CHATTELS DANGEROUS PER SE.

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Although no difficulty arose in the recent case of *The Adelaide Chemical and Fertilizer Co. Ltd. v. Carlyle*,[1] since the finding of negligence was upheld, the High Court decision raises the question of the exact rules that should be applied to chattels dangerous *per se*. At one time there was a tendency to assume that the decision which Pollock aptly christened the snail case[2] had destroyed the distinction between chattels dangerous *per se* and those only dangerous *sub modo*. Certainly *Donoghue v. Stevenson* removed the imperative historical reasons which first inflicted on the law of tort this curious category. The decision in *Earl v. Lubbock*[3] was so narrow that some means had to be found of extending liability in tort. The doctrine that if there was a contract there could never be an independent duty of care in tort owed to parties outside the contract has only to be stated baldly to reveal its insufficiency. Exceptions were gradually created but it was not until 1932 that the law was put on a firm foundation. It would have been more reasonable to abolish the category of chattels dangerous *per se* when the historical reasons which justified its creation ceased to have force. But case law cannot so easily escape from the shackles of the past, and unfortunately the distinction between chattels dangerous *per se* and those only dangerous *sub modo* still remains[4] to disfigure the law of tort with a category that is neither adequately defined nor properly understood.

The modern tendency, however, is to compliment the "reasonable man" by assuming that he would normally exercise a very high degree of care. As the rules of negligence are applied more strictly, the practical difference between the tort of negligence and those where liability is stricter becomes of less importance. Hence there is a tendency for the sphere of negligence to increase, and there is not to-day the same practical gulf that existed in the past between the principles of negligence and those that relate to chattels dangerous *per se*. But though this must be admitted, it is going too far to say that there is no practical difference whatever or that the courts in fact have simplified the law while the books maintain the old distinctions.

The following seem to be the rules that apply to chattels dangerous *per se* :—

1. It is a question of law whether a *res* is dangerous *per se*. The decision is reached, not by considering the circumstances of the particular case, but by an analysis of the abstract nature of the chattel. In 1929 Dr. Stallybrass pointed out the weakness of this approach, for danger is relative to time and place and the class of persons likely to come into contact with the chattel.[5] In developing the rule in *Rylands v. Fletcher*[6] the Courts have wisely avoided the temptation to classify, according to

1. [1941] A.L.R. 10.
2. *Donoghue v. Stevenson*, [1932] A.C. 562.
3. [1905] 1 K.B. 253.
4. This may be seen from *Donoghue v. Stevenson* itself where the distinction is clearly emphasized, [1932] A.C., at pp. 595, 602, 611. The dictum of Goddard L.J. in *Paine v. Colne Valley Electricity Supply*, [1938] 4 All E.R., at p. 808, is too broadly expressed.
5. 3 Cambridge Law Jo. 376.
6. (1868) L.R. 3 H.L. 330.

their abstract qualities, things which may be brought on land. We cannot say whether the introduction of water, gas, electricity or explosives on land is caught by *Rylands'* case or not—all depends on the actual facts. High tension electric cables, gas mains in the street, water mains under great pressure, a concentration of explosives—these entail strict liability on those who introduce them to their land. But domestic electric wiring, gas mains in a house, water pipes for home use, the storage of small quantities of fireworks for November 5th—these impose no liability on the owner of land unless there be negligence.[7] In the language of jurisprudence the Court has adopted an elastic *standard* which may be applied with due consideration of the needs of the particular case. In the case of chattels dangerous *per se* the law has unfortunately tried to formulate a rigid *concept*, which allows of no discretion, for the attempt is made to class chattels according to their abstract qualities, and, since this is done as a matter of law, a chattel, once labelled, remains within the category and the strict rules apply whether it be reasonable or not in the particular case.

Dr. Charlesworth has made an exhaustive attempt to lay down the characteristics which are common to all things regarded as dangerous by the Courts, but his work suffers from the fact that he attempts to generalise from cases illustrating very diverse rules. His conclusion is that " to constitute anything a dangerous thing, its power to cause damage must be : (i) inherent ; (ii) invariable ; and (iii) due to human agency."[8] Lord Wright suggests that, although it is not easy to lay down a general test, the distinction is easy to apply in actual cases. There are things that cannot be handled without serious risk : whereas other things are only potentially dangerous, i.e., they will cause danger only if there is negligence, the source of danger being something which is not essential to their ordinary character.[9] It is true that almost anything may become a source of danger—a piece of string may be placed across a stair so as to cause injury, a chair may be dangerous if it is fragile, and so on. But string and chairs are not invariably dangerous, but only " string in a certain position " or a " chair that is structurally weak." Poison and a loaded gun possess an inherent danger in all circumstances.

The following chattels have been held to be dangerous *per se* : loaded guns,[10] a stick of phosphorus,[11] a naked sword, a hatchet,[12] a hair-dye which was dangerous to certain types of skin and could be used safely only after skin tests were taken,[13] detonators,[14] " Irish lime,"[15] sulphuric acid,[16] a compound for cleaning boilers[17] and gas.[18] Sometimes efforts

7. See *Collingwood v. Home and Colonial Stores*, [1936] 3 All E.R., at p. 208 ; *Rickards v. Lothian*, [1913] A.C., at pp. 280-1.
8. *Liability for Dangerous Things*, at p. 7.
9. *Wray v. Essex C.C.*, [1936] 3 All E.R., at p 102.
10. *Dixon v. Bell*, (1816) 5 M. & S. 198.
11. *Williams v. Eady*, (1893) 10 T.L.R. 41.
12. These examples are given in an *obiter dictum* in *Wray v. Essex C.C.*, by Lord Wright, [1936] 3 All E.R., at p. 102.
13. *Parker v. Oloxo Ltd.*, [1937] 3 All E.R., at p. 528. " The danger was in it and it was a chemical danger, which could not be known or apparent to any user of the article." See also *Watson v. Buckley*, [1940] 1 All. E.R., at pp. 183-4.
14. *Marcroft v. Inger*, [1936] N.Z.L.R. 121, noted in 9 A.L.J. 449.
15. *Love v Thomson*, [1937] 53 Sheriff Ct. Rep. 81.
16. *Faulkner v. Wischer & Co. Pty. Ltd.*, [1918] V.L.R. 513 ; *Adelaide Chemical and Fertilizer Co. v. Carlyle*, [1941] A.L.R. 10.
17. *Anglo-Celtic Shipping Co. v. Elliott*, (1926) 42 T L.R. 297.
18. *Dominion Gas Co. v Collins*, [1909] A.C 640.

have been made to extend the category to ridiculous lengths, but the Courts have rejected appeals to include the following chattels—knitting needles,[19] an oil can with a long spout,[20] a locked saloon car with a dog in it,[21] a toy soldier with a lance.[22]

Chemicals have usually been treated as chattels dangerous *per se*, yet in *Kubach v. Hollands*,[23] this was not done. A school-girl was injured while carrying out an experiment in a chemistry class. The teacher had purchased the chemicals from a retailer who had bought them from B. The material sold as manganese dioxide contained another substance which caused an explosion which would not have occurred had the manganese dioxide been pure. B, in supplying the goods to the retailer, stated that the goods should be tested before use : but the retailer carried out no test and did not advise the teacher that a test was necessary. The decision was that the retailer was guilty of negligence but that he could not recover from B, since B had recommended a test, and, intermediate examination thus being suggested, the rule in *Donoghue v. Stevenson* did not apply. We may ask, however, why the stricter rules relating to chattels dangerous *per se* were not invoked. Instead of being pure manganese dioxide, the substance was nine-tenths antimony sulphide ; thus what was sold as a comparatively harmless substance was likely to explode, if used as pure manganese dioxide could be used. The warning given did not suggest that this was the case. We shall see below that, where a chattel dangerous *per se* is concerned, the warning must be full and adequate before it is available as a defence. It is true that the addition of antimony sulphide still left the substance safe for some commercial purposes. But in *Anglo-Celtic Shipping Co. v. Elliott*,[24] vast quantities of a boiler cleansing fluid had been used without mishap, but when for the first time it was used on a cast-iron boiler and an explosion resulted, the fact that the manufacturer was unaware of this danger was no defence.

2. The category of chattels dangerous *per se* must be carefully distinguished from the substances to which *Rylands v. Fletcher*[25] relates. *Rylands v. Fletcher* (even if in certain respects it has been extended)[26] primarily refers to unnatural or unreasonable user of *land*, and is not directly concerned with chattels. It is true that *Rylands*' case imposes a rule of strict liability, and relates, in a broad sense, to the introduction of *dangerous things* on to land. But the approach being different, the list of substances caught by *Rylands v. Fletcher* is not the same as that which falls within the category of chattels dangerous *per se*. Thus water (with which *Rylands*' case was concerned) has not yet been held to be a chattel dangerous *per se*, though this point is rather academic, since artificial accumulation of water concerns a use of land. Moreover, as was pointed out earlier, *Rylands*' case depends on a broad standard which enables the Court to take note of all the circumstances in determining whether there has been an unnatural user of land. Fire, water, gas and

19. *MacDonald v. City Council of Inverness*, [1937] Scots Law Times 91.
20. *Wray v. Essex County Council*, [1936] 3 All E.R. 97 (C.A.).
21. *Fardon v. Harcourt-Rivington*, (1932) 48 T.L.R. 215 (H.Lds.).
22. *Chilvers v. L.C.C.*, (1916) 80 J.P. 246.
23. [1937] 3 All E.R. 907.
24. (1926) 42 T.L.R. 297.
25. (1868) L.R. 3 H.L. 330.
26. See the present writer in 10 Aust. Law Jo. (1937) 472.

electricity sometimes fall under *Rylands'* case and sometimes do not. Where chattels dangerous *per se* are concerned, the classification is rigidly made as a matter of law. Hence, while there is much that is common between the two classifications, it is dangerous to cite a decision based on *Rylands v. Fletcher* as evidence that a particular chattel is dangerous *per se*. Failure to appreciate this has led many writers astray. *Rylands'* case has been applied to caravan dwellers who "escaped,"[27] rusty pieces of wire which "escaped" from a fence,[28] a flagpole,[29] vibrations caused by pile-driving[30]—none of these could be regarded as a chattel dangerous *per se*.

3. *The extent and nature of the duty.*

(*a*) There need be no knowledge on the part of the defendant, that the particular chattel is dangerous, if in fact it is classified by the law as dangerous *per se*. This is made clear by Atkinson J. in *Burfitt v. Kille*.[31] "The duty has never been stated to rest upon knowledge. If A chooses to sell things of a class dangerous in themselves, he cannot be heard to say that he did not know of or appreciate the danger." The point which the cases do not make clear is whether there must be a finding that it was *negligent* to be unaware of the danger. Mackinnon L.J. considers the test to be whether the supplier knew or *as a reasonable man ought to have known of the danger*.[32] On the other hand, in *Burfitt v. Kille*,[33] (where a retailer was held liable), there is no finding that it was negligent not to be aware of the dangerous nature of the child's pistol. The pistol was for blank ammunition and the danger lay in the fact that the U-shaped barrel was likely to become blocked. What was described as a "safety-pistol" was in reality a trap. There was some evidence that the importer gave a warning on the boxes which were supplied to retailers, but no finding that the defendants had actually been warned. Hence it is not a clear case of negligence on the part of a retailer who was apparently not a fire-arms expert.[34] Since therefore liability was imposed without a clear finding of negligence, the case is authority for the proposition that there is no need to show that a reasonable man would have appreciated the danger.

(*b*) The duty of care is owed by the supplier not only to the recipient but to all such persons as may reasonably be contemplated as likely to be endangered.[35] Thus A supplies a dangerous chattel to B without proper warning. A is liable not only for any injury which B may suffer as a result of his lack of knowledge, but also for any injury which B may cause to third parties provided it can be causally related to A's failure to indicate the danger inherent in the chattel. Even where A does not actually foresee that another may come into contact with the chattel he may be liable, for he owes a duty of care not to leave the chattel where it may be interfered with by incompetent persons.

27. *A.-G. v. Corke*, [1933] 1 Ch. 89.
28. *Firth v. Bowling Iron Co.*, (1878) 3 C.P.D. 254.
29. *Shiffman v. The Order of St. John*, [1936] 1 All E.R. 557.
30. *Hoare v. McAlpine*, [1923] 1 Ch. 167.
31. [1939] 2 K.B. 743.
32. *Taylor & Sons Ltd. v. Union Castle Steamship Co.*, (1932) 48 T.L.R. 249.
33. [1939] 2 K.B. 743.
34. The nature of the trade pursued by the shop which sold the pistol is not disclosed. Such "toys" are sold in many types of shops.
35. Atkinson J., *Burfitt v. Kille* (*supra*); *Dominion Natural Gas Co. Ltd. v. Collins*, [1909] A.C. 640, at p. 646; *Donoghue v. Stevenson*, (1932) A.C. 562, at p. 596; duty towards "persons likely to have to do with the dangerous thing in the condition in which (defendant) leaves it": *per* Irvine C.J., *Faulkner v. Wischer & Co. Pty. Ltd.*, [1918] V.L.R., at p. 523.

It is a defence that the *res* is delivered (*a*) to a competent person (*b*) who already knows or is warned of the danger.[36] Both these conditions must be fulfilled. Thus it is no defence, if the *res* is handed to an incompetent person, that a warning of the danger was given. Nor does it avail that a drum was labelled "Sulphuric Acid—dangerous," if in fact the stopper was defective.[37]

To say that the defendant is not liable for a conscious act of volition by a third party[38] is rather too wide. The real test is the extent of knowledge or warning given to such third party. Thus a competent chemist would not require warning of the properties of a chemical; an intelligent man, if told that a gun was loaded, would not be expected to cause injury; on the other hand, even a detailed warning to a child of the dangers of an air gun would be no defence to the fond parent who supplied it, if the child caused injury to a third party.

In this regard the rule is slightly wider than that of *Donoghue v. Stevenson*.[39] The latter depends on the fact that the *res* reached the consumer in the same state as it left the manufacturer and the rule concerning the "possibility of intermediate examination" is so phrased in order to protect the manufacturer if there has been interference with the *res* by third parties. In the case of chattels dangerous *per se* the defendant is required at his peril to take precautions against wrongful use of the chattel by the immature or the incompetent. Hence the range of persons to whom the duty is owed is much wider than in the case of *Donoghue v. Stevenson*.[40]

A dictum by Lord Dunedin is frequently cited: There can be no liability "*ex dominio solo* . . . there must always be found somewhere the element of negligence on his part to make the owner of a chattel liable for that injury."[41] Lord Wright refers to chattels dangerous *per se* as "holding a special place in the law of negligence."[42] These dicta are sometimes held to be authority for the view that, if the defendant proves that he has taken reasonable care, he escapes. But there are two points that must be considered. Firstly, there is a tendency to broaden the term negligence so that it covers actionable conduct. Thus Stallybrass states that the rule in *Rylands v. Fletcher*[43] is properly regarded as a branch of the law of negligence.[44] This is rather confusing, for proof that the defendant has used all reasonable care is no defence under *Rylands'* case. But the use of the term *statutory negligence* is leading to an extension of the word negligence beyond cases where only reasonable care is required. In view of this tendency, the dicta cited are not conclusive. Secondly, there is the common sense view that the duty of reasonable care naturally varies according to the circumstances. The greater the danger, the more extensive are the precautions necessary. It is unfortunate that

36. A warning is not, of course, necessary where the recipient is already aware of the danger. Cf. Scrutton L.J. in *Bottomley v. Bannister*, [1932] 1 K.B., at p 473.
37. *Faulkner v. Wischer & Co. Pty. Ltd.*, [1918] V.L.R. 513.
38. *Dominion Natural Gas Co. v. Collins*, [1909] A.C., at p. 647.
39. *supra*.
40. *supra*.
41. *Oliver v. Saddler*, [1929] A.C., at p. 599.
42. *Wray v. Essex C.C.*, [1936] 3 All E.R., at p. 101
43. *supra*.
44. Salmond on *Torts*, p. 605.

the law did not, from the beginning, treat the whole question of dangerous chattels as merely a branch of the law of negligence, for that would have not only simplified the rules, but enabled the Court to do substantial justice by taking all the facts of the situation into account.[45] However, it is submitted that the law of tort has not yet escaped from earlier distinctions and that at present it is not enough for the defendant to show that he has exercised reasonable care where chattels dangerous *per se* are concerned. Lord Macmillan refers to these rules as being " a special instance of *negligence* (*sic*) where the law exacts a degree of diligence so stringent as to amount practically to a guarantee of safety."[46]

On this point, the recent decision of the High Court[47] is indecisive, for negligence was expressly found, and hence there was no need to go further and determine what would be the position had reasonable care been taken. Rich A.-C.J. stated merely that " every care should be taken." Starke J. denied that strict and unqualified liability applied—but he admitted that " a reasonably prudent man would no doubt, in the case of such things exercise a keener foresight " or a " high degree of care amounting in effect to an insurance against risk " or the " greatest care " or " consummate care." Dixon J. stated that at least all reasonable care should be taken.

The argument may easily become one of words. If it is conceded that the reasonable man would take " consummate care " where chattels dangerous *per se* are concerned, then it may be sufficient to treat the duty as satisfied by the exercise of reasonable care. Such a case as *Marcroft v. Inger*[48] shows how far the duty may be carried. " There the defendant kept detonators in a metal box on a shelf six feet from the ground in a dark corner of a poorly lighted room of a disused house on an isolated farm."[49] The plaintiff, a farm labourer, who sheltered in the house from rain which had interrupted his walk to work, cleaned out a detonator in ignorance of its nature and was a second time tempting injury when an explosion occurred. The defendant was held to be guilty of negligence.

However, in spite of the lengths to which the duty of reasonable care is sometimes carried, there is in theory a distinction between reasonable care and consummate care and to avoid confusion it is better to use the latter phrase where chattels dangerous *per se* are concerned.

45. The American Restatement of the Law of Torts does not treat chattels dangerous *per se* as a separate category: See S. 388 *et seq.*
46. *Donoghue v. Stevenson*, [1932] A.C., at pp. 611-2.
47. *Adelaide Chemical & Fertilizer Co. Ltd. v. Carlyle*, [1941] A.L.R. 10.
48. [1936] N.Z.L.R. 121.
49. Note in 9 A.L.J. 449.