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# Cities Service Co. v. State, 312 So. 2d 799 (Fla. 2d Dist. Ct. App. 1975)

J. Stephen O'Hara, Jr.

**Torts**—STRICT LIABILITY FOR HAZARDOUS USE OF ONE'S LAND—IMPOUNDING PHOSPHATE SLIMES IN RESERVOIR IS NON-NATURAL USE OF LANDS—ESCAPE OF SLIMES INVOKES DOCTRINE OF STRICT LIABILITY.—*Cities Service Co. v. State,* 312 So. 2d 799 (Fla. 2d Dist. Ct. App. 1975).

On December 3, 1971, a dam burst at a phosphate mine operated by Cities Service Company in Polk County, Florida. Approximately 1 billion gallons of phosphate slimes retained in a settling pond escaped into Whidden Creek. The slimes reached the Peace River, "killing countless numbers of fish and inflicting other damage."[1]

The State of Florida filed suit against Cities Service Company, seeking injunctive relief and compensatory and punitive damages. The trial court granted a temporary injunction and struck the claim for punitive damages.[2] Subsequently, the trial court entered an order granting the state's motion for partial summary judgment on liability. The court stated that Cities Service maintained the slime ponds at its peril and was liable for damages caused by the escaping slimes—regardless of fault.[3] Cities Service Company took an interlocutory appeal. In *Cities Service Co. v. State*[4] the Second District Court of Appeal affirmed the judgment of the circuit court. The district court concluded that "the Cities Service slime reservoir constituted a non-natural use of the land such as to invoke the doctrine of strict liability."[5] The court expressly adopted the *Rylands v. Fletcher*[6] doctrine of strict liability for the hazardous use of land, a doctrine never previously recognized by the Florida appellate courts.[7]

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1. Cities Service Co. v. State, 312 So. 2d 799, 800 (Fla. 2d Dist. Ct. App. 1975).

2. *Id.* These two points were not raised on appeal.

3. Order, State v. Cities Service Co., No. 71-4273 (Fla. Cir. Ct. Polk County, Nov. 8, 1974).

4. 312 So. 2d 799 (Fla. 2d Dist. Ct. App. 1975).

5. *Id.* at 803.

6. [1868] L.R. 3 H.L. 330, *aff'g* [1866] L.R. 1 Ex. 265.

7. 312 So. 2d at 800. The *Cities Service* court stated that Pensacola Gas Co. v. Pebley, 5 So. 593 (Fla. 1889), implies acceptance of the *Rylands* doctrine. In *Pensacola Gas Co.,* the plaintiff claimed damages when a neighboring landowner constructed a gas works and allowed polluted water to spill and sink through the sand. The filthy water entered the common ground water and polluted the plaintiff's well. The Florida Supreme Court, affirming judgment for the plaintiff stated:

> The appellant gas company had the right to use the water in and about the gas-works as they pleased, but they had no right to allow the filthy water to escape from their premises, and to enter the land of their neighbors. It was the duty of the company to confine the refuse from their works so that it could not enter upon and injure their neighbors, and if they did so it was done at their peril; the escape of the refuse filthy water being in itself an evidence of negligence on the part of the gas company, Ball v. Nye, 99 Mass. 582 . . . .

In *Rylands v. Fletcher,* the defendants were millowners who constructed a reservoir upon their land. The water penetrated the shaft of an abandoned coal mine, and flooded along connecting passages into the plaintiff's adjoining coal mine. The defendant millowners were held liable for the damages even though they were not negligent. Justice Blackburn, in the Exchequer Chamber, stated:

> We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.[8]

Justice Blackburn's statement was severely limited in the House of Lords. In Lord Cairn's opinion, the principle applied to a non-natural use of the defendant's land, but not to "any purpose for which it might in the ordinary course of the enjoyment of land be used . . . ."[9] The *Cities Service* court recognized the generally

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5 So. at 595. This language was quoted by the *Cities Service* court, which failed to note the implication of negligence on the part of the gas company. However, the *Cities Service* court did note the citation to Ball v. Nye, 99 Mass. 582 (1868), one of the first American decisions acknowledging *Rylands.* The *Pensacola Gas Co.* court itself did not once cite *Rylands.*

The *Cities Service* court also referred to two Florida circuit court judgments regarding factual situations strikingly similar to that of the subject case. 312 So. 2d at 801. In Ague v. American Agricultural Chem. Co., 5 Fla. Supp. 133 (Fla. Cir. Ct. Hillsborough County, March 17, 1953), the plaintiffs brought an "action against defendant for damages claimed to have been suffered by them to their property by reason of the escape of phosphate washings, dirt, slush and the like from a reservoir constructed and maintained by defendant on adjoining property in connection with a phosphate mining plant." 5 Fla. Supp. at 133–34. The *Ague* court refused to apply the *Rylands* rule, and it limited the plaintiff's cause of action to the ground of negligence.

Sixteen years later, in Caldwell v. American Cyanamid Co., 32 Fla. Supp. 163 (Fla. Cir. Ct. Hillsborough County, Jan. 2, 1969), the plaintiffs made "allegations of damages to plaintiffs' property when slimes, waters and mud refuse collected and maintained on defendant's lands behind dikes and other man-made works escaped and flowed onto the property of the plaintiffs and into the Alafia River adjoining the property . . . ." *Id* at 163. This time the Circuit Court of Hillsborough County stated:

> There being no appellate authority to the contrary in Florida, this court is of the opinion that the doctrine of Rylands v. Fletcher, as limited to the "non-natural" use of land, is supported by the weight of authority in this country; is a logical doctrine, consistent with established principles of law; and that the motions to dismiss the first counts should be denied.

*Id.* at 165.

The *Cities Service* court referred to no other Florida decisions.

8. Fletcher v. Rylands, [1866] L.R. 1 Ex. 265, 279.

9. Rylands v. Fletcher, [1868] L.R. 3 H.L. 330, 338–39. *See* W. PROSSER, THE LAW OF TORTS § 78, at 505 (4th ed. 1971). *See also* Clark-Aiken Co. v. Cromwell-Wright Co., 323 N.E.2d 876, 878–79 (Mass. 1975); 2 HARPER & JAMES, THE LAW OF TORTS § 14.2 (1956);

accepted limitation, then premised its adoption of *Rylands* on two grounds. First, the court considered the weight of authority throughout America. It concluded that a majority of American jurisdictions accept the *Rylands* doctrine.[10] Second, the court considered the social utility of the doctrine. It noted that dangerous enterprises involving a high degree of risk to others were once indispensable to the commercial and industrial growth of a new country. But the court concluded that, while certain dangerous activities still have economic utility, it is now time for those who maintain hazardous activities to be made the insurers of the concomitant risks.[11]

Having adopted the *Rylands* doctrine, the court attempted to determine the rule's applicability to Cities Service Company's maintenance of the slime reservoir. Since the court acknowledged that application of the doctrine is limited to non-natural use of the land, it first had to decide whether Cities Service Company was making a non-natural use of its property.

Non-natural use is a nebulous concept, and is variously defined. Generally, a non-natural activity is "the thing out of place, the abnormally dangerous condition or activity which is not a 'natural' one where it is."[12] The *Cities Service* court apparently equated the term "non-natural" with the term "abnormally dangerous." Then, to determine whether Cities Service Company's maintenance of the slime reservoir was an abnormally dangerous activity, the court looked to the factors suggested by Tentative Draft No. 10 of the *Restate-*

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Stallybrass, *Dangerous Things and the Non-Natural User of Land,* 3 CAMB. L.J. 376, 389–90 (1929). For an historical inquiry into the genesis of the non-natural use limitation, see Newark, *Non-Natural User and Rylands v. Fletcher,* 24 MODERN L. REV. 557 (1961).

10. 312 So. 2d at 800. The court cited respected authority for its conclusion. *See* W. PROSSER, THE LAW OF TORTS § 78, at 509 (4th ed. 1971).

11. 312 So. 2d at 801. The court again relied on Prosser. *See* W. PROSSER, THE LAW OF TORTS § 78, at 509 (4th ed. 1971).

12. W. PROSSER, THE LAW OF TORTS § 78, at 512 (4th ed. 1971). The *Cities Service* court noted Prosser's definition. 312 So. 2d at 802.

One authority states: "[Non-natural] has been said to be equivalent to 'unreasonable,' but more probably means 'extra-ordinary.' This test is an elastic one and is capable of variation according to time and place." 2 HARPER & JAMES, THE LAW OF TORTS § 14.4, at 796 (1956) (footnote omitted). Another commentator, noting that non-natural is a matter of relativity, states that "just as there is nothing which is at all times and in all circumstances dangerous so it seems that there is scarcely anything which is in all circumstances safe." Stallybrass, *Dangerous Things and the Non-Natural User of Land,* 3 CAMB. L.J. 376, 387 (1929). And according to Foster and Keeton: "[F]or strict liability to be applicable, it is not sufficient that the activity is merely dangerous. The activity or condition must create an unusual, non-customary, one-sided risk and involve a substance or operation which may go amiss despite all reasonable precautions." Foster & Keeton, *Liability Without Fault in Oklahoma,* 3 OKLA. L. REV. 1, 172, 214–15 (1950).

*ment (Second) of Torts*.[13] Those factors are: (1) whether the activity involves a high degree of risk of harm to the property of others,[14] (2) whether the potential harm is likely to be great,[15] (3) whether the risk can be eliminated by the exercise of reasonable care,[16] (4) whether the activity is a matter of common usage,[17] (5) whether the activity is inappropriate to the place where it is conducted,[18] and (6) whether the activity has substantial value to the community.[19] The *Cities Ser-*

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13. RESTATEMENT (SECOND) OF TORTS; § 520 (Tent. Draft No. 10, 1964). The Tentative Draft proposes certain changes to the language of the original Restatement, which provides:

> [O]ne who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm.

RESTATEMENT OF TORTS § 519, at 41 (1938). The Restatement also defines "ultrahazardous activity":

> An activity is ultrahazardous if it
>
> (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and
>
> (b) is not a matter of common usage.

*Id.* § 520. The Tentative Draft substitutes the words "abnormally dangerous" for the word "ultrahazardous" and suggests six criteria for use in determining whether a particular activity is abnormally dangerous. RESTATEMENT (SECOND) OF TORTS §§ 519, 520 (Tent. Draft No. 10, 1964).

14. Maintenance of phosphate waste settling ponds involves a high degree of risk of harm to the land of others. The court observed: "From the transcript of the testimony taken in connection with the injunction proceedings, it is evident that despite the best of care, earthen dams enclosing phosphate settling ponds do give way from time to time without explanation." 312 So. 2d at 804.

15. The potential harm resulting from the escape of such phosphatic wastes is likely to be great:

> This is not clear water which is being impounded. Here, Cities Service introduced water into its mining operation which when combined with phosphatic wastes produced a phosphatic slime which had a high potential for damage to the environment. If a break occurred, it was to be expected that extensive damage would be visited upon property many miles away. In this case, the damage, in fact, extended almost to the mouth of the Peace River, which is far beyond the phosphate mining area . . . .

*Id.* at 803.

16. The risk created by the maintenance of the slime reservoir cannot be eliminated by the exercise of reasonable care. *See* note 23 *infra*.

17. The court apparently concluded that the maintenance of the reservoir is not a matter of common usage. *But see* notes 21 and 22 and accompanying text *infra*.

18. Maintenance of the slime reservoir is clearly appropriate to the place where it is. *See* notes 21 and 22 *infra*.

19. The activity is of significant value to the community. The affidavit filed in opposition to the state's motion for partial summary judgment states:

> It is common knowledge that the central Florida area, of which Polk County is the hub, is the largest producer of phosphate rock in Florida and data compiled by the Florida Phosphate Council, according to its report attached hereto as

*vice* court considered all these factors and concluded that the first four favored the state while the last two favored Cities Service.[20]

The court's reasoning may have been partly erroneous. The fourth factor (whether the activity is a matter of common usage) probably supports the argument that the slime reservoir was not abnormally dangerous. Phosphate mining is the dominant industry in Polk County;[21] such mining is a reasonable and common usage of the land in that county. Furthermore, the settling pond is an integral part of the mining process and is a normally expected activity in the Polk County area.[22]

Even if the *Cities Service* court had acknowledged the common use of settling ponds, it still would have held Cities Service Company strictly liable for the damages caused. Though the court briefly considered the activity's prevalence, appropriateness, and economic utility, it was more impressed by the great risk of harm, the potential magnitude of that harm, and the inefficacy of exercising reasonable care.[23]

Thus, the *Cities Service* court virtually disregarded the engineering necessity of the settling ponds, the suitability of the land for phosphate mining, and the economic value of the industry to the Polk

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Exhibit A, is to the effect that Florida produced over 80% of the Nation's marketable phosphate rock and one-third of the world production thereof in 1973. Affidavit of Harold N. Hedrick, State v. Cities Service Co., No. 71-4273 (Fla. Cir. Ct. Polk County, Nov. 8, 1974).

Exhibit A of the affidavit further states that by January 1, 1974, members of the Florida Phosphate Council employed nearly 9,000 individuals. And two-thirds of those employees lived in Polk and Hillsborough Counties. The exhibit further indicates that the total phosphate industry investment in Florida is $3 billion, and that the impact on Florida's economy is approaching $1½ billion annually. *See* A. MORRIS, THE FLORIDA HANDBOOK 498 (15th ed. 1975).

20. 312 So. 2d at 803. *See* notes 14 through 19 *supra*.

21. In the affidavit filed in opposition to the state's motion for partial summary judgment, the affiant stated: "The phosphate industry in and around the area where the mine . . . is located . . . is the principal industry for such area . . . ." Affidavit of Harold N. Hedrick, State v. Cities Service Co., No. 71-4273 (Fla. Cir. Ct. Polk County, Nov. 8, 1974).

22. In the affidavit filed in opposition to the state's motion for partial summary judgment, the affiant described the purpose and necessity of maintaining settling ponds. He concluded: "The phosphate waste settling pond is, accordingly, an integral and expected part of the process by which man draws from the land and beneficiates [*sic*] this important natural resource, and this is the normal use expected to be made of the land in the Polk County area phosphate fields." *Id.*

23. The court stated:

> In the final analysis, we are impressed by the magnitude of the activity and the attendant risk of enormous damage. The impounding of billions of gallons of phosphatic slimes behind earthen walls which are subject to breaking even with the exercise of the best of care strikes us as being . . . "abnormally dangerous" . . . .

312 So. 2d at 803.

County community. But the importance of such factors has long been judicially recognized in some jurisdictions. In factual situations strikingly similar to that of *Cities Service*,[24] courts have refused to characterize as "non-natural" certain activities associated with irrigation,[25] coal mining,[26] and oil drilling.[27] An example is *Turner v. Big Lake Oil Co.*,[28] in which a Texas court recognized the economic value of the oil industry and refused to apply the *Rylands* rule to the escape of polluted water from an oil-drilling operation.

In *Turner* the defendants were oil well operators who constructed large earthen ponds to hold salt water from a well. The salt water escaped from one or more of the ponds, passed over the adjoining turf of the plaintiffs, and entered a dry valley on the plaintiffs' land. Several miles down the valley were natural holes where the plaintiffs watered their stock. The salt water entered these water holes, causing injury to cattle and sheep. The plaintiffs, alleging negligence, brought an action for damages. The jury found that the defendants permitted the salt water to escape onto the plaintiff's land, but it acquitted the defendants of negligence.[29]

The plaintiffs ultimately carried their appeal to the Texas Supreme Court where they urged that the defendants should be held liable without negligence, under the *Rylands* rule. But the court refused to apply the *Rylands* rule. It reasoned that *Rylands* had been rejected by the majority of American courts,[30] that the cases of escaping fire and trespassing animals upon which *Rylands* relied had been repudiated in the Texas law,[31] that conditions in Texas differed so radically from those in England that *Rylands* was not properly applicable in Texas,[32] and that *the oil industry was so essential to the*

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24. For a review of cases involving the escape of water caused by a dam failure, see Annot., 51 A.L.R.3d 965 (1973).

25. *See* Anderson v. Rucker Bros., 183 P. 70 (Wash. 1919); Jacoby v. Town of City of Gillette, 174 P.2d 505 (Wyo. 1946). *Cf.* Reter v. Talent Irrigation Dist., 482 P.2d 170 (Ore. 1971); Turner v. Big Lake Oil Co., 96 S.W.2d 221 (Tex. 1936).

26. *See* Jones v. Robertson, 6 N.E. 890 (Ill. 1886); Kentucky Block Fuel Co. v. Roberts, 268 S.W. 802 (Ky. 1925); Venzel v. Valley Camp Coal Co., 156 A. 240 (Pa. 1931).

27. *See* Sinclair Prairie Oil Co. v. Stell, 124 P.2d 255 (Okla. 1942); Tidal Oil Co. v. Pease, 5 P.2d 389 (Okla. 1931); Turner v. Big Lake Oil Co., 96 S.W.2d 221 (Tex. 1936).

28. 96 S.W.2d 221 (Tex. 1936). *See also* Sinclair Prairie Oil Co. v. Stell, 124 P.2d 255 (Okla. 1942); Gulf Pipe Line Co. v. Alred, 77 P.2d 1155 (Okla. 1938); Cosden Oil Co. v. Sides, 35 S.W.2d 815 (Tex. Ct. App. 1931).

29. Turner v. Big Lake Oil Co., 96 S.W.2d 221 (Tex. 1936).

30. *Id.* at 222, 226. While the majority of American courts may have rejected *Rylands* in 1936, the opposite is true today. *See* note 10 and accompanying text *supra*.

31. Turner v. Big Lake Oil Co., 96 S.W.2d 221, 223–24, 226 (Tex. 1936).

32. *Id.* at 225–26.

*economic prosperity of Texas that it should not be made an insurer of the risks it creates.*[33]

Just as the oil industry has a significant economic impact in Texas, the phosphate industry has a significant economic impact in Florida.[34] And just as salt water is a necessary byproduct of oil production,[35] phosphate slimes are a necessary byproduct of phosphate mining.[36] Clearly, if the *Turner* court had considered the *Turner* facts in light of the six criteria of Tentative Draft No. 10, it would have emphasized the last three and not the first three as did the *Cities Service* court.[37]

One authority says that *Turner* is "undoubtedly best explained upon the basis of a different community view which makes such things [properly conducted oil wells] 'natural' to the particular locality."[38] Arguably, properly conducted phosphate mines are equally "natural" to the locality of the Cities Service mine. But the *Cities Service* court determined that the slime reservoir was a non-natural use of land such as to invoke the doctrine of strict liability.[39]

The *Cities Service* court implemented its determination by affirming the trial court's entry of partial summary judgment for the plaintiff. But the appellate court noted that an activity's status as natural or non-natural is ordinarily "one which would require the trial court's evaluation of all of the pertinent factors at a trial."[40] The court's approval of the summary judgment is subject to question, for summary judgment is no substitute for a trial.[41] Summary judgment is proper only where the pleadings, depositions, and other papers on file reveal no genuine issue as to any material fact and show that the moving party is entitled to judgment as a matter of law.[42] In Florida, summary judgment is never proper if the evidence raises the *slightest doubt* upon any issue of material fact or permits different reasonable inferences.[43] Despite the conclusion of the *Cities Service* court, it is

33. *Id.* at 226.

34. *See* note 19 and accompanying text *supra.*

35. Turner v. Big Lake Oil Co., 96 S.W.2d 221, 226 (Tex. 1936).

36. *See* note 22 and accompanying text *supra.*

37. *See* notes 13 through 20 and accompanying text *supra.*

38. W. PROSSER, THE LAW OF TORTS § 78, at 511 (4th ed. 1971).

39. 312 So. 2d at 803.

40. *Id.*

41. Booth v. Mary Carter Paint Co., 182 So. 2d 292, 296 (Fla. 2d Dist. Ct. App. 1966); Alepgo Corp. v. Pozin, 114 So. 2d 645, 647 (Fla. 3d Dist. Ct. App. 1959), *cert. denied,* 117 So. 2d 842 (Fla. 1960).

42. FLA. R. CIV. P. 1.510(c). *See* Holl v. Talcott, 191 So. 2d 40 (Fla. 1966); Byrd v. Leach, 226 So. 2d 866, 868 (Fla. 4th Dist. Ct. App. 1969); Reserve Ins. Co. v. Earle W. Day & Co., 190 So. 2d 803 (Fla. 2d Dist. Ct. App. 1966); Smith v. City of Daytona Beach, 121 So. 2d 440, 443 (Fla. 1st Dist. Ct. App. 1960).

43. Shollenberger v. Baskin, 227 So. 2d 79, 81 (Fla. 4th Dist. Ct. App. 1969); Byrd

not apparent that Cities Service Company's maintenance of the slime reservoir was indeed a non-natural use of the land. The issue was highly disputed,[44] and different reasonable inferences were possible. If, however, the natural versus non-natural determination is one more properly made by the court than by the trier of fact, the *Cities Service* court's approval of the summary judgment is less objectionable. The pivotal question is whether the determination is a matter of law or a matter of fact.

The tentative draft of the *Restatement (Second) of Torts,* upon which the *Cities Service* court so heavily relied, includes a comment which suggests that the natural versus non-natural determination is a matter of law. The comment states that the imposition of strict liability "calls for a decision of the court . . . and . . . is no part of the province of the jury . . . ."[45] If it is for the court to determine whether a particular activity is abnormally dangerous, is it also for the court to resolve each of the six factors[46] suggested by the tentative draft? At what point do the disputed issues finally boil down to genuine issues of material fact?

Perhaps the natural versus non-natural determination is one best

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v. Leach, 226 So. 2d 866, 868 (Fla. 4th Dist. Ct. App. 1969); Dickinson v. Allen, 215 So. 2d 747, 749 (Fla. 2d Dist. Ct. App. 1968); Booth v. Mary Carter Paint Co., 182 So. 2d 292, 297 (Fla. 2d Dist. Ct. App. 1966); Crovella v. Cochrane, 102 So. 2d 307, 310 (Fla. 1st Dist. Ct. App. 1958).

44. *See* Brief for Appellant at 12–14, Brief for Appellee at 37–40, Cities Service Co. v. State, 312 So. 2d 799 (Fla. 2d Dist. Ct. App. 1975). *See also* affidavit of Harold N. Hedrick, State v. Cities Service Co., No. 71-4273 (Fla. Cir. Ct. Polk County, Nov. 8, 1974).

45. The full text of the comment follows:

> Whether the activity is an abnormally dangerous one is to be determined by the court, upon consideration of all the factors listed in this Section, and the weight given to each which it merits upon the facts in evidence. In this it differs from questions of negligence. Whether the conduct of the defendent has been that of a reasonable man of ordinary prudence, or in the alternative has been negligent, is ordinarily an issue to be left to the jury. The standard of the hypothetical reasonable man is essentially a jury standard, in which the court interferes only in the clearest cases. A jury is fully competent to decide whether the defendant has properly driven his horse, or operated his train, or guarded his machiney [*sic*], or repaired his premises, or dug a hole. The imposition of strict liability, on the other hand, involves a characterization of the defendant's activity or enterprise itself, and a decision as to whether he is free to conduct it at all without becoming liabke [*sic*] for the harm which ensues even though he has used all reasonable care. This calls for a decision of the court; and it is no part of the province of the jury to decide whether an industrial enterprise upon which the community's prosperity might depend is located in the wrong place, or whether such an activity as blasting is to be permitted without liability in the center of Chicago.

RESTATEMENT (SECOND) OF TORTS § 520, comment at 68 (Tent. Draft No. 10, 1964).

46. *See* notes 13–20 *supra.*

made by the trier of fact.[47] The resolution of certain factual issues is prerequisite to resolution of the determinative factors suggested by Tentative Draft No. 10.[48] Furthermore, Prosser has admitted that the natural versus non-natural determination depends on community attitudes.[49] It is submitted that a consensus of the jury is more indicative of community attitude than is the opinion of a single judge. Of course, there are circumstances in which activities conducted in one community may adversely affect the interests of neighboring communities. Such were the circumstances in the *Cities Service* case.[50]

Perhaps the result reached in *Cities Service* does justify the court's approval of the summary judgment for the state. Spills from earthen dams retaining phosphate slimes occur often in phosphate mining.[51] The instant case is not the first litigation resulting from a slime spill.[52]

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47. The proposition is not without authoritative support. In an English court considering the applicability of the *Rylands* rule, Lord Porter discussed what is a dangerous use and what is a non-natural use:

> Indeed, there is a considerable body of case law dealing with these questions and a series of findings or assumptions as to what is sufficient to establish their existence. . . . [E]ach seems to be a question of fact subject to a ruling of the judge as to whether the particular object can be dangerous or the particular use can be non-natural, and in deciding this question I think that all the circumstances of the time and place and practice of mankind must be taken into consideration so that what might be regarded as dangerous or non-natural may vary according to those circumstances.

Read v. J. Lyons & Co., [1947] A.C. 156, 176. Consider the following:

> The true distinction is not, it is submitted, between the dangerous or non-dangerous character of the thing inherently, but between those circumstances in which the defendant will be allowed to deny the dangerous character of his act or undertaking and those in which he will not. And it seems just the kind of question to which a jury can provide the best answer: *Was* the plaintiff entitled to impose the risk of loss upon another without himself running the risk of paying any damages?

Stallybrass, *Dangerous Things and the Non-Natural User of Land*, 3 CAMB. L.J. 376, 389 (1929).

Whether a particular act constitutes negligence is an ultimate fact to be inferred by the jury from the evidence submitted. Perhaps whether a particular fact is non-natural is also such an ultimate fact. *Cf.* Annot., 53 A.L.R.3d 16, 46 (1973). *But cf.* State *ex rel.* Shevin v. Tampa Elec. Co., 291 So. 2d 45, 47–48 (Fla. 2d Dist. Ct. App. 1974). *Contra,* RESTATEMENT (SECOND) OF TORTS § 520, comment at 68 (Tent. Draft No. 10, 1964) [*quoted in* note 45 *supra*].

48. *See* notes 13–20 *supra.*

49. *See* note 38 and accompanying text *supra.*

50. In the words of the court: "If a break occurred, it was to be expected that extensive damage would be visited upon property many miles away. In this case, the damage, in fact, extended almost to the mouth of the Peace River, which is far beyond the phosphate mining area described in the Cities Service affidavit." 312 So. 2d at 803.

51. Brief for Appellee at 4, Cities Service Co. v. State, 312 So. 2d 799 (Fla. 2d Dist. Ct. App. 1975).

52. *See* Caldwell v. American Cyanamid Co., 32 Fla. Supp. 163 (Fla. Cir. Ct.

It can be presumed that similar spills will occur in the future. But in view of *Cities Service,* it is unlikely that the mining companies will be eager to go to trial. Settlements will more likely be negotiated, thus relieving the already overburdened courts. If such a case does reach trial, the court may safely grant a summary judgment for the complaining party because such uses of land, at least in the Second District, are now non-natural as a matter of law.

Thus, *Cities Service Co. v. State* is a significant decision in several respects. First, it represents the first application by a Florida appellate court of the *Rylands v. Fletcher* doctrine of strict liability for the hazardous use of land. Second, its determination as a matter of law that maintenance of a slime reservoir by a phosphate mining company is a non-natural use of land will encourage out-of-court settlements of future claims. Last, the decision expresses a growing concern on the part of the courts for preservation of the ecological environment. Through application of a judicially created doctrine, the *Cities Service* court has created a means by which environmental pollution can be discouraged if not prevented; and by which non-natural users of land must insure against the risks they create.

J. STEPHEN O'HARA, JR.

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Hillsborough County, Jan. 7, 1969); Ague v. American Agricultural Chem. Co., 5 Fla. Supp. 133 (Fla. Cir. Ct. Hillsborough County, March 17, 1953).