in the clearest cases. Adoption of the views expressed by Lord Diplock in *Horrocks* v. *Lowe* would provide more effective and realistic protection to persons making defamatory statements on occasions of qualified privilege.

L. A. Andersen

NEW ZEALAND FOREST PRODUCTS LTD. v. O'SULLIVAN

Introduction

The recent decision of Mahon J. in *New Zealand Forest Products Ltd.* v. *O'Sullivan*[1] involves a number of interesting and important aspects of liability for the escape of fire, including (1) the interest which the plaintiff must have in order to establish title to sue under the rule in *Rylands* v. *Fletcher*[2] (2) the scope of liability for pure economic loss (3) the relationship between the old common law action on the case for the escape of fire and the action based on *Rylands* v. *Fletcher*, and (4) the nature of the concept of non-natural user and its relationship with negligent use of land.

The respondent, O'Sullivan, was burning off scrub and bracken on his property during a closed fire season when the fire got out of control. He had obtained a permit under section 21 of the Forest and Rural Fires Act 1955 to carry out this activity, but the statutory provision does not remove civil liability in respect of the activity. The fire was lit when there was a light wind blowing but later in the day the wind shifted in direction and increased in velocity. The fire escaped from the respondent's land on to the adjoining land of Hutt Timber and Hardware Co. Ltd., the second appellant, which was covered in fern and bracken. Any further wind change would have sent the fire towards valuable pine forests owned by Hutt Timber and the adjoining landowners, New Zealand Forest Products Ltd. The Magistrate who heard the action at first instance found as a fact that at this stage the forests of both appellants were "menaced" by the fire. Both appellants sent employees to fight the fire. Eventually the fire was brought under control and the forests of both appellants were preserved intact. The only damage which resulted was the burning of several acres of fern and bracken on the land of Hutt Timber. However the appellants sought to recover the financial cost they had incurred in fighting the fire,[3] bringing their claims under the rule in *Rylands* v. *Fletcher*, negligence and nuisance.

1. *Standing to Sue*

First, Mahon J. considered whether the financial costs incurred by the appellants in averting the threat to their forests were capable in law of being recovered in an action under the rule in *Rylands* v. *Fletcher*. This initial problem raised two separate but closely related

1 [1974] 2 N.Z.L.R. 80.
2 (1866) L.R. 1 Ex. 265, affirmed (1868) L.R. 3 H.L. 330.
3 $1,898.40 by Forest Products and $64.42 by Hutt Timber.

questions: what interest must the plaintiff have in order to establish his title to sue under *Rylands* v. *Fletcher,* and to what extent is pure economic loss unassociated with any physical loss recoverable in an action under the rule in *Rylands* v. *Fletcher*? Mahon J. dealt with these two questions together:

> The learned Magistrate rejected the claim of the appellants under the *Rylands* v. *Fletcher* principle because the only loss which they sustained was the expense of fighting the fire. There was no damage to the land of either appellant, and the learned Magistrate held this factor to be decisive against the claim. In doing so, I think he overlooked the point that liability under *Rylands* v. *Fletcher* requires proof of interference with the use of land of another, and is not dependent on destruction of the land itself. If a claim may be sustained for damage to land and to chattels or fixtures on the land to which the fire had escaped, I can see no reason why the reasonable cost of preserving such chattels or fixtures from damage should not be recoverable.[4]

By taking the view that although the plaintiff need not be in occupation of land on to which the dangerous thing physically intrudes, the escape must nevertheless cause "interference with the use of" land occupied by the plaintiff, Mahon J. seems to have treated the basis of liability under the principle in *Rylands* v. *Fletcher* as being the same as that for an action in nuisance. Although the exact nature and scope of the interests protected by the *Rylands* v. *Fletcher* action have never been conclusively determined, the view taken by Mahon J. is not consistent with any of the previous authorities on the point. Lord Macmillan in *Read* v. *J. Lyons & Co. Ltd.*[5] saw the doctrine in *Rylands* v. *Fletcher* as arising from "the mutual obligations of owners or occupiers of neighbouring closes" and considered that the plaintiff must be the owner or occupier of adjoining land on to which the dangerous thing escapes. However, courts in both England and the Commonwealth have refused to accept that proposition and have indicated that the plaintiff need not have an interest in any land that is in any way affected by the escape.[6] Earlier authorities were also inconsistent with Lord Macmillan's narrow view.[7]

Clearly Hutt Timber had standing to sue, but Forest Products Ltd. had no interest in any land on to which the dangerous thing escaped.

There seems little merit in restricting recovery under the rule in *Rylands* v. *Fletcher* to persons who are occupiers of land which is affected (whether directly or indirectly) by the escape. It is difficult

4 [1974] 2 N.Z.L.R. 80, 83.

5 [1947] A.C. 156, 174. See also *Cattle* v. *Stockton Waterworks Co.* (1875) L.R. 10 Q.B. 453, and *Weller & Co.* v. *Foot and Mouth Disease Research Institute* [1966] 1 Q.B. 569, 588. Cf. *British Celanese Ltd.* v. *A. H. Hunt (Capacitors) Ltd.* [1969] 1 W.L.R. 959, 964.

6 E.g. *Benning* v. *Wong* (1969) 122 C.L.R. 249, 319 per Windeyer J.; *Thompson* v. *Bankstown Corpn.* (1953) 87 C.L.R. 619, 644 per Kitto J.; *Aldridge* v. *Van Patter* [1952] 4 D.L.R. 93; *Vaughn* v. *Halifax-Darmouth Bridge Commission* (1961) 29 D.L.R. (2d) 523, 525; *Sochacki* v. *Sas* [1947] 1 All E.R. 344, 345; *British Celanese Ltd.* v. *A. H. Hunt (Capacitors) Ltd.* [1969] 1 W.L.R. 959, 964.

7 E.g. *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* [1914] 3 K.B. 772, 785 per Bray J.; *Rainham Chemical Works Ltd.* v. *Belvedere Fish Guano Co. Ltd.* [1921] 2 A.C. 465, 471 per Lord Buckmaster; *Miles* v. *Forest Rock Granite Co.* (1918) 34 T.L.R. 500; *Hale* v. *Jennings Brothers* [1938] 1 All E.R. 579; *Eastern & South African Telephone Co. Ltd.* v. *Cape Town Tramways Co. Ltd.* [1902] A.C. 381, 392.

to see why an adjoining occupier's claim is of greater merit than that of a road-user who suffers similar injury as the result of the same escape.

2. *Recovery of Pure Economic Loss*

Mahon J. proceeded on the basis that the appellants were seeking to recover pure economic loss unassociated with any physical loss. Although it was surely open to Hutt Timber, on to whose land the fire had escaped and destroyed several acres of fern and bracken, to argue that *some* physical damage had been suffered, Mahon J. found that "no damage was done to that land" and proceeded to treat the claims of both appellants on the basis that their only loss was the financial cost incurred in successfully preventing damage to their forests. Although he proceeded to make use of cases involving actions for negligence to justify extending the rule in *Rylands* v. *Fletcher* to allow recovery of this loss, Mahon J. made no reference to the line of cases in which the right to recover pure economic loss resulting from a negligent act has been held to be very restricted. Mahon J. reasoned:

> If a claim may be sustained for damage to land and to chattels or fixtures on the land to which the fire had escaped, I can see no reason why the reasonable cost of preserving such chattels or fixtures from damage should not be recoverable. The duty of the 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. He may do so, in a proper case, even where the effort to diminish the loss is unavailing, and the ultimate cost is greater than if no steps to mitigate had been taken: *Gardner* v. *The King* [1933] N.Z.L.R. 730. The only question is whether on the facts the plaintiff was justified in committing himself to the expenditure. In an action for fire damage based on negligence the plaintiff can plainly recover the expenses of fighting the fire: *Filliter* v. *Phippard* (1847) 11 Q.B. 347; 116 E.R. 506; *Landon* v. *Rutherford* [1951] N.Z.L.R. 975. There is accordingly some logical justification for allowing similar recovery under the *Rylands* v. *Fletcher* principle. . . . [I]t seems contrary to general principles that the plaintiff in a *Rylands* v. *Fletcher* action could recover damages for loss of chattels and fixtures and yet be denied redress for the cost of saving the same chattels and fixtures from destruction. In my opinion the plaintiff in a *Rylands* v. *Fletcher* action who claims damage for the escape of fire may recover as special damages for consequential loss the expense to which he has reasonably been committed in attempting to save his land or its chattels and fixtures from damage or destruction. . . . I consider that the expenses of fighting the fire form a legitimate item of damage not only at the suit of the Hutt Timber Company on to whose land the fire escaped, but also at the suit of Forest Products whose forests were also menaced by the spreading conflagration. I think the matter is clear in principle as representing the duty of an adjoining occupier to take all available steps to abate the tort or nuisance.[8]

The discussion of the duty to mitigate is unexceptional as far as it goes. The three cases Mahon J. cited lend some support by analogy[9] to the proposition that the plaintiff in a *Rylands* v. *Fletcher* action who claims damages for the escape of fire may recover as special damages for consequential loss the expense to which he has been reasonably committed in attempting to save his land or his chattels and fixtures from damage or destruction. But, with respect,

8 [1974] 2 N.Z.L.R. 80, 83-84.

9 *Gardner* v. *The King* [1933] N.Z.L.R. 730 was in fact an action in contract, although this should make no difference in principle. Both *Filliter* v. *Phippard* (1847) 11 Q.B. 347 and *Landon* v. *Rutherford* [1951] N.Z.L.R. 975 were appeals in which only liability, and not damages, was discussed.

the proposition itself had little relevance to the facts before him. In each case the plaintiff had suffered some actual physical damage and the costs incurred in minimizing that damage were therefore truly consequential. But in the case of Forest Products there was *no* physical damage to which the firefighting costs could be attached as consequential losses. It is clear in principle that a plaintiff is bound to take reasonable steps to mitigate damage actually occuring, and as a corollary is entitled to be compensated for the expense incurred in doing so. However the plaintiff's duty to mitigate is limited to taking "all reasonable steps to mitigate the loss he has sustained consequent upon the defendant's wrong"[10] and the accompanying right to recover the expenses of mitigation must logically have the same limits. Because the appellants suffered no other loss it would seem that the principle of mitigation was not capable of justifying recovery of their firefighting expenses however reasonably those expenses were incurred.

As an alternative, Mahon J. seems to suggest that recovery can be justified by reference to "the duty of an adjoining landowner to abate the tort or nuisance". However the concept of abatement, which is peculiar to nuisance, involves a right rather than a duty[11] which merely provides a justification for what would otherwise be tortious. Exercise of the right is an alternative to damages.[12] Thus recovery in this case could not be justified by reference to the concept of abatement.

The question therefore remains, was recovery on these facts capable of being justified in terms of the established principles governing recovery of pure economic loss unassociated with physical loss? The basic rule, developed in a line of cases based on the judgment of Blackburn J. in *Cattle* v. *Stockton Waterworks Co.*[13] is that foreseeable economic loss resulting from a negligent act[14] is recoverable only if it is accompanied by, and "truly consequential upon", actual physical damage to the person or property of the plaintiff. In most of these cases the basic rule has been explained in terms of *duty*: the law does not recognize a duty of care in negligence to avoid foreseeable economic loss unless it is accompanied by and consequential upon foreseeable physical damage. But in *S.C.M. (U.K.) Ltd.* v. *W. J. Whittall & Sons Ltd.*[15] Lord Denning M. R. expressed the view that the rationale behind the general rule of no recovery for pure economic loss is not that there is no duty owed, but rather that pure financial loss is normally *too remote.* If liability for economic loss is in fact a problem of remoteness, it may be open to argue that pure economic loss, although not recoverable in negligence, may be recoverable in an action based

10 Halsbury, *Laws of England* (4th ed. 1973-) Vol. 12, 477.

11 *Morgan* v. *Khyatt* [1962] N.Z.L.R. 791, 796 (C.A.), affirmed [1964] N.Z.L.R. 666, [1964] 1 W.L.R. 475 (P.C.).

12 *Baten's Case* (1610) 9 Co. Rep. 53b-55a; 77 E.R. 810, 812; *Lagan Navigation Co.* v. *Lambeg Bleaching Dying & Finishing Co. Ltd.* [1927] A.C. 226, 244 per Lord Atkinson.

13 (1875) L.R. 10 Q.B. 453, 457. The historical development of this rule is discussed by L. L. Stevens, "Negligent Acts Causing Pure Financial Loss: Policy Factors at Work " (1973) 23 U. of Toronto L.J. 431; and P. S. Atiyah, "Negligence and Economic Loss" (1967) 83 L.Q.R. 248.

14 An exception to the basic rule of no recovery is firmly established in respect of negligent misstatements causing pure economic loss: *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] A.C. 465.

15 [1971] 1 Q.B. 337, 345.

on *Rylands* v. *Fletcher*. In *Fletcher* v. *Rylands*[16] Blackburn J. said the defendant "is answerable for all the damage which is the natural consequence of [the] escape", and in *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock & Engineering Co. Ltd. (The Wagon Mound)*[17] the Privy Council left open the possibility that the test of remoteness in an action based on the rule in *Rylands* v. *Fletcher* may be different from that in an action in negligence. However in *Cattle* v. *Stockton Waterworks Co.*[18] Blackburn J. expressed the view, obiter, that pure economic loss, at least where it is suffered by a person who has no interest in any land on to which the dangerous thing escapes, would be treated as being too remote to be recovered under the rule in *Rylands* v. *Fletcher*, and this view was approved and applied by Widgery J. in *Weller & Co.* v. *Foot & Mouth Disease Research Institute.*[19]

In any case, in *Spartan Steel & Alloys Ltd.* v. *Martin & Co. (Contractors) Ltd.*[20] Lord Denning abandoned his attempt to rationalise the cases relating to the recovery of economic loss in terms of either duty or remoteness and said:

> The more I think about these cases, the more difficult I find it to put each in its proper pigeon-hole. Sometimes I say: 'There was no duty.' In others I say: 'The damage was too remote.' So much so that I think the time has come to discard those tests which have proved so elusive. It seems to me better to consider the particular relationship in hand, and see whether or not, as a matter of policy, economic loss should be recoverable.[21]

The approach taken in *Spartan Steel* suggests that the English Court of Appeal is not prepared to restrict itself to applying the basic rules of no liability for pure economic loss in a rigid inflexible manner. This case indicates a willingness to discuss the relevant policy considerations openly, and to recognize exceptions to the general rule where the relevant policy factors indicate that this is appropriate and desirable.

Certain exceptions to the basic rule are well established.[22] Certain further exceptions have been suggested but have not yet become firmly established. It has been inferred in a number of cases (but never actually held) that an exception to the general rule of non-recovery might exist where physical damage to the plaintiff's person or property was reasonably foreseeable as a consequence of the defendant's act but did not result, whereas foreseeable financial loss *did* result from the negligent act. In *Morrison Steamship Co. Ltd.* v.

16 (1866) L.R. 1 Ex. 265, 279.
17 [1961] A.C. 388, 426-427.
18 (1875) L.R. 10 Q.B. 453, 457.
19 [1966] 1 Q.B. 569, 588.
20 [1973] 1 Q.B. 27.
21 Ibid., 37. This overt policy-based approach is consistent with other recent decisions in cases where the courts have been asked to extend the categories of negligence to protect an interest not previously recognised as coming within the ambit of the tort: e.g. *Home Office* v. *Dorset Yacht Co.* [1970] A.C. 1004; *Dutton* v. *Bognor Regis U.D.C.* [1972] 1 Q.B. 373; *McCarthy* v. *Wellington City* [1966] N.Z.L.R. 481; *Bognuda* v. *Upton & Shearer Ltd.* [1971] N.Z.L.R. 618; *Marx* v. *A.-G.* [1974] 1 N.Z.L.R. 165
22 The actions *per quod servitium amissit* and *per quod consortium amissit* are clear exceptions. In *Morrison Steamship Co Ltd.* v. *Greystoke Castle (Cargo Owners)* [1947] A.C. 265 the House of Lords decided that cargo owners who became liable to contribute to general average expenditure could recover directly from the negligent shipowner.

Greystroke Castle (Cargo Owners)[23] Lord Roche gave an illustration of a situation in which, in his view, pure economic loss would be recoverable. He said that if A is carrying B's goods on his truck and X negligently collides with A's truck so that the truck is damaged and cannot continue its journey but B's goods are not damaged, B can recover from X the cost of removing his goods to another truck so that they can be carried to their destination. In *S.C.M. (U.K.) Ltd.* v. *W. J. Whittal & Son Ltd.*[24] Lord Denning M. R. agreed that this loss would be recoverable in negligence.

In *Dutton* v. *Bognor Regis U.D.C.*[25] both Lord Denning M. R. and Sachs L. J. relied upon an illustration which suggested that they would be prepared to apply this exception in a limited manner to allow recovery of the cost of repairing a negligently constructed building or chattel in order to forestall an imminent threat of external physical damage to person or property.[26] This limited exception to the general rule of no liability for pure economic loss was rejected by the majority of the Supreme Court of Canada in *Rivtow Marine Ltd.* v. *Washington Iron Works*[27] where the Court refused to allow recovery of the cost of making a dangerously defective chattel safe. Although it seems that *Dutton's case* was not referred to Mahon J. in *New Zealand Forest Products* v. *O'Sullivan,* the dicta of Lord Denning and Sachs L. J. provide support for Mahon J.'s view that it would be illogical and unjust to allow the plaintiffs to recover for any damage to land and chattels caused by the escape, but refuse to allow recovery for the cost incurred in successfully preserving that property from an imminent threat of destruction presented by the escape. Mahon J.'s reasoning on this point was not limited to the action under *Rylands* v. *Fletcher*—he expressly stated that he would also have been prepared to find for the plaintiffs in negligence if the action under *Rylands* v. *Fletcher* had failed.[28]

This exception to the basic rule against recovery of pure economic loss seems eminently reasonable and just, and can be supported by reference to the broad policy considerations relevant to recovery of

23 [1947] A.C. 265, 280.

24 [1971] 1 Q.B. 337, 346. This example has also been cited with approval by Lord Hodson in *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] A.C. 465, 509, and by Widgery J. in *Weller & Co.* v. *Foot and Mouth Disease Research Institute* [1966] 1 Q.B. 569, 581. On one interpretation the judgment of Widgery J. in *Weller & Co.* v. *Foot and Mouth Disease Research Institute* lends strong support to the broad principle which can be extracted from Lord Roche's illustration.

25 [1972] 1 Q.B. 373, 396, 403-404.

26 In *Dutton* v. *Bognor Regis U.D.C.* both Sachs L. J. and Lord Denning M. R. were prepared to treat deterioration of a building due to negligent construction as property damage, but both expressed the view that even if the damage should properly be regarded as financial it was recoverable. However their decision on the facts in respect of the damages recoverable went beyond the scope of their illustration. Mrs Dutton recovered the whole cost of restoring her house even though there was no evidence that the condition of her house presented an imminent threat of injury to person or external property. In *Bowen* v. *Paramount Builders (Hamilton) Ltd.* [1975] 2 N.Z.L.R. 546, Speight J. refused to follow *Dutton* v. *Bognor Regis U.D.C.,* holding that damage consisting of deterioration of real property due to negligent construction was financial loss and was not recoverable in tort from a building contractor.

27 (1973) 40 D.L.R. (3d) 530.

28 [1972] 2 N.Z.L.R. 80, 91.

pure economic loss. There is no possibility of a flood of actions and no problem of distinguishing genuine from spurious claims if recovery is limited to the cost of averting an imminent threat of physical damage. Similarly, policy arguments concerning the respective abilities of the parties to bear and distribute the loss must be resolved in the same manner as they would if physical damage actually occurred. If the general rule of non-recovery is applied strictly in this situation the shrewd plaintiff would have an incentive to ensure that he suffered some minimal physical loss before directing his full energy and resources to extinguishing the fire.

3. *The Relationship between the Common Law Action on the Case and Rylands* v. *Fletcher*

In this case the relationship between the old common law action on the case for the escape of fire[29] and the action under the rule in *Rylands* v. *Fletcher* was raised only indirectly through the defendant's reliance on section 86 of the Fires Protection (Metropolis) Act 1774 (G.B.)[30] which provides that no action shall be maintained against any person "on whose estate any fire shall . . . accidentally begin". Mahon J. dealt with the defence based on this section as follows:

> The provisions of the section, first enacted in slightly different form in 1707, were designed to mitigate the severity of the ancient common law action on the case for escape of fire. The meaning of the word 'accidentally' was in later times the subject of controversy, especially when negligence came to be recognised as a separate tort, but in *Filliter* v. *Phippard* (1847) 11 Q.B. 347; 116 E.R. 506 Lord Denman C. J. expressed the opinion that the statute afforded no defence to a fire negligently lit. He said: ". . . the word accidentally may be employed in contradistinction to wilful, and so the same fire might both begin accidentally and be the result of negligence. But it may equally mean a fire produced by mere chance, or incapable of being traced to any cause, and so would stand opposed to the negligence of either servants or masters" (ibid., 357; 510). Lord Denman preferred the second interpretation, and his view was approved by the Privy Council in *Goldman* v. *Hargrave* [1967] A.C. 645; [1966] 2 All E.R. 988. The statute therefore does not protect a defendant who has deliberately lit a fire on his own land nor, having regard to the decision in *Goldman* v. *Hargrave,* does it exempt from liability a defendant on whose land the fire started accidentally but spread later through his negligence. In the present case, the fire having been intentionally ignited, the statute has no application.[31]

Having found the defence provided by the Act to be unavailable to the defendant, Mahon J. proceed to enquire whether the deliberate lighting of the fire by the defendant in the conditions prevailing amounted to a non-natural user of his land, so as to bring the case within the principle of *Rylands* v. *Fletcher.* It has long been established that section 86 does not provide a defence to an action based on *Rylands* v. *Fletcher* for the escape of fire,[32] although this conclusion

29 *Beaulieu* v. *Finglam* (1401) Y.B. 2 Hen. 4, f. 18, pl. 18 (translated by C. H. S. Fifoot, *History and Sources of the Common Law* (1949) 166) is generally accepted as the earliest reported example of this action.

30 In effect in New Zealand by virtue of English Laws Act 1908, s. 2 (N.Z.).

31 [1974] 2 N.Z.L.R. 80, 84.

32 *Musgrove* v. *Pandelis* [1919] 2 K.B. 43, 46, 49, 51; *Mulholland & Tedd Ltd.* v. *Baker* [1939] 2 All E.R. 253, 256; *Balfour* v. *Barty-King* [1956] 1 W.L.R. 779, 790. The Canadian Courts have taken the same view: see e.g. *Brody's Ltd.* v. *C.N.R.* [1929] 2 D.L.R. 549, 522; *Morwick* v. *Provincial Contracting Co. Ltd.* (1923) 55 O.R. 71, 74.

is hard to reconcile with the words of the statute.[33] But in the light of Mahon J.'s acceptance of the view taken in *Filliter* v. *Phippard*[34] that the Act has no application where a fire has been intentionally lit, it would have been open to the appellants to argue that the mere fact that they suffered damage as the result of the escape of a fire which had been intentionally lit by the defendant entitled them, without more, to recover under the old common law action on the case for the escape of fire. While the history and precise scope of the action on the case is far from clear, it appears that liability under the action was strict, the only defence available to an occupier being that the escape of fire from his premises was caused by an act of God or the act of a stranger. The Act of 1774 was designed to mitigate the harshness of this rule of strict liability, but the narrow interpretation of the statute taken in *Filliter* v. *Phippard* meant that the protection afforded by section 86 was limited to situations where the fire was "produced by mere chance or incapable of being traced to any cause".

It was only much later in his judgment that Mahon J. referred to the demise of the old common law action on the case, and then only for the purpose of rejecting an argument, based on *Tuberville* v. *Stampe*[35] to the effect that an escape of fire caused by unforseeable forces of nature is not actionable under the rule in *Rylands* v. *Fletcher*. Mahon J. said, "The dictum of Holt C. J. in *Tuberville* v. *Stampe* related to the old action on the case for escape of fire, a remedy long since absorbed into the principle of *Rylands* v. *Fletcher*".[36]

Mahon J. apparently considered the demise of the common law action on the case to be so self-evident as not to require any reference to authority.[37] The passing of the old action has been clear in Australia since 1919 when the High Court ruled during the course of the argument in *Bugge* v. *Browne*[38] that it was no longer available. Although no reasons for that view are recorded in the report, the ruling has been considered authoritative in Australia ever since.[39] In New Zealand, however, there are several cases which support the continued existence of strict liability for the escape of fire independent of the *Rylands* v. *Fletcher* principle.[40] Nor is the position in England entirely clear. In one recent case[41] the English Court of Appeal imposed strict liability independent of the rule in *Rylands* v. *Fletcher*, but on other occasions English courts, while distinguishing between the

33 See the comments of MacKenna J. in *Mason* v. *Levy Autoparts of England Ltd.* [1967] 2 Q.B. 530, 541.

34 (1847) 11 Q.B. 347.

35 (1967) 1 Ld. Raym. 264; 91 E.R. 1072.

36 [1974] 2 N.Z.L.R. 80, 88.

37 In New Zealand, see *Boulcott Golf Club Inc.* v. *Engelbrecht* [1945] N.Z.L.R. 556, 557 per Finlay J. (obiter) to the same effect.

38 (1919) 26 C.L.R. 110, 115.

39 See e.g. *Pett* v. *Sims Paving & Road Construction Co. Pty. Ltd.* [1928] V.L.R. 247, 252; *Wise Bros. Pty. Ltd.* v. *Commissioner of Railways (N.S.W.)* (1947) 75 C.L.R. 59, 67-68; *Hazelwood* v. *Webber* (1935) 52 C.L.R. 268, 274-5.

40 See e.g. *Dougherty* v. *Smith* (1887) 5 N.Z.L.R. (S.C.) 374; *Threlkeld* v. *White* (1890) 8 N.Z.L.R. 513; *Piper* v. *Geary* (1899) 17 N.Z.L.R. 357; *Kelly* v. *Hayes* (1902) 22 N.Z.L.R. 429. See generally K. T. C. Sutton, "Liability for Escape of Fire" (1958) 34 N.Z.L.J. 87.

41 *Balfour* v. *Barty-King* [1957] 1 Q.B. 496.

two actions, have regarded proof of non-natural user of land as an essential element of liability for the escape of fire.[42]

In the recently reported case of *Holderness* v. *Goslin*[43] Mahon J. reiterated his view that the old rule of strict liability has now been enveloped by the rule in *Rylands* v. *Fletcher,* but the comments of the Court of Appeal on this point,[44] seem to reflect a desire to leave the point open.

5. *Non-Natural User*

An essential element of a successful action under *Rylands* v. *Fletcher* is proof that the escape of the dangerous thing resulted from "non-natural use" to which the defendant put his land. This requirement was first imposed by Lord Cairns in the House of Lords in *Rylands* v. *Fletcher*.[45] The sense in which Lord Cairns used this term was not clear and subsequent cases illustrated the ambiguity and difficulty of the concept. It was authoritatively explained, however, in *Rickards* v. *Lothian*[46] where Lord Moulton, delivering the advice of the Privy Council, declared that for a use to be "non-natural" it must be "some special use bringing with it increased danger to others and must not merely be the ordinary use of land or such a use as is proper for the general benefit of the community". The test thus acquired an element of flexibility involving consideration of the reasonableness of the use, the degree of risk involved, the amount of the damage which the escape is likely to cause, and the difficulty of controlling the thing likely to escape. This can be compared with the concept of "unreasonable risk of harm to others" upon which liability in negligence is founded. Although it is not suggested that the courts are yet ready to equate the tests of "non-natural use" and "unreasonable risk of harm to others"[47] it is difficult to imagine circumstances where the lighting of a fire (or indeed any other use of land) will constitute a "non-natural use" of land but not amount to negligence. In the present case, Mahon J. was prepared to find the defendant negligent[48] and central to his discussion of "non-natural use" are such expressions as "exceptional danger", "the degree of hazard", "great danger", and "acts . . . fraught with risk". In *Mason* v. *Levy Autoparts of England Ltd.*[49] MacKenna J. seems to have taken a similar approach. After propounding a test of "non-natural use" in relation to the storage of combustibles he commented that the same considerations which led him to a finding of "non-natural use" may also have justified a finding of negligence.

This tendency of the two tests to merge suggests that the action under the rule in *Rylands* v. *Fletcher* may become little more than an alternative to negligence in cases where the damage was caused

42 E.g. *Mason* v. *Levy Autoparts of England Ltd.* [1967] 2 Q.B. 530. In "Vagaries in Liability for Escape of Fire" [1969] C.L.J. 104 A. I. Ogus discusses the English cases and strongly argues for the repeal of s. 86 of the Fires Prevention (Metropolis) Act 1776.

43 [1975] 2 N.Z.L.R. 46, 51.

44 Sub. Nom. *Dobson* v. *Holderness,* judgment delivered 13 June, 1975, C.A. 5/75 (as yet unreported).

45 (1868) L.R. 3 H.L. 330, 338.

46 [1913] A.C. 263, 280.

47 In both *N.Z. Forest Products* v. *O'Sullivan* [1974] 2 N.Z L.R. 80, 88, and in *Holderness* v. *Goslin* [1975] 2 N.Z.L.R. 46, 53 Mahon J. expressly rejected the suggestion that liability for escape of fire is now based in negligence alone.

48 [1974] 2 N.Z.L.R. 80, 91.

49 [1967] 2 Q.B. 530, 542-3.

by an escape from land. One important practical distinction may remain. In *Hazelwood* v. *Webber*[50] the High Court of Australia expressed the unanimous view that the question of "non-natural use" is not a question of fact to be decided by the jury but is rather a question of law to be decided by the judge in each case. On the other hand, in *Read* v. *J. Lyons & Co. Ltd.*[51] Lord Porter was of the opinion that the question is one of fact subject to a ruling by the judge whether a particular use is capable of being "non-natural". In *Forest Products*[52] Mahon J. appeared to endorse the approach taken by the High Court in *Hazelwood* v. *Webber*. If this approach is consistently followed the result may well be different depending upon whether an action is brought in negligence or under the rule in *Rylands* v. *Fletcher*.

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50 (1934) 52 C.L.R. 268, 277, 281.
51 [1947] A.C. 156, 176.
52 [1974] 2 N.Z.L.R. 80, 87.