Burnie Port Authority v General Jones Pty Ltd - [1994] HCA 13

HIGH COURT OF AUSTRALIA

MASON CJ, BRENNAN, DEANE, DAWSON, TOOHEY, GAUDRON AND McHUGH JJ

BURNIE PORT AUTHORITY v GENERAL JONES PTY. LIMITED
(1994) 179 CLR 520
24 March 1994

Fire—Negligence

Fire—Escape from premises—Ignis suus rule—Whether an independent rule in Australia—Rylands v. Fletcher—Whether part of Australian law—Fires Prevention (Metropolis) Act 1774 (14 Geo. III c. 78) Supreme Court Civil Procedure Act 1932 (Tas.), s. 11 (15). Negligence—Duty of occupier of land to neighbours—Dangerous activity carried on by independent contractor—Liability of occupier for contractor's negligence.

Orders

Appeal dismissed with costs.

Decisions

MASON CJ, DEANE, DAWSON, TOOHEY AND GAUDRON JJ The respondent, General Jones Pty. Limited ("General"), suffered damage when a very large quantity of frozen vegetables which it owned was ruined by a fire which destroyed a building owned by the appellant, the Burnie Port Authority ("the Authority"), at Burnie in Tasmania. The frozen vegetables were stored in three cold rooms in the building. General occupied the cold rooms and an office area pursuant to an agreement with the Authority. The rest of the building, including the area between the ceiling and roof, remained under the occupation of the Authority. At the time of the fire, work was being carried out to extend the building and install further cold storage facilities in the extension. The original building in which the vegetables were stored was known as "Stage 1" and the uncompleted extension was known as "Stage 2".

2. The Authority had not engaged a head contractor in relation to the work involved in erecting and equipping Stage 2. Through employees, it effected part of that work itself, including clearance of the site, the pouring of the concrete foundations and the design of the steel work. Other work involved in Stage 2, including the erection of the steel frame and the installation of electrical and refrigeration equipment, was entrusted to independent contractors. One of those independent contractors was Wildridge and Sinclair Pty. Limited ("W. and S.").

3. The work contracted to W. and S. included the installation of the additional refrigeration in Stage 2. It involved considerable welding and the use of a large quantity of expanded polystyrene (EPS) which is an insulating material. While EPS contains retardant chemicals to inhibit ignition, it can be set alight if brought into sustained
contact with a flame or burning substance. Once ignited, the substance dissolves into a liquid fire which burns with extraordinary ferocity, at a rate which increases in geometric progression. The EPS to be used by W. and S. was marketed under the commercial name of "Isolite" and was contained in approximately thirty cardboard cartons which were, to the knowledge of the Authority, stacked together in an area or "void" under the roof of Stage 2 ("the roof void") in close vicinity to where W. and S. would, again to the knowledge of the Authority, be carrying out extensive welding activities. Obviously, it was essential that care be exercised to ensure that sparks or molten liquid from those welding activities did not ignite the cardboard of one of the stacked containers. If that happened, the likelihood was that the Isolite in that container would ignite with
the result that the whole of the Isolite would become an uncontrollable conflagration.

4. It is common ground that, at relevant times, the Authority was itself in occupation of Stage 2, including the roof void. The Authority took no steps to avoid the risk of conflagration which

unguarded welding activities in the vicinity of the cartons of Isolite involved. On the findings of the learned trial judge, employees of W. and S. carried out the welding activities in such a negligent fashion that sparks or molten metal fell upon one or more of the cartons containing the Isolite. The cardboard was set alight and the Isolite itself commenced to burn fiercely. The conflagration spread from the roof void to the whole of Stage 2 and most of Stage 1, including those parts of the original building containing the cold rooms occupied by General. Within minutes of the commencement of the fire, the whole complex was engulfed in flames.

5. In due course, General sued both the Authority and W. and S. in the Supreme Court of Tasmania. At first instance, the proceedings were complicated by cross-claims and third party claims among the defendants and an additional party, Olympic General Products Pty. Limited ("Olympic"), which had been the supplier of the Isolite. The learned trial judge (Neasey J) found that General was entitled to judgment against the Authority and W. and S. for the damage (to be assessed) which it had sustained by reason of the loss of its frozen vegetables. His Honour held that W. and S.'s liability resulted from the application of the ordinary principles of the law of negligence ("ordinary negligence") and from the application of a special rule relating to an occupier's liability for damage caused by the escape of fire from his or her premises (the "ignis suus rule"). His Honour held that the Authority's liability resulted from the application of the ignis suus rule. As between the Authority and W. and S., his Honour found that the Authority was, by reason of W. and S.'s negligence, entitled to be indemnified by W. and S. in respect of any damages which it paid to General. The Authority's and W. and S.'s third party claims against Olympic were dismissed.

6. The Authority appealed to the Full Court from the trial judge's order that judgment be entered in General's favour against it. The Full Court (Cox, Crawford and Zeeman JJ) affirmed the Authority's liability to General and ordered that the appeal be dismissed. However, the members of the Full Court concluded that the basis of the Authority's liability to General lay not in any special rule relating only to the escape of fire but in a more general common law rule, the rule in Rylands v. Fletcher ((1) (1866) LR 1 Ex 265 ; affd (1868) LR 3 HL 330 .), relating to the liability of an occupier for damage caused by the escape of dangerous substances introduced to his or her premises. The present appeal is by the Authority from the judgment and order of the Full Court.

7. In this Court, General has argued that it is entitled to maintain the judgment in its favour on each of three distinct grounds, namely, (i) the ignis suus principle; (ii) Rylands v. Fletcher liability; and (iii) ordinary (or Donoghue v. Stevenson ((2) (1932) AC 562 .)) negligence. A fourth ground, ordinary nuisance, was raised in General's written outline of argument but was abandoned in the course of oral argument. For its part, the Authority, while denying any liability to General, has not challenged the findings in the courts below to the effect that General sustained substantial damage caused by the spread of fire from premises occupied by the Authority (Stage 2 and the residue of Stage 1) to the premises occupied by General (the cold rooms) and that the fire was caused by negligence on the part of the Authority's independent contractor in carrying out unguarded welding operations on the premises occupied by the Authority in the close vicinity of the stacked cardboard cartons of Isolite. It is in the context of those now undisputed findings of fact that the applicable principles of law must be identified.

Ignis suus

8. The special common law rule relating to the liability of an occupier for damage caused by the escape of fire from his or her premises can be traced back to the 1401 Year Book case of Beaulieu v. Finglam ((3) (1401) YB 2 Hen. IV, f.8, pl.6; translated in Fifoot, History and Sources of the

Common Law: Tort and Contract, (1949) at 166-167.). That special rule had its basis in the ancient custom of England ((4) See Beaulieu v. Finglam (1401) YB 2 Hen. IV, f.18, pl.6 and Turberville v. Stampe (1697) 1 Ld Raym 264 (91 ER 1072): "common custom of the realm"; Filliter v. Phippard (1847) 11 QB
347 at 354 (116 ER 506 at 509): the "ancient law, or rather custom of England".). It did not extend to a fire caused by an act of God or a stranger which was not, for the purposes of the rule, the occupier's ("suus") fire. While the old action on the case for damage caused by the spread of fire involved an allegation of "negligenter", the preferable view is that that was "a pleader's adverb" which originally did no more than reflect the perception that it was the strict duty of the occupier of premises to prevent the spread of "his fire" from those premises ((5) See, generally, Comyns's Digest, 4th ed. (1800), vol.1 at 284-285.).

9. The ignis suus rule was progressively modified in England in the 18th century by legislation ((6) See, in particular, Acts of 1707 (6 Anne c.31), 1711 (10 Anne c.14) and the Fires Prevention (Metropolis) Act 1774 (14 Geo. III c.78).) which ultimately operated indefinitely ((7) The operation of the relevant section of the 1707 Act was initially limited to three years duration, but was made perpetual by the 1711 Act.) to exclude the liability of "any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall ... accidentally begin" ((8) Fires Prevention (Metropolis) Act 1774, s.86.). The English legislation was subsequently adopted by a number of Australian legislatures ((9) See, generally, Higgins, Elements of Torts in Australia, (1970) at 209; Fleming, The Law of Torts, 8th ed. (1992) at 349-350.). A settled, and perhaps surprising, course of judicial decisions in England, and later in this country, has established that, contrary to the views of (amongst others) Blackstone ((10) Commentaries on the Laws of England, 10 th ed. (1787), Bk 1 at 431.) and Bacon ((11) A New Abridgment of the Law, 5th ed. (1789), vol.1 at 85. See also, Viscount Canterbury v. Attorney-General (1843) 1 Ph 306 at 315-319 per Lord Lyndhurst LC (41 ER 648 at 652-653).), any fire caused (or allowed to spread) through negligence is not, for the purposes of that legislation, an accidental one ((12) See Filliter v. Phippard (1847) 11 QB at 355-358 (116 ER at 510); Musgrove v. Pandelis (1919) 2 KB 43 at 47 ; Spicer v. Smee (1946) 1 All ER 489 at 495 ; Wise Bros. Pty. Ltd. v. Commissioner for Railways (N.S.W.) (1947) 75 CLR 59 at 67 ; Hargrave v. Goldman (1963) 110 CLR 40 at 58 ; Goldman v. Hargrave (1967) 1 AC 645 at 665.). The result is that the rule survived, and arguably still survives ((13) See, e.g., Balfour v. Barty-King (1957) 1 QB 496 ; Mason v. Levy Auto Parts of England Ltd. (1967) 2 QB 530 at 540-541 ; H. and N. Emanuel Ltd. v. Greater London Council (1971) 2 All ER 835 at 838-839 . But note, for the view that it has been absorbed by more general principles, Jones v. Festiniog Railway Co. (1868) LR 3 QB 733 at 736, 738 ; Powell v. Fall (1880) 5 QBD 597 at first instance at 599 per Mellor J; affd by Bramwell, Baggallay and Thesiger L.JJ in the Court of Appeal; Gunter v. James (1908) 24 TLR 868 ; Mansel v. Webb (1918) 88 LJKB 323 at 324-325.), in England as a special rule imposing liability upon an occupier of premises for the escape of a fire on the premises caused by the negligence of the occupier or his or her invitee or licensee ((14) Balfour v. Barty-King (1957) 1 QB at 504-505 ; H. and N. Emanuel Ltd. v. Greater London Council (1971) 2 All ER at 838 .). If the ignis suus rule, as qualified by the Tasmanian equivalent of the English legislation ((15) See Supreme Court Civil Procedure Act 1932 (Tas.), s. 11(15).) , survives in the law of Tasmania as a special rule applicable to damage caused by fire, it will, as Neasey J held at first instance, suffice to impose liability upon the Authority for the damage sustained by General in the present case since it would render the Authority liable for the damage caused by the spread from the Authority's premises of a fire caused by the negligence of the Authority's independent contractor.

10. It is perhaps arguable that, in a context where the "rigorous" ((16) See, e.g., Bugge v. Brown (191 9) 26 CLR 110 at 115 ; Hargrave v. Goldman (1963) 110 CLR at 57, 58.) special ignis suus rule was

explained as being one of English custom, neither the rule itself nor the 18th century statutes which modified it were ever transported to this continent as part of our inherited law ((17) See Batchelor v. Smith (1879) 5 VLR L 176 at 178; Whinfield v. Lands Purchase and Management Board of Victoria and State Rivers and Water Supply Commission of Victoria (1914) 18 CLR 606 at 616 ; but cf., e.g., Hazelwood v. Webber (1934) 52 CLR 268 at 275 ; Hargrave v. Goldman (1963) 110 CLR at 58 .). On the other hand, the whole of the common law of England can be truly said to be "the legal expression of custom" ((18) Williams v. Owen (1955) 1 WLR 1293 at 1297. See also Comyns's Digest, op.cit. at 285; Read v. J Lyons and Co. Ltd. (1945) KB 216 at 228 per Scott L.J; (1947) AC 156 at 175 per Lord Macmillan.). It is, however, unnecessary to pursue that question. The cases in this Court establish that, under the common law of this country, any special rule relating to the liability of an occupier for fire escaping from his premises has been absorbed into, and qualified by, more general rules or principles. We turn to demonstrate that that is so. The difference of opinion in the courts below about the effect of the decisions of this Court makes it necessary that the cases be examined in greater detail than might otherwise be appropriate.

11. In Whinfield v. Lands Purchase and Management Board of Victoria and State Rivers and Water Supply Commission of Victoria ((19) (1914) 18 CLR 606.), a case concerned with damage caused by the escape of fire, Griffith CJ ((20) ibid. at 614-615, 616 ; Powers J concurring at 621-622.) and Isaacs J ((21) ibid. at 617.) rejected the proposition that, under the common law of this country, the occupier's liability falls to be determined by reference to some special rule restricted to the escape of fire as distinct from the more general principles defining liability for the escape of any dangerous substance. Indeed, in the course of his judgment ((22) ibid. at 616.) , Griffith CJ commented:

> "It would be a shocking thing to lay down as a rule of law that in a country like Australia, where probably hundreds, if not thousands, of men travelling on foot in sparsely settled districts ask every day for permission to camp for the night on private property, the owner by granting such poor hospitality becomes responsible for the lighting of a fire by the wayfarer to boil his 'billy' or keep himself warm."

Notwithstanding the 18th century legislation, the old ignis suus rule would, as has been seen ((23) See above, fn.(12).), have imposed liability on such an owner for damage caused by the spread of fire as a result of the negligence of such a licensee. Isaacs J rejected the proposition that "fire being always dangerous unless confined, a person who introduces it upon his own land is, apart from the effect of inevitable accident or the wrongful interposition of a third person, liable for all damages caused to another by its escape" ((24) (1914) 18 CLR at 617 .). His Honour added that "(t)he decision in Rickards v. Lothian ((25) (1913) 16 CLR 387; (1913) AC 263.) and also the judgment in Eastern and South African Telegraph Co. v. Cape Town Tramways Cos. ((26) (1902) AC 381 .) there cited, particularly when read together, place the law very definitely on a much more reasonable foundation." Those two cases were concerned with Rylands v. Fletcher liability - Rickards v. Lothian with liability for escape of water; the Cape Town Tramways Case with liability for escape of electric current. Isaacs J, in express reliance upon "their explanation of the doctrine of Rylands v. Fletcher" ((27) (1914) 18 CLR at 620 .), held that liability for the escape of fire had not been established by Mr Whinfield.

12. The next case in the Court to which specific reference should be made is Hazelwood v. Webber ((28) (1934) 52 CLR 268.). In that case, fire had escaped from the defendant's land to the plaintiff's land where it caused damage. The Court held that the defendant was liable pursuant to the general principles governing liability for the escape of dangerous substances. In the course of their

judgment, Gavan Duffy CJ, Rich, Dixon and McTiernan JJ expressly referred ((29) ibid. at 274-276 .) to the old common law rule relating to the escape of fire and to the Fires Prevention (Metropolis) Act 1774. Their Honours made clear ((30) ibid. at 275, 277-278.) that the old special rule had been absorbed into the general principles relating to the escape of dangerous substances which had been laid down in Rylands v. Fletcher and developed in Rickards v. Lothian. Starke J, the fifth member of the Court, expressed a corresponding view ((31) ibid. at 280.):

> "The use of fire involved at common law the strictest responsibility, and decisions in modern times have brought that responsibility into line with what Blackburn J ((32) Jones v. Festiniog Railway Co. (1868) LR 3 QB at 736 .) called 'the general rule of common law ... given in Fletcher v. Rylands' ...; 'when a man brings or uses a thing of a dangerous nature on his own land, he must keep it in at his own peril; and is liable for the consequences if it escapes and does injury to his neighbour' ((3 3) ibid.) . Exceptions from this liability have been recognized, and the critical question is whether the appellant has established that the present case is within any such exception."

13. Wise Bros Pty. Ltd. v. Commissioner for Railways (N.S.W.) ((34) (1947) 75 CLR 59.) was another case to reach the Court in which the occupier of land was sued for damage caused by the escape of fire. The plaintiff's reliance upon a special ignis suus rule was seen by the Court ((35) ibid. at 67, 70, 73-74 .) as answered by Hazelwood v. Webber. The Court treated as applicable ((36) ibid. at 67-68, 70, 73-74.) the general principles determining liability for the escape of dangerous substances introduced or collected upon land as explained and developed in Rylands v. Fletcher ((37) (1866) LR 1 Ex 265; (1868) LR 3 HL 330.), Rickards v. Lothian ((38) (1913) 16 CLR 387; (1913) AC 263.), Hazelwood v. Webber ((39) (1934) 52 CLR 268 .) and Read v. J Lyons and Co. Ltd. ((40) (1947) AC 156 .). It was held that the defendant was not liable under those principles for the reason that its use of the land was not a non-natural use. The result was that the case was, by reason of the wrongful exclusion of evidence, remitted for a new trial restricted to two counts alleging ordinary negligence.

14. In Hargrave v. Goldman ((41) (1963) 110 CLR at 56-58.), Windeyer J traced the origins of what he described ((42) ibid. at 58.) as "the rigorous rule of the mediaeval common law" relating to escape of fire and identified its statutory modifications in England and Western Australia. His Honour concluded that, even if it were accepted that those statutory modifications did not apply in this case, the Court would not be "thrown back" to that rigorous rule since the Court had "held that the old rules have been absorbed into the principle of Rylands v. Fletcher; and that the strict liability of the common law is subject to the qualifications of and exceptions to that principle" ((43) ibid.). In support of that conclusion, his Honour cited Bugge v. Brown ((44) (1919) 26 CLR at 114-115 .) and Hazelwood v. Webber ((45) (1934) 52 CLR 268 .). The reference to Bugge v. Brown was to pages of the Commonwealth Law Reports in which Isaacs J had recorded that, in the course of argument of that case, the Court had ruled against a proposition "that the owner of land is liable for damage caused by any fire there in fact kindled or kept by his servant whether negligently or not, and whether or not in the course of his employment". The various reports of the argument in Bugge v. Brown do not refer to that ruling ((46) See (1919) 26 CLR at 111-114; (1919) VLR 264 at 266-268 ; (1919) 25 Argus LR 103 at 103-104.). Isaacs J's terse explanation of it in his judgment was that "the rigorous proposition so contended for cannot now be maintained". It is possible that, as Zeeman J suggested in his judgment in the present case, the ruling was based more on the perceived effect of the 18th century legislation than on the perception in support of which Windeyer J cited it in

Hargrave v. Goldman, namely, that "the old rules have been absorbed into the principle of Rylands v. Fletcher". On balance, however, it seems to us that, in the context of Isaacs J's judgment in the earlier case of Whinfield v. Lands Purchase and Management Board of Victoria ((47) (1914) 18 CLR 606 .), Windeyer J's reliance on Bugge v. Brown was well founded. In that regard, it is relevant to note Isaacs J's reference, in the course of argument in Bugge v. Brown ((48) (1919) 26 CLR at 112 .), to Batchelor v. Smith ((49) (1879) 5 VLR L 176.) and the subsequent reference in his judgment ((50) (1919) 26 CLR at 129 .) to Musgrove v. Pandelis ((51) (1919) 1 KB 314.). In the former case ((52) (1879) 5 VLR L at 178, 179.), it was held by the Full Court of the Supreme Court of Victoria that neither the ignis suus rule nor the 18 th century English statutes had ever applied in Victoria. In the latter ((53) (1919) 1 KB at 317 . This approach was affirmed by the Court of Appeal in Musgrove v. Pandelis (1919) 2 KB 43 . See also Jones v. Festiniog Railway Co. (1868) LR 3 QB at 738 per Lush J), the trial judge, Lush J, had indicated that, in the context of the Fires Prevention (Metropolis) Act 1774, the defendant's liability for damage caused by the escape of fire from his premises flowed from the application of the "principle" of Rylands v. Fletcher rather than from any special rule relating to the escape of fire. However, regardless of the justification for Windeyer J's reliance on Bugge v. Brown, one thing is clear. That is that his Honour's conclusion that the cases in the Court establish that the old special rule relating to liability for escape of fire has been "absorbed into the principle of Rylands v. Fletcher" was fully justified by the judgments in Hazelwood v. Webber and the other cases to which reference has already been made in this judgment.

15. Nor is there any reason in principle or policy for the preservation in this country of the special ignis suus rule formulated as appropriate to urban circumstances in medieval England. For one thing, that special rule was formulated before either the establishment of more general principles dealing with the escape of
dangerous substances or the development of the modern law of negligence. For another, though fire is an exceptional hazard in Australia, contemporary conditions in this country have no real similarity to urban conditions in medieval England where the escape of domestic fire rivalled plague and war as a cause of general catastrophe ((54) See, e.g., Filliter v. Phippard (1847) 11 QB at 354 (116 ER at 509); Balfour v. Barty-King (1957) 1 QB at 502. See also Bell, The Great Fire of London in 1666, (1920) at 1, 17, 296-298 ;
Fifoot, op.cit. at 155; definition of "curfew" in The Oxford English Dictionary, 2nd ed. (1989), vol.4 at 142.).

16. It follows that any liability of the Authority to General must be founded otherwise than on some special rule dealing only with liability for the escape of fire.

The 18th Century English Statutes

17. As has been seen, it is settled by judicial decision that the 18th century English statutes (and their Australian equivalents) excluding the liability of any person for the spread of a fire which "accidentally" began on "his" premises were inapplicable to a fire caused by negligence. It has also been held that those statutes, where still in force, have no application to exclude Rylands v. Fletcher liability ((55) Musgrove v. Pandelis (1919) 1 KB 314; (1919) 2 KB 43 .) or liability in nuisance ((56) Spicer v. Smee (1946) 1 All ER at 495.). While that judicial confinement of the scope of the English statutes, and of any Australian equivalents, should be accepted as settled law, the reasoning which was invoked in support of it is open to legitimate criticism ((57) See, e.g., Ogus, "Vagaries in Liability for the Escape of Fire", (1969) 27 Cambridge Law Journal 104 at 112-116, 118-119 .). A preferable rationalization is that those statutes were directed solely to providing protection from liability under the ignis suus rule ((58) See, e.g., Stallybrass, "Dangerous Things and the Non-

Natural User of Land", (1929) 3 Cambridge Law Journal 376 at 397; but cf. Williams v. Owen (1955) 1 WLR at 1298 .) and accordingly must be construed as not concerned with providing protection for liability under more general principles. On that approach, the effect of our conclusion that no special ignis suus rule survives in our common law is that those English statutes and their Australian equivalents can be generally treated by the courts of this country as no longer applicable. In any event, the effect of the confinement by past decisions of the scope of those statutes is that they are inapplicable to General's claim to the extent that it is based on the rule in Rylands v. Fletcher or ordinary negligence.

The "true rule" in Rylands v. Fletcher

18. In Fletcher v. Rylands ((59) (1866) LR 1 Ex at 279-280 .), a strong Court of Exchequer Chamber ((60) Willes, Blackburn, Keating, Mellor, Montague Smith and Lush JJ), in a judgment delivered by Blackburn J, identified what was described as "the true rule of law":

> "the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient."

Notwithstanding the many accolades which have been, and continue to be, lavished on Blackburn J's judgment ((61) See, e.g., Wigmore, "Responsibility for Tortious Acts: Its History", (1894) 7 Harvard Law Review 315, 383, 441 at 454: "the master-mind of Mr Justice Blackburn"; Newark, "The Boundaries of Nuisance", (1949) 65 Law Quarterly Review 480 at 487: "his great judgment"; Salmond and Heuston on the Law of Torts, 20th ed. (1992) at 314: "always been recognised as one of the masterpieces of the Law Reports".), that brief exposition of "the true rule of law" is largely bereft of current authority or validity if it be viewed, as it ordinarily is, as a statement of a comprehensive rule ((62) See, e.g., Jones v. Festiniog Railway Co. (1868) LR 3 QB at 736 per Blackburn J: "the general rule of common law".). Indeed, it has been all but obliterated by subsequent judicial explanations and qualifications. Thus, the phrase "for his own purposes" has been largely discarded as a general qualification. While it occasionally re-emerges in general statements of the rule, its current role would seem to be confined to that of a bolster of the requirement of "natural use" ((63) See below.) in cases involving the use of premises for public or patriotic purposes ((64) See, e.g., Read v. J Lyons and Co. Ltd. (1947) AC at 169-170 .). The possessive "his" before "lands", apparently used to denote ownership, must be expanded to include the non-owning occupier. Arguably, it should be further expanded to the stage where it would include any person in control. On the other hand, it is arguable that it should be confined to exclude the non-occupying owner. The word "lands", used in conjunction with "escapes", is too narrow. The precise extent to which it should be
extended is, however, a matter of complete uncertainty. The conjunctive "and" before "collects" and "keeps" should be read as the disjunctive "or". The phrase "anything likely to do mischief if it escapes" has, in a process commenced by Blackburn J himself ((65) Jones v. Festiniog Railway Co. (1868) LR 3 QB at 736 : "a thing of a dangerous nature".), largely been supplanted by the word "dangerous". The reference to "all the damage which is the natural consequence of its escape" is too wide ((66) See below, fn.(118).). The statement that it was "unnecessary to inquire what excuse would be sufficient" has inevitably been overlaid by decisions identifying such excuses. It does,

however, serve the continued purpose of highlighting the fact that the rule enunciated by Blackburn J was, as his Lordship made clear, one of "prima facie" liability.

19. The Court of Exchequer Chamber in Fletcher v. Rylands itself recognized that the above statement of the "true rule of law" is too wide, even as an exposition of a prima facie rule, unless it is accompanied by some overriding qualifications. Thus, Blackburn J commented ((67) Fletcher v. Rylands (1866) LR 1 Ex at 280 .) that:

> "it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property". (emphasis added)

Again, however, Blackburn J's statement of those qualifications has long been overlaid and effectively displaced. The qualification "which was not naturally there" was adverted to with apparent approval by Lord Cairns LC in the House of Lords in Rylands v. Fletcher ((68) (1868) LR 3 HL at 340.) but converted ((69) ibid. at 338-339.), without explanation and perhaps inadvertently, into a quite different ((70) See below.) requirement of "non-natural use". The qualification "which he knows to be mischievous" has been, in the context of private nuisance and the development of the modern law of negligence, transformed from an apparent requirement of actual knowledge into a requirement closely resembling, or perhaps even amounting to ((71) See Cambridge Water Co. v. Eastern Counties Leather Plc. (1994) 2 WLR 53 at 79 ; and note Holmes' view that foreseeability of the likelihood of harm is the unifying element of tortious liability: see O.W. Holmes, The Common Law, (1882), Lectures III and IV; see also Read v. J Lyons and Co. Ltd. (1945) KB at 227 - 235.), a requirement of foreseeability of relevant damage in the event of the escape of the dangerous substance.

20. Unfortunately, the subsequent judicial alterations and qualifications of Blackburn J's statement of the "true rule" have introduced and exacerbated uncertainties about its content and application. Thus, while it is clear that the requirements of "for his own purposes", "brings on", "his" (in the sense of ownership) and "lands" are all too narrowly identified, there remains room for legitimate dispute about precisely what, if anything, should be substituted for each of them. In addition, it is unclear whether another requirement, that of "escape", refers to escape from the defendant's "land" or other "premises" or merely escape from control. The critical obscurity resides, however, in the twin requirements of "dangerous substance" and "non-natural use". If, as Rylands v. Fletcher itself decided, water can be a dangerous substance for the purposes of the rule, it is difficult to identify anything which, accumulated either in sufficient quantity or under sufficient pressure, might not be a dangerous substance. In that regard, it would seem that Blackburn J's own exclusion of things "naturally there" was intended to be understood as referring to things "naturally there" in their "mischievous" state since the report of proceedings in the Court of Exchequer discloses that, notwithstanding Blackburn J's repeated use of the words "brings on" and "brought on" ((72) See (1866) LR 1 Ex at 279, 280, 282.), the water in the defendants' reservoir in Fletcher v. Rylands had come "to their land naturally" ((73) (1865) 3 H and C 774 at 786 (159 ER 737 at 742); but cf. Cambridge Water Co. v. Eastern Counties Leather Plc. (1994) 2 WLR at 82 .).

21. Lord Cairns L.C.'s requirement of "non-natural use" may have originally been intended to echo Blackburn J's "not naturally there" and to refer to a use of land other than in its natural state. If so, that narrow interpretation of the requirement did not survive. The most influential of the subsequent

explanations of the requirement of "non-natural use" has proved to be that formulated by the Privy Council, in a judgment delivered by Lord Moulton on an appeal from this Court, in Rickards v. Lothian ((74) (1913) 16 CLR at 400-401; (1913) AC at 280 .):

> "It is not every use to which land is put that brings into play (the principle in Rylands v. Fletcher). It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community."

That formulation, which was to some extent based on the judgment of Wright J in Blake v. Woolf ((75) (1898) 2 QB 426 at 428 : "using ... land in the ordinary way"; "an ordinary and reasonable user of ... premises".), has been adopted both in this Court ((76) See, e.g., Whinfield v. Lands Purchase and Management Board of Victoria (1914) 18 CLR at 618 ; Hazelwood v. Webber (1934) 52 CLR at 278 ; Torette House Pty. Ltd. v. Berkman (1940) 62 CLR 637 at 646, 656 ; Benning v. Wong (1969) 122 CLR 249 at 302.) and in the House of Lords ((77) See, e.g., Read v. J Lyons and Co. Ltd. (1947) AC at 169, 176, 187.). The descriptions which it uses - "special" and "not ... ordinary" - seem to focus, like Lord Cairns L.C's "non-natural", on the nature of the use.

22. However, other cases have made clear that, in determining whether a use satisfies the "non-natural", "special" or "not ordinary" description, regard may be had to the manner as well as to the nature of the use. Increasingly, Rylands v. Fletcher liability has come to depend on all the circumstances surrounding the introduction, production, retention or accumulation of the relevant substance. That being so, the presence of reasonable care or the absence of negligence in the manner of dealing with a substance or carrying out an activity may intrude as a relevant factor in determining whether the use of land is a "special" and "not ordinary" one. Certainly, the factors which are relevant in determining whether a defendant has been guilty of negligence in a case involving damage caused by the escape from premises of a dangerous substance will almost inevitably also be relevant on the question whether the defendant's use of those premises was a "natural" one. As Lord Porter said in Read v. J Lyons and Co. Ltd. ((78) ibid. at 176.):

> "each (i.e. the questions whether something 'is dangerous' and whether a 'use' is a 'non-natural' one) seems to be a question of fact subject to a ruling of the judge as to whether the particular object can be dangerous or the particular use can be non-natural, and in deciding this question I think that all the circumstances of the time and place and practice of mankind must be taken into consideration so that what might be regarded as dangerous or non-natural may vary according to those circumstances".

Those comments are not inconsistent with the statement of Gavan Duffy CJ, Rich, Dixon and McTiernan JJ in Hazelwood v. Webber ((79) (1934) 52 CLR at 278 .) that the question of non-natural use "is not one to be decided by a jury on each occasion as a question of fact". Indeed, the sentences in their Honours' judgment which immediately precede that statement tend to emphasise the importance of the particular factual circumstances ((80) ibid.):

> "Now in applying this doctrine to the use of fire in the course of agriculture, the benefit obtained by the farmer who succeeds in using it with safety to himself and the frequency of its use by other farmers are not the only considerations. The degree of hazard to others involved in its use, the extensiveness of the damage it is likely to do and the difficulty of actually controlling it are even more important factors. These depend upon climate, the character of the country and the natural conditions."

Obviously, the question whether there has been a non-natural use in a particular case is a mixed question of fact and law which involves both ascertainment and assessment of relevant facts and identification of the content of the legal concept of a "non-natural" use. Indeed, it is one of those questions which may be misleadingly converted into a pure question of fact or a pure question of law by an unexpressed assumption that either the precise content of applicable legal concepts or the relevant facts and factual conclusions are manifest and certain. Be that as it may, and regardless of whether one emphasises the legal or factual aspect of the question of non-natural use, the introduction of the descriptions "special" and "not ordinary" as alternatives to "non-natural", without any identification of a standard or norm, goes a long way towards depriving the requirement of "non-natural use" of objective content ((81) cf. Webber v. Hazelwood (1934) 34 SR (NSW) 155, at 159 per Jordan CJ: "The adjectives which have been used in this connection do not of themselves supply a solution.").

23. In Read v. J Lyons and Co. Ltd., Lord Porter referred ((82) (1947) AC at 176 . See also, Cambridge Water Co. v. Eastern Counties Leather Plc. (1994) 2 WLR at 82-83 .) to a possible future need "to lay down principles" for determining whether the twin requirements of "something which is dangerous" and "non-natural use" have been satisfied. We are unable to extract any such principles from the decided cases. Indeed, if the rule in Rylands v. Fletcher is regarded as constituting a discrete area of the law of torts, it seems to us that the effect of past cases is that no such principles exist. In the absence of such principles, those twin requirements compound the other difficulties about the content of the "rule" to such an extent that there is quite unacceptable uncertainty about the circumstances which give rise to its so-called "strict liability". The result is that the practical application of the rule in a case involving damage caused by the escape of a substance is likely to degenerate into an essentially unprincipled and ad hoc subjective determination of whether the particular facts of the case fall within undefined notions of what is "special" or "not ordinary".

24. If the problems of the rule in Rylands v. Fletcher were confined to the uncertainties of its content and application, it would be necessary for the courts to continue their so far spectacularly unsatisfactory efforts to resolve them. The problems are not, however, so confined. In the more than a century and a quarter that has passed since its formulation by Blackburn J, the rule 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. From
within, the broadening of Blackburn J's exception of things "naturally there", which would seem to have been used in the sense of without human intervention, into an exception of "natural", "ordinary" or not "special" use has reduced the scope of the rule to the stage where a majority of the House of Lords in Read v. J Lyons and Co. Ltd. ((83) (1947) AC at 169-170, 174, 186-187 .) could indicate a view that, in the circumstances of that case, the use of land for the obviously dangerous activity of manufacturing high-explosive shells may have been outside the scope of the rule. From without, ordinary negligence has progressively assumed dominion in the general territory of tortious liability for unintended physical damage, including the area in which the rule in Rylands v. Fletcher once held sway. Ultimately, as will be seen, the resolution of this case largely turns upon a consideration of the present relationship between ordinary negligence and the rule in Rylands v. Fletcher. A starting point of that consideration is an understanding of the role played by the conception of proximity in the development of the unified modern law of negligence.

Negligence

25. Fletcher v. Rylands was decided by the Court of Exchequer Chamber some seventeen years

before Lord Esher (then Brett MR), in Heaven v. Pender ((84) (1883) 11 QBD 503.), formulated the general - or "larger" ((85) ibid. at 509.) - proposition which constituted the first step in the perception of a coherent jurisprudence of common law negligence. Almost half a century later, the House of Lords in Donoghue v. Stevenson ((86) (1932) AC 562 .) effectively completed the process. The judgment of Brett MR in Heaven v. Pender and the speech of Lord Atkin in Donoghue v. Stevenson were both concerned with identifying a general unifying proposition which explained why a duty to take care to avoid injury to another had been recognized in past cases in the courts. Essentially, the methodology of both was identical: the identification of a general proposition which selected "recognised cases suggest, and which is, therefore, to be deduced from them" ((87) (1883) 11 QBD at 509 ; and see Donoghue v. Stevenson (1932) AC at 580 .) and the confirmation of the validity of the proposition by ascertaining that no "obvious case can be stated in which the liability must be admitted to exist, and which yet is not within this proposition" ((88) (1883) 11 QBD at 509-510 ; and see Donoghue v. Stevenson (1932) AC at 583-584 .).

26. The "larger proposition" formulated by Brett MR in Heaven v.

> Pender was one of foreseeability ((89) (1883) 11 QBD at 509 .): "whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger".

It was, however, expressly rejected by the majority of the English Court of Appeal (Cotton and Bowen L.JJ) in that case for the reason that "there are many cases in which the principle was impliedly negatived" ((90) ibid. at 516.). In Donoghue v. Stevenson, Lord Atkin emphatically endorsed that rejection of it as an unqualified proposition ((91) (1932) AC at 580 ("demonstrably too wide"), 582.). On the other hand, he concluded ((92) ibid. at 582.) that "the judgment of Lord Esher (in Heaven v. Pender) expresses the law of England" if the requirement of a relationship of proximity, partly derived from the judgments of Lord Esher MR himself and A.L. Smith LJ in Le Lievre v. Gould ((93) (1893) 1 QB 491 at 497 per Lord Esher
MR: physically "near", at 504 per A.L. Smith L.J: physical "proximity".), were recognised as a general overriding control - "this necessary qualification" ((94) (1932) AC at 582 ; and see, generally, Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad" (1976) 136 CLR 529 at 574-575 ; Jaensch v. Coffey (1984) 155 CLR 549 at 583-586 ; Sutherland Shire Council v. Heyman (1985) 157 CLR 424 at 495-496 ; Stevens v. Brodribb Sawmilling Co. Pty. Ltd. (1986) 160 CLR 16 at 52 ;
Cook v. Cook (1986) 162 CLR 376 at 382.) - of the test of foreseeability.

27. The "general conception" of a relationship of proximity was identified ((95) (1932) AC at 580 .) by Lord Atkin as the "element common to the cases where (liability in negligence) is found to exist" and as the basis of the duty of care which is common to all such cases. It has been stressed and developed in judgments in recent cases in the Court ((96) See, in particular, Jaensch v. Coffey (1984) 155 CLR at 553-554, 583-586 ; Sutherland Shire Council v. Heyman (1985) 157 CLR at 441, 461-462, 471, 495-498 ; Stevens v. Brodribb Sawmilling Co. Pty. Ltd. (1986) 160 CLR at 30, 49-53 ; San Sebastian Pty. Ltd. v. The Minister (1986) 162 CLR 340 at 355 ; Cook v. Cook (1986) 162 CLR at 381-382 .). As Deane J pointed out in Stevens v. Brodribb Sawmilling Co. Pty. Ltd. ((97) (1986) 160 CLR at 53 ; and see, generally, Cook v. Cook (1986) 162 CLR at 382 per Mason, Wilson, Deane and Dawson JJ), that common element of a relationship of proximity "remains the general

conceptual determinant and the unifying theme of the categories of case in which the common law of negligence recognizes the existence of a duty to take reasonable care to avoid a reasonably foreseeable risk of injury to another". Without it, the tort of negligence would be reduced to a miscellany of disparate categories among which reasoning by the legal processes of induction and deduction would rest on questionable foundations since the validity of such reasoning essentially depends upon the assumption of underlying unity or consistency.

28. It is true that the requirement of proximity was neither formulated by Lord Atkin nor propounded and developed in cases in this Court as a logical definition or complete criterion which could be directly applied as part of a syllogism of formal logic to the particular circumstances of a particular case ((98) See Donoghue v. Stevenson (1932) AC at 580 ; and, generally, Stevens v. Brodribb Sawmilling Co. Pty. Ltd. (1986) 160 CLR at 51-53 .). As a general conception deduced from decided cases, its practical utility lies essentially in understanding and identifying the categories of case in which a duty of care arises under the common law of negligence rather than as a test for determining whether the circumstances of a particular case bring it within such a category, either established or developing ((99) See, generally, Jaensch v. Coffey (1984) 155 CLR at 585 ; Stevens v. Brodribb Sawmilling Co. Pty. Ltd. (1986) 160 CLR at 53 ; Hedley Byrne and Co. Ltd. v. Heller and Partners Ltd. (1964) AC 465, at 524-525 .). That is, however, the basic function performed by general principles or conceptions in the ascertainment and development of the common law. More than half a century ago, Scott LJ ((100) Haseldine v. C.A. Daw and Son Ltd. (19 41) 2 KB 343, at 362-363 .) drew attention to the "curious repetition of history" involved in the fact that "Lord Atkin's exposition of principle (had) met with the same unfair criticism, although less in degree, as that which Lord Esher's exposition (of principle in Heaven v. Pender had) evoked". Scott LJ correctly pointed out ((101) ibid.) that criticism based on "the error ... of assuming that Lord Atkin was intending to formulate a complete criterion, almost like a definition in the prolegomena to a new theory of philosophy" failed to appreciate "the real value of attempts to get at legal principle". The point can be illustrated by contrasting the specific test of "non-natural", "special" or "not ordinary" use under the rule in Rylands v. Fletcher with the general conception or principle of proximity of relationship in the law of negligence. The "non-natural" use test under the rule in Rylands v. Fletcher was not deduced from past cases. As has been said, it was an unexplained, and conceivably inadvertent, judicial transformation of Blackburn J's qualification "not naturally there". More important, notwithstanding its lack of clear objective content, it has been propounded merely as a specific test to be directly applied, as part of a complex complete criterion of liability, to the particular circumstances of a particular case. Far from representing a unifying principle and a general conceptual explanation and determinant of different categories of case, it has, in combination with the associated (and often confused ((102) See Stallybrass, op.cit. at 395-396.)) requirement of dangerousness, become a source of disunity and disparity within the individual category. Thus, the introduction to or retention on land of trees, water, gas, electricity, fire and high-explosives ((103) See, generally, ibid. at 382-385; Fleming, op.cit. at 339.), amongst other things, have all been seen, as a result of the application of the test to the particular circumstances, as both attracting and not attracting the operation of the rule in Rylands v. Fletcher ((104) See, e.g., Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co. (1921) 2 AC 465 at 471 ; but cf. Read v. J Lyons and Co. Ltd. (1947) AC at 169-170, 174, 186-187 .). Indeed, the test of "non-natural use" has probably done more than anything else to vindicate Sir Frederick Pollock's identification, almost a century ago, of Rylands v. Fletcher as one of those authorities "that are followed only in the letter, and become slowly but surely choked and crippled by (judicially imposed) exceptions" ((105) The Law of Fraud, Misrepresentation and Mistake in British India, (1894) at 54.).

29. Much has been written in the past about precisely where, among the old forms of action, one should locate the source or sources of the rule in Rylands v. Fletcher ((106) See, e.g., Wigmore, op. cit. at 452-456; Winfield, "The Myth of Absolute Liability", (1926) 42 Law Quarterly Review 37; Winfield, "Nuisance as a Tort", (1931) 4 Cambridge Law Journal 189; Newark, op.cit.; Prosser, Selected Topics on the Law of Torts, (1982), c.3; Salmond and Heuston on the Law of Torts, op.cit. at 315-316, 317-319.). However, the subsequent emergence of a coherent law of negligence to dominate the territory of tortious liability for unintentional injury to the person or property of another has deprived the question of much of its practical significance. Regardless of the parental claims of nuisance ((107) See, e.g., Rickards v. Lothian (1913) 16 CLR at 395-396; (1913) AC at 275 ; Musgrove v. Pandelis (1919) 2 KB at 47, 49, 51 ; Read v. J Lyons and Co. Ltd. (1947) AC at 173, 182-183 ; Benning v. Wong (1969) 122 CLR at 296-297, 319-320 ; Cambridge Water Co. v. Eastern Counties Leather Plc. (1994) 2 WLR 53 .) or even trespass ((108) See, e.g., Foster v. Warblington Urban Council (1906) 1 KB 648 at 672 per Stirling L.J; Jones v. Llanrwst Urban Council (1911) 1 Ch 393 at 402-403 per Parker J; Hoare and Co. v. McAlpine (1923) 1 Ch 167 at 175 per Astbury J; Read v. J Lyons and Co. Ltd. (1947) AC at 166 per Viscount Simon; but cf. Rigby v. Chief Constable of Northamptonshire (1985) 1 WLR 1242 at 1255 per Taylor J), the rule has been increasingly qualified and adjusted to reflect basic aspects of the law of ordinary negligence. As has been said, Blackburn J's qualification: "which he knows to be mischievous", has been refined into an objective test which is (at the least) a close equivalent of foreseeability of damage of the relevant kind. As has been seen, the absence of reasonable care or the presence of "negligence" has itself intruded as a factor in determining whether, for the purposes of the rule, the use of land is "non-natural", "special" or "not ordinary". Moreover, the various defences of an occupier of premises against Rylands v. Fletcher "strict liability" closely correspond with grounds of denial of fault liability under the law of negligence. Thus, "consent" and "default of the plaintiff" are analogous to voluntary assumption of risk and contributory negligence. Again, while Blackburn J recognized them as
possible excuses ((109) (1866) LR 1 Ex at 280 .), defences of "consequence of vis major, or the act of God", in the context of damage caused by the "escape" of the dangerous substance, are more attuned to the notion of fault liability than that of strict liability ((110) But cf. Benning v. Wong (1969) 122 CLR at 298-299 per Windeyer J). Where the defence of statutory authority is available, the issue will commonly become one of negligence simpliciter ((111) See, e.g., Northwestern Utilities Ltd. v. London Guarantee and Accident Co. (1936) AC 108 at 119-121 ; Thompson v. Bankstown Corporation (1953) 87 CLR 619 at 630, 634, 637, 644-645 .). Clearly, there is validity in Professor Fleming's comment ((112) The Law of Torts, 8th ed. (1992) at 343.) that "(t)he aggregate effect of these exceptions makes it doubtful whether there is much left of the rationale of strict liability as originally contemplated in 1866."

30. Similarly, former restrictions upon the damages recoverable under the rule in Rylands v. Fletcher have, at least in this country, been relaxed towards correspondence with the rules controlling recoverable damages in an action in ordinary negligence. In Benning v. Wong ((113) (1969) 122 CLR at 319-320 .), Windeyer J correctly saw that relaxation as part of a wider movement in the law of torts:

> "Developments in the law of tort are towards a liability for personal harm done to persons who are neighbours in Lord Atkin's sense. They need not be persons having an interest in land in the neighbourhood. The movement of the common law is away from any preoccupation it may once have had with the protection of rights in land. ... I think

> this Court should ... treat the doctrine of Rylands v. Fletcher as having become in this matter emancipated from restrictions its origin in or relationship with nuisance might impose."

It would seem that, in England, recoverable damages under the rule in Rylands v. Fletcher may still be confined to compensation for damage to property sustained by the owner or occupier of neighbouring land "on to" which the dangerous thing "passes" and "does damage" ((114) See, e.g., Read v. J Lyons and Co. Ltd. (1945) KB at 238; (1947) AC at 173, 174 ; but cf. Perry v. Kendrick's Transport Ltd. (1956) 1 WLR 85 at 92.). In this country, such damages are not so confined but extend to personal injury or damage to property sustained outside the relevant premises by persons having no relationship to neighbouring land apart from being on it ((115) See, e.g., Thompson v. Bankstown Corporation (1953) 87 CLR at 644 ; Benning v. Wong (1969) 122 CLR at 274-275, 277, 319-320 .). As Windeyer J said in Benning v. Wong ((116) (1969) 122 CLR at 320 .):

> "A plaintiff can I think recover under it for personal injuries, or harm to his personal effects if, at the time when the escaping thing came upon him, he was in a place where he was lawfully entitled to be as a licensee, or as a member of the public, such as on a highway or in a public park."

Windeyer J's qualification "where he was lawfully entitled to be" was intended, as his Honour made clear ((117) ibid.), to leave open rather than to exclude the position of a trespasser. Otherwise, the main control of recoverable damages under the rule is the requirement that the damage be related to the qualities or circumstances which bring the case within the rule ((118) See Fletcher v. Rylands (1866) LR 1 Ex at 279 : "damage which is the natural consequence of (the) escape"; Fleming, op.cit. at 329.). In the context of the other requirements of the rule ((119) In particular, Blackburn J's "which he knows to be mischievous" as developed by subsequent authority.), that control closely corresponds with ordinary negligence's insistence that actionable damage be foreseeable ((120) Benning v. Wong (1969) 122 CLR at 320 ; see also Salmond and Heuston on the Law of Torts, op. cit. at 324-325; Todd et al., The Law of Torts in New Zealand, (1991) at 471; but cf. Clerk and Lindsell on Torts, 15th ed. (1982) at 1205.).

31. The rule in Rylands v. Fletcher has never been seen as exclusively governing the liability of an occupier of land in respect of injury caused by the escape of a dangerous substance ((121) See, e.g., Carstairs v. Taylor (1871) LR 6 Ex 217 ; Ross v. Fedden (1872) LR 7 QB 661 ; Anderson v. Oppenheimer (1880) 5 QBD 602 ; Rickards v. Lothian (1913) 16 CLR 387; (1913) AC 263; Torette House Pty. Ltd. v. Berkman (1940) 62 CLR 637 ; Hargrave v. Goldman (1963) 110 CLR 40 .). In that, the rule can be contrasted with the old special rules defining the liability of an occupier of premises for damage sustained by a visitor on the premises which were traditionally seen as excluding the application of more general principles ((122) See, e.g., Commissioner for Railways v. Quinlan (1964) AC 1054 .). The result of the development of the modern law of negligence has been that ordinary negligence has encompassed and overlain the territory in which the rule in Rylands v. Fletcher operates. Any case in which an owner or occupier brings onto premises or collects or keeps a "dangerous substance" in the course of a "non-natural use" of the land will inevitably fall within a category of case in which a relationship of proximity under ordinary negligence principles will exist between owner or occupier and someone whose person or property is at risk of physical injury or damage in the event of the "escape" of the substance. Indeed, so much was made clear in Donoghue v. Stevenson itself where Lord Atkin referred ((123) (1932) AC at 595-596 ; see also, at 611-612 per Lord Macmillan.) to "the cases dealing with duties where the thing is dangerous", as illustrating "the general principle" which he had formulated.

32. In Commissioner for Railways (N.S.W.) v. Cardy ((124) (1960) 104 CLR 274 at 291.), Fullagar J commented that Donoghue v. Stevenson "in a sense reoriented the whole law of negligence, and left perhaps few cases which went to the root of that subject and which were not liable to be re-examined and tested in the light of it". That approach was reflected in judgments in this Court in a series of five cases between 1953 and 1963 ((125) Thompson v. Bankstown Corporation (1953) 87 CLR 619 ; Rich v. Commissioner for Railways (N.S.W.) (1959) 101 CLR 135 ; Commissioner for Railways (N.S.W.) v. Cardy (1960) 104 CLR 274 ; Commissioner for Railways (N.S.W.) v. Anderson (1961) 105 CLR 42 ; Voli v. Inglewood Shire Council (1963) 110 CLR 4 .), supporting the conclusion that the old special rules concerning the duties of occupiers to invitees, licensees and trespassers were "part of" and "ultimately subservient" to the ordinary principles of the law of negligence with the result that the "duty to a trespasser is a duty to a person who may also be a neighbour in the sense in which Lord Atkin used the word" ((126) Rich v. Commissioner for Railways (N.S.W.) (1959) 101 CLR at 159 ; Voli v. Inglewood Shire Council (1963) 110 CLR at 89 ; and see, generally, Hackshaw v. Shaw (1984) 155 CLR 614 at 646-653 .). That conclusion was denied by the Privy Council in Commissioner for Railways v. Quinlan ((127) (1964) AC 1054 at 1081.) where their Lordships commented that they could not "find any line of reasoning by which the limited duty that an occupier owes to a trespasser (under the old special rules could) co-exist with the wider general duty of care appropriate to the Donoghue v. Stevenson formula". It is, however, now fully reinstated in the common law of this country by Australian Safeway Stores Pty. Ltd. v. Zaluzna ((128) (1987) 162 CLR 479 at 484-488 per Mason, Wilson, Deane and Dawson JJ) where it was held that the old inflexible rules defining the duty of an occupier of land to an invitee, a licensee and a trespasser have been absorbed by the principles of ordinary negligence. Inevitably, the question arises whether the special rule in Rylands v. Fletcher has similarly been so absorbed.

33. Some of the considerations favouring an affirmative answer to that question have already been identified: the fact that, unlike the old rule regulating an occupier's liability to a visitor, the rule in Rylands v. Fletcher has never been seen as an exclusive determinant of liability with the result that ordinary negligence has overlain the whole area in which the rule operates; the uncertainties about the content of the rule, including the quite unacceptable uncertainty of the requirement of "non-natural", "special" or "not ordinary" use; the difficulties in its application; and the reluctance of the courts to accept and apply it. To them must be added the fact that, like the old special rules defining the liability of an occupier to invitees, licensees and trespassers, some of the distinctions upon which the rule is based are unreasonably arbitrary. Thus, for example, the
decision in Read v. J Lyons and Co. Ltd. would indicate that liability under the rule to two persons in otherwise identical circumstances who were injured by an explosion when entering premises would be different if, at the time of the explosion, one person had paused and allowed the other to cross the threshold. Indeed, it would seem at least arguable that liability in the case of a single plaintiff who was so injured could be confined by reference to which of the directly injured parts of his or her body remained physically outside the premises at the instant of the explosion.

34. The main argument supporting the preservation of the rule in Rylands v. Fletcher as a discrete or independent area of the law of torts is the argument that the rule cannot be accommodated within the principles of ordinary negligence without denying liability in cases where it would otherwise exist. In considering that argument, it is appropriate to accept a broad or expansive view of the kind of substance or activity which may come within the reach of the rule. Accordingly, we shall assume that the rule extends to the introduction or retention of any dangerous substance or the carrying out of any dangerous activity upon or within property under the occupation or control of the defendant.

35. Inevitably, the past adjustments and qualifications of the rule in Rylands v. Fletcher to reflect aspects of the law of ordinary negligence have greatly reduced the likelihood that Rylands v. Fletcher liability will exist in a case where liability would not exist under the principles of negligence. Thus, the editors of the last five editions of Winfield and Jolowicz on Tort ((129) See, e. g., Jolowicz, Ellis Lewis and Harris, 9th ed. (1971) at 388, 390; Rogers, 13th ed. (1989) at 443.) have expressed the view that, putting to one side the factual situations in which a plaintiff will succeed equally well either under the rule or in nuisance, "(w)e have virtually reached the position where a defendant will not be considered liable when he
would not be liable according to the ordinary principles of negligence." A similar view has been expressed by other distinguished academic writers. Nonetheless, there remains the perception of an underlying antithesis between the rule in Rylands v. Fletcher and the
principles of negligence. Liability under the rule is still theoretically seen as "strict liability" in the sense that it can arise without personal fault whereas liability in negligence is fault liability, that is to say, liability flowing from breach of a duty owed by the defendant to the plaintiff. The judicial transformation of Blackburn J's requirement of "not naturally there" into a test of "special" and "not ordinary" use and the expanded defences to a Rylands v. Fletcher claim have, as has been seen, deprived that perception of underlying antithesis of some of its theoretical validity and most of its practical significance. However, as Professor Thayer indicated in a posthumous article published in the Harvard Law Review in 1916 ((130) "Liability without Fault", (1916) 29 Harvard Law Review at 801.), the final answer to any argument based on that perceived theoretical contrast lies in ordinary negligence's concepts of a "non-delegable" duty and a variable standard of care.

The "non-delegable" duty

36. As was pointed out in the majority judgment in Cook v. Cook ((131) (1986) 162 CLR at 382 .), "(t)he more detailed definition of the objective standard of care (under the ordinary law of negligence) for the purposes of a particular category of case must necessarily depend upon the identification of the relationship of proximity which is the touchstone and control of the relevant category." It has long been recognized that there are certain categories of case in which a duty to take reasonable care to avoid a foreseeable risk of injury to another will not be discharged merely by the employment of a qualified and ostensibly competent independent contractor. In those categories of case, the nature of the relationship of proximity gives rise to a duty of care of a special and "more stringent" kind, namely a "duty to ensure that reasonable care is taken" ((132) See Kondis v. State Transport Authority (1984) 154 CLR 672 at 686.). Put differently, the requirement of reasonable care in those categories of case extends to seeing that care is taken. One of the classic statements of the scope of such a duty of care remains that of Lord Blackburn in Hughes v. Percival ((133) (1883) 8 App Cas 443 at 446.):

> "that duty went as far as to require (the defendant) to see that reasonable skill and care were exercised in those operations ... If such a duty was cast upon the defendant he could not get rid of responsibility by delegating the performance of it to a third person. He was at liberty to employ such a third person to fulfil the duty which the law cast on himself ... but the defendant still remained subject to that duty, and liable for the consequences if it was not fulfilled."

In Kondis v. State Transport Authority ((134) (1984) 154 CLR at 679-687 ; and see, also, Stevens v. Brodribb Sawmilling Co. Pty. Ltd. (1986) 160 CLR at 44 per Wilson and Dawson JJ), in a judgment with which Deane J and Dawson J agreed, Mason J identified some of the principal categories of case in which the duty to take reasonable care under the ordinary law of negligence is non-delegable

in that sense: adjoining owners of land in relation to work threatening support or common walls; master and servant in relation to a safe system of work; hospital and patient; school authority and pupil; and (arguably), occupier and invitee. In most, though conceivably not all, of such categories of case, the common "element in the relationship between the parties which generates (the) special responsibility or duty to see that care is taken" is that "the person on whom (the duty) is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised" ((135) Kondis v. State Transport Authority (1984) 154 CLR at 687 ; see, also, Stevens v. Brodribb Sawmilling Co. Pty. Ltd. (1986) 160 CLR at 31, 44-46 .). It will be convenient to refer to that common element as "the central element of control". Viewed from the perspective of the person to whom the duty is owed, the relationship of proximity giving rise to the non-delegable duty of care in such cases is marked by special dependence or vulnerability on the part of that person ((136) The Commonwealth v. Introvigne (1982) 150 CLR 258 at 271 per Mason J).

37. The relationship of proximity which exists, for the purposes of ordinary negligence, between a plaintiff and a defendant in circumstances which would prima facie attract the rule in Rylands v. Fletcher is characterized by such a central element of control and by such special dependence and vulnerability. One party to that relationship is a person who is in control of premises and who has taken advantage of that control to introduce thereon or to retain therein a dangerous substance or to undertake thereon a dangerous activity or to allow another person to do one of those things. The other party to that relationship is a person, outside the premises and without control over what occurs therein, whose person or property is thereby exposed to a foreseeable risk of danger ((137) "which he knows to be mischievous if it gets on his neighbour's (property)": Fletcher v. Rylands (1866) LR 1 Ex at 280 ; see above, fn.(120).). In such a case, the person outside the premises is obviously in a position of
special vulnerability and dependence. He or she is specially vulnerable to danger if reasonable precautions are not taken in relation to what is done on the premises. He or she is specially dependent upon the person in control of the premises to ensure that such reasonable precautions are in fact taken. Commonly, he or she will have neither the right nor the opportunity to exercise control over, or even to have foreknowledge of, what is done or allowed by the other party within the premises. Conversely, the person who introduces (or allows another to introduce) the dangerous substance or undertakes (or allows another to undertake) the dangerous activity on premises which he or she controls is "so placed in relation to (the other) person or his property as to assume a particular responsibility for his or its safety".

38. It follows that the relationship of proximity which exists in the category of case into which Rylands v. Fletcher circumstances fall contains the central element of control which generates, in other categories of case, a special "personal" or "non-delegable" duty of care under the ordinary law of negligence. Reasoning by analogy suggests, but does not compel, a conclusion that that common element gives rise to such a duty of care in the first-mentioned category of case. There are considerations of fairness which support that
conclusion, namely, that it is the person in control who has authorized or allowed the situation of foreseeable potential danger to be imposed on the other person by authorizing or allowing the dangerous use of the premises and who is likely to be in a position to insist upon the exercise of reasonable care. It is also supported by considerations of utility: "the practical advantage of being conveniently workable, of supplying a spur to effective care in the choice of contractors, and in pointing the victim to a defendant who is easily discoverable and probably financially responsible" ((138) Thayer, op.cit. at 809.). The weight of authority confirms that the duty in that category of

case is a non-delegable one.

39. Thus, in Black v. Christchurch Finance Co. ((139) (1894) AC 48.), the plaintiff sustained damage when a fire, which had been negligently lit by an independent contractor on the defendant's land, spread to the plaintiff's land. It was assumed by the Privy Council ((140) ibid. at 56.) that, in lighting the fire at the time he did, the independent contractor was acting in "violation of the terms of the contract" between the defendant and himself. Nonetheless, it was held that the defendant was liable. Their Lordships found it unnecessary to address the question whether the case fell within the rule in Rylands v. Fletcher and was therefore one of "strict liability". Indeed, neither the report of argument nor the judgment contains any reference to Rylands v. Fletcher or cases dealing with the escape of dangerous substances. Nor did their Lordships invoke any special rule relating to escape of fire. The basis of their Lordships' decision was that, in the context of the dangerous activity on its land, the defendant had been under a non-delegable duty "to use all reasonable precautions" of the kind identified in Hughes v. Percival. In that regard, using language appropriate to ordinary negligence but not to strict liability, their Lordships said ((141) ibid. at 54.):

> "The lighting of a fire on open bush land, where it may readily spread to adjoining property and cause serious damage, is an operation necessarily attended with great danger, and a proprietor who executes such an operation is bound to use all reasonable precautions to prevent the fire extending to his neighbour's property (sic utere tuo ut alienum non laedas). And if he authorizes another to act for him he is bound, not only to stipulate that such precautions shall be taken, but also to see that these are observed, otherwise he will be responsible for the consequences. See Hughes v. Percival and authorities there cited." (emphasis added)

40. Black v. Christchurch Finance Co. was followed by this Court in McInnes v. Wardle ((142) (193 1) 45 CLR 548 .). There again, the plaintiff's property had been damaged when fire spread to his land from the defendant's land. The fire had been lit to burn bracken on the defendant's land by an independent contractor whom the defendant had engaged to fumigate rabbits on the property and to do some other work. It was found by the trial judge that, notwithstanding that the burning of scrub at that time of the year was an unlawful and dangerous activity, the defendant knew, or ought reasonably to have known, that fire would be employed if, as was likely, its use was found necessary or expedient in the opinion of the independent contractor ((143) See ibid. at 551 but note that Gavan Duffy CJ and Starke J expressed the view (at 550) that it would be irrelevant if the independent contractor had not complied with or had abused the "conditions of authority".). Rylands v. Fletcher was not mentioned in argument or in any of the judgments. Gavan Duffy CJ and Starke J (in a joint judgment) and Evatt J and McTiernan J (in individual judgments) all concluded that the defendant was liable on the ground that, in the circumstances of the case, he owed a non-delegable duty of care, of the kind which had been held to exist in Hughes v. Percival and Black v. Christchurch Finance Co., which required him to ensure that the independent contractor exercised "reasonable care" ((144) ibid. at 552 per Evatt J) (emphasis added) or took "reasonable precautions" ((145) ibid. at 550 per Gavan Duffy CJ and Starke J: "all reasonable precautions" and 556 per McTiernan J: "every reasonable precaution".) (emphasis again added). The other member of the Court, Dixon J, also referred to the "duty of an occupier to take care that his land is so used and the operations carried out upon it are so managed that his neighbours are not exposed to injury by exceptional dangers" (emphasis added) ((146) ibid. at 552; but note Dixon J's reference to Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co. (1921) 2 AC 465 .). Again, in Torette House Pty. Ltd. v.

Berkman ((147) (1940) 62 CLR at 655 .), Dixon J would seem to have accepted that dangerous use of land will give rise to such a personal or non-delegable duty of care on the part of the occupier under the principles of ordinary negligence. In that case, the independent contractor had not been employed by the defendant in the defendant's capacity of occupier of the premises from which water had escaped. He had been employed, as Dixon J pointed out ((148) ibid.), "to do some work at the fittings of the shop further down the street". In concluding that, in the circumstances, the defendant was not liable under general principles for the negligence of his independent contractor, his Honour commented ((149) ibid.):

> "But the case cannot be treated as one where an occupier allows an independent contractor so to use or deal with his premises that they become a source of harm to his neighbour."

The degree of care

41. Where a duty of care arises under the ordinary law of negligence, the standard of care exacted is that which is reasonable in the circumstances. It has been emphasised in many cases that the degree of care under that standard necessarily varies with the risk involved and that the risk involved includes both the magnitude of the risk of an accident happening and the seriousness of the potential damage if an accident should occur ((150) See, e.g., Thompson v. Bankstown Corporation (1953) 87 CLR at 645 ; Wyong Shire Council v. Shirt (1980)
146 CLR 40 at 47-48 .). Even where a dangerous substance or a dangerous activity of a kind which might attract the rule in Rylands v. Fletcher is involved, the standard of care remains "that which is reasonable in the circumstances, that which a reasonably prudent man would exercise in the circumstances" ((151) Adelaide Chemical and Fertilizer Co. Ltd. v. Carlyle (1940) 64 CLR 514 at 52 3.). In the case of such substances or activities, however, a reasonably prudent person would exercise a higher degree of care. Indeed, depending upon the magnitude of the danger, the standard of "reasonable care" may involve "a degree of diligence so stringent as to amount practically to a guarantee of safety" ((152) Donoghue v. Stevenson (1932) AC at 612 per Lord Macmillan; Adelaide Chemical and Fertilizer Co. Ltd. v. Carlyle (1940) 64 CLR at 523 per Starke J; and, generally, Stevens v. Brodribb Sawmilling Co. Pty. Ltd. (1986) 160 CLR at 30, 42.).

Conclusion

42. Once it is appreciated that the special relationship of proximity which exists in circumstances which would attract the rule in Rylands v. Fletcher gives rise to a non-delegable duty of care and that the
dangerousness of the substance or activity involved in such circumstances will heighten the degree of care which is reasonable, it becomes apparent, subject to one qualification, that the stage has been reached where it is highly unlikely that liability will not exist under the principles of ordinary negligence in any case where liability would exist under the rule in Rylands v. Fletcher. It is true that one can point to a few cases, of which the most important are probably the 1934 case of Hazelwood v. Webber ((153) (1934) 52 CLR 268 .) in this Court and the 1908 case of West v. Bristol Tramways Company ((154) (1908) 2 KB 14 .) in the English Court of Appeal, in which Rylands v. Fletcher liability was held to exist notwithstanding a finding of, or to the effect of, no negligence by the defendant. However, close examination of those cases discloses that they lack validity as examples of circumstances where the application of the modern law of negligence and

the rule in Rylands v. Fletcher would produce different results. In Hazelwood v. Webber, which was the last case in this Court in which a finding of liability was based on the rule in Rylands v. Fletcher, the defendant had failed to take the steps necessary to ensure that a fire which he had lit on his land in breach of s.2 of the Careless Use of Fire Act 1912 (N.S.W.) ((155) See Webber v. Hazelwood (1934) 34 SR (N.S.W.) 155.) in mid-summer did not revive and spread to his neighbour's land. The trial jury had given a negative answer to the question whether the defendant had been negligent. That answer had, however, been given in a context where the trial judge had refused to give a direction that burning off in mid-summer was not a natural and proper use of the land ((156) ibid. at 156.). In this Court, where the propriety of the jury's answer negating negligence was not examined in the judgments, the basis of the finding of Rylands v. Fletcher liability was the conclusion that burning off in mid-summer in Australia was a non-natural, extraordinary, special and highly dangerous use of land ((157) See (1934) 52 CLR at 278-279, 281.). Once that conclusion is accepted, it is plain that the jury's finding of no negligence could not, under the modern law of negligence, be sustained in the absence of any direction about the non-delegable nature and onerous standard of the duty of care required in relation to such a user of land. Indeed, the judgment of the majority of the Court in Hazelwood v. Webber ((158) ibid. at 279.) actually quotes the Privy Council's statement of that onerous non-delegable duty in Black v. Christchurch Finance Co. ((159) (1894) AC at 54 .), but in support of the finding of Rylands v. Fletcher liability. In West v. Bristol Tramways Company, the jury's answers to a number of questions were treated by the Court of Appeal as negating any negligence on the part of the defendant company. On that basis, it is difficult to understand the Court of Appeal's conclusion that Rylands v. Fletcher was applicable to a case involving the use of creosote-coated wood for paving parts of a road in circumstances where the denial of negligence presumably meant that the defendant company did not "know", and could not reasonably be expected to know, that the creosote component of creosote-treated timber was "mischievous if it gets on his neighbour's (land)" ((160) Rylands v. Fletcher (1866) LR 1 Ex at 280 .) . Indeed, at least in this country, it is somewhat difficult to understand how creosote-treated timber could be seen as a "dangerous" substance for the purposes of the rule in Rylands v. Fletcher. Again, however, if the basis for Rylands v. Fletcher liability did exist and the treated timber was a "dangerous" substance which the defendant knew, or ought to have known, would cause damage if it "escaped", it would seem that a finding of negligence would be inevitable under the modern law of negligence.

43. The qualification mentioned in the preceding paragraph is that there may remain cases in which it is preferable to see a defendant's liability in a Rylands v. Fletcher situation as lying in nuisance (or even trespass) and not in negligence ((161) See, e.g., Northwestern Utilities Ltd. v. London Guarantee and Accident Co. (1936) AC at 119 ; Cambridge Water Co. v. Eastern Counties Leather Plc. (1994) 2 WLR 53 ;
and, generally, Newark, op.cit.). It follows that the main consideration favouring preservation of the rule in Rylands v. Fletcher, namely, that the rule imposes liability in cases where it would not otherwise exist, lacks practical substance. In these circumstances, and subject only to the above-mentioned possible qualification in relation to liability in nuisance, the rule in Rylands v. Fletcher, with all its difficulties, uncertainties, qualifications and exceptions, should now be seen, for the purposes of the common law of this country, as absorbed by the principles of ordinary negligence. Under those principles, a person who takes advantage of his or her control of premises to introduce a dangerous substance, to carry on a dangerous activity, or to allow another to do one of those things, owes a duty of reasonable care to avoid a reasonably foreseeable risk of injury or damage to the person or property of another. In a case where the person or property of the other person is lawfully in a place outside the premises that duty of care both varies in degree according to the magnitude of the risk involved and extends to ensuring that such care is taken. It is unnecessary for the purposes

of the present case to express a concluded view on the question whether the duty of care owed, in such circumstances, to a lawful visitor on the premises is likewise a non-delegable one. The ordinary processes of legal reasoning by analogy, induction and deduction would prima facie indicate that it is. Like Windeyer J in Benning v. Wong ((162) See above, fn.(117).), we have added the qualifications "lawfully" and "lawful" to reserve the
position of, rather than to exclude, the unlawful plaintiff.

The Present Case

44. The difference of opinion between the learned trial judge and the members of the Full Court about whether the circumstances of the present case attracted the rule in Rylands v. Fletcher resulted from the fact that the trial judge considered that the rule's requirement of "non-natural use" was not satisfied while the Full Court concluded that it was. That disagreement between the trial judge and the members of the Full Court is not surprising in the context of the "rough sea of contradictory authority" ((163) Smeaton v. Ilford Corporation (1954) Ch 450 at 478 per Upjohn J) in which one can find powerful support for both the proposition that the escape of the contents of an ordinary privy satisfies the requirements of the rule ((164) See Fletcher v. Rylands (1866) LR 1 Ex at 279-280 ; and see, generally, Smeaton v. Ilford Corporation (1954) Ch at 466-479 .) and the proposition that the manufacture of high-explosives does not necessarily satisfy the requirement of "non-natural" use ((165) Read v. J Lyons and Co. Ltd. (1947) AC at 169-170, 174, 186-187 .). Fortunately, our conclusion that the rule in Rylands v. Fletcher has been absorbed by the principles of ordinary negligence makes it unnecessary to attempt to derive from the decided cases some basis in principle for answering the question whether the welding activities in the circumstances of the present case were or were not a "non-natural" or "special" use of the Authority's premises. The critical question for the purposes of applying the principles of ordinary negligence to the circumstances of the present case is whether the Authority took advantage of its occupation and control of the premises to allow its independent contractor to introduce or retain a dangerous substance or to engage in a dangerous activity on the premises. The starting point for answering that question must be a consideration of what relevantly constitutes a dangerous substance or activity.

45. In the context of the ordinary law of negligence, the character of "dangerous" is not confined to those classes of things, such as poison, a loaded gun or explosives, which are "inherently dangerous" or "dangerous in themselves". This point was made by Lord Atkin in Donoghue v. Stevenson ((166) (1932) AC at 595-596 .):

> "I do not find it necessary to discuss at length the cases dealing with duties where the thing is dangerous, or, in the narrower category, belongs to a class of things which are dangerous in themselves. I regard the distinction as an unnatural one so far as it is used to serve as a logical differentiation by which to distinguish the existence or non-existence of a legal right. In this respect I agree with what was said by Scrutton LJ in Hodge and Sons v. Anglo-American Oil Co. ((167) (1922) 12 Ll L Rep 183 at 187.), a case which was ultimately decided on a question of fact. 'Personally, I do not understand the difference between a thing dangerous in itself, as poison, and a thing not dangerous as a class, but by negligent construction dangerous as a particular thing. The latter, if anything, seems the more dangerous of the two; it is a wolf in sheep's clothing instead of an obvious wolf.' The nature of the thing may very well call for different degrees of care, and the person dealing with it may well contemplate persons as being

within the sphere of his duty to take care who would not be sufficiently proximate with less dangerous goods; so that not only the degree of care but the range of persons to whom a duty is owed may be extended. But they all illustrate the general principle."

The fact that a particular substance or a particular activity can be seen to be "inherently" or "of itself" likely to do serious injury or cause serious damage will, of course, ordinarily make characterization as "dangerous" more readily apparent. That fact does not, however, provide a criterion of what is and what is not dangerous for the purpose of determining whether the duty of a person in occupation or control of premises to take care to avoid injury or damage outside the premises is or is not a delegable one. It suffices for that purpose that the combined effect of the magnitude of the foreseeable risk of an accident happening and the magnitude of the foreseeable potential injury or damage if an accident does occur is such that an ordinary person acting reasonably would consider it necessary to exercise special care or to take special precautions in relation to it.

46. Similarly, a substance or activity entrusted to an independent contractor or other agent may be relevantly dangerous notwithstanding that foreseeable injury or danger will arise only in the event of what is commonly described as "collateral" negligence. If X engages an independent contractor to separately move two chemicals, which will cause a major explosion if they come into contact with one another, into separate storage areas, there may be no real risk of injury or damage at all if the independent contractor does what he or she is engaged to do. The activity is, however, obviously fraught with danger unless special precautions are taken to ensure that the independent contractor does not, through "collateral" negligence, transport the two chemicals together and in a way which causes contact between them. As Professor Thayer correctly pointed out ((168) op.cit. at 810.), "collateral" is used in this context as a "most conveniently question-begging adjective" which, so far as it points to a definite conception, does no more than "indicate a distinction according to the definiteness of the danger inherent and visible in the nature of the undertaking".

47. In the present case, the particular qualities of EPS made the stacked cardboard containers of Isolite in the roof area of the Authority's premises a dangerous substance in the sense that, if one of the cardboard containers were accidentally set alight, an uncontrollable conflagration would almost inevitably result ((169) cf. Lord Sumner's description, in Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co. (1921) 2 AC at 479 , of dinitrophenol as a "dangerous explosive" notwithstanding that "a hot flame is needed to explode it".). Clearly, the introduction of more than twenty of those cardboard containers called for special precautions to be taken to avoid any risk of that happening. A fortiori, the carrying out of welding activities in the premises within which the cardboard containers of Isolite were stacked was itself a dangerous activity in that it was reasonably foreseeable that, unless special precautions were taken, sparks or molten metal might fall upon one of the containers and set the cardboard alight.

48. As has been seen, the evidence established that the Authority (through one of its employees) was aware that the cardboard containers of Isolite were being stored in the roof area near where welding work was to be carried out by W. and S. It is, however, unnecessary that that was so. It suffices for present purposes that the Authority engaged and authorized its independent contractor to carry out work within its premises which required both the introduction of such large quantities of EPS to the premises and the carrying out of extensive welding work within the premises. It has not been suggested that it was not reasonably foreseeable that the large quantities of EPS which W. and S. was authorized and required by the Authority to use would be contained in a combustible container such as cardboard. To the contrary, the evidence established that the Isolite had been used in Stage 1

of the building and, as has been said, that an employee of the Authority actually saw the cardboard containers being raised into the roof of the premises. In these circumstances, the overall work which the independent contractor was engaged to carry out on the premises was a dangerous activity in that it involved a real and foreseeable risk of a serious conflagration unless special precautions were taken to avoid the risk of serious fire. It was obvious that, in the event of any serious fire on the premises, General's frozen vegetables would almost certainly be damaged or destroyed. In these circumstances, the Authority, as occupier of those parts of the premises into which it required and allowed the Isolite to be introduced and the welding work to be carried out, owed to General a duty of care which was non-delegable in the sense we have explained, that is to say, which extended to ensuring that its independent contractor took reasonable care to prevent the Isolite being set alight as a result of the welding activities. It is now common ground that W. and S. did not take such reasonable care.

49. It follows that the Authority was liable to General pursuant to the ordinary principles of negligence for the damage which General
sustained. The appeal must be dismissed.

BRENNAN J The Burnie Port Authority ("BPA"), a statutory body incorporated under the Marine Act 1976 (Tas.), had a cold store building on its land at Burnie. It contained three cold rooms. General Jones Pty. Ltd. ("General Jones") occupied these cold rooms
under licence from BPA, using them for the storage of frozen vegetables. BPA undertook an extension of the cold store building by adding two further rooms (rooms 4 and 5) to the eastern end of the building. This extension was known as Stage 2. The licence granted to General Jones contained a clause relating to the extension:

> "It is hereby agreed that the Board may extend the cold store building and use in connection therewith the refrigeration equipment presently used for the purpose of the said premises".

BPA, acting as its own contractor, engaged Wildridge and Sinclair Pty. Ltd. ("WS") to install electrical and refrigeration services to the extension. This work involved welding and the lagging of pipes between the cold room extension and the refrigeration units. While this work was being carried out by employees of WS on 20 December 1979, a fire broke out and destroyed most of the cold store building.

2. General Jones brought an action in the Supreme Court of Tasmania against BPA and WS claiming damages against each of them for the loss of vegetables and plant and consequential loss. Neasey J entered judgment for the plaintiff against each of the defendants for damages to be assessed. An appeal to the Full Court of the Supreme Court of Tasmania was dismissed.

3. The cold store building in which the fire occurred was rectangular in shape. The walls and ceiling in each of the refrigerated rooms, including rooms 4 and 5, were made from panels of expanded polystyrene or EPS (an insulating material) between thin steel or aluminium sheets. Steel portal frames stood at approximately 8.3m centres. The above-ceiling shape of the portals was an inverted V enclosing a "roof void" (as it was described) of approximately 3m in height between the apex and the ceiling of the refrigerated rooms. The walls of the refrigerated rooms were attached to a light steel framework and the ceilings of the rooms were attached to chains hanging from the roof. The exterior of the building consisted of outer walls and a roof of asbestos cement sheeting. There were asbestos cement gables at either end of the roof void. There was a gap of approximately 1m around

the perimeter of the ceiling which allowed the passage of air from outside the building across the top of the ceiling.

4. On the day before the fire, employees of WS moved into the roof void 20 to 30 large cardboard cartons containing blocks of EPS having the trade name "Isolite". The Isolite was to be used as lagging around the pipes that carried refrigerant between the refrigeration units and the cold rooms. The seat of the fire was in a stack of Isolite cartons about 2m high near the eastern end of the roof void.

5. It is difficult to set fire to Isolite; it tends to shrink away from a heat source to which it is exposed. Further, chemicals which act to retard the initial establishment of flame are often added in the manufacture of EPS. However, constant exposure of Isolite to a sufficient heat source (such as burning cartons) may lead to the Isolite catching fire. Once it is ignited, the Isolite is highly flammable (in layman's terms, it is about twice as flammable as soft wood) and fire retardants have little or no effect. A short time before the fire, an employee of WS was welding a metal plate in close proximity to the stack of cartons. About 10 to 15 minutes after he stopped welding, some flames were noticed at one corner of the stack of cartons. The alarm was raised and employees of WS tried to extinguish the flames. However, the fire took hold and spread rapidly, and when it became apparent that their efforts were inadequate, the employees fled and the fire quickly engulfed the building.

6. Neasey J found that, on the balance of probabilities, the fire was caused by the falling of sparks or particles of molten metal, which had been emitted from welding carried on by an employee of WS, onto the cardboard cartons of Isolite. The sparks or particles set fire to the cardboard and thus the Isolite was ignited. His Honour held that WS were liable in negligence to the respondent. He found that such negligence consisted, in substance, of carrying out welding operations without taking adequate precautions, such as moving the stack of cartons containing the Isolite beyond the range of the welding operations or covering the cartons to protect them from sparks and pieces of hot metal. The precautions were elementary. As his Honour found, "the employees of WS chose to store these cartons of Isolite, though there was no need and no good reason to do so, close to their intended welding site, where there would according to ordinary welding practice taught to every apprentice in the trade be danger of fire when the welding took place." His Honour also found that WS was negligent in failing to keep a watch around the site of the welding operations after the welding had finished, and in failing to ensure that adequate fire-fighting equipment was available to control or extinguish any fire. The findings of the trial judge as to the negligence of WS in carrying out the welding operations were not challenged on appeal.

7. The present appeal concerns the liability of BPA to General Jones for damage resulting from the fire caused by the negligence of WS. WS was BPA's independent contractor, not its servant. Neasey J held that BPA was liable to General Jones by reason of a proposition which he stated in these terms:

> "an occupier of land is liable for damage caused by the spread of fire from his land caused by the negligence of his independent contractor."

This proposition was supported by reference to a rule of ancient origin (the "ignis suus" or "his (or her) fire" rule) which found modern expression in the judgment of Lord Denning MR in H and N Emanuel Ltd. v. Greater London Council ((170) (1971) 2 All ER 835 at 838-839 .). General Jones had founded its claim against BPA on two other bases, each of which was rejected by Neasey J He

rejected General Jones's submission that BPA was liable under the rule in Rylands v. Fletcher ((171) (1866) LR 1 Ex 265 ; on appeal (1868) LR 3 HL 330 .) on the ground that welding was not a non-natural use of BPA's premises. He also rejected a submission that BPA was liable in negligence. Although BPA had failed to provide adequate fire-fighting
equipment, his Honour held that the fire was so intense that fire-fighting equipment would have been of no avail. Accordingly, he held that BPA was not guilty of any effective negligence. To the extent of BPA's liability to General Jones, BPA was held to be entitled to an indemnity from WS. His Honour also held WS liable in negligence for the loss suffered by BPA.

8. In the Full Court, BPA successfully attacked the very existence of the tort of ignis suus under which Neasey J had held BPA liable. A majority of the Full Court (Crawford and Zeeman JJ) held that the tort of ignis suus had been absorbed by the rule in Rylands v. Fletcher. However, the Full Court held BPA liable under the rule in Rylands v. Fletcher, finding that it was a non-natural use of BPA's premises to weld in the roof void near the stacked cartons of Isolite. Referring to Neasey J's finding that the employees of WS had failed to take precautions elementary in the welding trade Zeeman J said:

> "The failure by WS's employee to take such precautions, leads me to the conclusion that the particular welding operations did not amount to a natural user of the land, but amounted to a non-natural user."

9. On appeal by BPA to this Court, it was submitted on behalf of General Jones that the facts found by Neasey J supported the judgment in its favour on one or more of three bases: (i) the tort of ignis suus; (ii) the rule in Rylands v. Fletcher; (iii) the tort of negligence consisting, in this case, of a breach of a duty of care owed by BPA directly to General Jones. These were the bases which Bankes LJ in Musgrove v. Pandelis ((172) (1919) 2 KB 43 at 46, 47.) had identified as separate heads of liability for damage done by escape of fire originating on the defendant's land. In England, the three separate heads have been criticized ((173) See the discussion by MacKenna J in Mason v. Levy Auto Parts of England Ltd. (1967) 2 QB 530 at 540, 541.) on the ground that the common law provided but a single head of liability, stated in terms derived from the ancient rule of ignis suus.

Ignis suus

10. The earliest expression of this tort appears in Beaulieu v. Finglam ((174) (1401) YB 2 Hen 4, f. 18, pl.6; Fifoot, History and Sources of the Common Law, (1949) at 166-167.) where Markham J said:

> "I shall answer to my neighbour for each person who enters my house by my leave or my knowledge, or is my guest through me or through my servant, if he does any act, as with a candle or aught else, whereby my neighbour's house is burnt. But if a man from outside my house and against my will starts a fire in the thatch of my house or elsewhere, whereby my house is burned and my neighbours' houses are burned as well, for this I shall not be held bound to them; for this cannot be said to be done by wrong on my part, but is against my will."

A later case, in 1697, was Turberville v. Stampe ((175) (1697) 1 Ld Raym 264 (91 ER 1072).) where it was held that a person might be liable for the escape of fire from his field as he would be

for the escape of fire from his house. In Mason v. Levy Auto Parts of England Ltd. ((176) (1967) 2 QB at 540 .) Mackenna J stated the common law rule in broad terms:

> "A person from whose land a fire escaped was held liable to his neighbour unless he could prove that it had started or spread by the act of a stranger or of God."

And in Hazelwood v. Webber ((177) (1934) 52 CLR 268 at 274-275 .) it was said that:

> "the common law imposed upon the occupier of land, who used fire upon it, a prima facie liability which was independent of negligence for the harm suffered by his neighbour as a natural consequence of the escape of the fire."

11. The liability for escape of fire was qualified at first by an Act of 1707 ((178) 6 Anne c.31, s.6.) and then by The Fire Prevention (Metropolis) Act 1774 ((179) 14 Geo.3 c.78.), s.86. In Tasmania, that provision is enacted by s.11(15) of the Supreme Court Civil Procedure Act 1932 (Tas.), which provides:

> " No action or process may be had, maintained, or prosecuted against a person on whose land a fire accidentally begins, and he shall not be required to make recompense for any damage suffered thereby, any law, usage, or custom to the contrary notwithstanding."

The legislation protects the defendant from liability in a case of fires which begin "accidentally", a term discussed by Lord Goddard CJ in Balfour v. Barty-King ((180) (1957) 1 QB 496 at 504.):

> " The precise meaning to be attached to 'accidentally' has not been determined, but ... where the fire is caused by negligence it is not to be regarded as accidental. Although there is a difference of opinion among eminent text writers whether at common law the liability was absolute or depended on negligence, at the present day it can safely be said that a person in whose house a fire is caused by negligence is liable if it spreads to that of his neighbour, and this is true whether the negligence is his own or that of his servant or his guest, but he is not liable if the fire is caused by a stranger."

This accords with the view of Higgins J who said in Bugge v. Brown ((181) (1919) 26 CLR 110 at 130.) that the statute limited liability to cases of negligence, though the negligence may be on the part of employees or independent contractors.

12. The modern English statement of the rule appears in the judgment of Lord Denning MR in H and N Emanuel Ltd. v. Greater London Council ((182) (1971) 2 All ER at 838 .):

> "the occupier of a house or land is liable for the escape of fire which is due to the negligence not only of his servants, but also of his independent contractors and of his guests, and of anyone who is there with his leave or licence. The only circumstances when the occupier is not liable for the negligence is when it is the negligence of a stranger."

His Lordship explained the contemporary law in these terms ((183) ibid. at 839.):

> "The liability of the occupier can be said to be a strict liability in this sense that he is liable for the negligence not only of his servants but also of independent contractors and, indeed, of anyone except a 'stranger'. By the same token it can be said to be a 'vicarious liability', because he is liable for the defaults of others as well as his own. It can also be said to be a liability under the principle of Rylands v. Fletcher, because fire is undoubtedly a dangerous thing which is likely to do damage if it escapes. But I do not think it necessary to put it into any one of these three categories."

If Australian law had marched in step with English law, BPA's liability to General Jones would have been established simply on account of the negligence of BPA's independent contractor which started the fire. This was indeed the basis on which Neasey J had held BPA liable. But Australian law took its own path, repudiating the ignis suus basis of liability as inappropriately rigorous.

13. It may have been that the natural and social conditions of this wide brown continent made the ignis suus rule an impossible burden for those who live in rural areas, especially in the early days of settlement. It would have been intolerable to impose an absolute liability on a landholder for the escape of any fire lit negligently by whosoever came upon his land by his leave and licence. Such a rule might have generally restricted the tradition of hospitality in the bush and would have been a disincentive to pastoralists to allow Aboriginal communities to camp on their holdings. Whatever the reason for rejecting the rule of ignis suus, in Bugge v. Brown Isaacs J rejected a contention based on Beaulieu v. Finglam that an owner of land is liable for escape of any fire "kindled or kept by his servant whether negligently or not, and whether or not in the course of his employment". His Honour said ((184) (1919) 26 CLR at 115 .) that "the rigorous proposition so contended for cannot now be maintained". In that case the fire was lit by a pastoral employee to cook his meat while he was out working on a station and the fire escaped by his negligence. The defendant was held liable in that case, but the reason advanced by the majority (Isaacs and Higgins JJ) for so holding was that the lighting of the fire was within the scope of the employee's authority and the defendant was therefore vicariously liable for the employee's negligence. In Hazelwood v. Webber ((185) (1934) 52 CLR at 275 .) the ignis suus rule was invoked but the majority (Gavan Duffy CJ, Rich, Dixon and McTiernan JJ) held that other principles now governed liability for escape of fire:

> "The special responsibility arising from the use of fire has come to be regarded as no more than an application of a wider general rule governing the liability of occupiers of property and, perhaps, others who introduce an agency from which harm may reasonably be expected unless an effective control of it is maintained. The grounds of excuse or exception have arisen in the development of this general rule rather than in connection with the ancient strict liability for the escape of fire."

Windeyer J was thus able to say in Hargrave v. Goldman ((186) (1963) 110 CLR 40 at 58. See also per Starke J in Wise Bros. Pty. Ltd. v.
Commissioner for Railways (N.S.W.) (1947) 75 CLR 59 at 70.):

> "This Court has held that the old rules have been absorbed into the principle of Rylands v. Fletcher; and that the strict liability of the common law is subject to the qualifications of and exceptions to that principle".

It may be that the movement from strict to qualified liability in tort, which has long been judicially noticed ((187) Stevens v. Brodribb Sawmilling Co. Pty. Ltd. (1986) 160 CLR 16 at 42 per Wilson and Dawson JJ and Read v. J Lyons and Co., Ld. (1947) AC 156 at 180.), assisted first in the

statutory qualification of ignis suus ((188) See Balfour v. Barty-King (1957) 1 QB at 503 .) and later in the absorption of the tort of ignis suus in the rule in Rylands v. Fletcher. Whatever the explanation, the rule in Rylands v. Fletcher excluded the rule of ignis suus as an appropriate measure of the liability of an occupier of land or premises if damage is caused by the escape of fire. One consequence is that an owner or occupier of land or premises is no longer liable if a fire has been lit upon his land or premises without his authority by a licensee other than his servant and the fire escapes without negligence ((189) Hargrave v. Goldman (1963) 110 CLR 40; (1966) 115 CLR 458; (1967) 1 AC 645.) on the part of that owner or occupier. The Full Court was therefore right to reject the basis on which Neasey J had held BPA liable. A more difficult question is whether BPA is liable under the rule in Rylands v. Fletcher.

The rule in Rylands v. Fletcher

14. The "true rule of law", as stated by Blackburn J ((190) Fletcher v. Rylands (1866) LR 1 Ex at 279-280 .), is -

> "that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of vis major, or the act of God".

Lord Cairns LC affirmed that statement on appeal ((191) Rylands v. Fletcher (1868) LR 3 HL at 339-340.), but he drew a distinction ((192) ibid. at 338-339.) between "the natural user" of land and "a non-natural use" by which he meant something brought onto the land "which in its natural condition was not in or upon it". His Lordship held that, as it was a non-natural use to bring water onto land and keep it in a reservoir, the defendants kept water in their reservoir at their peril and were liable, when the water escaped, for damage sustained by the plaintiff into whose mine the water flowed. Although Lord Cairns affirmed the rule stated by Blackburn J in one part of his speech and stated the principle relating to non-natural use in another ((193) ibid. at 339.), it was understood that liability under the rule in Rylands v. Fletcher was subject to an exception permitting natural use of the defendant's land. The scope of that exception has been the subject of much judicial and academic debate.

15. Before examining the exception, it is desirable first to identify the factor which attracts liability under the rule in Rylands v. Fletcher. This factor is the unusual and dangerous nature of what is brought onto the defendant's land. Wright J in Noble v. Harrison ((194) (1926) 2 KB 332 at 342 ; see also Leakey v. National Trust (1980) QB 485 at 518 per Megaw L.J) cited as the "true principle of Rylands v. Fletcher" what Fletcher Moulton LJ (as he then was) had said in Barker v. Herbert ((195) (1911) 2 KB 633 at 642.) :

> "This is not a case where a landowner has erected or brought upon his land something of an unusual nature, which is essentially dangerous in itself."

Then, in Rickards v. Lothian, Lord Moulton delivering the opinion of the Privy Council said ((196) (1913) 116 CLR 387 at 400-401 ; (1913) AC 263 at 280.):

> "It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community. To use the language of Lord Robertson in Eastern and South African Telegraph Co. v. Cape Town Tramways Companies ((197) (1902) AC 381 at 393.) , the principle of Fletcher v. Rylands 'subjects to a high liability the owner who uses his property for purposes other than those which are natural.'"

The fact that a use is dangerous is an indication that it is non-natural. However, it was held in Rickards v. Lothian that a water supply in a city building was an ordinary use of land - "an almost necessary feature of town life" ((198) (1913) 16 CLR at 402; (1913) AC at 281 .). The categories of use mentioned by Lord Moulton - a "special use bringing with it increased danger to others" and an "ordinary use of the land or such a use as is proper for the general benefit of the community" - have been treated as mutually exclusive, the former category attracting liability, the latter excluding liability. The latter category has been extended by expanding the notion of "ordinary use" beyond the meaning which Lord Cairns attributed to "natural use" in Rylands v. Fletcher. In Read v. J Lyons and Co., Ld. Lord Uthwatt said ((199) (1947) AC at 187 .) that "natural" did not mean "primitive".

16. In Rickards v. Lothian the Privy Council were concerned, on the one hand, to uphold the liability of an occupier whose "special use" of land exposed his neighbours to an increased risk of damage and, on the other, to exempt from liability an occupier whose use of land amounted to no more than an ordinary and reasonable enjoyment of the land having regard to local and contemporary practice. These objects are not easily to be reconciled, especially when the courts do not treat "use" as connoting a state of affairs but include within the concept the doing of a particular act ((200) See Williams, "Non-natural Use of Land", (1973) Cambridge Law Journal 310.). In Hazelwood v. Webber ((201) (1934) 52 CLR at 277 .), this Court stated the scope of the rule in Rylands v. Fletcher in terms which looked to the purpose to which the land is or the premises are being put and the acts done incidentally to that purpose:

> "when the use of the element or thing which the law regards as a potential source of mischief is an accepted incident of some ordinary purpose to which the land is reasonably applied by the occupier, the prima facie rule of absolute responsibility for the consequences of its escape must give way."

It is a condition of liability under Rylands v. Fletcher that by the act of the defendant, or of some person for whose act the defendant is responsible, there is on the defendant's land something dangerous "in the sense that, if it escapes, it will do damage": Read v. J Lyons and Co., Ld. ((202) (1947) AC at 176 .) per Lord Porter. The act which creates or brings the dangerous thing on the land is the use which must be classified under one or other of Lord Moulton's categories.

17. The nature of a particular use of land depends upon the surrounding circumstances. Thus, in Hazelwood v. Webber ((203) (1934) 52 CLR at 278 .), a farmer's burning-off of stubble in mid-summer attracted liability as a non-natural use when fire escaped, the danger overriding the agricultural utility of the practice and the frequency with which other farmers burnt their fields ((204) Similarly, in New Zealand: see New Zealand Forest Products Ltd. v. O'Sullivan (1974) 2 NZLR 80 at 90.). In Torette House Pty. Ltd. v. Berkman ((205) (1940) 62 CLR 637 at 654-655 .) Dixon J said that, in determining the nature
of a use of the defendant's land -

> "the advantage to the occupier who succeeds in the harmless use of an agency such as a large quantity of water which is a potential source of mischief, and the frequency of its use by other occupiers, are not the only considerations. 'The degree of hazard to others involved in its use, the extensiveness of the damage it is likely to do and the difficulty of actually controlling it are even more important factors': cf. Hazelwood v. Webber ((206) (1934) 52 CLR at 278 .) . Time, place and circumstance, not excluding purpose, are of course most material considerations."

18. The approach to be taken in determining the character of a use was defined by Gavan Duffy CJ, Rich, Dixon and McTiernan JJ in Hazelwood v. Webber ((207) ibid.):

> "The question is not one to be decided by a jury on each occasion as a question of fact. The experience, conceptions and standards of the community enter into the question of what is a natural or special use of land, and of what acts should be considered so fraught with risk to others as not to be reasonably incident to its proper enjoyment." (Emphasis added.)

The view taken by this Court that the character of a use is "not one to be decided by a jury" differs from the view taken by Lord Porter in Read v. J Lyons and Co., Ld ((208) (1947) AC at 176 .). He thought it was a mere question of fact. The difference seems to me to be of some importance. If the character of a use is a mere question of fact, the rule in Rylands v. Fletcher would become another conquest in the imperial expansion of the law of negligence. It would be unlikely in practice that a different answer would be given to the question: "was the use so fraught with risk to others as not to be a natural use?" from the question: "was the use so fraught with risk to others that the defendant is liable for any failure to exercise reasonable care to prevent the escape of the dangerous thing?" There is, of course, no legal imperative to contain the expansion of the law of negligence but, if it were to conquer the rule in Rylands v. Fletcher, a plaintiff who suffers loss by the escape of a dangerous thing from the defendant's land would go remediless unless the plaintiff could prove negligence contributing to the escape on the part of the defendant, his servants or agents or the escape amounted to a nuisance. Under Rylands v. Fletcher, the plaintiff can recover if the escape is caused by negligence on the part of the defendant's independent contractor or, more accurately, without proof of any negligence causing or contributing to the escape. "The whole point of Rylands v. Fletcher liability", said Menzies J in Benning v. Wong ((209) (1969) 122 CLR 249 at 278.), "is that the exercise of care is irrelevant". To eliminate the rule in Rylands v. Fletcher and to subject all cases now falling within that rule to the law of negligence would be to depreciate the duty which Rylands v. Fletcher imposes on the occupiers of land and premises and correspondingly to diminish the security which that rule confers on their neighbours ((210) In Cambridge Water Co. v. Eastern Counties Leather Plc. (1994) 2 WLR 53 the House of Lords has maintained strict liability for damage in the event of escape of harmful things from the defendant's premises where damage of the relevant type was foreseeable if the thing should escape.). Nevertheless, as we shall see, many cases in which a plaintiff might recover under Rylands v. Fletcher are cases in which the plaintiff might recover in negligence or in nuisance.

19. By remitting the question "what is a natural or special use of land?" for determination by the judge, courts have been able to control the scope of the liability under Rylands v. Fletcher. Thus liability was denied under that head when an occupier of a flour mill at Narrandera accumulated flammable dust in the manufacture of flour ((211) Wise Bros. Pty. Ltd. v. Commissioner for

Railways (N.S.W.) (1947) 75 CLR at 68, 70, 73, 74.) and when liability for a fire in Fremantle Harbour was sought to be imposed on the authority which brought fuel oil for ships to a berth in the harbour ((212)
Eastern Asia Navigation Co. Ltd. v. Fremantle Harbour Trust Commissioners (1951) 83 CLR 353 at 388, 396-397 .). Conversely, in Benning v. Wong, Windeyer J was prepared to accept on the authority of precedent that the laying of gas pipes was a non-natural use of land ((213) (1969) 122 CLR at 302 .). It is not surprising that he said ((214) ibid.) in reference to cases relating to the "non-natural" use of land:

> "Some of them seem to me to make a natural or non-natural use of land depend not on any certain objective criteria, but on whether it is a use of such a character that the defendant ought, in the opinion of the court determining the particular case, to take the risk of having a dangerous thing where it was." (Emphasis added.)

20. Although the absence of objective criteria in the law of tort is unsatisfactory, the question whether land or premises is being "reasonably applied" to "an ordinary purpose" is a question which provides the court with considerable guidance ((215) In Cambridge Water Co. Lord Goff of Chieveley anticipated that the requirement of foreseeability of harm by escape may make the natural user exception to liability "easier to control" and having "a more recognizable basis of principle". He described the storage of substantial quantities of chemicals on industrial premises "as an almost classic case of
non-natural use": (1994) 2 WLR at 83 .). And it is a question which the court, conscious of the policy of the law and of the effect of time, place and circumstance, and purpose or the nature of land use, is peculiarly well suited to answer.

21. The rule in Rylands v. Fletcher has been said ((216) Rickards v. Lothian (1913) 16 CLR at 395-396; (1913) AC at 275 .) to rest on the principle sic utere tuo ut alienium non laedas ("so use your own property as not to injure the rights of another" ((217) Broom's Legal Maxims, 10th ed. (1939) at 238 n.(z).)). It imposes a duty arising out of the use of land or premises on "occupiers of property and, perhaps, others who introduce an agency from which harm may reasonably be expected unless an effective control of it is maintained": Hazelwood v. Webber ((218) (1934) 52 CLR at 275 . Note the similarity
between "harm reasonably expected" and the requirement of "foreseeability of damage of the relevant type" in Cambridge Water Co.). "The foundation of the rule", Windeyer J said in Benning v. Wong ((219) (1969) 122 CLR at 298 .), "is that the bringing of things with mischievous possibilities or propensities upon land creates a duty to confine them there. The harm they do by escaping could not occur but for the act of bringing them to the place whence they escape." But Rylands v. Fletcher does not impose liability on an occupier of land if the mischievous thing is not created or brought onto the land with the occupier's authority or kept there for the occupier's purpose. In Hargrave v. Goldman ((220) (1963) 110 CLR 40 ; on appeal (1966) 115 CLR
458; (1967) 1 AC 645 .) where lightning struck and lit a tree on the defendant's land whence a fire spread after a time to neighbouring land, the defendant was held liable for allowing the fire to spread, but his liability was found in nuisance and in negligence, not under Rylands v. Fletcher. Although fire is a thing likely to do mischief if it escapes, Rylands v. Fletcher was "excluded simply because the respondent did not bring the fire upon his land, nor did he keep it there for any purpose of his own. It came there from the skies. And he did nothing to make its presence there more dangerous to his neighbours." ((221) (1963) 110 CLR per Windeyer J at 59; and see (1966) 115

CLR at 460; (1967) 1 AC at 656 .) And in McInnes v. Wardle ((222) (1931) 45 CLR 548.) the liability of the farmer for escape of fire lit by his independent contractor to assist in the fumigation of rabbits depended upon a finding that the farmer had authorized the independent contractor to light the fire ((223) ibid. at 550, 552 ; see also Black v. Christchurch Finance Co. (1894) AC 48 at 54.). By contrast, in Torette House Pty. Ltd. v. Berkman ((224) (1940) 62 CLR 637 .), the defendant occupier of the premises from which the water escaped was held exempt from liability. In that case, the escape of water which damaged the plaintiff's premises was caused by the negligence of the defendant's plumber, an independent contractor, who negligently turned a stopcock causing water to flow out of an uncapped pipe in the water supply system. The defendant was not vicariously liable for the negligence of his independent contractor in turning on the water, nor was he liable under Rylands v. Fletcher, for the installation of a water supply system was a natural use of his premises.

22. In this case, Isolite packed in cardboard cartons was brought onto BPA's premises by WS. It was not a danger unless the cartons were ignited or heat of sufficient intensity was otherwise applied. But the cartons of Isolite were stored near the welding site in the roof void and there was a possibility that molten metal, spattered around the welding site, might ignite the cartons of Isolite. BPA can be taken to have authorized the use of the roof void for construction purposes, including welding and bringing in Isolite to insulate the pipes carrying refrigerant. The carrying out of welding near a stack of cartons of Isolite and the stacking of cartons of Isolite near the site of a welding operation were, however, acts done solely on the initiative of the employees of WS. The employees of WS acted in breach of such elementary precautions that it would be wrong to find that BPA expected that they would act in that way. The authority given by BPA to use the roof void for welding and the storage of cartons of Isolite cannot be held to embrace an authority to use the roof void by doing the acts which resulted in the fire. This case is thus distinguishable from McInnes v. Wardle and Black v. Christchurch Finance Co. where the actual setting of the fire was held to be within the authority conferred by the defendant. The acts which caused the Isolite to ignite were the unauthorized and negligent acts of WS, an independent contractor. The question of BPA's liability for the acts of the WS employees is examined in more detail later in this judgment.

23. If BPA had authorized the stacking of the cartons of Isolite near the welding site, it would have been responsible for an unusual and dangerous use of the premises ((225) Mason v. Levy Auto Parts of England Ltd. (1967) 2 QB 530 at 542- 543 .) and it would have been liable to General Jones under Rylands v. Fletcher. It would have been immaterial to that liability that BPA did not know of the danger ((226) Rainham Chemical Works, Ld. v. Belvedere Fish Guano Co. (1921) 2 AC 465 at 471.). It can be accepted that welding carries a risk of starting a fire if flammable materials are close by and that Isolite is, given a sufficient source of initial heat, flammable material. No doubt, as the Full Court held, the failure of the employees of WS to take elementary precautions before welding - either by moving the stack of Isolite cartons or by covering them - means that the welding operation was not a natural use of BPA's premises, but BPA did not authorize welding near the stack of cartons. BPA authorized the general work of construction which included the welding and the bringing of Isolite into the roof void for the purpose of insulating pipes, but neither of those acts was by itself a source of danger. The welding and the bringing of cartons of Isolite into the roof void were the accepted incidents of the construction of the cold store extension. That work, to which General Jones had agreed by the terms of its licence, was an ordinary purpose to which the premises were reasonably applied by the occupier. BPA authorized a natural use of its premises but, as it did not authorize the acts which ignited the Isolite, it is not liable under Rylands v. Fletcher for the damage suffered by General Jones when the fire escaped into its premises.

24. Nevertheless, the construction work which WS had contracted to perform - like many other

construction works - exposed the owners or occupiers of neighbouring premises to a risk of damage if the contractor or its employees should perform the work negligently. Is a building owner liable in negligence because he authorizes an independent contractor to perform works attended by such a risk?

Negligence

25. WS was an independent contractor which undertook part of the construction of the cold store for BPA. The liability of BPA for negligence on the part of WS's employees in performing that work depends on principles which Dixon J stated in Colonial Mutual Life Assurance Society Ltd. v. Producers and Citizens Co-operative Assurance Co. of Australia Ltd. ((227) (1931) 46 CLR 41 at 48 ; see also Kondis v. State Transport Authority (1984) 154 CLR 672 at 691-692 .):

> " In most cases in which a tort is committed in the course of the performance of work for the benefit of another person, he cannot be vicariously responsible if the actual tortfeasor is not his servant and he has not directly authorized the doing of the act which amounts to a tort. The work, although done at his request and for his benefit, is considered as the independent function of the person who undertakes it, and not as something which the person obtaining the benefit does by his representative standing in his place and, therefore, identified with him for the purpose of liability arising in the course of its performance. The independent contractor carries out his work, not as a representative but as a principal."

There are two exceptions, or apparent exceptions, to the general rule that an employer is not liable for a tort committed by his independent contractor: the first, when the employer directly authorizes "the doing of the act which amounts to a tort"; the second, when the employer engages the independent contractor to perform a duty resting on the employer and the independent contractor fails to perform it. Where the employer is sought to be made liable for the negligent conduct of an independent contractor but that conduct has not been authorized by the employer and is not in breach of a duty of care resting personally on the employer, the negligence is said to be "collateral" ((228) Lord Blackburn used the term in Dalton v. Angus (1881) 6 App Cas 740 at 829 ; it had been used by Pollock CB in Hole v. Sittingbourne and Sheerness Railway Co. (1861) 6 H and N 488 at 497 (158 ER 201 at 204).) and creates no liability in the employer.

26. In some cases where an employer is held liable for the tort of an independent contractor, the ground of liability can be seen clearly to be either authorization of a negligent act ((229) As in Black v. Christchurch Finance Co. (1894) AC at 54 ; McInnes v. Wardle.) or non-performance of an employer's personal duty ((230) As in The Commonwealth v. Introvigne (1982) 150 CLR 258 at 270 -271, 274-275, 279-280 .), but the two grounds coalesce where the doing by an independent contractor of an act authorized by the employer gives rise to a duty resting on the employer personally. In such a case, the relevant principle is that stated by Mason J in Stoneman v. Lyons ((231) (1975) 133 CLR 550 at 574.):

> "Although the general rule is that a person is not liable for the negligence of his independent contractor, it is accepted that a person who owes a duty to a third party cannot avoid responsibility for discharging that duty by delegating performance of it to an independent contractor."

Dixon J in McInnes v. Wardle ((232) (1931) 45 CLR at 552 and cf. Torette House Pty. Ltd. v. Berkman (1940) 62 CLR at 651 .) pointed out that an occupier of land may come under a duty by reason of acts done by an independent contractor:

> " The duty of an occupier to take care that his land is so used and the operations carried out upon it are so managed that his neighbours are not exposed to injury by exceptional dangers is not confined to dangers arising from acts of himself and his servants. (See per Littledale J in Laugher v. Pointer ((233) (1826) 5 B and C 547 at 560 (108 ER 204 at 209).) ; per Jessel MR in White v. Jameson ((234) (1874) LR 18 Eq 303 at 305.) ; and Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co. ((235) (1921) 2 AC 465 .))."

The general principle was stated by Cockburn CJ in Bower v. Peate ((236) (1876) 1 QBD 321 at 326 -327 .):

> "(A) man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else - whether it be the contractor employed to do the work from which the danger arises or some independent person - to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted. While it may be just to hold the party authorizing the work in the former case exempt from liability for injury, resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences if such consequences are not in fact prevented, no matter through whose default the omission to take the necessary measures for such prevention may arise."

27. There is a difficulty with this passage if it is applied in a case where negligence is in issue. The difficulty lies in the words "is bound to see to the doing of that which is necessary to prevent the mischief", for those words suggest that the duty is an absolute duty "to prevent the mischief", a duty higher than a duty to exercise reasonable care. There are some cases, notably the rule in Rylands v. Fletcher and the law of nuisance, where the act authorized to be done does impose on the employer of an independent contractor a duty higher than a duty to exercise reasonable care ((237) Don Brass Foundry Pty. Ltd. v. Stead (1948) 48 SR (NSW) 482 at 486.). Therefore, where the authorized act is or creates a non-natural use of land ((238) As in McInnes v. Wardle.), or in the absence of preventive measures will create a nuisance ((239) Matania v. National Provincial Bank Ltd. (1936) 2 All ER 633 ; Dalton v. Angus (1881) 6 App Cas 740 ; Odell v. Cleveland House (Limited) (1910) 26 TLR 410 ; cf. per Mason J in Kondis v. State Transport Authority (1984) 154 CLR at 685 .), the duty of the employer is, in the one case, to prevent escape of the mischievous thing or, in the other, to prevent the occurrence of the nuisance. But the duty in negligence is not so demanding. Cockburn CJ therefore stated the principle too broadly.

28. In Dalton v. Angus ((240) (1881) 6 App Cas at 829 ; see also at 791 per Lord Selborne L.C.) Lord Blackburn adopted the general principle of Bower v. Peate but, in Hughes v. Percival ((241) (1 883) 8 App Cas 443 at 447.), he thought that Bower v. Peate might be too broadly stated since it might be taken to impose a duty in a negligence case higher than a duty to take reasonable care. Nevertheless, he accepted that, as Bower v. Peate was a case of interference with the plaintiff's right of support - a case in nuisance - it was rightly decided. His Lordship had been careful, in Dalton v. Angus, not to define the extent of the different duties which may devolve on an employer who, to use the words of Cockburn CJ, "orders a work to be executed (by an independent contractor), from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise". Lord Blackburn said ((242) (1881) 6 App Cas at 829 .):

> "Ever since Quarman v. Burnett ((243) (1840) 6 M and W 499 (151 ER 509).) it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it: Hole v. Sittingbourne Railway Co.; Pickard v. Smith ((244) (1861) 10 CB (NS) 470 (142 ER 535).); Tarry v. Ashton ((245) (1876) 1 QBD 314 .)."

In Canada, a similar approach can be seen in the judgment of Duff J in Vancouver Power Co. v. Hounsome ((246) (1914) 19 DLR 200 at 204.).

29. The extent of the duty imposed on the employer in a particular case is precisely the same as it would be if the act were done by the employer. The extent of the duty therefore depends on the nature of the liability which would attach if the injurious consequences of the authorized act were not prevented: a duty to take reasonable care to avoid the injurious consequences when the only tortious liability would be for negligence; a higher duty when the tortious liability would be for nuisance or under Rylands v. Fletcher.

30. In Stoneman v. Lyons, the plaintiff sought to impose a higher duty on the ground that the work which the employer had authorized his independent contractor to perform was an "extra-hazardous act". The Court rejected the notion that the doing of an extra-hazardous act imposed a higher duty than the duty to take reasonable care. Rather, citing Read v. J Lyons and Co., Ld., it was said ((247) (1975) 133 CLR at 575 .) that what has to be done to perform the duty to take reasonable care is proportioned to the danger created by the doing of the relevant act. In Stevens v. Brodribb Sawmilling Co. Pty. Ltd. ((248) (1986) 160 CLR at 42-44 .), Wilson and Dawson JJ affirmed that proposition and cited the authorities in this Court which support it. However, when an act done by an independent contractor and authorized by the employer creates or increases the risk of injury to a third party, the employer who authorizes the act brings himself into such a relationship with the third party that he is bound to take reasonable care to prevent the occurrence of that injury ((249) Sutherland Shire Council v. Heyman (1985) 157 CLR 424 at 479.). The duty is personal and, if it is not performed, the employer is responsible. In practice, the act which gives rise to a duty in the employer to take reasonable care will be one which, in the natural course of things, involves the risk of injurious consequences to a third party. In that sense, the act will be naturally "dangerous".

31. Where the occupier of premises engages an independent contractor to perform on his premises work which naturally carries a risk of damage to neighbouring premises and performance of the work results in such damage, the employer's liability can be imposed not only by the law of negligence but also by the law of nuisance ((250) See the cases in fn.(239).). The duty arising under the law of negligence may then be subsumed by the higher duty arising under the law of nuisance, but it does not follow that the law of negligence imposes some special duty when extra-hazardous acts are authorized. That notion was dispelled by Stoneman v. Lyons. So far as it is material to consider the duty arising under the law of negligence, the work done by an independent contractor on an employer's premises will impose on the employer a duty to take reasonable care to avoid its injurious consequences on a neighbour's premises only if the work naturally involves a risk of those consequences. Where injurious consequences flow from the negligent manner in which an independent contractor does an authorized act and not from the nature of the act which was authorized, the employer is not liable. In Hole v. Sittingbourne and Sheerness Railway Co. ((251) (1861) 6 H and N at 497-498 (158 ER at 204-205).) Pollock CB said:

> " Where the act complained of is purely collateral, and arises incidentally in the course of the performance of the work, the employer is not liable, because he never authorized that act - the remedy is against the person who did it. ... But when the contractor is employed to do a particular act, the doing of which produces mischief, another doctrine applies."

The distinction in principle was stated by Fletcher Moulton LJ in Padbury v. Holliday and Greenwood Limited ((252) (1912) 28 TLR 494 at 495.) in reference to what Lord Watson had said in Dalton v. Angus:

> "before a superior employer could be held liable for the negligent act of a servant of a sub-contractor it must be shown that the work which the sub-contractor was employed to do was work the nature of which, and not merely the performance of which, cast on the superior employer the duty of taking precautions." (Emphasis added.)

32. The distinction between a risk of damage arising from the nature of the authorized work and a risk of damage arising from the manner in which work is performed distinguishes negligence for which the employer is liable from "collateral" or incidental negligence for which he is not. In Torette House Pty. Ltd. v. Berkman ((253) (1939) 39 SR (NSW) 156 at 170.) Jordan CJ said:

> "A person who procures the doing of an act is liable for its actual consequences and for anything necessarily involved in its being done whomsoever he may have procured to do it. He is liable for the acts of any agent of his acting within the scope of his employment. For the actual breach of any duty owed by himself he is responsible whatever steps he may have taken or agency he may have employed to endeavour to prevent a breach. In certain special circumstances, if he causes an act to be done he incurs a liability to see that care is used to prevent injury from being caused by methods incidentally used to produce the result, whomsoever he may employ to produce it. But there is no general rule that if a person employs an independent contractor to do an inherently lawful act, he incurs liability for injury to others occasioned by the methods incidentally employed by the contractor in the course of its performance (these not

> being methods necessarily involved in the doing of the act and necessarily injurious), by reason only of the fact that the act is 'dangerous,' 'hazardous,' or 'extra hazardous.'"

And in Stoneman v. Lyons, Stephen J said ((254) (1975) 133 CLR at 564 .):

> " An employer will, whether or not the activity is regarded as extra-hazardous, be liable in negligence for the consequences to third parties both of acts which he specifically authorizes or directs and of methods not so authorized but which are necessarily involved in performing those acts. For the consequences of other negligent conduct of the contractor the employer will not be liable".

Thus no duty to take reasonable care is imposed on an employer merely because damage might be done if the independent contractor authorized to perform an act adopts a careless method of doing it and no liability is imposed on the employer merely because damage is done by carelessness in the method adopted. Such carelessness on the part of an independent contractor is the "collateral negligence" of which Lord Blackburn spoke and for which the employer is not responsible. It is a question of fact whether damage has been caused by collateral negligence or by a failure to perform the duty of care resting on the employer. It may be a question of some difficulty. The case will fall into the latter category if the risk of damage arises from the way in which the work will necessarily be done or from the way in which the employer expects that it will be done ((255) As in Black v. Christchurch Finance Co. or McInnes v. Wardle.), for in each of those situations the incurring of the risk is authorized by the employer. But the employer is not liable merely because it is foreseeable that the independent contractor might, on his own initiative, adopt a careless way of doing the work. If liability were imposed on an employer in that situation, the employer would become a virtual guarantor of the independent contractor's carefulness.

33. In the present case, General Jones' claim against BPA in negligence fails for precisely the same reason as its claim under Rylands v. Fletcher fails. BPA can be taken to have authorized welding in the roof void and the storing of Isolite in the roof void, for those activities were necessarily involved in constructing the cold store extension. But neither of those activities might have been expected to cause damage to General Jones' premises provided WS performed the work without negligence. Damage was caused to General Jones' premises by the dangerous act of welding near the stack of Isolite cartons and that was a method of doing the work "incidentally employed by the contractor". The doing of that act was "collateral" negligence for which BPA is not liable.

34. The three bases on which General Jones put its case fail. The appeal must be allowed, the order of the Full Court set aside and, in lieu thereof, the appeal to that Court must be allowed and judgment entered for BPA in the claim made against it by General Jones.

McHUGH J Burnie Port Authority ("BPA") appeals against an order of the Full Court of the Supreme Court of Tasmania which upheld an award of damages made in favour of the respondent, General Jones Pty. Limited ("General Jones"). The damages were awarded for the loss suffered by General Jones when fire spread from part of premises occupied by BPA to another part of the premises occupied by General Jones. The Full Court, reversing the trial judge's decision, held that BPA was not liable under the ancient common law doctrine of "ignis suus". However, it held that BPA was liable under the rule in Rylands v. Fletcher ((256) (1866) LR 1 Ex 265 ; affd (1868) LR 3 HL 330 .). In my opinion the appeal should be allowed on the ground that BPA was not liable under the doctrine of "ignis suus", the rule in Rylands v. Fletcher, or in negligence. No claim in nuisance was relied upon in this Court.

The factual background

2. On 20 December 1979, a fire broke out in a cold store, owned by BPA at Burnie in Tasmania, which was in the process of construction. Part of the store (Stage 1) was completed. General Jones used that part to store frozen foods. Another part of the building (Stage 2) was under construction. The construction work was being carried out by BPA. BPA had employed Wildridge and Sinclair Pty. Limited ("Wildridge") to lag refrigeration pipes.

3. On 20 December 1979, seven employees of Wildridge were doing welding work in the roof of Stage 2. During the course of welding a steel plate that was to support a refrigeration unit, sparks from the welder ignited a stack of cartons containing Isolite. Isolite is a highly flammable insulation material. The fire destroyed the building within a few minutes. An employee of BPA was aware that Stage 2 contained cartons of Isolite. BPA does not dispute that Wildridge was guilty of negligence in causing the cartons to be set alight or that the fire escaped from Stage 2 to Stage 1 and caused damage of $2.246 million to the property of General Jones.

The "ignis suus" principle

4. The first question in the appeal is whether the "ignis suus" principle is part of the common law of Australia. Although that principle remains part of the common law of England, in my opinion it is not part of the common law of Australia.

5. At common law, the occupier of premises was liable for the act of any person who entered the occupier's house by leave or to his or her knowledge and who did any act which caused a neighbour's house to burn ((257) Beaulieu v. Finglam (1401) YB 2 Hen IV F.18 pl.6; translated in Fifoot, History and Sources of the Common Law, (1949) at 166.). This was the "ignis suus" (his fire) principle. The remedy of the person whose house was burnt was an action on the case. Debate has ensued as to whether the plaintiff was required to prove that the fire was the result of negligence. Support for the view that the plaintiff had to prove negligence arises from the use of the term "negligenter"
in the form of action. However, the better view is that this allegation was a pleader's flourish ((258) Comyns's Digest, 4th ed (1800), vol.1 at 284-285; Winfield on Tort, 8th ed (1967) at 438.). Turberville v. Stampe ((259) (1697) 1 Ld Raym 264 (91 ER 1072).), however, established that the occupier was not liable for a fire which was started by a stranger or by an act of God ((260) See also Becquet v. MacCarthy (1831) 2 B and Ad 951 (109 ER 1396).). Subsequently, liability for purely accidental fire was abolished by statute in the reign of Queen Anne ((261) 6 Anne c.31, s.6. In Tasmania, the relevant enactment is the Supreme Court Civil Procedure Act 1932, s. 11(15).) . But, according to a long line of authority, a fire started negligently was not started accidentally within the meaning of the Statute of Anne ((262) Goldman v. Hargrave (1967) 1 AC 645 at 664-665 .).

6. Unquestionably, the "ignis suus" principle remains part of the common law of England ((263) Balfour v. Barty-King (1957) 1 QB 496 ; H. and N. Emanuel Ltd. v. Greater London Council (1971) 2 All ER 835 .). In Balfour v. Barty-King ((264) (1957) 1 QB 496.), the Court of Appeal held that an occupier of land was liable for damage caused by the escape of a fire resulting from the acts of independent contractors working on the land. The Court held ((265) ibid. at 502.) that there was a "special duty to guard against an escape of fire" which had been established by Beaulieu v. Finglam ((266) (1401) YB 2 Hen IV f.18 pl.6.) and Turberville. In H. and N. Emanuel Ltd. v. Greater London Council ((267) (1971) 2 All ER 835 at 838.), Lord Denning MR said:

> "(T)he occupier of a house or land is liable for the escape of fire which is due to the negligence not only of his servants, but also of his independent contractors and of his guests, and of anyone who is there with his leave or licence. The only circumstances when the occupier is not liable for the negligence is when it is the negligence of a stranger."

7. However, the "ignis suus" principle is not part of the common law of Australia. In this country, liability for fire is not the subject of a special common law rule. It is covered by the rule in Rylands v. Fletcher. At all events, that was the conclusion of Windeyer J in Hargrave v. Goldman ((268) (1963) 110 CLR 40 at 58.). His Honour cited two cases in support of that conclusion - Bugge v. Brown ((269) (1919) 26 CLR 110 .) and Hazelwood v. Webber ((270) (1934) 52 CLR 268.). Counsel for General Jones claimed that these cases did not support his Honour's conclusion. However, in my opinion they do support it. In Hazelwood ((271) ibid. at 275.), Gavan Duffy CJ, Rich, Dixon and McTiernan JJ, after referring to the common law principle of liability for fire, said:

> "The special responsibility arising from the use of fire has come to be regarded as no more than an application of a wider general rule governing the liability of occupiers of property and, perhaps, others who introduce an agency from which harm may reasonably be expected unless an effective control of it is maintained."

8. This wider general rule was clearly a reference to the rule in Rylands v. Fletcher. In Bugge ((272) (1919) 26 CLR at 114-115.), Isaacs J recorded that, during the argument in that case, the Court had ruled that an owner of land was not liable "for damage caused by any fire there in fact kindled or kept by his servant whether negligently or not". His Honour said ((273) ibid. at 115.): "Whatever may have been anciently considered the true rule of the common law, the rigorous proposition so contended for cannot now be
maintained."

9. Furthermore, in Whinfield v. Lands Purchase and Management Board of Victoria and State Rivers and Water Supply Commission of Victoria ((274) (1914) 18 CLR 606 .), the Court held that the occupier of land was not liable for an escape of fire caused by the negligence of one of its employees who, with its permission, was camping on the defendant's land. Both the reasoning and the actual decision are inconsistent with the existence of the "ignis suus" principle being part of the law of Australia. Indeed, Isaacs J dealt with the case on the basis that, if the defendant was liable, it was liable under the rule in Rylands v. Fletcher.

10. Then, in McInnes v. Wardle ((275) (1931) 45 CLR 548.), where the Court held that the employer of an independent contractor was responsible for the spread of fire which the contractor had started, none of the reasons for judgment relied on the common law principle of "ignis suus". Nevertheless, counsel for General Jones relied on a passage in the judgment of Evatt J in that case to support the existence in Australia of the "ignis suus" principle. His Honour said ((276) ibid. at 552.):

> "Black v. Christchurch Finance Co. ((277) (1894) AC 48 .) establishes that a person who authorizes the use of fire in order to clear or burn off on land occupied by him is

> under a duty to neighbouring landholders to see that reasonable care is exercised to prevent the fire from spreading."

However, the reference to reasonable care in that passage makes it plain that his Honour was not intending to apply the doctrine of
"ignis suus" formulated by the early common law.

11. Finally, in Wise Bros. Pty. Ltd. v. Commissioner for Railways (N.S.W.) ((278) (1947) 75 CLR 59.), the Court held that Hazelwood was authority for the proposition that the "ignis suus" principle was not part of the law of Australia ((279) See ibid. at 67, 68, 70, 73-74 .).

12. Having regard to these authorities, it is not possible to hold
that the "ignis suus" principle is part of the common law of Australia. Accordingly, the Full Court of the Supreme Court of Tasmania was correct in the present case in rejecting the argument that the "ignis suus" principle is part of the common law of Australia
and entitled General Jones to succeed in the present action.

Rylands v. Fletcher

13. In Fletcher v. Rylands ((280) (1866) LR 1 Ex at 279-280 .), Blackburn
J said:

> "We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just."

14. When the case was taken on appeal to the House of Lords,
Lord Cairns LC and Lord Cranworth expressly agreed with that statement ((281) Rylands v. Fletcher (1868) LR 3 HL at 340.). However, in the course of his speech, Lord Cairns drew ((282) ibid. at 339.) a distinction between the "natural use" of the defendant's land and its "non-natural use".

15. The rule in Rylands v. Fletcher, like other common law rules, has undergone much exposition and development since it was first formulated by Blackburn J in Fletcher v. Rylands ((283) (1866) LR 1 Ex
at 279-280.). The genius of the common law is that the first statement of a common law rule or principle is not its final statement. Rules and principles are modified and expanded by the pressure of changing social conditions and the experience of their practical application in the life of the community. In Australia, however, the rule in Rylands v. Fletcher has undergone little, if any, development in the last sixty years. The reason for this is that, in Hazelwood ((284) (1934) 52 CLR at 277.), this Court explained the rule in terms which have been regarded as authoritative.

16. In Hazelwood ((285) (1934) 52 CLR at 277-278 .), Gavan Duffy CJ, Rich, Dixon and McTiernan JJ said:

> "The principle upon which a prima facie absolute liability appears to be imposed by the law is that no man should at the expense of his neighbour introduce upon his own land a potential source of harm which is considered to require continual and effective control or restraint to prevent mischief. If through a failure or relaxation of control damage to his neighbour occurs, although without negligence on his part, he should indemnify his neighbour. But when, to obtain effectual use and enjoyment of land in a reasonable manner according to its character and the uses for which it is adapted, occupiers find that the introduction of such a potential source of harm is generally necessary, to insist upon the prima facie rule would be to restrict the proper enjoyment of the land or to impose a special responsibility for loss arising from a danger to which by the recognized use of the land every occupier exposed himself and other occupiers. Accordingly, when the use of the element or thing which the law regards as a potential source of mischief is an accepted incident of some ordinary purpose to which the land is reasonably applied by the occupier, the prima facie rule of absolute responsibility for the consequences of its escape must give way. The terms in which the grounds of this exception from or exclusion of the prima facie rule have been described have varied, and, both because of this variation and of their indefiniteness, have been open to criticism. ... But in the decision which finally confirmed the general application of this exclusion of absolute responsibility, namely, Rickards v. Lothian ((286) (1913) AC 263 at 280.), Lord Moulton defined the rule to be that the occupier's liability independent of negligence arose from 'some special use bringing with it increased danger to others' and 'not merely ... the ordinary use of the land or such a use as is proper for the general benefit of the community'."

17. In my experience, this authoritative exposition of the rule has proved a satisfactory, if not sure, guide to its proper application. Of course, views will inevitably differ as to what results should flow from the application of the rule. But in the application of legal rules and principles there is nothing novel about that experience.

18. In England, the position is very different. From the beginning of the post-Rylands v. Fletcher period, English courts have sought to restrict the scope of that case ((287) See, for example, Green v. The Chelsea Waterworks Company (1894) 70 LT 547 at 549 where Lindley LJ said that it was "not to be extended beyond the legitimate principle on which the House of Lords decided it. If it were extended as far as strict logic might require, it would be a very oppressive decision".) . When, in Read v. J Lyons and Co. Ltd. ((288) (1947) AC 156 .), the House of Lords did not greet the rule with any enthusiasm, it became obvious that English law would not develop a comprehensive and coherent theory of strict liability for hazardous conduct. No doubt this attitude to the rule in Rylands v. Fletcher was the consequence of the belief that civil liability should depend on moral fault, an idea that began to influence English legal thinking in the second half of the nineteenth century and still finds support in common law jurisdictions. As is generally the case when courts are not enthusiastic about a legal rule, the decisions as well as dicta in English cases on the rule in Rylands v. Fletcher are not easy to reconcile. Thus, to evaluate the rule in terms of the English cases or to analyse English decisions on the effect of particular words and phrases used by Blackburn J would be to ignore the significant Australian contribution to the understanding of the rule. Moreover,

Rylands v. Fletcher contains a common law principle, not a statutory enactment. In applying the common law, it is not the function of "judges to frame definitions or to lay down hard and fast rules. It is their function to enunciate principles and much that they say is intended to be illustrative or explanatory and not to be definitive" ((289) Broome v. Cassell and Co. Ltd. (1972) AC 1027 at 1085 per Lord Reid.). In Benning v. Wong ((290) (1969) 122 CLR 249 at 299.), Windeyer J, speaking of the rule in Rylands v. Fletcher, said:

> "What the Court of Exchequer Chamber and the House of Lords did was to state a doctrine or principle of the common law. To regard the words used as if they were the provisions of a statute defining in precise and permanent terms the limits of legal rights and duties seems to me a mistake."

19. Counsel for General Jones suggested that the rule in Rylands v. Fletcher had been incorporated into the law of negligence. Just when or how this incorporation occurred was not explained. In view of the decisions of this Court in Lothian v. Rickards ((291) (1911) 12 CLR 165 .), Hazelwood, Torette House Pty. Ltd. v. Berkman ((292) (1940) 62 CLR 637 .), Wise Bros., Eastern Asia Navigation Co. Ltd. v. Fremantle Harbour Trust Commissioners ((293) (1950) 83 CLR 353 .) and Benning, the incorporation must have occurred only in recent years. Moreover, it has escaped the attention of the authors of texts on the law of torts who have devoted separate chapters to the rule in Rylands v. Fletcher.

20. Irrespective of whether the rule in Rylands v. Fletcher is or is not a satisfactory ground of tortious liability, for more than one hundred years it has been treated in this country as a settled rule of
liability in no way dependent upon proof of negligence. In Benning ((294) (1969) 122 CLR at 278 .), Menzies J said:

> "The whole point of Rylands v. Fletcher liability is that the exercise of care is irrelevant. The liability for injury by reason of the escape of the dangerous substance brought on to premises is absolute save for well defined defences such as an act of God. To admit a defence of no negligence as an answer to a Rylands v. Fletcher claim would virtually defeat the very purpose of the rule itself and it is clear that the original foundation of the rule did not admit care as a defence in any circumstances at all. The duty established was to insure against damage from a dangerous thing brought upon premises if it escape, even without negligence."

21. With great respect to those who are of the contrary opinion, I do not see how, consistently with the settled doctrine of this Court, the liability of an occupier of land under the rule in Rylands v. Fletcher can be understood as assimilated to, or could be incorporated into, an occupier's liability in negligence. It is true that, in some circumstances in an action for negligence, an occupier of land is liable for the acts of independent contractors. In that respect there is a superficial similarity between liability in negligence and liability under the Rylands v. Fletcher rule. However, the similarity is superficial because in negligence the occupier is only liable for the negligent acts of an independent contractor. Under Rylands v. Fletcher, on the other hand, the occupier of land is liable for the acts of an independent contractor which cause the escape of the harmful thing whether or not the

contractor's acts were negligent.

22. Once one moves out of the area of independent contractors, any similarity between an occupier's liability for negligence and the rule in Rylands v. Fletcher disappears. Outside the area of independent contractors, the occupier of land is liable in negligence only for his or her own negligence or the negligence of his or her employee. Under Rylands v. Fletcher, the occupier is liable for an escape caused by any person other than a stranger, irrespective of negligence.

23. The most important difference between the action for negligence and the action based on Rylands v. Fletcher, however, is that the occupier of land is not liable under Rylands v. Fletcher unless the escape of the dangerous substance was the result of what Lord Cairns in that case described as a "non-natural use" of land. As the judgment of this Court in Hazelwood ((295) (1934) 52 CLR at 278 .) explains, a non-natural use of the land occurs only when some special use is made of the land which brings with it increased danger to those outside the land.

24. Furthermore, it is a question of law for the trial judge to determine whether the use of the land amounts to a special use bringing with it an increased danger to others. As the Court pointed out in Hazelwood ((296) ibid.):

> "The question is not one to be decided by a jury on each occasion as a question of fact. The experience, conceptions and standards of the community enter into the question of what is a natural or special use of land, and of what acts should be considered so fraught with risk to others as not to be reasonably incident to its proper enjoyment."

25. In Handcraft Supply Co. Pty. Ltd. v. Commissioner for Railways ((297) (1959) 77 WN(NSW) 84 at 87.), Jacobs AJ said that the concept of natural use:

> "is, apparently, a changing one and, perhaps, this is one of the rare cases where the law openly recognizes the effect of social and economic circumstances upon the determination of questions of law in the judicial process. It appears to me that there is no more than that which is involved. The judge is bound to apply to the question whether the user is a natural or non-natural one the experience, conceptions and standards of the community in which he is. The judge must take into account all the various matters, such as climate, character of the country and natural conditions. He must bear in mind the competing social needs which are involved and he must, as best he can, determine the matter as one of law."

26. In those States where actions based on Rylands v. Fletcher and negligence are tried by juries, the issue of non-natural use is determined by the judge, the issue of negligence by the jury.

27. In determining the issue of non-natural use, factors that would be decisive on an issue of negligence will frequently be of only marginal relevance on the issue of non-natural use. Often, they will be irrelevant to the latter issue. In determining whether a use of land is natural, the court does not look at all the particular circumstances of the individual occupier but whether, in the time, place and circumstances of the particular community, the character of the use of the land by that occupier

constitutes a non-natural use. Thus, in the classic Rylands v. Fletcher situation, land is used for a non-natural purpose even though the particular amount of water stored is small and the walls of the reservoir are thick and high. Similarly, burning a domestic fire to warm a room does not constitute a non-natural use of the premises because the fire has no guard and is left unattended ((298) Sochacki v. Sas (1947) 1 All ER 344 .). Non-natural use of land is a different concept from the negligent use of the land ((299) Whinfield (1914) 18 CLR at 616 ; Hazelwood (1934) 52 CLR at 275 - 277; Torette House (1940) 62 CLR at 654-655 ; Wise Bros (1947) 75 CLR at 68 ; Smith v. Badenoch (1970) SASR 9 at 13-14 ; Rickards v. Lothian (1913) 16 CLR 387 at 401; (1913) AC at 280 ; Read (1947) AC at 176 ; British Celanese v. A.H. Hunt Ltd. (1969) 1 WLR 959 at 963.).

28. Counsel for General Jones insisted that the manner of performing an operation was relevant to the issue of non-natural use and that cases which had ignored the manner of use were wrongly decided. But the submission must be rejected. No doubt there are cases where courts have looked at the manner of an operation on an occupier's land. But, with respect, this approach is wrong. Circumstances are relevant to the issue of non-natural use. But manner of performance is not ((300) Hazelwood (1934) 52 CLR 268 ; Bayliss v. Lea (1959) 61 SR(NSW) 247.). 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 natural use having regard to the time, place and circumstances including the conduct of other members of the relevant community. Inevitably, the court must consider the risk involved, including the risk of escape from the class of activity, and the potential magnitude of the damage. But the exercise does not involve any close examination of the specifics. In a fire case, the Court does not examine how many hydrants or hoses were available. Nothing in Hazelwood supports any contrary view. The Court's reference ((301) ibid. at 278.) to "the benefit obtained by the farmer who succeeds in using it with safety to himself" is not a reference to the particular defendant but to a section of the community. Indeed, the Court was at pains to point out ((302) ibid.) that "(t)he question is not one to be decided by a jury on each occasion as a question of fact" (my emphasis).

29. Determining what is or is not a natural use of land is often a difficult question. Because that is so, it is not surprising that some decisions seem inconsistent with others. But that does not mean that the principles expounded in Hazelwood result in unprincipled,
ad hoc decision-making. The criterion of reasonable care in negligence is equally capable of producing decisions which appear to be inconsistent with each other. But no one suggests that they are unprincipled.

30. It is, of course, true that, like negligence liability, liability under Rylands v. Fletcher is not absolute. The prima facie liability of the occupier for an escape may be displaced by various defences such as act of God, act of a stranger and consent or default of the plaintiff. But, with the exception of the defence of consent, those defences cannot be equated with the defences of volenti or contributory negligence to an action for negligence. The Rylands v. Fletcher defences go to the issue of causation. The occupier is not liable under those defences because the act of God or the act of a stranger is a novus actus interveniens ((303) Benning (1969) 122 CLR at
298.). Furthermore, no defence of contributory negligence is available in an action based on Rylands v. Fletcher. Yet, if the rule of that case is incorporated into the law of negligence, the damages of a plaintiff will be liable to be reduced by the extent of that person's fault in contributing to the damage.

31. A further difference between an action for negligence and an action based on Rylands v. Fletcher is that in negligence the defendant is liable only for damage which is reasonably foreseeable. It has not yet been held in this country that the defendant in a Rylands v. Fletcher action

is liable only for damage which is reasonably foreseeable ((304) See Overseas Tankship (U.K.) Ltd. v. Morts Dock and Engineering Co. Ltd. (The Wagon Mound) (1961) AC 388 at 426-427 .). And since liability in that action is a strict liability, it is inconsistent with its rationale to limit the occupier's liability to damage which was reasonably foreseeable. Until last year, the weight of authority supported this conclusion ((305) West v. Bristol Tramways Company (1908) 2 KB 14 ; and see Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co. (1921) 2 AC 465 .). However, the House of Lords has now held that liability under Rylands v. Fletcher is limited to damage which is reasonably foreseeable. Their Lordships did so on the ground that the remoteness rule applied to nuisance actions and that, because a Rylands v. Fletcher action was an extension of the action for nuisance, it was logical to apply the same remoteness rule to it ((306) Cambridge Water Co. v. Eastern Counties Leather Co. (1994) 2 WLR 53 at 79.). Logical or not, it is inconsistent with the rationale of the rule in Rylands v. Fletcher.

32. Furthermore, I cannot accept the proposition that, if liability exists under the rule in Rylands v. Fletcher, it is highly likely that liability will arise under the ordinary principles of negligence. Hazelwood itself is a convincing answer to that proposition. There the jury expressly found that there was no negligence on the part of the defendant or his employees. Yet the Full Court of the Supreme Court of New South Wales was able to hold the defendant liable under Rylands v. Fletcher on the ground that there was a non-natural use of land. This Court upheld the finding of the Full Court. Similarly, in West v. Bristol Tramways Company ((307) (1908) 2 KB 14 .), the defendant was held liable under the rule in Rylands v. Fletcher although there was a finding of no negligence. It is beside the point that these days a finding of negligence might be made in circumstances similar to those in issue in those cases. What is decisive for present purposes is that liability existed under Rylands v. Fletcher even though the occupier had not been negligent. As long as it remains the law that a person is not liable in negligence for a reasonably foreseeable risk of injury unless a reasonably practicable alternative means of avoiding the risk was also available to the defendant, liability will continue to exist under Rylands v. Fletcher in cases where it does not exist in negligence.

33. If plaintiffs were deprived of the benefit of the rule in Rylands v. Fletcher, they would often have difficulty in obtaining compensation for their damage.It often happens that the cause of an escape of a harmful product either is unknown or cannot be established on the probabilities. In such cases, proof of negligence is impossible unless the plaintiff can invoke the doctrine of res ipsa loquitur. Even when the cause of an escape can be identified, it does not follow that negligence will be established. If the rule in Rylands v. Fletcher is subsumed under negligence liability, it seems inevitable that many defendants, liable under that rule, will escape liability if plaintiffs are confined to actions for negligence and nuisance. In many, perhaps the majority of cases of escape arising from the non-natural use of land, proof of negligence involves a contest between experts as to whether the risk of escape in the process or system was reasonably foreseeable and whether this or that precaution should reasonably have been taken. Such cases are expensive to run and uncertain of result. True it is that most Rylands v. Fletcher claims are accompanied by a claim in negligence. However, particularly in trials by judges without juries, it is often convenient and possible to try the Rylands v. Fletcher claim first.

34. To incorporate the rule in Rylands v. Fletcher into the law of negligence by judicial decision would be a far reaching step, going beyond previous developments of the common law by this Court. Here the Court is dealing with a rule which has been explained and applied by this Court on numerous occasions. It is a fixed rule of law, as imperative as a statutory command. It has been applied in this country for more than one hundred years. Indeed, the formulation of the rule in

Rylands v. Fletcher was not intended to create a new tort. It "was expressed as only a generalized statement of ancient common law doctrine as exemplified by a variety of earlier cases" ((308) Benning (1969) 122 CLR at 294 .).

35. One does not have to agree with the result in State Government Insurance Commission v. Trigwell ((309) (1979) 142 CLR 617.) to agree, as I do, with what Mason J said in that case about departing from the settled rules of the common law. What his Honour said must always be borne in mind before this Court abolishes, extends or modifies a settled rule of the common law. His Honour said ((310) ibid. at 633-634 .):

> "The court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts as found. The court's facilities, techniques and procedures are adapted to that responsibility; they are not adapted to legislative functions or to law reform activities. The court does not, and cannot, carry out investigations or enquiries with a view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community and whether they command popular assent. Nor can the court call for, and examine, submissions from groups and individuals who may be vitally interested in the making of changes to the law. In short, the court cannot, and does not, engage in the wide-ranging inquiries and assessments which are made by governments and law reform agencies as a desirable, if not essential, preliminary to the enactment of legislation by an elected legislature.
>
> These considerations must deter a court from departing too readily from a settled rule of the common law and from replacing it with a new rule."

36. No doubt courts in general, and this Court in particular, are more ready to alter the rules of the common law and equity than they were in 1979 when Trigwell was decided. But the law-making function of a court is different from that of a legislature. It is merely an incident of the duty to adjudicate disputes between litigants. It arises from the necessity to do justice between the parties and those who stand in similar situations. A judge-made rule is legitimate only when it can be effectively integrated into the mass of principles, rules and standards which constitute the common law and equity. A rule which will not "fit" into the general body of the established law cannot be the subject of judge-made law.

37. Incorporating the rule in Rylands v. Fletcher into the law of negligence might not offend the "fit" principle. But it would require squeezing an established principle of strict liability out of the common law so that the law of negligence can control the field. In an age where the escape of fire, oil, gases, chemicals and even radio-active materials has often caused widespread damage, it is not readily apparent why the common law should now abandon the prima facie rule of strict liability established in Rylands v. Fletcher for the indeterminacy of the action for negligence. Proximity, remoteness, reasonable care and breach of duty, the bench marks of negligence law, are not formulas for exactness. The wavering history of the law of negligence in relation to the recovery of damages for purely economic loss is eloquent evidence of the inherent indeterminacy of negligence law. Moreover, the common law holds no prejudice against strict liability. As Windeyer J pointed out in Benning ((311) (1969) 122 CLR at 303 .) "strict liability was known to the law long before negligence emerged in the nineteenth century as itself a cause of action".

38. By abolishing the rule in Rylands v. Fletcher, the Court would abolish the rights and potential rights of persons whose property and person have been or will be injured by the escape of dangerous substances. No one can know how many pending cases or existing causes of action will be defeated by the abolition of the rule. If experience is any guide, the recent bushfires in New South Wales will generate at least some Rylands v. Fletcher claims.

39. Furthermore, in recent years, Law Reform Commissions and equivalent bodies have advocated the enactment of strict liability rules in various areas of social activity which involve the use of substances likely to cause great harm if they escape ((312) See Great Britain, Royal Commission on Civil Liability and Compensation for Personal Injury, 1978, Cmnd 7054-1; South Australia, Eighty-Seventh
Report of the Law Reform Committee of South Australia to the Attorney-General Relating to Claims for Injuries from Toxic Substances and Radiation Effects, 1985.). Clearly, the investigations of those bodies have not revealed the superiority of the negligence action to an action based on a prima facie rule of strict liability. With great respect to those who hold the contrary view, much more evidence, analysis and argument than was put before this Court in this case is needed before the Court can properly determine whether the rule in Rylands v. Fletcher should be banished from the books. In the meantime, we should continue to apply the established rule.

The liability of BPA under Rylands v. Fletcher

40. In the last quarter of the twentieth century, the use of welding equipment on an industrial site for the purpose of construction work cannot be regarded as a non-natural use of land. The learned judges of the Full Court thought a non-natural use of land had occurred because the welding was done in the vicinity of cartons of Isolite. But this is to determine the issue of non-natural use by reference to the manner of performing the work. In that respect, the Full Court was in error. In so far as the action against BPA was based on the rule in Rylands v. Fletcher, it must fail.

The liability of BPA in negligence

41. The action based on negligence must also fail because the defendant is not liable for the negligence of its independent contractor. The reasoning and, in my view, the decision of this Court in Stoneman v. Lyons ((313) (1975) 133 CLR 550) is directly opposed to the proposition that BPA is liable simply because it engaged and authorised Wildridge to carry out work which involved the use of Isolite stored in cardboard cartons and to do extensive welding work. Obviously, the welding operation carried out by Wildridge involved a real and serious risk of injury unless precautions were taken to eliminate the risk of injury. But it has not yet been held in this Court that that is sufficient to make a person in BPA's position liable for the negligence of an independent contractor.

42. In Stoneman, the owner of land employed a contractor to construct a wall along the boundary of the land immediately adjacent to a building on the adjoining land. The contractor caused the collapse of the wall of the building when he negligently excavated a trench alongside the wall. This Court held that the owner was not liable for the collapse of the wall. Mason J, with whose judgment Barwick C.J and Gibbs J agreed, said ((314) ibid. at 576.):

> "The principle that in the case of dangerous operations there is a special responsibility to take care does not exclude the liability of a person who engages an independent contractor to undertake an operation which is inherently dangerous and which injures a

> third party. But to make the principal liable it must appear that he himself was guilty of some negligent act or omission or that he authorized some negligent act or omission by the contractor in executing the operations which the latter was employed to carry out. Thus it may appear that the principal is liable because he has failed to take care to engage a competent contractor or because, having knowledge that the contractor proposed to execute the work in an unsafe manner, he did nothing to eliminate the danger."

Stephen J said ((315) ibid. at 564.):

> "An employer will, whether or not the activity is regarded as extra-hazardous, be liable in negligence for the consequences to third parties both of acts which he specifically authorizes or directs and of methods not so authorized but which are necessarily involved in performing those acts. For the consequences of other negligent conduct of the contractor the employer will not be liable; he did not, in the language of Jordan CJ, have control over that conduct."

43. In the present case, as in Stoneman, BPA did not engage an incompetent contractor. Nor did it have knowledge "that the contractor proposed to execute the work in an unsafe manner". It cannot be held liable for the negligence of Wildridge.

44. The appeal must be allowed.

Cited by:

GM v Department of Human Services [2025] SASCA 68 -
GM v Department of Human Services [2025] SASCA 68 -
MTH v State of New South Wales [2025] NSWCA 122 (06 June 2025) (Mitchelmore and Adamson JJA, Price AJA)

> 157. The duty of care owed by a guardian to a ward is non-delegable: *Willmot v Queensland* [2024] HCA 42; (2024) 98 ALJR 1407 at [49]-[50] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ); see also *Bennett v Minister of Community Welfare* (1992) 176 CLR 408; [1992] HCA 27 for a discussion of the duties owed by a guardian to a ward. The duty therefore requires not merely the taking of reasonable care but also ensuring that reasonable care is taken: *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 550 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ) ; [1994] HCA 13 . However, s 43A of the *Civil Liability Act* applies because the State is a public authority and the powers it exercised with respect to MTH were special statutory powers.

MTH v State of New South Wales [2025] NSWCA 122 (06 June 2025) (Mitchelmore and Adamson JJA, Price AJA)

> *Willmot v Queensland* [2024] HCA 42; (2024) 98 ALJR 1407; *Bennett v Minister of Community Welfare* (1992) 176 CLR 408; [1992] HCA 27; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; [1994] HCA 13 , applied.

MTH v State of New South Wales [2025] NSWCA 122 -

Bird v DP (a pseudonym) [2024] HCA 41 (13 November 2024) (Gageler CJ; Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ)

> 36. The second area of law in which the expression "vicarious liability" has been used, but where its use is also inapposite, is liability imposed on a defendant for breach of a "nondelegable duty". A "nondelegable" or "personal" duty of care is "a duty ... of a special and 'more stringent' kind". [32] It is not merely a duty to take care, but a "duty to *ensure that reasonable care is taken*"; [33] to "ensure that the duty is carried out"; [34] or to "procur[e] the careful performance of work [assigned] to others". [35] Liability for breach of a non-delegable duty is therefore direct – not vicarious. [36]

via

[33] *Kondis* (1984) 154 CLR 672 at 686 (emphasis added). See also *Introvigne* (1982) 150 CLR 258 at 270-271 ; *Burnie Port Authority* (1994) 179 CLR 520 at 550 ; *Lepore* (2003) 212 CLR 511 at 551-552 [101], 598 [254] .

Willmot v Queensland [2024] HCA 42 (13 November 2024) (Gageler CJ; Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ)

> 49. As the analysis of the pleadings demonstrates, [83] the issues in dispute are narrow. Many of the most basic of facts are not in issue. And because Ms Willmot frames her case as a breach of a nondelegable duty, [84] and the State concedes that it owed Ms Willmot a non-delegable duty, the central issue for determination at a trial is whether each category of harm she alleges occurred and amounts to a breach of that duty. Recalling that a "nondelegable" or "personal" duty of care is "a duty ... of a special and 'more stringent' kind" [85] and not merely a duty to take care, but a "duty to *ensure that reasonable care is taken*"; [86] to "ensure that the duty is carried out"; [87] or to "procur[e] the careful performance of work [assigned] to others", [88] there is no question about what steps the State took or could reasonably have taken to prevent the alleged harm. Put another way, Ms Willmot's claims of breach do not call for an inquiry into the adequacy of the steps taken by the State to ensure that reasonable care was taken for Ms Willmot's safety while she was in foster care, at the Girls' Dormitory, or in the care of her relatives while away from Cherbourg. As Mason J observed, even in the context of a non-delegable duty owed by school authorities, "the duty is not discharged by merely appointing competent teaching staff and leaving it to the staff to take appropriate steps for the care of the children. It is a duty to ensure that reasonable steps are taken for the safety of the children, a duty the performance of which cannot be delegated." [89]

via

[85] *Bird v DP (a pseudonym)* [2024] HCA 41 at [36]-[37] . See also *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 550 , quoting *Kondis v State Transport Authority* (1984) 154 CLR 672 at 686 ; *New South Wales v Lepore* (2003) 212 CLR 511 at 530 [25], 551-552 [101], 598 [254] ; *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22 at 27 [6] .

Bird v DP (a pseudonym) [2024] HCA 41 (13 November 2024) (Gageler CJ; Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ)

> 41. The nature and content of the particular duty and responsibility allegedly owed to DP as a nondelegable duty as set out in the notice of contention was not identified or pleaded at trial. For example, there was no pleading about, and the evidence did not address, whether there was an element in the relationship between the Bishop, or the Diocese, and DP from which it could be inferred that they had assumed a special responsibility or higher duty to ensure that reasonable care was taken for the safety of DP in one or more of several circumstances, including in DP's parents' home, because the Bishop or the Diocese had undertaken the care,

supervision or control of DP, or were so placed in relation to DP as to assume a particular responsibility for his safety in circumstances where DP might reasonably expect that due care would be exercised by them. [51] Put in different terms, the factual inquiry for a nondelegable duty, a breach of which gives rise to direct liability, can be and often is different from the inquiries that were pursued in respect of the issues argued at trial in this matter.

via

[51] See, eg, *Lepore* (2003) 212 CLR 511 at 533-534 [35] , quoting *Kondis* (1984) 154 CLR 672 at 687. See also *Burnie Port Authority* (1994) 179 CLR 520 at 550-551 ; *Schokman* (2023) 97 ALJR 551 at 567 [70]; 410 ALR 479 at 497-498 .

Bird v DP (a pseudonym) [2024] HCA 41 -
Bird v DP (a pseudonym) [2024] HCA 41 -
Bird v DP (a pseudonym) [2024] HCA 41 -
Bird v DP (a pseudonym) [2024] HCA 41 -
Bird v DP (a pseudonym) [2024] HCA 41 -
Willmot v Queensland [2024] HCA 42 -
Bird v DP (a pseudonym) [2024] HCA 41 -
Willmot v Queensland [2024] HCA 42 -
Bird v DP (a pseudonym) [2024] HCA 41 -
Transport for NSW v Hunt Leather Pty Ltd; Hunt Leather Pty Ltd v Transport for NSW [2024] NSWCA 227 -
CCIG Investments Pty Ltd v Schokman [2023] HCA 21 -
CCIG Investments Pty Ltd v Schokman [2023] HCA 21 -
Mt Owen Pty Ltd v Parkes [2023] NSWCA 77 -
Mallonland Pty Ltd v Advanta Seeds Pty Ltd [2023] QCA 24 (28 February 2023) (Morrison and Bond JJA; Williams J)

205. The learned trial judge observed that the concept of "vulnerability" was used in at least two senses in authorities such as *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"*, [143] *Wool cock Street Investments Pty Ltd v CDG Pty Ltd*, [144] *Perre v Apand Pty Ltd*, [145] *Burnie Port Authority v General Jones Pty Ltd*, [146] *Esanda Finance Corp Ltd v Peat Marwick Hungerfords*, [147] and *Brookfield Multiplex Ltd v Owners Corp Strata Plan 61288*. [148]

via

[146] (1994) 179 CLR 520 .

Mallonland Pty Ltd v Advanta Seeds Pty Ltd [2023] QCA 24 (28 February 2023) (Morrison and Bond JJA; Williams J)
Burnie Port Authority v General Jones Pty Ltd (1994) 179 CLR 520; [1994] HCA 13 , cited

Electricity Networks Corporation v Herridge Parties [2022] HCA 37 -
Electricity Networks Corporation v Herridge Parties [2022] HCA 37 -
Mt Pleasant Stud Farm Pty Ltd v McCormick [2022] NSWCA 191 -
Collins v Insurance Australia Ltd [2022] NSWCA 135 (02 August 2022) (Meagher and Kirk JJA, Basten AJA)

37. (1994) 179 CLR 520 at 558-559 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ); [1994] HCA 13 .

Collins v Insurance Australia Ltd [2022] NSWCA 135 -
Collins v Insurance Australia Ltd [2022] NSWCA 135 -

Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Kimber v Chief Executive, Department of Treasury and Finance [2021] SASCA 133 (11 November 2021)

55. To this end, he relied on the observation by the High Court in *Burnie Port Authority v General Jones Pty Ltd* , [35] as to what might be characterised as a 'dangerous' substance or activity for the purposes of an occupier's liability in the law of negligence: [36]

> The fact that a particular substance or a particular activity can be seen to be "inherently" or "of itself" likely to do serious injury or cause serious damage will, of course, ordinarily make characterization as "dangerous" more readily apparent. That fact does not, however, provide a criterion of what is and what is not dangerous for the purpose of determining whether the duty of a person in occupation or control of premises to take care to avoid injury or damage outside the premises is or is not a delegable one. It suffices for that purpose that the combined effect of the magnitude of the foreseeable risk of an accident happening and the magnitude of the foreseeable potential injury or damage if an accident does occur is such that an ordinary person acting reasonably would consider it necessary to exercise special care or to take special precautions in relation to it.

Kimber v Chief Executive, Department of Treasury and Finance [2021] SASCA 133 -
Kimber v Chief Executive, Department of Treasury and Finance [2021] SASCA 133 -
Kimber v Chief Executive, Department of Treasury and Finance [2021] SASCA 133 -
Herridge Parties v Electricity Networks Corporation t/as Western Power [2021] WASCA 111 -
Herridge Parties v Electricity Networks Corporation t/as Western Power [2021] WASCA 111 -
Nottingham Forest Trustee Ltd v Unison Networks Ltd [2021] NZCA 227 -
Nottingham Forest Trustee Ltd v Unison Networks Ltd [2021] NZCA 227 -
Nottingham Forest Trustee Ltd v Unison Networks Ltd [2021] NZCA 227 -
Woodhouse v Fitzgerald [2021] NSWCA 54 -
Woodhouse v Fitzgerald [2021] NSWCA 54 -
Woodhouse v Fitzgerald [2021] NSWCA 54 -
Gladstone Ports Corporation Limited v Murphy Operator Pty Ltd [2020] QCA 250 -
Brocklands Pty Ltd v Tasmanian Networks Pty Ltd [2020] TASFC 4 -
Thompson v Body Corporate for Arila Lodge [2019] QCA 267 -
Weber v Greater Hume Shire Council [2019] NSWCA 74 (17 April 2019) (Basten and Gleeson JJA, Sackville AJA)

205. In *Burnie Port Authority v General Jones Pty Ltd* , [138] a majority of the High Court held that for the purposes of the common law of Australia the so-called rule in *Rylands v Fletcher* , [139] whi ch imposed a form of strict liability on occupiers who conducted dangerous activities on their land, had been absorbed by the general principles of negligence. The facts of *Burnie* wer e similar to those of *McInnes v Wardle* , in that a fire was started in the defendant's building by the negligence of a contractor and caused damage to another section of the same building occupied by a licensee. The majority judgment cited *Black v The Christchurch Finance Company Limited* and *McInnes v Wardle* as decisions founded on the ordinary principles of the law of negligence which recognise that an occupier of land in some circumstances may be subject to a non-delegable duty of care. [140]

Weber v Greater Hume Shire Council [2019] NSWCA 74 -
Weber v Greater Hume Shire Council [2019] NSWCA 74 -
Weber v Greater Hume Shire Council [2019] NSWCA 74 -
Weber v Greater Hume Shire Council [2019] NSWCA 74 -
Weber v Greater Hume Shire Council [2019] NSWCA 74 -
Fuller-Wilson v State of New South Wales [2018] NSWCA 218 -
State of Queensland v Baker Superannuation Fund Pty Ltd; Aurizon Operations Limited v Baker Superannuation Fund Pty Ltd [2018] QCA 168 (27 July 2018) (Morrison and McMurdo JJA and Jackson J)

269. In *Burnie Port Authority v General Jones Pty Ltd* ,[208] the High Court held that, under the common law of Australia, any special rule relating to the liability of an occupier for fire escaping from their premises, under the rule in *Rylands v Fletcher* , has been absorbed into and is qualified by the more general rules or principles relating to the law of negligence. In a thorough examination of the cases, decided both before and after *Rylands v Fletcher,* the court considered, inter alia, the operation of the distinction between a natural use and a non-natural use of land in the context of the rule. [209] One observation was that Lord Cairns had converted Blackburn J's qualification "which was not naturally there" in the statement set out above into the requirement of "non-natural use" set out in his own formulation. [210] A possible explanation for the difference is that different arguments were advanced by the appellant in the Court of Exchequer Chamber and in the House of Lords, including reference to cases not apparently cited to the Court of Exchequer Chamber, [211] but the point is not of importance in the present case.

via

[209] (1994) 179 CLR 520 , 537-541 .

State of Queensland v Baker Superannuation Fund Pty Ltd; Aurizon Operations Limited v Baker Superannuation Fund Pty Ltd [2018] QCA 168 (27 July 2018) (Morrison and McMurdo JJA and Jackson J)

269. In *Burnie Port Authority v General Jones Pty Ltd* , [208] the High Court held that, under the common law of Australia, any special rule relating to the liability of an occupier for fire escaping from their premises, under the rule in *Rylands v Fletcher* , has been absorbed into and is qualified by the more general rules or principles relating to the law of negligence. In a thorough examination of the cases, decided both before and after *Rylands v Fletcher,* the court considered, inter alia, the operation of the distinction between a natural use and a non-natural use of land in the context of the rule. [209] One observation was that Lord Cairns had converted Blackburn J's qualification "which was not naturally there" in the statement set out above into the requirement of "non-natural use" set out in his own formulation. [210] A possible explanation for the difference is that different arguments were advanced by the appellant in the Court of Exchequer Chamber and in the House of Lords, including reference to cases not apparently cited to the Court of Exchequer Chamber, [211] but the point is not of importance in the present case.

State of Queensland v Baker Superannuation Fund Pty Ltd; Aurizon Operations Limited v Baker Superannuation Fund Pty Ltd [2018] QCA 168 (27 July 2018) (Morrison and McMurdo JJA and Jackson J)

286. Any analysis that has regard to all the circumstances, including the relevant purposes for which the higher land is or may be used, can operate differently from case to case, according to the particular uses in question and what surrounds them. In the context of the rule in *Rylands v Fletcher* , any review of the cases shows that often it was not easy to discern the case when a particular use could be distinguished as "non-natural", unlike the famous metaphorical example of "a pig in the parlor instead of the barnyard". [234] No doubt dissatisfaction as to the application of the distinction contributed to the High Court's statement in *Burnie Port Authority* that the courts have made spectacularly unsuccessful efforts, so far, to resolve the uncertainties of the rule's application. [235]

via

[235] (1994) 179 CLR 520 , 540.

State of Queensland v Baker Superannuation Fund Pty Ltd; Aurizon Operations Limited v Baker Superannuation Fund Pty Ltd [2018] QCA 168 -

State of Queensland v Baker Superannuation Fund Pty Ltd; Aurizon Operations Limited v Baker Superannuation Fund Pty Ltd [2018] QCA 168 -
State of Queensland v Baker Superannuation Fund Pty Ltd; Aurizon Operations Limited v Baker Superannuation Fund Pty Ltd [2018] QCA 168 -
State of Queensland v Baker Superannuation Fund Pty Ltd; Aurizon Operations Limited v Baker Superannuation Fund Pty Ltd [2018] QCA 168 -
Sednaoui v Amac Corrosion Protection Pty Ltd [2017] VSCA 66 -
Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright [2017] NSWCA 21 -
Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright [2017] NSWCA 21 -
Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright [2017] NSWCA 21 -
Perera v Genworth Financial Mortgage Insurance Pty Ltd [2017] NSWCA 19 -
Perera v Genworth Financial Mortgage Insurance Pty Ltd [2017] NSWCA 19 -
Perera v Genworth Financial Mortgage Insurance Pty Ltd [2017] NSWCA 19 -
Marsh v Baxter [2015] WASCA 169 (03 September 2015) (McLure P; Newnes and Murphy JJA)

257. Although the rule in *Rylands v Fletcher* started out in England as a form of nuisance, in Australia it has been absorbed into the common law of negligence: ***Burnie Port Authority v General Jones Pty Ltd*** (1994) 179 CLR 520, 556. However, it would be wrong to treat the law relating to the escape of things from a defendant's land as circumscribed or narrowed by the scope of the rule in *Rylands v Fletcher* at the time of its absorption.

Marsh v Baxter [2015] WASCA 169 -
Marsh v Baxter [2015] WASCA 169 -
Swick Nominees Pty Ltd v Leroi International Inc (No 2) [2015] WASCA 35 (27 February 2015) (Buss and Murphy JJA; Edelman J)

385. The salient features are not limited to these matters. It might be difficult to predict the matters that might be said to be salient. In one case parties led abstract economic evidence as an alleged salient factor concerning the impact upon tort law of a recognition of a duty of care to avoid economic loss in those circumstances. [62] As McHugh J has said, there is an 'inherent indeterminacy' [63] in the salient features approach.

via

[63] ***Burnie Port Authority v General Jones Pty Ltd*** [1994] HCA 13; (1994) 179 CLR 520, 593 (McHugh J). See also ***Perre v Apand Pty Ltd*** [1999] HCA 36; (1999) 198 CLR 180, 253 [198] (Gummow J).

Swick Nominees Pty Ltd v Leroi International Inc (No 2) [2015] WASCA 35 (27 February 2015) (Buss and Murphy JJA; Edelman J)

Burnie Port Authority v General Jones Pty Ltd [1994] HCA 13 ; (1994) 179 CLR 520

Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 [2014] HCA 36 (08 October 2014) (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ)

21. An extended concept of proximity was adopted in this Court as a criterion of the existence of a duty of care in the 1980s and until the beginning of this century [46] . It was used to identify categories of cases in which a duty of care arose under the common law of negligence, rather than as a test for determining whether the circumstances of a particular case brought it within such a category [47] . It was invoked in 1995 in *Bryan v Maloney* [48] , in which the Court held that the builder of a dwelling house owed a duty of care to a subsequent purchaser of the house, a breach of which, by careless construction giving rise to latent defects, would support an action in negligence for economic loss. Thereafter it became a metaphor under threat. McHugh J in *Perre v Apand Pty Ltd* [49] regarded it as already despatched [50] . In *Sullivan v Moody* , it was put to rest by the whole Court, which observed that despite its centrality for more than a century [51] :

"it gives little practical guidance in determining whether a duty of care exists in cases that are not analogous to cases in which a duty has been established".

That was not to say, and the Court did not say, that its application in previous cases such as *Bryan v Maloney* , which was of a classificatory and conclusionary character, falsified the underlying judgments that the circumstances said to be indicative of "proximity" gave rise to a duty of care. As Basten JA observed in the Court of Appeal, "the factors which were apt to be included" in "the concept of 'proximity' as a touchstone of the existence of a duty of care ... remain relevant" [52] .

via

[47] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 543 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ .

Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 [2014] HCA 36 -
Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 [2014] HCA 36 -
Victorian YMCA Community Programming Pty Ltd (ACN 092 818 445) v Nillumbik Shire Council , Victorian WorkCover Authority , , Victorian YMCA Community Programming Pty Ltd (ACN 092 818 445) and Nillumbik Shire Council [2014] VSCA 197 -
Victorian YMCA Community Programming Pty Ltd (ACN 092 818 445) v Nillumbik Shire Council , Victorian WorkCover Authority , , Victorian YMCA Community Programming Pty Ltd (ACN 092 818 445) and Nillumbik Shire Council [2014] VSCA 197 -
and a Woodley Osteopathic Services Pty Ltd v Transport Accident Commission andBRENDAN Woodley , , Brendan Woodley and Transport Accident Commission and a Woodley Osteopathic Services Pty Ltd [2013] VSCA 350 (06 December 2013) (Maxwell P, Tate and Priest JJA)

22. Noting that the agistment of horses on rural land was not 'inherently dangerous', his Honour went on to explain why, in his view, an ordinary person acting reasonably would consider it necessary to exercise 'special care' or to take 'special precautions' in relation to the risk of a horse escaping:

> On any analysis the agistment of horses on land abutting a major multi-lane highway ... is likely to be dangerous for persons using the highway unless care is taken to confine the horses to the land. Further, as it appears to me, the magnitude of foreseeable risk of an accident happening and the magnitude of the foreseeable potential injury or damage in the event of a horse escaping onto the highway and causing an accident are such that an ordinary person acting reasonably would consider it necessary to exercise special care or to take special precautions to prevent the horses' escape onto the highway. In those circumstances I consider that *Burnie Port Authority* [7] dictates that the occupier of land which abuts such a highway and who permits others to agist horses on the land may be held to owe to motorists passing on the highway by the property a non-delegable duty to take reasonable care to prevent the horses escaping onto the highway. [8]

and a Woodley Osteopathic Services Pty Ltd v Transport Accident Commission andBRENDAN Woodley , , Brendan Woodley and Transport Accident Commission and a Woodley Osteopathic Services Pty Ltd [2013] VSCA 350 (06 December 2013) (Maxwell P, Tate and Priest JJA)

26. As Nettle JA stated in *McLean* , the applicable standard of care in a case such as this, as in any other negligence case, is the standard of reasonable care. [11] His Honour set out the following passage from the majority judgment in *Burnie Port Authority* :

> Where a duty of care arises under the ordinary law of negligence, the standard of care exacted is that which is reasonable in the circumstances. It has been emphasized in many cases that *the degree of care under that standard necessarily varies with the risk involved and that the risk involved includes both the magnitude of the risk of an accident happening and the seriousness of the potential damage if an accident should occur*. Even where a dangerous substance or a dangerous activity of a kind which might attract the rule in *Rylands v Fletcher* is involved, the standard of care remains 'that which is reasonable in the circumstances, that which a reasonably prudent man would exercise in the circumstances'. In the case of such substances or activities, however, a reasonably prudent person would exercise a higher degree of care. Indeed, depending upon the magnitude of the danger, the standard of 'reasonable care' may involve 'a degree of diligence so stringent as to amount practically to a guarantee of safety'. [12]

and a Woodley Osteopathic Services Pty Ltd v Transport Accident Commission andBRENDAN Woodley , , Brendan Woodley and Transport Accident Commission and a Woodley Osteopathic Services Pty Ltd [2013] VSCA 350 (06 December 2013) (Maxwell P, Tate and Priest JJA)

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via

[12] *Burnie Port Authority* (1994) 179 CLR 520, 554 (emphasis added, citations omitted).

and a Woodley Osteopathic Services Pty Ltd v Transport Accident Commission andBRENDAN Woodley , , Brendan Woodley and Transport Accident Commission and a Woodley Osteopathic Services Pty Ltd [2013] VSCA 350 -
Gales Holdings Pty Ltd v Tweed Shire Council [2013] NSWCA 382 (18 November 2013) (Emmett and Leeming JJA, Sackville AJA)

278. Shortly after *Cambridge Water* was delivered, the High Court decided in *Burnie Port Authority v General Jones Pty Ltd* [1994] HCA 13; (1994) 179 CLR 520 that much of the so-called rule in *Rylands v Fletcher* had been absorbed by the principles of negligence. Although that decision preserved a distinction between negligence and nuisance, and there are difficulties

sustaining the reasoning today to the extent it is based on proximity, *Burnie Port Authority* does not assist the appellant's submission. Indeed, the joint reasons referred at 537 to the development, in the context of private nuisance and the development of the modern law of negligence, of "a requirement closely resembling, or perhaps even amounting to a requirement of foreseeability of relevant damage in the event of the escape of the dangerous substance". The reasons also noted Holmes' view in *The Common Law* that "foreseeability of the likelihood of harm is the unifying element of tortious liability".

Gales Holdings Pty Ltd v Tweed Shire Council [2013] NSWCA 382 -
The Owners - Strata Plan No 61288 v Brookfield Australia Investments Ltd [2013] NSWCA 317 -
Day v The Ocean Beach Hotel Shellharbour Pty Ltd [2013] NSWCA 250 -
Bootle v Barclay [2013] NSWCA 142 (31 May 2013) (Meagher JA, Sackville AJA and Ball J)

18. The primary Judge found that all four defendants had breached their duty of care to the Barclays. He reached this conclusion because each could (and presumably should) have called off the spraying on the Pine and Taxi paddocks on Bonna on 6 July 2005. His Honour reasoned as follows:

> 75 What is factually true is that neither Mr Bootle nor BBM actually carried out any aerial spraying. The individual who did that was Mr Shapley. But that spraying was at the direction of Mr Bootle and BBM. Although neither Mr Bootle or BBM or MVAS had control over how the plane was flown, anyone of those entities could have directed the pilot not to engage in aerial spraying on the day in question.
>
> 76 It is important to emphasise that the prime cause of the damage occurring on the day, **did not arise out of the manner in which the plane was piloted, including choice of droplet size and nozzle angle, but because the weather was unsuitable in all the circumstances due to the wind speed and direction.** That damage was, in my view, prima facie preventable by either Mr Bootle or BBM or MVAS telling Mr Shapley not to spray on that day or by Mr Shapley himself deciding not to spray in the prevailing conditions...
>
> ...
>
> 80 ... I do agree with the submission that if Mr Bootle had a duty of care [then] that was a duty of care no less nor greater than that owed by BBM.
>
> 81 I think the situation needs to be put in perspective. Here we have two farmers with significant common land boundaries engaged in the production of cereal crops to feed humans and lucerne crops to feed animals. In order to control weed infestations over large areas requires broad acre spraying of glyphosate and other herbicides with the obvious and real risk of such herbicides damaging productive crops. A balance has to be weighed between economics and the risk that if your decision to spray in conditions that result in damage to your neighbours crop, **then you may be absolutely liable for any consequential damage**.
>
> 82 ... **[T]he fault in this case is not in the methodology of the operation but in the decision to carry out the aerial spraying on the day in question, rather than ground spray or spray on another more suitable day. This is not an issue as to the skills of the pilot, the nature of the herbicide, the patterns of spraying, the control of the aircraft but simply whether or not aerial spraying should have been conducted on that day having regard to all the circumstances.**
>
> 83 Having regard to the expert evidence and the risks involved in the given climatic conditions, aerial spraying should not have been carried out where there was a risk of terminal damage to a neighbours crop. Had the aerial spraying been of some benign substance, we would not be here, but what was sprayed was a substance fatal to both good plants and bad and thus in my view what was said in *Burnie Port Authority* is apposite.
>
> ...
>
> 91 There is no doubt that all the defendants were well aware of the risks attaching to the use of glyphosate both from long experience in the agricultural industry and from previous

problems of overspray between the properties in 2003. Although any such damage was denied by Mr Bootle, having regard to some problem in the former good relationship between Mr Bootle and Mr Barclay, apparently an amount of $3,000 was paid for its nuisance value by Mr Bootle to Mr Barclay for what I understand to be an overspray in that year.

...

110 An occupier or user of farm premises cannot, once a decision is made to aerial spray a noxious substance, simply pass over responsibility to either or both the pilot or the aircraft company. Whilst the flying of an aeroplane is a specialised activity that would be beyond the control of someone like Mr Bootle, what is to be sprayed, where and when is not. I would expect that a broad acre farmer would have developed experience of the types of conditions likely to generally impact on aerial spraying activity. In Mr Bootle's case, he was aware that his neighbour had emergent crops which were more likely to be adversely affected by glyphosate than more mature plants. Mr Bootle could have directed MVAS not to engage in spraying on that day, or used ground spray equipment instead, as he was and had already been doing. Because he was 2 weeks behind and needed to have those paddocks treated, he decided on aerial spraying, knowing the nature and quality of the extra risk involved as apposed to ground spraying, which is also not without risk.

...

112 In the circumstances I am satisfied, as per *Burnie* , that liability exists in the first and second defendants as it does for the third and fourth defendants. I am satisfied that each is jointly and severally liable for damage caused by the aerial spraying in terms of the Civil Liability Act and the common law. (Emphasis added.)

Bootle v Barclay [2013] NSWCA 142 (31 May 2013) (Meagher JA, Sackville AJA and Ball J)

33. If this is a correct understanding of the judgment, as I think it is, the primary Judge was in error. Assuming aerial spraying of glyphosate on Bonna to be a hazardous activity in the *Burnie* sense, this would mean that BBM as the occupier of Bonna (and possibly Mr Bootle as the lessor) owed a non-delegable duty of care to the Barclays. Such a duty required BBM to ensure that reasonable care was exercised in the use of aerial spray on Bonna so as to avoid inflicting damage on susceptible crops on Kilbirnie. BBM could not comply with its duty of care simply by engaging an ostensibly competent contractor to perform the aerial spraying: *Burnie* , at 550-552 , per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ . Consequently, BBM would be liable to the Barclays if the contractor engaged by it (whether MVAS, Mr Shapley or both) failed to exercise reasonable care when undertaking aerial spraying on Bonna so as to prevent damage to the susceptible crops growing on Kilbirnie.

Bootle v Barclay [2013] NSWCA 142 -
Bootle v Barclay [2013] NSWCA 142 -
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Meandarra Aerial Spraying Pty Ltd v Gej & MA Geldard PTY LTD [2012] QCA 315 (16 November 2012) (Fraser and White JJA and Mullins J,)

22. For claims of the present kind, the considerations to which the plurality referred in *Burnie Port Authority v General Jones Pty Ltd* [33] as justifying variations in the degree of care required to meet the standard of reasonable care are now reflected in s 9(1)(c) and, particularly, ss 9(2)(a) and (d), of the Act , but it remains necessary for a plaintiff to demonstrate that the criteria in ss 9(1)(a) and (b) are fulfilled. In *Adeels Palace Pty Ltd v Moubarak* [34] the High Court emphasised the centrality of the provisions of the very similar *Civil Liability Act 2002 (NSW)* t o questions of breach of duty (and causation).[35] It was accepted for the purposes of argument in that case that there was a risk of which the defendant knew or ought to have known [36] and that the relevant risk "was not insignificant". The question was whether a reasonable person in the position of the defendant would have taken the precautions that the plaintiffs alleged should have been taken under ss 5B(1)(c) and 5B(2), provisions which are similar to s 9(1)(c) and s 9(2) of the Act . The High Court observed that the relevant questions were to be answered,

> "prospectively, [37] not with the wisdom of hindsight ... they were to be assessed *before* the function [in which the plaintiffs were injured] began, not by reference to what occurred that night."
>
> and that;
>
> "The points to be made that are of general application are first, that whether a reasonable person would have taken precautions against a risk is to be determined prospectively, and secondly, that the answer given in any particular case turns on the facts of that case as they are proved in evidence." [38]

Meandarra Aerial Spraying Pty Ltd v Gej & MA Geldard PTY LTD [2012] QCA 315 (16 November 2012) (Fraser and White JJA and Mullins J,)

18. The respondent pointed out that the trial judge had referred to the relevant provisions of the Act , the necessity to consider whether the event giving rise to the injury was reasonably foreseeable, and whether the appellants failed to do what a reasonable person would have done in the circumstances. The respondent argued that Mason J's analysis in *Wyong Shire Council v Shirt* quoted by the trial judge substantially reflected the relevant provisions of the Act . The respondent argued that a high degree of care was required because of the dangerousness of the herbicide sprayed by the appellants (the respondent referred to *Burnie Port Authority v General Jones Pty Ltd* [27]) and that there were ample bases in the evidence for finding that the damage to the respondent's crops was foreseeable, that a high standard of care was appropriately imposed upon the appellants, and that the applicable standard was not met. The respondent submitted that there was an inconsistency in the appellants' challenge to the finding of foreseeability and their concession, implicit in their arguments under the duty question, that they owed a duty of care to the respondent, because foreseeability was a condition of the existence of a duty of care.

via

[27] (1994) 179 CLR 520 at 554.

Meandarra Aerial Spraying Pty Ltd v Gej & MA Geldard PTY LTD [2012] QCA 315 -
Meandarra Aerial Spraying Pty Ltd v Gej & MA Geldard PTY LTD [2012] QCA 315 -
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Meandarra Aerial Spraying Pty Ltd v Gej & MA Geldard PTY LTD [2012] QCA 315 -
Town of Port Hedland v Hodder (No 2) [2012] WASCA 212 -
Town of Port Hedland v Hodder (No 2) [2012] WASCA 212 -
Barclay v Penberthy [2012] HCA 40 -
Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79 (04 April 2012) (McLure P, Pullin JA, Buss JA)

283. Counsel for the appellants also submitted that the law should exact in this case 'a degree of diligence so stringent as to amount practically to a guarantee of safety': see ***Burnie Port Authority v General Jones Pty Ltd*** (554) quoting what was said by Lord Macmillan in ***Donoghue v Stevenson*** [1932] AC 562, 612. The reference in ***Burnie's*** case made it clear that such diligence is required where the magnitude of the risk of harm and the seriousness of the potential damage require such diligence: ***Hackshaw v Shaw*** [1984] HCA 84; (1984) 155 CLR 614 provides an example.

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Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79 (04 April 2012) (McLure P, Pullin JA, Buss JA)

82. The appellants place significant reliance on ***Burnie Port Authority v General Jones Pty Ltd*** (1994) 179 CLR 520 . In that case the owner of a building retained an independent contractor to do work on extensions to the building. The work involved welding activities in close proximity to cardboard cartons containing an insulating material which burnt fiercely if brought into sustained contact with flame. Due to the contractor's negligence, sparks or molten metal fell on the containers and caused the insulating material to burn. The ensuing fire spread to an area of the building occupied by a licensee and caused damage to its stock.

Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79 -
Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79 -
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Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79 -
Aircraft Technicians of Australia Pty Ltd v St Clair; St Clair v Timtalla Pty Ltd [2011] QCA 188 (09 August 2011) (Fraser, Chesterman and White JJA, Judgment of the Court)

65. The plaintiff relies upon *Burnie Port Authority* in which Mason CJ, Deane, Dawson, Toohey and Gaudron JJ said: (550-551)

> "It has long been recognized that there are certain categories of case in which a duty to take reasonable care to avoid a foreseeable risk of injury to another will not be discharged merely by the employment of a qualified and ostensibly competent independent contractor. In those categories of case, the nature of the relationship of proximity gives rise to a duty of care of a special and "more stringent" kind, namely a "duty to ensure that reasonable care is taken". Put differently, the requirement of reasonable care in those categories of case extends to seeing that care is taken.
>
> ...
>
> In *Kondis v State Transport Authority* , in a judgment with which Deane J and Dawson J agreed, Mason J identified some of the principal categories of case in which the duty to take reasonable care under the ordinary law of negligence is non-delegable in that sense: adjoining owners of land in relation to work threatening support or common walls; master and servant in relation to a safe system of work; hospital and patient; school authority and pupil; and (arguably), occupier and invitee. In most, though conceivably not all, of such categories of case, the common "element in the relationship between the parties which generates [the] special responsibility or duty to see that care is taken" is that "the person on whom [the duty] is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised." It will be convenient to refer to that common element as "the central element of control". Viewed from the perspective of the person to whom the duty is owed, the relationship of proximity giving rise to the non-delegable duty of care in such cases is marked by special dependence or vulnerability on the part of that person." (footnotes omitted)

Aircraft Technicians of Australia Pty Ltd v St Clair; St Clair v Timtalla Pty Ltd [2011] QCA 188 (09 August 2011) (Fraser, Chesterman and White JJA, Judgment of the Court)

74. In *Scott* Gummow J was similarly critical of the imposition of non-delegable duty. His Honour said (416-417):

> "Further, with respect to any doctrine of "non-delegability", there is a difficulty in identifying any principle which dictates an expansion of liability such that the defendant becomes, in effect, the insurer of some activity even when it is performed by another. The explanation of the cases given by Mason J in *Kondis* was accepted in *Burnie Port Authority v General Jones Pty Ltd* . In *Kondis* , Mason J identified (i) cases where the defendant "has undertaken the care, supervision, or control of the person or property of another" and (ii) cases where the defendant is so placed in relation to the person or property of the plaintiff as "to assume a particular responsibility" for the plaintiff's safety, in each case where the plaintiff

might reasonably expect the exercise of due care. Such an approach requires some caution in its general application. It may explain the cases on "non-delegability"; but many other cases not decided on that basis also may have answered the criteria stated by Mason J. How then does the court decide a fresh case where the preferred criteria are historically descriptive but not normatively predictive? Some caution is required because the characterisation of a duty as non-delegable involves, in effect, the imposition of strict liability upon the defendant who owes that duty."

Aircraft Technicians of Australia Pty Ltd v St Clair; St Clair v Timtalla Pty Ltd [2011] QCA 188 (09 August 2011) (Fraser, Chesterman and White JJA, Judgment of the Court)

62. The plaintiff relied upon *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520. His Honour referred to the judgments in that case and noted:

> "[73] In *Fitzgerald v Hill* (2008) 51 MVR 55; [2008] QCA 283 McMurdo P engaged in a careful analysis of the origins and essential features of a non-delegable duty. Her Honour synthesised the various authorities in the following way:
>
> > "[66] ... The non-delegable duty of care is a special duty to ensure that reasonable care is taken for the safety of those to whom it is owed. It is not vicarious; it is a personal duty, breach of which requires fault. It is an onerous duty in that if a defendant owing the duty to a claimant does not take reasonable care to avoid a foreseeable risk of injury which eventuates causing damage to a claimant, then liability cannot be avoided by the defendant engaging another to carry out the defendant's responsibilities.
> >
> > [67] Whether the duty arises in a particular case will depend on the relationship between claimant and defendant. It is well established that this non-delegable duty is owed by a school authority to a pupil and by a hospital to a patient. Factors which support the existence of the duty include whether the relationship is one where the defendant has a high degree of control, the claimant is vulnerable, or the claimant has a special dependence on the defendant. The categories of situations where a non-delegable duty of care is owed are not closed, but courts should exercise care in extending them."
>
> [74] The following situations have been recognised as giving rise to a non-delegable duty of care:
>
> > (a) employer – employee: *Kondis v State Transport Authority* (1984) 154 CLR 672;
> >
> > (b) hospitals – patients: *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553;

(c) schools – students: *Commonwealth v Introvigne* (1982) 150 CLR 258;

(d) occupiers – contractual entrants: *Watson v George* (1953) 89 CLR 409, *Calin v Greater Union Organisation Pty Ltd* (1991) 173 CLR 33 at 38 ; and

(e) bailees for reward: *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716.

[75] As is noted by McMurdo P the categories of situations where a non-delegable duty of care is owed are not closed. The plaintiff has not identified any recognised category into which this case would fall but says that it comes within the general description in *Burnie Port Authority* referred to above."

Aircraft Technicians of Australia Pty Ltd v St Clair; St Clair v Timtalla Pty Ltd [2011] QCA 188 (09 August 2011) (Fraser, Chesterman and White JJA, Judgment of the Court)

67. The case is not that of employer and employee and it does not assist the plaintiff to assert that it is. The case is one of the engagement of an independent contractor to perform a service which was done without reasonable care resulting in injury to a third party. The question is whether the circumstances come within the description given in *Burnie Port Authority* , that Timtalla undertook the care, supervision or control of the plaintiff or was so placed in relation to him as to assume a particular responsibility for his safety where the plaintiff reasonably expected that that care would be exercised. An affirmative answer will extend the category of case in which the non-delegable duty is recognised.

Aircraft Technicians of Australia Pty Ltd v St Clair; St Clair v Timtalla Pty Ltd [2011] QCA 188 (09 August 2011) (Fraser, Chesterman and White JJA, Judgment of the Court)

63. His Honour rejected an argument that the duty on Timtalla was non-delegable because of the "hazardous or dangerous nature" of servicing a helicopter. He referred to *Burnie Port Authority* at 558 and concluded:

"[81] The relationship between Timtalla and the plaintiff did not fall into any of the recognised categories which give rise to a non-delegable duty of care. The plaintiff seeks to extend the reasoning in *Burnie Port Authority* to cover Timtalla but he has not satisfied the preconditions for application, that is, he has not established that Timtalla had undertaken the care, supervision or control of him or the property of another or was so placed in relation to him or his property as to assume a particular responsibility for his safety, in circumstances where he might reasonably expect that due care would be exercised."

Aircraft Technicians of Australia Pty Ltd v St Clair; St Clair v Timtalla Pty Ltd [2011] QCA 188 -
Aircraft Technicians of Australia Pty Ltd v St Clair; St Clair v Timtalla Pty Ltd [2011] QCA 188 -
Aircraft Technicians of Australia Pty Ltd v St Clair; St Clair v Timtalla Pty Ltd [2011] QCA 188 -
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Aircraft Technicians of Australia Pty Ltd v St Clair; St Clair v Timtalla Pty Ltd [2011] QCA 188 -
LCR Mining Group Pty Ltd v Ocean Tyres Pty Ltd [2011] QCA 105 -

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Rail Corporation New South Wales v Fluor Australia Pty Ltd [2009] NSWCA 344 -
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Rail Corporation New South Wales v Fluor Australia Pty Ltd [2009] NSWCA 344 -
Leighton Contractors Pty Ltd v Fox [2009] HCA 35 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 (31 August 2009) (Allsop P at 1; Basten JA at 149; Simpson J at 242)

> 108 A relevant category of analysis within the above framework of approach is one which considers the place and effect of the employment relationship and independent subcontracting. The employment relationship brings with it the well-known duty to exercise care in the provision of a safe system of work. The use of an independent contractor by a principal, rather than the direct engagement of employees, is a significant factor in the existence or not of responsibility of the principal arising from the conduct or activity of the subcontractor and its employees or agents: *Swee ney v Boylan Nominees*. Circumstances will arise, however, where the principal remains subject to a duty of care in respect of damage or harm that may arise from, or in connection with, the conduct of the independent contractor. An example of such is the liability (based on a duty of care) in certain circumstances of a principal or third party for injury to employees of an independent contractor: *Stevens* ; *Northern Sandblasting* ; *Crimmins* ; and *Abramovic* . Another example is the liability of a party for damage caused by its independent contractor in connection with the control of a dangerous substances or the carrying on of a dangerous activity: *Burnie Port Authority Limited v General Jones Pty Ltd* [1994] HCA 13; 179 CLR 520 ; *cf Transfield Services (Australia) v Hall* [2008] NSWCA 294.

Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Stuart v Kirkland-Veenstra [2009] HCA 15 -
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Stuart v Kirkland-Veenstra [2009] HCA 15 -
Gett v Tabet [2009] NSWCA 76 (09 April 2009) (Allsop P ; Beazley JA ; Basten JA)

> 272 At least with respect to the High Court, there may be doubt as to whether the conclusion that an earlier decision is wrong, if by that is meant erroneous in terms of the law as it stands, is indeed a precondition to departing from earlier authority. There are circumstances in which the Court may think that the law should be changed, usually because of changed social circumstances or changes in related parts of the law: see, for example, *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221 at 241 (PC); *Public Transport Commission (NSW) v Perry* [1977] HCA 32; 137 CLR 107; *Burnie Port Authority v General Jones Pty Ltd* [1994] HCA 13; 179 CLR 520 ; *Brodie v Singleton Shire Council* [2001] HCA 29; 206 CLR 512. However, at least where the High Court has addressed an issue, this Court has no power to depart from such authority for any policy reason short of statutory amendment to the law: see *Jacob v Utah Construction and Engineering Pty Ltd* [1966] HCA 67; 116 CLR 200 at 207 (per Barwick CJ), 217 (McTiernan, Taylor and Owen JJ agreeing).

Gett v Tabet [2009] NSWCA 76 -
Transfield Services (Australia) v Hall [2008] NSWCA 294 (10 November 2008) (Beazley JA ; Campbell JA ; McClellan CJ at CL)

> 84 Mr Campbell SC, counsel for the Respondent, reminded us of ***Burnie Port Authority v General Jones Pty Ltd*** [1994] HCA 13; (1994) 179 CLR 520 . It is a case that has significance concerning both liability for extra-hazardous activities, and the basis on which non-delegable duties exist. ***Burnie*** wa s a joint judgment of Mason CJ, Deane, Dawson, Toohey and Gaudron JJ, in which the defendant was a building owner who retained an independent contractor to carry out work on the defendant' s premises. Those premises contained some highly inflammable material, that was ignited when

welding activities carried out by the contractor caused sparks or molten metal to ignite the material. The plaintiff was an occupier of adjacent premises whose goods were ruined when the fire spread. The court held that the defendant was in breach of a non-delegable duty of care.

Transfield Services (Australia) v Hall [2008] NSWCA 294 -
Transfield Services (Australia) v Hall [2008] NSWCA 294 -
Transfield Services (Australia) v Hall [2008] NSWCA 294 -
Transfield Services (Australia) v Hall [2008] NSWCA 294 -
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Transfield Services (Australia) v Hall [2008] NSWCA 294 -
Transfield Services (Australia) v Hall [2008] NSWCA 294 -
Fitzgerald v Hill [2008] QCA 283 (16 September 2008) (McMurdo P, Holmes JA and Mackenzie AJA,)

59. Whether a relationship between parties is of a type to found a non-delegable duty must be determined according to the circumstances of each case. It requires an assessment of the extent of the obligation assumed by the person whom it is alleged owed a non-delegable duty: see Gleeson CJ's helpful history and analysis of the duty in the more recent case of *New South Wales v Lepore; Samin v State of Queensland; Rich v State of Queensland*. [69] Gleeson CJ, Gummow, Kirby, Hayne and Callinan JJ (McHugh J dissenting) there declined to extend the non-delegable duty of a school authority to intentional criminal conduct (sexual abuse) committed by a teacher employed by the school authority. After discussing *Introvigne* and *Burnie Port Authority* , Gleeson CJ, with whom Callinan J agreed, noted:

> "The proposition that, because a school authority's duty of care to a pupil is non-delegable, the authority is liable for any injury, accidental or intentional, inflicted at school upon a pupil by a teacher, is too broad, and the responsibility with which it fixes school authorities is too demanding."[70]

After referring with approval to Mason J's observations in *Kondis* , his Honour made the following observations:

> "In cases where the care of children, or other vulnerable people, is involved, it is difficult to see what kind of relationship would not give rise to a non-delegable duty of care. It is clearly not limited to the relationship between school authority and pupil. A day-care centre for children whose parents work outside the home would be another obvious example."[71]

Fitzgerald v Hill [2008] QCA 283 -
Fitzgerald v Hill [2008] QCA 283 -
Fitzgerald v Hill [2008] QCA 283 -

Fitzgerald v Hill [2008] QCA 283 -
Fitzgerald v Hill [2008] QCA 283 -
Fitzgerald v Hill [2008] QCA 283 -
New South Wales v West [2008] ACTCA 14 -
New South Wales v West [2008] ACTCA 14 -
New South Wales v West [2008] ACTCA 14 -
Imbree v McNeilly [2008] HCA 40 (28 August 2008) (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ)

> 129. In Australia, this Court has gradually replaced many special rules that were responses to earlier particular case situations with general principles of broad application [160] . Necessari ly, however, any broad principles of the common law must themselves adapt to relevant legislation. Sometimes, such legislation is confined to particular jurisdictions. Whilst it must be applied there, it may not impact on the single common law applicable throughout Australia[161]. On the other hand, occasionally, legislation may include common themes that apply throughout the nation. In such cases, the common law principle may itself adapt to such legislative provisions. Such is the flexibility and practicality of judge-made law [162] .

via

> [160] See eg *Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7 at 21, 22, 32; [1985] HCA 3; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 541-544 , 547-548 ; [1994] HCA 13 ; *Jones v Bartlett* (2000) 205 CLR 166 at 237 [244]; [2000] HCA 56.

Imbree v McNeilly [2008] HCA 40 -
SNF (Australia) Pty Ltd v Jones [2008] WASCA 121 (10 June 2008) (McLure JA)

> 43 The question whether a duty of care is non-delegable only arises if a defendant owes a duty of care to the claimant and has expressly or impliedly delegated the responsibility for discharging the duty to a suitably qualified and experienced independent contractor. (A failure to take reasonable care in the selection of the contractor will constitute a breach of the usual common law duty.) A defendant will be liable for the negligence of an independent contractor if the defendant's duty of care is higher than usual and extends to ensuring the independent contractor is not negligent: ***Burni e Port Authority v General Jones Pty Ltd*** (1994) 179 CLR 520 ; ***Stevens v Brodribb Sawmilling Co Pty Ltd*** (1986) 160 CLR 16. Ordinarily, questions of non-delegability arise in cases where the existence and scope of the duty of care are well established, as in the employment relationship. In cases such as this where there is a dispute as to whether the defendant owed a duty of care at all, the answer to that question will have regard to all relevant circumstances including the involvement of contractors.

SNF (Australia) Pty Ltd v Jones [2008] WASCA 121 -
SNF (Australia) Pty Ltd v Jones [2008] WASCA 121 -
Pollard v Baulderstone Hornibrook Engineering Pty Ltd [2008] NSWCA 99 -
Pollard v Baulderstone Hornibrook Engineering Pty Ltd [2008] NSWCA 99 -
Gittani Stone Pty Ltd v Pavkovic [2007] NSWCA 355 -
Gittani Stone Pty Ltd v Pavkovic [2007] NSWCA 355 -
John Fairfax Publications Pty Ltd v Gacic [2007] HCA 28 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 (27 February 2007) (Gleeson CJ; Kirby, Hayne, Callinan and Crennan JJ)

> 166. It is understandable that the Court of Appeal on the state of the authorities as they then stood should so conclude. Its decision followed earlier authority of that Court of which *Roads and Traffic Authority (NSW) v Scroop* [228] is an example [229] . There, a motor vehicle accident had occurred as a result of road works negligently carried out by an independent contractor. Fitzgerald AJA, with whom Handley and Beazley JJA agreed, said in that case [23 0] :

"[The Road and Traffic Authority's ("RTA")] argument that it had delegated its duty of care to road users to [the independent contractor] was founded on an article published in 1991[231]. However, there is an extensive body of English case law against RTA on this point[232]. A conclusion that a highway authority causing or permitting operations on the highway has a non-delegable duty of care to highway users also seems to me required by recent pronouncements of the High Court [233]."

via

[233] See, eg *Kondis v State Transit Authority* (1984) 154 CLR 672; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 550 ; *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313.

Leichhardt Municipal Council v Montgomery [2007] HCA 6 (27 February 2007) (Gleeson CJ; Kirby, Hayne, Callinan and Crennan JJ)

153. Further, it may also be noted that Mason J gave a third example of nondelegable duty in *Kond is* – the liability owed by an occupier of land to those who were then classified as invitees. Classification of entrants, as invitees, licensees or trespassers, has since been discarded as a consideration relevant to the definition of the content of the duty of care owed by an occupier of land to entrants to the land [219] . Whether, or in what circumstances, this particular form of nondelegable duty survives this reexpression of the occupier's duty of care to entrants are questions that do not arise directly in the present matter. Nor do similar questions about the nature or extent of duties owed by hospitals to patients or by school authorities to pupils arise. It is sufficient to notice that decisions of this Court after *Kondis* , in particular *Scott v Davis* [220] and *New South Wales v Lepore* [221] , point out the many difficulties that lie behind adopting principles cast in terms of nondelegable duties. Not least of these difficulties is that a nondelegable duty is a form of strict liability and *Burnie Port Authority v General Jones Pty Ltd* , in its treatment of the rule in *Rylands v Fletcher* , shows the disfavour with which strict liability is now viewed [222] .

Leichhardt Municipal Council v Montgomery [2007] HCA 6 (27 February 2007) (Gleeson CJ; Kirby, Hayne, Callinan and Crennan JJ)

150. But there is a further aspect of the decision in *Brodie* and *Ghantous* that is of critical importance. The Court held [211] that the time had come "to treat public nuisance, in its application to the highway cases, 'as absorbed by the principles of ordinary negligence' [212]." It follows that if any principle of nondelegable duty is now to be applied to highway authorities, it must now find its roots elsewhere than in the law of public nuisance.

via

[212] *Burnie Port Authority* (1994) 179 CLR 520 at 556.

Leichhardt Municipal Council v Montgomery [2007] HCA 6 (27 February 2007) (Gleeson CJ; Kirby, Hayne, Callinan and Crennan JJ)

110. *A non-analogous category*: But what of the respondent's submission that the relationship of roads authority and road user is analogous to the categories of relationship involving non-delegable duties, already acknowledged by the common law of Australia? Those relationships are employer/employee [156] ; hospital/patient [157] ; school authority/pupil [158] ; and occupier/contractual entrant in circumstances involving extra-hazardous activities [159] .

via

[159] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 550-554 , 556557 ; cf *Stevens* (1986) 160 CLR 16 at 29-30 .

Leichhardt Municipal Council v Montgomery [2007] HCA 6 (27 February 2007) (Gleeson CJ; Kirby, Hayne, Callinan and Crennan JJ)

189. In *Burnie Port Authority v General Jones Pty Ltd* [262] five members of this Court spoke of the emergence, subsequent to *Rylands v Fletcher* [263] , "of a coherent law of negligence to dominate the territory of tortious liability for unintentional injury to the person or property of another" [264] . Although their Honours went on to hold that the Authority there owed a non-delegable duty, they stressed that any special rule relating to the liability of an occupier for the escape of fire from its premises, had been absorbed into, and qualified by more general rules or principles [265] .

via

[262] (1994) 179 CLR 520 .

Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
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Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Sutherland Shire Council v Becker [2006] NSWCA 344 (12 December 2006) (Mason P; Giles JA; Bryson JA)

Burnie Port Authority v General Jones Pty Ltd (1994) 179 CLR 520
Coote v Forestry Tasmania

Sutherland Shire Council v Becker [2006] NSWCA 344 -
Sutherland Shire Council v Becker [2006] NSWCA 344 -
Sutherland Shire Council v Becker [2006] NSWCA 344 -
Sutherland Shire Council v Becker [2006] NSWCA 344 -
Mambare Pty Ltd trading as Valley Homes v Rebecca Irene Bell in her capacity as Administratrix of the Estate of the Late Simon James Bell & Anor [2006] NSWCA 332 -
Mambare Pty Ltd trading as Valley Homes v Rebecca Irene Bell in her capacity as Administratrix of the Estate of the Late Simon James Bell & Anor [2006] NSWCA 332 -
Mambare Pty Ltd trading as Valley Homes v Rebecca Irene Bell in her capacity as Administratrix of the Estate of the Late Simon James Bell & Anor [2006] NSWCA 332 -
Stingel v Clark [2006] HCA 37 -
Batistatos v Roads and Traffic Authority of New South Wales [2006] HCA 27 -
Batistatos v Roads and Traffic Authority of New South Wales [2006] HCA 27 -
The Finance Brokers Supervisory Board v Van Stokkum [2006] WASCA 97 -
The Finance Brokers Supervisory Board v Van Stokkum [2006] WASCA 97 -
Dowthwaite Holdings Pty Ltd v Saliba [2006] WASCA 72 -
Yaraka Holdings Pty Ltd v Giljevic [2006] ACTCA 6 (30 March 2006)

18. Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ, said at 38 [39] that:

> *In* Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia *(1931) 46 CLR 41 , Dixon J explained the dichotomy between the relationships of employer and employee, and principal and independent contractor, in a passage which has frequently been referred to in this Court* (Kondis v State Transport Authority *(1984) 154 CLR 672 at 691-692 ;* Burnie Port Authority v General Jones Pty Ltd *(1994) 179 CLR 520 at 574 ;* Northern Sandblasting Pty Ltd v Harris *(1997) 188 CLR 313 a t 329-330, 366). His Honour explained that, in the case of an independent contractor* (Colonial Mutual *(1931) 46 CLR 41 at 48):*
>
> > *"[t]he work, although done at [the principal's] request and for his benefit, is considered as the independent function of the person who undertakes it, and not as something which the person obtaining the benefit does by his representative standing in his place and, therefore, identified with him for the purpose of liability arising in the course of its performance. The independent contractor carries out his work, not as a representative but as a principal."*

Moorabool Shire Council v Taitapanui [2006] VSCA 30 (24 February 2006) (Maxwell, P., Ormiston and Ashley, Jj.A)

79. In the particular case, Gummow J regarded it as of particular significance that the Council had –

> "a significant and special measure of control over the safety from fire of persons and property in [that] street. Such a situation of control is indicative of a duty of care. [85] The Shire had statutory powers, exercisable from time to time, to pursue the prevention of fire at [the premises]. This statutory enablement of the Shire 'facilitate[d] the existence of a common law duty of care,' [86] but *the touchstone of what I would hold to be its duty was the Shire's measure of control of the situation*, including its knowledge, not shared by [the plaintiffs], that, if the situation were not remedied, the possibility of fire was great and damage to the whole row of shops might ensue." [87]

via

[85] His Honour referred to *Howard v Jarvis* (1958) 98 CLR 177 at 183 ; *Parramatta City Council v Lutz* 91988) 12 NSWLR 293 at 328 ; *Hawkins v Clayton* (1988) 164 CLR 539 at 553 ; *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 427 ; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 556-557 ; *Hill v Van Erp* (1997) 188 CLR 159 at 198-199, 234.

Moorabool Shire Council v Taitapanui [2006] VSCA 30 (24 February 2006) (Maxwell, P., Ormiston and Ashley, Jj.A)

20. In *Hill v Van Erp* , Gummow J adverted to what he regarded as –

> "real difficulty in treating the requirement of a relationship of proximity as an overriding requirement which provides the conceptual determinant... for the recognition of an existence of a duty to take reasonable care to avoid a reasonably foreseeable risk of injury." [44]

Nevertheless, his Honour acknowledged, the notion of proximity might provide –

> "a unifying theme for various categories of case, the genus of which they are species."

By way of example, his Honour referred to *Burnie Port Authority v General Jones Pty Ltd* [45] and to *Bryan v Maloney* as each providing –

> "authority for a distinct species of negligence. The first [*Burnie*] is concerned with a person who takes advantage of the control of premises to introduce a dangerous substance, to carry on a dangerous activity, or to allow another to do one of those things. The second [*Bryan*] deals with the duty of a builder to a subsequent owner as regards diminution in value of the structure when the inadequacy thereof first becomes manifest by reason of consequent damage to its fabric. *Each species displays a particular manifestation of the notion of a relationship of proximity*. But, by itself, the notion of proximity, used as a legal norm, has the uncertainties and perils of a category of indeterminate reference, used with shifting meanings to mask no more than policy preferences." [46]

Moorabool Shire Council v Taitapanui [2006] VSCA 30 (24 February 2006) (Maxwell, P., Ormiston and Ashley, Jj.A)

16. The significance of control as a factor came into much sharper relief in his Honour's judgment in the second case cited in *Woolcock*. In *Pyrenees Shire Council v Day* ,[34] the building inspector employed by the Shire Council had identified a fire risk in certain premises, but the Shire failed to ensure that the risk was removed. A fire broke out and neighbouring premises were damaged. The majority of the High Court[35] held that the Shire owed a duty of care to the owners of the adjacent property to take reasonable care to prevent the kind of economic loss which they had suffered. As Ormiston and Ashley JJA point out, Gummow J regarded it as of particular significance that the Shire had –

> "a significant and special measure of control over the safety from fire of persons and property in [that] street. Such a situation of control is indicative of a duty of care. [36] The Shire had statutory powers, exercisable from time to time, to pursue the prevention of fire at [the premises]. This statutory enablement of the Shire 'facilitate[d] the existence of a common law duty of care,' [37] but *the touchstone of what I would hold to be its duty was the Shire's measure of control of the situation*, including its knowledge, not shared by [the plaintiffs], that, if the situation were not remedied, the possibility of fire was great and damage to the whole row of shops might ensue." [38]

via

[36] His Honour here referred to *Howard v Jarvis* (1958) 98 CLR 177 at 183 ; *Parramatta City Council v Lutz* (1988) 12 NSWLR 293 at 328 ; *Hawkins v Clayton* (1988) 164 CLR 539 at 553 ; *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 427 ; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 556-557 ; *Hill v Van Erp* (1997) 188 CLR 159 at 198-199, 234.

Moorabool Shire Council v Taitapanui [2006] VSCA 30 -
Moorabool Shire Council v Taitapanui [2006] VSCA 30 -
A D & S M McLean Pty Ltd v Meech [2005] VSCA 305 (16 December 2005) (Chernov and Nettle, Jj.A and Hollingworth, A.J.A)

19. As Flemming says, however, the rule in *Rylands v Fletcher* did not fit precisely into any rules of tort liability recognised at the time: it was not trespass because the damage caused by the flooding water was not the direct result of constructing the reservoir on the defendant's land; and it has been said that it could not have been nuisance because it was an isolated escape and not a continuous or recurring invasion[45] (although it may be observed that liability for a singular event of nuisance had already been recognised in *Tarry v Ashton*). [46] While therefore the rule may not have been intended to create a new tort,[47] it represented a further development of the idea that an occupier of real property may be chargeable for injuries occasioned by acts of persons whom he brings onto his land and, importantly for present purposes, it put the non-delegable liability of the occupier on a basis approaching negligence (as it came later to be understood).[48] Furthermore, as the majority in *Burnie Port Authority* observed, although *Rylands v Fletcher* was decided 17 years before Brett, M.R. laid down in *Heaven v Pender* [49] the groundwork for what was to follow 50 years later in Lord Atkin's speech in *Donoghue v Stevenson,* [50] and thus in advance of the development of the general conception of proximity as the element common to the cases where liability in negligence is found to exist, [51] the subsequent development of the law of negligence had its effect on the rule.

A D & S M McLean Pty Ltd v Meech [2005] VSCA 305 (16 December 2005) (Chernov and Nettle, Jj.A and Hollingworth, A.J.A)

21. So, as the majority held in *Burnie Port Authority*,[55] the rule in *Rylands v Fletcher* is now seen as absorbed by the principles of ordinary negligence. Under those principles, a person who takes advantage of his or her control of premises to carry on a "dangerous activity", or to allow another to do so, owes a non-delegable duty of reasonable care to avoid a reasonably foreseeable risk of injury or damage to the person or property of another. What is more, for those purposes an activity is to be regarded as a "dangerous activity," even though it is not "inherently dangerous" or dangerous in itself, if the combined effect of the magnitude of the foreseeable risk of an accident happening and the magnitude of the foreseeable potential injury or damage if an accident does occur, is such that an ordinary person acting reasonably would consider it necessary to exercise "special care" or to take "special precautions" in relation to it. [56]

via

[56] (1994) 179 C.L.R. at 558-559 .

A D & S M McLean Pty Ltd v Meech [2005] VSCA 305 (16 December 2005) (Chernov and Nettle, Jj.A and Hollingworth, A.J.A)

20. That effect led by stages to the relaxation of the non-natural use requirement; correspondence with rules controlling recoverable damages in an action in ordinary negligence; and, in this country, the recognition of *Rylands v Fletcher* liability for personal injuries and damage to property sustained outside the relevant property by persons having no relationship to neighbouring land apart from being on it, including on a highway or in a public park. [52] That led in turn to a greatly reduced likelihood that *Rylands v Fletcher* liability could exist in a case where liability would not exist under the principles of negligence. And, ultimately, that led to the recognition in *Burnie Port Authority* that:

> "The relationship of proximity which exists, for the purposes of ordinary negligence, between a plaintiff and a defendant in circumstances which would prima facie attract the rule in *Rylands v Fletcher* is characterized by...a central element of control and by... special dependence and vulnerability. One party to that relationship is a person who is in control of premises and who has taken advantage of that control to introduce thereon or to retain therein a dangerous substance or to undertake

> thereon a dangerous activity or to allow another person to do one of those things. The other party to that relationship is a person, outside the premises and without control over what occurs therein, whose person or property is thereby exposed to a foreseeable risk of danger." [53]

And that:

> "It follows that the relationship of proximity which exists in the category of case into which *Rylands v Fletcher* circumstances fall contains the central element of control which generates, in other categories of case, a special 'personal' or 'non-delegable' duty of care under the ordinary law of negligence. Reasoning by analogy suggests, but does not compel, a conclusion that that common element gives rise to such a duty of care in the first-mentioned category of case. There are considerations of fairness which support that conclusion, namely, that it is the person in control who has authorized or allowed the situation of foreseeable potential danger to be imposed on the other person by authorizing or allowing the dangerous use of the premises and who is likely to be in a position to insist upon the exercise of reasonable care. It is also supported by considerations of utility: 'the practical advantage of being conveniently workable, of supplying a spur to effective care in the choice of contractors, and in pointing the victim to a defendant who is easily discoverable and probably financially responsible'. The weight of authority confirms that the duty in that category of case is a non-delegable one." [54]

A D & S M McLean Pty Ltd v Meech [2005] VSCA 305 (16 December 2005) (Chernov and Nettle, Jj.A and Hollingworth, A.J.A)

26. Under the rule in *Rylands v Fletcher*, it was a question of law for a trial judge to determine whether the use of the land amounted to a special use bringing with it an increased danger to others. The view which was taken was that "...The experience, conceptions and standards of the community enter into the question of what is a natural or special use of land, and of what acts on land should be considered so fraught with risk to others as not to be reasonably incident to its proper enjoyment". [59] But the same does not necessarily apply now that liability is to be decided on the basis of negligence. Indeed the following passage from the dissenting judgment of McHugh, J. in *Burnie Port Authority* rather suggests the contrary:

> "In determining the issue of non-natural use, factors that would be decisive on an issue of negligence will frequently be of only marginal relevance on the issue of non-natural use. Often, they will be irrelevant to the latter issue. In determining whether a use of land is natural, the court does not look at all the particular circumstances of the individual occupier but whether, in the time, place and circumstances of the particular community, the *character* of the use of the land by that occupier constitutes a non-natural use. Thus, in the classic *Rylands v Fletcher* situation, land is used for a non-natural purpose even though the particular amount of water stored is small and the walls of the reservoir are thick and high. Similarly, burning a domestic fire to warm a room does not constitute a non-natural use of the premises because the fire has no guard and is left unattended . *Non-natural use of land is a different concept from the negligent use of the land*. [60]

A D & S M McLean Pty Ltd v Meech [2005] VSCA 305 (16 December 2005) (Chernov and Nettle, Jj.A and Hollingworth, A.J.A)

35. I am not persuaded that there is any substance in either of those complaints. Clearly enough, the applicable standard of care is the standard of reasonable care. As the majority put it in *Burnie Port Authority* :

> "Where a duty of care arises under the ordinary law of negligence, the standard of care exacted is that which is reasonable in the circumstances. It has been emphasized in many cases that the degree of care under that standard necessarily varies with the risk involved and that the risk involved includes both the magnitude of the risk of an accident happening and the seriousness of the potential damage if an accident should occur. Even where a dangerous substance or a dangerous activity of a kind which might attract the rule in *Rylands v Fletcher* is involved, the standard of care remains 'that which is reasonable in the circumstances, that which a reasonably prudent man would exercise in the circumstances'. In the case of such substances or activities, however, a reasonably prudent person would exercise a higher degree of care. Indeed, depending upon the magnitude of the danger, the standard of 'reasonable care' may involve 'a degree of diligence so stringent as to amount practically to a guarantee of safety'." [64]

But, as it seems to me, that is the effect of the way in which the judge charged the jury.

A D & S M McLean Pty Ltd v Meech [2005] VSCA 305 (16 December 2005) (Chernov and Nettle, Jj.A and Hollingworth, A.J.A)

20. That effect led by stages to the relaxation of the non-natural use requirement; correspondence with rules controlling recoverable damages in an action in ordinary negligence; and, in this country, the recognition of *Rylands v Fletcher* liability for personal injuries and damage to property sustained outside the relevant property by persons having no relationship to neighbouring land apart from being on it, including on a highway or in a public park. [52] That led in turn to a greatly reduced likelihood that *Rylands v Fletcher* liability could exist in a case where liability would not exist under the principles of negligence. And, ultimately, that led to the recognition in *Burnie Port Authority* that:

> "The relationship of proximity which exists, for the purposes of ordinary negligence, between a plaintiff and a defendant in circumstances which would prima facie attract the rule in *Rylands v Fletcher* is characterized by...a central element of control and by... special dependence and vulnerability. One party to that relationship is a person who is in control of premises and who has taken advantage of that control to introduce thereon or to retain therein a dangerous substance or to undertake thereon a dangerous activity or to allow another person to do one of those things. The other party to that relationship is a person, outside the premises and without control over what occurs therein, whose person or property is thereby exposed to a foreseeable risk of danger." [53]

And that:

> "It follows that the relationship of proximity which exists in the category of case into which *Rylands v Fletcher* circumstances fall contains the central element of control which generates, in other categories of case, a special 'personal' or 'non-delegable' duty of care under the ordinary law of negligence. Reasoning by analogy suggests, but does not compel, a conclusion that that common element gives rise to such a duty of care in the first-mentioned category of case. There are considerations of fairness which support that conclusion, namely, that it is the person in control

> who has authorized or allowed the situation of foreseeable potential danger to be imposed on the other person by authorizing or allowing the dangerous use of the premises and who is likely to be in a position to insist upon the exercise of reasonable care. It is also supported by considerations of utility: 'the practical advantage of being conveniently workable, of supplying a spur to effective care in the choice of contractors, and in pointing the victim to a defendant who is easily discoverable and probably financially responsible'. The weight of authority confirms that the duty in that category of case is a non-delegable one." [54]

via

> [54] (1994) 179 C.L.R. 520 at 551-2 , footnotes omitted.

A D & S M McLean Pty Ltd v Meech [2005] VSCA 305 -
A D & S M McLean Pty Ltd v Meech [2005] VSCA 305 -
A D & S M McLean Pty Ltd v Meech [2005] VSCA 305 -
A D & S M McLean Pty Ltd v Meech [2005] VSCA 305 -
A D & S M McLean Pty Ltd v Meech [2005] VSCA 305 -
A D & S M McLean Pty Ltd v Meech [2005] VSCA 305 -
A D & S M McLean Pty Ltd v Meech [2005] VSCA 305 -
A D & S M McLean Pty Ltd v Meech [2005] VSCA 305 -
A D & S M McLean Pty Ltd v Meech [2005] VSCA 305 -
A D & S M McLean Pty Ltd v Meech [2005] VSCA 305 -
A D & S M McLean Pty Ltd v Meech [2005] VSCA 305 -
A D & S M McLean Pty Ltd v Meech [2005] VSCA 305 -
A D & S M McLean Pty Ltd v Meech [2005] VSCA 305 -
Leichhardt Municipal Council v Montgomery [2005] NSWCA 432 -
Volman T/a Volman Engineering v Lobb; Mobil Oil Australia Pty Ltd v Lobb [2005] NSWCA 348 (31 October 2005)

> 40. I accept that Mobil is not liable on the basis that it caused the nuisance, or that by neglect of any duty it allowed the nuisance to arise. I accept that the activities for which Volman was engaged were not of the kind that would give rise to a non-delegable duty, as would be the case if a subcontractor were engaged to excavate in a way that threatened to withdraw support from adjoining land: *Burnie Port Authority* at 550.

Volman T/a Volman Engineering v Lobb; Mobil Oil Australia Pty Ltd v Lobb [2005] NSWCA 348 (31 October 2005)

> (3) While the nature of the operations being carried out did not give rise to a non-delegable duty on the part of an occupier, Mobil nevertheless had a duty to ascertain from time to time whether those activities were causing a nuisance: *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 distinguished. Mobil should have known of the hazard at a time when reasonable steps to deal with the hazard would have prevented the accident: *Torette House Pty Ltd v Berkman* (1940) 62 CLR 637 applied.

Volman T/a Volman Engineering v Lobb; Mobil Oil Australia Pty Ltd v Lobb [2005] NSWCA 348 -
Volman T/a Volman Engineering v Lobb; Mobil Oil Australia Pty Ltd v Lobb [2005] NSWCA 348 -
Boylan Nominees Pty Ltd t/as Quirks Refrigeration v Sweeney [2005] NSWCA 8 -
Moyne Shire Council v Pearce [2004] VSCA 246 -
Gardner v Northern Territory of Australia [2004] NTCA 14 (10 December 2004)

> [7] At trial that statement was accepted, correctly in my view, as an accurate statement of the respondent's duty: Hargrave v Goldman (1963) 110 CLR 40 ; Burnie Port Authority v General Jones

Pty Limited (1994) 179 CLR 520 . At issue were the content of that duty in all the circumstances and whether the appellant had established that the respondent had failed to discharge that duty.

Gardner v Northern Territory of Australia [2004] NTCA 14 -
Parissis v Bourke [2004] NSWCA 373 -
Parissis v Bourke [2004] NSWCA 373 -
Parissis v Bourke [2004] NSWCA 373 -
Bashford v Information Australia (Newsletters) Pty Ltd [2004] HCA 5 -
Signet Engineering Pty Ltd v Melvan [2003] WASCA 313 -
Signet Engineering Pty Ltd v Melvan [2003] WASCA 313 -
Shire of Brookton v Water Corporation [2003] WASCA 240 -
Shire of Brookton v Water Corporation [2003] WASCA 240 -
Shire of Brookton v Water Corporation [2003] WASCA 240 -
Shire of Brookton v Water Corporation [2003] WASCA 240 -
Rockdale Beef Pty Ltd v Carey [2003] NSWCA 132 -
Rockdale Beef Pty Ltd v Carey [2003] NSWCA 132 -
Fox v Percy [2003] HCA 22 -
Fox v Percy [2003] HCA 22 -
Roads and Traffic Authority of NSW v Palmer [2003] NSWCA 58 (28 March 2003) (Spigelman CJ, Handley and Giles JJA)

121 With respect to the issue of control, the joint judgment referred to *Burnie Port Authority v General Jones Pty Ltd* (1992) 179 CLR 520 at 551-552 . In that part of the joint judgment in *Burnie Port Authority,* t he Court was dealing with the issue of non-delegable duty and gave particular attention to the interaction between the control exercised, relevantly, by someone who had undertaken inherently dangerous activities on his or her property, and the vulnerability of persons outside the premises.

Roads and Traffic Authority of NSW v Palmer [2003] NSWCA 58 -
TNT Australia Pty Ltd v Christie [2003] NSWCA 47 -
New South Wales v Lepore [2003] HCA 4 (06 February 2003) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

254. In this Court, the concept of a nondelegable duty of care has been considered in detail in *Intr ovigne* , *Kondis* [278] and in the joint reasons of five members of the Court in *Burnie Port Authority* [279] . As was said [280] in *Burnie Port Authority* , "[i]t has long been recognized that there are certain categories of case in which a duty to take reasonable care to avoid a foreseeable risk of injury to another will not be discharged merely by the employment of a qualified and ostensibly competent independent contractor" or, we would add, a qualified and ostensibly competent employee. Their Honours went on to say that [281] :

> "In those categories of case, the nature of the relationship of proximity gives rise to a duty of care of a special and 'more stringent' kind, namely a 'duty to ensure that reasonable care is taken' [282] . Put differently, the requirement of reasonable care in those categories of case extends to seeing that care is taken."

via

[280] (1994) 179 CLR 520 at 550.

New South Wales v Lepore [2003] HCA 4 (06 February 2003) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

152. This Court has said that the law will identify a duty as non-delegable whenever a person has undertaken the supervision or control of, or has assumed a particular responsibility for, the person or property of another in circumstances where the person affected might reasonably expect that due care would be exercised [169] . However, the concept of non-delegable duties

of care has been strongly criticised. Professor Fleming described a non-delegable duty as a disguised form of vicarious liability [170]. Professor Glanville Williams has gone further. He has said that it is a "fictitious formula"[171]. Perhaps a more accurate statement is that of Giles JA in *Elliott v Bickerstaff* [172] where his Honour said "the so-called duty of care in truth is not a duty to take care but a mechanism for responsibility for someone else's failure to take care". However, as I later point out, this statement does not mean that the person owing the duty is liable only when someone else is liable.

via

[169] *Kondis v State Transport Authority* (1984) 154 CLR 672 at 687 ; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 550-552 .

New South Wales v Lepore [2003] HCA 4 (06 February 2003) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

100. Within the law of negligence, certain relationships have been identified as giving rise to duties which have been described as "non-delegable" [80] or "personal" [81] , including master and servant (in relation to the provision of a safe system of work), adjoining owners of land (in relation to work threatening support or common walls), hospital and patient and, relevantly for these appeals, education authority and pupil [82] . The relationships which give rise to a non-delegable or personal duty of care have been described as involving a person being so placed in relation to another as "to assume a particular responsibility for [that other person's] safety" because of the latter's "special dependence or vulnerability" [83] .

via

[83] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 551 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ .

New South Wales v Lepore [2003] HCA 4 (06 February 2003) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

101. It has been said that a non-delegable or personal duty of care is "a duty ... of a special and 'more stringent' kind" [84] and that it is a "duty to ensure that reasonable care is taken." [85] I n *Scott v Davis* , Gummow J said that a non-delegable duty "involves, in effect, the imposition of strict liability upon the defendant who owes that duty." [86] To say that, where there is a non-delegable duty of care, there is, in effect, a strict liability is not to say that liability is established simply by proof of injury. As Gummow J pointed out in *Scott* , there must first be a duty of care on the part of the person against whom liability is asserted. And, obviously, there must also have been a breach of that duty and resulting injury.

via

[84] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 550 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ referring to *Kondis v State Transport Authority* (1984) 154 CLR 672 at 686 per Mason J.

New South Wales v Lepore [2003] HCA 4 (06 February 2003) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

286. First, there is a special category of liability of school authorities that has been considered by this Court in *The Commonwealth v Introvigne* [314] . The principle there stated has been accepted in later decisions [315] . The nature of the duty has not been doubted, although the

scope and content of such duty is subject to dispute. However, no party in these appeals sought to challenge the correctness of the decision in *Introvigne* . None asked that it be overruled or qualified.

via

[315] *Kondis v State Transport Authority* (1984) 154 CLR 672 at 685-686 ; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 575 ; *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 331-332 .

New South Wales v Lepore [2003] HCA 4 -
New South Wales v Lepore [2003] HCA 4 -
New South Wales v Lepore [2003] HCA 4 -
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New South Wales v Lepore [2003] HCA 4 -
New South Wales v Lepore [2003] HCA 4 -
New South Wales v Lepore [2003] HCA 4 -
Hillcoat v Keymon P/L [2002] QCA 527 (06 December 2002) (McMurdo P, Mackenzie and Holmes JJ,)

Burnie Port Authority v General Jones Pty Ltd (1994) 179 CLR 520 , considered
Jones v Bartlett (2000) 75 ALJR 1, considered

Hillcoat v Keymon P/L [2002] QCA 527 -
Hillcoat v Keymon P/L [2002] QCA 527 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 (05 December 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

231. *The Caparo three-stage test*: Whilst Lord Atkin in *Donoghue v Stevenson,* building on earlier judicial attempts, propounded a unifying concept for liability in negligence at common law, and specifically for the circumstances giving rise to a legally enforceable duty of care, the defect in his analysis and in its acceptance in later cases as a "general unifying proposition" [176] or "statement of principle" [177] is the generality, even circularity, of the touchstone for defining the "neighbour" relationship [178] . The decision in *Donoghue v Stevenson* inevitably gave rise to attempted refinement, so as to retain the advantages of a unifying concept but to flesh out the detail concerning the manner of its application.

via

[176] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 541.

Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 (05 December 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

150. The factor of control is of fundamental importance in discerning a common law duty of care on the part of a public authority [98] . It assumes particular significance in this appeal. This

is because a form of control over the relevant risk of harm, which, as exemplified by *Agar v Hyde* [99] , is remote, in a legal and practical sense, does not suffice to found a duty of care.

via

[98] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 551-552 ; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 24-25 [43]-[46], 42-43 [104], 61 [166], 82 [227], 104 [304], 116 [357] ; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 558559 [102] .

Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
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Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Lloyd Russell Jones v Commissioner of Main Roads [2002] WASCA 307 -
Lloyd Russell Jones v Commissioner of Main Roads [2002] WASCA 307 -
Lloyd Russell Jones v Commissioner of Main Roads [2002] WASCA 307 -
Royal and Sun Alliance Insurance Australia Limited v Betta Industries Pty Limited; Harlander Pty Limited (in liq) v State of New South Wales [2002] NSWCA 323 -
Royal and Sun Alliance Insurance Australia Limited v Betta Industries Pty Limited; Harlander Pty Limited (in liq) v State of New South Wales [2002] NSWCA 323 -
Royal and Sun Alliance Insurance Australia Limited v Betta Industries Pty Limited; Harlander Pty Limited (in liq) v State of New South Wales [2002] NSWCA 323 -
Tame v New South Wales [2002] HCA 35 -
Kolodziejczyk v Grandview Pty Ltd [2002] NSWCA 267 -
Kolodziejczyk v Grandview Pty Ltd [2002] NSWCA 267 -
Dhu v Total Corrosion Control Pty Ltd [2002] WASCA 173 -
Dhu v Total Corrosion Control Pty Ltd [2002] WASCA 173 -
Dhu v Total Corrosion Control Pty Ltd [2002] WASCA 173 -
Mickelberg v Aerodata Holdings Ltd [2002] WASCA 80 -
Mickelberg v Aerodata Holdings Ltd [2002] WASCA 80 -
National Australia Bank Ltd v Nemur Varity Pty Ltd [2002] VSCA 18 (01 March 2002) (Phillips, Callaway and Batt, Jj.A)

59. On the other hand, *France v. Gaudet* , and indeed *The Arpad*, were decided before reasonable foreseeability was established as the test for remoteness in the tort of negligence. Moreover, in *Cambridge Water Co.* the House of Lords held that foreseeability of damage was "a prerequisite of recovery of damages" or "of liability in damages" [96] under the principle of *Rylands v. Fletcher* [97] . That principle was described as one of strict liability "in the sense that the defendant may be held liable notwithstanding that he has exercised all due care to prevent the escape".[98] The conclusion was based on references in Blackburn, J.'s judgment in *Fletcher v. Rylands* which held, to import that knowledge, or at least foreseeability of the risk, was a prerequisite to recovery and on the view that the principle was an extension of nuisance, it was logical to apply the same remoteness rule to it as to nuisance.[99] Their Lordships' conclusion is described in *Clerk & Lindsell on Torts* [100] as "at first sight appear [ing] paradoxical" and in its limitation of the occupier's liability it was similarly criticised by McHugh, J. in his dissenting judgment in *Burnie Port Authority v. General Jones Pty. Ltd.* [101] as being inconsistent with the rationale of the principle as a tort of strict liability. To my mind the validity of the criticism depends upon understanding "strict liability" as connoting a reference to the extent of damage for which a defendant is liable as against connoting a reference to the level of care taken by the defendant. But it is in the latter sense that the expression not only was used in *Cambridge Water Co.* but is, I think, used generally in the law of torts, as shown, for instance, in Fleming, *The Law of Torts* [102].

National Australia Bank Ltd v Nemur Varity Pty Ltd [2002] VSCA 18 -

National Australia Bank Ltd v Nemur Varity Pty Ltd [2002] VSCA 18 -
Frost v Warner [2002] HCA 1 -
Kavanagh v Ioannou [2002] NSWCA 2 (30 January 2002) (Handley and Giles JJA, Ipp AJA)

> The appellant submitted that the duty of care owed by the service station operator to its customers required a daily inspection of all petrol bowser hoses before the premises were opened for business. He relied on ***Burnie Port Authority v General Jones Pty Ltd*** (1994) 179 CLR 520 which emphasised the high duty of care owed by persons whose business involves the storage and use of dangerous substances. There was no evidence that an incident of this nature had occurred previously at this or any other service station, although some four years before the hoses on the respondent's bowsers had been severed.

Kavanagh v Ioannou [2002] NSWCA 2 -
Kavanagh v Ioannou [2002] NSWCA 2 -
Kavanagh v Ioannou [2002] NSWCA 2 -
Scott & v McMahon & 2 Ors [2001] NSWCA 481 -
State Rail Authority of NSW v Watkins [2001] NSWCA 405 -
State Rail Authority of NSW v Watkins [2001] NSWCA 405 -
Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd [2001] HCA 63 -
Hollis v Vabu Pty Ltd [2001] HCA 44 (09 August 2001) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

> 39. In *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Cooperative Assurance Co of Australia Ltd* [49] , Dixon J explained the dichotomy between the relationships of employer and employee, and principal and independent contractor, in a passage which has frequently been referred to in this Court [50] . His Honour explained that, in the case of an independent contractor [51] :
>
> > "[t]he work, although done at [the principal's] request and for his benefit, is considered as the independent function of the person who undertakes it, and not as something which the person obtaining the benefit does by his representative standing in his place and, therefore, identified with him for the purpose of liability arising in the course of its performance. The independent contractor carries out his work, not as a representative but as a principal."
>
> *via*
>
> [50] *Kondis v State Transport Authority* (1984) 154 CLR 672 at 691692 ; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 574 ; *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 329330, 366.

Hollis v Vabu Pty Ltd [2001] HCA 44 (09 August 2001) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

> 26. As previously mentioned, Sheller JA addressed the vicarious liability issue on the footing that the bicycle couriers were independent contractors. His Honour rejected the claims that Vabu was vicariously liable for the acts of its bicycle couriers. He rejected Mr Hollis' submission that the activity in which the bicycle couriers were engaged on behalf of Vabu was "itself a hazardous one or dangerous because of [Vabu's] emphasis on speedy delivery and the recognition that a significant number of couriers disobeyed traffic rules and posed a danger to pedestrians" [21] . He also held that "[t]here was not and could not be any finding that Vabu directly authorised the offending courier to drive his bicycle in an illegal or negligent manner" [22] , thus (it was said) invoking an "agency" exception to the usual rule of nonliability of a principal. This matter was discussed recently in *Scott v Davis* [23] .

via

[23] (2000) 74 ALJR 1410 at 1440 [168]; 175 ALR 217 at 258. See also *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 575. *Morley v Gaisford* (1795) 2 H Bl 441 [126 ER 639] and *Chandler v Broughton* (1832) 1 C & M 29 [149 ER 301] are authority for the proposition that a master was directly liable for the trespasses of his servant where the acts comprising it were done "at [the master's] command".

Hollis v Vabu Pty Ltd [2001] HCA 44 -
Hollis v Vabu Pty Ltd [2001] HCA 44 -
Hollis v Vabu Pty Ltd [2001] HCA 44 -
Hollis v Vabu Pty Ltd [2001] HCA 44 -
Hollis v Vabu Pty Ltd [2001] HCA 44 -
Rich v State of Queensland & Ors [2001] QCA 295 -
Rich v State of Queensland & Ors [2001] QCA 295 -
Rich v State of Queensland & Ors [2001] QCA 295 -
Rich v State of Queensland & Ors [2001] QCA 295 -
Rich v State of Queensland & Ors [2001] QCA 295 -
Brodie v Singleton Shire Council [2001] HCA 29 (31 May 2001) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

67. The "highway rule" is said to be that, "by reason of any neglect on its part to construct, repair or maintain a road or other highway", a "road authority" incurs "no civil liability". The terms are those used by Dixon J in *Buckle* [64] . However, the cases develop exceptions and qualifications which so favour plaintiffs as almost to engulf the primary operation of the "immunity" [65] . The interests of public authorities cannot fairly be served by maintaining an "immunity" which functions so poorly.

via

[65] cf *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 544.

Brodie v Singleton Shire Council [2001] HCA 29 (31 May 2001) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

210. Thirdly, it is the undoubted function of a court such as this to contribute to the simplification of legal concepts, replacing categories with principles that will permit a more coherent and efficient application of the common law [365] . In this regard, this Court has functions in relation to the unified common law in Australia different from those of other final courts, such as the Supreme Court of the United States [366] . In discharging its functions, this Court, when asked, can and should reconsider the common law if, on analysis, that law appears to be out of harmony with altered social conditions [367] . Or if it contains anachronistic categories that invite abolition or modification [368] . Or if, effectively, it derogates unjustifiably from the principle of equality before the law [369] . One consideration that may encourage reexpression of the common law by the Court is a call for an established principle to be reconsidered by judges who have the responsibility of applying it and who identify defects occasioning confusion, uncertainty or injustice [370] .

via

[365] eg *Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7 at 20, 38 ; *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 484488 ; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 544550 ; *Northern Sandblasting* (1997) 188 CLR 313 at 395396 .

Brodie v Singleton Shire Council [2001] HCA 29 -

Brodie v Singleton Shire Council [2001] HCA 29 -
Brodie v Singleton Shire Council [2001] HCA 29 -
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Brodie v Singleton Shire Council [2001] HCA 29 -
Brodie v Singleton Shire Council [2001] HCA 29 -
Brodie v Singleton Shire Council [2001] HCA 29 -
Lepore v State of New South Wales [2001] NSWCA 112 (23 April 2001)

28. The concept of a non-delegable duty of care has been discussed in a number of High Court decisions (see ***Kondis v State Transport Authority*** (1984) 154 CLR 672, ***Burnie Port Authority v General Jones Pty Ltd*** (1994) 179 CLR 520 , ***Northern Sandblasting Pty Ltd v Harris*** (1997) 188 CLR 313 and ***Scott v Davis*** [2000] 175 ALR 217, [2000] HCA 52 at [245]-[249], [307]-[308], [353]). Employers, hospitals and school authorities are the clearest categories of relationships giving rise to such a duty.

Lepore v State of New South Wales [2001] NSWCA 112 (23 April 2001)

43. Discussion about non-delegable duties of care is usually accompanied by the statement that the duty will not be discharged merely by the employment of a qualified and ostensibly competent independent contractor (eg ***Burnie Port Authority*** at 550). However, the concept extends to negligence by employees, because it may be invoked where the fault is, or might be, that of an employee whether or not acting in the course of employment. Many of the hospital cases are in this category, because there is uncertainty whether the personal fault lay with an employee (eg a nurse) or an independent contractor (eg a visiting specialist surgeon).

Lepore v State of New South Wales [2001] NSWCA 112 -
Lepore v State of New South Wales [2001] NSWCA 112 -
Lepore v State of New South Wales [2001] NSWCA 112 -
Lepore v State of New South Wales [2001] NSWCA 112 -
Lepore v State of New South Wales [2001] NSWCA 112 -
Lepore v State of New South Wales [2001] NSWCA 112 -
Lepore v State of New South Wales [2001] NSWCA 112 -
O'Doherty v Birrell [2001] VSCA 44 (12 April 2001) (Winneke, P., Phillips and Batt, Jj.A)

44. The allegation of a duty to take reasonable care to prevent financial loss is extraordinary given that the duty was said to have arisen as between two barristers jointly retained in the same proceeding for the same clients. It is true that the trial judge was in no doubt about the defendant's neglect of his obligations. He said in the reasons for judgment:-

> "In my view, the defendant failed totally to fulfil his obligations to the defendants under his retainer in relation to the summary judgment application. I am unable to say whether his failure to do so was due to lack of diligence or incompetence or whether it occurred simply through him being out of his depth or a combination of those matters."

But that was neglect by Mr. Birrell of his obligations to the defendants in the South Australian proceeding. As already indicated Lander, J. too was doubtless of like mind when he ordered Birrell alone to pay the defendants' costs of the adjournment, fixed at $9,780. But to say as much does not answer the question whether Mr. Birrell owed to Mr. O'Doherty a duty to take care not to cause him financial loss as the two of them went about performing their tasks pursuant to the retainer that each had accepted for

the defendants in the South Australian proceeding. In our opinion the trial judge was correct to conclude that no such duty of care could arise between co-counsel retained to represent the interests of the same clients in the same litigation. [16]

via

[16] The trial judge said that in arriving at his conclusion he had referred to *Jaensch v. Coffey* (19 84) 155 C.L.R. 549, *Council of the Shire of Sutherland v. Heyman* (1985) 157 C.L.R. 424, *Hawkins v. Clayton* (1988) 164 C.L.R. 539, *Caparo Industries PLC v. Dickman* [1990] A.C. 605, *Gala v. Preston* (1991) 172 C.L.R. 243, *Burnie Port Authority v. General Jones Pty. Ltd.* (1994) 179 C.L.R. 520 , *Caltex Oil (Aust) Pty. Ltd. v. The Dredge "Willemstad"* (1976) 136 C.L.R. 529, *Hill v. Van Erp* (1997) 188 C.L.R. 159, *Esanda Finance Corp. Limited v. Peat Marwick Hungerfords* (1997) 188 C.L.R. 241, *W.D. and H.O. Wills (Aust) Limited v. State Rail Authority of New South Wales* (1998) 43 N.S.W.L.R. 338, *Pyrenees Shire Council v. Day* (1998) 192 C. L.R. 330, *Romeo v. Conservation Commission of the Northern Territory* (1998) 192 C.L.R. 431, *Yates Property Corp. v. Boland* (1998) 85 F.C.R. 84 (in the Federal Court) and Katter, *"Duty of Care in Australia; Is the Fog Lifting?"* (1998) 72 A.L.J. 871 .

Heydon v NRMA Ltd; Bateman v NRMA Ltd; Morgan v NRMA Ltd [2000] NSWCA 374 -
Almeida v Universal Dye Works Pty Ltd [2000] NSWCA 264 -
Ebner v Official Trustee in Bankruptcy [2000] HCA 63 -
Annetts v Australian Stations Pty Ltd [2000] WASCA 357 (21 November 2000) (Malcolm CJ, Pidgeon J, Ipp J)
Burnie Port Authority v General Jones Pty Ltd (1994) 179 CLR 520
Cormier v Dixon

Annetts v Australian Stations Pty Ltd [2000] WASCA 357 (21 November 2000) (Malcolm CJ, Pidgeon J, Ipp J)
Burnie Port Authority v General Jones Pty Ltd (1994) 179 CLR 520
Cormier v Dixon

Jones v Bartlett [2000] HCA 56 -
Jones v Bartlett [2000] HCA 56 -
Jones v Bartlett [2000] HCA 56 -
Scott v Davis [2000] HCA 52 (05 October 2000) (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ)

218. The judgment of Parke B, delivering the judgment of the Court of Exchequer in *Quarman* , is treated in this Court as the classic authority that at common law a person generally is not liable for the negligence of an independent contractor [344] . In *Parker v Miller* , Scrutton LJ appears to have overlooked the circumstance that in *Quarman* the plaintiff was non-suited because there was no master-servant relationship, despite there having been a right to "control" (in the sense used in *Samson v Aitchison*) retained by the defendants [345] .

via

[344] *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 43 ; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 577 ; *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 366.

Scott v Davis [2000] HCA 52 -
Scott v Davis [2000] HCA 52 -
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Scott v Davis [2000] HCA 52 -
Scott v Davis [2000] HCA 52 -
Scott v Davis [2000] HCA 52 -
Scott v Davis [2000] HCA 52 -
Scott v Davis [2000] HCA 52 -
City of Rockingham v Curley [2000] WASCA 202 -
City of Rockingham v Curley [2000] WASCA 202 -
Ward Enterprises Pty Limited v Ahern [2000] NSWCA 184 (01 August 2000) (Mason P, Meagher JA and Clarke AJA)

> 24 CLARKE AJA- I agree with Meagher JA that the trial judge's apportionment of responsibility cannot stand. However I am not persuaded that TNT Management Pty Limited (TNT) should bear 100% of the damages. 25 R L & B A Ward Enterprises Pty Limited (Ward) conceded that the facts found by his Honour established its breach of duty towards the plaintiff. It submitted, however, that it was liable only because it had failed to ensure that reasonable care was taken (Kondis v State Transport Authority (1984) 154 CLR 672 at 686. ; Burnie Port Authority v General Jones Pty Limited (1994) 179 CLR 520 at 550.). 26 The latter case made it clear that the obligation undertaken by Ward extended to "seeing that care was taken". Ward clearly failed in this respect. 27 Indeed the trial judge found that Ward failed properly to inspect the trailer or to take reasonable care to ensure that it was properly maintained. Not only were those findings justified but there was no evidence that when the "quick hitch" system was employed Ward took any steps to ensure that the trailer was in a proper condition. Ward simply relied on TNT. 28 While it is easy to understand the difficulties of ensuring that reasonable care was exercised in the maintenance of the trailer the simple fact is that Ward did nothing in order to comply with its obligations to its servants. 29 In these circumstances my opinion is that Ward should bear a proportion, albeit small, of the responsibility, I would fix its liability at 15%. 30 On the question of damages, while my initial reaction was that the award was very high, I agree with Meagher JA that the challenge must fail. 31 I wish to add only one observation. It is not open to this Court to accept Ward's submission that the plaintiff's return to the workforce must be offset because it was a financial benefit resulting from the death. Carroll v Purcell (1961) 107 CLR 73 . stands in the way of accepting that proposition. Any doubt on the question was removed by Dominish v Astill. (1979) 2 NSWLR 368 at 374, 386. 32 In the circumstances I agree with orders 1, 2 and 4 proposed by Meagher JA. I would, however, vary order 3 made by Cooper DCJ by setting it aside and in its place I would order that Ward contribute 15% and TNT 85% of the plaintiff's damages and costs. I would also order TNT pay 50% of Ward's costs of the cross-claims.

Ward Enterprises Pty Limited v Ahern [2000] NSWCA 184 -
Redken Laboratories (Australia) Pty Ltd v Docker [2000] NSWCA 100 -
Schellenberg v Tunnel Holdings Pty Ltd [2000] HCA 18 -
Schellenberg v Tunnel Holdings Pty Ltd [2000] HCA 18 -
Schellenberg v Tunnel Holdings Pty Ltd [2000] HCA 18 -
State of New South Wales v Buckland; Katena Pty Ltd v Buckland [2000] NSWCA 72 -
State of New South Wales v Buckland; Katena Pty Ltd v Buckland [2000] NSWCA 72 -
State of New South Wales v Buckland; Katena Pty Ltd v Buckland [2000] NSWCA 72 -
State of New South Wales v Buckland; Katena Pty Ltd v Buckland [2000] NSWCA 72 -
State of New South Wales v Buckland; Katena Pty Ltd v Buckland [2000] NSWCA 72 -
State of New South Wales v Buckland; Katena Pty Ltd v Buckland [2000] NSWCA 72 -
State of New South Wales v Buckland; Katena Pty Ltd v Buckland [2000] NSWCA 72 -
State of New South Wales v Buckland; Katena Pty Ltd v Buckland [2000] NSWCA 72 -
Woods v Multi-Sport Holdings Pty Ltd [2000] WASCA 45 (01 March 2000) (Malcolm CJ, Pidgeon J, Murray J)

> Burnie Port Authority v General Jones Pty Ltd (1994) 179 CLR 520
> Calin v Greater Union Organisation

Jakovich Transport and Earthmoving Pty Ltd v Spiral Tube Makers Pty Ltd [2000] WASCA 46 -
Jakovich Transport and Earthmoving Pty Ltd v Spiral Tube Makers Pty Ltd [2000] WASCA 46 -
Woods v Multi-Sport Holdings Pty Ltd [2000] WASCA 45 -

Esso Australia Resources Ltd v Federal Commissioner of Taxation [1999] HCA 67 -
Elliott v Bickerstaff [1999] NSWCA 453 (16 December 1999) (Handley, Stein and Giles JJA)

79 This was taken up in the joint judgment of Mason CJ and Deane, Dawson, Toohey and Gaudron JJ in *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 550-551 . Their Honours said -

Elliott v Bickerstaff [1999] NSWCA 453 -
Elliott v Bickerstaff [1999] NSWCA 453 -
Boland v Yates Property Corporation Pty Ltd [1999] HCA 64 (09 December 1999) (Gleeson Cj,gaudron, Gummow, Kirby, Hayne and Callinan JJ)

310. In the last 20 years it is possible to point to many changes in legal thinking in and as a result of decisions of this Court [299] . There are also a number of decisions of this Court on important matters in which different Justices have taken diametrically opposed views [300] . All of this is to highlight the increased difficulty which lawyers face in making decisions as to the way in which to conduct some complex cases and to advise their clients.

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[299] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 ; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. See also the discussion by Brennan J of presumptions as to the state of the law from time to time in *Giannarelli v Wraith* (1988) 165 CLR 543 at 583-586 .

Lipohar v The Queen [1999] HCA 65 -
Lipohar v The Queen [1999] HCA 65 -
Crimmins v Stevedoring Industry Finance Committee [1999] HCA 59 -
Hollis v Vabu Pty Limited (T/as Crisis Couriers) [1999] NSWCA 334 (05 November 1999) (Sheller and Giles JJA, Davies AJA)

22 Brennan J quoted and applied this in *Kondis v State Transport Authority* (1984) 154 CLR 672 at 691-2 and, in dissent, in *Burnie Port Authority v General Jones Pty Limited* (1994) 179 CLR 520 at 574. See also *Northern Sandblasting Pty Limited v Harris* at 366 per McHugh J. Dixon J at 49 said that he believed there was no case which distinctly decided that a principal was liable generally for wrongful acts which he did not directly authorise, committed in the course of carrying out his agency by an agent who was not the principal's servant or partner, except, perhaps in some special relations, such as solicitor and client, and then within limitations. At 49 hee quoted from Dr Baty, *Vi carious Liability*, at 44 as follows:

> "Principals have been held liable in cases substantially of contract. Principals have been held liable in cases of tort where the agent was also a servant. Principals have been held liable for the wrongs of their agents which they told them to commit. But, fortunately, there seems to be no occasion in which a mere agent has been held to have had 'implied authority' to commit wrongs or to be negligent. The danger that such a proposition may be laid down is nevertheless imminent."

This strict demarcation does not apply in the case where a principal confides to its agent the conduct of negotiations with a third party; see *Bayley v Manchester, Sheffield and Lincolnshire Railway Co* (1872) LR 7 CP 415 at 420 approved in the judgment of Dixon, Evatt and McTiernan JJ in *Australasian Brokerage Limited v Australian and New Zealand Banking Corporation Limited* (1934) 52 CLR 430 at 451. Such cases speak in the language of the scope of the agent's authority and ostensible authority. But that is in the context of statements made during the course of negotiation and has no application to the present case.

Hollis v Vabu Pty Limited (T/as Crisis Couriers) [1999] NSWCA 334 -
Hollis v Vabu Pty Limited (T/as Crisis Couriers) [1999] NSWCA 334 -
Hollis v Vabu Pty Limited (T/as Crisis Couriers) [1999] NSWCA 334 -
Hollis v Vabu Pty Limited (T/as Crisis Couriers) [1999] NSWCA 334 -
Cochrane v Hannaford [1999] NSWCA 371 -
Yanner v Eaton [1999] HCA 53 -
Newcastle Entertainment Security Pty Ltd v Simpson [1999] NSWCA 351 (27 September 1999) (Mason P, Sheller and Beazley JJA)

(c) Toohey J found that there was a non-delegable duty. His Honour emphasised that foreseeability itself would not generate such a duty of care (at 350-1). Nevertheless he held that the landlord could not escape liability merely by establishing that a qualified electrician was engaged to carry out the repair work. As I read his Honour's reasoning (esp at 351-2) the critical fact was that the landlord had, at the request of the tenant, undertaken to have the faulty stove repaired and had engaged an electrician for that purpose. (This was the principle stemming from *Pickard* to which Dawson J had adverted.) A particular application of that principle, cited by Mason J in *Kondis* (at 685) and by Toohey J in *Northern Sandblasting* (at 351) was *Meyers v Eastern* (1878) 4 VLR 283 where a landlord, at the solicitation of his tenant the plaintiff, had undertaken to renew the roof of his house. For reasons developed at 352-5 Toohey J held that *Burnie's* requirements of "control" and "special dependence or vulnerability" were satisfied and that there were no policy reasons which precluded the imposition of a non-delegable duty.

Newcastle Entertainment Security Pty Ltd v Simpson [1999] NSWCA 351 (27 September 1999) (Mason P, Sheller and Beazley JJA)

(e) McHugh J held that the landlord was subject to a personal, non-delegable duty of care because it undertook to have the electrical stove repaired in circumstances where the plaintiff and her parents might reasonably expect that due care would be exercised in repairing the stove (at 368-369). In his view, the case was analogous to the holding in *Burnie* that a land owner who allows a dangerous substance to be brought on to land or who allows a dangerous activity to be performed on land owes a non-delegable duty of care to persons who come on the land.

Newcastle Entertainment Security Pty Ltd v Simpson [1999] NSWCA 351 -
Newcastle Entertainment Security Pty Ltd v Simpson [1999] NSWCA 351 -
Newcastle Entertainment Security Pty Ltd v Simpson [1999] NSWCA 351 -
Newcastle Entertainment Security Pty Ltd v Simpson [1999] NSWCA 351 -
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Newcastle Entertainment Security Pty Ltd v Simpson [1999] NSWCA 351 -
Newcastle Entertainment Security Pty Ltd v Simpson [1999] NSWCA 351 -
Newcastle Entertainment Security Pty Ltd v Simpson [1999] NSWCA 351 -
Fabian v Welsh [1999] QCA 365 -
Elliott v Minister for Transport for the State of Western Australia [1999] WASCA 134 (19 August 1999) (Pidgeon J, Anderson J, Parker J)

Burnie Port Authority v General Jones Pty Ltd (1994) 179 CLR 520
Esanda Finance Corporation v Peat Marwick Hungerfords

Elliott v Minister for Transport for the State of Western Australia [1999] WASCA 134 -
Perre v Apand Pty Ltd [1999] HCA 36 (12 August 1999) (Gleeson Cj,gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

298. I refer, first, to the concern to avoid imposing legal liability upon an indeterminate class for indeterminate amounts [417] . This is a legitimate and justifiable concern. It would, for example, allow the law to draw a rational line which would deny recovery to the local store in the Perres' town whose income had dropped because of the loss to the Perre interests (and hence to the income of its principals and employees) following the loss of the export trade to

Western Australia. It would permit exclusion of a legal duty of care to a trucking firm which, before the blight, carried the potatoes to Western Australia. It would exclude consumers in that State, forced to purchase potatoes, or the crisps manufactured from them, from other more distant and expensive suppliers. A line must be drawn to limit indeterminate liability. What permits it to be drawn in this case, and not to exclude all of the Perre interests, is the specific foresight of potential damage to potato producers in the position of the Perres, operating in such close proximity to the Sparnons. In this sense the Perres were particularly vulnerable to the conduct of Apand, as it ought to have recognised and in a general sense did.

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[417] cf *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 593 per McHugh J .

Perre v Apand Pty Ltd [1999] HCA 36 -
Perre v Apand Pty Ltd [1999] HCA 36 -
Perre v Apand Pty Ltd [1999] HCA 36 -
Perre v Apand Pty Ltd [1999] HCA 36 -
Perre v Apand Pty Ltd [1999] HCA 36 -
Astley v AusTrust Ltd [1999] HCA 6 -
Scrase v Jarvis [1998] QCA 441 -
Bourke v Victorian Workcover Authority [1998] VSCA 24 -
Garcia v National Australia Bank Ltd [1998] HCA 48 -
R v Morrison [1998] QCA 162 -
Romeo v Conservation Commission of The Northern Territory [1998] HCA 5 -
Romeo v Conservation Commission of The Northern Territory [1998] HCA 5 -
Pyrenees Shire Council v Day [1998] HCA 3 -
Pyrenees Shire Council v Day [1998] HCA 3 -
Pyrenees Shire Council v Day [1998] HCA 3 -
Northern Sandblasting Pty Ltd v Harris [1997] HCA 39 (14 August 1997) (Brennan CJ; Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ)
[303] (1994) 179 CLR 520 at 551.

Northern Sandblasting Pty Ltd v Harris [1997] HCA 39 (14 August 1997) (Brennan CJ; Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ)
[302] (1994) 179 CLR 520 at 550-554 .

Northern Sandblasting Pty Ltd v Harris [1997] HCA 39 (14 August 1997) (Brennan CJ; Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ)
[137] (1994) 179 CLR 520 at 551-552 .

Northern Sandblasting Pty Ltd v Harris [1997] HCA 39 (14 August 1997) (Brennan CJ; Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ)
[162] (1994) 179 CLR 520 .

Northern Sandblasting Pty Ltd v Harris [1997] HCA 39 (14 August 1997) (Brennan CJ; Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ)
[296] (1994) 179 CLR 520 .

Northern Sandblasting Pty Ltd v Harris [1997] HCA 39 (14 August 1997) (Brennan CJ; Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ)
[288] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 551.

Northern Sandblasting Pty Ltd v Harris [1997] HCA 39 -
Northern Sandblasting Pty Ltd v Harris [1997] HCA 39 -
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Northern Sandblasting Pty Ltd v Harris [1997] HCA 39 -
Northern Sandblasting Pty Ltd v Harris [1997] HCA 39 -
Esanda Finance Corporation Ltd v Peat Marwick Hungerfords [1997] HCA 8 (18 March 1997) (Brennan CJ; Dawson, Toohey, Gaudron, McHugh and Gummow JJ)

> [54] (1994) 179 CLR 520 .

Hill v Van Erp [1997] HCA 9 (18 March 1997) (Brennan CJ; Dawson, Toohey, Gaudron, McHugh and Gummow JJ)

> [64] (1994) 179 CLR 520 .

Hill v Van Erp [1997] HCA 9 -
Hill v Van Erp [1997] HCA 9 -
Esanda Finance Corporation Ltd v Peat Marwick Hungerfords [1997] HCA 8 -
Hill v Van Erp [1997] HCA 9 -
Esanda Finance Corporation Ltd v Peat Marwick Hungerfords [1997] HCA 8 -
Hill v Van Erp [1997] HCA 9 -
Hill v Van Erp [1997] HCA 9 -
Hill v Van Erp [1997] HCA 9 -
Hill v Van Erp [1997] HCA 9 -
Hill v Van Erp [1997] HCA 9 -
Wik Peoples v Queensland [1996] HCA 40 (23 December 1996) (Brennan CJ; Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ)

> [457] See also the discussion by McHugh J of this passage in *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 592-593 .

Lanestar and Monrest Pty Ltd v Arapower Pty Ltd, Deasy Investments Pty Ltd and Deasy [1996] QCA 466 -
Bale v Seltsam Pty Ltd [1996] QCA 288 -
Bale v Seltsam Pty Ltd [1996] QCA 288 -
Birstar v Proprietors 'Ocean Breeze' BUP No 4745 [1996] QCA 110 -
Harris v Northern Sandblasting [1995] QCA 413 (08 September 1995)

> Pty Ltd (1994) 179 C.L.R. 520 . The pertinent passages, which are set out in the reasons

Ltd (1994) 68 A.L.J.R. 331 , 346 , col. 1C. The plaintiff was a child, but, in respect of her

Harris v Northern Sandblasting [1995] QCA 413 (08 September 1995)

[1973] A.C. 912 the court was, in the absence of legislative warrant to depart from it, understandably reluctant to disturb.

Once it is accepted that, properly construed, s. 106(1)(a) imposes on a landlord an obligation which, according to its plain terms, requires the premises to be maintained in a condition fit for human habitation, the problems confronting the plaintiff in her action against the third defendant largely disappear. Putting aside arguments founded on contractual privity means that the terms of s. 106(1)(a) fall to be viewed as giving rise to a statutory duty to maintain in repair. In accordance with general principles, a duty of that kind is, in a context like this, to be considered as conferring a private right of action for damages for its breach. The question then is to identify the persons in whose favour it is intended to operate. The tenant is obviously one such person; but to limit the right of action to the tenant is simply to resurrect the reasoning based on contractual privity. Limiting the right to those linked contractually to the landlord would mean that the statutory provisions added little or nothing to the implied warranty already recognised by *Smith v. Marrable* in 1843.

That is not the view that has been taken of comparable legislation in other jurisdictions. In *Basset Realty Ltd. v. Lindstrom* (1979) 103 D.L.R. (3d) 654, the successful plaintiff was not the tenant himself but a five year old boy whose mother was living with the tenant in a suburban house rented from the defendant. In giving the judgment of the Appellate Division dismissing the landlord's appeal against a judgment for damages for personal injuries caused when the plaintiff fell out of a defective attic window, Jones J.A. said (103 D.L.R. (3d) 654, 666):

> "The tenant and members of his household were clearly within the class of persons intended to be protected by the statute ..."

In *Altz v. Leiberson* 134 N.E. 703 (1922) a similar view was taken of a New York statute requiring tenement housing to be kept in good repair. In delivering the judgment of the

Court of Appeal, Cardozo C.J. said (at 704):

> "We may be sure that the framers of this statute, when regulating tenement life, had uppermost in thought the case of those who are unable to protect themselves. The duty imposed becomes commensurate with the need. The right to seek redress is not limited to the city or its officers. The right extends to all whom there was a purpose to protect."

Two further matters call for attention. Inevitably it will be said that to hold the third defendant liable to the plaintiff in circumstances like these is to extend the liability of landlords for undetected defects to an endless range of potential plaintiffs. That is not so.

Under both s. 7(a)(i) of the *Residential Tenancies Act*, and s. 106(1)(a) of *Property Law Act*, to say nothing of the common law, a landlord is already under a duty to tenants to ensure that leased premises are in a condition fit for human habitation. The interpretation favoured here simply applies that duty to members of the tenants' immediate family. The question whether it would extend to visitors and friends coming on the premises may be left, as it was in *Zavaglia v. MAQ Ltd* (1983) 50 B.C.L.R. 204, 212, for decision on another occasion.

Policy considerations. On the other hand to exclude the tenant's children from the protection of the statutory provisions would lead to arbitrary consequences that can best be illustrated by reference to the circumstances of the present case. Here both the plaintiff's parents were parties to the tenancy agreement. Each was therefore entitled to the benefit of the statutory provisions. If it had been the plaintiff's mother who had turned the tap off, she would have had a cause of action statutory or otherwise, in respect of the injures cased by doings so. As it happened, she was talking to the plaintiff's father at the time, and so she asked her daughter to attend to the tap. Her daughter the plaintiff was not a party to the tenancy agreement. For obvious reasons children, especially young children, never are. If that is so, it may be that they are specially vulnerable and so in need of protection of the kind considered in *Burnie Park Authority v. General Jones Pty. Ltd* (1994) 68 A.L.J.R. 331 , 346 col. 1C, which entails liability for the negligent acts of independent contractors. There is no other way in which they can receive the protection needed for their safety. But I prefer the view that, in enacting s. 7(a)(i) and s. 106(1)(a) , the legislature must have had in mind the protection not only of those who chanced to become in law tenants of the premises let, but all members of the family who might reasonably be

expected to be living there. In the case of short leases for three years or less, the underlying social policy is self-evident. Any other conclusion would mean that the legislation had done little more than codify the law in the form it has been in since 1844. It is true that in *Basset Reality Ltd v. Lindstrom* (1979) 103 D.L.R. (3d) 654, 666, there is a passage which suggests that the statutory duty is limited to ensuring that the premises are as safe as reasonable care and skill could make them. That corresponds to the standard of care owed to contractual entrants under *Francis v. Cockerell* (1870) L.R. 5 Q.B. 184 as interpreted in *Maclennan v. Segar* [1917] 2 K.B. 325. For my part, I cannot see that it makes any difference to express the duty in that way. The house here was not as safe as reasonable skill and care could make it. In *Francis v. Cockerell* liability attached to the occupier even though the plaintiff's injury resulted from the negligence of an apparently competent independent contractor engaged by the occupier to construct the grandstand. If the extent of liability corresponds with that of the common callings, it is qualified only by exceptions for acts of God and the King's enemies, inherent vice, and default of the plaintiff himself. None of these is a matter relevant to the third defendant's liability in the present case. However, the statutory provisions should in my opinion be approached in accordance with their plain words and ordinary meaning, free of any pre-disposition to maintain the traditional immunity of landlords at common law. So read and understood, they confer a right of action for breach that is available to the plaintiff in the present case.

Fortified by the Canadian and Americans referred to earlier, I would be prepared to hold that the plaintiff is entitled to succeed in reliance on the obligation implied by s. 7(a)(i) of the *Residential Tenancies Act 1975* . I continue to think, however, that s. 106(1)(a) of the *Property Law Act 1974* presents a less controversial basis on which to found a judgment in her favour. The amended statement of claim in paras. 3C to 3G allege a duty in the statutory terms to maintain the subject premises in a condition fit for human habitation and the breach of that duty. In doing so, para. 3F refers specifically to s.7(a) of the *Residential Tenancies Act*, but not to s. 106(1)(a) of the *Property Law Act* . Despite an invitation issued in the course of hearing the appeal, nothing has been suggested by the third defendant to persuade me that allowing an amendment to include a reference in para.

3F to s. 106(1)(a) would take the third defendant by surprise, or would have affected the third defendant's defence of the action, or the way in which it was conducted at the trial. Here the material facts are all alleged, "and in these days so long as the facts are alleged, that is sufficient for the Court to proceed to judgment without putting a particular legal label upon the cause of action". *Shaw v. Shaw* [1954] 2 Q.B. 429, 441.

Lord Denning was there speaking of a case in which the plaintiff's claim was on appeal presented for the first time as one of breach of an implied warranty on which she ultimately succeeded. The present case is in that respect at least as strong as *Shaw v. Shaw* . Indeed, the plaintiff would be entitled to succeed in reliance on s. 106(1)(a) by amending the statement of claim so as simply to omit the words "by section 7(a) of the Residential Tenancies Act 1975 " that appear in para. 3F, leaving the allegation in that paragraph in other respects to stand in a form capable of attracting either or both of the two relevant statutory provisions. It may nevertheless be preferable to put the matter in para. 3F beyond doubt by inserting an express reference to s. 106(1)(a) of the *Property Law Act*

Harris v Northern Sandblasting [1995] QCA 413 -
Harris v Northern Sandblasting [1995] QCA 413 -
Harris v Northern Sandblasting [1995] QCA 413 -
Dynevor Pty Ltd v Proprietors, Centrepoint Building Units Plan No 4327 [1995] QCA 166 -
Northern Territory v Mengel [1995] HCA 65 -
Bryan v Maloney [1995] HCA 17 -
Bryan v Maloney [1995] HCA 17 -
Bryan v Maloney [1995] HCA 17 -
Bryan v Maloney [1995] HCA 17 -
Queensland Railways v Houston [1994] QCA 529 (07 December 1994) (Pincus JA. Davies JA. Lee J.)

A duty to ensure that reasonable care is taken does not amount to a guarantee that an accident will not occur. The appellant is not an insurer of risks and it advances the argument no further to say that the appellant, as an occupier carrying on a dangerous activity, was under a higher duty than persons in less analogous positions: Burnie Port Authority v. General Jones Pty Ltd (1992-94) 68 A.L.J.R. 331 , 345-7 ; Kondis v. State Transport Authority (1984) 154 C.L.R. 672, 686. The expression "non-delegable duty" is but another way of expressing the proposition that the particular duty is and continues to be a personal one.

Gay v Pidgeon [1994] QCA 303 -