WHY NOT NEGLIGENCE?

WHAT DIRECTION SHOULD THE NEW ZEALAND COURT OF APPEAL TAKE IN RESPECT OF *RYLANDS V FLETCHER*?

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I INTRODUCTION

New Zealand's Court of Appeal recently considered important questions concerning the status of the *Rylands v Fletcher*[1] rule in *Autex Industries Ltd v Auckland City Council*[2] and *Hamilton v Papakura District Council*.[3] These cases identified fact scenarios resembling *Rylands* situations. Following decisions of the High Court of Australia in *Burnie Port Authority v General Jones Pty Ltd*[4] and the House of Lords in *Cambridge Water Co v Eastern Leather Plc*,[5] placing *Rylands* into negligence and nuisance categories respectively, the Court of Appeal's approach was eagerly anticipated. Of importance, is a careful consideration of the two cases, identifying the reasoning and policy underpinning the judgments. Therefore, the predominant focus incorporates an in-depth discussion of *Burnie* illustrating judicial alternatives available in analysing one-off damaging events, accompanied by an appropriate reflection on the application of such arguments to New Zealand's jurisprudential environment. The fundamental flaws associated with *Rylands* and its nuisance rationalisation, results in the argument that classifying the doctrine as negligence presents a better option. To provide this answer, this paper will identify and consider a number of integral *Rylands* issues including 'non-natural use', foreseeability, and defences. In combination, these factors suggest that negligence should control this area of liability.

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[1] *Rylands v Fletcher* (1868) LR 3 HL 330 (HL (Eng).
[2] *Autex Industries Ltd v Auckland City Council* [2000] NZAR 324 (CA).
[3] *Hamilton v Papakura District Council* [2000] 1 NZLR 265 (CA).
[4] *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42; 179 CLR 520 (HCA).
[5] *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 AC 264 (HL (Eng).

II RYLANDS *AND RECENT DEVELOPMENTS*

On December 11, 1860, a newly excavated Lancashire reservoir, being filled for the first time, burst as disused mine shafts underneath failed to hold the weight. These shafts connected directly to the adjacent Red House Colliery, and the escaping water flooded the entire workings.[6] From those facts, Blackburn J delivered the initial judgment of *Fletcher v Rylands*, imparting the *Rylands* principle; the "true rule of law":[7]

> [T]he 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 which is the natural consequence of its escape.

This principle, coupled with meanings deduced from it and subsequent additions to it, constitutes the question guiding this paper. This principle and its manifestations resulted in the House of Lords identifying the doctrine with the law of nuisance, and it is equally this principle and additions that allowed the High Court of Australia to conclude that negligence subsumed the doctrine. The United States adapted the doctrine to develop a strict liability doctrine for conveyance, possession, maintenance, and use of "ultra-hazardous" goods and activities,[8] and it is the same doctrine that Canadian Courts often ignore in favour of ordinary nuisance or negligence principles.[9] Recent New Zealand treatment places *Rylands* as a strict liability doctrine within nuisance. Evidently, *Rylands v Fletcher* arouses great passion within individuals; great tort writers often commented

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[6] A W B Simpson "Legal Liability for Bursting Reservoirs: The Historical Context of *Rylands v Fletcher*" (1984) XIII The Journal of Legal Studies 209, 212-213.
[7] *Fletcher v Rylands and Harrocks* (1866) LR 1 Ex 265, 279-280 (Ex Ch).
[8] American Law Institute *Restatement (Second) of Torts* (1977) § 519 and § 520.

upon it, either loving it or loathing it. Sir Frederick Pollock, ostensibly, was troubled by the doctrine. Like many, the original (strict liability) conception was enticing, but subsequent alterations and explanations aroused his disdain, resulting in a comment that *Rylands* was one of those authorities "that are followed only in the letter, and become slowly but surely choked and crippled by [judicially imposed] exceptions".[10] Pollock also determined that the doctrine was "anomalous".[11] These comments possessed incredible insight, receiving publication over 100 years ago. Therefore, marked disagreement exists among common law countries as to the appropriate classification of *Rylands*. This paper seeks to rationalise the most appropriate approach for New Zealand.

III THE RECENT NEW ZEALAND APPROACH

A Autex Industries Ltd v Auckland City Council

Factually, *Autex* is simple. An Auckland City Council water main burst approximately eight metres from Autex's premises. The water caused substantial damage to premises, equipment, and stock totalling $206,780.17. Autex sought summary judgment on two grounds, namely strict liability for the escape of water under *Rylands*, and negligence in allowing the escape. For the *Rylands* action, the direct Court of Appeal precedent of *Irvine and Co Ltd v Dunedin City Corporation*[12] concerned a similar escape of water. The City Corporation was held strictly liable, and the decision stood unchallenged for sixty years. Master Kennedy-Grant removed the application for

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[9] *Tock v St John's Metropolitan Area Board* (1989) 64 DLR (4th) 620 (SCC); *Ratko v Public Utility Commission of City of Woodstock* (1994) 111 DLR (4th) 375 (Ont Divisional Ct); and *Smith Bros Excavating Windsor Ltd v Price Waterhouse Ltd* (1994) Ont CJ Lexis 1486 (Ont CJ).

[10] Quoted in *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42, 57 (HCA), but deriving from Sir Frederick Pollock *The Law of Fraud, Misrepresentation and Mistake in British India* (1894) 54.

[11] Sir Frederick Pollock *The Law of Torts* (1st ed, Stevens & Sons Ltd, London, 1888) 398.

[12] *Irvine and Co Ltd v Dunedin City Corporation* [1939] NZLR 741 (CA).

summary judgment to the Court of Appeal, accepting that *Irvine* bound the High Court. Master Kennedy-Grant believed it appropriate that with recent commonwealth developments concerning *Rylands*, and the challenge to the previously undisputed *Irvine*, the case should be considered at the highest level.[13]

The five-member bench provided a three to two judgment. However, the split concerned a disagreement as to procedure, rather than the status of *Rylands*. The majority,[14] it would seem, concentrated on the fact that additional evidence was available (which could support establishing foreseeability), highlighting (and ultimately deciding) that such significant and important contentions deserved full legal arguments before a final resolution by the Court.[15] The predominant issue was that the Council sought to introduce extra affidavit evidence to support its defence. The Court exercised its residual discretion under R 136 of the High Court Rules, remitting the case for High Court trial.[16]

Blanchard and Keith JJ's strong minority judgment determined that the plaintiff was entitled to summary judgment. The judgment noted the historical position of the *Rylands* doctrine, and considered whether common bulk conveyance by Councils of water, gas, or electricity could be considered a natural use of land. Upon determining that, as a matter of law, bulk conveyance was a non-natural use of land, they considered the status of *Rylands*. The minority stated that no tenable argument existed to require *Rylands* to be incorporated into negligence, and that the doctrine was simply a particularity of nuisance relating to isolated escapes. They affirmatively cited *Cambridge*

1[13] *Autex Industries Ltd v Auckland City Council* [2000] NZAR 324, 327 (CA).

[14] The majority constituted Richardson P, Gault and Henry JJ.

[15] *Autex Industries Ltd v Auckland City Council* [2000] NZAR 324, 329 (CA).

[16] See Ursula Cheer "Whither *Rylands v Fletcher*" (1998) NZLJ 344 and her discussion about the uniqueness of this decision, as the restricted grounds for this discretion usually include the unusualness of the features of the case that would make summary judgment unfair or unjust, and where there are complex questions of fact and law. Deciding on the basis of important and significant features of these profound and far-reaching questions of fact and law is unprecedented.

Water.[17] However, they briefly considered the implications of *Burnie*, noting especially that the High Court majority "left the door open for the continued application of the law of nuisance in appropriate cases".[18] The minority identified certain policy reasons in favour of maintaining the status quo. These arguments included a cost-benefit insurance analysis so favoured by American jurisprudence, noting that:[19]

> The risk of calamitous loss to a neighbour, who is necessarily unable to forestall an escape occurring on adjacent property. . .is spread amongst all ratepayers or borne by the local authority's public liability underwriter. Such a rule. . .protects those who may not be able to obtain insurance. . .It also minimises any doubling up of insurance premiums.

The dissent also noted the lack of clear justifications for replacing *Rylands* uncertainties with negligence uncertainties, including the fact that negligence "can provide no guarantee of recovery. . .",[20] and they were evidently persuaded by Professor Fleming's view that *Rylands* was a vital component of tort theory. Upon those considerations, the minority entered the summary judgment for the plaintiff in the amount of their claim, holding simply that *Rylands* was not part of negligence.

Following *Autex Industries*, a certain degree of uncertainty surrounded the rule's status, for no definitive answer was provided, although the minority's argument seemed strong. Vennell argues that *Autex Industries* indicates that if the appropriate case came before the Court where the question was fully argued, '*Rylands v Fletcher* might still have a life here'.[21] With due respect, *Autex* presented the Court with an opportunity to lay the modern foundation for the direction of *Rylands*. The facts represent classic

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[17] *Autex Industries Ltd v Auckland City Council* [2000] NZAR 324, 327 (CA).
[18] *Autex Industries Ltd v Auckland City Council* [2000] NZAR 324, 335 (CA) Keith and Blanchard JJ, identified from *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42, 58 (HCA).
[19] *Autex Industries Ltd v Auckland City Council* [2000] NZAR 324, 335 (CA) Keith and Blanchard JJ.
[20] *Autex Industries Ltd v Auckland City Council* [2000] NZAR 324, 335 (CA) Keith and Blanchard JJ.
[21] Margaret Vennell "*Rylands v Fletcher* in New Zealand" (2000) NZLJ 33.

Rylands, and for the full bench of the Court of Appeal to not at least *indicate* the appropriate direction for *Rylands*, it seems difficult to argue, with any certainty, what a Court would decide. However, it is worth noting that the minority's determinant factors lack real punch in terms of concluding that nuisance is the better way. This will be explored later.

B Hamilton v Papakura District Council

The second important case is *Hamilton v Papakura District Council*. The basic allegation was that the plaintiff's hydroponically grown tomatoes were damaged due to the contamination by herbicide residues of local water supplies. The water remained safe for general purposes (including drinking) but it was argued that the level of contamination was toxic to these plants. After extensive evidence, the trial judge concluded on the balance of probabilities that the contamination level was, at no relevant time, sufficient to cause damage to the plants. Nuisance, negligence, and *Rylands v Fletcher* were among the Hamiltons' numerous causes of actions. Gault J, delivering the Court's judgment,[22] held that *Rylands* was a subset of nuisance law, and that as foreseeability of harm was a private nuisance damage prerequisite, then it was similarly a prerequisite for *Rylands* liability. Quite unbelievably, the Court failed to mention yet alone consider the Australian approach of *Burnie*. Of interest, was Gault J's discussion of this foreseeability, especially in his designation that strict liability foreseeability was no different to that required within negligence liability.[23]

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[22] Only a 3-member bench this time, including Gault, McGechan, and Paterson JJ.

[23] *Hamilton v Papakura District Council* [2000] 1 NZLR 265, 283-284 (CA). See also Stephen Todd "Review: Tort" (2000) NZ Law Rev 505, 520.

Thus, the New Zealand Court of Appeal decided to position *Rylands* as a separate nuisance subset. However, in doing so, there was an incredibly minute discussion about the implications and conceptual underpinnings of such a decision. Surprisingly, the interesting judgment of *Burnie* received transitory treatment in the Court of Appeal.[24] The Court considered the doctrine firmly entrenched in nuisance, with foreseeability as a clear prerequisite for such strict liability (perhaps then, the better description should be 'stricter' liability), drawing from the judgment of Lord Goff in *Cambridge Water*.[25] Still, numerous concerns surround such a classification. With all due respect, a definitive statement of law must be defensible by discernible legal reasoning and criteria, and the Court of Appeal failed on all counts. In simply stating that *Rylands* is a special set of nuisance, the Court has not assisted comprehensive and comprehensible legal development. In reading the *Autex* minority, and the *Hamilton* judgments, readers seeking meaning are provided with few answers. Also, surprisingly, given the importance of these issues, remarkably little academic discussion concerns the appropriate direction.[26] Implicit flaws in both nuisance and *Rylands* exist, and true concerns arise in conceptualising the answer to one-off damaging events from escape as nuisance. These flaws constituted the key concern identified by the majority in *Burnie*. Further confusion derives from Gault J correctly determining that no difference exists between the foreseeability requirements in negligence and the standard adopted by Lord Goff in *Cambridge Water*. There can only be one foreseeability test, but that provides no

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[24] *Autex Industries Ltd v Auckland City Council* [2000] NZAR 324, 327, 330, 335 (CA).
[25] *Hamilton v Papakura District Council* [2000] 1 NZLR 265, 283 (CA).
[26] Stephen Todd "Review: Tort" (2000) NZ L Rev 505; John Smillie "The Rule in *Rylands v Fletcher*" in Stephen Todd (ed) *The Law of Torts in New Zealand* (3 ed, Wellington, Brookers, 2001) 554; Ursula Cheer "Whither *Rylands v Fletcher*" (1998) NZLJ 344; Margaret Vennell "*Rylands v Fletcher* in New Zealand" (2000) NZLJ 33; and to a limited extent Bruce Pardy "Fault and Cause: Rethinking the Role of Negligent Conduct" (1995) TLR 143.

overwhelming rationale for placing *Rylands* in the nuisance context; if anything, it makes *Rylands* increasingly similar to negligence.

IV THE BURNIE *JUDGMENTS*

Burnie also concerns a relatively simple fact scenario. General Jones Pty Ltd used cool stores owned by Burnie Port Authority (Burnie Port) for the storage of frozen vegetables. Burnie Port was conducting a large renovation and extension project to their existing premises. One aspect involved the installation of refrigeration equipment, which was entrusted to independent contractor Wildridge & Sinclair Pty Ltd (the contractor). The contractor's work included substantial welding, and the installation of expanded polystyrene (EPS), an insulating material called 'Isolite'. While inclusive of fire retardant chemicals, sustained contact with a flame or burning substance can cause ignition, which causes dissolution into liquid fire, "burn[ing] with extraordinary ferocity, at a rate which increases in geometric progression".[27] The contractor purportedly stacked cardboard boxes containing 'Isolite' in a roofed area, in close proximity to where they were concurrently conducting extensive welding activities. At all times, Burnie Port continued occupation of the premises, and was aware of the contractor's stacking of the boxes. The trial judge (Neasey J) determined that the contractor's employees conducted the welding in such negligent fashion as to cause, by spark or molten metal falling onto one or more of the cardboard boxes, ignition of the 'Isolite' and incineration of the entire Burnie Port complex, including those formerly frozen vegetables of General Jones. General Jones sued both Burnie Port and the contractor for damages totalling $2.246 million.

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[27] *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42, 44 (HCA)

Neasey J considered Burnie Port liable through the ancient *ignis suus* rule. The *ignis suus* doctrine states:[28]

> [A]n occupier of land is liable for damage caused by the spread of fire from his land caused by the negligence of his independent contractor.

The Judge rejected the claim against Burnie Port under *Rylands*, as welding was not a 'non-natural use' of the premises, and negligence was unfounded. The Full Court of the Supreme Court of Tasmania, on appeal, held that *ignis suus* was absorbed (in Australia) by *Rylands*. Liability arose from the application of *Rylands*, predominantly through determining that welding was a 'non-natural use'. Burnie Port appealed to the High Court of Australia. General Jones' representatives submitted for liability under *ignis suus*, *Rylands v Fletcher*, and negligence.

A full seven-member High Court bench considered the case. A 5-2 majority determined that the rule in *Rylands*, as a separate doctrine, did not represent the law of Australia and had been incorporated into the law of negligence.[29] The attack on *Rylands v Fletcher* was rather unforeseen, perhaps partly due to the relatively small number of cases that enter the Courts, and further still, reach the highest courts. Of the two dissenting judgments of McHugh and Brennan JJ, McHugh J's discussion predominantly considered the *Rylands* issue.[30]

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[28] This constitutes a slight modification to the original strict liability rule as identified in the 1401 case of *Beaulieu v Finglam* (1401) YB 2 HEN IV, f 18, pl 6, which steadfastly constrained the rule's application to an occupier's fire. Lord Denning MR revisited the rule in *H & N Emanuel Ltd v Greater London Council* [1971] 2 All ER 835 (CA), extending its application to include any fire that escapes from the occupier's land due to the negligence of any person under the control of the occupier. A stranger's negligence provides the only defence.

[29] The majority included Mason CJ, Deane, Dawson, Toohey, and Gauldron JJ. Brennan and McHugh JJ dissented.

[30] The Full Court unanimously held that the *ignis suus* rule was absorbed by *Rylands v Fletcher*. Therefore, the majority also must impliedly hold that ignis suus is absorbed by negligence.

V THE MAJORITY'S CONCERNS

A The Trend to Negligence

Thus, the majority's novel journey attempted to rationalise and reconcile *Rylands*. Sceptics will disregard this approach as 'excessive' judicial activism, but rather the Court should be hailed for being prepared to question the underpinnings of the doctrine. In questioning the true meaning of *Rylands*, the Court justifiably determined that *Rylands* increasingly reflected negligence due to continued judicial interference. The majority discusses three illustrations of the trend towards negligence. First, the criteria for determining 'non-natural' use of land are nearly, if not wholly, irreconcilable, and negligence criteria including the absence of reasonable care has intruded as a common element in answering whether the use of the land was 'non-natural' (or the fashionable epithet).[31] The original qualification of "which he knows to be mischievous" manifested into an objective test resembling foreseeability. The introduction of the notion of 'danger' in the context of dangerousness or dangerous necessarily imports foreseeability criteria. Todd recognises that the New Zealand Court of Appeal accepted that this foreseeability element did not differ from the negligence standard.[32] It is noteworthy that *Rylands* defences align closely with those acceptable under negligence. Defences including "consequence of vis major[33] or the act of God" represent fault liability, rather than strict liability.[34] A true strict liability doctrine would (although harshly) impart liability simply because the act occurred: see *Empress Car Co (Abertillery) Ltd v*

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[31] Perhaps the best example is from *Blake v Woolf* [1898] 2 QB 426, 428, Wright J, see the required use of land section later.
[32] Stephen Todd "Review: Tort" (2000) NZLR 505, 516.
[33] A successful case for the vis major defence was *Carstairs v Taylor* (1871) LR 6 Ex 217 (Ex Ch).
[34] *Goldman v Hargrave* [1967] 1 AC 645 (PC).

National Rivers Authority.[35] The majority acknowledged that the recognised *Rylands* defences of 'consent' and 'default of the plaintiff' were analogous to the "voluntary assumption of risk and contributory negligence".[36]

The majority expressed widespread concern about the *Rylands* rule, predominantly focusing on 'non-natural use', foreseeability, and the *Rylands* defences. These concerns enabled the majority of the High Court to state that:[37]

> [T]he subsequent judicial alterations and qualifications. . .of the 'true rule' have introduced and exacerbated uncertainties about its content and application.

They questioned the validity and conception of the 'true rule of law' expounded by Blackburn J, noting that "subsequent judicial explanations and qualifications" had all but obliterated the identified imperative.[38] Specific concerns included "for his own purposes" and its effect alongside "natural use", the ownership implication of "his" in the phrase "his lands", and in turn, the implicit limitations of "lands" combined with "escapes". Further concern surrounded "anything likely to do mischief", and the width of "all the damage which is the natural consequence of its escape". The majority noted that Blackburn immediately qualified the scope of the "true rule" through including the excuses regarding the fault of another or an act of God. However, more important qualifications, in the strict liability sense,[39] derive from the inclusion of the moderator: "was not naturally there. . .but which he knows to be mischievous if it gets on his

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[35] *Empress Car Co (Abertillery) Ltd v National Rivers Authority* [1999] 2 AC 22 (HL (Eng).
[36] *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42, 58 (HCA).
[37] *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42, 52 (HCA).
[38] *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42, 50 (HCA).
[39] It is important to realise that the traditional English conception of strict liability is more akin to New Zealand's understanding of absolute liability; that is once the act has occurred, there is liability for the damage. New Zealand's concept of strict liability, including some element of foreseeability, allows some excuses.

neighbour's [property]". Great disquiet derived from the fact that even this basic notion no longer existed, effectively displaced by continual adaptation and qualification of the original concept.

The majority then posed the inevitable question, should negligence absorb the special *Rylands* rule? In favour of subsuming the rule, they repeated five factors including: a) *Rylands* was never the exclusive determinant of liability, b) ordinary negligence overlays the entire area, c) the rule's uncertainties, d) application difficulties, and e) the Courts reluctance to accept and apply it.[40] The majority believed it prudent to recognise certain distinctions were unreasonably arbitrary, while noting that the predominant argument for retaining the rule as an independent tort was that ordinary negligence could not accommodate the doctrine without denying liability in situations "where it would otherwise exist".[41] In determining the appropriate balance, the majority considered it necessary to take an expansive view of the rule to include any dangerous substance under the defendant's control, and concluded that these factors balanced in favour of applying negligence liability.

Therefore, the majority were seriously concerned about the condition of the *Rylands* doctrine. The basic premise for this paper originates directly from the majority's reasoning; simply, *Rylands* is in such a confused state that no succinct body of applicable law could develop from it, and thus, it cannot remain a separate recognised doctrine.

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[40] *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42, 60 (HCA).
[41] *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42, 61 (HCA).

VI CONFUSION WITH THE REQUIRED USE OF LAND - 'NON-NATURAL USE'

The majority in *Burnie* commenced the investigation by tracing through major judicial alterations and additions to the *Rylands* doctrine. The primary inquiry considered Lord Cairns LC's conversion of "which was not naturally there" to 'non-natural use'. It is noteworthy that Lord Cairns LC entirely concurred with Blackburn J's "true rule".[42] Thus, while noting that this change may have been inadvertently effected, the majority also noted the vast conceptual disparity. Blackburn J's 'not naturally there' incorporates the introduction of foreign objects onto land, further explained through "brings on his lands", and thus, the notion of 'non-natural use' is poles apart for its predominant focus is the nature of the use. Blackburn J's original terminology is often quoted, but the focus then moves to an inquiry into the type of use. One might argue that Lord Cairns merely referred to the use of land other than in its natural state, but subsequent judgments have developed a much wider understanding. Lord Moulton, for example, in the Privy Council case of *Rickards v Lothian*,[43] focused on the use of the land, introducing such characterisations as "special use" increasing the danger to others and "not. . .ordinary", when contrasted to "the ordinary use of the land".[44] In the controversial case of *Read v J Lyons & Co Ltd*,[45] all three notions of the land's use received consideration, while Viscount Simon introduced yet another epithet; "exceptional" use.[46] Further epithets, including 'dangerous' activity, have been bandied about. For example, the United States

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[42] *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42, 51-52 (HCA).

[43] *Rickards v Lothian* [1913] AC 263 (PC), ironically, an Australian case on appeal from the High Court of Australia, concerned the escape of water from a water basin in a building's toilet facilities, which had been blocked by an unidentified malicious third party. The resulting flood caused water damage to a business below.

[44] *Rickards v Lothian* [1913] AC 263, 280 (PC).

[45] *Read v J Lyons & Co Ltd* [1947] AC 156 (HL (Eng).

[46] See *Read v J Lyons & Co Ltd* [1947] AC 156, 169-170 (HL (Eng) Viscount Simon.

Rylands conception, developed through the leading judgment of *Siegler v Kuhlman*,[47] and stated in the Restatement (Second) of Torts, defines the governing notion as liability for 'ultra-hazardous activities'.[48]

Thus, in a short period of time, it seems to have become impossible to rationalise any bright-line understanding of what 'use of land' is required. Furthermore, the actual focus dramatically materialised from the original concentration on what was naturally on the land and that introduced, to the inherently challenging and dissimilar focus on land use deemed special or exceptional. In reality, such inconsistency in legal doctrine is unacceptable, but still Courts continue to persist with *Rylands*. However, the criticism of the "true rule" is not solely the domain of the *Burnie* majority, arousing much debate and contention ever since Blackburn J's provision of the original *Fletcher v Rylands*. With respect, the doctrine received its first "mortal blow"[49] through the various transformations exacted by Lord Cairns' judgment in *Rylands v Fletcher* itself. The 'giant' has been increasingly crippled by each new judicial explanation, and this motivated the learned Court to conclude that *Rylands* was irreconcilable in application, but reconcilable with negligence.[50] Early decisions seemed happy to accept this approach to *Rylands*. Perhaps the best example is from *Blake v Woolf*,[51] where Wright J explained that a natural use of

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[47] *Siegler v Kuhlman* (1973) 502 P 2d 1181 (Wash).

[48] American Law Institute *Restatement (Second) of Torts* (1977) § 519 and § 520. There is also reference to abnormally dangerous activities. The determination of abnormally dangerous or ultra-hazardous concerns the following factors (§ 520):

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;
(b) likelihood that the harm that results from it will be great;
(c) inability to eliminate the risk by the exercise of reasonable care;
(d) extent to which the activity is not a matter of common usage;
(e) inappropriateness of the activity to the place where it is carried on and;
(f) extent to which its value to the community is outweighed by its dangerous attributes.

[49] Jane Swanton "Case Note: 'Another Conquest in the Imperial Expansion of the Law of Negligence': *Burnie Port Authority v General Jones Pty Ltd*" (1994) 2 TLJ 1.

[50] See John G Fleming "The Fall of the Crippled Giant" (1995) TLR 56.

[51] *Blake v Woolf* [1898] 2 QB 426, Wright J.

land was adjudged by "an ordinary and reasonable user of. . .premises".[52] It is obvious that this is classic negligence phraseology, highlighting the closeness of *Rylands* and negligence.

The majority discussed the controversial ruling in *Read v Lyons*, and its particular relevance to the 'non-natural use' inquiry.[53] The House of Lords determined that the explosion of a shell causing injury to the plaintiff on the defendant's land could not establish *Rylands* liability.[54] The decision is, in fact, correct for there was no escape to neighbouring land. However, controversy surrounds the indication that the manufacture of shells during the war could be a natural or ordinary use of land, outside the scope of the *Rylands* rule. With respect to the House of Lords, consistent development of the *Rylands* doctrine demanded that the House find the manufacture of shells to be a 'non-natural use'. While the High Court acknowledged that this was an extreme case, it clearly canvassed the problems associated with the *Rylands* doctrine.[55]

Recent decisions indicate a return to the 'natural'/'non-natural' distinction. Lord Goff's detailed and lengthy *Cambridge Water* judgment signals one such indication, as his focus concerned whether the defendant's use of the land (the use of the solvent perchloroethene to degrease pelts) was natural. Without deciding the point, Lord Goff stated that he was:[56]

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[52] *Blake v Woolf* [1898] 2 QB 426, 428, Wright J.
[53] *Read v J Lyons & Co Ltd* [1947] AC 156.
[54] In fact, Lord Macmillan indicated that the case required the pleading of negligence, see *Read v J Lyons & Co Ltd* [1947] AC 156, 174 (HL (Eng) Lord Macmillan.
[55] Under the section of 'Limitations to the Scope of the Rule', several New Zealand cases highlight this same problem, see *Russell v McCabe* [1961] NZLR 392 (CA); *Eriksen v Clifton* [1963] NZLR 705 (SC); and *New Zealand Forest Products v O'Sullivan* [1974] 2 NZLR 80 (SC).
[56] *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 AC 264, 282 (HL (Eng) Lord Goff.

> satisfied that the storage of chemicals in substantial quantities, and their use in the manner employed at [the tannery's] premises, cannot fall within the exception. . .[I]t would not be right in such circumstances to exempt [the tannery] from liability. . .on the ground that the use was natural or ordinary.

Lord Goff focuses more on Lord Moulton's "special use" definition, rather than the modern qualifications. By Lord Moulton's definition, the inquiry embraces natural and ordinary use of land.[57] One telling comment referring to the original 'non-natural' definitions indicates:[58]

> [T]he law has long since departed from any such simple idea, redolent of a different age.

In signalling such an approach, Lord Goff strongly criticised the proposed extension to the 'non-natural use' 'test' to include a community benefit test (consideration of beneficial employment), rationalising that the test focused on land use alone, whether ordinary or natural. Thus, modern considerations of the 'non-natural' inquiry seem to recognise that the continued alteration and modern development of the test renders it extremely difficult to apply, but still confusion exists as to which test applies. Without reverting to the original *Rylands* definitions, there is the inevitable inclusion within the test for the required use of land of foreseeability questions, closely aligning with a negligence focus. The *Burnie* majority, in considering the suitable test, clearly struggled to identify the appropriate designation.

The majority struggled further to reconcile the "critical obscurity" stimulated by the duality of 'dangerous substance' and 'non-natural use'. They highlighted the absurdity of these binary requirements by stating that:[59]

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[57] *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 AC 264, 281 (HL (Eng) Lord Goff.
[58] *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 AC 264, 281 (HL (Eng) Lord Goff.

> Far from representing a unifying principle and a general conceptual explanation and determinant of different *categories* of case, it has, in combination with the associated (and often confused) requirement of dangerousness, become a source of disunity and disparity within the individual category. Thus, the introduction to or retention on land of trees, water, gas, electricity, fire and high explosives, amongst other things, have all been seen, as a result of the application of the test to the particular circumstances, as both attracting and not attracting the operation of the rule in *Rylands v Fletcher*. (emphasis in case)

Thus, "if. . .water can be a dangerous substance for the purposes of the rule, it is difficult to identify anything, which, accumulated either in sufficient quantity or under sufficient pressure, might not be a dangerous substance".[60] In fact, this represents the exact formation of the rule utilised in *Autex*; it was the quantity and inherent risk of the bulk conveyance that allowed the 'non-natural use' designation. Therefore, very few substances or activities could ever be considered not dangerous. While this classification often represents the distinguishing feature between simple private nuisance and *Rylands*, this specific point of distinction seems arbitrary and irrelevant, especially within the guiding notion of one-off damaging events. Identifying the inherent risk of a substance categorically points to foreseeability and negligence considerations. Justice Brennan's dissent appears to formulate a response to this concern, by declaring that "[t]he fact that a use is dangerous is an indication that it is non-natural".[61] With due respect, Brennan J's statement is an incorrect generalisation, with regards to the original conception of the rule. While it is arguable that dangerous activities equate with 'non-natural use', as Brennan J suggests, this formulation of the rule is too exclusionary, and the dual inquiry problem continues, as it include elements of negligence. As Blackburn J focused on that "not naturally there", harmless introduced substances, and naturally accumulating substances (both dangerous or not) are similarly excluded from the rule, due to the

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[59] *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42, 57 (HCA).
[60] *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42, 52 (HCA).
[61] *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42, 76 (HCA) Brennan J.

investigation for foreseeability. Furthermore, Lord Moulton's definition in *Rickards v Lothian* highlighted this important consideration, by indicating, "[I]t is not every use of land that brings into play [the principle in *Rylands v Fletcher*]".[62]

A New Zealand's Position

Thus, does this concern regarding the required use of land exist in New Zealand? New Zealand has a long history considering the *Rylands* doctrine, often concerning fire escape. However, New Zealand does, in fact, share similar problems defining 'non-natural use'. In the previous leading case of *Irvine v Dunedin City Corporation*,[63] the five-member Court of Appeal presented individual opinions. Four of the five judges considered *Rylands v Fletcher*.[64] 'Non-natural use' received various judicial descriptions. Chief Justice Meyers concluded that it constituted some form of "dangerous use",[65] Justice Smith conceived it as a "non-natural or extraordinary user of the land",[66] while Justice Johnston cited the "special use bringing with it increased danger to others" explanation.[67] The Supreme Court in *Mackenzie v Sloss*[68] carefully defined the concept as ordinary or natural use, but then proceeded to explain further by quoting Lord Moulton and Justice Johnston's conception of "special use".[69] Mahon J reconsidered the cause of action in *New Zealand Forest Products v O'Sullivan*,[70] providing a vastly confusing array of descriptions of 'non-natural use', including "dangerous element", "proper use of land", "exceptional danger", and "special use fraught with risks of damage". The *Autex*

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[62] *Rickards v Lothian* [1913] AC 263, 280 (PC) Lord Moulton.
[63] *Irvine v Dunedin City Corporation* [1939] NZLR 741 (CA).
[64] Justice Fair answered the case on the statute alone, and Justice Ostler dissented.
[65] *Irvine v Dunedin City Corporation* [1939] NZLR 741, 759 (CA) Meyers CJ.
[66] *Irvine v Dunedin City Corporation* [1939] NZLR 741, 775 (CA) Smith J.
[67] *Irvine v Dunedin City Corporation* [1939] NZLR 741, 790 (CA) Johnston J.
[68] *Mackenzie v Sloss* [1959] NZLR 533 (SC).
[69] *Mackenzie v Sloss* [1959] NZLR 533, 538 (SC) McGregor J.

minority generally focused on "natural use", equating it, following Lord Goff in *Cambridge Water*, with "ordinary use". However, they largely eliminated references to any contrary authority on the meaning of use. In essence, they really fail to provide an answer to the question, almost answering it off-the-cuff, with reference to nuisance, and the Canadian approach. However, they use Lord Wright's quote from *Collingwood v Home and Colonial Stores Limited*,[71] which indicates that bulk conveyance is a dangerous use due to the inherent danger. The minority concentrated on the nature and quantity of the bulk conveyance of water, holding that those factors rendered the conveyance non-natural.[72] No definitive answer as to what regulates *Rylands* derives from *Autex*. Although there is very little discussion of the elementary boundaries of *Rylands* in *Hamilton v Papakura District Council*, there is at least one reference to "reasonable use".

Evidently, the New Zealand test incorporates this "critical obscurity" by including both 'non-natural' and 'dangerousness', similar to Brennan J's position above. Interestingly, the New Zealand judicial approach endeavours to reconcile the two concepts as one. This is inadequate, for asking the question of dangerous non-natural use is, in effect, the same as a foreseeability test. For example, the *Autex* minority concentrates on the inherent risk (the danger) in bulk conveyance of water; this mirrors the foreseeability requirement in negligence, but negligence avoids the artificiality of the determination as to land use. The *Autex* minority fail to separate the inquiry into the respective facets of non-natural use, and then dangerous substance; use should be

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[70] *New Zealand Forest Products v O'Sullivan* [1974] 2 NZLR 80 (SC).

[71] *Collingwood v Home and Colonial Stores Limited* [1936] 3 All ER 200 (HL (Eng).

[72] It is interesting to contrast the finding in *Autex* with results from Canada. In a remarkably similar fact scenarios, Canadian Courts have consistently rejected a claim to a non-natural use or an abnormal use for bulk conveyance of water in, see *Tock v St John's Metropolitan Area Board* (1989) 64 DLR (4th) 620 (SCC); *Ratko v Public Utility Commission of City of Woodstock* (1994) 111 DLR (4th) 375 (Ont Divisional Ct); and *Smith Bros Excavating Windsor Ltd v Price Waterhouse Ltd* (1994) Ont CJ Lexis 1486 (Ont SC).

different from risk, and negligence separates this inquiry. Therefore, the "critical obscurity" of the dual requirements is apparent in New Zealand. Incredible confusion arises from considering the duality of 'non-natural' and 'dangerous', and this flaws the application of the *Rylands* doctrine, rendering it susceptible to anomalous results.

B Conclusion as to the Required Use of Land - 'Non-natural Use'

The multitude of judicial epithets resulted in one New Zealand author resolving that the real question is "whether the risk of harm is so inherently great, even if all due care is taken, that neighbouring occupiers cannot reasonably be expected to accept it".[73] With due respect, that rationalisation is a far cry from that illustrated by Blackburn J or even Lord Cairns. In fact, it is a far cry from any understanding of the required test. The genuine concern is that focus concentrates on the extent of foreseeable harm, adequately covered by the foreseeability investigation carefully framed by Lord Goff in *Cambridge Water*. In essence, the above question results in the same inquiry being conducted twice: Is there an inherently risky activity? and is there the risk of damage upon escape? Same question, same answer. Most surely, that cannot be the correct approach; asking the same question twice seems ludicrous. The recent Court of Appeal cases largely excluded such considerations from their judgments, ignoring and evading the inherent complications of *Rylands* terminology. It appears as though they failed to recognise the problem. Given the likelihood that subsequent Courts will find 'non-natural use' too uncertain to apply, or be tempted to manipulate the requirements, the failure to define what land use meant highlights the flawed nature of the *Rylands* doctrine. Two options exist: simplify *Rylands* to its original position, or more realistically, import the inquiry into foreseeability and

proximity as per *Burnie*, and disregard the need for a determination as to use. In considering the modern conception of *Rylands*, the relative importance of the foreseeability inquiry should render the 'non-natural use' issue a simple matter. If *Rylands* applies, the original conception of the test should be the focus: that 'not naturally there'. The original test constitutes an incredibly simple investigation seeking to determine what was there, and what was introduced. No determination into the inherent nature of the use is necessary, for that is the domain of foreseeability. It is important to understand that the 'non-natural' factor never was the determinant for liability; it simply provided a criterion in order to be considered under the *Rylands* doctrine. The damage, and the foreseeability criteria are far more determinative of liability. Simply, nothing inherently special derives from the classification of *Rylands* as a separate doctrine. In fact, this author contends that the requirements of ordinary negligence, and further, the comprehensiveness of a foreseeability inquiry should more comprehensively answer these very *Rylands* questions. Inherent risks will suggest the imposition of a relevant and varied standard of care. The gap instigated by dangerous substances naturally on the land is incorporated within negligence liability, upon the proviso that the defendant adopted or failed to take reasonable care to remedy the risk of damage.[74] Thus, a better approach to these concerns, arguably, is through negligence itself.

C Question of Law or Fact?

Amirthalingam contends that the majority failed to satisfactorily consider a crucial point identified by the minority. The argument concerns the determination that non-

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[73] John Smillie "The Rule in *Rylands v Fletcher*" in Stephen Todd (ed) *The Law of Torts in New Zealand* (3 ed, Wellington, Brookers, 2001) 554.

natural use and dangerous substance are a question of law in *Rylands*, whereas the determination of foreseeability in negligence is a question of fact.[75] Brennan J connoted that this "seems to be of some importance".[76] There is a three-fold response. First, judges, thus far, have struggled to identify a common thread in answering the question in law. Perhaps, it is time for the jury to complement or complete the fact-finding mission. Judges still retain jury direction in regards to legal definitions. Furthermore, Lord Porter in direct conflict with Brennan J's proposition, stated in *Read v J Lyons* that:[77]

> . . .each [ie the questions whether something 'is dangerous' and whether a 'use' is a 'non-natural' one] seems to be a question of fact. . .

Thus, it is doubtful whether the inquiry was the sole domain of a question of law. If anything, it had to be a mixed question of law and fact.[78] Secondly, the non-natural and dangerous investigation accords more easily with a factual inquiry. The reasonable person should easily determine what is or is not dangerous or non-natural. The majority also recognise that it is not possible to consider the inquiry as solely one of fact or law, but rather a combination. Thirdly, the minority's concern lacks significance when one considers the nature of the tort trial. Questions of law and fact are relevant, more so, to jury trials. Jury trials in tort are increasingly infrequent, thus, often the judge answers both questions of law and fact, and even if a jury trial occurred, the Judge retains control

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[74] This derives from an application of *Goldman v Hargraves* [1967] 1 AC 645 (PC) and *Sedleigh-Denfield v O'Callaghan (Trustees for St Joseph's Society for Foreign Missions)* [1940] AC 880 (HL (Eng).

[75] Kumaralingam Amirthalingam "Strict Liability Restricted: A Critical Commentary on *Burnie Port Authority v General Jones Pty Ltd*" (1994) 13 (No 2) U of Tas L Rev 416, 419.

[76] *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42, 77 (HCA) Brennan J.

[77] *Read v J Lyons & Co Ltd* [1947] AC 156, 179 (HL (Eng) Lord Porter, quoted in *Autex Industries Ltd v Auckland City Council* [2000] NZAR 324, 328 (CA).

[78] Kumaralingam Amirthalingam "Strict Liability Restricted: A Critical Commentary on *Burnie Port Authority v General Jones Pty Ltd*" (1994) 13 (No 2) U of Tas L Rev 416, 419. As a *Rylands* inquiry, the majority also recognise that it was a mixed question of law and fact, see *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42, 54 (HCA).

over the jury's answer of fact by determining the applicable standard of care. Through choosing negligence, the majority embark on an analysis of 'non-natural use' as a question of fact. Thus, the negligence investigation as a question of fact seems to pose little of the problems as identified by the minority. In fact, the factual inquiry seems to constitute a natural inquiry. Arguably, the question of fact could provide a more appropriate and rational legal answer, and "[i]f the character of a use [becomes] a mere question of fact, the rule in *Rylands v Fletcher* would become another conquest in the imperial expansion of the law of negligence",[79] then so be it.

D Limitations to the Scope of the Rule

The majority next considered the scope of the rule. They determined that progressively alterations, additions, explanations, and qualifications internally 'weakened and confined'[80] the application and scope of the *Rylands* rule.[81] While the majority focused on the controversial *Read v Lyons* decision,[82] they should have considered New Zealand's case law to discover some interesting internal limitations concerning the scope of *Rylands*. Common farming practice uses fire to clear land and back burn. However, New Zealand's history is littered with examples of damage resulting from these fires to neighbour's person, property, and chattels. Three such cases are worth a mention, for they highlight the confused *Rylands* doctrine. In *Russell v McCabe*,[83] the appellant lit a fire on her property, which due to unfavourable windy and dry conditions escaped and

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[79] *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42, 77 (HCA) Brennan J.
[80] *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42, 54 (HCA).
[81] J M Paterson "*Rylands v Fletcher* into Negligence: *Burnie Port Authority v General Jones Pty Ltd*" (1994) 20 Monash Uni L Rev 318, 319-320.
[82] *Read v J Lyons & Co Ltd* [1947] AC 156 (HL (Eng) incorporates an exceptional case-specific determination with little authoritative standing. Few cases, thankfully, have raised similar fact scenarios.
[83] *Russell v McCabe* [1961] NZLR 392 (CA).

injured the respondent. Admittedly, the case was answered in the respondent's favour due to the negligent lighting of the fire. However, the Court mentioned that the use of fire to burn off potential fire hazards constituted a natural use of the land, irrespective of the escape; no definitive decision on *Rylands* was provided. In *Eriksen v Clifton*,[84] McGregor J detailed that using fire to burn off gorse constituted a natural use of land, but that escape would render the use dangerous and non-natural. Consequently, the landowner would be liable if the fire was their responsibility. The landowner circumvented liability, as the independent contractor responsible for lighting the fire was only an invitee employed to inspect and decide whether there would be acceptance of the task. The landowner could only foresee the mere inspection, and not the fire lighting.[85] In *New Zealand Forest Products Ltd v O'Sullivan*,[86] Mahon J provided the interesting determination that burning off of vegetation in midsummer was a non-natural land use, but it may well be a natural use in other seasons of the year. These examples highlight the inadequate scope of the *Rylands* consideration. They clearly illustrate the problems associated with the ill-defined and variable concepts of *Rylands*, so often subject to manipulation. These concepts, in practice, are incredibly difficult to apply to factual scenarios, rendering the doctrine susceptible to unforeseeable and anomalous results. Interestingly, two out of the three cases found an answerable case in negligence.

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[84] *Eriksen v Clifton* [1963] NZLR 705 (SC).

[85] Interestingly, however, even the application of the non-delegable duty from *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42 (HCA) would not apply for there was no expectation of contractual performance, as there was no contract. In essence, the true party responsible could only be

E Ignis Suus

Technically, each of those cases (*Russell*, *Eriksen*, and *O'Sullivan*) represented an easy determination for non-natural and dangerous use. Nevertheless, the cases provide excellent examples of the limitations of the scope of the rule. To incorporate *ignis suus* within *Rylands*, the doctrine is really stretched. While the factors of escape and foreseeability of damage are evident, there are difficulties with the 'non-natural use' inquiry. Recognition must accord that these cases are probably outside the original appreciation of 'collecting and keeping' for *Rylands*; there is no accumulation of a substance. In fact, the only rationale for determining that there has been a 'non-natural use' derives from the risk being so extreme. Simply, the *ignis suus* rule does not naturally fit within *Rylands*. The considerations of foreseeability, proximity, and a variable standard of care available within negligence comprehensively answer the *ignis suus* question. The fact that *Rylands* encompasses *ignis suus* provides a further factor favouring the adoption of negligence liability.[87] If *Rylands* is not incorporated into negligence, then, at the very least, the *ignis suus* doctrine must become part of the law of negligence.

In reality, this entire discussion about the confusion and epithets introduced by the judiciary has left the doctrine near impossible to apply. Courts have seemingly forgotten the origins of the doctrine. Thus, time has come for New Zealand Courts to reconcile the true answer. *Rylands* no longer represents a separate doctrine; it leans too heavily on

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the third party that lit the fire. However, the case is illustrates the finding that the lighting of fire is a natural use of land. See the later discussion concerning non-delegable duties.

[86] *New Zealand Forest Products v O'Sullivan* [1974] 2 NZLR 80 (SC). See discussion above.

[87] *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42, 66 (HCA).

negligence concepts to determine any answer. The Court of Appeal in *Hamilton* recognised the idiocy of incorrectly labelling concepts, when Gault J states that:[88]

> ". . .we do not understand the foreseeability requirement in negligence to be any different".

Justice Gault explained that the foreseeability required for *Rylands* (as explained by Lord Goff in *Cambridge Water*) matches the foreseeability element included in negligence. This constitutes the first step on the path to ordinary negligence liability, a doctrine encompassing the potential to provide a better, succinct answer to damage arising from one-off damaging events.

VII THE EXPANSION OF THE LAW OF ORDINARY NEGLIGENCE: FORESEEABILITY AND PROXIMITY

The majority considered the continued expansion of the ordinary negligence doctrine,[89] remarking that:[90]

> From without, ordinary negligence has 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.

The general *Rylands* conception primarily encapsulates one-off, damaging events, which admittedly, accords closely with negligence and unintended damaging events. The distinction between the two, oddly, derives from the land-based nature of *Rylands*,

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[88] *Hamilton v Papakura District Council* [2000] 1 NZLR 265, 284 (CA) Gault J.

[89] One important aspect highlighted was the decision of Lord Esher in *Heaven v Pender* (1883) 11 QBD 503, which re-conceptualised the importance of foreseeability in negligence as a 'larger' proposition. It was from here that the majority concluded that the "coherent jurisprudence of common law negligence" began, see *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42, 55 (HCA).

[90] *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42, 55 (HCA).

requiring an escape from the defendant's *land* damaging the plaintiff's *land*. Negligence has never been so limited, simply requiring the imposition of a duty of care based on foreseeability and proximity, a breach of that duty, and corresponding damage. In effect, the traditional distinction is the strict liability of *Rylands*, and the fault-based liability of negligence.[91] It is, without doubt, a gross exaggeration to conclude that *Rylands* constitutes a strict liability doctrine (or absolute liability – in the New Zealand understanding, although perhaps this has too changed with the prominence of foreseeability). Even the "true rule of law" recognised that it was not a strict liability doctrine; the requirement of "anything likely to do mischief", coupled with the allowable excuses (Act of third person/God) indicate that the concept was, at the very least, initially, a stricter liability doctrine. It is accepted that foreseeability is the same for the two doctrines. In reality, any attempt to define foreseeability by degree, must include an implicit recognition that foreseeability possesses the same originating point. This is an essential consideration for two factors: First, the introduction of and reliance upon negligence concepts highlights the closeness of the two torts, and secondly, the artificialities included within *Rylands* indicates that these negligence concepts should provide a better legal answer when separated from the confines of *Rylands*.

The majority commented on the increasing closeness of the doctrines. In identifying the key negligence elements (foreseeability and proximity), recognising the dominance of negligence law for unintentional injury to property or person, and conceptualising *Rylands* in a negligence sense, this allowed the majority to state that:[92]

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[91] As mentioned above, John G Fleming argued that this was the greatest loss from assuming *Rylands* into negligence, see John G Fleming "The Fall of the Crippled Giant" (1995) TLR 56.

[92] *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42, 56 (HCA).

> [T]he rule has been increasingly qualified and adjusted to reflect basic aspects of the law of ordinary negligence.

A Proximity

Essential to any negligence discussion is the notion of relationship or proximity, although it is recognised that Australia has a chequered history in relation to this concept.[93] Recently, the Australian approach has favoured a general reliance principle. Nevertheless, in *Burnie* the majority's discussion of proximity concentrated on its usefulness as an analytical tool, rather than as a definitive criterion. Mason CJ explicitly recognised this:[94]

> It is true that the requirement of proximity was neither formulated by Lord Atkin[95] nor propounded and developed in cases in this court as a logical definition or complete criterion which could be directly applied as part of a formal syllogism of formal logic to the particular circumstances of a particular case. As a general conception. . .its practical utility lies essentially in understanding and identifying the *categories* of case in which a duty of care arises under the common law of negligence. . .

It is submitted that this relationship factor, while similar to the *Rylands* inquiry is a more comprehensive and applicable test. In ignoring many of the *Rylands* artificialities, it is able to draw on an incredibly diverse precedent history. The importance of proximity as a general conception within negligence cannot be underestimated; Deane J in *Stevens v Brodribb Sawmilling Co Pty Ltd* recognises that it is "the general conceptual determinant and that unifying theme of the categories of cases in which the common law of

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[93] In fact, the most recent movements have shown a clear preference for "general reliance" and "vulnerability", for further information see *Crimmins v Stevedoring Industry Financing Committee* (1999) 167 ALR 1 (HCA), *Pyranees Shire Council v Day* (1998) 151 ALR 147 (HCA), and *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 (HCA).

[94] *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42, 56 (HCA).

[95] This references to the Lord Atkin's celebrated judgment in *Donoghue v Stevenson* [1932] AC 562 (HL (Eng) which determined that proximity acts as form of qualification over the proposition of foreseeability as derived from Lord Esher in *Heaven v Pender* (1883) 11 QBD 503.

negligence recognises the existence of a duty to take reasonable care".[96] Thus, while not operating as comprehensive liability criterion, the use of proximity isolates the essential negligence theme of the crucial relationship (or the general reliance relationship), providing that necessary conceptual determinant sadly missing from *Rylands*. The *Rylands* relationship of an owner or occupier bringing and keeping dangerous substances and embarking on a non-natural use of land is very similar to situations where a 'relationship of proximity' arises between the owner or occupier, and another whose property is at risk due to an escape.[97] In its role as a *general conception*, proximity remains essential for consistency, operating in the background as conceptual 'glue', and not governing the tort. This contrasts to the requirement of 'non-natural use'. As a specific tortious element, it forms an aspect of the complex liability criterion, a unique inquiry for each case, so the introduction or retention of trees, water, gas, electricity, fire, and explosives has equally attracted or not attracted the operation of *Rylands*.[98] Sadly, this expression of principle has sourced incredible disunity and disparity within the tort. In essence, the Courts conclusion is a lottery; there is little surety regarding the Court's direction even with precedent authority.

Thus, this author suggests that the notional underpinning of proximity within the law of negligence much better suits the questions posed by the *Rylands* doctrine. Importantly, proximity underpins, and does not govern. Standard proximity will suffice for the inquiry, as it applies naturally to such an inquiry. However, it will depend on the approach the Courts decide to adopt with respect to proximity. For completeness,

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[96] *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 31, 55 (HCA) per Deane J.

[97] Peter B Kutner *The End of Rylands v Fletcher – II: Burnie Port Authority v General Jones Pty Ltd* (1996) 31 Tort & Ins LJ 663, 669.

[98] For one example see *Rainham Chemical Works Ltd v Belvedere Fish Guano Co* [1921] 2 AC 465 (HL (Eng) and compare it with *Read v J Lyons & Co Ltd* [1947] AC 156 (HL (Eng).

Australian Courts recently moved away from proximity, towards the relationship of general reliance or vulnerability.[99] The vulnerability notion poses no concern to the New Zealand Courts, essentially mirroring the scope of proximity. However, three aspects deserve notice. First, the categories of case adopting general reliance concern public liability or government liability cases, and reliance is accordingly an appropriate focus. Secondly, the courts are yet to decide if general reliance governs negligent injury to person or property. It seems doubtful that it would apply, for proximity better encapsulates the nature of damage claims; "that person so closely and directly affected". Thirdly, if general reliance were the determining factor, this approach would then differ markedly to New Zealand's approach to the relationship factor, and the appropriate understanding of proximity would have to be determined. Whether proximity, general reliance, the *Anns* two-stage test, or *Caparo's* three-step approach should apply is beyond the scope of this paper, but certainly needs further investigation. The important conclusion is that proximity closely mirrors the *Rylands* investigation, but more succinctly encapsulates the concern. The operation of proximity is far more certain and applicable, and the removal of this consideration from the 'use' focus is a distinct benefit arising from the negligence approach.

Interestingly, the *Hamilton* Court of Appeal accepted that water suppliers owed a general duty of care to the plaintiffs, but did not accept that they owed a specific duty of care due to the hydroponically grown tomatoes and the grower's reliance on pure water supplies. Importantly, there had been no representation or undertaking from the water

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[99] See *Crimmins v Stevedoring Industry Financing Committee* (1999) 167 ALR 1 (HCA), *Pyranees Shire Council v Day* (1998) 151 ALR 147 (HCA), and *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 (HCA).

supplies that they would take extra care.[100] However, it was easily acceptable that due to the proximity of the water supplier to the plaintiffs, and the likelihood of harm through negligently conducting their duties that a duty of care was owed. It would seem certain that the same duty would exist in *Autex* between the Council and the ratepayers. In fact, the closely analogous Canadian cases of *Tock v St John's Metropolitan Area Board*[101] and *Ratko v Public Utility Commission of City of Woodstock*[102] both held that the authorities owed duties of care to the ratepayers. However, both the *Autex* and *Hamilton* Courts failed to consider the best proximity approach.

B Nuisance and Trespass

The majority maintained that the rule reflected negligence irrespective of "parental claims" of nuisance or trespass.[103] This is undoubtedly a bold statement. Traditionally, "the true rule" of *Rylands* operated as a distinct strict liability doctrine, separate from negligence despite its continued infiltration. However, the High Court majority performed what no other major appeal Court was prepared to do. The majority, in reverting to first principles, asked what the rule really means. Contrastingly, the House of Lords definitively found that *Rylands* continues as a subset of nuisance. The greatest failure in that approach was simply that His Honour Lord Goff provided little explanation as to what necessitated the continuation of this particular doctrine, even within nuisance.

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[100] *Hamilton v Papakura District Council* [2000] 1 NZLR 265, 281-282 (CA) Gault J.
[101] *Tock v St John's Metropolitan Area Board* (1989) 64 DLR (4th) 620 (SCC).
[102] *Ratko v Public Utility Commission of City of Woodstock* (1994) 111 DLR (4th) 375 (Ont Divisional Ct).
[103] *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42, 57-58 (HCA). The majority identified a plethora of authority representing the 'parental claims'. For nuisance it included *Rickards v Lothian* [1913] AC 263, 275 (PC); *Musgrove v Pandelis* [1919] 2 KB 43, 47, 49, 51; *Read v J Lyons & Co Ltd* [1947] AC 156, 173, 182-183 (HL (Eng); *Benning v Wong* (1969) 122 CLR 249, 296-297, 319-320; *Cambridge Water Co v Eastern Leather Plc* [1994] 2 AC 265 (HL (Eng), and one could include the New Zealand cases of *Autex* and *Hamilton*. For trespass the authorities included *Foster v*

The inclusion of the 'important' element of 'foreseeability', which differs from negligence foreseeability, can only be problematic.[104] One may boldly suggest that the House of Lords blatantly ignored the true state of the rule.[105]

C Strict Liability

The celebrated academic, the late Professor Fleming, favoured the *Rylands* doctrine. He titled his commentary concerning *Burnie* and *Cambridge Water* as "the fall of the crippled giant".[106] With due respect, his predominant concern was the decline of the strict liability rationale, rather than more focused and detailed considerations of the implicit and explicit doctrinal flaws. *Burnie* has also been categorised as "another conquest in the imperial expansion of the law of negligence".[107] The strict liability question is worth pondering. The numerous exceptions to *Rylands* including the defences of 'consent' and 'default of the plaintiff' prompted the celebrated academic, the late Professor Fleming to comment that:[108]

> [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.

Warblington Urban Council [1906] 1 KB 648, 672; *Jones v Llanrwst Urban Council* [1911] 1 Ch 393, 402-403 (HC); and *Hoare & Co v McAlpine* [1923] 1 Ch 167, 175 (HC).

[104] See Gault J in *Hamilton v Papakura District Council* [2000] 1 NZLR 265, 284 (CA), where foreseeability cannot differ from the negligence standard.

[105] The Canadian approach is somewhat confusing, with nuisance providing the most common answer. However, all three torts tend to be applied. Often the criteria are intertwined, rendering many of the decisions confusion and difficult to apply.

[106] John G Fleming "The Fall of the Crippled Giant" (1995) TLR 56.

[107] *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42, 77 (HCA) per Brennan J, and Jane Swanton "Case Note: 'Another Conquest in the Imperial Expansion of the Law of Negligence': *Burnie Port Authority v General Jones Pty Ltd*" (1994) 2 TLJ 1.

[108] John G Fleming *The Law of Torts* (9 ed, 1998, Sydney, Law Book Company) 385.

The Professor explained that the effect of these defences equates to "almost complet[ing] the circle of. . .negligence liability".[109] Fleming states 'almost completing' in relation to the defences alone. However, the combination of the application of negligence criteria, the similarity of the foreseeability requirement, and the closeness of the defences, this circle should now be completed. In effect, *Rylands* increasingly reflects negligence. The majority's position is therefore warranted, for it accounts for the true conceptual similarity of the torts.[110]

Pardy discusses the idealism of a strict, no-fault regime, while recognising the gradual erosion by fault-based torts.[111] Thus while it is arguably ideal that defendants bear the full cost for carrying on harmful activities, negligence requires cost-responsibility for carelessly conducted activities.[112] Subsuming *Rylands* liability into negligence ignores the traditional strict liability conception, as negligence requires and demands the breach of the duty owed by the defendant. One benefit is that negligence encourages careful behaviour, for any carelessness will be punished; strict liability on the other hand, provides few incentives to monitor behaviour, as an individual is liable irrespective of precautions taken or care exercised.[113] The strict liability argument is easily criticised. First, it is simply incorrect (emphasised throughout this paper) to suggest that *Rylands* remains strict. However, it would be unwise to ignore the traditional, 'ideal' position. Simply, Blackburn J's original decision probably implements a strict liability standard, but Lord Cairn's distortions no longer rendered the 'true rule' truly strict. One important historical realisation is that these torts (negligence, nuisance,

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[109] John G Fleming *The Law of Torts* (9 ed, 1998, Sydney, Law Book Company) 385.
[110] See Fleming and Pollock above, footnotes 10, 11, and 103.
[111] Bruce Pardy "Fault and Cause: Rethinking the Role of Negligent Conduct" (1995) TLR 143.
[112] Bruce Pardy "Fault and Cause: Rethinking the Role of Negligent Conduct" (1995) TLR 143, 144.
[113] Bruce Pardy "Fault and Cause: Rethinking the Role of Negligent Conduct" (1995) TLR 143, 144-145.

and *Rylands*) derive from the writ of action on the case.[114] This common root prompted Pardy to suggest that the elimination of these distinctions would make render this area conceptually sound.[115] Oliver Wendell Holmes commented that foreseeability of the likelihood of harm was the unifying element of tortious liability, and in particular, this triumvirate of negligence, nuisance, *Rylands*.[116] Pardy was concerned by the fact that no Court had expressed a principle that sensibly and manifestly governs this liability; although he noted that the *Burnie* majority and the *Cambridge* House of Lords indicate attempts at such rationalisation.[117] Perhaps the underlying antithesis would be constrained for the persistent introduction and adoption of negligent criteria highlights that negligence continues to assume dominance in this complete area of liability. Leaving nuisance aside from this consideration, in applying negligence standards to this area New Zealand, in following Australia, would accord with Roman law jurisdictions. For example, South Africa and Scotland successfully operate a fault-based conception for this harm caused by the escape of controlled substances.[118] Therefore, although the direction chosen by the High Court is novel and bold, it is certainly not unprincipled or legally incorrect. The precedent and rationale exist for a New Zealand Court to at least consider the correct approach to *Rylands*, rather than simply concluding that it is a subset of nuisance, and failing to consider the options.

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[114] Bruce Pardy "Fault and Cause: Rethinking the Role of Negligent Conduct" (1995) TLR 143, 157.
[115] Bruce Pardy "Fault and Cause: Rethinking the Role of Negligent Conduct" (1995) TLR 143, 157.
[116] Oliver Wendell Holmes *The Common Law* (1882) Lectures III and IV.
[117] Bruce Pardy "Fault and Cause: Rethinking the Role of Negligent Conduct" (1995) TLR 143, 157.

D Defences

The minority targeted defences as a key dissenting factor. McHugh J's arguments included that *Rylands* defences apply to causation and not to the denial or reduction of liability as in negligence; that no contributory negligence concept is available in *Rylands*; and that negligence incorporation will result in the reduction of liability calculated on the extent of the contributing fault.[119] With due respect, McHugh J ignores the important role within negligence of causation; little difference will actually result. Simply, the plaintiff's default can only be equated with contributory negligence. Professor Fleming confidently reconciles the two with each other, and recognises that the plaintiff's default reduces damages in the contributory negligence sense.[120] McHugh's stance is unsubstantiated, and contrasts to the plentiful authority supporting the contributory negligence approach.[121] Legal principle demands that risks created by one must be balanced against those taken by the other; justice requires equity of treatment and each person's contribution should be considered appropriately. Fleming's opinion suggests that causation is not the predominant focus of the *Rylands* defences. With respect, McHugh J overstates the concern. Rather, it provides another rationale for negligence subsuming *Rylands*, harmonising and simplifying the inquiry.

The obvious question concerns whether these trends are detectable in New Zealand. No question surrounds the 'mischievous' aspect, as Gault J explicitly agrees that negligence foreseeability must accord with Lord Goff's standard. Simply, the various conceptions of *Rylands* defences correspond strongly "with the grounds of denial

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[118] Jeannie Marie Paterson "Rylands v Fletcher *into Negligence:* Burnie Port Authority v General Jones Pty Ltd" (1994) 20 Monash Uni L Rev (No 2) 317, 323.
[119] *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42, 93 (HCA) per McHugh J.
[120] John G Fleming *The Law of Torts* (9 ed, 1998, Sydney, Law Book Company) 387.

of fault of liability under the law of negligence".[122] While some desire that *Rylands* remains 'strict', in essence, it never was, and certainly would be nigh near impossible to now apply. The defences, while not necessarily examined by the New Zealand Courts, are arguably irrefutably similar to negligence. It is with some amusement that one reads comments made by the Court and commentator alike. Smillie considers the application of the act of God defence, noting that it only applies to "freakishly rare" occurrences not considered to be even a remote possibility.[123] Interestingly, Smillie considers the House of Lords case of *Greenock Corp v Caledonian Railway Co* in considering the application of the Act of God defence. The test considered was "whether human foresight and prudence could *recognise the possibility* of such an occurrence".[124] This clear negligence language is intimately similar to the negligence approach to third party interference. One comment boldly states that "since liability under the rule in *Rylands v Fletcher* remains strict and is not dependent on lack of reasonable care. . .the defence of contributory negligence has no application".[125] A 1902 New Zealand case supported this proposition, and McHugh provided the authoritative evidence for this claim. Simply, the playing field for *Rylands* has changed. While the original premise may have anticipated 'stricter' liability, judicial alterations and qualifications render such a claim laughable. Therefore, the trends identified by the High Court of Australia equally apply in New Zealand. Once again, the apparent difference is that the Australian Court questioned *Rylands*, while New

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[121] *Dunn v Birmingham Canal Co* (1872) LR 7 QB 244; *Eastern & S African Telegraph v Cape Town Tramways* [1902] AC 381 (PC); and *Martins v Hotel Mayfair* [1976] 2 NSWLR 15 (SC).

[122] *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42, 58 (HCA).

[123] John Smillie "The rule in *Rylands v Fletcher*" in Stephen Todd (ed) *The Law of Torts in New Zealand* (3 ed, Wellington, Brookers, 2001) 556.

[124] *Greenock Corp v Caledonian Railway Co* [1917] AC 556 (HL (Eng). The sole case with a successful Act of God defence was *Nichols v Marsland* (1876) 2 Ex D 1.

[125] John Smillie "The rule in *Rylands v Fletcher*" in Stephen Todd (ed) *The Law of Torts in New Zealand* (3 ed, Wellington, Brookers, 2001) 555.

Zealand Courts blindly follow history and the 'mother' jurisdiction without pondering the implications of doing so; someone has to ask why.

E The Implications of Hunter v Canary Wharf

The potential repercussion that the decision in *Hunter v Canary Wharf* may have on *Rylands* is the most concerning aspect in placing *Rylands* as a subset of nuisance. This concerns both New Zealand and the United Kingdom. The judgment's consideration of standing to sue potentially has far-reaching implications. While *Hunter* remains to be considered in New Zealand, only a brave Court would fail to follow Lord Goff's persuasively argued majority judgment, although Lord Cooke provides an excellent and persuasive dissenting judgement. The House of Lords held that the governing standing consideration is exclusivity of possession, essentially comprising the fee simple estate owner, leasehold owner, and potentially, a reversionary interest holder. Thus, in calling *Rylands* an aspect of nuisance, this controlling proposition applies. However, it extends even further, in that not only must the plaintiff have exclusive possession, but so must the defendant.[126] The paramount consideration in nuisance is to strike a balance between the two competing property interests of neighbours.[127] It necessarily follows that if one holds exclusive possession then so must the other, or those property interests would not be on equal footing. Conceptually, this is an immense change to the *Rylands* doctrine; one would warn that such change requires careful consideration. *Rylands* has and never was so arbitrarily limited in application. Even Blackburn J's pronouncement of "his land" for the defendant was not so stringently interpreted as to require a strong possessory interest.

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[126] Lord Goff would probably favour the exclusive possession approach for the plaintiff, as this follows the property damage focus in *Cambridge Water*.

[127] John G Fleming *The Law of Torts* (9 ed, 1998, Sydney, Law Book Company) 467.

In fact, a simple occupational interest continues to be the concern. This represents a change of some magnitude, potentially operating as a further *ad hoc* limitation on recovery. It seems grossly unjust for a plaintiff to establish all circumscribing criteria for the claim to fail simply due to the defendant holding an insufficient property interest. One can foresee the idiocy of a defendant simply pleading insufficient title (operating as a further 'defence'). The plaintiff affected is also adjudged by their possessory interest in land. This seems entirely unprincipled. *Rylands* compensation is recoverable for all damage that is the natural, foreseeable consequence of the escape; there is no express or inherent restriction on who may sue. The relative importance of *Hunter* for nuisance, coupled with associating *Rylands* as a division of nuisance, leads to the inevitable conclusion that the principles established in *Hunter* infiltrate and control the operation of *Rylands*. In shifting *Rylands* into negligence, the arbitrariness of possessory interest requirements is replaced with more flexible notions of proximity and the neighbour principle. Plaintiffs can more easily establish a prima facie case, simply demonstrating Lord Atkin's hypothesis of 'that person':[128]

> so closely and directly affected by my acts. . . that one ought reasonably to think of them.

Negligence will better avoid the complications of the nuisance/*Rylands* inquiry, including the wholly unnecessary requirement for such a strict possession standard for the defendant. In collecting and keeping substances likely to harm upon escape, there appears little value in governing liability by some antiquated notion of exclusive

[128] *Donoghue v Stevenson* [1932] AC 562 (HL (Eng) Lord Atkin.

possessory interests. In essence, the closeness of nuisance and *Rylands* creates immense difficulties, and thus, negligence best avoids such arbitrary and unnecessary distinctions.

VIII RECOVERABLE DAMAGES

The consideration of recoverable damages available under *Rylands* represented an integral aspect of the majority's judgment. The two competing answers included maintaining *Rylands* within the land-based scope of allowable damages, or aligning *Rylands* with negligence to incorporate a wider scope of damages not based on land ownership. *Cambridge Water* clearly confined recoverable damages in England to compensation for damage to property sustained by the owner or occupier of neighbouring land.[129] The leading case cited was *Read v Lyons*, where a shell explosion on the defendant's land caused great personal injury to plaintiff. In a strict legal decision, the escape factor was determinant, but unfortunately little discussion considered whether personal injury claims could succeed under *Rylands*. Traditionally, negligence operates to remedy unintentional personal injury. Conceptually, a nuisance claim only recognises damage to the plaintiff's use and enjoyment of the land, but that was seemingly not enforced in *Read v Lyons*.[130]

The Australian position is far less confined. Windeyer J's judgment in *Benning v Wong*, extended damages under *Rylands* to cover both personal injury or damage to property sustained by the escape from the defendant's land in circumstances where the plaintiff has no relationship to the neighbouring land apart from being on that land at that

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[129] In fact, that was arguably the determining factor in *Read v J Lyons &Co Ltd* [1945] AC 156 (HL (Eng) where the Court focused on the fact that injury occurred on the defendant's premises, and thus, there was no escape, as was necessary. Some doubt exists in England however, as *Perry v Kendrick's Transport Ltd* [1956] 1 All ER 154; 1 WLR 85 (CA) clearly postulates wider damages than just injury to property affected by an escape.

time.[131] Obviously, a wider conception of recoverable damages exists in Australia, and although it was necessary to meet the other requirements of the rule, this concept of the tort is more akin to negligence. The High Court of Australia reconciled that the main control of recoverable damages, "damage which is the natural consequence of [the] escape",[132] closely paralleled foreseeability for actionable damages within negligence. *Wagon Mound (No 1)* details that damage suffered must be foreseeable.[133] Lord Goff's inclusion of foreseeability of damage dramatically changed the English approach, and in effect, the practicalities of the *Cambridge Water* result could be the same as *Burnie*.[134] It certainly brings negligence and *Rylands* closer. Lord Goff commented that he "did not consider that [the defendant] should be under any greater liability than that imposed for negligence".[135] Perhaps the best summary of the approach chosen by the High Court is encapsulated in the phrase, "Let us call a spade a spade".[136]

Arguably, New Zealand's damages position is similar to Australia. A telling signal is the Court of Appeal's reference to the case of *Benning v Wong* in *Mayfair Ltd v Pears*.[137] Although the case was not decided in a *Rylands* sense, referring to intentional torts, the Court clearly, but briefly, acknowledged and accepted the case's approach.[138] The case's focus on the recoverability of damages therefore strengthens the claim that New Zealand's conception of *Rylands* should align with Australia's approach, despite the

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[130] It is to be remembered that Lord Macmillan believed that negligence should have been pleaded.
[131] *Benning v Wong* (1969) 122 CLR 249, 274-275, 277, and especially 319-320, per Windeyer J.
[132] *Fletcher v Rylands* (1866) LR 1 Ex 265, 279 per Blackburn J.
[133] *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (The Wagon Mound)* [1961] 1 All ER 404 (PC).
[134] John G Fleming "The Fall of the Crippled Giant" (1995) TLR 56, 56-57.
[135] *Cambridge Water Co Ltd v Eastern Counties Leather Plc* [1994] 2 AC 264, 281; 1 All ER 53, 77 (HL (Eng) Lord Goff.
[136] Kumaralingam Amirthalingam "Strict Liability Restricted: A Critical Commentary on *Burnie Port Authority v General Jones Pty Ltd*" (1994) 13 (No 2) U of Tas L Rev 416, 427.
[137] *Mayfair Ltd v Pears* [1987] 1 NZLR 459 (CA).
[138] *Mayfair Ltd v Pears* [1987] 1 NZLR 459, 471 (CA) per Somers J.

statements of the Court of Appeal. The fact that the Courts in *Autex* and *Hamilton* failed to provide any specific statements as to the types of recoverable damages is noteworthy. One would certainly understand that such an inquiry would form part of the calculation as to which is the most appropriate tort. However, the New Zealand position will differ for one key factor. The Accident Compensation personal injury scheme rules out any decision in respect of personal injury.[139] The Courts will not consider it, due to ACC's exclusive control of personal injury.

On a first principles approach (in the absence of ACC), there appears no rational reason as to why personal injury damages could not be recovered. Professor Fleming criticises Lord Macmillan's position in *Read v Lyons* that argued that *Rylands* could never support a personal injury claim. Fleming describes this as unprincipled and unsupported (both then and now), and then proceeds to identify a number of distinct *Rylands* cases concerning physical injury,[140] including *Perry v Kendrick's Transport*,[141] and the Canadian case of *Aldridge v Van Patter*.[142] Few valid reasons detail why New Zealand Courts could not allow a claim for personal injury (in ACC's absence). First, Blackburn J's doctrine provides that the defendant is "answerable for all the damage which is the natural consequence of its escape".[143] Thus, it seems unduly arbitrary to deny recovery for natural personal injury simply because it is not property damage. Secondly, it is possible to recover economic losses under the *Rylands* doctrine, although the method closely aligns with the negligence approach.[144] The wider the scope of available damages, the closer *Rylands* is to negligence. Not only do qualifying criteria for liability

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[139] Accident Insurance Act 1998, s 394.
[140] John G Fleming *The Law of Torts* (9 ed, 1998, Sydney, Law Book Company) 384.
[141] *Perry v Kendrick's Transport* [1956] 1 WLR 85, 92 (CA) Parker LJ.
[142] *Aldridge v Van Patter* [1952] 4 DLR 93 (Ont HC).
[143] *Fletcher v Rylands* (1866) LR 1 Ex 265, 280 (Ex Ch) Blackburn J.

parallel negligence, so does the extent of recoverability. ACC is an important consideration, but on its own, it cannot prevent the incorporation of *Rylands* into negligence.[145]

IX CONCLUSION AS TO NEGLIGENCE AND DAMAGE

New Zealand, much like England, refuses to question *Rylands*, while increasingly aligning *Rylands* more closely with negligence in the relevant aspects of the test, and simultaneously rendering it as a nuisance sub-set. Professor Fleming criticises the House of Lords for its decision in *Cambridge Water*, stating that:[146]

> "The Court did not, however, expressly question the precedential authority of *Rylands v Fletcher* itself, merely its message of strict liability. In doing so, it followed a long and well trodden path of qualifying its scope and stripping away its no-fault characteristics".

New Zealand's Court of Appeal is equally guilty. In a much-anticipated opportunity for true judicial consideration, there was a complete failure. They accepted the status quo, adopted, and altered some confusing developments, and, in effect, ignored the true question posed. In *Hamilton v Papakura District Council*, the Court attempted to rationalise the 'strictness' of *Rylands* by indicating that it is strict liability, as negligence need not be proved. However, the obvious concern with such a statement is that the elements essential for *Rylands* liability include numerous negligence considerations. Foreseeability obviously requires discussion; not only does it play an integral role in determining whether a use is non-natural, it is determinative whether 'dangerousness' arises (inherent danger), and it is decisive in whether the damage needs remedying (was

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[144] John G Fleming *The Law of Torts* (9 ed, 1998, Sydney, Law Book Company) 384-385.

it foreseeable?). Courts and commentators alike must realise the true nature of the tort. *Rylands* is so closely intertwined in negligence that it is submitted that they cannot be separated.

Importantly, as the majority appreciates, the *Rylands* rule "has never been seen as exclusively governing the liability of an occupier of land in respect of injury caused by the escape of a dangerous substance".[147] Statute law, negligence, trespass, and nuisance all operate in this realm. *Empress Car Co*[148] is a clear example of the statutory influence; New Zealand's Resource Management Act 1991 similarly plays an extensive role in controlling this area. One integral provision includes s 9(4)'s definition of 'use', which could encompass 'brings on to his lands and collects and keeps there'.[149] Negligence controls a wider scope and variety of situations, unquestionably holding sway in personal injury and property damage circumstances. Furthermore, a plethora of examples highlight that nuisance often answers questions concerning one-off damaging events, supposedly the thesis of *Rylands*, including *Sedleigh-Denfield v O'Callaghan.*[150] Essentially, *Rylands* fails to operate as a separate doctrine, borrowing heavily from other torts, and this applies in New Zealand. The development of the modern law of negligence led the majority of the High Court of Australia to conclude that ordinary negligence has "encompassed and overlain the territory in which the rule in *Rylands v Fletcher*

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[145] Negligence would still cover a wider area of property damage than current recoverability, and that is favourable.

[146] John G Fleming *The Fall of a Crippled Giant* (1995) TLR 56, 58.

[147] *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42, 59 (HCA).

[148] *Empress Car Co (Abertillery) Ltd v National Rivers Authority* [1999] 2 AC 22 (HL). [1999] 2 AC 22 (HL (Eng).

[149] Hinde, McMorland, and Sim *Butterworths Land Law in New Zealand* (1997, Wellington, Butterworths) 908-909, see Resource Management Act 1991, s 9(4).

[150] *Sedleigh-Denfield v O'Callaghan (Trustees for St Joseph's Society for Foreign Missions)* [1940] AC 880 (HL (Eng).

operates".[151] This is highlighted two-fold: First, the predominance and importance of negligence factors in the *Rylands* test, and secondly by the exponential increase in negligence cases concerning one-off damaging events. The key *Rylands* notions will "inevitably fall within" principles of ordinary negligence and the 'relationship of proximity' determines the conceptual 'neighbour'. Certainly, it would be unusual for *Rylands* to exist sans negligence, but it is not entirely inconceivable (see *Autex*).

These considerations seemingly balance in favour of applying negligence liability. In recognising the past adjustments and qualifications to *Rylands*, the majority contended that it would be increasingly difficult to render a judgment in *Rylands* where that liability did not exist under ordinary negligence. The majority combine both non-delegable duties of care and variable standards of care to conclude that it is wholly unlikely that a case decided in *Rylands* could not be decided in negligence. In essence, one could argue that with the variable standard of care alone, few cases would not be 'caught' by negligence. The majority state that on close examination of cases establishing *Rylands* sans negligence, they constitute invalid examples due to the continued development of the law of negligence. While accepting the majority's position, there is inadequate space for consideration of those few cases. The majority qualify their negligence proposition, by indicating that in certain circumstances there may remain cases in which it is preferable to ground liability in nuisance or trespass; an acceptable allowance given the increasing alignment of these torts. An element of intentional entry or direction indicates trespass, while interference without physical damage or exclusive possession of the defendant and plaintiff might support invoking nuisance.

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[151] *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42, 59 (HCA).

Perhaps the most effective and telling summary of this position is: [152]

> We have virtually reached the position where a defendant will not be considered liable when he would not be liable according to the ordinary principles of negligence.

This position exists in New Zealand, for the Court of Appeal's direction, while supposedly aligning the Court closely to the English nuisance position they closely associate the doctrine with negligence. It is simply incorrect to label the current direction as upholding *Rylands* within a nuisance rationale, when the very tests that determine liability demand and apply a negligence standard of behaviour. The role of foreseeability, the applicability of the proximity inquiry, the similarity of the defences, and the increasing dominion of negligence all operate to limit the possibility of establishing *Rylands* without negligence. However, it is important to recognise the residual categories where nuisance or trespass could apply in appropriate cases.[153]

A Variable Standard of Care

The *Burnie* majority considered the role of variable standards of care within negligence. This is a pertinent consideration as it introduces implicit flexibility in determining breaches of the duty of care. This is a beneficial inclusion as it accords with some of the strictness of liability associated with *Rylands*, rendering it very rare for *Rylands* to exist without negligence. The variable standard of care has a great degree of attractiveness, for "the standard of care exacted. . .necessarily varies with the risk involved and that the risk involved includes both the magnitude of the risk. . .and the

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[152] Rogers (ed) *Winfield and Jolowicz on Tort* (13 ed, London, Street & Maxwell Ltd, 1989) 443.
[153] See *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42, 57-58 (HCA), and *Autex Industries Ltd v Auckland City Council* [2000] NZAR 324, 335 (CA) Keith and Blanchard JJ.

seriousness of the potential damage if an accident should occur".[154] It is worth noting that *Thompson v Bankstown Corp*, which establishes this variable standard, was accepted in New Zealand.[155]

The *Rylands* categorisations of 'non-natural', 'special', or 'dangerous substances likely to do harm' necessarily imports the test of the reasonable prudent person *in the circumstances*. One must recognise that the greater the likely resulting harm, the higher the standard of care expected. Responsibility for dangerous substances would require a reasonably prudent person to exercise a higher degree of care. Accordingly, this variable standard of care, depending on the magnitude of the danger, could result in "a degree of diligence so stringent as to amount practically to a guarantee of safety".[156] Therefore, the extreme danger posed by Isolite coupled with welding in the near vicinity, rendered it necessary to heighten the requisite standard of care.

B Non-delegable Duties

In concluding that Burnie Port Authority was liable for the negligence of the independent contractor, the majority imposed a non-delegable duty of care. Without proposing to consider non-delegable duties in great detail, it is necessary to briefly allude to the discussion. Non-delegable duties apply in situations where defendants cannot acquit themselves of the responsibility to exercise reasonable care by entrusting the work to a contractor.[157] The duties are not without controversy, and perhaps it is unfortunate that such an important case combined both *Rylands* and non-delegable duties. However,

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[154] *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42, 65 (HCA). The principle derives from the case of *Thompson v Bankstown Corp* (1953) 87 CLR 619, 645.

[155] See *McCarthy v Wellington City* (1966) NZLR 481 (CA), and *Heard v New Zealand Forest Products Ltd* (1960) NZLR 329 (CA).

[156] *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42, 65 (HCA).

this is not a criticism of the majority, for their answer is seemingly correct. The unique fact scenario of *Burnie* involved negligent welding by the independent contractor. The leading Australian case concerning the criteria for non-delegable duties is *Kondis v State Transport Authority*.[158] Mason J, in a meticulously argued judgment, described that generally, the determinant[159]

> element in the relationship between the parties which generates [the] responsibility or duty to see that care is taken is that the person on whom [the duty] is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised.

The Burnie Port Authority exercised this control element by selecting the contractor, regulating its activity, controlling access, and at all times, possessing knowledge of the activities being completed, supervising this process, and authorising the work. Finally, it is noteworthy that non-delegable duties are not uncommon, nor foreign, to New Zealand. In fact, one of the key cases considered by Mason J in *Kondis* was the New Zealand case of *Mt Albert Borough Council v Johnson*,[160] which considered a complicated fact discussion of an owner-cum-builder, and an independent contractor, with a subsequent subsidence of the property due to negligently constructed foundations. Thus, non-delegable duties, in an appropriate case, are a useful instrument.

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[157] John G Fleming *The Law of Torts* (9 ed, 1998, Sydney, Law Book Company) 435.
[158] *Kondis v State Transport Authority* (1984) 154 CLR 672.
[159] *Kondis v State Transport Authority* (1984) 154 CLR 672, 687, per Mason J.
[160] Mt Albert Borough Council v Johnson [1979] 2 NZLR 234 (CA)

C Increased Fluidity of Law

It is contended that subsuming *Rylands* into negligence introduces necessary fluidity into this area of law. The partition of negligence, nuisance, *Rylands*, and trespass involved unnecessary and undesirable competition and confusion. Common law fluidity should be cherished and sought-after. In reconciling that nuisance is the governing head of liability, and *Rylands* is a subset, Lord Goff in *Cambridge Water* chose to ignore the immense complications encompassed in *Rylands*, complicating rather than solving the problems.[161] Nuisance, generally, only applies to instances continuing discomfort, and one-off damaging events, traditionally, was outside its scope. It seems irrational to place *Rylands* into the ill-fitting nuisance, when negligence is more appropriate. While foreseeability is an element of both, the *Hunter* decision drastically limits the applicable scope, and it is clear that available damages in nuisance will not remedy physical damage. Thus, the acceptance of negligence will negate many of the uncertainties and idiosyncrasies of Rylands; negligence (in this particular field) operates as a more coherent scheme. One must remember that it was doubtful that Blackburn J established *Rylands* as a separate doctrine, with the favoured approach recognising that it was presented within the principles of nuisance. However, one must recognise that the common law is not static, and the law should change as the principles change. *Rylands* sits awkwardly (to say the least) as a subset of nuisance – the continual introduction and application of negligence criteria increasingly renders the two doctrines indistinguishable. The common sense approach, and the jurisprudentially justified decision, is to absorb *Rylands* into negligence.

X APPLICATION TO THE RECENT NEW ZEALAND CASES

Neither *Autex* nor *Hamilton* actually established liability, although the *Autex* minority were prepared to enter summary judgment. In both cases, the relationship of the regional or district council in the provision of water supplies would easily lead to the imposition of a duty of care. Water supply is an essential service; its negligent supply could foreseeably cause damage to many affected parties. The real question concerns the breach of the duty of care. In *Autex*, there is insufficient evidence to provide an answer, but if evidence existed regarding insufficient or ignored maintenance, then certainly a breach would be established. However, if no such evidence was identifiable then there probably is no negligence. It would only take a small factual modification to establish negligence. A representation to the affected party, or a failure to remedy a fault would found negligence However, due to the exclusive possession rights, it is duly submitted that *Autex* fits into the residual nuisance category, and thus, the Canadian nuisance approach in *Tock*[162] and *Ratko*[163] should be adopted and applied. These cases accept that a negligence duty of care is owed, that *Rylands* fails to provide an appropriate answer, and that nuisance succinctly covers this Council water escape situation. This is not an indication that negligence is an incorrect approach, but rather that the escape of bulk conveyances of water, supplied by councils is better considered under nuisance.

In *Hamilton*, both negligence and *Rylands* were unfounded. The extensive factual inquiry suggests that a slight factual adjustment concerning foreseeability or the concentration levels of the herbicide would ground negligence liability. Essentially, the

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[161] In fact, Lord Goff's 'introduction' of, or focus on, the foreseeability element for *Rylands* increases the conceptual confusion underpinning the doctrine.

[162] *Tock v St John's Metropolitan Area Board* (1989) 64 DLR (4th) 620 (SCC).

introduction of a damaging herbicide into the water supply accords closely with a negligence approach. Negligence provides the better method to this claim.

The fact of no negligence in both cases could be disconcerting. However, this author is rather encouraged for negligence provides the same answer as *Rylands*, but through a better investigation. The imposition of duty of care represents one step in a better direction, and slight factual alterations would ground liability in negligence.

To conclude, negligence succinctly and aptly rationalises the position that *Rylands* occupies. It is submitted that the wider application of negligence and the greater certainty accompanying the tort, will provide a better, more reasoned legal answer. The New Zealand Court of Appeal should stop being such a 'nuisance' and follow the lead indicated by the *Burnie* majority. Negligence should subsume *Rylands v Fletcher*.

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[163] *Ratko v Public Utility Commission of City of Woodstock* (1994) 111 DLR (4th) 375 (Ont Divisional Ct).

Appendix One

Table of Cases

1 *Aldridge v Van Patter* [1952] 4 DLR 93 (Ont HC).
2 *Autex Industries Ltd v Auckland City Council* [2000] NZAR 324 (CA).

3 *Beaulieu v Finglam* (1401) YB 2 HEN IV, f 18, pl 6.
4 *Benning v Wong* (1969) 122 CLR 249.
5 *Blake v Woolf* [1898] 2 QB 426 (CA)
6 *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42; 179 CLR 520 (HCA).

7 *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 AC 264 (HL (Eng).
8 *Carstairs v Taylor* (1871) LR 6 Ex 217 (Ex Ch).
9 *Collingwood v Home and Colonial Stores Limited* [1936] 3 All ER 200 (HL (Eng).
10 *Crimmins v Stevedoring Industry Financing Committee* (1999) 167 ALR 1 (HCA).

11 *Donoghue v Stevenson* [1932] AC 562 (HL (Eng).
12 *Dunn v Birmingham Canal Co* (1872) LR 7 QB 244.

13 *Eastern & S African Telegraph v Cape Town Tramways* [1902] AC 381 (PC).
14 *Empress Car Co (Abertillery) Ltd v National Rivers Authority* [1999] 2 AC 22 (HL (Eng).
15 *Eriksen v Clifton* [1963] NZLR 705 (SC).

16 *Fletcher v Rylands and Harrocks* (1866) LR 1 Ex 265 (Ex Ch).
17 *Foster v Warblington Urban Council* [1906] 1 KB 648 (CA).

18 *Goldman v Hargrave* [1967] 1 AC 645 (PC).
19 *Greenock Corp v Caledonian Railway Co* [1917] AC 556 (HL (Eng).

20 *H & N Emanuel Ltd v Greater London Council* [1971] 2 All ER 835 (CA).
21 *Hamilton v Papakura District Council* [2000] 1 NZLR 265 (CA).
22 *Heard v New Zealand Forest Products Ltd* (1960) NZLR 329 (CA).
23 *Heaven v Pender* (1883) 11 QBD 503.
24 *Hoare & Co v McAlpine* [1923] 1 Ch 167 (HC).

25 *Irvine and Co Ltd v Dunedin City Corporation* [1939] NZLR 741 (CA).

26 *Jones v Llanrwst Urban Council* [1911] 1 Ch 393 (HC).

Table of Cases - Continued

Appendix Two

Table of Legislation

NEW ZEALAND

Accident Insurance Act 1998, s 394.

Resource Management Act 1991, s 9(4).

Other Instruments

UNITED STATES OF AMERICA

American Law Institute *Restatement (Second) of Torts* (1977) § 519 and § 520.

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