The Rule in *Rylands v Fletcher*

Background Reading
Books
NJ McBride and R Bagshaw, *Tort Law* (London: Pearson, 2018) ch 23.
R Glofcheski, Tort Law in Hong Kong (Sweet and Maxwell, 2018) ch 21.

Article
J Murphy, "The Merits of *Rylands v Fletcher*" (2004) 24 OJLS 643.

I Introductory Issues

A. Limited Application

The tort is of limited practical application in the modern era. It was developed *before* we had a general tort of negligence.

- A tort decided to solve particular case
- Hardly any cases before HL case; case with respectable claim to be the most written about tort
- Some courts might have got this tort wrong??

But nowadays, many of the relevant cases would be actionable in negligence.

In Australia, the action has been formally subsumed within the law of negligence.

- Australia: abolish it entirely, subsumed within the general law of negligence
- In US. Narrows it down that divert from the original tort

- **UK: forms a sub-branch of law of private nuisance**
- Murphy: separate from private nuisance: (1) court still talks about it independently with diff elements & (2) wholly wrong to think that they are sub-branch of private nuisance

B. A Strict Liability Tort

Rylands v Fletcher (1868) LR 3 HL 330

> The person who for his own purposes brings on his land and **keeps and collects** there **anything likely to do mischief if it escapes, must keep it in at his peril** and is ***prima facie*** **answerable for all the damage which is the natural consequence of its escape** (Blackburn J).

Facts	D has constructed in his land a reservoir, Rylands hires some constructors, and found some mine shafts during digging; disused mine shaft now blocked off; **reservoir filled with water and bursts** the disused mine shafts, **flooding P's mine** which is still being in use
Issue	Could D be held liable
Held	**Insistence to keep it at peril > strict liability tort** (not just reasonable care, must keep the thing collective on his land at his peril); if escape, prima facie liable (does not care how it happens)
Note	Originally Fletcher v Rylands

On appeal to the House of Lords, this *dictum* was accepted with the qualification that D must be engaged in a **"non-natural" use of his land**.

- Agrees this as a tort
- Qualifier: but the use of land must be "non-natural" use of land

Transco plc v Stockport MBC [2004] 2 AC 1

> Bearing in mind the historical origins of the rule … its effect is to **impose liability in the absence of negligence** for an isolated occurrence (*per* Lord Bingham).

Facts	D owns a block of flats, water pipes presence on D's land, water escapes from D's land and waters away soil supporting the gas pipe on P's land (P now needs to turn off the gas supply);
Held	Apply the Fletcher rule; No requirement to show negligence, strict liability tort

Note:

- Not a tort in some scholars' view: as it does not involve anyone's duty to do, or failure of one's duty to do
- May have invasion of private right but not involving breach of duty

II Elements of the Rule

A. "Non-natural Use"

The definition of non-natural use remains elusive.

The best definition, for a long time, came from a case reported in 1913.

Rickards v Lothian [1913] AC 263

> [It is] some special use bringing with it increased danger to others, and **must not merely be the ordinary use of land** or such use as **is proper for the general benefit of the community** (Lord Macnaghten).

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

Facts	Treat lather requires chemicals, chemicals spilt out on floor and water passed in, chemicals escaped & found its way to waterway to land of P
Held	Does not need to define what "natural use of land is", as it is a classic example of so Lord Golf: - a sub-branch of private nuisance - non-natural use: overlaps with unreasonable use of land in private nuisance
Note	Lord Gold' view doubted in Transco Murphy also agrees that this is not a nicely decided case

Since then, *Rickards* has been endorsed with a little more elaboration.

Transco plc v Stockport Metropolitan Borough Council [2003] UKHL 61

> [T]he rule in ***Rylands v Fletcher*** **is engaged only** where the defendant's use is shown to be **extraordinary or unusual**. (Lord Bingham)

Yet, Lord Bingham **(a) doubted whether it could be a direct parallel to unreasonable user in private nuisance**, and (b) said that **the key was whether the use was ordinary in time and place**.

- What is non-natural use (or what is extraordinary or unusual) to be constructed in accordance with **time and space**; analysed contextually, as a matter of facts and degree
- Murphy agrees so, also see Read v Lyons

1. Determined Contextually, as a Question of Fact and Degree

Read v Lyons [1947] AC 156

> it was **not non-natural to use land** in war-time for the manufacture of explosives (Lord Macmillan).

Facts	Injured in D's factory, no escape from the explosion, no liability
Held	Obviously a normal thing to do (making bomb in wartime), not unusual use of land
Note	Affirming Lord Bingham's view

Wayfoong Credit Ltd v Tsui Siu Man Plastics [1984] HKLR 259

> There was **no evidence to show** that the number of dolls accumulated on the 8th floor, or the plastic of which they were composed, **was unnecessary or unreasonable** … There was little actual evidence as to the character of the neighbourhood, but we do know that the defendant occupied a flatted factory in an industrial building, and we may take judicial notice that Kwun Tong is by no means a purely residential area. (Cons JA.)

Facts	D manufactured plastic dolls, in an industrial building; highly inflammable plastic started a fire moved to P's premises
Held	No evidence to show the amount of dolls are unreasonable No unreasonableness, not unnatural use of land attended to context: considering the neighbourhood also
Note	Construction of the engagement of the question was clearly attentive to context

Wong Ching Chi v Full Yue Bleaching and Dyeing Co Ltd [1994] 3 HKC 606

> Ultimately, the question of whether the use was natural or not arises as one of fact and degree in each case … In the present case, it has to be borne in mind that the building was **an industrial building**. But even then, we are confronted by 21 tanks and a pool sunk into the floor. In my view, **the user here was non-natural**. (Bokhary J.)

Facts	D stored unusual amount of water in his premises, D initially held liable when the water escaped
Held	Even for industrial use of water, there is still an amount/limit that is deemed to be unreasonable: Still can be over normal amount of water even for industrial purposes (taken into account the characteristics of the building, time & space) Matter of facts and degree, look at the quantity of a thing

2. Social Utility

In *Rickards*, Lord Moulton hinted at a connection between the **social utility of D's enterprise** and **the question of whether there had been a natural use**. However, this connection must not be overstated:

- In *Rickards*, D thinks that if it has social utility, it cannot be a unnatural use
- This idea was rejected in *Cambridge* Water

Cambridge Water v Eastern Counties Leather (*supra*)

> I myself ... **do not feel able to accept** that **the creation of employment** as such, even in a small industrial complex, is **sufficient of itself to establish a particular use** as constituting a natural or ordinary use of land. (Lord Goff.)

Facts	D argued on ground that they are employed for the benefit of the public; cannot fall within the definition of unusual use
Issue	Whether can be said to be engaged in a natural use of land, if what u do is to bring benefit to the local community
Held	Not as natural or ordinary use of land
Note	Goes back to Rickards v Lothian: "such use as is proper for the general benefit of the community"

In truth, the law is in a state where it is hard to say just what would count on this front, and for how much it would count.

B. "D Brings onto his Land and Keeps/Collects there..."

The difficulty with this element of the rule is what is meant by "brings onto his land and keeps or collects there".

Giles v Walker (1890) 24 QBD 656

Facts	D cut down some trees, left the soil bare, weeds grow & seeds spread; P sues that affecting his land that cannot be used for original agriculture use
Held	Not a case of Rylands v Fletcher: Weeds are natural growth of the soil; D just consciously get rid of the tree but there is not consciously setting out to collect the seeds of weeds ➢ Not a case of D "brings onto his land and keeps or collects there"

C. Escape

There must be an escape from D's land.

Read v Lyons [1947] AC 156

Facts	Explosion of a shell, P got injured
Held	**There must be an escape** of the dangerous substance likely to cause mischief for there to be liability under the Rylands v Fletcher tort **Held** P was injured inside D's factory, therefore no liability could be imposed under the rule.

Furthermore, **the thing that escapes must be the thing brought onto the land**.

Chung Wah Steel Ltd v Chan Kwong Kwan [2013] HKCU 2118

> **The 'thing' brought onto the defendant's premises was second-hand furniture**, electrical appliances and various other miscellaneous items… [But] [t]he items did not escape. **What escaped was the fire.** (Wilson Chan J.)

Facts	Large amount of second-hand furniture in D's place, fire started and spread, highly inflammable material promotes the fire, P relies on this
Held	Distinguish the fire being escaped, but not the furniture that D collected No liability, thing that D collected is not the thing that escaped

D. "Liable to do Mischief if it Escapes"

It is clear that **the thing need not be dangerous in itself.** Recall that water in *Rylands* itself was not *per se* dangerous.

- E.g., water escapes, not inherently dangerous
- Q is whether the storage would cause dangerousness, once water escapes
- Dangerous related to once it escaped, whether it could cause dangerous

It was, though, **able to do damage upon its escape in vast quantities was relevant**.

ACL Electronics (HK) Ltd v Bulmer Ltd [1992] 1 HKC 133

Facts	Cold air generated from AC, escaped to P's premise, condensation caused damages
Issue	Whether large amount of condensation or the cold air is the cause
Held	Liable to cause damages, does not need to be dangerous itself

E. Protected Interests

A key question concerns the range of protected interests covered by the *Rylands* rule.

1. Land

Rylands v Fletcher itself makes clear that damage to land supports an action. (Two are the land based tort, land is protected)

2. Chattels

Jones v Festiniog Rly (1868) LR 3 QB 733 (chattels)

Facts	Train runs along the track, produces sparks on D's land, fire escapes and spread to haystack (personal property)
Held	P could sue for damage caused for the burning of the haystack
Note	Decided by Blackburn J who devised the rule

Wong Ching Chi v Full Yue Bleaching and Dyeing Co Ltd [1994] 3 HKC 606

Held	Can recover for damages for chattel

3. Personal Injury

Hale v Jennings [1938] 1 All ER 579

Facts	Boat (a chair) comes loose, fairground ride causes personal injuries
Held	Can sue for personal injury - the neighbouring attraction was a non-natural use of land and it was something that did risk causing mischief if it escaped (chair coming loose)

Cf *Transco plc v Stockport Metropolitan Borough Council* [2003] UKHL 61

Held	Lord Goffman: note this as a **sub-branch of law** of private nuisance, doubt that if can sue under personal injury (as it might do not cover personal injury); whether a sub-branch can be repacked to be capable to cover personal injury (covering extra which is not covered in private nuisance
Note	Not a case of personal injury: only obiter view

NB 1 HL in *Transco* said that the rule in *Rylands* was a **sub-branch of the law of private nuisance** and that, therefore, it ought now to be **confined to damage to land** (and interests in land).

- Different in the original law of private nuisance, where land is the only interest

NB 2 The HL saying this was NOT material to turning down the claim in *Transco*: therefore *obiter*.

F. Foreseeability of Harm

The *Cambridge Water* case made it clear that **D is only liable for foreseeable forms of harm**

Cambridge Water v Eastern Counties Leather (*supra*)

Held	The damage in this case was too remote as it was not possible for the Defendants to reasonably foresee a spillage which would eventually lead to contamination of a water borehole so far away. ➢ **Same remoteness/foreseeability test applies as in negligence case** (Wagon case)

III Defences

Just as with private nuisance, there are several recognised defences which D might raise.

A. Act of God (Natural events that occur that is extraordinary event)

Nichols v Marsland (1876) 2 Ex D 1.

Facts	Downfall of water accumulated to D's land that passed to P's land, defence being due to act of god
Held	D was not liable for the damage caused by the flooding because it was not reasonably foreseeable.

B. Unforeseeable act of a "Stranger" (3rd party that D has no control of)

Perry v Kendricks [1956] 1 WLR 85

Facts	2 boys playing disused cars throwing objects to the lights that cause explosion, P (a kid) gets injured; due to someone (a 3rd party) removed the petrol cap of the light
Held	D not liable: If the escape is due to **unforeseeable act of the stranger**, D has no control
Note	Personal injury recognised

C. Consent of the Claimant

Works as defence, where c consented to accumulation, P would have no successful action

Carstairs v Taylor (1871) LR 6 Ex 217

Facts	At top of the building D constructed water tank which is made use of all the occupants including P, water overflows and passes through P's premises
Held	Action failed as P consented it collection for its use

D. Statutory Authority

This operates in the same way we saw in the context of nuisance.

Green v Chelsea Waterworks (1894) 70 LT 547

Facts	D was required by statue to provide a supply of high-pressure water, water escape
Held	Defense valid, D not liable

E. Default of Plaintiff

It was said in *R v F* that **if P was the cause of the escape, then P cannot claim.**

- If P is the author of the compliant, there would be no defence

Relationship between Nuisance & the Rule in *Rylands v Fletcher*

In *Transco* (and in the *Cambridge Water* case), it was said that the rule in *Rylands v Fletcher* is now a sub-branch of the law of private nuisance.

Strictly, their Lordships were speaking *obiter* on both occasions. But this view must now be seen as the orthodox one.

But it is a view with which I struggle on several fronts.

- Ordinarily involve one does sth that cause interference to his neighbour
- Nuisance: generally speaking, ongoing interference
- Vs this special sub-branch: a special incident, a special case about interference generated from the escape of a thing
- But wrong to say that they go tgt

1. P must have a proprietary interest

Why in the case of *Rylands* liability. The rule only insists that D must be a land-owner.

- Private nuisance: P's land, the only people who can sue (with proprietary interest); P must own the land
- Vs here: sth brings on to his (D in this case but not P's land) > **the focus on D's land**, no requirement that P should own land > different focus v in private nuisance

2. These torts only protect land and interests in land?

Why is this so in the case of *Rylands* liability? The rule refers to "all the damage" that results.

- Interest in land is not the only focus, can claim for chattel damage and personal injury

3. Non-natural use = unreasonable user?

This seems implausible to me. Building reservoirs isn't unreasonable, but it creates a non-natural (ie, artificial body of water).

- E.g., nothing unreasonable to build a reservoir but it is non-natural to collect huge amount of water

4. One off escapes *versus* ongoing interferences

- Duration of the thing is a consideration
- One-off escape > cannot be nuisance

➔ No sense to make them the same tort
➔ But the court put this as a sub-branch?

Nuisance/*Rylands* and other Civil Law Actions

I Trespass to Land Contrasted

Sometimes, people confuse a nuisance with a trespass onto one's land. Two key differences can, however, be identified:

- Directness of the invasion is necessary in cases of trespass. In **nuisance** (and *Rylands* cases), **one can do something on one's land and a by-product of that activity causes the loss**.
    - trespass requires directness. Vs in nuisance it can be indirectly affecting P
- Trespasses are actionable *per se* (*ie*, without proof of tangible loss). **Proof of loss or damage** is always required in cases of nuisance and under the rule in *Rylands v Fletcher*.

II Negligence Contrasted

In theory, the single greatest contrast between negligence and these torts is the fact that **negligence liability is fault-based** whereas these are **strict liability torts**.

But what do the defences to these torts tell us about the strictness of liability? Think!!

- But private nuisance and Rylands v Fletcher are not pure strict liability torts: defences available (e.g., act of god), weakens the strictness of liability

DMCs

Owners of flats in multi-storey buildings enter into what are called **Deeds of Mutual Covenant**. They are binding promises made by one flat owner to all other flat owners in the same building.

- Mutually covered certain thing not to do, and it would be breach of contract if one does so

By virtue of **Building Management Ordinance (Cap 344)**, some terms of these contracts are imposed by statute so as to give rise to a contract action for things which might also support a nuisance action.

For example, s 34H of the Building Management Ordinance introduces into the Deed of Mutual Covenant the obligation to maintain the property in a good state of repair.

QUESTIONS TO PONDER
[recording Feb 28]

1. What, *in theoretical terms*, are the strengths and weaknesses of the now orthodox view that the rule in *Rylands v Fletcher* is merely a sub-set of the law of private nuisance?

2. The Americans have a strict liability rule concerning ultrahazardous activities (discussed in J Goudkamp and J Murphy, "The Failure of Universal Theories of Tort Law" (2015) 21 *Legal Theory* 47, at pp77-84). Bearing in mind the theoretical debates that surround it, is this a preferable rule than the original rule in *Rylands v Fletcher*, from which it derives?

3. Chromoshine Ltd, a small-scale cleaning firm, stores quantities of a toxic industrial cleaning chemical on its land on an industrial estate close to a residential housing estate. The site used by Chromoshine Ltd has been occupied by various industrial cleaners for the past 25 years. Mysteriously, a barrel of the toxic fluid was recently overturned and it ruptured with the following results:

   (a) Mary, a catering assistant who works in Chromoshine's canteen, stepped in the spilled fluid **on her way into work**. Her legs were badly burned and her shoes were also damaged.

- Public nuisance, possible claim (need to be in public area involving public right), but Mary is on her way into work (have to be in public area, road outside, but this is unknown on facts)
- For mary to be able to sue, the location must be at public way
- Sth stored collective on land that has been escaped
- Not private nuisance (no proprietary interest)

   (b) A quantity of the fluid seeped into an underground water supply used by the Downs Water Company with the result that the company had to find an alternative source of water in order to meet its statutory obligations to supply consumers in the area.

- Similar to Cambridge water
- D got land, collected fluid there (can question the amount of the fluid, no law requires large), escaped, liable to do mischief (as toxic chemicals)
- Do not know where the fluid would leak to (foreseeability test): if cannot foresee the result (finding its way to some waterway), it would be too remote

   Advise Mary and the Downs Water Company.