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THE DEMISE OF THE RULE IN *RYLANDS* v *FLETCHER?*

This article examines the rule in *Rylands* v *Fletcher*, and considers the prospects for its future role in tort law in the light of two recent decisions, one by the House of Lords in England, and one by the High Court of Australia, both of which suggest that its continued existence as a separate tort cannot be justified.

I. INTRODUCTION

THE rule in *Rylands* v *Fletcher*[1] is one of the best known formulations of principle in English law. When Blackburn J gave the judgment of the Court of Exchequer Chamber in 1866,[2] and explained with such clarity the "true rule of law" with regard to the bringing of dangerous things onto one's land, he effectively laid down a new tort[3] imposing strict liability on owners and occupiers of land[4] for damage caused to their neighbours. The rule established itself as an important part of tort law, with a distinct and significant role to play. From its very inception, though, exceptions to, and restrictions on, the rule began to develop, and its importance was greatly reduced when the tort of negligence began its meteoric rise. Nevertheless, the rule has remained part of the common law, and has continued to be pleaded (frequently alongside negligence and nuisance), even in recent years. Its slow decline now seems, however, to have turned into a potentially terminal condition. This is due in large part to two recent decisions, one emanating from the House of Lords, and the other from the Australian High Court.

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1 (1868) LR 3 HL 330.

2 *Fletcher* v *Rylands* (1866) LR 1 Ex 265.

3 It should be noted that Blackburn J did not appear to consider at the time that he was formulating a new principle. In stating the rule, he drew on various cases concerning the escape from land of things such as cattle and other animals and filth from privies – cases apparently decided in nuisance. The rule soon developed, however, into a distinct action with its own individual requirements. For further discussion of whether or not the rule should ever have been treated as a separate tort, see *infra*, note 39 *et seq*.

4 The requirement that the defendant must have a legal interest in the land has not been seen as crucial in every case (see note 19, *infra*). Nor does it appear critical for the plaintiff always to have a proprietary interest in land (see note 28, *infra*).

The decisions in *Cambridge Water Co Ltd* v *Eastern Counties Leather plc*[5] and *Burnie Port Authority* v *General Jones Pty Ltd*[6] both discuss at length the rule in *Rylands* v *Fletcher* and both, though for different reasons, conclude that it has little or no role to play nowadays as a distinct entity in tort law. The aim of this article is to consider the reasons given by these two eminent courts for reaching such a conclusion, and to question whether the rule really is something which the law can so easily do without. First, though, it is necessary briefly to examine the rule in *Rylands* v *Fletcher* itself, and to consider the elements which a plaintiff seeking to bring an action under the rule must establish, and the defences which can be raised against it.

II. The Rule in *Rylands* v *Fletcher*

In the case of *Rylands* v *Fletcher* the defendants (Rylands) had a reservoir constructed on their land by apparently competent independent contractors and engineers. There were disused mine shafts under the land. The reservoir was not properly constructed, with the result that water burst from it into these shafts and flooded a mine owned by the plaintiff (Fletcher), which, unknown to the defendants, adjoined their disused shafts. The plaintiff sued the defendants for damages. It was established in the Court of Exchequer[7] that the defendants were personally free from blame, though their contractors had exhibited a lack of care and skill in failing to take account of the disused shafts when constructing the reservoir. The majority of the Court of Exchequer held that the defendants would only have been liable to the plaintiff had they personally failed to take reasonable and prudent precautions when having the reservoir constructed. Since the defendants had taken such precautions as were deemed by the court to be reasonable, they were held not liable.

The plaintiff appealed to the Court of Exchequer Chamber. It was there that Blackburn J (giving the decision of the court and reversing the decision of the court below), framed his famous statement with regard to the obligations of those who bring dangerous things onto their land:

> We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage

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5 [1994] 2 AC 264, House of Lords (the *Cambridge Water Co* case).

6 (1994) 68 ALJR 331, High Court of Australia (the *Burnie Port Authority* case).

7 3 H&C 774; 34 LJ (Ex) 177.

> which is the natural consequence of the escape ... 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.[8]

Thus Blackburn J is generally taken to have laid down a rule of strict liability, potentially applicable to any defendant who brought something onto his land which caused damage to his neighbour.

The case was appealed to the House of Lords. Their Lordships affirmed the decision of the Court of Exchequer Chamber and cited with approval the formulation of the rule by Blackburn J. Its position in tort law was thus established.

III. The Elements of and Defences to the Rule

Some of the aspects of the rule referred to by Blackburn J appear to have been recognised from a very early stage as being of only peripheral relevance. The requirement that the thing must be brought onto land for the defendant's "own purposes" has, for example, virtually never been referred to as a separate element again.[9] The requirements of "collecting and keeping" the thing have similarly been glossed over, leaving only three or four crucial elements to be established.

(i) *There must be a non-natural use of land*

The requirement that there must be a non-natural use of land was introduced into the rule immediately, though somewhat ambiguously, by Lord Cairns in the House of Lords in the case of *Rylands* v *Fletcher* itself. In approving the judgment of Blackburn J in the Court of Exchequer Chamber, Lord Cairns drew a distinction between what he termed as "natural" and "non-natural" uses of land. He observed that, had the defendants in the case made a natural use of their land, that would not have given rise to liability. There would be liability only if:

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8 *Supra*, note 2, at 279.

9 Though in cases where the use is, *eg*, for the benefit of the community as a whole, the case may, anyway, be decided on the basis that there has been no non-natural use of land (see discussion *infra*, at note 12). And in cases where the use is for the common benefit of the plaintiff and the defendant, the defence of common benefit – which tends to be treated as much the same thing as consent of the plaintiff – will prevent a claim from succeeding (see, *eg*, the case of *Carstairs* v *Taylor* (1871) LR 6 Ex 217).

> [o]n the other hand ... the defendants, not stopping at the natural use 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 ... and if in consequence of their doing so ... the water came to escape and pass off into the close of the plaintiff.[10]

This criterion of non-natural use was clearly satisfied on the facts of *Rylands* v *Fletcher*, and Lord Cairns gave no indication that, in referring to it, he intended to add any requirement to Blackburn J's original formulation that the damage-causing thing must have been "not naturally there." Indeed, it has often been suggested that Lord Cairns' introduction of the requirement of non-natural use may have been inadvertant – a view shared by the Australian High Court in the *Burnie Port Authority* case.[11] Nevertheless, whether deliberate or not, the introduction of non-natural use into the rule immediately restricted its scope and strictness. The rule ceased to be available simply by reason of the artificial introduction onto the land of *anything* (however normal or "natural" it might be) which was likely to do damage if it escaped, and became applicable only where the offending thing had been brought onto the land for a purpose which was in some way extraordinary.

The definition of non-natural use has been kept very flexible by the courts – though the flexibility generally seems to lean more towards a finding that uses are *not* non-natural. To fall within the definition a use "must be some special use bringing with it increased danger to others and must not merely be the ordinary use of land or such a use as is proper for the benefit of the community."[12] Furthermore, in assessing whether it is a special use, "all the circumstances of the time and place and the practices of mankind must be taken into consideration, so that what might be regarded as dangerous or non-natural may vary according to those circumstances."[13] Applying this test, it has even been suggested that a munitions factory might not constitute a non-natural use of land in time of war,[14] and there seems to be a tendency in many cases to give more weight to the benefit attached to the activity than to the risk inherent in it.[15] On the other hand there are

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[10] *Supra*, note 1, at 339.

[11] *Supra*, note 6, at 338.

[12] *Per* Lord Moulton in *Rickards* v *Lothian* [1913] AC 263, 280.

[13] *Per* Lord Porter in *Read* v *J Lyons & Co* [1947] AC 156, 176, (*Read* v *Lyons*).

[14] *Ibid.*

[15] At the trial level in the *Cambridge Water Co* case, *eg*, Ian Kennedy J did not consider that even the storage of substantial quantities of chemicals on industrial premises would constitute a non-natural use of land. The House of Lords, however, took a different view.

cases where, because of increased danger involved, even beneficial uses have been held to be non-natural.[16]

(ii) *The thing which results from the non-natural use must be likely to do mischief if it escapes*

The requirement that the thing must be likely to do mischief if it escapes, although always present in theory, has taken rather a back seat in practice in many *Rylands* v *Fletcher* cases. This seems to be due partly to an assumption that a non-natural use of land is likely to be potentially mischief-causing anyway, and partly to an assumption that actions can only be brought under the rule once damage has been caused, so the likelihood of the offending thing causing damage has effectively been satisfied by the very fact of the damage having been sustained.

Their Lordships in the House of Lords in the *Cambridge Water Co* case[17] have now expressed the view that it has always been a requirement of the rule that the type of damage sustained must be foreseeable and if one accepts that analysis, there is certainly an argument that, in order for the type of damage suffered as a result of the escape to be foreseeable, the damage-causing thing must necessarily have been likely to cause that damage if it escaped. However, the courts have, in the past, adopted a much more casual approach to the "likely to do mischief" requirement, and, as a result, all kinds of things have been held to be covered by the rule, including many objects which one would not normally consider as being "likely to do mischief",[18] certainly not in the sense of being inherently dangerous. As several commentators point out, however, "danger" is not an ideal concept to use in this context, because many things which are not dangerous in themselves may become so if and when they escape. The key should thus

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Lord Goff stated categorically that the such storage would constitute a non-natural use (see *supra*, note 5, at 309).

16 See, *eg*, *Rylands* v *Fletcher* itself, *supra*, note 1, and *Western Engraving Co* v *Film Laboratories Ltd* [1936] 1 All ER 106, where the use of water was held to be non-natural, and *Batchellor* v *Tunbridge Wells Gas Co* (1901) 84 LT 765 and *National Telephone Co* v *Baker* [1893] 2 Ch 186, where the use of, respectively, gas and electricity were held to be non-natural.

17 *Supra*, note 5.

18 The rule has, *eg*, been applied even to such unlikely objects as flag-poles (see *Shiffman* v *The Venerable Order of the Hospital of St John of Jerusalem* [1936] 1 All ER 557). The more predictable things to which it has been applied include electricity (*National Telephone Co* v *Baker*, *supra*, note 16), water (*Rylands* v *Fletcher*, *supra*, note 1, and *Western Engraving Co* v *Film Laboratories Ltd*, *supra*, note 16), gas (*Batchellor* v *Tunbridge Wells Gas Co*, *supra*, note 16), fire (*Jones* v *Ffestiniog Ry Co* (1868) LR 3 QB 733), fumes (*Halsey* v *Esso Petroleum Co Ltd* [1961] 2 All ER 145) and sewage (*Humphries* v *Cousins* (1877) 2 CPD 239).

not be the danger inherent in the thing but its damage-causing potential in the event of its escape.

(iii) *There must be an escape of the damage-causing thing*

Blackburn J, in formulating the rule in *Rylands* v *Fletcher*, referred to the person who brought something "dangerous" onto his land[19] being liable for damage caused by its escape.[20] The first occasion when the definition of the element of escape actually became an issue was in the case of *Read* v *Lyons*,[21] where the plaintiff was injured by an explosion on the defendants' land but still sought to bring an action under the rule. The House of Lords held that, for the purposes of the rule, "escape" means "escape from a place where the defendant has occupation or control over land to a place which is outside his occupation or control."[22] The plaintiff therefore failed in her action. This definition of escape has been applied universally since that time, and has had a major effect in limiting the potential application of the rule. This is particularly so with regard to what might otherwise have been the rule's application to ultra-hazardous activities, where the logical requirement would have been for the defendant to be liable for damage caused by such activities, regardless of where the damage was sustained.[23]

(iv) *Damage must be caused*

Although damage of some kind is clearly a prerequisite for applying the rule in *Rylands* v *Fletcher*, there is some uncertainty over the type of damage which is recoverable. Blackburn J referred to the defendant being

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19 In spite of the rule apparently being based on a proprietary interest in land, it has been used (both recently and in the more distant past) to impose liability not only on owners and legal tenants of land, but also on persons with no proprietary interest at all in the land from which the damage-causing thing escapes. Control over the damage-causing thing seems to be the only real key in such cases. See, *eg*, *Rigby* v *Chief Constable of Northamptonshire* [1985] 2 All ER 985, 996, and *Powell* v *Fall* (1880) 5 QBD 597, where even escapes from the highway have been held to give rise to an action under the rule. There remains, however, a school of thought that the rule should apply only to an escape of the damage-causing thing from the property of the defendant to that of the plaintiff (see *infra*, note 25).

20 Although it will normally be the "dangerous" thing brought onto the land which itself escapes and causes damage, this need not necessarily be the case. In the case of *Miles* v *Forest Rock Granite Co (Leicestershire) Ltd* (1918) 34 TLR 500 (*Miles* v *Forest Rock*), rocks (which were already on the land) blown onto the highway by an explosive substance (which was the thing brought onto the land) actually caused the damage complained of. The Court of Appeal held that an action brought under the rule in *Rylands* v *Fletcher* could still succeed.

21 *Supra*, note 13.

22 *Ibid*, *per* Viscount Simon at 168.

23 For further discussion of this point, see *infra*, note 49.

liable for "*all* the damage which is the natural consequence" of the escape,[24] but in *Read* v *Lyons* the House of Lords (and, in particular, Lord Macmillan) expressed the view that, because of its fundamental links with adjoining land and landowners (and its close ties with the tort of nuisance), the rule should be restricted to property damage.[25] Lord Macmillan was of the view that an allegation of negligence would always be required in a claim for personal injuries.[26] If accepted, this view would, of course, have encroached yet further into the scope and application of the rule.

The point was not decided in *Read* v *Lyons*, and subsequent courts have generally, if unenthusiastically, accepted the position as it was prior to the pronouncements in *Read* v *Lyons* – *ie*, that personal injuries *are* recoverable under the rule.[27] Some commentators suggest that a distinction is to be drawn in this respect between occupiers of land (who should be able to claim for personal injuries) and non-occupiers (who – presumably based on an analogy with private nuisance, under which the plaintiff must have a proprietary interest in land – should not). However, most cases seem to suggest that persons in either category will be entitled to claim for personal injuries under the rule,[28] and to refuse a claim to a plaintiff who is a non-occupier could certainly lead to a charge that the rule is, anachronistocally, more concerned with the protection of proprietary interests than with the protection of personal safety. The question of personal injuries being recoverable at all has frequently been left open, though, and cases have often been decided on other grounds.[29]

(v) *Defences*

Another very significant way in which the breadth and strictness of the rule in *Rylands* v *Fletcher* has been limited has been in the development and application of defences to the rule. In his original formulation, Blackburn

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24 *Supra*, note 2, at 279.

25 *Supra*, note 13, at 173-175. The land and landowner connection was clearly fundamental to Lord Macmillan, notwithstanding the existence of authorities imposing liability on defendants for the escape of damage-causing things from places such as highways. See *supra*, note 19, for further discussion of this point.

26 *Ibid*. See, too, *infra*, note 42, for further discussion of this point.

27 See, *eg*, *Perry* v *Kendricks Transport Ltd* [1956] 1 WLR 85 at 92 (*Perry* v *Kendricks*), in which Parker LJ in the Court of Appeal did not consider it open to that court to hold that the rule applied only to property damage. This was presumably because he regarded himself bound by earlier Court of Appeal decisions allowing recovery for personal injuries, such as *Miles* v *Forest Rock* (*supra*, note 20).

28 See, *eg*, both *Hale* v *Jennings Bros.* [1938] 1 All ER 579 (where a tenant of land recovered for personal injuries) and *Miles* v *Forest Rock* (*supra*, note 20) (where the plaintiff recovered for personal injuries sustained on the highway, over which he had no proprietary interest).

29 As, *eg*, in *Perry* v *Kendricks* (*supra*, note 27).

J referred to only two possible defences – default of the plaintiff and act of God.[30] Various other defences, such as consent of the plaintiff,[31] common benefit[32] and statutory authority[33] have developed over the years. All have reduced the usefulness of the rule from a plaintiff's point of view, and some, like the defence of act of a stranger, have effectively introduced into the rule, by the back door, aspects of fault which sit uneasily with its apparent status as a strict liability tort, and which have further reduced the availability of the rule.[34]

IV. The New Cases

A. *The Cambridge Water Co Case*

In this case, the defendants, Eastern Counties Leather plc (ECL), were manufacturers of leather. As part of the tanning process, they used a chemical solvent. During the tanning process, quite small amounts of the chemical solvent regularly splashed onto the concrete floor of the tannery. It was estimated that, by the end of 1976 (when the spillages stopped), the total amount of solvent spilled was over 1,000 gallons. The spilled solvent (which was not readily water-soluble) seeped through the tannery floor to the soil below. It reached an impermeable strata 50 metres below the surface. From there, it percolated along a plume and finally reached a strata containing a borehole from which the plaintiffs, the Cambridge Water Co Ltd (CWC), extracted water for domestic use. Their water was thus contaminated.

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30 *Supra*, note 2, at 280. For an example of a case involving default of the plaintiff, see *Lomax* v *Stott* (1870) 39 LJ Ch 834. The first case actually to use the defence of act of God was *Nichols* v *Marsland* (1876) 2 ExD 1.

31 See, *eg*, *Ross* v *Fedden* (1872) LR 7 QB 661 and *Attorney-General* v *Cory Brothers & Co Ltd* [1921] 1 AC 521.

32 See, *eg*, *Carstairs* v *Taylor*, *supra*, note 9.

33 See, *eg*, *Green* v *Chelsea Waterworks Co* (1894) 70 LT 547.

34 The defence of act of a stranger developed initially through an analogy with the defence of act of God. Under the defence, the rule in *Rylands* v *Fletcher* will not apply if the escape is caused through the unforeseeable act of a stranger over whom the defendant has no control. The defence is complicated by the fact that some judges assume that it will apply only to deliberate and intentional acts by third parties (see, *eg*, the dictum of Singleton LJ in *Perry* v *Kendricks*, *supra*, note 27, at 87), while others take the view that the defence will be available as long as the act of the third party, whether deliberate or not, causes the escape (see, *eg*, the dictum of Jenkins LJ, also in *Perry* v *Kendricks*, *ibid*, at 90). A further complication is to be found in the fact that the defence can fail if the defendant ought to have foreseen and prevented the stranger's act. In this respect, the defence brings a *Rylands* v *Fletcher* action perilously close to an action in negligence, since a case involving the defence of act of a stranger will effectively turn on the question of whether or not the defendant ought to have done more to prevent the stranger from committing the escape-causing act.

CWC's borehole was 1.3 miles from ECL's tannery, and it took about 9 months for the solvent to seep from the tannery to the borehole.

CWC sued ECL, claiming damages in negligence, nuisance and under the rule in *Rylands* v *Fletcher*. At first instance, the judge, Ian Kennedy J, held that the actions in nuisance and negligence failed because ECL could not reasonably have foreseen, in or before 1976, that spillages of such small quantities of solvent would seep into the underground strata and then contaminate the water as they did. The action in *Rylands* v *Fletcher* he also dismissed, on the ground that ECL's tanning business constituted a natural use of their land (a finding subsequently reversed by both the Court of Appeal and the House of Lords).[35] CWC appealed to the Court of Appeal, but only with regard to the action under the rule in *Rylands* v *Fletcher*. There was no appeal against the trial judge's conclusion on nuisance and negligence. Mann LJ, delivering the judgment of the Court of Appeal, held that ECL were strictly liable under the rule in *Rylands* v *Fletcher* for the percolation of the water onto CWC's land. CWC were awarded substantial damages. ECL appealed to the House of Lords.

The judgment of the House was delivered by Lord Goff of Chieveley. CWC had not appealed the nuisance point to the Court of Appeal, which meant that it was not technically an issue before the House of Lords. However, Lord Goff felt compelled to examine the whole area of nuisance in dealing with the rule in *Rylands* v *Fletcher* because of what he described as their "close relationship".[36] One of the main submissions made by counsel for ECL was that there could be strict liability under the rule in *Rylands* v *Fletcher* only if the damage suffered was foreseeable. His Lordship considered that this could be determined only by deciding, first, whether foreseeability was an essential element in nuisance and, secondly, if it was, whether the position under the rule in *Rylands* v *Fletcher* must necessarily be identical.

With regard to the question of whether damage must be foreseeable in nuisance, Lord Goff concluded that it must, citing in this respect the dictum of Lord Reid in *The Wagon Mound No 2*[37] that: "[i]t is not sufficient that the injury suffered ... was the direct result of the nuisance if that injury was in the relevant sense unforeseeable".

Lord Goff then turned to the question of whether foreseeability must, therefore, automatically be a requirement under the rule in *Rylands* v *Fletcher*. In deciding this point, his Lordship referred to the "seminal" article written in 1949 by Professor Newark,[38] which criticised the way in which the tort

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35 See *supra*, note 15.

36 *Supra*, note 5, at 297.

37 *Overseas Tankship (UK) Ltd* v *Miller Steamship Co Pty Ltd* [1967] AC 617.

38 "The boundaries of nuisance" (1949) 65 LQR 480.

of nuisance had begun to overlap with negligence, and which expressed the view that this "fogging" of the boundaries of nuisance had led to the rule in *Rylands* v *Fletcher* being treated as a separate tort, rather than as simply a decision in nuisance. In Professor Newark's view, although Blackburn J had not used the word "nuisance" when reaching his decision, he had clearly decided the case as a nuisance issue, and had not regarded himself as laying down a new proposition of law.[39] Professor Newark stated that *Rylands* v *Fletcher* had been misunderstood and misapplied by the legal profession, and had been seen as an exceptional case where liability was strict because of the hazardous activities being carried on by the defendant, rather than as a normal case of nuisance where the liability was strict because of the nature of the plaintiff's invaded interest. For this reason, two incorrect conclusions had been reached with regard to the rule. These, as Lord Macmillan had observed in *Read* v *Lyons*,[40] were that the rule could be extended beyond neighbouring occupiers,[41] and that it could be used to allow a remedy for personal injuries.[42]

Lord Goff agreed with Professor Newark's view that Blackburn J had not intended to lay down new law, and concluded that "[s]een in its context, there is no reason to suppose that Blackburn J intended to create a liability any more strict than that created by the law of nuisance."[43] This being so, Lord Goff concluded that, since foreseeability is a crucial requirement for an action in nuisance, it must also be an essential element in an action brought under the rule in *Rylands* v *Fletcher*, and in reaching this conclusion, he cited Blackburn J's reference in the original formulation of the rule to the fact that the thing which escapes must be "*likely* to do mischief".[44] His Lordship recognised that the position had been complicated by some fairly early authorities in which foreseeability did not appear to be considered a necessary element of the rule,[45] and by later cases (including a decision of the House of Lords[46] itself) which appeared to negative the requirement of foreseeability, but he took the view that such cases "provide a very fragile base for any firm conclusion that foreseeability of damage has been authoritatively rejected as a prerequisite of the recovery of damages under the rule in *Rylands* v *Fletcher*."[47]

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[39] For further discussion of this point, see *supra*, note 3.
[40] *Supra*, note 13.
[41] See discussion, *supra*, at note 25.
[42] See discussion, *supra*, at note 26.
[43] *Supra*, note 5, at 299.
[44] *Supra*, note 8.
[45] See, *eg*, *Humphries* v *Cousins*, *supra*, note 18.
[46] *Rainham Chemical Works Ltd* v *Belvedere Fish Guano Co Ltd* [1921] 2 AC 465.
[47] *Supra*, note 5, at 304.

Having thus decided that foreseeability was a requirement both in nuisance and under the rule in *Rylands* v *Fletcher*, his Lordship held that there could be no liability under either tort in the *Cambridge Water Co* case, because the kind of damage sustained in that case had been unforeseeable at the time when the escape of the chemicals occurred. Lords Templeman, Jauncey, Lowry and Woolf concurred with his decision.

The finding that foreseeability was an essential requirement of the rule in *Rylands* v *Fletcher* was clearly the basis of the court's decision, and was sufficient to dispose of the case. However, in discussing the role of the rule in *Rylands* v *Fletcher* in contemporary law, Lord Goff took his examination one step further. He considered the question of whether, in spite of the rule's origins in nuisance, and the fact that both Blackburn J and, later, Professor Newark, had apparently seen it as nothing more than a sub-class of nuisance, the practice adopted by courts of treating it as a free-standing, independent tort was a justifiable one. In this respect, his Lordship observed:

> It can be argued that the rule in *Rylands* v *Fletcher* should not be regarded simply as an extension of the law of nuisance, but should rather be treated as a developing principle of strict liability from which can be derived a general rule ... for damage caused by ultra-hazardous operations, on the basis of which persons conducting such operations may properly be held strictly liable for the extraordinary risk to others involved in such operations.
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> I have to say, however, that there are serious obstacles in the way of the development of the rule in *Rylands* v *Fletcher* in this way. First of all, if it was so to develop, it should logically apply to liability to all persons suffering injury by reason of the ultra-hazardous operations; but the decision of this House in *Read* v *Lyons* ... which establishes that there can be no liability under the rule except in circumstances where the injury has been caused by an escape from land under the control of the defendant, has effectively precluded any such development ... In this connection, I refer in particular to the Report of the Law Commission on Civil Liability for Dangerous Things and Activities[48] ... the Law Commission expressed serious misgivings about the adoption of any test for the application of strict liability involving a general concept of 'especially dangerous' or 'ultra-hazardous' activity, having regard to the uncertainties and practical difficulties of its application. If the Law Commission is unwilling to

[48] Law Commission No 32, 1970.

consider statutory reform on this basis, it must follow that judges should if anything be even more reluctant to proceed down that path.[49]

In view of these facts, Lord Goff concluded that the rule in *Rylands* v *Fletcher* was still intrinsically and inseparably connected with the tort of nuisance. Indeed he expressed the view that: "[i]t would moreover lead to a more coherent body of common law principles if the rule were to be regarded essentially as an extension of the law of nuisance to cases of isolated escapes from land"[50] rather than as a separate tort.

Although not, strictly speaking, the ratio of the case, this dictum – that there is no place in English law for the rule in *Rylands* v *Fletcher* as a separate tort – may, with the benefit of hindsight, be seen as heralding the beginning of the end of its life as a distinct cause of action.

B. *The Burnie Port Authority Case*

In this case, the defendants, the Burnie Port Authority (BPA), owned a building in Burnie, Tasmania. They occupied most of the building themselves, but allowed the plaintiffs, General Jones Pty Ltd (General Jones), to occupy three cold rooms and an office in the building under licence in order to store large quantities of frozen vegetables. Work was being carried out to extend the building and to install further cold storage facilities. BPA had not employed a head-contractor to carry out this work. They had, however, employed independent contractors to carry out specific aspects of it, including contractors named Wildridge & Sinclair Pty Ltd (WS), who were engaged to install the electrical and refrigeration equipment. This involved a great deal of welding and the use of expanded polystyrene (EPS), an insulating material. Although EPS tends to shrink away from heat sources and contains chemicals to inhibit ignition, it can be set alight if brought into sustained contact with a flame or burning substance. Once it ignites, it burns with great (and geometrically progressing) intensity. Thirty cardboard cartons containing the EPS to be used in the relevant work were, to the knowledge of BPA, stacked together very close to where the welding works were to be carried out. Employees of WS carried out the welding work negligently, and either sparks or molten metal fell onto the boxes

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[49] *Supra*, note 5, at 305.

[50] *Ibid*, at 306. Lord Goff recognised that the rule in *Rylands* v *Fletcher* as established is not limited to cases of isolated escapes, and that, on the facts of the *Cambridge Water Co* case itself, the escapes had not, in fact, been isolated. He pointed out, however, that since, classically, the case would have been regarded as one of nuisance, it would be strange if, by classifying it as a *Rylands* v *Fletcher* action, liability were to be made more strict than it would be under nuisance. For further discussion of this point, see *infra*, note 99.

containing the EPS. An enormous fire resulted. Within minutes, the whole complex was engulfed in flames, and General Jones' frozen vegetables were destroyed.

General Jones sued both BPA and WS in the Supreme Court of Tasmania. In proceedings complicated by cross-claims and third-party claims which did not affect the primary findings, it was held at first instance that both parties were liable to General Jones: BPA on the basis of a special rule (the *ignis suus* rule) relating to an occupier's liability for damage caused by the escape of fire from his premises, and WS under the ordinary principles of negligence and the *ignis suus* rule. The trial judge, Neasey J, held that there could be no action under the rule in *Rylands* v *Fletcher* because there was no non-natural use of land. He also held that BPA had not themselves been negligent. Therefore, they were entitled to be indemnified by WS in respect of any damages which they paid to General Jones. BPA appealed to the Full Court, which affirmed their liability to General Jones, but on different grounds. The members of the Full Court concluded that they were liable not under any special rule relating only to the escape of fire, but under the rule in *Rylands* v *Fletcher*. BPA then appealed to the High Court of Australia.

In the High Court, General Jones argued that BPA were liable to them on three distinct grounds – under the general principles of negligence, under the *ignis suus* rule, and under the rule in *Rylands* v *Fletcher*.[51] BPA did not challenge the findings that the damage sustained by General Jones was caused by negligence on the part of WS, their independent contractors, but argued that these findings were not sufficient to make them liable to General Jones.

(i) *The majority decision*

The majority of the High Court (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ) rejected the argument made by BPA and found in favour of General Jones. Unlike the lower courts, however, they held the liability to be in negligence, and not under either the *ignis suus* rule or the rule in *Rylands* v *Fletcher*.

With regard to the *ignis suus* argument, the majority concluded that no such rule survived under Australian common law,[52] and that any strict liability action based on escape of fire would have to be brought under the rule in *Rylands* v *Fletcher*. The question which they then went on to consider apparently, if somewhat surprisingly, (based on the argument of counsel

[51] A claim in nuisance, raised in their written outline of arguments, was abandoned in the course of oral argument.

[52] *Supra*, note 6, at 337.

for General Jones) was whether the rule in *Rylands* v *Fletcher* itself still had any role to play in Australia.

The first observation made by the majority was that:

> Notwithstanding the many accolades which have been, and continue to be, lavished on Blackburn J's judgment, that brief exposition of "the true rule of law" is largely bereft of current authority or validity if it be viewed, as it ordinarily is, as a statement of a comprehensive rule. Indeed, it has been all but obliterated by subsequent judicial explanations and qualifications.[53]

The majority discussed the various elements of the rule as formulated, and observed the extent to which these had been abandoned or modified. They referred, for example, to the fact that the requirement that the thing kept by the defendant must be "for his own purposes" had been largely discarded as a general qualification,[54] and to the general abandonment of the concept of "anything likely to do mischief if it escapes" (or its substitution in many cases with the idea that the thing must be "dangerous").[55] They also referred to the fact that, in the House of Lords, Blackburn J's reference to the thing being "not naturally there" was "converted [by Lord Cairns], without explanation and perhaps inadvertantly, into a quite different requirement of non-natural use,"[56] and they considered the consequences of this conversion.[57] Their conclusion was that, over the years, the definition of

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53 *Ibid*, at 337-338.

54 See *supra*, note 9, for further discussion of this point.

55 See *supra*, note 18, for further discussion of this point.

56 *Supra*, note 6, at 338. For further discussion of this point, see *supra*, note 10.

57 One consequence observed by the majority in the Australian High Court was that the substitution of "non-natural use" for Blackburn J's original reference to the thing being "not naturally there" might actually have led to liability becoming stricter in one sense, since its effect had (in their view) been to substitute for Blackburn J's requirement that the offending thing must be something which the defendant "*knows* to be mischievous", a requirement "closely resembling, or perhaps even amounting to, foreseeability" (*supra*, note 6, at 338). They referred in this respect to the decision in the *Cambridge Water Co* case (*supra*, note 5), which was, of course, based on the conclusion that damage must be foreseeable in order to give rise to an action under the rule in *Rylands* v *Fletcher*. Indeed, in the *Cambridge Water Co* case, Lord Goff also referred to the reference by Blackburn J to things which the occupier "*knows* to be mischievous" – and he observed that "the general tenor of his [Blackburn J's] statement of principle is therefore that knowledge, or at least foreseeability of the risk, is a prerequisite of the recovery of damages under the principle" (see *supra*, note 5, at 302). However, these observations about knowledge and foreseeability aside, the substitution of "non-natural use" for the requirement that the thing must be "not naturally there" is generally seen as reducing, rather than increasing, the strictness of the rule (see discussion *supra*, note 10 *et seq*), as the majority in the Australian High Court themselves recognised in their subsequent discussion (*supra*, note 6, at 339 *et seq*).

"non-natural use" had been refined, in cases such as *Rickards* v *Lothian*[58] and *Read* v *Lyons*,[59] to an extent where:

> Increasingly, *Rylands* v *Fletcher* liability has come to depend on all the circumstances surrounding the introduction, production, retention or accumulation of the relevant substance. That being so, the presence of reasonable care or the absence of negligence in the manner of dealing with a substance or carrying out an activity may intrude as a relevant factor in determining whether the use of land is a "special" and "not ordinary"[60] one.[61]

The result of this approach to non-natural use could be seen in decisions such as that in *Read* v *Lyons*, where it was held that even the obviously dangerous activity of manufacturing high explosive shells may have been outside the scope of the rule. Thus, from within, the test of non-natural use had, in the opinion of the majority, largely deprived the rule in *Rylands* v *Fletcher* of any objective content, and had led to uncertainties of application. Moreover, from without, the constantly developing tort of negligence had: "progressively assumed dominion in the general territory of tortious liability for unintended physical damage, including the area in which the rule in *Rylands* v *Fletcher* once held sway."[62] It was, therefore, in their view, time to consider the present role of the rule as a separate tort.

In considering this question, the majority took as their starting point the fact that: "[r]egardless of the parental claims of nuisance or even trespass, the rule has been increasingly qualified or adjusted to reflect basic aspects of the law of ordinary negligence."[63] As an example of the move away from the rule's nuisance-based origins, they pointed out that an action brought under *Rylands* v *Fletcher* was no longer available only to aggrieved owners or occupiers of land.[64] As examples of the trend towards an overlap with negligence, they referred to the use, in determining the recoverability of damage, of the test of foreseeability (which they considered had effectively

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58 *Supra*, note 12.

59 *Supra*, note 13.

60 The requirement that the use must be "special" and "not ordinary" was introduced in *Rickards* v *Lothian*, *supra*, note 12.

61 *Supra*, note 6, at 339.

62 *Ibid*, at 340.

63 *Ibid*, at 342.

64 In this respect, their Honours observed that the position might be different in England, and they referred in this respect to the decision in *Read* v *Lyons* (*supra*, note 13). However, as they also recognised, cases such as *Perry* v *Kendricks* (*supra*, note 27) suggest that a proprietary interest on the part of the plaintiff is no longer a prerequisite for an action under the rule in England, either.

taken the place of a thing which the defendant "knows to be mischievous" under Blackburn J's original formulation of the rule)[65] and to the subjective factors (similar to the concept of unreasonable risk) relevant in determining non-natural use.[66] They also referred to the use of defences such as consent and default of the plaintiff, which they considered to be analogous to voluntary assumption of risk and contributory negligence.[67] Even the defence of act of God they saw as more attuned to fault, rather than no-fault, liability, and they observed that, where the defence of statutory authority is involved, the action often becomes one of negligence simpliciter.[68] In light of these considerations, they agreed with Professor Fleming's comment that "[t]he aggregate effect of these exceptions makes it doubtful whether there is much left of the rationale of strict liability as originally contemplated in 1866"[69] and with the view expressed by the editors of the last five editions of Winfield and Jolowicz on Tort that "[w]e have virtually reached the position where a defendant will not be considered liable [under the rule] when he would not be liable according to the ordinary principles of negligence."[70]

The majority recognised that the main argument for retaining the rule in *Rylands* v *Fletcher* as an independent tort would be if it could not be accommodated within the principles of ordinary negligence without denying recovery to persons who would otherwise have had a cause of action.[71] In this respect, they stated that there might well be a problem in abandoning

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65 See *supra*, note 8, and, for further discussion of the foreseeability point, *supra*, note 57.

66 Other commentators have also suggested that the factors relevant in determining whether or not there has been a non-natural use of land are not dissimilar to those relevant in determining whether an unreasonable risk has been taken in the tort of negligence (see *eg*, Williams "Non-Natural Use of Land" [1973] CLJ 310, and the discussion thereon in Jones, *Textbook on Torts* (4th ed, 1993), at 251 *et seq*). There is, it is true, a parallel to be drawn where the weighing of risk and benefit is concerned. However, there is at least one very significant difference between the two concepts, since the concept of unreasonable risk depends on the defendant having been at fault, whereas the concept of non-natural use focuses solely on the use to which the land is put. For further discussion of this point, see the dissenting judgement of McHugh J, *infra*, note 83 *et seq*.

67 For further discussion of the defences available to an action under the rule, see *supra*, note 30 *et seq*.

68 Although their Honours did not make the point, the same can be said of the defence of act of a stranger. For further discussion of this defence, see *supra*, note 34.

69 The Law of Torts (8th ed, 1992), at 343. This contention was noted in the *Burnie Port Authority* case, *supra*, note 6.

70 They referred, *eg*, to Jolowicz, Ellis, Lewis and Harris (9th ed, 1971), at 338, 390 and Rogers (13th ed, 1989), at 443. See *supra*, note 6, at 345.

71 This recognition mirrored the views of Professor Thayer in his article "Liability without Fault", (1916) 29 *Harvard Law Review* at 801, which was cited by their Honours. See *supra*, note 6, at 345.

the rule if the concepts of non-delegable duty[72] and a variable standard of care in negligence were not sufficiently adaptable to allow actions in all situations where they would otherwise have been available under *Rylands* v *Fletcher*.

Their Honours went on to consider the concepts of non-delegable duty and a variable standard of care in some depth. With regard to the concept of non-delegable duty, they concluded that the type of case in which a landowning defendant would be strictly liable under the rule in *Rylands* v *Fletcher* would also usually be the type of case in which the same defendant would be liable in negligence under the concept of non-delegable duty, since the inherent risk involved in bringing the offending thing onto his land would probably mean that he would not be able to delegate its control to any other person (such as his independent contractor). Thus the connecting factors between liability under the rule in *Rylands* v *Fletcher* and liability in the tort of negligence would be the control exercised by the defendant over the damage-causing thing, and the proximity between the defendant and the plaintiff, created by the plaintiff's relative vulnerability and the defendant's relative power in bringing the damage-causing thing onto his land. The fact that the thing brought onto land was "inherently" likely to cause harm would not in itself automatically lead to a conclusion that the responsibility for keeping it in was non-delegable, but, when combined with considerations as to the standard of care involved, liability would almost certainly attach in the same circumstances under the tort of negligence as under the rule in *Rylands* v *Fletcher*.

With regard to the standard of care in negligence, the majority recognised that the key to liability lay in the fact that the defendant must have failed to exercise reasonable care in the circumstances. They agreed that this appeared to be a far more demanding hurdle for a plaintiff to jump than would be the case in bringing an action under *Rylands* v *Fletcher*, where liability (theoretically at least) would not depend on proof of any fault on the part of the defendant. However, as they pointed out, the degree of care exercised must be reasonable in the light of the magnitude of the risk involved, which would mean taking account of the likelihood of an accident occurring and the seriousness of the potential damage if it should occur.[73] For this reason, if dangerous or threatening substances were to be involved, the magnitude of the risk would be great, and it would be reasonable to

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[72] This is the concept in negligence under which a defendant cannot (as would normally be the case) discharge his duty of care to the plaintiff simply by delegating a task to his independent contractor. A duty is normally held to be non-delegable because of the danger (to the plaintiff) inherent in the task which the defendant requires the independent contractor to perform.

[73] See, *eg*, *Wyong Shire Council* v *Shirt* (1980) 146 CLR 40 at 47-48.

expect a defendant to exercise a very high degree of care, possibly even "a degree of diligence so stringent as to amount practically to a guarantee of safety".[74] At that stage, the difference between the two torts would be negligible. They concluded:

> Once it is appreciated that the special relationship of proximity which exists in circumstances which would attract the rule in *Rylands* v *Fletcher* gives rise to a non-delegable duty of care and that the dangerousness of the substance or activity involved in such circumstances will heighten the degree of care which is reasonable, it becomes apparent, subject to one qualification, that the stage has been reached where it is highly unlikely that liability will not exist under the principles of ordinary negligence in any case where liability would exist under the rule in *Rylands* v *Fletcher*.[75]

The "one qualification" to which the majority referred was their view that there might be some cases (though not the present one) in which it would be preferable to frame a defendant's liability in the tort of nuisance (or even in trespass) rather than in negligence. As an example of such a case, their Honours referred to the decision of the House of Lords in the *Cambridge Water Co* case (which, of course, had taken a very different approach to the rule in *Rylands* v *Fletcher*, and had concluded that cases previously brought under it should in future *in all circumstances* be regarded as nuisance actions). Their Honours gave no explanation for this qualification, nor did they lay down any guidelines to indicate the specific fact situations in which it would apply. It is hard to avoid the conclusion that their primary motivation in introducing such a qualification was probably their desire not to take issue unnecessarily with such a recent decision of the House of Lords.[76]

Having thus decided that the rule in *Rylands* v *Fletcher* could, for almost all purposes, be regarded as having been absorbed by the tort of negligence, the majority of the Australian High Court then decided the case as a negligence action. Unlike the courts below, they held that BPA *were* liable in negligence. They concluded that BPA had owed General Jones a duty

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[74] This quotation, taken from the speech of Lord Macmillan in *Donoghue* v *Stevenson* [1932] AC 562 at 612, was cited, *supra*, note 6, at 348.

[75] *Supra*, note 6, at 348.

[76] In this respect, though, it should be observed that the members of the Australian High Court do not appear to be constrained by such considerations where what they perceive as major points of legal principle are involved. See, *eg*, their criticisms of the decision of the House of Lords in *Anns* v *Merton London Borough Council* [1978] AC 728 in the case of *Sutherland Shire Council* v *Heyman* (1985) 60 ALR 1.

of care which was non-delegable in the sense that it extended to ensuring that their independent contractor, WS, took reasonable care to prevent the EPS from being set alight as a result of the welding activities. Given that WS had not taken reasonable care, BPS were therefore liable for failing to discharge their duty. They were thus held liable under the ordinary principles of negligence.

(ii) *The minority judgments*

Two members of the High Court – Brennan and McHugh JJ – dissented. Brennan J, whilst agreeing with the majority that the *ignis suus* rule had no place in modern law, did not even consider their proposition that the rule in *Rylands* v *Fletcher* might also be redundant. He therefore decided the case straightforwardly as a *Rylands* v *Fletcher* action, but held on the facts (as Neasey J, the trial judge, had done) that the construction work which had been carried on in BPA's building was a normal (or natural) use of its premises, to which General Jones had agreed. He went on to say that, since BPA had not authorised the acts which had led to the escape of the EPS and the ensuing fire (*ie*, the stacking of the cartons of EPS near the welding site and the subsequent negligent welding operations), they could not be held responsible for an unusual and dangerous use of the premises (*ie*, a non-natural use), and could not, therefore, be liable under the rule in *Rylands* v *Fletcher* for the damage caused to General Jones. For the same reason, he considered that the action against BPA in negligence must also fail. In his opinion, although BPA could be taken to have authorised both the storage of the EPS and the welding, neither of those activities might have been expected to cause damage had the cartons been stored sensibly and the work been carried out carefully. Thus the case was not one involving an inherently dangerous situation and the circumstances had not, therefore, given rise to a non-delegable duty.

Although the conclusion reached by Brennan J, and the process of reasoning on which it is based, is potentially controversial in its analysis both of the requirements of the rule in *Rylands* v *Fletcher* and of the concept of non-delegable duty in negligence, the judgment is not of particular concern here since it did not address the critical question of whether the rule in *Rylands* v *Fletcher* should survive as an independent tort. It merely assumed the continued application of the rule. Of far more significance from our point of view is the dissenting judgment of McHugh J, which paid considerable attention to the question of whether the rule could be said to have been absorbed by the tort of negligence. McHugh J, after a careful consideration of the area, concluded that it could not, and that it should continue to be treated as a separate, independent, rule of tort law. He started by setting out his position very clearly:

> Counsel for General Jones suggested that the rule in *Rylands* v *Fletcher* had been incorporated into the law of negligence. Just when and how this incorporation occurred was not explained. In view of the decisions of this Court in *Lothian* v *Rickards*,[77] *Hazelwood, Torette House Pty Ltd* v *Berkman*,[78] *Wise Bros, Eastern Asia Navigation Co Ltd* v *Fremantle Harbour Trust Commissioners*[79] and *Benning* v *Wong*,[80] the incorporation must have occurred only in recent years. Moreover, it has escaped the attention of the authors of texts on the law of torts who have devoted separate chapters to the rule in *Rylands* v *Fletcher*.
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> Irrespective of whether the rule ... is or is not a satisfactory ground of tortious liability, for more than 100 years it has been treated in this country as a settled rule of liability in no way dependent upon proof of negligence ...
>
> With great respect to those who are of the contrary opinion, I do not see how, consistently with the settled doctrine of this Court, the liability of an occupier of land under the rule in *Rylands* v *Fletcher* can be understood as assimilated to, or could be incorporated into, an occupier's liability in negligence.[81]

His Honour conceded that, in a case where one was seeking to make an occupier liable in negligence for the acts of his independent contractors, there might be a superficial similarity between liability in negligence and liability under the rule in *Rylands* v *Fletcher* – but he stressed that the similarity would be merely superficial because in negligence the occupier could be liable only for the negligent acts of his contractor, whereas under the rule in *Rylands* v *Fletcher* he could be liable for any acts of his contractor which caused the escape of the harmful thing, whether or not those acts were negligent. And McHugh J considered that once one were to move outside the area of independent contractors, any similarity between the two torts would disappear, since in the tort of negligence an occupier could be held liable only for his own (or his employee's) negligence, whereas under the rule in *Rylands* v *Fletcher* the occupier could be liable for any escape, however caused, unless the person causing the escape could be

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77 (1911) 12 CLR 165. See *supra*, note 12 *et seq*, for the Privy Coucil decision in the same case.

78 (1940) 62 CLR 637.

79 (1950) 83 CLR 353.

80 (1969) 122 CLR 249.

81 *Supra*, note 6, at 366.

brought within the definition of a "stranger" for the purposes of the defence of act of a stranger.[82]

In the view of McHugh J, the most important difference between the two actions was, however, to be found in the distinction between the concepts of non-natural use of land for the purposes of an action under *Rylands* v *Fletcher* and negligent use of land for the purposes of an action in the tort of negligence. Unlike the majority in the same court, his Honour considered that "factors that would be decisive on an issue of negligence will frequently be of only marginal relevance on the issue of non-natural use,"[83] and he referred to the fact that non-natural use is determined not by looking at the particular circumstances of the individual occupier, but by taking account of whether, in the particular time, place and circumstances of the community in which the occupier lives, the character of the use is special or brings with it increased danger, *etc*.[84] He gave as examples the fact that even a small amount of carefully stored water in a reservoir might constitute a non-natural use of land and give rise to liability under the rule in *Rylands* v *Fletcher*, while an unguarded and unattended fire in a living room might not be regarded as a non-natural use and might, therefore, give rise to none. He pointed out that quite the opposite view would be likely to be taken with regard to two such situations under the tort of negligence, and argued that these examples illustrated that the concepts of non-natural use and negligence were clearly different.

McHugh J agreed that determining what is or is not a natural use of land may often be a difficult question, and that decisions on the issue of non-natural use might, therefore, appear to be inconsistent. But he did not see this as an argument for regarding the test as unprincipled, or for even abandoning it, any more than the difficulty of determining what is or is not reasonable care in negligence would justify its criticism or abandonment.

There were other aspects of the rule which he also felt to be incompatible with the tort of negligence. With regard to the similarity or otherwise between the defences available under the rule in *Rylands* v *Fletcher* and the tort of negligence, for example, McHugh J again took quite a different view from the majority.[85] Although he agreed that the defences available under the rule in *Rylands* v *Fletcher* showed that it did not give rise to absolute

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82 For discussion of the defence of act of a stranger, see *supra*, note 34.

83 *Supra*, note 6, at 367. For the majority view on this point, see *supra*, note 58 *et seq*.

84 Counsel for General Jones had argued that the manner of performing an operation could also be relevant to the issue of non-natural use, and that this represented a parallel between the concept of non-natural use under the rule in *Rylands* v *Fletcher* and the tort of negligence. McHugh J, however, resisted this argument vigorously. He stated: "Circumstances are relevant to the issue of non-natural use. But manner of performance is not" (*ibid*).

85 For the majority view on this point, see *supra*, note 67 *et seq*.

liability (a respect in which it resembled the tort of negligence), he considered that there was no substantive similiarity between the defences available under the two torts, apart from the obvious connection between consent under the rule in *Rylands* v *Fletcher* and *volenti* in negligence. He considered the nature and purpose of the other defences under the two torts to be completely different, since he saw most *Rylands* v *Fletcher* defences (such as act of God and act of a stranger) as stemming from the concept of *novus actus interveniens*, rather than from the concept of contribution to the plaintiff's damage, as would be the case under the defence of contributory negligence in the tort of negligence.

Another, very significant, point of distinction between an action under the rule in *Rylands* v *Fletcher* and an action in negligence related, in McHugh J's view, to the fact that in negligence only foreseeable damage is recoverable. In this respect, his Honour observed:

> It has not yet been held in this country that the defendant in a *Rylands* v *Fletcher* action is liable only for damage which is reasonably foreseeable. And since liability in that action is a strict liability, it is inconsistent with its rationale to limit the occupier's liability to damage which was reasonably foreseeable. Until last year, the weight of authority supported this conclusion. However, the House of Lords [in the *Cambridge Water Co* case] has now held that liability under *Rylands* v *Fletcher* is limited to damage which is reasonably foreseeable. Their Lordships did so on the ground that the remoteness rule applied to nuisance actions and that, because a *Rylands* v *Fletcher* action was an extension of the action for nuisance, it was logical to apply the same remoteness rule to it. Logical or not, it is inconsistent with the rationale of the rule in *Rylands* v *Fletcher*.[86]

This observation, which openly criticised the whole basis for the decision of the House of Lords in the *Cambridge Water Co* case, and differed from the views of his majority colleagues, who considered that foreseeability (or something very close to it) had already become a feature of the rule, will be considered in greater detail below.[87] It is of critical importance, going as it does to the heart of the debate about the role of the rule in *Rylands* v *Fletcher*, and its status as a strict liability tort.

The conclusion to which McHugh J's views on all these individual differences between the rule in *Rylands* v *Fletcher* and the tort of negligence inevitably led was that an action in negligence (or, in rare cases, nuisance)

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[86] *Supra*, note 6, at 368.

[87] For the majority view on this point, see *supra*, notes 57 and 65. For further discussion of the impact of requiring foreseeability under the rule, see *infra*, note 98 *et seq*.

would *not* always be available in situations where, to date, actions had been brought under the rule in *Rylands* v *Fletcher*. This was the fundamental respect in which he departed from the view of the majority of the High Court.[88] In his opinion:

> If plaintiffs were deprived of the benefit of the rule in *Rylands* v *Fletcher*, they would often have difficulty in obtaining compensation for their damage. It often happens that the cause of an escape of a harmful product either is unknown or cannot be established on the balance of probabilities. In such cases, proof of negligence is impossible unless the plaintiff can invoke the doctrine of res ipsa loquitur. Even when the cause of an escape can be identified, it does not follow that negligence will be established. If the rule in *Rylands* v *Fletcher* is subsumed under negligence liability, it seems inevitable that many defendants, liable under that rule, will escape liability if plaintiffs are confined to actions for negligence or nuisance.[89]

Interestingly, McHugh J used similar reasoning to that which had been adopted by Lord Goff in the *Cambridge Water Co* case to reach the entirely opposite conclusion. Lord Goff had taken the view that to make the rule in *Rylands* v *Fletcher* an independent tort relating to ultra-hazardous activities would require the intervention of the legislature, and that, in the absence of such intervention, the rule must remain a sub-class of nuisance.[90] McHugh J, on the other hand, took the view that the court might effectively be exercising a legislative, rather than a judicial, function if it were to take away the specific role of the rule and to merge it with the tort of negligence:

> To incorporate the rule in *Rylands* v *Fletcher* into the law of negligence by judicial decision would be a far reaching step, going beyond previous developments of the common law by this Court. Here the Court is dealing with a rule which has been explained and applied by this Court on numerous occasions. It is a fixed rule of law, as imperative as a statutory command.[91]

Quoting the words of Mason J in *State Government Insurance Commission* v *Trigwell*[92] (now Mason CJ, and, somewhat ironically, one of the majority judges in this case) McHugh J noted:

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88 For the majority view on this point, see *supra*, note 75.
89 *Supra*, note 6, at 368.
90 See *supra*, note 49.
91 *Supra*, note 6, at 368.
92 (1979) 142 CLR 617.

> The court is neither a legislature nor a law reform agency ... The court does not, and cannot, carry out investigations or inquiries with a view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community and whether they command popular assent ...
>
> These considerations must deter a court from departing too readily from a settled rule of the common law and from replacing it with a new rule.[93]

McHugh J concluded that to incorporate the rule into the law of negligence:

> ... would require squeezing an established principle of strict liability out of the common law so that the law of negligence can control the field. In an age where the escape of fire, oil, gases, chemicals and even radio-active materials has often caused widespread damage, it is not readily apparent why the common law should now abandon the *prima facie* rule of strict liability established in *Rylands* v *Fletcher* for the indeterminacy of the action for negligence. Proximity, remoteness, reasonable care and breach of duty, the bench marks of negligence law, are not formulas for exactness. The wavering history of the law of negligence in relation to the recovery of damages for purely economic loss is eloquent evidence of the inherent indeterminacy of negligence law. Moreover, the common law holds no prejudice against strict liability.
>
> By abolishing the rule in *Rylands* v *Fletcher*, the Court would abolish the rights and potential rights of persons whose property and person have been or will be injured by the escape of dangerous substances.[94]

Far more evidence, analysis and argument would be required before McHugh J would be convinced that the rule in *Rylands* v *Fletcher* should be "banished from the books".[95]

On the facts of the *Burnie Port Authority* case, his Honour decided that there could be no liability under the rule in *Rylands* v *Fletcher*, reasoning (as Brennan J had done) that there had been no non-natural use of land, because it had not been the actual storage of the EPS, but only the manner

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93 *Supra*, note 6, at 369. One could, of course, take issue with this view by making the argument that to change common law rules, even old and well-established ones, is clearly within the power of the highest court in any common law judicial system.

94 *Ibid.*

95 *Ibid.*

in which it had been stored, which had been dangerous.[96] He also took the view that there could be no liability in negligence, since BPA had engaged competent independent contractors and had not known that these contractors proposed to carry out their work in an unsafe manner.

V. The Impact of the New Cases

We now face a situation in which two of the most eminent courts in the common law world have apparently agreed that the rule in *Rylands* v *Fletcher* has ceased to exist as an independent tort. Their reasons for this conclusion, are however, very different. Their Lordships in the House of Lords have taken the view that the rule in *Rylands* v *Fletcher* was never really anything more than an aspect of nuisance, and have therefore, as they see it, merely clarified, and not changed, the existing law. The majority of the Australian High Court, on the other hand, have taken the view that what was once regarded as a separate tort has now, by process of evolution, developed to a stage where it has all but been absorbed by the tort of negligence. To this rather confusing picture must be added the recognition that a very strong and powerfully argued objection to the demise of the rule in *Rylands* v *Fletcher* has been voiced within the Australian High Court.

So where does that leave us? Although it seems fairly clear that the combined effect of these two decisions will effectively be to eradicate the rule in *Rylands* v *Fletcher* as the basis for a separate cause of action in tort (in the United Kingdom and Australia, at least), the question of whether or not this is a legally desirable situation remains to be answered.

In practical terms, the answer to this question will be found in observing whether (as McHugh J in the Australian High Court predicted) many actions which would previously have succeeded under the rule in *Rylands* v *Fletcher* will, in future, fail. In the United Kingdom, the key consideration in this respect will lie not so much in the fact that the rule in *Rylands* v *Fletcher* has been down-graded (since it still exists, albeit as an aspect of nuisance), as in the fact that damage will, in future, always have to be foreseeable in order for an action brought under the rule to succeed. In Australia, the key consideration will lie in the fact that an action which would previously have been available regardless of fault will, in future, be available only if negligence can be established. Although there are obvious aspects of these two considerations which will be unique to each jurisdiction, there is one, very important, factor which connects them – the effective removal (or,

[96] McHugh J had already pointed out that the manner in which something was stored was not relevant in determining whether its storage constituted a non-natural use of land. See *supra*, note 84.

at the very least, reduction) from this area of law of the concept of strict liability.

The removal of strict liability by the majority of the Australian High Court was unequivocal – an action in the tort of negligence (now almost always[97] the only action available in what was previously a *Rylands* v *Fletcher* situation) cannot succeed without proof of fault. The decision of the majority in the *Burnie Port Authority* case may have been based on the assumption that subjective elements akin to negligence have been relevant under the rule for some time, but the fact remains that they decided openly to abandon a rule which started life as one of strict liability.[98]

Their Lordships in the House of Lords in the *Cambridge Water Co* case, on the other hand, dealt more obliquely with the matter – they reiterated the fact that an action under the rule in *Rylands* v *Fletcher* would continue to be one based on strict liability, but added that damage would have to be foreseeable before strict liability could attach to the defendant's act. There is, however, as McHugh J in the Australian High Court recognised, a strong school of thought that the concepts of foreseeability and strict liability are very uneasy bedfellows, and that the real effect of requiring foreseeability in any tort is to introduce into that tort an element of fault – not necessarily fault akin to negligence, but fault at least in the sense that the defendant can be liable only if he ought to have anticipated the occurrence of damage of this type.[99]

It may be that the way in which the rule in *Rylands* v *Fetcher* has developed over the past 100 years or so, particularly in terms of the increasingly

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97 Subject to the qualification that some cases will be decided in nuisance. See *supra*, note 75 *et seq* for further discussion of this point.

98 Though it should perhaps be noted in this respect that the majority in the Australian High Court seemed to consider Blackburn J's original formulation of the rule to require knowledge of the danger posed by the thing brought onto the land, which suggests that they may not have seen it as ever having been a rule of strict liability as such. See *supra*, note 57 for further discussion of this point.

99 Lord Goff arguably recognised the equation between foreseeability and a reduction in the strictness of liability (and even, tacitly, the equation between foreseeability and fault) in the *Cambridge Water Co* case. He expressed the view that if foreseeability is a requirement in negligence, then it ought equally to be a requirement in nuisance, since "if a plaintiff is in ordinary circumstances only able to claim damages in respect of personal injuries where he can prove such foreseeability on the part of the defendant, it is difficult to see why, in common justice, he should be in a stronger position to claim damages for the interference with the enjoyment of his land where the defendant was unable to foresee such damage". And his Lordship then went on to state that foreseeability ought also to be a requirement under the rule in *Rylands* v *Fletcher* since, if it were not, one might be faced with the strange situation where "by characterising the case as one falling under the rule ... the liability [w]ould thereby be rendered more strict [than it would have been in nuisance]" (see *supra*, note 5, at 300 and 306, and note 50).

subjective requirements which have been introduced into it, means that the removal (as in Australia) or reduction (as in the United Kingdom) of its strict liability status will actually have very little impact in the future on the availability of a remedy in the types of action in which the rule would, until now, have been pleaded. However, McHugh J in the Australian High Court clearly had strong reservations about whether this would be so,[100] and it is difficult to argue with his view that the whole concept of strict liability, which has been in existence for so much longer than has the concept of negligence, ought not to be "squeezed out"[101] simply because a more fashionable tort is in its ascendancy – not, at least, until a detailed investigation of its role and significance has first been carried out.

VI. Conclusion

It is a coincidence that two cases dealing with actions brought under the rule in *Rylands* v *Fletcher* arose before two of the most important courts in the common law world within only a few months of each other. It may or may not be a coincidence that both courts took the opportunity, when these cases came before them, to examine the whole question of whether the rule has now, or should ever have had, any role to play as a distinct tort. It seems almost certain, given the conclusions reached by both the House of Lords and the Australian High Court on this question, that there will be no future development of the rule in *Rylands* v *Fletcher* as an independent aspect of tort law. In view of the importance of the two courts concerned, the overwhelming likelihood is that courts in other Commonwealth jurisdictions, including Malaysia and Singapore,[102] will follow one

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[100] See *supra*, note 89.

[101] See *supra*, note 94.

[102] The introduction of the Application of English Law Act (No 35 of 1993) and the abolition of appeals to the Privy Council have, of course, loosened Singapore's ties with English law, and thus with decisions of the House of Lords. Nevertheless, it is unlikely that the combined effect of decisions of both the House of Lords and the Australian High Court will be ignored by the courts here. There have not been a vast number of local cases involving the rule, and many of those which have involved a *Rylands* v *Fletcher* plea in the past have succeeded on the alternative grounds of nuisance or negligence (see, *eg*, *Hiap Lee* v *Weng Lok* [1974] 2 MLJ 1, a Privy Council decision on appeal from Malaysia, where a reservoir constructed for a tin-mine was held not to be a non-natural use of land, but a claim in private nuisance was successful, and *Ang Hock Hai* v *Tan Sum Lee* (1957) 23 MLJ 135, a decision of the Singapore High Court, which succeeded both under the rule in *Rylands* v *Fletcher* and in negligence). It is nevertheless possible that, if the approach of either the House of Lords or the Australian High Court is adopted here, a case might in future arise in this jurisdiction in which a plaintiff who would previously have had a cause of action under the rule but who cannot satisfy the foreseeability requirement of nuisance or the lack of care requirement of negligence could find himself without a remedy.

or other of the decisions, leading, whichever approach is chosen, to a drastic reduction in the significance of the rule. Only with the benefit of hindsight will we be able to tell whether the decision that the rule in *Rylands* v *Fletcher* has no role to play as a separate tort represents a sensible streamlining of the law or a precipiate and ill-advised removal of necessary rights.

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