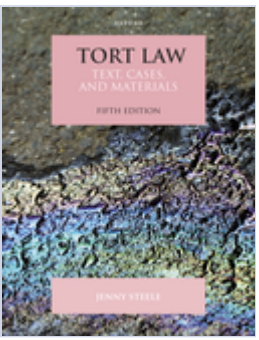

Tort Law: Text, Cases, and Materials (5th edn)
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12. *Rylands v Fletcher* and Strict Liability

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https://doi.org/10.1093/he/9780198853916.003.0012
Published in print: 29 September 2022
Published online: September 2022

Abstract

All books in this flagship series contain carefully selected substantial extracts from key cases, legislation, and academic debate, providing able students with a stand-alone resource. This chapter analyses the rule in *Rylands v Fletcher* on liability for damage done by the escape of dangerous things accumulated on one's land, regardless of fault. It considers the problem in overlap between negligence and strict liability, and how the tort of negligence can impose liability in situations far removed from cases of individual fault, including the situations covered by *Rylands v Fletcher*. After providing an overview of the case of *Rylands v Fletcher* and the origins and elements of the rule, the chapter looks at the rule and its categorization and boundaries today, paying particular attention to two major English cases that treat *Rylands* as an aspect of nuisance: *Cambridge Water Company v Eastern Counties Leather plc* and *Transco v Stockport MBC*. Finally, it examines the Australian High Court's decision in *Burnie Port Authority v General Jones Pty Ltd*

Keywords: fault, Rylands v Fletcher, damage, dangerous things, negligence, strict liability, tort, nuisance

Central Issues

i) The 'rule in *Rylands v Fletcher*' appears to determine that there is liability for damage done by the escape of dangerous things accumulated on one's land, regardless of fault. The rule applies only if those things were accumulated for one's own purposes, and were not accumulated in

the course of a 'natural' use of land. The strictness of the rule is mitigated by a number of defences and criteria, some of which appear incompatible with the underlying logic of the rule itself.

ii) The zone of application of *Rylands v Fletcher* has been in decline pretty much since its inception. Yet the existence of strict liability for dangerous activities (including 'accumulations') is far from being outdated. Despite the apparent conflict in principle between negligence and strict liability, in practice the greater problem is not so much conflict, but overlap. Arguably, the tort of negligence can adapt to impose liability in situations far removed from cases of individual fault, including the situations covered by *Rylands v Fletcher*. This was the move made by the Australian High Court, in *Burnie Port Authority v General Jones Pty Ltd* In the English courts, *Rylands* has been described as one of the source authorities for a non-delegable duty based on the relationship between neighbouring occupiers; but without discussion of whether negligence on the part of contractors should therefore be a pre-requisite of liability.

iii) The growth both of strict liability statutes, and of negligence liability divorced from fault, underline that areas of strict liability are entirely acceptable to contemporary thinking. But the growth of these alternative methods of imposing strict liability have left the rule itself exposed as arbitrary, limited, and in this sense archaic. Studying the limited role of *Rylands v Fletcher* is a good way of approaching the subtle relationship between negligence and strict liability; and also allows us to question the underlying purposes of strict liability in tort (see also Chapters 10 and 16).

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1 Introduction

In England and Wales, the 'rule in *Rylands v Fletcher*' is now treated as a branch of the tort of private nuisance. In Australia, the rule has been largely absorbed into negligence, which now provides an alternative route to liability without personal fault where some hazardous activities are concerned. In the United States, a specific and limited principle of strict liability has evolved in respect of 'dangerous' activities. This has clearly developed from the rule in *Rylands v Fletcher* but it is not confined by the limits associated with nuisance, particularly in respect of the types of damage that are recoverable. In Scotland, the rule does not apply: *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council*, 1985 SLT 214, at 217. *Rylands* deals with 'isolated escapes', and furthermore it deals with cases of actual damage, rather than general 'interference'. As such it provides a direct alternative to negligence in some circumstances. In terms of long-term survival, that has been its problem. In *Northumbrian Water v Sir Robert McAlpine* [2014] EWCA Civ 685; [2014] Env LR 28, a case argued in nuisance, the Court of Appeal confirmed that a defendant will not be liable for an isolated escape 'unless the case can be brought within the rule in *Rylands v Fletcher*': *Rylands* is a branch of nuisance, but it is a distinct branch.

This chapter falls into three parts. The first part considers the case of *Rylands v Fletcher* itself and the origins of the rule. The second identifies the elements of the rule so far as this can be done despite the confused case law. The third part turns to the categorization and boundaries of the rule today. Here we extract the major English cases of *Cambridge Water Company v Eastern Counties Leather plc*, and *Transco v Stockport MBC*, which treat *Rylands* as an aspect of nuisance; and (by contrast) the Australian High Court's decision in *Burnie Port Authority v General Jones Pty Ltd*, which deals with a very similar problem through the tort of negligence.

2 Origins of the Rule: *Rylands & Another v Fletcher*

2.1 Key Cases

Rylands & Another v Fletcher (Court of Exchequer Chamber LR 1 Ex 265 (1866); House of Lords LR 3 HL 330 (1868))

The plaintiffs were tenants of land on which they worked a mine. Their workings extended (under licence) through underground shafts to an area beneath neighbouring land. The defendants were neighbouring mill owners. They arranged for the construction of a reservoir in connection with the operation of their mill. There were old shafts under the reservoir, and these shafts connected with the plaintiffs' mine shafts.

The reservoir was not strong enough to bear the pressure of water when filled. As a consequence, it burst downwards and the water flooded the plaintiffs' mineshafts. The action proceeded on the basis that there had been no negligence on the part of the defendants themselves. They had employed a competent engineer and competent contractors. However, it was also stated that reasonable and proper care had not been used by those individuals employed in the planning and construction of the reservoir. The majority of the Court of Exchequer held that the failure of due care on the part of those employed to construct the reservoir did not, in the absence of any notice to the defendants, affect the defendants with any liability. The plaintiffs appealed to the Court of Exchequer Chamber.

p. 717 **Court of Exchequer Chamber**

Blackburn J (reading the judgment of the court)

The plaintiff, though free from all blame on his part, must bear the loss, unless he can establish that it was the consequence of some default for which the defendants are responsible. The question of law therefore arises, what is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escape out of his land. It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbours, but the question arises whether the duty which the law casts upon him, under such circumstances, is an absolute duty to keep it in at his peril, or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions, in order to keep it in, but no more. If the first be the law, the person who has brought on his land and kept there something dangerous, and failed to keep it in, is responsible for all the natural consequences of its escape. If the second be the limit of his duty, he would not be answerable except on proof of negligence, and consequently would not be answerable for escape arising from any latent defect which ordinary prudence and skill could not detect.

Supposing the second to be the correct view of the law, a further question arises subsidiary to the first, viz., whether the defendants are not so far identified with the contractors whom they employed, as to be responsible for the consequences of their want of care and skill in making the reservoir in fact insufficient with reference to the old shafts, of the existence of which they were aware, though they had not ascertained where the shafts went to.

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. He can excuse himself by shewing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law whether the things so brought be beasts, or water, or filth, or stenches.

> The case that has most commonly occurred, and which is most frequently to be found in the books, is as to the obligation of the owner of cattle which he has brought on his land, to prevent their escaping and doing mischief. The law as to them seems to be perfectly settled from early times; the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape …

p. 718 ↵ Blackburn J continued his analysis of the law relating to escaping cattle and continued (at 282):

> As has been already said, there does not appear to be any difference in principle, between the extent of the duty cast on him who brings cattle on his land to keep them in, and the extent of the duty imposed on him who brings on his land, water, filth, or stenches, or any other thing which will, if it escape, naturally do damage, to prevent their escaping and injuring his neighbour, and the case of *Tenant v. Goldwin* (1 Salk. 21, 360; 2 Ld. Raym 1089; 6 Mod. 311), is an express authority that the duty is the same, and is, to keep them in at his peril.

Commentary

The rule as stated by Blackburn J does not require that any negligence should be established on anyone's part. Rather, his rule of liability requires the following elements:

(a) a person brings something on his or her land and collects and keeps it there;

(b) this is done for his or her own purposes;

(c) the thing in question is likely to do mischief if it escapes;

(d) the damage done is a natural consequence of the escape.

Blackburn J expressly differentiated this 'true rule of law', from the alternative possibility that liability in the case might have rested upon proof of negligence. As Blackburn J explained, if liability did rest upon negligence, then a subsidiary question would arise, namely 'whether the defendants are not so far identified with the contractors whom they employed, as to be responsible for their lack of care or skill'.

In effect, this alternative is the route adopted by the High Court of Australia in *Burnie Port Authority v General Jones Pty Ltd* ((1992–94) 179 CLR 520), recognizing a 'non-delegable duty' on the part of the occupier to ensure that dangerous works are conducted with reasonable care. The main difference between these two approaches appears to be simple. On the Australian analysis, negligence on the part of the contractors needs to be established; in *Rylands v Fletcher*, there need be no negligence at all.[1]

The High Court of Australia doubted whether this difference is really so great in practical terms, arguing that negligence would be found on pretty much all those sets of facts where *Rylands* would be available. As we will see later, this depends on a particular interpretation of the tort of negligence as it applies between neighbouring occupiers. The High Court recognized both that there is a special relationship between neighbouring occupiers giving rise to positive duties relating to dangerous activities; and that varying degrees of care would be demanded within the tort of negligence, depending on the degree of danger involved in a particular use of land.

There is now some indication that in English law also, *Rylands* liability is seen as based not on the hazardous nature of the accumulation itself, but on the relationship between defendant and claimant as occupiers of adjacent land. In *Woodland v Swimming Teachers Association*,[2] Lord Sumption JSC explained that there were two distinct categories of case in which non-delegable duties are said to arise. The first comprises 'the
p. 719 creation of hazards in a ↵ public place, generally in circumstances which apart from statutory authority would create a public nuisance' ([6]). The second category 'arises not from the negligent character of the act itself but because of an antecedent relationship between the defendant and the claimant' ([7]). Lord Sumption went on to associate *Rylands v Fletcher* not with the first, but with the second category of case:

Lord Sumption, *Woodland v Swimming Teachers Association*
[2013] UKSC 66

> 8 This characterization of non-delegable duties originated in the law of nuisance, and in a number of seminal judgments of Lord Blackburn in the late nineteenth century. It was implicit in the famous judgment of the Exchequer Chamber in *Rylands v Fletcher* (1866) LR 1 Ex 265, delivered by Blackburn J and subsequently affirmed by the House of Lords (1868) LR 3 HL 330, that the duty of the defendant to prevent the escape of water from his reservoir was non-delegable, for on the facts it was due to the operations of an independent contractor …
>
> 9 *Rylands v Fletcher* and *Dalton v Henry Angus & Co* might have been explained by reference to the hazardous character of the operation carried out by the defendant's contractor, and sometimes have been, notably by the Court of Appeal in *Honeywill & Stein Ltd v Larkin Bros (London's Commercial Photographers) Ltd* [1934] 1 KB 191. But it is clear from Lord Blackburn's observations that the essential point about them was that there was an antecedent relationship between the parties as neighbouring landowners, from which a positive duty independent of the wrongful act itself could be derived. The duty was personal to the defendant, because it attached to him in his capacity as the occupier of the neighbouring land from which the hazard originated.

Lord Sumption did not, however, comment on the absence of any apparent need to show negligence on the part of the contractor in *Rylands v Fletcher* itself. It has generally been thought not that *Rylands* provides a route for finding the occupier liable for the negligence of a contractor, but that it provides a route for finding that there is potential liability where an accumulation leads to an escape, irrespective of any negligence at all.

The apparent contradiction between negligence liability, and the rule in *Rylands v Fletcher*, therefore deserves a little thought. The manner in which the rule was stated by Blackburn J seems designed to appeal to a simple sense of fairness: the thing that escapes is accumulated for D's own purposes; therefore D, and not C, must take the consequences should that thing escape. Negligence liability, as stated in *Donoghue v Stevenson*, also had simple intuitive appeal. So how can both make sense in terms of intuitive fairness?

Perhaps the answer lies in the idea of 'keeping things in at one's peril'. We do not primarily regard the damage as the result of an isolated event, namely the escape. Rather, we see it as the result of a risk that is created by an activity on one's land. As already mentioned, this is critically different from most nuisance cases, where the interference is a result—sometimes an inevitable result—of the conflict between two uses of land. *The rule in*

Rylands v Fletcher differs from both negligence and nuisance in suggesting that the risks in question may legitimately be run. It does not suggest that the accumulation of a dangerous thing per se amounts to an actionable nuisance. However, the risks associated with an accumulation may not be placed altogether upon an innocent
p. 720 claimant. Rather, the risks are run 'at the peril of' the ↵ person who accumulates a dangerous thing for their own purposes. In a sense then, the defendant 'insures' the neighbouring occupier against risk.[3]

We will see later that this idea of 'insuring' against harm was diluted from the start, in particular through the development of broad defences relating to the manner of the escape itself (which should really have been irrelevant in most circumstances). But we should also notice that the apparent contrast with negligence may not be real given the ability of negligence to adapt to different circumstances. In particular, the degree of care that would be undertaken by a prudent person in the exercise of a dangerous calling may bring the negligence duty very close to the duty in *Rylands v Fletcher*, at least in its diluted form. The following extract expresses the issue very clearly.

E. R. Thayer, 'Liability Without Fault' (1916) 29 Harv L Rev 801–15, at 805–6

> How powerful a weapon the modern law of negligence places in the hands of the injured person, and how little its full scope has been realized until recently, is well shown by the law of carrier and passenger. The futility of degrees of care in general has long been recognized; but in the case of public service companies the habit of talking as if the carrier owed some special degree of care other than that of the ordinary prudent man has persisted and is common today. Clear-headed judges, however, have pointed out that the distinction is illusory. The ordinary prudent man would never take human beings into his keeping in conditions where they trusted utterly in him, and where life and limb was the stake, without qualifying himself in advance in all practicable ways for so dangerous a business and without using all available precautions in carrying it on. In such a business the highest care is thus nothing more than ordinary care under the circumstances; and it may be conjectured that in the case of carrier and passenger there is little difference, as a practical matter, between the results reached by the law of negligence and the doctrine of *Rylands v Fletcher*. Few cases are likely to arise in which a railroad company would escape today, except where the accident was caused by the unforeseeable intervention of some natural force or human being. Yet those are the very things which excuse him also under *Rylands v Fletcher*.
>
> This stringent liability of the carrier is not due to his public calling, but to the nature of the agencies he uses, the helplessness of the passengers, and the peril to life and limb. … And in these respects the parallel between the carrier and the defendant in a case like *Rylands v Fletcher* is close. In each case the defendant has chosen to create a condition dangerous to others unless kept in control. In each the plaintiff has no means of protecting himself and is left helpless and forced to look to the plaintiff for protection. In the one case as in the other the argument is overwhelming that ordinary prudence requires the defendant not only to take every precaution to inform himself of the dangers of his enterprise before undertaking it, and to guard against such dangers in construction, but also to use unremitting diligence in maintenance and inspection. And so great are the resources of modern science that an accident occurring without the intervention of a new unforeseeable agency will make a hard case for the defendant. There may, of course, be facts which will entitle him to prevail, but they
p. 721 are most unlikely. It will be a strange case where the accident was due to conditions ↵ existing when the defendant did the responsible act, or where new forces operated which should have been foreseen, and yet the defendant was free from blame in failing to guard against them. A proper study of the plaintiff's case with expert assistance will be likely to disclose the elements of liability under the modern law of negligence in the vast majority of cases where, assuming the rule in *Rylands v Fletcher*, the defendant would not be excused in view of *Nicholls v Marsland* and *Box v Jubb*.

The idea of 'keeping things in at one's peril', softened by a range of defences, could be comprehended from the vantage point of the tort of negligence, according to Thayer's analysis.

The House of Lords (1868) LR 3 HL

The judgment of Blackburn J was approved by the House of Lords. Of the two judges named in the Report, Lord Cairns added some comments about non-natural user. The non-natural user criterion has subsequently been taken to be an additional requirement for the application of the rule. (The absence of a named third judge in the report simply adds to the mystery of *Rylands v Fletcher*, since it seems to underline the fact that the case was seen by its authors as relatively inconspicuous and unproblematic.)[4]

Lord Cairns LC, at 383

My Lords, the principles on which this case must be determined appear to me to be extremely simple. The Defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the Plaintiff, the Plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving, or by interposing, some barrier between his close and the close of the Defendants in order to have prevented that operation of the laws of nature.

As an illustration of that principle, I may refer to a case which was cited in the argument before your Lordships, the case of *Smith v. Kenrick* in the Court of Common Pleas (7 C. B. 515).

On the other hand if the Defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land,—and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the Plaintiff, then it appears to me that that which the Defendants were doing they were doing at their own peril; and, if in the course of their doing it, the evil arose to which I have referred, the evil, namely, of the
p. 722 escape of the water and its ↵ passing away to the close of the Plaintiff and injuring the Plaintiff, then for the consequence of that, in my opinion, the Defendants would be liable. As the case of *Smith v. Kenrick* is an illustration of the first principle to which I have referred, so also the second principle to which I have referred is well illustrated by another case in the same Court, the case of *Baird v. Williamson* (15 C. B. (N. S.) 317), which was also cited in the argument at the Bar.

My Lords, these simple principles, if they are well founded, as it appears to me they are, really dispose of this case.

The same result is arrived at on the principles referred to by Mr Justice *Blackburn* in his judgment, in the Court of Exchequer Chamber … [Lord Cairns here quotes a passage from Blackburn J's judgment, extracted above, and expresses his agreement with it.]

Lord Cranworth

… I come without hesitation to the conclusion that the judgment of the Exchequer Chamber was right. The Plaintiff had a right to work his coal through the lands of Mr *Whitehead*, and up to the old workings. If water naturally rising in the Defendants' land (we may treat the land as the land of the Defendants for the purpose of this case) had by percolation found its way down to the Plaintiff's mine through the old workings, and so had impeded his operations, that would not have afforded him any ground of complaint. Even if all the old workings had been made by the Plaintiff, he would

> have done no more than he was entitled to do; for, according to the principle acted on in *Smith v. Kenrick*, the person working the mine, under the close in which the reservoir was made, had a right to win and carry away all the coal without leaving any wall or barrier against *Whitehead's* land. But that is not the real state of the case. The Defendants, in order to effect an object of their own, brought on to their land, or on to land which for this purpose may be treated as being theirs, a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage to the Plaintiff, and for that damage, however skilfully and carefully the accumulation was made, the Defendants, according to the principles and authorities to which I have adverted, were certainly responsible.

Commentary

Lord Cranworth reiterated clearly that negligence or lack of care was not required for the application of the principle of liability, despite the apparent negligence of the contractors in the case itself. But it was the judgment of Lord Cairns that added the criterion of *non-natural user*. As Lord Cairns put it, the defendants would have been entitled to use the land for any purpose 'for which it might in the ordinary course of the enjoyment of land be used', and the plaintiffs would have been unable to seek redress for any damage that might flow from that 'ordinary' use in the absence of negligence. But if the defendants made a *non-natural* use of the land (as here), then the defendants were to be treated as doing so 'at their own peril'.

Unfortunately, it will be apparent that Lord Cairns' judgment here contains more than one formulation of this additional criterion of liability, since it refers first to the 'ordinary' use of the land, and second to a distinction between 'natural' and 'non-natural' use. More unfortunately, in discussion of 'non-natural' use he makes some reference to 'that which in its natural condition was not in or upon it'. In the article extracted below, Professor Newark traces different meanings of 'non-natural' as used in the judgment of Lord Cairns, and outlines a major change in the more recent case law beginning with *Rickards v Lothian* in 1913.

p. 723 **F. Newark, 'Non-Natural User and Rylands v Fletcher' (1961) 24 MLR 557–71, at 570–1**

> Lord Cairns had dealt with three distinct conceptions, and he kept them distinct, but it was his fault to introduce the word 'natural' into each. The first is a reference to an escape 'by the laws of nature.' Here he meant no more than that the dangerous agent moved on to the plaintiff's close in consequence of a natural force, *e.g.*, gravity, and was not propelled thither by act of the defendant. The second is a reference to 'the user of land in the ordinary course of enjoyment' which he equates with 'natural user.' But his very next words show that he was referring to *a user of land which caused the dangerous agent to escape*, as in the *Smith v Kenrick* type of case. And thirdly he refers to 'non-natural use' which is artificially introducing the dangerous agent on to the land.
>
> Shortly, what has happened by the time of *Rickards v Lothian* in 1913 is that 'ordinary' which had been used as a synonym for 'natural' in Lord Cairns' second conception (*viz.*, the user which caused the dangerous agent to escape) had been transferred to the third conception which relates to the introduction of the dangerous agent on the land, so that whereas Lord Cairns asserted that bringing the dangerous agent on to the land was necessarily 'non-natural use' we are now led to believe that it is only 'non-natural' if it is 'not ordinary.' And the result as applied in the modern cases is, we believe, one which would have surprised Lord Cairns and astounded Blackburn J.

Now, however, the non-natural user criterion has become the main mechanism for setting some appropriate limits to the rule, and it does so quite independently of the idea of natural in the sense of 'natural condition'. Its content may now (belatedly) be in the process of developing in a manner uncluttered by confusion over the origins, purpose, and nature of the rule. But because of other limitations to the rule (particularly in the form of defences, but also through the close association with other forms of nuisance) this development is probably too late to convert *Rylands v Fletcher* into a workable rule of strict liability.

We will revisit non-natural user and its most recent interpretation in Section 4 of this chapter. For now, we will simply note that one of Lord Cairns' formulations of the rule—the reference to 'ordinary use'—is similar to the expression used by Bramwell B in *Bamford v Turnley* (1862) 122 ER 27, where he summarized a range of cases that was subject to the principle of 'give and take' in the tort of private nuisance. Lord Bramwell's judgment in *Bamford v Turnley* was extracted in Chapter 10. Bramwell B was the single dissenting judge in *Fletcher v Rylands* in the Court of Exchequer, who would have awarded damages to the plaintiff Fletcher, and who was supported on appeal both by the Court of Exchequer Chamber and by the House of Lords. In a footnote to Newark's article extracted above ('Non-Natural User and *Rylands v Fletcher*', at n 53), the author suggests that the similarity between natural user in *Rylands*, and ordinary user in *Bamford v Turnley*, is merely superficial. No comparison could have been intended because (he argues) it would surely otherwise have been mentioned. But as we will see the version of the 'non-natural user' criterion which has been accepted, with variations, since *Rickards v Lothian* in 1913 is precisely an ordinary user test. Recent interpretations of the non-natural user criterion, to be found in Lord Goff's judgment in *Cambridge Water*, and in the judgments of both Lord Bingham and Lord Hoffmann in *Transco v Stockport MBC* (extracted in Section 4.1), turn on 'ordinary' user and certainly bear comparison with Bramwell B's analysis in *Bamford v Turnley*.

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3 Elements of Actionability

A general principle of strict liability for hazardous activities has never developed in English law. Ironically perhaps, it is in the United States that a general principle of strict liability for ultra-hazardous acts has been adopted, despite the 'initially cool reception' given to *Rylands v Fletcher* itself (Fleming, *The Law of Torts*, 9th edn, p. 370; Rest. (Torts) 2d §519). The components of the rule as stated by Blackburn J have been read as strict requirements. In addition, a number of other limitations to the rule have become apparent. As we have seen, these include the requirement (added by Lord Cairns, but reinterpreted over the years) that the defendant's user of the land should be 'non-natural'; but also include a range of defences not mentioned in *Rylands v Fletcher* itself.

Courts have struggled to reconcile the action in *Rylands*, with negligence liability, and this makes it hard to give a wholly consistent account of the case law. This struggle began straight away with cases such as *Jones v Festiniog Railway* ((1868) LR 3 QB) and *Nicholls v Marsland* ((1868) 2 Ex D 1), both of which are discussed later in this chapter.

3.1 Accumulation of Something Likely to Do Mischief

The defendant must have 'accumulated' something on his or her land; and that thing must be something that, in the words of Blackburn J, is 'likely to do mischief if it escapes'. The thing may be brought on to the land by the defendant. Alternatively, it may come on to the land by a natural process, provided that some action of the defendant has caused it to gather or accumulate. For example, the defendant may have constructed a reservoir that will fill with rainwater, or may have dammed a stream to create a lake. An entirely natural accumulation will not fulfil the requirements of *Rylands v Fletcher*. Thus, *Rylands v Fletcher* itself distinguished the earlier case of *Smith v Kendrick* ((1849) 7 CB 515), in which the accumulation of water was natural. It should be noted, however, that a case like *Smith v Kendrick* will now be interpreted in terms of a 'measured duty of care' in nuisance within the terms of *Leakey v National Trust* [1980] QB 485 (Chapter 10).

In *Giles v Walker* (1890) 24 QBD 656, a defendant had neglected to mow thistles which had seeded naturally upon his land, thus causing damage to his neighbour when thistledown was blown on to the neighbour's land. The very brief judgment in *Giles v Walker* did not mention *Rylands v Fletcher*, but its implication was that the rule does not apply to natural accumulations. So far as reported, this is the leading judgment in full:

> **Lord Coleridge CJ**
>
> I never heard of such an action as this. There can be no duty as between adjoining occupiers to cut the thistles, which are the natural growth of the soil. The appeal must be allowed.

Giles v Walker was overruled in *Leakey*, in consequence of the recognition of a positive duty to take reasonable steps to protect one's neighbour. The degree to which positive duties have overtaken the rule in *Rylands v Fletcher* is a question to which we return later.

The additional idea that the things accumulated are 'likely to do mischief' if they escape draws attention to
p. 725 the likely consequences should such an escape occur. Thus an element ↵ of foreseeability has been present in *Rylands v Fletcher* from the start, even if it was not expressed in these terms. Because of more recent controversies, we should note that it is foreseeability of danger, not foreseeability of escape specifically, which is implicit in Blackburn J's statement.

3.2 Escape

Rylands liability requires an escape. This is one of the most artificial elements of the rule, and the retention of this requirement illustrates clearly that the rule has not developed into a general principle of strict liability.

Viscount Simon, *Read v Lyons*
[1947] AC 156, at 168

> 'Escape,' for the purpose of applying the proposition in *Rylands v. Fletcher,* means escape from a place where the defendant has occupation of or control over land to a place which is outside his occupation or control. Blackburn J. several times refers to the defendant's duty as being the duty of 'keeping a thing in' at the defendant's peril and by 'keeping in' he does not mean preventing an explosive substance from exploding but preventing a thing which may inflict mischief from escaping from the area which the defendant occupies or controls.

An event which occurs entirely within the confines of the defendant's land will therefore not satisfy the criterion. As a result, there was no 'escape' for the purposes of the rule when there was an explosion in a munitions factory, no dangerous thing thus escaping from the defendant's premises. This decisive aspect of *Read v Lyons* was described by Fleming as having in itself ended the possibility of a general rule based on *Rylands v Fletcher*:

J. Fleming, *The Law of Torts* (9th edn, NSW: Law Book Company, 1998)

> The most damaging aspect of the decision in *Read v Lyons* was that it prematurely stunted the development of a general theory of strict liability for ultra-hazardous activities.

Application to Cases of Fire

It has sometimes been wondered whether cases of fire damage are special, and more inclined to give rise to strict liability. One reason for this has been the authority of *Musgrove v Pandelis* [1919] 2 KB 43, where a fire began in the engine of a motorcar stored in a garage, and spread to neighbouring property. The occupier of the garage was liable for damage caused by the fire despite a lack of negligence. In the case of *Stannard v Gore*, however, the Court of Appeal interpreted more recent decisions of the House of Lords as setting out general criteria for the operation of liability under *Rylands*, so that there could be no exception for cases of fire. *Musgrove* is unlikely now to be followed, as it was interpreted as—at best—confined to its facts (as those facts appeared in 1919), and there was at least a suspicion that the decision in inconsistent with the principles set
p. 726 out more recently in *Transco v Stockport*. Most ↵ importantly perhaps, strict liability under *Rylands v Fletcher* for damage by fire will be limited by the requirement that it is the *fire itself* which must have been accumulated by the defendant. It is not sufficient to show that an accumulation of flammable material has led to the escape of fire, since the material has in that case not 'escaped'.[5]

Ward LJ, *Stannard v Gore*
[2012] EWCA Civ 1248

> 48 Cases of fire damage are likely to be very difficult to bring within the rule because (1) it is the 'thing' which had been brought onto the land which must escape, not the fire which was started or increased by the 'thing'. (2) While fire may be a dangerous thing, the occasions when fire as such is brought onto the land may be limited to cases where the fire has been deliberately or negligently started by the occupier or one for whom he is responsible. Is this not a relic of the *ignis suus* rule? (3) In any event starting a fire on one's land may well be an ordinary use of the land.

According to Ward LJ, *Musgrove v Pandelis* should 'therefore simply be relegated to a footnote in the history of *Rylands v Fletcher*'. Etherton LJ went further, and suggested that the decision in *Musgrove* was simply unsustainable after *Transco*.

An extra dimension in fire cases is provided by the continued existence of the following statutory provision, itself re-enacting a 1707 provision:

Fires Prevention (Metropolis) Act 1774, section 86

> No action, suit, or process whatsoever shall be had, maintained, or prosecuted against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall accidentally begin, nor shall any recompense be made by such person for any damage suffered thereby, any law, usage or custom to the contrary notwithstanding.

One question that has arisen is whether this provision should be interpreted as prohibiting liability for fire in the absence of negligence under *Rylands v Fletcher*. The answer to that question is not so important in practice after *Stannard v Gore*, since the Court of Appeal there decided that liability for fire does not arise under *Rylands* unless the fire is either negligently or deliberately started in any event. But it is worth noting Lewison LJ's analysis of the history of the section, from which he concluded that it ought to be interpreted as restricting liability under *Rylands v Fletcher* in fire cases; while Ward LJ and Etherton LJ were each content to accept an earlier analysis of the provision as simply clarifying a point of interpretation in the old law of *ignis suus*, namely when will a fire be regarded as that of the occupier of land on which it starts?[6] On that interpretation, it had no application to *Rylands*, which represented a separate strand of strict liability. Part of the significance
p. 727 of this lies in ↵ the important role played by insurance in the 1774 legislation as a whole, as well as in its predecessor.[7] As we will see, the general approach in the most recent *Rylands* cases is one of caution in creating liability for commonly insured risks.

3.3 Who Can Sue and for What Damage?

Personal Injury

When Lord Macmillan said, in *Read v Lyons* (earlier) that the rule would not allow recovery for personal injuries, his comments were against the run of authority. They were based on an analysis of the origins of the action in nuisance, and not on the later case law. Later, in *Hale v Jennings* [1938] 1 All ER 579, the Court of Appeal said that the rule applied where personal injuries were caused by a fairground 'Chair-o-Plane' becoming detached and striking the plaintiff. There was no discussion of the personal injury point. Rather, the court was concerned with the question of whether the Chair-o-Plane was dangerous in itself, or whether the defendant should be exonerated because of the 'fooling about' of one of its customers. In *Perry v Kendricks* [1956] 1 WLR 85, Parker LJ thought that on the balance of authority, it was not open to the Court of Appeal to exclude personal injury from the ambit of the rule. In particular, the Court of Appeal would be bound by its earlier decision in *Musgrove v Pandelis* [1919] 2 KB 43. But *Musgrove v Pandelis* was a case of property damage, and not of injury to the person. The Court of Appeal had there considered the important distinction between physical damage (in that case, to chattels), and damage to proprietary interests, and decided that *Rylands* liability was not confined to the latter.

Now, however, the incorporation of *Rylands v Fletcher* into nuisance, coupled with the decision in *Hunter v Canary Wharf* ([1997] AC 655, Chapter 10), determines clearly that personal injuries will not be compensated under the rule.[8] The same developments also suggest that only those in occupation of land will be able to claim in *Rylands*, but there is much less clarity concerning the nature of the occupation that will suffice. In *Shiffman v Order of St John* [1936] 1 All ER 557, Atkinson J remarked that damages *might* be recoverable under the rule when children were injured by the fall of a flagpole erected by the defendants.[9] Dealing with the occupancy issue, he stated that: 'if it fell it was certain to fall on land of which [the defendants] were not in occupation and on which the public had a right to be'. This kind of 'licence' to be present he thought would be sufficient. More significantly perhaps, in *Charing Cross Electricity Supply Company v Hydraulic Power Company* [1914] 3 KB 772, the Court of Appeal clearly stated that the rule in *Rylands v Fletcher* applied even where the plaintiff suffered injury on a site occupied under licence, and not under any right of property in the soil. The damage suffered there was damage to a pipe (a chattel) laid under (not on) the highway. Notably, the Court of Appeal in the *Charing Cross* case clearly considered liability under *Rylands v Fletcher* to be a species of nuisance, since they assumed that it came within the terms of a clause of the relevant act which saved actions in respect of nuisances arising from the defendants' exercise of their powers (London Hydraulic Power Act 1884, section 17).

p. 728

'Pure' Economic Loss

In *D. Pride & Partners v Institute for Animal Health* [2009] EWHC 655 (QB), Tugendhat J ruled that the 'exclusionary rule' which rendered the economic losses pleaded in that case irrecoverable in negligence, applies just as well to actions in private nuisance and in *Rylands v Fletcher*. The particular 'exclusionary rule' in issue was the one which in Chapter 6 we described as relating to 'category A' economic losses: losses suffered through damage to the property of another. Tugendhat J pointed out that the extension of this rule to *Rylands*

v Fletcher could not be in doubt, since one of the originating authorities on which it is based—*Cattle v Stockton Waterworks Co* (1875) LR 10 QB 453—was itself a claim argued in *Rylands v Fletcher*. The leading judgment in *Cattle* was by Blackburn J himself.

3.4 Defences

Consent

It seems to be accepted that *consent* on the part of the claimant to the accumulation may give rise to a defence, although this does not seem entirely consistent with the purpose of the rule, unless the 'consent' is something closer to shared benefit. In the multi-faceted case of *Colour Quest v Total Downstream UK plc* [2009] EWHC 540 (Comm), it was accepted that consent does generally amount to a defence to *Rylands* liability, but this consent was vitiated where there was negligence. In this instance, there was alleged to be negligence both in the accumulation (there was no safe system in place), and in the escape (a fuel tank was carelessly overfilled, leading to a major explosion). David Steel J added that there was no basis for excluding an action in *Rylands* in a case where negligence is present, but this is another way in which the strictness of *Rylands* as compared to the action in negligence is restricted.

Vis Major/Act of God; Act of a Stranger

These defences relate to the means by which the escape occurs. Any defence based on the idea that the defendant was not 'to blame' for the way in which an escape occurred will undercut the impact of the rule, which is calculated to place the risk of an escape—and the burden of keeping the thing safe—upon the person who accumulates it.

If these defences are broadly applied, this will further illustrate that *Rylands* has not been wholeheartedly applied by the courts. An early example is the case of *Nicholls v Marsland* (1868) 2 Ex D 1, in which 'exceptionally heavy rain' was held to take the escape beyond the reach of the rule in *Rylands v Fletcher*. A modern court could choose to differ from its nineteenth-century counterpart on the basis that the occurrence of 'exceptional' conditions is now rather more predictable than once was the case. Lord Hoffmann, in *Transco v Stockport MBC* (at [32]), cites *Carstairs v Taylor* (1871) LR 6 Ex 217 as evidence that 'act of God' is interpreted broadly. Here, a rat gnawed through a gutter box, causing a flood. There was no liability on the part of the occupier. However, Lord Hobhouse correctly pointed out in response to Lord Hoffmann (*Transco*, at [59]) that apart from Kelly CB, the other judges in that case distinguished *Rylands v Fletcher*, so that it is not strong authority on the content of the defence of act of God. Bramwell B, for example, distinguished *Rylands* on the basis that in *Carstairs v Taylor*, the accumulation (of rainwater in guttering) was made as much for the benefit of the plaintiff as for that of the defendant. Thus it was not made by the defendant 'for his own purposes'.

p. 729 ↵ Further, in the case of 'act of a stranger', Lord Hoffmann suggests that it is sufficient to show that the escape had been caused by a vandal, for example, and is not attributable to the defendant (*Rickards v Lothian* [1913] AC 263). However, the discussion in *Shiffman v Order of St John* (earlier in this section) suggests that a *foreseeable* act of vandalism would not trigger the defence. And in *Perry v Kendricks* (where the defence was decisive), the court did indeed emphasize the *unforeseeable* nature of the intervention. Some acts of vandalism

being quite foreseeable, and the kind of thing that should be guarded against, this interpretation would place some positive duties upon the defendant to 'keep the thing in', even if it falls short of imposing a duty to insure against damage. In *Hale v Jennings* [1938] 1 All ER 579, it was emphasized that the dangerous thing (a fairground 'Chair-o-Plane') was likely to produce the very danger that occurred, where a customer loosened the chair through his 'folly'. The fact that this third party had caused the 'escape' through his own fault did not absolve the defendants from liability under *Rylands v Fletcher*, since it was within the foreseeable risk associated with the operation of the equipment.

The fact remains that under a serious rule of strict liability a defendant could not expect to enjoy broad defences concerning operation of nature and acts of third parties.

Statutory Authority

Significant issues also arise in respect of the defence of statutory authority. We considered this defence in the chapter earlier, concerning nuisance. But the issues are subtly different in respect of *Rylands v Fletcher*. The normal case of private nuisance concerns ongoing activities. In some cases, inevitable interferences arise from those activities. Since those interferences are an inevitable aspect of the authorized activity, a finding of nuisance would contradict the statute. The defence of statutory authority in private nuisance is therefore close to being a logical necessity, although its application to specific circumstances is of course a matter of debate. But in the context of liability under *Rylands v Fletcher*, the escape itself is generally accidental and not an 'inevitable' aspect of the authorization. Authorization for an accumulation clearly authorizes the *risk* of an escape, but this does not compel the view that there should be no liability when an escape actually occurs.

In *Transco*, as we shall see later, Lord Hoffmann has suggested that statutory authority removes liability for escapes in the absence of negligence. In support of this interpretation, Lord Hoffmann quotes from the advice given by Blackburn J himself to the House of Lords in *Hammersmith and City Railway Co v Brand* 1869 [LR] 4 HL, and refers also to Lord Blackburn's statement in *Geddis v Proprietors of the Bann Reservoir* 1878 3 App Cas 430: '... no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorized, if it be done negligently'.

Neither of these cases concerned the rule in *Rylands v Fletcher* directly. Nevertheless, the statements are very general. Should we take it that they were meant to encompass liability under *Rylands*? It appears that Blackburn J himself *did* consider that the defence applies to *Rylands v Fletcher* in the manner stated in *Brand* and *Geddis*. In *Jones v Festiniog Railway* (1868 [LR] 3 QB), Blackburn and Lush JJ applied the newly formulated rule in *Rylands v Fletcher* to a case of damage caused by sparks emitted from locomotives. In order to hold that there was liability in *Rylands* despite statutory authorization for the operation of the railroad, they clearly thought they first had to hold that as a matter of statutory interpretation, authorization for the running of a
p. 730 railroad did not include authorization for the ↵ running of locomotives specifically. These were not essential to the purpose of the enterprise so authorized. Although the plaintiffs in that case were successful, the judges clearly thought that if the accumulation was expressly permitted, then this would be enough to oust the strict liability rule.

This state of affairs seriously restricts the practical ambit of *Rylands v Fletcher*. It also further illustrates that the courts have never really accepted that the rule in *Rylands v Fletcher* has the purpose of internalizing risks.

Sellers LJ, *Dunne v NW Gas Board*
[1964] 2 QB 806, 834

> It is not easy to contemplate a case where the inevitable result of doing what a statute required would result in damage except directly to property interfered with, but it could be contemplated, as here, that the result might do so. Gas, water and electricity all are capable of doing damage, and a strict or absolute liability for any damage done by them would make the undertakers of these services insurers.

Sellers LJ clearly thought that this possibility amounted to a conclusive argument *against* the application of the rule. But there is an argument that the undertakers of public services *should be* the insurers of damage done by their activities. Obviously, there may be arguments either way as to whether this is desirable or not. But the evident surprise of the Court of Appeal that such a thing might be suggested illustrates a general lack of clarity about the purpose of the rule. It is not simply that there is disagreement over the purpose of the rule; it is more that the history of the rule is marred by an absence of concern with questions of purpose and rationale.

3.5 Remoteness

Foreseeability of some kind is inherent in the rule as initially stated. The decision in *Cambridge Water* (extracted and discussed in Section 4.1) employed an historical analysis to interpret *Rylands* as an aspect of the law of nuisance, and thus determined that the normal rules on remoteness of damage, as expressed in *The Wagon Mound*, apply also to *Rylands v Fletcher*. Not only must the accumulated thing be liable to do mischief if it escapes, but the eventual damage must in a relevant sense be foreseeable. On the rather peculiar facts of *Cambridge Water* itself, the absence of foreseeability in respect of the claimants' damage was plain; but that damage was unforeseeable in a number of different ways.

3.6 Non-natural User

In the most recent cases, the idea of 'non-natural user', derived from the judgment of Lord Cairns, has received more direct and sustained consideration. We noted earlier that in his article 'Non-natural User and *Rylands v Fletcher*', Newark argued that Lord Cairns had used the expression in a number of different ways, but that its essence as he used it lay in the contrast between 'natural' and 'artificial' uses of the land. That meaning has now been confined to history, being described by Lord Goff as being 'redolent of a different age' (*Cambridge Water v Eastern Counties Leather plc*). It is in *Rickards v Lothian* [1913] AC 263, and specifically in the following statement, that the origins of the modern approach to non-natural user are now recognized to lie:

p. 731 ↵

> **Lord Moulton, *Rickards v Lothian*, at 280**
>
> It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.

Lord Moulton's idea that the use should not be merely 'ordinary' is the basis for the reasoning in recent case law, where Lord Bingham has suggested that the terminology of 'ordinary user' is preferable to that of 'natural user' (*Transco v Stockport*, extracted later in this chapter, at [11]). But there has been general rejection of the other element in Lord Moulton's statement, that use 'for the general benefit of the community' should be sufficient to make out the defence.

The newer interpretations of non-natural user, based on Lord Moulton's statement, are further considered later in this chapter.

4 Categorization and Boundaries

4.1 The English Approach: A Species of Nuisance

After much conflicting and inconclusive case law, two House of Lords decisions have considered and retained the rule: *Cambridge Water v Eastern Counties Leather plc* [1994] 2 AC 264, and *Transco v Stockport MBC* [2003] UKHL 61; [2004] 2 AC 1. These cases have considered the categorization of the rule, and have clarified the contents of the applicable tests of foreseeability and of natural user, respectively.

Cambridge Water v Eastern Counties Leather plc: Foreseeability and Non-natural User

The defendants (ECL) were leather manufacturers operating from a site on an industrial village in Sawston, near Cambridge. In the course of their business, they used a chlorinated solvent, perchloroethene (PCE). Quantities of PCE were stored in drums on their premises.

The plaintiffs (CWC) owned a borehole at Sawston Mill, from which they extracted water. This water was supplied to domestic users. The borehole was 1.3 miles from the defendants' premises. At the time that the plaintiffs bought Sawston Mill, the presence of PCE in a public water supply was not a matter for concern. Subsequently, pursuant to a European Council Directive (80/778/EEC), the Department of the Environment set a standard for the presence of PCE among other compounds in water intended for domestic use. The water from Sawston Mill was subsequently tested, and it was found that the concentrations of PCE in the water were many times higher than the permitted levels. In 1983, the plaintiffs ceased extracting water from Sawston Mill. They initiated a complex investigation, which traced the PCE levels in the water to the defendants' operations.

p. 732 ↵ Lord Goff discussed the applicability and interpretation of the remoteness criterion in nuisance and continued:

Cambridge Water Co v Eastern Counties Leather plc
[1994] 2 AC 264

Lord Goff of Chieveley

Foreseeability of damage under the rule in *Rylands v. Fletcher*

[Lord Goff quoted from the passage of Blackburn J's judgment extracted in Section 2 above and continued:]

In that passage, Blackburn J. spoke of 'anything *likely* to do mischief if it escapes;' and later he spoke of something 'which he *knows* to be mischievous if it gets on his neighbour's [property],' and the liability to 'answer for the natural *and anticipated* consequences.' Furthermore, time and again he spoke of the strict liability imposed upon the defendant as being that he must keep the thing in at his peril; and, when referring to liability in actions for damage occasioned by animals, he referred, at p. 282, to the established principle that 'it is quite immaterial whether the escape is by negligence or not.' The general tenor of his statement of principle is therefore that knowledge, or at least foreseeability of the risk, is a prerequisite of the recovery of damages under the principle; but that the principle is one of strict liability in the sense that the defendant may be held liable notwithstanding that he has exercised all due care to prevent the escape from occurring.

There are, however, early authorities in which foreseeability of damage does not appear to have been regarded as necessary: see, e.g., *Humphries v. Cousins* (1877) 2 C.P.D. 239. Moreover, it was submitted by Mr Ashworth for C.W.C. that the requirement of foreseeability of damage was negatived in two particular cases, the decision of the Court of Appeal in *West v. Bristol Tramways Co.* [1908] 2 K.B. 14 and the decision of this House in *Rainham Chemical Works Ltd v. Belvedere Fish Guano Co. Ltd* [1921] 2 A.C. 465.

I feel bound to say that these two cases provide a very fragile base for any firm conclusion that foreseeability of damage has been authoritatively rejected as a prerequisite of the recovery of damages under the rule in *Rylands v. Fletcher.* Certainly, the point was not considered by this House in the *Rainham Chemical* case. In my opinion, the matter is open for consideration by your Lordships in the present case ...

The point is one on which academic opinion appears to be divided. ... However, quite apart from the indications to be derived from the judgment of Blackburn J. in *Fletcher v. Rylands*, L.R. 1 Ex. 265 itself, to which I have already referred, the historical connection with the law of nuisance must now be regarded as pointing towards the conclusion that foreseeability of damage is a prerequisite of the recovery of damages under the rule. I have already referred to the fact that Blackburn J. himself did not regard his statement of principle as having broken new ground; furthermore, Professor Newark has convincingly shown that the rule in *Rylands v. Fletcher* was essentially concerned with an extension of the law of nuisance to cases of isolated escape. Accordingly since, following the observations of Lord Reid when delivering the advice of the Privy Council in *The Wagon Mound (No. 2)*

[1967] 1 A.C. 617, 640, the recovery of damages in private nuisance depends on foreseeability by the defendant of the relevant type of damage, it would appear logical to extend the same requirement to liability under the rule in *Rylands v. Fletcher*.

p. 733 ↵ Even so, the question cannot be considered solely as a matter of history. It can be argued that the rule in *Rylands v. Fletcher* should not be regarded simply as an extension of the law of nuisance, but should rather be treated as a developing principle of strict liability from which can be derived a general rule of strict liability for damage caused by ultra-hazardous operations, on the basis of which persons conducting such operations may properly be held strictly liable for the extraordinary risk to others involved in such operations. As is pointed out in *Fleming on the Law of Torts*, pp. 327–328, this would lead to the practical result that the cost of damage resulting from such operations would have to be absorbed as part of the overheads of the relevant business rather than be borne (where there is no negligence) by the injured person or his insurers, or even by the community at large. Such a development appears to have been taking place in the United States, as can be seen from section 519 of the *Restatement of the Law (Second) Torts* 2d, vol. 3, pp. 34–36. The extent to which it has done so is not altogether clear; and I infer from section 519, and the Comment on that paragraph, that the abnormally dangerous activities there referred to are such that their ability to cause harm would be obvious to any reasonable person who carried them on.

I have to say, however, that there are serious obstacles in the way of the development of the rule in *Rylands v. Fletcher* in this way. First of all, if it was so to develop, it should logically apply to liability to all persons suffering injury by reason of the ultra-hazardous operations; but the decision of this House in *Read v. J. Lyons & Co. Ltd* [1947] A.C 156, which establishes that there can be no liability under the rule except in circumstances where the injury has been caused by an escape from land under the control of the defendant, has effectively precluded any such development. ... there is much to be said for the view that the courts should not be proceeding down the path of developing such a general theory. In this connection, I refer in particular to the Report of the Law Commission on Civil Liability for Dangerous Things and Activities (1970) (Law Com. No. 32). In paragraphs 14–16 of the Report, the Law Commission expressed serious misgivings about the adoption of any test for the application of strict liability involving a general concept of 'especially dangerous' or 'ultra-hazardous' activity, having regard to the uncertainties and practical difficulties of its application. If the Law Commission is unwilling to consider statutory reform on this basis, it must follow that judges should if anything be even more reluctant to proceed down that path.

Like the judge in the present case, I incline to the opinion that, as a general rule, it is more appropriate for strict liability in respect of operations of high risk to be imposed by Parliament, than by the courts. If such liability is imposed by statute, the relevant activities can be identified, and those concerned can know where they stand. Furthermore, statute can where appropriate lay down precise criteria establishing the incidence and scope of such liability.

It is of particular relevance that the present case is concerned with environmental pollution. The protection and preservation of the environment is now perceived as being of crucial importance to the future of mankind; and public bodies, both national and international, are taking significant steps towards the establishment of legislation which will promote the protection of the environment,

and make the polluter pay for damage to the environment for which he is responsible—as can be seen from the W.H.O., E.E.C. and national regulations to which I have previously referred. But it does not follow from these developments that a common law principle, such as the rule in *Rylands v. Fletcher*, should be developed or rendered more strict to provide for liability in respect of such pollution. On the contrary, given that so much well-informed and carefully structured legislation is now being put in place for this purpose, there is less need for the courts to develop a common law principle to achieve the same end, and indeed it may well be undesirable that they should do so.

p. 734 ↵ Having regard to these considerations, and in particular to the step which this House has already taken in *Read v. J. Lyons & Co. Ltd* [1947] A.C. 156 to contain the scope of liability under the rule in *Rylands v. Fletcher*, it appears to me to be appropriate now to take the view that foreseeability of damage of the relevant type should be regarded as a prerequisite of liability in damages under the rule. Such a conclusion can, as I have already stated, be derived from Blackburn J.'s original statement of the law; and I can see no good reason why this prerequisite should not be recognised under the rule, as it has been in the case of private nuisance. ... It would moreover lead to a more coherent body of common law principles if the rule were to be regarded essentially as an extension of the law of nuisance to cases of isolated escapes from land, even though the rule as established is not limited to escapes which are in fact isolated. I wish to point out, however, that in truth the escape of the P.C.E. from E.C.L.'s land, in the form of trace elements carried in percolating water, has not been an isolated escape, but a continuing escape resulting from a state of affairs which has come into existence at the base of the chalk aquifer underneath E.C.L.'s premises. Classically, this would have been regarded as a case of nuisance; and it would seem strange if, by characterising the case as one falling under the rule in *Rylands v. Fletcher,* the liability should thereby be rendered more strict in the circumstances of the present case.

The facts of the present case

Turning to the facts of the present case, it is plain that, at the time when the P.C.E. was brought onto E.C.L.'s land, and indeed when it was used in the tanning process there, nobody at E.C.L. could reasonably have foreseen the resultant damage which occurred at C.W.C.'s borehole at Sawston.

...

Natural use of land

I turn to the question whether the use by E.C.L. of its land in the present case constituted a natural use, with the result that E.C.L. cannot be held liable under the rule in *Rylands v. Fletcher*. In view of my conclusion on the issue of foreseeability, I can deal with this point shortly. ...

It is a commonplace that this particular exception to liability under the rule has developed and changed over the years. It seems clear that, in *Fletcher v. Rylands*, L.R. 1 Ex. 265 itself, Blackburn J.'s statement of the law was limited to things which are brought by the defendant onto his land, and so did not apply to things that were naturally upon the land. Furthermore, it is doubtful whether in the House of Lords in the same case Lord Cairns, to whom we owe the expression 'non-natural use' of

> the land, was intending to expand the concept of natural use beyond that envisaged by Blackburn J. Even so, the law has long since departed from any such simple idea, redolent of a different age; and, at least since the advice of the Privy Council delivered by Lord Moulton in *Rickards v. Lothian* [1913] A.C. 263, 280, natural use has been extended to embrace the ordinary use of land. ... *Rickards v. Lothian* itself was concerned with a use of a domestic kind, viz. the overflow of water from a basin whose runaway had become blocked. But over the years the concept of natural use, in the sense of ordinary use, has been extended to embrace a wide variety of uses, including not only domestic uses but also recreational uses and even some industrial uses.
>
> . ... Fortunately, I do not think it is necessary for the purposes of the present case to attempt any
> p. 735 redefinition of the concept of natural or ordinary use. This is because I am satisfied that ↵ the storage of chemicals in substantial quantities, and their use in the manner employed at E.C.L.'s premises, cannot fall within the exception. ... It may well be that, now that it is recognised that foreseeability of harm of the relevant type is a prerequisite of liability in damages under the rule, the courts may feel less pressure to extend the concept of natural use to circumstances such as those in the present case; and in due course it may become easier to control this exception, and to ensure that it has a more recognisable basis of principle. For these reasons, I would not hold that E.C.L. should be exempt from liability on the basis of the exception of natural use.

Commentary

Foreseeability

The decisive finding of the House of Lords in this case was that reasonable foreseeability is an essential element of liability in *Rylands v Fletcher*, just as it is in nuisance. There were several stages in the reasoning that led to this conclusion.

First, Blackburn J's own statement of the rule incorporated the idea that the substance accumulated is 'likely' to do damage if it escapes. Although there is some case law which does not require that there should be foreseeability, this case law is limited and offers a 'fragile basis' for an argument against a foreseeability requirement. Second, *Rylands v Fletcher* is accepted to be a branch of nuisance, relating to isolated escapes. Therefore, the development of a remoteness rule for nuisance in the form of reasonable foreseeability, as explained in *The Wagon Mound (No 2)*, could not have been intended to bypass *Rylands v Fletcher*. Here Lord Goff leans heavily on Professor Newark's classic article, 'The Boundaries of Nuisance' (1949) 65 LQR 480, as revealing the true historical basis of *Rylands v Fletcher*. This element of the reasoning in *Cambridge Water* has been extremely important, for example, in the *Transco* decision.

Third, Lord Goff rejected an invitation to develop the principle in *Rylands* beyond its narrow confines and to see it as part of a developing principle of strict liability for ultra-hazardous operations, in which case he might be free to dispense with the 'reasonable foreseeability' criterion. His rejection of this invitation was supported by three separate reasons:

(a) If there is to be a principle of strict liability for ultra-hazardous activities, why would this be limited to cases of escape, as *Rylands v Fletcher* has been? Here of course it may be objected that *Read v Lyons* (1947) AC 156 could be overruled, if it was thought that a broadened principle would be desirable. But the difficulty remains that there is no clear principled basis to the rule which would set alternative limits to it.

(b) The Law Commission considered a general principle of strict liability for dangerous activities in 1970, and rejected the idea of statutory development (*Report of the Law Commission on Civil Liability for Dangerous Things and Activities* (Law Com Report No 32, 1970)). Therefore the common law should be still more wary.

(c) The case is one of environmental pollution, and it is wise for the common law not to become too involved in this specialized and evolving area.

On the face of it, this third reason may be the weakest. Judges sometimes underestimate the extent to which Parliament works around rules of common law and takes a lead from the principles which are embedded in that law. On the other hand, Lord Goff's words of caution are not without justification. In particular, the evolution of environmental law involves considerable change having an impact on a wide variety of interests.
p. 736 Statutory liabilities ↵ generally take effect *prospectively*, and those whose interests are affected may be given fair warning of change to come.

When it came to addressing the facts of the case, however, it is not entirely clear which type of foreseeability Lord Goff had in mind, since it is not clear which particular element of the facts made the damage in a relevant sense unforeseeable. In a brief statement on the subject, Lord Goff refers to 'foreseeability of damage'. He does not explicitly require that the escape should be foreseeable. Should we conclude that the escape need not be foreseeable? Not necessarily. Damage may be unforeseeable *because* the escape is unforeseeable. Capturing this ambiguity, two different potential meanings of foreseeability in the context of this case are identified in the following extract.

David Wilkinson, '*Cambridge Water Company v Eastern Counties Leather plc:* Diluting Liability for

Continuing Escapes' (1994) 57 MLR 799–811, at 803–4

> **… Consider the following options.**
>
> - Strict liability means that liability is limited to foreseeable damage and, in determining what damage is foreseeable, the escape itself is not to be assumed. On this view, a defendant would be liable for only that damage caused by the escape which a reasonable bystander would have anticipated. The foreseeability of the escape itself is an integral part of foreseeability of damage. If no escape is foreseeable then, as a matter of logic, no damage of any kind is foreseeable. We may refer to this view as 'full foreseeability.'
> - Strict liability means that liability is limited to foreseeable damage and, in determining what damage was foreseeable, the escape is to be assumed (whether or not it was foreseeable). On this view, a defendant would be liable for all damage caused by the escape that a reasonable bystander, upon being informed of the escape, would have anticipated. The foreseeability of the escape is irrelevant to the foreseeability of damage. We may refer to this as 'semi-foreseeability' …
> - Strict liability means that foreseeability is irrelevant to liability. On this view, a defendant would be liable for all damage caused by the escape, whether or not foreseeable. This view is no longer tenable in the light of the present case.

It seems likely that Lord Goff had in mind the reasons given by the first instance judge, Kennedy J, for saying that the damage was unforeseeable for the purposes of an action in either nuisance or negligence. The appeal to the House of Lords concerned the question of whether absence of foreseeability *also* ruled out an action in *Rylands v Fletcher*. The reasons given by Kennedy J were summarized by Lord Goff (at 292) in his judgment as follows. The reasons are multiple, reflecting the facts of this particular case:

Lord Goff
[1994] 2 AC 264, at 292

> However, as the judge found, a reasonable supervisor at ECL would not have foreseen, in or before 1976, that such repeated spillages of small quantities of solvent would lead to any environmental
> p. 737 hazard or damage—ie that the solvent would reach the aquifer or that, having ↵ done so, detectable quantities would be found down-catchment. *Even if he had foreseen that solvent might enter the aquifer, he would not have foreseen that such quantities would produce any sensible effect upon water taken down-catchment, or would otherwise be material or deserve the description of pollution.* … The only harm that could have been foreseen from a spillage was that somebody might have been overcome by fumes from a spillage of a significant quantity'.
>
> [Emphasis added]

If we do, as Wilkinson proposes, 'presume the escape', it was therefore not reasonably foreseeable in this case that the type of damage in question would be done. This 'additional' aspect of unforeseeability mentioned by Kennedy J and repeated by Lord Goff, italicized in the extract above, could be referred to as 'semi-

foreseeability' in Wilkinson's sense. Therefore, *both* forms of unforeseeability were present in *Cambridge Water*, and it is not possible to be entirely clear which one was decisive. 'Semi-foreseeability' would be more consistent with the general purpose of the rule in *Rylands v Fletcher*, than would full foreseeability.

The House of Lords in the later case of *Transco v Stockport MBC* gave a far clearer account of the foreseeability criterion and even appeared to treat the issue as clearly settled. Their interpretation does not require foreseeability of escape. Lord Bingham said that the foreseeability criterion will be satisfied 'however unforeseeable the escape', provided that the defendant ought to have recognized the risk of damage (at [10]); and Lord Hoffmann said (at [33]) that under *Rylands v Fletcher*, 'the defendant will be liable even if he could not reasonably have foreseen that there would be an escape'. As explained earlier, this interpretation is the most appropriate to the strict liability rule.

Non-natural User

Lord Goff added some comments on non-natural user, though they did not form part of the decision.

Lord Goff generally accepted that the principle of 'natural' user can be equated with 'ordinary' user. He was also clear that being 'for the general benefit of the community' is not sufficient to create an 'ordinary' user of land, and in this respect he disagreed with the first instance judge. Even though the defendant's activities were generally beneficial in providing local employment, this could not be a reason for defining their use as a 'natural' one. But he thought that there was some room for ambiguity in the space between these two clear cases, since some uses which are for the benefit of a *local* community will be thought to amount to a natural user: 'If these words [referring to the "benefit of the community"] are understood to refer to a local community, they can be given some content …'. Here, Lord Goff seems to have been thinking of accumulations which are of general or reciprocal benefit to all. Potential claimants may gain directly from the accumulation, or may have made similar accumulations of their own, as in the provision of domestic water supplies.

In any case, Lord Goff made very clear that the storage of chemicals in drums, no matter how appropriate that storage might be in the precise location stored, was not in his opinion capable of amounting to a 'natural user'. Neither appropriateness of the location, nor general public interest (for example, in providing local employment), were relevant tests to apply for the purposes of this criterion.

p. 738

Transco plc v Stockport Metropolitan Borough Council [2003] UKHL 61; [2004] 2 AC 1

The House of Lords was invited by counsel to follow the Australian lead, and to declare *Rylands v Fletcher* to have been absorbed by negligence. It declined to do so. The 'non-natural user' criterion was unanimously thought not to be satisfied where the use in question was provision of a domestic water supply to a block of flats. Additional reasons for rejecting the claim were offered by Lord Bingham (there was no accumulation of a 'dangerous' thing) and Lord Scott (there was no relevant escape). Lord Hoffmann's judgment merits separate consideration because it grapples with the boundaries of the strict liability rule, through the non-natural user criterion, not only through analysis of the case law, but also in policy terms.

The facts of the case are briefly summarized in the extract from Lord Bingham's judgment.

Lord Bingham of Cornhill

2 … The salient facts appear to me to be these. As a multi-storey block of flats built by a local authority and let to local residents, Hollow End Towers was typical of very many such blocks throughout the country. It had been built by the respondent council. The block was supplied with water for the domestic use of those living there, as statute has long required. Water was carried to the block by the statutory undertaker, from whose main the pipe central to these proceedings led to tanks in the basement of the block for onward distribution of the water to the various flats. The capacity of this pipe was much greater than the capacity of a pipe supplying a single dwelling, being designed to meet the needs of 66 dwellings. But it was a normal pipe in such a situation and the water it carried was at mains pressure. Without negligence on the part of the council or its servants or agents, the pipe failed at a point within the block with the inevitable result that water escaped. Since, again without negligence, the failure of the pipe remained undetected for a prolonged period, the quantity of water which escaped was very considerable. The lie and the nature of the council's land in the area was such that the large quantity of water which had escaped from the pipe flowed some distance from the block and percolated into an embankment which supported the appellant Transco's 16-inch high-pressure gas main, causing the embankment to collapse and leaving this gas main exposed and unsupported. There was an immediate and serious risk that the gas main might crack, with potentially devastating consequences. Transco took prompt and effective remedial measures and now seeks to recover from the council the agreed cost of taking them.

…

The future development of *Rylands v Fletcher*

…

10 It has from the beginning been a necessary condition of liability under the rule in *Rylands v Fletcher* that the thing which the defendant has brought on his land should be 'something which … will naturally do mischief if it escape out of his land' (LR 1 Ex 265, 279 per Blackburn J), 'something dangerous …', 'anything likely to do mischief if it escapes', 'something … harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's' (p 280), 'anything which, if it should escape, may cause damage to his neighbour' (LR 3 HL 330, 340, per Lord Cranworth). The practical problem is of course to decide whether in any given case the thing which has escaped
p. 739 satisfies this mischief or danger test, a problem exacerbated by the fact that many things not ordinarily regarded as sources of mischief or danger may none the less be capable of proving to be such if they escape. … Bearing in mind the historical origin of the rule, and also that its effect is to impose liability in the absence of negligence for an isolated occurrence, I do not think the mischief or danger test should be at all easily satisfied. It must be shown that the defendant has done something which he recognised, or judged by the standards appropriate

at the relevant place and time, he ought reasonably to have recognised, as giving rise to an exceptionally high risk of danger or mischief if there should be an escape, however unlikely an escape may have been thought to be.

11 … I think it clear that ordinary user is a preferable test to natural user, making it clear that the rule in *Rylands v Fletcher* is engaged only where the defendant's use is shown to be extraordinary and unusual. This is not a test to be inflexibly applied: a use may be extraordinary and unusual at one time or in one place but not so at another time or in another place (although I would question whether, even in wartime, the manufacture of explosives could ever be regarded as an ordinary user of land, as contemplated by Viscount Simon, Lord Macmillan, Lord Porter and Lord Uthwatt in *Read v J Lyons & Co Ltd* [1947] AC 156, 169–170, 174, 176–177, 186–187). I also doubt whether a test of reasonable user is helpful, since a user may well be quite out of the ordinary but not unreasonable, as was that of *Rylands, Rainham Chemical Works* or the tannery in *Cambridge Water*. Again, as it seems to me, the question is whether the defendant has done something which he recognises, or ought to recognise, as being quite out of the ordinary in the place and at the time when he does it. In answering that question, I respectfully think that little help is gained (and unnecessary confusion perhaps caused) by considering whether the use is proper for the general benefit of the community. In *Rickards v Lothian* itself, the claim arose because the outflow from a wash-basin on the top floor of premises was maliciously blocked and the tap left running, with the result that damage was caused to stock on a floor below: not surprisingly, the provision of a domestic water supply to the premises was held to be a wholly ordinary use of the land. An occupier of land who can show that another occupier of land has brought or kept on his land an exceptionally dangerous or mischievous thing in extraordinary or unusual circumstances is in my opinion entitled to recover compensation from that occupier for any damage caused to his property interest by the escape of that thing, subject to defences of Act of God or of a stranger, without the need to prove negligence.

The present appeal

…

13 It is of course true that water in quantity is almost always capable of causing damage if it escapes. But the piping of a water supply from the mains to the storage tanks in the block was a routine function which would not have struck anyone as raising any special hazard. In truth, the council did not accumulate any water, it merely arranged a supply adequate to meet the residents' needs. The situation cannot stand comparison with the making by Mr Rylands of a substantial reservoir. Nor can the use by the council of its land be seen as in any way extraordinary or unusual. It was entirely normal and routine. Despite the attractive argument of Mr Ian Leeming for Transco, I am satisfied that the conditions to be met before strict liability could be imposed on the council were far from being met on the facts here.

Lord Hoffmann

...

p. 740

The social background to the rule

28 Although the judgment of Blackburn J [in *Fletcher v Rylands*] is constructed in the traditional common law style of deducing principle from precedent, without reference to questions of social policy, Professor Brian Simpson has demonstrated in his article 'Legal Liability for Bursting Reservoirs: The Historical Context of *Rylands v Fletcher*' (1984) 13 J Leg Stud 209 that the background to the case was public anxiety about the safety of reservoirs, caused in particular by the bursting of the Bradfield Reservoir near Sheffield on 12 March 1864, with the loss of about 250 lives. The judicial response was to impose strict liability upon the proprietors of reservoirs. But, since the common law deals in principles rather than ad hoc solutions, the rule had to be more widely formulated.

29 It is tempting to see, beneath the surface of the rule, a policy of requiring the costs of a commercial enterprise to be internalised; to require the entrepreneur to provide, by insurance or otherwise, for the risks to others which his enterprise creates. That was certainly the opinion of Bramwell B, who was in favour of liability when the case was before the Court of Exchequer: (1865) 3 H & C 774. He had a clear and consistent view on the matter: see *Bamford v Turnley* (1862) 3 B & S 62, 84–85 and *Hammersmith and City Railway Co v Brand* (1867) LR 2 QB 223, 230–231. But others thought differently. They considered that the public interest in promoting economic development made it unreasonable to hold an entrepreneur liable when he had not been negligent. ... On the whole, it was the latter view—no liability without fault—which gained the ascendancy. With hindsight, *Rylands v Fletcher* can be seen as an isolated victory for the internalisers. The following century saw a steady refusal to treat it as laying down any broad principle of liability. . ...

Where stands the rule today?

39 I pause at this point to summarise the very limited circumstances to which the rule has been confined. First, it is a remedy for damage to land or interests in land. As there can be few properties in the country, commercial or domestic, which are not insured against damage by flood and the like, this means that disputes over the application of the rule will tend to be between property insurers and liability insurers. Secondly, it does not apply to works or enterprises authorised by statute. That means that it will usually have no application to really high risk activities. As Professor Simpson points out (1984) 13 J Leg Stud 225 the Bradfield Reservoir was built under statutory powers. In the absence of negligence, the occupiers whose lands had been inundated would have had no remedy. Thirdly, it is not particularly strict because it excludes liability when the escape is for the most common reasons, namely vandalism or unusual natural events. Fourthly, the cases in which there is an escape which is not attributable to an unusual natural event or the act of a third party will, by the same token,

usually give rise to an inference of negligence. Fifthly, there is a broad and ill-defined exception for 'natural' uses of land. It is perhaps not surprising that counsel could not find a reported case since the second world war in which anyone had succeeded in a claim under the rule. It is hard to escape the conclusion that the intellectual effort devoted to the rule by judges and writers over many years has brought forth a mouse.

Is it worth keeping?

40 In *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 a majority of the High Court of Australia lost patience with the pretensions and uncertainties of the rule and decided that it had been 'absorbed' into the law of negligence. Your Lordships have been invited by the
p. 741 respondents to kill off the rule in England in similar fashion. It is said, first, that in its present attenuated form it serves little practical purpose; secondly, that its application is unacceptably vague ('an essentially unprincipled and ad hoc subjective determination' said the High Court (at p 540) in the *Burnie* case) and thirdly, that strict liability on social grounds is better left to statutory intervention.

41 There is considerable force in each of these points. It is hard to find any rational principle which explains the rule and its exceptions. ... And the proposition that strict liability is best left to statute receives support from the speech of Lord Goff of Chieveley in the *Cambridge Water* case ...

...

43 But despite the strength of these arguments, I do not think it would be consistent with the judicial function of your Lordships' House to abolish the rule. It has been part of English law for nearly 150 years and despite a searching examination by Lord Goff of Chieveley in the *Cambridge Water* case [1994] 2 AC 264, 308, there was no suggestion in his speech that it could or should be abolished. I think that would be too radical a step to take.

44 It remains, however, if not to rationalise the law of England, at least to introduce greater certainty into the concept of natural user which is in issue in this case. In order to do so, I think it must be frankly acknowledged that little assistance can be obtained from the kinds of user which Lord Cairns must be assumed to have regarded as 'non-natural' in *Rylands v Fletcher* itself. ... Whatever Blackburn J and Lord Cairns may have meant by 'natural', the law was set on a different course by the opinion of Lord Moulton in *Rickards v Lothian* [1913] AC 263 and the question of what is a natural use of land or, (the converse) a use creating an increased risk, must be judged by contemporary standards.

45 Two features of contemporary society seem to me to be relevant. First, the extension of statutory regulation to a number of activities, such as discharge of water (section 209 of the Water Industry Act 1991) pollution by the escape of waste (section 73(6) of the Environmental Protection Act 1990) and radioactive matter (section 7 of the Nuclear Installations Act 1965). It may have to be considered whether these and similar provisions create an exhaustive code of liability for a particular form of escape which excludes the rule in *Rylands v Fletcher.*

46 Secondly, so far as the rule does have a residuary role to play, it must be borne in mind that it is concerned only with damage to property and that insurance against various forms of damage to property is extremely common. A useful guide in deciding whether the risk has been created by a 'non-natural' user of land is therefore to ask whether the damage which eventuated was something against which the occupier could reasonably be expected to have insured himself. Property insurance is relatively cheap and accessible; in my opinion people should be encouraged to insure their own property rather than seek to transfer the risk to others by means of litigation, with the heavy transactional costs which that involves. The present substantial litigation over £100,000 should be a warning to anyone seeking to rely on an esoteric cause of action to shift a commonplace insured risk.

47 In the present case, I am willing to assume that if the risk arose from a 'non-natural user' of the council's land, all the other elements of the tort were satisfied...

48 The damage which eventuated was subsidence beneath a gas main: a form of risk against which no rational owner of a gas main would fail to insure. The casualty was caused by the escape of water from the council's land. But the source was a perfectly normal item of
p. 742 plumbing. The pipe was, it is true, considerably larger than the ordinary domestic size. But it was smaller than a water main. It was installed to serve the occupiers of the council's high rise flats; not strictly speaking a commercial purpose, but not a private one either.

49 In my opinion the Court of Appeal was right to say that it was not a 'non-natural' user of land. I am influenced by two matters. First, there is no evidence that it created a greater risk than is normally associated with domestic or commercial plumbing. ... I agree with my noble and learned friend, Lord Bingham of Cornhill, that the criterion of exceptional risk must be taken seriously and creates a high threshold for a claimant to surmount. Secondly, I think that the risk of damage to property caused by leaking water is one against which most people can and do commonly insure. This is, as I have said, particularly true of Transco, which can be expected to have insured against any form of damage to its pipe. It would be a very strange result if Transco were entitled to recover against the council when it would not have been entitled to recover against the water authority for similar damage emanating from its high-pressure main.

...

Lord Hobhouse of Woodborough

52 I consider that the rule is, when properly understood, still part of English law and does comprise a useful and soundly based component of the law of tort as an aspect of the law of private nuisance. It derives from the use of land and covers the division of risk as between the owner of the land in question and other landowners. It is not concerned with liability for personal injuries which is covered by other parts of the law of torts (*Read v J Lyons & Co Ltd* [1947] AC 156) and which does not rise for discussion in this case ...

> 54 The salient features of the rule are easily identified: the self interest of the landowner, his conduct in bringing or keeping on his land something dangerous which involves a risk of damaging his neighbours' property, the avoidance of such damage by ensuring that the danger is confined to his own property and liability to his neighbours if he fails to do so, subject to a principle of remoteness. The subsequent complications and misunderstandings have arisen, not from the original rule and its rationale, but from additional criteria, often inappropriately expressed, introduced in later cases.

Comments

Although there were no dissenting judgments, the members of the House of Lords varied widely in their emphasis and in their reasons for retaining the rule in *Rylands v Fletcher*. Lord Bingham clarified the content of the rule, suggesting that the mischief or danger test should be hard to satisfy, and that it is preferable to refer to 'ordinary' rather than to 'natural' user. On the other hand, he made it clear that 'ordinary' is not a synonym for 'reasonable'; that a perfectly reasonable use of land may well be judged 'non-natural'; and that public utility will (additionally) be no defence. Although Lord Bingham thought that the conditions of the rule should be hard to fulfil, he also thought that there are circumstances in which it is still justified. Specifically, he mentioned the facts of *Cambridge Water*, had there been foreseeability of damage, as well as older cases. In these cases, he suggested that strict liability is 'just'. While he considered that any *extension* of the principle in *Rylands* would be better left to legislation, he made the point that to abrogate the existing rule may well be to 'falsify' the assumption on which various statutory strict liabilities had been enacted, and that this step
p. 743 should therefore be avoided. It is clear from Lord Bingham's judgment that personal injury ↵ damages will not be available in *Rylands v Fletcher*. He also thought there had been no relevantly hazardous accumulation of a 'dangerous' thing on these specific facts.

Lord Hobhouse appeared to be the most enthusiastic of their Lordships about the retention of strict liability under *Rylands v Fletcher*. He defended the justice and coherence of the rule in *Rylands*, arguing that the many confusions concerning its extent are created by later cases, and are not aspects of the original rule. However, this does not deal with the question of why there should be rather arbitrary limitations (especially the requirement of an escape) inherent in a rule that is supposedly based on defensible principles. Lord Hobhouse implies that strict liability was a more familiar and widely accepted principle of liability at the time of the decision in *Rylands v Fletcher* than it is today. His historical account here differs, at least in its emphasis, from that of A. W. B. Simpson, who has suggested that fault was already on the ascendant at the time that *Rylands* was decided, and who has proposed that the decision was primarily a reaction to the problem of bursting reservoirs.

A. W. B. Simpson, 'Bursting Reservoirs and Victorian Tort Law: *Rylands and Horrocks v Fletcher'*, in Simpson, *Leading Cases in the Common Law* (Oxford: Oxford University Press, 1996), 195–226, at 197–8; by

permission of Oxford University Press

> Writers on the common law have long regarded *Rylands v Fletcher* as an anomalous decision. Back in the nineteenth century Pollock criticised it in his treatise on the law of torts; Holmes had considerable difficulty fitting it into his general theory of tort law. A commonly held view used to be that the original common law proceeded on the basis that a man acted at his peril, but this harsh doctrine was progressively relaxed in the nineteenth century with the reception of the principle of liability only for negligent conduct. The law was thus moralized, and *Rylands v Fletcher* can only be explained as an atavistic decision, a throwback or a survival of more primitive times. This picture of legal development would today not be accepted by serious legal historians, but the alternative story still leaves much to be explained. It goes like this. Before the nineteenth century, questions of fault, contributory fault, assumption of risk, standards of appropriate behaviour, causation, and so forth, certainly arose in litigation. But there was virtually no law about them. They were treated as jury questions, to be handled in the main by lay common sense. The trial judge might well give the jury some guidance, but what he said was not subject to review and did not feature in law reports or legal treatises. What happened in the nineteenth century was the creation of law on issues where there had been none before. But on this view *Rylands v Fletcher* still appears puzzling, for it was decided at the end of a period in which the negligence principle had been steadily gaining ground through the extension of the tort of negligence.
>
> The numerous judges who were involved in the case must have been aware that, if tort law was to incorporate two different principles of liability, there was a need to explain the relationship between them. Only two of them attempted to do so. One was Bramwell B., who favoured strict liability in his dissenting opinion in the Court of Exchequer, and the other was Blackburn J. … Bramwell B dealt with the problem very briefly, but thought that in collision cases the negligence principle had to apply as a matter of logic, and this because of a problem over causation … Blackburn J, the judge most closely associated with the so-called rule in *Rylands v Fletcher*, offered a much more radical theory. It was that the *primary* principle of tort law was that of strict liability. The negligence principle applied only as an exception in situations in which people had, by implication, agreed that it should—the theory of assumption of risk. …
>
> p. 744 ↵ Blackburn's theory was not very convincing, but his contention that strict liability was the norm was stated in an opinion agreed by Willes, Keating, Mellor, Montague Smith, and Lush JJ … It seems as if Willes J and his colleagues were persuaded in *Rylands v Fletcher* that strict liability was the basic common law rule, and fault liability the exception. This, viewed at least from a modern perspective, seems to reverse the natural order of things, and certainly nothing of the sort had ever been said in the nineteenth century before this.

The way in which the rule in *Rylands v Fletcher* was restrictively interpreted in early cases such as *Carstairs v Taylor* (1871) LR 6 Ex 217, *Nicholls v Marsland* (1868) 2 Ex D 1, and even *Jones v Festiniog Railway* (1868) [LR] 3 QB, suggests that many nineteenth-century courts did not find the idea of strict liability in this particular context as natural and comfortable as Lord Hobhouse implies. If they had, then a more robust rule, and a clearer rationale, would surely have developed in the years immediately following the decision in *Rylands v Fletcher* itself.

Lord Hoffmann's Interpretation

Lord Hoffmann's general interpretation of the rule, or what is left of it, is almost as negative as the majority judgment in *Burnie Port Authority v General Jones Pty* (1994) 179 CLR 520 (extracted later in this chapter), but for different reasons. Like the High Court of Australia, Lord Hoffmann contends that the rule in *Rylands* is now of very limited application. However, he concludes that this is the case not because of the ability of negligence to apply on the same facts, but because the most exceptional or dangerous uses of land are now dealt with via statute. In many cases, the relevant 'accumulation' will today be permitted by statute, giving rise to a defence of statutory authority. In Lord Hoffmann's analysis, the recognition of this defence is one of the key reasons why claims under *Rylands v Fletcher* are now so rarely successful. In other cases, there will be a statutory regime of *liability* in force, which will displace the common law rule, and frequently exceed it. Lord Hoffmann offers a number of examples. In these instances, the relevant liability is strict, and excludes defences such as 'act of God' or of a third party.[10] In the particular case before the House, Lord Hoffmann points out (at [42]) that the claimant gas company would have been barred, by statute, from claiming if the leak had been from water mains belonging to a water authority (Water Industry Act 1991, section 209(3)(b)). This provision governs the distribution between two public utilities of a particular sort of risk, and also precludes expensive transaction costs involved in litigation between these utilities at the expense of users. By extension, Lord Hoffmann considered that this was a reason why litigation was also inappropriate between the gas supplier and the local authority. The gas company would be imprudent not to seek insurance against the possibility of damage caused by flooding. A first party insurance solution was regarded as preferable by Lord Hoffmann, primarily because of the lower transaction costs.

But Lord Hoffmann's preoccupation with distributive questions went further than this. Importantly, he suggested that the ambit of the rule in *Rylands v Fletcher*, and particularly the non-natural user criterion,
p. 745 should itself now be understood in terms of insurability. If ↵ an occupier of land can reasonably be expected to insure against the kind of danger posed by the defendant's use of land, then that use should on his analysis be seen as a 'natural user'. It appears to be only those risks that are *not* readily insurable by those exposed to them that will count as 'non-natural' (or extraordinary) uses.

This approach identifies a reason of policy which might both justify the retention of the rule, and at the same time be used to keep it within ascertainable limits, without heavy reliance on artificial concepts such as 'escape'. We should notice that this solution is in an important respect more restricted in its scope than the Australian approach, which recognized a strict form of liability between neighbours, via the tort of negligence. In the Australian approach outlined later, the activity carried on by the defendant occupier must be shown to be hazardous. However, many hazardous activities, which might fit the definition in *Burnie Port Authority*, are also insurable. The Australian approach places the burden of insurable losses on the defendant so long as they arise from a relevantly hazardous activity, and of course provided a relevant standard of care has been breached. Lord Hoffmann would place the burden of insuring against such losses on the claimant, provided the risk is readily insurable.

The question of whether a user is non-natural therefore becomes one of who should pay for insurance to cover the risk that the activity creates. On Lord Hoffmann's approach, the far lower transaction costs associated with insuring against one's own losses, when compared with the costs of litigation, suggest that first party insurance is to be preferred where this is possible. It can readily be seen why this might be

appropriate as between two public utilities, or between a public utility and a local authority, as in *Transco* itself. But is it generally a sound means of distinguishing natural from non-natural user, and therefore for establishing and rationalizing the boundary between strict liability and negligence? Here we should note again that ever since its inception, *Rylands* has been a rule in search of a robust rationale.

It is suggested that more empirical information would be required before reaching a conclusion on this. For example, we might ask what is the most *efficient* allocation of the burden of insurance, drawing attention to the importance of risk-rating. How can insurers establish the appropriate *cost* of insurance, if they deal only with those who are *exposed to* risk? In most such situations, the risk-creator has the fullest information about the risk. This may be adapted to a point about coverage. Will a potential claimant have sufficient knowledge to ensure that they *seek* insurance? The issue of insurability also raises an issue of fairness, which was mentioned by Lord Hobhouse in the extract earlier. Who ought to bear the *cost* of insurance? In the circumstances of *Rylands v Fletcher* liability, many claimants and defendants will be linked only by physical neighbourhood, and not (for example) by contractual or quasi-contractual relationships such as employment or consumer-producer relationships; nor will they have an immediate correspondence in interests. Here, there is no direct way in which the cost of insurance (if imposed primarily on defendants) will be passed to the group of potential claimants; nor will it be shared directly with prospective claimants in renewed premiums, as in motor insurance. It makes sense in this context to discuss the *fairness* of the burden of insurance, and on whom it should fall. However, this analysis does not fit so well where the defendant is a public utility or public authority, and this underlines the significance of Lord Hoffmann's observations concerning the vital importance of statutory intervention into most cases of dangerous accumulation. In *Cordin* (n 10 in this chapter), the judge discussed Lord Hoffmann's approach in *Transco* but decided not to be guided by considerations of insurability. His reasons were that (a) the House of Lords had not been unanimous as to its relevance; (b) in the case of flooding, the claimants' loss may turn out not to be commercially insurable; and (c) the correct approach was really a matter for Parliament, which had decided to impose strict liability through the Water Resources Act 1991, section 209.

p. 746 ↵ At a much more general level, Lord Hoffmann's approach is important because it gives reasons based in distributive concerns, for limiting the ambit of the strict liability rule. It therefore directly counters any suggestion that the principle of strict liability ought to be developed further into a general principle relating to dangerous activities, and it gives some distributive reasons why 'internalization' through liability may not be the appropriate way forward. Thus, even if we move our discussion to distributive questions Lord Hoffmann's approach suggests that the 'internalizers' should not be allowed to have things all their own way. In this, he continues an academic discussion that he initiated in *Wildtree Hotels* [2011] 2 AC 1, concerning a particular and long-lived economic interpretation of private nuisance.

4.2 Australian High Court: Non-Delegable Duties in Negligence

Soon after the House of Lords' decision in *Cambridge Water v Eastern Counties Leather plc*, the High Court of Australia decided that *Rylands*-type cases should generally be dealt with by the tort of negligence. The High Court's conclusion that there was liability *in negligence* on the facts of *Burnie Port Authority* illustrates both that the tort of negligence is not always permeated by a concern with personal 'fault'; and that the idea of fault is so adaptable that it may sometimes impose stringent duties on individuals, dependent on the activity being

carried out. Whose duty was it to take care, and what degree of care was required? Since the duty was non-delegable, it amounted to a positive duty to take action. On the other hand, the content of the duty relates to 'taking care': it takes the *form* of a duty to *ensure that care is taken*. The High Court recognized that the *standard* of care would be variable, depending on the hazardous nature of the activity. We have already noted, in Section 1 of this chapter, that in *Woodland v Swimming Teachers Association*, the UK Supreme Court has recognized an extension of non-delegable duties of care and has described *Rylands* liability itself as based upon the special relationship between neighbouring occupiers. But it has not used that insight in order to absorb *Rylands* into the tort of negligence, as the Australian High Court did.

Burnie Port Authority had retained an independent contractor to carry out building work. This work involved welding in close proximity to cartons of Isolite, a highly flammable substance. Through the contractors' negligence, a fire started which spread to premises occupied by the plaintiff, ruining a quantity of the plaintiffs' frozen vegetables. This case recalls the facts of *Rylands v Fletcher* itself, where there had been negligence on the part of the contractors employed to construct the reservoir.

Burnie Port Authority v General Jones Pty Ltd
(1994) HCA 13; 179 CLR 520; 120 ALR 42 (High Court of Australia)

Conclusion

42. Once it is appreciated that the special relationship of proximity which exists in circumstances which would attract the rule in Rylands v Fletcher gives rise to a non-delegable duty of care and that the dangerousness of the substance or activity involved in such circumstances will heighten the degree of care which is reasonable, it becomes apparent, subject to one qualification, that the stage has been reached where it is highly
p. 747 unlikely that liability will not exist under the principles of ordinary negligence in any case where liability would exist under the rule in Rylands v Fletcher …

…

43. The qualification mentioned in the preceding paragraph is that there may remain cases in which it is preferable to see a defendant's liability in a Rylands v Fletcher situation as lying in nuisance (or even trespass) and not in negligence. … It follows that the main consideration favouring preservation of the rule in Rylands v Fletcher, namely, that the rule imposes liability in cases where it would not otherwise exist, lacks practical substance. In these circumstances, and subject only to the above-mentioned possible qualification in relation to liability in nuisance, the rule in Rylands v Fletcher, with all its difficulties, uncertainties, qualifications and exceptions, should now be seen, for the purposes of the common law of this country, as absorbed by the principles of ordinary negligence. Under those principles, a person who takes advantage of his or her control of premises to introduce a dangerous substance, to carry on a dangerous activity, or to allow another to do one of those things, owes a duty of reasonable care to avoid a reasonably foreseeable risk of injury or damage to the person or property of another. In a case where the person or property of the other person is lawfully in a place outside the premises that duty of care both varies in degree according to the magnitude of the risk involved and extends to ensuring that such care is taken.

…

44. … Fortunately, our conclusion that the rule in Rylands v Fletcher has been absorbed by the principles of ordinary negligence makes it unnecessary to attempt to derive from the decided cases some basis in principle for answering the question whether the welding activities in the circumstances of the present case were or were not a "non-natural" or "special" use of the Authority's premises. The critical question for the purposes of applying the principles of ordinary negligence to the circumstances of the present case is whether the Authority took advantage of its occupation and control of the premises to allow its independent contractor to introduce or retain a dangerous substance or to engage in a dangerous activity on the premises. The starting point for answering that question must be a consideration of what relevantly constitutes a dangerous substance or activity …

…

> 48. … the overall work which the independent contractor was engaged to carry out on the premises was a dangerous activity in that it involved a real and foreseeable risk of a serious conflagration unless special precautions were taken to avoid the risk of serious fire. It was obvious that, in the event of any serious fire on the premises, General's frozen vegetables would almost certainly be damaged or destroyed. In these circumstances, the Authority, as occupier of those parts of the premises into which it required and allowed the Isolite to be introduced and the welding work to be carried out, owed to General a duty of care which was non-delegable in the sense we have explained, that is to say, which extended to ensuring that its independent contractor took reasonable care to prevent the Isolite being set alight as a result of the welding activities. It is now common ground that W. & S. did not take such reasonable care.
>
> 49. It follows that the Authority was liable to General pursuant to the ordinary principles of negligence for the damage which General sustained

p. 748 ↵ The solution adopted by the High Court of Australia was to 'absorb' *Rylands* to negligence, by recognizing a non-delegable duty of care in circumstances such as these. The idea of a non-delegable duty has certain advantages over the rule in *Rylands v Fletcher*. It can be explained in principled terms, through the ideas of dangerousness, proximity, and dependence, rather than through apparently arbitrary 'rules' relating to (for example) accumulation and escape. And it is clearly not limited to protection of interests in land. However, this solution depends on accepting some controversial ideas about the position now reached in the tort of negligence, particularly in recognizing non-delegable duties in a broadened range of circumstances.[11]

Through its use of positive duties to ensure that care is taken, the *Burnie* case accepts that there is nothing outdated about a rule whose effect is to impose liability in the absence of personal fault. Indeed, it suggests that the negligence principle has adapted over the years to the point that those conducting particular activities have a duty to ensure that a high level of care is taken to protect certain others against the risk of harm. But it also suggests, in effect, that it is too late for *Rylands v Fletcher* to be developed in such a way as to provide a coherent rule of strict liability. Whether it is right to say that negligence can adapt to provide sufficient coverage of all those areas where stricter standards of liability at common law are justified depends on recognizing that standards of care are highly flexible according to the danger posed by one's activities. It also depends on recognizing occupation of neighbouring land as giving rise to one of a group of relationships involving special, positive duties of care. Nevertheless, the revised rule in *Rylands v Fletcher* has been confined to protection of a narrow range of interests associated with nuisance, and itself now lacks the adaptability associated with the tort of negligence. Quite possibly, the new acceptance of non-delegable duties on the part of the UK Supreme Court in *Woodland v Swimming Teachers Association* (extracted in Chapter 10, and earlier in this chapter) will in time lead to new directions in strict liability, one of whose forebears will be *Rylands v Fletcher*.

5 Conclusions

i. The 'rule in *Rylands v Fletcher*' is by no means the only instance of strict liability in the law of tort, and we have seen that it is very rarely successfully argued. At the same time, it is one of the most studied branches of the law of tort. The reason for this may very well be that it is so close to the tort of negligence in its concern with one-off events which cause damage. In this, it forms a distinct branch of the tort of nuisance; so that it is no longer recognized as extending to personal injury.

ii. Despite the many restrictions that have been placed on the operation of the rule, its core analysis retains appeal and in this sense provides a rival analysis to the negligence parable in *Donoghue v Stevenson*. Rather than asking whose duty it was to avoid harm (what steps should have been taken?), *Rylands* asks *at whose risk* an accumulation was made. This concern with identifying allocation of risk can be seen not only in other areas of strict liability (such as Consumer Protection, Chapter 16); but also in the tort of negligence itself (recall our discussion of Remoteness and Attribution of Damage, in Chapter 6). In retreating from applying the rule, courts have nevertheless retained it; and if there is to be an expansion in the realm of non-delegable duties in the tort of negligence, one of the ancestors of any such development will be this action, which is now recognized—and duly confined—as simply a branch of nuisance.

p. 749

Further Reading

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Notes

[1] It appears, though, that the contractors were negligent in *Rylands* itself.

[2] Also extracted and discussed in Chapter 10.

[3] This was the approach taken by Pollock: F. Pollock, ‘Duties of Insuring Safety: The Rule in *Rylands v Fletcher*’ (1886) 2 LQR 52. See also J. Steele and R. Merkin, Further Reading, for discussion in the particular context of liability for fire.

[4] For an investigation see R. Heuston, ‘Who Was the Third Judge in *Rylands v Fletcher?* (1970) 86 LQR160–5.

[5] Similarly, in *Lindsay v Berkeley Homes* [2018] EWHC 2042 (TCC), it was held that vibrations caused by construction work were not a ‘thing’ that had been accumulated on the defendant’s premises, so that the claim could not fall within the rule in *Rylands v Fletcher*.

[6] This was the interpretation of A. Ogus, ‘Vagaries in Liability for Escape of Fire’ (1969) 27 CLJ 104.

[7] These issues are explored by J. Steele and R. Merkin, ‘Insurance Between Neighbours: *Stannard v Gore* and Common Law Liability for Fire’ (2013) 25 JEL 305.

[8] This was clearly stated by the House of Lords in *Transco v Stockport*.

[9] These hypothetical remarks were no part of the *ratio* of the case, which was not decided on the basis of *Rylands v Fletcher* although it is sometimes assumed that it was (see, for example, *Transco v Stockport*, at [35]).

[10] In *Cordin v Newport CC* (23/01/2008, QBD (TCC)), Judge Graham Jones made precisely this point. The defendant council was liable in *Rylands v Fletcher* for flooding of the claimants’ land when water escaped from a reservoir; but there was also far stricter liability under the Water Resources Act 1991, s 209. As is often the case, the problem with *Rylands* here is not that it imposes strict liability, but that it does not add to the other potential sources of liability.

[11] Note that it is also quite possible that the majority of the High Court would revert to nuisance law if faced with facts closely analogous to *Cambridge Water*. But how would they decide such a nuisance case without reference to the specific requirements of an action in *Rylands v Fletcher*, now that they have concluded that the action is too ambiguous to be applied?

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