a trial, but the state is barred (for a relatively innocuous reason) from proceeding – that the right to private prosecution should have practical effect.

FINDLAY STARK

RYLANDS v FLETCHER RESTRICTED FURTHER

FEW cases in tort law are better known than *Rylands v Fletcher*, in which Blackburn J. formulated ((1866) L.R. 1 Exch. 265) and the House of Lords affirmed with minor modifications ((1868) L.R. 3 H.L. 330) the rule that a defendant is strictly liable for damage caused by the escape from his land of things which he has accumulated in the course of a "non-natural" use of the land and are likely to do mischief if they escape. Over the years the rule has been emasculated, partly due to the growing influence of negligence ideas but also because of its judicial categorisation as a sub-species of nuisance. In *Transco Plc v Stockport MBC* [2003] UKHL 61, [2004] 2 A.C. 1, at [39], Lord Hoffmann was little surprised "that counsel could not find a reported case since the Second World War in which anyone had succeeded in a claim under the rule". However, as H.H.J. Peter Coulson Q.C. noted in *LMS International Limited v Styrene Packaging and Insulation Limited* [2005] EWHC 2065 (TCC), there have in fact been quite a few such cases in that period, most of which concern an escape of fire. These cases, it seems, provide the last bastion of the rule in *Rylands v Fletcher*. Hence when the application of the rule to damage by fire came under scrutiny in *Stannard (t/a Wyvern Tyres) v Gore* [2012] EWCA Civ 1248, it was bound to be of importance both for the rule and fire claims.

As part of his tyre-fitting business, operated from premises on an industrial estate, Stannard stored about 3,000 tyres. One night a fire accidentally broke out on his premises, probably due to electrical wiring. The fire ignited the tyres, intensifying and spreading onto Gore's adjoining premises, which were destroyed. Gore sued in negligence and under the rule in *Rylands v Fletcher*. At first instance, the claim in negligence failed. The recorder found that Stannard was not at fault regarding the keeping of the electrical wiring or the storage of the tyres. Thus he was not negligent for the starting or spreading of the fire. Nonetheless, he found for Gore on the ground that liability under *Rylands v Fletcher* was established. Stannard appealed against the finding.

In a judgment running to 170 paragraphs, the Court of Appeal unanimously allowed the appeal. After a thorough review of the

case law with particular emphasis on *Transco*, Ward L.J. extracted the following framework of liability under the rule in *Rylands v Fletcher*:

> (1) The defendant must be the owner or occupier of land; (2) he must bring or keep or collect an exceptionally dangerous or mischievous thing on his land; (3) he must have recognised or ought reasonably to have recognised, judged by the standards appropriate at the relevant place and time, that there is an exceptionally high risk of danger or mischief if that thing should escape, however unlikely an escape may have been thought to be; (4) his use of land must, having regards to all the circumstances of time and place, be extraordinary and unusual; (5) the thing must escape from his property into or onto the property of another; (6) the escape must cause damage of a relevant kind to the rights and enjoyment of the claimant's land; (7) damages for death or personal injury are not recoverable; (8) it is not necessary to establish the defendant's negligence but an Act of God or the act of a stranger will provide a defence.

Applied to the facts, this test was not satisfied. First, the tyres, which were the thing brought by Stannard on his land, were not exceptionally dangerous. Secondly, Stannard neither recognised nor ought reasonably to have recognised that there was an exceptionally high risk of danger if the tyres should escape. Thirdly, keeping tyres, even in large quantities, on tyre-fitting premises was not for the time and place an extraordinary or unusual use of the land. Finally, the tyres themselves did not escape.

The key feature of the decision is the assertion that the rule in *Rylands v Fletcher* requires in all cases that it is the thing brought, kept or collected on the defendant's land which must escape and cause damage. The Court of Appeal rejected a special operation of the rule in fire cases. This would have entailed that it would be enough that a dangerous thing (*i.e.* a thing likely to catch fire and where the fire would be likely to spread) was brought onto the land and started a fire which escaped, causing damage. Rather a narrower rule applies: the fire must be brought onto the land and escape. Cases supporting the wider rule were doubted. *Musgrove v Pandelis* [1919] 2 K.B. 43, where a claim under *Rylands v Fletcher* was allowed when a motor-car with petrol in its tank caught fire that escaped and caused damage, was singled out for harsh criticism. Ward L.J. treated it as "a fact sensitive case" that ought to be "relegated to a footnote in the history of *Rylands v Fletcher*" (at [49]).

The Court of Appeal's analysis of this point differs from that found in many textbooks, where it is explained that under *Rylands v Fletcher* it is not always necessary that the dangerous substance itself should escape, but it is enough that its consequences do (see, *e.g.*, S. Hedley, *Tort*, 7th ed., (Oxford, 2011), 199; N.J. McBride & R. Bagshaw, *Tort*

Law, 4th ed., (Harlow, 2012), 482). This wider view is an accurate reading of the pre-existing case law, which was primarily concerned with, but not restricted to, fire cases. For example, the rule in *Rylands v Fletcher* has been applied where, after an explosion, damage was caused by the escape of something other than the explosives themselves, such as debris (*Miles v Forest Rock Granite Co* (1918) 62 S.J. 634). The Court of Appeal considered that *Transco* weighed heavily against any expansive view of the rule in *Rylands v Fletcher*. Yet this precise point was not discussed in *Transco*, where the House of Lords could have easily overruled *Musgrove* as part of its major re-examination of *Rylands v Fletcher*. Thus it was arguably open to the Court of Appeal to adopt the wider view.

Whether it was preferable to do so depends in part on matters of policy. More specifically, who ought to pay for the consequences of an accidentally-started fire? Ward L.J. offered a glimpse of the Court of Appeal's opinion in his statement that "the moral of the story is taken from the speech of Lord Hoffmann: make sure you have insurance cover for losses occasioned by fire on your premises" (at [50]). This referred to Lord Hoffmann's observation in *Transco* that there should be no liability under *Rylands v Fletcher* if the resulting damage was something against which the claimant could reasonably be expected to insure. This reasoning is problematic. Insurability is a complex issue and using it to determine liability is fraught with difficulties (see, *e.g.*, J. Stapleton, "Tort, Insurance and Ideology" (1995) 58 M.L.R. 820). In any case, it does not explain why it is fairer for the claimant to have to take out insurance covering the risk. Contrary to the views of Lord Hoffmann and Ward L.J., there is considerable force in Lord Hobhouse's opinion in *Transco* that "he who creates the relevant risk and has, to the exclusion of the other, the control of how he uses his land, should bear the risk" and with it the economic burden of insurance.

The Court of Appeal's decision diminishes the significance of *Rylands v Fletcher* in fire cases since the re-stated test would rarely apply to them. There are two reasons for this. The first is the requirement that fire is brought onto the land, which is limited to cases where "the fire has been deliberately or negligently started" by the occupier or someone he is responsible for. Ward L.J. saw this as a relic of the medieval custom of the realm under which a man had to keep his fire (*ignem suum*) safe. Lewison L.J.'s approach was even narrower. He held that *Rylands v Fletcher* could apply only where the fire was deliberately started, thus being no more than the *ignis suus* rule, which in his view was concerned with fires deliberately lit. The second reason is that starting a fire on one's land will often be an ordinary use of the land.

Where does this leave the rule in *Rylands v Fletcher*? In light of the House of Lords' opinion in, among others, *Transco*, there is little hope that it would develop into a general "strict" liability rule for damage caused by abnormally dangerous activities. The current judicial preference is for retaining but restricting the rule. This is hardly satisfactory. One can no longer agree with Laws L.J. in *Arscott v Coal Authority* [2004] EWCA Civ 892, that the rule is "alive and well." Years of erosion have taken the life out of it, so much so that one wonders whether it would not be better to put it out of its misery by abolishing it altogether.

STELIOS TOFARIS

NEGLIGENCE: INTO BATTLE

CAN soldiers killed or injured during combat sue the Ministry of Defence for failing to protect them? At first blush this sounds like the latest in that series of questions to which the terse answer is "no". Such claims, in negligence, have previously been given short shrift: *Mulcahy v Ministry of Defence* [1996] Q.B. 732 (which P.S. Atiyah said was "surely entitled to the prize for the most undeserving claim of the decade (which is saying something)": *The Damages Lottery* (Hart, 1997), p. 90). On the other hand, the Ministry clearly owes duties to its employees both at common law and under the Health and Safety at Work Act 1974, as confirmed in cases concerning injuries during military training exercises (*e.g.*, *Chalk v MoD* [2002] EWHC 422 (QB) and *Fawdry v MoD* [2003] EWHC 322 (QB)). Furthermore, since the claim in *Mulcahy* was dismissed, the Human Rights Act 1998 has imposed new duties upon the Government. Might the line in the sand now be crossed?

Smith v MoD [2012] EWCA Civ 1365 concerned soldiers wounded or killed during the Iraq war. There were two groups of incidents and claims. In the first, numerous "Snatch" Land Rover vehicles (which were notoriously lightly armoured) had been attacked using "improvised explosive devices". In the second incident, a tank from a different regiment of the British army had shelled the claimant soldiers (mistaking their identity). The claimants sought to rely upon the MoD's obligation to safeguard their right to life under Article 2 of the European Convention on Human Rights, or upon common law negligence, or both. The gist of the alleged breaches was a failure to provide suitable equipment (properly armoured Land Rovers; automatic recognition systems to guard against "friendly fire") or adequate training in vehicle recognition.