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A2 GCE LAW

G158/01/RM Law of Torts Special Study

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- This document consists of **8** pages. Any blank pages are indicated.

SOURCE 1

***Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 1 All ER 53**

LORD GOFF OF CHIEVELEY

My Lords, this appeal is concerned with the question whether the appellant company, Eastern Counties Leather plc (ECL), is liable to the respondent company, Cambridge Water Co (CWC), in damages in respect of damage suffered by reason of the contamination of water available for abstraction at CWC's borehole at Sawston Mill near Cambridge. The contamination was caused by a solvent known as perchloroethene (PCE), used by ECL in the process of degreasing pelts at its tanning works in Sawston, about 1·433 miles away from CWC's borehole, the PCE having seeped into the ground beneath ECL's works and thence having been conveyed in percolating water in the direction of the borehole. CWC's claim against ECL was based on three alternative grounds, viz negligence, nuisance and the rule in *Rylands v Fletcher* […]. The judge, Ian Kennedy J, dismissed CWC's claim on all three grounds – on the first two grounds, because (as I will explain hereafter) he held that ECL could not reasonably have foreseen that such damage would occur, and on the third ground because he held that the use of a solvent such as PCE in ECL's tanning business constituted, in the circumstances, a natural use of ECL's land. The Court of Appeal, however, allowed CWC's appeal from the decision of the judge, on the ground that ECL was strictly liable for the contamination of the water percolating under CWC's land […] and awarded damages against ECL […]. It is against that decision that ECL now appeals to your Lordships' House, with leave of this House.

[…] it appears to me to be appropriate now to take the view that foreseeability of damage of the relevant type should be regarded as a prerequisite of liability in damages under the rule. Such a conclusion can, as I have already stated, be derived from Blackburn J's original statement of the law; and I can see no good reason why this prerequisite should not be recognised under the rule, as it has been in the case of private nuisance.

[…] I cannot think that it would be right […] to exempt ECL from liability under the rule in *Rylands v Fletcher* on the ground that the use was natural or ordinary. The mere fact that the use is common in the tanning industry cannot, in my opinion, be enough to bring the use within the exception, nor the fact that Sawston contains a small industrial community which is worthy of encouragement or support. Indeed I feel bound to say that the storage of substantial quantities of chemicals on industrial premises should be regarded as an almost classic case of non-natural use; and I find it very difficult to think that it should be thought objectionable to impose strict liability for damage caused in the event of their escape.

SOURCE 2

***Transco plc v Stockport Metropolitan Borough Council* – [2003] UKHL 61**

LORD BINGHAM OF CORNHILL

2. […] The salient facts appear to me to be these. As a multi-storey block of flats built by a local authority and let to local residents, Hollow End Towers was typical of very many such blocks throughout the country. It had been built by the respondent council. The block was supplied with water for the domestic use of those living there, as statute has long required. Water was carried to the block by the statutory undertaker, from whose main the pipe central to these proceedings led to tanks in the basement of the block for onward distribution of the water to the various flats. The capacity of this pipe was much greater than the capacity of a pipe supplying a single dwelling, being designed to meet the needs of 66 dwellings. But it was a normal pipe in such a situation and the water it carried was at mains pressure. Without negligence on the part of the council or its servants or agents, the pipe failed at a point within the block with the inevitable result that water escaped. Since, again without negligence, the failure of the pipe remained undetected for a prolonged period, the quantity of water which escaped was very considerable. The lie and the nature of the council's land in the area was such that the large quantity of water which had escaped from the pipe flowed some distance from the block and percolated into an embankment which supported the appellant Transco's 16-inch high-pressure gas main, causing the embankment to collapse and leaving this gas main exposed and unsupported. There was an immediate and serious risk that the gas main might crack, with potentially devastating consequences. Transco took prompt and effective remedial measures and now seeks to recover from the council the agreed cost of taking them.

10. […] Bearing in mind the historical origin of the rule, and also that its effect is to impose liability in the absence of negligence for an isolated occurrence, I do not think the mischief or danger test should be at all easily satisfied. It must be shown that the defendant has done something which he recognised, or judged by the standards appropriate at the relevant place and time, he ought reasonably to have recognised, as giving rise to an exceptionally high risk of danger or mischief if there should be an escape, however unlikely an escape may have been thought to be.

11. […] I think it clear that ordinary user is a preferable test to natural user, making it clear that the rule in *Rylands v Fletcher* is engaged only where the defendant's use is shown to be extraordinary and unusual. This is not a test to be inflexibly applied: a use may be extraordinary and unusual at one time or in one place but not so at another time or in another place […] I also doubt whether a test of reasonable user is helpful, since a user may well be quite out of the ordinary but not unreasonable […]

SOURCE 3

***Gore v Stannard (trading as Wyvern Tyres)* [2012] EWCA Civ 1248**

A fire broke out at the defendant's business premises as a result of an electrical fault, igniting a large number of tyres which the defendant had brought onto the premises. The tyres, once alight, fed the ferocity of the fire, which spread and destroyed the claimant's adjoining premises. The claimant brought an action for damages on the alternative bases of negligence and the strict liability rule in *Rylands v Fletcher*. The judge rejected the claim in negligence but allowed the claim based on the strict liability rule, holding that, (i) although the tyres were not per se readily combustible, they could catch fire from another source of flame or heat, and the defendant's activities in storing tyres in the numbers and the ways he had were dangerous, (ii) there had been an "escape" from the defendant's land for the purposes of the rule, and (iii) the defendant's storage of the tyres amounted to non-natural use of the land.

On the defendant's appeal –

Held, allowing the appeal, that the rule in *Rylands v Fletcher* did not apply where the defendant had brought onto his land a thing which had started or increased a fire and the fire, but not the thing, had escaped from his land; and that, accordingly, since the tyres, while having been brought onto the defendant's land, had not escaped, and the fire, while having escaped, had not been brought onto the defendant's land, the rule did not apply […]

SOURCE 4

John Cooke, Law of Tort, 9th Edition, Pearson Longman, p 357

Rylands v Fletcher (1865) 3 H&C 774; (1868) LR 3 HL 330 (HL)
The defendant had employed contractors to build a reservoir on his land to supply water for his factory. The contractors negligently failed to block a disused mine shaft and when the reservoir was filled the plaintiff's adjoining mine was flooded. At first instance, Blackburn J laid down the following rule:

> A person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape.

The House of Lords approved the decision, subject to the addition of the requirement that the defendant's user [sic] of his land should be non-natural.

Defences
Liability in ***Rylands*** is said to be strict. This means that the absence of negligence on the part of the defendant is not a defence. However, as liability is strict and not absolute, there are certain defences to the action.

Consent of the claimant: If the claimant expressly or impliedly consents to the presence of the thing on the defendant's property, then the defendant is not liable for damage caused by the escape unless they have been negligent. [In] ***Peters v Prince of Wales Theatre (Birmingham) Ltd*** [1943] 1 KB 73, [t]he plaintiff had leased a shop from the owners of an adjoining theatre. The plaintiff's shop was flooded when pipes for a sprinkler system in the theatre burst during cold weather. There was held to be implied consent on the part of the plaintiff to the existence of the sprinkler system, which existed at the time he took his lease.

Act of a stranger: Where the escape is caused by the act of a stranger over whom the defendant has no control, this will be a defence. [In] ***Perry v Kendricks Transport Ltd*** [1956] 1 WLR 85, [t]he defendants parked their coach on their car park. The petrol tank had been drained. The child plaintiff was crossing waste land adjacent to the car park, when he was injured by an explosion caused by a small boy throwing a lighted match into the petrol tank. An unknown person had removed the cap from the petrol tank. The defendants were held not liable, as the explosion was caused by the act of a stranger over whom they had no control.

Act of God: This is a defence which is remembered by students but which has little application. It is available when the escape is caused by natural forces, in circumstances which no human foresight can provide against and of which human prudence is not bound to recognise the possibility. [In] ***Nichols v Marsland*** (1876) 2 Ex D 1, [t]he defendant had three artificial lakes made on his land by damming a natural stream. A heavy thunderstorm accompanied by unprecedented rain caused the banks of the lakes to burst and water to destroy four bridges on the plaintiff's land. It was held that the flooding was caused by an Act of God for which the defendant was not liable.

Statutory authority: Whether a statute confers a defence under ***Rylands*** is a question of construction of the statute.

SOURCE 5

Jason Lowther, Case Commentary: Transco plc v Stockport MBC, ELM 15 [2003] 6

The House of Lords has, in this unanimous judgment, sounded the death knell for the rule in *Rylands v Fletcher* […] effectively to be considered as a tort/rule in its own right.

Comment: On the facts of *Transco* there can be no real issue with the decision so far as it is limited to those facts. For one thing, it is probably unquestionable that the supply of domestic water is, as reflected upon by Lord Bingham, a wholly ordinary use of land, given the reference to […] many […] authorities which have considered this issue. With one of the necessary components for liability absent, it follows that Stockport would not be liable under the rule.

Whether or not this proves to be the end of the line in relation to *Rylands* liability will have to be seen. Set against the context of this judgment, however, and the powerful opinions expressed in their Lordships' judgments, particularly in relation to the concept of dangerous or extraordinary use, it would seem that there will be very few cases where the rule will be seen to apply.

It would appear that their Lordships regarded the fact that the damage suffered would be something that an ordinary person might insure against as in some way determinative. It could be respectfully argued that whether or not a person has insured against a particular form of damage, does not remove the fact that the damage has occurred, and further that it has occurred through no fault of the insured (or non-insured) party, although it is perhaps a compelling means by which to assess the extraordinariness of the activity leading to the damage. Strict liability is recognised to exist as a result of statutory schemes mentioned within the judgment, and the presence of such regulatory mechanisms have much to do with Lord Goff's judgment in the decision of the house in *Cambridge Water*. In that case his Lordship, as referred to in *Transco* by Lord Bingham, essentially stated (at p. 305) that it was more appropriate for Parliament to impose strict liability in respect of operations of high risk. His reasoning suggested that the relevant activities may have been more easily prescribed, that the persons involved stood more chance of knowing their legal position, and that the incidence and scope of the liability could be determined with more precision. That is probably correct as far as it goes, but for areas where Parliament has not acted, the question as to whether a person's knowledge of the extent of his or her liability can be precisely ascertained by him or her does not seem to be capable of a straightforward answer.

Other aspects of the judgment merely reflect the shift change that has occurred in the past decade, and the seeming judicial desire to clarify the extent and application of the rule. The requirement of foreseeability of damage being a necessary condition to be established is restated clearly, as is the fact that the rule only offers compensation for damage to a claimant's property. All of their Lordships referred to Professor Newark's view that the rule is a species of nuisance 'novel only to the extent that it sanctioned recovery where the interference by one occupier of land with the right or enjoyment of another was isolated and not persistent'. (At p. 487–488.)

Their Lordships all considered that the rule had long been characterised by difficult distinctions and exceptions, and that the restatement they have provided should make the rule easier to interpret, although, it might be said, more difficult to apply.

SOURCE 6

Vera Bermingham & Carol Brennan, Tort Law Directions, 3rd Edition, Oxford University Press, p 238

In *Cambridge Water*, Lord Goff did not believe that it was appropriate for the Lords to develop the rule in *Rylands*, preferring it to remain in its historical context as an aspect of nuisance law. Furthermore, statutory provision was said to be the most appropriate and adaptable means of addressing environmental losses:

> Like the judge in the present case, I incline to the opinion that, as a general rule, it is more appropriate for strict liability in respect of operations of high risk to be imposed by Parliament, than by the courts. If such liability is imposed by statute, the relevant activities can be identified, and those concerned can know where they stand. Furthermore, statute can where appropriate lay down precise criteria, establishing the incidence and scope of such liability. … It is of particular relevance that the present case is concerned with environmental pollution. The protection and preservation of the environment is now perceived as being of crucial importance to the future of mankind; and public bodies, both national and international, are taking significant steps towards the establishment of legislation which will promote the protection of the environment, and make the polluter pay for damage to the environment for which he is responsible. …But it does not follow from these developments that a common law principle, such as the rule in *Rylands v Fletcher*, should be developed or rendered more strict to provide for liability in respect of such pollution. On the contrary, given that so much well-informed and carefully structured legislation is now being put in place for this purpose, there is less need for the courts to develop a common law principle to achieve the same end, and indeed it may well be undesirable that they should do so.

In the same year, however, in *Burnie Port Authority v General Jones Pty Ltd* (1994), the High Court of Australia held that the differences between *Rylands v Fletcher* and negligence are now so slight that the former should be absorbed as a variation of the latter, while characterized by a non-delegable duty and a high standard of care.

In *Transco*, the House of Lords noted the decision in *Burnie* but rejected the opportunity to permit *Rylands v Fletcher* to be absorbed into the law of negligence or alternatively to extend the reach of strict liability in this area.

Instead, Lord Bingham proposed that the court should retain the rule, as a 'sub-species of nuisance ... while insisting upon its essential nature and purpose; and … restate it so as to achieve as much certainty and clarity as is attainable'. *Rylands* 'has been a part of English law for nearly 150 years and despite a searching examination [by Lord Goff in *Cambridge Water*] 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.'