

The Practical Impacts of Burlington Northern

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Environmental Issues in Region 6:
Recent Developments and Hot Topics

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Setting precedent.



Topics

- Statutory Context
- BNSF
- BNSF Predecessors
- BNSF Progeny
- Apportionment/Allocation Summary
- A Hierarchical Approach

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Setting precedent.

Statutory Context

- Superfund created a new paradigm for environmental laws, imposing liability based on a nexus to contamination rather than on a violation of law
- Superfund liability for costs of investigation and remediation is:
 - strict
 - retroactive
 - unlimited
 - generally joint and several

Statutory Context (cont'd)

To establish liability, a plaintiff must show that:

- there has been a release or threatened release of a hazardous substance
- from a facility
- the plaintiff has incurred response costs
- the costs were necessary and consistent with the National Contingency Plan*
- the defendant is a potentially responsible party or PRP

*where plaintiff is not the government

Statutory Context (cont'd)

PRPs include:

- Present owners and operators
- Owners and operators at the time of disposal
- Arrangers
- Transporters who selected the site

Statutory Context (cont'd)

- Under §113(f), PRPs who have paid more than their fair share may seek contribution:
 - during or following a civil enforcement action
 - following a settlement resolving that person's CERCLA liability to US or a state.
- Liability is several; burden of proof is on plaintiff.
- Statute of limitations is 3 years.

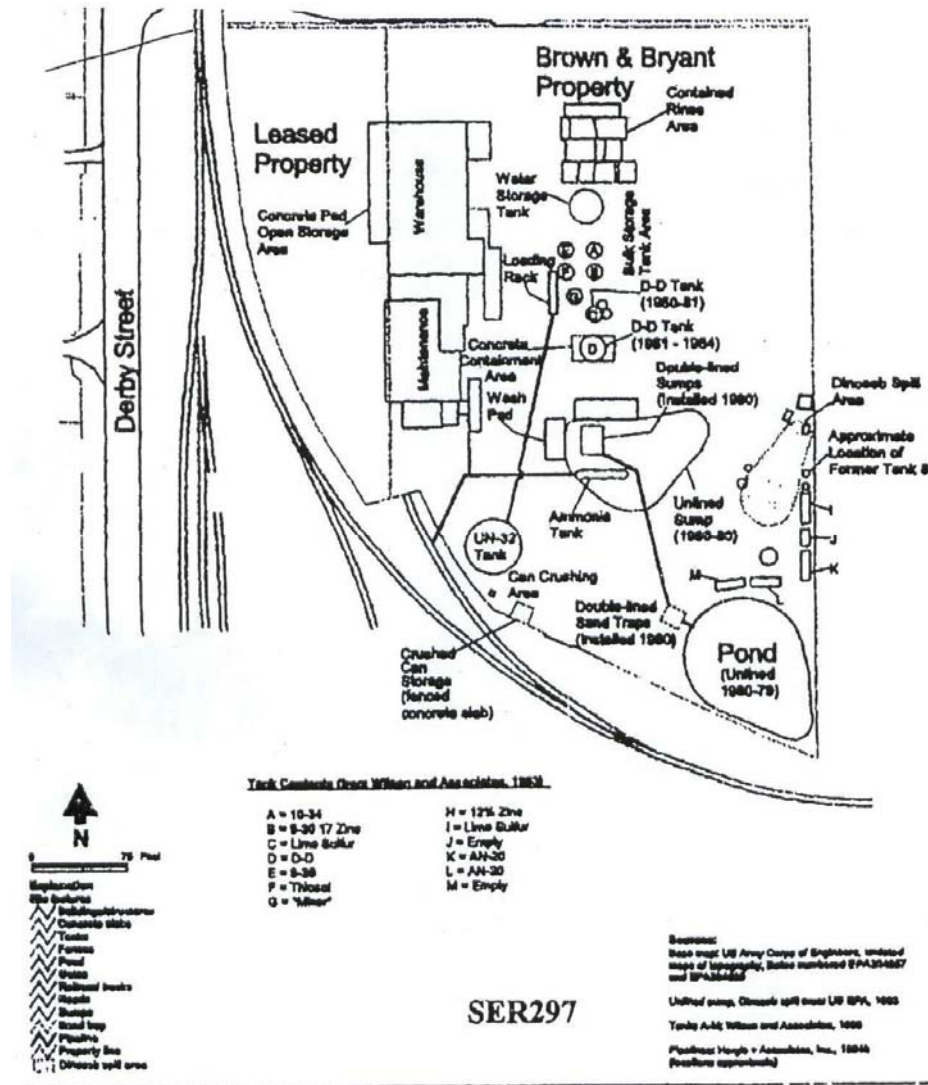
Statutory Context (cont'd)

- Under §107(a)(4)(B), PRPs who have voluntarily incurred cleanup costs may seek cost recovery.
- Liability presumably -- and generally -- is joint and several
- Statute of limitations is 6 years.

Statutory Context (cont'd)

- If liability is joint and several, the defendant is liable for orphan shares.
- If liability is several, the defendant is liable only for its share, based on proof it provides in defense or on proof plaintiff provides in a 113 contribution action.

BNSF - Facts



BNSF – Facts (cont'd)

- In 1960, Brown & Bryant, Inc. (B&B) began operating an agricultural chemical distribution business, purchasing pesticides from, among others, Shell.
- Original property was 3.8 acres.
- In 1975, B&B expanded operations on to a .9 acre parcel owned by BNSF and Union Pacific.
- Operations resulted in soil and ground water contamination.

BNSF – Facts (cont'd)

- In 1989, B&B became insolvent and site was added to the NPL.
- In 1991, EPA ordered railroads to remediate.
- 1992, Railroads sued B&B.
- In 1996, that lawsuit was consolidated with actions by governments against Railroads and Shell.

BNSF -- Case History

- District Court
 - Apportionment appropriate
 - Adequate showing for apportionment
 - Shell liable as arranger
- Court of Appeals
 - Apportionment appropriate
 - Adequate showing for apportionment not made
 - Shell liable as arranger
- Supreme Court
 - Apportionment appropriate
 - Adequate showing for apportionment made
 - Shell not liable as arranger

BNSF Decision

- Citing Chem-Dyne, which relied on common law and Restatement (Second) of Torts, §433A, the Court explained there were exceptions to general rule of joint and several liability.
- Court held defendant could limit exposure to several liability if it could show either distinct harms or a reasonable basis for apportioning a single harm.

BNSF Decision (cont'd)

- In finding a reasonable basis existed, Court noted divisibility could be established, if there were adequate information, based on “volumetric, chronological, or other types of evidence, including geographical considerations.”
- Even though district court had included a 50% factor for calculation errors and even in the absence of detailed records and precise calculations, Court held apportionment appropriate.
- Court upheld apportionment (9% to railroads) based on relative contributions, impacted areas, and periods of time of conduct and ownership.

Marathon Battery

- Successive owners of battery manufacturing facility, with increasingly more effective water pollution controls over time.
- Water discharge contributions and air emissions depositions could be calculated.
- EPA issued NBAR, which became basis of settlement.

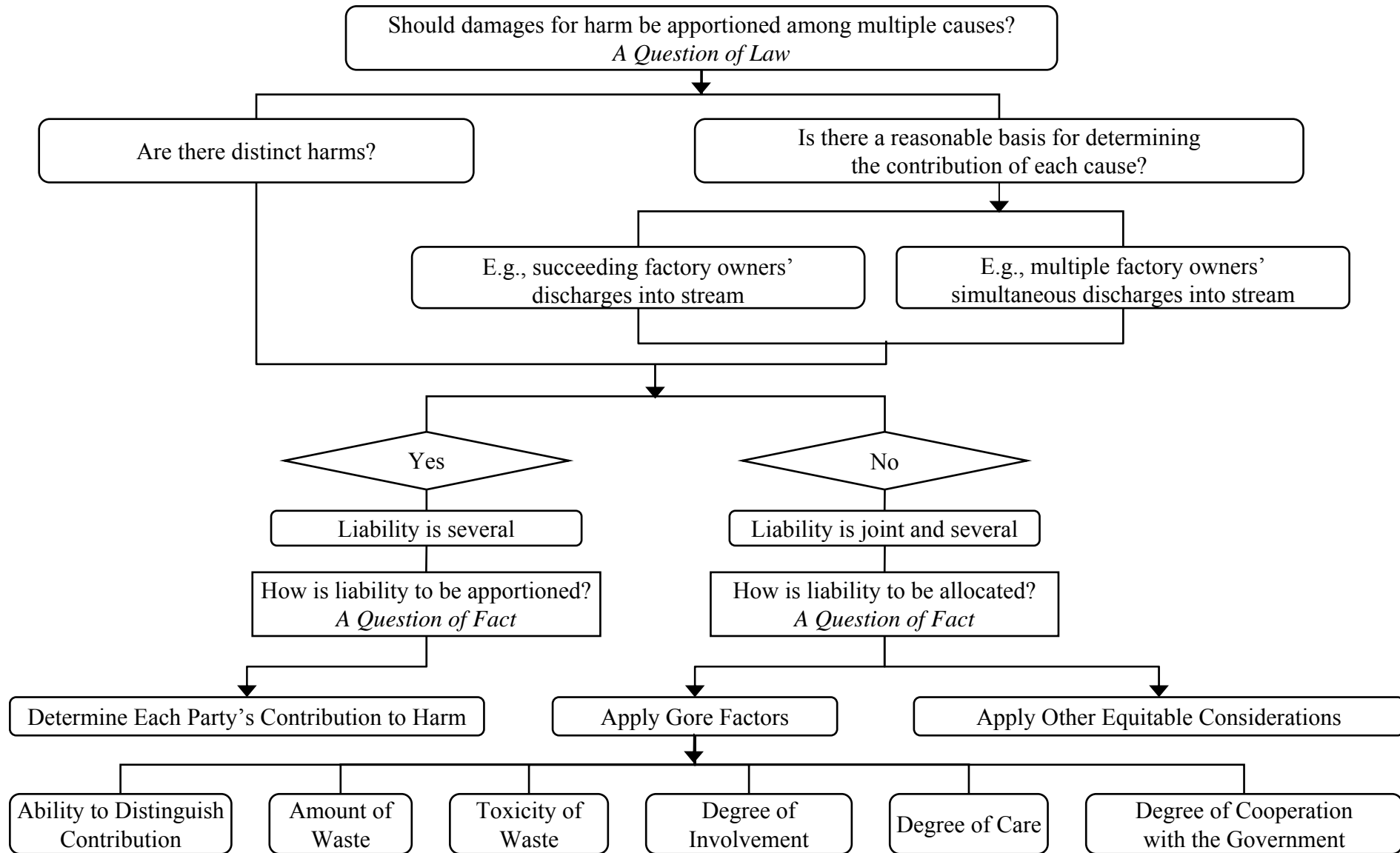
Bell Petroleum

- Was the key case before BNSF.
- Established principle for apportioning liability.
- Apportionment possible because there were successive owners.

BNSF Progeny

- *ITT Corp. v. Borg Warner*
- *Evansville Greenway and Remediation Trust v. Southern Indiana Gas and Electric Co., Inc.*
- *Appleton Papers, Inc. v. George A. Whiting Paper Co.*
- *United States v. Saporito*
- *Reichhold v. U.S. Metals Refining Co.*
- *United States v. Iron Mountain Mining, Inc.*

Analysis of PRP Liability* Apportionment/Allocation



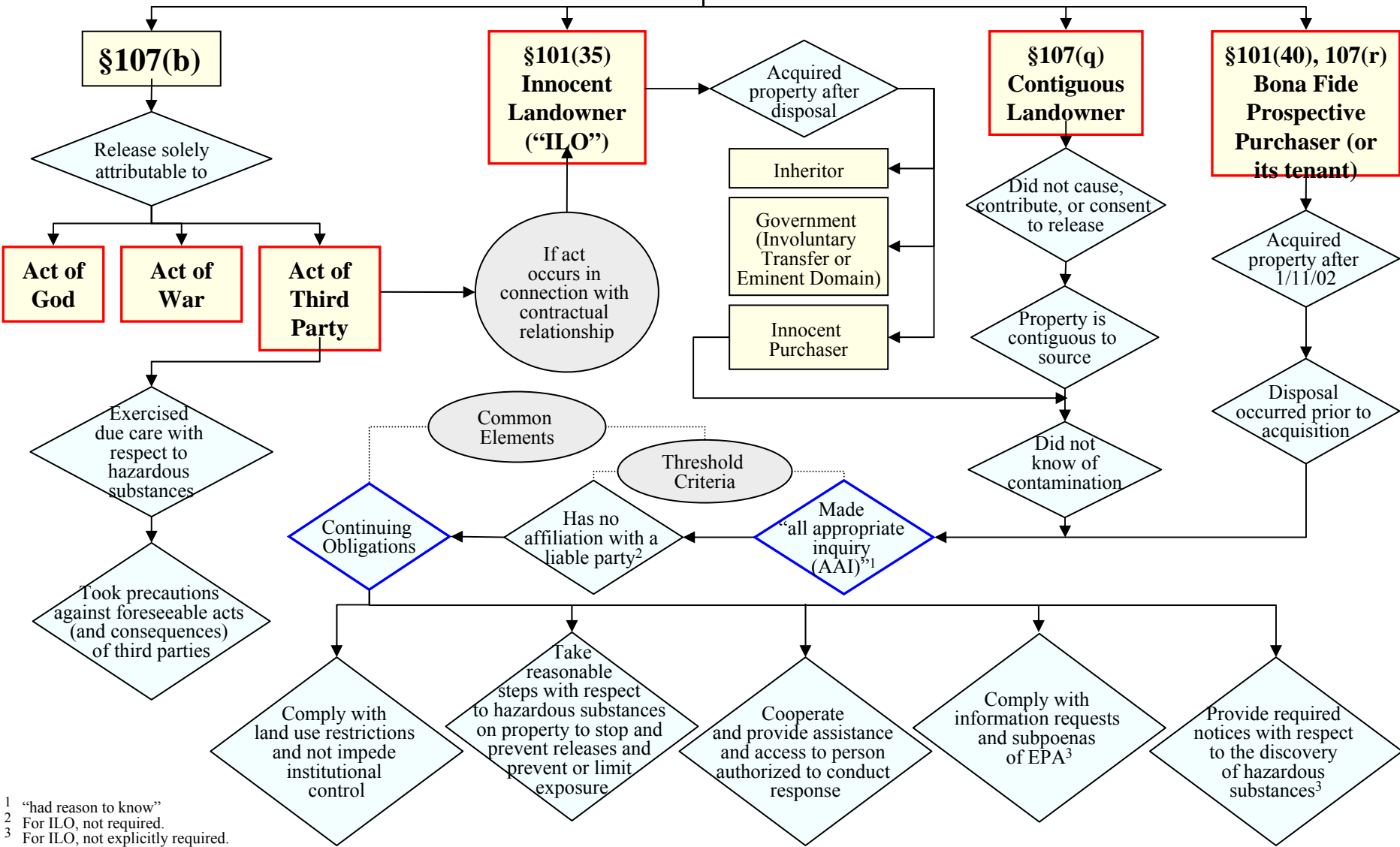
BNSF – Companion Case

- Shell had sold pesticide to B&B and knew B&B was having releases.
- Shell was not liable as an arranger PRP based on mere knowledge of spills.
- Shell was not a party to apportionment and government was stuck with 91% of costs, with the railroads being responsible for 9%.

Hierarchical Approach to Defending Superfund Cases

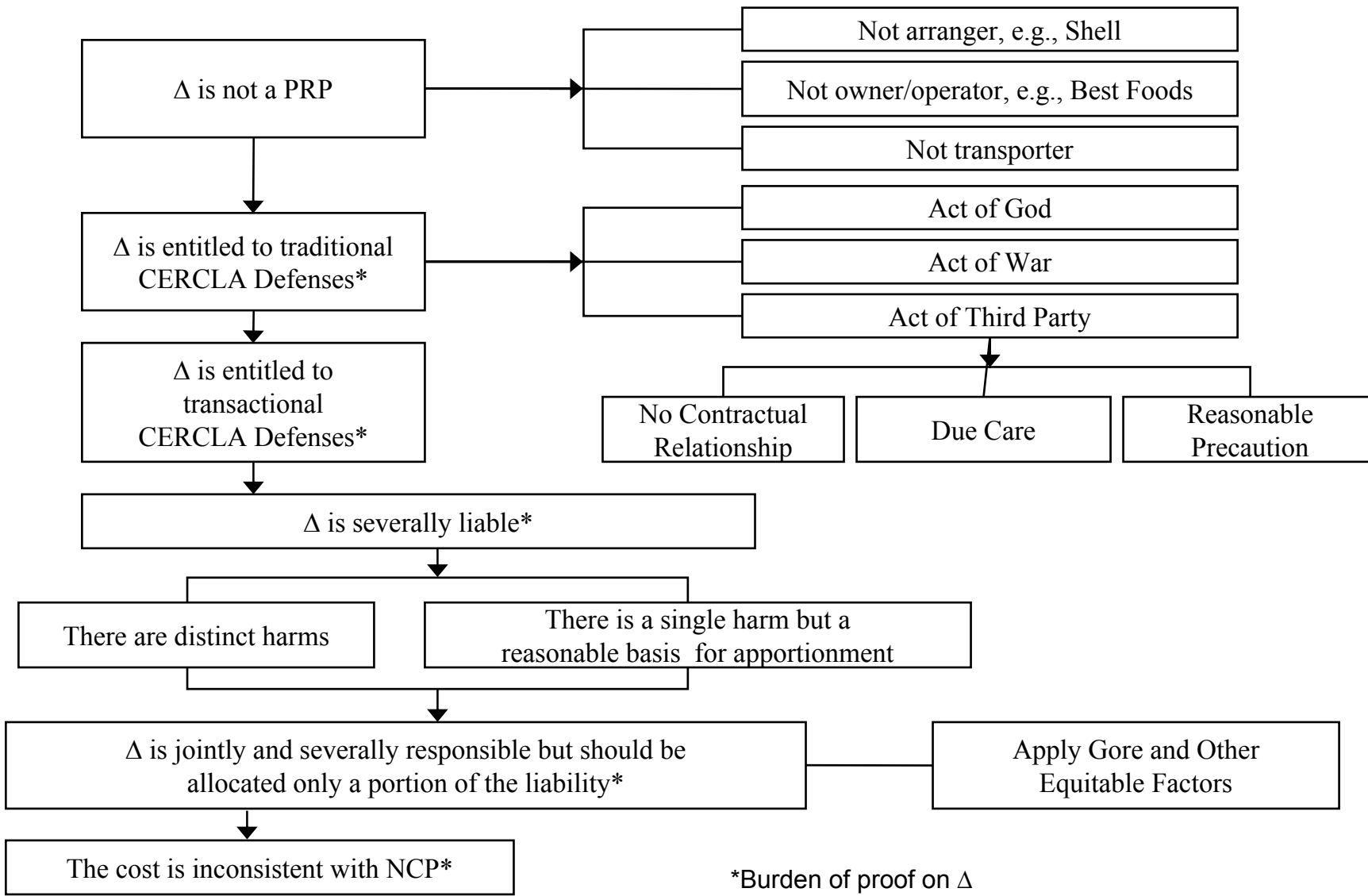
- BNSF addressed:
 - who is a PRP
 - when is liability several
- Other elements include:
 - availability of defenses
 - equitable allocation
 - consistency/inconsistency with NCP

Superfund Defenses



1 "had reason to know"
 2 For ILO, not required.
 3 For ILO, not explicitly required.

A Hierarchical Approach to Defending Superfund Cases



Conclusions

- The potential for liability to be several even for single harm is confirmed.
- Several liability will arise only in unique circumstances.
- Threshold for establishing basis for several liability is lowered.
- BNSF holdings help flesh out a hierarchical approach for defending Superfund cases.