# Rylands v Fletcher into Negligence: Burnie Port Authority v General Jones Pty Ltd

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Since 1866, the rule in *Rylands* v *Fletcher*[1] has been used to impose liability on an owner or occupier of land for damage caused by the escape of a dangerous thing from the land, regardless of whether or not the owner or occupier was negligent.

The nature, history and justification of the rule in *Rylands* v *Fletcher* have long been controversial.[2] Is it a distinct tort or a species of nuisance?[3] Is it the harbinger of a new general rule of strict liability for dangerous activities[4] or a relic of a medieval conception of liability given brief renewal through hostility to industrial enterprise?[5]

In Australia, these questions will trouble us no longer, for in *Burnie Port Authority* v *General Jones Pty Ltd*[6] the majority Justices of the High Court[7] have held that the rule in *Rylands* v *Fletcher* should be seen as absorbed by the principles of ordinary negligence.

According to the majority, the rule in *Rylands* v *Fletcher* has become so qualified and the principles of the law of negligence have developed to such an extent that negligence will now confer a remedy in practically all cases of liability under the rule in *Rylands* v *Fletcher*.

In negligence, according to the majority, an owner or occupier who authorises or allows an independent contractor to introduce a dangerous substance or undertake a dangerous activity on the premises is under a non-delegable duty in favour of a person lawfully[8] outside the premises to ensure that the contractor uses reasonable care.[9] Further, the majority

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1 (1866) LR 1 Ex 265; affirmed (1868) LR 3 HL 330.

2 For further discussion of the doctrinal and historical origins of the rule in *Rylands* v *Fletcher* see *Benning* v *Wong* (1969) 122 CLR 249 (Windeyer J); see also R P Balkin and J L R Davis, *The Law of Torts* (1991) 495–7; R W M Dias and B S Markesinis, *Tort Law* (2nd ed, 1989) 344–6; R F V Heuston and R A Buckley, *Salmond & Heuston on the Law of Torts* (20th ed, 1992) 315–19; A W B Simpson, 'Legal Liability for Bursting Reservoirs: The Historical Context of *Rylands* v *Fletcher*' (1984) *Journal of Legal Studies* 209; F A Trindade and P Cane, *The Law of Torts in Australia* (2nd ed, 1993) 630–1.

3 See *Benning* v *Wong* (1969) 122 CLR 249 per Windeyer J; also Balkin and Davis, op cit (fn 2) 514–15.

4 The concept of a general doctrine of absolute liability for dangerous operations was rejected by the House of Lords in *Read* v *J Lyons & Co Ltd* [1947] AC 156.

5 Cf G W Keeton, *Elementary Principles of Jurisprudence* (2nd ed, 1961) 390, with W Holdsworth, *History of English Law* (2nd ed, 1937) Vol VIII, 469–72.

6 (1994) 120 ALR 42 (hereafter '*Burnie Port Authority*').

7 Mason CJ, Deane, Dawson, Toohey and Gaudron JJ (hereafter referred to as the majority). Brennan and McHugh JJ gave separate dissenting judgments.

8 The majority stated that the qualification was to 'reserve the position of, rather than to exclude, the unlawful plaintiff': *Burnie Port Authority* (1994) 120 ALR 42, 67

9 The majority stated that ordinary reasoning would suggest that the duty of care owed to a lawful visitor on the premises was 'likewise a non-delegable one': ibid.

affirmed that the danger involved in such circumstances will heighten the degree of care which is reasonable.

This writer agrees with the majority that the rule in *Rylands* v *Fletcher* is able to be accommodated within the principles of ordinary negligence without denying liability where it would otherwise exist. The new category of non-delegable duty of care is not without difficulty, particularly in determining what is a dangerous activity or substance so as to impose a non-delegable duty of care. However the majority decision should at least provide greater guidance for determining liability than did the requirements of the rule in *Rylands* v *Fletcher*.

## THE CASE

### Background

General Jones Pty Ltd ('General') stored frozen vegetables in coolrooms owned by the appellant, the Burnie Port Authority ('the Authority'). An independent contractor engaged by the Authority caused a fire on the premises by carrying out unguarded welding operations in close vicinity to stacked cardboard cartons of an insulating material called Isolite. (Isolite burns with 'extraordinary ferocity' if set alight through sustained contact with a flame.) The fire spread to the coolrooms and damaged General's frozen vegetables.

The trial judge held that the independent contractor was negligent and that the Authority was liable for damage caused as an occupier from whose premises fire has escaped (the *ignis suus* rule). On appeal, the Full Court of the Supreme Court of Tasmania held the Authority liable under the rule in *Rylands* v *Fletcher*. The High Court considered liability under *ignis suus*, *Rylands* v *Fletcher* and negligence. The majority found the Authority liable under the principles of negligence.

### The *Ignis Suus* Rule

All of the High Court Justices[10] confirmed that, in accordance with previous decisions of the Court,[11] in Australian law, the *ignis suus* rule has been 'absorbed into, and qualified by, more general rules or principles'.[12]

[10] Id 45–50 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ, 71–5 per Brennan J, 86–8 per McHugh J.

[11] *Whinfield* v *Lands Purchase & Management Board of Victoria and State Rivers & Water Supply Commission of Victoria* (1914) 18 CLR 606; *Hazelwood* v *Webber* (1934) 52 CLR 268; *Wise Bros Pty Ltd* v *Commissioner for Railways (NSW)* (1947) 75 CLR 59; *Hargrave* v *Goldman* (1963) 110 CLR 40.

[12] *Burnie Port Authority* (1994) 120 ALR 42, 47.

### *Rylands* v *Fletcher*

In considering *Rylands* v *Fletcher*, the High Court Justices began with the statement by Blackburn J in the Court of Exchequer Chamber:

> 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. 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 general rule, as above stated, seems on principle just.[13]

The majority then proceeded with the following arguments:

(i) The rule stated by Blackburn J had been overlaid with qualifications and alterations.[14] In particular, Lord Cairns in the House of Lords had converted Blackburn J's reference to a mischievous thing 'not naturally there' to a requirement of 'non-natural use'.[15]

(ii) Judicial alterations and qualifications had introduced uncertainty about the content and application of the rule.[16] 'Critical obscurity' resided in the requirements of 'dangerous substance' and 'non-natural use'.[17] As illustration, the majority noted that

> the introduction to or retention on land of trees, water, gas, electricity, fire and high explosives, amongst other things, have all been seen, as a result of the application of the test [of non-natural use] to the particular circumstances, as both attracting and not attracting the operation of the rule in *Rylands v Fletcher*.[18]

The majority referred to apparently conflicting statements by the House of Lords in *Read* v *J Lyons & Co Ltd*[19] and the High Court in *Hazelwood* v *Webber*,[20] and concluded that the 'question whether there has been a non-natural use in a particular case is a mixed question of fact and law'.[21]

The majority were unable to extract any principles from the decided cases for determining whether the requirements of 'something which is dangerous' and 'non-natural use' under the rule in *Rylands* v *Fletcher* had been satisfied.[22]

(iii) The subsequent qualifications and alterations had 'weakened and

[13] *Fletcher* v *Rylands* (1866) LR 1 Ex 265, 279–80.
[14] *Burnie Port Authority* (1994) 120 ALR 42, 51–2.
[15] Id 52; see also F H Newark, 'Non-Natural User and Rylands v Fletcher' (1961) 24 MLR 557.
[16] *Burnie Port Authority* (1994) 120 ALR 42, 51–4.
[17] Id 52; cf 78 per Brennan J, 89 per McHugh J.
[18] Id 57.
[19] [1947] AC 169.
[20] (1934) 52 CLR 268.
[21] *Burnie Port Authority* (1994) 120 ALR 42, 54; cf 77–8 per Brennan J, 91 per McHugh J.
[22] Id 54.

confined' the scope of the rule in *Rylands* v *Fletcher* from within.[23] For example, the majority in the House of Lords in *Read* v *J Lyons & Co Ltd* could indicate that 'the use of land for the obviously dangerous activity of manufacturing high-explosive shells may have been outside the scope of the rule'.

(iv) Ordinary negligence had 'progressively assumed dominion' in the general territory.[24] The majority noted that the rule in *Rylands* v *Fletcher* was decided some seventeen years before Lord Esher in *Heaven* v *Pender*[25] formulated foreseeability as a 'larger' proposition in the law of negligence, thereby beginning the 'coherent jurisprudence of common law negligence'.[26]

(v) The majority again explained the utility of the concept of proximity developed by the Court in recent cases.[27] Although not a complete criterion of liability in a particular case, proximity was a 'unifying theme and central conceptual determinant' of the categories of case in which the law of negligence recognised a duty to take reasonable care.[28]

(vi) The rule in *Rylands* v *Fletcher* had been 'increasingly qualified and adjusted to reflect basic aspects of the law of ordinary negligence'.[29]

The majority gave three illustrations of this trend. The requirements that the defendant know the thing which causes harm 'to be mischievous' and that damage be the 'natural' consequence of the escape had been refined to a 'close equivalent of foreseeability of damage of the relevant kind' in ordinary negligence.[30] The absence of reasonable care might intrude as a factor in determining whether a use of land was non-natural.[31] The various defences against liability under *Rylands* v *Fletcher* closely corresponded 'with the grounds of denial of fault of liability under the law of negligence'.[32]

(vii) Any case of *Rylands* v *Fletcher* circumstances would now fall within a category of case in which a relationship of proximity would exist between the parties under ordinary negligence principles.[33]

(viii) It was unlikely that liability would not exist under the principles of ordinary negligence where liability would exist under the rule in

[23] Ibid.
[24] Id 54–5.
[25] (1883) 11 QBD 503.
[26] *Burnie Port Authority* (1994) 120 ALR 42, 55. It might also be noted that, at the time *Rylands* v *Fletcher* was decided, no liability for negligence of an independent contractor was accepted, with *Bower* v *Peate* (1876) 1 QBD 321 the first inroad on this principle: Dias and Markesinis, op cit (fn 2) 344.
[27] *Jaensch* v *Coffey* (1984) 155 CLR 549; *Sutherland Shire Council* v *Heyman* (1985) 157 CLR 424; *Stevens* v *Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *Cook* v *Cook* (1986) 162 CLR 376.
[28] *Burnie Port Authority* (1994) 120 ALR 42, 56.
[29] Id 58; cf 92–3 per McHugh J.
[30] Id 58–9; cf 93 per McHugh J.
[31] Id 58, also 53; cf 92 per McHugh J.
[32] Id 58; cf 93 per McHugh J.
[33] Id 59.

*Rylands* v *Fletcher*.[34] The majority distinguished the few cases in which *Rylands* v *Fletcher* liability was found to exist, notwithstanding a finding of no negligence, as lacking validity under modern principles of negligence.[35]

(ix) Any remaining perceived 'theoretical contrast' between the rule in *Rylands* v *Fletcher* and ordinary negligence was answered by two further concepts:
   (a) a non-delegable duty of care, being the personal duty of an owner or occupier to 'ensure care is taken'; and
   (b) a variable standard of care, under which the magnitude of danger may heighten the degree of care exacted.[36]

The majority concluded that the rule in *Rylands* v *Fletcher* should be seen as absorbed by the principles of ordinary negligence.[37] The conclusion was subject to the qualification that in some cases a defendant's liability in a *Rylands* v *Fletcher* situation might preferably lie in nuisance or trespass rather than negligence.[38]

On the facts of the present case the combination of carrying out welding activities in premises in which cardboard containers of Isolite were stacked was a dangerous activity. It was reasonably foreseeable that, unless special precautions were taken, sparks or molten metal might fall upon one of the containers and set the cardboard alight. In these circumstances the majority held that Authority owed to General a non-delegable duty of care which extended to ensuring that the Authority's independent contractor took reasonable care to prevent the Isolite from being set alight as a result of the welding activities. The independent contractor did not take such care and hence the Authority was liable to General in negligence.[39]

### Minority Judgments

Brennan and McHugh JJ, in separate judgments, dissented, holding that *Rylands* v *Fletcher* remained a distinct tort and the Authority was not liable under it or in negligence. Their Honours specifically did not accept propositions (ii)[40] and (viii)[41] of the majority. McHugh J did not accept proposition (vi).[42]

Both Brennan and McHugh JJ indicated a fundamental concern that absorbing *Rylands* v *Fletcher* into negligence would, in the words of Brennan J, 'be to depreciate the duty which *Rylands v Fletcher* imposes on the occupiers of land and premises and correspondingly to diminish the security which that

[34] Id 65, also 61 and 67.
[35] Id 65–7; cf 77–8 per Brennan J, 93–4 per McHugh J.
[36] Id 61. The majority referred to the article by Professor E R Thayer, 'Liability without Fault' (1916) 29 *Harv LR* 801.
[37] *Burnie Port Authority* (1994) 120 ALR 42, 67.
[38] Id 66–7.
[39] Id 69; cf 79–80 and 85 per Brennan J, 96–7 per McHugh J.
[40] See text accompanying fns 16–22 supra.
[41] See text accompanying fns 34–5 supra.
[42] See text accompanying fns 29–32 supra.

rule confers on their neighbours.'[43] McHugh J also indicated concern about the legitimate exercise of the Court's law-making function.[44]

## SHOULD *RYLANDS* v *FLETCHER* BE ABSORBED INTO NEGLIGENCE?

There can be no doubt that the Court has authority to make changes to legal doctrine if it finds that one area of law has been surpassed by the evolution of another.[45] The rule in *Rylands* v *Fletcher* was itself a creative judicial development drawn from a number of discrete, ancient rules relating to escaping cattle, fires and filth.[46] Such developments are desirable if there is no radical change in the circumstances in which liability is imposed and the new principles are tolerably clear, or at least clearer than the earlier law.

In the view of this writer, there is much force in the majority's criticism that the rule in *Rylands* v *Fletcher* was uncertain and difficult to apply.[47]

The minority judgments differed from the majority in considering that what amounted to non-natural use under the rule in *Rylands* v *Fletcher* was a question of law. The minority contrasted breach of duty in negligence which is a question of fact. With respect to the minority, this difference does not seem a significant reason for maintaining the rule in *Rylands* v *Fletcher* as a distinct tort.[48] The distinction between questions of fact and questions of law is more relevant in a jury trial; jury trials in tort are increasingly less frequent. Even in a jury trial, in negligence the judge retains the control over the jury that a question of law provides through determining the standard of care as a question of law.[49]

The critical difference, in theory, between the rule in *Rylands* v *Fletcher* and the law of negligence is that *Rylands* v *Fletcher* is said to impose strict liability while liability under negligence is based on fault.[50]

However, many academic commentators share the majority's opinion[51] that the rule in *Rylands* v *Fletcher* has been qualified to 'reflect aspects of the law of ordinary negligence'.[52] The process has continued to the present day in

[43] *Burnie Port Authority* (1994) 120 ALR 42, 77–8; see also 94–5 per McHugh J.
[44] Id 95.
[45] McHugh J did not suggest that the Court should never alter the law: ibid.
[46] *Fletcher* v *Rylands* (1866) LR 1 Ex 265, 279–80; see also Dias and Markesinis, op cit (fn 2) 344; cf Heuston and Buckley, op cit (fn 2) 315–16.
[47] Point (ii) in text accompanying fn 16 supra.
[48] See text accompanying fn 21 supra.
[49] Balkin and Davis, op cit (fn 2) 287–9; Trindade and Cane, op cit (fn 2) 433–4.
[50] *Burnie Port Authority* (1994) 120 ALR 42, 61 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ, 78 per Brennan J, 94 per McHugh J.
[51] Point (vi) in text accompanying fns 29–32 supra.
[52] *Burnie Port Authority* (1994) 120 ALR 42, 61. The majority cited J A Jolowicz, T E Lewis and D M Harris, *Winfield and Jolowicz on Tort* (9th ed, 1971) 388, 390; W V H Rogers, *Winfield and Jolowicz on Tort* (13th ed, 1989) 443. See also J G Fleming, *The Law of Torts* (8th, 1992) 336; Thayer, op cit (fn 36); Trindade and Cane, op cit (fn 2) 644; cf Heuston and Buckley, op cit (fn 2) 318–19.

England. In *Cambridge Water Co* v *Eastern Counties Leather PLC*[53] (decided just before *Burnie Port Authority*) the House of Lords affirmed that 'foreseeability of damage of the relevant type should be regarded as a prerequisite of liability in damages under the rule' in *Rylands* v *Fletcher*.[54] This corresponds with the test of remoteness under the law of negligence.[55]

Comparison with the Roman-based law of South Africa and Scotland is instructive in showing how a fault-based regime can adequately address the issues raised by cases like *Rylands* v *Fletcher*. These jurisdictions have not generally relied on the rule in *Rylands* v *Fletcher*. Liability remains dependent on notions of *culpa* (fault)[56] but similar results to the rule in *Rylands* v *Fletcher* are achieved in such circumstances through a ready presumption of fault on the happening of escape and damage, a high standard of care[57] and personal liability of an owner or occupier for damage caused by an independent contractor.[58]

The majority's development of the principles of negligence shows similar tendencies.[59] The principles stated by the majority bring fault-based liability for damage caused by a dangerous use of premises very close to strict liability.

### High Standard of Care

The principle that the degree of care exacted in the circumstances of a particular case will vary according to the risk involved is well established.[60] The majority did not need to explore the principle in this case because the parties to the appeal did not dispute the finding that the independent contractor was negligent. The scope of the principle is important. If strict *Rylands* v *Fletcher* liability is to be successfully accommodated within negligence, the principles of negligence must be able to impose liability in *Rylands* v *Fletcher* circumstances where there has been no negligence in the sense applicable to 'non-dangerous' activities. Such a possibility is indicated in the majority's statement that in *Rylands* v *Fletcher* circumstances, depending on the danger

[53] [1994] 2 WLR 53, referred to in a footnote in the majority judgment: *Burnie Port Authority* (1994) 120 ALR 42, 52 and 58.

[54] *Cambridge Water Co* v *Eastern Counties Leather PLC* [1994] 2 WLR 53, 80 per Lord Goff, with whom the other Law Lords agreed. See further M Davies, 'Strict Liability and Foreseeability: Cambridge Water Co v The Eastern Counties Leather' (1994) 2 *Torts Law Journal* 12.

[55] *Burnie Port Authority* (1994) 120 ALR 42, 52, 58 and 59.

[56] D M Walker, *The Law of Delict in Scotland* (2nd ed, 1981) 981; R G McKerron, *The Law of Delict* (6th ed, 1965) 232; cf *Eastern & South African Telegraph Co* v *Cape Town Tramways* [1902] AC 381, 393–4.

[57] F H Lawson and B S Markesinis, *Tortious Liability for Unintentional Harm in the Common Law and the Civil Law* (1982) Vol I, 143; J C MacIntosh and C Norman Scoble, *Negligence in Delict* (5th ed, 1970) 215–20; McKerron, op cit (fn 56) 232–5; Walker, op cit (fn 56) 975–89.

[58] MacIntosh and Norman Scoble, op cit (fn 57) 218; McKerron, op cit (fn 56) 97–8; Walker, op cit (fn 56) 155–63, 988. Both jurisdictions appear to accept the 'ultra-hazardous' activities doctrine referred to in the text accompanying fn 87 infra.

[59] Point (ix) in text accompanying fn 36 supra.

[60] See *Wyong Shire Council* v *Shirt* (1980) 146 CLR 40.

involved, the standard of reasonable care may involve 'a degree of diligence so stringent as to amount practically to a guarantee of safety'.[61]

A practical 'guarantee of safety' is almost a standard of strict liability. In application they may be the same. Under a heightened standard of care, a court may demand that the reasonable precautions accompanying a dangerous use of land be extensive. If damage occurs it may be easy to find that sufficient precautions were not taken. It may even be that if an activity involves a high degree of risk even though extensive precautions are taken, negligence will lie in carrying out the activity in proximity to persons or property who or which are exposed to the risk.

Demanding such a stringent degree of diligence might be criticised as depriving the concept of reasonable care of meaning.[62] However it is surely entirely reasonable and in accordance with community expectations to require those who undertake a dangerous activity or use a dangerous substance to use a commensurate degree of care.

### Non-delegable Duty of Care

The non-delegable duty of care identified by the majority in *Rylands* v *Fletcher* circumstances similarly imposes a 'stringent'[63] duty on an owner or occupier who authorises or allows a dangerous use of land.[64]

An 'ordinary' duty of reasonable care would normally be satisfied by employing a 'qualified and ostensibly competent independent contractor'[65] to perform a lawful[66] task.[67] An employer would rarely be required to supervise the work of the independent contractor.[68] An independent contractor is normally employed to perform independently a skilled task at which the employer may lack expertise. Even in the rare case only reasonable care in supervision would be required.

A non-delegable duty of care, the majority explained, would not be satisfied merely by care in selecting an independent contractor. The non-delegable duty was a 'duty to ensure that reasonable care is taken'.[69] It follows that if the independent contractor is negligent then the employer will have breached his or her non-delegable duty of care because the employer will have failed to

[61] *Burnie Port Authority* (1994) 120 ALR 42, 65 citing *Donoghue* v *Stevenson* [1932] AC 562, 612 per Lord Macmillan; *Adelaide Chemical and Fertiliser Co Ltd* v *Carlisle* (1940) 64 CLR 514, 523 per Starke J; *Stevens* v *Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 30, 42.

[62] Heuston and Buckley, op cit (fn 2) 319.

[63] *Burnie Port Authority* (1994) 120 ALR 42, 62; cf 81–4 per Brennan J, who stressed that the duty of care of an employer in such circumstances was a duty to take reasonable care to avoid the injurious consequences of the authorised act.

[64] See further J A Jolowicz, 'Liability for Independent Contractors in the English Common Law' (1957) 9 *Stanford Law Review* 690; Trindade and Cane, op cit (fn 2) 713–14; G Williams, 'Liability for Independent Contractors' [1956] CLJ 180.

[65] *Burnie Port Authority* (1994) 120 ALR 42, 62.

[66] An employer who authorises the commission of a tort will be liable along with the independent contractor: see further id 81 per Brennan J; also Dias and Markesinis, op cit (fn 2) 397.

[67] *Kondis* v *State Transport Authority* (1984) 154 CLR 672, 678–9 per Mason J.

[68] Id 680.

[69] *Burnie Port Authority* (1994) 120 ALR 42, 62.

ensure that care is taken. There is no room for inquiry into the care personally exercised by the employer. The employer's liability resembles vicarious liability in that it turns on negligence of another person.[70]

The concept has been criticised[71] but in Australian law a number of categories of case of non-delegable duty have been authoritively established.[72] In this case, the majority imposed a new category of non-delegable duty of care. The majority argument can be criticised in the reasons given for this development.

The established categories of cases of non-delegable duty include employer and employee (in relation to a safe system of work), school and principal, hospital and patient and (arguably) occupier and invitee.[73] In the established categories of case, according to the majority, there was a 'central element of control' on the part of the person on whom the duty was imposed.[74] From the perspective of the person to whom the duty is owed, the relationship of proximity between the parties was marked by 'special dependence or vulnerability'.[75]

The majority considered that these features also characterised the relationship of proximity which would exist in *Rylands* v *Fletcher* circumstances. Their Honours explained that in a case where a person took advantage of the control of premises to introduce a dangerous substance or undertake a dangerous activity, a person outside the premises was 'specially dependent' upon the person in control of the premises to ensure that reasonable precautions were taken in relation to the dangerous use of the premises. The person outside the premises commonly would 'have neither the right nor the opportunity to exercise control over, or even to have the foreknowledge of, what is done or allowed by the other party within the premises'.[76] The common features suggested that the duty of care in *Rylands* v *Fletcher* circumstances was non-delegable.

The majority discussed the issue in terms of the 'relationship of proximity' between the parties. The usefulness of the concept of proximity, although repeatedly affirmed by the High Court (including in this case),[77] has been controversial.[78] With respect, the concept of proximity adds little to the analysis in this case, except as a reminder to examine the relationship between the parties. The concept of proximity does not identify the important common features of control and dependence in the relationship between the parties in the established categories of case. It was analogy with those features which, in the opinion of the majority, supported there being a non-delegable duty of care in *Rylands* v *Fletcher* circumstances.

[70] P S Atiyah, *Vicarious Liability in the Law of Torts* (1967) 5.
[71] Williams, op cit (fn 64) 193; cf Jolowicz, op cit (fn 64).
[72] *Kondis* v *State Transport Authority* (1984) 154 CLR 672.
[73] *Burnie Port Authority* (1994) 120 ALR 42, 62.
[74] The majority drew on the judgment of Mason J in *Kondis* v *State Transport Authority* (1984) 154 CLR 672, 679–87.
[75] *Burnie Port Authority* (1994) 120 ALR 42, 62.
[76] Id 63.
[77] See point (v) in text accompanying fns 27–8 supra.
[78] See, eg, the judgment of Brennan J in *San Sebastian Pty Ltd* v *Minister Administering the Environmental Planning and Assessment Act 1979* (1986) 162 CLR 340, 368–9.

The majority stated that reasoning by analogy did not compel the conclusion that the duty of care in *Rylands* v *Fletcher* circumstances was non-delegable.[79] This must be correct. Having identified common features between the category of cases, the majority still had to decide how much significance the similarities should be given. The relationship of proximity between the parties in many categories of case may contain elements of control and dependence. What degree of control is sufficient to impose a non-delegable duty? There are also differences between the established categories of cases and the *Rylands* v *Fletcher* category of cases. The kind of relationship in the established categories was described by Deane J in *Jaensch* v *Coffey* as 'circumstantial proximity'.[80] The relationship between an owner or occupier and a person outside the premises arises from location and might be described as one of 'physical proximity'.[81] When are the common features more significant than the differences between categories of cases?

Some further special factor must therefore be present. According to the majority, it was fair and useful to impose a non-delegable duty on an owner or occupier of land in *Rylands* v *Fletcher* circumstances.[82] Relevant considerations included first the employer's role in authorising or allowing the dangerous use of premises and second the ability of the employer to exercise care in selecting a contractor, to insist upon care being taken and to bear the financial risk of damage.

The second of these considerations is not entirely convincing. It is not necessary to impose a non-delegable duty of care to encourage employers to take care in selecting an independent contractor. As noted above, an ordinary duty of reasonable care requires such care. An independent contractor may be a better person than the employer to ensure that care is taken because the contractor will be directly in control and more skilled as regards the activity. The only practical reason for the plaintiff to seek to impose liability on the employer is where the independent contractor is unable to pay the damages.[83] That of itself cannot be a justification for imposing a non-delegable duty on an employer.

That leaves the fact that the owner or occupier of land has authorised or allowed a dangerous use of land by the independent contractor. The majority found support for a non-delegable duty in *Rylands* v *Fletcher* circumstances in earlier authorities on the escape of fire.[84]

Their Honours did not refer to the more recent High Court decisions in *Stoneman* v *Lyons*[85] and *Stevens* v *Brodribb Sawmilling Co Pty Ltd.*[86] As Brennan J noted, these cases rejected the so-called 'extra-hazardous acts'

[79] *Burnie Port Authority* (1994) 120 ALR 42, 63.
[80] (1985) 155 CLR 549, 584–5.
[81] Ibid.
[82] *Burnie Port Authority* (1994) 120 ALR 42, 63; see also Atiyah, op cit (fn 70) 333–6; Jolowicz, op cit (fn 64); Thayer, op cit (fn 36), referred to by the majority.
[83] Williams, op cit (fn 64) 195.
[84] *Burnie Port Authority* (1994) 120 ALR 42, 63. The majority referred to decisions in *Black* v *Christchurch Finance Co Ltd* (1894) AC 48, *McInnes* v *Wardle* (1931) 45 CLR 548 and dicta by Dixon J in *Torette House Pty Ltd* v *Berkman* (1940) 62 CLR 637, 655.
[85] (1975) 133 CLR 550.
[86] (1985) 160 CLR 16.

doctrine that an employer was liable for the negligence of an independent contractor on the basis that the contractor was engaged to perform 'extra-hazardous' activities.[87]

The distinction between the rejected extra-hazardous acts doctrine and the non-delegable duty in *Rylands* v *Fletcher* circumstances is not clear. Both impose a personal duty[88] on an employer by reason of a particularly dangerous activity undertaken, which duty is breached if the independent contractor is negligent.

The doctrine of extra-hazardous acts was described in the earlier cases as an instance of 'strict liability'.[89] By contrast, the majority described the non-delegable duty as a duty of care, of a 'special and "more stringent" kind'.[90] This difference in description does not amount to a difference in substance. As discussed, liability under a non-delegable duty is dependent on fault in theory only.

If the majority did not recognise a non-delegable duty of care in *Rylands* v *Fletcher* circumstances, then absorbing the rule into negligence would have reduced the field of liability for damage caused by the escape of dangerous things. The perceived need to maintain liability may be one of the most compelling reasons for recognising the new category of non-delegable duty, notwithstanding previous rejection of the similar extra-hazardous activities doctrine. However, the development can only be good law, and an improvement on the rule in *Rylands* v *Fletcher*, if the concept of a 'dangerous' use of premises, which imposes the non-delegable duty, is sound.[91]

## Dangerous Activity or Substance

The majority stated that the category of relevantly dangerous activities or substances was not confined to 'inherently dangerous' things.[92] According to the majority, for the purposes of imposing a non-delegable duty of care, it sufficed that

> the combined effect of the magnitude of the foreseeable risk of an accident happening and the magnitude of the foreseeable potential injury or damage if accident does occur is such that an ordinary person acting reasonably

[87] The doctrine of extra-hazardous activities has been said to arise from a number of English decisions: *Honeywill & Stein Ltd* v *Larkin Bros (London's Commercial Photographers) Ltd* [1934] 1 KB 191; *Matania* v *National Provincial Bank Ltd* [1936] 2 All ER 633; *Salsbury* v *Woodland* [1970] 1 QB 324. However it has not achieved complete acceptance in England: *Daniel* v *Metropolitan Railway Co* (1871) LR 5 HL 45; *Hughes* v *Percival* (1883) 8 App Cas 443; *Rainham Chemical Works Ltd* v *Belvedere Fish Guano Co Ltd* [1921] 2 AC 465. Cf *Read* v *J Lyons & Co Ltd* [1947] AC 156. See further discussion in *Stoneman* v *Lyons* (1975) 133 CLR 550, 565 per Stephen J and 575 per Mason J; *Stevens* v *Brodribb Sawmilling Co Pty Ltd* (1985) 160 CLR 16, 29 per Mason J and 41–2 per Wilson and Dawson JJ.C.

[88] In relation to the extra-hazardous acts doctrine see *Stevens* v *Brodribb Sawmilling Co Pty Ltd* (1985) 160 CLR 16, 29 per Mason J.

[89] Id 29 per Mason J and 42–3 per Wilson and Dawson JJ.

[90] *Burnie Port Authority* (1994) 120 ALR 42, 62–3.

[91] See Thayer, op cit (fn 36) 811.

[92] Ibid.

> would consider it necessary to exercise special care or take special precautions in relation to it.[93]

The majority further stated that an activity or substance might be relevantly dangerous notwithstanding that the foreseeable injury or danger would 'only arise in the event of what is commonly described as "collateral" negligence' on the part of an independent contractor.[94]

Under traditional doctrine, an employer will not be liable personally under a non-delegable duty for 'collateral' negligence on the part of an independent contractor. The concept of collateral negligence is based on a distinction between risk arising from the nature of the work authorised by the employer and risk arising from the manner in which the work is performed. Negligence by a contractor in the manner of performing work is collateral to the risk inherent in the nature of the work authorised by the employer and negligence for which the employer is not liable.[95]

The majority referred to criticism of 'collateral' in this context as

> a "most conveniently question-begging adjective" which, so far as it points to a definite conception, does no more than "indicate a distinction based on the definiteness of the danger inherent and visible in the nature of the undertaking".[96]

It will be interesting to see whether the concept of collateral negligence remains relevant to other categories of non-delegable duty.

That aside, and with respect, the majority approach to identifying a dangerous use of premises might also be criticised as question-begging. It makes an activity or substance relevantly dangerous, so as to impose a non-delegable duty of care, if the reasonable person would, in the circumstances, consider the activity so dangerous as to make special care appropriate.

Formulating a more precise test is undeniably difficult. The difficulty arises because most activities are dangerous if performed carelessly. There will not be even an 'ordinary' duty of care unless there is some foreseeable risk or danger in relation to which care is required.[97] To impose a non-delegable duty, a court is searching for an extra or special degree of danger. That degree of danger is not easily defined.[98]

Arguably the best approach is, as the majority suggested, to assess the identified factors of the magnitude of foreseeable risk and the magnitude of foreseeable injury or damage in the circumstances of each case. A similar process is undertaken in determining whether or not there has been a breach of an ordinary duty of reasonable care.

In the opinion of the writer, the majority approach to identifying a

[93] *Burnie Port Authority* (1994) 120 ALR 42, 68.
[94] Id 68–9; cf 84–5 per Brennan J.
[95] Balkin and Davis, op cit (fn 2) 811; see also *Burnie Port Authority* (1994) 120 ALR 42, 85 per Brennan J.
[96] *Burnie Port Authority* (1994) 120 ALR 42, 69. The majority quoted Professor Thayer, op cit (fn 36) 810; see also Atiyah, op cit (fn 70) 374–88; cf *Burnie Port Authority* (1994) 120 ALR 42, 84–5 per Brennan J.
[97] Thayer, op cit (fn 36) 810.
[98] See also *Stevens* v *Brodribb Sawmilling Co Pty Ltd* (1985) 160 CLR 16, 30 per Mason J.

dangerous use of premises imposing a non-delegable duty of stringent care should at least provide greater certainty than the rule in *Rylands* v *Fletcher*. The concept of special danger may be more easily understood than the requirement of non-natural use under the rule or the concept of collateral negligence. More importantly, by openly identifying the relevant factors to assess in each case, the majority approach provides some structure for determining liability.