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# SURVIVING AGAINST THE ODDS — THE RULE IN *RYLANDS v. FLETCHER* LIVES ON

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*Transco plc. v. Stockport Metropolitan Borough Council*[1]

## I. INTRODUCTION

The rule in *Rylands v. Fletcher*[2]—under which a landowner can be held strictly liable for a "non-natural" (or special) use of his land which causes damage to his neighbours—has had a chequered history. When the rule was first formulated by Blackburn J.[3] in the middle of the 19th century, it looked set to play a significant role in tort law. However, the advent of the tort of negligence, and judicial concern about the imposition of strict liability in any but the most extreme circumstances meant that it never fulfilled its early promise. By the end of the 20th century its role had become so marginalised that in 1994 the Australian High Court, when deciding *Burnie Port Authority v. General Jones Pty. Ltd.*,[4] held that the rule should cease to exist and that cases which would previously have fallen within its ambit should in future be dealt with under the umbrella of negligence. Although the English courts did not go quite this far, in *Cambridge Water Co. Ltd. v. Eastern Counties Leather*[5] (decided earlier in 1994), the House of Lords held that the rule should never have been accorded the status of a distinct tort, since it was in reality merely a sub-category of nuisance. Following these two decisions, the future for the rule in *Rylands v. Fletcher* looked decidedly bleak. Now however, the House of Lords in the case of *Transco* has chosen, in spite of apparently persuasive arguments that the rule should be allowed to fade into historical obscurity, to reaffirm its applicability, albeit within the framework of

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1 [2003] U.K.H.L. 61; [2003] 3 W.L.R. 1467 [*Transco* cited to W.L.R.].

2 (1868) L.R. 3 H.L. 330.

3 As Lord Bingham pointed out in *Transco* (*supra*, note 1 at 1471) Blackburn J., when delivering his judgment in the Court of Exchequer Chamber ((1866) L.R. 1 Ex. 265, at 279) "did not conceive himself to be laying down any new principle of law." In his formulation of the rule, Blackburn J. referred to liability for the escape of things "not naturally there". However, when the case was appealed to the House of Lords, Lord Cairns (*supra*, note 2 at 339) referred to a "non-natural use" of land, and this was the expression adopted by subsequent courts.

4 (1994) 68 A.L.J.R. 331 [*Burnie Port Authority*].

5 [1994] 2 A.C. 264 [*Cambridge Water*].

nuisance. As a result, beleaguered and diminished though it may be, the rule has—at least in England—survived to fight another day.

## II. The Facts

*Transco* concerned a water pipe owned by the defendant local authority, Stockport Metropolitan Council ("the council"). The pipe supplied water to a block of flats in Brinnington, Stockport. The claimant, Transco plc. (formerly British Gas plc.) owned a high-pressure steel gas main which passed beneath the surface of a nearby disused railway line owned by the council. The gas main had been installed in 1966, and when the council had purchased the land in 1972, the claimant had been granted a continuing easement of support with respect to the main. In 1992, without negligence on the part of the council, the water pipe fractured. This caused water to be released into the ground in the surrounding area. The water spread to an embankment through which the claimant's gas main passed. Since (again without negligence on the part of the council) the fracture to the pipe was not discovered for some time, the quantities of water which flowed into the embankment were so great that the embankment collapsed. As a result, the gas main was left exposed and unsupported, and the claimant had to carry out emergency repair work, at a cost of over £100,000. The claimant brought an action seeking compensation for this expense. The case was founded, *inter alia*, on the argument that the council was strictly liable under the rule in *Rylands v. Fletcher* for its non-natural use of land.

## III. The Decision

In the High Court, Howarth J. held that the claimant was entitled to damages under the rule in *Rylands v. Fletcher*. However, on appeal, the Court of Appeal reversed his decision on the ground that there had been no non-natural use of land. The claimant then appealed to the House of Lords, where all five Law Lords[6] considered the present and future role of the rule. They concluded that it still offered a valid cause of action in tort, but agreed that, on the facts of this case, no liability had arisen.

### A. *The Continued Existence of the Rule*

Although in one sense only the backdrop to the factual decision in *Transco*, their Lordships' discussion of the continuing role of the rule in *Rylands v. Fletcher* is in practice the most important aspect of the case.[7] On behalf of the council, it was argued before their Lordships that there were various possible ways of treating the rule—one of which (and for obvious reasons the one favoured by the council) was to follow the majority view in *Burnie Port Authority* and regard it as having been absorbed by the ordinary principles of negligence.

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6 Lord Bingham of Cornhill, Lord Hoffmann, Lord Hobhouse of Woodborough, Lord Scott of Foscote and Lord Walker of Gestingthorpe.

7 See, *e.g.*, the opening words of Lord Hobhouse's judgment: "… the importance of this appeal lies in the fact that your Lordships have been asked to review and, if you should think it right to do so, hold not still to be good law what is commonly called 'the rule in *Rylands v. Fletcher*'" (*supra*, note 1 at 1485).

Lord Bingham—who began by observing that "few cases in the law of tort or perhaps any other field … have attracted more academic and judicial discussion … than *Rylands v. Fletcher*"[8]—alluded to the reasons behind the decision of the Australian High Court in *Burnie Port Authority* to reject its future role in tort law. These reasons included the difficulties in interpreting and applying the rule, its progressive weakening by the courts, the fact that negligence had developed and expanded very significantly since the rule had been formulated, and the belief that most claimants who initiated actions under the rule would nowadays succeed in negligence actions anyway. His Lordship conceded that there was a "theoretical attraction in bringing this somewhat anomalous ground of liability within the broad and familiar rules governing negligence,"[9] (not least because this would bring the law of England and Wales closer to that of Scotland) and he stated that he would be willing to suppress his instinctive resistance to treating a nuisance-based tort as though it were governed by negligence if he were convinced that to discard the rule would serve the interests of justice.[10] However, this he hesitated to do for four main reasons.

The first was that there were still some cases (however rare they might be) in which liability could be justified in the absence of fault.[11] The second was that the common law in this area operated in conjunction with statutory provisions which appeared to assume that in a *Rylands v. Fletcher* situation strict liability would attach. If the rule were to be abandoned, this might leave in place legislation based on false assumptions about rights which no longer existed.[12] The third was that the House of Lords in *Cambridge Water* had considered the possibility of departing entirely from the rule in *Rylands v. Fletcher*, but had chosen not to do so, preferring instead a "more principled and better controlled application of the existing rule".[13] The fourth was that, while assimilating the rule within the tort of negligence would bring English law into line with the law of Scotland, it would increase the disparity between it and the laws of other countries, such as France and Germany.[14]

Lord Hoffmann for his part referred to the invitation to "kill off" the rule in the light of arguments such as its limited practical purpose, its vague application, and the undesirability of removing issues of strict liability from the control of the legislature and placing them in the hands of the judiciary—all of which he considered to be

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8 *Ibid.*, at 1470.

9 *Ibid.*, at 1472.

10 *Ibid.*

11 As examples of such rare cases, Lord Bingham referred to *Attorney General v. Cory Bros. & Co. Ltd.* [1921] 1 A.C. 521 (in which huge quantities of mineral waste stored on a hillside caused a catastrophic landslide), *Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co. Ltd.* [1921] 2 A.C. 465 (in which chemicals used in the making of munitions caused a violent explosion) and—had the claimants been able to satisfy the requirement of foreseeability—*Cambridge Water* (*supra*, note 5) (in which toxic chemicals used in an industrial process seeped into and contaminated a supply of drinking water).

12 In this respect, his Lordship referred to the *Water Industry Act 1991*, section 209, and the *Reservoirs Act 1975*, Schedule 2.

13 *Supra*, note 1 at 1472–1473. With respect to the undesirability of taking a different approach to that in *Cambridge Water*, Lord Bingham observed: "While it is not a conclusive bar to acceptance of the detailed argument presented to the House on this occasion, 'stop-go' is in general as bad an approach to legal development as to economic management." For further discussion of this point, see *infra*, text at note 39.

14 *Supra*, note 1 at 1473.

arguments of considerable force. However he ultimately concluded that:

> … despite the strength of these arguments, I do not think it would be consistent with the judicial function of your Lordships' House to abolish the rule. It has been part of English law for nearly 150 years and despite a searching examination by Lord Goff of Chieveley in the *Cambridge Water* case … there was no suggestion in his speech that it could or should be abolished. I think that would be too radical a step to take.[15]

Lord Hobhouse also favoured retention of the rule. It had been attacked as "obsolete, unworkable or, more simply, as not being a rule at all"[16] but in his view the rule was still part of English law, "a useful and soundly based component of the law of tort"[17] and one which "should not be abrogated. The rationale for it … remains valid."[18]

Lord Scott's approach was that the "rather drastic solution" adopted in *Burnie Port Authority* was unnecessary in England.[19] And Lord Walker, while acknowledging that the criticisms of the rule coming from such a distinguished source as the Australian High Court offered "a salutary reminder of the serious difficulties which beset this area of the law,"[20] nevertheless concluded that "they do not in my opinion make out the case for writing off *Rylands v. Fletcher* as a dead letter".[21] Its scope might have been restricted by the growth of statutory regulation of hazardous activities on the one hand, and the development of negligence on the other, "but it would be premature to conclude that the principle is for practical purposes obsolete".[22] Moreover, his Lordship took particular issue with the apparent assumption in *Burnie Port Authority* that:

> the imposition of strict liability is unnecessary and undesirable if a claim based solely on negligence would lead to the same outcome … that assumption seems to me, with respect, to overlook the practical implications in a case of this sort, of bringing a claim in negligence … In such circumstances, fairness may require that, instead of the claimant having to prove his case, the law casts on the defendant the burden of proving … some … defence to strict liability.[23]

Given, therefore, that their Lordships were agreed that the rule in *Rylands v. Fletcher* ought to be retained as an aspect of tort law, the question was, what role should it play? One approach would have been to have taken the opposite view to that of the Australian High Court and to have extended the scope of strict liability, as suggested by commentators such as the late Professor Fleming, who favoured a general theory of strict liability for ultra-hazardous activities.[24] However, largely due to their concerns

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15 *Ibid.*, at 1484.
16 *Ibid.*, at 1485.
17 *Ibid.*, at 1486.
18 *Ibid.*, at 1491.
19 *Ibid.*, at 1494.
20 *Ibid.*, at 1499.
21 *Ibid.*
22 *Ibid.*
23 *Ibid.*, at 1503.
24 See Fleming, *The Law of Torts*, 9th ed. (Sydney: LBC Information Services Ltd, 1998) at 377. Other commentators (such as Markesinis and Deakin, *Tort Law*, 5th ed. (Oxford: Clarendon Press, 2003) at

that strict liability should, in general, remain the preserve of Parliament,[25] their Lordships preferred the middle ground—that of maintaining the rule, while (as in their earlier decision in *Cambridge Water*) treating it as a sub-species of nuisance rather than a tort in its own right.[26] In the words of Lord Bingham, the task of the courts would now be to restate the rule:

> … so as to achieve as much certainty and clarity as is attainable, recognising that new factual situations are bound to arise posing difficult questions on the boundary of the rule, wherever that is drawn …[27]

### B. *The Application of the Rule*

Having decided that the rule in *Rylands v. Fletcher* retained a role in English tort law, their Lordships turned to the question of whether it could give rise to liability on the facts of this case. To this question the unanimous answer was that it could not.

All five members of the court concluded that the use of land by the authority to transport water through a pipe could not be defined as use of a non-natural or special nature. Lord Bingham quoted the famous dictum of Lord Moulton in *Rickards v. Lothian* that: "[i]t is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others".[28] He referred to cases—such as *Rylands v. Fletcher* itself—in which the keeping of water on land had been regarded as such a special use by reason of its accumulation in large quantities, but considered that in this case:

> … the piping of a water supply … was a routine function which would not have struck anyone as raising any special hazard. In truth, the council did not accumulate any water, it merely arranged an adequate supply to meet the residents'

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544) have expressed similar views. For reference by their Lordships to these views, see *supra*, note 1 at 1473 (*per* Lord Bingham).

25 See *supra*, note 1 at 1473 (*per* Lord Bingham) and 1483 (*per* Lord Hoffmann).

26 See, *e.g.*, the judgments of Lord Bingham (*ibid.*, at 1473), Lord Hobhouse (*ibid.*, at 1486) and Lord Walker (*ibid.*, at 1503). In confirming that the rule should be regarded as falling under the umbrella of nuisance, their Lordships thus also effectively confirmed that, whatever the position might have been in the past, in contemporary law the rule requires a legal interest in land on the part of the claimant, as determined in *Hunter v. Canary Wharf Ltd.* [1997] A.C. 655 and applied in *McKenna & Ors v. British Aluminium Ltd.* T.L.R. 25 April 2002 (see in this respect the judgment of Lord Walker, *supra*, note 1 at 1496–1497). In addition, given the apparent limitation of nuisance actions to cases involving property damage, the decision also seems to confirm that the rule in *Rylands v. Fletcher* should not be applied to cases involving personal injuries—an issue which was for many years in doubt, notwithstanding the assertion to this effect by Lord Macmillan in *Read v. J. Lyons & Co. Ltd.* [1947] A.C. 156 (see the judgment of Lord Hoffmann, *supra*, note 1 at 1481).

27 *Ibid.*, at 1473.

28 [1913] A.C. 263, at 280. Several of their Lordships did, however, voice doubts about the second part of Lord Moulton's dictum—that the use will be regarded as special only if it is not "for the general benefit of the community". Lord Bingham stated: "I respectfully think that little help is gained (and unnecessary confusion perhaps caused) by considering whether the use is proper fro the general benefit of the community" (*supra*, note 1 at 1475), and Lord Walker expressed the view (*ibid.*, at 1501) that: "Where Lord Moulton's formulation becomes questionable is, as Lord Goff pointed out in *Cambridge Water* [*supra*, note 5 at 308] his reference to land use 'for the general benefit of the community' … in this area … the court cannot sensibly determine what is an ordinary or special (that is, specially dangerous) use of land by undertaking some utilitarian balancing of general good against individual risk."

> needs. The situation cannot stand comparison with the making … of a substantial reservoir. Nor can the use by the council of its land be seen as in any way extraordinary or unusual.[29]

Lord Hoffmann indicated the need to introduce more certainty into the concept of "natural user". In this respect, he expressed the view that, whatever the judges when deciding *Rylands v. Fletcher* had meant by the term "natural user", Lord Moulton had introduced into it the idea that a "non-natural" or "special" use must be judged by contemporary standards.[30] That being so, the Court of Appeal had been correct to hold that the pipe did not constitute a non-natural use of land, since:

> … there is no evidence that it created a greater risk than is normally associated with domestic or commercial plumbing … the criterion of exceptional risk must be taken seriously and creates a high threshold for a claimant to surmount.[31]

The concept of non-natural use was closely associated by Lord Hoffmann with that of insurance: "A useful guide in deciding whether the risk has been created by a 'non-natural' user of land is … to ask whether the damage which eventuated was something against which the occupier could reasonably be expected to insure himself."[32] Since property insurance was relatively cheap and easy to obtain, his Lordship was of the view that actions of this kind would be better dealt with as insurance claims. Indeed he took the view that the litigation in this case was simply an example of the folly of attempting to use "an esoteric cause of action to shift a commonplace insured risk."[33] Lord Hobhouse, on the other hand, while agreeing that on these facts there was no non-natural use of land,[34] took a different view on the insurance point. In his opinion "the rationale, he who creates the risk must bear the risk, is not altered by the insurance market … The economic burden of insuring the risk must be borne by he who creates it and has the control of it."[35]

Lord Walker and Lord Scott were also of the opinion that the pipe did not constitute a non-natural, or special, use of land.[36] In addition, Lord Scott held that the element of "escape" required by the rule had not been satisfied. The trial judge had taken the view that escape was just the way in which an invasion of a claimant's proprietary right was normally described, and that since the claimant in this case had an easement over the embankment, that was enough to establish such a right and give rise to a claim. However, Lord Scott considered this analysis to be erroneous. "Escape" could not simply be equated with a proprietary interest on the part of the claimant,

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29 *Supra*, note 1 at 1476.

30 *Ibid.*, at 1484.

31 *Ibid.*, at 1485.

32 *Ibid.*, at 1484.

33 *Ibid.*, at 1485.

34 "[T]he plaintiffs must show that the defendants brought onto their land something dangerous which involved the risk of damaging the plaintiffs' property. Stored water might constitute such a danger … but the water pipe … was not such a danger" (*ibid.*, at 1491).

35 *Ibid.*, at 1489.

36 "[T]o the question whether the council's use of land was a natural and ordinary use that did not attract strict liability under the rule … there can, in my opinion, be only one answer. It did not." (*Per* Lord Scott, *ibid.*, at 1496); "[The] gradual and invisible saturation of the … ground cannot be described as an accumulation … The conditions for strict liability were simply not fulfilled." (*Per* Lord Walker, *ibid.*, at 1503–1504).

since it had been established in the case of *Read v. Lyons* that the escape in question must be "from a place where the defendant has occupation of or control over land to a place which is outside his occupation or control."[37] In this case, since the claimant's easement was over the defendant's land, and since the damage had been sustained on that land, there had been no such escape and the action could not succeed.[38]

## IV. Discussion

In deciding that the rule in *Rylands v. Fletcher* should be retained, their Lordships in *Transco* were clearly influenced by the fact that less than ten years earlier in *Cambridge Water*, "the possibility was ventilated that the House might depart from *Rylands v. Fletcher* in its entirety [but] … this suggestion was not accepted."[39] To have abandoned the rule now might well have been seen as somewhat capricious, particularly given the House's well-established caution towards departing from its prior decisions.[40]

On the other hand, *Transco* offered their Lordships the first opportunity to reconsider the rule since the decision of the Australian High Court in *Burnie Port Authority*, and, had the House felt strongly that the approach taken in that case was the right one for the English courts in the 21st century, a change of heart could have been justified on this basis. Yet their Lordships chose not to adopt the view favoured by the majority of the High Court, preferring instead to stress the continuing validity of the rule.

This writer has argued before that there has been too great a willingness on the part of the courts in recent years to cast aside the concept of strict liability in general, and the rule in *Rylands v. Fletcher* in particular, in order to make way for the ever-advancing tide of negligence.[41] Their Lordships in *Transco* are therefore to be applauded for refusing to take the law any further in this direction.

However, it is clear from *Transco* that the English courts will continue to scrutinize closely cases in which they are asked to impose strict liability under the rule. One of the major hurdles facing claimants in *Rylands v. Fletcher* actions has always been the need to overcome the reluctance of the courts to impose strict liability, and *Transco* suggests that in this respect the bar will continue to be raised. This is apparent in the narrow assessment of what constitutes a non-natural use of land. Although the actual decision in *Transco* was almost certainly correct—a pipe supplying water to a residential area can hardly be seen in contemporary society as non-natural use of

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37 [1947] A.C. 156, at 168 (*per* Viscount Simon).

38 Lord Scott considered that the same conclusion could be reached by examining the relationship between the claimant as the dominant owner of the easement and the council as the servient owner, since a servient owner normally has no positive obligation to keep the servient land in good condition. In his opinion, therefore, the rule in *Rylands v. Fletcher* would be inapplicable to an action by the dominant owner against the servient owner for damage to the servient land. (*Supra*, note 1 at 1494).

39 *Ibid.*, at 1472, *per* Lord Bingham. This is, perhaps, rather a broad interpretation of the judgment of the House delivered by Lord Goff of Chieveley in *Cambridge Water*, given that the judgment did not specifically moot the possibility of abandoning the rule entirely.

40 See, *e.g.*, cases such as *Jones v. Secretary of State for Social Services* [1972] A.C. 944, in which even though a majority of four out of seven Law Lords considered a prior decision of the House to be wrong, only a minority of three were prepared to depart from it.

41 See, *e.g.*, Fordham, "The Demise of the Rule in *Rylands v. Fletcher*?" [1995] Sing. J.L.S. 1.

land—the view of their Lordships that very few situations will nowadays be regarded as satisfying the requirement of non-natural use suggests that in only the most extreme circumstances, such as those where land is used to store high explosives or toxic chemicals,[42] will *Rylands v. Fletcher* claims be likely to succeed. Moreover, if the views of Lord Hoffmann (rather than those of Lord Hobhouse) are adopted by future courts, a risk against which a claimant is able to insure—no matter how special or dangerous the defendant's activity—will by definition be regarded as falling outside the scope of non-natural use of land. This will mean that, for all practical purposes, a claimant who seeks to establish an action in tort will almost always need to prove negligence.

So the rule in *Rylands v. Fletcher* has survived in England, but as a shadow of its former self. What impact is the decision in *Transco* (or indeed are the earlier decisions in *Cambridge Water* and *Burnie Port Authority*) likely to have in Singapore and Malaysia, where the rule has been recognised and applied for several decades?[43]

One indication of the direction in which the Malaysian courts might be moving can be seen in the decision of the Malaysian High Court in *Steven Phoa Cheng Loon & Ors. v. Highland Properties Sdn. Bhd. & Ors.*[44] In that case, Foong J. considered the implications of both *Cambridge Water* and *Burnie Port Authority*, and concluded:

> I tend to favour the Australian approach since after the case of *Cambridge Water* … the requirement of foreseeability … deprived this independent cause of action of its attractiveness. Since foreseeability is required to be proved, it might as well be absorbed into the liability of negligence.[45]

Although *Steven Phoa* was decided before *Transco*, it is hard to envisage that the decision of their Lordships in confirming the validity of *Cambridge Water* would have much impact on the Federal Court were that court to favour the views expressed by Foong J. However, at least one commentator has argued that it would be wrong, without very careful consideration, to adopt the Australian approach and to treat the rule in *Rylands v. Fletcher* as having been absorbed into negligence in Malaysia.[46] Moreover, the apparent assumption that reasonable foreseeability of damage can effectively be equated with negligence (on which Foong J.'s views appear to be premised) is open to debate. If one were to take the view that any action requiring foreseeability of harm might as well fall under the umbrella of negligence, then many other causes of action—including all nuisance claims—would find their days numbered. In addition, it has been pointed out that even though the need for *Rylands v. Fletcher* in cases involving environmental damage might not be great in

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42 See *supra*, note 11.

43 See, *e.g.*, the Singapore case of *Ang Hock Hai v. Tan Sum Lee & Anor* (1957) 23 M.L.J. 135 and the Malaysian cases of *Hoon Wee Thim v. Pacific Tin Consolidated Corporation* [1966] 2 M.L.J. 240 and *Hiap Lee (Cheong Leong & Sons) Brickmakers Ltd. v. Weng Lok Mining Company Ltd.* [1974] 2 M.L.J. 1.

44 [2000] 4 M.L.J. 200 [*Steven Phoa*].

45 *Ibid.*, at 218.

46 See Chan Shick Chin, "Liability under the rule in *Rylands v. Fletcher* in Malaysia" [2003] 3 M.L.J. i, at iii: "The rule in *Rylands v. Fletcher* … has been a canon in the law of tort in Malaysia for several decades and, for this reason alone, ought not to be abolished without a comprehensive appraisal."

England (where legislation now governs the area) the same is not necessarily true in Malaysia.[47]

There will obviously be no resolution to this matter until the Federal Court has the opportunity to consider a case involving a *Rylands v. Fletcher* issue. In the meantime, Malaysian courts are continuing to apply the rule in its existing form.[48]

In Singapore, two recent (and related) cases, both decided in the High Court by Choo Han Teck J.C., suggest that the views of the Australian High Court and the House of Lords have yet to be considered here. The first of the cases is *Sim Chiang Lee and another v. Lee Hock Chuan and others*.[49] It concerned a fire, apparently caused by defective wiring, which started on the first floor of a shophouse and spread to the shophouse next door, causing severe damage to that property. The claim, by the owner and the tenant of the damaged shophouse, was brought against the owner and the tenants of the first and second storeys of the shophouse in which the fire originated. The owner was sued in negligence and under the rule in *Rylands v. Fletcher*, and the tenants were sued in negligence. Choo J.C. held that the owner could not be liable under the rule since he was not in occupation or control of the premises at the time of the fire. The tenant of the second storey (which was *not* the origin of the fire) could not be liable under the rule either. No plea to this effect had been made against him, and there was, anyway, no evidence that the ordinary use of electricity constituted a non-natural use of land. However, the tenant of the first floor—where the fire had started—was found liable in negligence.[50]

The judgment of Choo J.C. contained no discussion of either *Cambridge Water* or *Burnie Port Authority* (and the case was decided before *Transco*), and his traditional approach towards *Rylands v. Fletcher* indicated no inclination to embark on a radical re-evaluation of the rule. Indeed, his reference to liability for fire having long been assimilated into the rule, and to the fact that "no claim … was made in the tort of nuisance"[51] suggests that he regarded *Rylands v. Fletcher* as offering a completely independent basis for liability in tort—a view which is consistent with the English position prior to the decisions in *Cambridge Water* and *Transco*.

The second case is *Epolar System Enterprise Pte Ltd and others v. Lee Hock Chuan and others*,[52] which arose from the same facts as *Sim Chiang Lee*, and concerned actions by owners and/or occupiers of neighbouring properties who sustained damage in the fire. The actions were originally brought "based on the rule in *Rylands v. Fletcher*, negligence and nuisance,"[53] although the claims under *Rylands v. Fletcher* were subsequently withdrawn. The withdrawal of these claims notwithstanding, both the nature of the pleadings and Choo J.C.'s analysis again support the

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47 Chan, *ibid.*, at xxx.

48 See, *e.g.*, *Milik Perusahaan Sdn Bhd & Anor v. Kembang Masyur Sdn Bhd* [2003] 1 C.L.J. 12 C.A. For further discussion of the Malaysian position, see Chan, *supra*, note 46 at xxxi to xxxiii.

49 [2003] 1 S.L.R. 122 [*Sim Chiang Lee*].

50 The claimants appealed against the decision to dismiss their claim against the first and second defendants and the third defendant appealed against the finding of liability, but both appeals were subsequently dismissed by the Court of Appeal.

51 *Supra*, note 49 at 124. See in this respect, too, Choo J.C.'s observation (*ibid.*, at 127) that: "The law imposes sufficient obligations and sanctions on an occupier not to do harm to his neighbour, whether by trespass, negligence, nuisance or under the rule in *Rylands v. Fletcher*."

52 [2002] 4 S.L.R. 769 [*Epolar System*]. Although reported before *Sim Chiang Lee*, *Epolar System* was in fact decided a couple of years later.

53 *Ibid.,* at 771.

view that in Singapore the rule is still considered to offer a valid cause of action, and one which, moreover, exists in its own right, independent of nuisance.[54]

## V. Conclusion

It seems likely that when the next *Rylands v. Fletcher* action reaches the Federal Court, the question of what role, if any, the rule should play in Malaysia will be faced head-on. The court will then decide whether to follow the lead of the Australian High Court in doing away with *Rylands v. Fletcher* altogether or whether to adopt the stance preferred by the House of Lords in keeping it, though as an aspect of nuisance. In Singapore, where interest in contemporary attitudes to the rule on the part of the English and Australian courts has yet to be shown, the picture is less clear.

*Rylands v. Fletcher* may be dead and buried in Australia, but, in theory at least, it lives on in England. Indeed, it is tempting to take the view that, by reaffirming the decision in *Cambridge Water*, the House of Lords in *Transco* has secured the future role of *Rylands v. Fletcher*, if only under the aegis of nuisance. However, in practice, the effect of *Transco* might actually be to reduce the range of situations in which the rule is in future applied, leading to the conclusion that there will ultimately be little point in retaining the rule if it is to receive no more than lip-service from the courts. Although, for the reasons already given, this writer's inclination is to favour its retention, there is not much to be said for keeping the rule just so that it can gather dust. The attitude of the English courts to *Rylands v. Fletcher* in general, and to the definition of non-natural use in particular, during the next decade or so is likely to prove decisive in determining whether the rule survives as a valuable basis for the imposition of strict liability or becomes nothing more than an insignificant footnote to the tort of nuisance.

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[54] Choo J.C. dismissed the claims. The case was appealed to the Court of Appeal, but since the *Rylands v. Fletcher* argument had not been pursued at trial, there was no discussion of the rule in the Court of Appeal's decision (see [2003] S.G.C.A. 10; [2003] 2 S.L.R. 198).