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When sparks fly because of your neighbour's independent contractor: The stricter-liability test of private nuisance in Singapore – PEX International Pte Ltd v Lim Seng Chye and another and another appeal [2020] 1 SLR 373

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WHEN SPARKS FLY BECAUSE OF YOUR NEIGHBOUR'S INDEPENDENT CONTRACTOR: THE STRICTER LIABLITY TEST OF PRIVATE NUISANCE IN SINGAPORE

Case Comment: PEX International Pte Ltd v Lim Seng Chye and another and another appeal

[2020] 1 SLR 373 / [2019] SGCA 82
Court of Appeal of Singapore
Sundaresh Menon CJ, Andrew Phang Boon Leong JA, Steven Chong JA
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I. Introduction

1 When your land has been damaged by your neighbour's independent contractor, who should be held responsible—the contractor or your neighbour? Previously, it was considered by some to be difficult to pin liability on one's neighbour.[1] This position was criticised for being unfair and unjust, especially in situations where one was unable to obtain recourse from the contractor.[2]

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[1] *Eng Yuen Yee v Grandfort Builders Pte Ltd* [2018] SGHCR 1 at [54]: "a landowner would owe only a non-delegable duty to his neighbour in nuisance for damage caused to them by an independent contractor if the negligent construction works caused the neighbouring land or building to lose its support … if the negligent works did not result in a loss of support…, the matter would be governed by the principles of negligence". See Singapore Legal Advice, "Your Contractor Damaged Your Neighbour's Property. Can You Be Made Liable?" <https://singaporelegaladvice.com/law-articles/contractor-damage-neighbour-property-liability>; and *Ng Huat Seng and another v Munib Mohammad Madni and another* [2017] 2 SLR 1074 at [64], which held that landowners were not vicariously liable for an independent contractor's negligence, and that landowners owed no non-delegable duties to their neighbours.

[2] Low Kee Yang, "Vicarious Liability, Non-delegable Duty and the *Ng Huat Seng* Decision" (Singapore Law Gazette, 2017) at p 1–11 <https://lawgazette.com.sg/feature/vicarious-liability-non-delegable-duty-ng-huat-seng-decision/>.

2 The Singapore Court of Appeal's ("**CA**") decision in *PEX International v Lim Seng Chye*[3] ("***PEX International***") has since clarified that the actions of private nuisance and the rule in *Rylands v Fletcher*[4] can be used to hold neighbours liable for damaging a claimant's land even if the damage is caused by an independent contractor. This is a welcome judgment in providing justice for an aggrieved neighbour. Nonetheless, *PEX International* has raised some interesting questions regarding when a neighbour may be liable for such damage. First, under the tort of private nuisance, what is the content of the "reasonable user" principle, and how should it be applied?[5] Second, should the rule in *Rylands v Fletcher* be retained, and if so, what should its scope be?[6]

II. Relevant facts

3 The defendant, PEX International Pte Ltd ("**PEX**"), had authorised an independent contractor ("**Formcraft**") to do addition and alteration works ("**A&A works**") on its land ("**PEX's property**").[7] These involved hot works, *i.e.*, works that generate a source of ignition. The plaintiff ("**Lim**") owned a property ("**Lim's property**") next to PEX's property.[8] During the hot works, strong winds blew sparks onto items stored in the backyard of Lim's property,[9] causing them to catch fire.[10] The fire subsequently spread throughout Lim's property and caused extensive damage.[11]

4 Lim commenced proceedings against PEX and Formcraft. As Formcraft did not procure insurance for the A&A works and therefore lacked the financial means to compensate Lim,[12] Lim sought compensation from PEX for the damage done to his premises and goods.[13] His claims were based on the torts of negligence (coupled with vicarious liability and non-delegable duty), private nuisance, and the rule

3 *PEX International Pte Ltd v Lim Seng Chye and another and another appeal* ("*PEX International v Lim Seng Chye*") [2020] 1 SLR 373.
4 *Rylands v Fletcher* [1868] LR 3 HL 330.
5 See [17] of this case note.
6 See [32] of this case note.
7 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [13].
8 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [6]–[7].
9 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [18(b)].
10 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [18(c)].
11 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [3].
12 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [17].
13 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [20].

in *Rylands v Fletcher*. The High Court ("**HC**") did not develop the concepts of negligence, vicarious liability or non-delegable duty beyond the position of existing case law, and this paper will not focus on the reasoning regarding these grounds. Lim's actions on those grounds were dismissed.[14]

5 However, the HC held that a defendant can be liable under private nuisance even if he has taken all reasonable care or precaution to prevent the incident.[15] Liability would be established where a reasonable man could have "realised or *foreseen and prevented the risk*" of harm from occurring[16] This statement, which suggested that foreseeability of the *risk* of harm was needed to prove liability, would later become the central issue on appeal before the CA.

6 The HC further held that PEX's hot works were foreseeably unsafe due to:[17] (a) the presence of strong winds; (b) the close proximity of the works to the flammable material stored at the backyard of Lim's property; and (c) the absence of any supervision over the workers doing such works. Thus, the HC held that PEX had used its land unreasonably as it ought to have known that executing hot works in such an unsafe manner would cause fire damage to Lim's property.[18]

7 PEX was also held liable under the rule in *Rylands v Fletcher*. This tort is made out if: there was a non-natural or extraordinary use of land,[19] the "thing" brought onto the defendant's land was a dangerous thing which posed an exceptionally high risk to neighbouring property should it escape,[20] and the type of damage suffered by the plaintiff by the escape of the "thing" was foreseeable.[21]

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14 *Lim Seng Chye v Pex International Pte Ltd and another* ("*Lim Seng Chye v Pex International Pte Ltd*") [2019] SGHC 28 at [69], [83], [94].

15 *Lim Seng Chye v Pex International Pte Ltd* [2019] SGHC 28 at [110], citing *Spicer and another v Smee* [1946] 1 All ER 489 at 493.

16 *Lim Seng Chye v Pex International Pte Ltd* [2019] SGHC 28 at [113] (emphasis added); endorsing *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty and another* [1967] 1 AC 617 at 644.

17 *Lim Seng Chye v Pex International Pte Ltd* [2019] SGHC 28 at [121].

18 *Lim Seng Chye v Pex International Pte Ltd* [2019] SGHC 28 at [121].

19 *Lim Seng Chye v Pex International Pte Ltd* [2019] SGHC 28 at [125]; *Rylands v Fletcher* [1868] 3 LR HL 330 at 338–339 *per* Lord Cairns.

20 *Lim Seng Chye v Pex International Pte Ltd* [2019] SGHC 28 at [126]; *Transco plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1 at [11]–[12].

21 *Lim Seng Chye v Pex International Pte Ltd* [2019] SGHC 28 at [128]; *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 AC 264 at 306.

8 The hot works, which produced sparks or molten globules, amounted to a non-natural use of the land.[22] The sparks were not something that would be in or upon the natural condition of the land, and they constituted a dangerous "thing" which posed an exceptionally high risk to neighbouring property should they escape.[23] The sparks eventually did escape and wreaked extensive damage to Lim's property, thereby fulfilling the rule in *Rylands v Fletcher*.[24]

III. Court of Appeal decision

9 On appeal, PEX argued that it should not be held liable for private nuisance as the starting of the fire was not reasonably foreseeable. PEX also disputed its liability under *Rylands v Fletcher*.[25]

10 Addressing PEX's private nuisance claim, the CA held that foreseeability of the *risk* of harm, akin to the test of liability in negligence,[26] was not a requirement for establishing liability under nuisance.[27] In doing so, the CA departed from the current English position.[28] Foreseeability would only be used to assess the remoteness of damage, and whether the *type* of harm inflicted was foreseeable. Further, the landowner's conduct in exercising reasonable care to avoid harm was strictly irrelevant.[29] Instead, the test for liability was generally only dependent on whether the landowner had used the land reasonably (the "**reasonable user principle**"). The CA gave three reasons for this approach.

11 First, this approach preserved the historical distinction between the tort of negligence and private nuisance.[30] Negligence focuses on the conduct of the tortfeasor; fault and therefore foreseeability of risk are relevant.[31] Conversely, nuisance focuses on vindicating a landowner's interest or right over his land. The fault of the tortfeasor has limited relevance, and the inquiry shifts to determining the proper balance of

22 *Lim Seng Chye v Pex International Pte Ltd* [2019] SGHC 28 at [131].
23 *Lim Seng Chye v Pex International Pte Ltd* [2019] SGHC 28 at [131]
24 *Lim Seng Chye v Pex International Pte Ltd* [2019] SGHC 28 at [131]
25 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [29], [65].
26 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [30].
27 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [59(a)].
28 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [48], [52], [55].
29 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [41], citing *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 AC 264 at 299.
30 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [56].
31 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [56].

interests between neighbouring landowners who have complied with the reasonable user principle.[32]

12 Second, this approach is consistent with the "original" scope of nuisance.[33] The newer English cases' departure from the original scope arose from the cases failing to explicitly distinguish between risk and type of harm.[34]

13 Third, land scarcity in Singapore justified a stricter application of the test for nuisance. Acknowledging the close proximity of neighbouring land and the need for landowners to respect these boundaries, the CA affirmed its earlier decision of *Xpress Print Pte Ltd v Monocrafts Pte Ltd*,[35] which imposed a strict duty on defendant landowners to "use their own property in such a manner as not to injure that of [their adjacent landowner]".[36] Such considerations also applied in imposing "a stricter version of the test for nuisance in Singapore".[37]

14 However, the CA noted that in situations where the nuisance does not originate from the landowner, foreseeability of the risk of harm remains relevant in establishing liability. Examples of such situations include acts of nuisance from a trespasser,[38] and nuisance arising from "natural causes".[39] As such situations cannot constitute the landowner's use of the land, the element of "unreasonable use of the land" would be unfulfilled.[40] A landowner will only be liable for such interferences if they had knowledge and time to correct and obviate the "mischievous effects" caused by the nuisance.[41]

15 Here, as the hot works were authorised by PEX, foreseeability of the risk of harm was "strictly irrelevant".[42] Nevertheless, there had

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32 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [56].
33 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [57].
34 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [57].
35 *Xpress Print Pte Ltd v Monocrafts Pte Ltd and another* [2000] 2 SLR(R) 614.
36 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [58], citing *Xpress Print Pte Ltd v Monocrafts Pte Ltd and another* [2000] 2 SLR(R) 614 at [48]–[51].
37 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [58].
38 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [59(b)].
39 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [42], citing *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 AC 264 at 300.
40 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [59].
41 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [37], citing *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 904 *per* Lord Wright.
42 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [61].

been an unreasonable use of the land *due to the three factors mentioned in the HC judgment*.[43] The fire damage to Lim's property was reasonably foreseeable, as PEX authorised Formcraft to engage in construction tasks which would ordinarily involve hot works.[44]

16 Turning to the rule in *Rylands v Fletcher*, the CA held that foreseeability of risk was not a necessary requirement for establishing liability under *Rylands v Fletcher*. In England, a similar position has been adopted, although a distinction between nuisance and *Rylands v Fletcher* is still maintained.[45] The former rule requires foreseeability of the risk of harm whereas the latter does not. The CA recognised that their decision could lead to *Rylands v Fletcher* being subsumed under the rule under private nuisance,[46] but did not definitively pronounce on this issue.[47] Here, the hot works were a non-natural use of the land. The *spark* constituted a dangerous object if it escaped, and the type of harm (*i.e.*, the physical damage caused by the fire) was also foreseeable.[48]

IV. Discussion

A. The reasonable user principle under private nuisance

17 The CA has decisively ruled that foreseeability of the risk of harm (as opposed to the foreseeability of the type of harm) is unnecessary to make out the tort of private nuisance in Singapore. This makes it easier for a landowner to seek compensation from a neighbour when the latter's independent contractor causes damage to the landowner's property. The neighbour now cannot escape liability by claiming that they could not foresee the damage caused by the independent contractor. The author finds this result appropriate for Singapore's context and agrees with the CA's reasoning on land scarcity in Singapore.[49] Since land is scarce, physical damage to land is onerous and an avenue of compensation must be made available—this is

43 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [62], referring to *Lim Seng Chye v Pex International Pte Ltd* [2019] SGHC 28 at [121]. See also [7] of this case note.
44 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [62].
45 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [66].
46 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [68].
47 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [69].
48 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [70]. See also [8] of this case note.
49 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [58].

important in situations where the independent contractor is unable to pay. This result, however, is potentially complicated depending on how one interprets the reasonable user principle as set out in *PEX International*.

18 Under the common law, it seems that there are two conflicting formulations of the reasonable user principle. The first formulation provides that liability is established when the tortfeasor uses the claimant's land in an unreasonable *manner*. Conversely, the second formulation requires the tortfeasor's *interference* with the claimant's land to be unreasonable. The distinction between either formulation is essential as it addresses the difficult question of whether foreseeability of risk and reasonable care can truly be divorced from the tort of private nuisance involving physical damage to property.

19 The two formulations differ in focus. The first formulation focuses on the conduct of the defendant, while the second focuses on the effects of the interference on the plaintiff. The first formulation implies that so long as the defendant's use of his land was reasonable, he would not be liable for any interference. In contrast, the second formulation offers no such caveat: if the interference with the plaintiff's property is unreasonable, the defendant is liable.

20 At first blush, the CA in *PEX International* appeared to favour the first formulation:

> "Foreseeability of the risk of harm is relevant only where the acts which created the nuisance were not authorised by the defendant, such as where the relevant acts originated from a trespasser. This exception is founded on the basis that *the defendant needs to have* ***"used"*** *the land in an* ***unreasonable manner*** in order to be liable in nuisance."[50]

21 The first formulation was also applied in *Tesa Tape Asia Pacific Pte Ltd v Wing Seng Logistics Pte Ltd*.[51] There, the defendant

[50] *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [59] (emphases added in italics and bold italics).

[51] *Tesa Tape Asia Pacific Pte Ltd v Wing Seng Logistics Pte Ltd* [2006] 3 SLR(R) 116. Although the case did make a reference to undue interference (at [5]), its subsequent focus on the conduct of the defendant and mention of "unreasonable use of the premises" (at [6]) shows its application of the first formulation.

had stacked containers on his industrial premises which fell onto and damaged the plaintiff's property due to strong winds.[52] The court held that "the mere storage of containers in the premises should [not] be regarded as an *unreasonable use of the premises*",[53] and "[l]iability would attach only if the stacking of the containers as done by the defendant was *unsafe* in the circumstances".[54] The focus was therefore on *how* the defendant used its land.

22 The second formulation focuses on whether the tortfeasor's use of his land unreasonably interfered with the plaintiff's land or property. In the House of Lords decision of *Sedleigh-Denfield v O'Callaghan*,[55] Lord Romer held that "[a]n owner or occupier of land must so use it that he does not thereby substantially *interfere* with the comfortable enjoyment of their land by his neighbours".[56] Recent UK cases also use similar language.[57] In fact, the English Court of Appeal in *Barr v Biffa Waste Services Ltd* expressly noted that it was *incorrect* to ask, pursuant to the "reasonable user" principle, whether the defendant's use of his land was reasonable.[58] Instead, the inquiry of "reasonable user" had to be "judged by the well-settled tests",[59] which amounted to "what objectively a normal person would find it reasonable to have to put up with",[60] *i.e.*, whether the interference with the plaintiff's land was unreasonable. In Singapore, the CA has also previously stated that the "essence of nuisance is a condition or activity which *unduly interferes* with the use or enjoyment of land".[61]

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52 *Tesa Tape Asia Pacific Pte Ltd v Wing Seng Logistics Pte Ltd* [2006] 3 SLR(R) 116 at [2]–[3].

53 *Tesa Tape Asia Pacific Pte Ltd v Wing Seng Logistics Pte Ltd* [2006] 3 SLR(R) 116 at [6] (emphasis added).

54 *Tesa Tape Asia Pacific Pte Ltd v Wing Seng Logistics Pte Ltd* [2006] 3 SLR(R) 116 at [6] (emphasis added).

55 *Sedleigh-Denfield v O'Callaghan* [1940] AC 880.

56 *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 912 *per* Lord Romer (emphasis added). See also Donal Nolan, "'A Tort Against Land': Private Nuisance as a Property Tort" in *Rights and Private Law* (Donal Nolan & Andrew Robertson eds) (Hart Publishing, 2011) at p 468, 484.

57 *Lawrence and another v Fen Tigers Ltd and others* [2014] AC 822 at [3]; *Barr v Biffa Waste Services Ltd* [2013] QB 455 at [36], [72].

58 *Barr v Biffa Waste Services Ltd* [2013] QB 455 at [66]–[69], citing *Bamford v Turnley* (1860) 3 B & S 62 at [77]–[78]; *Tipping v St Helen's Smelting Co* (1863) 4 B & S 608 at 615; and *St Helen's Smelting Co v Tipping* [1865] 11 HL Cas 642 at 653–654.

59 *Barr v Biffa Waste Services Ltd* [2013] QB 455 at [72]. The "well-settled tests" refer to the tests derived from the cases in footnote 58.

60 *Barr v Biffa Waste Services Ltd* [2013] QB 455 at [72], endorsing Tony Weir, *An Introduction to Tort Law* (Oxford University Press, 2nd Ed, 2006) at p 160.

61 *Epolar System Enterprise Pte Ltd and others v Lee Hock Chuan and others* [2003] 2 SLR(R) 198 at [10] (emphasis added).

23 Although seemingly affirmed by the CA in the present case, the first formulation provides no substantive definition on what constitutes unreasonable use of one's land. This creates uncertainty in interpreting the first formulation as can be seen from *PEX International*:

> "Nevertheless, we agreed with the Judge there was an unreasonable use of land. The hot works were done at the perimeter between No 15 and No 17 in the presence of strong winds, in close proximity to the flammable mattresses stored at the backyard of No 15 and significantly, without any proper supervision of the workers…".[62]

24 Instinctively, these facts show unreasonable use as PEX's conduct demonstrated a blatant lack of reasonable care, and a high foreseeability of causing the fire. However, given the CA's holding that foreseeability of risk and reasonable care are *not relevant* in determining liability for nuisance, it would be strange to interpret the decision as re-introducing these concepts under the reasonable user principle.

25 The other possible interpretation of the CA's statement above is that the defendant's use *unreasonably interfered* with the plaintiff's interest in land (*i.e.*, the second formulation). This author is not alone in such an understanding of the court's language. A New Zealand commentator also understood the principle of reasonable user as stated by *PEX International* to refer to unreasonable interference.[63] Framed in this manner, the authorities now provide guidance—determining whether *interference* is unreasonable involves a balancing exercise "between the right of the occupier to do what he likes with his own [land], and the right of his neighbour not to be interfered with."[64] The balancing exercise features more prominently when the interference complained of involves personal discomfort (*e.g.*, smoke, smells, noise).[65] However, where there has been material physical damage caused to the claimant's property, this is usually sufficient to tilt the balance towards a finding of

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62 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [62].

63 See Maria Hook, "Strict liability in nuisance — a fork in the road" [2021] NZLJ 136 at 137.

64 *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 903 *per* Lord Wright.

65 For a list of some of the factors, see Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at [10.040]–[10.049].

unreasonable interference by the tortfeasor.[66] The author finds this distinction justified, as tolerating physical damage to one's property would be particularly onerous in land-scarce Singapore. Applying this to *PEX International*, since the hot works authorised by PEX caused the fire (which amounted to interference), and resulted in physical damage to the plaintiff's property, this clearly constituted unreasonable interference.

26 If the above is correct, then the two formulations entail the same inquiry. Nevertheless, to ensure clarity, the second formulation should be used. The first formulation, as just demonstrated, risks conflating nuisance with negligence. As Professor Donal Nolan argued:

> "A … terminological source of confusion is the use of the phrase 'unreasonable user' to describe the requirement of substantial interference. *So long as it is understood that it is the interference which must be unreasonable, and not the defendant's conduct, no harm is done, but inevitably this distinction is frequently lost*, so that we end up with a reference to 'the centrality to the tort of nuisance of the fault-based concept of unreasonableness' and the claim that no clear distinction can be drawn between negligence and nuisance, since in both 'the question is whether the defendant has acted reasonably'. A recent example of the doctrinal chaos that can result is provided by the decision of the Court of Appeal in *Network Rail Infrastructure Ltd v Morris*, where Buxton LJ sought to abandon well-established principles of private nuisance law and to replace them with an 'analysis of the demands of reasonableness' in the particular case.

[66] See *St Helen's Smelting Company v Tipping* [1861-73] All ER Rep Ext 1389 at 1395–1396, and *Halsey v Esso Petroleum Co Ltd* [1961] 1 WLR 683 (QB) at 691. See also Donal Nolan, "The Distinctiveness of *Rylands v Fletcher*" (2005) 121 LQR 421 at 435: "the doctrine of unreasonable user would be superfluous if applied to a *Rylands v Fletcher* case, since where there is physical damage to the claimant's land the requirement appears automatically to be satisfied". The conduct of the defendant may be relevant for determining whether interference was unreasonable for cases involving personal discomfort and loss of amenity: see Gary Chan Kok Yew and Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at [10.040]–[10.049]. They are to be distinguished from cases involving physical damage.

> It is difficult to imagine a better recipe for uncertainty and incoherence".[67]

This in turn risks re-introducing the concepts of foreseeability of risk and reasonable care into nuisance liability: the very outcome that the CA wished to avoid.

27 Moreover, the language of the second formulation is conceptually consistent with the focus of private nuisance in vindicating the plaintiff's interests in land above the conduct or fault of the defendant.[68] It is also consistent with the established rule in Singapore that "*active interference* with the support [of the plaintiff's land] which causes damage" is sufficient by itself to establish liability.[69] Similar considerations apply to private nuisance,[70] leading to the principle that one should not use one's property in such a way that injures another's property.[71] Hence, in cases involving material physical damage to property, there is usually no need to further examine the defendant's *manner of using his land* in establishing liability.

28 Therefore, the reasonable user principle should be focused on determining if the *interference* by the tortfeasor was *unreasonable*. This would remove uncertainty in application of the reasonable user principle and establish a firm distinction between the tort of negligence and private nuisance, as the CA intended. It would also be consistent with the CA's position that foreseeability of the risk of harm is generally irrelevant for the tort of private nuisance.

29 If the above analysis is correct, then in some sense, this stricter version of nuisance has a great reach—it comes very close to a strict liability tort as far as *physical* damage to land and chattels on land is concerned.[72] The tort of private nuisance is now the go-to tort for a landowner who wishes to claim from her neighbour for damage caused

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67 Donal Nolan, "'A Tort Against Land': Private Nuisance as a Property Tort" in *Rights and Private Law* (Donal Nolan & Andrew Robertson eds) (Hart Publishing, 2011) at p 484 (emphasis added).

68 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [56].

69 *Xpress Print Pte Ltd v Monocrafts Pte Ltd and another* [2000] 2 SLR(R) 614 at [51].

70 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [58].

71 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [58].

72 For the point on material physical damage almost always constituting unreasonable interference, see [25] of this case note. For the point on "chattels on land", see [39] of this case note.

by the latter's independent contractor. However, the applicability of the tort is limited by the condition that the cause of damage must emanate from the defendant's land, as private nuisance is about balancing the defendant's right to use his land and the claimant's right not to be interfered with.[73]

30 In the introduction to this section, this author had agreed with the granting of greater protection to land interests as compared to protections granted to other forms of property interests unrelated to land, for instance, chattels that are not on the land. There is, however, a criticism that it is indefensible to give greater protection to interests in land than interests in the person, because human safety is, and ought to be viewed as, more valuable than mere property.[74] Dispensing with the fault requirement for cases of interference with land but not for cases of bodily harm would be, as the argument goes, treating human wellbeing and life as inferior to land interests.

31 The author suggests that the above conclusion is not the right one to draw. Instead, the difference in treatment arises from the unfortunate reality that the law as a practical instrument cannot be based solely on ideals. The counter-concern here is that extending strict (or stricter) liability to personal injuries *in general* leads to "imposition of indeterminate liability on an indeterminate class of tortfeasors".[75] Control of liability through fault (including negligence) is therefore necessary.[76] The "stricter liability" in nuisance, on the other hand, does not face this problem—liability is kept within the controlled confines of situations involving damage emanating from a neighbour's land to another neighbour's land or the chattels thereon. Therefore, rather than a devaluation of human interests, *PEX International* should be seen as an effort to maximise compensatory justice, or to add "strings to the

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73 *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 903 *per* Lord Wright.

74 Donal Nolan, "The Distinctiveness of *Rylands v Fletcher*" (2005) 121 LQR 421 at 440, referring to Allen M Linden, "Whatever Happened to *Rylands v Fletcher?*" in *Studies in Canadian Tort Law* (Lewis Klar ed) (Butterworths, 1977) at p 336: "It is unthinkable that our courts could possibly value property interests over human safety."

75 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [29].

76 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [30].

doctrinal bow",[77] in a domain where it is possible to appropriately and rationally limit the scope of liability.

B. The status of the rule in Rylands v Fletcher

32 Turning to the rule in *Rylands v Fletcher* ("**the Rule**"), the CA opined that in the absence of full arguments, there was no good reason to depart from the English position that the Rule was a subspecies of nuisance.[78] It acknowledged that by removing the requirement of foreseeability of risk for the tort of private nuisance, the decision "undermined the distinction" between the Rule and private nuisance. However, the court also noted that there were arguments for the retention of the Rule on other grounds. This part of the case note aims to contribute to the debate by arguing that even with the stricter version of nuisance in *PEX International*, the Rule should *not* be viewed as a subspecies of private nuisance, and that there are good reasons to retain the Rule's effect. In so doing, this author suggests a reconceptualization of the Rule and a broad framework to applying the Rule.

33 To recapitulate, the rule in *Rylands v Fletcher* is made out if:

(a) There was a non-natural or extraordinary use of land;[79]

(b) The "thing" brought onto the defendant's land was likely to do mischief if it escaped (sometimes phrased as a dangerous thing which posed an exceptionally high risk to others should it escape);[80]

(c) The type of damage suffered by the plaintiff by the escape of the "thing" was foreseeable.[81]

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77 See *BOM v BOK and another appeal* [2019] 1 SLR 349 at [123], citing Andrew B L Phang & Goh Yihan, *Contract Law in Singapore* (Wolters Kluwer Law & Business, 2012) at [732].

78 *PEX International v Lim Seng Chye* [2020] 1 SLR 373 at [66], [69].

79 *Rylands v Fletcher* (1868) 3 LR HL 330 at 338–339, *per* Lord Cairns.

80 *Rylands v Fletcher* [1861-73] All ER Rep 1 at 11, *per* Blackburn J; *Transco plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1 at [11]–[12].

81 *Lim Seng Chye v Pex International Pte Ltd* [2019] SGHC 28 at [129]; *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 AC 264 at 306; *Rylands v Fletcher* [1861-73] All ER Rep 1 at 6: "it seems but just that [the defendant] should at his peril keep it there so that no mischief may accrue, or answer for the natural and *anticipated* consequences" (emphasis added); *Cattle v Stockton Waterworks* (1875) QB 453 at

The driving principle behind the Rule is that whoever creates the risk on his or her property must bear any adverse consequences.[82]

34 There are two main arguments supporting abolition of the Rule. First is the notion that the Rule is a subspecies of nuisance and can therefore be subsumed under the latter. Second is the criticism that the current form of the Rule is inconsistent in its results and unclear in its rationale, and that the qualifications to the Rule have "brought forth a mouse",[83] *i.e.*, made it so that only very few cases may successfully invoke the Rule. While this author disagrees with the first argument, he agrees to some extent with the second argument. This author ultimately argues that the problems with the Rule are not sufficient to abolish it in its entirety.

(1) The Rule is not a subspecies of nuisance

35 In the UK and in Singapore, the orthodox view (though not definitively confirmed) seems to be that the Rule is a subspecies of nuisance.[84] This view was first raised by Professor Newark in his article "The Boundaries of Nuisance",[85] and subsequently endorsed by Lord Goff in *Cambridge Water Co v Eastern Counties Leather Plc*,[86] who claimed that Newark had "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".[87] However, there are several points that cast doubt on the theory that the Rule was intended as a subspecies of nuisance, or even a land tort at all.[88] As will be shown, the formulation of the rule in *Rylands v Fletcher* itself allows for damage wider than

457, *per* Blackburn J: in holding that pure economic loss was too remote, he said that courts should redress only the proximate and direct consequences of wrongful acts, citing *Lumley v Gye* [1843-60] All ER Rep 208 at 221.

82 *Transco plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1 at [57].

83 *Transco plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1 at [39]; Donal Nolan, "The Distinctiveness of *Rylands v Fletcher*" (2005) 121 LQR 421 at 451.

84 See *Transco plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1 at [9]; *Tesa Tape Asia Pacific Pte Ltd v Wing Seng Logistics Pte Ltd* [2006] 3 SLR(R) 116 at [8] and *PEX International Pte Ltd v Lim Seng Chye* [2020] 1 SLR 373 at [69].

85 F H Newark, "The Boundaries of Nuisance" (1949) 65(4) LQR 480.

86 *Cambridge Water Co Ltd v Eastern Counties Leather Plc* [1994] 2 AC 264.

87 *Cambridge Water Co Ltd v Eastern Counties Leather Plc* [1994] 2 AC 264 at 304, *per* Lord Goff.

88 See Donal Nolan, "The Distinctiveness of *Rylands v Fletcher*" (2005) 121 LQR 421 at 423–427; *Northwestern Utilities Ltd v London Guarantee and Accident Co* [1936] AC 108 at 119, *per* Lord Wright; *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 903, *per* Lord Wright; Percy Henry Winfield, "Nuisance as a Tort" (1931) 4(2) CLJ 189 at 195.

those kinds allowed in nuisance, including personal damage.[89] Moreover, in *Cattle v Stockton Waterworks*, Blackburn J himself (the formulator of the Rule) took for granted, albeit in a hypothetical situation, that the *workmen* (and not just the owner) of a drowned mine could be compensated for their *destroyed clothes* or *tools* under the Rule.[90] By allowing the workmen's claims for chattel even though the land did not belong to them, Blackburn J must *not* have conceived the Rule as a land tort at all, much less a subspecies of nuisance. This explains why Donal Nolan argued that the relevant passage in Newark's article "consists merely of assertion",[91] and that the more plausible origin for the Rule was an application of the "ancient theory that a man acts at his peril".[92]

36 The scope of the Rule differs from nuisance in several ways. First, while the authorities on private nuisance have generally not allowed claims for personal injuries,[93] the weight of authority allows for *personal damage* to be claimed under the Rule.[94] In *Rylands v Fletcher* itself, Blackburn J held that a defendant under the Rule is "answerable for *all* the damage which is the natural consequence of its escape".[95] This formulation of the Rule is wide enough to cover claims for personal injuries. Indeed, *Rylands v Fletcher* was a judicial reaction to the extremely *fatal* reservoir dam failures that occurred during the time,[96] and the Rule must thus have contemplated personal injuries.[97] All these facts stand in stark contrast to the *obiter* pronouncement by the House

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89 See [36] onwards of this case note.

90 *Cattle v Stockton Waterworks* (1875) LR 10 QB 453 at 457.

91 Donal Nolan, "The Distinctiveness of *Rylands v Fletcher*" (2005) 121 LQR 421 at 423.

92 Donal Nolan, "The Distinctiveness of *Rylands v Fletcher*" (2005) 121 LQR 421 at 430.

93 See *Hunter v Canary Wharf Ltd* [1997] AC 655 at 707; *Transco plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1 at [9], where Lord Bingham held that the Rule was a "sub-species of nuisance", and it followed consequently that "the claim cannot include a claim for death or personal injury, since such a claim does not relate to any right in or enjoyment of land".

94 See *Hoare & Co v McAlpine* [1923] 1 Ch 167 at 174 ("*Rylands v Fletcher* applies to all physical and tangible damage to person or property", *per* Astbury J); *Perry v Kendricks Transport Ltd* [1956] 1 All ER 154 at 157 ("I assume for this purpose that an action for damages for personal injuries will lie in such a case", *per* Singleton LJ); *British Celanese Ltd v A H Hunt Capacitors Ltd* [1969] 1 WLR 959 at 964; *Eastern & South African Telegraph Co v Cape Town Tramways* [1902] AC 381 at 391.

95 *Rylands v Fletcher* [1861-73] All ER Rep 1 at 6 (emphasis added).

96 AWB Simpson, "Legal Liability for Bursting Reservoirs: the Historical Context of *Rylands v Fletcher*" (1984) 13 Journal of Legal Studies 209 at 219–231. See also *Transco plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1 at [3(3)].

97 See John Murphy, "The Merits of *Rylands v Fletcher*" (2004) 24(4) Oxford Journal of Legal Studies 643 at 648 and footnote 25.

of Lords that since the Rule was a subspecies of nuisance, personal injuries could not be claimed under the Rule.[98]

37 Second, while a claimant needs a proprietary interest in the land to sue under private nuisance,[99] there is no such requirement under the Rule. Again, the defendant under the original formulation of the Rule was "answerable for *all* the damage which is the natural consequence of its escape".[100] Moreover, the word "escape" means "escape from a place where the defendant has occupation of or control over land, to a place which is *outside* his occupation or control".[101] Hence, "[o]nce there has been an escape… those damnified may claim. They need not be the occupiers of adjoining land, or indeed of any land".[102] Indeed, it is arguable that contrary to the HC's formulation of requirement (b),[103] the *original* formulation of the Rule was wide enough to encompass claims for damage to property and personal injuries that did *not* occur on the claimant's land. For instance, in *Halsey v Esso Petroleum Co Ltd*, the claimant successfully claimed damages under the Rule for the damaged paintwork, caused by acid smuts, of his car which was parked on the street *outside* his house.[104] In *Shiffman v Order of St. John*, the claimant successfully recovered *personal injury damages* after he was hurt by a flagpole which fell (and thus escaped) from the defendant's licensed land in Hyde Park to the park's *public area*.[105]

38 Third, while the tort of private nuisance is focused on *interference* with the *claimant's land*,[106] the Rule is focused on *the use of the defendant's land*. This is apparent from the wording in *Rylands v Fletcher*: "[the defendant] who for his own purposes *brings on his lands* and collects and keeps there anything likely to do mischief if it

98 *Transco plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1 at [9].
99 *Epolar System Enterprise Pte Ltd v Lee Hock Chuan and others* [2003] 2 SLR(R) 198 at [10]–[15].
100 *Rylands v Fletcher* [1861-73] All ER Rep 1 (emphasis added).
101 *Read v J Lyons & Co, Ltd* [1947] AC 156 at 168 (emphasis added).
102 *British Celanese Ltd v A. H. Hunt (Capacitors) Ltd* [1969] 1 WLR 959 at 964.
103 See [33(b)] of this case note for requirement (b). See [7] of this case note for the High Court's formulation of requirement (b) in *Lim Seng Chye v Pex International Pte Ltd* [2019] SGHC 28.
104 *Halsey v Esso Petroleum Co Ltd* [1961] 1 WLR 683 at 692, *per* Veale J, referring to *Charing Cross Electricity Supply Co v Hydraulics Power Co* [1914] 3 KB 772 and *Miles v Forest Rock Granite Co (Leicestershire) Ltd* (1918) 34 TLR 500.
105 *Shiffman v Grand Priory in British Realm of Venerable Order of the Hospital of St John of Jerusalem* [1936] 1 All ER 557.
106 See [22]–[25] of this case note. See also John Murphy, "The Merits of *Rylands v Fletcher*" (2004) 24(4) Oxford Journal of Legal Studies 643 at 647.

escapes…".[107] Put another way, "nuisance is a wrong caused *to* [interests in] land, whereas *Rylands v Fletcher* is a wrong arising *from* land".[108]

39 There are other differences between the Rule and the tort of private nuisance, but these are less relevant where the stricter version of private nuisance in *PEX International* is concerned. For instance, it has been argued that nuisance ought to address cases of non-tangible interference, while the Rule should address cases of physical harm instead.[109] However, the tort of private nuisance in Singapore has been consistently applied to cases involving physical damage to land and chattels on land.[110] Moreover, any conceptual or historical issues with applying the tort of private nuisance to physical damage are now resolved by the new rationale of land scarcity underpinning the stricter version of nuisance in *PEX International*.[111]

40 Therefore, it is submitted that the Rule was not conceptualised as a property tort or a subspecies of nuisance, and should not be viewed as such. Subsuming the Rule under the tort of nuisance would deprive many claimants of their remedy under the Rule. Examples include a claimant suing for damage to chattel that is not upon the claimant's land, or for personal injuries. Subsuming the Rule would also overwrite the original purpose and rationale of the Rule.

(2) The problems with the current form of the Rule

41 The other line of argument calling for the Rule's abolition focuses on the complexity, inconsistencies, and uncertainty present in the Rule,[112] as well as the observation that the area of the Rule's effective

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[107] *Rylands v Fletcher* [1861-73] All ER Rep 1 at 6 (emphasis added). See also John Murphy, "The Merits of *Rylands v Fletcher*" (2004) 24(4) Oxford Journal of Legal Studies 643 at 648.

[108] Donal Nolan, "The Distinctiveness of *Rylands v Fletcher*" (2005) 121 LQR 421 at 427.

[109] John Murphy, "The Merits of *Rylands v Fletcher*" (2004) 24(4) Oxford Journal of Legal Studies 643 at 650.

[110] See *PEX International Pte Ltd v Lim Seng Chye* [2020] 1 SLR 373; *Tesa Tape Asia Pacific Pte Ltd v Wing Seng Logistics Pte Ltd* [2006] 3 SLR(R) 116; *OTF Aquarium Farm v Lian Shing Construction Co Pte Ltd* [2007] SGHC 122; *Hygeian Medical Supplies Pte Ltd v Tri-Star Rotary Screen Engraving Works Pte Ltd* [1993] 2 SLR(R) 411.

[111] *PEX International Pte Ltd v Lim Seng Chye* [2020] 1 SLR 373 at [58].

[112] Donal Nolan, "The Distinctiveness of *Rylands v Fletcher*" (2005) 121 LQR 421 at 447, referring to Law Com. No. 32, *Civil Liability for Dangerous Things* (1970) at

operation has been diminished by the qualifications to the Rule over the years.[113] These criticisms arise in part at least from the difficulty of defining the two interrelated ideas of "non-natural use" and "dangerousness" (or "likely to do mischief if it escapes").

42 First, it is difficult to distinguish between non-natural use and otherwise ordinary use of the land. The non-natural use element has been explained as a kind of "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".[114] The "general benefit of the community" gloss, however, was rejected in *Transco plc v Stockport Metropolitan Borough Council* as the court considered that it should not engage in a "utilitarian balancing of general good against individual risk".[115] In *Hygeian Medical Supplies*,[116] the Singapore High Court held that the test for non-natural use is one that contemplates whether the defendant used his land in an ordinary manner, taking into account *all the circumstances* and the *practice of mankind*.[117] In Australia, before the Rule was abolished there, it was similarly held that what constitutes "a dangerous and extraordinary use of lands in one generation may well, in another, become but an ordinary and legitimate enjoyment of those lands. Indeed, in some cases the question may become one of fact."[118]

43 Despite these general statements, the cases have not applied these criteria consistently. Natural features of the land (*e.g.*, rivers) would straightforwardly fall outside of the Rule's ambit, as they were not caused by the landowner's use of the land.[119] But there are cases

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para 20; see also *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42 at 51ff.

113 See *Transco plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1 at [98], citing *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42 at 54. See also Donal Nolan, "The Distinctiveness of *Rylands v Fletcher*" (2005) 121 LQR 421 at 451: "the new orthodoxy has left the rule in *Rylands v Fletcher* a shadow of its former self, lacking either rationale or practical significance, and hedged about with arcane and indefensible restrictions."

114 *Rickards v John Inglis Lothian* [1913] AC 263 at 280.

115 *Transco plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1 at [105].

116 *Hygeian Medical Supplies Pte Ltd v Tri-Star Rotary Screen Engraving Works Pte Ltd* [1993] 2 SLR(R) 411.

117 *Hygeian Medical Supplies Pte Ltd v Tri-Star Rotary Screen Engraving Works Pte Ltd* [1993] 2 SLR(R) 411 at [26], citing *Read v J Lyons & Co Ltd* [1947] AC 156 at 176, *per* Lord Porter.

118 *Hazelwood v Webber* (1934) 52 CLR 268 at 281, *per* Starke J.

119 *Transco plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1 at [63].

where the landowner's uses of land are viewed as natural uses of the land. Turning to cases involving water, the supply of water to the various parts of a house (*e.g.*, water in a cistern, water flowing from a lavatory, or water in the supply and overflow pipes of a water closet) constitutes ordinary use,[120] but storing water in a large reservoir, or water in high pressure water mains,[121] constitute non-natural use.

44 Activities done as part of construction or maintenance works also appear to be borderline cases. For instance, it is unclear whether hot works are an extraordinary use of land. On one hand, hot works may result in a certain level of danger; on the other hand, construction and renovation works arguably constitute the usual practice of mankind, and they regularly involve the use of hot works. Since the Rule considers the practices of mankind, the Rule should, arguably at least, not have been satisfied in *PEX International*. The minority judgment in *Burnie Port Authority v General Jones Pty Ltd*[122] arrived at a similar conclusion—there, McHugh J argued that "the use of welding equipment on an industrial site for the purpose of construction work cannot be regarded as a non-natural use of land".[123]

45 The concept of "danger" is also not a straightforward differentiating line. First, things brought upon the land for apparently "natural" purposes could well be likely to cause mischief or be dangerous upon the thing's escape: the supply of water to a house is an example. Second, it is difficult to characterise a use as dangerous in the abstract, as the danger or risk of any activity is almost always linked to the *manner* in which it is conducted.[124] For instance, even the transportation of nuclear waste has low risks as it is carried out with exceptional caution.[125] This explains why there are cases which consider

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120 *Rickards v John Inglis Lothian* [1913] AC 263 at 280–281, referring to *Blake v Woolf* and *Ross v Fedden*.

121 *Transco plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1 at [67], referring to *Charing Cross Electricity Supply Co v Hydraulic Power Co* [1914] 3 KB 772.

122 *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42. The majority judgment abolished the Rule in *Rylands v Fletcher*, converting it into a non-delegable duty under negligence.

123 *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42 at 96, *per* McHugh J.

124 Donal Nolan, "The Distinctiveness of *Rylands v Fletcher*" (2005) 121 LQR 421 at 449.

125 Donal Nolan, "The Distinctiveness of *Rylands v Fletcher*" (2005) 121 LQR 421 at 449.

the manner of the use of land,[126] but such an approach would eventually lead to a negligence standard, as the presence or absence of reasonable care would determine the issue of non-natural use.[127] Third, the idea of accounting for the circumstances in determining whether use was non-natural "appears to be quite difficult to surmount with no clear guidance as to what constitutes an extraordinary use".[128] For instance, it has been held that the manufacturing of munitions is a non-natural use,[129] but would it still be non-natural if the factory were surrounded by other factories, or other munitions-making factories? As has been seen, the phrase "non-natural use" is "extremely malleable and open to a wide range of judicial discretion",[130] which explains the criticism behind the uncertainty of the Rule. However, as will be explained, the uncertainties and other criticisms do not suffice to abolish the Rule.

46 Another point of difficulty in the Rule is the requirement that it is the "thing" which had been brought onto the land which must escape. Hence, even if the fire, which was started or increased by the "thing", escaped, it would be difficult to show liability under the Rule. In *Stannard v Gore*,[131] where a fire was caused by the combustion of tyres (through no fault of the defendant) and spread to the neighbouring property, the relevant "things" that were brought on the land were the tyres, not the fire. Since the tyres did not escape, the Rule could not apply.[132] Two things may be said about this holding. First, this would arguably not apply to cases where the defendant had brought the fire onto the land. For instance, in *PEX International*, PEX had authorised the hot works and therefore brought the sparks onto the land, which may

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126 In *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42 at 96, McHugh J noted that the court below "thought a non-natural use of land had occurred because the welding was done in the vicinity of cartons of Isolite". But he disapproved of this line of reasoning as the effect was "to determine the issue of non-natural use by reference to the manner of performing the work". See also *Balfour v Barty-King* [1956] 1 WLR 779 (where lighting up a blowlamp in a loft close to combustible material was considered a non-natural use); and *Mason v Levy Auto Parts of England Ltd* [1967] 2 QB 530 (where the method of storing combustible material made the latter a non-natural use).

127 Donal Nolan, "The Distinctiveness of *Rylands v Fletcher*" (2005) 121 LQR 421 at 449.

128 Liam Rose, "Untangling the Rule in *Rylands v. Fletcher* from Nuisance" (2016) 4(1) North East Law Review 127 at 127.

129 *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd* [1921] 2 AC 465 at 471–472.

130 Liam Rose, "Untangling the Rule in *Rylands v. Fletcher* from Nuisance" (2016) 4(1) North East Law Review 127 at 127.

131 *Stannard v Gore* [2013] 3 WLR 623.

132 *Stannard v Gore* [2013] 3 WLR 623 at [50].

be distinguished from *Stannard v Gore*, where the fire was caused by an accident.[133] Second, such a formalistic reading may go against the driving idea of the Rule, which is that the person creating the risk ought to bear it.[134] It also ignores an earlier form of the Rule: that "it is not always necessary that the dangerous substance itself should escape, but it is enough that its consequences do".[135]

(3) The Rule should be retained

47 Although the Rule as it stands may be "complex, uncertain and inconsistent in principle",[136] this paper argues that these criticisms do not suffice to abolish the Rule. The uncertainties can be minimised by clarifying the purpose and policy of the Rule, and reformulating the Rule's elements.

48 Practically speaking, the only reason for the Rule to exist is if the Rule extends to cases involving personal damage and/or damage to chattels not upon the claimant's land. After all, the Rule may well be redundant where the defendant's use of land has damaged the claimant's land and the chattels thereon—such a claimant may seek justice under the stricter version of nuisance due to unreasonable interference.[137] The Rule should be retained as there is normative justification for the defendant's strict liability towards the community (as opposed to just neighbouring land in private nuisance) for foreseeable types of damage caused by the defendant's use of land.

49 First, the Rule is important for *levelling the playing field* between claimants who have suffered damage unrelated to his land (*e.g.*, a passerby whose car is destroyed by fire, or a passerby who is hit by toxic waste), and defendants whose use of their *private* land caused damage. If the damage is not caused intentionally, such claimants' only route of claim (other than the Rule) is through negligence; yet, they face

133 *Stannard v Gore* [2013] 3 WLR 623 at [4]–[7].
134 *Transco plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1 at [57].
135 Stelios Tofaris, "*Rylands v Fletcher* Restricted Further" [2013] CLJ 11 at 12–13, referring to S Hedley, *Tort* (Oxford, 7th Ed, 2011) at p 199; NJ McBride & R Bagshaw, *Tort Law* (Harlow, 4th Ed, 2012) at p 482. See also *Miles v Forest Rock Granite Co*, where the claimant successfully sued for damage caused by debris instead of the explosive brought onto the defendant's land.
136 Donal Nolan, "The Distinctiveness of *Rylands v Fletcher*" (2005) 121 LQR 421 at 447, citing Law Com. No. 32, *Civil Liability for Dangerous Things* (1970) at para 20.
137 See [29] of this case note.

a *difficult evidentiary burden* of proving the defendant's negligence when the defendant has full control and privacy over the activities of his property. This is true in some cases, such as damage resulting from fireplaces or tyres. In such situations, evidentiary claims over breaches of duty may devolve into "he-said-she-said" arguments, with the defendant able to conceal evidence of fault. Nor does the *res ipsa loquitur* doctrine easily apply, because the requirement that "the cause of the accident must be unknown" would likely not be met in such cases.[138]

50 In any event, this difficulty is exacerbated in situations where the defendants are industrial enterprises. As John Murphy notes in "The Merits of *Rylands v Fletcher*",[139] industrial defendants can dissuade relatively impecunious layperson claimants with ease by claiming that they had followed industry standards and regulations; arguments that such compliance is not a defence are not straightforwardly clear.[140] Alternatively, industrial defendants may challenge the claimant to establish lack of reasonable care according to ordinary negligence principles, but this would be "an almost impossible task in relation to the activities of a specialist industrial enterprise".[141] This arguably creates burdens that "may be thought inappropriate as a matter of policy and justice".[142]

51 Additionally, the Rule may serve as the common law's residual protection of the environment, which is particularly relevant in an age where many factories spew pollution.[143] This residual protection is afforded when claimants who suffer the effects of harmful discharges or emissions sue the responsible industrial players. Indeed, the House of Lords recognised that the courts should develop the tort of nuisance with

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138 See *Lim Seng Chye v Pex International Pte Ltd* [2019] SGHC 28 at [104]; *Grace Electrical Engineering Pte Ltd v Te Deum Engineering Pte Ltd* [2018] 1 SLR 76 at [39].

139 John Murphy, "The Merits of *Rylands v Fletcher*" (2004) 24(4) Oxford Journal of Legal Studies 643.

140 John Murphy, "The Merits of *Rylands v Fletcher*" (2004) 24(4) Oxford Journal of Legal Studies 643 at 660.

141 John Murphy, "The Merits of *Rylands v Fletcher*" (2004) 24(4) Oxford Journal of Legal Studies 643 at 660.

142 John Murphy, "The Merits of *Rylands v Fletcher*" (2004) 24(4) Oxford Journal of Legal Studies 643 at 660.

143 John Murphy, "The Merits of *Rylands v Fletcher*" (2004) 24(4) Oxford Journal of Legal Studies 643 at 660–661.

environmental protection concerns in mind.[144] There is no reason why the Rule should not develop in the same way.

52 Lastly, it is simply difficult to see why a victim should bear the cost for an escape of things (or consequences) from the defendant's land that were *not necessary to enable or improve the defendant's ordinary use and enjoyment of the land*, *e.g.*, where the defendant uses land for opulent luxury, creates risks on a whim, or performs gain-seeking enterprises on the land. The injustice becomes even clearer in the latter case—in such situations, "those who create risks by means of activities undertaken with a view to personal gain should… be held strictly accountable for any harm thereby caused".[145] Letting the claimant suffer loss would be in effect to use the claimant as a subsidy for the defendant's risky enterprise, which "cannot easily be justified when it is difficult to be sure that the defendant's works are, on balance, wealth-creating".[146]

53 These considerations can lead us to an underlying rationale of the Rule, which is that the Rule respects the defendant's use and enjoyment of his land, but limits such use or enjoyment with reference to whether the risks created by the defendant's use are *tolerable to the community* or not. Such a formulation of the rationale, while not explicitly stated in the authorities, may be readily inferred from them. In *Rickards v John Inglis Lothian*,[147] the court found that an overflow of water from the defendant's lavatory was an ordinary use because it "has become, in accordance with modern sanitary views, an almost necessary feature of town life",[148] and because the provision of water "is not only a reasonable act on his part but *probably a duty*".[149] It being "an almost necessary feature", it was something that the community had to accept as tolerable. The High Court of Australia built upon this in *Hazelwood v Webber*.[150] In that case, the defendant farmer set fire to stubble on his land, and the fire caused damage to the claimant's land. The court held the defendant liable as fire was viewed in Australia as a non-natural use

144 *Hunter v Canary Wharf* [1997] AC 655 at 711.
145 John Murphy, "The Merits of *Rylands v Fletcher*" (2004) 24(4) Oxford Journal of Legal Studies 643 at 665.
146 John Murphy, "The Merits of *Rylands v Fletcher*" (2004) 24(4) Oxford Journal of Legal Studies 643 at 666.
147 *Rickards v John Inglis Lothian* [1913] AC 263.
148 *Rickards v John Inglis Lothian* [1913] AC 263 at 281.
149 *Rickards v John Inglis Lothian* [1913] AC 263 at 282.
150 *Hazelwood v Webber* (1934) 52 CLR 268.

of land, especially due to Australia's arid climate. In doing so, it made the following points:[151]

(a) When the *introduction of such a potential source of harm* is *generally necessary* to allow the occupier to effectively use and enjoy the land, to insist upon the *prima facie* rule of liability upon escape of the danger would be to restrict the defendant's proper enjoyment of the land.

(b) In applying the Rule to cases of fire arising from agriculture, "the *benefit* obtained by the farmer who succeeds in using it with safety to himself and the *frequency of its use* by other farmers are *not the only considerations*. The degree of hazard to others involved in its use, the extensiveness of the damage it is likely to do, and the difficulty of actually controlling it, are even more important factors. These depend upon climate, the character of the country, and the natural conditions… ***The experience, conceptions and standards of the community enter into the question of what is a natural or special use of land***, and of ***what acts should be considered so fraught with risk to others as not to be reasonably incident to its proper enjoyment***."

(4) A suggested approach to the Rule

54 The overarching inquiry of the Rule, then, is what kind of risks should be considered intolerable by a particular community. The author suggests that the substance of the inquiry would differ depending on the category of "things" being addressed. The first category comprises things which escape directly and cause damage to others. Such things can be almost anything: water, fire, coal, cows, industrial discharges. The second category comprises things that do not actually escape, but have the potential to cause or greatly aggravate a dangerous state of affairs. For instance, a dynamite, without itself escaping, may cause damage through its blast, or a defendant's collection of flammable liquids or tyres may aggravate a fire which the defendant did not ignite or authorise.

[151] *Hazelwood v Webber* (1934) 52 CLR 268 at 277–278 (emphases added in italics and bold italics respectively).

55 For the first category of things, the main question ought to be whether the thing brought onto the land was generally necessary to enable or improve the defendant's use and enjoyment of the land.[152] If so, no liability would attach to the defendant. As suggested by the words "generally necessary", this category should be narrowly confined to the things that are *essential* and *commonly used* for the use and enjoyment of land. In this regard the *purpose* of the thing is important. For instance, "essential things" may include water in water utility pipes, fires used for cooking, and things brought on the land for construction and renovation work of the premises such as fire for the purposes of welding. These things are so essential that *virtually every household* in the community would have (or once have had) brought them upon the land—so the defendant cannot be said to generate any more risk than the rest of the community by having these things. Other things which are not clearly essential or necessary for enabling the use and enjoyment of land (*e.g.*, artificial water bodies, cows, fire for the sake of farming, and things brought to the land for the sake of luxury or profit-gaining ventures) and things which are not commonly used in enabling the enjoyment of land (*e.g.*, demolishing a building with dynamite), would fail the test. Once again, the focus here is whether the defendant creates *more risk* than the rest of the community—if he does, he should be liable. Of course, what is deemed necessary or essential will change with the times, and the law should adapt to such changes.[153] This narrow approach clarifies and gives certainty to the "non-natural use" requirement.

56 If the thing is not essential to the enjoyment of land, there should be no further need to ascertain whether these things are "dangerous" or not, as *anything* that causes harm *is* dangerous.[154] Even something as apparently harmless as water can cause damage with enough volume. This approach eliminates the almost impossible difficulty of distinguishing between things that are dangerous and things that are not. It is also consistent with the older authorities which have held defendants liable for damage caused by cows,[155] filth,[156] and even

[152] *Hazelwood v Webber* (1934) 52 CLR 268 at 278.
[153] *Hazelwood v Webber* (1934) 52 CLR 268 at 281, *per* Starke J.
[154] See *Read v J Lyons & Co Ltd* [1947] AC 156 at 172, *per* Lord MacMillan: "[e]very activity in which man engages is fraught with some possible element of danger to others. Experience shows that even from acts apparently innocuous[,] injury to others may result."
[155] *Rylands v Fletcher* [1861-73] All ER Rep 1 at 6.
[156] *Rylands v Fletcher* [1861-73] All ER Rep 1 at 6.

flagpoles,[157] all of which were not "inherently" dangerous except for the fact that they had caused damage. The phrase "special use bringing with it increased danger to others" in *Rickards v John Inglis Lothian* is also consistent with this approach. That case decided that water in a cistern was "an ordinary and reasonable user" of the premises.[158] In this context, the phrase must be understood as the opposite of "merely… the ordinary use of the land".[159]

57 This case note will now address the second class of things, *i.e.*, "things that do not actually escape, but have the potential to cause or greatly aggravate a dangerous situation". Under a formalistic reading of the Rule, these things would not be caught by the Rule because those things did not "escape". In *Stannard v Gore*, for instance, where the tyres did not escape but only amplified the intensity of the fire caused by an electrical fault, the defendant was not held liable under the Rule.[160] Since the fire was not created or authorised by the defendant, the defendant had not brought the fire onto the land. Such an approach might remove the uncertainty as to determining the requisite extent of aggravation or danger for the Rule to apply. However, this ignores the reality that the defendant had, through storing the tyres, caused an increase in risk towards the community by increasing the potential harm that could be caused by a fire. Indeed, the tyres transformed a small fire into a raging inferno.[161] The Rule must be capable of dealing with such situations if it is to properly address intolerable risks created by the defendant.

58 In cases where the defendant's thing caused damage without an escape (*e.g.*, dynamite), it seems clear that the defendant must be liable for any resulting damage to property or body if the thing were not generally necessary for the use and enjoyment of land.[162] But in cases where the defendant's thing may potentially aggravate a dangerous situation, it may not be fair to hold the defendant liable merely for bringing things that are not generally necessary for the use and

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157 *Shiffman v Grand Priory in British Realm of Venerable Order of the Hospital of St John of Jerusalem* [1936] 1 All ER 557.

158 *Rickards v John Inglis Lothian* [1913] AC 263 at 280.

159 *Rickards v John Inglis Lothian* [1913] AC 263 at 280: the phrase "special use bringing with it increased danger to others" is directly contrasted with "and must not merely be the ordinary use of the land".

160 *Stannard v Gore* [2013] 3 WLR 623.

161 *Stannard v Gore* [2013] 3 WLR 623 at [7]. See also *Stannard v Gore* [2013] 3 WLR 623 at [11]; where this finding of fact was not challenged.

162 *Miles v Forest Rock Granite Co (Leicestershire) Ltd* (1918) 34 TLR 500.

enjoyment of land. After all, many things can contribute to a dangerous situation no matter how small the contribution. A computer or appliance burnt by a fire could explode, for instance, but it could hardly be considered to have increased any risk. However, a collection of tyres would intolerably increase the risk caused by a fire, and a defendant who created this intolerable increase in risk should be liable. In distinguishing between things that merely contribute to a dangerous situation and things that increase the risk of that situation intolerably, the courts should take a commonsensical approach to assess the additional amount of damage that could be potentially caused by the thing. In so assessing, the manner of how the thing was stored should *not* be relevant—the focus here is once again on the character of the thing.

59 As is usual in strict liability torts, the Rule would be subject to defences showing a break in the chain of causation, for instance, the escape was caused by an act of God, *force majeure*, the unlawful act of a stranger, or caused or consented to by the plaintiff himself.[163] Also, the defendant would be liable only for foreseeable types of damage.[164]

60 In the author's view, this suggested approach seems well-placed to resolve the inconsistent outcomes and uncertainties arising from the old requirements of "dangerousness" and "non-natural use". Certainly, lesser forms of uncertainty may arise due to the fact-sensitive nature of the inquiry, but fact-sensitive approaches are commonplace in the common law. Nor should the court be concerned about overstepping its role in "policy-making": it is the hallmark of the common law to engage in "reactive policy making",[165] *i.e.*, to provide social justice where it is lacking.[166] Indeed, the Singapore Court of Appeal did so

[163] *Rylands v Fletcher* [1861-73] All ER Rep 1 at 6; *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42 at 93. See also Donal Nolan, "The Distinctiveness of *Rylands v Fletcher*" (2005) 121 LQR 421 at 447 at 430, 436 and 445.

[164] *Lim Seng Chye v Pex International Pte Ltd* [2019] SGHC 28 at [129]; *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 AC 264 at 306; *Rylands v Fletcher* [1861-73] All ER Rep 1 at 6: "it seems but just that [the defendant] should at his peril keep it there so that no mischief may accrue, or answer for the natural and *anticipated* consequences" (emphasis added); *Cattle v Stockton Waterworks* (1875) QB 453 at 457, *per* Blackburn J: in holding that pure economic loss was too remote, he said that courts should redress only the proximate and direct consequences of wrongful acts, citing *Lumley v Gye* [1843-60] All ER Rep 208 at 221.

[165] Kumaralingam Amirthalingam, "*Rylands* Lives" (2004) 63(2) CLJ 273 at 275.

[166] Kumaralingam Amirthalingam, "*Rylands* Lives" (2004) 63(2) CLJ 273 at 274–275.

when it highlighted the significance of land-scarcity in Singapore as the rationale for stricter liability for interference with land and support.[167]

61 With a clarification of the purpose and rationale of the Rule, and the reworking of the Rule's elements, it is possible to minimise the inconsistent outcomes and grave uncertainties which previously plagued the Rule. Hence, the Rule should *not* be abolished simply because its *current* form is unwieldy—if the courts agree that the suggested rationale of the Rule is sound, the courts are free to develop the Rule in line with that rationale.

V. Conclusion

62 *PEX International* is significant in showing Singapore courts' willingness to protect landowners from physical damage to their land from neighbours. This is so even when it is the neighbour's independent contractor which causes the damage. The author respectfully views *PEX International* as a step in the right direction given Singapore's land-scarcity situation. In the meantime, the author hopes that the comments on the reasonable user principle under private nuisance and the status and reconceptualization of the rule in *Rylands v Fletcher* will contribute to the development of these two torts.

[167] See *PEX International Pte Ltd v Lim Seng Chye* [2020] 1 SLR 373 at [58]; *Xpress Print Pte Ltd v Monocrafts Pte Ltd and another* [2000] 2 SLR(R) 614 at [48]–[51].