

THE RISE AND FALL OF RYLANDS v. FLETCHER

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I

The Common Law Procedure Act, 1852, freed the common law of the previous bonds imposed upon the development of its principles by the mediaeval forms of action. Throughout the rest of the nineteenth century the courts were thus better able to adapt the law to the needs of a changing community. Adaptation was necessary. For the law suitable to a predominately agricultural and slow-moving society was unsuited for one which was industrial, expanding and faster-moving. This was clearly seen by some at least of the judges, who began to turn the law of nuisance and trespass away from the formerly dominating notion of liability based on the idea that a man acts "at his peril". The change of direction was achieved by the gradually more extended use of the ideas of negligence or unreasonable conduct in fields of law from which hitherto those ideas had been largely excluded. The law of negligence—a tort which matured in the twentieth century but had its birth at the beginning of the nineteenth—was all the time growing in scope and importance, and was becoming more perfectly understood and more elaborately discussed by the courts.

Into the crucible where all these ideas were interacting, Blackburn J. threw an idea which can only be described as having a hardening effect. In delivering the judgment of the Court of Exchequer Chamber in *Fletcher v. Rylands*¹ he seems to have tried to put a stop, or at least a limit, on the freedom of change and development which the common law had begun to enjoy. At a time when the courts were making the law of torts into a more flexible and reasonable instrument for the balancing of conflict-

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¹(1866), L.R. 1 Ex. 265; affirmed in the House of Lords *sub nomine*, *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330.

ing social interests, Blackburn J. returned to the mediaeval period with its ideas of strict liability.

What may be called the orthodox historical view of the origin of the rule in *Rylands v. Fletcher* is that its antecedents are to be found in the law of trespass, nuisance, liability for fire and liability for damage caused by animals. Before this case, according to Ames,² there were categories of liability for unlawful acts (including trespass), for infringing the principle *sic utere tuo ut alienum non lædas*, and for certain cases involving negligence. But some cases of damage never became amenable to the test of due care in the circumstances. Of these Ames said, in a now famous sentence,³

. . . they wandered about unhoused and unshepherded, except for casual attention, in the pathless fields of jurisprudence, until they were met some forty years ago, by the master-mind of Mr. Justice Blackburn, who guided them to the safe fold where they have since rested.

Whether in fact they have "rested" in any "safe fold" is a matter to be discussed later. But it is clear that Ames regarded Blackburn J.'s judgment as involving novel ideas. It was a judgment that

. . . caught up and reconciled the absolute liabilities already predicated as well in the two rules just above mentioned [consequential damage of an unlawful act, and 'so use your own as not to injure another's'] as in the remaining rules for trespasses by acts done 'at peril' [keeping cattle, shooting guns under certain circumstances and others already mentioned]; it furnished a general category in which all such rules, whenever formed, could be placed.

Holdsworth also regarded the principle in the case as new, in scope and direction, if not in language.⁴ As he pointed out,⁵ in mediaeval law little or no attempt was made to try the intent of a man, and the conception of negligence had as yet hardly arisen. A man acted at his peril. These ideas, according to Holdsworth, were carried over and adapted for modern law by *Rylands v. Fletcher*, which laid the foundation-stone for the modern rules on dangerous acts.

Another of this opinion was Bohlen, who took the view that the judgment of Blackburn J. did not make new law but "merely applied to a novel situation, closely analogous to those redressed

² Responsibility for Tortious Acts: Its History, 3 Select Essays in Anglo-American Legal History (1909) 474, at pp. 516-520.

³ *Ibid.*, at p. 518.

⁴ History of English Law, Vol. 8, p. 468. See also Potter, Historical Introduction to English Law (1948) pp. 369-370.

⁵ History of English Law, Vol. 3, p. 375.

in existing actions, a principle plainly deducible from the decisions therein".⁶ In fact Bohlen's chief criticism was that the rule was too narrow rather than too broad in its formulation. The only difference between the Ames-Holdsworth attitude to *Rylands v. Fletcher* and that of Bohlen seems to be this: the former was based on the idea that the law was concerned with moral responsibility, that is, responsibility based upon some idea of faulty behaviour, which was wide enough to include behaviour that was intrinsically dangerous while not intended or foreseeably likely to produce harm. Bohlen, on the other hand,⁷ gave an economic interpretation to the rule and said it was the result of the English judges' inclination to protect landowners against the invasions of their property by the newer class of people engaged in the exploitation of natural resources, a view recently restated in terms of the greater "risk-bearing" capacity of enterprisers, as they are called by Professor Clarence Morris.⁸

As Prosser points out,⁹ there is nothing in the judgment of **Blackburn J.** which would support the Bohlen-Morris view. The language of his judgment is concerned with the assessment of liability for causing harm, not with the importance of protecting landowners. Bohlen's approach is in fact a fanciful attempt at re-creating or re-interpreting legal history. As a writer on a very different topic has said: "The desire to discover common causes is to some degree a craze with us, and sometimes leads us to forget a much simpler psychological explanation of the facts".¹⁰ Here the simpler explanation is based upon the perhaps unfortunate, but understandable, continuation of pre-1852 ideas about liability into a period when, as already explained, some of the judges were beginning to feel less restricted in their outlook. The principle in *Rylands v. Fletcher* was not deliberately produced for the purpose of restricting industrial growth, although one effect of it may well have been to involve those concerned with that growth in some measure of care for the well-being of others. The principle of *Rylands v. Fletcher* was founded upon the mediaeval idea that a man acts at his peril. It was a moral idea, not an economic one. But the moral idea seems to have stopped short at

⁶ *Studies in the Law of Torts* (1926) p. 359.

⁷ *Ibid.*, at pp. 367-370. On this see Pound, *Interpretations of Legal History* (1923) pp. 105-109.

⁸ *Hazardous Enterprises and Risk-Bearing Capacity* (1952), 61 *Yale L.J.* 1172.

⁹ *Selected Topics on the Law of Torts* (1953) p. 139.

¹⁰ Huizinga, *The Waning of the Middle Ages* (Penguin Edition, 1955) p. 21.

injuries to land: it does not appear to have been considered appropriate for personal injuries. In respect of personal injuries it would seem that by the middle of the nineteenth century morality dictated the necessity for showing blameworthy behaviour.

The historical justification of the distinction may well have been that, at least until towards the end of the nineteenth century, or perhaps even until as late as the 1914 war, interests in land were regarded by the community whose views the judges reflected as more sacrosanct and more susceptible of injury than interests in personal safety. This is not related to any idea of opposition to industrial growth, that is, to any conscious economic motivation, as Bohlen's theory holds. Rather is it based upon the delay in recognition of the importance of industrial activity as a means of producing personal injury. The law on personal injuries was very limited in scope in the nineteenth century. This may have been because of the lack of a tort of negligence: it may have been the cause of the lack. It is clear, however, that one of the mainsprings of the development of the tort of negligence was the growing desire and need to widen the scope of the law on personal injuries, as a result of the growing importance and frequency of such injuries by comparison with the gradual decline in the importance of land and the amount of litigation over injuries to land, a process of growth and decline which had been taking place since about the middle of the eighteenth century. Debate in the courts about the problems connected with these developments is still going on. But the law has developed sufficiently for it to be said that at the present time the law, reflecting present-day views on the comparative social importance of personal and proprietary injuries, takes a different attitude on the question whether remedies in tort for personal injuries should be restricted. It is only necessary to refer to the developments from *Donoghue v. Stevenson* and the law on nervous shock to see how far the courts have gone since the days when, outside the very restricted scope of trespass, personal injuries were largely dealt with by the manipulation of the law of contract: compared with such developments the law on injuries to land and interests in land has not gone much further than it was in the nineteenth century. Indeed, it is possible to suggest that even in the case of torts which originally were concerned with injuries to land, such as nuisance and *Rylands v. Fletcher* liability itself, more emphasis has been placed upon the personal-injury aspects.

Of that more will be said later. For the moment the relevant

point is that at the time *Rylands v. Fletcher* was decided there was considerable authority behind making a distinction between personal injuries and injuries to land in so far as theoretical considerations were concerned. The distinction had been in operation for a long time. The relevance of "fault" in cases of personal injury goes back a long way, whereas injuries to land were actionable without proving any "fault". In the old case of *Weaver v. Ward*¹¹ it was said that a defendant could be excused from liability for trespass to the person of another if he were "utterly without fault". But, in the case of injuries to land caused by cattle trespass or nuisance, even someone "utterly without fault" would not be excused from liability. In so far as Blackburn J.'s principle was based upon existing authority, it justifiably drew a distinction between the two kinds of injury. It is therefore unnecessary to argue that the judges who decided *Rylands v. Fletcher* were consciously and deliberately making up their minds to impose a more rigorous form of liability in the case of injuries to land than they were imposing for personal injuries. They were simply continuing along lines previously laid down.

But, while the principle enunciated by Blackburn J. is thus justifiable on historical grounds, it is surprising that he did not take into account the development in the law of torts of which mention was made at the beginning of this essay. It is all the more surprising because Blackburn J. himself was of the opinion¹² that there were some injuries to land or property which were only actionable if produced through wilful or negligent (that is, blameworthy) behaviour. It might have been thought that if such an approach were suitable in some cases it was also suitable in others.

Perhaps this explains why, when *Rylands v. Fletcher* came before the House of Lords, Lord Cairns¹³ introduced the idea of "non-natural" user of land as opposed to "natural" user, a doctrine which in recent times has suggested to the Supreme Court of Nova Scotia¹⁴ that there are really two rules in *Rylands v. Fletcher*, the one of Lord Cairns, the other as stated by Blackburn J. Lord Cairns' distinction is clearly based upon the idea

¹¹ (1616), Hobart 134.

¹² See *Fletcher v. Rylands* (1866), L. R. 1 Ex. 265, at p. 286; *River Wear Commissioners v. Adamson* (1877), 2 App. Cas. 743, at p. 767. Contrast Thayer, *Liability Without Fault* (1916), 29 Harv. L. Rev. 801, at p. 805: "... the modern law of negligence . . . is very modern—so modern that even the great judges who sat in *Rylands v. Fletcher* can have had but an imperfect sense of its reach and power".

¹³ (1868), L.R. 3 H.L. 330, at p. 339.

¹⁴ In *J. Porter & Co. v. Bell*, [1955] 1 D.L.R. 62, per MacDonald J. at p. 66.

that the creation of extra risk by the way one utilizes one's property should carry with it extra burdens in the form of liability for the resulting injury. Such a view is much the better one, and can be harmonized much more easily with the demand, which was growing in the nineteenth century and is still operating in the twentieth, for liability based upon blameworthiness. Lord Cairns, in fact, seems to have been much more in touch with the social background to developments in the law of torts than Blackburn J. And the developments of the rule in *Rylands v. Fletcher* over the past ninety years have proceeded on the footing that liability under it should be assimilated so far as possible to liability for negligence, as Prosser has pointed out,¹⁵ and as will be further discussed later.

Such an approach seems very far from the original ideas of Blackburn J. His statement of the law was in the nature of a reversion to old ideas. And, if there is anything about *Rylands v. Fletcher* which justifies the Ames-Holdsworth view of the case as an attempt to revalue and restate old principles so as to cope with modern developments in the field of tort liability, it is not to be found in the judgment of Blackburn J., but in the different phrasing of the principle to be found in the speech of Lord Cairns. The judgment of Blackburn J. can be said to have been subverted by the speech of Lord Cairns.¹⁶ But the trouble has been that, so far from openly acknowledging this, the courts have been taking great pains to reconcile the two views, even to the extent of applauding the rule while excluding its operation upon the facts of the case before them.¹⁷ So much so has this been the approach of the courts that in the Canadian case already referred to, *J. Porter & Co. v. Bell*,¹⁸ it was suggested that either of the two statements of the principle could be used by a court, depending upon the circumstances of the case in hand. If this is correct, then it means

¹⁵ Selected Topics on the Law of Torts (1953) pp. 179, 181.

¹⁶ Cp. Prosser, *op. cit.*, at p. 139, " . . . the 'rule' so stated [by Blackburn J.] remained the law of the case for only two years. In the House of Lords . . . it was sharply limited, and placed upon a different footing."

¹⁷ Cp. Pollock, *The Law of Fraud in British India*, p. 53 (quoted by Thayer in (1916), 29 Harv. L. Rev. 801, at p. 804): "In every case of the kind which has been reported since *Rylands v. Fletcher*, that is, during the last 25 years, there has been a manifest inclination to discover something in the facts which took the case out of the rule". In this connection the oft-quoted remarks of Lindley L.J. should be noted, when he said in *Green v. Chelsea Waterworks Co.* (1894), 70 L.T. 547, at p. 549, that *Rylands v. Fletcher* was "not to be extended beyond the legitimate principle on which the House of Lords decided it. If it were extended as far as strict logic might require, it would be a very oppressive decision." But what is the "legitimate principle"?

¹⁸ [1955] 1 D.L.R. 62.

that the courts can do almost what they like. They can reject the strictness of the rule or accept it as they please. But this result would seem to be far removed from the intentions of Blackburn J. and from the intent of the rule which he stated to be the law.

This in fact is the central problem in the application of the *Rylands v. Fletcher* principle at the present time. Can the courts accept the rule and apply it as it was stated by Blackburn J. without stultifying other developments in the law of torts before and after that case? Or must they acknowledge that the rule in the form in which it was stated by Blackburn J. is harsh and unworkable, requiring modification in the light of modern needs and modern ideas on the subject of liability in tort? The suggestion will be made in this essay that in practice the way in which *Rylands v. Fletcher* is made to work is directly opposed to the ideas underlying the case as they were originally formulated by Blackburn J. That is not to be understood as a criticism of what the courts have been doing. Rather is the opposite suggestion intended. But the simple fact is that Blackburn J.'s views, which were out of step with the rest of the development in the law of torts in his day, are even more out of step with modern developments. Consequently his original principle is revealed even more clearly as an undesirable one.

II

It has already been suggested that Lord Cairns modified the original views of Blackburn J. in a manner which indicates a revulsion from their strictness. The introduction of the idea of "natural" and "non-natural" user of land was seized upon by the courts as a means of manipulating the principle in *Rylands v. Fletcher* more in accordance with the idea of fault liability. To go through all the cases is unnecessary; many of them have been referred to and discussed elsewhere. But from 1868 to the present day the courts have been juggling the idea of natural user. From their struggles certain basic notions emerge.

Thus the test of natural user is not whether the public will benefit from what the defendant is doing. Such an approach seems to have been introduced first by the Privy Council in *Rickards v. Lothian*.¹⁹ More recently, in the *Pride of Derby* case,²⁰ Denning

¹⁹ [1913] A.C. 263, at p. 280: "It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of land or such a use as is proper for the general benefit of the community".

²⁰ *Pride of Derby and Derbyshire Angling Association Ltd. v. British Celanese Ltd.*, [1953] Ch. 149, at p. 189.

L.J. gave it fresh impetus. But his remarks were impliedly dissented from by Evershed M.R., when he spoke of local authorities having no special immunity from the rule in *Rylands v. Fletcher*,²¹ and by Upjohn J. in the later decision of *Smeaton v. Ilford Corporation*,²² in which the carrying-on of sewage disposal, a most necessary public activity, was considered to be a non-natural use of land. In the same way the court in *J. Porter & Co. v. Bell*²³ held that the making of explosives, even though in the interests of the safety of the state, was not a natural way to use land.

Public benefit having been rejected in this way,²⁴ what other criterion can be found? It would seem that the courts have adopted the view, though they may not always have expressed it so explicitly, that the true test is "unreasonable user" or "extra-hazardous user". Thus, to have normal, household supplies of gas,²⁵ water²⁶ or electricity²⁷ on land is a natural use of the land. But to have large amounts for commercial or industrial purposes is a non-natural user.²⁸ And this is a distinction running through all the cases. If the true test is reasonableness, does this not suggest, as writers like Thayer and Prosser have indicated, that the *Rylands v. Fletcher* principle is only another variety of negligence liability?

Such a view has recently been denied by Professor Street,²⁹ who bases his denial on the speeches of the House of Lords in *Read v. Lyons & Co. Ltd.*³⁰ But this case does not really affect the general theory of *Rylands v. Fletcher*. It simply clarifies one or two points on the application of the rule. Where the *Rylands v. Fletcher* principle can be invoked it still leaves open for discussion

²¹ *Ibid.*, at p. 176.

²² [1954] Ch. 450.

²³ [1955] 1 D.L.R. 62. Cp. *Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co. Ltd.*, [1921] 2 A.C. 465, and the remarks made on it in *Read v. J. Lyons & Co. Ltd.*, [1947] A.C. 156.

²⁴ But note Lord Simon's favourable reference to the possible future importance of Lord Moulton's words in *Rickards v. Lothian*; *Read v. J. Lyons & Co. Ltd.*, [1947] A.C. 156, at p. 169.

²⁵ *Miller v. Addie & Sons' Collieries*, 1934 S.C. 150.

²⁶ *Rickards v. Lothian* (*supra*); *Peters v. Prince of Wales Theatre*, [1943] K.B. 73.

²⁷ *Collingwood v. Home & Colonial Stores*, [1936] 1 All E.R. 74; *Spicer v. Smee*, [1946] 1 All E.R. 489.

²⁸ Gas: *Northwestern Utilities v. London Guarantee & Accident Co.*, [1936] A.C. 108; water: *Western Engraving Co. v. Film Laboratories*, [1936] 1 All E.R. 106 (and see *A. Prosser & Son Ltd. v. Levy*, [1955] 1 W.L.R. 1224, discussed *post*); electricity: *Eastern & South African Telephone Co. v. Cape Town Tramways Co.*, [1902] A.C. 381.

²⁹ Law of Torts (1955) p. 257. ³⁰ [1947] A.C. 156.

whether the principle has any affinity with negligence. This question must now be considered.

In negligence it is not unreasonable *per se* to have large quantities of water, gas and the like on one's land.³¹ It is negligent, however, to fail to take reasonable care that they do not cause injury to others. But in *Rylands v. Fletcher* having such substances in such quantities on one's land is *per se* tortious,³² though liability will not result until damage has been caused to someone by their escape. Though in theory this may seem a big difference, in practice it is not, since in both forms of action liability is based on the fact that damage has been caused to the plaintiff by the defendant's conduct. But in cases under *Rylands v. Fletcher* (as opposed to negligence) the plaintiff will not have to prove that the defendant has failed to take reasonable care; the escape of the substance will be sufficient to ground an action. The distinction is not really great because, as has been pointed out,³³ the idea of *res ipsa loquitur* can often be invoked in negligence cases to show that there must have been negligence by someone in order for the injury to have occurred. Hence, in actions for negligence and under the principle of *Rylands v. Fletcher* alike, proof of certain facts will result in liability, without the necessity for proving negligence. But *res ipsa loquitur* is only a commodious way of stating the principles of inference upon which the courts will act, as the present writer has suggested elsewhere.³⁴ *Rylands v. Fletcher*, however, does not deal with the kinds of inferences which can be drawn or the correct way to draw them. It deals with liability—not proof. Hence there does appear to be a difference between negligence liability (even with the addition of the idea behind *res ipsa loquitur*) and *Rylands v. Fletcher* liability.

Two "fire" cases from Australia would seem at first sight to

³¹ But it may be that keeping such large quantities on one's land will be unreasonable in some circumstances, in which event the defendant will be guilty of *nuisance*: see Seavey, *Nuisance: Contributory Negligence and Other Mysteries* (1952), 65 Harv. L. Rev. 984, at p. 986. He here contrasts nuisance liability with *Rylands v. Fletcher* liability on the basis of the risk involved. But see the criticism of his opinion in Prosser, *op. cit.*, at pp. 173-175 and notes. The same criticism can be said to apply to a distinction between *Rylands v. Fletcher* liability and negligence liability based upon ideas of risk.

³² Since in fact *Rylands v. Fletcher* liability is very similar to nuisance, on which see the immediately preceding footnote and the references there cited.

³³ *E.g.*, by Thayer, *Liability Without Fault* (1916), 29 Harv. L. Rev. 801, at p. 807.

³⁴ Fridman, *The Myth of Res Ipsa Loquitur* (1954), 10 U. of Toronto L. J. 233; see also the recent case of *Moore v. R. Fox & Sons*, [1956] 2 W.L.R. 342, which seems to make the doctrine stricter in application than the present writer thought previously.

show how *Rylands v. Fletcher* liability may exist independently of negligence liability and *vice versa*. In *Hazelwood v. Webber*³⁵ the defendant had started "burning off" on his property at a time of year when bush fires can easily spread and cause damage to others. It was held by the High Court of Australia that, although the jury had negatived negligence by the defendant in doing what he did, *Rylands v. Fletcher* applied, because what the defendant had done amounted to a non-natural or unreasonable use of his land. The conclusion appears to be a little inconsistent. If the defendant had behaved unreasonably, even though without carelessness in his mode of operation, could it not have been said that he was negligent in that he had undertaken an unreasonable task which he should have foreseen was likely to cause harm? To the answer that, although he may have owed a duty to take extra care, he had not failed to take that care, it can be said, following some remarks in *Bolton v. Stone*,³⁶ that the mere doing of such a task at such a time with such foreknowledge of the risks involved was of itself a breach of the duty of care he owed to his neighbours. That is to say, the most reasonable thing for the defendant to have done was to have refrained from burning-off at that time of year. Where no risk was involved in the activity carried on—as in *Bolton v. Stone*—nothing unreasonable, in other words negligent, is done by carrying on with the activity. But where, as in *Hazelwood v. Webber*, the operation itself is risky, surely it could be argued that performing the operation was itself a negligent act.

In the other case, *Wise Bros. Pty. Ltd. v. Commissioner for Railways (N.S.W.)*,³⁷ the fire in question resulted from carrying on business as a miller. It was held by the High Court of Australia that such a business was a natural use of land; therefore *Rylands v. Fletcher* did not apply. But there had been negligence as a result of which the fire had started and spread, for which there was liability. Here again could it not be said that, although carrying on a flour mill was a natural use of land, carrying on a flour mill which was not properly equipped against the starting or spreading of fires was in fact non-natural, in the sense of unreasonable, because of the risks involved? Hence there could have been liability under *Rylands v. Fletcher* on that ground. In this respect it is

³⁵ (1934) 52 C.L.R. 268.

³⁶ [1951] A.C. 850, especially *per* Lord Radcliffe at pp. 868-869. See on this Payne, *The Tort of Negligence* (1953), 6 *Current Legal Problems* 236, at p. 248.

³⁷ (1947), 75 C.L.R. 52.

interesting to compare the recent English decision in *A. Prosser & Sons v. Levy*³⁸ (to be further discussed in a moment), in which *Rylands v. Fletcher* was applied—though the case could be said to be one of negligence, as will appear from what is to be said—where the danger did not stem from bringing water on the premises but in allowing the water system used to be in a dangerous state.

It is submitted, therefore, that some cases in which a rigid distinction has been drawn between negligence and *Rylands v. Fletcher* need not have proceeded along such lines. If this is conceded, then the distinction between the two kinds of liability becomes increasingly more difficult to maintain.

This nebulous distinction between the two is further revealed when the effects of an act of God or the act of a third party, a stranger over whom the defendant has no control, are considered. Here the courts have clearly laid down that an act of God, being unforeseeable by definition, results in no liability.³⁹ So far as the act of a stranger is concerned,⁴⁰ the courts have only recently reiterated the view that, unless the interference were foreseeable, and could have been guarded against by the taking of reasonable care, no liability will be imposed on a defendant whose collection of a dangerous substance, or a substance in such quantities that it is dangerous, has given rise to the opportunity for damage to result from the acts of the stranger.

In one of those cases, *A. Prosser and Sons v. Levy*,⁴¹ the English Court of Appeal could possibly be considered to have placed as much reliance upon negligence as a cause of action as upon *Rylands v. Fletcher*. There the action was brought for damage caused by water dripping from an unstopped tap. The tap should have been stopped, and was designed to prevent water from escaping from a wash basin, but it had been left turned on by an unknown party. In the circumstances there was liability because (1) there was an escape of a dangerous thing within the principle of *Rylands v. Fletcher*; (2) there was negligence in the form of a

³⁸ [1955] 1 W.L.R. 1224. See also *Balfour v. Barty-King*, [1956] 1 W.L.R. 779 (fire from use of blowlamp).

³⁹ *Nichols v. Marsland* (1875), L.R. 10 Ex. 255; *Carstairs v. Taylor* (1871), L.R. 6 Ex. 217; *Greenock Corporation v. Caledonian Rly.*, [1917] A.C. 556.

⁴⁰ Earlier cases which make this point are: *Box v. Jubb* (1879), 4 Ex. D. 76; *Rickards v. Lothian*, [1913] A.C. 263; *Northwestern Utilities v. London Guarantee and Accident Co.*, [1936] A.C. 108; *Shiffman v. Order of St. John*, [1936] 1 All E.R. 557; *Hale v. Jennings Bros.*, [1938] 1 All E.R. 579.

⁴¹ [1955] 1 W.L.R. 1224.

breach of the duty of care owed by the defendants as owners of the building to the plaintiffs as tenants of the ground floor. Reading the judgment of Singleton L.J., who spoke for the whole court, it is not very difficult to see the close connection in his mind between negligence as evidencing a lack of consent on the part of the plaintiffs to the dangers involved in allowing water on the premises and negligence as giving rise to a cause of action independent of *Rylands v. Fletcher* liability.

This connection is even more marked in the judgment of Jenkins L.J. in *Perry v. Kendrick's Transport Ltd.*⁴² Here the action was for personal injuries caused to the plaintiff when an explosion resulted from some boys' playing with a disused coach which had been left by the defendants on their land. It was held that there was no liability under the principle of *Rylands v. Fletcher* because the "escape" had been caused by the interference of third parties and the defendants had not been negligent in respect of the intervening activity. A number of interesting features of *Rylands v. Fletcher* liability were discussed; but for present purposes the most important is the suggestion by Jenkins L.J.⁴³ that in cases involving interference a claim in *Rylands v. Fletcher* could be said to merge with a claim for negligence.

The result seems to be, therefore, that the courts in England at any rate are not making a very sharp distinction between so-called "strict" liability in *Rylands v. Fletcher* and liability based upon fault, which can be taken here to mean negligence. This is borne out by a consideration of some of the other remarks in *Perry v. Kendrick's Transport Ltd.* referring to liability under *Rylands v. Fletcher* for personal injuries.

In *Read v. Lyons & Co. Ltd.*⁴⁴ Lord Macmillan suggested that negligence must be proved in actions for personal injuries. That is to say, he considered that the principle in *Rylands v. Fletcher* (and presumably also liability in nuisance) would not extend to claims for personal injuries. But it has been argued⁴⁵ that to restrict *Rylands v. Fletcher* in this way would be unreasonable; and there are dicta,⁴⁶ and at least one decision,⁴⁷ which make *Rylands v.*

⁴² [1956] 1 W.L.R. 85.

⁴³ *Ibid.*, at p. 91.

⁴⁴ [1947] A.C. 156, at p. 170.

⁴⁵ Tylor, *The Restriction of Strict Liability* (1947), 10 Mod. L. Rev. 398.

⁴⁶ *Wing v. L.G.O. Co.*, [1909] 2 K.B. 652, *per* Fletcher-Moulton L.J. at p. 665; *Miles v. Forest Rock Gravel Co.* (1918), 34 T.L.R. 500, *per* Swinfen Eady M.R.

⁴⁷ *Hale v. Jennings Bros.*, [1938] 1 All E.R. 579. And see *Shiffman v. Order of St. John*, [1936] 1 All E.R. 557.

Fletcher liability appropriate to actions for personal injuries. The *Perry* case also supports this view. It is far from reliable as an authority on the point, however, for Singleton L.J. seems to have assumed that *Rylands v. Fletcher* liability would have been involved if the facts had otherwise justified it, Jenkins L.J. did not even consider the question, and Parker L.J. regarded the issue as concluded so far as the Court of Appeal is concerned. But it would appear that there is a tendency in the courts to accept *Rylands v. Fletcher* as applicable to personal injuries. What becomes of Lord Macmillan's dictum in *Read v. Lyons*? Either it must be regarded as incorrect, at least so far as courts below the House of Lords are concerned, or else it must be read in the light of the suggestion that *Rylands v. Fletcher* liability is in fact a variety of negligence liability. The latter approach is put forward as a more reasonable way of interpreting the dictum because the rest of the House of Lords do not seem to have barred the way to the application of *Rylands v. Fletcher* to personal injuries. Moreover, such an interpretation would accord with the way in which the law of trespass has been interpreted in personal-injury cases.⁴⁸ It is therefore true to say that negligence is essential in an action for personal injuries (in the absence of proof of intention, it must be added); but this does not rule out *Rylands v. Fletcher*, or trespass, or nuisance. For in all three actions what the plaintiff must prove is unreasonable conduct on the part of the defendant, that is, conduct which carries with it an unreasonable amount of risk to the plaintiff.⁴⁹

Where only interference with the use of land is involved, then it may be that "negligence" is irrelevant. But even in cases of trespass to land there would seem to be authority for the proposition that a reasonable use of the plaintiff's land (for example, for the purpose of passing an obstruction on the highway) may not amount to a trespass;⁵⁰ while in nuisance the frequent use of the term "unreasonable" to describe what the defendant was doing in or on his property seems to indicate that, so far as that tort is concerned, the courts pay some regard to the blameworthiness of the defendant's actions and do not decide the question of nuis-

⁴⁸ See e.g., *Stanley v. Powell*, [1891] 1 Q.B. 86; *Walmesley v. Hume-nick*, [1954] 2 D.L.R. 232; *Hollebone v. Barnard*, [1954] 2 D.L.R. 278.

⁴⁹ So far as nuisance is concerned, see *Bamford v. Turnley* (1862), 3 B. & S. 66, and cp. Fridman, *Motive in the English Law of Nuisance* (1954), 40 *Virg. L. Rev.* 583, and Fridman, *Nuisance and the Reasonable Milkman* (1955), 29 *Aust. L.J.* 435.

⁵⁰ See *National Coal Board v. Evans*, [1951] 2 K.B. 861. Cp. *Esso Petroleum Co. v. Southport Corporation*, [1955] 3 All E.R. at p. 873.

ance simply on whether the defendant by his conduct has interfered with the plaintiff's comfortable enjoyment of his land.⁵¹

The similarity between such an approach in the law of nuisance and the use of the term "reasonable" to decide whether the defendant has been making a natural or non-natural use of his land for the purposes of *Rylands v. Fletcher* liability has been pointed out before by other writers and requires no further comment.⁵² Clearly, therefore, even where injuries to or in connection with the enjoyment of land are concerned, there is something to be said for the idea that the law is paying more attention to the fault underlying the defendant's behaviour and is not deciding cases by the application of "strict" rules of liability. Even if *Rylands v. Fletcher* liability is therefore confined to injuries to land, there is strong support for the proposition that it is akin to liability for negligence. It is certainly accepted that *Rylands v. Fletcher* liability is often intermingled with or akin to liability for nuisance.⁵³ If these inter-relations are accepted, and *Rylands v. Fletcher* liability is not so distinct in modern law, but is often very much like other forms of liability which also include or are forms of negligence liability, what can be said of Ames' comment on the "safe fold" into which Blackburn J. guided some previous cases? Whatever may have been said then, it must now be conceded that the barriers between these various kinds of torts are fast vanishing. What need is there, therefore, for a separate rule in *Rylands v. Fletcher*?

⁵¹ See footnote 50 *ante*. Cp. Prosser, *op. cit.*, p. 171. See also cases of nuisance on or to the highway, such as *Trevett v. Lee*, [1955] 1 All E.R. 406; *Everitt v. Martin*, [1953] N.Z.L.R. 298. Cp. *Mussett v. Reitman's Ltd.*, [1955] 3 D.L.R. 780.

⁵² See Goodhart, *Essays in Jurisprudence and the Common Law* (1937) Chap. 8.

⁵³ See *St. Anne's Well Brewery v. Roberts* (1928), 140 L.T. 1; *Noble v. Harrison*, [1926] 2 K.B. 332; *Attorney-General v. Corke*, [1933] Ch. 89; *Hoare v. MacAlpine*, [1923] 1 Ch. 167; *Barrette v. Franki Compressed Pile Co. of Canada Ltd.*, [1955] 2 D.L.R. 665. Cp. also Prosser's discussion of *Rylands v. Fletcher* and "absolute nuisance", *op. cit.*, pp. 164-177. See also Winfield's distinctions between nuisance and *Rylands v. Fletcher*, set out in his *Textbook of the Law of Tort* (6th ed.) pp. 606-607, and Professor Street's comments on them, *Law of Torts* (1955) pp. 270-271.