NOTES

The Changing Fortunes of Rylands v Fletcher

★

PETER CANE†

The rule in *Rylands v Fletcher*[1] has been moribund for many years. There are, perhaps, two main explanations for this. One is the difficulty of justifying the existence of a principle of liability limited in its operation to escapes of stored substances. The other is the infiltration of the principle by concepts of fault. One possible reaction to a moribund legal principle is to kill it off. This is what the High Court of Australia did to the principle in *Rylands v Fletcher* in *Burnie Port Authority v General Jones Pty Ltd.*[2] Another is to attempt rejuvenation. It has occasionally been argued that the principle in *Rylands v Fletcher* should be transformed into a general principle of strict liability for the conduct of "ultra-hazardous activities" or the like. This option is unattractive partly because of the difficulty of defining the concept of an "ultra-hazardous activity".[3] Another approach would be to purge the concept of "non-natural use", which is central to the rule in *Rylands v Fletcher*, of the cost-benefit analysis which has formed its core since the decision in *Rickards v Lothian*.[4] This, essentially, is what the House of Lords did in *Cambridge Water Co v Eastern Counties Leather plc.*[5] On the face of it, therefore, these two cases establish a significant divergence between Australian and English law. But on closer examination the position is not quite as simple as it appears at first sight.

---

† Corpus Christi College, Oxford.

1. (1886) LR 1 Ex 265.
2. (1994) 120 ALR 42.
3. Whether an activity is ultra-hazardous or only hazardous depends on how it is carried on: an activity which would be ultra-hazardous if conducted carelessly may only (or not even) be hazardous if conducted with all reasonable care. Furthermore, "ultra-hazardous" conveys the idea of unacceptable risk, and what level of risk we are prepared to accept in any particular activity depends on how highly we value that activity.
4. (1916) 16 CLR 387.
5. [1994] 2 WLR 53.

In *Burnie Port Authority v General Jones Pty Ltd,* a very large quantity of frozen peas owned by GJ was stored in cold rooms occupied by GJ under an agreement with BPA, which occupied the rest of the building in which the cold rooms were situated. The peas were ruined by a fire which started in and spread from a part of the building occupied by BPA. The fire was caused by the negligence of an independent contractor engaged by BPA to do work including the installation of new refrigeration equipment.

In *Cambridge Water Co v Eastern Counties Leather plc,*[6] CWC suffered economic loss as a result of the pollution of a borehole which it acquired in 1976. The pollution was caused by a solvent used by ECL in the production of leather. Small quantities of the solvent were repeatedly spilled and seeped into chalk aquifers up-catchment from CWC's borehole. Use of the solvent began in the 1960s and ceased in 1991. Spillage of the solvent ceased in 1976, but pollution caused by residues of the solvent in the aquifers was still occurring at the date of the action. A result of the pollution was that under regulations which came into force in 1985, water from the borehole was "unwholesome" and so could not be supplied by CWC to its customers. CWC claimed as damages the cost of developing an alternative source of supply.

Clearly the social context of these two cases was quite different. One was concerned with the age-old problem of the escape of fire caused by construction workers, the other with the more recently perceived scourge of large-scale degradation of underground water supplies by industrial activity. Some might think that the differing social contexts of the two cases adequately explain and justify the fact that the High Court of Australia held BPA liable to GJ for destruction of the peas, while the House of Lords refused to impose liability on ECL for the economic loss suffered by CWC. Others might take a different view of the social merits of the two decisions. Be that as it may, in legal terms the issue in both cases was seen to be the same, namely whether the risk that something might escape from land and cause injury to another should be borne by the person in control of the land or by the injured party. The House of Lords and a majority of the High Court agreed that the legal category of liability for escape of substances from land makes little non-legal sense: why should a landowner's liability for activities conducted on the land vary according to whether the person injured was within the boundary or without? But they reacted to the difficulty of answering this question in quite different ways. The House of Lords used it to justify a refusal to extend the scope of the rule in *Rylands v Fletcher* to cover unforeseeable as well as foreseeable losses. The majority in the High Court, on the other hand, used it to justify abolishing the rule in *Rylands v*

6. Ibid.

Fletcher and putting in its place a rule which, in its terms, drew no distinction between loss and damage caused by escapes and injuries not so caused.[7]

The English Court of Appeal had decided in favour of CWC. The insurance industry reacted against this decision with speed and force, and its reversal by the House of Lords has been widely greeted with relief as restoring a sane balance between industrial prosperity and environmental quality. Polluters and their insurers tend to take the view that if anyone is to pay for environmental degradation, which has only come to be seen as socially unacceptable with the benefit of hindsight ("historic pollution"), it should not be them. In fact, the case had little to do with the environment as such and much to do with how the costs of meeting stringent EC drinking water standards are to be met — by industry and its customers or by water consumers. Given the large overlap between the two groups, the social and economic importance of the choice is not clear. On the other hand, the question of how the costs of cleaning up historic pollution are to be borne is a hot political and ideological issue in all advanced industrial states. Rightly or wrongly, the House of Lords made no express mention of, and gave no express consideration to, this political dimension of the *Cambridge Water* case.

Nevertheless, the decision of the House of Lords was not an unqualified rejection of the "polluter pays" principle. This is because of the approach adopted by the House to the definition of "non-natural use". The consensus of opinion prior to *Cambridge Water* was that very few, if any, industrial processes were "non-natural" as that term had come to be defined. Indeed, it was arguable that the term did not refer to the nature of the use but to whether, all things considered, the use to which the land was put was being carried on in a reasonable and socially acceptable way.[8] Lord Goff in *Cambridge Water* set English law on a different path by rejecting the idea that the judgment of whether a use was non-natural involved weighing the benefits of the use against its costs,[9] and by asserting that "the storage of substantial quantities of chemicals on industrial premises should be regarded as an almost [sic] classic case of non-natural use".[10] Many believe that Lord Goff's approach has opened the way for the much increased use of *Rylands v Fletcher* in environmental cases by making it much more likely that common industrial processes will be held to involve non-natural use. Add to this the fact that the House made it clear that a person in control of

---

7. This statement may be controversial. The majority in *Burnie Port Authority* supra n2, 60-61 describe the requirement of escape as "unreasonably arbitrary"; but a pivotal passage at 67 could be interpreted as preserving it.
8. But for a different view, see *Burnie Port Authority* supra n2, McHugh J, 92.
9. *Cambridge Water* supra n5, 83. He also specifically denied that the fact that ECL was a large local employer was relevant to deciding whether its activity was non-natural.
10. Ibid.

land could be liable under *Rylands v Fletcher* even if that person had taken all reasonable precautions to prevent the escape (provided only that the loss suffered by the plaintiff as a result of the escape was foreseeable) and it can be seen that writers of English tort texts are not about to remove the chapter on *Rylands v Fletcher* from the pages of their books.

Before leaving *Cambridge Water*, one more doctrinal point deserves mention. The House treated *Rylands v Fletcher* as a form or application of the principles of private nuisance and this is why, following *The Wagon Mound (No 2)*,[11] it held that there could be no liability under the principle for unforeseeable loss. There is another respect in which the House asserted that nuisance and *Rylands v Fletcher* go hand in hand: liability can arise under either head even if the person against whom the claim is made had taken all reasonable precautions to prevent the unlawful interference with the use of the claimant's land. It is arguable whether this view of nuisance is consistent with the relevant case-law.

As I have already noted, the approach of the majority of the High Court in *Burnie Port Authority* to the rule in *Rylands v Fletcher*[12] was that it "should now been seen ... as absorbed by the principles of ordinary negligence, and not as an independent principle of strict liability".[13] But the Court also held BPA liable to GJ for breach of a "non-delegable duty of care" owed to GJ. In other words, BPA was liable to GJ for the escape of fire despite lack of negligence on its part, not by virtue of a principle of liability for the escape of dangerous substances (including fire) from land but by virtue of the principle of vicarious liability embodied in the concept of "non-delegable duty". This non-delegable duty arose because BPA had control of premises on which a dangerous activity (welding in close proximity to a large amount of highly inflammable material) was being carried on.

The main reasons given by the majority for subsuming situations falling within the principle in *Rylands v Fletcher* under the tort of negligence were that the boundaries of the principle in *Rylands v Fletcher* are unclear and unstable, and that because of the way the principle has been developed, any case in which liability could be imposed under it would very likely be a case in which liability could also be imposed under principles of the law of negligence.[14] The first of these propositions is easily accepted and clearly influenced the Law Lords in *Cambridge Water*.

---

11. *Overseas Tankship (UD) Ltd v Miller Steamship Co Pty* [1967] 1 AC 617.
12. Which the majority treated as concerned with the suffering of personal injury or property damage as a result of the escape of dangerous substances from land controlled by another.
13. *Burnie Port Authority* supra n2, 67. The Court also decided unanimously that there are no special common law rules concerning liability for the escape of fire.
14. McHugh J vigorously rejected this conclusion: see esp id, 93-94. The crucial difference between negligence and strict liability is a practical one: does the plaintiff have to prove negligence? It may well be true that in most cases falling under the rule in *Rylands v*

The second proposition is rather more problematic because of the way the majority of the High Court supported it. Negligence can subsume *Rylands v Fletcher* without significant remainder, they said, because of two principles: first, the more dangerous an activity the greater the care which must be taken in order successfully to rebut claims of negligence, so that in the case of specially dangerous activities, the standard of care required may be "so stringent as to amount practically to a guarantee of safety";[15] and secondly, the conduct of dangerous activities on land which threatens people outside the land generates a non-delegable duty of care resting on any person in control of the land.[16] It seems to me that this reasoning is open to three main objections. The first is that the High Court does not directly tackle the central question of who should bear those costs of activities which the reasonable person would not take precautions to prevent. Should it be the parties on whom those costs fall or the parties who carry on the activities which generate those costs? A rule of negligence liability imposes such costs on victims while a rule of strict liability imposes them on entrepreneurs. A rule of strict liability may have the effect of encouraging the expenditure of money by entrepreneurs to discover cost-efficient ways of avoiding costs hitherto unavoidable at reasonable cost, whereas a rule of negligence liability may encourage such expenditure by victims.

The imposition of a non-delegable duty of care on BPA by virtue of its control of the land on which the dangerous activity is being carried on suggests that the majority of the High Court believed that those in control of land, rather than victims, should bear the risks of the conduct of dangerous activities on land even if the controller of the land could not be expected to have done any more than the controller in fact did to eliminate the risks. I say this because liability for breach of a non-delegable duty of care is a form of vicarious liability which can be imposed without proof of any fault on the part of the person vicariously liable.[17] So the majority clearly did not believe that tort liability without fault should never be imposed; and in this light, the important question is when, in their view, it could fairly be imposed.

Fletcher the defendant has been negligent; but, even if this is so, it is a great advantage to the plaintiff not to have to prove this. The majority perhaps gave too little weight to this consideration.

15. *Burnie Port Authority* supra n 2, 65.
16. Ibid.
17. It may just be possible to interpret the reasoning of the majority as saying that BPA had been negligent because they had employed the contractor to do work which required the accumulation on the premises of highly flammable material and had not taken reasonable care to see that the contractor did this carefully (McHugh J id, 97 specifically denied that BPA had been negligent). But, on this interpretation, the notion of "non-delegable duty" does no work: BPA's liability would rest on breach by it of an ordinary duty of care, not on breach of a non-delegable duty of care.

This observation leads to the second main objection to the High Court's reasoning, which is that it draws an artificial distinction between those who control land on which dangerous activities are conducted and those who conduct such activities but do not control the land on which they are conducted. Control of land obviously appealed to the judges as a good ground for imposing strict liability because they also suggested (without deciding) that the person in control of land on which dangerous activities are conducted owes a non-delegable duty of care to lawful (and perhaps unlawful) visitors to the land and not just to persons outside it.[18] What they do not make clear is why a person who controls land on which dangerous activities are conducted should be strictly liable while a person who conducts a dangerous activity on land which that person does not control is not strictly liable even if the person in control of the land exercises no effective control over the conduct of the activity and is not negligent in failing to do so.

The third main objection to the High Court's reasoning arises from the role played in it by the idea of dangerous activities. A dangerous activity is one which might foreseeably cause injury or damage if special care and precautions are not taken in its conduct. This concept of dangerous activities is more or less equivalent to the discredited notion of "ultra-hazardous" activities, and the majority judges gave no guidance as to what is meant by "special care" or "special precautions". This would not matter if the only obligation in respect of a dangerous activity was to take reasonable care in conducting it, because in that case the question of whether the obligation had been fulfilled could be decided simply by determining whether the precautions actually taken were reasonable. But once the concept of dangerousness is made a criterion for the imposition of strict liability through the medium of a non-delegable duty of care, we need to be able to say whether any particular activity is dangerous independently of the question of whether it was conducted with reasonable care. It would be circular to say that a non-delegable (strict) duty would arise if the activity had been conducted without reasonable care but not otherwise.

It is, I believe, very difficult to define the scope of strict liability by reference to the nature of the activities which attract such liability (eg, whether they are dangerous or not). The fundamental question we need to answer is whether, in relation to any particular activity, there are good reasons why the person conducting that activity should bear legal responsibility for losses arising from it which could not have been avoided by the exercise of reasonable care by that person. One way of approaching this question might

---

18. Id, 67. See further FA Trindade & P Cane *The Law of Torts in Australia* 2nd edn (Melbourne: Oxford UP, 1993) 710-711. In England, occupiers are not vicariously liable to lawful visitors for torts of independent contractors: Occupiers' Liability Act 1957 s2(4)(b).

be to think about different ways in which liability for fault and liability without fault distribute risks attaching to activities. Liability limited by a requirement of proof of negligence places fewer of the risks generated by an activity on the actor than does liability which can be imposed even in the absence of proof of negligence. Even more of the risks can be imposed on the actor by allowing liability for unforeseeable risks. The distribution of risks can also be modified by the use of defences and burdens of proof. In this light, and against the background which the modern law provides of a norm of "no tort liability without fault", the relevant question becomes that of how we are to justify the imposition on an actor of liability for more of the risks of any particular activity than would be imposed by the requirement of proof of negligence.

A common reaction to talk of risk allocation is to say that risks should be allocated to the party best able in financial terms to bear them personally or to distribute them. This reaction is a product of viewing tort law primarily as a mechanism for compensating injured parties; but the limits and defects of tort law as a compensation mechanism are too well-known to need discussion here. Moreover, the fact that someone could easily absorb a loss does not justify the conclusion that the person ought to be required by the law to absorb it. If we are to make sense of tort law we must treat it primarily as a system of norms of personal responsibility. This suggests (amongst other things) that the choice to impose liability regardless of fault in preference to liability for fault should be justified primarily by pointing to some factor which increases the responsibility of the actor for the damage inflicted. Jane Stapleton[19] suggests that the pursuit of profit is such a factor: actors who conduct an activity for profit can justifiably be made liable for injuries resulting from it even in the absence of personal fault on the part of the actor.[20] This is a normatively attractive proposition, but it only goes part of the way in explaining the law. For instance, liability under the principle in *Rylands v Fletcher* or for breach of the High Court's non-delegable duty in respect of the conduct of dangerous activities on land is not, in its terms, limited to the use of land for profit.

The principle of responsibility which is central to the reasoning of the majority of the High Court in *Burnie Port Authority* is that of *control*. The normative power of this concept derives partly from the idea that people should not be held (fully) responsible for situations outside their control. This idea helps to explain the decision in *Leakey v National Trust*[21] that, contrary to normal principles, the personal resources of a landowner were relevant to deciding how much care ought to have been taken to prevent

19. J Stapleton *Product Liability* (London: Butterworths, 1994).
20. Id, ch 8.
21. [1980] QB 485.

neighbours being harmed by hazards naturally occurring on the land and not created by the landowner. But for the majority of the High Court the chief significance of control lay elsewhere: people who may be injured by a danger which they cannot control are dependent on the person who controls the danger. This dependency or vulnerability justifies the imposition of special responsibility (in the form of a non-delegable duty) on the person who can control the danger.

As a principle of responsibility, the concept of control is not without its difficulties. The concept, which was derived from the judgment of Mason J in *Kondis v State Transport Authority,*[22] extends beyond the control of land and is used to justify the imposition of strict liability on (for example) employers in respect of the safety of employees, on hospitals in respect of the safety of patients and on schools in respect of the safety of pupils.[23] Once the idea of control is extended in this way it becomes little more than a label attached to all the sorts of cases in which the courts see fit to impose strict liability. This conclusion might prompt us to ask why car drivers, for example, should not be said to be "in control of" their cars so as to justify the imposition of strict liability in respect of road accidents. We may have to look beneath the language of control to find explanations and justifications for the particular pattern of strict liability present in the law. The concept of control by itself is an inadequate justification for the imposition of strict liability because in respect of many activities and situations we would not want to impose strict liability on that basis alone. In other words, "control" might operate as a precondition but not as a ground of liability. On the other hand, the High Court's attempt to narrow further the boundaries of strict (vicarious) liability by using the notion of specially dangerous activities is, I believe, a mistake. What is needed is a more developed set of principles of responsibility.[24]

There are two other noteworthy features of the High Court's approach. First, as already stated, the concept of non-delegable duty is part of the law of vicarious liability, that is, liability for the torts of another. *Rylands v Fletcher*, on the other hand, is a principle of personal liability (although part of the motivation for its development may have been to create liability for the negligence of an independent contractor). It may seem odd to abolish a principle of personal strict liability and to put in its place a principle of

22. (1984) 154 CLR 672.
23. *Burnie Port Authority* supra n2, 62.
24. We may also need some theory of protected interests. Strict liability is a characteristic feature of torts which protect property from misappropriation and from use without the owner's consent: see P Cane *Tort Law and Economic Interests* (Oxford: Clarendon Press, 1991) ch 2. Some interests may be seen as so important that they deserve the protection from interference afforded by the imposition of liability without fault.

vicarious (strict) liability. Why, for instance, should a person in control of land be strictly liable for the escape of fire from land if, but only if, the fire was caused by someone else?[25] A possible answer to this question may lie in the observation that a principle of vicarious liability is more apt to impose liability on corporate landowners than on individuals who control land because corporations must act through human agents whereas individuals can act personally. Might it be that the majority of the Court wished to limit strict liability to those who occupy land for commercial purposes? No doubt the judges did not feel able expressly to draw a distinction between commercial and non-commercial landowners; but perhaps they thought that the principle of non-delegable duties provided an acceptable surrogate for such a distinction. There is no visible sign of such a line of reasoning in the majority judgment in *Burnie Port Authority*; but it would make some sense of what otherwise seems an odd move. A principle that strict tort liability is appropriately imposed on the conduct of commercial activities clearly has close affinities with Stapleton's suggestion that strict liability is an appropriate response to profit-making.[26] However, the concept of the non-delegable duty weakens the link because not all profit-making activities are carried on vicariously, as it were.

Secondly, despite assimilating *Rylands v Fletcher* to negligence, the majority said that "there may remain cases in which it is preferable to see a defendant's liability in a *Rylands v Fletcher* situation as lying in nuisance (or even trespass) and not in negligence".[27] This odd statement apparently makes the challengeable assumption that liability for property damage in nuisance and trespass is strict and not fault-based. Moreover, the phrase "it is preferable" is far too vague to provide any guidance as to the boundaries of any remaining pocket of strict liability.

Finally, it may be instructive to ask how the High Court would now decide a case like *Cambridge Water*, and how the House of Lords would decide a case like *Burnie Port Authority*. The loss to GJ in *Burnie Port Authority* was undoubtedly foreseeable, so the fact that neither the fire nor its escape were the result of negligence on the part of BPA would not prevent the imposition of liability under *Rylands v Fletcher* as interpreted by the House of Lords. The remaining question would be whether the use of the land was "non-natural". The answer to this question depends in part on how the use of the land is defined: having construction work done on premises may not per se be a non-natural use, but construction work might be a non-

25. As Brennan J, 83-85 and McHugh J, 96-97 pointed out in *Burnie Port Authority* supra n2, the non-delegable duty principle is arguably inconsistent with earlier High Court decisions.
26. Stapleton supra n19.
27. *Burnie Port Authority* supra n2, 66-67.

natural use if it entailed the deployment of large quantities of highly inflammable material. In a case of escape of fire, the relevant use is, presumably, that which generates the fire; and this is certainly the approach adopted by all the justices in *Burnie Port Authority*. Even so, Brennan and McHugh JJ held that the relevant activities of the contractor did not constitute a non-natural use.[28] Unfortunately, Lord Goff declined to attempt to redefine "non-natural use" in *Cambridge Water*, but it is certainly arguable that he would be prepared to classify the contractor's activities in *Burnie Port Authority* as non-natural use. If this is right, an English court might well reach the same result as the majority of the High Court, but by a different route.

Applying the reasoning of the majority of the High Court to a situation similar to that in *Cambridge Water*,[29] the crucial question would be whether ECL's activity was "dangerous". The answer must depend on whether foreseeability of harm resulting from an activity is a condition of its being dangerous in the relevant sense. As already noted, the harm caused by the activities of BPA's contractors certainly was foreseeable. Moreover, successful use of the concept of non-delegable duty presupposes that the person actually responsible for the harm committed a tort. Since the absorption of *Rylands v Fletcher* into negligence, the only torts possibly relevant to the facts of *Cambridge Water* are negligence and nuisance, both of which require foreseeability of harm. So it seems that the High Court would not hold a person liable for breach of a non-delegable duty unless the relevant harm was foreseeable, and that it would decide a case like *Cambridge Water* in the same way as the House of Lords did.

Whatever one's view of the merits of the two decisions, one cannot help wishing that in their reasons the judges of the two courts had spent more time considering the pros and cons of strict liability and less time merely manipulating the tired categories of traditional tort law.

---

28. Id, Brennan J, 80 and McHugh J, 92.

29. In *Cambridge Water* itself, the spillage of the pollutant chemical was apparently caused by employees of ECL. So ECL would have been vicariously (and, therefore, strictly) liable if the employees had committed a tort. In this light, it is surprising that the majority in *Burnie Port Authority* treated the central issue in the case as being the nature of the liability of a landowner for things done on the land rather than the scope of an employer's vicarious liability for torts of independent contractors.