. 635 (N.D. Ill. 1987) (No. 80 C 1857).

<sup>30</sup> More generally, conditioning the application of strict liability on a judicial efficacy determination serves no useful purpose. When firms like Cyanamid are subject to strict liability, their motive to maximize profits leads them to identify and exploit cost-effective activity-level options regardless of whether and, indeed, what courts have previously opined on the matter.

<sup>31</sup> See Richard A. Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205, 208 (1973).

consequently reducing Cyanamid's risky activity, including the amount and frequency of the chemical's transport by rail.

Putting aside these qualms, I suggest that Judge Posner's costly inquiry was unnecessary for another reason: he posited the wrong baseline. The inquiry and its costs could have been avoided if the baseline had been strict liability rather than negligence. Cases might of course arise in which the negligence rule would eliminate all risk. But there is no need to choose between strict liability and negligence in such cases because both would produce identical deterrent effects: the defendant would invest in reasonable care to avoid all risk of accident. At the other extreme, cases might arise in which the negligence rule would not eliminate all risk, but the defendant lacks options to reduce activity level, even by raising price. The two rules again produce the same deterrent effect: the defendant would invest in reasonable care, leaving a residuary of unavoidable risk. In short, courts do not need to choose between rule regimes because strict liability works in all cases: it will be effective when it is needed and do no harm when it is not.

This brings me to the second level of inquiry, the one that Judge Posner did not explicitly address but that nonetheless seemed to be animating his opinion. Strict liability is not costless, but only seems so because Judge Posner truncated the inquiry. The problem with strict liability, as he was one of the first to point out, is that although it is cheaper to apply at trial than negligence, this relative efficiency could result in more claims being filed and litigated, thus swamping any savings.<sup>32</sup> This problem probably was foremost in Judge Posner's mind in *Indiana Harbor Belt*, although he suggested it only obliquely in noting that applying strict liability to acrylonitrile shipments implied using it for the shipment of scores of more dangerous chemicals, and possibly many other less dangerous chemicals. Although he characterized this prospect as "sweeping . . . liability," indeed "so sweeping" as to be unprecedented,<sup>33</sup> Judge Posner made no effort to estimate the number of claims that might result, nor did he consider accident data submitted by Cyanamid indicating that applying strict liability rather than negligence probably would not increase litigation costs substantially.<sup>34</sup>

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<sup>32</sup> See *id.* at 209. In theory, of course, the negligence rule would deter all negligent conduct and thus never result in lawsuits, whereas strict liability requires some litigation to resolve claims that arise from the unavoidable residual risk. In practice, however, both rules generate litigation, the relative cost of which for a given type of case is an empirical question.

<sup>33</sup> *Ind. Harbor Belt*, 916 F.2d at 1178.

<sup>34</sup> See Memorandum of Am. Cyanamid Co. in Opposition to the Motion of Ind. Harbor Belt R.R. Co. for Summary Judgment at 7, *Ind. Harbor Belt*, 662 F. Supp. 635 (N.D. Ill. 1987) (No. 80 C 1857). Citing Department of Transportation reports, Cyanamid emphasized the industry's rail safety record in shipping acrylonitrile and other hazardous materials. It pointed out that between 1979 and 1985, its shipments of acrylonitrile averaged around 1000 carloads annually and resulted in just four incidents, with only one involving chemical release; that during the period from 1984

It is unsurprising that Judge Posner did not press his inquiry further. Estimating the increased number and cost of claims under strict liability requires gathering and analyzing lots of data. Moreover, that question is only one of a complex of interrelated issues that must be resolved to determine the relative superiority of negligence to strict liability. The choice ultimately turns on the rules' comparative net deterrence benefit — that is, their relative deterrence benefit minus litigation costs. This analysis incorporates, but goes far beyond, Judge Posner's inquiry. On the negligence side, the court must design the best negligence rule for the situation (deciding, for example, whether to apply *res ipsa loquitur*, as the lower court did on remand in *Indiana Harbor Belt*<sup>35</sup>); assess the consequent frequency and volume of lawsuits as well as the costs of discovery, settlement, and trial; and evaluate the resulting deterrence effects on plaintiffs as well as defendants.<sup>36</sup> On the strict liability side, courts must determine not merely the efficacy but also the potential deterrence benefits from any reduction in the level of risky activities by defendants.<sup>37</sup> Only then is the court positioned to estimate the litigation costs of strict liability. Complicating this cost assessment, however, is the fact that strict liability is frequently subject to contributory negligence and similar defenses, as well as to other restrictions, such as the requirement that the risk be suffi-

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through 1985, the other three manufacturers of acrylonitrile shipped more than 6307 carloads with only one reported incident and no release; and that overall between 1978 and 1984, only one percent of rail accidents involving any type of hazardous material resulted in the material's release. Post-*Indiana Harbor Belt* data confirm not only a relatively low rate of rail accidents involving hazardous materials, but also a substantial reduction in the level of this risky activity. See U.S. DEP'T OF TRANSP., BIENNIAL REPORT ON HAZARDOUS MATERIALS TRANSPORTATION CALENDAR YEARS 1996-1997, at 91-92 (1999), available at [http://hazmat.dot.gov/pubs/biennial/96\\_97biennial.rpt.pdf](http://hazmat.dot.gov/pubs/biennial/96_97biennial.rpt.pdf) (reporting that rail incidents averaged 1150 annually between 1990 and 1997, of which an average of 68 per year were rated "serious," but not necessarily for involving release of the transported substance); U.S. DEP'T OF TRANSP., HAZARDOUS MATERIALS SAFETY INCIDENTS BY MODE AND INCIDENT YEAR 1 (2007), available at <http://hazmat.dot.gov/pubs/inc/data/tenyr.pdf> (reporting that rail incidents averaged 815 annually from 2001 through 2005, with incident rates declining appreciably each year); U.S. DEP'T OF TRANSP. & U.S. DEP'T OF COMMERCE, 2002 ECONOMIC CENSUS: TRANSPORTATION 2002 COMMODITY FLOW SURVEY 18 (2004), available at <http://www.census.gov/prod/eco2/eco2tcf-haz.pdf> (reporting a drop in hazardous material shipments between 1997 and 2002 from 78,619,000 to 72,087,000 ton-miles and from 837 to 695 average miles per shipment).

<sup>35</sup> See *Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, No. 80 C 1857, 1991 WL 206079, at \*4-6 (N.D. Ill. Sept. 27, 1991).

<sup>36</sup> This analysis will also often require consideration of the propensity of the negligence rule, given imperfect enforcement, to distort deterrence effects. See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 224-28 (2004) (discussing the potential for the negligence rule to distort incentives and the comparative advantage of strict liability).

<sup>37</sup> Courts must also consider the extent to which the prospect of strict liability damages will diminish the plaintiff's incentives to avoid the accident.

ciently foreseeable.<sup>38</sup> Such constraints on the scope of strict liability not only increase litigation costs, but also tend to decrease the filing of claims.<sup>39</sup>

In light of the inquiry involved, I doubt courts would undertake to determine the relative superiority of negligence to strict liability beyond making rough judgments about general categories of accidents. For example, courts might find negligence more appropriate for automobile accidents, as Judge Posner suggested,<sup>40</sup> while favoring strict liability for business-related accidents involving harm to “strangers,” such as factories polluting nearby neighborhoods.<sup>41</sup>

In the end, however, Judge Posner’s concerns were misplaced. *Indiana Harbor Belt*-type cases present no need to address the big

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<sup>38</sup> See, e.g., RESTATEMENT (SECOND) OF TORTS § 524 (1977) (providing a defense of contributory negligence); RESTATEMENT (THIRD) OF TORTS § 25 (Proposed Final Draft No. 1, 2005) (reducing recovery by “comparative responsibility” of contributorily negligent plaintiff); *id.* § 20 (Proposed Final Draft No. 1, 2005) (limiting strict liability for abnormally dangerous activity to conduct that “creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors”).

<sup>39</sup> Contributory negligence is especially costly to apply, although it does not require determining a defendant’s negligence. Nevertheless, to set a standard of reasonable care for the plaintiff, a court must determine the unavoidable residual risk that the plaintiff should expect to confront, which requires determining what the defendant should reasonably do to reduce that risk with respect to both care and activity levels.

A complete comparative advantage assessment should account for administrative regulation of shipping hazardous materials by rail, such as the Department of Transportation’s comprehensive regulation under the Hazardous Materials Transportation Act, 49 U.S.C.A. §§ 5101–5127 (West 1997 & Supp. 2006). Courts should also consider reputational, financial, and other adverse market consequences that affect risk-taking.

<sup>40</sup> See *Ind. Harbor Belt*, 916 F.2d at 1177. Judge Posner explained the *Restatement’s* strict liability exemption for automobile driving and other “common activities” as being based on the view either that the hazard is not great or that “technology of care is available to minimize” the risk. *Id.* A more realistic explanation of the exemption for driving focuses on the behavior of drivers, who tend to make more or less sporadic, uncalculated decisions regarding when, where, and how much to drive. Applying strict liability to them probably would not yield a sufficient deterrence benefit to justify the likely vast increase in automobile litigation, which currently constitutes half the torts docket nationwide. See NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2005: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 28 (Richard Schaufliet et al. eds., 2006). Strict liability is also unnecessary since applying the negligence rule to driving and other common or reciprocal risk activities already generates the desired activity-level incentives by requiring each participant to bear strictly the unavoidable residual risk from the other’s nonnegligent conduct. See Peter A. Diamond, *Single Activity Accidents*, 3 J. LEGAL STUD. 107, 116 (1974).

<sup>41</sup> Because business risk-taking is systematic in nature, the cost of litigating the resulting strict liability claims can be reduced substantially by means of collective adjudication in consolidated or class actions.

Of course, the decision to apply strict liability for business risk-taking could be mistaken; for example, deterrence benefits may not outweigh litigation costs or may not dominate after accounting for other effects, such as income distribution, market competition, and the cost of liability insurance. However, strict liability provides a stable, clear-cut default rule that should facilitate oversight and reform by legislatures, which are better able than courts to marshal the necessary information and resources.

torts question of negligence versus strict liability because they are better treated as contract rather than tort cases.

Tort liability is a mode of regulation that should be used only when the market fails to achieve the social objectives involved — here, primarily deterrence — and when judicial intervention promises superior results. There was no suggestion in the record or by Judge Posner of any failure of the market between Cyanamid, IHBR, and the other contracting parties, who probably included an array of insurers and financial intermediaries — all repeat, large-scale, well-informed participants in a continuously operating, sophisticated market for transporting hazardous chemicals. They could have allocated the risk of tank car spills on their respective properties by contract. These contracts could have specified negligence, strict liability, or some amalgam as the governing rule. The parties could also have managed risk far better than regulators, let alone courts, could hope to by prescribing sophisticated means of controlling and monitoring risks and assuring financial responsibility through requirements for insurance. Moreover, contracts could have established efficient modes of resolving disputes, such as by requiring arbitration and fixing damage schedules. In addition, relegating the parties to contract would have enlisted the disciplining market forces of price, reputation, and competition.<sup>42</sup>

Judge Posner's opinion reveals no sign that he treated the case as one of contracts rather than torts. Nowhere does he suggest, for example, that the choice of liability regime was merely a default rule the parties could change by agreement.<sup>43</sup> He recognized the market underpinnings, but invoked them only in dismissing IHBR's argument that Cyanamid should bear strict liability because it was the "deepest pocket."<sup>44</sup> Judge Posner doused this "*distributive*" assertion with a blast of reality: "Cyanamid is a huge firm [compared to IHBR] . . . .

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<sup>42</sup> Because civil liability is publicly "subsidized," the parties might seek to avoid paying the full cost of resolving their disputes by formulating agreements that would replay *Indiana Harbor Belt* in court as a breach of contract action. A countermeasure would have courts charge the parties the public cost of adjudication. To be sure, contracting may be too costly; this may explain the absence of any contract between Cyanamid and IHBR, although Cyanamid did have contracts with MoPac and Conrail, which in turn contracted with IHBR for car inspection and other services benefiting Cyanamid. Pricing adjudicative services provides a market means not only of preventing the parties from free-riding on the public, but also of enabling them to make use of courts when contracting would be more costly.

<sup>43</sup> If Judge Posner meant to prescribe negligence as a default term representing the liability rule that the contracting parties would have chosen had they addressed the issue, he could have simply invoked the empirical premise of the negligence baseline — reasonable care eliminates accident risk in most cases — rather than have undertaken his detailed cost-benefit inquiry. Despite Judge Posner's silence on the matter, the possibility that he was nonetheless establishing negligence as a default rule could be tested by examining *Indiana Harbor Belt*-type cases for decisions that enforce contracts specifying some liability rule that conflicts with the prevailing torts rule.

<sup>44</sup> *Ind. Harbor Belt*, 916 F.2d at 1182.

Well, so what? [C]ontracts . . . determine who will bear the brunt of liability."<sup>45</sup>

Nor was Judge Posner without the doctrinal means and precedent to decide the case as a matter of contract. Assumption of the risk by agents, independent contractors, and other parties participating in an abnormally dangerous activity is a complete defense under the *Restatement*,<sup>46</sup> and the Supreme Court had recently lent support to an emerging line of decisions rejecting tort liability and relegating commercial parties to contract in cases involving economic loss from defective products.<sup>47</sup>

### III.

Posner's treatment of *Indiana Harbor Belt* as a torts rather than contracts case follows in the tradition of other "torts" classics, such as *In re Polemis*,<sup>48</sup> *The T.J. Hooper*,<sup>49</sup> *Vincent v. Lake Erie Transportation Co.*,<sup>50</sup> and even *Rylands v. Fletcher*.<sup>51</sup> Yet the *Indiana Harbor Belt* case offered Posner the chance to rein in a tort system that, at a cost of well over a hundred billion dollars annually, renders decisions of great social consequence without the requisite resources and expertise. Why did he pass up the opportunity?

This brings me back to my earlier query: what is the judicial Posner up to? First of all, he is judicious. Despite the available authority, he may have thought that resolving the *Indiana Harbor Belt* case on contract grounds would have been too big a step. The path of least resistance may have seemed the best way of persuading his colleagues to vote with him and of avoiding effective reversal by the Illinois Supreme Court.

But for Posner the scholar provocateur, his *Indiana Harbor Belt* opinion succeeds in adding major facets to the case law. Few torts decisions (or commentators) even mention deterrence, let alone apply the theory in any sustained and knowledgeable way. By introducing crucial insight regarding the activity-level effect, Posner fundamentally changed the portrayal of strict liability in case law. More generally, Posner's opinion provides a primer on applying the functional approach from start to finish in analyzing social (qua legal) problems.

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<sup>45</sup> *Id.* at 1181-82.

<sup>46</sup> See RESTATEMENT (SECOND) OF TORTS § 523 & cmt. d (1977).

<sup>47</sup> See *E. River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 875 (1986).

<sup>48</sup> [1921] 3 K.B. 560 (C.A.).

<sup>49</sup> 60 F.2d 737 (2d Cir. 1932).

<sup>50</sup> 124 N.W. 221 (Minn. 1910).

<sup>51</sup> 1 L.R.-Ex. 265 (1866); see also Gary T. Schwartz, *Rylands v Fletcher, Negligence and Strict Liability*, in *THE LAW OF OBLIGATIONS: ESSAYS IN CELEBRATION OF JOHN FLEMING* 209 (Peter Cane & Jane Stapleton eds., 1998).

To be sure, the *Indiana Harbor Belt* opinion has received relatively little attention in other cases for these key points, and none for the ones I regard as problematic.<sup>52</sup> However, the future lies in the minds of students, and I surmise that they are the principal audience for Posner's opinion. The nature of legal education today (and yesterday) is such that students' exposure to the leading functionalist literature — or any scholarly work for that matter — is usually limited to snippets in casebook notes. For Posner to get more of his message across to students, then, he must do it through his opinions, having them published (albeit excerpted) in casebooks and his arguments (qua judicial rulings) mooted in class. He achieved this with the *Indiana Harbor Belt* case.<sup>53</sup>

Casebook editors can cut up an opinion to say virtually whatever they want it to say and teachers can rough it up in class, but Posner's trenchant analysis and writing make it hard to miss or mangle his main arguments. Overthrowing the formalist establishment will not come about easily or quickly, but for society's sake it cannot come soon enough. In hastening that day, the judicial Posner deserves honor and gratitude.

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<sup>52</sup> Of the fifty-six decisions citing *Indiana Harbor Belt*, the great majority refer to the case solely for a proposition unrelated to the issue of negligence versus strict liability. Notably, many among the remaining decisions refer to Judge Posner's point about activity levels, although none adopts his efficacy test. See, e.g., *Fletcher v. Tenneco, Inc.*, 37 Env't Rep. Cas. (BNA) 1237, 1243-44 (E.D. Ky. 1993).

<sup>53</sup> Of nineteen post-1990 torts casebooks and hornbooks readily available from Harvard library shelves, all but two include some reference to *Indiana Harbor Belt*; most contain substantial excerpts from the case, including Judge Posner's explanation of the activity-level benefits of strict liability, and provide more extended commentary in notes following these excerpts.