The Law Commission

(LAW COM. No. 32)

CIVIL LIABILITY FOR DANGEROUS THINGS AND ACTIVITIES

Laid before Parliament by the Lord High Chancellor pursuant to section 3(2) of the Law Commissions Act 1965

Ordered by The House of Commons *to be printed*
3rd November 1970

LONDON
HER MAJESTY'S STATIONERY OFFICE
6s. 0d. [30p] net

142

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Commissioners are—

The Honourable Mr. Justice Scarman, O.B.E., *Chairman.*

Mr. Claud Bicknell, O.B.E.

Mr. L. C. B. Gower.

Mr. Neil Lawson, Q.C.

Mr. N. S. Marsh, Q.C.

The Secretary of the Commission is Mr. J. M. Cartwright Sharp, and its offices are at Conquest House, 37-38 John Street, Theobald's Road, London, WC1N 2BQ.

CONTENTS

		Paragraph	Page
I.	**INTRODUCTION**	1–6	1
II.	**THE EXISTING LAW REVIEWED**	7	4
III.	**RYLANDS *v.* FLETCHER, FIRE AND NUISANCE: POSSIBLE APPROACHES TO REFORM** ...	8–18	6
IV.	**LIABILITY FOR INDEPENDENT CONTRACTORS**	19	11
V.	**CONCLUSION**	20	12
	APPENDIX I—STRICT LIABILITY AT COMMON LAW		14
A	The Doctrine of *Rylands v. Fletcher*	1–15	14
	(*a*) Where did the thing escape from and who can be defendant?	4–5	15
	(*b*) The nature of the escaping thing	6	16
	(*c*) The necessity for escape	7	16
	(*d*) The requirement of non-natural use	8	17
	(*e*) The status of the plaintiff	9	17
	(*f*) The nature of the damage	10	18
	(*g*) Defences to *Rylands v. Fletcher*	11–15	18
	(i) Act of a stranger	11	18
	(ii) Act of God	12	19
	(iii) Consent of the plaintiff	13	19
	(iv) Default of the plaintiff	14	20
	(v) Statutory authority	15	20
B	Liability for Fire	16–19	22
C	Nuisance...	20–36	23
	(*a*) Private nuisance	22–26	24
	(*b*) Public nuisance	27–36	26
D	Liability for Independent Contractors	37–49	30
	(*a*) Fire	38	30
	(*b*) Nuisance	39–42	30
	(i) Private nuisance	39–40	30
	(ii) Public nuisance	41–42	31
	(*c*) The " ultra-hazardous activity " cases	43	32
	(*d*) Other cases of liability for the fault of an independent contractor	44–49	33
	(i) Employer's liability...	45	33
	(ii) The hospital cases	46–47	33
	(iii) Occupier's liability	48–49	34

Page

APPENDIX II—A NOTE ON CRITICISMS OF A NEGLIGENCE-BASED SYSTEM OF LIABILITY 36

APPENDIX III—LIST OF PARTICIPANTS IN A SEMINAR ON DANGEROUS THINGS AND ACTIVITIES HELD AT ALL SOULS COLLEGE, OXFORD, ON SEPTEMBER 29 AND 30, 1969 37

LAW COMMISSION

Item IV of the First Programme

CIVIL LIABILITY FOR DANGEROUS THINGS AND ACTIVITIES

To the Right Honourable the Lord Hailsham of Saint Marylebone, Lord High Chancellor of Great Britain.

I. INTRODUCTION

1. Item IV of the Law Commission's First Programme reads as follows:

" CIVIL LIABILITY FOR DANGEROUS THINGS AND ACTIVITIES

" Although this branch of the law has acquired a greatly increased importance in modern conditions, its haphazard development has resulted in many distinctions of a highly technical character not apparently justified by differences in the subject matter. Examples are the liability, which is notoriously uncertain, of a person for the acts and defaults of his independent contractors, and the special defences applicable in this branch of the law, in which there are seemingly capricious variations.

" *Recommended:* That an examination be made of the basic principles of liability applicable to dangerous things and activities, with a view to clarifying and harmonising and, so far as may be expedient, unifying the principles in question.

" *Examining Agency:* The Commission."

2. In submitting our Report on this Item we should at the outset draw attention to the fact that it differs from the great majority of our previous reports in that it does not contain any recommendations for a change in the law nor any draft Bill to give effect to such recommendations. This is not because we have reached the conclusion that no change in the law is desirable. It is rather because we have been unable to secure the approval necessary under Section 3(1)(*c*) of the Law Commissions Act 1965 for the inclusion in our First Programme of an investigation into the principles of liability governing accidents involving personal injury, which we recognise might raise issues of policy which are not for us to decide. For the reasons given below this limitation on the scope of any proposals which we might put forward has prevented us from presenting a satisfactory solution to the problems raised by this Item.

3. The results of our examination of the present law covered by Item IV are set out in Appendix I to this Report. They show that certain things or activities giving rise to accidents imposed on those who control or undertake them a liability at common law for those accidents which is to a greater or lesser extent " strict ". By " strict liability " we mean in this context a liability which may arise without fault on the part of the controller or undertaker or on the part of his employee in the course of his employment. The vicarious liability of an employee does not require fault on the part of the employer. But the liability of a person for his

own fault and that of his servants is, in the English common law of tort a principle generally applicable to accidents, whereas strict liability in the narrower sense in which we have above defined it is at present somewhat exceptional. It was this exceptional area of strict liability which formed the subject matter of our enquiry under Item IV.

4. We were not directly concerned under Item IV with strict liability so far as it has been introduced by, or inferred from, statutes or regulations made under the authority of statutes. The introduction of strict liability by statute has hitherto been limited to a more specialized category of cases than are covered by strict liability imposed by the common law for dangerous things and operations.[1] It was not our purpose to call in question the policy of the comparatively recent statutes imposing such liability, especially where they implemented obligations of this country under, or where they enabled this country to accept, international conventions.[2] The existence of such statutes, and the policy underlying them, would however obviously have become relevant if, after our examination of the cases of strict liability at common law, we had been free to consider whether strict liability should be limited or extended and, if extended, whether some new principle underlying its different fields of application required to be worked out.

5. Strict liability,[3] arising on inference[4] made by the courts that the legislator (whether Parliament or a subordinate authority under statutory powers) intended breach of penal provisions to give rise to civil liability (as, for example, under the Mines and Quarries Act 1954, the Factories Act 1961 and the Offices, Shops and Railway Premises Act 1963), covers

---

[1] e.g., Civil Aviation Act 1949 and Nuclear Installations Act 1965. See also Employers' Liability (Defective Equipment) Act 1969 which makes an employer liable for personal injuries suffered by an employee in the course of his employment in consequence of a defect in equipment provided by the employer for the purposes of his business, if the defect is wholly or partly attributable to the fault (defined as negligence, breach of statutory duty or other act or omission giving rise to liability in tort) of a third party. An earlier example is afforded by the Dogs Acts 1906 to 1928 which imposed a strict form of liability for injury to cattle and poultry done by dogs; the liability is preserved in (and in respect of the protected category of animals somewhat extended by) the Animals Bill 1970.

[2] See e.g., s. 8 of the Civil Aviation Act 1949 referring to the Chicago Convention of 1944, 1945 Cmd. 6614. The Nuclear Installations Act 1965 (consolidating the Nuclear Installations (Licensing and Insurance) Act 1959 and the Nuclear Installations (Amendment) Act 1965) was followed in 1966 by United Kingdom ratification of the Paris Convention ("Convention on Third Party Liability in the Field of Nuclear Energy signed at Paris on 29 July 1960, as amended by the Additional Protocol signed at Paris on 28 January 1964", 1964 Cmnd. 2514) and of the Brussels Convention ("Convention Supplementary to the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy signed at Brussels on 31 January 1963, as amended by the Additional Protocol signed at Paris on 28 January 1964", 1964 Cmnd. 2515).

[3] Some statutory duties require in effect only the exercise of reasonable care, and where they require higher standards these may be of varying strictness. For example, in *Levesley* v. *Thomas Firth and John Brown Ltd.* [1953] 1 W.L.R. 1206, 1210, Denning, L.J. said of the obligation to "provide and maintain safe means of access . . . so far as is reasonably practicable" (Factories Act 1937, s. 26(1), now s. 29(1) of Factories Act 1961) that it "adds very little to the common law obligation between employers and workmen". Contrast s. 14(1) of the Factories Act 1961, imposing a duty to fence dangerous parts of machinery, which must be complied with even if it would render the use of the machine impossible—*John Summers Ltd.* v. *Frost* [1955] A.C. 740.

[4] Breach of a statutory duty may be expressly stated in a statute to give rise to a civil action. See e.g., Consumer Protection Act 1961, s. 3, which imposes civil liability for damage arising from the sale, or possession for sale, of goods not complying with safety regulations imposed by the Minister.

a wide field of great practical importance. However, there are considerable differences between the civil liability which may or may not emerge as the by-product of duties imposed primarily under threat of criminal sanctions in order to promote the safety, health or welfare of a particular class of persons and the strict liability arising under the common law for accidents resulting from certain things or operations. We considered that our enquiries under Item IV should be primarily directed to the latter field of strict liability for the following reasons. First, the civil consequences of breach of a statutory duty are by no means automatic; the existence of a civil remedy (where it is not specifically provided for[5]) depends in theory on the intention of the Act, but in practice gives rise to much uncertainty.[6] The aim of civil strict liability should be to enable potential plaintiffs and defendants to know, without recourse to litigation, their respective rights and duties, and the extent to which they should cover the risk of accidents by insurance. Secondly, the civil action for breach of statutory duty may give rise to further uncertainty, and necessity for litigation, regarding the class of persons or section of the public who are entitled to sue in respect of the breach[7]; a directly and deliberately imposed strict liability ideally[8] should aim at providing a remedy to anyone who suffers loss within clearly defined categories by reason of the miscarriage of the specified things or operations which are subject to such strict liability. Thirdly, statutes imposing or authorising the imposition of duties in respect of, for example, safety, health or welfare, must, when they have civil consequences, necessarily single out the acts or omissions which constitute the essential breaches of duty without which the claim for compensation cannot arise. On the other hand, the area of liability, with which we were concerned under Item IV, does not require breach of particular duties by reason of which a thing or operation miscarries; its underlying purpose is to impose liability (to a greater or lesser extent strict) on the controller or operator for loss resulting from the miscarriage as such of certain things and operations.

6. We examined therefore under Item IV the rule in *Rylands* v. *Fletcher*,[9] liability for fire, certain cases of strict liability under the law of nuisance, and the lesser degree of strict liability which arises in those special cases where, contrary to the general rule of the

[5] See n. 4 above.

[6] In our own Joint Report with the Scottish Law Commission on the Interpretation of Statutes (Law Com. No. 21; Scot. Law Com. No. 11) we have discussed this difficulty (see para. 38 of the Joint Report) and made recommendations to secure greater certainty in respect of duties imposed by or under future statutes.

[7] Thus a fireman was unable to sue in respect of breach of regulations (under the Factories Acts 1937 and 1948) by the owners of a factory where the fireman was fighting a fire in the factory (*Hartley* v. *Mayoh & Co.* [1954] 1 Q.B. 383). But a person was able to sue for breach of the Factories Act 1937, although he was an independent contractor working as a window cleaner in the factory concerned (*Lavender* v. *Diaments Limited* [1949] 1 K.B. 585).

[8] In fact, as appears from Appendix I, paras. 9 and 10, the plaintiff suing in respect of the strict liability imposed under the *Rylands* v. *Fletcher* ((1866) L.R. 1 Ex. 265; (1868) L.R. 3 H.L. 330) principle may arguably require a landed status and possibly be involved in dispute as to the kind of damage for which he can sue. And, so far as private nuisance gives rise to strict liability (see paras. 22-26 of Appendix I), the liability is only to an occupier of land, the enjoyment of which is injuriously affected by the nuisance; moreover, the plaintiff in private nuisance can probably not recover for personal injuries and possibly not for damages to chattels (*ibid* n. 94(iv)).

[9] See n. 8 above.

common law, a principal is liable for the fault of his independent contractor.[10] We did not under Item IV deal with the strict liability which applies in certain circumstances in respect of injury or damage done by animals, as this formed the subject-matter of a separate enquiry under Item V of our First Programme, on which we have already presented a Report.[11]

II. THE EXISTING LAW REVIEWED

7. From the results of this examination, as set out in Appendix I, we are led to the following conclusions:

(*a*) The common law giving rise to strict liability and to liability for the fault of an independent contractor is very complex[12] and subject to numerous uncertainties.[13]

(*b*) So far as there is any general principle, on which strict liability in the wider sense (as distinguished from liability for the fault of an independent contractor) is imposed, it seems to be as follows: *strict liability is justified in respect of certain things and certain activities which involve special danger—i.e., a more than ordinary risk of accidents or a risk of more than ordinary damage if accidents in fact result.*

(*c*) This principle, however, is not applied to many situations where it would seem to be applicable, either because the thing or operation involving strict liability is narrowly defined[14] or because the liability is subject to defences of very wide extent, which in some cases seem to pay little regard to the principle.[15] Thus, the strict liability clearly established for cases falling within the rule in *Rylands* v. *Fletcher* has a very limited practical effect, in so far as the narrow scope of the rule and the number of the exceptions to it generally prevent a plaintiff from succeeding on the basis of that case.

---

10 It is more usual in this connection to speak of "liability for the *negligence* of an independent contractor", but as there may be such liability for conduct not necessarily involving negligence (e.g., breach of certain statutory duties) *we generally use in this Report* the formulation above.

11 See our Report, *Civil Liability for Animals*, Law Com. No. 13 the recommendations in which are largely embodied in the Animals Bill 1970.

12 Perhaps most notably in regard to the liability for fire (see paras. 16-19 of Appendix I).

13 By way of example only we may refer, with regard to liability under the rule in *Rylands* v. *Fletcher*, to the physical situation of the escaping thing and the relationship of the defendant to that situation, the definition of a thing "likely to do mischief if it escapes" and of the "non-natural use" of the place from which it escapes, the required status of the plaintiff and the nature of the damage, and the scope of the defence of consent of the plaintiff (see paras. 4-5, 6, 8, 9, 10 and 13 of Appendix I).

14 For example: the necessity for the thing which is the subject of a *Rylands* v. *Fletcher* claim to have escaped from a place which is under the defendant's control and to have caused damage to the plaintiff in an area outside that control (see Appendix I, para. 7); the necessity for the thing to have been used in "non-natural" way (*ibid*, para. 8); the necessity (if such is the law, which is admittedly doubtful) for the plaintiff to have an interest in the land on to which the thing escapes (*ibid*, para. 9) and to exclude personal injuries from his claim for damages (*ibid*, para.10).

15 The most striking example is the defence of statutory authority (see para. 15 of Appendix I).

(*d*) As regards liability for the fault of an independent contractor it is not possible to link the different categories of cases by any one general principle.

(i) in some cases,[16] it is true, the principle seems similar to that which appears to account for liability of the *Rylands* v. *Fletcher* type, namely that the operation on which the independent contractor is engaged involves, like the thing which is the subject of a *Rylands* v. *Fletcher* claim, some " special danger ". But if this is the true principle, it is not easy to explain, except by reference to legal history[17] why some cases fall under the *Rylands* v. *Fletcher* rule and others only involve the less strict liability for the fault of an independent contractor.

(ii) Some cases, however, cannot be explained on the basis that the work or operation, in the course of which the accident occurred, had unusually dangerous potentialities, as, for example, where a principal is liable to his employee for the fault of his independent contractor in respect of the competence of his staff, his plant or his system of work[18] or where a hospital may perhaps be liable to its patients for the fault of persons in its organisation, whether the latter were strictly speaking employees or independent contractors.[19] It does not seem a satisfactory justification for the decisions in these cases to say simply that they concern a non-delegable duty which the principal cannot discharge by the employment of a seemingly competent contractor ; this, it has been pointed out,[20] is only to state the effect of the liability without giving a reason for it. The broad principle underlying these cases, although it is admittedly ill-defined in scope, seems to be as follows: *a principal should be liable for the fault of his independent contractor where the negligence arises in the course of work organised by the principal and, having regard to the respective positions of the principal and the victim of the negligence and to the practical effectiveness of any remedy of the victim against the contractor himself,*[21] *it appears reasonable to require the principal to cover (by insurance or otherwise) the risk of accidents resulting from the fault of his contractor.*

---

16 See e.g., *Honeywill* v. *Stein* and *Matania* v. *National Provincial Bank* which are discussed in paras. 40 and 43 of Appendix I.

17 See the emphasis put by Lord Macmillan in *Read* v. *Lyons* [1947] A.C. 156, 173 on the close relationship between the rule in *Rylands* v. *Fletcher* and the old common law remedies for the protection of interests in land (discussed in para. 9 and n. 34 of Appendix I).

18 See Appendix I, para. 45.

19 *ibid*, paras. 46-47.

20 See Glanville Williams, [1956] C.L.J. 180.

21 As where it is difficult to trace the independent contractor, or where the principal has used a number of identified contractors to do work for him, but it is difficult to prove exactly which contractor was responsible for the damage. The independent contractor (the manufacturer of the defective chisel which caused injury to the plaintiff) in *Davie* v. *New Merton Board Mills Ltd.* [1951] A.C. 604 was apparently difficult to trace, and this was one of the considerations emphasised in the debate on the Second Reading of the Bill resulting in the Employer's Liability (Defective Equipment) Act 1969 (see end of n. 2 above). See *Official Report*, Commons, 6 December 1968, col. 1966, *et seq.*, especially at cols. 1980-81.

(iii) Yet in a third group of cases the principal has not been held liable for the fault of an independent contractor in circumstances where either the "dangerous potentialities" principle of (i) above or the "reasonable coverability of risk" principle of (ii) above might well have been applied. Thus it seems that a person who engages an apparently competent contractor to fell a tree is not liable for the latter's negligence as a result of which a pedestrian on an adjoining highway is injured,[22] and the operator of a motor vehicle on the highway does not incur liability for the negligence of an independent contractor to whom he has entrusted it for repair,[23] although a person who engages an independent contractor to carry out work in or on the highway[24] or possibly on artificial projections over the highway[25] is liable for the contractor's negligence.

III. RYLANDS *v.* FLETCHER, FIRE AND NUISANCE: POSSIBLE APPROACHES TO REFORM

8. In the light of these deficiencies of the rule in *Rylands* v. *Fletcher* and, to the extent that it may be strict, of liability for fire or nuisance, we considered how they might best be remedied. There appeared to be four possible approaches. First, the complexity, uncertainty and inconsistency of the law in this area could have been admitted, but the conclusion nevertheless reached that these defects concerned the application of a principle of strict liability which was seldom if ever applied in practice. On this approach it could have been argued that there was no necessity to make proposals for reform; an obscure branch of the law could have been safely left to wither away by disuse. Secondly, we could have proposed that the rule in *Rylands* v. *Fletcher* and strict liability, so far as it exists for fire and nuisance, be formally abolished, without any attempt to reform them or to replace them by some new principles of strict liability. Thirdly, we could have taken the view that what was unsatisfactory in this area of the law was not the idea of strict liability itself but the principle—or lack of principle—on which it was applied or rejected; on this approach it would have been necessary for us to propose some new principles regulating the circumstances in which strict liability ought to be imposed. Fourthly, we could have attempted a more limited approach in seeking to reform the application of such principles as might at present govern strict liability at common law.

9. We doubt whether any lawyer, advising on liability in circumstances involving the escape of a dangerous thing, a fire or a possible nuisance, could, without running the danger of a complaint in respect of his professional negligence, afford entirely to ignore the rule in *Rylands* v. *Fletcher*

---

22 See *Salsbury* v. *Woodland* [1970] 1 Q.B. 324 (C.A.) discussed in n. 152 of Appendix I.

23 See *Phillips* v. *Britannia Hygienic Laundry Co. Ltd.* [1923] 1 K.B. 539, affirmed [1923] 2 K.B. 832 (C.A.).

24 Highway authorities sued for failure to repair the highway have a special defence under the Highways (Miscellaneous Provisions) Act 1961; for details see para. 42 of Appendix I.

25 For details see para. 41 and n. 152 of Appendix I.

or to disregard the peculiarities of liability (so far as its strictness is concerned) for fire and nuisance. Even if the rule in *Rylands* v. *Fletcher*, by reason of its many limitations and exceptions, today seldom forms the basis of a successful claim in the courts, it continues to be referred to in the courts and to be extensively treated in the textbooks. This consideration appears to us to be a powerful objection to the suggestion that no change of any kind—even in the formal requirements (as distinguished from the practical effect)—of the law is required. But apart from this, to allow strict liability at common law to wither away by disuse would be to assume that strict liability has no useful role to play in the law relating to civil liability for accidents[26] and that the social needs of the times can be adequately met by the action in negligence, having regard to the doctrine of *res ipsa loquitur*[27] and to the power of the courts to adjust the standard of reasonable care to the particular circumstances and risks involved.[28] We would not be entitled to make this assumption[29] without considering whether, to what extent and in what spheres a system of strict liability might overcome the disadvantages which, it has been widely suggested, attach to a system of liability based on negligence.[30]

10. The same assumption in an even clearer way would have been involved in the proposal that the rule in *Rylands* v. *Fletcher* and strict liability, so far as it exists, for fire and nuisance should be formally abolished. Thus the first two approaches mentioned in paragraph 8 above could not in practice have been separated from the third approach, which would have involved consideration of the circumstances in which and the principles on which strict liability should be imposed.

11. When we turned, however, to the ways in which strict liability at common law should be reorganised, as distinguished from being ignored or simply abolished, we found ourselves in a dilemma. On the one hand

---

26 A contrary assumption is made in *Disposal of Solid Toxic Wastes*, H.M.S.O., 1970 in which the Technical Committee on the Disposal of Toxic Solid Wastes report at para. 117 as follows: " Of particular importance in relation to toxic wastes is what may be called the principle of *Rylands* v. *Fletcher*, namely that a person who, for his own purpose brings and keeps upon his land something which is likely to do damage if it escapes, keeps it at his peril, and if he fails to do so he is, even without proof of negligence, answerable for all damage which is the natural consequence of its escape. It is easy to see how this could apply to a toxic waste placed on a tip, escaping from it in solution in water percolating through, and poisoning a water supply some distance away."

27 As Professor Fleming (*Law of Torts*, 3rd ed., 1965, pp. 285-88) points out, in England, where negligence cases are usually tried by a judge alone deciding issues of fact and law, there is a tendency to attach more compelling weight to this maxim than in Australia, Canada, the U.S.A. and probably New Zealand, where it only means that the jury are provided with sufficient evidence on which they *may* (no evidence to the contrary forthcoming) find for the plaintiff. " The obvious effect ", Professor Fleming concludes, " of increasing the procedural disadvantages of defendants is that *res ipsa loquitur* becomes to that extent a more effective device for imposing strict liability under the pretence of administering rules of negligence."

28 See Lord Wright in *North-Western Utilities Limited* v. *London Guarantee and Accident Company Limited* (1936) A.C. 108, 126.

29 We have taken note of the *Thirteenth Report of the Law Reform Committee for Scotland* (1964, Cmnd. 2348) which was concerned with " the law relating to civil liability for loss, injury and damage caused by dangerous agencies escaping from land." The majority of the Committee, taking the view that " it seems to make little, if any, difference in the result whether one adopts what may be called the ' absolute liability ' theory or adheres rigidly to the fault principle " (para. 22 of the Report) recommended no change in the law of Scotland. This conclusion, however, would appear to have been influenced by a doubt as to whether the *Rylands* v. *Fletcher* principle applies in Scotland in any event.

30 See Appendix II.

it was evident that a possible basis for a rational system of strict liability would involve asking the question: who, as between the plaintiff and defendant, can more reasonably be expected to cover (whether by insurance or otherwise) the risk of the accident in question? It was equally clear that the answer to this question might, among other considerations, involve distinguishing between the appropriate principle of liability in personal injury cases and that to be applied to other kinds of damage.[31] It could be persuasively argued that, whereas it would be plainly unreasonable to expect every citizen to take out a policy against personal injury in respect of all the multifarious risks to which he might be exposed in the course of his life, it would not necessarily be unreasonable to expect the controllers of certain things and the undertakers of certain operations to cover the personal injury risks to which those things and operations can give rise.[32] On the other hand, as explained in paragraph 2 above, it was precisely the topic of the principle of liability for personal injury which we were not in a position to investigate.

12. In these circumstances we considered that the most useful course which we could follow in regard to Item IV of our First Programme was to investigate the practicability of a limited measure of reform on the lines of the fourth possible approach mentioned in paragraph 8 above. The next succeeding paragraphs describe the steps taken in what may conveniently be called a " feasibility study " as to the fourth approach.

13. This approach seemed to involve the retention of the principle of " special danger " implicit in the rule in *Rylands* v. *Fletcher*.[33] A possible pattern was suggested by section 519 of the American Law Institute's *Restatement of the Law of Torts* 1938

> " . . . one who carries on an ultra-hazardous activity is liable to another whose person, land or chattels the actor should recognise as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultra-hazardous, although the utmost care is exercised to prevent the harm."

By section 520 an ultra-hazardous activity is defined as:

> " An activity . . . [which]
>
> (*a*) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and,
>
> (*b*) is not a matter of common usage."

This approach appeared to have the advantage of relative simplicity in statement and of flexibility in application. Moreover it did not involve the rather arbitrary distinction which is drawn in English law between liability

[31] It is significant in this connection that the liability imposed on the employer by the Employers' Liability (Defective Equipment) Act 1969 (see n. 1 above) was limited to accidents involving personal injuries.

[32] The argument, of course, implies that the plaintiff who suffers only property damage might be left to cover that risk himself, at least where the defendant has not been negligent. It is not invalidated where the plaintiff has contributed by his negligence to his personal injury, provided that the strict liability of the defendant permits a defence of contributory negligence, as, for example, if appears to do under the present rule in *Rylands* v. *Fletcher* (see Appendix I, para. 14).

[33] See n. 8 above.

in negligence under the Occupiers' Liability Act 1957 of an occupier for damage to visitors on his land and the strict liability under the rule in *Rylands* v. *Fletcher* to which he may be subject for damage by certain objects which " escape " off his land.[34] And, in view of the somewhat theoretical character of the defence of act of God[35] and of the important limitation on the effective scope of strict liability, which in English law results from the admissibility of the defence of " act of a stranger ",[36] it appeared to us a significant advantage that the *Restatement of the Law of Torts* by section 522 excluded both these defences.[37] Another advantage of the *Restatement* approach was that it clearly removed the doubt which, as far as English law is concerned, has persisted since *Read* v. *Lyons*,[38] whether damages for personal injury are recoverable in an action of *Rylands* v. *Fletcher* type.

14. We were, however, greatly impressed by the difficulties involved in any solution of the problems of strict liability on the lines indicated in the preceding paragraph. An obvious drawback of the solution was the uncertainty which it would create. It would be difficult to make insurance arrangements to cover the strict liability, since at first it would be relatively unpredictable whether in any particular case the activity which a person was carrying on was " ultra-hazardous " ; litigation would often be necessary to decide this question. The uncertainty implicit in the American Law Institute's *Restatement* is shown by the fact that the Institute itself expressly left it open whether the construction and use of a large tank or artificial reservoir in which water or other fluid was collected was to be regarded as an ultra-hazardous activity.[39] Moreover, it appeared doubtful whether the determination of the incidence of risk over the whole field of accidents might not impose an excessive burden on the courts, if they had no more to guide them than the directive to make a distinction between ultra-hazardous and other activities. It is in this connection significant that the American courts have in fact made little use of sections 519 and 520 and, so far as they have extended strict liability in particular fields, have generally used other methods.[40]

---

[34] See Appendix I, para. 7.

[35] *ibid*, para. 12.

[36] *ibid*, para. 11.

[37] Although it appears that s. 522 may not be in harmony with the majority of American cases: see *Harper and James*, The Law of Torts, 1956, pp. 810–811, who add however that some of these cases " reflect a myopic view of the foreseeability test and appear almost to subvert the theory of enterprise liability."

[38] n. 17 above. See on recovery for personal injuries, Appendix I, para. 10.

[39] *Restatement of the Law of Torts*, 1948, vol. III, p. 44. A formula similar to the ultra-hazardous test has been judicially developed in Norway. In *Danish and Norwegian Law*, a General Survey edited by the Danish Committee on Comparative Law, 1963, at p. 110 it is stated that " the concrete application of the principle gives rise to doubt in several instances." Experience with the concept of ultra-hazardous activities, in the context of liability for the fault of independent contractors has, as far as English case law is concerned, been so slight since *Honeywill and Stein* v. *Larkin Bros.* (para. 43 of Appendix I) that it affords little indication of how the courts would treat the concept if embodied in a statute with the implication not merely of liability for the negligence of an independent contractor but of a much wider strict liability.

[40] As by extending the " products liability " of a seller of goods to protect certain third parties to the contract of sale. See Uniform Commercial Code, section 2–318, which is discussed in para. 62 of our *First Report on Exemption Clauses in Contracts: Amendments to the Sale of Goods Act* 1893 (Law Com. No. 24; Scot. Law Com. No. 12). See generally on products liability in the U.S.A., Robert G. Pasley (1969), 32 M.L.R. 9 and P. N. Legh Jones [1969] C.L.J. 54.

15. Another objection to the *Restatement* approach was that it confined the situations to which strict liability applied to those activities which are "not a matter of common usage"[41] a requirement similar to that of "non-natural use" under the rule in *Rylands* v. *Fletcher*, which, as we explain in Appendix I to this Report,[42] may confine the operation of the rule to a very narrow field. The *Restatement* also retains[43] in an even wider form the defence of "statutory authority", which, in relation to the rule in *Rylands* v. *Fletcher*, may, as we point out in Appendix I to this Report,[44] be questionable in the light of certain policy considerations underlying the rule. We did not, however, consider these objections as in themselves conclusive; it would clearly have been possible for us to adopt the general approach of the *Restatement*, while modifying its details to meet the particular requirements of this country.

16. Our most serious misgiving about any test for the application of strict liability, involving a general concept of an "especially dangerous" or "ultra-hazardous" activity, was that in ignoring the wider considerations taken into account by the "reasonable coverability of risk" principle,[45] the former test would not lead to improvement of the law commensurate with the practical difficulties of its application.

17. In these circumstances we decided not to circulate the usual Working Paper for general consultation, a stage which usually precedes the publication of a Report, until we were sufficiently convinced of the feasibility of a limited scheme of reform of strict liability to justify our putting forward provisional proposals on which that consultation might take place. We were able to arrange for a discussion of the issues involved at a seminar, held at the kind invitation of All Souls College, Oxford, on 29th-30th September 1969. Apart from representatives of the Law Commission and Scottish Law Commission, the participants[46] were drawn from the judiciary, the practising and academic branches of the legal profession, departments of Government, public corporations, insurance interests, the Trades Union Congress and the Consumer Council. At the Seminar we presented for discussion a draft Working Paper. It included an exposition of strict liability under the existing common law which, with the necessary editorial adjustments and some slight additions, is now set out in Appendix I to this Report. This was followed by a summary of the defects in the existing law relating to Item IV, as they appeared to be revealed by our exposition, with particular reference to the law's complexity, uncertainty and inconsistent application of principle. These two sections of the draft Working Paper were preceded by an introduction explaining that the problems raised by Item IV might be regarded in two ways: first, as requiring a fundamental reconsideration of the rationale of strict liability in the law; secondly, as only calling for limited adjustment in the application of the existing principles of strict liability. As the former approach was outside the scope of our approved Programme, we concluded the draft Working Paper with the tentative outline of a scheme of reform which essentially adopted the

---

41 See para. 13 above.
42 See Appendix I, para. 8.
43 By section 521.
44 See Appendix I, para. 15.
45 See para. 11 above.
46 See Appendix III.

latter (i.e., the " special danger " principle of strict liability) as expressed in the American *Restatement of the Law of Torts,* while endeavouring to meet some of the more obvious criticisms which might be brought against it. In particular, we suggested that the defences of " common usage " (or, in the English terminology, " natural use ") and of " stautory authority " were contrary to the principle underlying strict liability and should not be permitted ; that the definition of a " dangerous thing or operation " should not be left to the courts ; but that the dangerous things and operations subject to strict liability should be listed in a schedule to a statute or an instrument made under statute, the exercise of such powers requiring prior reference to a consultative body. The concluding sections of the draft Working Paper discussed the incidents of the strict liability which might be imposed by or under statute and the impact of such strict liability on other branches of the law.

18. Our doubts, to which we have referred in paragraph 16, concerning the tentative proposals summarised in the preceding paragraph, were strengthened by the general discussion at the Seminar. We reached the conclusion that any satisfactory reforms would necessitate expanding the field of our enquiry to cover the principles of liability governing accidents involving personal injury. Since, for the reasons given in paragraph 2, we cannot undertake such an enquiry we have taken the view that no useful purpose would be served by publishing a Working Paper for general circulation and have therefore proceeded directly to a Report, stating our reasons for not making any recommendations at this stage on Item IV. We hope that this will at least serve the limited purpose of focussing attention on the major issues which have to be resolved if this branch of the law is to be satisfactorily reformed.

IV. LIABILITY FOR INDEPENDENT CONTRACTORS

19. In the draft Working Paper presented to the All Souls' Seminar we made separate tentative proposals for dealing in a more systematic way with the ill-defined and somewhat miscellaneous categories of situations[47] where a principal is at common law vicariously liable for the fault of his independent contractor. These proposals were on the whole sympathetically received by the participants in the Seminar.[48] Nevertheless, we have reached the conclusion that it would not be satisfactory to proceed to a Working Paper and ultimate Report only on that part of Item IV which is concerned with liability for the fault of an independent contractor. In the first place, the principle on which liability for the fault of an independent contractor may be justified would seem to be very similar to that which

---

[47] See Appendix I, paras. 37–49.

[48] Our tentative proposals involved the replacement of the existing categories of vicarious liability at common law for the independent contractor (so far as it exists towards *the public generally*, as distinguished from particular types of persons—e.g., employees) by a general test of liability. The essence of this suggested test was that a principal should be vicariously liable for the fault of an independent contractor when the principal was engaged in a business or profession (including the provision of public services) and the fault occurred in the course of work which the principal held himself out as undertaking. It is obvious that such a test would give rise to some difficulty in borderline cases, and the question therefore would be whether it was preferable to have a limited area of uncertainty as to the application of a single test rather than the multiple uncertainties which now arise in connection with the different categories of liability.

may be used to justify a more complete strict liability. Both forms of strict liability ultimately turn on a question of social policy, namely, who, as between the plaintiff and defendant, should bear a specified risk. Where full strict liability is involved, this risk is that of the accident happening at all ; where the lesser form of strict liability is in issue, the risk is of the accident happening through the fault of the defendant's independent contractor. But, as we have pointed out in paragraph 11 above, to reach a conclusion on the proper incidence of risk in such circumstances may well involve making a distinction between liability for personal injury and liability for other cases of accidents, and it is precisely an investigation into the principle of liability for personal injury actions which we are not in a position to make. Secondly, the scope of the problem raised by liability for the fault of an independent contractor would be substantially reduced if it were first possible to establish in what areas full strict liability is to be imposed, as in those areas the liability would in any event cover, among other causes of accident, the fault of an independent contractor.

V. CONCLUSION

20. We much regret that we are unable to complete our work on Item IV in our First Programme. The stages in our examination of Item IV which have ultimately led to this conclusion may be summarized as follows:—

(*a*) Having examined the law relating to liability under the rule in *Rylands* v. *Fletcher* and, so far as strict liability is involved, for fire and nuisance, as well as the lesser form of strict liability for the fault of an independent contractor, we took the view that the law in these fields is complex, uncertain and inconsistent in principle. [Appendix I and paragraph 7 above.]

(*b*) We did not think we were entitled to recommend that these branches of the law should be allowed to wither away or be formally removed, without a prior consideration of the extent to which strict liability had a useful role to play in the modern law of liability for accidents. [Paragraphs 9 and 10.]

(*c*) We took the view that an investigation into the role of strict liability might involve asking the question : " Who as between plaintiff and defendant should bear the risk of the accident in question?" ; and that in answering this question it would be necessary to consider making a distinction between liability for personal injury and liability for other accidents. [Paragraph 11.]

(*d*) We have not been able to secure approval for the inclusion of an item in our Programme covering the principle of liability for personal injury accidents, which we recognise would raise issues of policy that are not for us to decide. [Paragraphs 2, 11 and 18.]

(*e*) We considered how far it might be feasible, within the framework of our present Programme, to correct the defects in strict liability at common law by limited reforms applying more clearly and consistently the principle of " special danger " in the thing or operation involved, on which strict liability at present appears generally to be based. [Paragraphs 12–15 and 17.]

(*f*) We reached the conclusion that it would not be possible to make any worthwhile proposals for reform without taking into account the issues raised in (*c*); and that, therefore, it would serve no useful purpose to give general circulation to a Working Paper putting forward proposals on the lines indicated in (*e*). [Paragraphs 16 and 18.]

(*g*) We also reached the conclusion that we ought not to attempt to make proposals for the general reform of the common law relating to liability for the fault of independent contractors, until it became possible to deal with strict liability in the fuller sense. [Paragraph 19.]

(*h*) In these circumstances we took the view that the best contribution which we could make to the ultimate solution of the problems raised by Item IV was to proceed directly to a Report, setting out the results of our examination of the law involved, recording the steps that we had taken to find a feasible approach to these problems and explaining why we are unable to present a Report with recommendations for legislative action.

(*Signed*) LESLIE SCARMAN, *Chairman.*
CLAUD BICKNELL.
L. C. B. GOWER.
NEIL LAWSON.
NORMAN S. MARSH.

J. M. CARTWRIGHT SHARP, *Secretary.*
14*th September* 1970.

APPENDIX I

STRICT LIABILITY AT COMMON LAW

A. The Doctrine of Rylands v. Fletcher

1. From a theoretical point of view the most important illustration of strict liability at common law is the doctrine of *Rylands* v. *Fletcher*.[1] In giving it pride of place however we do not mean to imply that as a practical matter its sphere of operation today is substantial, as will appear from the qualifications of, and exceptions to, the doctrine which are discussed below. As long ago as 1928 it could be said that " when stated without the exceptions it is a rule of absolute liability but there are so many exceptions to it that it is doubtful whether there is much of the rule left ".[2] On the other hand it is in our view important to review this doctrine which, as Scott L.J. once said, " goes to the roots of the common law "[3] and has been responsible for a confusing mass of case law which no lawyer advising in this field can afford to ignore.

2. In *Rylands* v. *Fletcher* the defendants employed an independent contractor to build a reservoir on land of which they were treated as owners or occupiers.[4] Owing to negligence on the part of the contractors the water escaped through disused shafts into the plaintiff's mine. It should be noted that the case might have been decided on the question whether the defendants were liable for the negligence of their independent contractor, a much narrower doctrine of strict liability with which we deal below.[5] But the decision of Blackburn J. in the Court of Exchequer Chamber was put on a much broader ground. He said:

> " We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects 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."[6]

This statement of the law was endorsed by the House of Lords; but Lord Cairns L.C. added[7] that the rule required a " non-natural use of the land " for its operation.

3. The main elements of the liability thus concern:—
   - (*a*) the place from which the thing escapes and the relationship of the defendant to that place;
   - (*b*) the nature of the escaping thing;
   - (*c*) the necessity for escape;
   - (*d*) the requirement of non-natural use;

---

1 (1866) L.R. 1 Ex. 265; (1868) L.R. 3 H.L. 330.

2 Scrutton L.J. in *St. Anne's Well Brewery Co.* v. *Roberts* (1928) 140 L.T. 1, 6.

3 *Read* v. *J. Lyons & Co. Ltd.* [1945] 1. K.B. 216, 224.

4 The statement of facts in the report of the case before the Exchequer Chamber ((1866) L.R. 1 Ex. 265) only refers to the defendants as having the permission of the owner of the land to make the reservoir, but in the House of Lords Lord Cairns L.C. ((1868) L.R. 3 H.L. 330, 338) treated the case on the footing that the defendants were owners or occupiers.

5 See paras. 37–49 below. In the decision of the Court of Appeal in *Dunne* v. *N.W. Gas Board* [1964] 2 Q.B. 806, 831, Sellers L.J., giving the judgment of the Court, said that " in the present time the defendants' liability in [*Rylands* v. *Fletcher*] could simply have been based on the defendants' failure of a duty to take reasonable care to protect the adjacent mines ... and in respect of such a duty it is no answer to say that the failure was that of an independent contractor."

6 (1866) L.R. 1 Ex. 265, 279–80.

7 (1868) L.R. 3 H.L. 330, 338–9. Strictly speaking Lord Cairns appears to have envisaged strict liability simply for non-natural use *or* on the conditions prescribed by Blackburn J., and one Canadian case has so treated his speech (*Porter* (*J.P.*) *Ltd.* v. *Bell* (1953) 1 D.L.R. 62); but the weight of modern opinion regards the two judges' views as cumulative.

(*e*) the status of the plaintiff. (This was not an element mentioned in the formulation of the rule by Blackburn J. quoted in paragraph 2 above, but it will be necessary to consider this element in view of some later judicial pronouncements. It will be noted that the plaintiff in *Rylands* v. *Fletcher* was in fact the occupier of the land affected and that Blackburn J. in another passage[8] spoke of harm done to a neighbour's property, and Lord Cairns L.C. in the House of Lords[9] of the thing escaping into the *close* of the plaintiff.)

(*f*) the nature of the damage. (This factor was not specifically mentioned by Blackburn J. but has given rise to doubts in later cases.)

(*g*) the defences implied in Blackburn J's reference to *prima facie* responsibility.

(*a*) *Where did the thing escape from and who can be defendant?*

4. With regard to the place of origin of the escaping thing and the relationship thereto of the defendant, one question that arises is whether the place can only be land. Is the doctrine applicable, in other words, to, for example, things escaping from ships—such as the oil from the *Torrey Canyon?* In *Howard* v. *Furness Houlder Argentine Lines Ltd.*[10] it seems to have been assumed that *Rylands* v. *Fletcher* might apply in some circumstances to things escaping from a ship, but in the particular case it was held that there had been no escape and that the use (generating steam) was natural. In the proceedings, however, in *Miller Steamship Co. Pty.* v. *Overseas Tankship* (*U.K.*) *Ltd.* (*The Wagon Mound* (*No. 2*))[11] before the Supreme Court of New South Wales Walsh J. said that the principle of *Rylands* v. *Fletcher* was "not to be extended . . . it is applicable only where is an escape from land of the defendant and not when, as here, there is an escape from a ship." It is also possible that things escaping from ships would in many cases be excluded from the principle of *Rylands* v. *Fletcher* on the ground that, as Blackburn J. said in *River Wear Commissioners* v. *Adamson,*[12] a person having property adjoining a highway or navigable waters must, if his property is damaged, bear his own loss "unless he can establish that some other person is in fault."

5. A further question is whether the defendant has to own or occupy the place from which the thing escapes. Scrutton L.J. in *St. Anne's Well Brewery Co.* v. *Roberts*[13] said that "the doctrine of *Rylands* v. *Fletcher* relates to occupiers. I do not know . . . of any case where the doctrine has been applied to an owner not in occupation." However, as it seems that an occupier who gives permission to a licensee to bring on to his land the thing which escapes may be liable under the doctrine,[14] it is hard to see why an owner who lets his land for the very purpose of bringing thereon the dangerous thing should not be liable.[15] In *Rainham Chemical Works Ltd.* v. *Belvedere Fish Guano Co.*[16] Lord Sumner made it clear that in his view the licensee would also be liable, even though he was not technically an occupier; this view is supported by cases in which *Rylands* v. *Fletcher* has been regarded as applicable to dangerous things

8 (1866) L.R. 1 Ex. 265, 280.

9 (1868) L.R. 3 H.L. 330, 339.

10 (1936) 2 All E.R. 781.

11 (1963) 1 Lloyd's Rep. 402, 426. The case was not argued on *Rylands* v. *Fletcher* before the Privy Council ([1967] A.C. 617).

12 (1877) L.R. 2 App. Cas. 743, 767. Without referring to *Rylands* v. *Fletcher* Lord Reid, delivering the judgment of the Privy Council in *The Wagon Mound* (*No*. 2) (see n. 11 above at p. 639), said that the case was "one of creating a danger to persons or property in navigable waters (equivalent to a highway) and there it is admitted that fault is essential."

13 n. 2 above at pp. 5–6.

14 See Lord Sumner in *Rainham Chemical Works Ltd.* v. *Belvedere Fish Guano Co.* [1921] A.C. 465, 480.

15 He may be liable for a nuisance in an analogous case (*Harris* v. *James* (1876) 45 L.J.Q.B. 545).

16 n. 14 above at p. 479.

brought on to or placed under the highway pursuant to a licence.[17] A leading textbook[18] indeed suggests that liability under *Rylands* v. *Fletcher* does not depend on any legal right to use the place where the dangerous thing is kept, but only on control of the dangerous thing; if this is correct, however, the element of escape from the defendant's land is difficult to apply.

(*b*) *The nature of the escaping thing*

6. It is very difficult to define with precision the essential character of the things to which *Rylands* v. *Fletcher* applies and attempts to do so usually end simply by giving examples of things to which the principle has and has not been applied.[19] As Lord Porter said in *Read* v. *J. Lyons & Co., Ltd.*[20] " each [case] seems to be a question of fact subject to a ruling of the judge as to whether the particular thing can be dangerous . . . all the circumstances of the time and place and practice of mankind must be taken into consideration." There is in any event some difficulty as to the preliminary test: must the thing be, as Blackburn J. originally, said " likely to do mischief if it escapes " or, as Lord Uthwatt said in *Read's Case*[21] must it be " liable to escape "? The weight of authority seems to be in favour of the former view.

(*c*) *The necessity for escape*

7. In *Read* v. *J. Lyons & Co., Ltd.*[22] it was unanimously held by the House of Lords that, in Lord Porter's words,[23] " in order to establish liability . . . there [must] have been some form of escape from the place in which the dangerous object has been retained by the defendant to some other place not subject to his control." In view of the historical connections of the rule with nuisance and cattle trespass[24] this emphasis on some element of escape is understandable, but from the point of view of a modern rule of strict liability for special risks it produces odd results. For example, it appears that if a person manufactures explosives on his premises and an explosion occurs without negligence he might be liable to his neighbour but not to a postman on the premises delivering a letter. Yet the risk for the postman is just as great if not greater than that for the neighbour. It would of course be possible to explain an exemption from liability towards persons on the defendant's premises by reference to some element of voluntary acceptance of the risk by the visitor (this being the approach of the American *Restatement of Torts*[25]) but this was not suggested in *Read* v. *Lyons;* it does not appear that it would have made any difference if the plaintiff in that case had been entirely unaware of the nature of the activity being carried on in the factory.

---

[17] e.g., *Powell* v. *Fall* (1880) 5 Q.B.D. 597; *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* [1914] 3 K.B. 772; *N. W. Utilities Ltd.* v. *London Guarantee and Accident Co.* [1936] A.C. 108 (P.C.).

[18] *Salmond on Torts*, 15th ed., 1969, p. 415; *cp. Winfield on Tort*, 8th ed., 1967, p. 436, which emphasises the element of control of the land on which the dangerous thing exists, even if the defendant is only licensee of the land.

[19] For example, *Rylands* v. *Fletcher* has been considered applicable (though not necessarily applied, for other reasons) to water (in the parent case itself), electricity (*National Telephone Co.* v. *Baker* [1893] 2 Ch. 186), gas (*Goodbody* v. *Poplar Borough Council* (1915) 84 L.J.K.B. 1230), sparks emitted from a steam locomotive (*Jones* v. *Festiniog Railway* (1866) L.R. 3 Q.B. 733), a " chair-o-plane " (*Hale* v. *Jennings Bros.* [1938] 1 All E.R. 579), colliery waste (*A–G* v. *Cory Bros. & Co. Ltd.* [1921] A.C. 521), offensive caravan dwellers (*A–G* v. *Corke* [1933] Ch. 89) and recently strips of metal foil (*British Celanese Limited* v. *A. M. Hunt* (*Capacitators*) *Limited* [1969] 1 W.L.R. 959. It is difficult to find a case in which a thing which has escaped and caused damage was not considered to ground liability on the *Rylands* v. *Fletcher* principle solely because it lacked inherent dangerous qualities. Cases at first sight to the contrary generally appear on closer examination to have related to the now doubtful distinction in the law of negligence between chattels dangerous *per se* and chattels dangerous *sub modo*, or to involve a rejection of *Rylands* v. *Fletcher* liability without clear indication as to the particular reason for that rejection (e.g. *Burley* v. *Stepney Corp.* [1947] 1 All E.R. 507).

[20] [1947] A.C. 156, 176.

[21] *ibid* at p. 186.

[22] n. 20 above.

[23] *ibid* at p. 177.

[24] See *Rylands* v. *Fletcher* (n. 1 above) at p. 280.

[25] Article 523, qualifying the generality of the " ultra hazardous test " in Article 519.

(*d*) *The requirement of non-natural use*

8. The requirement that the use of the land in keeping the dangerous thing should be non-natural is, like the dangerous character of the thing involved, a question of fact in each case, subject to the preliminary ruling of law whether uses of that nature are capable of being regarded as non-natural. There is therefore under this heading a wide margin of uncertainly whether what is non-natural in one place or time is necessarily so in others. Thus, Lord Macmillan in *Read* v. *Lyons*[26] said that he would hesitate to hold that "in these days [i.e., it would seem, in time of war] and in an industrial community" even the manufacture of explosives was a non-natural use. From the point of view of counsel advising in *Rickards* v. *Lothian*[27] it was not perhaps therefore excessively difficult to forecast that the supply of water to a hand basin in an office building in 1909 would be an ordinary use of the premises, although this did not prevent the case reaching the Privy Council. And although it was held in *Musgrove* v. *Pandelis*[28] that the storage of a car in a garage with the tank full of petrol was a non-natural use of the premises in 1917, it would seem unlikely that such an activity would be so regarded today.[29] However, in *Rickards* v. *Lothian*[30] Lord Moulton said that the use must be a special one bringing increased danger to others and "must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community." This second link of the test of non-natural use has received little attention but seems to have been implicitly relied on by Viscount Simon and Lord Macmillan in *Read* v. *Lyons*[31]; taken at its face value it would seem to limit the operation of *Rylands* v. *Fletcher* to a very narrow field where there is no element of public benefit in the activity. This seems inconsistent with the fairly clear distinction in the cases[32] between ordinary domestic supply of things such as gas and water and their bulk carriage or accumulation. Nevertheless, Lord Moulton's dictum was quoted by Lawton J. in the recent case of *British Celanese Limited* v. *A. H. Hunt* (*Capacitators*) *Limited*[33] where he held that in 1964 the storing of metal foil, not of itself creating special risks, on a trading estate by manufacturers of electrical components "for use in the manufacture of goods of a common type which at all material times were needed for the general benefit of the community" was a natural user of the manufacturer's premises. British Celanese Limited failed to make good their claim under the principle of *Rylands* v. *Fletcher* when foil, blown by the wind, fouled the bus bars of a nearby electricity supply sub-station, causing a power failure with resulting physical injury to the plaintiff's machinery and goods in production, as well as loss of profits.

(*e*) *The status of the plaintiff*

9. In *Rylands* v. *Fletcher* the plaintiff was the occupier of the flooded mine-workings. Was this status essential to his claim? Lord Macmillan appears in *Read* v. *Lyons*[34] to have answered this question affirmatively. But in *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.*[35] the plaintiffs in a *Rylands* v. *Fletcher* claim were not occupiers of the land in which the damaged cables were laid but only had a statutory right to place the cable there. Again, in *Miles* v. *Forest Rock Granite Company* (*Gloucestershire*) *Ltd.*[36] Swinfen-Eady M.R. in

[26] n. 20 above at p. 174. See also to the same effect Viscount Simon at p. 169.

[27] [1913] A.C. 263.

[28] [1919] 2 K.B. 43.

[29] The position might be otherwise where a disused vehicle is on an open site with a tank containing highly inflammable petrol vapour—see *Perry* v. *Kendricks Transport Ltd.* [1956] 1 W.L.R. 85 where however the defendant successfully relied on the defence of act of a third party.

[30] n. 27 above at pp. 279–280.

[31] n. 20 above at pp. 169–170 and 173–5 respectively.

[32] See e.g., Lord Wright M. R. in *Collingwood* v. *H. & C. Stores Limited* [1936] 3 All E.R. 200, 208 (C.A.).

[33] [1969] 1 W.L.R. 959, 963.

[34] n. 20 above at p. 173. Lord Macmillan said: "The doctrine of *Rylands* v. *Fletcher*, as I understand it, derives from a conception of mutual duties of adjoining or neighbouring landowners and its congeners are trespass and nuisance."

[35] [1914] 3 K.B. 772 (C.A.).

[36] (1918) 34 T.L.R. 500 (C.A.).

deciding on an issue of negligence, said that the plaintiff, a pedestrian on a nearby road, who was injured by the blast from an explosion in the defendants' quarry, would have succeeded under *Rylands* v. *Fletcher*. In *Shiffman* v. *Order of St. John*[37] the successful plaintiff, a member of the public injured by the fall of a flag pole in Hyde Park, was able to prove negligence, but Atkinson J. said that *Rylands* v. *Fletcher* was also applicable.[38] In *Perry* v. *Kendricks Transport Ltd.*[39] it seems to have been assumed that the fact that the infant plaintiff was not the occupier of the land on which he was injured would not in itself have barred his claim under *Rylands* v. *Fletcher*. The present state of the law on this point appears somewhat doubtful, since although there is a weight of judicial opinion which would not require the plaintiff to have something in the nature of landed status, the observations are mainly by way of *obiter dicta*. However, in *British Celanese Limited* v. *A. H. Hunt (Capacitators) Limited*[40] Lawton J. clearly stated that "once there has been an escape [from a place where the defendant had occupation of or control over land to a place which is outside his occupation or control—i.e. the test propounded by Viscount Simon in *Read* v. *Lyons*[41]] . . . those damnified . . . need not be the occupiers of adjoining land or indeed of any land." But here again this viewpoint may not have been strictly necessary to the decision, as the judge had already decided that the storing of the metal foil which escaped from the premises of the storers was a natural user of their land.[42]

(f) The nature of the damage

10. It was again Lord Macmillan in *Read* v. *Lyons*[43] who raised the further question whether the doctrine of *Rylands* v. *Fletcher* applied to personal injuries. He appears to suggest that with the exception of strict liability for animals proof of negligence is essential in modern times to any common law claim for damages for personal injuries. In the same case[44] Viscount Simon and Lord Porter left the point open. However in the *Miles, Shiffman* and *Perry* cases cited above,[45] as well as in *Hale* v. *Jennings Brothers*[46] where the decision in fact turned on *Rylands* v. *Fletcher* liability, the possibility of recovering for personal injuries under the rule was accepted.[47] And in a Canadian case[48] liability under *Rylands* v. *Fletcher* was held to extend to personal injuries sustained "by anyone to whom the probability of such damage would naturally be foreseen". In spite of the weight of authority taking a contrary view to Lord Macmillan in *Read* v. *Lyons*[49] the Court of Appeal in the recent case of *Dunne* v. *N. W. Gas Board*[50] appears to have regarded the question as by no means settled.

(g) Defences to Rylands v. *Fletcher*

(i) *Act of a stranger*

11. It is a defence to a *Rylands* v. *Fletcher* claim that the escape of the dangerous thing was due to the act of a stranger.[51] For this purpose a servant within the course of his employment or an independent contractor engaged on work having some connection with the dangerous thing (as in *Rylands* v. *Fletcher* itself) is not to be regarded as a stranger. A trespasser is undoubtedly

37 [1936] 1 All E.R. 557.

38 The "escape" doctrine is however difficult to apply in a case like this. See paras. 5 and 7 above.

39 [1936] 1 W.L.R. 85 (C.A.). See, however, n. 29 above.

40 n. 33 above at p. 964.

41 n. 20 above at p. 168.

42 See end of para. 8 above.

43 n. 20 above at pp. 170–1.

44 At pp. 168–9 and 178 respectively.

45 Para. 9 above.

46 [1938] 1 All E.R. 579 (C.A.).

47 There are also *dicta* of Fletcher Moulton L.J. in *Wing* v. *London General Omnibus Company* [1909] 2 K.B. 652, 655 (C.A.) to the effect that the rule applies to personal injuries.

48 *Aldridge* v. *Van Patter* [1952] 4 D.L.R. 93.

49 n. 43 above.

50 [1964] 2 Q.B. 806, 838.

51 *Box* v. *Jubb* (1879) 4 Ex. D. 76; *Rickards* v. *Lothian* (n. 27 above at p. 279); *Perry* v. *Kendricks Transport Ltd.* (n. 47 above).

a stranger, but the position of a licensee on the land on which the dangerous thing is kept is more doubtful: whether or not he is a stranger has been said[52] to depend on the "control" which is exercised over him; but "control" in this context is by no means self-explanatory and it would appear that this test imports in a disguised form a requirement of negligence.[53] Of course, where there is in fact negligence in respect of the activities of some other person, whether he comes within the definition of a stranger or not, there may be liability quite apart from the principle of *Rylands* v. *Fletcher.*

(ii) *Act of God*

12. This defence is of limited importance, being successfully raised in only one English case, *Nichols* v. *Marsland.*[54] There are, however, some difficulties of principle about its precise scope. It is clearly not identical with *any* natural event, such as a fall of snow or rain. Nor is it always equivalent to a natural event which, for the purposes of the law of negligence, is not reasonably foreseeable.[55] It must be highly exceptional and entail "circumstances which no human foresight can provide against and of which human prudence is not bound to recognise the possibility."[56] But even this definition of an act of God appears to be related to, if only because it goes beyond, a duty of care, albeit of an exceptional nature, greater than would normally be expected of any reasonable man. Professor Goodhart[57] has forcibly argued that a duty of care should have no place in *Rylands* v. *Fletcher* liability, pointing out that the conclusion reached by the American cases is that "'strict liability' is based on the principles of allocation of risk and . . . a person who has created an unusual risk is liable if harm results from it even though the immediate cause was an act of God."

(iii) *Consent of the plaintiff*

13. This defence is of considerable practical importance, particularly in cases concerning joint occupancy of buildings, although it must be pointed out that some of the cases, particularly the older ones, could in modern conditions have been decided on the ground that the thing in question did not involve a non-natural use of land.[58] There is no difficulty when the plaintiff expressly consents to run the risk of the dangerous thing; the more serious problem arises where the courts imply from a legal relationship of the parties or from the physical circumstances that the plaintiff has consented. It is clear that a tenant who suffers damage from the escape of a dangerous thing from premises in the same building, which are occupied by his landlord, and who himself benefits from that thing, must be assumed to consent to forego any right which he might otherwise have to recover damages in the absence of negligence.[59] But even where these conditions are not satisfied consent may nevertheless be implied. Thus where the plaintiff had rented a field from an adjoining quarry owner, he was held to have consented to damage arising from the normal operation of the quarry without negligence.[60] Consent may even be implied where the plaintiff and defendant

---

[52] By the Court of Appeal in *Perry's Case* (n. 29 above).

[53] For this reason the defence of act of a stranger is criticised by Professor Goodhart on the same grounds as he attacks the defence of act of God. See para. 12 and n. 57 below.

[54] (1876) 2 Ex. D. 1.

[55] *Salmond, op. cit.*, p. 421, argues to the contrary, but *Winfield, op. cit.*, p. 430, suggests that there is a clear difference between act of God and inevitable accident, in that the former differs "both in the degree of unexpectability and in the exclusion of human activity as a causal link in the chain of events."

[56] *per* Lord Westbury L.C. in *Tennent* v. *Earl of Glasgow* (1864) 2 M. (H.L.) 22, approved in *Corporation of Greenock* v. *Caledonian Railway Company* (1917) A.C. 556.

[57] [1951] 4 C.L.P. 178–183.

[58] As, in *Anderson* v. *Oppenheimer* (1886) 5 Q.B.D. 602, where the thing in question was a domestic water system. In *Peters* v. *Prince of Wales Theatre (Birmingham) Ltd.* [1943] 1 K.B. 73 at p. 76, it seems that the Court regarded a sprinkler system as "ordinary and usual" in a theatre, although it went on the discuss the consent issue at length.

[59] See *Carstairs* v. *Taylor* (1871) L.R. 6 Ex. 217—escape of water collected from gutters in a box from part of building occupied by landlord/defendant to lower floor occupied by tenant/plaintiff.

[60] *Thomas* v. *Lewis* [1937] 1 All E.R. 137. It should be noted that the plaintiff recovered damages in respect of damage to another field which belonged to him.

occupy different parts of the same building without any landlord and tenant relationship, provided at least that the thing which escapes is part of a service (e.g. water) for their common benefit.[61] More doubtful, however, is the position where the dangerous thing cannot be regarded as for the common benefit of both parties. This was the case in *Western Engraving Co.* v. *Film Laboratories Ltd.*[62] where no implication of consent to the presence of large quantities of water used for washing the defendants' films was made. But some doubt is thrown on this case by the remarks of Goddard L.J. delivering the judgment of the Court of Appeal in *Peters* v. *Prince of Wales Theatre (Birmingham) Ltd.*[63] where he suggested that if the water system was in fact already installed when the plaintiffs took over their part of the building it might have been argued that they " took the premises as they found them ". It is somewhat remarkable that this latter phrase should be put forward as a ground for implying consent in a field of law which has many affinities with the law of nuisance, where it is clear that it is no defence to prove that the plaintiff " came to the nuisance ", as by setting up house next door to the source of the nuisance. Looked at as a whole, the refinements and uncertainties of the defence of consent to a claim under *Rylands* v. *Fletcher* illustrate the reluctance of the courts to apply the doctrine of that case and the resulting narrow field of its operation.

(iv) *Default of the plaintiff*

14. This defence was specifically recognised in *Rylands* v. *Fletcher*.[64] It would seem that contributory negligence would also to the extent of the negligence be a defence, though direct authority is lacking. In the analogous case of strict liability for animals the defence of contributory negligence has been recognised by the courts.[65] Closely associated with the defence of default of the plaintiff, though sometimes treated as a separate concept, is the situation which arises when the damage which the plaintiff has suffered is due to the excessive sensitivity of his property.[66] It is doubtful however whether this state of affairs should be regarded as a " defence " to a *Rylands* v. *Fletcher* claim ; it is rather an assertion that the thing is not " likely to do mischief if it escapes ".

(v) *Statutory authority*

15. Like consent of the plaintiff, this defence is of considerable practical importance: operations which may involve the escape of dangerous substances such as gas, water, electricity and sewage are in modern conditions generally undertaken under statutory powers. Where the statutory authority is mandatory it is clear that the body subject to it is not liable for things done pursuant to that authority in the absence of negligence ; this emerges from that part of the judgment in *Dunne* v. *N.W. Gas Board*[67] which deals with the liability of the first defendants, the Gas Board, from whose mains under the highway gas escaped, ignited and injured the plaintiffs. An example of a statute facing squarely the problems involved and departing from the ordinary rule of non-

[61] See Goddard L.J. in *Kiddle* v. *City Business Properties Ltd.* [1942] 1 K.B. 269 at p. 274.

[62] (1936) 1 All E.R. 106.

[63] n. 58 above.

[64] n. 1 above at pp. 279–80.

[65] See *Rands* v. *McNeil* [1955] 1 Q.B. 253, 266, where reference is made to *Filburn* v. *People's Palace and Aquarium Co. Ltd.* (1890) 25 Q.B.D. 258.

[66] See *Eastern and S. African Telegraph Co. Ltd.* v. *Cape Town Tramways Co. Ltd* [1902] A.C. 281 (P.C.). *cf. Bridlington Relay Ltd.* v. *Yorkshire Electricity Board* [1965] Ch. 436 where the plaintiffs failed in a claim for an injunction on the ground that interference with the reception of television programmes on one channel did not in 1965 constitute an actionable nuisance.

[67] [1964] 2 Q.B. 806, 853–5. However, the Court of Appeal considered that, as the "sole and effective cause of the accident " was the bursting of the second defendants' water pipes, " with which the gas board had nothing to do ", the Gas Board would not in any event have been liable, presumably because, although the bursting of the water pipes took place without any negligence on the part of the water authority (Liverpool Corporation) it could be treated as due to an " act of a stranger ". It is, however, hard to see how the water authority were involved in any " act " which caused the bursting of the water pipes and the escape of the gas.

liability is provided by the Reservoirs (Safety Provisions) Act 1930,[68] s. 7 of which provides that in the case of reservoirs constructed under statutory powers after the commencement of the Act, the fact that they are so constructed " shall not exonerate the undertaker from any indictment, action or other proceedings to which they would otherwise have been liable ", no distinction thus being made between mandatory and permissive powers. The defence that the operations giving rise to an escape were carried out under mandatory authority is available even if the relevant statute contains a clause preserving the undertakers' liability for " nuisance ".[69] Where however the authority given is permissive only, there may be liability under the doctrine of *Rylands* v. *Fletcher*.[70] Where there is no clause preserving liability for nuisance, there will be no liability in the absence of negligence.[71] Thus the second defendants, the water authority, in *Dunne's Case*[72] were exempted from liability on this principle. Although the rules relating to the defence of statutory authority which have just been summarised are reasonably clear, it has been suggested that the law goes further and that a local authority is not in any event liable under *Rylands* v. *Fletcher* for a use of land which is " for the general benefit of the community,"[73] presumably on the ground that such a use is the natural use of the land. The Court of Appeal in *Dunne*, however, did not find it necessary to discuss this question. Taking into account the whole complex of rules relating to the defence of statutory authority, it will be evident that they lean heavily on, and perhaps strain, the presumed intention of Parliament. At all events, it is for consideration whether in such a case as *Dunne* the risk of an explosion of gas, where there is no negligence, should rest on the injured party merely because the gas is piped under mandatory powers (or under permissive powers, there being no reservations of liability for nuisance) or whether if the community authorises a risky operation, the burden of that risk should not be spread as widely as possible, either over the general body of taxpayers or at least, through adjustment of tariffs, among those members of the community who enjoy the service supplied.[74]

---

68 Passed as a result of the Dolgarrog dam disaster in 1925. See also the limited exclusion of the defence of statutory authority in the Railway Fires Act 1905 and 1923 (n. 87 below).

69 See that part of the judgment in *Dunne's Case* (n. 67 above) which deals with the liability of the Gas Board; *Stretton's Derby Brewery Co.* v. *Mayor of Derby* [1894] 1 Ch. 431; and the observations of Lord Sumner in *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* [1914] 3 K.B. 772, 781.

70 See the *Charing Cross* case (n. 69 above).

71 *Geddis* v. *Proprietors of the Bann Reservoir* (1878) 3 App. Cas. 430.

72 n. 67 above at pp. 836–8.

73 See Denning L.J. in *Pride of Derby etc. Angling Association Ltd.* v. *British Celanese Ltd.* [1953] Ch. 149, 189.

74 A Member of Parliament recently referred to a Government Department a letter on this subject from a firm of solicitors in his constituency. The letter, passed to us by the Department, dealt with two cases in which the firm represented the plaintiffs, against gas and water authorities respectively. In the first, escape of gas from a main led to the death of the plaintiff's wife and to brain injury to himself; in the second escape of water from a main damaged property belonging to a client of the firm. The solicitors also mention two further cases in the same area, arising from similar circumstances and leading in the one case to the destruction of a shop and the death of a mother with several young children and in the other to widespread flooding of property. The solicitors' clients were unable to prove negligence, for such pipes are usually buried deep in the earth and under the sole control of the statutory undertaker. They add that they believe the other two plaintiffs were equally unsuccessful in their claim for compensation for the same reason. They suggest that in such circumstances statutory undertakers should be subject to strict liability, or at the very least be required to prove their lack of negligence by a reversal of the burden of proof. These suggestions resemble those made in 44 (1970) Aust. L.J. 93–4, where, in a comment on *Benning* v. *Wong* (1969) 43 Aust. L.J.R. 467, (*a*) the question is asked, with reference to the defence of statutory authority, " Why should the injured individual have to bear all the loss caused by the activity of a profit-making public utility or even a non-profit-making public enterprise from which the community benefits? " (*b*) the majority decision of the High Court of Australia (contrary to the view of Barwick C.J. and Windeyer J.) is criticised for insisting that, where statutory authority is a defence to a *Rylands* v. *Fletcher* claim, the burden of proof to show that the body exercising statutory authority was negligent is on the plaintiff.

B. **Liability for Fire**

16. At common law and long before *Rylands* v. *Fletcher* there existed a liability for the escape of fire which was stricter than the modern liability for negligence.[75] Subject to the statutory modification to be discussed below the liability still exists, independent of any liability under *Rylands* v. *Fletcher*. The exact boundaries of the common law liability before the statutory modification are now uncertain, but it would seem that it was a defence to prove that the fire was started by (or where it was already in existence its escape was due to) the act of a stranger[76] or an " act of God ".[77] The position prior to an Act of 1707 (substantially re-enacted in the still extant s. 86 of the Fires Prevention (Metropolis) Act 1774, which applies to the whole country and indeed to parts of the Commonwealth[78] was stated by Lord Tenterden, C.J., in *Becquet* v. *MacCarthy*[79] to be that " if a fire began on a man's own premises by which those of his neighbour were injured, the latter, in an action brought for such an injury, would not be bound in the first instance to show how the fire began but the presumption would be (unless it were shown to have originated from some external cause) that it arose from the neglect of some person in the house."

17. The Act of 1774 provides that " no action . . . shall be maintained . . . against any person in whose house, chamber, stable, barn or other building or on whose estate any fire shall . . . accidentally begin. " Accidentally " does not include " negligently ", whether the negligence be that of the defendant or his servant[80] or his independent contractor.[81] But the statute does cover the case of a fire which begins without negligence on anyone's part or from unknown causes.[82] " Begin " as far as the issue of negligence is concerned does not necessarily relate to the actual commencement of the fire (which may be by a harmless non-negligent act) but also to the spread of the fire.[83] Thus where a fire is even deliberately lit in circumstances of safety and spreads without negligence there will be no liability. This indeed appears to have been the position before the Act, but it is now generally accepted[84] that what the Act did was to reverse the burden of proof: it is not for the defendant to disprove negligence in a case to which the Act applies.

---

75 See Winfield (1926), 42 L.Q.R. 46–50.

76 *Beaulieu* v. *Finglam* (1401) Y. B. Pasch, 2 Hen. IV, f. 18. The following are not strangers: the defendant's servant in the course of his employment (*McKenzie* v. *McLeod* (1834) 10 Bing. 385), a contractor also, presumably, in the course of employment (*Balfour* v. *Barty-King* [1957] 1 Q.B. 496, 504), a guest (*Crogate* v. *Morris* (1617) 1 Brownl. 197) or indeed anyone on the defendant's property with his leave. Presumably in the last two cases there will be no liability if the act is quite outside the terms of the licence. See also *H. & N. Emanuel Ltd.* v. *Greater London Council, The Times*, 21 July 1970, in which the Council was held strictly liable for the escape of fire from land remaining in its occupation owing to the negligence of a contractor who was not employed by the Council but was on the land with their consent.

77 In *Turberville* v. *Stamp* (1697) 1 Salk. 13 it was suggested that "if a sudden storm had arisen [the defendant] could not stop [sic] it was a matter of evidence and he should have showed it ". " Act of God " in this context seems wider than under *Rylands* v. *Fletcher*, but the point is now academic because (*a*) of the statutory modification of the common law liability (see para. 17 below) and (*b*) where *Rylands* v. *Fletcher* applies the defence will be narrowly construed.

78 e.g., Western Australia. See *Goldman* v. *Hargrave* [1967] 1 A.C. 645.

79 [1831] 2 B. & Ad. 951, 958.

80 *Musgrove* v. *Pandelis* [1919] 2 K.B. 43.

81 *Spicer* v. *Smee* [1946] 1 All E.R. 489, 495; *Balfour* v. *Barty-King* (n. 76 above at p. 504): "At the present day it can safely be said that a person in whose house a fire is caused by negligence is liable if it spreads to that of his neighbour and this is true whether the negligence is his own, or that of his servant or his guest . . . but if a man is liable for the negligent act of his guest, it is indeed difficult to see why he is not liable for the act of a contractor whom he has invited to his house to do work in it and who does the work in a negligent manner." (*per* Lord Goddard C.J.).

82 *Collingwood* v. *H. & C. Stores* [1936] 3 All E.R. 200.

83 *Musgrove* v. *Pandelis* (n. 80 above).

84 See Mackenna J. in *Mason* v. *Levy Auto Parts of England Ltd.* [1967] 2 Q.B. 330, 538–539.

18. Even if the common law liability is excluded because of the operation of the Act of 1774, can there be liability for escaping fire where the conditions of *Rylands* v. *Fletcher* are satisfied? For example, if in *Collingwood* v. *H. & C. Stores*[85] the Court had held that there was a non-natural use, would they have been bound to decide in favour of the plaintiff despite the terms of the Act? In *Musgrove* v. *Pandelis*[86] the Court of Appeal held that the Act of 1774 does not confer exemption from liability where the rule in *Rylands* v. *Fletcher* can be applied. As Bramwell, B., had earlier stated in *Vaughan* v. *The Taff Vale Railway Company*[87]: "The statute [of 1774] does not apply where the fire originates in the use of a dangerous instrument knowingly used by the owner of the land on which the fire breaks out." Although preferring to treat the escape of fire as giving rise to a liability analogous to, rather than strictly within, the principle of *Rylands* v. *Fletcher*,[88] MacKenna, J., in *Mason* v. *Levy Auto Parts of England Ltd.*[89] felt constrained to follow the principle of *Musgrove* v. *Pandelis*. He pointed out, however, that the Court of Appeal in that case "went very far in holding that an exemption given (by virtue of s. 86 of the Act of 1774) to accidental fires 'any law, usage or custom to the contrary notwithstanding' does not include fires for which liability might be imposed on the principle of *Rylands* v. *Fletcher*." Indeed, it is difficult to escape a dilemma: if a liability of the *Rylands* v. *Fletcher* type existed before its classic enunciation in the case from which it takes its name (as the Court of Appeal in fact argued in *Musgrove* v. *Pandelis*) then the broad language of the statute, to which MacKenna, J., drew attention can hardly be ignored; if on the other hand it were suggested that the doctrine of *Rylands* v. *Fletcher* grew up after the 1774 Act then its development was necessarily limited by the mandate of Parliament.

19. Reviewing the liability for fire as a whole with its complex interaction of different kinds of common law liability and the obscure intervention of Parliament, it is surprising that a branch of the law which deals with such a common cause of injury and damage as fire has been allowed to remain in so unsatisfactory a state. As MacKenna J., said in *Mason's Case*[90]: "I find it . . . deplorable that liability should depend, in the matter of fire, on what a draftsman meant in Queen Anne's day by 'accidental fires' . . . It is a proof of our love of old things, rather than a tribute to his drafting skill that we —and more surprisingly our kinsmen in the antipodes (see *Goldman* v. *Hargrave*)[91]—are still governed by this phrase."

C. Nuisance

20. Many situations where liability for nuisance may be in issue give rise in any event to liability under the doctrine of *Rylands* v. *Fletcher*. Thus *Midwood and Co. Ltd.* v. *Manchester Corporation*[92] (which related to the explosion of an electric main laid in bitumen whereby the plaintiff's goods in his premises adjoining a road in which the main was laid were damaged) was treated by the

85 See n. 82 above.

86 See n. 80 above.

87 [1858] 3 H. & N. 743 at p. 751. The decision was later reversed on other grounds (1860), 5 H. & N. 679. It is interesting to note that the ground for the reversal was that the railway company was acting under statutory authority (see para. 26 above) and that the hardships which this defence might produce were to a limited extent recognised by the Railway Fires Acts 1905 and 1923. Under those Acts railway companies were made liable up to a limit of £200 for damage caused to agricultural land or agricultural crops by fire arising from sparks or cinders emitted by their locomotives, even though the locomotives were being run under statutory powers. But this liability is in effect a common law liability (without the defence of statutory authority) and therefore subject to the other defences and incidents of such common law liability: see *J. Langlands (Swanley) Ltd.* v. *British Transport Commission* (1956) 1 W.L.R. 890.

88 On the ground that the inflammable substance had not escaped, but only the resulting fire.

89 See n. 84 above.

90 *ibid* at p. 543.

91 See n. 78 above.

92 [1905] 2 K.B. 597.

Court of Appeal as a case of nuisance; in *Charing Cross Electricity Co.* v. *Hydraulic Power Co.*,[93] however, which concerned damage done to the plaintiff's cables by the defendant's escaping water, *Midwood's Case* was used by the Court of Appeal to support a finding that the defendants were liable under the rule in *Rylands* v. *Fletcher*. But there are other cases of liability in nuisance independent of liability under *Rylands* v. *Fletcher*.[94] We are not here concerned to examine all the features of liability in nuisance but only to consider it so far as it may involve a person in liability for loss arising from accidents other than in cases where he (or his servant in the course of his employment) has been negligent.

21. Liability in nuisance may of course be strict in the sense that it may involve liability for the negligence of an independent contractor. However, we deal with this aspect of liability in nuisance under the heading "Liability for Independent Contractors".[95]

(a) Private Nuisance

22. Where the defendant or his servant creates a nuisance it is sometimes said that his liability is not dependent on negligence.[96] This will of course be true in a case which may be subsumed under *Rylands* v. *Fletcher* as well as under nuisance, but in other cases it is difficult to accept the numerous *dicta* in an unqualified form. Before proceeding, it must be admitted that where *Wringe* v. *Cohen*[97] applies the liability is certainly stricter than liability for negligence (including the cases where there is liability for the fault of independent contractors), but it is questionable whether there are now any other instances

---

[93] See n. 69 above.

[94] See West, "Nuisance or *Rylands* v. *Fletcher*" (1966), 30 Conv. (N.S.) 95–105. The main differences between the two types of liability would appear to be as follows: (i) in *Rylands* v. *Fletcher* there must be a "thing" which the defendant has brought on to his land, or at least in respect of which he has taken some action; in nuisance, where the primary emphasis is on interference with the enjoyment of the plaintiff's land, the way in which the interference has arisen is immaterial, the question being whether the defendant is to be made responsible for the interference. Thus, in *Pontardawe R.D.C.* v. *Moore-Gwyn* [1929] 1 Ch. 656 (where the judgment discussed liability in terms of *Rylands* v. *Fletcher*) a declaration that the defendant was obliged to execute works to make safe a natural outcrop of rock on his premises was refused; but in *Goldman* v. *Hargrave* [1967] 1 A.C. 645 (P.C.) an occupier of land was held liable by the Privy Council in nuisance for failing to extinguish fire caused by lightning which had struck a tree on his land. (ii) In *Rylands* v. *Fletcher* the "thing" has to be likely to do mischief if it escapes. In nuisance there is no such requirement; if there is unreasonable interference with the enjoyment of the plaintiff's land, it is not normally necessary to consider any special character of the state of affairs from which the nuisance arose, although the position may be otherwise where it is sought to make the defendant liable in nuisance for an independent contractor—see paras. 39–40 below. (iii) In *Rylands* v. *Fletcher* there must have been an unnatural use of the defendant's land; in nuisance liability may be imposed in similar circumstances but by the application of a different test. The test in nuisance is whether the interference with the enjoyment of the plaintiff's land was in the particular environment unreasonable. (iv) In *Rylands* v. *Fletcher* the more widely held view is that anyone outside the land from which the "thing" escapes can sue even for personal injuries (see paras. 9 and 10 above); in private nuisance the plaintiff has to be the occupant of the land enjoyment of which is interfered with (*Malone* v. *Laskey* [1907] 2 K.B. 141), and there is some doubt whether the tort covers personal injuries, although it has been applied in a case of injury to goods (*Halsey* v. *Esso Petroleum Co. Ltd.* [1961] 1 W.L.R. 683, 692), but as to the latter see *Cunard* v. *Antifyre Ltd.* [1933] 1 K.B. 551, 557 and Somervell L.J. in *Newcastle-under-Lyme Corporation* v. *Wolstanton Ltd.* [1947] Ch. 427, 445–6, who seems to deny a right of recovery in respect of damage to chattels, at least where there is no damage to the land itself; in public nuisance a person who suffers damage over and above that inflicted upon the public in general can recover for any foreseeable loss, including personal injuries (*Castle* v. *St. Augustine's Links* 38 T.L.R. 615) damage to goods (*Halsey's Case* above at p. 692) and even for purely pecuniary damage (*Rose* v. *Miles* (1815) 4 M. & S. 101), if he has suffered his particular damage in exercise of his right to use the highway (or navigable waters). Other differences, so far as they relate to the strictness of the liability, are dealt with in the text—paras. 22–36 below.

[95] See paras. 39-42 below.

[96] See e.g., Lindley L.J. in *Rapier* v. *London Street Tramways Co.* [1893] 2 Ch. 588, 590: "At common law, if I am sued for nuisance, and the nuisance is proved, it is no defence on my part to say, and to prove, that I have taken all reasonable care to prevent it."

[97] [1940] 1 K.B. 299 (C.A.). See paras. 30-33 below.

of strict liability for nuisance which cannot be explained as coming under *Rylands* v. *Fletcher* or liability for the fault of independent contractors.

23. First, it should be noted that in many of the cases of nuisance the claim is for an injunction to prevent the continuance of the nuisance; consideration of the strictness of the duty is then out of place—all that the court is concerned with is the question, "Should the defendant be told to stop this interference with the plaintiff's rights?" Whether or not the defendant knew of the smell or noise or the like when it first began to annoy the plaintiff does not matter; he becomes aware of it at the latest when the plaintiff brings his claim before the Court. Secondly, the essence of nuisance is that it is the law of give and take; it follows from this that the court should be primarily concerned with how far the defendant's freedom of action can be allowed to impinge upon the plaintiff's right to be free from intrusion. In this enquiry it is indeed true that it is no answer for the defendant to say that he built his factory or stables with all possible care so as to put those around him to the minimum of inconvenience, for it is this minimum of inconvenience which may constitute the nuisance. In the great majority of the cases to be found in the books this minimum of inconvenience must indeed have been obvious to the defendant—e.g., that there was smoke or dust or smell emanating from his premises: what he does is to take a risk in hoping that it is only so much as the law will allow.[98] In a sense it might be said that nuisance in such cases is not merely negligent, it is intentional, and to say that in such a case it is no defence for the defendant to carry on his operations with the utmost care is far from saying that if something goes unforeseeably amiss in an undertaking which is normally unobjectionable there will be liability in nuisance for damage which is caused. The defendants in *Halsey* v. *Esso Petroleum Co. Ltd.*[99] were liable because, although they ran their oil depot carefully they knew or should have known that fumes were emitted. The defendant in *Ilford U.D.C.* v. *Beal*[100] was not liable because she was ignorant of the existence of the sewer over which she built her wall and could not be expected to know of it.

24. The close relationship between the modern law of negligence and nuisance was discussed in the advice of the Privy Council in *Overseas Tankship (U.K.) Ltd.* v. *The Miller Steamship Co. Pty. (The Wagon Mound No. 2)*:[101]

> "Nuisance is a term used to cover a wide variety of tortious acts or omissions and in many negligence in *the narrow sense*[102] is not essential. An occupier may incur liability for the emission of noxious fumes or noise although he has used the utmost care in building and using his premises. The amount of fumes or noise which he can lawfully emit is a question of degree and he or his advisers may have miscalculated what can be justified. Or he may deliberately obstruct the highway adjoining his premises to a greater degree than is permissible, hoping that no one will object. On the other hand, the emission of fumes or noise or the obstruction of the adjoining highway may often be the result of pure negligence on his part . . . And although negligence may not be necessary, fault of some kind almost always[103] is, and fault generally involves foreseeability."

25. It has been suggested [104] that the true position is this: Liability for nuisance is strict in the sense that it is no defence for the creator of a nuisance to assert that he took all reasonable care to prevent it arising; but it is based on fault in the sense that he will not be liable where he could not reasonably have foreseen

---

98 Contrast the balancing of risk of injury against the loss that would be caused by closing the factory in *Latimer* v. *A.E.C.* [1952] 2 Q.B. 701, a case of negligence.

99 See n. 94(iv) above.

100 [1925] 1 K.B. 671.

101 [1967] 1 A.C. 617, 639.

102 Emphasis added.

103 i.e., unless *Wringe* v. *Cohen* (n. 97 above) or *Rylands* v. *Fletcher* applies?

104 See Dias, [1967] C.L.J. 62, especially at pp. 78-82.

the kind of damage which might result and the way in which it might arise if he failed to use reasonable care. The following example may help to illustrate the relevant distinctions:

> A efficiently repoints a chimney stack with cement which he obtains from a reputable dealer. Unknown to him the cement is faulty, and as a result the chimney stack collapses on to his neighbour's house. It would seem that A is liable in nuisance, although he took all reasonable care in carrying out the repairs, because he ought to have foreseen the possibility of the kind of damage which in fact occurred.

26. These distinctions between pure negligence liability and liability in nuisance are limited to cases where the defendant is responsible[105] for the creation of a nuisance. But if the nuisance has been created by a trespasser or the occupier's predecessor in title[106] the occupier is not liable unless he was aware, or ought by the exercise of reasonable care to have been aware, of its existence, and had an opportunity to remedy it.[107] The rule is the same if nuisance is brought into being by the operation of the forces of nature. The position at the present day is that there is "a general duty upon occupiers in relation to hazards occurring on their land, whether natural or man-made", and in each case in determining the existence of liability the reasonable capabilities of the occupier to discover the nuisance and remedy it must be taken into account.[108]

(b) Public Nuisance[109]

27. It is now widely recognised that this branch of the law is approaching very close to negligence and that as a general rule the defendant or his servants (or, in some cases, his independent contractors) must have failed to take reasonable care to avoid reasonably foreseeable damage or injury to others if there is to be liability. As long ago as 1872 the close relationship between nuisance and negligence was recognised in the case of *Sharp* v. *Powell*.[110] The defendant's servant had washed his van in a public street—a criminal offence. There was a severe frost and a blocked drain led to the water freezing on the street, whereby the plaintiff's horse fell and was injured. The case was laid in nuisance, but the defendant was held not liable because his servant "could not reasonably be expected to foresee that the water would accumulate and freeze at the spot where the accident happened."[111] Lord Reid remarked in *The Wagon Mound (No.* 2)[112] that "no one concerned [in *Sharp* v. *Powell*] thought that there was any difference in this respect between negligence and nuisance." *The Wagon Mound (No.* 2) itself finally confirms that where the claim is in respect of a danger created in a highway or navigable waters negligence is essential for a successful claim in nuisance.[113] However, though the question was not discussed in *The Wagon Mound* (No. 2), one difference may remain between public nuisance and simple negligence as regards the burden of proof. In *Southport Corporation*

105 i.e., where he or his servant in the course of his employment or in certain cases his independent contractor (see paras. 39-40 below) has created the nuisance.

106 Unless *Wringe* v. *Cohen* (n. 97 above) applies.

107 See *Sedleigh-Denfield* v. *O'Callaghan* [1940] A.C. 880.

108 See *Goldman* v. *Hargrave* (n. 94(i) above) at pp. 661-2, 663-4.

109 A public nuisance is a nuisance "which materially affects the reasonable comfort and convenience of a class of Her Majesty's subjects" (*per* Romer L.J. in *A.-G.* v. *P.Y.A. Quarries Ltd.* [1957] 2 Q.B. 169, 184). It is a crime at common law, but where tortious liability is in issue the plaintiff is required to prove that he has suffered damage over and above that inflicted upon the public in general.

110 (1872) L.R. 7 C.P. 253.

111 *ibid* at p. 259, *per* Bovill C.J.

112 See n. 101 above at p. 637.

113 See also *Maitland* v. *Raisbeck* [1944] K.B. 689—no action for nuisance where an accident is caused by the rear light of a vehicle going out without fault on the driver's part. In *Morton* v. *Wheeler*, *The Times*, February 1st, 1956, referred to by Lord Reid in *The Wagon Mound* (*No.* 2), (n. 101 above at p. 640) Denning L.J. said, in deciding that spikes on a shop window were not a nuisance: "How are we to determine whether a state of affairs in or near a highway is a danger? This depends, I think, on whether injury may reasonably be foreseen."

v. *Esso Petroleum Co. Ltd.*[114] Denning L. J. expressed the view that "in an action for public nuisance, once the nuisance is proved and the defendant is shown to have caused it, then the legal burden is shifted on to the defendant to plead and prove a sufficient justification or excuse." This view is difficult to reconcile with *dicta* of high authority[115] which suggests that proof of negligence is always essential to found liability for damage caused by traffic on a public highway or in navigable waters.

28. The relevance of negligence to public nuisance is illustrated by a number of comparatively recent cases relating to damage caused by trees to users of the highway. In 1926 in *Noble* v. *Harrison*[116] it was held that the occupier of land adjoining the highway was not liable for the fall of a tree on to the highway if he did not know or could not by the exercise of reasonable care have known that the tree was dangerous. In 1951 the House of Lords in *Caminer* v. *Northern & London Investment Trust Ltd.*[117] confirmed this principle and held the standard of care required is that of the reasonably prudent occupier rather than of an expert on trees ; it appears to make no difference whether the tree was planted by the defendant, inherited by him[118] or self-sown.

29. Although the position regarding trees adjoining the highway seems clear, there is some doubt regarding artificial projections over the highway. In *Tarry* v. *Ashton*[119] where a lamp projecting over the highway fell on the plaintiff, the occupier of the house to which the lamp was attached was held liable by Blackburn J., who said that the occupier was liable if he knew of the defect or if he failed to discover a defect which he ought on investigation to have discovered. On the facts the occupier did not know of the defect, but he had entrusted the repair of the lamp to an independent contractor who had been negligent in not discovering the defect. According to Blackburn J. the occupier was nevertheless liable because he could not evade his "duty to make the lamp reasonably safe" (by which he appears to have meant his duty to take reasonable steps to make it safe) by entrusting the fulfilment of that duty to another. He doubted (or "at all events . . . . would not say") whether there would be liability for a latent defect (meaning presumably one which could not be discovered by the exercise of reasonable care). However, Lush and Quain JJ., who also held the occupier liable, seemed to base their judgments on the ground that the occupier of premises with a projection over the highway has an unqualified duty to keep the projection in a proper state of repair. Thus on Blackburn J.'s reading of the law, *Tarry* v. *Ashton* falls to be considered in the section[120] below which is concerned with liability in public nuisance for the negligence of an independent contractor. But according to Lush and Quain JJ. it establishes a form of strict liability in public nuisance which goes beyond liability for the negligence of an independent contractor.

---

114 [1954] 2 Q.B. 182, 197. In the House of Lords ([1956] A.C. 218) which reversed the majority (including Denning L.J.) of the Court of Appeal it was held that the case as pleaded by the Corporation precluded them from arguing that it was for Esso to disprove negligence with regard to the seaworthiness of the ship. No clear view was expressed as to the possible fate of such a plea if it had been available.

115 See Lord Blackburn in *River Wear Commissioners* v. *Adamson* (1877) 2 App. Cas. 743, 767: "Property adjoining to a spot on which the public have a right to carry on traffic is liable to be injured by that traffic. In this respect there is no difference between a shop, the railings or windows of which may be broken by a carriage on the road, and a pier adjoining to a harbour or a navigable river or the sea, which is liable to be injured by a ship. In either case the owner of the injured property must bear his own loss, unless he can establish that some other person is in fault, and liable to make it good." Similar observations with an even wider reach (covering damage to persons *on* the highway) were made by the same judge in *Rylands* v. *Fletcher* (1886) L.R. 1 Ex. 265, 286.

116 [1926] 2 K.B. 332.

117 [1951] A.C. 88.

118 As in *B.R.S.* v. *Slater* [1964] 1 W.L.R. 498.

119 (1876) 1 Q.B.D. 314.

120 See paras. 41-42 below. Because of its reliance on *Tarry* v. *Ashton* we treat *Wringe* v. *Cohen* under the heading of public nuisance, as a case concerned with nuisance to the highway. But, as is pointed out in paragraph 32 below, the case concerned adjoining occupiers of houses which happened to abut on the highway—i.e., the issue on the facts concerned private nuisance.

30. In *Wringe* v. *Cohen*[121] the Court of Appeal followed *Tarry* v. *Ashton*, or at least the majority judgments in that case, laying down a much criticised rule in the following terms:

"It is said that the defendant is liable only if it is found as a fact that he knew or ought to have known of the want to repair, that the judge did not so find, and that we ought to send the case back for a new trial. It said that the judge was wrong in holding that the obligation to repair was absolute.

"In our judgment if, owing to want of repair, premises on a highway become dangerous and, therefore, a nuisance, and a passer-by or an adjoining owner suffers damage by their collapse, the occupier, or the owner, if he has undertaken the duty of repair is answerable whether he knew or ought to have known of the danger *or not*.[122] . . . . On the other hand, if the nuisance is created, not by want of repair, but, for example, by the act of a trespasser, or by a secret and unobservable operation of nature, such as a subsidence under or near the foundations of the premises, neither an occupier nor an owner responsible for repair is answerable, unless with knowledge or means of knowledge he allows the danger to continue. In such a case he has in no sense caused the nuisance by any act or breach of duty."

31. The effect of this statement of the law depends on the meaning given to "owing to want of repair" which the Court only defined by reference to examples of what was not included in the phrase. If there are other unstated cases not arising by reason of want of repair it is possible that they may reduce or extinguish the apparent area of strict liability. For example, if an occupier does work on his roof with materials he neither knew nor ought to know to be defective, as a result of which the roof collapses on the roadway, does this constitute a nuisance for which the occupier will be liable? Again, does the phrase exclude cases where there is nothing wrong with the building as such but where, owing to some extraneous factor, such as a fall of snow, it has become dangerous? In such a case is there liability irrespective of negligence?[123] On the other hand, if the so-called examples of what does not arise owing to want of repair are in fact intended to be a comprehensive list, does this imply that an occupier is strictly liable for damage arising from the defective state of his premises which are due to the open and observable operation of nature (such as lightning) even if he had no reasonable opportunity to remedy the defect?

32. It is possible that the Court of Appeal in *Wringe* v. *Cohen* intended to establish a very strict liability for those responsible for the condition of buildings adjoining a highway, in view of the danger to users of the highway. But on this assumption it is difficult to see why a person is not liable, independently of negligence, for leaving an unlighted car in the highway,[124] which would seem to be an equal if not greater danger to road-users. Furthermore, on the facts of *Wringe* v. *Cohen*, (which related to damage done to adjoining property not to users of the highway) there was in fact no real highway element to explain the strict liability.

33. The present status of *Wringe* v. *Cohen* is doubtful. In *The Wagon Mound* (*No.* 2)[125] the Privy Council expressly declined to pass any comment upon the case.

34. Nuisance in regard to highways gives rise to special problems where the party whom it is sought to make liable is the highway authority. At common law, if a highway authority undertook works which were incompetently carried out it was liable in the same way as a private person; but if the authority chose to ignore the want of repair of the highway there could be no *civil* liability

121 See n. 97 above, at p. 233.

122 Emphasis added.

123 In *Slater* v. *Worthington's Cash Stores* [1941] 1 K.B. 488, where snow had accumulated on the roof of premises adjoining the highway, the decision against the occupier went on the basis that it was not a case of want of repair and that therefore negligence was essential.

124 *Maitland* v. *Raisbeck* (n. 113 above).

125 See n. 101 above. In the Canadian case of *O'Leary* v. *Meltitides and Eastern Trust Co.* (1960) 2 D.L.R. 258, 266-8, Ilsby C.J. said that *Wringe* v. *Cohen* "is out of accord with current authority and requires consideration by a higher tribunal."

even though there were injurious consequences.[126] This rule was abrogated by the Highways (Miscellaneous Provisions) Act 1961, section 1(1). Section 1(2) lays down the basic rule that in any action for damages for failure to maintain a highway it shall be a defence (without prejudice to any other defence or the application of the law relating to contributory negligence) for the highway authority to prove that it took such care as in all the circumstances was reasonably required to secure that the highway was not dangerous for traffic. For the purposes of this defence the court is required by section 1(3) to have regard in particular to the following matters:

(*a*) the character of the highway and the traffic which was reasonably to be expected to use it;

(*b*) the standard of maintenance for a highway of that character and used by such traffic;

(*c*) the state of repair in which a reasonable person would have expected to find the highway;

(*d*) whether the highway authority knew, or could reasonably be expected to know, that the condition of the part of the highway to which the action relates was likely to cause danger to users of the highway;

(*e*) when the highway authority could not reasonably have been expected to repair that part of the highway before the cause of action arose, what warning notices of its condition had been displayed.

35. The above Act has given rise to some difficulty in the Court of Appeal in *Griffiths* v. *Liverpool Corporation*.[127] The plaintiff was injured due to a defective flagstone in the highway. Three-monthly inspections of the highway were found by the county court judge to be a reasonable standard of inspection in the circumstances, but the authority had not in fact inspected that part of the highway for some five or six months before the accident. " . . . The authority contended that the lack of systematic inspection was justified, because even with an adequate inspection system there were insufficient skilled road repairers to deal generally with the defects which such a system would have revealed. It was admitted, however, that the defect in the particular flagstone in the case could have been repaired by an ordinary labourer (who would have been available). On these facts the county court judge held that the authority was liable. In the Court of Appeal Diplock L.J. started from the premise that the criminal liability for non-repair of a highway as it already existed before the Act was absolute. The Act created civil liability for such non-repair[128] which would have been " absolute "[129] were it not for section 1(2) and (3). The effect of section 1(2) and (3) was to reverse the burden of proof as to reasonable care. It would not be a defence under these subsections for the highway authority to show that the accident would have happened even if it had taken such reasonable care. On the other hand Diplock L.J. without expressing a final opinion thought[130] that " if the highway authority could show that no amount of reasonable care on its part could have prevented the danger the *common law*[131]

[126] *Russell* v. *Men of Devon* (1788) 2 T.R. 667.

[127] [1967] 1 Q.B. 374 (C.A.).

[128] Diplock L.J. implied (at pp. 389-390) that this absolute civil liability would also have applied to misfeasance by a highway authority. If this means that s. 1(2) was intended to deal with civil liability arising from misfeasance as well as non-feasance by a highway authority it is hard to reconcile with the language of the sub-section, which speaks only of liability for "failure to maintain". If on the other hand Diplock L.J. meant that at common law before the Act civil liability of a highway authority for misfeasance was absolute this would appear to render otiose the cases where courts have been at pains to establish liability for the negligence of independent contractors (see paragraphs 41-42 below).

[129] Diplock L.J. made a tentative qualification of this term by saying (at p. 390) that "it may be that the highway authority could have escaped liability by proving that the danger was caused by inevitable accident or the malicious act of a stranger [but] it would have been no defence to them merely to prove that they had in fact taken all reasonable care to prevent the existence of the danger."

[130] At p. 390.

[131] Emphasis added.

defence of inevitable accident would be available to it.". Salmon L.J. took a similar view and said that "*prima facie,* since the flagstone was dangerous, the defendants were liable to the plaintiff—absolutely and irrespective of any negligence on their part."[132] While a highway authority could escape liability by showing that they had taken such care as, in all the circumstances they reasonably could, they could not escape by proving that, though they had not in fact taken reasonable care, the accident would have happened even if they had taken such care.[133] Sellers L.J. on the other hand dissented and took the view that the Act of 1961 made "negligence the essential and ultimate basis of a claim against a highway authority, as it has always been and still is in respect of misfeasance ".[134]

36. As far as the basic concern of this survey is concerned, therefore, it would seem that liability of a highway authority, at least for non-feasance in regard to the highway, is strict in the sense that it differs from ordinary negligence liability (*a*) with regard to the burden of proof and, perhaps, (*b*) in the non-availability of the defence of inevitable accident—i.e., that the accident would have happened even if reasonable care had been taken. As will be seen in paragraph 41 below, a further element of strict liability may arise where the highway authority employs an independent contractor.

D. **Liability for Independent Contractors**

37. In this section we are primarily concerned with the special cases when a principal is liable for the fault of an independent contractor, contrary to the general principle of the common law.[135] We should however first emphasise that, where the conditions for the application of the rule in *Rylands* v. *Fletcher*[136] are satisfied, the defendant may be liable in respect of the acts or omissions of his independent contractor (not being a "stranger"), whether or not the contractor was at fault in regard to the escape.[137]

(*a*) Fire

38. Where a claim is made in respect of loss or damage arising from fire, and the case is not treated by reference to the principles of *Rylands* v. *Fletcher* but on the basis of the common law liability for fire (as modified by the Fires Prevention (Metropolis) Act 1774), an occupier of premises will be liable for the fault of his independent contractor (and indeed for that of his guest) in starting the fire or in allowing it to spread.[138]

(*b*) *Nuisance*

(i) *Private Nuisance*

39. A line of late nineteenth century cases in nuisance lays down a rule of liability for the fault of independent contractors where there has been a withdrawal of support from neighbouring land. In such a case, *Bower* v. *Peate,*[139] Cockburn C.J. said that where a principal "orders a work to be executed from which, in the natural course of things, injurious consequences to his neighbours

---

132 At p. 394.

133 At p. 395. Similarly if an authority could reasonably have inspected more frequently than they did, it is immaterial that more frequent inspections would not necessarily have discovered the relevant defect before the accident (see *Pridham* v. *Hemel Hempstead Corporation*, The Times, 19 December 1969; (1969) 68 L.G.R. 113).

134 At p. 386. In *Meggs* v. *Liverpool Corporation* (1967) 65 L.G.R. 479 (C.A.) Winn L.J. said "I think the first section [of the Highways Act] of 1961 may on a future occasion require . . . fuller argument and consideration . . . I am not sure I yet understand the scope of the section."

135 See *Quarman* v. *Burnett* (1840) 6 M. & W. 479.

136 See n. 1 above.

137 In fact in *Rylands* v. *Fletcher* the escape of the water was due to the negligence of an independent contractor and, as we point out in n. 5 above, might have been decided on this basis.

138 See *Balfour* v. *Barty-King* (n. 81 above).

139 (1876) 1 Q.B.D. 321, 326-7.

must be expected to arise, unless means are adopted by which such consequences may be prevented" he must bear liability if his contractor fails to take those precautions. This proposition was criticised by Lord Blackburn in *Hughes* v. *Percival*[140] as perhaps too widely stated, although liability was here again imposed in similar circumstances. Two years earlier, however, in *Dalton* v. *Angus*,[141] which concerned the removal of soil by excavation, causing the collapse of a neighbouring factory, Lord Blackburn had gone so far as to say that "a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor." Professor Glanville Williams[142] persuasively criticises the literal implications of Lord Blackburn's words in *Dalton* v. *Angus,* pointing out that they would "efface the whole distinction between a servant and a contractor" but in the light of *Hughes* v. *Percival* it seems clear that Lord Blackburn was saying only that there was a class of cases where there was liability for an independent contractor rather than attempting to define their nature.

40. The liability of an occupier for a private nuisance (other than in cases of withdrawal of support) created by his independent contractor was discussed in *Job Edwards Ltd.* v. *The Company of Proprietors of the Birmingham Navigations*:[143] Scrutton L.J. said,[144] *obiter:*

> ". . . in my view it is clear that a landowner or occupier is liable to an action by a private person damaged by a nuisance existing on or coming from his land; (i) if he or his servants or agents created the nuisance; (ii) or if an independent contractor acting for his benefit created the nuisance, though contrary to the terms of his employment."

In *Spicer* v. *Smee*[145] Atkinson J., relying on Scrutton L.J.'s dictum held the defendant liable in nuisance for a fire caused by defective electric wiring negligently installed by the defendant's independent contractor. If *Spicer's Case* is correctly decided it is difficult to escape the inference that liability for nuisances created by independent contractors attaches to occupiers without more, but it is unlikely that this represents the law.[146] The leading modern case is *Matania* v. *National Provincial Bank Ltd.*[147] where dust and noise arose from building operations carried out for the defendants by an independent contractor. In holding the defendants liable for the nuisance Slesser L.J. said,[148]

> "If the act done is one which in its very nature involves a special danger of nuisance being complained of, then it is one which falls within the exception for which the employer of the contractor will be responsible if there is a failure to take the necessary precautions that the nuisance shall not arise."

It seems clear that the Court would not have imposed liability on the defendants for a "mere ordinary building operation", but regarded the case before it as one where "there was a great and obvious danger that nuisance would be caused."[149]

(ii) *Public Nuisance*

41. In *Penny* v. *Wimbledon U.D.C.*[150] Bruce J. said: "When a person employs a contractor to do work in a place where the public are in the habit of passing,

---

140 (1883) 8 App. Cas. 443, 447.
141 (1881) 6 App. Cas. 740, 829.
142 [1956] C.L.J. 180.
143 [1924] 1 K.B. 341 (C.A.).
144 At p. 355.
145 [1946] 1 All E.R. 489.
146 An instance of a landowner *not* being held liable for a nuisance created by a contractor is to be found in *Gourock Ropework Co. Ltd.* v. *Greenock Corporation* (1966) S.L.T. 125. But in this case the contractor had complete control over the land.
147 [1936] 2 All E.R. 635 (C.A.).
148 At p. 646.
149 *Per* Finlay J. at p. 641.
150 [1898] 2 Q.B. 212, 217. This passage was approved by the Court of Appeal [1899] 2 Q.B. 72, 76.

which work will, unless precautions are taken, cause danger to the public, an obligation is cast upon the person who orders the work to be done to see that the necessary precautions are taken, and, if the necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor." The principle, it seems, is applicable to navigable waters[151] and perhaps to works or buildings adjoining the highway,[152] as well as to street excavations, as in *Penny's Case* itself. It seems that Bruce J. in *Penny's Case* did not envisage that *all* operations, of whatever nature, done in the highway would entail this form of liability: a distinction between harmless and dangerous operations may perhaps be implicit in the expressions used, though it must be confessed that the distinction is difficult to apply. In any event, it is quite clear that the operator of a motor vehicle on the highway does not incur liability for the fault of an independent contractor to whom he has entrusted it for repair.[153]

42. As regards the liability of highway authorities for failing to repair a highway,[154] the Highways (Miscellaneous Provisions) Act 1961 lays down that, for the purposes of the defence provided by section 1(2) and (3) " it shall not be relevant to prove that the highway authority had arranged for a competent person to carry out or supervise the maintenance of the part of the highway to which the action relates unless it is also proved that the authority had given him proper instructions with regard to the maintenance of the highway and that he had carried out those instructions." This part of the Act is not entirely free from difficulty, though it has not so far been the subject of litigation; read literally the effect of the Act would seem to be that a highway authority would be liable if it properly instructed an independent contractor to carry out repairs but the contractor was prevented from carrying out the instructions through no fault of his own.

(c) The " ultra-hazardous activity " cases

43. In *Honeywill and Stein Ltd.* v. *Larkin Bros. Ltd.*[155] a photographic company, as independent contractors, were held liable to indemnify their principals in respect of a sum paid by the latter to a third party as compensation for the damage caused by the contractor's negligence. The case therefore turned on the question whether the principals were in law liable for the negligence of their contractors. The operation carried out by the contractors was the taking of photographs with the aid of a magnesium flash and this had set fire to the third parties' cinema. Slesser L.J. said:[156]

> " It is clear that the ultimate employer is not responsible for the acts of an independent contractor merely because what is to be done will involve danger to others if negligently done. The incidence of this liability is limited to certain defined classes and for the purpose of this case it is necessary only to consider that part of this rule of liability which has reference to ultra-

151 *The Snark* [1900] P. 105 (C.A.).

152 See *dicta* in *Walsh* v. *Holst & Co. Ltd.* [1958] 1 W.L.R. 800 (C.A.) at pp. 804, 806, 812. And, if Blackburn J. was right in *Tarry* v. *Ashton* (n. 119 and para. 29 above) the principle also applies to artificial projections over the highway. On the other hand in *Salsbury* v. *Woodland*, [1970] 1 Q.B 324, the Court of Appeal held that an occupier was not liable for the negligence of an independent contractor employed to fell a tree whereby injury was caused to a pedestrian on the highway. Widgery L.J. (at pp. 338 and 340) said that (i) felling a tree did not fall into the category of extra-hazardous acts (as to which see para. 43 below) and (ii) there was no separate category of liability for the negligence of an independent contractor covering work commissioned near (as distinguished from in or on) a highway where, if due care was not taken, injury would be caused to persons on it. The Court of Appeal also said that the liability discussed in this paragraph only arose where the work was done under statutory power; although the decided cases generally involved such work, the statements of the courts do not always seem to be so confined.

153 *Phillips* v. *Britannia Hygienic Laundry Co. Ltd.* [1923] 1 K.B. 539, affirmed [1923] 2 K.B. 832 (C.A.).

154 See paras. 34-36 above.

155 [1934] 1 K.B. 191 (C.A.).

156 At p. 197. The existence of a similar liability had been recognised in *Black* v. *Christchurch Finance Co. Ltd.* [1894] A.C. 48 (P.C.)—burning bushes—and by Talbot J. in *Brooke* v. *Bool* [1928] 2 K.B. 578, 586—search for a gas leak with a naked light.

hazardous acts, that is, acts which, in their very nature, involve in the eyes of the law special danger to others ; of such acts the causing of fire and explosion are obvious and established instances."

There is little English authority[157] since *Honeywill's Case* to indicate the range and type of operations which are extra-hazardous in this sense. A Canadian case[158] has treated the handling of petrol by an independent contractor as an extra-hazardous operation and two Australian cases stress the distinction between work which " of its very nature " involves a risk of damage (in the particular instance[159] bulldozing at the top of a steep slope) and other work (in the particular instance[160] alterations to an office water supply by a plumber).

(*d*) *Other cases of liability for the fault of an independent contractor*

44. Running right through the line of cases so far considered on liability for independent contractors, whether it be for fire, for nuisance or for ultra-hazardous activities, may be found a link of principle, though sometimes not very apparent in the language of the cases, to the effect that the operation involved entails some sort of special risk. There are, or have been, however, other instances of this form of liability which cannot easily be fitted into this mould.

(i) *Employer's liability*

45. Following *Wilsons and Clyde Coal Co.* v. *English*[161] it was widely thought that the liability of an employer to his servants in respect of the competence of his staff and the safety of his plant and system of work always included liability for the negligence in these respects of an independent contractor. In *Davie* v. *New Merton Board Mills*[162] it became clear that at common law an employer is not liable for injury to his employee caused by a defect which he had no reason to suspect in a standard but defectively manufactured article such as a tool bought in the open market. However, it is probable that an employer who for example delegated to a competent contractor the task of repairing the roof of his factory would be liable to his employee for injury caused by the negligence of that contractor in carrying out the work.[163] In any event the Employers' Liability (Defective Equipment) Act 1969 introduces liability of the employer for the fault of an independent contractor in certain circumstances.[164]

(ii) *The hospital cases*

46. There is a doctrine, the present status and limits of which are doubtful, appearing to make the principal liable for the fault of an independent contractor when the negligence occurred in the course of the working of certain types of organisation, without reference to any notion of special risk. Developments along these lines can be seen in cases concerning the liability of hospitals. Thus in *Cassidy* v. *Minister of Health*[165] Denning L.J. thought that the liability of a hospital authority for the negligence of a member of its staff—

" does not depend on whether the contract under which he was employed was a contract of service or a contract for services. This is a fine distinction which is sometimes of importance ; but not in cases such as the present,

157 In *Fosbroke-Hobbes* v. *Airwork Ltd.* [1937] 1 All E.R. 108, 111-112 Goddard J. held that to arrange for a journey by aeroplane was not to set in motion a thing dangerous in itself, referring in this connection to *Honeywill's Case*. As stated in n. 152 above, in *Salsbury* v. *Woodland* the Court of Appeal have now stated that felling a tree near a highway is not an ultra-hazardous activity.

158 *Peters* v. *North Star Oil Ltd.* (1965) 54 D.L.R. (2d) 364.

159 *Watson* v. *Cowen* (1959) Tas. S.R. 194.

160 *Torette House* v. *Berkman* (1940) 62 C.L.R. 637.

161 [1938] A.C. 57.

162 [1959] A.C. 604.

163 See, e.g., Lord Tucker in *Davie's Case* at pp. 646-7: "It may well be that in some cases the employer may delegate the performance of his obligations in this sphere to someone who is more properly described as a contractor than a servant, but this will not affect the liability of the employer, he will be just as much liable for his negligence as for that of his servant."

164 For details see end of n. 2 in the main Report which this Appendix accompanies.

165 [1951] 2 K.B. 343, 362-3, 365.

where the hospital authorities are themselves under a duty to use care in treating the patient. I take it to be clear law, as well as good sense, that, where a person is himself under a duty to use care, he cannot get rid of his responsibility by delegating the performance of it to someone else, no matter whether the defendant is a servant under a contract of service or an independent contractor under a contract for services. . . . The plaintiff knew nothing of the terms on which they [the hospital authorities] employed their staff ; all he knew was that he was treated in the hospital by people whom the hospital authorities appointed and the hospital authorities are liable for the way in which he was treated."

It will be observed that Denning L.J., referred to cases where the principals are themselves under a duty to use care, but this of course leaves open the question whether they can discharge that duty by exercising reasonable care in choosing someone to carry out the performance of the duty. This in turn must depend on the nature of the duty, and the inference which apparently must be drawn from Denning L.J.'s statement is that hospital authorities at all events are under a duty which is not discharged by the exercise of reasonable care in choosing an independent contractor. The approach taken however by Denning L.J. does not seem to have been shared by all the judgments of the other members of the Court in *Cassidy's Case* or in *Roe* v. *Minister of Health,*[166] where Denning L.J. repeated the views he had expressed in the earlier case.

47. It may be of course that the hospital cases are explicable on the ground that the relationship between hospital and patient, if not strictly contractual, at least has a strong consensual element. If the relationship may be so regarded there are many similarities with the liability of bailees and carriers,[167] wherein liability for the negligence of independent contractors is well established. It is also conceivable that the courts may come to regard the carrying on of a hospital as an extra-hazardous operation, at least as regards the medical services which it provides.

(iii) *Occupier's liability*

48. At common law there was a further possible instance of liability for an independent contractor in respect of the duty of an occupier of premises towards certain categories of visitors on those premises.[168] But so far as such liability is concerned, Section 2(4)(*b*) of the Occupiers Liability Act 1957 now provides that:

> "Where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done."

Apart from the question whether this provision puts the occupier/employer of the independent contractor in a special position so far as he may have the burden of proof to show that he has acted reasonably, it would seem that, in respect of

166 [1954] 2 Q.B. 66, 82. In *Cassidy's Case* (n. 165 above at p. 351) Somervell L.J. treated the doctors whose negligence was in issue as the servants not the contractors of the hospital; Singleton L.J.'s position is less clear, but from the emphasis which he put on the status of the doctors (expressly reserving the position of a consulting surgeon—see p. 358), it would seem that he also was treating the doctors as servants. In *Roe's Case* Somervell L.J. said (at pp.79-80) that the doctors were "part of the permanent staff and, therefore, in the same position as the orthopaedic surgeon in *Cassidy's Case*."

167 See e.g., *Stewart* v. *Reavell's Garage Ltd.* [1952] 2 Q.B. 545 (bailee).

168 The House of Lords in *Thomson* v. *Cremin* (decision given on October 20, 1941, but only reported in (1941) 71 Ll.L.R.1 until 1953 when it was reported in [1953] 2 All E.R. 1185) held the owner of a ship liable for the negligence of an independent contractor, but until the Occupiers' Liability Act 1957 the significance of the decision appears to have been widely overlooked and the position thought still to be governed by the conflicting decision in *Haseldine* v. *Daw* [1941] 2 K.B. 343, which was decided on July 31, 1941.

cases covered by the 1957 Act there is no liability for the fault of an independent contractor.[169]

49. The scope of the 1957 Act is however not entirely clear. Section 1(1) of the Act provides rules " to regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises *or to things done or omitted to be done on them* ". The scope of the emphasised words may be limited by section 1(2), which lays down that those rules " shall regulate the nature of the duty imposed by law *in consequence of a person's occupation or control of premises.*" (Emphasis added). It has been suggested[170] that duties which the occupier may owe not because he happens to be the occupier but for some other reason fall outside the Act. This distinction in most cases will be of little practical significance, but, if it is correctly drawn, it may sometimes be important where liability for the fault of an independent contractor is in issue. If, for example, the occupier of premises engages an apparently competent contractor to demolish a building on the premises, and if such demolition work (involving perhaps the use of explosives) is to be regarded as an ultra-hazardous activity within the principle of *Honeywill and Stein* v. *Larkin Bros.*[171] the occupier may be liable to a visitor on the premises in spite of section 2(4)(*b*) of the 1957 Act, if the independent contractor was in fact at fault in carrying out the work.

169 In *Cook* v. *Broderip, The Times*, February 27th, 1968, the occupier of a flat was held in the Queen's Bench Division (O'Connor J.) not liable for the negligence of an independent contractor who had carried out electrical work for him in the flat, as a result of which a cleaner employed by the occupier was injured. Thus, the present law draws a rather fine distinction between the liability of an occupier for his independent contractor in respect of damage or injury caused to a visitor on the premises, and such liability vis-à-vis a person outside the premises. In the latter case if the plaintiff was on the highway, or even, it would seem, in other premises, provided they adjoined the highway *Wringe* v. *Cohen* (n. 97 above) suggests that the occupier of premises will be liable for the acts or omissions of an independent contractor whether or not the contractor was negligent. And even apart from *Wringe* v. *Cohen* there may be liability to a user of the highway for the negligence of an independent contractor in respect of artificial projections over the highway. (See para. 29 above).

170 See e.g., *Winfield on Tort*, 8th ed., pp. 173-5; *cf* Salmond, *The Law of Torts*, 5th ed., pp. 335-7.

171 See n. 155 above.

APPENDIX II

A NOTE ON CRITICISMS OF A NEGLIGENCE-BASED SYSTEM OF LIABILITY

(See paragraph 9 and n. 30 of the Report)

1. The limitations of the action for negligence in accident cases have been particularly discussed with reference to traffic accidents. Thus Lord Parker, C.J. ((1965) 18 C.L.P. 1–5) draws attention to the following practical defects in the present English system for dealing with (i) loss of memory by the plaintiff preventing him from proving his case (ii) lack of witnesses able or willing to substantiate his case (iii) difficulty for the plaintiff to prove mechanical fault in the defendant's vehicle (iv) limitations on the judge's capacity to assess the truthfulness of witnesses (v) unreliability of witnesses' memory after delay. This theme has been the subject of an extensive literature. For a selection up to 1963 see Appendix A to the New Zealand *Report of the Committee on Absolute Liability*, 1963. Further references too recent for inclusion in that Report are given in n. 13 of Professor André Tunc's " Development and Function of the Law of Torts ", (1965) 14 I.C.L.Q. 1089, 1097. See among many later contributions: the exchanges of views between Professor A. L. Goodhart and Mr. Fuchsberg in (1965) 49 *Journal of the American Judicature Society* 26, 60; R. E. Keeton and J. O'Connell, *Basic Protection for the Traffic Victim*, 1965; D. R. Harris, (1966) 116 N.L.J. 439, 477, who has also conducted an enquiry (as yet unpublished) into the practical consequences of road accidents in the City of Oxford in 1965—see, for a summary, Hartz, 119 N.L.J., 492; D. W. Elliot and Harry Street, *Road Accidents* 1968; *Report of Special Committee to Study and Evaluate the Keeton-O'Connell Basic Protection Plan and Automobile Accident Reparations*, American Insurance Association, 1968; Lord Upjohn, " Twenty Years On ", (1968) 65 *Law Society's Gazette* 657, 659; British Columbia *Report of the Royal Commission on Automobile Insurance*, 1968 (see (1969) 47 Can. B.R. 304); Report of New York State Insurance Department, *Automobile Insurance-for whose benefit?*, February, 1970, commented on in (1970) 120 N.L.J. 469-70. It should also be mentioned that a Committee of Experts (on which the United Kingdom is represented) under the auspices of the Council of Europe, have since 1967 been discussing the civil liability of motorists. Their terms of reference, as laid down by the European Committee on Legal Co-operation (see Item 9 of CM (66) 194) and approved by the Committee of Ministers (see CM/Del/Concl. (67) 158, Item XII(iii) include: " the advisability of abolishing the ' fault ' principle in relation to the question of compensation for injuries caused by motor vehicles."

2. Criticism of the action for negligence in respect of personal injury, whether or not caused in traffic accidents, is to be found in the Report of the Royal Commission of Inquiry, 1967, *Compensation for Personal Injury in New Zealand*, discussed in [1969] *New Zealand Law Journal* 297–313 and by Professor Mathieson in (1968) 31 M.L.R. 544. Mention should also be made of the memorandum prepared by Mr. P. S. Atiyah (then Fellow of New College, Oxford, now Professor of Law at the Australian National University at Canberra) and thirty-three other signatories, in which it was argued that the whole topic of compensation for personal injuries and disabilities (whether or not there is at present liability at common law or by statute) should be investigated by a Royal Commission, with special reference to the question whether improved payments under a national scheme of social security could replace and, irrespective of the way in which an injury or disability arose, go beyond any damages now recoverable in the courts for personal injuries. See *The Times*, 5th July 1969; (1969) 119 N.L.J. 653 (text of memorandum), 727, 734, 755, 863 (discussion of memorandum); [1969] *Law Guardian* (July) 17 (article on his proposals by Mr. Atiyah); (1969) 119 N.L.J. 957 (report on a conference of the Industrial Law Society at which Mr. Atiyah's proposals were debated). Professor Atiyah has now developed his arguments at length in *Accidents, Compensation and the Law*, 1970.

APPENDIX III

LIST OF PARTICIPANTS* IN A SEMINAR ON DANGEROUS THINGS AND ACTIVITIES HELD AT ALL SOULS COLLEGE, OXFORD, ON 29th AND 30th SEPTEMBER, 1969

Dame Elizabeth Ackroyd, D.B.E.	Then Director of the Consumer Council.
Mr. P. S. Atiyah	New College, Oxford (now Professor of Law at the University of Canberra).
Professor A. H. Campbell	University of Edinburgh.
Mr. R. C. Chilver, C.B.	Ministry of Housing and Local Government.
Mr. G. L. Close	Treasury Solicitor's Office (Ministry of Transport).
Professor Rupert Cross	All Souls College, Oxford.
Mr. C. R. Dale	Social Insurance Department, Trades Union Congress.
The Rt. Hon. Lord Diplock	
Sir Denis Dobson, K.C.B., O.B.E.	Lord Chancellor's Office.
Mr. H. F. Duder	Lloyd's.
Master J. B. Elton	
Mr. B. B. Hall	Treasury Solicitor's Office (Ministry of Power).
Mr. D. Harris	Balliol College, Oxford.
Dr. A. M. Honoré	New College, Oxford.
Professor R. F. V. Heuston	University of Southampton.
Mr. Alistair Johnston, Q.C.	Scottish Law Commission.
Mr. J. A. Jolowicz	Trinity College, Cambridge.
Professor Otto Kahn-Freund	Brasenose College, Oxford.
Mr. A. W. G. Kean	Solicitor's Department, Board of Trade.
Mr. E. Kelsey	Solicitor and Parliamentary Officer, Greater London Council.
Mr. Mark Littman, Q.C.	Legal Adviser, British Steel Corporation.
Mr. D. A. Marshall	Messrs. Barlow, Lyde and Gilbert.
Mr. Patrick Neill, Q.C.	All Souls College, Oxford.
The Rt. Hon. Lord Pearson, C.B.E.	
Professor T. B. Smith, Q.C.	Scottish Law Commission.
Mr. J. R. L. Southam	Legal Adviser to the Gas Council.
Mr. Brian Thompson	Messrs. W. H. Thompson.
Professor David M. Walker, Q.C.	University of Glasgow.

*Representatives of the Law Commission are not included. The Hon. Mr. Justice Amissah of the Court of Appeal of Ghana, Chairman of the Ghana Law Reform Commission, who was then visiting the United Kingdom, also attended the Seminar as a guest.

Printed in England by Her Majesty's Stationery Office
at St. Stephen's Parliamentary Press

(309311) Dd. 164304 K18 11/70 St.S.

HER MAJESTY'S STATIONERY OFFICE

Government Bookshops

49 High Holborn, London WC1V 6HB
13a Castle Street, Edinburgh EH2 3AR
109 St. Mary Street, Cardiff CF1 1JW
Brazennose Street, Manchester M60 8AS
50 Fairfax Street, Bristol BS1 3DE
258 Broad Street, Birmingham 1
7 Linenhall Street, Belfast BT2 8AY

Government publications are also available through booksellers

SBN 10 214271 8