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VOLUME 13

Fault-based and Strict Liability in the Law of Neighbours

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Preface

This book is a revised version of my PhD thesis, *Fault-based and Strict Liability in the Law of Neighbours*, which was submitted to the University of Edinburgh in May 2017 and examined in July of the same year. Some structural changes have been made to improve the thesis for publication purposes, namely division of chapters that were, perhaps, inconveniently long. A couple of references have been added to reflect judicial developments that occurred after the thesis was written, but the substance remains largely unaltered.

Engaging in the fascinating task that is exploring Scots private law and producing an extensive piece of work like this one would have not been possible for a Chilean lawyer far from home but for the assistance and encouragement of several individuals. They are too many to mention here, including my family, friends, colleagues and members of the wider Edinburgh Law School community, yet some deserve special recognition. Professor Elspeth Reid's commitment to this project and confidence in my ability to complete it were essential in this journey. She is a true and thorough supervisor, an academic mentor and an admirable woman to whom I will be eternally grateful. My second supervisor, Scott Wortley, provided invaluable insights that pushed me into thinking beyond my self-set boundaries, and his empathy and transparency were fundamental for my wellbeing. I would also like to express my gratitude to my examiners Professor Martin Hogg and Gordon Cameron, who provided useful comments to my thesis and helped in bringing this journey to a happy ending. Lastly, I would like to thank Professor Kenneth Reid, who not only provided important assistance during my research but, thereafter, kept encouraging me to publish this work.

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This book is dedicated to the memory of my grandmother, Luz Besa Lyon, who passed away when I was in Scotland.

María Paz Gatica
Santiago, Chile
November 2021

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Environment Act 1995	8-02	(Scotland) Act 1951	8-02
Flood Prevention (Scotland) Act		Spray Irrigation (Scotland) Act	
1961	8-02	1964	8-02
Flood Prevention and Land Drainage		Tenements (Scotland) Act	
(Scotland) Act 1997	8-02	2004	9-24, 9-30
Flood Risk Management (Scotland)		s 7	9-28, 9-31
Act 2009	8-02	s 8	9-29
Human Rights Act 1998	1-08	s 9	9-29, 9-65
Land Drainage (Scotland) Act		Water Environment and Water Services	
1930	8-02	(Scotland) Act 2003	8-02
Land Drainage (Scotland) Act		Water Resources (Scotland) Act	
1941	8-02	2013	8-02
Land Drainage (Scotland) Act		Water (Scotland) Act 1980	8-02
1958	8-02		
Law Reform (Contributory Negligence)			
Act 1945			
s 1(1)	7-50		
s 5	7-50		

Abbreviations

Journals and law reports

A comprehensive list of abbreviations for journals and law reports can be found in the *Cardiff Index to Legal Abbreviations* (<http://www.legalabbrevs.cardiff.ac.uk/>).

Others

Bankton	A MacDouall, Lord Bankton, <i>An Institute of the Laws of Scotland in Civil Rights</i> (1751–53, reprinted as Stair Society vols 41–43, 1993–95)
Bell, <i>Principles</i>	G J Bell, <i>Principles of the Law of Scotland</i> (4th edn, 1839, reprinted by the Edinburgh Legal Education Trust, 2010)
Erskine	J Erskine, <i>An Institute of the Law of Scotland</i> (1773, reprinted by the Edinburgh Legal Education Trust, 2014)
Glegg, <i>Reparation</i>	A T Glegg, <i>A Practical Treatise on the Law of Reparation</i> (1892)
Gordon & Wortley, <i>Land Law</i>	W M Gordon and S Wortley, <i>Scottish Land Law</i> (3rd edn, 2 vols, 2009 and 2020)
Guthrie Smith, <i>Reparation</i>	J Guthrie Smith, <i>A Treatise on the Law of Reparation</i> (1864)
Hume, <i>Lectures</i>	G C H Paton (ed), <i>Baron David Hume's Lectures 1786–1822</i> (Stair Society vols 5, 13, 15, 17–19, 1939–58)
Kames, <i>Equity</i>	H Home, Lord Kames, <i>Principles of Equity</i> (3rd edn, 1778, reprinted by the Edinburgh Legal Education Trust, 2013)

PETL	European Group on Tort Law (http://egtl.org/index.html), <i>Principles of European Tort Law</i> (2005)
Rankine, <i>Land-Ownership</i>	J Rankine, <i>The Law of Land-Ownership in Scotland: A Treatise on the Rights and Burdens incident to the Ownership of Lands and Other Heritages in Scotland</i> (4th edn, 1909)
Reid, <i>Property</i>	K G C Reid, <i>The Law of Property in Scotland</i> (1996) (= <i>The Laws of Scotland: Stair Memorial Encyclopaedia</i> vol 18, Pt I (1993))
Restatement (2d)	American Law Institute, <i>Restatement Second of Torts</i> (1979)
Restatement (3d)	American Law Institute, <i>Restatement Third of Torts: Liability for Physical and Emotional Harm</i> (2010)
Robbie, <i>Private Water Rights</i>	J Robbie, <i>Private Water Rights</i> (Studies in Scots Law vol 4, 2015)
SME	T B Smith et al (eds), <i>The Laws of Scotland: Stair Memorial Encyclopaedia</i> (25 vols, 1987–96) with cumulative supplements and reissues
Smith, <i>Short Commentary</i>	T B Smith, <i>A Short Commentary on the Law of Scotland</i> (1962)
Stair	J Dalrymple, Viscount Stair, <i>The Institutions of the Law of Scotland</i> (tercentenary edn by D M Walker, 1981, based on the 2nd edn of 1693)
Thomson, <i>Delictual Liability</i>	G Cameron, <i>Thomson's Delictual Liability</i> (6th edn, 2021)
Walker, <i>Delict</i>	D M Walker, <i>The Law of Delict in Scotland</i> (2nd edn, 1981)
Whitty, "Nuisance" (1988)	N R Whitty, "Nuisance" in <i>The Laws of Scotland: Stair Memorial Encyclopaedia</i> , vol 14 (1988)
Whitty, "Nuisance" (Reissue, 2001)	N R Whitty, "Nuisance" (Reissue, 2001) in <i>The Laws of Scotland: Stair Memorial Encyclopaedia</i>

I Introduction

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A. A NEW MODEL OF LIABILITY?

1-01. “Couple win right to sue whisky giant” was the headline in *The Falkirk Herald* on 3 March 2017.¹ The couple, Mr and Mrs Chalmers of Bonnybridge, raised a damages claim for £100,000 against Diageo, the multinational alcoholic beverage company, for the harm allegedly caused to their house and outdoor property by the “Angel’s Share” emanating from the defender’s neighbouring bonded warehouse. The pursuers argued that the ethanol evaporating from the whisky casks stimulated the growth of a type of fungus which covered their property in an unsightly black coating, amounting to a nuisance.² In allowing a proof before answer, the Lord Ordinary (Ericht) remarked upon what over the last thirty years has been repeated in case law and literature almost like a legal mantra: “[i]t is clear from the case law that the essential basis for liability and reparation from nuisance is *culpa*”. Yet, at the end of the same paragraph, he warned that it was also “clear from the authorities that very little may be needed by way of pleading to support an assertion of fault”.³ In this case, the pursuers averred that, according to the state of scientific investigation, the defenders knew or ought to have known that the emanations were liable to cause the

¹ *The Falkirk Herald* (online), 3 March 2017, available at <https://www.falkirkherald.co.uk/news/crime/couple-win-right-sue-whisky-giant-1147121>.

² The case does not seem to be an isolated instance, and possibly other interests are involved in the dispute: see “The big gorilla has not chosen to be socially responsible”, *The Scotsman* (online), 17 September 2012, available at <https://www.scotsman.com/news/gaynor-allen-big-gorilla-has-not-chosen-be-socially-responsible-2467228>.

³ *Chalmers v Diageo Scotland Ltd* [2017] CSOH 36, 2017 GWD 9-126 at para 11. The Lord Ordinary made assertions to the same effect in the more recent case of *Sabet v Fife Council* [2019] CSOH 26, 2019 SLT 514 at para 49.

damage that in fact occurred, and these averments were considered sufficient to allow the case to go to proof so far as fault was concerned.⁴

1-02. These remarks illustrate the legacy of the two leading modern cases regarding the basis of liability in nuisance: *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council*⁵ and *Kennedy v Glenbelle Ltd*.⁶ In the first of these decisions, the House of Lords established fault as an essential requirement for damages claims.⁷ The Inner House clarified some years later, in the second of these decisions, that fault was not limited to negligence, but included other forms of fault, such as malice, intention, recklessness and conduct causing a special risk of abnormal damage.⁸

1-03. This apparently simple model is more problematic than it seems. Most of these forms of fault remain judicially and doctrinally underdeveloped in the context of neighbourhood law. Some (such as negligence) might be seen as incompatible with nuisance or at best (malice and, perhaps, recklessness) of limited utility for such a context. More importantly, some of these notions actually hide forms of strict liability, either in themselves (such as conduct causing a special risk of abnormal damage) or in the way they are construed (such as intention and recklessness). As suggested in the “Angel’s Share” case, very little may amount to an averment of fault – so little that *de facto* it might dispense with any relevant notion of fault. This not only undermines the apparent simplicity of this one-rule, fault-based liability model, but also hinders the adequate understanding and development of the law.

1-04. Furthermore, an examination of other areas of the law regulating disputes between neighbours shows that the seemingly simple, fault-based model applicable to nuisance is not replicated across the board. Indeed, pockets of (overt) strict liability are found in areas such as conflicts over uses of water and withdrawal of support, despite the fact that these disputes have experienced a taxonomical shift, from property law to an increasingly consistent categorisation as nuisances.

1-05. This book proposes a more coherent and principled model, based on the available authority and general principles of delictual liability. This model is based upon two liability rules: a general fault-based rule, applicable to nuisance, and a special strict-liability rule, applicable to abnormally dangerous conduct. On the basis of this model, solutions are offered for a wide number of problematic issues, either from a conceptual or a policy perspective. This model serves to clarify and clear the ground for future development of this currently unsatisfactory area of the law of delict.

⁴ [2017] CSOH 36, 2017 GWD 9-126 at para 12.

⁵ *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17.

⁶ *Kennedy v Glenbelle Ltd* 1996 SC 95.

⁷ 1985 SC (HL) 17 at 39–45 per Lord Fraser of Tullybelton.

⁸ 1996 SC 95 at 99–100 per Lord President Hope.

B. SCOPE

1-06. This book is concerned with a particular type of claim and a particular type of rule: with damages claims for harm caused by non-trespassory uses of land, decided by reference to private, common law rules.

1-07. The restriction to damages claims is almost self-explanatory: the book is about the role of fault, and only damages awards have fault as a prerequisite. It is non-contentious that the other key remedy for nuisance, interdict, does not have such a requirement.⁹ The restriction to non-trespassory uses of land, in turn, seeks to limit the object of study to those disputes that arise from the use that a landowner makes of *his own* land, excluding encroachments. In encroachment cases, even though fault on the part of the defender might have a bearing in the determination of the remedy awarded to the pursuer, it is not a requirement of any particular one.¹⁰

1-08. The focus on private, common law rules seeks to exclude two further sets of rules. On the one hand, neighbour disputes, in particular those involving public-authority defenders, have increasingly been analysed from a human rights perspective, given the invocation of article 8 of the European Convention on Human Rights (right to respect for private and family life) and of article 1 of its First Protocol (protection of property) as the basis for liability under the Human Rights Act 1998, sometimes alongside common law liability in nuisance. This has been the case mainly where the statutory regimes in place prevent damages awards based on common law rules,¹¹ or where the nature of the rights held by the neighbour over the property (or absence thereof) might affect his title to sue.¹² This dimension, however, is not explored in this book, for the reasoning involved in adjudicating claims under the 1998 Act is one of balancing of rights that is quite distinct from the reasoning underlying fault assessments, which are the main concern of this book. Furthermore, some types of disputes between neighbours have been addressed through statutory regulations, especially in light of the industrial and urban development experienced by Britain from the nineteenth century onwards, limiting the role of common law rules. These regulations are, however, not comprehensively discussed in this book, not only

⁹ *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17 at 42. See the discussion by E Reid, "The Basis of Liability in Nuisance" 1997 JR 162 at 165–166 and, more generally, H Burn-Murdoch, *Interdict in the Law of Scotland: with a Chapter on Specific Performance* (1933) ch IX.

¹⁰ See the discussion in K G C Reid, *The Law of Property in Scotland* para 178.

¹¹ See e.g. *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66, [2004] 2 AC 42 (floods caused by discharge of sewage); see also *Hatton v UK* (36022/97) (2003) 37 EHRR 28 (noise caused by the operation of Heathrow Airport).

¹² Contrast, for instance, *Hunter v Canary Wharf Ltd* [1997] AC 655 with *Pemberton v Southwark LBC* [2000] 1 WLR 1672.

for reasons of extension but, more importantly, because they generally provide little or no light on the particular issues with which the book is concerned.

C. METHODOLOGY

1-09. This book is, fundamentally, a doctrinal work. Some comparative as well as historical references are incorporated in aid of the arguments developed, but the main focus of the book is modern Scots law.

D. STRUCTURE

1-10. Including this Introduction (chapter 1), the book is divided into ten chapters. Chapter 2 sets the conceptual framework. The arguments made in this book revolve around the notions of fault-based and strict liability. Accordingly, chapter 2 sets out what these concepts are taken to mean, as well as their internal taxonomy and their boundaries with neighbouring concepts.

1-11. Chapter 3 discusses the fault framework adopted in *Kennedy v Glenbelle Ltd* for damages claims in nuisance, examining its sources in connection with each of the different forms of fault offered – malice, intention, recklessness, negligence, and conduct causing a special risk of abnormal damage – as well as evaluating the notion that allegedly underlies and connects these forms of fault, namely the idea of the “fault continuum”.

1-12. Chapter 4 focuses on the problems associated with the first two forms of fault identified by *Kennedy v Glenbelle Ltd*, under the notion of intentional nuisance: malice and intention. It will show that malice serves a rather limited role as a form of fault in the context of nuisance, and that the current understanding of intention seems to challenge the very idea of a fault-based liability rule.

1-13. Chapter 5, in turn, discusses the second group of forms of fault identified by *Kennedy v Glenbelle Ltd*, under the notion of unintentional nuisance: negligence and recklessness. After examining the alleged lack of compatibility between negligence and nuisance, arguing that these notions are not truly incompatible, the chapter explores the rather underdeveloped notion of recklessness and submits that, in its current understanding, it suffers some serious shortcomings that lead to similar problems to those identified with regard to intention.

1-14. Chapter 6 focuses on the last of the forms of fault listed by *Kennedy v Glenbelle Ltd*: conduct causing a special risk of abnormal damage. The category is especially challenging, for neither its sources nor its subsequent application are particularly helpful in clarifying its boundaries and the nature of the liability

it attracts. Chapter 7 argues that, contrary to the orthodox view, liability based on this category is actually strict. Therefore, it is essential to define the scope of this category, and a proposal is made to that effect, renaming the category as “abnormally dangerous conduct”.

1-15. Chapter 8 is concerned with a set of rules that does not seem to replicate completely the fault-based model of liability for nuisance: those addressing disputes over conflicting uses of water. It will be argued that this category does, nevertheless, fit the wider two-rule model set by the previous chapters, that is, the combination of the general liability rule applicable to nuisance with the special liability rule applicable to abnormally dangerous conduct.

1-16. Chapter 9, in turn, is concerned with a further set of rules that does not appear to follow the fault-based model of liability for nuisance: disputes arising from withdrawal of support. This category does not, in fact, fit that model, nor does it fit the two-rule model advanced by this book. It will be argued, however, that the specific liability rules applicable to withdrawal of support are not currently justified and that the more consistent approach would be to address these disputes within the framework here proposed.

1-17. The book concludes with a brief chapter (chapter 10) summarising the key arguments presented.

2 Conceptual Framework

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A. INTRODUCTION

2-01. The subject of this book is the basis of delictual liability in the context of neighbourhood. Consequently, throughout the book both descriptive and normative claims regarding this basis are made, that is, about certain conduct attracting fault-based or strict liability. The distinction between fault-based and strict liability, however, is by no means clear-cut, so by claiming simply that liability is or should be of one or the other type, much is left unexplained. Moreover, the internal taxonomy of these two categories can also be problematic. The purpose of this chapter is, consequently, to set out the conceptual framework that underlies these claims, identifying which versions of these concepts are adopted here and distinguishing them from other associated or similar concepts.

2-02. This chapter is, however, of limited theoretical reach. Each concept discussed probably deserves a chapter – perhaps a book – on its own, but this book does not aim at elucidating them generally. The aim here is to outline some operative concepts that will serve as a frame of reference for their use throughout the seven chapters that develop the book’s arguments.

2-03. First, the notion of fault will be explored, outlining the different forms fault may adopt: intention, negligence, and recklessness (section B), subsequently addressing the notion of “stricter-than-normal” liability and the forms this type of liability can adopt (section C). The final section will offer some brief conclusions (section D).

B. FAULT

(1) Notion and forms of fault

2-04. As a general rule, liability to make reparation in delict is fault-based in Scots law, and strict liability is only sparingly recognised. The emphasis on fault¹ has been identified as “the first cardinal feature of reparation in Scots law”.² It is not entirely clear whether this was historically the case,³ and the principle does not arise so clearly from the early institutional writers,⁴ though this is also a matter of contention.⁵ The historical evolution of the general basis of liability goes beyond the scope of this section, but it seems reasonably clear that by the mid-nineteenth century, the general principle of fault-based liability was well established in case law.⁶

2-05. The concept of fault is elusive. It is a matter of debate whether it is based on notions of moral blameworthiness or whether it departs from this type of consideration,⁷ and many accounts define fault by listing and describing its different recognised forms, raising the question of whether it is possible to

¹ In this book, the term “fault” is preferred over the similar and also widely used “*culpa*”, for the latter is used somewhat ambiguously in legal literature and by courts: sometimes it signifies negligence; sometimes, a wider notion comprehensive of other forms of fault. See the discussion by D M Walker, *The Law of Delict in Scotland* (2nd edn, 1981) 46–48. “Fault” is, perhaps, a more obviously comprehensive notion in this sense.

² H McKechnie, “Reparation” in J L Wark (ed), *Encyclopedia of the Laws of Scotland*, vol 12 (1931) para 1063.

³ W A Elliot, “What is Culpa?” (1954) 66 JR 6 at 7. For some insights on the development of Aquilian liability in Scotland, see D W McKenzie and R Evans-Jones, “The Development of Remedies for Personal Injury and Death” in R Evans-Jones (ed), *The Civil Law Tradition in Scotland* (Stair Society supplementary vol 2, 1995) 277; H L MacQueen and W D H Sellar, “Negligence” in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000) vol 2, 517.

⁴ Stair I.3.4 bases the obediencial obligation of reparation on “delinquency”, as does Bankton I.10, seemingly referring to obligations that can arise from the commission of a crime.

⁵ McKechnie (n 2) para 1063 sees the principle illustrated in Stair I.9.6.

⁶ See e.g. the remarks by Lord Neaves in *Mackintosh v Mackintosh* (1864) 2 M 1357 at 1363; and by Lord Inglis in *Campbell v Kennedy* (1864) 3 M 121 at 126 and *Laurent v Lord Advocate* (1869) 7 M 607 at 610–611.

⁷ See e.g. the debate held in Scotland between W A Elliot and J J Gow in the 1950s: W A Elliot, “Reparation and the English Tort of Negligence” (1952) 64 JR 1; J J Gow, “Is Culpa Amoral?” (1953) 65 JR 17; and W A Elliot, “What is Culpa?” (1954) 66 JR 6.

identify some conceptual unity underlying these different forms of fault.⁸ It is not the purpose of this chapter to solve this theoretical question. Instead the chapter sets out to provide working concepts for the different forms of fault in operation in the neighbourhood context.

2-06. The two traditional forms of fault found in most accounts are those derived from the Roman sources:⁹ intention and negligence. This division found support in the texts of the institutional writers,¹⁰ and served as the basis for the way in which the law of delict was structured since the time of Hume onwards: in his chapter on obligations *ex delicto*, Hume restricted his account to intentional delicts, whereas obligations arising from negligence or inadvertency were treated as obligations *quasi ex delicto*.¹¹ Even though the term quasi-delict is no longer used in this sense today, the division remained central in the legal literature: it was accepted by Guthrie Smith in the second half of the nineteenth century,¹² and determined the structure of Glegg's treatment up until the last edition of his book.¹³

2-07. There is, however, a third form of fault, the position and content of which requires clarification: recklessness. This notion becomes particularly relevant in the context of this book, since *Kennedy v Glenbelle Ltd*¹⁴ listed recklessness as a separate form of fault that can serve as the basis of a damages claim in nuisance. These three notions – intention, negligence, and recklessness – are explored in the following sections.

(2) Intention

(a) *Ends, means, and side-effects*

2-08. As a general rule, proof of negligence suffices to satisfy the fault requirement of a fault-based liability claim. Intention will be required only in particular cases. Moreover, negligence is the more common form of fault: more often than not, people cause harm without meaning to do so. Consequently, at the level of general concepts, private lawyers tend to pay less attention to intention

⁸ See, e.g. the concept of “legal fault” in P Cane, *Responsibility in Law and Morality* (2002) 78, structured as an either-or clause denoting that the concept encompasses two distinct sorts of things.

⁹ Elliot, “Reparation and the English Tort of Negligence” (n 7) 1.

¹⁰ In its modern formulation, it is traced to Bell, *Principles* §§ 544 and 553: D Visser and N Whitty, “The Structure of the Law of Delict in Historical Perspective” in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000) vol 2, 422 at 452. The distinction between intention and negligence is, however, arguably perceptible in Stair I.9.11 and Erskine III.1.13. See MacQueen and Sellar (n 3) 524–525.

¹¹ Hume, *Lectures* vol III, chs XIV and XVI.

¹² J Guthrie Smith, *A Treatise on the Law of Reparation* (1864) 3.

¹³ A T Glegg, *The Law of Reparation in Scotland* (4th edn by J L Duncan, 1955).

¹⁴ *Kennedy v Glenbelle Ltd* 1996 SC 95 at 99.

and focus, instead, on the operation of negligence and its different elements. In addition, terminology associated with intention is unclear, as both scholars and courts use the terms “malice” and “intention” sometimes interchangeably and sometimes to convey different meanings. Descriptions of these notions, in turn, feature a wide range of concepts, including “desire”, “motive”, “purpose”, “foresight”, “plan”, and many others.¹⁵

2-09. The first Scottish treatises on delictual liability described intention, as a general concept, in very wide – and, perhaps, confusing – terms. Guthrie Smith explained that “malice, in law, does not mean a fixed feeling of malignity, but an intention to injure”,¹⁶ and later on distinguished *culpa* from *dole*, the latter entailing injuring someone “by design”, a “wicked and depraved disposition”, a “bad heart”.¹⁷ Glegg, in turn, distinguished malice in fact, namely “personal spite, or ill-will against a determinate individual”, from malice in law, i.e. “merely the intentional doing of a wrongful act”.¹⁸ Intention tended to be the object of a detailed consideration in those delicts that could only be committed with a specific intention, and the analysis was confined to their particular scope (e.g. assault, malicious prosecution, fraud, etc). This is still the case today, whereas intention as a general concept remains “ambiguous”.¹⁹

2-10. Perhaps a good illustration of this ambiguity is the definition offered by a standard modern book on the law of delict: according to Walker, “[i]ntention or malice or *dolus* connotes that the actor directed his mind to the conduct in question and its natural and probable consequences, and desired those consequences to result”.²⁰ The first aspect that stands out from this concept is the abovementioned use of “intention” and “malice” as synonyms. In Walker’s book, however, the term “malice” is reserved particularly to identify what Elspeth Reid calls “motive malice”,²¹ that is, bad or improper motives, as discussed below.²² Further ambiguity derives from the fact that intention is predicated on two different objects: the conduct and its consequences. Conduct is intentional when it is deliberate, as opposed to automatic or accidental;

¹⁵ See, e.g. the different meanings attached to these terms and their relation with intention (though reaching diverse conclusions) in A R White, *Grounds of Liability: An Introduction to the Philosophy of Law* (1985) ch 6 and R A Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (1990) ch 2.

¹⁶ Guthrie Smith, *Reparation* 3. Malice “in law”, as distinguished from malice in fact, was of particular relevance in contexts where privilege required malice to be rebutted, e.g. in the case of defamation or actions by the police. Guthrie Smith seems to be looking at malice through this prism.

¹⁷ Guthrie Smith, *Reparation* 59.

¹⁸ A T Glegg, *A Practical Treatise on the Law of Reparation* (1892) 10.

¹⁹ K McK Norrie, “The Intentional Delicts” in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000) vol 2, 477 at 478.

²⁰ Walker, *Delict* 43.

²¹ E Reid, “Malice in the Jungle of Torts” (2012–2013) 87 Tul LR 901 at 904.

²² See paras 2-17 to 2-19 below.

consequences are intended when the conduct has the purpose to produce them.²³ Intention as a form of delictual fault, however, relates to consequences.²⁴

2-11. The precise delimitation of which consequences can be considered as “intended” is the source of further discussion. There seems to be no significant challenge to the idea that “[i]ncluded in one’s intention is everything which is part of one’s plan (proposal), whether as purpose or as way of effecting one’s purpose(s)”.²⁵ Side-effects, on the other hand, are more controversial. On one view, foreseen consequences also form part of one’s intention, even when they are neither a means nor the end of the conduct but only its by-product.²⁶ The reason is that, in all these cases, the agent has control over the alternative between a result happening or not happening; “his choice tipped the balance”.²⁷ This form of intention has been called “oblique”²⁸ or “indirect”.²⁹ The alternative view sees the inclusion of side-effects, even if foreseen, and welcome, as a utilitarian fiction that does not agree with common morality and the standards by which moral responsibilities are assessed.³⁰

2-12. Therefore, the scope of intention can vary according to the consequences that are seen as encompassed within it. A different question is which of these versions of intention is necessary to satisfy an intention requirement. The issue can be illustrated by comparing the intention requirement in two different torts as they have evolved in English law: causing loss by unlawful means and misfeasance in public office.

2-13. The intention requirement in causing loss by unlawful means was analysed in the much-discussed House of Lords’ decision of *OBG Ltd v Allan*.³¹ Before this decision, the distinction that dominated the discussion was between “targeted” and “untargeted” harm. Harm was “targeted” when the conduct was directed at or calculated to injure the claimant’s interests, and “untargeted” when it was a foreseen – yet not aimed at – inevitable (or even probable) consequence.³² Most judicial decisions and academic commentaries favoured

²³ Cane, *Responsibility* (n 8) 79.

²⁴ P Cane, *The Anatomy of Tort Law* (1997) 32; Reid (n 21) 902.

²⁵ J Finnis, “Intention in Tort Law” in D G Owen (ed), *The Philosophical Foundations of Tort Law* (1997) 229.

²⁶ J Austin, *Lectures on Jurisprudence*, vol 1 (R Campbell ed, 4th edn, 1873) 436–437; H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (2008) 119–120.

²⁷ Hart, *Punishment and Responsibility* (n 26) 121.

²⁸ P Cane, “*Mens Rea* in Tort Law” (2000) 20 OJLS 533 at 535.

²⁹ J Neethling and J M Potgieter, *Neethling – Potgieter – Visser Law of Delict* (7th edn, 2015) 133.

³⁰ Finnis (n 25) 243–244. P J Fitzgerald (ed), *Salmond on Jurisprudence* (12th edn, 1966) 368–370 contemplates unintended foreseen consequences, but admits that there are reasons for the law to treat them as intended.

³¹ *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1.

³² E Reid, “‘That Unhappy Expression’: Malice at the Margins” in S G A Pitel, J W Neyers and E Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (2013) 441 at 457; H Carty, *An Analysis of the Economic Torts* (2001) 105–106.

the targeted harm requirement.³³ In *OBG*, however, Lord Hoffmann and Lord Nichols abandoned the target test, to focus on the distinction between ends, means and consequences. Both judges agreed that the “mental ingredient” of the tort was satisfied if harm was either an end or a means to an end, but not if it was simply a foreseeable consequence of the defendant’s conduct.³⁴ It is unclear whether the two tests lead to different results,³⁵ and the Court of Appeal in the *Douglas v Hello Ltd* case³⁶ had indeed attempted a parallel between the two, concluding that the target test was satisfied (a) where harm was an end in itself, or (b) when harm was a necessary means to an ulterior motive.³⁷

2-14. In contrast with the narrow approach to intention adopted for the tort of causing loss by unlawful means, a broader notion of intention is admitted for the tort of misfeasance in public office, according to the House of Lords decision in *Three Rivers DC v Bank of England (No 3)*.³⁸ The “mental ingredient” of this tort is satisfied not only when the public officer abuses his powers “specifically intending to injure the claimant” but also when he “knows that in so acting he is likely to injure the claimant”.³⁹ Therefore, not only targeted intention, but also untargted intention will suffice.⁴⁰

2-15. Consequently, side-effects are sometimes regarded as part of one’s intention in legal discourse, but the line that marks the fulfilment of an intention requirement for a particular wrong will shift depending on the nature of the wrong. Thus, in the economic delicts or torts a stricter requirement is aligned with the fact that harm is, in principle, part of market competition, whereas misfeasance in public office is an affront-based wrong that justifies a more flexible approach to the intention requirement. It can also be noted that these side-effects are in some cases considered as intended even when they are not certain but only likely to result. As will be discussed in chapter 3, the notion of intention adopted by the American *Restatement Second of Torts* in 1979

³³ Carty, *Analysis of the Economic Torts* (n 32) 105–108.

³⁴ *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1 at para 62 per Lord Hoffmann, and paras 164–167 per Lord Nicholls.

³⁵ See the discussion in H Carty, *An Analysis of the Economic Torts* (2nd edn, 2010) 82–84, who nevertheless criticises strongly the change of approach.

³⁶ *Douglas v Hello Ltd* [2005] EWCA Civ 595, [2006] QB 125, object of one of the three appeals decided in *OBG Ltd v Allan*.

³⁷ [2005] EWCA Civ 595, [2006] QB 125 at para 195. The language of the target test would, however, come back shortly after in a House of Lords’ decision in a case of conspiracy: *Revenue and Customs Commissioners v Total Network SL* [2008] UKHL 19, [2008] 1 AC 1174 at para 120 per Lord Mance, and similarly at para 44 per Lord Hope (“loss caused by an unlawful act directed at the claimants themselves”, emphasis added). Lord Neuberger, at para 224, adopted a seemingly broader notion of intention for the tort, including harm that is the “direct, inevitable and foreseeable result” of the conduct.

³⁸ *Three Rivers DC v Bank of England (No 3)* [2001] UKHL 16, [2003] 2 AC 1 at paras 44–46 per Lord Hope of Craighead.

³⁹ J Murphy, “Misfeasance in a Public Office: A Tort Law Misfit?” (2012) 32 OJLS 51 at 51–52.

⁴⁰ Reid (n 32) at 459.

includes consequences that the defender knew were certain to happen as a result of his conduct, without distinguishing whether the consequence is a means to a further end or just a side-effect of the execution of his plan.⁴¹ *Kennedy v Glenbelle Ltd*⁴² subsequently adopted this broad approach for nuisance, despite it not being an affront-based wrong, and commentary supports the possibility of establishing knowledge constructively.⁴³

2-16. One last aspect of Walker's notion of intention must be noted: he includes within the consequences deemed to be intended those that derive naturally and probably from the conduct. This inclusion entails the possibility of treating as intended certain consequences that are neither in the actor's plan nor are they known side-effects of his conduct. No authority is offered by Walker to support the inclusion apart from a reference to Salmond's chapter on intention.⁴⁴ But he fails to account for Salmond's view on the supposed presumption of knowledge of natural and necessary results: Salmond believes that it is "much too wide a statement" that would eliminate the distinction between intention and negligence. In his view, it is closer to the truth to say that sometimes the law treats as intentional the consequences of recklessness, which he sees as a form of negligence,⁴⁵ where foreseeability – and not actual foresight – belongs.

(b) Malice

2-17. As pointed out above, the term "malice" is used in legal discourse in two senses: as a synonym of intention, and as an indication of the wrongdoer's motives.⁴⁶ Yet, as Reid⁴⁷ and Cane⁴⁸ both remark, even though they can coincide, intention and motives are not the same. Intention, as explained, points to whether the consequences of one's action were part of one's purpose or plan, i.e. whether the conduct was executed in order to bring about those consequences. Motives, on the other hand, refer to one's reasons for engaging in such conduct in the first place.⁴⁹

2-18. Malice points to "bad" or "improper" motives, such as those identified by Guthrie Smith as *dole*, or by Glegg as *malice in fact*.⁵⁰ More generally, "[m]alice provides a general motive answer in every day speech of two slightly

⁴¹ See para 3-14 below.

⁴² 1996 SC 95 at 99.

⁴³ See para 4-21 below.

⁴⁴ G Williams (ed), *Salmond on Jurisprudence* (11th edn, 1957) 410 *et seq.*

⁴⁵ Williams (ed), *Salmond on Jurisprudence* (n 44) 413.

⁴⁶ Walker, *Delict* 50; Reid (n 21) 903–906.

⁴⁷ Reid (n 32) 441.

⁴⁸ Cane (n 28) 539.

⁴⁹ For a more detailed discussion, see G H L Fridman, "Malice in the Law of Torts" (1958) 21 MLR 484 at 487–491.

⁵⁰ See para 2-09 above.

different kinds: it may mean that an act was done in order to hurt another for *no* particular reason at all, or in order to do so for a *morally insufficient* reason”.⁵¹ If the reason why a person injures someone else is the furtherance of a legitimate interest, then his motive is not malicious.⁵² But motives are often mixed, so the law resorts to the notion of “predominant motive”:⁵³ malice will be present when the predominant motive is improper and any other proper motive is just accessory.

2-19. It is usually said that motives are irrelevant for delictual liability.⁵⁴ Malice has, however, traditionally been regarded as relevant in particular contexts,⁵⁵ though even in these cases it is arguable that its role is marginal.⁵⁶ One of these particular contexts is precisely the one with which this book is concerned: harms caused between neighbours. Chapter 4 will include a discussion of the limited scope of the doctrine of *aemulatio vicini* and the place of malice within it.⁵⁷

(3) Negligence

2-20. Unlike intention, negligence has been widely discussed and private law literature is considerably more comprehensive. The concept is, consequently, in a better position in terms of its development, so there is no utility in reproducing much of these discussions here. Nevertheless, it is worth highlighting the difference between negligence as a form of fault and what we could call the “delict of negligence”. It is arguable that in Scots law there is no such thing as a delict of negligence, in contrast with the English tort of negligence.⁵⁸ It is observed, however, that nowadays both laws have converged in this area: Scots law has experienced a marked shift from the civilian tradition towards the common law in this context.⁵⁹ Consequently, it should be noted that negligence in this section – and in most of this book, unless otherwise indicated – is not used to designate the totality of the requirements that must be satisfied to hold the defender liable for his negligent conduct, i.e. duty of care, breach of the relevant standard of care, causation, etc. If a parallel can be drawn, it is with the second of these elements. Chapter 5 considers a contrast between liability in

⁵¹ J F Lever, “Means, Motives, and Interests in the Law of Torts” in A G Guest (ed), *Oxford Essays in Jurisprudence* (1961) 56.

⁵² Fridman (n 49) 485; Lever (n 51) 56.

⁵³ Cane (n 28) 539.

⁵⁴ Walker, *Delict* 51; Cane, *Anatomy* (n 24) 35.

⁵⁵ See the surveys by Lever (n 51) 57–65 and Walker, *Delict* 51. For a more up-to-date view, see Reid (n 32).

⁵⁶ Reid (n 32) 461.

⁵⁷ See paras 4-04 to 4-16 below.

⁵⁸ T B Smith, *A Short Commentary on the Law of Scotland* (1962) 658–659; Walker, *Delict* 44.

⁵⁹ For the evolution and possible reasons for this shift, see MacQueen and Sellar (n 3).

nuisance based on negligence as a form of fault and liability based on the delict of negligence.⁶⁰

2-21. Negligence, as a form of fault, seems to have been described as the breach of a duty since the time of the institutional writers:⁶¹ sometimes rather specific duties,⁶² or more generally a duty to take care.⁶³ Specialised works on the law of delict, but also more general works, are consistent in this approach: from Guthrie Smith, who identified the unlawfulness in quasi-delicts in “the way of doing the act [. . .] because it is done without the level of required care”,⁶⁴ to Walker, who explained negligence as involving “the existence of a legal duty to take a particular degree of care in particular circumstances and a failure to take the requisite degree of care”,⁶⁵ authors writing on Scots law have all followed this line of conceiving negligence as the breach of a duty of care.⁶⁶

2-22. Negligence, therefore, is the failure to meet a standard of conduct, particularly a standard of care. Strictly speaking, it has no mental element;⁶⁷ it is predicated on the level of care deployed by the wrongdoer. It is, nevertheless, based on the element of reasonable foreseeability of harm, which could be seen as an objectivised mental state, a mental state of knowledge that the defender is deemed to have. As Lord Macmillan argued in *Muir v Glasgow Corporation*,

there is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation, and what, accordingly, the party sought to be made liable ought to have foreseen.⁶⁸

But this is regardless of the defender’s real mental state; actual foresight is not required.⁶⁹ Even if actual foresight is present, it is not this mental state that constitutes negligence, but the defender’s conduct in the presence of such foresight. Negligence, in sum, “is the attribution of a quality to conduct

⁶⁰ See paras 5-13 to 5-37 below.

⁶¹ Erskine III.1.13, stating that “wrong may arise, not only from positive acts of trespass or injury, but for blameable omissions or neglect of duty”.

⁶² E.g. when discussing obligations *ex delicto*, Hume, *Lectures* vol III 186: “neglect duly to repair”; “neglect duly to fence and inclose”.

⁶³ Bell, *Principles* § 553.1.

⁶⁴ Guthrie Smith, *Reparation* 58.

⁶⁵ Walker, *Delict* 44.

⁶⁶ Glegg, *Reparation* 10; Gow (n 7) 24; Elliot (n 3) 29; Smith, *Short Commentary* 664; G MacCormack, “Culpa in the Scots Law of Reparation” 1974 JR 13 at 20; and more recently K McK Norrie, “Obligations: Obligations Arising from a Wrongful Act: Fault” in *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol 15 (1995) para 254.

⁶⁷ Cane (n 28) 536.

⁶⁸ *Muir v Glasgow Corporation* 1943 SC (HL) 3 at 10.

⁶⁹ K W Simons, “Rethinking Mental States” (1992) 72 Boston U LR 463 at 472.

which does not measure up to the standard of precautions demanded in the circumstances”.⁷⁰

2-23. Scots law’s turn from its civilian roots towards the English common law involved, among other elements, a shift in the delineation of the standard of care. The Roman distinction between the three levels of *culpa* – *lata*, *levis* and *levissima* – was rejected in favour of a single criterion: that of the reasonable man in the circumstances.⁷¹ Consequently, the standard of care, i.e. what amounts to reasonable care, is highly contextualised and varies according to the particular circumstances of the case. It takes into account a number of elements, among which the level of risk, meaning the likelihood of harm and its magnitude, is central.⁷² As a result, a more demanding standard of care will be attached to acts or omissions that entail a higher degree of risk. Available precautions and the cost of taking them can also, however, play a relevant role in raising or lowering such standard, among other elements, such as the utility of the defender’s conduct, and custom and practice.⁷³

(4) Recklessness

2-24. Somewhere between intention and negligence lies recklessness, a notion that remains underdeveloped in private law literature. Even though recklessness is generally described as a mental state of indifference to risk,⁷⁴ Scots private law seems to have considered recklessness to be essentially connected to negligence.⁷⁵ For Guthrie Smith, recklessness seemed to be a form or perhaps a cause of negligence,⁷⁶ whereas Glegg explained that the reason why a reckless person is to be liable is precisely because of the person’s negligence.⁷⁷ This connection is set out more clearly by Walker:

Recklessness is a frame of mind in which persons may behave, an attitude of indifference to the realised possible risks and consequences of one’s actions, in which

⁷⁰ Walker, *Delict* 45.

⁷¹ MacQueen and Sellar (n 3) 533. See *Mackintosh v Mackintosh* (1864) 2 M 1357 at 1362 per Lord Neaves.

⁷² *Mackintosh v Mackintosh* (1864) 2 M 1357 at 1362–1363 per Lord Neaves; *Muir v Glasgow Corporation* 1943 SC (HL) 3 at 10 per Lord Macmillan; and generally *Bolton v Stone* [1951] AC 850.

⁷³ See Walker, *Delict* 199–205; G Cameron, *Thomson’s Delictual Liability* (6th edn, 2021) paras 5.3–5.9.

⁷⁴ E.g. A R White, “Carelessness, Indifference and Recklessness” (1961) 24 MLR 592 at 594; Cane (n 28) 535.

⁷⁵ See e.g. *Campbell v Kennedy* (1864) 3 M 121 at 122; *Laurent v Lord Advocate* (1869) 7 M 607 at 612.

⁷⁶ Guthrie Smith, *Reparation* 58.

⁷⁷ Glegg, *Reparation* 12.

consequences are foreseen and possible but not desired, not a form of negligence but a cause of negligence.⁷⁸

Recklessness, then, is different from intention, in that harm is not part of one's purpose. One realises that it might occur, and just does not care – and for that reason, does not take care. Recklessness simply explains why a person was negligent.

2-25. What, then, is special about recklessness if it is simply a reason for negligence? Why would a pursuer attempt to establish this particular frame of mind that caused the negligence if negligence is already a sufficient basis of liability? The answer lies precisely in the various contexts where negligence does not suffice as a basis for liability and intention is required: in some of these contexts, recklessness may be deemed enough for satisfying the intention requirement. It has been so regarded, for instance, in the context of delicts against the physical person,⁷⁹ defamation,⁸⁰ misfeasance in public office,⁸¹ interference with contract,⁸² fraud or deceit,⁸³ among others. It appears, therefore, that there is something special about recklessness; that being negligent because one tried to be careful and failed is not to be equated with being negligent simply because one did not make the effort to be careful. The law judges indifference more harshly than it does failure, equating the former to intention.⁸⁴ But negligence remains essentially connected to recklessness.

2-26. As will be discussed in chapter 3, *Kennedy v Glenbelle Ltd*⁸⁵ listed recklessness as one of the possible forms of fault that could serve as ground for a damages claim in nuisance, alongside intention and negligence. This makes for an odd inclusion: unless nuisance is one of those contexts, mentioned above, where negligence of itself will not suffice, then what is the practical relevance of recklessness? Moreover, even though *Kennedy* described recklessness in a way that seems to be very much in line with its previous understanding, as having “no regard to the question whether [one’s] action, if it was of a kind likely to cause harm to the other party, would have that result”,⁸⁶ it brought with it different considerations that do not fit this understanding, leading subsequently to a distorted development of the notion.⁸⁷

⁷⁸ Walker, *Delict* 43.

⁷⁹ *Reid v Mitchell* (1885) 12 R 1129, esp at 1131 per Lord Justice-Clerk Moncreiff.

⁸⁰ *Horrocks v Lowe* [1975] AC 135 at 145 per Viscount Dilhorne and 150 per Lord Diplock.

⁸¹ *Three Rivers DC v Bank of England (No 3)* [2001] UKHL 16, [2003] 2 AC 1 at para 44 per Lord Hope of Craighead.

⁸² *Emerald Construction Co Ltd v Lowthian* [1966] 1 WLR 691 at 701 per Lord Denning.

⁸³ *Boyd & Forrest v Glasgow and South-Western Rly Co* 1912 SC (HL) 93 at 99 per Lord Atkinson.

⁸⁴ Walker, *Delict* 43.

⁸⁵ *Kennedy v Glenbelle Ltd* 1996 SC 95.

⁸⁶ 1996 SC 95 at 100.

⁸⁷ See paras 5-38 to 5-51 below.

C. STRICT AND “STRICTER-THAN-NORMAL” LIABILITY

(1) From fault-based to strict liability

2-27. As Zweigert and Kötz explain, the distinction between fault-based and strict liability is not an “either-or situation”: in most legal systems “liability for fault imperceptibly shades into strict liability”.⁸⁸ Consequently, it is possible to identify certain devices that fall somewhere in between these two notions, not only as successive steps in a historical trajectory from fault-based to strict liability, as with the “transitional devices” recognised by Palmer,⁸⁹ but actually as mechanisms that are designed to aid the pursuer to obtain compensation without compromising radically the fault principle. It is possible, then, to say that when these mechanisms operate, liability is (borrowing Zimmermann’s terminology) “stricter-than-normal”,⁹⁰ without becoming strict. One should be careful, however, when considering such mechanisms, for on occasions they are designed or applied in a way that turns them into nothing but strict liability “in disguise”.⁹¹

2-28. Both Zweigert and Kötz and Palmer identify among these devices the three mechanisms that Scottish courts and scholars have used to explain liability by virtue of dangerous conduct, as will be explained in chapter 6:⁹² heightened standards of care, presumptions of fault, and the doctrine of *res ipsa loquitur*.⁹³ Therefore, this section seeks to explain the notion of strict liability *stricto sensu*, leaving the abovementioned mechanisms of stricter-than-normal liability to be explored later.

(2) Strict liability

2-29. The idea of strict liability has received widespread academic attention, much of the debate focusing on its justification and compatibility with certain moral principles.⁹⁴ Paradoxically, the concept itself appears to be “left largely to intuition; all have used it, many have abused it, and rarely two lawyers attached the same meaning to it”.⁹⁵ Palmer has tried to flesh out this intuition, listing

⁸⁸ K Zweigert and H Kötz, *An Introduction to Comparative Law* (T Weir tr, 3rd edn, 1998) 649.

⁸⁹ V V Palmer, “In Quest of a Strict Liability Standard Under the Code” (1982) 56 Tul LR 1317 at 1323.

⁹⁰ R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996) 1133.

⁹¹ Zimmermann, *Law of Obligations* (n 90) 1132–1133.

⁹² See paras 6-31 to 6-38 and 6-48 to 6-57 below.

⁹³ Zweigert and Kötz, *Comparative Law* (n 88) 650; Palmer (n 89) 1323.

⁹⁴ See, among others, T Honoré, *Responsibility and Fault* (1999) ch 2, and R A Epstein, “A Theory of Strict Liability” (1973) 2 JLS 151; contrast with E J Weinrib, *The Idea of Private Law* (revised edn, 2012) ch 7.

⁹⁵ Palmer (n 89) at 1317.

and analysing what he identifies as the key criteria to assess whether liability is strict or fault-based: an inelastic concept of unlawful harm; a factual test of causation that disregards proximate cause and omissions; and the reduction of defences available to the defendant.⁹⁶ His approach is, however, more flexible than this suggests: none of these criteria is identified as being the core of strict liability; rather, the focus is more on overall compliance with them.⁹⁷ This, of course, entails the understanding that some liabilities can be stricter than others, depending on how many – and how much – of these criteria are fulfilled. Consequently, Palmer rejects the traditional approach that builds a binary classification on the basis of the single criterion of presence or absence of fault: he understands strict liability “as a genus of liability and not a species”, as several types of strict-liability rules can be identified depending on the variations of the three criteria he considers relevant.⁹⁸

2-30. Arguably, however, strict liability does have a core. This translates indeed into a binary classification built upon the basis of a single criterion, but this criterion is not the actual presence or absence of fault, but rather whether averment and proof of fault is required and, consequently, whether its absence is admitted as a defence. This does not entail a rejection of Palmer’s criteria: it is possible to conceive stricter fault-based liability rules (e.g. if there are devices that facilitate proof of fault) and stricter strict-liability rules (e.g. if even defences based upon a break of the causal link are excluded⁹⁹), though perhaps in this last case the term “stricter” does not adopt a technical meaning but is only descriptive of its effect on the defender, i.e. it is a more stringent liability rule.

2-31. In his landmark essay on the moral basis of strict liability, Honoré held that “liability is strict when it attaches to us by virtue of our conduct and its outcome alone, irrespective of fault”.¹⁰⁰ But the reference to conduct in this approach can be misleading: strict liability does not rest on a negative judgment about conduct itself but only on it being the cause of a certain result. Fleming¹⁰¹ and Cane,¹⁰² on the other hand, remark that strict liability is imposed on injury that is neither intentional nor negligent, seemingly focusing on the actual absence of fault. But strict liability can be imposed when there *is* fault. Indeed, strict liability is in some contexts used as a way of relieving the victim

⁹⁶ V V Palmer, “A General Theory of the Inner Structure of Strict Liability: Common Law, Civil Law, and Comparative Law” (1988) 62 Tul LR 1303.

⁹⁷ Palmer (n 96) 1310.

⁹⁸ Palmer (n 96) 1310–1311.

⁹⁹ The typical example is provided by liability rules applicable to the operation of nuclear installations. See e.g. Nuclear Installations Act 1965 s 13(4)(b).

¹⁰⁰ Honoré, *Responsibility and Fault* (n 94) 23.

¹⁰¹ J G Fleming, *An Introduction to the Law of Torts* (2nd edn, 1985) 153.

¹⁰² Cane, *Anatomy* (n 24) 45.

from proving fault when fault is actually present.¹⁰³ As a more general claim, Cane argues that criteria of liability are nested, so “conduct which attracts strict liability may satisfy the legal definitions of negligent, reckless or intentional conduct”.¹⁰⁴ Therefore, strict liability is imposed *regardless* of the presence or absence of fault, and not necessarily *without* or *in absence of* fault.¹⁰⁵

2-32. This means two things. First, a strict-liability rule does not require the pursuer to aver and prove fault in order to obtain compensation. Causation between the defender’s conduct and the harm suffered by the pursuer is a sufficient basis for liability. Secondly, a strict-liability rule does not admit the absence of fault as a defence. This second statement is linked with Palmer’s third criterion: in his view, liability is strict – or stricter – when admissible defences are fixed in number, are based upon the break of causation, and are more restricted by comparison to negligence.¹⁰⁶ But the author, loyal to his flexible approach, does not pin down the exclusion of any particular defence as conclusive, in contrast with what is submitted here.

2-33. There is one additional issue that requires to be clarified in order to delineate the boundaries of strict liability: the role of foreseeability of harm. It will become apparent in the following chapters that, in some circumstances, foreseeability of harm is seen as a sufficient basis for the classification of a liability rule as fault-based.¹⁰⁷ On closer examination, however, it does not play that role.

2-34. Foreseeability of harm is a pervasive notion in the law of negligence. It is present at the different stages of the negligence analysis, from the determination of the existence of a duty of care, to the standard of care and the delimitation of the scope of the defender’s liability.¹⁰⁸ It has, indeed, been identified as one of the two “hallmarks” of the tort of negligence.¹⁰⁹ Yet it is also an element that is featured as a requirement in some regimes traditionally described as of strict liability, most notably, the *Rylands v Fletcher*¹¹⁰ rule as qualified by the decision in *Cambridge Water Co v Eastern Counties Leather plc*.¹¹¹ This requirement has been construed not only as evidence of the expansive influence of the tort

¹⁰³ Honoré, *Responsibility and Fault* (n 94) 23.

¹⁰⁴ Cane, *Responsibility* (n 8) 88.

¹⁰⁵ C Witting, *Street on Torts* (16th edn, 2021) 6; J Gardner, “Some Rule-of-Law Anxieties about Strict Liability in Private Law” in L M Austin and D Klimchuck (eds), *Private Law and the Rule of Law* (2014) at 207.

¹⁰⁶ Palmer (n 96) at 1330.

¹⁰⁷ See paras 4-40 to 4-42 and 7-13 to 7-15 below.

¹⁰⁸ Smith, *Short Commentary* 669.

¹⁰⁹ T Weir, “The Staggering March of Negligence” in P Cane and J Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (1998) 101.

¹¹⁰ *Rylands v Fletcher* (1868) LR 3 HL 330.

¹¹¹ *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264.

of negligence¹¹² but also as an indication of the true nature of liability as fault-based.¹¹³ In Scots law, a similar position has been held by Whitty, who argued that:

“strict liability” in delict has reference to the requirement of the defender’s knowledge or foreseeability of the certainty or risk of harm to the pursuer. If liability depends on the pursuer establishing that the defender knew, or ought to have known, that the harm suffered by the pursuer was certain or likely to result from the defender’s acts or omissions, or if the defender can escape liability by establishing that he did not have such knowledge or constructive knowledge, then liability cannot be said to be “strict” in the normal sense of that term.¹¹⁴

2-35. It is unquestionable that foreseeability of harm is an essential requirement of negligence-based liability. It is less certain, however, that foreseeability of harm is an ingredient of intention-based liability, for intention requires actual knowledge of the certainty of harm on the part of the defender, even though the establishment of such knowledge often involves resort to objective indicators.¹¹⁵ Foreseeability is not the same as knowledge. Foreseeability, moreover, is not even implied in knowledge: if one knows a particular consequence will certainly result from one’s action, even if it cannot be said to be reasonably foreseeable, it can still be considered as an intended consequence, depending on the notion of intention adopted. As Nolan has so simply articulated, “[a]lthough there can be no fault without foreseeability, there can be foreseeability without fault”, supporting the compatibility of a foreseeability requirement with a strict-liability rule.¹¹⁶ And this is the case because foreseeability of harm is not concerned with the definitional elements of the different forms of fault as outlined above. A rule like the one in *Rylands* is not one of negligence because, as Weir pointed out, the (un)reasonableness of the conduct is still irrelevant; “it remains a tort of strict liability for the foreseeable consequences”.¹¹⁷ Further, the fact that harm was foreseeable is not equivalent to knowing it will certainly occur.

2-36. Requiring foreseeability of harm in the context of a strict-liability rule is a way of restricting the scope of liability to exclude consequences that are simply too far-fetched. As Cane suggests, it is arguable that even when liability is strict,

¹¹² Weir (n 109) 102.

¹¹³ Cane, *Anatomy* (n 24) 49 and 144.

¹¹⁴ N R Whitty, “Nuisance” (Reissue, 2001) in *The Laws of Scotland: Stair Memorial Encyclopaedia* para 88. See also para 95, esp fn 7.

¹¹⁵ Reid (n 32) 442. The issue is discussed further in paras 4-23 to 4-27 below.

¹¹⁶ D Nolan, “The Distinctiveness of *Rylands v Fletcher*” (2005) 121 LQR 421 at 444.

¹¹⁷ Weir (n 109) 107. In similar vein, see G T Schwartz, “*Rylands v Fletcher*, Negligence, and Strict Liability” in P Cane and J Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (1998) 215.

people ought to be in a position to take account of their potential legal liabilities in advance in deciding what activities to engage in and on what scale; and a person cannot reasonably be expected to take account of freakish or unexpected or unusual events.¹¹⁸

It has even been argued that one cannot meaningfully speak about a wrong if it does not have harm as a foreseeable consequence.¹¹⁹ In the context of negligence, such considerations are normally analysed under the notion of remoteness, but they do not seem to be exclusive to this head of liability. Whitty’s argument fails to take this role of foreseeability into account.

2-37. In sum, the fact that liability only extends to foreseeable harm does not determine its nature as fault-based: strict liability may also be limited by a requirement of foreseeability.

(3) Heightened standard of care

2-38. The first instance in which a case of stricter-than-normal liability has been identified is when a “heightened standard of care” operates for activities that entail a high risk. As explained above, negligence is the breach of a standard of reasonable care, a notion that is sensitive, among other elements, to risk, i.e. the probability of harm and/or its potential magnitude.¹²⁰ Consequently, the standard of reasonable care associated with given conduct will be higher if the risk created by such conduct is higher. This is the normal operation of the rules of negligence. Thus, a heightened standard of care in this sense does not entail stricter-than-normal liability. It might, of course, lead to a very demanding standard that will be very difficult to meet and, accordingly, its breach will be easier to establish and difficult to defeat. But this result is contingent: it will depend on the circumstance of all other relevant elements remaining the same, especially those that could lower the standard (e.g. high costs of taking precautions).

2-39. Some authors, however, identify a heightening of the standard of care that goes beyond reasonable care. Walker, for instance, explains that there are “a number of cases where a more stringent duty than that of merely taking reasonable care to avoid causing unintended harm to another is exacted and where liability is imposed despite the absence of ‘fault’ in the ordinary sense”.¹²¹ This type of case, where what is imposed is the standard of the “highest possible” care or the “utmost” care, is not distinguishable from strict liability,¹²² for the standard is either designed or applied in a way that leads to the inescapable

¹¹⁸ P Cane and J Goudkamp, *Atiyah’s Accidents, Compensation and the Law* (9th edn, 2018) 106.

¹¹⁹ D G Owen, “Figuring Foreseeability” (2009) 44 Wake Forest LR 1277 at 1277–1278.

¹²⁰ See para 2-23 above.

¹²¹ Walker, *Delict* 284.

¹²² Palmer (n 89) 1324.

conclusion of its breach.¹²³ It is an instance of what Zimmermann described as strict liability in disguise.¹²⁴ Its explanation in terms of fault, argues Walker, “springs from a wish to maintain the appearance that all liability in Scots law depends on fault”.¹²⁵

2-40. Consequently, the only possible version of a stricter-than-normal liability based upon a heightened standard of care would be one where the standard lies in the gap between reasonable care and the highest possible care, a possibility that appears as rather artificial – and unknown at least in the Scottish context.¹²⁶

(4) Presumption of fault

2-41. Liability can also be conceived as stricter-than-normal when it is imposed by virtue of the operation of a presumption of fault. The treatment of presumptions in Scotland is a largely uncontroversial and stable matter.¹²⁷ The notions outlined by the institutional writers¹²⁸ remain to a large extent relevant and are referred to in contemporary treatises on the law of evidence.¹²⁹

2-42. “Presumptions”, in the words of Erskine, “are consequences drawn from facts notorious or already proved, which infer the certainty, or at least a strong probability, of other facts to be proved”.¹³⁰ Consequently, in a presumption of fault, the notorious or proved fact of harm being caused by a certain act or omission or in certain circumstances leads to the inference of the certainty or strong probability of the fact of it being the consequence of fault on the part of the defender, relieving the pursuer from the burden of proving it. Yet the strength of this inference depends on the nature of the presumption.

2-43. Scots law recognises three kinds of presumption. The first kind are presumptions *juris et de jure*, or irrebuttable presumptions of law. As their name suggests, they do not admit evidence to the contrary.¹³¹ Therefore, where a presumption of fault of this type is in place, the defender cannot discharge it by proving absence of fault. There is, however, general agreement that these

¹²³ Zweigert and Kötz, *Comparative Law* (n 88) 650.

¹²⁴ See para 2-27 above.

¹²⁵ Walker, *Delict* 284

¹²⁶ They are conceivable, perhaps, in statutory form: Law Commission, *Civil Liability for Dangerous Things and Activities* (Law Com No 32, 1970) 2 fn 3.

¹²⁷ W D H Sellar, “Presumptions in Scots Law” in R H Helmholz and W D H Sellar (eds), *The Law of Presumptions: Essays in Comparative Legal History* (2009) 219.

¹²⁸ See Stair IV.45.9–14; Bankton IV.34.1–3; Erskine IV.2.34–38; Bell, *Principles* § 2260.

¹²⁹ See M Ross, J Chalmers and I Callander, *Walker and Walker The Law of Evidence in Scotland* (5th edn, 2020) paras 3.1 ff. F P Davidson, *Evidence* (2007) does not make express reference to the institutional writers but the concepts at 125–127 coincide largely.

¹³⁰ Erskine IV.2.34.

¹³¹ Ross et al, *Walker and Walker on Evidence* (n 129) para 3.2.1.

are not true presumptions, but simply rules of substantive law.¹³² In this sense, an irrebuttable presumption of fault is nothing more than a rule of liability regardless of fault, i.e. a strict-liability rule, according to the notion of strict liability adopted in this chapter.

2-44. Presumptions of the second kind, *juris tantum* or rebuttable presumptions of law, are generally seen as true presumptions. These are clearly recognised by statute, custom or judicial decision, and their effect is to relieve the pursuer from proving the inferred fact, burdening the defender with the proof of the absence of such fact.¹³³ Thus, when what is presumed is fault, it operates a shift in the burden of proof: it is not the pursuer who will have to argue and demonstrate that the defender acted with fault, but the latter who will have to argue and demonstrate that he acted without it to escape liability. A rule of this sort can be accurately described as one of stricter-than-normal liability.

2-45. Finally the third kind, rebuttable presumptions of fact or *hominis vel judicis*, arise by reference to the facts and circumstances of the particular case.¹³⁴ It is also questionable whether they are, indeed, true presumptions, as they appear to “involve no more than the drawing of the obvious inferences from the facts”,¹³⁵ and they have been seen simply as circumstantial evidence.¹³⁶ Accordingly, the court can logically infer the existence of fault from the proved facts of the case at issue. It does not entail a stricter-than-normal liability: it is still the pursuer’s burden to aver fault and to prove, if necessary, the facts that can allow the court to reach such a conclusion.

2-46. Consequently, rebuttable presumptions of law are the only type of presumption the operation of which allows the characterisation of liability as stricter-than-normal.

(5) *Res ipsa loquitur*

2-47. The last of the devices that is identified as turning liability into a stricter-than-normal one is the so-called doctrine of *res ipsa loquitur*: “the matter speaks for itself”.¹³⁷ The doctrine finds its traditional formulation in the English case of *Scott v London and St Katherine Docks Co*:

¹³² Davidson, *Evidence* (n 129) para 4.46; Sellar (n 127) at 220; Ross et al, *Walker and Walker on Evidence* (n 129) para 3.2.1.

¹³³ Ross et al, *Walker and Walker on Evidence* (n 129) paras 3.3.1 and 3.4.1.

¹³⁴ Ross et al, *Walker and Walker on Evidence* (n 129) para 3.3.1.

¹³⁵ Davidson, *Evidence* (n 129) para 4.47.

¹³⁶ See discussion in Sellar (n 127) at 212–218. For Ross et al, *Walker and Walker on Evidence* (n 129) para 3.3.1, presumptions of fact and circumstantial evidence are different, though they acknowledge that they are “frequently difficult to distinguish”.

¹³⁷ F M Wheelock and R A LaFleur, *Wheelock’s Latin* (7th edn, 2011) 355.

There must be reasonable evidence of negligence. But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.¹³⁸

Consequently, the doctrine affords an evidentiary aid for the pursuer: it facilitates proof of negligence, specifically of the breach of the standard of care, assistance that becomes especially relevant where the relevant information about the facts is within the knowledge of the defender.¹³⁹

2-48. The doctrine, however, provides moderate assistance only. According to the leading modern Scottish authority, *Devine v Colvilles Ltd*, “the maxim is of limited ambit”.¹⁴⁰ It operates within restricted boundaries and even within them its effects are limited. These boundaries are well-established:¹⁴¹ *res ipsa loquitur* will only operate when (a) the object or structure causing the accident was under the exclusive control of the defender at the relevant time;¹⁴² (b) the accident is one that normally does not happen if proper care is taken;¹⁴³ and (c) the accident remains unexplained.¹⁴⁴

2-49. When these requirements are fulfilled, there is *prima facie* evidence of negligence, and it is for the defender to offer an explanation that is consistent with the absence of negligence,¹⁴⁵ that is, “that the accident could have happened despite reasonable care on the defender’s part”.¹⁴⁶ It is important to stress this point: in some accounts, the doctrine is seen as a presumption of negligence,

¹³⁸ *Scott v London and St Katherine Docks Co* (1865) 3 H & C 596 at 601. The formulation is consistently cited by Scottish authority: see, e.g. *Ballard v North British Railway Co* 1923 SC (HL) 43 at 48 per Lord Chancellor (Cave); *Devine v Colvilles Ltd* 1969 SC (HL) 67 at 99 per Lord Guest and 101 per Lord Upjohn.

¹³⁹ See *Elliot v Young’s Bus Service* 1945 SC 445 at 456 per Lord Justice-Clerk Cooper.

¹⁴⁰ *Devine v Colvilles Ltd* 1969 SC (HL) 67 at 100 per Lord Guest.

¹⁴¹ See, for Scotland, Walker, *Delict* 396–397, and for England, P Giliker, *Tort* (7th edn, 2020) paras 5.030–5.033 and Witting, *Street on Torts* (n 105) 155–161.

¹⁴² See, e.g. *Booth v Macmillan* 1972 SC 197 at 199, where the involvement of third parties was regarded as enough to rule out the application of *res ipsa loquitur*. In the same vein, see *Murray v Edinburgh District Council* 1981 SLT 253 at 256; but contrast with the more recent *McDyer v The Celtic Football and Athletic Co Ltd* 2000 SC 379 at 385–386.

¹⁴³ *Ballard v North British Railway Co* 1923 SC (HL) 43 at 53 per Lord Dunedin. A good example is provided by the collision in *Ng Chun Pui v Lee Chuen Tat* [1988] RTR 298, where a coach travelling in one direction crossed the central reservation and reached a vehicle travelling in the opposite direction.

¹⁴⁴ *Ballard v North British Railway Co* 1923 SC (HL) 43 at 48 per Lord Chancellor (Cave). For this reason, *res ipsa loquitur* was not applicable in *McQueen v The Glasgow Garden Festival (1988) Ltd* 1995 SLT 211 at 214: the cause of the accident was clearly explained. See also the more recent *David T Morrison & Co Ltd v ICL Plastics Ltd* [2013] CSIH 19, 2013 SC 391 at paras 37–38.

¹⁴⁵ *Devine v Colvilles Ltd* 1969 SC (HL) 67 at 100 per Lord Guest.

¹⁴⁶ Smith, *Short Commentary* 669.

requiring the defender to demonstrate his diligence in order to discharge it.¹⁴⁷ But this is not its effect; it is not a presumption of fault.¹⁴⁸ The doctrine does not alter the *onus* of proof but only throws on the defender the burden of offering an alternative explanation that is consistent with diligence.¹⁴⁹ When the defender is able to produce this explanation, he is not yet free from liability, but the pursuer has then to provide actual evidence of negligence: he is back at “square one”.¹⁵⁰ This stands in clear contrast with a proper rebuttable presumption of law in regard to fault, in the sense described above, which actually reverses the *onus* and can only be discharged by demonstrating diligence. Once diligence has been proved, the defender escapes liability. It also stands in contrast with a presumption of fact in regard to fault, for in *res ipsa loquitur* the court is tightly constrained as to the circumstances from which the inference can be made, and also as to the effects of such inference.

D. CONCLUSION

2-50. This chapter set out the conceptual framework of the book. Its arguments are concerned with the basis of liability in the context of neighbourhood, i.e. the question as to liability being fault-based or strict. Consequently, this chapter outlined the working concepts that provide necessary content for this question. First, fault-based liability was addressed. Even though it is difficult to outline an overarching concept of fault, some notions were offered about its different forms and the boundaries between them: intention, malice, negligence and recklessness. Secondly, strict liability was discussed. It was distinguished, on the one hand, from “normal” fault-based liability and, on the other hand, from forms of liability that can be seen as “stricter-than-normal”: heightened standards of care, presumptions of fault, and *res ipsa loquitur*. On the basis of these general notions, these concepts will be considered extensively, in the different contexts of the law of neighbours, throughout the following chapters of this book.

¹⁴⁷ See, e.g. Viscounts Haldane and Finlay’s speeches in *Ballard v North British Railway Co* 1923 SC (HL) 43 at 49 and 52. In Fleming’s view, this “heresy” gained ground in England: Fleming, *Law of Torts* (n 101) 151–152. Cane, *Responsibility* (n 23) 46 also identifies this as one of the interpretations of the doctrine.

¹⁴⁸ *Ballard v North British Railway Co* 1923 SC (HL) 43 at 54 per Lord Dunedin; see also the useful explanation by Lord Griffiths in *Ng Chun Pui v Lee Chuen Tat* [1988] RTR 298 at 300–301.

¹⁴⁹ *Devine v Colvilles Ltd* 1969 SC (HL) 67 at 100 per Lord Guest.

¹⁵⁰ *Ibid* at 102 per Lord Donovan. See also Lord Justice-Clerk Cooper’s explanation in *Elliot v Young’s Bus Service* 1945 SC 445 at 455.

3 Nuisance: the Fault Framework

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A. INTRODUCTION

3-01. Since the decision of the House of Lords in *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council*, and after a long line of seemingly contradictory authorities, the question about the basis of liability in nuisance has been partially settled: damages are awarded only upon proof of fault, at least as a general rule.¹ The settlement was only partial because Lord Fraser's speech did not make completely clear what amounted to an averment of fault.²

¹ *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17 at 39–45 per Lord Fraser of Tullybelton. For two different accounts of this evolution, see R Zimmermann and P Simpson, "Liability among Neighbours" in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000) vol 2, 612, and G D L Cameron, "Neighbourhood Liability in Scotland 1850–2000" in J Gordley (ed), *The Development of Liability between Neighbours* (2010) 132.

² An aspect highlighted, shortly after, by the discussion in *Argyll & Clyde Health Board v Strathclyde Regional Council* 1988 SLT 381. For more details about this case, see para 5-17 below.

3-02. Further clarification arrived with the Inner House decision in *Kennedy v Glenbelle Ltd*,³ where the court outlined a catalogue of types of conduct that amounted to fault in this context. After reiterating fault as the basis of liability in nuisance, and further distinguishing liability in nuisance from liability in negligence, Lord President Hope stated that:

Culpa which gives rise to a liability in delict may take various forms. In vol 14, Stair Memorial Encyclopaedia, Nuisance, para 2087, it is stated that the usual categories of *culpa* or fault are malice, intent, recklessness and negligence. To that list there may be added conduct causing a special risk of abnormal damage where it may be said that it is not necessary to prove a specific fault as fault is necessarily implied in the result [. . .].⁴

Subsequently, and after considering some of the relevant authorities, Lord Hope proceeded to a brief explanation of these concepts:

The essential requirement is that fault or *culpa* must be established. That may be done by demonstrating negligence, in which case the ordinary principles of the law of negligence will provide an equivalent remedy. Or it may be done by demonstrating that the defender was at fault in some other respect. This may be because his action was malicious, or because it was deliberate in the knowledge that his action would result in harm to the other party, or because it was reckless as he had no regard to the question whether his action, if it was of a kind likely to cause harm to the other party, would have that result. Or it may be – and this is perhaps just another example of recklessness – because the defender has indulged in conduct which gives rise to a special risk of abnormal damage, from which fault is implied if damage results from that conduct. In each case personal responsibility rests on the defender because he has conducted himself in a respect which is recognised as inferring *culpa* by our law. So what is required is a deliberate act or negligence or some other conduct from which *culpa* or fault may be inferred.⁵

3-03. This model has been analysed in terms of a fault “continuum”,⁶ placing malice on one end of the spectrum and negligence on the other end, whereas the position of conduct causing special risk of abnormal damage within the spectrum is not clear. In this continuum, as the term itself suggests, there are no clear delimitation lines between the different categories of fault.

3-04. Apart from the questions of whether the previous authority supported the fault-based account of nuisance and whether this is the most appropriate approach for nuisance, Scots law made a choice here. The choice was seemingly

³ *Kennedy v Glenbelle Ltd* 1996 SC 95.

⁴ 1996 SC 95 at 99.

⁵ 1996 SC at 100–101.

⁶ N R Whitty, “Nuisance” (Reissue, 2001) in *The Laws of Scotland: Stair Memorial Encyclopaedia* para 89; Cameron (n 1) 150.

animated by an intention to reassert the civilian character of the law of delict.⁷ Paradoxically, the system that provided the model for the fault continuum was not a civilian one at all: as will be explained, the source of the model was the American Law Institute's *Restatement Second of Torts* (1979), in what can perhaps be described as a partial legal transplant. This adoption, however, is not wholly unproblematic, and this chapter will address some of the problems, leaving the remaining ones for the following chapters.

3-05. The second section of this chapter will offer an analysis of the fault framework adopted in *Kennedy v Glenbelle* and its sources (section B). The third section will assess critically the analysis of fault as a continuum (section C). The final section will offer some brief conclusions (section D).

B. THE FAULT FRAMEWORK IN *KENNEDY v GLENBELLE*

(1) Origin and description

3-06. The origin of the model, as indicated by Lord President Hope, is para 2087 of Niall Whitty's ground-breaking title on "Nuisance" in the *Stair Memorial Encyclopaedia* (as first published). Whitty was writing after *RHM Bakeries*, so the fault-based account of nuisance had already been adopted. In that context, he explained that *RHM Bakeries* left open the question of

which of the usual categories of *culpa* or fault – malice (*aemulatio* or spite), intent, recklessness, negligence, and conduct causing a special risk of abnormal danger – or in other words what types of delictual conduct on the part of the defender are actionable by reference to the test of *plus quam tolerabile*, and which categories are actionable by reference to the ordinary principles of negligence. This is probably now the most important single issue in the modern Scots law of nuisance. Yet there is scant direct Scottish authority on that issue [. . .].⁸

Whitty did not mention the source of this catalogue of types of fault, apart from a reference to the case of *Miller v Robert Addie & Sons' Collieries Ltd*⁹ for the last category. He then stated that the lines have to be drawn "by reference to general principle, having regard also to Anglo-American authorities which afford considerable assistance".¹⁰ In the reissue of the "Nuisance" title, in 2001, the reference to general principle and Anglo-American authorities was

⁷ T B Smith, *A Short Commentary on the Law of Scotland* (1962) 534; N R Whitty, "Reasonable Neighbourhood: the Province and Analysis of Private Nuisance in Scots law. Part I" (1982) 27 JLSS 497 at 498.

⁸ N R Whitty, 'Nuisance' in *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol 14 (1988) para 2087.

⁹ *Miller v Robert Addie & Sons' Collieries Ltd* 1934 SC 150.

¹⁰ Whitty, "Nuisance" (1988) para 2087.

abandoned and replaced by a reference to *Kennedy* as approving the proposition made in the previous version of the title.¹¹

3-07. The model was not derived directly, therefore, from Scottish authority. It has indeed been described as “an example of legal borrowing”:¹² it mirrors to a great extent the model adopted by the American Restatement (2d) for the basis of liability in nuisance,¹³ to which Whitty refers throughout his analysis, in both versions of his title.¹⁴ The content of this model will, consequently, be outlined according to the way it is presented by *Kennedy*, as well as by reference to its immediate source, that is, Whitty’s original title on “Nuisance” (with some refinements introduced in the reissue of 2001) and its mediate source, namely, the American Restatement (2d) (with some references to its partial successor, the Restatement (3d)).

(a) *The model as presented by Kennedy v Glenbelle*

3-08. Lord Hope explained in *Kennedy* that if the test which is peculiar to nuisance – the *plus quam tolerabile* test – is satisfied and if fault is also established, the requirements of liability in damages for nuisance are fulfilled.¹⁵ He then listed five different types of conduct that, if demonstrated, would establish fault for these purposes: negligent conduct, malicious conduct, conduct that is deliberate in the knowledge that harm will result, reckless conduct, and conduct which gives rise to a special risk of abnormal damage. Not much can be concluded from the case itself as to the links between the different categories of fault, except the possible overlap between the last two types of conduct, suggested by Lord Hope.¹⁶

3-09. There are, however, some interesting remarks by Lord Hope that deserve to be noted about two of these categories. First, in the case of negligent conduct, Lord Hope said that “the ordinary principles of the law of negligence will provide an equivalent remedy”.¹⁷ The meaning of this statement is not fully clear and will be explored in chapter 5. Secondly, in relation to conduct creating special risk of abnormal damage, “it may be said”, remarked Lord Hope, “that it is not necessary to prove a specific fault as fault is necessarily implied in the result”,¹⁸ and specific reference was made to Lord Justice-Clerk

¹¹ Whitty, “Nuisance” (Reissue, 2001) para 87.

¹² G D L Cameron, “Scots and English Nuisance . . . Much the Same Thing?” (2005) 9 EdinLR 98 at 118.

¹³ American Law Institute, *Restatement Second of Torts* (1979) §§ 822 and 825.

¹⁴ Whitty, “Nuisance” (1988) paras 2089, 2092 and 2106; Whitty, “Nuisance” (Reissue, 2001) paras 89, 92 and 106.

¹⁵ *Kennedy v Glenbelle Ltd* 1996 SC 95 at 99.

¹⁶ 1996 SC 95 at 100.

¹⁷ 1996 SC 95 at 100.

¹⁸ 1996 SC 95 at 99.

Moncreiff's much-discussed dictum in *Chalmers v Dixon*.¹⁹ Lord Hope then mentioned three cases that followed this dictum: *Edinburgh Railway Access and Property Co v John Ritchie & Co*,²⁰ *Hester v MacDonald*,²¹ and *Noble's Trs v Economic Forestry (Scotland) Ltd*.²² These cases will be considered further in the discussion of intentional harm in chapter 4, as well as in the discussion of dangerous conduct in chapters 6 and 7.

(b) Immediate source: Whitty's SME title on "Nuisance"

3-10. In his treatment of nuisance, Whitty makes a fundamental distinction between intentional and negligent harm, grouping together under the first heading both malicious conduct, i.e. conduct with the purpose of causing harm (*in aemulationem*), and also conduct carried out with the knowledge, actual or constructive, that harm will certainly result from it.²³ The relevance of this fundamental division is that, in his view, different tests operate for each category: the *plus quam tolerabile* test²⁴ applies only to intentional harm,²⁵ whereas negligent harm must be actionable according to "the general rules regulating liability for negligent conduct".²⁶

3-11. Recklessness is neither explained nor placed clearly in this division, but only mentioned as a form of fault located somewhere between intention and negligence by reference to the underlying level of risk: the risk is higher than in negligence but lower than in intention.²⁷

3-12. Conduct creating special risk of abnormal damage, which was only mentioned as a form of fault but not explained in the title as first published, is discussed in the reissue and described as an "impure taxonomic category", for it is defined by reference to a different element: the gravity of possible harm, as opposed to the mental element in the other types of conduct. Consequently, this type of conduct can overlap with the other forms of fault. The case of *Chalmers v Dixon*²⁸ is mentioned simply as one of the "several judicial descriptions" of this type of conduct, but Whitty²⁹ reproduces that contained in *Noble's Trs*.³⁰

¹⁹ *Chalmers v Dixon* (1876) 3 R 461 at 464.

²⁰ *Edinburgh Railway Access and Property Co v John Ritchie & Co* (1903) 5 F 299.

²¹ *Hester v MacDonald* 1961 SC 370.

²² *Noble's Trs v Economic Forestry (Scotland) Ltd* 1988 SLT 662.

²³ Whitty, "Nuisance" (1988) paras 2015 and 2016, a division preserved in Whitty, "Nuisance" (Reissue, 2001) paras 105 and 106.

²⁴ Described in *Watt v Jamieson* 1954 SC 56 at 58.

²⁵ Whitty, "Nuisance" (1988) para 2105.

²⁶ Whitty, "Nuisance" (1988) para 2106.

²⁷ Whitty, "Nuisance" (1988) para 2089.

²⁸ (1876) 3 R 461.

²⁹ Whitty, "Nuisance" (Reissue, 2001) para 108.

³⁰ *Noble's Trs v Economic Forestry (Scotland) Ltd* 1988 SLT 662 at 664.

(c) Mediate source: Restatement (2d)

3-13. The division in the Restatement (2d) is slightly different from the framework described above. According to § 822, the invasion of another's interest in the use and enjoyment of land is either (a) intentional or (b) unintentional.

3-14. Intent, according to § 8A, denotes “that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it”. Intentional invasion, therefore, includes conduct carried out for the purpose of causing that invasion and conduct carried out with the knowledge that it will result (§ 825), and it is actionable if the invasion is unreasonable according to §§ 822 and 826.

3-15. Unintentional invasion, i.e. invasion that does not fall within the previous description, is actionable if it follows from negligent, reckless or abnormally dangerous conduct, according to the general rules applicable to each of these types of conduct (§ 822(b)). For negligent conduct, these general rules are contained in §§ 281–328D. Detailed explanation of these rules is unnecessary here, since in this aspect the Scots model did not take inspiration from the American model.

3-16. The position of reckless conduct in the Restatement (2d) is clearly on the side of unintentional invasions precisely because the invasion is unintended, even though the act or omission that causes the harm is – and must be – intentional in the sense of deliberate.³¹ But, at the same time, reckless conduct is expressly excluded from the definition of negligence.³² A person's conduct is in “reckless disregard of safety of another”, according to § 500,

if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Recklessness, therefore, includes two types of case: in the first type, a wrongdoer knows or should know those facts and, realising that such risk exists, proceeds deliberately with indifference to it; in the second type, the wrongdoer knows or should know those facts, but fails to appreciate the risk and proceeds accordingly.³³ It can, consequently, be constructed on a double fiction: the fiction that the wrongdoer knows the facts that would lead him to realise the risk, because there are reasons for him to know even if he actually does not; and the fiction that he realises that risk exists on the basis of those facts, because a reasonable man would have such realisation, even if he actually does not.

³¹ Restatement (2d) § 500 comments b and f.

³² Restatement (2d) § 282.

³³ Restatement (2d) § 500 comment a.

3-17. The difference between negligence and recklessness lies essentially in the magnitude of the risk, but it is a difference in degree “so marked as to amount substantially to a difference in kind”.³⁴ The analysis developed in the Restatement (2d) rests on a proportion between risk and utility: depending on the degree of disproportion, the conduct can be either negligent or reckless, or even get closer to intention, where “there is a marked tendency to give the conduct a legal effect closely analogous to that given conduct (*sic*) which is intended to cause the resulting harm”.³⁵ Thus, reckless conduct takes elements both from intentional invasions and from negligent conduct: the rules for determining liability for reckless conduct are the same as apply to negligence,³⁶ but with certain exceptions that bring reckless conduct closer to intention. First, recklessness can be taken into account to determine the existence of a causal link that would not be found where the conduct is merely negligent;³⁷ secondly, the victim’s contributory negligence does not bar recovery for recklessly caused harm as it would if it were caused only negligently;³⁸ and thirdly, reckless conduct might serve as justification for a punitive damages award.³⁹

3-18. Abnormally dangerous activities, in turn, attract strict liability, according to § 519. Liability, it is stated, is based neither on intention nor on negligence, whether in carrying out the activity itself or in the way it is carried out; it is based simply upon the abnormal danger it creates, whatever the level of care displayed to prevent the damage.⁴⁰ The determination of what is “abnormally dangerous” depends on a number of factors listed in § 520, none of which is necessarily sufficient, nor is there need for all of them to be present.⁴¹ The factors include the degree of risk, the inability to eliminate the risk with reasonable care, the place where it is carried out, and its social value. The difference with negligence lies, again, in the contrast between utility and risk, but in this case the line is drawn where the proportion is reversed: if utility outweighs risk, negligence is conceptually excluded because, in this case, risk is not unreasonable,⁴² but strict liability based upon abnormal danger remains open.⁴³ It is not clear how this rule is to be reconciled with the rules indicating the factors that must be taken into account to determine utility (§ 292) and risk (§ 293) for the purposes of negligence. As observed elsewhere,⁴⁴ there is such an overlap between these factors that the distinction between an abnormally dangerous activity

³⁴ Restatement (2d) § 500 comment g.

³⁵ Restatement (2d) § 282 comment e.

³⁶ Restatement (2d) § 501 (1).

³⁷ Restatement (2d) § 501 (2).

³⁸ Restatement (2d) § 503 (1).

³⁹ Restatement (2d) § 908 (2).

⁴⁰ Restatement (2d) § 510 comment d.

⁴¹ Restatement (2d) § 520 comment f.

⁴² Restatement (2d) § 291.

⁴³ Restatement (2d) § 520 comment b.

⁴⁴ See para 6-11 below.

and negligent conduct might be nothing more than procedural. This and other criticisms were noted by the drafters of the Restatement (3d)⁴⁵ so that the new rules for abnormally dangerous activities exclude several of the overlapping elements – most notably, social value – and the remaining ones are considered necessary requirements (§ 20).

(2) Restatement (2d) and the Scots model contrasted

3-19. The treatment of intentional and negligent harm in the Restatement (2d) coincides largely with Whitty's version of the model for Scots law. In both models, a broad sense of intention is adopted, including not only those consequences the defender has the purpose to bring about (henceforth, "intention as purpose"), but also those the defender knows will certainly result (henceforth, "intention as knowledge"). A further test is required to assess that harm: in the Restatement (2d), the unreasonableness test; in the Scots version, the *plus quam tolerabile* test, also based on reasonableness.⁴⁶ Malicious conduct is, in the Restatement (2d), not only intentional but also unreasonable,⁴⁷ whereas according to Whitty, the primary purpose of the conduct causing the invasion is one of the relevant factors taken into account to determine whether the invasion is *plus quam tolerabile*, so that when this purpose is malicious, the invasion will be considered to fulfil the test.⁴⁸ It is possible, nevertheless, to identify some relevant differences in these models' approach to the different forms of fault.

3-20. The first difference concerns the role of malice. The Restatement (2d) is clear in pointing out that for an invasion to be intentional there is no need for it to be malicious.⁴⁹ Malice, i.e., "the sole purpose of causing harm", plays its role essentially in the reasonableness test.⁵⁰ Whitty did not draw this line so clearly. Throughout his exposition, malice is indeed defined in accordance with the Restatement (2d),⁵¹ but is identified as the first form of intention, namely intention as purpose. The author distinguishes, as forms of intention, malice (the sole purpose to harm) from intention as knowledge,⁵² and this is the distinction that is reflected in *Kennedy*,⁵³ whereas the Restatement (2d) distinguishes, as

⁴⁵ American Law Institute, *Restatement Third of Torts: Liability for Physical and Emotional Harm* (2010) § 20, reporters' note to comment k.

⁴⁶ Whitty, "Nuisance" (Reissue, 2001) paras 39–41. It is possible, however, to note differences between both understandings of reasonableness: compare Restatement (2d) §§ 826–828 with Lord President Cooper's formulation in *Watt v Jamieson* 1954 SC 56 at 58.

⁴⁷ Restatement (2d) § 829 (a).

⁴⁸ Whitty, "Nuisance" (1988) para 2068.

⁴⁹ Restatement (2d) § 825 comment c.

⁵⁰ Restatement (2d) § 829 (a).

⁵¹ Whitty, "Nuisance" (1988) paras 2069, 2089 and 2015.

⁵² Whitty, "Nuisance" (1988) paras 2087 and 2089.

⁵³ *Kennedy v Glenbelle Ltd* 1996 SC 95 at 100 per Lord President Hope: "This may be because his action was malicious, or because it was deliberate in the knowledge that his action would result in harm . . .".

regards intention, intention as purpose from intention as knowledge, leaving malice outside the picture. Paradoxically, intention in its more obvious sense – as purpose – seems to fall through the cracks in Whitty’s model. But if knowledge of certainty of harm is treated as a form of intention by the model, it is only logical that the purpose of bringing about harm must be treated likewise.

3-21. There is a further difference in the treatment of intention. In Whitty’s model, intention as knowledge includes not only the consequences that the defender actually knew would result, but also those he *ought to have known* would result.⁵⁴ §§ 8A and 825 of the Restatement (2d) and their comments, on the contrary, do not seem to incorporate those consequences which the defendant should have known would result, limiting the definition to actual knowledge. Both issues related to intention are discussed further in chapter 4.⁵⁵

3-22. Negligence, in contrast, receives a similar treatment in both models: in the Restatement (2d) negligence in nuisance is assessed according to the general rules on liability for negligence, just as it should in Scots law according to Whitty. In this point, both models resort to their own well-established systems of rules. The question about the rules applicable to negligent nuisance, however, has not been free from debate in Scots law. This debate is addressed in chapter 5.

3-23. Recklessness is treated differently and certainly in more detail in the Restatement (2d). As explained, reckless conduct is on the side of unintentional invasions. Apart from the particularities of the required – or imputed – knowledge and the specific level of underlying risk, determination of liability follows the rules of negligence, but some of the consequences associated with intentional invasions are attached to reckless invasions. Recklessness in the model adopted for Scots law, on the other hand, is not developed, but only listed as one of the possible forms of fault,⁵⁶ and placed somewhere between intention and negligence.⁵⁷ The precise position of recklessness with regard to the fundamental intentional/negligent harm division and their respective tests, and the different consequences possibly attached to reckless conduct – if any – are not spelled out. This point is revisited in chapter 5.

3-24. Dangerous activities receive, at least on the surface, a different treatment. In the Restatement (2d), liability for abnormally dangerous activities is based upon the creation of the relevant risk, and not on fault. There is a complex system of rules designed to determine when such risk has been created, and once this is verified, liability is strict. Conversely, conduct creating a special risk of abnormal damage is considered in the Scottish model as a form of fault.

⁵⁴ Whitty, “Nuisance” (1988) para 2105.

⁵⁵ See paras 4-11 to 4-16 and 4-21 to 4-42 below.

⁵⁶ Whitty, “Nuisance” (1988) para 2087.

⁵⁷ Whitty, “Nuisance” (1988) para 2089.

In neither system, however, are the rules clear-cut. In the Restatement (2d), as already mentioned,⁵⁸ the overlap of the elements listed in § 520 for abnormal danger and the elements listed in §§ 292–293 for unreasonable risk has the consequence of blurring the distinction between strict liability and negligence, leading to a subsequent adjustment in the Restatement (3d). In Scotland, although the orthodox view characterises the rule as fault-based, as will be explained in chapter 6, there are good reasons to argue that it is in fact a strict-liability rule, a position that will be discussed in chapter 7.

3-25. In sum, despite the clear inspiration found in the Restatement (2d) by the model adopted in *Kennedy* from Whitty’s proposal, a closer look shows that there are several differences in the way these models approach particular forms of fault or particular aspects of them. Consequently, these differences must be taken into account when looking at the Restatement (2d) as a source for interpretation of the Scottish version of the model.

C. THE FAULT CONTINUUM IN *KENNEDY v GLENBELLE*

(I) Sense in which the model features a continuum

3-26. When presenting the different types of conduct causing harm, Whitty explains that there is “a *continuum* moving from intent down through recklessness to negligence”.⁵⁹ To explain this notion, he refers to comment b on § 8A of the Restatement (2d):

All consequences which the actor desires to bring about are intended, as the word is used in this Restatement. Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. As the probability that the consequences will follow decreases, and becomes less than substantial certainty, the actor’s conduct loses the character of intent, and becomes mere recklessness, as defined in § 500. As the probability decreases further, and amounts only to a risk that the result will follow, it becomes ordinary negligence, as defined in § 282.

In the reissue of his title on “Nuisance”, Whitty added that this continuum was recognised in Scots law by *Kennedy v Glenbelle Ltd*, quoting the section of Lord President Hope’s dictum reproduced above.⁶⁰

3-27. In the Restatement (2d), therefore, the type of fault seemingly depends on a continuum of probability of harm, a view that has since been endorsed in Scottish literature. The continuum notion is, consequently, transferred to fault

⁵⁸ See para 3-18 above.

⁵⁹ Whitty, “Nuisance” (1988) para 2089, italics in the original.

⁶⁰ See para 3-02 above.

itself, making the distinction between different forms of fault a matter of degree, where there are no clear demarcation lines between intentional and unintentional harm.⁶¹ The continuum model from the Restatement (2d), however, seems to be more complex than its description in comment b on § 8A, and indeed the notion of continuum is revisited later in the Restatement (2d), when commenting on the definition of negligence in § 282. According to this section's comments, the difference between intention, recklessness and negligence is based upon a risk/utility ratio.⁶² Likelihood of harm, as pointed out in the comments to § 822, is only one element of risk; risk is the product of likelihood and extent of harm.⁶³ Consequently, it is conceivable to locate conducts higher in the continuum even if likelihood is rather low, when the possible harm is great in extent. Further, it should be possible to locate conducts higher in the continuum when risk is low, but utility is even lower. This more complex version of the model has not, however, been recognised in Scots law.

3-28. Moreover, as will be discussed below, the notion of a fault continuum is itself an inaccurate and misleading depiction of the fault framework described in the previous section. Not only, according to its very logic, does it not encompass all the categories of fault offered by the catalogue, but the difference between the ones that are admittedly encompassed is not one of degree but one of nature, a clarification that is not merely of theoretical importance but has practical implications for the way fault is pleaded.

(2) Conceptually excluded categories

3-29. The first problem with the idea of fault as a continuum depending upon likelihood of harm is that it does not encompass all the five categories of fault offered by the *Kennedy v Glenbelle* catalogue. On the one hand, it certainly excludes some versions of intention, for malice and intention as purpose do not depend on any level of likelihood of harm; and the category of conduct causing a special risk of abnormal damage does not constitute a separate category of fault.

(a) *Malice and intention as purpose*

3-30. As a first observation, the very nature of malice and intention as purpose, as will be explained in chapter 4, places them outwith the fault continuum. The reason is simply that spiteful motives and the purpose to harm have nothing to do with these concepts, because what characterises these forms of fault is

⁶¹ Cameron (n 1) 150; Cameron (n 12) 59; F du Bois and E Reid, "Nuisance" in R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 576 at 590–591.

⁶² Restatement (2d) § 282 comment e.

⁶³ Restatement (2d) § 822 comment k.

a mental state: the mental state of desiring certain effects (and believing they might result),⁶⁴ regardless of how likely these effects in fact are, and regardless of *why* they are so desired. The point has been conceded in Scots doctrine at least with regard to malice.⁶⁵

3-31. It could be argued that, even though malice and intention as purpose are not part of the wider continuum, they are indeed in a continuum with the other form of intention that will be described in chapter 4: intention as knowledge (of the harmful consequences that are certain to result). This would acknowledge a sort of “internal” intentional-harm fault continuum where malice is the graver version of intention. It is true that these are all states of mind but, in the sense they are presented by the model under analysis, they do not represent degrees within the same hierarchy. Malice and intention as purpose, insofar as they are dominated by the purpose to cause harm (with or without spiteful motives), are mainly mental states of desire.⁶⁶ Intention as knowledge, on the other hand, is a mental state of pure belief.⁶⁷ They cannot be in a continuum from a conceptual perspective. In sum, by definition, malice and intention as purpose do not belong in the fault continuum generally, nor do they differ only by degree from intention as knowledge.

(b) Conduct causing a special risk of abnormal damage

3-32. On the other extreme of the continuum lies conduct causing a special risk of abnormal damage. In contrast with the categories analysed above, i.e. malice and intention as purpose, this category does indeed depend to an extent on likelihood of harm, so the reason for its exclusion from the continuum is different. As Whitty himself acknowledged,

Technically this is an impure taxonomic category because, unlike the other forms of *culpa* which form a series or continuum of types of conduct defined by reference to the pursuer’s mental element, this has reference to the gravity of the possible harm suffered by the defender not to the pursuer’s mental element and therefore belongs to a different classificatory series.⁶⁸

Whitty’s explanation must, however, be qualified, for not *all* the other categories are defined by reference to the mental element. More accurately, it can be said

⁶⁴ See R A Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (1990) 55–58.

⁶⁵ G D L Cameron, “Muddy Pavements and Murky Law: Intentional and Unintentional Nuisance and the Recovery of Pure Economic Loss” 2001 JR 223 at 223.

⁶⁶ See, however, P J Fitzgerald (ed), *Salmond on Jurisprudence* (12th edn, 1966) 369, distinguishing intention and desire.

⁶⁷ The issue of the independence of mental states of desire and mental states of belief is further explored by K W Simons, “Rethinking Mental States” (1992) 72 Boston U LR 463 at 476–482.

⁶⁸ Whitty, “Nuisance” (Reissue, 2001) para 108.

that the other categories assess certain elements of the defender's behaviour in the face of a certain risk – his mental state or the precautions taken by him – whereas conduct causing a special risk of abnormal damage attributes liability regardless of these elements.

3-33. Furthermore, the continuum depends solely on likelihood of harm, whereas conduct creating a special risk of abnormal damage, as will be discussed in chapters 6 and 7, depends on a certain interaction between likelihood of harm and its magnitude, so it cannot be located in a specific place within the spectrum, despite the intuition that, given the level of risk that is required, it should be “near the top rather than the bottom end of the continuum”.⁶⁹ It could, in a given case, require a lower level of likelihood than one would expect where the potential consequences are devastating. Consequently, conduct creating a special risk of abnormal damage can overlap with the other categories of the continuum. It is not a different category of fault but actually, as argued in chapter 7, a form of strict liability.

(3) Intention as knowledge and negligence: difference in nature, not in degree

3-34. Is it possible to affirm that there is a continuum of fault encompassing the remaining categories, that is, intention as knowledge, recklessness and negligence? The idea of the continuum of fault rests upon the notion of a continuum of likelihood of harm, by virtue of which different degrees of fault are attached to different degrees of likelihood. There is thus a continuum “transfer”: from the fact that there is a continuum of risk based on the likelihood of harm, we conclude that there is a continuum of fault. This transfer, however, is improper for two reasons: firstly, because even if there is a continuum of risk, fault is not the materialisation of such risk; secondly, because the different types of fault are not all necessarily attached to a particular level of risk. Consequently, there is no such fault continuum.

3-35. This conclusion is relevant because the continuum notion seems to suggest two misleading consequences that have practical importance. It suggests, firstly, that a claimant could rely upon the “lighter” form of fault if he cannot prove the “heavier”, i.e. if he cannot prove certainty of harm, it would be enough for him to prove its likelihood. In fact, merely proving likelihood would not suffice, because he would also need to aver and prove the rest of the elements that constitute the lighter form of fault. The second consequence would be that the level of risk predetermines the type of fault that pursuers are supposed to plead: if harm was certain, there is only room for a case of intention; if harm was only likely, there is only room for a case of negligence.

⁶⁹ Du Bois and Reid (n 61) 590.

Yet, as will be explained, only the latter is true. To facilitate the argument, the contrast between intention and negligence will be addressed in order to locate recklessness within the framework.

(a) *Fault is not the materialisation of the risk*

3-36. Assuming that there is in fact an underlying continuum of risk, based on the likelihood of harm, to which each type of conduct is attached, materialisation of such risk is not *per se* sufficient to be the basis of liability. What constitutes fault is not the fact that harm happened, whether it was certain or just likely; risk is not the *defining* element but only the underlying element. In intention as knowledge, what constitutes fault is acting with the knowledge that harm will result, so the focus is on *knowledge*, that is, a mental state towards consequences; in negligence, fault is not taking due care, so the focus is on *conduct*, that is, whether it complies with a certain standard or not. As explained by Simons in the context of American law (the source of the Scottish continuum), they do not belong in the same hierarchy of culpability: intention in this version belongs in the hierarchy of mental states of belief, whereas negligence belongs in a hierarchy that is not of mental states but of standards of conduct.⁷⁰

3-37. This is why a pursuer cannot simply rely on the lighter form of fault if he fails to prove the level of certainty required by the more serious one, unless his fall-back position includes the elements of the former that actually constitute fault. The best illustration of the difference can, in fact, be noted in the very case of *Kennedy v Glenbelle*, a case which concerned the withdrawal of support to the upper floors of a tenement as a result of works carried out in the basement. In *Kennedy* the pursuers (the proprietors of the upper floors) tried two different bases of liability for the same “likelihood” of harm: intentional – or perhaps reckless – nuisance (art 9 of the condescence) and “fault” (art 10 of the condescence). About this second plea, Lord President Hope stated:

[I]t is averred that the second defenders knew that the execution of the works “was likely” to cause damage to the pursuers’ premises of the kind which in fact occurred, and that it was the second defenders’ duty not to instruct and direct the carrying out of these works. If what is meant by these averments is that the second defenders knew that damage would inevitably result from the carrying out of the works, which is what the pursuers say in the preceding articles of the condescence, then this seems to me to be a repetition of the case of nuisance which is pled in art 9. If it is being suggested that the damage was likely in the sense that, if due care had been taken, it might have been prevented, then the suggestion is that the second defenders were negligent. *But the pleadings in art 10 are wholly inadequate to support a case based on negligence* [. . .].⁷¹

⁷⁰ Simons (n 67) 464–465.

⁷¹ *Kennedy v Glenbelle Ltd* 1996 SC 95 at 102, emphasis added.

3-38. This difference in nature is, indeed, the explanation for the irrelevance of the degree of care employed in the case of intentional harm;⁷² there is simply “no room for arguments based on the absence of negligence”⁷³ because care is not at issue. This is, moreover, the reason why speaking of a “standard of care” in intentional wrongdoing is technically incorrect: we do not have here an “absolute”⁷⁴ or “higher”⁷⁵ standard of care, as it has been suggested, because care is not under scrutiny when the type of fault asserted is intention.

(b) Fault is not predetermined by the level of risk

3-39. Furthermore, the risk continuum does not determine in an inescapable way the type of fault the pursuer has to plead, at least not at both ends of the spectrum. The fact that certainty of harm serves as the basis for the assertion of intention as knowledge does not exclude the possibility of the conduct of the defender being negligent if he did not meet the standard of care that the circumstances required him to meet.⁷⁶ Thus, it would be possible to plead negligence when harm was certain and even actually intentional;⁷⁷ liability criteria are “nested”.⁷⁸ The pursuer might want to choose this road for two reasons: because even if harm is certain, the defender might not have known it was, which excludes intention; or because, despite the fact that the defender knew, negligence might be easier to prove. The standard of care for negligence may and probably will be very high in the face of certain harm and, consequently, its breach will be easier to establish. This is the only sense in which speaking of a standard of care for intentional wrongdoing is possible: when harm is in fact intentional but the type of fault pleaded is not intention, but negligence.

3-40. The converse, however, is not true: intention as knowledge cannot be established on the face of mere likelihood of harm. If harm is simply probable, but not certain, only the road of negligence is open. Therefore, the degree of likelihood only determines the type of fault that can be pled in one direction, not in both.

⁷² Du Bois and Reid (n 61) 592; Cameron (n 65) 229.

⁷³ J M Thomson, “Damages for Nuisance” 1997 SLT (News) 177 at 178.

⁷⁴ D M Walker, *The Law of Delict in Scotland* (2nd edn, 1981) 166.

⁷⁵ Whitty, “Nuisance” (Reissue, 2001) para 95.

⁷⁶ A R White, “Carelessness, Indifference and Recklessness” (1961) 24 MLR 592 at 592, although he considers this consequence of the objective notion of negligence as a “logical absurdity”.

⁷⁷ P Cane, “*Mens Rea* in Tort Law” (2000) 20 OJLS 533 at 537; the incompatibility identified by Fitzgerald, *Salmond on Jurisprudence* (n 66) 380 stems from the fact that he considers negligence to be a “mental attitude”.

⁷⁸ P Cane, *Responsibility in Law and Morality* (2002) 88.

(4) The position of recklessness

3-41. As will be argued in chapter 5, the developments since *Kennedy v Glenbelle* have seemingly reduced recklessness to a mental state of pure knowledge of the likelihood of harm, disregarding – or at best, assuming – the element of indifference to risk that characterised the notion in its traditional understanding.⁷⁹ If one adopts this view, then it is arguable that recklessness is in fact in a continuum with intention as knowledge, as a “lighter” form of fault. Where likelihood of harm turns into certainty of harm, recklessness turns into intention.

3-42. This notion of recklessness, however, does not rely on a particular level of likelihood of harm. Accordingly, it simply cannot be in a continuum with negligence: they can actually both be attached to the same level of likelihood. Moreover, this notion of recklessness differs from negligence in nature, not in degree, for these forms of fault entail an assessment of different elements of the defender’s act or omission, just as intention as knowledge differed from negligence.⁸⁰ As a consequence, this version of recklessness seems to be the final nail in the coffin for the continuum notion.

D. CONCLUSIONS

3-43. The arrival of the *Kennedy v Glenbelle* model of fault in the Scots law of nuisance cannot be regarded simply as a rationalisation of the law already in place. It entailed the partial adoption of a foreign model that still requires to be clarified and adapted to its new environment.

3-44. Overall, explaining the links between the different forms of fault through the notion of continuum is unhelpful and even misleading. On the one hand, the concept that underlies the so-called continuum, namely likelihood of harm, conceptually excludes some of the forms of fault: malice and intention as purpose, insofar as they do not depend on any notion of likelihood; and conduct creating a special risk of abnormal damage, which depends on a notion that is more complex than mere likelihood and which does not constitute a separate form of fault but actually a form of strict liability. On the other hand, the notion of a continuum suggests that fault is simply the materialisation of a risk and, more importantly, that the level of likelihood predetermines the type of fault that can be pled by the pursuer. Yet both of these suggestions are misleading. Perhaps only recklessness – in the rather problematic version adopted after *Kennedy* – and intention as knowledge can be understood as differing in degree rather than in nature, but in general, it seems better to analyse each form of fault separately rather than try to find a unifying concept that might lead to a misunderstanding of the nature of the different categories. This separate analysis is offered in the chapters that follow.

⁷⁹ See paras 5-40 to 5-44 below.

⁸⁰ See para 3-34 above.

4 Intentional Nuisance

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A. INTRODUCTION

4-01. As explained in the previous chapter, in *Kennedy v Glenbelle Ltd*¹ the Inner House outlined a catalogue of types of conduct that amounted to fault in the context of nuisance. Listing malice and intent as the first two categories of fault,² Lord President Hope explained that a defender might be at fault “because his action was malicious, or because it was deliberate in the knowledge that his action would result in harm to the other party”.³

4-02. It was discussed earlier how the notion of malice in Scots law is used in two different senses: in the sense of bad motive or spite, and in the sense of intention without spiteful motive.⁴ It was also explained that Whitty seems to have adopted the first sense.⁵ He submits that malice is present where “the defender intends the harm to result in the sense that he knows that it is certain or substantially certain to result from his conduct, and in addition he acts with

¹ *Kennedy v Glenbelle Ltd* 1996 SC 95.

² 1996 SC 95 at 99.

³ 1996 SC 95 at 100.

⁴ See paras 2-09 and 2-10 above.

⁵ See para 3-20 above.

the spiteful motive of causing the harm without benefit to himself”,⁶ a view which emphasises the synonymy between malice and the Latin term *aemulatio*.⁷ Malicious conduct in the context of neighbour relations is, accordingly, the object of the doctrine of *aemulatio vicini*. Intention, in turn, is identified by Whitty with knowledge that harm will certainly result from conduct,⁸ a broad notion that is considerably expanded by the possibility of establishing knowledge constructively.⁹ This chapter will present arguments related to each of these two forms of fault, grouped here under the label of “intentional nuisance”, following Whitty’s division.¹⁰

4-03. With regard to malice, the doctrine of *aemulatio vicini* will be described briefly and its relation with the law of nuisance sketched out. This is followed by an evaluation of the position of malice as a form of fault for nuisance damages actions. It will be argued that malice in the context of nuisance, though not excluded in principle as a form of fault, has a marginal role given its practical shortcomings. Indeed, one of its few roles may be in cases where the particular invasion that resulted was not one the wrongdoer intended to cause (section B). As to intention, the chapter will offer an explanation of the broad notion of intention adopted in *Kennedy v Glenbelle* by reference to this decision, its sources, and subsequent case law. It will then argue that this notion, especially since it appears that it is possible to establish knowledge constructively, comes very close to a form of strict liability, so if the aim of the courts is a firm adherence to the fault principle, then some adjustments are needed (section C). The final section will offer some brief conclusions (section D).

B. MALICE

(I) *Aemulatio vicini* and its relation with nuisance

4-04. Interferences with the use and enjoyment of land are actionable, according to the doctrine of *aemulatio vicini*, when the sole or predominant motive of the defender’s conduct is a desire to harm the pursuer,¹¹ tested objectively by the absence of any benefit for the defender.¹² The doctrine has institutional authority¹³ as well as support in the courts.¹⁴

⁶ N R Whitty, “Nuisance” in *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol 14 (1988) 2089.

⁷ Whitty, “Nuisance” (1988) paras 2005, 2008, 2087, 2089 and 2104.

⁸ See para 3-10 above.

⁹ See paras 3-20 and 3-21 above.

¹⁰ See para 3-10 above.

¹¹ D M Walker, *The Law of Delict in Scotland* (2nd edn, 1981) 51.

¹² Whitty, “Nuisance” (1988) para 2008.

¹³ Bankton I.10.40; Kames, *Equity* 56; Erskine II.2.2; Hume, *Lectures* vol III, 207–208; Bell, *Principles* §§ 964.4 and 966.

¹⁴ For an enumeration of the judicial authority, see H McKechnie, “Reparation” in J L Wark (ed),

4-05. Doubts about whether this doctrine belonged to Scots law were raised by Lord Watson's widely discussed dictum in the English appeal in *Bradford (Mayor of) v Pickles* in 1895. After questioning the foundations of Bell's recognition of the doctrine and referring to the "loose" usage of the expression *in aemulationem vicini* by Scots lawyers, Lord Watson stated that he knew

of no case in which the act of a proprietor has been found to be illegal, or restrained as being in aemulationem, where it was not attended with offence or injury to the legal rights of his neighbour. [...] The law of Scotland, if it differs in that, is in all other respects the same with the law of England. *No use of property, which would be legal if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious.*¹⁵

4-06. Nowadays there is general agreement that, at least, the emphasised text is not an accurate description of the position in Scots law.¹⁶ The reasons that have been advanced for this conclusion were summarised in *More v Boyle*,¹⁷ a sheriff court decision in which *aemulatio vicini* was held to be relevant: (a) Lord Watson's observations in the *Pickles* case were *obiter*; (b) the very same Lord Watson, two years before, had recognised the principle as part of Scots law in *Young & Co v Bankier Distillery Co*,¹⁸ (c) his dictum is inconsistent with the principle as stated by the institutional writers and applied by courts; and (d) the Court of Session recognised the existence of the principle and applied it in a subsequent case (*Campbell v Muir*¹⁹). Doctrinal recognition of the principle has also been stable,²⁰ with possibly only two exceptions. Rankine challenged the soundness of the institutional writers' explanations and questioned the doctrine's practical relevance, as "it must seldom happen that an act of enjoyment of property should be actuated solely by malice".²¹ Mitchell doubted that the doctrine belonged in Scots law, relying on Rankine's view and Lord Watson's dictum.²²

4-07. The principle has been recognised as part of the law of Scotland in more recent cases, mainly involving interdict and most decided by the Outer

Encyclopedia of the Laws of Scotland, vol 12 (1931) para 1076; and a more updated list in N R Whitty, "Nuisance" (Reissue, 2001) in *The Laws of Scotland: Stair Memorial Encyclopedia* para 33 nn 2 and 3.

¹⁵ *Mayor of Bradford v Pickles* [1895] AC 587 at 598, emphasis added.

¹⁶ Walker, *Delict* 51; Whitty, "Nuisance" (Reissue, 2001) para 34.

¹⁷ *More v Boyle* 1967 SLT (Sh Ct) 38 at 39–40.

¹⁸ *Young & Co v Bankier Distillery Co* (1893) 20 R (HL) 76 at 77.

¹⁹ *Campbell v Muir* 1908 SC 387.

²⁰ J Guthrie Smith, *A Treatise on the Law of Reparation* (1864) 380–381; A T Glegg, *A Practical Treatise on the Law of Reparation* (1892) 258; McKechnie (n 14) paras 1076–1078; T B Smith, *A Short Commentary on the Law of Scotland* (1962) 661. See also D Johnston, "Owners and Neighbours: from Rome to Scotland" in R Evans-Jones (ed), *The Civil Law Tradition in Scotland* (Stair Society supplementary vol 2, 1995) 176.

²¹ J Rankine, *The Law of Land-Ownership in Scotland* (4th edn, 1909) 381–383.

²² W Mitchell, "Nuisance and Non-Natural Use of Property" in J L Wark (ed), *Encyclopedia of the Laws of Scotland*, vol 10 (1930) para 707.

House.²³ But although the principle was recognised in these cases, it was not actually applied, suggesting that *aemulatio vicini* is, as it was in the time of Lord Watson, a marginal doctrine.²⁴ If so, this is not exactly for the reasons Lord Watson advanced in his dictum, as will be explained: the doctrine operates fundamentally at the margins of nuisance.

4-08. Ascertaining the relation between the doctrine of *aemulatio vicini* and the law of nuisance is not a straightforward exercise. The simple answer is that they overlap: there are invasions done *in aemulationem* that cannot be characterised as nuisances; there are nuisances where the sole or predominant motive is not malicious; and there are invasions that can be described as nuisances *and* where the sole or predominant motive is malicious. In this area of overlap, therefore, we must determine how these principles interact, whereas outside the boundaries of this overlap, each doctrine operates its own principles.

4-09. The answer provided by Whitty for the way in which these principles interact in the overlap area is that in nuisance *aemulatio* has been absorbed by reasonableness.²⁵ When courts assess whether a disturbance is *plus quam tolerabile*, the defender's motive can be taken into account, and if this conduct is malicious it can "tip the scales",²⁶ making actionable an invasion that would not be so were the purpose legitimate. Malice "negatives reasonableness",²⁷ as suggested in *Armistead v Bowerman*.²⁸ A modern example can be found in *Summers v Crichton*,²⁹ where the purpose behind installing a set of outside lights was considered when trying to determine whether they were substantially intrusive so as to amount to a nuisance and, therefore, whether they should be removed. Malice was one of the elements that was considered in the assessment. The case, however, illustrates some of the aspects that will be discussed below, namely the evidential difficulty and malice's marginal role. Malice was considered not established, based on the defender's argument that the lights benefited him: as there had been some acts of vandalism, the lights were installed allegedly to prevent further incidents. This did not prevent the

²³ *Logan v Wang (UK) Ltd* 1991 SLT 580 at 584; *Davidson v Kerr* 1997 Hous LR 111 at para 3-25; *Summers v Crichton* 2000 GWD 40-1495 at paras 101-105; *Canmore Housing Association Ltd v Bairnsfather (t/a B R Autos)* 2004 SLT 673 at paras 13 and 17.

²⁴ E Reid, "Strange Gods in the Twenty-First Century: the Doctrine of *Aemulatio Vicini*" in E Reid and D Carey Miller (eds), *A Mixed Legal System in Transition: T B Smith and the Progress of Scots law* (Edinburgh Studies in Law vol 1, 2005) 239 at 246.

²⁵ Whitty, "Nuisance" (Reissue, 2001) para 70.

²⁶ F du Bois and E Reid, "Nuisance" in R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 576 at 585. This is also highlighted by Johnston (n 20) 194 n 74.

²⁷ Whitty, "Nuisance" (Reissue, 2001) para 69.

²⁸ *Armistead v Bowerman* (1888) 15 R 814 at 822 per Lord Young, although malice was not found in the case.

²⁹ *Summers v Crichton* 2000 GWD 40-1495.

court from finding that the lights were substantially intrusive, regardless of the absence of malice.³⁰

4-10. If malice is subsumed in the notion of reasonableness, “the distinctive role of *aemulatio vicini* [seems to be] to apply in cases where the doctrine of nuisance does not apply”,³¹ that is, outwith the overlap area. On this view, the doctrine of *aemulatio vicini* might find application where, rather than an invasion of his proprietary rights, the pursuer is deprived of a benefit to which he has no express right,³² or, in the words of Whitty, “extrinsic benefits enjoyed *de facto*”;³³ an uninterrupted view, access to light or air, privacy from neighbours overlooking one’s property, and casual water percolating to such property.³⁴

(2) Malice as a form of fault in nuisance

4-11. The contention that in nuisance malice has been fully absorbed by reasonableness entails denying malice’s role as a form of fault, a consequence that appears to be in conflict with the very model of fault adopted by *Kennedy v Glenbelle*. It will be argued that, although malice’s exclusion as a form of fault might be justified from a practical viewpoint, it is not excluded in principle and, moreover, there might still be (limited) room for it to operate as a relevant form of fault in nuisance.

(a) *The practical shortcomings of malice*

4-12. When the only remedy sought by the victim of a nuisance is interdict, the analysis of malice as subsumed in reasonableness is sufficient: the only consideration is whether the invasion is *plus quam tolerabile*, and malice is absorbed by this test.³⁵ Malice will be relevant when the invasion does not satisfy the “objective” factors of the test; if it does, recourse to malice is unnecessary, as was the case in *Summers v Crichton*.³⁶ When the remedy sought is damages, however, proof of fault is required, and this requirement could be fulfilled by proving malice. In the model presented by Whitty, therefore, malice serves a double function: it excludes reasonableness, and it constitutes fault. The first is predicated on the invasion or interference, even if it does not affect the invasion objectively; the second, on the motive of the conduct. The consequence is that if in a given case malice is irrelevant for the first test, that is, if the test is satisfied

³⁰ 2000 GWD 40-1495 at paras 104–105 per Lord Cameron of Lochbroom.

³¹ Whitty, “Nuisance” (Reissue, 2001) para 34. See also Johnston (n 20) 194 n 74.

³² Reid (n 24) 243–244.

³³ Whitty, “Nuisance” (Reissue, 2001) para 32.

³⁴ The contention finds support in the institutional writers: see Bankton IV.45.110; Erskine II.1.2.

³⁵ See, e.g. the English case of *Christie v Davey* [1893] 1 Ch 316 at 326–327.

³⁶ *Summers v Crichton* 2000 GWD 40-1495.

by the invasion's objective features, it might still be relevant for the second test, as the type of fault upon which the case rests. This would mean that it is still necessary to prove malice, not to turn the invasion into an unreasonable one, but to be able to fulfil the fault requirement of a damages claim.

4-13. The most obvious practical shortcoming of malice is evidential. Not only does it suffer from the inherent difficulty of proving mental states, which requires resort to mostly circumstantial evidence, but also the very configuration of malice makes it difficult to prove. Malicious conduct is motivated solely or predominantly by the desire to cause harm, so it requires proof of the absence of any other motive or, alternatively, that any other motive was just incidental. Although the absence of other motive is allegedly tested objectively by the absence of benefit for the defender, in the context of property use it will be rather difficult to find such total absence.³⁷ As for the incidental character of other motives, it is difficult to see how it can be tested objectively.

4-14. But besides being difficult to prove, malice seems unnecessary, given the availability of intention as a form of fault, and especially since Whitty's model adopted a broad notion of intention, as will be discussed below.³⁸ If the sole or predominant motive is harming the pursuer, and harm occurs, then one can straightaway conclude that the harm was intentional: the wrongdoer either acted in order to cause it or at least knew that it would result precisely because it is the reason he acted in the first place. Malicious conduct implies that the conduct was intentional.³⁹ If this is the case, and considering that intention is easier to prove than motives,⁴⁰ then "there seems no reason why pleaders would give themselves the additional burden of proving malice".⁴¹ So just as with the reasonableness test for invasions that are objectively *plus quam tolerabile*, malice is also unnecessary for the fault test. This conclusion, nevertheless, has a weakness.

(b) The limited role of malice

4-15. For the conclusion outlined above to hold, the invasion or harm to which motive and intention refer must converge. But it is possible that they do not, and here lies the conclusion's weakness: the defender might have considered causing harm to his neighbour as the sole or main motive to act, and yet not have envisaged the particular harmful consequences that ensued. I can start a

³⁷ See e.g. "*Corporation of Bradford v Pickles* (Note)" (1895) 7 JR 413, arguing that the defendant's attempt at improving his bargaining position in *Mayor of Bradford v Pickles* [1895] AC 587 was enough benefit for this purpose.

³⁸ See paras 4-17 to 4-19 below.

³⁹ P Cane, "*Mens Rea* in Tort Law" (2000) 20 OJLS 533 at 539.

⁴⁰ Cane (n 39) 543.

⁴¹ G D L Cameron, "Muddy Pavements and Murky Law: Intentional and Unintentional Nuisance and the Recovery of Pure Economic Loss" 2001 JR 223 at 224.

fire very close to my neighbour's window only to disturb him (malice), and the particular consequence that I plan to cause or that I know will result is his house being filled with smoke to his inconvenience (intended consequence), but I do not mean to and ignore that the smoke will permanently stain his walls (unintended consequence). The issue, of course, depends on the level of generality with which we describe consequences. But in this case, strictly speaking, the particular consequence cannot be seen as covered by intention, either in the sense of purpose or in the sense of knowledge. A possibility of classifying this harm as intentional would be open if we can rely upon the notion of constructive knowledge: even if I did not know that my neighbour's walls would be stained, I should have known. But the possibility of establishing knowledge constructively for the purposes of intention is at least questionable. An argument is made below to justify the exclusion of this possibility,⁴² and if this argument is sound, then the only possibility to succeed in proving fault in a case like the one described would be by proving malice.

4-16. To this situation can be added those cases where the invasion, absent malice, would be reasonable. For in such a case, the defender will need to prove malice and it will then play both roles: it will turn the invasion into an unreasonable one and it will also fulfil the fault requirement, as mooted in *Armistead*.⁴³

C. INTENTION

(1) A broad notion of intention

4-17. As has been explained, the concept of intention adopted in Whitty's model is a broad one, which includes not only the core content covered by all notions of intention, that is, the purpose or plan to achieve the action's consequences either as an end or as means to an end (what we have called so far "intention as purpose"), but also the knowledge of the consequences that are substantially certain to result from the action, even if not desired and only a side-effect of the conduct (what we have called so far "intention as knowledge"). As mentioned earlier, the latter has been called "oblique"⁴⁴ or "indirect"⁴⁵ intention. It was also explained that, on a close reading, it seems that intention as knowledge is included in the model while intention as purpose is not. It is assumed, however, that this was not intended and, more importantly, it would be logically unsound to hold such a view.⁴⁶ Consequently, this section proceeds on the assumption that both versions of intention are effective forms of fault in nuisance.

⁴² See paras 4-22 to 4-42 below.

⁴³ *Armistead v Bowerman* (1888) 15 R 814.

⁴⁴ Cane (n 39) 535.

⁴⁵ J Neethling and J M Potgieter, *Neethling – Potgieter – Visser Law of Delict* (7th edn, 2015) 133.

⁴⁶ See para 3-20 above.

4-18. According to *Kennedy v Glenbelle*, indeed, the requirement of *culpa* can be established when action “was deliberate in the knowledge that his action would result in harm to the other party”.⁴⁷ This largely reproduces Whitty’s description of intentional conduct: “[t]he defender has knowledge that the harm will result, or is substantially certain to result, from his otherwise lawful and even laudable conduct”,⁴⁸ which in turn coincides with the way intention as knowledge is defined in the American Law Institute’s *Restatement Second of Torts*, both in general and for the purposes of nuisance.⁴⁹ Prosser and Keeton, commenting on the Restatement (2d), identified as one of the three most basic elements of intention the fact that it “extends not only to having in the mind a purpose (or desire) to bring about given consequences but also to having in mind a belief (or knowledge) that given consequences are substantially certain”.⁵⁰ It does not cover “mere knowledge of statistical probability where there is no certainty in the concrete instance”.⁵¹

4-19. This is the form of intention that has been pled in cases following *Kennedy v Glenbelle*, at least as one of the alternatives advanced to assert fault. In *Anderson v White*, the contention that the third defenders knew, because of the complaints made to them, that their actions – allowing the water level of a dam to rise – were causing damage was considered a relevant averment of fault.⁵² In *Powrie Castle Properties Ltd v Dundee City Council*, in turn, the knowledge of certain damage – caused by failing to waterproof a wall – was pled by the pursuers and admitted by the defenders.⁵³ In *Esso Petroleum Co Ltd v Scottish Ministers*, as in *Anderson*, it was held that after the first defenders were alerted by the pursuers of the existence of the nuisance – contamination by the emanation of deleterious substances from the defenders’ land – the pursuers were in a position to found upon an intentional nuisance that entitled them to an inquiry.⁵⁴ More recently, in the case of *Chalmers v Diageo Scotland Ltd*, the pursuers argued that “the defenders knew or ought to have known that the release of ethanol vapour from their property would be liable to cause loss”,⁵⁵ though the use of the word “liable” in this context hinders the determination of the particular type of fault averred, i.e. whether they were averring intention or recklessness. In the

⁴⁷ *Kennedy v Glenbelle Ltd* 1996 SC 95 at 100 per Lord President Hope.

⁴⁸ Whitty, “Nuisance” (1988) paras 1089 and 1105.

⁴⁹ American Law Institute, *Restatement Second of Torts* (1979) §§ 8A and 825.

⁵⁰ W P Keeton (ed), *Prosser and Keeton on the Law of Torts* (5th edn, 1984) 34.

⁵¹ P J Fitzgerald (ed), *Salmond on Jurisprudence* (12th edn, 1966) 370.

⁵² *Anderson v White* 2000 SLT 37 at 40.

⁵³ *Powrie Castle Properties Ltd v Dundee City Council* 2001 SCLR 146 at 150.

⁵⁴ *Esso Petroleum Co Ltd v Scottish Ministers* [2015] CSOH 21, 2015 GWD 7-134 at para 33. A subsequent decision in this case (*Esso Petroleum Co Ltd v Scottish Ministers* [2016] CSOH 15, 2016 SCLR 539) was only concerned with the scope of non-delegable duties of care and, therefore, did not considered the issue of intention. For a discussion of the notion of non-delegable duties see paras 6-79 to 6-82 below, and see paras 9-45 to 9-54 below for their operation in the particular context of liability for withdrawal of support.

⁵⁵ *Chalmers v Diageo Scotland Ltd* [2017] CSOH 36, 2017 GWD 9-126 at para 9, cond 5.

case of *Morris Amusements Ltd v Glasgow City Council*, however, the pursuers' pleading of intention was considered short of an averment of the specific state of knowledge required by *Kennedy*.⁵⁶ The pursuers had been unable to aver specific knowledge on the part of the defenders about the certain or likely harmful consequences that demolition works would cause to the support of the pursuer's building.⁵⁷

4-20. As for *Kennedy v Glenbelle* itself, it has been seen as a case of intentional nuisance as well,⁵⁸ but this cannot be concluded so clearly from the report. Certain paragraphs describing the pursuers' pleadings point to the defenders' knowledge of the certainty of the harm, while others point to their knowledge of its likelihood, so it could be understood that the fault alleged was located "towards the reckless [. . .] end of the intentional part of the continuum".⁵⁹

(2) Constructive knowledge?

4-21. It might be questioned whether it is appropriate to extend the notion of intention so as to include knowledge of consequences that will certainly follow from the conduct as side-effects, that is, to admit intention as knowledge as a form of fault.⁶⁰ This is, however, the position that *Kennedy v Glenbelle* undoubtedly inherited from Whitty and the Restatement (2d). But Whitty's position went even further. In his view, harm is also intentional when the defender "knew, or ought to have known, that the invasion was certain, or substantially certain, to result from his conduct".⁶¹ Knowledge, then, can be established constructively. In the words of Cameron,

[it] appears from the dicta cited above [excerpts from *Chalmers, Edinburgh Rly Access & Property Co* and *Noble's Trs* quoted by Lord Hope in *Kennedy*] that there is no need to inquire into the state of mind of the defender to determine his or her knowledge. Just as negligence is concerned with what the reasonable person in the defender's position ought to have foreseen when directing his mind to the likely consequences of his conduct, so too in this form of intentional liability, courts will impute constructive knowledge.⁶²

4-22. This possibility is problematic for three reasons: first, it seems to conflate the mental state that constitutes intention with the way of proving it; secondly, the authority cited does not provide enough support for this contention; thirdly,

⁵⁶ *Morris Amusements Ltd v Glasgow City Council* [2009] CSOH 84, 2009 SLT 697 at para 46.

⁵⁷ [2009] CSOH 84, 2009 SLT 697 at para 35.

⁵⁸ Whitty, "Nuisance" (Reissue, 2001) para 105; G D L Cameron, "Scots and English Nuisance. . . Much the Same Thing?" (2005) 9 EdinLR 98 at 118.

⁵⁹ G D L Cameron, "Making Sense of Nuisance in Scots Law" (2005) 56 NILQ 236 at 262–263.

⁶⁰ For this discussion, see para 2-11 above.

⁶¹ Whitty, "Nuisance" (1988) para 1105, emphasis added.

⁶² Cameron (n 59) 263.

and more importantly, it appears to be contrary to the fault-based liability rule enshrined by *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council*.⁶³ Each of these problems will be addressed below.

(a) *Mental states: content and proof*

4-23. Mental states entail an inherent difficulty of proof; intentions are not “directly observable”.⁶⁴ For this reason, the pursuer is limited as to the elements upon which he can rely to prove such mental state. If the defender’s own account does not help, then the pursuer is left only with inferences from the conduct and its circumstances.⁶⁵ But it is a different thing to say that intention extends to the consequences that the defender ought to have known, if by this we mean what he should have known according to an objective standard. As has been said in the context of criminal law, “[i]ntention, then, is subjective, but is proved objectively”, meaning that evidence might be circumstantial but this does not turn knowledge into an objective standard.⁶⁶ The distinction is clearly set out by Prosser and Keeton, again commenting on the Restatement (2d):

Since intent is a state of mind, it is plainly incorrect for a court to instruct a jury that an actor is presumed to intend the natural and probable consequences of the actor’s conduct; but it is correct to tell the jury that, relying on circumstantial evidence, they may infer that the actor’s state of mind was the same as a reasonable person’s state of mind would have been.⁶⁷

4-24. The approach indicated by Cameron seems to extend intention from the foreseen consequences to the foreseeable consequences, and consequently objectivise knowledge, a concession that changes the nature of the concept. This “inferred intention”, in the words of Cane, “is not a frame of mind at all; rather it consists of a contextualised interpretation of what the accused did and said based on a judgment about the way people normally (ought to) behave”.⁶⁸

4-25. In the context of justifying the inclusion of intention as knowledge, Cameron points to South Africa as a jurisdiction that admits it as a form of fault (*dolus eventualis*), and the point of objective knowledge is addressed.

⁶³ *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17.

⁶⁴ Cane (n 39) 542.

⁶⁵ Cane (n 39) 542; R A Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (1990) 28. See more generally on evidence of states of mind, M Ross, J Chalmers and I Callander, *Walker and Walker The Law of Evidence in Scotland* (5th edn, 2020) paras 7.11 ff.

⁶⁶ G H Gordon, *The Criminal Law of Scotland*, vol 1 (M G A Christie ed, 3rd edn, 2000) para 7.28.

⁶⁷ Keeton, *Prosser and Keeton on the Law of Torts* (n 50) 36.

⁶⁸ P Cane, *Responsibility in Law and Morality* (2002) 47.

He explains that the difference between *Kennedy's* notion of intention and the South African *dolus eventualis* is that:

in the latter, knowledge of the harmful consequence must be subjective and actual. In Scotland it appears that knowledge can be treated objectively. The South African authors consider that objective knowledge belongs properly to recklessness which they equate with gross negligence.

However, he then justifies dispensing with the requirement of actual knowledge by clarifying that Scotland did not follow South African but American law.⁶⁹ This is, however, a curious reason to disregard the requirement: American law – as explained⁷⁰ – does not admit constructive knowledge either and, moreover, objective knowledge in the Restatement (2d) also belongs to recklessness, which is essentially tied to negligence,⁷¹ just as it is in South African law.

4-26. The relevance of distinguishing between proving actual knowledge objectively and relying upon an objective standard of knowledge lies in the admission of ignorance as a defence. If the requirement is actual knowledge, the pursuer might be able to say that any reasonable person in the defender's circumstances would have had the knowledge, and that the defender is a reasonable person, so he must have had the knowledge; but the defender can then lead evidence in order to show that he was justified in his ignorance. If the requirement is just constructive knowledge, the pursuer only needs to go as far as the first statement. Of course, one could argue that the reasons that justify ignorance can be factored into the "defender's circumstances", but to the extent that these reasons are exclusive to the particular defender, this entails abandoning the idea of a standard of knowledge. For instance, in a given case a reasonable person might have known that harm would result but the particular person adopted additional precautions to avoid it, precautions that turned out to be ineffective. If his constructive knowledge is determined by what a reasonable person that took those adequate precautions would have known, then we are building the "standard" to fit the particular defender. What in effect is established is his actual knowledge.

4-27. In stating that, for intentional harm, knowledge could be established constructively, Cameron himself would appear to have foreseen the possibility of justified ignorance:

There is of course scope to argue that a defender did not and could not have known that a particular consequence would transpire. We do not yet have case law on this point. When the issue does emerge, as doubtless it will given time, Scots courts should avoid the English solution of imposing a requirement of *reasonable foreseeability*

⁶⁹ Cameron (n 59) 264.

⁷⁰ See para 3-21 above.

⁷¹ See paras 3-16 and 3-17 above.

as happened in *Cambridge Water Co v Eastern Counties Leather*,⁷² simply because this terminology belongs properly to negligence and its use in the context of Scots nuisance will serve only to confuse the doctrines once more.⁷³

If this statement is correct, as is consistent with the argument here advanced, then what does it mean that in intention, knowledge can be established constructively? This must entail that it can be proved objectively.

(b) *Scottish authority (or its absence)*

4-28. The fact that the very source of the model, i.e. the Restatement (2d), does not contemplate the possibility of establishing knowledge constructively would not, of course, be a sufficiently strong reason to reject the concession if support for it could be found in Scots law. But this is doubtful: even though *Kennedy*'s fault model is borrowed from Whitty, as quoted above⁷⁴ Lord President Hope's definition of intention did not include knowledge of the consequences that the defender ought to have known.⁷⁵ Cameron, in turn, calls in support the authorities cited by the Lord President, cases where he found the distinction between intentional and negligent harm. These cases, however, were decided in the context of dangerous activities, identifying a special treatment of fault for this type of operations, and, furthermore, the distinction made in these cases is not between intentional and negligent conduct but between avoidable and unavoidable harm. This requires a more detailed explanation.

4-29. The line of cases begins with *Chalmers v Dixon*, where Lord Justice-Clerk Moncreiff pronounced his famous dictum in the context of an activity that was considered hazardous:

If a man puts upon his land a new combination of materials, *which he knows, or ought to know*, are of dangerous nature, then either due care will prevent injury, in which case he is liable if injury occurs for not taking that due care, or else no precautions will prevent injury, in which case he is liable for his original act in placing the materials upon the ground.⁷⁶

His conclusion was that "*culpa* [did] lie at the root of the matter", but that on the facts of the case it was "not necessary to prove specific fault [as it was]

⁷² *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264.

⁷³ Cameron (n 59) at 263, emphasis in the original.

⁷⁴ See para 4-18 above.

⁷⁵ The possibility was considered by the Lord Ordinary (Abernethy) in *Kennedy v Glenbelle Ltd* 1995 GWD 7-398 at 24, yet by reference to the same authority that this section holds to be insufficient for supporting such a conclusion, in particular, the case of *Noble's Trs v Economic Forestry (Scotland) Ltd* 1988 SLT 662: see para 4-33 below. I am grateful to Scott Wortley for helping me trace the Lord Ordinary's decision.

⁷⁶ *Chalmers v Dixon* (1876) 3 R 461 at 464, emphasis added.

necessarily implied in the result”.⁷⁷ Lord Moncreiff’s distinction must be understood in this light: he was arguing that, when someone engages in activity that he *knows or ought to know* is dangerous, fault can be inferred from the fact that damage has resulted: if damage was not avoidable, then fault consisted in engaging in the activity in the first place; if it was avoidable, then fault consisted in not taking due care to avoid it.

4-30. The dictum does not seem to afford sufficient authority for the possibility of establishing knowledge constructively, in the sense of an objective standard for the purposes of pleading intention, at least not generally. Because of the context in which the dictum was pronounced, it is possible to conclude that it sought to present a regime applicable only to dangerous activities.⁷⁸ For this purpose, knowledge (actual or constructive) was considered relevant and its object was the dangerous nature of the activity. Indeed, Lord Moncreiff explained that actual knowledge of the danger was not necessary, because requiring it could introduce an arbitrary difference by virtue of which the defender who knew the dangerous nature of his activity would be liable, but the defender who ignored it would “escape liability in consequence of his ignorance”.⁷⁹ Even in *Kennedy v Glenbelle* itself, reference to *Chalmers* is made, following a colon, after mentioning, and in support of, conduct giving rise to special risk of abnormal damage as a type of fault implied in the resulting damage.⁸⁰

4-31. In any case, the distinction made in *Chalmers* is not coincident with the distinction between intention and negligence made both in the Restatement (2d) and in Whitty’s model: in *Chalmers*, the relevant element is the possibility of avoiding harm by the adoption of precautions, whereas the defining element that underlies the distinction in the model presented by Whitty and the Restatement (2d) – in its simple version – is the likelihood of harm. The fact that damage is unavoidable by the adoption of precautions proves, of course, that harm is certain to result, but the converse is not true. Avoidable damage can still be certain to result if the defender has done nothing to prevent it – and precisely because of that. Furthermore, it is not clear from the dictum which precautions are taken as a reference to draw the line between the two situations, i.e. *due* precautions or *any* precautions.⁸¹ This simply reinforces the argument, because if the point of reference is *due* precautions, then harm is not even certain to result in the first type of case, since it could still be avoidable – except not by due care, but by a higher level of care. Consequently, if harm is not certain, then it can hardly be intentional in the sense discussed here.

⁷⁷ (1876) 3 R 461 at 464.

⁷⁸ This is, in fact, one of the main cases cited by Whitty, “Nuisance” (Reissue, 2001) para 108 when he explains conduct giving rise to special risk of abnormal damage.

⁷⁹ *Chalmers v Dixon* (1876) 3 R 461 at 464.

⁸⁰ *Kennedy v Glenbelle Ltd* 1996 SC 95 at 99 per Lord President Hope.

⁸¹ For a discussion of this point, see para 6-69 below and more generally paras 7-54 to 7-64 below.

4-32. In sum, it seems that the dictum in *Chalmers* cannot be understood both as supporting a special regime for particularly hazardous activities and also, at the same time, as establishing the distinction between intentional and negligent conduct, allowing “objective” knowledge to serve as the basis of intention.

4-33. In the later case of *Edinburgh Rly Access & Property Co*⁸² the distinction seems to serve a similar purpose to the one in *Chalmers*: it is used as the basis of certain inferences of fault. If, it is said, the necessary or natural result of the activity is damage, then the defender is not entitled to carry out the operation; if damage is not the necessary or natural consequence but in fact happens, there is an inference of negligence.⁸³ In this case, however, reference to knowledge is omitted, so the inference seems to be based only upon the nature of the activity, which reinforces the point: we cannot use this passage as authority for the admission of objective knowledge. Furthermore, the passage comes from the Lord Ordinary’s judgment, which was reversed by the Inner House,⁸⁴ so its use as authority for any proposition seems questionable.

4-34. The distinction, however, was again reproduced in the case of *Noble’s Trs v Economic Forestry (Scotland) Ltd* in 1987:

A landowner will be liable to his neighbour if he carries out operations on his land which will or are likely to cause damage to his neighbour’s land however much care is exercised. Similarly will a landowner be liable in respect of carrying out operations [...] if it is necessary to take steps in the carrying out of those operations to prevent damage to a neighbour, and he [...] does not take or instruct those steps. In the former case the landowner’s culpa lies in the actual carrying out of his operations *in the knowledge actual or implied* of their likely consequences. In the latter case culpa lies in not taking steps to avoid consequences which he should have foreseen would be likely to flow from one method of carrying out the operation.⁸⁵

Here, however, the distinction is slightly different, which indeed confirms the view of it as the basis for a special regime for dangerous activities: the consequences are no longer certain but only likely. The key element for intention, namely the knowledge of harm that is certain to result, disappears in this formulation. Consequently, what we have here is, again, not a distinction between intentional and negligent conduct but between activities where harm is or is not preventable. Therefore, the reference to “knowledge actual or implied” can hardly be understood as referring to the knowledge required for intention. *Noble’s Trs* has indeed, like the previous cases, been seen as an application of the special regime for dangerous activities – in this particular case, in the form

⁸² (1903) 5 F 299.

⁸³ *Edinburgh Railway Access and Property Co v John Ritchie & Co* (1903) 5 F 299 at 302.

⁸⁴ (1903) 5 F 299 at 303.

⁸⁵ *Noble’s Trs v Economic Forestry (Scotland) Ltd* 1988 SLT 662 at 664, emphasis added.

of a *presumption of intention* given the risk attached to the activity, not actual intention.⁸⁶

4-35. If we understand these cases as applying a special fault regime for particularly dangerous activities, the idea of constructive or objective knowledge in the sense of a standard can be consistent with such a regime. But a general admission of such a standard is in no sense consistent with the generality of intention cases. One could argue that any case where harm is certain to result is dangerous enough to justify the application of the special regime, so the distinction is irrelevant. And it is true that there is a large area of overlap. However, these rules do not completely coincide in their scope of application, for the special regime of liability for dangerous activities is not only based on likelihood of harm, but also – and fundamentally – on a certain extent or gravity of the potential harm.⁸⁷ Slight – but not trivial – interferences that are certain to happen do not make an activity particularly hazardous, yet they could give place to a finding of intention if the defender knew they would happen.

4-36. The case of *Anderson v White*⁸⁸ has also been referred to as authority for the proposition that actual knowledge is not necessary.⁸⁹ In this case, it was stated that when the pursuer avers a deliberate action,

[t]he only further requirement [is] to aver that the defenders knew that their actions would result in harm to the pursuers, or alternatively that they had no regard to the question whether their action was likely to cause such harm. The pursuers say that the defenders knew of the resultant harm because of complaints, and that in any event *the likelihood of the harm was obvious*. That, according to my understanding of the cases cited [*RHM Bakeries*, *Noble's Trs* and *Kennedy*], is sufficient to make a relevant case.⁹⁰

It is quite clear that in the first sentence of the quoted dictum, the court was trying to replicate the distinction between intentional and reckless harm in the way *Kennedy* presented it. *Anderson* is probably cited to support the possibility of establishing knowledge constructively because of the emphasised phrase: the court considered that it was relevant pleading to say that “the likelihood of the harm was obvious”. Now, it is not clear to which of the alternatives the phrase refers, but most likely to the alternative of recklessness; it is the *likelihood* of harm which was allegedly obvious and not the certainty of harm, so it seems that the pursuer is attempting a second option in case he fails to prove the knowledge required by intention. This raises the question of whether the mental state described as recklessness can be established constructively, but at least for

⁸⁶ J M Thomson, “Damages for Nuisance” 1997 SLT (News) 177 at 178.

⁸⁷ See paras 7-37 to 7-39 below.

⁸⁸ 2000 SLT 37.

⁸⁹ G D L Cameron, “Neighbourhood Liability in Scotland 1850–2000” in J Gordley (ed), *The Development of Liability between Neighbours* (2010) 132 at 151.

⁹⁰ 2000 SLT 37 at 40, emphasis added.

the purposes of intention, the case does not seem to support the proposition. We will come back to this question in chapter 5.⁹¹

4-37. More recently, in *Chalmers v Diageo Scotland Ltd* the Lord Ordinary considered that the pursuers' averment that "the *defenders knew or ought to have known* that [their conduct] would be liable to cause loss" was enough to allow the case to go to proof.⁹² This could be seen as allowing the establishment of knowledge constructively as long as the word "liable" is taken to mean substantial certainty, which seems to stretch the meaning of the word. Otherwise, just as in *Anderson*, the question about constructive knowledge is, in fact, related to recklessness, not to intention.

4-38. Finally, the case of *Morris Amusements Ltd v Glasgow City Council* gave the court the opportunity of deciding this particular point, for the first defenders argued that knowledge both for intention and recklessness must be actual.⁹³ But given that the pursuers did not actually aver any specific knowledge, and that for this reason the nuisance case was held to be irrelevant, the issue of whether knowledge had to be actual or could indeed be constructive was neither discussed nor decided by the court.

4-39. In conclusion, it appears that the possibility of establishing knowledge constructively does not find strong support in Scottish authority.

(c) Elision with strict liability?

4-40. There is, in addition, a perhaps unnoticed consequence of admitting the possibility of establishing knowledge constructively: it makes liability for "intentional" harm tantamount to a form of strict liability, contrary to the rule established so clearly by *RHM Bakeries*.⁹⁴ For in the end, the only thing that is required is that harm was foreseeable, regardless of whether the defender foresaw it. It must be noted that the fact that foreseeability – as opposed to foresight – is enough for negligence does not mean that it should be enough for intention. What constitutes negligence is not foreseeability of harm itself, but the breach of a standard of care. In other words, it is the defender's conduct that is assessed on the face of foreseeable harm: the level of precautions taken in engaging with an activity. In intention, on the other hand, fault is not predicated on the defender's conduct but on his "mental disposition" while engaging in the activity. It is this mental disposition that constitutes fault. Consequently, if the only thing that is required from the defender is constructive knowledge of the harm that would certainly follow, that is, foreseeability of such harm, then

⁹¹ See paras 5-45 to 5-51 below.

⁹² *Chalmers v Diageo Scotland Ltd* [2017] CSOH 36, 2017 GWD 9-126 at para 12, emphasis added.

⁹³ *Morris Amusements Ltd v Glasgow City Council* [2009] CSOH 84, 2009 SLT 697 at para 16.

⁹⁴ *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17.

effectively no mental disposition is required. Liability is based simply on that foreseeability. And that is a form of strict liability.⁹⁵

4-41. It could be argued that the requirement here is different from mere foreseeability, because harm must be certain. But certainty is a separate requirement. Foreseeability refers to the ability or possibility to anticipate harm; certainty, to the probability of its occurrence.⁹⁶ Certainty of harm simply defines the scope of application of the liability rule, as is typical with any strict-liability rule. It will be argued in chapter 7 that particularly dangerous activities attract strict liability, and the level of danger required for the application of this liability rule is defined by the interaction of likelihood and extent of harm, among other elements.⁹⁷ In the rule under analysis here, certainty of harm would play a similar role: liability would be imposed by reference to a particular level of likelihood of harm. In both cases, harm must be foreseeable. It is not clear, then, why in the case of dangerous activities we speak of strict liability, whereas in the case of certain harm we speak of fault-based liability – more specifically, liability based on intention – in circumstances where the mental state of the defender is the same.

4-42. In sum, a construction of *Kennedy v Glenbelle* that allows knowledge to be established constructively for the purposes of intention ends up partly undoing what *RHM Bakeries* was meant to do with nuisance: finally to establish a general fault-based liability rule and to limit special regimes of liability or proof to special circumstances. It might be that certainty of harm is a special circumstance that does in fact deserve to be treated specially, through a rule of strict liability. But disguising this as an application of the general fault-based liability rule certainly does not help the understanding of the law, nor does it promote a conceptually adequate discussion of it. Otherwise, if what is intended is to adhere rigorously to the principle enshrined in *RHM Bakeries*, only actual knowledge should be accepted for the purposes of establishing intentional nuisance.

D. CONCLUSIONS

4-43. It can be concluded that malice in the context of nuisance, though absorbed by reasonableness for the purposes of assessing the invasion itself, is not, in accordance with *Kennedy v Glenbelle*, excluded in principle as a form of fault tending to fulfil the fault requirement imposed by *RHM Bakeries*. It

⁹⁵ See para 2-35 above.

⁹⁶ In the context of negligence, Wilson highlights the distinction between probability and foreseeability: “A consequence can be a reasonably foreseeable consequence even although it is not a very probable consequence”. See W A Wilson, *Introductory Essays on Scots Law* (2nd edn, 1978) 124.

⁹⁷ See the detailed explanation in paras 7-36 to 7-72 below.

has, however, a marginal role in this field given its practical shortcomings: it is difficult to prove and is mostly unnecessary given the possibility that is open for the pursuer to aver and prove other – easier – forms of intention. Its main role is limited to interferences that, if malice were absent, would not amount to a nuisance and, possibly, to those cases of nuisance where the particular harm that resulted was not one the wrongdoer intended to cause.

4-44. With regard to intention, the model adopted by *Kennedy* for intentional harm features a comprehensive notion that admits as forms of intention both having the purpose of bringing about particular consequences and having the knowledge that those consequences will certainly follow. The interpretation of the latter form, however, proves problematic. Contrary to what has been argued by recent mainstream doctrinal work in Scotland, it is submitted that knowledge should actually be established; constructive knowledge is not enough. Admitting the latter as a possibility confuses the content of a mental state with its proof; it does not find adequate support in the available authority; and more importantly, it promotes an interpretation of *Kennedy* that contradicts *RHM Bakeries*, the very decision that it is trying to explain and complement.

5 Unintentional Nuisance

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A. INTRODUCTION

5-01. As explained in chapter 3, in the case of *Kennedy v Glenbelle Ltd*,¹ the Inner House outlined a catalogue of types of conduct that amounted to fault in the context of nuisance. Chapter 4 discussed the first two forms listed by Lord President Hope in that case; this chapter, in turn, will address two others: negligence and recklessness.² According to Lord Hope, in the case of negligent nuisance “the ordinary principles of the law of negligence will provide an equivalent remedy”, while a reckless defender was one who “had no regard to the question whether his action, if it was of a kind likely to cause harm to the other party, would have that result”.³

5-02. Unlike in the case of intentional nuisance, the issues associated with negligent nuisance predate the decision in *Kennedy v Glenbelle*. They

¹ *Kennedy v Glenbelle Ltd* 1996 SC 95.

² 1996 SC 95 at 99.

³ 1996 SC 95 at 100.

crystallised when in 1985 *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council*⁴ imposed a requirement of fault for nuisance. *Kennedy*, however, did not help matters by expressly allowing negligence to be pled as a relevant form of fault for a damages claim in nuisance. That seemed to mean that when a defender had interfered negligently with the pursuer's use and enjoyment of his property, two alternatives would in principle be open for the latter: to ground his claim on (the delict of) negligence, or to ground it on nuisance and plead negligence as the required basis of fault.⁵

5-03. In fact, the meaning of Lord Hope's reference to the ordinary principles of the law of negligence is not entirely clear, and various interpretations have been offered,⁶ but nowadays the predominant doctrinal view is that the statement must mean that where the form of fault pled is negligence, then the claim must be dealt with under the ordinary principles governing (the delict of) negligence.⁷ Two main reasons are advanced for this conclusion. The first reason is that, if the claims are dealt with under nuisance rules, the *plus quam tolerabile* test that is peculiar to nuisance would have to be applied. This test, in turn, would not be suitable for unintentional invasions because it is conceptually incompatible with negligence and sets a standard of care so high that it turns this allegedly negligence-based liability into strict liability, in contravention of *RHM Bakeries*. The second reason is that nuisance rules would introduce unjustified differences between defenders that have negligently caused a nuisance and defenders that have negligently committed other wrongs, especially with regard to the requirements of the pleadings, the recovery of pure economic loss, liability for omissions, and the relevance of abnormal sensitivity in respect of the pursuer or his property.

5-04. Recklessness, in turn, has been described as “the grey area”,⁸ the veil under which intention and negligence shade into each other.⁹ As explained in chapter 2, recklessness is an underdeveloped notion in the context of private law.¹⁰ In the particular context of nuisance, the same picture presents itself: until its identification in *Kennedy* as a separate form of fault, it seldom appeared in nuisance cases, and when it did, it was mostly in connection with negligence.

⁴ *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17.

⁵ For the distinction between the delict of negligence and negligence as a form of fault, see para 2-20 above.

⁶ See J M Thomson, “Damages for Nuisance” 1997 SLT (News) 177 at 178; E Reid, “The Basis of Liability in Nuisance” 1997 JR 162 at 168; G D L Cameron, “Muddy Pavements and Murky Law: Intentional and Unintentional Nuisance and the Recovery of Pure Economic Loss” 2001 JR 223 at 228–230.

⁷ N R Whitty, “Nuisance” in *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol 14 (1988) para 2106; Cameron (n 6) 228.

⁸ G D L Cameron, “Scots and English Nuisance . . . Much the Same Thing?” (2005) 9 EdinLR 98 at 118.

⁹ G D L Cameron, “Neighbourhood Liability in Scotland 1850–2000” in J Gordley (ed), *The Development of Liability between Neighbours* (2010) 132 at 150.

¹⁰ See para 2-24 above.

5-05. This chapter will present arguments related to each of these two forms of fault, grouped here under the label of “unintentional nuisance”, following Whitty’s division.¹¹ A third form of unintentional nuisance, that is, the one derived from conduct giving rise to special risk of abnormal damage, is the subject of chapters 6 and 7.

5-06. Regarding negligence, the chapter addresses the two reasons advanced to support the contention that negligent nuisance must be dealt with under the ordinary rules and principles of (the delict of) negligence. It will be argued, first, that the *plus quam tolerabile* test can indeed be applied in the case of negligent nuisances, and secondly, that negligent nuisance does not introduce the alleged unjustified differences, and more generally that the highly contextual nature of negligence allows the adaptation of its different elements to the landownership context, reaching results that are consistent with those derived from negligent nuisance. Therefore, negligence can indeed be accommodated as a form of fault within the framework of nuisance (section B). As to recklessness, it will be argued first that *Kennedy* changed the understanding of recklessness by reducing it to a state of pure knowledge of likelihood of harm that cannot readily be categorised as a form of fault. This notion becomes even more problematic in nuisance if it is accepted that this knowledge can be established constructively (section C). The final section will offer some brief conclusions (section D).

B. NEGLIGENCE

(1) Application of the *plus quam tolerabile* test to negligent nuisance

5-07. As explained above,¹² the first suggested reason why negligent nuisances must allegedly be addressed according to the general rules governing (the delict of) negligence is that the nuisance test of reasonableness of the invasion, the *plus quam tolerabile* test, is not suitable for unintentional interferences with the use and enjoyment of property. Both of the reasons presented to justify this argument will be considered below, in order to argue that the *plus quam tolerabile* test can indeed be applied to negligent nuisances. It must be noted, however, that the practical relevance of this discussion might be rather limited, for in most cases of negligent nuisances, the type of invasion is physical harm to property¹³ and it is thought that, at least as a general rule, invasions of this nature always meet the *plus quam tolerabile* test.¹⁴ Nonetheless, the *plus quam tolerabile* test can play a role when the negligent conduct causes a non-physical interference, and especially when economic loss follows such interference.

¹¹ See para 3-10 above.

¹² Para 5-03.

¹³ Whitty, “Nuisance” (1988) para 2106.

¹⁴ Reid (n 6) 167; Whitty, “Nuisance” (1988) para 2049; Cameron (n 6) 229.

(a) *Compatibility of the plus quam tolerabile test with negligence*

5-08. Whitty argues that “the *plus quam tolerabile* test and negligence are not overlapping but mutually exclusive categories”.¹⁵ This can, in his view, be seen from the role that the notion of risk plays in both tests: in the *plus quam tolerabile* test, the risk question is previous, not part of the test, and the requirement is (substantial) certainty, whereas in negligence, risk is an aspect of the test itself. In the *plus quam tolerabile* test, reasonableness is determined regardless of risk; in negligence, reasonableness depends to a great extent on the level of risk.¹⁶ A similar conceptual problem would be faced by the notion of gravity or extent of the harm as part of the *plus quam tolerabile* test: gravity of harm is one of the elements that leads to a determination of the level of risk (together with its likelihood), and negligence law sets the standard of care in accordance with such risk. Consequently, if the *plus quam tolerabile* test is applied to negligent nuisances, gravity of the harm is taken into account twice, and this, in Cameron’s view, is not appropriate.¹⁷

5-09. There is considerable force in these arguments. It is certainly true that risk is not relevant for the *plus quam tolerabile* test because it is mostly a gravity test that assesses the invasion once it has occurred (or while it is occurring), irrespective of whether this invasion was certain to result or only more or less likely. But risk is still relevant for intentional invasions, not in assessing their gravity, but in determining whether there is fault, particularly intention as knowledge, and this is also the case in negligence. In both forms of fault, there is blame attached to the defender’s conduct in the face of a certain level of risk: carrying out his activity with the knowledge of the certainty of the invasion, or carrying out his activity without taking adequate precautions given the foreseeable likelihood of the invasion. In other words, the fact that the *plus quam tolerabile* test does not consider risk does not make it incompatible with negligence. Very much on the contrary, it is quite logical that it does not consider risk, for it is, as explained, mostly a gravity of harm test, whereas risk is relevant for the quite separate question of fault. The statement that *plus quam tolerabile* requires substantial certainty as a prior element is simply the consequence of assuming that it only applies to intention. The argument is circular.

5-10. As for the notion of gravity being taken into account twice, though it must be conceded that this is indeed the case, it must also be noted that it is not taken into account for the same purpose. The purpose of the *plus quam tolerabile* test is to exclude liability for certain invasions considered to be part of normal life in the community; it sets a threshold of harm. In contrast, gravity of harm in negligence does not set such a threshold; in principle, negligence

¹⁵ Whitty, “Nuisance” (1988) para 2089.

¹⁶ Whitty, “Nuisance” (1988) para 2106.

¹⁷ Cameron (n 6) 229.

does not exclude liability for invasions according to their extent. In practice, of course, the defender might not be liable for slight invasions simply because the standard of care in those cases must be rather low and easy to meet. But the extent of the potential harm is not the only element taken into account to determine such a standard. Both likelihood of harm as a component of risk, and considerations apart from risk (e.g. the cost of taking precautions), can raise the standard of care and make it more difficult to meet.¹⁸ So in those cases, the *plus quam tolerabile* test would have a margin to perform its distinctive role of excluding liability.

(b) *Standard of care imposed by the plus quam tolerabile test*

5-11. The second suggested ground for rejecting the application of the *plus quam tolerabile* test is that it would impose too high a standard of care for unintentional invasions, lowering the threshold of liability to the point that it becomes strict, a result that explicitly contravenes the ruling in *RHM Bakeries*.¹⁹ “It is unfair”, said Whitty, “to hold [the defender] liable as if he intended to inflict [the harm]”.²⁰ It appears that this reason to reject the application of the *plus quam tolerabile* test assumes that it would be applied to unintentional invasions *instead* of the reasonable care test from negligence, and not *in addition* to it. If the only test for unintentional invasions is the *plus quam tolerabile* test, then Whitty and Cameron are right at least in the second part of the argument: liability would become strict, contravening *RHM Bakeries*. It is not clear, however, why this would impose a particularly high standard of care unless this statement is supposed to mean that, by imposing strict liability, it subjects the defender to a severe or stringent liability rule, and not that it imposes a high standard of care in a technical sense. *Plus quam tolerabile*, in fact, imposes *no* standard of care; it says nothing about the way in which the defender is expected to behave. It simply imposes a threshold of harm under which there will be no compensation.

5-12. It is arguable, however, that the *plus quam tolerabile* test is not meant to replace the reasonable care test that is peculiar to negligence as a form of fault, but to be applied in addition to it. This view is more consistent with the analysis contained in *Kennedy v Glenbelle*:

The *plus quam tolerabile* test is peculiar to the liability in damages for nuisance. Where that test is satisfied and *culpa* is established, the requirements for the delictual liability are fulfilled.²¹

¹⁸ See para 2-23 above.

¹⁹ Whitty, “Nuisance” (1988) para 2089; Cameron (n 6) 230.

²⁰ Whitty, “Nuisance” (1988) para 2106.

²¹ *Kennedy v Glenbelle Ltd* 1996 SC 95 at 99 per Lord President Hope.

The two requirements are distinct and both must be fulfilled. In this light, the *plus quam tolerabile* test does not lower the threshold of liability. If anything, it raises it by excluding trivial invasions from the possibility of being compensated.

(2) Alleged unjustified differences introduced by nuisance

5-13. The second reason why negligent nuisances must allegedly be addressed through the law governing (the delict of) negligence, “in all its glory with no shortcuts”,²² is that dealing with them under nuisance rules would introduce unjustified differences between defenders who negligently committed a nuisance and defenders who negligently committed other wrongs. Thus, it is submitted that pursuers in nuisance not only are allowed to circumvent the requirements of negligence pleadings, but can also avoid the restrictions imposed by the law of negligence for the recovery of pure economic loss and liability for omissions. In addition, it is argued that nuisance introduces a difference, this time for the benefit of pursuers in negligence, in the treatment of abnormal sensitivity of the pursuer or his property given the availability of the “egg-shell skull” rule. In what follows, each of these aspects will be considered in order to argue that the so-called unjustified differences are not such or are indeed justified, demonstrating that the different elements of negligence adapt to the context of landownership to render results that are not different from those that can be reached through the negligent nuisance route.

(a) Pleadings requirements

5-14. One of the apprehensions to which the inclusion of negligent nuisances in the framework of nuisance gives rise is that “the requirements of pleadings in negligence may to some extent be circumvented in a nuisance action”.²³ This particular formulation of the apprehension was a reaction to a proposal advanced by Thomson in his case note on *Kennedy v Glenbelle*. In his view, the establishment of the existence of a duty of care should not be necessary in nuisance claims, because nuisance already has in place a liability control device: the *plus quam tolerabile* test. It should suffice for the pursuer to aver that “the defender’s conduct simply fell below the standard of reasonable care”.²⁴ Against this proposal, Cameron argues that Thomson’s view, though tempting, misunderstands the role of the *plus quam tolerabile* test, going on to explain its conceptual incompatibility with negligence.²⁵

²² Cameron (n 6) 227.

²³ Cameron (n 6) 227.

²⁴ Thomson (n 6) 178.

²⁵ Cameron (n 6) 229.

5-15. This argument has been addressed above,²⁶ but it remains true that the duty of care in negligence and the *plus quam tolerabile* test in nuisance control liability in different ways and for different reasons. Duty of care is mostly designed to exclude potential pursuers or particular types of harm, in order to control the “floodgates” of litigation and protect defenders from what can be seen as “excessive” liability. The *plus quam tolerabile* test, on the other hand, is designed to exclude claims for reasonable invasions in the context of neighbourhood, in order to preserve a margin of “liability-free” use of property consistent with ownership. In this sense, the *plus quam tolerabile* test does not and cannot perform the same control function as duty of care.

5-16. Nevertheless, the apprehension seems overstated, for in the context of nuisance, the risks that are normally controlled by the duty of care are naturally constrained by the very limits of nuisance. On the one hand, nuisance assumes a rather close level of (physical) proximity or at least the physical ability to reach and therefore interfere with someone else’s land as a consequence of the use of land of one’s own. On the other hand, insofar as nuisance only protects the use and enjoyment of property, other problematic categories that are controlled by the duty of care are conceptually excluded, such as psychiatric injury or pure economic loss.²⁷

5-17. In support of his view, Cameron refers to two cases where, in his opinion, courts showed that pursuers could not circumvent the requirements of negligence pleadings by turning to a nuisance claim. The first one is the Outer House decision in *Argyll and Clyde Health Board v Strathclyde Regional Council*,²⁸ where the relevancy of the pursuer’s pleadings of negligence was discussed. The Lord Ordinary, Lord McCluskey, considered that the pursuer’s general averment of the water authority’s duty to take reasonable care that water mains in their ownership did not burst was irrelevant because he failed to specify what proper maintenance would have been.²⁹ This case, in Cameron’s view, supports the argument that the pleadings must be sufficient to establish (the delict of) negligence.³⁰ The second case is the sheriff court decision in *The Globe (Aberdeen) Ltd v North of Scotland Water Authority*,³¹ where the sheriff considered that the pursuer’s averment of the water authority’s duty to ascertain ground conditions before engaging in works on a sewer had no factual

²⁶ Paras 5-07 to 5-10 above.

²⁷ The issue of economic loss is revisited in paras 5-20 to 5-24 below.

²⁸ *Argyll & Clyde Health Board v Strathclyde Regional Council* 1988 SLT 381.

²⁹ 1988 SLT 381 at 385.

³⁰ Cameron (n 6) 226.

³¹ Reported as *Cansco International Plc v North of Scotland Water Authority* 1999 SCLR 494. The decision was overturned by the Inner House on the point of exclusion of pure economic loss: *The Globe (Aberdeen) Ltd v North of Scotland Water Authority* 2000 SC 392. See para 5-20 below.

basis.³² “The lesson”, concludes Cameron, “is clear. This case is indicative of the dangers where parties seek to argue negligence without first addressing the basis upon which a duty of care arises”.³³

5-18. It is important to distinguish the two cases cited in support of the argument, because the inadequacy of the averments is based upon different considerations. In *Argyll and Clyde Health Board*, what the pursuer failed to identify was the standard of care, not the duty of care: the court did not question the principle that the water authority had the duty to maintain the pipes; the reason for holding the fault averments as irrelevant was that the pursuer did not “specify in their pleadings a system or systems of maintenance and [. . .] lead evidence to establish that any such system was ‘proper’”,³⁴ against which the defender’s conduct could be judged and which the defender could challenge. This calls for a qualification of Thomson’s proposal, though arguably this qualification is implied in his formulation: it is not enough for the pursuer to aver that “the defender’s conduct simply fell below the standard of reasonable care”,³⁵ but the pursuer actually has to aver – and eventually prove – what this standard consists of.

5-19. *The Globe (Aberdeen)* case, on the other hand, poses a more difficult challenge, because the reason for the irrelevancy was precisely the pursuer’s failure to aver the factual basis for the duty of care. It must be noted, however, that while only this particular duty – to ascertain ground conditions – was deemed irrelevant, another duty did survive a relevancy attack: the duty “to take reasonable care to avoid causing a nuisance to neighbouring property”. This could be read as an acknowledgement of a general duty of care in nuisance, given the nature of the context in which these disputes arise, and this would be consistent with the argument presented above about the absence of a need to control the floodgates and excessive liability risks in this setting. But even if there is no need to establish a specific duty of care, it is still necessary to establish the standard of care and its breach.³⁶

(b) Recovery of economic loss

5-20. It is a commonplace that the law of negligence places restrictions upon the recovery of pure economic loss. Nuisance, however, would seemingly allow these restrictions to be avoided. The point became especially prominent

³² *Cansco International Plc v North of Scotland Water Authority* 1999 SCLR 494 at 499.

³³ Cameron (n 6) 231.

³⁴ *Argyll & Clyde Health Board v Strathclyde Regional Council* 1988 SLT 381 at 384.

³⁵ See para 5-14 above.

³⁶ The *plus quam tolerabile* test does not “[take] the place in the nuisance action of an analysis of the existence of a duty of care and its breach”: C Smith, “Scots Law of Nuisance: *Kennedy v Glenbelle Ltd*” (1995) 8 *Greens Environmental Law Bulletin* 4 at 5 (emphasis added).

in the Inner House decision in the case of *The Globe (Aberdeen) Ltd v North of Scotland Water Authority*.³⁷ The pursuers were the owners of a pub and the defender was the water authority replacing a sewer outside. The works, which according to the information provided by the defender were meant to last six weeks, lasted nine months. During this period, the pavement adjacent to the pub was covered in mud and, this pavement being the only access to the pub, patrons refrained from visiting it. The pursuers sued the authority in nuisance claiming, among other harms, the loss of profits caused by the drop in customers. The sheriff considered that, on the authority of *Dynamco Ltd v Holland & Hannen & Cubitts (Scotland) Ltd*,³⁸ this was pure economic loss and the pursuers did not relevantly aver sufficient proximity between them and the defenders to this effect.³⁹ On appeal, however, the Inner House was of a different opinion. The judges “[did] not think that it can be affirmed, without careful consideration of the authorities relating to pure financial or economic loss, that in a case of alleged nuisance it is necessarily too remote to claim mere financial loss”,⁴⁰ and remitted the cause to the sheriff for a proof before answer.

5-21. Superficially, when contrasted with *Dynamco*, the decision in *Globe (Aberdeen)* seems to provide an advantage to pursuers in nuisance: while in *Dynamco*, pled in negligence, liability for pure economic loss was held to be excluded in principle,⁴¹ in *Globe (Aberdeen)*, pled in nuisance, liability for pure economic loss was not so excluded. If pure economic loss is recoverable generally under nuisance, then the distinction between negligence and negligent nuisance indeed “becomes critical”,⁴² because it would allow pursuers to circumvent negligence limitations by grounding their claims in nuisance.⁴³ This contrasting of *Globe (Aberdeen)* with *Dynamco* can, however, be criticised. In Cameron’s view, the difference in result is not due to the fact that the pursuers claimed in nuisance and negligence respectively, but to the nature of the harm suffered by the pursuer: while *Dynamco* was about – and remains good law for – secondary pure economic loss, (i.e., economic loss derived from harm to property that does not belong to the pursuer), *Globe (Aberdeen)* was about primary pure economic loss (i.e. economic loss that is not mediated by any harm to property). As to the latter type of harm, the law of negligence has evolved

³⁷ *The Globe (Aberdeen) Ltd v North of Scotland Water Authority* 2000 SC 392.

³⁸ *Dynamco Ltd v Holland & Hannen & Cubitts (Scotland) Ltd* 1971 SC 257.

³⁹ *Cansco International Plc v North of Scotland Water Authority* 1999 SCLR 494 at 503–504.

⁴⁰ *The Globe (Aberdeen) Ltd v North of Scotland Water Authority* 2000 SC 392 at 394–395 per Lord Coulsfield delivering the opinion of the court.

⁴¹ *Dynamco Ltd v Holland & Hannen & Cubitts (Scotland) Ltd* 1971 SC 257 at 267 per Lord Migdale, and 268–270 per Lord Cameron.

⁴² E Reid, “Financial Loss and Negligent Nuisance” 2000 SLT (News) 151 at 153.

⁴³ N R Whitty, “Nuisance” (Reissue, 2001) in *The Laws of Scotland: Stair Memorial Encyclopaedia* para 153.

and become more flexible, and the decision in *Globe (Aberdeen)* would be a reflection of this evolution.⁴⁴

5-22. A different and simpler explanation can, however, be offered: when there is nuisance, all economic loss is consequential or derivative, even if it does not derive from physical damage to property. The comfortable use and enjoyment of property is a primary interest recognised by the law of delict; interference with it is as much an injury to property as physical damage to it, so much so that it can theoretically be compensated by itself. That makes economic loss that arises as a consequence of such interference, *not* pure. It is true that some concepts of pure economic loss rely on its independence from *physical* harm to the person or property,⁴⁵ but this is not always the case.⁴⁶ In some relevant English nuisance cases of non-physical interference, economic harm has, in fact, been treated as consequential.⁴⁷ This also gives a consistent explanation of some previous cases: *Globe (Aberdeen)* was not, of course, the first case where loss of business was claimed in the context of nuisance. Reid points to nineteenth and early-twentieth century nuisance cases that today would probably be regarded as negligent, and where this loss was claimed with success: *Laurent v Lord Advocate*,⁴⁸ *Cameron v Fraser*⁴⁹ and *Huber v Ross*.⁵⁰ “Of the restrictions on recovery for financial loss, already being established in mainstream negligence, there is little sign” in these cases.⁵¹ And there should not be, for there is no pure economic loss.

5-23. Accordingly, understanding economic loss in the context of nuisance as consequential or derivative provides a clear explanation for its recovery without introducing an exceptional rule to the general restrictions imposed by negligence. Pure and secondary economic loss are excluded by the very nature of nuisance as a delict that protects the use and enjoyment of property: after all, if the origin of the economic loss suffered by the pursuer cannot be traced back to an interference with his property – physical or otherwise – then he simply

⁴⁴ Cameron (n 6) 231–232.

⁴⁵ See e.g. G Cameron, *Thomson’s Delictual Liability* (6th edn, 2021) para 4.16.

⁴⁶ Whitty, “Nuisance” (Reissue, 2001) para 153 admits the possibility for the pursuer to “recover damages for economic loss consequential on invasions of his use and enjoyment of his land where, for example, his business activities are adversely affected and loss of profits is suffered as a result of the invasions”, though he does seem to treat *Globe (Aberdeen)* as a case of pure economic loss. See also, e.g., P Giliker, *Tort* (7th edn, 2020) para 3.002, defining pure economic loss as loss that “does not result from damage to the claimant’s property”, without specifically referring to physical damage.

⁴⁷ E.g. *Andreae v Selfridge & Co Ltd* [1938] Ch 1, a case of inconveniences caused by noise and dust, and especially *Hunter v Canary Wharf Ltd* [1997] AC 655, the well-known case of interference with television reception.

⁴⁸ *Laurent v Lord Advocate* (1869) 7 M 607.

⁴⁹ *Cameron v Fraser* (1881) 9 R 26.

⁵⁰ *Huber v Ross* 1912 SC 898.

⁵¹ Reid (n 42) at 153.

does not have the possibility of claiming nuisance in the first place, showing the lack of need for the negligence duty of care as a control device for nuisance. For this pursuer, the only available route is (the delict of) negligence.

5-24. Moreover, it is arguable that, in nuisance, recovery of economic loss, even if derivative or consequential, is limited in a way that it is not in negligence. An analysis of nineteenth-century authority suggests that economic loss, just like non-physical interferences with the use and enjoyment of property, falls to be assessed according to nuisance principles, namely the *plus quam tolerabile* test.⁵² Consequently, admitting the recovery of economic loss in this way does not mean that “anything which interferes with property constitutes damage”, a contention that according to the sheriff in *Globe (Aberdeen)* “is far too widely stated”.⁵³ The sheriff was right: not *anything*, but only interferences that are beyond what is reasonably tolerable in the neighbourhood, constitutes relevant damage for nuisance. It is arguable that reparation, construction and other legitimate operations performed in a neighbourhood might cause some acceptable inconvenience, even financial loss, to property owners, which they have to tolerate.⁵⁴ Nuisance, not negligence, is thus the more restrictive regime in this regard, and the difference is justified by the very nature of nuisance.

(c) Liability for omissions

5-25. The third aspect in which the distinction between negligence and negligent nuisance seems to be relevant is in liability for omissions. The law of delict is generally reluctant to impose liability for pure omissions,⁵⁵ yet it seems that this reluctance is not so strong in the context of nuisance.

5-26. Liability for nuisances caused by negligent omission to control a source of risk present on the defender’s land but not created by him is governed by a line of cases initiated by the decision of the House of Lords in the English case of *Sedleigh-Denfield v O’Callaghan*,⁵⁶ a case that has been consistently considered authoritative in Scotland.⁵⁷ During a heavy rainstorm, a pipe placed in the defendant’s land by a third party became choked with leaves, and the water overflowed on to the plaintiff’s land. The defendant was held liable for nuisance despite not having consented to or known of the presence of the pipe: he was taken to know and, based on this presumed knowledge, it was found that at least he continued the nuisance.⁵⁸ According to this decision, a landowner

⁵² Reid (n 42) at 152–153.

⁵³ *Cansco International Plc v North of Scotland Water Authority* 1999 SCLR 494 at 494.

⁵⁴ See *Cameron v Fraser* (1881) 9 R 26 at 29 per Lord Young.

⁵⁵ Reid (n 6) 171.

⁵⁶ *Sedleigh-Denfield v O’Callaghan* [1940] AC 880.

⁵⁷ See, for references to this case in Scots law, Whitty, “Nuisance” (Reissue, 2001) para 98.

⁵⁸ *Sedleigh-Denfield v O’Callaghan* [1940] AC 880 at 897 per Lord Atkin. In Viscount Maugham’s view, he also “adopted” the nuisance: see at 895.

will be liable for a nuisance that he did not actively create if he “continues” the nuisance, that is, “if with knowledge or presumed knowledge of its existence he fails to take any reasonable means to bring it to an end though with ample time to do so”; or if he “adopts” the nuisance, namely, “if he makes any use of the erection, building, bank or artificial contrivance which constitutes the nuisance”.⁵⁹ It is possible to note here a terminology shift: as Whitty points out,⁶⁰ the term “nuisance” here does not refer to the interference with the pursuer’s property but to the condition on the defender’s land that eventually causes it, that is, to the source of risk.

5-27. The decision was followed and developed further in two important cases: the Privy Council decision in the Australian case of *Goldman v Hargrave*,⁶¹ and the decision of the Court of Appeal in England in *Leakey v National Trusts for Places of Historic or Natural Beauty*.⁶² In *Goldman*, a tree located in the defendant’s land was struck by lightning and caught fire. The defendant cut down the tree and left it to be consumed by the fire without taking further precautions to extinguish it. A change in the weather conditions reignited and spread the fire to the plaintiff’s property. The court held the defendant liable, recognising the existence of a general duty upon occupiers to protect neighbours from hazards present in their land, and extending the principle advanced in *Sedleigh-Denfield* from man-made nuisances to nuisances caused by the operation of nature.⁶³ The extent of this duty, however, was said to depend on the particular circumstances of the defendant, in particular his resources, for “the law must take account of the fact that the occupier on whom the duty is cast has, *ex hypothesi*, had this hazard thrust upon him through no seeking or fault of his own”.⁶⁴ This is the inception of the “measured” duty of care,⁶⁵ though it is more accurately described as a measured standard of care. The case was pled in negligence, but the possibility of the case being also classified as a nuisance was recognised – though not resolved.⁶⁶ A similar conclusion as to the defender’s liability, this time clearly in nuisance, was reached by the Court of Appeal in *Leakey*: the defendants were found liable for the harm caused to the plaintiffs’ houses by the fall of soil from a mound located on the defendants’ land. The defendants had been made aware of previous incidents and did not take the precautions that, according to the measured standard, should have been taken.⁶⁷

⁵⁹ [1940] AC 880 at 895 per Viscount Maugham.

⁶⁰ Whitty, “Nuisance” (1988) para 2099.

⁶¹ *Goldman v Hargrave* [1967] 1 AC 645.

⁶² *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485.

⁶³ *Goldman v Hargrave* [1967] 1 AC 645 at 661–662.

⁶⁴ [1967] 1 AC 645 at 663.

⁶⁵ As it has been called in more recent English cases such as *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836, and *Lambert v Barratt Homes Ltd* [2010] EWCA Civ 681, [2011] HLR 1.

⁶⁶ *Goldman v Hargrave* [1967] 1 AC 645 at 656.

⁶⁷ *Leakey v National Trust* [1980] QB 485 at 526–527 per Megaw LJ and 529 per Shaw LJ.

5-28. In sum, there is no limitation in principle to recovery for nuisances caused by omissions, as long as some constructive knowledge of their existence can be attributed to the landowner. The landowner's negligence is assessed according to a measured standard of care that takes into account his circumstances, especially financial. Despite doubts raised about following *Leakey* in Scotland,⁶⁸ there seems to be no distinction nowadays, for these purposes, between man-made and natural hazards.⁶⁹ The absence of the limitation for recovery has been acknowledged in the recent decisions in *Sabet v Fife Council*⁷⁰ and *Edwards v Fife Council*,⁷¹ where harm was sustained by the pursuers' houses due to flooding by a blocked weir located in neighbouring property. The pursuers in both cases claimed damages against the landowner in nuisance, based on the defender's fault by failure to remove the accumulated debris at the weir which, they stated, had been blocked on previous occasions and caused floods. The Lord Ordinary (Ericht), answering to the defender's allegation that there were no averments of fault, submitted that fault was in fact averred and added simply that "[f]ailure to remove debris is a relevant case in nuisance" by reference to *Sedleigh-Denfield*. He subsequently stated that "[w]hether the weir was prone to being blocked and whether the second defender ought to have known about the history of flooding and blockage which had existed for four months are matters for proof before answer".⁷²

5-29. The modern formulation of the rules governing recovery for negligent omissions is contained in the House of Lords decision in a Scottish appeal: *Maloco v Littlewoods Organisation Ltd*.⁷³ In this case, vandals entered into an empty former cinema that belonged to the defender and started a fire that spread and caused harm to the pursuer's neighbouring property. In an often-cited passage which identifies various categories of liability, Lord Goff said that a defender could be held liable in negligence even when the immediate cause of the damage is the wrongdoing of a third party:

[T]here is a more general circumstance in which a defender may be held liable in negligence to the pursuer, although the immediate cause of the damage suffered by the pursuer is the deliberate wrongdoing of another. This may occur where the defender negligently causes or permits to be created a source of danger, and it is reasonably foreseeable that third parties may interfere with it and, sparking off the danger, thereby cause damage to persons in the position of the pursuer [third

⁶⁸ W M Gordon, "Is Moving Land a Nuisance? New Developments South of the Border" (1980) 25 JLSS 323.

⁶⁹ Whitty, "Nuisance" (1988) para 2100.

⁷⁰ *Sabet v Fife Council* [2019] CSOH 26, 2019 SLT 514.

⁷¹ *Edwards v Fife Council* [2019] CSOH 27, 2019 GWD 11-150.

⁷² *Sabet v Fife Council* [2019] CSOH 26, 2019 SLT 514 at para 48. In *Edwards v Fife Council* [2019] CSOH 27, 2019 GWD 11-150 he referred at para 3 to his reasons in the *Sabet* decision to allow a proof before answer.

⁷³ *Maloco v Littlewoods Organisation Ltd* 1987 SC (HL) 37.

category]. [...] There is another basis upon which a defender may be held liable for damage to neighbouring property caused by a fire started on his (the defender's) property by the deliberate wrongdoing of a third party. This arises where he has knowledge or means of knowledge that a third party has created or is creating a risk of fire, or indeed has started a fire, on his premises, and then fails to take such steps as are reasonably open to him (in the limited sense explained by Lord Wilberforce in *Goldman v Hargrave* at pp 663–664) to prevent any such fire from damaging neighbouring property [fourth category].⁷⁴

In the event, the defender was found not to be liable. This was because, despite there being evidence of previous break-ins, he was neither informed nor aware of such evidence.

5-30. Lord Mackay's less reproduced (but more supported within the court) view relied on different reasoning to reach the same conclusion.⁷⁵ In his view, liability rested on foreseeability, coupled with a requirement of high probability of harm:

[W]hat the reasonable man is bound to foresee in a case involving injury or damage by independent human agency, just as in cases where such agency plays no part, is the probable consequences of his own act or omission, but [...] in such a case, a clear basis will be required on which to assert that the injury or damage is more than a mere possibility.⁷⁶

However, in the more recent case of *Mitchell v Glasgow City Council*,⁷⁷ Lord Goff's approach was held to be preferable,⁷⁸ and his list of categories was considered open to further development according to the three-step duty test formulated in *Caparo Industries Plc v Dickman*.⁷⁹

5-31. Superficially, contrasted with *Maloco*, *Sedleigh-Denfield* seems to provide an advantage to pursuers who choose the nuisance road: in *Maloco*, pled in negligence, the pursuer was unsuccessful in his claim, whereas in *Sedleigh-Denfield*, pled in nuisance, the plaintiff obtained compensation for the defender's omission. Nevertheless, a deeper look into the cases suggests that there might not be a real difference in approach.

5-32. The first difference that can be identified between the cases is noted by Reid: in *Maloco*, the harm was the result of the intentional actions of third

⁷⁴ 1987 SC (HL) 37 at 77–79. The first two categories are excluded here since they are not relevant for our discussion.

⁷⁵ See E Reid, "Smith v Littlewoods Organisation Ltd (1985)" in C Mitchell and P Mitchell (eds), *Landmark Cases in the Law of Torts* (2010) 251 at 261 and the assessment of both approaches at 265–266.

⁷⁶ *Maloco v Littlewoods Organisation Ltd* 1987 SC (HL) 37 at 68.

⁷⁷ *Mitchell v Glasgow City Council* [2009] UKHL 11, 2009 SC (HL) 21 at paras 21 and 25 per Lord Hope.

⁷⁸ [2009] UKHL 11, 2009 SC (HL) 21 at para 15 per Lord Hope.

⁷⁹ *Caparo Industries Plc v Dickman* [1990] 2 AC 605.

parties, whereas in *Sedleigh-Denfield*, there was nothing more than negligence on the part of the third parties.⁸⁰ But more importantly, it is arguable that, unless a strict view of Lord Goff's fourth category in *Maloco* is adopted, restricted exclusively to fire, the reasoning in *Sedleigh-Denfield* and *Leakey* is perfectly consistent with that in *Maloco*:⁸¹ in *Sedleigh-Denfield* and *Leakey*, the defendant knew or was deemed to know of the existence of the source of danger; in *Maloco*, the pursuers could not prove the defenders' knowledge of the existence of the source of danger. And the narrative of Lord Goff's dictum seems to allow a broad interpretation of the fourth category: he used a fire hazard as an example for the third category and might have chosen to use fire in the fourth category just to continue with the example. The case of *Goldman* is even easier, for it actually deals with fire, so the same logic applies without the need to have a comprehensive view of the fourth category. Furthermore, the notion of a measured standard of care, which could be seen as drawing a difference between negligence and nuisance, is expressly considered applicable to Lord Goff's fourth category in *Maloco*.⁸² This demonstrates how both the duty of care and the standard of care in negligence are flexible mechanisms that adapt to the context of landownership and produce results that, in substance, are not different from those that would be reached if the matter were approached from the perspective of negligent nuisance.

5-33. More generally, while it is clear that the law of negligence imposes constraints upon the recovery of damage caused by omissions, nuisance does so too, first through the old language of continuing and adopting the nuisance from *Sedleigh-Denfield*, and now through the limits more precisely defined by knowledge of the source of danger – which also helps in setting straight the terminological shift. And these constraints seemed to have converged in Lord Goff's fourth category in *Maloco*. In sum, the supposed difference in approach between negligence and nuisance with regard to liability for omissions is more apparent than real.

(d) The relevance of abnormal sensitivity

5-34. The final difference that has been identified between the rules governing negligence and negligent nuisance is their approach to the abnormal sensitivity of the pursuer or his property or use. In negligence, the defender assumes the risk of the hypersensitivity of the victim or the victim's property by virtue of the so-called "egg-shell skull" rule: the negligent defender takes his victim as he finds her and is bound to compensate all harm suffered by her, even if the

⁸⁰ Reid (n 6) 172.

⁸¹ Reid (n 6) 173.

⁸² Lord Mackay also regarded the notion applicable in his framework: *Maloco v Littlewoods Organisation Ltd* 1987 SC (HL) 37 at 74.

extent of the harm is the result of a particular vulnerability and that vulnerability is unforeseeable for him.⁸³ It has been contended that the rule would not apply to hypersensitive property,⁸⁴ but there is some authority supporting the contrary view⁸⁵ and the distinction is arguably unjustified.⁸⁶ Moreover, the distinction is not accepted in all jurisdictions,⁸⁷ so the point ultimately depends on how the rule is justified.⁸⁸ Nuisance, on the contrary, disregards hypersensitivity of both the victim and her property in assessing the gravity of the harm:⁸⁹ the assessment of the tolerability of the interference is performed considering the perspective of a reasonable person⁹⁰ or normally vulnerable property or use.⁹¹

5-35. It is important, however, to distinguish properly between the egg-shell skull rule and the disregard for hypersensitivity featured in nuisance. These are not two different answers to the same question, but answers to two different questions. The egg-shell skull rule determines the extent of liability: if there is foreseeable harm, and if the other requirements of negligence are met, there will be liability for the full harm, namely, the said foreseeable harm as well as any unforeseeable harm derived from the pursuer's abnormal sensitivity. In the words of Lord Wright in *Bourhill v Young*, "[t]he question of liability is anterior to the question of the measure of the consequences which go with the liability".⁹² Nuisance's disregard of abnormal sensitivity, on the other hand, is part of the harm threshold that determines whether the defender is liable in the first place. Therefore, the presence of foreseeable harm is not enough if it falls below the *plus quam tolerabile* test; and if this test is met only due to the unforeseeable abnormal sensitivity of the pursuer or his property, then the defender will neither be liable for the foreseeable nor for the unforeseeable harm. But the egg-shell skull rule does in effect apply in nuisance: if the foreseeable harm meets the *plus quam tolerabile* test, that is, if for the normally sensitive

⁸³ D M Walker, *The Law of Delict in Scotland* (2nd edn, 1981) 196; Reid (n 6) 169. See, for a modern Scottish case, *Simmons v British Steel plc* [2004] UKHL 20, 2004 SC (HL) 94 at para 67.

⁸⁴ Thomson, *Delictual Liability* para 16.4: "It cannot be stressed enough that the thin skull rule only applies where the victim has suffered personal injuries".

⁸⁵ See e.g. *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791, though the case was decided in a contractual context.

⁸⁶ See the discussion in A Tettenborn (ed), *Clerk & Lindsell on Torts* (23rd edn, 2021) para 2-177.

⁸⁷ Indeed, American Law Institute, *Restatement Third of Torts: Liability for Physical and Emotional Harm* (2010) § 31 comment d expressly declares that the thin skull rule applies to property.

⁸⁸ For a brief discussion of the point, see P J Rowe, "The demise of the thin skull rule?" (1977) 40 MLR 377 at 381–382.

⁸⁹ Whitty, "Nuisance" (1988) paras 2060–2063.

⁹⁰ See e.g. *Maguire v Charles M'Neil Ltd* 1922 SC 174 at 191 per Lord Skerrington, and more recently, *Greenline Carriers (Tayside) Ltd v City of Dundee District Council* 1991 SLT 673 at 675–676 per Lord McCluskey, delivering the opinion of the court.

⁹¹ *Armistead v Bowerman* (1888) 15 R 814 at 821 per Lord Justice-Clerk Moncreiff.

⁹² *Bourhill v Young* 1942 SC (HL) 78 at 92.

victim or property or use the interference would have been intolerable, then any further unforeseeable harm due to abnormal sensitivity will be compensated as well.⁹³ Consequently, once it is established that the defender is liable, both in nuisance and in negligence, he will have to compensate the entire harm caused, even harm due to the hypersensitivity of the pursuer or his property or use. In this sense, part of the alleged difference is illusory: the egg-skull rule applies in both cases.

5-36. Furthermore, it has been suggested that, in negligence, abnormal sensitivity is taken into account in order to determine whether there is a duty of care. Thus, Lord Wright in *Bourhill v Young* remarked that the “question whether there is duty owing to members of the public who come within the ambit of the act, must generally depend in a normal standard of susceptibility”.⁹⁴ But even if the duty stage is passed, the determination of the standard of care in accordance with foreseeable harm might end up excluding liability. Conversely, it is arguable that some hypersensitive uses could be protected in nuisance when they are in line with the character of the locality.⁹⁵

5-37. In sum, there seems to be no relevant difference in this context between negligence and nuisance. This demonstrates once again how the elements of negligence adapt to the particular context in which they operate, producing results that are consistent with those that would follow from negligent nuisance.

C. RECKLESSNESS

(1) Recklessness in nuisance: before and after *Kennedy v Glenbelle*

5-38. As previously stated, recklessness seldom appears in cases that today we would classify as nuisances.⁹⁶ During the nineteenth century, references in pleadings to recklessness were typically made alongside negligence. For instance, in *Campbell v Kennedy* the pursuer claimed the compensation for “damage sustained [. . .] through the culpable carelessness or recklessness, or negligence of the defender” caused by the bursting of a water pipe in the latter’s property.⁹⁷ Similarly, in *Paterson v Lindsay*, the pursuer argued that rocks reached the place where he was working “[i]n the consequence of the culpable recklessness and gross carelessness of the defender [. . .] in the conduct of said

⁹³ This is the general position in English law, based on the decision of the Privy Council in the Canadian case of *McKinnon Industries Ltd v Walker* [1951] WN 401: see e.g. J Murphy, *The Law of Nuisance* (2010) § 2.17; Giliker, *Tort* (n 46) para 10.010. Whitty, “Nuisance” (1988) para 2156 seems to limit it to injury to health, following *Shanlin v Collins* 1973 SLT (Sh Ct) 21.

⁹⁴ *Bourhill v Young* 1942 SC (HL) 78 at 92.

⁹⁵ Reid (n 6) 169, based on *Mull Shellfish Ltd v Golden Sea Produce Ltd* 1992 SLT 703.

⁹⁶ Para 5-04 above.

⁹⁷ *Campbell v Kennedy* (1864) 3 M 121 at 122.

blasting operations”;⁹⁸ and in *M’Bride v Caledonian Railway Co*, the pursuers contended that the defender’s sewer construction operations “were conducted in a reckless, negligent, and unskilful manner”.⁹⁹ In these cases, recklessness does not seem to have a meaning substantially different from negligence. In other cases, however, pursuers seemed to plead recklessness in a sense closer to a mental state, especially when they had warned the defender of the possible harm, e.g. “the said operations having been conducted improperly and illegally, and in gross and wilful recklessness of the rights and interests of the pursuer”;¹⁰⁰ or “notwithstanding the warnings given to him by the pursuer, and his promise to take precautions, the defender [. . .] wrongfully, recklessly, and in total disregard of pursuer’s interest, dragged the timber. . .”.¹⁰¹ Nevertheless, in both types of case the courts’ reasoning was mainly focused on the precautions taken by the defender, i.e. a negligence reasoning, quite apart from any form of mental disposition. This is hardly surprising: in this context, intention was not a requirement for liability. Consequently, as discussed in chapter 2,¹⁰² there was no particular reason for a pursuer to plead recklessness if negligence sufficed. During the twentieth century, recklessness simply disappeared from nuisance cases, until the notion was unearthed by *Kennedy v Glenbelle*.¹⁰³

5-39. The immediate source of *Kennedy* – Whitty’s model in his title on “Nuisance” in the *Stair Memorial Encyclopaedia*¹⁰⁴ – did not develop the notion of recklessness. It was merely mentioned alongside the other categories of fault included in the fault continuum found in the American Law Institute’s *Restatement Second of Torts*; it also appeared in a quote from the Restatement (2d) explaining the continuum, where it is stated that conduct is reckless when the probability of harm is less than substantial certainty but more than mere risk.¹⁰⁵ On this view the difference between intention, recklessness and negligence is simply one of likelihood of harm. Yet recklessness in the Restatement (2d) is more complex than that. It is a form of fault determined by the rules of negligence that is treated, in some respects, on a par with intention given that the underlying risk is particularly high and the defendant is – actually or constructively – aware of it. It is, in sum, a judgment about the conduct coupled with a mental element, though the latter is highly objectivised.¹⁰⁶

5-40. The view adopted in *Kennedy v Glenbelle* is somewhat difficult to assess. According to Lord President Hope, the defender was reckless if he “had

⁹⁸ *Paterson v Lindsay* (1885) 13 R 261 at 262.

⁹⁹ *M’Bride v Caledonian Railway Co* (1894) 21 R 620 at 621.

¹⁰⁰ *Miller v Renton and Beattie & Sons* (1885) 13 R 309 at 310.

¹⁰¹ *Armistead v Bowerman* (1888) 15 R 814 at 815.

¹⁰² See paras 2-25 and 2-26 above.

¹⁰³ *Kennedy v Glenbelle Ltd* 1996 SC 95.

¹⁰⁴ N R Whitty, ‘Nuisance’ in *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol 14 (1988).

¹⁰⁵ Whitty, “Nuisance” (1988) para 2089.

¹⁰⁶ See paras 3-16 and 3-17 above.

no regard to the question whether his action, if it was of a kind likely to cause harm to the other party, would have that result”.¹⁰⁷ This description seemingly coincides with the conception of recklessness discussed in chapter 2, i.e. the idea of a mental state of indifference to risk.¹⁰⁸ But on closer scrutiny, there is a considerable difference, for this disregard of risk is, after *Kennedy*, reduced to the mere knowledge of its existence. What is remarkable, however, is that *Kennedy*’s notion of recklessness, unlike the approach adopted in its sources, does not attach to a particular level of likelihood of harm. It suffices that harm is likely, as opposed to certain.

5-41. It is not clear whether *Kennedy* itself was deemed a case of reckless harm because, as mentioned in the previous chapter, the report points to both knowledge of certainty of the harm and knowledge of likelihood of harm when explaining the pursuer’s pleadings.¹⁰⁹ So it is risky to draw conclusions about recklessness based on how *Kennedy* was decided when what could be under analysis is actually intention. The literature that followed *Kennedy* does not provide much assistance either: it is limited to references to Walker’s definition of recklessness,¹¹⁰ which conceptualises it as a frame of mind of indifference to realised risks,¹¹¹ or to references to the Restatement (2d)’s explanation of the continuum quoted by Whitty;¹¹² and to the acknowledgement that recklessness is equivalent to intention,¹¹³ without clarifying what consequences follow from this assimilation.

5-42. In the few cases following *Kennedy* where recklessness was in point, there are, however, some remarks that might throw light on the issue. In *Anderson v White*, the Lord Ordinary (Philip) remarked that, since the pursuers had averred a deliberate action on the part of the defenders,

The only further requirement was to aver that the defenders knew that their actions would result in harm to the pursuers [intention], or alternatively that they had no regard to the question whether their action was likely to cause such harm [recklessness]. The pursuers say that the defenders knew of the resultant harm because of complaints, and *that in any event the likelihood of harm was obvious*. That, according to my understanding of the cases cited, is sufficient to make a relevant case.¹¹⁴

Consequently, to make a relevant averment of recklessness it sufficed simply to argue that the defenders were aware of the likelihood of harm. Whether the

¹⁰⁷ *Kennedy v Glenbelle Ltd* 1996 SC 95 at 100.

¹⁰⁸ See para 2-24 above.

¹⁰⁹ See para 4-20 above.

¹¹⁰ Walker, *Delict* 43.

¹¹¹ Reid (n 6) 168.

¹¹² Cameron (n 6) 224; G D L Cameron, “Making Sense of Nuisance in Scots Law” (2005) 56 NILQ 236 at 261.

¹¹³ Thomson (n 6) 177; Reid (n 6) 168; Cameron (n 112) 262–263.

¹¹⁴ *Anderson v White* 2000 SLT 37 at 40, emphasis added.

defenders were actually indifferent to or disregarded such risk did not need to be specified. One has to conclude that such indifference was inferred – though it is not clear from what (perhaps from the fact that harm occurred?). The same alternative pleadings – intention and recklessness – can be found in the more recent case of *Morris Amusements Ltd v Glasgow City Council*. Here, the Lord Ordinary (Emslie) submitted that:

[a]s explained by the Lord President in *Kennedy*, each of these alternatives requires *proof of a specific state of knowledge* on the defender's part, and on a strict technical approach it might be said that the pursuers' pleadings fall somewhat short of that requirement.¹¹⁵

Admittedly, these are only Outer House decisions. But there seems to be a trend: even though *Kennedy* conceptualised recklessness as a mental state of indifference, courts have been content to treat it as a mental state of mere knowledge. Indifference is absent from the analysis, and so is any consideration of negligence. The courts have, however, followed *Kennedy* – and not its sources – in that they do not require a specific level of likelihood. It is enough that harm is likely, and that the defender knows it.

5-43. As a consequence, the idea of recklessness has departed fundamentally from its treatment in the Restatement (2d), for there is neither an assessment of the level of care taken by the defender, nor a requirement of a particularly high level of risk. In the latter aspect, the Scottish development converges with the approach adopted by the Restatement (3d), where recklessness is not necessarily associated with a high level of likelihood.¹¹⁶ But the convergence stops there, for the Restatement (3d) clearly conceives recklessness as the combination of two distinct mental states: one of knowledge of risk (§ 2 (a)) and one of indifference towards risk (§ 2 (b)). The second of these mental states is inferred from the fact that adequate precautions impose a very slight burden and yet they are not adopted. As a result, the defendant's indifference is assumed, but this assumption stems from the combination of (i) negligence and (ii) the low burden of taking precautions. This stands in sharp contrast with the decisions discussed above, where indifference is simply excluded from the analysis or, at most, assumed seemingly just from the occurrence of harm.

5-44. Recklessness is, in sum, a state of knowledge that stands as a lighter form of intention, where the difference lies simply in the harm being no longer certain to result but only likely. This appears, at the very least, problematic. To put it simply: most of our actions entail a certain likelihood of harm, and we know it. Can we be said to be at fault just because of that? There is clearly

¹¹⁵ *Morris Amusements Ltd v Glasgow City Council* [2009] CSOH 84, 2009 SLT 697 at para 46, emphasis added.

¹¹⁶ American Law Institute, *Restatement Third of Torts: Liability for Physical and Emotional Harm* (2010) § 2 comment e.

something missing here. The issue becomes all the more problematic when we consider the possibility of establishing this knowledge constructively.

(2) Constructive knowledge?

5-45. On the face of it, recklessness seems a rather attractive form of fault to be averred: the only requirement is knowledge of the likelihood of harm. Indeed, the passage quoted above from *Anderson v White* might suggest that recklessness is the most attractive form of fault:¹¹⁷ if the assertion that likelihood of harm *was obvious* was deemed a relevant averment of recklessness, does it mean that knowledge can be established constructively? It is not possible to find a clear and conclusive answer from either *Kennedy*'s sources or subsequent doctrine and case law, but the possibility suffers from the same problems indicated in the previous chapter in relation to intention.¹¹⁸

(a) No clear answer provided by sources and case law

5-46. It has already been mentioned that Whitty did not develop the notion of recklessness.¹¹⁹ The Restatement (2d) considered the possibility of applying a reasonableness test to the required knowledge; but, as explained above, the nature of recklessness in the Restatement (2d) is strikingly different from that adopted by and developed after *Kennedy v Glenbelle*.¹²⁰ For this reason, and despite it being one of the sources of the model, what makes sense in the framework of the Restatement (2d) might not necessarily be adequate for the Scots notion. A swift extrapolation is, to say the least, risky.

5-47. Doctrinally, as indicated, recklessness is considered as equivalent to intention, though it is not exactly clear in what respects.¹²¹ If there is also equivalence in the way intention is established, then according to the current position in Scots law, we would have to conclude that knowledge, for the purposes of recklessness, can indeed be established constructively.

5-48. Case law is not entirely clear either, but it seems progressively more inclined to admit averments of constructive knowledge at least to allow the case to go to proof. In *Anderson v White*, the court considered that there were relevant pleadings of fault, and the pursuers' contention that "the likelihood of the harm was obvious" seemed to be directed at proving the knowledge required for recklessness.¹²² Now, it is not clear whether this was meant to assert that the

¹¹⁷ Para 5-42 above.

¹¹⁸ See paras 4-20 to 4-41 above.

¹¹⁹ See paras 3-11 and 5-39 above.

¹²⁰ See paras 3-16 and 5-43 above.

¹²¹ See para 5-41 above.

¹²² *Anderson v White* 2000 SLT 37 at 40.

defenders knew the risk – i.e. that the pursuer intended to prove actual knowledge by circumstantial evidence – or that the defenders should have known because every reasonable defender in their position would have known. The phrase used leaves space for both interpretations. In *Morris Amusements Ltd v Glasgow City Council*, in turn, it was highlighted that a specific state of knowledge must be proved, but nothing was said about how this could be done.¹²³ More recently, the court in *Chalmers v Diageo Scotland Ltd* regarded the assertion that “the defenders knew or ought to have known that [their conduct] would be liable to cause loss”¹²⁴ as a relevant averment of fault, language that more clearly points to the admission of constructive knowledge. The alleged knowledge was claimed to derive from the existence of a number of scientific papers linking the harm suffered (development of fungus on the pursuers’ property) to the defenders’ conduct (keeping a bonded warehouse in the vicinity).

(b) Problems of an affirmative answer

5-49. Admitting the possibility of establishing knowledge constructively for the purposes of recklessness is, however, problematic for the same reasons indicated in relation to intention.¹²⁵ First, there is the problem of confusing the content of mental states and their proof, given the particular difficulty attached to this proof. The need to resort to circumstantial evidence is not the same as applying an objective test of knowledge. Secondly, there is no strong basis in authority for allowing knowledge to be established constructively, though in the case of recklessness the cases of *Anderson v White*¹²⁶ and *Chalmers v Diageo Scotland Ltd*¹²⁷ could be seen as providing some support. These are, however, Outer House cases allowing proof before answer, postponing the actual decision of whether liability can be imposed on this basis. In the case of *Anderson*, this decision did not arrive and is not likely to arrive in the *Diageo* case either.

5-50. More importantly, just as in the case of intention, admitting this possibility means effectively imposing strict liability for foreseeable harm. In intention at least the scope of application of the rule is limited only to cases where harm is certain to result, whereas here, mere likelihood suffices, without a clear definition of how great this likelihood must be. It is, in sum, a broader strict-liability rule that, again, goes against the decision in *RHM Bakeries*.¹²⁸ It could actually render negligence irrelevant: negligence, besides foreseeability of harm, requires the conduct of the defender to be in breach of the relevant

¹²³ *Morris Amusements Ltd v Glasgow City Council* [2009] CSOH 84, 2009 SLT 697 at para 46.

¹²⁴ *Chalmers v Diageo Scotland Ltd* [2017] CSOH 36, 2017 GWD 9-126 at para 12.

¹²⁵ See paras 4-22 to 4-42 above.

¹²⁶ 2000 SLT 37.

¹²⁷ [2017] CSOH 36, 2017 GWD 9-126.

¹²⁸ *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17.

standard of care, a requirement absent from the version of recklessness adopted by and developed after *Kennedy*.

5-51. Consequently, if complete consistency with the general fault-based liability rule enshrined by *RHM Bakeries* for nuisance is to be achieved, then two roads can be followed: either the basis for a recklessness averment is limited only to actual knowledge, or the notion of recklessness as a pure state of knowledge is reassessed.

D. CONCLUSIONS

5-52. As explained in this chapter, negligence in the context of nuisance has been the subject of debate. For different reasons, it has been seen as a form of fault that does not fit the nuisance framework, so that negligent nuisance should be treated simply as negligence (as a delict) and attract the application of the general rules of the law of negligence. This is, however, not necessarily the case, and negligence can be accommodated as a form of fault in the nuisance model. The *plus quam tolerabile* test that is peculiar to nuisance is neither conceptually incompatible with negligence, nor does it set too high a standard of care for unintentional invasions. Moreover, accepting negligence as a form of fault in nuisance does not introduce unjustified differences of treatment between nuisance and negligence: the differences are either justified – as in the case of economic loss – or more apparent than real, for the elements of negligence integrate factors that are specific to the landownership context. Consequently, and in accordance with *Kennedy v Glenbelle*, negligent nuisance requires the fulfilment of two tests: *plus quam tolerabile* and breach of the appropriate standard of care.

5-53. Recklessness, in turn, remains the less developed form of fault that is offered by the model. Departing from what seems to have been the understanding of recklessness in Scots law, the notion adopted by *Kennedy* for the nuisance fault model is a purely subjective one, a state of mind consisting of the knowledge that certain harm is likely to follow from the defender's conduct. It does not assess the defender's conduct objectively, nor is it associated with a particularly high level of likelihood of harm, in contrast with its counterpart in the Restatement (2d). In this context, admitting the possibility of establishing knowledge constructively might lead to a broad rule of strict liability in disguise.

6 Conduct giving rise to a Special Risk of Abnormal Damage: the Fault-based Liability Account

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A. INTRODUCTION

6-01. The previous chapters discussed the first four categories of fault listed by Lord President Hope in *Kennedy v Glenbelle Ltd* in addressing the basis of liability in nuisance.¹ This chapter is concerned with the fifth and last of these categories, namely “conduct causing a special risk of abnormal damage, where it may be said that it is not necessary to prove a specific fault as fault is necessarily implied in the result”. The formulation discloses from the outset that this type of conduct is subject to a special treatment or regime: whereas with the other four categories of fault, instances of malice, intention, recklessness or negligence (as the case may be) must be proved by the pursuer in order to obtain compensation, in the case of conduct that meets the above-mentioned description there is no need to prove specific fault, for it is implied.

6-02. Neither the scope of this category nor the nature of the liability that it attracts has been satisfactorily explained by Scots case law and doctrine. In the words of Cameron, “it may be that this element of fault requires to be more fully worked out”.² The aim of this chapter is to contribute to the analysis of this special-liability regime by explaining some of the difficulties that are present in the law as it stands in order to make an exploration of a more rational regime possible.

6-03. A discussion of the sources of this category and of subsequent case law and literature will reveal difficulties for the adequate delineation and explanation of this regime of liability, for three reasons. First, the sources lead to different and, on occasions, conflicting views about the category. Secondly, most of these sources remain directly or indirectly connected to the English case of *Rylands v Fletcher*,³ which was excluded from Scots law in the House of Lords decision in *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council*.⁴ Thirdly, much of the more recent relevant authority is concerned with the application of a connected yet different liability rule: that applicable to employers for damage caused by independent contractors. Despite these issues, at least one feature of Scottish doctrine as it has evolved appears to be uncontentious: the regime can be explained in fault terms. Precisely for this reason, the need to delineate with precision the scope of this regime is downplayed. This chapter considers three groups of materials: two that serve as sources for the category of conduct causing a special risk of abnormal damage recognised in *Kennedy v Glenbelle*, and one that focuses on its development after *Kennedy*.

¹ *Kennedy v Glenbelle Ltd* 1996 SC 95 at 99.

² G D L Cameron, “Neighbourhood Liability in Scotland 1850–2000” in J Gordley (ed), *The Development of Liability between Neighbours* (2010) 132 at 151.

³ *Rylands v Fletcher* (1868) LR 3 HL 330.

⁴ *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17.

6-04. The first group consists of para 2087 of Whitty's path-breaking title on "Nuisance" as first published in the *Stair Memorial Encyclopaedia* in 1988.⁵ This is the introductory paragraph to the section about the basis of liability in reparation, and its sources. Here the author sets out the fault model or "continuum" based on the American Law Institute's *Restatement Second of Torts*, which was discussed in detail in the previous chapters. According to Whitty's model, "conduct causing a special risk of abnormal danger" is one of the "usual categories of *culpa*".⁶ It should be noted that Whitty refers here to abnormal *danger*, and not to abnormal *damage* as in Lord Hope's formulation, a point that will be revisited below.⁷ The only authority cited in support of this category is *Miller v Robert Addie & Sons' Collieries Ltd*,⁸ which in turn applied the rule developed by the Privy Council in the Australian case of *Rickards v Lothian*.⁹ The section concludes with a discussion of Whitty's further references to dangerous activities. The analysis will show that by the time *Kennedy* was decided, the scope and nature of this category was rather unclear, despite the fact that the orthodox view considered these activities as subject to a fault-based liability rule (section B).

6-05. The second group of materials considers the treatment in *Kennedy v Glenbelle* itself together with the authority identified in the decision for the specific category under discussion. In *Kennedy*, Lord President Hope listed conduct causing a special risk of abnormal damage as the last category of *culpa* and cited four decisions as authority for it.¹⁰ Unfortunately, Lord Hope's account and the authority there considered do not take us much further than the sources previously mentioned. First, even though the nature of the regime remains fault-based, *Kennedy* undermined what at that point was the orthodox explanation of the regime without providing a satisfactory new account. Secondly, although *Kennedy* clearly isolates the relevant element that determines the scope of the category (danger), it provides little assistance in delineating its boundaries (section C).

6-06. The third group of materials is case law and legal literature after *Kennedy*. It will be argued that most of the case law deals with an issue which, while perhaps connected, is certainly distinct from the issue under analysis here. The remaining judicial and doctrinal materials are of limited assistance (section D).

⁵ N R Whitty, "Nuisance" in *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol 14 (1988). A reissue of this entry was released subsequently: see N R Whitty, "Nuisance" (Reissue, 2001) in *The Laws of Scotland: Stair Memorial Encyclopaedia*. Paragraph numbers in both versions are correlative: para 2087 in "Nuisance" (1988) corresponds with para 87 in "Nuisance" (Reissue, 2001). This section on the sources of the category is, however, mostly concerned with the original version.

⁶ Whitty, "Nuisance" (1988) para 2087.

⁷ See para 6-62 below.

⁸ *Miller v Robert Addie & Sons' Collieries Ltd* 1934 SC 150.

⁹ *Rickards v Lothian* [1913] AC 263.

¹⁰ 1996 SC 95 at 99.

6-07. In each of these three groups of materials, a distinction will be made between the key aspects of the liability regime, i.e. (i) the nature of the liability rule (whether fault-based, “stricter-than-normal” or strict according to the taxonomy set out in chapter 2), and (ii) its scope of application, that is, the definition of the category of conducts to which it applies. The final section will offer some brief conclusions (section E).

B. SOURCES (I):WHITTY’S MODEL

(I) Whitty’s model and Restatement (2d) contrasted

6-08. Even though the fault model adopted by Whitty is derived from the Restatement (2d), by incorporating the type of conduct under discussion into the fault framework he departed from this source, where abnormally dangerous activities are subject to a strict-liability rule.¹¹ This departure, however, is fundamental to the nature of the applicable liability rule, i.e. fault-based as opposed to strict liability. The delimitation of the conduct itself in the Restatement (2d), however, could still be illustrative for our purposes, since it seems to have informed the way in which Whitty defined the conduct by incorporating the notion of abnormal danger. Consequently, even though this type of conduct falls within a different liability regime, the Restatement (2d) nevertheless serves as a relevant point of reference.

6-09. Abnormally dangerous activity is defined in § 520 Restatement (2d), which lists a number of factors that must 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.

According to the Restatement (2d), none of these factors is necessarily sufficient of itself, and normally several of them will be required to characterise an activity as abnormally dangerous, but they do not all need to be present. For this reason, “it is not possible to reduce abnormally dangerous activities to any definition”.¹²

6-10. This approach has come to be considered problematical in several ways,¹³ especially due to the difficulty in separating activities that trigger the application

¹¹ American Law Institute, *Restatement Second of Torts* (1979) § 519.

¹² Restatement (2d) § 520 comment f.

¹³ Details of the problems associated with the application of these factors can be found in the reporter’s notes on American Law Institute, *Restatement Third of Torts: Liability for Physical and Emotional Harm* (2010) § 20.

of strict liability from those that are subject to the general fault-based liability regime. The difference, in this model, lies in the contrast between utility and risk. If utility outweighs risk, then risk is reasonable and negligence is excluded, for negligence can only arise from unreasonable risks,¹⁴ but there is still space for strict liability based upon abnormal danger.¹⁵ Conversely, if risk outweighs utility, then risk is unreasonable and, therefore, conduct can be negligent. This, however, should not close the possibility of strict liability; otherwise, it could create the contradiction that a higher risk that is not outweighed by its utility would be excluded from the category of abnormal danger and liability would only depend on proof of negligence.

6-11. It seems, therefore, that unreasonable risk, unlike abnormal danger, is a relational concept: risk can be reasonable because of the activity's utility, but still so high as to be abnormal; risk can be low and so not enough to be abnormal, but still unreasonable if the activity's utility is even lower.¹⁶ Some of the factors included in § 520, however, undermine this conclusion; for instance, value to the community is itself an indicator of utility for negligence purposes.¹⁷ There is, in fact, a wide overlap between the factors that are taken into account under § 520 to characterise an activity as abnormally dangerous and the factors taken into account to characterise risk as unreasonable,¹⁸ so one is left to wonder whether in practice these tests have any substantial difference and whether they can in fact bring about different results. It has, indeed, been said that "when a court applies all the factors suggested in the Second Restatement it is doing virtually the same thing as is done with the negligence concept".¹⁹ The Restatement (2d) highlights a procedural difference: weighing factors that define an activity as abnormally dangerous is a task for the court; weighing factors that characterise risk as unreasonable is a task for the jury.²⁰ Substantively, however, there seems to be little difference.

6-12. It will be possible to note from the authority analysed in this chapter that some of the factors considered in the Restatement (2d) have been identified as relevant in Scots law. For example, the inability to eliminate risk lies at the heart of the distinction drawn in the case of *Chalmers v Dixon*;²¹ and the ideas of common usage and value for the community could be seen as the basis for the decision in *Miller v Robert Addie*.²² Yet the fact that none of the factors is treated as necessarily decisive in the Restatement (2d) constitutes a fundamental

¹⁴ Restatement (2d) § 291.

¹⁵ Restatement (2d) § 520 comment b.

¹⁶ Restatement (2d) § 520 comment g.

¹⁷ Restatement (2d) § 292 (a).

¹⁸ Compare factors in § 520 with factors in §§ 291–293.

¹⁹ W P Keeton (ed), *Prosser and Keeton on the Law of Torts* (5th edn, 1984) 555; see also E Reid, "Liability for Dangerous Activities: A Comparative Analysis" (1999) 48 ICLQ 731 at 737.

²⁰ Restatement (2d) § 520 comment l.

²¹ (1876) 3 R 461 at 464 per Lord Justice-Clerk Moncreiff.

²² 1934 SC 150.

difference with the Scottish approach. For instance, under § 520, activities that would inexorably fall in Scots law under the general rules of fault-based liability according to *Miller*²³ for being common uses of land or uses for the general benefit of the community, could still be considered as abnormally dangerous in the Restatement (2d) if other elements are strong enough, as in the case where it is extremely likely that damage will follow from the activity and no precautions would control such risk. Consequently, the Restatement (2d)'s flexible approach to the definition of abnormally dangerous activities stands in contrast with the sources considered by Whitty in defining conduct causing a special risk of abnormal danger.²⁴ It seems, therefore, that the inspiration obtained by Whitty from the Restatement (2d) in this point did not go beyond the incorporation of the “abnormal danger” wording.

(2) *Miller v Robert Addie*, its sources and aftermath

6-13. We turn, then, to the only authority cited by Whitty in support of the category of conduct causing a special risk of abnormal danger: the case of *Miller v Robert Addie*, decided by the Second Division in 1933.²⁵ This decision, paradoxically, did not apply any special liability regime. Indeed, as we will see, the general rules of fault-based liability were applied.

(a) *Facts and decision*

6-14. In this case, gas escaped from service pipes, property of the defenders, and found its way into the pursuer's house, causing personal injuries to the pursuer and her child, and resulting in the death of her husband. One of the grounds of her claim was the rule in *Rylands v Fletcher*:²⁶ all that was needed to establish liability, she argued, was that there was a non-natural use of land and that such use created a danger. There was no need to aver fault. The Court unanimously decided that providing gas to houses was not a non-natural use of land and that, for this reason, *Rylands* was not applicable.²⁷ It adopted for the provision of gas for domestic purposes the qualification that *Rickards v Lothian*²⁸ had introduced to the application of *Rylands* in the context of the provision of water: “[i]t must be some special use bringing with it increased

²³ Discussed at length in paras 6-13 to 6-33 below.

²⁴ This flexible approach is abandoned in the Restatement (3d): see § 20.

²⁵ 1934 SC 150.

²⁶ (1868) LR 3 HL 330.

²⁷ *Miller v Robert Addie* 1934 SC 150 at 154 per Lord Justice-Clerk Aitchison, 156 per Lord Hunter, 157 per Lord Anderson, and 159 per Lord Murray.

²⁸ [1913] AC 263.

danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community".²⁹

6-15. The wording Whitty employs for his formulation "conduct causing a special risk of abnormal danger" seems to combine elements from both the *Rickards* definition of the conduct that triggers the application of the *Rylands* rule (*special use* that brings *increased danger*) and the definition of the conduct that attracts strict liability in the Restatement (2d) (*abnormally dangerous* activities). However, the reference to a *special use* is replaced by Whitty with the reference to a *special risk*, without signalling explicitly the reason for the change, if there was one. The result is a redundant and perhaps confusing definition, since it is based upon both risk and danger, two concepts that are not easily distinguishable.³⁰ If risk and danger are the same, then we end up with two separate requirements for this risk or danger: it has to be both special and abnormal. It is not clear whether these are actually two different requirements and we do not find assistance in Whitty's title or his references to answer this question.

6-16. There are, moreover, two fundamental issues that leave *Miller* in a rather problematic position as authority to support the category under discussion. On the one hand, the authority upon which *Miller* relies provides some insights about the rule's scope and nature, but certainly does not provide clear and conclusive views. On the other hand, the case keeps the category connected with *Rylands v Fletcher*.

(b) *The authority considered in Miller*

6-17. The central question in *Miller* was whether the escape of gas from the defender's service pipes triggered the application of the *Rylands* rule, a rule that was identified with those applied in the cases of *Kerr v Earl of Orkney*,³¹ *Chalmers v Dixon*,³² and *Caledonian Railway Co v Greenock Corporation*.³³ The issue was, therefore, one about the scope of application of the rule, though some of the judges manifested their views about the nature of the rule.

(c) *Kerr v Earl of Orkney*

6-18. In *Kerr v Earl of Orkney*³⁴ the defender erected a large dam that, only a few months after its construction and as a consequence of a heavy rainfall, burst

²⁹ [1913] AC 263 at 280 per Lord Moulton.

³⁰ The notions of danger and risk are, indeed, expressly considered to be synonyms in the Restatement: see Restatement (2d) § 282 comment c.

³¹ (1857) 20 D 298.

³² (1876) 3 R 461.

³³ 1917 SC (HL) 56.

³⁴ (1857) 20 D 298.

and swept away the pursuer's houses and structures. In the decision, the judges made some remarks about the nature of the defender's liability, the language of which seems to point towards strict liability. Lord Justice-Clerk Hope submitted that, when an operation reaches a certain level of danger, the person engaging in such operation must afford "complete protection" to potential victims; he must provide security even against extraordinary events. The defenders "were exposed to no danger before the operation. He creates the danger, and he must secure them against danger". Proof of skill and care was deemed irrelevant: the fact that the dam gave way immediately after its construction showed that it was not constructed so as to provide the security it was bound to afford. *Damnum fatale* would have exempted the defender from liability, but it was not present in the case.³⁵ In similar vein, Lord Murray considered that this type of operation required "security of all who are liable to be affected by it [and] reparation for all damage occasioned by its inefficiency".³⁶

6-19. The reasoning contained in the Lord Ordinary's decision in *Kerr*, to which the Second Division adhered, points towards fault-based rather than strict liability albeit that, given the nature of the operations and the circumstances of the accident, they deserved a "special" treatment. In the Lord Ordinary's opinion, the construction of the dam "was attended with some hazard, and required great care and caution". The neighbours "were entitled to rely on the respondent's availing himself of the best skill, the best materials, and the best workmanship",³⁷ language that appears to point to a very high standard of care. The fact that the accident occurred "in reference to a recent work, constructed by a private party for his own pleasure, must be held to throw on the respondent the burden of explaining the fact on some footing consistent with the strength and sufficiency of the work".³⁸ It is not clear, however, whether what operates here is a presumption of fault in the strict sense, or merely the *res ipsa loquitur* doctrine.³⁹ The wording seems to point to the latter, since it does not burden the defender with the proof of diligence but only with the provision of an explanation that is consistent with it.⁴⁰

³⁵ (1857) 20 D 298 at 302–303.

³⁶ (1857) 20 D 298 at 304. Lord Murray's reference to *Macdonald of St Martin's v Spittal's Trs* is obscure: there seems to be no such a case in the law reports. E M Clive, "The Thirteenth Report of the Law Reform Committee for Scotland" 1964 JR 250 at 252, after analysing a different report of *Kerr* (30 Sc Jur 158), concludes that Lord Murray was, in fact, referring to two cases: *Spittal's Trs*, which in Clive's view corresponds with *Cleghorn v Taylor* (1856) 18 D 664, and *Macdonald of St Martin's*, which he does not identify. This second reference might be to *M'Donald v Mackie and Co* (1831) 5 W&S 462 – I thank Elspeth Reid for bringing this case to my attention. The cases, however, are of not much assistance: while *Cleghorn* seems to refer to liability of landowners for the wrongs of their contractors, *M'Donald* is concerned mostly with contractual liability.

³⁷ *Kerr v Earl of Orkney* (1857) 20 D 298 at 300.

³⁸ (1857) 20 D 298 at 300.

³⁹ For the distinction, see para 2-50 above.

⁴⁰ Reid (n 19) 749 supports the latter view.

6-20. With regard to the scope of application of this special regime, Lord Justice-Clerk Hope identified danger as the key element: complete protection is the condition for operations involving “great risk to the safety of life and of property”. Lord Murray, on the other hand, seems to have focused on the “novelty” of the operations, that is, on the introduction of something that was not previously on the land, by linking the duty to provide security and to compensate with the notion of *novum opus*.⁴¹ This notion had been used by the Lord Ordinary, who defined it as “an innovation [. . .] voluntarily erected for the benefit or pleasure of the respondent”.⁴²

(d) *Rylands v Fletcher*

6-21. Ten years later, *Rylands v Fletcher* was decided by the House of Lords.⁴³ Over time, the case provided the label for a special-liability regime; “the *Rylands* rule”. The facts are well-known and, to an extent, similar to those in *Kerr*. The defendant employed an engineer and a contractor to build a reservoir on his land, who in turn failed to block certain disused shafts and passages that connected the defendant’s land with the plaintiff’s coalmines, located under neighbouring land. As a result, the water introduced into the reservoir flowed through these shafts and passages, flooding the mines. The Exchequer Chamber, reversing the Court of Exchequer’s decision, held that the defendant was liable for the damage caused, and this decision was upheld by the House of Lords.

6-22. The views expressed in this decision point more clearly towards a strict-liability rule. In the words of the Lord Chancellor, Lord Cairns, owners engaging in this type of operation act “at their own peril”, becoming liable if damage results “in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so”. Quoting Blackburn J’s dictum in the Exchequer Chamber decision,⁴⁴ the Lord Chancellor highlighted the limited availability of defences: the defendant could escape liability by showing that the accident was the consequence of the plaintiff’s own fault, or of *vis major* or an act of God, which were not present in the case.⁴⁵ Lord Cranworth, agreeing with the Lord Chancellor, considered that the owner engaging in such operations was “responsible, however careful he may have been, and whatever precautions he

⁴¹ *Kerr v Earl of Orkney* (1857) 20 D 298 at 303.

⁴² (1857) 20 D 298 at 300. The *novum opus* terminology can also be found in *Potter v Hamilton and Strathaven Railway Co* (1864) 3 M 83 and, much more recently, in the sheriff court case of *D McIntyre & Son Ltd v Soutar* 1980 SLT (Sh Ct) 115, where this terminology was considered more satisfactory than that of non-natural use.

⁴³ *Rylands v Fletcher* (1868) LR 3 HL 330.

⁴⁴ *Fletcher v Rylands* (1865–66) LR 1 Ex 265 at 279.

⁴⁵ *Rylands v Fletcher* (1868) LR 3 HL 330 at 339.

may have taken to prevent the damage”, referring to authority that supported the irrelevance of skill and care.⁴⁶

6-23. To what type of operations did this liability rule apply? The Exchequer Chamber’s decision focused on the element of danger, talking of “the person who, for his own purposes, brings on his land and collects and keeps there *anything likely to do mischief* if it escapes”, mentioning if almost incidentally – in parenthesis – the fact that the thing brought into the land “was not naturally there”.⁴⁷ In the House of Lords, the Lord Chancellor expanded this qualification: the plaintiff cannot complain if the use falls within the “ordinary course of enjoyment of land”.⁴⁸ For the defendant to be liable, the use had to be:

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.⁴⁹

(e) *Chalmers v Dixon*

6-24. The next of the four cases considered by *Miller* was *Chalmers v Dixon*.⁵⁰ In this case, some of the judges in the Inner House explicitly brought liability by virtue of the *Rylands* rule back to a fault framework. The defenders had accumulated a bin of refuse which caught fire and kept burning for a substantial period of time, emitting noxious vapours and smoke that reached the pursuer’s land, causing inconvenience and injuring his crops.

6-25. Despite considering that, according to *Rylands* and *Kerr*, these operations “are only lawful where injury does not happen to the neighbours”, Lord Justice-Clerk Moncreiff said that:

A good deal has been said as to the necessity of proving *culpa*. I think that *culpa* does lie at the root of the matter. If a man puts upon his land a new combination of materials, which he knows, or ought to know, are of a dangerous nature, then either due care will prevent injury, in which case he is liable if injury occurs for not taking that due care, or else no precautions will prevent injury, in which case he is liable for his original act in placing the materials upon the ground.⁵¹

As a consequence, “it is not necessary to prove specific fault. Fault is implied in the result”.⁵² In similar vein, Lord Gifford considered that in this type of

⁴⁶ (1868) LR 3 HL 330 at 340–341.

⁴⁷ *Fletcher v Rylands* 1865–66) LR 1 Ex 265 at 279 per Blackburn J (emphasis added).

⁴⁸ *Rylands v Fletcher* (1868) LR 3 HL 330 at 339–340.

⁴⁹ (1868) LR 3 HL 330 at 340.

⁵⁰ (1876) 3 R 461.

⁵¹ (1876) 3 R 461 at 464.

⁵² (1876) 3 R 461 at 464.

operation the defender is to be liable “even though it be not possible to bring home negligence or fault in the ordinary sense”. The foundation of this liability was, in any case, *culpa*, a notion that he considered flexible: “much lighter fault may make a person liable in some circumstances than in others”.⁵³ Only Lord Ormidale departed from this line of argument, highlighting that the defenders were only entitled to do what they did “at their own peril and risk, as regarded injurious consequences to their neighbours” and quoting Lord Cranworth’s dictum from *Rylands*.⁵⁴

6-26. Regarding the type of activity that would trigger the application of the *Rylands* rule, each judge employed a different terminology. Lord Justice-Clerk Moncreiff drew a distinction between ordinary uses of property, “to which a neighbour is bound to submit, although they may cause incidental injury to him”, and an *opus manufactum*, “the bringing an article upon the land which creates a hazard which did not exist before. [. . .] The present case is a strong illustration of the distinction. The material which caused damage was entirely foreign to the surface of the land”.⁵⁵ Consequently, the two central elements of the notion of *opus manufactum* in Lord Justice-Clerk Moncreiff’s view were danger and novelty. Lord Ormidale, in turn, preserved the terminology from *Rylands*, considering that the defenders’ use of the land was unusual and unnatural in the sense in which those expressions were used by the Lord Chancellor in that case.⁵⁶ Lord Gifford, however, questioned the appropriateness of the terms “natural” and “non-natural” use, opting for the notion of uses that are “exceptional or occasional, or require special erections upon or special preparation of the subject”.⁵⁷ He considered that taking into account the presence of an *opus manufactum* was “[a]nother way of looking at the matter”, without offering a particular concept of such notion.⁵⁸

6-27. The decision in *Chalmers* will be revisited later in this chapter, as it is the only one of the four decisions cited by *Miller* that is considered in *Kennedy v Glenbelle* as authority for the category of conduct causing a special risk of abnormal damage.

(f) *Caledonian Rly Co v Greenock Corporation*

6-28. The final decision mentioned in *Miller* is that of the House of Lords

⁵³ (1876) 3 R 461 at 467.

⁵⁴ (1876) 3 R 461 at 466.

⁵⁵ (1876) 3 R 461 at 464. The notion of *opus manufactum* can be found in the previous case of *Pirie and Sons v Magistrates of Aberdeen* (1871) 9 M 412, in which it seems to be treated as a synonym of *novum opus*; and in the later cases of *Fleming v Gemmill* 1908 SC 340 and *Stirling v North of Scotland Hydro-Electric Board* 1965 SLT 229.

⁵⁶ *Chalmers v Dixon* (1876) 3 R 461 at 466.

⁵⁷ (1876) 3 R 461 at 467.

⁵⁸ (1876) 3 R 461 at 468.

in *Caledonian Rly Co v Greenock Corporation*.⁵⁹ In this case, the defenders converted a piece of land into a park, and for this purpose they altered the channel of a burn by enclosing it into a culvert, and built other works that obstructed its flow. During a period of heavy rain, the culvert proved to be insufficient and a flood resulted, reaching and damaging the pursuers' property.

6-29. The main focus of the decision was on whether there had been a *damnum fatale* that released the defender from liability, a defence that the defender failed to establish. The discussion about the basis of such liability was not developed in much detail. The Lord Chancellor, Lord Finlay, taking into consideration the cases of *Kerr v Earl of Orkney* and *Tennent v Earl of Glasgow*,⁶⁰ approved Rankine's view⁶¹ that a person who builds an *opus manufactum* on the course of a stream or diverts its flow is to be liable if (i) the damage would have not occurred in the absence of such construction or operation, and (ii) the *opus* has not been fortified by the operation of prescription.⁶² In similar vein, Lord Shaw, based on the case of *Kerr*, explained that a person collecting and damming up the water of a stream must make lower proprietors "as secure against injury as they would have been had nature not been interfered with".⁶³ Both formulations seem to highlight causation of harm as the basis of liability. Lords Dunedin and Parker also identified *Kerr* as the relevant authority, and deemed it approved by the House of Lords in the case of *Tennent*, but did not offer further insights about the basis of liability.⁶⁴ Lord Wrenbury, on the contrary, thought that the facts of *Kerr* did not fit the facts under discussion (that is, the flow of the water being thrown into a new channel) given that the natural channel was filled up as a consequence of the defender's works. He considered, nevertheless, that the defenders' liability was based on their failure to provide a channel that was equally efficient to the natural one,⁶⁵ focusing mainly upon the fact of their interference.

6-30. These remarks about the basis of liability also disclose some notions about the scope of the liability rule applied in the case. The Lord Chancellor, by approving Rankine's view, relied on the notion of *opus manufactum*, but his approach does not seem to refer to *opera manufacta* generally but only to those which are constructed "on the course of a stream". Diversion of the course of the stream appears as a different situation, but subject to the same rule. The reference to prescription emphasises the novelty element. In connection with the facts in *Kerr*, Lord Shaw simply referred to the case of a person "making operation for collecting and damming up the water of a stream" – which was

⁵⁹ 1917 SC (HL) 56.

⁶⁰ *Tennent v Earl of Glasgow* (1864) 2 M (HL) 22.

⁶¹ J Rankine, *The Law of Land-Ownership in Scotland* (4th edn, 1909) 376.

⁶² 1917 SC (HL) 56 at 61.

⁶³ 1917 SC (HL) 56 at 65.

⁶⁴ 1917 SC (HL) 56 at 63 and 67.

⁶⁵ 1917 SC (HL) 56 at 67.

not, it must be said, exactly the case in *Caledonian* – whereas Lord Wrenbury referred specifically to the facts of the case. These observations reveal a somewhat restrictive view of the rule's scope of application, linked more or less tightly with the facts of the case, yet seemingly highlighting interference with nature as a defining element.

(g) *Evaluation*

6-31. The conclusion from this survey is rather evident: the decision in *Miller v Robert Addie* and the authority cited in it provide us neither with a single explanation of the nature of the liability rule attached to “conduct causing a special risk of abnormal damage”, nor with a clear delimitation of the scope of this category of conduct.

6-32. Although the three Scottish cases cited in *Miller* were all identified as an application of the rule in *Rylands v Fletcher*, on closer analysis they seemingly rest upon differing regimes. The reasoning in *Rylands* and in *Caledonian Rly Co v Greenock Corporation* suggests the operation of a strict-liability rule, founding liability on the element of causation and limiting the admissible defences to those that break this link. In *Chalmers v Dixon*, on the other hand, liability is explained in fault terms, though different judgments highlight different elements of this liability: while Lord Moncreiff seems to have relied upon some sort of presumption of fault, Lord Gifford appears to have stressed a particularly heightened standard of care for this type of activity. In *Kerr v Earl of Orkney* we find elements pointing in both directions. References to the defender's obligation to afford complete protection for a danger that he created, and to the irrelevance of diligence as a defence, suggest the recognition of a strict-liability rule, placing the emphasis in causation. It is not clear, however, whether such defence was deemed irrelevant because of the nature of the liability rule or because the accident happened so shortly after the construction was finished, showing that it was not properly built, i.e., that adequate precautions were clearly not taken. Moreover, the Lord Ordinary's judgment supports a fault-based reading of the decision.

6-33. The discussion in *Miller* itself is a good reflection of this dichotomy of views. While recognising the existence of a special regime of liability based upon these decisions, Lord Justice-Clerk Aitchison questioned whether the *Rylands* rule was ever treated in Scotland as one of absolute liability. After quoting passages by Lords Gifford and Moncreiff in *Moffat & Co v Park*,⁶⁶ he concluded that:

[I]n those cases in which the doctrine of *Rylands v Fletcher* has been held to apply the obligation to take adequate precautions has been of so onerous and imperative a

⁶⁶ *Moffat & Co v Park* (1877) 5 R 13.

kind that the mere occurrence of damage and injury has of itself been sufficient to justify an inference of negligence.⁶⁷

Conversely, Lord Anderson considered that the acceptance of the *Rylands* rule as one of absolute obligation in Scotland was “fully documented” by *Kerr*, *Chalmers*, and *Caledonian Rly*.⁶⁸

6-34. The dichotomy was, again, reflected in two decisions pronounced in the following decade: the Outer House decision in *Western Silver Fox Ranch Ltd v Ross and Cromarty County Council*,⁶⁹ a case of harm to property caused by detonation of explosives, and the Inner House decision in *M’Laughlan v Craig*,⁷⁰ a case of personal injury and harm to property caused by an escape of gas and subsequent explosion. In the first case, Lord Patrick considered that the detonation of a considerable quantity of high explosives was an activity that the defender did at his peril, becoming liable for the damage caused “apart from any question of his negligence”, in application of the *Rylands* rule.⁷¹ In the second case, however, Lord President Cooper questioned, once again, the acceptance of the *Rylands* rule in Scotland, especially in light of the constraints imposed on the rule in England by the House of Lords in the case of *Read v J Lyons & Co Ltd*,⁷² decided two years earlier. He concluded that:

There are of course cases in which there is little difference in the result between the application of the English rule of absolute liability and the Scottish rule of *culpa*, where the facts raise a presumption of negligence so compelling as to be practically incapable of being displaced. But, when it comes to extending the rule in *Rylands v Fletcher* to situations undreamt of by those who formulated it, we cannot ignore the wide distinction in principle between the two systems without destroying the very basis of the Scots law of delict.⁷³

(h) Aftermath

6-35. By the 1960s the views expressed by Lord Aitchison (in *Miller v Robert Addie*) and Lord Cooper (in *M’Laughlan v Craig*) had come to be accepted in the legal literature as the orthodox account of this liability regime. On this view it consists of nothing more than a very high standard of care, commensurate with the level of danger created by the activity, combined with a presumption of its breach. Liability is, accordingly, fault-based. This view, which can indeed

⁶⁷ *Miller v Robert Addie* 1934 SC 150 at 155.

⁶⁸ 1934 SC 150 at 157.

⁶⁹ 1940 SC 601.

⁷⁰ 1948 SC 599.

⁷¹ *Western Silver Fox Ranch Ltd v Ross and Cromarty County Council* 1940 SC 601 at 603.

⁷² *Read v J Lyons & Co Ltd* [1947] AC 156.

⁷³ *M’Laughlan v Craig* 1948 SC 599 at 611.

be traced back in the literature to Glegg,⁷⁴ was held notably by Walker and T B Smith before it became the view of the Law Reform Committee for Scotland, as explained below.⁷⁵

6-36. While recognising that in *Kerr* there were passages that might suggest the existence of a strict-liability rule, Walker explained the case as a “decision on negligence where a higher standard of care than usual was demanded and fault was presumed from what happened rather than proved”.⁷⁶ After analysing successively the cases mentioned in this section, he concluded that “the whole body of Scottish decisions are only consistent with each other on the basis that in appropriate cases fault is presumed from the happening”.⁷⁷ This combination of a very high standard of care with an inference or presumption of fault was Walker’s explanation of liability imposed in cases of escapes of artificial accumulation of water, explosives and noxious fumes.⁷⁸ What remains unclear is the nature of this presumption or inference of fault. For Walker it was based on the fact that these substances escaped and caused damage. “In any event”, he added, “the conditions for the application of *res ipsa loquitur* seem to be satisfied”,⁷⁹ implying that *res ipsa loquitur* is a separate device and not the source of the presumption. He would later label this regime as one of “strict liability”, but still explain it as depending on circumstances requiring special care coupled with “a willingness to presume fault” by the courts.⁸⁰

6-37. T B Smith held a similar position, concluding that *Rylands*, as a rule of absolute liability, had never served as the sole basis of liability in Scotland in the absence of negligence (often presumed), acknowledging nonetheless that the difference in practice might be negligible. He clearly identified the above-mentioned presumption of negligence as a result of the operation of the principle of *res ipsa loquitur*.⁸¹

⁷⁴ A T Glegg, *A Practical Treatise on the Law of Reparation* (1892) 18–19 and 275–276, based upon the cases of *Laurent v Lord Advocate* (1869) 7 M 607 and *Pirie and Sons v Magistrates of Aberdeen* (1871) 9 M 412. Glegg’s editor maintained this view even after *Caledonian Rly*: whereas he acknowledged that certain passages in that case might point to strict liability, he argued that the decision could be explained on the basis of fault. He does not, however, offer such an explanation. See A T Glegg, *The Law of Reparation in Scotland* (3rd edn, 1939, by J L Duncan) 20.

⁷⁵ Similar views can be found in W Mitchell, “Nuisance and Non-Natural Use of Property” in J L Wark (ed), *Encyclopedia of the Laws of Scotland*, vol 10 (1930) at paras 694–700, without, however, explaining the origin of the imputation or implication of negligence; and in J J Gow, “Is Culpa Amoral?” (1953) 65 JR 17 at 25–26, though his explanation relies only on a high standard of care.

⁷⁶ D M Walker, “Strict Liability in Scotland” (1954) 66 JR 231 at 239.

⁷⁷ Walker, (n 76) 250.

⁷⁸ Walker, (n 76) 251.

⁷⁹ Walker, (n 76) 251.

⁸⁰ D M Walker, *The Law of Delict in Scotland* (2nd edn, 1981) 645.

⁸¹ T B Smith, *A Short Commentary on the Law of Scotland* (1962) 646.

6-38. These views were later reflected in the conclusions reached by the Law Reform Committee for Scotland in their *Thirteenth Report* on damage caused by dangerous agencies escaping from land,⁸² discussed later in this chapter.⁸³

6-39. As to the scope of “conduct causing a special risk of abnormal danger”, the terminology used in the cases referred to by *Miller* is not unequivocal, featuring three different – yet seemingly overlapping – elements which, by themselves or in combination, serve to define the type of activity that will attract the application of a special-liability rule: the creation of a danger, the introduction of something new or artificial on to the land, and the departure from what is considered a normal or natural use of the land. We only obtain, through the reference to *Rickards v Lothian*,⁸⁴ a clear exclusion: the provision of basic services for domestic purposes, such as water and gas. This exclusion had actually been recognised in Scots law before *Rickards*,⁸⁵ and it was confirmed in subsequent case law.⁸⁶

(i) *The connection with Rylands v Fletcher*

6-40. There is, moreover, a second issue affecting the reference to *Miller v Robert Addie*⁸⁷ as the key authority for defining the conduct and regime under discussion: even though the case questioned the status of *Rylands* in Scotland,⁸⁸ it still relied on this decision in recognising the existence of a category deserving special treatment. At the time Whitty was writing, however, the House of Lords had already decided in *RHM Bakeries* that *Rylands* was not part of Scots law,⁸⁹ so in this aspect, the case could be considered as superseded by *RHM Bakeries*.

6-41. Certainly *Miller* was not an application of the *Rylands* rule, so in this sense the result is not inconsistent with *RHM Bakeries*. But *Miller* still recognised the existence of a special regime of liability and defined the conduct

⁸² Law Reform Committee for Scotland, *Thirteenth Report: The Law relating to Civil Liability for Loss, Injury and Damage caused by Dangerous Agencies Escaping from Land* (Cmnd 2348, 1964).

⁸³ See paras 6-48 to 6-53 below.

⁸⁴ *Rickards v Lothian* [1913] AC 263.

⁸⁵ *Clarke v Glasgow Water Commissioners* (1896) 12 Sh Ct Rep 12 (water).

⁸⁶ *Spiers v Newton-on-Ayr Gas Co* (1940) 56 Sh Ct Rep 226 (gas); *M’Laughlan v Craig* 1948 SC 599 (gas); *R Wylie Hill & Co Ltd v Glasgow Corporation* 1951 SLT (Notes) 3 (water). In *Western Silver Fox Ranch Ltd v Ross and Cromarty County Council* 1940 SC 601 the exclusion was held not applicable precisely because the operations (detonations of explosives for building purposes) were not considered beneficial for the general community, unlike the provision of water and gas.

⁸⁷ *Miller v Robert Addie & Sons’ Collieries Ltd* 1934 SC 150.

⁸⁸ See para 6-22 above.

⁸⁹ *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17 at 41 per Lord Fraser of Tullybelton.

to which the regime was to be applied by reference to the case of *Rickards*.⁹⁰ *Rickards*, in turn, meant to introduce a qualification precisely to the *Rylands* rule. Consequently, the very reason why the court did not apply the *Rylands* rule in *Miller* was that the facts of the case were outside its scope by virtue of the *Rickards* qualification, and not because the *Rylands* rule was not part of Scots law.

6-42. The subsequent exclusion of the *Rylands* rule by *RHM Bakeries* leaves *Miller* as a rather weak support for the definition of the types of conduct or activity that create a special risk of abnormal damage, unless we adopt a view of *RHM Bakeries* that on the one hand denies the strict nature of the liability rule but nevertheless still recognises a special regime of liability generally applicable for dangerous activities. But *RHM Bakeries* provides us with little evidence of such an approach, apart from the possibility of releasing the pursuer from proving the precise nature of the defender's fault in certain circumstances that, again, are not clearly delineated.⁹¹ On the contrary, *RHM Bakeries* seems to recognise no special regime at all, apart from the rule applicable to the specific factual setting present in the *Caledonian Rly Co* case.

(3) The Thirteenth LRC Report and the “separation of waters”

6-43. Beyond para 2087 of his title on “Nuisance” in the *Stair Memorial Encyclopaedia*,⁹² which is the direct source mentioned in *Kennedy v Glenbelle*⁹³ for the category, Whitty deals with dangerous activities on two further occasions: when he explains the reasons for the (mistaken, in his view) belief that liability in nuisance is generally strict, and when he discusses the burden of proof of fault. These references, however, tend to confirm what was said earlier about *Miller v Robert Addie*⁹⁴ and its sources: they do not contribute much to the clarification of the category under analysis and they stay strongly connected with *Rylands v Fletcher*.⁹⁵

(a) The confusion between nuisance and dangerous activities

6-44. The first point is developed by Whitty in para 2093, according to which one of the reasons for the idea that nuisance was generally subject to a strict-liability rule was the identification of nuisance with “doctrines on abnormally

⁹⁰ *Rickards v Lothian* [1913] AC 263.

⁹¹ 1985 SC (HL) 17 at 45 per Lord Fraser of Tullybelton.

⁹² N R Whitty, “Nuisance” in *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol 14 (1988).

⁹³ 1996 SC 95.

⁹⁴ *Miller v Robert Addie & Sons' Collieries Ltd* 1934 SC 150.

⁹⁵ (1868) LR 3 HL 330.

dangerous things or activities”.⁹⁶ In his view, some cases confused nuisance with the rule in *Rylands*, “or its Scots analogue, the rule in *Kerr v Earl of Orkney*”.⁹⁷

6-45. As an example of this confusion Whitty cites the case of *Slater v M’Lellan*,⁹⁸ where a cargo of compressed cork caught fire when it was reached by sparks falling from the locomotive that was drawing it, and burning particles from the cargo caused damage to the defender’s property. Damages were awarded in nuisance, without proof of fault. According to Whitty, the categories of “dangerous nuisances” and “class of distinctively dangerous things” outlined in the case are indistinguishable from the *Rylands* category, and he questions the authority of *Slater* beyond its specific type of factual setting (i.e. traction engines and locomotives on the highway) after the fall of *Rylands*.⁹⁹

6-46. A second example is *Giblin v Lanarkshire County Council Middle Ward District Committee*,¹⁰⁰ where the escape of gas from pipes caused the fatal poisoning of the pursuer’s mother. The nuisance issue was allowed, without averments of fault – in fact, as an alternative to the fault issue – under the rule that “one who brings a dangerous agent on his land or keeps there anything likely to do damage if it escapes, must keep it at his peril”, language that strongly resembles *Rylands* even though the case was not mentioned.¹⁰¹ *Giblin*, however, was considered in *RHM Bakeries* as impliedly overruled by the cases of *Miller* and *M’Laughlan v Craig*.¹⁰² These cases, as discussed above, were cases of gas escapes that recognised the *Rickards* exclusion from the *Rylands* rule.¹⁰³ So again, the reason why these cases overrule *Giblin* is that the facts of the case would not fall within the scope of application of the *Rylands* rule – and not that the rule is not part of Scots law.

6-47. Whitty finishes the paragraph by highlighting the decline of *Rylands* since the decision in *RHM Bakeries*, save the possible exception for interference with the course of a natural stream as found in the *Caledonian Rly Co*¹⁰⁴ case.¹⁰⁵ It is not clear, then, what scope and effects he ascribes to these doctrines on abnormally dangerous things or activities, but his view seems to be that there is now little or no space for them in Scots law insofar as they were applications of *Rylands*. His rejection, however, appears limited to these doctrines inasmuch

⁹⁶ Whitty, “Nuisance” (1988) paras 2092 and 2093.

⁹⁷ Whitty, “Nuisance” (1988) para 2093.

⁹⁸ 1924 SC 854.

⁹⁹ Whitty, “Nuisance” (1988) para 2093.

¹⁰⁰ 1927 SLT 563.

¹⁰¹ 1927 SLT 56 at 565.

¹⁰² *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17 at 42 per Lord Fraser of Tullybelton.

¹⁰³ See paras 6-14 and 6-34 above.

¹⁰⁴ *Caledonian Rly Co v Greenock Corporation* 1917 SC (HL) 56.

¹⁰⁵ Whitty, “Nuisance” (1988) para 2093.

they suggest a regime of strict liability generally applicable to nuisance, but the position of the doctrines in their limited scope (traction engines and interference with water courses) is not developed further, nor linked to his own category of conduct creating a special risk of abnormal danger.

(b) *Burden of proof of fault*

6-48. The second point – onus of proof of fault – is discussed by Whitty in para 2107 of his title on “Nuisance”, where he connects his main source for conduct causing special risk of abnormal danger, namely *Miller v Robert Addie*,¹⁰⁶ with the Thirteenth Report of the Law Reform Committee for Scotland, published in 1964, which deals with liability for damage caused by dangerous agencies escaping from land.¹⁰⁷ In this section Whitty presents certain types of case where, allegedly, the burden of proof of fault would be reversed, one of which is the treatment of “the Scots equivalent” of the *Rylands* rule – without indicating a specific case – according to the explanation given by the Report. He reproduces one of the concluding paragraphs of the Report that attaches an especially high standard of care to the introduction of dangerous agencies into land in certain cases,¹⁰⁸ and explains that “[i]n this class of case there must presumably be a ‘special use’ creating ‘abnormal danger’”, by reference to *Miller*.¹⁰⁹ It must be noted that here the substitution of special *risk* for special *use* does not take place, which reinforces the impression that the change in the formulation of “conduct causing special risk of abnormal danger” might not have had a particular reason.¹¹⁰

6-49. The Thirteenth Report examined the relevant case law for three sets of common law rules that were regarded as relevant for the problem of escapes of dangerous agencies: the law governing the rights of riparian proprietors among themselves, the law of nuisance, and the rules that do not fall within either of these two sets. The Law Reform Committee believed that the law in the first and second sets was clear, but less so in the third set of rules.¹¹¹ For this a special regime of liability was appropriate based upon the concept of non-natural use, whereby “proof of specific fault on the part of the defender is unnecessary”.¹¹²

¹⁰⁶ *Miller v Robert Addie & Sons' Collieries Ltd* 1934 SC 150.

¹⁰⁷ Law Reform Committee for Scotland, *Thirteenth Report* (n 82).

¹⁰⁸ Law Reform Committee for Scotland, *Thirteenth Report* (n 82) para 17.

¹⁰⁹ Whitty, “Nuisance” (1988) para 2107.

¹¹⁰ See para 6-15 above.

¹¹¹ Law Reform Committee for Scotland, *Thirteenth Report* (n 82) para 14.

¹¹² Law Reform Committee for Scotland, *Thirteenth Report* (n 82) para 15.

6-50. The Law Reform Commissioners seemed to have no problem with the understanding of *Caledonian Rly*,¹¹³ and even of *Kerr v Earl of Orkney*,¹¹⁴ as applications of a strict-liability rule falling within the first set of rules, insofar as they were both alterations of the natural course of a stream and, in that sense, infringements of the property rights that the law confers on riparian owners.¹¹⁵ The extension of this rule to other “escapes” was, however, considered inconsistent with more recent authority: the cases of *Miller v Robert Addie*,¹¹⁶ and *M’Laughlan v Craig*.¹¹⁷ Adopting, consequently, the views of Lords Aitchison and Cooper in those cases,¹¹⁸ they concluded that:

if a person brings a dangerous agency on to land, the standard of care demanded of him by the law – at any rate where “non-natural” use of the land is involved – is so high that his liability, should the agency escape and cause damage, is in practice absolute or near absolute. A person claiming in respect of damage suffered in such circumstances need not prove the defender guilty of specific fault, for the facts raise a presumption of negligence. . .¹¹⁹

Explaining *Kerr* in these terms was considered as preferable as well as consistent with the reasoning in *Chalmers v Dixon*.¹²⁰

6-51. As to the nature of the liability rule, though the view adopted is clearly fault-based, it was said that it made “little, if any, difference in the result whether one adopts what may be called the ‘absolute liability’ theory or adheres rigidly to the fault principle” and recommended no changes to the existing law.¹²¹ Once again, the origin of the negligence presumption is not clear. One of the Commissioners, T B Smith, was, however of a different opinion as to the need for changes: even though he supported the fault-based view of the solution, he believed that, for the sake of clarity, *Rylands v Fletcher* should be explicitly excluded from Scots law, on the basis that strict-liability rules should be adopted exclusively through statutory provisions.¹²²

6-52. The Committee accepted that it was not entirely clear to what conduct this regime should apply, in light of the restrictions imposed on *Rylands* south of the border: at the time of the Report, the *Rylands* rule had been strictly limited to escapes “from a place where the defendant has occupation of or

¹¹³ *Caledonian Railway Co v Greenock Corporation* 1917 SC (HL) 56.

¹¹⁴ (1857) 20 D 298.

¹¹⁵ Law Reform Committee for Scotland, *Thirteenth Report* (n 82) paras 6–7, a classification challenged by Clive (n 36) 252, for the cases were decided by reference to authority that either had nothing to do with or was not based upon principles “peculiar to riparian owners”.

¹¹⁶ *Miller v Robert Addie & Sons’ Collieries Ltd* 1934 SC 150.

¹¹⁷ 1948 SC 599.

¹¹⁸ See paras 6-33 and 6-34 above.

¹¹⁹ Law Reform Committee for Scotland, *Thirteenth Report* (n 82) para 17.

¹²⁰ (1876) 3 R 461.

¹²¹ Law Reform Committee for Scotland, *Thirteenth Report* (n 82) para 22.

¹²² Law Reform Committee for Scotland, *Thirteenth Report* (n 82) Note of dissent.

control over land to a place which is outside his occupation or control".¹²³ The Commissioners considered that the configuration of this type of case as escapes of dangerous agencies in the course of non-natural uses of land was unsatisfactory for two reasons: first, because of the difficulties in recognising a non-natural use; second, because it was limited to *escapes* only.¹²⁴ In his dissenting note, T B Smith shared these concerns: he considered it illogical to limit any special regime to escapes, and regarded the notion of natural use "a nebulous concept". He deemed the American approach a better solution in that it was, at least, logical: the special regime of liability was generally applicable to the category of ultra-hazardous activities.¹²⁵ This reinforced his proposal to eliminate the *Rylands* rule altogether, bringing the treatment of dangerous agencies simply under the general liability rules.

6-53. In sum, while T B Smith defended the treatment of dangerous activities under the regular rules of fault-based liability, unless a rational strict-liability regime were to be created by statute, the rest of the Committee favoured the special treatment of these activities, so that although liability remained fault-based, the regular rules in regard to proof of fault did not apply in the face of non-natural uses causing escapes of dangerous things. Eventually, however, Smith's view triumphed, at least in principle: according to Lord Fraser's well-known dictum in *RHM Bakeries*, nuisance was and always had been fault-based. Moreover, the decision in *Rylands* "has no place in Scots law, and the suggestion that it has is a heresy which ought to be extirpated".¹²⁶ Liability in *Kerr* was based upon fault, Lord Fraser added, relying on the Lord Ordinary's decision, a conclusion that was reinforced by the language in *Chalmers v Dixon*.¹²⁷ The sole possible exception to this rule was the alteration of the natural course of a stream according to the decision in *Caledonian Rly*, a decision he considered to be limited to this type of operation only.¹²⁸ Yet Lord Fraser added two comments that deserve to be noted:

The first is that the view that I have just expressed does not by any means imply that, in a case such as this, a pursuer cannot succeed unless he avers the precise nature of the fault committed by the defender which caused the accident. It would be quite unreasonable to place such a burden on a pursuer, who in many cases will have no knowledge, and no means of obtaining knowledge, of the defender's fault. As a general rule it would, in my opinion, be relevant for a pursuer to make averments to the effect that his property has been damaged by a flood caused by an event on the defender's land, such as the collapse of sewer which it was the defender's duty

¹²³ *Read v J Lyons & Co Ltd* [1947] AC 156 at 168 per Viscount Simon.

¹²⁴ Law Reform Committee for Scotland, *Thirteenth Report* (n 82) para 21.

¹²⁵ Law Reform Committee for Scotland, *Thirteenth Report* (n 82) Note of dissent.

¹²⁶ *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17 at 41, references omitted.

¹²⁷ 1985 SC (HL) 17 at 39–40.

¹²⁸ 1985 SC (HL) 17 at 42.

to maintain, that properly maintained sewers do not collapse, and that the collapse is evidence that the defender had failed in his duty to maintain the sewer. The onus will then be on the defender to explain the event in some way consistent with absence of fault on his part. As a general rule the defences available will be limited to proving that the event was caused either by the action of a third party for whom he was not responsible, as the defender did in *Gourock Ropework Co Ltd v Greenock Corporation*,¹²⁹ or by a *damnum fatale*.

My second comment is that I do not believe that there is much difference in the practical result between the law as laid down in *Rylands v Fletcher*, and the law as laid down according to my understanding of *Kerr v The Earl of Orkney*. On that matter, I accept the majority view expressed in the Thirteenth Report of the Law Reform Committee for Scotland (1964), para 22.¹³⁰

6-54. These comments are somewhat puzzling. On immediate reading, the first comment seems to highlight, though in rather imprecise language, the availability of the *res ipsa loquitur* doctrine for nuisance cases, an interpretation that has been supported by subsequent cases,¹³¹ whereas the second comment, given the cases there mentioned, appears to refer to the special regime for dangerous activities under discussion here, reproducing the fault-based account adopted in the Thirteenth Report of the Law Reform Committee. But the limited defences offered in the first comment do not fit with its understanding as a description of *res ipsa loquitur*. They could find a more suitable place within the regime mentioned in the second comment, and even there they would point towards a strict-liability regime rather than one based upon presumed fault. Moreover, and more importantly, the second comment seems to undo, to an extent, what *RHM Bakeries* seeks to do: instead of eliminating any special-liability regime and giving space for the fault rules to operate with their inherent flexibility, it preserves the special regime in line with the majority position of the Law Reform Committee.

6-55. In his discussion of these comments, Whitty considered that in both cases a reversal of the onus of proof of fault operated, but distinguished the cases on the basis of the source of this reversal: whereas in *res ipsa loquitur* the alleged reversal came from the fact that the incident suggested negligence coupled with the defender's control, in the case of dangerous activities the reversal derived from a very high standard of care (mentioning here the conclusion reached by

¹²⁹ 1966 SLT 125.

¹³⁰ 1985 SC (HL) 17 at 45.

¹³¹ See *Argyll & Clyde Health Board v Strathclyde Regional Council* 1988 SLT 381 esp at 383, and, more recently, *David T Morrison & Co Ltd v ICL Plastics Ltd* [2013] CSIH 19, 2013 SC 391 at para 35, though this case was reversed in the Supreme Court on a point of prescription: *David T Morrison & Co Ltd v ICL Plastics Ltd* [2014] UKSC 48, 2014 SC (UKSC) 222. See, for another recent application, *McKenna v O'Hare* [2017] SAC (Civ) 16, 2017 SC (SAC) 33, though the notion of *res ipsa loquitur* was not expressly referred to and the language of the decision is, at times, conceptually misleading.

the Law Reform Committee).¹³² The sources cited by Whitty in these paragraphs bring about a distinction that *Miller v Robert Addie*¹³³ and its sources did not outline clearly. *Miller* grouped together *Kerr v Earl of Orkney*,¹³⁴ *Chalmers v Dixon*¹³⁵ and *Caledonian Rly*¹³⁶ and saw them all as applications of a single rule (the *Rylands* rule), subject to a single qualification (the *Rickards* qualification). But the sources considered in this section separate *Caledonian Rly* from the group.

6-56. *Caledonian Rly* is seen as the application of a liability rule that is strict in nature and that is applicable to a particular type of case: the alteration of or interference with the natural course of a stream; for this particular course of action infringes proprietary rights held by the riparian proprietors. This remained the accepted explanation of *Caledonian Rly* until a more recent study sought to demonstrate that the true basis of liability in the case was fault.¹³⁷ These views are discussed at length and challenged in chapter 8,¹³⁸ so for the purposes of this chapter the case is excluded from the analysis.

6-57. For the remaining cases, as explained above, the orthodox account is a fault-based explanation that combines two particular aspects of negligence: a substantive one, namely the standard of care's sensitivity to levels of risk, and an evidential one, i.e. a presumption the source of which is found in the operation of the *res ipsa loquitur* maxim (as advanced by T B Smith), or in the operation of the standard of care itself (in Whitty's explanation), or is left largely unexplained (as in Walker's book, the Thirteenth Report and, to an extent, *RHM Bakeries*). But despite the relatively clear answer to the question about the nature of the liability rule, the problems identified in connection with *Miller* are replicated with regard to the question about its scope: not only does the notion of escapes in the context of non-natural use remain unclear but it is actually connected to the *Rylands* rule.

6-58. T B Smith's position solved the two problems, for it advanced a clear rule that broke once and for all the link with *Rylands*, and this is, as explained, the position adopted in principle by *RHM Bakeries*. Nevertheless, by incorporating the category of conduct causing special risk of abnormal danger, Whitty seems to have considered that there was still a case for a special treatment of dangerous activities, and the cost of this option was preserving the problematic sources, in the same way as in Lord Fraser's second comment in *RHM Bakeries*. To the extent that *Kennedy v Glenbelle* relied on Whitty's view, the category not

¹³² Whitty, "Nuisance" (1988) para 2107.

¹³³ *Miller v Robert Addie & Sons' Collieries Ltd* 1934 SC 150.

¹³⁴ (1857) 20 D 298.

¹³⁵ (1876) 3 R 461.

¹³⁶ *Caledonian Railway Co v Greenock Corporation* 1917 SC (HL) 56.

¹³⁷ G D L Cameron, "Strict Liability and the Rule in *Caledonian Railway Co v Greenock Corporation*" (2000) 5 SLPQ 356.

¹³⁸ See paras 8-43 to 8-77 below.

only remains rather unclear and connected to *Rylands*, but actually, as the next section will show, undermines the relative clarity of the orthodox account.

C. SOURCES (2): KENNEDY AND ITS FOUNDATIONS

(I) Lord President Hope's view

(a) Nature of the liability rule

6-59. Lord President Hope's account in *Kennedy v Glenbelle*¹³⁹ is clear in at least one aspect: the fault-based nature of liability for conduct causing a special risk of abnormal damage. But clarity ends there: by adopting Whitty's approach from para 2087 of his "Nuisance" title in the *Stair Memorial Encyclopaedia*, listing conduct creating a special risk of abnormal damage alongside the different categories of fault, but then submitting that it affords an implication of fault, two incompatible views are juxtaposed in the same judgment.

6-60. The language used by Lord Hope suggests that he was perhaps sceptical about this conduct being a different category of fault: when he refers to para 2087 of Whitty's title and lists the different categories of fault, he mentions only malice, intent, recklessness and negligence. "To that list", he continues, "there may be added conduct causing a special risk of abnormal damage where it may be said that it is not necessary to prove a specific fault as fault is necessarily implied in the result", and refers to *Chalmers v Dixon*¹⁴⁰ as the source of this contention. Thus, Lord Hope separated this type of conduct from the list and attached to it a particular effect that is more in line with the presumption idea from the orthodox view than with it being a separate category of fault.

6-61. The idea that this type of conduct is not a different category of fault is confirmed later on in Lord Hope's judgment in the suggestion that it was "perhaps just another example of recklessness".¹⁴¹ Now, whether this suggestion is accurate depends on the notion of recklessness adopted on the one hand, and on the definition of conduct causing a special risk of abnormal damage on the other. The issue is discussed in the following chapter, after outlining the relevant elements of the latter,¹⁴² but the conclusion can be advanced here: given the notion of recklessness adopted after *Kennedy*, classifying conduct causing a special risk of abnormal damage as an example of recklessness is practically equivalent to treating it as a form of strict liability. But even if the pre-*Kennedy* notion of recklessness is adopted, the suggestion holds only as a *presumption* rather than an *example* of recklessness. As a result, by incorporating the

¹³⁹ 1996 SC 95.

¹⁴⁰ (1876) 3 R 461.

¹⁴¹ 1996 SC 95 at 100.

¹⁴² See paras 7-27 and 7-28 below.

notion of conduct creating a special risk of abnormal damage in the way it did, *Kennedy* introduced more questions than answers, causing instability to what had seemed to be, if not an entirely satisfactory, at least a rather stable explanation of the special treatment received by these cases. In addition, and just like *RHM Bakeries*,¹⁴³ *Kennedy* set apart the case of *Caledonian Rly*¹⁴⁴ as a possible exception to the general fault-based liability rule, without expressing why this case would attract strict liability.¹⁴⁵ *Caledonian Rly*, therefore, is not identified with conduct causing a special risk of abnormal damage, but as a specific case of strict liability.

(b) *Scope of application of the rule*

6-62. With regard to the delineation of the category itself, *Kennedy* isolates risk as the defining element, omitting any reference to the notions of *opus manufactum* and non-natural user which had been a constant presence in most previous doctrinal and judicial discussions. Here, Lord Hope departed from Whitty's wording: whereas Whitty named this alleged type of fault "conduct causing a special risk of abnormal *danger*"; the Lord President replaced "danger" with "damage". Again, we cannot be sure whether the replacement was deliberate and, if it was, what was the reason behind it. Nevertheless, the change is welcome for it removes from the definition the redundancy noted above of including both "risk" and "danger" in the notion¹⁴⁶ and incorporates a second element to the definition. Conduct can amount to fault not only because risk is high, but specifically because the possible damage is great. This incorporation, however, raises a new question: is the category *necessarily* defined by the magnitude of the likely harm or can likelihood and extent of the harm interact, so if the possible harm is highly likely but not great in extent, will it still amount to special risk of abnormal damage? As we will see, the authority on which *Kennedy* relied does not provide an answer to this question.

(2) Authority cited in support

6-63. Lord Hope quoted passages from four decisions in support of the category under analysis: *Chalmers v Dixon*,¹⁴⁷ *Edinburgh Railway Access and Property Co v John Ritchie & Co*,¹⁴⁸ *Hester v MacDonald*,¹⁴⁹ and *Noble's Trs v*

¹⁴³ *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17.

¹⁴⁴ *Caledonian Railway Co v Greenock Corporation* 1917 SC (HL) 56.

¹⁴⁵ *Kennedy v Glenbelle Ltd* 1996 SC 95 at 98 per Lord President Hope, and at 102 per Lord Kirkwood.

¹⁴⁶ See para 6-15 above.

¹⁴⁷ (1876) 3 R 461.

¹⁴⁸ (1903) 5 F 299.

¹⁴⁹ 1961 SC 370.

*Economic Forestry (Scotland) Ltd.*¹⁵⁰ We will see that the cases of *Edinburgh Railway Access* and *Hester* are of questionable authority in this context, and the assistance provided by the remaining two cases must be considered in light of the specific legal question that was being answered.

(a) *The decisions*

6-64. The facts in *Chalmers* were given above.¹⁵¹ Lord Hope quoted in *Kennedy*¹⁵² the well-known dictum by Lord Justice-Clerk Moncreiff, cited earlier in this chapter,¹⁵³ commenting on the cases of *Rylands* and *Kerr*, and presenting fault as the basis of the liability of a proprietor who places dangerous materials in his land and causes damage as a consequence.

6-65. The passage quoted from *Edinburgh Railway Access*, though similar to that in *Chalmers*, must be considered carefully. In this case, the defenders' blasting operations, carried out for excavation and building purposes, caused structural damage to the pursuers' house. The passage reproduced in *Kennedy* comes from the judgment of the Lord Ordinary (Lord Low). It states that, even though the general rule was that fault was required for liability, in the case at issue the question of fault did not arise or was not of importance, rephrasing Lord Moncreiff's dictum from *Chalmers* specifically for the case of blasting operations, and allowing the issue which was not based on fault.¹⁵⁴ The judgment, however, was reversed by the Inner House, where the issue was amended by the introduction of fault,¹⁵⁵ so the weight attributed to the Lord Ordinary's remarks is somewhat odd.

6-66. *Hester*, in turn, was a case of damages for wrongful imprisonment where the action was held incompetent given the absolute privilege of the defenders, and irrelevant for lack of sufficient averments of malice. The passage cited by Lord President Hope in *Kennedy* is Lord Guthrie's, who affirmed the fault principle and stated that "[t]he culpa which gives a right of action to the sufferer from the act is either intentional injury or negligence. [. . .] There are, however, cases where the intention is presumed, where the act itself infers the malice".¹⁵⁶ The facts of the case, however, were considered insufficient to bear such an inference. It is not clear how the passage supports the category under analysis: it merely lists intention and negligence as forms of fault and indicates the possibility of presuming intention, but the facts of the case provide

¹⁵⁰ 1988 SLT 662.

¹⁵¹ See para 6-24 above.

¹⁵² *Kennedy v Glenbelle Ltd* 1996 SC 95 at 99.

¹⁵³ See para 6-25 above.

¹⁵⁴ (1903) 5 F 299 at 302.

¹⁵⁵ (1903) 5 F 299 at 303.

¹⁵⁶ *Hester v MacDonald* 1961 SC 370 at 390.

no indication of this presumption having any identifiable link with the notion of danger. The reference to the case is, in sum, somewhat strange, since it has no connection with nuisance (the context of *Kennedy*) or with dangerous activities (the category that Lord Hope was trying to outline), and malice has a particular meaning in the context of claims against the police that is not readily transferable to neighbour disputes.¹⁵⁷

6-67. Finally, in the Outer House case of *Noble's Trs* the first defenders, in carrying out forestry and related operations authorised by the second and third defenders, the riparian proprietors, created a dirt road in such a manner that sand, silt and gravel were washed off the hillside into a river, causing damage to the pursuers' hydroelectric scheme located downstream. Lord Jauncey, referring expressly to Lord Justice-Clerk Moncreiff's dictum in *Chalmers*, stated that:

A landowner will be liable to his neighbour if he carries out operations on his land which will or are likely to cause damage to his neighbour's land however much care is exercised. Similarly will a landowner be liable in respect of carrying out operations, either at his own hand or at the hand of the contractor, if it is necessary to take steps in the carrying out of those operations to prevent damage to a neighbour, and he, the landlord, does not take or instruct those steps. In the former case the landowner's culpa lies in the actual carrying out of his operations in the knowledge actual or implied of their likely consequences. In the latter case culpa lies in not taking steps to avoid consequences which he should have foreseen would be likely to flow from one method of carrying out the operation.¹⁵⁸

In his judgment, Lord Jauncey concentrated on the liability of the second and third defenders, which explains the references to the contractor in the passage just quoted. The focus of the case was the defenders' non-delegable duty of care, as will be explained below.¹⁵⁹

(b) The nature of the liability rule

6-68. From the four decisions mentioned above, therefore, only two provide any assistance: *Chalmers* and *Noble's Trs*. With regard to the nature of the liability that conduct causing a special risk of abnormal damage attracts, these cases certainly provide authority for the conclusion reached in *Kennedy*: both cases consider this liability to be fault-based. It is worth noting in this respect that the dictum quoted from *Chalmers* in *Kennedy*, which is also referred to in *Noble's Trs*, is that of Lord Justice-Clerk Moncreiff highlighting the implication

¹⁵⁷ See E Reid, "The Sheriff in the Heather: *Beaton v Ivory*" in J Grant and E Sutherland (eds), *Pronounced for Doom: Early Scots Law Tales* (2013) 161 at 172–174.

¹⁵⁸ *Noble's Trs v Economic Forestry (Scotland) Ltd* 1988 SLT 662 at 664.

¹⁵⁹ See para 6-72 below.

of fault. Lord Gifford's judgment, which emphasised the heightened standard of care, was not considered in *Kennedy*.

(c) *The scope of application of the rule*

6-69. As for the scope of the category, both decisions are consistent in drawing a fundamental distinction between two types of case: in the first type, merely executing certain operations constitutes fault; in the second type, not adopting certain precautions constitutes fault. The configuration of these types of case is, however, problematic. In *Chalmers*,¹⁶⁰ the first type of case occurs when no precaution can prevent injury, whereas the second occurs when due care can prevent injury. As Clive has noted, this opposition poses a false alternative, because it does not contemplate a third option: where *some* precaution would prevent injury, but *due* care would not. The "true alternative", Clive argues, is that "either due care will prevent injury . . . or *due care* will not".¹⁶¹ In *Noble's Trs*,¹⁶² in turn, the distinction is between operations that will or are likely to cause damage however much care is exercised and operations where it is necessary to take steps to prevent damage, which implies that damage can in fact be prevented with those steps. This decision seems to shift the dividing line from *due* care to *any* care, and to get closer to a true alternative. Both cases, consequently, create a distinction between two types of danger, defined by the fact that harm remains likely even where certain precautions are taken. But on the basis of the available authority it is difficult to determine what these precautions are, i.e. whether the line is drawn where *any* precautions or only *due* precautions would control risk. It is also difficult to ascertain whether both types of case can be incorporated in the notion of conduct creating a special risk of abnormal damage. If "fault is implied in the result" – as Lord President Hope stated in *Kennedy* – in cases of both types, namely in the first type merely for engaging in the dangerous operations and in the second for not taking the relevant precautions, what is then the purpose of making the distinction? The decision in *Kennedy* does not provide any indication that serves to discriminate between the two types of danger, for the case was one of intentional or, perhaps, reckless harm.¹⁶³

6-70. The reasoning in the cases, however, suggests that only the first type of danger can be characterised as conduct creating a special risk of abnormal damage. In both decisions, fault in the second type of danger arises *from not taking precautions*: in *Chalmers*, the defender "is liable if injury occurs for not taking that due care"; in *Noble's Trs*, "*culpa* lies in not taking steps to avoid

¹⁶⁰ *Chalmers v Dixon* (1876) 3 R 461.

¹⁶¹ Clive (n 36) 257–256, emphasis in the original.

¹⁶² *Noble's Trs v Economic Forestry (Scotland) Ltd* 1988 SLT 662.

¹⁶³ See para 4-20 above.

consequences”. But in neither decision is it stated that the fact that precautions were not taken is to be inferred from the occurrence of the harm. This contrasts with what happens in the first type of case, where fault lies simply in engaging in the dangerous operation and is implied by the fact that injury was caused. The contention that fault would be inferred simply from the occurrence of the harm in cases of the second type was only made in one of the decisions cited by Lord Hope in *Kennedy*: in *Edinburgh Railway Access*, the Lord Ordinary explicitly stated that “if injury to the pursuers’ buildings was not a necessary or natural result of the blasting, but injury in fact resulted, *the inference is that the operation was negligently or unskilfully conducted*”.¹⁶⁴ Nonetheless, as mentioned above,¹⁶⁵ the judgment was reversed and the issue was amended to include fault, which suggests that the Inner House might not have regarded the possibility of this inference with approval.

6-71. The context in *Chalmers* supports this conclusion: the point was precisely to locate fault *somewhere* when damage is caused even despite taking due precautions, i.e. even when the defenders were not negligent. The defenders, indeed, pled that the bing had caught fire for reasons that were not attributable to their lack of care and, further, that it was impossible for them to extinguish the fire once it had started. If “traditional” fault (negligence) had had to be proved, it would not have been possible to hold the defenders liable. For Lord Justice-Clerk Moncreiff, however, the relevant question was not about the precautions taken or not taken. “[T]he question”, in his view, was “whether the defenders were entitled to put upon their lands a heap of refuse of this quality”, and he sought to locate fault in this action by saying that if the defenders could not have prevented the consequences that ensued, there was fault in doing it in the first place. The case was, thus, an example of the first type of danger, and fault was implied. Moreover, the expression “fault is necessarily implied in the result” – which is taken from *Chalmers* and repeated by Lord Hope in *Kennedy* to explain the effect of conduct causing special risk of abnormal damage – was used by Lord Moncreiff in *Chalmers* after the assertion that the heap was constructed by the defenders, kept there, took fire and caused damage. No reference was made to the second type of case in connection with implied fault. In this context, the second type is arguably nothing more than an explanation of negligence, where negligence can, in fact, be proved. The question of whether this negligence *must* be proved, however, was not conclusively answered, as the case did not require such an answer.

6-72. *Noble’s Trs* neither denies nor confirms this conclusion: the pursuers failed to aver either type of danger and for this reason the case was considered irrelevant. But even if the second type of danger had been averred, liability on

¹⁶⁴ *Edinburgh Railway Access and Property Co v John Ritchie & Co* (1903) 5 F 299 at 302, emphasis added.

¹⁶⁵ Para 6-65 above.

the part of the defenders would not have meant that cases of this type ought to be included within conduct causing a special risk of abnormal damage. Liability, in this case, would not have derived from the fact that the defenders created a certain level of danger that made them liable regardless of any negligence in the traditional sense. Liability would have derived from the fact that they contracted out the execution of the operation that created such danger, i.e. they would have been liable by virtue of a non-delegable duty of care or, as it was commonly labelled in Scots case law, by virtue of the “*Dalton* exception”. *Dalton* in this context refers to the English case of *Dalton v Angus*,¹⁶⁶ where the House of Lords approved Cockburn CJ’s dictum in the English decision of *Bower v Peate*, quoted in *Noble’s Trs*:

[A] man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else – whether it be the contractor employed to do the work from which the danger arises or some independent person – to do what is necessary to prevent the act he has ordered to be done from becoming wrongful.¹⁶⁷

The principle is called the *Dalton* “exception” because it constitutes an exception to the general rule that excludes liability of an employer for the wrongful acts of an independent contractor.¹⁶⁸

6-73. It will be argued later in this chapter, when post-*Kennedy* case law is discussed,¹⁶⁹ that liability for conduct causing a special risk of abnormal damage and liability by virtue of a non-delegable duty of care, though apparently similar, are conceptually distinct and must be treated accordingly. Consequently, the configuration of the scope of application of one of these rules does not necessarily affect the configuration of the other. This distinction, however, was not clearly drawn by Lord Jauncey in *Noble’s Trs*, who identified the principle in *Chalmers* with the principle in *Bower*.

6-74. Here lies the key to the direction that case law took after *Kennedy v Glenbelle*. Lord Jauncey conflated two notions of danger: the danger that justifies that “fault is implied in the result”, as formulated in *Chalmers*, which seems to concern only the first type of danger (i.e. danger that cannot be eliminated through any – or due – precautions), and the danger that justifies the imposition of a non-delegable duty, as formulated in *Bower*, which does not seem to be limited to such particular type. Lord President Hope, in supporting the category of conduct causing special risk of abnormal damage in both

¹⁶⁶ *Dalton v Angus* (1881) 6 App Cas 740.

¹⁶⁷ *Bower v Peate* (1876) 1 QBD 321 at 326.

¹⁶⁸ *Stephen v Thurso Police Commissioners* (1876) 3 R 535.

¹⁶⁹ See para 6-85 below.

Chalmers and *Noble's Trs*, perpetuated the conflation, and the two notions of danger seem indistinguishable in subsequent case law: when Cameron said that conduct causing special risk of abnormal damage needs to be worked out more fully,¹⁷⁰ he added immediately afterwards that:

On the basis of present authorities, it may be stated that where hazardous works are instructed and harm results from the operation, the party instructing the works cannot evade liability by pleading that he engaged a competent contractor to carry out the work. It seems that this form of fault is applicable where there is a very high risk of serious harm. The rule does appear to operate on the cusp of strict liability. It is also a variation on the normal rule of vicarious liability, that one is responsible for the delicts of employees, but not independent contractors.¹⁷¹

6-75. Accordingly, returning to the question above, i.e. whether both types of danger distinguished by *Chalmers* and *Noble's Trs* amount to conduct causing special risk of abnormal damage, the most reasonable answer is that they probably do not: only the first one certainly does, namely, only when precautions cannot control the danger. The second type is most likely ordinary negligence. If this is accepted, then the rational way of drawing the line between the two types follows: it must be drawn at due care (and not at *any* care), for this is the definitional element of negligence. The category, therefore, begins where due diligence becomes incapable of controlling the risk. All in all, it seems that it is *Chalmers* that provides the clearer and more accurate description of the conduct in these aspects, which is paradoxical since Whitty himself, in the 2001 reissue of his title on "Nuisance", chose *Noble's Trs* as the judicial description worth transcribing.¹⁷²

6-76. A further issue that arises from the above analysis concerns the quality of the knowledge required on the part of the defender in order to hold him liable. In *Chalmers*, actual knowledge of the dangerous nature of the activity was unnecessary. The point was expressly addressed by Lord Justice-Clerk Moncreiff:

Then, is it necessary that the danger should be known or anticipated? I think the man who brings new materials upon his land is bound to know the nature of these materials. It would be a strange result if the man who knew their nature was liable, while the man who did not know their nature was to escape liability in consequence of his ignorance.¹⁷³

Consequently, if a person develops operations that are dangerous, it is irrelevant whether he actually knows of the danger, because in any case he should know. Now, it is not clear whether the decision admits excusable ignorance as a

¹⁷⁰ See para 6-02 above.

¹⁷¹ Cameron (n 2) 151.

¹⁷² Whitty, "Nuisance" (Reissue, 2001) para 108.

¹⁷³ *Chalmers v Dixon* (1876) 3 R 461 at 464 per Lord Justice-Clerk Moncreiff.

defence, for even if this passage can be read as an absolute exclusion, other parts of the decision seem simply to find the defenders' plea of ignorance, in the circumstances of the case, unconvincing or inexcusable. For instance, Lord Ormisdale remarked that:

I can hardly take it from the defenders, who have had great experience as iron-masters, and in the working of minerals, that they and their managers, or other head people, were ignorant of the nature of the materials they brought up and heaped in such a mass on the surface of their ground. On the evidence I think they must have known.¹⁷⁴

The admission of the defence is, to an extent, confirmed by *Noble's Trs*: actual or implied knowledge of the likely consequences is required in order to make the defender liable. But since *Noble's Trs* was concerned with a non-delegable duty, the requirement might not be transferrable.

6-77. What is conspicuous by its absence in these formulations is any reference to the magnitude of the damage. Taking the decisions strictly would lead to the result that, aside from the level of likelihood, fault could be inferred from the occurrence of *any* harm, however slight. It would then be essential to pay due attention to the notion of "abnormal damage" included in the definition by Lord President Hope in *Kennedy*, since it seems to have been identified as the key element of the category by subsequent literature, even to the detriment of the likelihood element.¹⁷⁵

D. CASE LAW AND DOCTRINE AFTER KENNEDY

(1) Non-delegable duties of care for dangerous activities

6-78. As noted, case law on dangerous activities after *Kennedy v Glenbelle*¹⁷⁶ has tended to focus upon non-delegable duties of care. This was the main issue in *Powrie Castle Properties Ltd v Dundee City Council*,¹⁷⁷ *Southesk Trust Co Ltd v Angus Council*,¹⁷⁸ *Crolla v Hussain*,¹⁷⁹ *Stewart v Malik*,¹⁸⁰ *Morris Amusements Ltd v Glasgow City Council*,¹⁸¹ *McManus v City Link Development Co Ltd*,¹⁸² and *Esso Petroleum Co Ltd v Scottish Ministers*.¹⁸³ The dangerous nature of

¹⁷⁴ (1876) 3 R 461 at 466.

¹⁷⁵ See para 6-98 below.

¹⁷⁶ *Kennedy v Glenbelle Ltd* 1996 SC 95.

¹⁷⁷ *Powrie Castle Properties Ltd v Dundee City Council* 2001 SCLR 146.

¹⁷⁸ *Southesk Trust Co Ltd v Angus Council* [2006] CSOH 6.

¹⁷⁹ *Crolla v Hussain* 2008 SLT (Sh Ct) 145.

¹⁸⁰ *Stewart v Malik* [2009] CSIH 5, 2009 SC 265.

¹⁸¹ *Morris Amusements Ltd v Glasgow City Council* [2009] CSOH 84, 2009 SLT 697.

¹⁸² *McManus v City Link Development Co Ltd* [2015] CSOH 178, [2016] Env LR D1, aff'd [2017] CSIH 12, 2017 Hous LR 84.

¹⁸³ *Esso Petroleum Co Ltd v Scottish Ministers* [2016] CSOH 15, 2016 SCLR 539.

the different operations was discussed mostly in order to determine whether there was a basis for imposing liability on employers for the negligence of their independent contractors. The question decided was accordingly, in most of the cases, one of relevancy of the issue against the employer.

6-79. After they were decided, the English cases of *Bower v Peate*¹⁸⁴ and *Dalton v Angus*,¹⁸⁵ mentioned above, became the main authority in Scotland with regard to liability of employers for the wrongs committed by their independent contractors in the context of neighbourhood and dangerous activities.¹⁸⁶ This liability is based upon what in England has been called a “non-delegable duty of care”.¹⁸⁷ It is not possible to provide here a full account of the many debates that have arisen with regard to the foundations, operation and nature of the liability derived from a non-delegable duty.¹⁸⁸ Consequently, for the purposes of the present discussion, only some general features of the doctrine will be mentioned.

6-80. As a general rule, employers are not liable for injuries caused by their independent contractors.¹⁸⁹ Nevertheless, certain groups of “exceptions” to this rule have been identified:¹⁹⁰ first, cases where the employer authorised, procured or ratified the wrong; secondly, cases where the employer was personally negligent, e.g. in selecting a contractor; and thirdly, cases where the employer breached a non-delegable duty.¹⁹¹

¹⁸⁴ (1876) 1 QBD 321.

¹⁸⁵ (1881) 6 App Cas 740.

¹⁸⁶ There is earlier Scottish authority supporting liability of employers for the harms caused by their independent contractors in the case of dangerous operations: see e.g. *M'Lean v Russell, Macnee & Co* (1850) 12 D 887 at 892 per Lord Mackenzie and Lord Fullerton.

¹⁸⁷ See, among the modern literature, R Stevens, “Non-Delegable Duties and Vicarious Liability” in J W Neyers, E Chamberlain and S G A Pitel (eds), *Emerging Issues in Tort Law* (2007) 331 at 351; J Murphy, “Juridical Foundations of Common Law Non-Delegable Duties” in J W Neyers, E Chamberlain and S G A Pitel (eds), *Emerging Issues in Tort Law* (2007) 369 at 381; C Witting, “Breach of the Non-Delegable Duty: Defending Limited Strict Liability in Tort” (2006) 29 UNSW LJ 33 at 41.

¹⁸⁸ See, besides the materials indicated in the previous note, older accounts such as J A Jolowicz, “Liability for Independent Contractors in the English Common Law – A Suggestion” (1957) 9 Stanford LR 690; and especially P S Atiyah, *Vicarious Liability in the Law of Torts* (1967) chs 29 and 30. See also E McKendrick, “Vicarious Liability and Independent Contractors – A Re-examination” (1990) 53 MLR 770; and J Murphy, “The Liability Bases of Common Law Non-Delegable Duties – A Reply to Christian Witting” (2007) 30 UNSW LJ 86.

¹⁸⁹ This is “trite law”: *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177 at 208 per Lord Bridge. For Scotland, see *Stephen v Thurso Police Commissioners* (1876) 3 R 535.

¹⁹⁰ It is arguable that they are not “true” exceptions, for they are based on duties that are personally owed by the employer: *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177 at 208 per Lord Bridge, approving J F Clerk and W H B Lindsay, *Clerk & Lindsay on Torts* (15th edn by R W M Dias, 1982) § 3-37. In a similar sense, Walker, *Delict* 155.

¹⁹¹ C Witting, *Street on Torts* (16th edn, 2021) 624–630. For Scotland, Walker, *Delict* 155–162 provides a longer list of exceptions (9), but he acknowledges at 155 that the classes are not

6-81. According to the standard view, the liability imposed on employers by the non-delegable duty is strict.¹⁹² An examination of the literature in England shows, however, a lack of consistency in the mode of justifying the imposition of a non-delegable duty, both generally and in cases such as *Bower* and *Dalton*, where harm to a neighbour derives from operations performed in the defender's property, specifically by withdrawing support.¹⁹³ One justification that has traditionally been advanced is risk: an employer cannot escape liability by contracting out the execution of dangerous operations, and the operations in *Bower* and *Dalton* are framed in this way: withdrawal of support is an operation that "naturally" (*Bower*) or "necessarily" (*Dalton*) creates a risk to neighbours.¹⁹⁴ Beyond the particular context of withdrawal of support, the "modern foundation"¹⁹⁵ for the imposition of non-delegable duties in the case of "inherently hazardous" activities can be found more generally in the case of *Honeywill & Stein Ltd v Larkin Bros Ltd*.¹⁹⁶

6-82. This is the justification that has been generally adopted by Scots case law in the context of neighbour disputes, in cases such as *Duncan's Hotel (Glasgow) Ltd v J & A Ferguson Ltd*,¹⁹⁷ *Noble's Trs*,¹⁹⁸ *Borders Regional Council v Roxburgh District Council*¹⁹⁹ and *G A Estates Ltd v Caviapen Trs (No 1)*,²⁰⁰ as well as most of the cases decided after *Kennedy*,²⁰¹ although the terminology of "non-delegable duty" is adopted by courts only in some of the most recent cases.²⁰²

6-83. The question that arises for our purposes is whether, in framing the nature and scope of liability for conduct causing a special risk of abnormal damage, we can rely on decisions that are concerned with liability based upon non-delegable duties, for the former is imposed on people *engaging* in dangerous operations, whereas the latter is imposed on people *instructing* those

clearly settled and they might be explained under more than one head. Indeed, all these exceptions can be classified under one of the three categories identified by Witting.

¹⁹² R F V Heuston and R A Buckley (eds), *Salmond & Heuston on the Law of Torts* (21st revised edn, 1996) 463; Stevens (n 187) 331; P Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (2010) 116; Witting, *Street on Torts* (n 191) 630. For Scotland, see Reid (n 19) 753; Cameron (n 2) 152. For a different view, see Murphy (n 188).

¹⁹³ Liability for breaching a non-delegable duty in the specific context of withdrawal of support is explored in paras 9-45 to 9-63 below.

¹⁹⁴ This is the justification proposed by Murphy (n 188) 381-382.

¹⁹⁵ Stevens (n 187) 343.

¹⁹⁶ *Honeywill & Stein Ltd v Larkin Bros (London's Commercial Photographers) Ltd* [1934] 1 KB 191, esp at 200-201.

¹⁹⁷ *Duncan's Hotel (Glasgow) Ltd v J & A Ferguson Ltd* 1974 SC 191 at 196.

¹⁹⁸ *Noble's Trs v Economic Forestry (Scotland) Ltd* 1988 SLT 662 at 663.

¹⁹⁹ *Borders Regional Council v Roxburgh District Council* 1989 SLT 837 at 839.

²⁰⁰ *G A Estates Ltd v Caviapen Trs (No 1)* 1993 SLT 1037 at 1042.

²⁰¹ See para 6-78 above.

²⁰² *Morris Amusements Ltd v Glasgow City Council* [2009] CSOH 84, 2009 SLT 697 at para 45; *McManus v City Link Development Co Ltd* [2015] CSOH 178, [2016] Env LR D1 at paras 35 and 43.

operations. Arguably, the question is irrelevant in practical terms: nowadays, no one would engage personally in dangerous operations; people simply hire competent professionals to do so, and this is clearly reflected in the fact that recent case law on dangerous activities is mostly concerned with non-delegable duties. Consequently, what really matters is liability for non-delegable duties, and not liability for conduct causing a special risk of abnormal damage. The latter, however, preserves some practical importance for defenders whose course of business includes dangerous operations. Moreover, it is still relevant to clarify the rule for those factual settings where, for whatever reason, contractors are not employed.

6-84. At first sight, imposing strict liability on a landowner who entrusts dangerous operations to a competent independent contractor, yet subjecting the same person to a fault-based liability rule when he chooses to do without an independent contractor, might seem anomalous. It even seems counterintuitive: it would entail subjecting the more dangerous choice to the less stringent liability rule. It is, indeed, because of this anomaly that the strict nature of the liability imposed by non-delegable duties has been challenged in England. Since case law has rejected a general strict-liability rule for ultra-hazardous activities,²⁰³ “[i]t seems insupportable that a defendant will be held strictly liable for the extra-hazardous activity of an independent contractor, when it would not be so liable if it carefully carried out the same activity itself”.²⁰⁴

6-85. It is possible to argue, however, that this inconsistency is only apparent, and that the fact that strict liability is imposed on landowners who instruct dangerous operations does not necessarily justify the imposition of an equivalent rule if they engage in the operations personally, for the distribution of risks performed by the liability rule in each case is different. The rule imposing liability on a defender who has engaged personally in a dangerous operation distributes the consequences of risks *between pursuer and defender*. In the case of liability derived from the non-delegable duty, in contrast, the rule seeks to distribute the consequences of risk *between potential defenders*, that is, the employer and the independent contractor, *vis-à-vis* the pursuer: if the contractor was negligent, the pursuer will obtain reparation, either from the contractor, proving his negligence, or from the employer, without the need to prove his negligence. But the employer could eventually recover from the negligent independent contractor: apart from any indemnities that might be provided for in the contract between employer and contractor, they can be considered as joint wrongdoers and, for this reason, jointly and severally liable.²⁰⁵

²⁰³ *Read v J Lyons & Co Ltd* [1947] AC 156; *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264; and more recently *Transco Plc v Stockport Metropolitan Borough Council* [2003] UKHL 61, [2004] 2 AC 1.

²⁰⁴ Stevens (n 187) 344.

²⁰⁵ See, for England, A Tettenborn (ed), *Clerk & Lindsell on Torts* (23rd edn, 2021) paras 4-04 and 4-31; S Deakin and Z Adams (eds), *Markesinis and Deakin's Tort Law* (8th edn, 2019)

6-86. This subjects them in England to the rules on recovery of contribution contained in the Civil Liability (Contribution) Act 1978, and in Scotland to the relief rules contained in s 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940. According to these rules, the employer could, theoretically, recover from the contractor the entire amount paid as damages to the pursuer: in both countries, it is for the courts to assess the contribution according to what they deem just, and the English provision refers specifically to “the extent of the person’s responsibility for the damage in question” as the main criterion to determine what is just and equitable.²⁰⁶ The English statute explicitly allows for this contribution to result in a complete indemnity,²⁰⁷ and the possibility is not excluded in its Scottish counterpart. Walker argued that an employer can, in fact, recover the entire sum from the contractor provided that the former was completely blameless and the latter is solvent,²⁰⁸ and referred to a case where this recovery was allowed: *McIntyre v Gallacher*.²⁰⁹ In this case, the proprietor of a house had been held liable for damage caused to the house below by an overflow of water originating in his house. The cause of this overflow was proved to be an insecurely closed pipe due to the negligence of a plumber whom the proprietor had employed to repair the pipes in the house and, for this reason, the proprietor was allowed to recover from the plumber the compensation paid.

6-87. In sum, the rationale justifying the shift of the allocation of risks in one case might not be readily transferable to the other and, consequently, both the nature and scope of these liability rules do not need to be determined identically. It is possible to argue that the law can be more generous with victims in the context of non-delegable duties, where the defender has the means of recovery from the wrongdoer at fault. As a result, liability for conduct causing a special risk of abnormal damage does not have to be strict simply because liability by virtue of a non-delegable duty is strict. Likewise, the scope of the first rule does not need to coincide with the scope of the second rule, so if a non-delegable duty can be imposed even in cases where danger can be controlled by due care (i.e. the second type of danger identified above),²¹⁰ it does not mean that the category of conduct causing a special risk of abnormal damage should extend to those cases.

6-88. For these reasons, most cases decided after *Kennedy* provide little or no material upon which to determine the nature and scope of the rule under

878. Witting, *Street on Torts* (n 191) does not include the employer/independent contractor relationship in his classification, but it seems that they would be, at least, concurrent tortfeasors (643), which would subject them to the same contribution rules applicable to joint tortfeasors (646). For Scotland, see Walker, *Delict* 163 and 425.

²⁰⁶ Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 s 3(2); Civil Liability (Contribution) Act 1978 s 2(1).

²⁰⁷ Civil Liability (Contribution) Act 1978 s 2(2).

²⁰⁸ Walker, *Delict* 425.

²⁰⁹ *McIntyre v Gallacher* (1883) 11 R 64.

²¹⁰ See para 6-68 above.

analysis in this chapter: they were concerned with liability of people *instructing* dangerous operations, not *engaging* in them. Evidently, in all these cases *someone* was engaging in the activities and not merely instructing them: the contractors. But the discussion was not about the grounds for their liability. The only aspect that was decided in these cases was the relevancy of the averments against the person instructing them.

(2) Cases that do not rely on the notion of non-delegable duties

6-89. Outside the realm of non-delegable duties, the development has been limited. Only two Outer House cases have dealt – tangentially – with the matter: *Anderson v White*,²¹¹ and *Viewpoint Housing Association Ltd v City of Edinburgh Council*.²¹² They share with the previous group the fact that they were about relevancy of the issue. As a consequence, in both groups of case many of the more difficult questions were left for final resolution after proof, and this stage seems not to have been reached.

6-90. The decision in *Anderson v White*²¹³ was considered in chapters 4 and 5 with regard to the case of intentional or reckless nuisance against the third defender, proprietor of the land at the time of the claim, for allowing the water level behind a dam to rise so as to flood the pursuers' property.²¹⁴ The pursuers claimed damages for nuisance also against the second defender, trustee of the former proprietor of the land, by whose disposition the third defender became proprietor but who also retained the right to issue instructions to the latter and, therefore, to control his operations. The court held that *culpa* ought to be established and that, for those purposes, the pursuers required to aver:

first that the operations were either likely to cause damage to their land however much care was exercised, or were such that it was necessary to take steps in the carrying out of those operations to prevent damage to their land, and secondly, that the damage was foreseeable.²¹⁵

As to the first requirement, the pursuers averred the first alternative, i.e. that the operations were likely to cause damage regardless of the level of care deployed; and with regard to the second requirement, namely foreseeability, they averred that the second defenders had been informed of what was happening and that, in any case, the occurrence of the harm was obvious. Thus, the issue was regarded as relevant as an averment of fault.²¹⁶

²¹¹ *Anderson v White* 2000 SLT 37.

²¹² *Viewpoint Housing Association Ltd v City of Edinburgh Council* [2007] CSOH 114, 2007 SLT 772.

²¹³ 2000 SLT 37.

²¹⁴ See paras 4-36 and 5-42 above.

²¹⁵ 2000 SLT 37 at 42.

²¹⁶ 2000 SLT 37 at 42.

6-91. This is not, however, an averment of negligence, for no submissions were made about the standard of care or its breach. There are, consequently, two alternative explanations for the conclusion that creating such risk amounts to fault: either the court saw the case as one of intention or recklessness, or it considered that the sole creation of the risk, coupled with foreseeability of harm amounted to a different form of fault. The language used by the court with regard to the averments of fault in respect of the third defenders, which essentially reproduced the notions of intention and recklessness contained in *Kennedy v Glenbelle*, stands in contrast with the language used here (regarding the second defenders), which reproduces the distinction contained in *Chalmers*²¹⁷ and *Noble's Trs.*²¹⁸ It seems more plausible, therefore, to infer that the court took the second approach. If this is correct, we can conclude that the case was one of application of the special rule under discussion in this chapter, even though the court neither referred specifically to conduct causing a special risk of abnormal damage nor mentioned *Kennedy* when discussing the second defender's liability.

6-92. The conclusion that arises from this decision as to the nature of the liability rule is rather evident: the case continues the *Kennedy* analysis of the rule in fault terms. Unfortunately, the decision does not tell us much about the scope of the category we are trying to delineate. First, it does not tell us whether, had the pursuers framed their averments in the second alternative of the first requirement (that is, that the operations were "such that it was necessary to take steps. . ."), this would have been enough to establish fault, or whether the pursuers would have needed to prove, additionally, that those steps were not taken, i.e. to prove negligence in the ordinary sense. In other words, the case does not tell us whether the second type of danger falls to be treated in the same way as the first type, because the pursuers' averments were framed according to the latter. Secondly, the case does not tell us anything about the other elements of this risk, e.g. whether there is a requirement of magnitude of harm. What the case does tell us, however, is that harm must be foreseeable.

6-93. In the case of *Viewpoint Housing Association Ltd v City of Edinburgh Council*,²¹⁹ the pursuers suffered damage to their property as a consequence of a flood. The cause of the flood was, in the pursuers' view, the inadequacy of the culverting arrangements constructed by the former roads authority on the burn located nearby. They sought compensation from the new roads authority, now owners, possessors and controllers of the works. In his decision, the Lord Ordinary (Emslie) suggested, apart from the negligence case, the possibility of a strict-liability case based on the interference with the natural flow of a watercourse. The pursuers averred that, if fault could not be proved, a case based on strict liability was still open. Such possibility, however, was excluded

²¹⁷ *Chalmers v Dixon* (1876) 3 R 461.

²¹⁸ *Noble's Trs v Economic Forestry (Scotland) Ltd* 1988 SLT 662.

²¹⁹ [2007] CSOH 114, 2007 SLT 772.

from the case by reference to the state of the pleadings. “If pursuers wished to maintain such a fallback argument”, Lord Emslie said, “an appropriate minute of amendment would be required”.²²⁰

6-94. It seems, therefore, that a case of strict liability, arguably based on the rule in *Caledonian Rly Co*,²²¹ could have been possible if the averments were adequate and gave fair notice to the defenders. The scope of application of this alleged special-liability rule was defined by reference to the specific factual pattern present in the *Caledonian Rly Co* case which, as has been explained, is seen as an exceptional case of strict liability that is based upon the infringement of the rights of riparian owners²²² – a view that is considered and challenged in chapter 8.²²³ In this context, the decision in *Viewpoint Housing Association* does not contribute significantly to the delineation of the category beyond confirming what we already know: that interference with the natural course of a stream attracts strict liability.

(3) Doctrinal insights

6-95. Even though case law after *Kennedy v Glenbelle*²²⁴ sheds almost no light on the problematic aspects of this rule, legal literature leaves us in a slightly better position, for it discussed one important definitional element of the category: gravity of the potential harm. The view about the nature of the rule, however, remains largely unchanged: it is still generally considered as a fault-based liability rule.²²⁵ This is not surprising given that *Kennedy* itself proclaims that liability for conduct causing a special risk of abnormal damage is fault-based. The explanation of liability still relies on substantive and evidential elements of negligence.²²⁶

6-96. Reid proposed a way of dealing with dangerous activities that is more nuanced than the orthodox view: she distinguishes accumulation of substances that are intrinsically dangerous from the accumulation of substances that are not intrinsically dangerous. In the first type of accumulation (i.e. the *Chalmers*²²⁷ type of case) liability is explained by a heightened duty of care that is very easily breached, and where the pursuer can invoke the *res ipsa loquitur* doctrine.²²⁸ In

²²⁰ [2007] CSOH 114, 2007 SLT 772 at para 22.

²²¹ *Caledonian Rly Co v Greenock Corporation* 1917 SC (HL) 56.

²²² See para 6-56 above.

²²³ See paras 8-43 to 8-77 below.

²²⁴ *Kennedy v Glenbelle Ltd* 1996 SC 95.

²²⁵ See E Reid, “The Basis of Liability in Nuisance” 1997 JR 162 at 174; G D L Cameron, “Nuisance in the Common Law of Scotland” (1998) 3 SLPQ 1 at 7; Reid (n 19) 747–748; Whitty, “Nuisance” (Reissue, 2001) para 108.

²²⁶ Cameron (n 225) 7; Whitty, “Nuisance” (Reissue, 2001) para 108.

²²⁷ *Chalmers v Dixon* (1876) 3 R 461.

²²⁸ Reid (n 19) 748.

the second type (i.e. the *Kerr*²²⁹ type of case), a rebuttable presumption of fault operates. This presumption, however, seems to stem equally from the *res ipsa loquitur* doctrine.²³⁰ Consequently, there is significant common ground between the explanations for both types of case and the nuance tends to disappear. Further, it is not clear how “non-accumulation” cases are to be classified, i.e. dangerous activities that do not entail the storage and subsequent escape of a substance. This understanding of liability in negligence terms is consistent with Reid’s scepticism about the need for conduct causing a special risk of abnormal damage as a separate category,²³¹ a point that seems to be conceded by Whitty, referring to Lord Hope’s suggestion that it can actually just be recklessness.²³² What is noteworthy about these remarks is that they draw a question mark over the category, underscoring its somewhat odd character as a form of fault.

6-97. There is only one author who identifies in *Kennedy*’s implied fault what “to all intents and purposes” is a strict-liability rule,²³³ but then suggests that *Chalmers*, the authority upon which this implication fault is based, “does not represent the law of Scotland”, for it is in his view an unwarranted extension of the strict-liability rule applicable to *opera manufacta* on water courses.²³⁴

6-98. With regard to the scope of the category, doctrinal writings highlight what had been absent from previous formulations of the required risk: the element of *abnormal* damage. Whereas Reid explains that this conduct is classified by reference “to the gravity of the possible harm”,²³⁵ Whitty acknowledges that conduct causing a special risk of abnormal damage

is an impure taxonomic category because, unlike the other forms of *culpa* which form a series or continuum of types of conduct defined by reference to the pursuer’s mental element, this has reference to the gravity of the possible harm suffered by the defender not to the pursuer’s mental element and therefore belongs to a different classificatory series.²³⁶

This view entails imposing a minimum gravity threshold on the category. As a consequence, conduct that creates a very high likelihood of harm will not fall within its scope if this likely harm is not sufficiently material. It is not clear, however, where this threshold is to be placed, that is to say, no indications are provided to determine where to draw the line between the “normal” and the “abnormal”.

²²⁹ *Kerr v Earl of Orkney* (1857) 20 D 298.

²³⁰ Reid (n 19) 748–749.

²³¹ Reid (n 225) 174.

²³² Whitty, “Nuisance” (Reissue, 2001) para 108.

²³³ F McManus, “Liability for *Opera Manufacta* in Scots Law” 1998 JR 281 at 281.

²³⁴ McManus (n 233) 298.

²³⁵ Reid (n 225) 174.

²³⁶ Whitty, “Nuisance” (Reissue, 2001) para 108.

E. CONCLUSIONS

6-99. This chapter has discussed both the authority that serves as the source for conduct causing a special risk of abnormal damage as described by *Kennedy v Glenbelle*,²³⁷ and the subsequent case law and legal literature. It can be concluded from this discussion that the sources and subsequent materials are not consistent in that they lead to different views about the category, with regard both to its nature and scope. Further, many of these sources are connected to or directly rely on the *Rylands* rule,²³⁸ which is problematic given its general exclusion in *RHM Bakeries*.²³⁹ In addition, an important group of the cases that deal with dangerous activities are of no assistance, for they are concerned with a related yet different basis of liability: non-delegable duties of care. The latter issue is particularly pervasive in case law after *Kennedy*.

6-100. Possibly the one aspect of the regime that is nowadays widely agreed on by both courts and scholars is the fault-based nature of the liability that this type of conduct attracts. This underplays the relevance of determining the scope of the category. After *Kennedy*, however, it is possible to see a renewed doctrinal interest in this topic, although the interest does not go as far as to provide a full outline of what conduct causing a special risk of abnormal damage actually is. Yet, as will be discussed in the following chapter, this fault-based account of the regime has serious flaws and it might be better understood as a strict-liability regime, which in turn highlights the fundamental need to delineate the boundaries of the category to which it is applied.

²³⁷ 1996 SC 95.

²³⁸ *Rylands v Fletcher* (1868) LR 3 HL 330.

²³⁹ *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17.

7 Abnormally Dangerous Conduct: a Strict-liability Account

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A. INTRODUCTION

7-01. The previous chapter discussed the sources and the orthodox account of the fifth category of fault listed by Lord President Hope in *Kennedy v*

Glenbelle Ltd in addressing the basis of liability in nuisance: conduct causing a special risk of abnormal damage.¹ As explained, the fault-based account of this category raises some questions about the true nature of the applicable liability rule, as well as the boundaries of the category itself. This chapter explores the possibilities for a more rational approach that would allow the law to move forward. In doing so it advances two main arguments.

7-02. The first argument is that the rule is effectively one of strict liability. Chapter 6 showed that, despite the different views about the category under analysis, the explanation of the nature of the liability rule has reached a rather stable conclusion: liability is, at least conceptually, fault-based. There is, however, an equally stable acknowledgement of the idea that, in practice, the conceptual nature of the rule might not make much difference in result: liability in these cases “behaves” like strict liability, even if it is not. But if this is really the case, the question that then arises is whether this is not just “strict liability in disguise”, as suggested by Zimmermann and Simpson.²

7-03. An analysis of the rule shows that the answer to the question is, indeed, affirmative: liability for this type of activity seems to be not just *stricter-than-normal*, in the sense discussed in chapter 2, but actually *strict*.³ On the one hand, a survey of the identifiable elements of the rule according to the current authority and literature points strongly towards the presence of a truly strict-liability rule. On the other hand, the standard explanation of this rule as fault-based features some shortcomings that are difficult – if not impossible – to overcome, rendering the classification rather unconvincing (section B).

7-04. The second argument is that, given the strict nature of the liability rule, the precise delineation of its scope becomes critical and should be the main focus of inquiry, especially in a system of law that is committed to the fault principle. Since the available authority does not provide enough substantive assistance in elucidating this delineation, this chapter proposes a framework of the relevant elements that should be taken into account in defining conduct causing a special risk of abnormal damage, making choices based upon the available authority and general legal principles of liability.

7-05. In this proposal, it is submitted that a strict-liability rule should be applied to abnormally dangerous conduct, defined as conduct which creates a high risk of grave physical damage but restricted to those cases where risk cannot be adequately controlled by reasonable care and is not of common usage, and where risk and its magnitude are known or at least reasonably expected to be known by the defender. The proposal takes its inspiration from

¹ *Kennedy v Glenbelle Ltd* 1996 SC 95 at 99.

² R Zimmermann and P Simpson, “Liability among Neighbours” in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000), vol 2, 612 at 631.

³ See the distinction in paras 2-27 and 2-28 above.

the models adopted for abnormally dangerous activities by the American Law Institute's *Restatement Third of Torts* and by the *Principles of European Tort Law* ('PETL') produced by the European Group on Tort Law and first published in 2005, but with significant differences and qualifications. The Restatement (3d) is a helpful working model, not least because its formulation was based on the judicial experience of applying the previous versions, in particular the Restatement (2d) formulation which was so influential for Whitty's title on "Nuisance" in the *Stair Memorial Encyclopaedia*,⁴ taking into account the elements that were problematic in practice. The PETL, in turn, provide a useful framework because they try to "encompass the lowest common denominator as a minimum standard" between the different jurisdictions considered (section C).⁵ The final section will offer some brief conclusions (section D).

B. THE NATURE OF THE RULE: A STRICT-LIABILITY ACCOUNT

(1) An analysis of the rule

7-06. In order to determine whether we are, in fact, in the presence of a strict-liability rule, a good starting-point is to contrast the elements and effects of the regime under analysis with those that have been identified as the determining elements and effects of strict liability. If we can find a coincidence, then the preliminary conclusion is that we are likely dealing with a strict-liability regime. For these purpose, the frame of reference is that developed in chapter 2, where the notions of fault-based, stricter-than-normal and strict liability were outlined.

(a) Proof of fault

7-07. The authority considered in chapter 6 is consistent in recognising that, according to the liability regime under analysis, the pursuer does not have to prove fault in the ordinary way in order to obtain compensation. Lord President Hope in *Kennedy v Glenbelle* identified this as the main effect of conduct causing a special risk of abnormal damage: "it is not necessary to prove a specific fault as fault is necessarily implied in the result"; "fault is implied if damage results from that conduct".⁶

7-08. This element is consistent both with a strict-liability rule and a fault-based liability rule. In a strict-liability rule, since liability is imposed regardless

⁴ N R Whitty, "Nuisance" in *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol 14 (1988).

⁵ European Group on Tort Law (<http://egt1.org/index.html>), *Principles of European Tort Law: Text and Commentary* (2005) 104.

⁶ 1996 SC 95 at 99 and 100.

of fault, obviously fault does not have to be proved by the pursuer to obtain compensation. But a fault-based liability rule can also be “stricter” in this way,⁷ facilitating compensation for the pursuer by shifting the burden of proof of fault and, consequently, imposing on the defender the task of demonstrating that he was not at fault, i.e. that he did not have the mental disposition and/or knowledge required by intention and recklessness, or, more commonly, that he employed the level of care that was due according to the circumstances. This is the effect of a rebuttable presumption of fault. Consequently, the fact that fault does not have to be proved only leaves us within the range of stricter forms of liability.

(b) *Defences: absence of fault*

7-09. We turn, then, to what was identified in chapter 2 as the key defining element of a strict-liability rule: the admissibility of absence of fault as a defence.⁸ The relevant authority does not provide a clear answer to the question of whether absence of fault is an admissible defence in these cases. Often cited is Lord Justice-Clerk Hope’s dictum in *Kerr v Earl of Orkney* where he remarked that it was “not sufficient that [the defender] took all the pains which were thought at the time necessary and sufficient”,⁹ and that he was “not prepared to say that any proof of the skill and care with which a new operation was conducted will be relevant”.¹⁰ These remarks have been construed as a clear exclusion of the defence of absence of fault.¹¹ A more recent view, however, holds the opposite interpretation: in Reid’s opinion, what operated in *Kerr* was a rebuttable presumption of fault by virtue of the *res ipsa loquitur* doctrine, a conclusion that stems from the Lord Ordinary’s judgment.¹² On this view, Lord Justice-Clerk Hope’s words can be explained by the fact that, in the circumstances that had occurred, the lack of care was so evident – as he underlines by highlighting that the defender did not obtain advice from the adequate professionals nor had proper plans¹³ – that any discussion of diligence was pointless.

7-10. It appears, however, that there are better reasons to support the unavailability of the defence. First, later case law seems to point towards the

⁷ See paras 2-41 to 2-46 above.

⁸ See para 2-30 above.

⁹ *Kerr v Earl of Orkney* (1857) 20 D 298 at 302.

¹⁰ (1857) 20 D 298 at 303.

¹¹ See, e.g. E M Clive, “The Thirteenth Report of the Law Reform Committee for Scotland” 1964 JR 250 at 257; K W B Middleton, “Liability without Fault” 1960 JR 72 at 76; D M Walker, *The Law of Delict in Scotland* (2nd edn, 1981) 989.

¹² E Reid, “Liability for Dangerous Activities: A Comparative Analysis” (1999) 48 ICLQ 731 at 749. The relevant paragraph of the Lord Ordinary’s decision is quoted in para 6-19 above.

¹³ (1857) 20 D 298 at 302–303.

exclusion of the defence. In *Chalmers v Dixon*,¹⁴ both Lord Justice-Clerk Moncreiff and Lord Ormisdale treated the issue of precautions as relevant only if fault had to be proved. According to the former, “[f]ault is necessarily implied in the result, and it is unnecessary to go further”; the defenders’ (lack of) precautions were relevant only “if [he] were called to decide the question of fault”.¹⁵ The latter not only followed a similar argument, but actually quoted Lord Cranworth’s dictum from *Rylands v Fletcher*¹⁶ that specifically establishes the irrelevance of care as a defence.¹⁷ In *Noble’s Trs v Economic Forestry (Scotland) Ltd*,¹⁸ in turn, there was no discussion about precautions because the pursuers failed to aver the type of risk that, in the court’s view, was necessary to make a relevant averment of fault. Yet it is noteworthy that, as in *Chalmers*, when risk cannot be controlled by due care (i.e. the first type of risk identified in the previous chapter),¹⁹ fault is located in the act of engaging in the dangerous activity itself; “the landowner’s *culpa* lies in the actual carrying out of his operations”.²⁰ This stands in contrast with the case where risk can be controlled by due care, in which fault lies in not taking such care. Other cases where the rule was identified as applicable explicitly acknowledge that the defender is liable if harm is caused even if he used “the utmost care”,²¹ “however careful he might have been”.²²

7-11. These remarks lead to the second reason why absence of fault is not – or should not be – available as a defence. Fault is said to lie in engaging in the dangerous conduct precisely because due care is ineffective in controlling danger. Admitting due care as a defence defeats the very purpose of identifying fault in the act of engaging in this type of danger. The logical way of demonstrating absence of fault in this context should be to prove that the defender did not engage in a conduct that creates the type of danger required, i.e. to challenge the applicability of the rule.

7-12. It is true that, in Reid’s view, the defence would be admissible only in the *Kerr*²³ type of cases, namely the accumulation of substances that are not intrinsically dangerous, and not in the *Chalmers*²⁴ type of case, where the substances are intrinsically dangerous.²⁵ But not only has the rule in *Kerr*

¹⁴ (1876) 3 R 461.

¹⁵ (1876) 3 R 461 at 464.

¹⁶ (1868) LR 3 HL 330.

¹⁷ (1876) 3 R 461 at 466. The relevant paragraph of Lord Cranworth’s speech is quoted in para 6-22 above.

¹⁸ 1988 SLT 662.

¹⁹ See para 6-68 above.

²⁰ 1988 SLT 662 at 664. *Anderson v White* 2000 SLT 37 at 42 is to similar effect.

²¹ *Western Silver Fox Ranch Ltd v Ross and Cromarty County Council* 1940 SC 601 at 605.

²² *Blair v Springfield Stores Ltd* (1911) 27 Sh Ct Rep 178 at 182.

²³ *Kerr v Earl of Orkney* (1857) 20 D 298.

²⁴ *Chalmers v Dixon* (1876) 3 R 461.

²⁵ See para 6-96 above.

been widely identified with the rule in *Chalmers*, but identified specifically as the appropriate authority in cases where the substance that caused the harm could be described as intrinsically dangerous, as in the case of pesticides²⁶ or explosives.²⁷ Moreover, as remarked earlier,²⁸ the presumption of fault in both types of case seems to stem from the same source, so defences should be consistent across both groups.

(c) Knowledge of danger and foreseeability of harm

7-13. Overall, the case law seems to be consistent in requiring some element of knowledge or foreseeability. It is not entirely clear, however, what the object of that knowledge or foreseeability is. Some cases focus on the knowledge – actual or implied – of the *danger*: the defender will be liable without proof of fault provided that he knows, or at least ought to know, that the activity he is carrying out or the substance he is storing entails the level of required danger. This means knowing the extent of the potential harm and the level of likelihood of its occurrence. This is the case, for instance, in the decisions in *Chalmers*²⁹ and *Blair v Springfield Stores Ltd*.³⁰ Other cases, however, concentrate on foreseeability of the *consequences*, i.e. the harm suffered by the victim must be foreseeable at least in nature. Its extent and level of likelihood are not relevant. Examples can be found in the cases of *Western Silver Fox Ranch Ltd v Ross and Cromarty County Council*,³¹ *Noble's Trs*,³² and very clearly in *Anderson v White*.³³

7-14. Arguably the distinction is not relevant, for one implies the other: if there is knowledge – actual or implied – of the danger, then subsequent harm is foreseeable, and conversely, if harm is foreseeable, it entails that the dangerousness of its source must have been known or knowable. The second proposition is, however, not correct, and the best example is *Rylands v Fletcher*³⁴ itself: in that case, even though harm was foreseeable *if* there was an escape, the escape was not foreseeable,³⁵ highlighting that one does not necessarily imply the other.

²⁶ *D McIntyre & Son Ltd v Soutar* 1980 SLT (Sh Ct) 115.

²⁷ *Western Silver Fox Ranch Ltd v Ross and Cromarty County Council* 1940 SC 601.

²⁸ See para 6-96 above.

²⁹ *Chalmers v Dixon* (1876) 3 R 461.

³⁰ (1911) 27 Sh Ct Rep 178.

³¹ 1940 SC 601.

³² *Noble's Trs v Economic Forestry (Scotland) Ltd* 1988 SLT 662.

³³ 2000 SLT 37.

³⁴ (1868) LR 3 HL 330.

³⁵ P Cane, *The Anatomy of Tort Law* (1997) 49; R A Epstein, *Torts* (1999) 345. See, however, *Transco Plc v Stockport Metropolitan Borough Council* [2003] UKHL 51, [2004] 2 AC 1 at para 10 per Lord Bingham. For a different view, see G T Schwartz, "Rylands v Fletcher, Negligence, and Strict Liability" in P Cane and J Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (1998) at 217, arguing that the escape must have also been foreseeable at the time.

7-15. For the purposes of this section, we do not need to answer whether the regime under analysis requires knowledge of danger, foreseeability of harm, or both. What we need to answer here is whether an affirmative answer implies, necessarily, that the liability rule is fault-based or, on the contrary, whether it is compatible with a strict-liability regime. And the answer was provided in chapter 2's discussion of the notion of strict liability: requiring foreseeability of harm, or requiring knowledge of the level of risk of an activity, does not mean that the liability rule is fault-based.³⁶ This, however, is a distinct question from whether engaging in a particularly dangerous activity, with or without knowledge of its nature, can be considered as a form of fault in itself.³⁷

(d) The rule's "behaviour"

7-16. The analysis developed so far shows that the elements of the liability rule under discussion coincide with those of a strict-liability rule. Not only is there no requirement to prove fault, but proof of absence of fault is not an admissible defence, and the requirement of foreseeability of harm or knowledge of danger does not preclude this conclusion. The rule, in sum, "behaves" like a strict-liability rule. This, however, did not prevent some commentators from explaining it in terms of fault.

(2) The shortcomings of the fault-based account

7-17. As has been stated, the orthodox view does not argue that the rule behaves differently from a strict-liability rule. The position is best summarised by the Law Reform Committee's conclusion, cited by Lord Fraser in *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council*,³⁸ that "it seems to make little, if any, difference in the result whether one adopts what may be called the 'absolute liability' theory or adheres rigidly to the fault principle".³⁹ Yet the orthodox view explains this seemingly strict-liability rule using elements of fault-based liability, particularly of negligence. There are, however, some flaws in the reasoning that render this explanation rather unconvincing.

(a) High or heightened standard of care?

7-18. The first element that is deployed to explain this liability rule as fault-based, and that is present in most accounts, is the inherent sensitivity of

³⁶ See paras 2-33 to 2-37 above.

³⁷ See paras 7-29 and 7-30 below.

³⁸ *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17 at 45.

³⁹ Law Reform Committee for Scotland, *Thirteenth Report: The Law relating to Civil Liability for Loss, Injury and Damage caused by Dangerous Agencies Escaping from Land* (Cmnd 2348, 1964) para 22.

negligence's standard of care to risk: an activity that creates a very high level of risk will result in a very high standard of care. This is indeed one of the cases of "stricter-than-normal" liability identified in chapter 2,⁴⁰ and also the explanation offered by Weinrib to make strict liability for this type of activity compatible with the requirement of fault demanded by his corrective-justice justification of liability. "[T]here must be a point", he argues, "where activity is sufficiently risky that lack of care can be imputed from the very materialization of the risk".⁴¹ This is why, in his view, the defendant cannot invoke lack of fault.

7-19. It must be noted, however, that this explanation relies on a generalisation, for the standard of care depends mainly, but not exclusively, on the level of risk. The standard is determined by a series of factors, among which an important role is played by the costs of taking precautions. If these costs are too high in relation to the improvement achieved by taking them in terms of safety, and especially when activities are considered as socially useful or valuable,⁴² then due care might not necessarily be equal to all care. It would, in sum, depend on the circumstances of each case whether the standard of care is sufficiently high to make this alleged fault-based liability rule behave as a strict-liability one. Weinrib argues that the costs of taking precautions are largely ignored by English and Commonwealth courts,⁴³ so the standard of care would, in his view, depend exclusively on risk. Yet a recent study has sought to show that "Weinrib is badly mistaken here about the state of the law",⁴⁴ giving examples of cases where the cost of precautions has, indeed, been taken into account.⁴⁵ The contention is applicable to Scots law: Walker provides a list of cases that serve as authority for the proposition that "the expense and difficulty or practicability of taking certain precautions against a foreseen risk can be taken into account".⁴⁶

7-20. As a consequence, mere reliance on the standard's sensitivity to risk might lead to a level of care that is just not high enough to imply negligence from the fact that harm happened. It would be necessary to resort to the notion of "highest possible" or "utmost" care.⁴⁷ In this case, where the standard of care is placed so high that it is virtually impossible to comply with, that is to say, where *due care* becomes *all care* so that "nothing short of not doing the act is an adequate precaution",⁴⁸ then there is no difference in practice with a rule of strict

⁴⁰ See paras 2-38 to 2-40 above.

⁴¹ E J Weinrib, *The Idea of Private Law* (revised edn, 2012) 188.

⁴² P Cane and J Goudkamp, *Atiyah's Accidents, Compensation and the Law* (9th edn, 2018) para 2.4.5.

⁴³ Weinrib, *The Idea of Private Law* (n 41) 148.

⁴⁴ J Goudkamp and J Murphy, "The Failure of Universal Theories of Tort Law" (2015) 21 *Legal Theory* 47 at 57.

⁴⁵ Goudkamp and Murphy (n 44) 58.

⁴⁶ Walker, *Delict* 204. Some more recent cases can be found in G Cameron, *Thomson's Delictual Liability* (6th edn, 2021) para 5.8.

⁴⁷ See para 2-39 above.

⁴⁸ J J Gow, "Is Culpa Amoral?" (1953) 65 *JR* 17 at 25.

liability; it is “tantamount to strict liability”.⁴⁹ But for cases where the standard of care, though very high, is not high enough to reach this point, the explanation is, therefore, not sufficient: there is still a need to prove that the standard was actually breached, even if this breach entails only a slight lack of care.

(b) *High standard of care + res ipsa loquitur*

7-21. Generally, the issue is solved by the orthodox view through the idea of *res ipsa loquitur*: the fact that harm resulted is evidence of this (slight) lack of care. As explained in chapter 2, *res ipsa loquitur* does not amount to a proper presumption of negligence.⁵⁰ A presumption of negligence places on the defender the burden of proving diligence, whereas *res ipsa loquitur* simply charges him with the burden of proposing an alternative explanation of the accident that is compatible with diligence, throwing the burden of proof of negligence back on to the pursuer. Consequently, this is a weak explanation for a rule that behaves like strict liability and that, therefore, relieves the pursuer from proving fault. He might, indeed, need to prove fault after all, if the defender can provide the aforementioned explanation.

7-22. But there is a more fundamental flaw in the reasoning: one of the essential elements of *res ipsa loquitur* is incompatible with the type of activity that is characterised as conduct creating risk of abnormal damage, i.e. that in which due care cannot control the risk.⁵¹ *Res ipsa loquitur* operates when the accident is one that, in the ordinary course of things would not have happened if the defender had used proper care.⁵² Therefore, if the activity is one where due care cannot control the risk, it is not possible to assert at the same time that harms derived from this activity are, in the normal course of things, due to lack of proper care. At least in two of the cases mentioned by Reid in support of the *res ipsa*-based explanation,⁵³ the court explicitly recognised that danger was controllable through adequate precautions. In *Nautilus Steamship Co v David and William Henderson Co*, Lord Skerrington remarked that “the operation was obviously one which would be dangerous, unless precautions were taken”,⁵⁴ while in *Gilmour v Simpson*, the Lord Ordinary described the instrument used by the defenders as “a potentially dangerous instrument, if care was not duly exercised”.⁵⁵ In the third case mentioned by Reid, *Fitzpatrick v Melville*, though there is no explicit recognition, the facts can easily be characterised as such.⁵⁶

⁴⁹ W W McBryde, “The Advantages of Fault” 1975 JR 32 at 40.

⁵⁰ See para 2-49 above.

⁵¹ See para 6-70 above.

⁵² See para 2-48 above.

⁵³ Reid (n 12) n 105.

⁵⁴ *Nautilus Steamship Co v David and William Henderson Co* 1919 SC 605 at 609.

⁵⁵ *Gilmour v Simpson* 1958 SC 477 at 479.

⁵⁶ *Fitzpatrick v Melville* 1926 SLT 478.

7-23. It is true that the restriction of the category only to those cases where due care cannot control the risk is part of the previous chapter's argument. But even if we accept a wider category that includes also those cases where it is necessary to take steps to prevent risk, this merely turns the *res ipsa loquitur* explanation from completely inadequate to partially inadequate. At a more general level, *res ipsa* operates only when the accident is unexplained,⁵⁷ so it is, again, an unwarranted generalisation to assume that in the type of cases under analysis, the accident will always be unexplained.

7-24. As a consequence, *res ipsa loquitur* is not a convincing explanation for presuming the breach. Some other explanation is needed to keep the rule within the bounds of fault-based liability.

(c) *High standard of care + presumption of negligence*

7-25. An alternative explanation would be that there is a proper presumption of negligence in operation. However, no account is clear as to the nature and source of this presumption. In any case, the key question would then be whether the presumption can be rebutted. And if this is not the case, then it is difficult to see in what sense this remains a fault-based rule.⁵⁸ The view is not new: around the same time the orthodox view was consolidating, a dissenting voice pointed out the inadequacy of the explanation of *Kerr*,⁵⁹ *Chalmers*⁶⁰ and *Caledonian Railway Co v Greenock Corporation*.⁶¹

If strict liability amounts to no more than an inference or presumption of negligence, then it must be a good defence that in fact there has been no negligence. Of course, where a dangerous operation is carried on, the duty of care is high and it may even be that the onus of proof will shift to the defender to show that no negligence occurred. Yet, unless absence of negligence is irrelevant or negligence is imputed by law, it is impossible that the defender should be deprived of the opportunity to escape liability by proving that he exercised all the care that is expected of a reasonable man in the particular circumstances. This is precisely what the rule in *Kerr v Earl of Orkney* declares he cannot excuse himself by doing.⁶²

7-26. The availability of diligence as a defence is unclear. But, as argued above, the decided cases seem to point towards it not being admissible.⁶³ If that is correct, the presumption would be irrebuttable, undermining in a conclusive way the orthodox account of the rule based upon negligence elements.

⁵⁷ See para 2-48 above.

⁵⁸ See para 2-43 above.

⁵⁹ *Kerr v Earl of Orkney* (1857) 20 D 298.

⁶⁰ *Chalmers v Dixon* (1876) 3 R 461.

⁶¹ *Caledonian Railway Co v Greenock Corporation* 1917 SC (HL) 56.

⁶² Middleton (n 11) 76.

⁶³ See para 7-10 above.

(d) *The possibility opened up by Kennedy: recklessness?*

7-27. *Kennedy*,⁶⁴ however, opened up a new possible fault-based account that is not based upon negligence. Lord Hope, when referring to conduct causing a special risk of abnormal damage, considered that it was “perhaps just another example of recklessness”. A reckless defender was described as one who has “no regard to the question whether his action, if it was of a kind likely to cause harm to the other party, would have that result”.⁶⁵ It was argued in chapter 5, however, that the element of disregard of or indifference to risk has disappeared in the evolution of recklessness after *Kennedy*. Recklessness has been reduced to a state of pure – actual or constructive – knowledge of likelihood of harm. In this context, and insofar as conduct causing a special risk of abnormal damage requires knowledge of the danger, it can certainly be characterised as an example of recklessness. But, as concluded in chapter 5, this entails a form of liability that is in practice indistinguishable from strict liability.⁶⁶

7-28. Now, even if we consider the “pre-*Kennedy*” notion of recklessness, namely the notion that is still essentially defined by indifference, the conclusion does not change substantially. There is nothing in the configuration of conduct causing a special risk of abnormal damage that indicates indifference to risk on the part of the person engaging in the conduct. If such indifference is inferred from the fact that the person decided to engage in the conduct despite the risks that are involved, then this is a *presumption*, not an *example*, of recklessness. Depending on whether the defender is allowed to demonstrate the absence of recklessness, i.e. whether the presumption is rebuttable, this can be seen as in effect a strict-liability rule.⁶⁷ We are, therefore, back at square one: to leave the realm of strict liability, we take the recklessness route, but this route seems to lead straight back to strict liability.

(e) *The last option: fault by endangering?*

7-29. There is, however, a different way in which this rule could be explained on the basis of fault: by considering that there is fault in the creation of a foreseeable risk like the one discussed in this chapter, regardless of the precautions taken. This is the explanation offered by Middleton for the outcome of *Kerr*.⁶⁸

He was made responsible, not merely because his dam gave way, but because he had *chosen* to create a risk of harm to other people. He could be said to be blameworthy in so far as he deliberately did something which he either foresaw, or ought to have

⁶⁴ *Kennedy v Glenbelle Ltd* 1996 SC 95.

⁶⁵ 1996 SC 95 at 100.

⁶⁶ See paras 5-38 to 5-50 above.

⁶⁷ See para 2-43 above.

⁶⁸ *Kerr v Earl of Orkney* (1857) 20 D 298.

foreseen, *might* be dangerous. Otherwise there could be no blame, since nobody can guard against something that he cannot foresee. But while there was fault, there could not be said to be negligence [. . .]. It is necessary to recognise the existence of a variety of *culpa* which consists in creating a hazard, or initiating an activity which is potentially harmful to others. Absence of negligence is not a defence in this case, for *culpa* is involved in deciding to start the potentially harmful activity, not merely in failing to exercise due care once the decision to start it has been made.⁶⁹

This view returns us to what seems to have been Whitty's first approach: considering the creation of a special risk of abnormal damage a separate category of fault, alongside malice, intention, recklessness and negligence. This would also explain why the absence of negligence or intention is not a defence, and the view seems to be consistent with the language in *Chalmers*,⁷⁰ *Noble's Trs*⁷¹ and *Anderson*,⁷² all of which highlight the idea of *culpa* lying in the act of engaging in the dangerous activity itself.

7-30. There is, however, wide agreement on the very opposite conclusion. Engaging in dangerous activities does not entail fault. "To say that someone was at fault in behaving as they did is to say that they should have behaved differently".⁷³ But this is not the case here: the law does not forbid these activities nor can they be enjoined, because their value justifies taking the risk.⁷⁴ The law's reaction is simply to impose a condition in order to allow people to engage in these activities: they must compensate the victims if risk materialises;⁷⁵ "society's consent" depends on such a condition.⁷⁶ The last explanation, therefore, does not provide a satisfactory fault-based account of the rule.

7-31. In sum, the analysis and evaluation developed in this section shows that the rule under discussion is, indeed, one of strict liability. The elements and effects of this regime are coincident with those that have been signalled as key for the definition of a strict-liability rule, and all the different fault-based accounts of the rule suffer from grave shortcomings, turning them into fairly unconvincing explanations. The acknowledgement of the strict-liability nature of the rule, in turn, underscores the relevance of defining adequately the

⁶⁹ Middleton (n 11) 77. See, in a similar sense, W A Elliot, "What is Culpa?" (1954) 66 JR 6 at 23–26.

⁷⁰ *Chalmers v Dixon* (1876) 3 R 461.

⁷¹ *Noble's Trs v Economic Forestry (Scotland) Ltd* 1988 SLT 662.

⁷² *Anderson v White* 2000 SLT 37.

⁷³ Cane and Goudkamp, *Atiyah's Accidents* (n 42) 44.

⁷⁴ See e.g. J G Fleming, *An Introduction to the Law of Torts* (2nd edn, 1985) 154–155; T Honoré, *Responsibility and Fault* (1999) 23 and 28.

⁷⁵ Fleming, *Introduction to the Law of Torts* (n 74) 155. This is what Goldberg and Zipursky have called "conditional permissibility": J C P Goldberg and B C Zipursky, "The Strict Liability in Fault and the Fault in Strict Liability" (2016–17) 85 Fordham LR 743 at 763.

⁷⁶ Honoré, *Responsibility and Fault* (n 74) 23.

category to which it applies. This is the object of the proposal offered in the next section.

C. DEFINING THE CATEGORY: A PROPOSAL

(1) From “conduct causing a special risk of abnormal damage” to “abnormally dangerous conduct”

7-32. The first element of this proposal is one of terminology. As explained in the previous chapter,⁷⁷ the expression coined by Lord Hope in *Kennedy*⁷⁸ to describe the conduct to which this special-liability regime applies seems to be the result of an evolution in which the changes suffered by the formulation are neither explained nor justified. From a “special use bringing with it increased danger to others” qualification introduced by *Rickards v Lothian*⁷⁹ to the *Rylands*⁸⁰ rule, which found its way into Scots law through the case of *Miller v Robert Addie*,⁸¹ it evolved into Whitty’s “conduct causing a special risk of abnormal danger” as a form of fault,⁸² later finding itself in Lord Hope’s phrase in *Kennedy* as “conduct causing a special risk of abnormal damage”. We can only speculate as to the reasoning underlying these changes, and we can even evaluate these changes as positive, but the expression remains a source of uncertainties. It is unclear: (i) what makes a risk “special” – whether it is defined by a high likelihood of harm or whether it incorporates other elements such as the nature of the source of the risk, i.e. an “uncommon” activity; (ii) what makes damage “abnormal” – whether it is only its magnitude or also its nature; and (iii) to what extent these two elements can interact – whether a particularly “high” presence of one can lower the requirement of the other, or whether there is a minimum threshold for either, or both, of them.

7-33. The expression “abnormally dangerous conduct” seems preferable since it imposes a single requirement of abnormality and, in defining danger, allows for a margin of interaction between likelihood and magnitude of harm. Admittedly the expression itself does not necessarily convey much more meaning in terms of how we define abnormality, that is, it does not solve conclusively uncertainties (i) and (ii) listed above. This is, of course, an objection that can be made to any general standard that is embodied in one term. But by deploying one single notion and one single requirement, the formulation proposed here does not preclude the interaction of elements as explained in (iii), allowing a

⁷⁷ See paras 6-15 and 6-63 above.

⁷⁸ *Kennedy v Glenbelle Ltd* 1996 SC 95.

⁷⁹ [1913] AC 263 at 280.

⁸⁰ *Rylands v Fletcher* (1868) LR 3 HL 330.

⁸¹ *Miller v Robert Addie & Sons’ Collieries Ltd* 1934 SC 150 at 154 per Lord Justice-Clerk Aitchison, 165 per Lord Hunter, and 158 per Lord Anderson.

⁸² Whitty, “Nuisance” (1988) para 2087.

more flexible approach; and it eliminates possible redundancies in the notion. Uncertainties (i) and (ii) are, in turn, clarified by the other elements of the proposal explained below.

7-34. This terminological element highlights two further substantive points regarding the determination of the category: first, it focuses on dangerous *conduct*, and not on dangerous *things*; and secondly, as a consequence, it is a broader notion than that of *escapes* of things, which defines the current understanding of the *Rylands* rule's scope of application in England.⁸³ It is true that the authority upon which the category is based consists mainly of cases that could be characterised as escapes, yet it is difficult to see why conduct that creates a similarly relevant level of danger should be treated differently simply because it does not entail the movement of a substance from one plot of land to another. This point was clearly made in the Thirteenth Report of the Law Reform Committee,⁸⁴ and was also recognised as a source of potential anomalies by the Law Commission in England and Wales.⁸⁵ Moreover, *Kennedy* itself departed from these notions by describing the category in terms of risk-creating conduct.

7-35. Furthermore, the notion of “conduct” is preferred here over the term “activity”, adopted both by § 20 Restatement (3d) and article 5:101 PETL, because the latter might be seen as requiring active conduct, excluding, for example, omissions such as in *Anderson v White*,⁸⁶ where the rule was considered as applicable: in that case the second defendants failed to prevent the level of water being raised to a dangerous point.⁸⁷ Of course this particular omission could be seen as part of a positive activity: controlling a dam. But this is problematic, for a broad definition of an activity tends to “dilute” risk, that is, the overall activity might be seen as less dangerous than a particular conduct carried out in its context, restricting enormously the application of the rule.⁸⁸ Consequently, the terminology proposed here is clearer than that currently available and, at the same time, reflects judicial trends.

(2) The basic elements of abnormal danger and their interaction

7-36. Most human behaviour creates danger. “Dangerousness can thus hardly serve as the exclusive justification for deviations from general rules of tort law.

⁸³ See *Read v J Lyons & Co Ltd* [1947] AC 156; *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264 at 305 per Lord Goff.

⁸⁴ Law Reform Committee for Scotland, *Thirteenth Report* (n 39) para 21.

⁸⁵ Law Commission, *Civil Liability for Dangerous Things and Activities* (Law Com No 32, 1970) appendix I para 7, acknowledged subsequently by the Report of the Royal Commission on Civil Liability and Compensation for Personal Injury (Cmnd 7054, 1978) para 1637.

⁸⁶ 2000 SLT 37.

⁸⁷ See para 6-90 above.

⁸⁸ The point is made by G W Boston, “Strict Liability for Abnormally Dangerous Activity: The Negligence Barrier” (1999) 36 San Diego LR 597 at 649.

[. . .] We therefore need to find some way to measure the degree of danger”.⁸⁹ It is proposed here, as a starting point, that abnormally dangerous conduct is conduct that creates a *high risk of grave physical damage*.

(a) *High risk of grave damage*

7-37. Risk in this context is composed of two elements: the magnitude of the potential harm and the likelihood of its materialisation. Therefore, the risk of a particular harm can be high because the likelihood of its occurrence is high, even though its magnitude is not particularly material, or vice versa. This is the approach adopted both by § 20 Restatement (3d)⁹⁰ and article 5:101(3) PETL. The formulation proposed here, however, sets a minimum threshold of gravity of harm for the activity to be characterised as abnormally dangerous: danger will be abnormal only when the potential damage is grave. Above this threshold there can be different levels of gravity, and there is then space for interaction between magnitude and likelihood. If the potential harm is devastating (e.g. death, or total collapse of a building), a lower likelihood of its materialisation can justify the characterisation of the conduct as abnormally dangerous, whereas in the case of potential harms of less significance, but still grave (such as, for instance, severe but non-fatal bodily injury or structural damage of buildings), a higher likelihood should be required to justify such characterisation.

(b) *Grave physical damage*

7-38. *Physical damage* encompasses both bodily injury and damage to property. Scots case law has not discriminated between these two types of damage when deciding the scope of application of the special-liability regime. It is true that in most cases of death or personal injury considered in chapter 6, the rule was not applied. This result, however, had nothing to do with the type of injury suffered: the rule was excluded because the activity undertaken by the defender was one of common usage. In turn, the limitation that south of the border has been imposed on the *Rylands* rule,⁹¹ restricting its application to property damage,⁹² is tightly linked with its current understanding as a property protection rule.⁹³ This proposal, in contrast, includes both types of harm. It is

⁸⁹ B A Koch and H Koziol (eds), *Unification of Tort Law: Strict Liability*, vol 6 (2002) at para 52.

⁹⁰ American Law Institute, *Restatement Third of Torts: Liability for Physical and Emotional Harm* (2010) § 20 comment g.

⁹¹ *Rylands v Fletcher* (1868) LR 3 HL 330.

⁹² “It is now clear beyond even undergraduate fantasies that it cannot be prayed in aid by the victim of personal injury, even if suffered by a neighbour on his own land”: T Weir, *An Introduction to Tort Law* (2nd edn, 2006) 92.

⁹³ See *Transco Plc v Stockport Metropolitan Borough Council* [2003] UKHL 61, [2004] 2 AC 1 at paras 35 and 46 per Lord Hoffmann.

only logical that a regime that seeks to impose liability for abnormal danger should encompass the gravest possible consequences that a person can suffer, i.e. death or severe personal injury.⁹⁴

7-39. Harm, however, must be physical. The starting-point in the common law is that there is no generally recognised right to economic or mental integrity, even if harm is inflicted with fault.⁹⁵ Therefore, for pure economic loss or pure mental harm to be actionable the law imposes one or more additional requirements: gravity thresholds, specific proximity tests, or particular forms of fault. In contrast, when economic or mental harm is the consequence of the infringement of a recognised right, such as property or physical integrity, it is compensated by operation of the principle of full compensation.⁹⁶ Whether the common law's approach is justified is a question that goes beyond the scope of this book; the proposal here advanced simply seeks to be coherent from a systemic viewpoint. Hence, the regime under discussion disposes of the requirement of fault, under certain circumstances, for the infringement of a recognised right, where fault would otherwise have been a sufficient basis of liability. But when that would not have been the case, this regime does not provide a way of circumventing the additional requirements imposed by the law. Consequently, pure economic loss and pure mental or emotional harm should be actionable only under the general rules of fault-based liability insofar as they meet these specific requirements.

7-40. In order to meet the minimum threshold, however, it is obviously not enough that damage is physical. Physical harm can be negligible. So, in order to qualify, the harm must also be *grave*, that is, of a considerable magnitude. Examples of grave physical damage to the person include death and serious impairment or illness. Examples of grave physical damage to property include collapse of buildings, severe structural damage, and destruction of moveable property such as crops, vehicles or furnishings. The purpose of setting this minimum threshold is to exclude from the special regime of liability injuries that are certain or almost certain to be suffered but are of more limited magnitude, avoiding, in this way, the “blending of two extremes” that are not socially comparable.⁹⁷ Consequently, trivial or less significant harms, even if highly likely – or almost certain – to materialise do not justify the characterisation of conduct as abnormally dangerous. It was highlighted in the previous chapter⁹⁸ that discussion of the magnitude of the harm is virtually absent from Scots case law and that this could create a problem of over-inclusiveness, even though the label of the category seemingly stresses “abnormality” of damage. Setting a

⁹⁴ The exclusion of personal injury would “seem strange”: Walker, *Delict* 987.

⁹⁵ R Stevens, *Torts and Rights* (2007) 21 and 52.

⁹⁶ See Cane, *Anatomy* (n 35) 107–110.

⁹⁷ E Büyüksagis and W H van Boom, “Strict Liability in Contemporary European Codification: Torn between Objects, Activities, and their Risks” (2013) 44 *Georgetown J of Intl L* 609 at 632.

⁹⁸ See para 6-68 above.

minimum threshold of damage, therefore, seeks to prevent this problem, and aligns with doctrinal views of the category as focused chiefly on the gravity of the possible harm.⁹⁹

(c) *Abnormal sensitivity*

7-41. A further problem arises in determining whether potential harm is grave enough to justify characterising the conduct as abnormally dangerous: the incidence of abnormally sensitive persons or abnormally sensitive property. Seemingly the question here is whether we should extend the “egg-shell skull rule”, accepted in negligence cases,¹⁰⁰ to this special-liability regime, i.e. whether the defender is liable for injury the magnitude of which is augmented by some pre-existing condition that makes the victim or his property abnormally sensitive. And, again seemingly, there could be a case for distinguishing between abnormally sensitive persons and abnormally sensitive property, extending liability only in the first case.¹⁰¹

7-42. On a closer analysis, however, the question is a different one. The egg-shell skull rule, understood as described above, is a matter of extent of compensation. It tells us what the defender is liable for, i.e. which injuries he will be bound to repair. But a different problem arises when we incorporate a magnitude threshold in the liability rule, because in this case the question is not about the extent of the defender’s liability but whether he is liable at all. This is what happens, for instance, in nuisance: the *plus quam tolerabile* threshold means that liability depends on a certain gravity of interference, and the law generally disregards abnormal sensitivity in determining such gravity, favouring a standard set by reference to persons or property of normal sensitivity.¹⁰² In the special-liability regime proposed here, the magnitude of the potential harm would not exactly determine whether there is liability, but rather according to which rule of liability the defender will be assessed, so that if the potential harm is not grave enough, general fault-based liability rules – of nuisance or negligence – must be applied. The question in this context is, therefore, whether conduct can be regarded as abnormally dangerous when the potential harm would not have been grave had the victim or his property been of normal sensitivity, but it turns out to meet the minimum gravity threshold only because the sensitivity is abnormal.

7-43. The Restatement (3d) does not deal with this question; it only deals with the egg-shell skull rule.¹⁰³ But the Restatement (2d) did address the issue,

⁹⁹ See para 6-17 above.

¹⁰⁰ See para 5-34 above.

¹⁰¹ See para 5-34 above.

¹⁰² See para 5-35 above.

¹⁰³ Restatement (3d) § 31.

excluding the application of the strict-liability rule “if the harm would not have resulted but for the abnormal sensitive character of the plaintiff’s activity”.¹⁰⁴ It can be noted that the exclusion is framed in very restrictive terms: the liability rule does not apply only if harm *would not have resulted*, seemingly allowing the application of the rule when harm would have still resulted, *but not met the gravity threshold* but for the abnormal sensitivity. Moreover, the rule is excluded only due to the abnormal sensitivity of the plaintiff’s *activity*, which could ordinarily be seen as encompassing his property, but probably not his person.

7-44. It is not possible to find a straightforward answer to this question in the Scottish authorities considered so far, but the case for disregarding abnormal sensitivity of property in the application of the *Rylands* rule was made in a South African case decided by the Privy Council: *Eastern and South African Telegraph Co v Cape Town Tramways Co*. In this case, electricity from the tramlines operated by the defenders escaped and interfered with the telegraphic communications system operated by the pursuer. Lord Robertson said that:

A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure. The principle of *Rylands v Fletcher*, which subjects to a high liability the owner who uses his property for purposes other than those which are natural, would become doubly penal if it implied a liability created and measured by the non-natural uses of his neighbour’s property.¹⁰⁵

7-45. This argument was put forward by the defenders in the *Western Silver Fox Ranch* case.¹⁰⁶ They submitted that the silver-fox breeding business run by the pursuers was a “special use” in the sense meant by Lord Robertson. Although the response of the Lord Ordinary (Patrick) to the argument is initially rather puzzling – for it sought to solve the issue by applying the non-natural use test to the pursuer’s activity,¹⁰⁷ possibly in light of Lord Robertson’s words – it does shed some light on the matter. After acknowledging some level of special sensitivity on the part of the foxes, he added that:

This, however, does not alter the quality of the risk to which he who blasts subjects his neighbour, but only the quantity of the damage the neighbour may suffer. Thus, upon the uncontradicted evidence [. . .], some of the sows in a pig-breeding farm would have been affected by the blasting in this case, just as the silver fox vixens were, and with similar results.¹⁰⁸

The implication seems to be that if harm would be equally suffered by normally sensitive property, the fact that the property was abnormally sensitive does not

¹⁰⁴ American Law Institute, *Restatement Second of Torts* (1979) § 524A.

¹⁰⁵ *Eastern and South African Telegraph Co v Cape Town Tramways Co* [1902] AC 381 at 393.

¹⁰⁶ *Western Silver Fox Ranch Ltd v Ross and Cromarty County Council* 1940 SC 601.

¹⁰⁷ Walker, *Delict* 989 notes the “confusion”.

¹⁰⁸ 1940 SC 601 at 606.

exclude the application of the rule. But if the gravity threshold is met only due to hypersensitivity, then the application of the rule should be excluded and general nuisance or negligence rules applied.

7-46. There could be a case for restricting this reasoning to property: in the case of hypersensitive property there seems to be an element of choice on the part of the pursuer that is absent in the case of hypersensitive persons. The pursuer chooses to engage in telegraphic communications or to breed silver foxes, but he does not choose to suffer from a condition that makes him hypersensitive. But the reason why hypersensitivity is disregarded when assessing gravity of harm is not because the pursuer should suffer the consequences of his choice. The reason is that the defender cannot be expected to foresee such a result and, as will be argued below, the rule should only be applicable when the defender knows or is reasonably expected to know of the level of danger that he is creating.¹⁰⁹ This reasoning applies equally to hypersensitive persons and hypersensitive property.

7-47. This answer does not prevent the application of the egg-shell skull rule when the regime under analysis is applicable, i.e. the compensation of injuries in their actual extent even when their gravity is higher due to abnormal sensitivity; but this is subject to the proviso that a person or property of normal sensitivity would have suffered injury that is grave enough to meet the minimum threshold in the first place.¹¹⁰

(d) Victim's contribution to risk

7-48. A similar problem in the determination of the risk's magnitude is encountered when the conduct of the victim is a decisive factor in raising the risk to a level that justifies the characterisation of the conduct as abnormally dangerous, that is, when the level of risk – either due to its likelihood or the gravity of the harm – would have fallen below the standard required to make application of the strict-liability rule but for the fact that the victim contributed with his conduct to the increase of such risk, by failing to take reasonable care for his own safety or the safety of his property.

7-49. The problem is solved in the Restatement (3d) § 20 through the rule's description of the risk as that which is highly significant “even when reasonable care is exercised *by all actors*”,¹¹¹ including the victim.¹¹² The justification offered is that “[w]hen the conduct of actors other than the defendant has a significant influence on the number of injuries, the defendant cannot fairly

¹⁰⁹ See paras 7-70 to 7-72 below.

¹¹⁰ Walker, *Delict* 989.

¹¹¹ Restatement (3d) § 20(b)(1), emphasis added.

¹¹² Restatement (3d) § 20 comment h.

be identified as the exclusive cause of the risk”.¹¹³ § 20 simply states that the relevant level of risk is that which is created by the activity (implying the exclusion of risk contributions from other agents in the determination of such level) and which remains over the required level even when reasonable precautions are taken (without specifying the specific actors that are expected to take such precautions). Consequently, if what brings the level of risk over the standard is the victim’s failure to take reasonable care of the safety of his person or property, then the relevantly high level of risk is not exclusively created by the defender. It is reasonable, therefore, to take into account the victim’s role when assessing whether the relevant level of risk has been reached.

7-50. This does not mean that the defence of contributory negligence is excluded as a way of seeking apportionment of liability. According to s 1(1) of the Law Reform (Contributory Negligence) Act 1945:

Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage[.]

The interpretation given to the term “fault” for the purposes of the application of the Act to Scotland is provided by s 5: “the expression ‘fault’ means wrongful act, breach of statutory duty or negligent act or omission which gives rise to liability in damages. . .”. Consequently, the term “fault” is not taken in the Act in the sense adopted in chapter 2 of this book.¹¹⁴ It is here certainly a broader notion. The question that arises, therefore, is whether conduct that attracts strict liability can be considered as falling within this broader notion. And the answer seems to be affirmative.

7-51. On the one hand, the defence is available in Scotland for liability regimes that are clearly identified as strict. For instance, contributory negligence is admitted in a related strict-liability regime: the one for harms caused by dangerous animals. According to s 1(6) of the Animals (Scotland) Act 1987, “[f]or the purposes of the Law Reform (Contributory Negligence) Act 1945, any injury or damage for which a person is liable under this section shall be treated as due to his fault as defined in that Act”. In similar vein, s 6(4) of the Consumer Protection Act 1987 provides that:

Where any damage is caused partly by a defect in a product and partly by the fault of the person suffering the damage, the Law Reform (Contributory Negligence) Act 1945 [. . .] shall have effect as if the defect were the fault of every person liable by virtue of this Part for the damage caused by the defect.

¹¹³ Restatement (3d) § 20 comment h.

¹¹⁴ See paras 2-04 to 2-07 above.

Likewise, in the Scottish Law Commission's *Report on Civil Liability – Contribution*, the availability of the plea of contribution was accepted in the case of interference with the course of a stream, considered by the Law Commission as a conduct attracting strict liability.¹¹⁵

7-52. On the other hand, it is arguable that, despite the label, the availability of the defence entails introducing a fault element that moderates the strictness of the rule.¹¹⁶ In Cane's words, "[a]s a matter of principle, it may be argued that if fault is irrelevant to the issue of whether [the defendant's] conduct attracts liability, it should also be irrelevant to the issue of whether [the plaintiff's] conduct gives rise to a defence".¹¹⁷ Yet it appears that the admission of the defence does not change the basis of the defender's liability but only takes into account the causal relevance of the pursuer's conduct for the severity of the harm suffered, which is consistent with a rule that grounds liability in causation. Further, it seems fair to "require victims to take reasonable care for their own safety".¹¹⁸ Consequently, the defence is not incompatible with a strict-liability regime.

7-53. In sum, if the victim's contribution is the decisive factor that brings the level over the risk threshold, then the conduct is not itself abnormally dangerous and the special-liability regime is not open for the victim. He can pursue liability according to the general rules and his contributory negligence is likely to trigger the application of the apportionment rule. If the risk would be relevantly high regardless of the victim's contribution, then the conduct is abnormally dangerous and the special-liability regime applies, but the apportionment rule is not excluded and compensation may be reduced to reflect such contribution.

(3) Controllability of risk, common usage and social utility

7-54. There are three further elements that can be determinative of the type of conduct characterised as abnormally dangerous. These elements are the possibility of controlling the risk created by the conduct through certain precautions, the characterisation of the conduct as one of common usage, and the conduct's social utility. In contrast with the elements discussed in the previous section, where Scottish authority was virtually non-existent, it is possible to find some support in the available authority for the elements considered here.

¹¹⁵ Scottish Law Commission, *Report on Civil Liability – Contribution* (Scot Law Com No 115, 1988) para 4.9.

¹¹⁶ See V V Palmer, "A General Theory of the Inner Structure of Strict Liability: Common Law, Civil Law, and Comparative Law" (1988) 62 Tul LR 1303 at 1330.

¹¹⁷ Cane, *Anatomy* (n 35) 59.

¹¹⁸ Cane, *Anatomy* (n 35) 59–60.

(a) Possibility of controlling risk

7-55. It is proposed here that the risk that makes a conduct abnormally dangerous is that which remains relevantly high *even when reasonable precautions are taken*. In other words, it is a risk that remains at a high level even if the defender's conduct is diligent (as opposed to negligent). This element marks the point where negligence ends and, therefore, the defender would not be liable unless a different type of fault is present (i.e. intention) or a special-liability regime is available. This proposal seeks to make a special-liability regime available: it takes the standard of care the breach of which would serve as the basis of a finding of negligence, and utilises this standard as a control device for the definition of the relevant risk, making applicable the special-liability regime only where complying with the standard is irrelevant in controlling such risk and bringing it to a "normal" level.

7-56. This does not mean that negligent execution prevents conduct from being characterised as abnormally dangerous; on the contrary, it can be so described when the level of risk would have remained relevantly high *even if* execution had been diligent, regardless of whether it was, in fact, executed in such way. If this is the case, the pursuer has a choice: either to pursue liability based on the general rules (i.e. negligence, or nuisance if applicable), or to pursue liability under the special regime based on the abnormally dangerous character of the conduct. More precisely, the victim can choose either to aver that the standard of care was breached or to aver that the standard of care would not be effective in controlling the risk.

7-57. As for the defender, the rule allows him to make a decision, provided he wishes to engage in the conduct despite the high risk involved: he can either assume the costs of taking additional precautions that would in fact control the risk, or assume the costs of potential liability claims if the risk materialises. In other words, it "induces an actor either to set aside money for victims or, if it is cheaper, to make better choices when engaging in the activity".¹¹⁹

7-58. The determination as to which precautions are reasonable is to be made in the same way as in negligence: the standard of care will take into account not only the likelihood of the harm and its gravity, but also the costs of taking precautions, among other considerations.¹²⁰ This is, indeed, the reason why, even though the standard of care is determined by reference to the elements of risk, it does not necessarily control the risk effectively: there might be other considerations that make effective precautions unreasonable.

7-59. The fact that risk cannot be effectively controlled by reasonable precautions has been singled out by the Restatement (3d) as the key element

¹¹⁹ P M Gerhart, *Tort Law and Social Morality* (2010) 150.

¹²⁰ See para 2-23 above.

considered by courts in characterising activities as abnormally dangerous.¹²¹ It is useful to remember here that the Restatement (2d) differed in the way it determined what constituted an abnormally dangerous activity:¹²² § 520 contained a list of factors of which none was necessary nor necessarily sufficient of itself. The Restatement (3d) surveys the application of § 520 by the courts, concludes that the reasonable-care factor was the most relevant and, consequently, incorporates it as a necessary factor in the rule set out in § 20. The same approach is adopted by article 5:101(2) PETL, according to which:

An activity is abnormally dangerous if –

- a) it creates a foreseeable and highly significant risk of damage even when all due care is exercised in its management and
- b) it is not a matter of common usage.

7-60. It is possible, moreover, to find support in Scots authority for making this element a defining factor of the category: as discussed earlier,¹²³ the two relevant cases cited by Lord Hope in *Kennedy*¹²⁴ to support the implication of fault in the category of “conduct causing a special risk of abnormal damage”, *Chalmers*¹²⁵ and *Noble’s Trs*,¹²⁶ attempt a distinction between cases where danger can and cannot be controlled through precautions, and clearly identify implied fault in the latter case. Admittedly, it is not as clear whether they extended the implication of fault to the former and, further, the decisions are not consistent, either internally or between each other, in drawing the line that separates the two types of case. This proposal, consequently, seeks to solve the two problems by limiting the special treatment to the second type of case (where danger cannot be controlled), and drawing the line where reasonable precautions are ineffective in bringing the level of danger down to an acceptable level.

7-61. This is consistent with the cases in which the rule is unequivocally said to be applicable: they were cases where the first type of danger was present. In *Western Silver Fox Ranch*, in defending the application of the *Rylands* rule¹²⁷ – identified with the rule in *Kerr*¹²⁸ and *Chalmers* – to the facts of the case, the court remarked that “however carefully high explosives are used, their effect can only be localised to a very limited extent”.¹²⁹ In *D McIntyre & Son Ltd v Soutar*, where harm was caused by weed-spraying operations, the sheriff seemingly extended the rule to both types of danger when he stated that “[i]t makes no

¹²¹ Restatement (3d) § 20, reporter’s note to comment h.

¹²² See para 6-09 above.

¹²³ See para 6-68 above.

¹²⁴ *Kennedy v Glenbelle Ltd* 1996 SC 95 at 99–100.

¹²⁵ *Chalmers v Dixon* (1876) 3 R 461.

¹²⁶ *Noble’s Trs v Economic Forestry (Scotland) Ltd* 1988 SLT 662.

¹²⁷ *Rylands v Fletcher* (1868) LR 3 HL 330.

¹²⁸ *Kerr v Earl of Orkney* (1857) 20 D 298.

¹²⁹ *Western Silver Fox Ranch Ltd v Ross and Cromarty County Council* 1940 SC 601 at 605.

difference to say that the substance is safe if handled properly; this is a tautology, even radioactive substances, even a nuclear bomb, are safe if handled properly. *The point is that it is dangerous if it escapes*".¹³⁰ The implication seems to be that the possibility of controlling the risk by due care is irrelevant to determine the scope of application of the rule, yet the emphasised phrase acknowledges that, on the facts of the case, risk could *not* be controlled: even if the likelihood of escape was low, the potential harm was so grave that it justified the application of the rule. The examples given by the sheriff are illustrative of this conclusion: these are paradigmatic cases of activities where the risk remains very high even when due care is taken. Furthermore, the sheriff continued by saying that the substance's "dangerous character is enhanced because it is liable to escape by drift and because it is volatile",¹³¹ effectively denying the unlikelihood of the escape. Other examples can be found in *Gemmell's Trs v Alexander Cross & Sons Ltd* (manufacture of sulphuric and other acids in premises located on sloping ground),¹³² and *Blair v Springfield Stores Ltd* (storage of weevil-infested grain).¹³³

7-62. The adoption of this limit is not, however, free from problems. It imposes a high burden on the victim: he needs to aver both the standard of reasonable care *and* that it would not control the risk. It has even been said that this requirement means that the pursuer has effectively to prove that he cannot prove negligence.¹³⁴ The criticism, however, ignores the fact that, while imposing a high burden on the victim, the rule opens up a possibility of compensation where the rules of negligence would offer none: the victim can recover damages even if reasonable care *has* been taken. If it has not, then it is for the victim to assess the best strategy, according to the information available.

7-63. This limit can be seen also as problematic for the defender, forcing him to contemplate shooting his own foot: he cannot challenge the applicability of the rule because it would require him to acknowledge that risk was controllable through due care. One of the Scottish cases that discussed the rule noticed the paradox:

[O]nce [the defender] argues that [the substance] will not cause harm if handled with reasonable care and it is proved that in fact it has caused harm here, it follows, I think, that they must concede lack of reasonable care.¹³⁵

In other words, in order to challenge effectively the application of the rule, the defender will not only have to aver that the risk was controllable by due care, but also that he employed such care, and that harm happened because due care

¹³⁰ *D McIntyre & Son Ltd v Soutar* 1980 SLT (Sh Ct) 115 at 117, emphasis added.

¹³¹ 1980 SLT (Sh Ct) 115 at 117.

¹³² (1906) 14 SLT 576.

¹³³ (1911) 27 Sh Ct Rep 178.

¹³⁴ *Boston* (n 88) at 631–639.

¹³⁵ *D McIntyre & Son Ltd v Soutar* 1980 SLT (Sh Ct) 115 at 118.

still left a margin of risk not big enough to be abnormally dangerous but which in fact materialised. The strategy is complex and perhaps too risky. But this does not mean that the defender is out of defences: he can always challenge the application of the rule through the other elements, i.e. questioning the level of risk that the conduct created, or relying on its “common usage” nature.

7-64. In sum, the limit is effective in restricting the strict-liability rule to cases where diligence is incapable of controlling the risk and, though burdensome on the parties, it seems to be equally demanding on them both. For other cases, the normal rules of negligence apply, where substantive and evidential elements will aid the victim who has been exposed to a high risk.

(b) Common usage and social value

7-65. The second element that is relevant in determining the abnormal character of a danger is the nature of the conduct which causes it, particularly whether it is one of common usage, and also whether it is one of a high social utility. These elements, however, are not uncontroversial.

7-66. The element of common usage is key in the Restatement (3d) definition of an abnormally dangerous activity (§ 20 (b)(2)): if an activity can be qualified as of common usage, it excludes the application of the strict-liability rule.¹³⁶ The notion of common usage is seen as the heir of the “natural use” notion from *Rylands*.¹³⁷ The same approach is adopted by article 5:101(2)(b) PETL.¹³⁸

7-67. This exclusion is generally justified by the reciprocity of risk:¹³⁹

[A] victim has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant – in short, for injuries resulting from nonreciprocal risks. Cases of liability are those in which the defendant generates a disproportionate, excessive risk of harm, relative to the victim’s risk-creating activity.¹⁴⁰

As a consequence, strict liability would only be justified when the risk imposed on the victim can be characterised as non-reciprocal. This notion, however, has been criticised, not only because of the difficulty of distinguishing between

¹³⁶ In contrast with its role in the Restatement (2d), where it was only one of the many elements that could be taken into account: § 520.

¹³⁷ Restatement (3d) § 20 comment j.

¹³⁸ See the text at para 7-62 above.

¹³⁹ See Restatement (3d) § 20 comment j and reporters’ note to comment j.

¹⁴⁰ G P Fletcher, “Fairness and Utility in Tort Theory” (1972) 85 Harv LR 537 at 542. See also J L Coleman, “Moral Theories of Torts: their Scope and Limits: Part I” in M D Bayles and B Chapman (eds), *Justice, Rights and Tort Law* (1983) at 60–61; and more recently K W Simons, “The Restatement Third of Torts and Traditional Strict Liability: Robust Rationales, Slender Doctrines” (2009) 44 Wake Forest LR 1355 at 1362.

reciprocal and non-reciprocal risks,¹⁴¹ but because it excludes activities the benefits of which are widely spread.¹⁴² In this sense, perhaps a better justification for the common usage exclusion lies not in the distribution of risks but in the distribution of benefits, i.e. whether the benefit derived from the conduct is shared by the whole community or, at least, by the class of potential victims.¹⁴³ Consequently, a strict-liability rule would only be justified for conduct that imposes widespread risks rendering benefits that are concentrated only in a few.¹⁴⁴ Thus, it should exclude not only activities widely carried out by a significant part of a community, but also those that, despite being carried out by a limited number of people, produce benefits for a significant part of the community – or its entirety. These are not “abnormally” dangerous, in that they are not “outside of the bargain of those risks which must be accepted as part of group living in our society”.¹⁴⁵

7-68. Scottish authority points almost unequivocally to restricting the rule to cases where the danger is not “common”, taking as a starting point the *Rickards* qualification to the *Rylands* rule, as explained earlier.¹⁴⁶ The restriction takes both forms enunciated above: it excludes activities that are ordinary and pervasive, as in the cases of *Miller*,¹⁴⁷ *Spiers v Newton-on-Ayr Gas Co*,¹⁴⁸ and *M’Laughlan v Craig*,¹⁴⁹ and it excludes activities that render benefits that are widely distributed, as in *Clarke v Glasgow Water Commissioners*¹⁵⁰ and *Western Silver Fox Ranch*.¹⁵¹

¹⁴¹ Gerhart, *Tort Law and Social Morality* (n 119) 153.

¹⁴² Epstein (n 35) 349.

¹⁴³ Simons (n 140) 1364.

¹⁴⁴ Büyüksagis and Van Boom (n 97) 1364.

¹⁴⁵ Stevens, *Torts and Rights* (n 95) 113.

¹⁴⁶ See para 6-14 above.

¹⁴⁷ *Miller v Robert Addie* 1934 SC 150 at 154 per Lord Justice-Clerk Aitchison: “the provision of coal gas in an ordinary service pipe [. . .] is a *familiar everyday use* both in urban and in rural areas” (emphasis added).

¹⁴⁸ (1940) 56 Sh Ct Rep 226 at 236: a leak of gas will “involve liability only on proof of negligence [when it consists of an] escape from domestic apparatus installed *for the comfort and convenience of ordinary life*” (emphasis added).

¹⁴⁹ 1948 SC 599 at 611 per Lord President Cooper: “the introduction into dwelling-houses of a domestic gas or electricity supply has not only been the *invariable practice in urban Scotland for generations* but has long been obligatory under aedilic regulations and housing statutes” (emphasis added).

¹⁵⁰ (1896) 12 Sh Ct Rep 12 at 15: “The law laid down in *Rylands v Fletcher* [. . .] relates to private individuals storing water or other dangerous elements on their own land for their own private purposes. [. . .] But in the case of a public body who carry on a public undertaking *for behoof of the whole community* [. . .] the same principle does not apply” (emphasis added).

¹⁵¹ *Western Silver Fox Ranch Ltd v Ross and Cromarty County Council* 1940 SC 601 at 605: “the detonation of a considerable quantity of high explosive is, in a different category altogether from the provision of water or gas in houses *for the benefit of the general community*. The use of high explosives benefits a section only of the community, and not the whole community or substantially the whole community” (emphasis added).

7-69. The notion of general or widespread benefits should be distinguished from the element of social value. The fact that conduct has a high social value does not mean that this value is widely distributed; it does not turn it into a common usage in the sense explained above. The element of social value, formerly a relevant factor in the context of § 520 of the Restatement (2d), was excluded from § 20 of the Restatement (3d). And the elimination is justified: there is an underlying assumption that activities that are subject to the strict-liability rule are, indeed, socially desirable.¹⁵² This is, precisely, the reason why these activities are tolerated instead of being prohibited, even though they create an abnormal danger.¹⁵³ But the fact that they create social benefits does not justify the assumption of the costs by random victims.¹⁵⁴ In contrast with the element of common usage, Scots courts have not ruled out the application of the rule purely on the basis of the social utility of particular conduct.

(4) The knowledge required on the part of the defender

7-70. It is proposed that the risk and its magnitude must have been known or at least reasonably expected to be known by the defender at the time he carried out the conduct that created it. Therefore, it is not relevant whether he *actually knew*; it suffices that he could have known according to the information available at the time he engaged in the conduct and the research that can reasonably be expected from a person engaging in such conduct. This entails reading *Chalmers*¹⁵⁵ with a qualification: even though it is said that knowledge of the danger is irrelevant, because he who “brings new materials upon his land is bound to know the nature of these materials”,¹⁵⁶ the irrelevance must be understood as referring to actual knowledge. What he is bound to know must be limited by what he could have known and was expected to know.¹⁵⁷

7-71. The purpose of this requirement is to enable the defender to make a reasoned decision about engaging in the activity and, at the same time, to avoid paralysis of activities that might be socially useful. The strict-liability rule advanced here entails that there is a certain level of risk that the defender is willing to accept and, in economic terms, internalise in this activity. Permitting this assessment to be altered *ex post* by information that was not reasonably discoverable at the relevant time could create a level of uncertainty that might jeopardise the development of economic activity, especially when it involves innovation.

¹⁵² Boston (n 88) 624.

¹⁵³ F Werro and E Büyüksagis, “The Bounds Between Negligence and Strict Liability” in M Bussani and A J Sebok (eds), *Comparative Tort Law: Global Perspectives* (2015) at 211.

¹⁵⁴ W K Jones, “Strict Liability for Hazardous Enterprise” (1992) 92 ColumLR 1705 at 1712.

¹⁵⁵ *Chalmers v Dixon* (1876) 3 R 461.

¹⁵⁶ (1876) 3 R 461 at 464 per Lord Justice-Clerk Moncreiff.

¹⁵⁷ See para 6-76 above.

7-72. This requirement of actual or implied knowledge of the risk and its magnitude presupposes that harm is foreseeable. There is therefore no need for a separate requirement of foreseeability of harm.

D. CONCLUSIONS

7-73. This chapter has argued here that, contrary to the orthodox view, the liability attracted by the category of conduct giving rise to a special risk of abnormal damage does not merely operate like strict liability but is indeed conceptually strict. The conclusion was reached through a detailed analysis of the regime's elements by reference to the conceptual framework set out in chapter 2. This conclusion highlights the importance of outlining clearly the type of conduct to which this exceptional liability regime applies.

7-74. In this connection, the chapter sought to propose the relevant elements that should determine the boundaries of abnormally dangerous conduct attracting strict liability. The proposal, based upon the currently available authority and general principles of delictual liability, can be summarised as follows: strict liability should apply only to conduct that: (i) creates a high risk of grave physical harm, which risk remains even if reasonable precautions are adopted; (ii) is not the consequence of a common usage; and (iii) is known or should be known by the person engaging in the conduct.

8 Disputes over Uses of Water

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A. INTRODUCTION

8-01. Opening his chapter on “Water”, Rankine remarked that “[n]o part of the

law of neighbourhood has given so many difficult and delicate questions as the law which relates to right in water”.¹ The volume of litigation on the matter is a good illustration of the statement: a significant proportion of the decided cases between neighbours throughout the nineteenth century involved a dispute about the use of water running through or present in their lands. Use of water was, of course, of critical importance for Scotland’s pre-industrial agricultural economy as well as for the industrialisation process in the second half of the nineteenth century. Litigation rates dropped by the turn of the century, probably due to the incidence of statutory regulation.² But over the past three decades, water disputes have regained a prominent position in the neighbourhood context, disputes that are mostly derived from the harmful consequences of larger-scale construction projects, including public works. The types of uses complained of are varied and include activities that contaminate a stream or loch, consumption of water naturally present on the land, alterations of the bed of a river, and construction and operation of dams.

8-02. Even if involving only private rights, disputes over uses of water carry with them a public dimension, of which the most obvious aspects are public health and environmental protection. These concerns were historically addressed in the framework of common law and local regulations.³ Industrialisation in Britain, however, created unprecedented pollution problems for which common law was insufficient as a control tool.⁴ Provisions aimed at controlling water pollution can be found in several nineteenth century statutes.⁵ The first Act wholly concerned with restraining such pollution was passed in 1876,⁶ leading to a succession of statutory regulations directed specifically to this end throughout the twentieth century and up to the present day.⁷ Specific uses of water have similarly been regulated by statutes in an attempt to protect diverse interests of

¹ J Rankine, *The Law of Land-Ownership in Scotland* (4th edn, 1909) 511.

² See para 8-03 below.

³ See e.g. *Magistrates of Inverness v Skinners of Inverness* (1804) Mor 13191, making reference to local council acts. An old (1606) Scottish Parliament statute dealing with the issue is identified by Ferguson as exceptional: J Ferguson, *The Law of Water and Water Rights in Scotland* (1907) 369.

⁴ M Lobban, “Tort Law, Regulation and River Pollution: The Rivers Pollution Prevention Act and its Implementation, 1876–1951” in T T Arvind and J Steele (eds), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (2013) at 329.

⁵ Ferguson, *Law of Water* (n 3) points out statutes regulating fishing, public undertakings, public health and burgh police (370–376), and water supply (394) all containing provisions designed to control and prevent pollution of water.

⁶ Rivers Pollution Prevention Act 1876. See J C C Broun, *The Law of Nuisance in Scotland* (1891) 169.

⁷ Rivers (Prevention of Pollution) (Scotland) Act 1951; Control of Pollution Act 1974; Environment Act 1995; Water Environment and Water Services (Scotland) Act 2003. See W M Gordon and S Wortley, *Scottish Land Law*, 3rd edn, vol I (2009) paras 6-41 to 6-51 for an overview of the evolution of this statutory regulation.

public importance. This is the case for activities such as drainage,⁸ management of watercourses and embankments,⁹ irrigation,¹⁰ construction and management of reservoirs,¹¹ and abstraction of water.¹²

8-03. This extensive regulation may account for the decrease in litigation rates over the twentieth century. Nonetheless, the common law retains a fundamental role in this area, particularly in deciding reparation claims, for which most statutes do not provide special rules. The basis of liability in these claims, as in other types of disputes between neighbours, has not always been clear. On the one hand, the categorisation of disputes over uses of water has evolved, leading to the current standard position of classifying them as nuisances. On the other hand, the liability rules applicable to the categories within which water disputes have been adjudicated have themselves evolved, shifting from seemingly strict liability to – at least in general – fault-based liability rules. This chapter seeks to show that, currently, damages claims arising from water disputes follow consistently the general frameworks of liability for nuisance and abnormally dangerous conduct outlined in chapters 3 to 7 above.

8-04. It should be noted that this chapter is limited to uses of water *naturally* running through or present in the parties' land. Artificial channels stand in a different position from natural streams, in that the rights of the parties are normally determined by reference to the terms under which they make use of the channel and the water running in it.¹³ Equally, the artificial introduction of water into land and buildings through, for instance, pipes has generated a significant amount of litigation, but without requiring the particular accommodation that is needed for uses of water as a natural resource; indeed it is comparable to the artificial introduction of other elements, such as gas or electricity.

8-05. Damages claims for harm caused by uses of water are mostly of one of two types. In the first type, pursuers seek reparation for the harm sustained as a consequence of pollution of water, i.e. an interference with the "quality" of water. The harm complained of is normally either physical damage to property or economic loss.¹⁴ In the second, and certainly the most common,

⁸ Drainage of Lands Act 1847; Land Drainage (Scotland) Act 1930; Land Drainage (Scotland) Act 1941; Land Drainage (Scotland) Act 1958; Flood Prevention and Land Drainage (Scotland) Act 1997; Flood Risk Management (Scotland) Act 2009.

⁹ Flood Prevention (Scotland) Act 1961; Flood Prevention and Land Drainage (Scotland) Act 1997; Flood Risk Management (Scotland) Act 2009.

¹⁰ Spray Irrigation (Scotland) Act 1964; Natural Heritage (Scotland) Act 1991; Water Environment (Consequential and Savings Provisions) (Scotland) Order 2006, SSI 2006/181.

¹¹ Reservoirs Act 1975; Flood Risk Management (Scotland) Act 2009; Reservoirs (Scotland) Act 2011.

¹² Water (Scotland) Act 1980; Water Resources (Scotland) Act 2013.

¹³ See e.g. *Irving v Leadhills Mining Co* (1856) 18 D 833; *Heggie v Nairns* (1882) 9 R 704; *Strachan v City of Aberdeen* (1905) 12 SLT 725.

¹⁴ In a limited number of cases, the defender claimed both types of injury: see e.g. *Collins v Hamilton* (1837) 15 S 895 and *Young & Co v Bankier Distillery Co* (1893) 20 R (HL) 76.

type of claim, pursuers seek reparation for the harm caused by an activity or operation carried out by the defender that alters or interferes with the natural flow of water, whether a defined watercourse or surface water. The class of harm in this type of claim is normally physical damage sustained by property as a consequence of the mechanical action of water, though economic loss derived from the permanent diversion of a stream has also been claimed.¹⁵

8-06. In modern Scots law, these disputes have been categorised in three different ways: as belonging to the doctrine of common interest; to the law of nuisance; or to no specific category, especially in a few nineteenth-century cases where physical injury was the harm sought to be repaired, and where decisions relied on the more general notion of “wrong”. Damage caused by operations of drainage of surface water, however, has remained a separate category, except when the complaint is about pollution of such water.

8-07. The first section in this chapter explores and evaluates these categories, leading to a rather straightforward conclusion: the basis of liability in the current taxonomy is fault. Over the last thirty years, disputes over uses of water have been consistently categorised as nuisances,¹⁶ and during the same period, liability for nuisance has been considered fault-based on the authority of *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council*¹⁷ and *Kennedy v Glenbelle Ltd*.¹⁸ Drainage of surface water, despite having survived so far the expansive trend of nuisance, makes no exception regarding the applicable rule, which remains in line with the fault-based liability rule associated with nuisance (section B).

8-08. In the course of his speech in *RHM Bakeries*, Lord Fraser identified the one decision that seemed to be at odds with this general fault-based liability rule advanced for nuisance: the case of *Caledonian Railway Co v Greenock Corporation*.¹⁹ In his analysis of the decision, some passages seemed to support a strict-liability rule, whereas others appeared to have relied on fault. In any case, he regarded the decision as inapplicable to the facts in *RHM Bakeries*, where no natural stream diversion was under discussion. “It may be”, Lord Fraser continued,

that that case should be regarded as laying down a special rule applicable only to the case of a person who interferes with the course of a natural stream. If so, it is contrary to a general principle of the law of Scotland and, in my opinion, the rule should not be extended beyond the precise facts of that case.²⁰

¹⁵ *Hood v Williamsons* (1861) 23 D 496.

¹⁶ See paras 8-23 and 8-24 below.

¹⁷ 1985 SC (HL) 17.

¹⁸ 1996 SC 95.

¹⁹ 1917 SC (HL) 56.

²⁰ 1985 SC (HL) 17 at 42.

The next landmark nuisance case, *Kennedy v Glenbelle Ltd*, simply confirmed the status of the *Caledonian Rly Co* rule as “possible exception”.²¹ That status has, however, been the subject of more recent discussion: after several decades of being considered a case of strict liability, its position has been substantially challenged, and it is now argued that the case was one where liability was imposed by virtue of fault.

8-09. The second section of this chapter discusses both the traditional and the new view of the case, in order to argue that it is still possible to maintain the traditional view of *Caledonian Rly Co*, albeit not its traditional explanation. Although *Caledonian Rly Co* provides for a strict-liability rule in the case of an alteration of the natural course of a water stream, this is not because it interferes with riparian rights, as traditionally stated, but because it creates the level of risk that justifies the imposition of such a rule, in accordance with the arguments advanced in chapters 6 and 7. It follows, on this view, that not only the alteration of a watercourse, but *any* operation involving water that creates the relevant level of risk, is subject to this rule (section C). The final section offers some brief conclusions (section D).

B. THE GENERAL RULE: FAULT-BASED LIABILITY

(I) Water uses as breaches of common interest

(a) *The doctrine of common interest*

8-10. Highlighting its vulnerability to interference, Kenneth Reid pointed out that “[i]n the use and enjoyment of [. . .] running water naturally present within his boundaries, a proprietor is peculiarly at the mercy of his neighbour”.²² Running water creates a situation where a landowner, in using and enjoying his property, can quite easily affect in a substantial manner his neighbour’s use and enjoyment of his own, and, at the same time, the former is susceptible to the same substantial interference by the latter’s use and enjoyment. These remarks can be extended to “standing” water: landowners surrounding a loch can equally, though perhaps less easily, interfere with each other’s enjoyment of property. Given the particular nature of water, the law of property developed a special doctrine that sought to regulate private – and especially conflicting – uses of water: the doctrine of common interest. “Common interest [. . .] is applied to that right arising from mutual interest in a subject which, although not amounting to common property, vests the parties interested with certain rights which they may legally vindicate”.²³ Consequently, it creates a network of reciprocal rights

²¹ 1996 SC 95 at 98.

²² K G C Reid, *The Law of Property in Scotland* (1996) para 282.

²³ G Watson (ed), *Bell’s Dictionary and Digest of the Law of Scotland* (7th edn, 1890, reprinted by the Edinburgh Legal Education Trust, 2012) 204.

and obligations, positive and negative, whereby the parties interested in the same subject can restrict each other's use and enjoyment of property in order to protect their own. The doctrine, in Reid's view, has four main characteristics: "(1) [it] is a type of real condition; (2) it is found only where required by the physical proximity of benefited and burdened property; (3) it is 'tacit', arising automatically by operation of law; and (4) finally, [. . .] it is 'open-textured'".²⁴ It applies primarily to two types of subject: water and tenements.²⁵

8-11. The relevant aspects of its application in the context of tenements, specifically to withdrawal of support disputes, are discussed in chapter 9.²⁶ In turn, a modern work has addressed in detail the history and content of common interest as applicable to water,²⁷ so such aspects will not be revisited here, except for some points that are relevant for the topic under discussion, particularly for the types of case that most commonly give rise to damages claims.

8-12. The key aspects of this doctrine in their most common application, i.e. the case of running water,²⁸ are contained in what has been described as "the most important single contribution to the development of the law of riparian rights".²⁹ Lord Neaves' judgment in the 1864 Inner House decision in *Morris v Bicket*.³⁰ In that case, opposite riparian proprietors were in dispute about certain building operations performed by one on his half of the river bed. Lord Neaves, in describing "the protection of the natural flow" of the river,³¹ distinguished between the rights of successive proprietors and the rights of opposite proprietors. As to the former, he explained that:

An upper heritor, after enjoying the use of the water which passes through his lands, has nothing more to do with it, unless some operation below shall operate to his prejudice by making it regorge, or stagnate, or decrease in velocity or freedom of flow within his property. A lower heritor has this interest in the stream, that in passing through the lands of others it *shall be transmitted to him undiminished in quantity, unpolluted in quality, and unaffected in force and natural direction and current, except in so far as the primary uses of it may legitimately operate upon it within the lands of the upper heritor*.³²

With regard to opposite proprietors, after delimitating ownership over the bed (or *alveus*) of the river, he added that:

²⁴ K G C Reid, "Common Interest. A Reassessment" (1983) 28 JLSS 428 at 429.

²⁵ See Reid, *Property* paras 232–239, 282–290 and 307. For other subjects, see Reid (n 24) 431.

²⁶ See paras 9-25 to 9-28 and 9-31 below.

²⁷ J Robbie, *Private Water Rights* (Studies in Scots Law vol 4, 2015) chs 5–7.

²⁸ For its application to lochs, see Robbie, *Private Water Rights* paras 6-56 to 6-58.

²⁹ Reid, *Property* para 282.

³⁰ *Morris v Bicket* (1864) 2 M 1082 at 1092–1093, affirmed by the House of Lords as *Bicket v Morris* (1866) 4 M (HL) 44.

³¹ Robbie, *Private Water Rights* paras 7-33 to 7-35.

³² (1864) 2 M 1082 at 1092, emphasis added.

besides this ordinary right of property [. . .] they have a common interest arising from another right, as they have each a right in the water, not of property – for certainly *aqua profluens* is not the subject of property as long as it is running. [. . .] But each heritor, as it passes, has a right of an incorporeal kind to the usufruct of that stream for domestic purposes and for agricultural purposes, and, it may be, also for other purposes, subject to certain restrictions. This right in the general current of the stream gives him an interest in the whole of the *alveus*, and for this obvious reason, that no operation can, by the nature of things, be performed upon one half of the *alveus*, that shall not affect the flow of the water in the whole. [. . .] Now the common interest, therefore, *amounts to a right of preventing anything that shall palpably affect the water.* . . .³³

8-13. Many of the cases discussed in this chapter could be characterised as a breach of common interest. Certainly cases where a lower riparian owner claims to have suffered economic harm or damage to his property as a consequence of the pollution of a stream could fall within the emphasised section of the first paragraph transcribed above, in that water is allegedly not being transmitted “unpolluted in quality”. Yet, as will be explained, damages claims of this type are rarely framed in those terms and they do not fit the typical opposition between primary and secondary uses that prevails in interdict cases.³⁴

8-14. More problematic are cases where the pursuer claims to have suffered physical damage to his property as a consequence of the action of water resulting from the defender’s operations on the river. An alteration or interference with the course of a river might constitute a breach of common interest in the case of both successive and opposite riparian owners, as highlighted by the emphasised sections of the paragraphs by Lord Neaves transcribed above. Yet some cases cannot be analysed in these terms simply because the pursuer is not a riparian owner. Certainly his property can still be affected by the operations of a riparian owner in altering the natural flow of the stream, normally causing a flood. But as a neighbouring proprietor whose land is not *adjacent* to such a watercourse, it is not possible to assert that he had common interest rights that entitled him to have that flow protected. This was the case, for instance, in *Macfarlane v Lewis*³⁵ and *Pirie and Sons v Magistrates of Aberdeen*.³⁶ Most notably, the pursuer in the now controversial³⁷ case of *Caledonian Railway Co v Greenock Corporation*³⁸ was not a riparian owner: the burn ran through the defenders’ land and as a consequence of their operations, altering the burn’s natural channel, the burn became incapable of dealing with a heavy rainfall, causing a flood. The water reached a road that was at the lowest level of the land and flowed down this road

³³ (1984) 2 M 1082 at 1092–1093, emphasis added.

³⁴ See para 8-18 below.

³⁵ (1857) 19 D 1038.

³⁶ (1871) 9 M 412.

³⁷ The case is the centre of the discussion in paras 8-43 to 8-77 below.

³⁸ 1917 SC (HL) 56.

to reach the pursuers' property. In this type of case, the doctrine of common interest cannot provide a basis for liability.

8-15. In any event, even for those situations where defender and pursuer are both riparian owners, damages claims have not in practice been based upon common interest, as with pollution cases.

(b) The basis of liability for breach of common interest

8-16. The affected riparian owner, in enforcing common interest rights, can claim damages as one of the available remedies.³⁹ In practice, however, common interest is rarely enforced in this way. As Robbie points out, damages claims were infrequent in the early case law,⁴⁰ and the picture is similar in modern law: of the damages claims associated with uses of water, very few are based upon the infringement of common interest rights. This hinders any conclusive statement about the basis of liability. The doctrine of common interest in the context of water seems to have been used mainly as a tool to stop or prevent certain uses of water rather than to deal with their aftermath.

8-17. This is clearly reflected in the foundation for damages claims arising from damage caused by the alteration of watercourses: they are not based on common interest, and this was the case even after the law on that topic was clarified by *Morris v Bicket*, which undoubtedly considered this type of operation as a breach. To an extent, this is consistent with the core object of the doctrine and the reason why it developed: the natural flow is protected primarily in order to make sure that all riparian owners can make full – or the fullest possible – use of the water.⁴¹ Cases where physical harm of property is alleged depart from this purpose, and this might be the reason why the doctrine is not invoked in such cases.

8-18. As to cases of water pollution, the few modern damages claims are not now concerned with the destruction of the primary (i.e. domestic) use of water, but mostly with competing uses for manufacturing purposes in streams or rivers where primary purposes are either already destroyed or are unaffected, making the question of increase of pollution the key in determining whether common interest has been breached. The case of *Collins v Hamilton* translated this question into whether there was a nuisance,⁴² a perspective that is discussed below.⁴³ In *Ewen v Turnbull's Trs*,⁴⁴ in turn, the discussion concentrated on the form of the issue – whether it should include the contribution of other tenants

³⁹ Reid, *Property* para 290; Robbie, *Private Water Rights* paras 7-93 to 7-95.

⁴⁰ Robbie, *Private Water Rights* para 7-93.

⁴¹ See para 8-10 above.

⁴² *Collins v Hamilton* (1837) 15 S 895 at 902 per Lord Cockburn.

⁴³ See paras 8-23 and 8-24 below.

⁴⁴ *Ewen v Turnbull's Trs* (1857) 19 D 513.

higher up the stream – and other contractual aspects. The issue approved included the term “wrongfully”, which, as will be explained below, is not necessarily indicative of the basis of liability,⁴⁵ and the point is not discussed further in the case.

8-19. The leading House of Lords case of *Young & Co v Bankier Distillery Co*⁴⁶ is an unusual one, in that the quality of the water in the river was affected in a very specific way by the water discharged from the defender’s mineral works: primary purposes were preserved, but the water was rendered harder and, therefore, not suitable for distillery purposes. It could hardly be said that there was a material increase of pollution, if indeed there was any pollution at all.⁴⁷ Yet the court found for the pursuer, granting interdict and an award of damages. The decision has been criticised as failing to reflect a strict common interest approach to riparian owners’ rights.⁴⁸ Moreover, the infringement of common interest seems to have been determined not only by the alteration of this very special quality of the water, but also by the fact that the defenders were artificially introducing water to the stream, altering not only its quality but also its quantity.⁴⁹ The House of Lords confirmed the award of damages for the injury caused to the pursuer’s machines, but references to or discussion of fault on the part of the defender are absent from the decisions in both the Court of Session⁵⁰ and the House of Lords, suggesting that liability for infringing common interest might be strict.

8-20. Pointing in the opposite direction, the defenders were considered not to be liable for the economic loss caused to the pursuer’s paper-mill business in the case of *Edinburgh and District Water Trs v Sommerville & Son Ltd* precisely because no negligence could be attributed to them.⁵¹

8-21. There is a further damages case that was argued on the basis of common interest, but does not fit the two main groups of cases here identified: *Hood v Williamsons*.⁵² The case was one of consumption of water for cattle-watering purposes (a primary use) on the part of the defender, depriving the pursuer’s

⁴⁵ See para 8-31 below.

⁴⁶ (1893) 20 R (HL) 76.

⁴⁷ Commenting on the case, Rankine equated the introduction of water that destroys an established manufactory purpose to the introduction of a chemical substance that alters the natural quality of the water: Rankine, *Land-Ownership* 563.

⁴⁸ Robbie, *Private Water Rights* para 7-17. See, however, a case note published at the time, defending the correctness of the decision based on the irrelevance of the preservation of primary uses when the defender’s activity is not itself a primary use: J C C Broun, “*Bankier Distillery Co v John Young & Co* (Note)” (1894) 6 JR 85 at 86.

⁴⁹ Reid, *Property* para 286.

⁵⁰ *Bankier Distillery Co v Young & Co* (1892) 19 R 1083.

⁵¹ *Edinburgh and District Water Trs v Sommerville & Son Ltd* (1906) 8 F (HL) 25, esp at 31 per Lord Macnaghten, which is altogether surprising when contrasted with his earlier speech in *Young & Co v Bankier Distillery Co* (1893) 20 R (HL) 76 at 78, where no reference to fault can be found.

⁵² (1861) 23 D 496.

mill of water power and the ability to thrash a year's crop of grain. The case does not, however, provide any assistance because the defender was not found liable, as he was entitled to consume the water for primary purposes and there was no proof he had done otherwise. No discussion can be found in the decision about the defender's potential liability if, for instance, he had consumed the water for secondary (e.g. agricultural or industrial) purposes, or wasted the water not consumed for primary purposes.

8-22. Consequently, damages claims based on the doctrine of common interest, apart from being exceptional, do not provide a clear picture of the basis of liability. At one time, the position seemed to be that liability was strict.⁵³ Nevertheless, the common position nowadays is that liability for infringement of common interest is fault-based,⁵⁴ according to the Inner House decision in *Thomson v St Cuthbert's Cooperative Association Ltd*⁵⁵ and further sheriff court authority following this decision.⁵⁶ These cases, admittedly, were concerned with the infringement of common interest in the context of withdrawal of support in tenements. Further, it has been questioned whether *Thomson* was correctly decided,⁵⁷ and the idea that fault-based liability would deprive the doctrine of common interest from any content with regard to liability still resonates.⁵⁸ These aspects are discussed in chapter 9.⁵⁹

(2) Water uses as nuisances

(a) Water disputes as nuisances: an evolution

8-23. From the two main types of case identified above, water-pollution cases were the first to be treated as nuisances, something which occurred in the late eighteenth century. As Whitty points out, "[t]he intrusion of nuisance into the domain of water rights in Scotland begins with the two distillery cases of 1791".⁶⁰ These are the cases of *Miller v Stein*⁶¹ and *Russell v Haig*.⁶² In both the defenders were interdicted from discharging refuse originating from their distilleries into the streams running through the respective pursuers' lands, on

⁵³ Law Reform Committee for Scotland, *Thirteenth Report: The Law relating to Civil Liability for Loss, Injury and Damage caused by Dangerous Agencies Escaping from Land* (Cmnd 2348, 1964) paras 7 and 16.

⁵⁴ Reid, *Property* para 366; Robbie, *Private Water Rights* para 7-94.

⁵⁵ 1958 SC 380.

⁵⁶ *Kerr v McGreevy* 1970 SLT (Sh Ct) 7; *Doran v Smith* 1971 SLT (Sh Ct) 46.

⁵⁷ Reid (n 24) 434.

⁵⁸ Robbie, *Private Water Rights* para 7.94.

⁵⁹ See para 9-26 below.

⁶⁰ N R Whitty, "Water Law Regimes" in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000) vol 1, 420 at 465.

⁶¹ *Miller v Stein* (1791) Mor 12823.

⁶² *Russell v Haig* (1791) Mor 12823.

the basis that such discharge constituted a nuisance insofar as it destroyed the stream's primary uses. Thereafter, most cases of water pollution throughout the nineteenth century followed this pattern: they were disputes between neighbours making competing uses of water, where one sought to interdict the other's use, alleging that it was a nuisance, either because it destroyed some uses of the water – normally primary uses – or it affected the amenity of the pursuer's land. By contrast, the very few cases of damages claims based upon pollution of water were not consistently treated as nuisances until the early twentieth century,⁶³ and even since then it is possible to find occasional exceptions.⁶⁴

8-24. Alterations of or interferences with the natural course of a river did not enter the realm of nuisance until later in the twentieth century, with the case of *Gourock Ropework Co Ltd v Greenock Corporation*,⁶⁵ but virtually no exceptions can be found since that time. The consequence of this incorporation is that these disputes are now governed by two sets of prior case law: cases that fit their factual pattern but were not, at their time, considered to be nuisances; and cases that qualify as nuisances in its more traditional sense, where no physical harm to property was caused.

(b) The basis of liability in nuisance

8-25. The treatment of water disputes as nuisances brings with it the application of the nuisance liability rule. The issue of the basis of liability in nuisance was discussed in chapter 3, so the particulars are not revisited here. It is nowadays accepted that liability in nuisance is fault-based according to the House of Lords decision in the leading case of *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council*.⁶⁶ But before this decision, the matter was not settled and there was indeed authority pointing towards a rule of strict liability. After *RHM Bakeries*, the case of *Argyll and Clyde Health Board v Strathclyde Regional Council* highlighted the need to clarify what amounted, in this context, to an averment of fault. The court pointed out that it was not enough to plead simply “fault” or “lack of care” to make a case relevant: it was necessary to specify facts from which an inference of fault could be made.⁶⁷ Further clarification, particularly as to the forms of fault that could be pled, came with the Inner House decision in *Kennedy v Glenbelle Ltd*: according to that decision, fault encompasses not only negligence, but also other forms of fault, ranging from malice to engaging in dangerous conduct.⁶⁸

⁶³ From the case of *Fleming v Gemmill* 1908 SC 340 onwards.

⁶⁴ See *East Lothian Angling Association v Haddington Town Council* 1980 SLT 213 and the more recent case of *Southesk Trust Co Ltd v Angus Council* [2006] CSOH 6.

⁶⁵ 1966 SLT 125.

⁶⁶ 1985 SC (HL) 17 at 39–45 per Lord Fraser of Tullybelton.

⁶⁷ *Argyll & Clyde Health Board v Strathclyde Regional Council* 1988 SLT 381 at 383.

⁶⁸ 1996 SC 95 at 99–100 per Lord President Hope.

8-26. This evolution is reflected in the way damages claims have been decided: if before *RHM Bakeries* it was possible to find cases where, at the least, the basis of liability was not clear,⁶⁹ after this decision liability has been treated consistently as fault-based.⁷⁰ Moreover, while between *RHM Bakeries* and *Kennedy*, cases were based in negligence as the relevant form of fault, after *Kennedy* pursuers started exploring the other forms of fault, particularly recklessness and intention as knowledge of the certainty of harm.⁷¹

(3) Water uses as “wrongs”

(a) Fault and wrong

8-27. A few nineteenth-century cases were not categorised under the particular labels of nuisance or breach of common interest. Instead, they were discussed in light of the notion of “wrong”, that is, they addressed the question of whether there was a wrong or whether the defender had acted wrongfully, especially in cases where the harm complained of was physical damage to property.⁷² The implications of requiring wrongfulness⁷³ or including wrongfulness in the issues,⁷⁴ are not entirely clear, however.

8-28. Unlike legal systems in which a separate requirement of – objective – unlawfulness or wrongfulness must be fulfilled, such as German⁷⁵ and South African law,⁷⁶ Scots law does not feature a separate wrongfulness requirement. Some writers have sought to equate wrongfulness with fault. Hogg, for example, has argued that “for conduct to be wrongful it must exhibit fault on the part of the wrongdoer”.⁷⁷ This seems to be in line with Guthrie Smith’s views: even

⁶⁹ See e.g. *Fleming v Gemmill* 1908 SC 340; *Hanley v Edinburgh Magistrates* 1913 SC (HL) 27.

⁷⁰ *Noble’s Trs v Economic Forestry (Scotland) Ltd* 1988 SLT 662; *Hugh Blackwood (Farms) Ltd v Motherwell District Council* 1988 GWD 30-1290; *Logan v Wang (UK) Ltd* 1991 SLT 580; *G A Estates Ltd v Caviapen Trs (No 1)* 1993 SLT 1037; *Anderson v White* 2000 SLT 37; *Summers v Crichton* 2000 GWD 40-1495; *Viewpoint Housing Association Ltd v City of Edinburgh Council* [2007] CSOH 114, 2007 SLT 772; *Black Loch Angling Club v Tarmac Ltd* 2012 SCLR 501; *Esso Petroleum Co Ltd v Scottish Ministers* [2015] CSOH 21, 2015 GWD 7-134.

⁷¹ See *Anderson v White* 2000 SLT 37; *Esso Petroleum Co Ltd v Scottish Ministers* [2015] CSOH 21, 2015 GWD 7-134.

⁷² *Samuel v Edinburgh & Glasgow Railway Co* (1850) 13 D 312; *Ewen v Turnbull’s Trs* (1857) 19 D 513; *Macfarlane v Lowis* (1857) 19 D 1038

⁷³ As in *Samuel v Edinburgh & Glasgow Railway Co* (1850) 13 D 312 at 313 per Lord Cockburn.

⁷⁴ As in *Ewen v Turnbull’s Trs* (1857) 19 D 513 at 515; and *Macfarlane v Lowis* (1857) 19 D 1038 at 1040.

⁷⁵ J Bell and A Janssen, *Markesinis’s German Law of Torts: a Comparative Treatise* (5th edn, 2019) 49–53; K Zweigert and H Kötz, *An Introduction to Comparative Law* (T Weir tr, 3rd edn, 1998) 599.

⁷⁶ J C van der Walt and J R Midgley, *Principles of Delict* (3rd edn, 2005) para 103; J Neethling and J M Potgieter, *Neethling – Potgieter – Visser Law of Delict* (7th edn, 2015) ch 3.

⁷⁷ M Hogg, *Obligations* (2nd edn, 2006) paras 3.04–3.05.

though in the opening pages of his treatise he identified as a legal wrong any violation of the duty not to injure the rights of other members of society,⁷⁸ later pages stated that the obligation of reparation arose from the *illegality* of an act, “and there can be no violation of the precept *alterum non laede* in any other way”. He continued:

An illegal act may be—1. An act directly contrary to the law (*damnum directum dolosum*). 2. An act legal in itself, but illegally done, *i.e.* through negligence or imprudence (*damnum culposum*).⁷⁹

In other words, in looking for *dole* or *culpa*, Guthrie Smith seems to contend that the violation of the duty is wrongful *because* there is fault.

8-29. Other contemporary accounts advance a different view, however, and one that is more in line with Guthrie Smith’s initial definition of a wrong. In Birks’ view, for instance, the key element of a wrong is the breach of a duty.⁸⁰ But duties can be legally designed so that they might or might not require fault for their breach.⁸¹ As Stevens has pointed out in the exposition of his “rights model” of English tort law, “[j]ust as not all blameworthy conduct is wrongful, not all wrongful conduct is blameworthy”.⁸²

8-30. This view is consistent with contemporary Scottish accounts of delictual liability. For Walker, “wrongfulness consists solely in the actual or potential infringement of a legally protected interest vested in the complainer”,⁸³ but subsequently remarked that the notion of “wrong” is unhelpful, and is not a requirement but actually a consequence of delictual conduct.⁸⁴ In the particular context of nuisance, Whitty submitted more clearly that wrong is not the same as fault and “can exist independently of fault”.⁸⁵ Moreover, delictual remedies are awarded in Scotland, in some circumstances, for wrongs in the absence of fault. For instance, the key requirement of interdict is precisely a wrong done or threatened, and the remedy is indeed seen as one to stop or prevent wrongs,⁸⁶ yet no fault is required. This is quite commonly seen in operation in nuisance cases.⁸⁷ Therefore, the notions of wrongfulness and wrong are unhelpful in

⁷⁸ J Guthrie Smith, *A Treatise on the Law of Reparation* (1864) 2.

⁷⁹ Guthrie Smith, *Reparation* 7.

⁸⁰ P Birks, “The Concept of a Civil Wrong” in D G Owen (ed), *The Philosophical Foundations of Tort Law* (1997) at 37.

⁸¹ Birks (n 80) 42.

⁸² R Stevens, *Torts and Rights* (2007) 99.

⁸³ D M Walker, *The Law of Delict in Scotland* (2nd edn, 1981) 36.

⁸⁴ Walker, *Delict* 37.

⁸⁵ N R Whitty, “Nuisance” (Reissue, 2001) in *The Laws of Scotland: Stair Memorial Encyclopaedia* para 90.

⁸⁶ H Burn-Murdoch, *Interdict in the Law of Scotland: with a Chapter on Specific Performance* (1933) 1 and 86.

⁸⁷ See *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17 at 44 per Lord Fraser of Tullybelton. Whitty, however, argues that in these cases the interference

shedding light upon the basis of liability, i.e. whether liability is fault-based or strict.

(b) The basis of liability for wrongs

8-31. Consequently, the fact that the cases identified above required wrongfulness or included the notion of wrongfulness in the issue does not mean that liability was fault-based – nor strict. It is necessary to turn to other elements in the cases to elucidate the basis of liability. There is, however, no identifiable pattern. In *Samuel v Edinburgh & Glasgow Railway Co* the judges were sceptical towards liability based solely upon the occurrence of the flood damage, and directed that the issue should include inquiry as to the adequacy of the works instructed by the defenders.⁸⁸ In *Ewen v Turnbull's Trs* the main discussion focused on the materiality of the pollution⁸⁹ and no aspect of fault was considered. Finally, *MacFarlane v Lowis* does not contain a discussion of fault, though Lord President McNeill's judgment seems to associate wrongfulness with the way in which the operations were performed, rather than their harmful result.⁹⁰

(4) Drainage of surface water

(a) The right to drain surface water and the duty to receive it

8-32. Avoiding the labels previously discussed, drainage of surface water remains to this day largely a separate category, with the exception of the case where the complaint is for pollution of such water, which is treated as a nuisance in line with other cases of water pollution.⁹¹ According to Reid, surface water is that “which arises in the course of nature, whether from the sky or from neighbouring land, and which then lies on the surface of land without occupying any definite channel”.⁹²

8-33. The rights and duties associated with drainage of surface water are outlined by Erskine:

Where two contiguous fields belong to different proprietors, one of which stands upon higher ground than the other, nature itself may be said to constitute a servitude on the inferior tenement, by which he is obliged to receive the water that falls from the

is intentional, or at least becomes intentional when the defender finds out about the claim: Whitty, “Nuisance” (Reissue, 2001) para 94.

⁸⁸ *Samuel v Edinburgh & Glasgow Railway Co* (1850) 13 D 312 at 315.

⁸⁹ *Ewen v Turnbull's Trs* (1857) 19 D 513 at 516 per Lord Justice-Clerk Inglis.

⁹⁰ *Macfarlane v Lowis* (1857) 19 D 1038 at 1039–1040.

⁹¹ *Hugh Blackwood (Farms) Ltd v Motherwell District Council* 1988 GWD 30-1290.

⁹² Reid, *Property* para 340.

superior. If the water which would otherwise fall from the higher grounds insensibly, without hurting the inferior tenement, should be collected into one body by the owner of the superior, in the natural use of his property, for draining his lands, or otherwise improving them, the owner of the inferior tenement is, without the positive constitution of any servitude, bound to receive that body of water on his property, though it should be endamaged by it. *But as this right may be overstretched in the use of it, without necessity, to the prejudice of the inferior grounds, the question, How far it may be extended under particular circumstances? must be arbitrary.*⁹³

Lord Justice-Clerk Inglis, commenting on this paragraph in *Campbell v Bryson*, identified in the emphasised sentence the “proper qualification” of the doctrine:

if the inferior heritor complains that the superior heritor is unduly pressing his right, and making the servitude intolerable to him, he will have the right to come to the Court with his complaint, and the Court will be entitled to regulate the matter between the two upon equitable terms.⁹⁴

These two formulations remain the main authorities on the topic⁹⁵ and are cited in modern cases.⁹⁶ It must be noted that this authority categorises the doctrine as a “natural” servitude, an inaccurate label according to the modern understanding and regulation of servitudes.⁹⁷

8-34. Drainage operations can give place to two types of claim: the inferior proprietor’s claim that the operations performed by the superior are increasing the burden placed on him by law, or the superior proprietor’s claim that the operations performed by the inferior are preventing him from exercising his right to drain. The superior proprietor is not bound to drain the land; he is free to use up the surface water present in his land, subject to the limitation of *aemulatio vicini*.⁹⁸ There is authority to the effect that he is the owner of such water.⁹⁹ Consequently, apart from operations *in aemulationem*, the inferior proprietor cannot raise a claim for being deprived of surface water that would have naturally flowed to his land.

8-35. In both cases, the pursuer can ask for interdict or damages, and for both remedies the common requirement is the one identified by Erskine and Lord Justice-Clerk Inglis: the right must have been overstretched or unduly pressed.

⁹³ Erskine II.9.2, emphasis added.

⁹⁴ *Campbell v Bryson* (1864) 3 M 254 at 260.

⁹⁵ See Rankine, *Land-Ownership* 514; Reid, *Property* para 339; Gordon & Wortley, *Land Law* vol I, para 6-62. Other institutional writers who address the point are less frequently cited as authority: Bankton II.7.30; Bell, *Principles* §§ 968–969.

⁹⁶ *Noble’s Trs v Economic Forestry (Scotland) Ltd* 1988 SLT 662 at 664; *Logan v Wang (UK) Ltd* 1991 SLT 580 at 584.

⁹⁷ Reid, *Property* para 442.

⁹⁸ Reid, *Property* para 338.

⁹⁹ *Crichton v Turnbull* 1946 SC 52, though Gordon & Wortley, *Land Law* vol I, para 6-61 point out that this solution is criticised.

The meaning of this requirement is not entirely clear, and the Lord Ordinary (Prosser) in the case of *Logan v Wang* attempted an explanation:

[F]or a pursuer to succeed with such a claim, it would in my view be for him to aver and prove not merely that there have been damaging consequences from the development in question, and not merely that the consequences for him might be described as “intolerable”, but that the actions of the superior heritor are themselves open to criticism as being an undue pressing of his rights, “*without necessity*” in the sense of being *unreasonable or gratuitous*. It may indeed be that the actions must amount to actings in *aemulationem vicini*.¹⁰⁰

The passage points to necessity and reasonableness of the operations as the criteria to determine whether the right is overstretched or unduly pressed. The requirement for actings to be in *aemulationem*, however, renders the success of most claims impossible: such a standard is “unduly high”.¹⁰¹ Moreover, *aemulatio* can be seen in itself as a form of fault (i.e. by definition requiring malice),¹⁰² rendering any further requirement of fault superfluous. Yet, as explained below, fault is needed for damages claims as a separate requirement.

(b) *The basis of liability for drainage of surface water*

8-36. In the first type of claim, namely where the inferior proprietor argues that the operations performed by the superior proprietor in draining his land are causing him damage, modern case law has clearly identified fault as a separate requirement from that of undue pressing of the right. The point is discussed in *Noble’s Trs v Economic Forestry (Scotland) Ltd*.¹⁰³ According to the Lord Ordinary (Jauncey), Lord Justice-Clerk Inglis’ explanation of Erskine’s formulation in *Campbell v Bryson*¹⁰⁴ – acknowledging the affected landowner’s right to come to the court with the complaint – did not necessarily mean that the defender would be held liable to pay damages. There was, in his view, no reason to differentiate for these purposes between nuisance and this “servitude”, so fault should be required if the remedy sought by the pursuer was damages.¹⁰⁵ It can be observed that the Lord Ordinary maintained drainage of surface water as a category separate from nuisance, despite treating them as equivalent regarding the basis of liability.

8-37. The judgment in *Logan v Wang* simply confirmed the requirement of fault by reference to *Noble’s Trs*,¹⁰⁶ the main discussion in the case being

¹⁰⁰ 1991 SLT 580 at 584, emphasis added.

¹⁰¹ Reid, *Property* para 340 n 12.

¹⁰² See paras 4-04 to 4-16 above.

¹⁰³ 1988 SLT 662.

¹⁰⁴ (1864) 3 M 254.

¹⁰⁵ 1988 SLT 662 at 664.

¹⁰⁶ *Logan v Wang (UK) Ltd* 1991 SLT 580 at 583.

about the other requirement of the claim. Yet there is one noteworthy aspect: in confirming the requirement of fault, the Lord Ordinary (Prosser) referred also to *RHM Bakeries*¹⁰⁷ as authority. This reference raises the question whether he considered the nuisance rule to be applicable to the case and, more generally, whether the category of surface water will be able to resist the expansionary tendencies of nuisance. The reference, however, might be justified given that Lord Jauncey in *Noble's Trs* also cited *RHM Bakeries* as authority.¹⁰⁸ But the reference in *Noble's Trs* was intended to substantiate a different point: it sought to highlight *RHM Bakeries'* reference, in turn, to the English case of *Sedleigh-Denfield v O'Callaghan*¹⁰⁹ as authority for the proposition that interdict and damages can have different requirements, making it possible to require fault for the latter without doing so for the former.

8-38. As to the second type of claim, namely where the superior proprietor holds that the operations performed by the inferior proprietor are preventing him from exercising the right to drain the surface water, there is no clear authority. The claim was made in *Plean Precast Ltd v National Coal Board*,¹¹⁰ and the defender was held strictly liable. Yet the case was not treated as an infringement of the right to drain surface water, but rather as a case of alteration of a natural (defined) watercourse: the surface water drained into a natural stream, and this stream was culverted and diverted.¹¹¹ In principle there seems to be no reason to differentiate between the claim raised by an inferior proprietor and by a superior heritor with regard to the rights under analysis and, given that the decision in *Plean Precast Ltd* was based on rules applicable to a different factual setting, there is no authority supporting a departure from fault-based liability. Extending the argument advanced in *Noble's Trs*, there are no reasons to treat nuisance and this type of case differently.

(5) Overview: convergence of liability rules

8-39. The analysis developed so far brings out, in the first place, the issue of the relationship between nuisance and the doctrine of common interest. Whitty points out that “[s]everal commentators treat pollution of streams as part of nuisance, so that alteration of flow infringes common interest whereas deterioration of quality is nuisance”,¹¹² but then holds that the relation is better described as one of overlap, where common interest is reserved only for riparian owners whereas nuisance would protect owners that do not hold such status.¹¹³

¹⁰⁷ *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17.

¹⁰⁸ 1988 SLT 662 at 665.

¹⁰⁹ [1940] AC 880.

¹¹⁰ *Plean Precast Ltd v National Coal Board* 1985 SC 77.

¹¹¹ The case is discussed at para 8-49 below.

¹¹² Whitty (n 60) 460–461, references omitted.

¹¹³ Whitty (n 60) 461 n 389.

Within the area of overlap, there is a contrast between the respective applicable rules. It is believed that the *plus quam tolerabile* test from nuisance might provide a more flexible standard than the primary/secondary uses distinction from common interest,¹¹⁴ but setting the threshold of liability at a higher level, with the consequence that relief that is not available under nuisance might be available under common interest.¹¹⁵ With the exception of *Young & Co v Bankier Distillery Co*,¹¹⁶ however, the support for this contention is scant: in terms of the law of nuisance, the claim in that case would have been likely to fail due to the hypersensitivity of the particular activity carried out by the pursuer (whisky distilling). It is doubtful, however, that the case was correctly decided under the rules of common interest,¹¹⁷ leaving Whitty's contention rather unsupported.

8-40. Whatever the relationship between the two doctrines, however, it does not affect the basis of liability. The doctrines have evolved to reach a convergence: both under nuisance and under common interest, liability is nowadays, at least as a general rule, fault-based, whatever the criticism of this rule in each realm. Consequently, from the perspective of the requirement of fault, it does not make a difference which is cited as the basis of the claim. The only possible difference would be determined by the scope of application of *Kennedy v Glenbelle Ltd*.¹¹⁸ If *Kennedy* is to be regarded as of general application, beyond the realm of nuisance – which seems to be implied in the wording of Lord President Hope's judgment¹¹⁹ – then it makes no difference to invoke one doctrine rather than the other. If, on the other hand, *Kennedy* is restricted to nuisance only – which so far has been its only field of application in practice¹²⁰ – it might actually be easier to obtain damages under nuisance. For as argued in chapters 4 and 5, the way in which the *Kennedy* model has been understood leads to the conclusion that liability based on recklessness or on intention as knowledge comes very close to strict liability, for constructive knowledge of the likelihood or the certainty of damage, respectively, is considered as sufficient.¹²¹

8-41. The question would be of consequence only if the overlap of the two doctrines left outside its scope an area of “common interest-not-nuisance”

¹¹⁴ Whitty (n 60) 461 n 389.

¹¹⁵ Reid, *Property* para 299; Robbie, *Private Water Rights* para 7.58.

¹¹⁶ (1893) 20 R (HL) 76.

¹¹⁷ See para 8-19 above.

¹¹⁸ 1996 SC 95.

¹¹⁹ 1996 SC 95 at 99: “*Culpa* which gives rise to a liability in delict may take various forms”, proceeding to refer to the different forms of fault outlined by N R Whitty, “Nuisance” in *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol 14 (1988) para 2087. The “judicial consideration” of *culpa* from *Kennedy* is also discussed in the section on general principles of delict in H L MacQueen and Lord Eassie (eds), *Gloag and Henderson: The Law of Scotland* (14th edn, 2017) para 25.07.

¹²⁰ A search of cases where *Kennedy* is referred to as authority outside the realm of nuisance was unsuccessful.

¹²¹ See paras 4-21 to 4-42 and 5-45 to 5-51 above.

where pursuers could not resort to the advantages of the broad understanding of fault in nuisance. But this does not seem to be the case. Indeed, in Whitty's description, the contrary holds good: the overlap leaves, for non-riparian owners, an area of "nuisance-not-common interest". Consequently, for breaches of common interest, nuisance rules appear always to be available.

8-42. This, however, is not the case in the context of drainage of water. As already explained, liability arising from an infringement or "overstretching" of the right to drain surface water is fault-based,¹²² so in this sense the rule is in line with the rules of nuisance and common interest. But the question remains whether, in claiming damages associated with harm caused in drainage operations, the pursuer can benefit from the *Kennedy* formulation. If surface water drainage disputes end up being absorbed by nuisance, the question becomes irrelevant, but as long as the disputes are dealt with as a separate category, the issue can be of great practical relevance. Unfortunately, there is no authority with which to formulate an answer.

C. THE EXCEPTION: STRICT LIABILITY FOR ALTERATION OF WATERCOURSES

(1) The traditional view of *Caledonian Rly Co*: a strict-liability rule

8-43. As explained earlier,¹²³ in *RHM Bakeries*¹²⁴ Lord Fraser singled out alteration of watercourses as the one possible exception to the fault-based liability rule advanced for nuisance. This was based on the authority of *Caledonian Railway Co v Greenock Corporation*, a decision of the House of Lords in a Scottish appeal.¹²⁵ The facts in *Caledonian Rly Co* were considered in chapter 6.¹²⁶ As explained there, most of the discussion in the case was focused on whether there had been *damnum fatale*. Yet the speeches contain statements about the basis of the defenders' liability, an aspect that is addressed in more detail here.

8-44. Possibly the speech that contains the strongest suggestion that liability was strict is the Lord Chancellor's (Finlay).¹²⁷ He considered that the law applicable to an interference with the natural course of a stream was that stated in *Kerr v Earl of Orkney*,¹²⁸ as discussed and approved by the House of Lords in *Tennent v Earl of Glasgow*.¹²⁹ These cases, in his view, justified the proposition by Rankine, according to which:

¹²² See paras 8-36 to 8-38 above.

¹²³ See para 8-08 above.

¹²⁴ *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17.

¹²⁵ *Caledonian Rly Co v Greenock Corporation* 1917 SC (HL) 56.

¹²⁶ See paras 6-28 and 6-29 above.

¹²⁷ 1917 SC (HL) 56 at 59–63.

¹²⁸ (1857) 20 D 298.

¹²⁹ (1864) 2 M (HL) 22.

The sound view seems to be, that even in the case of an unprecedented disaster the person who constructs an *opus manufactum* on the course of a stream or diverts its flow will be liable in damages, provided that the injured proprietor can show – (1) that the *opus* has not been fortified by prescription; and (2) that but for it the phenomena would have passed him scathless.¹³⁰

This paragraph contains what appears as a rule of liability based solely upon causation, without consideration of the defender's fault. Rankine's proposition was also approved in *Caledonian Rly Co* by Lord Dunedin as an accurate statement of the law.¹³¹

8-45. Lord Shaw's speech can also be read as lending support to a strict-liability rule. In his view, "[a] person making an operation for collecting and damming up the water of a stream must so work as to make proprietors or occupants on a lower level as secure against injury as they would have been had nature not been interfered with".¹³² And the same can be said of Lord Wrenbury's speech, when he states that "[t]o construct a reservoir on your own land is a lawful act. To close or divert the natural line of flow so as to render it less efficient is not. It has never been held that in such a case there is not liability".¹³³ Finally, Lord Parker's speech focuses on *damnum fatale*, without making relevant remarks about the basis of liability.¹³⁴

8-46. These speeches provided the foundation of the dominant doctrinal view – at the time of *RHM Bakeries* – of *Caledonian Rly Co* as supporting a strict-liability rule.¹³⁵ Notably, the Law Reform Committee for Scotland recognised in their *Thirteenth Report* that *Caledonian Rly Co* interpreted and applied the rule in *Kerr v Earl of Orkney* as one of strict liability.¹³⁶

8-47. The view, however, had its detractors. Glegg's editor explained the rule as "a strong presumption of negligence", highlighting that in all cases of *novum opus* there was actually fault on the defenders.¹³⁷ Walker, in turn, despite labelling it as a "strict liability" rule, described it as an "imposition of a high standard of care [. . .] coupled with a ready presumption of fault where harm has resulted", a rule that might be regarded as risk-based yet developed

¹³⁰ Rankine, *Land-Ownership* 376.

¹³¹ 1917 SC (HL) 56 at 63.

¹³² 1917 SC (HL) 56 at 65–66.

¹³³ 1917 SC (HL) 56 at 68–69.

¹³⁴ 1917 SC (HL) 56 at 67–68.

¹³⁵ E.g. H McKechnie, "Reparation" in J L Wark (ed), *Encyclopedia of the Laws of Scotland*, vol 12 (1931) at para 1070; W A Elliot, "What is Culpa?" (1954) 66 JR 6 at 23; K W B Middleton, "Liability without Fault" 1960 JR 72 at 74.

¹³⁶ Law Reform Committee for Scotland, *Thirteenth Report* (n 53) para 16. See also the comments by E M Clive, "The Thirteenth Report of the Law Reform Committee for Scotland" 1964 JR 250 at 256–257.

¹³⁷ A T Glegg, *The Law of Reparation in Scotland* (4th edn by J L Duncan, 1955) 321.

out of fault liability.¹³⁸ In his view, Lord Shaw's contention that there was no difference between English and Scots law on this point¹³⁹ might have been true "in result, but is not so in legal principle".¹⁴⁰ It is worth noting that the Law Reform Committee adopted the position described by Walker more generally for the escape of dangerous agencies, but kept *Caledonian Rly Co* separate as a case of strict liability.¹⁴¹ The explanation, in the words of the Committee, was that "in all these cases, in which natural streams were involved, the cause of action was based on an infringement of the various proprietary rights and interests established by law, and not on failure to take reasonable care".¹⁴² No clear justification was offered for the exception, and the matter seems doubtful for, as has been mentioned, the pursuer in *Caledonian Rly Co* was *not* a riparian owner.¹⁴³ It is likely that these dissenting views, especially that of Walker (who is cited in the decision),¹⁴⁴ influenced the speeches in *RHM Bakeries*.

8-48. The courts, in turn, seemed to have fallen in with the dominant view of the case as the application of a strict-liability rule. Two Outer House cases lent support. First, in *Stirling v North of Scotland Hydro-Electric Board*,¹⁴⁵ damage to the pursuers' property was caused by the breach of a river embankment and subsequent flooding that resulted, in turn, from the discharge of waters by the defenders after an "abnormal" rainfall. The court considered that the law as stated in the *Caledonian Rly Co* case was applicable to the facts under discussion. Approving and applying *Kerr*, the court said, under reference to the Lord Chancellor's and Lord Dunedin's approval of Rankine's proposition,¹⁴⁶ that "liability lay in the fact that the damage would not have occurred had the stream been left in its natural condition". Consequently, liability was regarded as based on causation and, on this very ground, the pursuers failed: they did not attempt to prove that, if nature had been left undisturbed, the flood would not have happened. It could be objected that if the pursuers had not failed on causation, we do not know with certainty whether the court would have required fault, but this is unlikely since the case adopted the *Caledonian Rly Co* rule without qualification. It must be noted, nevertheless, that in this case the flow was not "altered" in the same way as in *Caledonian Rly Co*: water was added to it. Yet the court considered that the rule in *Caledonian Rly Co* was equally applicable since the operations increased the natural burden of a watercourse.

¹³⁸ Walker, *Delict* 983.

¹³⁹ *Caledonian Rly Co v Greenock Corporation* 1917 SC (HL) 56 at 65.

¹⁴⁰ Walker, *Delict* 981.

¹⁴¹ See para 6-50 above.

¹⁴² Law Reform Committee for Scotland, *Thirteenth Report* (n 53) para 7.

¹⁴³ See para 8-14 above.

¹⁴⁴ *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17 at 41.

¹⁴⁵ 1965 SLT 229.

¹⁴⁶ 1965 SLT 229 at 233.

8-49. The facts of the second case are closer to those in *Caledonian Rly Co.* In *Plean Precast Ltd v National Coal Board*,¹⁴⁷ a stream had been culverted, and the culvert became blocked and collapsed at the point where it diverted the natural course, flooding the pursuer's land. The court concluded¹⁴⁸ that, but for the culvert, the damage would not have happened,¹⁴⁹ and that, having "interfered with the natural course of things", the defenders were liable according to *Caledonian Rly Co* and the previous case of *Hanley v Edinburgh Magistrates*.¹⁵⁰ The finding of liability was further grounded in the nuisance branch of the decision in the Inner House in *RHM Bakeries*,¹⁵¹ in which liability was based solely upon causation.¹⁵² Four months after the decision in *Plean Precast*, however, the Inner House judgment in *RHM Bakeries*, was reversed in the House of Lords,¹⁵³ affirming, as mentioned above,¹⁵⁴ the fault requirement for damages claims in nuisance. It has been questioned, in consequence, whether the finding of liability in *Plean Precast* has survived the House of Lords decision in *RHM Bakeries*.¹⁵⁵ The latter decision, however, undermines only one of the two grounds for liability in *Plean Precast*: that of nuisance. The other ground – the rule from *Caledonian Rly Co* – was recognised in the *RHM Bakeries* case itself as a possible exception.

8-50. In sum, there was at the time of *RHM Bakeries*, with some exceptions, doctrinal and judicial support for the strict-liability view of the rule in *Caledonian Rly Co*. After *RHM Bakeries*, however, both doctrinal and judicial support started to decline. What before was mostly identified by scholars as an application of strict liability started not long after to be considered only as a "possible exception" to the fault rule established by *RHM Bakeries*,¹⁵⁶ or even as "likely [to be] dependent upon *culpa*".¹⁵⁷ Only Zimmermann and Simpson still considered the case to be one of strict liability, even though it rested uneasily with *RHM Bakeries* and its restrictive scope seemed to an extent unjustified.¹⁵⁸ Courts, on the other hand, seemed reluctant to part with the strict-liability rule, although the two cases in which the rule was considered, discussed below, were Outer House cases and did not actually apply it.

¹⁴⁷ 1985 SC 77.

¹⁴⁸ 1985 SC 77 at 86.

¹⁴⁹ 1985 SC 77 at 85.

¹⁵⁰ 1913 SC (HL) 27.

¹⁵¹ *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SLT 3.

¹⁵² 1985 SC 77 at 87.

¹⁵³ 1985 SC (HL) 17.

¹⁵⁴ See para 8-25 above.

¹⁵⁵ Reid, *Property* para 339 n 3.

¹⁵⁶ Whitty, "Nuisance" (1988) para 2093.

¹⁵⁷ K Miller, "Obligations: Obligations Imposed by Force of Law: Strict Liability" in *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol 15 (1995) para 195.

¹⁵⁸ R Zimmermann and P Simpson, "Liability among Neighbours" in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000) vol 2, 612 at 630.

8-51. The facts in *G A Estates Ltd v Caviapen Trs (No 1)*¹⁵⁹ were similar to those in *Caledonian Rly Co*: a stream was diverted and culverted but after a heavy rainfall the culvert proved insufficient to carry the whole water of the stream as increased by rainwater drainage. The affected proprietors, defenders in a claim for certain payments under a contract, filed a counterclaim against the pursuer seeking to recover the cost of preventative works against further floods. The Lord Ordinary (Coulsfield) explained the rule of liability as follows:

As was explained in *RHM Bakeries*, in a case of nuisance the liability of the occupier of land from which the agency escapes is based upon fault, and derives from the construction of the *opus manufactum*. The reasoning is that, in a case in which there is liability, either the work could not be constructed in such a way as to avoid harm to a neighbouring property, in which case there was fault in building it at all, or the work was built negligently. The liability, therefore, does not arise simply from the fact that the agency escapes on an occasion or occasions, but from the action of constructing the *opus manufactum*. Similarly, in my view, any strict liability arising from interference with the flow of a stream must arise from the action of constructing the work which interferes.¹⁶⁰

Lord Coulsfield recognised the difficulty in applying nuisance principles due to the fact that the culvert was, at the time of the flood, situated in the land of the defenders – the affected proprietors, who had in turn bought the land from the pursuers with the culvert already completed. There was further difficulty in the fact that the work was built for the benefit of both parties,¹⁶¹ and there was “likely to be even greater difficulty in applying any principle of strict liability”, so that this issue was left to be decided after proof.¹⁶² Consequently, the court seemed to have distinguished between the nuisance rule of fault-based liability, and a possibly applicable strict-liability rule. The distinction is, however, somewhat odd, for it grounds liability for nuisance in the construction of an *opus manufactum*, a notion that has traditionally been precisely linked to a special – stricter – regime of liability,¹⁶³ whereas it remains silent as to the scope of the possible strict liability. The defenders had presented as one of the grounds of their claim the fact that the pursuers had interfered with the course of the stream, arguing that this was the cause of the overflow and subsequent damage. In analysing this ground, Lord Coulsfield stated that:

The purpose of that paragraph is, as I understand it, to plead a case of absolute liability founding on the decision in *Caledonian Railway Co v Greenock Corporation* on the view that, in the circumstances of this case, such liability may be enforced without

¹⁵⁹ 1993 SLT 1037.

¹⁶⁰ 1993 SLT 1037 at 1041, emphasis added.

¹⁶¹ 1993 SLT 1037 at 1041.

¹⁶² 1993 SLT 1037 at 1042, emphasis added.

¹⁶³ See paras 6-26, 6-29 and 6-30 above.

proof of negligence, notwithstanding the decision in *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council*.¹⁶⁴

It is possible, therefore, to argue that when Lord Coulsfield distinguished between the nuisance rule and the possible strict-liability rule, the ground for the latter was precisely the rule from *Caledonian Rly Co*, as distinguished from the rule in *RHM Bakeries*, despite the fact that *Caledonian Rly Co* was not mentioned afterwards when laying down the liability rules.

8-52. Not too long after, a new case appeared where the pursuers partly founded their claim on the *Caledonian Rly Co* rule: the case of *Inverness Harbour Trs v British Railways Board*.¹⁶⁵ Its facts, however, were rather different from those in *Caledonian Rly Co*. The defenders built a railway viaduct over the river Ness and, during a state of high flow, one of the viaduct piers was undermined as a result of scour, causing the collapse of the viaduct and subsequent damage to the pursuers' harbour structures. Apart from averments of negligence on the part of the defenders in the viaduct's maintenance, the pursuers argued that by tipping stones around the piers in the process of building it, the defenders created a *novum opus manufactum* that altered the flow of the river and created a danger of serious harm for which they were responsible. They invoked the rule in *Caledonian Rly Co* which, in their view, "was a case of a *novum opus manufactum* which was not dissimilar to the present case". Lord Kirkwood, however, dismissed the application of *Caledonian Rly Co*:

In a case involving damage caused by a *novum opus manufactum*, other than a case where the facts are virtually identical to those in the *Caledonian Railway* case, I am satisfied that the basis of any liability on the part of the defender will be *culpa*.¹⁶⁶

Thus, Lord Kirkwood defined the scope of the *Caledonian Rly Co* rule in an extremely restrictive way. Alteration of the course of a stream is not enough; the facts must be "virtually identical" to those in *Caledonian Rly Co*, and it is clear they were not in this case: the alteration of the course of the river was effected in a different way, the phenomenon that ultimately triggered the accident was a different one, and the damage was caused by a different "agent" (not water itself, but the materials from the collapsed bridge). What is notable from the brief paragraph transcribed, however, is that Lord Kirkwood considered this rule not to be one of *culpa*.

8-53. Consequently, these two cases went no further than recognising the existence of the rule, without actually applying it: in the first case, its applicability was left to be determined after proof; in the second case, it was regarded as not applicable at all. Accordingly, these cases provide weaker

¹⁶⁴ *G A Estates Ltd v Caviapen Trs (No 1)* 1993 SLT 1037 at 1040.

¹⁶⁵ 1993 GWD 14-952.

¹⁶⁶ 1993 GWD 14-952.

support for the strict-liability view of *Caledonian Rly Co* than the two cases decided before *RHM Bakeries*.¹⁶⁷

(2) The modern view of *Caledonian Rly Co*: a fault-based liability rule

8-54. It is in this context that a substantial challenge to the traditional strict-liability view of the *Caledonian Rly Co* case¹⁶⁸ was advanced. In his article entitled “Strict Liability and the Rule in *Caledonian Railway Co v Greenock Corporation*”,¹⁶⁹ Gordon Cameron submitted not only that liability in the *Caledonian Rly Co* type of case is fault-based, as in any nuisance case, but also that the damages award in the case of *Caledonian Rly Co* itself was based upon fault. The contention has found subsequent support: while Gordon and Wortley assert that the strict nature of liability is now “not entirely clear” by reference to this argument,¹⁷⁰ Whitty concludes that Cameron’s research “points strongly to the view that the *Caledonian Rly Co* case is not a true exception” to the general fault-based liability rule.¹⁷¹ Consequently, it is necessary to evaluate this argument in order to determine whether we can still accept the existence of an exceptional strict-liability rule in this type of case or whether instead it should be dealt with under the general nuisance rule.

8-55. It is possible to identify four independent reasons advanced by Cameron to support his argument: (a) the authority cited in *Caledonian Rly Co* is seen now as fault-based; (b) the defenders were indeed found to be negligent; (c) the speeches do not conclusively support strict liability; and (d) the defenders were also at fault in a different sense. Each reason is explained briefly below.

(a) The decision in *Kerr* was based on fault

8-56. As was mentioned above, the decision in *Caledonian Rly Co* was based upon the earlier decision in *Kerr v Earl of Orkney*,¹⁷² and it is believed to have adopted and applied a strict-liability view of the latter case.¹⁷³ In Cameron’s submission, however, this view is inconsistent with the modern view of *Kerr*, advanced by the House of Lords in *RHM Bakeries*,¹⁷⁴ as fault-based. If the real

¹⁶⁷ *Stirling v North of Scotland Hydro-Electric Board* 1965 SLT 229; *Plean Precast Ltd v National Coal Board* 1985 SC 77.

¹⁶⁸ *Caledonian Rly Co v Greenock Corporation* 1917 SC (HL) 56.

¹⁶⁹ G D L Cameron, “Strict Liability and the Rule in *Caledonian Railway Co v Greenock Corporation*” (2000) 5 SLPQ 356.

¹⁷⁰ Gordon & Wortley, *Land Law* vol I, para 6-57.

¹⁷¹ Whitty, “Nuisance” (Reissue, 2001) para 93.

¹⁷² (1857) 20 D 298.

¹⁷³ See paras 8-44 and 8-46 above.

¹⁷⁴ *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17 at 39 per Lord Fraser of Tullybelton.

basis of liability in *Kerr* was fault, then it is problematic to justify the strict-liability view of *Caledonian Rly Co* in its application of *Kerr*.¹⁷⁵

(b) The defenders were actually negligent

8-57. Secondly, Cameron argues that the way in which the *Caledonian Rly Co* case was reported obscured the fact that the Lord Ordinary had indeed found negligence on the part of the defenders.¹⁷⁶ The main ground of the defenders' appeal was *damnum fatale*, that is, they attacked causation. The fact that they failed and their liability was upheld created the impression that liability was solely based on causation, but this was not the case. The remarks about the basis of liability were, in his view, "only secondary matters arising from the 'contingency plan' of the appellants".¹⁷⁷

(c) The speeches do not necessarily support strict liability

8-58. Thirdly, the impression that liability was based solely upon causation would be further assisted, in Cameron's view, by some remarks made by the judges in their speeches that seemed to support strict liability, where in fact they did not necessarily do so. In a detailed analysis of each of the speeches, he finds some key elements which would point towards liability based in negligence: the references to the "deficiency" of the culvert to carry off the water of an extraordinary yet foreseeable rainfall, present in the speeches of the Lord Chancellor, Lord Shaw and Lord Wrenbury, are interpreted by Cameron as setting out breach of a duty of care;¹⁷⁸ and the discussion by the Lord Chancellor of whether the defender was to be liable even for extraordinary events is seen as a discussion of the standard of care.¹⁷⁹

(d) The defenders were at fault apart from negligence: unlawfulness per se

8-59. Finally, Cameron submits that, besides being negligent, the defenders were at fault in a different way. Lord Shaw's statement about the defenders not being entitled to perform the operations in the first place – reported only in the Appeal Cases¹⁸⁰ – is interpreted as a finding of a form of fault different from negligence: what he calls "unlawfulness *per se*".¹⁸¹ A similar view is attributed

¹⁷⁵ Cameron (n 169) 360.

¹⁷⁶ Cameron (n 169) 361.

¹⁷⁷ Cameron (n 169) 362–363.

¹⁷⁸ Cameron (n 169) 366, 369 and 370.

¹⁷⁹ Cameron (n 169) 366.

¹⁸⁰ [1917] AC 556.

¹⁸¹ Cameron (n 169) 370.

to Lord Wrenbury¹⁸² and, to an extent, to the Lord Ordinary, though the view of the latter judge is linked to the rules of drainage of surface water.¹⁸³ Lord Shaw's and Lord Wrenbury's view of unlawfulness is considered to be close to a form of fault contemplated in the distinction laid out in *Chalmers v Dixon*,¹⁸⁴ *Edinburgh Railway Access and Property Co v John Ritchie & Co*¹⁸⁵ and *Noble's Trs v Economic Forestry (Scotland) Ltd*.¹⁸⁶ performing operations of which the natural result is harm and where no amount of care can prevent its occurrence. This form of fault, in Cameron's view, is the one identified by Lord President Hope in *Kennedy v Glenbelle Ltd*¹⁸⁷ as "conduct causing a special risk of abnormal damage".¹⁸⁸ The decision was, therefore, "doubly" fault-based.

(3) An alternative view: back to strict liability

8-60. The argument presented by Cameron is difficult to challenge. He offers four grounds each of which would, independently, justify his conclusion. A different reading is, however, proposed here. It is argued that it is still possible to recognise a strict-liability rule in *Caledonian Rly Co*,¹⁸⁹ precisely for the fourth reason advanced by Cameron – except that a different view of that reason is offered, namely that the form of fault consisting of conduct causing a special risk of abnormal damage, considered in *Kennedy*, is not accurately described as a form of fault. But first the other three of Cameron's grounds are discussed in order to argue that they are not fatal to the view here presented.

(a) *Caledonian Rly Co adopted a strict-liability view of Kerr*

8-61. Cameron's first argument is built as follows. The strict-liability view of *Caledonian Rly Co* is based upon its application of a strict-liability view of *Kerr v Earl of Orkney*.¹⁹⁰ *Kerr* is now, according to *RHM Bakeries*,¹⁹¹ considered to have been based upon fault. Therefore, the strict-liability view of *Caledonian Rly Co* is no longer justified.

8-62. It is irrefutable that Lord Fraser in *RHM Bakeries* did explain *Kerr* on the basis of fault, relying on passages from both the Outer House and the Inner

¹⁸² Cameron (n 169) 370 and 374.

¹⁸³ Cameron (n 169) 373–374.

¹⁸⁴ *Chalmers v Dixon* (1876) 3 R 461 at 464 per Lord Justice-Clerk Moncreiff.

¹⁸⁵ (1903) 5 F 299 at 302.

¹⁸⁶ 1988 SLT 662 at 664.

¹⁸⁷ 1996 SC 95.

¹⁸⁸ Cameron (n 169) 374–375.

¹⁸⁹ *Caledonian Rly Co v Greenock Corporation* 1917 SC (HL) 56.

¹⁹⁰ (1857) 20 D 298.

¹⁹¹ *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17.

House decisions in the latter case.¹⁹² One could, however, question whether he was justified in doing so. Lord Fraser recognised that there were passages in the Inner House decision that seemed to support a strict-liability rule, but dismissed them simply by saying that there were also passages pointing in the opposite direction. In this context, the selection of one set of passages over another seems not to be entirely warranted. At best, if fault was indeed the basis of the decision, it was a case of implied or presumed fault, since fault was not proved in the case.¹⁹³

8-63. In any case, even if one is willing to accept Lord Fraser's explanation of *Kerr* as based on a finding (or presumption) of fault, this does not mean that the House of Lords in *Caledonian Rly Co* had such a view of *Kerr*. The speeches in *Caledonian Rly Co*, in fact, seem to indicate the contrary, and this was acknowledged by Lord Fraser in *RHM Bakeries*, when he conceded that *Caledonian Rly Co* approved from *Kerr* the passages that seemed to apply strict liability.¹⁹⁴ One could, of course, argue that the court in *Caledonian Rly Co* applied the *wrong* view of *Kerr*, but it would still be the adopted view and the decision has not been overruled. Moreover, the House of Lords, having had the chance in *RHM Bakeries* to overrule *Caledonian Rly Co*, or at least to explain it in fault terms as it did with *Kerr* – especially since the court found in *Caledonian*, just as in *Kerr*, passages pointing in both directions – chose to do neither, allowing that it might remain in place as a possible, though restricted, exception.

(b) The irrelevance of the defenders' negligence

8-64. In Cameron's view, the report of *Caledonian Rly Co* omits to mention that the defenders were indeed found negligent, an aspect that was not discussed before the House of Lords. The discussion in this court was mainly concerned with the defence of *damnum fatale*, that is, with the requirement of causation, and not the requirement of fault, which had been satisfied earlier in the process.

8-65. It may well be that the defenders were indeed negligent and that the Lord Ordinary's decision was based in this circumstance, as it appears from his opinion.¹⁹⁵ Fault-based liability is always open for a pursuer to claim. But that would not preclude the court from recognising an equally applicable strict-

¹⁹² 1985 SC (HL) 17 at 39.

¹⁹³ An analysis of these passages can be found at paras 6-18 to 6-20 above.

¹⁹⁴ 1985 SC (HL) 17 at 42.

¹⁹⁵ See e.g. the paragraph transcribed by Cameron (n 169) 373–374: “The defenders may have been entitled to improve their property by culverting the stream and raising the level of the park, but they could easily have done that, *if they had exercised reasonable care*, without danger to anybody. [. . .] *I doubt whether the defenders ever considered what effect their interference with the stream and alteration of the levels was likely to have in very heavy floods*” (emphasis added).

liability rule. The correct question, in other words, is not whether there was fault, but whether fault was required. For this question, the fact that there is a finding of negligence is, technically, irrelevant: strict liability is not liability *without* fault, but liability *regardless* of fault.¹⁹⁶ Therefore, what would truly answer this question is the determination of whether the House of Lords discussed the requirement of causation as the *sole* basis of liability and confirmed the damages award accordingly, or only as *one* of the requirements of liability on the assumption that the other requirements – especially fault – were already satisfied. And here is where the speeches seem to be inconclusive.

(c) *The speeches are not supportive of fault-based liability*

8-66. The suggestion that the speeches do not necessarily support strict liability is also advanced by Lord Fraser in *RHM Bakeries*: certain passages in *Caledonian Rly Co* can be read as supporting strict liability, whereas others seem to ground liability in *culpa*.¹⁹⁷ Cameron identifies two specific elements that point in the latter direction: the references to the deficiency of the culvert, and the discussion of whether the defender was liable for extraordinary events. In his view, these elements refer respectively to a breach of the duty of care and to the standard of care, notions that belong to fault, particularly to negligence.

8-67. Arguably, however, those elements can also be read as referring to causation and the determination of whether there was a *damnum fatale*, a view that is consistent with the fact that these two aspects were precisely the issues under discussion in the case. Deficiency, in this view, is not an indication of the defenders' negligence but an element of their causal contribution to the accident. The discussion about the defenders having to respond to extraordinary events, in turn, seeks to draw the line between what is a *damnum fatale* and what is not, that is, whether the established causal link was broken by the rainfall.

(d) *Unlawfulness per se is not a form of fault*

8-68. The last argument advanced by Cameron is interesting because it departs from the previous ones, based upon negligence, and proposes a different form of fault: "unlawfulness *per se*". He remarks that, according to certain passages in *Caledonian Rly Co*, the defenders were at fault, apart from negligence, merely for altering the course of the stream; they "acted unlawfully in altering the lie of the land so as to make the public highway the natural conduit for any overflow".¹⁹⁸ The reasons why he considers this operation unlawful are twofold:

¹⁹⁶ See para 2-31 above.

¹⁹⁷ 1985 SC (HL) 17 at 42.

¹⁹⁸ Cameron (n 169) 373.

it breached the limitations imposed on the right to drain surface water, and it created a particular type of danger.

8-69. The first reason is based on the opinion of the Lord Ordinary (Dewar), who seems to have considered the defenders' operation as an unreasonable increase of the pursuer's burden to receive surface water, given the position of his land.¹⁹⁹ This view is rather puzzling, since the water that reached the pursuer's land was not, or at least not only, surface water: the harm was caused by the overflow of a stream, that is, water that flowed in a defined channel. The point was not revisited in the House of Lords, which focused on the alteration of this channel. Nevertheless, even if one accepts the surface-water rule as the basis of the Lord Ordinary's decision, it is not clear how this in itself constitutes a form of fault. As previously explained, liability for drainage of surface water requires fault as a separate requirement from that of undue pressing of the right.²⁰⁰ Arguably, that now-accepted view of the law might not have been so clear at the time *Caledonian Rly Co* was decided. Yet from Lord Dewar's very opinion it appears that the defenders' liability was based upon the fact that they did not exercise "reasonable care",²⁰¹ terminology that points to negligence as the basis of liability. Therefore, though the defenders' operations might have been unlawful – or "wrongful", in the sense discussed above²⁰² – in that they unduly pressed the right to drain surface water, that is not equivalent to a finding of fault.

8-70. The second and more compelling reason for the operation's unlawfulness is said to derive from the speeches of Lords Shaw and Wrenbury: the defenders were not entitled to execute the works in the first place because flooding was foreseeable. Consequently, in altering the course of the stream, the works can be described as of a type where no amount of care could prevent harm in the sense outlined by the line of cases led by *Chalmers v Dixon*,²⁰³ which corresponds with the last category of fault contemplated by the Inner House in *Kennedy v Glenbelle Ltd*:²⁰⁴ they created a special risk of abnormal damage. There is considerable force in this argument. The defenders undoubtedly created a significant danger, which called for the application of *Kerr*, and assuming that this danger was of a level that made it relevant in the sense of *Chalmers*, i.e. where due precautions would not prevent injury,²⁰⁵ *Kennedy's* reading of this type of operation would be that there is a different form of fault or, more precisely, implied fault.

¹⁹⁹ Cameron (n 169) 373–374.

²⁰⁰ See paras 8-36 to 8-38 above.

²⁰¹ See n 195 above.

²⁰² See paras 8-23 to 8-26 above.

²⁰³ (1876) 3 R 461 at 464 per Lord Justice-Clerk Moncreiff.

²⁰⁴ 1996 SC 95 at 99 per Lord President Hope.

²⁰⁵ See para 6-69 above.

8-71. Whitty warns that this is technically an “impure taxonomic category” compared to the other forms of fault from the *Kennedy* catalogue, in that it is determined by reference to the gravity of the harm rather than the mental element.²⁰⁶ In this book, however, the argument has gone further, holding that this notion of implied fault is in reality a label for strict liability.²⁰⁷ Cameron himself remarks that “[i]t may well be that this form of liability in Scots law does not differ significantly from the modern application of the rule in *Rylands* in English law, modified as it has been by *Cambridge Water Co v Eastern Counties Leather*”.²⁰⁸ The *Cambridge Water Co*²⁰⁹ case determined that liability based upon the strict-liability rule in *Rylands v Fletcher*²¹⁰ was conditioned by the requirement of foreseeability of harm. The fact that foreseeability of harm is required, however, does not turn a strict-liability rule into a fault-based one.²¹¹

8-72. A different form of unlawfulness is advanced by Robbie, in a view that seems to go back to the traditional explanation of the rule. In discussing damages as a remedy for breach of common interest, and highlighting the “paradox” of having strict liability under the exceptional rule from *Caledonian Rly Co* and a fault-based liability rule for common interest, she regrets that “it is not sufficiently highlighted in the case law or commentary that interfering with the natural flow of a river is a wrong in itself (albeit under common interest)”,²¹² referring to Cameron’s discussion of unlawfulness. It is not clear what the remark intends to suggest with regard to fault, but it must be noted, as it has been above, that the case of *Caledonian Rly Co* was not one between riparian owners,²¹³ so it can hardly be said that the pursuer had common interest rights to enforce.

8-73. More generally, this contention might be coloured by the subject-matter of Robbie’s work: she is concerned with common interest, and certainly any breach of common interest can be qualified as a “wrong”, for if this were not the case, it is difficult to see why the law would provide any remedy. But this does not mean that *all* remedies are available, particularly damages. If what is meant here is that, because the alteration of a watercourse is a wrong in itself, fault is not necessary – or, perhaps, fault is implied – then any breach of common interest would be susceptible to the same analysis. But this is not the case under the main modern position, which can be accepted (if not without hesitation): fault is required as a general rule.²¹⁴ The same is true in nuisance: even if it is

²⁰⁶ Whitty, “Nuisance” (Reissue, 2001) para 93.

²⁰⁷ See the full argument in paras 7-06 to 7-31 above.

²⁰⁸ Cameron (n 169) 375, reference omitted.

²⁰⁹ *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264.

²¹⁰ *Rylands v Fletcher* (1868) LR 3 HL 330.

²¹¹ See paras 2-33 to 2-37 above.

²¹² Robbie, *Private Water Rights* para 7-95.

²¹³ See para 8-14 above.

²¹⁴ See para 8-22 above.

a wrong that calls for the application of an interdict, damages claims require fault.

8-74. The view proposed here, therefore, seems to be close in substance with Cameron's analysis of this issue, though he remains on the side of the orthodox view in considering that the creation of the relevant level of risk is a form of fault or, more precisely, an implication of fault. The position here advanced challenges that notion, holding that this is simply a strict-liability rule.

(4) *Caledonian Rly Co* in the wider context of dangerous activities

8-75. The conclusion reached above leads inevitably to a further question: is the rule from *Caledonian Rly Co*, then, limited only to the alteration of watercourses, as *RHM Bakeries*²¹⁵ so strongly contends? If one takes the view that the reason why the alteration of a watercourse deserves special treatment is that it creates a certain level of risk, in the sense of *Kennedy*'s "implied fault",²¹⁶ then there is no reason to constrain its application strictly to this particular set of facts. However, this argues for both expanding and restricting the scope of application of the rule.

8-76. On the one hand, in the words of Zimmermann and Simpson, "if [. . .] the ratio underlying *Caledonian Railway* is sound it can hardly be confined to one specific situation".²¹⁷ And the ratio for the special treatment is not that there is something specific to alteration of watercourses that makes it wrong in the sense indicated by Robbie, i.e. a breach of common interest,²¹⁸ nor that the interference with nature is in itself deserving of a special treatment. The ratio is based upon risk. Consequently, any use of water – or, indeed, any use of property – that creates the relevant level of risk should be treated in the same way. The strict confinement of the rule in the terms outlined by *RHM Bakeries* is, in this sense, relaxed by *Kennedy*, expanding its application. On the other hand, the rule should be applied only if the relevant level of risk, in the sense discussed in chapter 7, is reached. If it is not, then the fact that the specific operation was the alteration of a watercourse should be irrelevant, and general fault rules should apply.

(5) Subsequent case law

8-77. Since Cameron's research was published, cases that serve to test these conclusions have been scant. There is, first, a case where the facts resemble

²¹⁵ *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17.

²¹⁶ *Kennedy v Glenbelle Ltd* 1996 SC 95.

²¹⁷ Zimmermann and Simpson (n 158) 630.

²¹⁸ See paras 8-72 and 8-73 above.

those of *Caledonian Rly Co*.²¹⁹ In *Viewpoint Housing Association Ltd v City of Edinburgh Council*,²²⁰ a stream was culverted by the roads authority, and its insufficiency caused the flooding of the pursuers' land. The pursuers' damages claim was founded both in negligence and nuisance, yet they later argued that a case based on strict liability would remain open if fault could not be proved. The Lord Ordinary (Emslie), however, had a different view: such a case was not open for the pursuers since the defenders had no fair notice of it. If the pursuers wanted to hold this "fallback" position, a minute of amendment would be required.²²¹ What seems to be implied is that strict liability was not excluded as a matter of principle, but only because it was not properly pled. Consequently, and in line with the previous post-*RHM Bakeries* cases of *G A Estates Ltd*²²² and *Inverness Harbour Trs*,²²³ the court appears to have recognised the existence of the rule, but did not apply it in the particular case. Commenting on this case, Cameron reaffirmed his view of *Caledonian Rly Co*, arguing that its relevance for *Viewpoint Housing* ought to have been only the recognition of a duty of care on the part of a public body building or in occupation and control of works on watercourses.²²⁴ But this leaves Lord Emslie's comments unexplained except for the implication that they were plainly mistaken given the fault-based liability view of *Caledonian Rly Co*.

8-78. The rule in *Caledonian Rly Co* was, however, pled in the more recent cases of *Sabet v Fife Council*²²⁵ and *Edwards v Fife Council*²²⁶ as an alternative to the fault averment.²²⁷ In these cases, the pursuers' houses suffered damage as a consequence of a flood caused by a blocked weir located in neighbouring property. The Lord Ordinary (Ericht), in allowing a proof before answer, considered that the averments of fault against the landowner (second defender) were relevant, adding that "[i]n any event, the pursuers also found on the *Caledonian Railway Co* case, which Lord Hope [in *Kennedy v Glenbelle*] identified as a possible exception to the requirement of *culpa*".²²⁸ These decisions, as in *Viewpoint Housing*, recognised the existence of the rule as – possibly – one of strict liability; and because it was properly pled (unlike in *Viewpoint Housing*), it was considered relevant for the cases. What stands out, however, is that the facts of these cases are remote from the facts in *Caledonian Rly Co*. There was no

²¹⁹ *Caledonian Railway Co v Greenock Corporation* 1917 SC (HL) 56.

²²⁰ [2007] CSOH 114, 2007 SLT 772.

²²¹ [2007] CSOH 114, 2007 SLT 772 at para 22.

²²² *G A Estates Ltd v Caviapen Trs (No 1)* 1993 SLT 1037.

²²³ *Inverness Harbour Trs v British Railways Board* 1993 GWD 14-952.

²²⁴ G D L Cameron, "Interference with Natural Watercourses: Nuisance, Negligence and Strict Liability" (2008) 12 EdinLR 105 at 108.

²²⁵ *Sabet v Fife Council* [2019] CSOH 26, 2019 SLT 514.

²²⁶ *Edwards v Fife Council* [2019] CSOH 27, 2019 GWD 11-150.

²²⁷ Discussed briefly in para 5-28 above.

²²⁸ *Sabet v Fife Council* [2019] CSOH 26, 2019 SLT 514 at para 49. In *Edwards v Fife Council* [2019] CSOH 27, 2019 GWD 11-150 he referred at para 3 to his reasons in the *Sabet* decision to allow a proof before answer.

alteration of a watercourse or, for that matter, any active conduct on the part of the landowner.

D. CONCLUSIONS

8-79. In conclusion, the damages claims originating from disputes over uses of water largely reproduce the rules outlined and discussed in chapters 3 to 7 of this book, that is, liability rules providing for nuisance and damage caused by abnormally dangerous conduct.

8-80. First, it has been shown that, despite the varied categorisation of disputes over uses of water – as breach of common interest, nuisance, breach of the right to drain surface water, or simply “wrongs” – the treatment of these disputes has evolved towards convergence, not only with regard to their categorisation but also with regard to the applicable liability rule. Thus, these disputes are now consistently dealt with within the nuisance framework, with the sole exception of disputes about drainage of surface water, which have remained a separate category so far. At the same time, all the categories have reached the same solution as to the requirement of fault for damages claims: fault must be averred and proved, according to the cases of *Thomson*²²⁹ in the context of breach of common interest, *RHM Bakeries*²³⁰ and *Kennedy*²³¹ in the context of nuisance, and *Noble’s Trs*²³² for damage caused by drainage of surface water. Hence it does not make a practical difference to resort to one or the other category – when more than one is available – as none will relieve the pursuer from the requirement of fault. It might, however, make a difference, for the case of surface water, if the scope of *Kennedy* is restricted to nuisance only.

8-81. Second, the evaluation developed here suggests that we can still consider the rule applicable to the alteration of a watercourse as a strict-liability rule. It is possible to raise some questions about Cameron’s view of *Caledonian Rly Co*²³³ being based on fault, but there is a section of his argument that seems unquestionable: the facts of *Caledonian Rly Co* would most likely fit what today is qualified as implied fault under the authority of *Kennedy*, namely conduct causing a special risk of abnormal damage. And in the view advanced in this book, this implied fault is, in reality, a disguised strict-liability rule. The necessary consequence is that the strict-liability rule from *Caledonian Rly Co* is not confined to the particular set of facts that were present in the case, but applies to any case where the relevant level of risk is created. *Caledonian Rly Co* is simply an instance of the application of this rule.

²²⁹ *Thomson v St Cuthbert’s Cooperative Association Ltd* 1958 SC 380.

²³⁰ *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17.

²³¹ *Kennedy v Glenbelle Ltd* 1996 SC 95.

²³² *Noble’s Trs v Economic Forestry (Scotland) Ltd* 1988 SLT 662.

²³³ *Caledonian Railway Co v Greenock Corporation* 1917 SC (HL) 56.

9 Withdrawal of Support

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A. INTRODUCTION

9-01. The second group of disputes between neighbours that receives special treatment concerns withdrawal of support. Unlike the previous group, however – disputes over uses of water, discussed in chapter 8 – this group does not conform to the general framework outlined in previous chapters. Damages claims for harm caused by withdrawal of support are governed by three sets

of rules. The first is called here the “basic rules” of support, namely a set of rules that are applicable specifically and exclusively to this type of dispute. The second set is that applicable to liability by virtue of non-delegable duties of care, a more general category that finds in support disputes one of its main fields of application. Finally, the law of nuisance is held to be equally applicable to liability derived from support disputes. The main argument presented in this chapter is that damages claims for withdrawal of support should be subject to the same general legal framework that applies to other disputes between neighbours. A survey of these three sets of rules will show, however, that they are not.

9-02. The basic rules that govern the so-called right to support vary according to the interaction of two elements. On the one hand, they vary depending on the type of property being supported, that is, whether it is land or a building (or a section of a building) and also, in the first case, on whether that land has buildings or structures erected on its surface. On the other hand, they vary according to the relative physical position of the property being supported with regard to the object providing such support, namely whether what is provided or withdrawn is subjacent or adjacent support. From the interaction of these two types of element we obtain a set of six factual settings. The respective sets of rules for each of these factual settings result, in turn, from the combination of legal and policy considerations.

9-03. From the perspective of the fault requirement for damages claims, the first four factual settings are covered by a strict-liability rule, whereas in the remaining two, liability is fault-based. Nowadays, however, the difference does not seem justified, for two reasons. First, the diverse legal nature of the right to support in the different contexts does not sufficiently justify the diversity in the existing rules. Secondly, the economic reason that underpinned the strict-liability rule for the first four settings has lost its relevance in current economic and legal conditions. The one factor that might justify a strict-liability rule today, namely risk, may well provide a reason to discriminate between different levels of risk but it provides none to discriminate between the different types of properties supported. A better approach, therefore, is to impose common rules of liability for all cases of withdrawal of support when the right to support exists, regardless of the type of property or its relative situation. These issues are explored in the following section of this chapter (section B).

9-04. In the present day, landowners rarely engage personally in operations that can endanger support of neighbouring properties. In the normal case, they hire a competent professional in order to plan and execute such operations; in other words, they entrust the operations to an independent contractor. Consequently, most of the support disputes that come before the courts today are not concerned with the application of the basic rules outlined above, which determine the liability of a landowner for his own acts and omissions, but rather

with the application of the rules that determine the landowner's liability for the acts of his independent contractor. The general trend has been to hold the landowner strictly liable by virtue of a "non-delegable duty", an exception to the general rule whereby employers are not liable for the negligence of independent contractors.

9-05. Recognising a non-delegable duty in this context has the practical effect of creating a uniform rule of strict-liability for all support disputes. This could be seen as a solution for the unjustified distinction identified above in the basic rules, and one that is precisely based on risk. Yet this is not a satisfactory solution, for not only is it contingent, but it also rests on uncertain grounds and can produce results that might be inconsistent with the treatment of other dangerous conducts (section C).

9-06. These observations about the two sets of rules make clear the need for a more rational and consistent approach. The framework developed in chapters 3 to 7 in this book provides for a more coherent way of dealing with damages claims derived from withdrawal of support, especially since, as indicated above,¹ these disputes have been subjected to a third set of rules: those governing nuisance. As a consequence, the fourth section of this chapter will explore the results that the application of these liability rules – those applicable to nuisance and those applicable to abnormally dangerous conduct – would produce in the context of support. These results, in turn, will be contrasted with the outcome of applying the basic rules of support, highlighting the differences that might arise (section D). The final section will offer some brief conclusions (section E).

B. THE BASIC RULES

(I) Six factual settings

9-07. As already mentioned, the basic rules that govern the so-called right to support vary according to the interaction of two elements: the type of property being supported and its relative position with regard to the object providing the support, resulting in six factual settings. The law applicable to each of these settings, as it stands today, can be summarised as follows:

¹ Para 9-01.

FACTUAL SETTING	NATURE OF THE RIGHT	CORRELATIVE OBLIGATION	LIABILITY RULE
Subjacent support of unencumbered land	Traditional view: natural right, incident to ownership. Modern view: delictual protection of property.	Negative obligation.	Strict liability.
Adjacent support of unencumbered land	Ditto.	Ditto.	Ditto.
Subjacent support of encumbered land	Traditional view: acquired right; servitude. Modern view: same nature as support of unencumbered land.	Ditto.	Ditto.
Adjacent support of encumbered land	Ditto.	Ditto.	Ditto.
Subjacent support of (sections of) buildings	Common interest.	Negative and positive obligation.	Fault-based liability.
Adjacent support of buildings	Common gable built on boundary: common interest	Ditto.	Ditto.
	Separate gables and common gable built on one side of boundary: servitude	Negative obligation.	

(a) Subjacent support of unencumbered land

9-08. Withdrawal of subjacent support of land is not discussed by the institutional writers or other earlier commentators, and there is almost no case law until the nineteenth century,² when it became a critical issue due to coal-mining activities. Most of the authority upon which the principles of the common law of support are based belongs, indeed, to the second half of the nineteenth century and the resolution of controversies between mineral proprietors and surface proprietors, when the extraction activities developed by the former caused the surface of the land to subside. In the present day, the common law principles have declined in importance, not only due to the contraction of coal-

² J Rankine, *The Law of Land-Ownership in Scotland* (4th edn, 1909) 488.

mining activity but mainly as a consequence of extensive statutory regulation enacted during the twentieth century.³ Nevertheless, as pointed out by Kenneth Reid, the principles remained relevant for mining activities outside the scope of statutory regulation as well as for different activities, such as tunnelling.⁴

9-09. The question of whether the surface owner has a right to have his land supported by the land below has not been controversial when the land is “unencumbered” and kept in its “natural state”, that is, when no buildings or structures are erected on the surface. Slightly more – though perhaps not sufficiently – controversial has been the question about the legal nature of this “right”. The traditional view is that the right to support is a natural right, incident to ownership.⁵ Scottish legal literature and case law rarely go further than formulating general statements to the same effect,⁶ with the exception of Reid, who adopts a clear position on the point,⁷ and Rennie, who remains cautious.⁸

9-10. These general statements about “a natural right” do not really tell us anything about the nature of the right. Instead, as pointed out by Reid,⁹ they tell us about the way in which this right is born, i.e. its origin: it does not have to be acquired but exists by operation of the law, whenever there is ownership of land. More illustrative of the actual nature of the right are some of the – mostly English – cases that are frequently cited as authority for the natural right of support: in both *Humphries v Brogden*¹⁰ and *Bonomi v Backhouse*,¹¹ the right

³ Coal Industry Nationalisation Act 1946; Coal-Mining (Subsidence) Act 1957; Coal Mining Subsidence Act 1991; Coal Industry Act 1994.

⁴ K G C Reid, *The Law of Property in Scotland* (1996) para 252. One of the last cases of withdrawal of subjacent support of land decided by the courts was, in fact, concerned with a railway tunnel: *Rogano Ltd v British Railways Board* 1979 SC 297.

⁵ Rankine, *Land-Ownership* 489; D R Stewart, *A Treatise on the Law of Mines, Quarries, and Minerals in Scotland* (1894) 166; J Carmont, “Support” in J L Wark (ed), *Encyclopedia of the Laws of Scotland*, vol 14 (1932) para 678; D M Walker, *The Law of Delict in Scotland* (2nd edn, 1981) 946, among others.

⁶ A more developed discussion can be found in South African literature. See e.g. J R L Milton, “Lateral Support of Land: a Natural Right of Property” (1965) 82 SALJ 459; J R L Milton, “The Law of Neighbours in South Africa” 1969 Acta Juridica 123 at 199–200; J D van der Vyver, “Expropriation, Rights, Entitlements and Surface Support of Land” (1988) 105 SALJ 1; A J van der Walt, *The Law of Neighbours* (2010) 96–113. This discussion in the South African context is limited to adjacent support, for horizontal division of ownership is not possible in that jurisdiction. Subjacent support has here a different nature: it is a servitude.

⁷ Reid, *Property* paras 254–258.

⁸ R Rennie, *Minerals and the Law of Scotland* (2001) 60–63. Additionally, Rennie mentions Gordon’s position on the subject, yet the source cited in this connection does not appear to be directly in point: it refers to the chapter on water in W M Gordon, *Scottish Land Law* (2nd edn, 1999).

⁹ Reid, *Property* para 254.

¹⁰ *Humphries v Brogden* (1850) 12 QB 739 at 744.

¹¹ *Bonomi v Backhouse* (1858) E B & E 622 at 637 per Wightman J, and 639 per Coleridge J. The decision was reversed by the Exchequer Chamber, yet only on the point about the moment in

was regarded as a restriction on the neighbour's use of his own property, based on the principle of *sic utere tuo non laedas alienum*. This is consistent with what Reid considers to be the nature of the right to support: it is simply "one aspect of the general rule that one must not injure the property of one's neighbour", an obligation founded in delict. This position, in his view, is expressed in most Scottish cases,¹² unlike the other two alternative explanations of the right, i.e. as common interest or implied servitude.¹³ The entitlement to support is, in other words, ancillary to the right of ownership (or possibly that of a tenant under a lease).¹⁴ Infringement of the correlative obligation on the part of neighbours to provide support triggers delictual liability.

9-11. In this sense, the right to support is equivalent to the right not to be affected by a nuisance. Moreover, Scots cases of withdrawal of support over the last fifty years suggest that these are not just seen as equivalent, but that withdrawal of support *is* indeed a form of nuisance.¹⁵ Legal literature in England too tends to agree that withdrawal of support is actionable in nuisance.¹⁶ Nevertheless, the term "right to support" will continue to be used here as shorthand for this form of delictual protection of ownership, that is, the right of the surface owner to be compensated when his property has been damaged as a consequence of withdrawal of support caused, in turn, by the operations performed by the lower proprietor. This protection includes the right to interdict these operations before harm has occurred, provided that the requirements of an interdict are fulfilled. This chapter, however, focuses on liability in damages once harm has occurred, for the subject of this book is the requirement of fault in damages claims. The obligation that correlates with this right is construed only in negative terms: the landowner can only claim compensation for damage caused by the lower proprietor's active interference with the existent support. He cannot claim compensation for the lower proprietor's failure to take positive steps to provide support.¹⁷

9-12. It is generally accepted nowadays that liability for withdrawing support is strict,¹⁸ according to what is considered the leading modern authority: *Angus*

which the claim arises; and this last decision was confirmed in *Backhouse v Bonomi* (1861) 9 HL Cas 503.

¹² Reid, *Property* para 256. In the same sense, though in a rather brief statement, J M Halliday, *Conveyancing Law and Practice*, vol 2 (2nd edn by I J S Talman, 1997) para 34-05 explains that damages are based on the *sic utere* principle.

¹³ Reid, *Property* paras 255 and 257.

¹⁴ Reid, *Property* para 258.

¹⁵ See para 9-64 below.

¹⁶ See, e.g., R Megarry and W Wade, *The Law of Real Property* (9th edn by S Bridge, E Cooke and M Dixon, 2019) para 26-027; K Gray and S F Gray, *Elements of Land Law* (5th edn, 2009) para 1.2.24 n 1.

¹⁷ *Rogano Ltd v British Railways Board* 1979 SC 297 at 302; Reid, *Property* para 253; W M Gordon and S Wortley, *Scottish Land Law*, 3rd edn, vol I (2009) para 5-83.

¹⁸ T B Smith, *A Short Commentary on the Law of Scotland* (1962) 527 n 4; Walker, *Delict* 947;

v National Coal Board.¹⁹ This, however, does not seem always to have been the case. The early treatises on the law of delict by Guthrie Smith and Glegg discussed the rights between surface owners and minerals owners in the context of negligent use of property.²⁰ Glegg expressly stated that a minerals owner would be liable if harm resulted “from want of usual and reasonable precautions, or due care and diligence”.²¹ Most of the early case law points in the same direction: cases such as *Bald’s Trs v Alloa Colliery Ltd*,²² *Hamilton v Turner*,²³ and *Mid and East Calder Gas-Light Co v Oakbank*²⁴ clearly relied on fault, whereas other cases such as *Howie v Campbell*²⁵ and *Muirhead v Tennant*²⁶ based liability on the notion of “improper working”.²⁷

9-13. Possibly the first indication of a change towards strict liability can be found in *Buchanan v Andrew*, where the contract between the parties included a clause excluding liability and the court considered that, despite the exclusion, liability for improper working of land was still open for the pursuer.²⁸ The implication seems to have been that the liability that was effectively excluded by the clause must have been strict. Other cases thereafter seemed to suggest that liability would be strict, but in these cases there were no damages claims, so no compensation was awarded based on this possibly strict-liability rule.²⁹ *Aitken Trs v Rawyards Colliery Ltd*,³⁰ however, was indeed a case where damages were claimed and awarded without any discussion of fault. This seems to be the decision that induced a change of mind on the part of Glegg: by the second edition of his treatise in 1905, the reference to “want of usual and reasonable precautions, or due care and negligence” disappeared from the text and, although he kept the reference to *Hamilton v Turner*, he added to the same note the case of *Aitken Trs*. By the turn of the century, the scales seemed

Reid, *Property* para 253; Rennie, *Minerals* (n 8) 82; H L MacQueen and Lord Eassie (eds), *Gloag and Henderson: The Law of Scotland* (14th edn, 2017) para 34.21.

¹⁹ *Angus v National Coal Board* 1955 SC 175.

²⁰ J Guthrie Smith, *A Treatise on the Law of Reparation* (1864) ch XI s I is entitled “Injuries caused by the negligent use of real property”; A T Glegg, *A Practical Treatise on the Law of Reparation* (1892) ch XII s II considers mining issues as a natural use of property, subject to the duty to take precautions.

²¹ Glegg, *Reparation* 264.

²² *Bald’s Trs v Alloa Colliery Ltd* (1854) 16 D 870 at 875 per Lord President McNeill.

²³ *Hamilton v Turner* (1867) 5 M 1086 at 1095 per Lord President Inglis.

²⁴ *Mid and East Calder Gas-Light Co v Oakbank Oil Co Ltd* (1891) 18 R 788 at 792 per Lord M’Laren.

²⁵ *Howie v Campbell* (1852) 14 D 377 at 378.

²⁶ *Muirhead v Tennant* (1854) 16 D 1106 at 1108 per Lord President McNeill.

²⁷ In some of these cases, land was actually encumbered with buildings. But, as will be explained, the right is said to operate in the same way and is subject to the same rules as in the case of bare land: see para 9-17 below.

²⁸ *Buchanan v Andrew* (1873) 11 M (HL) 13 at 20 per Lord Selborne LC.

²⁹ *Governors of Daniel Stewart’s Hospital v Waddell* (1890) 17 R 1077 at 1082 per Lord Young; *Bank of Scotland v Stewart* (1891) 18 R 957 at 968 per Lord Adam.

³⁰ *Aitken’s Trs v Raywards Colliery Co Ltd* (1894) 22 R 201.

to be inclined towards strict liability until the matter was settled conclusively by the mid-twentieth century in the case of *Angus v National Coal Board*, where liability was unanimously and explicitly held to be strict.³¹

9-14. It is possible to identify in the early cases a growing concern on the part of the courts for the fact that mineral owners, seeking to obtain the full benefit of the minerals, could simply bring down the land and the houses³² where surface owners lived, especially since, according to some methods utilised widely at the time and considered “proper” modes of working, it was impossible or very difficult to obtain all the minerals without causing this harmful result.³³ This might have been at the root of the development of the strict-liability rule: the consideration that mineral owners were developing a highly lucrative activity without assuming the risks involved. It was not possible to make fault-based liability effective because their conduct was considered appropriate according to the standards of the time.³⁴ Consequently, courts reacted by imposing strict liability as the price to pay, a price that ultimately was not seen as too high considering the level of profits that the activity yielded.

9-15. Nevertheless, *Angus v National Coal Board*, which contains the modern reaffirmation of the strict-liability rule, did not seem to ground the rule in this sort of consideration. The judgments suggest that the justification for such liability was simply that support was considered to be an “incident of property”. The owner had the right to have his land supported, and liability arose simply because such right had been interfered with.³⁵ This reasoning is, at best, unconvincing, and the point is revisited below.³⁶ Moreover, *Angus* itself was not a case of support in the sense discussed here but a personal injuries claim. Damages were claimed by the widow of an agricultural worker whose death was caused by the subsidence of the field in which he was working. Consequently, damages were not sought to compensate for harm to land or buildings and, for this reason, the case was not seen as one based on the right to support.³⁷ Compensation was refused and the remarks on the nature of the liability rule

³¹ *Angus v National Coal Board* 1955 SC 175 at 181 per Lord Justice-Clerk Thomson, and 182 per Lords Mackintosh and Birnam.

³² The reference to houses here, where unencumbered land is discussed, is explained by the fact that, when the right to support exists, the same principles apply in both contexts: see para 9-22 below.

³³ See *Hamilton v Turner* (1867) 5 M 1086 at 1100 per Lord Ardmillan; *Buchanan v Andrew* (1873) 11 M (HL) 13 at 20 per Lord Selborne LC; *Neill's Trs v William Dixon Ltd* (1880) 7 R 741 at 748 per Lord Gifford; *Governors of Daniel Stewart's Hospital v Waddell* (1890) 17 R 1077 at 1082 per Lord Young.

³⁴ See F Werro and V V Palmer (eds), *The Boundaries of Strict Liability in European Tort Law* (2004) 222–223.

³⁵ *Angus v National Coal Board* 1955 SC 175 at 181 per Lord Justice-Clerk Thomson, and 182 per Lord Mackintosh.

³⁶ See para 9-40 below.

³⁷ 1955 SC 175 at 181 per Lord Justice-Clerk Thomson, and 182 per Lord Mackintosh.

were, strictly speaking, *obiter dicta*. As the leading modern authority, therefore, it rests on rather weak grounds.

(b) *Adjacent support of unencumbered land*

9-16. In contrast to subjacent support, which was not dealt with by the institutional writers, adjacent support of land was considered by Bell:

Although a proprietor may, to the very verge of his property, dig his ground and remove the earth (§ 965), he is not entitled to do any direct injury to his neighbour; or to take away the support of his property; or to occasion reasonable apprehensions of danger; [. . .]³⁸

The authority cited by Bell, however, is not specific to this type of support but applies mostly to support in the context of tenements. The exception is *Robertson v Strang*,³⁹ where liability was imposed without much discussion of its basis.

9-17. Nevertheless, since the beginnings of developing principles for subjacent support, these principles were viewed as equally applicable to adjacent support,⁴⁰ and authors have frequently said as much.⁴¹ This is consistent with Scots law's recognition of ownership of "separate tenements":⁴² property in land admits not only of vertical but horizontal division, so that proprietors of, for instance, the minerals that lie underneath my land are my neighbours in the same sense as proprietors of adjacent land. Consequently, the nature of the right and the extent of its correlative obligation are considered to be the same in the case of subjacent and adjacent support, and liability is equally strict.⁴³

(c) *Subjacent support of land encumbered with buildings*

9-18. The traditional view of the right to support from subjacent strata when buildings or structures have been erected on the surface of land was that this right was not "natural" but "acquired": the surface proprietor must have been granted, expressly or impliedly, such a right.⁴⁴ As to the nature of the right, the

³⁸ Bell, *Principles* § 970.

³⁹ *Robertson v Strang* (1825) 4 S 5.

⁴⁰ *Caledonian Railway Co v Sprot* (1856) 2 Macq 449 at 452 per Lord Cranworth LC.

⁴¹ From Rankine, *Land-Ownership* 489 to Gordon & Wortley, *Land Law* vol I, para 5-82.

⁴² Reid, *Property* para 207.

⁴³ Although it is possible to identify here, just as in the case of subjacent support, early cases that seem to have been solved by reference to fault: see, e.g., *Campbell's Trs v Henderson* (1884) 11 R 520 at 525 per Lord Young.

⁴⁴ Rankine, *Land-Ownership* 496; Stewart, *Law of Mines, Quarries, and Minerals* (n 5) 170; Carmont (n 5) para 705; Smith, *Short Commentary* 527.

most common explanation was servitude.⁴⁵ But this was presented in a false opposition, that is, the right was seen as a servitude (pointing out its nature) as opposed to a natural right (which refers to the right's origin). With regard to its content, the servitude was considered to be similar to the Roman law servitude *oneris ferendi*,⁴⁶ and was positive in character.⁴⁷ The main debates that developed both doctrinally and judicially were concerned with the circumstances in which a grant of such servitude could be said to have occurred, particularly an implied grant, and the matter was seen mainly as one of contractual interpretation. The basic principle was enunciated in *Caledonian Rly Co v Sprot*:

[A]ll which a grantor can reasonably be considered to grant, or warrant, is such a measure of support subjacent and adjacent as is necessary for the land in its condition at the time of the grant, or in the state for the purpose of putting it into which the grant is made.⁴⁸

9-19. When buildings already existed at the time of the grant, the issue was not seen as problematic,⁴⁹ except in cases where these buildings were replaced by new ones.⁵⁰ The main controversy concerned buildings erected after the grant,⁵¹ and in determining whether the owner was entitled to have them supported the key question was whether the buildings were covered by the purpose of the contract,⁵² or more generally, whether they were in the contemplation of the parties.⁵³ Yet in some cases, courts went further: they considered that landowners were entitled to make reasonable use of their land, which included building on the surface, and this did not cause the right to support to be lost.⁵⁴ It is not clear

⁴⁵ Rankine, *Land-Ownership* 496; Stewart, *Law of Mines, Quarries, and Minerals* (n 5) 170–171; Carmont (n 5) para 705; Walker, *Delict* 948; Halliday, *Conveyancing Law and Practice* vol 2 (n 12) para 34-05; N R Whitty, “Reasonable Neighbourhood: the Province and Analysis of Private Nuisance in Scots law. Part II” (1983) 28 JLSS 5 at 15.

⁴⁶ Rankine, *Land-Ownership* 496. See paras 9-33 to 9-36 below for more details on the servitude *oneris ferendi*.

⁴⁷ Rankine, *Land-Ownership* 496, though the positive character of this “servitude” is mentioned explicitly only from the 2nd edition of his treatise (1884) 409; the positive nature is also mentioned in Stewart, *Law of Mines, Quarries, and Minerals* (n 5) 180 and Carmont (n 5) para 706.

⁴⁸ *Caledonian Railway Co v Sprot* (1856) 2 Macq 449 at 451 per Lord Cranworth LC.

⁴⁹ As, for instance, in *Gibson v Farie* 1918 1 SLT 404.

⁵⁰ E.g. *Aitken's Trs v Raywards Colliery Co Ltd* (1894) 22 R 201; *Barr v Baird & Co* (1904) 6 F 524.

⁵¹ These difficulties are noted in the recent case of *Coal Authority v Pegasus Fire Protection Co Ltd* [2019] CSIH 12, 2020 SLT 279 at para 2 per Lord President Carloway, explaining how they lead to enactment of legislation. This case, however, was decided on contractual grounds with regard to the extension of a grant to carry out remedial works.

⁵² Rankine, *Land-Ownership* 501, as in *Aitken's Trs v Raywards Colliery Co Ltd* (1894) 22 R 201 where the land was acquired for the purpose of building.

⁵³ Stewart, *Law of Mines, Quarries, and Minerals* (n 5) 178, as in *Hamilton v Turner* (1867) 5 M 1086 where building the houses was indeed an obligation contemplated in the lease.

⁵⁴ *Hamilton v Turner* (1867) 5 M 1086 at 1095 per Lord President Inglis, 1098 per Lord Deas, and 1100 per Lord Ardmillan; *Bain v Duke of Hamilton* (1867) 6 M 1; *Neill's Trs v William Dixon Ltd* (1880) 7 R 741 at 745 per Lord Ormidale.

whether this could simply be considered as the operation of the natural right to support or, on the contrary, it was a generally implied (acquired) right to support for such reasonable erections.⁵⁵

9-20. Later cases, however, seem to suggest that the right to support land encumbered with buildings is generally afforded as a matter of common law – although the parties could renounce it.⁵⁶ Based on these cases and those cited above,⁵⁷ Reid put forward the modern view on the origin and nature of the right to support land encumbered with buildings, namely that Scots law does not distinguish, as English law does,⁵⁸ between such land and land in its natural state. Moreover, a possible restriction on the right to support where there has been excessive building, although often mentioned, does not seem actually to have been applied in any case.⁵⁹ Consequently, both the origin of the right and its nature must remain the same as in the case of bare land: the right is natural, i.e. it arises together with ownership, and its primary significance is as a source of delictual liability. Of the few support cases of the last half century, however, the only one that discussed the nature and origin of this support, *Rogano Ltd v British Railways Board*, does not lend support for such a view, since it considered that the right of support for built-upon land was not a natural right, but had the nature of a servitude that had to be acquired by express or implied grant, and possibly by prescription.⁶⁰ The point does not seem to be resolved in the literature,⁶¹ but case law's broad construction of the notion of implied grant suggests that, perhaps, it only disguises the recognition of a general natural right to support, in line with Reid's view.

9-21. Less prominently than the debates just outlined, the possibility of acquiring the right by positive prescription has also been discussed. Rankine was initially inclined against this notion,⁶² yet by the second edition of his treatise, and apparently because he recognised the nature of the right as a positive servitude following *Dalton v Angus*,⁶³ he accepted the possibility,

⁵⁵ Gordon & Wortley, *Land Law* vol I, para 5-91. Carmont (n 5) para 710 was inclined to the latter position, which in his view only applied when the defender had granted the surface and retained the minerals.

⁵⁶ *Barr v Baird & Co* (1904) 6 F 524 at 529 per Lord President Kinross; *Dryburgh v Fife Coal Co Ltd* (1905) 7 F 1083 at 1098 per Lord Kyllachy.

⁵⁷ See n 54 above.

⁵⁸ Despite the traditional assertion of the identity of both laws in e.g. *Caledonian Railway Co v Sprot* (1856) 2 Macq 449 at 461 per Lord Cranworth LC; *Buchanan v Andrew* (1873) 11 M (HL) 13 at 17 per Lord Selborne LC; *William Dixon Ltd v White* (1883) 10 R (HL) 45 at 46 per Lord Blackburn.

⁵⁹ Reid, *Property* para 260.

⁶⁰ *Rogano Ltd v British Railways Board* 1979 SC 297 at 301.

⁶¹ A summary of the positions in this debate can be found in Rennie, *Minerals* (n 8) 63–68.

⁶² In the first edition of his treatise: J Rankine, *The Law of Land-Ownership in Scotland. A Treatise on the Rights and Burdens Incident to the Ownership of Lands and other Heritages in Scotland* (1879) 380–382.

⁶³ *Dalton v Angus* (1881) 6 App Cas 740.

since all positive servitudes could be acquired in this way.⁶⁴ Positive servitudes can, nowadays, be acquired by prescription according to the express provision contained in s 3 of the Prescription and Limitation (Scotland) Act 1973.⁶⁵ This view, of course, relies on the concept of support as a servitude and makes sense only in the context of support as an acquired right. Accordingly, the view has been contested more recently, based on the fact that damages for withdrawal of support can be claimed under the doctrine of nuisance, which would render acquisition by prescription unnecessary.⁶⁶

9-22. In any case, the difference between the natural right to subjacent support of unencumbered land and the acquired right to subjacent support of built-upon land was said to lie only in their origin. The extent and consequences of such rights were considered to be the same,⁶⁷ so in this sense, all the principles about subjacent support to unencumbered land would apply equally to built-upon land. This is the reason why most of the authority cited to justify the principles for support of bare land actually consists of cases where the land was built upon. Consequently, the obligation correlative to the right to support of land encumbered with buildings is negative only, and liability is strict, according to the current leading authority.

(d) Adjacent support of land encumbered with buildings

9-23. The principles applicable to this type of support result from the combination of the two assimilations discussed above: on the one hand, the assimilation between subjacent and adjacent support,⁶⁸ and, on the other, the assimilation between support of bare land and that of land encumbered with buildings.⁶⁹ The consequence is that, once again, the obligation is negative, and liability for its breach, strict.

(e) Subjacent support of (sections of) buildings

9-24. If support of land was of primary importance during the nineteenth and early-twentieth centuries, support within tenements took over this position to

⁶⁴ Rankine, *Land-Ownership* (2nd edn, 1884) 411–413. The same view was held by Stewart, *Law of Mines, Quarries, and Minerals* (n 5) 180–181 and Carmont (n 5) para 713.

⁶⁵ The required possession period is 20 years: Prescription and Limitation (Scotland) Act 1973 s 3(2).

⁶⁶ Whitty (n 45) 16, questioning the authority of *Dalton v Angus* (1881) 6 App Cas 740 in Scots law.

⁶⁷ Rankine, *Land-Ownership* 496; Stewart, *Law of Mines, Quarries, and Minerals* (n 5) 171; Carmont (n 5) para 707. The cases cited by these authors in support this contention were: *Bonomi v Backhouse* (1858) E B & E 622; *Caledonian Railway Co v Sprot* (1856) 2 Macq 449; and *Dalton v Angus* (1881) 6 App Cas 740.

⁶⁸ See para 9-17 above.

⁶⁹ See para 9-22 above.

become the main source of support disputes from the second half of the twentieth century onwards. In urban settings, buildings divided by floors and flats are commonplace.⁷⁰ This can be the source of various issues between neighbours, one of which is the treatment of possible harmful consequences caused to flats located in upper floors by the operations carried out by an occupier of a lower floor. This and other issues between tenement neighbours are addressed by the law of the tenement which, formerly common law, is today regulated by the Tenements (Scotland) Act 2004.

9-25. The idea that lower flats must bear the weight of and serve as the support structure for upper flats was recognised by Stair,⁷¹ Erskine,⁷² Hume,⁷³ and Bell.⁷⁴ Bell, in fact, provided the name for what has been identified as the basis of the obligation to provide subjacent support in the context of tenements: the doctrine of common interest.⁷⁵ This doctrine has already been mentioned in chapter 8 in the context of disputes over uses of water.⁷⁶ Since common interest has now been abolished for the purposes of the law of the tenement, as we will see,⁷⁷ no detailed account is offered here.⁷⁸ It is enough to say that, in general, the doctrine determined the rights and obligations of tenement owners with regard to the sections of the tenement that they did not own themselves.⁷⁹ More particularly, in relation to support, common interest gave upper proprietors the right to have their properties supported by lower proprietors.⁸⁰

9-26. This right to support, however, was different from that which exists in the previous four factual settings, in two fundamental aspects. First, the obligation that correlated to the support based upon common interest was not construed only in negative terms, but also had positive content: the upper proprietor not only could require the lower proprietor to refrain from doing anything that could interfere with the existent support – and be compensated if he did – but could also demand that he take positive steps to provide such support, that is, to keep his property in a condition to maintain adequate support.⁸¹ Secondly, liability for breaching these obligations was fault-based. The latter point was not clear and,

⁷⁰ This has been the case in Scotland since as early as the sixteenth century: K G C Reid, “The Law of the Tenement. New Thoughts on Old Law” (1983) 28 JLSS 472 at 472.

⁷¹ Stair II.7.6.

⁷² Erskine II.9.10.

⁷³ Hume, *Lectures* vol III, 226.

⁷⁴ Bell, *Principles* § 1086.

⁷⁵ The origin in this context is, however, traced back to Stair: K G C Reid, “Common Interest. A Reassessment” (1983) 28 JLSS 428 at 428.

⁷⁶ See paras 8-10 to 8-22 above.

⁷⁷ See para 9-28 below.

⁷⁸ For a traditional description, see Rankine, *Land-Ownership* ch XXXIII, largely intact since the first edition. For a more contemporary view, see Reid (n 75).

⁷⁹ See Reid, *Property* para 232.

⁸⁰ Reid, *Property* para 271.

⁸¹ Reid, *Property* para 233.

indeed, available authority seemed to point to strict liability,⁸² until the decision of the Inner House in *Thomson v St Cuthbert's Cooperative Association Ltd.*⁸³ The pursuer in that case based her claim on two alternative grounds: common interest and fault.⁸⁴ With regard to the first ground, she argued, *inter alia*, that requiring fault in this context would deprive the doctrine of common interest of any relevant content, as it would leave the matter to be entirely regulated by the law of negligence. Lord Mackintosh, however, rejected this view, explaining that:

[t]he doctrine of common interest creates a special area of community within which mutual rights and duties are owed, and makes into neighbours to whom duties are owed parties who otherwise under the general law of negligence as now developed in, for example the case of *Donoghue v Stevenson*, would not be treated as such.⁸⁵

According to this view, the doctrine of common interest seems to dispose of the question of duty of care in negligence. It is difficult to see, however, how the general law of negligence would provide a different answer: given the features of these disputes, arising in the context of close and circumscribed physical proximity and where physical harm is most probably foreseeable, it is likely that a duty of care would be identified in such context in any event. In this sense, it seems that the doctrine of common interest does not add anything to the general rules of liability for damage to property, and Reid suggested, some years later, that the case was actually wrongly decided.⁸⁶

9-27. The *Thomson* case was one of breach of the positive obligation of support. Two subsequent sheriff court cases clarified that the fault-based liability rule applies also to the breach of the negative obligation: the cases of *Kerr v McGreevy*⁸⁷ and *Doran v Smith*.⁸⁸ In both cases, the pursuers argued that, although there was no “absolute duty” to provide support, there was a duty not to interfere with support, and liability for the breach of this duty did not require fault.⁸⁹ The sheriffs, however, rejected this view. In *Kerr v McGreevy*, the decision was based on the general principle that liability does not arise *ex dominio* (as stated in *Campbell v Kennedy*),⁹⁰ and on the fact that the decision in *Thomson* did not make an exception for the negative obligation, identifying a “duty to take reasonable care” as corresponding to the right to object to operations that might endanger support.⁹¹ In *Doran v Smith*, in turn, the sheriff

⁸² Reid (n 75) 434.

⁸³ 1958 SC 380.

⁸⁴ 1958 SC 380 at 381.

⁸⁵ 1958 SC 380 at 397–398, reference omitted.

⁸⁶ Reid (n 75) 434–435.

⁸⁷ 1970 SLT (Sh Ct) 7.

⁸⁸ 1971 SLT (Sh Ct) 46.

⁸⁹ *Kerr v McGreevy* 1970 SLT (Sh Ct) 7 at 7; *Doran v Smith* 1971 SLT (Sh Ct) 46 at 47.

⁹⁰ (1864) 3 M 121.

⁹¹ 1970 SLT (Sh Ct) 7 at 8.

could not find a “valid distinction” between the negative and the positive obligation, making the rule from the *Thomson* case extend to the former.⁹²

9-28. This was the picture when, in 1998, the Scottish Law Commission issued its *Report on the Law of the Tenement*⁹³ which would subsequently lead to the enactment of the Tenements (Scotland) Act 2004. The Act expressly formally abolished the doctrine of common interest, at least insofar as it applied within the tenement (s 7), but in reality simply restated this common law doctrine in statutory form.⁹⁴

9-29. The positive obligation of support is provided for by s 8 of the Act, entitled “Duty to maintain so as to provide support and shelter etc”:

(1) Subject to subsection (2) the owner of any part of a tenement building, being a part that provides, or is intended to provide, support or shelter to any other part, shall maintain the supporting or sheltering part so as to ensure that it provides support or shelter.

According to s 8(2), however, this duty to maintain is not due “if it would not be reasonable to do so, having regard to all the circumstances”, which will happen when the building is no longer worth repairing.⁹⁵ The negative obligation, in turn, is regulated by s 9, as a “Prohibition on interference with support or shelter” by virtue of which:

(1) No owner or occupier of any part of a tenement shall be entitled to do anything in relation to that part which would, or would be reasonably likely to, impair to a material extent—

(a) the support or shelter provided to any part of the tenement building; [. . .]

No reference is made in either provision to the liability rule applicable if the obligations there stated are breached and damages are claimed. The reference to reasonableness in s 8 is linked to the condition of the building and whether it is still “worth saving”, not to the standard of care required for the maintenance. The *Report*, in turn, only discussed briefly the liability rule applicable to the infringement of the positive obligation, recommending the preservation of the common law fault-based liability rule as stated in *Thomson v St Cuthbert's Cooperative Association Ltd* without the need for an express provision.⁹⁶ Nothing was said about the rule applicable to the breach of the negative obligation.

9-30. There are two roads that can be followed here, and both lead to the same destination. One is to accept that the common law rules on liability based upon the doctrine of common interest have survived the 2004 Act, despite the fact

⁹² 1971 SLT (Sh Ct) 46 at 48.

⁹³ Scottish Law Commission, *Report on the Law of the Tenement* (Scot Law Com No 162, 1998).

⁹⁴ Explanatory note to s 7.

⁹⁵ Explanatory note to s 8(2).

⁹⁶ Scottish Law Commission, *Law of the Tenement* (n 93) para 7.9.

that the Act abolished the doctrine and, in restating it, did not include these liability rules. This position is supported, at least with regard to the positive obligation, by the remarks made in the *Report*. The other road is to acknowledge that the Act simply does not consider special-liability rules for the breach of the obligations of support and, therefore, that one must look at the general liability rules for damage to property. Through both roads, we arrive at the same conclusion: liability is still fault-based, as it was before the Act.

(f) *Adjacent support of buildings*

9-31. When two separate buildings share a wall, and the wall is built precisely on the line of the boundary, the ownership of the wall lies on each proprietor up to the mid-point. The part that is not owned is, however, subject to reciprocal rights of common interest.⁹⁷ The doctrine, in this context, was not abolished by s 7 of the Tenements (Scotland) Act 2004 and consequently remains in force. By virtue of this common interest, each proprietor is subject to both a positive and a negative obligation of support: they must, on the one hand, maintain their respective sides of the wall and, on the other hand, avoid doing anything that might endanger its stability.⁹⁸ The cases that provide authority for this proposition,⁹⁹ however, were not damages actions so they do not contain clear indications of the liability rule applicable to breach, and the literature similarly does not give a clear answer. If the law of common interest did not provide for strict liability in the context of tenements, it is difficult to see why it would do so in this context. There is no authority suggesting a departure from the general rules of liability.

9-32. Where, by contrast, the wall is built on one side of the boundary, or where there are two separate walls that touch each other, there is wide agreement as to the absence of a natural right to adjacent support. Bell recognised an owner's right to prevent neighbours from resting on his wall,¹⁰⁰ but authors up to the present day have consistently maintained that a servitude of support can be acquired by grant, express or implied.¹⁰¹ The possibility of acquiring this servitude by prescription has been more controversial.¹⁰²

9-33. Two Roman law servitudes of support are recognised by Scots law. One is the servitude *oneris ferendi*, namely the "right in the dominant proprietor

⁹⁷ Reid, *Property* para 223.

⁹⁸ Reid, *Property* para 225.

⁹⁹ *Cochran's Trs v Caledonian Rly Co* (1898) 25 R 572, and, more recently, *Trades House of Glasgow v Ferguson* 1979 SLT 187.

¹⁰⁰ Bell, *Principles* § 941.1.

¹⁰¹ Rankine, *Land-Ownership* 510; Carmont (n 5) para 719; Reid, *Property* para 484; Gordon & Wortley, *Land Law* vol I, para 5-106.

¹⁰² Rankine, *Land-Ownership* 510; Carmont (n 5) para 720; Reid, *Property* para 484.

to rest the weight of his house on the servient proprietor's wall or pillar".¹⁰³ The other is the servitude *tigni immitendi*, which binds the servient proprietor "to permit the dominant proprietor to insert a beam or joist in the wall of the servient tenement".¹⁰⁴ It can be noted that whereas the first servitude can be properly characterised as one of support, the second is probably better described as a right to encroach.¹⁰⁵ Consequently, only the first will be considered here.

9-34. This servitude of support is of a positive character:¹⁰⁶ it allows a use of the servient property by the dominant proprietor which would not be permissible in the absence of the servitude, in this case, the use of a neighbour's wall to rest the weight of a building; as a logical consequence, it imposes the negative obligation not to interfere with the support.¹⁰⁷ As to the imposition of a positive obligation to maintain the wall that provides the support, the institutional writers seemed divided: Stair acknowledged a division in opinions but he was inclined to the negative,¹⁰⁸ whereas Bankton identified *oneris ferendi* as the only servitude making exception to the general principle that servitudes do not impose positive obligations on the servient owner.¹⁰⁹ Erskine, in turn, deemed this to be the rule "in the common case", but no reference was made to any exceptional case,¹¹⁰ while Bell considered that this particular servitude did, in fact, impose the obligation to maintain the wall, although he acknowledged that "an opposite doctrine [was] sometimes laid down",¹¹¹ and later said that this obligation "with us [. . .] requires a special contract".¹¹²

9-35. Modern literature seems to agree that the servitude *oneris ferendi* is not, as it was in Roman law, an exception to the rule *servitus in faciendo consistere nequit*, although some authors express doubts.¹¹³ The doubts are worth considering, for the two cases cited as authority for the majority view were not, in fact, cases where adjacent support of buildings had been withdrawn. In *Robertson v Scottish Union and National Insurance Co*,¹¹⁴ a street was carried

¹⁰³ G Watson (ed), *Bell's Dictionary and Digest of the Law of Scotland* (7th edn, 1890, reprinted by the Edinburgh Legal Education Trust, 2012) 754.

¹⁰⁴ Watson (ed), *Bell's Dictionary and Digest* (n 103) 1087.

¹⁰⁵ T A Ross, *Servitudes in the Law of Scotland. Principles, Sources and Influences which have affected the Law* (1933) 69.

¹⁰⁶ Scottish Law Commission, *Report on Real Burdens* (Scot Law Com No 181, 2000) para 12.7; D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) para 3.73.

¹⁰⁷ Cusine and Paisley, *Servitudes and Rights of Way* (n 106) para 3.73.

¹⁰⁸ Stair II.7.6.

¹⁰⁹ Bankton II.7.7.

¹¹⁰ Erskine II.9.1.

¹¹¹ Bell, *Principles* § 984.

¹¹² Bell, *Principles* § 1003.

¹¹³ Reid, *Property* para 484 considers the point as "doubtful" but is still inclined to the negative, whereas Gordon & Wortley, *Land Law* vol II, para 25-21 do not manifest such doubts, and Cusine and Paisley, *Servitudes and Rights of Way* (n 106) para 3.73 actually affirm both answers, though later they reaffirm the negative.

¹¹⁴ 1943 SC 427.

over another street through an arched viaduct and bridge, and the question at issue was whether the maintenance of the arches was an obligation of the owners of the *solum* where they stood or an obligation of the public authority in charge of the streets. The court decided that, since the principles of accession did not operate in the case, the owners of the *solum* were subject only to a servitude of support, of the nature of *oneris ferendi*, that did not impose on them the obligation to maintain the arches.¹¹⁵ The case of *Rogano Ltd v British Railways Board*, in turn, was one of withdrawal of subjacent support of land encumbered with buildings, and the court, in identifying the nature of support in these cases as a servitude, limited its content to the negative obligation based on what the institutional writers had said about the servitude of support.¹¹⁶ Consequently, the reference to *oneris ferendi* in both cases – explicit in the first, implicit in the second – was not to the precise servitude envisaged by Roman law and adopted in Scotland. As to the incidence of the servitude *oneris ferendi* in its strict meaning, there is no precise authority on the point because this is not the usual way in which terraced or semi-detached houses are built. The common practice is to use common gables,¹¹⁷ so the importance of the servitude seems to be rather marginal.¹¹⁸ In any event, in the absence of direct authority supporting the imposition of a positive obligation, and given the rather wide agreement in the literature, it is unlikely that courts, faced with a dispute of this character, would recognise such an obligation.

9-36. With regard to the rule of liability applicable to the breach of the servitude, the picture is not much clearer due to the lack of authority, and authors in general do not discuss the point.¹¹⁹ Rankine gave the impression that liability in this case would be strict, by stating that outside the scope of the servitude, liability is a matter of negligence.¹²⁰ Gordon and Wortley, however, state more generally that the breach of a servitude allows a damages claim “where there has been fault”.¹²¹ The case cited as authority, though indeed asserting the requirement of fault for damages in the case of an “extended use of a servitude right”,¹²² was not a case of breach of servitude: what was being discussed was the right to drain and the corresponding duty to receive surface water. In any case, and again in the absence of any direct authority, the assumption must be that the general rules are applicable and that, therefore, liability is fault-based.

¹¹⁵ 1943 SC 427 at 439 per Lord Justice-Clerk Cooper, and 453 per Lord Wark.

¹¹⁶ *Rogano Ltd v British Railways Board* 1979 SC 297 at 302.

¹¹⁷ Reid, *Property* para 218.

¹¹⁸ The reason for its existence in Scotland is most likely historical: the system of urban servitudes was adopted as a whole from Roman law: Ross, *Servitudes* (n 105) 58.

¹¹⁹ Reid, *Property* para 482 states generally that damages are available when a servitude is breached, while Cusine and Paisley, *Servitudes and Rights of Way* (n 106) do not refer to damages.

¹²⁰ Rankine, *Land-Ownership* 510.

¹²¹ Gordon & Wortley, *Land Law* vol II, para 24-87.

¹²² *Noble's Trs v Economic Forestry (Scotland) Ltd* 1988 SLT 662 at 664.

(2) Questioning the difference

9-37. It has been seen that four out of the six factual settings described above are covered by a strict-liability rule (that is, subjacent and adjacent support of bare land and subjacent and adjacent support of land encumbered with buildings), whereas in the remaining two (i.e. subjacent and adjacent support of (sections of) buildings), liability is fault-based. This distinction, however, does not seem sufficiently justified, either by the diverse legal nature of the right to support in each context, or by the policy considerations that underlie such rules. A better ground for distinction is that between the general liability rule applicable to nuisance, discussed in chapters 3 to 5, and the exceptional liability rule applicable to abnormally dangerous conduct, discussed in chapters 6 and 7.

(a) Diverse legal nature, not necessarily diverse legal rule

9-38. As explained in the previous section, the nature of the so-called right to support has been seen, depending on the factual setting, as (i) delictual protection of ownership, (ii) as a servitude, or (iii) as based upon common interest. So, intuitively, one could take these different explanations of its nature as a justification for the diversity of liability rules. However, on the traditional view of support for built-upon land, this contention does not hold, for its nature as a servitude would be shared with adjacent support of buildings in the case of separate walls (*oneris ferendi*) and, as discussed above, in the first of these factual settings, liability is strict, whereas in the second, liability is fault-based.

9-39. This highlights the lack of proper consideration of support for land encumbered with buildings as a servitude. For even in the best case, it would be a servitude with a particular rule of liability. But in recognising that the only difference between support for land in its natural state and support for land covered with structures is their origin (a natural as opposed to an acquired right), the alleged servitude of support becomes quite a peculiar servitude that does not “behave” like one, but is actually assimilated to what is seen simply as delictual protection of property. This is especially so given that the supposed restriction on the right to support in cases of excessive building, which could be seen as a parallel to or even a manifestation of the dominant owner’s duty to exercise the servitude *civiliter*, does not seem to have been applied.¹²³

9-40. Now, if we disregard the servitude theory and consider that the nature of the right is the same in support of both bare land and built-upon land, that is, that the right is nothing more than delictual protection of property, we are able to draw a line between these cases, subject to a strict-liability rule, and those others based on common interest and servitude, i.e. support of buildings, subject to a fault-based liability rule. But this is not enough to justify a strict

¹²³ See para 9-20 above.

liability rule in the first case, and the reason is rather obvious: protection of property through delict does not necessarily translate into strict liability, and the best example in the Scottish context is, of course, nuisance. If nuisance enjoys the same status as withdrawal of support from the perspective of its nature, then why do we have in the first case a strict-liability rule and in the second case a fault-based liability rule? At this point we should recall that, before 1985, there was authority supporting a strict-liability view of nuisance,¹²⁴ so the strict-liability rule for withdrawal of support made sense in such context. More importantly, however, there were policy considerations at the root of the development of the strict-liability rule for withdrawal of support.

(b) Diverse policy considerations, different liability rules ... but not as they stand today

9-41. The evolution of the liability rules traced in the previous section shows a curious result: the current rules applicable to all these factual settings are generally clear, yet in most cases the starting-point seems to have been the opposite. Withdrawal of support of land, with or without structures built upon the surface, attracts strict liability, but this rule was settled with certainty only in the mid-twentieth century. Withdrawal of support of buildings, in turn, gives rise to liability only upon proof of fault, yet it is not clear, at least in the context of subjacent support, that this was always the way in which the doctrine of common interest was understood to operate, and clarification was achieved, again, only in the mid-twentieth century.

9-42. In the case of support of land, what seems to have justified the migration to a strict-liability rule was the protection of surface owners against mineral owners who would try to obtain the greatest possible benefit from their works, removing every last vestige of the minerals even if that would result in the destruction of houses built upon the surface.¹²⁵ The justification was mainly economic: the party obtaining considerable profit should also assume the cost of the activity. That justification was clearly absent in the context of support within or between buildings. But nowadays, this concern seems to have disappeared. The reasons, on the other hand, to subject withdrawal of support in tenements to a fault-based liability rule can be noted from the case of *Thomson*¹²⁶ and from the Scottish Law Commission's *Report on the Law of the Tenement*.¹²⁷ there simply seemed to be no reason, in the opinion of the court and, later, of the Law Commissioners, to depart from the general rules of liability in this case. Contemporary cases of withdrawal of support are

¹²⁴ See paras 9-65 to 9-67 below.

¹²⁵ See para 9-14 above.

¹²⁶ *Thomson v St Cuthbert's Cooperative Association Ltd* 1958 SC 380 esp Lord Mackintosh at 395–396.

¹²⁷ Scottish Law Commission, *Law of the Tenement* (n 93) para 7.9.

caused mainly by construction¹²⁸ and demolition¹²⁹ operations, activities that are subject to administrative regulations and that do not seem to create the economic asymmetries formerly created by mining activities.

(c) *The suggestion*

9-43. In a context where the economic asymmetries are no longer a relevant concern, what now emerges as the most convincing reason to justify the strict-liability rule is the potentially extensive damage to property and bodily integrity that interfering with support could entail, even to the point of destruction or death. However, if this risk serves as the justification for a strict-liability rule in the context of support of land, several questions are left unanswered. First, it is difficult to see why this does not extend to the context of support within or between buildings, where damage can be equally extensive. There seems to be no good reason to distinguish between a house that loses support and is rendered inhabitable because a neighbour dug a hole to set the foundations of his own house, from a flat that loses support and is rendered equally inhabitable because a neighbour from the lower floor removed a load-bearing wall to create an open-plan layout. Secondly, it is unclear why the rule should be applicable only to the breach of the negative obligation if an omission can equally create or perpetuate a significantly dangerous situation. Finally, if risk is nowadays the only convincing reason that justifies a strict-liability rule in the context of support of land, the application of the rule to *all* cases does not distinguish adequately between operations that actually have such harmful potential and those which do not.

9-44. The suggestion is, therefore, that a more consistent approach would be to deal with support issues under the general framework set out in chapters 3 to 7 above, subjecting them to a strict-liability rule when the defender's conduct meets the requirements to be characterised as abnormally dangerous, just as with any other conduct with similar harmful potential, and when it does not, to leave their regulation to the general fault-based liability rule for nuisance, regardless of the type of property.

C. AN APPARENT SOLUTION: NON-DELEGABLE DUTIES

(I) A uniform strict-liability rule

9-45. As discussed in chapter 6, employers are not liable for injuries caused by the negligence of their independent contractors.¹³⁰ In the context of withdrawal

¹²⁸ E.g. *Lord Advocate v Reo Stakis Organisation Ltd* 1981 SC 104; *Borders Regional Council v Roxburgh District Council* 1989 SLT 837.

¹²⁹ *Morris Amusements Ltd v Glasgow City Council* [2009] CSOH 84, 2009 SLT 69.

¹³⁰ See para 6-80 above.

of support, however, there is wide agreement about the existence of an exception to this general rule: when a landowner engages in operations that endanger support, he has a non-delegable duty whereby he is bound to make sure that damage does not occur. This is, indeed, one of the earliest identified cases of a non-delegable duty,¹³¹ and Scottish courts have generally recognised the authority of the English cases of *Bower v Peate*¹³² and *Dalton v Angus*¹³³ as the source of this duty. As was also remarked in chapter 6, the standard position in both English and Scots law is that when this non-delegable duty operates, the employer's liability is strict.¹³⁴

9-46. In the particular case of support disputes, Scottish courts have relied on two lines of justification for the imposition of liability by virtue of the operation of a non-delegable duty: one that is based upon the dangerous nature of the operations that result in withdrawal of support, and one that is based upon the particular nature of the duty to support.

9-47. The first line of justification finds its authority in the two abovementioned English cases, *Bower v Peate*¹³⁵ and *Dalton v Angus*,¹³⁶ which were both cases of withdrawal of adjacent support of land encumbered with buildings. In the first of these cases, Cockburn CJ explained that:

a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else [. . .] to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted.¹³⁷

This passage gained the approval of the House of Lords in the second of the cases,¹³⁸ although the wording of the ruling is slightly different:

When an employer contracts for the performance of work, which properly conducted can occasion no risk to his neighbour's house which he is under obligation to support, he is not liable for damage arising from the negligence of the contractor. But in cases

¹³¹ P Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (2010) 122.

¹³² (1876) 1 QBD 321.

¹³³ (1881) 6 App Cas 740.

¹³⁴ See para 6-81 above.

¹³⁵ (1876) 1 QBD 321.

¹³⁶ (1881) 6 App Cas 740.

¹³⁷ (1876) 1 QBD 321 at 326–327.

¹³⁸ *Dalton v Angus* (1881) 6 App Cas 740 at 829 per Lord Blackburn.

where the work is necessarily attended with risk, he cannot free himself from liability by binding the contractor to take effectual precautions.¹³⁹

9-48. The explanation traditionally given for this justification is one of distribution of risks: the operations are executed by the contractor for the benefit of the landowner, so the latter should assume the associated costs, not the former.¹⁴⁰ This is the type of justification that has been relied upon in most of the modern support cases: *Kerr v McGreevy*,¹⁴¹ *Duncan's Hotel (Glasgow) Ltd v J & A Ferguson Ltd*,¹⁴² *Baxter v Pritchard*,¹⁴³ *Hamilton v Wahla*,¹⁴⁴ and *Crolla v Hussain*,¹⁴⁵ which were all cases of withdrawal of subjacent support in the context of a tenement; *Borders Regional Council v Roxburgh District Council*,¹⁴⁶ a case of withdrawal of adjacent support of land encumbered with buildings; and *Morris Amusements Ltd v Glasgow City Council*,¹⁴⁷ a case of withdrawal of adjacent support of a building.

9-49. The risk-based justification for non-delegable duties, however, has not been exempt from criticism. There is, in England, a perceived inconsistency between the imposition of strict liability by virtue of a non-delegable duty and the denial of a general strict-liability rule for extra-hazardous activities.¹⁴⁸ Moreover, it is not clear what kind of danger justifies the imposition of a non-delegable duty. This can be noted from a comparison of the passages quoted above: while *Bower* seems to point to the source of the danger, regardless of whether it can be avoided, *Dalton* appears to take this last circumstance into account by confining

¹³⁹ (1881) 6 App Cas 740 at 831–832 per Lord Watson.

¹⁴⁰ P S Atiyah, *Vicarious Liability in the Law of Torts* (1967) 333.

¹⁴¹ 1970 SLT (Sh Ct) 7 at 7.

¹⁴² 1974 SC 191 at 196 citing *Bower v Peate* (1876) 1 QBD 321, *Dalton v Angus* (1881) 6 App Cas 740, and other English and Scottish nuisance cases.

¹⁴³ 1992 SCLR 780, citing *Dalton v Angus* (1881) 6 App Cas 740, and *Borders Regional Council v Roxburgh District Council* 1989 SLT 837.

¹⁴⁴ 1999 Rep LR 118 at para 20–14, though the reasoning here is different: by instructing dangerous operations, the landowner incurred the implied fault identified by *Kennedy v Glenbelle Ltd* 1996 SC 95, yet the result is said to be consistent with *Duncan's Hotel (Glasgow) Ltd v J & A Ferguson Ltd* 1974 SC 191.

¹⁴⁵ 2008 SLT (Sh Ct) 145 at paras 24–26, relying mainly in *Dalton v Angus* (1881) 6 App Cas 740, *Borders Regional Council v Roxburgh District Council* 1989 SLT 837, and other cases that decided disputes of a different nature, such as *Noble's Trs v Economic Forestry (Scotland) Ltd* 1988 SLT 662, and *G A Estates Ltd v Caviapen Trs (No 1)* 1993 SLT 1037.

¹⁴⁶ 1989 SLT 837 at 839, citing Lord Watson in *Dalton v Angus* (1881) 6 App Cas 740 at 831–832 and concluding that the pursuer's averments were not sufficient to bring the case under the rule.

¹⁴⁷ [2009] CSOH 84, 2009 SLT 697 at paras 43–45.

¹⁴⁸ R Stevens, "Non-Delegable Duties and Vicarious Liability" in J W Neyers, E Chamberlain and S G A Pitel (eds), *Emerging Issues in Tort Law* (2007) 331 at 344; R F V Heuston and R A Buckley (eds), *Salmond & Heuston on the Law of Torts* (21st revised edn, 1996) 465. For the progressive qualification of the rule in *Rylands v Fletcher* (1868) LR 3 HL 330 and denial of a general strict-liability rule, see *Read v J Lyons & Co Ltd* [1947] AC 156; *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264; and more recently *Transco Plc v Stockport Metropolitan Borough Council* [2003] UKSC 61, [2004] 2 AC 1.

liability to the case where the works are “necessarily attended with risk”, that is, when they are dangerous even if properly conducted. The leading case that imposed a non-delegable duty based upon danger (although not a support case), *Honeywill & Stein Ltd v Larkin Bros (London’s Commercial Photographers) Ltd*, regarded the origin of the danger as the relevant element: the operation had to be dangerous “in its intrinsic” nature, “inherently dangerous”, and it did not cease to be so just because, if carefully conducted, damage could be avoided.¹⁴⁹ More recently, however, the doctrine was characterised, in *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH*, as “so unsatisfactory that its application should be kept as narrow as possible”, confining it only to “activities that are exceptionally dangerous whatever precautions are taken”.¹⁵⁰

9-50. In Scotland, the lack of clarity of the concept of “extra-hazardous” or “inherently dangerous” activity was pointed out in some of the cases listed above,¹⁵¹ but even in those cases a non-delegable duty was recognised, so the courts seem to have considered that operations causing withdrawal of support somehow fit the category. The most recent case concerning non-delegable duties, *Esso Petroleum Co Ltd v Scottish Ministers*, highlighted once again, and in some detail, the problematical nature of the notion of “inherently hazardous operation”.¹⁵² The case was not one of support, yet in discussing non-delegable duties in general it considered that, even in the case of support, the justification was danger-based.¹⁵³

9-51. The second line of justification adopted by Scots courts for the imposition of non-delegable duty in support disputes is based upon the particular characterisation of the right to support and its corresponding duty. This rationale was adopted in only one case, but it is the single Inner House case that dealt with non-delegable duties in the context of support: the case of *Stewart v Malik*,¹⁵⁴ where damages were claimed for withdrawal of subjacent support in a tenement. This case reacted to the Outer House judgment in *Southesk Trust Co Ltd v Angus Council*,¹⁵⁵ a case of pollution of water, which questioned the existence of the *Dalton* exception in Scots law. After giving an account of the history of the reception of the exception¹⁵⁶ and concluding that there had been

¹⁴⁹ *Honeywill & Stein Ltd v Larkin Bros (London’s Commercial Photographers) Ltd* [1934] 1 KB 191 at 200–201.

¹⁵⁰ *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH* [2008] EWCA Civ 1257, [2009] QB 725 at para 78.

¹⁵¹ *Duncan’s Hotel (Glasgow) Ltd v J & A Ferguson Ltd* 1974 SC 191 at 196; *Crolla v Hussain* 2008 SLT (Sh Ct) 145 at para 26; *Morris Amusements Ltd v Glasgow City Council* [2009] CSOH 84, 2009 SLT 697 at para 44.

¹⁵² *Esso Petroleum Co Ltd v Scottish Ministers* [2016] CSOH 15, 2016 SCLR 539 at paras 16–21. [2016] CSOH 15, 2016 SCLR 539 at para 19.

¹⁵³ [2009] CSIH 5, 2009 SC 265.

¹⁵⁴ [2006] CSOH 6.

¹⁵⁵ [2009] CSIH 5, 2009 SC 265 at paras 10–19.

“a long tradition of [its] acceptance”,¹⁵⁷ Lord President Hamilton in *Stewart* submitted that it was not necessary to discuss whether this acceptance was well founded, precisely because the case at issue was one of support. After explaining that, according to the law of the tenement, “[f]ailure to support does not of itself, without proof of negligence or nuisance, give rise to liability in reparation (*Thomson v St Cuthbert’s Co-operative Association Ltd*) but the obligation of support includes an obligation not to carry out operations on one’s property which endangers support to other parts of the building”,¹⁵⁸ he concluded that:

In Scotland the law of tenement [. . .] casts on the “servient” proprietor a positive duty in carrying out works which may affect support to avoid endangering the “dominant” property. That duty, which is personal to him, cannot, in my view, be elided by the instruction of an independent contractor.¹⁵⁹

Consequently Lord Hamilton derived, from the duty to support’s positive and personal nature, its non-delegable nature.

9-52. This understanding of the justification of the non-delegable duty in the context of support is in line with the subsequent Supreme Court judgment in the English case of *Woodland v Essex CC*.¹⁶⁰ In this case, Lord Sumption recognised two categories of non-delegable duty: those arising from the dangerous nature of the operations,¹⁶¹ and those arising from a duty imposed by the common law on the defendant

which has three critical characteristics. First, it arises not from the negligent character of the act itself but because of an antecedent relationship between the defendant and the claimant. Second, the duty is a positive or affirmative duty to protect a particular class of persons against a particular class of risks, and not simply a duty to refrain from acting in a way that foreseeably causes injury. Third, the duty is by virtue of that relationship personal to the defendant.¹⁶²

The non-delegable duty that arises in support disputes was located by Lord Sumption within the second category, even though he recognised that it might have been explained before in terms of the first category. In his view, the antecedent relationship between the parties was that of neighbourhood, from which the positive duty derives, duty that is personal to the landowner in his capacity as occupier of the land.¹⁶³ The point is not developed further, however, for the case was not one of support. It can be noted that Lord Sumption’s analysis is largely coincident with Lord Hamilton’s characterisation of the

¹⁵⁷ [2009] CSIH 5, 2009 SC 265 at para 22.

¹⁵⁸ [2009] CSIH 5, 2009 SC 265 at para 25.

¹⁵⁹ [2009] CSIH 5, 2009 SC 265 at para 26.

¹⁶⁰ [2013] UKSC 66, [2014] AC 537.

¹⁶¹ [2013] UKSC 66, [2014] AC 537 at para 6.

¹⁶² [2013] UKSC 66, [2014] AC 537 at para 7.

¹⁶³ [2013] UKSC 66, [2014] AC 537 at para 9.

duty to support in Scots law, except that in the latter the first element is not explicit.

9-53. What can be concluded is that, despite the absence of agreement as to the justification for the imposition of a non-delegable duty in the context of support disputes, there is agreement about the fact of its application. Most of the cases that have applied it are concerned with subjacent support in tenements, but there are reasons to believe that the rule is equally applicable in the other factual settings. The first reason is, rather obviously, the fact that it has been applied in at least two other settings: adjacent support of built-upon land and adjacent support of buildings, as indicated above in the list of cases that adopted the risk-based justification.¹⁶⁴ The second is that, as explained above, when the right to support is found in the context of built-upon land, it operates in the same way as it would in bare land and, further, there is no relevant distinction between the rules applicable to subjacent support and to adjacent support.¹⁶⁵ Accordingly, if the non-delegable duty is applicable in the context of adjacent support of land encumbered with buildings, then it should apply equally to subjacent support of such land, as well as to those cases where there are no buildings erected on the surface of the land. In any event, when discussing the non-delegable duties, the cases speak generally of the right to support, without restricting the application to a particular context.

9-54. If this conclusion is correct, the consequence is that, in practice, there is a uniform strict-liability rule applicable to landowners for withdrawing support of neighbouring property, and a strict-liability rule that is in almost every case based upon the dangerous nature of the operations instructed by the defender. Most of the cases of support in the last 50 years mention expressly that operations were, in fact, executed by independent contractors. In the remaining cases, the operations date back to over a century,¹⁶⁶ or it is simply not specified who executed the works.¹⁶⁷ As a consequence, the suggestion advanced in the previous section of this chapter is not necessary: there is no need for a change of approach, because in practice the approach is already different. This, however, does not amount to a satisfactory solution.

(2) Some objections

9-55. The uniform and mostly risk-based strict liability that arises in practice in support disputes by the operation of non-delegable duties is not a satisfactory solution for three reasons, explained below.

¹⁶⁴ See para 9-50 above.

¹⁶⁵ See paras 9-17 and 9-22 above.

¹⁶⁶ *Rogano Ltd v British Railways Board* 1979 SC 297.

¹⁶⁷ *Doran v Smith* 1971 SLT (Sh Ct) 46; *Macnab v McDevitt* 1971 SLT (Sh Ct) 41.

(a) Contingent nature of risk-based strict liability

9-56. The first and most evident reason is that, even though this risk-based strict-liability rule has been applied in a rather uniform pattern, it might not *necessarily* be so. Its application is contingent on the employment of independent contractors in any given case. But not only is it possible for the landowner to engage himself in the operations that result in the withdrawal of support, instead of hiring a competent contractor (for whatever reason he might find compelling), but it is also possible that the landowner *is* a competent professional himself. In these cases, damages claims are subject to the basic rules of support, without any consideration of the actual level of risk that they might create.

(b) Danger-based justification: uncertain grounds

9-57. A second line of objections is linked to the results of the application of a non-delegable duty, in contrast with the results achieved by the application of the framework proposed in chapters 3 to 7 above. These results vary according to which justification one adopts.

9-58. As explained above, the justification for the imposition of a non-delegable duty based on danger is problematic because the boundaries of the type and the level of danger required are by no means clear.¹⁶⁸ A survey of the cases shows that, when operating on the basis of this line of justification, neither English nor Scottish courts are consistent in requiring that danger must be at the level that cannot be controlled by proper precautions.¹⁶⁹ This stands in contrast with the treatment proposed in chapter 7 for abnormally dangerous conduct: conduct would not be characterised as such unless the risk it created could not be adequately controlled through reasonable precautions.¹⁷⁰ The scope of application of the non-delegable duty rule is – or at least can be – defined more “generously”. The result is that certain types of conduct which, if performed personally by a landowner, would fall within the scope of chapters 3 to 5 (the fault-based liability rules applicable to nuisance) and not of chapters 6 and 7 (abnormally dangerous conduct), could, if performed by a contractor, still fall within the scope of application of the non-delegable duty rule and, consequently, be subject to strict liability.

9-59. Now, this is not problematic conceptually, for the scope of application of these rules does not need to coincide. There are, indeed, good reasons to distinguish between both situations, apart from the level of risk. As explained in chapter 4, the distribution of risks performed by these rules is different:

¹⁶⁸ See para 9-49 above.

¹⁶⁹ In Scotland, contrast e.g. *Morris Amusements Ltd v Glasgow City Council* [2009] CSOH 84, 2009 SLT 697 at para 44 with the more recent *Esso Petroleum Co Ltd v Scottish Ministers* [2016] CSOH 15, 2016 SCLR 539 at para 23.

¹⁷⁰ See paras 7-55 to 7-64 above.

the basic rules of liability for withdrawing support distribute the risk of harm between pursuer and defender, whereas the non-delegable duty rule distributes risk between defender and his independent contractor. The defender that is made strictly liable by virtue of a non-delegable duty might be able to recover from his contractor.¹⁷¹ The issue would be conceptually problematic only if, by employing a contractor, the defender could escape the strict liability rule that should apply to his abnormally dangerous conduct, but the situation is exactly the opposite: he only expands the scope of his possible strict liability by employing a contractor. In other words, any conduct that would be considered abnormally dangerous would also be enough to justify the application of a non-delegable duty, and the point would only become problematic if the position as between the two types of rule were to be reversed.

9-60. Yet the problem here is not about the scope of application of the rule. The problem is about the stability of the rule, both in its continued existence and its justification. For even when most of the sheriff court and Outer House decisions have accepted the application of a non-delegable duty when activities are inherently or necessarily dangerous,¹⁷² the Inner House simply acknowledged this as a fact, without issuing an opinion on whether it was sufficiently justified in Scots law.¹⁷³ The solution provided by non-delegable duties is effective insofar as courts continue to recognise the existence of the rule and its risk-based justification. Yet the cases of *Stewart v Malik*¹⁷⁴ and *Woodland v Essex CC*¹⁷⁵ seem to show a trend in higher courts that departs from this line of justification in the context of support, to favour the alternative “duty-based” justification. And this justification can produce results that are inconsistent with the ones achieved by the application of the framework outlined in chapters 3 to 7.

(c) Duty-based justification: inconsistent with abnormally dangerous conduct

9-61. The second line of justification, which is that adopted by the Inner House in *Stewart v Malik*¹⁷⁶ and by the Supreme Court in the English case of *Woodland v Essex CC*,¹⁷⁷ relies on the alleged positive nature of the duty to support. This might make sense in England, where relatively recent authority has concluded that the duty to support is, indeed, generally positive, even when the supported property is land.¹⁷⁸ In Scotland, however, the duty is said to comprise,

¹⁷¹ See paras 6-85 to 6-87 above.

¹⁷² A notable exception can be found in *Southesk Trust Co Ltd v Angus Council* [2006] CSOH 6.

¹⁷³ *Stewart v Malik* [2009] CSIH 5, 2009 SC 265 at para 22.

¹⁷⁴ [2009] CSIH 5, 2009 SC 265.

¹⁷⁵ [2013] UKSC 66, [2014] AC 537.

¹⁷⁶ [2009] CSIH 5, 2009 SC 265 at para 26.

¹⁷⁷ [2013] UKSC 66, [2014] AC 537.

¹⁷⁸ *Stevens* (n 148) 351, referring to *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836.

in most contexts, merely a negative obligation.¹⁷⁹ There is a positive obligation to support only in the contexts of tenements and of common gables built on the boundary line, so the imposition of the non-delegable duty would be justified only with regard to these situations. But even in the contexts where there actually is a positive obligation, the non-delegable duty would not apply when what is breached is the negative obligation, which would be the case every time landowners employ a contractor to do anything but repairs aimed at preserving support (which was, paradoxically, the case in *Stewart v Malik*). Yet the court, in *Stewart*, considered that the non-delegable duty rule was equally applicable, from which we must conclude that it is the *existence* of the positive obligation and not its breach that justifies the application of the rule or, alternatively, that breaching the negative obligation entails necessarily a breach of the positive obligation as well, i.e. that interfering with support entails a failure to provide it.

9-62. The consequence is evident: the nature of the duty has nothing to do with the level or kind of danger that the conduct involves. It is difficult to see how this justification could produce results that are consistent with the approach advanced in this book.

9-63. In conclusion, even though the mechanism of non-delegable duties seems to afford a practical alternative to the suggestion advanced in the previous section,¹⁸⁰ this solution is not satisfactory. This is because it is contingent on the employment of independent contractors, and because, whatever the justification adopted for it, the results are problematic: on the risk-based justification, due to uncertainty; on the duty-based justification, due to inconsistency with the abovementioned suggestion.

D. THE GENERAL FRAMEWORK APPLIED TO WITHDRAWAL OF SUPPORT

(I) **Withdrawal of support and nuisance**

9-64. The law of nuisance has been considered applicable to withdrawal of support consistently since the 1970s, either totally or partially.¹⁸¹ Over time, however, this view has had a mixed reception, because of the consequences it entails for the basis of liability.

¹⁷⁹ See summary table in para 9-07 above.

¹⁸⁰ See paras 9-43 and 9-44 above.

¹⁸¹ Contrast e.g. *Macnab v McDevitt* 1971 SLT (Sh Ct) 41, which treats as nuisance a case of withdrawal of support in a tenement, with *Lord Advocate v Reo Stakis Organisation Ltd* 1981 SC 104, which sees the categories as overlapping.

(a) *Withdrawal of support as a nuisance before RHM Bakeries*

9-65. In *Lord Advocate v The Reo Stakis Organisation*,¹⁸² a case of withdrawal of adjacent support of land encumbered with buildings, the Inner House recognised that nuisance and withdrawal of support were overlapping categories. In the decision, Lord President Emslie said that:

[i]t is no doubt the case that in some instances an occupier whose property suffers such damage may find himself with a remedy both under the law of nuisance and upon the basis of infringement of an acquired right of support, but it is by no means unusual to find that more than one right of action is available upon the same set of facts. The comment [that the law of support would be superfluous], in short, does not impress us for there are many sets of circumstances in which the law of support has an important role to play where there is no possibility of an action founded on nuisance. The law of support in relation to buildings is part of the law of heritable rights. The law of nuisance on the other hand is part of the law of neighbourhood. A right of support once acquired for a building may be vindicated by the heritable proprietor thereof for damage which is in no way attributable to any act on the part of the proprietor for the time being of the subjects obliged to afford that support. A right of support, too, can provide a remedy in appropriate circumstances where the injured proprietor-occupier cannot establish that the damage suffered is *plus quam tolerabile*. There are many other examples which we see no advantage in rehearsing here, and these examples include instances in which a remedy under the law of nuisance may lie where either no right of support exists or no infringement of such a right is in issue.¹⁸³

There are several aspects of this passage that are questionable. The distinction between “the law of heritable rights” and “the law of neighbourhood” is by no means clear, and it is also not clear what concrete consequences should be derived from it. Further, the distinction between withdrawal of support and nuisance based upon the person from whom damages can be claimed relies on the exclusion of liability of occupiers or tenants in the case of support, an issue that is at least debatable in the case of support of land,¹⁸⁴ and certainly inaccurate in the context of tenements since the enactment of the Tenements (Scotland) Act 2004.¹⁸⁵

9-66. At the time, however, this passage generated resistance for different reasons. When *Reo Stakis* was decided, the controversy about the basis of liability in nuisance was not yet settled,¹⁸⁶ and in the case the court considered the basis to be strict liability. Consequently, whether one treated the case as

¹⁸² 1981 SC 104.

¹⁸³ 1981 SC 104 at 110.

¹⁸⁴ Compare Gordon & Wortley, *Land Law* vol I, para 5-116 with Reid, *Property* para 262.

¹⁸⁵ Tenements (Scotland) Act 2004 s 9(1) imposes the restriction of withdrawing support upon the owner and the occupier.

¹⁸⁶ The settlement would come four years later: see para 9-71 below.

one of support or as one of nuisance, the liability rule would be the same: one of strict liability. Yet that result, in Gordon's view, would only be acceptable if there was, in fact, a right to support in the first place, which was not necessarily the case when buildings had been erected on the land. By allowing a nuisance claim when no claim was available under the law of support, the pursuer could circumvent the restrictions of the law of support and obtain damages without proof of fault,¹⁸⁷ in circumstances where the logical result is that he would need to turn to the law of negligence. On the other hand, if Reid's view about support of land encumbered by buildings were adopted, such problem would not arise. In his view, the right to support exists in this context naturally (not by acquisition)¹⁸⁸ and, therefore its withdrawal would justify the imposition of strict liability. Both support and nuisance would provide the same answer. But Gordon proposed a different solution: he suggested that the assessment of the tolerability of the interference had to be made by reference to the right held. In this way, if the pursuer did not have the right to support, the interference could hardly be characterised as *plus quam tolerabile*.¹⁸⁹ The solution, however, came in a different form, as will be explained below.

9-67. A further issue noted at the time, in this case by Reid, was the consequence of viewing withdrawal of support as a nuisance in the context of tenements. According to the understanding of the common interest doctrine in the case of *Thomson*,¹⁹⁰ liability for withdrawing subjacent support of upper flats was fault-based. Nuisance rules, however, would give the pursuer the better alternative of strict liability. Reid did not consider this as a negative result, since in his opinion it was questionable whether *Thomson* was correctly decided in the first place.¹⁹¹ But this result would not last long.

(b) Withdrawal of support as a nuisance after RHM Bakeries

9-68. Four years after the decision in the *Reo Stakis* case, the dispute about the basis of liability in nuisance was finally settled by the House of Lords in *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council*: damages claims require averment and proof of fault.¹⁹² This decision provided a solution for the problem identified by Gordon: now, liability in nuisance having been settled as fault-based, the inconsistency does not arise, since even if withdrawal of support is considered to be also a nuisance, nuisance rules would not provide for

¹⁸⁷ W M Gordon, "The Boundaries of Nuisance. Issues Raised by the *Reo Stakis* case" (1981) 26 JLSS 333 at 334–335.

¹⁸⁸ See para 9-20 above.

¹⁸⁹ Gordon (n 187) 335.

¹⁹⁰ *Thomson v St Cuthbert's Cooperative Association Ltd* 1958 SC 380.

¹⁹¹ Reid (n 75) 435–436.

¹⁹² *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17 at 42 per Lord Fraser of Tullybelton.

strict liability where support rules would not do so. In the context of support of buildings, in turn, the decision aligned the nuisance rule with the support rule. Therefore, if before *RHM Bakeries* there were two available liability rules for withdrawal of support of buildings (the fault-based liability rule from support and the strict liability rule from nuisance), after *RHM Bakeries* this possibility disappeared, although it persisted still in the other contexts of support where nuisance would provide a fault-based liability rule and support would provide a strict-liability rule. As a consequence, in the context of support of buildings, subjecting disputes to nuisance rules no longer changes anything with regard to the basis of liability, for both sets of rules – basic rules and nuisance rules – provide the same answer. But a change occurs in the other contexts, namely support of land, whether in its natural state or with structures built upon the surface. Here, dismissing the basic rules in favour of an exclusive application of the nuisance rules would entail a shift from strict liability to fault-based liability.

9-69. There is, in these latter contexts, a further and important consequence of treating withdrawal of support as a nuisance: it can extend the content of the right to support from a negative obligation to a positive obligation. There is a line of English and Australian authority,¹⁹³ accepted in Scotland,¹⁹⁴ supporting the contention that a landowner is liable for failing to eliminate a nuisance that has been created in his land by nature or third parties and of which he has acquired knowledge.¹⁹⁵ This would expand the content of the right to include a positive obligation in all cases where it was not already recognised by the basic rules: a landowner would be liable not only if, in actively engaging in activities on his land, he withdraws support of his neighbour's land and causes damage, but also if support is withdrawn due to an event or condition not created by him but which he knew about and failed to correct.

(2) Withdrawal of support as the result of abnormally dangerous conduct

9-70. The proposal here outlined does not entail ruling out strict liability completely when support is withdrawn. Strict liability should apply when the conditions discussed in chapter 7 are met by the conduct that has withdrawal of support as a consequence, namely, when it is abnormally dangerous conduct in the sense there described.

¹⁹³ *Sedleigh-Denfield v O'Callaghan* [1940] AC 880; *Goldman v Hargrave* [1967] 1 AC 645; *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485.

¹⁹⁴ Especially *Sedleigh-Denfield v O'Callaghan* [1940] AC 880. See *Watt v Jamieson* 1954 SC 56; *Plean Precast Ltd v National Coal Board* 1985 SC 77; *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17; *Maloco v Littlewoods Organisation Ltd* 1987 SC (HL) 37; *Kennedy v Glenbelle Ltd* 1996 SC 95; and *Canmore Housing Association Ltd v Bairnsfather (t/a B R Autos)* 2004 SLT 673, among others.

¹⁹⁵ See paras 5-26 to 5-28 above.

9-71. Many of the mining cases discussed in this chapter that were subjected to strict liability by virtue of the basic rules would have been solved in the same way under this approach: given that the methods employed were considered to be “proper” modes of working even when they involved the removal of all the minerals,¹⁹⁶ it is arguable that those cases fit the description of abnormally dangerous conduct, for the risk of grave physical damage – i.e. subsidence of the land, destruction of houses or personal injury – is not adequately controlled by proper precautions. The truly significant shift would take place in the currently more relevant context of support of buildings, for it involves the recognition of a strict-liability rule for cases where currently only fault-based liability is believed to be available. It is important to note that, according to the argument presented in chapter 7, abnormally dangerous conduct does indeed attract strict liability, so all that would be needed for the shift to take place is an acknowledgment of conduct resulting in withdrawal of support as abnormally dangerous when the relevant conditions are met. This stands in contrast with the argument presented above in connection with nuisance rules, which is a normative argument aimed at the dismissal of the basic liability rules for withdrawal of support of land.

9-72. It must be noted that the definition of abnormally dangerous conduct does not distinguish between acts and omissions. In this sense, just like the nuisance rules, the breach of both the positive and the negative obligations of support can trigger liability.

E. CONCLUSIONS

9-73. As discussed above, the current basic liability rules applicable to withdrawal of support distinguish between the different types of property supported and their relative physical position in order to determine the basis of liability. It is arguable that this distinction is not adequately justified: the differing legal nature of the right to support in the different contexts does not provide a sound foundation for the distinction and the policy considerations that drove the development of the strict-liability rule are today no longer relevant. Consequently, the better approach would be to deal with damages claims for withdrawal of support in the same way as any other damages claims in the context of neighbourhood, reserving a strict-liability rule for withdrawal of support that is the consequence of abnormally dangerous conduct.

9-74. In practice, a similar result is achieved through the application of non-delegable duties of care, which are pervasive in the support context. This solution, however, is unsatisfactory, for not only is it contingent on the involvement of an independent contractor, but also, depending on the justification adopted for such

¹⁹⁶ See para 9-14 above.

duty, might be unsustainable over time or produce results that are inconsistent with the treatment here advocated.

9-75. The result of the approach proposed here is that disputes arising from withdrawal of support of land would, by application of the fault-based liability nuisance rule, no longer be subject to a strict-liability rule unless the conduct causing such withdrawal could be characterised as abnormally dangerous. Moreover, withdrawal of support of (sections of) buildings could be subject to a strict-liability rule provided that the same characterisation could be made, contrary to the fault-based liability rule that applies today regardless of the level of risk. This approach would, therefore, introduce some changes with regard to the basis of liability.

10 Conclusions

10-01. This book has presented an argument as to the basis of liability for damages claims in the context of neighbour law. It contends that such claims are subject to two rules: a general fault-based liability rule applicable to nuisance, and a special strict-liability rule for abnormally dangerous conduct. Chapter 2 explains what is meant in this book by fault-based and strict liability. Both rules, however, are problematic and require clarification with regard to their content and scope.

10-02. The first of these rules, discussed in chapters 3, 4 and 5, derives from the leading cases of *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council*¹ and *Kennedy v Glenbelle Ltd*.² As explained in chapter 3, while the former established a general requirement of fault, the latter adopted a so-called fault *continuum*: a catalogue of several available forms of fault that are connected to one another by an underlying spectrum of likelihood of harm, namely malice, intention, recklessness, negligence, and conduct giving rise to a special risk of abnormal damage. This formulation, imported from the American Law Institute's *Restatement Second of Torts*, features a number of issues requiring clarification and adjustment.

10-03. It was also explained how the very notion of a fault *continuum* is not particularly helpful in explaining the links between the different forms of fault, and is even misleading. On the one hand, some of these forms are independent of any notion of likelihood of harm. On the other hand, those that actually depend on this notion are not exclusively dependent on it, nor are they all conclusively attached to a particular level of likelihood.

10-04. Chapter 4 focused on the forms of fault that lead to intentional nuisance. The first is malice in the sense of improper motives. The chapter discussed the relationship between *aemulatio vicini* and nuisance; and, more importantly for the purposes of this book, it explained the practical shortcomings of malice, which limit its role as a relevant form of fault in the context of nuisance.

10-05. The second form of fault is intention. It was observed that intention in its most obvious sense, that is, acting with the purpose of inflicting harm, seems to

¹ *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17.

² *Kennedy v Glenbelle Ltd* 1996 SC 95.

be omitted by the model presented by *Kennedy*, but it is only logical to consider it as an admitted form of fault. Possibly the most salient problem with this model is that the evolution of the notion of intention in the form of knowledge (including constructive knowledge) of certainty of harm, as seen in subsequent case law and legal literature, points to this form of fault as disguising a form of strict – or, in the best case, stricter-than-normal – liability. Insofar as the “mental state” component for this form of fault is one of objectivised knowledge, liability might therefore be based solely upon a standard of foreseeability of harm. This plays against the aim of *RHM Bakeries*. Consequently, if full adherence to the fault principle is to be achieved, it seems that only actual knowledge should be admitted in order to demonstrate this form of fault.

10-06. Chapter 5 discussed the forms of fault that lead to unintentional nuisance, namely negligence and recklessness. Contrary to claims in the literature, negligence is less problematic than it seems: as a form of fault – as opposed to the “delict of negligence” – it can be accommodated within the context of nuisance. There is no incompatibility between the reasonable-care test from negligence and the *plus quam tolerabile* test from nuisance. Moreover, addressing negligent nuisance under nuisance rules does not entail circumventing the limitations that are traditionally associated with the law of negligence.

10-07. Recklessness, in turn, seems to be affected by the same shortcomings as intention, given its development after *Kennedy*. The chapter analysed how recklessness seems to be understood currently as a pure state of knowledge of (any) likelihood of harm, disregarding the element of indifference that has been traditionally required and, indeed, considered by *Kennedy* itself as a component of this form of fault. This understanding, coupled with the possibility of establishing knowledge constructively, leads to a disguised form of strict liability that, in fact, could render negligence entirely irrelevant as a form of fault.

10-08. The second liability rule, discussed in chapters 6 and 7, is that applicable to what in *Kennedy v Glenbelle Ltd* is called “conduct causing a special risk of abnormal damage”. Chapter 6 developed a detailed analysis of the category’s sources and its subsequent application and discussion, showing that both the nature of the liability rule and its scope of application (i.e. the definition of the boundaries of the category) are unclear. This calls for a more rational formulation of the rule that allows the law to move forward.

10-09. Following on this conclusion, chapter 7 engaged in an attempt to provide just such a formulation. As to the first aspect (the nature of the liability rule), it was argued that, despite its orthodox characterisation as a form or implication of fault, this type of conduct attracts strict liability. Fault-based accounts, relying on the notions of heightened standard of care, a presumption of fault, *res ipsa loquitur*, and even recklessness, proved to be insufficient to provide

a satisfactory explanation of the acknowledged strict-liability-like effects of this rule. Further, this orthodox view of the rule's nature has obscured the fundamental need for a clear definition of the boundaries of this type of conduct, starting from the very terminology. Based on the available authority and on general principles of delictual liability, it was argued that this type of conduct is better labelled simply as “abnormally dangerous”, defined as conduct that creates a high risk of grave physical damage which remains at such a level even if reasonable precautions are taken, provided that the conduct is not one of common usage and that the defender has actual or constructive knowledge of the level of risk his conduct entails.

10-10. The two-rule model outlined in chapters 3 to 7 serves also to explain the operation of liability imposed in disputes arising from uses of water naturally running or present on land. These are discussed in chapter 8. On the one hand, and despite the fact that disputes over uses of water have been subject to different categorisations, the current trend is clear: they are generally treated as nuisances, with the exception of disputes arising from drainage operations. Moreover, the different categories of dispute have reached the same solution with regard to the basis of liability: damages are based on the averment and proof of fault. What remains open is whether, in the case of harm caused by drainage operations, the pursuer can benefit from the advantages of the fault model that has so far been applied only in the context of nuisance.

10-11. On the other hand, it appears that the traditional view of (strict) liability for interfering with the natural course of a stream, applied most notably in *Caledonian Rly Co v Greenock Corporation*,³ is correct: it does indeed attract strict liability, and this is so precisely because it is an application of the second, special rule of liability for abnormally dangerous conduct, as developed in chapter 7. This conclusion entails not only challenging the traditional explanation of this strict-liability rule as grounded in the existence of riparian rights, but also partially challenging more recent accounts that seek to demonstrate that liability in these cases, and in the particular decision in *Caledonian Rly Co*, is based upon fault.

10-12. There is, however, a second group of specific disputes that does not fit the two-rule model presented in this book: those arising from withdrawal of support, discussed in chapter 9. Fault-based and strict liability rules in this context depend on the type of property being supported and its physical position in relation to the supporting property. The discussion showed that the distinction based on these elements is not adequately justified in the modern law and that a better and more logical approach would be to resolve support disputes by following the model here proposed, according to the level and type of risk created by the defender's conduct. In practice, a result consistent with

³ *Caledonian Railway Co v Greenock Corporation* 1917 SC (HL) 56.

the proposed approach has been achieved through the application of the notion of non-delegable duties of care on the part of landowners when the interfering operations are performed by an independent contractor. This solution, however, is not adequate. First, it is contingent on the operations actually being performed by such a contractor, which will not necessarily always be the case. Secondly, the operation of the non-delegable duty is problematic for these purposes on whatever line of justification one adopts: on a risk-based justification, the boundaries and even the continued existence of the duty are uncertain; on a duty-based justification, it can produce results that are inconsistent with the proposed approach.

10-13. Adopting the approach suggested here would mean a shift in the basis of liability for the different types of support disputes. Withdrawal of subjacent or adjacent support of land, with or without structures built on the surface, would no longer be subject to strict liability across the board: it would depend on whether the operations were characterised as abnormally dangerous conduct. Likewise, withdrawal of subjacent or adjacent support of (sections of) buildings would not necessarily be subject to the current fault-based liability rule, a rule that takes no account of the nature and level of risk these operations can create: the strict-liability rule for abnormally dangerous conduct should be equally applicable, provided that the relevant conditions are met.

10-14. In sum, the two-rule model of liability proposed in this book represents a unified framework that cuts across the subdivisions of neighbour law, adopting a consistent approach that focuses on distinctions that are sufficiently justified.

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