

Article: Automobile Contamination Incidents

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Part 2: The Investigation of an Automobile Contamination Incident

Cars parked outside, whatever their colour or style, get dirty!

Cars parked in large car parks or docks awaiting collection and distribution prior to sale probably get dirtier than most.

The law provides no remedy for dirty cars unless they have been damaged by contamination and it is possible to find the source of the contaminant and a defendant who has responsibility either for that contaminant or for protecting the cars from being damaged.

Under English law the remedies are as follows:-

Contractual Liability

The contract between the car park operators and the vehicle owners may include terms providing that the cars should be stored either with a protective covering or under a roof or within a building. If in breach of those terms the vehicles are stored outside or without protection liability would lie with the operators for breach of contract and damages would cover the costs of repair or replacement of the contaminated vehicles together with additional costs of delay in sale and loss of profit in certain situations. The contract itself may determine the level of damages that would be paid in event of damage.

However contracts often will not include such easily determined obligations and the source of the damage may be far less easily identified. Liability may therefore arise under one of the heads of tort. We have considered the question of the collection of evidence in Part One.

Non Contractual Liability

Assuming that there is no contractual remedy available and the damage has been caused by some third party then, under English law, it is necessary to consider the law of Torts and in this

respect there are four possibilities in pursuing a third party who has through his actions or omissions caused damage to the cars. These four possibilities are:-

1. The rule in Rylands v Fletcher
2. Negligence
3. Private Nuisance
4. Public Nuisance

These four are not mutually exclusive. There is an overlap between them and any particular conduct or omission could fall within one or more of the above Torts. Later in this paper we consider the case arising from the Buncefield explosion in 2005 which illustrates how these four can overlap in practice.

Strict Liability Under the Rule in Rylands v Fletcher

This is considered first because it involves strict liability.

Where a defendant stores potentially damaging material on his land which escapes and causes damage then under the rule in the 1868 case of Rylands v Fletcher a plaintiff does not need to prove more than the chain of causation i.e. the origin of the contamination, and the defendant is strictly liable for the damage. This House of Lords case is almost treated in English law like a Statute.

The main judgement referred to is that delivered by Blackburn J., where the rule was put as follows:-

“We think that the true rule of law is, that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so is prima facie answerable for all the damage which is the natural consequence of its escape.”

If, for example, there is a builder’s merchant situated beside the car park who stockpiles cement outside and allows it to be blown about on a windy and damp day. Dust then falls on the vehicles and sets causing damage to the bodywork. The builder’s merchant will be strictly liable under the rule.

Requirements of the Rule in Rylands v Fletcher

1. The defendant must bring the thing on his land; he must do this for his own purposes. The defendant need not own the land to which he has brought the thing so a temporary occupier of land such as a lessee or licensee is equally within the scope of the rule. The requirement that the things must be brought on the land for the purposes of the defendant does not necessarily mean that it must benefit the defendant. Where the thing is naturally present on the land of the defendant he cannot be liable for its escape under this rule. (He might separately be liable if negligent).
2. The thing must be likely to do mischief if it escapes. The rule does not require that the thing should be both likely to escape, and likely to do mischief on escaping. The “thing” need not be a dangerous thing in its self. Even a harmless object when escaping from a person’s land may cause damage. The rule has been applied to a considerable class of objects including gas, electricity, explosives, the poisonous leaves of a tree, a flag pole, a revolving chair at a fair ground, and most importantly, in relation to in what we are considering, acid smuts from a factory. The Courts have established that the thing brought on the land need not be the thing which actually escapes. Thus a defendant who kept a motorcar in his garage with petrol in the tank was held liable for a fire which spread from the tank.

3. The defendant’s use of the land must be non-natural. It must be some special use bringing from it increased danger to others and not merely the ordinary use of the land.
4. The thing must escape.

Defences to Rylands v Fletcher

1. Act of God.
Here “Act of God” has been defined as an operation of nature “which no human foresight can provide against and of which human prudence is not bound to recognise the possibility”. Not every event which is not reasonably foreseeable may constitute an Act of God since the requirement is that the event must be one against which no human foresight can provide.
2. Act of a stranger.
If the escape is caused by an unforeseeable act of a stranger and not by such persons as the occupiers, servants, or independent contractor there with his permission, then there is a defence to Rylands v Fletcher. Thus where the plaintiff’s premises were flooded because an unidentified person had turned on a water tap in the person’s premises there was no liability under this rule. However, where the act of the stranger, whether it is deliberate or negligent, is foreseeable, then there is liability under the rule.
3. Consent.
Consent may be a defence if it is full and informed however, in the judgement following the explosion at the Buncefield storage depot considered below (Colour Quest Ltd v Total Downstream UK Plc and Others) it was made clear that consent is no defence to the Rylands v Fletcher rule where there has been negligence.

Overlap between Rylands v Fletcher and Other Torts

In many cases Rylands v Fletcher will overlap with other torts especially nuisance and negligence (considered below). The differences between Rylands v Fletcher and negligence are fairly obvious, but it is quite common for both to be committed in a given case. Rylands v Fletcher however only covers situations where there has

been an escape from one piece of land to another. It will not cover a case where the damage arises from within the same piece of land.

The important differences between Rylands v Fletcher and nuisance are:-

1. It is unlikely that Rylands v Fletcher extends to the escape of intangibles such as noise.
2. In Rylands v Fletcher the defendant is liable if he has brought the thing on the land in the course of non-natural use. In nuisance the requirement is that the defendant should have used the land unreasonably.
3. In Rylands v Fletcher there is always liability for an escape caused by an independent contractor. In nuisance liability is not usually imposed for the acts of an independent contractor.
4. In Rylands v Fletcher liability is strict and there is liability even for an unforeseeable escape. In nuisance an unforeseeable escape is not actionable.

2. Negligence

Liability for negligence is not strict liability but has to be established on the basis that a duty of care owed to an individual or class of people has been breached.

Where the contamination is caused by material which has come from a source in the general vicinity of the vehicles, liability will be based on a chain of causation from the producer of the material to the damage on the vehicle. The law of negligence holds that there must be sufficient proximity between the one said to be causing the damage and the damage itself so that a duty of care should be recognised. However, negligence can arise in many more situations than in Rylands v Fletcher which, as stated above, is limited to the escape of some unnatural element from one piece of land to another.

If buildings on the same premises as the car park are being spray painted on a windy day, or for example, a vessel at sea or in a dock or a river was being painted and paint escaped in the wind and damaged the cars then in none of these situations has an escape happened from "land" belonging to another so the rule in Rylands v Fletcher could not be invoked. However, negligence would be a remedy available assuming that there was a breach

of duty and sufficient proximity between the persons painting the vessel or the spray painter of the building and the cars. The cause of paint spots on the vehicles may easily be traced to the painter and his employers and a court may hold that they should have had in mind that the paint might spread and have taken appropriate precautions. The painter or his employer may be considered to have breached his duty to take care that no damage was caused by his acts. If liability can be shown damages would cover the cost of repair or replacement when repair would be impossible or not viable. Additional costs that the painters might reasonably be expected to have anticipated may be awarded, but not those for pure economic loss- the loss of profit on a future sale for example.

3. Private Nuisance

Where there is an isolated escape of contaminant material which causes damage to vehicles on the claimant's land and that escape is due to unreasonable or negligent use of the land by the defendant, such as stockpiling contaminant material without taking proper precautions to prevent escape, and it can be reasonably foreseen that if an escape took place damage would occur, then a claim under the tort of private nuisance may be possible. Liability would lead to a claim to cover either the repair or replacement of the vehicles.

Such facts may also give rise to a claim of strict liability under Rylands v Fletcher. Often both nuisance and Rylands v Fletcher are available on the same set of facts. The differences between the two have already been considered above. Negligence is wider than nuisance in the sense that the interests which it protects are not limited to the use and enjoyment of land. In nuisance, as in negligence, the plaintiff must establish that the defendant was under a duty to take care.

Interference with the enjoyment by the plaintiff of his land is not, as such, actionable. The plaintiff must show that the interference is unreasonable. The Court must consider both the conduct of the defendant in creating the interference and the effect that such interference has upon the victim.

The Buncefield case found that where there were a number of claimants who could successfully claim under private nuisance then there would be a

possible claim under public nuisance even though the right to the enjoyment of land by each individual claimant was of private and not public land. So if several separate claimants owned damaged vehicles on the same car storage area and claimed successfully for similar damage against the same defendant then it may be possible for a claim under public nuisance and were that the case it would give the opportunity for higher overall settlements as where there is a public as opposed to a private nuisance pure economic loss can be claimed.

Claims under private and public nuisance are not mutually exclusive- and again the same facts may also give rise to claims under negligence and *Rylands v Fletcher*.

4. Public Nuisance

A public nuisance has been described as:-

“Any nuisance ‘which invariably affects the reasonable comfort and convenience and life of a class of Her Majesty’s subjects. The sphere of the nuisance may be described generally as the ‘neighbourhood’; but the question whether the local community within that sphere comprises a sufficient number of persons to constitute a class of a public is a question of fact in each case”.

Roma, L.J in Attorney General v P.Y.A. Quarries 1957

This definition makes it clear that no absolute line can be drawn between public and private nuisance so that over-lapping between the two may exist. This was considered in the Buncefield case and there were sufficient claimants in that case for it to be considered as a public nuisance.

Public nuisance is a common law crime and for this reason special damages can be claimed and these can take the form of personal injury, damage to property or pure economic loss e.g. loss of business profits.

We now consider the Buncefield explosion case.

Colour Quest Ltd and Others v Total Downstream UK plc, Total UK Ltd and Hertfordshire Oil Storage Ltd 22.4.09

In the Commercial Court before Mr Justice David Steel.

On 11 December 2005 at 6 am the Oil Depot at Buncefield in Hertfordshire UK exploded. The noise of the explosion could be heard 200 kilometres away, and even as far as the Netherlands. It measured 6.4 on the Richter scale. The explosion was massive and the resulting fires in the oil reserves continued to burn for several days.

The surrounding houses and buildings were destroyed and access to local roads was obstructed for some weeks causing much distress and loss to local businesses and people. About 40 people were injured. Claims that arose were said to amount to over £750 million.

Hertfordshire Oil Storage Company operated the Oil Depot nominally on behalf of a joint venture company owned by Total and Chevron, Total having 60% of the company and day to day management responsibility.

Claimants included:-

1. Colour Quest Ltd and others who were mainly a group of companies, many situated on a local industrial site;
2. Douglas Jessop and others who were mainly individuals from the local area;
3. WLPS and UKOP, the legal owners of a neighbouring site at Buncefield;
4. BP, the legal owner of another site at Buncefield;
5. Shell who had an interest in the oil stored at the site;
6. BRE/Hemel 1 Ltd who owned a large warehouse on the site.

The main defendants were Total and HSOL (Chevron and others were Joined as third parties but cleared of liability).

The explosion occurred because of a chain of negligent events.

Two supervisors employed by HSOL and Total did not monitor levels in a storage tank effectively and did not see that a gauge had stuck at about 0300 on 11 December. This meant that the level on the tank was recorded as unchanged throughout the night despite the fact that the tank continued to be filled. As the tank filled, alarms should have rung as different levels were reached but the sensors were attached to the stuck gauge and so the alarms did not sound. A final alarm was not activated and trip valves on incoming pipes were not engaged because the mechanism had not been padlocked back into place after a recent inspection.

By about 0520 the tank began to overflow and a low mist of rising oil and water vapour began to rise around the tank. At 0550 a tanker driver reported to the Supervisors that there was a strong smell of petrol and at 0559 a Supervisor told the control room that one of the tanks appeared to have split.

The Control Room Supervisor immediately tried to divert the delivery of oil from a tanker to the tank but due to a misunderstanding shut off the wrong pipeline and petrol continued to be pumped out very soon after the explosion happened. It is recorded as Britain's biggest peacetime explosion.

In the summer of 2008 Total and HOSL made admissions that there had been negligence by a member of their staff and this allowed for summary judgement to be given for the claimants.

The subsequent trial was concerned with the following:-

Whether the damage that has occurred was reasonably foreseeable;

1. Whether the defendants were strictly liable under the rule in Rylands and Fletcher;
2. Whether the defendants were liable in either/or Private/Public Nuisance;
3. Whether Total or HSOL or the third parties were vicariously liable for the negligence of their employee;
4. Whether Total was entitled to an indemnity from Chevron in respect of any liability.

The findings were as follows:-

1. On the third day of the defendants conceded that the resulting losses were reasonably foreseeable as being the result of the explosion.

The majority of claimants were therefore able to recover their losses as a result though this did not allow for claims for pure economic loss.

2. The defendants were liable under the rule in Rylands and Fletcher and the defence of consent was not available.
3. The claimants had a claim in Private nuisance as well as under Rylands and Fletcher. An isolated escape where there was both unreasonable or negligent use of land and foreseeability of an escape could give rise to liability in Private Nuisance.
4. The claimants had a claim in Public Nuisance. The necessary feature was one of common injury to the public. Where there was illegal interference of several individual members of the public's enjoyment of land at the same time this would constitute a Public Nuisance.
5. The claimants' claim in Public Nuisance included, subject to proof of special damage, claims in respect of loss of business as a result of interference with customer access. So pure economic loss could be awarded.
6. The claimants' claim in Public Nuisance subject to proof of special damage, was not limited to those with proprietary interest in land in proximity to the explosion.

Total was not entitled to an indemnity from Chevron. An analysis of the company documentation and of the real evidence showed that Total was responsible for the on-site, daily management of the Depot. Total was found to be 100% liable for the losses.

Conclusions:

To finish Part 2 where we began in Part 1 of the paper, as the majority of incidents will involve tortious rather than contractual liability, it is essential that the proper investigations are instituted as soon as the damage is discovered in order that the source of the contamination is discovered and the liability of the relevant third party established in the most appropriate and advantageous way.

In England, unlike many European Countries the investigations have to be made entirely by the injured party – the Court will not appoint surveyors or any other officers to make investigations unless it appears that a criminal act has been committed.

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