

A Thing Less Likely to Do Mischief: An Alternative Application of the Rule in *Rylands v Fletcher* to ‘Ultra-Hazardous’ Activities

Ryan Chan-Wei*

Introduction

Through the past century, the rule in *Rylands v Fletcher*¹ has been the subject of much debate, to the point where Francis Bohlen commented that yet another analysis of *Rylands v Fletcher* would merely be ‘a thrashing out of old straw’.² Considering how crowded the field is, it might be difficult to see what value yet another article can add, let alone one by an undergraduate. However, I humbly suggest that there is still more to be said, especially with respect to how *Rylands v Fletcher* has been applied in the specific context of ‘ultra-hazardous’ activities. In particular, the English courts have not adopted a distinct approach³ in applying the rule in *Rylands v Fletcher* to ‘ultra-hazardous’ activities despite valid concerns raised to the contrary,⁴ instead preferring to subject both ‘ultra-hazardous’ and non-ultra-hazardous’ activities to the same *Rylands v Fletcher* standard. This article will demonstrate that such a position can, and should, be rethought.

1. Overview

The existing debate concerning *Rylands v Fletcher* liability for ‘ultra-hazardous’ activities has largely been framed as a stark choice between two polarities, to the point where it was once described as ‘a storm centre’.⁵ On the one hand, some see *Rylands v Fletcher* as an opportunity to impose a blanket rule of strict liability for ‘ultra-hazardous’ activities, by embracing the enterprise liability approach that has significantly shaped American tort law, and leaving the non-‘ultra-hazardous’ *Rylands v Fletcher* cases to negligence.⁶ On the other hand, some see the principle as obsolete, arguing instead that the rule in *Rylands v Fletcher* is an anachronism in light of the development of the fault principle and that it should be subsumed into the broader tort of negligence, even in the context of ‘ultra-hazardous’ activities, as the Australian courts have done.⁷

In contrast, this article will suggest that a middle ground can be found. An over-extension of the rule in *Rylands v Fletcher* (i.e. by imposing a general regime of strict liability for ‘ultra-hazardous’ activities) is just as undesirable as subsuming it entirely into the law of negligence, as both are sweeping responses to a category of cases that often have unique fact situations and instead require a

* St. Anne’s College, Oxford. I am deeply grateful to Dr Imogen Goold and Benjamin Mak for their comments on an earlier draft. I would also like to express my heartfelt thanks to the editorial team of the Oxford University Undergraduate Law Journal for reviewing this article. Any and all errors remain my own.

¹ [1868] LR 3 HL 330 (HL).

² Francis Bohlen, ‘The Rule in *Rylands v Fletcher*’ (1911) 59 U Pa L Rev 298, 373 and 423.

³ This reluctance is primarily underpinned by concerns over the ‘uncertainties and practical difficulties’ of pursuing a separate approach for ‘ultra-hazardous’ activities, as highlighted by Lord Goff in *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 AC 264 (HL) 305. These concerns will be addressed in Section 3.

⁴ For instance, see John Fleming, *The Law of Torts* (9th edn, Law Book Company 1998) 341. Arguing in favour of strict liability, he criticizes *Read v Lyons* [1947] AC 156 (HL) for prematurely stunting the ‘development of a general theory’ of *Rylands v Fletcher* liability for ‘ultra-hazardous’ activities.

⁵ Cecil Wright, ‘The Adequacy of the Law of Torts’ (1961) CLJ 44, 52.

⁶ *Cambridge Water Co* (n 3) 304.

⁷ *Burnie Port Authority v General Jones Pte Ltd* [1994] HCA 13.

more calibrated approach. For instance, it will be shown that the Australian approach has the right normative instinct (i.e. to focus on fault),⁸ but the wrong practical implementation (i.e. the evidential requirement of proving duty of care and breach of that duty to make out the tort of negligence may be too onerous a burden for the defendant to bear).

Instead, *Rylands v Fletcher* liability should be kept as it stands in English law, with the exception that the test for ‘ultra-hazardous’ activities should be separate, because such activities carry a uniquely high risk of harm. Unlike ordinary activities, when engaging in an ‘ultra-hazardous’ activity, even a small degree of fault can lead to the manifestation of an inordinate amount of harm; there is thus value in treating them as distinct, in order to better account for the disproportionate risks they pose.

This article will therefore propose an alternative framework for assessing *Rylands v Fletcher* liability in the context of ‘ultra-hazardous’ activities, which consists of 1) a working definition of an ‘ultra-hazardous’ activity and 2) a ‘reduced fault’ liability test. It may not be a flawless approach in practice, but it is arguably better for the courts to adopt an untested framework that attempts to offer a more nuanced and context-specific analysis of individual cases, than to apply a rigid, broad-brush approach which swings to doctrinal polarities and ignores the factual differences across the broad spectrum of *Rylands v Fletcher* cases. After all, in the former, we are approximately right; in the latter, we are precisely wrong.⁹

2. Understanding the Rule in Rylands v Fletcher

In *Rylands v Fletcher*, the factual scenario was fairly straightforward. The defendants constructed a reservoir in order to provide water for their mill, with the permission of the owner of the adjacent land. They employed independent contractors to do so and they themselves took no part in the construction. While the defendants were not guilty of any negligence in their selection of the site for the reservoir, it eventually transpired that there were some long abandoned mine workings underneath the site. In particular, there were several old shafts, which appeared to have been filled in. When excavating the bed of the reservoir, the contractors came upon these shafts, but did not make their existence known to the defendants. It was found that the contractors were negligent in proceeding with the construction of the reservoir despite their knowledge of the shafts.

The plaintiffs were lessees of a mine that lay under land close to the reservoir. In working their mine, they had broken into some of the aforementioned ‘long abandoned mine workings’. After the contractors completed work on the reservoir, the defendants filled it with water. The shafts (which were filled in by soil) gave way under the pressure of the water, allowing the water to flow into the abandoned mine workings. The water then flowed into an opening the plaintiff had made when breaking into the abandoned mine workings, and from there the water finally flowed into the plaintiff’s mine.

At trial, the main point of contention was whether the defendants could be held liable irrespective of proof of negligence on their own part, or on the part of the independent contractors. Although the court had some doubts about whether an isolated escape, as opposed to a continuous state of affairs, could found an action in nuisance, the defendants were ultimately held liable.

In delivering the opinion of the Court of Exchequer Chamber, Blackburn J laid down the

⁸ The complex jurisprudential debate surrounding the role of corrective justice and strict liability in tort law is beyond the ambit of this article. For the sake of clarity, it will suffice to note that the former should be preferred in context of *Rylands v Fletcher* liability. For more details as to why the latter should be approached with caution, see Lord Goff’s judgment in *Cambridge Water Co* (n 3) 305-306. Also see John Fleming, *The Law of Torts* (9th edn, Law Book Company 1998) 369.

⁹ To paraphrase a quote from famed investor Warren Buffett, who once said, ‘It is better to be approximately right than precisely wrong.’

broad principle (subsequently affirmed by the House of Lords on appeal), which has come to be known as the rule in *Rylands v Fletcher*, that: ‘the person who for his own purpose brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.’¹⁰ To this, two more requirements have been added as the law developed: the land must be used in a way that is non-natural¹¹ and there must be foreseeability of damage of the relevant type.¹²

It is worth noting that although *Rylands v Fletcher* liability is sometimes mentioned in the same breath as strict liability, it is not actually strict liability in the traditional sense, which holds the defendant liable *regardless of fault*. In English law, liability under the rule in *Rylands v Fletcher* is currently only ‘strict’ in the much looser sense that the defendant may be held liable notwithstanding that he has exercised all due care to prevent the escape from occurring. Ultimately, a fault element (of unreasonable risk-taking) still matters, and this will be explored further in Section 4.

3. Defining an ‘Ultra-Hazardous’ Activity

A. Context and Existing Definitions

Since the alternative framework proposed for assessing *Rylands v Fletcher* liability in the context of ‘ultra-hazardous’ activities will be formed by a two-stage test, it is important to first delineate the meaning of an ‘ultra-hazardous’ activity. This section will demonstrate that, despite weighty arguments to the contrary, it is in fact possible to obtain a satisfactory working definition.

The arguments against adopting a definition of ‘ultra-hazardous’ activities are well known, but they are ultimately unconvincing. For instance, academics such as Peter Cane have suggested any attempts at defining ‘ultra-hazardous’ will always be problematic because the term is inherently too subjective. He argues that ‘ultra-hazardous’ conveys the idea of an unacceptable risk, but that the ‘level of risk we are prepared to accept in any particular activity depends on how highly we value that activity’.¹³ In light of this, he hesitates to re-define the rule in *Rylands v Fletcher* in the context of ‘ultra-hazardous’ activities, arguing that ‘this option is unattractive (...) because of the difficulty of defining the concept of an “ultra-hazardous” activity’.¹⁴ A similar sentiment was echoed by Donal Nolan when he noted (quoting Lord MacMillan in *Read v Lyons*) that ‘in a progressive world things which at one time were reckoned highly dangerous come to be regarded as reasonably safe’,¹⁵ and to attempt to frame a legal classification would therefore be ‘impracticable’.¹⁶ This is understandably so, because the law needs to account for evolving public attitudes on what constitutes a ‘highly dangerous’ activity, rather than rigidly operating a definition that is too inflexible to accommodate these changes.

In the same vein, the House of Lords in *Cambridge Water Co* endorsed a Law Commission report¹⁷ which expressed serious misgivings about ‘a general concept of “ultra-hazardous” activity’ because of ‘uncertainties and practical difficulties of its application’¹⁸ that arise from its subjectivity, with Lord Goff indicating that judges should be ‘reluctant to proceed down that path’¹⁹ if the Law Commission was unwilling to do so. This was underpinned by the reasoning that if a general rule

¹⁰ *Fletcher v Rylands* [1866] LR 1 Ex 265 (Exch Ch) 279.

¹¹ *Rylands* (n 1) 339.

¹² *Cambridge Water Co* (n 3) 301.

¹³ Peter Cane, ‘The Changing Fortunes of *Rylands v Fletcher*’ (1994) 24 U W Austl L Rev 237, 237.

¹⁴ *ibid.*

¹⁵ Donal Nolan, ‘The Distinctiveness of *Rylands v Fletcher*’ (2005) 121 LQR 421, 448.

¹⁶ *Read v Lyons* [1947] AC 156 (HL) 172.

¹⁷ Report of the Law Commission on Civil Liability for Dangerous Things and Activities (Law Com No. 32, 1970).

¹⁸ *Cambridge Water Co* (n 3) 305.

¹⁹ *ibid.*

concerning ‘ultra-hazardous’ activities cannot be applied with precision, it is probably best not to extend the rule in *Rylands v Fletcher* in English law, and instead leave regulation to statute, which can lay down more ‘precise criteria’.²⁰ On this view, a general rule runs the risk of riding roughshod over nuances in the differences between particular activities (e.g. changing societal perceptions), by imposing liability on a very broad (and potentially indeterminate) swathe of activities. In contrast, statutory regulation supposedly offers more precision because it imposes liability on a clearly defined set of activities that Parliament has deemed to be ‘ultra-hazardous’, after taking into account nuances (e.g. context-specific norms) that are uniquely relevant to determining whether an activity is ‘dangerous’.

However, while the aforementioned arguments are not without merit, it is ultimately unwise to leave the governance of ‘ultra-hazardous’ activities purely to statutory regulation, and not attempt to define them at all.

Firstly, a list stipulating which activities are ‘ultra-hazardous’ cannot cover infinite possibilities, so it is very likely that there would be gaps in the law. At times, such a *numerus clausus* approach may be appropriate (e.g. when delineating rights that can be created in property); however, for the sake of efficiency, it would be preferable to adopt a working legal definition that can be applied consistently and flexibly to all fact situations, and the subsequent paragraphs will demonstrate that such an analytical framework can indeed be found.

Secondly, with respect, coming up with a suitable definition might not be quite as impractical as Cane and Nolan make it out to be. Admittedly, there is inherent subjectivity in attempting to determine what level of risk is ‘acceptable’, but this article will also go on to show that any uncertainty that might arise could be tempered by the subsequent application of an objective standard (such as that of a reasonable man in the shoes of the defendant) in determining whether the risk is acceptable in a particular context.

In contrast to the English perspective, American jurists have adopted a markedly different approach in attempting to come up with a clearer definition of ‘ultra-hazardous’, such as in Section 520 of the First Edition of the Restatement of Torts, where an activity is deemed to be ‘ultra-hazardous’ if it: a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of utmost care and b) is not a matter of common usage.

What they have proposed is far from perfect, but it has at least convincingly demonstrated that it is indeed possible to have a working definition of an ‘ultra-hazardous’ activity. The concerns raised by English academics and judges about the inherent subjectivity of defining an ‘ultra-hazardous’ activity are valid, to the extent that the definition of ‘acceptable danger’ is constantly evolving. However, the American jurists rightfully differ in their belief that nuances such as changing societal perceptions can still be accounted for under an objective standard. On the whole, their proposed approach is a useful definitional guide, although there are certain aspects that would benefit from greater clarity or a more context-specific approach.

For instance, three fundamental aspects of this definition arguably call for substantial clarification. Firstly, what degree of risk is required? Secondly, to what extent does that risk have to be foreseeable? Thirdly, what is meant by ‘common usage’?

The lack of clarity surrounding the notion of ‘common usage’ is particularly concerning, as it is both vague and incoherent. It is vague because it is not clear whether ‘common’ refers to the public generally or just a class of people; even if it referred to a class of people, it would still be necessary to clarify what the minimum size of such a class may be, and how ‘common’ the activity has to be within the context of that class.

²⁰ *Cambridge Water Co* (n 3) 305.

However, a greater cause for concern is the incoherence of the notion that an ‘ultra-hazardous’ activity by definition has to be one ‘not of common usage’. From a policy standpoint, it is hard to see why this should be, because there are clearly examples of activities in ‘common usage’ that one might instinctively regard as ‘ultra-hazardous’. For instance, nuclear power plants have been recognized as ‘ultra-hazardous’ by the Nuclear Installations Act 1965, but it is plausible that, at one point, those living near Three Mile Island or Fukushima (or any city that depends on nuclear power to support its economy and energy needs) would have regarded nuclear power plants as being of ‘common usage’, in the sense that it was ‘customarily carried on by many people in the community’.²¹ Consider also the use of explosives to blast open a mine, which is likely to be regarded as an ‘ultra-hazardous’ activity. In an urban centre, this would clearly not be of ‘common usage’; however, by contrast, in a mining town, it is likely that this would be considered ‘common usage’ and not an unacceptable risk, because many residents of that town are likely to be involved in the mining activities too (and probably accustomed to the occasional debris flying into their property from the explosions).²²

Nevertheless, Section 520 of the First Edition of the Restatement of Torts can still serve as a useful definitional guide, even though it is somewhat unclear, because its emphasis on ‘common usage’ rightfully draws attention to the notion that the level of risk considered to be ‘unacceptable’ for the purposes of an ‘ultra-hazardous’ activity should depend on the context. Instead of imputing a consistent objective standard of ‘common usage’ to all fact situations, which is a rather broad-brush approach; a more context-specific approach would be beneficial, because the extent to which an activity is of ‘common usage’ can depend significantly on the norms of a particular locality.

B. Proposed Definition

The proposed definition builds on the foundations set out in the First and Second Editions of the Restatement of Torts, in particular by modifying the test from the Second Restatement. It should be noted that although the Second Restatement uses the term ‘abnormally dangerous’ activity instead of ‘ultra-hazardous’ activity, this is largely a matter of semantics. ‘Abnormally dangerous’ is meant to be a slightly more accurate descriptor of how such activities tend not to be of ‘common usage’, but for practical purposes it can be used inter-changeably with ‘ultra-hazardous’, as was done in the cases of *Langan v Valicopters*²³ and *Bennett v Larsen*.²⁴

It is also important to note that this stage of determining whether an activity is ‘ultra-hazardous’ in the first place is a necessary but insufficient prerequisite for imposing liability; liability only attaches in the second stage, after applying the ‘reduced fault’ liability test (which will be discussed in the next section). If an activity does not fulfil the ‘ultra-hazardous’ test in the first place, then the liability test subsequently applied will be that of the normal fault test under the tort of negligence or nuisance, rather than the ‘reduced fault’ test.

The test proposed in this article is modified to account for more context-specific criteria and to offer more clarification on issues such as the risk of harm. My submission is that the defendant would be engaging in an ‘ultra-hazardous’ activity if a reasonable man in the defendant’s shoes would conclude that:

- i. The activity is inherently dangerous, in that it involves a high risk of severe harm that cannot

²¹ Section 520(e) of the First Edition of the Restatement of Torts and Section 520(i) of the Second Edition of the Restatement of Torts.

²² It is important to note that on occasion ‘there will be a regime of statutory liability in force, which will displace the common law rule, and frequently exceed it’, as observed by Jenny Steele in *Tort Law* (3rd edn, Oxford University Press 2014) 697. For instance, consider Section 209 of the Water Industry Act 1991. However, barring the presence of legislation, it is still necessary to craft a working definition of an ‘ultra-hazardous’ activity that is broad enough to cover the examples above, lest they fall through the cracks.

²³ *Langan v Valicopters Inc* 567 P 2d 218 (Wash 1977).

²⁴ *Bennett v Larsen Co* 348 N W 2d 540 (Wis 1984).

be eliminated despite the exercise of reasonable care;

ii. And the activity is not of ‘common usage’ (in the sense that it is neither customarily nor contextually appropriate to the locality in which it is carried out), such that the risks that accrue from it are deemed ‘unacceptable’.

The first limb accounts for the higher risk of harm threshold inherent in ‘ultra-hazardous’ activities. Additionally, it highlights a key distinguishing factor between liability for ‘ultra-hazardous’ activities and ordinary negligence liability, which is that liability under the former can still be incurred notwithstanding the exercise of reasonable care. In contrast, it is unlikely that ordinary negligence liability would be found if the harm could not be eliminated despite the exercise of reasonable care, as it would not be ‘fair, just and reasonable’ (under the third limb of the *Caparo*²⁵ test) for the courts to implement a duty of care in that context.

The second limb addresses variations in context that are not accommodated by the Second Restatement’s original definition, as discussed earlier, because the extent and type of risk that one might deem abnormal or ‘unacceptable’ ultimately depends on the context. Furthermore, it also addresses the possibility that the same activity can carry a different risk of harm, depending on the circumstances. For example, storing nuclear waste in an underground bunker in the middle of the desert carries a lower risk of harm than storing it in an underground bunker next to a densely populated city.

The test might be subject to criticism on the basis that its objectivity is merely a veil for the judiciary to apply a policy decision, as an objective standard tends to be inherently vague and how it is applied depends largely on who decides the case. Nevertheless, this has not prevented a workable objective test from being applied in numerous other circumstances (e.g. negligence and product liability), and thus should not pose a significant obstacle in this instance either.

4. An Alternative Application of the Rylands v Fletcher Rule to ‘Ultra-Hazardous’ Activities

A. Lord Bingham’s *Obiter Dictum* in *Transco*²⁶

There is value in treating ‘ultra-hazardous’ activities as distinct, because they carry a uniquely high risk of harm. Unlike ordinary activities, when engaging in an ‘ultra-hazardous’ activity, even a small degree of fault can lead to the manifestation of an inordinate amount of harm; and such activities should therefore be afforded a separate test in order to better account for the disproportionate risks they pose. Although the English courts have been hesitant to treat ‘ultra-hazardous’ activities as distinct, due to difficulties in defining ‘ultra-hazardous’, the preceding section has shown that it is possible to come up with a working legal definition. Having addressed that, this article will now explore how Lord Bingham’s *obiter dictum* in *Transco* could hypothetically be applied, by extrapolating from his passing remarks in that case to create a legal framework for thinking about *Rylands v Fletcher* liability in the specific context of ‘ultra-hazardous’ activities.

In *obiter*,²⁷ Lord Bingham observed that there was a ‘category of case, however small it may be’ in which it ‘seems just’ to extend the rule in *Rylands v Fletcher* and impose liability ‘even in the absence of fault’. He did not offer any concrete explanations, but instead merely offered a few cases as examples of what would constitute this category, such as *Cory Brothers*,²⁸ *Rainham Chemical Works*²⁹ and *Cambridge Water Co*, in which the defendants were all arguably engaged in some form of ‘ultra-hazardous’ activity. However, although Lord Bingham referred specifically to an ‘absence of fault’, a common thread running through each of these cases is in fact the presence of a fault element

²⁵ *Caparo Industries plc v Dickman* [1990] UKHL 2, [1990] 2 AC 605.

²⁶ *Transco Plc v Stockport MBC* [2003] UKHL 61, [2004] 1 AC 1 [6].

²⁷ *ibid.*

²⁸ *Attorney General v Cory Brothers & Co Ltd* [1921] 1 AC 521 (HL).

²⁹ *Rainham Chemical Works v Belvedere Fish Guano* [1921] 2 AC 465 (HL).

of unreasonable risk-taking. However, the degree of fault in these cases is too insignificant to be captured by traditional, currently legally recognized standards of fault (such as negligence).

For instance, Lord Bingham suggests that liability should have been imposed in *Cory Brothers*, even if the claimants had failed to prove negligence, since ‘memories of the tragedy at Aberfan are still green’.³⁰ The facts of *Cory Brothers* are similar to that of the Aberfan tragedy, where a waste tip slid down a mountainside into a village and killed many people, as the defendants placed up to half a million tons of mineral waste on a steep hillside, some of which eventually slipped off and damaged nearby properties. Lord Bingham appears to be suggesting that liability in the absence of negligent fault might be appropriate because the defendant was aware of the potential for severe harm to occur, and is therefore at fault for proceeding with the activity without making any effort to take precautions to mitigate the risk of harm materializing. This echoes the view of Viscount Haldane in *Cory Brothers*, who argued that instead of proving negligence (as the claimants did), it would suffice merely to ‘show that the hillside was steep, and that to pile rubbish on it in a large heap was to put a dangerous structure there’.³¹

Similarly, in *Rainham Chemical Works*, the defendants were involved in manufacturing picric acid (an explosive chemical) for the British government to make munitions during the First World War. However, they were not experts in chemistry and did not realize that that the picric acid was in fact highly explosive. Although there was no proof of negligence in their production process, they were nonetheless held liable for damage to neighbouring property when a fire occurred in their factory and the picric acid led to an explosion of ‘terrific violence’.³² A fault element is less obvious than in *Cory Brothers*, but was arguably still present: the chemical clearly had the potential to cause serious harm (the defendants knew that they were being manufactured as part of a war effort to make explosive munitions), and the defendants could be faulted for not attempting to determine the exact extent to which their chemicals were explosive. A reasonable man would arguably have made an effort to identify the specific explosive potential of the chemical, before proceeding with their production, in order to be better placed to take precautions to prevent the risk of harm from materializing.

Finally, Lord Bingham held that an extension of the rule in *Rylands v Fletcher* would be justified in *Cambridge Water Co* if the damage had been foreseeable by a reasonable man, and it is clear a fault element would have been present on the part of the defendant tannery in such a case, as a reasonable man would have taken more steps to prevent their industrial solvents from percolating down to the water table – after all, it was established in the case that the solvents were ‘bound to cause mischief’ if they escaped.³³

It is important to note that although Lord Bingham might appear to be proposing the imposition of a strict liability regime (albeit limited to the abovementioned fact situations), since he mentions the imposition of liability ‘even in the absence of fault’,³⁴ this is unlikely to be the case. It would be inordinately difficult to justify the imposition of a *limited* strict liability regime,³⁵ as any arguments used to establish this (e.g. economic efficiency) are likely to apply with equal force to the

³⁰ *Transco Plc* (n 26) [6].

³¹ *Attorney General* (n 28) 536.

³² *Rainham Chemical Works* (n 29) 471.

³³ *Cambridge Water Co* (n 3) 288-289.

³⁴ *Transco Plc* (n 26) [6].

³⁵ Even if a case could successfully be made for the imposition of a limited strict liability regime (e.g. ‘only in the absence of fault’), it would then be very difficult to justify circumscribing it only to that particular context, because of the all-encompassing nature of strict liability, which imposes liability *regardless* of whether the defendant was at fault or not. Therefore, it is likely that any arguments for a *limited* strict liability regime would apply with equal force to a *general* strict liability regime, because the former is not easily distinguishable from the latter.

imposition of a *general* strict liability regime,³⁶ and Lord Bingham is clearly against the latter, believing it is properly a matter for Parliament and not the courts to decide.³⁷

B. Proposition: 'Reduced Fault' Liability Test

So far, it is clear from Lord Bingham's *obiter dictum* that a degree of fault may well be present in *Rylands v Fletcher* cases that involve 'ultra-hazardous' activities. However, a new (reduced) standard of fault should be adopted when assessing the liability of defendants, as the degree of fault in those cases is often too insignificant to be captured by traditional, currently legally recognized standards of fault.

Thus, extrapolating from the underlying thread of a fault element identified in the three cases mentioned earlier, liability could be imposed with respect to an objective test that measures fault with respect to foreseeability of risk of harm, with the fault threshold fulfilled if a 'reasonable person' in the defendant's shoes would have foreseen a high risk of harm materializing (e.g. personal injury, property damage etc.) and acted differently. There may not be any negligent breach of a duty of care, but *Rylands v Fletcher* liability should still be incurred on the basis that the defendant did not adequately address the inherent dangers present in an 'ultra-hazardous' activity.

The lowered fault requirement applied in this test does not have a direct equivalent in tort law, but a parallel could be drawn to the *Caldwell* test,³⁸ which was formerly the test for recklessness in criminal law, especially if the second limb of that test was modified to make it objective as well. In essence, the modified variant of the *Caldwell* test applied in this context would impose liability on a defendant for all damage which is not too remote a consequence of his actions (following the *Wagon Mound*³⁹ principles, as applied in *Hughes v Lord Advocate*⁴⁰) if:

- i. The defendant does an act, which he should have reasonably foreseen as leading to a high risk of harm materializing,
- ii. And a reasonable man in the defendant's shoes would not have taken such a risk.

The ostensible harshness of this objective test towards the defendant is balanced out by the fact that it can only be applied once the activity in question has fulfilled the 'ultra-hazardous' test, whose context-specific analysis sets a high bar for arguing that an activity is 'ultra-hazardous' in the first place. It is a difficult threshold to fulfil, because it must be shown that the risks were 'unacceptable' in a very specific context (and not just generally, which would have been easier to establish), and this acts as a control mechanism to ensure that only defendants engaging in activities with a markedly unacceptable level of risk are deservedly subject to the more stringent 'reduced fault' test.

At any rate, it is important for this test (and the 'ultra-hazardous' test as well) to be an objective one assessed with respect to the standard of the 'reasonable man' as opposed to a subjective test; this objectivity acts as a control mechanism⁴¹ that judges can use to lay down extra-legal standards without which the law 'cannot do its work in a sufficiently sensitive way'.⁴² In the case of *Rylands v Fletcher* liability for 'ultra-hazardous' activities, such 'sensitivity' is necessary in order for judges to account for

³⁶ Regrettably, this article does not have the scope to delve further into the intricacies of strict liability; it will suffice to note that there are good reasons to be wary about the imposition of a strict liability regime, because, *inter alia*, it runs the risk of riding roughshod over key tort principles such as corrective justice. For further reading, consider 'Tony Honoré, *Responsibility And Fault* (Hart Publishing 1999)' and the corresponding Festschrift 'Peter Cane and John Gardner (eds), *Relating To Responsibility: Essays for Tony Honoré on His Eightieth Birthday* (Hart Publishing 2001)'.

³⁷ *Transco Plc* (n 26) [6].

³⁸ *R v Caldwell* [1982] AC 341 (HL).

³⁹ *Overseas Tankship Ltd v Morts Dock and Engineering Co Ltd* [1961] UKPC 2.

⁴⁰ *Hughes v Lord Advocate* [1963] UKHL 8, [1963] AC 837.

⁴¹ John Gardner, 'The Many Faces of the Reasonable Person' (2015) 131 LQR 563.

⁴² *ibid*, 4.

the varied impacts that differing contexts can have on the extent to which an activity is ‘ultra-hazardous’ and what a reasonable response to the risks present would be. An example would be that a defendant storing chemical waste is likely to be considered an ‘acceptable risk’ in an industrial town, but not in an urban centre, and therefore the level of precautions a defendant would be reasonably expected to undertake will be higher in the urban centre than in the industrial town. Unlike the Pearson Commission’s suggestion⁴³ to arbitrarily draw a line in the sand and impose strict liability on certain activities by statutory instrument, this ‘reduced fault’ test offers a more calibrated response and does not ride roughshod over the impact that the context can have.

Applying the proposed test to the cases mentioned above, both limbs would have been fulfilled in *Cory Brothers*, as 1) it is clear on the facts that the defendant should have reasonably foreseen (and in fact did foresee) a risk of harm materializing from the unsecured mineral waste slipping off the heap and 2) a reasonable man in the shoes of the defendant would not have taken such a risk, as Viscount Haldane clearly states that ‘it was *negligent* to put (the waste) there without taking adequate precautions [emphasis added]’.⁴⁴ Similarly, both limbs would have been fulfilled in *Rainham Chemical Works*, as 1) the defendants should have reasonably foreseen a risk of harm materializing from manufacturing an explosive chemical and 2) knowing of the risk of explosion, a reasonable man would not have proceeded with production without first determining the extent to which the chemical could pose a hazard, in order provide for adequate protective measures. It is not necessary for the defendant to have knowledge of all the circumstances before liability can be found, as long as the defendant is sufficiently aware of surrounding factors that should reasonably give rise to a cause for concern.

Ultimately, this alternative approach attempts to strike a balance between two extremes – the American approach, which has extended the rule in *Rylands v Fletcher* to impose strict liability for all ‘ultra-hazardous’ activities (though they now use the slightly different terminology of ‘inherently dangerous activity’), and the Australian approach, that has subsumed the rule in *Rylands v Fletcher* into the tort of negligence.

On the one hand, the American approach imposes a broad swathe of liability, and no cases ‘fall through the cracks’, but the imposition of a general regime of strict liability comes at an inordinately significant cost in the context of *Rylands v Fletcher* liability (which this article unfortunately does not have the scope to discuss).⁴⁵ *Inter alia*, a strict liability regime is likely to disrespect our status as autonomous agents with inherent dignity because it may hold us liable for things we have not voluntarily chosen. By contrast, a fault-based approach respects our autonomy by ensuring that we are only liable for the things we have chosen by our own volition to do, and should be preferred in the context of *Rylands v Fletcher* liability for ‘ultra-hazardous’ activities.

On the other hand, the Australian approach avoids the drawbacks of a general strict liability regime, but requiring claimants bring a negligence claim instead sets the bar too high, making it too easy for a defendant to escape liability; the requirement to establish a duty of care and then breach of that duty may be an ‘insurmountable evidentiary burden’.⁴⁶ For instance, as discussed earlier, in the three cases mentioned by Lord Bingham in *Transco*, the defendants were ‘at fault’ in some way, but not always to the point that they would have been liable in negligence.⁴⁷ Although the High Court of

⁴³ *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (Cmd 7054, 1978) (The Pearson Commission).

⁴⁴ *Attorney General* (n 28) 536.

⁴⁵ As mentioned previously (n 8), for more on the dangers of a general strict liability regime, see Lord Goff’s judgment in *Cambridge Water Co* (n 3), 305-306.

⁴⁶ John Murphy, ‘The Merits of *Rylands v Fletcher*’ (2004) 24 OJLS 643, 660.

⁴⁷ This was also the case in *Ilford Urban District Council v Beal and Judd* [1925] 1 KB 671 (KB), in which the source of the harm was not discoverable by reasonable care, hence there could not have been an actionable negligent breach of duty.

Australia was right to conclude in *Burnie Port Authority* that a duty of care analysis is appropriate since *Rylands v Fletcher* cases often reflect a relationship where the claimant is in a special position of dependence or vulnerability, it is precisely because of this vulnerability that it might not be appropriate for a *Rylands v Fletcher* case to be brought under a negligence action. After all, it is eminently conceivable that the disparity between the plaintiff and defendant could be so large (e.g. the defendant might be a large industrial enterprise) as to be ‘highly improbable that a (relatively impecunious) claimant would be able to establish the necessary lack of reasonable care for the purposes of a negligence action’.⁴⁸ Essentially, the Australian approach has the right normative instinct (to focus on fault), but the wrong practical implementation (the evidential requirement of proving duty of care and breach of that duty is too onerous a burden for the defendant to bear).

In contrast, this alternative approach of applying a ‘reduced fault’ test attempts to tread the middle ground and offers a more calibrated approach. It lowers the bar from the Australian approach, such that claims can still be brought as long as some fault element can be established. At the same time, this does not impose a regime of strict liability as broad as the American approach, which may prevent cases from slipping through the cracks, but also brings with it a host of undesirable attendant consequences.

By way of illustration, consider two defendants – one storing hazardous chemicals, and another transporting nuclear waste. The former is aware that his chemicals are somewhat hazardous, but does not make an effort to determine exactly how hazardous they are, beyond placing them in ordinary storage barrels conventionally used for storing hazardous chemicals. However, the chemicals are more hazardous than he expects, eventually corroding the barrels and leaking out, causing severe property damage. In contrast, the latter takes precautions that reduce the level of risk to miniscule proportions, such as transporting the nuclear waste in an armoured train, using several layers of durable protective casts.⁴⁹ However, the waste leaks out when the train is derailed due to a fault in the tracks, and causes equally severe property damage.

According to the American approach, which imposes a general regime of strict liability for all ‘ultra-hazardous’ activities, it is likely that both defendants will be found liable. On the other end of the spectrum, according to the Australian approach, it is plausible that neither defendant will be found liable. In the latter case, there was no negligence on the part of the defendant; in the former, it may not be possible to prove negligence, as the defendant’s fault may not have been sufficient to establish a breach of duty (as in *Rainham Chemical Works*).

However, under the proposed test, a more calibrated response can be found, such that the defendants’ fault is taken into account and they are not treated with the same broad-brush approach despite their different factual situations. Applying this test to the first defendant, he would have been found liable, as it is 1) it is plausible that he should have reasonably foreseen a risk of harm materializing from storing hazardous chemicals and 2) knowing of the risk of harm, a reasonable man would have first determined the extent to which the chemicals could pose a hazard, before proceeding with storage, in order to ensure that adequate protective measures were taken to prevent their escape. In contrast, applying this test to the second defendant, he would not have been found liable. Even though 1) it is reasonably foreseeable that transporting nuclear waste might lead to a high risk of harm materializing, 2) a reasonable man in the defendant’s shoes would have taken such a risk anyway, because of the extensive precautions that had been taken and the fact that he is unlikely to have had any way of knowing about a fault in the tracks.

Finally, a corollary of the ‘reasonable man’ element in the second limb of the test is also that a defendant will not be liable for any damage that it would have been unreasonable to expect him to know

⁴⁸ John Murphy (n 46), 660.

⁴⁹ An example borrowed from Ken Kress, ‘The Seriousness of Harm Thesis for Abnormally Dangerous Activities’ in David G. Owen (ed), *Philosophical Foundations of Tort Law* (Oxford University Press 1995) 281.

about (e.g. damage arising due to unforeseen occurrences). By way of yet another example, consider a defendant engaging in an ‘ultra-hazardous’ activity such as using dynamite to blast a tunnel through a mountain (this carries with it the risk of landslides). As long as he has taken adequate precautions such as putting up warning signs well in advance and scanning the immediate vicinity to make sure there are no civilians present, he would not be liable if some hikers disregarded his warnings, set up a camp near the mountain at the last minute and consequently were injured or killed by the landslide resulting from the explosion. After all, it is plausible that a reasonable man in the defendant’s shoes would have gone ahead with the activity anyway, as all necessary precautions were taken and there was no way to know about the presence of the hikers.

5. Conclusion

This article has proposed an alternative framework that analyzes *Rylands v Fletcher* liability for ‘ultra-hazardous’ activities in a way that seeks to tread the middle ground between the doctrinal extremes of the American approach and the Australian approach. Although untested and probably far from perfect, it is hoped that this framework is nevertheless a useful contribution to the existing debate on *Rylands v Fletcher*, because it endeavours to apply an ‘approximately right’ calibrated approach to a problem that has thus far been vulnerable to the ‘precisely wrong’ broad-brush approaches which swing to the doctrinal extremes of either imposing a general regime of strict liability, or subsuming the rule in *Rylands v Fletcher* entirely into the law of negligence.