# Electricity is Neither Ultrahazardous Nor Abnormally Dangerous

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Keywords
abnormally dangerous, distribution, electricity, high voltage, law, legal, strict liability, transmission, ultrahazardous

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## Introduction

A number of plaintiff's attorneys in the USA have argued that distribution of electricity is an ultrahazardous activity, for which strict liability (i.e., tort liability without proving negligence, in other words: without breach of a duty) should apply. This essay explains why they are wrong and cites many cases.

disclaimer

This essay presents general information about an interesting topic in law, but is *not* legal advice for your specific problem. See my disclaimer at http://www.rbs2.com/disclaim.htm . From reading e-mail sent to me by readers of my essays since 1998, I am aware that readers often use my essays as a source of free legal advice on their personal problem. Such use is *not* appropriate, for reasons given at http://www.rbs2.com/advice.htm .

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook*.

## Overview

In England in the year 1868, the famous case of *Rylands v. Fletcher,* L.R. 3 H.L. 330, established strict liability (i.e., tort liability without proving negligence) for abnormally dangerous activities. That case involved constructing a water reservoir above an abandoned coal mine, and the water leaked into the abandoned mine and then flooded plaintiff's adjacent mine. The doctrine of strict liability was extended to storage or use of explosives in inhabited areas, which is now the leading example.

In the USA, the doctrine of strict liability was expressed in the RESTATEMENT FIRST OF TORTS, §§ 519-520 (1938) under the label "ultrahazardous activity". The RESTATEMENT SECOND OF TORTS, § 520 (1977) uses the label "abnormally dangerous activities". Many modern judges continue using the label "ultrahazardous", even when applying the Second Restatement of Torts.

As the labels "ultrahazardous" and "abnormally dangerous" imply, there must be a great risk of harm from the activity. Such activities might be banned in inhabited areas, except that the activities are desirable to society (e.g., blasting to demolish a building downtown).

## Cases Involving Electricity

On 7-8 June 2011, I searched all state and all federal cases in Westlaw for the query:

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(electric! high-voltage) /s (ultra-hazardous (abnormally +1
dangerous))
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Most of the 129 cases found with this broad query were irrelevant. I also followed many citations in cases, to obtain additional cases that do not satisfy the above query. On 9 June 2011, I searched all state and all federal cases in Westlaw for the query:

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((electric! power) +1 (utility company)) /s ((strict absolute)
+1 liability)
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While this second broad search found 187 cases, it produced few relevant cases not found in the previous search. Most of the newly found relevant cases in the second broad search were before the year 1980.

I also made additional searches to find more cases before the year 1980. The following is a list of cases I consider most relevant since the year 1950, in chronological order. Note that in the 1950s and 1960s it was already well established in the USA that proof of negligence was required before an electric utility could be held liable for injury from electricity.

- *Hamilton v. Laclede Electric Co-op.,* 294 S.W.2d 11, 15 (Mo. 1956) ("An electric utility is not an insurer of the safety of persons. Its liability rests upon the rules of negligence. *State ex rel. Kansas City L. & P. Co. v. Trimble,* 315 Mo. 32, 285 S.W. 455, 458, 49 A.L.R. 1047 [(Mo. 1926)]; *Howard v. St. Joseph Transmission Co.,* 316 Mo. 317, 289 S.W. 597, 601[3, 4], 49 A.L.R. 1034 [(Mo. 1926)]; *Brubaker v. Kansas City El. L. Co.,* 130 Mo.App. 439, 449, 110 S.W. 12, 15 [(Mo.App. 1908)].");

- *Hall v. Lorain-Medina Rural Electric Co-op., Inc.,* 148 N.E.2d 232, 234 (Ohio App. 1957) ("The Electric Company is certainly liable for its negligence, but it is not an insurer of the safety of those who are injured by coming into contact with its wires. See: 29 C.J.S. Electricity § 38.");

- *McKenzie v. Pacific Gas & Elec. Co.,* 19 Cal.Rptr. 628, 631 (Cal.App. 1962) (Maintenance of electric power lines is not an ultrahazardous activity, cites *Beresford v. Pacific Gas & Electric Co.,* 290 P.2d 498, 502 (Cal. 1955).). *McKenzie* was overruled on other grounds, *DiMare v. Cresci,* 23 Cal.Rptr. 772, 776, 373 P.2d 860, 864 (Cal. 1962);

- *Hercules Powder Co. v. DiSabatino,* 188 A.2d 529, 533 (Del. 1963) ("He [i.e., 'an owner of land who has had erected and maintains on his land a power line of uninsulated wires carrying a high voltage of electricity'] is liable for injuries from electricity caused by his negligence, but he is not an insurer of the safety of the public.");

- *Bosley v. Central Vermont Public Service Corp.,* 255 A.2d 671, 673 (Vt. 1969) ("Electrical companies are not insurers of the safety of the public. 29 C.J.S. [Electricity], § 38, page 1057. **....** The transmission of electric current in this day and age is a usual and normal practice for the benefit of the community.");

- *Brigham v. Moon Lake Elec. Ass'n,* 470 P.2d 393, 395 (Utah 1970) ("This [danger] does not mean that one who supplies electricity to the public is strictly liable without regard to fault,[footnote omitted] as may be the case of one who keeps a wild and ferocious animal. The reason for the distinction lies in the use to which the dangerous thing is to be put. Our civilization could not exist without electricity, and those who supply it are benefactors to mankind. Therefore, the high degree of care required may be said to be reasonable care in view of the great potential danger involved. The amount of care to avoid negligence always varies with the risk of harm which is known or under the circumstances ought to be known to exist.[footnote omitted] We, therefore, reject the contention of the plaintiff that the defendant in this case is absolutely liable to the plaintiff regardless of negligence.");

- *Wertz v. Holy Cross Electric Ass'n,* 512 P.2d 286, 288 (Colo.App. 1973) ("Although held to a high degree of care because of the inherent danger of electricity, a power company is not an insurer and may be held liable for injuries or death resulting from contact between an electric line and a crane only if the power company is shown to be negligent and its negligence proximately caused the injury. *Currence v. Denver Tramway Corp.,* 132 Colo. 328, 287 P.2d 967 [Colo. 1955], is directly in point.");

- *Wood v. Public Service Co. of New Hampshire,* 317 A.2d 576, 579-580 (N.H. 1974) ("Although the generating and distribution of electricity has been held a dangerous activity, electric companies have not been held strictly or absolutely liable for injuries suffered from contact with its power lines. *Eastern Shore Pub. Serv. Co. v. Corbett,* 227 Md. 411, 425, 177 A.2d 701, 709 (1962); 26 Am.Jur.2d Electricity, Gas, And Steam § 39 (1966); see Annot., 69 A.L.R.2d 9, 15 (1960). **....** No compelling reason of policy or logic has been advanced to apply strict liability to electric companies.");

- *Plourde v. Hartford Elec. Light Co.,* 326 A.2d 848, 851-852 (Conn.Super. 1974) ("Repeatedly, it has been stated that the power company does not act at its peril and is not an insurer. [citing ten cases] **....** The overwhelming pertinent case authority as well as the analogous statements of our Supreme Court which pertain to the duty of care required to be exercised by an electric power company maintaining high-voltage wires; *Cutler v. Putnam Light & Power Co.,* 80 Conn. 470, 476, 68 A. 1006; *McAdam v. Central Railway & Electric Co.,* 67 Conn. 445, 447, 35 A. 341, compel the conclusion that the admitted facts of the complaint do not support a cause of action against the defendant on the ground that it is absolutely liable because it is maintaining and operating an agency which is inherently dangerous and ultrahazardous. The circumstances and conditions in the use of high-voltage electricity which has the capability of arcing and being conducted through the air do not involve a risk of probable injury to such a degree that the activity fairly can be said to be intrinsically dangerous to the person or property of others.");

- *Williams v. Detroit Edison Co.,* 234 N.W.2d 702, 709 (Mich.App. 1975) ("... we choose to follow California's example [in *McKenzie*] and hold the power company to the 'reasonable man' standard of care rather than impose liability based upon the maintenance of an ultra-hazardous activity.");

- *Ferguson v. Northern States Power Co.,* 239 N.W.2d 190, 194 (Minn. 1976) (In case involving injury by contacting uninsulated 8 kV distribution line, the court "... decline[s] to decide this issue [strict liability for abnormally dangerous activity] at this time; however, we do call this matter to the attention of the legislature which is better equipped to resolve economic problems of this nature.");

- *Tellis v. Union Electric Co.,* 536 S.W.2d 742, 745 (Mo.App. 1976) ("In *Donovan v. Union Elec.,* 454 S.W.2d 623, 626 (Mo.App. 1970), citing with approval *Foote v. Scott-New Madrid-Mississippi Elec. Co-op.,* 359 S.W.2d 40, 43 (Mo.App. 1962) [("... an electric company is not an insurer of the safety of persons and property, and that its liability vel non in a given situation is determinable upon principles of negligence.")], we held that an electric company is not an insurer of the safety of persons and its liability is determinable upon principles of negligence.");

- *Alabama Power Co. v. Alexander,* 370 So.2d 252, 254 (Ala. 1979) ("Electric companies are not insurers of the public's safety; and the law does not impose strict liability for all accidents involving their power lines. *Alabama Power Co. v. Tatum,* 293 Ala. 500, 306 So.2d 251 (1975); *Alabama Power Co. v. Berry,* 254 Ala. 228, 48 So.2d 231 (1950).");

- *Wirth v. Mayrath Industries, Inc.,* 278 N.W.2d 789, 794 (N.D. 1979) ("We agree that electrical power is necessary to the well-being of our country and our state, and believe that it is becoming more important as other sources of energy become scarce. We conclude that the provisions of Section 519 and 520 of the Restatement of Torts 2d are inapplicable to this case [accidental electrocution by contacting high-voltage wire].");

- *Hedges v. Public Service Co. of Indiana,* 396 N.E.2d 933, 937 (Ind.App. 1979) ("... it seems quite clear that we have not in the past, nor will we now, impose absolute liability upon the power companies.");

- *Hernandez v. George E. Failing Co.,* 624 P.2d 749, 750 (Wash.App. 1981) ("Power lines must be strung between areas where power sources are located and the power is utilized; the societal value of electrical services needs no enumeration. In short, the risk is not so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even though it is carried on with all reasonable care. **....** We conclude that the carrying of power through uninsulated lines across rural areas does not constitute such an abnormally dangerous condition as to impose strict liability upon electrical power companies. In reaching this conclusion, we join the majority of jurisdictions. [citing four cases, 69 ALR2d 9 and 93]");

- *Farina v. Niagara Mohawk Power Corp.,* 438 N.Y.S.2d 645, 647 (N.Y.A.D. 1981) ("... we note the inapplicability of the strict liability doctrine. Finding its genesis in *Rylands v. Fletcher* (L.R. 3 H.L. 330), that doctrine was imposed where there was found to be 'ultrahazardous' activity, now denominated 'abnormally dangerous' activities, and has achieved but limited acceptance.");

- *Kent v. Gulf States Utilities Co.,* 418 So.2d 493, 498-499 (La. 1982) ("On the other hand, the transmission of electricity over isolated high tension power lines is an everyday occurrence in every parish in this state and can be done without a high degree of risk of injury. And when the activity results in injury, it is almost always because of substandard conduct on the part of either the utility, the victim or a third party. [footnote omitted] **....** We accordingly conclude that Gulf States should not be held absolutely liable, as an enterpriser engaged in ultrahazardous activities, when its activity of transmitting electricity is a cause-in-fact of injury to another, unless fault was proved on Gulf States' part.");

- *New Meadows Holding Co. v. Washington Water Power Co.,* 659 P.2d 1113, 1118 (Wash.App. 1983) (Case involves fire from leaking gas from pipe owned by defendant. Final four factors in Restatement Second of Torts, § 520 are not satisfied. Judge Green's concurring opinion mentions there is no strict liability for electricity, which causes more injuries than gas.), *aff'd,* 687 P.2d 212, 215-217 (Wash. 1984);

- *Kentucky Utilities Co. v. Auto Crane Co.,* 674 S.W.2d 15, 18 (Ky.App. 1983) ("Most courts have uniformly rejected the doctrine that the transmission of electricity is an ultrahazardous activity. 82 A.L.R.3d 218. Furthermore, the rules for strict liability for abnormally dangerous activities rarely apply to activities carried on in pursuance of a public duty. RESTATEMENT (SECOND) OF TORTS, § 521 (1981). The transmission of electricity is a public necessity.");

- *Nelson by Tatum v. Commonwealth Edison Co.,* 465 N.E.2d 513, 522-523 (Ill.App. 1984) ("... the concept of absolute liability is reserved only for abnormally dangerous activities for which no degree of care can truly provide safety. (See RESTATEMENT (SECOND) OF TORTS § 519 (1981).) Absolute liability has not been imposed on power companies in Illinois because of the obvious social and economic burdens, and Illinois courts have frequently echoed the principle that power companies are not absolute insurers of public safety. [citations omitted] There is a clear distinction between requiring a defendant to exercise a high degree of care when involved in a potentially dangerous activity and requiring a defendant to absolutely insure the safety of others when engaging in an ultra hazardous activity; Illinois has held electrical power companies only to the former standard.");

- *Pierce v. Pacific Gas & Electric Co.,* 212 Cal.Rptr. 283, 293 (Cal.App. 1985) ("Our Supreme Court has limited the doctrine of ultrahazardous activity to encompass only activities which are neither commonplace nor customary. (*Luthringer v. Moore* (1948) 31 Cal.2d 489, 498, 190 P.2d 1.) In this case the allegedly ultrahazardous activity has become pervasive and is now entirely commonplace. (See, e.g., *Clark v. Di Prima* (1966) 241 Cal.App.2d 823, 51 Cal.Rptr. 49 [water escaping irrigation ditch; no liability as ditches now in widespread use.].) We therefore join the court in *McKenzie v. Pacific Gas & Elec. Co.,* supra, 200 Cal.App.3d 731, 19 Cal.Rptr. 628, in concluding that maintenance of electric power lines is not 'ultrahazardous.' (P. 736, 19 Cal.Rptr. 628.)");

- *Frazee v. Gulf States Utilities Co.,* 498 So.2d 47, 52-53 (La.App. 1986) ("The transmission of electricity over isolated high tension power lines is not considered to be an ultrahazardous activity, therefore absolute liability is not imposed on utility companies. In the case of an electrocution the principles of negligence apply and the liability of the various parties to the accident should be assessed under a duty-risk analysis. *Hebert v. Gulf States Utilities Company,* 426 So.2d 111 (La. 1983); *Kent v. Gulf States Utilities Company,* 418 So.2d 493 (La. 1982).");

- *SmithBower v. Southwest Cent. Rural Elec. Co-op.,* 542 A.2d 140, 142-143 (Pa.Super. 1988) ("... the courts [in other states] have consistently held that the use and maintenance of high voltage electrical transmission lines by electric companies does not constitute an abnormally dangerous activity. [citing five cases] **....** Therefore, after careful study of the decisions of the courts of our sister states, we too hold that the provision and maintenance of electrical transmission lines and the transmission of high voltage electricity by electric companies do not constitute abnormally dangerous activities and reject the imposition of absolute liability against electric companies in this area.");

- *South Pymatuning Township v. Bell of Pennsylvania,* 48 Pa. D. & C.3d 611, 616 (Pa.Com.Pl. 1988) (trial court opinion: "The extent to which the electricity is valued to the community is outweighed by its dangerous attributes is a requirement for strict liability recovery for an ultra-hazardous or abnormally dangerous activity. RESTATEMENT (SECOND) OF TORTS § 520(f) (1977); .... **....** We conclude that no cause of action would lie against an electric company which supplies electricity to the community based upon strict liability for engaging in an ultra-hazardous or abnormally dangerous activity.");

In November 1989, a U.S. District Court considered a case involving a ten-year old boy who climbed a tree and touched a high-voltage distribution line, killing the boy. The boy's parents sued the electric utility on a theory of ultrahazardous nature of electricity.

> While Maryland courts have not yet had the opportunity to apply these factors to the transmission of electricity via high voltage power lines, the issue has been addressed in several other jurisdictions. Without exception, each court considering the issue has rejected any finding of strict or absolute liability for the activity of transmitting electricity. This Court agrees with their analysis.
>
> First, it need not be stated that the transmission of electricity is an daily occurrence in every community in the United States. As such, it is a matter of common usage. This will weigh heavily against any finding of an "abnormally dangerous activity." See *New Meadows Holding Co. v. Washington Water Co.,* 34 Wash.App. 25, 659 P.2d 1113 (1983); *Kent v. Gulf States Utilities Co.,* 418 So.2d 493, 498-99 (La. 1982).
>
> Furthermore, to hold utilities to absolute liability by declaring their conduct to be ultrahazardous would be the equivalent of declaring them insurers for all members of the community in which they serve. This Court, along with others which have considered the issue, will not impose that responsibility upon a utility company. See *Nelson by Tatum v. Commonwealth Edison Co.,* 124 Ill.App.3d 655, 80 Ill.Dec. 401, 410-11, 465 N.E.2d 513,

522-23 (1984); *Kent,* at 498-99; *Clinton v. Commonwealth Edison Co.,* 36 Ill.App.3d 1064, 344 N.E.2d 509 (1976); *Kentucky Utilities v. Auto Crane Co.,* 674 S.W.2d 15, 18 (Ky.App. 1983).

Additionally, the rules of strict liability for abnormally dangerous activities rarely apply to acts carried out in pursuance to a public duty. RESTATEMENT OF TORTS, SECOND, § 521. The transmission of electricity by a public utility is a public duty. Therefore, strict liability is inappropriate. *Kentucky Utilities,* at 18. It is also worth noting that in most ultrahazardous activity cases there is no ability to protect oneself. The victim has no connection to the events which lead to his accident. [footnote omitted] Here, the decedent came to the hazard. It was not imposed upon him. The facts of this case do not fall within those of the traditional ultrahazardous activity case.

Finally, this Court finds that it is possible to eliminate the risks accompanying the transmission of electricity through the exercise of reasonable care. As stated, electricity is transmitted across power lines constantly. However, the number of injuries which result from this activity are very small. Injuries caused by contact with electrical wires are usually the result of negligence on the part of either the power company, the victim, or a third-party. Injuries do not generally occur because of the nature of the activity itself. See *Kent,* at 498-99. As such, claims arising out of this unfortunate accident are better suited for resolution through traditional negligence claims.

*Voelker v. Delmarva Power and Light Co.,* 727 F.Supp. 991, 994-995 (D.Md. 1989).

- *Mancuso v. Southern California Edison Co.,* 283 Cal.Rptr, 300, 307 (Cal.App. 2 Dist. 1991) ("Under modern California law, strict product liability is imposed on a power company not because it is engaged in an ultra hazardous *activity* (which it is not, *McKenzie v. Pacific Gas & Elec. Co.* (1962) 200 Cal.App.2d 731, 736, 19 Cal.Rptr. 628, ..., but because it has *sold and delivered* a defective product to a customer which has resulted in injury or damage. [footnote omitted]");

- *Martinez v. Grant County Public Utility Dist. No. 2,* 851 P.2d 1248, 1250 (Wash.App. 1993) ("Washington recognizes the societal necessity of transmitting lethal amounts of electricity through uninsulated overhead power lines through rural areas; it does not impose strict liability on electrical power companies for injuries arising out of contact with those power lines. *Hernandez v. George E. Failing Co.,* 28 Wash.App. 548, 550-51, 624 P.2d 749 (1981). Because the utility district is not subject to strict liability, negligence must be established.");

- *Fitzpatrick v. US West, Inc.,* 518 N.W.2d 107, 115 (Neb. 1994) (electricity not ultrahazardous);

In December 1994, a trial court in Connecticut reviewed the case law and concluded:

In reviewing the factors of the REST. OF TORTS and current case law, it strains credibility to hold a utility company strictly liable unless negligence is involved. The generation or transmission or supply of electricity touches all of us in our lives. We as citizens have overwhelmingly concluded that strict regulation of our public utilities is a necessary and prudent way to balance our insatiable use of electricity. Our homes, offices and our safety depend on its supply and safe use. To require a utility company to shoulder strict liability

without fault would basically undermine the economic balance struck between the state and its utility companies at the whim of unforeseen or uncontrollable events, that can happen around electricity without negligence.

*Curtiss v. Northeast Utilities,* Not Reported in A.2d, 1994 WL 702690 at *4 (Conn.Super. 1994).

- *Prudential Property & Casualty Co. v. Conn. Light & Power Co.,* Not Reported in A.2d, 1997 WL 381521 at *3 (Conn.Super. 1997) (delivery of electricity not ultrahazardous: "Can one realistically allege that the delivery of electricity is anything less than a substantial benefit to the community, or that its benefit is outweighed by the inherent risks?");

- *Dorsch v. City of Tacoma,* 960 P.2d 489, 492 (Wash.App. 1998) (electricity not ultrahazardous);

- *Estate of Thompson v. Jump River Elec. Co-op.,* 593 N.W.2d 901, 905 (Wis.App. 1999) ("We hold as a matter of law that while working with high voltage electricity is inherently dangerous, it is not an abnormally dangerous activity because special precautions may be taken to minimize the risk of injury.");

- *McGinnis v. Gallagher Electric,* Not Reported in A.2d, 2002 WL 31875291 at *3 (Conn.Super. 2002) ("Connecticut trial courts unanimously have rejected claims of strict liability against electric utilities based on allegations of an ultrahazardous activity. *Plourde v. Hartford Electric Light Co .,* 31 Conn.Sup. 192, 326 A.2d 848 (1974); .... **....** The court determines as a matter of law that providing electric service, including high voltage and high amperage service, is not an ultrahazardous activity for which the defendant utilities may be held strictly liable.");

- *Cornelius v. Powder River Energy Corp., Inc.,* 152 P.3d 387, 392, 2007 WY 30 at ¶13 (Wyo. 2007) (quoting trial court: "Finally, the Wyoming Supreme Court has held that electricity is an ultrahazardous instrumentality, and that businesses working with ultrahazardous instrumentalities owe a greater duty of care than the basic reasonable-under-all-the-circumstances standard. *Wyrulec Co. v. Schutt,* 866 P.2d 756, 761 (Wyo. 1993)." No mention of strict liability.):

- *In re Hanford Nuclear Reservation Litigation,* 350 F.Supp.2d 871, 876 (E.D.Wash. 2004) ("Under the same analysis of factors of § 520, Washington courts have held that the following activities are not abnormally dangerous including the transmission of electricity, *Dorsch v. City of Tacoma,* 960 P.2d 489, 92 Wash.App. 131 (1998); ...."), *aff'd,* 534 F.3d 986, 1006 (9thCir. 2008) ("The prototypical example of a defendant entitled to the public duty exception is a utility company that is legally required to transport an ultrahazardous good, such as electricity, and causes injury to someone during transport."), *cert. den. sub nom. E.I. du Pont de Nemours and Co. v. Stanton,* 129 S.Ct. 762 (2008);

- *Johnson v. CSX Transp., Inc.,* Not Reported in F.Supp.2d, 2008 WL 4427211 at *2 (W.D.Ky. 2008) ("Kentucky law does not recognize a strict liability cause of action for abnormally dangerous activities performed pursuant to a public service or public necessity. See *Kentucky Utilities Co. v. Auto Crane Co.,* 674 S.W.2d 15 (Ky.Ct.App. 1983) (holding that strict liability rarely applies to abnormally dangerous activities carried out pursuant to a public duty, in this case the transmission of electricity); ...."); 

- *Tri-County Metropolitan Transit Dist. v. Time Warner Telecom of Oregon, LLC,* Not Reported in F.Supp.2d, 2008 WL 4572519 at *7 (D.Or. 2008) ("An activity is not abnormally dangerous, however, if it constitutes an 'essential service activit[y] like the distribution of gas or electricity....' *Koos v. Roth,* 652 P.2d 1255, 1263 (Or. 1982.)").

## My Analysis

Many of the cases cited above simply state the legal rule that transmission or distribution of high-voltage electricity is *not* an ultrahazardous activity, without giving a reason.

To provide a good reason, a judge would need to engage in complicated balancing of the danger of high-voltage electricity with the benefit to society of electricity, including the benefit of low cost to consumers. Understandably, few judges want to wade into that swamp and make social policy.

An alternative to providing a good reason is to cite rules of law, e.g., from the RESTATEMENT OF TORTS. But those rules came from cases in which judges did engage in balancing mentioned in the previous paragraph. For example, the RESTATEMENT has a list of factors to consider in determining whether an activity is abnormally dangerous:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the action;

(f) extent to which its value to the community is outweighed by its dangerous attributes.

RESTATEMENT SECOND OF TORTS, § 520.

Looking at this list of factors in the RESTATEMENT § 520:

§ 520(a) there is no denying that touching an energized high-voltage distribution line can be just as deadly as being hit by shrapnel from detonation of explosives.[1] This consideration *alone* suggests that high-voltage distribution lines might be abnormally dangerous, like explosives.

§ 520(b) Touching a high-voltage distribution line with a bare hand is often fatal — but if not fatal, will likely result in severe burns that require amputation of an arm. Again, this consideration *alone* suggests that high-voltage distribution lines might be abnormally dangerous, like explosives.

§ 520(c) Workmen employed by the electric utility have special tools and safety equipment to allow them to work on energized lines without injury, so the risk of harm *can* be eliminated.

§ 520(d) But the focus on ultrahazardous activities is not only on the danger, but also the acceptance by society. In many towns, every alley or street has an overhead high-voltage distribution line, making those wires commonplace. However, detonation of explosives are rare events in most cities and towns. The frequency of use is one way of distinguishing electricity from explosives. See *Kent v. Gulf States Utilities Co.,* 418 So.2d 493, 498-499 (La. 1982); *Pierce v. Pacific Gas & Electric Co.,* 212 Cal.Rptr. 283, 293 (Cal.App. 1985); *Voelker v. Delmarva Power and Light Co.,* 727 F.Supp. 991, 994-995 (D.Md. 1989).

§ 520(e) While I personally would prefer that high-voltage wires in populated areas be buried underground, the cost of underground cables and digging a trench for them is much higher than the cost of installing bare wires on poles. Society in the USA has accepted overhead high-voltage distribution lines, so such lines are *not* "inappropriate" in a populated area. See *Apodaca v. AAA Gas,* 73 P.3d 215, 227-228, ¶32 (N.M.App. 2003) (case involves propane gas).

§ 520(f) Almost every building in the USA has electric power, which is evidence that the "value to the community" outweighs the danger. See *South Pymatuning Township v. Bell of Pennsylvania,* 48 Pa. D. & C.3d 611, 616 (Pa.Com.Pl. 1988).

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[1] *Brigham v. Moon Lake Elec. Ass'n,* 470 P.2d 393, 395 (Utah 1970) ("A high tension transmission wire is one of the most dangerous things known to man. Not only is the current deadly, but the danger is hidden away in an innocent-looking wire ready at all times to kill or injure anyone who touches it or comes too near to it.").

Further, Section 521 of the RESTATEMENT SECOND OF TORTS completely absolves anyone "in the pursuance of a public duty" — or any common carrier — from strict liability for an abnormally dangerous activity. This exception has been applied to electric utilities. *Kentucky Utilities Co. v. Auto Crane Co.,* 674 S.W.2d 15, 18 (Ky.App. 1983); *Voelker v. Delmarva Power and Light Co.,* 727 F.Supp. 991, 994-995 (D.Md. 1989); *In re Hanford Nuclear Reservation Litigation,* 534 F.3d 986, 1006 (9thCir. 2008). The reasoning seems to be that a "public duty" is desirable to society. A plaintiff's attorney who wishes to argue that high-voltage electricity is ultrahazardous or abnormally dangerous must not only defeat the public policy arguments in § 520(d-f), but also defeat the absolute bar in the "public duty" part of § 521.

Looking at this issue from another direction, tariffs exculpate electric utilities for liability caused by ordinary negligence, and allow liability only if the utility was grossly negligent or engaged in willful misconduct. The effect of such tariffs is to bar strict liability — liability without proof of negligence or willful misconduct. The state Public Utility Commission that reviewed and accepted the tariff engaged in balancing risks and benefits, and made public policy. Similarly, when a court says a utility is *not* an insurer, the court refuses to hold the utility strictly liable, and instead insists that the plaintiff prove negligence by the utility. For more on tariffs and "not an insurer", see my separate essay on an electric utility's liability for outages, at http://www.rbs2.com/outage.pdf .

Although the term "ultrahazardous" had been used in torts since the publication of the RESTATEMENT FIRST OF TORTS in the year 1938, the first two cases that I have found to consider "ultrahazardous" in the context of injury by electricity are *McKenzie v. Pacific Gas & Elec. Co.,* 19 Cal.Rptr. 628, 631 (Cal.App. 1962) and *Plourde v. Hartford Elec. Light Co.,* 326 A.2d 848, 851-852 (Conn.Super. 1974). I suggest that the rise of products liability — another form of strict liability — in the 1960s and 1970s encouraged plaintiffs' lawyers to consider liability for ultrahazardous activities.

## Conclusion

During the Twentieth Century and continuing in recent years, courts in the USA refused to hold electric utilities strictly liable for injuries caused by high-voltage electricity. Plaintiffs' attorneys should stop pleading ultrahazardous activities in complaints involving injury by electricity, unless those attorneys have a convincing explanation for why the long string of cases cited in this essay were all wrongly decided. Even with a convincing explanation, it will be difficult to overcome more than fifty years of precedent, in a court system that puts a high value on precedent.

If plaintiff's attorneys want strict liability for low-voltage electricity, they should try arguing that the electricity was a defective product, as explained in my essay at http://www.rbs2.com/utility.pdf .

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This document is at **www.rbs2.com/uh.pdf**
My most recent search for court cases on this topic was in June 2011.
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