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THE PRINCIPLE OF RYLANDS v. FLETCHER

The modern doctrine of strict liability for the escape of dangerous substances had its genesis in 1866, in the leading case of *Rylands v. Fletcher*.[1] The defendant mill owners decided to construct a water reservoir on their land for the purpose of supplying water to their factory. On the chosen site was a disused shaft of an abandoned mine, but owing to the negligence of the engineers, a firm of independent contractors who had been entrusted with the work, this fact was not discovered until the water broke into the shaft and flooded the plaintiff's adjoining mine through communicating passages. An arbitrator found that the defendants themselves had been ignorant of the existence of the old shaft and exonerated them for personal negligence. Nonetheless, they were held liable for the damage on the principle enunicated by Blackburn J., that a "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".[2]

The case did not precisely fit into any of the rules of tort liability recognised at the time. It was not trespass because the damage by flooding was not a direct and immediate consequence of the defendant's activity.[3] Nor was it an actionable nuisance because, apart from there being only an isolated escape and not a continuous or recurring invasion,[4] it was not contemplated for another decade that the employer of an independent contractor might in some circumstances become liable for a nuisance created in the course of the job.[5] Yet for all that, Blackburn J. seemed less conscious of propounding a novel principle than a mere generalisation of accepted rules. He could point to the analogies of cattle-trespass, nuisance by escaping fumes and an early precedent relating to the flow of filth from a privy;[6] and on one view, these instances of strict liability "wandered about, unhoused and unshepherded, except for a casual attention, in the pathless fields of jurisprudence, until they were met . . . by the mastermind of Mr Justice Blackburn who guided them into the safe fold where they have since rested. In a sentence epochal in its consequences this judge co-ordinated them all in their true category."[7] On the other hand, the

1. (1866) L.R. 1 Ex. 265, affd (1868) L.R. 3 H.L. 330.
2. (1866) L.R. 1 Ex. 265 at 279-280.
3. *Fletcher v. Rylands* (1865) 3 H. & C. 774 at 792; 159 E.R. 737 at 744 per Martin B.; *Read v. Lyons* [1947] A.C. 156 at 166. Conversely, an intentional release of a projectile falls to trespass, not *Rylands*: *Rigby v. Chief Constable* [1985] 1 W.L.R. 1242 at 1255.
4. It is probably no longer true that nuisance cannot be founded on isolated escapes: see below, p. 420. Conversely, *Rylands v. Fletcher* cases often involve conditions of some duration.
5. *Bower v. Peate* (1876) 1 Q.B.D. 321. See below, p. 391.
6. *Tenant v. Goldwin* (1703) 2 Ld Raym. 1089; 92 E.R. 222.
7. Wigmore, 7 Harv. L. Rev. 441 at 454 (1894).

decision was far more than a mere summary of the theory underlying these specific torts. Behind the screen of analogies drawn from existing precedents, it created new law by extending the incidence of strict liability to the general category of all inherently dangerous substances and making the occupier from whose land they escape responsible, even if he had used the utmost care and diligence in devising means for preventing their escape. Though it was arguable that the decision itself, as distinct from the reasoning, was linked to the finding of negligence by the contractors, subsequent interpretation has emphasised that a defendant cannot avail himself of the absence of all negligence on his part or of those over whom he has any measure of control.[8] He is charged with keeping them at his peril and excused only for an escape caused by an act of God or the unexpectable and malicious intervention of strangers.

Viewed against the background of the predominant fault theory, the decision seemed startling indeed. This is attested by the unfavourable reception it first encountered in American courts which reacted even more strongly to the facts of the case than to the legal principle.[9] It was difficult to accept the idea that the construction of a water reservoir was an outlandish activity fraught with exceptional risk rather than a commonplace, indeed indispensable undertaking, clearly justified on any cost/benefit scale.[10] But there is no evidence to support the suggestion[11] that the court deliberately espoused the cause of the dominant class of landed gentry against the interests of developing industry;[12] rather, its effect was to protect one industry (mining) against another (milling) because the latter was obviously a far better loss avoider. Whatever the true explanation of the reasons behind the decision, it found additional favour in more recent times among the proponents of "enterprise liability". Anyone, they contend, whose activity entails exceptional peril to others notwithstanding all reasonable safety precautions should fairly treat typical harm resulting from it as a cost item ("internalised"), which can be absorbed in pricing and passed on to the consumer, spread so thin that no one will be seriously hurt by it.[13] Even if the activity is not a business venture, the defendant should not prosecute it for his own purposes, unless he is willing to pay the price.[14] Besides, the cost of liability can be controlled by liability insurance.

Yet, despite this modern rationalisation and the general trend towards stricter liability, the rule in *Rylands v. Fletcher* has not evoked enthusiastic judicial response. Indeed, from its inception, it was subjected to a process of constriction which has greatly impaired its potential as a catalyst for a

8. *Dunn v. Birmingham Canal Co.* (1872) L.R. 7 Q.B. 244 at 259.
9. Paradoxically, this inauspicious start later changed to much more enthusiastic support than in the Commonwealth. See *Rest. 2d* §519; Prosser, *Selected Topics* (1953) ch. 3; Gregory, *Trespass to Negligence to Absolute Liability* 37 Va. L. Rev. 359 (1951).
10. But see Simpson, *Legal Liability for Bursting Reservoirs: The Historical Context of Rylands v. Fletcher*, 13 J. Leg. Stud. 209 (1984) who documents the impact of several contemporary dam disasters, but also the judicial ambivalence of how to deal with them.
11. This economic interpretation was advanced by Bohlen in his classical study, *Rule in Rylands v. Fletcher* 59 U. Pa. L. Rev. 298 (1911), reprinted in his *Studies* ch. 7.
12. Molly, 9 U. Chic. L. Rev. 266 (1942).
13. The Calabresi version of this theorem (above, p. 11) by contrast looks for optimal deterrence of accidents by higher prices and lessening consumer demand.
14. See Sharp, *Aristotle, Justice and Enterprise Liability*, 34 U. Tor. Fac. L. Rev. (1976).

or storage in bulk, while primarily reflecting the excessive danger, also promotes a sound distinction between utilities and private users based on their relative capacity for absorbing the loss.

The distinction between natural and non-natural use has served the function principally of lending the rule in *Rylands v. Fletcher* a desirable degree of flexibility by enabling the courts to infuse notions of social and economic needs prevailing at a given time and place.[45] Admittedly, it is not always handled intelligibly (or intelligently) under the screen of treating it as a question of fact; and by countenancing the notion of "reasonable user" tends to confuse strict liability with negligence. We must not lose sight of the fact that if "natural user" is given too wide a berth, it will quickly dismantle most of strict liability. Thus we should beware of the proposal[46] that approval of a particular use by a planning authority automatically qualify it as "natural" regardless of the risk it poses to the community, or occasional suggestions to exempt all activities redounding to the "general benefit of the community", such as nationalised industries[47] or even the manufacture of munitions in time of war.[48] Not only is there no warrant in principle for prejudicing private rights by the facile plea of overriding public welfare,[49] at least in the absence of statutory authorisation; indeed, many are the decisions which have attached strict liability to enterprises engaged in community services, such as public utilities.[50]

Dangerous things

As originally (and perhaps rather carelessly) formulated, the rule of strict liability purported to apply to "anything likely to do mischief if it escapes". There are, alas, few objects which do not in *some* circumstances present a risk of harm *if* they escape. According to one summation,[51] therefore, the only objects to qualify are those that are both likely to escape and, in doing so, entail exceptional peril to others. Yet the category of "*Rylands v. Fletcher* objects" has never become narrowed to that of "inherently dangerous" things which, as we shall see later,[52] has attracted a very

45. Bohlen, *Studies* 349-351. The question is one of law: *Hazelwood v. Webber* (1934) 52 C.L.R. 268 at 278, 281.
46. Williams, *Non-natural User of Land* [1973] Cam. L.J. 310, accepted in *Tock v. St John's* [1989] 2 S.C.R. 1181.
47. *Dunne v. N.W. Gas Bd* [1964] 2 Q.B. 806 at 832 (did the defendant collect and distribute gas "for its own purposes" (Blackburn's phrase)?).
48. Thus Lords Simon and Macmillan in *Read v. Lyons* [1947] A.C. 156 at 169-170, 173-174.
49. Far from justifying an exemption, it supplies an added reason for spreading the cost which not only should, but easily can be shared by the larger community through taxation or pricing: e.g. the redoubtable individualist, Bramwell B. in *Brand v. Hammersmith Rly* (1867) L.R. 2 Q.B. 223 at 230; and the civilised French doctrine of "*La Fleurette*" (egalité devant les charges publiques).
50. *Smeaton v. Ilford Corp.* [1954] Ch. 450 at 468-471; *Porter v. Bell* [1955] 1 D.L.R. 62 (blasting on defence project); *Handcraft Co. v. Comm. Rlys* (1959) 77 W.N. (N.S.W.) 84 (burning off along railway track); *Gertsen v. Metro. Toronto* (1973) 41 D.L.R. (3d) 646 (gas generated by garbage fill); *Gas Act* 1965 (U.K.) s. 14 (underground gas storage). Wrongheadedly, public authorities acting pursuant to statutory powers are usually exempt from strict liability, by the defence of statutory authority: see below, p. 347.
51. Stallybrass, *Dangerous Things and Non-Natural User of Land*, 3 Cam. L.J. 376 at 382-385 (1929).
52. See below, p. 490.

stringent duty of care, though not of strict liability. In truth, the task of confining the strict liability of *Rylands v. Fletcher* to extra-hazardous conditions (out of control) has fallen to the criterion of non-natural user rather than to any distinction based on the quality of a "thing" looked at in isolation without reference to its quantity or environment.

Thus the reason why motor cars,[53] even defective motor cars,[54] do not entail strict liability is not because of any doubt that they are "likely to do mischief if they escape", but because their use is normal nowadays rather than excessive. By the same token, one would look in vain at the long list of included objects for a clue as to why strict liability *was* imposed. They range from water,[55] electricity,[56] gas,[57] oil,[58] fire,[59] explosives[60] and acid smuts[61] to poisonous trees[62] and apparently even flagpoles,[63] chimney stacks[64] and the roof of a house.[65] Liability has even been imposed for vibrations, although not tangible at all;[66] and in at least one case for human beings, when the owner of a disused brickfield was made responsible for the unhygienic habits of caravan dwellers whom he had licensed to camp there at a weekly rent.[67] There need not even have been a *miscarriage* in the sense of something gone awry: sonic booms would surely qualify, although they are an inevitable accompaniment of supersonic flying.[68] The harm done must, however, result from a risk which called for the imposition of strict liability: a falling stack of dynamite that knocks over the plaintiff without exploding is a matter for negligence, not strict liability.[69]

53. The early inclination to attach strict liability (nuisance) to motor vehicles merely because they might skid was defeated in *Wing v. L.G.O. Co.* [1909] 2 K.B. 652. See Spencer, *Motor Cars and Rylands v. Fletcher* [1983] Cam. L.J. 65.
54. *Phillips v. Britannia Hygienic Laundry* [1923] 1 K.B. 539 esp. at 550-555 (defective axle). The closest we have come to strict liability is to reverse the onus of proof and require the defendant to establish that he was not negligent in relation to a latent defect: *Henderson v. Jenkins* [1970] A.C. 282.
55. Whether in reservoirs or drains: *Simpson v. A.-G.* [1959] N.Z.L.R. 546.
56. *National Telephone v. Baker* [1893] 2 Ch. 186; *Eastern & S. African Telegraph v. Cape Town Tramways* [1902] A.C. 381.
57. *Batcheller v. Tunbridge Wells Gas Co.* (1901) 84 L.T. 765.
58. *Smith v. Gt W. Rly* (1926) 135 L.T. 112. Pollution by tankers attracts strict liability under the *Merchant Shipping (Oil Pollution) Act* 1971 (U.K.).
59. See below, ch. 17.
60. *Rainham Chemical v. Belvedere Guano* [1921] 2 A.C. 465; *Porter v. Bell* [1955] 1 D.L.R. 62; *Jackson v. Drury Constructions* (1974) 49 D.L.R. (3d) 183.
61. *Halsey v. Esso Petroleum* [1961] 1 W.L.R. 683.
62. *Crowhurst v. Amersham Bd* (1878) 4 Ex. D. 5; *Ponting v. Noakes* [1894] 2 Q.B. 281.
63. *Shiffman v. Order of St John* [1936] 1 All E.R. 557.
64. *Nichols v. Marsland* (1875) L.R. 10 Ex. 255 at 259-260.
65. *Lamb v. Phillips* (1911) 11 S.R. (N.S.W.) 109.
66. *Hoare v. McAlpine* [1923] 1 Ch. 167; *Western Silver Fox v. Ross & Cromarty C.C.* [1940] S.L.T. 144; questioned in *Barrette v. Franki Pile* [1955] O.R. 413 and *Phillips v. Western Californian Standard* (1960) 31 W.W.R. 331 on the spurious grounds, propagated by Pollock (39 L.Q.R. 145 (1923)), that they are not inherently dangerous, cannot be said to escape or to have been brought on the land.
67. *A.-G. v. Corke* [1933] Ch. 89; criticised in *Matheson v. Northcote College* [1975] 2 N.Z.L.R. 106 at 117-118; 49 L.Q.R. 158 (1933). See also *Smith v. Scott* [1973] Ch. 314 (landlord not liable for objectionable tenants because not "in control"). Infected persons prematurely discharged from hospital did not qualify in *Evans v. Liverpool Corp.* [1906] 1 K.B. 160.
68. For statutory liability see above, p. 331.
69. See above, p. 329. This, rather than foreseeability or directness, serves as a test of remoteness: see below, p. 343.

Occasionally, the distinction between natural and non-natural user has been confused with that between dangerous and non-dangerous things.[70] The two questions, though functionally related in that both make room for judicial discretion in applying or withholding strict liability, are otherwise distinct. Water, gas, electricity and many other *Rylands v. Fletcher* objects are perfectly usual, and in order to attract the rule there must be both an extraordinary use of the land and the subject must in the circumstances be classifiable as dangerous.

Escape

The severest brake on the rule was applied when the House of Lords in *Read v. Lyons*[71] insisted that there must be an escape of the dangerous substance from land under the control of the defendant to a place outside. The plaintiff was employed by the Ministry of Supply during war as an inspector of munitions in the defendants' factory. Whilst there on duty, she was injured by an explosion but failed to recover, because she was unable to establish negligence and recourse to strict liability was precluded for want of an "escape". The decision has been applauded by some as a reminder that *Rylands v. Fletcher* is but a branch of the wider principle of nuisance,[72] which regulates the mutual duties of neighbouring occupiers and leaves to the law of negligence the responsibilities of an occupier to persons who suffer injury *on* his premises. It has been deplored by other critics for widening the unfortunate distinction between the protection according to persons injured *outside* and those just *inside* the dangerous premises. The escape need not, however, be upon the plaintiff's land, as when some material drifted into a power station and interrupted the electricity supply to a nearby factory.[73]

There is at least one[74] exception to the strict requirement of "escape" from land in occupation of the defendant. For it is clearly established as offering no defence to public utilities and to others who, under licence, introduce a dangerous substance (like gas) into mains on or under the highway from whence it escapes, by leak or explosion, unto neighbouring premises.[75] Other decisions have also imposed strict liability for bringing dangerous things on the highway, such as locomotive engines emitting sparks and setting fire to adjacent land.[76] Moreover, it is doubtful whether the rule in fact postulates occupation by the defendant of the land from which the escape occurs, so long as he introduced the dangerous substance

70. See the citations by Stallybrass, 3 Cam. L.J. 376 at 395-396 (1929).
71. [1947] A.C. 156.
72. Differing from it only by allowing recovery for an isolated escape: Newark, *Boundaries of Nuisance*, 65 L.Q.R. 480 at 488 (1949).
73. *British Celanese v. Hunt* [1969] 1 W.L.R. 959.
74. In Britain, atomic reactor operators are now strictly liable for ionising radiations causing personal injury or property damage, whether sustained *on* or *off* the reactor site: *Nuclear Installations Act* 1965 s. 7. See Street & Frame, *Law Relating to Nuclear Energy* (1966) ch. 4. U.S.: *Price-Anderson Act* 1957-1966 ("extraordinary nuclear occurrences").
75. *Midwood v. Manchester* [1905] 2 K.B. 597. This was accepted in *Benning v. Wong* (1969) 122 C.L.R. 249.
76. *Powell v. Fall* (1880) 5 Q.B.D. 597; *Mansel v. Webb* (1918) 88 L.J.K.B. 323; also *Rigby v. Chief Constable* [1985] 1 W.L.R. 1242 at 1254. Indeed, why should we not follow *Siegler v. Kuhlman* 502 P. 2d 1181 (Wash. 1972), which held a large petrol truck that overturned and burned to strict liability to another motorist?

and had control of it at the relevant time.[77] After all, there is no such requirement for nuisance,[78] which *Read v. Lyons* itself regarded as the wider genus.

The most damaging effect of the decision in *Read v. Lyons* is that it prematurely stunted the development of a general theory of strict liability for ultra-hazardous activities.[79] Prior to 1944, several strands of authority seemed to hold out promise that a law of dangerous operations was in the making. Thus, the duty of an owner of dangerous animals is not merely to keep them *in* his peril, but to keep them at his peril,[80] and since that principle was a major historical source of the rule in *Rylands v. Fletcher*, it would have been easy to extend the analogy. In addition, several decisions imposed liability on employers of independent contractors for damage caused in the performance of dangerous operations,[81] and these could be interpreted as another instance of strict liability for ultra-hazardous activities.[82] Again, liability for inherently dangerous chattels is strict in all but name, since the standard of care is so stringent as to amount "practically to a guarantee of safety".[83] But the invitation to unify these elements into a coherent principle was emphatically rejected. Scott L.J. specifically condemned as not being in conformity with English law[84] the rule of the American *Restatement*, that "one who carries on an ultra-hazardous activity is liable to another whose person, land or chattels the actor should recognise as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultra-hazardous, although the utmost care is exercised to prevent the harm."[85]

Type and extent of injury

Lord Macmillan in *Read v. Lyons* pushed his antipathy against *Rylands v. Fletcher* to the length of even questioning whether it could ever support a claim for personal injuries.[86] The doubt was certainly novel, indeed

77. *Rainham Chemical Works v. Belvedere Fish Guano* [1921] 2 A.C. 465 at 479; *Gertsen v. Metro. Toronto* (1973) 41 D.L.R. (3d) 646. But *The Wagon Mound (No. 2)* [1963] S.R. (N.S.W.) 948 held the rule inapplicable to escape of oil from a *ship* in harbour.
78. See below, p. 427.
79. The negative attitude displayed in *Read v. Lyons* [1947] A.C. 156 may have been a judicial reaction to the rapid increase of social welfare legislation; the courts taking the view that it is not their function, but that of Parliament, to augment the range of legal protection: Tylor, *Restriction of Strict Liability*, 10 Mod. L. Rev. 396 at 402 (1947); Friedmann, *Social Insurance and the Principles of Tort Liability*, 63 Harv. L. Rev. 241 (1949).
80. *Read v. Lyons* [1947] A.C. 156 at 182. But cf. *Rands v. McNeil* [1955] 1 Q.B. 253: see below, p. 358.
81. *Brooke v. Bool* [1928] 2 K.B. 578; *Honeywill v. Larkin Bros* [1934] 1 K.B. 191; *The Pass of Ballater* [1942] P. 112; see below, p. 391.
82. See the classification in Winfield, *Textbook of the Law of Torts* (5th ed., 1950) ch. 23, abandoned by his editors in later editions.
83. *Adelaide Chemical v. Carlyle* (1940) 64 C.L.R. 514 at 522 per Starke J. See below, p. 491.
84. [1945] K.B. 216 at 255 ff. His strictures are the more difficult to understand as, on his own admission, the same conclusion would have been reached on the facts of the case by following the *Rest. 2d*.
85. §519, subject to certain exceptions enumerated in §520-524. *Rest. 2d* substituted "abnormally dangerous" for "ultra-hazardous".
86. [1947] A.C. 156 at 173.

inconsistent with several precedents.[87] Moreover, its precise scope was far from clear. If the analogy of nuisance, from which it indubitably derived, provides any guidance, it would not so much justify withholding redress for personal injuries as limit recovery to persons who claim for personal injury or property damage in title of their occupation of land. But that would widen the unfortunate distinction in nuisance, itself lately questioned, between the protection for an occupier, on the one hand, and his family and licensees, on the other.[88] It might even preclude recovery by persons injured on the highway by an explosion from adjoining premises, unless the same rule were adopted which permits recovery for personal injuries suffered by reason of a *public* nuisance.[89]

The question whether the rule in *Rylands v. Fletcher* extends to personal injuries is, therefore, bound up with the related inquiry as to what nature of interest the plaintiff must have in the land on which he sustains the damage. Prior to Lord Macmillan's dictum in *Read v. Lyons*, the necessity of ownership or occupation or use of land by the plaintiff had not been broached. Indeed, once having held that strict liability attached to the escape of gas from an electric cable under the roadway to an adjacent house,[90] the courts extended it for the benefit of a co-licensee whose electricity cables were damaged by a broken water main under the same road bed.[91] Progressively the rule has since been applied to a car damaged while parked in the street,[92] to a holiday maker in Hyde Park struck by a collapsing flag pole,[93] and to a licensee of a fairground stand hit by a dislodged chair from a roundabout.[94] None of these cases lent countenance to the suggestion that standing to sue was limited as narrowly as private or public nuisance.

Nor has Lord Macmillan's suggested exclusion of all personal injury made any headway either in England[95] or elsewhere.[96] Besides lacking historical support, it would have foisted on our law the irrational distinction of testing liability for, say, explosives by whether the defendant happened to hit a casual passer-by in the street, his neighbour, or an adjoining conservatory. This would not have made much sense, even for the sake of adding another road block to strict liability.

However, purely economic loss (not resulting from damage to one's property or person) is not recoverable any more readily than in the case of negligence.[97] Thus Blackburn J. himself belittled the idea that workmen thrown out of work by the accident might have recovered their wages,[98]

87. *Miles v. Forest Rock Granite* (1918) 34 T.L.R. 500 (C.A.); *Shiffman v. Order of St John* [1936] 1 All E.R. 557; *Hale v. Jennings Bros* [1938] 1 All E.R. 579.
88. See below, p. 426. Cattle-trespass: see below, p. 355.
89. See below, p. 412.
90. *Midwood v. Manchester* [1905] 2 K.B. 597 (C.A.).
91. *Charing Cross Electricity v. Hydraulic Power Co.* [1914] 3 K.B. 772.
92. *Halsey v. Esso Petroleum* [1961] 1 W.L.R. 683.
93. *Shiffman v. Order of St John* [1936] 1 All E.R. 557 (just conceivably qualifying as an "occupier").
94. *Hale v. Jennings Bros* [1938] 1 All E.R. 579.
95. *Perry v. Kendrick's Transport* [1956] 1 W.L.R. 85 at 92 per Parker L.J. (not open to C.A.).
96. Australia: *Benning v. Wong* (1969) 122 C.L.R. 249 at 274, 277, 317. Canada: disregarded in *Aldridge v. Van Patter* [1952] 4 D.L.R. 93.
97. For negligence: see above, p. 177.
98. *Cattle v. Stockton Waterworks* (1875) L.R. 10 Q.B. 453 at 457.

and more recently auctioneers failed in a claim for the loss they suffered from the closing of a cattle market in consequence of an outbreak of foot and mouth disease due to a virus escaping from an experimental station.[99]

It is still an open question whether liability is limited to foreseeable consequences as under negligence and nuisance.[100] Several limitations on liability under different labels serve the same function as "remoteness", such as the defences (below) of Act of God and act of stranger. Moreover, as already noted,[101] the harm must fall within the risk which provided the reason for strict liability.

Defences

In the course of interpreting the rule in *Rylands v. Fletcher*, several specific exceptions or defences have been developed, in an endeavour to link it more closely to the pervasive concept of fault liability. This process has stopped only just short of actually admitting absence of negligence as an excuse. "Consent" and "default of the plaintiff" are merely versions of voluntary assumptions of risk and contributory negligence under a different name, while "act of a stranger" and "act of God" almost complete the circle of returning to negligence liability.[102] The aggregate effect of these exceptions makes it doubtful whether there is much left of the rationale of strict liability as originally contemplated in 1866.[103]

Consent of plaintiff

A plaintiff who has expressly or by implication consented to the presence of the source of danger forfeits the benefit of strict liability and is remitted to proof of negligence.[104] This principle has been most frequently invoked in cases where a lower tenant in a multiple dwelling suffers damage as the result of water seepage from an upper floor. Although sometimes explained on the ground of "common benefit", the preferred rationale seems to be that by accepting the premises with knowledge of the installation, the lower tenant consented to the risk of a non-negligent escape.[105] Its appeal is greatest when the claim is directed against the landlord[106] because of the familiar notion that a tenant takes the premises from him as they are and can complain, if at all, only of negligent injury emanating from outside the demised premises.[107] If the trouble was caused by a domestic water supply, strict liability is nowadays in any event excluded on the overriding ground of "natural user".[108]

99. *Weller v. Foot & Mouth Disease Research Institute* [1966] 1 Q.B. 569.
100. *Wagon Mound (No. 2)* [1967] 1 A.C. 617 at 639.
101. See above, p. 329.
102. These defences have an intriguing parallel in the French defences under *Civil Code* art. 1384.
103. Cf. *St Anne's Well Brewery v. Roberts* (1928) 44 T.L.R. 703 at 705.
104. *Carstairs v. Taylor* (1871) L.R. 6 Ex. 217 (water tank); *Pattison v. P.E. Conservation* (1984) 23 D.L.R. (4th) 201 (Ont.).
105. *Peters v. Prince of Wales Theatre* [1943] K.B. 73. See Samuels, *Escape of Water in Buildings*, 31 Conv. 247 (1967).
106. E.g. *British Office Supplies v. Masonic Institute* [1957] N.Z.L.R. 512; *Kiddle v. City Business* [1942] 1 K.B. 269.
107. See above, p. 471. Only a covenant may furnish additional protection.
108. See above, p. 336.

The "consent or benefit" defence retains its force, however, with regard to industrial water in bulk. It explains why the defence is not apparently available where the installation was set up after the commencement of the plaintiff's tenancy,[109] or in an action by an adjoining occupier[110] who has in no way assented to the risk, though deriving material benefit from the defendant's undertaking, as where a consumer of gas suffers damage to his house by an explosion from pipes under the control of the suppliers beneath an adjacent road.[111]

Even when denied the benefit of strict liability, the plaintiff may still succeed on proof of negligence. He obviously does not consent to a defective or dangerous water supply[112] nor to a flood caused by negligently forgetting to turn off the tap[113] or blocking up a drain with tea leaves.[114] Even if the escape was due to the act of a stranger, the defendant would be excused only if not himself remiss in guarding against it.[115]

Default of plaintiff

In *Rylands v. Fletcher* itself, it was suggested that the rule was excluded where the escape occurred owing to the plaintiff's own default.[116] This defence defeated a mine owner who, indifferent to the danger of flooding if he proceeded to work his mine under the defendant's canal, brought down the water upon himself.[117] So, by analogy to nuisance, there is no cause of complaint, at least in the absence of negligence, where the damage would not have occurred but for the abnormal sensitivity of the plaintiff's property or the use to which it is put. Thus, an action for disturbing the operation of a submarine cable by escaping electricity from a tramway system failed on the ground that one cannot increase the liability of neighbours by applying one's own property to special uses, whether for business or pleasure.[118] This argument, however, would not defeat the owner of an old building whose structural condition made it specially vulnerable to collapse from vibrations, because it would be unfair to expect him to render it proof against damage by others, not having put his property to any special or hypersensitive use.[119]

If the plaintiff's fault is not the sole cause of the "escape" but consists, for example, in failing to discover or avoid the danger, it would amount merely to contributory negligence and at most reduce his damages. Indeed

109. *Peters v. Prince of Wales Theatre* [1943] K.B. 73 at 79.
110. It is immaterial for this purpose that the plaintiff occupied adjacent, instead of subjacent, premises owned by a common landlord: *Kiddle v. City Business* [1942] 1 K.B. 269.
111. *Northwestern Utilities v. London Guarantee* [1936] A.C. 108. Cf. *Thomas v. Lewis* [1937] 1 All E.R. 137.
112. *Prosser v. Levy* [1955] 1 W.L.R. 1224.
113. *Ruddiman v. Smith* (1889) 60 L.T. 708.
114. *Abelson v. Brockman* (1890) 54 J.P. 119.
115. See below, p. 346.
116. (1866) L.R. 1 Ex. 265 at 279 per Blackburn J.
117. *Dunn v. Birmingham Canal Co.* (1872) L.R. 7 Q.B. 244. But cf. *Miles v. Forest Rock Granite Co.* (1918) 34 T.L.R. 500.
118. *Eastern & S. African Telegraph v. Cape Town Tramways* [1902] A.C. 381. Does that mean that there is a corresponding requirement of "natural user" by the *plaintiff*, as was thought in *Western Silver Fox v. Ross & Cromarty C.C.* [1940] S.L.T. 144 at 147?
119. *Hoare v. McAlpine* [1923] 1 Ch. 167.

there is some authority for excluding the defence altogether,[120] presumably on the ground that a plaintiff's negligence can be opposed only to a defendant's negligence, not to strict liability. But the risk created by one can be balanced against that of the other, and there is no obvious policy reason for abandoning here this incentive to accident prevention.

Act of God

Though recognised from the outset as a defence,[121] act of God has rarely been invoked with success. One of the few cases was *Nichols v. Marsland*,[122] where some artificial lakes had been created by damming up a natural stream. Owing to an extraordinary rainstorm of unprecedented violence, the artificial banks burst and the rush of escaping floodwater carried away some bridges. The defendant was excused after the jury had found that he could not reasonably have anticipated such an extraordinary act of nature. In a subsequent case[123] however, the correctness of this finding was challenged and, while the principle itself has stood immune from criticism, its scope is destined to be narrow.

Act of God is a term as destitute of theological meaning[124] as it is inept for legal purposes. It signifies the operation of natural forces, free from human intervention, rather than phenomena which, in common belief, are sometimes attributed to a positive intervention of deity. While it certainly includes such processes of nature as severe gales, snowstorms and cloudbursts, it may also encompass trivial occurrences like the gnawing of a rat.[125] A more appropriate term would have been vis major, were it not for the fact that this includes also malicious acts of a stranger which have been traditionally treated as a separate exception.[126]

An act of God provides no excuse, unless it is so unexpected that no reasonable human foresight could be presumed to anticipate its occurrence.[127] Sometimes it has been regarded as sufficient that it would not reasonably have been anticipated,[128] but nowadays the severer test is usually applied whether or not human foresight and prudence can be credited with reasonably recognising its *possibility*.[129] There must have been "an irresistible and unsearchable Providence nullifying all human effort".[130] It therefore seems to differ from "inevitable" accident[131] both

120. E.g. *Martins v. Hotel Mayfair* [1976] 2 N.S.W.L.R. 15 at 27. In the U.S. since apportionment, the defence is increasingly allowed against strict liability for defective products, notwithstanding *Rest. 2d* §402A comment *n*, §524; *Prosser & Keeton* §102.
121. (1866) L.R. 1 Ex. 265 at 280 per Blackburn J. It is not a defence in the U.S.: *Rest. 2d* §522.
122. (1876) 2 Ex D. 1. In *Carstairs v. Taylor* (1871) L.R. 6 Ex. 217 vis major provided one of several grounds for dismissing the action.
123. *Greenock Corp. v. Caledonian Rly* [1917] A.C. 556.
124. *The Mostyn* [1928] A.C. 57 at 93 per Lord Phillimore.
125. *Carstairs v. Taylor* (1871) L.R. 6 Ex. 217.
126. Cf. *Rickards v. Lothian* [1913] A.C. 263 at 278.
127. Thus, an ordinary whirlwind or tropical downpour, even of rather exceptional duration and intensity, cannot be set up as a defence in Australia: *Cottrell v. Allen* (1882) 16 S.A.L.R. 122; *Lamb v. Phillips* (1911) 11 S.R. (N.S.W.) 109; *Comm. Rlys v. Stewart* (1936) 56 C.L.R. 520; and cf. *Kingborough Corp. v. Bratt* [1957] Tas. S.R. 173.
128. This was the test applied in *Nichols v. Marsland* (1876) 2 Ex. D. 1.
129. *Greenock Corp. v. Caledonian Rly* [1917] A.C. 556.
130. *The Mostyn* [1928] A.C. 57 at 105 per Lord Blanesburgh. Likewise *Nugent v. Smith* (1876) 1 C.P.D. 423 at 441.
131. See above, p. 314.

in degree of unexpectability[132] and the exclusion of events having a causal link with human activity.

Act of stranger

Liability is excluded if the escape was due to the deliberate act of a stranger which could not reasonably have been anticipated. Though mentioned in the original case itself,[133] this defence is particularly difficult to reconcile with the rationale of strict liability, because it limits the duty of protection to reasonably foreseeable human interventions and equates it for this purpose with the duty of care postulated by the law of negligence. An insurer cannot plead that the accident insured against was caused by the voluntary act of a third person, because this forms an integral part of the risk. Likewise, the rule in *Rylands v. Fletcher* should consistently have exacted responsibility for all dangers inherent in the situation created by the defendant, including the risk that others may act stupidly or even maliciously.[134] The defence, however, is now well established, another example of the judicial retreat from the logic of strict liability. Thus, in an early case where it was applied to relieve a defendant from liability for the overflow of his reservoir caused by a third person emptying his own into the defendant's, the court propounded: "The matters complained of took place through no default or breach of duty of the defendants, but were caused by a stranger over whom and at a spot where they had no control."[135] This, clearly, is reasoning in terms of fault and negligent causation, not of strict liability.

The stranger's must have been "a conscious act of volition",[136] deliberate or intentional, not negligent; the owner being bound to guard against the negligence of third parties. It has been accepted as an excuse where the waste pipe of a lavatory basin was maliciously blocked up[137] and where mischievous children threw a lighted match into a petrol tank.[138] The onus is on the defendant to prove affirmatively that the escape was due to the activities of a stranger against which no reasonable precautions would have been of any use.[139] The ordinary negligence test seems to apply in determining whether, and what, measures of protection against outside interference should appropriately be taken,[140] but the high degree of risk inherent in the dangerous instrumentality may demand the most exacting standard of vigilance so as, for example, to require from a gas company a system of effective supervision to guard against interference with its mains by construction work carried out in their vicinity.[141]

132. Cf. *Comm. Rlys v. Stewart* (1936) 56 C.L.R. 520 at 528-529, 536-537.
133. *Rylands v. Fletcher* (1866) L.R. 1 Ex. 265.
134. Goodhart, *The Third Man*, 4 Cur. Leg. Prob., 178 at 183 (1951), and 72 L.Q.R. 184 (1956). Notably in the analogous case of dangerous animals, this defence is probably not recognised: see below, p. 363. *Rest. 2d* §522 exempts only deliberate mischief.
135. *Box v. Jubb* (1879) 4 Ex. D. 76 at 79.
136. *Dominion Gas Co. v. Collins* [1909] A.C. 640 at 647.
137. *Rickards v. Lothian* [1913] A.C. 263.
138. *Perry v. Kendricks Transport* [1956] 1 W.L.R. 85.
139. *Prosser v. Levy* [1955] 1 W.L.R. 1224.
140. Ibid.; also *Shiffman v. Order of St John* [1936] 1 All E.R. 557 at 561.
141. *Northwestern Utilities v. London Guarantee* [1936] A.C. 108; *Shell-Max v. Belfast Corp.* [1952] N.I. 72; *Lewis v. N. Vancouver* (1963) 40 D.L.R. (2d) 182 (water reservoir).

The category of strangers clearly includes trespassers and others who, without actually entering the defendant's premises, commit an act that causes the escape.[142] Besides, the occupier is liable not only for the defaults of his servants acting in the course of employment[143] but also of independent contractors engaged to perform work on his behalf,[144] even of invitees (like the customer who fooled about on a chair-o-plane in a fairground).[145] Should it be the same where the licensee brings the dangerous "thing" on the land for his own purposes rather than the licensor's? This would impose on the landowner a potential burden wholly disproportionate to the benefit he would derive from the licensed use; the risk potential of the licensee's activities being best known and insured by the latter. Hence gas or water leaks from pipes embedded on city or private property should be the sole responsibility of the utility.[146]

Statutory authority

Strict liability has also in large measure been withdrawn from undertakings carried out under statutory authority, like railways and public utilities supplying water, gas and electricity in bulk. Statutory authorisation has been interpreted as not only legalising the enterprise itself and thereby removing the spectre of having it enjoined as a nuisance, but also of conferring immunity for any harmful consequences which occur, without negligence, in its normal operation.[147] Thus protection is not confined only to cases were the harm suffered is a *necessary* incident of the activity expressly authorised, as where a railway empowered to run steam locomotives causes sparks or vibrations;[148] it has been extended also to cases of drains overflowing,[149] gas mains bursting[150] or electricity wires becoming dislodged.[151] This rule not only seems to be based on the fallacious assumption that there must be something unlawful about an activity to justify strict liability; it is also wrong in policy by excusing a public enterprise from internalising its own costs.[152]

The statutory immunity is lost if the grantee fails in his duty of care to avoid all unnecessary harm. He must observe the strictest safety standards, proportioned to the high degree of risk involved with respect to the

142. As in *Box v. Jubb* (1879) 4 Ex. D. 76.
143. But a servant may be a trespasser, as in *Stevens v. Woodward* (1881) 6 Q.B.D. 318 where he used a private lavatory and omitted to turn off the tap.
144. *Rylands v. Fletcher* (1866) L.R. 1 Ex. 265; *Schubert v. Sterling Trusts* [1943] 4 D.L.R. 584 (cyanide gas used by fumigator); see below, p. 391.
145. *Hale v. Jennings Bros* [1938] 1 All E.R. 579.
146. *Fenn v. Peterborough* (1979) 104 D.L.R. (3d) 174 (Ont. C.A.). Cf. *Burchett v. Comm. Rlys* [1958] S.R. (N.S.W.) 366 (involuntary licence); *Smith v. Scott* [1973] Ch. 314 (landlord not liable because not "in control").
147. The rule is much the same as for nuisance: see below, p. 439.
148. *C.P.R. v. Roy* [1902] A.C. 220; *Sermon v. Comm. Rlys* (1907) 5 C.L.R. 239. But it is under a duty of care to remove anything on its own property which increases fire hazard, such as dry grass, and to install efficient spark arresters: *Scott v. W.A. Rlys* (1957) 58 W.A.L.R. 87; *Dennis v. Victorian Rlys* (1903) 28 V.L.R. 576.
149. *Tock v. St John's Metro* [1989] 2 S.C.R. 1181.
150. *Benning v. Wong* (1969) 122 C.L.R. 249; *Dunne v. N.W. Gas Bd* [1964] 2 Q.B. 806 (C.A.).
151. *Thompson v. Bankstown Corp.* (1953) 87 C.L.R. 619.
152. Hence some modern statutes have corrected the error: e.g. *Reservoirs (Safety Provisions) Act* 1930 (U.K.); *Gas Act* 1965 (U.K.).

construction, management and possible improvement of the plant; and, to this end, is expected to avail himself of all accessible scientific aid, including independent experts.[153] There is a division of opinion, however, as to the burden of proof. According to one school, statutory authority is a defence only provided the requisite care is exercised, and this is for the defendant to establish affirmatively,[154] just as in nuisance.[155] On the other hand, a sharply divided High Court of Australia held that statutory authority completely eliminated strict liability and relegated the claimant to proof of negligence.[156]

153. *Manchester Corp. v. Farnworth* [1930] A.C. 171.
154. *Northwestern Utilities v. London Guarantee* [1936] A.C. 108 at 119, 121 per Lord Wright; consistently in Canada: e.g. *Porter v. Bell* [1955] 1 D.L.R. 62; *Turpin v. Halifax-Dartmouth* (1959) 21 D.L.R. (2d) 623.
155. See below, p. 440. Considering that *Rylands v. Fletcher* is a form of nuisance, the distinction cannot really be justified by saying, as in *Edwards v. Blue Mts C.C.* (1961) 78 W.N. (N.S.W.) 864, that the first focuses on the accumulation, the second on its consequences.
156. *Benning v. Wong* (1969) 122 C.L.R. 249. Not a word of explanation was offered whether this was fair in terms of access to evidence or compatible with the policy underlying the authorising statute. If the railway cases put the plaintiff to proof of negligence (e.g. *Rly Comm. v. Riggs* (1951) 84 C.L.R. 586), was it not because the *Fires Prevention Act* (see below, p. 349) so requires rather than just because the defendants operated under statutory authority?

17

FIRE

The law governing liability for escaping fire has undergone many changes during its long history.[1] Although the use of fire has always been recognised as a necessary adjunct to civilised existence, the measure of legal protection against its destructive potentialities has been differently assessed at progressive stages of societal development. On the one hand, improved standards of building construction and fire control have fostered a gradual relaxation of the standard of liability; fire insurance would have contributed even more towards this trend but for the fact that its prevalence in the city is not matched in the countryside.[2] On the other hand, the arid Australian climate accounts for a continuing acute sensitivity to the risk of fire and corresponding support of stricter liability as an added incentive to fire prevention.

The early common law provided a special action of trespass on the case against occupiers for "negligently using fire and allowing its escape[3] contrary to the general custom of the realm".[4] Whilst probably never absolute,[5] liability was so stringent that a defendant could acquit himself only by showing that the escape was due either to the act of a stranger or an act of God.[6] It was further presumed until the contrary was proved that the fire had been lit by him or someone for whom he was responsible.[7] The averment of negligence seems to have been mere surplusage.

The first modification was introduced by legislation, commenced in 1707 and culminating in the *Fires Prevention Act* 1775, which excused "any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall accidentally begin". The effect of this ill-drawn

1. See Ogus, *Vagaries in Liability For the Escape of Fire* [1969] Cam. L.J. 104.
2. Fire insurance offers a more efficient method of absorbing fire losses than tort liability (and liability insurance). This argues against subrogation for fire insurers and against all tort liability except for gross misconduct. Cf. Ogus [1969] Cam. L.J. 104. The problem of the uninsured victim can be resolved by leaving tort liability intact but giving the defendant a set-off for the plaintiff's fire insurance, if any, (as the Canadian *Railway Act* does; see below, n. 21), i.e. subrogating the defendant to the insurance rather than the insurer to the plaintiff.
3. From premises, not from a chattel like a fire originating in a car and damaging a public garage: *Mayfair v. Pears* [1987] 1 N.Z.L.R. 459 (C.A.).
4. The action is first heard of in *Beaulieu v. Finglam* (1401) Y.B. 2 H. IV, 18, pl. 6. Virtually nothing is known of the alternative remedies of tresspass vi et armis and the ordinary action on the case.
5. Winfield, *Myth of Absolute Liability*, 42 L.Q.R. 37 at 46-50 (1926) or *Select Essays*, 25-28; contra, Wigmore, *Responsibility for Tortious Acts: Its History*, 7 Harv. L. Rev. 315 at 448-449 (1894).
6. *Turberville v. Stampe* (1697) 1 Ld Raym. 264; 91 E.R. 1072.
7. *Becquet v. MacCarthy* (1831) 2 B. & Ad. 951 at 958; 109 E.R. 1396 at 1399.