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The Rule in Rylands v Fletcher

by

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Abstract of the Thesis.

The thesis will commence with a brief study of the historical background to the rule in Rylands v Fletcher[1] with a view to considering the extent to which Blackburn J.'s statement of the rule was the exposition of a completely new principle of law.

A detailed examination will be then made of the various component parts of the rule with chapters discussing the need for an escape, whether there is liability for personal injury and the concepts of non-natural user and dangerous object. Liability for the escape of fire will also be considered.

Having clarified the precise nature and scope of the tort we will then consider to what degree the general claim that the tort is one of strict liability is justifiable. An important aspect of this part of the thesis will be the consideration of the effect which the five defences to the tort and the need for there to be a non-natural user of land have on the strictness of liability.

Notice will also be taken of the fact that doubts about the strictness of liability in Rylands v Fletcher together with the modern tendency of the tort of negligence to form its basis of liability more on a concept of risk than of fault means that we are moving towards an equation of the two torts.

Finally we must look to the future and consider the direction in which the tort may go. Will the gap between negligence and Rylands v Fletcher diminish further until the technicalities surrounding Rylands v Fletcher result in its disappearance as a separate entity into a wider principle of negligence or will some completely new system of compensation for personal injury supersede all the present rules and make both negligence and Rylands v Fletcher redundant?

1. 1866 L.R. 1 Ex. 265.

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CHAPTER 1

The Origins of the Rule in Rylands v Fletcher.[1]

The rule in Rylands v Fletcher had its genesis as a separate head of tortious liability in the second half of the nineteenth century although its historical antecedents are of far greater antiquity. In order to fully understand the nature and scope of the rule it is necessary initially to make a detailed study of the case of Rylands v Fletcher itself and, in particular, of the judgment of Blackburn J. in the court of Exchequer Chamber.

The facts of the case were, briefly, that Messrs. Rylands and Horrocks, the defendants at first instance, caused a reservoir for the holding of rain water to be constructed on their own land. To this end they employed a competent engineer and contractor. The district was a mining area and it so happened that at the selected site there were some old vertical shafts which, as it transpired, led down to abandoned coal workings. These vertical shafts, which were half filled with earth, were discovered by the workmen while constructing the reservoir but they filled them up and blocked them with such care as was deemed necessary. Subsequently, the reservoir being filled, the water forced its way down these shafts and, escaping into the old workings, flowed through them and flooded the coal mine of Fletcher, the plaintiff. On these facts the case came before the Court of Exchequer which comprised Sir Frederick Pollock C.B. and Barons Bramwell, Martin and Channell.[2]

There were two points at issue. The first was whether the defendants were liable irrespective of negligence on the part of themselves or those who constructed the reservoir and the second was whether, although not themselves negligent, the defendants were liable for the negligence of the

1. 1866 L.R. 1 Ex. 265.
2. 3 H. and C. 774.

independent contractor they had employed. On this second point the court decided in favour of the defendants. The question was not further considered on appeal in view of the decision that the defendents were liable on the first point but the weight of authority would suggest that the court was wrong for, no matter how competent an independent contractor is, a plaintiff cannot relieve himself of liability by entrusting to him work which is potentially dangerous to adjacent property.[3]

On the first point the Court of Exchequer gave judgment in favour of the defendants on the ground that they were not liable for damage resulting from the lawful user of their own land in the absence both of intent and of negligence. Bramwell B. dissented on the ground that the plaintiff had the right to enjoy his land free from foreign water and that the defendants' act was both a trespass and a nuisance.

Error was brought to the Court of Exchequer Chamber which consisted of Willes, Blackburn, Keating, Mellor, Montague Smith and Lush J.J. They unanimously held the defendants liable; the judgment of the court being delivered by Blackburn J. The learned judge began by saying that it was an established rule of law that a person who brings something onto his lands and keeps it there is under a duty to see that it does not escape and cause damage to his neighbours. He saw the question at issue as being "whether the duty which the law casts upon him under such circumstances is an absolute duty to keep it in at his peril or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions to keep it in, but no more":[4] in other words did the plaintiff have to establish that the defendant had been negligent?

In answer to this question Blackburn J. gave what has come to be regarded as the standard pronouncement of the rule in Rylands v Fletcher. He said:[4] "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

3. Tarry v Ashton 1876 1 Q.B.D.314.
4. At pages 279, 280.

likely to do mischief it is 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 showing 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 enquire what excuse would be sufficient. The general rule, as stated above, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of this neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows 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. But for his act in bringing it there no mischief could have accrued and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, we think this is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches."

We must now examine the authorities on which this proposition was based. Blackburn J. remarked that as early as the Year Book 20 Ed. 4 - 11 Placitum 10 Brian C.J. laid down a doctrine very much resembling the later judgement of Lord Holt C.J. in Tenant v Goldwin[5] on which Blackburn J. placed much reliance. The earlier case was concerned with cattle trespass. The defendant's cattle had strayed on to the plaintiff's land and the defendant drove them back as soon as possible. Brian C.J. held that this was not sufficient

5. 2 Ld. Raym. 1089. (1704)

excuse to avoid liability and said[6]: "It behoves him to use his common so that he shall do no hurt to another man, and if the land in which he has common be not enclosed, it behoves him to keep the beasts in the common and out of the land of any other." He further emphasised this by adding, when it was proposed that the pleading should be amended so as to claim that the cattle were driven out of the common by dogs, that this excuse would not constitute a valid defence to the action.

Blackburn J. then cited the case of Cox v Burbridge[7] where the defendant's horse trespassed on to the highway and there kicked a young child. The child had no proprietary interest in the highway and so no question of cattle trespass arose. It was held that in the absence of negligence or scienter the defendant was not liable. Williams J. did however say obiter[8]: "I apprehend the general rule of law to be perfectly plain. If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour, and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial." Again in May v Burdett[9] where the plaintiff was bitten by the defendant's monkey the court concluded that "a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure at his peril."

An earlier authority relied on for this proposition was Lord Hale who, in his Pleas of the Crown[10], said that where one keeps a beast, knowing its nature or habits are such that the natural consequence of his being loose is that he will harm men, the owner "must at his peril keep him safe from doing hurt for, though he use his diligence to keep him up,

6. Pages 1089 and 1090.
7. 13 C.B. (N.S.) at page 438 (1863)
8. Page 438
9. 1846 9 Q.B. 101
10. At page 430.

if he escape and do harm the owner is liable to answer damages" although, as Lord Hale goes on to show, he will not be liable criminally without proof of want of care.

The case on which Blackburn J. placed most reliance, Tenant v Goldwin , was concerned not with the escape of animals but with the escape of filth. This case was a motion in arrest of judgment after judgment by default and thus everything that was correctly pleaded in the declaration was admitted to be true. The declaration alleged that the plaintiff had a cellar which lay contiguous to a messuage of the defendant and used (Solebat) to be separated and fenced from a privy house of office, parcel of the said messuage of the defendant, and by the defendant of right ought to have been repaired. Yet he did not repair it and for want of repair filth flowed into the plaintiff's cellar. The objection taken was that there was nothing to show that the defendant was under any obligation to repair the wall; that, it was said, being a charge not of common right, and the allegation that the wall de iure debuit reparari by the defendant being an inference of law which did not arise from the facts alleged.

Lord Holt C.J. held that there was a sufficient cause of action. He did not decide this on the solebat or the de iure debuit reparari since it was enough to say that the plaintiff had a house and the defendant had a wall and he ought to have repaired the wall. Lord Raymond commented:[11] "The reason of this case is upon this account, that everyone must so use his own as not to do damage to another; and as every man is bound so to look to his cattle as to keep them out of his neighbour's ground, that so he may receive no damage; so he must keep in the filth of his house of office that it may not flow in upon and damnify his neighbour." Lord Holt's reasoning can be seen to correspond very closely with that of Brian C.J.

11. 2 Ld. Raym. 1089 at page 1092.

The reason for the existence of such duties as this duty to repair was that they either afforded protection or provided a benefit. The defendant had either to deny the duty or to plead that he had performed it; to deny fault was not a proper plea. That this was Lord Holt's conception of the duty would appear from the fact that he likened the defendant's obligation to repair the wall to the duty to restrain cattle in which it was immaterial how diligently the defendant had tried to prevent their escape. Nor is there any allegation that the defendant knew of the bad condition of the wall, that it was obvious or that he was remiss in not discovering it. It was evident to Lord Holt that the duty of repair required the wall to be actually in good order, so that it should in fact be sufficient to keep the filth in. The defendant's conduct is important only as a means of accomplishing this required result and not as a thing which in itself determines his liability. We are looking at the matter in a wholly objective fashion, purely external to the defendant. His conduct is judged solely by its result and not by his subjective attitude, his deliberate disregard of his neighbour's safety nor even by his omission to diligently take those steps necessary to secure that safety.

Blackburn J.[12] next referred to the escape of noxious vapours. He was unable to quote any decisions on the precise point but gave an illustration from a case a few years before Rylands v Fletcher in which three actions were brought against the owners of some alkali works for alleged damage caused by fumes. It was shown that all possible precautions had been taken but the jury decided that the fumes must have escaped, somehow, and it was thus held that the defendant was liable. The verdict, Blackburn J. stated, was not disputed by the defendant on the ground that all proper care had been taken.

Blackburn J. thus derived the rule in Rylands v Fletcher from cases

12. At page 285.

concerned with the escape of cattle and filth and a notional case concerned with the escape of fumes. This process of reasoning has a marked similarity to the inductive process. Inductive reasoning is a process whereby we argue from the observed to the unobserved, concluding that some quality found to reside in all observed members of a class must therefore necessarily reside in all other members. Thus in Rylands v Fletcher we see the court starting from the fact that there were rules concerning the escape of cattle and of various other things and ending by positing a rule for all things whose escape is liable to cause damage. This it will be seen is not a true case of induction. There would be a genuine example of inductive reasoning if, for example, a non-lawyer, having discovered a rule about the escape of cattle and various other similar rules went on to infer that English law has a strict rule regarding all those things whose escape might cause harm. In practice this may be true but it does not, nevertheless, necessarily follow from the basic premise that it will be true. On the other hand in Rylands v Fletcher the court did not infer that English law contained such a rule, it decided that it did.

Whether in deciding Rylands v Fletcher the court established a new rule of law or merely reiterated a pre-existing principle will be discussed shortly but it is now necessary to look at the attitude taken by the House of Lords[13] to Blackburn J.s judgment on appeal. Doubts have been expressed[14] as to whether the House of Lords consisted of the necessary three judges at the hearing but this is not germane to the issue for Rylands v Fletcher is far too well established a case to founder on such a technicality. What we are sure of is that two judgments were delivered in the House, by the Lord Chancellor, Lord Cairns, and by Lord Cranworth.

The Lord Chancellor based his judgment affirming the decision of the Court of Exchequer Chamber on two propositions of law. First, Lord Cairns stated that in cases such as this the defendant could lawfully have used the land for any purpose for which it might in the ordinary course of

13. L.R. 3 H.L. 330 and 19 L.T. 220
14. See 19 L.T. 220 at page 221.

the enjoyment of land, be used, and if in such 'natural user' of that land, as he termed it, there was any accumulation of water whether on the surface or underground and if by the operation of the laws of nature that accumulation of water had passed into the plaintiff's land, then the plaintiff could not complain at law. The Lord Chancellor cited as his authority for this proposition the case of Smith v Kenrick.[15] In that case the owner of a coal mine worked out all of his coal and so left no barrier between his mine and the mine on the lower level so that the water percolated through the upper mine, flowed into the lower mine and obstructed the owner of it in getting in his coal. It was held that on the facts there was no liability since the defendant had a right to remove all his coal and the damage was caused by the natural flow or percolation of the water .

Secondly Lord Cairns said that if the defendant, not being satisfied with a merely natural user of his land, wanted to use it for any non-natural user in order to bring into or on the land that which, in its natural condition, was not in or on the land, and if in consequence of his doing so or in consequence of any imperfection in the mode of his doing so the water happened to escape and to pass into the plaintiff's land, then the defendant in so behaving is acting at his own peril and if in the course of this the water escaped and passed on to the plaintiff's land and injured the plaintiff then for the consequences thereof the defendant is liable. For this second principle Lord Cairns quoted as his authority the case of Baird v Williamson.[16]

In that case the defendant, the owner of the upper mine, did not merely suffer the water to flow through his mine without leaving a barrier between it and the mine below but, in order to work his own mine more beneficially, he pumped up large quantities of water which passed into the plaintiff's mine in addition to that which would naturally have reached it and so occasioned the plaintiff damage. He was held to be responsible for

15. 7 C.B. 515
16. 15 C.B. (N.5.) 376

the damage so occasioned although this was done without negligence. It was in consequence of his act, whether skilfully or carelessly performed, that the plaintiff had been damaged and the defendant was therefore held liable for the consequences. The damage in the former case (Smith v Kenrick) may be treated as having arisen from the act of God, in this case from the act of the defendant.

The Lord Chancellor expressly stated in his judgment that he concurred with all that Blackburn J. had said. All that Lord Cairns did was to put stress on an additional factor, that of the non-natural user of land; so modifying the effect of Blackburn J.'s judgment. This additional criterion led McDonald J. in Porter v Bell[17] to say that "the true situation seems to me to be that there is not one rule in Rylands v Fletcher but two; and that Blackburn J.'s version or Lord Cairns' more flexible one is invoked according to the circumstances of the case in hand." This, it is submitted, is not the correct interpretation of the case. There are not two rules but one, although that part of the one rule which is concerned with non-natural user is the more flexible part and may vary according to social and economic expedience and general matters of policy - it is that necessarily elastic part of any rule which can be varied so as to represent the opinion of the court. The statement of the rule in Rylands v Fletcher which thus results from the opinions of Blackburn J. and Lord Cairns can be put as follows: a person who, in the course of the non-natural user of land, is held to be responsible for the accumulation on it of anything likely to do harm if it escapes is liable for the interference with the use of land of another which results from the escape of the thing from his land.

The second judgment in the House of Lords did nothing to alter this. Lord Cranworth endorsed the Lord Chancellor's opinions and said that in cases of this nature[18] "in considering whether a defendant is liable to a plaintiff for damage which the plaintiff may have sustained the question in general is not whether the defendant has acted with due care and caution but

17 1955 1 D.L.R. 62
18 19 LT 220 at page 222.

whether his acts have occasioned the damage". He cited as his authority the case of Lambert v Bessey.[19]

We must now turn our minds to the question of whether this principle was indeed a valid general principle requiring one who collects upon his land foreign substances likely to escape to confine them at his peril. The opinions denying the existence of such a principle were urged by Martin B. in the Court of Exchequer.[20] These briefly were that the defendent's act is not a trespass for the damage is not direct but consequential; nor is it a nuisance for there is no continuous offensive or injurious condition. Further the action on the case for the spread of fire is an anomalous exception and finally "there is no reason why damage to real property should be governed by a different rule and principle than damage to personal property where proof of negligence is essential to recovery."[21]

These objections are taken further by Professor Winfield in his article "The Myth of Absolute Liability".[22] Professor Winfield takes about 150 examples of trespass from Brooke's Abridgement Cases of the fourteenth century. These cases show that it was no trespass to hunt on your land with your licence or to take goods by the Sheriff's agency when judgement has been made or to rescue your goods which have been thrown overboerd in a storm or to act in self defence. In nuisance it was likewise in many cases a valid defence for the defendant to show that he was in effect without fault.

As far as fire was concerned we are usually told that at common law a man must keep his fire at his peril. Most writers on the topic seem to consider that apart from a statute of 1774 which came relatively late in the development of the law this has always been so. Winfield argues[23] that there is little evidence for this assertion. Only one case on fire appears in the Rolls Series editions of the Year Books and none in the Selden Society series. Cases quoted in the Year Books are generally inconclusive.

19 1681. T. Raym. 421.
20 3 Hand C. 791 (1865)
21 At Page 791
22 42 L.Q.R. 37 (1926)
23 At page 47

Further, in the important case of Turberville v Stampe[24] three judges to one held that the liability extended to a fire originating in a field just as much as in a house but that if a sudden storm had arisen which left the defendant helpless this could be shown in evidence. It was also said that what are now known as acts of a stranger and inevitable accident would in addition constitute valid defences.

To determine the validity of these objections we must go back to the earliest days of the common Law. As Bohlen says[25] we cannot expect to find any general principle expounded in the earliest cases. The common law as enforced by the King's courts originated in a series of specific actions which were rigid and gave redress only in certain situations. It was not until the Statute of Westminster II, in consimili casu, created the action of trespass on the case that the law began to expand. Even then it expanded slowly and by analogy.

There were several early actions which gave a remedy to landowners whose land was injuriously affected by an act done or condition created by an adjacent owner on his own land or as a consequence of the use to which the latter put it. These actions are explained by Salmond[26] and at greater length by Bohlen.[27]

First, there was the action of trespass, where the plaintiff's land was directly invaded as a direct result of the defendant's act. Then there was the assize of nuisance in which the object of the remedy was specific relief and in which the recovery of damages was not the primary object of the action but merely an incident to the specific relief. Thirdly there was the action of trespass for the escape of cattle and fourthly there was the action on the case for harm done by the spread of fire started on the defendant's premises. Bohlen, taking a differen(t) view to that which Winfield was later to take, says that each of these actions lay irrespective of fault.

24. 1697 1 Ld. Raym. 264.
25. At page 353
26 15th Ed. page 404
27 At page 354

He then points out that these actions cover all the situations in which harm would be likely to result to one man's land by reason of another's use of his adjacent land in the then-existing primitive and simple state of society. From this the conclusion is drawn that "these are all but applications to the various situations of some underlying general principle imposing liability for harm to land without regard to the fault of its author". Bohlen cites the case in Y.B. 6 Ed. 1, 7 Pl. 18, 146 which is somewhat inadequately reported in Lambert v Bessey. The question was whether a man had the right to enter the land of another to retake thorns which had fallen upon his neighbour's land when he clipped his hedge. The defendant insisted that he could not be liable because his cutting was lawful and he did not intentionally cast them upon his neighbour's land:- that the harm done was damnum absque iniuria. Brian and Littleton J.J. asserted the old conception that "where any man does a thing, he is held to do it in such a way that through his act no prejudice, or damage, shall happen to others" (per Brian J.) "and that if a man has been damaged, he ought to be recompensed" (Littleton J.) The case was one of trespass to real property but the principle was stated broadly and not limited in its application to such cases.

There is therefore every reason to believe that the original conception was that legal liability for injury of all kinds depended not upon the actor's fault but upon the fact that his act had clearly caused harm to the plaintiff. Bohlen takes the orthodox view eschewed by Professor Winfield that in trespass to real property, in nuisance and in actions on the case for the spread of fire the defendant who is without fault is as liable today as he was in 1461. It is clear then, says Bohlen, that Blackburn J. did not make new law but merely applied to a novel situation, closing analogous to those redressed in existing actions, a principle plainly deducible from the decisions therein and in doing so was following the time-honoured custom of

English courts of establishing a new remedy upon facts closely cognate to those covered by the former actions.

This conception of legal liability has, however, come in for strong criticism in Milsom's recent book 'Historical Foundations of the Common Law.'[28] Milsom points out that in the whole of the Year Books there is no special plea of accident in trespass and that this has led most historians to think that liability was strict or absolute. It seems likely, he says, that accident was not irrelevant in the Year Book period but had been pushed back into the general denial in trespass. It would then be discussed before the jury at nisi prius and was of no interest to pleaders or their reporters.

In the later Year Books there are two discussions of accident, both raised incidentally by pleas concerning deliberate acts. Both are amateurish and this confirms that the matter was not a subject of professional discussion. But this, he says, is also consistent with the proposition that juries were left to struggle with the question as best they could. The same is suggested by a case of 1695 where in an action for battery the defendant pleaded that he was riding on his horse, the horse bolted, he shouted a warning but the plaintiff failed to jump clear, and so he ran him down by accident. He was held liable because this was no justification. All the reports note an observation by the court that he should have pleaded the general issue and given these facts in evidence. If they were true, he had not committed a battery.

He goes on to say that fault in trespass vi et armis seems to be one of those areas which were long protected from systematic legal thought by the primacy of the general issue. But, although this may seem a more acceptable conclusion than its only realistic alternative which is to believe in an almost absolute liability, we must not assume that juries were easily moved by hard luck stories. The late Year Book discussions and the Seventeenth Century reports all suggest that the defendant had to be so free of

28. Page 254.

fault that in some sense he did not do the harm. A horse could bolt because of a stranger's act, a clap of thunder, or its own fancy; and it was easier to find its rider not guilty than the man who was holding the gun when it went off.

Milsom is thus showing not that negligence was an essential part of early law but rather that liability then was far from absolute. He does recognise that this liability was stricter than ordinary negligence and so, it is suggested, his view is not really as different from that of Winfield as might appear at first sight. Any difference is one of degree of strictness rather than one of principle.

Bohlen criticised the rule in Rylands v Fletcher on the basis that it was too narrow rather than too broad in its formulation - that Blackburn J. did not include the actions of trespass for harm directly done by one land-owner to another. He seems to give a basically economic interpretation to the rule, saying that it was the result of the English judges' inclination to protect landowners against the invasion of their property by the newer class of people engaged in the exploration of natural resources, a view restated by Professor Morris in his article 'Hazardous enterprises and Risk-Bearing Capacity.'[29]

As is pointed out by Fridman[30] and by Prosser in his 'Selected Topics on the Law of Torts' there is little in the judgment of Blackburn J. to support this view. The language of his judgement is concerned with the assessment of liability for causing harm and not with the importance of protecting landowners. The simple explanation for the judgment is based upon the understandable continuation of pre-Common Law Procedure Act 1852 ideas about liability into a period when some of the judges were beginning to feel less restricted in their outlook. The principle in Rylands v Fletcher was not deliberately produced for the purpose of

29. 1952 61 Yale L.J. page 1172.
30. 1956 Canadian Bar Review page 810.

restricting industrial growth although that purpose may have been a supplementary factor in the decision. It was founded primarily on the medieval moral idea that a man acts at his peril.

The Common Law Procedure Act 1852 freed the common law of the bonds previously imposed upon the development of its principles by the medieval forms of action. Throughout the remaining part of the nineteenth century the courts were better able to adapt the law to the needs of a changing community. Adaptation was necessary, for the law suitable to a predominantly agricultural society was unsuited to an expanding industrial state. This was seen by at least some of the judges who began to turn the law of nuisance and trespass away from the formerly dominating notion of liability based on the idea that a man acts at his peril. The change of direction was achieved by the gradually more extended use of the concepts of negligence and unreasonable conduct in fields of law from which hitherto those ideas had been largely excluded. The law of negligence was all the time growing in scope and in importance.

Into the crucible where all these ideas were interacting, Blackburn J. threw an idea which had a hardening effect. In delivering his judgement he seems to have tried to put a stop to or at least to limit the freedom of change and development which the common law had begun to enjoy. At a time when the courts were making the law of tort into a more flexible and reasonable instrument for the balancing of conflicting social interests he returned to the medieval period with its ideas of strict liability.

We have up to now studied the historical background of the decision and attempted to place it in its correct position in the development of our law. We must now consider the extent to which Blackburn J.'s judgement involved novel ideas.

Bohlen, as we have seen, regarded the rule in Rylands v Fletcher as merely a logical extension of previous law. Ames[31], on the other hand, regarded the judgment as involving completely new thoughts. It was in his view a judgment that caught up and reconciled the absolute liabilities already predicated as well in the rules just above mentioned (consequential damage of an unlawful act, and 'So use your own as not to injure another's) as in the remaining rules for trespass by acts done at peril; it furnished a general category in which all such rules, whenever formulated, could be placed. Holdsworth[32] also regarded the principle in the case as new; in scope and direction if not in language. He pointed out that in medieval law little or no attempt was made to try the intent of a man and the conception of negligence had as yet hardly arisen. These ideas, according to Holdsworth, were carried over and adapted for modern law by Rylands v Fletcher which laid the foundation stone for the modern rules on dangerous acts.

One point on which there can be no dispute is that the eminent judges who decided the case were unconscious of any revolutionary principle implicit in their own decision. Thus Blackburn J. 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 law for at least three hundred years." It was to the judges nothing more than a restatement of established principles, principles dubiously described by Lord Cairns as 'extremely simple.'[33]

Newark in his article 'The Boundaries of Nuisance'[34] agrees with Lord Cairns as to the simplicity of the principle in the case but the principle in Newark's mind is that negligence is not an element in the

31. Responsibility for Tortious Acts: Its History, 3 Select Essays in Anglo-American Legal History (1909) page 474 at pp.516-520.
32. History of English Law Vol. 8 page 468.
33. 19 LT. 220 at page 221.
34. 65 L.Q.R. (1949) page 480.

tort of nuisance. Blackburn J., he admits, never used the word nuisance in his judgment nor did he rely on cases of nuisance, but he did cite in his judgment the case of fumes escaping from an alkali works as an instance of liability under the general principle he claimed he was reiterating; this being a clear example of nuisance.

Newark goes on to say:[35] "the profession as a whole failed to see in Rylands v Fletcher a simple case of nuisance. They regarded it as an exceptional case and the rule in Rylands v Fletcher as a generalisation of exceptional cases. They therefore jumped rashly to two conclusions: first, that the rule in Rylands v Fletcher could be extended beyond the case of neighbouring occupiers and secondly that the rule could be used to afford a remedy in cases of personal injury. Both these conclusions were denied by Lord MacMillan in Read v Lyons[36] but it remains to be seen whether the House of Lords will support his opinion when the precise point comes up for decision."

This paragraph exposes the flaw in Newark's argument for by his criteria of 1949 it is now in 1973 not only the profession but also the judiciary who do not see Rylands v Fletcher as a clear case of nuisance if indeed the judiciary ever did see it as such. Lord MacMillan[37] was the only Lord in Read v Lyons to express a definite view on whether negligence is essential for there to be liability for personal injuries. Other judges expressly left the point open and Lord MacMillan's view was not accepted subsequently by the Court of Appeal in Hale v Jennings[38] or Perry v Kendricks.[39] Doubts must also be expressed on the point relating to neighbouring occupiers. The lands of the plaintiff and the defendants in Rylands v Fletcher were not in fact adjoining, and in Read v Lyons Lord Porter said that what was required was "escape from the place in which the dangerous object has been maintained by the defendant to some place

35. At page 488.
36. 1947 A.C.156
37. At page 173
38. 1938 I.A.E.R. 579
39. 1956 I.A.E.R. 154

not subject to his control".[40]

The fact is that the courts were faced with a set of facts for which the then-existing authorities could not provide an adequate solution. The tort of nuisance could not apply because it had still to be decided that a person was liable for the nuisances committed by his independent contractor; the defendant was not negligent and the negligence on the part of the independent contractors was not material to the decision (Lord Simon said in Read v Lyons: "the case was treated as determining the rights of the parties independently of any question of negligence.") Trespass, as Lord Simon pointed out, could not apply since the damage was not direct but consequential. The court, then, had to find some fresh principle of law or at least an extension of already existing principles. Previous cases were limited to the escapes of animals and of filth; the rule in Rylands v Fletcher is a general rule which is applicable to the escape of any dangerous object. It was the starting point of a liability, now well developed, which was in its own field more embracing than any form of tortious liability which preceded it.

40. At page 178

CHAPTER II

Escape

Blackburn J. spoke in his judgment in Rylands v Fletcher[1] of "anything likely to do mischief it escapes". This need for an escape has always been one of the essential elements of the rule in Rylands v Fletcher. The notion of an escape was considered by the courts on several occasions between 1868 and 1947 but it was not until the decision of the House of Lords in Read v Lyons[2] that its precised scope was clarified. The concept is now a more sophisticated one than it was a hundred years ago but it remains in essence the same.

In Rylands v Fletcher itself Blackburn J. considered the examples of cattle escaping on to a plaintiff's land, water escaping from the defendant's reservoir on to the plaintiff's land, and the escape of filth and of fumes from the defendant's land on to that of the plaintiff. It seems clear from the tenor of his judgment and from the examples he gave that Blackburn J. regarded escape as meaning the escape of some tangible object from the land of the defendant to the land of the plaintiff. The Lord Chancellor, Lord Cairns, seems to have been of the same opinion in the House of Lords for the escape was also of that nature in the two cases on which he placed most reliance in his judgment, Smith v Kenrick[3] and Bard v Williamson[4].

Subsequent cases did nothing to alter this impression. In Ponting v Noakes[5] a horse was poisoned when it ate the leaves of the defendant's yew tree by reaching over to his land; the tree not having extended over the boundary between their respective properties. It was held that there was no liability in Rylands v Fletcher because the leaves had not escaped from the defendant's land. In Midwood & Co. v Manchester Corporation[6]

1. 1866 L.R. 1 Ex. 265 at pages 279. 280.
2. 1947 A.C. 156.
3. 1849 7 C.B. 515.
4. 1863 15C.B. (N.S.)376.
5. 1894 2 Q.B. 281.
6. 1905 2K.B. 597.

the rule was held applicable where, after an explosion in a cable belonging to and laid by the defendant in the highway, inflammable gas escaped into the plaintiff's nearby house and set fire to its contents and the rule also applied in West v Bristol Tramways Co.[7] when fumes given off by the defendant's creosote escaped and injured the plaintiff's plants and shrubs. The Midwood case was relied on by the Court of Appeal in Charing Cross Electricity Supply Co. v Hydraulic Power Co. [8] when it held that there was a sufficient escape where water from a main laid by the defendant company under the highway escaped and damaged the plaintiff's electric cable which was near to it and under the same highway. Similarly in Howard v Furness Houlder Ltd.[9] where there was an escape of steam due to an explosion on board ship and the plaintiff, a welder on the ship, was injured, it was held that the rule in Rylands v Fletcher could not apply since there had been no escape of steam from the premises of the defendant shipowner.

A slight modification to the notion of an escape was then seen when in two cases it was decided that, provided there was an escape from the defendant's land, it did not necessarily need to be on to land owned by the plaintiff. In Shiffman v Grand Priory of the Order of St. John,[10] the defendants, at the request of the local constabulary, erected a casualty tent. Nearby they erected a flag-pole which was supported by four guy ropes. A man was left in charge of the tent; it also being his duty to prevent interference with the flagpole. Children who came to play around the pole and to swing on the ropes were repeatedly ordered by the attendant to keep away. While the attendent was assisting a casualty inside the tent the children caused the pole to fall and injure the plaintiff on land of which the defendant was not in occupation but which the plaintiff did not own. Atkinson J. said obiter that there was

7. 1908 2 K.B. 14
8. 1914 3 K.B. 772
9. 1936 2 A.E.R. 781.
10. 1936 1 A.E.R. 557.

liability in Rylands v Fletcher.[11] Likewise in Hale v Jennings[12] the plaintiff was tenant of a stand on a fair ground belonging to the defendant. A chair withits occupant became detached from a chair-o-plane, the property of and operated by the defendant, and injured the plaintiff. It was found as a question of fact that this was due to the recklessness of the occupant of the car. The Court of Appeal, consisting of Slesser, Scott and Clauson L.J.J. held that the rule in Rylands v Fletcher applied where there had been an escape from land within the physical control of the defendant. It must however be conceded that although this point was vital to the decision it does not appear to have been fully argued.

Thus in 1944 the position seemed to be clear: for the rule in Rylands v Fletcher to apply there had to be an escape from the defendant's land or at least from the particular area within his control. This apparent state of the law was now seriously questioned for the first time by Cassels J. in Read v J. Lyons Ltd.[13]

In that case the ~~defendant~~ plaintiff was in 1942 in the employment of the Ministry of Munitions as an inspector at a factory where high explosive shells for use in the war were filled. Against her will she had been directed to work there by the Ministry of Labour and National Service. The defendants were the occupiers of the factory and conducted its operations under an agreement with the Ministry of Supply. That agreement made the defendant undertake the operation, management and maintenance of the factory and made them generally responsible for the provision of all the materials required. By the agreement they were deemed to be the employers of employees working at the factory although the plaintiff, as an inspector, was directly in the employment of the Ministry of Munitions.

In the relevant incident the plaintiff was seriously injured by the explosion of a shell in the course of filling it. The cause of the explosion was unknown and was never adequately explained. The plaintiff brought

11. At page 561.
12. 1938 1.A.E.R. 579.
13. 1944 60. T.L.R. 363.

this action to recover damages for the injuries to her person and based her claim solely on the ground that the defendants carried on the manufacture of highly explosive shells which to their knowledge were dangerous things and that she, while employed there, suffered injury, loss and damage through the explosion of one of the shells. Two defences were raised; that the statement of claim disclosed no cause of action and that the plaintiff was volenti. The second point was decided in favour of the plaintiff but it was the first which was of fundamental importance in the development of the rule in Rylands v Fletcher.

The case came before Cassels J. in the King's Bench Division. He considered that, following Rylands v Fletcher, "liability for damage arising from mischievous and dangerous animals or from explosives on a man's land are merely instances of strict liability."[14] He demonstrated that in the case of animals liability attaches even where there is no escape - relying on Besozzi v Harris[15] (where a bear on a chair mauled the plaintiff and Crowder J. said: "If it be so kept that a person passing is not sufficiently protected, the owner is liable"[16]) and on Filburn v People's Palace[17] where it was held that the defendants were liable for injuries inflicted by an elephant which they were exhibiting publicly and which ran at him. From these cases Cassels J. reached the rather dubious conclusion that "the keeping or manufacturing of explosives comes under the same doctrine of strict liability when they cause damage. The liability under such a heading is not limited to those who suffer injury on adjacent land or outside the premises."[18] He dismissed two cases which seem contrary to this view, Ponting v Noakes[19] and Howard v Furness Houlder,[20] by saying that the former really turned on the fact that the plaintiff's horse was a trespasser and that in the latter the facts were quite different and the point arose only incidentally.

The learned judge was helped to his conclusion by the seemingly strange results that would otherwise ensue. For, though the plaintiff herself would be without a remedy, if she had had a friend waiting for her

14. At page 364
15. 1858 1 F and F92
16. At page 93
17. 1890 25 Q.B.258
18. At page 365
19. 1894 2 Q.B.281.
20. 1936 2 A.E.R. 781

outside the premises when the explosion occured, that friend if injured would have been able to bring an action to which strict liability would have been applicable and indeed she herself would have had a remedy if she had been approaching the factory but had not reached it at the time of the explosions.

But, asks Stallybrass,[21] are the results in fact as strange as they seemed to the judge? Is it unreasonable that a man engaged upon dangerous operations should be liable even in the absence of negligence to anyone injured as a result of them who is outside his premises but should not be liable to those who come upon his premises of their own free will? Mr. Stallybrass considers that the fact that someone is ordered by a third party to enter the premises should not involve the occupier in any greater liability. Surely, he says, the occupier of premises with a dangerous chattel upon them is not liable to a soldier who is damaged by the chattel when he has entered the land under the order of his supervisors? (in the absence of negligence). It is, he claims, unnecessary and undesirable to extend the application of the rule in Rylands v Fletcher to cases where there has been no escape of the thing likely to do mischief if it escapes. Mr. Stallybrass goes on to point out a further imprecision in the judgment: Cassels J. did not make it clear whether he regarded the rule in Rylands v Fletcher as a rule governing liability for damage caused by dangerous things in general or as one sub-head under a wider rule of strict liability; other sub-heads being liability for the escape of animals, explosives etc.[22] He seemed to prefer the latter view which is plainly contrary to the intention of Blackburn J.

Cassels J. had thus shattered some firmly entrenched beliefs as to the true nature of the rule in Rylands v Fletcher. Orthodoxy however was to reassert itself in the hands of the Court of Appeal[23] consisting of

21. 60.L.Q.R. 207
22. At page 208
23. 1945 1 K.B.216

Scott, Mackinnon and Du Parcq LJJ and to be firmly reinstated in the subsequent judgments of the House of Lords.

Scott L.J.[24] took as a starting point Cassels J.'s view that only escape from full control was needed and that whether the harm is done inside or outside the defendant's land is immaterial. This was indeed the case with regard to the similar causes of action grouped together in Blackburn J.'s judgment. But it does not follow, the Lord Justice said, that that feature was in each case the ratio decidendi or that no other concomitant fact was needed to entitle the plaintiff to judgment. Escape from control was a link in the chain of causation. It was one material fact but not the real ground of the defendant's liability. Some further ingredient is required.

Scott L.J. then considered each tort in Blackburn J.'s list separately.[25] In cattle trespass it was, he said, the injury to the plaintiff's land for which the court gave relief and the basis of the relief was that the defendant's act was an interference with the plaintiff's right of property. In cases concerned with the escape of fumes or filth it was a breach of the duty of vicinage because there was an escape from the defendant's land which damaged the plaintiff's land. The breach and damage were actionable because it was the plaintiff's land which was damaged. With regard to animals a special rule of public policy had, he said, been enforced for so long that it was now part of the substantive law. "I have little doubt" remarked Scott L.J., "that it is the practical certainty of harm which historically was the judicial basis for that liability."[26] Rylands v Fletcher actions in his view resemble cattle trespass and the escape of filth and fumes much more closely than they resemble liability for dangerous animals.

24. At page 224
25. At page 236
26. At page 237

He thus saw Rylands v Fletcher as limited to an escape from the defendant's land to the plaintiff's land which there causes damage. Escape from control is a purely neutral fact except evidentially as a link between first cause and last effect and to extend the rule to a case like this on grounds of public policy was beyond the power of a judge.

He cited Lindley L.J. who said in Green v Chelsea Waterworks:[27] "that case (Rylands v Fletcher) is 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."

Mackinnon and Du Parcq LJJ. concurred in allowing the appeal. Du Parcq LJ. agreed with Lord Justice Lindley and said that the rule in Rylands v Fletcher is an exception to the general principle that there is no liability without fault and it ought not be readily extended even if the extension appeared to be logically consistent.[28] He considered that Cassels J. was unduly impressed by the apparent anomalies in Rylands v Fletcher and said that these were a necessary consequence of the distinctions which the law is compelled to draw in determining rights which must vary according to the circumstances in which the person claiming the right is placed.

Their decision was unanimously concurred in by the House of Lords.[29] Viscount Simon said that "escape for the purposes of applying the proposition in Rylands v Fletcher means escape from a place where the defendant has occupation of or control over land to a place which is outside his occupation or control"[30] while Lord MacMillan talked of an escape "from one man's close to another man's close"[31] and Lord Porter[32] of an escape to property over which the defendant had no control.

Professor Lloyd,[33] talking of the relationship of logic and the law, had said: "on the one hand, there is the appeal to logical consistency

27. 1894 70 L.T. 547 at page 549.
28. At page 246.
29. 1947 A.C.156.
30. At page 168.
31. At pages 173, 174.
32. At page 178.
33. 64 L.Q.R. 468

and the rational development of the law: on the other, the assertion that the matter must be considered pragmatically and with regard only to practical consequences. Stated in this form, the whole course of the common law points unswervingly to the viewpoint to which English judges may be expected to adhere."[34] The judges of the Court of Appeal and House of Lords, unlike Cassels J., did so adhere.

Professor Goodhart[35] considers the conclusion a reasonable one because there is a clear distinction between the position of a person who, either as an invitee or as a licensee, comes on to the defendant's lands and a person who has no connection with that land. There is no ground for placing the onerous duty of what is practically insurance on the occupier and the person who comes on to the land can at most require that the occupier shall take reasonable care to make it safe or warn him of any known dangers. The distinction between what happens within and what happens outside a landowner's boundaries is, he says, a valid one. Professor Goodhart would agree that this validity rests more on practical consequences than on logic. The line, as Du Parcq L.J. suggested, must be drawn somewhere and this is perhaps the best place to draw it.[28]

It should be remarked that, as well as dealing conclusively with the question of the need for an escape, Read v Lyons was an important landmark in the development of the law of tort in that it denied the existence of any general theory of strict liability for ultra-hazardous activities; a theory such as that found in the American Restatement of the Law of Torts[36] and which Paull K.C. suggested in argument was equally valid in English Law.[37] Scott L.J.[38] condemned as not being in conformity with English Law the declaration by the Restatement that "one who carried on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognise as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost

34. At page 471.
35. 63. L.Q.R. 160
36. Paragraph 519
37. 1945 1K.B.216 at page 219.
38. At page 228ff.

care is exercised to prevent the harm." If that principle had been accepted English law would have possessed a general rule of strict liability but the decision was taken that the Scope of the rule in Rylands v Fletcher was to be limited and not expanded; that in English law there is to be liability for non-negligent conduct only in certain strictly defined circumstances.

Viscount Simon talked of "an escape from a place where the defendant has occupation of or control over land to a place which is outside his occupation or control".[39] This would suggest that the escape need not be from the defendant's land but may be from any land over which he has effective control provided that it is to somewhere outside his occupation or control. Thus in Midwood and Co. v Manchester Corp.[40] Rylands v Fletcher was held to be applicable where there was an explosion in a cable belonging to and laid by the defendant in the highway. That case was relied on by the Court of Appeal in Charing Cross Electricity Supply Co. v Hydraulic Power Co.[41] when it was held that there was a sufficient escape where water from a main laid by the defendant underthe highway escaped and damaged the plaintiff's electric cable which was near to it and under the same highway. Further, in West v Bristol Tramways Co.[42] the basis of liability was the escape of creosote from wood blocks laid in the highway.

Lord Simonds was the only judge to discuss this point at any length in Read v Lyons and he expressly left it open.[43] Nevertheless the fact is that the House of Lords did not overrule the Midwood and Charing Cross cases and Lord Simonds did point out that in each there was an escape into property over which the defendant had no control from a container which the defendant had a licence to put in the highway.[44] The Rule in Rylands v Fletcher was fairly recently held to apply in similar circumstances in

39. 1947 A.C. 156 at page 168
40. 1905 2 K.B. 597
41. 1914 3 K.B. 772
42. 1908 2 K.B. 14
43. At page 183.
44. At page 183.

Hillier v Air Ministry[45] where the plaintiff's cows were electrocuted by an escape of electricity from the high voltage cables laid under the defendant's field.

We must also consider the question of whether the escape needs to be actually on to the land of the plaintiff. Viscount Simon talked only of an escape "to a place which is outside his occupation or control" although it does seem from the general tenor of the judgments in the House of Lords thaat they considered that a guest or invitee upon adjoining property could not sue. This view was merely obiter and seems contrary to authority. In the Charing Cross case Bray J. said that what was required was "not necessarily mischief occasioned to the owner of adjoining land, but any mischief thereby occasioned".[46] More significantly in the recent case of Hunt v British Celanese[47] Lawton J. said that once there has been an escape from occupation or control those damnified may claim and they need not be the occupiers of adjoining land or indeed of any land.

More difficult is the question of whether the rule in Rylands v Fletcher extends to an escape from land adjacent to the highway causing damage to a user of the highway. Statements to the effect that it does were made by Fletcher Moulton L.J. in Wing v London General Omnibus Co.[48] and by Swinfen Eady M.R. in Miles v Forest Rock Granite Co.[49] Lawton J. also seemed to take this view in the Hunt case. Further in Halsey v Esso Petroleum[50] there was held to be liability in Rylands v Fletcher where an escape from the defendant's land caused damage to the plaintiff's car on the adjacent highway. This extension too appears inconsistent with dicta in Read v Lyons and Lord Sumner in the Charing Cross[51] case was at pains to distinguish licensees from co-users of the highway. He said: "I

45. 1962 C.L.Y. 2084
46. 1914 3K.B. 772 at page 785
47. 1969 2 A.E.R. 1252
48. 1909 2 K.B. 652 at page 665
49. 34 T.L.R. 500 at page 501
50. 1961 2 A.E.R. 145
51. 1914 3 K.B. 772.

differ from Scrutton J. (at first instance) because he clearly was disposed to think that this was a case of joint user of highways. These cables and mains were laid under the highway but the laying and using of them are no part of the use of the highway."[52] He also pointed out that the statements in both Wing and Miles were obiter.

Tylor, in his article "The Restriction of Strict Liability",[53] argues that as the highway is dedicated for the use of the public it is reasonable that an occupier of adjoining land should be liable only for creating a public nuisance or for continuing a nuisance. Thus a fortuitous explosion on adjacent land would not be actionable by a user of the highway. A case such as Miles, he considered, would remain actionable in nuisance since the blasting operations were intentional. There would seem to be no basis for the distinction Tylor draws here and it is submitted that the highway should be treated no differently from private property to which the escape has taken place.

Blackburn J. talked of the escape of a substance which had been brought on to land and it has often been said that this is necessary for the rule to apply. A more sophisticated interpretation has prevailed, however, and it seems that it is enough that the thing accumulated caused the escape; it need not escape itself. Thus in Miles v Forest Rock Granite Co.[54] Rylands v Fletcher was held to apply where explosives were brought on to land and as a result rocks escaped. A similar principle can be seen in

52. At page 780.
53. 1947 IOM.L.R. 396
54. 1918 34 T.L.R. 500

cases concerned with liability for the escape of fire.[55]

A further possible extension of the rule was seen in Hoare v McAlpine[56] where pile driving caused vibrations to escape and damage a building. This case would suggest that the matter which escapes need not be of a tangible nature. The decision has not met with approval however. Pollock [57] has termed it a fallacious extension and has pointed out that a vibration is not something one can collect or store. There is, he says, no real analogy with sewage or explosives or high tension currents or water stored in a reservoir and there is no justification in the authorities for inventing one. Why, he asks, when the old law of nuisance is enough do we go about devising "fantastic extensions" of the law of trespass? In the Ontario High Court case of Barette v Franki Compressed Pile Co. of Canada[58] Schroeder J. held that pile driving operations setting up vibrations which damaged the plaintiff's building were a nuisance and not within the ambit of Rylands v Fletcher. The authority of Hoare v Mc.Alpine must thus be in doubt. This apparent need for tangible matter does not exclude such things as gas and electricity from the rule; like water and unlike vibrations they are things which can be collected on land and stored there.

We can thus agree with Viscount Simon's statement in Read v Lyons that:[59] "escape for the purposes of applying the proposition in Rylands v Fletcher means escape from a place where the defendant has occupation of or control over land to a place which is outside his occupation or control."

55. See Chapter VI
56. 1923 1 Ch.167
57. 39 L.Q.R. 145
58. 1955 2.D.L.R. 665.
59. 1947 A.C.156 at page 168

It seems from this and in the light of Hunt v British Celanese[60] that it is sufficient that the escape is from any land under the plaintiff's control; even it seems escape on to the highway, although here at least there is an element of doubt. The concept of escape has been modified so that it is now enough that it was caused by the dangerous thing brought on to the land; the thing brought on need not itself have escaped. It remains true, however, that the thing escaping must have some tangible quality.

60. 1969 1 W.L.R. 959.

CHAPTER III

Personal Injuries*

We must now turn our minds to the important question of whether there can be any liability under the rule in Rylands v Fletcher[1] where the result of the escape is the infliction of injury to the plaintiff's person. This question, like that of the need for an escape, was given detailed consideration by the House of Lords in Read v Lyons[2].

In Read v Lyons personal injuries were caused for which the damages were assessed at first instance at £525. A strong attempt was made by Lord MacMillan to restrict Rylands v Fletcher liability to proprietary as opposed to personal injuries. After remarking that "the process of evolution has been from the principle that every man acts at his peril and is liable for all the consequences of his acts to the principle that a man's freedom of action is subject only to the obligation not to infringe any duty of care which he owes to others"[3] he continued: "Cassels J., in his judgment, records that it was not denied that if a person outside the premises had been injured in the explosion the defendant would have been liable without proof of negligence."[4] I do not agree with this view. 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 defendant liable."[5]

Tylor[6] sees these dicta as reviving the old confusion between culpability and compensation. If all that they are intended to mean is that the escape from the defendant's land of something likely to do mischief, resulting in personal injury to the plaintiff, of itself

1. 1866 L.R. 1 Ex. 265.
2. 1947 A.C. 156.
3. At page 171
4. 1944 60 T.L.R. 363 at page 364.
5. At page 172.
6. 1947 10 M.L.R. page 396.

discloses no cause of action in the absence of negligence, then the dicta are to him unexceptionable. If, on the other hand, they are intended to lay down that, a cause of action having been established under the rule in Rylands v Fletcher, direct personal injury resulting is irrecoverable, so revolutionary a conclusion does not appear to accord with the modern theory which would compensate for direct personal injury resulting from the violation of a right, and appears devoid of authority.

Tyler goes on to remark[7] that the fallacy in confusing cause of action with kind of damage appears from Lord MacMillan's judgment when he says[8]: "The doctrine of Rylands v Fletcher, as I understand it, derives from a conception of the mutual duties of adjoining or neighbourning Landowner and its congeners are trespass and nuisance. 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. The duty is to refrain from injuring not alium but alienum."

The original form of this injuction in the Institutes was alterum non laedere and, to the translation in Broom's Legal Maxins, 'Enjoy your own property in such a manner as not to injure that of another person', is appended the note[9]: "Such is the literal translation of the above maxim; its true legal meaning would rather be: 'So use your own property as not to injure the rights of another!" It is in any event inconceivable, it is submitted, that so important a question as whether negligence must be proved for there to be liability for causing personal injuries, resting as it must primarily on matters of practical policy, should be decided on the precise translation of an old injunction.

Tylor ends:[10] "the suggestion that I can recover for an explosion wrecking my conservatory or a horse trespassing on my rose bed, but not for an explosion blowing me out of my deck chair in my own garden, or a

7. At page 400.
8. At page 173.
9. At page 289.
10. At page 400.

horse treading on my face as I sleep on my lawn, has little to commend it". The fact that he regards such a rule as having little to commend it is on the face of it inconsistent with his previous statement that he regards the view that an escape resulting in personal injury is not actionable in negligence as unexceptionable unless we are to assume that by unexceptionable he means unexceptionable in law rather than merely desirable.

Tylor does clearly say, as we have noted, that if liability has already been established in Rylands v Fletcher for another form of injury such as injury to property then damages for personal injuries must be obtainable in addition to those other damages. It seems doubtful whether Lord MacMillan was thinking of this example when he gave his judgment for he seems to have regarded himself as propounding a general rule of Law and it is further the case that when personal injuries are involved in a Rylands v Fletcher action it is in general personal injuries only that are involved.

This view is reinforced by the fact that in Read v Lyons the relevant damage was solely to the person of the plaintiff.

It appears then that Lord MacMillan considered that where there are injuries solely to the person Rylands v Fletcher does not lie. He was however the only member of the House of Lords who stated his opinion definitively on this aspect of the tort. Lord Simonds, in Read v Lyons, reserved his opinion on the point when he said:[11] "But I would not be taken as assenting to the proposition that if for example the plaintiff in Rainham's case had been a natural person who had suffered personal injuries the result would necessarily be the same." Viscount Simon L.C. also reserved his opinion although he seemed to tend towards Lord MacMillan's view.[12] The Lord Chancellor cited Blackburn J.'s judgment in Cattle v Stockton Waterworks Co.[13] as referring to workmen's cloths, tools or wages but not personal injuries. Yet the point of that case was whether a sub-contractor not in occupation could sue and the natural inference from Blackburn J.'s language

11. At page 180.
12. See pages 168 and 169.
13. 1875 L.R. 10Q.B. 453.

would seem to be that he recognised other damage than that to land e.g. damage to chattels or damage due to loss of employment. The escape of water from a main as in Cattle's case, so delaying operations, would not suggest any personal injury and hence no significance can be attached to its omission. Lord Porter seemed to prefer the opposing view although he reached no decision on the question. He restricted himself to saying that opinions expressed supporting its application to personal injuries undoubtedly extend the application of the rule ' and may some day require examination.'[14]

The fact is that in both Cattle's case and in Read V Lyons, as in several recent cases on aspects of negligence, the courts were fearful of a multiplicity of actions. The courts often prefer, it seems, to allow damages for personal injury only in the form of parasitic damages where they can be tacked on to damages obtained for injury to property. This raises important questions which will be considered at greater length in Chapter VIII when the importance of judical policy views on the development of this area of the law of tort will be closely scrutinised.

In order to solve the resulting difficulty the text-book writers have called into play the distinction between plaintiffs on their own land and plaintiffs who are non-occupiers of the land on which they are injured. In Read v Lyons the plaintiff was a non-occupier of the land on which she was injured and so Lord MacMillan's judgement has been interpreted as meaning that only a non-occupier need establish negligence in order to recover damages for injury to the person.

Whether or not Lord MacMillan was referring to all personal injuries or only to those to non-occupiers it is submitted that his dicta are not good law. A non-occupier recovered damages for personal injuries in Miles v Forest Rock Granite Co.[15] and also in Shiffman v Grand Priory of the Order of St. John;[16] neither of which was mentioned in the judgments of the

14. At page 178.
15. 1918 34 T.L.R. 500.
16. 1936 I.A.E.R. 557.

House of Lords in Read v Lyons. Further, the decision of the Court of Appeal in Hale v Jennings Bros.[17], also not referred to by the Lords, is authority for the proposition that a non-occupier of land is entitled to damages for personal injury under the rule in Rylands v Fletcher. In that case Scott L.J. said:[18] "It was inherently dangerous, and the defendants have to take the risk of any damage which may result from it." In the Canadian case of Aldridge v Van Patter[19] Rylands v Fletcher was held to apply in such circumstances, Spence J. taking the view that the four remaining Lords expressly refrained from assenting to Lord MacMillan's dicta. In Perry v Kendricks Transport Ltd.[20] the plaintiff, a boy of ten, was returning home from school by crossing some waste land, and was approaching land used by the defendant as parking ground when he saw two other boys standing on a bank at the Southern end of the defendant's parking ground near the side of the coach. As he approached them the two boys ran away and immediately there was an explosion in the petrol tank of the coach resulting in the plaintiff being badly burned and injured. In the Court of Appeal Singleton L.J. said he would 'assume' the rule applied to injuries to the person;[21] Jenkins L.J. did not refer to the point but Parker L.J. mentioned the doubts expressed in Read v Lyons as to whether the rule covered personal injuries and stated that "the final decision on the matter was expressly left over."[22] He was clearly of the opinion however that an action for damages for personal injuries would lie in such a case without proof of negligence. This view was impliedly accepted by Lawton J. in A.H. Hunt (Capacitors) Ltd., v British Celanese Ltd.[23] when he said that once there has been an escape in Viscount Simon's sense those who are damnified may claim.[24]

17. 1938 1 A.E.R. 579.
18. At page 585.
19. 1952 4 D.L.R. 93.
20. 1956 1 W.L.R. 85.
21. At page 87.
22. At page 92.
23. 1969 2 A.E.R.1252.
24. At page 1257.

Nor, it is submitted, is Lord MacMillan's view satisfactory in other respects for, as we have seen, his opinions would serve merely to increase the logical anomalies in a tort already amply provided for in that respect. Lord MacMillan's antipathy to the rule in Rylands v Fletcher is clear throughout his judgment. His views with regard to liability for personal injury are contrary to both precedent and common sense. Precedent and logic can be overidden but only for powerful reasons; reasons which Lord MacMillan did not furnish. It is submitted therefore that, although the question remains to be finally resolved, the preferable view is that there is always liability for injury to the person in Rylands v Fletcher circumstances.

CHAPTER IV

Non-Natural User of Land[1]

The need for there to be a non-natural user of land in order to establish liability under the Rule in Rylands v Fletcher did not manifest itself in the judgment of Blackburn J. in the Court of Exchequer Chamber. It in fact has its origin in the judgment of Lord Cairns L.C. in the House of Lords where the Lord Chancellor said[2]: "The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that the result had taken place.

"On the other hand, if the defendants, not stopping at the natural user of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land...... that which the defendants were doing, they were doing at their own peril."

The credit for this conception of the rule must be given to Manisty Q.C. who based his argument in allthree courts on this distinction between the natural and non-natural user of land. From the beginning of the Rylands v Fletcher litigation it was evident that if the plaintiff was to succeed

1. See in general Stallybrass 3C.L.J.376.
2. 19 L.T. 220 at page 221.

he must distinguish Smith v Kenrick[3] and it was this which led Manisty, the plaintiff's counsel, to fasten on to the fact that the water in the defendant's reservoir was an artificial accumulation. He was not however the first to see this distinction - in 1860 Bramwell B. in his judgment in Bamford v Turnley [4] had said: "What has been done was not the using of land in a common and ordinary way, but in an exceptional manner - not unnatural or unusual, but not the common and ordinary use of land."[5]

The entire validity of this distinction has been doubted. Thus Sir John Salmond said:[6] "Such a distinction has little in principle to recommend it. What is the natural use of land? Is it natural to build a house on it, or to light a fire? Almost all use of land involves some alteration of its natural condition, and it seems impossible to say how far this alteration may go before the use of the land becomes non-natural or extraordinary, so as to bring the rule in Rylands v Fletcher into operation."

Charlesworth observes that Lord Cairns gives Smith v Kenrick as an example of natural, and Baird v Williamson[7] as an example of non-natural user of land. "The explanation given of a non-natural user of land shows that what Lord Cairns had in mind," Charlesworth says, "was the distinction between natural and artificial water ..... as far as the actual user of the land is concerned, it is impossible to define with precision what is a natural, and what a non-natural, user of land."[8] As Stallybrass points out[9], Lord Cairns' use of the words "in the ordinary course of the enjoyment of the land" prevents us accepting Charlesworth's views as adequate although it is true nevertheless that Lord Cairns did not seem to note the clear distinction between things naturally on the land and things brought upon the land in the course of natural user.

3. 1849 7 C.B. 515.
4. 1862 3 B. and S.62
5. At page 83.
6. P.347 (7th Ed. 'Torts').
7. 1863 15 C.B. (N.S.) 376.
8. 'Liability for Dangerous Things' page 148
9. 3 C.L.J. 376 at page 391.

The fact is that the distinction between the natural and non-natural user of land has been accepted in subsequent cases and has remained an essential part of the Rule in Rylands v Fletcher. It is equally true, though, that the judges have recognised the real difficulty involved in drawing this distinction. Kekewich J. in National Telephone Co. v Baker[10], a case concerned with the escape of electricity, expressed the opinion that for 'non-natural' there should be substituted the word 'extraordinary'. This term was later used by Lord Alverstone C.J. and Farwell L.J. in West v Bristol Tramways Co.[11] and by Wright J. in Noble v Harrison.[12] Other words, such as 'unusual' and 'abnormal' have been used but their import appears to be the same.

Bramwell B. in Nichols v Marsland[13] regarded "the reasonable use of property in the way most beneficial to the commuhity" as outside the scope of the rule, the words 'natural' and 'ordinary' being absent from the judgment, and statements of Lord Moulton in Rickards v Lothian[14] come close to laying down this criterion of reasonableness. Thus at one point[15] he said that "the provision of a proper supply of water to the various parts of a house is not only reasonable, but has become, in accordance with modern sanitary views, an almost necessary feature of town life .... in some form or other it is usually made obligatory in civilised countries. Such a supply cannot be installed without causing some concurrent danger of leakage or overflow. It would be unreasonable for the law to regard those who instal or maintain such a system of supply as doing so at their own peril."

This however is incomplete; the user must not only be reasonable but ordinary or natural. This principle can be seen in the judgment of Bramwell B. in Bamford v Turnley[16] when he says: "those acts necessary for the common and ordinary use and occupation of land and houses may be done,

10. 1893 2 Ch. 186.
11. 1908 2 K.B. 14.
12. 1926 2 K.B. 332.
13. 1875 L.R. 10 Ex. 255 at page 259.
14. 1913 A.C. 263.
15. At page 280.
16. 1860 3 B. and S.62

if conveniently done, without subjecting those who do them to an action.... there is an obvious necessity for such a principle"[17] and in that of Jones J. who said in an older case: "where there is an ordinary use of sea coal no action lies because it is a matter of necessity and there is mutual sufferance."[18]

Whatever adjective may be used the best explanation of the concept of non-natural user of land was that given by Lord Moulton in delivering the advice of the Judicial Committee of the Privy Council in Rickards v Lothian.[19] He said that to come within the rule in Rylands v Fletcher the use to which the defendant's land is put must be "some special use bringing with it increasing 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".[20]

The rule in Rylands v Fletcher is historically derived from the law relating to the working of mines and it is a well established principle that if you work mines so as to cause damage to your neighbour you will be liable unless you work them in an ordinary manner. This rule was stated by Lord Blackburn in Wilson v Waddell[21] and by Cotton L.J. in Hurdman v N.E. Railway Co.[22] where he said that the excavation and raising of minerals so that water gravitates on to a neighbour's property is an exception to the general rule of liability, because it "is considered the natural use of mineral land, and these decisions (various cases cited) are referable to this principle, that the owner of lands holds his right to the enjoyment, thereof, subject to such annoyance as is the consequence of what is called the natural user by his neighbour of his land, and that when an interference with the enjoyment by something in the nature of nuisance ..... is the cause of complaint, no action can be maintained if this is the result of the natural user by a neighbour of his land."[23]

17. At pages 83, 84.
18. 1628 Palm. 536 at page 538.
19. 1913 A.C. 263.
20. At page 281.
21. 1876 2 App. Cas. 95.
22. 1878 3 C.P.D. 168.
23. At page 174.

It is this principle, identical to Lord Moulton's 'special use', which has been extended to fields other than that of the working of mines. Thus in Batcheller v Tunbridge Wells Gas. Co. [24] Farwell L.J. extended the concept of non-natural user to gas - "it was clearly a non-natural use of the land to put gas pipes there." The laying of a submarine cable was held by the Judicial Committee of the Privy Council to be a non-natural user of land in Eastern and South African Telegraph Co. v Cape Town Tramways[25] as was held the laying of creosote blocks as road paving by the Court of Appeal in West v Bristol Tramways Co.[26] In Stearn v Prentice Bros.[27] a Divisional Court regarded a large heap of bones at a manure factory as something arising in the ordinary course of business and bones as a natural waste, product from rearing sheep or cattle for slaughter. A retaining wall was held to involve the occupiers in no liability because it was erected in the ordinary and normal use of the defendant's land in both Ilford U.D.C. v Beal and Judd[28] and St. Anne's Well Brewery Co. v Roberts[29] while in Noble v Harrison[30] a Divisional Court held that non-poisonous trees came in the same category. A fire in a domestic grate (Sochacki v Sas[31]) and electric wiring (Collingwood v Home and Colonial Stores Ltd.[32]) have both been held to be natural users of land.

Cases in which non-natural user of land as a requirement of liability in Rylands v Fletcher is involved have three times come before the final appeal courts of this country. The first of these cases, Rickards v Lothian[33], was an appeal from the High Court of Australia and was heard by the Judical Committee of the Privy Council comprising Viscount Haldane L.C., Lord MacNaghten, Lord Atkinson and Lord Moulton. The defendant was the lessee of a building and the plaintiff was tenant under him of part of the second floor. On the fourth floor there was a room in which a wash hand basin was fixed. One night a stranger blocked up the basin and turned on the taps with

24. 1901 84 L.T. 765 at page 766.
25. 1902 A.C. 381.
26. 1908 2 K.B.14.
27. 1919 1K.B. 394.
28. 1925 1 K.B. 671.
29. 1928 140 L.T.1.
30. 1926 2 K.B.332.
31. 1947 1 A.E.R.344.
32. 1936 3 A.E.R. 200.
33. 1913 A.C. 263.

the result that a considerable quantity of water overflowed and the plaintiff's stock in trade was damaged. The defendant was unable to establish negligence.[34]

Lord Moulton, who delivered the judgment of the Judical Committee, remarked that it is not every use to which land is put that brings the rule in Rylands v Fletcher into play - "it must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land".[35] He cited Wright, J. who said in Blake v Woolf:[36] "the bringing of water on to such premises as these and the maintaining a cistern in the usual way seems to me to be an ordinary and reasonable user of such premises as these were; and therefore, if the water escapes without any negligence or default on the part of the person bringing the water in and owning the cistern, I do not think that he is liable for any damage that may ensue"; and also Blackburn J. in Ross v Fedden[37], a similar case in which there was no liability when pipes overflowed since negligence could not be proved.

The Judicial Committee shared these views. The court had regard to the desirability of a proper supply of water to the various parts of the house and considered that "it would be unreasonable for the law to regard those who instal or maintain such a system of supply as doing so at their own peril, with an absolute liability for any damage resulting from its presence....... in having on his premises such means of supply he is only using those premises in an ordinary and proper manner."[38]

The importance of this case cannot be overestimated. It was the first time since Rylands v Fletcher[39] itself, 45 years earlier, that this question had been considered by a final appeal court. The need for a non-

34. See also the defence of act of a stranger. Chapter VII. Part II
35. At page 281.
36. 1898 2 Q.B. 426 at page 428.
37. 1872 L.R. 7 Q.B. 661.
38. 1913 A.C. 263 at page 282.
39. 1868 19 L.T. 220.

natural user of land to establish Rylands v Fletcher liability was ignored as often as it was relied upon between 1868 and 1913 and Rickards v Lothian, as well as providing the now standard definition of non-natural user of land, firmly established this concept, as a requirement of liability under the rule in Rylands v Fletcher.

The House of Lords was called on to consider the matter eight years later in Rainham Chemical Works Ltd., v Belvedere Fish Guano Co. Ltd.[40] In this case the appellant company carried on the manufacture of explosives. Large quantities of dinetro-phenol were delivered at the factory and were stored there close to other inflammable materials. As a result an explosion occurred which caused damage to neighbouring property. Lord Buckmaster[41] talked of 'using land in an exceptional manner' and said that use for the purpose of making munitions was certainly not the common and ordinary use of the land. The other members of the House of Lords seemed to assume that there was a non-natural user of land.

The third and most recent of the cases was Read v J. Lyons Ltd.,[42] the facts of which have already been given[43] and which bear a marked similarity to those of the Rainham case. Viscount Simon confessed to finding the test of non-natural user of land difficult to apply.[44] Since he decided the appeal on the ground that there had been no escape he contented himself with saying that in analysing the concept he attached first importance to the judgment of Lord Moulton in Rickards v Lothian. The remaining Lords did not feel it necessary to consider the nature of the test and restricted themselves to some interesting comments on the decision of the House of Lords in the Rainham Chemicals v Belvedere Fish Guano[45] case. Viscount Simon remarked that Scrutton L.J., sitting as an additional judge of the King's Bench Division, had understood it to be admitted before him that the

40. 1021 2 A.C. 465.
41. At page 471.
42. 1947 A.C. 156.
43. See page 19. Chapter II.
44. At page 169.
45. 1921 2 A.C. 465.

constituent elements of Rylands v Fletcher liability were present. The Lord Chancellor further pointed out that Lords Carson and Buckmaster were almost entirely concerned with the liability of the directors of the appellant company and said that he did not consider the House to be bound by Rainham on the question of whether munitions in a factory for the purpose of helping to defeat the enemy was a non-natural user of land.[46] Lord MacMillan said that Lord Buckmaster's decision was a finding of fact rather than of law and clearly afforded no precedent for the claim in Read v Lyons.[47]

In refusing to accept Lord Buckmaster'v view the House of Lords showed a clear desire to restrict the scope of the rule in Rylands v Fletcher. There were several allusions in the Read v Lyons judgments to the prevailing conditions (war time) and these factors combine to indicate the extent to which the requirement of non-natural user of land can be modified at will so as to give effect to policy considerations, thus giving the rule a measure of elasticity which would not otherwise be present. This facility of the judges for applying the concept of non-natural user of land according to local conditions and to factors of general policy was seen again in the recent case of British Celanese v Hunt[48] where Lawton J. applied Lord Moulton's test of 'some special use bringing with it increased danger to others' and said; "the manufacturing of electrical and electronic components in the year 1964......... cannot be adjudged to be a special use nor can the bringing and storing on the premises of metal foil be a special use in itself. The way the metal foil was stored may have been a negligent one; but the use of the premises for storing such foil did not by itself create special risks. The metal foil was there for use in the manufacture of goods of a common type which at all material times were needed for the general benefit of the community."[49]

46. At page 169.
47. At page 175.
48. 1969 2 A.E.R. 1252.
49. At page 1257.

This distinction which we have considered between the natural and non-natural user of land is often confused with the distinction between those things which are naturally on the land and those which are brought on to the land or are artific ially created there. These different conceptions do not appear to have been clear to Lord Cairns but in fact they are quite distinct and so, having considered the first distinction we must turn out minds to the question of whether there can be any liability in Rylands v Fletcher for things naturally on the land.

Professor Salmond has said:[50] "the rule in Rylands v Fletcher applies to things which are artificially brought or kept upon the defendant's land, and is inapplicable to things which are naturally there, howsoever dangerous they may be - e.g. noxious weeds, vermin or water. So far from being absolutely liable for the escape of these things, the occupier of land is not even under any duty of care to prevent their escape." Salmond cited three cases - Giles v Walker,[51] Nield v London and North Western Railway Co.[52] and Stearn v Prentice Bros.[53] and also the Irish case of Brady v Warren[54] - in each of which the land had been artificially altered so that the result complained of was indirectly due to a human act. This, Goodhart says,[55] is true as far as it goes but misleading for Salmond failed to draw the vital distinction between things naturally present on land which has been artificially altered so as to cause the harm complained of and things naturally on land which has not been so altered by human act. It is suggested however that the recognition of such a distinction is implicit in what Salmond said. In considering the validity of the distinction between things naturally on land and things artificially brought on or created there we will first examine the cases concerned with things naturally on land which has

50. Page 351 (7th edition)
51. 1890 24 Q.B.D. 656.
52. 1874 L.R. 10 Ex. 4.
53. 1919 1 K.B. 354.
54. 1900 Irish Reports 632.
55. 4 C.L.J. 13 at page 14.

been altered, bearing in mind the virtual equation in many of these cases of liability in nuisance and under the rule in Rylands v Fletcher.

For a case which was subsequently to assume considerable importance Giles v Walker[56] was handled at all levels in a most haphazard fashion. Counsel for the plaintiff failed to cite the one case which was strongly in his favour - Proprietors of Margate Pier and Harbour v Town of Margate[57] - and of the two judges in the Divisional Court one delivered a judgment of two sentences and the other merely concurred with him. The facts were that the defendant occupied land which had originally been forest land but which his predecessor had cultivated. The forest land did not bear thistles prior to cultivation but on its being cultivated thistles sprang up all over it. The defendant did not mow the thistles and as a result the thistle seeds were blown on to the plaintiff's land where they caused damage. Lord Coleridge disposed of the case thus: "there can be no duty as between adjoining occupiers to cut the thistles, which are the natural growth of the soil."[58]

The thistles, however, were not the natural growth of the soil in its natural condition for they did not appear until the land had been cultivated. The decision can thus not be accepted as authority for the view that an occupier of land is never liable for "things which are naturally there, howsoever dangerous they may be." As far as Rylands v Fletcher liability is concerned. in the words of Clerk and Lindsell,[59] "this decision must be regarded as turning upon the fact that the operation which caused the thistles to spring up was a natural use of the soil." There would inciden-tally be liability today in nuisance on these facts for there can be liability in nuisance for continuing an act which one did not start and, although the defendant was not responsible for the first year's growth, he ought to have taken steps to prevent the damage in the second year as was decided in Davey v Harrow Corporation[60] and approved in Morgan v Khyatt.[61]

56. 1890 24 Q.B.D. 656.
57. 1869 20 L.T. (N.S.) 564.
58. At page 657.
59. Page 389.
60. 1958 1 Q.B. 60.
61. 1964 1 W.L.R. 475.

In Crowhurst v Amersham Burial Board[62] the defendants planted two yew trees about four feet inside their land but the trees grew through and beyond the boundary railings. Cattle lawfully on adjacent land ate the foliage and were poisoned by it. Although there was held to be liability in Rylands v Fletcher the question under discussion did not arise for the trees were not naturally on the land. It does seem though that any distinction between self-grown and planted trees is immaterial; thus Rowlatt J. said in Noble v Harrison:[63] "To grow a tree is one of the natural uses of the soil, and it makes no difference, in my judgment, whether the tree was planted or self-sown". To grow a poisonous tree, Crowhurst v Amersham Burial Board tells us, is not a natural use of land.

It will now be useful to consider the complicated question of whether the occupier is liable for the presence of animals naturally on his land. The earliest relevant decision was Boulston's case[64] in which the defendant constructed several coney-boroughs with the result that the coneys (rabbits) increased to such an extent that they caused damage to the plaintiff's adjacent land. It was held that "his neighbours cannot have an action on the case against him who makes the said coney-boroughs; for as soon as the coneys come on his neighbour's land he (the neighbour) may kill them, for they are ferae naturae, and he who makes the coney-boroughs has no property in them, and he shall not be punished for the damage which the coneys do in which he has no property, and which the other may lawfully kill." In this case the coneys were deliberately introduced on to the land and can not be said to have been naturally there.

Pollock B. refused to follow the principle of Boulston's case in Farrer v Nelson[65] where he said: "The moment he brings on game to an unreasonable amount or causes it to increase to an unreasonable extent he is doing that which is unlawful, and an action may be maintained by his

62. 1878 4 Ex. D.5.
63. 1926 2 K.B. 332 at page 336.
64. 5 Co. Rep. 104b.
65. 1885 15 Q.B.D. 258.

neighbour for the damage which he has sustained."

In Bland v Yates[66] Worthington J. granted an injunction against a defendant who used an excessive quantity of manure in which flies bred. The flies bred every bit as spontaneously as did the thistles in Giles v Walker[67] but the defendant was held liable. In Stearn v Prentice Bros. Ltd.[68], the defendants, who were bone manufacturers, kept on their premises a heap of bones which caused rats to assemble there. The rats then made their way on to the plaintiff's land and ate his corn. Bray J., purporting to follow Boulston's case, said that he was not aware that that decision had ever been overruled or questioned and that the defendants were not liable since they had no property in the rats. With reference to this strange conclusion Salmond says:[69] "Probably this case (Boulston's case) is no longer law, though approved and followed in Stearn v Prentice Bros." This makes it strange that Salmond should have cited Stearn as authority for his statement that an occupier of land is never under a duty of care to prevent the escape of things naturally on his land.

Goodhart[70] takes the view that the correct decision was that of Warrington J. in Bland v Yates.[66] He says that "an occupier of land is entitled to keep a reasonable number of animals on his land, whether they are there naturally or have been specifically introduced, but if they increase to an unreasonable extent, then he is under a duty to abate his nuisance."

It is submitted then that the cases concerned with animals demonstrate that a distinction must be drawn between animals naturally on the land and those unreasonably introduced or helped to remain there. On this basis Bland v Yates can be explained on the ground that the defendant encouraged the flies to breed there by using an excessive quantity of manure.

66. 1914 58 Sol, J. 612.
67. 1890 24 Q.B.D. 656.
68. 1919 1 K.B. 394.
69. Page 351 note (m).
70. At page 21.

Equally this enables us to draw a distinction between two fairly similar and instructive cases, Farrer v Nelson[71] and Seligman v Docker.[72] In the former case a tenant brought an unreasonable number of pheasants on to his land and was held liable for the damage they caused to neighbouring land; in Seligman v Docker the defendant did not bring the pheasants on to his land or unreasonably cause them to increase there and was held not to be liable.

Thus although many of the cases are inconclusive it is submitted that the preferable view is that the rules in Rylands v Fletcher does not apply to things which are naturally on land unless it can be said that the defendant, either by making some alteration to the land or by encouraging the things to remain or increase in number there, has artificially interfered in some way with their natural presence on the land. This view seems to be in accord both with the existing authorities and with principle.

We must now see to what extent this is valid having regard to the authorities concerning things on unaltered land. Seligman v Docker, as we have noted, supports the view that there will be no liability where the land is unaltered and the presence of the thing has not been encouraged by the defendant. It was said that the defendant is under a duty to remove the substance in Proprietors of Margate Pier and Harbour v Town Council of Margate[73] but in Pontardawe R.D.C. v Moore-Gwyn[74] Eve J. held that an occupier of land need take no steps to prevent rocks which have been loosened by weathering from falling. Goodhart prefers the view taken in the Margate case but it is submitted that the Pontardawe decision is the better one and that this, allied with Seligman v Docker, shows that there is no liability for things naturally on unaltered land unless the defendant has brought them on to the land or encouraged their continued presence there.

It should be further remarked that, even if it is shown that the

71. 1885 15 Q.B.D. 258.
72. 1949 Ch. 53.
73. 1869 20 L.T. (N.S.) 564.
74. 1929 1 Ch. 656.

defendant brought the dangerous thing on to his own land, the defendant will only be liable under the rule in Rylands v Fletcher if it can be shown that, in Blackburn J.'s own words, he brought it on to the land 'for his own purposes.'[75] This phrase has usually been widely interpreted and thus it is generally said that the defendant will be liable even where he gains no benefit from the accumulation on his land. If this were not the case bodies such as local authorities could never be liable in the tort of Rylands v Fletcher; it being decided that they can be in Charing Cross Electricity Supply Co. v Hydraulic Power Co.,[76] a decision agreed with by Upjohn J. in Smeaton v Ilford Corp.[77] where he said: [78]"I can see no justification for applying a different law to a local authority merely because it is a local authority, or that it is carrying out something beneficial to the community, or even that it is doing so pursuant to a statutory duty." A different and as yet unsupported view was expressed in Dunne v N. Western Gas Board[79] where Sellers L.J. giving the judgment of the Court of Appeal, pointed out that gas and water are brought on to the land for the general benefit of the the public and went on to say that "it would seem odd that facilities so much sought after by the community and approved by their legislators should be actionable at common law because they have been brought to the places where they are required and have escaped without negligence by an unforseen sequence of mishaps."[80]

75. 1866 L.R. 1 Ex. 265 at page 279.
76. 1914 3 K.B. 772.
77. 1954 ch. 450.
78. At page 478.
79. 1964 2 Q.B. 806.
80. At page 832.

CHAPTER V

Dangerous Things.

As originally formulated, the rule in Rylands v Fletcher applied to 'anything likely to do mischief if it escapes'.[1] This concept appears in several different branches of the law of tort - for example the liability of the vendor, manufacturer, hirer, consigner or donor of dangerous chattels, the liability of the occupier of land to persons coming upon his land, liability for public nuisance and liability under certain statutes - as well as as a component part of the rule in Rylands v Fletcher. In spite of the use of the concept in these various branches of the law the phrase is a highly uncertain one for it can truthfully be said that there are few objects which do not in some circumstances present a risk of harm if they escape. Almost anything is potentially dangerous.

Blackburn J.'s expression 'anything likely to do mischief if it escapes', has come to be equated with 'dangerous things'. (Blackburn J. himself explained the rule as applying to a 'thing of a dangerous nature' in Jones v Festiniog Railway Co.)[2]. In order to discover the essential characteristic of a dangerous thing we must examine those things which, in the context of the rule in Rylands v Fletcher, have been held to come within the ambit of this phrase.

Rylands v Fletcher itself was concerned with the escape of water and water has ever since been generally regarded as coming within the rule. Thus Eve J. in Whitmores Ltd. v Stanford[3] spoke of 'water, or any other dangerous element'. But Stephen J. appears not to have regarded water collecting in a cistern as falling within the rule in his judgment in Blake v Land and House Property Corp.[4] Fire[5] and things likely to cause a fire come within the 'dangerous category'. This includes also

1. 1866 L.R. 1 E.X. 265 at page 279.
2. 1868 L.R. 3 Q.B. 733 at page 736.
3. 1909 1 Ch. 427 at page 438.
4. 1887 3 T.L.R.667.
5. E.G. Job Edwards v Birmingham Canal Navigations 1924 1 K.B. 341.

gas[6], railway engines emitting sparks[7] and cars with full petrol tanks.[8] Equally explosives are within the rule (Miles v Forest Rock Granite Co.,[9] the Rainham[10] case and Read v Lyons[11]) as are electricity[12], chemicals,[13] sewage[14], wire rope[15] and, it seems, poisonous trees[16]. Motor cars have been held not to come within the rule [17](unless their petrol tanks are full and they are in a garage) although this is not because they lack the 'dangerous' quality but because their use is a natural user of land.

Stallybrass[18] concludes from the authorities that chemicals, explosives, fire and electricity will always be dangerous things but that other things such as water, trees and unloaded guns are sometimes regarded as dangerous in themselves and sometimes not. The essence of the matter, he says, lies in the relativity of danger and here we have to agree with Darling J. who said in Chichester Corp. v Foster:[19] "I very much doubt whether anything whatever can, strictly speaking, be called a 'dangerous thing'. That depends on its use - on environment. Water .... is only dangerous under certain conditions and so is fire." Just as there is nothing which is at all times and in all circumstances dangerous, so it seems that there is nothing which is in all circumstances safe; a view taken by Kay J. in Snow v Whitehead[20] when he said that "anyone who collects upon his land water, or anything else, which would not in the natural condition of the land be collected there, ought to keep it in at his peril." Sheep[21] and dogs[22] have been held not to come within the rule but it is

6. Batcheller v Tunbridge Wells Gas Co. 1901 84 L.T. 765.
7. Jones v Festinoig Railway Co. 1868 L.R. 3 Q.B. 733.
8. Musgrove v Pandelis 1919 2 K.B. 43.
9. 1918 34 T.L.R. 500.
10. 1921 2 A.C. 465.
11. 1947 A.C. 156.
12. National Telephone Co. v Baker 1893 2 CH. 186.
13. e.g. Smith v Great Western Railway Co. 1926 135 L.T. 112.
14. Humphries v Cousins 1877 2 C.P.D. 239.
15. Firth v Bowling Iron Co. 1878 3 C.P.D. 254.
16. Crowhurst v Amersham Burial Board 1878 4 Ex. D.5.
17. Phillips v Britannic Hygienic Laundry Co. 1923 1 K.B. 539.
18. 3 C.L.J. 376 at page 385.
19. 1906 1 K.B. 167 at pages 177, 178.
20. 1884 27 Ch. D. 588 at page 591.
21. Heath's Garage v Hodges 1916 2 K.B. 370.
22. Hines v Tousley 1926 95 L.J.K.B. 773.

submitted that, as with all other things, circumstances are conceivable in which they could come to be regarded as 'dangerous things'. The true distinction therefore is not between the dangerous or non-dangerous character of the thing but between those circumstances where the defendant will be allowed to deny the dangerous character of his act and those where he will not.

It can thus be seen that the category of Rylands v Fletcher objects has never become narrowed to that of 'inherently dangerous' things which have attracted a stringent duty of care elsewhere in the law of tort. It is to that other adaptable criterion, non-natural user of land, that the task of confining the strict form of liability in Rylands v Fletcher to extra-hazardous conditions has fallen. It is, it is submitted, because the use of motor cars is nowadays normal and usual that they do not generally incur strict liability and not because they are not regarded as objects likely to do mischief.

The distinctions between natural and non-natural user of land and between dangerous and non-dangerous things have on occasions been confused. Thus in Barker v Herbert[23] Fletcher Moulton L.J. said: "this is not a case where a landowner has erected or brought upon his land something of an unusual nature, which is essentially dangerous of itself. There is nothing unusual or necessarily dangerous in an area protected by railings," and in Latham v Johnson[24] Farwell L.J. spoke of "the introduction into the land .... of something out of the normal user of land, known to the owners to be dangerous."[25] The two questions are in fact entirely distinct although they are functionally related in that both make room for judical discretion in applying or withholding strict liability. Many Rylands v Fletcher objects, including water, gas and electricity, are perfectly usual, and in such order that the rule should apply it is necessary both that there must be an extraordinary user of the land and that the object must in the particular circumstances be dangerous.

23. 1911 2 K.B. 633 at page 642.
24. 1913 1 K.B. 398.
25. At page 406.

CHAPTER VI

Fire[1]

The law governing liability for the escape of fire has had a long history during which it has undergone many changes; changes which have frequently coincided with developments within society itself. For reasons of social policy it has developed in a different way to the tort of Rylands v Fletcher and because of this, although the rule in Rylands v Fletcher plays a significant role in liability for the escape of fire, fire must be regarded in the law of tort as much more than merely something liable to do mischief if it escapes. In this chapter we will study the historical origins of liability for the escape of fire, the relevant statutory provisions and the manner in which the liability has developed in recent times, culminating in the decisions in Mason v Levy Auto Parts of England[2] and Emanuel v Greater London Council.[3]

In the early common law the action brought for damage caused by the escape of fire was an action on the case pur negligent garder son few. The duty imposed to keep one's fire safe was but one example of a number of special duties imposed on such persons as innkeepers and common carriers who had a particular status in the eyes of the law. A parallel with Rylands v Fletcher can be seen from the need from earliest times for the fire to be within the control of the defendant. Thus in Anon. 1582[4] the court suggested that an action on the custom of the realm was not well brought where the defendant, by firing a gun at a fowl, set fire to his own and an adjoining house. The fire had never been within the defendant's control. The defendant was held to be liable for a fire lit in his own field in Turberville v Stampe[5] and in Beautieu v Finglam[6] a

1. See generally Ogus' article in 1969 C.L.J. P.104.
2. 1967 2 Q.B. 530.
3. 1971 2 A.E.R. 835.
4. Cro. Eliz. 10.
5. 1697 Salk. 647. 1 Ld. Raym. 264.
6. 1401 Y.B. 2 Hen. IV, f.18.

fire lit by the defendant's servant or guest was held to be the defendant's own fire for the acts of those persons were within his control.

For there to be liability the fire had to be lit 'tam negligenter ac improvide'. The significance of the word negligenter has been the subject of much discussion, Bracton[7], in discussing criminal liability for fire, says that a civil action lies for 'incendia fortuita, vel per negligentiam facta' which would seem to favour absolute liability. There is a remarkable absence from the Year Books of cases concerned with the escape of Fire. The first reported case of trespass on the case for the escape of fire is Beaulieu v Finglam and that case is singularly inconclusive. Thirning C.J. said that a man shall answer for his fire which by misfortune burns the goods of another. Markham J. said that the liability extended to acts done by a neighbour entering the defendant's house with his leave or knowledge, and also by a guest, but not by a stranger, because the fire was not due to evil on the defendant's part, but was against his will. Winfield[8] concludes, justifiably in view of the authorities, that negligence in this action did not have the technical meaning which it now bears in tort. It certainly excluded liability for the act of a stranger and for 'misadventure' or as we would now call it 'inevitable accident.' As Winfield concludes: "we cannot be sure that at any period in the history of the English common law a man was absolutely liable for the escape of his fire."

Having established that there was a fire within the defendant's control the plaintiff must show that it was that fire which escaped and caused damage to his property. Ogus[9] examines three hypothetical situations. First due to act of God or of a stranger the fire breaks out on the defendant's land, Here the defendant is not liable. Secondly the defendant lights a candle in his house and due to an act of God it is knocked over, sets fire to the defendant's house and then spreads to the

7. Fol. 146b.
8. 42 L.Q.R. 37 at P.49.
9. At page 106.

plaintiff's house. The position is uncertain but it seems probable that the defendant would have been liable on these facts. Thus Markham J. said: "If my servant or my guest puts a candle by a wall and the candle falls into the straw ...... I shall answer to my neighbour"[10] and in Bacon's Abridgement, written after the Act of 1774, appears the statement:[11] "It was formerly holden, that if a fire broke out accidentally in a man's house, and raged to that degree as to hurt his neighbour's, that he in whose house the fire first happened was liable to an action on the case on the general custom of the realm, quod quilibet ignem suum salvo." Thirdly the defendant lights a fire in his field and due to an act of God or of a stranger sparks are blown on to leaves which ignite. The fire spreads to the plaintiff's property. Again there is uncertainty but it seems that the defendant would not have been liable. The majority in Turberville v Stampe said of this: "If he kindle it at a proper time and place, and the violence of the wind carry it into his neighbour's ground and prejudice him, this is fit to be given in evidence."[12]

At this point in time social considerations began to play their part in the development of the law. With wooden houses multiplying the risks were much greater as was demonstrated by the Great Fire of London in 1666. Fire insurance was on the increase and Parliament became obsessed with preventing the outbreak of fires. Many regulations were enacted among which were two major clauses relating to civil liability. The first is §6 of an Act of 1707[13] 'for the better preventing the mischiefs that may happen by fire.' The first five sections of the Act imposed penal sanctions and §6 was added, Ogus argues,[14] in order to resolve the doubt outlined in his second hypothetical situation. §6 provides that 'no action, suit or process, whatever, shall be had, maintained or prosecuted

10. 1401 Y.B. 2 Hen. IV, f.18.
11. (5th ed. 1798 I.85.)
12. 1 Ld. Raym. 264.
13. 6 Anne, c.31.
14. At page 108.

against any person in whose house or chamber any fire shall ....
accidentally begin, or any recompense be made by such person for any damage suffered or occasioned thereby; any law, usage, or custom to the contrary notwithstanding'. Ogus concludes that as far as Parliament was concerned "the problems of civil liability were insignificant compared with the fundamental aim of preventing and controlling fires." This information is gained from the preamble to the statute which says: "Whereas many Fires have lately broken out in several places in and about the cities of London and Westminster, and other Parishes and Places comprised within the weekly Bills of Mortality, and many Houses have frequently been burnt and consumed before such Fires could be extinguished, to the Impoverishing and utter ruin of many of Her Majesty's Subjects, the Rage and Violence whereof might have been in great Part prevented, if a sufficient quantity of water had been provided in the Pipes lying in the Streets, and if Party Walls of Brick had been built between House and House, from the Foundation to the Top of the Roofs, and less Timber in the Front of Houses,"

If we accept Ogus's point it means that when insured property had been damaged insurance companies were never concerned with the liability of the owner of neighbouring property from which the fire had spread. Further third party risks were not covered in fire insurance policies until the nineteenth century. Additional evidence that §6 was enacted in order to resolve doubts as to the need for negligence in such cases is supplied by Holdsworth who, in his History of English Law Volume XI at page 607, points out that the form of action in which the liability for damage caused by fire was asserted was case and that it was in connection with actions on the case that lawyers were coming to be familiar with the idea that civil liability was based on negligence. It was generally alleged, as was seen in Turberville v Stampe, that the defendant had negligently kept his fire whereby damage had been caused to the plaintiff and this tended to make

lawyers think that it was anomalous that a man should be liable for damage caused by a fire which was not occasioned by his negligence.

This Act of 1707 was repealed in 1772. Section 6 was re-enacted. The new Act was itself repealed in 1774 but S.6 was again reenacted in S.86 of the Fires Prevention (Metropolis) Act 1774 15 and was extended from fires originating in buildings to those, such as the fire in Turberville v Stampe, which originated 'on estates'. This widened the scope of the section and resolved remaining doubts on the third of Ogus's hypothetical situations.

The first reported case in which the Act was pleaded was Canterbury v Attorney-General[16] in 1842. By this time negligence had begun to assert itself as was demonstrated in Vaughan v Menlove[17] where the direction to the jury was to consider whether in the circumstances the defendant had conducted himself with the 'caution such as a man of ordinary prudence would observe.' With the advent of the tort of negligence the courts had to reconcile this part of the common Law with S.86.

In Vaughan v Menlove[17] the statutory section was ignored. This may have been because the court considered that the provision applied only to London (it was clearly established to have general application in Richards v Easto 1846)[18]. Lord Denman C.J. in Filliter v Phippard[19] suggested that it was ignored because the court assumed the provision did not apply where the defendant was negligent but what is most likely is that the court considered the statutory provision to have no relevance to the modern tort of negligence.

There is also the view that S.86 is a good defence even where the defendant is negligent; that the word 'accidentally' in the Statute embraces the common Law on this point. This view is based upon a passage in Blackstone's Commentaries:[20] "By the Common Law, if a servant kept his master's fire negligently, so that his neighbour's house was burned

15. 14 Geo. 3, c 78
16. 1843 1 Phil. 306.
17. 1837 3 Bing. N.C. 468.
18. 15 M. and W. 251.
19. 1847 11 Q.B. 347 at page 357.
20. Vol. 1, p. 431.

down thereby, an action lay against his master; because this negligence happened in his service .... But now the common Law is altered by Statute which ordains that no action shall be maintained against any, in whose house or chamber any fire shall accidentally begin, for their own loss is sufficient punishment for their own or their servant's carelessness." It must be said however that the meaning Blackstone attaches to the word 'negligence' is uncertain, no statement is made on liability after the statute, and it involves a misreading of liability before 1707. This view further seems contrary to the policy behind the eighteenth century statutes for it would virtually abolish civil liability for the escape of fire. The passage was used in argument in Filliter v Phippard[19] but decisively rejected.

Having discounted that possibility Lord Denman had to find his own way of reconciling §86 with the principles of negligence. He did this by holding that 'accidentally' meant not only unintentionally but also without negligence in spite of the fact that the concept of negligence did not exist in this sense in 1774. This was nevertheless an effective way of disposing of §6.

Social policy reared its head again in the mid eighteenth century when the escaping of sparks from railway engines and their setting fire to property became a common occurence. Negligence was considered to be an adequate remedy for a time as was seen in the judgments in Piggot v Eastern Counties Railway[21]. Other judges who saw a greater danger from mechanised industries tended to favour a stricter form of liability as illustrated by Bramwell B.'s judgment in Vaughan v Taff Vale Railway where he said:[22] "railway companies, by using fire, are responsible for any accident which may result from its use, although they have taken every precaution in their power."

21. 1846 3 C.B. 229.
22. 1860 5 H. and N. 679 at page 685.

It can thus be seen that with a situation in which the judges were divided over the strictness of liability in cases of this nature the impact of the decision in Rylands v Fletcher was considerable. Fire was readily accepted as a Rylands v Fletcher object following Blackburn J.'s own judgment two years later in Jones v Festiniog Railway[23]. As we have seen liability for the escape in Rylands v Fletcher was modified to include not only the escape of the dangerous thing itself but any escape caused by bringing it on to the land. A similar rule was quickly developed in the case of fire and thus for the purposes of liability for the escape of fire a traction engine was held to be the dangerous thing in Gunter v James,[24] paraffin in Mulholland and Tedd v Baker,[25] petrol fumes in a car's petrol tank in Perry v Kendricks Transport[26] and a motor car with petrol in its tank in Musgrove v Pandelis.[27]

It should be noted however that in the case of other Rylands v Fletcher objects little objection was raised to this extension of the principle to an escape caused by the thing brought on to the land. In the case of fire it met with sterner opposition, opposition which if successful would have severely limited the efficacy of Rylands v Fletcher as a form of tortious liability where fire is involved. Romer L.J. pointed out the apparent inconsistency of this in Collingwood v Home and Colonial Stores[28] and Mackenna J. considered that matter at greater length in Mason v Levy Auto Parts.[29] The judge acknowledged that he was bound to follow the precedent of Musgrove v Pandelis[27] but did not accept the reasoning in that case. Mackenna J. said that since in Musgrove v Pandelis the thing brought on to the land had not escaped, the rule in Rylands v Fletcher could not apply, which is logical but contrary to

23. 1868 L.R. 3 Q.B. 733.
24. 1908 24 T.L.R. 868.
25. 1939 3 A.E.R. 253.
26. 1956 1 W.L.R. 85.
27. 1919 2 K.B. 43.
28. 1936 2 A.E.R. 200 at 208-209,
29. 1967 2 Q.B. 530.

precedent. He concluded as a result that Musgrove v Pandelis must have been decided on the wider principle on which, he said, Rylands v Fletcher itself was based - sic utere tuo ut alienum non laedas. He further stated that for the defendant to be liable for the escape of fire under the rule in Rylands v Fletcher he must

1. have brought something onto his land likely to do mischief if it escaped.
2. have done so in the course of a non-natural user of the land.
3. the thing must have ignited and the fire spread.

This argument is logically attractive but there are grave difficulties in accepting it. The reiteration of the sic utere maxim is of little value but what is more important is that this argument could much reduce the scope of liability in Rylands v Fletcher - such cases as Perry v Kendricks Transport[26] and Miles v Forest Rock Granite Co.[30] could no longer be decided under that principle. Significantly Mackenna J.'s views on escape have nowhere met with acceptance.

We must now study the effect Rylands v Fletcher had on the 1774 Act. The courts as we have seen tried to reconcile the Act with the modern concept of negligence and in Rylands v Fletcher too attempts at reconciliation were made. If Mackenna J.'s view of the law is accepted there is no difficulty for if the defendant lit the fire intentionally the Act would be inapplicable. Where however the source of the fire is the Rylands v Fletcher object there can be circumstances in which the fire itself could be said to have begun accidentally.

Such a case was Musgrove v Pandelis.[27] The defendant kept a car in his garage. While his chauffeur was trying to start the engine a fire broke out in the carburettor for some reason never adequately explained. It was found that the chauffeur was negligent in not preventing the fire from spreading and so the defendant relied on §86 and claimed that the fire began 'accidentally'. The Court of Appeal decided in favour of the plaintiff, holding that §86 was not a good defence to an action in Rylands

30. 34 T.L.R. 500

v Fletcher, following on this point Lush J.'s decision at first instance. Bankes L.J.[32] distinguished three forms of liability existing at common law: (i) for the mere escape of fire, (ii) for fire caused deliberately or negligently by the defendant or his servant and (iii) under the principle in Rylands v Fletcher which was, he said, an existing principle of the common Law. Bankes L.J. said that the object of the Act was to give protection under the first head, that liability under the second head was not affected following Filliter v Phippard[19] where it was held that the Act did not apply to a fire caused either deliberately or negligently. He then went on: "Why, if that is the law as to the second head of liability, should it be otherwise as to the third head; the liability on the principle of Rylands v Fletcher? If that liability existed, there is no reason why the statute should alter it and yet leave untouched the liability for fire caused by negligence or design."

It should be first remarked that it is illogical to argue from head (ii) to head (iii), to argue that because it is accepted that 'accidentally' does not apply where the fire was caused by negligence it should not apply in a Rylands v Fletcher situation where the essence of liability is that negligence need not be proved. Mackenna J. in Mason v Levy Auto Parts[33] said that "in holding that an exemption given to accidental fires ...... does not include fires for which liability might be imposed upon the principle of Rylands v Fletcher, the Court of Appeal went very far." It is submitted that it went too far. In addition Bankes L.J. showed a lack of understanding of the nature of the rule in Rylands v Fletcher. He said that it was plain that the principle of Rylands v Fletcher existed long before the case itself was decided. As evidence of this he offered a statement of Tindal C.J. in Vaughan v

32. At page 46.
33. 1967 2 Q.B. 530.

Menlove where the Chief Justice said:[34] "there is a rule of law which says you must so enjoy your own property as not to injure that of another." Here again is the fault of assuming from that very general and, in practice, almost meaningless principle the far more specific form of liability espoused by Blackburn J. The precise principle in Rylands v Fletcher did not exist before the Act of 1774.

Thus Bankes L.J.'s reasons for saying that §86 does not apply to the rule in Rylands v Fletcher are inadequate. Ogus[35] suggests that Bankes L.J.'s conclusion was right but that it should be based on the ground that since liability at common law rested only on 'the mere escape of fire', the statutory defence was relevant only to that form of liability. The best view, it is submitted, is that it is pointless to attempt to reconcile §86 with the rule in Rylands v Fletcher. Each of these two principles of law was introduced without thought to the other and they are in principle irreconcilable for Rylands v Fletcher is essentially concerned with liability for non-negligent escape while §86 says that there shall be no liability in those circumstances. The fact is that liability for the escape of fire existed before such categories as negligence and Rylands v Fletcher were thought of. No satisfactory solution can be found while rigid categories are maintained. We will however return to this question after considering further arguments of Ogus which have a bearing on it.

Inevitably the limitations engrafted on the rule in Rylands v Fletcher in cases concerned with other Rylands v Fletcher objects came to be applied to fire. Thus the lighting of a fire for domestic cooking or for the heating of a room was held to be a natural user of land and the defence of statutory authority was held to apply where a fire was lit incidentally to an enterprise carried on under that authority. The

34. 1837 3 Bing. N.C. 474.
35. at P.116.

widespread use of the flexible concept of non-natural user of land meant that Rylands v Fletcher liability only applied where the fire created an unreasonable risk and it can thus be seen that we had a concept very similar to those of negligence and nuisance. Further the rule in Rylands v Fletcher has been used more sparingly in all cases since the House of Lords decision in Read v Lyons.[36] As a result of these factors recent cases on the escape of fire have tended to be decided on principles of negligence and nuisance rather than under the rule in Rylands v Fletcher. Ogus[37] says that because of the extra flexibility of those two torts over Rylands v Fletcher it would be best to use one of them exclusively in all cases concerned with the escape of fire.

Although nuisance is defined as "an unlawful interference with a person's use or enjoyment of land or of some right over, or in connection with it",[38] it was never applied to the escape of fire until Job Edwards v Birmingham Canal Navigations[39] in 1924. There is also the case of Spicer v Smee[40] where defective electric wiring in the defendant's house caused a fire which escaped and destroyed the plaintiff's adjoining bungalow. There was held to be liability in nuisance although not for the fire but for its source, the defective wiring. Ogus says that this approach was introduced when the courts became unwilling to extend the ambit of Rylands v Fletcher to include all sources of fire as 'dangerous things'. This case, it is submitted, is no evidence for the proposition that nuisance is a more satisfactory form of liability than Rylands v Fletcher in such cases. The 'unreasonable user' of land in nuisance is the same as 'non-natural user' in Rylands v Fletcher. The point Ogus makes about dangerous things is of little validity since although ordinary electric wiring could not be classified as a Rylands v Fletcher object, defective electric wiring such as existed in this case would be very much a Rylands v Fletcher object on the same principle as was seen in Prosser v Levy[41] where a small piece of pipe which was part of a domestic water supply system which,

36. 1947 A.C.156.
37. Pages 116-117.
38. Winfield 8th Ed. p. 353.
39. 1924 1 K.B. 341.
40. 1946 1 AER 489.

according to Rickards v Lothion,[42] would ordinarily be a natural user of land, was held to be a non-natural user of land and also a dangerous thing because its position under the wash basin created an increased danger.

In another type of case the fire itself has been held to constitute a nuisance. Thus in Goldman v Hargrave[43] nuisance was held applicable where lightning ignited a fire on the defendant's land and he negligently failed to extinguish it. The importance of establishing negligence in cases of this type again suggests that there would be little point in making nuisance the sole form of liability for the escape of fire.

Negligence on the face of it would be a satisfactory tort to act as the sole form of liability for the escape of fire. Two difficulties would exist however. First, there is the old problem of S86 of the Fires Prevention (Metropolis) Act 1774. Lord Denman C.J.'s interpretation in Filliter v Phippard[44] has never gained general acceptance. Another attempt to avoid the section was seen in Musgrove v Pandelis[45] where the court distinguished the fire which originated inexplicably in the carburettor and its continuance which resulted from the chauffeur's negligence in not turning off the tapto the petrol tank. These were regarded as two separate fires and it was the second on which liability was based. This artificial reasoning was approved by the Judical Committee of the Privy Council in Goldman v Hargrave[46]. A better solution to the difficulty was that provided by Scrutton L.J. in the Job Edwards case where he said:[47] "I should respectfully have thought that it was safer to say that the fire was continued by negligence, and that the cause of action was not for a fire accidentally begun, but for negligence in increasing such a fire."

The second difficulty is that it would no longer be possible to apply a stricter form of liability in cases which seem to merit it. Thus in Australia the climate accounts for the continuing sensitivity to the

42. 1913 A.C. 263.
43. 1967 1 AC 645.
44. 1847 11 Q.B. 347
45. 1919 2 K.B. 43.
46. 1967 1 A.C. 645.
47. 1924 1 K.B. 341 at P. 361.

risk of fire and the corresponding retention of a strict form of liability as an added incentive to fire prevention. This difficulty can perhaps be overcome by varying the severity of the duty of care or by the application of the doctrine of res ipsa loquitur.

The best view, it is submitted, is that we should avoid a religious affinity to labels such as 'negligence', 'nuisance' and 'Rylands v Fletcher.' As we have seen the requirement of non-natural user of land in Rylands v Fletcher means that that rule can become almost indistinguishable from negligence and equally negligence can be a fairly strict form of liability where a severe duty of care is insisted upon or where res ipsa loquitur is applicable. The fact is that we are in a mid-way position between negligence and a strict liability - a state of affairs judicially noted as long ago as 1957 in Balfour v Barty-King[48] and which gained recent emphasis in the Court of Appeal decision in Emanuel v Greater London Council[49] where Lord Denning remarked[50] that it is unnecessary to put liability for the escape of fire into any of the three categories of negligence, nuisance and Rylands v Fletcher; it goes back as he said to the time when such categories were unheard of.

The incidence of fire insurance plays an important part in this view. In cases of escape of fire between adjoining properties it is invariably the plaintiff who insures against the risk and according to modern principles of loss-distribution it is he who should bear the loss. For this reason there is no need to resurrect a stricter form of liability. As far as categorisation is necessary a wider conception of negligence will be sufficiently precise provided it is realised that negligence too is a flexible principle and not a rigid category; it can mean almost any standard of care that the judge wants it to mean.

48. 1957 1 AER 156.
49. 1971 2 A.E.R. 835.
50. At page 839.

CHAPTER VII

The Defences.

Part I

Statutory Authority.[1]

The rule in Rylands v Fletcher may be excluded by statute although this does not happen as often as is sometimes supposed. Whether or not the rule is excluded depends on the construction of the particular statute concerned. Strict liability has to a large extent been removed from undertakings carried out under statutory authority such as public services which supply water, electricity and gas and the railways. The protection provided by such legislation is interpreted as extending not only to the legalising of the enterprise itself, thus preventing it being regarded as a nuisance, but also to any harmful consequences occurring during the normal operation of the enterprise where negligence can not be proved.

Several cases concerned with the operation of railways have established that the statutory protection applies where the harm suffered is a necessary incident of the activity expressly authorised. Thus in Vaughan v The Taff Vale Railway Co.[2] the Court of Exchequer Chamber held that a railway company, authorised by the legislature to use locomotive engines, was not responsible for damage from fire occasioned by sparks emitted from an engine travelling on their railway, provided they have taken every precaution in their power and adopted every means which science can suggest to prevent injury from fire, and are not guilty of negligence in the management of the engine. Cockburn C.J. summarised the rule as follows:[3] "Although it may be true, that if a person keeps an animal of known dangerous propensities, or a dangerous instrument, he will be responsible to those who are thereby injured independently of any negligence in the mode of dealing with the animal or using the instrument; yet when the

1. See in particular Fleming page 293.
2. 1860 5 Hand N.679.
3. At page 685.

legislature has sanctioned and authorised the use of a particular thing, and it is used for the purpose for which it was authorised, and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence, that if damage results from the use of such thing independently of negligence, the party using it is not responsible." Similar decisions were reached in Hammersmith Railway Co. v Brand[4] and in Canadian Pacific Railway Co. v Roy.[5]

Protection has also been extended to cases where the damage would not appear to have been a necessary incident of the authorised activity. Thus strict liability was held not to apply where electricity wires became dislodged in Thompson v Bankstown Corporation[6] nor where a water main burst in Benning v Wong[7] nor where a gas main burst in Dunne and another v North-Western Gas Board and another[8] and the Court of Appeal held that although the Board was acting, as water undertakers, under Private Acts of Parliament which gave permissive powers only and which contained no clause excluding liability in nuisance, the Board, against which negligence was not established, was not liable either under the rule in Rylands v Fletcher or in nuisance.

That strict liability is removed by the existence of statutory authority is undeniable from the case law but it is difficult to see why this should be so. The liability connotes something unlawful about the activity itself. Activities to which strict liability applies are generally those which entail extraordinary risk to others but which must be tolerated despite this because of their value to society. Thus one of the most important characteristics of strict liability is that it is imposed on activities which are both lawful and non-reprehensible. If strict liability does not in any way suggest that there is anything unlawful about the activity then logically there is no reason why statutory authority should imply that an activity is absolved from strict liability.

4. 1869 L.R. 4 H.L. 171.
5. 1902 A.C. 220.
6. 1953 87 C.L.R. 619.
7. 1969 43 A.L.J.R. 467.
8. 1964 2 Q.B. 806.

The reason for statutory authority excluding the application of the rule in Rylands v Fletcher is not that it logically should but that, as Cockburn C.J. said in Vaughan v The Taff Vale Railway Co.,[9] "It is consistent with policy and justice that it should be so." Thus gas, water and electricity are brought into an area for the general benefit of the members of the public for whom such facilities are provided. Gas, water and electricity can be regarded as necessities of modern life and if the companies which provide these services were to be held liable for accidents in connection with their provision in the absence of negligence then the public need would be endangered. This is of course equivalent to the nineteenth century opposition to imposing negligence on the ground that it inhibited enterprise.

The statutory protection is lost if the corporation fails in its duty of care to avoid unecessary danger. It must observe standards of safety in proportion to the high degree of risk involved. Thus all available scientific aid and knowledge must be used. In Manchester Corporation v Farnworth[10] the corporation was held to be liable when fumes escaped from a generating station because its responsible officers did not direct their minds to the prevention of nuisances which it was obvious might occur but were rather under the impression that, for all practical purposes, so long as their plant was efficiently and successfully run, the neighbours must endure any consequent injuries.

There is disagreement, however, as to the burden of proof when seeking to establish negligence in such cases. Whereas the burden of supporting a defence of statutory authority by proving due care is cast on the defendant in nuisance (this was established by the House of Lords in the Manchester Corporation v Farnworth [10] case), it is uncertain whether the same rule applies to Rylands v Fletcher. This view that for the defence to apply the defendant must establish affirmatively that the requisite care was exercised was seen in the decision of the Judicial Committee of the Privy Council in North Western Utilities Ltd. v London

10. 1930 A.C. 171.

9. At page 685.

Guarantee and Accident Company[11] and in particular in the judgment of Lord Wright in that case[12]. A similar view has been consistently taken in the Commonwealth cases on this point.[13]

11. 1936 A.C. 108.
12. At pages 119, 121.
13. Benning v Wong (1969) 43 A.L.J.R. 467.

Part II.

Act of a Stranger[1]

Liability under the rule in Rylands v Fletcher can be avoided if it can be shown that the escape was caused by the deliberate act of a stranger. The defence was hinted at in the judgment of Blackburn J. in Rylands v Fletcher[2] and, in spite of the fact that Blackburn J. is generally regarded as having expounded a principle of strict liability in that case, it illustrates more than any other single defence to the tort the fact that liability under the rule in Rylands v Fletcher is not as strict as is generally asserted since it enables a defendant to escape liability even though the act causing the damage was committed on his own land by human agency and though the plaintiff had no knowledge of the act and so could not have consented to it. Nor in the application of this defence does any statute come to the aid of the defendant.

If it is to be regarded as a tort of strict liability one would expect that the rule in Rylands v Fletcher would be applicable to all perils arising from situations created or caused by the defendant, including the risk that others may act stupidly or with malice. The position remains however that the defence of act of a stranger is firmly established as an excuse from liability. The defence must now be studied in some depth in order to discover to what extent its practical application bears out the assumption that here is a serious retreat in the direction of negligence from true principles of strict liability.

The origin of this type of defence to the tort lies, as indicated above, in the case of Rylands v Fletcher itself and, more precisely, in the Judgment of Blackburn J.[2] in the Court of Exchequer Chamber where the

1. See Goodhart 'The Third Man' 4 C.L.R. 178-183,
2. 1866 L.R. 1 Ex.265.

judge, typifying the often excessively cautious approach of our judiciary, weakened the effect of the firm rule he had just laid down by adding[3] that the defendant "can excuse himself by showing 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." This changed the whole emphasis of the rule from being based on a conception of risk to being based on one of fault and was quickly seized upon by the courts in 1879 in the case of Box v Jubb and another[4].

In that case the defendants possessed a reservoir with sluices connected with a main drain or watercourse, from which the reservoir was supplied, and with other sluices by which the surplus water was returned into the drain at a lower level. The combined effect of the emptying of a reservoir belonging to a third person above the defendant's premises, and of an obstruction in the drain below them, was to force water through the sluices into the defendant's reservoir and so cause an overflow from there on to the plaintiff's land. In an action for damage caused thereby it was shown that the defendants had no control over the main drain or the other reservoir, or knowledge of the circumstances which caused the overflow, and that the sluices were maintained so as to prevent overflow under ordinary circumstances. Kelly C.B. saw the crux of the matter as being[5]: "What was the cause of this overflow? Was it anything for which the defendants are responsible -did it proceed from their act or default or from that of a stranger over which they had no control?" The answer he gave to this question was that "the matters complained of took place through no default or breach of duty of the defendant, but were caused by a stranger over whom and at a spot where they had no control" and so the defendants were excused from liability.

3. At pages 279, 280.
4. 1879 4 Ex. D. 76.
5. At pages 78, 79.

This is clearly reasoning based on principles of fault and negligence and in no way based on principles of strict liability for strict liability, while less than absolute, is founded more on a risk than on a fault concept.

The fault doctrine in what is generally regarded as a tort of strict liability was taken to its logical conclusion by the decision of the Judicial Committee of the Privy Council in Rickards v Lothian[6]. In that case a wash-basin, in rooms occupied by the defendant on the top floor of his house, was maliciously plugged by an unknown third person, with the result that the water overflowed and damaged the plaintiff's property on the second floor. The Court held that there was no liability under the rule in Rylands v Fletcher because it was a natural user of land but the important part of the decision for the purposes of this chapter is that it was also held that[7] "a defendant is not liable on the principle of Fletcher v Rylands for damage caused by the wrongful acts of third persons", because a defendant cannot "be properly said to have caused or allowed the water to escape if the malicious act of a third person was the real cause of its escaping without any fault on the part of the defendant." Thus the court drew no distinction between the malicious and negligent acts of the third person. Salmond was thus led to state the position as follows: "It would not appear that .... it matters whether the novus actus be justifiable, lawful, negligent or criminal or whether it be the act of the plaintiff or of a third party[8]."

One of the more recent of the few cases concerned with this defence was Perry v Kendricks Transport Ltd.[9] In that case the defendants had placed a motor-coach on a parking ground after emptying the tank of petrol and screwing a cap on the entrance pipe. As the plaintiff was returning from school he saw two small boys standing near the coach; ~~they~~

6. 1913 A.C. 263.
7. At page 278.
8. 10th Ed. page 142.
9. 1956 1 A.E.R. 154.

they jumped away and immediately afterwards there was an explosion in the petrol tank which injured him severely. At the trial Lynskey J. found as a question of fact that the cap had been removed by some unknown person, and that one of the boys had thrown a lighted match into the petrol tank. The case reached the Court of Appeal where Jenkins L.J. held that:[10] "if the act bringing about the escape was the act of a stranger, and not any act or omission of the occupier himself or his servant or agent" then the rule in Rylands v Fletcher does not apply. Similarly Parker L.J. said:[11] "It has for a long time been an exception to the rule if the defendants can show that the act which brought about the escape was the act of a stranger, meaning thereby, someone over whom they had no control." Thus the courts again came down on the side of a fault rather than a risk concept.[12]

Although the defence of act of a stranger has been with us for a long time, there is no clear definition of the word 'stranger' in this context. As Box v Jubb[4] tells us, the category of strangers certainly includes trespassers and any others who, without actually entering the defendant's premises, commit an act that causes the escape. A servant acting in the course of his employment will not be a stranger. When a servant is a trespasser as in Stevens v Woodward[13] where the servant used a private lavatory and wash-basin to which he had been forbidden access and failed to turn off the tap then he is not acting in the course of his employment and can, it is submitted, be regarded as a stranger for the purposes of this defence. That the occupier will be liable for the acts of his independent contractors is apparent from the case of Rylands v Fletcher[14] itself although there is a recognised exception which stated that an employer will not be liable for the collateral or casual negligence of an independent contractor; that is, negligence in some collateral respect as distinct from negligence with regard to the

10. At page 159.
11. At page 161.
12. This question is fully discussed in Chapter VIII.
13. 1881 6 Q.B. 318.
14. 1866 L.R. 1 Ex. 265.

matter delegated to be carried out.[15]

An occupier willalso be liable under the rule in Rylands v Fletcher for the acts of any members of his family on the premises over whom he has control. In Hale v Jennings[16] it was held that he is liable for the acts of invitees - in that case an invitee tampered with a potentially dangerous machine provided for his amusement. There is some dispute between the textbook writers on the question of whether an occupier is liable for the acts of licensees on his land. There is no actual decision on this point but Charlesworth[17] and Salmond[18] both consider that an occupier will not be able to disclaim responsibility for the acts of licensees. Winfield[19] however claims that "it would be harsh to hold a person liable for the act of every casual visitor who has bare permission to enter his land and of whose propensities to evil he may know nothing" and suggests that the true test may be: "Can it be inferred from the facts of the particular case that the occupier had such control over the licensee or over the circumstances which made his act possible, that he ought to have prevented it? If so the occupier is liable, otherwise not."

Fleming[20] argues that the conclusions of Salmond and Charlesworth are supported by the analogy of liability for fire. This reasoning is not valid however for the defence of act of a stranger is in practice applied differently to the rule in Rylands v Fletcher than to fire (although there is no logical reason why this should be so). Thus we have already seen that an occupier will be liable for the acts of an invitee under the rule in Rylands v Fletcher but it was held in a case concerned with the escape of fire, Erikson v Clifton,[21] that where an invitee on impulse set gorse alight the absent occupier was to be excused from liability.

15. Pickard v Smith 1861 10 C.B. (N.S.) 470
16. 1938 1 A.E.R. 579
17. Negligence 4th Ed. pages 258 to 263
18. 14th Ed. page 461.
19. Page 426.
20. Page 292 note 33.
21. 1963 N.Z.L.R. 705.

It is submitted that the most realistic way of explaining the case law on this point is to say that the true test is not concerned with differentiation between categories of lawful visitors as they are now called under the Occupiers' Liability Act 1967 but is rather a test of forseeability. This forseeability test is consistent with the tendency we have noticed to rely in the defence of act of a stranger on a fault rather than on a risk concept and would explain why in Perry v Kendricks the defence was held to apply when the act was not forseeable and why in Hale v Jennings there was liability under the rule in Rylands v Fletcher in circumstances where the act could clearly have been forseen.

It is worth reminding ourselves at this point that the occupier will not be liable for the acts of his predecessor in title since the rule in Rylands v Fletcher makes it necessary that the defendant should have brought the danger on to his own land. Thus in Whitmores (Edenbridge)Ltd. v Stanford Eve J. said:[22] "The rule (in Rylands v Fletcher) .... so stated does not appear to me to extend to make the owner of land liable for consequences brought about by the collecting and impounding on his land, by another, of water, or any other dangerous element."

The defence of act of a stranger will not be applicable if there has been any negligence on the part of the defendant since the essence of the defence is that the defendant was in no way responsible for the act or for the damage caused thereby. It appears further, however, that the defence will not be valid if the stranger's act was negligent because it seems that the possessor of a dangerous thing is bound to guard against the negligence of third parties. This state of affairs is contrary to common sense for the defendant's ability

22. 1909 1 Ch. 427 at page 438.

to anticipate cannot depend on the stranger's state of mind. Nevertheless there is clear authority for the proposition that the occupier will be expected to anticipate negligent but not deliberate acts of strangers. Thus in Box v Jubb[23] Kelly C.B. held that the act which caused the escape was a malicious act and went on[24] "I think the defendants could not possible have been expected to anticipate that which happened here." Lord Moulton in Rickards v Lothian[25] stated the position as follows:[26] "A defendant cannot in their Lordship's opinion be properly said to have caused or allowed the water to escape if the malicious act of a third person was the real cause of its escaping without any fault on the part of the defendant" and in Dominion Natural Gas Co. v Collins and Perkins[27] the question was put: "Have the defendants been able to show affirmatively that the true cause of the accident was the conscious act of another volition"? The matter was again considered by the Judicial Committee of the Privy Council in North Western Utilities Ltd. v London Guarantee and Accident Co.[28] where Lord Wright held that malicious in this context meant merely conscious or deliberate.

The fact that defendant will be liable for another's negligence is an important restriction on the scope of the defence and is in its small way a reversion to the earlier acceptance of the rule in Rylands v Fletcher as constituting a risk rather than a fault concept. It cannot alter the fact, however, that the defence of act of a stranger constitutes a significant erosion of the risk concept in Rylands v Fletcher and assists in the move towards a narrowing of the boundaries between Rylands v Fletcher and the tort of negligence and the creation of one all-embracing tort based on a principle lying somewhere between

23. 1879 4 Ex. D.76.
24. At page 79.
25. 1913 A.C. 263.
26. At page 278.
27. 1909 A.C. 640.
28. 1936 A.C. 108.

fault and risk.[29] As we have seen, the more logical conclusion and that reached in the relevant American cases is that strict liability is based on the principle of the allocation of risk and that a person who has created an unusual risk is liable if harm results from it even though the immediate cause was an act of God or of a third party. Thus paragraph 522 of the American Law Institute's Restatement of the Law of Torts reads as follows:

Contributing Actions of Third Persons, Animals and Forces of Nature.

One carrying on an ultra-hazardous activity is liable for harm under the rule stated in paragraph 519, although the harm is caused by the unexpectable.

(1) innocent, negligent or reckless conduct of a third person, or

(2) action of an animal, or

(3) operation of a force of nature.

Comment:

Rationale. The reason for imposing absolute liability upon those who carry on ultra-hazardous activities is that they have thereby for their own purposes created a risk which is not a usual incident of the ordinary life of the community. If the risk ripens into injury it is immaterial that it is made effective in harm by the unexpectable action of a human being, an animal or a force of nature. This is so, irrespective of whether the action of the human being which makes the ultra-hazardous activity harmful is innocent, negligent or even reckless.

Caveat:

The Institute expresses no opinion as to whether the fact that the harm is done by an act of a third person, which is not only deliberate but is intended to bring about such harm, relieves from liability one who carries on an ultra-hazardous activity.

29. See Chapter VIII.

Despite the caveat it can be seen that the American law-makers in this matter have followed principles of logic far more than have the English courts. This tendency of the English judges to restrict the severity of the rule in Rylands v Fletcher can be traced to those oft-quoted words of Lindley L.J. in Green v Chelsea Waterworks Co.[30] when he said of the case of Rylands v Fletcher: "That case is 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." The question of which is the preferable approach will be considered in depth in a later chapter.

30. 1894 70 L.T. 547.

PART III

Act of God[1]

The defence of act of God was, as we have noted,[2] recognised by Blackburn J. in his judgment in Rylands v Fletcher[3]. However the defence has been rarely invoked and indeed there is only one reported English case in which it has been successfully pleaded, that of Nichols v Marsland[4] in 1875 where the Court of Appeal seized on Blackburn J.'s 'exclusion clause' for liability in Rylands v Fletcher.

The facts of the case were that there were ornamental pools on the defendant's land which contained large quantities of water. These pools had been formed by damming up with artificial banks a natural stream which rose above the defendant's land and flowed through it, and which was allowed to escape from the pools successively by weirs into its original course. An extraordinary rainfall caused the stream and the water in the pools to swell so that the artificial banks were carried away by the pressure, and the water in the pools being thus suddenly let loose, rushed down the course of the stream and injured the plaintiff's adjoining property. The plaintiff having brought an action against the defendant for damages, the jury found that there was no negligence in the maintenance or construction of the pools and that the flood was so great that it could not reasonably have been anticipated. The Court of Exchequer decided[5] that the escape of water was caused by an Act of God and that the defendant was thus not liable for the damage caused.

The case came before the Court of Appeal[4] consisting of Cockburn C.J., James and Mellish L.J.J. and Baggallay J.A.,[6] the judgement of the court being read by Mellish L.J. The Court held

1. See Goodhart 4 C.L.P.178 to 183.
2. See Chapter 1 page 3 [illegible].
3. 1866 L.R. 1 Ex. 265.
4. 1876 2 Ex. D.1.
5. 1875 L.R. 10 Ex.255.
6. A Fourth judge, Archibald J., died before judgment was delivered.

that act of God was a valid defence, Lord Justice Mellish saying that[7] "a defendant cannot, in our opinion, be properly said to have caused or allowed the water to escape, if the Act of God or the Queen's enemies was the real cause of its escaping without any fault on the part of the defendant." He is clearly talking here in terms of fault and causation and not in terms of allocation of risk; a mode of reasoning identical to that of Bramwell B. in the Court of Exchequer at first instance[5] when he said:[8] "What has the defendant done wrong? What right of the plaintiff has she infringed? She has done nothing wrong, she has infringed no right. It is not the defendant who let loose the water and sent it to destroy the bridges."

Nichols v Marsland would appear at first sight to be precisely the sort of case that the rule in Rylands v Fletcher was designed to cover since the rule can have no practical effect if the defendant is allowed to escape liability except where the embankment gives way under ordinary rainfall for then the defendant would normally be liable in negligence for failing to avoid a consequence which is reasonably forseeable. The only explanation for this case, and indeed for the similar case seen in the chapter on Act of a Stranger, Box v Jubb[9], is that the courts completely failed to realise that the case of Rylands v Fletcher had established a new principle of tortious liability separate from and independent of negligence.

The only other case which revolved around the validity of the defence of act of God was the Scottish case of Greenock Corporation v Caledonian Railway.[10] In that case the original defendants, the municipal authority, while laying out a park, constructed a concrete

7. At page 5.
8. At page 259.
9. 1879 4 Ex. D.76.
10. 1917 A.C. 556.

paddling pool for children in the bed of a stream and altered the course of the stream and obstructed the natural flow of water therefrom. Owing to an extraordinarily violent rainstorm the stream overflowed at the pool and, as a result of the municipal authority's acts, a great volume of water, which would have been carried off by the stream in its natural course without damage, poured down a public highway into the town and damaged the property of two railway companies.

The case came to the House of Lords which comprised the Lord Chancellor, Lord Finlay, and Lords Dunedin, Shaw, Parker and Wrenbury. Lord Finlay,[11] citing the judgment of Lord Cockburn in Samuel v Edinburgh & Glasgow Railway Co.[12], accepted the view that the authority was bound "to provide against the ordinary operations of nature but not against her miracles." He did not say what consisted a miracle but he did say[13] "What shall be considered a damnum fatale in such a case I need not inquire, but of this I am very clear, that a great fall of rain and consequent accumulation and weight of water is not a damnum fatale which exempts the proprietor from liability from the failure of his operation - for it is against such accumulation and weight of water that he is bound to provide." No case in which damnum fatale was successfully pleaded was cited in the judgments and the term is not familiar to English lawyers but Lord Dunedin in the Greenock case did equate the phrase with act of God and it seems that the two can reasonably be regarded as synonymous. Lord Shaw held,[14] using the exact words of Mellish L.J.[15] in Nichols v Marsland,[4] that the defendant was not liable even though the "fall was extraordinary or even unprecedented in quantity" while Lord Parker made it clear that although he questioned the finding of the jury in Nichols v Marsland he accepted that that case had clearly established the

11. At page 572.
12. 13 D. 312 at page 314.
13. Pages 573, 574.
14. At page 579.
15. See note 7.

existence of the defence of act of God.

It can thus be seen that to a certain extent the decision in the Greenock case discredited that in Nichols v Marsland. Goodhart considered that[16] because of this and because of the fact that the Nichols case is the foundation of the defence of act of God on which all subsequent cases are built the defence of act of God cannot be supported in relation to the rule in Rylands v Fletcher. He cites as authority for this proposition the statement of law made by Lord Justice -Clerk Hope in Kerry v Earl of Orkney[17] where he said: "The dam must be made perfect against all extraordinary falls of rain - else the protection is not afforded against the operation which the party must accomplish." It is submitted however that the tone of the judgments and in particular that of Lord Parker suggests only that they saw the requirements of the defence of act of God as being more severe than did the judges in Nichols v Marsland.[18] Thus it was considered in the Greenock case than rainfall, no matter how great its volume, was in essence so natural a thing that it could not constitute an act of God whereas in the Nichols case it was considered, rightly it is suggested, that a freak rainstorm could constitute an act of God. Thus, it appears, is the only way in which the two cases can be logically reconciled. Suffice it to say that subsequent decisions, some of which are cited below, have not accepted the Greenock case as having eaten away at the very roots of the existence of the defence of act of God.

Act of God is a term entirely devoid of theological import - 'an untheological expression' as Lord Phillimore called it in The Mostyn.[19] Rather than being concerned with phenomena ascribed by some to a deity it signified the operation of forces of nature which are unaffected by any human intervention. It can be justly said that it would be sensible to combine the defences of act of God and act of a Stranger into one defence of vis major but the cases have seen

16. 4 C.L.P. 177 at page 182.
17. 20 D.298.
18. 1876 2 Ex. D.1.
19. 1928 A.C.57.

to it that English Law has not developed in this more logical manner. The scope of the defence of act of God must be restricted to such extremes of nature as lightning, electricity, thunderstorms, snow-storms and hurricanes.

In Nichols v Marsland it was considered enough that the occurrence could not reasonably have been anticipated but since then a far more severe test has come to be applied; that of whether human foresight could have recognised even the possibility of its occurence. This severer test, already seen in the Greenock case, has also been applied in several Australian cases. Thus, according to Cottrell v Allen,[20] an ordinary whirlwind can not amount to an act of God and in Commissioner of Railways (Western Australia) v Stewart[21] it was held that a tropical downpour of exceptional intensity and duration was not an act of God by the High Court of Australia, Dixon J. saying[22]: "The weather experienced was not of an unfamiliar kind. It was unusual only in degree, and the difference in degree arose apparently from the circumstance that heavy rainfall took place after saturation of the ground. I do not think the occurrence is one against which no prudent engineer would have provided." Thus it can be seen that for the defence to be applicable there must have been, in the words of Lord Blanes-burgh in the Mostyn, "an irresistible and unsearchable providence nullifying all human effort".

Act of God can thus be seen to differ from act of a stranger in the lack of causal link with human activity and from inevitable accident both in that and in the degree of unexpectability.

20. 1882 16 S.A.L.R. 122.
21. 1936 56 C.L.R. 520.
22. At pages 534, 535.

PART IV.

Consent of the Plaintiff.

The essence of this defence is that the plaintiff has permitted the defendant to accumulate the thing of whose escape the plaintiff is complaining then the defendant will not be liable to the plaintiff under the rule in Rylands v Fletcher when the thing escapes. Consent of the plaintiff was the first judicially recognised defence to an action in Rylands v Fletcher after Blackburn J.'s judgment in that case, its existence being acknowledged in Carstairs v Taylor[1] in 1871.

The defence has been most often worked in cases where one tenant suffers damage as a result of seepage of water from part of the building occupied by the landlord. Thus when a person becomes tenant of premises at a time when the condition of adjoining premises which are occuped by the landlord is such that a Rylands v Fletcher type occurrence is possible he is considered to be consenting to the risk of the occurrence actually taking place. It was held in 1877 in Humphries v Cousins[2] that the principle of implied consent applies only where the plaintiff and the defendant are in a landlord and tenant relationship to one another although it is submitted that cases are imaginable in which implied consent would exist as between two tenants (Ross v Fedden established such consent between occupiers). The value of the defence will in any case be greatest when the claim is against a landlord because of the established principle that a tenant takes the premises from the landlord in the condition they are in at the time and is entitled to complain only of negligent injury emanating from beyond the demised premises unless there is a covenant affording additional protection.[3]

1. 1871 L.R. Ex. 217.

2. 1877 2 C.P.D. 239.
3. See Bottomley v Bannister 1932 1 K.B. 458, 468. G. Williams in Duties of Non-Occupers in Respect of Dangerous Premises 5 M.L.R. 194 at pages 201 to 203 advocates a duty to warn against known danger.

The defence, as stated above, was first seen in Carstairs v Taylor[1]. In that case the plaintiffs hired the ground floor of a warehouse from the defendant, the upper part of which warehouse the defendant himself occupied. The water from the roof was collected by gutters into a box, from which it was discharged by a pipe into the drains. A hole was made in the box by a rat, as a result of which water entered the warehouse and damaged the plaintiff's goods. It was found as a fact that the defendant had used reasonable care in examining and seeing to the safety of both the gutters and the box. The case came before the Court of Exchequer which consisted of Bramwell, Martin and Pigott B.B. They unanimously agreed that no action lay under the rule in Rylands v Fletcher, Bramwell B. saying:[4] "But I am clearly of the opinion that there is a material difference between the cases. In Rylands v Fletcher[5] the defendant, for his own purposes, conducted the water to the place from which it got into the plaintiff's premises. Here the conducting of the water was no more for the benefit of the defendant than of the plaintiffs. If they had been adjacent owners, it would have been for the benefit of the adjacent owner that the water from his roof was collected, and the case would have been within the decision in Rylands v Fletcher; but here the roof was for the common protection of both, and the collection of the water running from it was also for their joint benefit........ Here the plaintiffs must be taken to have consented to this collection of the water which was for their own benefit, and the defendant can only be liable if he was guilty of negligence." Another case where the defence was successfully pleaded was Kiddle v City Business Properties Ltd.[6]

4. At page 221.
5. 1866 L.R. 1 Ex. 265.
6. 1942 1 K.B. 269.

where an overflow of rainwater from a blocked gutter at the bottom of a sloping roof in the possession of the landlord, and above the tenant's premises, damaged the stock in the tenant's premises. It must be remembered in this context that if the damage is caused by a domestic water supply then the rule in Rylands v Fletcher will in any event be inapplicable since the domestic supply will be regarded as being a natural user of land.

It will be seen from the judgment of Bramwell B. in Carstairs v Taylor[1], quoted above, that the existence of a 'common benefit' plays a significant part in this defence. Winfield[7] treats consent of the plaintiff and common benefit as two separate defences although he accepts that they are very closely linked. The best view, it is submitted, is that if the accumulation benefits both the plaintiff and the defendant then that is an important factor in determining whether the plaintiff can be regarded as having consented ~~as having consented~~. This was made clear in the judgments of the Court of Appeal in Peters v Prince of Wales Theatre (Birmingham) Ltd.,[8] where the occupants of the premises were thus deemed to have consented to the risk and where a water closet was installed in Ross v Fedden[9] and also where water pipes were fitted in Anderson v Oppenheimer.[10] That common benefit is not a defence in its own right but merely a factor, albeit an important one, in establishing consent can be further seen from the fact that the defence is not available where the installation was set up after the plaintiff's tenancy had commenced[11] nor where the plaintiff has in no way consented to the risk in spite of deriving a benefit from the installation as was the case in North West Utilities v London Guarantee Corp.[12] where a consumer of gas suffered damage to his house as a result of pipes in the control of the supplier exploding in an adjacent road.

7. pages 423 and 424.
8. 1943 K.B.73.
9. 1872 L.R. 7 Q.B. 661.
10. 1880 5 Q.B.D. 602.
11. See the comment on the Western Engraving Co. v Film Laboratories 1936 1 AER 106 in the Peters case at 1943 K.B. 73 at page 79.
12. 1936 A.C. 108.

It should be remarked finally that although consent of the plaintiff is a defence to an action in Rylands v Fletcher the plaintiff will still be able to succeed if he can establish negligence. Thus, for example, it was held in Prosser v Levy[13] that a plaintiff could not be held to have consented to the existence of a dangerous water supply connection.

13. 1955 3 A.E.R. 577.

Part VIII

Default of the Plaintiff

This defence was noted by Blackburn J. in Rylands v Fletcher[1] itself and was shortly afterwards pleaded successfully in a case of similar facts, Dunn v Birmingham Canal Co.,[2] when a mine-owner, knowing that there was danger of his mine being flooded by his neighbour's operations on adjoining land, courted the danger by working a mine under the defendant's canal.

By analogy with nuisance there will be no action in the absence of negligence in cases where the damage occurred only because of the unusual sensitivity of the plaintiff's property or the use to which it is put.[3] Thus in Eastern and South African Telegraph Co. v Cape Town Tramways Companies[4] the plaintiffs, who complained that the defendant's tramways caused electrical interference with the receiving of messages through their submarine cable, failed because no damage to the cable itself was occasioned and "a man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure".[5] This need for there to be no element of special use would suggest a need for natural user by the plaintiff as well as by the defendant as was suggested in the Scottish case of Western Silver Fox Ranch Ltd., v County Council of Ross and Cromarty[6] where Lord Patrick[7] said: "The 'special use' of land by a neighbour to which the doctrine of Rylands v Fletcher will not apply must be a non-natural use, and I do not regard the use of land for the breeding of silver foxes as a non-natural use of land."[8] This decision in the Eastern and South African Telegraph Co.[4] case must have been affected

1. 1866 L.R. 1 Ex. 265.
2. 1872 L.R. 7 Q.B. 44.
3. For nuisance see Robinson v Kilvert 1889 41 Ch. D.88.
4. 1902 A.C. 381.
5. At page 393.
6. 1940 5 L.T.144.
7. At page 147.
8. c.f. Hollywood Silver Fox Farm v Emmett.

by considerations of policy as it would have seriously hampered a widespread and beneficial activity if the rule in Rylands v Fletcher was applied to the use of earth as a return for electric currents.

In Rylands v Fletcher[1] Blackburn J. clearly considered that any default on the part of the plaintiff excluded the defendant's liability altogether. It seems now however that apportionment under the provisions of the Law Reform (Contributory Negligence) Act of 1945 will apply in such circumstances. Under this Act opportionment is authorised whenever

1. the defendant's fault consists in 'negligence, breach of duty or other act or omission which gives rise to a liability in tort' and
2. the plaintiff's fault 'would, apart from the Act, have given rise to the defence of contributory negligence.'

The first requirement clearly includes all tortious claims including those of strict liability. The second requirement literally exempts from apportionment all cases where contributory negligence was not a defence at common law. However this requirement is generally interpreted in a liberal fashion and there seems to be little doubt that the Act is applicable to the rule in Rylands v Fletcher.[9]

9. The textbook writers are in agreement on this point. See e.g., Fleming P.228, Street P. 253.

CHAPTER VIII

Risk and Fault[1]

The existence of a law of torts in its present form is due to the need of society to reconcile two basic but conflicting interests of men. On the one hand there is the interest which we all share in the welfare of the individual and in his right not to suffer harm at the hands of other men and on the other there is the right to individual freedom of action which is an inherent part of the democratic state. The interest in individual welfare and safety requires that if one man causes damage to another then he must pay compensation to the victim regardless of whether the damage was caused intentionally, recklessly or by negligence or indeed accidentally. The interest in individual freedom in cases of this nature, accepting that for the benefit of society as a whole this freedom can never be complete, requires that compensation should be paid only in cases where the causer of the harm acted in a deliberate, reckless or negligent manner. The first interest results in a 'risk' concept of damages - we must accept any risk of damage that our actions may involve - and the second interest results in a 'fault' concept of damages - compensation is payable only where fault can be established. It is these conflicting concepts of risk and fault that the law of torts is constantly attempting to reconcile.

We have noted in our study of the rule in Rylands v Fletcher that that rule started off in the 1860s as a rule of strict liability as far as the judiciary were concerned[2]. This, as we saw, was less than the complete truth. Blackburn J. in his judgment in Rylands v Fletcher[3] said that the defendant "can excuse himself by showing 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."[4] Not only did the judge ensure in this sentence that the rule in Rylands v Fletcher could never

1. See in particular Fleming pages 7 - 9 and 271 - 276.
2. See Chapter 1 page 16
3. 1866 L.R. 1 Ex. 265.
4. At pages 279 - 280.

be regarded as one of absolute liability but he ensured also, it is submitted, that the rule could only with difficulty be regarded as one of strict liability. This difficulty was subsequently accentuated by the gradual development of the five defences of Act of God, statutory authority, consent of the plaintiff, fault of the plaintiff or contributory negligence and, most particularly, act of a stranger. The strictness of the liability has also been affected by such factors as the doubt over the possibility of recovering damages for personal injury and the supplementary requirement imposed by the House of Lords that there must be some non-natural user of land. As a result it is suggested that in 1973 the rule in Rylands v Fletcher, if we return to the terminology of the first paragraph, while still tending to be based more on a risk than on a fault concept, must be regarded as resting at some stage in between these two extremes.

It has been said by various writers on a large number of occasions in recent years[5] that this move away from a 'risk' basis of liability in Rylands v Fletcher has coincided with a marked shift of emphasis in the tort of negligence away from fault and in the direction of risk. This, if true, would clearly mean a far closer alliance between the two torts than has ever been the case since Blackburn J.'s judgment and indeed, if taken to its logical conclusion, would result in a merger between them. If this took place the rule in Rylands v Fletcher, surrounded as it is by such technicalities as, for example, the necessity for there to be an escape, would be a redundant rule and we would have reached a situation where there was one rule of law to cover all non-intentional torts of this nature. The occurrence of this shift of emphasis in the tort of negligence is thus of crucial significance to the rule in Rylands v Fletcher and must be considered at some length. First, however, it would be as well to remind ourselves of some relevant aspects of the historical background and development of the two torts.

5. See Fleming in particular.

Early law, as Winfield has shown,[6] never accepted a principle of absolute liability. Liability was strict, however, and the presence of any notion of fault was difficult to discern although it was not wholly excluded. The need for a strict liability in early law is apparent when we realise that the existence of this primitive law was due to the desire to provide an alternative to private vengeance and to give society some means of keeping its own peace and order.

As time went on man became less violent and more civilised - to use the words of Hobbes he was less 'solitary, poor, nasty, brutish and short' - and moral factors came to play a greater part in the interpretation of the law. Principles of natural law came to be quoted once more in England in the seventeenth and eighteenth centuries. Nor should the influence of the industrial revolution be underestimated for in this age of the as yet undisciplined machine the growth of industry would have been stifled if it had been liable for the occurrence of unavoidable accidents for this would have meant that the enterprise would have either had to cease to function or to bear the cost of all accidents at a stage in its development when it could not easily shoulder this burden.[7]

Another reason for the nineteenth century move towards a fault concept was that the role of the tort remedy was seen then as being penal rather than compensatory. The law of torts was regarded as an extension of the criminal law, exacting fines on those who were at fault. This view seems to have been first put forward by Jeremy Bentham who maintained that the underlying object of civil and criminal law was the same. Austin agreed, saying in Lecture 27 that "although the proximate end of a civil sanction is, generally speaking, redress to the injured party, its remote and paramount end, like that of a criminal sanction, is the prevention of offences generally." This belief in a deterrent tort law

6. 'The Myth of Absolute Liability'. 42 L.Q.R. 37.
7. Woodward 'Reality and Social Reform: Transition from Laissez Faire to Welfare State.' 72 Yale L.J. 286. (1962).

is philosophically unreliable for, as Glanville Williams tells us,[8] utilitarian philosophy of which both Bentham and Austin were exponents required that a punishment must not be greater than is necessary to repress the mischief in question. Damages may, however, be far greater than is required as a deterrent for they can be based on losses far in excess of those forseeable at the time of the tortious act.

Today the nineteenth century process is being reversed and the law of negligence is coming more and more to be based on compensatory factors and thus on concepts of risk rather than of fault. The classic definition of negligence, given by Alderson B. in Blyth v Birmingham Waterworks Co.[9] is that "negligence is the omission to do something which a reasonable man, guided upon these considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." This objective standard of care has little connection with notions of personal fault for accident victims frequently obtain damages for accidents caused by those who did the best they could to avoid the accident but failed to live up to the highest standards of care. In these cases society clearly puts the need for compensation above the deterrent value of the law.

It is useful at this stage in our analysis of the recent developments in negligence to study various rules whose operation imposes what is in reality a stricter form of liability although they are disguised as ordinary rules applying to the tort of negligence. The most important of these rules in res ipsa loquitur. This is a rule of evidence whereby a plaintiff is permitted to establish negligence on the part of the defendant without having to prove any specific act or omission. The rule will apply where there is an absence of any other explanation, the harm is of such a kind that it does not normally occur if proper care is

8. 4 C.L.P. 137 at page 144.
9. 1856 11 Exch. 781 at page 784.

taken and the cause of the accident was within the exclusive control of the defendant. The use of the maxim is intended to establish only a prima facie case but where it is applicable the plaintiff will almost invariably succeed. Res ipsa loquitur has come to cover a wide range of situations and plays an important part in modern accident litigation. It is interesting to note that New Zealand has a statutory equivalent to res ipsa loquitur in the Coal Mines Act of 1925 where there is a provision that any accident occuring in a mine is to be treated prima facie as occurring because of some negligence on the part of the owner of the mine.

Also of much importance is the judicial device of construing a large number of criminal safety statutes as sources of civil liability. S43(8) of the Copyright Act 1956 enacts that certain contraventions of the statute are actionable 'as a breach of statutory duty' and there is a similar provision in the Factories Acts but such provisions are not found in many statutes. The majority of penal Acts of Parliament do not take the possibility of civil liability into account but neither do they exclude it and the courts have frequently considered the unexcused violation of a safety statute as tantamount to negligence per se. This doctrine is often said to be based on a presumed intention of the legislature but it is in reality a fiction for the silence would rather suggest either than civil liability was not intended or that the possibility was never even considered.

Insurance has also had a part to play, albeit a lesser one, in the move towards a negligence without fault. English law has for the most part adhered to the fiction that insurance has no influence on the mind of a judge when determining liability but it does have an effect both in the fact that its presence may make the judge more likely to find in favour of the plaintiff and because it provides new guidelines

for the settlement of claims between insurance companies so that, for example, compromises are often reached in motoring cases without regard to whether negligence could be established.

The affect of these devices is to alter the established principles of the tort of negligence. They show the increasing realisation that with the number of accidents our advanced technological age makes inevitable we can no longer realistically talk in terms of the deterrent value of tort law. The real deterrents to the causing of accidents are penal sanctions and insurance premiums and the law of tort is becoming more and more compensatory in function. This trend can be seen also in certain areas of the recent case law as we will now see.

We have already noted the trend towards making liability stricter by raising the standard of care in certain circumstances.[10] In addition to this there are particular areas of substantive law in which modern developments have led to a wider and stricter form of liability in negligence and a move towards a risk rather than a fault basis of liability. One of the more important of these areas is that covered by the case of Donoghue v Stevenson[11] which laid down a general principle of liability for articles which are dangerous when negligently manufactured. In that case the original plaintiff drank a bottle of ginger beer which a friend had bought from a retailer and given to her. The bottle was alleged to contain the decomposed remains of a snail which could not be detected because of the opacity of the bottle. She was ill as a result and sued the manufacturer for damages. The House of Lords, by a three to two majority, held that the manufacturer was liable, Lord Atkin saying:[12] "a manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable

10. See page 95
11. 1932 A.C. 562.

care in the preparation of putting up the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care." Prior to this case the courts had followed the decision in Winterbottom v Wright[13] in 1942 which was interpreted as deciding that conduct which constitutes a breach of a contractual obligation to B could not at the same time furnish a cause of action for breach of a tortious duty to A. In 1842 the court felt that the growth of industry should not be impeded by increasing its potential range of liability; in 1932 the House of Lords felt that in cases such as this it was right that the manufacturer should bear the risk of injury ~~of injury~~ to the ultimate consumer.

Clearly in such a case as Donoghue v Stevenson it will be almost impossible for the plaintiff to prove the defendant's knowledge. Lord Macmillan however said that "there is no presumption of negligence in such a case as the present nor is there any justification for applying the maxim, res ipsa loquitur."[14] The legal position was seen in Grant v Australian Knitting Mills[15] as being that "if excess sulphites were left in the garment, that could only be becuase someone was at fault. The appellant is not required to lay his finger on the exact person in all the chain who was responsible, or to specify what he did wrong. Negligence is found as a matter of inference from the existence of the defects taken in connection with all the known circumstances." In Daniels and Daniels v White and Sons Ltd. and Tarbard[16] where the contents of a lemonade bottle included carbolic acid ~~and~~ it was held that the defendants had not rebutted the inference of negligence. This clearly establishes a rule of evidence for cases of this nature which is, despite what Lord MacMillan said, the equivalent of res ipsa loquitur. This principle stemming from Donoghue v Stevenson now has wide application - manufacturer for example includes assembers and repairers and products includes hair-dye and even motor cars.

13. 1842 Mand W 109.
14. At page 622
15. 1936 A.C. 85 at page 101.
16. 1938 4 A.E.R. 258.

The intervention of the legislature in recent years has also shown a desire to create stricter liability in the law of tort. Thus the employer's common law duty of care to his workmen was summed up by Lord Wright in Wilsons and Clyde Coal Co. v English [17] as being "a duty which rests on the employer and which is personal to the employer, to take reasonable care for the safety of his workmen, whether the employer be an individual, a firm or a company, and whether or not the employer takes any share in the conduct of the operation." The duty according to the House of Lords in that case is threefold - the provision of a competent staff of men, adequate material, and a proper system and effective supervision. The duty is personal but any liability is still for negligence and is not imposed regardless of fault - "the obligation is fulfilled by the exercise of due care and skill" (Lord Wright). The legislature considered that in one important respect this common law duty was not sufficiently severe for the adequate protection of workmen and thus in 1969 the Employers' Liability (Defective Equipment) Act [18] was put on the Statute book. This Act applies only to defective equipment which includes plant and machinery, vehicles, aircraft and clothing provided by the employer for the purpose of his business. Even where the defect can be attributed to the negligence of a third party or independent contractor the employer will be liable for personal injuries suffered by the employee in the course of his employment. This, then, is one small illustration of the legislature's view that in modern times a stricter form of liability should be applied in certain circumstances than was previously the case.

Liability for the acts of animals is another area in which statute has recently strengthened the old law of negligence. There has always been a duty to take care that an animal under one's control does not become a source of harm to others. Thus the House of Lords held in

17. 1938 A.C.57 at page 84.
18. 1932 A.E.R. 81.

1932 in Fardon v Harcourt-Rivington[18] that "quite apart from the liability imposed upon the owner of animals or the person having control of them by reason of knowledge of their propensities, there is the ordinary duty of a person to take care either that his animal or his chattel is not put to such a use as is likely to injure his neighbour ...."
There was however an exception to this liability for negligence which flowed from the anomalous rule that an owner or occupier of land owes no duty to users of an adjoining highway to maintain fencing and prevent his livestock from straying into the road. This rule originated before the inclosure movement of the eighteenth century reshaped the English countryside and before the advent of the motor car which increased the threat of roaming cattle to the travelling public. As late as 1946, in Searle v Wallbank,[19] the House of Lords refused to reconsider this rule. Thus when the legislature codified a large part of the law relating to animals in the Animals Act of 1971 the Act both made existing liability more strict in many cases by, for example, imposing strict liability for damage done by an animal which belongs to a dangerous species (S2(1)) and for damage caused by any other animal in consequence of its mischievous propensity of which the keeper is aware and also introduced for the first time liability for animals straying on to the highway. S8(1) Animals Act thus states that 'so much of the rules of the common law relating to liability for negligence as excludes or restricts the duty which a person might owe to others to take such care as is reasonable to see that damage is not caused by animals straying on to a highway is hereby abolished.' This then is another example of modern reform of the law of negligence resulting in both a widening of the limits of the law and in an increasingly strict form of liability.

A further example of this new type of negligence is the recent

18. 1932 A.E.R. 81.
19. 1947 A.C. 341.
20. ~~1971 2 Q.B. 245 (C.A.) 1972 2 W.L.R. 1217 (H.L.)~~

development in the field of vicarious liability. Vicarious liability exists where one person is held liable for the misconduct of another although he himself is free from fault. Thus, although fault is present, as far as the person held liable is concerned this is an instance of strict liability. Vicarious liability has been a part of the English law for many years but the recent case of Morgans v Launchbury[20] has brought it to the forefront as a means of extending risk rather than fault concepts into an area of law which had previously been the domain solely of traditional principles of negligence. In Morgans v Launchbury the defendant owned a motor car which was insured in her name but which was driven regularly by her husband. On the night in question he asked a friend of his to drive the car because he had had too much to drink and had promised his wife that if he was unfit to drive he would get someone else to do so. Due to the friend's negligence there was an accident in which both husband and friend were killed and the plaintiff, who was a passenger in the car, was injured. The trial judge found in favour of the plaintiff.[21]

Normally in such cases as this the court asks whether the driver was driving as the owner's agent - with the owner's permission and for a purpose which was at least partly the owner's purpose. On this basis Megaw L.J., who dissented in the Court of Appeal,[22] considered that the husband was using the car for his own purpose - a pub-crawl - and therefore the wife could not be liable. The majority disagreed, however, and upheld the verdict of the trial judge. In doing so they put liability on a risk-bearing basis and they did this for reasons of policy; in this case because of certain factors relating to insurance.

Under the insurance policy in force the insurers were obliged to indemnify only the wife. Thus by holding the wife liable the court secured the benefit of the insurance policy for the victims of the

20. 1971 2 Q.B. 245 (C.A.), 1972 2 W.L.R. 1217 (H.L.)
21. See 1971 C.L.J. 195 and 1972 L.Q.R. 449.
22. 1971 2 Q.B. 245 at page 261.

accident and also saved the wife from criminal liability and from potential civil liability (against which she was not insured) under the rule in Monk v Warbey[23] (the policy did not contain the usual extension to persons driving on her orders or with her permission and under S.201 of the Road Traffic Act 1960 it is unlawful for one person to permit another to use a motor vehicle on a road unless there is in force a policy of insurance in relation to the user of the vehicle by that other person).

Strictly speaking these principles of insurance should have no relevance when deciding such cases as Morgans v Launchbury and that was the approach taken by Megaw L.J., Edmund Davies L.J. avoided any discussion of the insurance but he did appear to bend his interpretation of the facts to take account of the insurance position. Lord Denning[24] was more realistic in admitting the affect of insurance on his judgment. He stated, rightly it is submitted, that the policy behind vicarious liability is "to put the responsibility on to the person who ought in justice to bear it."[25] He then went on to say that the owner should usually bear this responsibility because it will be he or she who put the car on the road and should be insured in respect of it. It seems, though, that this is an unjust burden to put upon the wife for she cannot reasonably be expected to be insured for all eventualities. The real reason for putting this burden on the wife was revealed when Lord Denning said that since the wife owned the car "when her husband was using it, he was using it as her 'agent' in the sense that, if he was involved in an accident, she ought to bear the responsibility, especially as she was the one who was insured."[26] Thus Lord Denning clearly put the moral principle of allotting the risk to whoever could best afford to bear it above principles of substantive law. This then is an outstanding example of a court deciding a case on the basis of who it thinks ought to bear the risk and not on whether the wife was in any way at fault according to the recognised principles of negligence.

23. 1935 1 K.B. 75.
24. At page 251.
25. At page 255.
26. At page 257.

However the House of Lords[20] unanimously allowed the appeal and rejected Lord Denning's 'modern' approach to the question. Their Lordships recognised the inadequacy of the law in modern conditions but considered that it was beyond the power of the courts to alter the legal position by taking such factors as insurance into account - that can be done only by Parliament. Jolowicz, writing in the Cambridge Law Journal,[27] considers that Parliament should act on this matter and that the owner of the car should be made civilly liable for the negligence of all permitted drivers. The Lords also decisively rejected such references to substantive law made by Lord Denning as his statement that "the owner of hirer is at common law responsible for all injury or damage done by his permitted driver in the negligent driving of the car."[28] Lord Wilberforce[29] said that "it has never been held that mere permission is enough to establish vicarious liability" and that the car was clearly being used for the husband's purposes at the time of the accident. Thus the Court of Appeal's decision in Morgans v Launchbury is not good law but that does not alter the fact that Lord Denning, with assistance from Edmund Davies L.J., attempted to restate substantive law so that it would fit in with risk-bearing rather than fault theories. This link between policy, insurance and new principles of tort law will be studied again in the next chapter but it is worthy of note at this stage as an example of the ease with which the courts can increase (and therefore also decrease) the strictness of liability in a particular case.

We can thus see that we are returning to a situation in which the emphasis is placed on the compensatory function of the law of tort. Negligence is in many ways a stricter form of liability than it has ever been; it is, as we have attempted to show, quite frequently as strict as is liability under the rule in Rylands v Fletcher and negligence has, of

27. 1971 C.L.J. 195.
28. At page 255.
29. 1972 2 W.L.R. 1217 at page 1220.

course, the additional advantage of lacking the artificial restrictions which such concepts as escape and non-natural user of land impose upon the rule in Rylands v Fletcher. Negligence has gained for itself a position of pre-eminence in the law of tort and Rylands v Fletcher has had left to it only a limited field of semi-strict liability whose independence from the principles of negligence is constantly lessening. Negligence has shown itself to have a capacity for growth and adaptability which is entirely foreign to the rule in Rylands v Fletcher.

Ironically, just at the time when negligence has attained such growth, the first signs of its decline are discernible. As Millner[30] puts it so aptly: "fostered by the individualism of the nineteenth century, whose needs and spirits it accurately reflects, negligence is in some ways basically unsuitable to the paternalistic society of the twentieth century." Negligence, despite its recent changes, still links the right to compensation for the plaintiff with the proof of fault on the part of the defendant. Legal fault can perhaps be shown more easily than in the past but it still has to be established. Today there is a powerful feeling that compensation should be a right of the injured party - a feeling voiced among others by Lord Kilbrandon[31] in 1966 and recently in Parliament during the thalidomide controversy. This whole area of the law of tort, negligence and Rylands v Fletcher included, is ripe for change and the first signs of a new approach are now evident.

30. 'Negligence in Modern Law' pages 234 and 235.
31. Hamlyn Lectures 'Other People's Law'.

CHAPTER IX

The New Approach

The initial interest in this new approach came with the increasing realisation that a victim's loss could be deemed to be an inevitable expense of a particular enterprise and should therefore in justice be distributed to all those sections of the public which benefit from the activity. This will result in the function of the law of tort being altered from that of shifting to that of distributing losses. The established rules pertaining to negligence are of course concerned with the apportionment of fault and rely for their moral justification on the premise that the person who is held to be negligent is genuinely at fault and ought in justice to have his interest subordinated to that of the plaintiff. The new approach, where it is applied, is more realistic and so more socially acceptable, for inherent in it is the view that in carrying on the activity which resulted in the accident the plaintiff is usually taking part in a socially desirable but hazardous activity, whose inevitable by-product is the occurrence of such mishaps and that therefore it is right that these expenses of the activity should be borne; not by this one unfortunate plaintiff alone but by all those who benefit from the activity concerned. This selection of 'defendants' by reason of their social responsibility and financial ability to absorb the costs of the activity may be termed 'loss distribution'. This line of reasoning was seen a good many years ago when, in the realisation that industrial injuries were the inevitable product of modern industry and despite the protests of the legal profession that to compensate employees regardless of fault would make them less careful and result in an increase in accidents. Canada, beginning in 1912, abolished the principle of fault-finding so far as industrial accidents were concerned. Industry in Canada now bears the cost of all accidents to workmen regardless of fault and all redress to

the courts has been abolished.[1]

Loss distribution does not mean, however, that there will be no circumstances in which it is not best that one of the parties involved in the accident should bear the loss. Thus as long ago as 1951, in <u>White v White</u>[2], Denning L.J., as he then was, said that "recent legislative and judicial developments show that the criterion of liability in tort is not so much culpability, but on whom should the risk fall." The risk, as this statement implies, should not always fall away from the participants in the accident. Although we must accept that the primary function of the law of tort is compensatory it also has its use as a means of discouraging the person responsible from committing further such acts although its effect in this respect is less than is the effect of the likely increase in insurance premiums following the accident. There will be certain cases in which it is right that the sufferer should bear the burden - for example householders invariably carry fire insurance and thus the courts consider that it is unwise to shift the loss as the householder is the best bearer of it[3] - but in the majority of cases in which it is right that one party should accept the loss that party will be the one whose conduct caused the accident. In any event English Law has decided, at least in part, to follow Canada over the question of workers' compensation for in response to the growing feeling that workers were having to subsidise industry by frequently bearing the costs of accidents to themselves a system of social insurance was inaugurated in 1948 following the Beveridge report so tha t a workman is now entitled to compensation for industrial injury regardless of fault.

Large changes, then, have taken place in the apportionment of liability for tortious acts in recent year, changes which frequently go

1. See Wright 'The Adequacy of the Law of Torts' 1961 C.L.J. page 44 at page 51.
2. 1950 P. 39 at page 59.
3. See Atkinson v Newcastle Waterworks 1877 2 Ex. D. 441.

beyond simple statements in law reports into the realms of judicial and, where applicable, jury psychology. By far the most significant influence on these changes has been the steady growth of insurance against liability. The presence of insurance has the effect that a judgment against the defendant does not shift the loss from the plaintiff to the defendant but rather distributes the loss amongst all those persons who are insured against this type of risk. Thus in any case in which the defendant is insured with regard to the claim being made against him he is in reality no more than a nominal party to the litigation.

One of the major results of this general insurance is the removal of any punitive effect which an adverse judgment and resulting damages might have on the defendant. We have noticed that fears were expressed in Canada as to whether this would lead to an increase in the number of accidents. Fleming[4] quotes statistics to show that this has not been the case in England but it is suggested that with the large number of factors influencing accident statistics these figures prove very little and that in fact the deterrent value of the fear of paying large sums of money in damages has been replaced, although perhaps with less effect, by the fear of having to pay increased insurance premiums following an accident, and, more significantly, by the fear of incurring penalties under the criminal law, in particular for driving offences where drink is involved.

The influence which the absence or presence of insurance has on the minds of juries in those countries following the common law system which still employ juries in personal injury cases is considerable. Fleming[5] makes the point that juries in Australia are well aware, particularly in cases involving motoring accidents, that if they find in favour of the plaintiff the defendant, for whom they might otherwise feel equal sympathy, will not be greatly out of pocket and that they can be generous

4. At page 11.
5. At page 12.

in the award of damages for the money will come not from the defendant but from the seemingly limitless pocket of an insurance company. This has led to recent suggestions that the assessment of damages should be taken altogether out of the hands of juries and made an exlusive responsibility of the judiciary - indeed the Winn Committee on Personal Injuries Litigation[6] went so far as to suggest that in certain circumstances the question of damages should be assessed only by appellate courts.

This does not alter the fact that judges have been at least as much influenced by the growth of insurance as have juries. This was seen in the consideration in the last chapter of the Court of Appeal judgments in Launchbury v Morgans[7] where Lord Denning and Edmund Davies L.J. were greatly influenced by the presence of insurance. This interest in insurance was seen also in the Court of Appeal in S.C.M. v Whittall[8] and more particularly in Spartan Steel and Alloys Ltd., v Martin and Co. (Contractors) Ltd.[9] where Lord Denning[10] said that the previous tests of negligence should be discarded and that the court should instead "consider the public relationships of those concerned in the particular circumstances and see whether, as a matter of policy, economic loss should be recoverable." It can therefore be said with some certainty that factors relating to insurance now have a considerable influence on judgments in personal injury cases.

From all this emerges the fact that the distribution of losses between members of a section of society has become increasingly prevalent in recent years. This system, though, is still linked to the existence of tort liability - before deciding how the loss is to be distributed a decision has to be reached as to whether there is in fact any liability on the facts of a particular case. The system which is becoming increasingly favoured as the ultimate answer to compensation for accidents is a system of full and direct compensation payable to the victim without regard to who caused the injury or to the allotment of responsibility for the accident. This new system would mean that the sufferer would auto-

6. Cmnd. 3691
7. 1971 2 Q.B. 245.
8. 1971 1 Q.B. 337.
9. 1972 3 W.L.R. 502.
10. At page 508.

matically obtain his damages without the need to go through the long and costly procedures of litigation. The law of tort would be entirely removed from personal injury cases for the purposes of compensation and the primitive element in damages would be replaced by increased insurance premiums and by present and perhaps new criminal sanctions where appropriate.

The arguments for and against such a system of direct compensation were analysed at length in the Woodhouse report[11] in New Zealand, a country whose laws at that time were very similar to the present position in England. This report was the work of a Royal Commission[12] which was set up in New Zealand in 1966 to inquire into the law relating to compensation and claims for damages for incapacity or death arising out of accidents suffered by persons in employment. The Commission was to investigate any need for change in the law, the administration of any new scheme suggested and the desirability of adopting any system of compensation in operation elsewhere.

The Woodhouse Committee considered the common law action of negligence in some depth. They felt that the guiding principles for a system of compensation are community responsibility, comprehensive entitlement, complete rehabilitation, real compensation and administrative efficiency.[13] It was felt that the common law action of negligence failed to achieve these objectives in four major respects.[13] These were that the moral basis of the action is false in that it is in fact not the nature of the defendant's conduct but its results which dictate the question of damages, that litigation so often results in the failure of an award to accurately reflect the losses it is supposed to be compensating for, that the procedure is slow and costly and that the whole process acts as an impediment to the obtaining of compensation and to rehabilitation. The members concluded that the common law process leads to a state of affairs where few of the many persons who are injured are ever able to benefit under it and where

11. 'Compensation for Personal Injury in New Zealand.'
12. The members were Mr. Justice Woodhouse (Chairman), H.L. Brockett and G.A. Parsons.
13. paragraph 55.

only a small proportion of these receive a full indemnity - Lord Parker[14] has said that of those injured on the roads only three out of ten recover compensation. The Committee felt that the fault principle is erratic and cannot logically justify the existence of the Common law remedy, the adversary system hinders the rehabilitation of injured persons, the remedy itself provides a full indemnity for very few and the system as a whole is cumbersome and inefficient.

The Committee then went on to recommend the scheme which they wanted to see in force. This was a scheme which would provide[15] 'a unified and comprehensive system of accident prevention, rehabilitation and compensation which will avoid the disadvantages of the present processes and will itself operate on a basis of consistent principle.' This scheme, amounting to a comprehensive system of social insurance, was in the main part implemented in New Zealand in the _Accident Compensation Act 1972_[16]. We will consider now to what extent English Law already has such a scheme as this, to what extent we can and should try to evolve a similar system to that now applying in New Zealand and, most important, where, if at all, _Rylands v Fletcher_ situations would fit in to the scheme for while we must accept that the criticisms which can be made of personal injury litigation include _Rylands v Fletcher_ actions there are elements peculiar to the rule in _Rylands v Fletcher_ which may mean that a different type of approach would be desirable.

The only important reppect in which English law already operates a scheme comparable to that envisaged by the Woodhouse Committee is in the field of industrial accidents. By the end of the nineteenth century common law negligence was no longer able to cope with the social problems created by the vast volume of industrial injuries. The view took hold that industry's first charge was the welfare of its workers and that compensation ought to be given by industry and to be regarded as part of the costs of production. Thus the Workmen's Compensation Acts introduced the first system of social insurance in this country with entitlement as

14. 1965 C.L.P.1.

16. See 34 M.L.R. 542.

of right without regard to the proof of fault. Workers' compensation is now the financial responsibility of industry, although in practice the increased costs are distributed even more widely through being passed on to the public. It is worth noting in addition that accidents involving automobiles have attracted a new approach in recent years. Technically they are still governed by common law negligence but the presence of insurance and in particular of compulsory third party insurance has had a profound practical influence and has led to a situation where very few cases reach the courts and in those that do there is a virtual abandonment of the fault principle.

Despite these instances of social insurance England has a long way to go before in reaches the state envisaged in New Zealand in the Woodhouse report. That it should do so if reasonably practicable is, it is submitted, desirable for the arguments put forward in the report against the present system of compensation (common law damages in particular) and in support of a comprehensive system of social insurance are strong.

We must now briefly study the recent developments in England which have increased the possibility of such a system being implemented in the not too distant future. Committees have been set up in this country to consider the question. Notably there was the 1966 Committee on Personal Injuries[17] under Winn L.J. whose terms of reference were too narrow, which came to the remarkable conclusion that it was the human element in the system, and not the system itself, which was at fault and which in total did more to reflect than to reconcile the differences of opinion. Just before the Winn Report Lord Parker, in his Presidential address to the Bentham Society[18], said that the time had come for us to recognise the inadequacy of the present methods and to seek some new approach and it is strange that only in recent months has the type of action been taken which seems as if it may lead to positive results. Something was needed to provide the initial impetus, to turn the Government thoughts into

17. Cmnd. 3691.
18. Reprinted in 1965 C.L.P. Page 1.

action and to concentrate public opinion on this matter and this came in late 1972 with the controversy over the thalidomide children where the prospect of a long and complicated legal tussle between the parents and the Distillers Company which manufacturered the drug led to demands for a state compensation scheme to be introduced to meet such cases and to by-pass the common law process. At the height of the controversy the Prime Minister announced to the House of Commons on December 19th 1972 the setting up of an inquiry into the basis of civil liability for the causing of death or personal injury.[19] The terms of reference of the Royal Commission are: to consider to what extent, in what circumstances and by what means compensation should be payable in respect of death or personal injury (including ante-natal injury) suffered by any person

(a) in the course of employment

(b) through the use of a motor vehicle or other means of transport

(c) through the manufacture, supply or use of goods or services

(d) on premises belonging to or occupied by another

(e) otherwise through the act or omission of another where compensation under the present law is recoverable only on proof of fault or under the rules of strict liability.

Mr. Heath envisaged a committee of fourteen or fifteen people including insurance actuaries, doctors, economists and representatives of employers and Trade Unions - the type of body which succeeded in New Zealand as opposed to the disappointing Winn Committee which was composed almost entirely of lawyers. The Chairman of the inquiry is to be Lord Pearson. It is to be hoped that the Pearson Commission will interpret its terms of reference as widely as seems intended. It will be some time before the results of its deliberations are known but what sort of view are the members likely to take of the practicability and advisability of implementing in England a scheme along the lines of that now in force in New Zealand?

19. The Times. December 20th 1972.

It is important to realise that different social and economic conditions prevail in this country to New Zealand. England is a far more densely and heavily populated country with a correspondingly far greater number of accidents involving personal injury. The administration of a comprehensive scheme of compensation in England would be expensive and, almost inevitably, slow. If lawyers are to be briefed to appear before the tribunals assessing compensation, if expense necessitates that tribunals are kept relatively few in number thus causing a large backlog of hearings; and if appeals, even if only on a point of law as the Woodhouse report recommended, are to be allowed as they must be, then it is possible that the whole process in terms of time and cost will not be greatly different from the common law process it is designed to replace. It is worth noting also that the common law system of liability is far more entrenched in our society than it was in New Zealand where it was transplanted in its later stages of development. This, though, is a less effective line of argument for if the common law process is really as deficient as it is made out to be then we must be prepared to accept some iconoclasm. Then there is the problem of the presence of vested interests in the common law process in this country which have a far greater restrictive influence on change in our more static society than in the developing nation of New Zealand. This, again, it is submitted, is of little importance; first because lawyers and most of the others involved in the common law process may still have their parts to play in the new system of compensation and secondly because such factors must not be allowed to interfere with our endeavour to find the best possible system for the population as a whole.

Vested interests of certain groups in society will have to be appeased, but accepting this and that the new system of compensation will in procedure be only marginally better than the common law process,

it is ultimately on the merits of the two alternatives that our decision must rest. It was not because of social or economic conditions that New Zealand accepted the compensation system but because of the manifest failings of the liability process. The time has come, it is submitted, to throw off the restrictive shackles of our common law system and to venture into the new, more equitable and more easily understandable realms of a system of compensation for all injuries. Many further details on the precise extent of the scheme and on the qualifications for entitlement would have to be worked out but in principle such a scheme must be most strongly recommended.

Having said this one must confess that the Pearson Commission, if it adopts the usual attitudes taken by committees in this country, may be far too cautious in its recommendations. It might for example recommend that the rule in Rylands v Fletcher should be left out of the scheme. Such caution would be disastrous as we will now see.

The crucial question then, having accepted the principle of such a scheme, is where the rule in Rylands v Fletcher will fit in to it, if at all.[20] The element in the rule which is the major reason for it being a tort of strict liability is the 'dangerous' quality of Rylands v Fletcher objects. There is no doubt that a reasonable case can be made out for the proposition that whereas in most accidents it is fair that the state should bear the loss, in cases in which the defendant brings onto his land and keeps there some dangerous object it is right that the defendant should personally accept responsibility for the consequences. Thus it can be argued that while it is fair that the State should accept responsibility for an accident caused during the manufacture of lemonade we should not collectively accept responsibility for an accident caused in the manufacture of explosives or in a nuclear establishment.

20. The proposition that the rule in Rylands v Fletcher does not apply to injuries to the person has been rejected - see Chapter III.

The fallacies in this argument are numerous however. First there is the point, that we would still have to distinguish between dangerous and non-dangerous objects - this might lead to two separate processes of law, first the hearing before a tribunal under the new compensation scheme which might result in a decision that the circumstances are outside the scheme and then in this case a hearing before the courts under the present system with all the disadvantages pointed out by Woodhouse and with the wastage in time almost doubled. And then what if the court considered that a dangerous object was involved but that the user of land was natural or that there had been no escape? Surely in this case we can not say that no damages are recoverable or are we to say that if the Rylands v Fletcher action fails, compensation will be automatically payable under the new scheme in which case the victim must first go to a tribunal to determine whether he prima facie comes within the compensation scheme, then go to court to sue in Rylands v Fletcher and then, if unsuccessful, go back to the tribunal? The third stage could be avoided by the tribunal making an award conditional on the Rylands v Fletcher action failing but nevertheless the practical difficulties are enormous. And what if the rule in Rylands v Fletcher clearly covers a situation but negligence can also be established? For the state to give compensation would be absurd if we are going to distinguish Rylands v Fletcher for this will mean that the defendant will himself have to pay damages unless he is negligent in which case the state will pay for him. Thus such an 'overlapping' action would have to go to the ordinary courts of law which would immediately mean that the many negligence actions now brought to which the rule in Rylands v Fletcher would also be applicable would be excluded from the system of compensation. The only sensible conclusion one can come to from this is that all actions should be heard by the tribunals under the system of

compensation and if any differentiation is required to discourage extra-hazardous activities that must come from some other source.

It is thus submitted that there are compelling reasons for bringing the rule in Rylands v Fletcher into this new system of compensation for personal injury. The prospect of having two parallel systems of redress - one for negligence and the other for strict liability - is unedifying and smacks indeed of a return to the medieval forms of action which stultified our legal system for so long. To have only one system of compensation for personal injury makes sense; it is simple, unambiguous and understandable by the population as a whole. This however leaves the argument that some deterrent may be required against firms who indulge in ultra-hazardous activities which are not for the public benefit. Such a deterrent could be created in two ways; first by making such firms pay a higher contribution to the state insurance fund and secondly by widening criminal liability so that if there is a breach of duty in such circumstances a prosecution can be brought while the injured party will still be allowed the advantages of the new scheme of compensation. Many details will clearly have to be worked out - for example will the new scheme apply to purely financial loss and to damage to property? (Logically it ought to or the unsatisfactory common law system will still be carried on in those respects although this scheme cannot be limitless for defamation damages, for example, should not for reasons of policy be paid out of a state fund and criminal penalties would not be an appropriate substitute) but in principle it is suggested that the advantages of a comprehensive system of compensation such as that outlined are great. We are now in England at the stage New Zealand had reached seven years ago when the Woodhouse Committee reported. Let us hope that the Pearson Committee will have as beneficial results for our law as one anticipates that the Woodhouse Committee's will have for the law in New Zealand.

CONCLUSIONS

1. The rule in Rylands v Fletcher[1] as expounded by Blackburn J. and modified on appeal by the House of Lords[2] was a new principle of law not directly related to the case law which preceded it.

2. For the rule to apply there must be an escape of or caused by the dangerous object from land under the control of the defendant. Injuries to the person as well as injury to property are actionable per se under the rule.

3. The escape must have taken place in the course of a non-natural user of the defendant's land. The defendant can be liable under the rule for things which are brought on to his land or artificially created or cultivated there with his knowledge or through his negligence but can not be liable for things naturally on the land which result in a spontaneous escape.

4. The rule applies only to something which is likely to do mischief if it escapes. Any object is capable of being dangerous and thus the true distinction is not between the dangerous and non-dangerous character of the thing but between those circumstances in which the defendant will be able to deny the dangerous quality in his act and those in which he will not.

5. The rule in Rylands v Fletcher is certainly not one of absolute liability and can only with difficulty be termed a rule of strict liability. Its basis of liability now lies at some stage in between the fault concept found in negligence and the risk concept of strict liability.

6. The tort of negligence has recently shown signs of moving from a fault concept of liability in the direction of a risk concept. Res ipsa loquitur and the growth and increasing awareness of the presence

1. 1866 L.R. 1 Ex. 265.
2. L.R. 3 H.L. 330.

of insurance have played a leading part in this shift in emphasis.

7. Today a powerful feeling is developing that compensation should be a right of the injured party. Loss distribution between members of a section of society has become increasingly prevalent but the system which is becoming more and more favoured as the ultimate answer to the problem of compensation for accidents involving personal injury is a system of full and direct compensation payable to the victim without regard to responsibility for the accident.

A Royal Commission under the chairmanship of Lord Pearson has now been set up to consider the whole question and its findings will have a great influence on the future of all torts of this nature. The rule in Rylands v Fletcher has now been with us for more than one hundred years but the end of its existence as an independent part of the law of tort may now be in sight.

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