Strict Liability Restricted: A Critical Commentary on *Burnie Port Authority* v *General Jones Pty Ltd*

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Introduction

The High Court of Australia on 24 March 1994 handed down an important decision affecting a fundamental principle of tort law.[1] A majority of the High Court left the rule in *Rylands v Fletcher*[2] very little, if any, room to operate in Australia. The decision was reached on the grounds that the rule is no longer capable of precise application and that it has, in effect, been subsumed by the expanding law of negligence. This article examines the decision and critically evaluates the legal reasoning by the Full Bench in relation to the rule in *Rylands v Fletcher*.

Facts

The respondent, General Jones Pty Ltd (GJ) suffered damage when a large quantity of vegetables it owned was ruined in a fire which destroyed the building owned by the appellants, Burnie Port Authority (BPA), in which the vegetables were stored. At the time of the fire, extension and renovation work was being carried out in the building. Part of the work, which involved considerable welding and the use of a large quantity of expanded polystyrene (EPS), was contracted to an independent contractor, Wildridge & Sinclair Pty Ltd (W&S). EPS contains retardant chemicals to inhibit ignition, but can be ignited when brought into sustained contact with a flame or burning substance. Once ignited EPS dissolves into a liquid fire and burns with extraordinary ferocity.

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1 *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42.

2 (1886) LR 1 Ex 265; affd (1868) LR 3 H 330.

The EPS was contained in cardboard cartons which were, with BPA's knowledge, stacked together in an area under the roof close to where W&S, again with BPA's knowledge, would be carrying out extensive welding activities. On the findings of the trial judge, employees of W&S carried out the welding activities in such a negligent fashion that sparks or molten metal fell upon one or more of the cartons containing the EPS, which ignited and incinerated, destroying the whole building. GJ sued BPA and W&S in the Supreme Court of Tasmania.

History

At first instance[3] Neasey J held that BPA was liable to GJ on the ground that 'an occupier of land is liable for damage caused by the spread of fire from his land caused by the negligence of his independent contractor.'[4] This proposition was supported by reference to the ancient rule of ignis suus (the 'his or her fire' rule) which has a modern expression in *H & N Emanuel Ltd v Greater London Council.*[5] Neasey J rejected GJ's submission that BPA was liable under the rule in *Rylands v Fletcher* on the ground that welding was not a non-natural use of BPA's premises. He also rejected a submission that BPA was liable in negligence.

BPA appealed to the Full Court of the Supreme Court which held that the tort of ignis suus had been absorbed by the rule in *Rylands v Fletcher*. The Full Court found that BPA was liable under the *Rylands v Fletcher* rule, finding that the welding was a non-natural use of the premises. BPA then appealed to the High Court and it was submitted on behalf of GJ that the facts found by Neasey J supported the judgment on one or more of three bases:

- tort of ignis suus
- the rule in *Rylands v Fletcher*
- the tort of negligence.

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3 The proceedings at first instance were complicated by third claims and cross-claims. For the purpose of this commentary we will disregard the collateral actions and focus on the litigation between BPA and GJ.

4 Quoted by Brennan J (1994) 120 ALR 42 at 71.

5 [1971] 2 All ER 835 at 838-9

The Judgment of the High Court

In a majority judgment of 5 - 2 the Full Bench of the High Court dismissed the appeal, but expressed a variety of opinions on each of the three bases put forward by GJ. It unanimously held that the ignis suus rule did not exist as a separate tort, but rather has been absorbed by the more general rule in *Rylands v Fletcher*.

The Majority View on Rylands v Fletcher

Mason CJ, Deane, Dawson, Toohey and Gaudron JJ further held that the rule in *Rylands v Fletcher* had been absorbed into the general principles of negligence. 'The result of the development of the modern law of negligence has been that ordinary negligence has encompassed and overlain the territory in which the rule in *Rylands v Fletcher* operates.'[6] Justice Blackburn in *Fletcher v Rylands*[7] identified what was described as the true rule of law which was stated thus:

> [t]he person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient.

The majority held that the rule 'had been all but obliterated by subsequent judicial explanations and qualifications.'[8] The reasoning of the majority is analysed here in light of the minority's and this author's views.

The House of Lords in *Rylands v Fletcher* although approving the rule, converted the qualification 'which was not naturally there' to a different requirement of 'non-natural use', which has, in turn, been subjected to a wide variety of interpretations, as the decisions of Neasey J and the Full Court demonstrate.[9] Also the qualification, 'which he knows to be mischievous', has been transformed from an apparent requirement of actual knowledge into a requirement closely resembling or, perhaps even amounting to, a requirement of

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6 (1994) 120 ALR 42 at 59.

7 (1866) LR 1 Ex 265 at 279-80.

8 (1994) 120 ALR 42 at 51.

9 (1994) 120 ALR 42 at 52.

foreseeability of relevant damage in the event of the escape of the dangerous substance.[10]

The greatest difficulty with the rule according to the majority, was the obscurity of the dual requirements of 'dangerous substance' and 'non-natural use'. If, as in *Rylands v Fletcher*, water itself can be a dangerous substance for the purpose of the rule, then, according to the majority in the present case, '[i]t is difficult to identify anything which, accumulated either in sufficient quantity or under sufficient pressure, might not be a dangerous substance.'[11] A response to this reasoning can be found in Brennan J's judgment. He reasons that the two requirements of dangerousness and non-natural use must be read together. As he says, '[t]he fact that a use is dangerous is an indication that it is non-natural.'[12] Thus, water in itself may not be a 'dangerous substance' but if it is put to use in a non-natural manner, through which it may cause some damage to another, then it becomes a dangerous substance for the purpose of the rule.

A crucial point which is identified by the minority,[13] but, with respect, not addressed satisfactorily by the majority, is the fact that the determination of non-natural use and dangerous substance is a question of law unlike the determination of negligence, which is a question of fact. Brennan J was of the view that this was the crux of the matter. He says, '[i]f the character of a use is a mere question of fact, the rule in *Rylands v Fletcher* would become another conquest in the imperial expansion of the law of negligence.'[14] The majority held that the question of non-natural use was a mixed question of fact and law which was incapable of being viewed solely either as a question of law or as a question of fact.[15] Having said that, they proceeded to treat the concept of 'non-natural use' as a question of fact by analogising it with negligence.

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10 (1994) 120 ALR 42 at 58.

11 (1994) 120 ALR 42 at 52.

12 (1994) 120 ALR 42 at 76.

13 (1994) 120 ALR 42 at 77 per Brennan J, at 91 per McHugh J.

14 (1994) 120 ALR 42 at 77.

15 (1994) 120 ALR 42 at 54.

The majority listed several difficulties with the rule, caused by the broad interpretation given to it by subsequent courts. In summary, these are:

- The phrase 'for his own purposes' has been largely discarded as a general qualification.[16]

- The possessive 'his' before 'lands', apparently used to denote ownership, has been expanded to include the non-owning occupier. The majority took the view that this element of the rule had no certainty in application, arguing that it should include any person in control but exclude the non-occupying owner. Whether this is the case is not clear.[17]

- The word 'land', used in conjunction with 'escapes' is too narrow. Clearly, subsequent cases had expanded on this but again the High Court was concerned with the uncertainty of the limits of expansion.[18]

- The phrase 'anything likely to do mischief if it escapes' has largely been supplanted by the word 'dangerous'.[19]

- The reference to 'all the damage which is the natural consequence of its escape' is too wide, as subsequent courts have confined liability to foreseeable losses only.[20]

- The statement that it was 'unnecessary to inquire what excuse would be sufficient' has inevitably been overlaid by decisions identifying such excuses.[21]

- It is unclear whether 'escape' refers to escape from the defendant's 'land' or other 'premises' or merely escape from control.[22]

The majority were of the view that the time had come to dispense with the rule by absorbing it into the law of negligence with the possibility of some 'residue' of the rule being included in

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16 (1994) 120 ALR 42 at 51

17 Ibid.

18 Ibid.

19 Ibid.

20 Ibid.

21 Ibid.

22 Ibid.

nuisance or trespass.[23] The rationale for the majority's absorption of the rule into the general law of negligence is two-fold. Firstly, *Rylands v Fletcher* liability has increasingly come to be assessed in the context of the surrounding circumstances. Secondly, the majority were of the view that the defences to *Rylands v Fletcher* are similar to the defences to negligence.

As to the first of these grounds, that of the manner of assessing liability under the rule, the majority asserted that courts tend in practice to do no more than apply the classic elements of the calculus of negligence ie the factors of probability, gravity and practicability. This approach was demonstrated by quoting from the majority judgment in *Hazelwood v Webber*:[24]

> Now in applying this doctrine ... [t]he degree of hazard to others involved in its use, the extensiveness of the damage it is likely to do and the difficulty of actually controlling it are ... important factors.

The majority stated:

> Certainly, the factors which are relevant in determining whether a defendant has been guilty of negligence in a case involving damage caused by the escape from premises of a dangerous substance will almost inevitably also be relevant on the question whether the defendant's use of those premises was a 'natural' one.[25]

With respect, the majority is in error in drawing this analogy because, as stated earlier, the question of non-natural use is one of law while the question of negligence is one of fact.

The second basis for the majority's decision in the present case was that the various defences of an occupier of premises against *Rylands v Fletcher* 'strict liability' are similar to the grounds of denial of fault liability under the law of negligence. 'Thus, 'consent' and 'default of the plaintiff' are analogous to voluntary assumption of risk and contributory negligence.'[26] However, they did not answer the arguments of the minority on this matter. McHugh J argued[27] that the *Rylands v Fletcher* defences such as act of God, act of a stranger and consent or default of the plaintiff, go to the issue of causation. The negligence defences of contributory negligence and

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23 (1994) 120 ALR 42 at 66.

24 (1934) 52 CLR at 278.

25 (1994) 120 ALR 42 at 53.

26 (1994) 120 ALR 42 at 58.

27 (1994) 120 ALR 42 at 93.

voluntary assumption of risk do not go to causation, but rather to denial or reduction of liability. Further, unlike the majority, McHugh J does not see the analogy between 'default of plaintiff' and 'contributory negligence', holding that contributory negligence is not relevant to liability under *Rylands v Fletcher*.

Having disposed of *Rylands v Fletcher*, the majority relied on *Cook v Cook*[28] for the purpose of establishing that a higher standard of care may be owed, based on the proximity of the relationship between BPA and GJ. The majority also relied on *Kondis v State Transport Authority*[29] to establish that there was a special non-delegable duty owed by BPA. Such a special responsibility apparently existed in cases where there was a 'central element of control'.[30]

The majority then said that:

> It follows that the relationship of proximity which exists in the category of case into which *Rylands v Fletcher* circumstances fall, contains the central element of control which generates, in other categories of case, a special 'personal' or 'non-delegable' duty of care under the ordinary law of negligence.[31]

The effect of the majority decision is that *Rylands v Fletcher* has, to all intents and purposes, no application in Australia, and the net of negligence may have been widened to include circumstances which would once have been regarded as imposing strict liability.

The reason for the majority dispensing with the rule is that subsequent applications of the rule had rendered it unworkable, by mixing it with the law of negligence. It should be remembered that *Rylands v Fletcher* was alive long before that legendary snail developed a fondness for gingerbeer. The courts since 1932 have considered *Rylands v Fletcher* situations through the 'tainted' spectacles of negligence, as the majority in this case themselves note.[32]

It is this author's opinion that when the general law of negligence was developed, it was a new tool to the judges, and lent itself to experimentation. The flexibility of negligence must have

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28 (1986) 162 CLR at 382.

29 (1984) 154 CLR 672 at 686.

30 (1994) 120 ALR 42 at 62.

31 (1994) 120 ALR 42 at 63.

32 (1994) 120 ALR 42 at 60.

appealed to the courts and, instead of allowing it to grow on its own, it was forced onto the existing framework of civil liability, including liability under *Rylands v Fletcher*. This explains, although does not justify, the influence of negligence concepts in the application of the rule.

The majority ultimately held that the rule had been subsumed by the law of negligence. However, it is this author's respectful view that the majority should instead, have held that it is only the expanded interpretation of *Rylands v Fletcher* that is no longer valid because it merely duplicates the law of negligence which has developed over the last six decades. As I argued earlier, since the law of negligence took root, the courts have pre-empted its natural growth by grafting negligence concepts onto *Rylands v Fletcher* liability. Now, it is clear, as the majority reason, that the law of negligence has subsumed the modern application of *Rylands v Fletcher*, but it has not, and cannot, subsume the original rule in *Rylands v Fletcher*. The majority should have recognised that the true rule in *Rylands v Fletcher* deserves a place in the current law, and the rule should have been resurrected to impose strict liability in limited circumstances. The minority give good reasons for retaining *Rylands v Fletcher*.

The Minority View on Rylands v Fletcher

The dissenting judges, Brennan and McHugh JJ, found that the rule in *Rylands v Fletcher* still survives and is not capable of being absorbed by the general law of negligence. The judgement of McHugh J in particular deals exhaustively with the *Rylands v Fletcher* issue. The main arguments of the minority have been covered in conjunction with the majority views. Other reasons given by the minority are concerned primarily with liability for the acts of independent contractors. In summary some of the points raised by the minority on this issue are:

- In negligence, even an occupier who owes a 'personal' or 'non-delegable' duty is liable for no more than the negligent acts of an independent contractor, whereas, under *Rylands v Fletcher*, the occupier is liable for the acts of an independent contractor which cause the escape of the harmful thing whether or not the contractor's acts were negligent.[33]

- An occupier is liable in negligence only for his or her own negligence or the negligence of his or her employee, whereas

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33 (1994) 120 ALR 42 at 82 per Brennan J, at 91 per McHugh J.

under *Rylands v Fletcher*, the occupier is liable for the consequences of an escape of a harmful substance caused by any person on the occupier's property with the occupier's consent, irrespective of negligence.[34]

- Under *Rylands v Fletcher* the occupier is not liable unless the escape of the dangerous substance was the result of a non-natural use of the land, whereas in negligence an occupier can be liable for the natural use of the land if there was any negligence causing harm.[35]

Apart from the legal arguments, McHugh J also raises policy reasons for retaining *Rylands v Fletcher*. Among his reasons, the strongest is the environmental argument. Given the widespread use of fire, oil, gases, chemicals and radio-active materials these days, it is probably unwise to abandon the prima facie rules of strict liability established in *Rylands v Fletcher*, especially since Law Reform Commissions and equivalent bodies have recently advocated enactment of strict liability rules in various areas of social activity which involve the use of substances likely to cause great harm if they escape.

Comments on the Decision

The main criticism of the majority judgement in the present case is that, by absorbing the *Rylands v Fletcher* rule into the general law of negligence, a void, albeit a small one, may have been created in the law. Unless negligence can be shown, liability cannot be attributed to someone who has brought what may, for want of a better description, be called a dangerous substance which causes damage to another onto their property. To fill this void, the High Court appears to have reversed direction regarding liability without fault by stretching the traditional concepts of duty and standard of care, and exploiting the doctrine of non-delegable duty to artificially encompass strict liability.

The majority in fact, made this point subliminally, when they said:

> Indeed, depending upon the magnitude of the danger, the standard of 'reasonable care' may involve a degree of diligence *so stringent as*

34 Ibid.

35 Ibid.

to amount practically to a guarantee of safety.[36]

This, for all practical purposes, is strict liability, except that it is in the guise of negligence. To borrow the statement of Lord Atkin, also quoted by the majority in the present case in a different context, this approach is dangerous because, '[i]t is a wolf in sheep's clothing instead of an obvious wolf.'[37]

The dissenting judges are of the view that the rule in *Rylands v Fletcher* should be retained and in fact is incapable of being absorbed into the general law of negligence. Justice Brennan quotes a statement by Menzies J which sums up the issue: 'The whole point of *Rylands v Fletcher* liability is that *the exercise of care is irrelevant.*'[38] Given that the law of negligence is fundamentally concerned with the exercise of a duty of care, it is therefore difficult to see how the majority could fit *Rylands v Fletcher* within the framework of negligence.

The majority appear to have attacked the rule in *Rylands v Fletcher* on the grounds that the statement of the principle has severe linguistic defects and as such is incapable of accurate and consistent application. On that basis, in the majority's view, it would serve the interest of justice better if the rule were absorbed into the general law of negligence. With respect, the majority seem to have fallen into the same error remarked on by Windeyer J who said of the rule in *Rylands v Fletcher*:

> What the Court of Exchequer Chamber and the House of Lords did was to state a doctrine or principle of the common law. To regard the words used as if they were the provisions of a statute defining in precise and permanent terms the limits of legal rights and duties seems to me a mistake.[39]

Although it is the respectful view of this author that perhaps the majority ought not have discarded the rule in *Rylands v Fletcher* by absorbing it into the law of negligence, the majority judgment does make the telling point that *Rylands v Fletcher* has suffered greatly at the hands of creative members of the bench in the past who, in their zeal to help unfortunate plaintiffs, may have put passion before principle. The rule in *Rylands v Fletcher* was designed

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36 (1994) 120 ALR 42 at 65, emphasis added.

37 *Donoghue v Stevenson* [1932] AC 562 at 595, quoted by the majority (1994) 120 ALR 42 at 68.

38 *Benning v Wong* (1969) 122 CLR 249 at 278, emphasis added.

39 *Benning v Wong*, note 37 above, at 299.

for damage to property but over the years it has been corrupted to include personal injury.

This extension of the rule to personal injury is the principal reason for its current dismal state. Given the reasoning of the minority in support of the retention of the rule and appreciating that the true rule in *Rylands v Fletcher* is limited to property damage there is good reason to review the abolition of this rule. The rule should survive to impose strict liability for property damage in circumstances that invoke the rule. It should not be confused with negligence liability or personal injury damages.

The law in Australia now, however, is as stated by the majority. *Rylands v Fletcher* after more than a century of service has been condemned to be unworkable and antiquated. This is a departure from the English position where *Rylands v Fletcher* is still alive albeit unwell, as the House of Lords demonstrated in the case of *Cambridge Water Co Ltd v Eastern Counties Leather plc.*[40] Briefly, the facts in this case were that the defendant was a leather manufacturer which used a chemical solvent in its tanning process. There were several regular spillages of the solvent in the course of the process. The solvent seeped through the tannery floor and eventually found its way into the plaintiff's borehole, where the plaintiff was engaged in the business of extracting water for domestic supply. The solvent contaminated the water and the plaintiff brought an action against the defendant claiming damages in negligence, nuisance and under *Rylands v Fletcher*. The case was eventually heard in the House of Lords, at which stage the question to be decided was liability under *Rylands v Fletcher*. In its reasoning, the House of Lords clarified that, although both nuisance and the rule in *Ryland v Fletcher* gave rise to strict liability, each had a controlling mechanism. In the former, it is the principle of reasonable user, while in the latter it is the notion of natural use.[41] Both the above heads of liability are distinguished from negligence where liability depends on some sort of fault or foreseeability of harm on the part of the defendant.

So far, the House of Lords have trotted along the orthodox path. A twist in the long road of civil liability was added when the House of Lords reasoned that although liability was strict in nuisance and *Rylands v Fletcher*, the question of foreseeability of damage was a

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40 [1994] 1 All ER 53, and see discussion of the case in R F V Heuston, 'The Return of *Rylands v Fletcher*' (1994) 110 *LQR* 185.

41 *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 1 All ER 53 at 71-2.

relevant issue. Lord Goff, giving the leading opinion in the House of Lords, stated:

> Having regard ... in particular to the step which this House has already taken in *Read v Lyons* to contain the scope of liability under the rule in *Rylands v Fletcher*, it appears to me to be appropriate now to take the view that foreseeability of damage of the relevant type should be regarded as a prerequisite to liability in damages under the rule.[42]

Thus, although the House of Lords retained the rule and stated that the rule gave rise to strict liability, they restricted its application severely by including the requirement of foreseeability of damages. Lord Goff went on to state that under the circumstances of the case he '[did] not consider that [the defendant] should be under any greater liability than that imposed for negligence.'[43] This appears to achieve the same practical result as *Burnie Port Authority*.

Hence, in principle, *Rylands v Fletcher* has survived in England to give rise to a cause of action without proof of fault or breach of duty. However, liability is contingent on the reasonable foreseeability of the type of damage suffered. This is a direct application of the *Wagon Mound No 1*[44] principle. One of the hallmarks of negligence, foreseeability of damage, has now been imported into *Rylands v Fletcher* liability in England.

In summary, the main difference is that in England, nuisance and *Rylands v Fletcher* still impose strict liability in theory, while negligence is a form of fault liability. The common thread that binds these three heads of liability, is the requirement of foreseeability of damage. In Australia, *Rylands v Fletcher* as a separate head of liability has been rejected, the preference being to deal with all such claims under negligence or nuisance. The result of *Burnie Port Authority* is that we now have differing views in principle regarding *Rylands v Fletcher* from the highest judicial authorities in Australia and England, although the practical result may well be the same. One is tempted to describe the approach of the Australian High Court as an example of the old saying, 'Let us call a spade a spade' whereas the approach of the English House of Lords may best be reflected by

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42 *Cambridge Water Co Ltd v Eastern Counties Leather plc*, note 40 above, at 76.

43 *Cambridge Water Co Ltd v Eastern Counties Leather plc*, note 40 above, at 77.

44 *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd, The Wagon Mound* [1961] 1 All ER 404.

William Shakespeare's famous line; 'A rose by any other name would smell as sweet.'

It is worthwhile, though, to call to mind the words of Khanna J who in a dissenting speech said:

> A dissent in a court of last resort ... is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.[45]

It remains to be seen whether this latest flight of judicial creativity by the High Court of Australia results in *Rylands v Fletcher* fading into history like the Dodo, or rising from the ashes like a Phoenix.

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45 *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 at 51 per Abdoolcader SCJ, quoting Additional District Magistrate, *Jabalpur v Shivakant Shukla (The Habeas Corpus Case)* [1976] AIR SC 1207 at 1277.