Cambridge Water Co Ltd v Eastern Counties Leather plc [1993] ABC.L.R. 12/09

HL before Lords Templeman : Goff ; Jauncey ; Lowry : Woolf. 9th December 1993

LORD TEMPLEMAN : My Lords,

1. For the reasons given in the speech by my noble and learned friend, Lord Goff of Chieveley I would allow this appeal.

LORD GOFF OF CHIEVELEY : My Lords.

2. This appeal is concerned with the question whether the appellant company. Eastern Counties Leather Plc (ECL), is liable to the respondent company. Cambridge Water Company (CWC), in damages in respect of damage suffered by reason of the contamination of water available for abstraction at CWC's borehole at Sawston Mill near Cambridge. The contamination was caused by a solvent known as Perchloroethene (PCE). Used by ECL in the process of degreasing pelts at its tanning works in Sawston. about 1.3 miles away from CWC's borehole, the PCE having seeped into the ground beneath ECL's works and thence having been conveyed in percolating water in the direction of the borehole. CWC's claim against ECL was based on three alternative grounds, viz. negligence, nuisance and the rule in ***Rylands v. Fletcher*** (1868) L.R.3 H.L. 330. The judge, Ian Kennedy J., dismissed CWC's claim on all three grounds - on the first two grounds, because (as I will explain hereafter) he held that ECL could not reasonably have foreseen that such damage would occur, and on the third ground because he held that the use of a solvent such as PCE in ECL's tanning business constituted, in the circumstances, a natural use of ECL's land. The Court of Appeal, however, allowed CWC's appeal from the decision of the judge, on the ground that ECL was strictly liable for the contamination of the water percolating under CWC's land, on the authority of ***Bollard v. Tomlinson*** (1885) 29 Ch. D. 115. and awarded damages against ECL in the sum assessed by the judge, viz., £1,064,886 together with interest totalling £642,885. and costs. It is against that decision that ECL now appeals to your Lordships' House, with leave of this House.

3. The factual background to the case has been set out. not only in the judgments in the courts below, but also in lucid detail in the agreed statement of facts and issues helpfully prepared by counsel for the assistance of the Appellate Committee. These reveal the remarkable history of events which led to the contamination of the percolating water available at CWC's borehole. which I think it desirable that I myself should recount in some detail.

4. ECL was incorporated in 1879. and since that date has continued in uninterrupted business as a manufacturer of fine leather at Sawston. ECL employs about 100 people, all or whom live locally. Its present works are. as the judge found, in general modern and spacious, and admit of a good standard of housekeeping.

5. The tanning process requires that pelts shall be decreased: and ECL. in common with all other tanneries, has used solvents in that process since the early 1950s. It has used two types of chlorinated solvents – organochlonnes known as TCE (trichloroethene) and PCE. Both solvents are cleaning and degreasing agents: and since 1950 PCE has increasingly been in common, widespread and everyday use in dry-cleaning, in general industrial use (e.g., as a machine cleaner or paint-thinner), domestically (e.g. in "Dab-it-off") and in tanneries. PCE is highly volatile, and so evaporates rapidly in air; but it is not readily soluble in water.

6. ECL began using TCE in the early 1950s and then changed over to PCE, probably sometime in the 1960s, and continued to use PCE until 1991. The amount so used varied between 50,000 and 100,000 litres per year. The solvent was introduced into what were (in effect) dry-cleaning machines. This was done in two different ways. First, from the commencement of use until 1976, the solvent was delivered in 40 gallon drums; as and when the solvent was needed, a drum was taken by forklift truck to the machine and tipped into a tank at the base of the machine. Second, from 1976 to 1991. the solvent was delivered in bulk and kept in a storage tank, from which it was piped directly to the machine.

7. There was no direct evidence of the actual manner in which PCE was spilled at ECL's premises. However, the judge found that the spillage took place during the period up to 1976, principally during the topping up process described above, during which there were regular spillages of relatively small amounts of PCE onto the concrete floor of the tannery. It is known that, over that period, the minimum amount which must have been spilled (or otherwise have entered the chalk aquifer below) was some 3,200 litres (1,000 gallons); it is not possible even to guess at the maximum. However, as the judge found, a reasonable supervisor at ECL would not have foreseen, in or before 1976, that such repeated spillages of small quantities of solvent would lead to any environmental hazard or damage - i.e., that the solvent would enter the aquifer or that, having done so, detectable quantities would be found down- catchment. Even if he had foreseen that solvent might enter the aquifer, he would not have foreseen that such quantities would produce any sensible effect upon water taken down-catchment, or would otherwise be material or deserve the description of pollution. I understand the position to have been that any spillage would have been expected to evaporate rapidly in the air. and would not have been expected to seep through the floor of the building into the soil below. The only harm that could have been foreseen from a spillage was that somebody might have been overcome by fumes from a spillage of a significant quantity.

8. I turn to CWC. CWC was created under its own Act of Parliament in 1853, and is a licensed supplier of water following implementation of the Water Act 1989. Its function is to supply water to some 275,000 people in the Cambridge area. It takes all its water by borehole extraction from underground strata, mainly the middle and lower chalk prevalent in the area. Since 1945. public demand for water has multiplied many times, and new sources of supply have had to be found. In 1975. CWC identified the borehole at Sawston Mill as having the potential to meet a need for supply required to avert a prospective shortfall, and to form part of its long term

provision for future demand. It purchased the borehole in September 1976. Before purchase, tests were carried out on the water from the borehole; these tests indicated that, from the aspect of chemical analysis, the water was a wholesome water suitable for public supply purposes. Similar results were obtained from tests carried out during the period 1979-1983. At all events CWC, having obtained the requisite statutory authority to use the borehole for public sector supply, proceeded to build a new pumping station at a cost of £184,000: and Sawston Mill water entered the main supply system in June 1979.

9. Meanwhile, in the later 1970s concern began to be expressed in scientific circles about the presence of organic chemicals in drinking water, and their possible effects. Furthermore, the development of. inter alia, high resolution gas chromatography during the 1970s enabled scientists to detect and measure organochlorine compounds (such as PCE) in water to the value of microgrammes per litre (or parts per billion) expressed as µg/1.

10. In 1984 the World Health Organisation (WHO) published a Report on Guidelines for Drinking Water Quality (Vol. 1: Recommendations). Although not published until 1984, the Report was the product of discussion and consultation during several years previously, and its recommendations appear to have formed the basis of an earlier EEC Directive, as well as of later UK Regulations. Chapter 4 of the Report is concerned with "Chemical and Physical Aspects", and Chapter 4.3 deals with organic contaminants, three of which (including TCE and PCE) were assigned a "Tentative Guideline Value". The value so recommended for TCE was 30 µg/1, and for PCE 10 µg/1.

11. The EEC Directive relating to the Quality of Water intended for Human Consumption (80/778/EEC) was issued on 15 September 1980. Member States were required to bring in laws within two years of notification, and to achieve full compliance within five years. The Directive distinguished between *'Maximum Admissible Concentration*" (MAC) values and *"Guide Level"* (GL) values, the former being minimum standards which had to be achieved, and the latter being more stringent standards which it was desirable to achieve. TCE and PCE were assigned a GL value of only 1 µg/1, i.e. 30 times and 10 times respectively lower than the WHO Tentative Guideline Values.

12. The United Kingdom responded to the Directive by DOE Circular 20/82 dated 15 August 1982. The effect was that, as from 18 July 1985. drinking water containing more than 1µ/1 of TCE or PCE would not be regarded as 'wholesome' water for the purpose of compliance by water authorities with their statutory obligations under the Water Act 1973. However, following a Regulation made in 1989 (1989 No. 1147), the prescribed maximum concentration values for TCE and PCE have been respectively 30 µg/1 and 10 µg/1, so that since 1 September 1989 the United Kingdom values have been brought back into harmony with the WHO Tentative Guideline Values.

13. CWC employed Huntingdon Research Laboratories (HRL) to test its water for the purpose of compliance with the European Directive. In August 1983 Dr. McDonald, an analytical chemist employed by HRL, decided to test tap water at his home in St. Ives, Cambridge. He discovered PCE in the water. Samples then taken of his own and his neighbours' water disclosed an average PCE concentration of 38.5 µg/1. As a result, CWC caused investigations to be made to discover the source of the contaminant, which was identified as the Sawston Mill borehole. The borehole was taken out of commission on 13 October 1983. The Anglian Water Authority then instituted what was to become a prolonged and exhaustive programme of investigation, principally conducted by the British Geological Survey (BGS), to discover the source and path of the PCE in the borehole water. This investigation yielded, between 1987 and 1989, a number of published papers which have become the UK source material on the behaviour and characteristics of chlorinated organic industrial solvents in groundwater. and the behaviour of groundwater in a fissure-flow, anisostropic (i.e., where permeability is higher in one direction rather than constant in all directions) chalk aquifer. Before publication of these papers little was known about either of these subjects.

14. The conclusions reached by BGS, and by the expert witnesses instructed by CWC and ECL in the present litigation, were as follows. Neat PCE had travelled down through the drift directly beneath ECL's premises, and then vertically downwards through the chalk aquifer until arrested by a relatively impermeable layer of chalk marl at a depth of about 50 metres. Thus arrested, the neat PCE had formed pools which were dissolving slowly in the groundwater and being carried down aquifer in the direction of Sawston Mill at the rate of about 8 metres per day, the travel time between pool and Sawston Mill being about 9 months, and the migration of the dissolved phase PCE being along a deep, comparatively narrow, pathway or "plume". On the balance of probabilities, this narrow plume had reached Sawston Mill and been at least materially responsible for the PCE concentrations found there.

15. Sawston Mill had been taken out of supply in October 1983. As an interim measure, CWC brought forward a pre-existing proposal to construct a new pumping station at Duxford Airfield. This new source, which came on stream in the summer of 1984. made up for the loss of the Sawston supply. CWC still needed to make use of the Sawston catchment, but it rejected methods of treatment of the water there as unproven at that time. Instead it proceeded with the development of a new source of supply at Hinxton Grange. The damages assessed by the judge, and awarded by the Court of Appeal, against ECL consisted of £956,937 in respect of the development of Hinxton Grange (less £60,000. being the residual value to CWC of Sawston Mill) together with certain incidental expenses. In fact, by 1990 CWC felt sufficiently confident in carbon filtration technology to build a treatment plant at Sawston Mill, for the purpose of treating water from Duxford Airfield to remove concentrations of an organic herbicide from the water there. This plant is capable of removing PCE from Sawston Mill water as and when required.

16. From the foregoing history, the following relevant facts may be selected as being of particular relevance.

(1). The spillage of PCE, and its seepage into the ground beneath the floor of the tannery at ECL's works, occurred during the period which ended in 1976, as a result of regular spillages of small quantities of PCE onto the floor of ECL's tannery.

(2). The escape of dissolved phase PCE, from the pools of neat PCE which collected at or towards the base of the chalk aquifers beneath ECL's works, into the chalk aquifers under the adjoining land and thence in the direction of Sawston Mill, must have begun at some unspecified date well before 1976 and be still continuing to the present day.

(3). As held by the judge, the seepage of the PCE beneath the floor of ECL's works down into the chalk aquifers below was not foreseeable by a reasonable supervisor employed by ECL. nor was it foreseeable by him that detectable quantities of PCE would be found down- catchment, so that he could not have foreseen, in or before 1976, that the repeated spillages would lead to any environmental hazard or damage. The only foreseeable damage from a spillage of PCE was that somebody might be overcome by fumes from a substantial spillage of PCE on the surface of the ground.

(4). The water so contaminated at Sawston Mill has never been held to be dangerous to health. But under criteria laid down in the UK Regulations, issued in response to the EEC Directive, the water so contaminated was not "wholesome" and, since 1985. could not lawfully be supplied in this country as drinking water.

The decision of Ian Kennedy J.

17. The judge dismissed the claims against ECL in nuisance and negligence in the following passage (see p. 50 D): *"That there should now be an award of damages in respect of the 1991 impact of actions that were not actionable nuisances or negligence when they were committed 15 years before is to my mind not a proposition which the common law would entertain".*

I feel, with respect, that this passage requires some elucidation.

18. It is not to be forgotten that both nuisance and negligence are historically, actions on the case: and accordingly in neither case is the tort complete, so that damages are recoverable, unless and until damage has been caused to the plaintiff. It follows that, in this sense (which I understand to be the relevant sense), there could not be an actionable nuisance by virtue of the spillage of solvent on ECL's land, but only when such spillage caused damage to CWC, i.e. when water available at its borehole was rendered unsaleable by reason of breach of the Regulations. It also follows that, in theory, the fact that the Regulations came into force after the relevant spillage on ECL's land, though before the relevant contamination of the water, would not of itself mean that there was no actionable nuisance committed by ECL, unless there is some applicable principle of law which would in such circumstances render the damage not actionable as a nuisance. The two possible principles are either (1) that the user of ECL's land resulting in the spillage was in the circumstances a reasonable user, or (2) that ECL will not be liable in the absence of reasonable foreseeability that its action may cause damage of the relevant type to CWC. In the present case, there does not appear to have been any reliance by ECL, in its pleaded case or in argument, on the principle of reasonable user. I therefore infer that the basis upon which the judge rejected CWC's claim in nuisance must have derived from his finding of lack of reasonable foreseeability of damage of the relevant type, which is basically the same ground on which he dismissed CWC's claim in negligence. This is however a point to which I will return at a later stage, when I come to consider liability on the facts of the present case under the rule in ***Rylands v. Fletcher***.

The decision of the Court of Appeal: *Ballard v. Tomlinson*

19. There was no appeal by CWC against the judge's conclusion on nuisance and negligence. CWC pursued its appeal to the Court of Appeal relying only on the rule in ***Rylands v. Fletcher*** L.R. 3 H.L. 330. on which point the judge had decided against it on the ground that the relevant operations of ECL constituted natural use of its land. The Court of Appeal however held ECL to be strictly liable in damages to CWC in respect of the contamination of the percolating water available for extraction by CWC from its borehole at Sawston Mill. This they did on the basis of the decision of the Court of Appeal in ***Ballard v. Tomlinson*** (1885) 29 Ch.D. 115.

20. In that case the plaintiff and the defendant, whose properties were separated only by a highway, each had on his land a well sunk into the chalk aquifer below. The plaintiff had a brewery on his land, for the purpose of which he used water drawn from his well. A printing house was built on the defendant's land, and the defendant constructed a drain from a water closet attached to the printing house, by means of which the sewage from the closet and the refuse from the printing house found their way into the defendant's well. The sewage and refuse which entered the defendant's well polluted the common source of percolating water so that the water which the plaintiff drew from his well was unusable for brewing purposes. The Court of Appeal, reversing the decision of Pearson J. (1884) 26 Ch.D. 194, held that the plaintiff was entitled to judgment against the defendant for an injunction and for damages.

21. The principal argument advanced by the defendant was based on the proposition that the plaintiff had no property in the water percolating beneath his land, and therefore had no cause of action for the pollution of that water. The judgments of the Court of Appeal, which were unreserved, were largely directed to the rejection of that argument. This they did on the basis that the plaintiff had a right to extract water percolating beneath his land, and the defendant had no right to contaminate what the plaintiff was entitled to get. As Brett M.R. said, at

p.121: *". . .no one of those who have a right to appropriate [the water] has a right to contaminate that source so as to prevent his neighbour from having the full value of his right of appropriation."*

22. It appears that both Brett M.R. and Cotton L.J. considered that the plaintiff's cause of action arose under the rule in ***Rylands v. Fletcher,*** which was the basis upon which the plaintiffs case was advanced in argument. Lindley L.J. however treated the case as one of nuisance.

23. The Court of Appeal treated this decision as determining the present case against ECL. Mann L.J. (who delivered the judgment of the Court) said. at pp.14 F - 15 C:

"It was sufficient that the defendant's act caused the contamination. Nor do the judgments contain any warrant for attaching importance to the reasonableness of the respondent's inability to foresee that spillages would have the kind of consequence which they did. It does not appear from the report whether Tomlinson either knew or ought to have known of any risk of damage attendant on his actions, but none of the judges in this court was concerned with his state of actual or imputed knowledge. The situation is one in which negligence plays no part.

"Ballard v. Tomlinson *decided that where the nuisance is an interference with a natural right incident to ownership then the liability is a strict one. The actor acts at his peril in that if his actions result by the operation of ordinary natural processes in an interference with the right then he is liable to compensate for any damage suffered by the owner."*

24. In his judgment in ***Ballard v. Tomlinson*** 29 Ch.D. 115, 124. Cotton L.J. spoke of the plaintiff's right to abstract percolating water beneath his land as " …. *a natural right incident to the ownership of his own land* ..." In the present context, however, this means no more than that the owner of land can, without a grant, lawfully abstract water which percolates beneath his land, his right to do so being protected by the law of tort, by means of an action for an injunction or for damages for nuisance: see *Megarry and Wade, Law of Real Property,* 5th ed., (1984), p.842, and *Simpson, History of Land Law*. 2nd ed., (1986), pp. 263-264. There is no natural right to percolating water, as there may be to water running in a defined channel; see ***Chasemore v. Richards*** (1859) 7 H.L.Cas. 349, 379, *per* Lord Cranworth, and *Halsbury's Laws of England*. 4th ed., vol. 49, para. 392. In the present case Mann L.J. stated (at p. 15B) that ***Ballard v. Tomlinson*** 29 Ch.D. 115 decided that "*where the nuisance is an interference with a natural right incident to ownership then the liability is a strict one*". In my opinion, however, if in this passage Mann L.J. intended to say that the defendant was held to be liable for damage which he could not reasonably have foreseen, that conclusion cannot be drawn from the judgments in the case, in which the point did not arise. As I read the judgments, they disclose no more than that, in the circumstances of the case, the defendant was liable to the plaintiff in tort for the contamination of the source of water supplying the plaintiffs well, either on the basis of the rule in *Rylands v. Fletcher,* or under the law of nuisance, by reason of interference with the plaintiff's use and enjoyment of his land, including his right to extract water percolating beneath his land. It follows that the question whether such a liability may attach in any particular case must depend upon the principles governing liability under one or other of those two heads of the law. To those principles, therefore. I now turn.

Nuisance and the rule in *Rylands v. Fletcher*

25. As I have already recorded, there was no appeal by CWC to the Court of Appeal against the judge's conclusion in nuisance. The question of ECL's liability in nuisance has really only arisen again because the Court of Appeal allowed CWC's appeal on the ground that ECL was liable on the basis of strict liability in nuisance on the principle laid down, as they saw it. In ***Ballard v. Tomlinson***. Since, for the reasons I have given, that case does not give rise to any principle of law independent of the ordinary law of nuisance or the rule in ***Rylands v. Fletcher,*** the strict position now is that CWC. Having abandoned its claim in nuisance, can only uphold the decision of the Court of Appeal on the basis of the rule in ***Rylands v. Fletcher***. However, one important submission advanced by ECL before the Appellate Committee was that strict liability for an escape only arises under that rule where the defendant knows or reasonably ought to have foreseen, when collecting the relevant things on his land, that those things might, if they escaped, cause damage of the relevant kind. Since there is a close relationship between nuisance and the rule in ***Rylands v. Fletcher,*** I myself find it very difficult to form an opinion as to the validity of that submission without first considering whether foreseeability of such damage is an essential element in the law of nuisance. For that reason, therefore. I do not feel able altogether to ignore the latter question simply because it was no longer pursued by CWC before the Court of Appeal.

26. In order to consider the question in the present case in its proper legal context, it is desirable to look at the nature of liability in a case such as the present in relation both to the law of nuisance and the rule in ***Rylands v. Fletcher,*** and for that purpose to consider the relationship between the two heads of liability.

27. I begin with the law of nuisance. Our modern understanding of the nature and scope of the law of nuisance was much enhanced by Professor Newark's seminal article on ***"The Boundaries of Nuisance***" (1949) 65 L.Q.R. 480. The article is avowedly a historical analysis, in that it traces the nature of the tort of nuisance to its origins, and demonstrates how the original view of nuisance as a tort to land (or more accurately, to accommodate interference with servitudes, a tort directed against the plaintiffs enjoyment of rights over land) became distorted as the tort was extended to embrace claims for personal injuries, even where the plaintiffs injury did not occur while using land in his occupation. In Professor Newark's opinion (p. 487), this development produced adverse effects, viz. that liability which should have arisen only under the law of negligence was allowed under the law of nuisance which historically was a tort of strict liability; and that there was a tendency for *'cross-infection to take place, and notions of negligence began to make an appearance in the realm of nuisance proper"*. But in addition,.

Professor Newark considered (pp. 487-488), it contributed to a misappreciation of the decision in ***Rylands v. Fletcher.***

"This case is generally regarded as an important landmark, indeed a turning point - in the law of tort; but an examination of the judgments shows that those who decided it were quite unconscious of any revolutionary or reactionary principles implicit in the decision. They thought of it as calling for no more than a restatement of settled principles, and Lord Cairns went so far as to describe those principles as 'extremely simple'. And in fact the main principle involved was extremely simple, being no more than the principle that negligence is not an element in the tort of nuisance. It is true that Blackburn J. in his great judgment in the Exchequer Chamber never once used the word 'nuisance', but three times he cited the case of fumes escaping from an alkali works - a clear case of nuisance - as an instance of liability, under the rule which he was laying down. Equally it is true that in 1866 there were a number of cases in the reports suggesting that persons who controlled dangerous things were under a strict duty to take care, but as none of these cases had anything to do with nuisance Blackburn J. did not refer to them.

"But the profession as a whole, whose conceptions of the boundaries of nuisance were now becoming fogged, failed to see in ***Rylands v. Fletcher*** *a simple case of nuisance. They regarded it as an exceptional case and the Rule in* ***Rylands v. Fletcher*** *as a generalisation of exceptional cases, where liability was to be strict on account of 'the magnitude of danger, coupled with the difficulty of proving negligence' [Pollock, Torts, 14th ed., p. 386] rather than on account of the nature of the plaintiffs interest which was invaded. They therefore jumped rashly to two conclusions: firstly, that the Rule in* ***Rylands v. Fletcher*** *could be extended beyond the case of neighbouring occupiers; and secondly, that the Rule could be used to afford a remedy in cases of personal injury. Both these conclusions were stoutly denied by Lord Macmillan in* ***Read v. Lyons*** *[1947] A.C. 156, but it remains to be seen whether the House of Lords will support his opinion when the precise point comes up for decision."*

28. We are not concerned in the present case with the problem of personal injuries, but we are concerned with the scope of liability in nuisance and in ***Rylands v. Fletcher***. In my opinion it is right to take as our starting point the fact that, as Professor Newark considered. ***Rylands v. Fletcher*** *was* indeed not regarded by Blackburn J. as a revolutionary decision: see, e.g., his observations in ***Ross v. Fedden*** (1872) 26 L.T. 966, 968. He believed himself not to be creating new law, but to be stating existing law. on the basis of existing authority; and. as is apparent from his judgment, he was concerned in particular with the situation where the defendant collects things upon his land which are likely to do mischief if they escape, in which event the defendant will be strictly liable for damage resulting from any such escape. It follows that the essential basis of liability was the collection by the defendant of such things upon his land; and the consequence was a strict liability in the event of damage caused by their escape, even if the escape was an isolated event. Seen in its context, there is no reason to suppose that Blackburn J. intended to create a liability any more strict than that created by the law of nuisance; but even so he must have intended that, in the circumstances specified by him. there should be liability for damage resulting from an isolated escape.

29. Of course, although liability for nuisance has generally been regarded as strict, at least in the case of a defendant who has been responsible for the creation of a nuisance, even so that liability has been kept under control by the principle of reasonable user - the principle of give and take as between neighbouring occupiers of land, under which *"... those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action":* see ***Bamford v. Turnley*** (1862) 3 B. & S. 62, 83, *per* Bramwell B. The effect is that, if the user is reasonable, the defendant will not be liable for consequent harm to his neighbour's enjoyment of his land; but if the user is not reasonable, the defendant will be liable, even though he may have exercised reasonable care and skill to avoid it. Strikingly, a comparable principle has developed which limits liability under the ***Rylands v. Fletcher***. This is the principle of natural use of the land. I shall have to consider the principle at a later stage in this judgment. The most authorative statement of the principle is now to be found in the advice of the Privy Council delivered by Lord Moulton in ***Rickards v. Lothian*** [1913] A.C. 263, 280 when he said of the rule **in *Rylands v. Fletcher***. *"It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community".*

30. It is not necessary for me to identify precise differences which may be drawn between this principle, and the principle of reasonable user as applied in the law of nuisance. It is enough for present purposes that I should draw attention to a similarity of function. The effect of this principle is that, where it applies, there will be no liability under the rule in ***Rylands v. Fletcher***: but that where it does not apply, i.e. where there is a non-natural use, the defendant will be liable for harm caused to the plaintiff by the escape, notwithstanding that he has exercised all reasnable care and skill to prevent the escape from occurring.

Foreseeability of damage in nuisance

31. It is against this background that it is necessary to consider the question whether foreseeability of harm of the relevant type is an essential element of liability either in nuisance or under the rule in ***Rylands v. Fletcher***. I shall take first the case of nuisance. In the present case, as I have said, this is not strictly speaking a live issue. Even so, I propose briefly to address it, as part of the analysis of the background to the present case.

32. It is, of course, axiomatic that in this field we must be on our guard, when considering liability for damages in nuisance, not to draw inapposite conclusions from cases concerned only with a claim for an injunction. This is because, where an injunction is claimed, its purpose is to restrain further action by the defendant which may interfere with the plaintiff's enjoyment of his land, and ex hypothesi the defendant must be aware, if and when an

injunction is granted, that such interference may be caused by the act which he is restrained from committing. It follows that these cases provide no guidance on the question whether foreseeability of harm of the relevant type is a prerequisite of the recovery of damages for causing such harm to the plaintiff. In the present case, we are not concerned with liability in damages in respect of a nuisance which has arisen through natural causes, or by the act of a person for whose actions the defendant is not responsible, in which cases the applicable principles in nuisance have become closely associated with those applicable in negligence: see ***Sedleigh-Denfield v. O'Callaghan*** [1940] A.C. 880, and ***Goldman v. Margrave*** [1967] 1 A.C. 645. We are concerned with the liability of a person where a nuisance has been created by one for whose actions he is responsible. Here, as I have said, it is still the law that the fact that the defendant has taken all reasonable care will not of itself exonerate him from liability, the relevant control mechanism being found within the principle of reasonable user. But it by no means follows that the defendant should be held liable for damage of a type which he could not reasonably foresee; and the development of the law of negligence in the past sixty years points strongly towards a requirement that such foreseeability should be a prerequisite of liability in damages for nuisance, as it is of liability in negligence. For if a plaintiff is in ordinary circumstances only able to claim damages in respect of personal injuries where he can prove such foreseeability on the part of the defendant, it is difficult to see why, in common justice, he should be in a stronger position to claim damages for interference with the enjoyment of his land where the defendant was unable to foresee such damage. Moreover, this appears to have been the conclusion of the Privy Council in ***Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty. (The Wagon Mound) (No. 2)*** [1967] 1 A.C. 617. The facts of the case are too well known to require repetition, but they gave rise to a claim for damages arising from a public nuisance caused by a spillage of oil in Sydney Harbour. Lord Reid, who delivered the advice of the Privy Council, considered that, in the class of nuisance which included the case before the Board, foreseeability is an essential element in determining liability. He then continued, at p. 640: "*It could not be right to discriminate between different cases of nuisance so as to make foreseeability a necessary element in determining damages in those cases where it is a necessary element in determining liability, but not in others. So the choice is between it being a necessary element in all cases of nuisance or in none. In their Lordships' judgment the similarities between nuisance and other forms of tort to which* ***The Wagon Mound (No. 1)*** *applies far outweigh any differences, and they must therefore hold that the judgment appealed from is wrong on this branch of the case. It is not sufficient that the injury suffered by the respondents' vessels was the direct result of the nuisance if that injury was in the relevant sense unforeseeable.*"

33. It is widely accepted that this conclusion, although not essential to the decision of the particular case, has nevertheless settled the law to the effect that foreseeability of harm is indeed a prerequisite of the recovery of damages in private nuisance, as in the case of public nuisance. I refer in particular to the opinion expressed by Professor Fleming in his book on *Torts*. 8th ed. (1992), pp. 443-444. It is unnecessary in the present case to consider the precise nature of this principle: but it appears from Lord Reid's statement of the law that he regarded it essentially as one relating to remoteness of damage.

Foreseeability of damage under the rule in *Rylands v. Fletcher*

34. It is against this background that I turn to the submission advanced by ECL before your Lordships that there is a similar prerequisite of recovery of damages under the rule in ***Rylands v. Fletcher.***

35. I start with the judgment of Blackburn J. in ***Fletcher v. Rylands*** itself (1866) L.R. 1 Exch. 265. His celebrated statement of the law is to be found at pp. 279-280. where he said: "*We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiffs default; or perhaps that the escape was the consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law whether the things so brought be beasts, or water, or filth, or stenches*".

36. In that passage, Blackburn J. spoke of "*anything likely to do mischief if it escapes*"; and later he spoke of something "*which he knows to be mischievous if it gets on to his neighbour's [property]*", and the liability to "*answer for the natural and anticipated consequences*". Furthermore, time and again he spoke of the strict liability imposed upon the defendant as being that he must keep the thing in at his peril; and. when referring to liability in actions for damage occasioned by animals, he referred (p. 282) to the established principle "*that it is quite immaterial whether the escape is by negligence or not*". The general tenor of his statement of principle is therefore that knowledge, or at least foreseeability of the risk, is a prerequisite of the recovery of damages under the principle; but that the principle is one of strict liability in the sense that the defendant may be held liable notwithstanding that he has exercised all due care to prevent the escape from occurring.

37. There are however early authorities in which foreseeability of damage does not appear to have been regarded as necessary (see. e.g., ***Humphries v. Cousins*** (1877) 2 C.P.D. 239). Moreover, it was submitted by Mr. Ashworth for CWC that the requirement of foreseeability of damage was negatived in two particular cases, the decision of the Court of Appeal in ***West v. Bristol Tramways Co.*** [1908] 2 K.B.14, and the decision of this House in ***Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co. Ltd.*** [1921] 2 A.C. 465.

38. In ***West*** the defendant tramway company was held liable for damage to the plaintiffs plants and shrubs in his nursery garden adjoining a road where the defendant's tramline ran, the damage being caused by fumes from creosoted wooden blocks laid by the defendants between the rails of the tramline. The defendants were so held liable under the rule in ***Rylands v. Fletcher,*** notwithstanding that they were exonerated from negligence, having no knowledge of the possibility of such damage; indeed the evidence was that creosoted wood had been in use for several years as wood paving, and no mischief had ever been known to arise from it. The argument that no liability arose in such circumstances under the rule in ***Rylands v. Fletcher*** was given short shrift, both in the Divisional Court and in the Court of Appeal. For the Divisional Court, it was enough that the creosote had been found to be dangerous by the jury, Phillimore J. holding that creosote was like the wild animals in the old cases. The Court of Appeal did not call upon the plaintiffs, and dismissed the appeal in unreserved judgments. Lord Alverstone C.J. relied upon a passage from *Garrett on Nuisances,* 2nd ed. (1897), p. 129, and rejected a contention by the defendant that, in the case of non-natural use of land, the defendant will not be liable unless the thing introduced onto the land was, to the knowledge of the defendant, likely to escape and cause damage. It was however suggested, both by Lord Alverstone C.J. (with whom Sir Gorell Barnes P. agreed) and by Farwell L.J. that, by analogy with cases concerning liability for animals, the defendant might escape liability if he could show that, according to the common experience of mankind, the thing introduced onto the land had proved not to be dangerous.

39. *The* ***Rainham Chemicals*** case [1921] 2 A.C. 465 arose out of a catastrophic explosion at a factory involved in the manufacture of high explosive during the First World War, with considerable loss of life and damage to neighbouring property. It was held that the company carrying on the business at the premises was liable for the damage to neighbouring property under the rule in ***Rylands v. Fletcher****;* but the great question in the case, at least so far as the appellate courts were concerned, was whether two individuals, who were shareholders in and directors of the company, could be held personally responsible on the same principle. The grounds on which the trial judge (Scrutton L.J., sitting as an additional judge on the Queen's Bench Division) and the majority of the Court of Appeal (Lord Sterndale M.R. and Atkin L.J.) held the two individuals liable were all different and were all held to be erroneous by your Lordships' House. The dissentient member of the Court of Appeal, Younger L.J., concluded that no liability could attach to them on any established principle, and plainly feared that they were being treated as scapegoats because they were making money out of the venture: see [1920] 2 K.B. 487, 521-523. The explosion at the factory appears to have originated in an ingredient used in the manufacture of the explosive, viz. dinitrophenol (DNP), which had formerly been used in dyeing; this exploded as a result of a fire, the cause of which was not established. Before Scrutton L.J., it appears to have been admitted that the person in possession of the DNP was liable under the rule in ***Rylands v. Fletcher*** for the consequences of the explosion. This was despite the fact that DNP had never been known to explode before and, as Younger L.J. pointed out. exactly the same fire and explosion might have occurred if the DNP had been stored at a dyeworks and was not being used in any way in the manufacture of explosives. In the Court of Appeal, Atkin L.J. was of the opinion that the fact that the work was known to be dangerous by the contractors and the company was, if relevant, established (see [1920] 2 K.B. 487, 505); but it seems clear that no such knowledge could be imputed to either of the two individual defendants. The point appears to have been briefly relied on by counsel in the Court of Appeal, but not to have been pursued by Sir John Simon K.C. on their behalf in the House of Lords. However, this House dismissed their appeal on a point of some technicality, viz. that their Lordships could not satisfy themselves that the two individuals had sufficiently divested themselves of the occupation of the premises, so as to substitute the occupation of the company in the place of their own - notwithstanding that the company itself was also in occupation: see [1921] 2 A.C. 465. 478-479 per Lord Buckmaster; pp. 480, 483-484. *per* Lord Sumner: p. 491. *per* Lord Parmoor; and pp. 492, 493- 494. *per* Lord Carson).

40. I feel bound to say that these two cases provide a very fragile base for any firm conclusion that foreseeability of damage has been authoritatively reacted as a prerequisite of the recovery of damages under the rule in ***Rylands v Fletcher.*** Certainly, the point was not considered by this House in the *Rainham Chemicals* case. In my opinion, the matter is open for consideration by your Lordships in the present case. and. despite recent dicta to the contrary (see. e.g., ***Leakey v. National Trust for Places of Historic Interest or Natural Beauty*** [1980] Q.B. 485. 519. *per* Megaw L.J.), should be considered as a matter of principle. Little guidance can be derived from either of the two cases in question, save that it seems to have been assumed that the strict liability arising under the rule precluded reliance by the plaintiff on lack, of knowledge or the means of knowledge of the relevant danger.

41. The point is one on which academic opinion appears to be divided: cf. *Salmond and Heuston on Torts,* 20th ed., (1992). pp 324-325. which favours the prerequisite of foreseeability, and *Clerk and Lindsell on Torts*. 16th ed., (1989), para. 25.09. which takes a different view. However, quite apart from the indications to be derived from the judgment of Blackburn J. in ***Fletcher v. Rylands*** L.R. 1 Exch. 265 itself, to which I have already referred, the historical connection with the law of nuisance must now be regarded as pointing towards the conclusion that foreseeability of damage is a prerequisite of the recovery of damages under the rule. I have already referred to the fact that Blackburn J. himself did not regard his statement of principle as having broken new ground;

furthermore. Professor Newark has convincingly shown that the rule in ***Rylands v. Fletcher*** was essentially concerned with an extension of the law of nuisance to cases of isolated escape. Accordingly since, following the observations of Lord Reid when delivering the advice of the Privy Council in ***The Wagon Mound (No. 2)*** [1967] 1 A.C. 617, 640, the recovery of damages in private nuisance depends on foreseeability by the defendant of the relevant type of damage, it would appear logical to extend the same requirement to liability under the rule in ***Rylands v. Fletcher***.

42. Even so, the question cannot be considered solely as a matter of history. It can be argued that the rule in ***Rylands v. Fletcher*** should not be regarded simply as an extension of the law of nuisance, but should rather be treated as a developing principle of strict liability from which can be derived a general rule of strict liability for damage caused by ultra-hazardous operations, on the basis of which persons conducting such operations may properly be held strictly liable for the extraordinary risk to others involved in such operations. As is pointed out in *Fleming on Torts,* 8th ed., pp. 327-328. this would lead to the practical result that the cost of damage resulting from such operations would have to be absorbed as part of the overheads of the relevant business rather than be borne (where there is no negligence) by the injured person or his insurers, or even by the community at large. Such a development appears to have been taking place in the United States, as can be seen from paragraph 519 of the *Restatement of Torts* (2d) vol. 3 (1977). The extent to which it has done so is not altogether clear: and I infer from paragraph 519, and the Comment on that paragraph, that the abnormally dangerous activities there referred to are such that their ability to cause harm would be obvious to any reasonable person who carried them on.

43. I have to say, however, that there are serious obstacles in the way of the development of the rule in ***Rylands v. Fletcher*** in this way. First of all, if it was so to develop, it should logically apply to liability to all persons suffering injury by reason of the ultra-hazardous operations; but the decision of this House in ***Read v. J. Lyons & Co. Ltd.*** [1947] A.C 156, which establishes that there can be no liability under the rule except in circumstances where the injury has been caused by an escape from land under the control of the defendant, has effectively precluded any such development. Professor Fleming has observed that "the most damaging effect of the decision in *Read v. Lyons* is that it prematurely stunted the development of a general theory of strict liability for ultra-hazardous activities" (see *Fleming on Torts,* 8th ed., p. 341). Even so, there is much to be said for the view that the courts should not be proceeding down the path of developing such a general theory. In this connection. I refer in particular to the Report of the Law Commission on Civil Liability for Dangerous Things and Activities (Law Com. No. 32), 1970. In paragraphs 14-16 of the Report, the Law Commission expressed serious misgivings about the adoption of any test for the application of strict liability involving a general concept of "*especially dangerous*" or "*ultra-hazardous*" activity, having regard to the uncertainties and practical difficulties of its application. If the Law Commission is unwilling to consider statutory reform on this basis, it must follow that judges should if anything be even more reluctant to proceed down that path.

44. Like the Judge in the present case (p. 50E), 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.

45. It is of particular relevance that the present case is concerned with environmental pollution. The protection and preservation of the environment is now perceived as being of crucial importance to the future of mankind: and public bodies, both national and international, are taking significant steps towards the establishment of legislation which will promote the protection of the environment, and make the polluter pay for damage to the environment for which he is responsible - as can be seen from the WHO, EEC and national regulations to which I have previously referred. But it does not follow from these developments that a common law principle, such as the rule in ***Rylands v. Fletcher,*** should be developed or rendered more strict to provide for liability in respect of such pollution. On the contrary, given that so much well-informed and carefully structured legislation is now being put in place for this purpose, there is less need for the courts to develop a common law principle to achieve the same end. and indeed it may well be undesirable that they should do so.

46. Having regard to these considerations, and in particular to the step which this House has already taken in *Read v. Lyons* to contain the scope of liability under the rule in ***Rylands v. Fletcher,*** it appears to me to be appropriate now to take the view that foreseeability of damage of the relevant type should be regarded as a prerequisite of liability in damages under the rule. Such a conclusion can. as I have already stated, be derived from Blackburn J.'s original statement of the law; and I can see no good reason why this prerequisite should not be recognised under the rule, as it has been in the case of private nuisance. In particular. I do not regard the two authorities cued to your Lordships, ***West v. Bristol Tramways Co.*** [1908] 2 K.B. 14 and ***Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co.*** [1921] 2 A.C. 465. as providing any strong pointer towards a contrary conclusion. It would moreover lead to a more coherent body of common law- principles if the rule were to be regarded essentially as an extension of the law of nuisance to cases of isolated escapes from land, even though the rule as established is not limited to escapes which are in fact isolated. I wish to point out, however, that in truth the escape of the PCE from ECL's land, in the form of trace elements carried in percolating water, has not been an isolated escape, but a continuing escape resulting from a state of affairs which has come into existence at the base of the chalk aquifer underneath ECL's premises. Classically, this would have been regarded as a case of nuisance: and it

would seem strange if, by characterising the case as one falling under the rule in ***Rylands v. Fletcher***, the liability should thereby be rendered more strict in the circumstances of the present case.

The facts of the present case

47. Turning to the facts of the present case, it is plain that, at the time when the PCE was brought onto ECL's land, and indeed when it was used in the tanning process there, nobody at ECL could reasonably have foreseen the resultant damage which occurred at CWC's borehole at Sawston.

48. However there remains for consideration a point adumbrated in the course of argument, which is relevant to liability in nuisance as well as under the rule in ***Rylands v. Fletcher***. It appears that, in the present case, pools of neat PCE are still in existence at the base of the chalk aquifer beneath ECL's premises, and the escape of dissolved phase PCE from ECL's land is continuing to the present day. On this basis it can be argued that, since it has become known that PCE, if it escapes, is capable of causing damage by rendering water available at boreholes unsaleable for domestic purposes, ECL could be held liable, in nuisance or under the rule in *Rylands v. Fletcher,* in respect of damage caused by the continuing escape of PCE from its land occurring at any time after such damage had become foreseeable by ECL.

49. For my part, I do not consider that such an argument is well founded. Here we are faced with a situation where the substance in question, PCE, has so travelled down through the drift and the chalk aquifer beneath ECL's premises that it has passed beyond the control of ECL. To impose strict liability on ECL in these circumstances, either as the creator of a nuisance or under the rule in ***Rylands v. Fletcher***, on the ground that it has subsequently become reasonably foreseeable that the PCE may, if it escapes, cause damage, appears to me to go beyond the scope of the regimes imposed under either of these two related heads of liability. This is because when ECL created the conditions which have ultimately led to the present state of affairs – whether by bringing the PCE in question onto its land, or by retaining it there, or by using it in its tanning process - it could not possibly have foreseen that damage of the type now complained of might be caused thereby. Indeed, long before the relevant legislation came into force, the PCE had become irretrievably lost in the ground below. In such circumstances, I do not consider that ECL should be under any greater liability than that imposed for negligence. At best, if the case is regarded as one of nuisance, it should be treated no differently from, for example, the case of the landslip in ***Leakey v. National Trust for Places of Historic Interest or National Beauty*** [1980] Q.B. 485.

50. I wish to add that the present case may be regarded as one of what is nowadays called historic pollution, in the sense that the relevant occurrence (the seepage of PCE through the floor of ECL's premises) took place before the relevant legislation came into force; and it appears that, under the current philosophy, it is not envisaged that statutory liability should be imposed for historic pollution (see, e.g. the Council of Europe's Draft Convention on Civil Liability for Damages Resulting from Activities Dangerous to the Environment (Strasbourg 29 January 1993) Article 5.1, and paragraph 48 of the Explanatory Report). If so, it would be strange if liability for such pollution were to arise under a principle of common law.

51. In the result, since those responsible at ECL could not at the relevant time reasonably have foreseen that the damage in question might occur, the claim of CWC for damages under the rule in ***Rylands v. Fletcher*** must fail.

Natural use of land

52. I turn to the question whether the use by ECL of its land in the present case constituted a natural use, with the result that ECL cannot be held liable under the rule in ***Rylands v. Fletcher***. In view of my conclusion on the issue of foreseeability, I can deal with this point shortly.

53. The judge held that it was a natural use. He said, at p. 41B-E: *"In my judgment, in considering whether the storage of organochlorines as an adjunct to a manufacturing process is a non- natural use of land. I must consider whether that storage created special risks for adjacent occupiers and whether the activity was for the general benefit of the community. It seems to me inevitable that I must consider the magnitude of the storage and the geographical area in which it takes place in answering the question. Sawston is properly described as an industrial village, and the creation of employment is clearly for the benefit of that community. I do not believe that I can enter upon an assessment of the point on a scale of desirability that the manufacture of wash leathers comes, and I content myself with holding that this storage in this place is a natural use of land".*

54. It is a commonplace that this particular exception to liability under the rule has developed and changed over the years. It seems clear that, in ***Fletcher v. Rylands*** L.R. 1 Exch. 265 itself, Blackburn J.'s statement of the law was limited to things which are brought by the defendant onto his land, and so did not apply to things that were naturally upon the land. Furthermore, it is doubtful whether in the House of Lords in the same case Lord Cairns, to whom we owe the expression "*non-natural use"* of the land. was intending to expand the concept of natural use beyond that envisaged by Blackburn J. Even so. the law has long since departed from any such simple idea, redolent of a different age; and. at least since the advice of the Privy Council delivered by Lord Moulton in ***Rickards v. Lothian*** [1913] A.C. 263. 280, natural use has been extended to embrace the ordinary use of land. I ask to be forgiven if I again quote Lord Moulton's statement of the law, which has lain at the heart of the subsequent development of this exception: *"It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community".*

55. ***Rickards v. Lothian*** itself was concerned with a use of a domestic kind, viz. the overflow of water from a basin whose runaway had become blocked. But over the years the concept of natural use, in the sense of ordinary use,

has been extended to embrace a wide variety of uses, including not only domestic uses but also recreational uses and even some industrial uses.

56. It is obvious that the expression "*ordinary use of the land"* in Lord Moulton's statement of the law is one which is lacking in precision. There are some writers who welcome the flexibility which has thus been introduced into this branch of the law, on the ground that it enables judges to mould and adapt the principle of strict liability to the changing needs of society; whereas others regret the perceived absence of principle in so vague a concept, and fear that the whole idea of strict liability may as a result be undermined. A particular doubt is introduced by Lord Moulton's alternative criterion - "or such a use as is proper for the general benefit of the community". If these words are understood to refer to a local community, they can be given some content as intended to refer to such matters as, for example, the provision of services; indeed the same idea can, without too much difficulty, be extended to, for example, the provision of services to industrial premises, as in a business park or an industrial estate. But if the words are extended to embrace the wider interests of the local community or the general benefit of the community at large, it is difficult to see how the exception can be kept within reasonable bounds. A notable extension was considered in your Lordships' House in ***Read v. J. Lyons & Co. Ltd***. [1947] A.C. 156, 169-170, *per* Viscount Simon, and p. 174, *per* Lord Macmillan, where it was suggested that, in time of war, the manufacture of explosives might be held to constitute a natural use of land, apparently on the basis that, in a country in which the greater part of the population was involved in the war effort, many otherwise exceptional uses might become "ordinary" for the duration of the war. It is however unnecessary to consider so wide an extension as that in a case such as the present. Even so, we can see the introduction of another extension in the present case, when the judge invoked the creation of employment as clearly for the benefit of the local community, viz. "*the industrial village*" at Sawston. I myself, however, do not feel able to accept that the creation of employment as such, even in a small industrial complex, is sufficient of itself to establish a particular use as constituting a natural or ordinary use of land.

57. Fortunately, I do not think it is necessary for the purposes of the present case to attempt any redefinition of the concept of natural or ordinary use. This is because I am satisfied that the storage of chemicals in substantial quantities, and their use in the manner employed at ECL's premises, cannot fall within the exception. For the purpose of testing the point, let it be assumed that ECL was well aware of the possibility that PCE, if it escaped, could indeed cause damage, for example by contaminating any water with which it became mixed so as to render that water undrinkable by human beings. I cannot think that it would be right in such circumstances to exempt ECL from liability under the rule in ***Rylands v. Fletcher*** on the ground that the use was natural or ordinary. The mere fact that the use is common in the tanning industry cannot, in my opinion, be enough to bring the use within the exception, nor the fact that Sawston contains a small industrial community which is worthy of encouragement or support. Indeed I feel bound to say that the storage of substantial quantities of chemicals on industrial premises should be regarded as an almost classic case of non-natural use; and I find it very difficult to think that it should be thought objectionable to impose strict liability for damage caused in the event of their escape. It may well be that, now that it is recognised that foreseeability of harm of the relevant type is a prerequisite of liability in damages under the rule, the courts may feel less pressure to extend the concept of natural use to circumstances such as those in the present case; and in due course it may become easier to control this exception, and to ensure that it has a more recognisable basis of principle. For these reasons, I would not hold that ECL should be exempt from liability on the basis of the exception of natural use.

58. However, for the reasons I have already given. I would allow ECL's appeal with costs before your Lordships' House and in the courts below.

LORD JAUNCEY OF TULLICHETTLE : My Lords.

59. I have had the advantage of reading in draft the speech prepared by my noble and learned friend. Lord Goff of Chieveley. I agree with it and for the reasons he gives I too would allow the appeal.

LORD LOWRY : My Lords.

60. I have had the advantage of reading in draft the speech prepared by my noble and learned friend. Lord Goff of Chieveley. I agree with it and for the reasons he gives I too would allow the appeal.

LORD WOOLF : My Lords.

61. I have had the advantage of reading in draft the speech prepared by my noble and learned friend. Lord Goff of Chieveley. I agree with it and for the reasons he gives I too would allow the appeal.