

## **Some Remarks on the Decline of *Rylands v Fletcher* and the Disparity of European Strict Liability Regimes**

*House of Lords 19 November 2003, [2004] 1 All ER 589 [Transco plc (formerly BG plc and BG Transco plc) v Stockport Metropolitan Borough Council]*

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### **Facts**

In the summer of 1992, a leak developed in an underground water pipe belonging to the Stockport Borough Council. As a result, a considerable part of the embankment suddenly gave way and slid downwards, leaving a 27 meter long section of a gas main exposed and unsupported. Gas company Transco (formerly: British Gas), that was responsible for maintaining the gas pipeline, quickly reinstalled the support of the gas pipeline and repaired the embankment in order to mitigate the instant and serious risk of explosion. Transco sued the Council for the repair cost.

As the cause of the water pipe rupture was never determined, the claim could not be based on negligence on the part of the Council. However, Transco claimed that the Council was liable without proof of negligence under the rule in *Rylands v Fletcher*.

### **Decision**

At the House of Lords, the Law Lords unanimously dismissed the appeal, leaving Transco to bear the cost of repair by itself. In their judgment, both *Lord Bingham of Cornhill*, *Lord Hoffmann*, *Lord Hobhouse of Woodborough*, *Lord Scott of Foscote*, and *Lord Walker of Gestingthorpe* paid considerable attention to the rule in *Rylands v Fletcher*. All agreed that the rule, which dates back to 1868, is still part of the common law of torts and that it should not be abandoned. Although [619] their Lordships found it hard to present convincing arguments in favour of the rule – in the words of *Lord Hoffmann* (at [41]): ‘It is hard to find any rational principle which explains the rule and its exceptions’ – they refused to abandon *Rylands*: the rule is part of the common law and abandoning it would create a vacuum. Their Lordships also agreed that the facts of this case do not give rise to liability under *Rylands v Fletcher*. The reasoning that the Lords applied, however, does differ.

In his speech, *Lord Bingham of Cornhill* stressed that there is a compelling objection to generous application and even extension of strict liability: strict liability for dangerous activities should be imposed by Parliament.

*Lord Bingham* stated (at [7]):

“Should, then, the rule be generously applied and the scope of strict liability extended? There are certainly respected commentators who favour such a course and regret judicial restrictions on the operation of the rule (see Fleming *The Law of Torts* (9th edn, 1998) p 377; Markesinis and Deakin *Tort Law* (5th edn, 2003) p 544). But there is to my mind a compelling objection to such a course, articulated by Lord Goff of Chieveley in the Cambridge Water case [1994] 1 All ER 53 at 76, [1994] 2 AC 264 at 305:

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'Like the judge in the present case, I incline to the opinion that, as a general rule, it is more appropriate for strict liability in respect of operations of high risk to be imposed by Parliament, than by the courts. If such liability is imposed by statute, the relevant activities can be identified, and those concerned can know where they stand. Furthermore, statute can where appropriate lay down precise criteria establishing the incidence and scope of such liability.'

It may be added that statutory regulation, particularly when informed by the work of the Law Commission, may take such account as is judged appropriate of the comparative law considerations on which I have briefly touched."

*Lord Bingham* concluded (at [13]):

"It is of course true that water in quantity is almost always capable of causing damage if it escapes. But the piping of a water supply from the mains to the storage tanks in the block was a routine function which would not have struck anyone as raising any special hazard. In truth, the council did not accumulate any water, it merely arranged a supply adequate to meet the residents' needs. The situation cannot stand comparison with the making by Mr Rylands of a substantial reservoir. Nor can the use by the council of its land be seen as in any way extraordinary or unusual. It was entirely normal and routine. Despite the attractive argument of Mr Ian Leeming QC for Transco, I am satisfied that the conditions to be met before strict liability could be imposed on the council were far from being met on the facts here."

*Lord Hoffmann's* speech is remarkable in the sense that it pleads for convergence of the rule in *Rylands v Fletcher* with the statutory strict liability regimes. In doing so, *Lord Hoffmann* also pleaded for an explicit inclusion of insurability [620] considerations into the mechanism of the rule. Both arguments lead him to conclude that Transco should bear the loss and should not be allowed to shift it unto the Council. *Lord Hoffmann* concluded (at [49]):

"In my opinion the Court of Appeal was right to say that it was not a 'non-natural' user of land. I am influenced by two matters. First, there is no evidence that it created a greater risk than is normally associated with domestic or commercial plumbing. True, the pipe was larger. But whether that involved greater risk depends upon its specification. One cannot simply assume that the larger the pipe, the greater the risk of fracture or the greater the quantity of water likely to be discharged. I agree with my noble and learned friend Lord Bingham of Cornhill that the criterion of exceptional risk must be taken seriously and creates a high threshold for a claimant to surmount. Secondly, I think that the risk of damage to property caused by leaking water is one against which most people can and do commonly insure. This is, as I have said, particularly true of Transco, which can be expected to have insured against any form of damage to its pipe. It would be a very strange result if Transco were entitled to recover against the council when it would not have been entitled to recover against the Water Authority for similar damage emanating from its high pressure main."

Case Note:

## **1. Facts and procedure**

In the summer of 1992, a leak developed in an underground water pipe belonging to the Stockport Borough Council. The pipe ran from the water main to a tower block where it supplied the water tanks in the basement of the block. The cause of the leak was never determined, but the effects of the leakage were far-reaching: when the leak was discovered, a

large quantity of water had already fully saturated a nearby derelict railway embankment.<sup>2</sup> As a result, a considerable part of the embankment suddenly gave way in September 1992 and slid downwards, leaving a 27 meter long section of a gas main exposed and unsupported. Gas company Transco (formerly: British Gas), that was responsible for maintaining the gas pipeline, quickly reinstalled the support of the gas pipeline and repaired the embankment in order to mitigate the instant and serious risk of explosion. Transco sued the Council for the total repair cost of some £ 93,000.

As the cause of the water pipe rupture was never determined, the claim could not be based on negligence on the part of the Council. However, Transco claimed that the Council was liable without proof of negligence under the rule in *Rylands v Fletcher*. The claim was sustained by the Queen's Bench Division, Technology and Construction Court. However, on appeal, the Court of Appeal reversed the [621] decision in first instance and dismissed liability under *Rylands v Fletcher*. At the House of Lords, the Law Lords unanimously dismissed the appeal, leaving Transco to bear the cost of repair by itself.<sup>3</sup>

In this note, I will present a short overview of *Rylands v Fletcher* and the subsequent case law that amended it (§ 2), and a discussion of the reasoning applied by the House of Lords in *Transco v Stockport* (§ 3). Furthermore, I will make some remarks on the position of the common law in comparison to other European jurisdictions (§ 4). Finally, the concept of strict liability in the recent work of the Study Group on a European Civil Code (SGECC) and the European Group on Tort Law (EGTL) will be discussed in light of the reasoning applied in the various European legal systems (§ 5).

## 2. *Rylands v Fletcher*<sup>4</sup> and what followed

In 1860, Thomas Fletcher was the lessee of the Red House Colliery near Ainsworth. On the neighbouring grounds of mill-owners John Rylands and Jehu Horrocks, a water reservoir was built to facilitate their downstream mill. When the bed of the reservoir was excavated, five disused and rubble-blocked mine shafts were discovered. Although the contractor and engineer obviously did not execute their task with reasonable care,<sup>5</sup> neither Fletcher nor Rylands and Horrocks actually knew that the shafts were connected with the Red House Colliery. When the reservoir was filled on December 11, 1860, one of the shafts gave way to the water pressure. As it turned out, the shafts were connected with the colliery, which was flooded as a result.

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<sup>2</sup> The embankment had been part of the now derelict short railway line running from Brinnington Junction to Reddish Junction. The embankment was (and still is) part of the Trans Pennine Trail, and it is situated between Reddish Vale (north west of Brinnington, Stockport) and the M60 junction 27 at Portwood.

<sup>3</sup> House of Lords 19 November 2003, [2004] 1 All ER 589 *Transco plc (formerly BG plc and BG Transco plc) v Stockport Metropolitan Borough Council*. For comments on the case, see, e.g., *Ken Oliphant*, England and Wales, in: H. Koziol/Barbara C. Steininger (ed.), *European Tort Law 2003, 2004*, pp. 135-137, *Roderick Bagshaw*, *Rylands Confined*, L.Q.R. 2004, pp. 388-392, and *Kumaralingam Amirthalingam*, *Rylands Lives*, C.L.J. 2004, pp. 273 ff.

<sup>4</sup> *Rylands v Fletcher* [1868] L.R. 3 H.L. 330, affirming *Fletcher v Rylands* [1866] L.R. 1 Exch 265. For an elaborate discussion of *Rylands v Fletcher* see, e.g., *R.F.V. Heuston/R.A. Buckley*, *Salmond & Heuston on the Law of Torts*, 1996, pp. 307 ff., *S. Deakin/A. Johnston/B.S. Markesinis*, *Markesinis and Deakin's Tort Law*, 2003, pp. 532 ff, *John Murphy*, *Street on Torts*, 2003, pp. 431 ff, *W.V.H. Rogers*, *Winfield & Jolowicz on Tort*, 2002, pp. 548 ff, *A.W.B. Simpson*, *Legal Liability for Bursting Reservoirs: the Historical Context of Rylands v. Fletcher*, XIII J. Legal Studies (1984), pp. 209 ff, and, from a comparative perspective, *G. Schamps*, *La Mise en Danger: un Concept Fondateur d'un Principe Général de Responsabilité*, 1998, pp. 417 ff.

<sup>5</sup> *W.V.Horton Rogers*, in: B.A. Koch/H. Koziol (eds.), *Unification of Tort Law: Strict Liability*, 2002, p. 114; *Rogers* (n. 4), p. 548.

Both the Court of Exchequer Chamber and the House of Lords decided that Rylands and Horrocks were liable on the basis of ‘extremely simple principles’ that were said to be reflected in earlier case law. In the words of Lord Cranworth, following Blackburn J, these principles led to the following rule: “If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape, [622]and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage”.<sup>6</sup> Furthermore, in *Rylands v Fletcher*, the House of Lords specified that the ‘simple principle’ applied to cases of non-natural use of the land; if water naturally rising and percolating had damaged the neighbouring colliery, there would have been no cause of action. However, since the deliberate accumulation of water in the reservoir amounted to non-natural use of the land, the ‘simple principles’ did call for liability.

In subsequent case law and legal writing, *Rylands v Fletcher* has been exposed as a *faux pas*: the cited precedents did not support the alleged existence of any ‘simple principles’ and the reasoning turned out to be quite difficult to apply in other cases. In the words of Lord Hoffmann, *Rylands* was an isolated victory for the cost internalisers.<sup>7</sup> Thus, in later case law, most of the seemingly wide ambit of *Rylands v Fletcher* was in effect restricted to an exceptionally small number of cases.<sup>8</sup> Few claimants have succeeded in reliance on the rule in *Rylands v Fletcher* alone, as Lord Bingham observes.<sup>9</sup>

It is more or less agreed that the rule now consists of at least three principal elements: ‘dangerous thing’, ‘non-natural use’, and ‘escape of the thing’.<sup>10</sup> The requirement of escape of ‘the thing’ from the land of the keeper seriously restricts the ambit of the rule: personal injury caused on the same premises does not fall under the rule.<sup>11</sup> Moreover, opponents of the rule argue that a “critical obscurity” resides in the first two elements.<sup>12</sup> Admittedly, the elements of dangerousness and non-natural use have never developed into a singular test. Sometimes, reference is made to whether normal households have the thing present.<sup>13</sup> For instance, bringing water into a building through a water conduit was not held to be non-natural [623] use.<sup>14</sup> By contrast, in *Rylands v Fletcher*, it apparently was the accumulation by man of large

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<sup>6</sup> *Rylands v Fletcher* [1868] L.R. 3 H.L. 330. The House of Lords followed Blackburn J in *Fletcher v Rylands* [1866] L.R. 1 Exch 265 at 279-280.

<sup>7</sup> *Transco plc (formerly BG plc and BG Transco plc) v Stockport Metropolitan Borough Council* [2004] 1 All ER 589 at [29].

<sup>8</sup> R. Zimmermann, *The Law of Obligations*, 1996, pp. 1138 ff. For example, escape of ‘the thing’ as a result of a third party’s intentional act was held not to fall under the rule; *Rickards v Lothian* [1913] AC 263. See, for an overview of the restrictions on the rule, *Transco plc (formerly BG plc and BG Transco plc) v Stockport Metropolitan Borough Council* [2004] 1 All ER 589 at [30] ff. (per Lord Hoffmann).

<sup>9</sup> *Transco plc (formerly BG plc and BG Transco plc) v Stockport Metropolitan Borough Council* [2004] 1 All ER 589 at [5]. Cf. Ken Oliphant (n. 3), p. 136.

<sup>10</sup> See *Chr. v. Bar*, *Gemeineuropäisches Deliktsrecht Bd. II*, 1999, no. 356 with further references.

<sup>11</sup> *Read v J. Lyons & Co Ltd.* [1946] 2 All ER 471, [1947] AC 156. See *Heuston/Buckley* (n. 4), pp. 309-310. Lord Scott of Foscote (*Transco plc (formerly BG plc and BG Transco plc) v Stockport Metropolitan Borough Council* [2004] 1 All ER 589, at [77]) raises this point as the main reason for rejecting Stockport’s liability: the water did not escape from the council’s land and the gas company’s easement merely gave the right to keep conduits on the council’s land. In Lord Scott’s view (at [79]), there was no invasion of a property right and therefore no cause of action under *Rylands v Fletcher*. On this point, see *Bagshaw*, L.Q.R. 2004, p. 391, and *Christopher McNall*, *Holding Back the Tide of Negligence: Rylands Resurgent, Conveyancer and Property Lawyer* 2004, pp. 240 ff. On ‘escape’, see *Murphy* (n. 4), pp. 441-442.

<sup>12</sup> *Burnie Port Authority v General Jones Pty Ltd* [1996] 4 LRC 605, [1994] 120 ALR 42 (High Court of Australia).

<sup>13</sup> In *Read v J. Lyons & Co Ltd.* [1946] 2 All ER 471, [1947] AC 156, serious doubts were raised on whether the presence of explosives in a war time ammunition factory amounted to non-natural use of the premises.

<sup>14</sup> *Rickards v Lothian* [1913] AC 263. See *Konrad Zweigert/Hein Kötz*, *An Introduction to Comparative Law*, 1998, p. 668. The reasoning applied in *Rickards* was that the provision of water supply to a house is quite

quantities of water – which did in fact enter the land naturally!<sup>15</sup> – that was held to be non-natural.

Therefore, it is sometimes said that *Rylands* can only be applied if a certain threshold level of danger is exceeded. There must be some ‘special use bringing with it increased danger to others’.<sup>16</sup> This point was elucidated in the most recent appendix to the rule, viz. *Cambridge Water Co Ltd v Eastern Counties Leather* (1994). In this ruling, the House of Lords did not only establish a definitive link between the tort of nuisance and the rule under *Rylands v Fletcher*, but the Lords also decided that the storage of substantial quantities of chemicals was a classical case of non-natural use.<sup>17</sup>

At the end of the day, however, ECL’s tannery was held not to be liable for the pollution of the water in the Cambridge Water’s bore hole. For several years, ECL had been spilling chemical solvents on the shop floor, which eventually led to the contamination of the bore hole more than a mile away from the tannery. The House of Lords decided that foreseeability of the damage of the relevant type was prerequisite of liability under *Rylands v Fletcher*. As a result, the tannery could not be held liable because, at the time of the spillage, it was not known that underground strata percolation could in fact lead to such damage.<sup>18</sup>

Much has changed since the 1860 flooding of the Red House Colliery. While the concept of faultless liability under the rule in *Rylands v Fletcher* seems to have developed into a more restricted liability inclining towards negligence or rather nuisance,<sup>19</sup> the legislature has also responded to some of the societal calls for clear and simple liability rules.<sup>20</sup> Thus, several strict liabilities have been promulgated that are akin to the rule in *Rylands v Fletcher*.<sup>21</sup> For instance, if the leaking water pipe in *Transco v Stockport* had not been privately owned by the Stockport Council but had instead been part of the water mains under control of the so-called statutory undertaker, i.e., the water company, then the statutory strict liability laid [624]down in S. 209 (1) of the Water Industry Act 1991 would have applied.<sup>22</sup> The strict liability in the Water Industry Act 1991 is applicable to ‘loss or damage’, so it includes personal injury and damage on the same premises.<sup>23</sup> Even more remarkable is the fact that water reservoirs such as the reservoir built on the land of John Rylands and Jehu Horrocks currently seem to fall under the statutory strict liability regime of the Reservoirs Act 1975.<sup>24</sup>

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common: it would be unreasonable, or so Lord Moulton reasoned, to hold the house owner liable for bringing water to his dwelling, and it would be even more unreasonable to hold the owner strictly liable for intentional blockage by a third party. On this reasoning, see *F.H. Newark, Non-Natural User and Rylands v. Fletcher*, 24 MLR (1961), pp. 557 ff.

<sup>15</sup> See Simpson (n. 4), p. 239 footnote 116, and *Burnie Port Authority v General Jones Pty Ltd* [1996] 4 LRC 605, [1994] 120 ALR 42 (High Court of Australia).

<sup>16</sup> *Rickards v Lothian* [1913] AC 263 at 280 (per Lord Moulton), confirmed in *Read v J. Lyons & Co Ltd.* [1946] 2 All ER 471, [1947] AC 156.

<sup>17</sup> *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 1 All ER 53, [1994] 2 AC 264.

<sup>18</sup> *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 1 All ER 53, [1994] 2 AC 264. Cf. *Rogers* (n. 5), p. 113. See also *Murphy* (n. 4), pp. 442-443.

<sup>19</sup> On this inclination of *Rylands* towards a rule based on liability for wrongfulness, see *B.S. Markesinis/H. Unberath*, *The German Law of Torts: A Comparative Treatise*, 2002, pp. 859-860. Cf. *G. Wagner*, in: Reinhard Zimmermann (ed.), *Grundstrukturen des Europäischen Deliktsrechts*, 2003, pp. 280-281.

<sup>20</sup> *Wagner* (n. 19), pp. 278-279. However, the use of statutory strict liabilities is less intense in the United Kingdom than it is in some of the continental jurisdictions; see *Rogers* (n. 4), p. 551.

<sup>21</sup> See *Schamps* (n. 4), pp. 470 ff. For an overview of the statutory regimes of strict liability in England, see *Rogers* (n. 4), pp. 571 ff.

<sup>22</sup> *Rogers* (n. 4), p. 552.

<sup>23</sup> S. 209 (1) of the Water Industry Act 1991; see <<http://www.hmsa.gov.uk>>.

<sup>24</sup> See *Rogers* (n. 5), p. 110. Cf. *Transco plc (formerly BG plc and BG Transco plc) v Stockport Metropolitan Borough Council* [2004] 1 All ER 589 at [6].

### 3. The reasoning applied by the House of Lords in *Transco v Stockport*

In their *Transco v Stockport* judgment, both Lord Bingham of Cornhill, Lord Hoffmann, Lord Hobhouse of Woodborough, Lord Scott of Foscote, and Lord Walker of Gestingthorpe paid considerable attention to the rule in *Rylands v Fletcher*. All agreed that the rule, which dates back to 1868, is still part of the common law of torts and that it should not be abandoned. They also agreed that the facts of this case do not give rise to liability under *Rylands v Fletcher*. The reasoning that the Lords applied, however, does differ.<sup>25</sup>

Their Lordships are unanimous in their criticism of the Australian High Court 1994 *Burnie Port Authority v General Jones Pty Ltd* decision. In this decision, the High Court essentially judged that *Rylands v Fletcher* had been assimilated and rendered obsolete by more recent developments such as the rise of the tort of negligence: 'The rule in *Rylands v Fletcher*, with all its difficulties, uncertainties, qualifications and exceptions, should now be seen, for the purposes of the common law of this country, as absorbed by the principles of ordinary negligence.'<sup>26</sup> Although the House of Lords finds it hard to present convincing arguments in favour of the rule – in the words of Lord Hofmann: 'It is hard to find any rational principle which explains the rule and its exceptions'<sup>27</sup> – it refuses to follow the Australian High Court example. The Lords state a number of reasons for not abandoning *Rylands v Fletcher*, some of which are more convincing than others. Lord Walker emphasizes that, although the operative scope of the rule in *Rylands* may have been restricted by the growth of statutory regulation of hazardous activities, on the one hand, and the continuing development of the law of negligence, on the other hand, it would still be premature to conclude that the principle is for practical purposes obsolete. Lord Bingham states that the rule serves useful purposes even [625] though the number of cases in which it will be applicable is very limited. Moreover, the rule is part of the common law and abandoning it would create a vacuum.

Although none of the Lords favour abolition, they do not favour expansion of the rule either. In his speech, Lord Bingham of Cornhill stresses that there is a compelling objection to generous application and even extension of strict liability: strict liability for dangerous activities should be imposed by Parliament. The legislature is in the position to decide more precisely under what conditions and to what extent such far-reaching liabilities should be imposed.<sup>28</sup> In this respect, Lord Hoffmann's speech is remarkable in the sense that it pleads for convergence of the rule in *Rylands v Fletcher* with the statutory strict liability regimes. In doing so, he also pleads for an explicit inclusion of insurability considerations into the mechanism of the rule. Both arguments lead him to conclude that *Transco* should bear the loss and should not be allowed to shift it unto the Council.

Lord Hoffmann's arguments are as follows. First, if the Water Industry Act 1991 had been applicable, the operator of the conduit would have been strictly liable vis-à-vis persons suffering damage, with the explicit exception of statutory bodies with a public task. This would exclude the gas company from claiming on this basis. Second, most property can be insured against external risks, so the element of non-natural use should be moulded into a requirement of uninsurability. People should be encouraged, as Lord Hoffmann essentially

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<sup>25</sup> On the reasoning, see *Oliphant* (n. 3), pp. 135-136.

<sup>26</sup> *Burnie Port Authority v General Jones Pty Ltd* [1996] 4 LRC 605, [1994] 120 ALR 42, quoted by Lord Walker of Gestingthorpe, at [93].

<sup>27</sup> Lord Hoffmann (*Transco plc (formerly BG plc and BG Transco plc) v Stockport Metropolitan Borough Council* [2004] 1 All ER 589), at [41].

<sup>28</sup> *Transco plc (formerly BG plc and BG Transco plc) v Stockport Metropolitan Borough Council* [2004] 1 All ER 589 at [7], with reference to a similar reserve expressed by Lord Goff of Chievely, in *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 1 All ER 53, [1994] 2 AC 264, at 305.

puts it, to take out first-party insurance instead of relying on an obscure cause of action.<sup>29</sup> The risk that Transco faced was in fact ‘a form of risk against which no rational owner of a gas main would fail to insure’ (at [48]). The arguments put forward by Lord Hoffmann are most relevant when judging the sensibility and efficiency of strict liability. I will deal with them more extensively in § 7. At this point, suffice it to say that, although the arguments are compelling, they nevertheless seem to send out the somewhat dubious message that the obscurity of the law purports to provide an incentive for property owners to avail themselves of first party insurance.

In conclusion, the Lords dismissed liability because the council did not bring something onto its land that was likely to cause danger if it escaped: it was the ordinary, normal, and routine use of the land (Lord Bingham),<sup>30</sup> and it did not create a greater risk than is normally associated with domestic or commercial plumbing (Lord Hoffmann).<sup>31</sup> [626]

#### 4. The legal position in various continental jurisdictions<sup>32</sup>

In his speech, Lord Bingham raises an additional argument in favour of preserving the rule under *Rylands v Fletcher*: repealing it would increase the disparity between the law of England and Wales and the laws of France and Germany.<sup>33</sup> This is of course an interesting point from a comparative law perspective and in view of the future of European tort law. However, when comparing the position under English law with other legal systems, it seems best not to focus exclusively on the question of whether the facts of *Transco v Stockport* would file either under ‘nuisance’ or ‘the law of neighbours’, ‘disputes involving land’ or any such category. This point is unintentionally illustrated by Lord Bingham when he cites the well-known case book edited by Van Gerven, Lever, and Larouche and then seemingly complacently notes that Van Gerven et al. suggested that the rule under *Rylands v Fletcher* is the most developed regime compared to French and German law.<sup>34</sup> In fact, the authors state this claim in respect of ‘disputes involving land’. However, it should be borne in mind that some jurisdictions do not necessarily qualify the questions dealt with in *Rylands v Fletcher* as problems of neighbouring landowners, but also as more general problems of defective premises or structures. As I will argue later, it can hardly be denied that more refined solutions are available to the problem thus defined. In this respect, Lord Bingham might well have argued that the rule in *Rylands v Fletcher* should in fact be extended in order to decrease the disparity between the law of England and Wales and the laws of at least France, possibly Germany, and most certainly some other smaller jurisdictions.

So let us first concentrate on the facts of the case itself.<sup>35</sup> The breach of a water pipe resulted in the underground accumulation of large quantities of water and the consequential landslide

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<sup>29</sup> Note that Lord Hobhouse of Woodborough (at [60]) applies the exact opposite reasoning: it is the creator of the risk that should bear the burden of taking out insurance.

<sup>30</sup> *Transco plc (formerly BG plc and BG Transco plc) v Stockport Metropolitan Borough Council* [2004] 1 All ER 589 at [12].

<sup>31</sup> *Transco plc (formerly BG plc and BG Transco plc) v Stockport Metropolitan Borough Council* [2004] 1 All ER 589 at [49].

<sup>32</sup> In this paragraph, I will disregard the possible complication, under some legal systems, that the possessor of the water pipe is a council, i.e., a local governmental body, and that this would probably lead to the application of specific rules and specific court jurisdiction.

<sup>33</sup> *Transco plc (formerly BG plc and BG Transco plc) v Stockport Metropolitan Borough Council* [2004] 1 All ER 589 at [6].

<sup>34</sup> *Walter van Gerven, Jeremy Lever and Pierre Larouche*, Cases, Materials and Texts on National, Supranational and International Tort Law, 2000, p. 205.

<sup>35</sup> See *supra* footnote 32.

caused a gas main to be left unsupported. Quick repair by the gas company was justified by the imminent threat of considerable damage to life and property. Can the owner/keeper of the water pipe be held liable even though neither the cause of the rupture nor any wrongful act or omission on the part of the owner/keeper was established?

Most legal systems will focus on the liability for the collapse of buildings and structures due to lack of maintenance.<sup>36</sup> In this respect, most continental Civil [627] Codes have been influenced by the French *Civil Code*. Article 1386 of the *Code Civil* holds the *propriétaire* liable for the *ruine d'un bâtiment* if caused by *défaut d'entretien ou par le vice de sa construction* (substandard maintenance or defective construction).<sup>37</sup> Some legal systems have understood this to hold a presumption of substandard maintenance in the event of collapsing buildings, while others have in fact interpreted it to be a strict liability. As a result, most of these legal systems assign liability for collapsing water pipe structures.<sup>38</sup>

French law itself currently offers even better protection to the injured party if the strict liability for ruinous immovables is *not* applicable. The more generally applied article 1384 *Code Civil (fait de la chose)*<sup>39</sup> provides this better protection, for it requires neither defectiveness nor collapse, which article 1386 does require.<sup>40</sup> Article 1384 is held to provide a strict liability of the *gardien* of the thing for its *rôle actif* in causing damage.<sup>41</sup> Defectiveness of the thing is not required and therefore the only defences likely to succeed are the absence of an active role in the causation, the defence of not being the *gardien*, or the defence of an external, unexpected, and uncontrollable cause.<sup>42</sup> Contrastingly, article 1386 is 'merely' a strict liability for ruinous and therefore defective buildings. So if the structure is involved in an accident, but there is no *ruine d'un bâtiment*, then article 1384 provides a victim-friendly cause of action for damages.<sup>43</sup> The case of *Transco v Stockport* could well fit the

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<sup>36</sup> See, e.g., Article 1386 Belgian Civil Code ("De eigenaar van een gebouw is aansprakelijk voor de schade door de instorting ervan veroorzaakt, wanneer deze te wijten is aan verzuim van onderhoud of aan een gebrek in de bouw." / "Le propriétaire d'un bâtiment est responsable du dommage causé par sa ruine, lorsqu'elle est arrivée par une suite du défaut d'entretien ou par le vice de sa construction."); Article 2053 Italian Civil Code ("Il proprietario di un edificio o di altra costruzione è responsabile dei danni cagionati dalla loro rovina, salvo che provi che questa non è dovuta a difetto di manutenzione o a vizio di costruzione"); Article 1907 Spanish Civil Code ("El propietario de un edificio es responsable de los daños que resulten de la ruina de todo o parte de él, si ésta sobreviniere por falta de las reparaciones necesarias."); Article 58 Swiss *Obligationenrecht* ("Der Eigentümer eines Gebäudes oder eines andern Werkes hat den Schaden zu ersetzen, den diese infolge von fehlerhafter Anlage oder Herstellung oder von mangelhafter Unterhaltung verursachen."). Note that, in some legal systems, the injured party has to prove the lack of maintenance, while in other systems the possessor/owner has to present the exculpatory evidence (e.g., in Spanish law; see *M. Martín-Casals/J. Ribot/J. Solé*, in: B.A. Koch/H. Koziol (ed.), *Unification of Tort Law: Strict Liability*, 2002, p. 285; in Italian law, see *F.D. Busnelli /G. Commandé*, in: B.A. Koch/H. Koziol (ed.), *Unification of Tort Law: Strict Liability*, 2002, p. 212). In the case of a water pipe rupture, the *res ipsa loquitur* rule may alleviate this burden of proof; cf. *Chr. v. Bar*, *Gemeineuropäisches Deliktsrecht* Bd. I, 1996, no. 229, footnote 1392.

<sup>37</sup> Article 1386 French Civil Code: "Le propriétaire d'un bâtiment est responsable du dommage causé par sa ruine, lorsqu'elle est arrivée par une suite du défaut d'entretien ou par le vice de sa construction."

<sup>38</sup> *v. Bar* (n. 36), no. 227 footnote 1375.

<sup>39</sup> Article 1384 *Code Civil*, first sentence, provides: "On est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde." See further *v. Bar* (n. 10), no. 311 ff. Cf. *Schamps* (n. 4), pp. 628 ff.

<sup>40</sup> As *Chr. v. Bar* (n. 36), no. 116, no. 226, essentially puts it: behind Article 1386 there is always Article 1384. Cf. *G. Viney/P. Jourdain*, *Traité de Droit Civil - Les Conditions de la Responsabilité*, 1998, no. 737.

<sup>41</sup> *Viney/Jourdain* (n. 40), no. 665. On the concept of 'gardien', see *v. Bar* (n. 10), no. 325-326.

<sup>42</sup> *Viney/Jourdain* (n. 40), no. 665 ff. Cf. *C. H. W. M. Sterk*, *Verhoogd gevaar in het aansprakelijkheidsrecht een rechtsvergelijkend onderzoek naar aansprakelijkheid voor zaken, stoffen en motorrijtuigen*, 1994, pp. 10 ff.

<sup>43</sup> For instance, slipping and tripping accidents within buildings are therefore dealt with under Article 1384 rather than under Article 1386. Cf. *v. Bar* (n. 36), no. 227. Note, however, Article 1384 cannot accumulate with Article 1386: if there is *ruine d'un bâtiment*, then Article 1384 cannot be applied even if there is no liability under

defectiveness requirement under article 1386, although it is doubtful that a water pipe rupture would be considered to be a *ruine*.<sup>44</sup> If, however, [628] article 1386 does not apply, then surely article 1384 would step in: it would seem that the collapse of the water pipe amounts to a *role actif* of the conduit.

Under German law, § 836 *Bürgerliches Gesetzbuch* (BGB) would probably apply.<sup>45</sup> The owner of a building or immovable structure (*Werk*) is liable in the event of personal injury or property damage caused by the collapse or disintegration of the building or structure. Underground water piping is held to be a structure.<sup>46</sup> The basis of § 836 is in fact presumed negligence: even if the claimant succeeds in proving defectiveness of the structure and causation (although on these issues the court may be satisfied by *Anscheinsbeweis*, presumption of proof), the defendant can escape liability by proving he has acted diligently and that the collapse or disintegration was not caused by his failure to uphold a high standard of maintenance and inspection of the structure.<sup>47</sup> Although in theory § 836 BGB amounts to liability for unlawful behaviour of the owner, in practice, to some extent, it mimics strict liability: the facts in *Transco v. Stockport* would probably give rise to liability under § 836 BGB because the cause of the breakdown of the pipe was not discovered and exculpatory evidence was therefore not available.<sup>48</sup>

Under German law, the facts in *Transco v. Stockport* can also lead to strict liability under the specific statutory provision of § 2 *Haftpflichtgesetz*. In this specific statute a number of sources of increased risk have been made subject to strict liability, including the *Rohrleitungsanlage* for *Flüssigkeiten* (conduits for liquids).<sup>49</sup> The *Inhaber* (possessor or operator) of the *Anlage* (structure, installation) is liable for the damage caused by ruptures of water pipes unless he can prove *höhere Gewalt* (*vis maior*; § 2 Abs. 3 *HaftpflG*). However, the strict liability is not applicable to damage caused within buildings and *befriedeten Grundstücke* (fenced premises).<sup>50</sup> Therefore, in the case of *Transco v. Stockport* liability seems to depend on whether the Council is considered to be the *Inhaber*, on the exact location of the fracture and on whether the premises were fenced. These points do not seem to stand in the way of strict liability of the Council: the Council was the possessor [629] and operator, the

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Article 1386. See *Viney/Jourdain* (n. 40), no. 649 and no. 737 ff., who observe (no. 739) that Article 1386 should be abolished.

<sup>44</sup> Article 1386 requires a ‘rôle actif du bâtiment’ with some kind of movement (falling down or breaking of parts of the structure; ; “effondrement partiel d’éléments de construction”). Therefore cracks in a chimney do not constitute a ‘ruine’ (Cass. 2e civ 3 mars 1993, bull. civ. II, no. 86, Resp. Civ. et Assur. 1993, comm. 189), and rupture of water works are not covered by art. 1386 (Cass Civ 4 mai 1973, D. 1973, inf. rap. p. 147); see *Jur.-Classeur Resp. Civ. et Assur.* (Vol. 2), Fasc. 152, no. 31.

<sup>45</sup> See, e.g., BGH 25 January 1971, BGHZ 55, 229 Next to § 836 BGB, there is the possibility of a cause of action under § 906 BGB for nuisance. See, e.g., BGH 30 May 2003, V ZR 37/02, at <www.bundesgerichtshof.de>. § 906 BGB will not be dealt with here.

<sup>46</sup> See BGH 25 January 1971, BGHZ 55, 229. See also *Günter Schlegelmilch* (ed.), Geigel - Der Haftpflichtprozeß, 2004, no. 19-5, and LG Karlsruhe 26 June 1986, VersR 1988, p. 694 (a ruptured water main caused a land slide and damaged parked motor vehicles). For more references to case law, see *Werner Filthaut, Haftpflichtgesetz*, 2003, § 2, no. 30.

<sup>47</sup> *Schlegelmilch* (n. 46), no. 19-14. Cf. *J. Fedtke/U. Magnus*, in: B.A. Koch and H. Koziol (eds.), *Unification of Tort Law: Strict Liability*, 2002, p. 149.

<sup>48</sup> Note that BGH 25 January 1971, BGHZ 55, 229 had already raised the appropriate standard of care of the operator of the water conduit, leaving little room for exculpatory evidence.

<sup>49</sup> *Filthaut* (n. 46), § 2, no. 22. Doctrine and case law distinguish between ‘Wirkungshaftung’ and ‘Zustandhaftung’. The ‘Wirkungshaftung’ of water conduits is focused on the typical consequences of the thrust with which the water is propelled through the conduit. See, e.g., BGH 13 June 1996, NJW 1996, p. 3208. Cf. BGH 5 October 1989, NJW 1990, p. 1167 (at p. 1168). On the ‘Wirkungshaftung’ of § 2 *HaftpflG*, see *Schlegelmilch* (n. 46), no. 22-62 ff. The ‘Zustandhaftung’ focuses on liability for the defectiveness of the structure; see *Reinhard Baur et al.*, *Wussow - Unfallhaftpflichtrecht*, 2002, pp. 544-547.

<sup>50</sup> Note the resemblance to the ‘escape’-requirement under *Rylands v Fletcher*.

fracture was outside of the block of flats, and the damage did not occur within a fenced property.

Under Dutch law (the reader will forgive me this touch of blatant chauvinism), the *Transco v Stockport* case is rather simple. A water conduit may be expected to contain water rather than leak it, and by leaking large quantities of water, it fails to provide the safety that may be expected from pipes and it thus brings about a specific risk, to property at least. Therefore, strict liability for defective buildings and structures (article 6:174 BW) comes into play. In 1992, when the 1838 Civil Code was replaced by the new Civil Code, the legislature abandoned the old regime of *ruine d'un bâtiment* based on article 1386 of the French Civil Code. Instead, the broader concept of 'the failure to offer the safety that may generally be expected of a building or structure under the given circumstances, and thus bringing about a specific risk to life and property' was introduced. A similar strict liability is currently available for movable objects (article 6:173 BW).

If the risk as mentioned in article 6:174 BW materialises, either the possessor or professional operator of the immovable property – which includes buildings, structures, parts thereof, mains and pipes, and road surfaces – is strictly liable for the ensuing damage.<sup>51</sup> The main defence that the liable person can raise is *vis maior*. In the case of *Transco v Stockport*, the Council, being the strictly liable possessor, bears the burden of proving that the defectiveness was caused by an uncontrollable external cause. Given the fact that the exact cause of the leak had not been established, the Council would remain liable. To conclude, under Dutch law the Council would be strictly liable for the repair cost incurred by Transco.<sup>52</sup>

The *Draft Principles on Tort Law by the Study Group on a European Civil Code* (June 2004) have taken the liability for defective premises one step further.<sup>53</sup> In article 3:203 ("Accountability for Damage Occurring in Premises"), the Draft states that "the occupier of premises is accountable for the causation of personal injury and consequential loss and for loss resulting from property damage as a result of the dangerous condition of the premises."<sup>54</sup> As article 3:203 is part of the section on 'Accountability without Intention or Negligence', it can be qualified as a true strict liability.<sup>55</sup> However, the comments, which are not yet officially available, should [630] clarify whether a water pipe rupture can qualify as a 'dangerous condition of the premises' and whether the injured party bears the burden of proving the cause of the rupture. Personally, I would find it disappointing if the claimant had to prove the cause, because that would take away most of the advantage that a strict liability in cases like *Transco v Stockport* would have to offer.

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<sup>51</sup> Article 6:174 and Article 6:181 *Burgerlijk Wetboek* (BW) (shifting the liability from possessor to professional operator). Note that, for defective conduits, the legislature has clearly provided where the strict liability of the operator of the conduit ends and the strict liability of the end user/home owner starts: the end user is responsible for the pipe if it is part of a building or structure and serves to supply the building with a substance or to remove that substance from the premises.

<sup>52</sup> Although this already follows from general principles of the law of damages, Article 6:184 BW confirms that the liable possessor or operator is also liable for the cost of reasonable measures that have been taken to prevent or mitigate imminent danger from materialising. See Article 6:184 BW, and *C.E. du Perron/ W.H. van Boom*, *The Netherlands*, in: B.A. Koch/H. Koziol (eds.), *Unification of Tort Law: Strict Liability*, 2002, p. 234.

<sup>53</sup> The text of the draft is available at <[www.sgecc.net](http://www.sgecc.net)>.

<sup>54</sup> Note that the liable occupier is also held accountable for the cost of 'prevention' (the term is badly chosen by the SGECC; the term 'mitigation of damage' would be preferable); see Article 1:102 in conjunction with Article 2:101 Draft (June 2004).

<sup>55</sup> Note that Article 5:302 allows the *vis maior* defence. The SGECC Draft seems not to have made an explicit exception to strict liability for the eventuality that the danger itself was scientifically unknown at the time of exposure to the danger.

The Draft Principles of the European Group on Tort Law do not deal explicitly with strict liability for defective premises. Instead, the attention is focused on a *general clause* on strict liability for ‘dangerous activities’. Article 5:101 (‘Abnormally Dangerous Activities’) states:

- (1) A person who carries on an abnormally dangerous activity is strictly liable for damage characteristic to the risk presented by the activity and resulting from it.
- (2) An activity is abnormally dangerous if:
  - a) it creates a foreseeable and highly significant risk of damage even when all due care is exercised in its management and
  - b) it is not a matter of common usage.
- (3) A risk of damage may be significant having regard to the seriousness or the likelihood of the damage.

Moreover, article 4:202 (‘Enterprise Liability’) shifts the burden of proof with regard to the cause of the pipe rupture onto the ‘enterprise’, even if liability is fault-based.<sup>56</sup>

## 5. Strict liability: General clause or specific statute?

Article 5:101 of the EGTL Principles raises the fundamental question of whether strict liability should be restricted to statutory regimes for specific sources of danger, or whether a general clause should allow courts to expand the scope of existing strict liabilities or even to implement new liabilities themselves. These questions have been the subject of a lively scholarly debate in a number of European countries, especially in those countries that lack a generally applicable strict liability for ‘dangerous things’ or ‘dangerous activities’ (whatever the content of these definitions may be).<sup>57</sup> In most countries, courts are not [631] allowed to proclaim strict liabilities<sup>58</sup> and therefore legislatures have dealt with a number of ‘modern’ sources of increased risk outside the Civil Codes.<sup>59</sup> When the risks that these sources of danger posed were thought to be serious enough, specific statutes dealing with strict liability for these dangerous activities or objects were enacted. As a result, in a number of countries, the patchwork of statutes governing strict liability experiences difficulty, or so some authors argue, in keeping up with technological innovation.<sup>60</sup>

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<sup>56</sup> Article 4:202 states: “(1) A person pursuing a lasting enterprise for economic or professional purposes who uses auxiliaries or technical equipment is liable for any harm caused by a defect of such enterprise or of its output unless he proves that he has exercised all proper care to prevent harm. (2) „Defect” is any deviation from standards that are reasonably to be expected from the enterprise or from its products or services.” Whether the Stockport Borough Council would – in its role as a landlord of the housing estate – be considered to be an ‘enterprise’, is not certain. The forthcoming comments to the Principles will have to shed light on the position of public bodies in this respect.

<sup>57</sup> On this discussion, see *Markesinis/Unberath* (n. 19), pp. 717 ff. (especially p. 723), with references. Cf. *C.C. van Dam*, *Aansprakelijkheidsrecht - een grensoverschrijdend handboek*, 2000, no. 419; *Nils Jansen*, *Die Struktur des Haftungsrecht*, 2003, pp. 382-385; *H. Koziol*, *Österreichisches Haftpflichtrecht - Band I: Allgemeiner Teil*, 1997, p. 218; *Zimmermann* (n. 8), pp. 1132 ff. In Switzerland, the discussion has taken a more substantive form with the recent reform proposals. See *P. Widmer*, Switzerland, in: B.A. Koch/H. Koziol (eds.), *Unification of Tort Law: Strict Liability*, 2002, pp. 346-347; *P. Widmer*, Reform und Vereinheitlichung des Haftpflichtrechts auf schweizerischer und europäischer Ebene, in: Reinhard Zimmermann (ed.), *Grundstrukturen des Europäischen Deliktsrechts*, 2003, pp. 168 ff.

<sup>58</sup> This seems to be the case in the majority of European jurisdictions; see, e.g. *Van Gerven/Lever/Larouche* (n. 34), p. 540, pp. 578-579.

<sup>59</sup> For an overview of these statutes under German law, see *Van Gerven/Lever/Larouche* (n. 34), p. 546 ff.

<sup>60</sup> *Zweigert/Kötz* (n. 14), pp. 658-659; *Zimmermann* (n. 8), p. 1134. Cf. *v. Bar* (n. 36), no. 101 ff., and *v. Bar* (n. 10), no. 315.

Therefore, some suggest that these specific statutes should be replaced by or supplemented with a general clause in the Civil Code which would provide a framework and ‘back-up strict liability’ for sources of increased risk.<sup>61</sup> However, these suggestions have met with considerable criticism.<sup>62</sup> I think that this criticism has considerable merit. The French example of article 1384 *Code Civil* shows that trading in specificity for flexibility has the obvious drawback of legal uncertainty and wide judicial discretion. Under article 1384 of the French Civil Code, a fairly general strict liability for accidents involving movables and immovables has developed. The problem is of course that it does not require a defect or a certain degree of dangerousness of the movable object, and, as a result, it is quite difficult to identify the exact mechanism and rationale for applying strict liability. Although the French courts seem satisfied by the mere fact that an object (actively) *caused* damage (which amounts to a mere *Kausalhaftung*), this, in my opinion, can hardly be considered to be a workable mechanism. Causation in this respect is an empty shell that can contain all sorts of policy considerations; I feel it is preferable to state these considerations openly rather than to leave all parties concerned in the dark.

An alternative to article 1384 *Code Civil* is a flexible strict liability for *inherently dangerous activities*.<sup>63</sup> Although this form of liability certainly is more informative [632] with regard to its scope of application, it still seems to display some flaws. Under this approach, courts are faced with similar problems as may arise under a requirement of *non-natural use* as in *Rylands v Fletcher*.<sup>64</sup> Apparently, the concept of ‘dangerous (professional) activities’ has led some courts to decide that the operation of a railway is dangerous, on the one hand, and the operation of a building construction company is not, on the other.<sup>65</sup> These diverging decisions are capricious given the fact that the construction industry has one of the highest rates of occupational casualties compared to all branches of industry.<sup>66</sup> And if a court did indeed

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<sup>61</sup> See *supra*, footnote 57. In England and Wales, this discussion has not received any major attention since the 1970 Law Commission Report entitled *Civil Liability for Dangerous Things and Activities* and the 1978 Pearson Commission report; see *Deakin/Johnston/Markesinis* (n. 4), pp. 546-547, *Rogers* (n. 4), p. 552 and *Schamps* (n. 4), pp. 518 ff.

<sup>62</sup> For a recent overview of the arguments in favour of and against a general clause in strict liability, see *J. Spier*, *The Phantom of a European Civil Code*, in: H. Koziol/Jaap Spier (eds.), *Liber Amicorum Pierre Widmer*, 2003, pp. 330 ff.

<sup>63</sup> Typical exponents of this type of liability for dangerous (business) activities are Article 2050 *Codice Civile* (Italy) and the case law of the Austrian *Oberste Gerichtshof* on the “gefährliche Betrieb”. See *v. Bar* (n. 10), no. 353 ff. For a more recent example, see Article 50 of the Swiss Draft *Haftungsrecht* (see *Pierre Widmer and Pierre Wessner*, *Vorentwurf zu einem Bundesgesetz über die Revision und Vereinheitlichung des Haftpflichtrechts*, 2001), which, however, is not intended to replace specific statutory strict liabilities, but rather to supplement them with a general umbrella-like provision on strict liability for dangerous activities (see art. 50 (2) and *Widmer* (n. 57), pp. 170-171).

<sup>64</sup> The term “non-natural use” has proved not to be a good example of a flexible definition, because it has been used to describe not merely the presence of something that Mother Nature did not bring to the land (which nowadays would be just about anything), but also the presence of things that are not usually present (compared to what or whom?), and with things that do not serve the community (can we really name an item that cannot be attributed some societal value?). On this point, see *Newark* (n. 14), p. 557 ff. In fact, some continental proponents of general strict liability for sources of heightened danger have argued that daily and usual activities should not be excluded from strict liability. This argument bears resemblance to the non-natural use requirement under *Rylands v Fletcher*, and therefore similar criticism can be raised against it: what is a daily activity and why would it be less dangerous? For criticism, see *Widmer* (n. 57), p. 174.

<sup>65</sup> This seems to be the position under Austrian law with regard to *strikte Haftung für gefährliche Tätigkeiten*; see the references at *v. Bar* (n. 10), no. 353. The Italian Article 2050 C.C. yields a similar capricious result: plastering a house is not considered to be a dangerous activity, but the collection of personal data is. See *v. Bar* (n. 10), no. 347. For similar criticism, see *Wagner* (n. 19), pp. 286 ff.

<sup>66</sup> For an overview of industrial casualty rates, see, e.g., <[www.europe.osha.eu.int](http://www.europe.osha.eu.int)>, identifying the building industry as one of the most hazardous.

include construction in the list of dangerous activities,<sup>67</sup> would we not consider whether other activities with a comparable or even higher statistically significant heightened incident rate (participating in traffic, walking stairs, skiing, swimming and boating) should somehow be part of this liability? Do we really want the courts to decide what is a dangerous activity *per se* and what is not? Do we think that courts are apt to decide, as article 5:101 of the EGTL Principles demands, whether an activity is a matter of common usage?<sup>68</sup>

Personally, I find the arguments against full court autonomy more convincing than the arguments in favour. Empirical research has shown that courts are bad at assessing and comparing dangers, and even worse at estimating the magnitude of risks.<sup>69</sup> Moreover, they are badly equipped for balancing policy reasons for imposing, rejecting or stretching strict liability.<sup>70</sup> In the legislative process of establishing strict liability, the decision to impose strict liability is the final stage of a political decision making process in which all interest groups have had their say and in which the advantages and drawbacks have been balanced openly. Not all courts are capable and willing to embark upon such an enterprise and, moreover, they [633] seem to lack sufficient expertise and time to devote to the balancing process involved. Second, most courts tend to decide case by case, and not all cases go to court, so how can courts balance anyway?

This, however, does not lead to the conclusion that courts should be completely denied the right to apply strict liability by way of *analogy*. It all depends on how frivolous a court has been in the past when using analogies. Indeed, using the courts' experience of flexible rule making and of adjusting their products to the needs of ever changing society can be an added value to the statutory framework. Admittedly, legislatures make little effort to keep their Civil Codes up to date with society's needs. Instead, they have always relied upon the judiciary to display creativity and invention. Therefore, the ideal situation would be one where strict liability on a statutory basis uses definitions that are flexible enough to be moulded by the courts on the one hand, and substantially relevant on the other in order to give adequate direction to the judicial process of deciding specific cases.<sup>71</sup>

I do not believe, however, that allowing the use of analogy will prove to be a solution to all problems. Let us think of the situation where the House of Lords would have considered stretching the statutory strict liability laid down in S. 209 (1) of the Water Industry Act 1991 to cover private owners as well.<sup>72</sup> Can a court truly balance the relevant policy arguments such as: "Can private owner take out liability insurance as easily as statutory undertakers? What will be the consequences for insurance premiums? If we allow this analogy, what other analogies should we allow as well?" These questions can raise fierce debates within the

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<sup>67</sup> This has been proposed by *Widmer* (n. 57), p. 170.

<sup>68</sup> If it is true (as *Ulrich Magnus*, *Vergleich der Vorschläge zum Europäischen Deliktsrecht*, ZEuP 2004, p. 571 suggests) that the 'common usage' exception was merely inserted in order to exclude motor vehicles from this strict liability, then surely explicitly stating so would have been the preferable option.

<sup>69</sup> See, e.g., *Jeffrey J. Rachlinski*, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. Chicago L. Rev. 1998, pp. 571 ff; *Christopher P. Guthrie/Jeffrey John Rachlinski/Andrew J. Wistrich*, *Inside the Judicial Mind*, 86 Cornell Law Review 2001, pp. 777 ff. For an extensive overview of research on the poor performance of the judiciary in risk assessment, see *W. H. van Boom*, *Structurele fouten in het aansprakelijkheidsrecht* (inaugural address Tilburg), 2003, and *W.H. van Boom/M.J. Borgers* (eds.), *De rekenende rechter*, 2004.

<sup>70</sup> See *Van Boom* (n. 69).

<sup>71</sup> In a similar vein *Wagner* (n. 19), p. 287. Cf. *v. Bar* (n. 10), no. 339. The suggestion by some to work with statutory instruments containing lists of activities that are deemed to fit the definition of 'dangerous activity' can be helpful, provided that this list is not exhaustive. See Article 50 (2) of the Swiss Draft: if a risk is similar to a risk that has already been subjected to strict liability, then the court is allowed to file that particular risk as 'das charakteristische Risiko einer besonders gefährlichen Tätigkeit'. The problematic question is of course how far courts are allowed to stretch the analogy.

<sup>72</sup> This would have led, as Lord Hoffmann points out, to dismissal of Transco's claim because the Water Industry Act excludes claims by gas companies.

legislative process deciding on strict liability, as was recently illustrated by the political decision-making process involving the European Directive on Environmental Liability.<sup>73</sup> It is necessary to be cautious in allowing these discussions to shift from parliament to the courtroom. In this respect, I feel that article 5:101 of the EGTL Principles is far from cautious, because it potentially has an unforeseeably wide scope of application. On the other hand, it seems to be rather restrictive in the sense that it does not cover rather the ‘normal situations’ of defective water pipes: if nothing else, the case law with regard to the rule in *Rylands v Fletcher* has shown that using water pipes is neither non-natural nor extraordinary. Using water pipes is not ‘abnormally dangerous’, but rather ‘common usage’. This would exclude it from the ambit of article 5:101 EGTL Principles. Nevertheless, there does seem to be a genuine need for (strict) liability for defective pipes. How can the law accommodate this need? [634]

## 6. Defectiveness and inherent dangers as a justification for strict liability

If legislatures want to get rid of specific statutes that deal with liability of gas pipe operators, water pipe operators, or any other pipe operators or possessors, they should turn to the question of *the common denominator* of these pipes. It seems that there are at least two elements that can be distinguished.

First, the fact that the content of the pipe is hazardous, noxious, combustible, corrosive, et cetera, can justify the imposition of strict liability on the possessor or operator of the content. The processes that can occur after the content has left the pipe can be damaging as well, even if the content escapes in small doses. The *inherent* features of the liquid or gas render it dangerous in some respect, and the legislature can choose to hold the possessor or user of the substance strictly liable for the dangers that these features pose.<sup>74</sup>

Water itself is said not to be *inherently* ultra-hazardous, at least not when compared to the inherent risks of chemicals and combustibles.<sup>75</sup> The relevant cause of water damage is of course pipe rupture. Pipes have in common that, *if* they are defective, enormous quantities of liquids or gasses can escape. The mere emission or leakage of these large quantities can in itself be harmful, even if the liquid or gas is not dangerous in small quantities (as is the case with water). The justification for liability in cases like these cannot be *non-natural use* or increased risk of using water pipes: the use itself belongs to everyday life and is not extraordinarily dangerous. However, we do have a general expectation that water pipes will hold their content and it is generally acknowledged that, if they do not, they will cause some

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<sup>73</sup> On that process, see, e.g., B.A. Koch, in: *H. Koziol/Barbara C. Steininger* (eds.), *European Tort Law 2003*, 2004, pp. 439 ff.

<sup>74</sup> In the event of concurring causes (e.g., the gas pipe is defective, the gas escapes and explodes) the legislature can choose either *to channel* liability to one of possibly two liable persons (e.g., the operator of the pipe and the possessor/user of the dangerous substance) or to impose *joint and several liability*. Article 6:175 of the Dutch Civil Code channels both liabilities towards the operator of the pipe. If, however, the pipe is part of a building or structure and serves to supply the building with the substance or to remove the substance therefrom, then both strict liabilities are channelled towards the professional user of the substance (Article 6:175 (3) in conjunction with (5) BW).

<sup>75</sup> The strict liability for hazardous and noxious substances (Article 6:175 BW) will not apply. See *Kamerstukken II* (i.e., legislative proceedings Second Chamber of Parliament) 1990/91, 21 202, no. 6, p. 18: liquids as such are not a hazardous substance, even though a person can easily drown in *large quantities* of it. Illustrative in this respect is no. 95 of the *Anhang 1 zu § 1 UmweltHG*, which provides that a industrial plant that merely uses *water* for solution purposes is excluded from the list of industrial sources of increased risk.

damage or other.<sup>76</sup> If the legislature feels that this risk – which typically combines a low frequency with a high danger of damage to property and sometimes even to life and limb – should be borne by the possessor or operator of the object, then strict liability seems in order. I do not think, however, that this can be called a liability for an ‘abnormally dangerous activity’.

So what can it be called? The Dutch Civil Code has tried to introduce the concept of objects ‘lacking the safety that may be expected thereof’. Possessors or [635] operators of tangible objects lacking this safety are strictly liable if the risks associated with this lacking safety materialize. Although, on the face of it, this might seem a practical solution, the concept does refer to expectations from a general safety point of view. In most cases, that will not be a problem: from a safety point of view, the general public may expect water mains to be watertight, and may expect water reservoirs to hold their contents. If a *specific* main or reservoir does not meet this general expectation, strict liability arises. More difficult are the cases that concern some element of inherent danger or danger by design: if some life saving-drug is known to cause a lethal allergy to one in a million users, does it then lack the safety that the public may expect? If household stairs are known to be a source of some danger (statistically speaking, at least), does that render them unacceptably unsafe? And if not, how frequently should an object be involved in accidents to conclude that it is an unacceptably unsafe object? If courts cannot rely on statutory safety standards in the case at hand, they will, when called upon, answer these questions with the use of their own perception of what constitutes an acceptable safety risk and what does not. Although that may not be perfectly preferable, it does seem to be the best compromise achievable if a legislature chooses to implement generally framed strict liability rules for dangerous objects or processes.<sup>77</sup>

## 7. How to synthesize Lord Hoffmann’s ideas with a policy on strict liability

Some remarks should be made on the ideas of Lord Hoffmann as to why a gas company should be denied the right to sue a Council under the rule in *Rylands v Fletcher*. In short, his Lordship’s argument was that a sensible gas company would insure itself against these risks. Thus, Lord Hoffmann essentially argues that there should be no strict liability under *Rylands* except in case of an uninsurable risk. In my view, this is a dangerous line of reasoning.<sup>78</sup> Admittedly, a legislature should always take into consideration whether a proposed strict liability is manageable, either through tighter risk reduction measures within the strictly liable organisation or through an (affordable) insurance policy. However, this reasoning should not be reversed: the fact that no relevant insurance product is currently available should not be prohibitive to introducing or upholding a strict liability. The unavailability of insurance

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<sup>76</sup> See, *Rogers* (n. 4), p. 551: “The tendency has been to say that common large-scale activities, especially services such as the supply of gas or water, do not constitute a non-natural use of land even though their potential for causing damage is very great.”

<sup>77</sup> B.A. Koch/H. Koziol, in: B.A. Koch and H. Koziol (eds.), *Unification of Tort Law: Strict Liability*, 2002, pp. 407-408, think that at least two key elements should be considered: the likelihood of an accident and the potential extent of the damage. A combination of high risk and little damage may justify strict liability as well as low probability and much potential damage; in practice, it merely seems to be the latter that is regulated through strict liability. Most sources of frequent but small damage are not considered to be subject to tortious liability but rather to be used at one’s own peril (such as kitchen knives).

<sup>78</sup> See also *Bagshaw*, L.Q.R. 2004, p. 390.

coverage may have a number of causes, of which imperfection of the local insurance market is but one.<sup>79</sup>

[636] The ideal situation would be that the legislature meticulously balances the insurability argument; far from ideal is the situation where a court starts from rather general ideas on insurability and ends up with the badly underpinned conclusion that the claimant should have taken out an insurance policy. This requires more detailed research into the practice of first party insurance usually taken out by land owners, and, in the case of *Transco*, by gas companies. Do gas companies in fact take out insurance against (imminent) property damage? I cannot judge the English situation,<sup>80</sup> but I do know that, on the continent, it is not unusual for public utility companies to self-insure rather than take out a genuine policy. If a court thinks it the best distribution to let the loss of public utilities (or any other company for that matter) lie where it falls, then the argument should not be based on insurability, but rather on the nature of the damage. If that position is taken, then basically the damage suffered by public entities cannot be shifted by means of strict liability because the entity is held to be capable of financially absorbing such a risk.<sup>81</sup> Although this is currently not a general principle of law, such a system is not inconceivable. For example, it is feasible to design a system of strict liability that only benefits consumers (viz., death, personal injury, and damage to property that is privately used<sup>82</sup>) and uninsured businesses.<sup>83</sup> Such an approach in respect of strict liability could more or less meet the objections raised by Lord Hoffmann. However, in my opinion, it should be the legislature that balances the relevant arguments in favour or against such a restricted scope of application for strict liabilities.

## 8. Conclusions

*Transco v Stockport* illustrates the reserve that the House of Lords usually displays with regard to the rule in *Rylands v Fletcher*. The House of Lords has not officially abolished the rule, but its scope of application has been narrowed down considerably ever since the decision in *Rylands* was rendered some 150 years ago. Phrased in neutral terms, we can say that, because the use of water pipes is ubiquitous and of ‘daily usage’, the claimant was denied the right to recover damages caused by a seriously leaking water pipe. In some continental jurisdictions, however, strict liability also covers this accidental failure of water pipes. In effect, some legal systems do and some do not adhere to the policy of attaching strict liability to events like [637] the Stockport embankment saturation. There are good arguments for both approaches, and there even are good arguments against allowing some claimants and refusing others. In any event, the most pressing point is that policy decisions in this field should preferably be made by legislatures rather than by courts.

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<sup>79</sup> M.G. Faure has often raised this point; see, e.g., *Michael Faure* (ed.), *Deterrence, Insurability, and Compensation in Environmental Liability*, 2003. Cf. also *McNall*, *Conveyancer and Property Lawyer* 2004, p. 251.

<sup>80</sup> It seems plausible that the exclusion in S. 209 of the Water Industry Act 1991 of claims from gas companies is (or rather, was) based on the idea that collecting damages from one public utility company to another would equal unnecessarily ‘pumping round’ money.

<sup>81</sup> *Rogers* (n. 4), p. 552, mentions the absorption capacity as the possible justification for the exclusion in S. 209 of the Water Industry Act 1991.

<sup>82</sup> The EC Products Liability Directive is restricted to these potential injured interests.

<sup>83</sup> See, e.g., Article 6:197 of the Dutch Civil Code, which denies first party insurers to benefit from a number of strict liabilities; these insurance companies are not subrogated into the rights of the insured ‘consumer’. On that system, see *C.E. du Perron/W.H. van Boom*, *The Netherlands*, in: Ulrich Magnus (ed.), *The Impact of Social Security Law on Tort Law*, 2003.