It is questionable whether the fact that the defendant caused V's mistake can properly be the justification for widening the scope of operative mistakes in kidnap beyond those found in *Elbekkay, Flattery* etc. Buxton L.J. justified this by distinguishing passive mistake by V from positive deception by D. But is this really satisfactory? Did Clarence positively represent himself as being healthy or merely fail to tell his wife that he was diseased? If he did not actually cause her mistake, he certainly created the situation in which her mistake was made. So it is arguable that there is nothing here in *Cort* that can be used to distinguish it from *Clarence*.

As for the second element, if fraud in kidnapping requires intent to induce V's mistake, then this may indicate greater culpability than the lack of reasonable belief in V's consent that the 2003 Sexual Offences Act now requires for sexual offences, or the lack of an honest belief in V's consent required by the current rules on non-sexual offences against the person. But even this distinction is not wholly convincing. If the presence of fraud is what matters, then why in other offences against the person is the range of operative mistakes still limited to those found in *Elbekkay* and *Flattery* in cases where fraud is present?

If this is so, then kidnapping cannot sensibly be distinguished from other offences against the person. From this it follows that the category of operative mistakes ought to be limited for all offences against the person or for none. The "none" approach in *Cort* has the disadvantage of widening the offence of kidnapping a great deal and much will now depend on whether V has also been "carried away". However, the categorisation of operative and inoperative mistakes has never been satisfactory and there is much to be said for the "clean slate" approach of Buxton L.J. If limits are really necessary, other and more convincing limits must be found instead.

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RYLANDS LIVES

THE defendant in *Rylands* v. *Fletcher* (1866) L.R. 1 Exch. 265 had constructed a large reservoir on his land from which water escaped and flooded the plaintiff's mines. The defendant was held strictly liable and the case has since been treated as laying down a distinct principle of liability separate from nuisance and negligence. Under *Rylands*, a defendant is liable for harm caused by the escape of

https://doi.org/10.1017/S0008197304256586 Published online by Cambridge University Press

anything brought or kept on the defendant's land for a non-natural use and which is likely to cause harm if it escapes.

Rylands has not had a happy history. Although the rule has its roots in nuisance, its scope has not been clear, with courts sometimes extending it to personal injury cases (*e.g. Hale* v. *Jennings Bros*. [1938] 1 All E.R. 579) while imposing numerous exceptions to limit its reach (see *Transco plc* v. *Stockport Metropolitan Borough Council* [2003] 3 W.L.R. 1467, [2003] UKHL 61, at [30]–[38] *per* Lord Hoffmann). The key concepts of "dangerousness" and "non-natural use" remain obscure. The rapid expansion of negligence, the development of statutory regimes for dangerous activities and the overlap with nuisance have raised questions as to the viability of *Rylands*. The House of Lords in *Cambridge Water Co*. v. *Eastern Counties Leather plc* [1994] 2 A.C. 264 left very little room for *Rylands* to operate outside nuisance, and the High Court of Australia has abolished the rule by absorbing it into the tort of negligence (*Burnie Port Authority* v. *General Jones Pty. Ltd.* (1994) 179 C.L.R. 520).

In its recent decision of *Transco* (above), the House of Lords was asked to follow the Australian High Court and abolish *Rylands*. The House refused to do so, holding that *Rylands*' demise would leave a lacuna in the law. The facts in *Transco* were that a water pipe designed to supply water to the respondent council's block of flats leaked, resulting in water collecting on the respondent's land and flowing into an embankment, also owned by the respondent, which supported the appellant's high-pressure gas main. The embankment collapsed and the unsupported gas main posed a serious risk, which the appellants avoided by repairing the embankment. They claimed the cost of the remedial measures under *Rylands*. The House unanimously dismissed the appeal on the grounds that the water pipe was not a non-natural use, nor was it dangerous.

The justification for retaining *Rylands* was largely based on social policy and *Transco* is interesting for the Lords' markedly different approaches. It was noted in *Transco* that *Rylands* itself was decided in a climate of social concern about the dangers of reservoirs and that arguably that was what persuaded the *Rylands* court that strict liability was justified (see B. Simpson, "Legal Liability for Bursting Reservoirs: The Historical Context of *Rylands* v. *Fletcher*" (1984) 13 J. Leg. Stud. 209). Lord Bingham of Cornhill accepted that the common law should reflect public concern in such cases and impose strict liability with respect to certain activities (para. [6]). Indeed, similar social concerns in the wake of the Bhopal gas disaster in India prompted the Supreme Court of

https://doi.org/10.1017/S0008197304256586 Published online by Cambridge University Press

India to create an absolute liability rule that was not subject to the exceptions to *Rylands* (*M.C. Mehta* v. *Union of India* (1987) 1 S.C.C. 395). This is a classic illustration of the common law stepping into the breach to provide social justice.

This is in fact what the Court of Appeal had done in *Khorasandjian* v. *Bush* [1993] Q.B. 272 where the principles of nuisance were extended to protect against harassment (*Khorasandjian* was subsequently overruled by the House of Lords in *Hunter* v. *Canary Wharf Ltd.* [1997] A.C. 655 following the enactment of the Protection from Harassment Act 1997). It is this kind of "reactive social policy" engagement that is, and should remain, the hallmark of the common law; this is judicial law-making that is perfectly acceptable. The danger is when courts engage in what may be termed "prescriptive social policy" by making value judgments on the impact of insurance and allocation of risk based on perceived notions of welfare. This is an area best left to the legislature. In *Transco* itself, two Lords took diametrically opposing views on this: Lord Hoffmann argued that the claimant should insure against water damage (para. [49]) while Lord Hobhouse of Woodborough strongly rejected this view as "unsound" (para. [60]), arguing that the focus should instead be on who should bear the cost of certain inherently risky activity. Lord Walker of Gestingthorpe, referring to chemical explosions in England in the twentieth century (para. [104]), accepted that special societal concerns should guide the courts, but cautioned against engaging in "prescriptive social policy" (para. [105]).

Having justified the continuation of *Rylands*, the Lords affirmed that the rule was a sub-species of nuisance and therefore it excluded claims for personal injury or death and was limited to claimants who had a proprietary right or interest in the land (cf. *Hunter*). The twin requirements of dangerousness and non-natural use were seen as interlinked and to be tested by "ordinary contemporary standards". This fusing of the two limbs of *Rylands* is achieved with highly normative language. There has to be an "exceptionally high risk of danger" (para. [10] *per* Lord Bingham) and the activity must be highly unusual or "special" (para. [108] *per* Lord Walker) to warrant strict liability. This calls for a degree of intuition and not surprisingly the House resorted to the time-honoured test of reasonable foreseeability to determine whether an activity was dangerous and unusual. This arguably dilutes the strict liability aspect of the rule. Nevertheless, *Transco* has rightly given *Rylands* a very narrow application and thus saved it from disrepute.

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Given the rule's basis in nuisance, the House also insisted on the requirement of escape of the dangerous thing from the defendant's land (cf. *Read* v. *J. Lyons & Co. Ltd.* [1947] A.C. 156). There was no requirement of foreseeability with respect to the escape and here *Transco* remains true to strict liability. The problem with these "escape" and "proprietary interest" requirements is that they can result in uncertainty and arbitrariness. In *Transco* itself, the appellant had an easement over the embankment which belonged to the defendants. Four Lords accepted that this was a sufficient proprietary interest for the tort (Lord Hobhouse disagreeing, para. [68]); and again, four Lords accepted that there had been an "escape" (Lord Scott disagreeing, para. [78]). If the underlying policy of *Rylands* is that there are certain risks for which the creator must bear the cost, surely liability should not hang on the precise nature of the proprietary interest or, worse, geographical chance.

Transco is a welcome decision for its recognition that there is a need for a pocket of strict liability. As Lord Walker noted, even if negligence covered the field in most cases, the *Rylands* strict liability rule was still significant for it effectively shifted the burden of proof to the creator of the risk (para. [110]); justice required this in certain situations. It would have been better if the House had simply dissociated *Rylands* from nuisance and reinvented it as a special rule that was applicable in cases where fairness dictated the imposition of strict liability. This would have emancipated the rule from the unnecessary encumbrances of nuisance and provided a valuable, modern tort that afforded protection in an age where hazardous materials and activities relating to industry, war and terrorism abound.

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CLOUDING THE ISSUES ON CHANGE OF POSITION

THE defence of change of position has a pivotal role to play in controlling the scope of claims for restitution of unjust enrichments. The cause of action of unjust enrichment imposes a strict liability on the recipient. This might seem harsh and over-extensive were it not balanced by the recipient's right to say, "I am not liable because the enrichment has been lost". Since it was first authoritatively accepted by the House of Lords in *Lipkin Gorman* v. *Karpnale Ltd.* [1991] 2 A.C. 548 the courts, through a series of cases, have slowly but surely—in the finest traditions of the

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