

Inherently Dangerous and Ultrahazardous Activities

Standard of Care and Vicarious Liability

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This article discusses how Colorado appellate courts have construed the inherently dangerous and ultrahazardous activity doctrines to define duties of care and impose vicarious liability. It also briefly considers how anticipated pattern jury instructions may clarify these doctrines.

The inherently dangerous activity doctrine has emerged in disparate contexts. Courts have struggled with what the doctrine means and when to apply it. “Inherently dangerous activity” has been used to describe sometimes similar, but sometimes distinct, concepts. Inherently dangerous activities are different from ultrahazardous activities, although the latter may constitute a subset of the former, and both may impose liability on employers for their independent contractors’ activities. Anticipated changes to Colorado’s pattern civil jury instructions help

clarify the two doctrines, but do not resolve all uncertainties surrounding the doctrines’ application.

Colorado courts have used the phrase “inherently dangerous activity” in four discrete contexts to

- impose the highest degree of care on persons engaged in inherently dangerous activities, such as the transmission of electricity;¹
- impose vicarious liability on employers for their independent contractors’ tortious conduct when that conduct involves an

inherently dangerous activity, such as flying a small plane over the mountains in wintertime weather, or using an electric cutting torch inside a building;²

- impose strict liability for nearly any ensuing damages sustained by third parties caused by inherently dangerous activities that constitute abnormally dangerous or ultrahazardous activities, such as blasting and water impoundment;³ and
- relieve participants who mutually agree to participate in certain inherently dangerous activities, such as a martial arts

competition, from any duty of care to each other.⁴

Depending on the context, some decisions have held that whether an activity is inherently dangerous is a question of law;⁵ other decisions have held that it presents a question of fact.⁶ This article explores each of these four lines of authority, identifies potential conflicts, and briefly discusses how Colorado's pattern civil jury instructions may clarify these issues.

The Heightened Duty of Care

Certain activities require a heightened duty of care, beyond simple reasonable care, because of their inherently dangerous nature. These activities include transmission of electricity,⁷ supplying and distributing propane gas,⁸ loading diesel fuel into an aircraft while the engine is running,⁹ excavating in the vicinity of a natural gas pipeline,¹⁰ and power line construction in mountainous terrain using helicopters.¹¹ The general rule is that one carrying on an inherently dangerous activity must exercise the highest possible degree of skill, care, caution, diligence, and foresight with regard to that activity, according to the best technical, mechanical, and scientific knowledge and methods that are practical and available at the time of the conduct that caused the injury, and that the failure to do so is negligence.¹²

The Colorado Court of Appeals has held that whether a particular activity is inherently dangerous for purposes of imposing a heightened duty of care is a question of law for the court.¹³ A jury may be instructed that a defendant owes the highest degree of care only if the trial court finds that all reasonable minds would agree that the defendant engaged in an activity that posed a high risk of injury to others.¹⁴ (A separate line of authority not directly relevant here imposes the highest degree of care on persons engaged in specified activities, such as common carriers and amusement park ride operators.¹⁵)

Vicarious Liability

Although employers are typically not vicariously liable for their independent contractors' conduct, employers may be held vicariously liable for such conduct when the independent contractor engages in an inherently danger-

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ous activity.¹⁶ (Employers who owe independent, non-delegable duties of care may bear liability for their independent contractors' negligence tantamount to being held vicariously liable.¹⁷) If reasonable minds could differ as to whether an

activity is inherently dangerous for purposes of imposing vicarious liability on an employer, the question should be decided by the factfinder, typically a jury.¹⁸

In *Huddleston v. Union Rural Electric Association*, the Colorado Supreme Court considered a wrongful death claim arising from a rural electric association's hiring of an independent flying service to transport the association's lobbyist over the mountains in wintertime weather.¹⁹ The plane crashed, killing the lobbyist. The lobbyist's family sought recovery from the association for its vicarious liability for the pilot's negligence, which negligence was stipulated. The trial court's entry of judgment on the family's claim against the association was reversed by the Colorado Court of Appeals.²⁰ The Court of Appeals held that reasonable minds had to agree that the contracted-for activity was not inherently dangerous, and that the trial court erred in denying the association's motion for a directed verdict on this question.²¹

The Colorado Supreme Court reversed the Court of Appeals, holding that an employer who retains an independent contractor to perform an inherently dangerous activity may be vicariously liable for the contractor's negligence, and that whether flying a small plane over Colorado's mountains in wintertime weather constituted such an activity was a question for the jury. The Court cited two policy reasons supporting application of the inherently dangerous activity doctrine under these facts. First, “employers whose enterprises directly benefit from the performance of activities that create special and uncommon dangers to others should bear some of the responsibility for injuries to others that occur as a result of the performance of such activities.”²² The second reason is, the “sound public policy with regard to inherently dangerous activity ‘to have another layer of concern in order to try to ensure that activity that is inherently dangerous gets enough attention so that we reduce the number of people who are injured.’”²³

To reach its holding in *Huddleston*, the Court accepted the *Restatement (Second) of Torts* § 427 test for determining whether vicarious liability for an independent contractor's negligence should be imposed. This test requires proof that:

1. the activity in question presented a special or peculiar danger to others inherent in the nature of the activity or the particular circumstances under which the activity was to be performed;
2. the danger was different in kind from the ordinary risks that commonly confront persons in the community;
3. the employer knew or should have known that the special danger was inherent in the nature of the activity or in the particular circumstances under which the activity was to be performed; and
4. the injury to the plaintiff was not the result of the collateral negligence of the defendant's independent contractor.²⁴

The rule does not apply “where the negligence of the contractor creates a new risk, not inherent in the work itself or in the ordinary or prescribed way of doing it, and not reasonably to be contemplated by the employer.”²⁵

“Collateral negligence” means “negligence of the independent contractor that occurs after the independent contractor has departed from the ordinary or prescribed way of doing the work, when such departure is not reasonably to have been contemplated by the employer, and when such negligence would not have occurred but for such a departure.”²⁶ Collateral negligence also occurs if the departure is by itself a negligent act or omission by the independent contractor. In both instances, collateral negligence is negligence not reasonably contemplated by the employer, as opposed to negligence reasonably contemplated as a recognizable risk associated with the ordinary or prescribed way of doing the work under the circumstances.²⁷

Interestingly, the *Huddleston* Court quoted Professor Keeton, who stated that the collateral negligence exception is “little more than a negative statement of [the inherently dangerous activity exception], describing the type of situation in which the special danger is not necessarily involved in the work to be done, and not contemplated in connection with the way it is expected to be done.”²⁸ The Court also quoted the *Restatement (Second) of Torts* for the proposition that “[t]he rule stated in § 426 is the converse of the rule stated [in § 427], and the two should be read together.”²⁹ (Section 426

concerns the non-liability of an employer for its independent contractor's collateral negligence.³⁰) One might reasonably conclude from these statements that application of the collateral negligence exception is effectively rendered moot if the first three elements of the inherently dangerous activity doctrine are proven, because such proof would negate the existence of any collateral negligence. States appear divided on this question.³¹ However, in *Huddleston* the Supreme Court noted that the trial court's instructions were inadequate because “the jury was given no instruction at all on the issue of whether the accident was caused by the collateral negligence of [the pilot].”³² On remand, the trial court instructed the jury, inter alia, to the effect that it must find “that the injury to the plaintiff was not the result of the collateral negligence of the defendant's independent contractor.” The Court of Appeals observed that “[b]y so instructing the jury, the trial court set forth the objective test outlined by the supreme court.”³³ Thus, it is prudent to include the absence of collateral negligence as an element of proving application of the inherently dangerous doctrine until and unless the Colorado Supreme Court revisits the issue. New jury instructions that embody *Huddleston's* inherently dangerous vicarious liability doctrine and require the jury to find that the alleged negligence does not constitute collateral negligence are expected to be included in the next edition of *Colorado Jury Instructions for Civil Trials* as pattern instructions 8:24, 8:25, and 8:26.

Following remand in *Huddleston*, the Court of Appeals held that the association was not entitled to an instruction that its knowledge of the inherent danger of flying chartered aircraft in wintertime weather was to be determined subjectively, based on the utility's experience. The association was also not entitled to an instruction that an inherent danger is different in kind from ordinary risks to which persons in general are commonly subjected by ordinary forms of negligence usual in the community.³⁴

Strict Liability

Colorado imposes strict liability on persons who engage in abnormally dangerous or ultrahazardous activities and cause resulting damages.

Whether an activity is ultrahazardous is a question of law.³⁵ In *Garden of the Gods Village v. Hellman*, the Colorado Supreme Court stated that “[a] showing of negligence is not essential to the liability of a party who uses the *inherently dangerous agency* of powerful explosives on his land in such a way that the proximate result thereof is injury to the property of another from concussion and vibration of the earth and air, without physical invasion of the adjoining premises of the injured party.”³⁶ Although the *Hellman* Court used the term “inherently dangerous,” this rule of strict liability generally has been referred to as the “abnormally dangerous” or “ultrahazardous activity” doctrine since that opinion issued in 1956.³⁷ (The *Restatement (Second) of Torts* refers to “ultrahazardous activities” as “abnormally dangerous” activities, and uses the terms interchangeably.³⁸) Thus, the concept of an “inherently dangerous” activity, requiring the highest degree of care, is different from the “ultrahazardous activity” rule, which has thus far been applied by Colorado's appellate courts only in real property trespass cases where strict liability was imposed for the resulting injury.³⁹

Courts deciding whether an activity is ultrahazardous must consider whether

1. the activity poses a high degree of risk of harm to a person, land, or chattels;
2. it is likely that the resulting harm will be great;
3. the risk cannot be eliminated by exercising reasonable care;
4. the activity is not a matter of common usage;
5. the activity is inappropriate where it occurred; and
6. the activity's value to the community is outweighed by the danger.⁴⁰

Strict liability resulting from an ultrahazardous activity applies regardless of whether the employer used an employee or an independent contractor to perform the task.⁴¹

Is the Ultrahazardous Activity Doctrine Limited to Trespass?

The Colorado Court of Appeals has observed that, thus far, the ultrahazardous activity rule has been applied by Colorado courts only to claims

arising from blasting and water impoundment operations.⁴² Federal courts in Colorado have expanded the doctrine's application beyond such claims to include strict liability claims arising from the cleanup of a toxic lake, the operation of a nuclear weapons facility, and the underground storage of large amounts of gasoline.⁴³ Although all these claims involve the "escape" of matter or energy from the defendant's land, it remains to be seen whether this is a necessary element of such a claim.⁴⁴ Recently, an interesting debate has arisen regarding application of ultrahazardous strict liability principles to damages caused by fracking;⁴⁵ no Colorado court has yet addressed this question.

No Duty of Care

Participants in certain inherently dangerous activities, such as sporting matches, may not owe fellow participants a duty of ordinary care.⁴⁶ In *Laughman v. Girtakovskis*, the Colorado Court of Appeals held that because a martial arts match involves an inherently dangerous activity, no duty to exercise reasonable care is imposed on co-participants.⁴⁷ The Court reserved for later resolution the question whether tort liability may arise under some circumstances, such as those involving intentional or reckless conduct.⁴⁸ Earlier, in *Hackbart v. Cincinnati Bengals, Inc.*, the Tenth Circuit considered a personal injury suit brought by a Denver Broncos player against an opposing Cincinnati Bengals player for intentionally hitting him in the neck and head with his forearm during play out of frustration with losing the game, resulting in a serious injury. The Tenth Circuit reversed a summary judgment for the Bengals player and remanded the case for trial,⁴⁹ noting that there are "no principles of law which allow a court to rule out certain tortious conduct by reason of general roughness of the game or difficulty of administering it."⁵⁰ The holdings in these two cases suggest that Colorado courts may reach different conclusions depending on whether the injury-causing conduct is negligent, reckless, or intentional.

Courts have yet to consider whether other activities may be subject to *Laughman's* "no duty of ordinary care" analysis, such as unsanctioned

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Thus, one might view the negligence standard of care (reasonableness), inherently dangerous activity standard of care (highest degree of care), and ultrahazardous activity standard of care (irrelevant, because liability is imposed regardless of the degree of care employed), as existing along a continuum of tort liability that depends on the level of risk associated with the activity giving rise to the third party's injury.
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fisticuffs, drag racing, adventure travel contests, and collaborative base jumping and sky diving.

Reconciling the Authority

Some view ultrahazardous activities as a subset of inherently dangerous activities, and inherently dangerous activities as a subset of potentially negligent conduct. Thus, one might view the negligence standard of care (reasonableness), inherently dangerous activity standard of care (highest degree of care), and ultrahazardous activity standard of care (irrelevant, because liability is imposed regardless of the degree of care employed), as existing along a continuum of tort liability that depends on the level of risk associated with the activity giving rise to the third party's injury. Courts might also consider the injured party's role, if any, in the activity or the tortfeasor's mental state when determining the existence or extent of any applicable duty.

While it appears that the factual predicate is functionally identical for (1) determining whether a particular activity is inherently dangerous for purposes of imposing a heightened standard of care and (2) imposing vicarious liability on an employer for its independent contractor's negligence, this issue has not been squarely addressed by the Colorado Supreme Court. In *Bennett v. Greeley Gas Co.*, the Colorado Court of Appeals noted that although the Colorado Supreme Court has held that whether a particular activity is inherently dangerous for purposes of instructing a jury that the defendant owes the highest degree of care is a question of law for the court,⁵¹ the Supreme Court has also held, in contrast, that for the purpose of determining whether respondeat superior applies, the issue whether an activity is inherently dangerous is a question of fact for the trier of fact (although even for this purpose, the court may make the determination as a matter of law in proper circumstances).⁵² Tension between having a judge and a jury making these separate determinations may be highlighted in unique cases.

For example, in *Vikell Investors Pacific, Inc. v. Kip Hampden, Ltd.*, the trial court instructed the jury to decide whether providing soils engineering services under the unique circumstances of

that case, involving slope instability related to excavation at the bottom of a slope, constituted an inherently dangerous activity.⁵³ The Court of Appeals decided that Vikell’s argument on appeal objecting to this instruction was waived. The author has handled similar cases where he asked the jury to impose vicarious liability on developers or builders for their independent contractors’ negligence in building on inherently dangerous sites containing extremely expansive or hydro-compressible soils, with foundation failure rates equal to or exceeding 25%. The author did not also seek imposition of the higher standard of care because of the above-described tensions and uncertainties in Colorado law and the likelihood that the jury would find the defendant negligent anyway applying an ordinary standard of care.

Where the jury is asked to decide whether an activity is inherently dangerous for purposes of imposing vicarious liability on an employer while the court is asked to decide whether an activity is inherently dangerous for purposes of imposing a heightened standard of care, inconsistent results might theoretically arise if the test for each question is deemed functionally equivalent. And while liability will be imputed to an employer if the court finds as a matter of law that a retained independent contractor’s activity done on the employer’s behest is ultrahazardous, for inherently dangerous activities, the imposition of vicarious liability may depend on the jury’s factual findings. Thus, the separate roles of court and jury must be carefully delineated in all cases involving allegations of inherently dangerous and ultrahazardous activities.

Anticipated Jury Instructions

As noted above, new jury instructions reflecting *Huddleston’s* inherently dangerous vicarious liability doctrine and requiring the jury to find that alleged negligence does not constitute collateral negligence are expected. Anticipated new Colorado Pattern Jury Instructions 8:24, 8:25, and 8:26 will govern claims founded on an employer’s vicarious liability for its independent contractor’s negligence arising from the contractor engaging in an inherently dangerous activity on the employer’s behalf. Also, new Instruction 9:7A is expected to be

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added to govern liability claims founded on damage caused by a defendant, or the defendant’s independent contractor, engaging in an ultrahazardous activity. Further, the Notes on Use to Instruction 9:7 are expected to be revised to clarify when a defendant will be held to the highest degree of care if engaged in an inherently dangerous activity. No instruction concerning martial arts or similar contests is expected to be adopted.

Conclusion

Colorado’s appellate courts have, on occasion, used the terms “inherently dangerous activities,” “abnormally dangerous activities,” and “ultrahazardous activities” interchangeably, or with different meanings or effect depending on the

context and circumstances of the underlying claim. The courts have also issued different directives on who decides whether an activity is inherently dangerous—the judge or the jury—depending on whether the finding results in the imposition of a heightened standard of care or an employer’s vicarious liability for its independent contractor’s negligence.

Anticipated changes to Colorado’s civil jury instructions are expected to clarify these doctrines and more accurately apply appellate courts’ holdings regarding each doctrine’s meaning and application. Some uncertainties will undoubtedly remain, awaiting further direction from the courts. [CL](#)

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NOTES

1. *Fed. Ins. Co. v. Pub. Serv. Co.*, 570 P.2d 239 (Colo. 1977).
2. *Huddleston v. Union Rural Elec. Ass’n*, 841 P.2d 282 (Colo. 1992) (flying); *W. Stock Ctr., Inc. v. Sevit, Inc.*, 578 P.2d 1045 (Colo. 1978) (electric cutting torch).
3. *Garden of the Gods Vill. v. Hellman*, 294 P.2d 597 (Colo. 1956) (blasting); *Cass Co.-Contractors v. Colton*, 279 P.2d 415 (Colo. 1955) (blasting); *Garnet Ditch & Reservoir Co. v. Samson*, 110 P. 79 (Colo. 1910) (impounding water in a reservoir; strict liability imposed under Colorado statute).
4. *Laughman v. Girtakovskis*, 374 P.3d 504 (Colo.App. 2015).

5. See, e.g., *Fed. Ins. Co.*, 570 P.2d 239 (heightened duty of care).

6. See, e.g., *Huddleston*, 841 P.2d 282 (imposition of vicarious liability).

7. *Fed. Ins. Co.*, 570 P.2d 239; *City of Fountain v. Gast*, 904 P.2d 478 (Colo. 1995); *Yampa Valley Elec. Ass'n v. Telecky*, 862 P.2d 252 (Colo. 1993); *Mladjan v. Pub. Serv. Co. of Colo.*, 797 P.2d 1299 (Colo.App. 1990); *Denver Consol. Elec. Co. v. Lawrence*, 73 P. 39 (Colo. 1903). *But see Melton v. Larrabee*, 832 P.2d 1069 (Colo.App. 1992) (installing heat tape around water pipes was not an inherently dangerous activity).

8. *U.S. Fid. & Guar. Co. v. Salida Gas Serv. Co.*, 793 P.2d 602 (Colo.App. 1989); *Blueflame Gas, Inc. v. Van Hoose*, 679 P.2d 579 (Colo. 1984). *But see Trinity Universal Ins. Co. v. Streza*, 8 P.3d 613 (Colo.App. 2000) (where alleged tortfeasor was not engaged in business of supplying propane gas, trial court did not err in refusing to instruct jury on elements of inherently dangerous activities in negligence action arising out of explosion of propane heater).

9. *Ward v. Aero-Spray, Inc.*, 458 P.2d 744 (Colo. 1969).

10. *Bennett v. Greeley Gas Co.*, 969 P.2d 754 (Colo.App. 1998). *Compare Kulik v. Pub. Serv. Co.*, 605 P.2d 475 (Colo.App. 1979) (even assuming transmission of natural gas is an inherently dangerous activity, loss caused by defective steam pressure safety release valve on gas-fired boiler is not, under this instruction, chargeable to the activity of transmitting natural gas), *aff'd on other grounds sub nom. Metro. Gas Repair Serv., Inc. v. Kulik*, 621 P.2d 313 (Colo. 1980), *with Hartford Fire Ins. Co. v. Pub. Serv. Co. of Colo.*, 676 P.2d 25 (Colo.App. 1983) (while natural gas storage is commonly held to be an ultrahazardous activity, status has not been extended to its transmission).

11. *Various Underwriters at Lloyd's, London v. Mike J. Thiel, Inc.*, 578 F.Supp. 394 (D.Colo. 1984).

12. See generally CJI-Civ. 9:7 (CLE 2017 ed.) and cited cases.

13. See, e.g., *Bennett*, 969 P.2d at 764, following *Imperial Distribution Servs., Inc. v. Forrest*, 741 P.2d 1251, 1256 (Colo. 1987).

14. *Id.* (citing *Imperial Distribution Servs., Inc.*, 741 P.2d 1251).

15. This line of authority is premised on the fact that the plaintiff-passenger has surrendered herself to the care and custody of the defendant and has given up her freedom of movement and actions, and therefore there is nothing the passenger can do to cause or prevent an accident. *Bedee v. Am. Med. Response of Colorado*, 361 P.3d 1083, 1088 (Colo.App. 2015) (describing cases imposing heightened standard of care and noting that they have been applied in Colorado only to common carriers and ski lift and amusement ride operators). See also *Lewis v. Buckskin Joe's, Inc.*, 396 P.2d 933, 939 (Colo. 1964). Thus, because the defendant has exclusive possession and control of the facilities used in conducting its business, it should be held to the highest degree of care. See, e.g., *De Lue v. Pub. Utils. Comm'n*, 454 P.2d 939, 942-43 (Colo.

1969) (citing *McKay v. Pub. Utils. Comm'n*, 91 P.2d 965 (Colo. 1939)) (common carrier held to the highest degree of care); *Publix Cab Co. v. Fessler*, 335 P.2d 865, 868 (Colo. 1959) (carrier-passenger relationship required defendant taxi company to exercise the highest degree of care); *Summit Cty. Dev. Corp. v. Bagnoli*, 441 P.2d 658, 664-65 (Colo. 1968) ("chair ski lift operator must exercise the highest degree of care commensurate with the practical operation of the ski lift"); *Colorado & S. Ry. Co. v. McGeorge*, 102 P. 747, 748 (Colo. 1909) ("common carriers of passengers are held to the very highest degree of care and prudence that human care, vigilance, and foresight could reasonably do, which is consistent with the practical operation of their road and the transaction of their business"). *But see Bedee*, 361 P.3d 1083 (where ambulance was traveling at normal speeds in a nonemergency situation and its passenger was wearing a seat belt, such did not constitute the type of activity that has an increased risk of injury to others beyond the ordinary negligence standard of care). However, the rule as originally made applicable to amusement park operators has been preempted by the Premises Liability Act. See CRS § 13-21-115; *Anderson v. Hyland Hills Park & Recreation Dist.*, 119 P.3d 533, 536 (Colo.App. 2004) (trial court erred in applying the higher standard of care applicable to amusement ride cases rather than that in the premises liability statute; Premises Liability Act preempted any common law claim and trumped the highest degree of care standard in the amusement ride context), *abrogated on other grounds by St. Vrain Valley Sch. Dist. RE-1J v. A.R.L.*, 325 P.3d 1014 (Colo. 2014). The rule has also been applied to ski lift operators. See, e.g., *Bayer v. Crested Butte Mountain Resort, Inc.*, 960 P.2d 70, 80 (Colo. 1998) (standard of care applicable to Colorado ski lift operators for the design, construction, maintenance, operation, and inspection of a ski lift is the highest degree of care commensurate with the lift's practical operation; neither the Tramway Act nor the Ski Safety Act preempt or otherwise supersede this standard of care). At least one case has considered application of the Premises Liability Act to ski lift operator liability. See *Raup v. Vail Summit Resorts, Inc.*, 160 F.Supp.3d 1285 (D.Colo. 2016) (passenger's common law negligence claims were preempted by Premises Liability Act).

16. *Huddleston*, 841 P.2d 282, 287-88.

17. See *Springer v. City & Cty. of Denver*, 13 P.3d 794, 803 (Colo. 2000) ("[The] core principle behind all non-delegable duties is 'that the responsibility is so important to the community that the employer should not be permitted to transfer it to another.'").

18. *Huddleston*, 841 P.2d at 294.

19. *Id.* at 285.

20. *Huddleston v. Union Rural Elec. Ass'n*, 821 P.2d 862, 866 (Colo.App. 1991), *rev'd*, 841 P.2d 282 (Colo. 1992).

21. *Id.*

22. *Huddleston*, 841 P.2d at 287.

23. *Id.* (internal quotations omitted).

24. *Id.* at 294.

25. *Id.* at 288 (quoting *Restatement (Second) of Torts* § 427 cmt. d (1977)).

26. *Id.* at 288.

27. *Id.* at 288-89.

28. *Id.* at 289 n.8 (quoting Keeton et al., *Prosser and Keeton on the Law of Torts* § 71 at 515 (5th ed. 1984)).

29. *Id.* (quoting *Restatement (Second) of Torts* § 427 cmt. d (1977)).

30. See *Restatement (Second) of Torts* § 426 "Negligence Collateral to Risk of Doing the Work" (1977).

31. Jury instructions in other states that have adopted the inherently dangerous activity vicarious liability doctrine are split on whether they include an explicit reference to collateral negligence. Compare Pennsylvania: Pa. SSJI Civ. § 6.170 (referencing *Restatement (Second) of Torts* §§ 416, 427 in subcommittee note); Tennessee: 8 Tenn. Prac. Pattern Jury Instr. T.P.I.-Civil 12.11 (2017 ed.) (mentioning *Restatement (Second) of Torts* §§ 411, 427 in Comment); North Carolina: N.C.P.I.-Civil 640.48 (mentioning collateral negligence in note 1, citing Dobbs, *The Law of Torts* at 924 (2001)); and Missouri: Mo. Approved Jury Instr. (Civil) 31.15 (7th ed.) *with* New York: N.Y. Pattern Jury Instr.-Civil 2:256 (short reference embodying collateral negligence concept and referencing *Restatement (Second) of Torts* §§ 416, 426, 427 in Comment), and Michigan: Michigan Non-Standard Jury Instr. Civil § 21:12 (citing *Schoenherr v. Stuart Frankel Dev. Co.*, 679 N.W.2d 147 (Mich. 2003) (discussing only *Restatement (Second) of Torts* § 427B)).

32. *Huddleston*, 841 P.2d at 294.

33. *Huddleston v. Union Rural Elec. Ass'n*, 897 P.2d 865, 868 (Colo.App. 1995). The *Restatement (Second) of Torts* § 426 cmt. a (1977) supplies the following example of collateral negligence:

Thus an employer may hire a contractor to make an excavation, reasonably expecting that the contractor will proceed in the normal and usual manner with bulldozer or with pick and shovel. When the contractor, for his own reasons, decides to use blasting instead, and the blasting is done in a negligent manner, so that it injures the plaintiff, such negligence is "collateral" to the contemplated risk, and the employer is not liable. If, on the other hand, the blasting is provided for or contemplated by the contract, the negligence in the course of the operation is within the risk contemplated, and the employer is responsible for it.

Given this example, in an appropriate case the trial court might take from the jury the question whether the independent contractor's collateral negligence caused the plaintiff's injury and find for or against the plaintiff on this issue as a matter of law.

34. *Huddleston*, 897 P.2d at 868.

35. See *Minto v. Sprague*, 124 P.3d 881, 884 (Colo.App. 2005). See also *Bunting v. Preferred Homecare, No. 12-cv-03327-RM-KMT*, 2013 WL 5486201, at *2 (D.Colo. 2013) ("[w]hether an

activity is ultrahazardous—thereby subjecting the actor to strict liability—is a question of law for a court to decide.”) (citing *King v. United States*, 53 F.Supp.2d 1056, 1076 (D.Colo. 1999), *rev'd in part on other grounds*, 301 F.3d 1270 (10th Cir. 2002)).

36. *Garden of the Gods Vill.*, 294 P.2d at 600 (emphasis added). See also *Cass Co.-Contractors*, 279 P.2d 415 (blasting); *Garnet Ditch & Reservoir Co.*, 110 P. 79 (impounding water in a reservoir; strict liability imposed under Colorado statute). *But see Liber v. Flor*, 415 P.2d 332, 338 (Colo. 1966) (refusing to apply rule of absolute liability regarding the storage of dynamite).

37. See, e.g., *W. Stock Ctr., Inc. v. Sevit, Inc.*, 578 P.2d 1045, 1050 (Colo. 1978) (acetylene welding and cutting of abandoned ammonia processing equipment is inherently dangerous; it is “important not to confuse the ‘inherently dangerous’ exception with the ‘ultrahazardous activity’ rule applied in real property trespass cases”). Cf. *Walcott v. Total Petroleum, Inc.*, 964 P.2d 609 (Colo.App. 1998) (dispensing gasoline at a service station is not an ultrahazardous activity). Cf. *Imperial Distribution Servs.*, 741 P.2d 1251, 1256 (arguably conflating concepts in noting that the “trial court properly instructed the jury on the reasonable person standard of care” rather than the highest degree of care applicable to inherently dangerous and ultrahazardous activities).

38. See Lindahl, *Modern Tort Law: Liability and Litigation* § 3:53 (2d ed. 2017) (citing *Restatement (Second) of Torts* § 519 (1977)) (“Enhanced degree of care: conduct or activities involving unusually high risk of harm—Abnormally dangerous activities”). See also *Restatement (Third) of Torts* § 20 “Liability for Physical and Emotional Harm” (2010). Some commentators question the continuing viability of the ultrahazardous/abnormally dangerous strict liability doctrine. See Boston, “Strict Liability for Abnormally Dangerous Activity: The Negligence Barrier,” 36 *San Diego L.Rev.* 597, 598 (Summer 1999) (arguing that the doctrine of strict liability for abnormally dangerous activity has evolved to the point of near extinction because courts have concluded that the negligence system functions effectively to deter the serious risks posed by the activities involved).

39. *Bennett*, 969 P.2d at 764.

40. *Minto*, 124 P.3d at 884 (citing with authority *Restatement (Second) of Torts* § 520 (1977) (using term “abnormally dangerous activity”). *But see Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1544 (10th Cir. 1992) (*Restatement* factors require particularized inquiry, noting that “[e]ven blasting, the activity most commonly recognized as ultrahazardous, may not give rise to strict liability if conducted in an appropriate locale far away from human habitation or anything of value. To impose an inflexible strict liability rule on all blasting without consideration of the circumstances would be just as incorrect as Shell’s assertion of the opposite rule regarding hazardous wastes.” (citations omitted)).

41. See *Garden of the Gods Vill.*, 294 P.2d at 602 (“person causing blasting to be done assumes

the obligation not to injure his neighbor’s property and he cannot relieve himself of liability by showing or attempting to show that the work was done by an independent contractor”). Cf. 41 *Am. Jur. 2d Independent Contractors* § 59 (2017) (exception to the general rule that employer is not liable for torts committed by independent contractor in the course of performing contractual duties applies if the activity engaged in by the independent contractor is ultrahazardous).

42. *Forrest v. Imperial Distribution Servs., Inc.*, 712 P.2d 488, 491 (Colo.App. 1985), *rev'd*, 741 P.2d 1251 (Colo. 1987) (citing *Garden of the Gods Vill.*, 294 P.2d 597 (blasting) and *Garnet Ditch and Reservoir Co.*, 110 P. 79 (impounding water in a reservoir; strict liability imposed under Colorado statute)).

43. See *Daigle*, 972 F.2d 1527 (contention that cleanup of 93-acre toxic lake was abnormally dangerous (ultrahazardous) activity, resulting in strict liability for personal injuries and property damage, stated actionable claim); *City of Northglenn v. Chevron U.S.A. Inc.*, 519 F.Supp. 515 (D.Colo. 1981) (strict liability applied to storage of great quantities of gasoline in residential area with resulting personal injury and property damage to neighborhood families founded on negligence, trespass, nuisance, and strict liability due to “inherently dangerous character” of activity). Cf. *Cook v. Rockwell Int’l Corp.*, 181 F.R.D. 473, 486 (D.Colo. 1998) (considering application of abnormally dangerous doctrine to nuclear weapons production facility as to trespass and nuisance claims, but denying summary judgment due to plaintiffs’ failure to set out relevant undisputed facts warranting such ruling) (citing *Silkwood v. Kerr-McGee Corp.*, 667 F.2d 908 (10th Cir. 1981) (holding that the processing of plutonium at a nuclear fuel plant was an abnormally dangerous activity)), *rev'd on other grounds*, 464 U.S. 238 (1984)). *But see Bd. of Cty. Comm’rs of Cty. of LaPlata v. Brown Grp. Retail, Inc.*, 598 F.Supp.2d 1185 (D.Colo. 2009) (where complaint alleged that chemicals used in facility were mishandled, and that mishandling of chemicals caused property contamination, but complaint simply recited *Restatement* factors without alleging specific supporting facts, conclusory statement that factors were satisfied were merely legal conclusions, and claim was dismissed). Cf. *Effkay Enters. v. J.H. Cleaners, Inc.*, 10-cv-00075-REB-BNB, 2008 WL 2357698 (D.Colo. 2008) (complaint contained adequate facts to show that the use, handling, storage, and disposal of carcinogenic cleaning chemicals is abnormally dangerous or ultrahazardous); *Restatement (Second) of Torts* § 520 cmt. c (1977) (“If the abnormally dangerous activity involves a risk of harm to others that substantially impairs the use and enjoyment of neighboring lands or interferes with rights common to all members of the public, the impairment or interference may be actionable on the basis of a public or a private nuisance.”).

44. The ultrahazardous activity doctrine traces its origins to the seminal English chancery court case *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868), which arose from the defendant’s storage of water above the plaintiff’s coal mine.

The stored water leaked into the mine, causing damage. The court held that activities outside the “natural use” of the land required the defendant not to cause injury, and that persons who engage in ultrahazardous activities act at their own peril and are strictly liable for any resulting accident. The *Rylands* doctrine has been restated as holding that “a person who, for one’s own purposes, brings on one’s land and collects and keeps there anything likely to do mischief if it escapes must keep it on that person’s own premises at his or her peril and is strictly liable for all the damage which is the natural consequence of its escape even in the absence of negligence or other culpable conduct on that person’s part.” 1 *Am. Jur. 2d Adjoining Landowners* § 13 (2017).

45. *Compare Schremmer*, “Avoidable ‘Fraccident’: An Argument Against Strict Liability for Hydraulic Fracturing,” 60 *U. Kan. L.Rev.* 1215 (June 2012), with Watson, “Fracking and Cracking: Strict Liability for Earthquake Damage Due to Wastewater Injection and Hydraulic Fracturing,” 11 *Tex. J. Oil Gas & Energy L.* 1 (Jan. 2016).

46. See *Laughman*, 374 P.3d at 507–08 (participant in martial arts match did not owe fellow participant duty of ordinary care).

47. *Id.* The court did not focus its discussion on whether the parties “consented” to the physical contact and resulting injury, but in dicta it quoted with approval the following language from *Sanperi v. Junsch*, 274 A.D.2d 462, 463 (N.Y.App.Div. 2000): “By engaging in a sport or recreational activity, a participant consents to those commonly-appreciated risks which are inherent in the nature of the sport and flow from such participation.” (Emphasis added.)

48. *Laughman*, 374 P.3d at 508.

49. *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 520 (10th Cir. 1979).

50. *Id.*

51. *Bennett*, 969 P.2d at 764 (citing *Imperial Distrib. Servs., Inc.*, 741 P.2d 1251).

52. *Bennett*, 969 P.2d at 764 (citing *Huddleston*, 841 P.2d 282).

53. *Vikell Inv’rs Pac., Inc. v. Kip Hampden, Ltd.*, 946 P.2d 589 (Colo.App. 1997). Cf. *Doundoulakis v. Town of Hempstead*, 368 N.E.2d 24, 28–29 (N.Y. 1977) (city could be liable for damages arising from its independent contractor engineers’ hydraulic landfilling if activity itself is abnormally dangerous).