A

[HOUSE OF LORDS]

CAMBRIDGE WATER CO. . . . . RESPONDENTS

AND

EASTERN COUNTIES LEATHER PLC. . . . APPELLANTS

B

1992 Oct. 27, 28, 29; Nov. 2, 3; 19 — Sir Stephen Brown P., Mann and Nolan L.JJ.

1993 Oct. 11, 12, 13, 14, 18, 19; Dec. 9 — Lord Templeman, Lord Goff of Chieveley, Lord Jauncey of Tullichettle, Lord Lowry and Lord Woolf

C

Rylands v. Fletcher—Chemical solvent—Pollution of underground water supply—Chemical used in industrial process—Spillage resulting in chemical being carried in percolating water to plaintiffs' borehole—Possibility of damage unknown to defendants at time of pollution—Whether non-natural use of land—Whether defendants liable in absence of foreseeability of relevant damage

D

The defendants, leather manufacturers, used a chlorinated solvent in degreasing pelts at their tannery which was situated some 1·3 miles from the plaintiffs' borehole where water was abstracted for domestic purposes. The water in the borehole became unfit for human consumption by reason of the solvent having seeped into the ground below the defendants' premises whence it was conveyed in percolating water in the direction of the borehole. The plaintiffs brought an action for damages on three alternative grounds, negligence, nuisance and the rule in *Rylands v. Fletcher*. The trial judge dismissed the action in negligence and nuisance because the defendants could not reasonably have foreseen that such damage would occur, and on the third ground because the solvent used in the defendants' business constituted in the circumstances a natural use of the defendants' land. On appeal by the plaintiffs in respect of the dismissal of their third cause of action, the Court of Appeal in allowing the appeal declined to determine it on the basis of the rule in *Rylands v. Fletcher* but held that there was a parallel rule of strict liability in nuisance in that where the nuisance was an interference with a natural right incident to ownership the liability was a strict one.

E

F

On appeal by the defendants:—

Held, allowing the appeal, that foreseeability of harm of the relevant type by the defendants was a prerequisite of the recovery of damages both in nuisance and under the rule in *Rylands v. Fletcher*; and that, accordingly, albeit (contrary to the judge's finding) the use of the solvent in the manufacturing process and its storage constituted a non-natural use of the defendants' land, since the plaintiffs were not able to establish that pollution of their water supply by the solvent was in the circumstances foreseeable, the action failed (post, pp. 290F, 304D–E, 305H–306B, D–E, 309B–E, F–310A).

G

H

Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty. (The Wagon Mound (No. 2)) [1967] 1 A.C. 617, P.C. applied.

Rylands v. Fletcher (1866) L.R. 1 Ex. 265; (1868) L.R. 3 H.L. 330, H.L.(E.); *West v. Bristol Tramways Co.* [1908] 2 K.B. 14,

A C.A.; *Rickards v. Lothian* [1913] A.C. 263, P.C.; *Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co. Ltd.* [1921] 2 A.C. 465, H.L.(E.) and *Read v. J. Lyons & Co. Ltd.* [1947] A.C. 156, H.L.(E.) considered.

Ballard v. Tomlinson (1884) 26 Ch.D. 194 distinguished.

Decision of the Court of Appeal, post, pp. 268E et seq. reversed.

B The following cases are referred to in the opinion of Lord Goff of Chieveley:

Ballard v. Tomlinson (1884) 26 Ch.D. 194; (1885) 29 Ch.D. 115; (1885) 54 L.J. Ch. (N.S.) 454, C.A.

Bamford v. Turnley (1862) 3 B. & S. 62

Chasemore v. Richards (1859) 7 H.L.Cas. 349, H.L.(E.)

Goldman v. Hargrave [1967] 1 A.C. 645; [1966] 3 W.L.R. 513; [1966] 2 All E.R. 989, P.C.

C *Humphries v. Cousins* (1877) 2 C.P.D. 239

Leakey v. National Trust for Places of Historic Interest or Natural Beauty [1980] Q.B. 485; [1980] 2 W.L.R. 65; [1980] 1 All E.R. 17, C.A.

Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty. (The Wagon Mound (No. 2)) [1967] 1 A.C. 617; [1966] 3 W.L.R. 498; [1966] 2 All E.R. 709, P.C.

Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co. Ltd. [1920] 2 K.B. 487, C.A.; [1921] 2 A.C. 465, H.L.(E.)

D *Read v. J. Lyons & Co. Ltd.* [1947] A.C. 156; [1946] 2 All E.R. 471, H.L.(E.)

Rickards v. Lothian [1913] A.C. 263, P.C.

Ross v. Fedden (1872) 26 L.T. 966

Rylands v. Fletcher (1866) L.R. 1 Ex. 265; (1868) L.R. 3 H.L. 330, H.L.(E.)

Sedleigh-Denfield v. O'Callaghan [1940] A.C. 880; [1940] 3 All E.R. 349, H.L.(E.)

E *West v. Bristol Tramways Co.* [1908] 2 K.B. 14, C.A.

The following additional cases were cited in argument in the House of Lords:

Acton v. Blundell (1843) 12 M. & W. 324

Baird v. Williamson (1863) 15 C.B.(N.S.) 376

Benning v. Wong (1969) 122 C.L.R. 249

Bower v. Peate (1876) 1 Q.B.D. 321

Bradford Corporation v. Ferrand [1902] 2 Ch. 655

F *Bradford Corporation v. Pickles* [1895] A.C. 587, H.L.(E.)

Brown v. Collins (1873) 53 N.H. 442

Colls v. Home and Colonial Stores Ltd. [1904] A.C. 179, H.L.(E.)

Cox v. Burbidge (1863) 13 C.B. (N.S.) 430.

Crowhurst v. Amersham Burial Board (1878) 4 Ex.D. 5

Dalton v. Angus (1881) 6 App.Cas. 740, H.L.(E.)

Dillon v. Acme Oil Co. (1888) 2 N.Y.S. 289

G *Eastern and South African Telegraph Co. Ltd. v. Cape Town Tramways Co. Ltd.* [1902] A.C. 381, P.C.

Embrey v. Owen (1851) 6 Exch. 353

Filburn v. People's Palace and Aquarium Co. Ltd. (1890) 25 Q.B.D. 258, C.A.

Gertsen v. Municipality of Metropolitan Toronto (1973) 41 D.L.R. (3d) 646

Home Brewery Co. Ltd. v. William Davis & Co. (Leicester) Ltd. [1987] Q.B. 339; [1987] 2 W.L.R. 117; [1987] 1 All E.R. 637

H *Hurdman v. North Eastern Railway Co.* (1878) 3 C.P.D. 168, C.A.

Ilford Urban District Council v. Beal [1925] 1 K.B. 671

Lambert v. Bessey (1680) T.Raym. 421

Madras Railway Co. v. Zemindar of Carvatenagarum (1874) L.R. 1 Ind.App. 364

May v. Burdett (1846) 9 Q.B. 101
National Telephone Co. v. Baker [1893] 2 Ch. 186
New Zealand Forest Products Ltd. v. O'Sullivan [1974] 2 N.Z.L.R. 80
Nicholls v. Ely Beet Sugar Factory Ltd. [1936] Ch. 343, C.A.
Nichols v. Marsland (1876) 2 Ex.D. 1, C.A.
Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound) [1961] A.C. 388; [1961] 2 W.L.R. 126; [1961] 1 All E.R. 404, P.C.
Peters v. Prince of Wales Theatre (Birmingham) Ltd. [1943] K.B. 73; [1942] 2 All E.R. 533, C.A.
Polemis and Furness Withy & Co. Ltd., In re [1921] 3 K.B. 560, C.A.
Prosser (A.) & Son Ltd. v. Levy [1955] 1 W.L.R. 1224; [1955] 3 All E.R. 577, C.A.
Pugliese v. National Capital Commission (1977) 79 D.L.R. (3d) 592
Rapier v. London Tramways Co. [1893] 2 Ch. 588
R.H.M. Bakeries (Scotland) Ltd. v. Strathclyde Regional Council, 1985 S.L.T. 214, H.L.(Sc.)
St. Helen's Smelting Co. v. Tipping (1865) 11 H.L.Cas. 642, H.L.(E.)
Salvin v. North Brancepeth Coal Co. (1874) L.R. 9 Ch.App. 705
Severn Fisheries v. Hollerton (unreported), 14 December 1987, Philips J.
Smith v. Kenrick (1849) 7 C.B. 515
Snow v. Whitehead (1884) 27 Ch.D. 588
Solloway v. Hampshire County Council (1981) 79 L.G.R. 449, C.A.
Stanley v. Powell [1891] 1 Q.B. 86
Stephens v. Anglian Water Authority [1987] 1 W.L.R. 1381; [1987] 3 All E.R. 379, C.A.
Sutton v. Clarke (1815) 6 Taunt. 29
Tenant v. Goldwin (1704) 2 Ld.Raym. 1089; 1 Salk. 360
Weaver v. Ward (1616) Hob. 134
Young (John) & Co. v. Bankier Distillery Co. [1893] A.C. 691, H.L.(Sc.)

The following cases are referred to in the judgment of the Court of Appeal:

Baird v. Williamson (1863) 15 C.B.(N.S.) 376
Ballard v. Tomlinson (1884) 26 Ch.D. 194; (1885) 29 Ch.D. 115, C.A.
Goldman v. Hargrave [1967] 1 A.C. 645; [1966] 3 W.L.R. 513; [1966] 2 All E.R. 989, P.C.
Leakey v. National Trust for Places of Historic Interest or Natural Beauty [1980] Q.B. 485; [1980] 2 W.L.R. 65; [1980] 1 All E.R. 17, C.A.
Read v. J. Lyons & Co. Ltd. [1947] A.C. 156; [1946] 2 All E.R. 471, H.L.(E.)
Rylands v. Fletcher (1866) L.R. 1 Ex. 265; (1868) L.R. 3 H.L. 330, H.L.(E.)
Smith v. Kenrick (1849) 7 C.B. 515
West v. Bristol Tramways Co. [1908] 2 K.B. 14, C.A.
Wilson v. Waddell (1876) 2 App.Cas. 95, H.L.(Sc.)

The following additional cases were cited in argument in the Court of Appeal:

Acton v. Blundell (1843) 12 M. & W. 324
Aldred's Case (1610) 9 Co.Rep. 57b
Benning v. Wong (1969) 122 C.L.R. 249
Blake v. Woolf [1898] 2 Q.B. 426, D.C.
British Celanese Ltd. v. A.H. Hunt (Capacitors) Ltd. [1969] 1 W.L.R. 959; [1969] 2 All E.R. 1252
Carstairs v. Taylor (1871) L.R. 6 Ex. 217
Charing Cross Electricity Supply Co. v. Hydraulic Power Co. [1914] 3 K.B. 772, C.A.

Eastern and South African Telegraph Co. Ltd. v. Cape Town Tramways Co. Ltd. [1902] A.C. 381, P.C.
Home Brewery Co. Ltd. v. William Davis & Co. (Leicester) Ltd. [1987] Q.B. 339; [1987] 2 W.L.R. 117; [1987] 1 All E.R. 637
Humphries v. Cousins (1877) 2 C.P.D. 239
Kiddle v. City Business Properties Ltd. [1942] 1 K.B. 269; [1942] 2 All E.R. 216
Lambert v. Bessey (1680) T.Raym. 421
Mason v. Levy Auto Parts of England Ltd. [1967] 2 Q.B. 530; [1967] 2 W.L.R. 1384; [1967] 2 All E.R. 62
May v. Burdett (1846) 9 Q.B. 101
Nichols v. Marsland (1876) 2 Ex.D. 1, C.A.
Northwestern Utilities Ltd. v. London Guarantee and Accident Co. Ltd. [1936] A.C. 108, P.C.
Overseas Tankship (U.K.) Ltd. v. Morts Dock and Engineering Co. Ltd. (The Wagon Mound) [1961] A.C. 388; [1961] 2 W.L.R. 126; [1961] 1 All E.R. 404, P.C.
Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty. (The Wagon Mound (No. 2)) [1967] 1 A.C. 617; [1966] 3 W.L.R. 498; [1966] 2 All E.R. 709, P.C.
Perry v. Kendricks Transport Ltd. [1956] 1 W.L.R. 85; [1956] 1 All E.R. 154, C.A.
Peters v. Prince of Wales Theatre (Birmingham) Ltd. [1943] K.B. 73; [1942] 2 All E.R. 533, C.A.
Pride of Derby and Derbyshire Angling Association Ltd. and Earl of Harrington v. British Celanese Ltd. [1953] Ch. 149; [1953] 2 W.L.R. 58; [1953] 1 All E.R. 179, C.A.
Prosser (A.) & Son Ltd. v. Levy [1955] 1 W.L.R. 1224; [1955] 3 All E.R. 577, C.A.
R.H.M. Bakeries (Scotland) Ltd. v. Strathclyde Regional Council, 1985 S.L.T. 214, H.L.(Sc.)
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Ross v. Fedden (1872) 26 L.T. 966
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Sedleigh-Denfield v. O'Callaghan [1940] A.C. 880; [1940] 3 All E.R. 349, H.L.(E.)
Smeaton v. Ilford Corporation [1954] Ch. 450; [1954] 2 W.L.R. 668; [1954] 1 All E.R. 923
Smith (W.H.) & Son Ltd. v. Daw (unreported), 31 March 1987; Court of Appeal (Civil Division) Transcript No. 344 of 1987, C.A.
Sutton v. Clarke (1815) 6 Taunt. 29
Tenant v. Goldwin (1704) 2 Ld.Raym. 1089; 1 Salk. 360
Weaver v. Ward (1616) Hob. 134
Young (John) & Co. v. Bankier Distillery Co. [1893] A.C. 691, H.L.(Sc.)

APPEAL from Ian Kennedy J.

The plaintiff, Cambridge Water Co., brought an action against the defendant, Eastern Counties Leather Plc., claiming damages and injunctive relief in connection with the escape into water pumped from its borehole at Sawston Mill of perchloroethene stored by the defendant on its land. On 31 July 1991 Ian Kennedy J. dismissed the plaintiff's claim.

By a notice of appeal dated 16 October 1991 the plaintiff appealed on the grounds that (1) the judge had erred in holding that the storage by the defendant on its land of large quantities of perchloroethene for use in the

tannery business conducted by it on that land did not constitute non-natural user of the land within the meaning of the principle in *Rylands v. Fletcher*; and (2) on the facts found, the judge ought to have ordered that judgment be entered for the plaintiff for the sum of £1,064,886 together with interest.

By a respondent's notice dated 4 November 1991 the defendant gave notice that at the hearing of the appeal it would contend that the judgment of Ian Kennedy J. should be affirmed on the additional grounds that (1) the judge should have held as a matter of law under the rule in *Rylands v. Fletcher* a defendant was only liable for the natural and anticipated consequences of that which in fact escaped; (2) since at the date of the escapes the damage of which the plaintiff complained was not and could not have been anticipated, the defendant was not liable; (3) the judge had erred in holding that the escape of which the natural and intended consequences had to be judged was not the series of spillages which the judge had found had taken place, but an escape of the quantities (about 25,000 litres) kept by the defendant; and (4) the judge had erred in law in holding that the burden was on the defendant to prove that perchloroethene was harmless and should have found on the evidence that the plaintiff had failed to prove that perchloroethene in the quantities complained of was harmful.

The facts are stated in the judgment of the court.

Piers Ashworth Q.C. and *Lawrence West* for the plaintiff.
Philip Vallance Q.C. and *David Hart* for the defendant.

Cur. adv. vult.

19 November 1992. MANN L.J. handed down the following judgment of the court. This is an appeal from a decision of Ian Kennedy J. given on 31 July 1991. The decision was to dismiss a claim by Cambridge Water Co. against Eastern Counties Leather Plc. for injunctive relief and damages in respect of the pollution of groundwater. The pollution had prevented the plaintiff from continuing to use water pumped at their Sawston Mill borehole for the purpose of providing a public water supply. On the same day and in the course of the same judgment, the judge dismissed a similar claim brought in a separate action against Hutchings and Hardings Ltd. There is no appeal against his decision in that action and it is unnecessary to say more about it than the claim failed because the judge found the defendant was not proved "to have produced any measurable effect" on the water pumped at Sawston Mill.

The plaintiff is a statutory water company with the responsibility of providing a public water supply within an area of approximately 453 square miles which includes the city of Cambridge. The population supplied is approximately 275,000. All of the water which the plaintiff supplies is obtained by abstraction from underground strata and in particular from the middle and lower chalk. In 1976 the plaintiff purchased premises which had previously been used for paper-making which are situate about 1·3 miles north west of the village of Sawston and are known as Sawston Mill. The premises included a borehole to a depth of 30 metres

by means of which water could be pumped from the chalk aquifer. The abstraction was authorised by a licence under (what was then) the Water Resources Act 1963. The authorisation was for an abstraction of 1·5m. gallons in any one day subject to an annual total take equivalent to an average daily take of 1·27m. gallons. The plaintiff's object in purchasing the mill was to enable it to use the borehole to provide water for the public supply. The pumping station was commissioned in June 1979 and its yield came to represent about 12·5 per cent. of the plaintiff's total resources.

The plaintiff satisfied itself before purchasing Sawston Mill that the water from the borehole was "wholesome" in accordance with the then current standards of water quality. The concept of wholesomeness in relation to a public water supply is an important one and it was considered in the late 1970s and 1980s by both the World Health Organisation and the Council of the European Communities. On 15 July 1980 the Council issued a Directive relating to the Quality of Water intended for Human Consumption (80/778/E.E.C.). The directive required member states to fix values applicable to water so intended by reference to specified parameters and provided (in effect) 18 July 1985 as the compliance date. One of the parameters was of the maximum admissible concentration of organochlorine compounds and a guide figure of one microgramme per litre (1 μg/l) was given. The water industry in England and Wales was informed of the directive by Department of the Environment Circular 20/82 dated 19 August 1982. On 10 November 1983 the industry was informed by the Department that the maximum admissible concentration of the organochlorine called tetrachloroethene was to be the lower standard of 10 μg/l. This standard is now to be found in item 10 of Table D of Schedule 2 to The Water Supply (Water Quality) Regulations 1989 (S.I. 1989 No. 1147) which have effect as if made by the Secretary of State under the Water Industry Act 1991, Part III, Chapter III. Tetrachloroethene (C_2Cl_4) is also referred to as perchloroethene and we shall refer to it, in company with the judge, as "P.C.E." It is an artificial compound.

In 1976 when Sawston Mill was purchased, the presence of P.C.E. in a public water supply was not a matter of concern and water was not tested with P.C.E. in mind. The Council Directive altered the situation. A method of detecting the presence of P.C.E. was devised for the Anglian Water Authority which at that time was responsible for water quality, and tests were made of the water supplied by the appellant. Early results showed P.C.E. concentrations of between 70 and 170 μg/l. Although the quantity of P.C.E. was small, the concentrations were many times higher than either the European guide level or the later figure given by the Department of the Environment. An investigation showed that P.C.E. had entered the distribution system in water pumped from the Sawston source. The plaintiff ceased pumping for supply at Sawston on 13 October 1983 and the defendant accepted the plaintiff had no option to do otherwise. A complex hydro-geological inquiry was then undertaken in order to determine the origin of the contamination. In the light of the information produced by that inquiry, the plaintiff claimed the P.C.E. had originated from the defendant's premises in Sawston and it commenced proceedings on that basis.

Sawston is about five miles south of Cambridge and although described as a village it now has a resident population of approximately 7,300 people. Tanneries have been located in the village for over 350 years and paper making has been carried on there for over 300 years. Additionally there are today some other uses of a light industrial character. The judge described it as an "industrial village." The defendant was incorporated in 1879 and ever since that date has carried on business as a producer of fine leather at premises in the village. About 100 people are employed in the business and live locally. The defendant is of high repute and its pride in its history is evidenced by the book which was published to celebrate the centenary of incorporation.

Tanning necessarily involves the degreasing of pelts. Until 1991 the defendant used organochlorines as solvents for degreasing. It was and still is, common practice so to do. The judge found that the solvent used until "about 1973" was trichloroethene (C_2HCl_3, "T.C.E."), and thereafter was P.C.E. He also found that until "about 1976" first T.C.E. and then P.C.E. were delivered to the site in 40 gallon drums but that thereafter P.C.E. was delivered in bulk and stored in a tank from whence it was piped to the degreasing machines. There was no evidence as to the number of drums on site at any one time before the end of 1976, but by reference to the amount of subsequent bulk deliveries the judge made the assumption that there would have been a maximum quantity of 25,000 litres (5,500 gallons or 138 drums) at any one time. The drums were kept in storage and were carried when required by fork-lift truck from the storage area to the degreasing machines. When the truck reached a particular machine the drum would be broached, tilted and its contents allowed to flow into the reservoir which acted as a supply for the machine. The judge said:

> "It is difficult to believe that that drum after drum could be emptied in that way without accidents and regular spillages. Because P.C.E. is less viscous than water it could escape through the finest fissure in the concrete: equally a small amount could escape at the point of storage from supposedly emptied drums. I find that it was by such spillages that the major pollution of the aquifer with P.C.E. and T.C.E. occurred."

The spillages must have occurred before the end of 1976. An understanding of the way by which they contaminated (and continue to contaminate) the groundwater requires some knowledge of the chalk and of the characteristics of P.C.E. Chalk is a porous and naturally fissured material which locally is underlaid by effectively impermeable layers of marl over gault clay. The pores contain water which is held in place by surface tension whilst the fissures provide the means for the percolation of the groundwater which can be abstracted by pumping. P.C.E. is a volatile compound but notwithstanding this characteristic some of the defendant's spillages must have seeped below the surface of its premises and into the subjacent chalk. The seepage would have sunk through the chalk until it met the interface with the impermeable material where it would have tended to pond. It would also have ponded at any less permeable place in the chalk itself. Although P.C.E. is not readily miscible with water it will mix, and so P.C.E. will slowly have dissolved into the percolating flows of

groundwater and then been carried down catchment at an estimated rate of 7 metres a day towards the Sawston Mill borehole 1·3 miles away. The flows would have contaminated the pore-water by the process of equalisation, and this process was or is available to operate in reverse when the concentration of P.C.E. in the flows begins to fall below the concentration in the pore-water. Accordingly even although there has been no spillage since the end of 1976, the judge found that "apart from such pools of P.C.E. as may be at various horizons in the aquifer, there remains a significant reservoir within the chalk itself." The amount of conjectural and the period at the end of which P.C.E. will have disappeared from the aquifer is at present an indefinite one.

After an interim arrangement to which we need not refer, the plaintiff made good the deficiency in its resources resulting from the shut down of Sawston Mill, by the development of a borehole at Hinxton Grange which is up-catchment from the defendant's premises. The net cost of making good (that is to say the cost after allowing for some over-design) was found by the judge to be £956,937. Had he held the defendant liable he would have awarded as damages both that sum (less an allowance of £60,000 for the residual operating benefit of the Sawston Mill premises) together with the costs of a pilot plant and of pumping to waste in an unsuccessful attempt to purge the aquifer of P.C.E.

None of the facts which we have stated is now in dispute although at the trial there was a great deal of dispute over technical matters. The disputes were resolved with clarity in Ian Kennedy J.'s judgment and no complaint is made about his findings.

The plaintiff contended at trial that the defendant was liable in negligence, in nuisance or under the rule of law known as the rule in *Rylands v. Fletcher* (1868) L.R. 3 H.L. 330. The principal arguments seem to have been as to the application of the rule in *Rylands v. Fletcher*. The contentions in negligence and in nuisance failed because the judge found the defendant's employees could not have reasonably foreseen in 1976 or before, that the spillages would result in detectable quantities of P.C.E. being found in the aquifer let alone that those quantities would have a sensible effect upon water abstracted from down-catchment. There is no appeal against that finding, but whether it is a finding which is properly decisive of the plaintiff's claim in nuisance is a question which we will have to consider.

The judge rejected liability under the rule in *Rylands v. Fletcher* on a single ground. His starting point was to observe:

> "But the rigours of the rule in *Rylands v. Fletcher* have been mitigated with the passing years, not by introduction of any concept of fault but by a development of Lord Cairns's contrast of natural and non-natural user. Whether or not Lord Cairns intended his phrase to be definitive as opposed to descriptive (as to which either view might be held), the rule has been qualified by centering upon and giving a more liberal interpretation to the words 'natural user.'"

He next considered at length some of the authorities and concluded:

> "In my judgment, in considering whether the storage of organochlorines as an adjunct to a manufacturing process is a non-natural use of land, I must consider whether that storage created special risks for adjacent occupiers and whether the activity was for the general benefit of the community. It seems to me inevitable that I must consider the magnitude of the storage and the geographical area in which it takes place in answering the question. Sawston is properly described as an industrial village, and the creation of employment is clearly for the benefit of that community. I do not believe that I can enter upon an assessment of the point on a scale of desirability that the manufacture of wash leathers comes, and I content myself with holding that this storage in this place is a natural use of land. The plaintiffs have not sought to make any particular point on the proximity of either works to residential areas. . . . I hold that the storage of these chemicals did not amount to a non-natural user of land."

Mr. Piers Ashworth, for the plaintiff, challenged this conclusion and argued that if it is correct, then "far from the rule in *Rylands v. Fletcher* remaining in full force (as the judge expressly held) it has been emasculated to the point of extinction." This challenge raised the questions as to whether it is a requirement for the establishment of liability under the rule that the defendant's use of his land must have been a "non-natural use" and if so, what is meant by "non-natural use."

Mr. Philip Vallance, for the defendant, defended the judge's conclusion on natural use. He also sought to uphold the decision on the ground that the defendant neither knew nor ought to have known that P.C.E. if it escaped from the defendant's premises, was likely to cause damage of the type which in fact it did. This argument denies the sufficiency for the purpose of establishing liability under the rule in *Rylands v. Fletcher*, of the escaped thing having caused the damage which it did through the operation of ordinary natural processes such as those which we have endeavoured to describe.

The questions raised by Mr. Ashworth and Mr. Vallance are fundamental ones in regard to the rule in *Rylands v. Fletcher*, but they would not arise if the plaintiff could establish its claim under the heading of nuisance. Nuisance, as Lord Macmillan has said, is a congener of the rule in *Rylands v. Fletcher* (*Read v. J. Lyons & Co. Ltd.* [1947] A.C. 156, 173), but the former usually focuses on the acts of the defendant whilst the latter always focuses on the event of an escape of some mischievous thing which the defendant brought onto his land. The plaintiff's claim in nuisance failed for a reason which assumes the circumstances were such that the defendant could be liable for the consequences of its accidental spillage of P.C.E. only if it had broken a duty to avoid foreseeable damage of a particular kind. The parties seem to have been content that the judge should proceed on this assumption. The basis for it is not explicit in the judgment.

In *Goldman v. Hargrave* [1967] 1 A.C. 645, 657, Lord Wilberforce said:

> "the tort of nuisance, uncertain in its boundary, may comprise a wide variety of situations, in some of which negligence plays no part, in others of which it is decisive."

The situation in the present case is one where the plaintiff alleged an interference with a right enjoyed as an incident of its ownership of Sawston Mill. Rights which the courts have identified as an incident of the ownership of land have often been described, especially by judges in the 19th century, as "natural" rights. One of the rights is the right of the owner in regard to naturally occurring water which comes beneath his land by percolation through undefined underground channels. The owner's right is to have such of the water as he appropriates by abstraction come to him in an uncontaminated condition: *Clerk & Lindsell on Torts*, 16th ed. (1989), p. 1394, para. 24–54; *Coulson & Forbes on Waters and Land Drainage*, 6th ed. (1952), pp. 238–241.

The leading authority upon the right and the protection of it, is *Ballard v. Tomlinson* (1885) 29 Ch.D. 115. In that case the plaintiff and the defendant were adjacent landowners who each owned a well sunk into a chalk aquifer. The plaintiff pumped water from his well for the purposes of his brewery but the defendant came to use his well as a receptacle for the sewage and refuse from his printing house. The sewage and refuse contaminated the water in the chalk to an extent that the water which the plaintiff pumped became unusable in the brewing process. His claim for an injunction and damages failed before Pearson J. (1884) 26 Ch.D. 194, but succeeded in this court. Sir Baliol Brett M.R. said, 29 Ch.D. 115, 119, that the proposition of law raised by the case seemed to the court to be clear. He described an aquifer as a "common source" and said, at pp. 121, 122:

> "it seems to me that although nobody has any property in the common source, yet everybody has a right to appropriate it, and to appropriate it in its natural state, and no one of those who have a right to appropriate it has a right to contaminate that source so as to prevent his neighbour from having the full value of his right of appropriation. . . . Neither does it matter whether the parties are or not contiguous neighbours. If it can be shown in fact that the defendants have adulterated or fouled the common source, it signifies not how far the plaintiff's land is from their land."

Cotton L.J. said, at p. 124:

> "Then why has not the plaintiff a right of action? The defendants, not by exercising a natural right incident to the ownership of land, but by putting filth on their land, interfere with the exercise by the plaintiff of a natural right incident to the ownership of his own land, and although while dirty water is in the stratum under the defendant's land, or even, perhaps, while it is under the plaintiff's land, so long as he is not desiring to appropriate and use it, the plaintiff has no right of action, yet as soon as the act of the defendants interferes with the beneficial use by the plaintiff of that right, incident to the ownership of the land, in my opinion he has a right of action. Of

course if what the defendants were doing was a natural use of their land—that is to say, an exercise of a natural right incident to ownership—the plaintiff could not complain. But the defendants are not doing that. No one can say that putting filth on your land in such a position and with such little care that it gets down to the stratum where the water is common to you and to your neighbour, or to any other owner of land, is a natural use of the land."

In referring to the situation where a plaintiff could not complain because the defendant had done no more than properly exercise a natural right of his own, Cotton L.J. may have had in mind *Smith v. Kenrick* (1849) 7 C.B. 515 which had been cited in argument. That was a mining case where the defendant had worked his mine in a proper manner but with the consequence that water which naturally percolated into his mine was able to flow downward into the plaintiff's mine. Cresswell J. in delivering the judgment of the Court of Common Pleas said, at p. 564:

"it would seem to be the natural right of each of the owners of two adjoining coal mines—neither being subject to any servitude to the other—to work his own in the manner most convenient and beneficial to himself, although the natural consequence may be, that some prejudice will accrue to the owner of the adjoining mine, so long as that does not arise from the negligent or malicious conduct of the party."

A similar case was *Wilson v. Waddell* (1876) 2 App.Cas. 95 (especially at p. 99) but a contrasting one also cited in *Ballard v. Tomlinson*, 29 Ch.D. 115, is *Baird v. Williamson* (1863) 15 C.B.(N.S.) 376, where the plaintiff complained of water which flowed into his mine from the defendants' superior mine and which the defendants had pumped to their mine from elsewhere. The plaintiff succeeded because the natural right to mine gave "no right to be active agents in sending water into the lower mine:" *per* Erle C.J., at p. 391. We suspect Cotton L.J. would have proposed that the defendants in that case had not made a "natural use" of their land because they had not acted in the exercise of a natural right. Someone who regarded the case in that way might express his view by stating the user in *Smith v. Kenrick*, 7 C.B. 515 was "natural" whilst those in *Baird v. Williamson*, 15 C.B.(N.S.) 376 (and later) *Ballard v. Tomlinson*, 29 Ch.D. 115 were "non-natural." The statement does not cause difficulty provided the recipient understands both that it is an abbreviation and that it always predicates a prior determination of the real question. That question is whether the user was or was not the violation of a right of the plaintiff.

The third member of the court in *Ballard v. Tomlinson* was Lindley L.J., who said, at pp. 126–127:

"underground water which supplies a well may not be the property of the owner of the well, but he has a right to take and use such water, and upon principle he appears to me to have a right of action against those who poison what he has a right to get. If indeed the well owner had no right to get unpolluted water he would have no

A right of action, but it lies upon those who deny his right to maintain their position. Prima facie, at all events, the right of a man to get water from his well is to get the water as nature supplies it, and if any contends that he has a right to pollute the natural supply he must establish such right. A right to foul a stream may be acquired by prescription; and possibly a right to foul an underground basin of water might be similarly acquired; but no such question arises in this B case."

Ballard v. Tomlinson, was referred to by Ian Kennedy J. but he did not use it for any purpose beyond that of identifying the plaintiff's right. In particular he did not use it to compel the conclusion that the interference with the plaintiff's "natural" right which resulted from the defendant's C spillage of P.C.E. was actionable as a nuisance. Indeed it would appear that he was not asked to do so. In this court neither Mr. Ashworth nor Mr. Vallance could offer any reason which we find ourselves able to formulate, as to why *Ballard v. Tomlinson* is not determinate in the plaintiff's favour. Mr. Ashworth was of course content that it should be, and indeed had stated in his skeleton argument that the decision is "scarcely distinguishable from this case on the facts."

D In our judgment the case is not distinguishable and the judge was wrong not to apply it. That the plaintiff and the defendant were not adjacent landowners is immaterial because the same aquifer was beneath the surface of each ownership. It is also immaterial that Tomlinson's filth was deliberately put into his well whilst the P.C.E. was spilt by accident. The judgments contain no warrant for distinguishing between a deliberate E act and spillages which (as the judge found) were inherently likely to occur. It was sufficient that the defendant's act caused the contamination. Nor do the judgments contain any warrant for attaching importance to the reasonableness of the defendant's inability to foresee that spillages would have the kind of consequence which they did. It does not appear from the report whether Tomlinson either knew or ought to have known of any risk of damage attendant on his actions, but none of the judges in F this court was concerned with his state of actual or imputed knowledge. The situation is one in which negligence plays no part.

Ballard v. Tomlinson decided that where the nuisance is an interference with a natural right incident to ownership then the liability is a strict one. The actor acts at his peril in that if his actions result by the operation of ordinary natural processes in a interference with the right then he is liable G to compensate for any damage suffered by the owner. In the present case the P.C.E. was found to have been spilt by the actions of the defendant's servants and the damage which was suffered by the plaintiff resulted from the operation of ordinary natural processes. Accordingly in our judgment *Ballard v. Tomlinson* is determinate in favour of the plaintiff. We should add we cannot attach any importance to the fact that the plaintiff suffered damage only when quality standards were raised three years after its H abstraction commenced and many years after the defendant had ceased to spill P.C.E. Mr. Vallance drew attention to this fact, but he did not suggest it had any legal relevance, and we suspect he did so only in order to excite sympathy for the defendant which although historically a spiller

of P.C.E., now regards itself as potentially the victim of liability without fault.

Our conclusion makes it unnecessary to consider the fundamental questions relating to the rule in *Rylands v. Fletcher*, L.R. 3 H.L. 330 which were elaborately argued before us. However, whatever the answers to those questions may be, we think that the rule is inapposite in the present case. It is a rule which makes a person liable for the event of an escape rather than for his actions. This case is one where liability attached by reason of actions of the respondent in spilling P.C.E. Had the chemical escaped into the aquifer through cracks in a storage tank which had been negligently fabricated by an apparently competent contractor, then the case would have required an examination of the conditions for liability under the rule. The conditions are stated in the familiar and classic passage in the judgment of the Exchequer Chamber delivered by Blackburn J. in *Fletcher v. Rylands* (1866) L.R. 1 Ex. 265, 279–280. The statement was expressly approved in the speeches of Lord Cairns L.C. and Lord Cranworth in the House of Lords, L.R. 3 H.L. 333, 340; for the identity of the third member of the House see the note in (1970) 86 L.Q.R. 160. In our opinion it is doubtful whether in an earlier part of his speech, at pp. 338–339, Lord Cairns had intended to attach a further condition, that is to say that the thing which escaped must have been brought onto the defendant's land in the course of a "non-natural" use of it. In the earlier part Lord Cairns was dealing with the "simple principles" which he derived from *Smith v. Kenrick*, 7 C.B. 515 and *Baird v. Williamson*, 15 C.B.(N.S.) 376 (which we have discussed) and which he regarded as affording of themselves a sufficient ground for deciding in favour of the plaintiff. However, Viscount Simon has stated obiter that Lord Cairns added another condition (*Read v. J. Lyons & Co. Ltd.* [1947] A.C. 156, 166), and there are many statements or decisions which assume the rule has a condition or qualification relating to "non-natural" use (see *Clerk & Lindsell on Torts*, at pp. 1425–1426). None of the authorities very satisfactorily explains what the word means in this context and Megaw L.J. once remarked on the "anomalies if not absurdities of this supposed doctrine:" *Leakey v. National Trust for Places of Historic Interest or Natural Beauty* [1980] Q.B. 485, 521G. The court may have to consider on a future occasion both whether it is bound to hold there is a condition or qualification and if so what it means (the first issue is illuminated by Professor F.H. Newark in "Non-natural User and *Rylands v. Fletcher*" (1961) 24 M.L.R. 557). Mr. Vallance's argument as to foresight of the kind of damage caused by an escape will also have to await a future occasion. The decision in *West v. Bristol Tramways Co.* [1908] 2 K.B. 14 may then be important.

Mr. Vallance, and in response Mr. Ashworth, each submitted what they described as an argument on policy in support of their respective causes. Mr. Vallance was concerned to demonstrate how modern legislation in regard to both resource management and control of pollution makes it no longer either just or convenient that the common law should intervene to impose a strict liability for the pollution of an aquifer. Mr. Ashworth responded with the maxim "the polluter should pay" which is now embodied as a principle in article 130R of the E.E.C. Treaty, as

inserted by article 25 of the Single European Act (1986) (Cmnd. 9758). However, where the law which is binding on this court is clear, as we think here it is, then the court's decision cannot be affected by policy considerations. Others must consider whether *Ballard v. Tomlinson*, 29 Ch.D. 115 accords with contemporary opinion. Some of them may say that it does.

For the reasons which we have given this appeal is allowed.

Appeal allowed with costs.
Leave to appeal refused.

Solicitors: Barlow, Lyde & Gilbert; Berrymans.

M. B. D.

APPEAL from the Court of Appeal.

The defendants appealed by leave dated 18 March 1993 of the House of Lords (Lord Griffiths, Lord Goff of Chieveley and Lord Woolf).

The facts are stated in the opinion of Lord Goff of Chieveley.

Philip Vallance Q.C. and *David Hart* for the defendants. There are two respects in which this appeal is of interest and importance. (1) It addresses the foundations of liability in tort in an area which has been little visited in recent years and which is sometimes referred to (but confusingly) as "the law of nuisance," and to that particular enclave therein known as the rule in *Rylands v. Fletcher* (1868) L.R. 3 H.L. 330. (2) It does this in a context that is widely seen as both novel and important, namely, not that of environmental pollution, but that of the far more complex and intractable problem: who is to pay for the results of industrial activities carried out in the past, which at the time were commonplace and unexceptionable, unaccompanied by any apprehension of harm, but which are now seen by society—rightly so—not so much as having caused harm as having created a potentiality for harm which should now be eradicated?

The Court of Appeal held that the plaintiffs' entitlement to damages was founded upon an ability to sue in tort (nuisance) for infringement of a right—the right to have pure percolating water was identified as one of the natural rights incident to the ownership of land—and the court held that in the case of infringement of such a right liability is strict: the "actor" acts at his peril and is liable for any and all consequences which result from the operation of ordinary natural processes. Foreseeability is irrelevant: it was sufficient that the defendants' act caused the contamination.

The reasoning is fallacious, in two respects: (i) no such "natural right" exists in law; and (ii) whatever may be the true character of the "right," since this appeal concerns a claim for damages for accidental interference with it as opposed to an assertion of its existence as such (i.e. by way of declaration or injunction), then such claim properly falls to be assessed in accordance with standards of foreseeability and remoteness common to most, if not all tort law: see *Read v. J. Lyons & Co. Ltd.* [1947] A.C. 156,

172, *per* Lord Macmillan, and *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound)* [1961] A.C. 388, 422, *per* Viscount Simonds. As to (i), it was said by the Court of Appeal that it was a natural right incident to the ownership of Sawston Mill. As to (ii), the Court of Appeal relied upon *Clerk and Lindsell on Torts*, 16th ed. (1989), p. 1394, para. 24–54; *Coulson and Forbes, Waters*, 6th ed. (1952) pp. 238–241 and *Ballard v. Tomlinson* (1885) 29 Ch.D. 115.

To appreciate the decision in *Ballard v. Tomlinson* it is necessary to consider the historical background of the case and the hybrid nature of the law of nuisance. The present case is one of accidental damage.

There are three general categories of factual circumstances which through historical accident (the forms of action) are described as nuisance, i.e. interference with the use or enjoyment of land, or rights or interests in land. An action arising from the foregoing can take one of three forms: (i) an action for injunctive relief, (ii) an action for damages and (iii) an action for interference with a "servitude"—easement or profit acquired through grant or prescription—where damage is not the gist of the action and where the action lies to assert or vindicate a "right" and not to redress a wrong. It follows that when it is said that "no such natural right exists in law" this means that there are "rights" which are "natural" in the sense that (a) they pertain to the land and (b) they do not rest on grant or prescription, but they are not (by definition) servitudes and therefore an interference with them falls under (ii). The mistake of the Court of Appeal was to confuse this category with (iii). Where a plaintiff claims damages in tort, then it is a necessary ingredient of his cause of action, without which it is not complete, that he has suffered loss; foreseeability is thus (usually) an issue, and by reason of the remedy sought. [Reference was made to *Dias and Markesinis, Tort Law*, 2nd ed. (1989) pp. 300–301 and n.39; *Clerk and Lindsell on Torts*, 16th ed., pp. 1377–1378.] The Court of Appeal would have appeared to have placed reliance on *Winfield and Jolowicz on Tort*, 13th ed. (1989), p. 379, where reference is made, inter alia, to *Colls v. Home and Colonial Stores Ltd.* [1904] A.C. 179 and *Nicholls v. Ely Beet Sugar Factory* [1936] Ch. 343, for the proposition that all a plaintiff had to do in circumstances such as the present was to show that he had a natural right incident to the ownership of his land and interference with it. But on the existence of "natural rights," see *Megarry and Wade, The Law of Real Property*, 5th ed. (1984), p. 842 and *Simpson, A History of the Land Law*, 2nd ed. (1986), p. 263. Research throws little useful light on quite what are the natural rights incident to the ownership of land. The subject is extensively discussed in *Dalton v. Angus* (1881) 6 App.Cas. 740, where the judges' opinions appear to say that the only recognised "natural rights" were the right to support of soil by soil and the riparian owner's right to the flow of water in a defined channel.

As to rights to water, the law has long, and for good reason, drawn a sharp distinction between water which flows naturally in a known and defined channel, and that which does not. As to the former, see *Embrey v. Owen* (1851) 6 Exch. 353 and *Halsbury's Laws of England*, 4th ed., vol. 49 (1984), pp. 223–224, para. 392. For underground water flowing through undefined and unknown channels: see *Gale, Easements*, 15th ed. (1986),

p. 231 and *Halsbury's Laws of England*, vol. 49, pp. 236 and 237, paras. 413 and 414.

The law relating to percolating water was established in *Acton v. Blundell* (1843) 12 M. & W. 324 and *Chasemore v. Richards* (1859) 7 H.L.Cas. 349, where the courts expressly rejected the argument that, in abstracting percolating water, a landowner was exercising a natural right. Precisely because it is not a "natural" right (nor analogous to it) the landowner cannot complain if he finds there is no water at all to abstract because his neighbour has taken it first, even maliciously: *Bradford Corporation v. Pickles* [1895] A.C. 587.

The distinction is not between the above-ground and the below-ground, but between the known and the unknown, and this itself indicates the principle which underlies the distinction: natural streams are "public and notorious," but percolating waters are neither—and if liability for abstraction existed it would be "indefinite and unlimited:" see also *Chasemore v. Richards* 7 H.L.Cas. 349, 379, *per* Lord Cranworth and *Bradford Corporation v. Ferrand* [1902] 2 Ch. 655.

The position as regards percolating water may be summarised thus. Every landowner has the right to abstract all that he wishes. When he does so he is neither (a) enforcing a servitude nor (b) exercising a "natural right" (not to be interfered with by others) of the kind identified in *Dalton v. Angus*, 6 App.Cas. 740 or *Embrey v. Owen*, 6 Exch. 353. It is for this precise reason that if the landowner finds that all the percolating water has disappeared, he has no cause of action (because no "natural right")—unless he can locate a right in the modern law of nuisance or a duty as presaged by Lord Penzance in *Dalton v. Angus*, 6 App.Cas. 740, 745–746 and Lord Wensleydale in *Chasemore v. Richards*, 7 H.L.Cas. 349. So equally, if a landowner finds that the water has not disappeared but has become polluted he cannot claim for infringement of "natural right." But this is not to say that he may not have a cause of action, in nuisance, if he has sustained some form of actionable loss.

The authorities show that the correct approach is as follows (where P and D are landowners sharing the same catchment of percolating water). (i) Neither P nor D has a "natural right" to any water. (ii) D can abstract as much water as he wishes, and extinguish P's supply. (iii) It does not follow, however, that D has a "right" to pollute the water. (iv) If D does pollute the water then P *may* have an action against him in tort for damages (that is, subject to foreseeability, remoteness etc.), and in that sense (and that sense only) P has a right not to have the water which does come to him polluted. The Court of Appeal's error lay in including the remarkable but unnecessary (save for the purposes of creating a new tort of strict liability) step of finding that P, having no "natural right" to quantity, does nevertheless have a "natural right" to quality in respect of percolating water that comes onto his land.

In reaching their conclusion the Court of Appeal placed much reliance on *Ballard v. Tomlinson*, 29 Ch.D. 115 and observed both that it was the leading authority and that it decided that where the nuisance is an interference with a natural right incident to ownership then the liability is a strict one. But *Ballard* was not a "natural rights" case; it was a perfectly ordinary nuisance case. Moreover, although it is true that the judgments

contain no reference to foreseeability, that is because it was not raised by Tomlinson as a defence which given the facts is scarcely surprising. The case cannot be regarded as authority for the proposition that liability for pollution of percolating waters is "strict," any more than can (say) *Tenant v. Goldwin* (1704) 2 Ld.Raym. 1069.

The appeal concerns a claim for damages for accidental interference with land, and in principle, the allocation of loss in cases of accidental damage in accordance with a hierarchy of "property" rights leads to results which are both unreasonable and in tension with current notions of tortious duty.

Thus it may be regarded as surprising that although D now in some circumstances owes his neighbour P a duty to take positive steps to protect P from the foreseeable results of hazards occurring naturally on D's land (see *Goldman v. Hargrave* [1967] 1 A.C. 645 and *Leakey v. National Trust for Places of Historic Interest or Natural Beauty* [1980] Q.B. 485) nevertheless for 20 years from the moment that P erects a building on his land D can with impunity so excavate his own land as to bring it tumbling down—that is, because the right of support of soil by soil is a "natural right," while that of support of a building by soil is not: see *Dalton v. Angus*, 6 App.Cas. 740. Further, what sense is there in a system which permits D, knowingly and without good reason, to abstract all the water percolating beneath his land so as to extinguish his (literal) neighbour P's supply, or cause his house to subside (*Stephens v. Anglian Water Authority* [1987] 1 W.L.R. 1381), but which would nevertheless expose D to liability to compensate P (many miles away) for the unintentional, unforeseen and unforeseeable consequence of an accidental spillage occurring in the course of a beneficial industrial or agricultural activity? Here again, Commonwealth jurisdictions have rejected the "absolute rights" approach in favour of duties owed in nuisance or negligence: see *Pugliese v. National Capital Commission* (1977) 79 D.L.R. (3d) 592. In the United States the English "absolute right" doctrine has long since been rejected in favour of the "reasonable use doctrine" or the "correlative rights doctrine:" see the American *Restatement of the Law (Second) Torts* 2d, vol. 4, section 857, pp. 253 et seq. Further, it must not be overlooked that at the present time D, far from being able to exercise his "natural right," would need a licence to abstract under section 24 of the Water Resources Act 1991, in much the same way that Rylands before constructing his reservoir, would need both to obtain planning consent and to comply with the Reservoirs Act 1975. The American *Restatement, Torts* 2d, vol. 4, sections 831 and 832, pp. 141, 143–145 accurately states the position in English law.

As to liability for damages in nuisance, the medieval cases are of little assistance since they deal with factual situations very different from those pertaining in modern times. Further, they are not cognisant of the concept of foreseeability.

If one looks at the matter historically—the developments of the law from the assize of nuisance via the writ of trespass to the action on the case—it is sometimes seen as the gradual amelioration of medieval "force" theory (setting in motion a force which before it comes to rest causes loss) by notions of fault until the moralisation of the common law was achieved

in the 19th century. But it is doubtful whether the process was so simple: see *Fifoot, History and Sources of the Common Law* (1949), chapter 9.

In earlier times in a more static and agrarian society most forms of harm were predictable and therefore the need to ask the question ("was it foreseeable?") rarely arose. But urbanisation and mechanisation require that greater urgency is demanded of the law in deciding how far, and to what degree, liability to compensate should accompany causal nexus down a potentially endless path. Thus in negligence, foreseeability must now fall into step with proximity and with an evaluation of what is fair, just and reasonable.

With negligence established as an independent and free-standing basis of liability it should occasion no surprise that nuisance is sometimes seen as coming close to being subsumed within it (see *Clerk and Lindsell on Torts*, 16th ed., pp. 1367–1369, para. 24–18 and *Fleming, The Law of Torts,* 8th ed., p. 409) or that at least similar control mechanisms should apply. Thus, Newark, "The Boundaries of Nuisance" (1949) 65 L.Q.R. 480 et seq. and Gearty, "The Place of Private Nuisance in a Modern Law of Torts" (1989) 48 C.L.J. 214 et seq. suggest that questions relating to indirect physical damage to land should be left to be dealt with under negligence.

The foregoing contention is particularly applicable in the case of the critical distinction between the claim for injunctive relief and the claim for damages: see *Winfield and Jolowicz on Tort,* 13th ed., pp. 380–381. If P's land is interfered with by his neighbour D and he complains to D but D persists with the activity complained of, then the action for an injunction serves to prevent D from continuing in the future an activity which, by definition, he knows and has been proved to be an interference with P's property, and it is no defence for D to prove that he has taken all reasonable care to prevent it: *Rapier v. London Tramways Co.* [1893] 2 Ch. 588. If, however, P seeks to recover from D compensation for loss caused to him as a result of an accident occurring in the course of a hitherto harmless activity then P is doing something quite different and the control mechanism of foreseeability should and does apply. It should apply by reason of principle, and it does apply by reason of precedent: see *Sedleigh-Denfield v. O'Callaghan* [1940] A.C. 880, 897 (*per* Lord Atkin), 904 (*per* Lord Wright). This is considerably reinforced in more recent times by *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty. (The Wagon Mound (No. 2))* [1967] 1 A.C. 617, 636–640. [Reference was also made to *In re Polemis and Furness Withy and Co. Ltd.* [1921] 3 K.B. 560 and *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound)* [1961] A.C. 388, 413, 416, 421, 422–423.] *The Wagon Mound (No. 2)* has received general academic approval: see *Clerk and Lindsell on Torts,* pp. 1369–1372, paras. 24–19, 24–20, *Winfield and Jolowicz on Tort,* p. 382; *Fleming, The Law of Torts,* pp. 427–428, 443 and *Dias and Markesinis, Tort Law,* p. 311. The reasoning has been applied in *Solloway v. Hampshire County Council* (1981) 79 L.G.R. 449; *Home Brewery Co. Ltd. v. William Davis & Co. (Leicester) Ltd.* [1987] Q.B. 339 and *Severn Fisheries v. Hollerton* (unreported), 14 December 1987. A similar position has been reached in the U.S.A.: see the American *Restatement, Torts* 2d, vol. 4, section 822, pp. 108, 109–113 and *Dillon v. Acme Oil Co.* (1888) 2 N.Y.S. 289.

A denial of foreseeability of damage as a necessary ingredient of liability in nuisance would create, in pollution cases, the "strict retrospective" regime introduced in the U.S.A. by the Superfund Programme (Comprehensive Environmental Response, Compensation, and Liability Act 1980). It has been suggested that such a regime is presaged, within the E.E.C., by article 130 of the Treaty of Rome (as inserted by article 25 of the Single European Act). However, the principle has yet to be translated into legislation and it is far from clear that when it is liability will be not just strict but also retrospective.

The Council of Europe's Draft Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Strasbourg, 26 January 1993), while endorsing strict liability, expressly refuses to make such liability retrospective: article 5.1 and paragraph 48 of Explanatory Report.

Liability insurance provides no easy answer. Until about 1990 U.K. policies generally contained no pollution exclusion clause (but were and are "occurrence" based); since 1990 virtually all policies have been subject to a clause excluding cover for gradual, unintended and unexpected pollution. Environmental impairment liability policies are becoming available but they are restricted in scope and written on a "claims-made" basis.

If (a) liability in nuisance continues to be restricted to damage of the kind which, at the time the activity complained of occurred, ought reasonably to have been foreseen, and (b) this is perceived to impose an injustice on the innocent victim of historic pollution then statute, with its ability to evaluate competing political interests and to "fine tune" the balance between them, is peculiarly well equipped to provide the answer: see sections 4 and 5 of the Consumer Protection Act 1987; section 80 of the Environmental Protection Act 1990; sections 92 to 97 of the Water Resources Act 1991 and section 80(3)(*d*) and (5) of the Water Industry Act 1991.

The matter was well put by the trial judge. It is better, in cases of pre-Directive damage, that the law should adhere to foreseeability principles (which yield in most cases a just and equitable result), leaving it to Parliament to impose a stricter rule if desired, than that (understandable) concern for the environment should lead to an outcome in the present case which (a) will redistribute loss in a fashion disproportionate to the true damage suffered and (b) would be contrary to principle and precedent.

As to the rule in *Rylands v. Fletcher*, the problem which faced Blackburn J. in the Exchequer Chamber (1866) L.R. 1 Ex. 265 and Lord Cairns L.C. in the House of Lords (1868) L.R. 3 H.L. 330 was that at that time (a) since the event complained of was an isolated escape rather than a continuous or recurring interference it did not fall into any recognised category of actionable nuisance (see *Fleming, The Law of Torts*, p. 334 and *Dias and Markesinis, Tort Law*, p. 344); (b) although there was a finding that the contractors had been negligent, it was not until *Bower v. Peate* (1876) 1 Q.B.D. 321, that the possibility of vicarious liability for negligence of independent contractors came to be recognised (see also *Winfield and Jolowicz*, p. 423); (c) the courts remained anxious to protect,

so far as they legitimately could, a landowner's right to do with his land what he wished and would not countenance liability for a purely "natural" (that is pastoral) state of affairs: see *Smith v. Kenrick* (1849) 7 C.B. 515 and *Baird v. Williamson* (1863) 15 C.B.(N.S.) 376.

It must thus be borne in mind throughout that (a) and (b) no longer present obstacles; and (c) "neighbour" law (in the sense used by Lord Atkin) has now been refined and applied to duties owed to literal neighbours in respect of "natural" hazards in a manner which would have surprised and probably outraged 19th century judges: see *Leakey v. National Trust for Places of Historic Interest or Natural Beauty* [1980] Q.B. 485, 519–523. In short, the rule in *Rylands v. Fletcher* no longer serves any useful purpose and serves only to obfuscate an important area of law where modern nuisance and negligence principles are well equipped to do justice.

Whether Lord Cairns L.C. intended to add anything to Blackburn J.'s rule when he referred to "any purpose which I may term a non-natural use" (L.R. 3 H.L. 330, 339) has been the subject of intense academic debate. He does apparently envisage a "natural use" which embraces work or operations on or under land—and any logical distinction between bringing a thing on the land and carrying out work on the land seems tenuous to say the least. Some support for the view that the true distinction is between operations which are carried out in an "ordinary," "usual," "reasonable" and "proper" manner, and those which are not, can be derived from the mining cases: *Smith v. Kenrick*, 7 C.B. 515 and *Baird v. Williamson*, 15 C.B. (N.S.) 376.

It has however been cogently argued, most notably by Newark, *Non-natural user and Rylands v. Fletcher* (1961) 24 M.L.R. 557, that by "non-natural" Lord Cairns L.C. meant "anything not there in a state of nature" and that subsequent translations of that expression as meaning "unusual" or "extraordinary" were heretical. Since virtually anything has, one way or another, the capacity to cause some form of mischief if it escapes this would yield (if foreseeability of the mischief was not a further criterion) a tort liability of quite extraordinary breadth, and thus it is not surprising that the heresy (if that is what it was) should appear and take hold.

The relevant appellate cases are *Rickards v. Lothian* [1913] A.C. 263; *Sedleigh-Denfield v. O'Callaghan* [1940] A.C. 880 and *Read v. J. Lyons & Co. Ltd.* [1947] A.C. 156 (see especially the speech of Lord Macmillan and in the Court of Appeal [1945] K.B. 216 the judgment of Scott L.J. which provide useful historical analysis). The common theme in the cases is the perceived necessity to place some restraint on the rule, and to do so by excluding from its operation everyday activity and by confining it to "some special use bringing with it increased danger to others:" *Rickards v. Lothian* [1913] A.C. 263, 280, *per* Lord Moulton. The development has been generally welcomed by academics as providing a necessary and flexible control mechanism: see *Fleming, The Law of Torts*, p. 338; *Winfield and Jolowicz on Tort*, p. 428; *Clerk and Lindsell on Torts*, p. 1425, para. 25–06 and *Salmond and Heuston on The Law of Torts*, 20th ed. (1992), p. 322.

The "qualified" rule has been adopted in Canada (see *Gertsen v. Municipality of Metropolitan Toronto* (1973) 41 D.L.R. (3d) 646), New

Zealand (see *New Zealand Forest Products Ltd. v. O'Sullivan* [1974] 2 N.Z.L.R. 80) and Australia (see *Benning v. Wong* (1969) 122 C.L.R. 249), where the judgment of Windeyer J. affords valuable insight.

In many American jurisdictions the unqualified rule was initially subject to hostile criticism as being unworkable in practice and unsound in principle: see *Brown v. Collins* (1873) 53 N.H. 442. In its qualified form, however, and as a branch of nuisance, it has been effectively followed: see *Prosser and Keeton, The Law of Torts*, 5th ed. (1984), Ch. 13, especially pp. 545–556. The *Restatement of the Law (Second) Torts* 2d, vol. 3, p. 34 encompasses the qualified rule in a general principle governing abnormal dangerous activity in section 519.

On the issue of *Rylands v. Fletcher* and foreseeability, it is worth noting by way of background why it was that Victorian lawyers regarded an accumulation of water with such evident apprehension: see *Simpson, Legal Liability for Bursting Reservoirs: The Historical Context of Rylands v. Fletcher* (1984) 13 J.Leg.Stud. 209.

It is one thing to be held the insurer of a dangerous thing in the sense that if it escapes and does damage of the kind which makes it known to be dangerous it is no defence that all reasonable care was taken to prevent it escaping; it is another to be held not only strictly liable (that is for the fact of the escape) but also liable for each and every consequence of escape, however unrelated to the dangerous propensity. The former is, or may be, consistent with modern principle: the latter is not.

Applying the plain and natural meaning of his language, Blackburn J. clearly intended his "general rule" (which he regarded as reasonable and just) to apply, and apply only, to a thing which "will naturally do mischief if it escapes" (L.R. 1 Ex. 265, 279); that by "naturally" he meant "likely" (p. 279); that by "likely" he meant "which he knows to be mischievous" (p. 280); and that liability was to extend no further than "the natural and anticipated consequences" of the escape (p. 280). See, also, p. 286, where he states "there is no difference in this respect between chlorine and water; both will, if they escape, do damage, the one by scorching, and the other by drowning, and he who brings them there must at his peril see that they do not escape and do that mischief." The authorities then referred to by Blackburn J. all lend implicit support to this view: see the cattle trespass cases (all predicated on known propensity): *Cox v. Burbidge* (1863) 13 C.B.(N.S.) 430 (a scienter case); *May v. Burdett* (1846) 9 Q.B. 101 (another scienter case); and *Tenant v. Goldwin*, 2 Ld.Raym. 1069 (a house of office).

The suggested principle is encapsulated in (2) of the general rule already referred to from the American *Restatement (Second) Torts* 2d, vol. 3, section 519, p. 34: see the comment thereon at p. 35. Thus forseeability of damage (not in the sense that if there is carelessness there may be escape, and if escape there may be damage, but in the sense that if there is an escape a certain type of damage is virtually bound to occur) both give sense and rationale to any rule of liability for hazardous things and activities, and provides the necessary brake on "indeterminate" liability. The foregoing view finds general favour among the textbooks: see *Winfield and Jolowicz on Tort*, pp. 425, 440; *Fleming, The Law of Torts*, pp. 329, 339, 343; *Salmond and Heuston on The Law of Torts*, p. 324.

A In *Read v. J. Lyons & Co. Ltd.* [1945] K.B. 216, 237 knowledge (actual or to be imputed) of the probable mischief was regarded as being of the essence of the rule by Scott L.J.: see also [1947] A.C. 156, 181, *per* Lord Simonds.

The argument relating to *Rylands v. Fletcher* may thus be summarised. (1) Whether or not part of the original "rule", the requirement of proving "non-natural" user (as it has been articulated in subsequent cases, that is B "extraordinary" or "dangerous") has served in practice as a useful control mechanism. It does however suffer from the disadvantage that: (a) the original phrase is pregnant with uncertainty; (b) the subsequent articulation is incomplete. (2) Foreseeability (namely, not of escape but of damage) lay at the heart of the original rule: see the language used by Blackburn J. and the categories of cases he relied upon. (3) If (2) is wrong, then C foreseeability *should* be an ingredient (a) because *Rylands v. Fletcher* is part of the law of nuisance (*The Wagon Mound (No. 2)* [1967] 1 A.C. 617) and/or alternatively (b) as an essential control mechanism—all the more necessary if the "non-natural" (as articulated) restraint is removed. (4) What has to be foreseeable is not any damage, but the kind of damage which warrants making liability (that is for the escape) strict.

Should this House depart from its decision in *Rylands v. Fletcher*? D Your Lordships' House should either (1) depart from *Rylands v. Fletcher* in its entirety; or (2) restate the law so as to locate liability for the escape of things, as between neighbours (literal or otherwise), within nuisance law generally, and (in particular), if a form of strict liability is thought desirable, to restrict such liability to (a) hazardous activities and/or (b) foreseeable consequences. [Reference was also made to *Salvin v. North* E *Brancepeth Coal Co.* [1874] L.R. 9 Ch.App. 705 and *Hurdman v. North Eastern Railway Co.* (1878) 3 C.P.D. 168.]

Piers Ashworth Q.C. and *Lawrence West* for the plaintiffs. The case involves pollution that has been continuing since the 1960s. The P.C.E. that is polluting the plaintiffs' water today escaped from the pool under the defendants' land nine months ago.

A natural right does not lie in grant. One of the most natural rights F pertaining to land is the right to mine one's land or to take any water beneath it. These are no less rights than the right to support from neighbouring land or riparian rights. A landowner might need to invoke *Rylands v. Fletcher* in respect of a single escape of a substance on to his land. A continuous escape will lie in nuisance. The rule in *Rylands v. Fletcher*, however, is not confined to a single escape as distinct from a G continuous one.

A landowner is entitled to all the water that comes onto his land in its natural condition—in its pure state as nature provided. Any substance which is added to that water makes it polluted for present purposes. The right to take all water that comes onto one's land does not entitle the landowner to pollute it.

The Wagon Mound (No. 2) [1967] 1 A.C. 617 was a decision of the H Privy Council and therefore not strictly binding on this House. Further, it was a case of public nuisance where unlike private nuisance negligence has to be proved. In *Solloway v. Hampshire County Council*, 79 L.G.R. 449, a case concerned with damage caused by tree roots, the Court of Appeal,

applying *Leakey v. National Trust for Places of Historic Interest or Natural Beauty* [1980] Q.B. 485, held that where the nuisance arose out of natural phenomena the defendant was only liable if the damage in question was reasonably foreseeable. In general, however, cases of private nuisance are cases of strict liability and would come under the rule in *Rylands v. Fletcher*.

As to the American *Restatement*, it is not the law of the United States. Each state has its own law of torts. The authors of the *Restatement* are merely setting out what they think the law is or should be.

For the cases primarily relied on by Blackburn J. see *Tenant v. Goldwin*, 2 Ld.Raym. 1069; 1 Salk. 360 and *Sutton v. Clarke* (1815) 6 Taunt. 29.

The Court of Exchequer Chamber in *Fletcher v. Rylands*, L.R. 1 Ex. 265, 279 clearly identified the issue as whether the law imposed an absolute duty on the defendants to keep the water in at their peril or merely a duty to take care such that they "would not be answerable for escape arising from any latent defect which ordinary prudence and skill could not detect." In 1860 water was still (and remained for many years thereafter) the major source of industrial power—either directly through waterwheels or indirectly through steam; in both methods of use large quantities of water had to be impounded, and there were thousands of millponds and reservoirs throughout England.

In the Court of Exchequer Chamber the plaintiff relied on the absolute right of a landowner to enjoy his property undisturbed by the acts of his neighbours, a right which is independent of the amount of care exercised by them, or of their means of knowledge: see *Lambert v. Bessey* (1680) T.Raym. 421 and *Weaver v. Ward* (1616) Hob. 134.

In formulating his judgment Blackburn J. drew upon the law relating to cattle trespass. At common law, in general, an owner who brought animals onto his land was liable for all damage done by them if they escaped, but because it was common knowledge that certain types of animals were harmless in those cases an owner was only liable if he knew that the animal in question was potentially dangerous. But foreseeability of harm is not a relevant consideration for the purposes of the rule in *Rylands v. Fletcher*.

As to the defendants' submissions on nuisance, there are two observations. (a) A distinction must be drawn between private and public nuisance. Public nuisance cannot be strictly defined: it consists mainly of obstruction to the highway. To found an action in such cases it is necessary to prove negligence. (b) The mere fact that the court will not grant an injunction does not mean that there is no remedy in nuisance for damages.

As to the two decisions relating to *The Wagon Mound*, the basis of the decision [1961] A.C. 388 in the first of them was that where foreseeability was an ingredient of the tort it was also an ingredient of the damage. Their Lordships said that nothing they had said was intended to reflect on the rule in *Rylands v. Fletcher*. As to *The Wagon Mound (No. 2)* [1967] 1 A.C. 617, once it is accepted that nuisance as a tort is not homogeneous and that to found liability in some cases foreseeability is a prerequisite and not in others, then the question arises why should not the same

A criteria apply in relation to compensation? For the boundaries of strict liability in nuisance: see *Solloway v. Hampshire County Council* 79 L.G.R. 449, 452, *per* Dunn L.J. *St. Helen's Smelting Co. v. Tipping* (1865) 11 H.L.Cas. 642 forms a useful background to *Rylands v. Fletcher* in that it shows that where there is material damage to property it is easier for the plaintiff to succeed in nuisance than where the damage complained of consists solely of personal discomfort to the plaintiff.

B It has been suggested that Blackburn J., L.R. 1 Ex. 265, 279 by using the expression "keeps there anything *likely* to do mischief if it escapes" was importing a test of foreseeability. But a careful perusal of the preceding passages on that page will show that that is not so. The expression means: likely in all the circumstances—as a matter of fact—to cause harm if it escapes from the land. Earlier on p. 279 Blackburn J. uses

C the expression "*naturally* do mischief if it escape out of his land." "Naturally" in this context means "in the course of nature." This shows that the word "likely" which is used in the classic exposition of the rule does not connote foreseeability. In the House of Lords, L.R. 3 H.L. 330 Lord Cairns L.C. in his speech makes very plain what he means by a non-natural use of land, and there is nothing in the relevant passages in his speech to suggest a test of foreseeability. Lord Cranworth agrees with the

D Lord Chancellor that the rule of law was correctly stated by Blackburn J. There can be no doubt that the term "non-natural use" *as it was interpreted in some subsequent cases* has caused great confusion in the law: see Professor Newark's article in [1961] 24 M.L.R. 557. More recently Megaw L.J. in *Leakey v. National Trust for Places of Historic Interest or Natural Beauty* [1980] Q.B. 485, 521 referred to "the anomalies, if not the

E absurdities, of the development of this supposed doctrine." There is no confusion if the words of Blackburn J. and Lord Cairns L.C. are carefully examined. Moreover, in elucidating the rule Blackburn J. clearly considered that he was merely stating what had been the law for over 300 years: see his interlocutory observation in *Ross v. Fedden* (1872) 26 L.T. 966, 968.

As to some of the subsequent decisions, one of the few defences to the rule in *Rylands v. Fletcher* is where the damage caused is by act of God:

F see *Nichols v. Marsland* (1876) 2 Ex.D. 1. But from an early stage in the application of the rule foreseeability of damage has never been a prerequisite for the recovery of damages: see *Humphries v. Cousins* (1877) 2 C.P.D. 239. *Crowhurst v. Amersham Burial Board* (1878) 4 Ex.D. 5, 12 where the claim was for damage caused by the roots of a yew tree is explicable on the grounds that the trees having been planted that was a

G non-natural user of the land and that the defendant "must be held responsible for the natural consequences of his own act."

Eastern and South Africa Telegraph Co. Ltd. v. Capetown Tramways Co. Ltd. [1902] A.C. 381 is of importance, for the issue of foreseeability of damage would have been a complete answer to that case but it was never raised.

So far as can be ascertained it has never been held and scarcely ever

H argued that foreseeability of the damage complained of is a necessary ingredient of liability. Indeed the contrary: see for example *Humphries v. Cousins* 2 C.P.D. 239; *West v. Bristol Tramways Co.* [1908] 2 K.B. 14 and *Rainham Chemical Works Ltd v. Belvedere Fish Guano Co. Ltd.* [1921]

2 A.C. 465. The issue of knowledge has been raised, but if any knowledge of the mischievous or dangerous nature of the escaping substance is required, it can only be of its general nature and not of its nature to do the particular damage, for this would be to reintroduce the concept of foreseeability in another guise. In any event, the burden of proof of the "harmless" nature of the substance complained of lies on the defendant: *West v. Bristol Tramways Co.* [1908] 2 K.B. 14 which was approved in *Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co. Ltd.* [1921] 2 A.C. 465.

As to some of the later decisions, *Peters v. Prince of Wales Theatre (Birmingham) Ltd.* [1943] K.B. 73 was decided on the grounds that there was an implied consent to the dangerous substance being on the premises. [Reference was also made to *A. Prosser & Sons Ltd. v. Levy* [1955] 1 W.L.R. 1224.] *Read v. J. Lyons & Co. Ltd.* [1947] A.C. 156 was decided on the ground that there was no liability because there was no escape of any dangerous substance from the premises. In *Leakey v. National Trust for Places of Historic Interest or Natural Beauty* [1980] Q.B. 485, 519C–D, Megaw L.J. stated that lack of knowledge of the relevant danger is no defence to an action brought under the rule in *Rylands v. Fletcher.*

It is of great significance that the Law Commission Report, "Civil Liability for Dangerous Things and Activities," 1970 (Law Com. No. 32) makes no reference to foreseeability in relation to the rule in *Rylands v. Fletcher*, but it is clearly discussed in relation to nuisance: see pp. 14, 15–20, 23–26.

What is the mischief or the damage? A plaintiff does not have to prove injury to health or even damage to property in order to succeed. It suffices that what comes on to his land is something that he does not wish to be there. The damages recoverable are the cost of removing the unwanted substance and the cost of repairs for any damage caused. As regards water, a landowner is entitled to receive it in its natural state. If it has been changed in any way from that state the plaintiff is entitled to recover: see *Ballard v. Tomlinson*, 29 Ch.D. 115, 121, *per* Sir William Brett M.R.; (1885) 54 L.J. Ch. (N.S.) 454, 457, 458. [Reference was also made to *John Young & Co. v. Bankier Distillery Co.* [1893] A.C. 691, 696, 699–700.] To revert to "non-natural user," this means bringing on to land something that was not there in its natural state. One has to envisage the time before the establishment of towns and therefore what would be on the land in its state of nature, namely, grass, trees, minerals. In this sense it is a necessary ingredient of the rule. Lord Moulton's definition in *Rickards v. Lothian* [1913] A.C. 263 of what constitutes "non-natural user" is questioned.

Knowledge is totally immaterial: see the speech of Lord Cairns L.C. and Lord Cranworth in *Rylands v. Fletcher*, L.R. 3 H.L. 330. But it is an answer to a claim for the defendant to show that the object in question was safe in the common experience of mankind: *West v. Bristol Tramways Co.* [1908] 2 K.B. 14. It follows from the foregoing that foreseeability of the particular damage is not a requirement to founding an action. This is essential in negligence and possibly in nuisance but not for the purposes of the rule in *Rylands v. Fletcher.*

It is pertinent to observe that water is wholly unpredictable. For example, it may drown people, crush foundations of buildings and cause

sewers to reverse. It was totally unforeseeable that the water would flood Mr. Fletcher's mine.

The fact that the chlorinated solvent used by the defendants in their manufacturing process cannot be shown at the moment to be injurious to health is immaterial. It is a foreign substance in the plaintiffs' water from the Sawston Mill borehole. In any event, as the judge found, the present case is not one where there was no knowledge of the potential harmfulness of the chemical in question. [Reference was also made to *Snow v. Whitehead* (1884) 27 Ch.D. 588; *Filburn v. People's Palace and Aquarium Co. Ltd.* (1890) 25 Q.B.D. 258 and *McGregor on Damages,* 15th ed. (1988) p. 81.]

Vallance Q.C. in reply. It is interesting to observe that the rule in *Rylands v. Fletcher* has no place in Scots law: see *R.H.M. Bakeries (Scotland) Ltd. v. Strathclyde Regional Council,* 1985 S.L.T. 214, 216, 217, 218, 220. In the High Court of Australia Windeyer J. observed in *Benning v. Wong,* 122 C.L.R. 249, 320, that foreseeability was an ingredient of strict liability and also of the rule in *Rylands v. Fletcher.*

The pivotal case referred to in Professor Newark's article [1961] 24 M.L.R. 557 was not *West v. Bristol Tramways Co.* [1908] 2 K.B. 14 but *National Telephone Co. v. Baker* [1893] 2 Ch. 186. However the "heresy," that is, that a "natural" is equivalent to an "ordinary" use of land had appeared long before: see *Madras Railway Co. v. Zemindar of Carvatenagarum* (1874) L.R. 1 Ind.App. 364. *West v. Bristol Tramways Co.* was just a further example.

As to *Lambert v. Bessey,* T.Raym. 421 and *Weaver v. Ward* (1616) Hob. 134: see *Stanley v. Powell* [1891] 1 Q.B. 86. As to *Humphries v. Cousins* (1877) 2 C.P.D. 239: see *Ilford Urban District Council v. Beal* [1925] 1 K.B. 671 and *Clerk and Lindsell on Torts,* 16th ed., p. 1385.

For present purposes there is no distinction between public and private nuisance: see *Sedleigh-Denfield v. O'Callagan* [1940] A.C. 880, 893, 899, 906, 907, 910, 913, 918. It is inconceivable that Lord Reid in *The Wagon Mound (No. 2)* [1967] 1 A.C. 617, 638, seeking as he was "the question of principle," intended to convey by use of the word "nuisance" reference to public nuisance only. When dealing with a claim in damages no principle can be discerned to underpin any such distinction.

Negligence focuses on the character of the defendant's conduct—that is, doing something carelessly (namely, failing to conform to some external standard: Lord Reid's "negligence in the narrow sense") which, if done with care, would not cause harm. What transforms "carelessness" into actionable breach of duty is foreseeability of harm.

Nuisance focuses on the effects of an activity (or a state of affairs). When damages are claimed (although not where an injunction is sought) it is necessary to establish "fault"—not in the sense of "carelessness," but in the sense that the harm was foreseeable in terms of both (a) an escape *and* (b) harm if there was an escape. Here again, it is foreseeability which transforms the activity into an actionable wrong for damages. If either there is no escape or no harm if there is an escape, then there is no liability.

For this purpose, there is no distinction, in principle, between "creating" the activity and having discovered it, "continuing" it. What

underlies liability for both is knowledge, actual or presumed (in "creation" cases this will, of course, much more readily be found): see *Sedleigh-Denfield v. O'Callaghan* [1940] A.C. 880, 897–898 (*per* Lord Atkin), 902–906 (*per* Lord Wright); *Dias and Markesinis, Tort Law,* 2nd ed., pp. 311–314; *Salmond and Heuston on The Law of Torts,* 20th ed., pp. 69, 76; *Winfield and Jolowicz on Tort,* 13th ed., pp. 384–385 and *Clerk and Lindsell on Torts,* 16th ed., pp. 1367–1373, 1385.

The plaintiffs' statement of the rule in *Rylands v. Fletcher* is unconscionable. Moreover, *West v. Bristol Tramways Co.* [1908] 2 K.B. 14 is clearly wrong in principle. If it were right it would apply to every manufactured thing.

What a "strict" liability rule such as *Rylands v. Fletcher* then does is to eliminate the necessity of establishing foreseeability under (a), that is, liability still attaches even though the circumstances which permitted the escape were "latent." Such a rule is reasonable when the degree or magnitude of risk, namely, the nature or certainty of harm, if there is an escape, justifies it. By the same token or principle (a) the risk must be foreseeable and (b) the harm which ensues must fall within the risk which provided the reason for imposing "strict" liability in the first place: see *Fleming, The Law of Torts,* 8th ed., pp. 329, 339, 343 and the American *Restatement of the Law (Second) Torts* 2d, vol. 3, pp. 34, 35.

The rational options appear to be (a) to restate the rule in *Rylands v. Fletcher* so as expressly to underline the foreseeability of risk and/or that "non-natural" means unusually dangerous; or (b) to abandon the rule altogether, and substitute something along the lines of the *Restatement*, vol. 3, p. 34; or (c) to abandon *Rylands v. Fletcher* altogether, and with it any attempt to have a law of "dangerous things" (or activities) and to leave such cases to existing nuisance and negligence principles—particularly having regard to the latter's ability to measure the standard of care required against the degree of risk: it is not thought that in practical terms much difference would result.

Their Lordships took time for consideration.

9 December 1993. LORD TEMPLEMAN. My Lords, for the reasons given in the speech by my noble and learned friend, Lord Goff of Chieveley, I would allow this appeal.

LORD GOFF OF CHIEVELEY. My Lords, this appeal is concerned with the question whether the appellant company, Eastern Counties Leather Plc. (E.C.L.), is liable to the respondent company, Cambridge Water Co. (C.W.C.), in damages in respect of damage suffered by reason of the contamination of water available for abstraction at C.W.C.'s borehole at Sawston Mill near Cambridge. The contamination was caused by a solvent known as perchloroethene (P.C.E.), used by E.C.L. in the process of degreasing pelts at its tanning works in Sawston, about 1·3 miles away from C.W.C.'s borehole, the P.C.E. having seeped into the ground beneath E.C.L.'s works and thence having been conveyed in percolating water in the direction of the borehole. C.W.C.'s claim against E.C.L. was based on three alternative grounds, viz. negligence, nuisance and the rule in

Rylands v. Fletcher (1868) L.R. 3 H.L. 330. The judge, Ian Kennedy J., dismissed C.W.C.'s claim on all three grounds—on the first two grounds, because (as I will explain hereafter) he held that E.C.L. could not reasonably have foreseen that such damage would occur, and on the third ground because he held that the use of a solvent such as P.C.E. in E.C.L.'s tanning business constituted, in the circumstances, a natural use of E.C.L.'s land. The Court of Appeal, however, allowed C.W.C.'s appeal from the decision of the judge, on the ground that E.C.L. was strictly liable for the contamination of the water percolating under C.W.C.'s land, on the authority of *Ballard v. Tomlinson* (1885) 29 Ch.D. 115, and awarded damages against E.C.L. in the sum assessed by the judge, viz., £1,064,886 together with interest totalling £642,885, and costs. It is against that decision that E.C.L. now appeals to your Lordships' House, with leave of this House.

The factual background to the case has been set out, not only in the judgments in the courts below, but also in lucid detail in the agreed statement of facts and issues helpfully prepared by counsel for the assistance of the Appellate Committee. These reveal the remarkable history of events which led to the contamination of the percolating water available at C.W.C.'s borehole, which I think it desirable that I myself should recount in some detail.

E.C.L. was incorporated in 1879, and since that date has continued in uninterrupted business as a manufacturer of fine leather at Sawston. E.C.L. employs about 100 people, all of whom live locally. Its present works are, as the judge found, in general modern and spacious, and admit of a good standard of housekeeping.

The tanning process requires that pelts shall be degreased; and E.C.L., in common with all other tanneries, has used solvents in that process since the early 1950s. It has used two types of chlorinated solvents—organochlorines known as T.C.E. (trichloroethene) and P.C.E.. Both solvents are cleaning and degreasing agents; and since 1950 P.C.E. has increasingly been in common, widespread and everyday use in dry-cleaning, in general industrial use (e.g., as a machine cleaner or paint-thinner), domestically (e.g. in "Dab-it-off") and in tanneries. P.C.E. is highly volatile, and so evaporates rapidly in air; but it is not readily soluble in water.

E.C.L. began using T.C.E. in the early 1950s and then changed over to P.C.E., probably sometime in the 1960s, and continued to use P.C.E. until 1991. The amount so used varied between 50,000 and 100,000 litres per year. The solvent was introduced into what were (in effect) dry-cleaning machines. This was done in two different ways. First, from the commencement of use until 1976, the solvent was delivered in 40 gallon drums; as and when the solvent was needed, a drum was taken by forklift truck to the machine and tipped into a tank at the base of the machine. Second, from 1976 to 1991, the solvent was delivered in bulk and kept in a storage tank, from which it was piped directly to the machine.

There was no direct evidence of the actual manner in which P.C.E. was spilled at E.C.L.'s premises. However, the judge found that the spillage took place during the period up to 1976, principally during the topping up process described above, during which there were regular

spillages of relatively small amounts of P.C.E. onto the concrete floor of the tannery. It is known that, over that period, the minimum amount which must have been spilled (or otherwise have entered the chalk aquifer below) was some 3,200 litres (1,000 gallons); it is not possible even to guess at the maximum. However, as the judge found, a reasonable supervisor at E.C.L. would not have foreseen, in or before 1976, that such repeated spillages of small quantities of solvent would lead to any environmental hazard or damage—i.e., that the solvent would enter the aquifer or that, having done so, detectable quantities would be found down-catchment. Even if he had foreseen that solvent might enter the aquifer, he would not have foreseen that such quantities would produce any sensible effect upon water taken down-catchment, or would otherwise be material or deserve the description of pollution. I understand the position to have been that any spillage would have been expected to evaporate rapidly in the air, and would not have been expected to seep through the floor of the building into the soil below. The only harm that could have been foreseen from a spillage was that somebody might have been overcome by fumes from a spillage of a significant quantity.

I turn to C.W.C.. C.W.C. was created under its own Act of Parliament in 1853, and is a licensed supplier of water following implementation of the Water Act 1989. Its function is to supply water to some 275,000 people in the Cambridge area. It takes all its water by borehole extraction from underground strata, mainly the middle and lower chalk prevalent in the area. Since 1945, public demand for water has multiplied many times, and new sources of supply have had to be found. In 1975, C.W.C. identified the borehole at Sawston Mill as having the potential to meet a need for supply required to avert a prospective shortfall, and to form part of its long term provision for future demand. It purchased the borehole in September 1976. Before purchase, tests were carried out on the water from the borehole; these tests indicated that, from the aspect of chemical analysis, the water was a wholesome water suitable for public supply purposes. Similar results were obtained from tests carried out during the period 1979–1983. At all events C.W.C., having obtained the requisite statutory authority to use the borehole for public sector supply, proceeded to build a new pumping station at a cost of £184,000; and Sawston Mill water entered the main supply system in June 1979.

Meanwhile, in the later 1970s concern began to be expressed in scientific circles about the presence of organic chemicals in drinking water, and their possible effects. Furthermore, the development of, inter alia, high resolution gas chromatography during the 1970s enabled scientists to detect and measure organochlorine compounds (such as P.C.E.) in water to the value of microgrammes per litre (or parts per billion) expressed as μg/l.

In 1984 the World Health Organisation (W.H.O.) published a Report on Guidelines for Drinking Water Quality (Vol. 1: Recommendations). Although not published until 1984, the Report was the product of discussion and consultation during several years previously, and its recommendations appear to have formed the basis of an earlier E.E.C. Directive, as well as of later UK Regulations. Chapter 4 of the Report is concerned with "Chemical and Physical Aspects," and Chapter 4.3 deals

with organic contaminants, three of which (including T.C.E. and P.C.E.) were assigned a "Tentative Guideline Value." The value so recommended for T.C.E. was 30 μg/l, and for P.C.E. 10 μg/l. The E.E.C. Directive relating to the Quality of Water intended for Human Consumption (80/778/E.E.C.) was issued on 15 July 1980. Member states were required to bring in laws within two years of notification, and to achieve full compliance within five years. The Directive distinguished between "Maximum Admissible Concentration" (M.A.C.) values and "Guide Level" (G.L.) values, the former being minimum standards which had to be achieved, and the latter being more stringent standards which it was desirable to achieve. T.C.E. and P.C.E. were assigned a G.L. value of only 1 μg/l, i.e. 30 times and 10 times respectively lower than the W.H.O. Tentative Guideline Values.

The United Kingdom responded to the Directive by Department of the Environment Circular 20/82 dated 19 August 1982. The effect was that, as from 18 July 1985, drinking water containing more than 1 μg/l of T.C.E. or P.C.E. would not be regarded as "wholesome" water for the purpose of compliance by water authorities with their statutory obligations under the Water Act 1973. However, following a Regulation made in 1989 (S.I. 1989 No. 1147), the prescribed maximum concentration values for T.C.E. and P.C.E. have been respectively 30 μg/l and 10 μg/l, so that since 1 September 1989 the United Kingdom values have been brought back into harmony with the W.H.O. Tentative Guideline Values.

C.W.C. employed Huntingdon Research Laboratories (H.R.L.) to test its water for the purpose of compliance with the European Directive. In August 1983 Dr. McDonald, an analytical chemist employed by H.R.L., decided to test tap water at his home in St. Ives, Cambridge. He discovered P.C.E. in the water. Samples then taken of his own and his neighbours' water disclosed an average P.C.E. concentration of 38.5 μg/l. As a result, C.W.C. caused investigations to be made to discover the source of the contaminant, which was identified as the Sawston Mill borehole. The borehole was taken out of commission on 13 October 1983. The Anglian Water Authority then instituted what was to become a prolonged and exhaustive programme of investigation, principally conducted by the British Geological Survey (B.G.S.), to discover the source and path of the P.C.E. in the borehole water. This investigation yielded, between 1987 and 1989, a number of published papers which have become the U.K. source material on the behaviour and characteristics of chlorinated organic industrial solvents in groundwater, and the behaviour of groundwater in a fissure-flow, anisotropic (i.e., where permeability is higher in one direction rather than constant in all directions) chalk aquifer. Before publication of these papers little was known about either of these subjects.

The conclusions reached by B.G.S., and by the expert witnesses instructed by C.W.C. and E.C.L. in the present litigation, were as follows. Neat P.C.E. had travelled down through the drift directly beneath E.C.L.'s premises, and then vertically downwards through the chalk aquifer until arrested by a relatively impermeable layer of chalk marl at a depth of about 50 metres. Thus arrested, the neat P.C.E. had formed pools which were dissolving slowly in the groundwater and being carried down aquifer

in the direction of Sawston Mill at the rate of about 8 metres per day, the travel time between pool and Sawston Mill being about 9 months, and the migration of the dissolved phase P.C.E. being along a deep, comparatively narrow, pathway or "plume." On the balance of probabilities, this narrow plume had reached Sawston Mill and been at least materially responsible for the P.C.E. concentrations found there.

Sawston Mill had been taken out of supply in October 1983. As an interim measure, C.W.C. brought forward a pre-existing proposal to construct a new pumping station at Duxford Airfield. This new source, which came on stream in the summer of 1984, made up for the loss of the Sawston supply. C.W.C. still needed to make use of the Sawston catchment, but it rejected methods of treatment of the water there as unproven at that time. Instead it proceeded with the development of a new source of supply at Hinxton Grange. The damages assessed by the judge, and awarded by the Court of Appeal, against E.C.L. consisted of £956,937 in respect of the development of Hinxton Grange (less £60,000, being the residual value to C.W.C. of Sawston Mill) together with certain incidental expenses. In fact, by 1990 C.W.C. felt sufficiently confident in carbon filtration technology to build a treatment plant at Sawston Mill, for the purpose of treating water from Duxford Airfield to remove concentrations of an organic herbicide from the water there. This plant is capable of removing P.C.E. from Sawston Mill water as and when required.

From the foregoing history, the following relevant facts may be selected as being of particular relevance. (1) The spillage of P.C.E., and its seepage into the ground beneath the floor of the tannery at E.C.L.'s works, occurred during the period which ended in 1976, as a result of regular spillages of small quantities of P.C.E. onto the floor of E.C.L.'s tannery. (2) The escape of dissolved phase P.C.E., from the pools of neat P.C.E. which collected at or towards the base of the chalk aquifers beneath E.C.L.'s works, into the chalk aquifers under the adjoining land and thence in the direction of Sawston Mill, 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 P.C.E. beneath the floor of E.C.L.'s works down into the chalk aquifers below was not foreseeable by a reasonable supervisor employed by E.C.L., nor was it foreseeable by him that detectable quantities of P.C.E. 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 a spillage of P.C.E. was that somebody might be overcome by fumes from a substantial spillage of P.C.E. on the surface of the ground. (4) The water so contaminated at Sawston Mill has never been held to be dangerous to health. But under criteria laid down in the U.K. Regulations, issued in response to the E.E.C. Directive, the water so contaminated was not "wholesome" and, since 1985, could not lawfully be supplied in this country as drinking water.

The decision of Ian Kennedy J.

The judge dismissed the claims against E.C.L. in nuisance and negligence in the following passage:

> "That there should now be an award of damages in respect of the 1991 impact of actions that were not actionable nuisances or

A negligence when they were committed 15 years before is to my mind not a proposition which the common law would entertain."

I feel, with respect, that this passage requires some elucidation.

It is not to be forgotten that both nuisance and negligence are, historically, actions on the case; and accordingly in neither case is the tort complete, so that damages are recoverable, unless and until damage B has been caused to the plaintiff. It follows that, in this sense (which I understand to be the relevant sense), there could not be an actionable nuisance by virtue of the spillage of solvent on E.C.L.'s land, but only when such spillage caused damage to C.W.C., i.e. when water available at its borehole was rendered unsaleable by reason of breach of the Regulations. It also follows that, in theory, the fact that the Regulations C came into force after the relevant spillage on E.C.L.'s land, though before the relevant contamination of the water, would not of itself mean that there was no actionable nuisance committed by E.C.L., unless there is some applicable principle of law which would in such circumstances render the damage not actionable as a nuisance. The two possible principles are either (1) that the user of E.C.L.'s land resulting in the spillage was in the circumstances a reasonable user, or (2) that E.C.L. will D not be liable in the absence of reasonable foreseeability that its action may cause damage of the relevant type to C.W.C. In the present case, there does not appear to have been any reliance by E.C.L., in its pleaded case or in argument, on the principle of reasonable user. I therefore infer that the basis upon which the judge rejected C.W.C.'s claim in nuisance must have derived from his finding of lack of reasonable foreseeability of damage of the relevant type, which is basically the same ground on which E he dismissed C.W.C.'s claim in negligence. This is however a point to which I will return at a later stage, when I come to consider liability on the facts of the present case under the rule in *Rylands v. Fletcher*.

The decision of the Court of Appeal: Ballard v. Tomlinson

F There was no appeal by C.W.C. against the judge's conclusion on nuisance and negligence. C.W.C. pursued its appeal to the Court of Appeal relying only on the rule in *Rylands v. Fletcher*, L.R. 3 H.L. 330, on which point the judge had decided against it on the ground that the relevant operations of E.C.L. constituted natural use of its land. The Court of Appeal however held E.C.L. to be strictly liable in damages to C.W.C. in respect of the contamination of the percolating water available G for extraction by C.W.C. from its borehole at Sawston Mill. This they did on the basis of the decision of the Court of Appeal in *Ballard v. Tomlinson*, 29 Ch.D. 115.

In that case the plaintiff and the defendant, whose properties were separated only by a highway, each had on his land a well sunk into the chalk aquifer below. The plaintiff had a brewery on his land, for the purpose of which he used water drawn from his well. A printing house H was built on the defendant's land, and the defendant constructed a drain from a water closet attached to the printing house, by means of which the sewage from the closet and the refuse from the printing house found their way into the defendant's well. The sewage and refuse which entered the

defendant's well polluted the common source of percolating water so that the water which the plaintiff drew from his well was unusable for brewing purposes. The Court of Appeal, reversing the decision of Pearson J. (1884) 26 Ch.D. 194, held that the plaintiff was entitled to judgment against the defendant for an injunction and for damages.

The principal argument advanced by the defendant was based on the proposition that the plaintiff had no property in the water percolating beneath his land, and therefore had no cause of action for the pollution of that water. The judgments of the Court of Appeal, which were unreserved, were largely directed to the rejection of that argument. This they did on the basis that the plaintiff had a right to extract water percolating beneath his land, and the defendant had no right to contaminate what the plaintiff was entitled to get. As Brett M.R. said, at p. 121:

> "no one of those who have a right to appropriate [the water] has a right to contaminate that source so as to prevent his neighbour from having the full value of his right of appropriation."

It appears that both Brett M.R. and Cotton L.J. considered that the plaintiff's cause of action arose under the rule in *Rylands v. Fletcher*, which was the basis upon which the plaintiff's case was advanced in argument. Lindley L.J. however treated the case as one of nuisance.

The Court of Appeal treated this decision as determining the present case against E.C.L. Mann L.J. (who delivered the judgment of the court) said, ante, p. 275:

> "It was sufficient that the defendant's act caused the contamination. Nor do the judgments contain any warrant for attaching importance to the reasonableness of the defendant's inability to foresee that spillages would have the kind of consequence which they did. It does not appear from the report whether Tomlinson either knew or ought to have known of any risk of damage attendant on his actions, but none of the judges in this court was concerned with his state of actual or imputed knowledge. The situation is one in which negligence plays no part. *Ballard v. Tomlinson* decided that where the nuisance is an interference with a natural right incident to ownership then the liability is a strict one. The actor acts at his peril in that if his actions result by the operation of ordinary natural processes in an interference with the right then he is liable to compensate for any damage suffered by the owner."

In his judgment in *Ballard v. Tomlinson*, 29 Ch.D. 115, 124, Cotton L.J. spoke of the plaintiff's right to abstract percolating water beneath his land as "a natural right incident to the ownership of his own land." In the present context, however, this means no more than that the owner of land can, without a grant, lawfully abstract water which percolates beneath his land, his right to do so being protected by the law of tort, by means of an action for an injunction or for damages for nuisance: see *Megarry and Wade, The Law of Real Property*, 5th ed. (1984), p. 842, and *Simpson, A History of the Land Law*, 2nd ed. (1986), pp. 263–264. There is no natural right to percolating water, as there may be to water running in a defined

channel; see *Chasemore v. Richards* (1859) 7 H.L.Cas. 349, 379, *per* Lord Cranworth, and *Halsbury's Laws of England*, 4th ed., vol. 49 (1984), p. 223 para. 392. In the present case Mann L.J. stated, ante, p. 64C–D, that *Ballard v. Tomlinson*, 29 Ch.D. 115 decided that "where the nuisance is an interference with a natural right incident to ownership then the liability is a strict one." In my opinion, however, if in this passage Mann L.J. intended to say that the defendant was held to be liable for damage which he could not reasonably have foreseen, that conclusion cannot be drawn from the judgments in the case, in which the point did not arise. As I read the judgments, they disclose no more than that, 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, by reason of interference with the plaintiff's use and enjoyment of his land, including his right to extract water percolating beneath his land. 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 the law. To those principles, therefore, I now turn.

Nuisance and the rule in Rylands v. Fletcher

As I have already recorded, there was no appeal by C.W.C. to the Court of Appeal against the judge's conclusion in nuisance. The question of E.C.L.'s liability in nuisance has really only arisen again because the Court of Appeal allowed C.W.C.'s appeal on the ground that E.C.L. was liable on the basis of strict liability in nuisance on the principle laid down, as they saw it, in *Ballard v. Tomlinson*. Since, for the reasons I have given, that case does not give rise to any principle of law independent of the ordinary law of nuisance or the rule in *Rylands v. Fletcher*, L.R. 3 H.L. 330, the strict position now is that C.W.C., having abandoned its claim in nuisance, can only uphold the decision of the Court of Appeal on the basis of the rule in *Rylands v. Fletcher*. However, one important submission advanced by E.C.L. before the Appellate Committee was that strict liability for an escape only arises under that rule where the defendant knows or reasonably ought to have foreseen, when collecting the relevant things on his land, that those things might, if they escaped, cause damage of the relevant kind. Since there is a close relationship between nuisance and the rule in *Rylands v. Fletcher*, I myself find it very difficult to form an opinion as to the validity of that submission without first considering whether foreseeability of such damage is an essential element in the law of nuisance. For that reason, therefore, I do not feel able altogether to ignore the latter question simply because it was no longer pursued by C.W.C. before the Court of Appeal.

In order to consider the question in the present case in its proper legal context, it is desirable to look at the nature of liability in a case such as the present in relation both to the law of nuisance and the rule in *Rylands v. Fletcher*, and for that purpose to consider the relationship between the two heads of liability.

I begin with the law of nuisance. Our modern understanding of the nature and scope of the law of nuisance was much enhanced by Professor Newark's seminal article on "The Boundaries of Nuisance" (1949)

65 L.Q.R. 480. The article is avowedly a historical analysis, in that it traces the nature of the tort of nuisance to its origins, and demonstrates how the original view of nuisance as a tort to land (or more accurately, to accommodate interference with servitudes, a tort directed against the plaintiff's enjoyment of rights over land) became distorted as the tort was extended to embrace claims for personal injuries, even where the plaintiff's injury did not occur while using land in his occupation. In Professor Newark's opinion (p. 487), this development produced adverse effects, viz., that liability which should have arisen only under the law of negligence was allowed under the law of nuisance which historically was a tort of strict liability; and that there was a tendency for "cross-infection to take place, and notions of negligence began to make an appearance in the realm of nuisance proper." But in addition, Professor Newark considered, at pp. 487–488, it contributed to a misappreciation of the decision in *Rylands v. Fletcher*:

> "This case is generally regarded as an important landmark—indeed, a turning point—in the law of tort; but an examination of the judgments shows that those who decided it were quite unconscious of any revolutionary or reactionary principles implicit in the decision. They thought of it as calling for no more than a restatement of settled principles, and Lord Cairns went so far as to describe those principles as 'extremely simple.' And in fact the main principle involved was extremely simple, being no more than the principle that negligence is not an element in the tort of nuisance. It is true that Blackburn J. in his great judgment in the Exchequer Chamber never once used the word 'nuisance,' but three times he cited the case of fumes escaping from an alkali works—a clear case of nuisance—as an instance of liability under the rule which he was laying down. Equally it is true that in 1866 there were a number of cases in the reports suggesting that persons who controlled dangerous things were under a strict duty to take care, but as none of these cases had anything to do with nuisance Blackburn J. did not refer to them.
>
> "But the profession as a whole, whose conceptions of the boundaries of nuisance were now becoming fogged, failed to see in *Rylands v. Fletcher* a simple case of nuisance. They regarded it as an exceptional case—and the Rule in *Rylands v. Fletcher* as a generalisation of exceptional cases, where liability was to be strict on account of 'the magnitude of danger, coupled with the difficulty of proving negligence,' [*Pollock, Law of Torts,* 14th ed. (1939), p. 386] rather than on account of the nature of the plaintiff's interest which was invaded. They therefore jumped rashly to two conclusions: firstly, that the Rule in *Rylands v. Fletcher* could be extended beyond the case of neighbouring occupiers; and secondly, that the Rule could be used to afford a remedy in cases of personal injury. Both these conclusions were stoutly denied by Lord Macmillan in *Read v. Lyons* [1947] A.C. 156, but it remains to be seen whether the House of Lords will support his opinion when the precise point comes up for decision."

We are not concerned in the present case with the problem of personal injuries, but we are concerned with the scope of liability in nuisance and in *Rylands v. Fletcher*. In my opinion it is right to take as our starting point the fact that, as Professor Newark considered, *Rylands v. Fletcher* was indeed not regarded by Blackburn J. as a revolutionary decision: see, e.g., his observations in *Ross v. Fedden* (1872) 26 L.T. 966, 968. He believed himself not to be creating new law, but to be stating existing law, on the basis of existing authority; and, as is apparent from his judgment, he was concerned in particular with the situation where the defendant collects things upon his land which are likely to do mischief if they escape, in which event the defendant will be strictly liable for damage resulting from any such escape. It follows that the essential basis of liability was the collection by the defendant of such things upon his land; and the consequence was a strict liability in the event of damage caused by their escape, even if the escape was an isolated event. Seen in its context, there is no reason to suppose that Blackburn J. intended to create a liability any more strict than that created by the law of nuisance; but even so he must have intended that, in the circumstances specified by him, there should be liability for damage resulting from an isolated escape.

Of course, although liability for nuisance has generally been regarded as strict, at least in the case of a defendant who has been responsible for the creation of a nuisance, even so that liability has been kept under control by the principle of reasonable user—the principle of give and take as between neighbouring occupiers of land, under which "those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action:" see *Bamford v. Turnley* (1862) 3 B. & S. 62, 83, *per* Bramwell B. The effect is that, if the user is reasonable, the defendant will not be liable for consequent harm to his neighbour's enjoyment of his land; but if the user is not reasonable, the defendant will be liable, even though he may have exercised reasonable care and skill to avoid it. Strikingly, a comparable principle has developed which limits liability under the rule in *Rylands v. Fletcher*. This is the principle of natural use of the land. I shall have to consider the principle at a later stage in this judgment. The most authoritative statement of the principle is now to be found in the advice of the Privy Council delivered by Lord Moulton in *Rickards v. Lothian* [1913] A.C. 263, 280, when he said of the rule in *Rylands v. Fletcher*:

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

It is not necessary for me to identify precise differences which may be drawn between this principle, and the principle of reasonable user as applied in the law of nuisance. It is enough for present purposes that I should draw attention to a similarity of function. The effect of this principle is that, where it applies, there will be no liability under the rule in *Rylands v. Fletcher*; but that where it does not apply, i.e. where there is

a non-natural use, the defendant will be liable for harm caused to the plaintiff by the escape, notwithstanding that he has exercised all reasonable care and skill to prevent the escape from occurring.

Foreseeability of damage in nuisance

It is against this background that it is necessary to consider the question whether foreseeability of harm of the relevant type is an essential element of liability either in nuisance or under the rule in *Rylands v. Fletcher*. I shall take first the case of nuisance. In the present case, as I have said, this is not strictly speaking a live issue. Even so, I propose briefly to address it, as part of the analysis of the background to the present case.

It is, of course, axiomatic that in this field we must be on our guard, when considering liability for damages in nuisance, not to draw inapposite conclusions from cases concerned only with a claim for an injunction. This is because, where an injunction is claimed, its purpose is to restrain further action by the defendant which may interfere with the plaintiff's enjoyment of his land, and ex hypothesi the defendant must be aware, if and when an injunction is granted, that such interference may be caused by the act which he is restrained from committing. It follows that these cases provide no guidance on the question whether foreseeability of harm of the relevant type is a prerequisite of the recovery of damages for causing such harm to the plaintiff. In the present case, we are not concerned with liability in damages in respect of a nuisance which has arisen through natural causes, or by the act of a person for whose actions the defendant is not responsible, in which cases the applicable principles in nuisance have become closely associated with those applicable in negligence: see *Sedleigh-Denfield v. O'Callaghan* [1940] A.C. 880 and *Goldman v. Hargrave* [1967] 1 A.C. 645. We are concerned with the liability of a person where a nuisance has been created by one for whose actions he is responsible. Here, as I have said, it is still the law that the fact that the defendant has taken all reasonable care will not of itself exonerate him from liability, the relevant control mechanism being found within the principle of reasonable user. But it by no means follows that the defendant should be held liable for damage of a type which he could not reasonably foresee; and the development of the law of negligence in the past 60 years points strongly towards a requirement that such foreseeability should be a prerequisite of liability in damages for nuisance, as it is of liability in negligence. For if a plaintiff is in ordinary circumstances only able to claim damages in respect of personal injuries where he can prove such foreseeability on the part of the defendant, it is difficult to see why, in common justice, he should be in a stronger position to claim damages for interference with the enjoyment of his land where the defendant was unable to foresee such damage. Moreover, this appears to have been the conclusion of the Privy Council in *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty. (The Wagon Mound (No. 2))* [1967] 1 A.C. 617. The facts of the case are too well known to require repetition, but they gave rise to a claim for damages arising from a public nuisance caused by a spillage of oil in Sydney Harbour. Lord Reid, who delivered the advice of the Privy Council, considered that, in the class of

A nuisance which included the case before the Board, foreseeability is an essential element in determining liability. He then continued, at p. 640:

> "It could not be right to discriminate between different cases of nuisance so as to make foreseeability a necessary element in determining damages in those cases where it is a necessary element in determining liability, but not in others. So the choice is between it
B being a necessary element in all cases of nuisance or in none. In their Lordships' judgment the similarities between nuisance and other forms of tort to which *The Wagon Mound (No. 1)* applies far outweigh any differences, and they must therefore hold that the judgment appealed from is wrong on this branch of the case. It is not sufficient that the injury suffered by the respondents' vessels was the direct result of the nuisance if that injury was in the relevant sense
C unforeseeable."

It is widely accepted that this conclusion, although not essential to the decision of the particular case, has nevertheless settled the law to the effect that foreseeability of harm is indeed a prerequisite of the recovery of damages in private nuisance, as in the case of public nuisance. I refer in particular to the opinion expressed by Professor Fleming in *Fleming on*
D *the Law of Torts*, 8th ed. (1992), pp. 443–444. It is unnecessary in the present case to consider the precise nature of this principle; but it appears from Lord Reid's statement of the law that he regarded it essentially as one relating to remoteness of damage.

Foreseeability of damage under the rule in Rylands v. Fletcher

E It is against this background that I turn to the submission advanced by E.C.L. before your Lordships that there is a similar prerequisite of recovery of damages under the rule in *Rylands v. Fletcher*.

I start with the judgment of Blackburn J. in *Fletcher v. Rylands* (1866) L.R. 1 Ex. 265 itself. His celebrated statement of the law is to be found at pp. 279–280, where he said:

F

> "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 prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's
G default; or perhaps that the escape was the consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose
H habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally

there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law whether the things so brought be beasts, or water, or filth, or stenches."

In that passage, 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 his neighbour's [property]," and the liability to "answer for the natural *and anticipated* consequences." Furthermore, time and again he spoke of the strict liability imposed upon the defendant as being that he must keep the thing in at his peril; and, when referring to liability in actions for damage occasioned by animals, he referred, at p. 282, to the established principle that "it is quite immaterial whether the escape is by negligence or not." 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 may be held liable notwithstanding that he has exercised all due care to prevent the escape from occurring.

There are however early authorities in which foreseeability of damage does not appear to have been regarded as necessary: see, e.g., *Humphries v. Cousins* (1877) 2 C.P.D. 239. Moreover, it was submitted by Mr. Ashworth for C.W.C. that the requirement of foreseeability of damage was negatived in two particular cases, the decision of the Court of Appeal in *West v. Bristol Tramways Co.* [1908] 2 K.B. 14 and the decision of this House in *Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co. Ltd.* [1921] 2 A.C. 465.

In *West v. Bristol Tramways Co.* the defendant tramway company was held liable for damage to the plaintiff's plants and shrubs in his nursery garden adjoining a road where the defendant's tramline ran, the damage being caused by fumes from creosoted wooden blocks laid by the defendants between the rails of the tramline. The defendants were so held liable under the rule in *Rylands v. Fletcher*, notwithstanding that they were exonerated from negligence, having no knowledge of the possibility of such damage; indeed the evidence was that creosoted wood had been in use for several years as wood paving, and no mischief had ever been known to arise from it. The argument that no liability arose in such circumstances under the rule in *Rylands v. Fletcher* was given short shrift, both in the Divisional Court and in the Court of Appeal. For the Divisional Court, it was enough that the creosote had been found to be dangerous by the jury, Phillimore J. holding that creosote was like the wild animals in the old cases. The Court of Appeal did not call upon the plaintiffs, and dismissed the appeal in unreserved judgments. Lord Alverstone C.J. relied upon a passage from *Garrett on the Law of Nuisances*, 2nd ed. (1897), p. 129, and rejected a contention by the

A defendant that, in the case of non-natural use of land, the defendant will not be liable unless the thing introduced onto the land was, to the knowledge of the defendant, likely to escape and cause damage. It was however suggested, both by Lord Alverstone C.J. (with whom Sir Gorell Barnes P. agreed) and by Farwell L.J. that, by analogy with cases concerning liability for animals, the defendant might escape liability if he could show that, according to the common experience of mankind, the B thing introduced onto the land had proved not to be dangerous.

The *Rainham Chemical* case [1921] 2 A.C. 465 arose out of a catastrophic explosion at a factory involved in the manufacture of high explosive during the First World War, with considerable loss of life and damage to neighbouring property. It was held that the company carrying on the business at the premises was liable for the damage to neighbouring C property under the rule in *Rylands v. Fletcher*; but the great question in the case, at least so far as the appellate courts were concerned, was whether two individuals, who were shareholders in and directors of the company, could be held personally responsible on the same principle. The grounds on which the trial judge (Scrutton L.J., sitting as an additional judge of the Queen's Bench Division) and the majority of the Court of Appeal (Lord Sterndale M.R. and Atkin L.J.) held the two individuals D liable were all different and were all held to be erroneous by your Lordships' House. The dissentient member of the Court of Appeal, Younger L.J., concluded that no liability could attach to them on any established principle, and plainly feared that they were being treated as scapegoats because they were making money out of the venture: see [1920] 2 K.B. 487, 521–523. The explosion at the factory appears to have E originated in an ingredient used in the manufacture of the explosive, viz. dinitrophenol (D.N.P.), which had formerly been used in dyeing; this exploded as a result of a fire, the cause of which was not established. Before Scrutton L.J., it appears to have been admitted that the person in possession of the D.N.P. was liable under the rule in *Rylands v. Fletcher* for the consequences of the explosion. This was despite the fact that D.N.P. had never been known to explode before and, as Younger L.J. F pointed out, exactly the same fire and explosion might have occurred if the D.N.P. had been stored at a dyeworks and was not being used in any way in the manufacture of explosives. In the Court of Appeal, Atkin L.J. was of the opinion that the fact that the work was known to be dangerous by the contractors and the company was, if relevant, established (see [1920] 2 K.B. 487, 505); but it seems clear that no such knowledge could G be imputed to either of the two individual defendants. The point appears to have been briefly relied on by counsel in the Court of Appeal, but not to have been pursued by Sir John Simon K.C. on their behalf in the House of Lords. However, this House dismissed their appeal on a point of some technicality, viz. that their Lordships could not satisfy themselves that the two individuals had sufficiently divested themselves of the occupation of the premises, so as to substitute the occupation of the H company in the place of their own—notwithstanding that the company itself was also in occupation: see [1921] 2 A.C. 465, 478–479, *per* Lord Buckmaster; pp. 480, 483–484, *per* Lord Sumner; p. 491, *per* Lord Parmoor; and pp. 492, 493–494, *per* Lord Carson.

I feel bound to say that these two cases provide a very fragile base for any firm conclusion that foreseeability of damage has been authoritatively rejected as a prerequisite of the recovery of damages under the rule in *Rylands v. Fletcher*. Certainly, the point was not considered by this House in the *Rainham Chemical* case. In my opinion, the matter is open for consideration by your Lordships in the present case, and, despite recent dicta to the contrary (see, e.g., *Leakey v. National Trust for Places of Historic Interest or Natural Beauty* [1980] Q.B. 485, 519, *per* Megaw L.J.), should be considered as a matter of principle. Little guidance can be derived from either of the two cases in question, save that it seems to have been assumed that the strict liability arising under the rule precluded reliance by the plaintiff on lack of knowledge or the means of knowledge of the relevant danger.

The point is one on which academic opinion appears to be divided: cf. *Salmond & Heuston on the Law of Torts*, 20th ed. (1992), pp. 324–325, which favours the prerequisite of foreseeability, and *Clerk and Lindsell on Torts*, 16th ed. (1989), p. 1429, para. 25.09, which takes a different view. However, quite apart from the indications to be derived from the judgment of Blackburn J. in *Fletcher v. Rylands*, L.R. 1 Ex. 265 itself, to which I have already referred, the historical connection with the law of nuisance must now be regarded as pointing towards the conclusion that foreseeability of damage is a prerequisite of the recovery of damages under the rule. I have already referred to the fact that Blackburn J. himself did not regard his statement of principle as having broken new ground; furthermore, Professor Newark has convincingly shown that the rule in *Rylands v. Fletcher* was essentially concerned with an extension of the law of nuisance to cases of isolated escape. Accordingly since, following the observations of Lord Reid when delivering the advice of the Privy Council in *The Wagon Mound (No. 2)* [1967] 1 A.C. 617, 640, the recovery of damages in private nuisance depends on foreseeability by the defendant of the relevant type of damage, it would appear logical to extend the same requirement to liability under the rule in *Rylands v. Fletcher*.

Even so, the question cannot be considered solely as a matter of history. It can be argued that the rule in *Rylands v. Fletcher* should not be regarded simply as an extension of the law of nuisance, but should rather be treated as a developing principle of strict liability from which can be derived a general rule of strict liability for damage caused by ultra-hazardous operations, on the basis of which persons conducting such operations may properly be held strictly liable for the extraordinary risk to others involved in such operations. As is pointed out in *Fleming on the Law of Torts*, pp. 327–328, this would lead to the practical result that the cost of damage resulting from such operations would have to be absorbed as part of the overheads of the relevant business rather than be borne (where there is no negligence) by the injured person or his insurers, or even by the community at large. Such a development appears to have been taking place in the United States, as can be seen from section 519 of the *Restatement of the Law (Second) Torts* 2d, vol. 3, pp. 34–36. The extent to which it has done so is not altogether clear; and I infer from section 519, and the Comment on that paragraph, that the abnormally

dangerous activities there referred to are such that their ability to cause harm would be obvious to any reasonable person who carried them on.

I have to say, however, that there are serious obstacles in the way of the development of the rule in *Rylands v. Fletcher* in this way. First of all, if it was so to develop, it should logically apply to liability to all persons suffering injury by reason of the ultra-hazardous operations; but the decision of this House in *Read v. J. Lyons & Co. Ltd.* [1947] A.C 156, which establishes that there can be no liability under the rule except in circumstances where the injury has been caused by an escape from land under the control of the defendant, has effectively precluded any such development. Professor Fleming has observed that "the most damaging effect of the decision in *Read v. J. Lyons & Co. Ltd.* is that it prematurely stunted the development of a general theory of strict liability for ultra-hazardous activities" (see *Fleming on Torts*, p. 341). Even so, there is much to be said for the view that the courts should not be proceeding down the path of developing such a general theory. In this connection, I refer in particular to the Report of the Law Commission on Civil Liability for Dangerous Things and Activities (1970) (Law Com. No. 32). In paragraphs 14–16 of the Report, the Law Commission expressed serious misgivings about the adoption of any test for the application of strict liability involving a general concept of "especially dangerous" or "ultra-hazardous" activity, having regard to the uncertainties and practical difficulties of its application. If the Law Commission is unwilling to consider statutory reform on this basis, it must follow that judges should if anything be even more reluctant to proceed down that path.

Like the judge in the present case, I incline to the opinion that, as a general rule, it is more appropriate for strict liability in respect of operations of high risk to be imposed by Parliament, than by the courts. If such liability is imposed by statute, the relevant activities can be identified, and those concerned can know where they stand. Furthermore, statute can where appropriate lay down precise criteria establishing the incidence and scope of such liability.

It is of particular relevance that the present case is concerned with environmental pollution. The protection and preservation of the environment is now perceived as being of crucial importance to the future of mankind; and public bodies, both national and international, are taking significant steps towards the establishment of legislation which will promote the protection of the environment, and make the polluter pay for damage to the environment for which he is responsible—as can be seen from the W.H.O., E.E.C. and national regulations to which I have previously referred. But it does not follow from these developments that a common law principle, such as the rule in *Rylands v. Fletcher*, should be developed or rendered more strict to provide for liability in respect of such pollution. On the contrary, given that so much well-informed and carefully structured legislation is now being put in place for this purpose, there is less need for the courts to develop a common law principle to achieve the same end, and indeed it may well be undesirable that they should do so.

Having regard to these considerations, and in particular to the step which this House has already taken in *Read v. J. Lyons & Co. Ltd.* [1947]

A.C. 156 to contain the scope of liability under the rule in *Rylands v. Fletcher*, it appears to me to be appropriate now to take the view that foreseeability of damage of the relevant type should be regarded as a prerequisite of liability in damages under the rule. Such a conclusion can, as I have already stated, be derived from Blackburn J.'s original statement of the law; and I can see no good reason why this prerequisite should not be recognised under the rule, as it has been in the case of private nuisance. In particular, I do not regard the two authorities cited to your Lordships, *West v. Bristol Tramways Co.* [1908] 2 K.B. 14 and *Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co. Ltd.* [1921] 2 A.C. 465, as providing any strong pointer towards a contrary conclusion. It would moreover lead to a more coherent body of common law principles if the rule were to be regarded essentially as an extension of the law of nuisance to cases of isolated escapes from land, even though the rule as established is not limited to escapes which are in fact isolated. I wish to point out, however, that in truth the escape of the P.C.E. from E.C.L.'s land, in the form of trace elements carried in percolating water, has not been an isolated escape, but a continuing escape resulting from a state of affairs which has come into existence at the base of the chalk aquifer underneath E.C.L.'s premises. Classically, this would have been regarded as a case of nuisance; and it would seem strange if, by characterising the case as one falling under the rule in *Rylands v. Fletcher*, the liability should thereby be rendered more strict in the circumstances of the present case.

The facts of the present case

Turning to the facts of the present case, it is plain that, at the time when the P.C.E. was brought onto E.C.L.'s land, and indeed when it was used in the tanning process there, nobody at E.C.L. could reasonably have foreseen the resultant damage which occurred at C.W.C.'s borehole at Sawston.

However there remains for consideration a point adumbrated in the course of argument, which is relevant to liability in nuisance as well as under the rule in *Rylands v. Fletcher*. It appears that, in the present case, pools of neat P.C.E. are still in existence at the base of the chalk aquifer beneath E.C.L.'s premises, and the escape of dissolved phase P.C.E. from E.C.L.'s land is continuing to the present day. On this basis it can be argued that, since it has become known that P.C.E., if it escapes, is capable of causing damage by rendering water available at boreholes unsaleable for domestic purposes, E.C.L. could be held liable, in nuisance or under the rule in *Rylands v. Fletcher*, in respect of damage caused by the continuing escape of P.C.E. from its land occurring at any time after such damage had become foreseeable by E.C.L.

For my part, I do not consider that such an argument is well founded. Here we are faced with a situation where the substance in question, P.C.E., has so travelled down through the drift and the chalk aquifer beneath E.C.L.'s premises that it has passed beyond the control of E.C.L. To impose strict liability on E.C.L. in these circumstances, either as the creator of a nuisance or under the rule in *Rylands v. Fletcher*, on the ground that it has subsequently become reasonably foreseeable that the P.C.E. may, if it escapes, cause damage, appears to me to go beyond

the scope of the regimes imposed under either of these two related heads of liability. This is because when E.C.L. created the conditions which have ultimately led to the present state of affairs—whether by bringing the P.C.E. 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 P.C.E. had become irretrievably lost in the ground below. In such circumstances, I do not consider that E.C.L. should be under any greater liability than that imposed for negligence. At best, if the case is regarded as one of nuisance, it should be treated no differently from, for example, the case of the landslip in *Leakey v. National Trust for Places of Historic Interest or National Beauty* [1980] Q.B. 485.

I wish to add that the present case may be regarded as one of what is nowadays called historic pollution, in the sense that the relevant occurrence (the seepage of P.C.E. through the floor of E.C.L.'s premises) took place before the relevant legislation came into force; and it appears that, under the current philosophy, it is not envisaged that statutory liability should be imposed for historic pollution (see, e.g. the Council of Europe's Draft Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Strasbourg 26 January 1993) article 5.1, and paragraph 48 of the Explanatory Report). If so, it would be strange if liability for such pollution were to arise under a principle of common law.

In the result, since those responsible at E.C.L. could not at the relevant time reasonably have foreseen that the damage in question might occur, the claim of C.W.C. for damages under the rule in *Rylands v. Fletcher* must fail.

Natural use of land

I turn to the question whether the use by E.C.L. of its land in the present case constituted a natural use, with the result that E.C.L. cannot be held liable under the rule in *Rylands v. Fletcher*. In view of my conclusion on the issue of foreseeability, I can deal with this point shortly.

The judge held that it was a natural use. He said:

> "In my judgment, in considering whether the storage of organochlorines as an adjunct to a manufacturing process is a non-natural use of land, I must consider whether that storage created special risks for adjacent occupiers and whether the activity was for the general benefit of the community. It seems to me inevitable that I must consider the magnitude of the storage and the geographical area in which it takes place in answering the question. Sawston is properly described as an industrial village, and the creation of employment is clearly for the benefit of that community. I do not believe that I can enter upon an assessment of the point on a scale of desirability that the manufacture of wash leathers comes, and I content myself with holding that this storage in this place is a natural use of land."

It is a commonplace that this particular exception to liability under the rule has developed and changed over the years. It seems clear that, in

Fletcher v. Rylands, L.R. 1 Ex. 265 itself, Blackburn J.'s statement of the law was limited to things which are brought by the defendant onto his land, and so did not apply to things that were naturally upon the land. Furthermore, it is doubtful whether in the House of Lords in the same case Lord Cairns, to whom we owe the expression "non-natural use" of the land, was intending to expand the concept of natural use beyond that envisaged by Blackburn J. Even so, the law has long since departed from any such simple idea, redolent of a different age; and, at least since the advice of the Privy Council delivered by Lord Moulton in *Rickards v. Lothian* [1913] A.C. 263, 280, natural use has been extended to embrace the ordinary use of land. I ask to be forgiven if I again quote Lord Moulton's statement of the law, which has lain at the heart of the subsequent development of this exception:

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

Rickards v. Lothian itself was concerned with a use of a domestic kind, viz. the overflow of water from a basin whose runaway had become blocked. But over the years the concept of natural use, in the sense of ordinary use, has been extended to embrace a wide variety of uses, including not only domestic uses but also recreational uses and even some industrial uses.

It is obvious that the expression "ordinary use of the land" in Lord Moulton's statement of the law is one which is lacking in precision. There are some writers who welcome the flexibility which has thus been introduced into this branch of the law, on the ground that it enables judges to mould and adapt the principle of strict liability to the changing needs of society; whereas others regret the perceived absence of principle in so vague a concept, and fear that the whole idea of strict liability may as a result be undermined. A particular doubt is introduced by Lord Moulton's alternative criterion—"or such a use as is proper for the general benefit of the community." If these words are understood to refer to a local community, they can be given some content as intended to refer to such matters as, for example, the provision of services; indeed the same idea can, without too much difficulty, be extended to, for example, the provision of services to industrial premises, as in a business park or an industrial estate. But if the words are extended to embrace the wider interests of the local community or the general benefit of the community at large, it is difficult to see how the exception can be kept within reasonable bounds. A notable extension was considered in your Lordships' House in *Read v. J. Lyons & Co. Ltd.* [1947] A.C. 156, 169–170, *per* Viscount Simon, and p. 174, *per* Lord Macmillan, where it was suggested that, in time of war, the manufacture of explosives might be held to constitute a natural use of land, apparently on the basis that, in a country in which the greater part of the population was involved in the war effort, many otherwise exceptional uses might become "ordinary" for the duration of the war. It is however unnecessary to consider so wide an extension as that in a case such as the present. Even so, we can see the introduction of

A another extension in the present case, when the judge invoked the creation of employment as clearly for the benefit of the local community, viz. "the industrial village" at Sawston. I myself, however, do not feel able to accept that the creation of employment as such, even in a small industrial complex, is sufficient of itself to establish a particular use as constituting a natural or ordinary use of land.

B Fortunately, I do not think it is necessary for the purposes of the present case to attempt any redefinition of the concept of natural or ordinary use. This is because I am satisfied that the storage of chemicals in substantial quantities, and their use in the manner employed at E.C.L.'s premises, cannot fall within the exception. For the purpose of testing the point, let it be assumed that E.C.L. was well aware of the possibility that C P.C.E., if it escaped, could indeed cause damage, for example by contaminating any water with which it became mixed so as to render that water undrinkable by human beings. I cannot think that it would be right in such circumstances to exempt E.C.L. from liability under the rule in *Rylands v. Fletcher* on the ground that the use was natural or ordinary. The mere fact that the use is common in the tanning industry cannot, in D my opinion, be enough to bring the use within the exception, nor the fact that Sawston contains a small industrial community which is worthy of encouragement or support. Indeed I feel bound to say that the storage of substantial quantities of chemicals on industrial premises should be regarded as an almost classic case of non-natural use; and I find it very difficult to think that it should be thought objectionable to impose strict E liability for damage caused in the event of their escape. It may well be that, now that it is recognised that foreseeability of harm of the relevant type is a prerequisite of liability in damages under the rule, the courts may feel less pressure to extend the concept of natural use to circumstances such as those in the present case; and in due course it may become easier to control this exception, and to ensure that it has a more recognisable F basis of principle. For these reasons, I would not hold that E.C.L. should be exempt from liability on the basis of the exception of natural use.

However, for the reasons I have already given, I would allow E.C.L.'s appeal with costs before your Lordships' House and in the courts below.

G LORD JAUNCEY OF TULLICHETTLE. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Goff of Chieveley. I agree with it and for the reasons he gives I, too, would allow the appeal.

H LORD LOWRY. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Goff of Chieveley. I agree with it and for the reasons he gives I, too, would allow the appeal.

LORD WOOLF. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Goff of Chieveley. I agree with it and for the reasons he gives I, too, would allow the appeal.

Appeal allowed with costs.

Solicitors: Berrymans; Barlow Lyde & Gilbert.

J. A. G.

[HOUSE OF LORDS]

RHONE AND ANOTHER . . . . . APPELLANTS

AND

STEPHENS (EXECUTRIX OF MAY ELLEN BARNARD, DECD.) . . . . RESPONDENT

1994 Feb. 7, 8; March 17

Lord Templeman, Lord Oliver of Aylmerton, Lord Woolf, Lord Lloyd of Berwick and Lord Nolan

Restrictive Covenant—Positive covenant—Enforceability—Vendor covenanting for himself and successors in title to repair roof of own dwelling—Roof extending over adjoining dwelling conveyed to purchaser—Successors in title to purchaser seeking to enforce covenant against vendor's successor in title—Whether burden of positive covenant running with freehold land

In 1960 the owner of a house divided it into two separate dwellings. Part of the roof of the larger dwelling ("the house") lay above a bedroom in the smaller dwelling ("the cottage"). The owner retained the house and sold the cottage by a conveyance in which he covenanted "for himself and his successors in title . . . to maintain to the reasonable satisfaction of the purchasers and their successors in title such part of the roof of [the house] as lies above the property conveyed in wind and watertight condition." By 1984 the condition of the roof had deteriorated so that water leaked through into the cottage bedroom. The plaintiffs, who had purchased the cottage in 1981 by a conveyance containing an assignment of the benefit of the covenant, brought an action in the county court to enforce the covenant against the defendant, the successor in title to the original owner of the house. The judge found that the defendant was the owner of the roof and held that since the maintenance of the roof by the defendant was also to the benefit of her own property, the plaintiffs were entitled to enforce the covenant. The Court of Appeal allowed the