A House of Lords

Transco plc *v* Stockport Metropolitan Borough Council

[2003] UKHL 61

2003 March 31; April 1, 2; Nov 19

B Lord Bingham of Cornhill, Lord Hoffmann, Lord Hobhouse of Woodborough, Lord Scott of Foscote and Lord Walker of Gestingthorpe

Rylands v Fletcher — Provision of piped water supply — Fractured pipe — Damage caused by escape of water from pipe constructed to serve block of flats — Whether extraordinary use of land resulting in strict liability

C In 1966 the claimant was granted a right to install a gas main along a stretch of disused railway line which included an embankment at Brinnington in Stockport. On a nearby site owned by the defendant local authority lay a tower block of flats which was supplied with water by means of a water pipe which the authority had constructed between the tower block and the water main. In 1972 part of the disused line, including the embankment, was purchased by the authority, with the claimant continuing to have an easement of support in respect of its gas main. In 1992, without any negligence on the part of the authority, the water pipe leading to the D block of flats fractured. As a result large quantities of water escaped underground and caused the collapse of the embankment, leaving the gas main exposed and unsupported. The claimant, having been compelled to carry out emergency repair work to its gas main, brought an action in the High Court to recover the cost of the remedial work on the ground, inter alia, that the authority was strictly liable for non-natural user of land under the rule in *Rylands v Fletcher*. The judge found for the claimant on that ground but, on appeal by the local authority, his decision was E reversed by the Court of Appeal.

On appeal by the claimant—

Held, dismissing the appeal, that the rule in *Rylands v Fletcher* required that an occupier of land, acting other than under statutory authority, had brought on to his land or was keeping there some dangerous thing which posed an exceptionally high risk to neighbouring property should it escape and which amounted to an extraordinary and unusual use of the land, that there had been an escape on to some other property otherwise than by Act of God or the intervention of a third party and F that the damage claimed for had been to that other property and was a forseeable consequence of the escape; that the provision of a water supply to a block of flats by means of a connecting pipe from the water main, though capable of causing damage in the event of an escape, did not amount to the creation of a special hazard constituting an extraordinary use of land; that further (per Lord Scott of Foscote), since the damage to the claimant's gas main occurred on the local authority's own land there had been no escape for the purposes of the rule; and that accordingly, G irrespective of whether the claimant's easement of support was a sufficient proprietary interest to enable it to recover damages under *Rylands v Fletcher*, the facts upon which the claimant relied fell outside the ambit of rule (post, paras 9–13, 30–34, 43–44, 47–49, 52–54, 58–59, 64–67, 75, 77–79, 82, 84, 85, 87, 90–91, 103, 106, 111–113, 116).

Cambridge Water Co v Eastern Counties Leather plc [1994] 2 AC 264, HL(E) followed.

H *Rylands v Fletcher* (1868) LR 3 HL 330, HL(E) considered.

Decision of the Court of Appeal [2001] EWCA Civ 212 affirmed.

The following cases are referred to in their Lordships' opinions:

Allen v Gulf Oil Refining Ltd [1981] AC 1001; [1981] 2 WLR 188; [1981] 1 All ER 353, HL(E)

Anderson v Oppenheimer (1880) 5 QBD 602, CA
Andreae v Selfridge & Co Ltd [1938] Ch 1; [1937] 3 All ER 255, CA
Attorney General v Cory Bros & Co Ltd [1921] 1 AC 521, HL(E)
Autex Industries Ltd v Auckland City Council [2000] NZAR 324
Baird v Williamson (1863) 15 CB NS 376
Bamford v Turnley (1862) 3 B & S 62
Blue Circle Industries plc v Ministry of Defence [1999] Ch 289; [1999] 2 WLR 295; [1998] 3 All ER 385, CA
Bond v Nottingham Corpn [1940] Ch 429; [1940] 2 All ER 12, CA
Bradburn v Lindsay [1983] 2 All ER 408
Burnie Port Authority v General Jones Pty Ltd (1994) 179 CLR 520; 120 ALR 42
Cambridge Water Co v Eastern Counties Leather plc [1994] 2 AC 264; [1994] 2 WLR 53; [1994] 1 All ER 53, HL(E)
Carstairs v Taylor (1871) LR 6 Ex 217
Charing Cross Electricity Supply Co v Hydraulic Power Co [1914] 3 KB 772, CA
Dale v Hall (1750) 1 Wils 281
Delaware Mansions Ltd v Westminster City Council [2001] UKHL 55; [2002] 1 AC 321; [2001] 3 WLR 1007; [2001] 4 All ER 737, HL(E)
Donoghue v Stevenson [1932] AC 562, HL(Sc)
Dunne v North Western Gas Board [1964] 2 QB 806; [1964] 2 WLR 164; [1963] 3 All ER 916, CA
Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd [1999] 2 AC 22; [1998] 2 WLR 350; [1998] 1 All ER 481, HL(E)
Geddis v Proprietors of Bann Reservoir (1878) 3 App Cas 430, HL(I)
Goldman v Hargrave [1967] 1 AC 645; [1966] 3 WLR 513; [1966] 2 All ER 989, PC
Great Western Railway Co v Mostyn (Owners) [1928] AC 57, HL(E)
Green v Chelsea Waterworks Co (1894) 70 LT 547, CA
Hale v Jennings Bros [1938] 1 All ER 579, CA
Hammersmith and City Railway Co v Brand (1869) LR 4 HL 171, HL(E)
Holbeck Hall Hotel Ltd v Scarborough Borough Council [2000] QB 836; [2000] 2 WLR 1396; [2000] 2 All ER 705, CA
Hunter v Canary Wharf Ltd [1997] AC 655; [1997] 2 WLR 684; [1997] 2 All ER 426, HL(E)
Job Edwards Ltd v Birmingham Navigations Co Proprietors [1924] 1 KB 341, CA
Leakey v National Trust for Places of Historic Interest or Natural Beauty [1980] QB 485; [1980] 2 WLR 65; [1980] 1 All ER 17, CA
Longhurst v Metropolitan Water Board [1948] 2 All ER 834, HL(E)
Merlin v British Nuclear Fuels plc [1990] 2 QB 557; [1990] 3 WLR 383; [1990] 3 All ER 711
Miles v Forest Rock Granite Co (Leicestershire) Ltd (1918) 34 TLR 500, CA
Musgrove v Pandelis [1919] 2 KB 43, CA
Nichols v Marsland (1876) 2 Ex D 1, CA
Nugent v Smith (1876) 1 CPD 423, CA
Overseas Tankship (UK) Ltd v Miller Steamship Co Pty (The Wagon Mound (No 2)) [1967] 1 AC 617; [1966] 3 WLR 498; [1966] 2 All ER 709, PC
Perry v Kendricks Transport Ltd [1956] 1 WLR 85; [1956] 1 All ER 154, CA
RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council 1985 SC (HL) 17; 1985 SLT 214, HL(Sc)
Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd [1921] 2 AC 465, HL(E)
Rapier v London Tramways Co [1893] 2 Ch 588
Read v J Lyons & Co Ltd [1947] AC 156; [1946] 2 All ER 471, HL(E)
Rickards v Lothian [1913] AC 263, PC
River Wear Comrs v Adamson (1877) LR 2 App Cas 743, HL(E)
Ross v Fedden (1872) LR 7 QB 661; 26 LT 966

Rylands v Fletcher (1865) 3 H & C 774; (1866) LR 1 Ex 265; (1868) LR 3 HL 330, HL(E)
St Helen's Smelting Co v Tipping (1865) 11 HL Cas 642, HL(E)
Sedleigh-Denfield v O'Callaghan [1940] AC 880; [1940] 3 All ER 349, HL(E)
Shiffman v Order of the Hospital of St John of Jerusalem [1936] 1 All ER 557
Smith v Kenrick (1849) 7 CB 515
Tenant v Goldwin (1704) 2 Ld Raym 1089; 1 Salk 360
Webber v Hazelwood (1934) 34 SR (NSW) 155
Wildtree Hotels Ltd v Harrow London Borough Council [2001] 2 AC 1; [2000] 3 WLR 165; [2000] 3 All ER 289, HL(E)

The following additional cases were cited in argument:

Abbahall Ltd v Smee [2002] EWCA Civ 1831; [2003] 1 WLR 1472; [2003] 1 All ER 465, CA
Anns v Merton London Borough Council [1978] AC 728; [1977] 2 WLR 1024; [1977] 2 All ER 492, HL(E)
Blake v Woolf [1898] 2 QB 426, DC
Christie v Davey [1893] 1 Ch 316
Clift v Welsh Office [1999] 1 WLR 796; [1998] 4 All ER 852, CA
Collingwood v Home and Colonial Stores Ltd [1936] 3 All ER 200, CA
Green v Lord Somerleyton [2003] EWCA Civ 198, CA
Humphries v Cousins (1877) 2 CPD 239
Irvine & Co Ltd v Dunedin City Corpn [1939] NZLR 741
Kensington Borough Council v Allen [1926] 1 KB 576, DC
McKenna v British Aluminium Ltd The Times, 25 April 2002
Marcic v Thames Water Utilities Ltd [2002] EWCA Civ 64; [2002] QB 929; [2002] 2 WLR 932; [2002] 2 All ER 55, CA
Murphy v Brentwood District Council [1991] 1 AC 398; [1990] 3 WLR 414; [1990] 2 All ER 908, HL(E)
Northwestern Utilities Ltd v London Guarantee and Accident Co Ltd [1936] AC 108, PC
Peters v Prince of Wales Theatre (Birmingham) Ltd [1943] KB 73; [1942] 2 All ER 533, CA
Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd [1953] Ch 149; [1953] 2 WLR 58; [1953] 1 All ER 179, CA
Southwark London Borough Council v Mills [2001] 1 AC 1; [1999] 3 WLR 939; [1999] 4 All ER 449, HL(E)
Stovin v Wise [1996] AC 923; [1996] 3 WLR 388; [1996] 3 All ER 801, HL(E)
Watt v Hertfordshire County Council [1954] 1 WLR 835; [1954] 2 All ER 368, CA

APPEAL from the Court of Appeal

By leave of the House of Lords (Lord Nicholls of Birkenhead, Lord Hoffmann and Lord Hobhouse of Woodborough) given on 5 December 2001, the claimant, Transco plc (formerly BG plc and BG Transco plc) appealed against the decision of the Court of Appeal (Schiemann and Latham LJJ and Cresswell J) allowing an appeal by the local authority, Stockport Metropolitan Borough Council, from the decision of Judge Howarth, sitting in the Technology and Construction Court of the Queen's Bench Division, at Salford District Registry, ordering the local authority to pay the claimant £142,357, in respect of damages and interest thereon, for non-natural use of land under the rule in *Rylands v Fletcher* in respect of an escape of water from a water pipe owned by the local authority which resulted in the collapse of an embankment and resultant damage to the claimant's gas main pipe.

The facts are stated in the opinion of Lord Hoffmann. A

Ian Leeming QC and *Robert Sterling* for the claimant. The local authority was liable for the escape of water, under the rule in *Rylands v Fletcher* (1866) LR 1 Ex 265; (1868) LR 3 HL 330, on the basis that the authority had accumulated on its land, in circumstances falling outside the "natural user" exception, a substance with the propensity to do mischief if it escaped. B

The decisions of the Exchequer Chamber and House of Lords in *Rylands v Fletcher* were meant to reflect existing, well established law: see LR 1 Ex 265, 279–280; LR 3 HL 330, 341–342 and *Smith v Kenrick* (1849) 7 CB 515. The rule is to be regarded as an extension of the law of nuisance: see *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264, 306, Newark "The Boundaries of Nuisance" (1949) 65 LQR 480, 486–488 and *McKenna v British Aluminium Ltd* The Times, 25 April 2002. There is strict liability in the tort of nuisance: see *Hunter v Canary Wharf Ltd* [1997] AC 655, 723–724. Liability under *Rylands v Fletcher,* however, is not "strict" in any excessive sense. There are a number of defences to prima facie liability, namely, act of God (see *Nichols v Marsland* (1876) 2 Ex D 1), malicious acts of strangers (see *Rickards v Lothian* [1913] AC 263), or that the claimant himself caused the escape or damage. Further, there are control mechanisms governing the rule. The substance stored on the land must be dangerous and must have escaped from the defendant's land: see *Read v J Lyons & Co Ltd* [1947] AC 156. It must be foreseeable that the substance will cause harm in the event of an escape: see *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264, 301–306. C D

Accordingly, the ambit of a further control mechanism is in the form of a natural user defence should not be wide. The concept of general benefit to the community, postulated in *Rickards v Lothian* [1913] AC 263, 279, should not be accepted as an alternative defence to natural user: see *Cambridge Water Co* [1994] 2 AC 264, 308–309. There are existing precedents for dealing with water escape and similar problems in respect of buildings in joint or multiple occupation. Water brought onto a defendant's land in bulk, however, should remain within the rule and should not be taken into the natural user defence, the forseeable hazard presented by it being too great. [Reference was made to *Peters v Prince of Wales Theatre (Birmingham) Ltd* [1943] KB 73; *Carstairs v Taylor* (1871) LR 6 Ex 217; *Ross v Fedden* (1872) LR 7 QB 661; *Humphries v Cousins* (1877) 2 CPD 239; *Anderson v Oppenheimer* (1880) 5 QBD 602; *Blake v Woolf* [1898] 2 QB 426; *Charing Cross Electricity Supply Co v Hydraulic Power Co* [1914] 3 KB 772; *Northwestern Utilities Ltd v London Guarantee and Accident Co Ltd* [1936] AC 108; *Irvine & Co Ltd v Dunedin City Corpn* [1939] NZLR 741; *Autex Industries Ltd v Auckland City Council* [2000] NZAR 324; *Collingwood v Home & Colonial Stores Ltd* [1936] 3 All ER 200; *Bamford v Turnley* (1862) 3 B & S 62 and *Southwark London Borough Council v Mills* [2001] 1 AC 1.] E F G

Rylands v Fletcher should not be departed from. To do so would involve overruling *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264. The House ought only to depart from a previous decision of its own if the earlier decision has long been regarded as unsatisfactory, or if it rested on a superficial examination of principle or gave rise to difficulty in ascertaining H

upon what basis of principle it proceeded: see *Murphy v Brentwood District Council* [1991] 1 AC 398, 471, per Lord Keith of Kinkel giving reasons for overruling *Anns v Merton London Borough Council* [1978] AC 728.

The decision of the High Court of Australia in *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; 120 ALR 42 that the rule has been absorbed into the law of negligence ought not to be followed. The distinguishing feature of the rule is that liability is founded in the absence of negligence There are no true parallels between the rule in *Rylands v Fletcher* and negligence.

Mark Turner QC and *Stephen Davies* for the local authority. It is open to the House to apply the concept of non-natural user strictly in accordance with previous authority, or to apply the concept of reasonable user (the corresponding control mechanism in nuisance), or to bring the rule in *Rylands v Fletcher* within the broader tort of negligence and thus make reasonable care the control mechanism.

In considering the question of non-natural use, regard should be had to the policy of Parliament for over 100 years requiring the provision of water supplies to dwelling houses as a matter of public health and social duty: see section 48(1) of the Public Health (London) Act 1891; section 17 of the Housing etc Act 1909; sections 9, 10, 25 of the Housing Act 1936 and *Kensington Borough Council v Allen* [1926] 1 KB 576. From 1956 it was the policy of Parliament to encourage the construction of local authority housing in the form of tower blocks, which necessitated the use of water service pipes of dimensions similar to that in the present case. See the Housing Subsidy Act 1956.

As to applying the concept of non-natural user strictly in accordance with previous authority, *Rylands v Fletcher* did not purport to give an exclusive definition of the circumstances in which the occupier of land would be held liable for escapes therefrom. The authoritative starting point should be the decision in *Rickards v Lothian* [1913] AC 263, namely, that there must be a special use bringing with it increased danger to others and not merely the ordinary use of land.

In determining whether a particular use is to be regarded as ordinary the following factors are relevant: (i) the extent to which the activity is common, customary or usual (see *Stovin v Wise* [1996] AC 923, 949); (ii) the nature and extent of any foreseeable danger to others created by the carrying out of the activity (see *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264, 309); (iii) whether the activity is being carried on for profit or the personal gratification of its author; (iv) whether the person carrying on the activity is doing so out of the exercise of choice or under compulsion; (v) the extent, if any, of the social utility of the activity (see *Watt v Hertfordshire County Council* [1954] 1 WLR 835; *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd* [1953] Ch 149 and *Marcic v Thames Water Utilities Ltd* [2002] QB 929).

Any test of reasonable user should be applied according to the standards prevailing at the time of the assessment. The public provision of the supply of fresh water for domestic use in dwellings is now to be seen as ordinary: see *Dunne v North Western Gas Board* [1964] 2 QB 806, 832.

As to deploying the corresponding control mechanism in nuisance, the main factors which the courts have historically considered to be appropriate

to the application of the reasonable user test are the extent to which the activity is common, customary or usual (see *Andreae v Selfridge & Co Ltd* [1938] Ch 1) and whether the defendant's conduct is of obvious social utility (see *Christie v Davey* [1893] 1 Ch 316).

However, given the difficulties in applying the test of ordinary user (see *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485, 519 and *Burnie Port Authority v General Jones Pty Ltd* 179 CLR 520; 120 ALR 42), it might be preferable for the rule in *Rylands v Fletcher* to be absorbed within the broader tort of negligence, with reasonable care being adopted as the most appropriate control mechanism. A decision to that effect would remedy the uncertainty as to whether any operation was to be categorised as ordinary or extraordinary and would not impugn the decision in *Cambridge Water Co* [1994] 2 AC 264. [Reference was also made to *Abbahall Ltd v Smee* [2003] 1 WLR 1472, 1481–1482, para 43; *Delaware Mansions Ltd v Westminster City Council* [2002] 1 AC 321, 333, para 31; *Green v Lord Somerleyton* [2002] EWCA Civ 198 and *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17.]

Whatever control mechanism is adopted, the local authority is not liable. Its use of its land to provide local authority accommodation in a multi-storey building and to provide water in bulk to meet the ordinary requirements of its occupiers was a reasonable use of land. It was not guilty of a failure to exercise reasonable care in relation to the circumstances whereby water escaped from the pipe in question.

Leeming QC, in reply, referred to *Clift v Welsh Office* [1999] 1 WLR 796.

Their Lordships took time for consideration.

19 November. **LORD BINGHAM OF CORNHILL**

1 My Lords, in this appeal the House is called upon to review the scope and application, in modern conditions, of the rule of law laid down by the Court of Exchequer Chamber, affirmed by the House of Lords, in *Rylands v Fletcher* (1866) LR 1 Ex 265; (1868) LR 3 HL 330.

2 I need not repeat the summary given by my noble and learned friend, Lord Hoffmann, of the facts giving rise to the dispute between the parties to this appeal. The salient facts appear to me to be these. As a multi-storey block of flats built by a local authority and let to local residents, Hollow End Towers was typical of very many such blocks throughout the country. It had been built by the respondent council. The block was supplied with water for the domestic use of those living there, as statute has long required. Water was carried to the block by the statutory undertaker, from whose main the pipe central to these proceedings led to tanks in the basement of the block for onward distribution of the water to the various flats. The capacity of this pipe was much greater than the capacity of a pipe supplying a single dwelling, being designed to meet the needs of 66 dwellings. But it was a normal pipe in such a situation and the water it carried was at mains pressure. Without negligence on the part of the council or its servants or agents, the pipe failed at a point within the block with the inevitable result that water escaped. Since, again without negligence, the failure of the pipe remained undetected for a prolonged period, the quantity of water which escaped was very considerable. The lie and the nature of the council's land

A in the area was such that the large quantity of water which had escaped from the pipe flowed some distance from the block and percolated into an embankment which supported the appellant Transco's 16-inch high-pressure gas main, causing the embankment to collapse and leaving this gas main exposed and unsupported. There was an immediate and serious risk that the gas main might crack, with potentially devastating consequences. Transco took prompt and effective remedial measures and now seeks to B recover from the council the agreed cost of taking them.

Rylands v Fletcher

3 Few cases in the law of tort or perhaps any other field are more familiar, or have attracted more academic and judicial discussion, than *Rylands v Fletcher*. This relieves me of the need both to summarise the well-C known facts of the case and to rehearse yet again the passages cited by Lord Hoffmann in which Blackburn J, LR 1 Ex 265, 279 and Lord Cairns LC, LR 3 HL 330, 338–339 expressed the ratio of their decisions. I content myself with three points, none of them controversial:

(1) The plaintiff framed his claim as one of negligence: see LR 1 Ex 265. It was only when a majority of the Court of Exchequer (Pollock CB and Martin B, Bramwell B dissenting (1865) 3 H & C 774 held against him, ruling that D no claim would lie in the absence of negligence, that the plaintiff changed tack and contended that defendants were liable even if negligence could not be established against them.

(2) Blackburn J did not conceive himself to be laying down any new principle of law. When, in *Ross v Fedden* (1872) 26 LT 966, 968, it was later suggested to him by counsel that the question in *Rylands v Fletcher* had E never been decided until the adjudication of that case, he rejected the suggestion in robust terms. The Lord Chancellor regarded the principles on which the case was to be determined as "extremely simple": LR 3 HL 330, 338. Had the House regarded the case as raising issues of great moment, steps might no doubt have been taken to assemble a stronger quorum to hear the appeal: see Heuston, "Who was the Third Lord in *Rylands v Fletcher?*" F (1970) 86 LQR 160–165. It seems likely, as persuasively contended by Professor Newark ("The Boundaries of Nuisance" (1949) 65 LQR 480, 487–488), that those who decided the case regarded it as one of nuisance, novel only to the extent that it sanctioned recovery where the interference by one occupier of land with the right or enjoyment of another was isolated and not persistent.

(3) Those involved in *Rylands v Fletcher*, as counsel or judges, must have G been very much alive to the catastrophic results which may ensue when reservoir dams burst. Professor Brian Simpson has drawn attention ("Legal Liability for Bursting Reservoirs: The Historical Context of *Rylands v Fletcher*" (1984) 13 J Leg Stud 209) to two such catastrophes, one in 1852, some eight years before the inundation of Mr Fletcher's colliery, the second in 1864, after Fletcher's case had been heard at first instance but before the hearing in the three appellate courts. In the Court of Exchequer Chamber, H Blackburn J expressly referred to the case of damage done by the bursting of waterworks companies' reservoirs: LR 1 Ex 265, 270. Lord Cairns, as Sir Hugh Cairns QC, had advised on the payment of compensation when the second disaster occurred. No matter how broadly the principle was expressed when judgment was given, the risk of escape of water from an

artificially constructed reservoir was one which the judges must have had vividly in mind. The damage suffered by Fletcher was not the result of a dam failure, but nor was Rylands's reservoir a mere pond: inspecting it before writing his article, Simpson found it still in use, with a capacity of over 4 million gallons and covering $1\frac{1}{2}$ acres when full.

The future development of Rylands v Fletcher

4 In the course of his excellent argument for the council, Mr Mark Turner canvassed various ways in which the rule in *Rylands v Fletcher* might be applied and developed in future, without however judging it necessary to press the House to accept any one of them. The boldest of these courses was to follow the trail blazed by a majority of the High Court of Australia in *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42 by treating the rule in *Rylands v Fletcher* as absorbed by the principles of ordinary negligence. In reaching this decision the majority were influenced by the difficulties of interpretation and application to which the rule has undoubtedly given rise (pp 52–55), by the progressive weakening of the rule by judicial decision (pp 54–55), by recognition that the law of negligence has been very greatly developed and expanded since *Rylands v Fletcher* was decided (pp 55–65) and by a belief that most claimants entitled to succeed under the rule would succeed in a claim for negligence anyway (pp 65–67).

5 Coming from such a quarter these comments of course command respect, and they are matched by expressions of opinion here. Megaw LJ observed in *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485, 519 that application of the decision and of the dicta in *Rylands v Fletcher* had given rise to continual trouble in the law of England. In its report on Civil Liability for Dangerous Things and Activities (1970) (Law Com No 32), p 12, para 20(a) the Law Commission described the relevant law as "complex, uncertain and inconsistent in principle". There is a theoretical attraction in bringing this somewhat anomalous ground of liability within the broad and familiar rules governing liability in negligence. This would have the incidental advantage of bringing the law of England and Wales more closely into line with what I understand to be the law of Scotland (see *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SLT 214, 217, where Lord Fraser of Tullybelton described the suggestion that the decision in *Rylands v Fletcher* had any place in Scots law as "a heresy which ought to be extirpated"). Consideration of the reported English case law over the past 60 years suggests that few if any claimants have succeeded in reliance on the rule in *Rylands v Fletcher* alone.

6 I would be willing to suppress an instinctive resistance to treating a nuisance-based tort as if it were governed by the law of negligence if I were persuaded that it would serve the interests of justice to discard the rule in *Rylands v Fletcher* and treat the cases in which it might have been relied on as governed by the ordinary rules of negligence. But I hesitate to adopt that solution for four main reasons. First, there is in my opinion a category of case, however small it may be, in which it seems just to impose liability even in the absence of fault. In the context of then recent catastrophes *Rylands v Fletcher* itself was understandably seen as such a case. With memories of the tragedy at Aberfan still green, the same view might now be taken of *Attorney General v Cory Bros & Co Ltd* [1921] 1 AC 521 even if the claimants had

A failed to prove negligence, as on the facts they were able to do. I would regard *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd* [1921] 2 AC 465, and *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264 (had there been foreseeability of damage), as similarly falling within that category. Second, it must be remembered that common law rules do not exist in a vacuum, least of all rules which have stood for
B over a century during which there has been detailed statutory regulation of matters to which they might potentially relate. With reference to water, section 209 of the Water Industry Act 1991 imposes strict liability (subject to certain exemptions) on water undertakers and Schedule 2 to the Reservoirs Act 1975 appears to assume that on facts such as those of *Rylands v Fletcher* strict liability would attach. If the law were changed so as to require proof of negligence by those previously thought to be entitled to recover under the
C rule in *Rylands v Fletcher* without proving negligence, the effect might be (one does not know) to falsify the assumption on which Parliament has legislated, by significantly modifying rights which Parliament may have assumed would continue to exist. Third, although in *Cambridge Water* [1994] 2 AC 264, 283–285, the possibility was ventilated that the House might depart from *Rylands v Fletcher* in its entirety, it is plain that this
D suggestion was not accepted. Instead, the House looked forward to a more principled and better controlled application of the existing rule: see, for example, p 309. While this is not a conclusive bar to acceptance of the detailed argument presented to the House on this occasion, "stop-go" is in general as bad an approach to legal development as to economic management. Fourth, while replacement of strict *Rylands v Fletcher* liability
E by a fault-based rule would tend to assimilate the law of England and Wales with that of Scotland, it would tend to increase the disparity between it and the laws of France and Germany. Having reviewed comparable provisions of French and German law, van Gerven, Lever and Larouche (*Cases, Materials and Text on National, Supranational and International Tort Law* (2000), p 205) observe: "Even if the contours of the respective regimes may
F differ, all systems studied here therefore afford a form of strict liability protection in disputes between neighbouring landowners." The authors indeed suggest (p 205) that the English rule as laid down in *Rylands v Fletcher* is "the most developed of these regimes".

7 Should, then, the rule be generously applied and the scope of strict liability extended? There are certainly respected commentators who favour such a course and regret judicial restrictions on the operation of the rule: see
G *Fleming*, *The Law of Torts*, 9th ed (1998), p 377; *Markesinis & Deakin*, *Tort Law,* 5th ed (2003), p 544. But there is to my mind a compelling objection to such a course, articulated by Lord Goff of Chieveley in *Cambridge Water* [1994] 2 AC 264, 305:

> "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
H 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 may be added that statutory regulation, particularly when informed by the work of the Law Commission, may take such account as is judged appropriate of the comparative law considerations on which I have briefly touched.

8 There remains a third option, which I would myself favour: to retain the rule, while insisting upon its essential nature and purpose; and to restate it so as to achieve as much certainty and clarity as is attainable, recognising that new factual situations are bound to arise posing difficult questions on the boundary of the rule, wherever that is drawn.

9 The rule in *Rylands v Fletcher* is a sub-species of nuisance, which is itself a tort based on the interference by one occupier of land with the right in or enjoyment of land by another occupier of land as such. From this simple proposition two consequences at once flow. First, as very clearly decided by the House in *Read v J Lyons & Co Ltd* [1947] AC 156, no claim in nuisance or under the rule can arise if the events complained of take place wholly on the land of a single occupier. There must, in other words, be an escape from one tenement to another. Second, the claim cannot include a claim for death or personal injury, since such a claim does not relate to any right in or enjoyment of land. This proposition has not been authoritatively affirmed by any decision at the highest level. It was left open by Parker LJ in *Perry v Kendricks Transport Ltd* [1956] 1 WLR 85, 92, and is inconsistent with decisions such as *Shiffman v Order of the Hospital of St John of Jerusalem* [1936] 1 All ER 557 and *Miles v Forest Rock Granite Co (Leicestershire) Ltd* (1918) 34 TLR 500. It is however clear from Lord Macmillan's opinion in *Read* [1947] AC 156, 170–171 that he regarded a personal injury claim as outside the scope of the rule, and his approach is in my opinion strongly fortified by the decisions of the House in *Cambridge Water* [1994] 2 AC 264 and *Hunter v Canary Wharf Ltd* [1997] AC 655, in each of which nuisance was identified as a tort directed, and directed only, to the protection of interests in land.

10 It has from the beginning been a necessary condition of liability under the rule in *Rylands v Fletcher* that the thing which the defendant has brought on his land should be "something which . . . will naturally do mischief if it escape out of his land" (LR 1 Ex 265, 279 per Blackburn J), "something dangerous . . .", "anything likely to do mischief if it escapes", "something . . . 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" (p 280), "anything which, if it should escape, may cause damage to his neighbour" (LR 3 HL 330, 340, per Lord Cranworth). The practical problem is of course to decide whether in any given case the thing which has escaped satisfies this mischief or danger test, a problem exacerbated by the fact that many things not ordinarily regarded as sources of mischief or danger may none the less be capable of proving to be such if they escape. I do not think this condition can be viewed in complete isolation from the non-natural user condition to which I shall shortly turn, but I think the cases decided by the House give a valuable pointer. In *Rylands v Fletcher* itself the courts were dealing with what Lord Cranworth (LR 3 HL 330, 342) called "a large accumulated mass of water" stored up in a reservoir, and I have touched on the historical context of the decision in paragraph 3(3) above. *Rainham Chemical Works* [1921] 2 AC 465, 471, involved the storage of chemicals, for the purpose of making munitions, which "exploded with

terrific violence". In *Attorney General v Cory Bros & Co Ltd* [1921] 1 AC 521, 525, 530, 534, 536, the landslide in question was of what counsel described as an "enormous mass of rubbish", some 500,000 tons of mineral waste tipped on a steep hillside. In *Cambridge Water* [1994] 2 AC 264 the industrial solvents being used by the tannery were bound to cause mischief in the event, unforeseen on the facts, that they percolated down to the water table. These cases are in sharp contrast with those arising out of escape from a domestic water supply (such as *Carstairs v Taylor* (1871) LR 6 Ex 217, *Ross v Fedden* (1872) 26 LT 966 or *Anderson v Oppenheimer* (1880) 5 QBD 602) which, although decided on other grounds, would seem to me to fail the mischief or danger test. Bearing in mind the historical origin of the rule, and also that its effect is to impose liability in the absence of negligence for an isolated occurrence, I do not think the mischief or danger test should be at all easily satisfied. It must be shown that the defendant has done something which he recognised, or judged by the standards appropriate at the relevant place and time, he ought reasonably to have recognised, as giving rise to an exceptionally high risk of danger or mischief if there should be an escape, however unlikely an escape may have been thought to be.

11 No ingredient of *Rylands v Fletcher* liability has provoked more discussion than the requirement of Blackburn J (LR 1 Ex 265, 280) that the thing brought on to the defendant's land should be something "not naturally there", an expression elaborated by Lord Cairns (LR 3 HL 330, 339) when he referred to the putting of land to a "non-natural use": see Stallybrass, "Dangerous Things and the Non-Natural User of Land" (1929) 3 CLJ 376–397; Goodhart, "Liability for Things Naturally on the Land" (1932) 4 CLJ 13–33; Newark, "Non-Natural User and *Rylands v Fletcher*" (1961) 24 MLR 557–571; Williams, "Non-Natural Use of Land" [1973] CLJ 310–322; Weir, "*Rylands v Fletcher* Reconsidered" [1994] CLJ 216. Read literally, the expressions used by Blackburn J and Lord Cairns might be thought to exclude nothing which has reached the land otherwise than through operation of the laws of nature. But such an interpretation has been fairly described as "redolent of a different age" (*Cambridge Water* [1994] 2 AC 264, 308), and in *Read v J Lyons & Co Ltd* [1947] AC 156, 169, 176, 187 and *Cambridge Water*, at p 308, the House gave its imprimatur to Lord Moulton's statement, giving the advice of the Privy Council in *Rickards v Lothian* [1913] AC 263, 280:

> "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."

I think it clear that ordinary user is a preferable test to natural user, making it clear that the rule in *Rylands v Fletcher* is engaged only where the defendant's use is shown to be extraordinary and unusual. This is not a test to be inflexibly applied: a use may be extraordinary and unusual at one time or in one place but not so at another time or in another place (although I would question whether, even in wartime, the manufacture of explosives could ever be regarded as an ordinary user of land, as contemplated by Viscount Simon, Lord Macmillan, Lord Porter and Lord Uthwatt in *Read v J Lyons & Co Ltd* [1947] AC 156, 169–170, 174, 176–177, 186–187). I also doubt whether a test of reasonable user is helpful, since a user may well be

quite out of the ordinary but not unreasonable, as was that of *Rylands*, *Rainham Chemical Works* or the tannery in *Cambridge Water*. Again, as it seems to me, the question is whether the defendant has done something which he recognises, or ought to recognise, as being quite out of the ordinary in the place and at the time when he does it. In answering that question, I respectfully think that little help is gained (and unnecessary confusion perhaps caused) by considering whether the use is proper for the general benefit of the community. In *Rickards v Lothian* itself, the claim arose because the outflow from a wash-basin on the top floor of premises was maliciously blocked and the tap left running, with the result that damage was caused to stock on a floor below: not surprisingly, the provision of a domestic water supply to the premises was held to be a wholly ordinary use of the land. An occupier of land who can show that another occupier of land has brought or kept on his land an exceptionally dangerous or mischievous thing in extraordinary or unusual circumstances is in my opinion entitled to recover compensation from that occupier for any damage caused to his property interest by the escape of that thing, subject to defences of Act of God or of a stranger, without the need to prove negligence.

The present appeal

12 By the end of the hearing before the House, the dispute between the parties had narrowed down to two questions: had the council brought on to its land at Hollow End Towers something likely to cause danger or mischief if it escaped? and was that an ordinary user of its land? Applying the principles I have tried to outline, I think it quite clear that the first question must be answered negatively and the second affirmatively, as the Court of Appeal did: [2001] EWCA Civ 212.

13 It is of course true that water in quantity is almost always capable of causing damage if it escapes. But the piping of a water supply from the mains to the storage tanks in the block was a routine function which would not have struck anyone as raising any special hazard. In truth, the council did not accumulate any water, it merely arranged a supply adequate to meet the residents' needs. The situation cannot stand comparison with the making by Mr Rylands of a substantial reservoir. Nor can the use by the council of its land be seen as in any way extraordinary or unusual. It was entirely normal and routine. Despite the attractive argument of Mr Ian Leeming for Transco, I am satisfied that the conditions to be met before strict liability could be imposed on the council were far from being met on the facts here.

14 I would accordingly dismiss the appeal with costs.

LORD HOFFMANN

The flood

15 My Lords, the Brinnington Housing Estate forms part of the metropolitan borough of Stockport. It lies to the north of the town, beyond the M60 motorway. The estate was built by the predecessor of the respondent, the Stockport Metropolitan Borough Council ("the council") between 40 and 50 years ago and is the mixture of semi-detached houses and tower blocks characteristic of the urban planning of that time.

A **16** The estate stands on a low escarpment from which the land slopes down westward to the Reddish Vale Country Park and eventually the River Tame. The estate and the country park are separated by the bed of a disused branch railway which used to run from Stockport town centre in the south to Denton in the north. It still passes through the cuttings and embankments constructed across this broken country in the late 19th century, but the line was abandoned at about the time that the estate was built. The rails have B gone and like many such tracks throughout the country, it has been acquired by the council and surfaced for use by walkers and cyclists.

17 In 1966 the North Western Gas Board, pursuant to an agreement with the British Railways Board, laid a 16-inch high-pressure steel gas main beneath the surface of the old railway. It is not disputed that, whether by virtue of the agreement or subsequent prescription, the board acquired an C easement to maintain its pipe in the soil of the railway bed. The pipe now belongs to the appellant, which used to be called British Gas plc, then BG plc and is now Transco plc. I shall call it Transco.

18 At some time in the summer of 1992 a leak developed in a high pressure pipe belonging to the council which supplied water to Hollow End Towers, an 11-storey tower block on the Brinnington Estate. Although the pipe was not part of the North West Water Authority's mains system, it was D a good deal bigger than the kind of pipe which would normally lead from the mains to a single dwelling. This was because it had to supply the large tanks in the basement of Hollow End Towers from which the water was pumped to tanks on the roof which supplied all 66 flats in the block. The pipe was made of asbestos cement and had an internal diameter of three inches, giving it a capacity 16 times greater than the $3\frac{1}{4}$-inch pipe in common domestic use. E It is not clear why the pipe fractured but the judge found that it was probably the result of the subsidence of tipped material in a landfill site under part of the tower, which was itself supported on piles.

19 The leak was first discovered on 24 September 1992, when the well of the lift shaft at Hollow End Towers was found to be flooded. The fracture was found and quickly repaired. But later events showed that water must have been escaping from some time in considerable quantities, because two F days after the leak had been found, water was seen bubbling up near the old railway below the tower. The old landfill site below the tower, which had been soaking up water like a sponge, was now saturated. The water ran along the tightly packed surface of the footpath along the railway bed and then, where the path was carried upon an embankment, spilled down the sides. On 28 September 1992 a section of embankment, sodden with water, G gave way and spilled over the golf course sited on the edge of the country park. A 27-metre section of Transco's gas pipe line was left unsupported and exposed.

20 The possibility of a fracture in the unsupported gas pipe was obviously hazardous and Transco quickly took steps to repair the damage. The cost of the works required to restore support and cover the pipe was £93,681.

H

Rylands v Fletcher

21 Transco sued the council to recover the cost of repair. It did not allege that fracture in the pipe and consequent escape of water was caused by any lack of care. It did say the damage to the embankment would not have

happened if council had not allowed the drains and culverts under the old railway to become blocked, but the judge said that this had made no difference and there has been no appeal against his finding. Transco's main claim was that the council was liable without proof of negligence under the rule in *Rylands v Fletcher* (1868) LR 3 HL 330. On this ground it succeeded before the judge but his decision was reversed by the Court of Appeal.

22 The rule in *Rylands v Fletcher* needs little introduction, the story of the flooding of Mr Fletcher's Lancashire coal mine by the water from Mr Rylands's mill reservoir in 1860–1861 being known to every law student. It was decided according to a rule which Blackburn J, speaking for the Exchequer Chamber (1866) LR 1 Ex 265, 279, formulated in terms afterwards approved by the House of Lords LR 3 HL 330, 339–340:

> "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."

23 In the House of Lords LR 3 HL 330, 338–339, Lord Cairns LC put the matter in this way:

> "The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained . . . On the other hand if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land, and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril; and, if in the course of their doing it, the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the plaintiff and injuring the plaintiff, then for the consequence of that, in my opinion, the defendants would be liable."

The legal background to the rule

24 Lord Cairns said, at p 338, that the principles were "extremely simple" and Blackburn J disclaimed any originality in the formulation of the rule ("I wasted much time in the preparation of the judgment *in Rylands v Fletcher* if I did not succeed in showing that the law held to govern it had been the law for at least 300 years": *Ross v Fedden* (1872) 26 LT 966, 968) but posterity has taken him to have protested too much. The chapters devoted to the rule in every textbook on torts proclaim the contrary. None

of the cases which he cited (except possibly the reference to cattle trespass) decided that an occupier could be liable for damage which was not reasonably foreseeable. They were cases about whether one occupier of land was entitled to inflict damage upon another, irrespective of whether it was foreseeable or even intentional. In other words, they were ordinary nuisance cases, concerned with the kind of damage of which an occupier could complain.

25 Lord Cairns LR 3 HL 330, 339, contrasted *Smith v Kenrick* (1849) 7 CB 515 and *Baird v Williamson* (1863) 15 CB NS 317. In both, the question was whether the defendant had the right to conduct his mining operations so that water flowed into his neighbour's mine. In the first the answer was yes, because the defendant had merely dug holes in the ordinary course of mining and the water flowed into the other mine by gravitation ("naturally"). In the other, the answer was no because the water from the defendant's mine had been raised to a higher level by pumping ("non-naturally") and then flowed into the other mine. But neither addressed the question of whether the escape was reasonably foreseeable; in both cases, the defendant was obviously well aware that his water was flowing into his neighbour's mine. The issue in the case was whether the neighbour was obliged to put up with it or whether the defendant was obliged to keep the water in.

26 But a conclusion that an occupier of land has no *right* to discharge water or filth (*Tenant v Goldwin* (1704) 2 Ld Raym 1089) or chemicals (*St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642) upon his neighbour's land is not inconsistent with a rule that he will be liable in damages only for damage caused by a discharge which was intended or foreseeable. Indeed, that is the general rule of liability for nuisance today: *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty (The Wagon Mound (No 2))* [1967] 1 AC 617. Liability in nuisance is strict in the sense that one has no *right* to carry on an activity which unreasonably interferes with a neighbour's use of land merely because one is doing it with all reasonable care. If it cannot be done without causing an unreasonable interference, it cannot be done at all. But liability to pay damages is limited to damage which was reasonably foreseeable.

27 *Rylands* v *Fletcher* was therefore an innovation in being the first clear imposition of liability for damage caused by an escape which was not alleged to be either intended or reasonably foreseeable. I think that this is what Professor Newark meant when he said in his celebrated article ("The Boundaries of Nuisance" (1949) 65 LQR 480, 488) that the novelty in *Rylands v Fletcher* was the decision that "an isolated escape is actionable". That is not because a single deluge is less of a nuisance than a steady trickle, but because repeated escapes such as the discharge of water in the mining cases and the discharge of chemicals in the factory cases do not raise any question about whether the escape was reasonably foreseeable. If the defendant does not know what he is doing, the plaintiff will certainly tell him. It is the single escape which raises the question of whether or not it was reasonably foreseeable and, if not, whether the defendant should nevertheless be liable. *Rylands v Fletcher* decided that he should.

The social background to the rule

28 Although the judgment of Blackburn J is constructed in the traditional common law style of deducing principle from precedent, without

reference to questions of social policy, Professor Brian Simpson has demonstrated in his article "Legal Liability for Bursting Reservoirs: The Historical Context of *Rylands v Fletcher*" (1984) 13 J Leg Stud 209 that the background to the case was public anxiety about the safety of reservoirs, caused in particular by the bursting of the Bradfield Reservoir near Sheffield on 12 March 1864, with the loss of about 250 lives. The judicial response was to impose strict liability upon the proprietors of reservoirs. But, since the common law deals in principles rather than ad hoc solutions, the rule had to be more widely formulated.

29 It is tempting to see, beneath the surface of the rule, a policy of requiring the costs of a commercial enterprise to be internalised; to require the entrepreneur to provide, by insurance or otherwise, for the risks to others which his enterprise creates. That was certainly the opinion of Bramwell B, who was in favour of liability when the case was before the Court of Exchequer: (1865) 3 H & C 774. He had a clear and consistent view on the matter: see *Bamford v Turnley* (1862) 3 B & S 62, 84–85 and *Hammersmith and City Railway Co v Brand* (1867) LR 2 QB 223, 230–231. But others thought differently. They considered that the public interest in promoting economic development made it unreasonable to hold an entrepreneur liable when he had not been negligent: see *Wildtree Hotels Ltd v Harrow London Borough Council* [2001] 2 AC 1, 8–9 for a discussion of this debate in the context of compensation for disturbance caused by the construction and operation of works authorised by statutory powers. On the whole, it was the latter view—no liability without fault—which gained the ascendancy. With hindsight, *Rylands v Fletcher* can be seen as an isolated victory for the internalisers. The following century saw a steady refusal to treat it as laying down any broad principle of liability. I shall briefly trace the various restrictions imposed on its scope.

Restrictions on the rule

(a) Statutory authority

30 A statute which authorises the construction of works like a reservoir, involving risk to others, may deal expressly with the liability of the undertakers. It may provide that they are to be strictly liable, liable only for negligence or not liable at all. But what if it contains no express provision? If the principle of *Rylands v Fletcher* is that costs should be internalised, the undertakers should be liable in the same way as private entrepreneurs. The fact that Parliament considered the construction and operation of the works to be in the public interest should make no difference. As Bramwell B repeatedly explained, the risk should be borne by the public and not by the individual who happens to have been injured. But within a year of the decision of the House of Lords in *Rylands v Fletcher*, Blackburn J advised the House that, in the absence of negligence, damage caused by operations authorised by statute is not compensatable unless the statute expressly so provides: see *Hammersmith and City Railway Co v Brand* LR 4 HL 171, 196. The default position is that the owner of land injured by the operations "suffers a private loss for the public benefit". In *Geddis v Proprietors of Bann Reservoir* (1878) 3 App Cas 430, 455–456 Lord Blackburn summed up the law: "it is now thoroughly well established that no action will lie for

doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone."

31 The effect of this principle was to exclude the application of the rule in *Rylands v Fletcher* to works constructed or conducted under statutory authority: see *Green v Chelsea Waterworks Co* (1894) 70 LT 547; *Dunne v North Western Gas Board* [1964] 2 QB 806.

(b) Acts of God and third parties

32 Escapes of water and the like are often the result of natural events—heavy rain or drains blocked by falling leaves—or the acts of third parties, like vandals who open taps or sluices. This form of causation does not usually make the damage any the less a consequence of the risk created by the presence of the water or other escaping substance. No serious principle of allocating risk to the enterprise would leave the injured third party to pursue his remedy against the vandal. But early cases on *Rylands v Fletcher* quickly established that natural events ("Acts of God") and acts of third parties excluded strict liability. In *Carstairs v Taylor* (1871) LR 6 Ex 217, 221 Kelly CB said that he thought a rat gnawing a hole in a wooden gutter box counted as an Act of God and in *Nichols v Marsland* (1876) 2 Ex D 1 Mellish LJ (who, as counsel, had lost *Rylands v Fletcher*) said that an exceptionally heavy rainstorm was a sufficient excuse. In *Rickards v Lothian* [1913] AC 263 the same was said of the act of a vandal who blocked a washbasin and turned on the tap. By contrast, acts of third parties and natural events are not defences to the strict criminal liability imposed by section 85(1) of the Water Resources Act 1991 for polluting controlled waters unless they are really exceptional events: *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22.

(c) Remoteness

33 *Rylands v Fletcher* established that, in a case to which the rule applies, the defendant will be liable even if he could not reasonably have foreseen that there would be an escape. But is he liable for all the consequences of the escape? In *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264 the House of Lords decided that liability was limited to damage which was what Blackburn J had called the "natural", i e reasonably foreseeable, consequence of the escape. Lord Goff of Chieveley, in a speech which repays close attention, took the rule back to its origins in the law of nuisance and said that liability should be no more extensive than it would have been in nuisance if the discharge itself had been negligent or intentional. Adopting the opinion of Professor Newark, to which I have already referred, he said that the novel feature of *Rylands v Fletcher* was to create liability for an "isolated" (i e unforeseeable) escape. But the rule was nevertheless founded on the principles of nuisance and should not otherwise impose liability for unforeseeable damage.

(d) Escape

34 In *Read v J Lyons & Co Ltd* [1947] AC 156 a radical attempt was made to persuade the House of Lords to develop the rule into a broad principle that an enterprise which created an unusual risk of damage should

bear that risk. Mrs Read had been drafted into the Ministry of Supply and directed to inspect the manufacture of munitions at a factory operated by J Lyons & Company Ltd. In August 1942 she was injured by the explosion of a shell. There was no allegation of negligence; the cause of action was said to be the hazardous nature of the activity. But the invitation to generalise the rule was comprehensively rejected. The House of Lords stressed that the rule was primarily concerned with the rights and duties of occupiers of land. Escape from the defendant's land or control is an essential element of the tort.

(e) Personal injury

35 In some cases in the first half of the 20th century plaintiffs recovered damages under the rule for personal injury: *Shiffman v Order of the Hospital of St John of Jerusalem* [1936] 1 All ER 557; *Hale v Jennings Bros* [1938] 1 All ER 579 are examples. But dicta in *Read v J Lyons & Co Ltd* cast doubt upon whether the rule protected anything beyond interests in land. Lord Macmillan (at pp 170–171) was clear that it had no application to personal injury and Lord Simonds, at p 180, was doubtful. But I think that the point is now settled by two recent decisions of the House of Lords: *Cambridge Water Co v Eastern Counties Leather plc* [1994] AC 264, which decided that *Rylands v Fletcher* is a special form of nuisance and *Hunter v Canary Wharf Ltd* [1997] AC 655, which decided that nuisance is a tort against land. It must, I think, follow that damages for personal injuries are not recoverable under the rule.

(f) Non-natural user

36 The principle in *Rylands v Fletcher* was widely expressed; the essence was the escape of something which the defendant had brought upon his land. Not surprisingly, attempts were immediately made to apply the rule in all kinds of situations far removed from the specific social problem of bursting reservoirs which had produced it. Leaks caused by a rat gnawing a hole in a wooden gutter-box (*Carstairs v Taylor* LR 6 Ex 217) were not at all what Blackburn J and Lord Cairns had had in mind. In some cases the attempt to invoke the rule was repelled by relying on Blackburn J's statement that the defendant must have brought whatever escaped onto his land "for his own purposes". This excluded claims by tenants that they had been damaged by escapes of water from plumbing installed for the benefit of the premises as whole. Another technique was to imply the claimant's consent to the existence of the accumulation. But the most generalized restriction was formulated by Lord Moulton in *Rickards v Lothian* [1913] AC 263, 280:

> "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."

37 The context in which Lord Moulton made this statement was a claim under *Rylands v Fletcher* for damage caused by damage to stock in a shop caused by an overflow of water from a wash-basin in a lavatory on a floor above. To exclude domestic use is understandable if one thinks of the rule as

A a principle for the allocation of costs; there is no enterprise of which the risk can be regarded as a cost which should be internalised. That would at least provide a fairly rational distinction. But the rather vague reference to "the ordinary use of the land" and in particular the reference to a use "proper for the general benefit of the community" has resulted in the rule being applied to some commercial enterprises but not others, the distinctions being B sometimes very hard to explain.

38 In the *Cambridge Water Co* case [1994] 2 AC 264, 308–309 Lord Goff of Chieveley noted these difficulties but expressed the hope that it would be possible to give the distinction "a more recognisable basis of principle". The facts of that case, involving the storage of substantial quantities of chemicals on industrial premises, were in his opinion "an almost classic case of non-natural use". He thought that the restriction of C liability to the foreseeable consequences of the escape would reduce the inclination of the courts to find other ways of limiting strict liability, such as extension of the concept of natural use.

Where stands the rule today?

39 I pause at this point to summarise the very limited circumstances to D which the rule has been confined. First, it is a remedy for damage to land or interests in land. As there can be few properties in the country, commercial or domestic, which are not insured against damage by flood and the like, this means that disputes over the application of the rule will tend to be between property insurers and liability insurers. Secondly, it does not apply to works or enterprises authorised by statute. That means that it will usually have no E application to really high risk activities. As Professor Simpson points out (1984) 13 J Leg Stud 225 the Bradfield Reservoir was built under statutory powers. In the absence of negligence, the occupiers whose lands had been inundated would have had no remedy. Thirdly, it is not particularly strict because it excludes liability when the escape is for the most common reasons, namely vandalism or unusual natural events. Fourthly, the cases in F which there is an escape which is not attributable to an unusual natural event or the act of a third party will, by the same token, usually give rise to an inference of negligence. Fifthly, there is a broad and ill-defined exception for "natural" uses of land. It is perhaps not surprising that counsel could not find a reported case since the second world war in which anyone had succeeded in a claim under the rule. It is hard to escape the conclusion that the intellectual effort devoted to the rule by judges and writers over many G years has brought forth a mouse.

Is it worth keeping?

40 In *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 a majority of the High Court of Australia lost patience with the pretensions and uncertainties of the rule and decided that it had been H "absorbed" into the law of negligence. Your Lordships have been invited by the respondents to kill off the rule in England in similar fashion. It is said, first, that in its present attenuated form it serves little practical purpose; secondly, that its application is unacceptably vague ("an essentially unprincipled and ad hoc subjective determination" said the High Court (at

p 540) in the *Burnie* case) and thirdly, that strict liability on social grounds is better left to statutory intervention.

41 There is considerable force in each of these points. It is hard to find any rational principle which explains the rule and its exceptions. In *Read v J Lyons & Co Ltd* [1947] AC 156, 175 Lord Macmillan said with Scottish detachment "your Lordships are not called upon to rationalise the law of England" but in *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17, 41 Lord Fraser of Tullybelton described the suggestion that the rule formed part of the law of Scotland as "a heresy which ought to be extirpated". And the proposition that strict liability is best left to statute receives support from the speech of Lord Goff of Chieveley in the *Cambridge Water* case [1994] 2 AC 264, 305:

> "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."

42 An example of statutory strict liability close to home is section 209 of the Water Industry Act 1991:

> "(1) Where an escape of water, however caused, from a pipe vested in a water undertaker causes loss or damage, the undertaker shall be liable, except as otherwise provided in this section, for the loss or damage . . ."
>
> "(3) A water undertaker shall not incur any liability under subsection (1) above in respect of any loss or damage for which the undertaker would not be liable apart from that subsection and which is sustained . . . (b) by any public gas supplier within the meaning of Part I of the Gas Act 1986 . . ."

This provision is designed to avoid all argument over which insurers should bear the loss. Liability is far stricter than under the rule in *Rylands v Fletcher*. There is no exception for acts of third parties or natural events. The undertaker is liable for an escape "however caused" and must insure accordingly. On the other hand, certain potential claimants like public gas suppliers (now called public gas transporters) must insure themselves. The irony of the present case is that if the leak had been from a high pressure water main, belonging to the North West Water Authority, a much more plausible high-risk activity, there could have been no dispute. Section 209(3)(b) would have excluded a statutory claim and the authority's statutory powers would have excluded the rule in *Rylands v Fletcher*.

43 But despite the strength of these arguments, I do not think it would be consistent with the judicial function of your Lordships' House to abolish the rule. It has been part of English law for nearly 150 years and despite a searching examination by Lord Goff of Chieveley in the *Cambridge Water* case [1994] 2 AC 264, 308, there was no suggestion in his speech that it could or should be abolished. I think that would be too radical a step to take.

44 It remains, however, if not to rationalise the law of England, at least to introduce greater certainty into the concept of natural user which is in

A issue in this case. In order to do so, I think it must be frankly acknowledged that little assistance can be obtained from the kinds of user which Lord Cairns must be assumed to have regarded as "non-natural" in *Rylands v Fletcher* itself. They are, as Lord Goff of Chieveley said in the *Cambridge Water* case [1994] 2 AC 264, 308, "redolent of a different age". So nothing can be made of the anomaly that one of the illustrations of the rule given by Blackburn J is cattle trespass. Whatever Blackburn J and Lord Cairns may B have meant by "natural", the law was set on a different course by the opinion of Lord Moulton in *Rickards v Lothian* [1913] AC 263 and the question of what is a natural use of land or, (the converse) a use creating an increased risk, must be judged by contemporary standards.

45 Two features of contemporary society seem to me to be relevant. First, the extension of statutory regulation to a number of activities, such as C discharge of water (section 209 of the Water Industry Act 1991) pollution by the escape of waste (section 73(6) of the Environmental Protection Act 1990) and radioactive matter (section 7 of the Nuclear Installations Act 1965). It may have to be considered whether these and similar provisions create an exhaustive code of liability for a particular form of escape which excludes the rule in *Rylands v Fletcher*.

D **46** Secondly, so far as the rule does have a residuary role to play, it must be borne in mind that it is concerned only with damage to property and that insurance against various forms of damage to property is extremely common. A useful guide in deciding whether the risk has been created by a "non-natural" user of land is therefore to ask whether the damage which eventuated was something against which the occupier could reasonably be expected to have insured himself. Property insurance is E relatively cheap and accessible; in my opinion people should be encouraged to insure their own property rather than seek to transfer the risk to others by means of litigation, with the heavy transactional costs which that involves. The present substantial litigation over £100,000 should be a warning to anyone seeking to rely on an esoteric cause of action to shift a commonplace insured risk.

F **47** In the present case, I am willing to assume that if the risk arose from a "non-natural user" of the council's land, all the other elements of the tort were satisfied. Transco complains of expense having to be undertaken to avoid damage to its gas pipe; I am willing to assume that if damage to the pipe would have been actionable, the expense incurred in avoiding that damage would have been recoverable. I also willing to assume that Transco's easement which entitled it to maintain its pipe in the embankment G and receive support from the soil was a sufficient proprietary interest to enable it to sue in nuisance and therefore, by analogy, under the rule in *Rylands v Fletcher*. Although the council, as owner of Hollow End Towers, was no doubt under a statutory duty to provide its occupiers with water, it had no statutory duty or authority to build that particular tower block and it is therefore not suggested that the pipe was laid pursuant to statutory powers so as to exclude the rule. So the question is whether the risk came within the H rule.

48 The damage which eventuated was subsidence beneath a gas main: a form of risk against which no rational owner of a gas main would fail to insure. The casualty was caused by the escape of water from the council's land. But the source was a perfectly normal item of plumbing. The pipe

was, it is true, considerably larger than the ordinary domestic size. But it was smaller than a water main. It was installed to serve the occupiers of the council's high rise flats; not strictly speaking a commercial purpose, but not a private one either.

49 In my opinion the Court of Appeal was right to say that it was not a "non-natural" user of land. I am influenced by two matters. First, there is no evidence that it created a greater risk than is normally associated with domestic or commercial plumbing. True, the pipe was larger. But whether that involved greater risk depends upon its specification. One cannot simply assume that the larger the pipe, the greater the risk of fracture or the greater the quantity of water likely to be discharged. I agree with my noble and learned friend, Lord Bingham of Cornhill, that the criterion of exceptional risk must be taken seriously and creates a high threshold for a claimant to surmount. Secondly, I think that the risk of damage to property caused by leaking water is one against which most people can and do commonly insure. This is, as I have said, particularly true of Transco, which can be expected to have insured against any form of damage to its pipe. It would be a very strange result if Transco were entitled to recover against the council when it would not have been entitled to recover against the water authority for similar damage emanating from its high-pressure main.

50 I would therefore dismiss the appeal.

LORD HOBHOUSE OF WOODBOROUGH

51 My Lords, the importance of this appeal lies in the fact that your Lordships have been asked to review and, if you should think it right to do so, hold not still to be good law what is commonly called "the rule in *Rylands v Fletcher*". It has been attacked as obsolete, unworkable or, more simply, as not being a rule at all. It has been rejected as "heresy" in Scotland: *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC(HL) 17, 41, per Lord Fraser of Tullybelton. It is, for example, no longer used in Australia, having been subsumed into the general law of negligence: *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520. The history of the rule is itself remarkable, from the time of its birth in 1866–1868 (LR 1 Ex 265 and LR 3 HL 330) when it was seen as being no more that a statement of the existing law and not an innovation at all (*Ross v Fedden* (1872) 26 LT 966, 968 per Blackburn J; see also Lord Cairns LC LR 3 HL 330, 338), through to the present day when it has been affirmed as still being part of the English common law (*Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264), surviving en route many judgments where it appears to have been misunderstood and therefore treated as incoherent (e g see Professor Newark quoted by Lord Goff in *Cambridge Water,* at pp 297–298).

52 I consider that the rule is, when properly understood, still part of English law and does comprise a useful and soundly based component of the law of tort as an aspect of the law of private nuisance. It derives from the use of land and covers the division of risk as between the owner of the land in question and other landowners. It is not concerned with liability for personal injuries which is covered by other parts of the law of torts (*Read v J Lyons & Co Ltd* [1947] AC 156) and which does not rise for discussion in this case.

The rule

53 As formulated by Blackburn J and approved on appeal, the rule is:

> "We think that the true rule of law is, that the person who for his own purposes brings on his land, 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 . . . 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."

54 The salient features of the rule are easily identified: the self interest of the landowner, his conduct in bringing or keeping on his land something dangerous which involves a risk of damaging his neighbours' property, the avoidance of such damage by ensuring that the danger is confined to his own property and liability to his neighbours if he fails to do so, subject to a principle of remoteness. The subsequent complications and misunderstandings have arisen, not from the original rule and its rationale, but from additional criteria, often inappropriately expressed, introduced in later cases.

The principle

55 The principle which the rule reflects is also easily apparent. It is that the law of private nuisance recognises that the risk must be born by the person responsible for creating it and failing to control it. It reflects a social and economic utility. The user of one piece of land is always liable to affect the users or owners of other pieces of land. An escape of water originating on the former, or an explosion, may devastate not only the land on which it originates but also adjoining and more distant properties. The damage caused may be very serious indeed both in physical and financial terms. There may be a serious risk that if the user of the land, the use of which creates the risk, does not take active and adequate steps to prevent escape, an escape may occur. The situation is entirely under his control: other landowners have no control. In such a situation, two types of solution might be adopted. One would be to restrict the liberty of the user of the land, the source of the risk, to make such use of his land as he chooses. The other is to impose a strict liability on the landowner for the consequences of his exercising that liberty. The rule adopts the second type of solution as is clear from the language used by Blackburn J and on appeal and was explicit in the statements of Bramwell B at first instance (sic utere tuo . . .) and in the later cases cited by my noble and learned friend, Lord Hoffmann. It is a coherent principle which accords with justice and with the existing legal theory at the time.

56 This approach was entirely in keeping with the economic and political culture of the 19th century, laissez faire and an understanding of the

concept of risk. During the 20th century and particularly during the second half, the culture has changed. Government has increasingly intervened to limit the freedom of a landowner to use his land as he chooses, e g through the planning laws, and has regulated or forbidden certain dangerous or anti-social uses of land such as the manufacture or storage of explosives or the emission of noxious effluents. Thus the present state of the law is that some of the situations where the rule in *Rylands v Fletcher* applies are now also addressed by the first type of solution. But this does not deprive the rule of its utility. The area of regulation is not exhaustive; it does not necessarily give the third party affected an adequate or, even, any say; the government decision may give priority to some national or military need which it considers must over-ride legitimate individual interests; it will not normally deal with civil liability for damage to property; it does not provide the third party with adequate knowledge and control to evaluate and protect himself from the consequent risk and insurance cost. As Lord Goff pointed out in *Cambridge Water* [1994] 2 AC 264, the occasions where *Rylands v Fletcher* may have to be invoked by a claimant may be reducing but that is not to say that it has ceased to be a valid part of English law. The only way it could be rendered obsolete is by a compulsory strict public liability insurance scheme for all persons using their land for dangerous purposes. However this would simply be to re-enact *Rylands v Fletcher* in another guise.

57 *Rylands v Fletcher* was unremarkable in the mid 19th century since there was then nothing peculiar about strict liability. There were many other fields in which strict liability existed, for example conversion. For those following a "common" calling, such as common carriers or common innkeepers, liability was also strict. Although the origins were already present in the 19th century in the defence of "inevitable accident" in trespass cases, it was only later that the generalised criterion of negligence was developed, culminating in *Donoghue v Stevenson* [1932] AC 562. That is a fault—i e, breach of a duty of care—not a risk concept. But, where the situation arises as between landowners and arises from the dangerous use of his land by one of them, the risk concept remains relevant. He who creates the relevant risk and has, to the exclusion of the other, the control of how he uses his land, should bear the risk. It would be unjust to deny the other a risk based remedy and introduce a requirement of proving fault.

58 Three other considerations have been brought into the argument. First, it was already the law that, where the activity creating the danger has been authorised by statute, the question of what, if any, civil liability could arise from engaging in the authorised activity was a question of the construction of the statute. This was a principled approach (though not inevitable) and was not inconsistent with the existence of an unqualified common law rule where no statute was involved. A parallel situation existed where a carrier, who would otherwise have been carrying as a common carrier, had made a "special contract" with the merchant. But in any event the argument from statute does not assist. Even as recently as 1991 Parliament enacted legislation which expressly recognised the existence of the common law liability and preserved it: Water Industry Act 1991 section 209(1) and (3).

59 Secondly, arguments have been advanced relating to the defences recognised in *Rylands v Fletcher* as well as in cases following it. These defences were the same as those used elsewhere in the common law in

relation to strict liabilities and related to the causal connection between the relevant damage and conduct of the defendant. Thus "Act of God" was always a common law exception. It was metaphorical phrase (like "fate") with a religious origin used to describe those events which involved no human agency and which it was not realistically possible for a human to guard against: an accident which the defendant can show is due to natural causes, directly and exclusively, without human intervention and could not have been prevented by any amount of foresight, pains and care, reasonably to be expected of him (*Nugent v Smith* (1876) 1 CPD 423; see also *The Mostyn* [1928] AC 57 explaining *River Wear Comrs v Adamson* (1877) LR 2 App Cas 743). Damage done by rats is not an act of God: *Dale v Hall* (1750) 1 Wils 281. The case of *Carstairs v Taylor* (1871) LR 6 Ex 217 concerned damage done by rats to a gutter-box draining rain water from the roof of a warehouse, part of which was let to the plaintiff and in consequence wetted; but it was decided on consent grounds not on causation (except possibly for Kelly CB); *Rylands v Fletcher* was treated as distinguishable and therefore not applicable. Act of God is not, and never was, the same as inevitable accident or the absence of negligence as the judgment of the Court of Appeal delivered by Mellish LJ in *Nichols v Marsland* (1876) 2 Ex D 1 fully explains. The defendant could not have anticipated the exceptional flood which caused her dam to break; no conduct of hers was a proximate cause of the plaintiff's damage. This case was followed, together with its causation reasoning, by the Privy Council in *Rickards v Lothian* [1913] AC 263. On the question of causation, the speech of Lord Moulton has given rise to no problems; it is other aspects of what he has said that have been problematical.

60 Thirdly, it is argued that the risk of property damage is "insurable", just as is public liability. It is then said that, since insurers are likely to be the real parties behind any litigation, the rule has become unnecessary. This is an unsound argument for a number of reasons. It is historically unsound: in the second half of the 19th century there already existed in England, as the common law judges were well aware, a developed insurance market. The existence of an insurance market does not mean that such insurance is available free of charge: premiums have to be paid. Some risks may only be insurable at prohibitive rates or at rates which for the proposer are not commercially viable and so make the risk, for him, commercially uninsurable. (Indeed, in recent times it has been the experience that some insurers will not cover certain risks at all, e g loss or damage caused by flooding.) The rationale, he who creates the risk must bear the risk, is not altered at all by the existence of an insurance market. It is an application of the same concept, an acknowledgement of risk. The economic burden of insuring against the risk must be borne by he who creates it and has the control of it. Further, the magnitude of the burden will depend upon who ultimately has to bear the loss: the rule provides the answer to this. The argument that insurance makes the rule unnecessary is no more valid than saying that, because some people can afford to and sensibly do take out comprehensive car insurance, no driver should be civilly liable for his negligent driving. It is unprincipled to abrogate for all citizens a legal rule merely because it may be unnecessary as between major corporations.

Implied consent/mutual benefit

61 It is necessary at this stage to refer to a well established, basic and valuable principle of the law of private nuisance. Whereas (short of statute) there is no public interest defence in the civil law of nuisance, there is a defence of express or implied consent. This was expressly recognised by Blackburn J in *Rylands v Fletcher* and was, as we have seen, applied in *Carstairs v Taylor*. It obviously is of relevance where one or more tenants or freeholders are occupying a single building or where neighbours are living in close proximity with each other in an urban environment. The archetypical case is *Andreae v Selfridge & Co Ltd* [1938] Ch 1, where the disturbance arose from the building work involved in the demolition and rebuilding of the defendants' premises. It was held that the plaintiffs as landowners in central London could not claim in respect of the reasonable incidents of such operations: see also *Wildtree Hotels Ltd v Harrow London Borough Council* [2001] 2 AC 1. This is a principle of reciprocity or mutual benefit or "give and take, live and let live", an expression used as long ago as 1862 by Bramwell B in *Bamford v Turnley* (1862) 3 B & S 62, 84. (The whole judgment of Bramwell B contains a usefully clear analysis of relevant parts of the law.)

62 It is the failure to see that this principle of reciprocity and mutual benefit provided the answer to many of the problematic cases, coupled, but not necessarily so, with the defence of consent. It is the introduction of such words as "ordinary" or "reasonable" into the judgments and dicta in marginal cases which have caused confusion in those cases, whereas if the established common law principles of the civil law of nuisance and the essentials of Blackburn J's statement of the rule (which I have identified in paragraph 54 above) had not been departed from the confusions could have been avoided.

A further confusion

63 The main focus of unnecessary confusion has been the phrases "which was not naturally there" (Blackburn J) and "natural/non-natural user" (Lord Cairns LC). What they were referring to was the creation or preservation of the dangerous user by bringing something dangerous onto the land or keeping it there. This was how Lord Porter read it in his speech in *Read v J Lyons & Co Ltd* [1947] AC 156. It involves some positive use of the land by the landowner, created or continued by the landowner. Natural features of the land do not satisfy this criterion even if they constitute a danger to adjoining landowners, for example, rivers which are liable to flood. This does not involve an inquiry into the ever changing features of any landscape but should direct the focus onto what the occupier has himself done—what thing he has brought onto his land. Similarly, the presence of natural vegetation on the land, or the normal use of the land in the course of agriculture does not as such bring the rule into operation. Any risks involved, for example the spread of fire, are not ones which, without more, call for the imposition of any risk based liability; liability if any must be based upon some antecedent creation of risk or some subsequent fault: *Goldman v Hargrave* [1967] 1 AC 645. But, consistently with principle, there will not be a duty of care simply to protect one's neighbour from natural hazards; he must protect himself as he best thinks fit. Yet these simple criteria have been adapted in various cases and judgments so as to

A serve the purpose of the reciprocity/consent principles. This was and is unnecessary and has created the confusion which would have been avoided if the formulation of Blackburn J had been adhered to.

Cambridge Water Co v Eastern Counties Leather plc

64 Finally there is the principle recognised in the *Cambridge Water* case
B [1994] 2 AC 264. The plaintiffs sued in respect of the pollution of their water supply which was traced back to a method of working used in the defendants' factory many years before which involved minor but repetitive spillages of a chemical. The trial judge held that the defendants had not been negligent and the plaintiffs had abandoned their case in nuisance, choosing to continue with a claim solely based upon *Rylands v Fletcher*. It was further held that at the time of the spillages it was not foreseen or foreseeable that
C such spillages would cause any harm to other landowners or their water supplies. Lord Goff of Chieveley who delivered the leading judgment drew upon the language of nuisance used by Blackburn J and the limitations of the scope of that tort recognised by the Privy Council in *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty (The Wagon Mound (No 2))* [1967] 1 AC 617 and held that "foreseeability of harm of the relevant type by the
D defendants was a prerequisite for the recovery of damages in nuisance and under the rule in *Rylands v Fletcher*". Lord Goff saw this as a principle of the remoteness of damage (pp 301 and 304) but his reasoning is also consistent with it being part of the risk element in the tort. Thus he quotes, at p 308, Lord Moulton's statement in *Rickards v Lothian* [1913] AC 263, 280: "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
E others, and must not *merely* be the ordinary use of the land . . ." Lord Goff also cites phrases of Blackburn J: "the person who for his own purposes brings on his lands and collects and keeps there anything *likely* to do mischief if it escapes . . ." and "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
F on his neighbour's . . ." and "keep it there so that no mischief may accrue, or answer for the *natural and anticipated consequences*". (Emphases supplied.) It is thus the creation of a recognisable risk to other landowners which is an essential constituent of the tort and the liability of the defendant. But, once such a risk has been created, the liability for the foreseeable consequences of failure to control and confine it is strict.

G **65** Your Lordships' House therefore held in favour of the defendant Eastern Counties, Lord Goff commenting, at p 309, that the fact that their holding that there must be, for the establishment of liability in damages, foreseeability of harm of the relevant type should assist courts to avoid resorting to unsatisfactory arguments in their attempt to limit the scope of the strict liability. *Rylands v Fletcher* itself was declared still to be good law.

H

Conclusions

66 I consider that the rule in *Rylands v Fletcher* should not be abrogated. The rationale for it was and remains valid. The content of the rule has been clearly spelled out by Blackburn J and the relevant constituent

elements can be easily stated as I have done in para 54 above. The academic and judicial criticisms of the rule are largely the result of later confusions. The rule itself and the laws of private nuisance already in existence in the mid-19th century and still in existence today provide appropriate defences or, to adopt the current jargon, sufficient control mechanisms.

67 In the decision of disputes there are always bound to be cases which fall just on one side of the line or the other. The present case is no exception. The source of the leakage was a water pipe large enough to supply the defendants' flats. The accumulation of ground water arose because of unforeseen and undetected leakage over a period of time; the leakage was fortuitous. The case cannot be brought within the principle of shared benefit or implied consent nor was any act of God or vis major involved. But the necessity remains that the plaintiffs must show that the defendants brought onto their land something dangerous which involved a risk of damaging the plaintiffs' property. Stored water might constitute such a danger as could a high pressure water main laid under a city street: *Charing Cross Electricity Supply Co v Hydraulic Power Co* [1914] 3 KB 772. But the present is not such a case. The water pipe which the defendants laid to supply the flats was not such a danger; it falls on the wrong side of the line. The plaintiffs' claim rightly failed.

68 Finally, I should mention the plaintiffs' prescriptive easement of support. This did provide them with a property interest but did not itself give them a right to recover the damages claimed. This is because of the very limited rights and remedies which the "easement" entitles them to, an aspect of property law which lies outside the scope of this opinion and does not presently call for comment.

69 I agree that the appeal should be dismissed.

LORD SCOTT OF FOSCOTE

70 My Lords, in or around 1966 North West Gas Board laid a 16-inch high-pressure gas main in and along a railway embankment then owned by the British Railways Board. The gas main was laid pursuant to a Deed of Grant dated 3 November 1966. Transco plc, the appellant before the House, is the successor of North West Gas Board. So the gas main is Transco's gas main. The railway embankment belongs now to the respondent, the Stockport Metropolitan Borough Council. It is accepted that, as between the two parties, Transco and its predecessors are, and have been at all times material to this litigation, entitled to maintain their gas pipe in the council's embankment and to the support of the gas pipe by the earth beneath it.

71 The council is the owner also of an 11-storey block of 66 flats, Hollow End Towers, not far from the embankment. The block of flats had already been built at the time when Transco's gas pipe was laid in the embankment. The water supply to the block of flats is carried from the water authority's mains via a 3-inch internal diameter asbestos cement pipe. This supply pipe is the council's pipe. Its maintenance is, therefore, the council's responsibility. It is not contended that the supply pipe was in any way unusual in its dimensions for the supply of water to an 11-storey block of 66 flats.

A **72** The land lying between the block of flats and the embankment, too, is owned by the council. The area had been used by the council in the 1950s for landfilling and has since been grassed over.

73 Further details about the locus in quo are contained in the opinion of my noble and learned friend, Lord Hoffmann, and I need not repeat them. The details of the fracture in the 3-inch water supply pipe, the consequent escape of water, first into the old landfill site and then on to the B embankment, the resulting collapse of a part of the embankment, and the repair work carried out by Transco in order to reinstate the necessary support for and protection of its gas pipe are set out in my noble and learned friend's opinion and these details, too, I need not repeat.

74 The action commenced by Transco which has found its way to your Lordships' House is an action to recover the cost of the work Transco has C carried out to the embankment. The claim is in the main based on the proposition that under the rule in *Rylands v Fletcher* (1868) LR 3 HL 330 the council is liable for the damage caused by the escape of water from its supply pipe whether or not the council was guilty of any lack of care. Indeed, it has never been contended that the fracture in the supply pipe was attributable to any lack of care on the part of the council. Transco's amended statement of claim did contain allegations against the council of D negligence relating to the state of the drains and culverts under the old railway, contributing, it was said, to their inability to carry away the volume of water escaping from the fracture, but the trial judge found against Transco on this issue. The case comes before your Lordships' House, therefore, on the footing that the escape of water from the fractured pipe, the damage the water caused to the embankment and the need for the work to E the embankment to be carried out in order to reinstate the support for Transco's gas pipe were not attributable to any negligence on the part of the council.

75 The classical exposition of the *Rylands v Fletcher* rule is to be found in the judgment of Blackburn J in the Exchequer Chamber (1866) LR 1 Ex 265, 279:

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."

The concept of "escape" underlies also the following passage, at p 280:

G > "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."

H The speeches in this House of Lord Cairns LC and Lord Cranworth similarly express the principle as being applicable to cases where something or other, potentially dangerous, that the defendant has brought onto his land has escaped onto the plaintiff's land and there caused damage (see LR 3 HL 330, 339, 340).

76 In *Read v J Lyons & Co Ltd* [1947] AC 156 Viscount Simon identified "escape" as one of the two conditions on which strict liability under the rule in *Rylands v Fletcher* depended—the other was a "non-natural use" of the land (see p 167). He said that "escape": "means escape from a place where the defendant has occupation of or control over land to a place which is outside his occupation or control." (p 168). Viscount Simon pointed out that on the facts in *Read v Lyons* there had been no escape. The explosion in the defendant's munitions factory had injured the plaintiff while she was on the factory premises. So the *Rylands v Fletcher* principle was inapplicable. The other members of the Appellate Committee made the same point: see pp 173–174, 177, 181 and 186. Accordingly, it is, in my opinion, established that whatever else may be said of the rule in *Rylands v Fletcher* the rule does not come into play unless there has been an escape from the defendant's land of whatever it is that has caused the damage.

77 That essential element of escape is absent in the present case. The water flowing from the fractured pipe accumulated in a part of the old landfill site and then made its way to the embankment. It began its "escape" on the council's property, accumulated on the council's property and eventually damaged the embankment, also the council's property. It is in respect of the damage to the embankment that Transco seeks damages.

78 The "escape" issue was specifically addressed by the trial judge. He noted that Transco had a proprietary right over the embankment in the form of an easement and held that interference with an easement was capable of founding an action in nuisance or under the rule in *Rylands v Fletcher*, that the crucial element in both nuisance and *Ryland v Fletcher* was "the wrongful invasion of a proprietary right" and that "escape was merely a useful way of describing that invasion in the usual sort of case". The Court of Appeal did not deal with this particular point. In my respectful opinion, the judge was in error in his approach to the requirement of an escape. I would readily accept that if, in a case to which the rule in *Rylands v Fletcher* applies, the damage done by the escaped substance is damage to servient land over which there is an easement and the damage interferes with the enjoyment of the easement, the proprietor of the easement is as well entitled to claim the cost of repairing the servient land as is the owner of the land. But if the easement is an easement over the defendant's own land, the land onto which the defendant has brought the substance which has caused the damage, a *Rylands v Fletcher* claim is, in my opinion, barred by *Read v Lyons*. If the *Read v Lyons* plaintiff had left her car parked in the factory car park and the car had been damaged by the explosion, the reasoning of their Lordships would have barred her recovery for that damage. There would have been no "escape". Nor would the case have been any different if the parked car had belonged to someone else, a neighbour who had had an easement to park it on the factory car park. Proof of negligence would have been necessary for recovery.

79 In my opinion, therefore, Transco's *Rylands v Fletcher* case fails by reason of its failure to satisfy the "escape" condition of liability that was re-confirmed by this House in *Read v Lyons*.

80 The same conclusion can equally well be reached by considering the relationship between the council as servient owner and Transco as dominant owner of the easement under which Transco was entitled to maintain the gas main in the embankment. It is well established that a servient owner has, in

general, no positive obligation to repair or keep in good condition the servient land. Entitlement to the easement carries with it the subsidiary right of the dominant owner to carry out any necessary repairs to the servient land: see generally *Gale on Easements*, 17th ed (2002), pp 51–52, para 1-86. A deliberate act by the servient owner in damaging the servient land and thereby interfering with the enjoyment of the easement would be actionable in nuisance. In principle I can see no reason why a servient owner should not owe a duty of care to the dominant owner not to damage the servient land so as to interfere with the enjoyment of the easement. But it would, it seems to me, be contrary to principle to hold a servient owner liable to the dominant owner for damage to the servient land, or for any other interference with the easement, caused neither by a negligent act nor by an intentional act of the servient owner. For present purposes it is not necessary to go further than to say that the strict liability rule of *Rylands v Fletcher* has no application to an action by the dominant owner against the servient owner for damage to the servient land.

81 The bulk of the argument on this appeal has been directed to the second of Viscount Simon's conditions on which liability under the rule in *Rylands v Fletcher* depends, namely, that the use of the land be a "non-natural use": [1947] AC 156, 167. As Viscount Simon noted, a large variety of epithets have been judicially employed, sometimes as synonyms for, sometimes as extensions of and sometimes as restrictions on the concept of "non-natural use". These "judicial alterations and qualifications" have, as the majority of the High Court of Australia noted in *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42, 52, "introduced and exacerbated uncertainties about its [i e the *Ryland v Fletcher* rules] content and application". The solution adopted by the High Court was simply to treat the rule as having become absorbed by the developed principles of ordinary negligence.

82 My Lords, I do not believe that that rather drastic solution is necessary in this jurisdiction. It is certainly not necessary for the purpose of disposing of this particular case. The concept of non-natural user of land, as enunciated in this House LR 3 HL 330, 339 by Lord Cairns, is to be contrasted with what Lord Cairns, at p 338, had referred to as a use "for which [the land] might in the ordinary course of the enjoyment of land be used". In *Rickards v Lothian* [1913] AC 263, 280 Lord Moulton, explaining the concept, said:

> "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."

83 The above passage was cited by Lord Goff of Chieveley in *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264 in drawing attention to the similarity of function between the concept of natural user or ordinary user in *Rylands v Fletcher* cases and the concept of reasonable user as applied in the tort of nuisance. He said, at p 306, that: "It would . . . lead to a more coherent body of common law principles if the [*Rylands v Fletcher*] rule were to be regarded essentially as an extension of the law of nuisance to cases of isolated escapes from land . . ."

84 The House held, in the *Cambridge Water Co* case, that the use of land for the storage of chemicals in substantial quantities could not be described as a "natural or ordinary" use of land so as to exclude the application of the *Rylands v Fletcher* rule (p 309) but held, also, that, as in nuisance cases, foreseeability of the damage was a prerequisite of liability. The House thereby added to the two conditions formulated in *Read v Lyons* a third condition on which liability under the rule in *Rylands v Fletcher* would depend.

85 Just as in *Cambridge Water* the House found it impossible to regard the storage of chemicals in substantial quantities as a natural or ordinary use of land so, in the present case, it is in my opinion equally impossible to regard the supply by the council of water to the block of flats as anything other than a natural or ordinary use.

86 Indeed, the council was under a statutory obligation to provide a suitable supply of water for domestic purposes to the occupiers of the 66 flats. Nobody has suggested that the means by which the council did so could have been satisfactorily achieved by some other practicable method which would have carried with it a lesser risk of serious flood.

87 There is no doubt that the rule in *Rylands v Fletcher* can be excluded by statute. In *Green v Chelsea Waterworks Co* (1894) 70 LT 547 a water main belonging to a waterworks company, which had been authorised by Parliament to lay the main, burst. There had been no negligence on the part of the waterworks company. The claimants' premises were flooded but the waterworks company was held to have no liability. The case was applied in this House in *Longhurst v Metropolitan Water Board* [1948] 2 All ER 834, a case in which water had leaked from a main and disturbed paving stones in the highway. The water board had had no knowledge of or reason to suspect any danger to the public at the place in question. The House, affirming the Court of Appeal, held that since the board was acting under statutory authority in maintaining the main, they were not liable in the absence of negligence. And more recently, Lord Wilberforce in *Allen v Gulf Oil Refining Ltd* [1981] AC 1001, 1011 reaffirmed the point. He said:

> "It is now well settled that where Parliament by express direction or by necessary implication has authorised the construction and use of an undertaking or works, that carries with it an authority to do what is authorised with immunity from any action based on nuisance. The right of action is taken away . . . To this there is made the qualification, or condition, that the statutory powers are exercised without 'negligence'—that word here being used in a special sense so as to require the undertaker, as a condition of obtaining immunity from action, to carry out the work and conduct the operation with all reasonable regard and care for the interests of other persons."

88 These principles regarding statutory authority and immunity from action are not directly applicable in the present case. There was no specific statutory authority for the council to build the block of flats. But it had a statutory function in regard to housing and the building of the block of flats was in discharge of that statutory function. There was no specific statutory authority for the council to lay the supply pipe where it did in order to provide a water supply to the block of flats. But it did have a statutory duty by some suitable means or other to provide a supply of water for domestic

purposes to the flats and no one has suggested that the laying of the supply pipe was not a proper discharge of that duty. In these circumstances the remarks of Lord Wilberforce, although not directly applicable, are in my opinion highly relevant to the question whether the laying and maintaining by the council of the supply pipe was, for *Rylands v Fletcher* purposes, a "natural" or "ordinary" use of its land so as to exempt it from liability resulting therefrom in the absence of negligence.

89 Before answering that question it is, I think, worth reflecting on why it is that an activity authorised, or required, by statute to be carried on will not, in the absence of negligence, expose the actor to strict liability in nuisance or under the rule in *Rylands v Fletcher*. The reason, in my opinion, is that members of the public are expected to put up with any adverse side-effects of such an activity provided always that it is carried on with due care. The use of the land for carrying on the activity cannot be characterised as unreasonable if it has been authorised or required by statute. Viewed against the fact of the statutory authority, the user is a natural and ordinary use of the land. This approach applies in my opinion, to the present case. The council had no alternative, given its statutory obligations to the occupiers of the flats, but to lay on a water supply. Strict liability cannot be attached to it for having done so.

90 So, to return to the question whether the council's use of its land was a natural and ordinary use that did not attract strict liability under the rule in *Rylands v Fletcher*, or, for that matter, in nuisance, there can in my opinion, be only one answer. It did not.

91 For these reasons, as well as those given by my noble and learned friends, Lord Bingham of Cornhill, Lord Hoffmann and Lord Walker of Gestingthorpe, I would dismiss this appeal.

LORD WALKER OF GESTINGTHORPE

92 My Lords, on three occasions within the last decade your Lordships' House has had to consider different aspects of the inter-relationship between strict liability under the principle in *Rylands v Fletcher* (1866) LR 1 Ex 265; (1868) LR 3 HL 330, nuisance and negligence. In the first case, *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264, the House confirmed that strict liability under *Rylands v Fletcher* should be regarded as a species, or special case, of nuisance, and confirmed or established that both for the genus and for the species it is normally a prerequisite of liability that damage (of the type actually suffered) was foreseeable. The second case, *Hunter v Canary Wharf Ltd* [1997] AC 655, was concerned with annoyance caused by dust, and by interference with television reception, by a major redevelopment in London's Docklands. The House (Lord Cooke of Thorndon dissenting) reaffirmed that the essence of private nuisance is a wrong committed by one landowner against a neighbouring landowner, so that to succeed in nuisance a claimant must have a sufficient proprietary (or at least possessory) interest in the land affected. In the third case, *Delaware Mansions Ltd v Westminster City Council* [2002] 1 AC 321 the House considered damage to a block of flats caused by the spread of tree roots from the local authority's land. It decided (in a speech by Lord Cooke of Thorndon in which all concurred) that the liability of the local authority (which on grounds of amenity had declined to remove the offending tree) was based on its failure, after learning of the foreseeable danger, to act

reasonably. Lord Cooke stated (p 333, paras 31 and 32) that in *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty (The Wagon Mound (No 2))* [1967] 1 AC 617 and *Goldman v Hargrave* [1967] 1 AC 645, the judgments

> "are directed to what a reasonable person in the shoes of the defendant would have done. The label nuisance or negligence is treated as of no real significance. In this field, I think, the concern of the common law lies in working out the fair and just content and incidents of a neighbour's duty rather than affixing a label and inferring the extent of the duty from it. Even in the field of *Rylands v Fletcher* (1868) LR 3 HL 330 strict liability the House of Lords in [*Cambridge Water*] has stressed the principles of reasonable user and reasonable foreseeability: see the speech of Lord Goff of Chieveley, at pp 299–301. It was the absence of reasonable foreseeability of harm of the relevant type that excluded liability in that case."

93 It is also convenient to refer at the outset to the important decision of the High Court of Australia in *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42. Judgment was given in that case on 24 March 1994, more than a year after the High Court had reserved judgment and a little more than three months after the House decided *Cambridge Water*, which is noted but not extensively discussed in the judgments (see footnotes 71, 73, 82, 161, 210 and 215). The majority of the High Court, led by Mason CJ, concluded in a tightly-argued judgment that subject to certain qualifications (p 67):

> "the rule in *Rylands v Fletcher*, with all its difficulties, uncertainties, qualifications and exceptions, should now be seen, for the purposes of the common law of this country, as absorbed by the principles of ordinary negligence."

Burnie was not apparently cited in *Hunter* or *Delaware Mansions*, but it has been cited and relied on (at any rate as an alternative submission) by Mr Turner for the respondent in this appeal.

94 Despite the attention which your Lordships' House has devoted to these questions in the three cases mentioned above, and although it might be possible to dispose of this present appeal on comparatively narrow grounds, the respondent's reliance on *Burnie* makes it appropriate to address the matter broadly. I will start with the genus of nuisance, taking as read what Lord Goff of Chieveley said in *Cambridge Water* [1994] 2 AC 264, 299–306, about the inter-relationship of *Rylands v Fletcher* and nuisance.

95 Nuisance has been described as "protean" (Lord Hope of Craighead in *Hunter v Canary Wharf* [1997] AC 655, 723, echoing Lord Wright in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, 903). Lord Wilberforce said in *Goldman v Hargrave* [1967] 1 AC 645, 657: "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." Lord Lloyd of Berwick (in *Hunter*, at p 695) provided a simple classification:

> "Private nuisances are of three kinds. They are (1) nuisance by encroachment on a neighbour's land; (2) nuisance by direct physical injury to a neighbour's land; and (3) nuisance by interference with a neighbour's quiet enjoyment of his land."

A Encroachment by the branches or (as in *Delaware Mansions* [2002] 1 AC 321) roots of trees is an example of the first category. The second category can be seen as including (but is certainly not limited to) the emission or escape of dangerous substances. Within this category at least, nuisance and *Rylands v Fletcher* are "congeners" (as it was put by Lord Macmillan in *Read v J Lyons & Co Ltd* [1947] AC 156, 173). Nuisance by noise or smell is an example of the third category and it is in this category that the principle B of "give and take, live and let live" has most part to play (see Bramwell B in *Bamford v Turnley* (1862) 3 B & S 62, 84). The unifying factor in all three categories is that there is some sort of invasion of the claimant's land, or his enjoyment of it.

96 Although the boundaries of nuisance are uncertain (and perhaps shifting) it is possible to sketch in some salient features of particular C relevance to this appeal. One part of the territory overlaps with (indeed, is a sort of condominium with) that of negligence. That is particularly the case where a failure to take reasonable care may result in the owner or occupier of land "adopting" or "continuing" a nuisance for which he was not initially responsible. Here the line of authority includes *Job Edwards Ltd v Birmingham Navigations Co Proprietors* [1924] 1 KB 341; *Sedleigh-Denfield v O'Callaghan* [1940] AC 880; *Goldman v Hargrave* [1967] 1 AC D 645; *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485; *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836 and *Delaware Mansions Ltd v Westminster City Council* [2002] 1 AC 321. In the factual situations in those cases (an accumulation of burning refuse, a blocked drain, a redgum tree struck by lightning, and so on) the defendant's actual neighbour was also his E neighbour for the purposes of the principle in *Donoghue v Stevenson* [1932] AC 562, 580.

97 Elsewhere in nuisance's extensive territory, however, negligence (in the sense of a demonstrable failure to take reasonable care) has traditionally been regarded as irrelevant. If the noise and smell from stabling for two hundred horses (used to pull trams) is intolerable in a densely-populated residential neighbourhood, it is no defence that the defendant has used all F reasonable care to minimise the annoyance: *Rapier v London Tramways Co* [1893] 2 Ch 588, 600. That was reaffirmed by your Lordships' House in *Cambridge Water*, at p 300, where Lord Goff referred to the relevant control mechanism being that of reasonable user. And when the focus moves to the species of nuisance known as the principle in *Rylands v Fletcher*, strict liability is its essential characteristic: liability arises (apart from particular G defences) without the need for proof of negligence.

98 On what grounds, then, did the majority of the High Court of Australia decide in *Burnie*, that strict liability under *Rylands v Fletcher* should be regarded as having been absorbed into the principle of ordinary negligence? The majority judgment is a tour de force, extending to 25 pages of the report, and containing some scorching criticism both of the rule as originally enunciated by Blackburn J ("largely bereft of current authority or H validity"—p 51) and of its subsequent vicissitudes ("if the problems of the rule in *Rylands v Fletcher* were confined to the uncertainties of its content and application, it would be necessary for the courts to continue their so far spectacularly unsatisfactory efforts to resolve them"—p 54). The whole of the judgment calls for careful study and does not admit of brief summary.

But the central points made and developed are (i) that there is a "critical obscurity . . . in the twin requirements of 'dangerous substance' and 'non-natural use' " (p 52); (ii) that the rule has been "progressively weakened and confined from within and the area of its effective operation, in the sense of the area in which it applies to impose liability where it would not otherwise exist, has been progressively diminished by increasing assault from without" (p 54); and (iii) that "the main consideration favouring preservation of the rule in *Rylands v Fletcher*, namely, that the rule imposes liability in cases where it would not otherwise exist, lacks practical substance" (p 67).

99 These criticisms, coming from such a distinguished source, command close and respectful consideration. They are in my opinion a salutary reminder of the serious difficulties which beset this area of the law, and a helpful guide to the way forward (even if much of the assistance is in telling us which way not to go). But they do not in my opinion make out the case for writing off *Rylands v Fletcher* as a dead letter. Its scope for operation has no doubt been restricted (and perhaps severely restricted, to judge by reported cases) by the growth of statutory regulation of hazardous activities, on the one hand, and the continuing development of the law of negligence, on the other hand. But it would be premature to conclude that the principle is for practical purposes obsolete.

100 The majority judgment in *Burnie* traces the history, through well-known authorities, of the twin requirements of "dangerous substance" and "non-natural use". It recognises the observations of Lord Moulton in *Rickards v Lothian* [1913] AC 263, 280 as the most influential explanation or restatement of the requirements:

> "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."

These observations were approved by your Lordships' House in *Read v J Lyons & Co Ltd* [1947] AC 156, 169, 176, 187.

101 In *Cambridge Water* Lord Goff (with whom the other members of the House agreed) cited Lord Moulton and added [1994] 2 AC 264, 308:

> "*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

A 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."

B

102 The majority in *Burnie Port Authority v General Jones Pty Ltd* 120 ALR 42 followed the same line of thought, but took it further and expressed it a good deal more vigorously, at p 54:

"Obviously, the question whether there has been a non-natural use in a particular case is a mixed question of fact and law which involves both
C ascertainment and assessment of relevant facts and identification of the content of the legal concept of a 'non-natural' use. Indeed, it is one of those questions which may be misleadingly converted into a pure question of fact or a pure question of law by an unexpressed assumption that either the precise content of applicable legal concepts or the relevant facts and factual conclusions are manifest and certain. Be that as it may,
D and regardless of whether one emphasises the legal or factual aspect of the question of non-natural use, the introduction of the descriptions 'special' and 'not ordinary' as alternatives to 'non-natural', without any identification of a standard or norm, goes a long way towards depriving the requirement of 'non-natural use' of objective content."—The footnote refers to *Webber v Hazelwood* (1934) 34 SR (NSW) 155, 159 per Jordan CJ "the adjectives which have been used in this connection do not
E of themselves supply a solution".—"In *Read v J Lyons & Co Ltd,* Lord Porter referred"—at p 176; there is also a reference to a passage in *Cambridge Water* [1994] 2 AC 264, 308—"to a possible future need 'to lay down principles' for determining whether the twin requirements of 'something which is dangerous' and 'non-natural use' have been satisfied. We are unable to extract any such principles from the decided cases.
F Indeed, if the rule in *Rylands v Fletcher* is regarded as constituting a discrete area of the law of torts, it seems to us that the effect of past cases is that no such principles exist. In the absence of such principles, those twin requirements compound the other difficulties about the content of the 'rule' to such an extent that there is quite unacceptable uncertainty about the circumstances which give rise to its so-called 'strict liability'. The result is that the practical application of the rule in a case involving
G damage caused by the escape of a substance is likely to degenerate into an essentially unprincipled and ad hoc subjective determination of whether the particular facts of the case fall within undefined notions of what is 'special' or 'not ordinary'."

103 There is obvious force in this criticism. A proliferation of adjectival
H paraphrase may not succeed in giving a full explanation of the twin requirements, but some explanation is called for, since "non-natural use" (the expression used by Lord Cairns LC in *Rylands v Fletcher* itself) is, as Lord Goff said in *Cambridge Water* [1994] 2 AC 264, 308 "redolent of a different age". In my opinion the twin requirements are best understood if they are taken together, as is implicit in Lord Moulton's reference to danger:

"some special use bringing with it increased danger to others." It is the extraordinary risk to neighbouring property, if an escape occurs, which makes the land use "special" for the purposes of the principle in *Rylands v Fletcher*.

104 This point is brought out vividly in an interesting and scholarly article by Professor A W B Simpson, "Legal Liability for Bursting Reservoirs: The Historical Context of *Rylands v Fletcher*" (1984) 13 J Leg Stud 209, 219:

> "in 19th century Britain there occurred two sensational reservoir disasters, and to appreciate the significance of these incidents it is important to appreciate the menacing character of a large dam once anxiety as to its security becomes current. Those who live or work in the area thought to be endangered by failure can conceive of themselves as permanently and continuously threatened; and depending on the state of the law, they may be, or at least think themselves to be, impotent in the face of the ever present threat. Nuclear power stations possess this menacing character for many people today, and it is not a product of the frequency of accidents at all."

The same may be said of industrial complexes producing or processing explosive or volatile substances. During the first half of the 20th century the terrible explosion at Rainham in Essex found its way into the law reports (*Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd* [1921] 2 AC 465). During the second half of the 20th century, the explosion at Flixborough in Humberside did not end in contested litigation. But no one who owned a house in the close vicinity of those disasters would readily have accepted that Lord Moulton's proposition was devoid of objective content.

105 Where Lord Moulton's formulation becomes questionable is, as Lord Goff pointed out in *Cambridge Water* [1994] 2 AC 264, 308 his reference to land use "for the general benefit of the community". It is understandable that any court might be inclined to deal more strictly with a defendant who has profited from a dangerous activity conducted on his own land, and less strictly with persons conducting similar activities for the general public good. But in this area (which is some way removed from the "give and take" of minor nuisances) the court cannot sensibly determine what is an ordinary or special (that is, specially dangerous) use of land by undertaking some utilitarian balancing of general good against individual risk. The court must beware of what David Campbell has called "unsustainably ambitious claims to be able to identify the social welfare function": see "Of Coase and Corn: A (Sort of) Defence of Private Nuisance" (2000) 63 MLR 197, 204. That inclination is apparent in the judgment of the Court of Appeal in *Dunne v North Western Gas Board* [1964] 2 QB 806. The temptation to make a utilitarian judgment even led Viscount Simon and Lord Macmillan in *Read v J Lyons & Co Ltd* [1947] AC 156, 169–70, 174) to contemplate that in wartime the manufacture of explosive munitions might be regarded as an ordinary use of land. Regardless of any national emergency that sort of activity is (in Lord Goff's words in *Cambridge Water,* at p 309) "an almost classic case of non-natural use".

106 My Lords, it is most desirable, after *Burnie*, that this House should state, with as much precision as the subject matter allows, the way in which Lord Moulton's test, now 90 years old, should be understood and applied in

A the 21st century. I have had the great advantage of reading in draft the speeches of my noble and learned friends, Lord Bingham of Cornhill and Lord Hoffmann. I respectfully agree with their observations on this topic, and in particular on what should now be understood by the "non-natural" or "special" use of land. I refrain from saying any more on the topic for fear of obscuring or qualifying in any way the clarity of my Lords' exposition.

B 107 The majority in *Burnie Port Authority v General Jones Pty Ltd* 120 ALR 42 commented that the scope of the *Rylands v Fletcher* principle has been progressively restricted from within and without. Both those observations are correct up to a point, but the process has not been entirely one-way traffic. Since the middle of the 19th century many activities which were once regarded as unusually dangerous (such as running railways, which no longer use steam locomotives fuelled by coal manually shovelled C into the firebox) have become commonplace. Other activities unknown in the 19th century (including all those connected with the internal combustion engine) have come on the scene, being regarded first as dangerous innovations (see *Musgrove v Pandelis* [1919] 2 KB 43) but now as basic necessities. More recent developments (especially those concerned with nuclear energy) are largely untouched by common law authority (see, as to liability under sections 7 to 12 of the Nuclear Installations Act 1965, *Merlin* D *v British Nuclear Fuels plc* [1990] 2 QB 557 and *Blue Circle Industries plc v Ministry of Defence* [1999] Ch 289).

108 The extent of land use to be regarded as "special" has therefore certainly changed, and may on balance have diminished. The impact of statutory regulation has certainly increased. Mr Turner referred us not only to section 209 of the Water Industry Act 1991 (which imposes a strict, E though qualified, liability in respect of any escape of water from a pipe vested in a water undertaker) but also to other statutory provisions affecting gas undertakers and persons responsible for damage caused by waste or aircraft. Another statutory provision of potentially far-reaching impact is to be found in the Health and Safety at Work etc Act 1974, which empowers the Secretary of State to make regulations, enforceable by action, for F purposes which include:

> "(b) protecting persons other than persons at work against risks to health or safety arising out of or in connection with the activities of persons at work; (c) controlling the keeping and use of explosive or highly flammable or otherwise dangerous substances, and generally preventing the unlawful acquisition, possession and use of such substances." (See G sections 1(1), 15 and 47(2) of that Act.)

109 There has, as already noted, been some assimilation of the principles of nuisance and negligence in the limited area where the law imposes, in respect of an adventitious hazard, a measured duty of care (the phrase first used in England, I think, by Lord Wilberforce in *Goldman v Hargrave* [1967] 1 AC 645, 662). Your Lordships' House has in *Delaware Mansions* shown some readiness to extend the process of assimilation. But H the principle in *Rylands v Fletcher* is the area of nuisance least open to that sort of assimilation. I am not persuaded that it would assist the development of the law to recast the *Rylands v Fletcher* principle as a "non-delegable duty of care" (see *Burnie* 120 ALR 42, 61–65) especially if the end result were to stretch the principles of negligence so far that (in the words of Lord

Macmillan in *Donoghue v Stevenson* [1932] AC 562, 612, cited in *Burnie*, at p 65): "the law exacts a degree of diligence so stringent as to amount practically to a guarantee of safety." A

110 The last observation that I wish to make about *Burnie* is on its implicit assumption that the imposition of strict liability is unnecessary and undesirable if a claim based solely in negligence would lead to the same outcome. That assumption seems to me, with respect, to overlook the practical implications, in a case of this sort, of bringing a claim in negligence, perhaps against a powerful corporate opponent. In such circumstances fairness may require that, instead of the claimant having to prove his case, the law casts on the defendant the burden of proving act of God, or some other defence to strict liability. That is illustrated by the New Zealand case of *Autex Industries Ltd v Auckland City Council* [2000] NZAR 324, in which the plaintiff would have succeeded (but for the court's residual discretion) in obtaining summary judgment under the principle in *Rylands v Fletcher*. B C

111 In my opinion the Court of Appeal was right in concluding that Transco's case, as pleaded and proved at trial, did not come within the principle in *Rylands v Fletcher*, nor did it establish liability under any other head of nuisance. The 11-storey tower built in the 1950's by Stockport MBC's predecessor was not in itself an unusual use of land. Nor was it an unusual use of land to provide a 3-inch asbestos cement pipe carrying water, under normal mains pressure, into the water tank room in the basement of the flats. There water was stored in two 1,000-gallon tanks, before being pumped up to tanks in the roof of the block of flats. No escape occurred from any of these tanks. D

112 The only relevant accumulation of water within (or in the vicinity of) the flats of which the local authority was aware was the amount of water in the 3-inch pipe between the water authority's main and the point of discharge in the water tank room. The volume of that water is unknown, but it cannot have been significant or such as could, by itself, have been regarded as dangerous. The judge's suggestion that it would have been different if there had been 66 separate small pipes coming from the water authority's main is not a realistic approach. E F

113 It is true that a very large quantity of water must have escaped from the 3-inch pipe before the fracture was discovered, since the adjacent ground had become saturated, and produced a new "spring", by the time that the matter was investigated and the fracture found. The judge found that "vast quantities of water must have escaped". But that gradual and invisible saturation of the adjacent ground cannot be described as an accumulation made by deliberate human design, in the way that Mr Rylands planned, constructed and started to fill his reservoir at Ainsworth. The conditions for strict liability were simply not fulfilled. The Court of Appeal came to the right conclusion as regards both *Rylands v Fletcher* and nuisance. There was no proper basis in the pleadings or the evidence for reliance on a measured duty of care based on the adventitious accumulation of water after its escape. G H

114 The case was in fact originally pleaded on a quite different basis from that on which it was argued at first instance and on appeal. Initially attention was focused on the drainage of the disused embankment, and that is what the experts' reports addressed. Transco pleaded that it was the

owner of the gas pipeline, without initially referring to any easement, but did in its reply plead that it had a proprietary interest in the land "the subject of the easements or rights enjoyed by [its] pipeline". Whether the easement was only an equitable easement, though granted by deed, was a point raised by the judge during closing submissions and it need not be addressed further.

115 On this part of the case the judge concluded that Transco could have a cause of action in nuisance in respect of its easement (which he regarded as a prescriptive easement) otherwise than by positive acts of withdrawal of support. He distinguished the well-known decision in *Bond v Nottingham Corpn* [1940] Ch 429, 438–439 by referring to the decision of Judge Blackett-Ord in *Bradburn v Lindsay* [1983] 2 All ER 408. That was a case where the defendant knew of the perilous state of her property (a semi-detached dwelling) and the judge applied the measured duty of care principle. But as the Court of Appeal observed, Transco's case: "was not pleaded or argued on the basis that the events of the weekend preceding the collapse should have caused Stockport to provide the replacement support before [Transco] did." For that reason your Lordships' House declined to permit Mr Leeming (for Transco) to advance this point, and it is not necessary to go further into what difference (if any) it made that Transco was not the owner of the embankment but merely had an easement running through its length.

116 For these reasons, and for the further reasons given by my noble and learned friends, Lord Bingham of Cornhill and Lord Hoffmann, I would dismiss this appeal.

Appeal dismissed with costs.

Solicitors: Legal Dept, Transco plc, Newcastle upon Tyne; Berrymans Lace Mawer, Manchester.

C T B