

RYLANDS v. FLETCHER REVISITED:
A COMPARISON OF ENGLISH, AUSTRALIAN AND
AMERICAN APPROACHES TO COMMON LAW
LIABILITY FOR DANGEROUS AGRICULTURAL
ACTIVITIES

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I. INTRODUCTION

A hurricane's torrential rain causes a hog farm liquid waste lagoon to break, spilling thousands of gallons of hog waste into nearby streams.¹ Chemicals from a pesticide container burial site seep into groundwater.² Water from an irrigation system overflows onto neighboring property.³ During burning of fields, fire escapes onto a neighbor's property.⁴ Pesticide drifts from the farmland on which it is being

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1. *Bertha Is Blamed for Hog-Waste Spill*, GREENSBORO NEWS & REC., July 16, 1996, at 1, available in 1996 WL 5777713.

2. *Tainted Well Victimizes Dairyman's Dream*, FARM JOURNAL, May 1987, at 21.

3. See, e.g., *Furrer v. Talent Irrigation Dist.*, 466 P.2d 605 (Or. 1970).

4. See, e.g., *Koos v. Roth*, 652 P.2d 1255 (Or. 1982).

applied and damages nearby crops.⁵ These situations all relate to agricultural activities that may involve a certain risk of harm or danger even if carried out with care.

The traditional remedies for damage arising from such activities usually are classified as trespass, negligence, or nuisance. While trespass is less common in agricultural situations, negligence and nuisance remain important. When the defendant fails to act reasonably under the circumstances, negligence provides a basic remedy. Nuisance will be applicable when a neighboring property owner is using land in such a way as to interfere with the use and enjoyment of land. A successful plaintiff may recover monetary damages for the loss in value caused by the offending activities or may obtain an injunction against the continuation of the activity. In addition to these traditional theories, the doctrine of riparian rights has been asserted as a basis for liability where a downstream riparian landowner is able to show that an upstream owner has unreasonably used the water. Also, the concept of strict liability, which is liability without fault where injury to a person or property is caused by abnormally dangerous activities, is sometimes asserted as the basis for liability.

II. NEGLIGENCE, TRESPASS, NUISANCE, AND RIPARIAN RIGHTS

The tort of trespass, unlike negligence, involves an element of intent. To show trespass, the injured property owner must prove a physical invasion of or interference with the actual possession of property. The critical factor is that the invasion or interference must be intentional. In such cases, there can be an invasion without harm so long as the action was intentional. For example, trespass has been used in some pollution cases where there is an actual invasion of neighboring property such as dust, smoke or waste particles moving from one property to another. To illustrate, consider a case involving a group of landowners who sued in trespass for damages to their property caused by airborne particles from a copper smelter.⁶

The common law concept of negligence provides a basis for liability in situations where the defendant fails to act reasonably under the circumstances and this failure causes harm to another. For example, if a farmer collects animal waste in a lagoon and, due to lack of attention, the lagoon overflows and causes damage to a neighbor's property, negligence may be a proper action. Liability is based on the idea that a duty was owed and the action (inaction) caused harm to another person or that person's property.⁷ Negligence is at the root of modern tort law and is sometimes

⁵. See, e.g., *Gotreaux v. Gary*, 94 So. 2d 293 (La. 1957); *Young v. Darter*, 363 P.2d 829 (Okla. 1961); *Cross v. Harris*, 370 P.2d 703 (Or. 1962); *Langan v. Valicopters, Inc.*, 567 P.2d 218 (Wash. 1977).

⁶. *Bradley v. American Smelting & Ref. Co.*, 709 P.2d 782 (1985). The court in this case limited the plaintiff's trespass action to actual and substantial damages that were caused by the accumulation of the particles on the land.

⁷. This example was taken from the publication, NEIL D. HAMILTON, A LIVESTOCK PRODUCER'S LEGAL GUIDE TO: NUISANCE, LAND USE CONTROL AND ENVIRONMENTAL LAW (1992) which is an excellent overview of nuisance and right to farm acts.

used in agricultural activity cases when there is proof of a failure to act reasonably.

The most widely used common law remedy for activities that interfere with use and enjoyment of land is nuisance. A precise definition of nuisance is difficult to formulate. The Kansas Supreme Court has described it as follows:

Briefly stated, the word “nuisance,” while perhaps incapable of precise definition, generally is held to be something which interferes with the rights of citizens, whether in person, property, or enjoyment of property or comfort, and also has been held to mean an annoyance, and that which annoys or causes trouble or vexation, that which is offensive or noxious, or anything that works hurt, inconvenience or damage.⁸

A private nuisance is an unreasonable interference with the use and enjoyment of another person’s property. The determination of “reasonableness” is a balancing process that weighs the gravity of the harm against the utility of the conduct causing the harm.⁹

Under the riparian rights concept, each riparian landowner is entitled to make reasonable use of the water from a lake or watercourse bordering her land. The downstream owner is entitled to receive water that is neither unreasonably impaired in quality nor unreasonably diminished in quantity. This concept is similar to the underlying basis for a nuisance action, but is often asserted as a separate cause of action by downstream riparian owners.¹⁰

A common thread in cases of negligence, nuisance, and riparian rights is the evaluation of the reasonableness of the conduct causing the harm. This evaluation

⁸. *Wilburn v. Boeing Airplane Co.*, 366 P.2d 246, 254 (Kan. 1961).

⁹. RESTATEMENT (SECOND) OF TORTS § 827 (1979). The Restatement sets out the following factors to be considered in the balancing process:

- a. the extent of the harm involved;
- b. the character of the harm involved;
- c. the social value which the law attaches to the type of use or enjoyment invaded;
- d. the suitability of the particular use or enjoyment invaded to the character of the locality; and
- e. the burden on the person harmed of avoiding the harm.

In addition, in considering the utility of the conduct, the RESTATEMENT (SECOND) OF TORTS § 828 (1979) suggests that the following are relevant:

- a. the social value that the law attaches to the primary purpose of the conduct;
- b. the suitability of the conduct to the character of the locality; and
- c. the impracticability of preventing or avoiding the invasion.

¹⁰. *See, e.g., Borough of Westville v. Whitney Home Builders*, 122 A.2d 233, 245 (N.J. 1956) where the court recognized the concept but refused to grant an injunction based on the “weighing of the reasonableness, under all the circumstances, of the use being made by the defendant and of the materiality of the harm, if any, found to be visited by such use upon the reasonable uses of the water by the complaining owner.” The action in *Westville* is more nearly a nuisance action. The concept of a cause of action for interference with a riparian property right was specifically recognized in *Springer v. Joseph Schlitz Brewing Co.*, 510 F.2d 468 (4th Cir. 1975).

leads to a certain overlap in theories. Most cases involving interference with riparian rights could be treated as nuisance cases; some cases of nuisance involve negligent conduct. In all such cases, the focus is on foreseeability or the “expectability of certain harms from certain types of conduct.” This is what Professor Harper characterized as probably the “most powerful and most uniform social policy crystallized in the various rules and doctrines of tort law.”¹¹

III. STRICT LIABILITY

Strict liability has not been used as frequently as a basis for recovery. However, in situations where an activity is considered abnormally dangerous, it is unnecessary for the plaintiff to show fault if the court follows a strict liability concept.

Rylands v. Fletcher,¹² the famous 1868 English case, served as the foundation for the American tort concept of strict liability for ultrahazardous or abnormally dangerous activities. The Restatement of (Second) Torts incorporates the reasoning of Justice Blackburn of the Court of Exchequer Chamber in formulating the concept for “abnormally dangerous” activities.¹³ While the decision in the House of Lords, and the opinion of Lord Cairns, has received less attention in the United States, the case itself has been frequently cited by American courts in dealing with a range of liability issues.¹⁴

The English courts have revisited issues related to the basis for liability in such situations. Most recently, the House of Lords adopted a new element in cases such as *Rylands v. Fletcher*, requiring foreseeability of harm. In *Cambridge Water Co. v. Eastern Counties Leather PLC*,¹⁵ Lord Goff, writing for a unanimous House of Lords, indicated that reasonable foreseeability of harm was an essential element in *Rylands* type cases. In doing so, he specifically rejected the American “ultra-hazardous” formulation and refused to extend the scope of liability.¹⁶ While he

¹¹. Fowler Vincent Harper, *The Foreseeability Factor in the Law of Torts*, 7 NOTRE DAME LAWYER 468 (1932). Fowler carried this idea to the extreme in suggesting that there can never be recovery in tort absent foreseeable danger. *Id.* at 471. This concept has not been generally accepted when strict liability is involved, but his idea continues to give pause. In all fairness, he was careful to distinguish various senses in which harm may be foreseeable. See *infra* text accompanying notes 85-90.

¹². *Rylands v. Fletcher*, 1 L.R.-Ex. 265 (1866), *aff'd*, L.R. 3 H.L. 330 (1868).

¹³. RESTATEMENT (SECOND) OF TORTS §§ 519-520 (1977). The general principle outlined in Section 519 is:

(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

¹⁴. According to a quick Lexis search, this case has been cited in 306 appellate court decisions in the United States.

¹⁵. *Cambridge Water Co. v. Eastern Counties Leather PLC*, 1 All E.R. 53 (H.L. 1994).

¹⁶. *Id.* at 75-76.

suggested the effect was “essentially as an extension of nuisance,”¹⁷ others have suggested the decision effectively merges the strict liability concepts of *Rylands* with traditional concepts of negligence as a basis for liability in such cases.¹⁸

Shortly after the House of Lords decision, the Australian High Court also revisited *Rylands v. Fletcher*. In *Burnie Port Authority v. General Jones Pty. Ltd.*,¹⁹ contractors of the defendant were welding near a highly flammable substance. Sparks from the welding activity caused the substance to ignite and the plaintiff lost a large quantity of vegetables stored in the building owned by the defendant. The basis of the lower court’s use of the *Rylands* rule was that the welding near flammable materials was a non-natural use of land. While the lower appellate court applied *Rylands*, the Australian High Court held that the basis for the liability was negligence and that the rule of *Rylands v. Fletcher* had been “absorbed” by the principles of ordinary negligence. Negligence would, according to the court, provide a remedy in most cases in which *Rylands* might apply.²⁰ This case, decided just after the House of Lords decision in *Cambridge Water Co. v. Eastern Counties Leather PLC*, imposed the same “foreseeability of damage” requirement.

Under those principles, a person who takes advantage of his or her control of premises to introduce a dangerous substance, to carry on a dangerous activity, or to allow another to do one of these things, owes a duty of reasonable care to avoid a reasonably foreseeable risk of injury or damage to the person or property of another.²¹

The imposition of a duty of a high standard of care in such cases brings Australia in line with the approach used in jurisdictions such as Scotland and South Africa which do not apply *Rylands*.²² For example, Scottish law would require some element of fault even though the standard of care placed on an occupier of land is high when a “non-natural” use of land is involved.²³

On the other hand, the *Rylands* analysis in Canada usually has focused on the

¹⁷. *Id.* at 76.

¹⁸. See Jeannie Marie Paterson, *Rylands v. Fletcher Into Negligence: Burnie Port Authority v. General Jones Pty. Ltd.*, 20 MONASH U. L. REV. 317, 323 (1994). This corresponds with the test of remoteness under the law of negligence.

¹⁹. *Burnie Port Authority v. General Jones Pty. Ltd.* (1994) 68 A.L.R. 331 (Austl.).

²⁰. See Paterson, *supra* note 18; Peter Bowal & Nicole Koroluk, *Closing the Floodgates: Environmental Implications of Rylands v. Fletcher*, 4 J. ENVTL. L. & PRAC. 310 (1994); Liz Fisher, *The Demise of the Rule in Rylands v. Fletcher: Occam’s Razor and the Unified Law of Negligence*, 68 AUSTL. L.J. 463 (1994) (discussing comments in the Australian case).

²¹. *Burnie Port Authority*, (1994) 68 A.L.R. at 349; see Paterson, *supra* note 18, at 322.

²². Paterson, *supra* note 18, at 323; Kenneth Miller, *Rylands v. Fletcher in Scotland*, 101 L.Q. REV. 472 (1985).

²³. Miller, *supra* note 22, at 473.

issue of “natural” versus “ordinary” use of land.²⁴ Apparently, the critical element is damage from an “inappropriate” use where it is being maintained.²⁵ For example, in one case, sewage escaping from a sewer main was “not such a ‘natural’ use as to take it outside the doctrine.”²⁶

IV. THE LEGACY OF RYLANDS V. FLETCHER

The facts of *Rylands v. Fletcher* are familiar to any student of the law. The defendant constructed a reservoir on property under which, at some prior time, the coal had been worked out, leaving shafts that filled with soil. These shafts “communicated” with old workings under the land and, from there, to mines of the plaintiff. The existence of these “latent defects,” as Justice Blackburn called them when the lower court decision was appealed to the Court of Exchequer Chamber, was not known to the defendants. Even the engineers and contractors who had been employed to construct the reservoir, upon discovering the shafts, did not know or suspect that they connected with the old workings under the land. Justice Blackburn identified the issue of law succinctly:

The question of law therefrom arises, what is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escape out of his land. . . . [T]he question arises whether the duty which the law casts upon him, under such circumstances, is an absolute duty to keep it at his peril, or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions, in order to keep it in, but no more.²⁷

He then described the “true” rule of law:

We think the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.²⁸

On appeal, the court held the defendant responsible for the damages caused by the escape of the water from the reservoir.

The case was then appealed to the House of Lords and in 1868 Lord Cairns, joined by Lord Cranworth, issued the opinion dismissing the appeal. However, this

²⁴. Bowal & Koroluk, *supra* note 20, at 324.

²⁵. *Id.* at 325.

²⁶. Andrew J. Roman & Derrek Farris, *Regulation of Groundwater Contamination in Canada*, 65 CHI.-KENT L. REV. 519, 522 (1989)(citing *Duncan v. The Queen*, 1966 Ex. C.R. 1080).

²⁷. *Rylands v. Fletcher*, 1 L.R.-Ex. 265, 279 (1866).

²⁸. *Id.*

opinion was based on somewhat different grounds from those stated by Justice Blackburn in the lower court.²⁹ Lord Cairns indicated that he thought the principles were “extremely simple.” He introduced the idea that a “non-natural” use of land could result in liability. While indicating that he “entirely” concurred with Justice Blackburn, his reasoning was more narrow. He suggested the rule of absolute liability would come into play from the introduction onto the land of a “non-natural” use. If in consequence of such a use there was an escape onto the land of others, liability would follow.³⁰ Justice Blackburn had not used the concept of non-natural use of the land, but instead he focused on the presence of anything “dangerous” or “likely to do mischief.”³¹

While not clearly understood by future courts, the limitation imposed by Lord Cairns was, according to one commentator, intentionally imposed and was “merely expression of the fact that the defendant has artificially introduced onto the land a new and dangerous agent.”³² In reviewing the cases from 1868 until 1913, Professor Newark concluded that equating the concept of “natural” with “ordinary” and “usual” only arose in five cases. Lord Cairns had referred to “non-natural use” in the context of artificially introducing the dangerous agent onto the land. Somehow in the subsequent cases, the concept became identified with the idea that “natural” use--use of land in the “ordinary” course of enjoyment--related to the use of the land itself, not to the introduction onto the land of the agent.³³

The common law concept of imposing strict liability without proof of negligence, had its origin in this case, although some writers suggest too much may be made of it. In fact, Professor Simpson suggests that it was but one case in a series dealing with bursting reservoirs, and it made sense in that context. However, it survived to “flourish in other fields of twentieth-century law.”³⁴

V. THE REVISED APPROACH IN ENGLISH LAW

English courts have cited *Rylands v. Fletcher* frequently as one of the three possible bases for recovery for activities associated with land use; the others being negligence and nuisance. The approach of *Rylands v. Fletcher* is to apply a two part test: (1) whether the use of land is natural or “non-natural”; and (2) whether an escape occurred.³⁵ The first of these elements, which poses some continued

²⁹. *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868), All E.R. Rep. 1 (H.L. 1861-73).

³⁰. *Rylands*, All E.R. Rep. at 13.

³¹. *Rylands*, 1 L.R.-Ex. 265 at 279.

³². F. H. Newark, *Non-Natural User and Rylands v. Fletcher*, 24 MOD. L. REV. 557, 561 (1961).

³³. *Id.* at 570-71.

³⁴. A. W. B. Simpson, *Legal Liability for Bursting Reservoirs: The Historical Context of Rylands v. Fletcher*, 13 J. LEGAL STUD. 209, 264 (1984).

³⁵. See, Bowal & Koroluk, *supra* note 20 at 313-14.

difficulty, is obviously derived from the opinion of Lord Cairns in the House of Lords opinion in *Rylands v. Fletcher*. The second, also from the House of Lords decision, has received less controversial treatment. In a 1947 House of Lords opinion, *Read v. J. Lyons & Co.*, “escape” was defined to mean that the dangerous substance had to enter another person’s property, emphasizing the nuisance element of *Rylands v. Fletcher*.³⁶ On the other hand, if the damage was caused by escapes within the defendant’s own property, negligence principles would apply. As Lord Macmillan indicated in *Read v. J. Lyons & Co.*, nuisance is a “congener” of the rule in *Rylands v. Fletcher* that focuses on the acts of the defendant.³⁷ The *Rylands v. Fletcher* rule focuses on an escape of “some mischievous thing which the defendant brought onto his land.”³⁸ The decision in *Read v. J. Lyons & Co.* may have served to limit the development of a general theory of strict liability in such cases by focusing only on those cases of “escape.”³⁹

The House of Lords recently revisited *Rylands v. Fletcher* in *Cambridge Water Co. v. Eastern Counties Leather PLC*.⁴⁰ The 1993 case involved groundwater contamination from spillage by a leather manufacturer that used a chemical solvent in its processing activities. The opinion by Lord Goff considered the issue under *Rylands* because the Court of Appeal had applied a strict liability in nuisance rule to find the manufacturer responsible for damage to the groundwater supply.⁴¹ The Court of Appeal distinguished this approach from *Rylands* because it did not find *Rylands* to be applicable. The reason *Rylands* did not apply was in part, because the Court of Appeal did not find an “escape” and, in part, because the court saw *Rylands* as restricted to cases where the “non-natural use” qualification applied.⁴² The court expressed some reservation as to whether this latter qualification was intended to be a part of the original *Rylands* formulation. The Court of Appeal did not find it necessary to decide the issue because another older case, *Ballard v. Tomlinson*⁴³ supplied the rule that when a “natural right incident to ownership” is interfered with, strict liability applies.⁴⁴

In the House of Lords, Lord Goff questioned whether this rule could be applied absent foreseeability of the harm resulting from the actions of the defendant.⁴⁵ Because the case had been submitted in the lower court under the *Rylands* rule rather than under nuisance, Lord Goff felt it necessary to examine both approaches. However, the plaintiffs had apparently not pursued the appeal on nuisance grounds,

³⁶. *Id.* at 314, note 26 (citing *Read v. J. Lyons & Co.*, App. Cas. 156 (H.L. 1947), 2 All E.R. 471 (H.L. 1946)).

³⁷. *Read v. J. Lyons & Co.*, 2 All E.R. 471, 477 (Eng. C.A. 1947).

³⁸. *Id.*

³⁹. See *Cambridge Water Co. v. Eastern Counties Leather PLC*, 1 All E.R. 53, 76 (Eng. C.A. 1994).

⁴⁰. *Id.*

⁴¹. *Id.*

⁴². *Id.* at 62.

⁴³. *Ballard v. Tomlinson*, 29 Ch. D. 115 (1885).

⁴⁴. *Cambridge Water Co.*, 1 All E.R. at 61.

⁴⁵. *Id.* at 68.

so the House of Lords decision was, in reality, based on the issue of whether *Rylands* afforded a basis of liability under these circumstances.⁴⁶

Lord Goff indicated that such cases were to be decided either under the nuisance law or under *Rylands*, and discounted the finding of the Court of Appeal relating to strict liability.⁴⁷ Lord Goff would insist on a foreseeability of harm test in such cases.⁴⁸ He justifies this view as growing out of the accepted idea that reasonableness of use determines liability in nuisance cases.⁴⁹ He also finds support in *The Wagon Mound (No. 2)*,⁵⁰ a Privy Council decision expressly finding foreseeability of harm as a prerequisite for the recovery of damages in nuisance cases. It is, according to Lord Goff, a question “essentially as one relating to remoteness of damage.”⁵¹ This was apparently true even in the limited number of cases where fault is not necessary.⁵²

Lord Goff next analyzed the question of foreseeability under *Rylands*. In Justice Blackburn’s original opinion, Goff found support for the proposition that foreseeability should be a prerequisite for recovery of damages in cases falling within the *Rylands* rule.⁵³ He concluded:

The general tenor of his statement of principle is therefore that knowledge, or at least foreseeability of the risk, is a prerequisite of the recovery of damages under the principle; but that the principle is one of strict liability in the sense that the defendant may be held liable notwithstanding that he has exercised all due care to prevent the escape from occurring.⁵⁴

Lord Goff saw a historical connection with nuisance law and indicated, “it would appear logical to extend the same requirement to liability under the *Rylands* rule.”⁵⁵

Lord Goff did not stop there. He addressed the idea that *Rylands* might be treated as a “developing principle of strict liability from which could be derived a general rule of strict liability for damage caused by ultra-hazardous operations,”

⁴⁶. *Id.*

⁴⁷. *Id.*

⁴⁸. *Id.* at 69.

⁴⁹. *Id.*

⁵⁰. *Overseas Tankship (UK) Ltd. v. Miller Steamship Co. Pty.*, 2 All E.R. 709 (Eng. C.A. 1966).

⁵¹. *Cambridge Water Co.*, 1 All E.R. at 72.

⁵². See Nicola Atkinson, *Strict Liability for Environmental Damage: The Cambridge Water Company Case*, 5 J. ENVTL. L. 173, 183 (1993).

⁵³. *Cambridge Water Co.*, 1 All E.R. at 73.

⁵⁴. *Id.*

⁵⁵. *Id.* at 75.

which he identified as the approach in the United States.⁵⁶ He cited the Restatement of (Second) Torts, section 519, but inferred from the comment to section 519 that abnormally dangerous activities be such that “their ability to cause harm would be obvious to any reasonable person who carried them on.”⁵⁷

Lord Goff referred to serious obstacles in developing the *Rylands* rule in this manner, specifically, the necessity of “escape from land under the control of the defendant.”⁵⁸ He referenced a Law Commission Report on *Civil Liability for Dangerous Things and Activities*, which expressed serious misgivings about “a general concept of ‘especially dangerous’ or ‘ultra-hazardous’ activity” because of “uncertainties and practical difficulties of its application.”⁵⁹ He indicated that judges should be “reluctant to proceed down that path” if the Law Commission was unwilling to do so.⁶⁰

Lord Goff also analyzed the question of “non-natural use” in the context of the facts of the case. He suggested prior cases had developed the principle that natural use was extended to include the “ordinary use” of land. While the concept of “ordinary use” lacks precision, he did not believe it needed any redefinition for purposes of the case.⁶¹ For instance, when substantial quantities of chemicals are stored on industrial premises, the storage of such chemicals amounts to a classic case of non-natural use; and Lord Goff found it difficult not to impose strict liability for damages caused by the chemical’s escape.⁶²

While it appears Lord Goff was sympathetic to the application of the *Rylands* rule to such circumstances, his adoption of the foreseeability test meant that liability would not attach. In his analysis of the facts, he concluded that when the chemicals were brought onto the land, the defendant could not have reasonably foreseen the resulting damage to the plaintiff’s property. Even if treated as a case of nuisance, the same conclusion is reached.⁶³

The commentators have various reactions to the decision. One suggested the imposition of the foreseeability test would not benefit many future defendants because it is not the escape that must be foreseen, only the damage, and such damage is usually easily foreseen.⁶⁴ He further suggested the real implication of the case was in Lord Goff’s analysis of the issue of “non-natural use.”⁶⁵ Because Lord Goff was willing to see that “quite normal uses” of standard industrial materials in industrial areas could result in liability for damage foreseeably resulting from their escape, the “natural” use defense was potentially less available.⁶⁶

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 76.

⁶⁰ *Id.* at 75-6.

⁶¹ *Id.* at 79.

⁶² *Id.*

⁶³ *Id.* at 77.

⁶⁴ Tony Weir, *Rylands v. Fletcher Reconsidered*, 53 CAMBRIDGE L.J. 216 (1994).

⁶⁵ *Id.* at 217.

⁶⁶ *Id.*

On the other hand, one commentator suggested, in the United Kingdom at least, the viability of *Rylands* was restricted by the decision.⁶⁷ This commentator, from Australia, was prophetic in her own country. Not long after the House of Lords decision, the Australian High Court faced an issue in which *Rylands* was one potential basis for liability.

VI. THE REVISED APPROACH IN AUSTRALIAN LAW

In *Burnie Port Authority v. General Jones Pty. Ltd.*,⁶⁸ the Australian High Court was called upon to evaluate a question of liability on three distinct grounds: (1) the *ignis suus* principle, (2) *Rylands v. Fletcher* liability, and (3) ordinary negligence. Ordinary nuisance was submitted as a fourth ground, but was abandoned during oral argument.⁶⁹

General Jones suffered losses when large quantities of frozen vegetables were destroyed by fire ignited by sparks from welding activity in the portion of the building occupied and controlled by the defendant. These sparks ignited stacks of cardboard cartons close to the work area containing an insulating material that, once ignited, “dissolves into a liquid fire which burns with extraordinary ferocity.”⁷⁰

The trial court had found liability under ordinary negligence and *ignis suus*, a special rule relating to the escape of fire. The Supreme Court of Tasmania (Full Court) premised liability on the rule of *Rylands v. Fletcher*.

The High Court first explored the special rule of *ignis suus* which dated to the 1401 Year Book case of *Beaulieu v. Finglam*.⁷¹ This rule, referred to in previous Australian cases, applied to occupiers of premises, but was later “absorbed” into general principles relating to the escape of dangerous substances--the *Rylands* type situations.⁷²

Second, the court proceeded to analyze the elements necessary to find *Rylands v. Fletcher* liability under Justice Blackburn’s “true rule,” which the majority immediately characterized as largely “bereft of current authority or validity.”⁷³ The court then set out the various explanations and qualifications from subsequent judicial decisions.⁷⁴ Interestingly, the High Court’s detailed focus on the qualifications imposed on Justice Blackburn’s attempt to set out a prima facie rule may have caused it to give less attention to the House of Lords decision in *Rylands v.*

⁶⁷. Liz Fisher, *Contaminated Groundwater, Foreseeability and the Rule in Rylands v. Fletcher*, 68 AUSTL. L.J. 388, 389 (1994).

⁶⁸. *Burnie Port Authority v. General Jones Pty. Ltd.* (1994) 68 A.L.R. 331 (Austl.).

⁶⁹. *Id.* at 333.

⁷⁰. *Id.* at 332-33.

⁷¹. *Id.* at 334, citing *Furrer v. Talent Irrigation Dist.*, 466 P.2d 605 (Or. 1970).

⁷². *Id.* at 335.

⁷³. *Id.* at 337.

⁷⁴. *Id.* at 338.

Fletcher. The court did recognize that the House of Lords decision, itself, converted Justice Blackburn's reference to something brought onto the property which "was not naturally there" to "non-natural use." The court only suggested that this change, along with subsequent alterations and qualifications of Justice Blackburn's "true rule," has "introduced and exacerbated uncertainties about its content and application."⁷⁵

The extent of these qualifications caused the court to question whether the rule of *Rylands* could continue to exist as an independent basis for liability and whether liability would ever exist under *Rylands* in a case where it would *not* exist under negligence principles.⁷⁶ Particularly persuasive was the court's feeling that one of Justice Blackburn's important qualifications in *Rylands* had been transformed.

The qualification "which he knows to be mischievous" has been, in the context of private nuisance and the development of the modern law of negligence, transformed from an apparent requirement of actual knowledge into a requirement closely resembling, or perhaps even amounting to, a requirement of foreseeability of relevant damage in the event of the escape of the dangerous substance.⁷⁷

The court suggests there may be some *Rylands* situations that might be best handled in nuisance (or even trespass).⁷⁸ Subject to this qualification the court was convinced that the rule of *Rylands v. Fletcher*, for purposes of the common law of Australia, should now be absorbed by principles of ordinary negligence.

Under those principles, a person who takes advantage of his or her control of premises to introduce a dangerous substance, to carry on a dangerous activity, or to allow another to do one of those things, owes a duty of reasonable care to avoid a reasonably foreseeable risk of injury or damage to the person or property of another.⁷⁹

The majority on the High Court found the proper rule was ordinary negligence, but in doing so applied, what one commentator has called, the "Occams Razor" approach to remove "outmoded distinctions based on the realities of a different age."⁸⁰ The effect was to eliminate the rule of *Rylands* as a separate cause of action in Australia.⁸¹ The majority was concerned that the original formulation of the *Rylands* rule had become so "overlaid with qualifications and alterations" as to be

⁷⁵. *Id.*

⁷⁶. *Id.* at 345.

⁷⁷. *Id.* at 338.

⁷⁸. *Id.* at 349.

⁷⁹. *Id.*

⁸⁰. Fisher, *supra* note 20, at 464.

⁸¹. There is some question about this. The dissenting judges argue that *Rylands* still exists as a separate doctrine. *Id.*

“weakened” from within.⁸² The court was particularly concerned with the issues relating to the “non-natural” use qualification. The majority was convinced that the rules of ordinary negligence, and sometimes nuisance and trespass, would provide sufficient remedies for all situations in which *Rylands* seemed to apply. This is especially true, given the court’s explanation of “non-delegable duty” of care imposed on an owner who authorizes or allows a dangerous use of the land. This concept, not unlike that already imposed in relationships of special dependence, such as employer-employee, was applicable in *Rylands v. Fletcher* circumstances. The court seemed to be establishing a new category of non-delegable duty by recognizing it as a “special” or “more stringent” kind. This is noteworthy given that Australia has rejected the idea of “extra-hazardous” acts as a basis for liability, in independent contractor cases, because it is “strict liability.”⁸³ This approach has been criticized as “question begging.” “It makes an activity or substance relevantly dangerous, so as to impose a non-delegable duty of care, if the reasonable person would, in the circumstances, consider the activity so dangerous as to make special care appropriate.”⁸⁴

VII. THE AMERICAN APPROACH TO ABNORMALLY DANGEROUS ACTIVITIES

The concept of strict liability for activities on land has been applied in the United States in a variety of contexts. Examples include situations involving storing and using explosives, spraying pesticides, spilling toxic substances, allowing the escape of sewage, and allowing the escape of noxious or poisonous gases, fumes or vapors.⁸⁵ These cases, frequently analyzed under the Restatement (Second) of Torts, result in liability without fault where the activity is considered abnormally dangerous. Liability arises out of the creation of an abnormal risk of harm whether that arises out of the activity itself or through the manner in which it is carried on.⁸⁶ The Restatement sets out the factors to consider in determining whether the activity is abnormally dangerous. These include:

- (a) existence of a high degree of risk of harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried

⁸². Paterson, *supra* note 18, at 319-20.

⁸³. *Id.* at 326-27.

⁸⁴. *Id.* at 328.

⁸⁵. For an examination of the application of the Restatement approach to these situations and others, see William K. Jones, *Strict Liability for Hazardous Enterprise*, 92 COLUM. L. REV. 1705 (1992).

⁸⁶. RESTATEMENT (SECOND) OF TORTS § 519 cmt. d (1977).

on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes.⁸⁷

“Abnormally dangerous” activities are described as dangers that “arise from activities that are in themselves unusual, or from unusual risks created by more usual activities under particular circumstances.”⁸⁸ The comments also refer to the concept as “absolute nuisance” even if applied to “harm to person, land or chattels.”⁸⁹

The prevailing approach in the United States has its genesis in *Rylands v. Fletcher*. After an initial cool reception in United States courts (which often focused on Justice Blackburn’s statement rather than the House of Lord’s opinion), the concept of a hazardous enterprise bearing responsibility for damage it inflicts, even in the absence of negligence, has gained acceptance.⁹⁰ The real issue is often whether a particular industry, at a given location, should be subjected to this higher test of liability.

The initial Restatement of Torts adopted the principle of *Rylands v. Fletcher*, but limited its application to “ultrahazardous activity.”⁹¹ The definition of “ultrahazardous activity” in the initial Restatement required a risk of serious harm to the person, land or chattels of others that cannot be eliminated by the exercise of utmost care and was not a matter of common usage.⁹² Prosser suggested this formulation went beyond *Rylands* and fell short of it. It goes beyond because it ignores “the relation between the activity and its surroundings” and falls short, “in the insistence on extreme danger and the impossibility of eliminating it with all possible care.”⁹³ When the Restatement of Torts was revised, the idea of “abnormally dangerous” activity replaced “ultrahazardous” and the six factors outlined above were added as the basis for deciding whether to apply strict liability.⁹⁴

It has been suggested that the addition of the six factors, and in particular the fifth--“inappropriateness of the activity to the place where it is carried on”--brings the current formulation closer to the original *Rylands* approach, at least as outlined by the House of Lords.⁹⁵ However, the Restatement does not insist on the idea of escape nor does it focus only on the “non-natural use” idea. It does suggest that an activity can

⁸⁷. RESTATEMENT (SECOND) OF TORTS § 520 (1977).

⁸⁸. *Id.* cmt. f.

⁸⁹. *Id.* cmt. c.

⁹⁰. W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 78, at 548-49 (5th ed. 1984).

⁹¹. *Id.* § 78, at 555. Some courts have reached the same result under the rubric of “absolute nuisance” in situations closely related to those in which the *Rylands* analysis can be applicable but with more focus on the relation of the activity to its surroundings. *Id.* § 78, at 554.

⁹². *Id.* § 78, at 551.

⁹³. *Id.*

⁹⁴. *Id.* § 78, at 555.

⁹⁵. Jon G. Anderson, Comment, *The Rylands v. Fletcher Doctrine in America: Abnormally Dangerous, Ultrahazardous, or Absolute Nuisance?*, 1978 ARIZ. ST. L.J. 99, 102.

be abnormally dangerous because of the unusual nature of the activity or because of unusual risks created by more usual activities. And, one factor continues to be the “extent to which the activity is not a matter of common usage.”

The promulgation of this list of factors has been less enthusiastically received than might be expected. The revisers of *Prosser and Keeton on Torts* suggest the First Restatement “set forth the best way of articulating and describing the requirements that ought to be met for applying strict liability to dangerous activities.” They further suggest that when a court considers the six factors, it is doing “virtually the same thing as is done with the negligence concept.”⁹⁶ And, some commentators suggest that the addition of the “appropriateness to the place factor” along with the “common usage factor” creates obstacles in the use of strict liability, particularly in the context of hazardous activity strict liability.⁹⁷ The addition of a “value to the community” factor, they suggest “converts the Restatement (Second) into a theory similar to negligence” and “even sought to convert the vocabulary of this area of law to that of negligence.”⁹⁸

The Restatement (Second) list of factors does not include foreseeability of damage although Lord Goff in the *Cambridge Water Co.* opinion suggested the American approach was one in which abnormally dangerous activities are such “that their ability to cause harm would be obvious to any reasonable person who carried them on.”⁹⁹ Earlier some commentators said foreseeability of harm threatened was an essential factor in all cases. “Neither in the case of intended invasions nor of negligent invasions of another’s interests, nor yet when the invasion is the result of extra-hazardous conduct, is the actor liable unless his conduct created a general type of foreseeable danger.”¹⁰⁰

However, the accepted view in modern American tort law is that foreseeability of harm, as used in the analysis of nuisance or negligence, is not an element in strict liability.

As described by one commentator, strict liability involves a “general type of harm,” which is foreseeable and avoidable at the time the enterprise is started, but the harm is merely “one of the necessary burdens and expenses incident to such

⁹⁶. W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 78, at 555 (5th ed. 1984).

⁹⁷. Virginia E. Nolan & Edmund Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. REV. 257, 272 (1987).

⁹⁸. *Id.* at 273.

⁹⁹. *Cambridge Water Co. v. Eastern Counties Leather PLC*, 1 All E.R. 53, 75 (H.L. 1994).

¹⁰⁰. This flat statement was made by Professor Fowler Vincent Harper in his article *The Foreseeability Factor in the Law of Torts*. Harper, *supra* note 11, at 469. Professor Harper was later the Simeon E. Baldwin Professor of Law at Yale University and co-author of THE LAW OF TORTS (3d ed. 1996) with Fleming James, Jr. and Oscar S. Gray. FOWLER V. HARPER ET AL., THE LAW OF TORTS (3d ed. 1996). Lack of foreseeability has apparently been successfully used as a defense in some *Rylands* type situations. Anderson, *supra* note 95, at 105. No cases are cited to support this assertion.

activities.”¹⁰¹

Professor Palmer argues that under strict liability, to have any meaning, the scope of unlawful harm must be “fixed predicate of the prima facie case.”¹⁰² If a court engages in an evaluation of de novo criterion by weighing whether risks are reasonable or unreasonable, it is no longer strict liability.¹⁰³ “Again in contrast to the negligence calculus, it is the foreknowledge of the lawgiver, not the foreknowledge of the injurer which is the baseline of liability. The lawgiver’s foreknowledge was general (the extent of risks associated with the activity) rather than specific foreseeability associated with a particular accident.”¹⁰⁴

Professor Harper later outlined a general rationale underlying strict liability in the treatise of which he was an original co-author. In examining the concept of foreseeability, the authors distinguish the foreseeable risk of harm that may spell negligence from more generalized foreseeability related to engaging in a dangerous enterprise.

Those who store explosives or who conduct blasting operations know that they are carrying on a dangerous activity although using every precaution. So too, one who with great diligence keeps on his premises a dangerous animal or who skillfully collects water or other substances in large and dangerous quantities must realize the possibility of escape and the gravity of the harm likely to be done. In all of these situations danger may be foreseen by reasonable people as possible if not probable. But the risks to others are not by the ordinary prudent man regarded as unreasonable. It is precisely these conditions that give rise to the doctrine of strict liability. Defendant is not regarded as engaging in blameworthy conduct. He is creating hazards to others, to be sure, but they are ordinary and reasonable risks incident to desirable industrial activity. Sound social policy, however, requires that the defendant make good the harm that results even though his conduct is free from fault. There emerges, thus, the notion of strict liability that is distinctly different in its legal and moral implications from liability based on conduct that falls below the standard required by society of its members.¹⁰⁵

This rationale applies equally to a pure *Rylands* situation or to the analysis of liability under the Restatement’s abnormally dangerous formulation. The court’s decision that a particular activity falls within the scope of *Rylands* or the Restatement

¹⁰¹. A. BECHT & F. MILLER, THE TORT OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES 47 (1961) (quoting A. EHRENZWEIG, NEGLIGENCE WITHOUT FAULT 50 (1951)), cited in Vernon Palmer, *A General Theory of the Inner Structure of Strict Liability: Common Law, Civil Law, and Comparative Law*, 62 TUL. L. REV. 1303, 1319 n.59 (1988).

¹⁰². Palmer, *supra* note 101, at 1320.

¹⁰³. *Id.*

¹⁰⁴. *Id.* at 1319.

¹⁰⁵. FOWLER V. HARPER, ET AL., THE LAW OF TORTS § 14.6, at 239 (2d ed. 1986).

creates a “categorical rule” for subsequent courts to use.¹⁰⁶ It is, thus, important to determine whether a particular activity has been categorized in a particular jurisdiction as falling within the scope of these approaches to liability.

VIII. ABNORMALLY DANGEROUS ACTIVITIES IN AGRICULTURE

The use of *Rylands*, the current Restatement approach, or its predecessor, has been evaluated in the United States in the context of various agricultural activities, most notably crop dusting, field burning, escape of water, groundwater contamination and harm from wastes (e.g., livestock waste).¹⁰⁷ If, indeed, the evaluation of a particular activity creates a “categorical rule” for subsequent courts, it is useful to evaluate how courts have applied these liability rules to such activities.

A. Crop Dusting or Spraying: Pesticide Drift

While most jurisdictions treat damages resulting from pesticide drift as an issue to be resolved under negligence theory, some have applied a strict liability concept derived from *Rylands* or, explicitly, under the Restatement.¹⁰⁸ Courts in Oregon, Oklahoma, Louisiana, and Washington have concluded that strict liability concepts may apply to aerial application of pesticides as an “inherently” or “abnormally” dangerous activity.¹⁰⁹

Courts in Oregon and Washington have employed the most thorough analysis. For example, an Oregon court applied strict liability to pesticide drift in the 1961 case of *Loe v. Lenhardt*.¹¹⁰ In 1977, the court reaffirmed this position in *Bella v. Aurora Air, Inc.*¹¹¹ Without using the full six-factor analysis of the Restatement “abnormally dangerous” formulation, the court analyzed the question of liability.¹¹² The case involved the spraying of 2,4-D in the vicinity of broad-leafed crops.¹¹³ Given legislation regulating the aerial application of the pesticide, the court required no proof to decide the activity was “abnormally dangerous” when damage from use

¹⁰⁶. Thomas C. Galligan, Jr., *Strict Liability in Action: The Truncated Learned Hand Formula*, 52 LA. L. REV. 323, 337 (1991).

¹⁰⁷. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 78, at 549-51 (5th ed. 1984).

¹⁰⁸. See, Robert F. Blomquist, *Applying Pesticides: Toward Reconceptualizing Liability to Neighbors for Crop, Livestock and Personal Damages from Agricultural Chemical Drift*, 48 OKLA L. REV. 393, 397 n.13 (1995).

¹⁰⁹. See cases cited *supra* note 5.

¹¹⁰. *Loe v. Lenhardt*, 362 P.2d 312, 318 (Or. 1961).

¹¹¹. *Bella v. Aurora Air*, 566 P.2d 489 (Or. 1977).

¹¹². *Id.* at 495. Subsequently, the Oregon Appellate Court applied the same concept to ground spraying in *Speer & Sons Nursery v. Duyck*, 759 P.2d 1133, 1134 (Or. Ct. App. 1988).

¹¹³. *Bella*, 566 P.2d at 495.

occurs.¹¹⁴ The court did, however, examine the concept of “abnormally dangerous,” which can be found “[w]hen the harm threatened by the activity is very serious even [with] a low probability of its occurrence”¹¹⁵ Even when the risk is only moderate, if the activity can be carried on “only with a substantially uncontrollable likelihood that the damage will sometimes occur,” the activity may be “abnormally dangerous.”¹¹⁶

The Washington Supreme Court also addressed the question in *Langan v. Valicopters, Inc.*¹¹⁷ The *Langan* court closely analyzed the six factors of the Restatement and concluded aerial application was “abnormally dangerous.”¹¹⁸ The Washington Supreme Court found all six factors to be present, although, it recognized the prevalence of crop dusting in the area where the application occurred.¹¹⁹ It specifically found crop dusting was “not a matter of common usage” because it was carried on by a comparatively small number of persons.¹²⁰ This conclusion has been questioned as “remarkable” with the suggestion that it “cast doubt” on all of the last three Restatement factors.¹²¹ These commentators assert that not only is the common usage factor brought into question by this conclusion, but the “inappropriateness to the place” criterion seems in doubt. “[T]he court found strict liability despite the common sense intuition that crop dusting may be quite appropriate in a valley in which its use by farmers is prevalent.”¹²²

A similar analysis, but different conclusion, appears in the Wisconsin case of *Bennett v. Larsen Co.*¹²³ The court analyzed the six factors of the Restatement and found pesticide spraying was not an “ultrahazardous activity,”¹²⁴ given the common usage of pesticides and the low risk of harm if properly applied and following of label directions.

Perhaps a more typical decision in pesticide cases is that of the Arkansas Appellate Court of Appeals in *J.L. Wilson Farms, Inc. v. Wallace*¹²⁵ in which the court found spraying of 2,4-D in rice fields near the plaintiff’s cotton involved risk of serious harm, regardless of care. This case, like many in other courts, analyzed the issue with no reference to the Restatement but rather focused on negligence. The *Wallace* court upheld a jury finding that “the product is inherently dangerous when used under the circumstances in evidence.”¹²⁶

This approach may be more of an “expansive” concept of negligence -- one

114. *Id.*

115. *Id.*

116. *Id.*

117. *Langan v. Valicopters, Inc.*, 567 P.2d 218 (Wash. 1977).

118. *Id.* at 223.

119. *Id.* at 222.

120. *Id.* at 223.

121. Nolan & Ursin, *supra* note 97 at 275.

122. *Id.* at 276.

123. *Bennett v. Larsen Co.*, 348 N.W.2d 540 (Wis. 1984).

124. *Id.* at 553.

125. *J.L. Wilson Farms, Inc. v. Wallace*, 590 S.W.2d 42 (Ark. Ct. App. 1979).

126. *Id.* at 45.

imposing a high degree of care because of the nature of the activity -- rather than a trend toward strict liability in such cases.¹²⁷ Negligence per se analysis offers something “close” to strict liability and is popular because of the statutory and regulatory controls imposed on pesticide applicators.¹²⁸

On its face, the original *Rylands* formulation would have little application to such cases if, as the English courts have suggested, the “non-natural” use test applies to use of land itself, not to the introduction to the land of the “agent” of harm. In an agricultural area, use of pesticide might be considered a “natural” or “ordinary” use of the land. This question gave the Washington court some pause in *Langan* because of two factors of the Restatement -- extent to which the activity is not a matter of common usage and inappropriateness of the activity to the place where it is carried on. While the Washington court concluded these tests were met, this conclusion has been questioned,¹²⁹ and, as evidenced by decisions such as the *Bennett* case in Wisconsin, courts could use the same factors and reach opposite conclusions.

B. Field Burning

Another agricultural practice that could fall within the strict liability analysis is field burning. A good example is provided by *Koos v. Roth*¹³⁰ where liability was imposed, even in the absence of proof of lack of due care. The court analyzed the six factors of the Restatement. However, the court rejected the “value to the community” and the “appropriate in its place” factors. This court also created an alternative to the Restatement’s “common usage” criteria.¹³¹

In *Koos*, the farmer produced grass seed. After harvest, the defendant and a crew equipped with water tanks burned the field after plowing a protective strip around the field. The fire spread to neighboring property and the owner sued for damages on theories of trespass, negligence, and strict liability. The trial court directed a verdict for the defendant based on the absence of negligence and the defendant’s assertion that agricultural field burning was not an abnormally dangerous activity.

When analyzing the strict liability question, the Oregon Supreme Court indicated that the question depended upon the “probability and on the magnitude of the threatened harm.”¹³² When attempting to apply the “common usage” and the “appropriate location” factors, the court indicated that no clear distinction had been made between the two.

¹²⁷. Blomquist, *supra* note 108, at 409.

¹²⁸. *Id.* at 410.

¹²⁹. Nolan & Ursin, *supra* note 97, at 276.

¹³⁰. *Koos v. Roth*, 652 P.2d 1255 (Or. 1982).

¹³¹. Nolan & Ursin, *supra* note 97, at 302-03.

¹³². *Koos*, 652 P.2d at 1260.

The test of common usage or uncommon usage has been recited to mean not only an activity that is widely carried on by many persons but also one that is accepted as natural or necessary by the inhabitants of the locality... Likewise, a location may sometimes be called “appropriate” because the dangerous activity is useful or necessary, and sometimes because it is less likely to cause extreme harm in that location. The second meaning clarifies but adds nothing to the initial equation of danger.¹³³

Using this formulation, the court concluded that field burning was not a “common usage” because it was an ordinary activity that many people expect to do for themselves.¹³⁴

The court discussed the final societal factor, “utility or value of the harmful activity,” but rejected it as “subjective and controversial.”¹³⁵ After evaluating these criteria, the court determined that field burning was an abnormally dangerous activity.¹³⁶

The court in *Koos* referred to cases in Australia and New Zealand, where agricultural burning was more like burning in Oregon than in England, in which the *Rylands* concept of “natural” or “non-natural” use of fire had been the deciding concept.¹³⁷ The Australian High Court reviewed these cases in *Burnie Port Authority v. General Jones Pty. Ltd.*,¹³⁸ indicating that the special common law rule (*ignis suus*) had been absorbed into the *Rylands* approach.¹³⁹ The same can be said of England.¹⁴⁰

In the United States, the use of the *Rylands* approach generally has not been applied to fires; negligent conduct is required.¹⁴¹ The Oregon court, using the Restatement approach rather than the *Rylands* approach, may be the exception.

C. *Escape of Water*

Damage may occur from the escape of water in a variety of contexts. Canals or ditches may overflow or excessive seepage may occur; irrigation pipes might break or dams may fail allowing large amounts of water to escape onto other land. This type of damage might be analyzed under the *Rylands* approach, especially because the original case involved escaping water. As mentioned above, Professor Simpson concluded that *Rylands* should be seen as a special case involving bursting reservoirs.¹⁴²

¹³³. *Id.* at 1261.

¹³⁴. *Id.* at 1265.

¹³⁵. *Id.* at 1261.

¹³⁶. *Id.* at 1267-68.

¹³⁷. *Id.* at 1264.

¹³⁸. *Burnie Port Authority v. General Jones Pty. Ltd.*, 68 A.L.R. 331 (1994).

¹³⁹. *Id.* at 335.

¹⁴⁰. See HARPER ET AL., THE LAW OF TORTS § 14.15, at 325 (2d ed. 1986).

¹⁴¹. *Id.* § 14.15, at 326-27.

¹⁴². See Simpson, *supra* note 34, at 209.

Damages from flooding, overflow, or seepage from canals, ditches, or irrigation pipes generally would be evaluated on a negligence theory.¹⁴³ While irrigation activities ordinarily would not be “abnormally dangerous,”¹⁴⁴ a Restatement analysis would provide a scheme for such evaluation. For example, in *Reter v. Talent Irrig. Dist.*,¹⁴⁵ the court applied a *Rylands*-type analysis to find that the activity was not “exceptional or unusual considering the locality in which it is carried on.”¹⁴⁶ Locality was one of the factors in the Restatement, although the court never directly referred to the Restatement.¹⁴⁷

The *Rylands* rule and the Restatement analysis might, more appropriately, come into play in cases of dam failures. The best example may be *Clark-Aiken Co. v. Cromwell-Wright Co.*¹⁴⁸ The Massachusetts case involved damage to downstream property when a dam failed, releasing water stored behind it and damaging land, buildings, and structures. The court reviewed the treatment of *Rylands* in Massachusetts and specified that the six-factor analysis under the Restatement (then in draft form) was appropriate to determine whether the activity was “abnormally dangerous.”¹⁴⁹ The court concluded that the use of *Rylands* in Massachusetts was consistent with the proposed revision of the Restatement and sufficiently stated a cause of action under Massachusetts law.¹⁵⁰

Other courts have been reluctant to extend liability in such cases. The Eight Circuit equates strict liability under “absolute nuisance” and under the *Rylands* rule. The circuit has held the *Rylands* rule inapplicable to small farm ponds maintained for conservation, in part, because they were “if not a common practice, certainly not unusual” in the area.¹⁵¹ According to testimony, up to 100-150 dams each year had been constructed in the area for drainage, irrigation, stock watering, and erosion control.¹⁵² *Rylands* liability rested on an “abnormal use in an inappropriate place” which was not the case here.¹⁵³

The Arkansas Supreme Court specifically refused to extend *Rylands* liability to a dam failure in *Dye v. Burdick*.¹⁵⁴ The court suggested the solution could be found in negligence or under the doctrine of *res ipsa loquitur* but not on a theory of strict

¹⁴³. Anderson, *supra* note 95, at 130.

¹⁴⁴. *Id.* at 130 n.260-61.

¹⁴⁵. *Reter v. Talent Irrigation Dist.*, 482 P.2d 170 (Or. 1971).

¹⁴⁶. *Id.* at 173.

¹⁴⁷. The Restatement (Second) version was released in 1971, the same year as the *Reter* decision.

¹⁴⁸. *Clark-Aiken Co. v. Cromwell-Wright Co.*, 323 N.E.2d 876 (Mass. 1975).

¹⁴⁹. *Id.* at 878-87.

¹⁵⁰. *Id.* at 888.

¹⁵¹. *Chicago & N.W. Ry. Co. v. Tyler*, 482 F.2d 1007, 1010 (8th Cir. 1973).

¹⁵². *Id.*

¹⁵³. *Id.* at 1011.

¹⁵⁴. *Dye v. Burdick*, 553 S.W.2d 833 (Ark. 1977).

liability.¹⁵⁵ The court cited Dean Prosser to suggest a focus on the “thing out of place” or the activity that is not a “natural” one where it is and expressed doubt that the *Rylands* approach would apply “even in England” to these facts.¹⁵⁶ The court further indicated that the Restatement limits the extent to which *Rylands* applies and that maintenance and use of a dam across a natural watercourse is not “ultrahazardous.” The court cited comment C, section 520, stating:

Any risk of serious harm could be eliminated by the exercise of the utmost care, even if the pond or lake is not considered a matter of common usage. . . . Furthermore, the activity was not inappropriate to the place it was carried on and the activity has some value to the community.¹⁵⁷

D. *Escape of Pollutants*

Related to the escape of water are cases involving the movement of pollutants from one landowner’s property to another. For example, storms may cause the overflow or failure of livestock waste lagoons from which large quantities of waste materials escape.¹⁵⁸ While general rules of negligence and nuisance may provide the basis for determining liability in such situations, *Rylands* and the Restatement also could provide a basis for liability if the “non-natural” or “abnormally dangerous” tests are met.

In analogous situations, some courts have applied strict liability concepts. Most notably, *Cities Service Co. v. State*¹⁵⁹ involved a dam that burst. The dam had retained slime from a phosphate mining operation that escaped to nearby waterways, killing fish and causing other damage. The court adopted and applied *Rylands* and used the six-factor analysis of the Restatement. In *Bunyak v. Clyde J. Yancy & Sons Dairy*,¹⁶⁰ the concept was applied to a case involving overflow of a liquid manure lagoon.

In this case, a dairy farmer had constructed two lagoons to hold the liquefied manure from the dairy barn. The neighboring plaintiffs discovered their ponds to be clogged and filled with manure. They traced the problem to culverts handling flow from the defendant’s lagoons. The court noted the case could be decided under a nuisance theory, but felt compelled to analyze the applicability of strict liability.¹⁶¹

The court looked at the six factors of the Restatement, finding the first four easy to apply. Impoundment of manure “certainly presents some risk [to others]. If it escapes, . . . great harm results. Ineradicable risks attend such impoundments despite

¹⁵⁵. *Id.* at 836.

¹⁵⁶. *Id.* at 840.

¹⁵⁷. *Id.*

¹⁵⁸. This occurrence has been reported in North Carolina recently as a result of Hurricane Bertha. See *Bertha Is Blamed for Hog-Waste Spill*, *supra* note 1.

¹⁵⁹. *Cities Service Co. v. State*, 312 So. 2d 799 (Fla. Dist. Ct. App. 1975).

¹⁶⁰. *Bunyak v. Clyde J. Yancy & Sons Dairy*, 438 So. 2d 891 (Fla. Dist. Ct. App. 1983).

¹⁶¹. *Id.* at 895-96.

reasonable care. . . . [T]he manure lagoon is not a matter of common usage. . . .”¹⁶² With regard to the last two factors--“inappropriateness of the activity to the place” and “value to the community”--the court indicated that while these would weigh in favor of the defendant (the activity was not inappropriate in the area and the industry had significant value to the community), this was not enough to keep the doctrine from applying.¹⁶³

E. Groundwater Contamination

The use of strict liability in cases involving groundwater has its historical roots in *Rylands*, which involved water escaping downward from the reservoir into coal pits of the plaintiff. A close parallel is the escape of water pollutants or other harmful chemicals into subterranean water on another landowner’s property.¹⁶⁴ For example, in *Yommer v. McKenzie*,¹⁶⁵ the court imposed strict liability when gasoline escaped from a storage tank and contaminated the plaintiff’s well. And, in *Branch v. Western Petroleum, Inc.*¹⁶⁶ strict liability was imposed for contamination of drinking water wells by oil well waste.¹⁶⁷

One particularly dramatic example of the use of strict liability (along with negligence, nuisance, and trespass) is *Sterling v. Velsicol*,¹⁶⁸ a class action in which the defendant’s creation and operation of a chemical waste burial site was considered “abnormally dangerous.” *Rylands* was cited by the court as the basis for strict liability in such cases and the Restatement approach compared. While no previous Tennessee cases had expressly adopted *Rylands* or the Restatement, the court’s “inescapable conclusion” was that the defendant would be “subject to strict or absolute liability for the non-natural, ultrahazardous and abnormally dangerous activities it conducted.”¹⁶⁹ The court specifically found each of the six elements of the Restatement to be present.¹⁷⁰

No reported cases are apparent with regard to similar contamination from

¹⁶² *Id.* at 894. The court equated the “common usage” factor to the “non-natural use of land” under *Rylands*.

¹⁶³ *Id.*

¹⁶⁴ See Peter N. Davis, *Groundwater Pollution: Case Law Theories for Relief*, 39 MO. L. REV. 117, 136-37 (1974), for a review of the strict liability cases involving groundwater contamination as of that date.

¹⁶⁵ *Yommer v. McKenzie*, 257 A.2d 138 (Md. 1969).

¹⁶⁶ *Branch v. Western Petroleum, Inc.*, 657 P.2d 267 (Utah 1982).

¹⁶⁷ The Canadian courts have used *Rylands* in such cases. See, e.g., *Duncan v. the Queen*, 1966 Ex. C.R. 1080, 1082.

¹⁶⁸ *Sterling v. Velsicol*, 647 F. Supp. 303 (W.D. Tenn. 1986).

¹⁶⁹ *Id.* at 315.

¹⁷⁰ *Id.* at 316.

agricultural chemical use.¹⁷¹ And, some states have adopted statutory liability exemptions for such uses.¹⁷² The major problem in using either the *Rylands* or the Restatement approach is that courts may be reluctant to accept the idea that routine agricultural activities are “non-natural” or “abnormally dangerous.”¹⁷³ This may be particularly difficult to show if the contamination is from the leaching of applied nitrogen fertilizers or pesticides. Similarly, if the problem is from irrigation practices or livestock facilities, the matter is complicated by issues of proof when the effect on groundwater is only incidental.

IX. CONCLUSION

The extent to which the adoption of the foreseeability of damage element under English and Australian law distances that approach from the abnormally dangerous activity analysis in the United States is unclear. Under the revised approach in those countries in the *Rylands* type case, foreseeability must be shown. This merges the concept with nuisance or negligence and eliminates the separate cause under *Rylands*. As Prosser has suggested, most *Rylands* cases could be analyzed under nuisance or negligence but the revised analysis eliminates the need for a separate *Rylands* cause.

In the United States the opposite movement may have occurred. Not only has a separate cause for abnormally dangerous activities been recognized, but also the types of activities within the premises of the rule seem to have expanded. Certainly, the strict liability concept has been well established and the use of the six-factor analysis is popular with some courts even if, ultimately, the finding is that an activity is not considered abnormally dangerous.

The extent to which a foreseeability element is part of the analysis is unclear. In fact, Lord Goff may have misunderstood the nature of the strict liability concept as applied in the United States. To add a foreseeability element would, it seems, transpose the analysis to one more akin to negligence or nuisance and is not currently reflected in the six factor analysis of the Restatement (Second) of Torts.

In the agricultural setting a number of typical activities may appear dangerous but when subjected to the six factor analysis, they are not found to be abnormally so.¹⁷⁴ Even aerial application of pesticides has been found to be abnormally

¹⁷¹. See John W. Mill, *Agricultural Chemical Contamination of Groundwater: An Economic Analysis of Alternative Liability Rules*, 1991 U. ILL. L. REV. 1135, 1145 n.90.

¹⁷². *Id.* at 1148.

¹⁷³. Debbie Sivas, *Groundwater Pollution from Agricultural Activities: Policies for Protection*, 7 STAN. ENVTL. L.J. 117, 134 (1987-88).

¹⁷⁴. Obviously, one such “dangerous” activity would be keeping livestock or other animals if they cause harm. Imposing strict liability on the owner (keeper) of animals that do harm if they escape or if they are dangerous is well-established at common law. Livestock present a danger if they escape and do mischief. A keeper of a dangerous animal exposes the community to risk. While the general common law approach of imposing strict liability for damage done by trespassing livestock has been modified in some respects by fencing statutes, both “fencing out” and “fencing in” states impose liability for animals that break through “lawful fences” even in the absence of negligence on the part of the owner. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 76, 538-43 (5th ed. 1984).

dangerous by a limited number of courts. Field burning and escape of water from irrigation facilities may fail to meet the test especially with regard to the factors of “common usage” and “inappropriateness of the activity” to the locality. On the other hand, groundwater contamination by chemicals and escape of pollutants, such as liquid livestock wastes, could fall easily within the situations anticipated by the *Rylands* or Restatement formulation. As stated by the Florida court in *Bunyak*, “[t]he conclusion is inescapable that no matter what theory is invoked by the plaintiff whose property is damaged by the lawful activities conducted upon or conditions existing on the land of another, the key consideration will always be that useful but dangerous activities must pay their own way.”¹⁷⁵

Likewise, strict liability has been imposed on keepers of animals with dangerous propensities if the owner knew or had reason to know of the dangerous propensity. *Id.* § 76, at 542. If the animals are wild and not domestic, the liability is imposed regardless of experience with a particular animal. *Id.* One factor in selecting between the two is whether there is an abnormal risk to the community considering the “abnormal nature of the animal in the particular community.” *Id.* at 543. Consideration of such factors draws immediate attention to the similarities to the type of abnormally dangerous activities evaluated under the *Rylands* or Restatement formulations of strict liability. While liability for abnormally dangerous animals could logically be treated within the *Rylands* approach, courts have drawn analogies but “stopped short of consolidation.” See Anderson, *supra* note 139, at 112 and n.116. Especially, it could be argued, selling of such animals “should be regarded as an abnormally dangerous activity because of the degree of harm the animals could potentially inflict.” Bruce A. Levin & Michael Spak, *Lions & Lionesses, Tigers & Tigresses, Bears &... Other Animals: Sellers’ Liability for Dangerous Animals*, 58 NOTRE DAME L. REV. 537, 547 (1983). However, because a normal activity can give rise to a dangerous condition, the Restatement formulation is difficult to apply to the selling of such animals. *Id.* at 553.

The question of whether the keeping of dangerous livestock could fit the Restatement formulation or *Rylands* itself essentially becomes moot because the Restatement has a separate section dealing with liability for possessors of wild animals. RESTATEMENT (SECOND) OF TORTS § 507. (1977) The Restatement also has a section on harm done by abnormally dangerous domestic animals. *Id.* § 509.

¹⁷⁵. *Bunyak v. Clyde J. Yancy & Sons Dairy*, 438 So. 2d 891, 896 (Fla. Dist. Ct. App. 1983).