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FAULT IN A STRICT LIABILITY TORT: FORESEEABILITY AS AN ELEMENT OF THE RULE IN *RYLANDS* V *FLETCHER*

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The decision of the House of Lords in Cambridge Water Co Ltd v Eastern Counties Leather Plc *[1994] 1 All ER 53 has, for the first time, authoritatively decided that foreseeability is an element of the rule in* Rylands v Fletcher. *For some this has heralded the arrival of fault to tort's last bastion of strict liability. This paper examines the concept of foreseeability in* Rylands v Fletcher *liability and suggests that it may have been a part of the rule from the beginning.*

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I INTRODUCTION

Liability in our legal system is based primarily on fault. Today negligence is the primary source of tortious liability. Absolute liability exists only at the whim of the legislature and the circumstances in which strict liability may come into play are severely restricted. The judiciary has embraced fault theory such that despite strict liability having existed at common law for hundreds of years, it is common for modern judges to declare that it is for Parliament, not the judiciary, to impose such liability.[1]

For years the rule in *Rylands* v *Fletcher* has been regarded as the last bastion of strict liability in the law of torts. While fault theory (in the form of foreseeability) was seen to overtake nuisance following the decision in the *Wagon Mound (No 2),*[2] the rule in *Rylands* v *Fletcher* was generally thought to have remained untouched by elements of fault. Thus the decision in of the House of Lords in *Cambridge Water* will have come as something of a shock to many commentators and judges. In this case the House of Lords re-established the relationship between nuisance and the rule in *Rylands* v *Fletcher* and acknowledged foreseeability as an element of *Rylands* v *Fletcher* liability. To some this means the end of tortious strict liability. However, it may be that foreseeability is not incompatible with the concept of strict liability. This paper examines the role of foreseeability in *Rylands* v *Fletcher* liability from the rule's origin in the Exchequer Chamber to the House of Lords' decision in *Cambridge Water* and suggests that foreseeability has played an unheralded part in strict liability for many years.

II THE RULE IN *RYLANDS* V *FLETCHER*

What is today recognised as the rule in *Rylands* v *Fletcher* was formulated by Blackburn J in the Exchequer Chamber:[3]

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

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1 See Lord Goff in Cambridge Water Co Ltd v Eastern Counties Leather Plc [1994] 1 All ER 53, 76.

2 *Overseas Tankship (UK) Ltd* v *Miller Steamship Co Pty Ltd (The Wagon Mound (No 2))* [1966] 2 All ER 709; [1967] 1 AC 617.

3 *Fletcher* v *Rylands* (1866) LR 1 Ex 265, 279.

The House of Lords[4] fully endorsed the test propounded by Blackburn J. However Lord Cairns, "not in a way that could be considered judicially responsible",[5] introduced a requirement of 'non-natural user' of land.

As will be discussed later, it appears that none of the judges deciding this case considered themselves to be creating new law. Nonetheless the decisions have led to the development of a distinct cause of action that has become known as the rule in *Rylands* v *Fletcher*. The elements of this rule are easily stated:

- The defendant, in the course of a non-natural use of his/her land;
- must bring on to his/her land;
- something likely to do mischief;
- which escapes; and
- causes damage.

However, the application of these elements has proved far from simple in many cases.

A The Elements of the Rule in Rylands v Fletcher

1 Non-natural use

Commentators variously praise Lord Cairns' introduction of this requirement as providing an element of flexibility to the rule[6] and condemn it as introducing uncertainty.[7]

Originally non-natural use was merely an "expression of the fact that the defendant has artificially introduced on to the land a new and dangerous agent."[8] Today, however, non-natural use is no longer a synonym for artificial. To be non-natural a use must be out of the ordinary or unusual rather than simply artificial.[9]

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4 *Rylands* v *Fletcher* (1868) LR 3 HL 330.

5 Sir Robin Cooke "The Condition of the Law of Tort" (Society of Public Teachers of Law, Frontiers of Liability Seminar, All Souls College, Oxford, 3 July 1993) 14.

6 Dias (ed) *Clerk and Lindsell on Torts* (16 ed, Sweet & Maxwell, London, 1989); Fleming *The Law of Torts* (8 ed, Law Book Co, Sydney, 1992).

7 Fridman *Torts* (1 ed, Waterlow Publishers, London, 1990).

8 FH Newark "Non-natural User and *Rylands* v *Fletcher*" (1961) 24 MLR 557, 561.

9 *Rickards* v *Lothian* [1913] AC 263.

The classic definition of non-natural use of land is to be found in the judgment of Lord Moulton in *Rickards* v *Lothian*:[10]

> It is not every use to which land is put that brings into play that principle [ie *Rylands* v *Fletcher*]. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of land or such a use as is proper for the general benefit of the community.

Using this as the test courts are able to infuse a certain degree of flexibility into the application of the rule in *Rylands* v *Fletcher*. They are thus, to some extent, able to free themselves from precedent and narrow or widen the scope of the rule as befits the socioeconomic conditions of the time.[11]

2 *Must Bring on to Land*

It is not only owners of land that may be liable under the rule in *Rylands* v *Fletcher*. Licensees with the right to use the land may also be liable.[12] What is essential is that the thing brought on to the land is under the defendant's control.

3 *Something Likely to do Mischief*

This element of the tort has caused a large amount of confusion. Today this requirement is generally equated with "dangerous thing" but there appears to be no settled test as to what constitutes a "dangerous thing". To some it is a question of fact "having regard to the circumstances of the time and place and practice of mankind and will vary with the circumstances."[13] To others an object is dangerous in the sense that on escape it will do damage.[14] What the concept of "dangerous thing" entails is considered in depth later in this paper.

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10 Above n 9, 280.

11 *Read* v *J Lyons & Co Ltd* [1947] AC 156, 176.

12 See for example *Rainham Chemical Works Ltd* v *Belvedere Fish Guano Co* [1921] 2 AC 465; *Charing Cross Electricity Supply Co* v *Hydraulic Power Co* [1914] 3 KB 772.

13 Dias, above n 6.

14 Lord Porter in *Read* v *J Lyons & Co Ltd*, above n 12; Trindale & Cane *Law of Torts in Australia* (2 ed, Oxford University Press, Melbourne, 1993).

Further confusion has arisen due to the occasional blurring of the "dangerous thing" and "non-natural use" distinction.[15] The two questions must be kept separate. The bringing of a "dangerous thing" onto land may, or may not, constitute a non-natural use.[16] Whatever the status of the use, however, it does not affect the question of whether the "thing" is "dangerous", although similar factors may influence the determinations.

4 *Escape*

In order to ground liability under the rule in *Rylands* v *Fletcher* there must be an escape from land under the control of the defendant to a place outside the defendant's control.[17] It need not, however, be the dangerous thing itself which escapes[18] and the escape need not be on to the plaintiff's land.[19]

5 *Damage*

The tort of *Rylands* v *Fletcher* is not actionable per se. There must be damage to give rise to an action. There is no doubt that damage to land and to personal property satisfies the damage requirement, but the position is less clear with respect to personal injuries. The English Court of Appeal has held in several cases that the rule in *Rylands* v *Fletcher* applies to personal injuries[20] but dicta of Lord MacMillan in *Read* v *J Lyons & Co Ltd*[21] suggests that personal injury is excluded from the rule. Subsequently however, Lord MacMillan's suggestion has made little headway in England or in any common law jurisdiction.[22]

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15 See Stallybrass (1929) 3 CLJ 376, 395-396.

16 Lord Porter in *Read* v *J Lyons & Co Ltd*, above n 11, 176.

17 *Read* v *J Lyons Co*, above n 11, 173-174. This aspect of the decision is considered to have "prematurely stunted the development of a general theory of strict liability for ultra-hazardous activities" (see Fleming, above n 6, 341; see also Lord Goff in *Cambridge Water*, above n 1, 76).

18 So in *Miles* v *Forest Rock Granite Co* (1918) 34 TLR 500, the defendant was liable under the rule in *Rylands* v *Fletcher* for damage caused by rocks thrown by blasting explosives.

19 *British Celanese Ltd* v *AH Hunt Ltd* [1969] 2 All ER 1252; *Halsey* v *Esso Petroleum Co* [1961] 2 All ER 145.

20 *Hale* v *Jennings Bros* [1938] 1 All ER 579; *Perry* v *Kendricks Transport Co* [1956] 1 WLR 85.

21 Above n 11, 173.

22 See Fleming, above n 6, 342; *Perry* v *Kendricks Transport Co*, above n 20; *Benning* v *Wong* (1969) 122 CLR 249; *Aldridge* v *Van Patter* [1952] 4 DLR 93.

B *Remoteness of Damage Under the Rule in Rylands v Fletcher*

A defendant in a *Rylands* v *Fletcher* action, as in any other tort, will not be liable *ad infinitum.* There must be some limit on the extent of liability.[23] As will be discussed later, there has been much confusion as to the limits of liability under the rule in *Rylands* v *Fletcher.* Blackburn J spoke of "the natural consequences" and "the natural and anticipated consequences". Prior to *Cambridge Water* the courts had tended to shy away from authoritatively dealing with this aspect of the rule.[24] Commentators toyed with the concept of foreseeability. Some suggested that while foreseeability was not an element of *Rylands* v *Fletcher* liability per se, it could be utilised as the test for remoteness once liability has been established.[25] Such a distinction, however, appears artificial and nonsensical.[26] It makes no difference to the outcome of a *Rylands* v *Fletcher* action if foreseeability is considered an element of the tort itself or simply a test for remoteness. To say that particular damage is unforeseeable and therefore not recoverable is simply to say that there is no liability for such damage under *Rylands* v *Fletcher.* Conceptually it may be possible to make a distinction, but in practice foreseeability will determine liability in either case. Thus foreseeability is either a part of *Rylands* v *Fletcher* liability, or it is not. This was the issue that was authoritatively decided for the first time by the House of Lords in *Cambridge Water.*

III *CAMBRIDGE WATER CO LTD* V *EASTERN COUNTIES LEATHER PLC*

Eastern Counties Leather (ECL) was a leather manufacturer that had been in business in the village of Sawton since 1879. The Cambridge Water Company (CWC) was a statutory water company responsible for providing a public water supply within a large area in and around the city of Cambridge.

In 1976 CWC purchased land 1.3 miles from Sawton for the purpose of abstracting water form the underground strata in order to supplement water supplies. A pumping station was commissioned on the site in 1979.

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23 Winfield *Winfield and Jolowicz on Tort* (13 ed, Sweet & Maxwell, 1989).

24 *Overseas Tankship (UK) Ltd* v *Morts Dock Engineering Co Ltd (Wagon Mound (No 1))* [1961] AC 388, 426-427; *British Celanese Ltd* v *AH Hunt Ltd,* above n 19. But see *Benning* v *Wong,* above n 22.

25 Winfield, above n 23, 440.

26 The Privy Council rejected just such a distinction in respect of negligence in the *Wagon Mound (No 1),* above n 24, 425.

Prior to purchase of the land, the water to be extracted was tested for purity and found to be "wholesome" in accordance with the then current standards for water quality. However, four years later, in 1980, the European Community Council issued a directive relating to the quality of water intended for human consumption. In this directive organochlorine compounds were, for the first time, considered contaminants of drinking water and assigned maximum admissible concentration values. The United Kingdom responded in 1982 with legislation setting appropriate maximum levels of organochlorine concentrations in drinking water to be enforced by 1985. Further tests on the water at the Sawton site in 1983 revealed concentrations of the organochlorine compound perchloroethane (PCE) well above the maximum levels set by the new legislation. As such the water was "unwholesome" and the pumping station was taken out of commission.

Extensive investigations revealed that the source of the PCE was the premises of ECL. ECL had, since the 1960's, utilised PCE as a cleaning and degreasing agent in the tanning of hides. The trial Judge found that spillages of PCE had occurred at the ECL plant up until 1976 when the method of storage and use of PCE was altered. The undisputed evidence of expert witnesses was that PCE so spilled travelled down through interstices in the concrete floor of the plant and into the soil below. It continued its downward passage through the chalk aquifer until it reached an impermeable strata 50 metres below the surface. Here it formed pools and slowly moved down the aquifer until it reached CWC's extraction plant 1.3 miles away. The whole journey was estimated to take about nine months. On the balance of probabilities it was held that this was the cause of the PCE contamination at CWC's Sawton borehole.

CWC then brought actions against ECL in negligence, nuisance and the rule in *Rylands* v *Fletcher*. At trial the evidence showed that PCE was highly volatile and evaporated quickly in air. The trial Judge held that the seepage of PCE through the plant floor and into the chalk aquifer was not foreseeable by a reasonable supervisor employed by ECL. Further, the movement of PCE down-catchment in detectable quantities was unforeseeable so that it could not be foreseen, in or before 1976, that the repeated spillages would lead to any environmental hazard or damage.

On the basis of these findings the trial Judge dismissed the actions in negligence and nuisance due to lack of foreseeability that the spillages of PCE would result in contamination of CWC's bore water. The action under *Rylands* v *Fletcher* failed on the basis that the storage and use of PCE in the leather tanning industry was a natural use of land.

In the Court of Appeal CWC pursued only the action under *Rylands* v *Fletcher*. The Court, however, held ECL liable on the basis of the decision in *Ballard* v *Tomlinson*.[27] That case decided that "where the nuisance is an interference with a natural right incident to ownership then the liability is a strict one."[28]

The House of Lords disagreed with the conclusion of the Court of Appeal. *Ballard* v *Tomlinson* was not authority for the proposition that a defendant could be held liable for damage which could not reasonably have been foreseen. In the opinion of the House of Lords, *Ballard* v *Tomlinson* disclosed no more than that:[29]

> ...in the circumstances of the case, the defendant was liable to the plaintiff in tort for the contamination of the source of water supplying the plaintiff's well, either on the basis of the rule in *Rylands* v *Fletcher*, or under the law of nuisance....It follows that the question whether such a liability may attach in any particular case must depend upon the principles governing liability under one or other of those two heads of law.

The claim in nuisance having been abandoned, it fell to the House of Lords to consider liability solely under the rule in *Rylands* v *Fletcher*.

Lord Goff, who delivered the judgment of the House, held that there was no liability under the rule in *Rylands* v *Fletcher* because foreseeability was an element of the rule and it was not satisfied on the facts. In authoritatively stating that foreseeability was an element of *Rylands* v *Fletcher* liability, Lord Goff was answering a question that earlier Courts had scrupulously avoided directly considering. Commentators, however, had found the issue a fertile ground for conjecture and comment. Some had argued that foreseeability was incompatible with *Rylands* v *Fletcher*'s status as a strict liability tort while others had claimed that it was an inherent part of the rule.

In support of his finding that foreseeability was an element of the rule in *Rylands* v *Fletcher*, Lord Goff relied on three points: the historical origins of *Rylands* v *Fletcher* in nuisance; the wording of the original statement of the rule by Blackburn J; and the move to restrict the scope of liability under the rule evidenced by the decision of the House of Lords in *Read* v *J Lyons & Co Ltd.*[30] It is the first two of these factors that

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27 (1885) 29 ChD 115.

28 Above n 1, 61.

29 Above n 1, 68-69.

30 Above n 11.

bear particular relevance to the concept of foreseeability as an element of the rule in *Rylands* v *Fletcher.*

IV THE RELATIONSHIP OF *RYLANDS* v *FLETCHER* WITH NUISANCE

A The Attitude of the Court of the Exchequer Chamber

Blackburn J clearly regarded the facts in *Rylands v Fletcher* as giving rise to an established form of liability:[31]

> We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is primâ facie answerable for all the damage which is the natural consequence of its escape.... *And upon authority, this we think is established to be the law* whether the thing so brought be beasts, or water, or filth, or stenches [emphasis added].

The authority considered by the Court of the Exchequer Chamber to be of most weight was *Tenant* v *Goldwin*[32] This case involved the escape of filth from the defendant's privy into the plaintiff's cellar. The defendant was held liable on the basis of the principle that everyone must so use their land as not to do damage to others. Just as you are bound to keep your cattle out of your neighbour's land so too must you confine your filth so that it will not flow onto your neighbour's property. The Court of the Exchequer Chamber in *Fletcher* v *Rylands* saw *Tennant* v *Goldwin* as:[33]

> ...a very weighty authority in support of the position that he who brings and keeps anything, no matter whether beast, or filth, or clean water, or a heap of earth or dung, on his premises, must at his peril prevent it from getting on his neighbour's, or make good all the damage which is the natural consequence of its doing so.

It had long been established at common law that owners of cattle must keep them confined at their peril. All that Blackburn J appears to have intended in *Fletcher* v *Rylands* was to follow *Tenant* v *Goldwin* in holding that this strict liability (as we now know it) extends to other things brought onto land that might cause mischief on escape.

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31 Above n 3, 279-280.

32 (1704) 2 Lord Raym 1089; 1 Salk 21, 360; 6 Mod 311.

33 Above n 3, 285.

His honour gives as examples, a cellar invaded by the filth from his neighbour's privy and the fumes and noisome vapours of a neighbouring alkali works. These are both clearly cases of nuisance and he regarded these as analogous to the case before him.[34] Indeed, Bramwell B in the Court below, whose dissenting decision Blackburn J endorses,[35] was of the opinion that there was no reason why the situation before him was not a nuisance.[36]

The underlying rule in both *Tenant* v *Goldwin* and in *Fletcher* v *Rylands* is clearly that you must so use your own property as not to injure that of another: *sic utere tuo ut alienum non lædas*. This is the very principle underlying the tort of nuisance and was in existence well before *Rylands* v *Fletcher* came before the Court of the Exchequer Chamber.[37]

That Blackburn J regarded himself as doing no more than stating existing law is illustrated by his comments in later cases. In *Jones* v *Festiniog Railway Co*[38] Blackburn J points out that *Rylands* v *Fletcher* was no more than an enunciation of common law. Four years later in the case of *Ross* v *Fedden*,[39] in response to counsel's claim that the point decided in *Rylands* v *Fletcher* was a new one, Blackburn J replied:[40]

> I wasted much time in the preparation of the judgment in *Rylands* v *Fletcher* if I did not succeed in showing that the law held to govern it had been law for at least 300 years.

Further support for Blackburn J's view that there was no new law involved in the decision in *Rylands* v *Fletcher* can be gleaned from a case decided six years earlier than *Rylands* v *Fletcher*. This was the case of *Vaughan* v *Taff Vale Railway Co.*[41] Blackburn J himself sat on this case but the leading judgment was given by Cockburn CJ. The case involved damage resulting from the emission of sparks from a steam

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34 Above n 3, 280.

35 Above n 3, 278.

36 "Why is it not a nuisance? The nuisance is not in the reservoir, but in the water escaping. As in *Bonomi* v *Blackhouse* [9 HL Cas 903; 27 Law J Rep (NS) QB 378], the act was lawful, the mischievous consequence was a wrong." As per Bramwell J in *Fletcher* v *Rylands* (1865) 34 Exch (NS) 177, 182.

37 See, for example, *Vaughan* v *Menlove* (1837) 3 Bing (NC) 468; *Tenant* v *Goldwin* above n 32.

38 (1868) LR 3 QB 733.

39 (1872) 26 LT 966.

40 Above n 39, 968.

41 (1860) 157 ER 1351.

locomotive. No negligence was involved as it was accepted by the Court that the defendants had taken all possible care to avoid the emission of sparks. The question before the Exchequer Chamber was whether, in light of a statute authorising the use of such locomotives, the defendants could be liable for the damage in the absence of negligence. It is not the decision in this case which is important to this discussion, rather it is the apparent assumption by the Court that, in the absence of the statute, the defendants would be liable that is of particular interest:[42]

> Although it may be true, that if a person keeps an animal of known dangerous propensities, or a dangerous instrument, he will be responsible to those who are thereby injured, independently of any negligence in the mode of dealing with the animal or using the instrument...[Cockburn CJ then goes on to demonstrate that the position is altered under the statute].

This sounds very much like *Rylands* v *Fletcher* six years early. Clearly in *Rylands* v *Fletcher* Blackburn J was applying the common law as the Exchequer Chamber in *Vaughan* v *Taff Vale Railway Co* understood it and the language he uses is reminiscent of Cockburn CJ's judgment. It may well be that as a relative newcomer to the bench in 1860[43] Blackburn J was influenced by these comments such that when he came to decide *Rylands* v *Fletcher* he remembered the words of Cockburn CJ.

On appeal *Rylands* v *Fletcher* came before the House of Lords. Lord Cairns and Lord Cranworth were in complete agreement with Blackburn J. Lord Cairns considered the principles on which the case was decided to be "extremely simple"[44] and both saw the nuisance cases of *Baird* v *Williamson*[45] and *Smith* v *Kendrick*[46] as providing ample authority. Lord Cranworth went even further back into judicial history to show that the principle in question had long been recognised.[47]

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42 Above n 41, 1354; as per Cockburn CJ.

43 Blackburn J had been appointed to the bench in June 1859 while *Vaughan* v *Taff Vale Railway Co* came before the Court of the Exchequer Chamber less than a year later in May 1860. Cockburn CJ, in contrast, had been on the bench for more than 10 years at the time this case was heard.

44 Above n 4, 338.

45 (1863) 15 CB (NS) 376; (1863) 143 ER 831.

46 (1849) 7 CB 515; (1849) 137 ER 205.

47 *Lambert and Olliot* v *Bessey* (1681) Sir T Raym 421; (1681) 83 ER 220.

B The Attitude of Later Courts

While the Exchequer Chamber and the House of Lords confidently applied a rule that they saw as having been in existence for 300 years, subsequent courts and commentators have experienced rather more difficulty in viewing *Rylands* v *Fletcher* as stating existing law. Many regarded, and continue to regard, *Rylands* v *Fletcher* as a landmark decision in the law of torts creating a new form of liability and a novel rule of law. Voices were raised in defence of the "established law" position but they tended to be isolated and drowned out by the excitement of discovering the limits of this "new" form of liability.

1 The English courts

In *Rickards* v *Lothian,* Lord Moulton stated that "[t]he legal principle that underlies the decision in *Rylands* v *Fletcher*...is nothing more than an application of the old maxim 'sic utere tuo alienum non lædas'."[48] In *Musgrove* v *Pandelis*[49] the English Court of Appeal expressed its view that "the principle of *Rylands* v *Fletcher* existed long before that case was decided."[50] But these sentiments were soon to give way to the extent that, in 1921, Lord Buckmaster was able to refer to "the familiar doctrine *established* by the case of *Rylands* v *Fletcher* [emphasis added]."[51]

An article published in 1949 by FH Newark,[52] suggesting that *Rylands* v *Fletcher* was a simple case of nuisance that had subsequently been misconstrued, was largely ignored by the judiciary. Newark considered the main principle involved in *Rylands* v *Fletcher* simply to be that negligence was not an element of nuisance. The only possible novelty in the case was that for the first time it was clearly decided that, as between adjacent occupiers, an isolated escape might give rise to liability. However, by this time *Rylands* v *Fletcher* was almost universally regarded as a new and distinct tort related to nuisance as "intersecting circles, not as the segment of a circle to the circle itself."[53] In the Privy Council Lord Wright went so far as to say that nuisance and the rule in *Rylands*

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48 Above n 9, 275.

49 [1919] 2 KB 43.

50 Above n 49, 47; as per Bankes LJ.

51 *Rainham Chemical Works Ltd* v *Belvedere Fish Guano Co*, above n 12, 471.

52 "The Boundaries of Nuisance" (1949) 65 LQR 480.

53 PH Winfield "Nuisance as a Tort" (1932) 4 CLJ 189, 195.

v *Fletcher* were different not only in their incidents and applications but also in their historical origins.[54]

Thus it appears that however the Exchequer Chamber and House of Lords may have regarded their decision, it has since "become the name of a separate chapter in the law of torts....The only question is what are its scope and limits."[55]

2 The New Zealand courts

In New Zealand similar confusion as to the origin of the rule in *Rylands* v *Fletcher* and its position within the law of torts has beset the judiciary. Hosking J in *Crisp* v *Snowsill*[56] considered *Rylands* v *Fletcher* to be an application of the old maxim *sic utere tuo ut alienum non lædas*, while Salmond J in *Knight* v *Bolton*[57] was concerned with "the rule of absolute liability *established* by *Rylands* v *Fletcher* [emphasis added]."[58] In *Irvine and Co Ltd* v *Dunedin City Corporation*[59] the full bench of the Court of Appeal made it abundantly clear that in their opinion *Rylands* v *Fletcher* was merely a form of nuisance. This case involved the escape of water from a pipe under the street surface. The water entered the basement of the plaintiff's premises and damaged goods therein. Counsel for both parties agreed that the sole question was whether the doctrine of *Rylands* v *Fletcher* was applicable given that the waterworks system was constructed and maintained under statutory authority. Despite this, in the first line of his judgment Myers CJ states that the "plaintiff's action is based solely upon nuisance."[60] He then goes on to consider *Green* v *Chelsea Waterworks Co*[61] and *Charing Cross Electricity Supply Co* v *Hydraulic Power Co*[62], both cases involving *Rylands* v *Fletcher* liability, before concluding that "the condition of things in the present case amounted to a nuisance."[63]

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54 *Northwestern Utilities Ltd* v *London Guarantee and Accident Co* [1935] AC 108, 119.

55 *Benning* v *Wong*, above n 22, 297; as per Windeyer J.

56 [1917] NZLR 252.

57 [1924] NZLR 806.

58 Above n 57, 811. Note that, as Sir Robin Cooke says in "The Condition of the Law of Tort", above n 5, 13: "*Rylands* v *Fletcher* was never absolute liability because of the act of God and act of a stranger defences."

59 [1939] NZLR 741.

60 Above n 59, 749.

61 (1894) 70 LT 547.

62 Above n 12.

63 Above n 59, 767.

The other members of the Court express similar sentiments. Ostler J states, in consecutive paragraphs, first, that the plaintiff company bases its claim entirely upon nuisance and then that counsel for the plaintiff contends that the defendant corporation is liable under the rule in *Rylands* v *Fletcher.*[64] Smith J, while discussing *Rylands* v *Fletcher* liability throughout his judgment, comes to the conclusion that the escape created a nuisance.

Since that time New Zealand courts have followed the international trend and have applied *Rylands* v *Fletcher* as an independent tort. However they have not forgotten its origins. While Hardie Boys J in *AS & AC Chaffey Ltd* v *Hobson*[65] stated that whether the rule in *Rylands* v *Fletcher* was simply an aspect of nuisance is a debatable question, Pritchard J in *Geothermal Produce New Zealand Ltd* v *Goldie Applicators Ltd*[66] was less coy stating that "[t]he rule in *Rylands* v *Fletcher* is a development from the law of nuisance: liability under the rule will often co-exist with liability under the law of nuisance."[67]

C *The Attitude of the House of Lords in Cambridge Water*

The judgment of the House of Lords in *Cambridge Water* represents a startling judicial about face. Instead of following the general trend of English courts to regard *Rylands* v *Fletcher* as a separate category of tortious liability, the House of Lords expressly adopts Newark's view of the origin of the rule in *Rylands* v *Fletcher.* Lord Goff is of the opinion that to regard the rule "essentially as an extension of the law of nuisance to cases of isolated escapes from land"[68] would lead to a "more coherent body of common law principles".[69] By acknowledging *Rylands* v *Fletcher's* nineteenth century nuisance origins the House of Lords are more easily able to bring it into line with twentieth century concepts of nuisance.

V FORESEEABILITY IN *RYLANDS* V *FLETCHER*

The historical connection between *Rylands* v *Fletcher* liability and nuisance played a large role in persuading Lord Goff that foreseeability was an element of *Rylands* v

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64 Above n 59, 768.

65 Unreported, 30 September 1988, High Court Christchurch Registry CP 10/87.

66 Unreported, 17 February 1983, High Court Rotorua Registry A 26/81.

67 Above n 66, 34.

68 Above n 1, 76.

69 Above n 1, 76.

Fletcher liability. Having acknowledged *Rylands* v *Fletcher*'s nuisance origins, Lord Goff went on to examine the relevance of foreseeability in nuisance. He saw the recent development of the law of negligence as strongly pointing to a requirement that the type of harm caused should be a prerequisite for liability in nuisance as it is for negligence. There was, in Lord Goff's view, no justification for a plaintiff to be in a stronger position with respect to interferences with land than personal injuries.

A Analogy with Nuisance

Lord Goff found support for his intuitive position that foreseeability was an element of nuisance in the decision of the Privy Council in *The Wagon Mound (No 2).*[70] This case has been generally considered to settle the law to the effect that foreseeability of harm is a requirement for liability in all forms of nuisance:[71]

> It is quite true that negligence is not an essential element in nuisance. Nuisance is a term used to cover a wide variety of tortious acts or omissions and in many negligence in the narrow sense is not essential...although negligence may not be necessary, fault of some kind is almost always necessary and fault generally involves foreseeability.

While the *Wagon Mound (No 2)* involved public nuisance, the Privy Council was of the opinion that this foreseeability of harm requirement was common to all nuisance actions.[72] This was confirmed in *Hiap Lee (Cheong Leong and Sons) Brickmakers* v *Weng Lok Mining Co Ltd*[73] where foreseeability was considered a part of private nuisance liability.[74]

1 What must be foreseeable in nuisance?

In the course of his judgment in the *Wagon Mound (No 2)* Lord Reid stated that[75] "[i]t is not sufficient that the injury suffered by the respondent's vessel was the direct result of the nuisance if that injury was in the relevant sense unforeseeable." Foreseeability in the relevant sense involved an analysis of whether a reasonable person

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70 Above n 2.

71 Above n 2, 717; 639.

72 Above n 2, 717; 640.

73 [1974] 2 Mal LJ 1 (Privy Council).

74 Similarly in New Zealand in *Clearlite Holdings Ltd* v *Auckland City Corporation* [1976] 2 NZLR 729.

75 Above n 2, 717; 640.

"having the knowledge and experience of the chief engineer of the Wagon Mound would have known that there was a real risk of the oil on the water catching fire".[76] Later cases[77] have further explained this foreseeability requirement as being foreseeability of the type or kind of damage in suit:[78]

> The present view is that all loss of a kind which could be foreseen is recoverable. Provided the loss is of a foreseeable kind, the wrongdoer will be held liable for all of it, even though its extent was unforeseeable or it arose in an unforeseeable manner.

So while the type of damage that occurred must be foreseeable the precise manner in which it came about and its extent need not be foreseeable.[79] In the *Wagon Mound (No 2)* it was held to be foreseeable that the oil might alight and thus fire damage was a foreseeable type of harm for which liability in nuisance could be imposed. The role of foreseeability established by the *Wagon Mound* litigation has been summarised in *Koufos* v *C Czarnikow Ltd (The Heron II)* [80] to the effect that "the defendant will be liable for any type of damage which is reasonably foreseeable as liable to happen even in the most unusual case...."

B Indications of Foreseeability by Blackburn J

Lord Goff found further support for the introduction of a foreseeability of harm requirement to *Rylands* v *Fletcher* liability in the judgment of Blackburn J in *Fletcher* v *Rylands*:[81]

> Blackburn J spoke of 'anything *likely* to do mischief if it escapes'; and later he spoke of something 'which he *knows* to be mischievous if it gets on to his neighbour's [property]', and the liability to 'answer for the natural *and anticipated* consequences'.... The general tenor of his statement of principle is therefore that knowledge, or at least foreseeability of the risk, is a prerequisite of the recovery of damages under the principle; but that the principle is one of strict liability in the sense that the defendant

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76 Above n 2, 718; 643.

77 *Hiap Lee (Cheong Leong and Sons) Brickmakers* v *Weng Lok Mining Co Ltd*, above n 73; *Geothermal Produce New Zealand Ltd* v *Goldie Applicators Ltd*, above n 67.

78 *Geothermal Produce New Zealand Ltd* v *Goldie Applicators Ltd*, above n 67, 85.

79 Fleming, above n 6, 211.

80 [1969] 1 AC 350, 385-386; as per Lord Reid.

81 Above n 1, 73.

> may be liable notwithstanding that he has exercised all due care to prevent the escape from occurring.

In addition Blackburn J explains the liability for the escape of cattle (a liability he regarded as analogous to that applicable in the case before him) as being limited to damage which could be expected to result. Thus the owner of the cattle would be answerable for the trampling and eating of grass but not for any injury to people as it is understood that this is not in the general nature of tame animals. However, "if the owner knows that the beast has a vicious propensity to attack man, he will be answerable for that too."[82] Thus it appears that Blackburn J did regard foreseeability of the type of harm as a prerequisite for liability under the rule that he "established". However, this does not necessarily mean that Lord Goff was completely in tune with Blackburn J's intentions. We must look to the role intended for foreseeability.

1 What form of foreseeability did Blackburn J intend?

Blackburn J was concerned solely with foreseeability of the type of harm. Thus he would impose liability on the escape of cattle for the trampling and eating of grass, but not for the kicking or goring of a person unless the animal's propensity for such violence was known. John Rylands and Jehu Horrocks would clearly have escaped liability if foreseeability of the way in which the harm occurred had been a requirement of liability. While the flooding of Thomas Fletcher's mine could be said to have been of a type foreseeable on the escape of a large body of water (ie flooding) the way in which it occurred was completely unforeseeable - the defendants were unaware of the existence of the mine shafts through which the water escaped. Thus it could be said that while the escape itself was unforeseeable, the type of damage that was suffered was foreseeable. Foreseeability of the way in which the harm occurred played no part in Blackburn J's judgment.

Further evidence that Blackburn J's judgment cannot be taken to adopt foreseeability of the way in which the harm occurred (ie foreseeability of the escape) comes in his suggested defences to liability: act of God and viz major. These defences both relate to the foreseeability of the event causing the harm. An act of God is an occurrence caused by the forces of nature "which no human foresight can provide against, and of which human prudence is not bound to recognise the possibility...."[83] Similarly with the defence of viz major, if the defendant can show that the cause of the

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82 Above n 3, 280.

83 As per Lord Westbury in *Tennent* v *Earl of Glasgow* 2M (HL) 22, 25-27.

escape and consequent damage was some intervening event, such as the act of a stranger, then liability will be avoided unless "the act was of the kind which the defendant could reasonably have foreseen and guarded against."[84]

If liability under the rule Blackburn J was applying required foreseeability of the way in which the harm occurred these defences would clearly be redundant. Where an escape and damage was the result of an act of God or viz major the necessary foreseeability to ground an action could not be established and the defendant would not need to raise a defence at all. This point is illustrated by the case of *Nichols* v *Marsland.*[85] In that case the defendant had ornamental pools on her property which, due to a rainfall of unprecedented proportions, flooded and damaged a neighbouring property. The defendant escaped liability under the rule in *Rylands* v *Fletcher* on the ground that the rainfall was so unusual as to be an act of God. If foreseeability of the way in which the harm occurred was an element of *Rylands* v *Fletcher* liability, the issue of whether the rainfall constituted an act of God would have added nothing to the inquiry. Once it was established that the rainfall was unforeseeable liability would be negated and its categorisation as an act of God would not be relevant.

C How has Foreseeability in the Rule in Rylands v Fletcher Been Seen Since?

Once again, despite Blackburn J being very clear as to an aspect of the rule he was applying, subsequently the position became highly confused. Part of the problem sprang from the concept that *Rylands* v *Fletcher* was a new strict liability tort and thus no hint of fault theory could be seen to impinge upon it. However, as is pointed out by Salmond and Heuston[86] a concept of foreseeability is not necessarily incompatible with strict liability. Even if the type of harm must be foreseeable, liability may still be strict in the sense that it will not avail the defendants to claim that they did all they could to avoid the harm.

The concept of 'dangerous thing'[87] would appear to be a vehicle for this foreseeability requirement. The approach of the English common law has largely been to

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84 Dias, above n 6, 1432.

85 (1875) LR 10 Ex 255.

86 Salmond *Salmond and Heuston on Torts* (20 ed, Sweet & Maxwell, London, 1992) 324-325.

87 A modern formulation of the requirement for a thing "likely to do mischief".

deal with the foreseeability of the thing being dangerous on escape[88]. Lord Porter in *Read* v *J Lyons & Co Ltd*[89] stated that an object could be classified as being dangerous in the sense that if it escapes it will do damage. Similarly in *Mulholland & Tedd Ltd* v *Baker*[90] Asquith J spoke of "an object likely to do damage if it is not kept under control."[91] Many of the major text writers agree with this approach;[92] however, there has been some confusion.

Clerk and Lindsell, for example, agree that the test is "that they are things likely to do damage if they escape"[93] but then go on to warn that "it is necessary to keep in mind the essential feature of the rule that it is applicable where no harm at all is reasonably foreseeable."[94] Fleming, while eschewing foreseeability as an element of the rule in *Rylands* v *Fletcher*, proposes that the harm done "must result from a risk which called for the imposition of strict liability."[95] But surely this is nothing more than requiring that the type of harm be foreseeable. Fridman provides a more pragmatic approach when he says:[96]

> Yet the operation of the rule does not depend upon what is foreseeable by the reasonable man, or preventable. It seems to depend more upon the willingness of a court to declare that the thing or object which resulted in the damage to the plaintiff is capable of falling within Blackburn J.'s category of "dangerous things", things likely to cause mischief if they escape.

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88 Note that foreseeability has never been extended to the likelihood of the escape in determining liability under the rule in *Rylands* v *Fletcher*. Nor has the gravity of the risk involved has ever been a relevant consideration under the rule.

89 Above n 11, 176.

90 [1939] 3 All ER 253.

91 Above n 90, 256.

92 "That a thing is 'dangerous' simply means that it is generally accepted as having the potential to cause damage." As per Salmond and Heuston on Torts, above n 86, 324. Trindale & Cane, above n 14, view foreseeability (that the thing would be likely to do damage on escape) as a minimal requirement. See also Todd (ed) *The Law of Torts in New Zealand* (Law Book Co Ltd, North Ryde, New South Wales, 1991).

93 Dias, above n 6, 1423.

94 Dias, above n 6, 1427.

95 Fleming, above n 6, 339.

96 Fridman, above n 7, 232.

Similar confusion has been evident in the case law. In *West* v *Bristol Tramways*[97] (a case cited before the House of Lords in *Cambridge Water*) foreseeability of harm appears to have been considered largely irrelevant in determining liability under the rule in *Rylands* v *Fletcher*. In that case creosoted wooden blocks, laid by the defendant between the rails of their tramline, released fumes resulting in damage to the plaintiff's plants in his adjoining nursery garden. The defendants were found to have had no knowledge of the possibility of such damage and evidence showed that such mischief was unknown despite several years of use of this type of creosoted wood. In the Divisional Court, Phillimore J held that it is no justification for the defendant to claim that "he did not know, or even that there was no reason why he should know, that the injury would be caused."[98] However the jury had already determined that creosote was a dangerous thing although on what grounds we are not told. If, as seems likely, foreseeability of harm plays some role in the determining whether something is a "dangerous thing" then Phillimore J's comments could only relate to knowledge, or means of knowledge, of the way in which the harm occurred. Creosote itself may be a dangerous thing because it is foreseeable that, on escape, it may damage plants and shrubs. What the evidence apparently showed was not that creosote was not known to cause this type of harm, but rather that an escape of creosote from these wooden blocks had not occurred in the several years that they had been in use. The defendants are effectively in exactly the same position as John Rylands and Jehu Horrocks found themselves in 42 years earlier. Thus the finding of liability in this case can be seen as entirely compatible with the judgment of Blackburn J in *Rylands* v *Fletcher*. The foreseeability of the type of harm having been established by the jury, Phillimore J was simply confirming that the defendants will be liable for that harm no matter how it is caused (subject to the defences of Act of God and viz major).

Nor do the judgments of the Court of Appeal in *West* v *Bristol Tramways* negate the existence of a foreseeability element in *Rylands* v *Fletcher* liability. Lord Alverstone CJ is concerned to negate counsel for the defendant's proposition that the defendant "is not liable unless the plaintiff shews that the thing introduced on to the land was, to the knowledge of the defendant, likely to escape and cause damage."[99] This part of his decision says no more than that foreseeability of the escape (ie the way in which the harm occurred) is not a prerequisite to liability under the rule in *Rylands* v *Fletcher*. This would be enough to dispose of this issue but Lord Alverstone CJ goes on and, with respect, becomes somewhat confused. In complete contradiction to the rule as

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97 [1908] 2 KB 14.

98 Above n 97, 16 (at footnote 1).

99 Above n 97, 20.

formulated by Blackburn J and Lord Cairns, Lord Alverstone CJ states that it is a defence for the defendant to show that the thing brought on to the land was "according to the common experience of mankind...not...dangerous, or likely to cause mischief."[100] Thus while Blackburn J would impose liability only for things "likely to do mischief" (ie "dangerous things"), Lord Alverstone CJ is prepared to impose liability for all things unless the defendant can prove that the thing in question is not likely to do mischief. His Honour appears to have forgotten that the jury had already determined that creosote was a dangerous thing and thus a thing likely to do mischief. This is illustrated by his statement that "there was no evidence in this case, that, according to the common experience of mankind creosote was not likely to cause mischief."[101] The jury having already determined this question such evidence would be irrelevant at the appellate stage.

Megaw LJ in *Leakey* v *National Trust*[102] expressed similar sentiments to those of Phillimore J in *West* v *Bristol Tramways* when he said:[103]

> In *Rylands* v *Fletcher* the defendant was held to be liable because he had erected or brought on his land something of an unusual nature, which was essentially dangerous in itself. That, said Wright J in *Noble* v *Harrison* [[1926] 2 KB 332,342], 'expresses the true principle of *Rylands* v *Fletcher*'. The decision in that case was that, on such facts there was strict liability. It would be no answer for the defendant to say 'I did not know of the danger and had no reason to know of it'.

This must be correct. In *Rylands* v *Fletcher*, Rylands and Horrocks were held to be liable despite the fact that they did not know of the existence of the mine shafts communicating with Fletcher's mine, nor did they have any reason to know of them. The body of water in *Rylands* v *Fletcher* was a "dangerous thing" (to use the modern terminology) because it was foreseeable that, on escape, it might do mischief. Knowledge, or the means of knowledge, of the way in which the water might escape played no role in determining liability. This is a fundamental part of the decision in *Rylands* v *Fletcher*. Thus Megaw LJ's comments need not be seen as negating a role for foreseeability in *Rylands* v *Fletcher* liability.

In addition to *West* v *Bristol Tramways*, counsel for the plaintiff in *Cambridge Water* relied on the case of *Rainham Chemical Works Ltd* v *Belvedere Fish Guano*

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100 Above n 97, 21.

101 Above n 97, 21.

102 [1980] 1 All ER 17.

103 Above n 102, 30.

Co[104] to show that foreseeability has no role in *Rylands* v *Fletcher* liability. In that case the plaintiff's property was damaged by an explosion in an explosives factory. The explosion had resulted from the storage of large quantities of dinitrophenol (DNP) close to other inflammable materials. The issue before the courts was whether the directors of the company could be held liable under the rule in *Rylands* v *Fletcher* notwithstanding that there was some question of their knowledge of the storage and characteristics of the DNP. The essence of the decision was that persons responsible for the bringing of dangerous substances upon their land may be liable whether or not they were aware of the danger at the time.[105] This, in itself, does not negate the existence of a foreseeability element in *Rylands* v *Fletcher*. Rather it simply means that where a defendant has brought a dangerous thing on to his or her land, s/he will be liable for damage consequent on escape and it will be no defence to say, "I personally did not know that it was a dangerous thing." It was apparently admitted before the trial judge that the person in possession of the DNP was liable under the rule in *Rylands* v *Fletcher*. This admission effectively designates DNP as a "dangerous thing" in these circumstances (just as water was a "thing likely to do mischief" in the circumstances of *Rylands* v *Fletcher*). Concern has therefore centred upon Younger LJ's comments that DNP "was not regarded by chemists as really, if at all, dangerous",[106] that it "was never known to have exploded",[107] and that there is "no real risk" in the storage of DNP.[108] However, these comments are countered by statements made by other members of the Court of Appeal. Lord Sterndale MR, for example, states that "the evidence shows in my opinion that the chemists were of the opinion that it [DNP] was not free from danger."[109] Atkin LJ was in no doubt that DNP was known to be dangerous.[110] In the House of Lords, Lord Sumner was of the opinion that DNP was a dangerous explosive when stored in large quantities[111] and Lord Parmoor considered that while DNP was not itself dangerous, the circumstances in which it was stored in this case made it dangerous.[112] Thus the decisions in this case cannot be said to support, with any great weight, a contention that foreseeability is not an element of *Rylands* v *Fletcher* liability.

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104 Above n 12 (House of Lords); [1920] 2 KB 487 (Court of Appeal).

105 Above n 12, 471 (House of Lords); above n 104, 500 (Court of Appeal).

106 Above n 104, 515 (Court of Appeal).

107 Above n 104, 515 (Court of Appeal).

108 Above n 104, 520 (Court of Appeal).

109 Above n 104, 500 (Court of Appeal).

110 Above n 104, 503 (Court of Appeal).

111 Above n 12, 479 (House of Lords).

112 Above n 12, 485 (House of Lords).

More problematic, from this point of view, is Bankes LJ's judgment in *Musgrove* v *Pandelis*,[113] a case involving the escape of fire which had started in the carburettor of a car in the defendant's garage. Bankes LJ was of the opinion that "the expectation of danger is not the basis of the principle of *Rylands* v *Fletcher*. A thing may be dangerous although the danger is unexpected."[114] He then goes on to agree with the trial judge that the motor car was dangerous within that principle but does not explain why this is so. Duke LJ, however, does outline the factors making the car a dangerous thing:[115]

> Taking together the presence of the petrol, and the production of the inflammable gas, or those combustibles together with the inexperience of the person placed in charge of them, it is impossible to say that this is not an instance of the principle laid down by Blackburn J.

These are clearly factors related to the foreseeability of fire, that is the type of harm which occurred. The mere presence of petrol in the fuel tank of a car is enough to make fire a foreseeable risk because it is entirely foreseeable that petrol might catch alight (just as the presence of oil in the *Wagon Mound (No 2)* was enough to make fire a foreseeable risk). In light of this, what is it that Bankes LJ intended by his statement that a thing may be dangerous even if the danger is unexpected? If he meant that foreseeability plays no part in the determination then it is difficult to reconcile his judgment with that of Duke LJ who purported to agree with him. Similarly this meaning cannot be reconciled with Blackburn J's "thing likely to do mischief" on escape. However, this is not the only possible interpretation of Bankes LJ's comment. His statement was made in response to a contention by counsel for the applicant that "a motor car is not a dangerous thing unless it is in such a condition that an accident is to be apprehended."[116] What counsel appears to be saying is that it is not enough for the car to have a full tank of petrol thus making fire a foreseeable type of harm, it must also be foreseeable that the risk would be realised. But this was not the law in relation to *Rylands* v *Fletcher* liability at the time of this case. It had always been enough to demonstrate that the type of harm was foreseeable; foreseeability of the escape itself was irrelevant.[117] The only question to be asked was

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113 [1919] 2 KB 43 (Court of Appeal).

114 Above n 113, 47.

115 Above n 113, 51. Similarly in *Perry* v *Kendrck's Transport Ltd*, above n 22, a bus was considered to be a dangerous thing and a thing "likely to do mischief if it escapes" because its tank contained inflammable petrol vapour.

116 Above n 113, 47.

117 "[T]here is some underlying foreseeability concept behind the classification of dangerous things to which the rule attaches even though foreseeability as regards the actual escape is an

whether a thing was likely to do mischief on escape, not whether the thing was likely to escape and do mischief.[118] As Eeklaar points out,[119] where the elements of "dangerous thing" and "non-natural user" are satisfied by the bringing and collecting of something on a property, the occupier will be liable for damage caused on escape whether or not the defendant "knew or ought to have known, of factors making the escape probable and whether or not they did take or could have taken precautions to prevent it."[120] It may be that this is the distinction that Bankes LJ was attempting to emphasise rather than eschewing foreseeability per se as the determinant of "dangerous thing". In this way the judgments of Bankes and Duke LJJ may be reconciled.

The 1878 case of *Crowhurst* v *Amersham Burial Board*[121] provides further evidence of foreseeability's role under the rule in *Rylands* v *Fletcher*. This case involved the poisoning of the plaintiff's horse by its having fed upon the leaves of the defendants' yew tree. In the course of his judgment Kelly CB made specific reference to the level of knowledge required under the rule:[122]

> It does not appear from the case what evidence was given in the county court to prove, either that the defendants knew that yew trees were poisonous to cattle, or that the fact was common knowledge amongst persons who have to do with cattle. As to the defendants' knowledge it would be immaterial, as whether they knew it or not they must be held liable for the natural consequences of their own act. It is, however, distinctly found by the judge "that cattle frequently browse on the leaves and branches of yew trees when within reach, and not unfrequently [sic] are poisoned thereby is a fact generally known;" and by this finding, which certainly is in accordance with experience, we are bound.

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unnecessary ingredient for liability." As per D Carroll "The Rule in *Rylands* v *Fletcher* : A Re-assessment" (1973) 8 Irish Jurist 208, 223.

118 Thus in *Balfour* v *Barty-King* [1956] 1 WLR 779, 791 Havers J determined that a blowlamp was within the ambit of *Rylands* v *Fletcher* "things" because "it was likely to do mischief if the dangerous element in it, that is to say, the fire, escaped." No analysis of the likelihood of escape was required.

119 JM Eeklaar "Nuisance and Strict Liability" (1973) 8 Irish Jurist 191.

120 Above n 119, 205.

121 (1878) 4 Ex D 5.

122 Above n 121, 11-12.

Thus whether the defendants did in fact foresee that the damage might occur was irrelevant, but whether such damage was within common knowledge (and therefore foreseeable) was central to the finding of liability.

Foreseeability thus appears to have played a role in determining liability under the rule in *Rylands* v *Fletcher* since the beginning. Further support for this contention comes in the judgment of Windeyer J in the Australian High Court in the case of *Benning* v *Wong*.[123] His honour sees the foundation of the rule in *Rylands* v *Fletcher* as being "that the bringing of things with mischievous possibilities or propensities upon land creates a duty to confine them there."[124] Windeyer J then noted that the Privy Council in *Wagon Mound (No 2)* held foreseeability of harm to be an element of nuisance and went on to say:[125]

> In a *Rylands* v *Fletcher* case that requirement is, I consider, satisfied if, in the particular circumstances, the defendant ought reasonably to have been aware that the thing he had accumulated on his land was likely to do harm if it should escape.

Again there is no requirement that the escape should, in anyway, be foreseeable. Foreseeability goes only to the harm that would be consequent on escape.

D Is the Concept of Foreseeability as Part of the Original Formulation of the Rule in Rylands v Fletcher Compatible with the Rule's Nuisance Origins?

An analysis such as Lord Goff's which, on the one hand, acknowledges *Rylands* v *Fletcher*'s nuisance origins and, on the other, establishes that foreseeability had been an element of the rule since its inception initially gives rise to a certain degree of conceptual difficulty. The problem stems from the idea that at the time *Rylands* v *Fletcher* was decided (and indeed until the decision in the *Wagon Mound (No 2)*) nuisance was a strict liability tort and as such foreseeability played no part. Although apparently never authoritatively stated in any case, it was assumed by many that this was the position. The concept of foreseeability in a strict liability tort was regarded as an oxymoron. Foreseeability is an element of fault theory and to many strict liability based upon fault was not strict liability at all. This attitude, it is submitted, rests on too narrow a concept of strict liability. Liability may remain strict although it extends only to foreseeable injury. It exists in that no amount of care will absolve a defendant of liability. To say

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123 Above n 22.

124 Above n 22, 298.

125 Above n 22, 320.

that liability resting on foreseeability cannot be strict is to ignore the most important difference between strict liability and negligence - the ability to avoid liability by the taking of reasonable care.[126] As Dias says:[127]

> The root difference between negligence and strict liability is that negligence presupposes unreasonable (careless) behaviour in the face of the foreseeable likelihood that the harm would occur, while strict liability does not rest on foreseeability that the event in question was likely to happen. This is why in strict liability situations a defendant is liable no matter how reasonably he may have acted.

It is accepted that the cattle trespass cases are examples of strict liability[128] and yet foreseeability has long played a role in such cases. As Blackburn J pointed out in *Fletcher* v *Rylands*:[129]

> The case that has most commonly occurred, and which is most frequently to be found in the books, is as to the obligation of the owner of cattle which he has brought on his land, to prevent their escaping and doing mischief. The law as to them seems to be perfectly settled from early times; the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape; that is with regard to tame beasts, for the grass that they eat and trample upon, though not for any injury to the person of others, for our ancestors have settled that it is not the general nature of horses to kick, or bulls to gore; but if the owner knows that the beast has a vicious propensity to attack man, he will be answerable for that too.

In more conventional language this amounts to saying that liability does not extend beyond foreseeable damage.[130] Despite this cattle trespass is accepted as being a form of strict liability closely analogous to the rule in *Rylands* v *Fletcher*.

Blackburn J had no doubts that the rule that he was applying was one of strict liability and yet he expressly referred to the foreseeability involved in cattle trespass and to the requirement of a thing "likely to do mischief on escape".

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126 "The whole point of *Rylands* v *Fletcher* liability is that the exercise of care is irrelevant"; as per Menzies J in *Benning* v *Wong*, above n 22, 278.

127 Dias "Trouble on oiled waters: Problems of the Wagon Mound (No 2)" (1967) 25 CLJ 62.

128 Dias, above n 6; Fleming, above n 6; Winfield, above n 23; Todd, above n 92.

129 Above n 3, 280.

130 Fleming, above n 6, 356.

It is submitted that foreseeability is not incompatible with the concept of strict liability. Further, while the *Wagon Mound (No 2)* addressed the issue of foreseeability in nuisance directly for the first time, in fact the finding that foreseeability is an element of nuisance is not incompatible with earlier authority. In the 1839 case of *Chadwick* v *Trower*[131] the question before the Exchequer Chamber was whether the law imposes a duty upon a defendant, when pulling down a wall on his or her property, to avoid damaging an adjoining vault on the neighbouring property, the existence of which the defendant was unaware. Although the language of Parke B is somewhat unclear, the case has subsequently been considered to have been decided on the basis of nuisance.[132] The Court in *Chadwick* v *Trower* were unanimously of the opinion that even supposing that there was a duty on the defendant not to injure the plaintiff's vault when the defendant is cognisant of the vault's existence, "no such obligation can arise where there is no averment that the defendant had notice of its existence".[133] The defendant was not liable for the damage to the plaintiff's vault because he was unaware of the vault's existence. In other words, the damage which occurred was unforeseeable.

Almost all nuisance cases prior to the *Wagon Mound (No 2)* fail to consider the issue of foreseeability but it appears that none are inconsistent with its application to nuisance. There seems to have been no binding authority where liability in nuisance was found in respect of damage that could be said to be completely unforeseeable.[134]

VI FORESEEABILITY'S ROLE IN *CAMBRIDGE WATER*

In *Cambridge Water* Lord Goff can be seen to be continuing the common law trend by applying a concept of foreseeability of the the type of harm to *Rylands* v *Fletcher* liability:[135]

> [I]t appears to me to be appropriate now to take the view that foreseeability of damage of the relevant type should be regarded as a prerequisite of liability in damages under the rule.

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131 (1839) 133 ER 1.

132 See *Dalton* v *Angus* (1881) 6 AC 740, 746; *Ilford Urban District Council* v *Beal and Judd* [1925] 1 KB 671.

133 Above n 131, 5.

134 Winfield, above n 23, 384.

135 Above n 1, 76.

However, it is his application of this foreseeability requirement to the facts of the case before him which must be assessed to determine the precise role he allocated to foreseeability.

Early in his judgment Lord Goff isolates four factors which he saw as being of particular relevance and it is on the basis of these that he decided the case:[136]

> (1) The spillage of the solvent and its seepage into the ground beneath the floor of the tannery occurred during the period which ended in 1976 as a result of regular spillages of small quantities of the solvent onto the tannery's floor.
>
> (2) The escape of dissolved solvent from the pools of neat solvent which collected at or towards the base of the chalk aquifers beneath the tannery into the chalk aquifers under the adjoining land and thence in the direction of the defendant's bore hole must have begun at some unspecified date well before 1976 and be still continuing to the present day.
>
> (3) As held by the Judge, the seepage of the solvent beneath the floor of the tannery down into the chalk aquifers below was not foreseeable by a reasonable supervisor employed by the tannery, nor was it foreseeable by him that detectable quantities of the solvent would be found down-catchment, so that he could not have foreseen, in or before 1976, that the repeated spillages would lead to any environmental hazard or damage. The only foreseeable damage from spillage of the solvent was that somebody might be overcome by fumes from a substantial spillage of the solvent on the surface of the ground.
>
> (4) The water so contaminated at the bore hole has never been held to be dangerous to health. But under criteria laid down in the UK Regulations, issued in response to the EEC Directive, the water so contaminated was not 'wholesome' and, since 1985, could not lawfully be supplied in this country as drinking water.

The third factor appears to go further than required and incorporates facts that were, at least prior to *Cambridge Water*, irrelevant to liability under the rule in *Rylands* v *Fletcher*. The fact that seepage of the PCE through ECL's concrete floor and into the chalk aquifer and its consequent movement down-catchment was unforeseeable is irrelevant. These facts simply tell us that the escape itself was unforeseeable and foreseeability of escape has never been an element of the rule in *Rylands* v *Fletcher*. The traditional inquiry has

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136 Above n 1, 66.

always assumed escape, the actual likelihood of the escape being irrelevant. The question to be addressed is whether, on escape, harm of the type which occurred was foreseeable. In viewing the foreseeability of seepage and down-catchment movement as relevant, Lord Goff appears to be asking a very different question: was it foreseeable that the PCE would escape and cause this type of damage? He fails to separate the escape from the damage. While on the facts of *Cambridge Water* the two are, for practical purposes, inextricably linked, for the purposes of the foreseeability inquiry only the type of damage is relevant. Lord Goff seems to be requiring foreseeability of both the type of harm that occurred and the way in which it happened to establish liability under the rule in *Rylands* v *Fletcher*. This would clearly be inconsistent with the previously accepted common law position as outlined in this paper. However, it may be that Lord Goff's judgment can be read in a manner more consonant with established common law.

The type of damage at issue in this case is contamination of drinking water by PCE. The escape of PCE occurred during the period ending 1976. However, on the facts before the court, PCE appears not to have been regarded as a contaminant of drinking water until 1980 when the Council of the European Communities issued a directive relating to the quality of water intended for human consumption. Thus it is impossible, at the time of the escapes, to say that contamination of drinking water was a reasonably foreseeable type of harm that might result from the escape of PCE. The only type of damage foreseeable from the escape of PCE was, at the time, that someone would be overcome by fumes.[137] As such there could be no liability under the rule in *Rylands* v *Fletcher* because the harm in issue was unforeseeable.

Thus there are two possible interpretations of the decision in *Cambridge Water*. On the first, the foreseeability element of the rule was not established because the course of events leading to the damage was not reasonably foreseeable. On the second, the foreseeability element was not satisfied because it was only after the event that what occurred came to be regarded as damage. The former would be a development in the doctrine of *Rylands* v *Fletcher*, the latter merely a confirmation of what appears, on this writer's analysis, to have been existing common law.

There is no express indication in Lord Goff's judgment as to which of the two approaches he is taking. His reliance on the facts above suggests that he was requiring foreseeability of both the type of harm and the way in which it occurred. However, a comment late in his judgment could be seen to indicate otherwise:[138]

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137 Above n 1, 64.

138 Above n 1, 77.

> [W]hen ECL created the conditions which have ultimately led to the present state of affairs - whether by bringing the PCE in question onto its land, or by retaining it there, or by using it in its tanning process - it could not possibly have foreseen that damage of the type now complained of might be caused thereby. Indeed, long before the relevant legislation came into force, the PCE had become irretrievably lost in the ground below.

A *Which Analysis is Preferable?*

Clearly an analysis which rests easily with over 100 years of consistently applied precedent is to be preferred to one which would appear, without providing any justification, to ignore established law. Further, the consequences of adopting an approach extending foreseeability to escape mitigate against such an approach. Requiring foreseeability of escape in order to establish liability under the rule in *Rylands* v *Fletcher* extends the role of the foreseeability inquiry well beyond that in nuisance. On this analysis it would be possible to avoid liability for a "dangerous thing" on your land by storing it in a way which makes escape unforeseeable. This brings the rule in *Rylands* v *Fletcher* very close to negligence. Liability could be avoided under the rule by the exercise of care. Strict liability would remain only where care was not taken to render escape unforeseeable or where the "thing" could not be stored in a manner that made escape unforeseeable.

Such an approach may illustrate negligence's "unstoppable tendency to subsume under its heading the role of older nominate torts",[139] but it goes further than the House of Lords appear to have intended. Lord Goff was concerned to bring *Rylands* v *Fletcher* into line with twentieth century concepts of nuisance. He does not appear to have intended that *Rylands* v *Fletcher* liability be subsumed by negligence.

VII CONCLUSION

Although foreseeability appears to have been a part of the rule in *Rylands* v *Fletcher* since the rule's inception, until *Cambridge Water* the courts avoided direct consideration of its scope or even its existence. Fleming regards the *Wagon Mound (No 2)* as representing "[a]nother important step...in consolidating the fault element in the modern law of nuisance with the persuasive theory of negligence."[140] It seems that the same can be said of the decision in *Cambridge Water* with respect to the rule in *Rylands* v

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139 Markesinis "Negligence, nuisance and affirmative duties of action" (1989) 105 LQR 104, 104.

140 Fleming, above n 6, 444.

Fletcher. Both decisions reflect more openness to the idea of fault in strict liability and both can be seen as judicial recognition of existing fault elements in strict liability torts.

It has been said that this decision spells the end of *Rylands* v *Fletcher's* useful life as an independent cause of action.[141] Now that foreseeability has been recognised as an element of the rule in *Rylands* v *Fletcher* nuisance will provide a remedy in all cases in which *Rylands* v *Fletcher* is applicable. The acknowledgement of foreseeability's role in *Rylands* v *Fletcher* liability removes the perceived advantage that the rule held over nuisance. Today it can clearly be seen that there is no advantage to a plaintiff in choosing *Rylands* v *Fletcher*, rather than private nuisance, to ground an action for escape in the course of a non-natural use. Lord Goff states that *Rylands* v *Fletcher* should be regarded "essentially as an extension of the law of nuisance to cases of isolated escape"[142] but it is clear that today nuisance itself extends to isolated escapes.[143] Nuisance is the broader tort and as such it may be that *Rylands* v *Fletcher*'s days are numbered. What is clear, for the first time since 1866, is that strict liability in tort rests squarely upon fault.

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141 Pardy "Requiem for *Rylands v Fletcher: Cambridge Water v Eastern Counties Leather*" (1994) NZLJ 130, 130.

142 Above n 1, 78.

143 *British Celanese* v *Hunt*, above n 19.

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