ABSTRACT

THESIS TITLE "A Comparative Analysis of the Rule in Rylands v. Fletcher and Article 1054(1) of the Civil Code of the Province of Quebec"

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In the civil law system of the Province of Quebec, Article 1054(1) of the Civil Code deals with the liability for damage caused by things. In the common law Provinces of Canada the rule in Rylands v. Fletcher is a tort concerned with an aspect of the liability for damage caused by things. This thesis analyses these two areas of delictual liability, investigates the requisite elements to establish liability, the defences to such prima facie liability and discusses their possible future development. Special consideration is given to the relationship between these torts and the traditional fault liability and to the judicial re-interpretation and development of Article 1054(1) C.C. Final conclusions are drawn from a consideration of the rationalization and development of the rule in Rylands v. Fletcher in the United States of America and the equivalent provision of Article 1054(1) C.C. in the French Civil Code.

RYLANDS v. FLETCHER

and

ARTICLE 1054(1) C.C. OF QUEBEC

A COMPARATIVE ANALYSIS

OF THE RULE IN RYLANDS v. FLETCHER

AND ARTICLE 1054(1) OF THE CIVIL CODE OF THE PROVINCE OF QUEBEC

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PREFACE

Originally, the object of this thesis was to consider, comparatively two rules of tortious liability dealing with liability for damage caused by things. Throughout the common law world the rule in Rylands v. Fletcher has been the subject of a considerable amount of legal analysis. Textbook writers on the law of torts have gone to some lengths to discuss the origins, application and scope of the rule and case notes and articles on some aspect of the rule abound in legal periodicals. There have, however, been few attempts to marshall the Canadian cases, to discuss them and to relate them to the interpretation and application of the rule in other common law jurisdictions. Article 1054(1) of the Civil Code of the Province of Quebec deals with liability for damage caused by things. This article, derived from the Code Napoléon, has been the subject of liberal judicial interpretation and has itself been the subject of considerable legal literature. An attempt will be made to compare and contrast the common law with the civil law principle to discover the differing origins, development, scope and policy orientation in the two jurisdictions.

A consideration of these two tortious principles has, however, raised issues of much broader interest. In both the civil and common law systems the present scope and application of the principles is the result of judicial interpretation--judge-made law. To the common lawyer this is not unusual. Indeed, it is by this method that the common law has evolved and developed. More unusual, however, is the role of civil law judges in the bold and liberal interpretation of article 1054(1) of the Civil Code. Possibly more than any other article of the Code, article 1054(1) C.C. has been subject to judicial interpretation and

extension. The history of article 1054(1) C.C. explodes the myth that in the civil law systems a judge has only to apply the law as stated in the Code.

A comparison of Rylands v. Fletcher and article 1054(1) C.C. also provides an interesting and fruitful study in that both principles to a greater or lesser extent depart from the traditional fault principle of tort liability. The uneasiness with which common law judges view strict liability is shared by their civilian counterparts. Attuned to fault liability with all its traditional and moral appeal the judges in both jurisdictions have searched for a policy rationale to justify a stricter form of liability.

The writer has attempted to canvass most of the relevant common law and Quebec cases to illustrate the working of the rules in their respective jurisdictions and also to consider how these rules may develop in the future by reference to their development in France and the United States of America.

I wish to thank Professor W. F. Foster, Associate Professor in Law, McGill University in Montreal, who originally suggested the subject of this dissertation to me. His guidance and assistance to me while writing this paper have been of immense value. I also wish to thank Miss Lynn Cook for typing this thesis.

Philip H. Osborne.

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PART I

THE RULE IN RYLANDS v. FLETCHER IN CANADA

CHAPTER I

THE CASE OF RYLANDS v. FLETCHER

Early in 1860 John Rylands and John Horrocks employed independent contractors to construct a water reservoir on their land for the purpose of supplying water to their mill. During the course of construction contractors unearthed five vertical mine shafts which were filled with soil and in an obvious state of disuse. The contractors did not know, nor did they suspect, that the shafts connected with old workings, and they continued construction without investigating the sufficiency of the reservoir with reference to the shafts. The reservoir was completed early in December 1860 and it was partly filled with water.

On December 12 of the same year one of the vertical shafts gave way and water burst downwards into the abandoned coal workings beneath and found its way into Thomas Fletcher's coal mine flooding the colliery so that it had to be abandoned. "From that incident litigation arose which took the parties to the House of Lords and in the course of which was born what we now know as the rule in Rylands v. Fletcher".[1] That litigation provides an object lesson in the way in which the common law of England has developed and the role which great judges play in the development of the Law.

That Rylands and Horrocks had caused damage to Fletcher's coal mine could not be disputed but it was not immediately clear under what head of liability Fletcher could base his claim. Neither the owners of the land nor the contractors had any reason to believe these disused shafts led to old coal workings under the site of the reservoir. However, it was established

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1. Blackburn, The Rule in Rylands v. Fletcher, (1961), 4 C.B.J. 39.

that the contractors had been negligent in failing to ascertain whether or not the reservoir would bear the pressure of water when it was filled. A claim against the owners of the reservoir did not appear to be maintainable under any of the existing actions in tort. Negligence did not apply as Rylands and Horrocks had not been negligent. An action in trespass was not appropriate as the nature of Fletcher's damage was consequential. Nor was private nuisance applicable as an occupier at that date was liable for a nuisance created by an independent contractor only if "in the natural course of things injurious consequences to a neighbour must be expected to arise ... unless some preventative measures are taken".[2] Furthermore, nuisance was generally regarded as applying to a continuing interference with a man's right of enjoyment of his land.[3] In other words, as Pollock, C.B. stated in the Court of Exchequer, "the question has never before been the subject of litigation for the reports are without any decided case in point. . ."[4]

At first instance, the plaintiff was successful. The action was heard at the Liverpool Summer Assizes in 1862, and the plaintiff was awarded £5000 damages, subject to the award of an arbitrator.[5] The decision was not

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2. Bower v. Peate, (1876), 1 Q.B.D.321, 326. See also Gray v. Pullen, 5 B. & S. 970, 981.

3. Even today it may, in some circumstances, be necessary to show a continuing interference in the use and enjoyment of land to establish nuisance. Stone v. Bolton [1950] 1 K.B. 201.

4. (1865), 34 L.J. (N.S.) 177, 185.

5. The power of the arbitrator is unclear. It does not appear from the the judgments or appeal whether the arbitrator was empowered to increase or decrease the damages. Fletcher v. Rylands, (1865), 34 L.J. (N.S.) 177.

reported and the grounds for awarding the damages do not appear in the judgments of the Higher Courts. However, a subsequent order was made by Channel, B. on December 31, empowering the arbitrator to state a special case for the opinion of the Court of Exchequer. The Arbitrator, exercised this power to state a special case instead of making an award.[6] The plaintiff did not prevail in the Court of Exchequer. Martin, B. held that the defendants could not be liable in trespass because the damage was consequential, and he also regarded nuisance as inapplicable as the act of the defendants was a lawful one and the water had reached the plaintiff's land by mere gravitation. The learned judge refused to make the defendants liable to insure the plaintiff against the consequences of a lawful act by holding them liable without proof of fault. The defendants were not liable in the absence of negligence. Pollock, C.B. also could find "no authority for bringing such an action"[7] and decided in favour of the defendants.

Bramwell, B. was more amenable and found for the plaintiff. The learned judge accepted that the defendants would not be liable for injury resulting from natural causes, but he decided that this was "foreign water"[8] and the defendants had no right to flood the plaintiff's mine with such water. The decision of Bramwell, B. was based on the principle that the occupier is liable without proof of negligence[9] for the withdrawal of lateral support and under the general maxim sic utere tuo ut alienum laedus.

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6. (1865), 34 L.J. (N.S.) 177.

7. Ibid., 189.

8. Ibid., 181.

9. Blackhouse v. Bonomi, (1961), 9 H.L.C. 503.

In May, 1864, the matter came before the Exchequer Chamber by way of further special case. The judgment of the Court (Willis, Blackburn, Keating, Mellor, Montagne-Smith and Tush, J.J.), was delivered by Blackburn, J.[10] The judgment is generally recognised as one of the classics in the common law. The crucial issue in the case was whether the law cast on the defendants an absolute duty to keep the water in at their peril or, as the majority of the Court of Exchequer thought, merely a duty to exercise reasonable and prudent precautions. Under the latter view the defendants would not have been liable to compensate the plaintiff. The Exchequer Chamber, however, opted for the former view. Blackburn, J. stated:

> We think the true rule of law is that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.... The general rule, as stated above, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose celler is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief should accrue, or answer for the natural and anticipated consequences.[11]

The rule, as laid down above, has been described as a principle

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10. (1886), 1 L.R. Ex. 265.

11. (1866), 1 L.R. Ex. 265, 279-280.

of absolute liability. Whether there has ever been absolute liability in the common law of torts is a problem of a semantic and a historical nature. Suffice it to say that Blackburn, J., by admitting that vis major and an escape caused by the plaintiff's default would be good defences to liability under the rule he enunciated (in Rylands v. Fletcher) robbed the rule of any nature of absolute liability. The term generally used is 'strict liability'.[12]

It appears from the judgement of Blackburn, J. that there were two main policy considerations which prompted the Court of Exchequer Chamber to impose a strict liability on the defendants. The predominant consideration was that the defendants had increased the risk of injury from the use of the land by building a reservoir. The rule laid down applied to things likely to do mischief if they escaped. Blackburn, J. regarded it as reasonable and just that the defendants should insure the plaintiff for damage resulting from the escape of such things. The second consideration was that the risk should be borne by the person who takes the benefit of the thing collected or kept on his land. The plaintiff had taken no benefit from the reservoir.[13] The defendants had stored the water for their "own purposes".[14] Thus in the 1860's Blackburn, J. was concerned with concepts which were to become of great significance in the common law and in the civil law during the subsequent hundred years.

It is of course not in the nature of the common law process of development to pluck new principles of law from the air. A judge must justify

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12. This is the epithet used by most writers. See also Winfield, The Myth of Absolute Liability, (1926), 42 L.Q.R. 37, 51.

13. Post., pp. 26-28.

14. (1866), 1 L.R. Ex. 265, 279.

his decision from existing principle and precedent even though the reasoning may be ex post facto. It is clear in the judgment of Blackburn, J. that it was the desire of the Court of Exchequer Chamber to hold the defendants liable for the damage caused to the plaintiff. However, the decision had to be supported by authority. Although direct authority was lacking the law relating to liability for animals proved a useful analogy and it was utilized to the full. There were numerous cases 'in the books' which held an owner of cattle liable for the natural consequences of their escape and Cox v. Burbidge[15] and May v. Burdett[16] were authority for the proposition that an owner of animals must keep them in at his peril for unnatural consequences if the owner of the animal has prior knowledge that it has some vicious propensity.[17] Leaving cattle trespass and the scienter action, the learned judge turned to the case of Tenant v. Goldwin[18] in which an occupier was held liable for the escape of filth from his privy to the plaintiff's adjoining land. The case was cited in support of the principle that there is a duty to prevent the escape of that which is brought on to the land be it cattle, filth, water or stench, if it is likely to do mischief if it escapes. As a final justification, Blackburn, J.

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15. (1863), 13 C.B. (N.S.) 430.

16. (1864), 9 Q.B. 101.

17. May v. Burdett, (1863), 13 C.B. (N.S.) 430 concerned the liability of an owner of a monkey for injuries to the plaintiff resulting from a vicious attack by the animal. The owner knew that the monkey had a ferocious nature and was likely to attack people. He was held liable without proof of negligence. In Cox v. Burbidge, (1846), 9 Q.B. 101, the defendant's horse strayed onto a highway and kicked a child. The defendant was not liable for the injuries as he did not know of any vicious propensity in the horse. Williams, J. stated, however, that the owner would be liable without negligence if the damage done by the straying animal was a natural consequence of that escape.

18. (1704), 1 Salk. 21, 360.

referred to a number of cases where occupiers were held liable for the escape of chlorine fumes from alkali works. Blackburn, J. was at pains to show that he was merely isolating the principle of law common to the examples he cited.

The defendants appealed to the House of Lords.[19] Their Lordships approved the judgment of the Exchequer Chamber and dismissed the appeal. However, Lord Cairns in his judgment planted seeds of confusion and doubt in the principle of law enunciated by Blackburn, J. by using the term 'non-natural use' of land:

> . . . if the Defendants, not stopping at the natural use of their close, had desired to use if for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it. . . .[20]

Blackburn, J. did not use the term in his judgment. He stated that the rule applied to all things brought on to the land, (anything not 'naturally there')[21] which would be likely to cause mischief if it escaped. In later years it was to be argued and accepted[22] that Lord Cairns introduced a new concept and modified the rule propounded by Blackburn, J. However, in the context of the judgment the term 'non-natural' means no more than artificial, not naturally present on the land or foreign. Lord Cairns did not therefore modify or restrict the rule laid down in the Exchequer Chamber. Furthermore, Lord Cairns elsewhere in his judgment expressly approved the ratio of Blackburn, J.'s judgment which includes the words "brings on his land and keeps there anything likely to do

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19. [1868] L.R. 3 H.L. 330.

20. Ibid., 339.

21. (1866) 1 L.R. Ex. 265, 280.

22. Post., pp. 14 ff.

mischief if it escapes".[23] Lord Cairns drew a distinction which made his meaning clear. On the one hand the learned judge considered that there was no liability for any water naturally on the land which passes onto the close of the plaintiff by the laws of nature. Smith v. Kenrick[24] was concerned with a natural accumulation of water which escaped causing damage. No liability attached to the defendant. Baird v. Williamson,[25] however, was concerned with water pumped on to the land by the defendant and he was held liable for the damage caused by the escape. As Newark points out,[26] in order to succeed the plaintiff had to distinguish Smith v. Kenrick[27] and he did this by distinguishing that case from the artificial accumulation of water in Rylands v. Fletcher. Plaintiff's Counsel, in argument before the Court of Exchequer, stated "I am bound to receive water naturally, flowing from above; but, if the water course is artificial, I am not so bound".[28] Lord Cairns did not modify the rule in Rylands v. Fletcher. Lord Cranworth also dismissed the appeal.

It is submitted that the rule laid down by Blackburn, J.and approved by the House of Lords, may be stated as follows. If a person brings on to his land for his own purposes something which is likely to do mischief if it escapes, he will be liable for all damage which is the natural consequence of the escape

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23. (1868), L.R. 3 H.L. 330, 339. (emphasis added).

24. (1849), 7 C.B. 515.

25. (1863), 15 C.B. (N.S.) 367.

26. Newark, "Non-natural user and Rylands v. Fletcher", (1961), 24 M.L.R. 557, 559.

27. (1849), 7 C.B. 515.

28. (1865), 34 L.J. (N.S.) 177, 180.

without proof of negligence.

It would appear from the remarks of Blackburn, J. in Ross v. Fedden[29] that he regarded the case of Rylands v. Fletcher as an application of settled principle to an unusual fact situation. In Ross v. Fedden Blackburn, J. rebuffed counsel when it was suggested that the point for adjudication in Rylands v. Fletcher had never before been decided.

> I wasted much time in the preparation of the judgment of Rylands v. Fletcher if I did not succeed in showing that the law held to govern it had been law for at least 300 years.[30]

However, not only did Blackburn, J. make new law but he also created a new head of tortious liability. He elucidated a general principle from cases which were formerly confined to their own facts. No judge had formerly suggested that the principle in cattle trespass could apply to other things which, if they escaped, could cause mischief. The categories of cattle trespass had been closed for hundreds of years. The same comment applies to the case of Tenant v. Goldwin.[31] This was an isolated case decided some 170 years earlier. Certainly these cases contain the same basic principle, but Blackburn, J. extended and rationalized the law. The major advance was the emancipation of existing principle from the shackles of a few specific fact situations to apply to things in general. One has only to peruse any textbook on torts to find the variety of things which have been leld to be within the rule in Rylands v. Fletcher to be convinced that new law was made.[32] The second advance made in the law was to

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29. (1872), 26 L.T. 966.

30. Ibid., 968.

31. (1704), 1 Salk. 21, 360.

32. See Salmond on the Law of Torts, 15th ed., by R.F.V. Heuston, (1969), 410-415: - chemicals, fire, gas, sewage, petrol, water, trees, chimney stacks, unloaded gun, flag pole, barbed wire, etc.

hold an occupier liable for the negligence of an independent contractor.

Winfield notes that:

> It is true that the Exch. Ch. said it was not necessary to decide whether defendants were liable for the default of independent contractors (L.R. 1 Ex. at p. 287), but it is certain that if the action had been for negligence or (at that date) for nuisance they would not have been liable for the wrongdoing of such contractors. In other words, the Exch. Ch. were extending the law in this respect.[33]

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33. Winfield on Tort, 8th ed., by J. R. Jolowicz and T. Ellis Lewis, (1967), 412.

CHAPTER II

THE DEVELOPMENT OF THE RULE IN RYLANDS v. FLETCHER IN CANADA

There have been many decisions involving the rule in Rylands v. Fletcher in the Common law provinces of Canada. Most of these cases will be canvassed in an attempt to ascertain how the Canadian Courts have applied and interpreted the rule. Because Canadian Courts tend to reflect the decisions of other Common Law jurisdictions, reference must also be made to some of the English, Australian and New Zealand cases. However, the use of these cases will be restricted. Similarly it will be necessary to draw attention to cases decided in other jurisdictions in order to clarify the position in Canada, and, where the law is unsettled in Canada, to predict with the hope of some certainty the way in which the Canadian Courts will decide the matter. For simplicity, the traditional approach of the text book writers will be adopted.

1. Things Naturally on the Land

The basis of the rule as expounded by Blackburn, J. was that liability arose from the "bringing on to the land and collecting and keeping there of something likely to do mischief if it escapes".[1] It was never anticipated that liability would attach to the occupier if something escaped which was naturally there. It was Lord Cairns' emphasis on this limitation of the rule which caused him to coin the phrase 'non-natural use'. It has been submitted earlier that Lord Cairns was merely emphasising that no liability attaches to things naturally or originally on the land.[2] It was on this basis that the plaintiff's case in

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1. (1866), 1 L.R. Ex. 265, 279.

2. Ante, pp. 6-7.

Giles v. Walker[3] was so summarily rejected. The defendant in that case owned land on which thistles were growing. He was not minded to cut them down and thistle seeds were blown in large quantities on to the plaintiff's land, where they took root and did damage. Lord Coleridge's judgment, quoted in its entirety is as follows:

> I never heard of such an action as this. There can be no duty as between adjoining occupiers to cut the thistles, which are the natural growth of the soil.[4]

Similarly an occupier has been held to be under no duty to prevent a noxious weed, prickly pear, which was naturally on his land, from attacking a neighbour's fence.[5]

The Canadian cases support this proposition. Charles R. Bell Ltd. v. City of St. John's[6] concerned damage caused by a brook which flowed through land owned by the defendant municipal corporation. The brook was partially blocked by debris and water overflowed its banks and joining with other surface waters flooded the plaintiff's warehouse. Puddester, J. in the Newfoundland Supreme Court held that Rylands v. Fletcher did not apply as the city had not brought the water on to the land. Similarily in Storms v. M. G. Henniger Ltd.[7] the defendant was not liable for damage caused by water naturally on his land. The defendant had excavated certain land and water flowed into the pit. In the ordinary course of drainage that water had seeped through the substrata and

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3. (1890), 24 Q.B.D. 656.

4. Ibid., 657.

5. Sparke v. Osborne, (1908), 7 C.L.R. 51.

6. (1965), 54 D.L.R. (2d) 528 (Nfld.).

7. [1953] O.R. 717 (C.A.).

caused the water table to rise on the plaintiff's land. This diminished the amount of water coming from springs on the plaintiff's land. The question was also considered by the Ontario Court of Appeal in Sorenson v. Board of Education of Petersborough[8] where due to heavy rainfall the defendant's drains had overflowed and flooded the plaintiff's greenhouses and put out the fires in his adjoining boiler room. It appeared from the evidence that the drains were in fact blocked with debris but it was not proved that this was due to the defendant's negligence. It was held that the rule in Rylands v. Fletcher had no application as "the water which caused the damage was not brought upon the defendant's lands for his own use; it came there in the ordinary use of land"[9]. Thus, it seems undisputed that in Canada no liability will attach under the rule in Rylands v. Fletcher for the escape of things naturally on the land.[10]

The rationale for this rule is probably that the occupier has neither brought anything on to his land nor has he in any practical manner adopted it for his own use. However the recent Privy Council decision in Goldman v. Hargrave[11] is of some interest in respect of liability for things naturally on the land. That case concerned a fire which arose on the appellant's land. The fire was caused by lightning striking a tall gum tree. The fire burned fiercely in a fork of the tree 80 feet above the ground, and the tree was

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8. [1939] 2 D.L.R. 488 (ont. C.A.).

9. Ibid., 491, per McTague, J.A.

10. See also Hamilton v. Keltner, 65 Man. L.R. 90; Oliver v. Francis, [1919] 2 W.W.R. 497 (Alta.); Christa v. Marshall, [1945] 2 W.W.R. 44 (Alta.), 47-48, per Purlee, J.

11. [1967] 1 A.C. 645 (P.C.).

felled in order that the fire might be dealt with. Before felling the tree, the surrounding area was cleared of combustible material and the ground was sprayed with water by the appellant. Once the tree was cut down, he took no further action, hoping that the fire would burn out. Unfortunately, due to a change in the weather, the fire spread, damaging the respondent's land. Their Lordships held that the appellant was liable under negligence, as he had failed to take reasonable precautions to abate the fire. In so doing their Lordships created a new head of negligence, holding that an occupier is under a general duty of care in relation to hazards, whether natural or man made, occuring on his land.[12] The duty is not based on the use of land but on the consequences of inactivity in the face of foreseeable harm. The appellant had not taken sufficient steps to abate the nuisance. The standard of care formulated by the Privy Council is a subjective one depending upon the physical and financial resources of the occupier, the difficulty of removing the hazard and the extent of the danger.[13] The establishment of this duty throws doubt on the validity of the decisions in such cases as Giles v. Walker[14], and Storms v. M. G. Henniger Ltd.[15]

It is generally agreed that there is no liability under the rule in Rylands v. Fletcher for things naturally on the land. However if an occupier is not content to remain inactive in respect of these things, but accumulates

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12. Ibid., 661-662.

13. Ibid., 663.

14. (1890), 24 Q.B.D. 656.

15. [1953] O.R. 717 (C.A.).

or adopts them for his own use, liability under the rule in Rylands v. Fletcher may attach to him in the event of an escape causing damage to another. This rule is well illustrated by liability for water. If water is accumulated in a reservoir the situation will be within the scope of the rule. In Lewis v. District of North Vancouver[16] the defendant constructed a reservoir, the spillway of which became obstructed with debris. The water overflowed and burst the dam releasing two million gallons of water which caused extensive damage. Munroe, J. regarded the rule in Rylands v. Fletcher as prima facie applicable. However, the defence of statutory authority was maintained. Similarly, in the early case of Hart v. McMullan[17] the defendant has held liable for damage caused by the bursting of a dam.[18] These cases are merely a direct application of the case of Rylands v. Fletcher itself. It seems likely however, that the accumulation or use of that which is naturally on the land must amount to a non-natural use.[19]

2. Non-natural use of Land.

It has been submitted earlier that the judgments of Blackburn, J. in the Exchequer Chamber and Lords Cairns and Cranworth in the House of Lords showed no concern for the type of artificial use the land was being put to. The strict interpretation of the judgments is that in spite of Lord Cairns'

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16. (1963), 40 D.L.R. (2d) 182 (B.C.).

17. (1899), 32 N.S.R. 340 (C.A.), affd. 30 S.C.R. 245.

18. Kelley v. Canadian Northern Railway Company, [1950] 1 W.W.R. 744 (B.C.C.A.); Wiles v. Grand Trunk R. Company, (1913), 9 D.L.R. 379 (Ont.); McDougall v. Snider, (1913), 29 O.L.R. 448 (C.A.).

19. Lewis v. District of North Vancouver, (1963), 40 D.L.R. (2d) 182 (B.C.).

use of the phrase 'non-natural use' the rule applied to all things likely to do mischief if they escape if they were not naturally upon the land. No consideration was given to whether or not the use of the land was unusual or extraordinary. As Newark[20] points out, the prevailing idea that the rule in Rylands v. Fletcher has no application if it is shown that the thing likely to do mischief if it escapes was brought onto the land or accumulated there in the ordinary and reasonable use of land was unknown at least until 1885. However, in England since that time a change can be detected. Newark points out that the word 'natural' by which Blackburn, J. and Cairns, L.J. meant 'originally on the land' or 'not brought on the land' became to mean ordinary use of land. It has been argued that a new defence was created but it is probably more correct to look at the development as restricting the application of the rule. The rule could only be applied where the thing brought on the land was not in the ordinary or usual use of the land. However, it was not until 1913 that the point came before a final Court of Appeal. The case was a Canadian one, Rickards v. Lothian[21] and the court was the Judicial Committee of the Privy Council. The facts were straight-forward. The vent hole of a washhand basin on the floor of a house occupied by the defendant was blocked by some unknown person and the tap was left running. The hand-basin over-flowed and the plaintiff's goods on the floor below were damaged. The plaintiff's claim was based on Rylands v. Fletcher and negligence. The defendant was not held liable on

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20. Newark, 'Non-natural user and Rylands v. Fletcher' (1961), 24 M.L.R. 551.

21. [1913] A.C. 263 (P.C.).

the grounds of Rylands v. Fletcher as the damage was caused by the wrongful act of a third party. However, Lord Moulton, delivering the judgment of their Lordships went on...

> But there is another ground upon which their Lordships are of the opinion that the present case does not come within the present principle laid down in Fletcher v. Rylands. It is not every use to which land is put that brings into play the principle. It must be some special use bringing with it increased danger to others and must not merely be the ordinary use of land or such a use as is proper for the general benefit of the community.[22]

It cannot be doubted that the dictum of Lord Moulton has been accepted by the Canadian courts.[23] The growth of the concept can be traced to no single source. Its immediate source is the use of the expression 'non-natural' by Lord Cairns when the learned judge meant artificial or foreign. Thus it may be argued that the modification of the rule was due to the misinterpretation of a judicial statement. However, the ratio decidendi of Blackburn, J.'s judgment and the judgments in the House of Lords are too clear to

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22. Ibid., 280, (emphasis added). Further judicial assistance in defining this requisite component of establishing Rylands v. Fletcher liability, was offered by Lord Porter in Read v. J. Lyons & Co. Ltd., [1947] A.C. 156, 176, where he considered the term non-natural use to be a question of fact subject to the ruling of the judge
"... as to whether the particular object can be dangerous or a particular use can be non-natural, and in deciding I think that all the circumstances of time and place and practice of mankind must be taken into consideration."

23. The dictum has been cited with approval in Crown Diamond Paint Company Limited, [1952] 2 S.C.R. 161; Mihalchuk v. Ratke et ux, (1966), 55 W.W.R. (N.S.) 555 (Sask.); Mussett v. Reitman's (Ontario) Ltd. and St. Catharines, [1955] 3 3 D.L.R. 780 (Ont.); Lawrysyn v. Town of Kipling, (1965), 50 W.W.R. 430 (Sask.) aff'd on other grounds, (1966), 55 W.W.R. 108 (Sask. C.A.); Bloom v. Creed and the Consumers' Gas Co. of Toronto, [1937] O.R. 626 (C.A.) and non-natural use has been interpreted in nearly all Canadian cases on the basis of the dictum.

suggest that the modification arose from a misunderstanding. It will be remembered that the rule as formulated by Blackburn, J. was based on two policy considerations - the risk of damage being caused by the keeping of the thing and that the thing is being used for the benefit and profit of the occupier. The common rationale of a tort of strict liability was that the danger and likelihood of harm to person or property was so great that the activity could only be undertaken if the creator of the risk was to bear it.[24] It is submitted that the interpretation placed on non-natural use witnesses a drift towards a justification of the rule on a traditional and accepted rationale for torts of strict liability - the magnitude of the danger and the likelihood of damage - and a movement or trend away from justifying the rule on the ground of benefit or profit received from the thing. The Common Law judges feel obliged to justify any rule of strict liability - such rules being a departure from the norm. The rule in Rylands v. Fletcher has been justified by applying it to special and extraordinary use of land which involves special danger to others.

The concept of non-natural use also gives more flexibility to the rule. One might note the judgment of Rand, J. in Crown Diamond Paint Company Limited v. Acadia Holding Realty Limited.[25] The learned judge stated that the circumstances must be looked at closely when deciding the natural use issue. He held that the use of a four inch pipe to conduct water for commercial purposes involved an increase in risk to that particular neighbourhood and must

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24. The scienter action and strict liability for the escape of fire are examples of strict liability, which are purely historical throwbacks. Perhaps their continued existence is due to the fact that they may be accommodated to the risk rationale. See also American Institute Restatement on Torts, 1934, s. 520 ff.

25. [1952] 2 S.C.R. 161. For a more detailed discussion of this case see post., pp. 20-21.

be regarded as a non-natural use. In other neighbourhoods such a use may have been natural.[26]

This attempt to introduce more flexibility into the rule so that differences in time, place and social and economic needs may be reflected in the judicial application of the rule opens the door to policy and compounds the difficulty in defining the term 'non-natural use' with any precision. Some decisions are only explicable on the grounds of policy and the circumstances of time and place. In Madder v. A. E. McKenzie & Company Limited[27] Dysart,J. in the King's Bench of Manitoba regarded the storage of oats in a warehouse as a non-natural user of land. The decision can only be justified because in the circumstances the use of that particular warehouse at that time and in that manner involved an increased danger to others.[28]

The difficulty in predicting what is a non-natural user of land is heightened by historical throwbacks. Strict liability for the escape of fire was established centuries ago and has generally been regarded as a non-natural use of land and within the scope of the rule in Rylands v. Fletcher since that rule was laid down.[29] However, there is authority to suggest that

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26. See also Read v. J. Lyon & Co. Ltd., [1947] A.C. 156, 174, per Macmillan, L.J.

27. [1931] 1 W.W.R. 344 (Man.).

28. See also McNerney v. Forrester, 22 Man L.R. 220; Shiffman v. Order of St. John, [1936] 1 All E.R. 557 (K.B.); Hale v. Jennings Brothers, [1938] 1 All E.R. 579 (C.A.).

29. Gogo v. Eureka Sawmill Limited, [1944] 3 W.W.R. 268 (B.C.); Morwick v. Provincial Contracting Co. Limited, (1923-24), 55 O.L.R. 71 (C.A.); Tahsis Company Ltd. v. Canadian Forest Products Ltd., (1968), 65 W.W.R. 641 (B.C.); Canadian National Railway Company v. Canadian Steamship Lines Limited, [1947] O.R. 585; Curtis et al. v. Lutes, [1953] O.R. 747 (C.A.); Ekstrom v. Deagan and Montgomery, [1945] 2 W.W.R. 385 (Alta.); Chamberlain v. Sperry, [1934] 1 D.L.R. 189 (Man.); Elder v. City of Kingston, [1954] O.R. 397 (C.A.); McLean v. Rhodes, Curry Co., Limited, (1913), 46 N.S.R. 491 (C.A.).

the rule in Rylands v. Fletcher does not apply if fire is used as a necessary incident to land husbandry such as the clearing of land for cultivation.[30] This may be supported on the grounds that such a use is of benefit to the community or that the use of fire is in the circumstances ordinary or usual. Similarly there appears to be an increasing reluctance to regard the use of internal combustion engines as being a non-natural use of land.[31] Undoubtedly it is the fact situation in the case of Rylands v. Fletcher itself which has caused the courts readily to regard the storage of water in bulk whether in reservoirs[32] or water mains[33] to be a non-natural use of land. Similarly,

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30. Dean v. McCarthy, [1846] 2 U.C.Q.B. 448; Murphy v. Dalton, [1884] 5 O.R. 541; Forbes v. Daw, (1920), 19 O.W.N. 262. See also the problem discussed in Curtis et al. v. Lutes, [1957] O.R. 747 (C.A.); Canadian Forest Products Ltd. v. Hudson Lumber Co. Ltd., (1960), 20 D.L.R. (2d) 712 (B.C.); Port Coquitlam v. Wilson, [1923] S.C.R. 235. Recently, an Australian judge has come to the same conclusion, Smith v. Badenock, (1970), 44 A.L.J.R. 390.

31. Canadian Forest Products Ltd. v. Hudson Lumber Co. Ltd., (1960, D.L.R. (2d) 712 (B.C.); J. B. Hand & Co. Ltd. v. F. E. Best Motor Accessories Ltd. et al., (1962), 34 D.L.R. (2d) 282 (Nfld.); Contra, Brody's Limited v. Canadian National Railway Company, [1929] 2 W.W.R. 497 (Alta.); Ekstrom v. Deagan and Montgomery, [1945] 2 W.W.R. 385 (Alta.); Canadian National Railway Company v. Canadian Steamship Lines Limited, [1947] O.R. 585; Morwick v. Provincial Contracting Co. Limited, (1923-24), 55 O.L.R. 71 (C.A.).

32. Hart v. McMullan, (1899), 32 N.S.R. 340 (C.A.), aff'd. 30 S.C.R. 245; Low et al. v. Canadian Pacific Railway Company, [1949] 2 W.W.R. 433 (Alta.); Lewis v. District of North Vancouver, (1963), 40 D.L.R. (2d) 182 (B.C.); Kelley v. Canadian Northern Railway Company, [1950] 1 W.W.R. 744 (B.C.C.A.); See also Verbrugge v. Port Alberni (City) et al., [1965] 50 W.W.R. (N.S.) 220 (B.C.); Niles v. Grand Trunk R. Company, (1913), 9 D.L.R. 397 (Ont.). Contra, McDougall v. Snider, (1913), 29 O.L.R. 448 (C.A.).

33. Renahan et al. v. City of Vancouver, [1930] 3 W.W.R. 166 (B.C.); Regina Cartage and Storage Company v. Regina (City), (1967), 61 W.W.R. 443 (Sask.); Skanes v. Town Council of Wabana and Vokey, (1958), 40 M. P. R. 274 (Nfld.).

the carrying of gas in bulk[34] and the commercial conduction of electricity[35] is generally held to be a non-natural use. However, the ordinary domestic use of gas, electricity or water is not usually regarded as a non-natural user of land.[36]

The case of Crown Diamond Paint Company Limited v. Acadia Holding Realty Limited[37] considered the use of water as a non-natural use. The respondent was the owner of a building which was divided into four adjoining units, the fourth of which was leased to the appellant. The basement of the first unit was separated from the second by a two foot stone and concrete wall, the second unit from the third by a wooden partition and the third from the fourth by a stone wall in which there were two doors. Water was piped into the first unit from a twelve inch street main by a four inch pipe. At the end of the four inch pipe was a bell, into which, for the purpose of reducing the flow was an iron plug. The first unit was being altered and the ground floor windows were without glass. However, at least one of the windows had not been boarded up. The unit was unheated during the night. On the night on which the damage was caused the temperature dropped from nineteen degrees to nine degrees

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34. Northwestern Utilities Limited v. London Gurantee and Accident Company Limited, [1936] A.C. 108; Darbey v. Winnipeg Electric Company, [1933] 1 W.W.R. 566 (Man. C.A.); Lohndorf and Alberta General Insurance Company v. British American Oil Company Limited, (1956), 24 W.W.R. (N.S.) 193. (Alta.)

35. Bell Telephone Co. of Canada v. Ottawa Electric Co. and City of Ottawa, (1920-21), O.W.N. 580; Winnipeg Electric R. Co. v. City of Winnipeg, (1916), 30 D.L.R. 159 (Man. C.A.); Gloster v. Toronto Electric Light Co., (1906), 35 S.C.R. 27.

36. Bloom v. Creed and the Consumers' Gas Co. of Toronto, [1937] O.R. 626 (C.A.); Imperial Tobacco Co. of Canada Ltd. v. Hart, (1918), 51 N.S.R. 397 (C.A.)

37. [1952] 2 S.C.R. 161.

below zero. At ten fifteen that evening water was seen coming out of the basement windows and the Water Department turned off the flow as soon as it was notified. The president of the respondent company was also notified but he did not investigate the matter until 8:00 a.m. the next morning. It was found that the flooding had occurred when the pipes froze and the reducing plug became dislodged from the bell. During the remainder of the night the water seeped through to the fourth unit where the appellant's goods were damaged. The appellant's action for damages in negligence, nuisance and on the rule in Rylands v. Fletcher was dismissed by the trial judge and the decision was upheld by the Supreme Court of New Brunswick. In the Supreme Court of Canada the appeal was upheld by a majority of four to one. Rinfret, C.J. and Rand, J. applied the rule in Rylands v. Fletcher. In their view the maintenance of a four inch pipe was a non-natural user of land and provided a substantial addition to the ordinary risks of the neighbourhood.[38] Locke, J. however, dissented and was of the opinion that bringing water into premises by means of a four inch pipe was not a non-natural use.[39] Kerwin and Estey, JJ. preferred to base their decision on negligence and found it unnecessary to consider the rule in Rylands v. Fletcher.[40]

Other illustrations of non-natural users of land are; the use of land for stock-car racing,[41] the use of land causing vibrations which cause

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38. Ibid., 174.

39. Ibid., 190.

40. Ibid., 183-184.

41. Aldridge & O'Brien v. Van Patter, [1952] 4 D.L.R. 93 (Ont.).

damage,[42] the fumigation of a building with prussic acid,[43] the construction of sewers,[44] the production of noxious fumes,[45] a sewage lagoon,[46] the spraying of crops from the air,[47] the demolition of a bridge,[48] a burnt out building,[49] the storage of oats,[50] the storage of arsenic,[51] fumigation by cyanide gas.[52]

Users of land (other than those which have already been mentioned)[53] which have been held to be a natural use are the ordinary drainage of land,[54]

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42. Aikman v. George Mills & Co. Ltd. et al., [1934] O.R. 597; Pilliterri v. Northern Construction Co. Ltd., (1930-31), 66 O.L.R. 128; J. P. Porter Co. Ltd. v. Bell et al., [1955] 1 D.L.R. 62 (N.S.); Bower v. Richardson Construction Company, [1938] O.R. 180 (C.A.); Anger et al. v. Northern Construction and J. W. Stewart Limited et al., [1938] O.R. 492. Contra, Barette et al. v. Franci Compressed Pile Company of Canada Limited, [1955] O.R. 413.

43. Skubiniuk v. Hartman, 24 Man. L.R. 836 (C.A.).

44. Rideau Lawn Tennis Club v. Ottawa, [1936] 3 D.L.R. 535 (Ont. C.A.); Duncan and Duncan v. The Queen, [1966] Ex. L.R. 1080.

45. Heard and Heard v. Woodward, (1954), 12 W.W.R. (N.S.) 312 (B.C.).

46. Lawrysyn v. Town of Kipling, (1965), 50 W.W.R. 430 (Sask.). Aff'd on other grounds (1966), 55 W.W.R. 108 (Sask. C.A.).

47. Mihalchuk v. Ratke et ux., (1966), 55 W.W.R. (N.S.) 555 (Sask.).

48. Lindsay and Lindsay v. The Queen, [1956] 5 D.L.R. (2d) 349 (Exch.).

49. McNerney v. Forrester, 22 Man. L.R. 220.

50. Madder v. A. E. McKenzie and Company Limited, [1931] 1 W.W.R. 344 (Man.).

51. Leibel v. Rural Municipality of South Qu'Appelle, [1943] 2 W.W.R. 277 (Sask.), aff'd. [1943] 3 W.W.R. 566 (Sask. C.A.); Cairns v. Canadian Refining Company, [1914] 26 O.W.R. 490 (C.A.).

52. Schubert v. Sterling Trust Corporation et al., [1943] O.R. 438.

53. Ante., pp. 19-20.

54. Sorenson v. Board of Education of Petersborough, [1939] 2 D.L.R. 488 (Ont. C.A.).

fencing,[55] the painting of a bridge[56] and the floodlighting of a building.[57]

The attitude of the Canadian courts to damage caused by explosives is somewhat surprising. Numerous cases have held that the use of explosives does not amount to a non-natural user of land. In Strapazon v. Oliphant Munson Collieries Limited[58] it was held that the use of explosives was not within the scope of the rule in Rylands v. Fletcher. In that case the plaintiff an employee of the defendants, was assisting in putting out a fire in the defendant's shed. The explosives stored in the shed exploded and the plaintiff was injured. Stuart, J. held that the plaintiff must prove negligence in such a case. The learned judge pointed out that the explosives required another agent (detonator fire) before they caused damage. However, the broad exclusion of explosives from the scope of the rule in Rylands v. Fletcher was not necessary for the decision because the plaintiff was on the defendant's land and there was no escape. Later in his judgment, Stuart, J. somewhat inconsistently stated that the position may be different if the plaintiff was on an adjoining highway and had been injured there. However, in the later case of Peitrzak v. Rocheleau[59] Strapazon's case was regarded as totally excluding explosives from the purview of Rylands v. Fletcher. Again, however, the plaintiff was injured on the defendant's land. Clarkson v. Hamilton Powder Company[60] and Brown v. Garson[61] are further authority that the plaintiff must prove negligence where damage is caused by explosives.

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55. Cowan et al. v. Harrington, (1938-39), 13 M.P.R. 5 (N.S.).

56. Vaughn v. Halifax-Dartmouth Bridge Commission, (1961-62), 46 M.P.R. 14 (N.S.).

57. Noyes v. Huron & Erie Mortgage Corp., [1932] 3 D.L.R. 143 (Ont.).

58. (1919-20), 15 Alta. L.R. 470.

59. [1928] 1 W.W.R. 428 (Alta.).

60. (1909), 10 W.L.R. 102 (B.C.).

61. (1913), 42 N.B.R. 354.

Brown v. Garson[62] however, is the only case where injury was sustained outside the occupier's land. The court held that excavation for the foundation of a house by explosives was a natural use.[63]

On the other hand there are cases where occupiers have been held liable for damage caused by vibrations which have originated from the detonation of explosives. In these cases the courts have at least impliedly recognised damage caused by explosives to be within the scope of the rules and that the use of explosives may be a non-natural use of land. There is also more positive authority for this view. In Lindsay and Lindsay v. The Queen[64] Cameron, J. held that the Crown was liable under the rule in Rylands v. Fletcher for injuries suffered by a bystander from a flying fragment of rock during the demolition of a bridge. Furthermore, it would appear that the use of explosives is recognised in other jurisdictions as a non-natural user of land and as being within the scope of the rule.[65]

There is a similar conflict of authority in regard to gasoline. The defendant in Chamberlain v. Sperry[66] was held liable under the rule in

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62. Ibid.

63. See Read v. Lyons, [1947] A.C. 156, where the House of Lords expressed some doubt as to whether the manufacture of munitions could be said to to be a non-natural use of land. The case, however, turned on the question of escape from land under the control or occupation of the defendant. The plaintiff was injured while in the munitions factory. Aikman v. George Mills & Co. Ltd. et al., [1934] O.R. 597; Pilliterri v. Northern Construction Co. Ltd., (1930-31), 66 O.L.R. 128; J. P. Porter Co. Ltd. v. Bell et al, [1955] 1 D.L.R. 62 (N.S.); Bower v. Richardson Construction Company, [1938] O.R. 180 (C.A.); Anger et al. v. Northern Construction and J. W. Stewart Limited et al., [1938] O.R. 492.

64. [1956] 5 D.L.R. 349 (Exch.).

65. Rainham Chemical Works Limited v. Belvedere Fish Guano Co., /1921 2 A.C. 465; Grice v. The King, [1937] N.Z.L.R. 574. Contra, Read v. J. Lyons and Co. Ltd., [1947] A.C. 156. (doubt was expressed by some of their Lordships in this case.)

66. [1934] 1 D.L.R. 189 (Man.)

Rylands v. Fletcher for damage caused by fire which originated from an explosion of five gallons of petrol brought into a house for cleaning purposes. Similarly, in Ekstrom v. Deagon and Montgomery[67] the draining of gasoline from the tank of a truck has been regarded as a non-natural use. The defendant was held liable for damage caused by a fire caused by an explosion of the petrol.[68] However, in Hutson et al. v. United Motor Service Ltd.[69] Middleton, J.A. doubted that Rylands v. Fletcher could apply where damage has been caused by an explosion of gasoline vapour. The learned judge held that although 10 gallons of gasoline had been allowed to escape into the air such a use was not non-natural and in any case the thing which had been brought on to the premises - the gasoline - did not escape - only the subsequent fire. The defendant was, however, liable in negligence.

It is interesting to find that the Canadian courts have been reluctant in bringing two highly dangerous substances - gasoline and explosives within the scope of the rule in Rylands v. Fletcher - a rule justified by the courts in its departure from liability based on fault by the danger caused to others. The explanation of this reluctance is two-fold. First, many cases involving both these substances do not contain the element of an 'escape'. The plaintiff was injured on land occupied or controlled by the defendant. Secondly, gasoline and explosives usually cause damage by the explosion of the

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67. [1945] 2 W.W.R. 385 (Alta.).

68. In this case however, there was no 'escape' from land.

69. [1936] O.R. 225. This case may be compared to Musgrove v. Pandelis, [1919] 2 K.B. 43, where a fire began from the carburettor of a car. In that case, however, the activating agent - the ignition spark - was brought onto the land.

substance and/or fire. The substances per se rarely escape and do damage. However, on the balance of authority it seems likely that today the courts will apply the rule where damage is caused outside the defendant's land by fire or blast even though another agent is required before the damage is caused.

In view of the large number of past situations in which the rule of Rylands v. Fletcher has been applied, and the fact that the rule is still in a state of evolution no strict rule of prediction can be offered as to whether any particular use of land is non-natural. However, the following guidelines may be useful.

1. In Canada the courts appear to demand that the use of land involves some increased danger to others either because the "thing" is inherently dangerous - electricity, gas - or the way in which the thing is utilized makes it dangerous - water in bulk. This reflects to a great extent the dictum of Lord Moulton in Rickards v. Lothian.[70]

2. The fact that the user of land is for the benefit of the community or for public purposes will not in itself be a deciding factor in categorizing the use as natural or non-natural. However, this factor which appears to have originated from Blackburn, J.'s requirement that the defendant must have brought the thing onto his land "for his own purposes"[71] has been considered by some judges as relevant. The concept was expanded by Moulton, L.J. in Rickards v. Lothian[72] where the learned judge in considering non-natural use stated, "it must be some special use bringing with it increased danger to others and must not merely be the ordinary use of land such as is proper for the general

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70. [1913] A.C. 263, 280 (P.C.).

71. (1866), 1 L.R. Ex. 265, 279.

72. [1913] A.C. 263 (P.C.).

benefit of the community".[73]

However, it is clear that companies and public authorities serving a city with gas, electricity or water may be liable under the rule in Rylands v. Fletcher for damage caused by an escape from bulk mains and lines although their operations are clearly for the benefit of the community.[74] There is, however, some support for the proposition that non-profit making enterprises which operate for the benefit of the community should not be strictly liable under the rule in Rylands v. Fletcher.[75] Whittaker, J. in Canadian Forest Products Ltd. v. Hudson Lumber Co. Ltd.[76] was prepared to go further and state that public benefit was a relevant factor in considering a profit-making activity. The learned judge was concerned with the escape of fire caused by the defendant's logging operations. He stated, "I think that it is clear that the use of wild forested areas of British Columbia for logging is a proper and ordinary use of such areas and is for the general benefit of the community."[77] This view, however, appears to be in direct contradiction to that stated by Rand, J. in the Supreme Court of Canada. In Crown Diamond Point Company Limited v. Acadia

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73. Ibid., 280.

74. Renahan et al. v. City of Vancouver, [1930] 3 W.W.R. 166 (B.C.); Regina Cartage and Storage Company Limited v. Regina (City), (1967), 61 W.W.R. 443 (Sask.); Darbey v. Winnipeg Electric Company, [1933] 1 W.W.R. 566 (Man. C.A.); Gloster v. Toronto Electric Co., (1906), 38 S.C.R. 27.

75. Dunne v. N. W. Gas Bd., [1964] 2 Q.B. 806, 832.

76. (1960), 20 D.L.R. (2d) 712 (B.C.).

77. Ibid., 730.

Holding Realty Limited[78] he stated that the benefit to the community must be direct such as health, and not arising remotely from industry.

It may be concluded that a consideration of public benefit may be relevant in some cases but as Fleming[79] states, "far from justifying an exception it supplies an added reason for spreading the cost which not only should, but can, easily be shared by the whole community by taxation and pricing. It is difficult to warrant the prejudicing of private rights by the facile plea of public welfare at least in the absence of statutory authorization."[80]

3. A factor of perhaps increasing importance is the circumstances of time and place coupled with social and economic need. This factor is particularly well illustrated by the decision of Whittaker, J. in Canadian Forest Products Ltd. v. Hudson Lumber Co. Ltd.[81] The case concerned damage caused by a fire which appeared to have been caused by a spark from an internal combustion engine. In finding a natural use of land, Whittaker, J. took into account the necessity for the use of such machines, the wide and accepted use of such engines and the importance of industry. A further illustration is the case of Aldridge and O'Brien v. Van Patter[82] which concerned injuries to bystanders caused by a stock-car smashing through the fence surrounding the track. The fact that the bystanders were in a public park adjoining the defendant's land and could be foreseen to be there clearly influenced the judge in

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78. [1952] 2 S.C.R. 161.

79. Fleming, The Law of Torts, 4th ed. 1971, 284.

80. For the defence of statutory authority see post., p. 41 ff.

81. (1959), 20 D.L.R. (2d) 72 (B.C.).

82. [1952] 4 D.L.R. 93 (Ont.).

finding a non-natural use of land. In Mihalchuk v. Ratke et ux.,[83] MacPherson, J. held that the spraying of crops from the air with an herbicide was a non-natural use of land. The learned judge based his decision, at least in part, on the fact that in that area crops were usually sprayed by a tractor. Similarly in Leibel v. Rural Municipality of South Qu'Appelle[84] it was noted that the arsenic was stored near to a frequently used drinking well. Finally attention should be drawn to another dictum of Rand, J. in the Supreme Court of Canada in the Crown Diamond Paint Case.[85] The learned judge stated that in considering the increased risk one should compare the risk of the activity with the ordinary risk of the neighbourhood. Thus, what may be a non-natural use in one area may not be regarded as such in another.[86]

It is hoped that this brief consideration of the term 'non-natural user' has shown how the scope of the rule in Rylands v. Fletcher has been restricted. From liability for the escape of all things brought on to the land which are likely to cause mischief the Courts now demand an increase in danger to others. This reflects to a certain extent a judiciary attuned to the tort of negligence and regarding increased danger and risk of injury as the only rationale for the imposition of strict liability. However, the courts' concern with reasonableness, safety, social value and surrounding circumstances of an activity

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83. (1966), 55 W.W.R. (N.S.) 555 (Sask.).

84. [1943] 2 W.W.R. 277 (Sask.)., aff'd. [1943] 3 W.W.R. 566 (Sask. C.A.).

85. [1952] 2 S.C.R. 161.

86. In this respect one should note Lawrysyn v. Town of Kipling, (1965), 50 W.W.R. 430 (Sask.), aff'd. on other grounds (1966), 55 W.W.R. 108 (Sask. C.A.), where it was held that a sewage lagoon is classified by where the lagoon is. If it is near cropping land it will amount to a non-natural use. It may not be if it is next to a river.

is relevant to a negligence action and to a certain extent Rylands v. Fletcher liability is a "loosely designed fault syndrome".[87]

It has been traditional among the text book writers to consider the concept of 'things likely to do mischief' separately. As the rule stood immediately after the decision in Rylands v. Fletcher the component of the rule requiring the establishment that the thing was likely to cause mischief was essential. This was the limiting principle of the rule. Rylands v. Fletcher did not establish liability for all things brought on to the land. It was only for those things likely to cause mischief if they escaped.[88] This covers a far wider range of fact situations than the present rule requiring a non-natural use. Now that there must be an element of danger to others ipso facto the thing must be likely to do mischief. It is difficult to imagine any hypothetical situation where, if a non-natural use of land is established and damage is caused by an escape, a separate inquiry into whether or not the thing is likely to do mischief if it escapes would not be answered in the affirmative. The concept of a thing likely to do mischief has been absorbed and assimilated into the concept of non-natural use. A brief consideration of the things held to amount to a non-natural use and outlined earlier shows that all are likely to do mischief if they escape. Furthermore the rule in Rylands v. Fletcher unlike trespass is not actionable per se. Will damage be caused by a thing NOT likely to do mischief if it escapes? For these reasons the writer submits that today a separate inquiry into the mischievous tendencies of the "thing" is unwarranted.

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87. Millner, Negligence in Modern Law, (1967), 195. See post., Part I, Ch. IV.

88. (1866), 1 L.R. Ex. 265, 279.

3. Escape.

The judgmentof Blackburn, J. concerned the escape of water which had been accumulated on the land. The whole basis of the decision was that, while it was lawful to keep the water on the land there would be liability for damage caused if it escaped. It may well be argued that this is an illogical and irrational restriction upon the rule of strict liability. If the defendant keeps on his land something which presents an increased danger should he not be liable for all damage caused by the thing whether it escapes from the land or not? This argument was presented to the House of Lords in Read v. J. Lyons and Co. Ltd.[89] In that case the defendants controlled and manufactured high explosive shells. The plaintiff was a factory inspector, whose duty it was to inspect the filling of shell cases. While in the factory, a shell exploded and the plaintiff suffered personal injuries. As there was no negligence on the part of the defendant the claim was based on the rule in Rylands v. Fletcher. Cassells, J. at first instance,[90] applied the rule holding that the defendants were liable because they carried on an ultra-hazardous activity, and so were under what he termed a strict liability to take successful care to avoid causing harm. The Court of Appeal[91] reversed the decision, holding that there had been no escape from the premises and the defendants were not liable without proof of negligence. The House of Lords unanimously dismissed the appeal.

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89. [1947] A.C. 156.

90. [1944] 2 All E.R. 98.

91. [1945] K.B. 216, per Scott, L.J.

Viscount Simonds made the position clear:

> Now the strict liability recognised by this House to exist in Rylands v. Fletcher is conditioned by two elements which I may call the condition of "escape" from the land of something likely to do mischief, and the condition of "non-natural use" ... "Escape" for the purpose of applying the proposition in Rylands v. Fletcher means escape from a place where the defendant has occupation of or control over land to a place which is outside his occupation or control.[92]

Thus in England any trend towards generalizing and rationalizing the rule by dispensing with the requirement of escape has been brought to a sharp halt.

In Canada the majority of cases illustrate damage caused by an escape from land. In view of the origins of the rule this is to be expected. One or two cases will suffice as illustrations. In Aldridge & O'Brien v. Van Patter[93] a stock car crashed through a fence surrounding the race track and injured two bystanders in a public park. The car had escaped from the land under the control of the defendants to a public park.[94] Deyo v. Kingston Speedway Limited et al.[95] concerned a similar situation but the car injured spectators. The rule had no application as there had been no escape from the defendant's land. Lindsay and Lindsay v. The Queen[96] is another excellent

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92. [1947] A.C. 156, 167-168.

93. [1952] 4 D.L.R. 93 (Ont.).

94. The court held both the defendant Martin and the defendant Western Fair Association liable under the rule in Rylands v. Fletcher. The former was a lessee of the raceway and the latter a licensee.

95. [1954] O.R. 223.

96. (1956), 5 D.L.R. (2d) 349 (Exch.).

illustration. A bystander was injured by a piece of flying steel during the demolition of a bridge by the army. Cameron, J. stated:

> In the course of carrying out such a dangerous operation they permitted to escape fragments of steel from the property under their control to such other area, thereby causing damage to the suppliant.[97]

The learned judge found for the plaintiff on the basis of the rule in Rylands v. Fletcher.

However, there is some authority in Canada for a less restricted application of the rule. In Ekstrom v. Deagon and Montgomery[98] the defendant had his truck towed to a garage owned by the plaintiff. The defendant was in the process of draining the gasoline from the fuel tank of the truck when a trouble light being used by him caused an explosion and fire which burnt the plaintiff's premises to the ground. The learned judge applied the rule in Rylands v. Fletcher. His reasoning, if not convincing, is interesting. If one is liable for an escape of a noxious agent one is even more liable if that agent if brought on to another's property. In Dokuchia v. Domansch[99] at the defendant's request, the plaintiff was sitting on the fender pouring gasoline into the carburettor of the defendant's truck while the truck was moving. An explosion occurred and the plaintiff was injured. Laidlaw, J.A. stated:

> ...the rule [in Rylands v. Fletcher] is not confined to liability of landowners to each other but makes the owner of a dangerous thing liable for any mischief thereby occasioned.... It is not confined to cases where the dangerous

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97. Ibid., 366. See also Tolfree v. Russell and Jennings and the City of Toronto, [1942] O.R. 724 (C.A.).

98. [1945] 2 W.W.R. 385 (Alta.).

99. [1945] O.R. 141 (C.A.).

> thing escapes from the premises of the person keeping it.... The rule covers cases in which the dangerous thing is brought or carried along a highway.[1]

In Hutson et al. v. United Motor Service Ltd.[2] a fire followed the explosion of gasoline vapour kept by the tenant of a building. The matter was decided on negligence but in the course of his judgment, Middleton, J.A. stated:

> Anyone who does a patently dangerous thing should, I think, be responsible. The incident of ownership of land is merely incidental and subsidiary.[3]

On the balance of the authorities it can not be doubted that an escape from land is a requirement for the establishment of Rylands v. Fletcher liability. However, seeds of a more rational approach are to be found in the Canadian jurisprudence. The gate to further development of the rule is not as firmly closed as in other jurisdictions.[4]

4. Locus Standi of Plaintiff and Defendant.

There is some doubt as to whether or not the plaintiff in an action based on the rule in Rylands v. Fletcher has to be an occupier of adjoining land. This has particular relevance to recovery for personal injuries under the rule in Rylands v. Fletcher. From the wording of the judgment of Blackburn, J., the question could never arise as it was held that an occupier would be liable for any damage which is the natural consequence of the escape.[5] The

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1. Ibid., 146.
2. [1936] O.R. 225.
3. Ibid., 231.
4. See also Raynor v. Toronto Power Co., (1914), 32 O.L.R. 612.
5. (1866), 1 L.R.Ex. 265, 279.

uncertainty as to whether or not a plaintiff must be in the occupation of land has probably arisen from the close association of the rule in Rylands v. Fletcher with the tort of private nuisance which primarily regulates the rights and duties of adjoining landowners.

However, despite some dicta in Read v. J. Lyons and Co. Ltd.,[6] to the contrary, the bulk of authority accepts that the plaintiff need not be an occupier of land. In Rainham Chemical Works Limited v. Belvedere Fish Guano Co.,[7] an explosion occurred on the defendant's land causing damage to neighbouring property. The following statement of Lord Buckmaster in the House of Lords is therefore obiter, but it is clearly in support of the view that the plaintiff does not have to be in the occupation of land:

> ...Fletcher v. Rylands depends upon...the use of land by one person in an exceptional manner that causes damage to another, not necessarily an adjacent landowner.[8]

Similarly in Canada the plaintiff need not be an occupier of land. In numerous cases the plaintiff has been either a bare licensee or just a member of the public. This was the status of the plaintiff in Lindsay and Lindsay v. The Queen[9] where injury was caused to a bystander watching the demolition of a bridge. The successful plaintiffs in Aldridge and O'Brien v. Van Patter[10] were walking in a public park and had no special interest in the land. However, the matter has not been finally settled and this is shown by the case of Vaughn

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6. [1947] A.C. 156.

7. [1921] 2 A.C. 465.

8. Ibid., 471. See also Shiffman v. Order of St. John, [1936] 1 All E.R. 557 (K.B.); Hale v. Jennings Brothers, [1938] 1 All E.R. 579 (C.A.).

9. [1956] 5 D.L.R. (2d) 349 (Exch.).

10. [1952] 4 D.L.R. 93 (Ont.).

v. Halifax-Dartmouth Bridge Commission.[11] In the process of painting a bridge flecks of paint were blown from the bridge on to cars in a nearby parking lot. McDonald, J. held that the rule in Rylands v. Fletcher could not apply as the injury complained of must be to the use and occupation of land. The interest of the car owners in the land was not sufficient. However, Ilsey, C.J.[12] stated that the rule in Rylands v. Fletcher was not restricted to the invasion of a right in property of land. The learned judge cited Clerk and Lindsell on Torts (11th ed.), "The duty under the rule of absolute liability is owed to the world at large."[13] Finally one might cite Leibel v. Rural Municipality of South Qu'Appelle[14] when the successful plaintiff was the user of a public well.[15]

The position in Canada could be summed up in the words of an Australian judge, Windeyer, J., in Benning v. Wong[16]:

> I think the Court should keep in step and treat the doctrine of Rylands v. Fletcher as having become in this matter emancipated from restrictions its origin in or relationship with nuisance might impose. A plaintiff can, I think, recover under it for personal injuries, or harm to his personal effects if, at the time when the escaping thing came upon him he was lawfully entitled to be a licensee, or as a member of the public such as on a highway or in a public park.[17]

However, the requirement that the defendant must be in the occupation or control of land is firmly established. This is consistent with the

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11. (1961-62), 46 M.P.R. 14 (N.S.).

12. Ibid., 271.

13. Ibid., 17-18.

14. [1943] 2 W.W.R. 277 (Sask.), aff'd. [1943] 3 W.W.R. 566 (Sask. C.A.).

15. See also Bell Telephone Co. of Canada v. Ottawa Electric Co. and the City of Ottawa, (1920), 19 O.W.N. 58.

16. (1969), 43 A.L.J.R. 467.

17. Ibid., 494.

judgment of Blackburn, J. in Fletcher v. Rylands.[18] The learned judge related the rule to a person "who brings on to his land, and collects and keeps there, things likely to do mischief if they escape."[19] To remove this limitation would be to extend the principle considerably, and to apply it to situations traditionally within the scope of the tort of negligence.

It has been noted earlier that Viscount Simonds, in Read v. J. Lyons and Co. Ltd.[20] made the position quite clear when referring to the requirement of an escape. The learned judge stated that there must be an escape of the thing likely to do mischief, from land in occupation or control of the defendant. Thus in England occupation is necessary but not in a strict legal sense - there must be occupation or control. Where the defendant has a right to lay water or gas mains in the highway there will be sufficient occupation or control to found an action on the rule in Rylands v. Fletcher. West[21] states that a defendant must be in occupation of the land but recognises the term occupation as including "a licensee in de facto occupation and statutory undertakers using the subsoil of a highway for pipes and mains".[22]

The Canadian cases, in the main, support this view. The Crown was liable in Lindsay and Lindsay v. The Queen[23] because its servants used explosives

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18. (1866), 1 L.R. Ex. 265.

19. Ibid., 279.

20. [1947] A.C. 156.

21. "Nuisance or Rylands v. Fletcher", (1966) 30 Conv. 95.

22. Op. cit., 104. See also Hale v. Jennings Brothers, [1938] 1 All E.R. 579 (C.A.); Shiffman v. Order of St. John, [1936] 1 All E.R. 557 (K.B.).

23. [1956] 5 D.L.R. (2d) 349 (Exch.).

upon property "where they had a licence to go" which caused an escape of flying steel which injured the plaintiff. In Bower v. Richardson Construction Company[24] the defendant was a construction company which was using a pile driver on land owned by the City in Toronto. The defendant was held liable under the rule in Rylands v. Fletcher[25]. It should also be noted that in Canada those who use the subsoil of a highway for the laying of mains and pipes will be regarded as having sufficient 'occupation or control' to be held liable under the rule.[26] The case of Canadian National Railway Company v. Canadian Steamship Lines Limited[27] is a good illustration of the concept of occupation and control. A fire broke out in a shed owned by the plaintiff but in part of the shed which was under the control and exclusively occupied by the defendant. The fire was caused by sparks emitted by a gasoline operated lift truck which ignited inflammable materials in the shed. The defendant was liable for the damage on the rule in Rylands v. Fletcher.

However, there is some authority in Canada for the proposition that the defendant need not be in occupation or control of land. It will be remembered that in Ekstrom and Deagan v. Montgomery[28] the defendant brought on

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24. [1938] O.R. 180 (C.A.).

25. See also Aldridge and O'Brien v. Van Patter, [1952] 4 D.L.R. 93 (Ont.); Vaughn v. Halifax-Dartmouth Bridge Commission, (1961-62), 46 M.P.R. 261 (N.S.), per Ilsey, C.J.

26. Northwestern Utilities v. London Guarantee and Accident Company Limited, [1936] A.C. 108 (P.C.); Lohndorf and Alberta General Insurance Company v. British American Oil Company Limited, (1956), 24 W.W.R. (N.S.) 193 (Alta.).

27. [1947] O.R. 585.

28. [1945] 2 W.W.R. 385 (Alta.).

to the plaintiff's land his truck to drain the full tank. An explosion occurred and the plaintiff's premises were burnt to the ground. The rule was applied. The defendant was also held liable in Dokuchia v. Domansch[29] when injury was caused to the plaintiff by the defendant's truck moving down the highway. The plaintiff was sitting on the fender pouring petrol into the carburettor when an explosion occurred. On the balance of authority however, the defendant must be in occupation or control of land from which the 'thing' escapes.

5. Personal Injuries.

Certain statements in Read v. J. Lyons and Co. Ltd.[30] throw doubt on the ability of a plaintiff to claim damages for personal injuries under the rule in Rylands v. Fletcher. Lord MacMillan stated:

> The doctrine of Rylands v. Fletcher, as I understand it, derives from a conception of mutual duties of adjoining or neighbouring landowners and its cogeners are trespass and nuisance. If its foundation is to be found in the injunction sic utere tuo at alienum non laedas, then it is manifest that it has nothing to do with personal injuries. The duty is to refrain from injury not to alium but alienum.[31]

The rule in Rylands v. Fletcher is historically and conceptually allied to the tort of nuisance. However, there are numerous differences in the incidence and application of the two torts. Blackburn, J. certainly did not limit the loss recoverable to damage caused to land. The learned judge stated that the occupier is liable for that damage which is the natural consequence of the escape.[32] There seems no reason in principle or logic to restrict the remedy. In England there is considerable authority for the proposition that

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29. [1945] O.R. 141 (C.A.).

30. [1947] A.C. 156.

31. Ibid., 173.

32. (1866), 1 L.R. Ex. 265, 279.

damages for personal injuries are recoverable.[33] In Canada the authority for recovery is overwhelming. Plaintiffs recovered in Aldridge & O'Brien v. Van Patter[34] for personal injuries after being hit by a stock car, in Lindsay and Lindsay v. The Queen[35] for shrapnel wounds, in Duncan and Duncan v. The Queen[36] for injuries suffered as a result of drinking from a polluted water supply and in Schubert v. Sterling Trust Corporation et al.[37] a claim was made under the Fatal Accidents Act.[38] There is also other strong authority for the recovery of damages for personal injuries and none against.[39]

It might also be noted that the High Court of Australia in Benning v. Wong[40] has unanimously allowed recovery for personal injuries. Thus it is suggested that a plaintiff may recover for personal injuries under the rule in Rylands v. Fletcher.

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33. Hale v. Jennings Brothers, [1938] 1 All E.R. 579 (C.A.); Shiffman v. Order of St. John, [1936] 1 All E.R. 557 (K.B.); Perry v. Kendricks Transport Ltd., [1956] 1 All E.R. 154 (C.A.)

34. [1952] 4 D.L.R. 93 (Ont.).

35. [1956] 5 D.L.R. (2d) 349 (Exch.).

36. [1966] Ex. C.R. 1080.

37. [1943] O.R. 438.

38. R.S.O. 1937, c. 210.

39. Bloom v. Creed and the Consumers' Gas Co. of Toronto, [1937] O.R. 626 (C.A.), the application of the rule in Rylands v. Fletcher was excluded but not on the grounds that damages for personal injuries was unsolved. Similar cases in this respect are Deyo v. Kingston Speedway Limited et al., [1954] O.R. 223; The Village of Kelliher v. A.C. Smith, [1931] S.C.R. 672. More positive authority is Leibel v. Rural Municipality of South Qu'Appelle, [1943] 2 W.W.R. 277 (Sask.) aff'd. [1943] 3 W.W.R. 566 (Sask C.A.).

40. (1969), 43 A.L.J.R. 467.

CHAPTER III

DEFENCES TO LIABILITY UNDER THE RULE IN RYLANDS V. FLETCHER

There are six main defences to liability under the rule in Rylands v. Fletcher, statutory authority, consent of the plaintiff, act of a stranger, vis major or act of God, default of the plaintiff and self defence. Two of these defences were alluded to by Blackburn, J. in his judgment.

> He can excuse himself by shewing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of vis major or act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be necessary.[1]

One judge has stated that "there are so many exceptions to it, that it is doubtful whether there is much of the rule left".[2] It is not intended to analyse the defences in any great detail. It is suggested that it is more important to be concerned with the substance of the rule rather than defences. However, a brief explanation shall be given of each.

1. Statutory Authority

Before considering the operation of this defence, it is not unhelpful to note some generally accepted principles in regard to statutory authority. Undoubtedly what is authorized by statute must be ascertained from the relevant provisions of the statute by the usual means of construction, and this will not generally turn on whether the statute is permissive or mandatory. One must also consider the nature of the authorization. Some statutes may authorize something to be done which will in itself create a nuisance or a situation to which Rylands v. Fletcher could apply. In such circumstances the statutory authorization is absolute. There is no authority to suggest that statutory authorization to do

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

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

something which would inevitably create a Rylands v. Fletcher situation would be actionable. A further principle which cannot be in doubt is that the statutory authority will be subject to the work being carried out with due care and skill. Statutory authority does not carry with it the authorization to be negligent or to create a Rylands v. Fletcher situation unnecessarily. That the statutory authority is conditioned on due care and skill being exercised raises the problem as to the burden of proof. Does the defendant have to show the requisite statutory authority plus the requisite amount of due care and skill or does the establishment by the defendant of statutory authority remove the matter from the realm of Rylands v. Fletcher and force the plaintiff to prove negligence. It is submitted that in view of the multitude of activities which are authorized by statute and could give rise to a Rylands v. Fletcher situation this is a question of some importance.

Dicta in the Privy Council decision of Northwestern Utilities Limited v. London Guarantee and Accident Company Limited[3] support both views. The case concerned the destruction of an hotel by a fire which was caused by the escape and ignition of gas from the appellant's mains. The appellant company had been given full power to put down, take up, repair, maintain and operate gas pipes along, through and under the streets of Edmonton, for the purpose of supplying natural gas to consumers. By clause 11 of the franchise which was confirmed by statute, the company was liable for the negligence of its employees and workmen. The case was in the final resort, decided on the question of negligence and the defendant was held liable. However, Lord Wright considered the rule in Rylands v. Fletcher and the defence of statutory authority. Lord Wright stated:

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3. [1936] A.C. 108 (P.C.).

> Thus the appellants who were carrying in their mains the inflammable and explosive gas are prima facie within the principle of Rylands v. Fletcher ... that is to say that although they are doing nothing wrongful in carrying the dangerous thing so long as they keep it in their pipes, they come prima facie within the strict rule of strict liability if the gas escapes: the gas constitutes an extraordinary danger created by the appellants for their own purposes and the rule established in Rylands v. Fletcher requires that they set at their peril and must pay for the damage caused by the gas if it escapes, even without any negligence on their part. The rule is not limited to cases where the defendant has been carrying or accumulating the dangerous thing on his own land: it applies equally in a case like the present where the appellants were carrying the gas in mines laid in property of a City (that is, in the subsoil) in exercise of a franchise to do so:... This form of liability is, in many ways, analogous to a liability for nuisance .... But the two causes of action often over-lap, and in respect of each of these causes of action the rule of strict liability has been modified by admitting as a defence that which has been done was properly done in pursuance of statutory powers, and the mischief which has happened has not been brought about by any negligence on behalf of the undertakers ... Where undertakers are acting under statutory powers it is a question of construction depending on the language of the statute whether they are only liable for negligence or whether they remain subject to the ... rule in Rylands v. Fletcher.[4]

The inference here is unmistakeable. The defence of statutory authority is a defence in the true sense of the word - it must be established by the defendant. It is up to the defendant to show not only that on the construction of the statute the particular undertaking was authorised by it, but also that the work was carried out with due care and skill. The burden of proof is on the defendant.

But one must contrast this passage with a further extract from Lord Wright's judgment:

The question in these proceedings is between the respondents,

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4. Ibid., 118-120 (emphasis added.)

> as or representing property owners, and the appellants as undertakers, who are carrying an element, gas, in their mains close to the owners' premises; the gas is carried at high pressure is very dangerous if it escapes and calculated if it does escape to damage, as it did, the owners' property. The appellants accordingly owe a duty to the respondents, even though the case falls outside the rule of strict or absolute liability to exercise all care and skill that these owners should not be damaged.[5]

The underlined words are not consistent with the passage cited earlier, and this was noted by the judges of the High Court of Australia in Benning v. Wong.[6] The rule laid down in this latter passage of the judgment contends that where work is authorised by statute, the plaintiff cannot have a successful claim unless he proves negligence, on the part of the defendant. The situation therefore falls outside the rule in Rylands v. Fletcher if there is statutory authority.

The Canadian authorities are split on the question but on the balance the decision of Manchester Corporation v. Farnworth[7] had been applied most often and the burden of proof has been placed on the defendant.[8] The defendant must show that all due care and skill has been used or that the damage was an inevitable result of the work. It may be noted that in a split decision (three-two) the High Court of Australia in the recent decision of Benning v.

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5. Ibid., 126 (emphasis added).

6. Supra.

7. [1929] 1 K.B. 533.

8. Aikman v. George Mills and Co. Lt. et al., [1934] O.R. 597; J. P. Porter Co. Ltd. v. Bell et al., [1955] 1 D.L.R. 62 (N.S.); Bower v. Richardson Construction Company, [1938] O.R. 180 (C.A.); Rideau Lawn Tennis Club v. Ottawa, [1936] 3 D.L.R. 535 (Ont. C.A.); Low et al. v. Canadian Pacific Railway Company, [1949] 2 W.W.R. 433 (Alta.); Verbrugge v. Port Alberni City et al., (1965), 50 W.W.R. (N.S.) 220 (B.C.). Contra, Dever v. South Bay Boom Company, (1872), 14 N.B.R. 109; Lewis v. District of North Vancouver, (1963), 40 D.L.R. (2d) 182 (B.C.); Partridge et al. v. The Township of Etobicoke et al., [1956] O.R. 121 (although the issue was not squarely faced in this case).

Wong[9] opted for the opposite view. It was held that statutory authority having been shown the plaintiff was required to prove negligence.

It is suggested that the Canadian view, that the onus must be on the defendant, is more appealing for the following reasons:

(1) The legislative policy that authorised work with all due care and skill and that the defendant should show he has discharged this responsibility.

(2) The fact that in a Rylands v. Fletcher situation the authority is to keep something which creates a risk of harm to others and the defendant should bear this risk.

(3) The practical difficulty of a plaintiff proving negligence in many situations involving technical engineering problems.

2. Consent of the Plaintiff and Mutual Benefit.

It is not surprising that the consent of the plaintiff is a good defence to an action under the rule in Rylands v. Fletcher. A plaintiff who has expressly or implicitly consented to the accumulation of the thing likely to do mischief on another's land, will not be able to recover for damages caused by its escape. The defence was established by a final court of appeal in Attorney General v. Cory Bros. and Co.[10] The case concerned the dumping of collieryspoil on land. After rain the earth and spoil slipped down a steep gradient causing considerable damage to buildings. There were two actions brought but it is only the second which requires some comment. It was brought

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9. (1969), 43 A.L.J.R. 467.

10. [1921] A.C. 521.

by a landowner on whose land the spoil was dumped for damage caused to some houses owned by him. Viscount Findlay in the House of Lords stated:

> The plaintiffs in the second action ... were themselves parties to the bringing of the colliery spoil upon their land. In consideration of payment, they allowed Cory Brothers to have the use of their land for this purpose. There is no authority for applying the doctrine of Fletcher v. Rylands to such a case, and in my opinion, so to apply it would be an unwarrantable extension of the principle of that decision. A plaintiff who is himself a consenting party to such accumulation cannot rely simply on the escape of the accumulated material; he must further establish that the escape was due to the want of reasonable care on the part of the person who made the deposit.[11]

This defence is no more than the application of the principle volenti non fit injuria. This defence, recognized by Robson, J.A. in Darbey v. Winnipeg Electric Company,[12] has not been of great importance. There does not appear to be any Canadian case where the decision has turned exactly on the issue of consent. However, as in other jurisdictions the defence has been a factor in cases concerning liability for the escape of water from one floor of premises to another. The whole matter was considered by Goddard, L.J. in Peters v. Prince of Wales Theatre (Birmingham) Ltd.[13] He reviewed the authorities and decided that the true basis for not applying Rylands v. Fletcher to the situation where the defendant and plaintiff occupy different floors of one building and water laid on to the premises escapes was that the defendant has consented to the plumbing system. However, many cases such as the Peter's case could be decided on the basis that the water brought to the premises was not merely for

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11. Ibid., 539.

12. [1933] 1 W.W.R. 566 (Man. C.A.).

13. [1943] K.B. 73.

the benefit of the defendant but for the mutual benefit of the parties. The Canadian cases in the main take this approach. Tennant v. Hall[14] and Hess v. Greenaway[15] both concerned the damage caused by the ordinary internal plumbing of premises. In Tennant v. Hall[16] water escaped from a blocked down pipe which caused damage to a tenant and Hess v. Greenaway[17] concerned a burst steam pipe. In both these decisions the learned judges based their judgments on Carstairs v. Taylor[18] and Ross v. Fedden[19] and stated that there could be no liability under the rule in Rylands v. Fletcher because the drain pipe and the steam pipe were for the mutual benefit of the plaintiff and defendant. Blackburn, J. had stated that the thing brought onto the land must be for the defendant's own purposes.[20] It may be argued that 'consent' and 'mutual benefit' are too closely allied and that one should be considered as reflecting the other. In any case, one might note that today such cases will usually be disposed of as not involving a non-natural use of land. Before leaving this defence one should note that the Supreme Court of Canada has held that 'mutual benefit' is a complete defence in itself. In the Village of Kelliher v. A. C. Smith[21] the plaintiff was a councillor of the defendant village and was entrusted with the care of

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14. (1888), 27 N.B.R. 499.
15. (1919), 45 O.L.R. 650 (C.A.).
16. Supra.
17. Supra.
18. (1871), L.R. 6 Exch. 217.
19. (1872), L.R. 7 A.B. 661.
20. (1866), 1 L.R. Ex. 265, 279.
21. [1931] S.C.R. 672.

a chemical fire extinguisher. The extinguisher exploded and injured the plaintiff. The Supreme Court held that the rule in Rylands v. Fletcher had no application as the defendant had not brought the fire extinguisher onto its land for its own purposes but for the mutual benefit and protection of the villagers. Consequently, the plaintiff had to prove negligence.

3. Act of a Stranger.

If the escape of the thing likely to cause damage is caused by the act of a stranger, the rule in Rylands v. Fletcher will not be applied. This was firmly established in Rickards v. Lothian[22]. This case concerned the escape of water from a lavatory basin on an upper floor of a building. The water escaped because the waste pipe was plugged and then the tap had been turned on full. The jury found that the escape of water was caused by the malicious act of a third party. Lord Moulton, delivering the judgment of the Privy Council argued by analogy from Nichols v. Marsland[23] and held that the defence of a malicious act of a third party was justifiable on the same principle. A defendant could not properly be said to have allowed the water to escape when the real cause of the escape was the malicious act of a third party without any default on the part of the defendant.

The rationale of this defence is that the third party could not be foreseen and, therefore, the occupier has no control over the person. However, if the occupier exercises control over third parties, whether they be independant contractions, servants, or licensees, then the occupier will be liable for the escape caused by them.

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22. [1913] A.C. 263 (P.C.).

23. (1876), 2 L.R. Ex. 1.

A good illustration is the case of Darbey v. Winnipeg Electric Company.[24] The defendant company was sued for damage caused by a break in the defendant's gas main. However, it was shown that the cause of the break was the action of the occupant in the front part of the section in altering his premises so that excess weight was thrown laterally on the sunken pipe until it broke at the joint. Gas escaped into the plaintiff's bedroom and she suffered injury to her health. The defendant was held not liable under the rule in Rylands v. Fletcher since the break was the result of 'the conscious act of another volition' which the defendant could not anticipate or suspect.

In Salamandick and Salamandick v. Canadian Utilities Limited[25] an aeroplane made a forced landing on a street and brought down power lines which injured the plaintiff. It was held that even if Rylands v. Fletcher were to apply, the defendant company and owner of the power lines would not be liable for the independant act of a third party.

4. Act of God.

Act of God or vis major was specifically laid down by Blackburn, J. to be a defence to an action under Rylands v. Fletcher.[26] There have been few reported cases on this subject but the defence was firmly established in the Court of Appeal in England in Nichols v. Marsland.[27] In that case, Marsland, the defendant, had made a number of artificial ornamental lakes by banking up a natural stream. An "extraordinary rainfall" caused the stream to swell and the artificial banks gave way allowing a huge amount of water to escape, causing

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24. [1933] 1 W.W.R. 566 (Man. C.A.).

25. [1947] 2 W.W.R. 709 (Alta.).

26. (1866), 1 L.R. Ex. 265, 280.

27. (1876), 2 L.R. Ex. 1.

damage to the plaintiff's property. In laying the basis of the defence, Mellish, L.J. said that:

> The accumulation of water in a reservoir is not in itself wrongful; but the making it and suffering the water to escape, if damage ensue, constitute a wrong ... in this [case] it is not the act of the defendant in keeping this reservoir, an act in itself lawful which alone leads to the escape of the water and so renders wrongful that which, but for such escape, would have been lawful. It is the supervening 'vis major' of the water caused by the flood which superadded to the water in the reservoir (which in itself would be innocuous) causes the disaster.[28]

It was further held that in this case the defence was established as the flood was so great "it could not reasonably have been anticipated."[29] It is interesting to note that Mellish, L.J. did not place accent on the violence of the flood. The learned judge regarded the anticipation of the Act of God as the vital factor. Was this a circumstance which a reasonable man would guard against? Salmond takes up the point.

> The violence or rarity of the event is relevant only in considering whether it could or could not have been prevented by reasonable care; if it could not, then it is an act of God which will relieve him from liability, howsoever trivial or common its cause may have been ... the unpredictable nature of the occurrence will go only to show that the act of God in question was one which the defendant was under no duty to foresee or provide against.[30]

The situation in Canada can be dealt with very briefly. The defence was recognized by the courts as early as 1888 in Tennant v. Hall[31] and

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28. Ibid., 5.

29. Ibid., 6 (emphasis added).

30. Law of Torts, 15th ed. by R. F. V. Hueston, (1969), 423-424.

31. (1888), 27 N.B.R. 499.

has been discussed in a number of subsequent cases.[32] The judges have generally accepted the test for vis major as laid down by Mellish, L.J. but have strangely disagreed that even an extraordinary rainfall amounts to a vis major. This is shown clearly in Kelley v. Canadian Northern Railway Company[33] where a dam was burst by the bulk of water from a late spring. O'Halloran, J.A. stated he preferred the authority of Greenock Corp. v. Caledonian Railway Company[34] which had held that an extraordinary rainfall did not amount to a vis major because even extraordinary rainfalls must be anticipated. In reality, the learned judge applied the test in Nichols v. Marsland[35] but differed on the application of the law to the facts. However, in general Greenock Corp. v. Caledonian Ry. Co.[36] has been looked on by the courts more favourably than Nichols v. Marsland.[37]

In summary - two questions must be answered in establishing the defence:

(1) In the particular case was the event such that a reasonable man should have anticipated and guarded against it?

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32. Wade et al. v. Nashwaak Pulp and Paper Company Limited, (1918), 46 N.B.R. 11; Low et al. v. Canadian Pacific Railway Company, [1949] 2 W.W.R. 433 (Alta.); Kelley v. Canadian Northern Railway, [1950] 1 W.W.R. 744 (B.C.C.A.); Verbrugge v. Port Alberni (City) et al., (1965), 50 W.W.R. (N.S.) 220 (B.C.); Lewis v. City of North Vancouver, (1963), 40 D.L.R. (2d) 182 (B.C.).

33. [1950] 1 W.W.R 744 (B.C.C.A).

34. [1917] A.C. 556.

35. Supra.

36. Supra.

37. Supra.

(2) Was the vis major the cause of the escapt?

5. Default of the Plaintiff.

Default of the plaintiff was specifically mentioned by Blackburn, J. in Fletcher v. Rylands. There are very few Canadian decisions in point and the defence is of minimal importance. The writer will discuss two cases as illustrations - one English and one Canadian. The defendant company in Dunn v. Birmingham Canal Co.[38] constructed a canal over the plaintiff's coal mine. The Plaintiff continued to work the mine knowing that the effect might be to disturb the strata and cause water from the canal to enter the mine. Not unexpectedly, the result of the working was to dislocate the strata and water escaped through the cracks and flooded the coal mine. It was held that the plaintiff was unable to recover as the escape of water had been caused by his own actions. In Partridge et al. v. The Township of Etobicoke et al.,[39] the plaintiff, a fifteen-year-old boy was walking along a footpath and made a running jump at a sloping guy wire which he grabbed above and below an insulator beyond the reach of a child of tender years. By reason of force exerted on the wire it came in contact with a heavy transmission wire and the boy was severely injured. It was held that the accident was due to the act of the plaintiff and he could not recover damages.

6. Self Defence.

It may be noted that particularly in regard to floods there may be a limited defence of self defence. If a flood is moving from the land of one

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38. (1872), 7 Q.B.D. 244.

39. [1956] O.R. 121 (C.A.).

person to another the Privy Council has stated that a lower property may be permitted to build an embankment to prohibit the entry of water and repulse it back on to the upper land to the owner's delvement. It was decided in Gerrard v. Crowe[40] that the appellant was entitled to protect his land from such a 'common enemy' as a flood and this right was not affected by the maxim sic utere tuo ut alienum non laedas. However, this rule may be regarded as a refinement of the rule in Gibbons v. Lenfesty.[41]

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40. [1921] 1 A.C. 395.

41. (1915), 84 L.J.P.C. 158.

CHAPTER IV

THE RELATIONSHIP OF THE RULE IN RYLANDS v. FLETCHER TO THE TORTS OF NEGLIGENCE AND NUISANCE

1. Negligence.

At first sight the rule in Rylands v. Fletcher is the antithesis of the tort of negligence. While it is true that damage must be proved in both situations and that the basis of liability is the responsibility for risk, the approach is entirely different. The rule in Rylands v. Fletcher is concerned with an activity as a whole or a state of affairs. The tort of negligence is concerned with the wrongful actions of individuals. The fault principle has become firmly entrenched in the common law of torts during this century and a brief consideration of its rationale and general appeal may not be unhelpful. The basic principle is that loss lies where it falls unless there is some reason for shifting this loss to the shoulders of another individual in the society. Thus if loss is caused by the wrongful, careless or reprehensible conduct of one individual, it is consistent with generally held concepts of social justice and reasonableness that the wrongdoer should compensate the person injured by that wrongful conduct. It follows that by basing liability on some form of reprehensible conduct, the tort of negligence has some deterrent aspect.[1] However, with the advent of insurance and the utilization by the courts of an objective standard of care the deterrent aspect is more apparent than real. Further, support for the fault principle is derived from the arguments that the principle does not discourage worthwhile activities, that it does not place too great a burden on any one person in the society and that it is consistent

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1. Donoghue v. Stevenson, [1932] A.C. 562, 580, per Atkin, L.J. "The liability for negligence...is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay".

with the nebulous, though valued concept of self determination--an individual may regulate his actions so as to attain the required standard of conduct. That the tort of negligence has been predominant in the common law this century cannot be doubted. The heads of negligence and the dictum of Atkin, L.J. in Donoghue v. Stevenson contain the seeds for further development.[2]

Because of the predominance of the tort of negligence the judges have sought to justify rules of strict liability which depart from the general trend of fault liability. It has been shown that the rule in Rylands v. Fletcher has been justified by requiring a non-natural use of land--a use which brings increased danger to others. The rule reflects a desire to force people to be extraordinarily careful which in turn brings the rule back to a concern for the conduct of people--a trait of the law of negligence. To some extent the interpretation of non-natural use by Moulton, L.J. in Rickards v. Lothian[3] has helped to merge the rule in Rylands v. Fletcher--with the tort of negligence.

The thesis is that if a person has made a special use of land and created increased danger to others there is a strong possibility that if damage results he may be found liable under the tort of negligence. In many cases a non-natural use of land could ground an action in negligence.

The point may be illustrated by the recent English case of Mason v. Levy Auto Parts[4]. The defendants were spare parts dealers. Almost the

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2. [1932] A.C. 562, 580, per Atkin, C.J.: "The rule that you are to love you neighbour becomes in law, you must not injure your neighbour; and the lawyers question, who is my neighbour: receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and and directly affected by my act that I ought reasonably to have them in in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

3. [1913] A.C. 263, 280 (P.C.).

4. [1962] 2 Q.B. 530.

whole of their yard was stocked with highly inflammable material which included paint, petroleum and acetylene. The defendants had sought advice from the local fire brigade about the provision of fire-fighting equipment and the recommendations of the brigade had been substantially complied with. In July 1964, a fire broke out in the yard and neither the prompt efforts of the defendants' employees nor the efforts of the fire brigade could prevent the fire from spreading to the plaintiff's property. It appears that the case was argued solely on the ground of Rylands v. Fletcher. This was probably because there had been no apparent negligence and that the escape of fire immediately conjures up Rylands v. Fletcher liability.

McKenna, J. held the defendants liable, finding that there was a non-natural use of land. The learned judge stated that such a use had been established having regard to (i) the quantities of combustible materials which the defendants brought on to the land, (ii) the way in which they were stored (iii) the character of the neighbourhood.[5] He then made the following observation:

> It may be that these considerations would also justify a finding of negligence. If that were so, the end would be the same as I have reached by a more laborious and perhaps more questionable route.[6]

The point that the writer wishes to emphasise is that, although McKenna, J. was still regarding the rule in Rylands v. Fletcher and negligence as in some way distinct, in view of the precautionary measures taken the only possible negligence could be the quantity of materials stored and the circumstances of

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5. Ibid., 542.

6. Ibid., 543.

time and place, i.e. the grounds upon which the learned judge had established the non-natural use of land.

Similarly in the Canadian case of Aldridge and O'Brien v. Van Patter[7] the test utilized by the judge to decide if there was a non-natural use of land is identical to that establishing negligence. The case concerned the liability of the lessee and licencee of a stock car racing track for injuries caused to the plaintiffs who were hit by a stock car which plunged from the track into a public park. Spence, J. held that the use of the track for stock car racing was a non-natural use of land because there was no attempt to bank the track,[8] the cars were travelling at high speed,[9] the park was surrounded by a front fence,[10] a car had hit the fence earlier in the day[11] and clouds of dust obscurring vision were thrown up by the cars.[12] The learned judge also found the defendants liable in negligence because there was no attempt to bank the track[13] no barrier had been placed to strengthen the fence,[14] a car had struck the fence earlier in the day,[15] that it was an earth track[16] and cars were being driven

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7. [1952] 4 D.L.R. 93 (Ont.).
8. Ibid., 102.
9. Ibid., 103.
10. Ibid., 103.
11. Ibid., 103.
12. Ibid., 103.
13. Ibid., 112.
14. Ibid., 112.
15. Ibid., 113.
16. Ibid., 112.

at speed.[17] Again the test for a non-natural use of land and negligence is identical. However, Spence, J. regarded the question of negligence and non-natural use as distinct.

Canadian Forest Products Ltd. v. Hudson Lumber Ltd.[18] is another useful illustration. A fire began from a spark from a gasoline engine yarder and the defendants were sued on the grounds of negligence and the rule in Rylands v. Fletcher. One of the allegations of negligence was that it was negligent in the dry conditions to use a gasoline engine yarder. Whittaker, J. held that it was not negligent holding that "The gasoline engine on the yarder was new and up-to-date. The internal combustion engines are in general use in the industry and have replaced, and are much safer than, the old steam donkey."[19] Whittaker, J. Also held that the rule in Rylands v. Fletcher did not apply - "In this modern age, gasoline engines are so widely used in industry and private life that to hold an operator liable for every fire resulting, without negligence, from their use might well lead to unfortunate results."[20] In Mihalchuk v. Ralke et ux[21] spraying herbicide from the air was regarded as a non-natural use. The learned judge came to this conclusion because most of the farmers in the area sprayed by tractor and thus spraying from the air was, unusual, special and increased the danger to others. Is it a big step to say that in the circumstances the defendant was negligent?

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17. Ibid., 114.

18. (1960), 20 D.L.R. (2d) 712 (B.C.).

19. Ibid., 720, (emphasis added).

20. Ibid., 727.

21. (1966), 55 W.W.R. (N.S.) 555 (Sask.).

In Leibel v. Rural Municipality of South Qu'Appelle[22] the judge at first instance applied the rule in Rylands v. Fletcher to the escape of arsenic into a drinking well. On appeal the question was dealt with solely on the ground of negligence.[23] The number of cases where the rule in Rylands v. Fletcher has been applied in order to give a decision to the plaintiff but which also involve liability in negligence is indicative of the relationship between the rule and negligence.[24]

However, the tort of negligence is not applicable to all Rylands v. Fletcher situations. Such cases concerning hidden defects and latent faults and liability for independent contractors will remain within the scope of the rule. It has been illustrated how the demand for a non-natural user of land involves many of the requirements and considerations necessary in establishing negligence. This is also reflected in the defences of vis major, act of a third party and default of the plaintiff. The common denominator of these defences is that the defendant shows that he was not at fault. The defendant could not anticipate nor guard against these eventualities. Thus, in regard

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22. [1943] 2 W.W.R. 277 (Sask.) aff'd. [1943] 3 W.W.R. 566 (Sask. C.A.).

23. [1943] 3 W.W.R. 566 (Sask. C.A.).

24. Skubinink v. Hartman, 24 Man. L.R. 836 (C.A.); Brody's Limited v. Canadian National Railway Company, [1929] 2 W.W.R. 497 (Alta.); Chamberlain v. Sperry, [1934] 1 D.L.R. 189 (Man.); Lohndorf and Alberta General Insurance Company v. British American Oil Company Limited, (1956), 24 W.W.R. (N.S.) 193 (Alta.); Curtis et al. v. Lutes, [1953] O.R. 747 (C.A.); Aldridge and O'Brien v. Van Patter, [1952] 4 D.L.R. 93 (Ont.); Schubert v. Sterling Trust Corporation et al., [1943] O.R. 438; Lewis v. District of Vancouver, (1963), 40 D.L.R. (2d) 183 (B.C.); Lindsay and Lindsay v. The Queen, [1956] 5 D.L.R. (2d) 349 (Exch.); Elder v. City of Kingston, [1954] O.R. 397 (C.A.); Canadian National Railway Company v. Canadian Steamship Lines Limited, [1947] O.R. 585; Raynor v. Toronto Power Company, (1914), 32 O.L.R. 612.

to the defences the spotlight is thrown back to the conduct of the defendant and whether or not he was negligent.

It is not possible to reach any positive conclusion as to the future of the rule in Rylands v. Fletcher in Canada. As Chitty[25] says the rule is one which is still very much in flux and has not as yet been fully worked out. It has been shown that the Canadian courts do not appear to be as eager to accept the limitation of escape from land as their Enlgish counterparts and there may be in the future some move towards a rationalization of the rule similar to the attempts in the United States of America. However, today it would be true to say that the rule in Rylands v. Fletcher as it stands is under attack from the traditional heads of negligence. The concept of non-natural user of land, and the defences to the rule create a close affinity to the tort of negligence.[26]

Before leaving this section some mention should be made of the recent Privy Council decision in Goldman v. Hargrave.[27] It will be remembered that the case concerned liability for a fire, caused by lightning, which escaped from the appellant's land and damaged land occupied by the respondents. The appellant felled the burning tree but took no further steps to control the fire. There could be no liability under the rule in Rylands v. Fletcher as the fire had not been brought on to the land and the appellant had niether adopted nor

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25. "Rylands v. Fletcher - A Practitioner's View", /1956/ 34 Can. Bar Rev. 1225.

26. Numerous fact situations to which the rule in Rylands v. Fletcher could apply could be equally dealt with under the maxim res ipsa loquiter. However, it should be noted that the liability in Rylands v. Fletcher is stricter in theory though perhaps not so in practice. See Millner, Negligence in Modern Law, London, 1967, 195.

27. [1967] 1 A.C. 645 (P.C.).

used the fire as his own. The Privy Council dealt with the appeal from the High Court of Australia solely on the grounds of negligence enunciating a new head of negligence.

> (There is) a general duty upon occupiers in relation to hazards occurring on their land whether natural or man made.[28]

The duty is to remove or reduce hazards to their neighbours. The Privy Council then went on to formulate a subjective standard of care based on whether the hazard was thrust upon the occupier or was his own, the physical and financial capacities of the occupier and the consequences of inaction. The duty is not based on the use of land but on the consequences of inaction in the face of foreseeable harm. The relevance of this case to the rule in Rylands v. Fletcher is in the word 'hazard'. It is not a word of art and one must consider the standard dictionaries. Webster's Third New International Dictionary defines hazard as a possible source of danger or risk. The Oxford English Dictionary defines it as something which creates a risk of loss or harm, peril or jeopardy. Thus the definition of the word hazard is closely allied to the court's interpretation of non-natural use. A non-natural use defined as a special use bringing with it increased danger to others may be regarded as a hazard - the duty to which is to take reasonable steps to reduce or abate it to the best of an occupier's ability. The case of Goldman v. Hargrave[29] has not been discussed in Canadian courts to any great extent but if the present trend of the courts

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28. Ibid., 661.

29. [1967] 1 A.C. 645 (P.C.).

towards rationalizing the rule in Rylands v. Fletcher in the context of negligence is to continue the case of Goldman v. Hargrave[30] may be of increasing importance.[31]

2. Private Nuisance.

An attempt has been made to illustrate that the main drift of judicial policy in respect of the rule appears to be towards negligence. It should not be overlooked, however, that historically and conceptually the tort of nuisance is more closely allied to the rule in Rylands v. Fletcher. However, there is a considerable disparity in the incidence and application of the two torts. These have been summarized by Winfield.[32]

(1) many private nuisances are quite outside the rule in Rylands v. Fletcher, e.g. noise.

(2) private nuisance is confined to injuries which primarily affect the use and enjoyment of land. A plaintiff claiming under the rule in Rylands v. Fletcher may be a non-occupier if the damage was caused by a thing likely to do mischief.

(3) in an action based on Rylands v. Fletcher there must be an escape.

(4) private nuisance may be legalized by prescription.

(5) a non-occupier may be liable for a private nuisance

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30. The only Canadian case in which it has been cited is Miller et al. v. Young Men's Christian Association et al., (1968), 66 D.L.R. (2d) 349.

31. [1967] 1 A.C. 645 (P.C.).

32. Nuisance as a Tort, (1930, 4 C.L.J. 189, 195.

created by him. In Rylands v. Fletcher liability the defendant has to be an occupier.

(6) vis major is a defence to Rylands v. Fletcher liability but not to an action in private nuisance.

(7) with some exceptions an occupier will not be liable for a private nuisance created by an independent contractor. This is not the case under the rule in Rylands v. Fletcher.

(8) an action will lie under Rylands v. Fletcher for personal injuries but will probably not be recoverable under private nuisance.

The writer does not wish to examine the relationship in detail but it is submitted that the most crucial difference is that private nuisance is a wrong to land - the plaintiff must be an occupier of land whereas the rule in Rylands v. Fletcher applies to a wrong arising out of land. However, there is an inevitable overlap where both parties are occupiers of land. Apart from the differences in application outlined above the action can probably be proved in either tort. The writer would agree with Winfield who regarded nuisance and the rule in Rylands v. Fletcher as related to each other as intersecting circles and not as a segment of a circle to the circle itself.[33]

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33. Op. cit., 195.

PART II

ARTICLE 1054(1) OF THE CIVIL CODE OF THE PROVINCE OF QUEBEC

CHAPTER I

A NEW INTERPRETATION OF ARTICLE 1054(1) OF THE CIVIL CODE OF THE PROVINCE OF QUEBEC

"L'office de la loi" wrote Portalis "est de fixer par de grandes vues, les maximes général du droit; d'établir des principes fécond en consequence, et non de descendre dans le détail des questions qui peuvent naître sur chaque matière."[1] In these words is summed up what might be referred to as the French concept of codification. No better example of this approach can be found than in the way in which the codifiers in France and Quebec have dealt with the law relating to delicts or torts. The Civil Code of the Province of Quebec in adopting in essence the provisions of the Code Napoleon has laid down the basic principles of delictual responsibility in four articles - articles 1053-1056 C.C.

Article 1053 C.C. postulates the fundamental principle of delictual liability:

> Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another whether by positive act, imprudence neglect or want of skill.

The similarity to the neighbour principle as expounded by Atkin, L.J. in Donoghue v. Stevenson[2] is patent. A plaintiff must prove fault, damage and a causal link showing that it was in fact the fault of the defendant which was the cause of the damage. Article 1054 C.C. is more specific and relates to a further responsibility of certain persons. The first paragraph of article 1054 states:

> He is responsible not only for damage caused by his own

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1. Fenet, Recueil complet des travaut préparatoires du Code Civil I, (1827-1828), 470 cited in Tunc André, The Grand Outlines of the Code Napoléon, (1955), 29 Tul. L.R. 431, 436.

2. [1932] A.C. 562 (P.C.).

> fault, but also caused by the fault of persons under his control and by things that he has under his care.

The subsequent paragraphs impose liability on fathers, or, after their decease, mothers, for damage caused by their minor children; tutors for damage caused by their pupils; curators or others having legal custody of insane persons for damage done by the latter; and schoolmasters and artisans for damage caused by their pupils or apprentices. The responsibility in these cases attaches only if as the penultimate paragraph of article 1054 C.C. states the person subject to it fails to establish that he was unable to prevent the act which caused the damage. The final paragraph of article 1054 C.C. imposes vicarious liability or employers for damage caused by their employees in the performance of work for which they are employed.

Article 1055 C.C. imposes strict liability in two situations - damage caused by the escape of animals and damage caused by the ruin of a building where it is caused from want or repairs or from an original defect in its construction. In both cases strict liability is imposed on the owner of the animal or building. The final article relating to delictual responsibility contains provisions similar to the Common Law Lord Campbell's Acts.

In this chapter it is proposed to bring into focus against this background of delictual principles article 1054(1) C.C. The introductory paragraph of article 1054 C.C. invokes a responsibility for damage caused by persons under the control of the defendant and for <u>things that he has under his care</u>. As we have seen the persons a defendant may have under his control are stipulated in the subsequent paragraphs of article 1054 C.C.

However no further clarification of "things under his care" is given in the article. In fact in France and Quebec from the time of codification

to the late nineteenth and early twentieth centuries the words relating to the liability for things were given no substantive meaning. The accepted view was that the words merely referred to the specific cases of strict liability in article 1055 C.C. With regard to damage caused by things under the care or control of the defendant, the plaintiff had to found his action on article 1053 C.C. unless his case could be brought within article 1055 C.C. Article 1054(1) did not lay down specific substantive rights and duties. It was purely introductory and descriptive of the liability laid down in article 1055 in respect of things. However, this "lambeau d'article"[3] was rediscovered by jurists and judges alike and was to be reinterpreted to play an important role in the law as to delicts in France and Quebec.

During the late nineteenth century increased mechanization and industrialization brought with it a spate of industrial accidents. It soon became apparent that the traditional delictual principles placed an unfortunately heavy burden on the injured worker. It is clear that such a plaintiff was unable to bring his case within the principles of strict liability outlined in article 1055 C.C. and he was therefore forced to sue his employer under article 1053 C.C. It was necessary for the plaintiff to make positive proof that the employer and/or owner of the machine which had caused the injuries had been at fault and that there was a causal connection between the fault and the damage. In many cases such positive proof could not be presented to the court. The complexity of the machinery and the fact that accidents can happen in a split second while the backs of fellow workmen are turned present grave difficulties in establishing evidence. The case of Montréal Rolling Mills Company v. Corcoran[4] illustrates

3. Baudouin, Louis, Le droit civil dans la province du Quebec, Wilson et Lafleur, Montreal, (1953), 778.

4. (1896), 26 S.C.R. 595.

the point. The deceased employee was alone in the engine room of a factory which contained a dangerous belt and a large fly-wheel. He was caught in one or other of these and was killed instantly. An action in damages was brought against the defendant, owner of the factory, by the deceased employee's widow. The judgment of the Supreme Court was delivered by Girouard, J. who held that the plaintiff's claim failed as she had not established fault on the part of the defendant "by direct evidence or by presumptions weighty, precise and consistent".[5] The plaintiff was required to prove the positive act, imprudence or neglect of the defendant and that this fault was the direct cause of the accident. This latter requirement was stressed by Taschereau, J. in his dissenting judgment in George Mathews Company v. Bouchard[6] where he stated:

> He (the plaintiff) had to prove clearly that the accident was due to the negligent act charged.[7]

It was apparent by the late nineteenth century that article 1053 C.C. which had proved sufficient for the need of an earlier society was inadequate to solve the problems of industrialization. Too many injured employees went without compensation.[8]

The jurisprudence in Quebec in the early twentieth century witnesses a discovery of article 1054(1) C.C. which led to a lessening of the burden of proof on plaintiffs injured by things under the control or care of the defendant,

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5. Ibid., 600.

6. (1898), 28 S.C.R. 580.

7. Ibid., 584.

8. It should be noted that the problem was overcome to some extent in 1909 with the passing of the Quebec Workmen's Compensation Act, S.Q. 1909, c. 66.

by placing on the defendant a presumption of fault. This discovery of article 1054(1) C.C. was sparked by the jurisprudence and doctrine of France and shows a willingness on the part of the judges in Quebec and indeed the English judges in the Privy Council to re-examine and re-interpret the Civil Code to solve new economic and social problems. In this regard alone it is an object lesson for the common lawyer who often raises the objection to codification that the law is tied to the past and cannot develop and be re-interpreted in the light of changed circumstances. The development and re-interpretation of article 1054(1) C.C. illustrates the genius of a code stating general rules and principles. It is herein that one finds the balance of clarity and conciseness with flexibility. The codifiers of the Code Napoleon were concerned that a code should not "bind the action of time [and] oppose the course of human events".[9] It is to their credit that it could be said in 1940 that "the code left open many avenues of growth and change as new pressures and new ethical standards emerged in French society".[10]

The judgment of the Privy Council in McArthur Dominion Cartage Company[11] was the first step in the development away from the requirement of strict proof of fault. The plaintiff was employed by the defendant company to tend an automatic machine used for filling cartridges with powder and shot. While the plaintiff was mending the machine there was an explosion and he was seriously injured. The plaintiff was unable to produce direct evidence of

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9. Fenet, Recueil complet des travaux préparatoires du Code Civil I, (1827-1828), 469 cited in Tunc André, The Grand Outlines of the Code Napoléon, (1955), 29 Tul. L.R. 431, 436.

10. Dawson, The Codification of French Customs, (1940), 38 Mich. L. Rev. 765, 800.

11. [1905] A.C. 72 (P.C.).

how the accident happened but the jury unanimously found the defendant to be guilty of negligence. The Supreme Court of Canada held that the plaintiff's action could not succeed as he had failed to prove fault on the part of the defendant which had been the direct cause of the accident. Girouard, J. held that there must be exact proof of fault which certainly caused the accident. Taschereau, J. dissented holding that the finding of the jury was based on reasonable inferences from the evidence and should not be reversed on appeal. The opinion of the dissenting judge was vindicated in the Privy Council. Lord McNaghten stated:

> It is enough to say that although the proposition may be reasonable in circumstances of a particular case it can hardly be applicable where the accident causing the injury is the work of a moment; and the eye is incapable of detecting its origin or following its course. It cannot be of universal application, or utter destruction would carry with it complete immunity for the employer.[12]

The Privy Council did not consider article 1054(1) C.C. Their Lordships held that proof of fault could be made by way of presumptions. In this respect they did not differ from the majority of the Supreme Court of Canada. However the Privy Council did differ in that the judges were of the opinion that the presumptions should not be required to be as strict and rigorous as had been demanded in the Supreme Court. The case illustrates a mellowing in the demand for strict proof of a positive fault which has caused the damage. However, development of article 1053 C.C. in regard to the establishment of fault by means of presumptions did not continue further. The spotlight of judicial thought began to focus on article 1054(1) C.C.

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12. Ibid., 77.

The turning point in Quebec jurisprudence with regard to article 1054(1) C.C. was the case of Shawinigan Carbide Company v. Doucet.[13] The facts of the case are as follows. The plaintiff was employed by the defendant to operate a furnace. He was with other employees required to charge the furnace and draw off liquid carbide through openings at the base of it and then to clean and replug the openings with moist mortar before recharging. The plaintiff was replugging the openings at the base of the furnace as directed when an explosion occurred causing him serious injury. It was held by a majority of the Supreme Court (Anglin and Duff, J.J., dissenting) that apart from article 1054(1) C.C. the fact of an explosion occurring under such circumstances was sufficient evidence to find fault on the part of the defendant and the plaintiff's action under article 1053 was maintained. However, Fitzpatrick, C.J. and Anglin, J., citing French jurisprudence and doctrine applied article 1054(1) C.C.

Fitzpatrick, C.J. was, in his judgment, definite in regard to the policies which the law should take into account and the basis for the re-interpretation of article 1054(1). The learned judge accepted the French doctrine of "le risque créé".[14]

> Pour ma part je suis d'avis que la fournaise était sous la garde de l'appelante qui l'utilisait à son profit et qui tirait un bénéfice du risque qu'elle a créé. Celui qui perçoit les émoluments procurés par une machine susceptible de nuire au tiers doit s'attendre à réparer le préjudice que cette machine causera "Ubi emolumentum ibi onus" . (. . .) Le sens que je donne à ce dernier texte

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13. (1910), 42 S.C.R. 281.

14. Josserand, L., La résponsibilité du fait des choses inanimées, 1897 and notes by the same author published, D. 1900 2. 289 and D. 1904 2. 257.

> c'est que tout propriétaire est responsable en raison même de sa qualité de propriétaire du dommage causé par sa chose lorsqu'elle est sous sa garge.[15]

The obligation of the owner of the furnace was held to be one of result or in Common Law terminology he was held to be strictly liable. The defendant, in order to exonerate himself would have to prove that the damage was caused by cas fortuit, force majeure or the fault of a third party. The learned Chief Justice held that article 1054(1) C.C. which exonerated those persons mentioned in the preceeding paragraphs for liability for damage caused by persons under their control when the defendant could prove that he was unable to prevent the damage by reasonable means had no application to article 1054(1) C.C. This view departed radically from the underlying notions of the Civil Code in regard to delictual liability. As far as article 1054(1) C.C. was concerned fault no longer provided the basis of liability. Damage caused by a thing under the defendant's control from which he profits and creates an increased risk of injury to others would be recoverable without proof of fault. The defendant was not permitted to exonerate himself by proof that he had taken all reasonable means to prevent the damage.

Anglin, J. also held that article 1054(1) C.C. made a person liable for damage caused by things under one's care where there is no proof by the defendant that the damage was caused by the fault of the person injured, to vis majeure to pure accident or that it occurred without fault attributable to themselves. The judgment however, shows some inconsistencies as to the strength of the liability. The learned judge stated that article 1054(6)C.C. did not

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15. (1910), 42 S.C.R. 281, 284.

apply to liability under article 1054(1) C.C. but earlier in his judgment he held that a defendant might exonerate himself by proof that the accident was not due to his fault. This confusion was to be dispelled by the Privy Council in a later case. One should note that Duff and Girouard, J.J. disagreed with the interpretation of Anglin, J. and Fitzpatrick, C.J. in regard to article 1054(1) C.C. Idlington, J. had no opinion on the matter.

Anglin, J. and Fitzpatrick, C.J. with the support of Brodeur, J. (Idlington, J. dissenting), reasserted their interpretation of article 1054(1) C.C. in Norcross Bros. Company v. Gohier.[16] The Supreme Court held a construction company liable for the death of an employee caused by a defective elevator. Fitzpatrick, C.J. stated:

> Le seul fait que cette mort a été causée par une chose inanimée sous la garde de l'appelante crée une présomption de faute à l'égard de celle-ci, gardienne de cette chose. (Article 1054 C. Civ. par. 1). En d'autres termes, il suffit que la demanderesse prouve que l'accident a été causée de la manière alléquée pour que le gardien de l'objet en question devienne de plein droit responsable. Il n'échappe à cette responsabilité que s'il peut prouver que le fait générateur du dommage provient d'une cause qui lui est étrangère.[17]

It would not suffice that the defendant should prove that he was without fault.

This radical re-interpretation caused some consternation among some of Quebec's jurists and judges. The basic scheme of delictual liability was fault liability and it was argued that an interpretation of article 1054(1) C.C. which imposed strict liability was untenable with the fundamental principle, no liability without fault. Pouliot voiced the opinion of many -

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16. (1918), 56 S.C.R. 415.

17. Ibid., 416.

> La loi n'établit pas de responsibilité d'une façon arbitraire à raison des actes humains de commission ou d'ommission. Elle obéit à un motif équitable et rationnel et c'est ce motif qui est la base et le fondement de la responsibilité.[18]

There was also some difficulty in Fitzpatrick, C.J.'s continued use of the term "présomption de faute" when describing the basis of liability under article 1054(1) C.C. "Mais alors on peut se demander de quelle nature était cette présomption de faute qu'on no pouvait repousser en prouvant qu'on est sans faute aucune."[19]

The interpretation of article 1054(1) C.C. was finally settled by two decisions of the Privy Council: Quebec Railway Heat and Power Company Limited v. Vandry[20] and City of Montreal v. Watt and Scott Limited.[21]

As Lord Sumner stated in Quebec Railway, Light, Heat and Power Company Limited v. Vandry, "the principal object of this appeal is to settle the true construction of article 1054 of the Civil Code of Lower Canada".[22] The facts of the case were that a violent wind had torn a branch from a tree and driven it against a primary cable charged with electricity at 2200 watts. The cable broke and came into contact with a secondary cable which supplied electricity to the customer's house. The high tension electricity found its

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18. "Responsibilité des choses dont on a la garde", (1925), 4 R. du B. 385, 392.

19. Nadeau, Traité du droit civil du Quebec, Wilson et Lafleur, Montréal, t. 8. no. 441, 389.

20. [1920] A.C. 662 (P.C.).

21. [1922] 2 A.C. 555 (P.C.).

22. Ibid., 668.

way along the secondary cable and caused a fire in the respondent's house. Rather than base their decision on the French doctrine and jurisprudence, their Lordships examined the words of the code itself and concluded:

> There seems to be no doubt that Article 1054 introduces a new liability, illustrated by a variety of cases and arising out of a variety of circumstances,all of which are independent of that personnal element of faute which is the foundation of the defendant's liability under Article 1053. Furthermore, proof that damage has been caused by things under the defendant's care does not raise a mere presumption of faute which the defendant may rebut by proving affirmatively that he was guilty of no faute. It establishes a liability, unless, in cases where the exculpatory paragraph applies the defendant brings himself within its terms. There is a difference, slight in fact but clear in law between a rebuttable presumption of faute and a liability defeasible by proof of inability to prevent the damage.[23]

Although Lord Sumner held that liability for things under one's care was independent of any question of faute, the learned judge also stated that article 1054(6) C.C. applied to exonerate the defendant in some cases. It appears that Lord Sumner read article 1054(6) C.C. literally which states that the defendant will be exonerated only if it is shown that he could not have prevented the damage. This would appear to have been interpreted by the Privy Council as requiring proof of force majeure, cas fortuit or the act of a third party. The exculpatory paragraph was not interpreted as meaning unable to prevent the damage by reasonable means. The immediate import of the decision was to eliminate all notions of fault from paragraph 1 of article 1054 C.C. and to impose an objective responsibility defeasible by proof of cas fortuit, force majeure, or some other cause not imputable to him.

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23. Ibid., 676-677.

This interpretation approved the judgements of Fitzpatrick, C.J. and Anglin, J. in the Shawinigan[24] and Norcross[25] cases; however, the Privy Council interpreted the article as a matter of construction whereas the two learned judges of the Canadian Supreme Court based their interpretation on the French doctrine and jurisprudence and basic policy factors. The Privy Council considered that article 1054(1) C.C. would be rendered otiose if the liability was founded on fault. If it was necessary to find fault, liability could be established under article 1053 C.C. The Privy Council found the defendants liable on the ground that the wind did not amount to a force majeure.

However, judicial and juristic discussion did not cease in Quebec following the decision. There was still considerable controversy as to what the basis of liability under article 1054(1) C.C. ought to be. Many jurists felt that article 1054(1) C.C. should have been interpreted so as to accord with the general pattern of fault liability. Sumner, L.J.'s approach was typically that of a common lawyer. The learned judge made scant attempt to rationalize his interpretation of article 1054(1) C.C., or to relate it to the general theory of delictual responsibility in the last analysis. After twenty years of split decisions in the Quebec jurisprudence and discussion on the interpretation of the article, the Privy Council stated in reality: - the test is clear, one only has to read it and apply it. It was thought in some quarters that the decision of the Privy Council in Vandry's case imposed too extreme an interpretation on article 1054(1) C.C. particularly with reference to the departure from fault liability.

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24. (1910), 42 S.C.R. 281.

25. (1918), 56 S.C.R. 415.

However, the Privy Council was able to reconsider its decision little more than a year later.

City of Montreal v. Watt and Scott Ltd.[26] concerned damage caused to the respondent's cellar by an overflow of a sewer under the care of the appellant municipality. The importance of the judgment is in establishing the mode of exoneration of the respondent. Lord Dunedin stated:

> The only addition to the views expressed in Vandry's case which was not necessary there but is necessary here is that in their Lordship's view "unable to prevent the damage complained of" means unable by reasonable means.[27]

it was held that the damage could have been avoided by the use of reasonable means and the respondent was held liable. It was at this stage that the interpretation of article 1054(1) C.C. stabilized. After a brief flirtation with the notion of objective responsibility the interpretation of article 1054(1) C.C. was finally placed on the familiar basis of fault albeit in the form of a presumption.

The final words in this chapter might be left to Pouliot, "La droit même se c'est codifiée n'est pas immuable."[28]

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26. [1922] 2 A.C. 555 (P.C.).

27. Ibid., 563.

28. "Responsibilité des choses", (1926), 4 R. du B. 385.

CHAPTER II

THE APPLICATION OF ARTICLE 1054(1) C.C.

Article 1054(1) C.C. as interpreted by the Privy Council may be looked at in two ways. Some jurisprudence and doctrine regard it as imposing a responsibility defeasible by proof of inability to prevent the damage by reasonable means.[1] On the other hand the article may be viewed as imposing a presumption of fault[2] against the person with the thing under his care that damage caused by it was caused by his fault. It establishes a legal presumption which shifts the burden of proof which is practically and legally almost indistinguishable from a responsibility which is defeasible upon proof that the defendant has taken all reasonable care to prevent the damage. It is the writer's view that an analysis of whether the responsibility or presumption theory carries the greater weight is therefore of purely theoretical interest. No attempt will be made to analyse the jurisprudence and doctrine in this regard. It should be mentioned, however, that the concept of defeasible liability or responsibility stems from the judgment of Sumner, L.J. in Quebec Railway, Light, Heat and Power Company Limited v. Vandry[3] where the learned judge specifically repudiated the notion of presumption. The word responsibility probably maintains in terminology an idea of objective responsibility which has continued even though it is now clear that article 1054(1) C.C. involves no notion of objective responsibility. Since the City of Montréal v. Watt and Scott Limited[4]

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1. Quebec Railway, Light, Heat and Power Company Limited v. Vandry, /1920/ A.C. 662, 666-667 (P.C.); M. & W. Cloaks Limited v. Cooperberg et al., /1959/ S.C.R. 785, 788.

2. Nadeau, Traité du droit civil du Quebec, Wilson et Lafleur, Montréal t. 8 no. 464; Crépeau, P.A., "Liability for Damage caused by Things", (1962), 40 Can. Bar Rev. 222, 232; The City of Montréal v. Watt and Scott Limited, [1922] A.C. 555 (P.C.).

3. [1920] A.C. 662 (P.C.).

4. [1922] 2 A.C. 555 (P.C.).

it is probably more correct to view article 1054 C.C. as imposing a presumption of fault but the question is of no practical interest.

To found an action under article 1054(1) C.C. the plaintiff must establish that the thing was under the care of the defendant and that the thing has been the cause of damage. Once these facts are established, the defendant then must bring evidence to show he has taken all reasonable care to avoid the damage or establish one of the other defences if he is to avoid having judgment entered against him.

The word "thing" has not been restricted in any way. Article 1054 (1) C.C. has been applied to damage caused by electricity,[5] gas,[6] sewers,[7] water-pipes,[8] elevators,[9] buildings[10] and machines.[11] However, two very important concepts which must be established in an action under this article have been developed by the doctrine and the jurisprudence. They are "la garde juridique" and "le fait autonome de la chose".

1. La Garde Juridique.

Article 1054(1) C.C. states:

> Elle est responsable non seulement du dommage qu'elle cause par sa propre faute, mais encore de celui cause par la faute de ceux dont elle a le controle et par les choses qu'elle a sous sa garde.

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5. Quebec Railway, Light, Heat and Power Company Limited v. Vandry, [1920] A.C. 662 (P.C.).

6. Groleau v. Montreal Light Heat and Power Consolidated, [1942] C.S. 120.

7. City of Montreal v. Watt and Scott Limited, [1922] 2 A.C. 555 (P.C.).

8. M. & W. Cloaks Limited v. Cooperberg et al., [1959] S.C.R. 785.

9. Norcross Bros. Company v. Gohier, (1918), 56 S.C.R. 415.

10. Northeastern Lunch Co. v. Hutchins, (1923), 35 B.R. 481.

11. Canadian Vickers Limited v. Smith, [1923] S.C.R. 203.

The concept of "garde"or care of the thing is the foundation of the liability for damage caused by things. However, as Baudouin points out "le texte ne donne aucune indication sur le contenu meme de la notion de garde".[12] One must look to the Quebec jurisprudence to ascertain what the concept of garde involves. The two leading cases of the Privy Council are not particularly helpful in this respect. Sumner, L.J. stated in Quebec Railway, Light and Power Company Limited v. Vandry[13] that:

> It is not necessary now to define the meaning of 'control' or 'under his care'. There is obviously much to be said in a proper case about both.[14]

Similarly the judgment of Dunedin, L.J. in City of Montréal v. Watt and Scott Limited[15] does not define the concept of 'garde'. The learned judge established liability on the ground that the sewer was "under the control of the appellants."[16] The more important theories and definitions of the term 'garde de la chose' warrant some consideration if only to throw light on the concept of garde juridique which is today accepted and applied by the courts.

The doctrine of "le risque créé" and its main protaganist, the French jurist Josserand, have been mentioned earlier.[17] The dominant theme of Josserand's theory was that the person who uses a thing for his benefit and profit should be liable for all damage caused by it. It followed from this that for the purposes of liability under article 1054(1) C.C. the thing causing

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12. Baudouin, Le droit civil dans la Province du Quebec, Wilson et Lafleur, Montreal, (1953), 781.

13. [1920] A.C. 662, 673 (P.C.).

14. Ibid., 673.

15. [1922] 2 A.C. 555 (P.C.).

16. Ibid., 560.

17. Josserand, L., La Responsibilité du fait des choses inanimées, 1897.

damage should be designated as being under the control of the person who takes the benefit or profit from it. The concept is similar to that found in the judgment of Blackburn, J. in Fletcher v. Rylands[18] when the learned judge considers things brought on to land "for his own purpose".[19] The theory was applied in Canadian courts by Fitzpatrick, C.J. in Shawinigan Carbide Company v. Doucet[20] and Norcross Bros. Company v. Gohier.[21] The theory was useful to provide a valid policy basis for the re-interpretation of article 1054(1) C.C. However, outside the field to industrial accidents the theory really provides little help in deciding who has the care or control of the thing. In many cases damage may be caused by things which are not used for profit in any real economic sense. A further problem arises even if the thing is used for an economic benefit if that benefit is taken by more than one person. A simple example is the hireage of a concrete mixer for construction work. Both the hirer and hiree profit by the hireage. Thus while the theory was a valid attempt to lay a policy basis for the extension of article 1054(1) C.C. its value diminished once the re-interpretation was made on other grounds such as pure construction of the legislation.

Alternatively it was thought by some that the liability under 1054 (1) C.C. should attach to the person with the physical power and control over the thing causing damage - 'la garde materielle'. However, such an interpretation

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18. (1866), 1 L.R. Ex. 265.

19. Ibid., 279.

20. (1909), 42 S.C.R. 281.

21. (1918), 56 S.C.R. 415.

of garde would have defeated the primary object of the interpretation of article 1054(1) C.C. If the garde of a factory machine was to be designated to the person with the physical power and control over it the employee or 'préposé' operating the machine would be deemed to have "la garde de la chose". This definition of garde was not accepted in Quebec or in France. The policy has clearly been to designate the owners of the factory as having "la garde" of machines.[22] It is they who have the ultimate juridical control over the machines and it is they who reap the profits from them. The interpretation of garde adopted by the courts of Quebec is that of "la garde juridique". Antaki states:

> ... la conception de la garde matérielle qui veut que le gardien soit celui que detient le pouvoir matériel sur la chose, étant inadmissible, on a soutenu la notion de garde juridique.[23]

Perhaps the clearest definition of this concept is that liability under article 1054(1) C.C. will attach to the person who has the "power of control and direction over a thing which a person exercises on his own behalf".[24] While in many situations the owner of a thing will be deemed to have la garde juridique the terms are not synonymous. Rinfret, C.J. stated in Lessard v. Hull Electric Company[25]:

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22. Shawinigan Carbide Company v. Doucet, (1909), 42 S.C.R. 281; Canadian Vickers Limited v. Smith, [1923] S.C.R. 203; Colpron v. Canadian National Railway Co., [1934] S.C.R. 189.

23. Antaki, Kamil, "Garde de Structure et Garde du Comportement - un aspect de la responsibilité du dommage causé par les choses", (1966), 12 McGill L.J. 41, 44.

24. Crépeau, P.A., "Liability for Damage caused by Things", (1962), 40 Can. Bar Rev. 222, 236.

25. [1947] S.C.R. 22.

> ... si (...) la chose était alors sous la "garde" d'un autre que le propriétaire, c'est celui qui à la "garde" qui est responsable à l'exclusion du propriétaire.[26]

It cannot be doubted that an owner of a thing will not be deemed to have 'la garde juridique' when the thing is in the possession of a thief.[27] In that situation the owner no longer has control or direction over the thing. One should point out at this point how the concept of garde juridique is rational with and reconcilable to the general scheme of fault liability under the Civil Code of the Province of Quebec.

If the thing is stolen the owner will not be liable for damage caused by it because he is no longer in a position to prevent damage by taking reasonable precautions. The owner no longer has the garde juridique because he has lost his legal power of control, direction and surveillance over the thing. As Nadeau says:

> ... on peut dire qu à la garde juridique d'une chose ... la personne à qui appartient, pour prévenir un dommage de garder et surveiller la chose, et de prendre les mesures nécessaires en ce sens. Il doit s'y ajouter l'élément contrôle mieux exprimer dans les termes de "direction" et "surveillance".[28]

While the case of theft is a classic example of the "garde juridique" being separated from ownership there are other common situations where the owner does not have "la garde juridique". In Nadeau v. Buckler[29] the defendant

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26. Ibid., 32.

27. Gervais v. Moffatt, (1927), 33 R.J. 13; Lambert v. Dumais, [1942] B.R. 561.

28. Traité du droit civil de Quebec, Wilson et Lafleur, Montreal t. 8, n. 461, 403-404.

29. [1951] R.L. 422.

voluntarily stored a compressor for the owner. The defendant was held to have the "garde juridique" although ownership was not transferred. In Massé v. Gilbert[30] the lessor gave a tenant the right to pile wood in a covered passageway. It was held that the tenant and not the lessor had the garde of the passageway. Similarly in Larouche v. Leahy[31] it was held that the defendant owner of a house occupied by a number of different tenants did not have the "garde juridique" of a toilet which was the probable cause of flooding in the premises of a co-tenant of the plaintiff.[32] However, in most cases it will be the owner who has the "garde juridique"; a gas company has the "garde juridique" of the pipes owned by it,[33] the owner of a house has the "garde juridique" of inside gas pipes,[34] the owner of an elevator has been held to have the garde[35] and in some exceptional cases the owner has been held to have the garde of a thing even though he no longer has a power of direction, control or surveillance. In Richard v. Lafrance[36] the defendant was a manufacturer of soft drinks. A number of bottles were delivered to the plaintiff at his restaurant under the arrangement that the defendant would remain the owner of the bottles. The

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30. [1942] B.R. 181; see also Northeastern Lunch Co. v. Hutchins, (1923), 35 B.R. 481.

31. Larouche v. Leahy, [1958] B.R. 247.

32. Ibid., 252.

33. Van Felson et al. v. The Quebec Railway, Light, Heat and Power Co., (1913), 43 C.S. 420.

34. Wolofsky v. The Montréal Light, Heat and Power Company and Streiffer, (1922), 60 C.S. 332.

35. Norcross Bros. Company v. Gohier, (1918), 56 S.C.R. 415.

36. [1942] C.S. 283.

plaintiff picked up a bottle and was injured when it exploded. The defendant manufacturer was held to have the "garde juridique". This case is very near the cutting line as the defendant would seem to have relinquished his power of control and surveillance.

It may be argued that the interpretation which has been placed on the word 'garde' reduces the necessity for a legal presumption of fault. It may well be submitted that once a plaintiff has shown that the defendant had a power of control, direction and surveillance over a thing such as to amount to the garde juridique, such evidence would amount to presumption of fact that the defendant was at fault irrespective of article 1054(1) C.C. This would not be so in every case but the possibility further stresses that the concept of garde is consistent with the basic theory and scheme of delictual responsibility in Quebec - fault liability.

However as Baudouin has pointed out one finds in some Quebec cases notions that liability belongs to those who take the economic benefit of a thing.

> On peut lire dans certaines decisions l'affirmation très nette de l'idée de profit comme élément positif de la notion de garde "celui qui récolte le profit d'une entreprise doit logiquement supporter les risques du domage cause à autrui"[37]

This tendency has not, however, been a sign of the replacement of fault by an objective responsibility but has rather underlined and stressed the concept of fault. The exploitation of a thing for profit requires extra care to be taken and to take special measures to avoid damage from being caused.

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37. Op. cit., 783-784. See also Gringras v. Loranger, (1934), 40 R.L. 305.

> ... la notion de profit permet même de se montrer plus exigeant dans la surveillance. Elle marque d'avantage le caractère moral et social de la faute.[38]

The primary and true test of "la garde juridique" is the juridical power of control, direction and surveillance over the thing.

As a general rule the 'garde juridique' of a thing has been regarded as alternative and not cumulative.[39] The garde juridique may, and often is transferred from the owner to another person and such transfer may be made by way of contract[40] or informal agreement.[41] However at any one time the garde must be found in one person - the person with a juridical power of direction control or surveillance. As Nadeau states:

> L'obligation de garde peut se transmettre a celui a qui le propriètaire confie sa chose pour s'en servir ou la garder et qui aura sur elle à son tour droit de direction et de surveillance devoir prendre les précautions voulues pour l'empecher d'être cause de dommage.[42]

In recent years, however, one finds in the doctrine and jurisprudence of France a refinement of the concept of garde juridique. In certain circumstances the courts will permit a split in the garde juridique between the person with the 'garde de la structure' of a thing and person with the 'garde du comportement.' This distinction reflects the concern of the courts that it is the person who is in the best position to prevent the damage who should have

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38. Baudouin, op. cit., 784.

39. Antaki, Kamil, Garde de Structure et Garde du Comportement - un aspect de la responsibilité du dommage causé par les choses, (1966), 12 McGill L.J. 41, 49.

40. Ouellette v. Korenstein, (1938), 65 B.R. 293.

41. Massé v. Gilbert, [1942] B.R. 181.

42. Op. cit., t. 8, no. 462, 404-405.

the garde and take responsibility for the damage. The situation to which this distinction applies is where the owner of a thing transfers the possession and use of it to another. In such a case the owner may continue to have the 'garde de la structure' although the other person has a legal power of control, direction and surveillance. Such a situation may arise when an owner leaves his automobile at a service station to have repairs carried out. The court may regard the owner as retaining the garde de la structure which in essence means the garde of the structure or construction of the automobile. He will continue to be liable for damage caused by inherent or hidden defects in the automobile although he no longer has any physical power of control over the automobile. However the garde du comportement is transferred to the service station owner and he will be liable for damage caused by the way in which the thing is handled and controlled. This distinction was referred to in Heroux Machine Parts Ltd. v. Lacoste[43] and applied in St. Jean Automobiles Limitée v. Clarke Lumber Sales Limited[44] and Tondreau v. Canadian National Railway Company[45]. In St. Jean Automobiles Limitée v. Clarke Lumber Sales Limited[46] the defendant was the owner of a car which was left at the plaintiff's premises to be washed. The car was being driven up a ramp to the first floor of the premises by an employee of the defendant when the brakes failed and the car rolled back and crashed into the door of the premises. The brake failure was caused by a break in a pipe which

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43. [1967] B.R. 349.

44. [1961] C.S. 82.

45. [1964] C.S. 606.

46. Supra.

carried the brake fluid. The learned judge held that the damage to the door was caused by a hidden defect in the construcion of the automobile and the owner was prima facie liable as having la garde de la structure of the automobile. However it was further held that the defendant did not know of the defect and was unable to prevent the damage by reasonable means. He was therefore exonerated from liability. In Tondreau v. Canadian National Railway Company[47] the railway company had leased a railway wagon to the plaintiff's employer. At each end of the wagon was a door hinged at the bottom and fastened at the top. One of the doors which opened into the wagon fell on the plaintiff. The door fell because it was insecurely fastened. The damage did not result from a defect in the structure or construction of the wagon and the defendant who had la garde de la structure was not liable.

The damage had been caused by the way in which the wagon had been used and controlled. Thus, the person with la garde du comportement would have been liable.

This new refinement of the concept of 'garde juridique' has been criticized by Antaki[48] but it would appear to continue the basic policy in the development of article 1054(1) C.C. what the person best in the position of preventing damage by taking reasonable care should be liable. Where a thing is temporarily in the possession of a person other than the owner it would be unjust to hold the possessor liable for damage caused by inherent or hidden defects in the thing.

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47. Supra.

48. Op. cit., 49.

The distinction may be used to avoid the difficulties illustrated in Richard v. Lafrance.[49] In that case the manufacturer and owner of a soft drink bottle was held liable for injuries caused by the explosion of the bottle although it was in the care, control and surveillance of the injured restaurant owner. Perhaps today the decision can be rationalized by regarding the defendant as retaining la garde de la structure. However, the limits to this new distinction have not been worked out fully by the courts and it is difficult to forecast the realm of its application. The most that can be said is that in some cases an owner who has temporarily parted with possession of a thing may retain la garde de la structure and be liable for damage caused by inherent and/or hidden defects of the thing.

2. Act Automne de la chose.

The jurisprudence of Quebec has constantly refused to apply article 1054(1) C.C. in every case where a thing is involved in the production of damage. Such an application of the article would derogate too severely from the scope and application of article 1053 C.C. Thus a rigid distinction is drawn between 'le fait de la chose' and 'le fait de l'homme'. This distinction is in many cases difficult to draw and has been discarded in France.[50] However, in Quebec one must distinguish between damage caused by a thing "as a result of its own dynamism, if its own motion [and] without the direct intervention of man"[51] and where the thing which, while being instrumental or involved in the

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49. [1942] C.S. 280.

50. Ch. réunies 13 février 1930, s. 1930 1. 121, note P. Esmein.

51. Crépeau, P.A., "Liability for Damage caused by Things", (1962), 40 Can. Bar Rev. 222, 235.

production of damage was in reality put into movement or action by the hand of a person. In the former case article 1054(L) C.C. can be applied but in the latter case where the damage was caused through "the mere instrumentality of the thing"[52] article 1053 C.C. will apply.

The two leading cases establishing this limitation of the application of article 1054(1) C.C. are Lacombe v. Power[53] and Perusse v. Stafford.[54]

In Lacombe v. Power[55] the appellant's son, who was employed as a mechanic by the respondent, was working on an automobile when the car suddenly started forward in the direction of an open elevator shaft. The car fell to the bottom of the elevator well and the appellant's son received fatal injuries. In considering the liability of the respondent under article 1054(1) C.C., Anglin, C.J.C. stated:

> If the proper inference from the evidence was that the automobile started of itself i.e. without the intervention of human agency and owing to something inherent in the machine the ensuing damage might be ascribable to it as a "thing" and be within the purview of article 1054 C.C. But if its movement was due to an act of the deceased, conscious or unconscious the damage was caused not by the thing itself, but by that act whether it should be regarded as purely involuntary and accidental or amounting to negligence and fault.[56]

The court held that on the evidence the accident was caused by the act of a person rather than the act of the thing. In the same year the Supreme Court

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52. Ibid., 234.

53. [1928] S.C.R. 409.

54. [1928] S.C.R. 416.

55. Supra.

56. Ibid., 412.

decided Perusse v. Stafford.[57] The appellant claimed damages resulting from an automobile accident. The appellant was the passenger of the respondent's chauffeur, and was injured when the truck hit the curb and broke a wheel. The judgment of the court was delivered by Anglin, C.J.C. The learned judge stated in regard to article 1054(1) C.C.:

> Our view is that the provision has no application to a case where, as here, the real cause of the accident is the intervention of some human agency.... Damage is not caused by a thing which is in the control of the defendant within the meaning of article 1054 where it is really due to some fault in the operation or handling of the thing by the person in control of it.[58]

A further useful illustration is Raymond v. Commission des accidents du travail de Quebec.[59] In that case, the employee of a subcontractor left a wheelbarrow close to an open shaft. The wheelbarrow fell down the shaft and injured the employee of another contractor on the construction site. Hyde, J. stated that the trial judge was wrong in entertaining liability under the first paragraph of article 1054 as "the fall of the barrow was not caused by any action of the "thing" itself, but by the act of the defendant's employee in leaving it as he did, in such a dangerous place".[60]

It cannot be doubted that it is fundamental to the success of an action brought under 1054(1) C.C. that the damage be caused by the thing itself not by the conduct of a person by which it is put in motion, controlled or

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57. Supra.

58. Ibid., 418.

59. [1957] B.R. 780.

60. Ibid., 782.

directed.[61] The concept was summed up in Stern v. Martin[62] - "It was not the thing which caused the damage but at most the use made thereof by the plaintiff which brought about the accident."[63]

The most profound impact of this restriction is to exclude article 1054(1) C.C. from the field of the majority of automobile accidents. In most of these cases the accident will be caused by the act of the person driving one of the automobiles. Also excluded are accidents caused by trains, trams, aircraft, etc. La Compagnie des Trainways de Montréal v. D. Lapointe[64] concerned the liability for the death of the plaintiff's husband resulting from a collision between a car driven by the deceased and a tram belonging to the defendant company. The headnote to the case states succinctly why article 1054(1) C.C. is of no application.

> Pour qu'il y ait application de l'article 1054 C. Civ., il faut que l'accident soit dû à un vice de la chose ou que le dommage ait été causé par elle même seule sans aucune intervention extérieure.[65]

It has also been held that the first paragraph of article 1054 C.C. has no application where a piece of ice[66] is propelled by the tires of a

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61. Curley v. Latreille, (1920), 60 S.C.R. 131, 140 per Anglin, J. See also Canadian Vickers Limited v. Smith, [1923] S.C.R. 203; Delisle v. Shawinigan Water and Power Company, [1968] S.C.R. 744.

62. (1941), 79 C.S. 451.

63. Ibid., 452-453.

64. (1921), 31 B.R. 374.

65. Ibid. See also Perusse v. Stafford, [1928] S.C.R. 416; Forrester v. Hardfield, [1944] R.L. 260; Montréal Tramways Company v. Frontenac Breweries, (1922), 33 B.R. 160; Volkert v. Diamond Truck Company, [1940] S.C.R. 455.

66. Dion v. Quebec Delivery Service Reg'd., (1941), 79 C.S. 197.

car and causes damage. The ice or stone is put in motion by the act of the individual driving the car. In the words of Anglin, J. in Curley v. Latreille[67] the damage caused "was ascribable to the conduct of the person by whom it is put in motion..."[68] However, where the damage is caused by a hidden defect or fault in the construction of the car, article 1054(1) C.C. may well apply. In Carmiel v. Plotnick[69] the rear left wheel evidently became detached from the defendant's car and flew across the road striking the plaintiff's car. The plaintiff's car was forced off the road into a ditch. McDougall, J. applied article 1054(1) C.C. This case illustrates what a difficult distinction "fait de l'homme" and "fait de la chose" is to maintain. On the one hand it could be argued that the wheel would never have been propelled across the road if the car had not been in motion. As Crépeau says: "Of course this distinction is not always easy to ascertain. In the final analysis, it is a question of fact to be decided according to the particular circumstances of each case."[70]

Two further cases may be useful by way of illustration. In Jalbert v. Gorman[71] the defendant's cook had been injured by an explosion which occurred when the plaintiff cook was igniting a gas oven. The explosion had been caused

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67. (1920), 60 S.C.R. 131.

68. Ibid., 140.

69. (1935), 73 C.S. 517.

70. Crépeau, "Liability for Damage caused by Things", (1962), 40 Can. Bar Rev. 222, 235.

71. [1942] C.S. 423.

by allowing too much gas into the oven before igniting it. Thus the damage was caused by the act of the cook not by the autonomous act of the thing.[72] In Bourgault v. Cie Hydro-Electrique Dixville[73] a power pole fell on the plaintiff's mare and killed it. The plaintiff pleaded his case on the basis of article 1054(1) C.C. The defendant alleged that the pole had been knocked over by a mechanical rake. This, if proved, was an answer to the plaintiff's case as the damage would no longer have been caused by the autonomous act of a thing but by the mechanical rake which had been put in motion by a person. However, the defendant's allegation was not well founded and the plaintiff succeeded in his claim. This case also illustrates the relationship between the defence of act of third party and "fait autonome de la chose". The defence is really superfluous because where the damage is caused by the act of a third party, by definition, the act has not been caused by the thing itself but by human intervention.[74]

This distinction between "fait de l'homme" which requires proof of fault under article 1053 C.C. and "fait autonome de la chose" has no equivalent in the Common Law. However, it is a restriction on the scope of article 1054 (1) C.C. and is comparable as such to the restrictions on the rule in Rylands v. Fletcher. Article 1054(1) C.C. is an exception to the usual requirement that in matters of delictual liability that fault must be proved by direct evidence and the action founded on article 1053 C.C. Like their common law "confreres"

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72. See also Groleau v. Montréal Light, Heat and Power Consolidated, [1942] C.S. 120; Canadian International Paper Co. v. Chenel, (1935), 59 B.R. 242.

73. [1944] C.S. 183.

74. See also Montréal Tramways Co. v. Dame Mullin and Kavanagh, (1923), 35 B.R. 392.

the judges of Quebec have sought to restrict and control the stricter form of liability to its 'proper' role. Attuned to article 1053 C.C. the judges have attempted to ensure that the scope of the primary article has not been unduly diminished. However, like so many of the restrictions the rule in Rylands v. Fletcher the limitation of article 1054(1) C.C. to 'fait de la chose' has its illogical and irrational aspect. Nadeau[75] has pinpointed the objection:

> ...il faut admettre si on la retient (la distinction) que plus la garde d'une chose est complète, moins il doit y avoir de responsibilité présumée à raison de cette garde[76]

Where the thing is being directed by the hand of a person there can be no application of article 1054(1) C.C. However it is in this situation that the person has the greatest ability to ensure that the thing does not cause harm to others. The need for a stricter form of liability for damage caused in automobile accidents has been fulfilled by legislation which tends to confirm criticism that article 1054(1) C.C. should not have been restricted to deal only with le fait automne de la chose. The Highway Victims Indemnity Act[77] now deals with the liability of the owner and driver of an automobile.

Article 3 of the Highway Victims Indemnity Act replaced section 53 of the Quebec Highway Code[78] on the first of October 1961. The new article goes further than section 53:

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75. Op. cit.,

76. Op. cit., no. 452, 398. See also Canadian Vickers Limited v. Smith, [1923] S.C.R. 203, 206, per Duff, J.; Pouliot, "Responsibilité des Choses dont on a la garde", (1925), 4 R. du B. 385.

77. S.Q., 1960-61, c. 65.

78. R.S.Q., 1941, c. 42 as amended by S.Q., 1959-60, c. 67.

> the owner of an automobile is responsible for all damage caused by such automobile or by the use thereof unless he proves
> a. that the damage is not imputable to any fault on his part or on the part of a person in the automobile or of the driver thereof, or
> b. that at the time of the accident the automobile was being driven by a third person who obtained possession thereof by theft, or
> c. that at the time of an accident that occurred elsewhere than on a public highway the automobile was in possession of a third party for storage repair or transportation. The driver of an automobile is responsible in like manner unless he proves that the damage is not imputable to any fault on his part.

Thus, there is placed on the driver "a legal presumption of fault defeasible by proof of absence of fault; but, on the other hand it also creates an irrefutable presumption of liability against the owner of a car for any damage caused by the fault of the driver or any person in the car unless the owner brings himself within the terms of paragraphs (b) and (c) of the article".[79]

It is a corollary to the requirement that the accident be due to 'le fait autonome de la chose' that the "thing" must not be passive or inert at the time the damage occurs. Ths thing must be the cause of the damage. The classic example is the case of Rosler v. Curé et Marguillers de l'Oeuvre et Fabrique de Notre Dame de Montréal[80] where the plaintiff injured himself by tripping over the root of a tree under the care of a defendant. It was held that article 1054(1) C.C. could not apply as the thing was absolutely inert and could not be said to have caused the injury. In L'Oeuvre des Terrains de Jeux de Quebec v. Cannon[81] an infant was injured when he slipped on an icy

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79. Crépeau, op. cit, 229.

80. (1936), 75 C.S. 91.

81. (1940), 69 B.R. 112.

ramp in a children's playground. The thing was inert and merely the occasion for the damage. The plaintiff to succeed would have to prove fault under article 1053 C.C. Other things which have been regarded as not within the scope of article 1054(1) C.C. are a staircase covered by torn carpet[82] an uneven staircase[83] a scaffolding[84] and a roof with a hole in it.[85] A final illustration is Smith v. Tillotson Rubber Co. Ltd.[86] where a young boy climbed a fence surrounding a transformer and was electrocuted. The transformer itself did not cause the damage and the facts did not bring the case within the scope of article 1054(1) C.C.

However, in deciding if the thing is inert one must look at the thing at the time when the damage was suffered. If the usually inert thing was in motion at the time of the accident and the movement of the thing can be said to have caused the injury article 1054(1) C.C. may apply. In Proulx v. Danis[87] the plaintiff employee was instructed on a windy day to nail up wallboard on the outside of a house. The plaintiff fell from the scaffolding upon which he was standing when the wind caught the wallboard. Citing French and Quebec doctrine the learned judge held that "an ordinarily inert object may if in motion at the time of the damage, bring into operation the responsibility for "le fait de la chose"[88] The learned judge went on to cite Cannon, J. in

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82. Charland v. Boucher, (1924), 36 B.R. 100.

83. Drury v. Lambert, (1941), 71 B.R. 330.

84. Dadanto v. Galardo, [1958] C.S. 387.

85. Wright v. Blanchard, [1951] C.S. 398. See also Arvida Ski Club Incorporated v. Boucher et vir, [1952] B.R. 537.

86. [1960] R.L. 244.

87. [1955] R.L. 488.

88. Ibid., 501.

Colpron v. Canadian National Railway Co.[89], a decision of the Supreme Court. That case concerned a plank which was used as a lever to raise a heavy steel beam. The plank was propelled through the air when the beam fell on it, fatally injuring a worker. Cannon, J. stated:

> Nous croyons que toutes les choses inanimées sont susceptibles d'échapper au contrôle et à la garde materiélle de l'homme, même celles qui sont "inertes". Ces dernières, en effect, demeurent soumises aux lois physiques, à l'action des forces naturelles (pesanteur, vent, etc.). Sous l'empire de ces forces, elles peuvent échapper à l'action de leur gardien; elles ne lui obéissent plus; il y a "fait de la chose" et non fait de l'homme.[90]

The employer was held liable on this basis.

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89. [1934] S.C.R. 189.

90. Ibid., 195.

CHAPTER III

THE DEFENCES TO LIABILITY UNDER ARTICLE 1054(1) C.C.

Once a prima facie case under article 1054(1) C.C. has been established by the plaintiff it rests upon the defendant to rebut the presumption of fault. If the defendant is unable to rebut the presumption, judgment must be entered for the plaintiff. It will be remembered that after Quebec Railway, Light, Heat & Power Company Limited v. Vandry[1] it appeared that the defendant would be required to prove cas fortuit, force majeure or the act of a third party to exonerate himself. However the Privy Council in City of Montréal v. Watt and Scott Limited[2] clarified the position and held that the defendant could exonerate himself by proof that he was unable to prevent the damage by reasonable means. This interpretation of the Privy Council has been affirmed by the Quebec jurisprudence and proof that the defendant has taken all reasonable means to prevent the damage is the most common defence to the liability.

The Supreme Court of Canada in Canadian Vickers Limited v. Smith[3] held the appellant was liable for injuries caused to the respondent when steel shavings flew from the lathe which he was working, into his eye. The court held that on the evidence the appellant had failed to show that the accident could not have been prevented by reasonable means.[4]

It will not suffice to claim that the cause of the accident is unknown. The case of City of Montréal v. Lesage[5] concerned an action brought

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1. [1920] A.C. 662 (P.C.).
2. [1922] 2 A.C. 555 (P.C.).
3. [1923] S.C.R. 203.
4. Lacharité v. Communauté des Soeurs de Charité, [1965] S.C.R. 553.
5. [1923] S.C.R. 355.

by the owner of a building for damage caused by flooding from a burst pipe under the care of the city. It was held unanimously that it was not sufficient for the defendants to plead that the cause of the burst pipe was unknown. The defendant must approve affirmatively that by reasonable means the damage could not be prevented. Mignault, J. considered that if the pipe had been burried deeper in the ground it may not have burst. However, as Nadeau[6] says, it is probably unnecessary that the defendant must prove the specific cause so that it may be shown that the damage could have been prevented by reasonable means. It will be sufficient to show that there has been a complete absence of fault so that none of the probable causes may be imputed to a failure to take reasonable measures. In this respect one should note Prévost et Dupont Construction Ltd. v. H. Bouthilier[7] where Montpetit, J. stated:

> Cette expression suggérée pour la première fois par le Conseil privé dans la cause de Cité de Montréal v. Watt and Scott pour expliquer la portée de la clause d'exonération que comporte l'Article 1054 C.C. ne signifie pas que les défendeurs doivent établir qu'ils étaient physiquement incapables d'empêcher que le dommage ou que ce dommage découle de la force majeure. Il leur suffit, pour en bénéficier de prouver absence de faute de leur part.[8]

A good example of the defence is in the case of Proulx v. Danis[9]. The case involved the liability of an employer who instructed his workmen to nail up wallboard on the outside of a house which was under construction. The plaintiff's employee was working on a scaffolding when a gust of wind caught the wallboard he was holding and he was thrown off balance and fell to the

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6. Traité du droit civil du Quebec, Wilson et Lafleur, Montréal n. 469, 411.
7. [1957] R.L. 479.
8. Ibid., 482.
9. [1955] R.L. 488.

ground. It was held that the defendant employer had not taken sufficient care to prevent the plaintiff from being injured. The defendant should have suspended the work or employed extra men to hold the wallboard while it was being nailed up. It will be seen from this case that stress is placed on the positive steps that the defendant should have taken to avoid the damage. The emphasis is on omissions and not merely negligent acts.

In M. & W. Cloaks Ltd. v. Cooperberg et al.[10] the defendants installed a new steam generating plant in a building shared with the plaintiff. Over the summer holidays, when the building was closed, a flood was caused by a defective ball float in a sealed tank forming part of the steam system, and caused damage to the plaintiff's property. The majority of the Supreme Court held that since the system was installed by a reputable plumber and was inspected at regular intervals and repaired when necessary, the defendants had taken all reasonable care to prevent the damage. In his judgment, Taschereau, J. gave a clear statement of the position of law in regard to exculpatory paragraph:

> C'est que le gardien juridique de cette chose est responsable des dommages qu'elle cause, mais il peut s'exonérer en demontrant l'intervention d'une force majeure, d'un cas fortuit, de l'acte d'un tiers ou, qu'il n'a pu par des moyens raisonnables empêcher le fait qui a causé le dommage.[11]

However, Taschereau and Fauteux, J.J. took a stricter view of facts. They held that the fact that the float was defective and caused the damage, showed that the reasonable precautions had not been taken.

As a general rule the Quebec courts do not distinguish between dangerous things and non dangerous things. However in regard to the steps taken

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10. [1959] S.C.R. 785.

11. Ibid., 788.

to prevent damage caused by dangerous things in Quebec courts will be more vigorous and strict in their requirement of reasonable care. In O. Charrier v. St. Laurent[12] the learned judge reviewed the cases concerning dangerous things and came to the conclusion that:

> ... les tribunaux ont exigé une prudence toute particulière de la part de ceux qui manipulent ou utilisent des substances explosives.[13]

While the proof that reasonable care was taken is the main defence one also finds in the jurisprudence that proof that the damage was caused by force majeure, cas fortuit, act of a third party or the fault of the plaintiff. It is not intended to deal with cas fortuit or force majeure at any length. The two terms are approximately equivalent to the Common Law concept of act of God. The fundamental notion of cas fortuit and force majeure is that the event which caused the damage is totally unforeseeable and irresistable. Thus the violent wind in Quebec Railway, Light, Heat and Power Company Limited v. Vandry[14] did not amount to a force majeure. Such a wind should have been foreseen and guarded against. A finding of cas fortuit or force majeure amounts to a finding of a total absence of fault.

The two other defences mentioned in Quebec jurisprudence are proof that the damage was caused by the act of a third party or fault of the plaintiff. It is probably that these defences which are mentioned in Quebec cases derive from French jurisprudence and doctrine. However momentary reflection will lead one to deny the applicability of these two defences in Quebec. If damage is caused by the fault of a third party or fault of the plaintiff article

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12. [1957] C.S. 217.

13. Ibid., 226.

14. [1920] A.C. 662.

1054(1) C.C. will not apply because the court would no longer be concerned with damage caused by the act of a thing but with damage caused by the act of a person. Thus these two defences may be relevant in France where no distinction is drawn between 'le fait automne de la chose' and 'le fait de l'homme' but they would appear to be of little value in Quebec.

PART III

CONCLUSION

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The rule in Rylands v. Fletcher and the principle of law contained in article 1054(1) C.C. are of particular interest because both illustrate a judicial development and interpretation of the law to deal with new social and economic problems. The rule in Rylands v. Fletcher has been refined from the original all-embracing formulation of Blackburn, J. to apply to dangerous activities undertaken on one's land. The rule has been justified in its departure from the principle of 'no liability without fault' by increased danger created by the activity. Salmond says -

> The principle behind all these cases is that if a man takes a risk which he ought not to take without also taking upon his own shoulders the consequence of that risk he must pay for any damage which ensues.[1]

The development of the rule in Rylands v. Fletcher has been clearly based on this policy.

On the other hand the policy of the re-interpretation of article 1054(1) C.C. was clear at the outset. It was a deliberate attempt by the courts to lessen the burden on plaintiffs injured by industrial accidents. However, this rationale disappeared to a great extent with the adoption of Worker's compensation schemes which replaced the fault system in regard to industrial accidents with a form of enterprise liability. Since the passing of such schemes the courts have failed to re-orient the law to any main policy factor. The result has been that policy-wise, article 1054(1) C.C. has drifted in limbo. Perhaps the nearest common law concept is res ipsa loquiter which may be viewed at two planes. The maxim prima facie is a technical device of pleading where because something was under control of the defendant proof of negligence would be difficult. However, one may consider that more than a

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1. Salmond, The Law of Torts, 15th ed., by R. F. V. Heuston, (1969), 407.

technical rule it is based fundamentally on the use of a thing. Article 1054 (1) C.C. may be regarded as being essentially concerned with the use of a thing for one's benefit. One must take care of the things which are under your direction and surveillance.

A common aspect of both the rule in Rylands v. Fletcher and article 1054(1) C.C. is their restricted scope. The courts have ensured that the concept of no liability without fault should not be unduly restricted. The common law judges have therefore hedged the rule in Rylands v. Fletcher with requirements and exceptions which have reduced the application of the rule. There is in the cases on Rylands v. Fletcher almost a distrust of strict liability and, as has been seen, the judges in reality often use negligence terminology and negligence concepts when deciding a case on the basis of Rylands v. Fletcher. This is most obvious in the concept of non-natural use and the defences. The courts of Quebec have been even more straightforward in their preference for fault liability. The present interpretation of article 1054(1) C.C. is firmly based on fault liability. However, even though fault is the basis the scope of the article is severely restricted by the concept of "le fait de la chose".

Similar rules to that in Rylands v. Fletcher and article 1054(1) C.C. are to be found in the United States of America and France. One finds in those jurisdictions an attempt to push these rules to their logical and rational limit. Both these jurisdictions should be considered as pointers to possible future development of these rules.

1. United States of America.

The rule in Rylands v. Fletcher has had a chequered career in the United States of America. Prosser has noted that it has been rejected in

name or principle in eleven jurisdictions.[2] It has been approved in twenty jurisdictions. It is not intended to analyse and comment in any detail on the United States jurisprudence. One may accept Prosser's comment that -

> ... the American decisions, like the English ones, have applied the principle in Rylands v. Fletcher only to the thing out of place, the abnormally dangerous condition or activity which is not a 'natural' one where it is.[3]

However, attention should be drawn to the approach of the American Law Institute Restatement on the Law of Torts, 1938. The Restatement has attempted to rationalize the rule in Rylands v. Fletcher and to base it on a clear policy criteria. The relevant sections are:

s. 519:

> Except as stated in ss. 521-4 one who carries on an ultra-hazardous activity is liable to another whose person, land or chattels, the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity, from harm resulting thereto from that which makes the activity ultra-hazardous although the utmost care is exercised to prevent the harm.

s. 520:

> An activity is ultra-hazardous if it
> (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.

s. 521:

> The rule stated in s. 519 does not apply if the activity is carried on in pursuance of a public duty imposed upon the actor as a public officer or employee or as a common carrier.

s. 522:

> One carrying on an ultra-hazardous activity is liable for harm under the rule stated in s. 519 although the harm is caused by the unexpectable,

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2. Prosser, Law of Torts, 4th ed., 1971.

3. Ibid., 527.

(a) innocent, negligent or reckless conduct of a third person or
(b) action of an animal
(c) operation of a force of nature

s. 523:

The rule stated in s. 519 does not apply where the person harmed by the unpreventable miscarriage of an ultra-hazardous activity has reason to know of the risk which makes the activity ultra-hazardous and
(a) takes part in it, or
(b) brings himself within the area which will be endangered by its miscarriage
  (i) without a privilege or
  (ii) in the exercise of a privilege derived from the consent of the person carrying on the activity or
  (iii) as a member of the public entitled to the services of a public utility carrying on the activity.

s. 524:

1. A plaintiff is not barred from recovery for harm done by the miscarriage of an ultra-hazardous activity caused by his failure to exercise reasonable care to observe the fact that the activity is being carried on or by intentionally coming into the area which would be endangered by its miscarriage.

2. A plaintiff is barred from recovery for harm caused by the miscarriage of an ultra-hazardous activity if, but only if,
(a) he intentionally or negligently causes the activity or miscarry, or
(b) after knowledge that it has miscarried or is about to miscarry, he fails to exercise reasonable care to avoid harm threatened thereby.

Thus, although the rule in Rylands v. Fletcher has not gained widespread approval in the law of the United States, it did form the basis of the ultra-hazardous activity doctrine as expounded in the sections of the Restatement cited above. The rule in Rylands v. Fletcher was both narrowed and widened by the American Institute in the Restatement. The rule was narrowed in that a higher degree of danger is demanded. The activity must not merely represent "an increased danger to others" but must be 'ultra-hazardous'. The activity must

involve a risk of serious harm which cannot be eliminated by the exercise of utmost care.[4] Ultra-hazardous activities are those which are neither negligent to conduct nor prohibited by the law because of their public utility. Such activities as blasting, aviation and fumigation with cyanide gas are within the purview of the ultra-hazardous doctrine.[5] Even though the activity be ultra-hazardous there will be no liability under the doctrine if the activity is one of common usage. This concept appears to be a direct carry-over of the English natural use concept. The concept is divorced from any idea of usual or common risk or danger and appears to be a continuation of the policy to restrict the scope of strict liability. Thus, the ultra-hazardous doctrine is based firmly on a high degree of unavoidable danger. That a higher degree of danger is required than under the rule in Rylands v. Fletcher is illustrated by the caveat that the Institute places on whether the storage of water in a reservoir is an ultra-hazardous activity. It should be noted that the commentary on the ultra-hazardous doctrine states that it is not relevant that the activity is carried out for profit. The Restatement of Torts (Second) which is as yet still in draft form replaces the term ultra-hazardous activity for abnormally dangerous activity. The new s. 520 that has been recommended reads as follows:

> In determining whether an activity is abnormally dangerous, the following factors are to be considered:
> (a) whether the activity involves a high degree of risk of some harm to the person, land or chattels of others;
> (b) whether the gravity of the harm which may result from it is likely to be great;
> (c) whether the risk cannot be eliminated by the exercise of reasonable care;

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4. Restatement of the Law of Torts, (1938), s. 520.

5. See James, Absolute Liability for Ultrahazardous Activities: an appraisal of the Restatement Doctrine, (1949), 37 Cal. L.R. 269.

> (d) whether the activity is not a matter of common usage;
> (e) whether the activity is inappropriate to the place where it is carried on; and
> (f) the value of the activity to the community.

The aim of the new draft section would appear to be to define the type of activity with more certainty and to outline the factors which should influence the court in its decision.

In the new draft as in the Restatement an attempt has been made to distinguish the liability from all notions of fault liability. Under s. 520 of the Restatement on Torts an activity is ultra-hazardous -

> if it involves a risk...which cannot be eliminated by the exercise of utmost care.

Similarly one of the factors to be taken into account in defining abnormally dangerous in the draft is that -

> the risk cannot be eliminated by the exercise of reasonable care.

The major emphasis is, however, the gravity of harm and the high degree of risk. Section 519 of the Restatement expressly recognises that the doctrine of ultra-hazardous activities covers damage to chattels, land and to the person.

To some extent the ultra-hazardous activity doctrine does also widen the rule in Rylands v. Fletcher. The principle is not limited to damage caused by an escape of something from land. However, s. 523 outlines some restrictions on possible plaintiffs. Under s. 523 all trespassers, licensees, business visitors and other people who have knowledge of the danger or risk of injury cannot recover under the doctrine. The rationale of this is that the person who voluntarily places himself in the endangered area assumes the risk of injury. However this restriction is not as strict as the English 'escape'

doctrine expounded in Read v. Lyons Co. Ltd.[6] which may apply to defeat the claims of persons who do not assent to the risk of harm.

Section 522 is of interest in that it excludes from the doctrine, the defences of act of a third party and force of nature. The writer has pointed out earlier how the defences of act of God and act of a third party are fundamentally linked to notions of fault. An act of God is one which could not be anticipated and guarded against and the act of a third party similarly must be one which could not be foreseen and guarded against. Thus to establish the defence one must in reality establish a complete lack of negligence. As James says:

> The person injured is no better able to bear the loss because the activity miscarried due to an act of God. The policy behind absolute liability does not require foreseeability of the particular event which causes the miscarriage but only an ability to foresee that there is a risk of serious harm in carrying on the operation.[7]

The ultra-hazardous activity doctrine has been subject to some discussion by the writers but has been given little notice by the courts. However the approach of the American Institute is of interest as a possible rationalization of the rule in Rylands v. Fletcher. The doctrine was firmly rejected by the English courts in Read v. J. Lyons & Co. Ltd.[9] but the rule in Canada is in a greater state of flux and the Restatement may point to further development in the future. The doctrine of ultra-hazardous activity presents a certain clarity of policy which is notably lacking in the rule of Rylands v. Fletcher. Strict liability is applied to those activities which can be foreseen

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6. [1947] A.C. 156.

7. Op. cit., 279-280.

8. Supra.

9. Supra.

to involve an unavoidable risk of harm. Liability may be regarded as the cost the society levies on the particular activity. If one wishes to carry on such an activity one must pay its way. In the commentary in the Restatement it is stated that no distinction is made between profit and non-profit activities. The fundamental rationale of the doctrine is the high degree of risk of the activity. However, there does seem to be an underlying current of policy that the undertaker of the activity will generally be in a position to spread the loss by insurance policies or by passing the cost on to the consumers. There is no express recognition of this policy and the doctrine must be regarded predominantly as a traditional loss-shifting device justified by the danger of the activity. However the attempt to more specifically define the activities subject to strict liability gives notice to such undertakers that they should take out insurance to spread the loss.

2. France.

Article 1384(1) C.N.

Article 1384(1) C.N. states:

> On est responsable, non seulement du dommage que l'on cause par son propre fait mais encore de celui qui est causé par le fait des personnes dont on doit répondre ou des choses.

The similarity to article 1054 of the Quebec Civil code is evident. However, two differences should be pointed out. It has been noted earlier that the use of the word 'elle' in 'elle est responsable' in article 1054(1) C.C. refers to persons who can discern right from wrong. However, the French Civil Code does not require the plaintiff to show that at the time of the damage the

defendant could discern right from wrong.[10] It should also be noted that the French equivalent to the exculpatory paragraph in article 1054(1) does not apply to the liability for the act of things. It was for the courts to decide what defences would lie against liability for the act of things.

Like article 1054(1) of the Quebec Civil Code, article 1384(1) C.N., when it was written was only introductory to the vicarious liability and liability for damage caused by animals and buildings in the paragraphs and articles which followed. The development of the Quebec article has been discussed. The development in France is similar but generally pre-dated the Quebec jurisprudence. Article 1384(1) C.N. was utilized by the courts in the late 19th century to relieve the burden of a positive proof of fault from the victims of industrial accidents. Many scholars who thought the law inadequate in the area of industrial accidents drew attention to article 1384(1) C.N. and considered that persons should be liable for things under their care even outside articles 1385 and 1386 C.N. The landmark case, Guissez, Cousin et Oriole v. Teffaine[11] concerned the liability of the owner of a tugboat whose employee was killed by the explosion of the tug's boiler. No fault was proved on the part of the owner but nevertheless he was held liable for the damage caused by the explosion of the boiler. Cas fortuit and force majeure were recognised by the Cour de Cassation as defences to liability. The judgment of the Court is typically brief and gives no hint of the radical change brought to the law. The following year the interpretation given to article 1384(1) C.N. was

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10. Nadeau, Traité du droit civil du Quebec, Wilson et Lafleur, Montréal, t. 8, no. 430, 381.

11. D. 1897. I. 433.

clarified. In Veuve Grande v. compagnie générale transatlantique[12] la Chambre de Requetes held that article 1384(1) C.N. applied where the damage was caused by a defect in the construction of the thing. Thus, the French jurisprudence began by distinguishing between the act of a thing and the act of a person. Further impetus to development of the principle of law was robbed by a Worker's Compensation Act in 1898. However, the article was destined to play a role in one of the most important areas of individual responsibility - automobile accidents. Two concepts, however, appeared to prevent the application of article 1384(1) C.N. to automobile accidents. The first was that some scholars argued that the article should only apply to dangerous things. An automobile, it was suggested, could not be regarded as dangerous. However the courts held that as the code made no distinction between dangerous and non-dangerous things no distinction should be invented by the judges.

The more serious obstruction to applying article 1384(1) C.N. to the field of automobile accidents was the distinction between act of a thing and act of a person. Most automobile accidents were caused by the act of the person in control of the automobile. However, in the famous case of Jand'heur v. Galeries Belfortaises[13] the Cour de Cassation stated that the Code drew no distinction between a thing actuated by human hands and one that was not and the Court would not do so. The Court stated:

> The presumption of liability established by article 1384 against the person in custody of an inanimate object that has caused harm to another person can only be rebuffed by proving a fortuitous event or vis major, or an external factor, that cannot be imputed

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12. D. 1897. I. 433.

13. Ch. réunies 13 février 1930 D. 1930. I. 57.

> to him; it does not suffice to prove that he did not commit any fault, or that the cause of the harmful act has not been ascertained.[14]

The case extended the scope of article 1384(1) C.N. to a great extent and brought about a decisive split between the Quebec and French jurisprudence.

As in article 1054(1) of the Quebec code liability under article 1384(1) C.N. lies against the person with the garde juridique of the thing. The interpretation of the term garde has been the same in both jurisdictions - the person with the power of use, direction and control over the thing. Mazeaud has described the concept by speaking of the 'power of command in the intellectual sense of the term'.[15] Similarly in France the owner is not liable for damage caused by a thing which is in the possession of a thief.[16]

It should be noted that today the French jurisprudence is more concerned about the causal element of damage than ever before. It will be remembered that the Quebec jurisprudence demands that the thing must be active in the production of the damage. In France it did not matter that there had been no contact between the thing and the person or object damaged. Nor did the courts demand that the thing be active in the production of damage. The new stress on the concept of cause has led the French courts to exonerate the defendant if it is shown that the thing was purely passive at the time of the damage or that the thing was operating in a normal manner.[17]

Some scholars still use the term 'presumption of fault'. However,

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14. Ibid.

15. Mazeaud, Henri et Léon, "Leçons de Droit Civil", Vol. 2, 2nd ed. 1962, 464.

16. Consorts Connot v. Franck, 1941. S. Jur. I. 217.

17. Dame Martinache v. Commune de la Roche-Posay, 1968 D.S. Somm. 13 (Cour d' Appel Poitiers); Desbons v. Consorts Deyssieu, 1945. D. Jur. 317 (Cass. Civ.).

since the defendant cannot exonerate himself by proof that he has taken all reasonable steps to prevent the damage and was not at fault the term is somewhat misleading. The statement below was made by the Cour de Cassation in the Jand'heur case:

> The presumption of liability established by article 1384 against the person in custody of an inanimate object that has caused harm to another person can only be rebutted by proving a fortuitous event or vis major or an external factor that cannot be imputed to him; it does not suffice to prove that he did not commit any fault or that the cause of the harmful act has not been ascertained.[18]

The strength of liability is very similar to that established under the rule in Rylands v. Fletcher. Similarly the defences maintain in this liability the basic moral appeal of the fault doctrine. The rationale of the defences is that if there is a total lack of fault the defendant should not be liable for the damage. As Tunc says:[19]

> These three factors (the act of the victim, the act of third party of the occurrence or a fortuitous event) discharge the custodian of a thing, only to the extent to which they could neither have been foreseen nor avoided. As a matter of fact, our courts usually discharge the custodian when he can give evidence that he, or the person who was actually in control of the thing, has not committed any fault. Our law in this field remains largely based on the concept of fault.[20]

However, there is one situation where the liability is absolute. If the damage is caused by a defect in the thing, the custodian will be liable even if it is shown that with the greatest diligence he could not know of the defect and

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18. D. 1930. I. 57.

19. Tunc, A., "The Twentieth Century Development and Function of the Law of Torts in France", (1965), 14 Int. Comp. L. Q. 1089.

20. Ibid., 1096.

could not have prevented the consequences. In this case liability is absolute.[21] However, in all other cases it appears that if it is absolutely certain that no fault was involved in the production of the damage, the defendant will not be liable.

The interpretation of article 1384(1) C.N. has been both radical and of broad scope. It was predicted at one time that the article would cover the whole field of compensation for loss. However, today the field of article 1384(1) C.N. is defined and this no longer seems likely.

The article is under some criticism today as being an unwieldy instrument to govern the compensation for automobile accident victims. The greater readiness of the courts to apportion damages where there has been the slightest fault by the victim and the difficulties of deciding if the garde has been transferred make the remedy complicated and uncertain and litigation may take a number of years.

However, the interpretation of article 1384(1) C.N. has served France well in settling the litigation which arises from the 12,000 people killed and 250,000 people injured in France every year by reason of traffic accidents.[22]

Thus one finds in the United States and France the rule in Rylands v. Fletcher and the interpretation of article 1054(1) C.C. taken to their logical conclusion. Some willingness has been shown by the judges to rationalize the rule and to free it from arbitrary restrictions. In Canada there has been more willingness to question the escape requirement than in other jurisdictions.

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21. Ibid.

22. Ibid., 1097.

Middleton, J.A. has stated:

> In the 8th edition of Salmond's Law of Torts p. 598, reference is made to the French doctrine of le risque créé. There there is liability on the part of anyone who undertakes to do anything involving risk which he ought not to take without taking upon his own shoulders the consequences of the risk, and, if he fails in this duty he must pay for any damage which ensues. The English courts seem to recognize a difference in a position of one who, for his own purposes, confines a tiger on a leash through the street he is only liable for negligence. It seems to me that the French law is more reasonable. Anyone who does a patently dangerous thing should, I think, be responsible.... The whole matter, I am satisfied, is in a condition of flux and uncertainty and is not yet clear whether the rule in Rylands v. Fletcher is only an example of a wider principle or whether it is a rule that is confined to a use made of real property.[23]

The parallel between le risque créé and the rule in Rylands v. Fletcher is no longer tenable now that it is clear that the liability for things in France is in no way linked to the danger of the thing. The editions of Salmond no longer make reference to the French law. The hopes of some who saw the rule in Rylands v. Fletcher as evolving towards a more rational rule to apply to all activities which involve a high degree of harm have been dimmed by the flourishing of the tort of negligence. The rule in Rylands v. Fletcher has been hedged by limitations and restrictions and has been relegated in application to a few specific fact situations. The restrictions and relationship with negligence has been discussed earlier.

However at the time of its greatest influence and application the decline of negligence is foreseen. Milner[24] sums up the inadequacies of the

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23. Hutson et al. v. United Motor Service Ltd., [1936] O.R. 225, 231.

24. Milner, Negligence in Modern Law, 1967.

law of negligence succinctly:

> Fostered by the individualism of the nineteenth century, whose needs and spirits it accurately reflects, negligence is in some way basically unsuited to the paternalistic society of the twentieth. In relation to physical injuries... the mood of the present time is poorly served by a principle of liability which ties compensation to proof of fault. The moral advantages of this theory are largely illusory.... Private litigation based on fault is a costly, unpredictable, inappropriate method of determining whether and to what extent compensation is to be paid to the injured party.[25]

Thus even though at this time when the rule in Rylands v. Fletcher appears to be destined for eclipse under the increasing pressure of the law of negligence it may be an appropriate time to call for a re-evaluation of the principle and renewed judicial interpretation to deal with the many activities which demand our attention because of the huge number of injured caused by them such as the use of automobiles or by the risk of massive damage, though such damage may be rare such as the peaceful use of atomic energy. The American Institute has given a lead in re-constructing the rule in Rylands v. Fletcher and have given attention to the most difficult problem - defining dangerous activities with a degree of certainty. However it is suggested that in defining these activities regard should not only be paid to the abnormality of the activity or the high degree of danger. It may be that one should have more regard to the frequency and severity of physical harm caused as of more significance and should discard the concept of common usage. In such situations negligence even if res ipsa loquiter applies is too uncertain as a method of loss allocation. The replacement of negligence with a more appropriate loss

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25. Ibid., 234-235.

allocating device is a widely discussed subject. The possibilities range from enterprise liability to liability insurance to social insurance. However, traditional tort rules may be adapted and modified to deal with some of the problems and the judges faced with activities which involve a serious risk of harm may in the future rework the rule in Rylands v. Fletcher.

It is perhaps in France that one finds a readiness to rework the code to solve the problems of the 20th century society. The interpretation of article 1384(1) C.N. while being totally uncharacteristic of the French judiciary has extended and developed the law in a revolutionary manner in direct response to the large number of motor vehicle accidents. The development of article 1384(1) C.N. was so rapid that one tends to overlook that at one stage the relationship between the rule in Rylands v. Fletcher and article 1384(1) C.N. was quite close. Before the Jand'heur[26] case, denied the distinction some jurisprudence and doctrine gave voice to the feeling that one should only have to take particular care of those things which were dangerous.

However this rationale was rejected by the Cour de Cassation in the Jand'heur[27] case, probably because of the difficulty in defining dangerous with any degree of certainty. The elasticity and power of development of the French law in this area has not crossed the Atlantic to the same degree. The basis of fault and the definite distinction between "fait de l'homme" and "fait automne de la chose" have restricted article 1054(1) to a minor role. The suggestion that the French interpretation should have been adopted completely appears to be vindicated by the legislation which has been passed dealing with

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26. Supra.

27. Supra.

automobile accidents. However, the legislation is open to criticism on the same grounds as the common law of negligence as the legislation is founded on fault which is an inappropriate manner to allocate accident loss. In Quebec it is unlikely that further judicial interpretation of article 1054(1) will be forthcoming. However, as dissatisfaction grows with fault as a basis of liability a bolder interpretation may be placed on the article.

BIBLIOGRAPHY

1. Books

Baudouin, Louis. Le droit civil de la province de Quebec. Montreal: Wilson and Lafleur, 1953.

Fenet. Recueil Complet des Travaux Préparatoires du Code Civil. Paris: Au Dépôt, 1827.

Fleming, John G. The Law of Torts. 4th ed. Sydney: Law Book Co. Ltd., 1971.

Mazeaud, Henri et Léon. Leçons du Droit Civil Vol. 2. 2nd ed. Paris: Montchestien, 1962.

Nadeau, André. Traite de droit civil de Quebec, vol. 8, La Responsibilité civile délictuelle et quasi délictuelle. Montreal: Wilson and Lafleur, 1942-58.

Prosser, William Lloyd. Handbook on the Law of Torts. 4th ed. St. Paul: West, 1971.

Salmond, Sir John William. Salmond on the Law of Torts. 15th ed. by R. F. V. Heuston. London: Sweet and Maxwell, 1971.

Winfield, P. H. Winfield and Jolowicz on Tort. 9th ed. by J. A. Jolowicz, T. E. Lewis and D. M. Harris. London: Sweet and Maxwell, 1971.

2. Periodicals

Antaki, Kamil. "Garde de Structure et Garde de Comportement - un aspect de la responsibilité du dommage causé par les choses". 12 McGill Law Journal 41 (1966).

Blackburn, W. Erskine. "The Rule in Rylands v. Fletcher" 4 Canadian Bar Journal 39 (1961).

Chitty, R. M. Willes. "Rylands v. Fletcher: A Practitioners View" 34 Canadian Bar Review 1225 (1956).

Dawson, John P. "The Codification of French Customs" 38 Michigan Law Review 765 (1940).

Crepeau, P-A. "Liability for Damage Caused by Things" 40 Canadian Bar Review 222 (1962).

James, Robert W. "Absolute Liability for Ultra-hazardous Activities: An Appraisal of the Restatement Doctrine" 37 Californian Law Review 269 (1949).

Newark, F. H. "Non-natural User and Rylands v. Fletcher" 24 Modern Law Review 557 (1961).

Pouliot, Louis-A. "Responsibilité des choses dont on a la garde" 4 Revue de Droit 384 (1925).

Tunc, Andre. "The Grand Outlines of the Code Napoléon" 29 Tulane Law Review 431 (1958).

Tunc, Andre. "The Twentieth Century Development and Function of the Law of Torts in France" 14 International and Comparative Law Quarterly 1089 (1965).

West, W. A. "Nuisance or Rylands v. Fletcher" 30 The Conveyancer and Property Lawyer 95 (1966).

Winfield, P. H. "Nuisance as a Tort" 4 Cambridge Law Journal 189 (1930).

Winfield, P. H. "The Myth of Absolute Liability" 42 Law Quarterly Review 37 (1926).