Donal Nolan, 'The Distinctiveness of *Rylands v Fletcher*' (2005) 121 *Law Quarterly Review* 421-451

The Distinctiveness of *Rylands v Fletcher*†

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The primary purpose of this article is to challenge the proposition that the rule in *Rylands v Fletcher* is best regarded as an offshoot of the tort of private nuisance, being an extension of that cause of action to isolated escapes. This offshoot theory was endorsed by the House of Lords in *Transco Plc v Stockport MBC* [2003] UKHL 61, [2003] 3 WLR 1467, and can now be described as the new orthodoxy. It is argued, however, that the offshoot theory should be rejected, since (1) analysis of the *Rylands v Fletcher* case provides little support for the theory; (2) there are well-established distinctions between the rule in *Rylands v Fletcher* and private nuisance; (3) merger with the rule will be bad for nuisance; and (4) the version of the strict liability rule to which the offshoot theory has given rise is unappealing. By way of contrast to the offshoot theory, the distinctiveness of the rule in *Rylands v Fletcher* is asserted. Consideration is also given to *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, where the High Court of Australia held that the rule in *Rylands v Fletcher* should be treated as having been absorbed by the principles of ordinary negligence, as well as to the desirability of a strict liability rule independent of nuisance.

Keywords: tort law; *Rylands v Fletcher*; strict liability; private nuisance; negligence

[421] Ever since its inception, the rule in *Rylands v Fletcher* has been controversial. When the case came before the courts, the judiciary was divided between advocates of the fault principle and proponents of an older model of strict liability. The decision in *Rylands* was an important victory for the supporters of strict liability, but while they won this particular battle their opponents eventually won the war. By the turn of the twentieth century, therefore, the rule in *Rylands v Fletcher* already appeared incongruous, a throwback to earlier times. And yet the cause of action has proved surprisingly resilient. Although the contempt of the House of Lords was barely concealed in the post-war case of *Read v J. Lyons & Co. Ltd*,[1] their Lordships contented themselves with imposing severe constraints on the rule's operation, and refrained from abolishing it altogether. Little was heard of *Rylands v Fletcher* in the decades that followed, but more recently two decisions of the House of Lords, *Cambridge Water Co. Ltd v Eastern Counties Leather plc*[2] and *Transco plc v*

† This material was first published by Sweet & Maxwell Ltd in Donal Nolan, 'The Distinctiveness of *Rylands v Fletcher*' (2005) 121 *Law Quarterly Review* 421 and is reproduced by agreement with the publishers.

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[1] [1947] A.C. 156.

[2] [1994] 2 A.C. 264.

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Stockport Metropolitan Borough Council,[3] have once again focused attention on the strict liability rule.

The waxing and waning of the rule's popularity has been accompanied by shifting perceptions as to the best explanation for the strict liability it imposes. Opinions differ as to the intentions of those who created it, and that difficult issue will be dealt with later. However, the subsequent triumph of the fault principle meant that a rationale was required for this outpost of strict liability, and the justification provided was that the defendant had been engaged in a peculiarly dangerous activity. The new understanding was epitomised by an article (published twenty years after *Rylands*) in which Pollock argued that while the general principle was no liability without fault, "the law takes notice that certain things are a source of extraordinary risk, and a man who exposes his neighbour to such risk is held … to insure his neighbour against any consequent harm not due to some cause beyond human foresight and control."[4] This was a perfectly sensible spin to put on the cause of action, particularly since the reinterpreted rule seemed an appropriate legal response to the more threatening innovations of the industrial age: hence the early deployment of *Rylands v Fletcher* against locomotives, traction-engines and electricity.[5] But this gradual transformation of the rule into a general principle of strict liability for ultra-hazardous activities was stopped in its tracks by *Read v Lyons*, where the House of **[422]** Lords denied the existence of any such principle, [6] and placed strict limits on the rule's operation. Once again, *Rylands v Fletcher* appeared anomalous. The most recent attempt at retrospective rationalisation came in *Cambridge Water*, where Lord Goff said that the rule was best regarded as an offshoot of the tort of private nuisance, an extension of that cause of action to isolated escapes. This "offshoot theory" was endorsed by the House of Lords in *Transco*, and can now be described as the new orthodoxy.

The principal purpose of this article is to challenge the new orthodoxy. In particular, it will be argued that the offshoot theory is historically unsound, and that the consequences of its endorsement by the judiciary will be bad for *Rylands v Fletcher*, and bad for nuisance too. By way of contrast to the offshoot theory, the distinctiveness of the rule in *Rylands v Fletcher* will be asserted. Although the principal focus will be on the relationship between the rule and nuisance, that distinctiveness has also been threatened in another way. In *Burnie Port Authority v*

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[3] [2003] UKHL 61; [2003] 3 W.L.R. 1467.

[4] Frederick Pollock, "Duties of Insuring Safety: the Rule in Rylands v Fletcher" (1886) 2 L.Q.R. 52.

[5] See respectively *Jones v Festiniog Rly Co.* (1868) L.R. 3 Q.B.D. 733; *Powell v Fall* (1880) 5 Q.B.D. 597; *National Telephone Co. v Baker* [1893] 2 Ch. 186 (defence of statutory authority on facts).

[6] n. 1 above, at 172-173 *per* Lord Macmillan, 181-182 *per* Lord Simmonds, 186 *per* Lord Uthwatt. See also the thorough analysis of the American principle by Scott L.J. in the Court of Appeal: [1945] 1 All E.R. 106 at 108-111.

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General Jones Pty Ltd,[7] the High Court of Australia held, by a five-to-two majority, that the rule in *Rylands v Fletcher* should henceforth be treated as having been absorbed by the principles of ordinary negligence. The majority argued that over the years the gap between the rule and negligence liability had narrowed to almost nothing, and hence that assimilation of the two was now appropriate. This contention will be examined, and an attempt made to refute it. Finally, the future of a strict liability rule independent of nuisance will be considered. Would a renewed attempt to carve out a special regime for abnormally dangerous activities be a sensible way forward? And, if not, what should become of the rule in *Rylands v Fletcher*?[8]

I. THE NEW ORTHODOXY

There is nothing particularly novel about the suggestion that the rule in *Rylands v Fletcher* is a sub-species of nuisance. Writing in the 1940s, Prosser posed the following question:[9]

> "Let the reader now refer again to the doctrine of *Rylands v Fletcher* and ask himself whether there is any difference to be found, either in the nature of the harm done, the character of the defendant's conduct, **[423]** the type of hazard which arises, or the limitations upon liability in terms of 'natural' or 'reasonable' use, between that doctrine as it has developed in England and in the American courts which have accepted it by name, and the strict liability imposed under the guise of 'absolute' nuisance."

A number of others have shared Prosser's opinion, by far the most influential of them being Newark, who propounded the offshoot theory in his article "The Boundaries of Nuisance".[10] Newark argued that the main reason why difficulties surrounded the law of nuisance was that the boundaries of the tort had become blurred. And he claimed that one result of the blurring of the distinction between nuisance and other torts had been a "misappreciation" of *Rylands v Fletcher*, namely that the case was a landmark in the law of tort. In fact, Newark maintained, the principle involved was a very simple one: that "negligence is not

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[7] (1994) 179 C.L.R. 520. Mason C.J., Deane, Dawson, Toohey and Gaudron JJ. in a joint judgment; Brennan and McHugh JJ. dissenting.

[8] The subject-matter of this article overlaps with that of John Murphy, "The Merits of *Rylands v Fletcher*" (2004) 24 O.J.L.S. 643, but not as much as I initially feared. Although Murphy also emphasises the distinctiveness of *Rylands v Fletcher*, many of his arguments are different from the ones on which I rely. Furthermore, while Murphy believes that the strict liability rule has an important role to play in the modern law of tort, I reach the opposite conclusion.

[9] William L. Prosser, "Nuisance Without Fault" (1942) 20 Tex. L. Rev. 399 at p. 420.

[10] (1949) 65 L.Q.R. 480. For judicial support for the Prosser/Newark position, see *e.g. Read*, n. 1 above, at 183 *per* Lord Simonds; *Benning v Wong* (1969) 122 C.L.R. 249, at 265 *per* Barwick C.J, and at 297 *per* Windeyer J.

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an element in the tort of nuisance."[11] The only novel aspect of the decision was that for the first time the law of nuisance had been applied to an isolated escape. Because by this time conceptions of the boundaries of nuisance were becoming fogged, this simple truth was not recognised, and the misguided perception took hold that the rule covered exceptional cases where liability was strict on account of the dangerous nature of the defendant's activity. This in turn led to the extension of the rule beyond the case of neighbouring property owners, and into the realm of personal injuries.

For the most part, this short passage of Newark's article consists merely of assertion. Although he points out that the judges who decided *Rylands v Fletcher* treated the case as a restatement of existing principles, this is far from proving Newark's point. The judiciary are understandably keen to make out that their decisions are in line with precedent, and in any case it will be argued that there is a more plausible explanation than the offshoot theory for the fact that those involved considered their reasoning to be consistent with earlier authority.[12] The only other evidence which Newark adduced in support of the offshoot theory was the fact that, in his judgment in *Rylands*, Blackburn J. had cited the case of fumes escaping from an alkali works – a "clear case of nuisance"[13] - as an instance of liability under the rule he was laying down. The significance of this will be addressed later: for now it is sufficient to note that the *locus classicus* of the new orthodoxy is more than a little flimsy.

Newark's analysis would have remained just another academic opinion had it not been for its enthusiastic adoption by Lord Goff in *Cambridge* **[424]** *Water*.[14] The defendants in this case were manufacturers of fine leather, who used a chemical solvent in their tanning process. Over the years, solvent that spilled on to the tannery floor seeped into the ground and contaminated the underground water that supplied a borehole used by the plaintiff water company. As a result, the plaintiffs were obliged to develop a new source of supply, and they sought recovery of the added expense from the defendants in negligence, private nuisance and under the rule in *Rylands v Fletcher*. At first instance, the judge dismissed the negligence and nuisance claims on the ground that the contamination of the borehole had not been reasonably foreseeable, and the *Rylands* action on the ground that the defendants' tannery was not a non-natural use of land. When the case reached the House of Lords, Lord Goff (who gave the only speech) held that the judge's finding on foreseeability was fatal to the *Rylands* claim, since "foreseeability of damage of the relevant type should be regarded as a prerequisite of liability under the rule."[15]

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[11] *ibid.* at p. 487.

[12] See below, text accompanying n. 56.

[13] n. 10 above, at p. 487.

[14] n. 2 above.

[15] *ibid.* at 306.

This conclusion was based on two considerations. The first was that the language Blackburn J. employed in the *Rylands* case suggested that it had originally been envisaged that liability was limited to foreseeable harm.[16] However, it was the second consideration that proved the more significant, for Lord Goff went on to say that Newark had "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,"[17] and that since recovery of damages in private nuisance was conditional on foreseeability of the relevant type of damage it was therefore logical to extend that requirement to liability under the rule.[18] His Lordship added that it would 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."[19]

Two points can be made about Lord Goff's adoption of the offshoot theory in *Cambridge Water*. The first is that, although the analogy with nuisance influenced the outcome of the case, it was not necessary to the conclusion that reasonable foreseeability of the harm was required for *Rylands v Fletcher* liability. As his Lordship pointed out, this conclusion was consistent with the language used in the case itself, and it is also noteworthy that academic commentators had previously made the case for a foreseeability requirement without reference to the nuisance analogy.[20] **[425]** The other point is that in making the connection Lord Goff relied almost entirely on Newark's article. In addition to citing Newark, his Lordship merely drew attention to the fact that Blackburn J. had not considered *Rylands* to be a revolutionary decision[21] – a point also made by Newark – and to what he considered to be the functional similarity between the doctrines of unreasonable user and non-natural use, the principal devices used to limit liability in nuisance and *Rylands v Fletcher* respectively.[22]

The speed with which Newark's thesis has been converted into orthodoxy since the *Cambridge Water* decision is remarkable. Two years after Lord Goff gave his speech, Judge Peter Bowsher Q.C. said that, "In view of the latest authority, it is difficult to separate off *Rylands v Fletcher* and nuisance,"[23] and went on to remark that in *Cambridge Water* Lord Goff had treated nuisance and the strict liability rule

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[16] n. 2 above, at 302. See (1866) L.R. 1 Exch. 265, where Blackburn J refers (at 279) to "anything likely to do mischief if it escapes," and (at 280) to liability for the "natural and anticipated consequences" of the escape.

[17] *ibid.* at 304.

[18] *ibid.*

[19] *ibid.* at 306.

[20] See *e.g. Salmond & Heuston on the Law of Torts* (20th ed., 1992) at pp. 324-325.

[21] n. 2 above, at 299.

[22] *ibid.* It will be argued that in fact these devices share little in common: see below, text accompanying n. 93.

[23] *Ellison v Ministry of Defence* (1996) 81 B.L.R. 101 at 117.

as "parts of the same cause of action."[24] Similarly, at first instance in *Marcic v Thames Water Utilities Ltd* Judge Richard Havery Q.C. commented that *Rylands v Fletcher* "may be said to be a variety of nuisance."[25] The alleged affinity with nuisance has also caused judges to call into question well-established principles of *Rylands v Fletcher* liability, such as the actionability of personal injuries and the absence of a *locus standi* rule requiring an interest in land affected by the escape.[26]

Any remaining doubts as to the impact of Lord Goff's reasoning were dispelled by the House of Lords in the *Transco* case.[27] *Transco* concerned an escape of water from the service pipe to a block of flats owned by the defendant council. The water that escaped caused the collapse of a nearby embankment, leaving the claimant's gas main exposed and unsupported, and the claimant sought to recover the cost of the required repairs from the defendant under the rule in *Rylands v Fletcher*. The House of Lords declined an invitation from counsel for the defendant to abrogate the rule, but held that the escape did not attract strict liability because the supply of water to the flats was a natural user of the council's land.[28] Most **[426]** importantly, however, their Lordships confirmed that the rule was now to be regarded as, in Lord Bingham's words, a "sub-species of nuisance."[29] And since liability under *Rylands v Fletcher* was therefore "a remedy for damage to land or interests in land,"[30] it followed that personal injuries were not actionable under the rule,[31] and that only those with a proprietary interest in the land affected by an escape could sue.[32] The assimilation of the *Rylands* rule into the tort of private nuisance is now, therefore, complete. However, in the next section it will be argued that, far from making the common law more coherent, this realignment is both undesirable and historically unsound.

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[24] *ibid.* at 120.

[25] [2001] 3 All E.R. 698 at 716.

[26] See *Ribee v Norrie* [2001] P.I.Q.R. P8 at [30], where Ward L.J. said that Lord Goff's reasoning threw doubt on claims for personal injury under the rule; and *McKenna v British Aluminium Ltd* [2002] Env. L.R. 30, where Neuberger J held that, in the light of the analysis in *Cambridge Water*, a claimant must have an interest in the land affected to bring an action under the rule. Only one judicial voice, that of Judge Anthony Thornton Q.C., has been raised against the new orthodoxy: see *Johnson v B.J.W. Property Developments Ltd* [2002] EWHC 1131 (TCC); [2002] 3 All E.R. 574 at [17] (the extent to which the causes of action in nuisance and *Rylands v Fletcher* have been assimilated remains unclear); and *Re-Source American International Ltd v Platt Service Ltd* [2003] EWHC 1142 (TCC) at [171] ("a claimant relying on a *Rylands v Fletcher* type claim … need not himself have an interest in land").

[27] n. 3 above.

[28] Lord Scott felt that the appeal could also be dismissed on the ground that, since the water had remained on the defendant's land, there had been no "escape": *ibid.* at [79].

[29] *ibid.* at [9]. Lord Walker took as read (at [94]) what Lord Goff had said in *Cambridge Water* about the inter-relationship of *Rylands v Fletcher* and nuisance.

[30] *ibid.* at [39] *per* Lord Hoffmann.

[31] *ibid.* at [9] *per* Lord Bingham, [35] *per* Lord Hoffmann, [52] *per* Lord Hobhouse.

[32] *ibid.* at [47] *per* Lord Hoffmann.

II. THE CASE AGAINST THE OFFSHOOT THEORY

A host of judges and academics have maintained that private nuisance and the rule in *Rylands v Fletcher* are distinct categories of liability. Lord Wright, for example, said that nuisance differed from the *Rylands* rule not only in its historical origin but also "in its legal character and in many of its incidents and applications."[33] And, in his article "Nuisance as a Tort",[34] Winfield devoted a good deal of space to demolishing the view that *Rylands* was but a subset of nuisance. According to Winfield:[35]

> "It would be incorrect … to state baldly that the rule in *Rylands v Fletcher* is merely a species of nuisance. It is much nearer the truth to say that an accident of definition, or lack of definition, of nuisance, may bring the same set of facts within either kind of liability, but that they differ notably in details, and that it is only where none of these differences of detail is in question that it is immaterial whether the action is for nuisance or is on the rule in *Rylands v Fletcher*. Nuisance and that rule are related to one another as intersecting circles, not as the segment of a circle to the circle itself."

Moreover, two years earlier Stallybrass, though conceding that the strict liability rule was in some respects "closely related" to nuisance, had cautioned that it was not to be identified with it as it had sometimes been,[36] **[427]** while West later argued that the true distinction between nuisance and the rule in *Rylands v Fletcher* was that nuisance is a wrong caused *to* land, whereas *Rylands v Fletcher* is a wrong arising *from* land.[37] Here, four reasons will be put forward for rejecting the offshoot theory: (1) analysis of the *Rylands v Fletcher* case provides little support for the theory; (2) there are well-established distinctions between the rule in *Rylands v Fletcher* and private nuisance; (3) merger with the rule will be bad for

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[33] *Northwestern Utilities Ltd v London Guarantee and Accident Co.* [1936] A.C. 108 at 119. See also his Lordship's speech in *Sedleigh-Denfield v O'Callaghan* [1940] A.C. 880 at 903: "There are … well marked differences between the two juristic concepts."

[34] [1931] C.L.J. 189.

[35] *ibid.* at p. 195.

[36] "Dangerous Things and the Non-Natural User of Land" [1929] C.L.J. 376 at p. 392. In the seventh edition of *Salmond on the Law of Torts* (1928), Stallybrass made a point of taking the rule in *Rylands v Fletcher* from out of the middle of the chapter on nuisance, and giving it "the dignity of a chapter to itself" (preface, at ix). In the body of the text, he made clear (at p. 374) that, while Salmond believed the rule to be "merely a branch of the law of nuisance," in his opinion the requirement of recurrent injury in nuisance cases differentiated the two causes of action.

[37] "Nuisance or *Rylands v Fletcher*" (1966) 30 Conv. 95. Other writers who have emphasised the differences between the two causes of action are R.J. Buxton, "The Negligent Nuisance" (1966) 8 Malaya L. Rev. 1 at pp. 6-8; and R.F.V. Heuston, *Salmond on the Law of Torts* (11th ed., 1953) at pp. 644-645 (though Heuston later changed his mind: see "The Return of *Rylands v Fletcher*" (1994) 110 L.Q.R. 185).

nuisance; and (4) the version of the strict liability rule to which the offshoot theory has given rise is unappealing.

(1) Analysis of the Rylands v Fletcher *case provides little support for the offshoot theory*

The defendants in *Rylands v Fletcher* had built a small reservoir to provide water for their mill. The design and construction of the reservoir were left in the hands of independent contractors. While excavating the bed of the reservoir the contractors had discovered some old shafts, filled in with soil. Neither the defendants nor the contractors knew that the shafts led to old workings under the reservoir site, which were in turn connected, by means of other underground workings, to the plaintiff's colliery. A few days after the reservoir was filled with water, one of the shafts burst downwards and the water passed through the old workings and flooded the plaintiff's mine. The action the plaintiff brought – which at the beginning looked like an ordinary negligence claim – was referred to an arbitrator, who found that the defendants had not been at fault, but that the contractors had been negligent in failing to block up the shafts. The arbitrator stated a special case, which came before the Court of Exchequer. By a majority, the court held that on these facts the plaintiff could not recover his losses from the defendants.[38]

It would appear that in the Court of Exchequer neither counsel referred to nuisance, nor indeed to any nuisance case. The focus was principally on trespass to land, though mention was also made of the action on the case. Henry Manisty Q.C., who appeared for the plaintiff, said that if a man collected water in a reservoir on his land and allowed it to escape on to the property of his neighbour, "It is a trespass."[39] He went on to draw an analogy with cattle trespass,[40] and cited *Tenant v Goldwin*[41] for the proposition that "one who creates foul water in his own land must keep it **[428]** in that it may not trespass."[42] For the defendants, George Mellish Q.C. argued that the case was not one of trespass, and that an action on the case did not lie in the absence of fault.

Martin B., who gave the principal majority judgment, held that if the defendants had directly cast water on the plaintiff's land, then that would have been a trespass, but that since in this case the damage was "mediate or consequential" no trespass action lay.[43] Although he referred to nuisance, Martin B. dismissed it on the grounds that there had been nothing hurtful or injurious to the senses,

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[38] *Fletcher v Rylands* (1865) 3 H. & C. 774; 159 E.R. 737.

[39] *ibid.* at 781.

[40] *ibid.*

[41] (1703) 2 Ld Raym. 1089; 91 E.R. 314.

[42] n. 38 above, at 783. Note also that, when distinguishing another case, counsel commented (at 784) that the defendant was not "as here, suffering a trespass to be committed on the plaintiff's land."

[43] *ibid.* at 792.

and added that "[t]he making of a pond for holding water is a nuisance to no one."[44] Furthermore, he took the view that in the absence of trespass or nuisance proof of negligence was required to recover for damage to real property, just as in cases of damage to personal property.[45] The dissenting judgment of Bramwell B. is arguably of even greater significance, since the majority's reasoning was not followed in the higher courts. It is noteworthy, then, that – as Martin B. pointed out – Bramwell B. seemed to think that "the act of the defendants was a trespass".[46] The essence of Bramwell B.'s reasoning can be found in the following passage:[47]

> "[The plaintiff] had a right to be free from what has been called 'foreign' water, that is, water artificially brought or sent to him directly, or indirectly by its being sent where it would flow to him. The defendants had no right to pour or send water on to the plaintiff's works. Had they done so knowingly it is admitted an action would lie; and that it would if they did it again … the plaintiff's right then has been infringed; the defendants in causing water to flow to the plaintiff have done that which they had no right to do; what difference in point of law does it make that they have done it unwittingly? I think none, and consequently that the action is maintainable. The plaintiff's case is, you have violated my right, you have done what you had no right to do, and have done me damage."

There are three reasons why this passage suggests that Bramwell B. had trespass in mind. First, he chose to conceptualise the issue in terms of the violation of a specific right of the plaintiff. Secondly, the right he identified was envisaged as extending to cases of direct interference which would clearly amount to trespasses. And, finally, the language Bramwell B. used to describe what took place – that the defendant "poured" the water into the plaintiff's mine – is, though perhaps not entirely accurate, none the less **[429]** redolent of trespass.[48] For Bramwell B., the issue appears to have been whether, for liability in trespass to arise, the defendants must have been aware of what they were doing. His conclusion was that no such awareness was necessary: "as a rule the knowledge or ignorance of the damage done is immaterial."[49]

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[44] *ibid.*

[45] *ibid.* at 793.

[46] *ibid.* at 792.

[47] *ibid.* at 789.

[48] See also *Nichols v Marsland* (1875) L.R. 10 Exch. 255 at 260, where Bramwell B. described *Rylands v Fletcher* as a case where "the defendant poured the water into the plaintiff's mine. He did not know he was doing so; but he did it as much as though he had poured it into an open channel which led to the mine without his knowing it."

[49] n. 38 above, at 789.

The Court of Exchequer Chamber unanimously reversed the decision of the Court of Exchequer, and found the defendants liable.[50] In reply to counsel for the defendants, counsel for the plaintiff once again made clear the basis on which he rested his case: "[H]ere the collecting of the water in such a manner as to invade the premises of the plaintiff was a trespass …".[51] Less obvious, though, is what Blackburn J., who delivered the judgment of the Exchequer Chamber, had in mind. He formulated the rule that made the case famous in the following terms:[52]

> "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 something 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."

An investigation into the thinking behind this rule might usefully begin with Newark's point that the judges who sat in *Rylands v Fletcher* denied that they were laying down new law. Blackburn J. later commented that he had wasted much time in the preparation of his judgment in the case if he did not succeed in showing that the law as he stated it had been law "for at least 300 years,"[53] and when the decision of the Exchequer Chamber was affirmed by the House of Lords, Lord Cairns L.C. remarked that the governing principles were "extremely simple,"[54] and Lord Cranworth came "without hesitation" to the conclusion that the judgment of the court below was right.[55] It is by no means clear, however, that these remarks imply – as Newark went on to argue – that the judges involved regarded *Rylands* as a straightforward nuisance case, not least because no attempt was made to refute Martin B.'s cursory dismissal of a nuisance analysis in **[430]** the Court of Exchequer. A more plausible explanation for the self-assurance with which strict liability was imposed is that the judges were simply applying the ancient theory that a man acts at his peril. This was certainly the view of Holdsworth, according to whom "the underlying principle [of *Rylands v Fletcher*] is the same as that which governed civil liability in general in the mediaeval common law."[56]

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[50] (1866) L.R. 1 Exch. 265.

[51] *ibid.* at 277.

[52] *ibid.* at 279-280.

[53] *Ross v Fedden* (1872) 26 L.T. 966 at 968.

[54] (1868) L.R. 3 H.L. 330 at 338.

[55] *ibid.*

[56] 8 *History of English Law* (1931) at p. 472. See also *Rickards v Lothian* [1913] A.C. 263 at 275 *per* Lord Moulton; A.K.R. Kiralfy, *Potter's Historical Introduction to English Law* (4th ed., 1958) at p. 383.

It is entirely consistent with this analysis that the rule enunciated by Blackburn J. should ground liability on causa rather than culpa.[57] While the act of building the reservoir was lawful, once the water escaped and did damage the plaintiff was entitled to recover without establishing negligence. The defendants' only hope would have been a causation argument: that the harm was caused not by them, but by an act of God, the claimant or a stranger. A similar causation-based analysis was evident in the House of Lords, where Lord Cranworth remarked that, in considering whether a defendant is liable for harm the plaintiff has sustained, "the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage."[58] Now that statement was surely too sweeping: after all, by this time negligence had already become the touchstone of liability in road accident cases,[59] and was probably a prerequisite of recovery for personal injury more generally.[60] But *Rylands v Fletcher* indicated that the triumph of the fault principle was not yet complete: in the real property context, strict liability remained the norm. Moreover, it has been argued that this distinction between the two kinds of injury was not a new one: proof that the defendant had been "utterly without fault" had long excused a defendant in trespass to the person cases, but not where the wrong was to land, as in cattle trespass and nuisance.[61]

This explains why Blackburn J. cited an example from the law of nuisance: his point was that in this real property tort it was no defence for, say, the owner of an alkali works to prove that he had taken all reasonable steps to prevent the escape of chlorine fumes. But to extrapolate from this citation (as Newark did) that Blackburn J. considered the *Rylands* rule to be simply an extension of nuisance is quite unwarranted. As we have seen, a close reading of the case suggests that trespass, rather than nuisance, was the established form of liability regarded as providing the closest analogy. And indeed the other two examples Blackburn J. gave of the application of the strict liability rule were trespass-type cases. He stated that the most **[431]** common scenarios within the rule were instances of cattle trespass,[62] which (as its name suggests) was generally regarded as a form of trespass to land.[63] And the third example of strict liability cited by

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[57] *Benning*, n. 10 above, at 298 *per* Windeyer J.

[58] n. 54 above, at 341.

[59] See the remarks of Martin B. in the Court of Exchequer: n. 38 above, at 793.

[60] G.H.L. Fridman, "The Rise and Fall of Rylands v Fletcher" (1956) 34 Can. Bar Rev. 810 at pp. 812-813.

[61] *ibid.* at p. 814.

[62] *ibid.*

[63] In Blackstone's words (III Bl. Comm. 211): "A man is answerable for not only his own trespass, but that of his cattle also: for if by his negligent keeping they stray upon the land of another … and they there tread down his neighbour's herbage, and spoil his corn or his trees, this is a trespass for which the owner must answer in damages." See similarly *Read*, n. 1 above, at 166 *per* Viscount Simon; M.J. Prichard, *Scott v Shepherd (1773) and the Emergence of the Tort of Negligence* (1976) at p. 9. As Williams points out (Glanville L. Williams, *Liability for Animals* (1939) at p. 127), the justification usually provided for this principle is a "fanciful rule of early law,"

Blackburn J. was *Tenant v Goldwin*,[64] where liability had been imposed for an escape of filth from the defendant's privy into his neighbour's cellar, and where, once again, the closest analogy was with trespass, rather than nuisance. According to Salkeld's report of this decision:[65]

> "The reason he gave for his judgment was because it was the defendant's wall, and the defendant's filth, and he was bound of common right to keep his wall so as his filth might not damnify his neighbour, and that it was a trespass on his neighbour …."

Despite these strong connections with trespass to land, the judges who decided *Rylands v Fletcher* do not appear to have seen the case as a straightforward example of that cause of action, though Bramwell B. perhaps came close to that position. This is understandable, for – as Francis Bohlen pointed out – if the shaft had given way as soon as the water was poured into the reservoir, then that would indeed have amounted to a trespass, but since in fact there was a "rest in the course of events, a pause … in the chain of causation," the harm was not a sufficiently direct consequence of the accumulation for trespass to lie.[66] Moreover, *Rylands v Fletcher* was framed as an action on the case.[67] At the same time, it would seem that in its conception the rule in *Rylands v Fletcher* was – as Newark argued – a tort against land, albeit not a form of nuisance but a *sui generis* cause of action. As we shall see, however, the later transformation of the rule into a principle of liability for dangerous things severed the connection with real property, and opened the door to claims for personal injury.[68]

[432] In practical terms, the significance of *Rylands v Fletcher* was twofold:[69] first, Blackburn J. took a liability rule previously applied to specifics, such as cattle and filth, and extended it to mischievous things generally;[70] and, secondly, the

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according to which trespass by one's cattle is equivalent to trespass by oneself: see *e.g.* Frederick Pollock, *The Law of Torts* (8th ed., 1908) at p. 497; *Read v J. Lyons & Co. Ltd* [1945] 1 All E.R. 106 at 113 *per* Scott L.J. Williams concludes that this supposed principle was little better than a myth, and argues that cases involving escaping cattle ought logically to be classed under nuisance, but none the less the previously widespread acceptance of the vicarious trespass analysis suggests that Blackburn J. would himself have associated cattle trespass with trespass to land rather than nuisance.

[64] n. 41 above.

[65] *ibid.* at 361.

[66] "The Rule in Rylands v Fletcher" (1911) U. Pa. L. Rev. 298, 373, 423 at p. 311. See also *Read*, n. 1 above, at 166 *per* Viscount Simon.

[67] It is noteworthy, however, that in *Jones v Llanwrst Urban Council* [1911] 1 Ch. 393 at 402-403 Parker J. seems to treat *Rylands* as a trespass case. See also *Clerk and Lindsell on Torts* (8th ed., 1929) at pp. 392-393).

[68] See below, text accompanying n. 82.

[69] Winfield, n. 34 above.

[70] See also Kenneth S. Abraham, "*Rylands v Fletcher*: Tort Law's Conscience," in Robert L. Rabin and Stephen D. Sugarman (eds), *Torts Stories* (2003) at p. 215: "The sense that something new

liability in question was imposed not only for the acts of oneself and one's servants but for the acts of anyone not classified as a stranger. (This explains why the defendants in *Rylands* were liable for the acts of their independent contractors a full ten years before such liability was imposed in nuisance.[71]) The broader significance of the case lay in the fact that it represented a victory for judicial opponents of the fault principle, but this is precisely why the rule so rapidly came to appear anomalous. Within a short time, the fault principle was ascendant, and only a few years later the facts of the case might well have been dealt with solely from the standpoint of negligence.

(2) There are well-established distinctions between the rule in Rylands v Fletcher *and private nuisance*

There are a number of well-established distinctions between the rule in *Rylands v Fletcher* and private nuisance. Perhaps the two most obvious of these derive from the fact that while private nuisance is a tort against land the *Rylands* rule overcame its origins in the real property context and developed into a cause of action of more general application. As was made clear in *Hunter v Canary Wharf Ltd*,[72] if a wrong is characterised as one against land, then it follows that claims cannot be brought for personal injury, and that only those with an interest in the land affected have standing. Historically, neither restriction applied to actions brought under the rule. Before the *Cambridge Water* case, the only clear-cut judicial support for the analysis of *Rylands v Fletcher* as a tort limited to the protection of real property interests was to be found in *Read v Lyons*,[73] a case concerning a munitions inspector injured when an explosion took place in the factory where she was working. The House of Lords held that the inspector was not entitled to recover damages from the factory's owners under the strict liability rule because there had been no escape of a dangerous thing from their premises, but Lord Macmillan added that the case also fell outside the ambit of the rule because *Rylands v Fletcher* **[433]** concerned "the mutual duties of adjoining or neighbouring landowners," and had "nothing to do with personal injuries,"[74] recovery for which required proof of negligence.[75] Lord Uthwatt likewise said that the principle applied only to interference with land,[76] and, while Lords Porter and Simonds left open the question of recovery for personal injury, the latter inclined towards Lord Macmillan's position.[77]

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was being decided in *Rylands* stems, I think, from the generality of the principle on which the opinions of Cairns and Blackburn are based." Strangely, the general rule did not swallow up all its more specific antecedents, for cattle trespass remained distinct.

[71] *Bower v Peate* (1876) 1 Q.B.D. 321.

[72] [1997] A.C. 655.

[73] n. 1 above.

[74] *ibid.* at 173.

[75] *ibid.* at 170-171.

[76] *ibid.* at 186.

[77] n. 1 above, at 178 and 180, respectively.

Of course due weight must be accorded to these pronouncements, but it is important to remember that they were merely *dicta*, and that the House of Lords in *Read* was evidently concerned to limit as much as possible the scope of a principle they regarded with obvious disdain. In any case, there are numerous authorities to the contrary. As regards *locus standi*, the case law before *Cambridge Water* strongly suggested that the right to bring a claim was not dependent on possession of an interest in the property on to which the thing escaped. As Lawton J. said in *British Celanese Ltd v A.H. Hunt (Capacitors) Ltd*: "Once there has been an escape … those damnified may claim. They need not be the occupiers of adjoining land, or indeed of any land."[78] Examples of this relaxed approach abound. One such is *Charing Cross Electricity Supply Co. v Hydraulic Power Co.*,[79] where water had escaped from the defendant's mains and damaged the plaintiff's electric cables, and where it was held that damages were recoverable under the strict liability rule, despite the fact that the plaintiff had no interest in the land where the cables were laid. *Rylands v Fletcher* has also been applied in cases where the damage occurred on a public highway,[80] and in a public park.[81] Some of the non-occupiers who successfully sued had suffered personal injury, but this was not seen as problematic either. In *Shiffman v Order of St John*,[82] for example, the plaintiff recovered damages under the *Rylands v Fletcher* rule after he was hurt by a falling flag pole in Hyde Park, and two years later, in *Hale v Jenning Bros*,[83] the Court of Appeal awarded the plaintiff damages under the rule after she was struck by a chair that became detached from a fairground chair-o-plane. Many **[434]** judges and commentators have noted these authorities, and concluded that the rule extends to cases of personal injury.[84]

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[78] [1969] 1 W.L.R. 959 at 964. See also *Perry v Kendricks Transport Co. Ltd* [1956] 1 W.L.R. 85 at 92, where Parker L.J. said that (notwithstanding the *dicta* in *Read v Lyons*) it was not open to the Court of Appeal to hold that the rule applied only to damage to adjoining land or to a proprietary interest in land.

[79] [1914] 3 K.B. 772.

[80] *Miles v Forest Rock Granite Co.* (1918) 34 T.L.R. 500; *Halsey v Esso Petroleum Co. Ltd* [1961] 1 W.L.R. 683. See also *Goodbody v Poplar Borough Council* (1914) 84 L.J.K.B. 122, where the action failed on other grounds.

[81] *Shiffman v Order of St John* [1936] 1 All E.R. 557.

[82] *ibid.*

[83] [1938] 1 All E.R. 579. See also *Miles*, n. 80 above (plaintiff injured by defendant's blasting operations).

[84] See *e.g. Perry*, n. 78 above, at 92 *per* Parker L.J.; *Hunter*, n. 72 above, at 719 *per* Lord Cooke; West, n. 37 above, at p. 96; J.G. Fleming, *The Law of Torts* (9th ed., 1998) at p. 384; Murphy, n. 8 above, at pp. 652-654. A Canadian commentator has described the view that personal injuries are excluded as "totally discredited": Allen M. Linden, "Whatever Happened to Rylands v Fletcher?" in Lewis Klar (ed.), *Studies in Canadian Tort Law* (1977) at p. 335.

The analysis of *Rylands v Fletcher* as a tort against land has not appealed to courts in other jurisdictions either,[85] while writers as distinguished as Winfield,[86] Stallybrass[87] and Fleming[88] have all rejected this narrow conception of the strict liability rule.[89] Moreover, there is evidence that Blackburn J. did not subsequently consider that the rule he himself laid down was limited to the protection of real property interests. In *Cattle v Stockton Waterworks*,[90] water that leaked from the defendant's main made work the plaintiffs had contracted to do on a third party's land more onerous, and they sought recovery of the extra expense under the *Rylands v Fletcher* rule. The Divisional Court dismissed the claim on the ground that the harm (pure economic loss) was too remote. The importance of the case for present purposes lies in a passage in Blackburn J.'s judgment where – in making the point that economic loss was not recoverable – he said that, if it was, then in a case like *Rylands v Fletcher* the defendant would be liable, "not only to an action by the owner of the drowned mine, *and by such of his workmen as had their tools or clothes destroyed*, but also to an action by every workman and person employed in the mine, who in consequence of its stoppage made less wages than he would otherwise have done."[91] The words in italics suggest that at this time Blackburn J. did not consider *Rylands v Fletcher* to be a real property tort.[92]

There are a number of other important distinctions between nuisance and *Rylands v Fletcher*. In *Cambridge Water*, Lord Goff pointed to what he called the "similarity of function" between the nuisance principle of unreasonable user and the *Rylands* principle of non-natural use.[93] But whilst at a general level there is indeed a functional connection – each concept being the principal "control mechanism" of the cause of action in question – closer scrutiny reveals marked differences between the two doctrines. The unreasonable user issue is ultimately concerned with **[435]** whether or not the interference with the claimant's land is tolerable, so the focus is not so much on the nature of the defendant's activity – though this is a factor to be considered – but on whether the resulting discomfort or inconvenience is something which the claimant can, in all the

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[85] See *e.g. Benning*, n. 10 above, at 275 *per* Barwick C.J., 277 *per* Menzies J., 319-320 *per* Windeyer J.; and *Aldridge v Van Patter* [1952] 4 D.L.R. 93 (recovery under the rule by a spectator at a stock-car race).

[86] n. 34 above, at p. 195.

[87] *Salmond on the Law of Torts* (7th ed., 1928) at p. 374.

[88] n. 84 above, at pp. 383-384.

[89] See also West, n. 37 above, at pp. 101-102; J.M. Eekelaar, "Nuisance and Strict Liability" (1973) 8 Ir. Jur. (N. S.) 191 at p. 205; Murphy, n. 8 above, at p. 646.

[90] (1875) L.R. 10 Q.B. 453.

[91] *ibid.* at 457 (emphasis added).

[92] Murphy, n. 8 above, also draws attention (at p. 653) to these remarks, as well as pointing out that in *Jones v Festiniog Rly*, n. 5 above, Blackburn J. applied the strict liability rule to a haystack (i.e., a chattel).

[93] n. 2 above, at 299.

circumstances, be expected to put up with.[94] The non-natural use concept is quite different, for here the focus is not on the harm caused to the claimant, or even on a balancing of the two parties' interests, but simply on the nature of the defendant's activity.[95] At root, the question is whether the way the defendant is using his property is extraordinary or unusual, as opposed to humdrum or everyday.[96] Besides which, the doctrine of unreasonable user would be superfluous if applied to a *Rylands v Fletcher* case, since where there is physical damage to the claimant's land the requirement appears automatically to be satisfied.[97] Indeed, Cross points out that, unlike the non-natural use requirement in *Rylands v Fletcher*, the reasonable user principle has never been a general prerequisite of liability in nuisance: rather it is "a test which has developed out of the need to establish, in a limited category of cases, whether the interference alleged surmounts the threshold of interference necessary to give rise to an action."[98] The non-natural use requirement also shows up another important difference between the two torts, namely that while, by definition, things that arise naturally on the defendant's land fall outside the scope of the strict liability rule,[99] an occupier who fails to take reasonable steps to prevent such a thing causing damage to a neighbour's property can be sued in nuisance.[100]

A trickier issue is whether a distinction exists when it comes to the link required, if any, between the defendant and the land from which the interference emanates or the thing escapes. In nuisance, it is almost universally accepted that the creator is liable regardless,[101] but the defendant's occupation of the land in question has been said by some to be **[436]** a prerequisite of liability under *Rylands v Fletcher*.[102] Indeed, it has been argued that the requirements of an

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[94] See Andrew Grubb (ed.), *The Law of Tort* (2002) at para. 22.38.

[95] Maria Lee, "What is Private Nuisance?" (2003) 119 L.Q.R. 298, at p. 313.

[96] See *Transco*, n. 3 above, at [11] *per* Lord Bingham; Prosser, n. 9 above, at pp. 407-408.

[97] See Grubb, n. 94 above, at para. 22.41. Roderick Bagshaw argues that it is hard to see how the nuisance principle of "give and take, live and let live" can be a general solution to the "non-natural user" conundrum "because it is difficult to apply it to cases involving property damage caused by rare and isolated escapes" ("*Rylands* Confined" (2004) 120 L.Q.R. 388 at p. 390).

[98] Gerry Cross, "Does Only the Careless Polluter Pay? – A Fresh Examination of the Nature of Private Nuisance" (1995) 111 L.Q.R. 445 at p. 448. For other criticism of the conflation of the two concepts, see Antonia Layard, "Balancing Environmental Considerations" (1997) 113 L.Q.R. 254; Michael A. Jones, *Textbook on Torts* (8th ed., 2002), at pp. 397-398; Lee, n. 95 above, at p. 313 ("non-natural use has generally not required a balancing of interests, but looks simply at what the defendant is doing"); and Murphy, n. 8 above, at pp. 655-656 ("the supposedly related tests … serve quite different functions within their respective torts").

[99] *Bartlett v Tottenham* [1932] 1 Ch. 114 at 131 *per* Lawrence L.J.; *Ellison*, n. 23 above, at 118 *per* Judge Peter Bowsher Q.C.

[100] *Leakey v National Trust* [1980] Q.B. 485.

[101] See Grubb, n. 94 above, at para. 22.11. For recent confirmation, see *Jones (Insurance Brokers) Ltd v Portsmouth City Council* [2002] EWCA Civ 1723; [2003] 1 W.L.R. 427.

[102] See *e.g. Pett v Sims Paving and Road Construction Co. Pty Ltd* [1928] V.R. 247; Winfield, n. 34 above, at p. 196; West, n. 37 above, at pp. 103-104. Such a requirement is also consistent with

accumulation on, and a non-natural use of, the defendant's land seem to force this conclusion,[103] and the same could be said of the escape requirement, since this has been defined in terms of an escape from a place which the defendant has occupation of, or control over, to a place outside his occupation or control.[104] There are, however, many authorities the other way.[105] That the rules governing liability for the acts of independent contractors differ as between the two causes of action is, on the other hand, not in doubt. In *Rylands v Fletcher*, the involvement of independent contractors makes no difference (as the leading case demonstrates), but in nuisance the general rule is that an occupier who employs a contractor to do work on his behalf is not liable if unlawful interference results,[106] though there are some exceptions, most notably where the task on which the contractor was engaged of its very nature involved a risk of damage to a third party.[107] When it comes to defences, we find that two (consent and statutory authority) are shared by both causes of action, but this is no surprise, since both are general defences to tort liability. The other three defences to actions under the rule in *Rylands v Fletcher* – act of God, act of a stranger, and default of the claimant – are causation based,[108] and no precise parallels exist in nuisance.

(3) Merger with the rule in Rylands v Fletcher *will be bad for nuisance*

The third objection to the merger of the rule in *Rylands v Fletcher* with private nuisance is that it will be bad for nuisance. There are three aspects to this objection. The first is that the assimilation of the two torts seems to be leading judges to apply principles developed in the *Rylands v Fletcher* context to ordinary nuisance cases, with unfortunate results. A good example is provided by *Dennis v Ministry of Defence*, where Buckley J. held that because using an airfield to train Harrier jet pilots was an extraordinary use of land the noise that resulted was a nuisance.[109] **[437]** Similarly, in *Crown River Cruises Ltd v Kimbolton Fireworks Ltd*,

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the language used in some of the English case law: see *e.g. Read*, n. 1 above, at 174 *per* Lord Macmillan (neighbouring owners), 186 *per* Lord Uthwatt (neighbouring occupiers); *Transco*, n. 3 above, at [11] *per* Lord Bingham, [57] *per* Lord Hobhouse (referring to situations arising "as between landowners").

[103] *Street on Torts* (11th ed., 2003) at p. 437.

[104] *Read*, n. 1 above, at 168 *per* Viscount Simon.

[105] See *e.g. Powell*, n. 5 above; *Charing Cross*, n. 79 above; *Shiffman*, n. 81 above, at 561 *per* Atkinson J.; *Northwestern Utilities*, n. 33 above, at 118 *per* Lord Wright; *Rigby v Chief Constable of Northamptonshire* [1985] 1 W.L.R. 1242 at 1255 *per* Taylor J.; *Crown River Cruises Ltd v Kimbolton Fireworks Ltd* [1996] 2 Lloyd's Rep. 533 at 547 *per* Potter J.

[106] *Matania v National Provincial Bank Ltd* [1936] 2 All E.R. 633 at 645 *per* Slesser L.J.; *Alcock v Wraith* (1991) 59 B.L.R. 16, 26 *per* Neill L.J.

[107] See *e.g. Matania*, n. 106 above. This principle is not limited to nuisance. The other three exceptions concern withdrawal of support, party-walls, and fire: see Grubb, n. 94 above, at para. 22.67.

[108] See below, text accompanying n. 164.

[109] [2003] EWHC 793 (QB) at [34].

Potter J. concluded that physical damage caused by a fireworks display on the River Thames was actionable in nuisance because such displays could "hardly be said to be an ordinary and reasonable incident of river life."[110] This sort of reasoning threatens to wreak havoc in the law of nuisance, since it follows that any interference with land caused by an extraordinary use will be actionable (no matter how trivial) and that any interference caused by an ordinary use will not be (no matter how intolerable). Indeed, the House of Lords has already taken a step towards the latter conclusion by holding that ordinary use of residential premises is never actionable in nuisance,[111] though that decision probably owed more to policy considerations than it did to the influence of *Rylands v Fletcher* reasoning.[112]

The second aspect of this objection is that extending private nuisance to isolated escapes undermines the essential nature of the cause of action. This becomes clear if we go back to the tort's origins in the assize of nuisance, for the object of the assize was abatement, a remedy which depended on the continuation of the interference down to the time of the action: hence Bohlen's definition of a nuisance as a "condition capable of abatement after it is known to be injurious."[113] Indeed, even in the modern law, the "nuisance" is defined as the state of affairs that causes the interference, rather than the interference itself,[114] which presupposes an element of continuity. Moreover, because a nuisance is a wrongful state of affairs, it can be enjoined by a quia timet injunction before any harm has occurred.[115] *Rylands v Fletcher* liability is very different, since the initial accumulation is itself perfectly lawful: as Mellish L.J. remarked in *Nichols v Marsland*, "The wrongful act is not the making or keeping the reservoir, but the allowing or causing the water to escape."[116] There is therefore no wrongful state of affairs which can properly be described as a nuisance,[117] and so a quia timet injunction will not lie. As Bagshaw has noted, this points to a fundamental distinction between the two causes of action:[118]

> "One of the functions of private nuisance is to decide what activities people should be permitted to pursue in a particular locality, given the effects of

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[110] n. 105 above, at 545. See also *Graham and Graham v ReChem International Ltd* [1996] Env. L.R. 158 at para. 162 *per* Forbes J. (incineration of chemical waste potentially actionable in nuisance because it was not necessary for the common and ordinary use and occupation of the land); and *Arscott v The Coal Authority* [2004] EWCA Civ 892 at [27] *et seq. per* Laws L.J.

[111] *Southwark London Borough Council v Mills* [2001] 1 A.C. 1.

[112] See Grubb, n. 94 above, at para. 22.40.

[113] n. 66 above, at p. 312.

[114] Warren A. Seavey, "Nuisance, Contributory Negligence and Other Mysteries" (1952) 65 Harv. L. Rev. 984 at p. 985.

[115] Winfield, n. 34 above, at p. 196.

[116] n. 48 above, at 5.

[117] Seavey, n. 114 above, at p. 986.

[118] n. 97 above, at p. 389.

> those activities on neighbours. But it is no part of the rule in *Rylands v Fletcher* to forbid particular activities. Rather … it is a **[438]** rule which requires those who pursue particular activities to internalise the costs of escapes. It is a rule about who pays when things go wrong rather than about whether the defendant's activity is wrongful."

It might be objected that this second consideration loses some of its force because a body of nuisance cases involving one-off escapes already exists. However, most such authorities fall within the *Leakey v National Trust*[119] category – where liability is contingent on proof of carelessness – and these are best regarded as instances of negligence liability dressed up in nuisance clothing.[120] If we set aside the *Leakey*-type cases, there were only three examples of successful private nuisance actions based on one-off events prior to *Cambridge Water*, and none is persuasive. *Midwood & Co. Ltd v Manchester Corporation*,[121] where an explosion was caused by the deficient insulation of the defendant's electric main, could surely have come under the *Rylands v Fletcher* rule, and was later treated as if it had.[122] The second such case is *British Celanese Ltd v A.H. Hunt (Capacitors) Ltd*,[123] where foil strips stored on the defendants' premises had blown on to the bus bars of a neighbouring electricity sub-station, and affected the electricity supply to the plaintiffs' factory. Since the plaintiffs suffered physical damage to their property as a result, recovery in negligence was straightforward. Rather strangely, however, Lawton J. held that the defendants were also liable in nuisance, though it is difficult to see how the damage to the materials could be described as an interference with the plaintiffs' use and enjoyment of their land.[124] In the final case, *Spicer v Smee*,[125] defective electric wiring in the defendant's bungalow caused a fire that destroyed his neighbour's house. The decision of Atkinson J. to award damages in nuisance was decidedly odd, for, as Winfield pointed out, "during the course of the common law's development, liability for fire and liability for nuisance travelled in separate compartments."[126] Besides, the legal gymnastics required to fit *Spicer v Smee* into nuisance included the conclusion that the "nuisance" was the defective state of the wiring,[127] but if that were right then the plaintiff would have been entitled to an injunction

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[119] n. 100 above.

[120] Conor Gearty, "The Place of Private Nuisance in a Modern Law of Torts" [1989] C.L.J. 214 at pp. 233-241. *Goldman v Hargrave* [1967] 1 A.C. 645, a leading authority in this category, reads like a negligence case as it is.

[121] [1905] 2 K.B. 597.

[122] *Charing Cross*, n. 79 above.

[123] n. 78 above.

[124] When a similar case reached the Court of Appeal three years later, the same judge made no mention of nuisance: *Spartan Steel & Alloys Ltd v Martin & Co. (Contractors) Ltd* [1973] Q.B. 27.

[125] [1946] 1 All E.R. 489.

[126] n. 34 above, at p. 203.

[127] n. 125 above, at 493.

requiring the defendant to put things right before the fire took place. In *Midwood*, Mathew L.J. saw this problem coming and denied that **[439]** the defendants' system of electric lighting itself amounted to a nuisance, since this "would seem to lead to the somewhat startling conclusion that, apart from actual mischief, it would be open to any one who might possibly be endangered by that system to indict the corporation for a nuisance in respect of it."[128] And yet this concession to common sense amounts to an acceptance that in these cases there is no "nuisance", in the sense of an injurious state of affairs, at all. Surely, then, the better view is that of Lord Denning:[129]

> "I quite agree that a private nuisance always involves some degree of repetition or continuance. An isolated act which is over and done with, once and for all, may give rise to an action in negligence or an action under the rule in *Rylands v Fletcher*, but not an action for nuisance."

The final aspect of this objection is that fusion with the rule in *Rylands v Fletcher* will hinder rationalisation of private nuisance. Gearty has argued that if cases of physical damage to property were hived off into negligence, we would be left with a slimmed down, more coherent tort.[130] Assimilation of the two causes of action presents a significant obstacle to this apparently desirable development, since cases within the rule invariably concern physical harm.[131]

(4) The version of the strict liability rule to which the offshoot theory has given rise is unappealing

The final objection to the offshoot theory is that it has given rise to a version of the strict liability rule which is unappealing. In the *Transco* case, Lord Bingham summed up the effect of the reformulated rule as follows:[132]

> "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."

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[128] n. 121 above, at 610 (see also *per* Channell J. at 608, *per* Romer L.J. at 609). In *Sedleigh-Denfield*, n. 33 above – a leading case within the *Leakey* category – the House of Lords could not agree whether the nuisance was a blocked drainage pipe or the flooding it caused: see Gearty, n. 120 above, at pp. 236-237.

[129] *Attorney-General v P.Y.A. Quarries Ltd* [1957] 2 Q.B. 169 at 192.

[130] n. 120 above.

[131] Lee, who opposes Gearty's proposed reform, points out that the assimilation of *Rylands v Fletcher* and nuisance serves to entrench the place of physical damage in the latter cause of action: n. 95 above, at p. 305.

[132] n. 3 above, at [11].

[440] This new version of the doctrine amounts, therefore, to a special category of liability for exceptionally hazardous activities that cause damage to land. An obvious objection is that greater protection is thereby given to proprietary interests than to personal interests, and that this would appear to be indefensible.[133] Indeed, it has been said that for the law to privilege real property interests in this way is suggestive of an "alarming retrogressive tendency,"[134] a throwback to a more primitive stage of the law's development. It is also worth pointing out that, while insurance against personal injury is relatively rare, insurance against property damage is relatively common. Although Lord Hoffmann's attempt in *Transco* to limit the *Rylands* rule to situations where the claimant could not reasonably have been expected to have insured himself[135] has been justly criticised,[136] nevertheless it seems odd that a strict liability rule often justified by reference to loss-spreading arguments should be deployed only where those arguments have the least bite.

Furthermore, in *Transco* their Lordships emphasised that the rule should henceforth be interpreted very narrowly. Lord Bingham did not think that the mischief or danger test would be at all easily satisfied: it must be shown that the defendant had done something which he recognised, or ought reasonably to have recognised, gave rise to an "exceptionally high risk of danger or mischief" in the event of an escape.[137] And when it came to the question of non-natural use, it must be shown that the defendant had done something which he recognised, or ought to have recognised, was "quite out of the ordinary" in the place and at the time when he did it.[138] Lord Hoffmann agreed that the criterion of exceptional risk must be taken seriously, and created a high threshold for the claimant to surmount.[139] It follows that in future there are likely to be even fewer cases where *Rylands v Fletcher* is pleaded successfully than there have been in the past, and it seems reasonable to conclude, therefore, that acceptance of the offshoot theory has resulted in a doctrine which is both arbitrary in its application and largely devoid of practical significance.

III. *RYLANDS v FLETCHER* AND NEGLIGENCE

Although in England the most serious challenge to the distinctiveness of *Rylands v Fletcher* has come from the offshoot theory, it has also been threatened in

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[133] See T.H. Tylor, "The Restriction of Strict Liability" (1947) 10 M.L.R. 396 at p. 400; and Linden, n. 84 above, at p. 336: "It is unthinkable that our courts could possibly value property interests over human safety."

[134] F.V. Harper and F. James, *Law of Torts* (1956), at p. 806.

[135] n. 3 above, at [46].

[136] *ibid.* at [60] *per* Lord Hobhouse; Bagshaw, n. 97 above, at p. 390.

[137] n. 3 above, at [10].

[138] *ibid.* at [11].

[139] *ibid.* at [49].

another way. The argument we are dealing with here is the **[441]** contention that the gap between *Rylands v Fletcher* liability and the tort of negligence has narrowed so much that the two causes of action are now virtually indistinguishable. Once again, there is nothing novel about this line of reasoning. As early as 1916, Thayer wrote that the difference between the two "in the actual protection given by the law to the injured person is not very great,"[140] and the following year Smith argued that *Rylands v Fletcher* could itself have been decided in negligence, since the contractors were careless, and the duty resting upon the defendants was non-delegable.[141] Since both Thayer and Smith were arch-proponents of the fault principle, their take on *Rylands v Fletcher* was unsurprising, but a similar analysis caused the High Court of Australia to hold, in *Burnie Port Authority v General Jones Pty Ltd*,[142] that the rule ought henceforth to be treated as having been absorbed by the principles of ordinary negligence. According to the Court, future cases should be dealt with under the usual negligence rules, with two provisos: the duty of care in situations falling within the scope of the *Rylands* rule would be non-delegable, and in the case of dangerous substances and activities the reasonably prudent person would exercise a particularly high degree of care.

Central to the reasoning of the majority (McHugh and Brennan JJ. dissented) was the perception that, since its original formulation, the rule in *Rylands v Fletcher* "has been progressively weakened and confined from within, and the area of its effective operation, in the sense of the area in which it applies to impose liability where it would not otherwise exist, has been progressively diminished by increasing assault from without."[143] It was argued that the shrinkage of the space between negligence and *Rylands v Fletcher* was the result of a combination of the toughening and expansion of the former head of liability and the softening and constriction of the latter. Particularly noteworthy in this regard were – as regards negligence – the raising of the standard of care (especially in the context of dangerous activities), the doctrine of *res ipsa loquitur*, and the extension of liability for independent contractors; and – as regards *Rylands v Fletcher* – the development of exculpatory defences (such as act of God), the infusion of fault ideas into the concept of non-natural user, and the foreseeability requirement laid down in *Cambridge Water*. The end result was that, in terms of coverage, the difference between the two causes of action was negligible,[144] and hence the majority passed off the absorption **[442]** of the rule

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[140] Ezra Thayer, "Liability Without Fault" (1916) 29 Harv. L. Rev. 801 at p. 808. For similar analyses, see V. MacDonald, "The Rule in Rylands v Fletcher and its Limitations" (1923) 1 Can. Bar Rev. 140; Fridman, n. 60 above; and M.A. Millner, *Negligence in Modern Law* (1967) at p. 190 *et seq*.

[141] Jeremiah Smith, "Tort and Absolute Liability – Suggested Changes in Classification" (1917) 30 Harv. L. Rev. 409 at pp. 409-410.

[142] n. 7 above.

[143] *ibid.* at 540.

[144] *ibid.* at 549, 555. For a similar conclusion, see *Transco*, n. 3 above, at [39] *per* Lord Hoffmann.

into negligence as, in Fleming's words, "just a cleaning-up of the structural debris of outworn doctrine."[145]

Although it will be argued that this analysis is to some extent misguided, it is less invidious than the offshoot theory, for four reasons. First, it is not grounded on a misreading of the original case. Secondly, it is true that, while there are important theoretical differences between the two causes of action, in most cases application of the rule in *Rylands v Fletcher* and the tort of negligence will indeed lead to the same result. Thirdly, there is little danger that subsuming *Rylands v Fletcher* under negligence will distort the latter tort or reduce its coherence. And, finally, the outcome of the *Burnie* analysis, abrogation of the strict liability rule, is much more defensible than the state in which English law finds itself in the aftermath of *Transco*.[146]

Nevertheless, the way in which the majority sugared the pill of abolition was unconvincing, as McHugh J. demonstrated in a strong dissenting judgment. His Honour pointed out that there were still important differences between the rule in *Rylands v Fletcher* and negligence, not least the fact that *Rylands v Fletcher* is a principle of strict liability, in the sense that the defendant may be held liable notwithstanding the fact that he exercised reasonable care. In particular, his Honour rejected the majority's argument that the presence of negligence has become a factor in determining whether the defendant's use of land is "non-natural", claiming instead that the requirement of non-natural use was an important difference between the two causes of action.[147] This seems right. While it is certainly true that attempts have been made to infuse the doctrine of non-natural use with fault-based reasoning, the claim that reasonableness in negligence and non-natural user are essentially similar concepts[148] does not hold water.

There are two notions which have threatened to reduce the conceptual space between negligence and non-natural use, the first of which is that a use of benefit to the community is for that reason a natural one. This concern with social utility was not mentioned in the early case law, but surfaced in a couple of early twentieth century authorities, where it formed one element of a wider backlash against the strict liability rule.[149] However, although the idea was

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[145] "The Fall of a Crippled Giant" (1995) 3 Tort L. Rev. 56 at p. 60.

[146] Although since the majority's approach relies heavily on the difficult concept of non-delegable duty, and ties its application to the vagaries of "dangerousness", it may be that the abrogation of the *Rylands* rule will give rise to as many problems as it solves. For a critique of the majority's reasoning on the non-delegable duty issue, see Jane Swanton, "Another Conquest in the Imperial Expansion of the Law of Negligence" (1994) 2 Torts L.J. 101 at pp. 109-115.

[147] n. 7 above, at 588.

[148] See *e.g.* Peter Cane, "Justice and Justifications for Tort Liability" (1982) 2 O.J.L.S. 30 at pp. 53-54.

[149] *Rickards*, n. 56 above, at 280 *per* Lord Moulton; *Read*, n. 1 above, at 169-170 *per* Viscount Simon.

influential in the post-war years, the *Cambridge Water* decision signalled a return to orthodoxy, with Lord Goff remarking that if general benefit to the community were taken into account it was difficult to see how the natural user exception could be kept within **[443]** reasonable bounds.[150] His Lordship's scepticism was echoed by Lords Bingham and Walker in *Transco*, the latter denying that a court could sensibly determine whether a use was ordinary or special "by undertaking some utilitarian balancing of general good against individual risk."[151]

The other threat to the distinction between the two doctrines has come from the notion that the manner as well as the nature of the use ought to be considered when determining whether it qualifies as non-natural.[152] In *Burnie Port* itself, for example, the Supreme Court of Tasmania held that the defendant's welding operations were a non-natural use because they were carried out in the vicinity of combustible material.[153] On appeal to the High Court of Australia, the majority agreed that when determining whether a use was non-natural regard could be had to its manner as well as to its nature.[154] There are also a handful of English cases where the courts have looked, not at the activity of the defendant *per se*, but at the way in which it has been carried out.[155] However, although this kind of reasoning obviously undermines the distinction between negligence and liability in *Rylands v Fletcher* (because the absence of reasonable care itself determines the applicability of the supposedly strict liability rule), it is surely an exaggeration to claim that this tendency has to all intents and purposes destroyed the latter cause of action as a separate entity.[156] Apart from these few cases, the authorities (including *Cambridge Water* and *Transco*) indicate that the issue of non-natural use should be determined not by reference to the manner of the defendant's operations but the character of his use of the land unit in

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[150] n. 2 above, at 308.

[151] n. 3 above, at [105]. Lord Bingham commented (at [11]) that "little help is gained (and unnecessary confusion perhaps caused) by considering whether the use is proper for the general benefit of the community." Similar developments have occurred in the United States. According to the Restatement, Second, Torts (1977) at s. 520(f), one factor which determines whether the strict liability rule for abnormally dangerous activities applies is the value to the community of the activity in question. However, in the draft of the third Restatement, the reference to the social utility of the activity has been dropped: Restatement, Third, Torts: Liability for Physical Harm (Basic Principles) (Tentative Draft No. 1, 2001) at s. 20 and comment k.

[152] See David W. Williams, "Non-Natural Use of Land" [1973] C.L.J. 310 at pp. 311-317.

[153] [1991] Tas. R. 203.

[154] n. 7 above, at 538-539.

[155] See *e.g. Balfour v Barty-King* [1956] 1 W.L.R. 779 (use of a blow-lamp in a loft, close to combustible material, a non-natural use) (affirmed on other grounds: [1957] 2 W.L.R. 84); and *Mason v Levy Auto Parts of England Ltd* [1967] 2 Q.B. 530 (method of storage of combustible material made it a non-natural use). For an example from Canada, see *Brady's Ltd v C.N.R.* [1929] 2 D.L.R. 549 (cleaning a truck engine with gasoline without disconnecting the battery a non-natural use).

[156] Cane, n. 148 above, at p. 54.

question. The distinction with negligence is therefore maintained. In *Burnie Port*, McHugh J. gave eloquent expression to the more orthodox approach:[157]

> "Circumstances are relevant to the issue of non-natural use. But manner of performance is not. In determining whether a use is a natural use, regard must be had to what the occupier did. It is then necessary to determine whether that class of activity constitutes a **[444]** natural use having regard to the time, place and circumstances … the exercise does not involve any close examination of the specifics."

Once it is understood that public benefit considerations have no place in the non-natural use inquiry, and that the non-natural use issue concerns only the general character of the defendant's activity, then the distinction between this concept and the requirement of unreasonable conduct in negligence becomes clear. As we have seen,[158] a use is non-natural because it is extraordinary or unusual: its reasonableness is neither here nor there.

Moving beyond the non-natural use requirement, there were two other developments in the law concerning *Rylands v Fletcher* actions which the majority in *Burnie Port* put forward as evidence of a gradual conflation with negligence. One was the decision in *Cambridge Water* to apply the principles governing remoteness of damage in negligence, so that foreseeability of damage of the relevant type became a prerequisite of liability under the rule. It is frequently alleged that this marked the end of strict liability in this context, but this is to ignore the fact that it is only the *consequences* of the escape, not the escape itself, that must be foreseeable,[159] and to make the mistake of confusing foreseeability with fault. Although there can be no fault without foreseeability, there can be foreseeability without fault: hence, if we assume that liability is strict where it is not conditional on proof of fault (or negligence), a foreseeability requirement is not inconsistent with a strict liability regime.[160] Furthermore, as Lord Goff pointed out in *Cambridge Water*, the language Blackburn J. used in the *Rylands v Fletcher* case suggests that it was originally envisaged that liability under the rule would be limited to foreseeable harm.[161]

Finally, the majority in *Burnie Port* said that recognised defences to a *Rylands v Fletcher* claim, such as act of God, were more "attuned to the notion of fault

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[157] *ibid.* at 589-590.

[158] See above, text accompanying n. 96.

[159] See further Grubb, n. 94 above, at para. 23.29.

[160] See *Salmond & Heuston on the Law of Torts* (21st ed., 1996) at p. 314; Tony Weir, "The Staggering March of Negligence," in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (1998) at p. 107. See also Restatement, Third, Torts, n. 151 above, at s.20, comment i (the principle of strict liability for abnormally dangerous activities is subject to a requirement of foreseeability).

[161] See above, text accompanying n. 16.

liability than that of strict liability."[162] In saying this, their Honours were echoing academic commentators who have argued that the development of these defences has narrowed the gap between *Rylands v Fletcher* and negligence to almost nothing, and made it doubtful "whether there is much left of the rationale of strict liability as originally contemplated in 1866."[163] This reasoning is also flawed, however. Two of the five **[445]** established defences to an action under the rule, consent and statutory authority, are of general application in the law of tort. The other three – act of God, act of a stranger, and default of the claimant – all go to causation: the defendant is excused because there has been a novus actus interveniens, an interruption of the "ordinary sequence of cause and consequence."[164] Recognition of these defences is therefore entirely in keeping with the philosophy underpinning the strict liability rule, namely that responsibility rests on causa rather than culpa.[165] It comes as no surprise, therefore, to see that in his judgment in *Rylands v Fletcher* Blackburn J. accepted that the defendant could 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."[166] In any case, the line of argument in question exaggerates the significance of these exceptions to the strict liability rule – the scope of the act of God defence is so narrow, for example, that it appears to have been pleaded successfully on only two occasions.[167]

Why, then, is there such broad acceptance of the view that the strictness of the *Rylands* rule has been diluted? The explanation probably lies in anachronistic reasoning. Those who make this argument appear to be looking at a mid-nineteenth century case through contemporary spectacles, and ascribing to the judges who sat in it motivations that were almost certainly far from their minds. As we have seen,[168] the decision in the original case is most plausibly explained as a survival of the general principle of liability recognized by the medieval common law, namely that a man acts at his peril. This explains both the nature

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[162] n. 7 above, at 545.

[163] Fleming, n. 84 above, at p. 385. See too A.L. Goodhart, "The Third Man, or *Novus Actor Interveniens*" [1951] C.L.P. 177.

[164] *Benning*, n. 10 above, at 306 *per* Windeyer J. See also *Transco*, n. 3 above, at [59] *per* Lord Hobhouse. This analysis is borne out by the leading authorities on the three defences, which are suffused with causation reasoning: see *Nichols*, n. 48 above, at 6 *per* Mellish L.J. (act of God); *Carstairs v Taylor* (1871) L.R. 6 Exch. 217 at 221 *per* Bramwell B.; *Box v Jubb* (1879) 4 Ex. D. 76 at 78-79 *per* Kelly C.B.; *Perry*, n. 78 above, at 90 *per* Jenkins L.J. (act of a stranger); and *Dunn v Birmingham Canal Co.* (1872) L.R. 7 Q.B. 244 at 260 *per* Cockburn C.J. (default of the claimant).

[165] See *Burnie Port*, n. 7 above, at 590 *per* McHugh J.

[166] n. 50 above, at 279-280.

[167] *Nichols*, n. 48 above; *Carstairs*, n. 164 above (where there were also other grounds for dismissing the claim). The House of Lords took a particularly restrictive line in *Greenock Corporation v Caledonian Rly Co.* [1917] A.C. 556.

[168] See above, text accompanying n. 56.

of the prima facie liability, and the character of the applicable defences.[169] The problem is that nowadays strict liability is generally justified by reference to internalisation of risk or insurance arguments, the logical conclusion of which is a liability model much tougher than that of the ancient common law: in essence, a regime of *absolute* liability.[170] Advocates of absolute liability are of course bound to consider the rule in *Rylands v Fletcher* something of a let-down, but they ought not to focus their disappointment on a **[446]** "watering down" of the original rule which is largely the product of their own imaginations.

Of course, this analysis itself leads us to the conclusion that in practical terms the gap between the *Rylands* rule and fault-based liability was never *that* great. This should, however, come as no surprise, for, as Ibbetson has demonstrated, it is a mistake to exaggerate the contrast between the medieval regime of strict liability (subject to a range of exculpatory defences) and a regime of fault liability.[171] In particular, the operation of ideas of causation meant that "strict liability was suffused through and through with ideas of fault."[172] But Ibbetson also makes the point that "fault" is not here a synonym for the modern notion of negligence, in the sense of an external standard according to which the wrongfulness of conduct could be assessed.[173] And of course it is impossible to make direct comparisons between an ancient system of strict liability heavily dependent on opaque jury verdicts and its modern manifestation as a series of rules applied by the courts. In any case, even if substantively the ancient and the modern approaches are not that dissimilar – since fault was usually present when "strict" liability was imposed – the structure of the liability inquiry differs in one important respect. Under the old law – and, hence, under *Rylands v Fletcher* – the burden of proof as to "fault" lay on the defendant, whereas in negligence it lies on the claimant.[174] In the end, therefore, it remains plausible to argue, not only that the rule in *Rylands v Fletcher* is quite distinct from negligence on a theoretical level, but also that application of the two causes of action will not infrequently lead to different outcomes.

IV. WHAT SHOULD BE DONE?

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169 Holdsworth, n. 56 above, at p. 472.

170 It has been noted that the rule in *Rylands v Fletcher* is one of strict, rather than absolute, liability: *Benning*, n. 10 above, at 298-299 *per* Windeyer J.; P. H. Winfield, *The Law of Tort* (1937), at p. 508.

171 *A Historical Introduction to the Law of Obligations* (1999) at pp. 58-63. See also P. H. Winfield, "The Myth of Absolute Liability" (1926) 42 L.Q.R. 37.

172 *ibid.* at p. 61.

173 *ibid.*

174 It is noteworthy that Pollock favoured abolition of the rule in *Rylands v Fletcher*, but reversal of the burden of proof as to fault in cases which would have come within the rule: see Sir Frederick Pollock, *The Law of Torts* (10th ed., 1916) at p. 511, and clause 68 of his draft Civil Wrongs Bill for India (*ibid.* at pp. 671-672). On the practical significance of the burden of proof point, see *Transco*, n. 3 above, at [110] *per* Lord Hobhouse.

The final question to be answered is what, then, *should* be done with the rule in *Rylands v Fletcher*? Rejecting assimilation of the rule into private nuisance leaves three other options: a return to the status quo ante the *Cambridge Water* and *Transco* cases; transformation into a general principle of liability for abnormally dangerous activities; and abolition. The first of these options is unappealing, because even before the most recent developments the restrictions imposed on the rule's operation robbed it of any coherence, and fostered arbitrary distinctions: the escape requirement meant, for example, that the liability to two persons injured by an explosion while entering a factory could differ because one had paused **[447]** to let the other cross the threshold.[175] Since there was neither a clear picture of, nor any logical explanation for, the circumstances in which the usual negligence standard was displaced by the operation of strict liability, it is difficult to disagree with the Law Commission's condemnation of the rule as it stood in 1970 as "complex, uncertain and inconsistent in principle."[176]

The second option is closely associated with developments in the United States, where, despite some early opposition,[177] the rule in *Rylands v Fletcher* was eventually accepted in many states and served as the foundation of a principle of strict liability for abnormally dangerous activities.[178] Generality was achieved by doing away with the escape requirement and extending the principle to personal injuries. Furthermore, liability was imposed even where the immediate cause of the injury was the unforeseeable conduct of a third person – though perhaps not where this was intended to bring about the harm – or the unforeseeable operation of a force of nature.[179] As we have seen,[180] at one point English law appeared to be edging towards a similar doctrine based on the *Rylands v Fletcher* rule, but the transformation was nipped in the bud by the House of Lords in *Read v Lyons*,[181] and future development along these lines appears most unlikely. In *Cambridge Water*, Lord Goff made it clear that any such reform was now a matter for Parliament. This assessment – with which Lord Bingham agreed in *Transco*[182] - was based partly on the uncertainties and practical difficulties to

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175 *Burnie Port*, n. 7 above, at 548.

176 Law Com. No. 32, *Civil Liability for Dangerous Things* (1970) at para. 20.

177 Though the perception that the initial reception of the rule was generally frosty has been challenged: see Jed Handelsman Shugerman, "The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of *Fletcher v Rylands* in the Gilded Age" (2000) 110 Yale L.J. 333.

178 See Restatement, Second, Torts, above n. 151, at s. 519(1): "One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm."

179 *ibid.* at s. 522.

180 See above, text accompanying n. 6.

181 n. 1 above.

182 n. 3 above, at [7].

which a general principle would give rise, and partly on the existence of a body of well-informed and carefully structured environmental protection legislation, which such a principle might overlap with or undermine.[183] And yet the chances of legislative intervention look slim. In the 1970s, the Pearson Commission recommended a statutory scheme which would have made the controller of any stipulated dangerous thing or activity strictly liable for personal injury or death the thing or activity occasioned.[184] At the time, this recommendation was ignored, and there is no reason to suppose that Parliament will be any more receptive to the idea in future: it is far more likely that the current legislative policy of **[448]** ad hoc imposition of strict liability on particular activities will prevail.[185]

In any case, the merits of a principle of strict liability for abnormally dangerous activities are doubtful. Far from being a panacea, it has been said that "the doctrine plays a rather subsidiary role in modern American tort law," and may in some circumstances be even more conservative than the *Rylands* doctrine as developed in English law.[186] More generally, there is the problem of deciding which activities qualify as "ultra-hazardous", a difficulty accentuated by the fact that "in a progressive world, things which at one time were reckoned highly dangerous come to be regarded as reasonably safe."[187] There is also the point that while at one stage tort law was fond of special rules for things "dangerous in themselves" and so forth, such an approach now looks rather dated. The modern tendency is towards generalisation, perhaps because the concept of dangerousness has been overtaken by the complexity of contemporary industrial society;[188] perhaps because technological advances have in fact rendered many previously dangerous activities much safer, both in the eyes of the public and in fact;[189] or perhaps because the original appeal of "dangerousness" lay in an outmoded perception of technology as alien and threatening. Finally, the rationale of a principle of this kind is far from clear. The justification usually given for the American doctrine is that the person who chooses to engage in an abnormally dangerous activity should bear the cost of any harm that results, because the risks his activity creates are not normal risks mutually created and

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[183] n. 2 above, at 305.

[184] *Royal Commission on Civil Liability and Compensation for Personal Injury* (1978), Cmnd 7054, vol. I, ch. 31.

[185] See *e.g.* Gas Act 1965, s. 14 (underground storage of gas); Nuclear Installations Act 1965, s. 12 (nuclear matter); Water Resources Act 1991, s. 209 (escape of water from a pipe vested in a water undertaker); Environmental Protection Act 1990, s. 73(6) (unlawful deposit of waste).

[186] Gary T. Schwartz, "*Rylands v Fletcher*, Negligence, and Strict Liability," in Cane and Stapleton, n. 160 above, at p. 238.

[187] *Read*, n. 1 above, at 172 *per* Lord Macmillan.

[188] Wolfgang Friedmann, *Law in a Changing Society* (2nd ed., 1972), at p. 164.

[189] Abraham, n. 70 above, at pp. 224-225.

borne by all.[190] Hence, according to Fletcher – who elevates this idea of non-reciprocal risks into a general justification for tort liability – the critical feature of *Rylands v Fletcher* was "that the defendant created a risk of harm to the plaintiff that was of an order different from the risks that the plaintiff imposed on the defendant."[191] Ripstein has articulated the rationale of strict liability in similar terms:[192] **[449]**

> "If the standard of care is supposed to protect people equally from each other, it cannot leave one person free to choose any activity and then exercise care in relation to that activity. The choice of activities may itself expose others to undue risks, which the risk creator must bear."

There are two difficulties with this reasoning, however. The first is that its application across the board would transform the law of tort: it would require us, for example, to impose strict liability whenever a lorry collides with a pedestrian, since a clearer example of "non-reciprocal risks" is hard to imagine. The second difficulty is that it makes no sense to characterise a given activity or thing as imposing a non-reciprocal risk in the abstract, for it all depends on the circumstances.[193] If I keep a lion in my back garden, and you keep an Alsatian in yours, which of us imposes the greater risk on the other depends on the precautions we take to keep our respective pets from escaping. Indeed, as Stanton points out, many of the most "dangerous" activities – such as the transportation of nuclear waste – are carried on with such exceptional precautions that the level of risk they actually create is very low.[194] It is precisely because the risks an activity creates are bound up with the way in which it is conducted that there has been a tendency to consider the manner as well as the nature of the use when deciding whether an activity is non-natural for the purposes of the *Rylands v Fletcher* rule, but, as we have seen, this approach would eventually lead to the abandonment of strict liability, and its replacement by a negligence standard.

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[190] *McLane v Northwest Natural Gas Co.* 467 P. 2d 635 (Or. 1970) at 638 *per* Holman J. See similarly Restatement, Second, Torts, above n. 151, at s. 522, comment a.

[191] George Fletcher, "Fairness and Utility in Tort Theory" (1972) 85 Harv. L. Rev. 537 at p. 546.

[192] Arthur Ripstein, *Equality, Responsibility, and the Law* (1999), at p. 71. By contrast, Murphy's recent defence of the rule in *Rylands v Fletcher* (n. 8, above) seems to be based on the fact that the defendant stands to profit from his risk-creating activity, rather than on the fact that the risks he creates are non-reciprocal. There are two problems with Murphy's position, however: one is that the rule is not limited to profit-making activities (indeed, it is not even clear whether the accumulation need have been for the defendant's benefit: see Grubb, n. 94 above, at para. 23.27); the other is that his thesis does not explain why only risks created by unusual and "dangerous" activities are caught by the rule.

[193] As Millner puts it (n. 140 above, at p. 195), "danger is not a quality of a thing, but of a thing in relation to the attendant circumstances."

[194] Keith M. Stanton, "The Legacy of *Rylands v Fletcher*," in Nicholas J. Mullany and Allen M. Linden (eds), *Torts Tomorrow: A Tribute to John Fleming* (1998), at pp. 92-93. Hence the so-called "zero-infinity" problem in risk analysis: the idea that in the case of some activities the risk of an accident approaches zero, but the possible consequences of such an accident are almost infinite.

In the end, therefore, the best way forward appears to be abolition. The House of Lords refused to take this course in *Transco*, but the reasons their Lordships gave for this refusal were somewhat tenuous. One of the principal arguments – that the rule was too well-entrenched to be done away with by the courts[195] – is unconvincing, not least because the High Court of Australia did precisely that in the *Burnie Port* case. Nor were the other justifications provided for rejecting this option persuasive. Lord Hobhouse defended the rule (a "useful and soundly based component of the law of tort"[196]) on the basis that where a landowner put his property to a dangerous use he ought to bear the resultant risk, but failed to explain why this principle extended only to interference with **[450]** property interests.[197] Lord Bingham felt that there was a category of case, however small, in which it seemed just to impose liability without fault, but provided no further elucidation. His Lordship also pointed out that in both French and German law there is an element of strict liability protection in disputes between landowners – though not in Scotland, which has never adopted the *Rylands* principle. Finally, Lord Bingham was concerned that Parliament might have passed legislation on the assumption that *Rylands v Fletcher* liability would continue, though he had no way of knowing whether this was so. This would appear, however, to be an argument against any judicial development of the law at all, and in any case Parliament could easily deal with such a problem – if indeed it exists – by amending the relevant legislation.

V. CONCLUSION

Two conclusions of general significance can be drawn from the recent history of the rule in *Rylands v Fletcher*. The first is that it is unwise to base a sweeping reformulation of the law on a single article, particularly when it flies in the face of an abundance of authority to the contrary. The second is that, while there is a good deal of truth in Holmes's aphorism that "it will be found that, when ancient rules maintain themselves … new reasons more fitted to the time have been found for them, and that they gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted,"[198] sometimes it is better simply to extinguish the flickering flame that remains when legal developments leave past doctrines behind. In the case of *Rylands v Fletcher*, the reluctance to take this step may be down in part to legal

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[195] n. 3 above, at [43] *per* Lord Hoffmann ("too radical a step to take"), [82] *per* Lord Scott (a "rather drastic solution"). Lord Bingham commented (at [6]) that the fact that the House had refused to take this course in *Cambridge Water* was a reason not to take it in *Transco*, since "stop-go" was "in general as bad an approach to legal development as to economic management."

[196] *ibid.* at [52].

[197] His Lordship did say – presumably with negligence in mind – that liability for personal injuries was "covered by other parts of the law of tort" (*ibid.*), but negligence surely protects proprietary interests as assiduously as it does personal ones.

[198] *The Common Law* (1881), at p. 36.

sentimentalism. *Rylands* has always possessed a certain symbolic significance, despite – or perhaps because of – its relative practical irrelevance. It is no coincidence, for example, that *Rylands* is the only decision to feature in two books devoted to in-depth analysis of leading cases, Simpson's *Leading Cases in the Common Law*,[199] and a recent American collection entitled *Torts Stories*.[200] And in his essay in the latter work, Abraham argues that "we study *Rylands* not only because of what it was and is, but also because of what it might have been and might still become."[201] The case is "one of tort law's greatest **[451]** hits"[202] because it is the emblem of a strict liability idea that serves as tort law's conscience: by reminding us that an alternative to the negligence paradigm exists, it forces us continually to assess whether the fault requirement accords with justice and public policy.

Be that as it may, the new orthodoxy has left the rule in *Rylands v Fletcher* a shadow of its former self, lacking either rationale or practical significance, and hedged about with arcane and indefensible restrictions. In *Transco*, their Lordships were at pains to point out that there have been very few cases in which actions under the rule have been successful, and Lord Hoffmann said that it was hard to escape the conclusion that the intellectual effort devoted to the rule by judges and writers over many years had "brought forth a mouse."[203] But if that is right – and his Lordship's conclusion appears inescapable – then would not putting this poor creature down have been more merciful than leaving it in the legal equivalent of a persistent vegetative state?

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[199] A.W. Brian Simpson, *Leading Cases in the Common Law* (1995). Simpson's core thesis is that the decision in *Rylands v Fletcher* was influenced by a recent spate of dam-bursting disasters, though the evidence he marshalls in support of this argument is (perhaps inevitably) circumstantial. He also seems to treat the decision as applying only to accumulations of water (see *e.g.* at p. 226, where he refers to the strict liability principle having "acquired an assured status in the law in the special context of reservoir disasters"), but the rule Blackburn J. formulated was not so limited.

[200] Rabin and Sugerman, n. 70 above.

[201] *ibid.* at p. 227.

[202] *ibid.* at p. 226.

[203] n. 3 above, at [39]. See also *per* Lord Bingham (at [5]): it seems that over the past 60 years "few if any claimants have succeeded in reliance on the rule in *Rylands v Fletcher* alone."