THE LAW OF NUISANCE AND

THE RULE IN RYLANDS v. FLETCHER

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ABSTRACT

The title of the thesis: The Law of Nuisance and the Rule in Rylands v. Fletcher.

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The thesis is concerned with the law of private nuisance and the rule in Rylands v. Fletcher, but not with public or statutory nuisance. It is submitted that every case of nuisance is determinable according to the same general principles. The thesis explores the "state of affairs" concept and who the appropriate defendant is. Knowledge of the state of affairs and foreseeability of harm by the defendant are seen as essential to the formation of liability; the suggestion that there are "intentional (or strict) nuisances" and "negligent nuisances" is rejected. The right protected by nuisance is the right to the ordinary enjoyment of land, and the person entitled to this right is the occupier. The nature of this right and the extent of the remedies available are discussed.

The case of Rylands v. Fletcher is seen as but another nuisance case. All the suggested differences between nuisance and Rylands v. Fletcher are explored and found to be illusory. Theories that Rylands v. Fletcher is an application of the "risk-duty" concept of negligence or of a tort of strict liability for "ultrahazardous activities" are examined but found wanting.

The vague concept of "reasonableness" often associated with nuisance is redefined in terms of a defence of ordinary use; the defendant must prove that the state of affairs was ordinary and that the activity causing harm was reasonably done. (This is the defence to Rylands v. Fletcher often called "natural user".) Other defences are statutory authority, consent, and contributory negligence, all of which are analysed. Alleged defences found to be without justification in the light of the juristic basis of nuisance are act of a stranger, Act of God, coming to the nuisance, prescription, and the Fires Prevention (Metropolis) Act 1774, s.86.

PREFACE

My interest in this topic was first kindled when serving as a Judges' Clerk at the Supreme Court in Auckland, New Zealand. Several nuisance cases came my way for research, and I soon became aware of not only the seeming confusion of the case law but also the paucity of academic writing on the subject.

Since being at Oxford, I have been extremely fortunate to have Mr. J.W. Davies as my supervisor. He has cheerfully read papers and chapters whenever asked, and his incisive criticisms and suggestions have at all times been of the utmost value. My debt to him is great and is warmly acknowledged.

Earlier this year, it came to my notice that Dr. D.M. Harris (now at the Liverpool Bar) had written a Ph.D. thesis at Cambridge in the late 1960s under the title, "History and Modern Law of the Liability in Damages of the Occupier of Premises". Dr. Harris kindly lent me a copy of his thesis and I wish to record my thanks to him. As he subsequently rewrote the chapters on Nuisance and the Rule in Rylands v. Fletcher in the ninth edition of Winfield and Jolowicz on Tort, I have, wherever possible, referred to Winfield rather than to his thesis, realising that the former is likely to be more readily available to the reader. Dr. Harris covered much ground not dealt with here and ignored much considered at length in this thesis; our conclusions, even where our subject matter does overlap, are, unfortunately, rather different!

My time at Oxford would never have been possible without generous financial assistance. I have held a Research Fellowship at New College for the last two years, and a Commonwealth Scholarship for all three years here. In 1975 I was elected the New Zealand Law Society Centennial Scholar and the Butterworths Travel Scholar, and was awarded a lump sum from the Spencer Mason Trust in New Zealand. I express my grateful thanks to New College and the donors of these scholarships.

Finally, my debt to my wife for her encouragement and help is immense. She has kept me sane when I began to dream about nuisance and Rylands v. Fletcher!

The law is stated as at 1 May, 1978. I have tried to cite authority from many countries of the Commonwealth. I make no apology for the number of New Zealand cases cited: in view of my background and the generous financial assistance derived from Antipodean sources, any other course would have been impolitic! But where statute has intervened, English law has always prevailed.

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* The Authorised Report of this case did not come to my notice until after most of the thesis had been typed. Hence, most of the references are to the All England Reports.

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ABBREVIATIONS

A.	Atlantic Reporter
A.L.J.	Australian Law Journal
A.L.J.R.	Australian Law Journal Reports
Alta. L. Rev.	Alberta Law Review
Atiyah	Vicarious Liability in the Law of Torts (London, 1967), by Professor P.S. Atiyah
Atl.	Atlantic Reporter
B.C.	British Columbia Reports
Bohlen	Studies in the Law of Torts (Indianapolis, 1926), by Professor Francis H. Bohlen
Can. Bar J.	Canadian Bar Journal
Can. Bar Rev.	Canadian Bar Review
Clerk	Clerk & Lindsell on Torts (London, 14th ed., 1975), General Editors: Sir Arthur Armitage, LL.D., and R.W.M. Dias.
C.L.J.	Cambridge Law Journal
Col.L.Rev.	Columbia Law Review
Conv. (N.S.)	The Conveyancer and Property Lawyer (New Series)
Cornell L.Q.	Cornell Law Quarterly
Cur. Leg. Prob.	Current Legal Problems
D.L.R.	Dominion Law Reports
Duke L.J.	Duke Law Journal
F.	Federal Reporter
Fifoot	History and Sources of the Common Law: Tort and Contract (London, 1949), by C.H.S. Fifoot
Fleming	The Law of Torts (Sydney, 5th ed., 1977), by Professor John G. Fleming, D.C.L.
Gale	Gale on Easements (London, 14th ed., 1972), by Spencer G. Maurice.
Hale	The History of the Pleas of the Crown (London, 2 vols.), by Sir Matthew Hale.
Harris	"History and Modern Law of the Liability in Damages of the Occupier of Premises", (Cambridge University unpublished Ph.D. thesis, 1969), by David M. Harris.
Harv. L. Rev.	Harvard Law Review
Hepple	Tort: Cases and Materials (London, 1974), by B.A. Hepple and M.H. Matthews
Higgins	Elements of Torts in Australia (Sydney, 1970), by P.F.P. Higgins
Holdsworth	A History of English Law (London, 12 vols.), by Professor Sir William Holdsworth, K.C., D.C.L., F.B.A.
Ir. Jur.	Irish Jurist
Ir. R.	Irish Reports

J. Leg. Studies	Journal of Legal Studies
Law & Contemp. Problems	Law and Contemporary Problems
Linden	Studies in Canadian Tort Law (Toronto, 1968), ed. by Dr. Allen M. Linden
L.Q.R.	Law Quarterly Review
McGregor	McGregor on Damages (London, 13th ed., 1972), by Dr. Harvey McGregor, Q.C.
Malaya L.R.	Malaya Law Review
Man. R.	Manitoba Reports
Mass.	Massachusetts Reports
Megarry	The Law of Real Property (London, 4th ed., 1975), by The Hon. Sir Robert Megarry and Professor H.W.R. Wade, Q.C., LL.D., D.C.L., F.B.A.
Millner	Negligence in Modern Law (London, 1967), by M.A. Millner
M.L.R.	Modern Law Review
N.E.	North Eastern Reporter
New England L. Rev.	New England Law Review
N.I.	Northern Ireland Reports
North, Animals	The Modern Law of Animals (London, 1972), by Peter M. North, Esq., D.C.L.
North, Occupiers' Liability	Occupiers' Liability (London, 1971), by Peter M. North, Esq., D.C.L.
N.S.W.R.	New South Wales Reports
N.W.	North Western Reporter
N.Y.	New York Reports
N.Y.U.L.R.	New York University Law Review
N.Z.L.R.	New Zealand Law Reports
N.Z.P.C.C.	New Zealand Privy Council Cases
N.Z. Recent Law	New Zealand Recent Law
Okla. L. Rev.	Oklahoma Law Review
O.L.R. or O.R.	Ontario Law Reports
Osgoode Hall L.J.	Osgoode Hall Law Journal
Otago L.R.	Otago Law Review
P. or Pac.	Pacific Reporter
Pollock	Pollock's Law of Torts (London, 15th ed., 1951), by P.A. Landon
Pollock & Maitland	The History of English Law (Cambridge, 2nd ed. Reissued, 1968, 2 vols.), by Professor Sir Frederic Pollock, Bt, LL.D., and Professor F.W. Maitland, LL.D.
Prosser	Handbook of the Law of Torts (St Paul (Minnesota), 4th ed., 1971), by Professor William L. Prosser
Q.S.R.	State Reports, Queensland
Russell	Russell on Crime (London, 12th ed., 1964, 2 vols.), by J.W. Cecil Turner, LL.D.

Salmond	Salmond on the Law of Torts (London, 17th ed., 1977), by Professor R.F.V. Heuston, D.C.L.
S.A.L.R.	South Australian Law Reports
S.E.	South Eastern Reporter
S.R.(N.S.W.)	State Reports New South Wales
Stanford L.R.	Stanford Law Review
Street	The Law of Torts (London, 6th ed., 1976), by Professor Harry Street, Ph.D., LL.D.
S.W.	South Western Reporter
Tas.S.R.	Tasmanian State Reports
Tex.L.R.	Texas Law Review
Tulane L.Rev.	Tulane Law Review
U. Chi. L.Rev.	University of Chicago Law Review
U. of Pa. L.R.	University of Pennsylvania Law Review
U. Pitts L.Rev.	University of Pittsburgh Law Review
U.S.	United States Supreme Court Reports
V.L.R. or V.R.	Victorian Reports
W.A.L.R. or W.A.R.	Western Australian Reports
Weir	A Casebook on Tort (London, 3rd ed., 1974), by Tony Weir
Wend. (N.Y.)	Wendell's New York Supreme Court Reports
Williams, Animals	Liability for Animals (Cambridge, 1939), by Professor Glanville L. Williams, Ph.D., LL.D.
Williams, Joint Torts	Joint Torts and Contributory Negligence (London, 1951), by Professor Glanville L. Williams, Ph.D., LL.D.
Winfield	Winfield and Jolowicz on Tort (London, 10th ed., 1975), by Professor W.V.H. Rogers
W.I.R.	West Indian Reports
W.N.(N.S.W.)	Weekly Notes (New South Wales)
W.W.R.	Western Weekly Reports
Yale L.J.	Yale Law Journal

Note: British Law reports have not been cited in this list of abbreviations.

PART I:

INTRODUCTION

In 1949, Newark began his classic article on nuisance with these words:[1]

> "Twelve years of lecturing on the Law of Tort have led to the conclusion that the tort of nuisance is the least satisfactory department of that subject, both to teacher and student. There are problems -- and tough problems -- in other departments; but these latter problems are not difficult to state and the methods of approach to a solution are reasonably easy to discern. In nuisance it is different, and the truest dictum in the books is that of Erle C.J. when he said that the answer to the question, What is a nuisance? is 'immersed in uncertainty'."

Twenty-four years later, Eekelaar, in his major reformulation of the principles of liability in nuisance, admitted that "we seem as far from clarity as ever".[2] It is the aim of this thesis to lift nuisance from its ignominious position at the bottom of the league table.

(a) The Scope of the Thesis

The thesis is concerned with the law of private nuisance and the rule in Rylands v. Fletcher. It examines the principles of liability and the defences available in nuisance and the relationship of Rylands v. Fletcher to nuisance and negligence.

In Part I, the scope and limits of the thesis are set.

In Part II, the implications of the maxim, sic utere tuo ut alienum non laedas, on which nuisance is said to be based,[3] are explored. The maxim suggests the two elements of the tort: a use of land by A and an injury to the land of B.

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[1] "The Boundaries of Nuisance", 65 L.Q.R. 480, 480.

[2] "Nuisance and Strict Liability", (1973) 8 Ir. Jur. 191, 191.

[3] Aldred's Case (1611) 9 Rep. 57b, 59a; Tenant v. Goldwin (1705) 2 Ld Raym. 1089, 1092; Sedleigh-Denfield v. O'Callaghan [1940] A.C. 880, 898.

Although most academics deny that both those elements are of relevance to nuisance, it will be submitted here that both are relevant. Part II also examines the question of the defendant's state of knowledge and the relevance of whether or not harm is foreseeable. This necessarily involves a discussion of the relationship between nuisance and negligence. Finally, there is an examination of the remedies available: damages (including consequential damages), injunctions, and injunctions quia timet.

Part III is concerned with the rule in Rylands v. Fletcher. The first chapter analyses at length the counsel's arguments at all three stages of reported hearings, and then seeks to interpret the judgments delivered in the light of those arguments. It will be shown that Blackburn J.'s "true rule of law" is applicable to the law of nuisance as a whole. Alternative explanations of the rule are also investigated.

Part IV deals with the defences to nuisance (and, by implication following the conclusions in Part III, to Rylands v. Fletcher). These defences are analysed in the light of the juristic basis of the nuisance action as revealed in Part II.

The thesis, therefore, sets out step by step the establishment of liability in nuisance, then explores the relationship of nuisance and Rylands v. Fletcher, and then turns to the defences available.

(b) A Summary of the Main Conclusions

The main conclusions of the thesis are:

(1) All cases of nuisance can be resolved in accordance with the "state of affairs" concept. The traditional divisions

between "activities" and "conditions on land", and between "creation of a nuisance" and "continuance or adoption of a nuisance" are regarded as misleading.

(2) The appropriate defendant is the occupier of the land on which the state of affairs is maintained. "Occupier" should be construed widely, and there may be more than one occupier of the land. Prima facie, the appropriate defendant will be an owner in occupation, a lessee, or a licensor. Frequently, however, a lessor may be given rights of control over the land by the terms of the lease; less often, licensees and even independent contractors may be given sufficient control by the terms of their licences or contracts respectively.

(3) Highway authorities have sufficient control over certain conditions on the highway to justify their being held liable in nuisance, but members of the public using the highway can never be liable in nuisance. The "watching and besetting" cases can be explained in other ways.

(4) The defendant must knowingly or with means of knowledge have maintained on his land the state of affairs which causes harm and the harm which results to the plaintiff from that state of affairs must have been foreseeable. But negligence is never an essential ingredient in the formulation of nuisance liability. There is no distinction between the so-called "intentional nuisance" and the "negligent nuisance" cases.

(5) Nuisance protects an occupier's right to enjoyment of land. This right comprises a number of subsidiary rights, such as the right not to have one's land flooded or invaded by fumes or made uninhabitable by noise. An occupier has no right to the protection of extraordinary or abnormally sensitive

uses.

(6) The plaintiff must have suffered "sensible harm". Where harm is difficult to measure (i.e. where the harm is not physical damage to the land or chattels), it will be necessary to investigate the plaintiff's locality to see whether the harm suffered is "sensible".

(7) An occupier may recover for damage to his chattels or injury to his animals and person either by way of consequential damages or by defining the right not to have one's chattels, animals, or person harmed as part of the overall right to enjoyment of land.

(8) Rylands v. Fletcher is but an example of a nuisance action, and exactly the same rules and principles apply as in nuisance.

(9) The main defence is ordinary use. A defendant must establish not only that the state of affairs on his land was ordinary but also that his activity or omission to act was in the circumstances reasonable. There are certain tests for determining "ordinariness" and "reasonableness".

(10) There is no special principle applicable to "natural" conditions on land. These cases are all determined in accordance with the general defence of ordinary use.

(11) Three other defences can be justified; statutory authority, consent, and contributory negligence. To rely on the first, the defendant must prove that the legislature intended to confer an immunity from liability, that he comes within the authorisation, and that he has exercised the authority reasonably. To rely on the second, the defendant must prove that the plaintiff, explicitly or impliedly, consented to the risk posed by the defendant's

state of affairs. (If the state of affairs is of "common benefit", consent to the risk will often be implied.) Contributory negligence may be shown if the plaintiff has put part of his land to an extraordinary use and has thereby contributed to the harm suffered on another part of his land which was being put to an ordinary use.

(12) Act of a stranger, Act of God, coming to the nuisance, prescription, and the Fires Prevention (Metropolis) Act 1774, s.8 are all unjustifiable defences.

(c) Two Semantic Difficulties

Two terms have caused commentators much difficulty. They are "strict liability" and "nuisance". They are now defined.

(i) "Strict Liability"

It is generally agreed that "strict liability" does not mean "absolute liability", for "there are too many exceptions ... for the adjective 'absolute' to stand well".[1] Windeyer J. has said that "strict liability" should be taken as meaning "that neither an intention to do harm nor negligence resulting in harm is necessary for liability".[2]

On the other hand, Eekelaar has written that a person is strictly liable "if he is legally responsible for a state of affairs, the causes of which he did not know nor could

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[1] Benning v. Wong (1969) 43 A.L.J.R. 467, 485; Eekelaar, 8 Ir. Jur. 191, 192.

[2] Benning v. Wong, 43 A.L.J.R. 467, 485. This was the definition adopted by the Royal Commission on Civil Liability and Compensation for Personal Injury: Cmnd. 7054, para. 71.

reasonably have known".[1]

In this thesis, "strict liability" is used in the sense ascribed to it by Windeyer J. and the Royal Commission, although that does not mean that Eekelaar's definition is wrong. The advantages of Windeyer J.'s test are that it sets strict liability apart from the intentional torts and negligence and yet it does not preclude the possibility of knowledge on the defendant's part and foreseeability of harm being relevant. The disadvantage with Eekelaar's definition is that nuisance and Rylands v. Fletcher, as they are defined in this thesis, could not be termed torts of "strict liability", and yet neither could liability in them be said to hinge on "intention" or "negligence". Nuisance would be thrown into no man's land. Indeed, does any action come within Eekelaar's definition of strict liability?

It is submitted that the apparent conflict between Lord Simonds's view that liability in nuisance is strict[2] and Lord Wright's that it is not[3] is explicible: Lord Simonds was using what might be called the "Windeyer" definition of strict liability, while Lord Wright was using the "Eekelaar" definition. There is no difference between Read's case[4] and Sedleigh-Denfield's case[5] as to the principles applicable to nuisance liability. Thus, when it is asserted in this thesis that liability in nuisance is strict, it must always be remembered that "strict" is being used in the "Windeyer" sense.

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[1] 8 Ir. Jur. 191, 191.

[2] Read v. J. Lyons & Co. Ltd [1947] A.C. 156, 183.

[3] Sedleigh-Denfield v. O'Callaghan [1940] A.C. 880, 904.

[4] [1947] A.C. 156.

[5] [1940] A.C. 880.

(ii) "Nuisance"

Quite apart from the confusion between public and private nuisance,[1] there has been much disagreement as to what the word "nuisance" means and as to how it should be used within the tort of private nuisance. Some have concluded that it is incapable of exact definition.[2]

Professor Street has isolated three ways in which the word "nuisance" is used. The first meaning of "nuisance" is to give a factual description of conduct or conditions on land; secondly, "nuisance" may mean the damage caused; and thirdly, it may be used to connote "legal liability".[3] An example may help. A's dog barks all night every night, and thereby keeps A's neighbour, B, awake. If the dog is kept in a kennel on A's property, there is no doubt that A will be liable to B in nuisance.[4] Is keeping the dog the nuisance? Is the noise the nuisance? Or is A liable in nuisance because he has maintained on his property a state of affairs which has impaired B's enjoyment of his land? It may seem academic to try to define exactly which is the correct use of the word "nuisance": after all, A is liable to B whether we call the keeping of a dog the nuisance, the noise the nuisance, or A's maintenance of his property so as to cause harm to B nuisance.

But suppose the dog climbs through a hole in the fence and then barks all night under B's window. It has been said

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[1] See p. 11 et seq.

[2] Bamford v. Turnley (1862) 3 B. & S. 62, 79; Harrison v. Good (1871) L.R. 11 Eq. 338, 351; Pwllbach Colliery Co. Ltd v. Woodman [1915] A.C. 634, 638.

[3] Street, p. 216; see too Salmond, p. 52.

[4] See Broder v. Saillard (1876) 2 Ch.D. 692 (horses); Leeman v. Montagu [1936] 2 All E.R. 1677 (roosters).

that "[t]he nuisance must [arise] elsewhere than in or on the plaintiff's premises".[1] Is A now not liable? Certainly, the source of the noise -- the dog -- is on the plaintiff's premises. Certainly, too, the noise is created there. But A will be liable in nuisance if "nuisance" is used in the third sense suggested. A's "fault" is in allowing holes to develop in the fence: he has maintained his property in such a way that harm was caused to his neighbours, and that leads to his being held liable in nuisance.[2]

It is submitted that "nuisance" should be used only in the third sense, that is to connote legal liability. This was Keeton's conclusion too:[3]

> "[T]he term 'nuisance' has been employed with a variety of meanings. Sometimes, for example, it is used to describe the activity or condition that results in the tortious invasion, whereas at other times it is used to denote the tortious invasion that results from the activity. I prefer to use it as the name for a kind of tort, distinguishable from the tort of trespass. Thus, the term includes both the elements of wrongful conduct and the consequences that must follow."

To use "nuisance" only in the third sense does not mean that the source of the damage or the way in which the damage is caused is irrelevant; it merely emphasises that the true nature of nuisance is not to be found by compiling lists of conditions or activities which have led to liability or lists of the ways in which damage has been caused. That it was a drain which caused the flooding in the Sedleigh-Denfield case[4] does not mean that all drains are nuisances or

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[1] Salmond, p. 51; Hooper v. Rogers [1975] Ch. 43, 50.

[2] See Clearlite Holdings Ltd v. Auckland City Corporation [1976] 2 N.Z.L.R. 729, 739.

[3] "Trespass, Nuisance, and Strict Liability", (1959) 59 Col. L. Rev. 457, 464.

[4] [1940] A.C. 880.

are "artificial contrivances giving rise to liability in nuisance"; nor is every flood a nuisance or "damage giving rise to liability in nuisance".

As well, only when "nuisance" is used in the third sense does one get the right emphasis on both the condition maintained by the defendant and the harm caused to the plaintiff. When "nuisance" is used in the first sense, all the emphasis is on the defendant: the nuisance is his conduct or the conditions on his land. Yet one certainly cannot ignore "the nature of the interest adversely affected", which some say is more important than "the motivation or form of the act which produced the interference".[1] On the other hand, when "nuisance" is used in the second sense, all the emphasis is on the plaintiff: attention is focussed on the damage which the plaintiff has suffered. Yet such an emphasis ignores what some call "the essence of nuisance", namely "a condition or activity which unduly interferes with the use or enjoyment of land",[2] and the fact that a nuisance action cannot be founded unless the defendant is at fault in some way (although he need not be negligent).[3] The truth is that both the defendant's activity and the plaintiff's harm are important, neither more than the other. If "nuisance" is used carefully only in this third sense, much of the confusion which has plagued the tort may be avoided.

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[1] McLaren, "Nuisance in Canada", in Studies in Canadian Tort Law, (1968), ed. Linden, p. 355; Prosser, p. 573 et seq.; Buxton, "The Negligent Nuisance", (1966) 8 Malaya L.R. 1, 12-14; Clearlite Holdings Ltd v. Auckland City Corporation [1976] 2 N.Z.L.R. 729, 739.

[2] Clerk, para. 1391.

[3] The Wagon Mound (No. 2) [1967] 1 A.C. 617, 639.

(d) The Limits of the Thesis

No apology is made for the fact that this thesis is, on the whole, but a detailed exposition of the principal areas of difficulty in nuisance and Rylands v. Fletcher, with suggestions as to how these difficulties should be resolved. While this thesis does not purport to be a jurisprudential study of the philosophy of nuisance, yet it tries to eschew the conventional textbook approach of rules, exceptions to rules, and exceptions to exceptions, with no analysis as to what the rules are trying to achieve. For various reasons, including limitations on length, the thesis concentrates on solving particular difficulties within a general, coherent framework; this framework is based on the assumption that the tort can be justified, whether on historical, social or economic grounds. Brief arguments in favour of that assumption are given at the end of this chapter.[1]

Four specific limits on the thesis' scope are now set.

(i) Statutory Nuisance, Public Nuisance, and Private Nuisance

Although the first part of the title of this thesis is, "The Law of Nuisance", this thesis does not deal with either statutory nuisance or public nuisance. It is concerned only with "private nuisance", or, as it is more commonly called, "nuisance". Statutory nuisance and public nuisance have nothing in common with private nuisance, except the word "nuisance", which is unfortunate, and the fact that, on certain occasions, the same facts may give rise to liability in public or statutory nuisance as well as private nuisance. Thus, it is not because of limitation of space that statutory

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[1] See p. 19 et seq.

nuisance and public nuisance are not discussed; it is because they hinder understanding of the real nature of the private nuisance action. It is as well to define statutory nuisance and public nuisance so as to underline the difference between them and private nuisance.

Every statutory nuisance is a criminal offence created by statute. Certain statutory nuisances are defined in the Public Health Act 1936,[1] among other statutes.[2] To be guilty of a criminal (or statutory) nuisance, the defendant must have committed an unlawful act or omitted to discharge a legal duty, such act or omission usually being one which affects the public health or safety.[3] It is regrettable that the term "nuisance" is used at all, because not every statutory nuisance is a public nuisance[4] or, of course, a private nuisance. This thesis is concerned with the law of tort, not the criminal law, and so statutory nuisances fall outside its ambit. Had the offence been called "unlawfully

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[1] See especially, s. 92.

[2] e.g. Clean Air Act 1956, s. 16 (smoke); Control of Pollution Act 1974, s. 58 (noise or vibration).

[3] Great Western Rail. Co. v. Bishop (1872) L.R. 7 Q.B. 550; Malton Board of Health v. Malton Manure Co. (1874) 4 Ex.D. 302, 306, per Stephen J. In New Zealand, every one commits criminal nuisance who does an act which he knows will endanger human life, safety, or health: Crimes Act 1961 (N.Z.), s. 145; Attorney-General v. Abraham and Williams Ltd [1949] N.Z.L.R. 461, 484. But sometimes, the wording of the statute may prescribe a wider test. For instance, under the Public Health Act 1936, s. 92 (a), it is an offence to own premises which are in such a state as to be prejudicial to the comfort of the neighbourhood (although not prejudicial to health): The Bishop Auckland Local Board v. The Bishop Auckland Iron and Steel Co. Ltd (1882) 10 Q.B.D. 138, 141; Salford City Council v. McNally [1976] A.C. 379, 389; National Coal Board v. Thorne [1976] 1 W.L.R. 543, 547.

[4] Salford City Council v. McNally [1976] A.C. 379, 390.

causing harm to the public health or comfort", no one would have suspected that it had any connection with "nuisance".

Every public nuisance is a common law crime: there is a strong affinity between statutory nuisances and public nuisances.[1] A public nuisance is an offence against the public; one commits the offence by either doing a thing which tends to the annoyance of all the Queen's subjects or neglecting to do a thing which the common good requires.[2] The list of crimes amounting to public nuisances is long and varied: eavesdropping (and consequently framing slanderous and mischievous tales), being a common scold or a night-walker, spreading contagious diseases, bringing a horse infected with glanders into a public place, supplying unwholesome food, causing serious public discomfort or injury to health by smoke, stench, or effluvia, suffering disorders in a public house, keeping a brothel or a common gaming-house -- the list seems endless.[3] The common feature of these various crimes is annoyance to the public in general. Today, public nuisances are met by an indictment[4] or by an action by the Attorney-General or a local authority[5] where an

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[1] Indeed, many statutory nuisances are but common law public nuisances codified.

[2] 4 Bl. Com. 166; Russell, vol. 2, p. 1387.

[3] See generally, Russell, vol. 2, p. 1387 et seq.

[4] The old remedies in court leets have fallen into disuse and the Sheriff's Tourn was abolished by the Sheriffs Act 1887, s. 19(2).

[5] A local authority which takes proceedings in respect of a public nuisance is no longer bound to sue on the relation of the Attorney-General: Local Government Act 1972, s. 222 (1)(a), overruling Prestatyn Urban District Council v. Prestatyn Raceway Ltd [1970] 1 W.L.R. 33: see Solihull Metropolitan Borough Council v. Maxfern Ltd [1977] 1 W.L.R. 127.

injunction is desired to put an end to the public nuisance.

Since the sixteenth century, a private individual has had a right of action against the criminal who has caused the public nuisance if he can prove that he has suffered particular damage other than and beyond the general inconvenience and injury suffered by the public.[1] It is not unusual for a person injured by a crime to have a civil remedy against the criminal. This is because "most crimes are torts".[2] For instance, the victim of criminal violence can sue the wrongdoer in trespass; the victim of theft can sue the wrongdoer in the tort of conversion. However, as the crime of public nuisance is, by definition, an annoyance to the public at large, it would be irrational togrant a private remedy to every victim of this crime, for every member of the public could bring an action: this point was made by Baldwin C.J. in a case in Common Pleas in 1535.[3] For this reason, the civil remedy in the case of this particular crime was limited to such members of the public as had suffered special harm as a result of the crime: thus did Fitzherbert J. decide. From this case the modern action in tort based on the crime of public nuisance has developed. This thesis is not concerned with this civil action: that action would be properly dealt with in a study of private remedies based on public wrongs.[4]

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[1] Y.B. 27 Hen. 8, Mich. pl. 10.

[2] Chapman v. Honig [1963] 2 Q.B. 502, 523.

[3] Y.B. 27 Hen. 8, Mich. pl.10; see 65 L.Q.R. 480, 483.

[4] See Thayer, "Public Wrong and Private Action", (1914) 27 Harv. L. Rev. 317 and Weir, Chapter 3 - "Crime and Tort".

The tort of nuisance (or private nuisance, to distinguish it from the civil action based on the crime of public nuisance) has quite a different history. Disseisina, transgressio, and nocumentum covered the three ways in which a man might be interfered with in his rights over land. Wholly to deprive a man of the opportunity of exercising his rights over land was to disseise him, for which he might have recourse to the assize of novel disseisin. To trouble a man in the exercise of his rights over land without going so far as to dispossess him was a trespass, if the act was done on the plaintiff's land, or a nuisance, if the act was done off the plaintiff's land. The remedies were an action of trespass or the assize of nuisance respectively.[1] It is from the assize of nuisance that the modern action has developed.[2]

A layman might say that he could see no similarity at all between public nuisance and private nuisance: he would be right. How then has the confusion arisen between them? To obstruct or hinder the free passage of the public along the highway has long been a crime, the crime of public nuisance. In keeping with the development of that crime and the civil remedies based on it, the courts have allowed a private individual to sue the person who obstructed the highway if he could show that he had sustained particular damage other than and beyond that suffered by the public.[3]

An action in private nuisance could be brought, from the very early days, if an individual had suffered an inter-

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[1] Newark, 65 L.Q.R. 480, 481.

[2] Sedleigh-Denfield v. O'Callaghan [1940] A.C. 880, 902.

[3] R. v. Cross (1812) 3 Camp. 224, 227; Benjamin v. Storr (1874) L.R. 9 C.P. 400.

ference with an easement or profit;[1] the case most commonly found involved the interference with a private right of way over another's tenement. Such a case has a superficial resemblance with a case involving the interference with the public's right of way along a highway. Because of that, at times cases involving a private right of way have been cited in cases involving the public highway, and vice versa, with the result that public nuisance and private nuisance have become hopelessly entangled.[2] Each action was an advantage to the law; the error was in the assumption that the action for interference with rights over land should have anything in common with an action based on the crime of causing annoyance to the public.

Most text-writers acknowledge that private nuisance and public nuisance "are not in reality two species of the same genus at all",[3] but none, with the laudable exception of

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[1] See p. 165 et seq.

[2] "[T]he apparent uncertainty in which the textbook authors leave the matter, seems to me to arise, at least in part, from the frequent use in the cases and in the texts of the word 'nuisance' when 'private nuisance' or 'public nuisance' are being discussed ...": Howard Electric Ltd v. A.J. Mooney Ltd [1974] 2 N.Z.L.R. 762, 766. The defendant's argument in Matheson v. Northcote College Board of Governors [1975] 2 N.Z.L.R. 106 shows how muddled public and private nuisance can become. Denning L.J.'s "simplification" of the distinction between private and public nuisance has not helped: Attorney-General v. P.Y.A. Quarries Ltd [1957] 2 Q.B. 169, 190-191.

[3] Salmond, p. 49; Winfield, p. 319; Clerk, paras. 1392-1393; Street, p. 217; Hepple & Matthews, p. 386; Higgins, p. 152; Friedmann, "Modern Trends in the Law of Torts", (1937) 1 M.L.R. 39, 43, footnote 6.

Weir,[1] takes the logical step of treating the two actions as distinct. Public nuisance -- especially "nuisance on the highway" -- is tacked on to the chapter on private nuisance, as though it were in some way derived from that action; only Weir treats it in the chapter dealing with civil actions arising from breaches of statutory duties or from common law crimes.

(ii) The History of Nuisance

This thesis is not concerned with the history of the nuisance action, except in so far as that history explains the modern position. Windeyer J. said in Benning v. Wong:[2]

> "There is never much to be gained by searching in mediaeval law for presages of modern rules, interesting though such doctrinal genealogy may be."

Indeed, too much concern with the history of an action may lead one to conclusions which ill befit the action in the modern world. For instance, Newark, who traced well the history of nuisance in his famous article,[3] concluded that personal injuries and damage to chattels were not recoverable in nuisance, because they had never been recovered

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[1] Weir, chap. 3 (public nuisance) vs. chap. 10 (private nuisance).

[2] 43 A.L.J.R. 467, 484.

[3] 65 L.Q.R. 480; although his conclusion that the crime of public nuisance was born out of the superficial resemblance between an interference with an easement (the tort of private nuisance) and the interference with the public's right of passage along the king's highway is doubtful (see at 482). The civil action based on the crime may have developed from such a resemblance, but the crime itself is of very early origin: Pollock & Maitland, vol. 2, pp. 519-520; Morris, The Mediaeval English Sheriff to 1300, (1927), pp. 220-221.

before 1535.[1] But because Glanvil and Bracton would have been surprised if an occupier had been able to recover in nuisance for personal injuries suffered on his land seems insufficient reason for preventing an occupier from recovering damages for such injuries today. Thus, there is some validity in Eekelaar's charge that Newark's "attempt to introduce consistency and rationality failed" because "he set out principles which were calculated to restore the common law to the purity which should have prevailed under the forms of action [but] events had already overtaken him".[2]

However, Eekelaar's complete disregard for the history of the action led to what he himself conceded was only a "rough reformulation"[3] of the incidence of liability in nuisance. It is suggested that the best approach is by the middle route: history should be a guide but not one's master.

(iii) Special Principles

Often, special rules are stated as being applicable to cases where harm has been caused by particular "things", such as water or fire.[4] Indeed, the editors of Clerk & Lindsell

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[1] 65 L.Q.R. 480, 489. It was then, according to Newark, that nuisance was diverted from its course by Fitzherbert J. But Fitzherbert J.'s judgment was unexceptionable: why should someone suffering special damage as the result of another's crime not be able to sue for it?

[2] 8 Ir. Jur. 191, 191.

[3] Ibid., 202.

[4] See, e.g., Clerk, para. 1437 et seq.; Fleming, p. 414.

see fit to consider water, fire, gas, electricity, explosives, poisons, aircraft, and nuclear installations as independent units within a chapter of "Rylands v. Fletcher liability".[1] It is submitted that this "object by object" approach is fallacious, and that all the special principles can be explained in terms of the general principles suggested in this thesis. For instance, the "common enemy" rule, whereby a lower owner may put up barriers and pen back surface water from above,[2] is but an application of the "ordinary and reasonable use" concept of nuisance.[3] There is no reason why a "water" case should not be cited in a "gas" case, and why both should not be of use in a "smells" case. It is not proposed to investigate all these "special principles" because, once the general principles are made clear, it will be obvious how these special principles should be dealt with and explained.

(iv) A Case for Nuisance

This thesis is written on the assumption that a tort of nuisance, in some form or other, is useful and can be justified. To explore fully the social and economic arguments for and against a tort of nuisance would unduly increase the length of this thesis and would detract from its main purpose which is to place nuisance on a more coherent footing by a clear enunciation of general principles. But some arguments

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[1] There is perhaps justification in the case of fire, for the old action of trespass on the case for the escape of fire has a distinct history from nuisance and Rylands v. Fletcher. Still, it is now considered to come within those principles: see p. 272.

[2] Gerrard v. Crowe [1921] 1 A.C. 395; Maxey Drainage Board v. Great Northern Railway (1912) 106 L.T. 429.

[3] Newsom Q.C., "River Pollution and the Law", (1972) 2 Otago L.R. 383, 384.

should be briefly stated to show that the assumption is not without foundation. These arguments do not prove that there must be a tort of nuisance; but they do suggest that the argument should be left open and a stay of execution granted. This may seem an unnecessarily timid approach, but it must be acknowledged that there are many who "think that the demise of most of the law of torts is imminent".[1] Nuisance in particular among the tortious actions has been vilified, but that criticism largely stems from the seeming lack of principles on which the action is based.

The principal advantage of nuisance is that it is based on strict liability: the plaintiff does not have to prove that the defendant intended to cause him harm or even that the defendant was negligent.

To fly the nuisance ensign on the mast of strict liability may seem foolish in view of the criticism of strict liability as being in some way "unfairer" than fault or negligence liability; but it is submitted that this is no folly, for strict liability has certain definite advantages in some situations.

Strict liability was known to the law long before the nineteenth century.[2] But during that century, the courts, perhaps to protect the industrial and manufacturing entrepreneur against liability for risks created by his undertaking for which, in terms of earlier tort law, he would have been answerable, created a new tort based on fault.[3]

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[1] Street, p. v; Professor Street is not among them.

[2] Holdsworth, vol. 8, p. 468; Benning v. Wong, 43 A.L.J.R. 467, 487.

[3] Millner, p. 190.

Negligence became the normal requirement of responsibility in tort, indeed to such an extent that some saw negligence as engulfing most other torts, in substance if not in name.[1] But, as Windeyer J. has stressed,[2] "to look upon strict liability as anomalous and unjust [is] to mistake present values as well as past history".

It is not suggested that strict liability should always be the prevalent theory, but it is submitted that, in certain circumstances, it is the more logical and the juster theory of liability. One such set of circumstances arises when A's animal harms B. If A keeps a tiger (which everyone knows is a dangerous species) or a dog which he knows bites strangers, then it seems right that he should bear the burden if that animal attacks B. He should keep the animal at his peril. It is "a risk against which he can more conveniently insure than can the potential victim".[3] Such arguments appealed to the Law Commission in its 1967 report on Civil Liability for Animals[4] and are reflected in the Animals Act 1971.

Similarly, the Commission considered that harm caused by the straying of cattle should remain an instance of strict liability. This is what the farming community wanted, because it was simple and allowed the settlement of disputes between neighbours without recourse to litigation.[5]

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[1] Friedmann, 1 M.L.R. 39, esp. at 61.

[2] Benning v. Wong, 43 A.L.J.R. 467, 487.

[3] Law Com. No. 13, s. 14.

[4] Law Com. No. 13.

[5] Ibid., s. 62; Report of the Goddard Committee (1953), Cmnd. 8746, s. 3; North, Animals, p. 11.

It is submitted that strict liability is the appropriate concept in the "neighbour" situation too. The issues raised by a conflict between two neighbouring land occupiers are quite different from the issues raised by a collision between two ships on the high seas. Neighbours have to live beside one another when the dispute is settled: that process is likely to prove more difficult if the dispute has required one party to make allegations of fault and negligence against the other. Indeed, litigation should be avoided if at all possible in "neighbour" situations, for nothing causes ill-feeling more than a battle in court. The best way of reducing the possibility of litigation is by reducing the number of litigiable issues. The most litigiable issue in the law of torts is whether the defendant wrongdoer has been in breach of a duty of care. Strict liability, of course, removes that issue and thereby makes pre-court settlement more likely.[1]

Strict liability may also be justified in a situation where the defendant is in a much better position than the plaintiff to know about the condition or activity causing the harm. If in such circumstances the plaintiff had to show fault or negligence on the defendant's part, then his case might often fail solely for lack of evidence, the facts being within only the defendant's purview.[2] As well, the

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[1] Ver Steeg, "Strict Liability and Judicial Resources", (1974) 3 J. Leg. Studies 217, 217; Posner, "An Economic Approach to Legal Procedure and Judicial Administration", (1973) 2 J. Leg. Studies 399; Ogus and Richardson, "Economics and the Environment: A Study of Private Nuisance", [1977] C.L.J. 284, 315.

[2] Report on Civil Liability for Dangerous Things and Activities, Law Com. No. 32, p. 21, footnote 74; N.Z. Forest Products Ltd v. O'Sullivan [1974] 2 N.Z.L.R. 80, 88; Keeton, "The Lessons of the Torrey Canyon - English Law Aspects", (1968) 21 Current Legal Problems 94, 98.

defendant in such circumstances is in a better position than the plaintiff to insure against harm caused by the condition he has created on his land. If a local authority carries gas in pipes under its streets, it can easily insure itself against the risk of gas escapes. Why should others insure themselves against harm when they may not even know the gas pipes are near their land and when they may receive none of the benefit of the risky activity?[1]

Thus, the conclusion is drawn that strict liability can be justified in the "neighbour" situation and in cases where the defendant has superior knowledge and is in the best position to cope with a potentially harmful set of circumstances. Nuisance, of course, is a tort where both these conditions apply; it is, therefore, entirely appropriate that nuisance should be based on strict liability. The attempt to merge nuisance with negligence, on the ground of fairness or rationalisation or whatever, is therefore strongly resisted. The main justification for the nuisance action is that negligence is irrelevant to liability.

But nuisance is under attack not only from negligence but also on three other fronts. It is conceded that these thrusts all have some validity; but counter-arguments can be made and should be made so that the case for nuisance does not go by default. At the end of the day, it is concluded that nuisance is worth preserving; its usefulness remains.

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[1] Benning v. Wong, 43 A.L.J.R. 467, 487; Thayer, "Liability without Fault", (1916) 29 Harv. L.Rev. 801, 802; Friedmann, 1 M.L.R. 39, 53; Jolowicz, "Liability for Accidents", [1968] C.L.J. 50, 61.

(1) Realignment of Tortious Liability

Some think that not only nuisance should be banished, but that all the existing actions in tort ought to be subsumed within new general principles of liability. Some are modest: Dr Harris saw only an alteration or redrawing of boundaries between the torts as necessary.[1] Others are more adventurous: Friedmann saw the need for a complete "rationalization" and "co-ordination" of the torts.[2] While Friedmann thought it premature to suggest one general formula of tortious liability, he did think torts could be divided into two principal groups: torts determined by the injured right and torts determined by a responsibility arising from duty based on a special social relation.

The most notable feature of these writings is their singular failure to win acceptance. It is not that the forms of action "still rule us from their graves";[3] it is rather that the courts have yet to be convinced that such general principles present the best way to resolve conflicts efficiently and fairly. The disadvantage of "co-ordination" is that whatever rule or rules are adopted must of necessity be generalised. The more generalised a rule, the more likely that litigation is going to be necessary. For this reason, no attempt is made in this thesis to advance a broad re-formulation of tortious liability: even if that were possible, it is submitted that it is not desirable. What is desirable, however, is that the "rules" pertaining to nuisance should

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[1] Harris, Chap. 1.
[2] Friedmann, 1 M.L.R. 39, 63.
[3] Maitland, Forms of Action at Common Law, (1936), p. 2.

be clearer so that individuals (and their counsel) should be able to judge where liability should fall in most factual situations without recourse to litigation.

(2) Town Planning Legislation

It has been suggested that the role of nuisance as a means of land use regulation has been superseded by modern town planning legislation. Certainly that legislation has been of immense importance and it is impossible to imagine civilised society without some form of general planning control.[1] But the planning laws should be seen, not as competitors with the common law concept of nuisance, but rather as a complementary mode of land use regulation. The great advantage of town planning legislation is that land use can be determined on a broad scale: a city can be zoned with its industry in one section and its residential quarter in another. By this means, an individual can be forewarned about existing and prospective standards prevailing in a given area. But the advantage of nuisance is that it gives redress to an aggrieved individual who has a specific complaint of wrongful land use by a neighbour. The courts, when resolving a particular conflict of land use, should have regard to the broad standards set by the planning authorities, but should not be bound by them.[2]

As well, not all the factual situations coming within

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[1]But it should not be assumed that the application of the legislation in practice is beyond criticism: discussion with members of his wife's profession has convinced the present writer of this!

[2]Williams, "Non-Natural Use of Land", [1973] C.L.J. 310, 319.

the sphere of nuisance could possibly be swallowed up by planning legislation, however widespread that law's effect may be. Only nuisance can resolve the case where A's children scream so loudly and persistently that B is deprived of sleep.

Finally, the judges have not as yet accorded planning legislation the all-embracing status which some academic writers have given it. Town planning decisions -- whether administrative or judicial -- have been mentioned but rarely in nuisance cases,[1] and most of the text-book writers have seen fit to ignore the effects of town planning legislation in their chapters on "Nuisance".

(3) Specific Environmental Statutes

Although nuisance and Rylands v. Fletcher have attempted to compensate the victims of pollution and, by use of the injunction, to prevent pollution, it is now suggested sometimes that the so-called "environmental problem" can best be dealt with, not by a common law action as old as nuisance, but by specific statutory enactments geared to the post-industrial age.[2] Such legislation may be commendable but it cannot entirely substitute for a private common law action: that "is the only means that ensures that the polluter is made to compensate his victims".[3] First, such legislation can never be comprehensive: to pursue pollutants one by one as evidence accumulates is inadequate when new pollutants are being

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[1] See p. 305.

[2] e.g. Coal Mining (Subsidence) Act 1957; Control of Pollution Act 1974; Deposit of Poisonous Waste Act 1972; Nuclear Installations Act 1965; Merchant Shipping (Oil Pollution) Act 1971.

[3] Newsom Q.C., 2 Otago L.R. 383, 389.

produced "at an almost geometric rate".[1] Indeed, some instances of pollution simply cannot be controlled by public regulation.[2]

Secondly, reliance on governmental agencies to enforce these laws means that the laws' effectiveness is only as good as those agencies want it to be. American experience at least is to the effect that the regulated and client groups exert an effective pressure on the administrative agency in proportion to the importance of their economic function and to their organisational cohesion[3] and that the administrator develops a presumption in favour of regulation and the regulated.[4]

Thirdly, the nuisance action is armed with the injunction, "in England by far the most effective method of combating river pollution"[5] and other forms of pollution. Mr Newsom's extensive experience of pollution actions lends great weight to his conclusions:[6]

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[1] Cassell, "The Health Effects of Air Pollution and Their Implications for Control", (1968) 33 Law & Contemp. Problems 197, 197.

[2] Juergensmeyer, "Control of Air Pollution Through the Assertion of Private Rights", [1967] Duke L.J. 1126, 1155; "Aesthetic Nuisance: An Emerging Cause of Action", (1970) 45 N.Y.U.L.R. 1075, 1097.

[3] Jaffe, "The Effective Limits of the Administrative Process: A Re-Evaluation", (1954) 67 Harv. L. Rev. 1105, 1107, et seq.

[4] Ibid., 1113, et seq.; 45 N.Y.U.L.R. 1075, 1097.

[5] Newsom Q.C., 2 Otago L.R. 383, 384; Salmond, p.9.

[6] Newsom Q.C., 2 Otago L.R. 383, 384.

> "Over and over again I have seen cases in which the defendant, either a municipal sanitary authority or an industrialist, has asserted that the pollution is not curable, or not economically curable, right down to the moment when the injunction has been granted. Once that has occurred, the difficulties have vanished like the snow in springtime. [A] consulting analyst ... tells me that he has never known a case of industrial pollution where the evil was not cured in consequence of the injunction."

This suggests that the injunction may be a much stronger weapon in the fight against pollution than the heaviest fine which might be imposed by a court for a breach of a criminal statute. Thus, nuisance can be of value in environmental control.[1]

In conclusion, then, it is submitted that a case can still be made for a tort of nuisance. But that case will not succeed ultimately unless the principles of liability in nuisance, the defences to the action and the relationship of nuisance and Rylands v. Fletcher are all more satisfactorily explained than they are at present.

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[1] The rule in Rylands v. Fletcher is, of course, similarly valuable: Carroll, "The Rule in Rylands v. Fletcher: A Re-Assessment", (1973) 8 Ir. Jur. 208, 225-226.

PART II: PRINCIPLES OF LIABILITY IN NUISANCE

Chapter 1: The "State of Affairs" Concept

(a) "State of Affairs"

It has been said that liability in nuisance is based on the maxim, sic utere tuo ut alienum non laedas.[1] However, that maxim, without qualification, is misleading as to the incidence of liability today. It suggests, for instance, that any "use" of land is actionable if it results in harm to a neighbour's land, but that is inaccurate: if a "use" is ordinary and reasonable, there is no liability on the defendant for the harm caused to the plaintiff. Further, the maxim suggests that mere inaction on an occupier's part can never lead to liability in nuisance, and yet it is now well established that an occupier may be liable to a neighbour, even though he has done nothing.

For these reasons, the word "use" is not employed in this thesis. That does not mean that the maxim is wrong; on the contrary, it encapsulates rather neatly the two principal features of the nuisance action, namely that liability springs from a condition on the defendant's land and that protection is accorded to the plaintiff's enjoyment of his land. But, because of the ambiguity of the word "use" without more, it is intended here to employ another concept, which is freer of such difficulties and which has been judically recognised.

This is the "state of affairs" concept. It is not intended that "state of affairs" is or should be a term of art. What is meant by it? The state of affairs existing on land is the general condition or activity which leads to harm's being caused to a neighbour. This condition or

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[1] See p. 2.

activity may have been created by the occupier himself, by a predecessor in title, by a trespasser, or by nature. Liability springs from the maintenance of the state of affairs.

The main advantages of the concept are that it includes omissions to act on the occupier's part (which cannot be termed "uses") and that it suggests an emphasis on a general condition rather than a specific act leading to harm. Nuisance, unlike negligence, is not concerned with specific acts; it is concerned with "land use" in a broader sense. Part of the difficulty with the word "use" has been the different levels of particularity which can be assigned to it.[1] At one extreme, "use" can mean the general character of land in a planning sense: land may be used industrially or agriculturally. At the other extreme, "use" can mean the particular activity being carried out on the land in a particular way. Williams calls this "use in the narrow or negligence sense".[2]

Nuisance tries to occupy a middle ground, and it is suggested that the expression "state of affairs" imports just such a level of particularity. It is important to strike the right level of particularity because three issues are dependent upon it. First, the person who has "used" the land in the broad sense may not be the person who has "used" it in the narrow sense. Thus, the identity of the defendant will depend upon the sort of "use" or "state of affairs" with which the action is concerned.

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[1]Williams, "Non-Natural Use of Land", [1973] C.L.J. 310, 312, et seq.

[2]Ibid., 313-314.

Secondly, the defendant may have knowledge of the "use" in the broad sense, but not of the "use" in the narrow sense. If liability in nuisance is dependent upon the defendant's having knowledge of the "use" or "state of affairs", it will obviously be crucial to decide of which "use" he must have knowledge.

Thirdly, the "use" in the broad sense may be "ordinary", but the "use" in the narrow sense may not be. Thus, whether the defendant can rely on the defence of ordinary use will depend upon the level of particularity of the land "use".

The "state of affairs" concept has academic support. Professor Street thinks that the trend in recent cases has been towards the view that liability in nuisance depends on "the user of adjoining premises [being] rendered hazardous by a threat of damage which is foreseeably likely to result from [the] dangerous state of affairs".[1] Professor Heuston also supports that approach; he says that the crucial point to be determined is whether "the defendant has maintained on his premises a state of affairs which is a potential nuisance".[2]

The concept also finds judicial support. It was expressly approved by McMullin J. in Matheson v. Northcote College Board of Governors.[3] Golf-balls were being hit, fire-crackers were being thrown, and school-children often trespassed onto the plaintiffs' property, which adjoined a

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[1] Street, p. 225.

[2] Salmond, p.53.

[3] [1975] 2 N.Z.L.R. 106; on rather similar facts, see Hall v. Beckenham Corporation [1949] 1 K.B. 716, 723, where Finnemore J. adopted a similar test of liability, and Dunton v. Dover District Council (The Times, 31 March, 1977, per Griffiths J.) (children in a playground made much noise and trespassed).

school. The plaintiffs sued the school's Board in, inter alia, nuisance, alleging that the defendant had so badly supervised and controlled the school that pupils were not prevented from trespassing. Plaintiffs' counsel submitted "that the damage to the plaintiffs' property was a consequence of the state of affairs for which the board was responsible and therefore amounted to a private nuisance": McMullin J. considered that submission sound.[1] His Honour said:[1]

> "The importance of the existence of a 'state of affairs' is also stressed in Street on Torts (5th ed.) 219 under the heading 'State of Affairs'. A consideration of the cases demonstrates that in considering whether or not an actionable nuisance has been established the courts have been concerned with a state of affairs, whether it be a state of affairs which continues without intermission or whether it be a state of affairs constituted by intermittent but repetitive acts which collectively, though not individually, amount to a nuisance."

Because of the "lack of supervision and a suitable fence",[1] the plaintiffs had suffered damage. The liability stemmed from the way in which the Board had allowed harm to be caused to its neighbour by the unreasonable use of its property.

In Titus v. Duke,[2] Wooding C.J. held that the essence of private nuisance was some wrongful interference with the use or enjoyment of land or premises "by the continuance of a state of affairs ... upon other premises". Liability in nuisance, according to Windeyer J. in Hargrave v. Goldman,[3] is "founded upon a state of affairs, created, adopted, or continued by one person (other than in the reasonable and

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[1] Ibid., 112.

[2] (1963) 6 W.I.R. 135, 136.

[3] 110 C.L.R. 40, 59.

convenient use by him of his land) which, to a substantial degree, harms another person (an owner or occupier of land) in his enjoyment of his land". There are many other cases in which the defendant has been held liable in nuisance because he had maintained on his property a state of affairs which caused harm to a neighbour.[1]

It has already been said that the "state of affairs" concept is of importance in the determination of who should be sued.[2] Liability falls on the person (maintaining) the harmful state of affairs, and that person will not necessarily be the person who performs the specific act which directly causes the harm. If a cricket ball is hit for six and breaks the plaintiff's window, who should be sued?

The "state of affairs" concept leads one to the correct conclusion that the appropriate defendant is the cricket club and not the batsman at the crease.[3] The reason is that liability turns on whether or not the club has so maintained its property that damage has resulted. This is in marked distinction to the action in negligence, where the appropriate defendant is always the person whose act (in

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[1] Groat v. Edmonton [1928] 3 D.L.R. 725, 725 (an overtaxed sewage system); Pemberton v. Bright [1960] 1 All E.R. 792, 799 (blocked drain). "State of things": Sedleigh-Denfield v. O'Callaghan [1940] A.C. 880, 895; Spicer v. Smee [1946] 1 All E.R. 489, 493. "Condition of things": Irvine & Co. Ltd. v. Dunedin City Corporation [1939] N.Z.L.R. 741, 767; Mayfair Ltd v. New Zealand Properties Ltd [1940] N.Z.L.R. 190, 196. See too Leakey v. National Trust [1978] 2 W.L.R. 774.

[2] See p. 31.

[3] See, e.g., Miller v. Jackson [1977] 3 All E.R. 338.

this case, hitting the ball) caused the harm.[1] In Aldridge v. Van Patter,[2] the plaintiff, who was injured when a stockracing car driven by Van Patter left the track and crashed through a fence, sued both Van Patter and the organisers of the event. Spence J. commented:[3]

> "Which of the defendants is liable in nuisance? Again I have not found a case where the actual individual perpetrator of the nuisance was found liable and for this reason I cannot find any liability on Van Patter on this ground of nuisance."

Rather, liability must fall on the organisers of the stock-racing: they maintained the state of affairs.

There are many other cases to like effect. In Attorney-General v. Stone,[4] gipsies, whom Stone allowed to camp on his land, were dirty, noisy, and untidy, and so caused annoyance to neighbours. Yet Stone, who may well have been clean, quiet, and tidy, was the defendant: the important thing, Romer J. said, was "how the defendant Stone

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[1]The fact that "occupiers" are less transient than "actors" -- see Matheson's case, [1975] 2 N.Z.L.R. 106, 113 -- and that they are more likely to be worth suing does not detract from the argument that "occupiers" are the appropriate defendants on theoretical grounds too.

[2][1952] 4 D.L.R. 93.

[3]Ibid., 109; this case is criticised on other grounds at p. 230.

[4]12 T.L.R. 76.

allowed his land to be used".[1] Land-owners who allow the public onto their land to shoot,[2] those who run speed-ways,[3] and those who organise entertainments in a hall[4] may all be liable in nuisance, although they personally may not be responsible for the noise created. Similarly, the persons in charge of a roller-skating rink[5] and a theatre[6] may be held liable in nuisance if they have attracted disorderly people into the area by the attractions which they offer on their land. The skaters and the theatre-goers cannot be liable in nuisance, although they may well have committed trespasses.[7]

The "state of affairs" concept also explains why the occupier remains liable in the "barking dog" problem given

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[1] Ibid., 76. Some of the gipsies were also sued, although they did not appear to defend the action at trial. They were licensees of Stone; they paid for the right to occupy his land. Thus, it is quite appropriate that they too should be sued; their liability would be founded on their maintenance of a state of affairs on land over which they had certain rights. It was not suggested that the actual noise-makers (who may well have been the children or friends of the contractual licensees) would be liable in nuisance because they made the noise. See too Park v. White (1893) 23 O.R. 611 and Smith v. Scott [1973] Ch. 314.

[2] R. v. Moore (1832) 3 B. & Ad. 184; 110 E.R. 68.

[3] Bloodworth v. Cormack [1949] N.Z.L.R. 1058.

[4] Clark v. Sloane [1923] N.Z.L.R. 1129.

[5] Newell v. Izzard [1944] 3 D.L.R. 118.

[6] Lyons, Sons & Co. v. Gulliver [1914] 1 Ch. 631.

[7] As in Matheson's case, [1975] 2 N.Z.L.R. 106 and Dunton v. Dover District Council (The Times, 31 March, 1977).

earlier.[1] The owner's liability does not depend on which side of the boundary the dog barks, for he will be liable regardless. Even if the dog crosses the boundary and barks on the plaintiff's land, the defendant occupier will be liable for having maintained such a state of affairs that the dog was able to escape and so interfere with the neighbour's enjoyment. There ought not to have been holes in the fence!

(b) The Creation and Adoption of Nuisances

It has been submitted that liability flows from the maintenance of a state of affairs. The word "maintenance" is used largely because, like "state of affairs", it covers omissions as well as commissions and it places an emphasis on a general condition (which is being kept up) rather than on a specific act.

However, many of the textbooks speak not in terms of "maintenance" but in terms of "creation", "continuance", and "adoption" of nuisances. The objection to such terminology is that "nuisance" is used in what was called above[2] the first sense, i.e. to indicate the condition or activity on the defendant's land, whereas it has been suggested that it should be used only in the third sense, i.e. to connote legal liability. That of itself would not be sufficient justification for condemnation of the "creation-adoption" terminology. But the use of this expression - the "creation of the nuisance" - had led some text-writers and judges to conclude erroneously

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[1] See p. 8 and Clearlite Holdings Ltd v. Auckland City Corporation [1976] 2 N.Z.L.R. 729, 739.

[2] See p. 8.

that liability hinges on the "creation of harm"; that is to say, "nuisance" is used in the second sense.[1] The further consequence of this conclusion is that the defendant need not be an occupier; "all that is required is a positive act creating the damage".[2] As will be shown, this is incorrect.[3] But the consequences are sufficiently serious to justify the abandonment of "creation-adoption" terminology: the misinterpretation of the word "nuisance" compels it.

(c) Damage on an Isolated Occasion

It has been thought on some occasions that liability in nuisance can arise only if the interference with the plaintiff's rights has been of no short duration.[4] One of the issues in Metropolitan Properties Ltd v. Jones[5] was whether noise lasting three weeks was actionable, and in Matania v. National Provincial Bank Ltd,[6] the defendants submitted that, as the dust and noise caused by their building operations were only temporary, they were not liable in nuisance.

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[1] See, e.g., Buxton, "The Negligent Nuisance", 8 Malaya L.R. 1, 12; but Buxton does think that the "creation/continuance" terminology is misleading.

[2] Clearlite Holdings Ltd v. Auckland City Corporation [1976] 2 N.Z.L.R. 729, 740.

[3] See p. 95 et seq.

[4] See again, e.g., Buxton, 8 Malaya L.R. 1, 26.

[5] [1939] 2 All E.R. 202.

[6] [1936] 2 All E.R. 633.

Denning L.J. said in Attorney-General v. P.Y.A. Quarries Ltd:[1]

> "I quite agree that a private nuisance always involves some degree of repetition or continuance. An isolated act which is over and done with, once and for all, may give rise to an action for negligence or an action under the rule in Rylands v. Fletcher, but not an action for nuisance."

Indeed, Talbot J. went so far as to say in Cunard v. Antifyre:[2]

> "Private nuisances, at least in the vast majority of cases, are interferences for a substantial length of time by owners or occupiers of property with the use or enjoyment of the neighbouring property."

Does all this mean, therefore, that a plaintiff cannot recover in nuisance if he is injured on an isolated occasion? It is submitted:

(1) that "a private nuisance [does] always involve some degree of repetition or continuance";

(2) that damage occurring on an isolated occasion -- damage "over and done with, once and for all" -- is recoverable in a nuisance action;

(3) that there is no inconsistency between submissions (1) and (2).

The "state of affairs" concept provides the key. The maintenance of the state of affairs causing the harm in itself provides for an element of continuance. There is no additional requirement that the harm be continuous or repetitive.[3] If the "state of affairs" concept is adopted, then a number of cases where the plaintiff has recovered for damage caused by a single escape of a dangerous thing can be

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[1][1957] 2 Q.B. 169, 192.

[2][1933] 1 K.B. 551, 556.

[3]Thomas A. Street, Foundations of Legal Liability, vol. 1, p. 222.

explained:[1]

> "The truth is that all wrongful escapes of deleterious things, whether continuous, intermittent, or isolated, are equally capable of being classed as nuisances. The type of harm caused by the escape, the gravity of that harm, and the frequency of its occurrence are each relevant (but not conclusive) factors in determining whether the defendant has maintained on his premises a state of affairs which is a potential nuisance."

Examples of damage on an isolated occasion giving rise to liability in nuisance are common: a water main bursting,[2] electric wiring igniting,[3] a blocked drain causing a flood,[4] and a gas explosion.[5] While an action in nuisance quite properly did not succeed on the facts of S.C.M. (United Kingdom) Ltd v. W.J. Whittall and Son Ltd,[6] Thesiger J.'s words are of interest:[7]

> "While there is no doubt that a single isolated escape may cause the damage that entitles a plaintiff to sue for nuisance, yet it must be proved that the nuisance arose from the condition of the defendant's land or premises or property or activities that constituted a nuisance."

Lawton J. had no doubt "that an isolated happening by itself can create an actionable nuisance".[8] To hold that did not in any way conflict with the proposition that "[m]ost

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[1] Salmond, p. 53; see too Clerk, para. 1399, to similar effect.

[2] Charing Cross Electricity Supply Co. v. Hydraulic Power Co. [1914] 3 K.B. 772; Irvine & Co. Ltd. v. Dunedin City Corporation [1939] N.Z.L.R. 741.

[3] Spicer v. Smee [1946] 1 All E.R. 489.

[4] Pemberton v. Bright [1960] 1 All E.R. 792.

[5] Midwood & Co. Ltd v. Manchester Corporation [1905] 2 K.B. 597.

[6] [1970] 2 All E.R. 417.

[7] Ibid., 430.

[8] British Celanese Ltd v. A.H. Hunt (Capacitors) Ltd [1969] 2 All E.R. 1252, 1261.

nuisances do arise from a long continuing condition".[1] The defendants were held liable because of the way in which they stored their metal foil, so that "those in the neighbourhood were exposed to the risk of having their electric power cut off".[2] The plaintiffs rightly succeeded, even though this was the first "flash-over" to occur.

Furthermore, no court has refused to grant a quia timet injunction solely on the ground that there has been only "a single isolated incident up to that point in time"[3] or that only an isolated harm threatens.[4]

Thus, damage occurring on a single occasion can be redressed in nuisance, even though nuisance "involves some degree of repetition or continuance". The solution lies in the "state of affairs" concept: the very idea of continuance is inherent in the maintenance of a state of things.

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[1] Ibid., 1261.

[2] Ibid., 1262.

[3] McLaren, "The Common Law Nuisance Actions and The Environmental Battle -- Well-Tempered Swords or Broken Reeds?", (1972) 10 Osgoode Hall L.J. 505, 536; he also wrote: "It is sometimes maintained that nuisance connotes a continuing or recurring interference with the use and enjoyment of land, and therefore cannot apply where the plaintiff's claim relates to an isolated incident ... the writer is inclined to reject this contention as a general proposition."

[4] Knight v. Bolton [1924] N.Z.L.R. 806; affd. [1924] N.Z.L.R. 1043. An artificial accumulation of soil threatened to slide onto the plaintiff's lower property. Salmond J. held that the defendant was under a duty to prevent that, and specifically stated that the cause of action was in nuisance.

PART II: PRINCIPLES OF LIABILITY IN NUISANCE

Chapter 2: The Defendant

It has been submitted that liability in nuisance is dependent upon the defendant's having maintained a state of affairs which led to the harm suffered by the plaintiff. But who should be the defendant? Prima facie, the person with the power to carry out the activity which leads to the harm or the duty to prevent harm from a condition existing on his land is the occupier of that land. Lord Wright said in Sedleigh-Denfield v. O'Callaghan:[1]

> "The ground of responsibility is the possession and control of the land from which the nuisance proceeds."

But this has not been the test universally adopted. Most textbooks, for instance, say that a single test of liability is impossible; at best, they produce a set of tests, the appropriate test in a given case being dependent upon the circumstances of that case. Sometimes, the creator of the nuisance will be liable; this "creator" does not need to be an occupier of land. Sometimes, the "continuer" or the "adopter" of a nuisance will be liable; he does have to be an occupier of land. Then there are special rules for certain situations. Where the premises from which the harm emanates are leased, sometimes the landlord is held liable, sometimes the tenant, sometimes both. Professor Street declares that separate treatment is called for because of the "respective liabilities of landlord and tenant".[2] The editors of Clerk and Lindsell isolate independent contractors for special attention: in that case, liability apparently hinges on whether the employer "could reasonably have foreseen that the work he has instructed the independent contractor

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[1][1940] A.C. 880, 903.

[2]Street, p. 237.

to do was likely to result in a nuisance".[1] Professor Fleming, although conceding that "public authorities enjoy no immunity as such from ordinary tort liability",[2] nonetheless considers that the "vestigial 'nonfeasance' rule" merits separate comment, whereby drainage authorities are not accountable for pollution caused by the inadequacy of existing sewers and highway authorities are not liable for damage caused by their failure to maintain highways in proper repair.[3] While it is conceded that it is probably not the function of general textbooks on the law of torts to analyse why such miscellaneous categories requiring separate rules should exist, it is submitted, with respect to the learned writers concerned, that the traditional treatment of who can be sued is lacking in coherence.

It is now proposed to show how the test suggested here -- namely, that the person liable in nuisance is the person who has maintained the state of affairs which has caused the plaintiff harm -- is applicable whatever the facts of the case.

(a) Neighbouring Land

Originally, under the assize of nuisance, the defendant had to be the freeholder of the servient tenement,[4] but when the assize was superseded by the action on the case, it became necessary to show only that the defendant was the

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[1] Clerk, para. 1419.

[2] Fleming, p. 417.

[3] Ibid., 418.

[4] Blackstone, 3 Bl. Com. 222.

occupier (although in most cases, no doubt, he was the freeholder as well). Thus, it has been said that "nuisance is a tort arising out of the duties owed by neighbouring occupiers".[1]

Many cases have followed Lord Wright's dictum that "possession or occupation is still the test".[2] The person in possession or occupation may be at times the "creator of the nuisance", but it is submitted that his liability springs from his occupation of the land, rather than for any precise act of creation.

In the most common case, the occupier is also the freeholder or owner of the property. The expression "owner of the property" is used here to include a wide variety of factual situations. For instance, a gas company has been held to have a determinable fee over the space and soil occupied by its gaspipes, and is therefore an owner/occupier and may be sued in nuisance if gas escapes from its pipes (and property) and injures another.[3]

A person may own a harbour, and will be liable to those

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[1] Salmond, p. 51.

[2] Sedleigh-Denfield v. O'Callaghan [1940] A.C. 880, 902; Smith v. Scott [1973] Ch. 314, 321, per Pennycuick V.-C. ("It is established beyond question that the person to be sued in nuisance is the occupier of the property from which the nuisance emanates."); Hooper v. Rogers [1975] Ch. 43, 50-51; Hall v. Beckenham Corporation [1949] 1 K.B. 716, 724, where Finnemore J. stated that the reason why the occupier was held liable was that he could prevent others coming onto his land; Kraemers v. Attorney-General for Tasmania [1966] Tas. S.R. 113, 135; Beaudesert Shire Council v. Smith (1966) 40 A.L.J.R. 211, 213.

[3] Auckland City Corporation v. Auckland Gas Co. Ltd [1919] N.Z.L.R. 561, 593, per Hosking J., approved in a case of the same name by the Court of Appeal, [1922] N.Z.L.R. 1041; to similar effect, Miller v. Robert Addie & Sons' Collieries Ltd 1934 S.C. 150, 157, per Lord Anderson ("the service pipes are in ground ... in the feudal ownership of the defenders...").

adjoining the harbour if he allows seaweed to collect in it and decompose, thereby emitting noxious and offensive gases.[1] So too, of course, a person may own a river-bed; if he dams that river and thereby causes his neighbour's property to flood, he will be liable as an occupier in nuisance.[2]

When the court is hearing an application for an interlocutory injunction, it will not be very concerned as to the exact status of the defendant, as that is a matter which can be investigated at the later hearing.[3]

(i) Lessor-lessee

The textbooks usually state that different rules apply where the premises are leased. It is submitted with respect that there are no special rules. Who is in occupation of the premises, and who is thus in a position to maintain a state of affairs or use the land? The lessee:[4] there is much judicial support for the view that it is always wise to sue the tenant.[5]

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[1] The Company of Proprietors of Margate Pier and Harbour v. The Town Council of the Borough of Margate (1869) 20 L.T. (N.S.) 564.

[2] Ellis v. Rasmussen (1910) 30 N.Z.L.R. 316.

[3] Thompson-Schwab v. Costaki [1956] 1 All E.R. 652, 654.

[4] It is of the essence of a lease that the tenant should be given the right to exclusive possession, that is, the right to exclude all other persons from the premises": Megarry, p. 618.

[5] See, in particular, Heap v. Ind Coope and Allsopp Ltd [1940] 2 K.B. 476, 480, Wilchick v. Marks [1934] 2 K.B. 56, 66, 68 and Brewer v. Kayes [1973] 2 O.R. 284, 286; see also Pretty v. Bickmore (1873) L.R. 8 C.P. 401, 404, per Bovill C.J., 405, per Honyman J. (still good law in so far as a tenant's liability is concerned); Humphries v. Cousins (1877) 2 C.P.D. 239, 246; Pwllbach Colliery Co. Ltd v. Woodman [1915] A.C. 634, 640 (sub-lessees); Brew Brothers Ltd v. Snax (Ross) Ltd [1970] 1 Q.B. 612, 644.

The position of the lessor is more difficult. His duty of care with regard to work done on or in relation to his premises and with regard to defects in the state of the premises has now been defined in statute,[1] but it is specifically provided that this duty of care in no way modifies his obligations under the law of nuisance.[2] It is true that the lessor does not have the right to immediate possession of the demised premises, but that is not to say he has no control over them. The position is best explained by considering some hypothetical examples.

Example 1. Landlord (L) demises the property excluding the roof and exterior walls to tenant (T). A slate falls off the roof and damages the property of a neighbour (N).

T in this case will not be liable, because he had no control over the roof. That part of the property was not demised to him. L will be liable to N because he maintained a state of affairs (a roof) on property he owned and retained control over, and harm was caused to N.

Example 2. L demises the property excluding the roof and guttering to T. Because of the defective design of the guttering, water overflows and floods part of the premises demised to T.

It is submitted that prima facie L will be liable to

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[1] Defective Premises Act 1972, ss. 3 and 4; see too North, (1973) 36 M.L.R. 628. The occupier's duty of care at common law remains. For a good discussion of the lessor's obligations under a covenant for quiet enjoyment and of that covenant's relationship to nuisance, see Russell, "Nuisance by Landlords", (1977) 40 M.L.R. 651.

[2] Ibid., s. 6(2).

T in nuisance.[1] Prendergast C.J. said in Reid v. Friendly Societies' Hall Co.:[2]

> "But there appears to be no reason for saying that the principle [of strict liability] does not apply to the case of the tenant of part of a building, and his landlord who retains control over another part of the same building and on which part the dangerous thing is maintained, unless the thing is maintained there for the benefit of the occupant of that part of the premises on which the damage is occasioned as well as for the benefit of the landlord and others occupying other parts of the same building."

In Western Engraving Co. v. Film Laboratories Ltd,[3] the plaintiff tenants succeeded under Rylands v. Fletcher for damage caused by water escaping from part of the premises within the control of the defendant landlords. Of course, the landlord may be able to rely on some defence or other. For instance, it may be that his activity or the state of affairs was an ordinary use. Alternatively, he may be able to show that the lessee agreed to run the risk of that state of affairs causing him harm. Consent will often be implied where the tenant has himself made use of or benefited from the thing which causes him harm. Those defences are considered later.[4]

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[1] Most of these cases have been decided on the basis of Rylands v. Fletcher. It will be submitted later that that case was but a nuisance action. If that thesis is not accepted, then it is submitted that L will be liable to T under the Rylands v. Fletcher doctrine. This matter will be dealt with here as it fits logically into a discussion of the landlord's liability for the state of his premises.

[2] (1881) N.Z.L.R. 3 C.A. 238, 244; to similar effect Blake v. Woolf [1898] 2 Q.B. 426; Hart v. Rogers [1916] 1 K.B. 646, 650-651; Cunard v. Antifyre [1933] 1 K.B. 551, 558 (plaintiff in fact failed in nuisance because the Divisional Court thought that action was confined to "injuries to property" whereas she had suffered personal injuries).

[3] [1936] 1 All E.R. 106; see too A. Prosser and Son Ltd v. Levy [1955] 3 All E.R. 577.

[4] See pp. 281-354.

But it is not true to say that strict liability, in the guise of Rylands v. Fletcher, is inapplicable between a lessee and his landlord: cases to that effect can all be traced to a dictum of Martin B. in Carstairs v. Taylor,[1] a dictum not assented to bythe other three Barons sitting in that case. Ross v. Fedden, decided the next year,[2] has been subject to some misinterpretation: the deputy county court judge, with whose judgment Blackburn and Mellor JJ. on appeal agreed, did say that Carstairs v. Taylor[3] made it doubtful whether Rylands v. Fletcher applied in the case of two occupiers of the same building, but the ground for his decision was that to have a lavatory in a residential property was an ordinary use and that the plaintiff tenant, by himself using that lavatory, had obviously consented to the "ordinary risks" associated with it, such as overflowing.[4] In Blake v. Woolf,[5] Wright J. thought Ross v. Fedden[6] a "consent" case, and it is submitted that that view is correct.[7]

The reason why the landlord is prima facie strictly liable is that the harm has emanated from a state of affairs within his control.

Example 3. L demises the property excluding the roof and guttering to T. The gutters become blocked with leaves; as

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[1](1871) L.R. 6 Ex. 217, 222; for a full discussion of this unsatisfactory case, see p. 363.

[2](1872) L.R. 7 Q.B. 661.

[3]L.R. 6 Ex. 217.

[4]L.R. 7 Q.B. 661, 663.

[5][1898] 2 Q.B. 426, 428.

[6]L.R. 7 Q.B. 661.

[7]Professor Street agrees at p. 257.

a consequence, water overflows and floods part of the premises demised to T and the yard of N.

L will, of course, be liable to N (for the same reasons expressed in Example 1), but T will not be.

L will, prima facie, be liable to T in nuisance (for the same reasons expressed in Example 2). Here, however, the cause of the harm was not a structural defect, but rather the failure to clear out the gutters. This has led some to conclude that T's cause of action is in negligence, and negligence alone. It may well be that L is liable to T in negligence, but it is submitted that an action in nuisance may also lie. T may have consented to run the risk of the guttering's failing because of defective design: by taking a lease of a house so constructed, he may be said to have consented to the risks embodied in its structure.[1] But it is most unlikely that the tenant consented to the risk of the defendant landlord's failing to exercise reasonable care in maintaining his part of the premises. The obligation is on the landlord to show either that he did exercise reasonable care or that the tenant consented to his failing to exercise such care. If he succeeds, then the action in nuisance fails; if he fails, then the plaintiff's action in nuisance succeeds, the defence not having been established. The importance of this distinction between negligence and nuisance is that, with the latter action, there is no onus on the plaintiff to establish that the defendant was negligent. It is for the defendant to prove that he did use reasonable care. To talk

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[1] Peters v. Prince of Wales Theatre (Birmingham) Ltd [1943] K.B. 73, 78; see further, p. 349 et seq.

of a "modified doctrine of Rylands v. Fletcher"[1] merely obfuscates the issues.

Example 4. L demises the whole property to T, but covenants to keep the property in repair. A slate falls off the roof and damages N's property.

L will be liable in nuisance to N, for the fact that he has covenanted to repair shows that he has control over the maintenance of the premises, which control is acknowledged by T.

Example 5. L demises the whole property to T. Nothing is said about the obligation to repair. A slate falls off the roof and damages N's property.

If the lease was weekly or short term, then "no term [is] more easily and more necessarily implied by law ... than a right in the landlord to enter, or to re-enter, to examine the premises and to do necessary repairs".[2] That is so, because, in the absence of express provisions, "[i]t must be in the contemplation of both parties to such a weekly tenancy that the tenant will not be called upon to do repairs".[2] That does not mean that the tenant will not be liable to the neighbour:[3] he has after all possession of the demised premises and should effect the repairs himself if the landlord fails to honour the implied obligation of repair.

Even if the lease is long term, all the circumstances may show that the parties intended that the landlord would

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[1] e.g. Cockburn v. Smith [1924] 2 K.B. 119, 133; Kiddle v. City Business Properties Ltd [1942] 1 K.B. 269, 274.

[2] Mint v. Good [1951] 1 K.B. 517, 521.

[3] Ibid., 527.

undertake repairs. This is particularly likely where the landlord, while not convenanting to keep the property in repair, retains the right to enter the property and the power to effect repairs.[1] The reason why the landlord is held liable in such circumstances is that, by reserving to himself this right over the premises, he has "to that extent, at any rate, exercised a measure of control over them".[2] In some jurisdictions, the legislature has intervened and imposed on landlords an obligation to maintain premises in good repair.[3]

Example 6. L demises the whole property to T, and T covenants to repair. A slate falls off the roof and damages N's property.

It is submitted that, prima facie, L is not liable to N in nuisance. This position has been preserved by the Defective Premises Act 1972. Section 4 of the Act applies only to landlords who are under an obligation to maintain or repair the premises, and, by extension,[4] to landlords who have a right to enter the premises to effect repairs (while being under no obligation so to do). The tenant's sole liability in these circumstances was recognised in Pretty v. Bickmore.[5] Such a rule is supported by good sense. The

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[1] Heap v. Ind Coope and Allsopp Ltd [1940] 2 K.B. 476, 483; Todd v. Flight (1860) 9 C.B. (N.S.) 377; Wilchick v. Marks [1934] 2 K.B. 56, esp. at 63, 67-68; Spicer v. Smee [1946] 1 All E.R. 489, 492.

[2] Wilchick v. Marks [1934] 2 K.B. 56, 63.

[3] See, e.g., Landlord and Tenant Act, R.S.O. 1970, s. 96(1), discussed in Brewer v. Kayes [1973] 2 O.R. 284, 287. To the extent provided by that Act, the lessor "has control of the premises and consequently becomes a co-occupier of the premises".

[4] s. 4(4).

[5] L.R. 8 C.P. 401, 404.

landlord has no right to enter the premises: he cannot effect the necessary premises even if he so wanted. As well, he has accepted a lower rent because of the tenant's agreeing to bear the responsibility for repair. Why should his responsibilities to his neighbour (in private nuisance) and the public on the highway (in public nuisance) be the same as the responsibilities borne by the landlord who has accepted a higher rent (because of his agreeing to effect repairs)? It may well be true that "there is no reason why because the tenant has made a contract with his landlord that should alter the duty he owes to persons on the highway".[1] The tenant remains liable to third parties, regardless of contractual duties and rights, because of his occupation of the premises: he owes a duty to others by law and he cannot extinguish that duty by private agreement. But the converse is not necessarily true. A landlord's liability springs from the control over the premises given him by contract -- as the quid pro quo for the high rent he receives, he agrees to effect repairs on the premises and to be jointly liable with the tenant for damage caused by the premises. If, by contract, he is given no control, then it follows that he is not liable in nuisance. It should be noted here that the courts are, of course, concerned with the reality of the situation, the actual degree of control exercised by the landlord. The courts will lift the veil, as it were, to see whether the tenant is but a "front man". If the lessee is "a man of straw" or "a penniless subsidiary", then the courts

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[1] Wilchick v. Marks [1934] 2 K.B. 56, 68; see too Mint v. Good [1951] 1 K.B. 517, 527.

may conclude that the lessor had in fact retained control, regardless of the wording of any sham agreement.[1]

It is submitted with respect that the decision in Pretty v. Bickmore,[2] approved in Wilchick v. Marks,[3] is to be preferred to the decision of the Court of Appeal in the Brew Brothers case.[4] In that case, the plaintiffs sought an injunction to restrain the neighbouring lessees and their landlords from allowing a nuisance, namely a wall in dangerous condition which threatened to collapse onto the plaintiffs' premises, to continue. The tenants had covenanted to effect repairs. The Court of Appeal held the landlords liable. The decision can be supported on the narrow ground that the work required to make the wall safe was much more than "repairs", and that in the circumstances this work was of a kind that the landlords were under an implied obligation to effect. But Sachs and Phillimore L.JJ. went further than that.

First, they said that because the wall was found to have been in an unstable condition at the time of the demise (June 1965), the owners could be held liable, even though there was no actual harm caused to the plaintiffs until the end of 1966. This reflects the argument in Gandy v. Jubber[5] that it be "a sound principle of law that the owner of property receiving rent should be liable for a nuisance existing on his premises at the date of the demise". The

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[1] Brew Brothers v. Snax (Ross) Ltd [1970] 1 Q.B. 612, 638, per Sachs L.J.; 644, per Phillimore L.J.

[2] L.R. 8 C.P. 401.

[3] [1934] 2 K.B. 56, 66.

[4] [1970] 1 Q.B. 612.

[5] (1865) 9 B. & S. 15, 16; 122 E.R. 914, 915.

same difficulty arises yet again: what is meant by "a nuisance"? Is an unstable wall "a nuisance" even though it is causing no harm? If it becomes "a nuisance" only when harm is caused, then what can be the relevance of the wall's being stable or otherwise at the date of the demise? If harm was being caused by the state of affairs before the demise as well as after, then, of course, the landlord will be liable for the harm caused while the property was in his possession, but not for the harm caused after the demise: that, after all, is harm which the tenant has covenanted to prevent. Sachs L.J. said:[1]

> "I can find no rational reason why liability should as regards third parties be shuffled off merely by signing a document which as between owner and tenant casts on the latter the burden of executing remedial work."

The reason, of course, is that the lessee, by depriving the lessor of the right of entry, also deprives him of all right of control.[2] One suspects that the Court's erroneous view, shared by Denning L.J. in Mint v. Good,[3] arises from a feeling that victims should not be restricted to suits against poor tenants, but should be able to sue the wealthy landlords as well. But it is not a case of the landlord "shuffling off" his liability. The prima facie position is that only the occupier, the tenant, is liable; it is this position which is often modified to provide that the landlord will exercise some control over the premises and hence will assume joint liability. Harman L.J. recognised this:[4]

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[1] [1970] 1 Q.B. 612, 638.
[2] Brewer v. Kayes [1973] 2 O.R. 284, 287.
[3] [1951] 1 K.B. 517, 527.
[4] [1970] 1 Q.B. 612, 631.

> "[Even assuming the premises were out of repair at the date of the demise,] I still cannot see why the landlords were not justified in taking a repairing covenant sufficient to put on the tenants the obligation to put in repair."

Secondly, Sachs L.J. compared the tenant with a contractor.[1] The comparison is fallacious: when the landlord engages a contractor, in the usual situation he retains full possession of the premises; he loses that right of possession when he demises the property. That is a crucial distinction.

Thirdly, Phillimore L.J.'s principles[2] may correctly state the position in negligence, but they do not reflect the position in the law of nuisance. There, the occupier's duty to his neighbour is not simply "to take reasonable care to avoid causing him damage which ... could reasonably be [foreseen]".

Thus, with the greatest respect, it is submitted that some of the statements made by the majority -- all merely obiter dicta in view of their interpretation of the word "repairs" -- were wrong and should not be followed.

Although the landlord may not, in the circumstances of this example, be liable in nuisance, he may nonetheless be liable to the neighbour by virtue of certain statutory duties. By s. 3(1) of the Defective Premises Act, 1972, where work is done on or in relation to premises, any duty of care which might be owed arising from the doing of such work to persons who might reasonably be affected by defects in the state of the premises created by the doing of the

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[1] Ibid., 638.
[2] Ibid., 644.

work shall be unaffected by subsequent disposal of the premises by the person who owed the duty. In that liability in negligence is founded upon a negligent act, there seems no reason in principle why the doer of that act should not remain liable for its consequences, regardless of whether the premises are subsequently disposed of or not. Nuisance is not so founded upon an act, but rather upon the maintenance of a state of affairs or a general use of land. Thus, in Example 6, L might be liable in negligence to N by virtue of s. 3(1) if the slate was improperly fitted.

As well, the Housing Act 1961, s. 32, places on the landlord a duty of structural and exterior repair and the maintenance of certain services in tenancies of dwelling-houses for less than seven years.[1]

Example 7. L demises the whole property to T. T acts in such a way that N's enjoyment of his property is impaired.

Prima facie, L is not liable to N,[2] because he has no control over the state of affairs. L may have even expressly forbidden T to act in such a way, as in Smith v. Scott,[3] where the tenants, a "problem family", committed physical damage to the plaintiffs' property and made so much noise that the plaintiffs' enjoyment of their property was diminished. Pennycuick V.-C. held the landlords not liable. So, if a tenant chooses to burn coal, whereas previous tenants have burned other materials less inclined to smoke, the landlord cannot be liable to a neighbour whose

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[1] Contracting out is forbidden, but the county court may, with consent of the parties, allow s. 32 to be excluded or modified.

[2] For a discussion of the authorisation of a tort, see p. 76.

[3] [1973] Ch. 314.

property is invaded by the vapours.[1]

In all these examples, the question of the lessor's knowledge of the state of affairs has been ignored; as will be seen, that too is decided according to criteria common to nuisance in general. These seven examples, which cover the various ways in which a neighbour may be harmed, are all decided according to a common principle: the lessor's control of a state of affairs which causes harm. The relevance of any covenant between the landlord and the tenant is limited to showing the degree of control possessed by the landlord over the particular thing or activity which causes the harm.

(ii) Licensor-licensee

"The general rule for distinguishing a lease from a licence is ... that a lease gives the right to exclusive possession of the land, whereas a licence usually does not. ... In case of a tenancy the landlord commits a trespass if he enters without the tenant's permission and without authority under the lease, whereas if only a licence is granted, the licensor by entering may commit a breach of contract, but not a trespass."[2]

This would indicate that a licensor retains the right to some kind of possession and control over the land. Prima facie, therefore, he would seem the logical defendant in a nuisance action.

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[1] Rich v. Basterfield (1847) 4 C.B. 783; 136 E.R. 715.
[2] Megarry, pp. 776, 618.

But the position is not as simple as the first two sentences may indicate. The learned editors note that the distinction between leases and licences is "a fine one"[1] and that there has been a growing tendency to label agreements where A has granted B exclusive possession of his land or part of his land as licences rather than leases.[2]

In the law relating to occupiers' liability to those injured on their premises, it is, of course, of crucial importance to determine who is the occupier in any given case. The leading case with regard to licensed premises is Wheat v. E. Lacon & Co. Ltd.[3] The respondent owned an inn. Mr. Richardson managed it. He and his wife lived above the inn, and were held to be licensees. Who was the occupier? Both the respondent and the Richardsons were held to be occupiers.[4] E. Lacon & Co. Ltd was an occupier because it had granted the Richardsons only a licence to occupy the upper floor and it had retained the right of repair over the premises. It had given the authority for the Richardsons to take in summer guests. This showed control. The Richardsons, on the other hand, were also occupiers, because they "had also a considerable degree of control"; indeed, "by mutual

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[1] Ibid., p. 619.

[2] Ibid., p. 776; see, e.g. Abbeyfield (Harpenden) Society Ltd v. Woods [1968] 1 W.L.R. 374; Barnes v. Barratt [1970] 2 Q.B. 657; Shell-Mex and B.P. Ltd v. Manchester Garages Ltd [1971] 1 W.L.R. 612.

[3] [1966] A.C. 552.

[4] Ibid., 574, per Viscount Dilhorne; 578, per Lord Denning; 585, per Lord Morris of Borth-y-Gest; 587, per Lord Pearce.

arrangement Lacons could not (subject to certain overriding considerations) exercise control over some parts".

In short, the crucial feature of the case was that "[i]n order to be an 'occupier' it is not necessary for a person to have entire control over the premises". It suffices "that he has some degree of control". Further, "two or more may be 'occupiers'". North concludes:[1]

> "If the premises are occupied under licence, rather than under a tenancy agreement, the licensor may well remain an occupier whether he be the owner or a local authority requisitioning the property; but that does not necessarily affect the issue of whether the licensee may not also be an occupier."

Thus, the determination of who is an occupier will largely depend upon the circumstances of the case.

It is submitted that a similar statement could be made with regard to liability in nuisance: all the circumstances must be considered in order to determine whether the licensor or the licensee or both had sufficient control over the premises that he could be said to have maintained the state of affairs which caused the harm. The lack of precise guidelines is due to the diverse nature of licences. If A says to B, "You may walk across my land," B is a licensee; if C enters into an agreement with D whereby D is given exclusive possession over a room in C's house, D may well be a licensee. But the rights of B and D (and, for that matter, A and C) are vastly different, especially as to revocability of the licence.[2]

This much can be said: it will be a rare case where the licensor cannot be held liable for a state of affairs existing on his land. This is partly because, in nearly all

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[1] Occupiers' Liability, p. 18.

[2] See Megarry, pp. 777-779.

cases, he retains the right of possession of the land. So, where a land-owner licensed another to excavate clay and make bricks on his land, with the result that a neighbour's property was affected by smoke, both licensor and licensee were held liable.[1] Many of the cases considered in the previous chapter[2] involved licensors and licensees. It was shown that the licensor was liable in nuisance, not because he himself made the noise complained of, but because he allowed his land to be used by others in such a way that neighbours' enjoyment of their property was disturbed.

Consider the following situation: A grants to B possession of a room in his house, in circumstances amounting to a contractual licence. B consistently plays loud music to the detriment of C, a neighbour. Might C sue A successfully? A has not, of course, authorised B to create this state of affairs. But it is submitted that A is liable to C because he has allowed B to remain on the premises and has not revoked the licence.[3] What would be the position if a term of B's contractual licence was that B did nothing to interfere with neighbours' enjoyment of their properties? It is submitted that, even then, A might be held liable to C (although, of course, he would have an action in contract against B) because he was still the man who permitted B to

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[1] White v. Jameson (1874) L.R. 18 Eq. 303, 305.

[2] See p. 34 et seq.

[3] The difficulties concerning revocation of contractual licences raised by Thompson v. Park [1944] K.B. 408 and certain obiter dicta in Winter Garden Theatre (London) Ltd v. Millennium Productions Ltd [1948] A.C. 173 are not considered here, because there can be no doubt that a licensor can revoke a licence if the licensee acts wrongfully.

remain on the premises and to use his part of them in the way he did. He still has "some degree of control" over the premises, to use their Lordships' terminology in Wheat's case,[1] and "entire control" is not necessary. If B had been a lessee, then A would not have been liable.[2] This is because a lessor has no right to the possession of land and has only as much control over activities and conditions on the land as are granted to him under the lease.

The degree of control of the licensee varies according to the nature of the licence. There is no doubt that at times he has been held to have had sufficient control over a state of affairs within the scope of his licence to justify his being held liable in nuisance.[3] The clearest exposition of a licensee's liability was given in an Australian case, Kraemers v. Attorney-General for Tasmania.[4] Kraemers's neighbour granted the Public Works Department a licence to take gravel from his land. As a result of the Department's activities, the plaintiff's property was flooded. Burbury C.J. held:[5]

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[1] [1966] A.C. 552.

[2] Smith v. Scott [1973] Ch. 314.

[3] See McLaren, 10 Osgoode Hall L.J. 505, 519, although, with respect, McLaren's authority was ill chosen. It would appear from the report of Weber v. Town of Berlin (1904) 8 O.L.R. 302 that the defendant owned the land on which the sewage works were maintained. In Groat v. Edmonton [1928] 3 D.L.R. 725, the defendant was specifically stated to be a "riparian owner", not a licensee.

[4] [1966] Tas. S.R. 113; this case is certainly not authority for the view that occupation of land is irrelevant in determining liability in nuisance - see Fleming, p. 410.

[5] Ibid., 118.

> "I am content to say that I agree with my brother Neasey J.'s conclusion that in accordance with the principles stated by Professor Street on Torts, 3rd edn., p. 229, the extent of control over the land which the respondent was authorised to exercise and did exercise as licensee constituted sufficient management and control of the land to found liability for nuisance emanating from it."

Gibson J. noted that "[t]he respondent had ... ample powers of control and management, and was ... in the situation of an occupier".[1] As with leases, it is the measure of control in fact with which the courts are concerned.[2]

Although it is difficult to see how a man licensed to walk across another's land can have sufficient control to maintain a state of affairs on the land, a man who is allowed to use land under agreement for the purposes of a particular activity for a considerable length of time may well be said to have sufficient control. A golfer who drops a cigarette on the links and starts a fire is in the former category.[3] A licensee with the right to excavate clay and make bricks is obviously in the latter category,[4] as are gipsies camping on a site and paying for the privilege.[5] A man who operates a speedway for motor-cycle racing under licence from a local authority will be liable in nuisance for the noise caused by that activity.[6] In

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[1] Ibid., 135.
[2] Ibid., 153.
[3] Boulcott Golf Club, Inc. v. Engelbrecht [1945] N.Z.L.R. 556 (licensor held liable).
[4] White v. Jameson L.R. 18 Eq. 303, 305.
[5] Attorney-General v. Stone 60 J.P. 168, 169.
[6] Bloodworth v. Cormack [1949] N.Z.L.R. 1058.

Hampstead and Suburban Properties Ltd v. Diomedous,[1] the defendant held a licence over part of the premises owned by the plaintiff. He held this licence, which was expressed to be supplemental to the lease, from the original lessee. Loud music from his restaurant made it impossible for the plaintiff's other tenants to sleep at night until after 2 a.m. The plaintiff's prayer for an injunction succeeded.

In Mayfair Ltd v. New Zealand Properties Ltd,[2] the second defendants operated a printing works in a building they occupied. No lease had been granted to them by the first defendants, nor was there any binding agreement for a lease. Thus, they were licensees, but clearly had sufficient control of the premises to be liable for the noise created by their printing machines.[3]

Many of the cases involving escapes of gas and water from pipes have involved licensees. In Benning v. Wong,[4] the Australian Gas Light Co. (the real defendants) were licensees in occupation of the area of sub-soil containing their pipes under statutory authority, and "had control of the pipe up to the point of escape, to the complete exclusion of the plaintiff".[5] Although each case must be considered in the light of its facts, it is submitted that, as a general rule, licences conferring a right to carry out

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[1] [1969] 1 Ch. 248.

[2] [1940] N.Z.L.R. 190.

[3] Ibid., 198. The licensors were also enjoined.

[4] (1969) 43 A.L.J.R. 467.

[5] Ibid., 486; see too Midwood v. Manchester Corporation [1905] 2 K.B. 597; Charing Cross Electricity Supply Co. v. Hydraulic Power Co. [1914] 3 K.B. 772; North-Western Utilities Ltd v. London Guarantee and Accident Co. [1936] A.C. 108. It is submitted that the defendant in Clearlite Holdings Ltd v. Auckland City Corporation [1976] 2 N.Z.L.R. 729 could have been held liable on the ground that he was a statutory licensee.

a particular trade or activity for a considerable length of time do confer on the licensee such power and control over that part of the land on which the trade or activity is carried out to justify the licensee's being held liable in nuisance for a disturbance of the neighbours' enjoyment of their land.

(iii) Employer-independent contractor

The editors of Clerk and Lindsell state, with regard to employers' liability:[1]

> "Whether a person can be said to be a wrongdoer if the nuisance is created by his independent contractor depends on whether he could reasonably have foreseen that the work he had instructed the independent contractor to do was likely to result in a nuisance."

Professor Fleming thinks that the employers' liability is more limited: only if the work "of its very nature involves a risk of damage" will the employer be liable.[2] Professor Street, with hesitation, thinks that Slesser L.J.'s statement in Matania v. National Provincial Bank Ltd[3] is to be preferred to the wider dictum of Cockburn C.J. in Bower v. Peate:[4] that is, there must be an act involving "a special danger of nuisance" before the employer will be liable.[5]

Professor Atiyah concedes that it "is still no easy matter to say how far it is now a general principle that there is liability in nuisance for the acts of an independent

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[1] Clerk, para. 1419.
[2] Fleming, p. 379.
[3] [1936] 2 All E.R. 633, 646.
[4] (1876) 1 Q.B.D. 321, 326.
[5] Street, pp. 234-235.

contractor".[1] He considers the leading cases and comments:[2]

> "If it is hard to support these cases on the grounds on which they were actually decided, it does not follow that there is anything very unjust about them. There is a good deal to be said for the view that a person should be liable in nuisance for damage caused to his neighbour by the way his premises have been used, whether the actual negligence is his or that of an independent contractor, or indeed, a member of his household."

Of course, if the employer authorises his contractor to commit the tort of nuisance, he will be liable on general tortious principles.[3] But what of the position where there is no such authorisation?

It is submitted with respect that the confusion apparent in some of the cases (and therefore reflected in the general texts) arises from a disregard of the nature of the tort of nuisance. The question, as always, should be: has the employer any control over the state of affairs on his land which is causing harm to the neighbour? Prima facie, the employer has possession of the premises and retains the authority to dictate whether or not the contractor will carry out a particular activity. That is not to say that he has control over the way in which the contractor will perform his task.

What is meant by "control"? It has sometimes been held that the crucial distinction between the master-servant relationship and the employer-contractor relationship is the degree of control which the master/employer has over the

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[1] Atiyah, p. 352.

[2] Ibid., p. 357.

[3] Street, p. 422; Atiyah, p. 292; for a full discussion of authorisation, see p. 76 et seq.

servant/contractor. It has been expressed thus:[1]

> "In the case of a servant the employer (who is commonly called the 'master') reserves to himself by the terms of the employment, express or understood, a power of controlling his servant in the execution of his work and of dismissing him for disobedience to orders. The employer of an independent contractor, on the other hand, cannot control the way in which the work is carried out."

The "control" test has been criticised as being of little use,[2] but even if it remains a useful test where simple forms of employment are in issue,[3] it must not be confused with the concept of "control" advanced here in discussing who can be sued in nuisance. "Control" in relation to nuisance means "management of the land"[4] or "power over [the land]".[5]

"Control", when used in the servant/contractor area, refers to "the master's right to control the method of doing the work"[6] or control or direction in telling the servant how to do the work.[7] Thus, it is quite possible for an employer to have "control" of the premises for the purposes of liability in nuisance, but to lack "control" of the work being done for his benefit.

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[1] Clerk, para. 222.

[2] Morren v. Swinton [1965] 1 W.L.R. 576, 582, and other cases cited in Clerk, p. 126, ftnt. 20.

[3] Clerk, para. 224.

[4] Kraemers v. Attorney-General for Tasmania [1966] Tas. S.R. 113, 153.

[5] Hall v. Beckenham Corporation [1949] 1 K.B. 716, 727.

[6] Short v. J. & W. Henderson Ltd (1946) 62 T.L.R. 427, 429, per Lord Thankerton.

[7] Morren v. Swinton [1965] 1 W.L.R. 576, 582.

An employer's status with regard to the land on which the activity is carried out is that of licensor; the independent contractor is a licensee. It will, therefore, be a rare case where the employer will not be the appropriate defendant. The contractor may be liable as well as the employer where he has been granted such control over the land that it is reasonable that he should be held liable. The employer's liability is not properly speaking vicarious "but springs from the danger to protected rights created by the [employer], albeit through the instrumentality of a contractor".[1] Not all the cases have been decided in accordance with the principles suggested here, although in some there are clear indications that these principles have been followed.

The first case cited by Professor Atiyah is Hughes v. Percival.[2] The defendant employed contractors to demolish his house and rebuild it. In the course of works the contractors (contrary to their instructions and to the specifications prepared by the architect) cut into a party wall on one side of the defendant's house. This so weakened the wall that the defendant's house collapsed, dragging with it the party wall shared with the plaintiff on the other side of the defendant's house. The plaintiff sued for the damage to his house. The defendant was held liable. Lord Blackburn stressed that Quarman v. Burnett[3] was still good law.[4] Quarman v. Burnett[5] held that an employer was liable for the acts of his servants but not for the acts of his

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[1] Buxton, 8 Malaya L.R. 1, 9; Jolowicz, 9 Stanford L.R. 690, 707.

[2] (1883) 8 App. Cas. 443.

[3] (1840) 6 M. & W. 499.

[4] 8 App. Cas. 443, 447.

[5] 6 M. & W. 499.

independent contractors. What Lord Blackburn must have meant was that, while the employer was not liable for the negligent cut into the party-wall made by the contractor, he was liable in nuisance. In negligence, one is concerned with a wrongful act, here the negligent cut; for that, the defendant could not be liable in negligence (because the cut was made by an independent contractor). But in nuisance, one is not concerned with a specific act. The focus is on the state of affairs, the general activity of excavation. The defendant, who was in possession of the land, was in control of that state of affairs. It is irrelevant whether the actual cut causing the harm was performed by the independent contractor or by the employer, because liability springs from the general state of affairs, and that was controlled (like most uses of land) by the occupier.

It is noteworthy that Lord Blackburn rejected the broad doctrine -- sometimes called the "dangerous operations" doctrine -- advanced by Cockburn C.J. in Bower v. Peate.[1] This case was not a case of"mainstream" nuisance at all: rather, it was an action based on the interference with an easement.[2] Cockburn C.J. stated:[3]

> "There is an obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted."

Professor Atiyah makes a devastating criticism of the learned Chief Justice's reasoning.[4] Unfortunately, as Professor

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[1] 1 Q.B.D. 321.
[2] See p. 165 et seq.
[3] 1 Q.B.D. 321, 326.
[4] Atiyah, pp. 327-332.

Atiyah notes, Lord Blackburn's rejection of the "dangerous operations" doctrine fell on deaf ears in Hardaker v. Idle District Council.[1] The comments there made on Hughes v. Percival[2] must have been obiter dicta, however, as Hardaker's case[3] was not a nuisance case at all. It was decided in negligence.

The leading modern case espousing the "dangerous operations" doctrine is Matania v. The National Provincial Bank Ltd.[4] The defendants employed a contractor to make extensive alterations to the ground floor of a building, in the second floor of which the plaintiff was a tenant. It was held that the defendants were liable to the defendant for the noise and dust from the contractor's operations, because this was not a case of a "mere ordinary building operation",[5] but one involving "a special danger of nuisance".[6] It is submitted that His Lordship was misled into using this terminology because he assumed that the employer's liability in negligence and nuisance was the same[7] and he had in mind his own judgment in Honeywill and Stein Ltd v. Larkin Brothers Ltd,[8] a negligence case. Under that doctrine, an employer was liable (in negligence) if his contractor was required to perform acts which involved "in the eyes of the law special danger to others".[9] There was no clear authority

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[1][1896] 1 Q.B. 335.
[2]8 App. Cas. 443.
[3][1896] 1 Q.B. 335.
[4][1936] 2 All E.R. 633.
[5]Ibid., 651: it is difficult to see from the facts as reported in what way it differed.
[6]Ibid., 646.
[7]Ibid., 645.
[8][1934] 1 K.B. 191 -- see p. 263.
[9]Ibid., 197.

to the effect that a similar rule existed in nuisance. The decision can, of course, be justified on the thesis presented here, namely that the defendants retained control of the premises on which the alterations were being made.

Some cases recently have not referred to this "dangerous operations" doctrine and liability seems to have hinged on the extent of the employer's control. In Gourock Ropework v. Greenock Corporation,[1] the defenders were not held liable. The pursuer's factory was flooded by operations on the defenders' land. Lord Fraser held that the defenders were not in occupation and had not retained control of the site during the progress of the works; "the site was in the control of the contractors".[2] There was no suggestion that the employers escaped liability because there was no "special danger of nuisance"; it was simply a case where the employers did not retain control of the site. It would be difficult to contend that there was a greater risk "of nuisance" in the activities undertaken in the Matania case[3] than in this case.

In Spicer v. Smee,[4] Mrs. Smee was held liable in nuisance for a fire which broke out as a result of some defective electrical work done by an independent contractor. Atkinson J. adopted the test laid down by Scrutton L.J. in Job Edwards, Ltd v. Birmingham Navigations[5] and ruled that a landowner or occupier could be held liable in nuisance even

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[1] 1966 S.L.T. 125.
[2] Ibid., 127.
[3] [1936] 2 All E.R. 633.
[4] [1946] 1 All E.R. 489.
[5] [1924] 1 K.B. 341, 355.

"if an independent contractor ... created the nuisance".[1] Mrs. Smee was liable in her capacity as lessor. In three recent Canadian cases, Newman v. Conair Aviation Ltd[2], Gertsen v. Municipality of Metropolitan Toronto,[3] and Jackson v. Drury Construction Co. Ltd,[4] employers were held liable in nuisance, but there was no finding that the activity performed by the contractor was a "dangerous operation". Nor was that doctrine mentioned in the Clearlite Holdings case,[5] in which the employer was held liable in nuisance. That suggests that the misconceived doctrine is dying, if not dead, at least as regards nuisance. The only occasion on which the employer will not be liable is where he has given over complete control of the land to the contractor.[6] Some head contractors on large building sites insist on complete control of the sites, even to the exclusion of the owners.

Just as a licensee's liability hinges on the extent of control over the land given by the licence, so the liability of an independent contractor depends on the terms

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[1] [1946] 1 All E.R. 489, 493. Professor Atiyah thinks that Atkinson J.'s decision was wrong; otherwise, he says (at p. 357), "an absurd distinction seems to exist between work done by a plumber and work done by an electrician, for in Blake v. Woolf it was held that a house-owner was not liable for leakage of water from a cistern due to negligent repairs performed by an independent contractor". But there is no inconsistency; the only reason why the plaintiff failed in that case was that "the bringing of water on to such premises as these and the maintaining a cistern in the usual way [is] an ordinary and reasonable user of such premises as these were", [1898] 2 Q.B. 426, 428 -- that is, a defence of ordinary user succeeded.

[2] (1972) 33 D.L.R. (3d) 474.

[3] (1973) 41 D.L.R. (3d) 646.

[4] (1974) 49 D.L.R. (3d) 183.

[5] [1976] 2 N.Z.L.R. 729.

[6] As in Gourock Ropework v. Greenock Corporation 1966 S.L.T. 125.

of his contract. Although there is no English authority,[1] there is support in Scotland[2] and the Commonwealth for the view that the contractor may be held liable in nuisance in certain circumstances. Neasey J. in Kraemers case[3] thought that a builder might be sufficiently an "occupier" as to be liable in nuisance for harm caused by his building operations. That certainly accords with the position in occupiers' liability, where "even contractors working on land or other premises owned or leased by someone else [have been] classed as occupiers".[4]

In the three recent Canadian cases just mentioned, the contractors were held liable in nuisance. In Newman v. Conair Aviation Ltd,[5] the defendant farmer contracted with the defendant aviation company for the spraying of his land from the air with insecticide. The spray came onto the plaintiffs' land, partly by way of drift from the defendant farmer's property, and partly by direct application, as the aircraft on at least one occasion actually flew over the plaintiffs' property. Wilson C.J.S.C. held both defendants liable in nuisance. The defendant farmer should clearly have been held liable: he was the occupier of the property from which the spray drifted and he had arranged the spraying. If he had sprayed by hand or tractor and some of the insecticide had found its way onto the plaintiffs', he would surely have

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[1] Professor Heuston cites in Salmond, p. 52, Heaven v. Mortimore (1968) 205 E.G. 767, but that case seems to have been decided purely on the grounds of negligence: see esp. at 767, per Harman L.J.

[2] Gourock Ropework v. Greenock Corporation 1966 S.L.T. 125, 127.

[3] [1966] Tas.S.R. 113, 153.

[4] North, Occupiers' Liability, p. 18.

[5] 33 D.L.R. (3d) 474.

been liable; it can surely make no difference that the insecticide was applied from an aeroplane flying ten feet above the ground.[1] What of the aviation company? It was wrongly held liable in nuisance, because it had neither possession nor control of the land. It is not every contractor called to undertake minor activities who will find himself saddled with liability in nuisance. But the company ought perhaps to have been held liable in trespass or negligence. Wilson C.J.S.C. refused to follow Lord Wright's dictum in the Sedleigh-Denfield case,[2] a dictum supported here, and said that he was confirmed in his belief "by the fact that in a number of cases involving picketing, that is watching and besetting, where no ownership or occupation by the defendants of land was involved, the defendants were held liable for nuisance".[3] As will be shown later,[4] the picketing cases are not cases of private nuisance at all.

In Gertsen v. Municipality of Metropolitan Toronto,[5] Toronto city brought putrescible organic matter onto land owned by the Corporation of the Borough of York. As it decomposed, it generated methane gas. This gas escaped to neighbouring property. York was held liable in nuisance because it occupied the land; Toronto was held to be an independent contractor[6] which had been given, by the terms of its agreement with the Borough of York, extensive control over York's land. It was because of this control that Toronto

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[1] Ibid., 476.
[2] [1940] A.C. 880, 902; see p. 43.
[3] 33 D.L.R. (3d) 474, 479.
[4] See p. 81 et seq.
[5] 41 D.L.R. (3d) 646.
[6] Ibid., 671.

was held liable in nuisance as well.[1] In Jackson v. Drury Construction Co. Ltd,[2] the defendant was an independent contractor which had been employed to reconstruct a road. As will be shown below,[3] the "owner" of a highway may be held liable in nuisance if the state of affairs causing harm is within its control. So, perhaps, if that "owner" cedes control to a contractor, that contractor may assume liability, just as the owner of an ordinary estate in fee simple may cede control to a contactor.

Some mention should be made of two cases cited by West as authority for the view that "a contractor" may be liable in nuisance, this providing further proof for West's view that the defendant in nuisance need not be an occupier of land.[4] The first was Thompson v. Gibson.[5] But that case did not even concern a contractor; the defendants were members of the Kendal borough council, and were sued because they had directed the erection of the building which now blocked the plaintiffs' market.[6] The other case was Dalton v. Angus,[7] but it is of no authority in relation to "mainstream" nuisance. It was concerned with an interference of an easement for the support of buildings, and in that sort of case, historically called "nuisance" for the reasons given below,[8] the appropriate defendant is the person

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[1] Ibid., 683.

[2] 49 D.L.R. (3d) 183.

[3] See p. 87 et seq.

[4] "Nuisance or Rylands v. Fletcher", (1966) 30 Conv. (N.S.) 95, 103. It is not disputed that contractors may in certain circumstances be liable in nuisance; it is disputed that a contractor will be liable simply on proof that he caused the harm. That is not the basis of his liability.

[5] (1841) 7 M. & W. 456; 151 E.R. 845.

[6] For further discussion of this case, see p. 100.

[7] (1881) 6 App. Cas. 740.

[8] See p. 165 et seq.

who has interfered with the easement. Thus, neither of these cases is of any use in the present enquiry.

In conclusion, then, it is submitted that the liability of the employer and the independent contractor will be decided according to the same principles as are applicable in the case of licensed premises. In nearly every case, the employer will be liable; sometimes, the contractor will be as well.

(b) Authorizer

Under general tortious principle, "a person is liable for a tortious act committed by his direction subject to the qualification made above, that where knowledge of facts is an essential ingredient in the tort, the defendant must have had that knowledge".[1] Indeed, "even a mere permission may be sufficient to make a person liable where he has some control over the doing of the act so that his permission amounts to assistance in the commission of the tort".

This principle applies, of course, as much to the tort of nuisance as to any other tort. It is true that the authorizer may be liable in nuisance even though he does not have control over the state of affairs which causes the plaintiff harm. That does not mean that the principle of "control" is wrong, nor even that this is an exception to that principle. The principle of "control" is peculiar to the tort of nuisance; it is overlaid, however, by the principle of "authorisation" which is common to the law of

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[1] Atiyah, pp. 291-292, 294; see too Williams, Joint Torts, p. 6 and Street, pp. 234, 422.

tort in general. Of course, the authorised agent must have maintained the harmful state of affairs on land within his control.

To be liable, the authorizer must have authorised a state of affairs from which harm was inevitable or "virtually certain" to result;[1] this is another way of saying that the harm must be a "necessary" consequence of that activity authorised.[2]

The most common way in which authority is given is "in the shape of a lease": where a field was "let for the very purpose and object of being worked as a lime quarry and for erecting lime kilns and burning lime", the authorizer (the lessor) was held liable in nuisance, as was, of course, the tenant who had possession of the field.[3] Similarly, where a hotel chimney gave off excessive smoke and soot to the plaintiff's detriment, the hotel's owner was held liable in nuisance, for when he let the hotel, he knew that the lessee would use this chimney. Indeed, the lessee would have been in breach of his covenants under the lease if he did not provide meals for his guests, and the only way in which meals could be cooked on the premises involved the use of this chimney.[4] In both these cases, harm was virtually certain to result from the activities authorised.

In Rich v. Basterfield,[5] the landlord neither had control over the defendant's activity nor had authorised it. In Smith v. Scott,[6] the corporation had clearly not

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[1] Smith v. Scott [1973] Ch. 314, 321.
[2] Atiyah, p. 292.
[3] Harris v. James (1876) 45 L.J.Q.B. 545, esp. at 546.
[4] Ross and Glendining Ltd v. Hancock and Co. [1929] N.Z.L.R. 204, 205-206.
[5] 4 C.B. 783; 136 E.R. 715.
[6] [1973] Ch. 314.

authorised the tort; indeed, it had expressly prohibited the family from committing a nuisance. The decision of the Exchequer Chamber in Brand v. Hammersmith Railway[1] is best explained on the basis of authorisation. The plaintiff's house was affected by vibration, smoke, and noise from trains running on a line operated by the Great Western Railway Co. The defendant was the railway company which had constructed the line and which owned the land.[2] The defendant authorised the Great Western to run the railway and it "is practically necessary ... for the using of the line"[3] that vibrations would be caused.

Thus, even if a lessor or the employer of an independent contractor is not in control or possession of the land, he may nonetheless, in certain circumstances, be liable in nuisance, along with his lessee or contractor. This is because of an overriding principle common to the law of torts.

(c) The Highway

There is a general presumption that the owner of land of whatever tenure adjoining a highway is owner also of one-half of the highway.[4] Every highway maintainable at the public expense, together with the material and scrapings thereof, vests in the highway authority[5] which, except in the case of Greater London, is the county council.[6] The

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[1](1867) L.R. 2 Q.B. 223, reversed on appeal, (1869) L.R. 4 H.L. 171, on the ground that s. 86 of the Railways Clauses Consolidation Act 1845 provided a good defence.

[2]Ibid., 247.

[3]Ibid., 230.

[4]19 Halsbury's Laws (3rd ed.), para. 96.

[5]Highways Act 1959, s. 226(1).

[6]Local Government Act 1972, s. 187(1).

highway authority does not, however, have the fee simple absolute in the land; it has merely property in the surface of the street or road, and in so much of the actual soil below, and air above, as may reasonably be required for its control, protection and maintenance as a highway for the use of the public. The legal interest in the property so vested in the authority is a legal estate in fee simple determinable in the event of the street or road ceasing to be a public highway.[1] This should be contrasted first with the powers of the owner of the soil of a highway:[2]

> "[He] 'has right to all above and underground, except only the right of passage for the king and his people', and may exercise all rights of ownership not inconsistent with the public right of passage ... He may maintain an action for trespass against any one who unlawfully places anything upon its surface."

The public's rights are very limited:[3]

> "The right of the public is a right to 'pass along' a highway for the purpose of legitimate travel, not to 'be on' it, except so far as their presence is attributable to a reasonable and proper use of the highway as such."

(i) The Public

A citizen's right over the highway is not dissimilar to a bare licensee's right over another's land. As has already been shown, such a licensee cannot be held liable in nuisance. It is submitted that an ordinary citizen cannot be held liable in private nuisance for harm resulting from his acts on the highway, although he may, of course, be liable in public nuisance. Devlin J. seemed to suggest in Southport

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[1] 19 Halsbury's Laws (3rd ed.), para. 105.
[2] Ibid., para. 103.
[3] Ibid., para. 107.

Corporation v. Esso Petroleum Co. Ltd[1] that a claim in private nuisance might succeed even though the defendant was but using the highway, although he thought that such an action "is properly laid for a public nuisance". In that case, in order to refloat a tanker, the defendant had caused 400 tons of fuel oil to be discharged. This oil deposited on the foreshore belonging to the plaintiff. A citizen's rights over the sea are not necessarily the same as his rights over the highway, and thus Devlin J.'s views regarding the highway are merely obiter dicta. His Lordship commented:[1]

> "In my judgment, the plaintiffs have a good cause of action in trespass or nuisance subject to the special defences raised by the defendants which I shall next consider ... On the first of these, if one seeks an analogy from traffic on land, it is well established that persons whose property adjoins the highway cannot complain of damage done by persons using the highway unless it is done negligently."

Because the defendant had not been negligent, the action failed. But negligence is irrelevant in private nuisance, although not in public nuisance.[2] Therefore, was Devlin J. referring only to public nuisance? If so, the case is of no authority with regard to liability in private nuisance; if not, then Devlin J. obviously considered private and public nuisance to be the same, a conclusion obviously wrong. Anyway, on this point, Devlin J.'s judgment was expressly dissented from in the Court of Appeal[3] and the House of Lords.[4]

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[1] [1956] A.C. 218, 225.

[2] See, e.g., Read v. J. Lyons & Co. Ltd [1947] A.C. 156, 183; Pwllbach Colliery Co. Ltd v. Woodman [1915] A.C. 634, 638.

[3] [1954] 2. Q.B. 182, 196; Denning L.J.'s view preferred by Newark, "Trespass or Nuisance or Negligence", (1954) 17 M.L.R. 579, 581.

[4] [1956] A.C. 218, 242.

What then of the "watching and besetting" cases? Surely they seem to establish that a person whose enjoyment of his land is affected by persons on the highway (usually pickets) can sue in private nuisance. It is submitted that they do not. The genesis of the authority was Lindley M.R.'s judgment in J. Lyons & Sons v. Wilkins.[1] The plaintiff's works were picketed. The status of the defendants (as non-occupiers) was not argued. The Master of the Rolls said:[2]

> "Such conduct seriously interferes with the ordinary comfort of human existence and ordinary enjoyment of the house beset, and such conduct would support an action on the case for a nuisance at common law..."

Presumably, His Lordship meant a private nuisance.[3] For the view that the defendants were liable in private nuisance, he cited Bamford v. Turnley,[4] where the defendant was an occupier. Broder v. Saillard[5] was also cited, with particular reference to Jessel M.R.'s judgment at p. 701 of the report. Lindley M.R. was no doubt referring to Jessel M.R.'s statement on that page that "the law is this, that a man is entitled to the comfortable enjoyment of his dwelling-house". But that must not be read out of context, for immediately Jessel M.R. continued:

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[1] [1899] 1 Ch. 255.

[2] Ibid., 267; see too Chitty L.J. at 271.

[3] Both private and public nuisances are common law nuisances, as opposed to statutory nuisances: 28 Halsbury's Laws (3rd ed.), para. 155. Unfortunately, Lindley M.R.'s judgment uses public nuisance and private nuisance terminology indiscriminately.

[4] 3 B. & S. 62.

[5] 2 Ch. D. 692.

> "If his neighbour makes such a noise as to interfere with the ordinary use and enjoyment of his dwelling-house ... the occupier of the dwelling-house is entitled to be protected from it. It is no answer to say that the Defendant is only making a reasonable use of his property ..." (My emphasis).

And later:[1]

> "The test, therefore, is, whether the stables are unluckily so situated as that the noise from the horses ... materially disturbs the comfort of the Plaintiff's dwelling-house..."

In short, Jessel M.R. constantly referred to the defendant's use of his property: that was the test of liability.

Lindley M.R. also cited Walter v. Selfe,[2] a case in which the plaintiffs' property was affected by smoke and vapours from the defendant's brick-making activities on his land. The Vice-Chancellor stressed that the defendant was being sued "in his character of a person owning, using and occupying his parcel of land" and that the plaintiffs were suing "in their characters of owner and occupier" of neighbouring land.[3]

Finally, Lindley M.R. cited Crump v. Lambert,[4] in which, again, the plaintiff was affected by smoke from the defendants' factory. Lord Romilly M.R. stated the law thus:[5]

> "The owner of one tenement cannot cause or permit to pass over, or flow into, his neighbour's tenement any one or more of these things in such a way as materially to interfere with the ordinary comfort of the occupier of the neighbouring tenement, or so as to injure his property..."

Thus, in all of the cases cited by Lindley M.R., the defendant was the occupier of property neighbouring the plaintiff's, and

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[1] Ibid., 702.
[2] (1851) 4 De G. & Sm. 315; 64 E.R. 849.
[3] Ibid., 321; 851.
[4] (1867) L.R. 3 Eq. 409.
[5] Ibid., 413.

this was held crucial to the plaintiff's suing successfully. That the plaintiff's enjoyment of his house must be interfered with is only one part of the test; the other part is concerned with the defendant's use of his property. It is, therefore, submitted that J. Lyons & Sons v. Wilkins[1] cannot be supported on private nuisance grounds, although it cannot be denied that it has since been followed on that very basis.[2] Its authority is left in doubt by Hubbard v. Pitt.[3]

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[1] [1899] 1 Ch. 255.

[2] Ward, Lock & Co. Ltd. v. The Operative Printers' Assistants' Society (1906) 22 T.L.R. 327; Torquay Hotel Co. Ltd v. Cousins [1968] 3 W.L.R. 540, 554, per Stamp J.

[3] [1976] Q.B. 142. The defendants were picketing the plaintiff's premises. The plaintiff sought an interlocutory injunction. Forbes J. granted an injunction on the ground that the defendants were committing a public nuisance (at p. 147). In the Court of Appeal, the argument turned from public to private nuisance, presumably because counsel for the plaintiff feared that the plaintiff would not be able to show that he had suffered or was likely to suffer "special damage" over and above that suffered by other users of the highway, as the defendants were now prepared to give an undertaking that they would not interfere with the right of access to and from the plaintiff's premises (see Turner-Samuel, Q.C., at p. 165). The plaintiff's task was easier if he simply had to show that his enjoyment of his land was threatened. Lord Denning M.R., dissenting, thought that J. Lyons & Sons v. Wilkins was wrong, because there was no tort of 'watching or besetting" -- that activity was wrongful only if combined with other conduct, such as obstruction or violence. Stamp and Orr L.JJ. held, following the test laid down in American Cyanamid Co. v. Ethicon Ltd [1975] A.C. 396, that there was a serious issue to be tried, namely the pleaded issue whether the defendants by their activities outside the plaintiffs' premises were committing the tort of private nuisance. It is submitted that, in view of J. Lyons & Sons v. Wilkins, on practically identical facts, there was such a serious issue. Orr L.J. stressed that what they had to decide was not whether "the plaintiffs' claim would succeed in the action, nor even whether it was more likely to succeed than to fail, but simply whether there was a serious question to be tried in the sense that the claim was not frivolous or vexatious" (p. 189). Thus, Stamp and Orr L.JJ.'s judgments should not be interpreted as approval of the Wilkins line of authority.

To assert that Mr. Wilkins should not have been held liable in private nuisance does not mean that J. Lyons & Sons were without remedy. Wilfully to obstruct the free passage along a highway, without lawful authority or excuse, is an offence,[1] and if the obstruction is unreasonable or excessive, also a public nuisance.[2] For a member of the public to have a private remedy, he must show:

(a) a particular injury to himself beyond that which is suffered by the rest of the public;

(b) the injury to the individual must be direct;

(c) the injury must be of a substantial character, not fleeting or evanescent.[3]

Under this test, many people with properties abutting the highway have succeeded in public nuisance for special damage caused by others unreasonably obstructing the highway. Sometimes they have complained that the activity has blocked their access,[4] sometimes that they have lost custom because of the obstruction.[5] So J. Lyons & Sons could claim that they

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[1] Highways Act 1959, s. 121(1); Hunt v. Broome [1974] A.C. 587.

[2] R. v. Clark (No. 2) [1963] 3 W.L.R. 1067; Tynan v. Balmer [1967] 1 Q.B. 91, 105, per Widgery J.; probably too, Bird v. O'Neal [1960] A.C. 907 (Judicial Committee held that the intimidation and threats of violence from the pickets were so great that their actions were "an actionable nuisance" -- but of what kind?).

[3] Benjamin v. Storr (1874) L.R. 9 C.P. 400, 406-407; Vanderpant v. Mayfair Hotel Co. Ltd [1930] 1 Ch. 138, 153.

[4] Benjamin v. Storr, L.R. 9 C.P. 400; Lyons, Sons & Co. v. Gulliver [1914] 1 Ch. 631, 639; Barber v. Penley [1893] 2 Ch. 447, 449.

[5] Wilkes v. Hungerford Market Co. (1835) 2 Bing. N.C. 281, 293; since approved in Blundy, Clark & Co. v. London & North Eastern Railway Co. [1931] 2 K.B. 334, 352, 362 and Harper v. G.N. Haden & Sons Ltd [1933] Ch. 298, 306, where the plaintiff failed only because the obstruction was reasonable and therefore not a public nuisance; see too Amalgamated Theatres Ltd v. Charles S. Luney Ltd [1962] N.Z.L.R. 226.

had suffered a particular, direct, and substantial injury.

Alternatively a picketed firm might sue the pickets for an interference with a "private right of access".[1] That this right may be interfered with in the absence of public and private nuisance is conclusively shown by the first case in which the right was judicially acknowledged, Rose v. Groves.[2] The plaintiff's inn was approached from the river Thames. The defendant put beams, spars, and other materials in the Thames, and thereby obstructed access to the inn. The defendant had not committed a public nuisance because the beams and spars had drifted close to the bank where the water was so shallow that no boat could pass, and consequently there was no obstruction of the waterway. Nor was the defendant liable in private nuisance, for in 1843 (if not now) it was inconceivable that the defendant not be an occupier of land. But the plaintiff still succeeded because his right of access to the waterway had been interfered with.[3] So too, in Lyon v. The Wardens, &c., of the Fishmongers' Co.,[4] there was no suggestion that the defendants would necessarily be liable in either public or private nuisance if they went ahead and erected the embankment.

That the action for disturbance of the right of access is different from the action in private nuisance is shown, not only by the fact that it may lie in factual circumstances where private nuisance cannot lie, but also by the fact that the right is not one attaching to the person in

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[1] Lyon v. The Wardens, &c., of the Fishmongers' Co. (1876) 1 App. Cas. 662, 675.

[2] 5 Man. & G. 613.

[3] See esp.. 621-622.

[4] 1 App. Cas. 662.

possession of the property but rather to the owner.[1] In private nuisance, as will be seen, possession is the primary criterion for the right to sue. But the right of access seems to be a right running with the freehold of the land at common law.[2]

Thus, a picketed firm could sue the pickets on the basis that a private right of access had been obstructed by the pickets' activity. The ultimate conclusion is that the "watching and besetting" cases are not actions in private nuisance at all. They are not authority for the proposition that an ordinary member of the public may be sued in private nuisance for his activities on the highway. When West asserts that "a person on the highway" may be liable in private nuisance,[3] all the cases except one are "watching and besetting" cases. The one other case which he cites is Halsey v. Esso Petroleum Co. Ltd.[4] But the defendant in that case was not a "person on the highway": it was a firm which so operated its factory that the plaintiff's property was damaged by oil smuts and the plaintiff's enjoyment was disturbed by the nauseating smell of oil and the noise of oil tankers turning in the depot. Indeed, Veale J. adopted Lord

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[1] St Mary, Newington v. Jacobs (1871) L.R. 7 Q.B. 47, 55; Tottenham Urban Council v. Towley [1912] 2 Ch. 633, 644, per Cozens-Hardy M.R., 647, per Kennedy L.J.; Forster v. Medicine Hat (1914) 6 W.W.R. 548, 549; Marshall v. The Mayor, Aldermen, and Burgesses of the County Borough of Blackpool [1935] A.C. 16, 22; Toronto TransportationCo. v. Swansea [1935] 3 D.L.R. 619, 620; Middleton v. Takapuna Borough [1945] N.Z.L.R. 434, 442.

[2] Ching Garage Ltd v. Chingford Corporation [1961] 1 W.L.R. 470, 477, per Lord Radcliffe; 485, per Lord Morris of Borth-y-Gest.

[3] 30 Conv. (N.S.) 95, 103.

[4] [1961] 2 All E.R. 145.

Wright's words to the effect that the ground of responsibility in private nuisance "is the possession and control of the land from which the nuisance proceeds".[1]

(ii) The Highway Authority

The highway authority does have certain rights over the highway, and can be said to have sufficient control over certain activities to justify its being held liable in nuisance for damage to neighbouring occupiers.

Since trees growing on the highway vest in the highway authority,[2] it would seem logical that that authority should be liable for damage caused to a neighbouring property, whether by way of root or branch encroachment or by the tree's falling onto that property, just as a neighbouring occupier would be liable. The authority has, after all, the right to chop these trees down.[5]

One aspect of the duty to maintain the roads is the effective drainage of them. Where a local authority constructed a road on the side of a hill so that it acted as a catch-water for rain from the upper slopes, and in a heavy rain the water flowed over the road into the valley beneath and damaged the plaintiff's mills, the local authority was held liable.[3] In Solicitor-General v. Smith,[4] the Taieri County Council was said to "have allowed the culvert under their control [on a road] to discharge water on to the

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[1] Ibid., 157.

[2] 19 Halsbury's Laws, (3rd ed.), para. 105.

[3] Baldwin's Ltd v. Halifax Corporation (1916) 85 L.J.K.B. 1769.

[4] (1896) 14 N.Z.L.R. 681, 689.

[5] See Masters v. Brent L.B.C. [1978] 2 W.L.R. 768.

defendant's land, and to cause a nuisance there". In Fortescue v. Te Awamutu Borough,[1] where a drain on the defendant's road discharged at such a point that water flowed onto the plaintiff's property, Hosking J. was prepared to hold that prima facie the facts seemed "to constitute a case of actionable misfeasance", but the defendant was able to rely on the defence of statutory authority.[2]

The highway authority's duty of repair may explain the decision in Moss v. Christchurch Rural District Council,[3] where a spark from the defendant's steam-roller caused the plaintiffs' house to catch fire. Salter J. held the defendant liable in nuisance:[4] perhaps the defendant's use of a steam-roller on land over which it had a power of maintenance could be said to be the maintenance of a state of affairs.

Where the highway authority has delegated the task of repair to an independent contractor, that contractor may be liable to an adjoining owner if his activities cause sensible harm. Again, it will depend upon the degree of

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[1] [1920] N.Z.L.R. 281.

[2] Ibid., 299. But the Court of Appeal was divided on the issue. Chapman J., like Hosking J., thought that a local authority might be liable in nuisance for misfeasance, but not for non-feasance (see esp. 291, 292, 295). But Stout C.J. (at 290) and Sim J. rejected the notion of a local authority's being liable. The latter said (at 296): "It may be the case ... that an authority is fully liable for a nuisance on a property which it owns or occupies in the same exclusive manner, with the same control, the same power of determining the nature of the use, and the same freedom of disposition as a private owner. But the ownership of a street is not of that character, and the property in it is 'so qualified and attenuated', ... that it ought not to be saddled with the obligations which the law attaches to beneficial ownership."

[3] [1925] 2 K.B. 750.

[4] Ibid., 751.

control which he is given over the highway.[1] However, it is quite clear that the highway authority can be liable only for a state of affairs within its control. In Campbell v. Paddington Corporation,[2] the defendant corporation, without authority,[3] erected a stand over the highway so that members of the council and their friends could watch the funeral procession of Edward VII. The plaintiff's view was obstructed. Avory J. remarked that the claim could have been brought in private nuisance,[4] an opinion doubted because the corporation was in the position of a trespasser.[5] Lush J., however, correctly found for the plaintiff on the basis that the erection of the stand was a public nuisance, from which the plaintiff had suffered special damage.[6] As well, of course, if the plaintiff's property had adjoined that part of the street on which the stand was erected, then the plaintiff (as soil-owner of half the highway) could have sued the corporation in trespass.[7]

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[1] Grandel v. Mason [1953] 3 D.L.R. 65 (but note, at 80, per Locke J. (dissenting)); Jackson v. Drury Construction Co. Ltd, 49 D.L.R. (3d) 183 (right decision for the wrong reasons).

[2] [1911] 1 K.B. 869.

[3] Ibid., 876.

[4] Ibid., 874.

[5] The soil-owner may maintain an action in trespass if the highway authority interferes with the sub-soil or places anything unlawfully upon the surface of or over the highway: The Mayor, &c., of Tunbridge Wells v. Baird [1896] A.C. 434 (lavatories underground); Northampton Corporation v. Ward (1745) 2 Stra. 1238 (stall).

[6] [1911] 1 K.B. 869, 879.

[7] If his property was further along the street, he might have an action against the soil-owner at the place where the stand was; the soil-owner would, of course, join the corporation as a third party.

Highway authorities may be able to rely on the defence now provided by s. 1 (2) of the Highways (Miscellaneous Provisions) Act 1961. In an action against a highway authority in respect of damage resulting from their failure to maintain a highway, it is a defence to prove that the authority had taken such care as was reasonably required to secure that the part of the highway to which the action relates was not dangerous for traffic. Thus, where an adjoining owner has suffered damage and that damage results from a failure to maintain the highway, he will succeed in private nuisance only if the highway authority has been negligent.[1]

(d) Public Places

The user of a public place other than the highway is a bare licensee, whose entry onto the public place is subject to whatever conditions are stipulated by the body in control of the place. It is submitted that such a user cannot be held liable in nuisance, although the controller of the place may be liable if he so manages it that neighbours' enjoyment of their land is impaired (perhaps by the acts of members of the public). The classic case is Hall v. Beckenham Corporation.[2] The defendant corporation was held

[1] Griffiths v. Liverpool Corporation [1967] 1 Q.B. 374.

[2] [1949] 1 K.B. 716; see note, (1949) 65 L.Q.R. 147, which is, however, wrong in two respects: (a) the case was decided in private nuisance, not public nuisance. Finnemore J. expressly found that no criminal offence had been committed, and all the cases cited were private nuisance cases; (b) the decision was not based on Lambeth Overseers v. London County Council [1897] A.C. 625, as Finnemore J. found it unnecessary to decide whether the Corporation was an "occupier" in the strict sense, as it was "certainly invested with the management and control of [the park]" (at 727) and that was sufficient.

not liable because it had no power under its by-laws to prevent the flying of model aircraft.[1] But what of those actually flying the aircraft? It may be noted that they were not parties to the action and thus were not held liable!

It is true that Finnemore J. said:[2]

> "It seems to me that, as things are, anyone who wishes can go into this ground and fly his aeroplane subject to being proceeded against by a person aggrieved if in fact he commits a nuisance."

If, by "nuisance", Finnemore J. meant "private nuisance", the statement is wrong; it may, however be right if His Lordship meant "public nuisance", because one may be indicted for making great noises to the disturbance of the neighbourhood.[3] But too much weight must not be placed on Finnemore J.'s remark; it should be remembered that counsel on both sides had been stressing that the members of the public might be liable, the Corporation's counsel because, of course, they wanted to show that the suffering plaintiffs would not be without redress ifthe Corporation were held not liable, and the plaintiff's counsel because (in the event of the Corporation's being held not to be "an occupier") they wanted the Corporation to be held vicariously liable for the nuisance committed by its licensees, the members of the public using the park. The plaintiff could not identify these

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[1] But that is surely no answer: it should have passed such a by-law. "[A] corporation which both owns and controls a park ought to be liable if, by failing to exercise the powers given to it, it allows the park to become a nuisance": 65 L.Q.R. 147, 148.

[2] [1949] 1 K.B. 716, 728.

[3] Russell on Crime, p. 1404; R. v. Smith (1725) 2 Str. 704.

members. Thus, the decision is not authority for the proposition that "a person in a place of public resort", although not an occupier, may be liable in private nuisance.[1]

McLaren has written that there are "decisions in Canada which leave no doubt that liability will be imposed where the defendant is not a land occupier, for example where he ... is engaged in some activity in a public place".[2] But, with respect, the authority cited does not support his assertion. The plaintiff in Forster v. Medicine Hat[3] failed; but anyway, his claim was not based in private nuisance, but rather for interference with his right of access[4] and for withdrawal of support, not strictly a case of nuisance at all.[5] Prentice v. Sault Ste. Marie[6] was a case of public nuisance. The patch of dangerous ice on which the plaintiff slipped was on the public highway (although outside her home). Anglin C.J.C., used terminology appropriate only to a public nuisance case: it was "a nuisance in the highway",[7] and it was "caused by negligence of [the defendant's] servants amounting to misfeasance and ... [it] caused special damage"[8] to the plaintiff. It has never been disputed that in public nuisance the defendant need not have

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[1] West, 30 Conv. (N.S.) 95, 103.
[2] 10 Osgoode Hall L.J. 505, 519.
[3] 6 W.W.R. 548.
[4] See p. 85.
[5] Atiyah, p. 355.
[6] [1928] 3 D.L.R. 564.
[7] Ibid., 566.
[8] Ibid., 568.

control of land. Toronto Transportation Co. v. Swansea[1] and Hagel v. Municipal District of Yellowknife[2] were, like Forster's case,[3] concerned with an owner's right of access to the highway, and not with private nuisance. Finally, McLaren cited Culp and Hart v. Township of East York and Municipality of Metropolitan Toronto.[4] Again, this was a case of public nuisance;[5] the plaintiff was, however, entitled to redress because he had "sustained ... some substantial injury beyond that suffered by the rest of the public".[6]

Thus, it is submitted that none of the cases cited by McLaren supports his contention. There are no reported cases where the user of a public place has been held liable in private nuisance, and it would be inconsistent with principle if there were.

(e) Plaintiff's Own Land

Professor Heuston states:[7]

> "The nuisance must have arisen elsewhere than in or on the plaintiff's premises ..."

The reason for this must be that expressed by Finnemore J. in Hall v. Beckenham Corporation:[8] an owner of private property can prevent others coming onto his land. When a branch fell from a large tree standing on property let to the

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[1] [1935] 3 D.L.R. 619.
[2] (1962) 35 D.L.R. (2d) 110, 115.
[3] 6 W.W.R. 548.
[4] (1956) 6 D.L.R. (2d) 417.
[5] Ibid., 423, per Ferguson J.
[6] Ibid., 422.
[7] Salmond, p. 51.
[8] [1949] 1 K.B. 716, 724.

plaintiffs, they failed in an action against their landlords because the "offending premises [must be] separately occupied from the premises affected by the alleged nuisance".[1]

If the plaintiff has retained control of his premises, then how can the defendant have sufficient control of them so as to maintain a state of affairs causing the plaintiff's premises harm? The matter need only be put in that way to show its absurdity. In the unusual case of Hooper v. Rogers,[2] the plaintiff and defendant were owners in common of the property from which the harm emanated. The defendant, without the plaintiff's consent, bulldozed a track on this land. Soil erosion was caused, and ultimately the plaintiff's farmhouse was detrimentally affected. Scarman L.J., the only member of the Court of Appeal to discuss the point, approved Salmond's statement, and said that the plaintiff had "to prove that the threat of damage to his land [arose] from acts or omissions of the defendant on his, the defendant's land".[3] The plaintiff could not prevent the defendant from coming onto the jointly owned land. The plaintiff succeeded because he satisfied His Lordship's test:[4]

> "He has only to show that land of which he is the occupier is damaged, or threatened, by a wrongful act done upon land of which the defendant is an occupier, and either created, continued or adopted by the defendant, to establish his cause of action."

It is submitted with respect that His Lordship's judgment is correctly reasoned.

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[1] Titus v. Duke (1963) 6 W.I.R. 135, 136. Salmond's statement was cited with approval.

[2] [1975] Ch. 43.

[3] Ibid., 50.

[4] Ibid., 51.

There are, however, three recent New Zealand cases where the plaintiff has recovered damages in nuisance even though the activity causing him harm occurred on his own premises. The first is Howard Electric Ltd v. A.J. Mooney Ltd.[1] The defendant, which was constructing a building next to the plaintiff's, left various items of builder's waste on the plaintiff's roof. A wedge of wood so left blocked the downpipe, and caused flood damage. The plaintiff sued the defendant, an independent contractor, in negligence and nuisance. O'Regan J. found for the plaintiff on the basic of negligence,[2] and so consequently His Honour's views on nuisance are obiter dicta. It may be that the defendant could have been held liable in trespass, as was the defendant in Konskier v. B. Goodman Ltd,[3] a case which, although on very similar facts, was apparently not cited to the Court. O'Regan J. seemed to think that private nuisance arose "where there has been an invasion of interests in the enjoyment of land":[4] if that is the test, then a man who throws stones onto the plaintiff's land, a man who camps on the plaintiff's land, and a man who digs up the plaintiff's soil will be liable in nuisance, yet each of those examples is obviously a trespass on any orthodox analysis. His Honour's error was to regard "damage to the plaintiff's property" as the sole criterion of liability in private nuisance.[5]

Similar arguments are found in decisions of Mahon J., Paxhaven Holdings Ltd v. Attorney-General[6] and Clearlite

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[1] [1974] 2 N.Z.L.R. 762.
[2] Ibid., 763.
[3] [1928] 1 K.B. 421.
[4] [1974] 2 N.Z.L.R. 762, 763.
[5] Ibid., 766.
[6] [1974] 2 N.Z.L.R. 185.

Holdings Ltd v. Auckland City Corporation.[1] In the latter, the Auckland City Corporation was laying new drainage pipes. A tunnel was excavated for this purpose under the plaintiff's land. This caused cracks to appear in the floor of the plaintiff's factory, and there was subsidence.[2] Mahon J.'s decision in favour of the plaintiff could be justified on the ground that the defendant was a statutory licensee with an exclusive right of control over the area of soil occupied by the pipes; that area was outside the plaintiff's control. But Mahon J.'s judgment was much wider than this, and involved an explicit denial of Salmond's statement. His Honour said:[3]

> "A private nuisance is a civil wrong based on a disturbance by the defendant of rights in land. It seems to me immaterial, in a case of actual damage to the land itself, to base any distinction upon the locality of the conduct complained of. All that is required in a case of this kind is a positive act creating the damage."

Therein lies the error: that is only half the story. The maxim on which nuisance is based is sic utere tuo ut alienum

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[1] [1976] 2 N.Z.L.R. 729; for a full case-note and criticism of these cases, see the author's article, "Nuisance -- Judicial Attack on Orthodoxy", [1978] N.Z.L.J. Only some of the arguments there presented are repeated here. Only the second of these cases will be considered, for it was in this case that His Honour expressed his views at considered length and further, if his judgment there can be proved wrong, then his judgment in the earlier case must also fall.

[2] It appears not to have been argued that the action was improperly framed in "mainstream" nuisance: should not the plaintiff's case have been based (apart from negligence) on a disturbance of the easement of support, if there were such an easement in this case?

[3] Ibid., 740.

non laedas: so use your own land that you do not harm your neighbour's. Without a consideration of the defendant's use of his land, how can the fundamental balancing process (which has always been the hallmark of the nuisance action) between the right of a man to use his land as he wishes and the right of his neighbour not to be disturbed in the enjoyment of his be undertaken? If Mahon J.'s views are correct, then one would be forgiven for asking why the nuisance action should be retained at all, for its whole historical basis concerning the rights and duties of neighbouring occupiers is destroyed. Mahon J. was forced to hold that Titus v. Duke[1] was wrongly decided, and to give a strained interpretation to the Sedleigh-Denfield case,[2] where their Lordships had clearly stated that nuisance involved a wrongful interference with A's enjoyment of his land or premises by the use of land or premises either occupied or in some cases owned by B. His Honour cited Devlin J.'s dicta in the Southport Corporation case,[3] without noting that those dicta were not accepted on appeal. Nor does Hargrave v. Goldman[4] support Mahon J.'s view: Windeyer J. said it was "not an essential element in liability for a nuisance that it should emanate from land belonging to the defendant", but all he meant by that was that the defendant need not have legal title to the land.[5]

Finally, the "animal" cases cited by Mahon J., all, he says, in principle nuisance cases and all having in common

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[1] 6 W.I.R. 135.
[2] [1940] A.C. 880.
[3] [1956] A.C. 218, 224-225.
[4] 110 C.L.R. 40, 60.
[5] See his judgment in Benning v. Wong, 43 A.L.J.R. 467, 483.

the fact that damage resulted from actionable conduct on the plaintiff's land,[1] appear, on close analysis, to be explicable on other grounds. Hilton v. Green[2] and Birkbeck v. Paget[3] were both decided in trespass: it is actionable as trespass to land intentionally to place an animal or to drive it onto the plaintiff's land without the plaintiff's permission.[4] In Seligman v. Docker,[5] the landlord defendant had reserved the exclusive right of sporting and preserving game and had kept possession of an area of grassland within the farm leased to the plaintiff tenant. Pheasants kept in the defendant's coverts strayed and damaged the plaintiff's crops. Thus, judgment for the plaintiff could be justified on the sic utere, etc. principle: the defendant had maintained on land exclusively in his possession a state of affairs, namely the keeping of pheasants, which caused harm to the occupier of neighbouring land. The decision in Farrer v. Nelson[6] can similarly be justified, either in trespass or on ordinary nuisance principles, according to one's interpretation of the facts in that case.

It is submitted with respect that Mahon J.'s thesis is wrong, and that none of the cases he cites supports it. His Honour's thesis is completely at variance with the "state of affairs" concept and, as he himself concedes, with the whole history of the nuisance action.[7] A defendant on the plaintiff's land satisfies neither criterion suggested

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[1] [1976] 2 N.Z.L.R. 729, 736.
[2] (1862) 2 F. & F. 821; 175 E.R. 1302.
[3] (1863) 3 F. & F. 683; 176 E.R. 313.
[4] R. v. Pratt (1855) 4 E. & B. 860, 864-865; Buckle v. Holmes (1925) 42 T.L.R. 147, 148; North, Animals, p. 171.
[5] [1949] 1 Ch. 53.
[6] (1885) 15 Q.B.D. 258.
[7] [1976] 2 N.Z.L.R. 729, 732.

earlier:[1] he cannot have any right to occupation or possession by law, nor can he have sufficient control because of agreement with the legal occupier.

(f) Conclusion

In all circumstances, liability in nuisance is determined according to a common principle. It has been shown that an owner/occupier, a lessee, and a licensor will all prima facie be liable in nuisance for harm caused by a state of affairs on their land, because they have the right to possession of the land. But others have been held to have sufficient control over a particular activity on or use of the land that they too can be held liable for harm caused by that activity or use. Those in the first category are liable because of obligations imposed by law: they are obligations incidental to possession of land. Those in the second category obtain their "control" (and hence their liability) from agreement with the occupiers. Thus, a lessor's liability may stem from a lease whereby he is given a right of entry to repair. Licensees and independent contractors less commonly are held to have sufficient control, but in their case it will stem from the terms of their licences or contracts respectively. The liability in all cases stems from this control: one is not liable qua creator of a nuisance (whatever that means) or qua continuer.

The traditional view of liability -- i.e. creation (sometimes of the conditions on the land, sometimes of the harm), continuation, adoption, plus various special rules for

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[1] See p. 45.

miscellaneous categories -- is rejected. Despite the bold assertion made by various texts that it is irrelevant "whether or not [the creator of the nuisance] is in occupation of the land from which it emanates",[1] it is nonetheless conceded by at least some of those writers that "there are no decisions squarely imposing liability on non-occupiers".[2] Other writers do cite authority. The editors of Clerk and Lindsell refer to Hall v. Beckenham Corporation,[3] already discussed and, in fact, in line with the thesis presented here. The editor of Winfield cites, apart from that case, Newman v. Conair Aviation Ltd[4] and Gertsen v. Municipality of Metropolitan Toronto,[5] both already discussed.[6]

West asserts plainly that the "defendant in nuisance need not be an occupier".[7] Most of the cases he cites have already been discussed. Those which have not been now will be. In Thompson v. Gibson,[8] a building was erected in 1838 under the defendants' superintendence and direction, although not on their land. The land belonged to the corporation of Kendal, of which the defendants were members. The building obstructed the market owned by Lord Lonsdale but let in 1839 to the plaintiffs. The defendants were held liable for the obstruction. The case might be explained on the basis of public nuisance, the defendants having obstructed the highway

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[1] Fleming, p. 410; Clerk, para. 1418; Street, p. 233; Winfield, p. 335.

[2] Fleming, p. 410, ftnt. 32; Street, p. 234, ftnt. 1.

[3] [1949] 1 K.B. 716; see p. 90 et seq.

[4] 33 D.L.R. (3d) 474.

[5] 41 D.L.R. (3d) 646.

[6] See p. 73 et seq.

[7] 30 Conv. (N.S.) 95, 103.

[8] 7 M. & W. 456; 151 E.R. 845.

and the plaintiffs having thereby suffered special damage, or on the basis of an interference with the common law right of access.[1] It may be that the defendants were liable as authorizers, a tortious act having been committed by their direction.[2] Yet again, the case can be seen as a "rival market" case: while interference with a market has traditionally been nocumentum (harm) coming within the category "nuisance",[3] it is today quite a different wrong from that suffered by a man whose enjoyment of land has been interfered with. Just as the appropriate defendant in the case of the disturbance of an easement (also traditionally a "nuisance" action) is he who disturbed the easement, so the appropriate defendant here would be he who has interfered with the market. Different rules apply to what may now be called the "mainstream" nuisance action, which is concerned with competing land uses. However, in so far as Parke B.'s judgment attempts to settle the law for "mainstream" nuisance, it is wrong; had this been a case of the plaintiffs' suffering harm in the enjoyment of their land, the appropriate defendants would have been the mayor, aldermen, and burgesses of the borough of Kirby-in-Kendal in the county of Westmorland.[4]

West also cites Sedleigh-Denfield v. O'Callaghan[5] as

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[1] See p. 85.

[2] See p. 76 et seq.

[3] See p. 166.

[4] An Act to provide for the Regulation of Municipal Corporations in England and Wales 1835 (5 & 6 Will. IV, c. 76), s. 6, Sch. A (Section 1).

[5] [1940] A.C. 880.

authority for the proposition that "even a trespasser" may be liable in nuisance. The case is, of course, authority for nothing of the sort. The defendants owned the premises on which the drain was laid by a trespasser. There is no suggestion anywhere in the judgments that that trespasser might have been liable in nuisance.

Certainly, Devlin J. said (by way of obiter dictum) in Southport Corporation v. Esso Petroleum Co. Ltd:[1]

> "I can see no reason why ... if the defendant as a licensee or trespasser misuses someone else's land, he should not be liable for a nuisance in the same way as an adjoining occupier would be."

First, there is a difference between the position of a licensee and that of a trespasser. In certain circumstances, a licensee, with a lawful right to be on another's land and with power to undertake certain activities there, may have sufficient control over the use of the land to justify his being held liable in nuisance. A trespasser has no lawful right to be on the land at all. Secondly, Devlin J.'s views on nuisance were overruled on appeal.[2] The High Court of Australia has ruled definitively that a trespasser cannot be liable in nuisance.[3]

The defendant in such a case ought to be the occupier who has allowed his land to be so used by a trespasser that harm has resulted to his neighbour. The defendant occupier may, of course, have an action against the trespasser, and at times the injured neighbour may be able to sue the trespasser in negligence.

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[1] [1953] 2 All E.R. 1204, 1207.

[2] See p. 80.

[3] Beaudesert Shire Council v. Smith, 40 A.L.J.R. 211, 212-213 (the Council was a trespasser on Crown land).

Quite apart from the cases, it is submitted that the traditional analysis is fallacious on principle. First, to talk of "creating a nuisance" begs the question, for what is "the nuisance"? It has already been seen that "nuisance" is sometimes used to mean the condition of things from which harm results, and, at other times, to mean the actual harm. A man may be creator of the nuisance in one sense but not in the other.

Secondly, the "creator" may not be the person who has maintained on his land the state of affairs which has caused harm to the neighbour. If the "state of affairs" concept is of value -- and it has been widely accepted as appropriate -- then rules relating to the incidence of liability in nuisance which are drawn independently of it, and indeed possibly at variance with it, are highly suspect.

Thirdly, it seems unjust that a man should be held liable for a condition of things which he may be powerless to correct.[1] Suppose A sets up a sewage lagoon on his property: he then sells the property to B; ten years later, sewage starts to seep out onto a neighbour's property. It would seem most unfair that A should be held liable in nuisance. He has had no control over the property for the last decade. The original risk of harm arising from "the creator's" act may have been extremely slight; the risk may have grown (by the effect of weather, say, on the thing "created") after the "creator" had sold the property. Without

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[1] The editor of Winfield admits that it is unfair, but justifies it on the ground that the creator "did the first wrong and he must answer for the damage resulting from it" (p. 335). This too begs the question: did he do the first wrong? What is meant by "wrong"? Certainly no harm occurred while he was in control of the condition of things.

committing a tort, he could do nothing to abate that increasing risk. Can it be right that he is liable for all damage flowing at some time or other from that act? He may well have accepted a lower price for his property when selling it because of the existence of this dangerous state of affairs upon it: is he to be held liable twice in effect? It must be remembered that the person harmed by this state of affairs is not without remedy: he has an action, of course, against the person at present in control of the harmful state of affairs.[1]

Fourthly, if the creator is not the occupier of the land from which the harm emanates, how is the court to achieve a balancing of land uses between the injured and the injurer? The creator (injurer) has no land to use.

Thus, it is submitted that the view that any creator of a nuisance will always be liable, qua "creator", cannot be supported on principle. Furthermore, if that view were correct, why was not the trespasser, the undoubted "creator", in the Sedleigh-Denfield case[2] sued? That trespasser was known and was not impecunious. And yet there is no suggestion in that case in any of their Lordships' judgments that the trespasser could have been successfully sued. That anyone but the occupier could be liable was expressly negatived by Lord Atkin:[3]

> "[Nuisance is] a wrongful interference with another's enjoyment of his land or premises by the use of land or premises either occupied or in some cases owned by oneself."

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[1] See Coal Industry Nationalisation Act 1946, s. 48(1), where liability is placed not on the colliery concern who made the excavations but on the colliery concern in occupation at the time of the subsidence of neighbouring property.

[2] [1940] A.C. 880.

[3] Ibid., 896; see too at 894, per Viscount Maugham; 903, per Lord Wright.

"Creators" can only be liable if they are in occupation (or in some circumstances owners) of the land.

PART II: PRINCIPLES OF LIABILITY IN NUISANCE

Chapter 3: Knowledge and Foreseeability

It is often said that the defendant must have knowledge of the nuisance,[1] but, yet again, one is faced with the question: what, in this context, is meant by "the nuisance"? In the Sedleigh-Denfield case,[2] the word is used to mean the damage caused[3] and the thing from which the damage was caused, namely the pipe.[4] Clearly, one might have knowledge of the nuisance (in the second sense) but not knowledge of the nuisance (in the first sense). In short, it is of little help to say that "the defendant must have knowledge of the nuisance" when the word "nuisance" is so enshrouded in mystery.

But this is only the beginning of the story. There is also judicial authority for the view that the defendant must have knowledge of the facts or the state of affairs,[5] and for the view that it is only if those facts threaten damage that the defendant will be liable.[6] In other cases, judges have talked of the need for the defendant to have had knowledge of the danger.[7] And then there are the difficult

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[1] Salmond, p. 66; St. Anne's Well Brewery Co. v. Roberts (1928) 140 L.T. Rep. 1, 7, per Scrutton L.J.; Billingsgate Fish Ltd v. British Columbia Sugar Refining Co. Ltd [1933] 1 W.W.R. 530, 530; Sedleigh-Denfield v. O'Callaghan [1940] A.C. 880, 897, 904; Johnson v. Clinton [1943] 4 D.L.R. 572, 574; Landon v. Rutherford [1951] N.Z.L.R. 975, 978.

[2] [1940] A.C. 880.

[3] Ibid., 887, 919; see too Buxton, 8 Malaya L.R. 1, 12.

[4] Ibid., 895, per Viscount Maugham; 895, per Lord Atkin.

[5] Wedderburn, [1958] C.L.J. 32, 32; Ilford U.D.C. v. Beal [1925] 1 K.B. 671, 679; Brew Brothers Ltd v. Snax (Ross) Ltd [1970] 1 Q.B. 612, 636.

[6] Sedleigh-Denfield v. O'Callaghan [1940] A.C. 880, 895.

[7] Noble v. Harrison [1926] 2 K.B. 332, 337; Turner v. McChesney (1901) 20 N.Z.L.R. 768, 768; Torette House Pty Ltd v. Berkman, 62 C.L.R. 637, 657; Sedleigh-Denfield v. O'Callaghan [1940] A.C. 880, 898, 919; Spicer v. Smee [1946] 1 All E.R. 489, 494; Aldridge v. Van Patter [1952] 4 D.L.R. 93, 109; Kraemers v. Attorney-General for Tasmania [1966] Tas. S.R. 113, 134.

Privy Council decisions of The Wagon Mound (No. 2)[1] and Goldman v. Hargrave[2] which seem to postulate tests of foreseeability.[3] Last but not least, there are the cases where the state of the defendant's knowledge has been held irrelevant.[4] Thus, authority leads one to the conclusion that sometimes no knowledge is necessary, sometimes the defendant must have knowledge of the nuisance (a proposition which itself can mean several things), sometimes a knowledge of the circumstances, facts, or state of affairs, sometimes a knowledge of the danger, and sometimes to the view that foreseeability of harm is essential to liability.

Academic lawyers have struggled as best they can to untangle the knots created by these conflicting decisions. Friedmann was forced to conclude that "three lines of decisions run, as it were, side by side, and that each formulates certain principles of liability for a particular type of case, but that a general connecting principle has not yet been found".[5] These three lines of decisions were:

(a) nuisance by misfeasance, where liability is strict;

(b) nuisance by continuance or other failure to control a nuisance created by someone else, where the defendant is liable only if he has knowledge or means of knowledge of the existence of the nuisance; and

(c) nuisance caused to a passer-by or to an adjoining owner by the defective state of premises on a highway,

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1 [1967] 1 A.C. 617.

2 [1967] 1 A.C. 645.

3 See too Gourock Ropework v. Greenock Corporation 1966 S.L.T. 125, 128.

4 Humphries v. Cousins (1877) 2 C.P.D. 239; Wringe v. Cohen [1940] 1 K.B. 229.

5 "Incidence of Liability in Nuisance", (1943) 59 L.Q.R. 63, 63.

where liability is determined according to the decision of the Court of Appeal in Wringe v. Cohen.[1]

The editor of Winfield concludes that two different types of liability exist:[2]

(a) cases in which negligence "in the narrow sense" is essential. Here, the plaintiff must prove the breach of a duty of care, and will normally succeed if he can prove that the defendant has neglected to take reasonable precautions to prevent foreseeable damage. "[I]t is immaterial whether the cause of action is termed 'nuisance' or 'negligence'."[2]

(b) cases in which negligence in the narrow sense is not essential, i.e. those cases where the defendant has acted wrongfully (though not necessarily carelessly) in prosecuting his activity when it is reasonably foreseeable that damage to the plaintiff will result from it.

He concedes that the difficulty is "to determine the criterion by which it is possible to distinguish the respective areas of application of these two different forms of liability in nuisance".[3] He concludes that it may be argued that the second form of liability applies to the creation or adoption of a nuisance and the first form of liability to the negligent continuance of it.[4] It is noteworthy that Winfield's tests are both more fault-orientated than Friedmann's.

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[1] [1940] 1 K.B. 229.

[2] Winfield, p. 322, et seq.

[3] Ibid., 323.

[4] Ibid., 324; i.e. Friedmann's categories (a) and (b) respectively.

Professor Fleming is not explicit as to the requirements of the defendant's knowledge. He does divide the topic into "Creating a Nuisance" and "Nonfeasance: Occupiers"; as to the first category, liability is "limited, just like negligence, to foreseeable consequences alone",[1] whereas, in the second category, the "keynote of his responsibility has become knowledge or means of knowledge".[2] To what extent "foreseeability" differs from "knowledge" is not explained. In short, the existing law is very uncertain and no one should be so bold as to claim that his analysis is without difficulty. But that should not deter one from attempting analysis, even of a radical kind, for existing analyses, with respect, leave the law little tidier than the judgments on which they are based.

It is submitted that the following proposition holds true for all cases of private nuisance:

A defendant will be prima facie liable in nuisance if:

(a) he has knowingly or with means of knowledge maintained on his land a state of affairs; and

(b) the harm which results to the plaintiff from that state of affairs was foreseeable.

This proposition will now be analysed and justified.

(a) "He has knowingly or with means of knowledge maintained on his land a state of affairs"

It has already been submitted that, in nuisance, one is concerned not with specific acts but with a state of affairs existing on the defendant's land.[3] "State of affairs",

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[1] Fleming, p. 410; on the basis of The Wagon Mound (No. 2) [1967] 1 A.C. 617.

[2] Ibid., p. 411.

[3] See p. 31.

it was stressed, is not a term of art, but it does suggest the general activity being undertaken or the general condition being maintained or tolerated by the defendant. Although liability in nuisance is strict, it has never been suggested that the defendant should be held liable for a state of affairs -- whether that be a use of the land or a condition on it -- about which he did not know. For instance, in the Sedleigh-Denfield case,[1] the respondents were taken to have knowledge "of the existence of the unguarded culvert which for nearly three years had been the means by which the water coming down the ditch on the respondents' land had flowed away to the sewer in Lawrence Street".[2] Where a wall threatened to collapse, the owners of it were enjoined to repair the wall because it constituted a "state of affairs ... within the knowledge of the owners".[3] It was a "complete answer" that a lessee did not know (and could not be expected to know) of a burst pipe on his premises.[4]

What then of the cases cited by Friedmann as instances of strict liability? The first was Broder v. Saillard,[5] a case which has been much misunderstood. The plaintiff complained of the noise emanating from the defendant's stable and of damp from his property. The defendant clearly had knowledge of the state of affairs -- namely, the keeping of horses -- which resulted in harm by way of noise. It is true that Jessel M.R. said that the defendant did not know that the soil-pipe in the stables was broken, although

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[1] [1940] A.C. 880.
[2] Ibid., 887.
[3] Brew Brothers Ltd v. Snax (Ross) Ltd [1970] 1 Q.B. 612, 636.
[4] Crown Diamond Paint Co. Ltd v. Acadia Holding Realty Ltd [1951] 1 D.L.R. 265, 272.
[5] (1876) 2 Ch.D. 692.

the judgment is silent as to whether he knew of the existence of the pipe.[1] Anyway, the wet came "in part, if not entirely, from the water used in washing the horses",[2] an activity of which the defendant had full cognisance. On this interpretation, the case is in accord with the thesis presented here.

The second case was Humphries v. Cousins.[3] A drain which began on the defendant's premises passed under other houses and received their drainage and then returned under the defendant's house. The return drain beneath the defendant's was decayed and allowed the drainage to escape, ultimately into the plaintiff's premises. Denman J. declared that the defendant's duty to prevent sewage from escaping lay "independent of his knowledge or ignorance of the existence of the drain".[4] It was irrelevant, he said, to consider the degree of care exercised by the defendant and his knowledge of the state of his property. Denman J. relied on several cases. The first was Smith v. Kenrick,[5] in which the defendant was held not liable because of a defence of ordinary use; it was, therefore,unnecessary to discuss the defendant's knowledge. In Baird v. Williamson,[6] as a result of pumping in the defendant's mine, water flowed through a crut or passage, which had been made by the defendant, into the lower mine of the plaintiff. As the defendant was responsible

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[1] Ibid., 699.

[2] Ibid., 700.

[3] 2 C.P.D. 239.

[4] Ibid., 244; followed in Esco v. Fort Henry Hotel Co. Ltd (1962) 35 D.L.R. (2d) 206, 210-211.

[5] (1849) 7 C.B. 515; 137 E.R. 205.

[6] (1863) 15 C.B. (N.S.) 831; 143 E.R. 831.

for the pumping and the cutting of the passage, his knowledge of the state of affairs on his property was obvious. Finally, Denman J. relied on Fletcher v. Rylands,[1] but in that case, the defendants deliberately accumulated the water in a reservoir. Here, the defendant did not know that sewage was accumulating on his property, for he did not know that the drain returned under his property. That is a crucial distinction. It is submitted with respect that Denman J.'s decision is wrong.[2] It was not followed in Ilford U.D.C. v. Beal,[3] a case on similar facts; Branson J. declared it to be irreconcilable with Barker v. Herbert[4] and continued:[5]

> "[T]he plaintiffs' action must therefore fail by reason of the fact that the defendant did not discover, and could not by the exercise of any diligence in the circumstances reasonably have discovered, the existence of the sewer, and thus the existence and extent of her duty to the plaintiffs."

With respect, Branson J.'s reasoning is to be preferred to Denman J.'s.

It is said that the defendant must "knowingly" or "with means of knowledge" have maintained the state of affairs. The reason for the inclusion of the latter phrase is that lack of knowledge cannot be relied upon if the defendant ought to have known of the state of affairs.[6] The rationale is that the absentee owner or the owner who is oblivious of what is happening under his eyes should be

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[1] L.R. 1 Ex. 265.

[2] Friedmann also considered it wrong: 59 L.Q.R. 63, 66.

[3] [1925] 1 K.B. 671.

[4] [1911] 2 K.B. 633.

[5] [1925] 1 K.B. 671, 679.

[6] Clerk, para. 1429; Johnson v. Clinton [1943] 4 D.L.R. 572, 574; Boatswain v. Crawford [1943] N.Z.L.R. 109, 112; Spicer v. Smee [1946] 1 All E.R. 489, 494; Brew Brothers Ltd v. Snax (Ross) Ltd [1970] 1 Q.B. 612, 638.

in no better position than the occupier who knows about the condition of his land.[1] The test is as suggested by Branson J.: could the defendant by the exercise of reasonable care in the circumstances have discovered the existence of the state of affairs?[2]

It should also be noted that the defendant must have "maintained" the state of affairs. Where the thing or activity threatening harm has been "created" by another (a predecessor in title or a trespasser, say), then the defendant cannot be said to have "maintained" that state of affairs until he either "adopts" it, i.e. makes use of it himself, or "continues" it, i.e. fails to do anything to bring it to an end. He can be said to have failed to do anything only when he has had a reasonable time to do it.[3] For example, if a trespasser lights a fire on A's property, and A is told about the fire, now an inferno, just five minutes before it crosses the boundary and does damage on B's property, A cannot be said to have "maintained" that state of affairs, namely the fire. The "reasonable time" which he is given to bring the fire to an end starts running from the time when he discovers its existence or ought to have discovered its existence.

(b) "<u>The harm which results to the plaintiff from that state of affairs was foreseeable</u>"

It is not enough that the defendant knows of the

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[1] <u>Sedleigh-Denfield</u> v. <u>O'Callaghan</u> [1940] A.C. 880, 887.

[2] See too <u>Torette House Pty Ltd</u> v. <u>Berkman</u>, 62 C.L.R. 637, 646, 657, -- "exercising due diligence".

[3] <u>Sedleigh-Denfield</u> v. <u>O'Callaghan</u> [1940] A.C. 880, 894, 913.

state of affairs on his land; · some uses of land or conditions on land pose no risk to neighbours and other uses or conditions, while they pose a risk of one kind, pose no risk of another kind. Should harm occur despite there having been no risk or should harm of one kind occur where only another kind of harm threatened, then it is submitted that the defendant will not be held liable in nuisance. All this was settled by the Privy Council in The Wagon Mound (No. 2).[1] However, there is much controversy as to what that case actually decided. It is submitted that the difficulties are resolvable if Lord Reid's judgment in The Wagon Mound (No. 2)[1] is carefully analysed.

His Lordship says categorically:[2]

> "It is quite true that negligence is not an essential element in nuisance."

In so holding, His Lordship was simply reiterating a view long held by most;[3] had the judgment stopped there, no one would have had any difficulty with it. The caveat Lord Reid adds -- that there are many cases where "the same facts will establish liability both in nuisance and in negligence"[4] -- need cause no concern, because it is not unusual for the same facts to give rise to more than one cause of action. For instance, before the passage of the Animals Act 1971, if A's horse had strayed on to B's land

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[1] [1967] 1 A.C. 617.

[2] Ibid., 639.

[3] e.g. Rapier v. London Tramways [1893] 2 Ch. 588, 599; Spicer v. Smee [1946] 1 All E.R. 489, 493; Read v. J. Lyons & Co. Ltd [1947] A.C. 156, 183; Jackson v. Drury Construction Co. Ltd (1974) 49 D.L.R. (3d) 183, 188; Miller v. Jackson [1977] 3 All E.R. 338, 344; Power v. Village of Hibbing (1930) 233 N.W. 597, 598; Paxhaven Holdings Ltd v. Attorney-General [1974] 2 N.Z.L.R. 185, 188.

[4] [1967] 1 A.C. 617, 639.

and kicked B's horse, that propensity being known to A, A might have been liable to B in cattle trespass,[1] in scienter,[2] in negligence,[3] and possibly even in Rylands v. Fletcher.[4] No one would conclude from that that cattle trespass, scienter, negligence, and Rylands v. Fletcher were the same, or indeed that they necessarily had anything in common but the fact that they overlapped in certain situations. So, the fact that an action might be maintained in either negligence or nuisance in certain circumstances reveals nothing as to the nature of each action; indeed it even reveals nothing as to the relationship of the two torts.[5]

Lord Reid then continues that, although negligence is not necessary, "fault of some kind is almost always necessary and fault generally involves foreseeability".[6] Dias justly criticises the Privy Council for this use of the word "fault without explanation".[7] Windeyer J. attempted an explanation in Benning v. Wong:[8]

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[1] Lee v. Riley (1865) 18 C.B.N.S. 722.

[2] Manton v. Brocklebank [1923] 2 K.B. 212, where it was assumed that there would have been liability, if scienter had been proved.

[3] Aldham v. United Dairies Ltd [1940] 1 K.B. 507; Draper v. Hodder [1972] 2 Q.B. 556.

[4] Animals mansuetae naturae may be classed as "dangerous things" if their owner has knowledge of their vicious or mischievous propensity: Hines v. Tousley (1926) 95 L.J.K.B. 773, 774, per Bankes L.J.; Knott v. London County Council [1934] 1 K.B. 126, 138, per Lord Wright. But usually the defendant will be able to rely on a defence of "ordinary use" when the rampaging animal is of a domestic kind.

[5] Winfield, "Nuisance as a Tort", (1931) 4 C.L.J. 189, 198.

[6] [1967] 1 A.C. 617, 639.

[7] "Trouble on Oiled Waters: Problems of the Wagon Mound (No. 2)", [1967] C.L.J. 62, 66.

[8] 43 A.L.J.R. 467, 485; see, to similar effect, Miller v. Robert Addie & Sons Collieries Ltd 1934 S.C. 150, 155; Torette House Pty Ltd v. Berkman, 62 C.L.R. 637, 659. (Windeyer J. is here referring to Rylands v. Fletcher, but he had already concluded that the rule was "of the genus nuisance" or an action "sui generis" involving no fundamental distinctions (at 484).)

> "Sometimes the idea of strict liability, in the relevant sense, is expressed as 'liability without fault'. There can be no objection to this expression if the word 'fault' is used to connote moral blame for negligence or evil intent. But fault may mean simply a falling short of some requirement. It was in this sense that Blackburn J. said that the question in Fletcher v. Rylands was whether the plaintiff could establish that his loss was 'the consequence of some default for which the defendants are responsible'. The default of the defendants lay simply in failure to prevent the water escaping. Fault in the sense of a falling short in this way of an obligation imposed by law need not import moral blame."

With respect, if "fault" is to be this braodly defined, then there seems to be little reason for the use of the concept at all.

Even if the concept of fault is used, it must be stressed that "fault" does not, of course, equal "negligence". Both Dias[1] and the editor of Winfield[2] give examples where a person may be said to be "at fault" and yet a claim in negligence against him would fail. It is submitted that all Lord Reid meant by the expression was that a defendant should not be held liable in nuisance unless he was or ought to have been aware that the state of affairs on his premises was "likely to cause damage to his neighbour":[3] if damage is foreseeable, then the defendant is "at fault" if the damage occurs.

Lord Reid says that "fault ... is almost always necessary".[4] What is the significance of "almost"? It is submitted that their Lordships did not

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[1] [1967] C.L.J. 62, 77.
[2] Winfield, p. 322.
[3] [1967] 1 A.C. 617, 639.
[4] Ibid. (My emphasis.)

want in The Wagon Mound (No. 2)[1] to become involved in a discussion of Wringe v. Cohen,[2] a case "on which neither counsel relied".[3] In that case,[4] the Court of Appeal had held that, in special circumstances, "fault" and "foreseeability" were not necessary. The fact that the sentence beginning, "Their Lordships express no opinion about cases like Wringe v. Cohen", is placed immediately after the sentence under discussion is confirmatory of the view here expressed. If the argument presented later to the effect that the Wringe v. Cohen[5] cases are wrong is accepted, then Lord Reid's dictum should be amended by the deletion of the word "almost".

In the present case, the "fault" was "the negligent discharge of the oil".[6] The presence of the word "negligent" need not cause alarm: it must be remembered that The Wagon Mound (No. 2)[7] was a case in public nuisance where negligence is sometimes a prerequisite for liability.[8] In public nuisance, "negligence in the narrow sense" may often be essential, but it is quite clear that it is not in private nuisance.[9] Lord Reid continues:[10]

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[1] [1967] 1 A.C. 617.
[2] [1940] 1 K.B. 229.
[3] [1967] 1 A.C. 617, 639.
[4] See p. 127 et seq.
[5] [1940] 1 K.B. 229.
[6] [1967] 1 A.C. 617, 639.
[7] [1967] 1 A.C. 617.
[8] Newark, for instance, has argued that the civil action in public nuisance was "really a case of negligence born before its due time" and that a person who maintains anything on a highway should owe to others merely "a duty to use reasonable care": 65 L.Q.R. 480, 485, 490.
[9] [1967] 1 A.C. 617, 639.
[10] Ibid., 640.

> "So in the class of nuisance which includes this case foreseeability is an essential element in determining liability."

What did he mean by "in the class of nuisance which includes this case"? It is clear that he was not referring to "public nuisance" as opposed to "private nuisance", for he would surely have used that expression had he meant that, and as well, His Lordship had in the preceding paragraph referred to the Sedleigh-Denfield case,[1] in which, he said, the fault of the defendant was the failure to abate the nuisance which was likely to cause harm to the plaintiff. It is submitted that Lord Reid meant by the phrase, "in nuisance (except for cases like Wringe v. Cohen)". Certainly, in Benning v. Wong,[2] Windeyer J. thought that Lord Reid's dictum had established that foreseeability of harm was an element of liability in private nuisance.

Lord Reid finishes his analysis by concluding that foreseeability is also "a necessary element in determining damages".[3] This attempt to distinguish between culpability and compensation has been termed "illusory",[4] although it is in fact "conceptually possible to divide the process for determining final liability into segments",[5] although there is no point in doing so where the test is the same for the different segments. The explanation for the division between a "liability" stage and a "remoteness of damage" stage in Lord Reid's judgment is simple. At the "liability" stage, foreseeability is the test in most but not all cases.

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[1] [1940] A.C. 880.
[2] 43 A.L.J.R. 467, 494.
[3] [1967] 1 A.C. 617, 640.
[4] Buxton, 8 Malaya L.R. 1, 18.
[5] Eekelaar, 8 Ir. Jur. 191, 201.

whereas at the "remoteness of damage" stage, foreseeability is always the test, even in those cases where foreseeability is not the test at the "liability" stage. In those cases, the distinction does make sense. As it will be submitted that the Wringe v. Cohen[1] cases were wrongly decided, it becomes unnecessary to persist with Lord Reid's distinction, and the conclusion can be drawn that, in nuisance, the defendant will be liable only if the harm which results to the plaintiff from the state of affairs maintained on the defendant's land was foreseeable.

It is submitted that there is nothing particularly startling about that conclusion. When judges talked of the need for the defendant to have had knowledge of the danger,[2] they were in effect saying that the damage must have been foreseeable: the word "foreseeable" is of comparatively recent use as a legal term, but the idea it conveys is of much older origin. It is true that in nuisance, as in negligence before The Wagon Mound,[3] the test was probably a "directness" test, but too much can be made of the supposed differences between the "directness" test and the "foreseeability" test: "when the disturbance created by the Privy Council's decision[3] has finally subsided, the end-result will be found to be little different from what went before".[4]

(c) Foreseeability and Negligence

In light of the above, a layman would be forgiven for asking wherein lay the difficulty. A theory which says

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[1] [1940] 1 K.B. 229.
[2] See the cases cited at p. 107, footnote 7.
[3] [1961] A.C. 388.
[4] Winfield, p. 94.

that a defendant should be liable only for those consequences which he should have foreseen seems reasonable and comprehensible. However, great difficulty has arisen because of confusion as to the relationship of foreseeability to negligence. Such confusion was fostered by the decision of the Judicial Committee in Goldman v. Hargrave,[1] although it was apparent before then.

Some have thought that if harm is foreseeable and that harm occurs, then the defendant is liable in negligence;[2] under this analysis, it is irrelevant to ask whether the defendant "caused the damage in the course of 'negligent' conduct".[3] It is submitted that such an argument is wrong. If A causes harm to B, that harm being foreseeable, then A can be said to be "at fault", but he is not necessarily "negligent" (in the sense that he will be liable to B under the tort of negligence). For instance, there is fault without negligence in the case of malicious, intentional, and reckless behaviour. "There may even be careless fault not amounting to negligence 'in the narrow sense', as where there is no foreseeability of injury to the particular plaintiff or the kind of damage in suit; or where there is no 'duty-situation'."[4]

The editor of Winfield observes:[5]

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[1] [1967] 1 A.C. 645.

[2] Buxton, 8 Malaya L.R. 1, 24, et seq.

[3] Buxton, "Nuisance and Negligence Again", (1966) 29 M.L.R. 676, 680.

[4] Dias, [1967] C.L.J. 62, 77; he cites Weller v. Foot and Mouth Disease Research Institute Ltd [1966] 1 Q.B. 569, where for the purpose of the preliminary issue, carelessness was admitted. Professor Heuston lists a number of cases where harm was foreseeable but where the defendant escaped liability because there was no duty: Salmond, p. 199.

[5] Winfield, p. 322.

"A person may still be legally at fault, even though a claim in negligence against him may fail. In certain circumstances he may, for instance, have taken reasonable care in conducting his activity, but he may still have knowingly fallen short of the standard set by law. Provided that he could foresee that such was a possible consequence of engaging in his activity he may be deemed to be 'at fault'."

Even Buxton concedes that "there may be circumstances where the damage was foreseeable and yet the defendant cannot be held responsible for failing to take precautions against its occurrence".[1] Such circumstances arise where the risk involved in the defendant's conduct was too small to warrant interference or where the burden of taking precautions would have been too heavy to require of him or where the social desirability of the end which he was pursuing outweighed the importance of protecting the plaintiff from harm.[1]

An excellent example of such circumstances is Bolton v. Stone.[2] In that case, it was foreseeable that the ball would leave the cricket ground and land on the road, but nonetheless the defendant was held not liable in negligence. That was because the risk of damage to a person on the road was so small that a reasonable man would have thought it right to refrain from taking steps to prevent the danger.[3] Similarly, in Miller v. Jackson,[4] it was foreseeable that balls would land in the plaintiffs' garden, but the defendants were not necessarily negligent in not preventing

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[1] 8 Malaya L.R. 1, 17.

[2] [1951] A.C. 850.

[3] Ibid., 866-867.

[4] [1977] 3 All E.R. 338; to similar effect, Lester-Travers v. Frankston [1970] V.R. 2.

them.[1] Of course, because that was a case of private nuisance, a finding of negligence was unnecessary, and thus the defendants were prima facie liable to the plaintiffs.[2]

Again, in Clearlite Holdings Ltd v. Auckland City Corporation,[3] Mahon J. found that "the possibility of some degree of subsidence of the land above must have been within reasonable contemplation as a possible though remote contingency".[4] Notwithstanding this, the defendants were held not to have been negligent. Of course, that did not prevent their being held liable in nuisance.

Thus, the difference between negligence and nuisance is this: in nuisance, once it is shown that the harm was foreseeable, the defendant becomes prima facie liable unless he can extricate himself; in negligence, "foreseeability is not the only question at issue in dubbing the defendant's conduct 'negligent'; foreseeability is only a necessary pre-condition of, and not co-terminous with, the obligation to take precautions which constitutes the defendant's duty".[5] In negligence, then, the plaintiff must show that the defendant was under a duty of care, which duty he failed to fulfil;[6] in nuisance, of course, the duty is not simply one of care, for the defendant may be liable no matter how careful he has been. Rather, the duty is to prevent all harm (providing, of course, such harm is

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[1] Ibid., 344.

[2] This case is discussed at p. 374.

[3] [1976] 2 N.Z.L.R. 729.

[4] Ibid., 741.

[5] Buxton, 8 Malaya L.R. 1, 20.

[6] Winfield, 4 C.L.J. 189, 198-199; Brenner, 3 J. Leg. Studies 403, 405; Dias, "Remoteness of Liability and Legal Policy", [1962] C.L.J. 178, 189, 193.

foreseeable). Lord Reid's judgment in The Wagon Mound (No. 2)[1] makes this clear. It is stressed that negligence is not an essential element in nuisance, but foreseeability is. The example he gives is the Sedleigh-Denfield case[2] in which harm was foreseeable[3] and yet in which the House of Lords had said that they found it unnecessary to consider whether the defendants were negligent.[4]

Unfortunately, the clarity of Lord Reid's judgment was distorted by Lord Wilberforce's in Goldman v. Hargrave.[5] That case is discussed below.

(d) The Friedmann Categories

It has been submitted that a general proposition of liability can be made which is of universal application in the law of private nuisance. As has already been stated, Friedmann found it impossible to make such a general statement, and said that there were three streams of authority with no common principle. It is proposed to examine these streams in turn.

(i) Nuisance by Misfeasance

This category includes cases where the defendant, by some act (of misfeasance), has "created a nuisance". It goes without saying that he knows about the activity he is performing (and thus has "knowingly maintained a state of affairs"). But that is not to say, because knowledge can be presumed, that this is a separate category from those

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[1] [1967] 1 A.C. 617.
[2] [1940] A.C. 880.
[3] [1967] 1 A.C. 617, 639.
[4] [1940] A.C. 880, 920.
[5] [1967] 1 A.C. 645.

cases where knowledge must be proved. The cases may be different on the facts, but they are not legally different. Friedmann says that liability is strict: indeed it is, in the sense that the defendant may be liable even though he has not been negligent. But that is not to say that the defendant will be liable for harm which is not reasonably foreseeable. In all Friedmann's cases, the harm suffered was foreseeable. For instance, in Rapier v. London Tramways Co.,[1] the defendant kept together 200 horses in a stable. If one keeps such a large number of horses, it is foreseeable that neighbours will suffer harm by smell. It is irrelevant that all reasonable care was taken to prevent smell: "[i]f they cannot have 200 horses together, even when they take proper precautions, without committing a nuisance, all I can say is, they cannot have so many horses together".[2] As the editor of Winfield noted:[3]

> "He may not have desired the consequences of his activity but he deliberately continued with it in the knowledge that, despite the care taken, damage might be caused to his neighbour. In this situation a claim in negligence may well fail, but prima facie a claim in nuisance will succeed."

(ii) Nuisance by continuance or other failure to control a nuisance created by someone else

Friedmann notes correctly that, in this category, knowledge of the state of affairs is a requirement of liability. The cases of Broder v. Saillard[4] and Humphries v. Cousins,[5] which Friedmann says do not conform with this thesis, and which are consequently wrong, have already been

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[1] [1893] 2 Ch. 588.
[2] Ibid., 602.
[3] Winfield, p. 323.
[4] 2 Ch. D. 692.
[5] 2 C.P.D. 239.

discussed.

The usual case where the occupier will lack knowledge is where the activity is being or has been undertaken by a trespasser. This was, of course, the situation in the Sedleigh-Denfield case itself,[1] but there the defendant knew (through servants) of the existence of the drain. In Attorney-General v. Tod Heatley,[2] the defendant admitted that he knew that members of the public were throwing refuse onto his vacant land; there was, therefore, little discussion of that aspect, the defendant instead relying on the difficulty of preventing the public from so acting. But the result would have been different had the defendant not had knowledge or means of knowledge of the use to which his land was being put.[3]

The cases Friedmann cites also reflect the second limb of the general proposition. In Sedleigh-Denfield v. O'Callaghan,[4] the defendants were held liable because, from the obstruction in the pipe, "flooding of the plaintiff's ground might reasonably be expected to result".[5]

(iii) Nuisance caused to a passer-by or to an adjoining owner, by the defective state of premises on a highway

There is no reason in principle why this should be a separate category. Why should any distinction be drawn between these two examples? --

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[1] [1940] A.C. 880.
[2] [1897] 1 Ch. 560 (public nuisance).
[3] Ibid., 573; see too Barker v. Herbert [1911] 2 K.B. 633.
[4] [1940] A.C. 880.
[5] Ibid., 895; see too 919, per Lord Romer; they "had ... or ought to have had knowledge of the danger".

(1) Occupier A's house falls onto Occupier B's property, A's house being adjacent to a highway; and

(2) Occupier A's house falls onto Occupier B's property, A's house not being adjacent to a highway.

Friedmann's analysis may be excused in that he was writing just a few years after the difficult decision in Wringe v. Cohen.[1] Less excusable is the following statement:[2]

> "Whatever the differences between liability for 'public' nuisance, that is nuisance caused to a member of the public, and private nuisance, that is liability to another occupier of land, may have been in the past, such differences no longer exist. On that point at least, there can hardly be any difference of opinion. The House of Lords expressly said so in Sedleigh-Denfield's case ..."

If by this Friedmann meant that the principles of liability in private and public nuisance are the same in all respects, then the statement is clearly wrong: indeed, two of their Lordships in the very case he cites expressly said they were not the same.[3] All they said was that the expression "continuing a nuisance" should not be given a different meaning in the two actions. As well, since The Wagon Mound (No. 2),[4] a common test of foreseeability has applied.

The facts of Wringe v. Cohen[5] were: the defendant's premises partially collapsed, and a gable end fell through the roof of the plaintiff's shop. Atkinson J. delivered the judgment of the Court of Appeal: the principle, he said, was this:[6]

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[1] [1940] 1 K.B. 229.
[2] 59 L.Q.R. 63, 69.
[3] [1940] A.C. 880, 905, per Lord Wright, 918, per Lord Porter.
[4] [1967] 1 A.C. 617.
[5] [1940] 1 K.B. 229.
[6] Ibid., 233.

> "In our judgment if, owing to want of repair, premises on a highway become dangerous and, therefore, a nuisance, and a passer-by or an adjoining owner suffer damage by their collapse, the occupier, or the owner if he has undertaken the duty of repair, is answerable whether he knew or ought to have known of the danger or not."

Five points ought to be made. First, there was no need to embark on this radical revision of the law, for harm was, on the facts, foreseeable. The house had, according to the evidence, been in defective repair for three years and the gable end had been bulging long before it collapsed. The defendant had knowingly maintained this state of affairs and the harm resulting from it was foreseeable.

Secondly, Atkinson J.'s interpretation of many of the cases was wrong. His judgment is inconsistent with the private nuisance case of St Anne's Well Brewery Co. v. Roberts,[1] in which Scrutton L.J. said that liability in nuisance depended upon knowledge, although one could also be liable if by the exercise of reasonable care one ought to have known there was a nuisance. It is also inconsistent with the difficult case of Tarry v. Ashton,[2] in which a lamp which projected over a public pavement fell and injured the plaintiff. Blackburn J. held that there was "ample evidence" that "the defendant was aware that the lamp might be getting out of repair".[3] His Lordship said:[4]

> "But if the defendant knowingly maintained it in a dangerous state he would then be indictable for the nuisance ... [A]s soon as he knew of the danger he would be bound to put the premises in repair or pull them down. So also the occupier would be

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[1] 44 T.L.R. 703.

[2] (1876) 1 Q.B.D. 314.

[3] Ibid., 319.

[4] Ibid., 318.

bound to know that things like this lamp will ultimately get out of order, and, as occupier, there would be a duty cast upon him from time to time to investigate the state of the lamp. If he did investigate, and there was a latent defect which he could not discover, I doubt whether he would be liable; but if he discovers the defect and does not cure it, or if he did not discover what he ought on investigation to have discovered, then I think he would clearly be answerable for the consequences."

This is completely in line with the thesis presented here. The defendant is liable if he has knowingly maintained the state of affairs; if he does not know of it, but could, by the exercise of due diligence, have discovered it, then he will be presumed to have the requisite knowledge. No harm is foreseeable from a lamp in perfect repair, nor from a lamp with a latent defect which the defendant could not discover. Lush and Quain JJ. did not deal with the issue of knowledge, which suggests that they did not dissent from Blackburn J.'s judgment. Pollock's note[1] that there was not "any real difference of opinion among the judgments in Tarry v. Ashton" is fully justified. In Palmer v. Bateman,[2] a judgment Atkinson J. was forced to conclude was wrong, Lord O'Brien L.C.J. interpreted the Court's decision in Tarry v. Ashton[3] to the effect that knowledge was necessary, as did Farwell and Vaughan Williams L.JJ. in Barker v. Herbert.[4] Finally, Atkinson J. referred to Wilchick v. Marks.[5] In that case, Goddard J. had explicitly said:[6]

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[1] In the 14th ed. of Pollock on Torts, p. 417, in preparation for the 15th ed.

[2] [1908] 2 I.R. 393.

[3] 1 Q.B.D. 314.

[4] [1911] 2 K.B. 633, 636.

[5] [1934] 2 K.B. 56.

[6] Ibid., 66.

> "[W]here the landlord has assumed an obligation to repair, he is liable to a person injured through disrepair, though to that must be now added that the plaintiff must prove that he had knowledge of the state of disrepair."

With the greatest respect to Atkinson J., it is submitted that all the cases he cites (without exception) point to the same conclusion: that knowledge is necessary in cases where damage is caused by premises in defective repair as in every other case of nuisance. Friedmann correctly observed:[1]

> "[The principle of Wringe v. Cohen] was formulated as the outcome of an extremely strained interpretation of precedents ... All these decisions have commonly been understood as developing the principle that liability of the occupier or -- as the case may be, the landlord -- depends on knowledge or means of knowledge."

The third point is that Atkinson J. did not refer to two important cases. The first was Job Edwards Ltd v. The Company of Proprietors of the Birmingham Navigations,[2] in which all three Lord Justices considered relevant the defendant's knowledge of the existence of the fire in the tip.[3]

The second case was Sedleigh-Denfield, recently delivered by the Court of Appeal,[4] in which it had been held that knowledge of the unprotected pipe, which was the cause of the flooding, was an essential prerequisite of liability.[5] It is submitted that Atkinson J.'s decision is clearly at variance with the later judgments of the House of Lords in that case too.

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[1] 59 L.Q.R. 63, 68.
[2] [1924] 1 K.B. 341.
[3] Ibid., 360.
[4] [1939] 1 All E.R. 725.
[5] Ibid., 727.

Fourthly, Atkinson J.'s judgment has internal contradictions. At the end of the judgment, he observed:[1]

> "On the other hand, if premises become dangerous, not by the occupier's act or neglect of duty, but as the result of the act of a third party, or of a latent defect, the occupier is not liable without proof of knowledge or means of knowledge and failure to abate it."

Friedmann commented:[2]

> "But the exclusion of liability in case of a latent defect virtually deprives the main proposition of its significance. For it can hardly be imagined that any damage caused neither by the act of a third person nor by a latent defect could be due to anything but knowledge or negligence of the occupier. All the cases quoted by the Court are thus explained. In Barker v. Herbert, it was the act of a stranger, in Pritchard v. Preto, Noble v. Harrison, St. Anne's Well Brewery's case the latency of the defect which absolved the defendant [sic] ..."

Finally it is submitted that Atkinson J.'s error arose because of confusion between contractual and tortious duties. If a landlord covenants to repair, then his duty in contract to his tenant is strict, and it will not avail the landlord to plead, in the event of the premises' falling from repair, that he did not know that, unless, by the terms of the contract, he is entitled to notice of disrepair before contractual liability arises.[3] But tortious liability is different. Atkinson J.'s comment that "[l]iability can be based on neglect by the landlord to perform his convenant

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[1] [1940] 1 K.B. 229, 248.

[2] "Nuisance, Negligence and The Overlapping of Torts", (1940) 3 M.L.R. 305, 309.

[3] See Morgan v. Liverpool Corporation [1927] 2 K.B. 131, where such terms were inserted in the agreement. This case was cited by Atkinson J., but it has no relevance when considering tortious liability. See Buxton, 8 Malaya L.R. 1, 16.

to repair ...; [t]hat obligation had not been performed, and the question of knowledge did not enter into it",[1] is accurate if one is discussing liability in contract, but liability in tort is based on the landlord's knowingly maintaining defective premises. The landlord's convenants cannot be used to make him liable to third parties where the tenant would not be.[2]

It is, therefore, submitted that Wringe v. Cohen[3] is wrong and that Friedmann's third category is non-existent.[4] The decision has been criticised both judicially[5] and by academics.[6] However, it cannot be denied that it has subsequently been followed, albeit at times without enthusiasm. In Heap v. Ind Coope and Allsopp Ltd,[7] MacKinnon L.J. approved of Atkinson J.'s dictum,[8] and, in Mint v. Good,[9] the Court of Appeal refused to declare it wrong. Denning L.J. was careful, however, to limit the decision to "premises on a highway" and would say that it was correct only "in regard to the responsibility of an

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[1] [1940] 1 K.B. 229, 234.

[2] That seems to be the effect of Robson's argument on p. 232.

[3] [1940] 1 K.B. 229.

[4] It is not recognised in Winfield or Fleming, although it is recognised as a separate category in Street (pp. 236-238).

[5] O'Leary v. Meltitides (1960) 20 D.L.R. (2d) 258, 266-268; Brewer v. Kayes [1973] 2 O.R. 284, 288.

[6] Salmond, p. 67; Friedmann, 3 M.L.R. 305, 59 L.Q.R. 63; Winfield, 56 L.Q.R. 1; Landon, 56 L.Q.R. 140.

[7] [1940] 2 K.B. 476.

[8] Ibid., 483.

[9] [1951] 1 K.B. 517.

occupier to passers-by".[1] It was left open whether a different rule of liability would apply with regard to harm to neighbouring occupiers, regardless of whether the defendant's premises were on a highway or not.

Finally, can Atkinson J.'s decision stand in the light of the decision of the House of Lords in Caminer v. Northern and London Investment Trust Ltd?[2] In that case, the appellants were injured when the respondent's elm tree fell on their car as they were proceeding along the highway. The respondent was held not liable, because, despite evidence that elms are treacherous and shallow-rooted and liable to fall suddenly, a prudent landowner would not have suspected any danger. That is to say,the harm was not foreseeable.[3] Why should knowledge be of relevance when considering a tree on a highway but of no relevance when considering premises on a highway?

(e) The Winfield Categories

It is now proposed to consider Winfield's"two different types of liability in nuisance".

(i) Cases in which negligence 'in the narrow sense' is essential

Of this category, the editor of Winfield says:[4]

> "The plaintiff will normally succeed if he can prove that the defendant has neglected to take reasonable precautions to prevent foreseeable damage and it is immaterial whether the cause of action is termed 'nuisance' or 'negligence'."

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[1] Ibid., 526; but that is illogical: how can it be so confined when the case had nothing to do with passers-by?

[2] [1951] A.C. 88.

[3] Ibid., 96, 110.

[4] Winfield, p. 322.

Only two cases are cited; that might be thought suspiciously few for one of only two categories of nuisance liability. The first is Bolton v. Stone.[1] But that is not even a case of private nuisance: it was concerned with public nuisance and negligence. As has already been said,[2] in the two private nuisance cases on rather similar facts, the courts found it unnecessary to decide whether the defendants were negligent or not.

The second is Goldman v. Hargrave.[3] It might be argued that the Judicial Committee never decided whether this was a case of nuisance at all;[4] certainly, the decision was made in the respondents' favour "on the basis of negligence".[5] However, there is no reason at all why the case should not have been treated as a nuisance case, and it is lamentable that the Privy Council fudged this issue. Lord Wilberforce said:[6]

> "As this Board has recently explained in Overseas Tankship (U.K.) Ltd v. Miller Steamship Co. Pty Ltd. (The Wagon Mound No. 2) the tort of nuisance, uncertain in its boundary, may comprise a wide variety of situations, in some of which negligence plays no part, in others of which it is decisive. The present case is one where liability, if it exists, rests upon negligence and nothing else;..."

That the Privy Council in The Wagon Mound (No. 2)[7] did not establish more clearly the difference between public nuisance and private nuisance is a matter for regret; however, it is clear from Lord Reid's judgment that the

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[1] [1949] 2 All E.R. 851 (C.A.), [1951] A.C. 850 (H.L.).

[2] See p. 122, especially footnote 4.

[3] [1967] 1 A.C. 645.

[4] Ibid., 657; Vennell, "The Essentials of Nuisance: A Discussion of Recent New Zealand Developments in the Tort of Nuisance", (1977) 4 Otago L.R. 56, 58.

[5] Ibid., 664.

[6] Ibid., 656.

[7] [1967] 1 A.C. 617.

cases where negligence is of relevance are all public nuisance cases. Not one private nuisance case was cited in which liability could be shown to have rested upon negligence. Lord Reid's judgment was, therefore, no authority for Lord Wilberforce's conclusion that a finding of negligence was essential in this case (concerned with private nuisance). Indeed, this case would seem to fit Lord Reid's category of cases where negligence was not necessary but foreseeability was, i.e. the Sedleigh-Denfield[1] category.[2] There, the fault lay "in failing to abate the nuisance of the existence of which the defender is or ought to be aware as likely to cause damage to his neighbour". Do not those words fit exactly the fault in the present case? No distinction can be drawn on the ground that in Sedleigh-Denfield[3] the hazard was brought about by the act of a trespasser, whereas in the present case, it arose from natural causes: that Lord Wilberforce concedes.[4] In Sedleigh-Denfield,[5] it was not considered relevant whether the defendants were negligent; why then was this crucial in Goldman v. Hargrave?[6]

It is submitted that Lord Wilberforce's judgment is erroneous in two respects. First, His Lordship wrongly concludes that Sedleigh-Denfield[7] established "a measured duty of care by occupiers to remove or reduce hazards to

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1 [1940] A.C. 880.
2 [1967] 1 A.C. 617, 639.
3 [1940] A.C. 880.
4 [1967] 1 A.C. 645, 660-661.
5 [1940] A.C. 880.
6 [1967] 1 A.C. 645.
7 [1940] A.C. 880.

their neighbours".[1] On the contrary, it established a duty to remove or reduce hazards. The other two cases cited by Lord Wilberforce are to similar effect. In Boatswain v. Crawford,[2] Johnston J. held that, once it was shown that the defendant knew of the fire, then he was under "the duty of abating it".[3] Negligence was not mentioned. In Landon v. Rutherford,[4] Fell J. said that once the plaintiff had proved that the defendant knew of the fire, then it was for the defendant to show that he acted reasonably in trying to stop it spreading.[5] If this were a case of negligence, would not the onus be on the plaintiff throughout?

Secondly, Lord Wilberforce confused the concept of reasonableness as it exists in the tort of negligence with the concept of reasonableness as it exists in the defence of ordinary use, a recognised defence in nuisance.[6] The case should have been approached thus. If a gum-tree is afire on one's land (regardless of how it ignited), it is foreseeable that harm by fire will be caused to one's neighbour's land. If that harm does occur, then one is prima facie liable in nuisance to that neighbour. However, one may be able to rely on a defence of ordinary use. As will be shown, the defendant must establish two things:
(a) that the state of affairs (here, a fire on one's land) was, in all the circumstances, common and ordinary; and
(b) that his failure to remove this hazard was reasonable

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[1] [1967] 1 A.C. 645, 662 - my emphasis.
[2] [1943] N.Z.L.R. 109.
[3] Ibid., 112.
[4] [1951] N.Z.L.R. 975.
[5] Ibid., 978; Fell J.'s approach is in line with the approach suggested below.
[6] See p. 281 et seq.

in all the circumstances.[1]

On the assumption that the respondents could have established part (a), then the enquiry under part (b) would be similar to any enquiry as to whether the defendant had been negligent in a suit for negligence. But it would not be identical. For one thing, the onus of proof would be on the defendant to show that he had acted reasonably, whereas in negligence, the onus is on the plaintiff to show that the defendant has acted unreasonably and failed to meet the standard of care required in the circumstances.

Thus, it is submitted that Lord Wilberforce's judgment, in so far as it attempts to define liability in nuisance, is wrong. It may be right about negligence: there may well be a duty of care imposed on occupiers with relation to their neighbours. But such a duty has nothing to do with nuisance. This is an example of facts giving rise to two causes of action, but the fact that two torts overlap in certain circumstances is no reason to merge them.

Neither of Winfield's cases therefore justifies the creation of this first category. The only cases in which negligence is relevant are public nuisance cases, and they have nothing to do with private nuisance.

(ii) Cases in which negligence in the narrow sense is not essential

These are the "cases where the defendant has acted wrongfully (though not necessarily carelessly) in prosecuting his activity when it is reasonably foreseeable that

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[1] For a fuller discussion of this defence, see p. 297 et seq.

damage to the plaintiff will result from it".[1] It is submitted that that statement fairly sums up liability in nuisance -- but in all cases of nuisance, not just those in the second category.[2] The difficulty with Winfield's classification, as the editor himself recognises,[3] is to determine whether one has a nuisance case which demands negligence or not. He suggests that the first category corresponds to the "continuance" of a nuisance situation, the second to the "creation" or "adoption" of a nuisance. But is that so? Bolton v. Stone[4] was hardly a "continuance" case,[5] and in Goldman v. Hargrave,[6] it would be possible to argue that the defendant "created" the nuisance, for the fire had been brought largely under control when the appellant, instead of putting it properly out with water, decided to burn it out. It was from that act that the damage arose.[7] The division into "creation" and "continuance" (with different rules of liability) is obviously unsound when valid arguments can be made for putting the same case into both categories:[8]

The editor of Winfield then goes on to suggest another criterion to distinguish the two forms of liability:[9]

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[1] Winfield, p. 322.

[2] Of course, omissions as well as acts may be wrongful and give rise to liability.

[3] Winfield, p. 323-324.

[4] [1951] A.C. 850.

[5] It is hard to describe it as a "creation" or "adoption" case either, which shows the limits of that terminology.

[6] [1967] 1 A.C. 645.

[7] Ibid., 656.

[8] Eekelaar, 8 Ir. Jur. 191, 198.

[9] Winfield, p. 324.

"If he was or ought to have been aware that it was an inevitable or likely consequence of his activity that damage would be caused to the plaintiff's interest then ... there is a prima facie case in nuisance and it is for the defendant to exculpate himself. Otherwise the plaintiff must himself prove that the defendant was negligent in the manner in which he prosecuted his activity or in failing to abate the nuisance. In essence the distinction is between the deliberate or reckless (if undesired) infliction of harm and the negligent infliction of harm."

Several comments are warranted. First, no authority is cited for this criterion.

Secondly, what does "deliberate or reckless (if undesired) infliction of harm" mean? It is to be presumed that Winfield means the deliberate continuation of an activity in the knowledge that damage might be caused (the expression used on the previous page), for it is a rare case where the defendant deliberately intends to inflict harm. But did not the defendant in Bolton v. Stone[1] deliberately continue the playing of cricket in the knowledge that damage might be caused? Yet that case is supposed to come within the second (negligent) category, not the first (deliberate) category.

Thirdly, what does "an inevitable or likely consequence" mean? If it simply means "a foreseeable consequence", then there is hard to see any difference between the two categories at all. The first category can be paraphrased thus: "If it was a foreseeable consequence of his activity that damage would be caused to the plaintiff's interest, then there is prima facie liability in nuisance". Then the second category begins, "Otherwise ..." That must mean: "If it was not a foreseeable consequence, then ..."

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1. [1951] A.C. 850.

But that does not make sense, for there is no liability in negligence for unforeseeable consequences. The conclusion must be, therefore, that "an inevitable or likely consequence" does not mean simply "a foreseeable consequence" but something more -- a consequence more likely than not, probable, inevitable or almost inevitable? But what authority is there for that?

With respect, it is submitted that this criterion is as arbitrary as the first one suggested; and the conclusion to which one is forced to return is that there is only one principle which pervades the whole law of nuisance.

PART II: PRINCIPLES OF LIABILITY IN NUISANCE

Chapter 4: The Right to Enjoyment of Land

(a) "Harm"

Until now, the proposition has been that the defendant will be liable in nuisance if he has maintained on land in his possession or control a state of affairs which causes "harm" to the plaintiff. No attempt has been made to define the meaning of "harm". The purpose of this Chapter, therefore, is to see what kind of harm or injury may be redressed in nuisance; that is to say, what rights are protected.

It is sometimes said that "[a] plaintiff can only sue in nuisance if he has an interest in the land affected"[1] or "some possessory right in land".[2] Indeed, in Read v. J. Lyons & Co. Ltd,[3] Lord Simonds stated that a plaintiff in nuisance must be able to show an "invasion of some proprietary or other interest in land". Blackstone commented that a nuisance was "anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another".[4]

None of these statements is wrong, but it is submitted with respect that they all tend to obfuscate the real purpose of the modern nuisance action. For nuisance is not primarily an action concerned with injury to the land, but with harm to or interference with some right incident to the ownership or possession of land. Newark has said:[5]

> "The essence of nuisance was, therefore, that it was a tort to land. Or to be more accurate it was a tort directed against the plaintiff's enjoyment of rights over land ..."

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[1] Street, p. 231.

[2] McLaren, 10 Osgoode Hall L.J. 505, 519.

[3] [1947] A.C. 156, 183.

[4] 3 Bl. Com. 216; "taken literally this is not accurate": Thomas A. Street, The Foundations of Legal Liability, Vol. 1, (1906), p. 211.

[5] 65 L.Q.R. 480, 482.

Denning L.J. said in the Southport Corporation case: [1]

> "In order to support an action on the case for a private nuisance, the defendant must have used his own land or some other land in such a way as injuriously to affect the enjoyment of the plaintiff's land."

Winfield's description of private nuisance has been judicially adopted: [2]

> "unlawful interference with a person 's use or enjoyment of land, or of some right over or in connection with it."

These dicta show that the action is primarily intended to redress interferences with the enjoyment of land. That is not to say that physical injuries to the land cannot be redressed: that is but one way in which a person's interest in and enjoyment of land may be affected. Thomas A. Street observed: [3]

> "[T]he wrong is ultimately resolvable into an interference with that right to the undisturbed enjoyment of one's premises which is inseparable from the ownership or possession of realty. And such beyond all question is the diagnosis of every true nuisance."

Professor Heuston acknowledges a "generic conception" which holds true for all cases: "all nuisances are caused by an act or omission, whereby a person is unlawfully annoyed, prejudiced or disturbed in the enjoyment of land". [4]

In what ways, then, may this "enjoyment of land" be disturbed? What is the right to enjoyment of land which neighbouring occupiers have a duty to respect?

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1 [1954] 2 Q.B. 182, 196.

2 Winfield, p. 318, adopted in Read v. J. Lyons & Co. Ltd [1945] K.B. 216, 236, per Scott L.J.; Howard v. Walker [1947] 2 All E.R. 197, 199; Hargrave v. Goldman (1963) 37 A.L.J.R. 277, 283, per Windeyer J.

3 The Foundations of Legal Liability, Vol. 1, p. 212.

4 Salmond, p. 50.

A man's enjoyment of his land will be affected adversely if the land is physically damaged. Such physical damage may be caused in an infinite variety of ways, of course. For example, damage to the land itself might be caused by sewage collecting on it[1] or by rainwater flowing onto it from overhanging eaves.[2] If a man's land is flooded as a result of wrongful acts on neighbouring land, his enjoyment is thereby impaired, for he cannot use the land in some ways (as a result of the flood) in which he has a legal right to use it.[3] His enjoyment will similarly be impaired if vibrations from powerful engines on land nearby cause structural damage to his house[4] and the threat of such damage may be grounds for the granting of an injunction.[5] If a man cannot grow crops or trees because of noxious fumes, his enjoyment is obviously impaired.[6]

An occupier's enjoyment is also affected if he cannot use part of his land as he would like because of encroachment by the roots or branches of a neighbour's tree.[7]

Perhaps the most common way in which liability accrues is the occupier's suffering personal discomfort as a result

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[1] Jones v. Llanrwst Urban Council [1911] 1 Ch. 393.

[2] Tucker v. Newman (1839) 11 Ad. & E. 39; 113 E.R. 327.

[3] Spear v. Newham [1926] N.Z.L.R. 897 (plaintiff's house damaged by water from storm-water drain); Sedleigh-Denfield v. O'Callaghan [1940] A.C. 880; Pemberton v. Bright [1960] 1 W.L.R. 436.

[4] Meux's Brewery Co. v. City of London Electric Lighting Co. [1895] 1 Ch. 287; Hoare & Co. v. McAlpine [1923] 1 Ch. 167.

[5] Colwell v. St Pancras Borough Council [1904] 1 Ch. 707.

[6] St Helen's Smelting Co. v. Tipping (1865) 11 H.L.C. 642; Salvin v. North Brancepeth Coal Co. (1874) L.R. 9 Ch. 705; Manchester Corporation v. Farnworth [1930] A.C. 171.

[7] Woodnorth v. Holdgate [1955] N.Z.L.R. 552; Davey v. Harrow Corporation [1958] 1 Q.B. 60.

of the defendant's activities on his land. If one runs a pig farm, neighbours may be deprived of their full enjoyment because of smell,[1] and brick-burning may be similarly offensive.[2] Unreasonable noise may deprive one's neighbour of sleep.[3] There are, of course, many other ways in which personal discomfort may be caused.[4]

These examples may seem to show injuries of a purely personal nature, but that is to misconceive them. The plaintiff in each succeeded because he was unable to use and enjoy his land to the extent to which he was entitled by law: in Newark's graphic words:[5]

> "A sulphurous chimney in a residential area is not a nuisance because it makes householders cough and splutter but because it prevents them taking their ease in their gardens."

It has also been held that an occupier's right of enjoyment is affected if his land, in its natural state, is let down because of activities on neighbouring land. Lord Selborne L.C. said in Dalton v. Angus:[6]

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[1] Bone v. Seale [1975] 1 All E.R. 787.

[2] Bamford v. Turnley (1860) 3 B. & S. 62. See too Halsey v. Esso Petroleum Co. Ltd [1961] 2 All E.R. 145 (smell of oil "nauseating"); Adams v. Ursell [1913] 1 Ch. 269 (fried fish shop).

[3] Brill v. Flagler (1840), 23 Wend. (N.Y.) 354 (dog howling at night); Shelfer v. City of London Electric Lighting Co. [1895] 1 Ch. 287 (engines); Metropolitan Properties Ltd v. Jones [1939] 2 All E.R. 202, 204 (badly installed heating apparatus); Mayfair Ltd v. New Zealand Properties Ltd [1940] N.Z.L.R. 190, 196; McKelvey v. Invercargill Milk-Supply Co. Ltd [1928] N.Z.L.R. 223 (no churning or box-making allowed after 6 p.m.); Stretch v. Romford Football Club Ltd (1971) 115 S.J. 741 (speedway racing).

[4] See Clerk, para. 1393.

[5] 65 L.Q.R. 480, 488.

[6] (1881) 6 App. Cas. 740, 791; to similar effect, Mitchell v. Darnley Main Colliery Co. (1884) 24 Q.B.D. 125, 137, per Bowen L.J. ("the real cause of action ... is the interference with the enjoyment of his property which is caused by the subsidence."); West Leigh Colliery Co. Ltd v. Tunnicliffe & Hampson Ltd [1908] A.C. 27, 31; Bognuda v. Upton and Shearer Ltd [1972] N.Z.L.R. 741, 760.

> "In the natural state of land, one part of it receives support from another, upper from lower strata, and soil from adjacent soil. This support is natural ... therefore, if one parcel be conveyed, so as to be divided in point of title from another contiguous to it, or (as in the case of mines) below it, the status quo of support passes with the property in the land, not as an easement held by a distinct title, but as an incident to the land itself ... it is for that reason often spoken of as a right by law; a right of the owner to the enjoyment of his own property, as distinguished from an easement supposed to be gained by grant; a right for injury to which an adjoining proprietor is responsible, upon the principle, sic utere tuo, ut alienum non laedas."

In other words, this is an ordinary nuisance action, which, His Lordship said, must be distinguished from the case where an easement is disturbed. (There is no natural right of support for buildings, but such a right may be acquired as an easement.)[1] It is submitted that it is wrong to group this so-called "natural right" with the right of an easement and a profit à prendre,[2] because a "natural right" -- for instance, the right of support of land in its natural state -- is exactly the same as a right not to have one's land flooded or a right not to have one's land invaded by roots:[3] each of these "rights" is a part of the all-embracing right of enjoyment of one's land.[4] Similarly, a riparian proprietor[5] has certain "natural rights".

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[1] See p. 168, where the appropriate action for the infringement of an easement is discussed.

[2] Professor Heuston does, for example: Salmond, p. 319, footnote 21.

[3] In Taylor v. Auto Trade Supply Ltd [1972] N.Z.L.R. 102, Perry J. rejected the view that the right of support to unencumbered land was a "natural servitude" (like an easement or profit), relying on earlier New Zealand Court of Appeal authority, Byrne v. Judd (1908) 27 N.Z.L.R. 1106.

[4] Innes' Digest of the Law of Easements (8th ed.) lists only two kinds of servitude: easements and profits à prendre (at p. 1).

[5] i.e., the owner of land in actual contact with a stream, whether or not he owns the soil of the stream: Lyon v. Fishmongers' Co. (1876) 1 App. Cas. 662.

For instance, he has a right of flow[1] and a right of purity;[2] breach of these "rights" will mean a loss of enjoyment of the riparian land.

The right to enjoyment of one's land is, in effect, a catch-all right which comprises a number of subsidiary rights -- e.g. the right to pure air, the right not to have one's land flooded -- which may be added to by judicial decision. It is predicted that Buckley J.'s view that "the ability to receive television free from occasional ... electrical interference is [not] so important a part of an ordinary householder's enjoyment of his property" that it ought to be protected will not stand for long.[3]

It is also predicted that the law will soon recognise what has been called a limited right to prospect or view:[4] a landowner should be able to seek relief from sights that are ugly and depressing.[5] So far, except in one case,[6]

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[1] Gale, p. 199; cf. McCartney v. Londonderry and Lough Swilly Railway Co. Ltd [1904] A.C. 301, 307.

[2] Young v. Bankier Distillery [1893] A.C. 691, 698; Groat v. Edmonton [1928] 3 D.L.R. 725; Kirkcaldie v. Wellington City Corporation [1933] N.Z.L.R. 1101.

[3] Bridlington Relay Ltd v. Yorkshire Electricity Board [1965] Ch. 436, 447; Professor Fleming has termed the decision "an altogether unwarranted limitation on the orbit of protecting the ordinary enjoyment of property for residential purposes": Fleming, p. 400, footnote 1.

[4] Catala and Weir, "Delicts and Torts: A Study in Parallel", (1964) 38 Tulane L. Rev. 221, 248, n. 6.

[5] 45 N.Y.U.L.R. 1075, 1079.

[6] Thompson-Schwab v. Costaki [1956] 1 All E.R. 652, 654, where Lord Evershed M.R. held that the defendant's use of his house as a brothel forced itself "on the sense of sight" of the plaintiffs, and as such interfered with the comfortable enjoyment of their land. If hesitating men, importuning women, and red lights can affect a neighbour's enjoyment, why not garbage heaps?

English courts have not been prepared to acknowledge an impairment of enjoyment in these circumstances,[1] but there is some indication that the Canadian courts are willing to protect an occupier's pleasure in his view.[2] The American courts appear to be divided.[3]

If A starts collecting hot rods in his back yard with the result that his property becomes an eyesore, why should B not be able to restrain him? This may affect B's enjoyment of his property as much as loud noise or foul smells from A's property would.[4] The argument that concepts of beauty are somehow unprovable, if not unreal, is unconvincing, because there are some sights which are so hideous (just as

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[1] McVittie v. Bolton Corporation [1945] K.B. 281, 283; Coventry City Council v. Cartwright [1975] 1 W.L.R. 845, 850 (but this case did concern a statutory nuisance under the Public Health Act 1936, s. 92(1)(c), and, because that section is really concerned with accumulations which are prejudicial to health, it may be distinguished in future private nuisance cases).

[2] Lockwood v. Brentwood Park Investments Ltd (1970) 10 D.L.R. (3d) 143, 166; cf. Morris v. Dominion Foundries & Steel Ltd [1947] 2 D.L.R. 840, 845 (but note the criticism of this case by Silverstone, "Visual Pollution: Unaesthetic Use of Land as Nuisance", (1974) 12 Alta. L. Rev. 542, 545, in particular his comment that because protection from eyesores was not part of the right of enjoyment in 1682 (when Knowles v. Richardson, 2 Keble 642, on which Barlow J. relied, was decided) is no reason why it should not be today. Attitudes and values change).

[3] Recognising the right: Yeager v. Traylor (1932) 160 A. 108, 109; Martin v. Williams (1956) 93 S.E. 2d 835, 844-845; Parkersburg Material Co. v. Barrack (1937) 191 S.E. 368, 370; Street v. Marshall (1927) 291 S.W. 494, 497. Against the right: McQuail v. Shell Oil Co. (1962) 183 A. 2d 581, 583; Zey v. Long Beach (1927) 258 Pac. 492.

[4] 45 N.Y.U.L.R. 1075, 1088.

there are some smells so foul) that reasonable men would agree that they ought to be restrained.[1] It is true that zoning and building restrictions have diminished the problem of protection against unsightliness to some extent, but the fact that cases continue to arise in which structures and conditions not in violation of any restrictions are complained of by neighbours and that in many localities conditions which are unsightly are not of frequent enough occurrence to warrant legislative action is sufficient reason for the tort's expanding to protect occupiers against eyesores.[2] Obviously, the courts' principal concern will be to protect occupiers in residential areas.[3]

This view -- that a man should be able to prevent his neighbour from maintaining an ugly state of affairs just as he can prevent him from maintaining a noisy or smelly state of affairs -- is but an example of the way in which the scope of the right to enjoyment of land may be extended. The aesthetic sensibilities of the public are increasing and the law should keep pace.

Is a right to privacy part of the right to enjoyment of land? Not directly, for an occupier cannot prevent his neighbour from looking over the fence to see what is happening on his land.[4] Any other rule is obviously impracticable in an island as densely populated as this.

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[1] Newsom, "Zoning for Beauty", (1969) 5 New England L. Rev. 1, 1-2; "Injunction Against 'Sight'Nuisance", (1935-1936) 2 U. Pitts. L. Rev. 191, 193; 45 N.Y.U.L.R. 1075, 1091.

[2] Noel, "Unaesthetic Sights as Nuisances", (1939) 25 Cornell L.Q. 1, 16.

[3] Ibid., 8; 45 N.Y.U.L.R. 1075, 1091-1092.

[4] Turner v. Spooner (1861) L.J. Ch. 801; Tapling v. Jones (1865) 11 H.L.C. 290, 305; Victoria Park Racing and Recreation Grounds Co. Ltd v. Taylor (1937) 58 C.L.R. 479, 494.

However, the right to privacy may be protected indirectly by the nuisance action. For instance, a man whose privacy is invaded by persistent telephoning in the night may sue the wrongdoer in nuisance for an interference with his "ordinary use", for "one of the ordinary purposes and uses of a dwelling is to sleep and rest therein".[1] Apart from this indirect protection, it is submitted that nuisance ought not to be expanded so as to protect privacy per se, because the action is ill-suited to deal with the real problem raised by "privacy" cases. The cases usually involve a Peeping Tom or busybody (often not an occupier of adjoining land) who is wilfully -- and sometimes maliciously -- causing distress to a man and his family: in other words, the problem centres on the defendant's conduct which is reprehensible and deserving of punishment, whereas nuisance is really designed, not as an agent of punishment, but as a means of protecting the plaintiff's enjoyment of his land. As will be shown, so far as nuisance is concerned, malice cannot make what would otherwise be lawful conduct unlawful.[2] Winfield rightly suggested that criminal penalties are the more appropriate remedy for checking these invasions of privacy.[3]

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[1] Stoakes v. Brydges [1958] Q.W.N. 5. If a man uses a loud-speaker on his land and thereby disturbs his neighbour, he will be liable in nuisance; if he uses a telephone and the noise of its ringing thereby disturbs his neighbour, he should be similarly liable.

[2] See p. 161.

[3] "Privacy", (1931) 47 L.Q.R. 23, 27. In Krupe v. Johnson [1898] 2 Q.B. 91 and Innes v. Newman [1894] 2 Q.B. 292, by-laws prohibiting the making of unreasonable noise were upheld; this seems a sensible way of dealing with "the itinerant organ-grinder or the raucous newsboy". See too Auckland City Council v. Pan Enterprises Ltd [1978] N.Z. Recent Law 2 (discussion of by-law prohibiting "a noise that is loud disturbing and unnecessary").

As well, only an "occupier" of land can sue in nuisance, whereas the distress caused by the Peeping Tom's activities may be experienced by a non-occupier, say an adolescent daughter.[1] She may be spied upon as much in the street as in her home; that is to say, the distress she suffers when at home is not connected in any way with the fact that she is at home. Thus, her enjoyment <u>of her home</u> is not specifically harmed by the prying.

It may be that a general right to privacy ought to be established on American lines[2] as the existing torts are not sufficient to prevent many invasions of privacy which ought not to go unpunished. Nuisance's role should be subsidiary; it should be limited to those cases where the occupier is able to show interference with one of the rights (other than a right to privacy) forming the catch-all right to enjoyment of land.

When considering whether a new subsidiary right ought to be acknowledged, the courts should remember that different generations place importance on different aspects of living, and a disturbance or discomfort of a kind which may once have been impossible[3] or of little concern may later prove of such import that the law will step in to prevent it.

In conclusion, it is submitted that the law of nuisance provides the remedy for a breach of the occupier's

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[1] <u>Report of the Committee on Privacy</u> (Cmnd. 5012 (1972)), Appendix I, para. 19.

[2] See <u>Prosser</u>, Chapter 20, and Cmnd. 5012, Minority Report by Mr. A.W. Lyon.

[3] e.g. disturbance of television reception would have been impossible before the 1930's because television had not been invented.

right to enjoyment of land. There is but one right, but that right may be breached in many different ways and has many dimensions. All nuisance actions[1] are determinable according to the same general principles, and in none of them will the plaintiff succeed unless he can prove that he has suffered an impairment of the enjoyment of his land.

(b) Sensible Damage

The vague "harm" has now been put in context. The next question is: will the slightest "harm" suffice? In other words, will the slightest loss of enjoyment give rise to a prima facie case? The cases speak with one voice: there must be "sensible damage", damage which can in some way or other be measured.

While most physical damage to land will be "sensible", that cannot be automatically assumed. For instance, where water flowed onto a plaintiff's property but he suffered only "a trivial injury" because the additional water was never "substantial in flow or frequent in occurrence", his claim in nuisance failed: he failed to establish "damage of a material kind".[2] Similarly, not every minor subsidence of a neighbour's land will give rise to liability in nuisance: the harm must be "appreciable".[3]

A riparian proprietor must have suffered a "sensible

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[1] For infringements of a servitude, see p.165 et seq.

[2] Nobilo v. Waitemata County [1961] N.Z.L.R. 1064, 1067; see too Bartlett v. Tottenham [1932] 1 Ch. 114, 132; Halsey v. Esso Petroleum Co. [1961] 2 All E.R. 145, 151.

[3] Mitchell v. Darnley Main Colliery Co., 24 Q.B.D. 125, 137.

diminution" of the natural flow of a stream as a result of the defendant's abstraction of the water before prima facie liability is established.[1] In Swindon Waterworks Co. Ltd v. Wilts and Berks Canal Navigation Co.,[2] the appellants drained water out of a stream so as to provide water for an adjacent town, and thereby caused "sensible damage"[3] to the respondents, lower riparian owners.

Damage is, of course, quite easy to measure when it is physical: the plaintiff can point to his flooded land or his polluted stream. Harm to personal comfort by way of fumes, smoke, or noise, say, is not so easily measurable. But the courts have still used the test of sensible damage. In the St Helen's Smelting case,[4] Lord Westbury L.C. spoke of "sensible personal discomfort", and in Luscombe v. Steer,[5] Rolt L.J. said that "a material injury" either to property or to the comfort of the existence of those who lived in the neighbourhood had to be established. A temporary annoyance will rarely constitute sensible harm.[6] Harm is

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[1] Embrey v. Owen (1851) 6 Ex. 353; 155 E.R. 579. The jury had found that there was no such diminution, and so Parke B. held that a verdict for the defendants was properly ordered (at 368; 585). The damage must be "actual and perceptible" (at 372; 587) -- all these expressions are synonymous, at least in intention.

[2] (1875) L.R. 7 H.L. 697.

[3] Ibid., 705, 715.

[4] 11 H.L.C. 642, 650; 11 E.R. 1483, 1486.

[5] (1867) 17 L.T. 229, 231.

[6] Harrison v. Southwark and Vauxhall Water Co. [1891] 2 Ch. 409, 413. Such temporary annoyance will often be caused during building operations, for instance, when the defendants might be able to rely on the defence of "ordinary use" as well.

"sensible" if a reasonable man looking at the facts would say, "Yes, I can see that the plaintiff's enjoyment of his land has been measurably affected by the defendant's activities to the extent that I think it fair that he be compensated for that impairment of enjoyment."

At times, it has been said that the plaintiff must show "a substantial injury".[1] In so far as "substantial" differs in meaning from "sensible" or "material", it is submitted that the test has been wrongly stated, for the test is not meant to deprive those wronged of a remedy simply because the extent of the damage suffered is moderate. If a man's property is detrimentally affected to the extent of £10, why should he not receive £10 in compensation from the wrongdoer? In Haddon v. Lynch,[2] the plaintiff claimed that his sleep was disturbed on Sunday mornings because of the ringing of church bells. The defendant was held liable in nuisance, although damages were assessed at only £5.[3] The loss of even one night's rest has been held no trivial matter,[4] although normally a plaintiff would have to show the likelihood of the disturbance's continuing before it could be termed a "serious" or "material" interference with enjoyment.[5] Professor Street supports the view that the

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[1] See, e.g., Ball v. Ray (1873) 8 Ch. App. 467, 469, per Lord Selborne L.C.

[2] [1911] V.L.R. 230.

[3] The defendant was also enjoined from ringing the bells before 9 a.m.

[4] Andreae v. Selfridge & Co. [1938] Ch. 1, 8.

[5] Ball v. Ray, 8 Ch. App. 467, 471, per Mellish L.J. (cf. Lord Selborne L.C., supra), approved in Sanders-Clark v. Grosvenor Mansions Co. Ltd [1900] 2 Ch. 373, 375; McKelvey v. Invercargill Milk-Supply Co. Ltd [1928] N.Z.L.R. 223, 226; Mayfair Ltd v. New Zealand Properties Ltd [1940] N.Z.L.R. 190, 196.

damage itself need not be substantial, but rather simply foreseeably likely to result from the state of affairs maintained by the neighbouring occupier: "if damage did in fact ensue, then an action of nuisance would lie, but the amount of damage would affect only the compensation recovered, not the existence of the cause of action".[1]

It is submitted that the "sensible damage" test is applicable to all cases of nuisance.

What then of Lord Westbury's famous dictum in the St Helen's Smelting case?[2]

> "It is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter ... whether that may or may not be denominated a nuisance must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs ..."

This in no way conflicts with the proposition stated above. All Lord Westbury was saying was that, where personal discomfort is the cause of the complaint, one cannot decide whether the discomfort is "sensible" until the locality is looked at. There is bound to be more smoke in the air in an industrial estate in Coventry than on the mountain-tops of Snowdonia; a man's enjoyment of his land in Coventry will be impaired only if he has suffered "sensible harm" in addition to that normally suffered by people living in Coventry, in the same way that an inhabitant of Rhyd-Ddu will succeed only if he can show that he has

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[1] Street, pp. 224-225.

[2] 11 H.L.C. 642, 650; 11 E.R. 1483, 1486; followed in Thompson-Schwab v. Costaki [1956] 1 W.L.R. 335, 338.

suffered "sensible harm" in excess of that harm normally sustained by people living in Snowdonia. A man living in Coventry cannot demand the same quality of air as his counterpart in Rhyd-Ddu. The standard is that "of the ordinary reasonable and responsible person" living in the particular area.[1] On the other hand, that same ordinary reasonable and responsible person never expects, no matter where he lives, to suffer physical damage to his property: wherever he lives, any physical damage he suffers (other than trivial damage) will be "sensible". If the harm could be quantified, the equations may look like this:

1. A living in Coventry suffers "x" amount of physical damage. Normally, a man living there suffers no physical damage. A's loss of enjoyment, therefore, is "x".

2. B living in Rhyd-Ddu suffers "x" amount of discomfort. Normally, a man living there suffers no discomfort of this kind. B's loss of enjoyment, therefore, is "x".

3. C living in Coventry suffers "x" amount of discomfort. Everyone living there suffers "x" amount of discomfort of this kind, because it is an industrial area. C has therefore suffered no impairment of his enjoyment. If, however, as a result of a neighbour's activities, C suffers "2x" amount of discomfort, then his loss of enjoyment would be "x".

Winfield's conclusion is:[2]

> "The magnitude of the harm, therefore, and in some cases the nature of the locality are circumstances to be considered in determining whether the defendant has acted unreasonably."

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[1] Halsey v. Esso Petroleum Co. [1961] 2 All E.R. 145, 151.

[2] Winfield, p. 327.

With respect, that conclusion is unfounded. The locality is considered not in a determination of the reasonableness of the defendant's conduct: it is considered in a determination of whether the plaintiff has suffered "sensible damage". This is made clear by Mellor J.'s direction to the jury in the St. Helen's Smelting case,[1] a direction warmly approved by all the Lords of Appeal: an injury to be actionable must produce "sensible discomfort", that is, it must "be such as visibly to diminish the value of the property and the comfort and enjoyment of it" and, in judging that, "all the circumstances, including those of time and locality, ought to be taken into consideration".[2]

It is submitted that Lord Westbury's dictum supports the view that, in all cases of nuisance, the plaintiff must show "sensible damage" causing loss of enjoyment; in deciding whether the damage caused by the defendant's activities is "sensible", it is necessary to investigate the quality or level of enjoyment which the plaintiff would have experienced but for the defendant's activity.

(c) Extraordinary or Sensitive Use of Land by the Plaintiff

If a plaintiff has suffered "sensible damage" only because he has put his land to an extraordinary or sensitive

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[1] 11 H.L.C. 642, 644; 11 E.R. 1483, 1484.

[2] Lord Westbury's test is sometimes criticised -- e.g. by Winfield, p. 327, footnote 67; Weir, p. 344 -- on the ground that it is vague as to what amounts to a nuisance to property and what amounts to a nuisance causing personal discomfort. But Lord Westbury did not mean to draw a sharp distinction between them: all His Lordship meant was that, in the case of the former, an enquiry into the locality would be futile because no matter where one lives, one does not expect to suffer physical damage to one's land, whereas, with the latter, such an enquiry would be useful because different areas enjoy different general standards of quietude and air.

use -- that is to say, he would not have suffered "sensible damage" had his use been normal -- then the defendant will not be held liable. "A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure."[1] Veale J. in the Halsey case[2] said that the standard was that "of the ordinary man",[3] and that was not necessarily the same standard which the plaintiff might choose to set up for himself.[4] So the owners of a drive-in cinema could not complain if lights on an adjoining race-course prevented the cinema audience from being able to see the film,[5] and mink farmers could not expect their neighbours to give up all activities which created noise during the whelping season.[6] In short, the plaintiff must not be hypersensitive[7] -- he has merely "a right to the ordinary enjoyment of his land".[8]

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[1] Eastern and South African Telegraph Co. v. Cape Town Tramways Cos. [1902] A.C. 381, 393; National Telephone Co. v. Baker [1893] 2 Ch. 186, 202, per Kekewich J., overruled in holding that plaintiff's extraordinary use not relevant.

[2] [1961] 2 All E.R. 145.

[3] Ibid., 151.

[4] See, too, Morris v. Dominion Foundries & Steel Ltd [1947] 2 D.L.R. 840, 842 - the plaintiff "was not a normally reasonable person".

[5] Amphitheaters, Inc. v. Portland Meadows (1948) 198 P. 2d 847.

[6] Grandel v. Mason [1953] 3 D.L.R. 65, as explained in Rattray v. Daniels (1959) 17 D.L.R. (2d) 134, 138, where mink farming described as a "delicate and sensitive" use of land.

[7] Stretch v. Romford Football Club Ltd., 115 S.J. 741; Bloodworth v. Cormack [1949] N.Z.L.R. 1058, 1064 (music teacher's evidence disregarded because that profession "exceptionally delicate").

[8] Backhouse v. Bonomi (1861) 9 H.L.C. 503, 512; 11 E.R. 825, 829; see too Robinson v. Kilvert (1889) 41 Ch.D. 88 (sensitive business); Phillippay v. Pacific Power and Light Co. (1922) 207 P. 957, 959-960; Heath v. Mayor of Brighton (1908) 98 L.T. 718; Noyes v. Huron and Erie Mortgage Corp. [1932] 3 D.L.R. 143; Bridlington Relay Ltd v. Yorkshire Electricity Board [1965] Ch. 436.

However, once it has been established that the right to the ordinary enjoyment has been infringed, the plaintiff can claim protection for his extraordinary or sensitive use. For instance, if the plaintiff in the Bridlington Relay case[1] had been able to establish that television reception had become part of one's ordinary enjoyment of land, it would have been able to protect its special use -- that of providing a television relay service for subscribers. In McKinnon Industries Ltd v. Walker,[2] the plaintiff's enjoyment was impaired by the emission of fumes and sulphur dioxide gas from the defendant's works. The defendant argued that, even if an injunction were granted, it should be modified so as to exclude protection to the plaintiff's orchids, the growing of which is "from the horticultural point of view a particularly difficult and delicate operation". But the Privy Council rejected this argument: once the plaintiff's ordinary enjoyment was affected, there was "no reason to treat damage to orchids differently from damage to any other flower plant or shrub".[3]

The principle relating to extraordinary or sensitive use is well justified both in terms of fairness and on economic grounds.[4] Why should the "normal" user and his consumers be penalised by the presence of an abnormal neighbour? If individuals require greater protection than is normal, they must procure it through private transactions

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[1] [1965] Ch. 436.
[2] [1951] 3 D.L.R. 577.
[3] Ibid., 581.
[4] Ogus and Richardson, [1977] C.L.J. 284, 303-304.

governed by the law of contract. It has been noted that, especially where the sensitive user is outnumbered by ordinary users or is subsequent in time, it is reasonable to assume that it is the "cheapest cost-abater".[1] It should also be noted that the principle has nothing to do with the alleged defence of default of the plaintiff[2] or with the concept of ordinary and reasonable use as a defence.[3] The plaintiff has done nothing wrong in adopting a special use of the land: rather, he has simply chosen to use his land in a way not protected by the nuisance action. Nor has the plaintiff's use of his land any bearing on the reasonableness of the defendant's use of his land.

There is one final problem. Is it relevant whether the defendant has acted maliciously or not? There is no difficulty where the plaintiff is using his land ordinarily; in that situation, if the defendant's activities cause "x" amount of harm ("x" being "sensible damage"), then the defendant will be liable in nuisance, regardless of whether he has acted maliciously or not. He is liable because he has caused sensible damage to the plaintiff's ordinary enjoyment of land. That the defendant has been malicious may well deprive him of any reliance on the defence of ordinary and reasonable use,[4] but it will not affect the establishment of prima facie liability one way or the other. But what is the position if the plaintiff is using his land in an extra-

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[1] Ibid.

[2] cf. Law Com. No. 32, "Civil Liability for Dangerous Things and Activities", p. 20.

[3] cf. Winfield, p. 437 (nuisance) and p. 378 (Rylands v. Fletcher).

[4] See p. 313.

ordinary way? If the defendant's activities cause only "½x" amount of harm, i.e. they are lawful because they would not have interfered with the plaintiff's enjoyment had his user been ordinary, then, for the reasons given above, the defendant will not be liable to the plaintiff (even if "½x" harm causes impairment of his sensitive use). Does it make any difference if the defendant caused this "½x" harm maliciously? Surely not: why should the plaintiff using his land in a sensitive way receive special protection just because the defendant's motive is suspect? "It is certainly a general rule of our law that an act prima facie lawful is not unlawful and actionable on account of the motive which dictated it."[1]

There is only one case which conflicts with this proposition: that is Hollywood Silver Fox Farm Ltd v. Emmett.[2] The plaintiff bred silver foxes. During the breeding season, vixens are very nervous and are liable, if disturbed, to refuse to breed, to miscarry, or to kill their young. The defendant maliciously caused his son to discharge a gun on four consecutive nights within his boundary but as near as possible to the plaintiff's breeding pens. Counsel for the defendant referred to Robinson v. Kilvert,[3] and Eastern and South African Telegraph Co. v. Cape Town Tramways Cos.,[4]

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[1] Allen v. Flood [1898] A.C. 1, 123, per Lord Herschell; to similar effect, 92, per Lord Watson.

[2] [1936] 2 K.B. 468; see too the report in [1936] 1 All E.R. 825, which is fuller, and articles in (1936) 182 L.T. 98 and (1937) 81 S.J. 540. (The reasoning of the latter is fallacious, for the reasons clearly expressed by Dr Harris, at p. 158 of his thesis.)

[3] 41 Ch.D. 88.

[4] [1902] A.C. 381.

and said that a man could not increase his neighbour's liabilities by applying his property to special uses. Macnaghten J. responded:[1]

> "It was argued that the keeping of a silver fox farm was not an ordinary use of land in the county of Kent, and what the defendant had done in discharging the bird-scaring cartridges would cause no alarm to the sheep or cattle which are usually to be found on Kentish farms. It was only because Captain Chalmers had brought these highly nervous animals -- not natural to this country -- that had caused the plaintiffs any loss and if silver foxes were brought to the county of Kent, one could not thereby restrict their neighbours in the matter of shooting. I am not satisfield that there is any substance in that argument. It is a perfectly lawful thing to keep a silver fox farm and I think the fact that the shooting took place intentionally for the purpose of injuring the plaintiffs made it actionable."

The fact that "[i]t is a perfectly lawful thing to keep a silver fox farm" is quite beside the point; it may be "lawful" and yet "sensitive" or "extraordinary".[2] The Eastern and South African Telegraph Co.'s activities were lawful too! The judge did not disagree with the contention that there would have been no disturbance of the plaintiff's enjoyment had the use been ordinary (e.g., sheep or cattle farming) -- that is to say, if the use had been ordinary, the defendant's act (although malicious) would have been lawful because no "sensible damage" would have been caused. And yet he goes on to say that because the shooting was malicious, that is enough to make this lawful act unlawful

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[1] [1936] 1 All E.R. 825, 828 -- this does not appear in the Authorised Reports.

[2] If by "lawful", Macnaghten J. meant "ordinary", then the decision is defensible. But it would be an odd finding of fact that silver fox farms in Kent were "ordinary" when mink farms in Canada (where in some provinces they are quite common) have been held "delicate and sensitive".

(i.e. "actionable"). Such a conclusion is in direct conflict with Allen v. Flood.[1]

The cases cited by Macnaghten J. do not support his argument. It is always hazardous to rest a judgment on authority as old as Keeble v. Hickeringill,[2] especially when the courts had not at that time drawn any distinction between ordinary and sensitive users of property. But anyway, it is submitted that the defendant's activities in that case were such as to cause interference with that ordinary enjoyment of the plaintiff's land, regardless of whether keeping a duck decoy can be termed a "sensitive" use or not.

Christie v. Davey,[3] also cited by Macnaghten J., is often put into the same category as the Silver Fox Farm case,[4] but it is quite different. The defendant played many kinds of instruments (rather badly), blew whistles, knocked on trays and boards, hammered, and shrieked and shouted so as to annoy the plaintiffs. Such behaviour, carried on as it was at all hours of the day and night, would clearly interfere with the plaintiff's ordinary enjoyment. The fact that the female plaintiff was also a music teacher and that this noise sometimes interfered with her lessons simply shows further harm on the lines of the McKinnon Industries decision.[5] The fact that the defendant acted maliciously simply served to rob him of reliance on the defence of ordinary and reasonable use, which North J. suggested (when giving judgment on the defendant's counter-claim) would be a good defence where the occupier was playing an instrument in his own home for a short

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[1] [1898] A.C. 1.
[2] (1706) 11 Mod. 74, 130; 88 E.R. 898, 945.
[3] [1893] 1 Ch. 316.
[4] [1936] 2 K.B. 468.
[5] [1951] 3 D.L.R. 577.

time each week at reasonable hours.

The other case on which Macnaghten J. relied was Ibottson v. Peat,[1] in which the defendant exploded fireworks, rockets, and bombs, and created as much noise as possible near the plaintiff's land, in an attempt to scare grouse away from the plaintiff's. This disturbance continued for a long period of time and was sufficient to make the plaintiff's cattle and horses alarmed. They rushed about, breaking down fences in their panic, and became completely unmanageable. Obviously, this was "a grievous disturbance to the plaintiff in his lawful and quiet occupation and enjoyment" of his land.

None of the cases cited support Macnaghten J.'s conclusion, although all were correctly decided. Malice cannot make a lawful act (i.e. an act not interfering with the ordinary enjoyment) unlawful. The reason why "spite-fences" are not unlawful is that one has no natural right to light or a view;[2] Bridlington Relay Ltd would have not succeeded even if the Yorkshire Electricity Board had maliciously caused the interference with television reception, because there is no legally recognised right to such reception. Similarly, there is no right to enjoy sensitive or special

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[1](1865) 3 H. & C. 644.

[2]Salmond, p. 72; Capital & Counties Bank v. Henty (1882) 7 App. Cas. 741, 766; Allen v. Flood [1898] A.C. 1, 46. In the United States, the prevailing view seems to be that one can restrain the erection of spite-fences (see Racich v. Mastrovich (1937) 273 N.W. 660), but this is not because they are malicious but simply because a right to light and view is more widely recognised there. See p.148. They come within the protection given against unaesthetic sights: Noel, 25 Cornell L.Q. 1, 12.

uses of land, unless the occupier wishing to enjoy such a use is prepared to negotiate for it and secure it by private contract.

Although Hollywood Silver Fox Farm ought not to have succeeded in nuisance,[1] it is submitted that the plaintiff may have had a remedy in negligence. On similar facts in Canada,[2] it has been held that the defendant, having committed without reasonable care certain acts which were foreseeably likely to injure his neighbour, was liable under the Donoghue v. Stevenson[3] principle. It has recently been held in England that an intentional act may amount to "a glaring breach" of a duty to take reasonable care -- "and this is negligence".[4]

(d) Interference with Easements and Profits

The Writ of Right, "as protean in scope as in form", was originally used to redress nocumentum, that is, any

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[1] Holdsworth, in his exchange with Goodhart in 52 L.Q.R. 460, 53 L.Q.R. 1, 3, thought the decision could be justified on the facts, namely that the firing of the shots amounted to an interference with the ordinary enjoyment of land, but, with respect, it is submitted that firing a gun for a short time on only four occasions could hardly be said to cause "sensible damage". However, Holdsworth's views on the law are to be preferred to Goodhart's.

[2] Grandel v. Mason [1953] 3 D.L.R. 65, 67; MacGibbon v. Robinson [1952] 4 D.L.R. 142, 144; cf. Rattray v. Daniels (1959) 17 D.L.R. (2d) 134 (action failed because no negligence proved).

[3] [1932] A.C. 562.

[4] Morris v. C.W. Martin & Sons Ltd [1966] 1 Q.B. 716, 738; Williams v. Humphrey (The Times, 20 February, 1975) (defendant deliberately pushed plaintiff into a swimming pool; held liable in negligence and trespass to the person).

damage to land falling short of an actual dispossession.[1] Until Bracton's time, no attempt was made at generalisation; but that great lawyer defined three types of cases as coming within the head of "nuisance". First, there were cases involving disturbances of easements and profits stricto sensu. Then, there were the "rival market" cases. B might have been granted a franchise to hold a market on condition that it be not "to the nuisance" of a similar franchise previously granted to A. Thirdly, there were the cases which we think of today as mainstream nuisance cases: "If a servitude is imposed upon a man's land by the law, though not by the grant of a man, whereby he is forbidden to do on his own land what may harm his neighbour, as if he should raise the level of a pond on his own land or make a new one whereby his neighbour is harmed, as e.g., if his neighbour's land is thus flooded, this will be to the injurious nuisance of his neighbour's freehold unless his neighbour has given his permission to do it."[2] Later, of course, the Assize of Nuisance developed, and was used wherever the wrongful act was done on the defendant's land.[3]

Thus, as early as the thirteenth century, it is clear that distinctions were made between disturbances of easements and profits and disturbances of freehold, but, the forms of action still being in the embryonic stage, both categories were gathered under the umbrella of "nuisance".[4]

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[1] Fifoot, pp. 3-4.

[2] Ibid., pp. 7-8, citing Bracton, f. 232.

[3] Ibid., p. 9.

[4] However, the confusion which developed between servitudes stricto sensu and natural rights is traceable in the Year Books and indeed until the nineteenth century: Holdsworth, vol. vii, pp. 328-333; Winfield, 4 C.L.J. 189, 189.

For historical reasons, as well as some good practical reasons, this position has remained to the present day. In Colls v. Home and Colonial Stores Ltd,[1] Lord Macnaghten said:[2]

> "This right in early times was vindicated by an action on the case for nuisance -- Baten's Case -- in which damages might be recovered and judgment had for removal or abatement of the nuisance ... In later times, when an action for the protection of ancient lights came to be regarded rather as an action grounded on nuisance -- as an action to prevent the infringement of a right rather than an action to redress a wrong -- the necessity of shewing the gravity of the injury complained of was not so apparent. Still, the principle was the same, and it must always be the same."

Lord Davey (with whom Lord Robertson agreed) said that the case was a nuisance case[3] and concluded:[4]

> "The single question in these cases is still what it was in the days of Lord Hardwicke and Lord Eldon -- whether the obstruction complained of is a nuisance."

These apparently contradictory statements do not, in fact, on close analysis conflict. When Lord Davey says that the action always was and still is a nuisance action, he is merely asserting that historically actions for the disturbance of easements have come under the general head of "nuisance"; he is not saying that these cases are in every detail on all fours with the more common nuisance (i.e. interference with right of enjoyment) cases. Similarly, Lord Macnaghten was not saying that actions for the disturbance of easements are quite different from the common

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[1] [1904] A.C. 179.
[2] Ibid., 186.
[3] Ibid., 197-198.
[4] Ibid., 204.

nuisance actions: in some ways, they have very much in comm.cn.

The historical reasons for similarity have already been given: the man whose easement was disturbed and the man whose freehold was disturbed had both suffered an injury which fell short of actual dispossession. The practical reasons for similarity today derive from the fact that the line between natural rights (forming the all-embracing right of enjoyment) and easements is finely drawn. One has a natural right to the support of unencumbered soil: one must acquire the right to support of buildings. The man whose right-of-way is flooded by activities on neighbouring (not the servient) land is in much the same position as the man whose freehold property is flooded by his neighbour's activities. Thus, the courts have tended to adopt the same test of "sensible damage". Lord Cozens-Hardy M.R. said in Pettey v. Parsons[1] that "in the case of a private right of way the obstruction is not actionable unless it is substantial", and in the Colls case,[2] Lord Macnaghten said that the jury had to "distinguish between a partial inconvenience and a real injury to the plaintiff in the enjoyment of the premises". Lord Lindley thought that "the buildings of the defendant had not so materially interfered with the light previously enjoyed by the plaint-iffs as to amount to a nuisance".[3]

The differences may be summarised thus:-

(1) as will be seen, the person entitled to sue in the

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[1] [1914] 2 Ch. 653, 662; see too 665, per Swinfen Eady L.J.
[2] [1904] A.C. 179, 187.
[3] Ibid., 185.

common nuisance case is the person in possession of the land;[1] this is not the case with easements and profits, where the right to sue rests with the owner of the easement or the profit.[2] Consider the case where A has a right of way over B's land. If that right of way is blocked, A can sue for the interference, even though A has no right of possession over the land. If B's land (including the area subject to the easement) is physically damaged by activities on C's land, B has an action in "mainstream" nuisance against C; A has no action against C unless the physical damage is such as to interfere materially with his right to pass.[3]

(2) it follows from this that the owner of the easement must establish his title to the easement "for he is asserting a right which of necessity excludes the possibility of possession of the servient tenement, or any part of it".[4] Only with disturbances of easements does "proof of the accessorial right" have to be shown.[5]

(3) as the action is in substance an action to redress the disturbance of an easement, although in form an action in nuisance,[6] there is no question of the defendant's having to be a neighbouring occupier of land. Whoever disturbs the easement is liable.[7]

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[1] See p. 173 et seq.

[2] Clerk, para. 1416; Newark, 65 L.Q.R. 480, 482; Cunard v. Antifyre Ltd [1933] 1 K.B. 551, 556; Fitzgerald v. Firbank [1897] 2 Ch. 96; Rawson v. Peters (1972) 116 S.J. 884.

[3] Gale, pp. 353, 361.

[4] Paine & Co. Ltd v. St. Neots Gas & Coke Co. [1939] 3 All E.R. 812, 823.

[5] Gale, p. 351.

[6] Price v. Hilditch [1930] 1 Ch. 500, 506.

[7] Ibid., 509; Bower v. Peate (1876) 1 Q.B.D. 321 (easement to the right of support of buildings).

(4) The editor of Winfield asserts:[1]

> "[T]he conduct of the defendant is in general irrelevant and the convenience of the locality, or the benefit of the activity in question to the community, or the care used by the defendant to avoid damage, will not suffice to absolve him from liability."

The footnote to that sentence cites no case authority for the proposition, but notes that "[t]he natural right of the riparian owner to the continued flow of a stream in its natural condition is an exception". The text itself is accurate: the reasons why the defence of ordinary use is not available are:

(i) as the defendant need not be an occupier of land, it is impossible to weigh his "land user" against the owner of the easement's, and that balancing process is the hall-mark of the defence of ordinary use.

(ii) the defendant is normally the person who has granted, either expressly or impliedly, the easement or profit now allegedly infringed. (If the servitude has been acquired by prescription, then the defendant normally is the person who has stood by without complaint for the prescription period.) This is especially so with the ease-ment of light and the easement for support of buildings, where it is difficult to imagine the defendant (i.e. the person who has disturbed the easement) as being other than the grantor. Once A has granted an easement to B -- that is to say, A has agreed to a diminution in his natural rights over his own land and to a corresponding increase in the rights incident to B's land -- A cannot derogate from that grant by asserting that he has the right to cause

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[1] Winfield, p. 319.

"sensible damage" to those rights granted if he is acting in an ordinary and reasonable way.[1] The grantor confers rights on the grantee: he cannot, without express words in the grant, then say that he is entitled to take away all benefit of that grant providing he does so reasonably.

The footnote's "exception" is in fact no exception at all, as the natural right to continued flow is but part of the all-embracing right to the enjoyment of land. Not surprisingly, the defence of ordinary and reasonable use is available in these "water" cases, just as it is in all common nuisance cases. The cases cited in Winfield show that it is an ordinary and reasonable use of land to take water for the purposes of irrigating the defendant's riparian property,[2] but the defence is not made out where the defendant has taken the water to supply a neighbouring town[3] or to supply locomotives.[4]

It is, therefore, submitted that, while injuries to servitudes for historical reasons are called "nuisance" actions, they are in many ways fundamentally different from the mainstream action. Just as it is often hazardous to cite public nuisance authority in private nuisance actions, notwithstanding the fact that the two actions have certain similarities and that the same factual situation may give rise to both actions, so it is submitted is it hazardous to confuse actions for the infringement of a servitude and the normal nuisance cases.

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[1] Pettey v. Parsons [1914] 2 Ch. 653, 665.

[2] Embrey v. Owen, 6 Ex. 353, 369; 155 E.R. 579, 585; in fact, the common law defence has been largely superseded by statute in so far as water and streams are concerned: Water Resources Act 1963, s. 23(1).

[3] Swindon Waterworks Co. Ltd v. Wilts and Berks Canal Navigation Co., L.R. 7 H.L. 697.

[4] McCartney v. Londonderry and Lough Swilly Railway Co. Ltd [1904] A.C. 301, 304.

PART II: PRINCIPLES OF LIABILITY IN NUISANCE

Chapter 5: The Plaintiff

(a) Owner in Occupation

The person who, prima facie, has the right to enjoyment of a piece of land is the owner in occupation of it.[1]

(b) Lessee

As the lessee has the right of immediate possession, it follows that he should be able to sue for any interference with the right to enjoyment.[2] Weekly tenants come within this category[3] and may even seek injunctions to stop a state of affairs causing injury to health or comfort.[4]

If the plaintiff is a tenant at will, then the duration of the tenancy may be material in considering whether an injunction ought to be refused and the plaintiff left to his remedy in damages, but an injunction may be granted for the duration of the tenancy in appropriate circumstances.[5] Of course, if the tenant has assigned his interest, and has thereby lost his right to occupation, he will not be able to sue in nuisance.[6]

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[1] Fleming, p. 408; Clerk, para. 1413; Cunard v. Antifyre Ltd [1933] 1 K.B. 551, 556; Taylor v. Auto Trade Supply Ltd [1972] N.Z.L.R. 102, 108-109; Hooper v. Rogers [1975] Ch. 43, 51.

[2] Shelfer v. City of London Electric Lighting Co. [1895] 1 Ch. 287, 311; Colwell v. St Pancras Borough Council [1904] 1 Ch. 707 (five of the six plaintiffs were lessees); Billingsgate Fish Ltd v. British Columbia Sugar Refining Co. Ltd [1933] 1 W.L.R. 530, 531 (suggestion that only the lessors entitled to sue held untenable); Esco v. Fort Henry Hotel Co. Ltd, 35 D.L.R. (2d) 206.

[3] Moss v. Christchurch Rural District Council [1925] 2 K.B. 750.

[4] Jones v. Chappell (1875) L.R. 20 Eq. 539, 544.

[5] Burgess v. City of Woodstock [1955] 4 D.L.R. 615, 619 (plaintiff had entered into possession under an Act by which he was deemed to be a tenant at will, although the substance of his contract under that Act was an agreement to purchase).

[6] Metropolitan Properties Ltd v. Jones [1939] 2 All E.R. 202.

(c) Lessor

As the lessor (or reversioner) has no right of immediate possession, he would seem at first sight to have no right to sue in nuisance. The right to enjoyment of land is the right of the person in occupation. However, the lessor has locus standi in certain circumstances, when he can show that his right to enjoyment in the future is threatened. These are the principles:-

1. If the interference with enjoyment is of a permanent nature, in the sense that it will continue forever unless something is done to prevent the interference, then the reversioner can sue. That was the test suggested by Parker J. in Jones v. Llanrwst Urban Council.[1] The interference is "permanent" (in the sense given) if:

(a) physical damage is caused to the reversioner's property. Such damage remains forever unless something is done to repair it or remedy it. It would be absurd if a lessor was unable to reclaim the cost of flood damage until the end of the tenancy. Unless the physical damage is remedied, that damage will still be present at the end of the tenancy.

In Colwell v. St Pancras Borough Council,[2] the sixth plaintiff was a lessee who had granted a sub-lease to another for the whole of his term less the last three days. He sought an injunction to prevent the defendant from operating its electric generating station. The injunction was granted because the damage threatened was of a permanent kind. The operation of the defendant's station did not give rise to "a mere temporary and occasional personal inconvenience" but

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1 [1911] 1 Ch. 393, 404.
2 [1904] 1 Ch. 707.

was calculated to work material injury to the property"[1] even "to destroy the houses".[2] Similarly in Moss v. Christchurch Rural District Council,[3] the plaintiff reversioner's cottage was destroyed by fire resulting from a spark emitted by the defendant's steam roller. Salter J. held that she could sue in nuisance: the damage was obviously permanent. In Meux's Brewery Co. v. City of London Electric Lighting Co.,[4] the reversioner was held entitled to sue after vibration from the defendant's engines caused structural injury to a house belonging to it.

(b) the state of affairs causing the interference is such that it will continue unless something is done to bring it to an end. The rationale is that he who is maintaining the state of affairs will not act so as to bring it to an end until he is compelled so to act. The reversioner can sue before he regains the right of possession because the preservation of the status quo means that the state of affairs and the harm will still be continuing at the end of the tenancy. Thus, in Tucker v. Newman,[5] the plaintiff's yard would continue to be filthy and wet unless the defendant's eaves were altered or guttering added. A reversioner was granted an injunction to prevent a council's building a urinal nearby; if the urinal were built and caused annoyance, that annoyance would continue until such time as the urinal was pulled down.[6] Where privy pits were located near the

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[1] Ibid., 711.
[2] Ibid., 713.
[3] [1925] 2 K.B. 750.
[4] [1895] 1 Ch. 287.
[5] 11 Ad. & E. 39; 113 E.R. 327.
[6] McCarty v. The Council of the Municipality of North Sydney (1918) 18 S.R. (N.S.W.) 210.

walls of the plaintiff's houses, the plaintiff lessor was held entitled to sue because the smell was likely to continue "to the time when the reversion would come into operation" unless the pits were removed or put into a sanitary condition.[1]

In Jones v. Llanrwst Urban Council,[2] sewage from Llanrwst was deposited in a river and collected on the banks of the plaintiff's property, which was leased to a yearly tenant. Parker J. held that the plaintiff could bring an action: the sewage of Llanrwst would continue to flow into this river unless and until something was done to divert it elsewhere.

2. If the interference with enjoyment is not permanent, then the reversioner cannot sue until he regains possession of the property. In Simpson v. Savage,[3] the plaintiff failed because fires must continually be made in order for smoke to be emitted. Unless the defendant kept doing something, the harm to the plaintiff's property would cease. The tenant could sue, but the reversioner could not sue until the tenancy ended, for only then would it be known whether his right of enjoyment would be affected. Similarly, in Landzick v. Robinson, [4] it was held that flies and smell would

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[1] Park v. White (1893) 23 O.R. 611, 616-617; the position evidenced by these cases also applies in "ancient lights" cases (i.e. easements of lights), where the owner of leased property has been held entitled to sue for an infringement of the easement: Jesser v. Gifford (1767) 4 Burr. 2141; 98 E.R. 116; Shadwell v. Hutchinson (1829) M. & M. 350; 173 E.R. 1185.

[2] [1911] 1 Ch. 393.

[3] (1856) 1 C.B. (N.S.) 347; 140 E.R. 143.

[4] (1935) 43 Man. R. 30.

plague the plaintiff's leased property only if the defendant continued to cure hides on his property.

In Jones v. Chappell,[1] where the defendant erected steam-engines and stone sawmills and other machinery on his land, with resultant noise, steam, and smoke, Sir George Jessel M.R. held that the plaintiff could not sue "because the saws might be stopped and the steam-engine might cease working at any moment".[2]

(d) Licensee

"In recent years it has been established that a person who has no more than a licence may yet have possession of the land."[3] A licensee with the right of possession may sue in nuisance. It is not necessary that he have any title, either legal or equitable, in the land itself,[4] but possession of the land is crucial.[5] Thus, the holder of a grazing licence issued under statutory authority succeeded in an action against a shire council which deposited nightsoil on his grazing land, thereby making the water on the property, which the licensee's sheep drank, unusable.[6] In Newcastle-under-Lyme Corporation v. Wolstanton Ltd,[7] the workings of a coal and ironstone mine caused the surface land to move, with the result that the corporation's gas mains and pipes,

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[1] L.R. 20 Eq. 539.

[2] Ibid., 543.

[3] Hounslow London Borough Council v. Twickenham Garden Developments Ltd. [1971] Ch. 233, 257.

[4] Newcastle-under-Lyme Corporation v. Wolstanton Ltd [1947] Ch. 92, 104, 108; on appeal, [1947] Ch. 427.

[5] Vaughn v. Halifax-Dartmouth Bridge Commission (1961) 29 D.L.R. (2d) 523, 524 (plaintiff's car damaged when parked in a parking lot).

[6] Vaughan v. Shire of Benalla (1891) 17 V.L.R. 129, 131, 135; Thomas v. Lewis [1937] 1 All E.R. 137 (plaintiff failed on other grounds).

[7] [1947] Ch. 92, 427.

which were laid under certain public streets, were damaged and gas escaped. Property in the mains and pipes was clearly vested in the corporation;[1] although the corporation had no title to the land, it was held that it did have exclusive possession of the area occupied by the pipes, and that possession was sufficient to give the corporation standing.[2]

What is the position if the plaintiff does not have possession of any land, but does have exclusive possession of a room in a house, say? Comparison with the tort of trespass is helpful, since that too is a tort concerned with the interference of possession.[3] It has been held that a lodger or guest cannot sue in trespass for any disturbance of his use of his room,[4] but that is surely the position only where the lodger or guest has had no specific room assigned to him.[5] If the lodger has an outdoor key and power to bar access to the room, then it is submitted that he has sufficient possessory rights to be able to sue in trespass or nuisance.[6]

Licensees without exclusive possession cannot sue. That is made clear by Malone v. Laskey[7] and Cunard v.

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[1] Ibid., 101.

[2] Ibid., 108.

[3] Thompson v. Ward [1953] 2 Q.B. 153, 158-159.

[4] Allan v. Liverpool Overseers (1874) L.R. 9 Q.B. 180, 191-192; Appah v. Parncliffe Investments Ltd [1964] 1 W.L.R. 1064, 1069-1070.

[5] Salmond, p. 45, footnote 73; Winfield, p. 302, footnote 21.

[6] Street, p. 68, and cases cited at footnote 4.

[7] [1907] 2 K.B. 141; on this point, still good law: Billings (A.C.) & Sons Ltd v. Riden [1958] A.C. 240, 254, 264. See too Masters v. Brent L.B.C. [1978] 2 W.L.R. 768.

Antifyre Ltd.[1] In both, the injured person was the occupier's wife. In the former, Sir Gorell Barnes P. rejected the plaintiff's claim, she having neither an interest in the property nor any "right of occupation in the proper sense of the term";[2] she was "merely present in the house".[3] Yet McLaren has written:[4]

> "It is essential that the plaintiff claim not only a right to the land, but also effective occupation of it. The only leeway allowed by the law is the extension of the action to cover the members of the land occupier's family, as long as they are resident thereon."

Who constitutes "a member of the land occupier's family"? Is the occupier's mother, if she lives with the occupier, such a member? Is the occupier's mother-in-law? If they are members, why not any lodger or guest? Such a proposition would seem directly contrary to the English cases cited above, and McLaren's only authority is Bottom v. Ontario Leaf Tobacco Co.[5] The plaintiff occupier sued the defendant company after his house became permeated with smoke and fumes from the defendant's factory. He and his wife became ill. Although Macdonnell J.A. refused to grant an injunction, he did award the plaintiff damages because he had "been subjected to some special discomfort" and "presumably his property [had] been diminished in value, at least to some extent". Thus, the plaintiff, who was the occupier, recovered for his loss of enjoyment of the land, not for his and his wife's illness. It is submitted with

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[1] [1933] 1 K.B. 551.
[2] Ibid., 151.
[3] Ibid., 153, per Fletcher Moulton L.J.
[4] 10 Osgoode Hall L.J. 505, 517.
[5] [1935] 2 D.L.R. 699.

respect that this case does not support McLaren's statement.

(e) Mortgagee

Only one case has been found in which the plaintiff was the mortgagee. In Preston v. Hilton,[1] the plaintiff, at the time of commencing an action for a declaration that the erection of certain stables and a waggon-shed by the defendants would constitute a nuisance, owned property which (she alleged) would be affected by this erection. After trial, but before judgment, she sold the property to another, taking a mortgage back for part of the purchase money. Orde J. held:[2]

> "The right of a mortgagee to an injunction to restrain a threatened nuisance, if it exists at all, must be limited to cases where it is clearly shown that the alleged nuisance would injure her security as mortgagee. The question of the effect upon the comfort of the occupant of the property would not be a factor except to the extent that it might lessen the value of the property and so injure the mortgagee's security."

In this case, Orde J. held that there was no such injury to the security.

In strict theory, where a legal mortgage has been created, the mortgagee is entitled to immediate possession at any time after the execution of the mortgage,[3] unless provision has been made for retention of possession by the mortgagor.[4] Where no such provision is made, it is submitted that a mortgagee has a sufficient interest. Where there is

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[1](1920) 55 D.L.R. 647.

[2]Ibid., 655.

[3]Marquis Cholmondeley v. Lord Clinton (1817) 2 Mer. 171, 359; 35 E.R. 905, 976.

[4]Gibbs v. Cruikshank (1873) L.R. 8 C.P. 454, 461; Moore v. Shelley (1883) 8 App. Cas. 285; Fourmaids Ltd v. Dudley Marshall (Properties) Ltd [1957] Ch. 317, 320; as for the effect of the Law of Property Act 1925, see ss. 87(1) and 95 (4).

such a provision (as will normally be the case, of course), then it is submitted that the mortgagee would be unable to show any interference with his enjoyment of the land, as he has no right to enjoy the land. He is not in the same position as the reversioner, who ultimately will regain possession. That is why the reversioner can sue in certain circumstances: that rationale does not apply to the mortgagee. If the property is damaged, then that simply means that the security for the debt is less valuable. But even if financial loss is recoverable, it is recoverable only as consequential damages -- that is, as an additional loss in consequence of an interference with the right of enjoyment of the land. A mortgagee has suffered no such interference.[1]

(f) Unlawful Possessor

De facto possession is sufficient.[2] As Professor Fleming observes, "it would be strange if it were otherwise, because even in conversion which, unlike nuisance, necessarily involves a reflection on the plaintiff's title, actual possession is protected against all but the rightful owner".[3] Thus, although the plaintiff's status in Crowhurst v. The Burial Board of the Parish of Amersham[4] was never established

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[1] If, contrary to this view, a mortgagee can sue in nuisance, even where the mortgagor retains possession, then several other problems are raised: what if it were only an equitable mortgage? what is the effect of the rent restrictions legislation? what is the position of second mortgagees?

[2] Paxhaven Holdings Ltd v. Attorney-General [1974] 2 N.Z.L.R. 185, 189; Foster v. Warblington Urban Council [1906] 1 K.B. 648.

[3] Fleming, p. 408.

[4] (1878) 4 Ex. D. 5.

-- he may have been a tenant or a licensee -- he was clearly in possession of the meadow, and thus could sue. Where the plaintiffs were in possession of land without any proper title, their occupation being merely with the implied approval of the officers of a government commission, they were held to have standing to sue in nuisance.[1] Even if an area of land was mistakenly included in the grant of a lease to the plaintiff, the plaintiff could sue in nuisance, since he exercised exclusive occupation of that land.[2]

(g) Conclusion

The editor of Winfield describes "[t]he need for an interest in land" as "an anomaly".[3] With respect, it is not. It follows from the nature of the right protected by the nuisance action -- namely, the right to the ordinary use and enjoyment of one's land -- that the plaintiff must be able to show an entitlement to such use and enjoyment. Free-holders in occupation, licensors, licensees in exclusive possession, and lessees can show such an entitlement. Because a lessor has a definite right to possession in the future, he can sue in nuisance if he can show that, unless something is done, he will suffer an impairment of enjoyment at the time when he does regain possession. But if one does not have possession of the land, and consequently has no right to use and enjoy it, how can one possibly rely on an action which is designed solely to compensate for and prevent interferences with the right of use and enjoyment of premises?

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[1] Ruhan v. The Water Conservation and Irrigation Commission (1920) 20 S.R. (N.S.W.) 439; see too S. Australian Co. v. City of Adelaide [1914] S.A.L.R. 16.

[2] Paxhaven Holdings Ltd v. Attorney-General [1974] 2 N.Z.L.R. 185.

[3] Winfield, p. 334.

PART II: PRINCIPLES OF LIABILITY IN NUISANCE

Chapter 6:
Damage to the Person, Chattels and Animals

(a) Introduction

The "right" for which the nuisance action provides protection is the right to the enjoyment of one's land. The next question which arises is: once the invasion of this right has been proved, what damages are recoverable? There are two issues here. The first is that, throughout the law of torts, "because of convenience, of public policy, or a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point".[1] Such a rule, founded on practical considerations if not logic, is necessary because "[t]heoretically the consequences of any conduct may be endless".[2] The law has solved this problem by the concept of remoteness of damage: one is liable only for damage which is not too remote. The test for remoteness (as indeed for liability) was settled by the decision of the Privy Council in The Wagon Mound (No. 2):[3] not only is foreseeability "an essential element in determining liability" in nuisance, but it is also the test for determining remoteness.[4]

Thus, so far as nuisance is concerned, damages are recoverable only for foreseeable harm. It has been submitted that the adoption of the "foreseeability" test has caused little change in practical terms from the position pertaining under the "directness" doctrine of Re Polemis.[5]

The second issue in deciding what damages are recover-

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[1] Palsgraf v. Long Island R.R. (1928) 248 N.Y. 339, 352; see too The Edison [1933] A.C. 449, 460.

[2] Winfield, p. 88; Fleming, p. 179.

[3] [1967] 1 A.C. 617.

[4] Ibid., 640; Winfield suggests that, in so far as remoteness is concerned, "[t]here now seems every likelihood that foreseeability will be held to be the test ... in other torts as well" (p. 95).

[5] [1921] 3 K.B. 560.

able relates to what kind of damage is recognised by law as coming within the ambit of the nuisance action's protection. For instance, if the occupier's chattels are damaged or if the occupier suffers personal injuries, can he recover for that harm in nuisance? Where the harm is not recognised by law, it is sometimes said that the damage is too remcte,[1] but "remote" here is being used in quite a different sense from its use above. It may be that personal injury to one's neighbour may be a foreseeable consequence of one's activity, but that such injury (should it occur) is nonetheless not actionable in nuisance because the harm is not of a kind recognised by the law of nuisance.

It is with the second of these issues that this chapter is concerned.

(b) Personal Injuries

If A operates a business with the result that his neighbour, B, cannot use his garden because of noxious fumes, A is liable in nuisance to B; he has impaired B's right to enjoyment. What if B not only coughs and splutters but also becomes physically ill as a result of the fumes? West has asserted that "there is no authority supporting a claim for personal injuries in a private nuisance action",[2] but that is not strictly true. There is at least tacit support in two English cases[3] for the view that occupiers can claim damages for personal injuries suffered.

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[1] S.C.M. (United Kingdom) Ltd v. W.J. Whittall & Son Ltd [1971] 1 Q.B. 337, 345-346.

[2] 30 Conv. (N.S.) 95, 101; see too Buxton, 8 Malaya L.R. 1, 24.

[3] Curard v. Antifyre [1933] 1 K.B. 551; Malone v. Laskey [1907] 2 K.B. 141.

In Schubert v. Sterling Trusts Corp.,[1] damages were recovered after some lessees died as a result of cyanide poisoning. Barwick C.J. has opined that damages for personal injuries can be recovered in both nuisance and Rylands v. Fletcher,[2] and in Gertsen v. Municipality of Metropolitan Toronto,[3] the plaintiff recovered in nuisance[4] the sum of $10,000 for the personal injuries he suffered when the methane gas, which was generated on the defendants' land, exploded in his garage.

What is not clear is on what basis the occupier may claim for his personal injuries. Two theories are now put forward.

(i) Consequential Loss

Newark believed that "damage to the person or chattels of the plaintiff [could not] by itself amount to a nuisance",[5] but he added in a footnote:[5]

> "It may well be that where an actionable nuisance is committed which in addition to interfering with the plaintiff's enjoyment of rights in land also damages his person or chattels, he can recover in respect of the damage to his person or chattels as consequential damages."

"Consequential" loss is frequently recovered in torts. For instance, the loss of a daughter's services,[6] the value of goods taken,[7] and the loss of cattle through disease[8] have

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[1] [1943] 4 D.L.R. 584.
[2] Benning v. Wong 43 A.L.J.R. 467, 475.
[3] 41 D.L.R. (3d) 646.
[4] Ibid., 681.
[5] 65 L.Q.R. 480, 490.
[6] Bennett v. Allcott (1797) 2 T.R. 166, 167; 100 E.R. 90, 91.
[7] Pritchard v. Long (1842) 9 M. & W. 665, 667; 152 E.R. 281, 282.
[8] Anderson v. Buckton (1719) 1 Strange 193; 93 E.R. 467.

all been redressed by way of consequential damages in actions based on trespass to land. In other words, once liability is established, then harm consequential upon the invasion of the right can be redressed, subject to the rules of remoteness and subject to the harm's being of a kind recognised by law. (It is essential, of course, that liability be established before discussion of the measure of the consequences is embarked upon.)[1]

As in trespass, so in nuisance. The plaintiff who has suffered personal injuries is not, however, making "a claim for personal injuries", in West's words; he is making a claim for an impairment of his right to enjoyment of his land, one of the foreseeable consequences of which is an injury to his person.[2] Professor Street certainly supports such an approach.[3] There is no reason on historical or policy grounds why personal injuries should not be of a kind recognised by law. "The suggestion that I can recover for an explosion wrecking my conservatory or a horse trespassing on my rose bed, but not for an explosion blowing me out of my deck chair in my own garden, or a horse treading on my face as I sleep on my lawn, has little to commend it."[4] To hold personal injuries always unrecoverable is to confuse culpability and compensation.[5]

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[1] Bourhill v. Young [1943] A.C. 92, 109.

[2] Thus, there is no conflict between this argument and Lord Macmillan's dictum in Read v. J. Lyons & Co. [1947] A.C. 156, 170, that "an allegation of negligence is in general essential to the relevancy of an action for reparation for personal injuries". This is not such an action: that personal injuries are compensated is merely a fortuitous consequence of an action based on the impairment of an occupier's right to enjoyment of land.

[3] Street, p. 233.

[4] Tylor, "The Restriction of Strict Liability", (1947) 10 M.L.R. 396, 400.

[5] Ibid., 399.

However, while this approach is here supported, it is not without difficulty. There is no difficulty with the case where A suffers personal discomfort (and subsequently physical illness) as a result of fumes emitted from B's property. But what of Professor Street's example of a chimney likely to fall onto C's land which falls onto C's head but causes no other damage? He thinks that damages here too would be recoverable, "since that interference with enjoyment which the tort demands has been proved".[1] While it is submitted that damages should be recoverable, it is difficult to term them "consequential", because, on conventional analysis, there has beenno physical harm to the land and the occupier has not suffered an interference with the use of his land in the way one normally expects. How does C establish the basic violation of a right, onto which the consequential personal injury can be hung? A solution will be suggested below.

Secondly, the approach lays itself open to charges of unfairness. The editor of Winfield observes:[2]

> 'If A and his wife are injured and their house damaged by an emission from B's adjoining property, it is unjust that A can recover for his personal injuries without proof of negligence as a consequence of his right to sue in nuisance for the damage to his property, whilst his wife will only be compensated if she can prove that B has acted in breach of his duty of care."

If A recovers for his personal injuries simply because some other right has been infringed, it does seem rather unfair that his wife, who may have suffered exactly the same injuries, cannot recover (unless she can prove negligence) simply

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[1] Street, p. 233.
[2] Winfield, p. 334.

because she, not being an occupier, cannot establish the other right.

Thirdly, the whole concept of consequential damages has fallen into some disfavour since Lord Denning M.R.'s attack on "parasitic damages" in Spartan Steel & Alloys Ltd v. Martin & Co. (Contractors) Ltd.[1] However, it is important to note that Edmund Davies and Lawton L.JJ. confined their remarks solely to negligence cases,[2] and it is possible to interpret Lord Denning's dicta as evincing simply a dislike of the term "parasitic" rather than as a condemnation of the whole concept of consequential damages, for he did acknowledge that "extra damages" might be added where "they flowed naturally and directly from the wrong done and could reasonably have been foreseen as a consequence of it".[3]

Despite these objections, it is submitted that an award of damages for personal injuries can be justified on the ground of consequential loss.

(ii) An Alternative Theory

It has been submitted that nuisance protects an occupier's right to the enjoyment of his land. That right is made up of subsidiary rights, such as the right not to have one's land flooded. Why should there not be a right not to be physically injured on one's land? If the noise from quarrying activities can lead to liability in nuisance, why should not the expulsion of rocks to a neighbour's lead to

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[1] [1973] Q.B. 27, 35.
[2] Ibid., 46, 49.
[3] Ibid., 36.

liability? In both cases, the neighbour is prevented from enjoying his garden. In the first case, he could seek an injunction because of the threat of unwarranted noise. In the second case, he could seek an injunction because of the threat of personal injury from flying rocks. If the harm has already been caused, then he should be able to sue for damages in both cases. The enjoyment of his land has been impaired.

Such a thesis avoids the difficulty presented by Professor Street's second example. Once it is acknowledged that there is a right not to be injured on one's land (just as there is a right not to be discomforted by smell, say), then a man hit on the head by his neighbour's chimney could prove an invasion of that right, and thereby an invasion of his right to enjoyment. If he knew the chimney was likely to fall, he would not use his garden -- and yet an occupier is entitled to use his garden. Thus, he has an action in nuisance. There is no need to call this damage consequential.

It also solves the second difficulty of the "consequential loss" approach. If an occupier is physically injured, his right to enjoyment has been impaired, just as it is if he is discomforted by smell. No one complains that only occupiers can claim for the latter; why then should there be complaint if only occupiers can claim for the former? The occupier is not suing for the personal injuries: he is suing for an interference with his right to enjoyment of land. As his wife has no such right, naturally she cannot bring an action based on a breach of it.

(c) Damage to Chattels and Animals

If it is conceded that damages may be recovered for personal injuries suffered by the occupier, then damages should also be recoverable for damage to the occupier's chattels and animals. Again, such damages can be justified either on the ground of consequential loss or on the alternative theory propounded above. In that case, the argument would be that the right to enjoyment has been impaired by virtue of the invasion of the right not to have the chattels and animals on one's land harmed. If an occupier is not able to park his caravan on his land for fear that his neighbour's unsafe wall will fall on it, then he is deprived of the use of his land to the extent allowed by law.

Occupiers have recovered damages in nuisance for the destruction of furniture,[1] damage to a motor-vehicle,[2] and for injury to stock-in-trade.[3] So too they have recovered damages for injury to their animals: such damages "have always been regarded as recoverable".[4] An Australian farmer claimed the value of his pigs after they died from swine fever which had spread from the defendant's land.[5] A Canadian farmer was

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[1] Moss v. Christchurch Rural District Council [1925] 2 K.B. 750.

[2] Gertsen v. Municipality of Metropolitan Toronto, 41 D.L.R. (3d) 646.

[3] Midwood & Co. Ltd v. Manchester Corporation [1905] 2 K.B. 597; Irvine & Co. Ltd v. Dunedin City Corporation [1939] N.Z.L.R. 741; British Office Supplies (Auckland) Ltd v. Auckland Masonic Institute and Club [1957] N.Z.L.R. 512 (action failed on other grounds).

[4] Benning v. Wong, 43 A.L.J.R. 467, 493.

[5] Ruhan v. The Water Conservation and Irrigation Commission, 20 S.R.(N.S.W.)439.

awarded the value of a heifer which had died of anthrax[1] and, in Britain, the owner of a horse recovered £21, that being its value, after it died from eating the branches of an overhanging yew tree.[2] The value of crops lost as a result of a neighbour's activities has also been claimed as damages.[3]

O'Regan J. thought that damage to chattels was recoverable as a consequential loss: he said:[4]

> "I think that once damage to the plaintiff's property is established, he is entitled to damages for whatever loss results to him as a natural and foreseeable consequence of the wrongful act of the defendant. In other words, once private nuisance is established, damages flow in the same way as that for tort generally ... It would seem to me illogical that the plaintiff in this case could merely recover for damage to his land and the buildings thereon but not for damage to his chattels housed therein."

It is submitted that, as in the case of personal injuries, damages could be so justified, but again not without charges of unfairness. Why should X recover £20,000 for the value of his Rolls Royce if it is parked in his drive-way and damaged, but Y receive nothing for his car parked out on the footpath?[5] Is it not unfair that the

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[1] Weber v. Town of Berlin (1904) 8 O.L.R. 302.

[2] Crowhurst v. The Burial Board of the Parish of Amersham (1878) 3 Ex. D. 5.

[3] Roud v. Vincent [1958] N.Z.L.R. 794 (plaintiff's garden damaged by defendant's elm roots); Simpson v. Attorney-General [1959] N.Z.L.R. 547 (potato crop destroyed by flooding).

[4] Howard Electric Ltd v. A.J. Mooney Ltd [1974] 2 N.Z.L.R. 762, 766.

[5] In Halsey v. Esso Petroleum Co. Ltd [1961] 2 All E.R. 145, Veale J. obviously had sympathy for Y. The plaintiff's car was damaged by smuts. His Lordship inclined to the view that this harm could not be recovered in private nuisance (because the car was on the road), but could be redressed in Rylands v. Fletcher or public nuisance. With respect, that is wrong. But Veale J. quite properly awarded, inter alia, £5 for the damage to the washing which was hanging out to dry in the plaintiff's garden.

recovery of the £20,000 depends solely on the fortuitous disturbance of the owner's land (however minimal), the foreseeable consequence of which was the destruction of the chattel? (It is fortuitous in the sense that the damages cannot be recovered until such a disturbance has been proved.) If the alternative theory is adopted, there is no need to rely upon a fortuitous disturbance, for an invasion of the right not to have the chattels on one's land destroyed is part of the right to enjoyment of one's land. That enjoyment is not interfered with in any way if a chattel situated elsewhere is damaged.

(d) Other Forms of Damage

The rationale of the alternative theory propounded is that, if the injured party had known of the risk of harm to his person, his chattels, or his animals, he would not have placed himself or them within that part of his property threatened by his neighbour's hazard.

Does that rationale apply to economic loss? Certainly loss of profits can be claimed as consequential loss,[1] and loss of earnings[2] and of custom[3] have been redressed. It is submitted that economic loss can be claimed only as consequential loss: the right to enjoyment of land is not invaded if one suffers economic loss without more. This accords

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[1] McGregor, p. 714, footnote 36; British Celanese Ltd v. A.H. Hunt (Capacitors) Ltd [1969] 2 All E.R. 1252, 1259; Weber v. Town of Berlin, 8 O.L.R. 302; Burgess v. City of Woodstock [1955] 4 D.L.R. 615 (loss of income by forced sale of cattle for beef rather than milk).

[2] Gertsen v. Municipality of Metropolitan Toronto, 41 D.L.R. (3d) 646; Matthews v. Forgie [1917] N.Z.L.R. 921 (Magistrate had awarded £5 for wages lost through illness; reversed on appeal on other grounds).

[3] Amalgamated Theatres Ltd v. Charles S. Luney Ltd [1962] N.Z.L.R. 226, 236.

with the position in negligence, where the courts have consistently refused to award damages to a plaintiff who has suffered economic loss,[1] except where the loss is immediately consequential upon injury to the plaintiff's person or his property.[2] If an occupier suffers economic loss alone, then he cannot assert that his use and enjoyment of his land has been impaired: his assertion must simply be that he has not made the profit from his land which he otherwise expected. However, it has been held that a plaintiff may recover the cost involved in averting the threat of physical injury.[3] But such a cost is claimed not as economic loss (in the sense in which that term is used above), but as an expense of mitigation. "The duty of a plaintiff to mitigate his loss is of general application in the law of damages and he may as a corollary recover from the defendant the expenses of mitigation ... I think the matter is clear in principle as representing the duty of an adjoining occupier to take all available steps to

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[1] Spartan Steel & Alloys Ltd v. Martin & Co. (Contractors) Ltd [1973] Q.B. 27; Electrochrome Ltd v. Welsh Plastics Ltd [1968] 2 All E.R. 205. In S.C.M. (United Kingdom) Ltd v. W.J. Whittall & Son Ltd [1971] 1 Q.B. 337, it was argued, on the basis of Campbell v. Paddington Corporation [1911] 1 K.B. 869, that even if pecuniary loss alone was not recoverable in negligence, it was in nuisance. Thesiger J. thought that such a distinction, if it existed, was wrong, and that damages ought to be awarded according to similar principles.

[2] S.C.M. (United Kingdom) Ltd v. W.J. Whittall & Son Ltd [1971] 1 Q.B. 337; Dutton v. Bognor Regis Urban District Council [1972] 1 Q.B. 373, 396; see too Atiyah, "Negligence and Economic Loss", (1967) 83 L.Q.R. 248.

[3] Landon v. Rutherford [1951] N.Z.L.R. 975 (recovered £18, the cost of checking the fire); Dutton v. Bognor Regis Urban District Council [1972] 1 Q.B. 373, 396; Rivtow Marine Ltd v. Washington Iron Works (1973) 40 D.L.R. (3d) 530, 549.

abate the tort or nuisance."[1]

What then of nervous shock? "[W]ould damages be recoverable in respect of physical illness from nervous shock caused by blasting?"[2] There seems to be no authority on this point either in the Commonwealth or in the United States, but it is submitted that, on principle, such harm, if suffered by an occupier, should be redressed in nuisance if it can be shown that it represented a disturbance of the right to enjoyment of the land. It has been suggested that a man can recover for his personal injuries on the ground that, if he had known about the risk of harm to his person, he would not have used that part of his land threatened by his neighbour's hazard; so it is now suggested that he can recover for his mental injuries. Of course, such harm must be reasonably foreseeable[3] and must have caused a disturbance of the enjoyment of the land. If as a result of blasting on A's land, damage was caused to B's person, with the result that C (another occupier) suffered from nervous shock on seeing or hearing of B's injuries, A would not be liable to C in

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[1] N.Z. Forest Products Ltd v. O'Sullivan [1974] 2 N.Z.L.R. 80, 83-84 (plaintiff claimed the cost of employing fire fighters to bring the fire under control and thus to save its forests).

[2] Street, p. 233, footnote 5.

[3] Bourhill v. Young [1943] A.C. 92, 109, 119; King v. Phillips [1953] 1 Q.B. 429. cf. the position in contract, where it has been held that "vexation, distress, and general disappointment" must be "reasonably foreseeable" or "within the contemplation of the parties": Cox v. Philips Industries Ltd [1976] 1 W.L.R. 638, 644; Cook v. S. [1967] 1 All E.R. 299; Heywood v. Wellars (A Firm) [1976] Q.B. 446; Rose, 55 Can. Bar Rev. 333.

nuisance, for C did not suffer the harm qua occupier.[1]

(e) Assessment of Damages

Once liability has been established and then the damage held to be not too remote, then the damages must be assessed. The general aim in the law of tort is to put the plaintiff in the position he would have been in if the wrong had not been committed.[2] Damages are easy to assess, of course, where the interference with enjoyment is by way of physical damage to the land: the measure of the interference is the cost of restoring the land to its former state or its diminution in value.[3] It has been held that the "true test" of diminution in value "is a sale or an abortive sale of the property".[4] A "theoretical diminution of the value of the property cannot be taken into account" because the purchaser would have a right to stop the harm, and thus may not pay less on account of the harm than he otherwise would.[5] In Park v. White,[6] the plaintiff sued, not as reversioner, but as an occupier who feared that he

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[1] To this extent, damages may be more easily recovered for nervous shock in negligence: see Benson v. Lee [1972] V.R. 879, but cf. Hambrook v. Stokes Bros. [1925] 1 K.B. 141.

[2] Armstrong v. Sheppard & Short [1959] 2 Q.B. 384; Ogus and Richardson, [1977] C.L.J. 284, 307.

[3] Landon v. Rutherford [1951] N.Z.L.R. 975 (value of land depreciated by £150 as a result of fire); Taylor v. Auto Trade Supply Co. [1972] N.Z.L.R. 102; Ellis v. Rasmussen (1910) 30 N.Z.L.R. 316 (small, but not nominal, damage to land by flooding); Howard Electric Ltd v. A.J. Mooney Ltd [1974] 2 N.Z.L.R. 762 (damage to building by flooding).

[4] Morris v. Dominion Foundries & Steel Ltd [1947] 2 D.L.R. 840, 844.

[5] Jones v. Chappell, L.R. 20 Eq. 539, 543; Landzick v. Robinson, 43 Man. R. 30, 32.

[6] 23 O.R. 611, 615.

would not be able to let his houses because of the foul smells from his neighbour's privy pits. The plaintiff was entitled to an injunction because the state of affairs causing the interference with the enjoyment of his land was such that it would continue unless something was done to bring it to an end. But the plaintiff would not be entitled to damages for loss of rent until such time as he could show that he was unable to let his houses because of the smell or that he had been forced to accept less rent than he would have received had the privy pits not been in existence. This case shows how, in certain circumstances, the plaintiff may be entitled to an injunction but not to damages.

It is more difficult to assess the appropriate damages where personal discomfort has been caused. If everyone living in a particular locality suffers "x" amount of harm, but the plaintiff suffers "3x" harm because of the defendant's activities, then the plaintiff's damage is "2x", not "3x", and the damages should, of course, reflect this.[1] An interesting proposition was put forward in Bone v. Seale:[2] the plaintiffs sought damages for the smells they had endured for the past 12½ years from the defendant's pig farm. They were not able to show any diminution in the value of the property;[3] there was no pecuniary loss, no damage to property, and no injury to health[4] -- merely discomfort. How then to assess the damages? Stephenson L.J. said:[5]

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[1] Andreae v. Selfridge & Co. Ltd [1938] Ch. 1.
[2] [1975] 1 All E.R. 787.
[3] Ibid., 793.
[4] Ibid., 794.
[5] Ibid., 793.

"The nearest analogy would seem to be the damages which are awarded almost daily for loss of amenity in personal injury cases; it does seem to me that there is perhaps a closer analogy than at first sight appears between losing the enjoyment of your property as a result of some interference by smell or by noise caused by a next door neighbour, and losing an amenity as a result of a personal injury."

The analogy has some use in fixing an upper limit to the quantum of damages. A man whose property is invaded by smell obviously should not receive higher damages than a man who has lost his sense of smell, for the former's detriment is only sporadic (i.e. it is experienced only when the man is on his land) whereas the latter's is permanent. The analogy should not be used as a criterion of damages in general.

Where the occupier has suffered personal injuries, then it is submitted that the damages awarded should approximate what the plaintiff would have received for similar injuries incurred as the result of another's negligence.

Where an occupier's chattel or animal is harmed, then the damages ought to reflect the value of the chattel or animal destroyed. It must be remembered that an occupier has a right to only the ordinary enjoyment of land; thus, he will not be able to claim the value of extraordinary chattels or animals unless he can show that the defendant's state of affairs which caused them harm would have caused harm even if he had been using the land in an ordinary way. The growing of orchids is an extraordinary user of land, but they may be protected if ordinary flowers would suffer as a result of the defendant's activities;[1] to manage a china

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[1] McKinnon Industries Ltd v. Walker [1951] 3 D.L.R. 577.

shop may similarly be extraordinary, but that too may be protected if the defendant's activities (say, drilling causing vibration) would affect an ordinary user.

(f) Equitable Remedies

Often, the plaintiff in a nuisance action will seek injunctive relief rather than damages. Interestingly, in so far as equitable intervention is concerned, the courts have been keener to provide redress for interference with personal comfort than for damage to property. That is because diminution in the value of property can be adequately redressed normally by damages, while personal discomfort cannot be.[1] It is not proposed to discuss here the circumstances in which the court, in the exercise of judicial discretion, ought to grant an injunction: guide-lines are set out by Lord Upjohn in his speech in Redland Bricks Ltd v. Morris.[2] The decision of the Court of Appeal in Miller v. Jackson[3] is disturbing in that, although two members of the Court[4] thought that the defendants were maintaining a state of affairs which interfered with the plaintiffs' ordinary enjoyment of their house and garden, a majority[5] refused an injunction on the grounds of public interest. But as soon as a plaintiff has shown that the

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[1] Thomas A. Street, The Foundations of Legal Liability, vol. 1, p. 222.

[2] [1970] A.C. 652, 665-667.

[3] [1977] 3 All E.R. 338.

[4] Geoffrey Lane and Cumming-Bruce L.JJ.

[5] Lord Denning M.R. (who thought the defendants could not be liable because they were there first) and Cumming-Bruce L.J.; Geoffrey Lane L.J. would have upheld the injunction granted by Reeve J.

defendant's continuing wrongful activity is interfering with his rights, he is entitled to an injunction "as of course",[1] and the most the defendant can hope for is a suspension of the operation of the injunction to enable him to take steps to bring the harmful state of affairs to an end.

The Court of Appeal's refusal to grant an injunction seems a quite improper exercise of judicial discretion, as no special circumstances existed[2] to justify a course other than the normal course.

An occupier may seek an injunction quia timet to restrain conduct which, if allowed to go forward, would almost certainly lead to his suffering substantial damage. It is enough if the plaintiff fears even an isolated escape of a thing onto his land,[3] although it must be almost certain that the harm will occur[4] and that it is imminent.[5] Quia timet actions are interesting for the light they throw on the discussion of whether personal injuries and injuries to

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[1] Redland Bricks Ltd v. Morris [1970] A.C. 652, 664; Pride of Derby, etc. Ltd v. British Celanese Ltd [1953] 1 Ch. 149, 181.

[2] For the relevant special circumstances, see Redland Bricks Ltd v. Morris [1970] A.C. 652 and Clerk, para. 495.

[3] Knight v. Bolton [1924] N.Z.L.R. 806, 808, per Salmond J.

[4] Attorney-General v. Nottingham Corporation [1904] 1 Ch. 673; Attorney-General ex rel. Shaw v. New Plymouth Borough [1920] N.Z.L.R. 761, 762 (no injunction because smells would not "necessarily" ensue from proposed public convenience).

[5] Lemos v. Kennedy Leigh Developments (1961) 105 S.J. 178. In Hooper v. Rogers [1975] Ch. 43, it was suggested that "imminent" indicated no more than that the injunction must not be granted prematurely (at 49, per Russell L.J.) -- where does this leave matters?

chattels may be redressed in nuisance. It is submitted that an injunction would be issued if the occupier was able to show that his person, his chattels or his animals were in danger on part or all of his property because of a neighbour's activities; that being so, it is submitted that he ought to be able to recover damages for any injury caused to them by those activities.

PART III: THE RULE IN RYLANDS v. FLETCHER

Chapter 1

The Decision and its Subsequent Treatment

(a) The Decision

Lords Blackburn and Cairns, were they alive today, would be astounded to learn that a major part of a doctoral thesis written in one of the ancient universities should be concerned with the so-called doctrine of Rylands v. Fletcher. After all, the former declared in a later case that there was nothing in his judgment in Rylands v. Fletcher[1] which had not been law for at least 300 years,[2] and the latter, in deciding the case, said that the principles on which the case had to be determined appeared to him to be "extremely simple".[3] Notwithstanding that, the case has become the focus of a distinct cause of action, although the scope of the action has never been satisfactorily defined. The decision has been seen as the recognition by a conservative judiciary of the need to protect the landed gentry at the expense of the new manufacturing classes.[4] It has also been attributed to the growth of collectivism.[5] But there is no real evidence for either of these superficially attractive hypotheses.

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[1] L.R. 1 Ex. 265.

[2] Ross v. Fedden, 26 L.T. 966, 968.

[3] L.R. 3 H.L. 330, 338.

[4] Bohlen, "The Rule in Rylands v. Fletcher", (1911) 59 U. Pa. L.R. 298, 318-320, 373, 423; see too Friedmann, "Modern Trends in the Law of Torts", (1937) 1 MLR 39, 51; effectively critised by Pound, "The Economic Interpretation and the Law of Torts", (1940) 53 Harv. L. Rev. 365, 383 and by Molloy, "Fletcher v. Rylands -- A Re-examination of Juristic Origins", (1941) 9 U. Chi. L. Rev. 266.

[5] Pound, Interpretations of Legal History, (1923), pp. 105-110; Dicey, Law and Public Opinion in England, 2nd ed., p. 259 et seq.; theory criticised by Buxton, 8 Malaya L.R. 1, 7, footnote 34.

It is the central submission of Part III of this thesis that Rylands v. Fletcher is not a separate doctrine of legal liability, but that the decision of the Exchequer Chamber and House of Lords was a judgment on orthodox principles of private nuisance. That the decision has become a landmark in the law of torts was largely due to the skilful advocacy of Mellish Q.C., counsel for the defendants. The way in which the case developed owes much to the opposing argument of counsel. Although his argument was not ultimately successful, its general thrust was so persuasive that Blackburn J. was at pains to show the justice of the Exchequer Chamber's unanimous decision to reject it. It is submitted that the major weakness of the analyses made by other commentators is the almost complete disregard of counsel's argument; only by understanding what they argued -- and, more importantly, why they pleaded their submissions as they did -- can one understand the judgments of Blackburn J. and of the House of Lords.

The facts of the case are so well known that they need but brief mention. Rylands and Horrocks, mill-owners, employed independent contractors to construct a reservoir on their land. In the course of their work, they came upon some old shafts, which they knew "must lead to old workings" and "consequently knew damage might happen".[1] The shafts in fact led to the mines leased to Fletcher. When the reservoir was filled, the water burst through the old shafts and flooded Fletcher's mines.

The action first came before the Liverpool Assizes. Fletcher secured a verdict, subject to the award of an

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[1](1865) 3 H. & C. 774, 790, per Bramwell B.

arbitrator, who was afterwards empowered by a judge's order to state a special case instead of making an award. There was a finding that the defendants had not been personally negligent, but that the contractors had been. This was a crucial finding of fact, too often ignored by commentators, as it explains why counsel adopted the arguments they did. It was crucial for the defendants to establish that the proper cause of action was in negligence, for it had been held in Quarman v. Burnett[1] that an employer was liable for the negligence of his servants, but not for the negligence of his independent contractors. The only negligence found in this case was the contractors'. On the other hand, the defendants were doomed if nuisance were held to be the appropriate cause of action. It has been shown above[2] that the employer remains liable in nuisance notwithstanding the fact that the specific act causing the harm is perpetrated by a contractor because the employer retains possession of the land on which that act is done. There was clear authority before 1865 that an employer might be liable in nuisance, the contractor's negligence or lack of negligence being irrelevant. In Laugher v. Pointer,[3] Abbott C.J. held an employer liable in nuisance: "I have the control and management of all that belongs to my land or my house; and it is my fault if I do not so exercise my

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[1](1840) 6 M. & W. 499.

[2]See p. 65 et seq.

[3](1826) 5 B. & C. 547; 108 E.R. 204.

authority as to prevent injury to another."[1] A similar argument had succeeded in Reedie v. London and North Western Railway,[2] Knight v. Fox,[3] and Overton v. Freeman.[4] Thus, it was crucial for the defendants to show that this was not a nuisance case, because if it were the defendants were prima facie liable.

(i) The Court of Exchequer[5]

Manisty,[6] counsel for the plaintiffs, said, as might have been expected in view of the findings of fact mentioned above, that this case fell to be decided on the sic utere (i.e. nuisance) principle.[7] The principle was, he said:[7]

> "The plaintiff has a right to enjoy his land free from the injury resulting from an act, not in the ordinary course, done by the defendants on their land. A person who collects on his land a dangerous element, be it fire or water, and allows it to escape and injure his neighbour's land, is liable for the consequences."

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[1] Ibid., 576; 215. Dr Harris says in his thesis (at p. 37): "This involves a logical fallacy, however, for it was finally decided in Laugher v. Pointer and Quarman v. Burnett that absence of control is the main factor distinguishing a servant from an independent contractor." With respect, there is no fallacy. It is simply a question of "control" being used in two different ways, as explained above at p. 67. The employer retains control of the land, but has no control over the way in which the independent contractor carries out the task contracted to him. The defendant in nuisance is the man with control of the land.

[2] (1849) 4 Ex. 244; 154 E.R. 1201.

[3] (1850) 5 Ex. 721; 155 E.R. 316.

[4] (1852) 11 C.B. 867; 138 E.R. 717.

[5] (1865) 3 H. & C. 774 (better report); 34 L.J. Exch. 177.

[6] By the time the case reached the Exchequer Chamber, Manisty had taken silk; by the time the case reached the House of Lords, Mellish (for the defendants) had similarly been called to the Inner Bar.

[7] 3 H. & C. 774, 781.

Several points are worthy of note. First, it is classic nuisance terminology. The plaintiff is described as having a right to enjoyment of land; the liability springs from acts done on the defendants' land. The acts must not be done "in the ordinary course", because that was a recognised defence in nuisance actions.[1] The act in this case was the collecting of water and allowing it to escape. Secondly, it is noticeable that Blackburn J.'s famous rule[2] adopts Manisty's words, virtually word for word. Thirdly, the authority cited for the proposition is almost entirely nuisance law: Smith v. Kenrick,[3] Aldred's Case,[4] Tenant v. Goldwin,[5] In Re Williams v. Groucott.[6]

Mellish responded with a smoke-screen. If this was seen as a nuisance case, his client would lose. And so, at all stages of the case, he tried to argue that the case must be decided in negligence. Then his client would win, for an employer was not liable for an independent contractor's negligence and the defendants in this case were not personally negligent. Thus, he argued that the defendants' duty was simply to use reasonable care not to injure the property of others.[7] His theme throughout was: if this

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[1] Smith v. Kenrick (1849) 7 C.B. 515; see p. 283.

[2] (1866) L.R. 1 Ex. 265, 279.

[3] 7 C.B. 515.

[4] (1610) 9 Rep. 57b.

[5] (1704) 2 Ld. Raym. 1089.

[6] (1863) 4 B. & S. 149; 122 E.R. 416, in which Blackburn J. held that "a man [was] bound to use his land so as not to injure his neighbour" (at 157; 419).

[7] 3 H. & C. 774, 785. The arguments presented later on appeal were very similar. As the best account of Mellish's argument is contained in the report of proceedings before the Exchequer Chamber, L.R. 1 Ex. 265, this will be the report cited here.

reservoir had burst and the plaintiff had been drowned at the bottom of his mine, the defendants would have been held liable only if they were negligent. What difference can it make if, instead of drowning the plaintiff, the bursting of the reservoir merely floods his mine? "In the absence of any authority distinguishing liability in respect of injury to real property from liability in respect of other injuries, the doctrine laid down as to actions of the latter kind applies, and in these it is clear that negligence must be shown."[1]

This is perhaps an attractive argument, especially to twentieth century minds, since greater emphasis is now placed on personal security than on security of property. That a man whose person is injured must prove negligence but a man whose property is injured need not may seem odd to some.[2] But the single point is that the argument was contrary to authority. For better or for worse, for historical or other reasons, the law did make a distinction between liability in respect of injury caused by B to A's property and liability in respect of injury to A's person.

Mellish declared that there were three classes of cases where negligence need not be proved. The first was trespass: Lambert v. Bessy[3] was an example. The second class comprised cases in which acts were purposely done and calculated to cause injury: examples were Aldred's Case[4]

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[1] L.R. 1 Ex. 265, 273-274.

[2] Arguments in favour of liability without negligence in certain circumstances have been cited in Part I, however, and it has been submitted that these arguments are sound.

[3] (1681) T. Raym. 421.

[4] 9 Rep. 57b.

and Baird v. Williamson.[1] The third category comprised cases where, by reason of the natural relation of the properties, a legal relation had been constituted between them, such as a right to support or a right to a water-course. An example was Bonomi v. Backhouse.[2] The present case, said Mellish, fitted into none of these categories. With respect, there was and is no real distinction between categories (2) and (3) and Mellish failed to show how Rylands v. Fletcher could be distinguished from Baird's case.[3] The defendant in that case no more "purposely caused the water to flow into the adjoining mine"[4] than did Rylands and Horrocks in this.

A majority of the Court of Exchequer found for the defendants. Martin B. accepted Mellish's argument that the defendants could be liable only if they were negligent and here they had not been.[5] Pollock C.B. seems to have thought that, because the defendants could not have been liable if the passages had been formed by nature,[6] a fortiori they could not be liable if they had been cut by the "complaining

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[1](1863) 15 C.B. (N.S.) 376; 143 E.R. 831.

[2](1861) 9 H.L.C. 503.

[3]15 C.B. (N.S.) 376; 143 E.R. 831.

[4]L.R. 1 Ex. 265, 276.

[5]3 H. & C. 774, 793. Martin B.'s reason for not holding the defendants liable in nuisance was that "there was no nuisance in the ordinary and generally understood meaning of the word, that is to say, something hurtful or injurious to the senses" (Ibid., 792). Nuisance has never been so limited; Bracton gave as an example of nuisance the case where a man's land was flooded by his neighbour's activities (see p.166). In the St Helen's Smelting case, Lord Westbury L.C. stressed that one kind of harm was "material injury to the property" (11 H.L.C. 642, 650; 11 E.R. 1482, 1486). There was clearly damage of that kind here.

[6]But why not? See p. 291, footnote 6, and pp. 316-327.

party" in the exercise of his right to take minerals.[1] But Fletcher did not cut the passages on the defendants' land.

But Bramwell B., dissenting, was not deceived by Mellish's attack on orthodoxy. The defendants were liable in nuisance. His Lordship said:[2]

> "Why is it not a nuisance? The nuisance is not in the reservoir, but in the water escaping. As in Backhouse v. Bonomi, the act was lawful, the mischievous consequence is a wrong."

It has already been shown that liability in nuisance flows from the maintenance of a state of affairs (which may well in itself be "lawful") which causes harm to another. That was exactly the position in this case.

(ii) The Exchequer Chamber.[3]

Similar arguments were again presented. The Exchequer Chamber unanimously held Bramwell B.'s judgment correct. Blackburn J.'s famous "true rule of law"[4] was but a restatement of Manisty's proposition, and that in turn was but a statement of traditional principle. The only novelty in Blackburn J.'s decision was the analogy drawn between cattle-trespass and nuisance.[5] His Lordship could see no distinction between the man "whose mine is flooded by the water from his neighbour's reservoir" and the man "whose cellar is invaded by the filth of his neighbour's privy, or habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works": each "is damnified

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[1] 3 H. & C. 774, 798.
[2] Ibid., 789.
[3] (1866) L.R. 1 Ex. 265 (best report); 35 L.J. Exch. 154; 4 H. & C. 263.
[4] L.R. 1 Ex. 265, 279.
[5] Ibid., 280; see p. 273 et seq.

without any fault of his own".[1]

Blackburn J. cited Tenant v. Goldwin[2] as being directly in point. And then he proceeded to compare the present case with several actions which had been brought "against the occupiers of some alkali works at Liverpool for the damage alleged to be caused by the chlorine fumes of their works" -- clearly actions in nuisance. Those occupiers had been held liable. "There is no difference in this respect between chlorine and water; both will, if they escape, do damage, the one by scorching, and the other by drowning."[3]

(iii) The House of Lords.[4]

In a short judgment, Lord Cairns L.C. fully accepted Blackburn J.'s judgment in the Exchequer Chamber and held that the case was indistinguishable from Baird v. Williamson[5], a nuisance case. The law was "extremely simple":[6]

> "The Defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used."

That was, of course, the ratio decidendi of Smith v. Kenrick:[7] that was a nuisance case in which the defendants had avoided liability because of a defence of "ordinary use". But to construct a reservoir was not an ordinary use, just as pumping up water was not an ordinary use in Baird's case;[8]

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[1] Ibid., 280.

[2] 6 Mod. 311, esp. at 314, per Lord Holt.

[3] L.R. 1 Ex. 265, 285-286.

[4] (1868) L.R. 3 H.L. 330 (best report); 19 L.T. 220; 37 L.J. Exch. 161.

[5] 15 C.B. (N.S.) 376; 143 E.R. 831.

[6] L.R. 3 H.L. 330, 338.

[7] 7 C.B. 515.

[8] 15 C.B. (N.S.) 376; 143 E.R. 831.

consequently, the ordinary principles of nuisance applied, and the defendants were liable for allowing the water "to pass off into the close of the Plaintiff".[1] Lord Cranworth's judgment was expressly founded on the sic utere principle.

Thus, it is submitted that the plaintiff consistently argued the case on nuisance principles, and that the case was so decided by Bramwell B., the Exchequer Chamber and the House of Lords. Because Mellish knew that his client stood no chance of success if the case were decided in nuisance, he tried to develop an analogy with the law relating to personal injury where the defendant could be held liable only if negligent. As has been said, the analogy was false and Mellish's argument a "smoke-screen"; but the fact that it was raised was probably the reason why Blackburn J. in particular went to such lengths in showing the justice and fairness of traditional liability without negligence in the torts of cattle-trespass and nuisance.

(b) The Novelty of the Case

There is no doubt that Blackburn J. formulated the principles of nuisance in striking form. The rule was crisply stated. But that does not mean that the rule was original in its principles.

Most commentators do, however, see the case as novel in two ways. These will now be investigated.

(i) Isolated Escape

It is sometimes said that the decision was novel because the plaintiff recovered damages for an "isolated

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[1] L.R. 3 H.L. 330, 339.

escape".[1] It has already been shown[2] that often claims have been brought in nuisance for harm caused on an isolated occasion, and certainly no argument was made by Mellish that the defendants were not liable on this ground. The reason is clear: there was authority which showed that liability in nuisance might flow from an isolated escape.[3] The House of Lords had held in the St Helen's Smelting case[4] that nuisance lay for "material injury to the property" and there was no suggestion that the "material injury" had to occur on more than one occasion or over a considerable length of time. If this was a novel feature of the decision, why did Mellish not argue the point? There was nothing in it, as later cases show.[5]

(ii) Independent Contractor

It has also been suggested that the decision was novel because an employer had never before been held liable in nuisance for the negligence or default of his independent contractor.[6] Dr Harris thinks this suggestion wrong because

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[1] Fleming, p. 320. Professor Fleming concedes (footnote 4) that "[i]t is probably no longer true that nuisance cannot be founded on isolated escapes [and] Rylands v. Fletcher cases often involve conditions of some duration. See too Newark, 65 LQR 480, 488 ("at least clearly decided for the first time"); Benning v. Wong 43 A.L.J.R. 467, 485.

[2] See p. 38 et seq.

[3] In particular, Baird v. Williamson, 15 C.B. (N.S.) 376; 143 E.R. 831; Bostock v. North Staffordshire Railway Co. (1852) 5 De G. & Sm. 584.

[4] 11 H.L.C. 642, 650; 11 E.R. 1483, 1486.

[5] Dr Harris also rejects the view that "isolated escape" was a novel feature: see pp. 45-48.

[6] Salmond, p. 315; Fleming, p. 320; Carroll, "The Rule in Rylands v. Fletcher: A Re-assessment", (1973) 8 Ir. Jur. 208, 209.

there were other decisions by 1865 showing that an employer might be vicariously liable for his contractor's defaults. But, with respect, both Dr Harris and those he criticises are wrong as Blackburn J.'s judgment shows. The case has nothing whatever to do with vicarious liability.[1] Blackburn J. explicitly stated that he did not have to decide whether or not the defendants would be responsible for the want of care and skill in the persons employed by them; that was irrelevant in view of his finding that the defendants were liable in strict liability (or nuisance).[2] As has already been shown,[3] for at least two decades, employers had been held liable in nuisance even though the specific act causing the harm had been done by an independent contractor. The fact that the reservoir had been constructed by contractors would have been relevant only if Mellish's arguments had been accepted, namely that this was a negligence, not a nuisance, case. The defendants were liable because they were occupiers of land from which harm to a neighbour emanated. There was nothing new in that principle.

Even if the case had been novel in either of the respects suggested, it would still not amount to a new cause of action; the extensions made to the law of negligence by cases like Hedley Byrne & Co. Ltd v. Heller & Partners Ltd[4] have not created new causes of actions distinct from negligence. It is common for one judgment to extend, by analogy or otherwise, the principles established by earlier

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[1] Buxton, 8 Malaya L.R. 1, 8-9.
[2] L.R. 1 Ex. 265, 287.
[3] See p. 205.
[4] [1964] A.C. 465.

cases; it is exceedingly rare for a judgment to found a new cause of action. At most, the judgments of the Exchequer Chamber and the House of Lords extended the principles of the law of nuisance.

(c) Some Pre-1865 (Rylands v. Fletcher) Authority

Quite apart from the authority cited in the various judgments delivered in Rylands v. Fletcher, there is other authority which clearly shows that the principle formulated in Rylands v. Fletcher was of long standing. As early as 1344, a case appears in the Year Books[1] under the title of writ of nuisance[2] in which water had made its way from the defendant's to the plaintiff's house, and there rotted the timber. The defendant pleaded that he was not liable because the rain came "by the grace of God", but the court countered:

> "This nuisance which affects him by the rain is through your handywork in that you have erected your house so near."

Liability was similarly found in Reynolds v. Clarke[3] and Tucker v. Newman.[4] In both cases, the defendant had caused water collected on his property to escape onto the plaintiff's, and there cause damage. Both were decided in nuisance: both fit within the rule in Rylands v. Fletcher.

In Bell v. Twentyman,[5] a watercourse on the defendant's property became blocked and as a consequence the plaintiff's house flooded. The defendant cleared out the blockage as soon as he had notice of it, but that did not

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[1] Anonymous case, Y.B., Trin., 18 Edw. 3, (Rolls Edition), No. 1, pp. 210-213.

[2] In Norman French, variously "un brief Danussaunce" and "un brief de Nusaunce".

[3] (1722) 1 Str. 634; 93 E.R. 747.

[4] (1839) 11 Ad. & E. 40; 113 E.R. 327.

[5] (1841) 1 Q.B. 766; 113 E.R. 1324.

relieve him of liability. Lord Denman C.J. said:[1]

> "The action is not founded on malice, or the breach of any moral duty: and, if damage has been so sustained, the defendant is not the less bound to compensate for that because he has very promptly repaired his fault."

How does this case differ from Rylands v. Fletcher? And yet it was decided in nuisance.

The most interesting case of all is the neglected decision of Hodgkinson v. Ennor.[2] The defendant discharged polluted water into some drains which connected with two "swallets" or natural rents in the limestone. These swallets in turn communicated with a cavern through which the plaintiff's water supply ran. The polluted water mingled with the pure stream, and as a consequence the plaintiff's water was fouled. He sued in nuisance. Cockburn C.J. held that the case fell within the maxim, sic utere tuo ut alienum non laedas.[3] Blackburn J. asked, during the argument:[4]

> "Are you not bound when digging in your own land, to take care not to send, in consequence of it, foul water or bad smells to the land of your neighbour?"

In giving judgment, he said:[5]

> "Mr. Coleridge is correct in saying that the defendant had a right to use the water on his own land, but then in doing so he had to dispose of the poisoned and corrupted water; and I take the law to be as stated in Tenant v. Goldwin ... that you must not injure the property of your neighbour, and consequently, if filth is created on any man's land, then, in the quaint language of the report in Salk. 361, 'he whose dirt it is, must keep it that it may not trespass'."

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[1] Ibid., 774; 1328.
[2] (1863) 4 B. & S. 229; 122 E.R. 446.
[3] Ibid., 241; 450.
[4] Ibid., 239; 450.
[5] Ibid., 241; 450.

No wonder Blackburn J. later claimed that there was nothing in his judgment in Rylands v. Fletcher[1] which had not been law for 300 years! The words used in Hodgkinson v. Ennor[2] to describe the rights and duties of the parties differ hardly at all from the words used three years later in Rylands v. Fletcher[3] itself: the defendant must keep in the mischievous thing lest it harms his neighbour, and this rule is as applicable to "bad smells" as to "foul water".

It is submitted that, had any of these cases been post-1870 rather than pre-1865, counsel for the plaintiffs may well have relied on the decision of Blackburn J. in Rylands v. Fletcher[3] when presenting their cases, for all of these cases fit within the terms of Blackburn J.'s rule. In all of them, the defendants had collected on their land a thing likely to do mischief if it escaped, and so were bound to keep it at their peril. That all were decided in nuisance says much about the supposed novelty of the decision in Rylands v. Fletcher itself.

(d) Subsequent comment

Two points are immediately conceded. First, if later courts have construed the judgments of Blackburn J. and Lord Cairns as the basis of a distinct cause of action, then that later development cannot be set aside solely by proof, however convincing, that Blackburn J. and Lord Cairns

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[1] L.R. 1 Ex. 265.
[2] 4 B. & S. 229, 241; 122 E.R. 446, 450.
[3] L.R. 1 Ex. 265, 279.

did not intend to create a new cause of action. It is not unknown for a principle to become so well established that later courts, while recognising the error on which the principle was founded, will refuse to discard it.[1]

Secondly, it is conceded that most jurists[2] have held the doctrine of Rylands v. Fletcher to be in some way different from nuisance, although their reasons for distinguishing the two concepts have been various. As well, no attempt has been made by counsel to analyse why certain features appear to be different between the two concepts.[3] That is not surprising. Counsel for plaintiffs want as many strings to their bows as possible.[4] Little advantage accrues to defendants even if their counsel do manage to prove that Rylands v. Fletcher was but an instance of liability in nuisance, for they then still have to establish one of the acknowledged defences to the nuisance action.

The most scholarly judicial analysis of Rylands v. Fletcher, its "[a]ntecedents and [d]evelopments", is Windeyer J.'s in Benning v. Wong.[5] Windeyer J. observed that the

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[1] Hammersmith City Railway Co. v. Brand (1869) L.R. 4 H.L. 171, 197, per Blackburn J., commenting on the defence of statutory authority as it had developed from the doubtful decision of R. v. Pease (1832) 4 B. & Ad. 30; 110 E.R. 366.

[2] e.g. Winfield, p. 358; Street, p. 259; Fleming, p. 320. But not all - see, in particular, Newark, 65 L.Q.R. 480.

[3] What these differences are will be investigated in the following chapter.

[4] There are, however, very few cases where the plaintiff has succeeded in Rylands v. Fletcher but not in nuisance (where both have been pleaded).

[5] 43 A.L.J.R. 467, 484-487.

"language which Blackburn J. used was expressed as only a generalized statement of ancient common law doctrine as exemplified by a variety of earlier cases".[1] He then said:[1]

> "Perhaps it is not far-fetched to see in Bracton, as I do, a still earlier hint of liability as in Rylands v. Fletcher. In ch. xliii, 'Of wrongful (tortious) nuisances' -- De nocumentis injuriosis -- Bracton, speaking of what he called a servitude (servitus) imposed by operation of law (a jure), said (at f. 232), '... whereby it is forbidden that a man do on his own land what may harm his neighbour as if he should raise the level of a pond on his own land or make a new pond whereby he harms his neighbour, as for example if his neighbour's land is thus flooded; this will be a wrongful nuisance to his neighbour's free tenement unless his neighbour has given him permission to do it'."

(What did Rylands and Horrocks do but "make a new pond" whereby a neighbour's land was flooded?)

Later, Windeyer J. asked rhetorically:[1]

> "But is the doctrine merely akin to nuisance? Is it not a special form of the ancient cause of action for nuisance?"

And then:[1]

> "Whether, as the result of the famous judgment of Blackburn J. there, we now describe the case, and all those which have been based upon it, as of the genus nuisance or as actions sui generis which are congeners of nuisance is a question of classification and description. Writers of text-books can tabulate for students of law distinctions between actionable nuisances of traditional kinds and Rylands v. Fletcher actions. The distinctions are not, I think, fundamental."

Thus, it is clear that Windeyer J., after careful analysis, concluded that Rylands v. Fletcher was not a separate tort. Barwick C.J., while refraining from "exhaustive examination" came to the same conclusion:[2]

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[1] Ibid., 484.
[2] Ibid., 471.

> "Suffice it for my present purposes to say that, as of the date of the decision in Rylands v. Fletcher, the suggested distinction would have had no substantial validity. The cause of action was from its conception in the nature of an action for nuisance."

The great tort lawyer, Salmond J., said in Knight v. Bolton:[1]

> "This plaintiff's cause of action is nuisance. He complains of the actual or apprehended escape into his land from that of the defendant of a dangerous thing kept by the defendant -- namely an artificial heap of soil."

The escape of "a heap of earth" was one of the very instances of liability cited by Blackburn J. in Rylands v. Fletcher.[2] Salmond J.'s phraseology is clearly that of Blackburn J.'s. And yet he has no hesitation in declaring the cause of action "nuisance".[3]

In Rickards v. Lothian,[4] Lord Moulton held that the principle of Rylands v. Fletcher had been known long before the decision was actually delivered,[5] and Lord Robertson declared in Eastern and South African Telegraph Co. v. Cape Town Tramways Cos.[6] that the principle was not only "fully accepted in Scotland, but ... had formed part of the law of Scotland before Rylands v. Fletcher was decided".[7] Bankes L.J. said in Musgrove v. Pandelis:[8]

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[1] [1924] N.Z.L.R. 806, 808.

[2] L.R. 1 Ex. 265, 285.

[3] In his textbook on torts, Sir John Salmond regarded Rylands v. Fletcher as coming within the law of nuisance: 6th ed., p. 257 et seq.

[4] [1913] A.C. 263.

[5] Ibid., 275.

[6] [1902] A.C. 381, 394.

[7] Rylands v. Fletcher has rarely been considered a separate doctrine in Ireland: "Rylands v. Fletcher", (1933) L.J. Ir. 105.

[8] [1919] 2 K.B. 43, 47.

"That the principle of Rylands v. Fletcher existed long before that case was decided is plain. In Vaughan v. Menlove Tindal C.J. says: 'There is a rule of law which says you must so enjoy your own property as not to injure that of another.' Park J. says: 'Although the facts in this case are new in specie, they fall within a principle long established, that a man must so use his own property as not to injure that of others.' Rylands v. Fletcher is merely an illustration of that old principle."

With that, Warrington and Duke L.JJ. agreed.[1] So did Finlay J. in Boulcott Golf Club, Inc. v. Engelbrecht:[2] "As Blackburn J. pointed out in Jones v. Festiniog Railway Co., Rylands v. Fletcher, so far as it extended, was no more than an enunciation of the common law." In Read v. J. Lyons & Co. Ltd,[3] the doctrine of Rylands v. Fletcher was said to derive "from a conception of mutual duties of adjoining or neighbouring land-owners",[4] and as "in harmony with a strictly analogous branch of the law, the law of nuisance".[5] The doctrine has, of course, frequently been cited as a "variety of nuisance" or as "the leading instance" of one class of nuisance case.[6]

What do these cases establish? At the least, they enable one to say that the doctrine is not so well established

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[1] Ibid., 49, 51.
[2] [1945] N.Z.L.R. 556, 558.
[3] [1947] A.C. 156.
[4] Ibid., 173.
[5] Ibid., 182.
[6] J.P. Porter Co. Ltd v. Bell [1955] 1 D.L.R. 62, 64; Cooper v. Bertelsen (1910) 30 N.Z.L.R. 1057, 1063; Solicitor-General v. Smith (1896) 14 N.Z.L.R. 681, 689; Shell-Mex & B.P. Ltd v. Belfast Corporation [1952] N.I. 72, 75; Dunne v. North Western Gas Board [1964] 2 Q.B. 806, 825 (in arguendo).

as a separate entity that one must concede it to be beyond attack; further, one can say that, although most authority takes the view that Rylands v. Fletcher is distinct from nuisance, there is authority -- indeed, sound authority from the House of Lords, the Privy Council, and the High Court of Australia -- to the contrary.

One is at the least justified in undertaking a review of the alleged distinctions between the actions to see whether, in fact, they are distinctions at all.

PART III: THE RULE IN RYLANDS v. FLETCHER

Chapter 2:

The Suggested Differences between Nuisance and Rylands v. Fletcher

It is now proposed to investigate whether the supposed differences between the rule in Rylands v. Fletcher and nuisance are real or imaginary.

(a) The West Formulation

West wrote:[1]

> "I submit that the true distinction between the two torts is basic -- they are complementary to one another, or perhaps more aptly it could be said that they are reverse sides of the same coin -- therefore detailed comparisons are profitless."

Detailed comparisons are not profitless, of course, if they prove that there is no distinction between the two torts!

West then defined the basic difference:[2]

> "[Rylands v. Fletcher] is essentially a wrong arising from occupation of land (and it is irrelevant whether the person suffering the injury occupies land or not), whereas [nuisance] is essentially a wrong to occupation of land (whether the person causing the injury does so qua occupier or not)."

This formulation has received some support,[3] but, with respect, it is submitted that the distinction is false. The formulation suggests that in Rylands v. Fletcher the defendant must be an occupier (but the plaintiff need not be) whereas in nuisance the plaintiff must be an occupier (but the defendant need not be). Is that right?

(i) The Plaintiff

It has already been shown that in nuisance the plaintiff must be an occupier.[4] What authority is there for the view

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[1] 30 Conv. (N.S.) 95, 100.

[2] Ibid., 101.

[3] e.g. Winfield, p. 380; Salmond, p. 318; Eekelaar, 8 Ir. Jur. 191, 205.

[4] See p. 173 et seq.

that the plaintiff in Rylands v. Fletcher need not be an occupier?

Certainly the case itself gives no support to such a proposition. Mr. Fletcher had occupied his colliery as a tenant of the Earl of Wilton since 1850.[1] He especially averred in the declaration that he "was possessed of coal mines lying near the defendants' land".[2] Manisty claimed that "the plaintiff's right of action [was] founded on his absolute right to enjoy his property undisturbed by the acts of his neighbours",[3] and it is submitted that Blackburn J. agreed with that claim. He said that it was just that a person who brings onto his property a thing "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",[4] and Lord Cairns said that for the defendants to be liable, the water had "to escape and to pass off into the close of the Plaintiff".[5]

Lord Macmillan in Read v. J. Lyons & Co. Ltd[6] stressed that "[t]he duty is to refrain from injuring not alium but alienum" and Lord Uthwatt said:[7]

> "I do not regard Rylands v. Fletcher as laying down any principle other than a principle applicable between occupiers in respect of their land."

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[1] L.R. 1 Ex. 265, 267 (the case stated).
[2] Ibid., 265.
[3] Ibid., 270.
[4] Ibid., 280 - my emphasis.
[5] L.R. 3 H.L. 330, 339.
[6] [1947] A.C. 156, 173.
[7] Ibid., 186.

Lord Simonds held that the position was exactly analogous with the law of nuisance, where only he who had suffered an invasion of some proprietory or other interest in land had a lawful claim.[1] One might have thought that such unequivocal statements would have settled the matter.

It is not suggested that the action in Rylands v. Fletcher is limited to adjacent freeholders; the action in nuisance is not so limited.[2] Thus, when Lord Buckmaster said in Rainham Chemical Works v. Belvedere Fish Guano Co.[3] that liability in Rylands v. Fletcher depended upon "damage to another, not necessarily an adjacent owner", he did not mean that the person harmed need have no occupational rights over land, but simply that he did not have to be the "owner" of the land. There is strong authority that the plaintiff must be an occupier, whether a lessee[4] or a licensee (in exclusive occupation).[5]

West cites Charing Cross Electricity Supply Co. v. Hydraulic Power Co.[6] as authority for the view that the plaintiff need not be an occupier of land.[7] But the plaintiffs were licensees with an exclusive right to the possession of the soil where their

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[1] Ibid., 182.

[2] Frequently, of course, the plaintiff is an owner/occupier of land, as e.g. Jones v. The Festiniog Railway Co., L.R. 3 Q.B. 733.

[3] [1921] 2 A.C. 465, 571.

[4] Rylands v. Fletcher itself; Farrer v. Nelson (1885) 15 Q.B.D. 258; Schubert v. Sterling Trusts Corp. [1943] 4 D.L.R. 584; Federic v. Perpetual Investments Ltd (1968) 2 D.L.R. (3d) 50, 52.

[5] Vaughn v. Halifax-Dartmouth Bridge Commission (1961) 29 D.L.R. (2d) 523, esp. at 535, (no exclusive possession, therefore no right of action; test seen as the same as in nuisance); Hale v. Jennings Brothers [1938] 1 All E.R. 579 (plaintiff described as "the tenant of a stand", but would seem to have been a licensee in exclusive occupation of the area occupied by his shooting gallery).

[6] [1914] 3 K.B. 772.

[7] 30 Conv. (N.S.) 95, 102; Carroll, 8 Ir. Jur. 208, 215.

electric cables were laid; as such, they were "occupiers". Windeyer J. defined an "occupier" as one who had "some right or interest in land beyond that of a mere gratuitous licensee":[1] the plaintiffs had such an interest.

Lord Sumner quite rightly said that Rylands v. Fletcher was not limited to the case of adjacent freeholders.[2] It is true that Bray J. said that the crucial point was whether the defendants had the right to occupy their land for a certain purpose and that, once that was established (as he held that it was), then they were liable for "any mischief ... occasioned".[3] But such a statement must not be read out of context. Bray J. was there concerned with rebutting counsel's assertion that Rylands v. Fletcher was available only between "the owners of adjoining closes of land".[3] Anyway, if the defendant public utility was an "occupier", as it would have to be under West's formulation if liability in Rylands v. Fletcher was to be properly based, then so too was the plaintiff public utility; and so even if Bray J.'s comments are to be read widely (as West suggests), they are only obiter dicta.

An interesting case is that of Eastern and South African Telegraph Co. v. Cape Town Tramways Cos.[4] The plaintiffs complained that the defendants' tramways caused electrical interference with the receipt of messages through their submarine cable. They failed because there was no interference with the ordinary enjoyment of land.[5] What was the

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[1] Benning v. Wong, 43 A.L.J.R. 467, 494.
[2] [1914] 3 K.B. 772, 779.
[3] Ibid., 785.
[4] [1902] A.C. 381.
[5] See p. 158.

plaintiffs' status? They were licensees of the area occupied by their cables and owners of premises in Cape Town where the signals were received. Had the right to be free from electrical interference been part of the right to ordinary enjoyment of land, it is interesting to speculate whether the "land" affected would have been the "land" occupied by the cables or the land on which the premises in Cape Town were situated. Either way the plaintiffs would have had locus standi -- as licensees with exclusive possession or as owner/occupiers.

What, though, of the cases usually cited as authority for the view that the plaintiff need not be an occupier? The first is Miles v. Forest Rock Granite Co. (Leicestershire) Ltd.[1] The plaintiff was injured on the highway. The case was decided in negligence. However, in obiter dicta, Swinfen Eady M.R. said that the plaintiff could also have succeeded on the basis of Rylands v. Fletcher, although that had not been argued before him,[2] presumably because the plaintiff's counsel realised that his client was not an occupier. The case is doubtful authority, as all remarks on Rylands v. Fletcher were obiter dicta, the Master of the Rolls cited no authority for his views on Rylands v. Fletcher, the point was neither pleaded nor argued, and the judgment was extempore.

In Shiffman v. The Grand Priory in the British Realm

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[1] (1918) 34 T.L.R. 500.

[2] "So if the case had been put at the trial, as it might have been put, independently of any question of negligence, the plaintiff must have succeeded. The case was not so put, but was based on the negligence of the defendants...": Ibid., 501.

of the Venerable Order of the Hospital of St John of Jerusalem[1], the plaintiff was injured when a flag-pole erected by the defendants fell on him as he was lying on the grass in Hyde Park. The defendants were held liable in negligence. Atkinson J. then went on to discuss (although there appears to have been no argument on the point) whether they might also be liable under Rylands v. Fletcher. He referred to the fact that the plaintiff was a licensee, and therefore concluded that the case was similar to the Charing Cross case.[2] But there is a crucial distinction: in Charing Cross,[2] the plaintiff was a contractual licensee with exclusive possession over the area where the pipes which were damaged were situated; in this case, the plaintiff was, in Windeyer J.'s words, a "mere gratuitous licensee". It is also pertinent to note that Atkinson J. himself stressed that he had decided "the case on the ground that negligence has been proved".[3]

It is submitted that both of these obiter dicta were overruled by the House of Lords in Read v. J. Lyons & Co. Ltd.[4] As has already been shown, all their Lordships in that case made it clear that the plaintiff in Rylands v. Fletcher must be an occupier. But too often that case has been ignored, even to the extent that a High Court Judge has said that he was bound by the decision in the Miles case,[5] quite overlooking the fact that that decision was

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[1] [1936] 1 All E.R. 557.
[2] [1914] 3 K.B. 772.
[3] [1936] 1 All E.R. 557, 562.
[4] [1947] A.C. 156.
[5] 34 T.L.R. 500.

implicitly overruled by the House of Lords.[1]

In Aldridge v. Van Patter,[2] the plaintiff was injured by a stock-racing car which left the track and crashed through a safety-barrier. Spence J. held that the plaintiff spectator was entitled to succeed under Rylands v. Fletcher. He relied on Miles,[3] Shiffman,[4] and Hale.[5] Quite apart from the doubts expressed concerning the first two and from the fact that the last case can be distinguished, Spence J.'s judgment is certainly inconsistent with their Lordships' decision in Read,[6] where it was stressed that there must be an "[e]scape from the place in which the dangerous object has been maintained by the defendant to some place not subject to his control".[7] The stock-racing car did not "escape" to a place not under the defendants' control: the spot at which the plaintiff was injured was, like the track itself, under the control of two of the defendants. At least in Miles,[8] and Shiffman,[9] the plaintiffs were not on the defendants' property. How can Aldridge's status be distinguished from Read's? Both were licensees of the defendants.

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[1] Halsey v. Esso Petroleum Co. Ltd [1961] 2 All E.R. 145, 152.
[2] [1952] 4 D.L.R. 93.
[3] 34 T.L.R. 500.
[4] [1936] 1 All E.R. 557.
[5] [1938] 1 All E.R. 579.
[6] [1947] A.C. 156.
[7] Ibid., 168, 177, 184-185.
[8] 34 T.L.R. 500.
[9] [1936] 1 All E.R. 557.

In Perry v. Kendricks Transport Ltd,[1] the plaintiff's status was not discussed by Singleton and Jenkins L.JJ., for his claim failed anyway, the defendant being able to rely on the defence of "act of a stranger". But Parker L.J. suggested that the plaintiff would have succeeded but for that defence:[2]

> "[N]or do I think it is open to this court to hold that the rule only applies to damage to adjoining land or to a proprietary interest in land and not to personal injury."

It may be that damages for personal injuries are recoverable, but what Parker L.J. failed to consider was whether (as in nuisance) they are recoverable only by occupiers. Parker L.J.'s opinion must be considered as of weak authority for it was not approved by the other members of the Court, was obiter dictum, was stated without authority's being cited, and was formulated without the benefit of argument from counsel.[3]

Halsey v. Esso Petroleum Co. Ltd[4] has already been mentioned. Veale J. stated that the plaintiff could recover in Rylands v. Fletcher for the damage caused by the smuts and oily drops which alighted on his car parked in the public highway. But the user of a highway does not have the same status as an electricity supply company; Veale J.'s argument that he was bound by the Charing Cross case[5] was therefore fallacious.

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[1] [1956] 1 W.L.R. 85.

[2] Ibid., 92.

[3] The sole issue seems to have been whether the defence of "act of a stranger" was applicable.

[4] [1961] 2 All E.R. 145.

[5] [1914] 3 K.B. 772.

The Court of Appeal's decision in Dunne v. North Western Gas Board[1] takes the matter no further. Three suits were brought against the gas board as the result of a number of explosions of coal gas at manhole points in Liverpool. The first plaintiff was a girl who was thrown off her bicycle and injured; the second plaintiffs were a married couple who were injured in their home; and the third plaintiffs were two children playing in the street. In nuisance, only the second plaintiffs would have had the right to sue. At first instance, all the plaintiffs succeeded, but all failed on appeal, because the defence of "statutory authority" was made out. The status of the plaintiffs was never discussed.

The plaintiff in Benning v. Wong[2] was an occupier, and the remarks of Barwick C.J. and Menzies J. were carefully so confined. Windeyer J. too thought that the plaintiff was an occupier, but then continued:[3]

> "[I]f it appears at the trial that the plaintiff was not in a strict legal sense an occupier, I think that she will nevertheless be entitled to recover damages ... Developments in the law of tort are towards a liability for personal harm done to persons who are neighbours in Lord Atkin's sense. They need not be persons having an interest in land in the neighbourhood. The movement of the common law is away from any preoccupation it may once have had with the protection of rights in land."

Undoubtedly, the major development in the law of tort this century has been the extension of liability for personal harm, and this extension has occurred under the guise of

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[1] [1964] 2 Q.B. 806.
[2] 43 A.L.J.R. 467, 467, 477.
[3] Ibid., 494.

negligence. It is true that until this century the law had been greatly concerned -- "pre-occupied" is too emotive a term -- with protection of rights in land, and rightly so: a man's rights in land should be protected. Traditionally this has been done by actions in nuisance or trespass. The dispute centres on the role of Rylands v. Fletcher: is it to be allied with negligence or nuisance? Earlier, His Honour had shown that its affinity was historically with the latter; how then does he now justify his associating it with the former? But Windeyer J.'s comments were but obiter dicta and were not assented to by other members of the High Court of Australia. He cited only Charing Cross,[1] where the plaintiff succeeded, not because it was a neighbour in the Atkinson sense, but because it was "licensed to pass [cables] through soil",[2] and the extremely doubtful case of Aldridge v. Van Patter.[3]

The final case worthy of note is British Celanese Ltd v. A.H. Hunt (Capacitors) Ltd.[4] Lawton J. held that the plaintiffs could recover in negligence. He then went on to discuss whether the defendants might also be liable in nuisance and Rylands v. Fletcher. The plaintiffs succeeded in nuisance: the defendants had maintained on their property a state of affairs which caused physical damage (and consequent economic loss) to the plaintiffs' property. But they failed in Rylands v. Fletcher because of the defence of "natural user". Unfortunately, Lawton J. then observed:[5]

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[1] [1914] 3 K.B. 772.
[2] Ibid., 781.
[3] [1952] 4 D.L.R. 93.
[4] [1969] 2 All E.R. 1252.
[5] Ibid., 1257.

> "Once there has been an escape in this sense, those damnified may claim. They need not be the occupiers of adjoining land or indeed of any land."

Again, this is but obiter dicta -- Lawton J. had already held that the defence of "natural user" was made out and further that the plaintiffs in this case were in fact occupiers of property which had been injured by the escape.[1]

Thus, it is submitted that all the cases which have held that the plaintiff does not need to be in possession of land can be explained in other ways. In many of them, the judges' comments were obiter dicta, and made without the benefit of argument; in other cases, judges have felt bound by earlier judgments. None of the cases is of higher than Court of Appeal authority, and all would seem (in so far as they suggest that the plaintiff need not be an occupier) in conflict with Read.[2] They also seem in conflict with the other decisions cited earlier in which it had been held that the plaintiff must be an occupier, whether as owner, lessee, or licensee in exclusive possession. And at least in the most recent case to deal with this point, it has been stated explicitly that "liability under Rylands v. Fletcher requires proof of interference with the use of the land of another".[3]

It is, of course, conceded that it is illogical to

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[1] Ibid., 1258.

[2] [1947] A.C. 156. There is no justification for Erskine Blackburn's view, as expressed in "The Rule in Rylands v. Fletcher", (1961) 4 Can. Bar J. 39, 49, that the plaintiff in Read would have succeeded had she just been arriving at the factory when the explosion took place: the case does not depend on whether or not her foot had crossed the threshold.

[3] N.Z. Forest Products Ltd v. O'Sullivan [1974] 2 N.Z.L.R. 80, 83.

insist on the plaintiff's having an interest in land if Rylands v. Fletcher is seen as a form of liability for harm caused by dangerous things[1] or as an action to redress harm caused by "extra-hazardous activities";[2] for various reasons, it is submitted that Rylands v. Fletcher is neither. However, that has undoubtedly influenced those who assert that the plaintiff need not be an occupier, and that Rylands v. Fletcher is merely an action arising from occupation to land.

(ii) The Defendant

It has already been shown that, contrary to West's submission, the defendant in nuisance must be an occupier. That is because liability in nuisance flows from the maintenance of a state of affairs; the logical defendant, therefore, is the maintainer of that state of affairs. Normally that will be the person in possession of the land -- the owner/occupier, the lessee, sometimes a licensee (if in exclusive occupation) -- although occasionally the defendant may be someone who has sufficient control of the land that it is reasonable that he be held liable for the harm caused by the state of affairs. A lessor or an independent contractor may come into that category.

It is submitted that the position is exactly the same in Rylands v. Fletcher. The defendant must be an occupier[3]

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[1] See pp. 255-260.

[2] See pp. 260-272.

[3] West, 30 Conv. (N.S.) 95, 103; Carroll, Ir. Jur. 208, 215; St. Anne's Well Brewery Co. v. Roberts (1928) 140 L.T. Rep. 1, 5, 7; cf. Stallybrass, (1929) 45 L.Q.R. 118.

although "occupation" (as in nuisance) "must be construed as a matter of broad common sense".[1] Even a lodger may be the defendant if he has exclusive occupation.[2] As in nuisance, liability does not necessarily fall on the person who performed the specific act causing the harm. For instance, in Hale v. Jennings Brothers,[3] Crampton, the foolish rider of the chair, was not sued. In Aldridge v. Van Patter,[4] Van Patter, the driver of the stock-racing car, was held not liable, although the claim against the race organisers, Martin and the Western Fair Association, who were respectively licensor and licensee of the track, was successful.[5]

The learned editors of Clerk and Lindsell take a different view. They say:[6]

> "The person liable is the owner or controller of the dangerous thing. If he brings or collects it on land, he is liable although he is not the owner or occupier of the land, but has merely a licence to use or enter upon it. If he brings it on the highway and it escapes and causes damage he is similarly liable. The occupier of the land from which it escapes is also liable if it is brought or collected on the land for his purposes or with his permission, but not otherwise."

This suggests that there are two criteria for liability: (1) ownership of the thing; or (2) occupation of the land (in certain circumstances). If that is right, that is certainly a distinction between this action and private nuisance. What authority is there for the proposition?

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[1] West, 30 Conv. (N.S.) 95, 104.

[2] Sochacki v. Sas [1947] 1 All E.R. 344, 344 (it would seem that defendant not liable only because of defence of natural user).

[3] [1938] 1 All E.R. 579.

[4] [1952] 4 D.L.R. 93, 105.

[5] Ibid., 106.

[6] Clerk., para. 1487.

Yale[1] cites first Rainham Chemical Works v. Belvedere Fish Guano Co.[2] The appellants, Messrs Feldman and Partridge, obtained a tenancy agreement of the land on which their factory was to be established. They then set up the Rainham Chemical Works. The benefit of the tenancy agreement was to be sold to this new company, but completion never took place. Until completion, the company was deemed, by the terms of this agreement, to be in possession as agents of the vendors. An explosion occurred in the factory with resultant damage to neighbouring property. Feldman and Partridge were held liable because they remained the lessees throughout.[3] Lord Parmoor explicitly said that "[t]he only ground" on which they might be held liable was "that they had not transferred to the company the exclusive occupation of the premises on which the explosion occurred".[4] The company too was liable because it was "in actual physical possession of the Range Works when the explosion occurred"[5] "as agents for the vendors".[6] At no stage did the House of Lords consider who actually owned the picric acid: the sole consideration was the occupation of the premises.

Yale then cites National Telephone Co. v. Baker.[7] The case was actually argued in nuisance, and Rylands v. Fletcher was cited merely as an example,[8] but Kekewich J.

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[1]Yale wrote this section in Clerk & Lindsell.
[2][1921] 2 A.C. 465.
[3]Ibid., 478, 492.
[4]Ibid., 488.
[5]Ibid., 491.
[6]Ibid., 475, 478.
[7][1893] 2 Ch. 186.
[8]Ibid., 192 (Webster Q.C.).

decided the case solely on the grounds of Rylands v. Fletcher. There is no suggestion anywhere in the judgment that the defendant was liable because it owned or controlled the dangerous thing (presumably electric current). The defendant was liable because as a statutory licensee it allowed the current to cause interference with the plaintiff's telephone wires under the soil.

Next, Yale cites St Anne's Well Brewery Co. v. Roberts.[1] But in that case Scrutton L.J. said that Rylands v. Fletcher was not applicable on the facts as it applied only as between occupiers.[2]

It has already been shown that a highway user cannot be liable in nuisance.[3] Yale suggests that he may be liable in Rylands v. Fletcher. He first cites Jones v. Festiniog Railway Co.[4] But in that case the defendant was not a highway user; it was a railway company which owned the land on which its trains ran. Sparks from the defendant's engines caused the plaintiff's hay stack to catch on fire.

Yale then cites Powell v. Fall[5] which admittedly supports his analysis. In that case, sparks from the defendant's traction engine caused the plaintiff's hay to catch alight. The facts seemed so similar to those in the Jones case[6] that all the argument was concentrated on whether s. 5 of the Locomotive Act 1865 constituted a defence. There was, of course, a crucial distinction in the facts: the sparks in the Jones case[6] emanated from land owned by the

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[1](1928) 44 T.L.R. 703.
[2]Ibid., 705.
[3]See p. 79.
[4]L.R. 3 Q.B. 733.
[5](1880) 5 Q.B.D. 597.
[6]L.R. 3 Q.B. 733.

defendant; the sparks in Powell v. Fall[1] emanated from the highway. But that point was not taken by counsel or by Mellor J. The case has since been followed.[2] The confusion is shown by Slater v. M'Lellan,[3] where Lord Sands found for the plaintiff on the basis of Powell v. Fall,[4] Lord Skerrington so found on the basis of the defendant's negligence, and Lord President Clyde on the basis that it was a private nuisance. All of these cases were decided before Donoghue v. Stevenson,[5] and it is submitted that all would be decided today on the basis of negligence rather than Rylands v. Fletcher. They all stem from a misunderstanding of the decision in the Jones case.[6]

Yale also cites West v. Bristol Tramways Co.[7] as authority for the view that a highway user may be liable in Rylands v. Fletcher. But the defendant in that case was a statutory licensee of the area occupied by its tramway. That area of the road was described as being under the defendant's control[8] and Farwell L.J. said that "the essential element [was] that the damage was ... occasioned by a non-natural use of the defendant's land".[9]

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[1] 5 Q.B.D. 597.

[2] Mansel v. Webb (1918) 88 L.J.K.B. 323; Frew and McCrostie v. Stewart [1928] N.Z.L.R. 806 (apparently not disputed by defence counsel that the defendants could be liable without proof of negligence -- see esp. at 807).

[3] 1924 S.C. 854.

[4] 5 Q.B.D. 597.

[5] [1932] A.C. 562.

[6] L.R. 3 Q.B. 733.

[7] [1908] 2 K.B. 14.

[8] Ibid., 16 (footnote), per Phillimore J.

[9] Ibid., 23.

It is submitted that none of the cited by Yale, with the exception of Powell v. Fall[1] and the cases based on it, supports his first criterion. The defendant's liability in each case was determined, not according to whether he owned or controlled the dangerous thing, but according to whether or not he occupied the premises from which it escaped. It is not denied, of course, that generally the defendant will be the owner of the thing which escaped; but it is not qua owner that he is held liable. Liability "is based ... on the occupation of land".[2]

What of Yale's second criterion? It is submitted that the occupier is liable in Rylands v. Fletcher, regardless of whether the "thing" was "collected on the land for his purposes or with his permission". For this qualification, Yale cites only Whitmores Ltd v. Stanford,[3] the facts of which had nothing to do with Rylands v. Fletcher. Thus, Eve J.'s remark to the effect that an occupier would not be liable if the accumulation of the dangerous element was not for his purposes[4] was merely obiter dictum. It was not followed in Smeaton v. Ilford Corporation,[5] and there are Commonwealth decisions of recent years to the effect that the occupier remains liable, even if the activity which causes harm has been undertaken for the benefit of others.[6] Anyway,

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[1] 5 Q.B.D. 597.

[2] Behrens v. Bertram Mills Circus Ltd [1957] 2 Q.B. 1, 21.

[3] [1909] 1 Ch. 427.

[4] Ibid., 438.

[5] [1954] Ch. 450, 468-471.

[6] J.P. Porter v. Bell [1955] 1 D.L.R. 62 (blasting on defence project); Handcraft Co. v. Commissioner for Railways (1959) 77 W.N. (N.S.W.) 84 (burning off along railway track).

where does one draw the line -- what is for one's own benefit and what for the benefit of others? The capitalist system is based on the premise that A, in providing a service for B, helps himself.[1]

Also, as in nuisance, the lessor of property may be liable in certain circumstances, and the House of Lords has held that the test is the same as that in nuisance.[2] Similarly, on ordinary tortious principles, an owner not in occupation of land will be liable in Rylands v. Fletcher if he has expressly or impliedly authorised a tenant to collect on his land the dangerous thing.[3]

If Yale's view as to liability in Rylands v. Fletcher is right, then a curious situation results. If one thinks that the plaintiff must be an occupier, then there is no difference between the position in Rylands v. Fletcher and the position as many see it in nuisance. If one thinks that the plaintiff need not be an occupier either, then one is forced to conclude that in certain undefined circumstances a non-occupier may be liable for harm caused to another non-occupier irrespective of negligence. As will be seen later,[4] the suggestion that strict liability is appropriate in such circumstances, even if the "thing" causing the damage is inherently and extremely dangerous, has been firmly scotched: liability depends solely on negligence.

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[1] Carroll, 8 Ir. Jur. 208, 220.

[2] Rainham Chemical Works v. Belvedere Fish Guano Co. Ltd [1921] 2 A.C. 465, 476, 489; cf. St Anne's Well Brewery Co. v. Roberts, 140 L.T. 1, 5, 9 (obiter dicta only).

[3] Clerk, para. 1487; Street, p. 252; Salmond, p. 69.

[4] See p. 260, footnote 1.

(b) Foreseeability of Harm

In nuisance, the defendant is liable only if harm was foreseeable:[1] but it has been suggested that the defendant in Rylands v. Fletcher cases may be held liable regardless of whether the harm caused was foreseeable. Thus, Professor Street says:[2]

> "Thus, if the ball is hit from a baseball park through a neighbour's window ... the club will be liable in Rylands v. Fletcher: they will be liable in nuisance only if it was reasonably likely that this would happen in view of the siting of the pitch in the park."

If that view is accurate, why did not the plaintiffs in Lester-Travers v. Frankston[3] and Miller v. Jackson[4] simply sue in Rylands v. Fletcher, and why did the plaintiff in Matheson v. Northcote College Board of Governors[5] fail in Rylands v. Fletcher?

Of course, Blackburn J. did not use the term "foreseeability of harm" in Rylands v. Fletcher: the expression would have been unknown to a nineteenth century tort lawyer. That the defendant is liable in nuisance only for foreseeable harm has been established definitively only in the last two decades. However, it was shown earlier[6] that the idea behind the concept of foreseeability of harm is much older than the terminology itself, and that the old cases in which judges talked of the necessity of the defendant's having knowledge of the danger are really at one with the post-Wagon Mound (No. 2)[7] cases.

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[1] See p. 110.
[2] Street, p. 259.
[3] [1970] V.R. 2.
[4] [1977] 3 All E.R. 338.
[5] [1975] 2 N.Z.L.R. 106.
[6] See p. 120.
[7] [1967] 1 A.C. 617.

Did Blackburn J. use "knowledge of the danger" terminology in Rylands v. Fletcher? Yes; His Lordship said that liability arose only if the thing brought onto the property was known to be mischievous.[1] In later cases based on the principle, the courts have held that knowledge of the harm was a prerequisite of liability[2] and have used as a guide "the common experience of mankind".[3] This does not mean that the defendant must have knowledge of all the facts. For instance, in Rylands v. Fletcher, the defendants did not know of the existence of the mine-shafts, but they did know or ought to have known that water if accumulated in a reservoir is liable to escape in some way or other. They knew it was "mischievous".

Indeed, the whole concept of "dangerousness" is but another way of saying that harm must be foreseeable. Blackburn J. himself used the expression "something dangerous",[4] and in the Jones case decided shortly afterwards, a railway engine was described as "a thing of a dangerous nature"[5]. That a thing is "dangerous" simply means that it is "likely to cause damage",[6] and that, it is submitted, is neither more nor less than a finding that harm is foreseeably likely to result.

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[1] L.R. 1 Ex. 265, 280.

[2] Ball v. Nye (1868) 99 Mass. 582, 584; Green v. General Petroleum Corporation (1928) 270 P. 952, 953; Imperial Furniture Pty Ltd v. Automatic Fire Sprinklers Ltd [1967] 1 N.S.W.R. 29, 38.

[3] West v. Bristol Tramways Co. [1908] 2 K.B. 14, 21; Crowhurst v. Amersham Burial Board (1878) 4 Ex. D. 5, 12; Sullivan v. Creed [1904] 2 Ir. R. 317, 325.

[4] L.R. 1 Ex. 265, 279. It was never suggested that the "thing" must be "in itself" dangerous, as the Headnote in Rylands v. Fletcher, L.R. 3 H.L. 330, suggests: see Chichester Corporation v. Foster [1906] 1 K.B. 617.

[5] L.R. 3 Q.B. 733, 736, 738.

[6] Mulholland & Tedd Ltd v. Baker [1939] 3 All E.R. 253, 256.

If damage is foreseeable but has not yet occurred, then it is submitted that the prospective victim could seek an injunction quia timet under the Rylands v. Fletcher label as under nuisance.[1] For instance, if A stored a large amount of dynamite in his wooden shed just a yard from his boundary with B, then B may be able to seek an injunction quia timet to restrain A from using his land in this way.[2] Of course, a plaintiff in Rylands v. Fletcher (like the plaintiff in any action) would have to establish that the harm threatened was substantial and imminent.

In The Wagon Mound,[3] Viscount Simonds was careful to restrict his judgment to nuisance and negligence, and said that their Lordships had not found it necessary to consider Rylands v. Fletcher. However, it is submitted that, in the wake of The Wagon Mound (No. 2),[4] a similar test to that pertaining in nuisance would be adopted in Rylands v. Fletcher. There is no reason on principle why a tort of strict liability (in the sense that negligence need not be established) is incompatible with a concept of foreseeability.[5] Certainly, in Benning v. Wong,[6] Windeyer J. thought that foreseeability of harm was now applicable to Rylands v. Fletcher cases.

(c) "Thing"

"[I]n Rylands v. Fletcher cases there has to be a

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[1] See p. 200.

[2] cf. Street, p. 259, footnote 5.

[3] [1961] A.C. 388.

[4] [1967] 1 A.C. 617.

[5] Carroll, 8 Ir. Jur. 208, 222-223; cf. McGregor, para. 100.

[6] 43 A.L.J.R. 467, 494.

'thing' which is 'likely to do mischief if it escapes'. This is not so in nuisance."[1]

Such a distinction brings to mind a comment made by Windeyer J. in Benning v. Wong:[2]

> "Sometimes [words and phrases used in the judgments delivered in Rylands v. Fletcher] have been used to support distinctions which seem to me to have been founded more on verbalisms than on logic or experience. What the Court of Exchequer Chamber and the House of Lords did was to state a doctrine or principle of the common law. To regard the words used as if they were provisions of a statute defining in precise and permanent terms the limits of legal rights and duties seems to me a mistake."

In Rylands v. Fletcher, the state of affairs maintained by the defendants was the keeping of a reservoir or the bringing on and storing of water in a reservoir. To talk of collecting a thing likely to do mischief if it escaped was, therefore, quite appropriate in view of the facts. But Blackburn J.'s rule of law was not to be read like a statute, imposing on future courts the necessity of isolating a "thing" which then escapes.

In fact, the courts have more often looked at the activity rather than the "thing". This was a necessity for in many cases clearly within the spirit of Rylands v. Fletcher that which escaped was not the "thing" brought onto the land. For instance, in Jones v. Festiniog Railway Co.,[3] the railway engine was the "thing of a dangerous nature".[4] But it did not escape: a spark did. Similarly, in Mulholland & Tedd Ltd v. Baker,[5] "20 gallons of paraffin collected in a

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[1] Salmond, p. 318; Winfield, p. 380.
[2] 43 A.L.J.R. 467, 485.
[3] L.R. 3 Q.B. 733.
[4] Ibid., 736.
[5] [1939] 3 All E.R. 253, 256.

drum" was the dangerous thing, and yet it did not escape: fire did.[1] Indeed, even vibrations[2] and caravan dwellers[3] on "escaping" and causing damage have led to Rylands v. Fletcher liability, and yet neither could be called a "thing".

It was "the manufacture of picric acid ... under dangerous conditions" which led to liability in the Rainham Chemical Works case;[4] the use of a blow-lamp for the purpose of thawing out a pipe is "an extremely dangerous practice" if carried out close to combustible material;[5] and it was the employment of dynamite which was described as "a dangerous operation" in Holinaty v. Hawkins.[6] As Barwick C.J. said in Benning v. Wong,[7] normally it is "activities [which] bring into existence a Rylands v. Fletcher situation". Certainly as the doctrine developed in the United States, there was no attempt to isolate a "thing": from the start, the emphasis was on the activity which the defendant was carrying out on his property.[8]

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[1] See too Musgrove v. Pandelis [1919] 2 K.B. 43, 47 (motor car with petrol tank full: fire); Perry v. Kendricks Transport Ltd [1956] 1 W.L.R. 85, 90 (motor-coach: fire). The problem was skilfully solved on a foreseeability-type test in Mason v. Levy Auto Parts of England Ltd [1967] 2 Q.B. 530, 542.

[2] Hoare & Co. v. McAlpine [1923] 1 Ch. 167.

[3] Attorney-General v. Corke [1933] Ch. 89.

[4] [1921] 2 A.C. 465, 484, 471.

[5] Balfour v. Barty-King [1956] 1 W.L.R. 779, 791.

[6] (1965) 52 D.L.R. (2d) 289, 290.

[7] 43 A.L.J.R. 467, 469.

[8] e.g. Defiance Water Co. v. Olinger (1896) 44 N.E. 238, 239; Wilson v. City of New Bedford (1871) 108 Mass. 261; Mears v. Dole (1883) 135 Mass. 508; Wells v. Knight (1911) 80 Atl. 16, 19; Green v. General Petroleum Corp. (1928) 270 P. 952, 955. There are, of course, many other examples.

It is, therefore, submitted that there is no distinction between nuisance and Rylands v. Fletcher on the ground that there must be a "thing" collected in the latter case but not in the former.

(d) Independent Contractors

Professor Street says that, whereas in Rylands v. Fletcher, an occupier is liable for an accumulation and escape caused by an independent contractor, an occupier's liability in nuisance is less extensive.[1] With respect, that shows a misunderstanding of the occupier's liability in nuisance: it has been shown that an employer is liable in nuisance because he retains possession of the land on which the independent contractor is working.[2] His liability has nothing to do with vicarious liability. That the position is just the same under Rylands v. Fletcher was made clear in that case itself. Blackburn J. said that there was no need "to consider whether the defendants would or would not be responsible for the want of care and skill in the persons employed by them",[3] for the defendants were liable in their own right.

(e) Personal Injuries

In nuisance, the right protected is the right to enjoyment of land. That right is interfered with if the occupier is discomforted by smells or noise, if his property is physically damaged or made unusable, whether temporarily or

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[1] Street, p. 260.
[2] See p.65 et seq.
[3] L.R. 1 Ex. 265, 287.

permanently, if his animals or chattels are harmed, or if he suffers personal injury when using his property. It may be that Rylands v. Fletcher has traditionally been invoked only in some of those cases, and not in others. That is because, in the case itself, damage to property had been caused, and not unsurprisingly, Blackburn J. used language which reflected those facts.

Although traditionally those suffering personal discomfort have sued in nuisance, there is no reason in principle why the decision in Rylands v. Fletcher could not be cited as well, for Blackburn J. in fact used as an example the case where alkali works gave off chlorine fumes to the detriment of neighbours' comfort.[1]

As in nuisance, damages may be recovered for harm to one's chattels and person under Rylands v. Fletcher. Blackburn J. himself allowed a claim for the destruction of a hay-stack[2] and there is now clear authority that occupiers can recover for personal injuries.[3]

That non-occupiers cannot recover for such harm was made clear by Read.[4] This case has "sometimes been interpreted to mean that damages for personal injuries can never

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[1] L.R. 1 Ex. 265, 285.

[2] Jones v. Festiniog Railway Co. L.R. 3 Q.B. 733; see too Musgrove v. Pandelis [1919] 2 K.B. 43 (furniture); Collingwood v. Home and Colonial Stores Ltd [1936] 3 All E.R. 200 (goods); N.Z. Forest Products Ltd v. O'Sullivan [1974] 2 N.Z.L.R. 80, 83.

[3] Carroll, 8 Ir. Jur. 208, 223; Salmond, p. 320; Hale v. Jennings Brothers [1938] 1 All E.R. 579; Benning v. Wong, 43 A.L.J.R. 467, 475, 493; Federic v. Perpetual Investments Ltd, 2 D.L.R. (3d) 50, 52.

[4] [1947] A.C. 156, 170.

be recovered unless negligence is proved. This is not so. [It means] no more than this: that a non-occupier must prove negligence before he can recover for personal injuries ...."[1] Thus, when cases like Shiffman,[2] Aldridge,[3] Perry,[4] Halsey,[5] and Dunne[6] are criticised,[7] it is on the ground that non-occupiers have been held able to sue in Rylands v. Fletcher, not on the ground that damages for personal injuries have been recovered.

It has been shown that in nuisance, an occupier can recover economic loss as consequential damages, providing he can establish an interference with the enjoyment of his land. A similar conclusion may be reached in Rylands v. Fletcher. In Cattle v. Stockton Waterworks Co.,[8] an independent contractor sued in Rylands v. Fletcher for the delay and expense to which he was subjected as a result of flooding caused by the defendant's defective pipe. Blackburn J. held that Cattle was unable to sue because he was not the occupier of the property.[9] Similarly, in Weller & Co. v. Foot And Mouth Disease Research Institute,[10] Widgery J. held that the plaintiffs were unable to sue in Rylands v. Fletcher because they were not occupiers of property whose enjoyment

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[1] Salmond, p. 320.
[2] [1936] 1 All E.R. 557.
[3] [1952] 4 D.L.R. 93.
[4] [1956] 1 W.L.R. 85, 92, per Parker L.J.
[5] [1961] 2 All E.R. 145.
[6] [1964] 2 Q.B. 806.
[7] See pp. 228-232.
[8] (1875) L.R. 10 Q.B. 453.
[9] Ibid., 457.
[10] [1966] 1 Q.B. 569.

of land had been affected. They had merely suffered loss of business because others (on whose business they relied) had had the enjoyment of their land detrimentally affected.

However, in British Celanese,[1] the plaintiff did recover £9372, that being its loss of profit, because it was consequential on the physical damage it suffered.[2] It is submitted that that decision is right.

There is, therefore, no distinction between Rylands v. Fletcher and nuisance on this point.

(f) Isolated Escape

Professor Heuston declares that "the essence of the Rylands v. Fletcher principle is that compensation is given for a single disastrous escape: in nuisance the plaintiff must usually establish some state of affairs".[3] However, as has already been shown, actions in nuisance may lie although damage is caused on an isolated occasion,[4] and that does not affect the validity of the "state of affairs" concept in nuisance.[5]

(g) "Natural User" and Other Defences

There is uncertainty as to the relationship between the defence of "natural user" in Rylands v. Fletcher and the "reasonable user" defence in nuisance.[6] This requires such detailed analysis that it will be held over for separate

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[1] [1969] 2 All E.R. 1252.
[2] Ibid., 1259.
[3] Salmond, p. 318.
[4] See p. 38 et seq.
[5] Street, p. 260; Fleming, pp. 320, 403.
[6] Winfield, p. 380; Street, p. 260.

consideration. So too will certain defences, such as "act of a stranger", be held over.[1] These being defences cannot affect a comparison of prima facie liability in nuisance and Rylands v. Fletcher.

(h) Two Intersecting Circles

Winfield in an article said that nuisance and the rule in Rylands v. Fletcher "are related to one another as intersecting circles, not as the segment of a circle to the circle itself".[2] With respect, that is disputed. Blackburn J. himself would have said that there was but one circle, and Rylands v. Fletcher represented the rule pertaining to that circle. Certainly he saw his rule as being broad enough to cover traditional nuisance cases involving the escape of filth and discomfort caused by smells, noise, and fumes, as well as cases of physical damage to the property of a neighbour. It is submitted that all the differences between the two actions are found to be, on analysis, illusory, and that West's formulation -- that one is an action concerning a wrong arising from occupation of land, the other an action concerning a wrong to land -- is unfounded.

At the least, Rylands v. Fletcher is a segment of the circle, in the same way that Hedley Byrne[3] is a segment of the circle of negligence. That is to say, if one can sue in Rylands v. Fletcher, one can also sue in nuisance (without exception), but the converse will not necessarily be the case.

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[1] See pp. 361 et seq.

[2] "Nuisance as a Tort", (1930) 4 C.L.J. 189, 195.

[3] [1964] A.C. 465.

In the final analysis, however, whichever view is accepted, the status of Rylands v. Fletcher as an independent action is denied -- but the law may be much the more coherent for that.

PART III: THE RULE IN RYLANDS v. FLETCHER

Chapter 3:

"Risk-Duty" Concept of Negligence and Ultrahazardous Activities

The view has already been expressed that the decision in Rylands v. Fletcher cannot be satisfactorily explained in social or economic terms.[1] The truth of the matter is that such theses have never received so much as implied approval from the judiciary.[2] There is nothing in the judgments of the Exchequer Chamber and the House of Lords to suggest other than an attempt to resolve the problem posed by the particular facts before the court in accordance with ordinary common law principles of liability. The difficulty with the case lay in ascertaining which particular set of principles were applicable to the facts. It is the thesis presented here that the court saw the facts as falling within the field of private nuisance, and decided accordingly; and it has been further submitted that subsequent cases, in which Rylands v. Fletcher has been cited as a relevant authority, can be explained and supported on the basis of nuisance.

But it is conceded that the rule in Rylands v. Fletcher has been interpreted as other than a definition of nuisance liability. Dunlop wrote in an article:[3]

> "It is submitted ... that this theory is at best one of two things: an application of the 'risk-duty' concept of negligence, or an application of the 'unusual activities' theory of strict liability. At worst it is a generalization that injects confusion rather than logic into the law."

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[1] See p. 203 . For a full discussion, see Dr Harris's thesis at pp. 54-56, 74 et seq.

[2] Benning v. Wong, 43 A.L.J.R. 467, 487, per Windeyer J. ("facile").

[3] "Liability for Damage Caused by Things: From the Common Law Point of View", (1962) 40 Can. Bar Rev. 240, 249.

It is proposed to investigate both these theories. A third theory will also be examined: was Blackburn J.'s intention to create an all-embracing independent tort of strict liability, incorporating nuisance, liability for fire, cattle trespass, and scienter? It will not be sufficient, of course, to look simply at the law of England in 1868: later cases based on Rylands v. Fletcher need to be examined in the light of the development of the law of torts during the past 110 years.

(a) Liability for Risks: The Affinity with Negligence

In the nineteenth century, a struggle developed. On one side was strict liability: a man acts at his peril. This may have been in medieval times the position throughout the law of tort as a whole.[1] On the other side of the struggle was fault: a man is not liable unless he is at fault. The nineteenth century is usually seen as "the age of the flowering of the fault theory" and Rylands v. Fletcher is, therefore, regarded by some as "curious" in that it seemed to be swimming against the current.[2] But was it? What was Blackburn J.'s intention in formulating his "true rule of law"? Was the real ground of Blackburn J.'s decision that the defendants should be held liable because they had run a risk and were "at fault"? If this question is to be answered in the affirmative,[3] then it must be shown with what

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[1] A man was liable for the harm he caused to another's person, personal property or real estate quite irrespective of "moral fault": Holdsworth, vol. 8, p. 468; Buxton, 8 Malaya L.R. 1, 6; Bohlen, 59 U. of Pa. L.Rev. 298, 310.

[2] Millner, p. 190.

[3] Smith, "Tort and Absolute Liability", (1917) 30 Harv. L.Rev. 409, 414, n. 23.

decisions Blackburn J. was drawing an analogy, for the common law has always developed and expanded by drawing analogies with existing and well established principles. The only cases based on a "risk-duty" concept were a set concerned with harm caused by dangerous chattels. Since 1816, a theory had been developing that the owner of a dangerous chattel might be liable to a third person (i.e. one with whom he was not in contractual relations) for harm caused by his chattel.

Dixon v. Bell[1] was the first step in this development. The defendant's gun went off injuring the plaintiff's son. Lord Ellenborough C.J. held that the defendant was liable, for "by charging the gun, [he] had made it capable of doing mischief", and this placed on him the onus of rendering "it safe and innoxious".[2]

The crucial development came in Longmeid v. Holliday.[3] Parke B. acknowledged that there were occasions on which a man might be liable to another for harm caused him, notwithstanding that there were no contractual relations between them. He instanced an apothecary who administered improper medicines, a stage-coach driver who drove carelessly and injured a passenger (with whom he might not have a contract), and a mason who erected a bridge defectively so that it amounted to a public nuisance. To these classes, he said, Dixon v. Bell[4] had added another: a man may be liable to

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[1](1816) 5 M. & S. 198; 105 E.R. 1023.

[2]Ibid., 199; 1024.

[3](1851) 6 Exch. 761; 155 E.R. 752. Langridge v. Levy (1837) 2 M. & W. 519; 150 E.R. 863, which is often seen as a step in the development of this branch of the law, is ignored here, as it is best seen as a case turning on fraudulent representation.

[4]5 M. & S. 198; 105 E.R. 1023.

another if he causes "an instrument in its nature dangerous, or under particular circumstances" to be "easily accessible to a ... person who sustains damage from it".[1]

Was Blackburn J.'s decision supposed to be a further step in this development? Certainly, some of the phraseology was similar. The fact that the defendants were held liable in Rylands v. Fletcher even though they had not been negligent[2] does not necessarily mean that the case could not come into the "dangerous chattels" development, as by 1866 liability was not clearly held to depend on the absence of care. If the thing was dangerous and damage was caused, then its owner was liable for that damage.

However, the evidence points decisively against this conclusion. It is noteworthy that neither counsel nor judges cited Dixon v. Bell[3] or Longmeid v. Holliday:[4] the cases cited were founded in nuisance, cattle trespass, and scienter. Blackburn J. stressed that the "dangerous thing" had to escape onto the plaintiff's property:[5] there was no such requirement under the "dangerous chattels" doctrine. Certainly, of course, there was no defence of "natural user" under that doctrine.

But regardless of the intentions of the Exchequer Chamber and the House of Lords, some have claimed that the rule of

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[1] 6 Exch. 761, 767.

[2] Indeed, Lord Cranworth made clear that they were liable "however careful [they] may have been and whatever precautions [they] may have taken to avoid the danger": L.R. 3 H.L. 330, 340.

[3] 5 M. & S. 198; 105 E.R. 1023.

[4] 6 Exch. 761; 155 E.R. 752.

[5] See p. 225.

Rylands v. Fletcher as it developed and the tort of negligence as it developed now mean that cases falling within the former category could all be explained on the basis of the "risk" theory of negligence.[1] Indeed, Millner says that "[a]part from advantages on the onus (which are to some extent illusory because of the effect of res ipsa loquitur) there is little of substance left to distinguish the Rylands v. Fletcher action from a straight-forward negligence action".[2]

But this is not true. First, the advantage of the "onus" cannot be so lightly dismissed, for res ipsa loquitur is available only in a limited number of cases where the facts are not known.[3] Secondly, if the concept of a duty of care is to be meaningful, the defendant must always have the opportunity of meeting the standard required: it must never be the case that, because damage has occurred, one automatically assumes that the duty has been breached. By contrast, in Rylands v. Fletcher, one does automatically assume that liability has accrued whenever harm to a neighbour's property is caused. Care or the lack of it continues to be an

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[1] Millner, pp. 196, 198; Thayer, 29 Harv. L. Rev. 801, 807; Stallybrass, "Dangerous Things and the Non-natural User of Land", (1929) 3 C.L.J. 376, 387; Harper, "The Foreseeability Factor in the Law of Torts", (1932) 7 Notre Dame Lawyer 468; Jolowicz, "Liability for Accidents", [1968] C.L.J. 50, 61-63.

[2] Millner, p. 196; see too Morris, "Absolute Liability for Dangerous Things", (1948) 61 Harv. L. Rev. 515, 517; Friedmann, "Modern Trends in the Law of Torts", (1937) 1 M.L.R. 39, 62; Carroll, 8 Ir. Jur. 208, 213.

[3] Barkway v. South Wales Transport Co. [1950] 1 All E.R. 392, 395; Bolton v. Stone [1951] A.C. 850, 859; Brewer v. Kayes [1973] 2 O.R. 284, 288.

irrelevant inquiry in assessing Rylands v. Fletcher liability.[1] Thirdly, how does the well established defence of "natural user" fit into a "risk-duty" concept of negligence liability? Fourthly, even Millner concedes that the remedy provided by the rule in Rylands v. Fletcher is probably restricted to occupiers still and that the tort of nuisance has a greater affinity with the rule than has the tort of negligence.[2] It has already been shown that nuisance and negligence should be kept firmly separated.

The fact is that Rylands v. Fletcher and the "dangerous chattels" cases could, just conceivably, have followed the same path; as an historical fact, they did not. The "dangerous chattels" cases became after 1868 ever more dependent upon a finding of negligence,[3] until, in Donoghue v. Stevenson,[4] they were completely subsumed within the new expanded tort of negligence. At the same time as this development was happening, less emphasis was being placed on the concept of "dangerousness". Although the law may still exact a degree of diligence so stringent as to amount practically to a guarantee of safety in the case of "dangerous chattels",[5] the test is nonetheless still one of "care", and "dangerous

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[1] Attorney-General v. Cory Brothers [1921] 1 A.C. 521, 539, 544; J.P. Porter Co. Ltd v. Bell [1955] 1 D.L.R. 62, 64; West v. Bristol Tramways [1908] 2 K.B. 14, 16; Benning v. Wong, 43 A.L.J.R. 467, 487.

[2] Millner, p. 198.

[3] Heaven v. Pender (1883) 11 Q.B.D. 503, 517; Le Lievre v. Gould [1893] 1 Q.B. 491, 502; Clarke v. Army and Navy Co-operative Society Ltd [1903] 1 K.B. 155, 164; Sullivan v. Creed [1904] 2 Ir. R. 317, 340.

[4] [1932] A.C. 562.

[5] Ibid., 611, per Lord Macmillan. The Law Commission, in recommending last year strict liability for injuries resulting from defects in products that are put into circulation in the course of a business, draws no distinction between "dangerous products" and other products: Law Com. No. 82, esp. at paras. 38-42.

chattels" do not form a separate category.[1] The Rylands v. Fletcher cases on the other hand have consistently avoided a similar subsumption and have rejected even a defence that care was taken, let alone any proposition that a lack of care should be an essential element in the formulation of liability.

The "risk-duty" concept of negligence does not, therefore, satisfactorily explain Rylands v. Fletcher liability.

(b) Ultrahazardous Activities

If Rylands v. Fletcher were not to be explained in terms of the "risk-duty" concept of negligence, then Dunlop saw it as an example of a theory of strict liability for "unusual activities".[2] However attractive this theory may be, it can have little practical validity in that the House of Lords firmly rejected its applicability to England in Read v. J. Lyons & Co. Ltd.[3] It is submitted that their Lordships' decision was right, but it has been severely criticised[4] and it was certainly out of step with much

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[1] Beckett v. Newalls Insulation Co. Ltd [1953] 1 All E.R. 250, 254; A.C. Billings & Sons Ltd v. Riden [1958] A.C. 240 (in which Malone v. Laskey [1907] 2 K.B. 141 and Ball v. London County Council [1949] 2 K.B. 159 were overruled in so far as they asserted a special category of liability for dangerous things); Imperial Furniture Pty Ltd v. Automatic Fire Sprinklers Pty Ltd [1967] 1 N.S.W.L.R. 29, 38; Griffiths v. Arch Engineering Co. (Newport) Ltd [1968] 3 All E.R. 217, 220. Interestingly, sellers of defective and dangerous products may now be strictly liable in the United States for harm caused by the defect: Restatement, Second, Torts, s. 402A; Ver Steeg, 3 J. Leg. Studies 217, 217; Suvada v. White Motor Co. (1965) 210 N.E. (2d) 182.

[2] 40 Can. Bar Rev. 240, 250.

[3] [1947] A.C. 156, 172, 181, 188.

[4] Tylor, 10 M.L.R. 396, 402.

academic writing.[1]

There was no judicial authority in the Commonwealth for a theory of strict liability for "unusual activities". While it is true that the courts have often, particularly of recent years, looked at the defendant's activity (rather than at the "thing") when considering liability under the rule in Rylands v. Fletcher, there is no evidence that they have adopted a principle of "enterprise liability".[2] For instance, before Read,[3] it had been suggested by way of obiter dicta in only two cases[4] that anyone but a neighbouring occupier might sue in Rylands v. Fletcher; it had never been suggested that an invitee who suffered harm on premises could sue the occupier of them without having to prove that the latter had breached his duty of care, no matter how dangerous the activity being carried out by the occupier. Indeed, it was not clear whether even a neighbouring occupier could sue in Rylands v. Fletcher for personal injuries he suffered. Thus, it is difficult to discern an "'unusual activities' theory of strict liability"[5] of which Rylands v. Fletcher can be said to be an application.

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[1] See, in particular, Thayer, 29 Harv.L. Rev. 801, 802; Friedmann, 1 M.L.R. 39, 53; Prosser, "Nuisance without Fault", (1942) 20 Tex. L.R. 399, 403; Prosser, Selected Topics in the Law of Torts, (1953), p. 135, et seq.; Morris, "Hazardous Enterprises and Loss-Bearing Capacity", (1952) 61 Yale L.J. 1172.

[2] i.e. the theory that an enterprise which exposes the community to an unusual risk, while it will be tolerated by the law, must pay its way, and that it is no defence that it took all possible care to avoid harm: Prosser, 20 Tex.L.R. 399, 403.

[3] [1947] A.C. 156.

[4] See p. 228.

[5] Dunlop, 40 Can. Bar Rev. 240, 249.

(i) Fleming's Theory

Professor Fleming deplores the House of Lords' decision because, in his view, it prematurely stunted the development of a general theory of strict liability for ultrahazardous activities.[1] He sees, quite apart from Rylands v. Fletcher, three strands of authority which "seemed to hold out promise that a law of dangerous operations was in the making", but "the invitation to unify these elements into a coherent principle was emphatically rejected".[1] If such a principle could be deduced from these strands, then it is conceded that Rylands v. Fletcher might be subsumed within it. What are these "strands of authority"?

First, "liability for inherently dangerous chattels is strict in all but name":[1] certainly, the standard of care expected is a high one, but the suggestion that dangerous chattels form a separate category from other chattels has been firmly rejected. Professor Fleming mentions none of the difficulties in determining what chattels are dangerous and what not.[2]

Secondly, Professor Fleming thinks an analogy could have been drawn with the law relating to animals, but, as will be shown below, that branch of the law has always been regarded "as a special rule of practical good sense" and as having a different "underlying condition" from the rule in Rylands v. Fletcher.[3]

The strongest strand would seem to have been, on its

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[1] Fleming, p. 329.
[2] Oliver v. Saddler & Co. [1929] A.C. 584, 599.
[3] Read v. J. Lyons & Co. [1947] A.C. 156, 182; Behrens v. Bertram Mills Circus Ltd [1957] Q.B. 1, 21.

face, the third: Professor Fleming draws an analogy with the decisions which impose liability on employers of independent contractors for damage caused in the performance of dangerous operations. "These were open to the interpretation of ... strict liability for ultrahazardous activities."[1] Even this strand proves, on analysis, to be too weak on which to hang Professor Fleming's tort of ultrahazardous activities. The argument would presumably be this. If an employer's liability is to be strict when the operation is dangerous, as suggested in Honeywill and Stein Ltd v. Larkin Brothers (London's Commercial Photographers) Ltd,[2] then why should he not be similarly strictly liable if he himself performs the dangerous operation? Otherwise, does not one cause the anomaly that a harsher test of liability is imposed on the man who employs an independent contractor than on him who undertakes the same dangerous task himself?

This argument is rejected. It is submitted, along with Professor Atiyah,[3] that the whole doctrine of "dangerous operations" is "so manifestly unsatisfactory that one may be permitted to hope that if the House of Lords is ever called upon to consider it the House will reject it altogether". Indeed, the doctrine is contrary to earlier House of Lords' authority. In the Rainham Chemical Works case,[4] Lord Buckmaster held that liability could be displaced by the introduction of an independent contractor,[5] and Lord Parmoor

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[1] Fleming, p. 327.
[2] [1934] 1 K.B. 191, 200.
[3] Atiyah, Vicarious Liability, p. 372.
[4] [1921] 2 A.C. 465.
[5] Ibid., 477.

agreed.[1] However, it cannot be denied that there are numerous dicta in support of the doctrine and it can be supported on policy grounds. Why should an employer, for whose benefit the operation is being performed, escape liability simply because the work is being undertaken by an independent contractor rather than by a servant? Why should the injured party's right to redress depend upon the internal business arrangements of the employer?[2] Thus, the Honeywill doctrine can be supported on policy grounds, even though the decision itself[3] was probably wrong in the light of earlier higher authority.[4]

It is not clear whether the employer's liability under the doctrine is vicarious or personal. Certainly there is authority for the view that the employer's liability in the "dangerous operations" situation is vicarious:[5] the employer is held liable for the contractor's defaults or negligence. In short, the decisions become a sort of back-door circumvention of Quarman v. Burnett,[6] which had

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[1] Ibid., 491.

[2] Friedmann, "Social Insurance and the Principles of Tort Liability", (1949) 63 Harv. L. Rev. 241, 245.

[3] [1934] 1 K.B. 191.

[4] See Williams, "Liability for Independent Contractors", [1956] C.L.J. 180, 192; Torette House Pty Ltd v. Berkman (1939) 39 S.R. (N.S.W.) 156, 170.

[5] Honeywill and Stein Ltd v. Larkin Brothers (London's Commercial Photographers) Ltd [1934] 1 K.B. 191, 197, 200, per Slesser L.J.; Matania v. National Provincial Bank Ltd [1936] 2 All E.R. 633, 645-646, per Slesser L.J., 648, per Romer L.J.; Anderson v. Mackellar County Council (1968) 69 S.R. (N.S.W.) 444, 452; City of St John v. Donald [1926] 2 D.L.R. 185, 191; AGA Heat (Canada) Ltd v. Brockville Hotel Co. Ltd [1945] 1 D.L.R. 689, 693; Bennett v. Imperial Oil Co. Ltd (1961) 28 D.L.R. (2d) 55, 68; Firestone Tire & Rubber Co. of Canada Ltd v. Stoochinoff (1964) 47 W.W.R. 102, 107, 110.

[6] 6 M. & W. 499.

established that an employer was not liable for the wrongful acts of his independent contractors. How can such decisions form the basis of Professor Fleming's tort? For if a special liability for ultrahazardous activities should be recognised, it must depend upon a personal or primary liability for damage caused, not on a vicarious liability for someone else's negligence

However, there is also authority for the view that the employer's liability for harm caused by dangerous operations carried out by his contractor is personal. The proposition has been expressed thus: where a man does work involving danger to another unless proper care is taken, he is liable for damage resulting from his failure to take proper care, and is equally liable if he procures another, whether he be servant, agent, contractor, or mere voluntary helper, to do the work for him.[1] In Salsbury v. Woodland,[2] Sachs L.J. stressed that the employer's liability "where the act done is so inherently dangerous or ... 'extra hazardous'" is primary, not secondary or vicarious.[3] The majority's view that there is a "direct and primary duty upon an employer to see that care is taken" is reflected in many other decisions.[4] If this view is right, then presumably Professor Fleming's argument would run thus:

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[1] Brooke v. Bool [1928] 2 K.B. 578, 587.

[2] [1970] 1 Q.B. 324.

[3] Ibid., 347-348; 336, per Widgery L.J.; cf. 344, per Harman L.J. (vicarious liability).

[4] Holliday v. National Telephone Co. [1899] 2 Q.B. 392; Daniel v. Rickett, Cockerell & Co. Ltd [1938] 2 K.B. 322, 325; Darling v. Attorney-General [1950] 2 All E.R. 793; Torette House Pty Ltd v. Berkman (1940) 62 C.L.R. 637, 655; Savage v. Wilby [1954] 3 D.L.R. 204; Peters v. North Star Oil Co. Ltd (1965) 54 D.L.R. (2d) 364, 375; Stewart v. Adams 1920 S.C. 129, 132, 133. Often, of course, it is not possible to tell into which category the judge intended the case to fall: The Pass of Ballater [1942] P. 112; Witham v. Shire of Bright [1959] V.R. 790; Holinaty v. Hawkins (1965) 52 D.L.R. (2d) 289.

(1) An employer is under a duty to see that, when he assigns a dangerous operation to an independent contractor, care is taken.

(2) The employer will be held liable to anyone suffering injury as a result of this dangerous operation, without proof that he is negligent, even though he has no control over the work methods of his contractor.

(3) The employer is, therefore, being held strictly liable.

(4) By analogy, therefore, why should he not be held strictly liable if he undertakes the dangerous operation himself? It would surely be illogical to impose a lesser standard on him should he undertake exactly the same task himself.

The fact that step (4) had never been made in any judgment even prior to Read[1] seems to suggest that there is faulty reasoning somewhere in the above argument. It is submitted that the fault lies in step (2). That statement is true as far as it goes, but it omits to mention one important fact: although the employer does not have to be negligent, the contractor must be before any liability will attach to the employer. The duty is "to see that care is taken": if the contractor uses all reasonable care, then the employer has fulfilled his duty. Thus, the employer's liability is not truly "strict" because a valid defence to any action against him would be that the contractor had not been negligent. Once the flaw in step (2) is acknowledged, then it will be seen that step (3) also requires modification. Step (4) then becomes plainly unarguable.

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[1] [1947] A.C. 156.

The conclusion reached is that none of the three strands of authority which held out hope of a doctrine of ultrahazardous activities proves, on analysis, to provide the basis for such a doctrine. It is unfair to chide the House for Lords for stunting a doctrine which was at best still at its embryonic stage.

(ii) The American Experience

Although there is no doctrine of ultrahazardous activities in England, such a doctrine has been advanced, at least by academics, in the United States, and is now formulated in the Restatement.[1] The doctrine has lost all its ties with nuisance: there is no requirement that either the plaintiff or the defendant be the occupier of land and it is limited in application to situations of "abnormally dangerous activity". Why this should have happened is not explained in the Explanatory Notes which accompanied the Tentative Draft No. 12, dated 7 March, 1935, although it is clear from these Notes that the sections were intended to codify the law relating to Rylands v. Fletcher as it had been applied in the United States.[2] Interestingly, ss. 519 and 520 seem to have secured little judicial recognition. The judges appear to have rejected the existence of an "unusual activities" doctrine, at least in so far as such a doctrine has been divorced from its historical basis as a means of protection of enjoyment of land.[3]

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[1] Restatement, First, Torts, ss. 519-520; 2nd ed. currently being written, but is still only at Tentative Draft stage. No significant change of policy has been suggested in this draft.

[2] See p. 145.

[3] Law Com. No. 32, para. 14.

There is little distinction between the American cases and the English nuisance and Rylands v. Fletcher cases. "Most frequently, in all of the American courts, the same strict liability is imposed upon defendants under the name of nuisance."[1] Some states adopted Rylands v. Fletcher by name, others have rejected it by name,[2] but "[t]here is in fact probably no case applying Rylands v. Fletcher which is not duplicated in all essential respects by some American decision which proceeds on the theory of nuisance; and it is quite evident that under that name the principle is in reality universally accepted".[3]

Certainly judges have referred to activities as "dangerous", but that phrase seems to have been used in the sense that harm could be foreseen or was probable.[4] Only rarely has there been any judicial acknowledgement that the operator of a "dangerous" activity should be held strictly liable as the price for undertaking the activity.[5] The strongest proof of this is that only on rare occasions has a non-occupier succeeded in Rylands v. Fletcher (whether under that name or nuisance). If a doctrine of ultrahazardous activities does exist separate from nuisance, then it should be irrelevant whether the plaintiff was an occupier of land. It is true that highway users have occasionally sued

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[1] Prosser, p. 512, et seq. See the dozens of cases listed by Prosser in footnotes 49-65 on pp. 512-513 in which "nuisance" has been held the cause of action, although the facts fall clearly within the ambit of the rule in Rylands v. Fletcher. See too Curtis, "Torts: Liability without Fault: Rylands v. Fletcher", (1962) 15 Okla. L. Rev. 95.

[2] See list in Prosser, p. 509; the case was first accepted in Massachusetts in 1868, in Ball v. Nye, 99 Mass. 582.

[3] Prosser, p. 513.

[4] See, e.g. Colton v. Onderdonk (1886) 10 Pac. 395, 397; Defiance Water Co. v. Olinger (1896) 44 N.E. 238; Green v. General Petroleum Corp., 270 P. 952, 955.

[5] Exner v. Sherman Power Construction Co. (1931) 54 F. (2d) 510, 514: liability arose "from an act connected with a business conducted for profit and fraught with substantial risk...".

successfully in Rylands v. Fletcher.[1] The first case allowing a highway user to sue in Rylands v. Fletcher seems to have been Shipley v. Fifty Associates.[2] The plaintiff was injured when snow slid off a roof onto the sidewalk. Ames J. held for the plaintiff on the basis of Rylands v. Fletcher because he thought that "[f]or the purpose for which she was using the sidewalk, her rights were exactly the same as if she owned the soil in fee simple".[3] That is not, of course, accurate,[4] but may be excused perhaps by the long history of muddle between public and private nuisance. Because Ames J. thought the rights "the same", it followed naturally that the remedies should be the same, and so a highway-user was held entitled to recover for her injuries in the same way that a "next-door neighbor" [sic] could recover if snow and ice were discharged onto his "building or land".

There is no worthwhile authority extending the range of plaintiffs beyond occupiers and highway users. For instance, gratuitous licensees on land other than the defendant's have not been able to sue, except in the curious case of Defiance Water Co. v. Olinger,[5] where Bradbury J. held that the plaintiff, who was the mother-in-law and guest of the occupier of the land on which she was injured, was able to sue because she was "rightfully there",[6] a surprising conclusion in the light of Bradbury J.'s assertion (which was right) that the rule in Rylands v. Fletcher was to "protect

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[1] Hannem v. Pence (1889) 41 N.W. 657, 658; Wells v. Knight (1911) 80 Atl. 16.

[2] (1870) 106 Mass. 194.

[3] Ibid., 197.

[4] See p. 79.

[5] 44 N.E. 238.

[6] Ibid., 239.

a proprietor against injuries caused by acts committed on adjoining premises".[1]

As well, licensees on the defendant's land have not been able to sue in Rylands v. Fletcher: "the occupier is not an insurer of the safety of invitees, and his duty is only to exercise reasonable care for their protection."[2] It is true that recently in McLane v. Northwest Natural Gas Co.,[3] an invitee on the defendant's property did successfully sue the defendant on the basis of strict liability. Holman J. conceded that "[a]ll [previous] Oregon decisions applying Rylands v. Fletcher [had] been cases where there was a trespass on the premises of another",[4] but he felt justified in not following them because he adopted the Restatement reformulation.

It is indisputable, however, that nearly all the cases in the United States have continued to apply what may be called "pure nuisance/Rylands v. Fletcher" and have rejected the Restatement. The so-called doctrine of ultrahazardous activities has in practice amounted to no more than Rylands v. Fletcher or nuisance under another name: the plaintiffs, almost without exception, have been the occupiers of property and the defendants occupiers of neighbouring properties. It is no wonder that a doctrine which has failed to attract other than academic support in the United States should have also failed before the House of Lords.

The American experience has also been rejected by two

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[1] Ibid., 239.
[2] Prosser, p. 392.
[3] (1970) Or., 467 P. 2d 635.
[4] Ibid., 639.

Commissions in Britain.[1] The Law Commission considered the Restatement formulation too uncertain,[2] and thought that the definition of a "dangerous thing or activity" should not be left to the courts: otherwise, there was the prospect of too much litigation to determine whether or not particular things and activities came within the category subject to strict liability.[3] Instead, the dangerous things and operations should be listed in a schedule to a statute or an instrument made under statute. The Royal Commission came to broadly similar conclusions, rejecting the American model[4] and recommending a statutory scheme, with a list of dangerous things and activities provided in a statutory instrument.[5] The difficulties of drafting such a list are not even discussed.[6] Further, while one can justify a wholesale reform of the law relating to accident compensation, as in New Zealand, it is much more difficult to justify the Royal Commission's conclusion that several systems of liability should exist side by side, especially when, as the Commission conceded,[7] there is no sharp distinction between "dangerous things" and other things.

However, there is no doubt that if Rylands v. Fletcher is to be slotted into some theory of ultrahazardous activities,

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[1] The Law Commission, in Law Com. No. 32, and the Royal Commission on Civil Liability and Compensation for Personal Injury, in Cmnd. 7054 - I.

[2] Law Com. No. 32, para. 14.

[3] Ibid., para. 17.

[4] Cmnd. 7054, para. 1647.

[5] Ibid., paras. 1649-1651.

[6] It is believed that the famous All Souls' seminar foundered on this point: see Law Com. No. 32, Appendix III.

[7] Cmnd. 7054, para. 1643.

that will be accomplished only by the legislature. The House of Lords in Read[1] have prevented any judicial attempt at such a reformulation. There is at present, contrary to Dunlop's assertion, no "'unusual activities' theory of strict liability" and it must be admitted that this writer has yet to be convinced even of the desirability of such a theory.

(c) Animals

Quite apart from the theory that Rylands v. Fletcher was but an application of either the "risk-duty" concept of negligence or the "unusual activities" (or "enterprise liability") theory, it has been suggested that Blackburn J., in formulating his rule, was seeking to create a coherent tort of strict liability, housing the seemingly disparate instances of strict liability -- nuisance, liability for fire, cattle trespass, and scienter -- within a single safe fold for the first time.[2] What is the evidence for such a conclusion?

It has been submitted that Blackburn J.'s decision was but an application of the existing law of nuisance, admittedly in striking language: thus, there can be no quarrel with its inclusion within the rule.

"For all practical purposes, the old rule of strict liability [for fire] has now been enveloped though not superseded by the rule in Rylands v. Fletcher."[3] The

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[1] [1947] A.C. 156.

[2] Wigmore, "Responsibility for Tortious Acts: Its History", (1894) 7 Harv. L. Rev. 441, 454.

[3] Holderness v. Goslin [1975] 2 N.Z.L.R. 46, 51; Jones v. Festiniog Railway, L.R. 3 Q.B. 733; Musgrove v. Pandelis [1919] 2 K.B. 43; Collingwood v. Home and Colonial Stores Ltd [1936] 3 All E.R. 200; Balfour v. Barty-King [1957] 1 Q.B. 496, 505. See too Winfield, Select Legal Essays, (1952), pp. 25-28; Ogus, "Vagaries in Liability for the Escape of Fire", [1969] C.L.J. 104; Winfield, p. 383.

defendant is liable in his capacity as occupier of the premises[1] and is able to rely on the full range of Rylands v. Fletcher defences.[2] Thus, it is possible to assert that the old common law action for the escape of fire was subsumed within Blackburn J.'s rule.

Cattle trespass and scienter cannot be as simply disposed of, and each requires separate discussion.

(i) Cattle Trespass

The action of trespass for the escape of cattle was one of the oldest in English law: it originated in the local courts.[3] The writ of trespass first appeared in the Royal courts in the reign of King John,[4] and the first writ of trespass covering an escape of beasts is found in the Curia Regis rolls of 1353;[5] in essence, the wording of that writ was retained throughout the centuries. Under the action, the owner of cattle[6] was liable for harm caused by the cattle to neighbouring property. Originally, the harm covered was limited to "depasturing and trampling down",[7] but later cases widened the scope of the action so that damages could be recovered where the plaintiff's animals had been

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[1] Sturge v. Hackett [1962] 1 W.L.R. 1257.
[2] Holderness v. Goslin [1975] 2 N.Z.L.R. 46, 51.
[3] Williams, Animals, p. 127.
[4] Ibid., p. 130.
[5] Ibid., p. 133.
[6] Or averia, a technical word borrowed from law-French, and including domesticated farm stock, such as oxen, cows, sheep, goats, pigs, horses, asses, fowls, geese, and ducks: Williams, Animals, pp. 27, 136.
[7] Williams, Animals, p. 156.

affected with disease carried by the trespassing cattle[1] or had been bitten or kicked[2] and where the plaintiff's machinery or vehicles had been damaged.[3]

In his judgment, Blackburn J. referred to an old case in cattle-trespass[4] in which the defendant's cattle, chased by a dog belonging to a third party, had escaped from a common onto the plaintiff's adjoining property. Brian C.J. ruled that the defendant was still liable, notwithstanding that the plaintiff might also have an action against the master of the dogs. Was this case within Blackburn J.'s rule?

Two important points suggest not. First, in cattle trespass, the defendant's knowledge of his beast's propensities was irrelevant, whereas under Rylands v. Fletcher, liability flowed only where the thing escaping was known to be mischievous.[5] Even if the cattle owner knew that his horse was likely to kick men, he would not be liable for a neighbour's personal injuries under the action ofcattle trespass,[6] but might well be under Rylands v. Fletcher or scienter. Erle C.J.'s attempt in Cox v. Burbidge[7] to explain cattle trespass on the basis of a presumed scienter

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[1] Anderson v. Buckton (1719) 11 Mod. 304; Earp v. Faulkner (1875) 34 L.T. 284, 286; Theyer v. Purnell [1918] 2 K.B. 333.

[2] Lee v. Riley (1865) 18 C.B. (N.S.) 722; Ellis v. Loftus Iron Co. (1874) L.R. 10 C.P. 10.

[3] Moon v. Stephens (1915) 23 D.L.R. 223; Welch v. Dominion Transport Co. (1922) 69 D.L.R. 588.

[4] Y.B. M. 20 E. 4. 10b, pl. 10; see Williams, Animals, pp. 142, 182.

[5] L.R. 1 Ex. 265, 280.

[6] cf. Wormald v. Cole [1954] 1 Q.B. 614, effectively overruled by Parliament in the Animals Act 1971, s. 4(1)(a).

[7] (1863) 32 L.J. (C.P.) 89, 90; see Williams, Animals, p. 160.

not only was historically inaccurate but also did not win the support of the other members of the Court.[1]

Secondly, a defence to Rylands v. Fletcher is that the defendant's use of land was "natural". As Viscount Simon said in Read,[2] the pasturing of cattle must be one of the most "natural" uses of land. The only solution to the conundrum is that the two actions are different.

Why then did Blackburn J. cite the case at all? It is vital to remember the argument which had been presented to the court.[3] It was a powerful argument on the law. On the one hand, it was argued that the defendants could be liable, although not negligent, because they had used their property to another's hurt. On the other hand, it was argued that the defendants should be held liable only if negligent. Rightly, the former argument prevailed; but Blackburn J. was at pains, after an argument which probed the very core of the law of tort, to show the justice of that argument:[4] just as the person whose grass or corn is eaten down by the escaping cattle of his neighbour is damnified without any fault of his own, so is the person whose mine is flooded by the water from his neighbour's reservoir. Brian C.J. had said that a man must not use his land so as to hurt another:[5] that was also the rationale of liability in the present case. Thus, the cattle trespass case was cited not in an attempt to

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[1] Ibid., 92.
[2] [1947] A.C. 156, 166.
[3] See p. 206 et seq.
[4] L.R. 1 Ex. 265, 280.
[5] cited L.R. 1 Ex. 265, 281.

bring it within a new rule of strict liability -- on two crucial points, it failed to fulfil the criteria of the rule formulated -- but rather as evidence of the wide acceptance of the principle that a man in certain circumstances acts at his peril. It was that principle which had been under attack in counsel's argument.[1]

(ii) Scienter

The law of scienter has even older roots than cattle trespass;[2] by Hale's time, it had assumed the form it was scarcely to divert from until the Legislature intervened in 1971.[3] Blackburn J. cited Cox v. Burbidge[4] and May v. Burdett[5] in his judgment. The latter was a straightforward case in scienter; the former[6] was in form an action in case for negligence. The plaintiff failed because there was no evidence of a lack of care on the defendant's part. But the Court went on to discuss liability for animals in general. Blackburn J. cited that part of Williams J.'s judgment[7] which

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[1] Blackburn J. was thus performing the valuable judicial task of "defusing the litigants" (especially the disappointed litigants): Megarry V.-C., "Judges and Judging", (1977) 3rd Child & Co. Lecture, p. 18.

[2] Williams, Animals, p. 277 et seq.; for Roman law, Ashton-Cross, "Liability in Roman Law for Damage Caused by Animals", (1953) 11 C.L.J. 395; Nicholas, "Liability for Animals in Roman Law", [1958] Acta Juridica 185.

[3] See Hale, i, p. 430.

[4] 32 L.J. (C.P.) 89.

[5] (1846) 9 Q.B. 101; 115 E.R. 1213.

[6] This was the only case concerning animals cited in argument, either by Manisty (35 L.J. Exch. 154, 155) or by Willes J. (4 H. & C. 263, 268).

[7] 13 C.B. (N.S.) 430, 438.

stressed that under cattle trespass, one was liable for the trespasses committed by one's animal, irrespective of negligence. The judges had also considered the law of scienter at length, and had drawn a distinction between cattle trespass and scienter.[1]

Again, the question must be: by citing these cases, did Blackburn J. intend to bring scienter within his rule of law? The answer in this case is emphatically No. From such a disparate set and small number of cases, and from such selective quotation from these cases, it is hard to imagine that His Lordship did intend to encompass scienter within his rule. There are significant differences between common law scienter and Blackburn J.'s rule:

(1) Under Rylands v. Fletcher, one may be liable for an animal which escapes causing damage even if one did not actively encourage that animal to come onto one's property but merely allowed it to remain once it had in fact so come. But one would not be liable under scienter in such a case.[2] The reason was given by Devlin J. in Behrens v. Bertram Mills Circus Ltd:[3]

> "[W]hether the process be one of analogy or one of derivation, it must be remembered that the underlying conditions for the two kinds of liability are different. One is based on the possession of an animal and the other on the occupation of land."

The defendant would be liable in Rylands v. Fletcher

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[1] 13 C.B. (N.S.) 430, 441, per Keating J.; 32 L.J. (C.P.) 89, 91, per Williams J.

[2] Williams, Animals, p. 352.

[3] [1957] 2 Q.B. 1, 21.

because he was the occupier of land from which harm emanated; he would not be liable in scienter because he was not the keeper of the animal.[1]

(2) Before liability arises under Rylands v. Fletcher, the animal must have escaped from one's property. There is no need for such an escape to found scienter liability.[2] It was stressed in Read[3] that, when injury is caused by a ferocious animal to a person who has entered upon the land occupied by its owner, it is not "strictly speaking appropriate" to invoke Rylands v. Fletcher at all. The action when there is no "escape" is scienter, for the very reasons given by Devlin J. in the Behrens case.[4] In so far as Lord Wright's judgment in Knott v. London County Council[5] suggested that all that needed to be shown in either Rylands v. Fletcher or scienter was an escape "from the keeper's control", it is wrong. The House of Lords in Read[6] made it clear that, under Rylands v. Fletcher, there must be "an escape from one place to another"; and it has been queried whether an animal could ever injure someone and yet not be said to have escaped from

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[1] Smith v. Great Eastern Rail. Co. (1866) L.R. 2 C.P. 4; Knott v. London County Council [1934] 1 K.B. 126, 142.

[2] Williams, Animals, p. 352; Cox v. Burbidge, 13 C.B. (N.S.) 430, 435.

[3] [1945] 1 All E.R. 106, 120; [1947] A.C. 156, 182.

[4] [1957] 2 Q.B. 1, 21; there was no escape, and yet the defendants were held liable in scienter, in Gould v. McAuliffe [1941] 2 All E.R. 527 and Pearson v. Coleman Bros [1948] 2 All E.R. 274.

[5] [1934] 1 K.B. 126, 138.

[6] [1947] A.C. 156, 168.

its keeper's control.[1] Denning L.J. confused the two different "escape" tests in the much criticised decision of Rands v. McNeil,[2] but that decision was not followed in the Behrens case[3] and has been effectively overruled by Parliament.[4]

(3) The defence of "ordinary and natural use" is not available in scienter.

(4) It may be that under common law scienter, the test of dangerousness was one of "viciousness", that is "a propensity to attack people";[5] the test of dangerousness under Rylands v. Fletcher is not so limited, of course. Even if "dangerousness" was not equated with "viciousness" under scienter,[6] there was no doubt that the defendant would be liable only if the animal was known to be a "danger to mankind".[7] Liability under Rylands v. Fletcher accrues whenever foreseeable harm to another's land or another's enjoyment of land occurs.

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[1] McNeill v. Frankenfeld (1963) 44 D.L.R. (2d) 132, 134.

[2] [1955] 1 Q.B. 253, 257; Rosen, "Dangerous Animals: Two New Defences", (1955) 105 L.J. 390; Payne, "Safe System of Work on a Farm", (1955) 18 M.L.R. 295, 296.

[3] [1957] 2 Q.B. 1.

[4] The requirement of an "escape from control" in scienter was criticised by the Law Commission -- Law Com. No. 13, s. 19 -- and has been omitted from the Animals Act 1971.

[5] Brock v. Richards [1951] 1 K.B. 529, 536; Fitzgerald v. E.D. and A.D. Cooke Bourne (Farms) Ltd [1964] 1 Q.B. 249, 266, 270; Eather v. Jones (1975) 49 A.L.J.R. 254.

[6] Milligan v. Henderson 1915 S.C. 1030, 1046.

[7] Buckle v. Holmes [1926]2 K.B. 125, 128-129; McQuaker v. Goddard [1940] 1 K.B. 687, 695; Fraser v. Pate 1923 S.C. 748, 751; Clinton v. J. Lyons & Co. Ltd [1912] 3 K.B. 198, 202.

If, then, there are clear distinctions between the actions, why did Blackburn J. cite the two animal cases? Again, because they showed the justice of his rule of law: the owners of dangerous animals are held liable without negligence being proved. Like cattle trespass, scienter was analogous[1] to Blackburn J.'s rule. As Lord Porter said in Read:[2]

> "[Blackburn J.'s illustrations] are but instances of the application of the rule of strict liability, having for the most part separate historical origins, and although they support the view that liability may exist in cases where neither negligence, nuisance, nor trespass are [sic] to be found, yet it need not, as I think, necessarily be said that they form a separate coherent class in which liability is created by the same elements throughout ."

Thus, it is submitted that Wigmore's fulsome praise was misplaced; Blackburn J.'s judgment was "epochal"[3] but not in the way Wigmore suggested. It was "epochal" in that it concisely explained the principle of liability in nuisance and further showed the justice of this principle by analogy with the common law action for the escape of fire, cattle trespass, and scienter.[4]

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[1] Paterson v. Fleming (1904) 23 N.Z.L.R. 676, 713.
[2] [1947] A.C. 156, 178.
[3] 7 Harv. L. Rev. 441, 454.
[4] It goes without saying that Parliament has conclusively divorced Rylands v. Fletcher from the "animal" actions by the Animals Act 1971. The concern of this section has been (a) to ascertain Blackburn J.'s intentions in 1866, and (b) to investigate judicial opinion of the relationship between Rylands v. Fletcher and the "animal" actions until 1971.

PART IV: DEFENCES

Chapter 1: Ordinary Use

Most text-writers acknowledge the relevance of ascertaining the reasonableness of the defendant's user when determining liability in nuisance. But there is no agreement as to how reasonable or unreasonable user is to be measured; indeed, there is not even agreement as to whether unreasonable use is an integral part in the establishment of liability or whether a finding of reasonable use merely serves as a defence releasing the defendant from his prima facie liability.[1] Only a close analysis of the origins of the "reasonable use" concept will provide the answers to these problems.

(a) The Origins of the Concept of "Ordinary and Reasonable Use"

The first case in which the relevance of reasonableness was clearly acknowledged was Bamford v. Turnley.[2] The proposition for which the case is famous is this:[3]

> "[T]hose acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action. This principle would comprehend all the casesI have mentioned but would not comprehend the present, where what has been done was not the using of land in a common and ordinary way, but in an exceptional manner -- not unnatural nor unusual, but not the common and ordinary use of land. There is an obvious necessity for such a principle as I have mentioned. It is as much for the advantage of one owner as of another; for the very nuisance the one complains

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[1] Fleming, p. 401; Street, p. 225, et seq.; Salmond, pp.62-63; Winfield, pp. 325-332; Prosser, p. 596, et seq.; Ogus and Richardson, [1977] C.L.J. 284, 297; Brenner, (1974) 3 J. Leg. Studies 403, 405.

[2] 3 B. & S. 62; 122 E.R. 25; called "the earliest expression of ... the qualification": Hazelwood v. Webber (1934) 52 C.L.R. 268, 277.

[3] Ibid., 83; 33, per Bramwell B.

> of, as the result of the ordinary use of his neighbour's land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live."

This proposition was quickly adopted in other cases. In Cavey v. Leadbitter,[1] Erle C.J. said that affairs of life in a dense neighbourhood are such that life cannot be carried on without mutual sacrifices of comfort. In the St Helen's Smelting case,[2] Lord Westbury L.C. said that a man who lived in a street of shops could not complain if a shop opened next door to him, providing it was "carried on in a fair and reasonable way".[3] This principle of "mutual adjustment" was to some extent based on the economic conditions of a newly industrialised Britain: great works, which were the means of developing the national wealth, must be encouraged, and thus reasonable works to that end must be protected.[4]

Nowhere was the need for a balancing of interests more necessary in the nineteenth century than in the mining industry. In Smith v. Kenrick,[5] the defendant worked his mine in the ordinary way, but, because of cuts drilled by his predecessor in title, water flowed into the plaintiff's mine. The defendant was held not liable in nuisance. In

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[1](1863) 13 C.B. (N.S.) 470, 476.

[2]11 H.L.C. 642; 11 E.R. 1483.

[3]Ibid., 650; 1486.

[4]Ibid., 653; 1487, per Lord Wensleydale. But this argument must not be carried too far: there is certainly no evidence for Brenner's view that different tests were applied depending on whether the defendant was an individual or a large manufacturing concern: 3 J. Leg. Studies 403.

[5]7 C.B. 515; 137 E.R. 205; a difficult case, but well explained later on an "ordinary and reasonable use" basis by Lord Cairns L.C. in Rylands v. Fletcher, L.R. 3 H.L. 330, 339.

Baird v. Williamson,[1] the defendants caused water to be pumped up from lower down. This water then flowed into the plaintiff's mine through a cut connecting the defendant's seam to the plaintiff's. The defendants were held liable. The distinguishing feature of this case was that the defendants did not stop "at the natural use of their land" but rather adopted "a non-natural use".[2]

These cases, then, laid the foundations for the concept of ordinary and reasonable use. The nature of this concept as it developed will be considered later;[3] so too will the criteria to be applied in assessing reasonableness.

(b) Rylands v. Fletcher and "Natural Use"

It was against this background that Rylands v. Fletcher was decided. The concept of reasonableness played no part in Blackburn J.'s decision in the Exchequer Chamber, but that is not surprising.

First, the two leading cases establishing the concept -- Bamford v. Turnley[4] and the St Helen's Smelting case[5] -- were not cited to the Court. The reason why they were not cited is that Mellish did not even concede that nuisance had anything to do with this case. He was arguing that the case lay in negligence, in which there was no place for any rule of "give and take, live and let live". Anyway, it would have been a desperate advocate who would have argued that the construction of a large reservoir of water was an act

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[1] 15 C.B. (N.S.) 376; 143 E.R. 831.

[2] Rylands v. Fletcher, L.R. 3 H.L. 330, 339.

[3] See p. 294 et seq.

[4] 3 B. & S. 62; 122 E.R. 25.

[5] 11 H.L.C. 642; 11 E.R. 1483.

"necessary for the common and ordinary use and occupation of land".[1] It would be most irregular for a judge to raise a defence in his judgment which had not been pleaded before him.

It would seem, however, that tactics changed when the case came on appeal before the House of Lords. Perhaps Mellish realised, after a unanimous judgment of the Exchequer Chamber, already recognised as potentially "epochal", that it would be foolhardy to persist with only one arrow in his quiver. Battle on nuisance would have to be joined. All the leading cases on "ordinary and reasonable use" were cited.[2] Manisty Q.C. strongly submitted that the case was indistinguishable from Baird v. Williamson[3] and discussed "the proper and ordinary way of working mining property".[4] In his judgment, Lord Cairns dealt at length with this argument: for the rest, he was content to adopt Blackburn J.'s judgment, but this point had not been argued in the Exchequer Chamber. He said:[5]

> "The Defendants, treating them as the owners or the occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the Plaintiff, the Plaintiff could not have complained that that result had taken place."

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[1] Bamford v. Turnley, 3 B. & S. 62, 83; 122 E.R. 25, 33.
[2] L.R. 3 H.L. 330; 19 L.T. 220; 37 L.J. Exch. 161.
[3] 15 C.B. (N.S.) 376; 143 E.R. 831.
[4] L.R. 3 H.L. 330, 336.
[5] Ibid., 338.

That is, Lord Cairns acknowledged that use "in the ordinary course of the enjoyment of land" -- almost Bramwell B.'s very words in Bamford v. Turnley[1] -- was lawful, and this sort of use he termed "natural user". "Natural" obviously must be equated with "ordinary".[2]

Lord Cairns then continued that the water must pass "by the operation of the laws of nature" if the defence was to be established. This use of the word "nature" was unfortunate, but need not cause any problem. It has no connection with his phrase "natural user".[3] It simply means "by gravity".

Lord Cairns then turned from that example, which was illustrated by Smith v. Kenrick,[4] to another example, which was illustrated by Baird v. Williamson.[5] He said:[6]

> "On the other hand if the Defendants, not stopping at the natural user of their close, had desired to use it 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, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land, -- and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the Plaintiff, then it appears to me that that which the Defendants were doing they were doing at their own peril..."

Lord Cairns gave as examples two uses which might be termed "non-natural". The first "purpose" was the situation

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[1] 3 B. & S. 62, 83; 122 E.R. 25, 33.

[2] Stallybrass certainly thought so in his instructive article, "Dangerous Things and the Non-Natural User of Land", (1929) 3 C.L.J. 376, 390-391.

[3] Even Newark acknowledges this: 24 M.L.R. 557, 570.

[4] 7 C.B. 515; 137 E.R. 205.

[5] 15 C.B. (N.S.) 376; 143 E.R. 831.

[6] L.R. 3 H.L. 330, 339.

in Rylands v. Fletcher itself, and is almost a direct paraphrase of Blackburn J.'s expression.[1] The second "purpose" was the situation in Baird v. Williamson,[2] where the defendant introduced water below ground by pumping in such quantity that it flowed into the plaintiff's seam and in a manner not properly connected with normal mining operations. Lord Cairns saw the present case as being within the principle of Baird v. Williamson.[2]

It is submitted that the decision in Rylands v. Fletcher did not extend the law on this point at all: at best it established the generality of the concept which had been developed in five earlier cases.[3] If Lord Cairns's judgment is to be criticised at all, it should be on the ground that his terming "ordinary [use]" "the natural user" of land probably confused rather than clarified the issue: the great Bramwell B.'s choice of words should not so lightly be set aside or improved upon.

With the above interpretation, Newark would disagree. Newark asserted that Lord Cairns in using the terms "natural user" and "non-natural use" in his judgment was employing two distinct conceptions. In the first case, "natural user" meant "the user of land in the ordinary course of enjoyment"[4] -- that is, "natural" was used in its secondary sense of "ordinary and usual, even though it may be artificial".[5] In the second case, "non-natural use" is equated with "artificially

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[1] L.R. 1 Ex. 265, 280.
[2] 15 C.B. (N.S.) 376; 143 E.R. 831.
[3] Hazelwood v. Webber, 52 C.L.R. 268, 277.
[4] 24 M.L.R. 557, 570.
[5] Ibid., 558.

introducing the dangerous agent on to the land"[1] -- that is, "natural" was used in its primary sense of "[existing] in or by nature and ... not artificial".[2] The equation of "natural" with "ordinary" in the second ("non-natural use") conception came about erroneously much later in the century and "would have surprised Lord Cairns and astounded Blackburn J.".[3] In short, Newark believed that, in order to avoid liability, the defendant had to show not only that his was a "natural user" of land in that it was an "ordinary" use but also that the agent causing the harm was "naturally" on the land in the sense that it had not been artificially introduced.[4]

It is submitted that that interpretation is wrong. First, it is scarcely conceivable that Lord Cairns should have used the word "natural" in two different ways (Newark's primary and secondary meanings) in the same sentence.[5] The "natural user" of the defendant in Smith v. Kenrick[6] -- and that had already been defined as user in "the ordinary course of the enjoyment of land"[7] -- is contrasted with the "non-natural use" of the defendants in Baird v. Williamson[8] and Rylands v. Fletcher. Any purpose beyond a "natural user" is termed a "non-natural use": an "X-nonX" classification covers all.

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[1] Ibid., 570.
[2] Ibid., 558.
[3] Ibid., 571.
[4] Ibid., 561.
[5] L.R. 3 H.L. 330, 339; see passage cited at p. 286.
[6] 7 C.B. 515; 137 E.R. 205.
[7] L.R. 3 H.L. 330, 338.
[8] 15 C.B. (N.S.) 376; 143 E.R. 831.

Secondly, if Newark is right, it is difficult to see why the facts of Smith v. Kenrick[1] did not bring it within the "non-natural use" category (Newark's second, i.e. "artificial" category) and consequently why the defendant was not there held liable. For the rainwater would never have accumulated in the defendant's mine but for the cuts drilled by the defendant's predecessor in title. It was "artificially" there in that it would not have been there but for human act, in the same way that the water in Baird v. Williamson[2] was "artificially" in the defendant's mine because of pumping, a different human act. The true distinction between the cases is that, in the former, the defendant was using his land in the way all mine-owners did, whereas in the latter, the defendant was acting in an extraordinary manner.

Thirdly, Newark's article makes no reference to the St Helen's Smelting case[3] and the suggestion that Lord Cairns's "natural use" can be identified with the "ordinary use" of land which Bramwell B. considered to be a defence to an action for nuisance is lightly dismissed in a footnote: "no such identification was suggested in the case and Blackburn J. could hardly have missed it if relevant".[4] The reason why Blackburn J. did not refer to the defence has already been given.[5] The "identification" is clear in Lord Cairns's judgment: he cites almost the very words used by Bramwell B. Lord Cranworth, who agreed with Lord Cairns, had

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[1] 7 C.B. 515; 137 E.R. 205.
[2] 15 C.B. (N.S.) 376; 143 E.R. 831.
[3] 11 H.L.C. 642; 11 E.R. 1483.
[4] 24 M.L.R. 557, 571, footnote 53.
[5] See p. 285.

also sat in the St Helen's Smelting case.[1] Both must, therefore, have been fully cognisant of the defence which had been developing in the 1860's.[2]

Fourthly, Newark's opinion runs counter to the Head-note ascribed to the decision of the House of Lords:[3]

> "When the owner of land, without wilfulness or negligence, uses land in the ordinary manner of its use, though mischief should thereby be occasioned, he will not be liable in damages."

Newark's interpretation has also been doubted by at least one writer.[4]

For these reasons, it is submitted that Newark's view is wrong. In his view, until 1885, the cases supported the distinction he makes between the "natural (= ordinary) user" concept on the one hand and the "non-natural (= artificial) use" concept on the other. After that date, "non-natural" in the second case erroneously came to mean "not-ordinary". In fact, on analysis, the cases before 1885 do not support Newark's thesis. Newark said of Carstairs v. Taylor:[5]

> "[I]f 'natural use' in the sense of ordinary user could have been relied on it was precisely the case where one would have expected defendant's counsel or the court to raise the point."

It would appear from the report that the defendant's counsel were not even called upon; the court found against the plaintiff on several grounds. Thus, there was no need to explore this possible defence.

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[1] 11 H.L.C. 642; 11 E.R. 1483.

[2] Stallybrass, 3 C.L.J. 376, 396; Goodhart, "Liability for Things Naturally on the Land", (1930) 4 C.L.J. 13, 24.

[3] L.R. 3 H.L. 330, 330.

[4] Prosser, p. 505, footnote 47.

[5] (1871) L.R. 6 Ex. 217, cited at 24 M.L.R. 557, 562.

Newark stated, with reference to Ross v. Fedden,[1] that "the words 'natural' and 'ordinary' appear nowhere in the judgments".[2] They certainly appear in the judgment of the deputy county court judge, with which Blackburn J. agreed.[3] That judge had said:[4]

> "I think the state of things then existing may be treated as the natural state of things, and the flow of water through cisterns and pipes then in operation as equivalent to the natural flow of water. I think he takes subject to the ordinary risks arising from the use of the rest of the house as it stands; and that one who merely continues to use the rest of the house as it stands and in the ordinary manner does not fall within the rule laid down in Rylands v. Fletcher."

Blackburn J. might have been expected to comment if that was a misconstruction of the rule the House of Lords had laid down. To have water in domestic pipes is to use domestic property "in the ordinary manner". The exchange between Blackburn J. and counsel, quoted by Newark, emphasises the view that Rylands v. Fletcher was in accordance with precedent.[5] That precedent had clearly established a defence of "ordinary use".[6]

In Nichols v. Marsland,[7] in which the plaintiff failed to recover, Bramwell B., who, of course, delivered the

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[1](1872) L.R. 7 Q.B. 661; 26 L.T. 966; this case can be "supported only on the ground that the rule has no application where land is used 'in the ordinary way'": Eekelaar, 8 Ir. Jur. 191, 199.

[2]24 M.L.R. 557, 565.

[3]L.R. 7 Q.B. 661, 665.

[4]Ibid., 663.

[5]24 M.L.R. 557, 564.

[6]Where, on the other hand, was the precedent before 1866 by which a defendant was relieved from liability if the thing causing the harm was on his land "by nature"?

[7](1875) L.R. 10 Ex. 255.

judgment in Bamford v. Turnley,[1] said:[2]

> "[T]his ... [is a] case ... of a reasonable use of property in a way beneficial to the community."

That is not evidence in support of Newark's view![3]

Newark next claimed that "Wilson v. Waddell[4] ... adds nothing". On the contrary, it is further evidence of the "ordinary use" view. Lord Blackburn said:[5]

> "The general rule ... is that the owner of one piece of land has a right to use it in the natural course of user, unless in so doing he interferes with some right created either by law or contract; and as a branch of that law, the owner of the minerals has a right to take away the whole of the minerals in his land, for such is the natural course of user of minerals ..."

His Lordship then cited as authority the judgment of Lord Cairns in Rylands v. Fletcher[6] and continued:[7]

> "[T]his was the usual and proper course of working such coal."

It is quite clear that Lord Blackburn was equating "natural course" with "usual and proper course", and thought such an equation justified by Lord Cairns's judgment.

Newark saw Hurdman v. The North Eastern Railway Co.[8] as the first case in which a change of view was discernible.[9] A strong bench, comprising Bramwell, Brett, and Cotton L.JJ., declared "excavating and raising the minerals" to be "the

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[1] 3 B. & S. 62; 122 E.R. 25.
[2] L.R. 10 Ex. 255, 260.
[3] 24 M.L.R. 557, 565.
[4] (1876) 2 App. Cas. 95.
[5] Ibid., 99.
[6] L.R. 3 H.L. 330.
[7] 2 App. Cas. 95, 100.
[8] (1878) 3 C.P.D. 168.
[9] 24 M.L.R. 557, 565.

natural use of mineral land". That indeed would seem to indicate that the court was concerned to exempt from liability those whose use of land was normal or ordinary. But was this a "slight change of view"? Was it not simply in accord with earlier authority?

The change (and the error) really began, according to Newark, with Pollock B.'s judgment in Farrer v. Nelson:[1] undeniably in this case, there was a clear equation of "natural use" with what is ordinary and usual.[2] This case was later cited by Garrett;[3] Garrett was cited by Kekewich J. in National Telephone Co. v. Baker,[4] that Judge adding the wise suggestion that "extraordinary" was perhaps clearer than "non-natural";[5] Garrett took this advice;[6] and Alverstone C.J. in West v. Bristol Tramways Co.[7] cited the sentence as clarified. Needless to say, it is submitted here that Farrer v. Nelson[8] was right, as were the cases based on it, and that Garrett's paraphrasing of Lord Cairns's dicta was accurate throughout. The remaining cases cited by Newark are all illustrations of the "ordinary use" interpretation, and consequently require no further analysis here.

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[1] 15 Q.B.D. 258.
[2] Ibid., 260.
[3] The Law of Nuisance, (1890), p. 122.
[4] [1893] 2 Ch. 186.
[5] Pollock B. used "extraordinary" in Farrer v. Nelson, 15 Q.B.D. 258, 260, and Stallybrass has said that "extraordinary" "seems to give the right expression of the doctrine": 3 C.L.J. 376, 391.
[6] 2nd ed., p. 130.
[7] [1908] 2 K.B. 14, 20.
[8] 15 Q.B.D. 258.

It is submitted that, contrary to Newark's opinion, the following conclusions can be drawn:

(a) Lord Cairns's use of the phrase "natural use" in Rylands v. Fletcher was merely a paraphrase of Bramwell B.'s "ordinary use" or Lord Westbury's "fair and reasonable" use;

(b) there were cases between 1868 and 1885 in which a defence of "natural (= ordinary) use" was raised, notably Ross v. Fedden,[1] Nichols v. Marsland,[2] Wilson v. Waddell,[3] and Hurdman v. The North Eastern Railway Co.[4]

(c) Farrer v. Nelson[5] and the other cases which followed it, in which Newark conceded that "natural" was equated with "ordinary", were in line with earlier precedent.

It should finally be added that, in some of these cases, Rylands v. Fletcher was not cited. That is because the judges saw the cases as primarily nuisance cases (of which Rylands v. Fletcher was an example). Just as Bramwell B.'s judgment was not cited on every occasion, nor was there always need to cite Lord Cairns's.

(c) The Nature of the Defence

While it has been shown that Lord Cairns's defence of "natural user" was but an application of a defence to nuisance already established (albeit of recent birth), no attempt has been made so far to discuss the nature and the ambit of that defence.

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[1] L.R. 7 Q.B. 661.
[2] L.R. 10 Ex. 255.
[3] 2 App. Cas. 95.
[4] 3 C.P.D. 168.
[5] 15 Q.B.D. 258.

Of course, to use the term "defence" begs the question: is "natural user" a defence or is a "non-natural use" an essential ingredient of the tort? It is submitted that it is a defence to an action in nuisance to prove that the defendant's user of land was "natural". First, there is no evidence that before 1849 plaintiffs had to establish that the defendants' acts were unreasonable or extraordinary before liability could be established: if X suffered harm at his neighbour's hands, then prima facie X recovered damages or was entitled to abate. What Smith v. Kenrick[1] and the later cases effected was a new defence; the reason for the creation of the defence may lie in the industrialisation of Britain in the nineteenth century and the move from rural to urban dwelling.

Secondly, there have been hundreds of cases since 1849 in which the plaintiff has succeeded in a nuisance suit even though no finding of unreasonableness has been adduced by the court. That suggests that unreasonableness or non-natural use is not an ingredient of the tort.

Thirdly, there is clear authority that the onus of proof falls on the defendant. The defendant must exculpate himself by proving that his use was reasonable or ordinary. Burbury C.J. said in Kraemers v. Attorney-General for Tasmania:[2]

> "It is not for the plaintiff to allege or prove unnatural or unreasonable use of the land by the defendant .... Unreasonable use is not, as I see it, an ingredient of the action but the law holds that certain types of user may amount to a 'natural' and reasonable user of the land and afford a defence."

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[1] 7 C.B. 515; 137 E.R. 205.

[2] [1966] Tas. S.R. 113, 118.

Later, the learned Chief Justice said:[1]

> "[I]t is for the defendant to allege and prove lawful justification in accordance with some recognized criterion of exculpation from liability such as 'natural' and reasonable user..."

This view has been echoed elsewhere.[2] In Bamford v. Turnley[3] itself, Bramwell B. treated his "ordinary use" concept as a defence. The plaintiff, he said, established a prima facie case when he showed that he had suffered a "sensible diminution of the comfortable enjoyment" of his land. He then continued:[4]

> "The defendant has infringed the maxim Sic utere tuo ut alienum non laedas. Then, what principle or rule of law can he rely on to defend himself?"

One such principle was "ordinary use".

Thus, it is submitted that "natural user" is a defence, just as statutory authority is a defence. The plaintiff has established his prima facie case when he has proved that he has suffered sensible damage: he need not prove that the defendant's activity was unreasonable.

What is the nature of the defence? Until now, the expressions "reasonable use", "natural use", and "ordinary use" have all been used indiscriminately and without explanation. In truth, all reflect the nature of the defence, but each falls short of defining the defence. For the test is not simply "whether or not the inconvenience caused is

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[1] Ibid., 122; Gibson J. agreed (at 154).

[2] Hazelwood v. Webber, 52 C.L.R. 268, 277; Southport Corporation v. Esso Petroleum Co Ltd [1954] 2 Q.B. 182, 197; Winfield, p. 325; cf. Gertsen v. Municipality of Metropolitan Toronto 41 D.L.R. (3d) 646, 664.

[3] 3 B. & S. 62; 122 E.R. 25.

[4] Ibid., 82; 32.

unreasonable";[1] "[i]t is no answer to an action of nuisance that the defendant is only making a reasonable use of his own property".[2] Often, a use has been held reasonable and yet the defendant has been held liable.[3] This is not to deny that reasonableness is of relevance; it is no answer, however, simply to assert that what the defendant was doing was reasonable from his point of view.[4]

On the other hand, simply to show that one's activity is "ordinary" does not necessarily relieve one from liability for harm caused by it. And yet "ordinariness" is, of course, of relevance.

It is suggested that the defence is of two parts, both of which must be established by the defendant:

(1) the state of affairs must be, in all the circumstances, common and ordinary; and

(2) (i) where the state of affairs is an activity, that activity must be reasonably undertaken;

(ii) where the state of affairs is a condition on the land, the failure to prevent that condition's causing harm must be reasonable.

It is submitted that such a test can be distilled from

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[1] Goodhart, "The Rule in Rylands v. Fletcher", (1947) 63 L.Q.R. 160, 163 (discussing the test in nuisance).

[2] Stallybrass, 3 C.L.J. 376, 392.

[3] Aldred's Case, 9 Co. Rep. 57b, 59a; 77 E.R. 816, 821; Broder v. Saillard, 2 Ch.D. 692, 701; Crewe v. Mottershaw (1902) 9 B.C. 246, 248; Vanderpant v. Mayfair Hotel Co. Ltd [1930] 1 Ch. 138, 166; McIndoe v. The Jutland Flat (Waipori) Gold-mining Co. (Ltd) (1893) 12 N.Z.L.R. 226, 238; cf. Harrison v. Southwark and Vauxhall Water Co. [1891] 2 Ch. 409, 413.

[4] West v. Nicholas (1915) 17 W.A.R. 49, 51; Attorney-General v. Cole & Son [1901] 1 Ch. 205, 206.

the cases. In Bamford v. Turnley[1] itself, Bramwell B. noted that "those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action".[2] This passage was correctly interpreted by Manning J. in the useful case of Bayliss v. Lea:[3]

> "... Bramwell B. ... stated two conditions, namely:
> (a) the act must be necessary for the common and ordinary use and occupation of the land;
> (b) the act must be done 'conveniently'.
> "In using the word 'conveniently', I take it that what was meant was that the act in question was not done in an unreasonable manner or to an excessive degree."

Of course, in the light of Sedleigh-Denfield[4] and Goldman v. Hargrave,[5] in which it was made clear that omissions to act may lead to liability in nuisance, the formulation suggested by Bramwell B. needs amendment. The term "state of affairs" has been substituted for "act" for the reasons given earlier.[6] So too, in Kraemers case,[7] Burbury C.J. said:[8]

> "Where the defendant seeks to avoid prima facie liability for an act causing interference with the plaintiff's enjoyment of his land upon the ground of some 'natural' use of his land, he must I think establish not only that the user falls within a recognised category of 'natural' use but also that his right to 'natural' use was exercised reasonably."

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[1] 3 B. & S. 62; 122 E.R. 25.
[2] Ibid., 83; 33.
[3] [1962] S.R. (N.S.W.) 521, 540.
[4] [1940] A.C. 880.
[5] [1967] 1 A.C. 645.
[6] See p. 31.
[7] [1966] Tas. S.R. 113.
[8] Ibid., 125.

Some examples may show more clearly how this bipartite defence is applied. In Bamford v. Turnley,[1] the defendant failed the first limb of the test, for the burning of bricks in that locality was "not the common and ordinary use of land".[2] In Bayliss v. Lea,[3] the finding of the trial judge, Hardie J., that to introduce water for irrigation purposes on to a farming property in that sort of area was not a "non natural use of land" was not challenged.[4] But the plaintiff's prayer for an injunction nonetheless succeeded, because "the manner in which the defendants laid out their irrigation works and used them was not, in all the circumstances, in accordance with normal and proper practice but on the contrary was an unreasonable and excessive user of land".[5] Thus, in this case, the defendant failed the second limb of the defence.

MacPherson J. also saw the test as being bipartite in Mihalchuk v. Ratke.[6] The defendant was a crop farmer. The growth and production of crops is clearly a natural use of his land. Part of that use is the control of weeds. But when the defendant used an aircraft to spray the weeds, he adopted a method of control which was unreasonable and unusual in that area. The usual method was boom-spraying behind a tractor. The plaintiff's claim for damage to his crops by drift of the herbicide was, therefore, successful.

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[1] 3 B. & S. 62; 122 E.R. 25.
[2] Ibid., 83; 33.
[3] [1962] S.R. (N.S.W.) 521.
[4] Ibid., 525.
[5] Ibid., 530.
[6] (1966) 57 D.L.R. (2d) 269.

To bring water into a domestic dwelling is normal or "ordinary"; to make use of that water by means of a cistern in the "usual way" is "ordinary and reasonable".[1] To carry on business as a shop-keeper in a shopping centre is normal; but it must be carried on "in a fair and reasonable way".[2] To erect buildings on land is "part of the normal use of land", but that does not excuse the erector unless, in so using his land, he employs "reasonable and proper care and skill".[3] What could be more normal than for a printer to set up in Fleet Street? True: but he must still use his presses at a time and in a manner to avoid excessive noise and disturbance to neighbours.[4] To farm rural property is, of course, ordinary; an "accepted incident" of that purpose is to use a tractor.[5] A farmer avoided liability when a spark from his tractor exhaust started a fire which spread to his neighbour's, because the farmer was using the tractor in a reasonable way, namely to cut a fire-break.[6]

The reason for the plaintiff's failure in Smith v. Kenrick[7] but success in Baird v. Williamson[8] was that, in the former, the defendant was working his mine in a reasonable way, while, in the latter, he was not. While the "excavating

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[1] Blake v. Woolf [1898] 2 Q.B. 426, 428.
[2] St Helen's Smelting, 11 H.L.C. 642, 650; 11 E.R. 1483, 1486.
[3] Andreae v. Selfridge & Co. [1938] Ch. 1, 6, 9.
[4] Rushmer v. Polsue & Alfieri Ltd [1906] 1 Ch. 234, 250; affirmed [1907] A.C. 121, 123-124.
[5] Williams, [1973] C.L.J. 310, 321.
[6] MacKenzie v. Sloss [1959] N.Z.L.R. 533, 538, 540.
[7] 7 C.B. 515; 137 E.R. 205.
[8] 15 C.B. (N.S.) 376; 143 E.R. 831.

and raising [of] minerals is considered the natural use of mineral land", the mine-owner will be exempt from liability "only if his works are carried on with skill and in the usual manner". In Hurdman v. The North Eastern Railway Co.,[1] the defendants could not rely on the defence because they "conducted this operation negligently and improperly".[2]

This, then, is the nature of the bipartite defence of "ordinary use". The defence is available in all nuisance cases, even where physical damage has been caused to the plaintiff.[3] It is submitted that the defence, as defined here, is in accordance with most of the cases and with common sense and justice. As only a defence, it preserves the basic principle that, if a person's enjoyment of his land is

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[1] 3 C.P.D. 168, 174.

[2] The suggestion that the "mining" cases are special is wrong as the other cases here cited show: Wedderburn, "Nuisance - Natural Causes - Tree Roots", [1958] C.L.J. 32, 33; Street, p. 228.

[3] Smith v. Kenrick, 7 C.B. 515; 137 E.R. 205; Rylands v. Fletcher, L.R. 3 H.L. 330; Blake v. Woolf [1898] 2 Q.B. 426; Wilkins v. Leighton [1932] 2 Ch. 106; Tilley v. Stevenson [1939] 4 All E.R. 207; Torette House Pty Ltd v. Berkman, 62 C.L.R. 637; Canadian Forest Products Ltd v. Hudson Lumber Co. Ltd (1959) 20 D.L.R. (2d) 712; Kara Pty Ltd v. Rhodes [1966] V.R. 77. Often, the defence has been raised, but "ordinary use" has not been proved on the facts. Never has the defence failed on the ground that it is unavailable where physical damage has been caused: Baird v. Williamson, 15 C.B. (N.S.) 376, 143 E.R. 831; Hurdman v. The North Eastern Railway Co., 3 C.P.D. 168; Hazelwood v. Webber, 52 C.L.R. 268; Smeaton v. Ilford Corporation [1954] Ch. 450; Bayliss v. Lea [1962] S.R. (N.S.W.) 521; Mihalchuk v. Ratke, 57 D.L.R. (2d) 269; Dijkmans v. Howick Borough [1971] N.Z.L.R. 400; Gertsen v. Municipality of Metropolitan Toronto, 41 D.L.R. (3d) 646; N.Z. Forest Products Ltd v. O'Sullivan [1974] 2 N.Z.L.R. 80.

impaired, he is prima facie entitled to relief. But it is also just that a land-owner should prima facie be exempted from liability for harm caused by normal and ordinary use of his land. If everyone is using his land in a particular way in a locality, then a principle of "mutual sufferance" would dictate that each should be willing to bear the cost of any harm caused to himself by another's ordinary and normal use. Such a principle is as much for the advantage of one owner as of another.

However, an exemption from liability for ordinary use might be abused: a defendant may not act "reasonably".

It is, therefore, appropriate that the defendant should also have to prove that he has not acted negligently or improperly.

(d) The First Limb

It is easy to say that the state of affairs must be, in all the circumstances, common and ordinary: it is more difficult to apply such a seemingly vague test to a given set of facts. While the expression is "highly flexible",[1] certain tests of "ordinariness" may be distilled from the cases and stated with some certainty.

(i) Dangerous State of Affairs

It has already been shown that liability in nuisance will lie only if harm was foreseeable.[2] But, even if harm is foreseeable, the state of affairs may still be "ordinary".

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[1] Street, p. 252; Carroll, 8 Ir. Jur. 208, 218.
[2] See p. 110.

However, the more dangerous the state of affairs, the less likely that the state of affairs will be termed ordinary. The Law Commission on one occasion thought that a working definition of a "dangerous activity" might be an activity which posed "a more than ordinary risk of accidents or a risk of more than ordinary damage if accidents in fact result";[1] such a definition might be of use here. The reason why "dangerous" activities are not likely to be "ordinary" is that such activities are not likely to be part of the "give and take" of land occupation. Bramwell B.'s justification for the defence was that it was "as much for the advantage of one owner as of another": there is no equality of advantage if one of the parties is undertaking a dangerous activity.

It has been said that "the element of increased danger to others" is the "main criterion in deciding whether a land use is natural".[2] The main authority is, of course, Lord Moulton's advice in Rickards v. Lothian:[3] if the defendant had undertaken "some special use bringing with it increased danger to others", then the defence of ordinary use could not be relied upon. Mahon J. said in N.Z. Forest Products Ltd v. O'Sullivan[4] that the defence could not be relied upon where the use involved "acts so fraught with risk to others as not to be reasonably incident to its proper enjoyment".

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[1] Law Com. No. 32, para. 7 (b).

[2] Williams, [1973] C.L.J. 310, 319; Hazelwood v. Webber, 52 C.L.R. 268, 278; Torette House Pty Ltd v. Berkman, 60 C.L.R. 637, 654.

[3] [1913] A.C. 263, 280. Lord Moulton made it clear that he saw no distinction between Rylands v. Fletcher and nuisance (at 275).

[4] [1974] 2 N.Z.L.R. 80, 87.

That the state of affairs is dangerous in not conclusive, however, as to "ordinariness" -- the House of Lords' decision in Read's case[1] is proof of that. But it is true that the more dangerous the activity, the less likely it is to be "ordinary".

(ii) Locality

It has already been shown that, where the harm caused is not physical damage but is discomfort to the senses, the plaintiff's locality is of relevance in determining whether he has suffered "sensible damage"[2]. Locality (this time the defendant's locality) may also be of relevance in quite a different enquiry, namely whether the defendant's user of land is "ordinary". In this case, it is immaterial whether the plaintiff has suffered physical damage or discomfort to the senses.

It is submitted that if a defendant is carrying on a particular trade or manufacture in a locality devoted to that trade or manufacture,[3] then that use is likely to be termed "ordinary".[4] Here, clearly, the defence is "as much for the advantage of one owner as of another". Thus, to operate a printing press in Fleet Street or to erect a house in a new estate or to spin cotton in the industrial quarters of Bolton or Rochdale would be to maintain an ordinary state

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[1] [1947] A.C. 156.

[2] See p. 155 et seq.

[3] It would appear that trades are treated more kindly than entertainment services: Clark v. Sloane [1923] N.Z.L.R. 1129, 1132; Bloodworth v. Cormack [1949] N.Z.L.R. 1058, 1071.

[4] Sturges v. Bridgman, 11 Ch.D. 852, 865; Rushmer v. Polsue & Alfieri Ltd [1906] 1 Ch. 234, 249; Halsey v. Esso Petroleum Co. Ltd [1961] 1 W.L.R. 683, 692.

of affairs. Similarly, logging in the wild, forested areas of Canada,[1] mining mineral land,[2] operating a scrap-yard in an industrial vicinity,[3] and farming rural land[4] are ordinary uses. One of the normal incidents of farming is irrigation, and so to bring water onto farming property for this purpose is ordinary;[5] another normal incident, at least in the rural areas of New Zealand, is the burning-off of stubble, bracken, and bush.[6] Is the provision of parks and recreation grounds in residential areas "ordinary"?[7]

In determining the ordinary user of any locality, the court may have regard to the zoning under modern planning legislation.[8] For instance, Hardie J. was influenced in Bayliss v. Lea[9] by the fact that the plaintiff's property was situated in a proclaimed irrigation district.

(iii) Generality

The more widespread a use or state of affairs is, the more likely that it will be termed "ordinary". A man "may build upon his land, and in modern times it is but a reasonable enjoyment of his rights in respect of his land that his

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[1] Canadian Forest Products Ltd v. Hudson Lumber Co. Ltd, 20 D.L.R. (2d) 712, 730.

[2] Rouse v. Gravelworks Ltd [1940] 1 K.B. 489.

[3] Morris v. Dominion Foundries & Steel Ltd [1947] 2 D.L.R. 840, 843.

[4] MacKenzie v. Sloss [1959] N.Z.L.R. 533.

[5] Bayliss v. Lea [1962] S.R. (N.S.W.) 521, 525.

[6] N.Z. Forest Products Ltd v. O'Sullivan [1974] 2 N.Z.L.R. 80, 84.

[7] It is submitted that the answer may well be "yes": see Miller v. Jackson [1977] Q.B. 966.

[8] Williams, [1973] C.L.J. 310, 319.

[9] (1959) 77 W.N. (N.S.W.) 272, 278.

buildings should be equipped with fireplaces or apparatus for heating his premises, and with a water and gas supply and a sewerage system".[1] This principle applies not only to domestic dwellings but also to industrial property.[2]

However, the "generality" principle cannot be carried too far: while the use of electricity, gas, and water in one's home is "ordinary" under the "rule of give and take", the handling of these agents "in bulk and in large quantities" is not.[3] Electricity and gas are always dangerous; but the law is prepared to excuse a person using them for domestic purposes from liability for damage caused by them, for the reason stated by Bramwell B. That reason does not apply to companies which provide such commodities in bulk, and therefore it must be submitted that Miller v. Robert Addie & Sons' Collieries Ltd[4] was wrongly decided. It is certainly inconsistent with Hanson v. Wearmouth Coal Co. Ltd,[5] a case on very similar facts, and North-Western Utilities Ltd v. London Guarantee & Accident Co.[6]

Similarly, while it is "ordinary" to have lavatories and privies on one's property, it is not "ordinary" to have large numbers of them so that neighbours are subjected to unpleasant odour.[7] It follows that to have pipes conducting sewage away from one's property is also universal today, even

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[1] Hazelwood v. Webber, 52 C.L.R. 268, 281; see too Bloom v. Creed [1937] 3 D.L.R. 709 (gas); Torette House Pty Ltd v. Berkman 62 C.L.R. 637, 646 (water); Rickards v. Lothian [1913] A.C. 263, 281-2 (water); Blake v. Woolf [1898] 2 Q.B. 426 (water); Sochacki v. Sas [1947] 1 All E.R. 344, 344 (small domestic fireplace); Brewer v. Kayes [1973] 2 O.R. 284, 287 (storing fuel oil for domestic purposes).

[2] Kara Pty Ltd v. Rhodes [1966] V.R. 77, 81.

[3] Collingwood v. Home and Colonial Stores Ltd [1936] 3 All E.R. 200, 208.

[4] 1934 S.C. 150.

[5] [1939] 3 All E.R. 47.

[6] [1936] A.C. 108.

[7] West v. Nicholas, 17 W.A.R. 49, 60.

if it were not at the time of Blackburn J.'s judgment in Rylands v. Fletcher,[1] but that will not avail a local authority which collects large quantities of sewage.[2]

(iv) Nature

As will be shown below, if the state of affairs has been brought about by nature, that state will be termed "ordinary".[3] Natural conditions were specifically given as an example of "ordinary use" in Rylands v. Fletcher. What could be more normal or natural than to have rocks on one's land[4] or weeds on one's station in the outback?[5] This deserves no further analysis at this stage.

(v) Necessity and Usefulness

It may be that a state of affairs is "ordinary" if the defendant can show that the activity was vital for the preservation of life or property or was of great general benefit to the community.

In Read's case,[6] the finding (albeit obiter dictum) of Viscount Simon that "the making of munitions in a factory at the Government's request in time of war for the purpose of helping to defeat the enemy" was not a "non-natural" use of land[7] can be justified only on the basis that the making of

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[1] L.R. 1 Ex. 265, 280, where filth from a neighbour's privy was given as an example of a "dangerous thing" within the principle of strict liability.

[2] Smeaton v. Ilford Corporation [1954] Ch. 450, 471.

[3] See p. 327.

[4] Pontardawe Rural District Council v. Moore-Gwyn [1929] 1 Ch. 656.

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

[6] [1947] A.C. 156.

[7] Ibid., 169.

munitions in time of war was vital for the preservation of life and property in Britain and was of overwhelming general benefit to the community. But is this view right? Certainly, one can cite other cases in its support,[1] although many of these cases can be explained in other ways.

It is submitted that necessity or social utility should not be taken into account in assessing "ordinariness". Why should necessity make a use "ordinary"? If an activity is "necessary", then it may often be universal or very general, and thus may qualify as "ordinary" qua the generality principle (case (iii)) rather than qua necessity or usefulness.[2]

Further, there are cases doubting the relevance of necessity and usefulness. In Bamford v. Turnley,[3] Bramwell B. rejected the theory of "public good" overriding "private right": "[i]t is for the public benefit that trains should run, but not unless they pay their expences [sic]." If an enterprise is vitally necessary or of great public benefit, then let the public pay for it: there seems no reason why someone harmed by such an enterprise, however laudable, should

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[1] St Helen's Smelting, 11 H.L.C. 642, 650; 11 E.R. 1483, 1486; Rickards v. Lothian [1913] A.C. 263, 281; Peters v. Prince of Wales Theatre (Birmingham) Ltd [1943] 1 K.B. 73, 76 (sprinklers); Halsey v. Esso Petroleum Co. Ltd [1961] 1 W.L.R. 683, 701; Miller v. Jackson [1977] Q.B. 966 (cricket); Canadian Forest Products Ltd v. Hudson Lumber Co. Ltd, 20 D.L.R. (2d) 712, 730 (logging).

[2] e.g. the domestic water supply in Rickards v. Lothian [1913] A.C. 263.

[3] 3 B. & S. 62, 84; 122 E.R. 25, 33.

have to bear the loss or damage himself.[1]

Jessel M.R. thought that there were some trades "to which it is absolutely and indispensably necessary for the welfare of mankind that some houses and some pieces of land should be devoted", and yet that in itself was not justification.[2] Counsel's suggestion in Smeaton v. Ilford Corporation[3] that a distinction should be drawn between uses "for the defendant's own purposes" and uses "beneficial to the community" was rejected.[4] In New Zealand, it has been considered settled that "useful trades" cannot expect special treatment, "although the public benefit far outweighs the loss inflicted on the individual",[5] and a similar attitude has been adopted recently in Canada.[6]

It is, therefore, submitted that the usefulness of an activity ought not to be of relevance, although it cannot be denied that there is authority to the contrary.

A compromise which suggests itself is the possibility of awarding damages in lieu of an injunction where the defendant's activity, although causing serious harm to the plaintiff, is of immense social utility or necessity. This seems to have been the approach of Cumming-Bruce L.J. in Miller

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[1] Bohlen, p. 429; Fleming, p. 402; Carroll, 8 Ir. Jur. 208, 219.

[2] Broder v. Saillard, 2 Ch.D. 692, 701.

[3] [1954] Ch. 450.

[4] Ibid., 468-470.

[5] Bloodworth v. Cormack [1949] N.Z.L.R. 1058, 1071.

[6] Newman v. Conair Aviation Ltd, 33 D.L.R. (3d) 474, 479.

v. Jackson[1], where His Lordship considered that he had a duty to consider the public's interests in determining whether to exercise the discretion to grant an injunction. Macdonnell J.A. refused to grant an injunction in Bottom v. Ontario Leaf Tobacco Co.[2] because 200 men would have been put out of work if the defendant's factory had been closed, as it would have had to for it was already equipped with every device known to remove the offensive smell. So too a factory causing air pollution was required to pay only damages when an injunction would have caused the factory to close down, with the result that properties in the area would have become practically worthless as 10,000 people would have had to leave their homes in search of employment elsewhere.[3]

But this compromise -- finding the infringement of a right but then refusing the only remedy of any use to the plaintiff -- has been condemned in some cases:[4] is it "complete justice to allow the big man ... to have his way, and to solace the little man for his darkened and stuffy little house by giving him a cheque that he does not ask for"?[5]

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[1] [1977] Q.B. 966, 988; but see valid criticism, Buckley, "Cricket and the Law of Nuisance", (1978) 41 M.L.R. 334, 335-336.

[2] [1935] 2 D.L.R. 699.

[3] Madison v. Ducktown Sulphur, Copper & Iron Co. (1904) 83 S.W. 658, 660, 666.

[4] Shelfer v. City of London Electric Co. [1895] 1 Ch. 287; Munro v. Southern Dairies [1955] V.L.R. 332; Bellew v. Cement Co. [1948] Ir. R. 61 (factory closed for three months even though it was the only cement factory in Ireland at a time when building was urgent public necessity); Hulbert v. California Portland Cement Co. (1911) 118 P. 928.

[5] Leeds Industrial Co-operative Society v. Slack [1924] A.C. 851, 872, per Lord Sumner (dissenting); and see Newsom Q.C.'s comments on the success of the injunction at p. 27.

There are, therefore, four (possibly five) tests applicable in determining whether the state of affairs which the defendant was maintaining was ordinary. All of the tests (except the last) can be justified on the "give and take" basis of mutual advantage suggested by Bramwell B. They are not conclusive; one or some of them may be more important than others. Two points emerge: the defence is quite narrow in its scope (especially when one recalls that this is but one limb of the defence) and it is not as "highly flexible" as it might at first appear.

(e) The Second Limb

Having proved that his user was ordinary, the defendant must then prove that the act causing the harm was reasonably done. This requirement is, in effect, a check against abuse. The test of reasonableness here is, to all intents, the same as the test pertaining in the law of negligence,[1] apart from the crucial distinction as to the onus of proof. It is not possible to lay down specific guidelines as to what is reasonable and what not. However, general principles may be distilled from the cases.

If the defendant has adopted the usual and accepted means of proceeding, that will usually be reasonable.[2] To

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[1] That does not mean, of course, that "unreasonableness of the defendant's conduct vis-à-vis the plaintiff is an ingredient in the action for nuisance as it is in the case of an action for negligence": Kraemers v. Attorney-General for Tasmania [1966] Tas. S.R. 113, 125.

[2] e.g. the mining cases: Wilson v. Waddell, 2 App. Cas. 95, 100 and Hurdman v. The North Eastern Railway Co., 3 C.P.D. 168, 174 - reasonable; Baird v. Williamson, 15 C.B. (N.S.) 376, 143 E.R. 831 - unreasonable.

use an aircraft to spray weedkiller in Canada was "an unusual operation" and more dangerous than "the usual boom-spraying behind a tractor".[1] If the method of irrigation is "not, in all the circumstances, in accordance with normal and proper practice", then the defendant cannot rely on the ordinary use defence, even if his property is situated in an irrigation district.[2] Although the use of a blow-lamp may be the "recognised method of thawing out a pipe" in some circumstances, it is not when the pipe is close to combustible material: then "it is an extremely dangerous practice ... which no prudent workman or contractor would have adopted".[3]

An activity may be reasonable if undertaken at a certain time, but unreasonable if undertaken at another time.[4] An oil company's use of tankers in its yard throughout the night was unreasonable,[5] as was a builder's constant use of mechanical drills so as to make work during business hours almost impossible.[6]

Of course, the more skill with which a defendant acts, the more likely it is that the court will find his act reasonable. Those responsible for mining,[7] the use of

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[1] Mihalchuk v. Ratke, 57 D.L.R. (2d) 269, 272.
[2] Bayliss v. Lea [1962] S.R. (N.S.W.) 521, 530.
[3] Balfour v. Barty-King [1956] 1 W.L.R.779, 791.
[4] Morris v. Dominion Foundries & Steel Ltd [1947] 2 D.L.R. 840, 846; Gertsen v. Municipality of Metropolitan Toronto, 41 D.L.R. (3d) 646, 665.
[5] Halsey v. Esso Petroleum Co. Ltd [1961] 1 W.L.R. 683, 701.
[6] Daily Telegraph Co. Ltd v. Stuart (1928) 28 S.R. (N.S.W.) 291, 294.
[7] Hurdman v. The North Eastern Railway Co., 3 C.P.D. 168, 174.

gasoline engines,[1] and demolishing a building[2] have all avoided liability on showing that they acted with "reasonable and proper care and skill".

If the defendant has acted maliciously, then his act is ipso facto unreasonable. This is made clear by the interesting case of Christie v. Davey[3] in which the defendant was held liable because his "musical" activities were undertaken maliciously, whereas the plaintiff (the defendant on the counter-claim) avoided liability because her piano-playing was performed at reasonable hours for only a moderate length of time each week.

Finally, a particular activity is likely to be judged reasonable if to have acted otherwise would have involved the defendant in so much greater expense as to amount to an intolerable burden. Sir Wilfrid Greene M.R. said in Andreae:[4]

> "All those questions are matters of common sense and degree, and quite clearly it would be unreasonable to expect people to conduct their work so slowly and so expensively, for the purpose of preventing a transient inconvenience, that the cost and trouble would be prohibitive."

In Daily Telegraph Co. Ltd v. Stuart,[5] the extra cost of operating outside normal business hours or of operating in business hours less noisily was not so great that the defendant builders could not be expected so to operate.

When Hargrave v. Goldman[6] was before the High Court of

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[1] Canadian Forest Products Ltd v. Hudson Lumber Co. Ltd, 20 D.L.R. (2d) 712, 727.

[2] Andreae v. Selfridge & Co. [1938] Ch. 1, 9.

[3] [1893] 1 Ch. 316, 326-327; see p. 163.

[4] [1938] Ch. 1, 10.

[5] 28 S.R. (N.S.W.) 291.

[6] 110 C.L.R. 40.

Australia, Windeyer J. thought the appropriate test was one of "intolerable burden", and he explained Sparke v. Osborne[1] as a case where it would have been an "intolerable burden" on the landowner to require him to check the prickly pear on his land.[2]

On appeal, Lord Wilberforce suggested[3] that the courts, when determining this question, ought to take into account the individual circumstances of the defendant: "less must be expected of the infirm than of the able-bodied". No authority was cited for this proposition. "Normally the common law applies an objective test":[4] why should there be any exception in this case? Where the state of affairs has been created by a trespasser, the defendant occupier has never been able to plead a lack of resources. In Attorney-General v. Tod Heatley,[5] for instance, the defendant tried to prevent trespassers throwing rubbish onto his vacant lot, but without success. There was no question of his avoiding liability simply because he lacked the resources to keep the trespassers off.[6] The test was objective: "whenever he becomes aware that there is a nuisance, the duty to abate it at once arises".[7] Why should a distinction be made between

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[1](1908) 7 C.L.R. 51.

[2]110 C.L.R. 40, 71, citing 56 Harv. L. Rev. 772.

[3][1967] 1 A.C. 645, 664.

[4]British Railways Board v. Herrington [1972] A.C. 877, 898; Glasgow Corporation v. Muir [1943] A.C. 448, 457; The Germanic (1905) 196 U.S. 589, 596, per Holmes J.

[5][1897] 1 Ch. 560.

[6]See O'Connor J.'s excellent discussion of this case in Leakey v. National Trust For Places of Historic Interest or Natural Beauty [1978] 2 W.L.R. 774, 791.

[7][1897] 1 Ch. 560, 573.

that case and the situation where the state of affairs has been created by nature? One of the burdens of land occupation is the duty to prevent harm to neighbours, and one cannot avoid that duty simply by showing that one has done everything possible within one's budget.

Nor can Lord Wilberforce's dictum be supported by reference to the cases concerning an occupier's duty to trespassers, in which it has been held that a subjective test is appropriate. These cases are quite different from any others, as Lord Reid explained in British Railways Board v. Herrington:[1]

> "[A]n occupier does not voluntarily assume a relationship with trespassers. By trespassing they force a 'neighbour' relationship on him ... So it appears to me that an occupier's duty to trespassers may vary according to his knowledge, ability and resources."

But an occupier's neighbour does not "force a 'neighbour' relationship on him"; the occupier "voluntarily assume[s]" that when he purchases his property. The editor of Winfield says that Lord Wilberforce's dictum must be confined "to its actual context",[2] but, with respect, it is submitted that it should not be followed in any circumstance. O'Connor J. recently cast doubt upon it, finding it "more favourable" to defendants than the approach in earlier cases.[3] The defendant will have acted "reasonably" only if, on an objective analysis, to have acted otherwise would have involved him in expense amounting to an intolerable burden.

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[1] [1972] A.C. 877, 898; see too Southern Portland Cement Ltd v. Cooper [1974] A.C. 623, 642.

[2] Winfield, p. 61, footnote 66.

[3] Leakey v. National Trust [1978] 2 W.L.R. 774, 791.

Thus, whether the defendant has acted reasonably or not will depend on the court's assessment of the method adopted, the time, the skill and care which he has shown, his motive, and the cost of acting otherwise. This assessment is, of course, necessary only when the defendant has already shown that the state of affairs he was maintaining was ordinary.

In this discussion of the two limbs of the defence, little attention has been paid to the situation where liability springs from an omission to act. That is partly because the applicable principles are the same whether the harm arises from an act or an omission to act and partly because most cases where liability has sprung from an omission to act involve a state of affairs created by nature. This is analysed at length in the next section.

(f) "Naturally on the Land"

It has sometimes been said that an occupier cannot be held liable for "natural nuisances", that is, for "damage caused by natural forces operating upon land in its natural state".[1] Some see Rylands v. Fletcher itself as the genesis of this "doctrine", but this is doubted as "natural" was there used clearly in the sense of "ordinary". Whatever the doctrine's genesis, there is undoubtedly some support for it, although it is submitted here that the doctrine is misconceived and wrong.

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[1] Wedderburn, [1958] C.L.J. 32, 32; Newark, 24 M.L.R. 557, 558; Neath Rural District Council v. Williams [1951] 1 K.B. 115, 122.

The leading article is undoubtedly Goodhart's, "Liability for Things Naturally on the Land".[1] Goodhart divided his topic in two; he distinguished "things naturally on land which has been artificially altered in some way by an act of man so as to cause, directly or indirectly, the harm complained of" from "things naturally on land which has not thus been altered by a human act".[2] Although no reason for this distinction is given, it is submitted that it is probably based on the supposed difference between "creating a nuisance" and merely "adopting a nuisance". It was not until their Lordships delivered judgment in the Sedleigh-Denfield case[3] that it became clear beyond doubt that a defendant might be liable in nuisance for an omission as well as a commission; thus, it is not surprising that Goodhart, writing in 1930, should want to differentiate between those cases the factual situations of which placed them in the first class (where the defendant had done something) and those cases in the second class (where the defendant had done nothing). It has already been submitted that there is no distinction in

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[1](1930) 4 C.L.J. 13: it was termed "formative" in Goldman v. Hargrave [1967] 1 A.C. 645, 662.

[2]Ibid., 13.

[3][1940] A.C. 880; it is true that certain decisions before this had been leading in the same direction, in particular Job Edwards Ltd v. Birmingham Navigations [1924] 1 K.B. 341, per Scrutton L.J. (dissenting), Noble v. Harrison [1926] 2 K.B. 332, and Torette House Pty Ltd v. Berkman, 62 C.L.R. 637.

principle between "creating" and "adopting" a nuisance,[1] but for the sake of analysing Goodhart's thesis, this distinction will be observed.

It is interesting to note that Goodhart apparently saw no difficulty in deciding into which category any set of facts should be placed.

(i) Things on Altered Land

Goodhart subdivided this section into four factual categories: weeds, trees, animals, and water. He concluded that liability for harm caused by these things did not seem to depend on the question whether these things were spontaneously on the land or not.[2] The test is "whether the occupier has acted reasonably in relation to it and to his neighbour".[2] It is submitted that Goodhart's conclusion was right.

The cases since 1930 have strengthened Goodhart's argument. Giles v. Walker,[3] in which Lord Coleridge C.J. had held that "[t]here can be no duty as between adjoining owners to cut the thistles, which are the natural growth of the soil",[4] would "be decided differently" today:[5] were the

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[1] See pp. 37-38, 99 et seq.

[2] 4 C.L.J. 13, 25.

[3] (1890) 24 Q.B.D. 656.

[4] Ibid., 657.

[5] Davey v. Harrow Corporation [1958] 1 Q.B. 60, 72; French v. Auckland City Corporation [1974] 2 N.Z.L.R. 340; Leakey v. National Trust [1978] 2 W.L.R. 774, 787.

facts to recur, "it is probable that they would not be decided without a balanced consideration of what could be expected of the particular occupier as compared with the consequences of inaction".[1] Just as it was said that a particular activity is likely to be judged reasonable if to have acted otherwise would have involved the defendant in so much greater expense as to amount to an intolerable burden, so an omission (or inaction) is likely to be reasonable if action would have involved great expense amounting to an intolerable burden.

Goodhart's view that it made no difference to liability whether the tree causing harm was self-grown (i.e. naturally on the land) or planted has since been approved. Lord Goddard C.J. said in Davey's case:[2]

> "We cannot find any distinction that has ever been drawn between these two classes of trees ... nor do we see on what ground it could be."

It would seem that the planting or growing of trees "is part of the ordinary use of land"[3] and the only issue would seem to be whether the defendant's failure to cut back the branches or roots causing harm to the plaintiff's property is reasonable or not.[4]

Goodhart conceded that the various animal cases were conflicting, but it is submitted that his conclusion was correct when he opined that, on the authority of Bland v.

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[1] Goldman v. Hargrave [1967] 1 A.C. 645, 664 (but query "particular"); see too Yale, "Nuisance - Tree Roots - Damage to Adjoining Property", [1957] C.L.J. 137, 139.

[2] [1958] 1 Q.B. 60, 71; see too Khyatt v. Morgan [1964] N.Z.L.R. 666, 667, per Lord Evershed.

[3] Molloy v. Drummond [1939] N.Z.L.R. 499, 501.

[4] Matthews v. Forgie [1917] N.Z.L.R. 921, 925; Woodnorth v. Holdgate [1955] N.Z.L.R. 552.

Yates[1] and Farrer v. Nelson,[2] it was irrelevant whether the animals were there naturally or had been specially introduced. What was important was whether they had been allowed to increase in numbers to an unreasonable extent.[3]

Finally, Goodhart looked at six water cases, in all of which the water had come spontaneously on the land and had not been directly brought onto it by the defendant and in all of which the defendant had done something which had either increased the flow of water into the plaintiff's land or had altered the nature of the flow. Yet in three cases, the defendant had been held liable and in three he had not. Goodhart remarked:[4]

> "We cannot therefore say either that a man is liable for the results caused by water naturally on his land or is not liable for such results. These cases are all determined on the ground that the user of the land was either normal or abnormal, or that the defence against a natural condition was reasonable or not, and this, as Mr. Stallybrass has said, is based on the principle of mutual sufferance. The cases are, therefore, cases of natural user and not of natural condition. The fact that the water came on the land naturally and spontaneously is immaterial."

That view has since been confirmed. The rule seems to be that "[t]here is no liability for gravitation of natural surface water, even if concentrated by the upper owner by means of check-banks or drainage, provided it is but a natural incident of farming or mining land and the methods employed were not unusual".[5] Windeyer J. held in Gartner v. Kidman[6]

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[1](1914) 58 Sol. J. 612.

[2]15 Q.B.D. 258.

[3]4 C.L.J. 13, 21.

[4]Ibid., 24.

[5]Fleming, p. 415, citing Smith v. Kenrick, 7 C.B. 515 and Rouse v. Gravelworks [1940] 1 K.B. 489. A similar rule applies to city and suburban land: see Dijkmans v. Howick Borough [1971] N.Z.L.R. 400, 408.

[6](1962) 108 C.L.R. 12, 48.

that a higher proprietor may be liable for harm caused by surface water (which, of course, is naturally on the land) if his land use is other than "natural":

> "What is a natural use is a question to be determined reasonably having regard to all the circumstances, including the purposes for which the land is being used and the manner in which the flow of water was increased..."

Three "water" cases since Goodhart's article deserve mention. In Bartlett v. Tottenham,[1] Lawrence L.J. thought that "the rule in Fletcher v. Rylands applies only to things artificially brought or kept upon the defendant's land, and has no application to things which are naturally there". Such a view conflicts both with Goodhart's conclusion and with the decisions of the Court of Appeal in Hurdman's case[2] and Whalley v. Lancashire and Yorkshire Railway Co.,[3] in both of which the thing, namely water, was naturally on the defendant's land, and yet the defendant was held liable on the basis of Rylands v. Fletcher. In any case, Lawrence L.J. seemed to decide the case in the defendant's favour not on that ground but rather because the defendant's user was "natural and proper".[4] Further, it might be said that the whole discussion of the defence of ordinary or natural use was obiter dictum, for the plaintiff was unable to establish that he had suffered sensible damage.[4]

Lord Goddard C.J. in Neath R.D.C. v. Williams[5]

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[1] [1932] 1 Ch. 114, 131.
[2] 3 C.P.D. 168.
[3] (1884) 13 Q.B.D. 131.
[4] [1932] 1 Ch. 114, 132.
[5] [1951] 1 K.B. 115.

considered that there could be no liability where the obstruction to a stream was caused by natural and not artificial causes.[1] The case actually concerned a prosecution under the Public Health Act 1936. That Act provided that, in the case of a watercourse which became silted up so as to obstruct the proper flow of water and thereby to cause a statutory nuisance, only the person "by whose act or default" the nuisance arose could be liable. However, with regard to other statutory nuisances, a person "by whose act, default or sufferance" a nuisance arose could be held liable. Lord Goddard correctly concluded that, as the defendant had merely "suffered" the natural watercourse to become silted up, he could not be held liable: the Act had after all drawn a careful distinction between watercourses which amounted to nuisances and other listed statutory nuisances. Unfortunately, His Lordship, in obiter dicta, went on to consider the position at common law, and here he erred, largely because of his misinterpretation of the facts of Margate Pier and Harbour v. The Town Council of the Borough of Margate.[2]

The Lord Chief Justice himself seems to have recognised the inaccuracy of that part of his judgment for, in Davey v. Harrow Corporation,[3] he considered both Giles v. Walker[4] and Pontardawe Rural District Council v. Moore-Gwyn[5] wrong, in so far as they established that there could be no liability for things natural. The Davey case[6] has since been followed.[7]

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[1] Ibid., 123.

[2] (1869) 20 L.T. (N.S.) 564; see p. 324, footnote 3.

[3] [1958] 1 Q.B. 60.

[4] 24 Q.B.D. 656.

[5] [1929] 1 Ch. 656.

[6] [1958] 1 Q.B. 60.

[7] Morgan v. Khyatt [1964] 1 W.L.R. 475; Leakey v. National Trust [1978] 2 W.L.R. 774, 787, 789.

The obiter dicta of the Neath decision[1] conflict with Goodhart's conclusion and are wrong.

In Radstock Co-operative and Industrial Society Ltd v. Norton-Radstock Urban District Council,[2] the plaintiff's bridge and other property were damaged by eddying and turbulence caused by the defendant's sewer becoming exposed in the riverbed, as the result of natural erosion.

In essence, this is the case of water naturally coming onto the altered land of the defendant[3] and harm being thereby caused to the plaintiff neighbour. Harman and Russell L.JJ. held that the defendant was not liable because "the sewer as laid was not ... a nuisance, and ... could not have become so through mere lapse of time without any action on their part".[4] But, in the Sedleigh-Denfield case,[5] the drain "as laid was not ... a nuisance", but did become so "through mere lapse of time without any action on [the defendants'] part": wherein lies the difference between the cases?

The decision has been strongly criticised, and held inconsistent with Goldman v. Hargrave,[6] which was not cited to the Court, and the Davey case.[7] "[N]one of the modern authority was cited to the court ... and no useful principle can be derived from it."[8] Sachs L.J.'s dissenting judgment is

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[1] [1951] 1 K.B. 115.
[2] [1968] Ch. 605.
[3] The Council were lessees of the riverbed.
[4] [1968] Ch. 605, 625.
[5] [1940] A.C. 880.
[6] [1967] 1 A.C. 645.
[7] [1958] 1 Q.B. 60.
[8] Leakey v. National Trust [1978] 2 W.L.R. 774, 789.

to be preferred. A defence of ordinary use was not available because it is not an ordinary use to collect large quantities of sewage in pipes.[1]

Thus, Goodhart's view that, in so far as harm is caused by things on altered land, it is immaterial whether that thing is there naturally or not, is here adopted. The test is one of ordinary use, and the inquiry will usually focus on whether the defendant's activity was reasonable.

(ii) Things on Unaltered Land

Goodhart submitted that the correct principle for this category was:[2]

> "[A]n occupier of land is liable for a nuisance of which he knows, or ought to know, whether that nuisance is caused by himself, his predecessor in title, a third person or by nature."

Goodhart conceded that, of the four cases he had found, only one supported this analysis. Such a concession was needlessly made.

Goodhart's prime authority was Margate Pier and Harbour v. The Town Council of the Borough of Margate.[3] The proprietors of the harbour were required to abate a nuisance caused

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[1] Smeaton v. Ilford Corporation [1954] Ch. 450, 471; see p. 307.

[2] 4 C.L.J. 13, 30.

[3] (1869) 20 L.T. (N.S.) 564; Newark, at 24 M.L.R. 557, 559, and Lord Goddard C.J. in Neath R.D.C. v. Williams [1951] 1 K.B. 115, 125, were wrong when they asserted that this was really a "first category" case, on the ground that "the piers in question, which were erected by the company, had apparently caused the accumulation of the seaweed". The evidence in Margate, which is extensively reported, shows clearly that the seaweed accumulated in the harbour because of the natural rock formation of the harbour -- see Souter's evidence at p. 566 -- and Manisty Q.C.'s allegation that the appellants had made a harbour with piers, "and thus the accumulation occurs" was not accepted by Lush J., who replied (at p. 568): "It is not so stated in the case, and I cannot assume that there would not be the same accumulation if the piers were not there."

by seaweed which had been brought in by the tide. The decision was surely right: while it is "ordinary" for harbours to have seaweed in them, the proprietors' efforts to clear the seaweed in this case were far from reasonable in the circumstances. They thus failed to prove the second limb of the defence of ordinary use.

Goodhart considered Eve J.'s decision in Pontardawe Rural District Council v. Moore-Gwyn[1] wrong, because he thought it had established "that an occupier of land need take no steps to prevent rocks, which had been loosened by the natural agency of weathering, from falling".[2] But it was not on the ground that the rocks were naturally there that the defendant was exempted from liability. For His Lordship cited Lord Cairns's speech in Rylands v. Fletcher[3] and Smith v. Kenrick,[4] and then concluded that this action was an attempt to impose liability "on an owner who is using and enjoying his land in the ordinary manner of its use and reasonably".[5] His decision not to act was reasonable because, as the Privy Council said in approving the decision, "to maintain the rocks in a state of safety would have cost the occupier some £300".[6] Thus, the decision does not conflict with Goodhart's view; it is simply an illustration of the defence of ordinary use. Eve J. made it clear in the judgment that this was the true ground of his decision, for he cited

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[1] [1929] 1 Ch. 656.

[2] 4 C.L.J. 13, 27; see too Leakey v. National Trust [1978] 2 W.L.R. 774, 785-787.

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

[4] 7 C.B. 515; 137 E.R. 205.

[5] [1929] 1 Ch. 656, 660.

[6] Goldman v. Hargrave [1967] 1 A.C. 645, 663.

Wright J.'s judgment in Blake v. Woolf:[1]

> "[There is no liability] where a person is using his land in the ordinary way and damage happens to the adjoining property without any default or negligence on his part."

Goodhart also considered Sparke v. Osborne[2] wrongly decided. The decision would be considered wrong today,[3] not because the case established that an occupier could not be liable for natural conditions on unaltered land -- it established no such proposition -- but because the High Court was of the view that liability in nuisance could not spring from inaction. Had the case been decided forty years later, after the House of Lords had settled that inaction could found liability in nuisance,[4] the result may well have been different, for only one Judge referred to the fact that prickly pear was natural growth.[5] Indeed, one Judge admitted that there may be circumstances "under which the overhanging of a tree or plant the natural product of the soil would, if it caused damage to the adjoining landowner, amount to an actionable nuisance".[6]

Thus, Goodhart's ground was stronger than he realised. Subsequent cases have confirmed his view: the defendant was held liable in Goldman v. Hargrave,[7] and that decision has since been adopted in England.[8]

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[1] [1898] 2 Q.B. 426, 428; at p. 661 in Eve J.'s judgment.
[2] 7 C.L.R. 51.
[3] Goldman v. Hargrave [1967] 1 A.C. 645, 664.
[4] Sedleigh-Denfield v. O'Callaghan [1940] A.C. 880.
[5] 7 C.L.R. 51, 57, per Griffiths C.J.
[6] Ibid., 70, per O'Connor J.
[7] [1967] 1 A.C. 645.
[8] Leakey v. National Trust [1978] 2 W.L.R. 774.

Thus, it is submitted that, whether the thing causing harm is naturally on altered or unaltered land, the occupier of that land is entitled to no special exemption from liability. The "doctrine as to non-liability for a natural condition" is "mistaken".[1] Perhaps a loose phrase in Rylands v. Fletcher was to blame;[2] however, the first case establishing the so-called doctrine seems to have been Giles v. Walker,[3] decided as late as 1890 and apparently in ignorance of the earlier conflicting decision of Margate Pier.[4] The doctrine was then fuelled by cases like Sparke v. Osborne,[5] which were really decided on the ground (now considered wrong) that an occupier could not be liable for a nuisance which he had not created.[6] It is to be hoped that the doctrine has now been buried for good and all.

However, an occupier who is maintaining a state of affairs created by nature may still be able to rely on the defence of ordinary use, should harm be caused by that state of affairs to a neighbour. Nothing could be more normal than to have rainwater or rocks on one's property: indeed, a "natural" state of affairs must ipso facto be normal and ordinary. But the occupier will still have to show, should that water or those rocks cause harm, that any acts which he did (which caused them to leave his property) were reasonably done or, if the harm results from an omission, that his failure to control these things was reasonable in the circumstances.

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[1] 4 C.L.J. 13, 31.
[2] See 24 M.L.R. 557, 560.
[3] 24 Q.B.D. 656.
[4] 20 L.T. (N.S.) 564.
[5] 7 C.L.R. 51.
[6] i.e. for a nuisance created by his predecessor in title, a trespasser, or by nature.

PART IV: DEFENCES

Chapter 2: Three Justifiable Defences

The defence of ordinary use is undoubtedly the most important defence to a nuisance or Rylands v. Fletcher action. It is now proposed to discuss three other defences, none of which is peculiar to nuisance and Rylands v. Fletcher. Statutory authority was common as a defence last century. The legislature thought that great industries ought not to be hindered or closed down because of the unfortunate harm which they might cause to a few, and so they protected them from common law liability. The prevalent attitude today is that industry should pay its way and should compensate those who are harmed by it. Indeed, the Royal Commission on Civil Liability and Compensation for Personal Injury has recommended that statutory authority should not be a defence in respect of harm caused by a "dangerous operation".[1] However, it will be submitted that the defence can still be justified on theoretical grounds. Consent is, of course, a defence to many torts, but there are particular problems in the case of nuisance: for instance, to what must the plaintiff have consented? Finally, the defence of contributory negligence will be analysed. While it is often said to be a defence to nuisance, there is no private nuisance case in which the defence has succeeded. It is, in general, an inappropriate concept in the light of the true nature of the nuisance action; but it will be shown that there is one circumstance in which the defence may be applicable.

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[1] Cmnd. 7054, para. 1653.

(a) Statutory Authority

(i) Duties and Powers

On principle, there would seem to be a difference between the case where the legislature compelled a man to do a particular thing and the case where it merely authorised him to do a particular thing. In the first case, the man has no choice about whether he does the thing requested: if he does not do it, he may be brought before the courts and they will compel him to do it, whether by an order of mandamus or by mandatory injunction. In the second case, however, the man does have a choice about whether or not to do the thing authorised.

The position, however, is not as simple as it may at first appear. For instance, at times a duty may be clothed in permissive language:[1] "what is important is what the law prescribes, not the words by which it is described".[2] Further, even where the man does have a choice as to whether he does the thing authorised, he may be under a subsidiary duty to exercise this discretion in accordance with the public interest.[3] The courts may force the man to fulfil this duty, and by this means the power ceases to confer an absolute discretion. At times, therefore, not only are duties and powers difficult to distinguish, but also powers themselves may give rise to certain duties. However, it is submitted that the courts, when considering the defence of statutory authority, ought to distinguish between legislative

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[1] R. v. Derby JJ., ex parte Kooner [1971] 1 Q.B. 147.

[2] Benning v. Wong, 43 A.L.J.R. 467, 491.

[3] Ayr Harbour Trustees v. Oswald (1883) 8 App. Cas. 623, 639; Anns v. London Borough of Merton [1977] 2 All E.R. 492, 501, per Lord Wilberforce.

commands and mere authorisations.

Where a man is compelled by the legislature[1] to do a certain thing, he ought not to be liable to any person for harm caused by the doing of that thing, at least where he has used reasonable care in undertaking the task;[2] the legislature must have intended to confer an immunity against liability for harm caused by the activity authorised. It is, in fact, rare today for the legislature to <u>compel</u> a citizen to do a particular thing; "[t]he normal way of entrusting a social function to a public authority is now increasingly the granting of statutory powers".[3] Where such a power is granted, it will not necessarily mean that the legislature intended to confer an immunity against liability. The legislature's intention can be divined only from an examination of all the circumstances. This is why a distinction must be drawn, when considering the defence of statutory authority, between duties and powers. With the former, the legislature's intention is clear on the face; with the latter, the intention must be discovered by the application of certain tests:[4]

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[1]Only if the duty or power is created by a sovereign parliament can it be relied upon as a defence: <u>Amalgamated Theatres Ltd</u> v. <u>Charles S. Luney Ltd</u> [1962] N.Z.L.R. 226, 233. Local authorities may not authorise by by-laws private citizens "to create a nuisance"; the rationale must be that Parliament has not conferred such a power of authorisation on local authorities.

[2]The legislature cannot have intended to condone carelessness: this check against abuse is discussed below at p. 338 <u>et seq</u>.

[3]Friedmann, "Statutory Powers and Legal Duties of Local Authorities", (1945) 8 M.L.R. 31, 46.

[4]<u>Metropolitan Asylum District</u> v. <u>Hill</u> (1881) 6 App. Cas. 193, 199, 213; <u>Irvine & Co. Ltd</u> v. <u>Dunedin City Corporation</u> [1939] N.Z.L.R. 741, 790; <u>B.C. Pea Growers Ltd</u> v. <u>City of Portage La Prairie</u> (1963) 43 D.L.R. (2d) 713, 727, 729, 733; <u>Dunne</u> v. <u>North Western Gas Board</u> [1964] 2 Q.B. 806; <u>Pollock</u>, p. 95.

(1) If the statute conferring the power provides for statutory compensation for those suffering harm as a result of the exercise of the power, then it will normally be assumed that the legislature intended to confer an immunity from liability at common law. Those suffering harm may make an application for compensation under the statute. It would be strange if the legislature intended them to be able to have two bites at the cherry, with the possibility of recovering both statutory compensation and damages at common law.[1] In O'Brien v. Wellington City Corporation,[2] Stout C.J. said that in cases where the legislature had authorised a nuisance and provided for compensation for those affected, no action lay: "[i]t cannot be suggested that there could be two remedies -- namely, a remedy by action and for injunction, and also a remedy for compensation for the same injury".[3]

In Marriage v. East Norfolk Rivers Catchment Board,[4] Tucker L.J. thought that the right to compensation provided by the Land Drainage Act 1930 was highly suggestive of the right of action at law having been taken away. He was able to distinguish Geddis v. Proprietors of the Bann Reservoir[5] and Manchester Corporation v. Farnworth,[6] in both of which

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[1]What if the compensation is manifestly inadequate? No case has been found in which a plaintiff has argued that his right of action at common law should be preserved because the statutory compensation is insufficient. It is submitted that the courts should not allow a challenge as to adequacy: if the legislature has provided a scheme of statutory compensation, and if that scheme covers the kind of harm suffered, then the courts should assume that the legislature thought the statutory compensation to be fair and sufficient.

[2][1928] N.Z.L.R. 215, 218.

[3]Ibid., 222.

[4][1950] 1 K.B. 284, 293.

[5](1878) 3 App. Cas. 430.

[6][1930] A.C. 171.

the defendants had been held liable, on the ground that in those cases there was no compensation clause. Singleton L.J. in the same case made it clear that this is a question of statutory interpretation, of trying to discern Parliament's intention:[1]

> "Examination of the Land Drainage Act, 1930, and of s. 34 in particular, leads irresistably to the view that Parliament recognized that there might be, and frequently must be, a nuisance created by the carrying out of works under the powers given by the section; and compensation for any damage sustained thereby is provided ... It is this which satisfies me that a person who sustains injury through the operations has no right of action for nuisance."

(2) If the statute authorises a body to do a particular thing which is in the public interest and not for the benefit of the body so authorised, then it will normally be assumed that the legislature intended to confer an immunity from liability. "[T]he social object of the power, not the status of the party or the form in which the power is conferred must be the decisive test."[2]

For instance, by the Civil Defence Act 1939, s. 9, local authorities were empowered to erect air-raid shelters. Since local authorities derive no benefit or profit from such an undertaking, the erection of the shelters being purely for the public benefit, it is submitted that the legislature must have intended to confer on the authorities an immunity from liability. In Oakes v. Minister of War Transport,[3] where the plaintiff was injured by a projecting tank trap constructed under a statutory power, the defendant was not

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[1] [1950] 1 K.B. 284, 298.
[2] Friedmann, 8 M.L.R. 31, 36.
[3] (1944) 60 T.L.R. 319.

held liable. Singleton J. commented that the authority to construct the obstruction had been conferred in the interest of public safety.

This category is narrow. Even Metropolitan Asylum District v. Hill[1] did not fall within it; their Lordships thought that the Metropolitan Poor Act 1867 manifested no intention to interfere with private rights.

(3) If the statute authorises a body to engage in a particular business or to provide a particular service, such a business or service being one able to be run on a profit and loss basis, then it will normally be assumed that the legislature intended that body to act on equal terms with any private enterprise and without prejudice to private rights.[2] Providing an air-raid shelter is quite different from running a gaming casino or a railway. If a railway causes harm to those whose properties adjoin tracks, then the railway company should have to pay for that harm.[3] Ultimately, of course, the damage is paid for by way of higher fares paid by the travelling public.

(4) It must be remembered, especially in any consideration of a nineteenth century statute, that the statute may have conferred certain powers on an undertaking simply to ensure that the undertaking, when it performed the activity authorised, acted intra vires, not ultra vires. If that is the legislature's aim, then it will normally be assumed that the legislature did not intend to confer an immunity from

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[1] 6 App. Cas. 193.

[2] Friedmann, 8 M.L.R. 31, 37.

[3] Most of the railway Acts last century contained compensation clauses, however. Test (1) predominates.

liability. In Metropolitan Asylum District v. Hill,[1] Lord Watson held that the function of the Metropolitan Poor Act 1867 was to make the setting up of hospitals intra vires so that the expense of treating patients could be repaid from the common poor fund.[2] In Hammersmith and City Railway Co. v. Brand,[3] Bramwell B., in a dissenting judgment, said that the Private Acts establishing railway companies were passed so that those companies should have the vires to run a railway.[4]

(5) The more insignificant the power and the wider the group authorised to exercise it, the less likely it is that the legislature intended to confer an immunity. For instance, when Parliament, by s. 12(1) of the Motor-Vehicles Act 1924 (N.Z.), authorised the use of traction-engines on public roads, a person using such a vehicle could not rely on the statute as a defence when a spark from the engine set fire to a frontager's fence.[5] Similarly, where a tenant held his

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[1] 6 App. Cas. 193.

[2] Ibid., 216; see too 201, per Lord Selborne L.C.

[3] (1869) L.R. 4 H.L. 171, 189.

[4] That argument was not accepted by the majority, perhaps because enterprises such as railways "were so important that the courts [were] unwilling to risk hampering them by saddling them with liability for non-negligent conduct": Harris, p. 124; Linden, "Strict Liability, Nuisance, and Legislative Authorisation", (1966) 4 Osgoode Hall L.Rev. 196. Note Windeyer J.'s interesting comment in Benning v. Wong, 43 A.L.J.R. 467, 489, that it was lawful for Rylands and Horrocks to accumulate water on their land: "Does it make any difference that their right to do so arose from their being freeholders, not by virtue of some statute conferring rights similar to that of a freeholder?"

[5] Frew and McCrostie v. Stewart [1928] N.Z.L.R. 806.

lease by virtue of a Land Act which required him to effect improvements, he could not rely on the Act as a defence when fire, used in clearing the land, spread to the plaintiff's. The power given was very general, and there was no intention to interfere with ordinary rights.[1]

It must always be remembered that the sole purpose of this enquiry is to determine the legislature's intention: did the legislature intend to confer a prima facie immunity from liability? It is submitted that today that question will usually be answered in the affirmative only if the legislature has provided another scheme of compensation.[2] It is conceded immediately that some cases of the nineteenth century would have been decided differently had these tests been applied. But there has been a hardening of opinion against immunity for statutory bodies this century, as is evidenced by the small number of modern statutes which evince a legislative intention to protect such bodies. For instance, there is now no doubt that local authorities are not in a privileged position so far as liability in nuisance is concerned;[3] their liability is to be determined according to general principle. Last century, local authorities were

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[1] Kelly v. Hayes (1902) 22 N.Z.L.R. 429.

[2] i.e. test (1). It may also be answered in the affirmative if test (2) is satisfied, but probably only local authorities in what might be called their "public welfare" guise will ever qualify under that test.

[3] Jones v. Llanrwst Urban District Council [1911] 1 Ch. 393; Pride of Derby, etc. Ltd v. British Celanese Ltd [1953] Ch. 149, 176.

often granted special protection, especially in respect of sewage works;[1] this was partly because the courts feared that, without immunity, local authorities would be inundated by a multiplicity of actions[2] and partly because, under the Public Health Act 1875, s. 21, individuals had the right to make connexion into the public sewer, irrespective of the adequacy of the system.[3] Today the courts have a more robust attitude.

It should be noted here that any activity necessarily incidental to an authorised activity should be treated in the same way as the main activity, for if the doing of A necessarily involves the doing of B as well, then to give protection to the doing of A but not to the doing of B renders the protection accorded the former worthless.[4]

Once it has been established that Parliament did intend, when granting a power to do something, to release the donee of the power from liability for the consequences of exercising the power, then no further distinction between duties and powers should be drawn. The immunity conferred is derived by a different route, but the end result is the same. When Barwick C.J. said that he found it unnecessary in Benning v. Wong[5] "to advert to the difference said to result from a permissive authority given, and a mandatory

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[1] See Moore, "Misfeasance and Nonfeasance in the Liability of Public Authorities", (1914) 30 L.Q.R. 276, 415.

[2] Glossop v. Heston & Isleworth Local Board (1879) 12 Ch.D. 102; Robinson v. Borough of Workington [1897] 1 Q.B. 619, 622.

[3] Brown v. Dunstable Corporation [1899] 2 Ch. 378, 390; Earl of Harrington v. Corporation of Derby [1905] 1 Ch. 205, 220.

[4] J.P. Porter Co. Ltd v. Bell [1955] 1 D.L.R. 62, 69; Benning v. Wong, 43 A.L.J.R. 467, 468.

[5] 43 A.L.J.R. 467, 475; see too Irvine & Co. Ltd v. Dunedin City Corporation [1939] N.Z.L.R. 741, 769, per Ostler J. (dissenting).

obligation imposed, by statute", he must have been referring to the second stage of inquiry (discussed below) where there is indeed no difference, for there is a distinction on principle at this, the first, stage of inquiry.

(ii) The Check Against Abuse

The second limb of the defence of ordinary use was described as a check against abuse:[1] it prevents a man from relying on the defence where he has acted unreasonably. The courts have devised a similar check against abuse with regard to the defence of statutory authority. It is not enough for a man to say, "I am authorised to do such and such, and I am therefore immune from all liability, no matter how I exercise this duty." Even where the legislature intended to confer an immunity, that must have been subject to the authorised person's undertaking the activity carefully and properly: the legislature never condones unreasonable behaviour. Where harm is caused to a neighbour by the exercise of a statutory duty or power, two explanations are possible.

(1) Inevitable Harm

Sometimes, harm may be caused to a neighbour by an activity even though the party authorised by the legislature to undertake that activity has used reasonable care to prevent any harm being caused. Such harm may be termed "inevitable". It may be "inevitable" because of the nature of the activity authorised. For instance, if a man is compelled by the

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[1] See p. 311.

legislature to run a railway, then he ought not to be liable for the noise and vibration caused by that railway, because "without noise and vibration trains cannot be run at all".[1] Similarly, "the emission of sparks from coal-burning locomotives is an unavoidable incident of their normal use -- ... no method exists whereby the escape of sparks from such an engine can be entirely eliminated".[2]

Were the position otherwise, action after action might be maintained for the harm caused, until equity "would interfere by injunction, and would prevent the railway being worked -- which, of course, is a reductio ad absurdum, and would defeat the intention of the Legislature".[3]

It is difficult to see what other activities could come into this category.[4] It has been suggested that it is not possible, in the climatic conditions pertaining in Britain, to avoid all bursting of water pipes: this at least is the explanation of Green v. Chelsea Waterworks Co.[5] advanced by Barwick C.J. in Benning v. Wong.[6] It may be

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[1] Pollock, p. 95; Hammersmith and City Railway Co. v. Brand, L.R. 4 H.L. 171, 202; R. v. Pease (1832) 4 B. & Ad. 30, 110 E.R. 366; Vaughan v. The Taff Vale Railway Co. (1860) 5 H. & N. 679, 157 E.R. 1351; London and North-Western Railway Co. v. Bradley (1851) 3 Mac. & G. 336, 42 E.R. 290; Canadian Pacific Railway Co. v. Roy [1902] A.C. 220; J.P. Porter Co. Ltd v. Bell [1955] 1 D.L.R. 62, 71.

[2] Benning v. Wong, 43 A.L.J.R. 467, 490.

[3] Hammersmith and City Railway Co. v. Brand, L.R. 4 H.L. 171, 215.

[4] That is not to say, however, that railway engines are "a special anomaly": (1970) 44 A.L.J. 93, 94.

[5] (1894) 70 L.T. 547.

[6] 43 A.L.J.R. 467, 468.

too that it is impossible to run a sewage lagoon without causing odours.[1]

On the other hand, an activity may be harmful, not by nature, but because the legislature has laid down various requirements which make the harm complained of the inevitable consequence of undertaking the activity. In R. v. Pease,[2] Parliament had defined the route of the railway line, and had permitted no more than 100 yards' deviation from that route. Parke J. held that the legislature must have known that the line passed for one mile adjacent to a road (on which horses were frightened by the locomotives): no matter how much care was used, "some inconvenience" was the inevitable result. Similarly, where Parliament authorised a railway company to use land near its stations as cattle-yards, it was inevitable that neighbours would suffer noise from the animals and the drovers: all possible care could not prevent such noise.[3]

The occasions on which harm is inevitable, despite the exercise of reasonable care, are rare. But there is nothing surprising in that. Usually, the legislature will authorise activities which can be performed without detriment to others; if detriment is caused, that will be because the authorised agent has not used appropriate care and skill.

There is no need to enter into a discussion as to the meaning of "inevitability" of harm.[4] All harm caused despite

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[1] B.C. Pea Growers Ltd v. City of Portage La Prairie, 43 D.L.R. (2d) 713, 734.

[2] 4 B. & Ad. 30; 110 E.R. 366.

[3] The London, Brighton, and South Coast Railway Co. v. Truman (1885) 11 App. Cas. 45, 50.

[4] Manchester Corporation v. Farnworth [1930] A.C. 171, 183; B.C. Pea Growers Ltd v. City of Portage La Prairie, 43 D.L.R. (2d) 713, 734.

reasonable care is "inevitable harm" for these purposes.

(2) Failure to Use Reasonable Care

It should be stressed that this category is not distinct from the "inevitable harm" category just discussed. In all cases, the test in applying this check against abuse is the same: has the defendant used reasonable care in exercising his statutory duty or power? Sometimes, the answer will be "yes". If harm has nonetheless been caused, then it must have been "inevitable", either because of the nature of the activity authorised or because of the imposition of particular methods or other requirements by the legislature when authorising the activity. Sometimes, the answer to the question will be "no". In these circumstances, it is submitted that the defendant will lose the benefit of the prima facie immunity against liability. Thus, Barwick C.J. said in Benning v. Wong:[1]

> "[A] person who has to justify his otherwise tortious act by an assertion of statutory authority must show as part of his justification in defence that he did the authorized act skilfully and carefully..."

Suppose Parliament authorised an activity from which "x" amount of harm was likely to result, no matter how carefully the activity was undertaken. If the person authorised acts carelessly and causes "2x" harm, is he liable for all the harm or merely for the half attributable to his negligence? It is submitted that he will be liable for all the harm, for he will be unable to show "that he did the authorized act skilfully and carefully", and therefore he

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[1] 43 A.L.J.R. 467, 468.

does not qualify for the immunity: "[n]o statutory authority provides shelter for carelessness".[1] In our example, the harm resulted from a failure to use reasonable care, and thus the defendant cannot rely on the statutory authority.[2]

What is "reasonable care"? The test is, in effect, the same test as would be used in a negligence action, but the word "negligence" will here be eschewed. This is because of the confusion which has developed between the defence of statutory authority and the tort of negligence. Here, the inquiry is designed to ascertain whether the defendant has abused a power given to him by the legislature; in a negligence action, one is concerned with whether the defendant has breached a duty of care owed to the plaintiff. The inquiries are, therefore, quite different. The issue here is whether the defendant has exercised the power "with judgment and caution"[3] or "with moderation and discretion ... [and] a reasonable regard to the rights of other persons".[4]

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[1] Friedmann, 8 M.L.R. 31, 38.

[2] cf. Andreae v. Selfridge & Co. [1938] Ch. 1 and example (3) on p.156, where the plaintiff who had suffered "2x" harm in an area where everyone suffered "x" harm recovered damages for only "x" (i.e. 2x - x) harm. But the inquiry there is quite different: how much "sensible" harm has the plaintiff suffered in the light of the locality in which he lives? Here, there is no doubt that the defendant has caused "2x" worth of sensible harm to the plaintiff. The question is: is he excused from all liability for that harm because he was undertaking a statutory power reasonably?

[3] London and North-Western Railway Co. v. Bradley, 3 Mac. & G. 336, 341; 42 E.R. 290, 292, per Lord Truro L.C.

[4] Biscoe v. Great Eastern Railway Co. (1873) L.R. 16 Eq. 636, 640; Provender Millers (Winchester) Ltd v. Southampton County Council [1940] Ch. 131, 140; J.P. Porter Co. Ltd v. Bell [1955] 1 D.L.R. 62, 70.

According to Lord Selborne, a "reasonable and proper use of [the] statutory powers" had to be shown.[1] To use the expression "without negligence" invites confusion: witness the judgment of Menzies J. in Benning v. Wong:[2]

> "The whole point of Rylands v. Fletcher liability is that the exercise of care is irrelevant ... To admit a defence of no negligence as an answer to a Rylands v. Fletcher claim would virtually defeat the very purpose of the rule itself and it is clear that the original foundation of the rule did not admit care as a defence in any circumstances at all ... the rule in Rylands v. Fletcher does not apply to the escape of something dangerous which has been brought upon land under statutory authority."

In other words, once a defence of statutory authority is raised and the authority proved, then there can be no liability in nuisance and Rylands v. Fletcher: the plaintiff must sue in negligence. That is wrong. It is true that "a defence of no negligence" is no answer to a nuisance or Rylands v. Fletcher suit, for the plaintiff's right of action does not stem from the defendant's failure to exercise due care; it stems from the defendant's maintenance of a state of affairs which has caused the plaintiff harm. But a failure to exercise due care does preclude the defendant from relying on a defence of statutory authority which might otherwise have been available. "The statute itself is in these circumstances a partial defence which becomes a complete defence on the negation of a lack of reasonable skill and care in the installation and maintenance of the authorized work."[3]

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[1] Geddis v. Proprietors of the Bann Reservoir, 3 App. Cas 430, 452; applied in Anns v. London Borough of Merton [1977] 2 All E.R. 492, 503; City of Essendon v. McSweeney (1914) 17 C.L.R. 524, 530.

[2] 43 A.L.J.R. 467, 477, 479.

[3] Ibid., 475, per Barwick C.J.

The standard of care required of a defendant will often be high: great powers, after all, often involve great responsibilities.[1] MacDonald J. suggested in the Porter case[2] that to act "reasonably" in this context meant to show "that in practical feasibility the obligation could be performed in no other way save one which involves damage to other persons". On the facts of that case, it meant that the defendant had to negative the contention that it could have adopted other methods "such as breaking the rock, by dynamite differently placed, or detonated in different quantities, or in sequence instead of simultaneously, etc., thereby causing less intense vibrations which would not have harmed the plaintiffs' houses".[3] Similarly, in the Provender Mills case,[4] Farwell J. thought that a person acted "not negligently" -- which phrase was used in a special sense[5] -- only if it was shown "that that, and that only, was the way in which the duty could be performed".[6]

In Turpin v. Halifax-Dartmouth Bridge Commission,[7] it was accepted that the Commission had implied authority to remove snow from its bridge, but it was not able to rely on that authority as a defence because the harm was not "the inevitable result of the exercise of the power (or duty)"[8] and

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[1] Manchester Corporation v. Farnworth [1930] A.C. 171, 201; Benning v. Wong, 43 A.L.J.R. 467, 475.

[2] [1955] 1 D.L.R. 62, 71.

[3] Ibid., 74.

[4] [1940] Ch. 131.

[5] See too Benning v. Wong, 43 A.L.J.R. 467, 490.

[6] [1940] Ch. 131, 140.

[7] (1959) 21 D.L.R. (2d) 623.

[8] The harm was caused by the road salt which was used to melt the ice and snow.

besides, the Commission had failed to use "proper care". "There is more than one method of snow removal."[1]

The difference between a nuisance action where there is no question of statutory authority and one where there is is well shown by O'Brien v. Wellington City Corporation.[2] There was evidence that the defendant's machinery (which was causing smoke) was "the most approved machinery in the world".[3] That, of course, would not avail the defendant in the first case, but would be very relevant in the second case, when deciding whether or not the defendant had used reasonable care in exercising the power given it by the legislature. That is not to say, however, that the defendant must have "adopted the last inventions of ever-changing, ever-advancing scientific discovery".[4] A man has to do only "what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense".[5] No man acting under legislative orders should have to search the earth or spend a fortune in an attempt to find a way to prevent a harmful consequence of his obeying those orders.

(iii) Onus of Proof

It is submitted then that the defendant must prove not only that the legislature intended to confer an immunity and that what he did fell within the statutory authorisation but

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[1] 21 D.L.R. (2d) 623, 628-629.
[2] [1928] N.Z.L.R. 215.
[3] Ibid., 220.
[4] National Telephone Co. v. Baker [1893] 2 Ch. 186, 204.
[5] Manchester Corporation v. Farnworth [1930] A.C. 171, 183.

also that he used reasonable care and skill in exercising the power given.

That the onus is on the defendant is shown by all the cases[1] except one. It has been suggested that in Benning v. Wong,[2] the High Court of Australia held by a majority of three to two that the onus of proving negligence is on the plaintiff.[3] Barwick C.J. and Windeyer J. both considered that the burden of proving the defence was on the defendant.[4] Menzies and Owen JJ. thought that the effect of a statutory authorisation was to prevent the rule of Rylands v. Fletcher from applying[5] and to convert the action into a suit in the tort of negligence. That being so, not unnaturally, they held that the onus of proving this negligence lay on the plaintiff. If their basic premise is wrong (and it is submitted that it is), then their view on the question of onus of proof lacks authority. McTiernan J.'s short judgment follows a path of its own and seems to be founded on the view that, since gas from time to time escapes from pipes, the legislature must have known that and intended to grant an immunity from

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[1] Clowes v. Staffordshire Potteries Waterworks Co. (1872) L.R. 8 Ch. App. 125, 139; B.C. Pea Growers Ltd v. City of Portage La Prairie, 43 D.L.R. (2d) 713, 731; Crossman v. Moncton Electricity and Gas Co. [1940] 4 D.L.R. 127, 133; J. & J. Makin Ltd v. London and North Eastern Railway Co. [1943] K.B. 467, 470; Metropolitan Asylum District v. Hill, 6 App. Cas. 193, 199, 208, 213; Turpin v. Halifax-Dartmouth Bridge Commission, 21 D.L.R. (2d) 623, 626, 629-630; J.P. Porter Co. Ltd v. Bell [1955] 1 D.L.R. 62, 71; Provender Millers (Winchester) Ltd v. Southampton County Council [1940] Ch. 131, 142; Manchester Corporation v. Farnworth [1930] A.C. 171, 202.

[2] 43 A.L.J.R. 467.

[3] 44 A.L.J. 93, 94; Street, p. 261, footnote 3: Professor Street suggests that there may be a distinction between nuisance and Rylands v. Fletcher on this point, but does not explain why this should be so.

[4] 43 A.L.J.R. 467, 468, 489.

[5] Ibid., 479.

liability to those undertaking the supply of gas. The Court really exhibited, therefore, three opinions, none of which commanded a majority. It is to be hoped that future Australian courts will follow the exemplary judgments of Barwick C.J. and Windeyer J.

That the onus should be on the defendant is not surprising, for it is normally the case that a party wishing to be excused from liability should have to justify his being so excused. But there are additional reasons here why it is desirable that the onus should be on the defendant. First, the legislature often authorises specialised activities, such as the conveyance of gas or water under high pressure in mains. It is very difficult for a person injured by an escape of this gas or water to prove whether the defendant has used reasonable care or not, because evidence is so hard to collect.[1] Secondly, the defendant is more likely to undertake inquiries and to make an effort to discover the safest method of fulfilling a statutory power or duty if he knows that he will have to justify his actions if any harm is caused. The defendant, with his specialised knowledge (which is why the duty has been entrusted to him), is in a better position than the plaintiff to conduct such inquiries.

(iv) Nuisance Clauses

It has been said that a person can rely on the defence of statutory authority only if he can show that the legislature intended to grant him an immunity from liability. If the legislature enacted that nothing in the Act conferring the power or duty was to be taken as conferring an immunity from

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[1] See p. 22.

liability, that would seem to put the legislature's intention beyond doubt: the statute could not be relied upon as a defence. Do not "nuisance clauses" enact precisely that?[1]

Up to now, "nuisance clauses" have been carefully avoided. Their treatment by the courts has been lamentable. If at all possible, the courts have tried to look the other way, and to decide the case as though the statute contained no such clause.[2] Barwick C.J. thought that "little, if any, significance" should be attached to a "nuisance clause" and that such a clause was but "a useful emphasis included in a statute for more abundant caution".[3] Lord Blanesburgh thought that nuisance clauses were enacted for the protection of defendants,[4] whereas, of course, they are intended to protect the rights of those who might be affected by the exercise of the statutory power.[5] In Dunne v. North Western Gas Board,[6] the defendant gas board acted subject to the provisions of the Gas Act 1948, Schedule III, para. 42 of which provided that "[n]othing in [the] Act shall exonerate an area board from any indictment, action, or other proceeding for any nuisance caused by them". Despite this provision, the Court of Appeal refused to find the defendant liable; regardless of whether there was a "nuisance clause", there was no liability if what

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[1] See, e.g., Reservoirs (Safety Provisions) Act 1930, s. 7; Public Health Act 1936, s. 31.

[2] See, for instance, the way in which the New Zealand courts tried to avoid the "nuisance clause" in the Municipal Corporations Act 1908 (N.Z.), s. 150: Lyttle v. Hastings Borough [1917] N.Z.L.R. 910, 917, and other cases mentioned in Irvine & Co. Ltd v. Dunedin City Corporation [1939] N.Z.L.R. 741, 784.

[3] Benning v. Wong, 43 A.L.J.R. 467, 469.

[4] Manchester Corporation v. Farnworth [1930] A.C. 171, 203.

[5] Clowes v. Staffordshire Potteries Waterworks Co., L.R. 8 Ch. App. 125, 140.

[6] [1964] 2 Q.B. 806.

has been done "was that which was expressly required by statute to be done or was reasonably incidental to that requirement and was done without negligence".[1]

It is preposterous to suggest that the clause is of no effect or was enacted simply "for more abundant caution". It is often "[p]art of the price for the right to exercise the statutory powers ... that those who exercise them shall not create a nuisance",[2] and to deny any effect to the clause is to destroy that "consideration". The effect of nuisance clauses is simple: they show unequivocally that the legislature did not intend to confer an immunity from liability. In Windeyer J.'s graphic words:[3]

> "Here there is [a "nuisance clause"]. It furnishes a short and simple answer to the demurrer."

If there is such a clause, the court need look no further. The defence cannot be argued.

(b) Consent

If a man consents to his neighbour's maintaining a state of affairs which threatens harm in a particular way, then he cannot complain if he is injured in that way. If A says to B, "Go ahead and do that: I am prepared to run the risk!", then B is entitled to organise his affairs on the basis of A's acceptance of the risk.[4]

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[1] Ibid., 835.

[2] Shelfer v. City of London Electric Lighting Co. [1895] 1 Ch. 287, 313.

[3] Benning v. Wong, 43 A.L.J.R. 467, 492.

[4] He may quite properly decide not to insure against damage from that risk. The lower price he is thus able to charge for his product or service may be the reason for A's agreeing to run the risk.

The defence of consent is widely accepted[1] although it is often not made clear to what exactly the plaintiff must have consented. In cases like Rylands v. Fletcher, where the defendant has brought onto or accumulated on his property a thing which threatens harm, it is that accumulation to which the plaintiff must have consented: if the plaintiff agrees to run the risk of that accumulation's causing him harm, then he cannot later sue the defendant in nuisance (or Rylands v. Fletcher) for harm caused in the way threatened.[2] In other nuisance cases, it must be shown that the plaintiff agreed to run the risk of harm from the defendant's activity. It is obvious that the plaintiff must at the least know of the risk he is running[3] but that of itself is not sufficient: the maxim is volenti non fit injuria, not scienti non fit injuria.[4] Certainly a man who has submitted to something he was powerless to prevent cannot be said to have acquiesced in it.[5]

It is consent to the risk of harm which must be proved, not consent to the trade or activity.[6] Earl Loreburn said in Pwllbach Colliery Co. Ltd v. Woodman:[7]

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[1] e.g. Clerk, para. 1431; Street, p. 240; Fleming, p. 329.

[2] Attorney-General v. Cory Brothers & Co. Ltd [1921] 1 A.C. 521, 539.

[3] Morley v. Dubinsky (1966) 59 D.L.R. (2d) 217, 221.

[4] Thomas v. Quartermaine (1887) 18 Q.B.D. 685, 696; City of Essendon v. McSweeney, 17 C.L.R. 524, 533.

[5] McIndoe v. The Jutland Flat (Waipori) Gold-mining Co. (Ltd) (1893) 12 N.Z.L.R. 226, 238; affd. (1895) 14 N.Z.L.R. 99, 112.

[6] Jerram v. Hood [1954] N.Z.L.R. 909, 916.

[7] [1915] A.C. 634, 639.

> "To my mind it is clear that permission to carry on a business is quite a different thing from permission to carry it on in such a manner as to create a nuisance."

Whether the plaintiff has consented to the risk of harm is a question to be determined on the facts. If the trade or activity inevitably involves a risk of harm, then the plaintiff's consent to the trade or activity will, of course, imply a consent to the risk as well. But in the Pwllbach Colliery case,[1] the House of Lords was not convinced that the appellants' screening process was the only method of breaking up, washing, and screening coals, nor that it was "necessarily incidental to the ... mining operations".

The agreement to run the risk may be explicit. For instance, in Akerib v. Booth & Others Ltd,[2] the lessees specifically agreed in the tenancy agreement that the landlords would not be liable for damage caused to the lessees' goods by water. This clause protected the landlords at least from liability for damage caused by water collected on the premises for domestic purposes.[3] In Lyttelton Times Co. Ltd v. Warners Ltd,[4] the parties expressly contracted that the appellants should use the ground floors of the building for printing, and thus the respondents could not complain about the inevitable vibrations.

More often the agreement to run the risk will be implied. In Thomas v. Lewis,[5] the defendant worked a quarry.

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[1] Ibid., 641, 646.

[2] [1960] 1 W.L.R. 454.

[3] But not for other purposes (at 458): the tenants had not accepted that risk.

[4] (1907) N.Z.P.C.C. 470, as explained in the Pwllbach Colliery case, [1915] A.C. 634, 638, 644.

[5] [1937] 1 All E.R. 137.

He granted the plaintiff grazing rights over another piece of land he owned. Farwell J. held that the plaintiff took his rights over that land subject to "an implied term of the agreement" that the defendant could "continue the quarry as he had worked it before."[1]

However, Farwell J. acknowledged that if the plaintiff could show that "the way in which the quarry was being worked was in itself improper, or in some way different from the method employed at the time of the arrangement", then the plaintiff may still be able to found an action in nuisance. It is important to remember that agreement to run the risks inherent in one method of working does not mean agreement to run any risks, and in particular may not mean consent to the defendant's acting negligently.

In Dickison v. Mornington Tramway Co. Ltd,[2] the plaintiff was held to have impliedly consented to the smoke, noise and vibration of the defendant's stationary steam engine, because he had not only made no objection to its erection but also negotiated the purchase of the land on which the engine stood for the defendant company.[3] Certainly consent will be implied where the thing causing the plaintiff harm was installed solely for the plaintiff's benefit.[4]

One of the most common ways of showing that a plaintiff impliedly accepted the risk is to prove that he himself made use of the thing ultimately causing damage to him. The usual

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[1] Ibid., 140.

[2] (1887) 6 N.Z.L.R. 126.

[3] Ibid., 132.

[4] Cooper v. Bertelsen (1911) 30 N.Z.L.R. 1057 (drain which overflowed back onto respondents' land was solely for respondents' benefit); Syme v. R. [1919] N.Z.L.R. 641.

example is the case of a cistern in a block of apartments, within the landlord's control but for the benefit of everyone in the block, which bursts or leaks, thereby causing damage by flooding to one of the tenants. Water supply is not possible without such a cistern, and the tenants all use the water.[1] The tenants must, therefore, be taken to have agreed to run the risk of the cistern's leaking. But a tenant does not usually consent to the landlord's leaving a tap turned on, with the consequence that his shop is flooded, or to the mode of supply's being "of quite an unusual kind",[2] or to the landlord's bringing onto the premises an extraordinary quantity of water for manufacturing purposes, necessitating a boiler and carboys for storing the water.[3]

It is submitted, however, that the courts have been too ready to find consent where consent never existed. Indeed, some have concluded that wherever there is a "common benefit", consent can be implied.[4] The fact that the plaintiff derived a benefit from the thing or activity which has now caused him harm is but evidence that he impliedly consented to the state of affairs: but it is not conclusive evidence, and it ought not to stand in face of other evidence indicating a lack of

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[1] See, e.g. Anderson v. Oppenheimer (1880) 5 Q.B.D. 602, 607; Blake v. Woolf [1898] 2 Q.B. 426, 428; cf. Reid v. Friendly Societies' Hall Co., N.Z.L.R., 3 C.A. 238 (plaintiff never used basin which overflowed, and water supply on upper floor not for his benefit; therefore, no consent).

[2] A. Prosser & Son Ltd v. Levy [1955] 3 All E.R. 577, 586.

[3] Western Engraving Co. v. Film Laboratories Ltd [1936] 1 All E.R. 106, 109.

[4] See, e.g. Kiddle v. City Business Properties Ltd [1942] 1 K.B. 269, 274; Gill v. Edouin (1894) 71 L.T. 762, 763 (although the Court of Appeal, on appeal, at 72 L.T. 579, stressed that Wright J.'s judgment was being affirmed, not on the ground of common benefit, but on the ground that the plaintiff had consented to the alteration which had been made in the mode of getting rid of the rainwater).

consent or agreement to run the risk. Goddard L.J. expressed the position thus:[1]

> "[T]he fact that in most of the cases, at any rate, the benefit of the water or the gutters was common to both parties is really an element, although, no doubt, an important element, in showing that there was consent."

But when he continued:[2]

> "the plaintiff takes the premises as they are, and, accordingly, consents to the presence there of the installed water system with all its advantages and disadvantages",

he failed to follow his own advice. The fact that the water system was in the building when the plaintiff took the lease may be evidence that he has consented to the risk it poses, but such consent does not automatically follow from the taking of the lease. In the Western Engraving case,[3] the plaintiff, when he took the lease, knew that the defendant was in the film developing business, a trade known to use large quantities of water, but he was nonetheless held not to have accepted the risk which that water posed. Similarly, it is no defence to have come to the nuisance:[4] why then should it automatically be a defence that the landlord was acting in this way before the tenant arrived? He should make it a term of the tenancy agreement if he wants the tenant to accept this risk.

Thus, while a defence of consent is accepted and can be justified on principle, it is submitted that the courts have abused it and found consent implied in cases where it was

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[1] Peters v. Prince of Wales Theatre (Birmingham) Ltd [1943] 1 K.B. 73, 78; see too Carstairs v. Taylor, L.R. 6 Ex. 217, 222, per Bramwell B.; Blake v. Woolf [1898] 2 Q.B. 426, 428; Hart v. Espagne [1930] N.Z.L.R. 289.

[2] Ibid., 79.

[3] [1936] 1 All E.R. 106.

[4] See p. 373 et seq.

not intended at all. Many of these cases would have been far better decided on the basis of the "ordinary use" defence. Wright J.'s first ground in Blake v. Woolf[1] was that "the bringing of water on to such premises ... and the maintaining a cistern in the usual way [was] an ordinary and reasonable user" of the premises. Things or activities of "common benefit" may well be often of "ordinary use" as well.

(c) Contributory Negligence

It is impossible to say definitely whether or not contributory negligence is a defence to private nuisance. Some writers say that it is not;[2] others say that it is.[3] So far as researches show, there is no case where the defence has succeeded. It is important to distinguish here between public nuisance and private nuisance. There is clear authority that contributory negligence may be a defence to the former[4] but it by no means follows that it should also be a defence to the latter. Each tort is concerned with quite a different factual situation.

In public nuisance cases where contributory negligence is alleged, one is normally concerned with what may be called "accident" situations. For instance, A may have obstructed the highway or caused a danger on the highway -- a public nuisance -- but B may have contributed to the damage he suffers by driving too fast. The "accident" is partly the fault of A and partly B's fault. It would be quite wrong

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1. [1898] 2 Q.B. 426, 428.
2. Winfield, 4 C.L.J. 189, 200.
3. Williams, Joint Torts, pp. 203-205.
4. Butterfield v. Forrester (1809) 11 East. 60, 103 E.R. 926; Trevett v. Lee [1955] 1 All E.R. 406.

if B's fault did not result in a reduction in his damages, for otherwise a careless plaintiff would be able to improve his position simply by suing in public nuisance rather than negligence.[1]

Private nuisance, on the other hand, is not concerned with "accidents": it is concerned with competing land uses. One looks at the general state of affairs being maintained on the defendant's land, and the plaintiff will be considered to have suffered "harm" only if he can show that his ordinary right to enjoyment of land has been impaired. The whole concept of contributory negligence, which presupposes some specific act or "fault", fits inelegantly into the concept of private nuisance. What, then, is the role of contributory negligence?

Where the plaintiff was simply making an ordinary use of his property, the defendant cannot plead that the plaintiff contributed to the damage he suffered. It is an ordinary use to sit in one's garden or to have a small greenhouse beside one's vegetable patch. What if A while in the garden or A's greenhouse is hit by a golf-ball from B's links next door? Certainly, A has increased the risk of his suffering harm by sitting in the garden and by building the greenhouse, but this he was entitled to do. To allow B to construe that risk as contributory negligence would be to depreciate A's full right of enjoyment.[2] Thus, A is not contributorily negligent if he grows white crops on his land, even though such crops are well known as being particularly

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[1] Cull v. Green (1924) 27 W.A.L.R. 62; McMeekin v. Maryborough Council [1947] Q.S.R. 192.

[2] Lester-Travers v. City of Frankston [1970] V.R. 2; Fleming, p. 426.

susceptible to flood damage.[1] Nor is he contributorily negligent if he has dry or half-decayed trees on his land which catch fire.[2]

Where the plaintiff was making an extraordinary use of his property, the defendant has no need to plead a defence of contributory negligence, because he will not be liable to the plaintiff at all for harm to that extraordinary use. This is because there has been no breach of his duty not to interfere with the plaintiff's ordinary enjoyment of land. If A uses his land as a mink farm, and the noise from B's factory causes the vixen to kill their young, A cannot allege that he was merely "contributorily negligent" and hence that there ought to be an apportionment of damages in terms of s. 1(1) of the Law Reform (Contributory Negligence) Act 1945. That Act applies only where the damage is suffered "as a result partly of [the plaintiff's] own fault and partly of the fault of any other person". But B in these circumstances has not been at fault: he has not breached the duty imposed by the law of nuisance.

But contributory negligence may be a defence where part of the plaintiff's land was being used in an extraordinary or abnormally sensitive way and part in an ordinary way, and where the former use contributed to the impairment of the latter use. Land may be used in more ways than one, and one use may be ordinary and another extraordinary. Suppose A placed a large amount of inflammable material near his boundary with B's railway line. If a spark from B's engine

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[1] Aitcheson v. Bruce County (1896) 15 N.Z.L.R. 483, 486.
[2] Kelly v. Hayes (1902) 22 N.Z.L.R. 429, 430.

ignited this material and the fire then spread and burnt down A's house, it is submitted that A would be held contributorily negligent. The test was suggested by Viscount Simon in Nance v. British Columbia Electric Railway:[1]

> "When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove ... that the injured party did not in his own interest take reasonable care of himself and contributed, by his want of care, to his own injury. ... [T]he principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

In the example given, A, by storing inflammable material near a railway line, did not take reasonable care of his house (the ordinary use of his land) and contributed to the injury to the house. He was part author of his own injury. To this limited extent, the defence of contributory negligence may have a role in nuisance. It should be stressed that no authority to this effect can be cited, but this would seem to be the result suggested by principle.

This matter has been discussed largely without reference to the Law Reform (Contributory Negligence) Act 1945. That is because "fault" under that Act is defined in s. 4 as "negligence, breach of statutory duty or other act or omission which ... would, apart from this Act, give rise to the defence of contributory negligence". But once it is shown that the plaintiff was at "fault" in terms of that definition, then s. 1(1) of the Act provides that that fault shall not defeat the plaintiff's claim, although the damages recoverable by the plaintiff will be reduced to such extent

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[1] [1951] A.C. 601, 611.

as the court thinks just and equitable having regard to the plaintiff's share in the responsibility for the damage. It is beyond the scope of this thesis to discuss how the courts have exercised and should exercise this discretion.

When Blackburn J. said that "default of the plaintiff" might be a defence,[1] it is submitted that he meant no more than that contributory negligence might be a defence, for what is contributory negligence but the suffering of "damage as a result partly of [the plaintiff's] own fault". Professor Fleming says that using land in an extraordinary manner may be an example of a plaintiff's "default";[2] that is so if that extraordinary use contributes to the impairment of an ordinary use on the land.

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[1] Rylands v. Fletcher, L.R. 1 Ex. 265, 279; Fleming, p. 330.
[2] Fleming, p. 330.

PART IV: DEFENCES

Chapter 3: Five Unjustifiable Defences

This chapter is concerned with various defences to nuisance or Rylands v. Fletcher which have been suggested from time to time.

(a) Act of a Stranger

It has been said that a man will not be held liable in nuisance unless he knowingly or with means of knowledge maintained on his land a state of affairs which has caused harm to his neighbour.[1] In a case where fire spreads from A's land to B's, A's liability may well depend on who lit the fire. If A did, then obviously A knew about the state of affairs. If A's licensee or contractor lit it, then A in nearly every case either will have known of it or ought to have known of it. But if a trespasser lit the fire, then A may well have had neither knowledge nor means of knowledge of the state of affairs on his land. But if he does know that a fire is burning on his land and he does nothing to prevent its spreading, then he will be liable in nuisance. This is clear from the Sedleigh-Denfield case:[2]

> "What is the legal result of the original cause being due to the act of a trespasser? In my opinion the defendants clearly continued the nuisance for they come clearly within the terms I have mentioned above, they knew the danger, they were able to prevent it and they omitted to prevent it."

The Court of Appeal had earlier adopted a similar approach in Barker v. Herbert,[3] in which some railings had

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[1] See p. 110.

[2] [1940] A.C. 880, 899, per Lord Atkin, see too 894, per Viscount Maugham; 920, per Lord Porter; Smeaton v. Ilford Corporation [1954] Ch. 450, 462; Pemberton v. Bright [1960] 1 All E.R. 792.

[3] [1911] 2 K.B. 633: a public nuisance case, but the principles on this facet of the case have been held in the Sedleigh-Denfield case (e.g., at 892) to be equally applicable to private nuisance.

been removed by a trespasser. The plaintiff fell through the hole where the railings ought to have been. Fletcher Moulton L.J. had said:[1]

> "In a case where the nuisance is created by the act of a trespasser, it is done without the permission of the owner and against his will, and he cannot in any sense be said to have caused the nuisance; but the law recognizes that there may be a continuance by him of the nuisance."

Thus, in nuisance, it is irrelevant whose act created the state of affairs which caused harm; what is crucial is who maintained that state of affairs, and that is prima facie the occupier of the property.[2]

However, a defence called "act of a stranger" has developed. It has never been available in nuisance, but it has been raised by defendants in Rylands v. Fletcher suits. That in itself is cause for suspicion in that most commentators, even if they do not ascribe to the view expressed in this thesis, at least acknowledge the close relationship between nuisance and Rylands v. Fletcher. How is it that "act of a stranger" is established as a defence to one of the actions but not to the other?

In Rylands v. Fletcher itself, Blackburn J. opined that "perhaps" the defendant could excuse himself if he could show "that the escape was the consequence of vis major" but "as nothing of the sort exists here it is unnecessary to inquire what excuse would be sufficient".[3] But that,

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[1] Ibid., 642; to similar effect, Cushing v. Peter Walker & Son (Warrington & Burton) Ltd [1941] 2 All E.R. 693, 702.

[2] A trespasser cannot be liable in nuisance: Beaudesert Shire Council v. Smith, 40 A.L.J.R. 211.

[3] L.R. 1 Ex. 265, 279.

tentative as it is, is not the language from which new defences are born. What precisely did Blackburn J. mean by "vis major"? Certainly there was no suggestion that the defendants' independent contractors who were responsible for the escape of the water were "vis major".

The seeds of the defence of "act of a stranger" are really to be found in two cases of the 1870s. The first was Carstairs v. Taylor,[1] a most unsatisfactory case. Rainwater was conveyed by gutters into a box in which a rat gnawed a hole. Water flowed through that hole and into the premises of the plaintiffs, who were the defendant's lessees, and damaged their goods. The plaintiffs sued the defendant in contract and nuisance. All four Barons who heard the case found for the defendant. Kelly C.B. held that "the cause of the mischief" was the rat's action, and this amounted to a vis major, "as much as if a thief had broken the hole in attempting to enter the house, or a flash of lightning or a hurricane had caused the rent".[2]

Bramwell B. rejected this line of reasoning: "the defendant has here conducted the water to the place from which it poured on to the plaintiffs' premises, and he may therefore be said to have poured it on to them".[3] Instead, the learned Baron found for the defendant on the basis that the roof was the common protection of both, and the collection of the water running from it was also for their joint benefit. Consequently, the plaintiffs must be taken to have consented

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[1](1871) L.R. 6 Ex. 217.
[2]Ibid., 220.
[3]Ibid., 221.

to this collection of the water "which was for their own benefit, and the defendant can only be liable if he was guilty of negligence".[1] Thus, Bramwell B.'s judgment was based on a defence of consent or common benefit. Pigott B. then delivered judgment:[1]

"I am of the same opinion."

But which opinion? Martin B.'s approach was different yet again. He said that the decision in Rylands v. Fletcher had no relevance: "it referred only to the acts of adjoining owners of land".[1] But he dismissed the plaintiffs' claim because of an implied consent under the lease. "[O]ne who takes a floor in a house must be held to take the premises as they are, and cannot complain that the house was not constructed differently."[1]

In short, the decision has no ratio decidendi, but that has not prevented judges in later cases from citing the case as authority for X or as authority for Y.

The second case was Box v. Jubb.[2] As the case was heard by Kelly C.B. and Pollock B., it is not surprising that enterprising counsel should have chosen to cite Carstairs v. Taylor;[3] nor is it surprising that it was the view of the Chief Baron in that case which prevailed in Box v. Jubb.[2] As a result of an obstruction in the drain into which the surplus water of the defendant's reservoir discharged, the reservoir overflowed and the plaintiff's premises were flooded.

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[1] Ibid., 222.
[2] (1879) 4 Ex. D. 76.
[3] L.R. 6 Ex. 217.

On the principle of Rylands v. Fletcher, it might have been thought that the defendant would be liable, having collected a large amount of water which escaped. In Rylands v. Fletcher, the defendants were held liable although they were not negligent: wherein lies the difference between the cases? Kelly C.B., in an oral judgment, said:[1]

> "It seems to me immaterial whether this is called vis major or the unlawful act of a stranger; it is sufficient to say that the defendants had no means of preventing the occurrence."

With respect, that is wrong. Under a statute then in force,[2] the occupier of land injured by the neglect of another occupier to cleanse and scour the channel of a drain on his land had power to cleanse and scour the channel himself, and then to recover the costs of so doing from the occupier whose neglect had caused the injury.[3] A landowner with a right by contract to discharge water into an artificial watercourse may sue under that contract if the right to discharge is impeded by an obstruction in the watercourse. So too the lower occupier might be liable in negligence or nuisance: Kelly C.B. conceded the stranger's act to be "unlawful". Thus, the defendant not only could have prevented the occurrence but also could have sued the lower occupier for the damage caused him by the failure to keep the drain free of obstruction. It was by no means, therefore, a hard case to hold the defendant liable to the plaintiff.

The error in Kelly C.B.'s reasoning is this: he

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[1] 4 Ex.D. 76, 79.

[2] An Act to facilitate the Drainage of Lands in England and Wales, 10 & 11 Vict., c. 38.

[3] Ibid., s. 14; see now Land Drainage Act 1961, s. 45.

considered not the general activity -- the accumulating of water in a reservoir, as in Rylands v. Fletcher itself -- but rather the specific act which precipitated the general activity's causing harm. That is a legitimate enquiry in a negligence suit, but not in nuisance and Rylands v. Fletcher. It mattered not in Rylands v. Fletcher that an independent contractor was involved; it mattered not how the water found its way to the plaintiff's property. All that mattered was that the defendant had kept a large amount of water on his land and it had escaped. It is absolutely irrelevant that he "has done all that skill and judgment can do", which is the ground on which Pollock B. absolved the defendant in Box v. Jubb.[1]

On these two cases -- one of them without a ratio decidendi, the other misreasoned and inconsistent with Rylands v. Fletcher -- rests the defence of "act of a stranger". The defence has been strongly criticised, primarily on the ground that it limits a defendant's duty to his neighbour to nothing more "than the ordinary duty of care" postulated by the law of negligence.[2] It is no defence under common law scienter or under the Animals Act 1971 that the beast caused harm owing to the wrongful act of a third party,[3] for "the act of a third party is one of the circumstances against which the person creating the risk should take precautions".[4] For similar reasons the Royal Commission on Civil Liability and Compensation for Personal Injury

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[1] 4 Ex.D. 76, 79.

[2] Goodhart, "The Third Man or Novus Actor Interveniens", (1951) 4 Cur. Leg. Prob. 177, 182-183; Fleming, pp. 331-332.

[3] Baker v. Snell [1908] 2 K.B. 825, 833-834; Behrens v. Bertram Mills Circus, Ltd [1957] 2 Q.B. 1, 21-25.

[4] Law Com. No. 13, s. 24.

recommended that "the act of a third party" should not be a defence to its proposed tort of strict liability for harm caused by "dangerous activities".[1] The defence finds no place in the American Restatement,[2] where it is said that if a man creates a risk to his neighbour and that risk ripens into injury, then it is immaterial "that it is made effective in harm by the unexpectable action of a human being, an animal or a force of nature".

Rejection of the defence, however, does not lead, as one might have expected, to a fundamental change in the results of disputes involving a "stranger". This is:

(a) partly because of the requirement that a defendant must have knowledge or means of knowledge of the state of affairs causing the harm: the cases where the defendant does not have such knowledge are likely to involve a state of affairs created either by nature or by a trespasser, and, of course, the trespasser is the prime example of a "stranger"; and

(b) partly because the defence has become over time extremely limited. It seems clear that independent contractors,[3] licensees,[4] servants and agents[5] are not "strangers"; only trespassers seem to qualify, and they do only if they are

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[1] Cmnd. 7054, para. 1660.

[2] Restatement, First, Torts, s. 522; the majority, in Tentative Draft No. 10 for the 2nd edition, voted to retain this section: see p. 82 et seq.

[3] Black v. Christchurch Finance Co. Ltd [1894] A.C. 48; H. & N. Emanuel Ltd v. Greater London Council [1971] 2 All E.R. 835.

[4] Hale v. Jennings Brothers [1938] 1 All E.R. 579; Boulcott Golf Club, Inc. v. Engelbrecht [1945] N.Z.L.R. 556.

[5] Holderness v. Goslin [1975] 2 N.Z.L.R. 46, 55.

not reasonably foreseeable.[1] Further, it seems that the defence will succeed only if the stranger's act has been malicious,[2] deliberate[3] or conscious:[4] a negligent act does not suffice.[5]

Thus, even if the defence were now rejected, many cases would still be decided in the same way (but, of course, for different reasons) as they would have been had the defence been utilised. Consider the following cases. Approach A is the view that "act of a stranger" is a defence; Approach B is the analysis advocated in this thesis.

(1) An independent contractor pours a poisonous substance into a stream on X's property, with the result that Y's crops are damaged. Under Approach A, X will be liable to Y, because an independent contractor is not a "stranger". (The defence may also be unavailable if the contractor's action was merely negligent.) Under Approach B, X will be liable to Y, because he ought to have known what the independent contractor on his land was doing. There may be the exceptional case where a court would hold that X could not have been expected to know of the state of affairs created by the contractor; in that sort of case, X will not be liable. But nor would he be under Approach A, because this sort of case would involve in all probability an act so alien to the contract that it

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[1] Benning v. Wong, 43 A.L.J.R. 467, 488; Perry v. Kendricks Transport Ltd [1956] 1 All E.R. 154, 158.

[2] Hale v. Jennings Brothers [1938] 1 All E.R. 579, 584; A. Prosser & Son Ltd v. Levy [1955] 3 All E.R. 577, 587; Benning v. Wong, 43 A.L.J.R. 467, 488.

[3] Shell-Mex & B.P. Ltd v. Belfast Corporation [1952] N.I. 72, 86; Perry v. Kendricks Transport Ltd [1956] 1 All E.R. 154, 157.

[4] Hanson v. Wearmouth Coal Co. Ltd [1939] 3 All E.R. 47, 53.

[5] cf. Perry v. Kendricks Transport Ltd [1956] 1 All E.R. 154, 159, 161; Goodhart, "Rylands v. Fletcher Today", (1956) 72 L.Q.R. 184, 186.

could not have been anticipated.[1] An example might be if X employed an independent contractor to clean windows, and came home to find that he had instead lit a fire which had spread to Y's property.

(2) Substitute a trespasser for a contractor. Under Approach A, X will not be liable, because a trespasser is outside X's control and is not foreseeable. Under Approach B, X will not be liable either, because he cannot be expected to know whether trespassers are on his property and what they are doing.

(3) A different result will occur, however, in some situations. A trespasser cuts X's gas-pipes, and gas escapes to Y's, causing damage. Under Approach A, X will not be liable; under Approach B, he will be, because it is he who has engaged in an activity posing high risks. If one carries gas in pipes, it is foreseeable that that gas will escape and cause damage; it does not matter whether it escapes as the result of an act of the gas owner, a trespasser, or of nature. Why should not X be liable? He has run a risk; he should carry the responsibility. That is the price for carrying on the activity.

The whole defence of "act of a stranger" is, therefore, misconceived; this becomes obvious if a "state of affairs" approach is adopted. The defendant's liability ought to hinge on the state of his knowledge, not on whether he can

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[1] "[T]he character of the interference [must be] something which they ought to anticipate": Perry v. Kendricks Transport Ltd [1956] 1 All E.R. 154, 158; Shiffman v. Grand Priory [1936] 1 All E.R. 557, 561; Hale v. Jennings Brothers [1938] 1 All E.R. 579, 585; H. & N. Emanuel Ltd v. Greater London Council [1971] 2 All E.R. 835, 839.

point to a specific act by a stranger. That would be appropriate in negligence, but not in strict liability. The blame for this confusion can be laid at the feet of Kelly C.B.

(b) Act of God

"Act of God" is always mentioned in the textbooks as a defence, although Professor Street acknowledges that it has achieved "a prominence out of all proportion to its practical importance"[1] and Professor Fleming thinks that "its scope is destined to be narrow."[2] It is usually regarded solely as a defence in Rylands v. Fletcher, but it is also (at least theoretically) a defence in nuisance actions as well.[3] It was mentioned as being "perhaps" a defence in Rylands v. Fletcher[4] itself, but Blackburn J. said that he did not need to consider it. It has been mentioned (by way of obiter dicta) as a defence on occasions since[5] but, so far as researches show, has been successfully raised as a defence in nuisance and Rylands v. Fletcher only once in the Commonwealth.[6] That was in Nichols v. Marsland,[7] where the

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[1] Street, p. 259.

[2] Fleming, p. 331.

[3] Tennent v. Earl of Glasgow (1864) 2 Macph. (H.L.) 22, 26-27.

[4] L.R. 1 Ex. 265, 279.

[5] e.g. Attorney-General v. Cory Brothers & Co. Ltd [1921] 1 A.C. 521, 539; Carstairs v. Taylor, L.R. 6 Ex. 217, 220, per Kelly C.B.; Northwestern Utilities Ltd v. London Guarantee & Accident Co. Ltd [1936] A.C. 108, 119; J. & J. Makin Ltd v. London and North Eastern Railway Co. [1943] K.B. 467, 470; Irvine & Co. Ltd v. Dunedin City Corporation [1939] N.Z.L.R. 741, 767.

[6] Unsuccessful attempts include Cottrell v. Allen (1882) 16 S.A.L.R. 122 (whirlwind not an Act of God); Commissioner of Railways (Western Australia) v. Stewart (1936) 56 C.L.R. 520, 529 (tropical storms, even if the most violent ever experienced, not Acts of God); Dougherty v. Smith (1887) N.Z.L.R., 5 S.C. 374, 379 (gale of wind); Simpson v. Attorney-General [1959] N.Z.L.R. 547, 549 (heaviest fall of rain ever recorded at the scene not Act of God).

[7] (1876) 2 Ex.D. 1; strongly criticised by Goodhart, (1939) 55 L.Q.R. 123, 124.

plaintiff's property was flooded after the defendant's ornamental pools overflowed because of an extraordinary rainfall. In Greenock Corporation v. Caledonian Railway Co.,[1] on the other hand, a case with very similar facts, the defence was unsuccessful, even though rain fell in "a heavy, it may be an extraordinary and it may be an unprecedented, spate".[2] The two decisions cannot stand together[3] and their Lordships in effect said that the earlier case was wrong.[4] The Greenock Corporation case[5] has since been followed by the House of Lords in the Sedleigh-Denfield case.[6]

The error in Nichols v. Marsland[7] is obvious; Mellish L.J. said:

> "[T]he ordinary rule of law is that when the law creates a duty and the party is disabled from performing it without any default of his own, by the Act of God, or the King's enemies, the law will excuse him; but when a party by his own contract creates a duty, he is bound to make it good notwithstanding any accident by inevitable necessity."

First, His Lordship's judgment presupposes incorrectly that there can be only one "rule of law" (as opposed to a "rule of contract") whereas, in fact, the law imposes many different duties on citizens. The duty imposed on an occupier by nuisance is not to harm his neighbour, whereas the duty he

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[1] [1917] A.C. 556.

[2] Ibid., 580.

[3] "[T]here is [no] difference on this topic between the law of England and that of Scotland": Greenock Corporation v. Caledonian Railway Co. [1917] A.C. 556, 579.

[4] [1917] A.C. 556, 575, 580-581. Lord Wrenbury (at 584) distinguished Nichols v. Marsland on the ground that the facts were different, but he misunderstood the facts of the earlier case: in both cases, the pools were formed by damming a stream.

[5] [1917] A.C. 556.

[6] [1940] A.C. 880, 886; Nichols v. Marsland was not cited.

[7] 2 Ex.D. 1, 4.

owes to his visitors is simply one of reasonable care. Secondly, if there is a defence of "act of a stranger" or "act of the King's enemies", it does not follow that there must be a defence of "Act of God": Mellish L.J. seems to equate the two as though the same principle governs each. Act of a stranger would be a defence because the occupier cannot control the actions of another human being trespassing on his land: that "stranger" has a will of his own, and might, despite every precaution by the occupier, maliciously cause something on the occupier's land to harm the neighbour's. The weather has no will of its own, except in an irrelevant anthropomorphical sense, and cannot act maliciously.

Mellish L.J. continued:[1]

> "But the present case is distinguished from that of Rylands v. Fletcher in this, that 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, super-added to the water in the reservoir (which of itself would have been innocuous), causes the disaster."

The answer to that was provided by Lord Wrenbury in the Greenock Corporation case: "but for the act of man there would have beenno damage from the act of God".[2] Further, the courts' attitude to natural phenomena has changed since 1876: natural conditions on land are now treated like any other conditions.[3]

It is submitted that the defence should be relegated

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[1] Ibid., 5.

[2] [1917] A.C. 556, 583; see too Simpson v. Attorney-General [1959] N.Z.L.R. 547, 549.

[3] See p. 316 et seq.

to the pages of legal history[1] as its purpose has been taken over by the concept of foreseeability of harm. If the wall of a house collapses solely because of an earthquake, then the owner of the house may not be liable for the damage because harm was not foreseeable, not because earthquakes are Acts of God.

(c) Coming to the Nuisance

Until recently, there was no doubt that it was no defence that the plaintiff "came to the nuisance". In Elliotson v. Feetham,[2] the fact that the defendant manufacturers had used their workshops for ten years before the plaintiff became possessed of the neighbouring house was held not to avail them, and in Bliss v. Hall,[3] Tindal C.J. held that it was no answer that the defendant had been there first. In Sturges v. Bridgman,[4] the defendant confectioner had been using pestle and mortar on his premises, thereby creating vibration and noise, for more than twenty years when the plaintiff built his consulting room at the end of his garden. But the plaintiff's prayer for an injunction succeeded. In Khyatt v. Morgan,[5] Leicester J. held that it was no defence "that the adjoining owner ... came to the nuisance because he purchased the property at a period when the nuisance was continuing ... Nor does it matter that the plaintiff, with knowledge of the existence of the nuisance,

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[1] Jolowicz, [1968] C.L.J. 50, 62. The defence is not recognised in the United States: Restatement, First, Torts, s. 522.

[2] (1835) 2 Bing.(N.C.) 134; 132 E.R. 53.

[3] (1838) 4 Bing.(N.C.) 183; 132 E.R. 758.

[4] (1879) 11 Ch.D. 852.

[5] [1961] N.Z.L.R. 1020, 1024.

places himself in its path by building near it."

The rationale is simple: every occupier of land is entitled to the ordinary enjoyment of his land. To allow an occupier to continue an activity even though it is interfering with another's ordinary enjoyment simply because he was there first is to deny the occupier harmed his right to ordinary enjoyment. There is no justification for that. If that were the law, "land could become burdened with diverse and sterilising incidents".[1]

However, in Miller v. Jackson,[2] Lord Denning M.R. thought that "coming to the nuisance" may be a defence. He said:[3]

> "The building of the house does not convert the playing of cricket into a nuisance when it was not so before."

In reaching this conclusion, the Master of the Rolls ignored all the decisions mentioned above, except Sturges v. Bridgman[4] which was dismissed, wrongly, on the ground that it "turned on the old law about easements and prescriptions, and so forth".[5] But apart from that, His Lordship's conclusion is wrong in principle. The playing of cricket may well have interfered with the ordinary enjoyment of the land on which the plaintiffs' house was built before the plaintiffs moved there: would not the then owner of it have been able to sue the club in nuisance if his cattle were hit by cricket balls?[6] Even if the playing of cricket did not cause harm

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[1] Goode, (1977) 93 L.Q.R. 481, 482.

[2] [1977] Q.B. 966. See further, Buckley, 41 M.L.R. 334.

[3] Ibid., 980.

[4] 11 Ch.D. 852.

[5] [1977] Q.B. 966, 981.

[6] Apparently not, according to Lord Denning (at p. 981); that is defensible only on the ground that the playing of cricket is an ordinary and reasonable use of land, as it may well be, but that is another matter.

before, it did now: the building of houses on land is one of the most ordinary uses of land imaginable and house-owners have a right not to be interfered with. Is a smelly and noisy factory in the middle of a residential suburb to be protected solely because, when it was built in the 1850s, it was situated outside the city limits? There cannot be one rule for cricket clubs and another for industry.[1]

Lord Denning's view did not prevail, however. Geoffrey Lane L.J. said:[2]

> "[I]t is no answer to a claim in nuisance for the defendant to show that the plaintiff brought the trouble on his own head by building or coming to live in a house so close to the defendant's premises that he would inevitably be affected by the defendant's activities, where no one had been affected previously."

Cumming-Bruce L.J. agreed with Geoffrey Lane L.J.'s interpretation of the law, including his acceptance of the decision in Sturges v. Bridgman.[2] However, Cumming-Bruce L.J.'s refusal to grant an injunction was lamentable[3] and, in effect, the same result was achieved as though there were a defence of "coming to the nuisance". There is not such a defence: Lord Denning's is a lone voice to the contrary, and one suspects that even he would want to acknowledge the defence only in certain circumstances!

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[1]The argument that the plaintiff, in buying a house overlooking a cricket ground and thus having the advantage of a view, must also take the risks involved, e.g. of cricket balls, begs the question because the plaintiff may not regard this particular view as an advantage: chacun son goût. (Contrary to Lord Denning's assertion, cricket is not the delight of everyone!) He may have decided to buy the house only because he thought that any interference with his enjoyment of it would be prevented by the law.

[2][1977] Q.B. 966, 987.

[3]See p.199and Buckley, 41 M.L.R. 334, 336, esp. footnote 6.

(d) Prescription

"A right to commit a private nuisance may be acquired as an easement by prescription."[1] thus speak the text-books. The rules relating to prescription are of ancient origin, but were codified in the Prescription Act 1832.[2] The defence is of very little practical importance as it is almost impossible to satisfy all the tests which prove that the "right to commit a private nuisance" has been legalised by prescription.

The defendant must show:[3]

(a) that the right claimed is capable of qualifying as an easement. Thus, one may acquire a right to discharge rain-water from his eaves onto his neighbour's land,[4] but one may not acquire a right to send smoke, smells, noise or vibration on to his neighbour's, for one cannot acquire easements to that effect.[5]

(b) that this "easement" has existed for twenty years, and is neither vi, clam, nor precario. Thus, in Liverpool Corporation v. H. Coghill & Son Ltd,[6] the defendant failed to establish a right to discharge effluent containing borax in solution into the plaintiff's sewers because the plaintiff

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[1] Street, p. 239; Clerk, para. 1469; Fleming, pp. 424-425.

[2] "one of the worst drafted Acts on the Statute Book": Law Reform Committee, 14th report, Cmnd. 3100, para. 40. This report summarises well the effect of the Act.

[3] The onus of proof "clearly ought to be upon [the defendant]": Ball v. Ray (1873) L.R. 8 Ch. 467, 471.

[4] Fay v. Prentice (1845) 1 C.B. 828; Harvey v. Walters (1873) L.R. 8 C.P. 162.

[5] Clerk, para. 1469; Webb v. Bird, 10 C.B.(N.S.) 268, 282-283; Sturges v. Bridgman, 11 Ch.D. 852, 856-857 (noise); Dalton v. Angus, 6 App. Cas. 740, 798 (prescriptive right only to easements).

[6] [1918] 1 Ch. 307.

had not known all the facts.[1] Twenty years is an arbitrary period[2] and is laid down in s. 2 of the Act. The enjoyment of the right must be uninterrupted: s. 4.

(c) that at all times within the twenty year period, those harmed could have brought an action to determine the right. One of the reasons why the defence of prescription failed in Sturges v. Bridgman[3] was that, although the defendant had caused vibration and noise for more than twenty years, it was only recently that the plaintiff had erected his consulting room at the end of the garden and had begun to suffer from that vibration and noise. Until then, he could not have sued to determine the right because he suffered no interference with the enjoyment of his land. "[U]ser which is neither preventible nor actionable [cannot] found an easement."[4]

(d) that the right claimed is of a uniform and certain nature. It is submitted that the defence will not apply to encroaching branches or roots, because the quantity of the inconvenience is constantly changing.[5] A fortiori, how can one measure the quantity of inconvenience with smell, smoke, and noise?[6] By nature, they are uncertain, here one minute, gone the next; and when here, sometimes trifling in significance, at other times unbearable.

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[1] Ibid., 314.

[2] Ogus and Richardson, [1977] C.L.J. 284, 303.

[3] 11 Ch.D. 852.

[4] Ibid., 863; see too Ball v. Ray, L.R. 8 Ch. 467, 472.

[5] Lemmon v. Webb [1895] A.C. 1; Khyatt v. Morgan [1961] N.Z.L.R. 1020, 1024.

[6] Hulley v. Silversprings Bleaching Co. [1922] 2 Ch. 268.

Ogus and Richardson state that the prescription rule may be explained "in terms of efficiency":[1]

> "Where the discharger has acquired a prescriptive right the assumption is that the victim has consciously been prepared to bear the cost. The discharger has presumably relied on this fact and has organised his business accordingly."

But,with respect, that is a shallow justification. That a discharger has managed to avoid compensation for twenty years or more is no reason to give him a legal right to avoid it forever. Why, after 19 years, should the discharger have to pay for his easement, but, after 20 years, gain his easement free of charge?

The Law Reform Committee recommended the total abolition of the law of prescription: that recommendation is endorsed.[2] Prescriptive rights may no longer be acquired in New Zealand,[3] some Canadian provinces,[4] and some Australian states.[5] In many cases, even if prescription were abolished, the defendant would still be able to rely on the plaintiff's consent, which has been held to lie "at the root of prescription"

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[1] [1977] C.L.J. 284, 301.

[2] Cmnd. 3100 - a majority decision.

[3] Land Transfer Act 1952 (N.Z.), s. 64 (except over land the title to which is not under the Land Transfer Act, but such land is now virtually non-existent).

[4] See, e.g., Land Titles Act (R.S.S.) 1965, s. 74; Linden, p. 373.

[5] See, e.g. Real Property Act 1900 (N.S.W.), s. 45; Van den Bosch v. Australian Provincial Assurance Association Ltd (1968) 88 W.N. (Pt 1) (N.S.W.) 357, 364. Rights to light can no longer be acquired by prescription anywhere in Australia; nor can rights to air in New South Wales, Victoria, Western Australia, and the Capital Territory: Higgins, pp. 169-170.

anyway.[1] But, as was said earlier, the defence is so difficult to prove that its practical effect, even without formal abolition, is negligible.

(e) Fires Prevention (Metropolis) Act 1774

Section 86 of the Fires Prevention (Metropolis) Act 1774 is sometimes said to provide a defence in nuisance.[2] It has been conclusively held that the section does not operate as a defence in Rylands v. Fletcher situations.[3] It is submitted that there can be no reliance on it in other nuisance situations either.[4]

Professor Street allows that it may have application "where a person may be liable in nuisance though his conduct was neither intentional nor negligent",[5] a reference to the position in Wringe v. Cohen.[6] That case has already been criticised[7] and this distinction between intentional nuisances,

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[1] Sturges v. Bridgman, 11 Ch.D. 852, 863. Prescription cannot, however, be fully allied with consent, because (a) part of its justification is that it brings certainty to the ownership of rights and property (and that is irrelevant to the defence of consent) -- see Dalton v. Angus, 6 App. Cas. 740, 818; and (b) the defendant may rely as much on the "consent" of former owners as of the present owner of the servient tenement, whereas, with the defence of consent, the present owner cannot be in any way bound by the acquiescence of previous owners.

[2] Street, p. 241.

[3] Musgrove v. Pandelis [1919] 2 K.B. 43, 46, 49; Mulholland & Tedd Ltd v. Baker [1939] 3 All E.R. 253, 256; MacKenzie v. Sloss [1959] N.Z.L.R. 533.

[4] Boatswain v. Crawford [1943] N.Z.L.R. 109, 113; Spicer v. Smee [1946] 1 All E.R. 489, 495; Goldman v. Hargrave [1967] 1 A.C. 645, 655.

[5] Street, p. 241, and see footnote 3.

[6] [1940] 1 K.B. 229.

[7] See p. 127 et seq.

negligent nuisances, and other (Wringe v. Cohen-type) nuisances held wrong. If a fire has spread to a neighbour's in such circumstances that the occupier could be said to have maintained a harmful state of affairs, then it is not an "accidental" fire, and so the section can have no application in cases where prima facie liability has been established.

However, to put the matter beyond doubt, s. 86 ought to be repealed. There is no justification today for fire's being treated any differently from any other dangerous thing on one's land, and social conditions have changed dramatically in two important respects since 1774: an occupier can now insure himself (and nearly always does) against damage to others and to himself caused by the spread of fire, and modern fire fighting techniques and equipment make it relatively easy to confine a fire within a limited area. There is no longer any risk of an "accidental" fire destroying streets of houses, and the occupier of the house from which the fire spread being liable to dozens of occupiers.

(f) Conclusion

It has not been the object of this chapter to describe the requirements of each of these defences but rather to examine their justification. "Act of a stranger" has developed from two judgments by Kelly C.B.; it is suggested that many of the cases where the defence has been raised would be better decided on a consideration of the defendant's knowledge or means of knowledge of the harmful state of affairs on his land. "Act of God" has succeeded as a defence on only one occasion; but "coming to the nuisance" cannot even chalk

up that success rate. Its status depends on the opinion of Lord Denning M.R. It has been submitted that prescription should be abolished and that s. 86 of the Fires Prevention (Metropolis) Act 1774 should be repealed by Parliament, although even without such formal action, they are rarely raised by way of defence successfully.

It is submitted that all five defences prove to be without justification. Some can be seen as judicial attempts to dilute the theory of strict liability: the first two defences mentioned can definitely be seen as responses to what were thought to be "hard cases". This chapter does not present the law as it is, but rather as it ought to be. That only ordinary use, statutory authority, consent, and occasionally contributory negligence can be justified as defences should be cause for rejoicing, not alarm. The nuisance action becomes thereby more certain and responsibility is more likely to fall on him who created the risk.

PART V

CONCLUSION

At the start of this thesis, it was said that the aim was to lift nuisance from its ignominious position at the bottom of the league table. It is hoped that this aim has been realised. Although the nuisance action -- especially when the rule in Rylands v. Fletcher is brought within its fold, as it clearly should be -- covers a large number of diverse factual situations, broad principles of liability can nonetheless be stated.

Much of the difficulty with nuisance has arisen because of inconsistency in the way in which the word "nuisance" has been used and because of uncertainty of approach. The first problem has been overcome by using "nuisance" solely as the name of a tort. The second has been overcome, so it is hoped, by the way in which this thesis has been laid out. Part II was a step by step analysis of the establishment of a prima facie case in nuisance, ending with the remedies available. Part III tied Rylands v. Fletcher to this analysis, and then Part IV explored the defences on which the defendant might rely. The aim of this Part is simply to present the conclusions reached, lest they be lost in the detail.

The following submissions have been made:

1. All cases of nuisance can be resolved in accordance with the "state of affairs" concept. This concept embraces both activities and conditions on land (occupied by the defendant). The traditional divisions between "activities" and "conditions", and between "the creation of a nuisance" and "the continuance or adoption of a nuisance" are regarded as misleading and are consequently rejected. (II, 1.) [1]

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[1] Throughout this Part, reference is made to the section of the thesis to which the submission relates. The Roman numeral indicates the Part, the arabic number the chapter.

2. The appropriate defendant is the person who has maintained this state of affairs which has caused harm. That person will be the "occupier" of the land on which the state of affairs is maintained. The obvious defendants are owners in occupation, licensors and lessees. (II, 2.)

3. Lessors may also be held liable in nuisance if they have been given control over the state of affairs by the terms of the lease. Such control may be implied. A lessor may be liable in nuisance even to a lessee in another part of the premises. (II, 2.)

4. Occasionally, licensees and independent contractors may be sued in nuisance if they have maintained a state of affairs on land over which they have been given control by virtue of their licences or contracts respectively. Usually, however, the licensor or employer is the appropriate defendant; he is held liable not vicariously but qua occupier of land. The "dangerous operations" doctrine has no relevance in nuisance. (II, 2.)

5. Under general tortious principle, a person is liable for a tortious act committed by his direction. In the case of nuisance, such authorisation is usually given "in the shape of a lease". (II, 2.)

6. A highway user cannot be held liable in nuisance; the "watching and besetting" cases are not cases of private nuisance, but should be seen as cases of public nuisance or as actions for the infringement of a frontager's right of access. (II, 2.)

7. A highway authority may be liable in nuisance, for it does have control over certain activities and conditions on the highway. (II, 2.)

8. The users of public places cannot be liable in nuisance, although those in control of such places may be. (II, 2.)

9. Nuisance is inappropriate where the harm to the plaintiff results from a state of affairs maintained on the plaintiff's own land. (II, 2.)

10. In all cases of nuisance, it must be shown that:

(a) the defendant has knowingly or with means of knowledge maintained on his land a state of affairs; and

(b) the harm which results to the plaintiff from that state of affairs was foreseeable.

There is no distinction between the so-called "intentional (or strict) nuisances" and "negligent nuisances". (II, 3.)

11. That harm must be foreseeable does not mean that the defendant must be shown to be negligent. The duty in nuisance is never simply one of care. (II, 3.)

12. The cases where harm is caused to a passer-by or an adjoining owner by the defective state of premises on a highway should be decided according to general principles: they are not a separate category. (II, 3.)

13. The right protected by the nuisance action is the right to the ordinary enjoyment of one's land. This right is, in effect, a catch-all right comprising a number of subsidiary rights, such as the right to pure air and the right not to have one's land flooded. (II, 4.)

14. These subsidiary rights may be added to by judicial decision. It is suggested that a right to prospect or a view should now be recognised by the English courts, for example. (II, 4.)

15. Other subsidiary rights are the right (of the occupier)

not to have his chattels and animals harmed and the right not to be personally injured on his land. (II, 6.)

16. The plaintiff must show that he has suffered "sensible damage". (II, 4.)

17. Damage on an isolated occasion is recoverable in nuisance; this is explained by the "state of affairs" concept. (II, 1.)

18. Where the damage caused is "material injury to the property", there is no need to look at the plaintiff's locality, because whereover one lives, one is not expected to tolerate such injury. However, where the damage is "personal discomfort", it is proper to look at the locality, because one cannot decide whether the discomfort is "sensible" except by reference to the locality. An inhabitant of Coventry cannot expect the same purity of air as an inhabitant of Snowdonia. (II, 4.)

19. If a man puts his land to an extraordinary or sensitive use, he cannot expect protection for that use from nuisance, unless the state of affairs maintained by the defendant would have interfered with the plaintiff's enjoyment even had it been ordinary. (II, 4.)

20. The person entitled to the right of enjoyment is the occupier of the land interfered with; that will usually be an owner in occupation or a lessee. (II, 5.)

21. A lessor can sue even though out of occupation if the interference with enjoyment is of a permanent nature. Otherwise, the lessor has no locus standi until he regains possession. (II, 5.)

22. A licensee or a person in de facto occupation may sometimes sue, but it is doubtful whether a mortgagee can. (II, 5.)

23. Even if submission 15 is rejected, damages for personal injuries and for harm to one's chattels and animals may be recovered by way of "consequential" damages, as may damages for economic loss. (II, 6.)

24. As well as damages, the court may grant an injunction. Injunctions quia timet may be sought in circumstances where it is almost certain that harm will occur and where that harm is imminent. (II, 6.)

25. The decision in Rylands v. Fletcher is explicable only if seen and interpreted in the light of the arguments presented. The main thrust of the plaintiff's argument was that this was a nuisance case, and hence negligence need not be proved; the defendants argued that they could be held liable only if negligent. The Exchequer Chamber and the House of Lords accepted the plaintiff's argument. (III, 1.)

26. The decision was not even novel, although Blackburn J. did restate nuisance liability in graphic terms. Defendants had been held liable in nuisance for isolated escapes prior to Rylands v. Fletcher. Nor is it correct to say that this was the first time that an employer had been held liable for his contractor's negligence, because that was not the basis of the defendants' liability. Their liability was not vicarious, but personal: they were liable as occupiers of land who had caused harm to their neighbour. (III, 1.)

27. The supposed differences between nuisance and Rylands v. Fletcher are illusory. In particular,

(a) the view that the plaintiff need not be an occupier in Rylands v. Fletcher is shown to be inconsistent with House of Lords' authority and to be based on weak obiter dicta at first instance and in the Court of Appeal;

(b) the view that the defendant is liable qua owner of the "thing" escaping rather than qua occupier of the property from which it escaped is shown to be wrong.

In short, nuisance and Rylands v. Fletcher are not simply "two intersecting circles". (III, 2.)

28. Although Rylands v. Fletcher might have developed along the lines of the law relating to "dangerous chattels", as an historical fact it did not; it cannot be explained in terms of the "risk-duty" concept of negligence. (III,3.)

29. The concept of a tort of strict liability for "ultra-hazardous activities" has been rejected by the House of Lords. Even in the United States, where the concept has some academic support, it has failed to win judicial recognition, and Rylands v. Fletcher continues to be regarded as a case in or a species of nuisance. (III, 3.)

30. In Rylands v. Fletcher itself, Blackburn J. cited some "animal" cases; some have consequently seen his judgment as an attempt to bring nuisance, liability for fire, cattle trespass, and scienter within the same fold. But there are significant differences between cattle trespass, scienter, and Rylands v. Fletcher. Blackburn J. cited the "animal" cases in an attempt to show the justice of strict liability in certain circumstances; this was necessary because of the strong attack by the defendants on the theory of strict liability. (III, 3.)

31. The main defence to nuisance and Rylands v. Fletcher is the defence of ordinary use. It originated in the 1840s and was based on a principle of mutual sufferance or "live and let live". It was clearly defined by Bramwell B. in Bamford v. Turnley and Lord Cairns L.C. in Rylands v. Fletcher. (IV, 1)

32. The defendant must prove:

(a) that the state of affairs was "ordinary". Whether a state of affairs is ordinary will depend upon its dangerousness, its generality, the locality, and whether the state of affairs exists by nature. Possibly too, if the state of affairs is of great social utility, it will be considered "ordinary".

(b) that the activity causing the harm was reasonably carried out, or, where the harm is caused by a general condition existing on the land, that the failure to remove that condition was reasonable. This second limb of the defence may be seen as a check against abuse. A defendant cannot rely on the "ordinariness" of the land use if he has behaved unreasonably. (IV, 1.)

33. If a defendant has acted maliciously, then he cannot rely on a defence of ordinary use, for to act maliciously is ipso facto to act unreasonably. But malice does not make a lawful activity (i.e. a state of affairs which does not interfere with the plaintiff's ordinary enjoyment) unlawful. (II, 4; IV, 1.)

34. A condition existing by nature is not treated differently from any other state of affairs on land, although such a condition will be regarded as "ordinary". The usual question in such a case will be whether the defendant's failure to prevent that natural condition's causing harm is reasonable. (IV, 1.)

35. The defendant may also rely on a defence of statutory authority. Where the defendant is under a duty to do something, it is presumed that the legislature intended to confer on him an immunity from liability. Where the defendant is authorised

to do something, then the legislature's intention must be divined from the nature of the power. (IV, 2.)

36. The legislature never, of course, condones unreasonable or careless behaviour; the defendant will, therefore, lose the benefit of the immunity unless he can prove that his behaviour was reasonable. (IV, 2.)

37. Where the legislature has enacted a "nuisance clause", that is evidence that the legislature did not intend to confer an immunity from liability. (IV, 2.)

38. Another defence is consent. The defendant must prove that the plaintiff agreed to run the risk of harm from his state of affairs. Such consent may be explicit or implied. Implied consent will often be found where the state of affairs was for the "common benefit" of plaintiff and defendant. (IV, 2.)

39. The defendant may rely on the plaintiff's contributory negligence as a defence where the plaintiff has carelessly put part of his land to an extraordinary use and has thereby contributed to the harm suffered on another part of his land, which was being used in an ordinary way. (IV, 2.)

40. "Act of a stranger" is not a defence, although the defendant may often be able to plead, in situations where that "defence" might have applied, that he did not know of the state of affairs causing harm (see submission 10). (IV, 3.)

41. Nor is "Act of God" a defence -- it has succeeded in only one case. Again, in cases where the "defence" might have been raised, the defendant will sometimes be able to argue that the harm was not foreseeable. (IV, 3.)

42. Lord Denning M.R. recently tried to revive "coming to

the nuisance" as a defence. But such a concept would be at odds with the proposition that an occupier is entitled to the ordinary enjoyment of his land, regardless of who was there first (see submission 13). (IV, 3.)

43. Although prescription is a defence, it is extremely difficult to establish. It is suggested that it should be abolished, being unjustifiable on economic and other grounds. (IV, 3.)

44. Section 86 of the Fires Prevention (Metropolis) Act 1774 provides a defence against damage caused by fires which have begun "accidentally". This has been so narrowly interpreted that it is now clear that the defence cannot prevail in Rylands v. Fletcher, and probably not in nuisance. To remove doubt, it is submitted that the section should be repealed, because the reasons for the defence no longer pertain. (IV, 3.)

45. Actions brought for the interference of a servitude (i.e. an easement or a profit à prendre) are, for historical reasons, called "nuisance" actions. But they differ from mainstream nuisance actions in certain respects: for instance, as to who should be sued and as to the defences available. (II, 4.)

All these conclusions have been justified in the main body of the thesis. It is not pretended that all the problems concerned with nuisance have been solved, but it is hoped that the submissions made here at least advance the cause of coherence in an action which has been bedevilled by uncertainty. Unfortunately, nuisance has been to a large extent deprived of the penetrating academic analysis which has been accorded this century, say, to the tort of negligence.

Having been forced into an academic backwater, it has proved easy prey to judicial heresy. The prime example is, of course, the way in which negligence has become muddled with nuisance.

In the final analysis, it is submitted that, if nuisance is coherently analysed in the way suggested here, it becomes a cause of action not only defensible but indeed valuable in the protection of individual property rights.