

## **1BCL**

### **Law of Tort:**

### **Tutorial No. 1**

### **Rylands v Fletcher**

Stephen O'Halloran BCL, LLM (Commercial)

### **CASES:**

#### **General Principle:**

- *Fletcher v Rylands* [1861 – 73] All ER Rep. 1 (Exchequer)
- *Rylands v Fletcher* [1861 – 73] All ER Rep. 1 (House of Lords)
- *Read v Lyons* [1946] 2 All ER 471
- *Perry v Kendrick* [1956] 1 All ER 154

#### **Evolution of Rylands v Fletcher towards either Negligence or Nuisance:**

- *Cambridge Water Company v Eastern Counties Leather* [1994] 1 All ER 63 (Nuisance)
- *Burnie Port Authority v General Jones Pty* (1994) 179 CLR 520 (Negligence)
- *Transco plc v Stockport Metropolitan Borough Council* [2004] 1 All ER 589 (Nuisance)

*“There are few cases upon which such magnificent edifices of theory have been erected and few, which in the process, have been so sadly misunderstood.”*

Prosser, describing the rule in *Rylands v Fletcher*.

A law student studying the topic of *Rylands v Fletcher* would be forgiven for thinking that the rule must be invoked on a daily basis in the Four Courts given the amount of paper and energy expended in trying to explain the operation of the rule. Such a law student would in fact be gravely mistaken. The paucity of authority versus the amount of academic discussion devoted to the rule was commented upon by Lord Hoffman in *Transco v Stockport*, where he said:

*“It is perhaps not surprising that counsel could not find a reported case since 1939 – 45 war in which anyone had succeeded in a claim under the [Rylands v Fletcher] rule. It is hard to escape the conclusion that the intellectual effort devoted to the rule by judges and writers over many years has brought forth a mouse!”*

The rule is of little importance to the modern practitioner, but as law students, it is important that you understand where the rule came, how it works, and where it is going. The exam question will be either a problem question testing your knowledge of the rule and the various defences, or it will be an essay question about the future of *Rylands v Fletcher* and whether it is merely an aspect of nuisance or negligence or a tort in its own right. **I would strongly recommend reading the recent House of Lords decision of**

*Transco v Stockport*, [2004] 1 All ER 589, as it gives an excellent summary of the law up to 2004 and guidance on some of the more contentious aspects of the rule.

## THE RULE:

### Rylands v Fletcher (1866 – 68)

#### Facts:

The defendant landowners, Rylands<sup>1</sup> and Horrocks, engaged some independent contractors to construct a reservoir to supply water to their mill. Due to the negligence of the contractors, and unknown to the defendant landowners, the reservoir was constructed above 5 old blocked vertical mine shafts. When the reservoir was partially full, one of these shafts burst downwards, emptying the reservoir, and the water travelled underground through a series of old abandoned coal workings. These abandoned mines had come to be connected to the active underground workings of Thomas Fletcher, the plaintiff and owner of an adjoining mineshaft, the Red House Colliery. His colliery was inundated with water and all work had to be suspended. He sued the defendants for damages. The plaintiffs had a problem however. Liability could not be based on any of the existing torts at the time. The activity constituted a single escape, which was neither continuous nor recurring. Therefore, there was no actionable private nuisance. At the time, there was no such thing as vicarious liability for the actions of independent contractors; therefore there was no cause of action. The landowners themselves were not negligent. They had no knowledge of the actions of the independent contractors. The judiciary however, could not allow the defendant to escape liability. Professor AWB Simpson discusses the background of the rule in his article “*Legal Liability for Bursting Reservoirs: The Historical Context of Rylands v Fletcher*”, (1984) 13 JLS 209 at 219. He explained that:

*“In 19<sup>th</sup> century Britain there occurred two sensational reservoir disasters, and to appreciate the significance of these incidents it is important to appreciate the menacing character of a large dam once anxiety as to its security becomes current. Those who live or work in the area thought to be endangered by failure can conceive of themselves as permanently and continuously threatened; and depending on the state of the law, they may be, or at least think themselves to be, impotent in the face of the ever present threat. Nuclear power stations possess this menacing character for many*

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<sup>1</sup> John Rylands was an enormously successful entrepreneur. He entered his father’s textile business as a partner, and when his father died, gained sole control. In 1873, he turned the business into a limited company, which was the largest of its kind in the cotton industry and the largest employer in the country, having some 12,000 operatives in 17 mills and other establishments. Rylands died worth £2,574,195 in 1888. His widow, and third wife, bought Althorp Library as his memorial and as the John Rylands Library, it is now administered by the University of Manchester: See ‘*Bursting Reservoirs*’ (n 117) 239.

*people today, and it is not a product of the frequency of accidents at all.”*

In the mind of the judges when formulating the principle in *Rylands v Fletcher* was the public anxiety about the safety of reservoirs cause in particular by the bursting of the Bradfield Reservoir near Sheffield on the 12 March 1864, with the loss of about 250 lives.

**Held:**

Blackburn J in the Court of Exchequer Chamber stated the rule as follows:

*“We think that the true rule of law is that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it 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 ... [T]he neighbour who has brought something on his property, which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows will 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.”*

The House of Lords affirmed the lower courts decision, and the principle was restated by Lord Cairns. This restatement has caused some confusion in later decisions. He said that:

*“If the defendants, not stopping at the natural use of their close [read as land], had desired to use it for any purpose which I may term a non-natural use for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below the ground in quantities and in a manner not the result of any work or operation on or under the land; and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril; and if in the course of their doing it the evil arose to which I have referred – the evil, namely, of the escape of the water and its passing away to the close of the plaintiff and injuring the plaintiff, then for the consequence of that, in my opinion, the defendants would be liable ...”*

For a long time after the decision, Blackburn J denied any originality in the formulation of the rule. In *Ross v Fedden* he said:

*“I wasted much time in the preparation of the judgment in Rylands v Fletcher if I did not succeed in showing that the law held to govern it had been the law for at least 300 years.”*

The justice did protest too much methinks, because the chapters devoted to the rule in every textbook proclaim the contrary. He did in fact formulate a new rule of strict liability for damage caused by an escape of something accumulated on a person's property if that accumulation was a non-natural use of the property.

#### **ELEMENTS OF THE RULE:**

The rule in *Rylands v Fletcher* imposes **strict liability** on the defendant landowner if the following conditions are satisfied:

- **Accumulation of something on the defendant's property e.g. gathering water in a reservoir, gathering explosives in a warehouse, storing chemicals.**
- **The thing that is accumulated on the property has to escape from the property e.g. dam bursts and water flows onto neighbours land, chemicals explode causing damage to neighbour and property.**
- **Before strict liability will be imposed, it must be shown that accumulating the thing on the property was a 'non-natural' use of the land. This is the most contentious issue in Rylands v Fletcher liability because precedent is of little value and the outcome seems very much to depend on the circumstances and the subjective determination of the presiding judge.**
- **Finally, the plaintiff must show that the thing which escaped caused damage. In the modern formulations of the rule, the courts have held that the damage must also be a reasonably foreseeable consequence of the escape: *Cambridge Water Company v Eastern Counties Leather* per Lord Goff.**

#### **ESCAPE:**

##### **Read v Lyons**

##### **Facts:**

The plaintiff was an inspector for the Ministry of Supply during World War II. She was sent to inspect a munitions factory owned by the defendant. While carrying out her duties at the factory, she was injured in an explosion which occurred during the filling of shell cases with explosives. She argued that the defendant should be held strictly liable under the principles of *Rylands v Fletcher*. The case turned on what constituted a valid escape for the purposes of the rule. The plaintiff was on the premises when she was injured.

##### **Held:**

Viscount Simon said that the plaintiff's action had to fail because there was no escape. He said that:

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

The plaintiff failed to establish liability under *Rylands v Fletcher* because she was injured within the property of the defendant.

***Issue of recoverability for personal injury under the rule:***

All remarks by the Lords on this issue were obiter, and therefore serve only to guide later courts, not bind them. Viscount Simons declined to consider the issue because he had already dispensed with the case under the escape requirement. He did indicate however that personal injuries may not be recoverable:

*"It may be noted, in passing, that Blackburn J himself when referring to the doctrine of Rylands v Fletcher in the later case of Cattle v Stockton Waterworks leaves [the issue of personal injuries] undealt with. He treats damages under the Rylands v Fletcher principle as covering damages to property, such as workmen's clothes or tools, but says nothing about liability for personal injuries."*

Lord MacMillan dealt with the issue head on in his speech. He felt that an action for personal injuries was better taken under the heading of negligence rather than *Rylands v Fletcher*:

*"In my opinion persons injured by the explosion inside or outside the defendant's premises would alike require to aver and prove negligence to render the defendants liable ... The doctrine of Rylands v Fletcher, as I understand it, derives from a conception of the mutual duties of adjoining or neighbouring landowners ... If its foundation is to be found in the injunction sic utere tuo ut alienum non laedas, then it is manifest that it has **nothing to do with personal injuries** ... I think that the doctrine of Rylands v Fletcher, when studied in its setting, is truly a case on the mutual obligations of the owners or occupiers of neighbouring closes and is entirely inapplicable to the present case, which is quite outside its ambit."*

## NON-NATURAL USE:

This is a control mechanism for liability under the rule in *Rylands v Fletcher*, but unfortunately it is also the most difficult to identify due to ambiguous and often mistaken application throughout the years. Modern courts regard something as a non-natural use of land if it is abnormal, excessive or inappropriate to its location. Another indicator that a use is non-natural is if the activity of the defendant is in some way unusual or out of the ordinary according to acceptable social standards. The definition of non-natural use that has gained most acceptance was laid down in the case of *Rickards v Lothian*:

*“There must be some special use bringing with it an increased danger to others, and must not merely be the ordinary use of land or such a use as is proper for the general benefit of the community.”*

It has been further developed by the House of Lords in *Cambridge Water* and *Transco*, and I will deal with those developments when discussing those cases.

Judicial precedents on this issue are confusing and inconsistent. It has become a very subjective criterion, heavily criticised and essentially amounting to a value judgment on the part of the judge varying from place to place and time to time.

### Examples of Non-Natural Use:

#### (i) Water

The decision in *Rylands v Fletcher* is authority for the proposition that an accumulation of water will constitute a non-natural use of land. In *Imperial Tobacco v Hart*, domestic use of water for heating, and in *Carstairs v Taylor* and *Ross v Fedden* use of water for domestic plumbing are not non-natural uses of property. In Australia, it has been contended that swimming pools in private residences do not come under the rule: Shelton ‘Anyone for Tennis?’ (1984) 58 Law Institute Journal 639. In *Peters v Prince of Wales Theatre* a sprinkler system was held not to come within the rule.

#### (ii) Trees

Trees are not normally considered to come under the rule. Indeed one of the gentler souls of the English legal system was scandalised at the proposition that a beech tree could come within the rule of *Rylands v Fletcher* in *Noble v Harrison* per Wright J:

*“A beech tree is a usual and normal incident of the English country; it develops by slow natural growth, its branches are not likely to cause danger, even if permitted to expand outwards over the highway. Such a tree cannot be compared to a tiger, a spreading fire, or a reservoir in which a hug weight of water is artificially accumulated to be kept in by dams, or noxious fumes or sewage.”*

### (iii) Electricity, gas and explosives

*Collingwood v Home & Colonial Stores Ltd*: Domestic use of electricity does not come under the rule of *Rylands v Fletcher*.

*Miller v Robert Addie*: Domestic use of gas does not come under the rule in *Rylands v Fletcher*.

Non domestic uses of these things may give rise to strict liability: *Northwestern Utilities v London Guarantee and Accident Co*; *Hanson v Wermouth Coal Ltd*.

The dicta relating to the storage of explosives have been contradictory. In *Rainham Chemical Work v Belvedere Fish Guano* the court held that the manufacturing of explosives was a non-natural use of land. However, in *Read v Lyons*, the court held that the manufacturing of explosives was a natural use of land. Viscount Simon said:

*“I think it not improper to put on record, with all due regard to the admission and dicta in that case, that if the question had ... to be decided whether the making of munitions in a factory at the governments request in time of war for the purpose of helping to defeat the enemy is a non-natural use of land, adopted by the occupier for his on purposes, it would not seem to me that the House would be bound by this authority to say that it was.”*

### (iv) Motor Cars

In *Musgrove v Pandelis* it was held that a motor car brought into a garage with full tanks was a dangerous object, a conclusion which, in 1936 as Romer LJ pointed out in *Collingwood v Home and Colonial Stores Ltd*, involves the propositions that a motor car is a dangerous thing to bring into a garage and that the use of one's land for the purpose of erecting a garage and keeping a motor car there is not an ordinary or proper use of the lands. Similarly, in *Perry v Kendricks*, the storage of a motor car on property was enough to attract the rule in *Rylands v Fletcher*. That case was decided in 1956.

Do you think that the idea that keeping a car on your property would still constitute a non-natural use today? This is an example of how the concept of non-natural use can vary over time and why precedent is unhelpful and sometimes unreliable for determining the issue.

### DEFENCES:

There are a number of defences to *Rylands v Fletcher* :

- **Consent of the plaintiff:** The rule does not apply to the escape of things brought by the defendant onto his premises with the consent of the plaintiff. In such cases, the plaintiff will be limited to an action in negligence: *Victor Weston Ltd v Kenny*. The most common application of this defence is in the situation where water escapes on the upper storey of a building with several tenants: *Victor*

*Weston Ltd v Kenny*; *Rickards v Lothian*. Also, as in *Scully v Marjorie Boland Ltd*, the fact that water used for domestic purposes is generally regarded as a natural use of property would also defeat the claim. The defence of consent also extends to cases of common benefit.

- **Special Sensitivity or default of the plaintiff:** In *Rylands v Fletcher*, Blackburn J recognised that the plaintiff's own default was a ground for excluding the application of the rule. Therefore, in *Dunn v Birmingham Canal*, mine-owner who worked his mine under the defendant's canal in the knowledge of the danger and brought water down from the canal upon himself was denied recovery.
- **Act of God:** In *Rylands v Fletcher* Blackburn J stated that the defendant could "excuse himself by showing that the escape was a consequence of vis major, or the act of God." An Act of God was defined by Lord Westbury in *Tennent v Earl of Glasgow* (1864) as "an event which no human foresight can provide against, and of which human prudence is not bound to recognise the possibility." Only the most extreme natural disasters will afford a good defence. Gales (*Lawler v Sir James Mackey*), heavy rain (*AG v Cory Bros and Greenock Corporation v Caledonian Railway*) and heavy snowfall (*Fenwick v Schmaltz*) have been held not to have been Acts of God. The defence succeeded in the case of *Nichols v Marshland*. In that case the defendant had formed artificial ornamental lakes on his property by damming a stream. Owing to an extraordinary storm described as that heaviest in living memory, the water escaped and carried away the plaintiff's bridges. The defendant escaped liability using the defence of Act of God.
- **Statutory Authority:** In some instances a statute may authorise the defendant to act in a manner that would involve liability under *Rylands v Fletcher*. Where the harm is a necessary incident of the activity authorised by the statute, liability under the rule will not attach.
- **Act of a Stranger:** We will now deal with the next case in the tutorial materials, *Perry v Kendricks*.

### **Perry v Kendricks**

#### **Facts:**

The defendant was storing a vehicle on his premises. He objected to people crossing the park, and regularly chased children away. The petrol tank in the motor coach had been drained and regularly inspected. The plaintiff was walking by the park and saw two boys standing near the coach and then run away. The motor coach then exploded and injured the plaintiff. He sued the defendant for his injuries.

#### **Held:**

The storage of the motor coach on the defendant's property was a non-natural use of land for the purposes of *Rylands v Fletcher*:

*"I am prepared to accept the view that this motor coach in the condition in which it was on the defendant's land was an object of the class to which*



*the rule in Rylands v Fletcher applies, that is to say, that it was, for this purpose, a dangerous thing, because the tank contained inflammable petrol vapour and the defendants were under an obligation to prevent it, or the dangerous element in it, escaping onto a neighbour's land and doing damage there."*

The court also accepted that the rule could be applied to personal injuries:

*"I do not think that it is open for this court to hold that the rule applies only to damage to adjoining land or to proprietary interest in land and not to personal injury. It is true that in Read v Lyons Lord Macmillan, Lord Porter and Lord Simons all doubted whether the rule extended to cover personal injuries, but the final decision in the matter was expressly left over and, as the matter stands at present, I think we are bound to hold that the defendants are liable in this case, quite apart from negligence, unless they can bring themselves within one of the well known exceptions to the rule."*

The court then went on to deal with the defence of Act of Stranger. They said that a stranger was a person over whose acts the occupier of the land had no control. They then went on to say that the defence will not be applicable if the act of this stranger was one which the defendant could reasonably have anticipated and guarded against. It was not sufficient to show that the defendants knew that the children played in the vehicle park. The plaintiff must show *"that the defendants reasonably should have anticipated an act of a kind which would cause the escape."* The appeal was dismissed and the defendant was allowed to rely on the act of a stranger defence to escape liability.

### **EVOLUTION OF RYLANDS V FLETCHER TOWARDS NEGLIGENCE OR NUISANCE?**

Describing the arguments between keeping *Rylands v Fletcher* separate from other torts and combining it, Megaw LJ said that it was:

*"A regrettable modern instance of the forms of action successfully clanking their spectral chains."*

English and Australian judges have, over the past few decades, severely questioned the utility of the rule in *Rylands v Fletcher*. The popular assertion in England has been that the rule is really only a subspecies of the law of private nuisance. By contrast, the Australian judiciary has abandoned the rule altogether, preferring to expand the law of negligence to capture the rule's former territory. This naturally raises the question of which of the two torts share the closest connection with the rule in *Rylands v Fletcher* and whether the rule has any sustainable claim to continued independence.

### **Connection to Nuisance:**

**What is nuisance?** The essence of nuisance, according to Newark, is a “*tort directed against the enjoyment of rights over land.*” In *Hurdman v The North Eastern Railway Co* Cotton LJ said of private nuisance:

*“Every occupier is entitled to the reasonable enjoyment of his land and it is well established that an occupier of land may protect himself by action against any one who allows filth or any other noxious thing produced by him to interfere with this enjoyment.”*

Nuisance is concerned with ongoing interferences with amenities associated with land. In other words, some continuing annoyance that prevents a person from reasonable enjoyment of his land e.g. excessive and continuous noise, noxious fumes.

**Why Rylands v Fletcher is actually different to nuisance:**

**John Murphy**, in his article ‘*The Merits of Rylands v Fletcher*’ in the 2004 edition of the **Oxford Journal of Legal Studies**, argues that there are significant differences between *Rylands v Fletcher* and nuisance which rebut the argument that *Rylands v Fletcher* is merely a subset of nuisance:

- **Emphasis on land ownership:** One reason why textbook writers and law teachers more generally often deal with the law of private nuisance and the rule in *Rylands v Fletcher* side by side is that they share the connection of being torts centred on land. Their respective spheres of operation are frequently the same i.e. disputes between neighbouring landowners. Yet there is a critical distinction between the two torts. It is that while nuisance law insists absolutely that the claimant should possess a proprietary interest in the land affected, there is no such equivalent requirement under the rule in *Rylands v Fletcher*. Rather, the only mention of any land in Blackburn J’s formulation refers to **land owned by the defendant**. English law has never insisted that the plaintiff be a landowner for the purposes of the rule. In *Transco v Stockport* the House of Lords suggested obiter that a claim under the rule must relate to an interest in land, but this is in stark contrast with the case of *Rainham Chemical Works v Belvedere Fish Guano*. In that case Lord Buckmaster said:

*“The familiar doctrine established by the case of Rylands v Fletcher ... depends upon ... the use of land by one person in an exceptional manner that causes damage to another, and not necessarily an adjacent owner.”*

The rule has always been capable of being clearly distinguished from nuisance. *Rylands v Fletcher* is centred on accumulation on the defendant’s land rather than (as in private nuisance) a claimant’s ownership interest in the land affected by some form of interference for which the defendant is responsible.

- **Personal Injuries:** Newark, when commenting on the law of nuisance said:

*“In true cases of nuisance, the interest of the plaintiff which is invaded is not the interest of bodily security, but the interest of liberty to exercise rights over land in the amplest manner ... a sulphurous chimney in a residential area is not a nuisance because it makes householders cough and splutter, but because it prevents them taking their ease in their garden.”*

The idea that personal injuries were recoverable in the law of nuisance was dismissed in the case of *Hunter v Canary Wharf*. In that case Lord Goff said that:

*“Although in the past, damages for personal injury have been recovered at least in actions of public nuisance, there is now developing a school of thought that the appropriate remedy for such claims ... should lie in ... negligence and that personal injury claims should be altogether excluded from the domain of nuisance.”*

In the same case, Lord Hoffman said that in the case of nuisance, the *“action is not for causing discomfort to the person ... [but] for causing injury to the land.”*

By contrast, the rule in *Rylands v Fletcher* has not historically been restricted to actions based on interferences with rights in or over land. In Blackburn J’s dictum he intended that the rule not be limited to damage to land, because he himself mentioned that it would cover damage to chattels (personal property). Later, he allowed a claim for damage to a haystack in *Jones v Festiniog Railway Co*. Similarly, in a more modern decision, the court in *Halsey v Esso Petrol* allowed the owner of a car to recover compensation under the rule for damage to the paintwork caused by acid smuts.

The more contentious point was whether the rule could be invoked to provide a remedy for personal injuries. Blackburn J did not expressly rule out a claim for personal injuries under the rule. He said that a defendant would be *“answerable for all the damage which is the natural consequence of [the] escape.”* As we have seen in *Read v Lyons* and as we will see in *Transco v Stockport*, the House of Lords have on two occasions said obiter that personal injuries were not recoverable under the rule. The justification for saying this in *Transco* was that because *Hunter v Canary Wharf* said that personal injuries were not recoverable in nuisance and since *Rylands v Fletcher* was itself a subset of nuisance, then personal injuries were not recoverable. However, we have seen that *Rylands v Fletcher* is different from nuisance in that there is no requirement that the claimant have an interest in land. The only critical land in the tort is that belonging to the defendant. Perhaps the judgment of Parker LJ in *Perry v Kendrick*s is to be preferred, where he doubted the correctness of *Read v Lyons* in excluding a claim for personal injuries under *Rylands v Fletcher*.

## Bringing Rylands v Fletcher under the wing of nuisance:

### Cambridge Water v Eastern Counties Leather

#### Facts:

The defendant was a leather manufacturer. The employees regularly spilled a solvent used in the tanning process onto a concrete floor prior to a change in method. The solvent seeped through the floor into the soil and then moved eight meters a day until it reached the plaintiff's water supply, which was 1.3 miles away. The solvent would have taken nine months to reach the well once it had been spilled. The well became unusable. The plaintiffs sued under *Rylands v Fletcher*.

#### Held:

In an important judgment on the nature of *Rylands v Fletcher*, Lord Goff rejected the claim of the plaintiffs. He said that because Blackburn J and the other judges who formulated the rule in *Rylands v Fletcher* believed that they were simply restating existing law, this was indicative that *Rylands v Fletcher* was not a separate tort, but merely an aspect of the law of nuisance.

Because of this connection with the law of nuisance, he felt that the concept of foreseeability of harm should now form a part of the rule. He felt that:

*"knowledge, or at least foreseeability of risk, is a prerequisite of the recovery of damages under the principle."*

Therefore, in order to impose strict liability for *Rylands v Fletcher*, you must establish the following elements:

- Accumulation of something on the land;
- Escape of that thing from a place where the defendant has occupation or control into a place where he has no control;
- A non-natural use of the property. According to *Rickards v Lothian*, which was endorsed by Lord Goff, this is *"some special use bringing with it increased danger to others."*
- Damage. However, this requirement is now qualified. **The damage caused by the escape must be reasonably foreseeable consequence of the escape to the defendant.** Only after all of these things have been satisfied will there be 'strict liability'.

In this case, Lord Goff felt that the seepage of the chemicals into the well was not reasonably foreseeable; therefore the plaintiff could not recover. He also made some important comments about the test of non-natural use laid down in *Rickards v Lothian*. In that case, Lord Moulton stated that:

*“It is not every use to which land is put that brings into play at 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.”*

It was the last comment about general benefit to the community with which Lord Goff had problems. He felt that the strict liability of *Rylands v Fletcher* would be diluted too much if this criteria for natural use was used. Where does one stop when assessing ‘general benefit to the community’? Provision of services, employment etc. It is impossible to keep the exception within reasonable bounds:

*“I ... do not feel able to accept that the creation of employment as such, even in a small industrial community, is sufficient of itself to establish a particular use as constituting natural or ordinary use of land.”*

Lord Goff was also of the opinion that:

*“The storage of substantial quantities of chemicals on industrial premises should be regarded as an almost classic case of non-natural use.”*

### **Transco v Stockport**

#### **Facts:**

Stockport Council owned a residential tower block, Hollow End Towers. Water for the 66 flats flowed through a main pipe to the base of the tower. There, it passed into the defendant’s service pipe and was collected in large tanks in the basement. Subsidence caused the service pipe to crack beneath the tank room floor, soaking the soil beneath. The land became so water logged that water gushed from the ground outside the block. Thousands of litres of escaping water found their way to a disused nearby railway embankment, also owned by the council, trickled 200 meters along a footpath on top of the embankment, before pouring into a crack in the embankment. This caused the soil to partially collapse, exposing a long length of the plaintiff’s high-pressure gas pipe exposed and unsupported. The pipe was not damaged, but its condition was dangerous in that it could have slumped and broken under its own weight posing a risk of explosion. The plaintiff did not own the land around the pipe. The defendant owned the land, but had granted the plaintiff an easement to lay the pipe. (An easement is a right in your favour which affects someone else’s property e.g. a right of way). The council was not obliged to fix the problem; therefore the plaintiff had to pay to have the soil repaired. They sought to recover the cost (about £100,000) of this work under the rule in *Rylands v Fletcher*.

## **Held:**

*Should Burnie port authority be applied in England?*

The House of Lords took the opportunity to clarify and restate the rule in *Rylands v Fletcher*. The defendant offered the House of Lords the opportunity to end the rule's independent existence by submerging it into the tort of negligence. They wanted the House to follow the Australian case of *Burnie Port Authority v General Jones Pty Ltd*, which will be discussed below. The Law Lords resisted the temptation. It was recognised, albeit with varying degrees of enthusiasm, that *Rylands v Fletcher* should be retained. Most in favour were Lord Bingham and Lord Hobhouse. Lord Bingham observed that *Rylands* represented a "category of case however small ... in which it seems just to impose liability even in the absence of fault." Lord Hobhouse considered the rule to be "a useful and soundly based component of the law of tort". Moreover, A more equivocal position was taken by Lord Scott who thought that the abolition of *Rylands* was "a rather drastic solution and not necessary." The most antipathy for the rule was voiced by Lord Hoffman. Although unable to find "any rational principle" for it, he nevertheless considered its abolition "too radical" a step to take.

Even though the Lords chose to keep *Rylands v Fletcher*, they restated the rule in a way which will severely limit its practical use.

*Does the rule encompass actions other than damage to land?*

The Law Lords chose to confine the action to impose liability only where there had been damage to real property interests in the absence of fault, thereby excluding personal injuries from the ambit of the rule. Lord Hobhouse stated that in order to claim under the rule both parties must be landowners. They reached this conclusion by applying Lord Goff's opinion in *Cambridge Water* that *Rylands v Fletcher* was merely a sub-species of nuisance, with the narrow ruling in *Hunter v Canary Wharf*, which excluded recovery for personal injuries from private nuisance. Bagshaw, when commenting on the decision in the 2004 edition of the Law Quarterly Review, found this conclusion surprising for a number of reasons:

- In explaining why the rule was useful, the Lords referred to the disasters caused by the bursting of the dams at Bradfield Reservoir, Aberfan and Flixborough. These disasters were made horrifying by the loss of life rather than the effects on neighbouring property owners. If the rule was brought in to give people peace of mind that there would be an action in law should the dams burst, then why should personal injuries be excluded?
- In defending the continued existence of the rule, Lord Bingham drew attention to statutes imposing strict liability which suggested that Parliament had assumed that the rule in *Rylands v Fletcher* would continue to exist. The examples he chose, all involve liability which extends to cover personal injury and damage to personal property as well as land. Parliament apparently did not share the view that it is only just to impose liability for damage to real property interests (land).

- Bagshaw also argued that *Rylands v Fletcher* was sufficiently distinct from nuisance that applying the *Hunter v Canary Wharf* case was not justified. He said that one of the functions of private nuisance is to decide what activities people should be permitted to pursue in a particular locality given the effects of those activities on neighbours. *Rylands v Fletcher* has never been used to forbid particular activities. As Lord Hoffman put it, it is a rule about who pays when things go wrong rather than about whether the defendant's activity is wrongful. In *Hunter v Canary Wharf*, the reason they excluded personal injuries from nuisance was the need to limit the number of claimants so as to facilitate sensible agreements about the continuation of disturbing activities. In that case, the claimants were complaining about the building of the tower at Canary Wharf. A decision to allow the personal injuries claims and damage to chattel claims would have placed an intolerable restraint on the building industry as to how they conducted construction of buildings. This reasoning is not applicable to *Rylands v Fletcher*.

#### *Non-natural Use:*

The Lords took the opportunity to restate what was traditionally considered the most controversial aspect of *Rylands v Fletcher* : Non-natural use. Lord Bingham recommended that in the future the equivalent question should be whether the use of the land was “*extraordinary and unusual*”. Lord Walker expressly adopted Lord Bingham's observations, but wanted to ask whether the use of the land was “*special*”. Lord Hobhouse and Lord Hoffman criticised the use of either “*ordinary*” or “*natural/non-natural*” in formulations of the rule.

A majority (Lord Bingham, Lord Hobhouse and Lord Walker) confirmed that the question of whether a use is non-natural, extraordinary or special is not the same as whether it was unreasonable. They also stressed the importance of establishing that the defendant brought onto his land something “*he ought reasonably to have recognised as giving rise to an exceptionally high risk of danger or mischief if there should be an escape, however unlikely an escape may have been thought to be.*”

Lord Hoffman stated that:

*“a useful guide in deciding whether the risk has been created by a non-natural user of land is ... to ask whether the damage which eventuated was something against which the occupier could reasonably be expected to have insured himself.”*

#### *Was there an escape?*

One unusual feature of the case was that the escaped water remained on the defendant's land, merely moving to a part of the land over which the claimant had an easement. Lord Hoffman was willing to assume that the claimant's easement was a sufficient proprietary interest to entitle it to claim under either private nuisance or the rule in *Rylands v*

*Fletcher* and stated that “*escape from the defendant’s land or control*” is an essential requirement for a claim.

Lord Scott, however, was clear that the plaintiff’s claim should fail because there had been no escape from the defendant’s land and considered that in a case involving an easement, the rule in *Rylands v Fletcher* could not help the plaintiff. Lord Hobhouse also doubted whether the plaintiff’s easement was sufficient to give it a right to recover under the rule. Practical simplicity and precedent (*Read v Lyons*) favours Lord Scott’s rule that there must be an escape beyond the physical boundaries of the defendant’s land.

#### *Decision:*

Ultimately, the Lords dismissed the plaintiffs appeal on the basis that it was impossible to regard the supply of water by the council to the flats as anything other than a natural or ordinary use of property. The water pipe created no greater risk than was normally associated with domestic or commercial plumbing. While water in quantity is always capable of causing damage if it escapes, the piping of a water supply from the mains to a storage tank was a routine function not raising any special hazard. Therefore the case did not fall within the scope of the rule in *Rylands v Fletcher*.

#### **Connection to Negligence:**

#### **Why keep *Rylands v Fletcher* separate from Negligence?**

Beyond its usefulness as a mechanism for securing environmental protection, there are a number of reasons for keeping *Rylands v Fletcher* separate from negligence. To allow the rule to be swallowed up by negligence would mean that in some cases claimants would face insurmountable evidentiary burdens, burdens that may be inappropriate as a matter of policy and justice. If we assume that large factories and other industrial enterprises are the most likely sources of escapes that would be caught by *Rylands v Fletcher*, then it is highly improbable that a relatively poor plaintiff would be able to establish the necessary lack of reasonable care for the purposes of a negligence action. Strict liability no fault *Rylands v Fletcher* provides redress where a necessarily fault based law of negligence would not.

#### **The rule is abandoned in favour of Negligence:**

#### **Burnie Port Authority v General Jones Pty Ltd**

#### **Facts:**

In 1979, a waterfront warehouse owned by the Authority was destroyed by fire. General Jones, a canning company, occupied three cold rooms in the warehouse building under an agreement with the Authority. A large quantity of frozen vegetables stored by General Jones in the cold rooms was ruined in the fire. At the time of the fire, the Authority was carrying out work to extend the building. The original building in which the vegetables were stored was known as ‘Stage 1’ and the uncompleted extension was known as ‘Stage



2'. The Authority hired independent contractors to install electrical and refrigeration equipment in 'Stage 2'. In the vicinity of where the independent contractors were carrying out welding, there were 30 cardboard boxes containing an insulation material known as 'Isolite'. If this material was brought into sustained contact with a flame or burning substance it would ignite and dissolve into a liquid fire which burned with extraordinary intensity. The Isolite was stored with the knowledge of the Authority in an area where the independent contractors were welding. While welding, sparks or molten metal set the cardboard alight and in turn ignited the Isolite. Both 'Stage 2' and 'Stage 1' were burned to the ground and the plaintiff's stock was destroyed.

### **Held:**

The majority decided that the rule in *Rylands v Fletcher*, "*with all its uncertainties, qualifications and exceptions, should now be seen, for the purpose of the common law of Australia, as absorbed by the principles of negligence.*" They felt that the practical application of the rule had descended into "*an essentially ad hoc subjective determination of whether the particular facts fell within undefined notions of what is special or not ordinary.*" In essence, the criticisms voiced were reducible to the simple proposition that the rule in *Rylands v Fletcher* had so dreadfully lost its way that it ought decently to be confined to the graveyard of legal history.

The main argument for keeping the rule was that it imposed liability in cases where it would not otherwise exist. The High Court of Australia considered that this was no longer the case, and that negligence had expanded to fill the gap that *Rylands v Fletcher* once filled. They said that in the categories of cases which *Rylands v Fletcher* dealt with, there was a central element of control which the defendant had over the plaintiff which put the plaintiff in a special position of dependence or vulnerability. This relationship of vulnerability generated a special duty of care in negligence. The High Court believed that once it was appreciated that the special relationship of proximity which exists in circumstances which would attract the rule in *Rylands v Fletcher* also gives rise to a duty of care in negligence, it becomes apparent that it is highly unlikely that liability will not exist under ordinary principles of negligence in any case where liability would not exist under the rule in *Rylands v Fletcher*. The new test they laid down was as follows:

*"A person who takes advantage of his or her control of premises to introduce a dangerous substance or to carry on a dangerous activity, owes a duty of reasonable care to avoid a reasonably foreseeable risk of injury or damage to the person or property of another. Where the person is outside the defendant's premises, the duty varies according to the magnitude of the risk involved."*

The critical question in this case was whether the Authority had taken advantage of its occupation and control of the premises to allow the independent contractors to introduce or retain a dangerous substance or to engage in a dangerous activity on the premises. In their view, the Authority had breached the duty that it owed to General Jones for the damage sustained in the fire.

## EXAM QUESTIONS

**Summer 2005:**

**Summer 2004: Q 2(i) Essay (ii) Problem**

**Summer 2003: Q4 Essay**

**Autumn 2003: Q1 Problem**

**Autumn 2002: Q3 Essay**

**Autumn 2001: Q4 Essay**

**Autumn 2000: Q5(i) Essay**

**Autumn 1999: Q3(i) Essay**

### QUESTION 2(II) SUMMER 2004:

*I have broken up the question into sections in order to demonstrate how important it is to analyse every sentence in a problem question. Before you write anything, you **must read through the question at least twice**. I would also strongly advise planning your answer on the rough work paper provided before you ever start to write so that you don't forget something or leave something out. **Always begin a problem question like this one by stating the guiding rule and then the issues as you perceive them.** At the end, have a brief recap of all of the issues and your advice to ensure that you have not missed anything. Leave a space before starting the next question so that you can come back and add things if you need to.*

**Ω** Recylots is a recycling plant established in a rural area in 1974 by Mr. Burner.

Does this mean that it is an unusual activity for the area? Or does the fact that the plant has been in operation for so long mean that what would once have been considered unusual, has now become normal for the area? This will feed into your discussion of the non-natural use requirement under the rule. You can refer to examples of how the concept of what is natural or non-natural is constantly changing. For example, *Rainham Chemical Works*, an explosives factory was a non-natural use of land, but 20 years later, in *Read v Lyons*, an explosives factory was a natural use of land during a time of war. See also *Musgrave v Pandelis* and *Perry v Kendricks* where storing a car on property was held to be a non-natural use. It is highly improbable that the same conclusion would be reached today.

**Ω** Because of its environmentally friendly activity, Mr. Burner was granted statutory immunity from nuisance actions provided the plant does not exceed the generous toxic emissions levels set.

**Environmentally Friendly Activity:** First, refer back to the test for non-natural use laid down by *Rickards v Lothian*, and focus on the last part of the test. Something will be a natural use of property if it benefits the community. Does the fact that Recylots is engaging in an environmentally friendly activity mean that it is a natural use of the

property? You will need to refer to *Cambridge Water Company v Eastern Counties Leather* and Lord Goff's criticisms of this part of Lord Moulton's test.

**Statutory Immunity from Nuisance:** This is an opportunity for you to show what you know about the evolution of the rule in *Rylands v Fletcher*. In England in modern times, the judges have claimed that the tort is not a separate tort, but merely a subset of the law of nuisance. If this is the case, then does this statutory immunity for nuisance actions encompass the rule in *Rylands v Fletcher*? See *Rylands v Fletcher*, *Read v Lyons*, *Cambridge Water*; *Transco v Stockport*; *Burnie Port Authority*.

Ω The plant recycles paper, tin, glass and plastic. The tin, glass and plastic are each recycled by a heating process in separate specially designed furnaces which are cooled by water from the nearby river. The paper is treated with chemicals and when the process is completed it is stored wet in wooden crates beside the river.

This part of the problem question is meant to remind you to mention that one of the requirements for strict liability under *Rylands v Fletcher* is that there is an accumulation of something on the land of the defendant. You will also have to address whether or not the storage of these materials constitutes a natural or non-natural use of property. The fact that they are being stored for a commercial purpose might indicate a non-natural use.

Ω Adjacent to Recylots is River Bank Farm owned by Mr. Fallow. Mr. Fallow is a dairy, sheep and crop farmer. He also owns the champion racehorse, Dandini which he is training for the Irish Derby and is odds on favourite for the cup and \$150,000 prize money.

When the horse is injured, Mr. Fallow loses his 'chance' to win the prize money. Is it possible to recover for 'loss of a chance'? According to *Chaplin v Hicks* [1911] KB 786, a plaintiff is allowed to recover for loss of a chance in contract law. In the law of tort, whether or not loss of chance is recoverable is still being debated: *Hotson v East Berkshire Area Health Authority* [1987] AC 750. It seems that the courts are reluctant to allow recovery for loss of a chance of avoiding a physical injury, however, they have generally been more lenient where the damage to which the chance relates is economic loss. In Australia, the High Court allowed recovery for the loss of a commercial opportunity in *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332.

Even if 'loss of chance' were recoverable, and we are not entirely certain on this point, we must still address the issue of whether or not economic loss is recoverable under *Rylands v Fletcher*: *Cattle v Stockton*, *Weller v Foot & Mouth Disease Institute*. This also leads to a discussion of the type of damage that is actually recoverable under the rule. You would be expected to discuss the case law where the House of Lords have held that the tort is strictly limited to actions in relation to damage to land: *Transco v Stockport*, *Read v Lyons*, *Cambridge Water v Eastern Counties Leather*.

Ω On an unusually windy day in late 2003, Mr. Bunsen, the furnace operator, puts the materials in the wrong furnaces.

**On an Unusually Windy Day:** This is meant to trigger a discussion of one of the defences to *Rylands v Fletcher*, Act of God or vis major. Is this enough to trigger the defence? Refer to the case law, and give reasons for your answer by citing examples of where the defence has succeeded and where the defence has failed: *Nichols v Marsland*, *Superquinn v Bray UDC* etc.

**Mr. Bunsen:** The owner of the property was not negligent, however his employee was? Will there be vicarious liability? Will the plaintiffs have an action in both *Rylands v Fletcher* and Negligence?

Ω This results in explosions in all the furnaces whereby the plastics are emitted from the chimney in a semi molten state and cover the sheep which are about to be sheared. The fleeces are ruined and can only be sold at a loss of 50,000.

This is the escape requirement under the rule. Define escape: *Read v Lyons*.

The second part of this section gives us more information about the type of damage suffered. Mr Fallows has suffered economic loss, in not being able to sell the fleeces. He has also suffered damage to personal property, in that the fleece were his property. Is this type of damage recoverable? See *Transco v Stockport*, *Cambridge Water Company v Eastern Counties Leather*, *Read v Lyons*, *Halsey v Esso Petroleum* etc.

Ω The tin is also emitted which unluckily for Mr. Fallow hits and seriously injures him and fatally injures his pet dog, Felix.

Are personal injuries recoverable under *Rylands v Fletcher*? *Transco v Stockport*, *Hale v Jennings*, *Read v Lyons*, *Perry v Kendricks*, *Cambridge Water v Eastern Counties Leather*, *Hunter v Canary Wharf* etc.

Mr Fallows dog is his personal property. What type of damage is recoverable under the rule in *Rylands v Fletcher*?

Ω Dandini's training track is covered with broken glass, similarly emitted, resulting in his training schedule being curtailed and he will not be able to race in the Derby.

This is damage to land, therefore he can recover for the damage caused to the training track. Whether or not he can recover for the economic loss caused by the loss of a chance is debatable. However, it seems that economic loss is not recoverable under the rule: *Cattle v Stockton*, *Weller v Foot & Mouth Research Institute*, *Transco v Stockport*.

Ω The cattle have recently fallen ill and the crops have wilted. Testing on water samples reveal accumulated quantities of the chemicals used in treating the paper at the plant. Mr. Fallow's herd has to be replaced at a cost of 250,000. The loss of profit on the crop is 15,000.

This is a question of foreseeability of damage. You will be expected to discuss the decision of *Cambridge Water v Eastern Counties Leather* and the requirement that the damage be a reasonably foreseeable consequence of the escape, added by Lord Goff.

Again, the issue of the type of damage that is recoverable under the rule crop up. Economic loss is not recoverable, damage to personal property/chattels is not recoverable. The only type of damage that is currently recoverable under the rule is damage to land: *Transco v Stockport*.

**If you could establish that Mr Burner was vicariously liable for the acts of his employee, Mr Bunsen, would Mr Fallow be able to recover the economic loss in negligence? See Tutorial Number 4 (after Christmas).**

Ω Mr. Fallow's children are emotionally disturbed at the loss of Felix. Mr. Fallow seeks your advice.

We know that this type of damage is not recoverable under *Rylands v Fletcher*. However, if one were to make Mr Burner vicariously liable for the negligent acts of his employee, Mr Bunsen, then there might be a case to answer in negligently inflicted nervous shock. However, it would still be likely to fail under the *Alcock* criteria. Have they suffered a recognised psychiatric illness? Not very likely. Will the courts recognise ties of close love and affection between a person and an animal as being sufficient for the test? Again, not very likely. That being said however, a woman was able to recover for nervous shock having witnessed her house being burned down in *Attia v British Gas*. This is authority for the proposition that one can suffer a recoverable nervous shock by witnessing the destruction of property. If the children witnessed the death or aftermath of their dog, which is their property, and suffered a recognised psychiatric illness, would this be enough?