THE INHERENTLY DANGE

Sometimes the words a court uses take on a life of their own. They free themselves from the facts that gave rise to them and become almost independent actors. So it has been with the inherently dangerous activity theory, which began as a limited rule applying basic nuisance principles to damage to adjacent property, but has become an essentially undefined strict liability principle in personal injury cases.

The beginning—a real property nuisance rule

The inherently dangerous activity rule began prosaically enough, with *Inglis v Millersburg Driving Association.*[1] In *Inglis,* a driving club wanted to clear some land and hired a contractor to set fires to burn off brush. The fire escaped and caused extensive damage to the adjacent property. The defendant argued that it was not liable for the contractor's negligence and succeeded on that basis in the trial court. The supreme court reversed and rejected the argument. The court stated that the contractor defense did not apply

> *. . . where a duty is imposed upon the employer in doing work necessarily involving danger to others, unless great care is used, to make such provision against negligence as may be commensurate with the obvious danger.*[2]

The court also noted that this rule did not apply "in cases where the injuries occur which are collateral to the employment."[3]

On the facts of *Inglis,* there is nothing remarkable in this result. The defendants had chosen to set in motion an instrumentality—fire—that by its nature is a destructive force. Moreover, the damage was to property, so the tort had elements of trespass or nuisance. Years later, in *Buckeye Insurance Co v Michigan,*[4] the supreme court would deny a defense of governmental immunity where a fire starting in a building the state owned damaged adjacent property, on the basis that a fire hazard was a nuisance.

> *It was in the very nature of the nuisance involved in this case—a fire hazard—that eventually negligent or lawless acts or sheer chance or an act of God (lightning) would convert the peril to the neighboring land into a destructive force—the hazard—the nuisance took its toll.*[5]

The *Buckeye* court drew an analogy to "situations of trespass from flooding waters escaping from artificial reservoirs," citing *Ashley v City of Port Huron.*[6] This, of course, is similar to the classic flooding case of *Rylands v Fletcher.*[7]

But the language of *Inglis* was not read in light of the facts that linked it to nuisances and damage to property. Instead, it fairly quickly moved from a situation where the defendant intentionally sets a dangerous instrumentality in motion causing damage to property to become the amorphous general principle that we now know as "inherently dangerous activity."

The next step took place in *Olah v Katz,*[8] in which a plumber left an excavation unguarded on property adjacent to the property were the minor plaintiff lived. The court cited the general statement to impose liability on the real estate company that had hired the plumber. Even this case was linked to a condition of real property that inures a third person. *Wight v H G Christman Co*[9] followed shortly thereafter. In *Wight,* a corporation hired a contractor to build a building. Sparks from a coal-fired steam shovel escaped and caused a fire on nearby property. The court cited *Inglis* in support of a finding that the defendant company that hired the steam shovel could not escape liability.

These cases show some movement away from the trespass-nuisance facts of *Inglis,* but there still was (1) a condition on land and (2) an injury to a member of the public.

The current rule

It did not last. Fairly quickly, as law measures time, the words freed themselves from the facts that had given them birth, and took on a life of their own. Gone was the tie to intentionally creating a risk *(Inglis),* gone was the requirement of condition on real property *(Inglis, Olah),* and gone was the limitation of the potential plaintiffs to third persons unrelated to the work itself *(Inglis, Olah, Wight).*

Vannoy v City of Warren[10] illustrates the fully evolved rule. The project in *Vannoy* was the installation of a sewer. The decedent, an

BY HAL O. CARROLL

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ACTIVITY THEORY

AN IDEA WHOSE TIME HAS GONE

employee of a contractor hired by the city to do the work, descended into the sewer and was asphyxiated by gas. Citing *Inglis,* the court held that the city had a "nondelegable duty" to protect the safety of the workers of the contractor it hired. Note that the liability is no longer limited to members of the public, but to the very workers whose expertise the owner has hired:

> *A distinction, as argued by the city, based upon the legal designation of inured parties, e.g., "third" persons or "others" as opposed to employees of independent contractors, violates the absolute character of the duty. . . .*

The *Vannoy* court characterized the rule as "closely akin to, but not exactly the same as, strict liability." It also held that it was for the jury to decide whether an activity was "inherently" dangerous or not.

The case that is universally considered as providing the authoritative definition of the rule is *Bosak v Hutchinson.*[11] The activity at issue in *Bosak* was assembling a crane at night. The supreme court held this was not an inherently dangerous activity, but provided the definition that subsequent cases have relied on. The court reviewed the prior cases and concluded that

> *it is apparent that an employer is liable for harm resulting from work "necessarily involving danger to others, unless great care is used" to prevent injury, Inglis, supra, 331, or where the work involves a "peculiar risk" or "special danger" which calls for "special" or "reasonable"*

Fast Facts:

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precautions. It must be emphasized, however, that the risk or danger must be "recognizable in advance," i.e., at the time the contract is made, for the doctrine to be invoked. Thus, liability should not be imposed where a new risk is created in the performance of the work which was not reasonably contemplated at the time of the contract.[12]

Bosak attempted to distinguish between an "inherent" danger and a "collateral" risk.

The doctrinal thread that runs through Michigan case law, which we reaffirm today, is the definition enumerated in Vannoy, supra, that the inherently dangerous doctrine is something akin to a theory of strict liability. Given this definition, we decline to drift toward a standard that would permit collateral negligence to elevate normal activity into inherently dangerous activity.[13]

That is the rule as it is applied today. The question is not so much whether the rule is good or bad, as whether it is workable. That is, can it lead to consistent results, or does it depend on a subjective opinion of the particular judges as to whether a particular risk is an "inherent" danger of a "collateral" one.

One clue is provided by *Bosak* itself. Notice that liability can be imposed on the owner if the contractor fails to take "'reasonable' precautions." That of course, is an ordinary negligence test. The law expects all persons undertaking any activity to use reasonable care.

Deficient public policy

It conflicts with Michigan's adherence to a single tort standard of care.

In *Frederick v City of Detroit,*[14] the supreme court rejected the argument that a common carrier owed a higher degree of care to its passengers.

The common-law standard of reasonable care is constant although it "may require an infinite variety of precautions, or acts of care, depending upon the circumstances, and… it is primarily for the jury to say just what precautions were appropriate to the danger apparent in the case at hand." (Citation omitted.)

It imposes strict liability on the owner.

The notion that the theory imposes something "akin" to but less than strict liability on the owner, advanced in *Vannoy* and endorsed in *Bosak,* is simply wrong. From the perspective of the only person whose perspective matters—the owner, the liability is strict in the purest sense. Because the owner's liability turns upon the "nature" of the activity—determined after the fact—rather than the conduct of the owner, it is strict liability. Nothing the owner does or fails to do has any effect on his or her liability.

The expertise of the owner is irrelevant.

Again it is the nature of the activity that matters. The rule, with commendable equality, applies to rich and poor, layperson and expert alike. The proverbial widow is as likely to be on the wrong end of a verdict as is the largest corporation, because what each knew or did not know is irrelevant. The inherently dangerous activity theory is epithetical jurisprudence at its purest: pick the label and determine the result.

An unworkable rule

Perhaps more significant than its failings as a matter of policy is its unworkability in practice. The question, whether a danger is inherent rather than adventitious is an invitation, if not a mandate, to navel-gazing.

The *Bosak* court's injunction that the risk must be "'recognizable in advance,' i.e., at the time the contract is made," provides no help. The very concept of a foreseeable risk, the fundament of negligence, assumes that the risk was or should have been known. Note that *Bosak* does not require that the "inherent" danger be *recognized* but only that it be *recognizable.* Thus, the owner who is in good faith ignorant of an "inherent" danger finds no refuge.

Nor does *Bosak*'s distinction between an "inherent danger" and "collateral negligence" help. It is merely the verbal inverse of a danger that is inherent. It is a remarkably content-free criterion.

Virtually any case applying the rule can be used to illustrate its inherent unworkability, but cases involving falls are among the best. After all, they involve the most universally "inherent" force—gravity. The risk of falling must always be recognizable in advance. The following is a list of cases that have held variously that the risk does or does not present a jury question as to where the danger was "inherent."

No, when a worker fell from a roof.[15]

Yes, when a worker on a column was injured when the improperly braced column fell.[16]

No, when a worker fell because joists and decking shifted.[17]

Yes, when a worker fell from a steel beam.[18]

No, when a worker fell because roof joists collapsed.[19]

Yes, when the worker fell from a telephone pole.[20]

No, when a worker fell from a scaffold.[21]

Yes, when a worker fell into a pit.[22]

No, when the worker tripped on pipes on the floor.[23]

Yes, when the worker slipped on a wet pipe.[24]

Yes, when a worker fell because of a one-foot-deep trench in the floor.[25]

Does anyone benefit?

The dominant characteristic of the theory is its irremediable vagueness. Whether this is a virtue or a failing depends upon one's position in the particular litigation. But if we view it from neutral principles, it is a rule that is essentially beyond the control of the courts.

A fundamental question is not addressed in the cases: does the theory itself have any inherent value? The rule introduces randomness into the litigation process by making the result an exercise in philosophy rather than law, and in doing so it creates another theory for an injured plaintiff to have a chance of getting to the jury. This understandably makes it attractive, but does it do for any plaintiff what ordinary negligence would not do?

As to the contractor, the rule has no effect because the contractor will be liable for its own negligence. As to the owner, if there is some special risk that is known to the owner but not to the contractor, such as a concealed excavation or unshielded electrical wiring hidden from view, then the owner is negligent in failing to inform the contractor of the risk, because it presents a foreseeable risk.

In addition, the rule is bad as a matter of fundamental policy. If there is a danger in doing work that is such an "inherent" part of the work that the contractor must be presumed to be aware of it, then the contractor's failure to address the normal risk should not result in liability for the owner, who did

nothing more serious than failing to tell the contractor what the contactor already knew.

Michigan has always adhered to the basic rule that there is one standard of care, and that what that standard requires varies according to the risk.[26] Even Michigan's former concept of "gross negligence" was actually a form of "last clear chance," which lost its vitality with the shift from contributory to comparative negligence, and was abandoned in *Jennings v Southwood*.[27]

The inherently dangerous activity rule is a relic of nineteenth century epithetical jurisprudence and it is time for it to be put to rest. ✦

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Footnotes

1. 169 Mich 311; 136 NW 433 (1912).
2. *Inglis* at 321.
3. Id.
4. 383 Mich 630; 178 NW2d 476 (1970).
5. *Buckeye* at 638.
6. 35 Mich 296 (1877).
7. LR 2 HL (1868).
8. 234 Mich 112; 207 NW 892 (1926).
9. 244 Mich 208; 221 NW 314 (1928).
10. 15 Mich App 158; 166 NW2d 486 (1968).
11. 422 Mich 712; 375 NW2d 333 (1985).
12. *Bosak* at 727–728 (citation omitted).
13. *Bosak* at 729–730 (footnote omitted)
14. 370 Mich 425, 432; 121 NW2d 918 (1963).
15. *Schoenherr v Stuart Frankel Development Co,* ___ Mich App ___; ___ NW2d ___ (2003), application for leave held in abeyance.
16. *Phillips v Mazda Motor,* 204 Mich App 401; 516 NW2d 502 (1994).
17. *Ormsby v Capital Welding,* 255 Mich App 165; 660 NW2d 730 (2003).
18. *Warren v McLouth Steel Corp,* 111 Mich App 496; 314 NW2d 666 (1981).
19. *Kulp v Verndale,* 193 Mich App 524; 484 NW2d 699 (1992).
20. *Dowell v General Telephone Co,* 85 Mich App 84; 270 NW2d 711 (1978).
21. *Szymanski v K Mart Corp,* 196 Mich App 427; 493 NW2d 460 (1992), after remand 202 Mich App 348; 509 NW2d 801 (1993).
22. *Oberle v Hawthorne Metal Product,* 192 Mich App 265; 480 NW2d 330 (1991).
23. *Ghaffari v Turner Construction Co,* ___ Mich App ___; ___ NW2d ___ (2003).
24. *Burger v Midland Cogen Venture,* 202 Mich App 310; 507 NW2d 827 (1993).
25. *Perry v McLouth Steel Corp,* 154 Mich App 284; 397 NW2d 284 (1986).
26. *Frederick,* supra.
27. 446 Mich 125; 521 NW2d 230 (1994).