VICTORIA

A CONTINUING RETREAT FROM STRICT LIABILITY AT COMMON LAW
Burnie Port Authority v General Jones P/L

Introduction

In its recent decision in ***Burnie Port Authority v General Jones Pty Ltd,***[1] the High Court of Australia has confirmed the modern judicial trend away from the imposition of strict liability at common law. By a majority of five to two, the High Court has decided that the tort first defined in ***Rylands v Fletcher***[2] should be absorbed into the law of negligence. To be able to establish liability for environmental damage caused by an "escape" of dangerous substances from a property, a plaintiff must now either show that a nuisance has been committed or that the occupier of the property was negligent in failing to take measures to prevent the "escape". As a matter of legal analysis, the reasoning of the majority[3] is largely correct.

Nevertheless, the case further emphasises that the common law is incapable of creating a legal framework for regulating or preventing environmental degradation. The courts are confined to adjudicating disputes between individual interests in specific contexts and are less able to consider broader concepts such as the fairness of allocating the costs of environmental damage. For example, the majority failed to explore in detail the possible policy role of strict liability with regard to such damage. In particular, the spread of contamination from a property to neighbouring properties may not be found to be negligent, even though there is a social interest in ensuring that the costs of clean-up are met and that occupiers review their activities for environmental risk. Arguably, the absorption of the ***Rylands v Fletcher*** tort into negligence ignores some special characteristics associated with environmental degradation. Some of the policy arguments raised by McHugh J in his dissent against the abolition of the tort are compelling for this reason.

Background

General Jones Pty Ltd ("General") suffered damage when a large quantity of frozen vegetables stored inside cold rooms within a building owned by the Burnie Port Authority ("BPA") was damaged by a fire which destroyed the building. At the time of the fire, work was being carried out by BPA to extend the building. Wildridge & Sinclair Pty Ltd ("W&S") was contracted to install additional refrigeration systems, which required the use of a large amount of expanded polystyrene ("EPS"), a substance that could ignite on sustained contact with a flame and burn uncontrollably for some time.

W&S stored thirty cartons of EPS in a space under the roof in close proximity to where W&S employees would be carrying out extensive welding activities. This was known to BPA which took no steps to minimise the risk of fire resulting from the welding work. It was subsequently found by the trial judge that W&S had been negligent in performing the welding work inside the

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[1] Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ. Unreported judgment of 24 March 1994. In this note, I focus only upon the ***Rylands v Fletcher*** aspects of the case.

[2] (1866) LR 1 Ex 279; (1868) LR 3 HL 340

[3] A single majority judgment was written by Mason CJ, Deane, Dawson, Toohey and Gaudron JJ in favour of General.

roof void. Sparks from the welding work must have set alight at least one of the cartons, leading to a fire that engulfed the building in flames within minutes. This finding was unchallenged on appeal, so the issue became whether BPA was also liable to General for the negligent acts of its independent contractor. General argued, among other things, that BPA was liable under a ***Rylands v Fletcher*** tort.

The decision

The key issue for the majority was whether ***Rylands v Fletcher*** continued to exist as a separate head of tortious liability in the context of what Brennan J (dissenting) called "the imperial expansion of the law of negligence". The majority relied upon two primary lines of reasoning to support its conclusion that the tort did not survive as such. First, they focused upon the definitional problems associated with the tort. They described the ***Rylands v Fletcher*** formulation as "largely bereft of current authority or validity if it be viewed ... as a statement of a comprehensive rule. Indeed, it has been all but obliterated by subsequent judicial explanations and qualifications".

It is true that the application of ***Rylands v Fletcher*** has produced a variety of contradictory outcomes.[1] Among other factors, the presence of reasonable care or the absence of negligence may be relevant to deciding whether or not a use of land is a special and not ordinary use. The question whether there has been a non-natural use of the land is a mixed question of fact and law which involves ascertainment of relevant facts and identification of the content of the concept of a non-natural use. However, the use of the descriptions "special" and "not ordinary" has led to a less objective test of liability. The majority therefore argued: "[T]here is quite unacceptable uncertainty about the circumstances which give rise to its so-called strict liability".

But, as Brennan and McHugh JJ both pointed out, ordinary negligence is equally susceptible to definitional ambiguity and arbitrary application on occasion. The dissenting judges argued that it was possible to apply ***Rylands v Fletcher*** in a rational manner in Australian law because the application of ***Rylands v Fletcher*** in Australian courts has tended to retain its theoretical purity, whereas the English courts have tended to weaken the doctrine through qualifications that incorporate notions of moral culpability (*i.e.* negligence). The definitional problems could be dealt with by re-drafting the formulation of the tort.

More importantly, the majority contended that: "[T]he rule has been progressively weakened and confined from within and the area of its effective operation, in the sense of the area in which it applies to impose liability **where it would not otherwise exist**, has been progressively diminished by increasing assault from without" (emphasis added). The majority stressed that ***Rylands v Fletcher*** was decided long before the line of cases in which the concept of negligence was developed.[2] The emergence of negligence to dominate the territory of liability in tort for unintentional injury to the person or property of another had meant that ***Rylands v Fletcher*** was increasingly defined in terms of negligence.

The issue was whether the abolition of ***Rylands v Fletcher*** would result in any situation where no liability can be attributed to a landowner for the escape of substances from land, due to a failure to establish the elements of negligence. To this possibility, the majority answered that

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[1]For example, trees, water, gas, electricity, fire and explosives have all been held to be **both** natural and non-natural uses at different times according to particular circumstances.

[2]Namely, **Heaven v Pender** (1883) and **Donoghue v Stevenson** (1932).

there was a **complete overlap** between negligence and ***Rylands v Fletcher***. Two reasons were advanced for this conclusion:

> In ***Rylands v Fletcher*** situations, there are invariably circumstances that would support the existence of a non-delegable duty of care. In those situations, the nature of the proximity relationship creates a duty of care that is more stringent: the duty to ensure that reasonable care is taken.
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> In ***Kondis v State Transport Authority,***[1] the High Court had decided that there were some categories of cases in which such a duty exists. The common theme in those cases is the fact that the person upon whom the duty is imposed has undertaken the care or control of the person or property of another; or assumes a particular responsibility for their or its safety in circumstances where the person affected might reasonably expect that due care will be exercised. The person affected has a special dependence or vulnerability with regard to what the first person does. In a ***Rylands v Fletcher*** situation, the occupier has taken advantage of its control over land to bring dangerous substances or activities onto the land. The other party has no control over what occurs on the land and is exposed to a reasonably foreseeable risk of danger. Thus, a very high standard of care is expected of the occupier, which approaches the so-called "strict liability" of ***Rylands v Fletcher***.
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> The standard of care necessarily varies with the risk involved, including the magnitude of the risk of an accident and the seriousness of the consequences of such an accident. With the kind of dangerous substances present in ***Rylands v Fletcher*** situations, the standard of care is likely to be extremely high.

In other words, the law of negligence had developed to the stage where a "strict liability" equivalent could be found to exist in particular circumstances. Accordingly, the ***Rylands v Fletcher*** tort was abolished.

Comment

The impact of the High Court decision is likely to be limited in the context of environmental damage. In practice, ***Rylands v Fletcher*** is rarely invoked for environmental damage, as nuisance is usually seen by plaintiffs as a more effective cause of action.

The case is, however, interesting for the light that it throws upon how the common law can contribute to the control and prevention of environmental degradation. One way in which the common law can make this contribution is to impose liability upon persons for engaging in activities that cause environmental damage. If those persons know that their behaviour is highly likely to result in substantial liability, they may be more inclined to refrain from the activities or to at least carry them out in such a way as to minimise significantly the risk of an "escape".[2] Through judge-made law, some rough, broad standards may be produced for the control of behaviour. Other social purposes in imposing liability include the equitable consideration that persons who contribute to environmental damage share in some of the costs of rectifying the damage, rather than the community generally bearing those costs.[3] Finally, the

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[1](1984) 154 CLR 672.

[2]In other words, the deterrence rationale, which is subject to significant doubts.

[3]This is the familiar cost internalisation argument.

social utility of carrying on a particular activity or use must be measured against the possible risks created by the activity or use.

It follows that the ways in which liability is imposed at common law are important. The more likely that a person's conduct will be penalized, the greater the deterrence and equitable effects of the common law may be. Customarily, there is a three-fold classification of liability, into ordinary liability, strict liability and absolute liability. Traditionally, strict liability at common law refers to liability that arises independently of whether or not an escape occurred through negligence, with the liability deriving from the fact that the defendant's conduct **caused** the escape (at least in theory). Only a few restricted defences are usually available against the imposition of strict liability. Those defences tend to relate to the causation of the escape, rather than the avoidability of the escape, as was pointed out by McHugh J. The ***Rylands v Fletcher*** defences include proving a stranger was responsible for the damage arising from the conduct, or showing that an entirely unforeseeable event caused the damage.

Stoljar, however, has argued that strict liability in effect relates to a shifting of the probative burden to defendants to exonerate themselves once the facts have been proven at a preliminary stage.[1] Merely contending that a ***Rylands v Fletcher*** situation exists, as in the deliberate bringing of dangerous goods onto land, may be sufficient to create a prima facie inference of gross negligence which must be displaced by a defence raised by the defendant. On one level, this is true; yet the rationale of ***Rylands v Fletcher*** is theoretically that "[T]he exercise of care is irrelevant". In other words, it can be simpler and more predictable to apply strict liability as all that is necessary is to show that damage has resulted from the **escape** of dangerous substances from within land as a result of some non-natural activity or keeping on the land.[2] There is a lessened need to prove culpability, which may demand very complex evidence.

As McHugh J points out, there may be cases where a negligence suit would not succeed even though a ***Rylands v Fletcher*** action might conceivably succeed. Those cases are most likely to occur in the field of land contamination, where contamination may gradually flow underground into the soil of a neighbouring property over a long period of time. ***Rylands v Fletcher*** liability differs from negligence which requires that:

> the occupier owed a duty of care to the person or property of the plaintiff;
> the occupier's conduct caused the damage caused be shown; and
> the standard of reasonable care was not satisfied in all the circumstances.

However, it often happens that the cause of an escape cannot be established, or that the standard of care expected of the occupier is indefinite, or that there were no reasonable precautions that could be taken by the occupier. For example, it may be difficult to show that an occupier should have taken measures to prevent the escape at a time when the existing state of knowledge was insufficient to show that measures should be taken. In other words, culpability may be unprovable even though it is readily possible to show that an escape of the contamination from a property has occurred as a fact.

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[1] Stoljar, S., "Concerning Strict Liability" in Finn, P., (ed) ***Essays on Torts*** (1989) 267, 287.

[2] Note that the possibility of the escape needs to have been known to the occupier. In practice, however, it can be difficult to show that the use of the land was a "non-natural" one. Indeed, Brennan and McHugh JJ both held that there was no Rylands v Fletcher liability in this case because there was no "non-natural" use.

Yet there is a range of social purposes for imposing liability upon the occupier of the land from which contamination originates.[1] For example, there may be a social interest in imposing the costs of cleaning-up the contamination upon the occupier for reasons of equity and deterrence. There could also be a further interest in encouraging occupiers to take measures to prevent future contamination by activities currently occurring on their land. Finally, it may be important to restrain occupiers from engaging in particularly hazardous uses of land altogether. The issue of whether the occupier is obviously culpable may well be less relevant for those social purposes.

The only rationale for retaining ***Rylands v Fletcher*** is its supposed strict liability basis. Otherwise, it is justifiably incorporated into the law of negligence, where liability is related to culpability. It was therefore necessary to consider carefully the policy reasons for imposing strict liability at common law. This issue was unfortunately not directly addressed by the majority, who failed to analyse the environmental law implications of abolishing ***Rylands v Fletcher***. McHugh J stressed that, without extensive research and input from the community, it was inappropriate to depart from long-established principles of the common law to adopt a radically new approach.

The High Court's decision merely highlights the inability of the common law to prevent or regulate environmental degradation. As has been stressed frequently by commentators in the past, negligence is subject to unpredictability as to the outcome of a particular case. One praiseworthy point is that the High Court re-affirms the concept of a non-delegable duty of care where persons are in a position of unequal knowledge and ability to protect themselves as compared with the persons whose conduct may result in an escape. But, while it is true that the emergence of the non-delegable duty of care means that persons are more likely to be held negligent for the spread of contamination or pollution, the imprecise nature of negligence may make it less likely that those persons will be held liable. This does not promote deterrence or equity as social objects. The common law, as has been pointed out, also cannot produce specific standards that govern the activities occurring on properties and is merely reactive to particular cases.

It now appears that the imposition of strict or absolute liability will tend to occur only where judges are expressly required by legislation to apply strict or absolute liability. In most cases of pollution moving from within a property to another property, such as the emission of particles that subsequently land elsewhere, environmental laws impose criminal liability upon the persons responsible. Under the **Environment Protection Act 1970 (Vic)**, for example, a number of air and land pollution offences are created. It was held by the Supreme Court of Victoria in ***Allen v United Carpet Mills Pty Ltd*** [1989] VR 323 that those offences impose absolute liability, with no defence being available.

The criminal offences can operate as a substitute, to some extent, for the common law. However, this form of liability does not ensure that the persons who are affected by the pollution are adequately compensated for their damage. Usually, there is no express provision for civil damages under environmental laws, so that those persons must still resort to the common law for compensation.[2] It appears that a breach of statutory duty action has never been brought in Australia with regard to an environmental law. Thus, with the abolition of the ***Rylands v***

[1] See Iles, A., "Financial Liability for the Clean-up of Contaminated Sites" (1994) 19 ***Melbourne University Law Review*** (forthcoming).

[2] It should be noted that section 65A of the **Environment Protection Act 1970 (Vic)** allows a person to seek an order for compensation to be paid by a person who has been convicted of a criminal offence under the Act. The compensation can include the reasonable or estimated costs of conducting a clean-up.

Fletcher tort, plaintiffs are largely limited to negligence, trespass or nuisance as causes of action. They must contend with the evidentiary and conceptual problems associated with those causes of action.

In the particular area of land contamination, there is thus a strong need for a national legislative response to the issue of distributing liability for the contamination among different parties. As has been noted in past issues of the *AELN*, the Australian and New Zealand Environment and Conservation Council is currently considering the creation of legislation that determines how the costs for cleaning up a contaminated site are to be apportioned. It is better to have legislative intervention that specifies with some precision the factors which must be considered in deciding whether or not to affix liability to a party, instead of leaving it to the uncertain operation of the common law.

In conclusion, ***Burnie Port Authority v General Jones Pty Ltd*** continues a trend in the courts away from the imposition of "strict liability" at common law towards a liability based upon culpability. While the decision is probably correct as a matter of legal analysis, it has failed to recognise the policy issues that underlie the imposition of strict liability, and highlights the deficiencies of the common law in responding to environmental degradation.

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