

OREGON'S DEVELOPMENT OF ABSOLUTE  
LIABILITY UNDER THE *RYLANDS* DOCTRINE:  
A CASE STUDY

C. CONRAD CLAUS\*

“Unstable as water, thou shalt not excel . . . .”<sup>1</sup>

I. INTRODUCTION

Water has always been a double-edged sword for humanity. It is a necessity for a multitude of human activities, and much of civilization rests upon the successful use and development of water resources.<sup>2</sup> Yet “[c]ivilization represents a state of . . . hazard with respect to water,”<sup>3</sup> for “[w]ater, at times, is a most dangerous element even flowing in its natural condition, without the influence of man; and, when formally restrained by the works of man . . . it becomes even more dangerous.”<sup>4</sup> Perhaps nowhere are the potential

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\* B.S. 1992, Portland State University; J.D. 1996, Willamette University College of Law.

1. *Genesis* 49:4 (King James).

2. See generally JOHN P. POWELSON, *THE STORY OF LAND: A WORLD HISTORY OF LAND TENURE AND AGRARIAN REFORM* (1988). In fact, some historians have suggested that human civilization and organized government developed because of the requirements of organizing and managing large water control projects. See generally *id.*

3. Paul B. Sears, *Introduction to* ELMER T. PETERSON, *BIG DAM FOOLISHNESS* at vii (1954).

4. *Suko v. Northwestern Ice & Cold Storage Co.*, 113 P.2d 209, 212 (Or. 1941) (quoting 3 CLESSON S. KINNEY, *A TREATISE ON THE LAW OF IRRIGATION* § 1669, at 3069-70 (1912)).

dangers of restrained waters greater than in the construction and maintenance of reservoirs. A striking example of these dangers is the failure of the reservoir above Johnstown, Pennsylvania in 1889. In the late 1880s, a club of wealthy sportsmen built a private hunting and fishing reservoir near the center of Johnstown by placing a dam across South Fork Creek, a small tributary of the Little Conemaugh River.<sup>5</sup> Although the inhabitants of Johnstown initially expressed concern over the safety of the dam, the club allayed such concern by engaging the services of a competent engineer who declared that the dam was thoroughly sound.<sup>6</sup>

On May 31, 1889, heavy mountain rains significantly increased the water level of the reservoir, which, over the course of ten years, had become a considerably large lake.<sup>7</sup> The resulting increase in water pressure caused the dam to collapse, releasing the reservoir's water into the town below.<sup>8</sup> The consequences were horrific; the deluge killed approximately two thousand people<sup>9</sup> and caused \$17 million in property damage.<sup>10</sup>

For centuries, mankind has enacted laws to deal with the dangers of restrained waters.<sup>11</sup> Such laws have been especially significant in Oregon because, in the words of former Oregon State Representative Parkinson, "Oregon is a wet state."<sup>12</sup> In 1979, a statewide study of

5. See WILLIS FLETCHER JOHNSON, HISTORY OF THE JOHNSTOWN FLOOD 15, 32-33 (1889).

6. See *id.* at 33-34.

7. See DAVID G. MCCULLOUGH, THE JOHNSTOWN FLOOD 100 (1968).

8. See *id.*

9. See DISASTER, DISASTER, DISASTER: CATASTROPHES WHICH CHANGED LAWS 36 (Dougless Newton ed., 1961).

10. See MCCULLOUGH, *supra* note 7, at 264. For the purposes of this Article, it is instructive that, though there were several suits filed against the owners of the club, none of the plaintiffs prevailed. See *id.* at 258. Pennsylvania had only the three traditional common law bases of liability, each of which precluded recovery by the plaintiffs in their suits. See CHAPIN D. CLARK, SURVEY OF OREGON'S WATER LAWS 66 (1974); see also discussion *infra* notes 28-34 and accompanying text.

11. For example, in the Code of Hammurabi, one of the earliest sets of written laws, the Babylonians attempted to deal with disputes that arose when efforts to control large amounts of water went awry. See THE HAMMURABI CODE 37 (Chilperic Edwards ed., 1971). For an example of another pre-modern society's problems with water impoundment projects and the legal actions resulting from those problems, see JEAN GIMPEL, THE MEDIEVAL MACHINE 17-21 (1980).

12. *Hearings Before the House Committee on Intergovernmental Affairs in Regards to SB 97*, 49th Legis., Reg. Sess. (Or. 1957) (audio tape HC-85-IGA-156 available in the Oregon

Oregon found over five thousand existing or proposed reservoirs that were large enough to be considered for use as hydroelectric power sources.<sup>13</sup> While most of these structures are not as large as the Johnstown Reservoir was, they, as well as smaller agricultural reservoirs,<sup>14</sup> restrain massive and potentially damaging forces that pose significant danger to their surrounding areas. Oregon's general approach to legal disputes arising from the failure of such dams and reservoirs is to impose heightened liability on the owners of these bodies of water. Oregon courts have followed a fairly consistent path in treating this issue,<sup>15</sup> from their earliest decisions that addressed the issue to their most recent decisions.

This Article will trace the development of absolute liability<sup>16</sup> for the escape of impounded waters, often called the *Rylands* doctrine,<sup>17</sup> from its genesis, over 130 years ago, to the present. Part II of this Article outlines the origin of the *Rylands* doctrine. Part III gives an overview of the different ways in which states in this country have adopted and implemented the *Rylands* doctrine. Part IV then discusses Oregon's application of the *Rylands* doctrine. Finally, Part V concludes that Oregon's application of the *Rylands* doctrine serves as a tested model of absolute liability for the release of artificially impounded waters.

## II. THE BIRTH OF THE *RYLANDS* DOCTRINE

Absolute liability for the escape of impounded waters was first established in England during the mid-nineteenth century in the case

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State Legislative Archives). Representative Parkinson made this statement while speaking about proposed changes to the state rules for municipal annexation of property across bodies of water and the possible abuses of those rules. *See id.*

13. *See* PETER C. KLINGEMAN, A RESOURCE SURVEY OF THE HYDROELECTRIC POTENTIAL AT EXISTING AND PROPOSED DAMS IN OREGON 85 (1980).

14. Based on a study of small agricultural reservoirs in Oklahoma, which indicated that there were approximately forty-five thousand small agricultural reservoirs in that state in 1953, it is probably safe to assume that there are at least that many reservoirs in Oregon, where water resources are more plentiful. *See* ELMER T. PETERSON, BIG DAM FOOLISHNESS 192 (1954).

15. *But see* William L. Hallmark, Recent Case, *Irrigation Districts and Rylands v. Fletcher in Oregon*, 46 OR. L. REV. 239 (1967) (suggesting that Oregon Supreme Court decisions in this area of the law are somewhat contradictory).

16. For a brief discussion of the term "absolute liability," *see infra* note 49.

17. *See infra* Part II.

of *Fletcher v. Rylands*.<sup>18</sup>

### A. *The Factual Setting*

In 1850, Fletcher obtained the right to work the Red House Colliery, located in the Township of Ainsworth.<sup>19</sup> To the west of the Red House Colliery, separated from the Colliery by a single intervening piece of property, was the Ainsworth Mill, owned by Rylands.<sup>20</sup> In 1851, Fletcher additionally obtained the right to mine the coal from the land that intervened between the Ainsworth Mill and the Red House Colliery.<sup>21</sup> Between 1851 and 1860, Fletcher removed the coal from an underground seam that extended to the border of Rylands's property.<sup>22</sup>

In 1860, Rylands began constructing a reservoir to supply the Ainsworth Mill with water.<sup>23</sup> During the construction of the reservoir bed, Rylands discovered five old vertical coal-mining shafts.<sup>24</sup> The timber sides of the shafts remained, but the shafts themselves were filled with soil.<sup>25</sup> When Rylands filled the reservoir, water burst through the soil in one of the vertical mine shafts and entered the abandoned underground coal workings beneath Rylands's property. The water then entered the coal workings on Fletcher's intervening property and flowed into the Red House Colliery, causing it to be permanently abandoned as a working mine.<sup>26</sup>

### B. *The Court of Exchequer Opinion*

Fletcher subsequently brought a recovery action against Rylands

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18. 3 H. & C. 774, 159 Eng. Rep. 737 (Ex. 1865), *rev'd*, 1 L.R.-Ex. 265 (Ex. Ch. 1866), *aff'd*, 3 L.R.-E. & I. App. 330 (H.L. 1868).

19. *See* 159 Eng. Rep. at 738.

20. *See id.*

21. *See id.*

22. *See id.*

23. *See id.* at 739.

24. *See id.*

25. *See id.* at 740. The shafts were the remains of forgotten coal workings that were located beneath Rylands's property and that had been "worked at some time or other beyond living memory." *Id.* at 739.

26. *See id.* at 740.

in the Court of Exchequer.<sup>27</sup> Under the common law, recovery was possible on one of three grounds: trespass, negligence, or nuisance.<sup>28</sup> A party could be liable under trespass only for damages caused by immediate encroachments.<sup>29</sup> In this case, the water did not directly trespass onto Fletcher's property, but, rather, crossed another property first. The court found that this encroachment was merely "mediate or consequential"<sup>30</sup> and, thus, denied recovery for trespass.<sup>31</sup> Furthermore, the court determined that the construction of a below-ground pond was a "nuisance to no one"<sup>32</sup> and, therefore, denied recovery for nuisance.<sup>33</sup> Finally, the court denied recovery for negligence after finding that Rylands had acted with due care with respect to Fletcher's property.<sup>34</sup> Thus, the court found for the defendant, Rylands.<sup>35</sup>

### *C. The Exchequer Chamber Opinion*

While not disputing the Court of Exchequer's analysis of the three traditional bases for recovery, the Exchequer Chamber reversed the decision of the trial court and found for the plaintiff, Fletcher.<sup>36</sup> The court, in an opinion written by Justice Blackburn, found that:

[T]he 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

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27. *See id.* at 737.

28. *See id.* at 744.

29. *See id.* at 745.

30. *Id.*

31. *See id.*

32. *Id.*

33. *See id.*

34. *See id.* at 744, 747. In his dissent, Baron Bramwell argued that Fletcher ought to be able to recover from Rylands regardless of the applicability of the three traditional bases for recovery. Bramwell argued that "on the plain ground that the defendants have caused water to flow into the plaintiff's mines, which but for their, the defendants', act would not have gone there, this action is maintainable." *Id.* at 744 (Bramwell, B., dissenting). Bramwell's opinion thus presaged the Exchequer Chamber's *Rylands* holding. *See infra* Part II.C.

35. *See id.* at 747.

36. *See* 1 L.R.-Ex. at 269.

consequence of its escape.<sup>37</sup>

This passage of Blackburn's opinion established broad liability for land owners whose land development activities result in the unexpected release of a large volume of water. However, Justice Blackburn limited this principle later in his opinion by requiring that a defendant have introduced onto his property a substance that is foreign to his property:

[I]t seems but reasonable and just that the neighbour, who has brought something on his own property *which is 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.<sup>38</sup>

In *Rylands*, the "something" not "naturally there" was the water in the mill pond, an artificial construction of the defendant.<sup>39</sup>

During oral arguments, Justice Blackburn referred to *Smith v. Kenrick*<sup>40</sup> and *Baird v. Williamson*,<sup>41</sup> two cases involving water that left a defendant's property and entered a neighboring mine shaft. In *Smith*, the defendant allowed water that had naturally entered his mine to enter the plaintiff's mine through underground conduits that ran between the two mines.<sup>42</sup> The *Smith* court found for the defendant because the defendant's use of the mine was not "unusual,"<sup>43</sup> and the water in the defendant's mine had "naturally flow[ed] down"<sup>44</sup> to the plaintiff's mine.<sup>45</sup>

In contrast, *Baird*, which the Court of Common Pleas decided after the Court of Exchequer decided *Rylands*, involved several defendants who permitted water to be pumped directly into the

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37. *Id.* at 279.

38. *Id.* at 280 (emphasis added).

39. *See id.*

40. 137 Eng. Rep. 205 (C.P. 1849).

41. 143 Eng. Rep. 831 (C.P. 1863).

42. *See* 137 Eng. Rep. at 206-07.

43. *Id.* at 223.

44. *Id.* at 225.

45. *See id.* at 224-25.

plaintiff's mine as part of the defendants' mineral extraction operations.<sup>46</sup> The *Baird* court held that the defendants were liable for the incursion because the flow of water to the plaintiff's mine was contrary to the "operation of nature."<sup>47</sup> Blackburn declared that *Baird* and *Smith* established the proposition that "the mine owner who works to the edge of his land subjects himself to the natural flow of water into his mine, but not to the flow of water artificially brought there by a neighboring mine-owner."<sup>48</sup> Justice Blackburn's emphasis on the importance of questioning whether water causing damage to neighboring land was "naturally there" seems to acknowledge (and perhaps extend) the importance of the principles that he extracted from *Smith* and *Baird*.

#### D. The House of Lords Opinion

After the Exchequer Chamber determined that Rylands was absolutely liable<sup>49</sup> for the escape of water from his mill pond into Fletcher's mine, Rylands appealed to the House of Lords.<sup>50</sup> Affirming the Exchequer Chamber's opinion,<sup>51</sup> the Chancellor, Lord Cairnes, concurred with Justice Blackburn's opinion and further refined the rule of law applicable to the escape of impounded waters.<sup>52</sup> Lord Cairnes relied on Blackburn's "naturally there" language and the principles that Blackburn extracted from *Smith* and *Baird*.<sup>53</sup>

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46. See 143 Eng. Rep. at 832.

47. *Id.* at 837.

48. *Fletcher v. Rylands*, 1 L.R.-Ex. 265, 270 (Ex. Ch. 1866).

49. "Absolute liability" is the modern term for the type of liability that the Exchequer Chamber imposed on Rylands. Courts and commentators frequently refer to this type of liability as "strict liability." See Thomas C. Galligan, *Strict Liability in Action: The Truncated Learned Hand Formula*, 52 LA. L. REV. 325 (1991). Some authorities, however, believe that the term "strict liability" more properly applies to cases involving a case-specific risk-utility balance not called for in *Rylands*. See *id.* at 336. Thus, for the purposes of this Article, and with due respect for the courts and commentators that have used the term "strict liability," this author adopts the "absolute liability" wording as more conceptually useful.

50. See *Rylands v. Fletcher*, 3 L.R.-E. & I. App. 330 (H.L. 1868).

51. See *id.* at 342.

52. See *id.* at 337-40.

53. See *id.* at 338-39. Using Blackburn's "naturally there" language and the holdings of both *Smith v. Kenrick* and *Baird v. Williamson*, Lord Cairnes wrote:

The Defendants . . . might lawfully have used [their] close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may

Significantly, Lord Cairnes clarified Justice Blackburn's "naturally there" language by requiring that the activity causing the damage involve a "non-natural" use of the land.<sup>54</sup> In other words, to be the sort of activity for which absolute liability could be imposed, Lord Cairnes required that an activity be "likely to do mischief" and not be of the type that would occur "in the ordinary course of the enjoyment of the land."<sup>55</sup>

*Rylands* established a new basis of liability for property damage, the gravamen of which lies in the nature of certain activities that are carried out on real property. Some of these activities, such as forcing water onto a neighbor's property, or harboring a large volume of water, can carry a high risk of harm to innocent neighbors. While

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term the natural use of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the Plaintiff, the Plaintiff could not have complained that that result had taken place. . . .

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On the other hand if the Defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land,—and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the Plaintiff, then it appears to me that that which the Defendants were doing they were doing at their own peril; and, if in the course of their doing it, the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the Plaintiff and injuring the Plaintiff, then for the consequence of that, in my opinion, the Defendants would be liable.

*Id.*

54. *See id.* Some commentators seem to ignore the close connection between the "naturally there" wording in Blackburn's opinion and the "non-natural" requirement of Lord Cairnes's opinion. *See, e.g.,* CLARK, *supra* note 10, at 66; Thomas B. Brand, *Rylands v. Fletcher in Oregon*, 1 WILLAMETTE L. REV. 344, 344-45 (1960); J.B. Glen, Annotation, *Liability for Overflow or Escape of Water from Reservoir, Ditch, or Artificial Pond*, 169 A.L.R. 517, 520 (1957). This treatment may be attributable to William L. Prosser's treatment of *Rylands*, which ignores the connection and credits Justice Blackburn with creating the broad statement of law that "the person who brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril. . . ." WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 59, at 449 (1941). Prosser treats Lord Cairnes's "non-natural" use requirement as an "important qualification" that limited the scope of Blackburn's opinion. *See id.*

55. *Rylands v. Fletcher*, 3 L.R.-E. & I. App. 330, 338-39 (H.L. 1868).

such activities may produce a net public good and, thus, are not considered a public nuisance, it is unfair to require unsuspecting neighbors to bear the damage that these activities might cause, even when the party conducting the dangerous activity is innocent of any negligent behavior. The *Rylands* doctrine imposes a policy, therefore, that between two parties innocent of any wrongdoing, the party responsible for a dangerous activity must pay the cost of any damage that the activity produces. This, in effect, makes the party conducting such a dangerous activity an insurer for neighbors who might be damaged by the activity.

### III. ACCEPTANCE OF THE *RYLANDS* DOCTRINE IN THE UNITED STATES

Whether a particular state has adopted a limited, categorical reading of the *Rylands* doctrine<sup>56</sup> or a broader, general reading,<sup>57</sup> it can be said that "most jurisdictions in this country have adopted the principle of *Rylands v. Fletcher* . . . and impose liability on owners and users of land for harm resulting from abnormally dangerous conditions and activities . . . ."<sup>58</sup>

#### *A. The General Rule*

American courts began dealing with *Rylands* absolute liability soon after the House of Lords issued its *Rylands* opinion. The first American jurisdiction to apply the *Rylands* doctrine was Massachusetts, where a court imposed absolute liability on a defendant who allowed filthy water to percolate into a neighbor's well.<sup>59</sup> Shortly thereafter, Minnesota adopted *Rylands* absolute liability in a case involving the breach of an underground water tunnel.<sup>60</sup> For several decades following these decisions, courts and

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56. See, e.g., *Shockley v. Hoechst Celanese Corp.*, 793 F. Supp. 670 (D.S.C. 1992).

57. See, e.g., *Peneschi v. National Steel Corp.*, 295 S.E.2d 1, 5 (W. Va. 1982) ("The 'rule' of *Rylands* is that 'the defendant will be liable when he damages another by a thing or activity unduly dangerous and inappropriate to the place where it is maintained, in light of the character of that place and its surroundings.'" (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 78, at 508 (4th ed. 1970))).

58. *Ruggeri v. Minnesota Mining & Mfg. Co.*, 380 N.E.2d 445, 447 (Ill. App. Ct. 1978).

59. See *Ball v. Nye*, 99 Mass. 582 (1868).

60. See *Cahill v. Eastman*, 18 Minn. 324 (1872).

commentators in the United States largely disapproved of the *Rylands* doctrine.<sup>61</sup>

Some commentators have suggested that *Rylands* initially met nearly uniform resistance throughout the United States due to the country's rapid expansion and socioeconomic development during the nineteenth century.<sup>62</sup> During this period, the United States government was trying to encourage economic growth in its frontier regions. A doctrine such as *Rylands* would have treated harshly those who were constructing the American infrastructure. Thus, *Rylands* was unacceptable at the time.<sup>63</sup> Once the American infrastructure

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61. See KEETON ET AL., *supra* note 57, § 78, at 508 (citing *Brown v. Collins*, 53 N.H. 442 (1873)); see also *Marshall v. Welwood*, 38 N.J.L. 339 (1876); *Losee v. Buchanan*, 51 N.Y. 476 (1873); Jeremiah Smith, *Tort and Absolute Liability*, 30 HARV. L. REV. 241, 319, 408 (1916); Ezra Ripley Thayer, *Liability Without Fault*, 29 HARV. L. REV. 801 (1916); *The Theory of Torts*, 7 AM. L. REV. 652 (1873); cf. Frederick Pollock, *Duties of Insuring Safety: The Rule in Rylands v. Fletcher*, 2 L. Q. REV. 52 (1886) (comparing the lack of acceptance of the *Rylands* doctrine in the United States and the doubts over its historical significance in England). But see *Braford Glycerine Co. v. St. Mary's Woolen Mfg. Co.*, 54 N.E. 528 (Ohio 1899) (applying *Rylands* liability to an explosion of stored nitroglycerine); *Weaver Mercantile Co. v. Thurmond*, 70 S.E. 126 (W. Va. 1911) (applying *Rylands* to the escape of impounded water). The Pennsylvania Supreme Court, in an opinion delivered nearly twenty years after *Rylands* was decided, exemplified the general disapproval of the doctrine in the United States:

The doctrine declared in *Fletcher v. Rylands*, regarded as a general statement of the law, is perhaps not open to criticism in England, but it is subject to many and obvious exceptions there, and has not been generally received in this country. A rule which casts upon an innocent person the responsibility of an insurer is a hard one at the best, and will not be generally applied unless required by some public policy or the contract of the parties.

*Pennsylvania Coal Co. v. Sanderson*, 6 A. 453, 460 (Pa. 1886). Later in the case the court continued:

In the first place, then, we do not regard the rule in *Rylands v. Fletcher* as having any application to a case of this kind; and, if it had, we are unwilling to recognize the arbitrary and absolute rule of responsibility it declares, to the full extent, at least, to which its general statement would necessarily lead.

*Id.* at 463.

62. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 78, at 549 (5th ed. 1984).

63. See, e.g., *Dye v. Burdick*, 553 S.W.2d 833, 840 (Ark. 1977) ("One reason often given for the rejection of strict liability is the burden that would be placed upon a legitimate activity which is in the interest of utilization and development of natural resources and the state's economy, such as the advancement of agriculture." (citing *Barum v. Handschiegel*, 173 N.W. 593 (Neb. 1919))); cf. *Turner v. Big Lake Oil Co.*, 96 S.W.2d 221, 223 (Tex. 1936) ("The fact that [*Rylands*], as abstractly stated, cannot be justly applied to all subjects which its terms embrace, is enough to show that it is incorrect as a statement of a general principle of law.

became more developed, however, a number of jurisdictions found absolute liability more palatable.<sup>64</sup>

Currently, most states generally accept the *Rylands* doctrine either by name or by a statement of law that was derived from *Rylands*.<sup>65</sup> As of 1984, *Rylands* was rejected by name in only seven American jurisdictions:<sup>66</sup> Maine,<sup>67</sup> New Hampshire,<sup>68</sup> New York,<sup>69</sup> Oklahoma,<sup>70</sup> Rhode Island,<sup>71</sup> Texas,<sup>72</sup> and, for all practical purposes, Wyoming.<sup>73</sup>

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Accordingly, it has not met with general acceptance in this country.”).

64. For a discussion of this trend, see KEETON ET AL., *supra* note 62, § 78, at 548-49.

65. See *id.* at 549 (“[*Rylands*] has been approved by name, or a statement of principle clearly derived from it has been accepted, in some thirty jurisdictions, with the number expanding at the rate of about one a year.”) (citing *Enos Coal Mining Co. v. Schuchart*, 188 N.E.2d 406 (Ind. 1962); *Healey v. Citizens Gas & Elec. Co.*, 201 N.W. 118 (Iowa 1924); *Central Exploration Co. v. Gray*, 70 So.2d 33 (Miss. 1954); *Berg v. Reaction Motors Div., Thiokol Chem. Corp.*, 181 A.2d 487 (N.J. 1962); *Thigpen v. Skousen & Hise*, 327 P.2d 802 (N.M. 1958); *Loe v. Lenhardt*, 362 P.2d 312 (Or. 1961); *Wallace v. A.H. Guion & Co.*, 117 S.E.2d 359 (S.C. 1960)); see also *Zampos v. United States Smelting, Refining and Mining Co.*, 206 F.2d 171 (10th Cir. 1953); *Cross Oil Co. v. Phillips Petroleum Co.*, 944 F. Supp 787 (E.D. Mo. 1996); *In re Tutu Wells Contamination Litig.*, 846 F.Supp. 1243 (D.V.I. 1993); *Sterling v. Velsicol Chem. Corp.*, 647 F. Supp. 303 (W.D. Tenn. 1986); *Gainey v. Folkman*, 114 F. Supp. 231 (D. Ariz. 1953); *Matomco Oil Co. v. Arctic Mechanical, Inc.*, 796 P.2d 1336 (Alaska 1990); *North Little Rock Transp. Co. v. Finkbeiner*, 420 S.W.2d 874 (Ark. 1967); *Luthringer v. Moore*, 190 P.2d 1 (Cal. 1948); *Catholic Welfare Guild, Inc. v. Brodney Corp.*, 208 A.2d 301 (Del. Super. Ct. 1964); *Cities Service Co. v. State*, 312 So.2d 799 (Fla. Dist. Ct. App. 2d 1975); *Fallon v. Indian Trail Sch.*, 500 N.E.2d 101 (Ill. App. Ct. 1986); *National Steel Serv. Ctr., Inc. v. Gibbons*, 319 N.W.2d 269 (Iowa 1982); *Williams v. Amoco Prod. Co.*, 734 P.2d 1113 (Kan. 1987); *Washington Suburban Sanitary Comm'n v. CAE-Link Corp.*, 622 A.2d 745 (Md. 1993), *cert. denied*, 510 U.S. 907 (1993); *Clark-Aiken Co. v. Cromwell-Wright Co. Inc.*, 323 N.E.2d 876 (Mass. 1975); *Valentine v. Pioneer Chlor Alkali Co.*, 864 P.2d 295 (Nev. 1993); *Guilford Realty and Ins. Co. v. Blyth Bros. Co.*, 131 S.E.2d 900 (N.C. 1963); *Phillip Morris, Inc. v. Emerson*, 368 S.E.2d 268 (Va. 1988); *Siegler v. Kuhlman*, 502 P.2d 1181 (Wash. 1972), *cert. denied*, 411 U.S. 983 (1973).

66. See KEETON ET AL., *supra* note 62, § 78, at 549; cf. *Rodney Max, Blasting—An Abnormally Dangerous Activity in Need of a Strict Liability Standard*, 11 CUMB. L. REV. 23, 25 (1980) (“The majority of states now recognize blasting as an abnormally dangerous activity and apply the strict liability approach for injury or damage caused thereby.”).

67. See KEETON ET AL., *supra* note 62, § 78, at 549 n.57 (citing *Reynolds v. W.H. Hinman Co.*, 75 A.2d 802 (Me. 1950)). But see *Hanlin Group v. Int'l Minerals & Chem. Corp.*, 759 F. Supp. 925 (D. Me. 1990).

68. See *Garland v. Towne*, 55 N.H. 55 (1874); see also KEETON ET AL., *supra* note 62, § 78, at 549 n.58 (citing *Brown v. Collins*, 53 N.H. 442 (1873)).

69. See KEETON ET AL., *supra* note 62, § 78, at 549 n.59 (citing *Losee v. Buchanan*, 51 N.Y. 476 (1873); *Cosulich v. Standard Oil Co.*, 25 N.E. 259 (1890)).

70. See *Sinclair Prairie Oil Co. v. Stell*, 124 P.2d 255 (Okla. 1942); see also KEETON ET AL., *supra* note 62, § 78, at 549 n.60 (citing *Gulf Pipe Line Co. v. Sims*, 32 P.2d 902 (Okla. 1934)).

71. See KEETON ET AL., *supra* note 62, § 78, at 549 n.61 (citing *Rose v. Socony-Vacuum*

However, even in these jurisdictions, it is likely that the principle of *Rylands* has been accepted, and absolute liability imposed, under the name of "nuisance" or "absolute nuisance."<sup>74</sup>

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Corp., 173 A. 627 (R.I. 1934)); *see also* *Wilson Auto Enters., Inc. v. Mobil Oil Corp.*, 778 F. Supp. 101 (D.R.I. 1991).

72. *See* KEETON ET AL., *supra* note 62, § 78, at 549 n.62 (citing *Turner v. Big Lake Oil Co.*, 96 S.W.2d 221 (Tex. 1936)); *Gulf, Colo. & Santa Fe R.R. Co. v. Oakes*, 58 S.W. 999 (Tex. 1900); *see also* *Stephens Trucking Co. v. Kemp*, 560 S.W.2d 523 (Tex. Civ. App. 1977, no writ); *Dellinger v. Skelly Oil Co.*, 236 S.W.2d 675 (Tex. Civ. App. 1951, writ ref'd n.r.e.).

73. *See* KEETON ET AL., *supra* note 62, § 78, at 549 (citing *Jacoby v. Gillette*, 174 P.2d 505 (Wyo. 1947)). While the possibility that a Wyoming court might impose *Rylands* absolute liability may not yet be foreclosed, its likelihood has grown more remote since 1984. In *Wyrulec Co. v. Schutt*, 866 P.2d 756, 761 (Wyo. 1993), the Wyoming Supreme Court stated:

Wyoming, as had most states, rejected the notion that absolute liability should be imposed for anything brought onto the land which was not naturally there, escaped and caused damage. This court required that negligence must be shown. We have since consistently imposed the standard of ordinary care under all of the circumstances rather than absolute liability.

*Id.* (citation omitted).

74. *See* KEETON ET AL., *supra* note 62, § 78, at 552-53 ("There is in fact probably no case applying *Rylands v. Fletcher* which is not duplicated in all essential respects by some American decision which proceeds on the theory of nuisance; and it is quite evident that under that name the principle is in reality universally accepted." (footnote omitted)); *see also* William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 426 (1942) ("[L]iability for what is called 'nuisance' very often rests upon a basis of strict liability, without proof of wrongful intent or negligence, and is not to be distinguished in any respect from the doctrine of *Rylands v. Fletcher*.").

While for some time several American jurisdictions classified *Rylands* as a nuisance doctrine, this view is no longer widely followed. *See, e.g.*, *The Ingrid*, 195 F. 596 (S.D.N.Y. 1912); *In re Oskar Tiedman and Co.*, 179 F. Supp. 227 (D. Del. 1959); *Brownsey v. General Printing Ink Corp.*, 193 A. 824 (N.J. 1937); *Taylor v. Cincinnati*, 55 N.E.2d 724 (Ohio 1924).

Perhaps the best statement of the current legal thought on this issue was made by the Third Circuit Court of Appeals in *Moran v. Pittsburgh-Des Moines Steel Co.*:

There is a well recognized doctrine in the law which found a full exposition in the famous English case of *Rylands v. Fletcher* which imposes liability on a land occupier who collects on his premises things which are apt to do harm if they escape. The law imposes insurer's liability, or almost insurer's liability, upon the occupier in such case for the harm done to his neighbors for the escape of the dangerous substance. The rule and its limitations are well recognized and generally classified today under the heading of ultra-hazardous activities, or some such descriptive phrase. . . .

Sometimes courts, clear as to the result to be reached, but not always happy in the words used to describe it, have talked the law of nuisance in this connection . . . . But the basis for liability is not really nuisance, a wrong in itself for which equitable relief against continuance would be appropriate. The basis of liability, instead, is the conclusion that when a man does something extraordinarily dangerous which creates an unusual risk to his neighbors he should bear the consequences when that risk ripens into harm. . . . [This is] the now orthodox explanation of the basis of liability . . . .

While most, if not all, American jurisdictions have endorsed some form of *Rylands* absolute liability, many of the jurisdictions employ distinct liability analyses. For example, some jurisdictions rely solely on *Rylands*, and subsequent case law interpreting *Rylands*, as their basis for finding absolute liability.<sup>75</sup> Other jurisdictions rely upon the *Restatement of Torts (First)*<sup>76</sup> as their basis for absolute liability.<sup>77</sup> The majority of jurisdictions that recognize *Rylands* absolute liability, however, rely on the *Restatement of Torts (Second)*,<sup>78</sup> often identified as the embodiment of *Fletcher v. Rylands*.<sup>79</sup> The

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166 F.2d 908, 912-13 (3rd Cir. 1948) (footnote omitted); *see also* *Kall v. Carruthers*, 211 P. 43, 44 (Cal. 1922). In *Kall*, the California Supreme Court stated:

In *Fletcher v. Rylands* it was declared that no amount of diligence is a legal excuse if [impounded] water escapes and damages another. The effect of this doctrine is everywhere conceded to make every person who brings a foreign substance upon his property an insurer against all damage that may result by reason of its presence on his property.

....

We find the tendency among the courts in a great majority of the cases to give effect to the rule by finding negligence in some form and putting the decision on that ground. Others give effect by characterizing the result as a nuisance, but declaring some of the acts appearing in such cases to be negligence. Still others give effect on the ground of "absolute liability," or hold the party impounding the water as an "insurer." The tendency of the courts is to avoid resting the decision upon the two latter grounds.

*Id.* (citation omitted).

75. *See, e.g.*, *National Steel Serv. Ctr. v. Gibbons*, 319 N.W.2d 269, 273 (Iowa 1982) ("[W]e are committed to a broader application of the strict liability doctrine of *Rylands v. Fletcher* than is reflected in the Restatement.").

76. *RESTATEMENT (FIRST) OF TORTS* (1938).

77. *See, e.g.*, *Matomco Oil Co. v. Arctic Mechanical, Inc.*, 796 P.2d 1336, 1341 n.12 (Alaska 1990) ("This court has stated its preference for the 'ultrahazardous activity' test of the First Restatement over the 'abnormally dangerous' test of the Second." (citing *State Farm Fire & Cas. Co. v. Municipality of Anchorage*, 788 P.2d 726, 729 (Alaska 1990))).

78. *RESTATEMENT (SECOND) OF TORTS* (1977).

79. *See Cropper v. Rego Distribution Ctr., Inc.*, 542 F. Supp. 1142, 1149 (D. Del. 1982) ("Although *Rylands*' doctrine of strict liability for ultrahazardous activities was slow to gain acceptance in this country, it is now accepted in most jurisdictions."). Interestingly, the *Cropper* court used the "ultra hazardous" wording of the *Restatement (First)* to describe the application of the *Restatement (Second)*'s "abnormally dangerous" embodiment of *Rylands* absolute liability. *See id.*

Section 519 of the *Restatement (Second)* provides:

(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

*Restatement (Second)* calls for a fact-specific evaluation to determine whether absolute liability will lie in a particular case.<sup>80</sup> Thus, in most jurisdictions today, courts apply the *Rylands* doctrine on a case-by-case basis. This accords with Blackburn's original "naturally there" language,<sup>81</sup> and Lord Cairnes's "non-natural" land use qualification.<sup>82</sup>

### B. The Categorical Rule

The *Rylands* doctrine periodically has been treated by courts as a categorical rule that applies to any impoundment of water.<sup>83</sup> Many states that have followed this categorical rule, however, have created exceptions and explanations to the categorical rule, perhaps because the imposition of liability without proof of fault is such a harsh remedy.<sup>84</sup> The process by which states have developed variations on

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(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

RESTATEMENT (SECOND) OF TORTS § 519. Section 520 of the *Restatement (Second)* provides:

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

*Id.* § 520.

80. See RESTATEMENT (SECOND) OF TORTS § 520.

81. See *supra* note 38 and accompanying text.

82. See *supra* note 54 and accompanying text.

83. See KEETON ET AL., *supra* note 62, § 78, at 548.

84. See, e.g., *City Water Power Co. v. Fergus Falls*, 128 N.W. 817, 818 (Minn. 1910) (imposing absolute liability for the failure of a reservoir, but refusing to extend the rule to lakeside or riverside property owners who place milldams across natural water courses for the purpose of utilizing water power).

A recurring theme in reported cases is courts' acceptance of the principle of absolute liability for activities of heightened danger but emphatic rejection of "the *Rylands* rule," which these courts define as merely pertaining to the categorical imposition of liability in situations that involve the failure of a water impoundment facility. Thus, these courts at the same time paradoxically reject and accept *Rylands*. See, e.g., *Snow v. City of Columbia*, 409 S.E.2d 797 (S.C. Ct. App. 1991), cited in *Shockley v. Hoechst Celanese Corp.*, 793 F. Supp. 670, 673 (D.S.C. 1992).

the categorical *Rylands* rule closely parallels courts' treatment of the *Rylands* doctrine in England.<sup>85</sup>

One interesting variation on the categorical *Rylands* rule has developed in the more arid western states. While purporting to embrace *Rylands*'s principal of categorical liability for the impoundment of water, these states have nonetheless been unwilling to impose absolute liability in cases involving irrigation ditches.<sup>86</sup> This exception is not surprising, given the importance of agricultural irrigation in these states<sup>87</sup> and provides a perfect example of how states liberally interpret the doctrine to meet the specialized needs of their citizenry.

### C. Statutory Application of the *Rylands* Rule

Many jurisdictions have codified some form of *Rylands* absolute liability. Louisiana, with its unique approach to the law among the states, may very well have the most far-reaching codified liability scheme. Article 667 of the Louisiana Civil Code<sup>88</sup> establishes

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85. See *North Little Rock Transp. Co. v. Finkbeiner*, 420 S.W.2d 874, 879-81 (Ark. 1967); see also A.W.B. Simpson, *Legal Liability for Bursting Reservoirs: The Historical Context of Rylands v. Fletcher*, 13 J. LEGAL STUD. 209, 251-64 (1984).

86. See, e.g., *Burt v. Farmers' Coop. Irrigation Co.*, 168 P. 1078, 1082 (Idaho 1917). The *Burt* court opined that:

Under the common law one who diverted water from its natural course did so at his peril, and was held practically to be an insurer against damage which might result from such action. The common law has been modified and relaxed in this and other arid states, so that the owner of an irrigation ditch is only liable for damages occurring to others as a result of his negligence or unskillfulness in constructing, maintaining, or operating the ditch.

*Id.* (citations omitted) (citing *Campbell v. Bear River Mining Co.*, 35 Cal. 679 (Cal. 1868); *Messenger v. Gordon*, 62 P. 959 (Colo. 1959); *City of Boulder v. Fowler*, 18 P. 337 (Colo. 1888); *Stuart V. Noble Ditch Co.*, 76 P. 255 (Idaho 1904); *McCarty v. Boise City Canal Co.*, 10 P. 623 (Idaho 1886); *Fleming v. Lockwood*, 92 P. 962 (Mont. 1907); *Howell v. Bighorn Co.*, 81 P. 785 (Wyo. 1905)); see also *Kunz v. Utah Power & Light Co.*, 871 F.2d 85 (9th Cir. 1989); *Zamos v. United States Smelting, Refining and Mining Co.*, 206 F.2d 171 (10th Cir. 1953) (citing *Mackay v. Breeze*, 269 P. 1026 (Utah 1928)); *Stephenson v. Pioneer Irrigation Dist.*, 288 P. 421 (Idaho 1930); *Arave v. Idaho Canal Co.*, 46 P. 1024 (Idaho 1896).

87. While these cases were decided before the *Restatement (First)* and *Restatement (Second)* were published, it is likely that a similar result would have been reached under either *Restatement*. See RESTATEMENT (SECOND) OF TORTS § 520(f) (1977) (discussing the balance between the utility of the impounded water and its dangers).

88. LA. CIV. CODE ANN. art. 667 (West 1980).

Louisiana's Statutory basis for *Rylands* liability.<sup>89</sup> It provides, "Although a proprietor may do with his estate whatever he pleases, still he can not make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him."<sup>90</sup> While the Louisiana statute does not expressly establish absolute liability, Louisiana courts have interpreted it that way.<sup>91</sup>

Perhaps the best known example of statutory absolute liability for property damage is the clean-up provisions in the Comprehensive Environmental Response, Compensation and Liability Act.<sup>92</sup> Other examples include Utah's Hazardous Substances Mitigation Act,<sup>93</sup> which establishes absolute liability for investigation and abatement costs resulting from the release of hazardous materials,<sup>94</sup> and the Wyoming Environmental Quality Act of 1973,<sup>95</sup> which establishes absolute liability for the discharge of pollution into state waters.<sup>96</sup> Additionally, several states have enacted legislation based on the *Rylands* categorical rule relating solely to the impoundment of water.<sup>97</sup>

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89. See *id.* Other sections of the Louisiana Civil Code establish strict liability in other areas of the law. See A.N. Yiannopoulos, *Civil Responsibility in the Framework of Vicinage: Articles 667-69 and 2315 of the Civil Code*, 48 TUL. L. REV. 195, 223 (1974).

90. Article 667.

91. See *Butler v. Baber*, 529 So.2d 374 (La. 1988), cited in *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1254, 1257 (5th Cir. 1985); *Street v. Equitable Petroleum Corp.*, 532 So.2d 887 (La. Ct. App. 1988); John C. Anjier, Note, *Butler v. Baber: Absolute Liability for Environmental Hazards*, 49 LA. L. REV. 1138 (1989).

92. 42 U.S.C. §§ 9601-9675 (1994).

93. UTAH CODE ANN. §§ 19-6-301 to -325 (1995).

94. See *id.* § 19-6-302.5, cited in *Utah Dep't of Env'tl. Quality v. Wind River Petroleum*, 881 P.2d 869, 871 (Utah 1994).

95. WYO. STAT. ANN. §§ 35-11-101 to -1507 (Michie 1997).

96. See *People v. Platte Pipe Line Co.*, 649 P.2d 208 (Wyo. 1984), cited in James E. Ellerbe, Note, *Strict Liability for Oil Spills in Wyoming*, 18 LAND & WATER L. REV. 805 (1983).

97. For example, a Wyoming statute enacted in 1957 provided: "The owners of reservoirs shall be liable for all damage arising from leakage or overflow of the waters therefrom, or by floods caused by breaking of the embankments of such reservoir." WYO. STAT. § 41-46 (1957) (repealed by 1977 Wyo. Sess. Laws ch. 120, § 3). *But see* *Wheatland Irrigation Dist. v. McGuire*, 537 P.2d 1128, 1142-43 (Wyo. 1975). In *Wheatland*, the Wyoming Supreme Court determined through a somewhat circuitous route that:

In light of the entire history of the common-law rule in Wyoming as interpreted by the opinions of this court, as well as the philosophy surrounding those opinions as they

#### IV. RYLANDS EXPLORED: OREGON'S APPLICATION OF THE DOCTRINE

Oregon's application of the *Rylands* doctrine is in many respects typical of the way in which other states have applied the rule. Consequently, Oregon law accurately represents the current status of the *Rylands* doctrine nationwide. For those states that have not adopted the *Rylands* doctrine, or whose approach to the doctrine substantially differs from Oregon's approach, examining Oregon's application of the rule can provide a structured and reasonable approach to addressing *Rylands*-style claims.

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must be applied to the interpretation of Section 41-46, W.S. 1957, it must be concluded as we do, that the statute was not intended to be and is not one which imposes absolute liability.

*Id.* The Wyoming legislature has enacted a statute that would appear to overrule *Wheatland*:

Nothing in this act shall be construed to relieve an owner or owners of any reservoir, dam or diversion system of any legal duties, obligations or liabilities incident to their ownership or operation of or any damages resulting from the leakage or overflow of water or for floods resulting from the failure or rupture of the fill or structure for such works.

WYO. STAT. ANN. § 41-3-317 (Michie 1997). However, while this provision would appear to establish (or re-establish) the *Rylands* categorical rule for reservoirs in Wyoming, the Wyoming Supreme Court has rejected this interpretation and, thus, still applies a negligence standard. See *Tillery v. West Side Canal, Inc.*, 719 P.2d 1384, 1386 (Wyo. 1986).

Likewise, a 1949 Kansas statute supplanted the *Rylands* categorical rule with a test for negligence:

The proprietors of every canal, fountain, ditch, conduit or other works for conveying, collecting, retaining or storing waters shall construct and always maintain in good order and repair the dams, locks and gates, embankments, and all other appurtenances thereof, so that the water conveyed, collected, retained or stored thereby may not flood or damage the premises of others, or any highway, or unnecessarily run to waste, and shall be liable for all damages resulting from their willful or negligent failure to comply with any of the provisions of this act, or from their negligence in the construction, maintenance or operation of any such works.

KAN. GEN. STAT., § 42-321 (1994), *quoted in* *Garden City Co. v. Bentrup*, 228 F.2d 334, 336 (10th Cir. 1955). By way of contrast, Colorado's relevant statute, COLO. REV. STAT. ANN. § 37-87-104 (West 1990), appears to apply *Rylands* style liability to reservoirs, albeit in a form riddled with exceptions. See *Barr v. Game, Fish and Parks Comm'n*, 497 P.2d 340 (Colo. Ct. App. 1972); see also *Garnet Ditch & Reservoir Co. v. Sampson*, 110 P.2d 79 (Colo. 1910), *cited in* Wade R. Habeeb, Annotation, *Applicability of Rule of Strict or Absolute Liability to Overflow or Escape of Water Caused by Dam Failure*, 51 A.L.R.3d 965, 972 (1973); *Larimer County Ditch Co. v. Zimmerman*, 34 P. 111 (Colo. 1893). See generally Wade R. Habeeb, *supra*, at 972.

### A. Establishment of the Rylands Doctrine in Oregon

#### 1. The *Esson* Decision

Oregon's first application of the *Rylands* doctrine can be found in dicta in the 1893 Oregon Supreme Court decision, *Esson v. Wattier*.<sup>98</sup> In *Esson*, an individual who owned property adjoining the site of a proposed dam filed suit to enjoin construction of the dam primarily because water from the dam was likely to enter and damage his neighboring property.<sup>99</sup> Relying on Justice Blackburn's *Rylands* opinion, the *Esson* court denied the plaintiff's request for injunctive relief, holding that "[i]f a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril."<sup>100</sup> The *Esson* court, however, failed to acknowledge Blackburn's "naturally there" requirement and the House of Lord's "natural use" limitation on Blackburn's broad rule.<sup>101</sup> Thus, the *Esson* court substantially broadened the original scope of *Rylands* liability.

After affirming the general application of *Rylands* in Oregon, the *Esson* court specifically addressed the application of the *Rylands* rule to cases in which an injunction has been sought. The court announced the following rule:

If a person, by artificial means, raises a volume of water above

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98. 34 P. 756 (Or. 1893). The *Esson* court's application of the *Rylands* doctrine aligned Oregon with a handful of jurisdictions that, after the 1889 Johnstown Flood, began establishing absolute liability for damages caused by the escape of impounded waters. See Habeeb, *supra* note 97, at 965; Glen, *supra* note 54, at 517.

There is a significant historical parallel between *Esson* and *Rylands*. The Oregon Supreme Court decided *Esson* while the Johnstown flood was still fresh in the American public's memory. Similarly, England suffered disastrous dam failures at the Bilberry and Bradfield Reservoirs, two disasters that occasioned great loss of life and property, shortly before the English courts decided *Rylands*. See A.W.B. Simpson, *Legal Liability for Bursting Reservoirs: The Historical Context of Rylands v. Fletcher*, 13 J. LEGAL STUD. 19, 225 (1984). Thus, the backdrop for both *Esson* and *Rylands* was a fresh memory of disaster occasioned by the catastrophic failure of large reservoirs.

99. See *Esson*, 34 P. at 756.

100. *Esson*, 34 P. at 757 (quoting *Fletcher v. Rylands*). The *Esson* court attributed this quotation to Justice Blackburn. In fact, however, the quotation is properly attributable to Lord Cranworth of the House of Lords, who was paraphrasing Justice Blackburn's Exchequer Chamber opinion. See 3 L.R.-E. & I. App. 330, 340 (H.L. 1868).

101. See *Esson*, 34 P. at 757.

its natural level, and, by percolation or by overflow, injures neighboring lands, without license, prescription, or grant from the proprietor, he may invoke the interposition of a court of equity, and obtain an injunction to prevent it, when he would sustain irreparable injury, or be compelled to bring a multiplicity of actions to recover the damages as they accrued.<sup>102</sup>

Finding that the plaintiff had not sufficiently shown that his property would be damaged by the new dam, the court held in favor of the defendant.<sup>103</sup>

## 2. The *Mallet* Decision

Two decades later, in *Mallett v. Taylor*,<sup>104</sup> the Oregon Supreme Court affirmed in dicta the broad *Esson* version of the *Rylands* rule. *Mallett* involved the escape of water from an irrigation ditch through percolation.<sup>105</sup> In affirming the application of absolute liability in cases involving the escape of water from a ditch or dam, the court followed the rule established by Justice Blackburn and followed by both the House of Lords in *Fletcher* and the Oregon Supreme Court in *Esson*.<sup>106</sup> However, the *Mallett* court found that “[i]n the instant case there is no need to invoke in all its severity the rule laid down in *Esson v. Wattier*”<sup>107</sup> because the defendant had been negligent, thus allowing the plaintiff to prevail on a negligence claim.<sup>108</sup> Thus, the Oregon Supreme Court recognized that in situations involving the escape of water from either dams or irrigation ditches, liability could be established without any inquiry into the naturalness of the activity. In effect, the *Mallett* court’s application of the *Rylands* doctrine imposed absolute liability in all cases involving the escape of impounded water, regardless of the nature of the water source.

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102. *Id.*

103. *See id.* at 758.

104. 152 P. 873 (Or. 1915).

105. *See id.*

106. *See supra* notes 53, 100 and accompanying text.

107. *Mallett*, 152 P. at 875.

108. *See id.*

*B. The Distinction Between Reservoirs and Ditches*

In 1917, the Oregon Supreme Court decided *Taylor v. Farmers' Irrigation Co.*,<sup>109</sup> in which a property owner sought injunctive relief against the incursion of water onto his property caused by his neighbor's allegedly negligent construction of a ditch.<sup>110</sup> After finding that the plaintiff had not been injured by the defendant and the defendant had not been negligent, the court denied injunctive relief.<sup>111</sup> The court stated that "the owner of a ditch is not liable *per se* for leakage from his ditch, without negligence upon his part."<sup>112</sup> This was a clear departure from the absolute liability rule that the Oregon Supreme Court had applied to dams and reservoirs.<sup>113</sup> However, it appears that *Taylor's* inclusion of a negligence requirement was restricted to the escape of water from a ditch. Oregon courts confirmed this apparent distinction between reservoirs and ditches in later cases.

Oregon's next opportunity to address the *Rylands* doctrine came twenty years later in *Patterson v. Horsefly Irrigation District*.<sup>114</sup> Like *Taylor*, *Patterson* concerned water that had leaked from a ditch.<sup>115</sup> In *Patterson*, the defendant appealed the trial court's use of jury instructions that closely resembled the *Mallet* court's wording of the *Rylands* rule.<sup>116</sup> The *Patterson* court acknowledged the precedential value of the *Mallet* decision, but applied the *Taylor* court's negligence modification.<sup>117</sup> According to the *Patterson* court:

[T]he strict rule of liability, as laid down in the cases of dams and reservoirs . . . is not usually applied to ditches and canals, where the water is under no, or comparatively little, pressure.

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109. 162 P. 973 (Or. 1917).

110. *See id.*

111. *See id.* at 974.

112. *Id.*

113. *See, e.g., Esson v. Wattier*, 34 P. 756 (Or. 1893).

114. 69 P.2d 283 (Or. 1937).

115. *See id.*

116. *See id.* at 290. The section of the jury instructions at issue read: "I instruct you where a person by artificial means causes water to percolate through the soil to the injury of his neighbor [he] does so at his peril and is legally responsible therefor irrespective of negligence." *Id.* (brackets in original).

117. *See id.* at 291.

The carrying of water through ditches and canals is not a dangerous or menacing undertaking, and, by the exercise of ordinary or reasonable care, it can be rendered comparatively harmless. . . . In other words, the owners of an irrigation canal or ditch are not liable as insurers, for injuries sustained to adjoining property by seepage, leakage, or overflow from the canal or ditch, but are only liable for such injuries in case of actual negligence.<sup>118</sup>

The *Patterson* court distinguished ditches from dams and reservoirs because ditches, unlike reservoirs, do not typically overflow without negligence. In addition, the *Patterson* court noted that the escape of water from a ditch "is liable to do little injury, as compared with that when the escape is from a reservoir."<sup>119</sup> Thus, the *Patterson* court justified on solid policy grounds *Taylor*'s distinction between dams and reservoirs on the one hand, and ditches and canals on the other.

The Oregon Supreme Court faced yet another question regarding liability for the escape of water from a ditch in *Kaylor v. Recla*.<sup>120</sup> The *Kaylor* court, which relied upon its previous decisions in *Mallet* and *Patterson*, declared that, according to Oregon jurisprudence, "[I]f a person, by artificial means, raises a volume of water above its natural level, and, by percolation and by overflow, injures neighboring lands . . . when the same can be prevented by reasonable and not too expensive means, the [person] is liable for injury done to adjoining lands . . ."<sup>121</sup> Significantly, the *Kaylor* court's statement of the status of Oregon law mischaracterized Oregon jurisprudence by asserting that, generally, Oregon courts impose absolute liability according to whether a party has acted reasonably<sup>122</sup> in his or her attempts to avoid injuring neighboring property. Contrary to the *Kaylor* court's statement of Oregon law, Oregon courts consistently have held that, with respect to dams and reservoirs, the *Rylands*

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118. *Id.* at 290-91 (quoting 3 KINNEY ON IRRIGATION AND WATER RIGHTS 672 (2d ed. 1912)).

119. *Id.*

120. 84 P.2d 495 (Or. 1938).

121. *Id.* at 496-97 (emphasis added).

122. *See id.*

doctrine imposes strict liability without regard to whether a party has acted reasonably. While it is possible that the *Kaylor* court's statement of Oregon jurisprudence represents an attempt to integrate the Oregon Supreme Court's holdings in *Patterson* and *Mallet*, it makes little sense to extend the *Patterson* requirement of negligence into areas that neither *Patterson* nor *Taylor* contemplated. *Kaylor*'s interpretation of the doctrine of liability for escaping waters has been largely ignored in subsequent Oregon and federal court decisions and is probably best viewed as a simple misstatement of the law.<sup>123</sup>

### C. The Exception for Reservoir-Like Bodies of Water

In 1950, Judge James Alger Fee of the United States District Court for the District of Oregon decided *Ure v. United States*.<sup>124</sup> *Ure* was a consolidation of two actions, both of which concerned a breach in the North Canal of the Owyhee Reclamation Project. The North Canal was a raised canal,<sup>125</sup> approximately seventy miles long,<sup>126</sup> that carried 3,366 gallons of water per second.<sup>127</sup> In 1946, the North Canal suffered a breach approximately fifty feet wide at a point located thirty-six miles from the head of the canal.<sup>128</sup> Water drained out of the canal through the breach and flowed onto neighboring properties that were located a short distance from, and approximately 260 feet below, the level of the raised canal.<sup>129</sup> One of the neighboring properties was owned by the Ures, who instituted an action to recover damages caused by the incursion of water onto their land.<sup>130</sup> The Whites, who owned agricultural land some distance from the canal breach, also instituted an action, claiming that the canal breach

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123. *But see* Glen, *supra* note 54, at 523, 526 (citing *Kaylor v. Recla* as supporting the proposition that "[a]ccording to the overwhelming weight of authority, liability for damage caused by the escape of waters impounded in reservoirs or ponds . . . depends upon proof of some act of negligence.").

124. 93 F. Supp. 779 (D. Or. 1950), *rev'd on other grounds*, 225 F.2d 709 (9th Cir. 1955).

125. *See id.* at 785.

126. *See id.* at 781.

127. *See id.* at 782. This amount is equal to approximately 450 second-feet, with a weight of approximately fourteen tons (28,080 pounds). *See* THE WORLD ALMANAC 559-62 (Robert Famighetti et al. eds., Funk & Wagnalls 1995).

128. *See Ure*, 93 F. Supp. at 781.

129. *See Ure*, 225 F.2d at 710.

130. *See Ure*, 93 F. Supp. at 782.

caused a lack of irrigation water for their crops.<sup>131</sup>

With respect to the Whites, the court held that the defendant did not breach its duty to them and, thus, was not liable for their damages.<sup>132</sup> With respect to the Ures, however, the court found that the defendant was absolutely liable for the breach in the canal.<sup>133</sup> Judge Fee examined Oregon's application of the *Rylands* doctrine and noted that while "there [was] probably no opinion in which the [Oregon Supreme Court] squarely applied [*Rylands*],"<sup>134</sup> the emphatic approval of *Rylands* by the Oregon Supreme Court convinced him that "the Oregon Supreme Court, if faced with the exact facts here, would apply the rule of absolute liability."<sup>135</sup>

According to Judge Fee, prior Oregon case law had dealt with minor incursions of water from canals and had never addressed "a major breach in the bank of a large canal."<sup>136</sup> In the Ures' situation, the "column of water was flowing for a distance of 36.15 miles down and through the break,"<sup>137</sup> and the canal represented a "highly dangerous instrumentality"<sup>138</sup> capable of releasing a "devastating rush of water."<sup>139</sup> This fact distinguished *Ure* from other Oregon cases dealing with water escaping from ditches and canals.

Judge Fee's decision seems to have been based on the proposition that a breach in a major canal carrying a large amount of water poses the same type and degree of danger inherent in a breach of a dam or reservoir. This observation is supported by Judge Fee's examination of case law from outside of Oregon. After analyzing several such cases involving the percolation of waters from an irrigation ditch<sup>140</sup> and slight overflows from a canal,<sup>141</sup> Judge Fee wrote:

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131. See *id.* at 781.

132. See *id.* at 785.

133. See *id.* at 792.

134. *Id.* at 789.

135. *Id.* at 791. Some commentators have incorrectly construed this as a blanket statement that effectively reinstated the *Rylands* rule of strict liability for the escape of water from both reservoirs and ditches, as applied in *Esson* and *Mallet*. See CLARK, *supra* note 10, at 69; Brand, *supra* note 54, at 351.

136. *Ure*, 93 F. Supp. at 790.

137. *Id.* at 782.

138. *Id.* at 791.

139. *Id.* at 786.

140. See *id.* (citing *North Sterling Irrigation Dist. v. Dickman*, 149 P. 97 (Colo. 1915)).

141. See *id.* (citing *Jacoby v. Town of Gillette*, 174 P.2d 505 (Wyo. 1946), *aff'd*, 177 P.2d

All these must be distinguished from the violent breach of a reservoir by this elemental force stored by the act of a party. Where one is managing a stream of water and loses control, whereby the element rages over the land of another, the cases above mentioned have no applicability.<sup>142</sup>

Judge Fee's opinion, which has been characterized as "classical,"<sup>143</sup> would be of great help to the Oregon Supreme Court when, the following year, it would attempt to clarify the application of *Rylands* absolute liability in Oregon.

#### *D. Oregon's Current Law: The Brown Decision*

In 1951, the Oregon Supreme Court, armed with Judge Fee's clarification of Oregon law, addressed the issue of absolute liability for escaping water in *Brown v. Gessler*.<sup>144</sup> In 1947, the Gesslers began construction of a building on their property.<sup>145</sup> Following the excavation, and before the building's foundation could be laid, rain water filled the excavation site.<sup>146</sup> The water flowed into the Browns' neighboring basement through a drainage tile, damaging materials stored in the basement.<sup>147</sup> The Browns filed suit, alleging that the Gesslers were liable under the absolute liability rule of *Rylands*.<sup>148</sup>

Although the Oregon Supreme Court acknowledged that the *Rylands* doctrine had been adopted in Oregon, the court found that the rule was not applicable to the facts of *Brown*.<sup>149</sup> The court distinguished the facts of *Brown* from the Oregon cases that had applied the rule: "[T]he excavation here was not for the purpose of constructing a reservoir to hold water. It was made in the ordinary course of building construction and was temporary in character."<sup>150</sup>

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204 (Wyo. 1947)).

142. *Ure*, 93 F. Supp. at 787.

143. *See Union Pac. R.R. Co. v. Oregon Irrigation Dist.*, 253 F. Supp. 251, 258 (D. Or. 1966).

144. 230 P.2d 541 (Or. 1951).

145. *See id.* at 543.

146. *See id.* at 544.

147. *See id.*

148. *See id.* at 545.

149. *See id.* Instead, the court found the defendants liable on the basis of negligence.

150. *Id.*

Thus, *Brown* reaffirmed and clarified *Patterson's* application of *Rylands* absolute liability to reservoirs and not to ditches.<sup>151</sup> It also provided a clearer conceptual basis for Oregon's different treatment of reservoirs and ditches. Reservoirs, unlike ditches, are not ordinary or, in Lord Cairnes's words, "natural" uses of water; rather, they are uses that come with an extraordinary risk of harm. Thus, a higher level of liability should be associated with reservoirs.

When *Brown* is placed in the context of the other Oregon decisions, it is clear that there are two theories under which a water impoundment facility may be subject to the *Rylands* doctrine. First, if a water impoundment facility was constructed for the purpose of acting as a reservoir, it would be categorically subject to *Rylands* absolute liability.<sup>152</sup> Second, even if a reservoir-like impoundment facility was not constructed to act as a reservoir, it may still be subject to *Rylands* liability if a court determines that its use is unreasonable.<sup>153</sup>

### 1. Categorical Liability

The *Brown* court first dealt with the question of whether the defendants' excavation was for the purpose of constructing a reservoir. According to the court, "[t]he waters collected in the [excavation] were not brought [into the excavation] to serve any purpose of the defendants and were perhaps as unwelcome to the defendants as to plaintiffs."<sup>154</sup> The *Brown* court held that the defendants did not intend to build a reservoir but instead were taking what was "necessarily the first step in the construction of [a]

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151. See *supra* note 119 and accompanying text.

152. Several commentators have expressed the mistaken belief that *Brown* requires that a defendant have brought water onto his property "for his own purposes." See CLARK, *supra* note 10, at 70. This belief may stem from the *Brown* court's decision to quote Justice Blackburn's *Rylands* opinion: "'We think 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 . . . must keep it in at his peril . . .'" *Brown*, 230 P.2d at 545 (quoting *Fletcher*, 1 L.R.-Ex. 265 (Ex. Ch. 1866)). In fact, however, Oregon courts have not used Blackburn's generalized "for his own purposes" test in reported cases, either before or after *Brown*.

153. See *Brown*, 230 P.2d at 540.

154. *Id.* at 545.

building.”<sup>155</sup> According to the court, the Gesslers should have anticipated that the excavation site might fill with water, and their failure to take the necessary precautions established the basis of their liability in negligence rather than absolute liability.<sup>156</sup>

## 2. Unreasonable Use of a Reservoir-Like Impoundment Facility

Having determined that the excavation site was not a reservoir, the *Brown* court turned to the question of whether such a site could nonetheless invoke *Rylands* absolute liability because of its reservoir-like characteristics. In response to the plaintiffs’ contention that the application of *Rylands* does not depend on whether a defendant excavates his property for the purpose of building a reservoir,<sup>157</sup> the court admitted that “[u]nder some circumstances that might be true, but not under the circumstances of this case.”<sup>158</sup> According to the court, the circumstances under which the purpose of the excavation would be unimportant could be determined by asking if the “act or use [was] a reasonable exercise of the dominion which the owner of the property has by virtue of his ownership over his property, having regard to all interests affected, his own and those of his neighbors, and having in view also, public policy.”<sup>159</sup> The end result of this analysis would yield the appropriate “degree of care . . . required commensurate with the danger involved.”<sup>160</sup>

Toward this end, the *Brown* court distinguished its holding from the Colorado case of *Canon City v. Oxtoby*.<sup>161</sup> In *Canon City*, a railroad company excavated a borrow pit<sup>162</sup> to obtain material to maintain its embankments and roadbed.<sup>163</sup> The pit soon filled with water, creating a pond between four and seven feet deep with a

155. *Id.*

156. *See id.*

157. *See id.*

158. *Id.* at 546.

159. *Id.* at 547 (citing 1 AM. JUR. *Adjoining Landowners* § 3 (1936)).

160. *Id.*

161. 100 P. 1127, 1128 (Colo. 1908), cited in *Brown*, 230 P.2d at 546.

162. A “borrow pit” is a pit from which earth is taken for use in filling or embanking. *See* WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 257 (3d ed. 1993).

163. *See Canon City*, 100 P. at 1127.

surface area that was slightly larger than an acre.<sup>164</sup> The water sat in the borrow pit for a prolonged period of time, after which it began to damage a neighboring property through percolation.<sup>165</sup> The Colorado Supreme Court held the railroad liable for the damage caused by the escaping water.<sup>166</sup>

The *Brown* court explained that, unlike the Gesslers' excavation, "a 'borrow pit' is a more or less permanent excavation and, *in effect*, a reservoir, though not such for any use or purpose of the owner."<sup>167</sup> The *Brown* court further explained that while the Gesslers' excavation was a "reasonable" use of the property,<sup>168</sup> "retaining . . . water in the 'borrow pit' involved an extraordinary and unusual danger to the adjoining landowner."<sup>169</sup> Thus, the *Brown* court recognized *Ure's* extension of absolute liability to activities that produce the same effects as reservoirs, but limited that extension to those circumstances that present extraordinary and unusual danger.

#### *E. Subsequent Cases and the Expansion of the Rylands Doctrine Beyond Water-Related Liability*

Since the Oregon Supreme Court decided *Brown*, the list of reservoir-like activities to which the *Rylands* doctrine applies has branched out into activities that are not associated with water. Oregon courts have increasingly applied the *Rylands* doctrine to other "ultra hazardous"<sup>170</sup> or "abnormally dangerous"<sup>171</sup> activities, such as the

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164. *See id.* At various times during the year, the pond held up to 2,618,350 gallons of water, with a weight of 10,930 tons. *See id.*

165. *See Canon City*, 100 P. at 1128.

166. *See id.* Though a Colorado case, *Canon City* is nevertheless applicable to a discussion of Oregon law because the *Canon City* court asserted that it decided the case in accord with the common law of England, *see id.*, and Oregon courts' application of absolute liability consistently has followed the common law of England.

167. *Brown*, 230 P.2d at 546 (emphasis added).

168. *See id.* at 545.

169. *Id.* at 546. In contrasting the borrow pit and the Gesslers' excavation, the *Brown* court focused on the fact that the construction of a building on the Gesslers' property, including the necessary act of digging a temporary excavation for the foundation, was a "reasonable exercise of the dominion which [the] defendants had over their own property," *id.* at 547, while the borrow pit involved extraordinary and unusual danger. *See id.*

170. "Ultra hazardous" is the terminology used in the *Restatement (First) of Torts*. *See* RESTATEMENT OF TORTS § 520, 41 (1938).

171. "Abnormally dangerous" is the terminology used in the *Restatement (Second) of*

storage of natural gas,<sup>172</sup> blasting,<sup>173</sup> and crop dusting.<sup>174</sup> Currently, the most widely accepted wording of the rule of absolute liability in Oregon can be found in *McLane v. Northwest Natural Gas Company*.<sup>175</sup> According to *McLane*, an activity is abnormally dangerous and, thus, subject to *Rylands* absolute liability when it is "extraordinary, exceptional, or unusual, considering the locality in which it is carried on; when there is a risk of grave harm from such abnormality; and when the risk cannot be eliminated by the exercise of reasonable care."<sup>176</sup> While the exact application of this formula often differs between Oregon courts,<sup>177</sup> the law, in general, is fairly well settled.<sup>178</sup>

The Oregon Supreme Court recently has shown a willingness to apply the *McLane* formulation of "abnormally dangerous activities" to irrigation ditches, despite earlier decisions, such as *Patterson*, that would seem to preclude such an application. In *Reter v. Talent Irrigation District*,<sup>179</sup> the Oregon Supreme Court examined the possibility of applying *Rylands* absolute liability to a claim for damage to an orchard caused by seepage from a small irrigation ditch

*Torts. See* RESTATEMENT (SECOND) OF TORTS § 520, 36 (1977).

172. *See, e.g.,* *McLane v. Northwest Natural Gas Co.*, 467 P.2d 635 (Or. 1970).

173. *See, e.g.,* *Bedell v. Goulter*, 261 P.2d 842 (Or. 1953).

174. *See, e.g.,* *Loe v. Lenhardt*, 362 P.2d 312 (Or. 1961).

175. 476 P.2d 633 (Or. 1970).

176. *Id.* at 637. The formulation is essentially that of the *Restatement (Second) of Torts* without part (f):

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

RESTATEMENT (SECOND) OF TORTS § 520.

177. *See, e.g.,* *Koos v. Roth*, 652 P.2d 1255, 1258-61 (Or. 1982).

178. *See, e.g.,* James O. Garrett, II OREGON STATE BAR REAL PROPERTY CLE § 52.30, at 52-21.

179. 482 P.2d 170 (Or. 1971).

carrying a "non-reservoir-like" flow of water.<sup>180</sup> The court, after first quoting with approval *McLane's* definition of "abnormally dangerous," stated that:

The activity conducted by defendant here—the irrigation of orchard land in a naturally dry area—can hardly be called "exceptional, or unusual, considering the locality in which it is carried on." Moreover, the risk of serious harm created by the activity is minimal. The canals involved in this case are approximately 18 inches deep and four feet wide. They do not appear to create the risk of serious harm which courts have had in mind in imposing strict liability.<sup>181</sup>

Thus, while the *Reter* court found that imposing absolute liability was inappropriate under the facts of *Reter*, the court's willingness even to apply the *McLane* formula to irrigation ditches represents a significant departure from Oregon's *Rylands* jurisprudence.

## V. CONCLUSION

The Oregon case law dealing with *Rylands* absolute liability has followed a consistent path. *Esson* and *Mallett* initially recognized the need for a non-traditional basis of liability for the escape of restrained waters. In doing so, Oregon became one of the first states to recognize that certain activities are so dangerous that a party conducting those activities should act as an insurer for neighbors. Subsequent Oregon case law clarified the doctrine of absolute liability on practical and public policy grounds. Eventually, Oregon courts developed a two-prong test for the application of *Rylands*: structures constructed for the purpose of acting as a reservoir are categorically subject to absolute liability, whereas structures that were not built to serve as reservoirs are subject to a case-by-case analysis to determine whether absolute liability should be imposed. While this case-by-case analysis of non-reservoir structures first hinged on the distinction between "reasonable" uses of property and those uses that carry with them the same sort of danger that is

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180. *See id.* at 173.

181. *Id.*

associated with reservoirs, subsequent case law has expanded this distinction to one between reasonable uses of property and “abnormally dangerous” uses of property.

Oregon’s application of the *Rylands* doctrine exemplifies the doctrine’s status throughout much of the United States. While most states have adopted the *Rylands* doctrine either in whole or in part, not all states have had the opportunity to develop and test the doctrine to the same degree as has Oregon. Thus, Oregon’s refined application of the doctrine may serve well as a prototype for those states whose own version of the doctrine is not so well defined.

## **NOTES**

