

September Term, 2021
No. 16

**IN THE
COURT OF APPEALS OF MARYLAND**

DANIEL BECKWITT,
Appellant/Cross-Appellee,

v.

STATE OF MARYLAND,
Appellee/Cross-Appellant.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF SPECIAL APPEALS OF MARYLAND**

OPENING BRIEF OF APPELLANT/CROSS-APPELLEE

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APPENDIX

Pertinent provisions are provided in the Appendix.

STATEMENT OF THE CASE

On May 31, 2018, Appellant/Cross-Appellee, Daniel Beckwitt, hereinafter “Beckwitt”, was indicted by the Grand Jury for Montgomery County in a two-count indictment and charged with Count One: Second-Degree Murder, Count Two: Involuntary Manslaughter.

Following an eight-day jury trial, the jury was instructed on depraved-heart murder, gross negligence manslaughter, and legal duty manslaughter. On April 24, 2019, the jury returned a general verdict of guilty as to second degree murder and involuntary manslaughter.

On June 17, 2019, Beckwitt was sentenced to 21 years’ imprisonment on the murder count, all suspended but nine years, and the manslaughter count merged. Beckwitt appealed to the Court of Special Appeals.

On January 29, 2021, the Court of Special Appeals issued a reported opinion in *Beckwitt v. State*, No. 794, Sept. Term, 2019, and vacated Beckwitt’s second degree murder conviction finding that there was insufficient evidence as to the requisite *mens rea*. The court affirmed Beckwitt’s involuntary manslaughter conviction on the grounds of gross negligence involuntary manslaughter, without deciding whether the evidence was sufficient to support legal duty involuntary manslaughter, and without considering Beckwitt’s challenges to the legal duty manslaughter jury instruction.

The court ordered a remand for re-sentencing on the involuntary manslaughter conviction. Beckwitt filed a motion for reconsideration which was denied and the mandate of the Court of Special Appeals issued on March 31, 2021.

Beckwitt filed a petition for writ of certiorari and the State filed a cross-petition. On June 22, 2021, this Court granted both Beckwitt’s petition and the State’s cross-petition.

This opening brief addresses the questions presented in Beckwitt’s petition. Beckwitt will address the question presented in the State’s cross-petition after the State files its opening brief.

STATEMENT OF QUESTIONS PRESENTED¹

1. As a matter of first impression, did the trial court lack subject matter jurisdiction to enter a conviction against an occupant of a home on a common law involuntary manslaughter charge resulting from an accidental house fire?
2. As a matter of first impression, was the evidence legally sufficient to permit a rational trier of fact to find that Beckwitt was guilty of involuntary manslaughter beyond a reasonable doubt for permitting the victim to work in a home with hoarding conditions accompanied by power outages?
3. As a matter of first impression, is legal duty manslaughter a type of gross negligence manslaughter that serves as a lesser-included offense of depraved-heart murder, thereby requiring review of Beckwitt’s challenges to the legal duty manslaughter conviction?
4. Did the trial court commit reversible error by failing to instruct the essential elements of legal duty manslaughter, for which there is no pattern jury instruction?

STATEMENT OF FACTS

Overview

This case involves the tragic passing of Askia Khafra, (“Khafra”), Beckwitt’s twenty-one-year-old friend, who died on September 10, 2017 in an accidental fire in the

¹ The first question presented appeared as the fourth question presented in Beckwitt’s petition. Beckwitt moved the question up to the first position as the argument section reads more naturally in this order.

basement of Beckwitt's childhood home located at 5212 Danbury Road, Bethesda, Maryland.

An electrical outlet manufactured before 1974 had been installed in the basement of the Bethesda home and was used without incident for more than forty-three years. Unbeknownst to Beckwitt, or to anyone observing the outlet, this outlet contained a latent defect that was a "pretty typical" "failure mode for this type [of] receptacle" wherein there was a loose connection between the power rail and the plug blade that caused deterioration in the outlet over the course of "decades". E. 561, 563-564, 571-572. The internal deterioration caused the components to heat up over time.

On September 10, 2017, around 4:17 p.m., the deterioration produced a flame, which caused the fire in this case to ignite in the center of the basement's egress path. Within "minutes", the fire engulfed the laundry room in the center of the egress path with enough smoke, flames, and carbon monoxide, that it prevented Khafra from making further egress, even though he was just steps from a direct exit out. E. 519. Before the fire began, Khafra was in a bunker, directly below the basement.

Beckwitt Meets Khafra

Beckwitt, a twenty-six-year-old stock trader and investor, E. 782, 946-947, met Khafra online in an investor chatroom where Khafra was trying to raise capital for his business, Equity Shark. E. 116, 180. Khafra and Beckwitt developed a close friendship, E. 189, 195, and Beckwitt invested \$10,000 in Khafra's business. E. 184. Equity Shark did not take off as planned so Khafra agreed to work off his debt to Beckwitt by helping Beckwitt dig tunnels. E. 146, 184.

The Tunnels

Beckwitt created an underground bunker at his parents' home for safety during a time when North Korea was threatening to use nuclear weapons against the United States. E. 186, 197. Khafra was not the first person to dig, but rather, others had dug in the tunnels without incident in the preceding years.

During 2017, Khafra dug for Beckwitt for days at time over the course of five months. E. 126-127. Khafra slept, ate, and went to the bathroom in the bunker which had been outfitted with air ventilation, lights, a mattress, refrigerator, microwave, shower, and internet. The bunker was powered by the use of extension cords.

While there, Khafra had a cell phone and a laptop which he used to communicate with his friends and family through Facebook, text, and Google hangouts. E. 149, 198, 213, 216. He communicated with Beckwitt either in person or through Google chats. Khafra roamed freely in the basement and the tunnels, but he was not permitted to come up to the first or second floors of the residence. Beckwitt never left Khafra alone at the house.

The State did not present evidence that the tunnels themselves were structurally unsafe, a point the State conceded during closing argument.

A Hoarder's Home

The home by all accounts was a hoarder's home. E. 296, 331, 366, 591, 1205. The hoarding began with Beckwitt's parents who instilled in Beckwitt – a sheltered, homeschooled, only child – that this was a normal way of life. E. 776, 780.

As of 2011, Beckwitt was away at college, his mother had passed away, and his father moved into a nursing home. E. 1413-1415. Beckwitt had his neighbor, Jane Legg

(“Legg”), check on the house in March, 2011, and at that time there was an “[o]verwhelming sense of the entire house” that “every surface was covered” with “various piles of things” stacking two to three feet high, and the basement was “extremely difficult” just to get through. E. 1410, 1417, 1419, 1422-1424.

Beckwitt returned to the house to reside years later.

The Day of the Accidental Fire

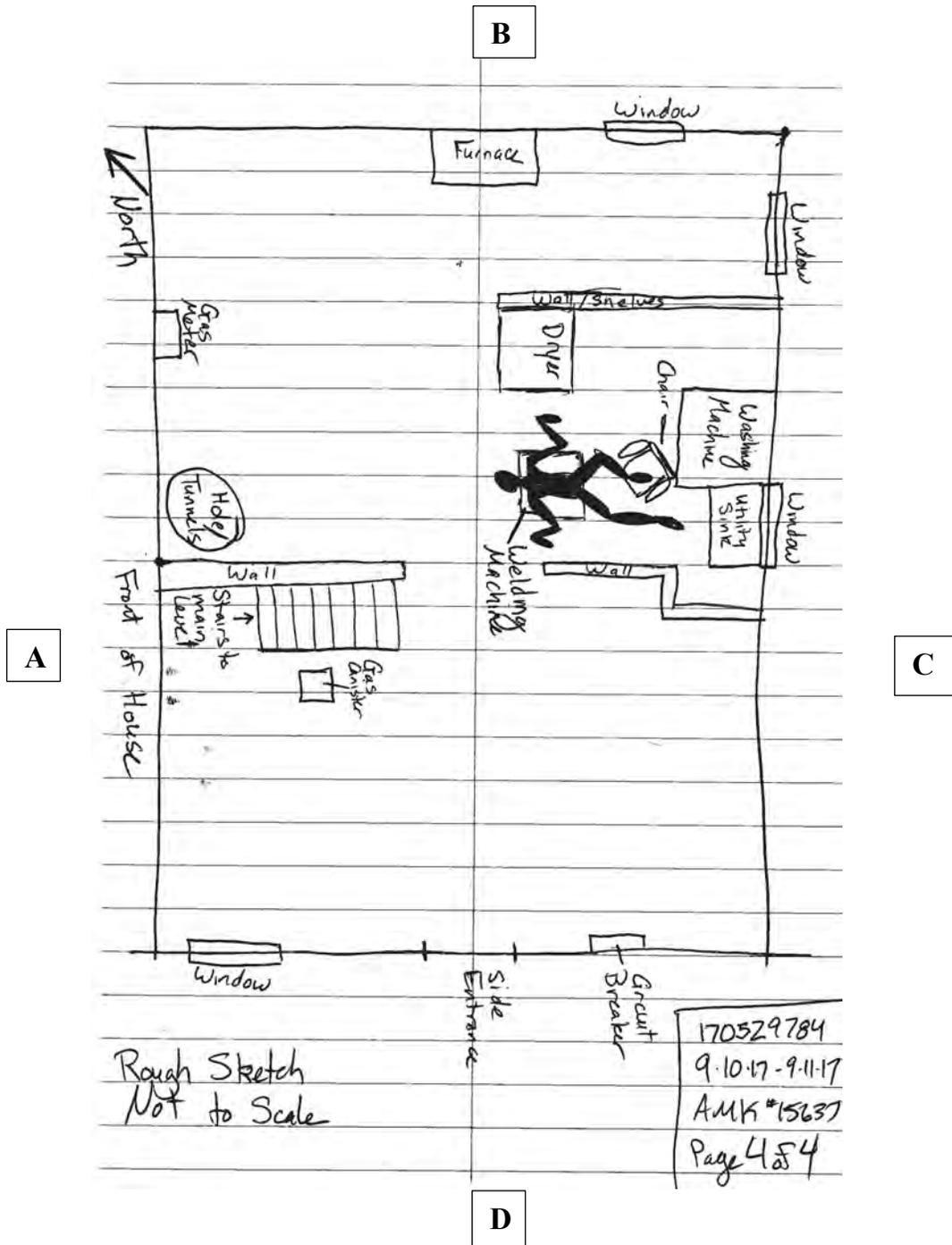
Khafra came to dig in the tunnels on September 3, 2017, and stayed there for one week. On September 10, 2017, at approximately 2:30 a.m., a power outage occurred caused by a faulty extension cord. At that time, Khafra believed that he smelled smoke, but he quickly dispensed with that thought and explicitly told Beckwitt, “NVM” or “nevermind” about the smoke. E. 630. Around 9:00 a.m., Beckwitt replaced an extension cord and plugged it into an outlet on a different circuit, fixing the power outage. E. 1094-1095. While in the basement, Beckwitt and Khafra discussed whether Khafra had actually smelled any smoke and Khafra said that he was mistaken. E. 1069. Neither of them observed any smoke or fire in the basement at that time so they went back about their normal routines.

Around 4:00 p.m. that afternoon, Beckwitt heard a beep from the carbon monoxide detector indicating that the power had gone out. E. 801, 870. Beckwitt went to the basement to reset the circuit breaker. E. 801, 808, 819. Beckwitt did not observe smoke, fire, or anything out of the ordinary at that time. E. 872, 1097.

When Beckwitt reset the breaker, he thought he heard the refrigerator compressor turn on so Beckwitt went up to the kitchen to investigate. E. 803, 819. Upon arriving in the kitchen, Beckwitt noticed smoke coming up through the floor. E. 803. Beckwitt “instantly

turned tail and went back downstairs and yelled to [Khafra], 'it's a fire, we got to get out. Fire, we got to get out.'" E. 803, 822, 1105.

The following sketch of the basement was introduced into evidence as State's Exhibit 13, with the sides of the home being referred to as A through D. E. 266.

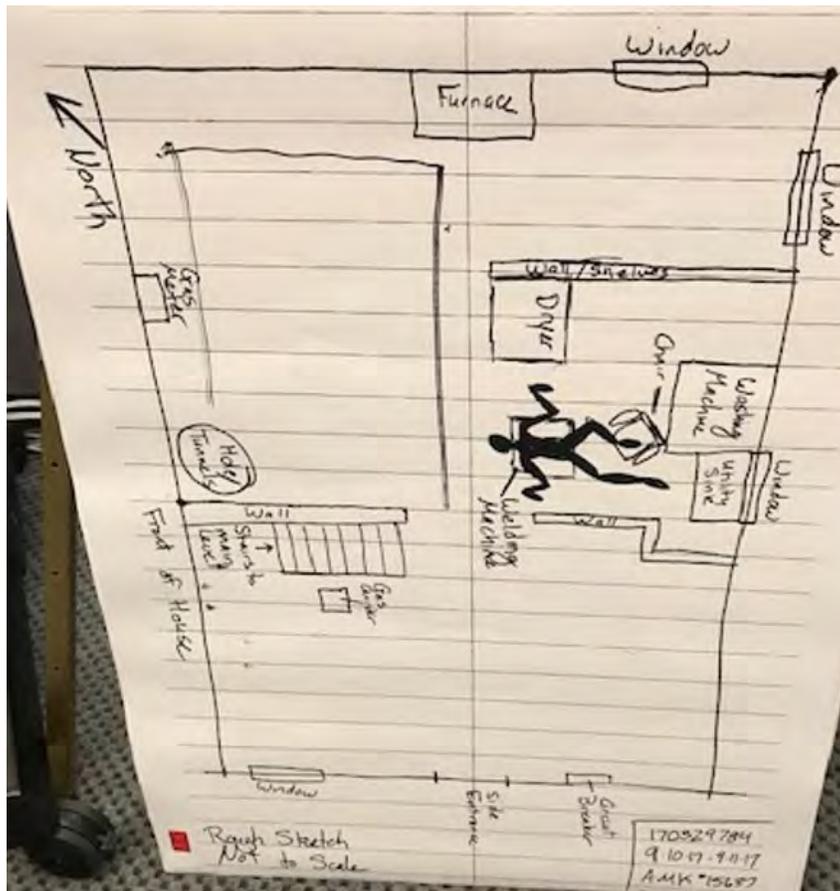


Upon Beckwitt's return to the basement, Beckwitt was met by smoke that prevented him from going past the laundry room area, which is the area in the diagram labeled with a "washing machine" and "dryer". E. 823, 825, 1098, 1100.

Beckwitt yelled out to Khafra and Khafra yelled back from the "furnace" area, "yo dude." E. 803, 823, 827, 890. Beckwitt yelled, "you got to make it out here man." E. 823.

Beckwitt was overcome with smoke and feared that he was not going to make it out alive so he ran outside to catch his breath. E. 803, 829. Beckwitt then ran back inside where he was met by fire coming from the laundry room. E. 803, 830, 835, 843, 1105, 1123.

To get from the tunnel to the laundry room, one would have to walk a path like the one drawn with a black marker on State's Exhibit 13 below. E. 442.



The path existed because of surrounding hoarding conditions. The “wall(s)” that are labeled in the diagram are naturally constructed walls, rather than debris.

Neighbors Respond

Around 4:20 p.m., Neighbors Bruce Leshan (“Leshan”), Mattias Machner, (“Machner”), Mattias Lundberg (“Lundberg”), and Legg, witnessed the smoke spilling out of the house and converged upon the scene to assist. E. 228.

Leshan heard a loud voice that was Beckwitt’s, screaming repeatedly, “get out, get out, get out!” E. 225. Beckwitt advised that someone was in the basement. E. 233. Leshan called 911 and opened the basement door, out of which came “a lot of smoke.” E. 227, 234.

Beckwitt went into the basement two to three times, each time for ten to fifteen seconds. E. 241, 243.

Machner entered two to three feet in, but the intense heat and smoke prevented Machner from being able to safely enter further. E. 191. Machner tried to extinguish the fire with a small fire extinguisher but it was “completely hopeless there was no way that this little fire extinguisher was going to make a difference here.” E. 236. Machner called out and heard no response so Machner exited and closed the basement door behind him. E. 1394.

Rescue Workers Arrive

Mark Stoddard (“Stoddard”) was a firefighter and EMT for the Montgomery County Rescue Service who received the call for help at 4:23 p.m. E. 267. When Stoddard arrived at the scene a minute or so later, he encountered Beckwitt in an excited state, visibly upset,

yelling that his friend was still in the house, and pointing to the basement door. E. 269, 298.

Beckwitt was medically evaluated on scene and found to be in distress with an elevated heart rate, carbon monoxide levels of 13%, swelling, burn marks and soot in and around his mouth. E. 745, 748, 1023. Beckwitt was placed on oxygen, administered fentanyl for pain, and transported by ambulance to MedStar Hospital in Washington, D.C. E. 1023.

Stoddard was joined by firefighters Brian Stern, (“Stern”) and David Takesuye (“Takesuye”), who entered the basement searching for Khafra. Upon entry there was a pathway that led them towards the fire. E. 270. The pathway was two to three feet wide. E. 275, 290, 343. The rescue workers were able to make entry all the way from the exterior door to the interior door. E. 303, 313. The interior door was located between the two lines labeled “wall” on the diagram. This was also the separation between the finished area of the basement (below the walls on diagram) and the unfinished area (above the walls).

The fire was overhead and was coming out of the laundry room. Firefighters described the fire as “extreme” and “intense” and worried that if Khafra was in the laundry area, Khafra had a “[v]ery small chance of survival.” E. 339.

The entire search for Khafra was done in low visibility because of the amount of smoke generated from the fire. E. 277, 311-312, 319. Stern actually went straight past the body without noticing it. E. 587.

Stoddard sprayed his hose and extinguished the fire. E. 279. When the smoke cleared, Stoddard observed a hand curled and a person lying on his back like he had been

in a chair that went backwards. E. 281. Khafra was found on top of a blue welding machine within the laundry room. E. 442.

Stern could see that Khafra's injuries were incompatible with life. E. 588.

The Manner of Khafra's Death was Undetermined

Dr. Pamela Ferreira of the Office of the Chief Medical Examiner testified as an expert in the field of forensic pathology. E. 1009. Dr. Ferreira testified that the cause of death of Khafra was smoke inhalation and thermal injuries but she did not offer an opinion as to the manner of death. E. 1017.

Dr. Ferreira testified that the level of carbon monoxide in Khafra's body was greater than 75%. E. 1016. There was no information in this case to say how long it took for Khafra to get to that level. E. 1016. Khafra could have been unconscious at a lower level and continued to inhale additional amounts of carbon monoxide before death. E. 1019.

The Cause of the Fire was Accidental: A Typical Electrical Outlet With No Prior History of Failing Contained a Latent Defect that May Have Been Deteriorating for Decades

At trial, the State called Fire Investigator Daniel Maxwell ("Maxwell") who was accepted as an expert with regard to fire escape, fire safety, and origin and cause of fires. E. 382, 400.

Maxwell first responded to the hospital to interview Beckwitt and then went to the fire scene to investigate. E. 390, 397.

At trial, Maxwell testified that the origin of the fire was an electrical outlet on a stud of the wall labeled on the diagram as "wall/shelves", near a workbench area on the wall adjacent to the laundry room. E. 416, 419, 433. The laundry room was directly below the

kitchen. E. 416, 419. A path existed for the smoke to travel from the workbench up to the cabinetry in the kitchen, as Beckwitt told investigators he had observed. E. 477.

Because the cause of the fire appeared to be from an electrical outlet, Maxwell had electrical engineer Jeremy Neagle (“Neagle”), with the Bureau of Alcohol, Tobacco, Firearms and Explosives, E. 539, come out to the scene to assist. E. 433.

Neagle was accepted at trial as an expert in the field of electrical engineering. E. 543-544. Neagle testified that the “standard wall outlet”, affixed on the wall against the laundry room, was the probable source of ignition of the fatal fire. E. 550-551, 554-555, 562-563. Although Neagle had observed one other possible source of ignition, the welding machine, E. 551, Neagle had no evidence that anyone was welding at the time of the fire, and the welder was plugged into an outlet for the dryer, not plugged into the electrical outlet containing the latent defect. Therefore, Neagle determined that the welder was not the likely or probable source of ignition of the fire. E. 554-555, 562-563.

This “standard wall outlet” or “duplex receptacle”, was “a pretty typical wall outlet like you might have in your home” for a “lamp” or “T.V.” in which to insert a plug. E. 555.

This outlet was “mounted in a metal box, and that metal box [was] mounted to” a “wooden wall.” E. 567. The metal box containing the outlet had a metal cover on it. E. 567. All that was visible to the naked eye were the “two openings where...you would insert the plug”. E. 567.

When Neagle examined the inside of this outlet, “a couple things stood out.” E. 560. Neagle noticed “a small area of arch melting on one of the power rails”, a power rail being “the metal component inside the outlet that carries the current.” E. 560. Neagle also noticed

arch melting on “the component that the plug blade slides up against to make contact.” E. 560. These findings indicated “that there was some electrical activity there.” E. 560.

A cord to a fluorescent light was plugged into one of the holes of the outlet. E. 575. In the other hole, the “very tip” of a blade remained which appeared to be part of “a three-prong plug” adapter that allowed a three-prong plug to be plugged into this two-prong outlet. E. 568, 579-580. However, nothing else was attached to that blade because it had been “consumed” by the fire. E. 569, 575-576, 579-580. The tip of the blade became “fused to a piece of the receptacle.” E. 568.

Neagle explained that when “contact is a little bit loose” between the blade and the power rail, oxidation occurs generating electrical resistance. When electrical current flows through that resistance, “it generates heat, and over time that can progress to the point of heating up the materials around it and causing an ultimate failure, and potentially resulting in a fire.” E. 561. The heating up over time “typically precedes a flame and combustion.” E. 560.

Neagle testified that the failure in this outlet was a latent defect in which the failure became visible “only after the face plate was removed”. E. 564. This is because the defects were “located behind the plastic and within the receptacle itself.” E. 564.

This electrical outlet appeared to be consistent with an outlet from at least 1974 as it was two-prong not three-prong and “[i]t did not have the grounding connection”. E. 570.

Neagle opined that this “damage is pretty characteristic”, “pretty typical” and “a known failure mode for this type [of] receptacle” when there is a “plug in a socket.” E. 561.

Neagle opined that the failure in this outlet resulted from deterioration over time and “[i]t’s a pretty typical failure mode for a receptacle, and it can happen in anywhere from hours to years or decades.” E. 563. Neagle could not “put a value of time on” how long it would take after the metal plate begins to heat up to generate enough heat necessary to cause smoke or fire; but he estimated that “it could be many years” for the “whole overall process.” E. 564, 571-572.

This electrical outlet was “the only item that [Neagle] was able to identify in that area of origin...backing up to the workbench area that had signs of failure”. E. 563. Despite being “designed to contain an electrical failure”, on September 10, 2017, the outlet failed, causing a flame to ignite. E. 567-568.

Relying on Neagle’s findings, Maxwell opined that the cause of the smoke and fire was an accidental fire in the outlet. E. 511. Maxwell agreed that this was a latent defect that would not have been observed by an individual prior to the event occurring, and that there would have been no reason to suspect that there was a faulty outlet just from looking at it. E. 492, 511.

This was “an odd fire,” in which after the first item ignited and made a flame, it only took minutes to get to the point where the flame was “pumping out a whole lot of smoke.” E. 519.

The “bizarre” nature of the tunneling system had nothing to do with Maxwell’s opinions regarding cause and origin of the fire. E. 499, 501-502, 515.

Khafra's Final Moments

At 4:17 p.m., Khafra had been on his Macbook computer on the bed in the bunker, below the opening to the hole from the basement floor. E. 659, 669-670, 711-712. Khafra sent a message to Beckwitt that there was smoke, E. 631, and some point thereafter, Khafra exited the bunker to the basement.

Beckwitt himself had already been checking the circuit breaker and the buzzing noise in the kitchen.

Khafra exited from the bunker to the basement, and began his way down the path to the outside. Maxwell testified about human behavior in fires, opining that a blind person can get out of the house if they are familiar with its surroundings. E. 454, 503. People do not usually try to get out through windows, rather, they try to go where they always go, which in this case, was the side exit door. E. 510. People also do not generally walk into a room that is on fire. E. 521.

Maxwell believed Khafra was trying to make his way to the side exit when he collapsed. E. 511. What prevented Khafra from getting out was the fire, smoke, or combination of the two. E. 511. Although the fire was not total room involvement, it still was a dangerous situation in which gases were building at the ceiling level, there was smoke, and radiant heat moving in all directions. E. 439.

Maxwell testified that when wood burns it creates carbon monoxide. E. 506. The effect of carbon monoxide on the human body begins with a euphoric feeling, like being drunk. E. 508. It will then cause difficulty with coordination, such as turning door knobs, and can ultimately make a person lose consciousness. E. 508.

Dr. Yale Caplan was accepted as a defense expert in the field of forensic toxicology. E. 1352. Dr. Caplan testified that carbon monoxide levels at 30% will be the beginning of cognitive difficulties and dissociated thoughts. E. 1364, 1377. At 40-50% saturation, a person is close to collapse and their ability to make decisions is severely limited. E. 1377.

Maxwell testified that “had [Khafra] made it a foot or two to the right and kept going, he would have been in another room” meaning the finished part of the basement where there was the direct path out. E. 484, 510. Khafra was but a mere “two steps to a straight exit” out when he collapsed. E. 510.

The State’s Theory at Trial

The State’s theory at trial was that Beckwitt’s conduct was based upon a series of omissions to act. The State filed a Bill of Particulars in this case noting that “the conduct that forms the bases for the charges of Second Degree Murder (that the defendant acted with extreme disregard for human life), and for Manslaughter (that the defendant acted in a grossly negligent manner)” included a failure to provide adequate egress unobstructed by hoarding, a failure to provide a reasonably safe work environment, a failure to reasonably respond to warnings of a fire risk, and a failure to exercise reasonable efforts within Beckwitt’s power to assist Khafra in escaping the fire. E. 106.

The trial court relied upon this omissive conduct to sustain sufficiency of the evidence challenges during the motions for judgment of acquittal, finding that there was a common law duty to provide a safe workplace, that a jury could find that there was an employer-employee relationship, that Khafra was working under conditions that were not safe because if a fire broke out, it was very difficult to make ingress or egress because of

the hoarding conditions, and that Beckwitt breached that standard of care. *See* E. 1261-1264, 1458, 1495-1496.

During Beckwitt's motion for judgment of acquittal, he argued that it is legally not possible to provide a basis for these charges by not providing adequate egress because there is no statutory or common law duty. E. 1255-1256.

The jury was instructed that the second degree murder charge included involuntary manslaughter, and was instructed that there are two theories of involuntary manslaughter in this case: affirmative act gross negligence manslaughter and failure to perform a legal duty gross negligence manslaughter. E. 1524-1525. The instruction given on legal duty manslaughter was given over Beckwitt's objection that the instruction "is not a complete and fair statement of the law[.]" E. 1673.

During closing argument, the State was permitted to argue about the "omission of a safe working condition," E. 1461, and thereafter argued to the jury that "when you're evaluating *all of these ways to find culpability*" you must see if there was "a safe working environment" where "people need to be able to escape", E. 1534 (emphasis added); and "to keep that [employer-employee relationship] in mind when you are evaluating *all the risk taking behavior...*[t]hese are all the things that the State believes show beyond a reasonable doubt that the defendant engaged in, *in order to be liable for depraved heart murder or involuntary manslaughter.*" E. 1537-15538 (emphasis added); and "[t]he defendant engaged in extreme risk taking behavior both as an employer and as any person and I ask you to *find the defendant guilty of the charges.*" E. 1563 (emphasis added).

The jury returned general verdicts of guilty to each count without being asked which theory they were relying upon.

The Court of Special Appeals

The Court of Special Appeals found that the evidence was insufficient to support a second degree murder conviction. Although the Court found that the evidence was sufficient to support an involuntary manslaughter conviction, the court recognized that it “cannot say that the evidence of [Beckwitt’s] guilt is truly overwhelming.” E. 97-98.

The Court of Special Appeals refused to consider Beckwitt’s arguments with respect to the sufficiency of the involuntary manslaughter conviction under the legal duty manslaughter theory, and similarly refused to undergo an analysis as to the correctness of the legal duty manslaughter jury instruction.² E. 75, 79. The reasoning for these refusals was the Court’s determination that because the jury convicted Beckwitt of depraved heart murder, it must have convicted Beckwitt of the lesser-included offense of gross negligence manslaughter. E. 76.

However, the conduct relied upon by the Court of Special Appeals in affirming the involuntary manslaughter conviction all relates to omissions to act, essentially, a failure to provide adequate egress from a fire.

² The Court also failed to address Beckwitt’s argument about the lack of cognizability of the offenses where there was no common law duty to provide emergency egress from an accidental fire or to provide a smoke detector.

First, the intermediate court discussed the legal duty relationship between Beckwitt and Khafra, explaining that Beckwitt “hired Khafra to dig tunnels below his basement”, E. 68; and Beckwitt “pa[id] Khafra \$150 a day to dig tunnels underneath his home”. E. 58.

Second, the Court of Special Appeals relied upon omissive conduct that served as the omissive rei. The intermediate court relied upon a failure to provide adequate communication and/or response to Khafra: “The only way Khafra could contact appellant in case of an emergency was to send appellant messages through Google apps and hope [Beckwitt] received them”, E. 58; Khafra’s “early morning messages went unnoticed for more than six hours until [Beckwitt] finally woke up.” E. 58. The intermediate court relied upon a failure to provide a safe workplace: “[Beckwitt] created unsafe conditions...invited Khafra to dig tunnels in a secret location beneath appellant’s home where there were power outages, and where mounds of garbage and debris, and possibly locked doors, impeded escape in the event of an emergency.” E. 66. The intermediate court relied upon a failure to provide adequate egress in the event of a fire emergency: “[T]he amount of debris and detritus in appellant’s basement. These conditions elevated the danger by hampering Khafra’s ability to escape in the event of an emergency.” E. 59.

Third, the Court of Special Appeals determined that causation was based upon omissive conduct. The court again relied upon the failure to provide adequate egress: “When a relatively minor fire broke out, the fact that [Beckwitt’s] basement was covered in debris and garbage hampered Khara’s ability to escape the fire”, E. 68; “[T]he hoarder conditions in [Beckwitt’s] home dangerously hampered Khafra’s ability to escape in the event of a fire emergency.” E. 69. The intermediate court relied upon the failure to provide

a safe workplace: “Although [Beckwitt] did not intentionally set the fire, his disregard for safety, including his refusal to recognize the implications of two electrical failures on the day of the fire, satisfy actual causation”, E. 68; “[Beckwitt] hired Khafra to dig tunnels below the basement”, E. 68; “But-for arranging to have Khafra work in a dangerous environment, Khafra would not have died.” E. 68.

Additional facts will be presented herein.

SUMMARY OF THE ARGUMENTS

Beckwitt is the first employer in Maryland and the first occupant of a home in Maryland to be convicted of a homicide by omission for the failure to provide adequate egress from an accidental fire. Beckwitt’s conviction stems from an application of “duties” imposed upon Beckwitt which never existed at common law, or if they did, were preempted by statutory enactments whose terms are inapplicable to the circumstances in Beckwitt’s case.

First, four English statutes which culminated in the Fires Prevention (Metropolis) Act of 1774, prohibited any action, including a prosecution, against someone in whose home a fire accidentally began. The statutes were in existence as of July 4, 1776, and numerous courts across the United States have incorporated them into their State’s common law. The statutes serve as a complete bar to any action arising out of an accidental house fire, and therefore prohibit an entire class of cases, like Beckwitt’s, thereby divesting the courts of subject matter jurisdiction over these types of cases.

Second, there was no duty at common law for an employer to provide a means of egress from a fire that began accidentally. There also was no duty at common law for an

occupant of a home to provide a smoke detector. Numerous courts across the country have already made such determinations.

Third, assuming *arguendo*, there were any common law duties to provide smoke detectors or adequate egress from an accidental fire, this Court has already determined in *Salvatore v. Cunningham*, 305 Md. 421 (1986), that any *arguendo* common law duty to provide a smoke detector was “rooted out” by the passage of a statute which is inapplicable to the circumstances in Beckwitt’s case. The rationale applied by this Court in *Salvatore* should similarly be used for this Court to find that any *arguendo* common law duty to provide egress from an accidental fire was “rooted out” by the passage of Maryland’s State Fire Prevention Code, a code which consists of an “entire body of law [] occupied on a comprehensive basis” as to fire safety and egress, and therefore preempts any prior laws in the field of fire safety and egress. *Genies v. State*, 426 Md. 148, 155 (2012).

Fourth, there was insufficient evidence of opprobrious conduct joined with quasi-intentional mens rea to support a finding that Beckwitt was wanton and reckless in permitting someone to work in a home with hoarded conditions and two power outages. Neither of those conditions are inherently dangerous, neither of those conditions are prohibited by law on a statewide basis, Beckwitt was not engaged in conduct that was likely to start a fire, Beckwitt had no knowledge that a fire was likely to happen at any moment, and Beckwitt’s conduct did not cause the fire to begin.

Fifth, there was insufficient evidence of causation to support a finding that two power outages that were unrelated to the latent defect in the electrical outlet, were actual or foreseeable causes of an electrical fire. Further, the evidence was insufficient to support

a finding that it was the hoarding conditions that slowed Khafra down by an amount of time that would have been meaningful to his successful escape from this “odd fire” that erupted into flames within “minutes”, giving off “intense” and “extreme” heat, smoke, and carbon monoxide, right in the middle of the pathway out.

Sixth, this Court cannot say that the jury relied upon affirmative act gross negligence manslaughter to convict Beckwitt of involuntary manslaughter or depraved heart murder. The evidence relied upon by the trial prosecutor, the trial court, Appellee, and the Court of Special Appeals, all establishes that the conduct was omissive conduct based upon a legal duty to provide a safe workplace with adequate egress in the event of a fire emergency. Therefore, the Court of Special Appeals should have considered Beckwitt’s arguments that the legal duty manslaughter instruction was erroneous for failing to inform the jury of the subjective mental states required for assigning criminal liability to omissions to act, in contradiction of this Court’s instructions in *State v. DiGennaro*, 415 Md. 551 (2010) and *State v. Kanavy*, 416 Md. 1 (2010). This Court will see that legal duty manslaughter is a type of gross negligence involuntary manslaughter that served as a lesser-included offense of depraved heart murder in this case.

ARGUMENTS

I. The circuit court lacked subject matter jurisdiction to enter a conviction and sentence on a common law charge resulting from an accidental housefire against an occupant of a home.

“Perhaps the universal silence in our courts upon the subject of any such responsibility of the [occupant] for accidental fires, is presumptive evidence that the doctrine of [negligence for failing to provide egress from an accidental fire] has never been introduced, and carried to that extent, in the common law jurisprudence[.]” *Rogers v. Atl., G. & P. Co.*, 213 N.Y. 246, 250, 107 N.E. 661 (N.Y. 1915); accord *Kellogg v. Chicago & N.W. Ry. Co.*, 26 Wis. 223, 272 (Wis. 1870).

A. Standard of Review

“[A] challenge to the trial court’s subject matter jurisdiction may be raised on appeal even if not raised in or decided by the trial court.”³ *Lane v. State*, 348 Md. 272, 278 (1997); Maryland Rule 8-131(a). This is “based on the premise that a judgment entered on a matter over which the court had no subject matter jurisdiction is a nullity and, when the jurisdictional deficiency comes to light in...an appeal...ought to be declared so.” *Id.* at 278 (internal citations omitted). “[A] court may not validly enter a conviction on a charge that does not constitute a crime and [] the deficiency in any such judgment is jurisdictional in nature.” *Id.*

³ At trial, Beckwitt did challenge the trial court’s ability to enter a conviction on a common law offense that was not cognizable, arguing “it is legally not possible to provide a basis for these charges by not providing adequate egress from a single-family home because there is no statutory or common law duty.” E. 1255. Beckwitt further argued that any common law duties were “abrogated by enactment of the Maryland State Fire Prevention Code” and its applicable regulation. E. 1255-1256.

This Court must determine whether the trial court had the power to adjudicate a “class of cases within which a particular one falls.” *Downes v. Downes*, 388 Md. 561, 575 (2005) (internal citation omitted). An unintentional homicide is not cognizable at common law if it included the instrumentality of an accidental house fire that caused death. *Accord State v. Gibson*, 4 Md. App. 236, 240, *aff’d*, 254 Md. 399 (1969) (an unintentional homicide is not cognizable at common law if it included the instrumentality of a motor vehicle that caused death). There are no “condition precedents”, i.e., facts, that can be proven that will allow the offense to become cognizable. *Carroll v. Konits*, 400 Md. 167 (2007).

Similarly, if the conduct has been preempted such that Beckwitt should not have been charged, convicted, or sentenced, then he was given an illegal sentence which may be reviewed by this Court at this time. *See Roary v. State*, 385 Md. 217, 225-26 (2005), *overruled on other grounds by State v. Jones*, 451 Md. 680, 704 (2017) (A “sentence imposed under an entirely inapplicable statute is an illegal sentence which may be challenged at any time.”). *Accord Fisher v. State*, 367 Md. 218, 239-40 (2011) (reviewing claim that felony murder doctrine is inapplicable to a homicide resulting from child abuse because, if true, the sentence imposed on the felony murder conviction would be an illegal sentence).

This Court must review several statutes for this issue. This Court reviews interpretations and applications of constitutional, statutory, or case law, under a *de novo* standard of review. *Peterson v. State*, 467 Md. 713, 725 (2020) (internal citation omitted).

In reviewing the statutes at issue, this Court must look “to the language of the statute, giving it its natural and ordinary meaning” on the “tacit theory” that the legislating body “is presumed to have meant what it said and said what it meant.” *Id.* at 727.

B. The common law courts have been legislatively preempted from jurisdiction over accidental fires.

1. The English Statutes

Medieval common law courts of England developed a doctrine of absolute liability upon occupiers of land for the occurrence of fires, this doctrine being called *ignis suus* or “his fire.” *Koos v. Roth*, 652 P.2d 1255, 1262 (Or. 1982); *Turberville v. Stampe*, (1697) 91 Eng. Rep. 1072, 1 Ld Raym. 264

In 1707, this doctrine was legislatively abrogated by “An Act for the better preventing Mischiefs that may happen by Fire.” *See 6 Ann.*, Chapter 31⁴, Section 6 (1707) which provided:

That *no action*, suit, or process whatsoever, shall be had, maintained, or *prosecuted against any person in whose house or chamber any fire shall*, from and after the said first day of May, *accidentally begin*, or any recompence be made by such law, usage, or custom to the contrary notwithstanding.

APP. 8 (emphasis added).

The Act banned *any* action, including prosecutions resulting from damage or injury caused by an accidental fire in a person’s home. As further evidence that criminal prosecutions were contemplated by this Act, Section 3 of the same Act, is a provision which

⁴ Chapter 31 is widely misreported as Chapter 3 in judicial opinions.

explicitly allowed criminal prosecutions and punishment in special circumstances, not applicable here, against servants who negligently started a fire. APP. 8

Section 6 of Anne's Act of 1707 was made permanent by 10 *Ann.*, Chapter 14, Section 1 (1711). APP. 9. This act was later reenacted as 12 *Geo. III*, Chapter 73, Section 37 (1772) which added a savings clause for contracts and agreements between landlords and tenants. APP. 10. Section 34 of that act sought to deter the willful setting of fire to one's home, and Section 35 reinstated criminal penalties for one's servant who negligently set a fire, thereby indicating an exception for criminal prosecutions in certain circumstances. APP. 10.

Finally, in 1774, this statutory defense was expanded by the passage of the Fires Prevention (Metropolis) Act of 1774, 14 *Geo. III*, Chapter 78, Section 86, which expanded the protected premises of "house or chamber" to include fires that accidentally started in one's "house, chamber, stable, barn, or other building, or on whose estate." APP. 11.

Because all four acts cover dwelling houses they have no difference relevant to the matter *sub judice*.

2. Incorporation Into Maryland Common Law

Article 5 of the Maryland Declaration of Rights provides:

That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law, and to the benefit of the English Statutes as existed on the Fourth day of July, seventeen hundred and seventy-six; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity; and also of all Acts of Assembly in force on the first day of June, eighteen hundred and sixty-seven; except such as may have since expired, or may be inconsistent with the

provisions of this Constitution; subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State.

Md. Decl. Rts., art.5(a)(1). APP. 4.

As of July 4, 1776 there existed this Fire Prevention (Metropolis) Act of 1774, which stated in relevant part:

That no action, suit, or process whatever, shall be had, maintained, or prosecuted, against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall, after the said twenty-fourth day of June, accidentally begin...

14 Geo. 3, c. 78, § 86 (1774) (emphasis added). APP. 11.

As previously discussed, this statute derived from Statute 6 Ann., c. 31, § 6 (1707); Statute 10 Ann., c. 14, § 1 (1711), and Statute 12 Geo. III, c. 73 (1772).

Courts in the United States “have found these statutes applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity” and therefore the statutes have met the requirements of Md. Decl. Rts., art.5(a)(1).

In *Lansing v. Stone*, 37 Barb. 15 (N.Y. Gen. Term. 1862), the New York Supreme Court determined that the Statute of Anne (6 Anne, Ch. 31), as re-enacted by 14 Geo. III, “is part of the common law of this state[.]” *Id.* at 18. In so finding, the Court determined that:

The common law of the mother country as modified by positive enactments, together with the statute laws which were in force at the time of the emigration of the colonists, because in fact the common law... The statute law of the mother country, therefore, when introduced into the colony of New York, by common consent, because it was applicable to the colonists in their new situation, and not by legislative enactment, became a part of the common law of the province.

Id. The Court determined that 14 *Geo. III* was in force and has not since expired, or been repealed or altered. *Id.* at 19. The same findings were made again by the Court of Appeals of New York in *Rogers v. Atlantic Gulf and Pac. Co.*, 213 N.Y. at 254, 107 N.E. at 662.

In *Kellogg v. Chicago & N.W. Ry. Co.*, the Supreme Court of Wisconsin determined that “statute 6 Ann, c. 31, § 6, still in force, which ordains that no action shall be maintained against any in whose house or chamber any fire shall accidentally begin[.]” 26 Wis. at 272. The Court further found “[t]hat statute being in force in this country at the time of the revolution and since as part of our common law, sufficiently explains the absence of precedents for the recovery of damages in such cases[.]” *Id.*

The viability of these statutes into common law in the United States has been recognized by the Supreme Court of the United States. *See St. Louis & S.F.R. Co. v. Mathews*, 165 U.S. 1, 6 (1897) recognizing that “common-law liability in case of ordinary accident, without proof of negligence” for the inception of a fire was altered by passage of all four statutes.

The statutes were also recognized by the Supreme Judicial Court of Maine. *See Bachelder v. Heagan*, 18 Me. 32, 33 (Me. 1840) (recognizing that “[t]he hardship of” the “ancient common law” that “if a house took fire, the owner was held answerable for any injury thereby occasioned to others” was “corrected by the statute of 6 *Anne*, c. 31, which exemp[t]ed the owner from liability, where the fire was occasioned by accident.”).

American courts have been largely influenced by the Metropolis Act as American courts have been reluctant to find liability for accidental fires. *See* W. Page Keeton, et. al., *Prosser and Keeton on The Law of Torts*, § 77, pp. 543-44 (5th ed. 1984).

Not only have the acts been made applicable to the United States, but they have continued to provide defenses in England, Africa, New Zealand, and Canada. *See, e.g., Collingwood v. Home & Colonial Stores*, [1936] 3 All E.R. 200 (Court of Appeal of England holding that Section 86 of the 1774 Act was a defense to an accidental electrical fire) (APP. 110); *Solomons v. R. Gertzenstein Ltd*, [1954] 1 Q.B. 565 (England's High Court of Justice holding that Section 86 of the 1774 Act was a defense for an accidental electrical fire) (APP. 131); *Torr v. Davidson*, (1920) 216 L.R.K. 170 (The Court of East Africa holding "[i]n the case of an accidental fire 14 Geo. III C. 78 Section 86 applies and affords a defence to common law liability.") (APP. 187); *Hunter v. Walker*, (1888) 6 N.Z.L.R. 690 (Supreme Court of New Zealand holding that "The English Common Law on the subject of fires applies to this colony. The provisions of 14 Geo. III., c. 78 (the Metropolitan Building Act), relating to fires are applicable to bush fires in this colony.") (APP. 120); *Canada Southern Ry. Co. v. Phelps*, (1884) 14 SCR 132 (Supreme Court of Canada holding the statute 14 Geo. 3 ch. 78 sec. 86, which is an extension of 6 *Ann.* ch. 31 secs. 6 and 7 is in force in the Province of Ontario as part of the law of England) (APP. 89).

As recent as 2012, the defense of the Metropolis Act to a claim of negligence based upon an accidental fire was applied in *Stannard v. Gore*, [2012] EWCA Civ 1248, 2012 WL 4050249, *3 (2012) (APP. 141), a negligence claim that was brought under facts

similar to Beckwitt's where "the primary cause of the fire lay in the wiring or electrical appliances" on the premises. The Court of Appeal of England determined that "there was nothing to show that such a state of affairs was the result of a failure to maintain or keep in good order the electrical system itself or all those electrical appliances that were located within the premises, as opposed to something that might have arisen entirely by accident." *Id.* at *3. The Court of Appeal repeated the lower court's holding that "the failure of Mr[.] Gore to establish to the satisfaction of the court any negligence on the part of Mr[.] Stannard means that...he has the benefit of a defence under section 86 of the Fires Prevention (Metropolis) Act 1774 on the basis that the fire was accidental." *Id.*

This Court has not yet been asked to decide whether these statutes were incorporated into Maryland's common law pursuant to Article 5 of the Maryland Declaration of Rights. However, in 1818, this Court did comment on the existence of the statutes in *White v. Wagner*, 4 H. & J. 373 (1818). In that case, this Court commented that "[i]f fire in every case was an excuse to the tenant, why was the statute of *Anne* passed?" *Id.* at 385. Years later in *Bodman v. Murphy*, 35 Md. 154 (1872), this Court again recognized the existence of the statutes:

Now it has been held that a fire negligently lighted or kept by a person or his servant on his own premises which communicates with his neighbor's premises, is not within the protection of *Stat., 6 Ann. c. 31*, which does not apply to a case of negligence or a fire intentionally lighted. *Filliter vs. Phippard*, 11 *Q. B.*, 347. Thus, if a negligent fire from Murphy & Co's premises communicates with the adjoining house, Murphy & Co. are liable therefor.

Bodman, 35 Md. at 156.

Beckwitt recognizes that in Maryland, courts have turned to *Kilty's Report of the Statutes* which is “[t]he only evidence to be found on [the] subject” of “which statutes by experience have been found to be applicable” in Maryland. *State v. Magliano*, 7 Md. App. 286, 293 (1969) (citing *Dashiell v. Attorney General*, 5 Har. & J. 392, 401 (1822)).

Candidly, the statutes relied upon by Beckwitt have not been found applicable by Kilty. With no explanation by Kilty at all, the first two statutes of Anne (6 *Ann.*, Ch. 31, sec. 6 (1707) and 10 *Ann.*, Ch. 14, sec. 1 (1711)) were “statutes not found applicable” to Maryland. See *Kilty's Report of the Statutes* at 108, 110 (APP. 86-87). The two statutes of George III. (12 *Geo.* III, Ch. 73, sec. 37 (1772) and 14 *Geo.* III, Ch. 78, sec. 86 (1774)) were likewise “statutes not found applicable” but for a different reason in which Kilty said that *all* statutes after 1760 were “statutes which did not extend in the province being very numerous, and entirely on local subjects[.]” *Id.* at 136 (App. 88).

Although Kilty's Report is the authority that has been relied upon, Maryland Courts have ruled that just because “Kilty did not regard a statute as ‘applicable’ did not preclude a court from having a different view.” See *Magliano*, 7 Md. App. at 293, n.5 (citing *Shriver v. State*, 9 Gill & J. 1, 11 (1837) (overruling Kilty's opinion) and *Sibley v. Williams*, 3 Gill & J. 63 (1830) (overruling Kilty's opinion)).

This Court should likewise determine that these English Statutes which existed on July 4, 1776, and which by experience, have been found applicable and used and practiced by the Courts, as exemplified by the numerous cases *supra*, are in fact part of the common law of Maryland today. With respect to Kilty's findings that statutes post-1760 did not extend to the province because they were “entirely on local subjects”, Kilty was incorrect.

While it is true that the Statutes of George state that their purpose is “for the better regulation of Buildings and Party Walls within the Cities of *London* and *Westminster*, and the Liberties thereof...”, it was held by the English Court of Exchequer in *Richards v. Easto*, (1846) 15 M&W 244, 251, 153 E.R. 840, that universal applicability inhered in “some of the clauses affecting all the Queen’s subjects, as the 84th and 86th, relating to accidental fires; and the statute is, in that respect, public.” (APP. 127). The 86th clause refers to 14 George III, Chapter 78, Section 86 (1774).

This view that section 86 affected all of the Queen’s subjects was adopted and approved in *Filliter v. Phippard*, (1847) 11 Q.B. 347, EngR 999, 116 ER 506 (APP. 115), the case cited by this Court in *Bodman, supra*, 35 Md. at 156, when this Court discussed section 86’s predecessor, Statute 6 Anne, Chapter 31.

The opinions of *Richards v. Easto* and *Filliter v. Phippard* were relied upon by *Torr v. Davidson, supra*, in deciding to apply section 86 to the common law of East Africa.

The United States Supreme Court and the New York Supreme Court did not find that George’s statutes did not extend to the province, or that they were only related to local subjects. Both of those courts specifically referred to 14 *Geo. III* as part of the common law in this country. *See St. Louis & S.F.R. Co. v. Mathews*, 165 U.S. at 6 (1897); *Lansing v. Stone*, 37 Barb. at 15.

Beckwitt is therefore entitled to any defense that was available by English statute that was incorporated into Maryland common law. Because “no action, suit or process whatever, shall be...prosecuted, against any person in whose house...any fire shall...accidentally begin [.]” 14 Geo. 3, c. 78, § 86 (1774), the State could not bring any

action, including a criminal prosecution against Beckwitt for liability for an accidental fire that began in his home.

This “no action...shall be” language is the core term of exculpatory negative preemptive field occupation that has been determined to be sweeping and barring of jurisdiction in other contexts, and because it is contained within an applicable statute, it provides a defense to Beckwitt’s prosecution of common law charges based upon an accidental fire. *See e.g., Weinberger v. Salfi*, 422 U.S. 749, 757 (1975) (The “no action shall be brought” language is “sweeping and direct” and states that “no action shall be brought under s 1331, not merely that only those actions shall be brought in which administrative remedies have been exhausted.”); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).

In Beckwitt’s case, there was no dispute that the fire did accidentally begin in Beckwitt’s home. E. 107, 511. Thus, Beckwitt’s case was barred from any action, including a prosecution.

C. The common law courts never imposed a duty upon anyone (i) to install a smoke detector; or (ii) to provide emergency egress from an accidental fire; but even if there were any *arguendo* duties, such duties have been legislatively preempted and are inapplicable to Beckwitt’s circumstances.

1. Beckwitt was under no duty to install a smoke detector.

Without any basis in the common law or any obligation by statute, the State averred in its Bill of Particulars that Beckwitt committed common law involuntary manslaughter by failing to install a smoke detector in the tunnel underneath his home. E. 106. In the prosecutor’s opening statement, the State argued to the jury that “there wasn’t a smoke

detector or carbon monoxide detector in the tunnel[.]” E. 111. The State further argued that this case is about “gross negligence and you are showing you don’t care about human life to put a person down there with no smoke detector, with no carbon monoxide detector[.]” E. 112. At trial, the State produced evidence that there was no smoke detector in the tunnel, E. 693; and that a smoke detector provides a reasonable warning for escape. E. 454. The State’s theory for its conviction was that Khafra was unable to escape the tunnel in sufficient time to avoid the deleterious effects of the fire.

During the motion for judgment of acquittal, defense counsel argued that the State

[C]an’t just pull out of plain air and say, okay, you’re supposed to have a smoke detector in an underground tunnel, and if you don’t, that somehow is an act that supports these charges. There is no evidence in this case to support that there is any requirement for that at all...there is nothing elsewhere that suggests that this is an allegation they can make that constitutes a basis for a criminal charge.

[Y]ou can’t tell the jury that if he didn’t have a smoke detector...that’s a factor they can consider in supporting a verdict for either one of these charges[.]”

E. 1242-1243.

Defense counsel further argued that

[W]ith respect to the issue of the absence of a smoke detector, there is no statutory standard for this, for a private home, for a personal residence. To the extent that there has been any legislation in this area under COMAR that incorporated any fire safety codes that deal with these kinds of issues...it does not apply to somebody in Mr. Beckwitt’s position. Mr. Beckwitt was neither a landlord, nor was he a property owner. To the extent that there has been legislation in this area to discuss these standards, it has preempted any common law. And to the extent that it has preempted any common law...[a]nd so, what we’re left with is really no legal, no statutory, no common law standards[.]

E. 1251-1252.

Defense counsel specifically referred to *Salvatore v. Cunningham*, 305 Md. 421 (1986) and that court's determination that there was no common law duty to provide smoke detectors in a single-family home and that the Maryland statutes are inapplicable in Beckwitt's case. E. 1256.

The trial court failed to address these arguments, and instead focused exclusively on the common law employer duty to provide a reasonably safe workplace in denying Beckwitt's motion for judgment of acquittal. E. 1261-1264.

In *Salvatore v. Cunningham*, 305 Md. 421, 430 (1986), the plaintiffs brought a negligence claim asserting that the defendants were negligent in that they had a duty to pursuant to Article 38A, Section 12A to equip a ski chalet with a fire alarm system and smoke detectors; that they had a duty, pursuant to Maryland common law, to take reasonable care to not subject others to an unreasonable risk of harm, and to provide a reasonably safe premises for their tenant; and that they breached that duty by failing to equip the chalet with a smoke alarm system. *Id.* at 425. The trial court found "that there is no common law duty to install fire detection devices" and held "that the common law duty to maintain safe premises for a tenant does not encompass the installation of fire detection devices." *Id.* at 425-26. The trial court also determined that Article 38A, Section 12A exempted one, two or three family dwellings constructed prior to July 1, 1975 to install smoke detectors. *Id.* at 426. Applying the language of the statute to the facts of the case, the ski chalet was precluded from any statutory duty.

This Court determined that the trial judge was correct in determining that “the construction and configuration of the premises [] must determine its classification”, not “the intention of the parties as a criterion for classification” and this Court agreed that as a single family dwelling, under § 12A(b), there was no obligation on the part of the owner to install smoke detectors. *Id.* at 429-430. This Court further “[ou]nd the argument relative to common law obligation to be without merit” because “[i]f any common law obligation ever existed it was rooted out when the General Assembly passed Ch. 860 of the Acts of 1975 which by its terms exempted residential building erected prior to July 1, 1975 from any obligation to install smoke detectors.” *Id.* at 430.

The Act in *Salvatore* was repealed by Acts 2003, c. 5, § 1, eff. Oct. 1, 2003, and the Public Safety Article (“P.S.”) became codified within the Annotated Code of Maryland. P.S. § 9-106(c) is the provision imposing a statutory duty upon certain individuals to install smoke detectors. APP. 23. P.S. § 9-106(c) exempts Beckwitt from any requirement to install a smoke detector because the statute only applies to “a landlord or property owner”, but not to occupants of a home, such as Beckwitt.

As in *Salvatore*, there was no common law duty obliging Beckwitt to install fire detection devices, and therefore a common law conviction could not be based upon such a failure. Moreover, as in *Salvatore*, the enactment of Ch. 860 of the Acts of 1975, which was recodified as P.S. § 9-106(c), “rooted out” any so-called obligation, “if such an obligation ever existed”, and therefore, there continued to be no common law obligation by Beckwitt to install a smoke detector. Thus, Beckwitt could not be negligent, grossly negligent, possessive of a depraved heart, or in violation of a legal duty, for failing to install

a smoke detector. These arguments should not have been made to the jury and a conviction which may be based upon the failure to install smoke detectors is not a sound theory of common law liability.

2. Beckwitt was under no duty to provide emergency egress to an employee from an accidental fire that began in a single-family dwelling.

The State further particularized that Beckwitt's conduct was criminal because Khafra was "working in [a] tunnel, where the path to the only viable exit to outside was lengthy and, in the basement portion of the path, restricted by debris and unsafe hoarding conditions[.]" E. 106.

a. There was no duty at common law for an employer to provide egress to an employee from an accidental fire.

Beginning with a review of the common law, a duty to maintain a safe workplace did not encompass a duty to provide emergency egress in the case of an accidental fire. In *Jones v. Granite Mills*, 126 Mass. 84 (1878), the Supreme Judicial Court of Massachusetts held that there was no common law duty for a master to provide a means of escape for an employee trapped in a fire that started by accident, where the fire was not caused by the master's negligence:

We know of no principle of law by which a person is liable in an action of tort for mere nonfeasance by reason of his neglect to provide means to obviate or ameliorate the consequences of the act of God, or mere accident, or the negligence or misconduct of one for whose acts towards the party suffering he is not responsible. If such liability could exist, it would be difficult, if not impossible, to fix any limit to it.

[T]he liability arises upon the doing of the act. But the common law goes no further; it does not provide a remedy when the master is not responsible for

the act, on the ground that he has omitted to provide means to avoid its consequences.

It is no part of the contract of employment between master and servant so to construct the building or place where the servants work, that all can escape in case of fire with safety, notwithstanding the panic and confusion attending such a catastrophe. No case has been cited where an employer has been held responsible for not providing such means of escape.

Id. at 88-89.

Numerous courts have determined the same. “At common law the owner of a building was not bound to anticipate the possibility of remote danger from fire, or that its occurrence would put in jeopardy the lives of its employees or tenants.” *Irwin v. Torbert*, 49 S.E.2d 70, 81 (Ga. 1948) (internal citation omitted). “At common law the owner of a building, not particularly exposed to the danger of fire from the character of the work to be carried on in it, was not bound to anticipate the possibility of remote danger from fire, or that its occurrence would put in jeopardy the lives of his employe[e]s or tenants[.]” *Yall v. Snow*, 100 S.W. 1, 3 (Mo. 1906). “We are satisfied that, if any duty devolved upon the defendant to anticipate the possible burning of its building, and provide modes of escape to that emergency, such duty did not exist at common law[.]” *Pauley v. Steam-Gauge & Lantern Co.*, 131 N.Y. 90, 94, 29 N.E. 999, 999 (N.Y. 1892). “It is held that there is no common-law obligation resting on the master to provide means of escape from fire for his employe[e]s.” *Schmalzreid v. White*, 36 S.W. 393, 395 (Tenn. 1896) (internal citations omitted).

Common law negligence actions, as in Beckwitt's case, are predicated upon the existence of a duty that the defendant was under to protect the plaintiff from injury. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 522 (1992). *See also Warr v. JMGM Grp., LLC*, 433 Md. 170, 181 (2013). It is axiomatic that "[t]here can be no negligence where there is no duty." *Hartford Ins. Co. v. Manor Inn of Bethesda*, 335 Md. 135, 148 (1994).

Despite the lack of duty at common law, the State, the trial court, and the Court of Special Appeals, relied exhaustively on this "common law duty" of egress from an accidental fire as a requirement for an employer, to find liability in this case.

During the first motion for judgment of acquittal, the prosecutor argued that "fire is always a risk" and "that's why we have smoke detectors and fire escapes...we assume that fire could always break out...and that's why we have emergency exits, and that's why we take precautions, and that's why those things are required in a public building like this." E. 1258. The trial court determined that there is a duty to provide a safe workplace, E. 1261-1262, and determined that the unsafe working condition in this case was "egress and ingress" because "as an employer, he had a duty to make it safe[.]" E. 1236. The trial court further found "that the circumstances under which [Khafra] was working, that if a fire broke out, and there is testimony from Firefighter Maxwell that it was very difficult to make ingress or egress around that corner...the only exit that he had would be circuitous at best" so Beckwitt "breached that standard of care." E. 1264.

During closing argument the prosecutor argued, over defense objection, "that to have a safe working environment people need to be able to escape from a building, to be able to escape from a fire[.]" E. 1532-1533. Though the prosecutor "acknowledge[d] that,

the defendant didn't cause the fire", the prosecutor argued that "the defendant caused the inability to escape from the fire and that's what caused Askia's death." E. 1562. The prosecutor reiterated that Khafra "died because of the inability to escape the fire." E. 1563.

Like the trial prosecutor and the trial court, the Court of Special Appeals improperly focused on the "anticipat[ion] [of] the possibility of remote danger from fire", *Irwin*, 49 S.E.2d at 81; finding that actus reus for manslaughter was satisfied by Beckwitt's failure to provide adequate egress "in the event of an emergency." E. 59. The Court of Special Appeals found that the hoarding "conditions elevated the danger by *hampering Khafra's ability to escape in the event of an emergency.*" E. 59 (emphasis added). Similarly, in determining that causation was satisfied, the Court of Special Appeals again relied upon a lack of adequate egress "in the event of a fire emergency." E. 69.

Beckwitt's common law convictions cannot be sustained based upon a breach of a common law duty to provide egress for an employee in the event of an accidental fire that was not caused by Beckwitt's negligence. The trial court lacked subject matter jurisdiction to enter such a conviction, and therefore, the sentence imposed was illegal.

b. Any *arguendo* common law duty to provide egress from an accidental fire was preempted by the enactment of Maryland's State Fire Prevention Code.

Assuming, *arguendo*, that any common law duty ever existed to provide emergency egress from an accidental fire, "it was rooted out"⁵ by the passage of the State Fire Prevention Code, codified in the Code of Maryland Regulations ("COMAR") 29.06.01

⁵ *Salvatore v. Cunningham*, 305 Md. at 430.

(APP. 28), and its enabling statute, P.S. § 6-206(a)(1)(i) (APP. 12), which is an “entire body of law [] occupied on a comprehensive basis” as to fire safety and egress, and therefore preempts any prior laws in the field of fire safety and egress. *Accord Genies v. State*, 426 Md. 148, 155 (2012) (internal citation omitted).

“The presumption against such repeal [of the common law] may be overcome, generally, when the statute [] addresses the entire subject matter, known as field preemption”, *Genies*, 426 Md. at 154, just as occurred in *Salvatore v. Cunningham* with respect to a duty to install smoke detectors.

“Field preemption is implicated when an entire body of law is occupied on a comprehensive basis by a statute.” *Id.* at 154-55 (citing *Robinson v. State*, 353 Md. 683, 694 (1999)). Where “statutes as adopted represent the entire subject matter” the statutes “abrogate the common law on the subject.” *Robinson*, 353 Md. at 694 (enactment of assault statutes preempted the common law offenses of assault and battery entirely); *State v. Gibson*, 254 Md. 399, 401 (1969) (enactment of manslaughter by motor vehicle statute was a comprehensive in which Legislature intended to deal with an entire subject matter of unintended homicides resulting from motor vehicle, and therefore the statute implicitly preempted the common law); *accord Board of County Commissioners of Washington County v. Perennial Solar, LLC*, 464 Md. 610 (2019) (implicit preemption of local zoning authority by State statute granting general regulatory powers over entire subject matter of generation stations).

“The primary indicia of a legislative purpose to preempt an entire field of law is the comprehensiveness with which the General Assembly has legislated in the field.” *Howard County v. Pepco*, 319 Md. 511, 23 (1990) (internal citation omitted).

Maryland’s State Fire Prevention Code requires that “the Commission *shall adopt comprehensive regulations* as a State Fire Prevention Code.” P.S. § 6-206(a)(1)(i) (emphasis added) (APP. 12). The intended purpose of the State Fire Prevention Code is to “establish[] the minimum *requirements to protect life and property from the hazards of fire and explosion.*” P.S. § 6-206(d)(1) (APP. 13) (emphasis added). The General Assembly further commanded that the “Code has the *force and effect of law* in the political subdivisions of the State”. See P.S. § 6-206(a)(1)(iii); APP. 12 (emphasis added). Hence, the statute is “interpreted as expressly occupying the field with respect to state...regulations” on protection from the hazards of fire. *Spreitsma v. Mercury Marine*, 537 U.S. 51, 69 (2002).

COMAR 29.06.01 is the corresponding regulation to the State Fire Prevention Code. COMAR 29.06.01.02 discusses the purpose of the State Fire Prevention Code, which similar to P.S. § 6-206(d)(1), states that the purpose of the Code is “to establish minimum requirements that will provide a reasonable degree of fire prevention and control to safeguard life, property, or public welfare from (1) the hazards of fire and explosion...” The regulations specifically state that the Code is to safeguard against “(1) [t]he hazards of fire and explosion arising from the storage, handling, or use of substances, materials, or devices; and (2) [c]onditions hazardous to life, property, or public welfare in the use or

occupancy of buildings, structures, sheds, tents, lots, or premises.” COMAR 29.06.01.02A(1) & (2); APP. 28.

Importantly, the State Fire Prevention Code “incorporates by reference NFPA 1 Fire Code (2015 Edition)...and NFPA 101 Life Safety Code (2015 Edition)[.]”. COMAR 29.06.01.06B(1) & (2); APP. 29. The significance of the incorporation of NFPA 1 Fire Code and NFPA 101 Life Safety Code into the comprehensive regulations of the State of Maryland, is that those codes encompass emergency egress, thereby bringing provisions regarding egress from a fire within the State Fire Prevention Code’s preemption purview.

Most of the State’s allegations in Beckwitt’s case correspond to a failure to comply with a field of legal duties covering conduct constituting the maintenance of egress from a fire. NFPA 1 and NFPA 101 are all-encompassing when it comes to the field of egress from a fire.

For instance, NFPA 1 Fire Code contains Chapter 14, a chapter titled “Means of Egress” that is dedicated to egress from a fire. *See, e.g.*, § 14.1 “Application”; § 14.2 “Exit Access Corridors”; § 14.3 “Exits”; § 14.4 “Means of Egress Reliability”; § 14.5 “Door Openings”; § 14.6 “Enclosure and Protection of Stairs”; § 14.7 “Exit Passageways”, § 14.8 “Capacity of Means of Egress”; § 14.9 “Number of Means of Egress”; § 14.10 “Arrangement of Means of Egress”; § 14.11 “Discharge from Exits”; § 14.12 “Illumination of Means of Egress”; § 14.13 “Emergency Lighting”; § 14.14 “Marking of Means of Egress”; and § 14.15 “Secondary Means of Escape.” APP. 60.

Similarly, NFPA 101 Life Safety Code, also incorporated by the Maryland State Fire Prevention Code, contains Chapter 7, entitled “Means of Egress”, detailing standards

for provisioning egress. *See* § 7.1 “General”; § 7.2 “Means of Egress Components”; § 7.3 “Capacity of Means of Egress”; § 7.4 “Number of Means of Egress”; § 7.5 “Arrangement of Means of Egress”; § 7.6 “Measurement of Travel Distance to Exits”; § 7.7 “Discharge from Exits”; § 7.8 “Illumination of Means of Egress”; § 7.9 “Emergency Lighting”; § 7.10 “Marking of Means of Egress”; and § 7.11 “Special Provisions for Occupancies with High Hazard Contents”. APP. 67.

Incorporation by reference is also important because NFPA 1 Fire Code contains section 11.1 “Electrical Fire Safety” which provides provisions for basic electrical safety adopting topics such as power taps (power strips), multi-plug adapters, extension cords, electrical appliances, equipment, fixtures, and wiring. NFPA 1 incorporates NFPA 70 which is the National Electric Code. Importantly, existing electrical wiring, fixtures, wiring, appliances, and equipment, “shall be permitted to be maintained” unless it has been determined to present an imminent danger. NFPA 1, § 11.1.2.2.

Taken together, the relative completeness with which these various provisions cover the egress field, fire safety, and electrical issues, leads to a strong inference that all conduct within those fields is subsumed by the State Fire Prevention Code and its corresponding regulations and codes. *See Robinson*, 353 Md. at 693-96. “These statutory provisions manifest the general legislative purpose to create an all-encompassing state scheme of” regulation of fire prevention and safety, including egress from a fire. *Accord Talbot Cty. v. Skipper*, 329 Md. 481, 491 (1993); *Perennial Solar, LLC*, 464 Md. at 631.

Moreover, additional language within the State Fire Prevention Code further signals the General Assembly’s intent to preempt the common law in this field. For instance, the

State Fire Prevention Code “establishes the minimum *requirements* to protect life and property from the hazards of fire and explosion.” P.S. § 6-206(d)(1) (emphasis added); APP. 13. The Supreme Court has determined that “[a]bsent other indication, reference to a State’s ‘requirements’ includes its common-law duties.” *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008). Therefore, when the Maryland General Assembly enacted the State Fire Prevention Code, and indicated that the Code “establishes the minimum requirements to protect life and property from the hazards of fire and explosion”, P.S. § 6-206(d)(1), the Code intended to regulate all duties in this field.

As yet another example of how the State Fire Prevention Code preempts other law in the State, the General Assembly put determination of any question as to whether a State or local law or regulation governs into the decision-making power of the Commission. *See* P.S. § 6-206(d)(3); APP. 13. This was of significance in *Perennial Solar* where this Court found that Public Utilities (P.U.) Article § 7-207 pre-empted local law by field preemption based in part on the fact that “the final determination whether to approve” a Certificate of Public Convenience and Necessity application is ultimately made by the Maryland Public Service Commission, and not the local authority, even though the local authority was given the opportunity for input. *Perennial Solar*, 464 Md. at 632-633. The language in P.S. § 6-206(a)(2)(ii) further supports this principle because where a regulation adopted under this subsection does not apply to a certain set of conditions, it is up to “the Commission [to] determine[.]” whether the regulations should in fact apply and the situation be corrected. APP. 12. This is further bolstered by COMAR 29.06.01.03.A which provides that “The State Fire Marshal or the legally appointed designee has the authority to make a

determination of the applicability of this chapter to any building or condition in it.” APP. 28.

Lastly, the Supreme Court has previously determined that field-pre-emption rules apply where a field has been reserved for specific regulation. In *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), the Supreme Court held that the scheme of mandatory federal regulation over oil tankers implicitly pre-empted the power of the State of Washington to regulate such matters; noting that the federal act’s language “*required* the Secretary to issue ‘such rules and regulations as may be necessary with respect to the design, construction, and operation of the covered vessels.’” (emphasis in original)). *Id.* 161. Likewise, Maryland’s State Fire Prevention Code “requires” the Commission to adopt such comprehensive rules and regulations as may be necessary with respect to the hazards associated with fires. *See* P.S. § 6-206(a)(1)(i) (“To protect life and property from the hazards of fire and explosion, the Commission *shall* adopt comprehensive regulations as a State Fire Prevention Code.”) (emphasis added); APP. 12.

Reading all the aforesaid provisions in concert, it is plainly obvious that they “manifest the intention to occupy the entire field.” *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 611 (1926).

Not only did the General Assembly intend to occupy the field of fire prevention and safety to include adequate egress in the event of a fire, but it was specifically contemplated whether the requirements in the State Fire Prevention Code should be made applicable to one- and two-family dwelling houses, and it was determined that it should not.

Under the “Application and Scope” section of the Fire Prevention Code in COMAR 29.06.01.06, as amended by COMAR 29.06.01.07 and COMAR 29.06.01.08, the fire safety field, and all of the field therein requiring the maintenance of emergency egress from a structure, is occupied. APP. 29. There is but one *exemption* and that is for one- and two-family dwelling houses. The regulations state that “[t]he provisions of this [State Fire Prevention Code] chapter do not apply to buildings used solely as dwelling houses for not more than two families as prescribed in Public Safety Article, Title 6, Subtitle 3, Annotated Code of Maryland.” COMAR 29.06.01.03.D; APP. 28. But for the decision by the State Fire Prevention Commission, single family dwellings would have come under the requirements of the code. Additional support that the General Assembly intended to exempt single family dwellings from the requirements of the State Fire Prevention Code can be found in P.S. § 6-305(1) which places a duty upon the State Fire Marshal to enforce “all laws of the State that relate to...(iv) the means and adequacy of exit, in case of fire, from buildings and all other places in which individuals work, live, or congregate, *except buildings that are used solely for dwelling houses for no more than two families.*” (emphasis added); APP. 16. Support can also be garnered from P.S. § 9-803 which authorizes inspection by fire officials for “accumulations...[of] combustible material...except [within] the interior of a private dwelling.” APP. 25. *See also* P.S. § 6-307 (imposing duty upon the State Fire Marshal to inspect various buildings except those “occupied as a private dwelling.”). APP. 20.

This is not simply a case of the regulators failing to address whether protections from fire hazards are needed in single family dwellings, rather, this is a case of an explicit

consideration and determination that single family dwellings are exempted. If the Fire Prevention Code were not preemptive, the common law would have jurisdiction to fill this regulatory gap (assuming the common law had a duty requiring action in the first place). However, this is not the case. Instead, this is a case where a “decision to forego regulation in a given area may imply an authoritative...determination that the area is best left *un* regulated, and in that event would have as much pre-emptive force as a decision *to* regulate.” *Ark. Elec. Coop. v. Ark. Pub. Serv. Comm’n*, 461 U.S. 375, 384 (1983) (emphasis in original) (internal citations omitted).

Therefore, pursuant to P.S. § 6-206(a)(2)(ii), it is up to “the Commission [to] determine[]” whether the regulations should in fact apply to single family dwellings, not the courts. Thus, buildings used solely as dwelling houses for not more than two families are expressly exempted from compliance with the State Fire Prevention Code. This represents a de-regulating negative pre-emption. *CSX v. Miller*, 159 Md. App. 123, 171-73 (2004). This is because the conduct falls within the scope of comprehensive regulatory authority delegated but not fully exercised. *Napier*, 272 U.S. at 613.

In Maryland, the only way for a person to be liable “at common law” for conduct relating to fire safety, egress, and electrical issues, would be if the liability is based upon a parallel violation of the State Fire Code or a more stringent local code that is not in conflict with the State Code. It would then be the duty imposed by the code that is actually being transplanted into the common law action. *See, e.g., Pittway Corp. v. Collins*, 409 Md. 218 (2009) (negligence action premised upon violations of City of Gaithersburg Housing Ordinance and Building Codes); *Collins v. Li*, 176 Md. App. 502 (2007) (same); *Rivers v.*

Hagner Management Corp., 182 Md. App. 632 (2008) (negligence action based upon violation of Prince George’s County Fire Code).

The relative strength of the preemptive inference far exceeds those inferences drawn in *Gibson*, 4 Md. App. 236 and in *Robinson*, 353 Md. 683. This is one of those “times when the legislature [] so forcibly express[es] its intent to occupy a specific field of regulation that the acceptance of the doctrine of pre-emption by occupation is compelled.” *County Council for Montgomery County v. Montgomery Assn., Inc.*, 274 Md. 52, 59 (1974) (citing *City of Baltimore v. Sitnick*, 254 Md. 303, 323 (1969)).

The State Fire Prevention Commission declined state-wide dwelling regulations. The common law courts are simply not authorized “safety-standard cooks”⁶ that can whip up a recipe of a failure to provide adequate egress in the event of an accidental fire emergency in a single-family dwelling and use that to serve up a defendant on a common law silver platter. Rather, courts should “defer to the judgments of legislatures and agencies when they have spoken because they are institutionally better situated to set safety standards. These same principles underlie many forms of judicial deference to agency action.” *In re City of New York*, 522 F.3d 279-285-86 (2d Cir. 2008) (citing *United States v. Mead Corp.*, 533 U.S. 218, 228-29 (2001); *Auer v. Robbins*, 519 U.S. 452, 461 (1997); (additional citations omitted)).

“As the Supreme Court has recently noted, [] agencies are often better positioned to set standards of care than are common-law courts.” *Id.* at 286 (citing *Riegel v. Medtronic*

⁶ *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 871 (2000).

Inc., 128 S.Ct. 999, 1008, 1011 (2008) (noting that juries applying the common law lack the expertise of agencies)).

It was error to allow the jury to speculate that a lack of a smoke detector and lack of adequate egress from an accidental fire were instrumentalities of negligence in this common law case. *Robinson*, 353 Md. at 704. Maryland's Public Safety statutes foreclosed the use of the common law reasonable person standard within the subject matter of smoke detectors and egress from a fire in single family dwellings, and left the statutory violations as the sole route to provide negligence. *See Salvatore*, 305 Md. at 430; *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 344-45 (2008) (Ginsburg, J., dissenting).

Neither at common law, nor by statute today, did Beckwitt have any duty to provide a smoke detector or emergency egress to an employee trying to escape from an accidental fire in a single-family dwelling. It was error for the trial court to enter a conviction and impose a sentence based upon conduct that was neither criminal at common law, nor is criminal by statute as applied to Beckwitt. Where there is no duty, there is no negligence, and therefore, can be no gross negligence manslaughter conviction.

II. The evidence was legally insufficient to permit a rational trier of fact to find that Beckwitt was guilty of involuntary manslaughter beyond a reasonable doubt for permitting his friend to work in a home with hoarding conditions accompanied by two power outages.

A. Standard of Review

When reviewing a criminal conviction for sufficiency of the evidence, this Court “will consider the evidence adduced at trial sufficient if, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt.” *State v. Coleman*, 423 Md. 666, 672 (2011) (internal quotation marks omitted) (quoting *Facon v. State*, 375 Md. 435, 454 (2003)).

“Common law involuntary manslaughter is generally defined as an ‘unintentional killing of a human being, irrespective of malice.’” *State v. Morrison*, 470 Md. 86, 108 (2020) (citing *State v. Thomas*, 464 Md. 133, 152 (2019)). To sustain a conviction for involuntary manslaughter, the prosecution must prove that the killing was committed: “(1) by doing some unlawful act endangering life but which does not amount to a felony[;] or (2) in negligently doing some act lawful in itself[;] or (3) by the negligent omission to perform a legal duty.” *Morrison*, 470 Md. at 108-09 (internal citations omitted).

The latter two variations of involuntary manslaughter were presented to the jury in this case, but only a general verdict was returned.

B. There was no legal duty applicable to the circumstances in Beckwitt’s case.

The conduct in this case was based upon omissions which only become criminal if there was a legal duty requiring action. While “the act of killing may be by omission as

surely as by commission,” there is a “limitation.” Charles E. Moylan, Jr., *Criminal Homicide Law*, § 12.9, p. 235 (2002). “[F]or a homicide by omission to be criminal, the homicidal agent must have owed a duty to the homicide victim”. *Id.*; *see also* Wayne R. LaFave, *Substantive Criminal Law*, 2 Subst. Crim. L. § 15.4(b) (In order for an “omission to act to give rise to criminal liability for a homicide resulting from the omission, it must first be shown that the one who failed to act had a duty to act.”).

There can be no question that the conduct in this case was based upon omissions to act including: failure to provide adequate egress unobstructed by hoarding, failure to provide a reasonably safe work environment, failure to reasonably respond to warnings of a fire risk, and failure to provide a smoke detector. *See* E. 1261-1264 (State’s Bill of Particulars); E. 1458, 1461, 1495-1496 (Trial Court’s Rulings on Motions for Judgment of Acquittal); E. 1524-1525 (Jury instruction on legal duty manslaughter); E. 1534-1538, 1563 (State’s Closing Arguments); E. 58-59, 66, 68-69 (Findings of Omissions by Court of Special Appeals).

Because a homicide by omission can only be criminal where the homicidal agent owed a duty to the homicide victim, these failures to act could only sustain involuntary manslaughter in the context of legal duty gross negligence manslaughter.

As argued *supra*, Argument I, it has been said by numerous courts of varying jurisdictions that there was no common law duty for a master to provide a means of escape for an employee trapped in a fire that started by accident, that was not caused by the master’s negligence. *See, e.g., Jones v. Granite Mills*, 126 Mass. at 88-89; *Irwin v. Torbert*,

49 S.E.2d at 81; *Yall v. Snow*, 100 S.W. at 3; *Pauley v. Steam-Gauge & Lantern Co.*, 131 N.Y. at 94; *Schmalzreid v. White*, 36 S.W. at 395.

Moreover, Beckwitt was not charged in this case with violating any State or local fire codes relating to egress from a fire.

While it is a maxim that ignorance of the law is no defense, “it stretches that fiction too far to put a defendant on notice that the prohibition against his conduct...that has never made its way into” Maryland criminal law, “could provide adequate notice to justify a criminal charge.” *See State v. Lisa*, 919 A.2d 145, 160 (N.J. Super. Ct. App. Div. 2007), *aff’d*, 945 A.2d 690 (N.J. 2008). “A duty of care, upon which a duty to act is premised, must be so firmly established as to be beyond controversy or dispute if it is to provide presumed notice.” *Id.*

“In the case of negligent homicide or manslaughter, the duty must be found outside the definition of the crime itself, perhaps in another statute, or in the common law or in a contract.” *State v. Far West Water & Sewer Inc.*, 228 P.3d 909, 922 (Ariz. Ct. App. 2010) (internal citations omitted). “In the absence of duty imposed by law, due process concerns may bar a criminal prosecution.” *Id.*, n. 8 (internal citations omitted).

In this case, the duty charged to the jury was based upon amorphous concepts of providing a safe workplace, without consideration of the fact that the safe workplace duty did not encompass providing emergency egress in the event of an accidental fire, nor did it encompass providing a smoke alarm. Further, the duty in this case was not found outside the crime itself such as by incorporation from another statute or code.

“Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. ‘Proof of negligence in the air, so to speak, will not do.’” *Palsgraf v. Long Island R.Co.*, 248 N.Y. 339, 31, 162 N.E. 99, 99 (N.Y. 1928) (internal citations omitted); *see also Jacques v. First Nat. Bank of Maryland*, 307 Md. 527, 532 (1986) (The injured “must bring himself within the scope of a definite legal obligation, so that it might be regarded as personal to him. ‘Negligence in the air, so to speak, will not do.’”) (internal citations omitted).

Beckwitt should not have been held to a legal standard, never applied before, at the whim of the trial court and the jury. *See Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964) (“There can be no doubt that a deprivation of the right of fair warning can result...from an unforeseeable and retroactive judicial expansion” of well-settled common law principles.) *see similarly, Doe v. Department of Public Safety and Correctional Services*, 430 Md. 535, 547-48 (2013) (“determining that the retroactive application” of the law “violates Article 17” of the Maryland Declaration of Rights); *accord* MD. CONST. DECL. OF RTS. arts. 5, 17, 21, and 24; U.S. CONST. amends. V and XIV.

C. The State failed to demonstrate that Beckwitt’s conduct demonstrated a wanton and reckless disregard for human life.

This Court’s review requires a finding that the conduct “be criminally culpable”, *Thomas*, 464 Md. at 152, meaning that the negligence “rises to the level of wanton and reckless conduct – i.e., gross negligence.” *Morrison*, 470 Md. at 109 (internal citations omitted).

“Issues involving gross negligence are often more troublesome than those involving malice because a fine line exists between allegations of [simple] negligence and gross negligence.” *Id.* (citing *Stracke v. Butler*, 465 Md. 407, 420 (2019)). “Only conduct that is extraordinary or outrageous character will be sufficient to imply [the] state of mind” of “a wanton or reckless disregard for human life.” *Id.* at 109-110 (internal citations omitted).

In determining this standard, this Court must make an “assessment of whether the activity is more or less ‘likely at any moment to bring harm to another’” and requires a finding that “[t]he defendant, or a reasonably prudent person, must also be aware of the risk and subsequently disregard it.” *Id.* at 114-115 (internal citations omitted).

Although the Court of Special Appeals determined that “the evidence was sufficient to support [Beckwitt’s] conviction for gross negligence involuntary manslaughter, ‘[it] [could] not say that the evidence of [Beckwitt’s] guilt is truly overwhelming.’” E. 97-98 (internal citations omitted). As will be demonstrated below, the evidence of Beckwitt’s wanton conduct was not just less than overwhelming, it was less than legally sufficient.

1. Having someone work in a home with hoarding conditions and two power outages is not likely at any moment to bring harm to another.

To determine whether a particular activity is “more or less ‘likely at any moment to bring harm to another’”, this Court must “weigh[] the inherent dangerousness of the act and environmental risk factors.” *Thomas*, 464 Md at 160-61. To determine whether a risk is substantial, this Court considers “both the likelihood that the harm will occur and the magnitude of potential harm. ...” *Id.* at 167 (citing *People v. Hall*, 999 P.2d 207, 218 (Colo. 2000)).

a. Hoarding is not inherently dangerous conduct.

In this case, the State has already acknowledged (1) that hoarding alone is not inherently dangerous nor vicious conduct⁷; (2) that “hoarding conditions may not present an ‘imminent risk’” to another⁸; and (3) that the dangers from hoarding “may be relatively *unlikely* to happen on any one day inside a hoarder’s home[.]”⁹

Likewise, the Court of Special Appeals correctly found that though Beckwitt’s “basement was cluttered with trash and detritus,...*these conditions were not inherently dangerous in that they posed an imminent risk of death to Khafra.*” E. 73. (Emphasis added).

This Court has previously found inherently dangerous conduct likely to bring about substantial harm to another at any moment in the following instances: (1) selling heroin to a desperate addict by a defendant who was aware that heroin caused overdoses in a county riddled with heroin deaths, *see Thomas*, 464 Md. at 159; (2) driving more than thirty miles over the speed limit in a residential district on a Sunday evening where people were likely to be walking around, *see Duren v. State*, 203 Md. 584, 588-89 (1954); (3) pointing a gun directly at another person by a defendant who was inexperienced with handling guns and knew that the gun was loaded, *Thomas*, 464 Md. at 159 citing *Mills v. State*, 13 Md. App. 196, 202 (1971); and (4) permitting a 20-month-old baby to be savagely beaten by an adult male. *See Palmer v. State*, 223 Md. 341 (1960).

⁷ *See* Appellee’s Brief in the Court of Special Appeals at 30.

⁸ *See* Appellee’s Conditional Cross Petition at 23.

⁹ *See* Appellee’s Conditional Cross Petition at 24 (emphasis added).

In this Court's prior gross negligence manslaughter cases, the underlying conduct itself was both dangerous to others and unlawful, even absent the attendant circumstances.

In Judge Moylan's *Pagotto v. State*, 127 Md. App. 271, 332 (1999), there was recognition that conduct for gross negligence manslaughter must be both inherently dangerous and of a *malum in se* character, in other words, conduct that is traditionally universally prohibited, rather than a mere *malum-prohibitum*-type of regulatory violation that may vary from year to year and from county to county. This Court recognized in *State v. Pagotto*, 361 Md. 528, 551 (2000), that the conduct must be prohibited at least on a statewide basis in order to be grossly negligent.

In *Thomas*, this Court determined that the conduct had to be inherently dangerousness, and then, even that would not be enough. 464 Md. at 163. Rather, only when the inherently dangerous conduct was "combined with environmental risk factors" do those two components, "which, together, make the particular activity more or less 'likely at any moment to bring harm to another'", suffice for criminal gross negligence. *Id.* at 159.

This Court has never sustained a conviction for gross negligence manslaughter where the underlying conduct itself was not prohibited on a statewide basis, *see Pagotto*, 361 Md. 528, or where the underlying conduct itself was not inherently dangerous, *see Morrison*, 470 Md. 86.

The conduct that Beckwitt was engaged in, allowing Khafra to travel through hoarded conditions to work in an underground tunnel, was not conduct that was inherently

dangerous on its own, or prohibited on a statewide basis like the examples of drug distribution, reckless driving, brandishing a firearm, or assault.

b. The possibility of a fire emergency does not convert innocuous conduct into wanton and reckless conduct.

The only evidence presented about “dangers” of hoarding came in the context of responding to a fire emergency. There was no danger in this case absent the occurrence of the fire. There was no evidence offered that the hoarding conditions in this basement would otherwise have killed or substantially harmed Khafra.

Firefighters testified that “[i]f this home ever catches on fire, it’s going to put you in danger, trying to go in, trying to go out”; the job “*while fighting the fire*” is dangerous because if something “falls” it can “block your exit”; and risks posed by hoarding when firefighters are fighting fires include slowing down one’s escape. E. 295-296. (Emphasis added).

The Court of Special Appeals repeatedly emphasized that this non-dangerous conduct of working in hoarded home, only turned criminal with the *potential of a fire emergency*. See E. 73-74 (“To be sure, [Beckwitt’s] basement cluttered with trash and detritus...were not inherently dangerous in that they posed an imminent risk of death to Khafra. Rather, the hoarding conditions exacerbated any potential danger because, *in an emergency*, Khafra’s escape path would be severely restricted.”); E. 59 (“Contributing to the environmental risk factors here was the amount of debris and detritus in [Beckwitt’s] basement. These conditions elevated the danger by hampering Khafra’s ability to escape *in the event of an emergency*.”); E. 66 (“[Beckwitt] invited Khafra to dig tunnels in a secret

location beneath [Beckwitt's] home where there were power outages, and where mounds of garbage and debris, and possibly locked doors, impeded escape *in the event of an emergency.*"); E. 66 ("[Beckwitt] disregarded the significance of Khafra's precarious and dependent position in the tunnels, the occurrence of two electrical failures within a twenty-four-hour period, and the obstacles Khafra faced *in the event of an emergency.*"); E. 69 ("Additionally, the hoarder conditions in [Beckwitt's] home dangerously hampered Khafra's ability to escape *in the event of a fire emergency.*"). (Italics added throughout).

The intermediate court's reliance on the possibility of a fire emergency to support a finding of gross negligence is at odds with the Restatement of Torts which cogently states that the "mere... failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency" is but a "form of negligence". *See* Restatement of Torts, Second, Ch. 19, § 500, Comment g. (1965) (June 2021 Update). The Court of Special Appeals appeared to erroneously equate a failure to protect against a possible emergency with gross negligence, rather than mere negligence. Before arriving at a finding of reckless misconduct, there must be evidence of "a conscious choice of a course of action"; with "knowledge of the serious danger to others", including a "recogni[tion] that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent". *Id.* It is a "difference in the degree of the risk" that "is so marked as to amount substantially to a difference in kind." *Id.*

The premise advanced by the Court of Special Appeals "that a fire *might* occur in the basement", is not the standard. Rather, for gross negligence, there must be "a wanton

and reckless disregard of a *high degree of risk* to human life” and that risk must be “*substantial.*” *Morrison*, 470 Md. at 112, 115 (internal citation omitted) (emphasis added).

In *Geele v. State*, 47 S.E.2d 283, 287 (Ga. 1948), defendants were charged with involuntary manslaughter based on the commission of lawful acts without due caution, alleging that defendants failed to provide safe premises, based in part on inadequate egress, for patrons of a hotel who were unable to escape a fire not caused by defendants’ negligence. The Court contrasted the inherently dangerous instrumentalities of a firearm, knife, and automobile, which if handled negligently or recklessly could support a murder or manslaughter charge (like the Maryland cases of *Mills* and *Duren*, *supra*) with the “materially different situation” alleging deficient fire safety practices in which “not a single instrumentality mentioned” would cause “an ordinarily prudent person [to] recognize or consider as being inherently dangerous,” “not a single specified act of negligence [] is prohibited by State law,” [t]here is no...duty to act where these defendants are alleged to have negligently failed to act.” *Id.*

In Beckwitt’s case, Khafra dug tunnels in the earth underneath the basement. Khafra was not hired to use blow torches and welders. There is no evidence that he used any equipment that had the potential to cause a fire. There was no evidence in the record that during the time that Khafra was at the residence that either Beckwitt or Khafra were using any appliance, instrument, or apparatus, likely to cause a fire. Where Beckwitt and Khafra were not engaged in conduct likely to be a fire hazard, the gross negligence standard is not met. *See Yall v. Snow*, 100 S.W. at 3 (the fact that the building “was not particularly exposed to the danger of fire from the character of the work to be carried on in it” means

one is “not bound to anticipate the possibility of remote danger from fire, or that its occurrence would put in jeopardy the lives of his employe[e]s[.]”).

Beckwitt is not bound at common law to anticipate the possibility of *remote* danger from fire, or that its occurrence would put in jeopardy the lives of its employees. *Irwin v. Torbert*, 49 S.E.2d at 81. Rather the danger must be likely, or “*highly probable*”. See *Earle v. Gunnell*, 78 Md. App. 648, 663 (1989). In this case, the State failed to demonstrate that the conduct involved a risk substantially greater in amount and in kind than that which is necessary to make one’s conduct simply negligent.

c. The extension cords and two power outages did not make it likely, highly probable, or foreseeable that a fire would occur.

The Court of Special Appeals correctly found: “Nor was [Beckwitt’s] use of multiple electrical extension cords, despite their apparent history of failing, reasonably likely to cause death.” E. 74..

Despite this finding, the intermediate court posited an unproven hypothesis in its opinion that two prior power outages on the day of the fire made it possible “that a fire *might* occur in the basement”, E. 68; and that Beckwitt should have “recognize[d] the implications of two electrical failures”, E. 68, and “ask[ed] Khafra to leave the basement for precautionary reasons.” E. 60. (Emphasis added).

Courts, including this one, have wisely advised that they do not want people to rely upon “judicial opinions – to obtain technical information concerning the significance of the evidence before them”, instead; “[a] properly qualified expert” like an “electrical engineer” is “needed” to make such sweeping conclusions. *State v. Payne*, 440 Md. 680,

721 (2014). *See also Crickenberger v. Hyundai Motor America*, 404 Md. 37, 53 (2008) (“Without expert testimony...allegations of a defect in this case amount to ‘mere speculation.’”); *accord Moser v. Agway Petroleum Corp.*, 866 F.Supp. 262, 264 (D.Md. 1994) (noting that the average lay person would require expert testimony to come to a conclusion regarding the operation of equipment involving electrical circuits).

In this case, the State’s expert electrical engineer, Jeremy Neagle, never testified that the use of extension cords to power the basement or the tunnel would make it likely or foreseeable that an electrical fire would occur. Neagle never testified that two prior power outages that day made it likely or foreseeable that a fire would occur. Neagle never expressed an opinion that the extension cords or the two prior power outages caused the fire in this case to occur. Significantly, Neagle was never asked:

- What caused the two prior electrical failures on September 10, 2017?
- Did the latent defect in the faulty electrical outlet cause the earlier power outages to occur?
- Did the use of extension cords cause the two prior electrical failures?
- Did the prior electrical failures cause the electrical fire?
- Could the prior electrical failures cause an electrical fire?
- How likely is it that the prior electrical failures would cause an electrical fire?
- What should an occupant of a home do when there are two power outages in one day?

- Are two power outages indicative of a problem in the entire electrical system?
- Is it dangerous to use extension cords in a home?
- Does the use of extension cords increase the likelihood that an electrical fire might occur?
- Does the use of a three-prong plug adapter increase the likelihood that an electrical fire might occur?

The intermediate court’s bald assertion that there were “implications” that a person in their home should have “recognized” as likely to cause substantial harm when the power outages occurred is not supported by the record.

The Court of Special Appeals failed to utilize a forward-looking approach to assess Beckwitt’s conduct so as not to convert no negligence, or simple negligence, into gross negligence, based upon the resultant harm. *See Pagotto v. State*, 127 Md. at 299-300 (1999), *aff’d*, 361 Md. 528 (2000) (In determining the “incremental catalyst that may transform mere negligence into gross negligence” the court must “scrupulously avoid working backward from the consequences.”); *see also Morrison*, 470 Md. at 127 (This Court must “avoid a ‘20/20’ hindsight assessment of ‘what may have or could have occurred’ since “[s]uch hindsight bias has the power to ‘distort the risk of [] inaction so that *all* risk becomes substantial.’”) (internal citation omitted) (emphasis in original).

The first electrical issue was a power outage that occurred at 2:32 a.m. on the morning of September 10, 2017. At that time, Khafra messaged to Beckwitt that “there’s no power down here” and that Khafra thought he smelled “smoke in the basement”. E. 628-

629. Khafra then messaged to Beckwitt “NVM [nevermind] about the smoke. But yeah pitch black down here and no air flow lol please try to fix when you see this.” E. 630.

Beckwitt did not see these messages until around 9:00 a.m. when he woke up. At that time, Beckwitt went down to the basement. E. 630-631. Beckwitt was able to “swap[] out” one extension cord for another, and plug it into a different circuit. E. 1094-1095. This was not Beckwitt’s “only response” to the first power outage. E. 59. Rather, Beckwitt spoke to Khafra in person in the basement to inquire about the smoke. E. 1069. Khafra told Beckwitt that “I don’t think it was really there. I was just imagining it or something.” E. 1069.

To be sure, there was no indication to Beckwitt or to Khafra as of 9:00 a.m. that there was any smoke or fire in the basement. In the six-and-a-half hours that had passed since the first power outage, the basement had not filled with smoke and nothing had started on fire.

At trial, neither Fire Marshal Maxwell nor Electrical Engineer Neagle testified that Beckwitt’s conduct of changing the extension cord and placing it on a different circuit was unreasonable. Neither expert testified that the use of extension cords to power the basement and the tunnels was dangerous. Neither expert testified that the first power outage signaled a greater problem in the house or within the general electrical system. Neither expert testified that the first power outage might cause or be indicative of a fire. Neither expert testified that Beckwitt should have taken precautionary measures at that time.

More than twelve hours after the first power outage, a second power outage occurred. Beckwitt heard “the carbon monoxide detector turn off[.]” E. 393. Fire Marshal

Maxwell testified that he, too, was “familiar with” this occurrence “because [he] ha[s] the same type [of carbon monoxide detector] at [his] house. When the electricity goes off...[i]t’s like a little noise.” E. 393. Beckwitt went to the basement and reset the circuit breaker to the kitchen which powered the carbon monoxide detector. E. 801, 802, 819. While Beckwitt was in the basement re-setting the circuit breaker, he did not see or smell any smoke or fire. E. 872, 1097.

Fire Marshal Maxwell agreed that “sometimes [] circuit breakers just flip because they get a quick power overload and we flip them and go back about our business”; but there is nothing “out of the ordinary or inconsistent with the ordinary common experience with respect to that[.]” E. 490. Maxwell did not testify that Beckwitt should have asked Khafra to evacuate at this time, or that Beckwitt’s troubleshooting at this stage was unreasonable, even though there had been a previous power outage that day.

Moreover, neither Maxwell nor Neagle testified that this second power outage was inherently dangerous or likely at any moment to start a fire. Maxwell was directly asked “what the relationship if any to the fire was to the carbon monoxide detector and the power source to the carbon monoxide detector going off” and Maxwell responded, “I don’t know the direct correlation, no.” E. 490.

After Beckwitt reset the circuit he heard buzzing in the kitchen so he went upstairs to investigate. Beckwitt saw “smoke coming up through the kitchen floor”. E. 803. The kitchen was directly above the workbench area in the basement where the fire began. E. 477-478. Upon seeing smoke in the kitchen, Beckwitt “instantly turned tail and went back

downstairs and yelled to [Khafra], it's a fire, we got to get out. Fire, we got to get out." E. 802.

The forward-looking approach demonstrates that with each occurrence, Beckwitt took reasonable action to fix the problem that was readily apparent. *See People v. Reagan*, 723 N.E.2d 55 (N.Y. 1999) (finding that the performance of reasonable troubleshooting negates mens rea).

This Court has previously said that culpability "is dependent on the *observable* forces at play", not the *invisible* forces at play. *Thomas*, 464 Md. at 154 (emphasis added). In this case, the Court of Special Appeals improperly speculated that there were "implications of [these] two electrical failures", E. 68, and held Beckwitt to an unreasonable standard that Beckwitt's failure to "recognize" the *unrecognizable* "implications of [these] two electrical failures" served as a breach of a standard of care in this case.

Not only did the Court of Special Appeals use the earlier power outages, that were not proven to have caused or been related to the fire, as evidence to of knowledge or notice of some claimed danger in the greater electrical system, but the Court also improperly used the earlier power outages as direct evidence of negligence where the State never alleged that the fire was negligently caused by overloading an extension cord. *See Locke v. Sonnenleiter*, 208 Md. 443, 447-48 (1955).

The Court of Special Appeals improperly lumped together all the electrical equipment in the premises into a single instrumentality for analytical purposes and faulted Beckwitt for failing to recognize occult and nebulous "implications" of prior occurrences

that find no support in the expert testimony or caselaw. *See Wise v. Ackerman*, 76 Md. 375 (1892) (holding that circumstances of two different accidents in different freight elevators inside the defendant’s building could not be legally combined into an inference of negligence). The misuse of prior defect evidence is never appropriate where “no ordinary care or reasonable diligence could have discovered the defects.” *State v. Emerson & Morgan Coal Co.*, 150 Md. 429, 446 (1926). Instead, the rule is “that when an appliance or machine not obviously dangerous, has been in daily use for a long time, and has uniformly proved adequate and safe, its use may be continued without imputation of negligence.” *Stewart & Co. v. Harman*, 108 Md. 446, 70 A. 333, 336 (1908) (internal citation omitted); *accord McVey v. Gerrald*, 172 Md. 595, 192 A. 789, 791 (1937).

d. Khafra’s mode of egress was reasonable under the circumstances.

What is important to remember in this case is that Khafra was not *prevented* from escaping from the basement through the hoarding conditions; rather, in a light most favorable to the State, Khafra was *slowed down* by the hoarding conditions.

This Court has previously said that deviating from the *safest* way to engage in conduct or to maintain premises does not automatically lend itself to a finding of negligence, let alone to a finding of gross negligence. *See Morrison*, 470 Md. at 115-16 (“Although the State introduced evidence that the safest way for a baby to sleep is alone in a crib or bassinet”, this Court determined that a “deviation from best sleeping practices does not lend itself to a finding” of gross negligence.); *Harrison v. Harrison*, 264 Md. 184, 188 (1972) (In a negligence action by an employee injured on the job against his employer, this Court determined that “[t]he mere fact that” one method “is ‘safer’” than another, “is

insufficient to prove negligence.” “The test as to whether the employer has fulfilled his [] duty to provide the employee with a ‘reasonably safe place to work,’ is not per se a comparison of standards, that is, [it][sic] is not a question of whether one method may be ‘safer’ than another[.]” Rather, the test is “whether, the use of the method employed was reasonable under the circumstances.”).

In Beckwitt’s case, the path that Khafra was familiar with using on each occasion to egress from the tunnel, through the basement, to the outside, was reasonable under the circumstances. The path in this case, even with the hoarded conditions, only measured 25 to 35 feet in length, was two-to-three-feet wide, as wide as a standard doorframe, and lead directly to the outside. E. 275, 303, 313, 343.

Fire Marshal Maxwell testified that the first leg of the path from the hole of the tunnel to the furnace area would not be terribly difficult to traverse. E. 465. Only when Khafra arrived at the laundry room did it become more cumbersome because in that location there was debris of up to 18 inches off the ground. E. 465. The issue was not that Khafra could not walk through the debris, but rather, with the thick layer of toxic gases that were building at the ceiling from the fire, Khafra would have needed to crawl low enough below that layer of gases in order to be safe. E. 456, 463.

When asked by the prosecutor “how does one increase their chances of escaping a fire”, Fire Marshal Maxwell answered that “*familiarity with the structure that you’re in is number one.*” E. 453-454 (emphasis added). Maxwell explained that with “knowledge of the area” even “a blind person can get out of the house if they’re familiar with the house.”

E. 454; *see also* E. 503 (“[A] critical factor in determining a person’s ability to make egress” is familiarity with the premises.).

The record demonstrated that Khafra was knowledgeable of this egress path, and all of its conditions, as this was the only path that he ever used to get out of the tunnel, and he did so on multiple occasions, including three days in January, two days in February, seven days in March, three days in April, and seven days in September, 2017. E. 126-127; Khafra was in the basement on the morning of September 10, 2017, and therefore had traversed the path hours before the fire began. E. 881-885, 956.

Fire Marshal Maxwell agreed that it was a “significant factor” that Khafra had come and gone on previous occasions and knew “which directions to go[.]” E. 503. Maxwell opined that Khafra was trying to make his way to the exit when he collapsed in the laundry room. E. 510-511.

Khafra was the only individual using the path on the occasions when he was at Beckwitt’s residence, other than Beckwitt himself. This is not a case where there were dozens of individuals crammed into a confined space who all would need to egress through a single crowded exit at the same time in the event of a fire emergency. *Cf. Commonwealth v. Welansky*, 55 N.E.2d 902 (Mass. 1944) (night club owner prosecuted for manslaughter in death of hundreds of his patrons while they all tried to escape through a single revolving door because all of the other exits were locked or blocked).

2. Neither Beckwitt nor a reasonable person would be aware that hoarding and the power outages presented a high degree of risk of substantial harm to human life.

“In order that an act or omission may be regarded as negligent, the person accused of negligence must have known or should have known that danger was involved in such act or omission or that the instrumentality or property causing the injury was in some way defective or dangerous.” *Harrison*, 264 Md. at 189.

The Court of Special Appeals correctly found that “[i]n the instant case” there was “no evidence that [Beckwitt] actually appreciated the dangerousness of his conduct[.]” E. 57, n.14.

With respect to the hoarding, the hoarding began with Beckwitt’s parents who instilled in Beckwitt that this was a normal way of life. E. 776, 780.

In 2013, Beckwitt started digging the tunnels and hired others to assist him. E. 1053-1057. This continued through 2017 with Khafra’s work. The State did not introduce any evidence of any previous fire, injury, death, or egress difficulty in all of those years that Beckwitt had lived in those conditions.

This incident-free past experience was a pertinent factor in *Morrison*. *See Morrison*, 470 Md. at 123 (“[T]he State did not introduce evidence that Ms. Morrison lost a child as a result of sleeping in the same bed with her children. In fact, the evidence reflected that Ms. Morrison was an experienced parent who shared a bed with children without incident.”). This incident-free past experience was also a pertinent factor in *Harrison*. *See Harrison*, 264 Md. at 188-89 (“We would also add that in the instant case there was no prior indication that the young bull in question had vicious propensities or

temperament...Therefore, there was no apparent need to take any unusual precautionary measures in regard to this particular bull.”).

In *Morrison*, this Court twice relied upon the defendant’s subjective state of mind that she was not actually aware that co-sleeping could be deadly. *See Morrison*, 460 Md. at 104, 115 (stating that “there was no suggestion that she was aware that co-sleeping could be deadly, even if risky[,]” and “the State did not introduce evidence that Ms. Morrison was aware of the risks of co-sleeping[.]”). Likewise, in *Thomas*, this Court attributed the defendant’s subjective mens rea towards its finding of gross negligence. *See Thomas*, 464 Md. at 168 (“It is also fair to infer that Thomas subjectively knew an overdose was possible based on his statement that Colton ‘couldn’t have overdosed off [the amount] I sold him.’ It is enough that Thomas knew about the overdose risks of heroin.”) (emphasis omitted).

In this case, the State did not introduce any evidence that Beckwitt was aware of the risks of hoarding or of power outages. It has been said that “[o]rdinary negligence is based on the fact that one ought to have known the results of his acts; while gross negligence rests on the assumption that *he did know* but was recklessly or wantonly indifferent to the results.” *People v. Campbell*, 212 N.W. 97, 99 (Mich. 1927) (emphasis added); *see also Williams v. State*, 235 S.W.3d 742, 750-51 (Tex. Crim. App. 2007) (Criminal negligence is a lesser culpable mental state than criminal recklessness, “[w]ith criminal negligence, the defendant *ought to* have been aware of a substantial and unjustifiable risk that his conduct could result in the type of harm that did occur...while recklessness depends upon a more serious moral blameworthiness – the actual disregard of a known substantial and unjustifiable risk.” It is like foreseeing the risk and “not giving a damn”).

Because there was “no evidence that [Beckwitt] actually appreciated the dangerousness of his conduct”, E. 57, n. 14; Beckwitt could not have been recklessly or wantonly indifferent to what he did not know.

For that reason, Beckwitt’s case is distinguishable from the cases relied upon by the Court of Special Appeals in affirming Beckwitt’s involuntary manslaughter conviction. *See* E. 60-66 citing *Noakes v. Commonwealth*, 699 S.E.2d 284 (Va. 2010) (“The measures that Noakes undertook to prevent the crate from falling upon Noah demonstrate *her actual knowledge of the inherent danger* of the contraption she placed atop the crib. And, because *Noakes knew that she had placed Noah in an inherently dangerous situation* that could cause serious injury, she certainly should not have left Noah unattended[.]” (Emphasis added)); and citing *People v. Luo*, 224 Cal. Rptr. 3d 526, 535 (Cal. Ct. App. 2017) (Luo “did not inform the workers that *he had been ordered by the city to stop work due to a dangerous condition*, and directed the victim to work in the dangerous area *even after receiving the Stop Work Notice.*” (Emphasis added)).

Beckwitt’s subjective state of mind is also an essential requirement for legal duty manslaughter because a conviction for that offense cannot be sustained where the evidence fails to demonstrate that he was subjectively aware that his failure to provide a reasonably safe workplace would create a high degree of risk to human life, and where the evidence fails to show that the defendant consciously disregarded his legal duty. *See, infra*, Argument IV.

As to the objective standard, the State likewise failed to produce evidence that an ordinarily prudent person, under similar circumstances, would have been conscious of a

high degree of risk of substantial harm that could come from allowing someone to work in a hoarded home with two power outages in one day.

As discussed *supra*, the only evidence produced at trial about any “dangers” of hoarding came in through the testimony of firefighters in the context of escaping from a fire or rescuing a person during a fire emergency. Fire Marshal Maxwell testified as an expert in “fire escape” and “fire safety”, discussing his personal awareness of the risks posed by hoarding when he is fighting fires. E. 384. Although the State introduced evidence about the dangers of hoarding when fighting fires, the State did not introduce evidence about the dangers generally to people living in homes with hoarded conditions or power outages. For instance, there was no testimony about the frequency of hoarding deaths in the community, or even the frequency of death by fire in a home. Contrast that to the evidence in *Thomas*, where this Court found it salient that an expert in CDS investigations would have testified that Worcester County “has been consumed with heroin overdoses, some resulting in deaths, *and that these overdoses have resulted in an acute awareness of the dangers of heroin*”. 464 Md. at 168-69 (emphasis added).

Moreover, there was no evidence introduced about the dangers, if any, of using extension cords, or the dangers, if any, posed by two power outages in a home. Neither the fire marshal nor the electrical engineer offered testimony that the use of extension cords can cause a fire, or that one to two power outages in a day signal that there is a greater electrical problem that is a hazard to any occupant. Even Fire Marshal Maxwell testified that sometimes “the electricity goes off” at his house. E. 393. There was no evidence

introduced about the number of electrical fires in homes per year that would signal that people should be “acute[ly] aware[]” of such dangers. *Thomas*, 464 Md. at 168-69.

Power outages happen in a home. They can happen to a fire marshal, they can happen to an ordinary person, they happened in this case. They do not signal that there is an imminent disaster likely to occur any moment.

3. Beckwitt’s conduct does not rise to the opprobrious level of gross departures exhibited by defendants in other gross negligence manslaughter cases where death was the result of a fire.

As mentioned *supra*, Beckwitt’s conduct in allowing Khafra to travel through hoarded conditions to work in an underground tunnel, was not conduct that was dangerous or illegal on its own like this Court’s cases of gross negligence manslaughter for the conduct of drug distribution, reckless driving, brandishing a firearm, or assault.

The only cases in the country in which a person has been convicted of involuntary manslaughter for the death of another caused by fire have been cases of extraordinary conduct on the defendant’s part. *See e.g., Welansky*, 316 Mass. 383 (club owner only provided one viable means of egress for hundreds of patrons occupying his 10,000 square foot nightclub); *Commonwealth v. Zhan Tang Huang*, 25 N.E.3d 315 (Mass. App. Ct. 2015) (defendant landlord of multi-unit apartment building had violated over 36 separate provisions of State building codes relating to fire protection, defendant had been given written notice by the health department in the weeks leading up to the fire that he was in violation of the codes and that repairs had to be made within twenty-four hours, defendant told one of the tenants “[I] don’t care” when asked what would happen to the children in the apartment should a fire occur, and defendant also stated prior to the fire that even

though his conduct was “illegal” he would risk it and just “pay the \$10,000 fine” if he were caught); *People v. Ogg*, 182 N.W.2d 570, 571-72 (Mich. App. 1970) (defendant parents left their 4-year-old and 5-year-old children unattended and locked in their sleeping quarters beginning at 7:00 p.m. one evening, never checking on them for more than 16 hours, and when a fire began at 11:30 a.m. the next morning, nobody was present to help the children escape the fire); *In re Williams*, 101 A.3d 151, 153-54 (Vt. 2014) (defendant intentionally set a fire in wastebasket of home where others were sleeping); *State v. Jeffries*, 285 S.E.2d 307, 311 (N.C. App. 1982) (defendant intentionally set building on fire using accelerants so that he could make insurance claim on the damage to the building).

These cases are not just the extreme cases of involuntary manslaughter based upon death by fire, they are the *only* cases because only those types of exceptional conduct renders someone’s conduct wanton. “[A]t common law conduct does not become criminal until it passes the borders of negligence and gross negligence and enters into the domain of wanton or reckless conduct.” *Welansky*, 316 Mass. at 400. “Wanton or reckless conduct is the legal equivalent of intentional conduct.” *Id.* at 401; *see also Kiriakos v. Phillips*, 448 Md. 440, 479-80 (2016) (citing *Law of Torts*, at § 34, at 212-13) (“Lying between intent to do harm, which...includes proceeding with knowledge that the harm is substantially certain to occur, and the mere unreasonable risk of harm to another involved in ordinary negligence, there is a penumbra of what has been called ‘quasi-intent.’”).

To be “willful,” “wanton,” or “reckless,” “the actor has intentionally done an act of an unreasonable character in *disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow*[.]” *Earle v. Gunnell*, 78 Md. App. 648,

663 (1989) (citing *Law of Torts*, § 34, at 212-14). It is “an extreme departure from ordinary care, in a situation where a high degree of danger is apparant[.]” *Id.* It “must be more than any mere mistake resulting from inexperience...or simple inattention...or *even of an intentional omission to perform a statutory duty*[.]” *Id.* (emphasis in opinion). “Willful or wanton” is “extraordinary and outrageous.” *Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 165-66 (1972). It is “utter disregard for the rights of others.” *Baltimore Transit Co. v. Faulkner*, 179 Md. 598 (1941).

Viewing grossly negligent manslaughter as a “quasi-intentional” killing neatly fits into its junior varsity relationship with depraved heart murder, a killing with the actual equivalent of intent. If the lethal conduct more closely resembles an intentional killing, it is grossly negligent. If it more closely resembles an accidental killing, it is simple negligence.

It is readily apparent that the overall character of the occurrence in this case is strongly accidental. Unlike the aforementioned defendants, Beckwitt did not set the fire at all, let alone set a fire using accelerants, like in *Jeffries*, or set a fire knowing someone was in the home, like in *Williams*. Beckwitt did not leave children unattended with no means of escape, like in *Ogg*. Beckwitt was never put on notice that there was anything unsafe about the conditions of the home, nor did he express that he knew his conduct was illegal or that he did not care what the consequence to someone would be in the event of a fire, like in *Huang*.

The State failed to establish wanton and reckless conduct by Beckwitt’s egress means in the event of an accidental fire emergency to someone working and staying in his

home. This Court's inquiry on sufficiency of the evidence should end here and Beckwitt's conviction for involuntary manslaughter should be vacated.

D. The State failed to produce sufficient evidence to establish causation.

Involuntary manslaughter requires that the defendant cause the death of the victim. *Thomas*, 464 Md. at 173 (2019); *Craig v. State*, 220 Md. 590, 597 (1959). The defendant's conduct must be the proximate cause of the victim's death – meaning the (1) actual, but-for cause and (2) legal cause. *Thomas*, 464 Md. at 173.

In this case, a rational juror could not have found beyond a reasonable doubt that Beckwitt's conduct was the direct cause of Khafra's Death.

There will be an overlap in discussion of many of the facts mentioned *supra*. “While there must be sufficient evidence to support a finding of causation and gross negligence separately, it is clear that the analysis for the two are intertwined and often involve the same or overlapping factual bases.” *Thomas*, 464 Md. at 185, fn. 3 (Hotten, J., dissenting).

1. Lack of Proof of Actual Causation

“For conduct to be the actual cause of some result, ‘it is almost always sufficient that the result would not have happened in the absence of the conduct’ – or ‘but for’ the defendant's actions.” *Thomas*, 464 Md. at 174. (internal citations omitted).

The Court of Special Appeals determined that “there was sufficient evidence of actual causation” because:

[Beckwitt] hired Khafra to dig tunnels below his basement. When a relatively minor fire broke out, the fact that [Beckwitt's] basement was covered in debris and garbage hampered Khafra's ability to escape the fire. Although [Beckwitt] did not intentionally set the fire, his disregard for safety, including his refusal to recognize the implications of two electrical failures on the day

of the fire, satisfy actual causation. In short, but-for [Beckwitt] arranging to have Khafra work in a dangerous environment, Khafra would not have died.

E. 68.

a. It was error for the Court of Special Appeals to make a finding that Beckwitt’s “refusal to recognize the implications of two electrical failures on the day of the fire, satisfy actual causation.”

As discussed *supra*, Section II(C)(1)(c), and adopted herein, there was no evidence introduced of “the implications of two electrical failures on the day of the fire”. The State’s electrical engineer, Neagle, was not asked a single question about the implications of the two prior electrical failures on the day of the fire, or the significance, if any, of the prior electrical failures, or how those failures related to the outlet with the latent defect. There was no connection established between the prior electrical failures and the electrical defect in the outlet that caused the fire that caused Khafra’s death.

With respect to the first power outage, Beckwitt told the police that he was able to “swap[] out” one extension cord for another, and plug it into a different circuit. E. 1094-1095. The record does not reveal from which circuit the extension cord was unplugged, and onto which circuit the new extension cord was plugged into. Thus, there was no connection between the faulty extension cords the circuit that the faulty electrical outlet may have been on.

With respect to the second power outage, the carbon monoxide detector beeped because the power went off. The record established that the carbon monoxide detector was on the kitchen circuit. E. 801. But there is no evidence that the faulty electrical outlet in the

basement was on the same circuit as the kitchen circuit on which the carbon monoxide detector was located.

With respect to Beckwitt's handling of the second power outage, Fire Marshal Maxwell agreed that there was nothing out of the ordinary in the way that Beckwitt addressed that power outage. E. 489-490. Neither Fire Marshal Maxwell nor Electrical Engineer Neagle testified that Beckwitt should have asked Khafra to evacuate the home at this time, or that Beckwitt's troubleshooting was unreasonable.

Furthermore, Maxwell was specifically asked "what the relationship if any to the fire [there] was [with] the carbon monoxide detector and the power source to the carbon monoxide detector going off" and Maxwell answered that he "d[id]n't know the direct correlation". E. 490. Neagle, the electrical engineer, was never asked about the relationship between this outage and the fire.

Moreover, there was no evidence that the prior electrical outages *caused* the faulty electrical outlet to start on fire, or that the prior electrical outages in any way contributed to the latent problem that had been invisibly brewing for years within that electrical outlet.

All that was established about the cause of the fire was that this electrical outlet contained a latent defect within the receptacle itself. E. 564. The only evidence of what was plugged into this defective outlet was the cord of a fluorescent light in the top part of the outlet, E. 575, and the very tip of a plug blade that was part of a three-prong adapter in the bottom part of the outlet. E. 568, 579-580. There was no evidence of what had been attached to that plug blade because it was disconnected and melted in the fire. E. 568-569, 575-576, 579-580.

There was no testimony that the amount of power running through the outlet was too great. Rather, it was the connection itself between the plug blade and the power rail on the inside of the receptacle that caused the catastrophic failure in this case. Neagle explained that when “contact is a little bit loose” between the blade and the power rail, oxidation occurs generating electrical resistance. E. 561. When electrical current flows through that resistance, “it generates heat, and over time that can progress to the point of heating up the materials around it and causing an ultimate failure, and potentially resulting in a fire.” E. 561. The heating up over time “typically precedes a flame and combustion.” E. 560.

The defective electrical outlet was manufactured sometime before 1974. E. 570. Neagle testified that the latent defect of overheating when there is a “plug in a socket” is “pretty characteristic”, “pretty typical” and “a known failure mode for this type [of] receptacle”. E. 561. Neagle did not testify that Beckwitt was using the outlet in a manner that was inconsistent with how the outlet should be used, or that it was being used in a dangerous manner. Neagle opined that the failure in this outlet resulted from deterioration over time and “[i]t’s a pretty typical failure mode for a receptacle, and it can happen in anywhere from hours to years or decades.” E. 563. Neagle could not “put a value of time on” how long it would take after the metal plate begins to heat up to generate enough heat necessary to cause smoke or fire; but, he estimated that “it could be many years” for the “whole overall process.” E. 564, 571-572. The defect in the electrical outlet was going to happen in any event because the fatal electrical failure was caused by deterioration within the electrical outlet itself. E. 564, 571-572.

Extension cords and power outages are not to blame for the tragedy that occurred on September 10, 2017. The Court of Special Appeals improperly relied upon non-causative antecedent conduct that did not cause the fatal electrical failure. Where the antecedent has nothing to do with the consequent, the antecedent does not cause the consequent. *Jackson v. State*, 286 Md. 430, 442 (1979).

This case has been sullied by irrelevant oddities and tarnished by faulty assumptions never proven as fact. The State's bald assertion that "[h]aving multiple extension cords as the permanent power source...drastically increase[d] the likelihood that an electrical fire will break out", Appellee's Cross-Petition at 24, was not supported by the record and is not even what caused the electrical fire in this case.

The State failed to establish that the prior power outages were the but-for cause of the fatal failure, and thus, failed to establish that there were any "implications" that should have been "recognize[d]" from these prior events. Therefore, this Court cannot say that but-for Beckwitt's "refusal to recognize the implications of two electrical failures on the day of the fire", that Khafra would have lived.

b. This Court cannot find that but-for the hoarding conditions in the basement, that Khafra would have lived.

The Court of Special Appeals wrongly determined that the hoarding conditions in the basement "hampered Khafra's ability to escape the fire" and therefore were the but-for cause of Khafra's death. E. 68.

A “hampered” egress route does not mean that “but for” the hoarding, Khafra would have lived. “Hampered” egress did not mean non-existent egress. “Hampered” egress did not mean unreasonable under the circumstances.

As argued *supra*, Section II(C)(1)(d), and incorporated herein, the pathway from the hole to the outside was two-to-three-feet wide, with varying amounts of debris from inches to 18 inches high. E. 275, 303, 313, 343. Khafra successfully made it through the hoarded conditions that he was familiar with from the hole to the laundry room.

Fire Marshal Maxwell walked the path from the hole to the outside. E. 462. Maxwell, who was *unfamiliar* with the hoarding conditions, testified that “the junk in this path” “from the hole to” the laundry room would have slowed someone down by at least *two seconds*. E. 534. Maxwell then estimated that egress from the laundry room where Khafra died to the doorway leading to safety in the finished area of the basement would have slowed someone down by “[a] couple” of seconds. E. 534.

There is no way on this record to know that had Khafra not been slowed down by seconds from the hoarding conditions, that he would have survived the fire.

The fire erupted in the middle of the basement on the wall of the laundry room. Regardless of the hoarding conditions, Khafra still would have had to pass through the interior door of the basement where the laundry room is located, in order to exit to the exterior door to safety, because of the partition wall that existed separating the two halves of the basement.

Would getting out seconds faster have made a difference? Khafra was on his computer in the tunnel when the smoke began in the late afternoon. At 4:16:50 p.m. Khafra

messaging Beckwitt saying, “I was tired af.” E. 631. At 4:17:05 p.m. Khafra messaged Beckwitt saying, “I def smell smoke down here.” E. 631. The record does not reveal how long Khafra remained in the tunnel before he decided to ascend to the basement. We do know he was down there for at least 15 seconds in between sending those two messages.

There is no way to know whether he waited a couple of seconds, a minute, or more before ascending. If he waited any appreciable time in the tunnel, his egress may have been delayed not by the hoarding conditions, but by the effects of carbon monoxide, intense smoke, and flames.

The medical examiner offered no opinion as to whether Khafra might have lived if he had exited any sooner, or any faster. The medical examiner was unable to opine how long it took for Khafra’s body to become saturated with 75% carbon monoxide which was the fatal amount discovered at the time of his autopsy. E. 1016, 1019.

Fire Marshal Maxwell, and defense toxicologist Dr. Yale Caplan, each testified about the effects of carbon monoxide on a person. They testified that carbon monoxide reduces the amount of available oxygen to the tissues and a person under the influence of carbon monoxide will experience cognitive difficulties and dissociated thoughts affecting coordination, and eventually be severely limited in the ability to make decisions. E. 313-314, 1364, 1377. At first, a person affected may feel as though they are “drunk”, but then it can become “very difficult” to do “coordinat[ed]” things such as “turning door knobs”. E. 507-508. At just 30% saturation, there will be cognitive difficulties and dissociated thoughts. E. 1364, 1377. At 40-50% saturation, a person is close to collapse and their ability to make decisions is severely limited. E. 1377. Maxwell testified that enough carbon

monoxide, such as the 75% found in Khafra's system, would cause a person to lose consciousness and to pass out. E. 507-508.

The record does not disclose where Khafra was when he first became uncoordinated and disoriented. The fact that Khafra had made it to all but "two steps to a straight exit", E. 510, indicates that it was less likely that any debris prevented his egress, since he had already made it all but two steps out, and more likely that the effects of carbon monoxide rendered him unconscious and caused him to pass out where his body was found.

Another reasonable alternative to why Khafra did not make it out alive is the evidence of the black smoke itself and the effect that it had on Khafra's ability to see and breathe while trying to escape. E. 306, 307. The record revealed that when Beckwitt was in the basement warning Khafra to get out that he was met by smoke that had filled up the area and prevented him from getting past the laundry room area to the back part of the basement. E. 823, 825. Beckwitt could not see the unfinished part of the basement due to the smoke which was filling up within seconds. E. 823, 1098, 1100. Beckwitt became overcome by smoke and had to keep running in and out. E. 1439-1440.

Neighbors who tried to enter the basement before the firefighters arrived also testified that copious amounts of smoke were coming out of the basement door, with the smoke being described as very heavy. E. 234, 238. Flames were observed in the center of the basement, and despite the relatively "minor" size of the fire, E. 440, neighbors felt "completely hopeless there was no way that this little fire extinguisher was going to make a difference here." E. 236.

When firefighters entered the house they described the smoke as creating a “blackout environment”. E. 271. Firefighters discussed the impact of the smoke and how it would make your eyes water and prevent your ability to breath if you were not wearing protective gear, which Khafra was not. E. 306. The smoke was densest and darkest in the interior room where Khafra’s body was found. E. 306. There was “zero visibility” inside the house, and firefighters could not even see their hand held up in front of their faces. E. 585-586. Likewise, the temperature was warmest in the room with the fire, and Khafra would swiftly feel the effect of the flames and the smoke. E. 307.

Beckwitt, whose presence in and around the room with fire and smoke was much less than Khafra’s, had carbon monoxide levels in his body that had already reached 13%. E. 745. Likewise, Beckwitt’s presence a distance away from the fire still produced burn marks around his mouth, soot in his mouth, and swelling on his face. E. 392, 1023. These injuries, which paled in comparison to what Khafra experienced, still required the administration of oxygen, and fentanyl for pain. E. 1023.

Fire Marshal Maxwell testified that what would have stopped Khafra would have been fire, smoke, or a combination of fire and smoke. E. 511.

This Court cannot say that but for hoarding, Khafra would have made it out alive. “In Maryland, the test of the sufficiency of the evidence” is “reasonable probability” or “reasonable certainty.” *Wilhelm v. State Traffic Safety Commission*, 230 Md. 91, 103, n.1 (1962) (internal citation omitted). “The law requires proof of probable not merely possible, facts, including causal relations.” *Id.* at 103, n.1. “[P]ossible causal relation” is insufficient in the face of “other equally probable cause.” *Id.* (emphasis in original).

In Beckwitt's case there was an abundance of other equally probable causes of delay of Khafra's egress such as Khafra messaging Beckwitt at 4:16 p.m. and 4:17 p.m., rather than leaving the bunker at that time; breathing in carbon monoxide which made him disoriented, uncoordinated, and rendered him unconscious two steps away from the exit; and being confronted with thick dark smoke, radiant heat, and flames. All of these conditions would have affected one's egress even if the path were pristine.

A court's review does not permit speculation that Khafra *would* have escaped the fire had the basement not been filled with so much detritus. *See Jones v. Granite Mills*, 126 Mass. at 88 (rejecting liability on the theory that "if [adequate egress] had been provided, some of the results that followed from the fire might have been lessened, alleviated, or prevented."); *accord Morrison*, 470 Md. at 127 (rejecting a "'20/20 hindsight' assessment of 'what may have or could have occurred[.]'" (internal citation omitted).

Further, a court's review does not permit speculation that Khafra *would* have escaped the fire had there been a smoke detector in the basement or the tunnel. Prior cases have found insufficient evidence to establish that the absence of such a warning device was the proximate cause of the victim's death. *See Yearty v. Scott Holder Enterprises, Inc.*, 824 S.E.2d 817 (Ga. Ct. App. 2019); *Wilkerson v. Alexander*, 429 S.E.2d 685 (Ga. Ct. App. 1993); *Acevedo v. Audubon Management, Inc.*, 721 N.Y.S.2d 332 (N.Y. App. Div. 2001); *State Farm Ins. Co. v. Nichols*, 825 N.Y.S.2d 156 (N.Y. App. Div. 2006).

A defendant "is only criminally liable for what he has caused, that is, there must be a causal relationship between his act and the harm sustained for which he is prosecuted." *Palmer*, 223 Md. at 353.

Because the State failed to establish that Beckwitt's conduct was the actual cause of Khafra's death, this Court must vacate his involuntary manslaughter conviction.

2. Lack of Proof of Legal Causation

The concept of legal causation "is applicable in both criminal and tort law, and the analysis is parallel in many instances." *Thomas*, 464 Md. at 178 (internal citations omitted). Legal causation "turns largely upon the foreseeability of the consequence of the defendant's conduct." *Id.* (internal citations omitted).

The Court of Special Appeals erred in determining that "[t]he facts in this case are sufficient to support a finding that [Beckwitt's] conduct was the legal cause of Khafra's death" by finding as follows:

Although the evidence demonstrated that [Beckwitt] could not have observed the latent defect in the electrical outlet that ultimately caused the fatal fire, two separate electrical failures, one of which [Beckwitt] himself described as 'major,' occurred the day Khafra died. Additionally, the hoarder conditions in [Beckwitt's] home dangerously hampered Khafra's ability to escape in the event of a fire emergency. Based on these facts, it was foreseeable that a fire might occur in the basement, and if it did, Khafra's ability to safely escape would be severely restricted. Accordingly, the evidence sufficiently demonstrated legal causation.

E. 69.

Assuming *arguendo* that this Court finds the evidence sufficient as to actual causation, the State's burden is not complete. That is because "[l]egal causation is a policy-oriented doctrine designed to *limit* liability after cause in fact is established", not to expand liability. *Pittway Corp. v. Collins*, 409 Md. at 245 (emphasis added).

"This part of the causation analysis requires [this Court] to consider whether actual harm to the [victim] falls within a general field of danger that the [defendant] should have

anticipated or expected.” *Id.* Legal causation refers not just to the requirement that the act and the injury be related, but it imposes a requirement that “the act and injury be *reasonably* related.” *Id.* (emphasis added). Policy considerations are to be taken into account such as the “remoteness of the injury from the negligence” as well as the “extent to which the injury is out of proportion to the negligent party’s culpability.” *Id.* Liability should not be imposed “where it appears ‘highly extraordinary’ that the negligent conduct should have brought about the harm.” *Id.*

In this case, it was highly extraordinary that a typical wall outlet would have a loose connection such that if something were plugged into it, that over time it would spark, and that the spark would emit from the metal box that was designed to prevent that from happening.

It was highly extraordinary that this defective outlet which had been manufactured and installed prior to 1974, and had been operating for forty-three years without incident, would then on September 10, 2017, which one only one of twenty-two days that Khafra had ever been in the house, erupt into flames within minutes.

It was highly extraordinary that even though it was a “minor” fire that did not spread beyond the location of its origin, that the fire would happen to erupt in the middle of the egress path, through which Khafra would have to pass, even absent the hoarding conditions, as the natural layout of the basement contained a wall partitioning two halves of the basement.

It was highly extraordinary that this fire that only took 15 seconds to be extinguished by firefighters, would prevent Khafra from escaping and would prevent Beckwitt and all of the neighbors from rescuing Khafra or putting out the fire with an extinguisher.

It was highly extraordinary that there would be a fire in the first place when there was no evidence that Khafra or Beckwitt were engaged in any conduct that was likely to start a fire at that time.

Indeed, legal causation “turns largely upon the **foreseeability** of the consequence of the defendant’s conduct.” E. 68 (internal citation omitted) (emphasis in opinion). Without any support in the record, the intermediate court determined that “two separate electrical failures” the day Khafra died were the “facts” that made it “foreseeable that a fire might occur in the basement[.]” E. 68. The court cited no facts or authority from the record to support this proposition. That is because none exist in the record.

This Court has never addressed foreseeability based upon previous power outages in a home, nor has this Court addressed whether a prior defect in one’s utility system makes it reasonably foreseeable that a subsequent defect in the same utility system is likely to occur and likely to cause imminent harm.

Other courts have determined that evidence of problems in some areas of a system do not give rise to a duty to inspect all of the premises nor do they put one on notice of a latent defect. *See, e.g., Villareal v. TGM Eagle’s Pointe, Inc.*, 249 Ga. App. 147, 547 S.Ed.2d 351 (Ga. 2001) (holding that evidence of electrical problems in some areas of the premises did not give rise to duty to inspect all of the premises, especially not behind a light switch for damaged electrical wire where it was not evident that there was a problem

with that switch); *Tribble v. Somers*, 115 Ga.App. 847, 849, 156 S.E.2d 130, 132 (Ga. App. 1967) (“Notice of separate and independent patent defects in no way connected with a latent defect which is alleged to have occasioned the injury...is not constructive notice of the latter defect. Such notice does not place on the landlord the duty of inspection to discover the latent defect.”); *Bennett v. People*, 155 Colo. 101, 392 P.2d 657 (Colo. 1964) (holding that the evidence was insufficient to sustain a conviction of a truck owner for involuntary manslaughter predicated on a collision caused by brake failure of his truck – even though the truck owner had knowledge of a slow leak in the truck’s quick release valve that was causing a drop in pressure when the truck was idling, the ultimate brake failure was caused by breakage of the brake airline copper tube, rather than the slow leak); *Colbert v. Mayor & City Council of Baltimore*, 235 Md. App. 581, 589 (2018) (holding that evidence was legally insufficient that the municipality had actual or constructive notice that the main water line was defective even though the municipality had notice of defects to subsidiary water lines running off of the main water line).

This Court should accept the reasoning from the aforementioned cases. It was not reasonably foreseeable that power outages signaled that a fire might occur in the basement. It was not reasonably foreseeable that a hoarded home that lacked prior instances of fire or egress difficulty would produce a catastrophic result on September 10, 2017.

Society is not prepared to accept that an occupant of a home must check an entire utility system for latent defects just because some part of the same utility system experiences a patent defect that does not appear to be life-threatening. To hold otherwise, one could never be sure that a power outage was not merely the result of a short circuit, or

a faulty appliance, but rather, must worry that it is indicative of a latent defect on the cusp of a catastrophic failure. To hold otherwise, every time there is a power outage in a home, one must evacuate the premises for precautionary reasons as announced by the intermediate court.

To uphold the intermediate court's opinion would mean that no occupant of a home should use extension cords or power strips as permanent fixtures to plug in computers, TVs, or appliances, since the intermediate court's opinion, not supported by testimony from an electrical engineer, now puts people on notice that there may be fire implications from the use of extension cords.

To uphold the intermediate court's opinion would mean that every "hoarder" is put on notice that liability, including criminal liability, will attach to anyone who maintains their home in a way that could hamper egress in the event of an emergency.

Liability in this case should be *limited* by the policy considerations discussed above. This is not a case where Beckwitt was engaged in inherently dangerous conduct, or conduct that was illegal on a statewide basis, or conduct that was likely to start a fire. This case was truly an accident in which the fire would have occurred regardless of the use of extension cords and prior power outages. The fire would have erupted in the middle of the egress path regardless of the hoarding in that path.

"[N]o matter how regrettable [Khafra's] death, nor how gross [Beckwitt's] negligence, may have been, [Beckwitt] cannot be held criminally responsible unless there w[as] a causal connection between [his] negligence [___] and the death that ensued." *Craig v. State*, 220 Md. 590, 598 (1959) (reversing conviction for involuntary manslaughter

where proximate cause not found); *see also* *McVey v. Gerrald*, 172 Md. 595 (1937) (reversing judgment against defendant employer where there was a latent defect in the ladder that was not obviously dangerous).

III. Legal duty manslaughter is a type of gross negligence involuntary manslaughter that serves as a lesser-included offense of depraved-heart murder, thereby requiring review of Beckwitt’s challenges to the legal duty manslaughter modality of the involuntary manslaughter conviction.

A. Standard of Review

In determining whether two offenses are the same, this Court applies the required evidence test. *Snowden v. State*, 321 Md. 612, 616 (1991). “The required evidence test focuses upon the elements of each offense; if all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements,” the former is a lesser-included offense of the latter. *Id.* at 617. “[W]here only one offense requires proof of an additional fact, so that all elements of one offense are present in the other, the offenses are deemed to be the same for double jeopardy purposes.” *Newton v. State*, 280 Md. 260, 266 (1977) (internal citation omitted).

B. Legal Duty Manslaughter is a type of Gross Negligence Manslaughter.

Although this Court has referred to “three varieties” of involuntary manslaughter – (1) unlawful act manslaughter; (2) gross negligence manslaughter; and (3) the negligent omission to perform a legal duty – the “latter two categories” are really one in the same, both requiring grossly negligent conduct that proximately caused death. *Thomas*, 464 Md. at 152.

Indeed, legal treatises are now beginning to recognize that though the scope of involuntary manslaughter “is still undergoing slow change”; “[i]nvoluntary manslaughter itself may be divided into two separate types” labeled: (1) “criminal-negligence” manslaughter and (2) “unlawful-act” manslaughter. Wayne R. LaFave, *Substantive Criminal Law*, 2 Subst. Crim. L. § 15.4 (3d ed.) (October 2020 Update).

Even Judge Moylan’s famous treatise, *Criminal Homicide Law*, which devotes Chapter Eleven to “Unlawful Act-Manslaughter” and Chapter Twelve to “Gross Negligence Manslaughter”, does not contain a Chapter Thirteen for “Legal Duty Manslaughter”. See Judge Charles E. Moylan, Jr., *Criminal Homicide Law*, pp. xv-xvii (2002). This is because omissions to act pursuant to a legal duty fall under the category of “Gross Negligence Manslaughter” discussed in Chapter Twelve. *Id.* at § 12.9, p. 235 (“Gross Negligence May Consist of Acts of Omission.”).

Likewise, in *Thomas*, this Court classified the failure to perform a legal duty as a type of gross negligence involuntary manslaughter: “Our courts have discussed gross negligence involuntary manslaughter in four main contexts: automobiles, police officers, *failure to perform a duty*, and weapons.” *Thomas*, 464 Md. at 154 (emphasis added).

Similarly, in *State v. Kanavy*, 416 Md. 1 (2010), this Court recognized that gross negligence manslaughter is the umbrella term that can be committed by affirmative conduct or omissive conduct, finding that “[w]ith gross negligence manslaughter..., the act of killing may be by omission as surely as by commission[.]” *Id.* at 10 (citing Moylan, *Criminal Homicide Law*, § 12.9, pp. 235-36); see also *State v. Gibson*, 4 Md. App. 236, 242 (1968), *aff’d*, 254 Md. 399 (1969).

Thus, the two grossly negligent modalities – affirmative act gross negligence manslaughter and failure to perform a legal duty gross negligence manslaughter – are but a mere means of commission and omission for exactly the same offensive conduct of gross negligence involuntary manslaughter.

The “means” of committing an offense is not an “element” of an offense, but rather is a “fact” which must be decided by the jury. *See Mathis v. United States*, --- U.S. ---, 136 S.Ct. 2243, 2255 (2016) (citing *Descamps v. United States*, 570 U.S. 254, 265, n. 3 (2013)) (A “means” is a “non-elemental fact” which “by definition” is “*not* necessary to support a conviction.”); *see also Schad v. Arizona*, 501 U.S. 624, 639 (1991) (distinguishing means from elements).

Grossly negligent involuntary manslaughter, whether by active conduct or omissive conduct, is at its core a negligence action, requiring “(1) that the defendant was under a duty to protect the plaintiff from injury, (2) that the defendant breached that duty, (3) that the plaintiff suffered actual injury or loss, and (4) that the loss or injury proximately resulted from the defendant's breach of the duty.” *See Blondell v. Littlepage*, 413 Md. 96, 119 (2010) (internal citations omitted) (emphasis omitted).

Thus, grossly negligent involuntary manslaughter contains the same basic elements of: (i) a legally cognizable duty; (ii) breached to a degree objectively constituting gross negligence; (iii) proximately creating a high degree of risk; (iv) causative of death. *See generally People v. Sealy*, 136 Mich.App. 168, 172, 356 N.W.2d 614 (1984).

Historically, when there is affirmative, active risk creation, trial courts have not explained to criminal juries, nor have appellate courts explained in their opinions, that there

must be a breach of a legal duty (of a reasonable care) in order to sustain a conviction for depraved heart murder or affirmative act gross negligence manslaughter. This may be because the affirmative act of creating a risk of danger essentially speaks for itself, as a dangerous act towards another is a breach of a care.

However, it is implicit in Maryland's prior jurisprudence on the affirmative act modality of grossly negligent involuntary manslaughter that the defendant's affirmative acts of risk creation equate to a failure to exercise "reasonable care", i.e., a breach of a legal duty. *See e.g., Thomas*, 464 Md. at 153 ("The act must 'manifest[] such a gross departure from what would be the conduct of an ordinarily careful and prudent person[.]'" (internal citation omitted); *Duren*, 203 Md. at 592 ("As a rule, the care required is to be proportioned to the danger[.]") (internal quotation omitted). Hence, a "legal duty" is simply "an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another." *Gourdine v. Crews*, 405 Md. 722, 745 (2008) (citing *W. Page Keeton, et. al., Prosser and Keeton on The Law of Torts* § 53 (5th ed. 1984)); *see also Warr v. JMGM Grp., LLC*, 433 Md. 170, 214 (2013) (Adkins, J., dissenting) (internal citations omitted) ("[A]n individual who engages in active risk creation is subject to the ordinary duty of reasonable care.").

By contrast, in the instance of a failure to act, such inaction requires an explanation that a failure to act may become criminal when a defendant has a duty to affirmatively act as established by statute, by contract, or by operation of a special relationship. *Bobo v. State*, 346 Md. 706, 715 (1997). The subjective *mens rea* requirement that Beckwitt argues in the fourth issue of this appeal is required for a legal duty manslaughter conviction, is

simply a way to satisfy the breach element of the offense in general. *See Schad*, 501 U.S. at 639. This is because a failure to act does not breach a general standard of care, like an affirmative risk creating act would; but rather, for a failure to act to be criminal, the defendant must know that he has this special relationship that requires him to act, and he must consciously disregard known risks that are likely to result from failing to perform his legal duty.

The subjective mens rea element is not a distinct element for purposes of the crime itself, but rather is an instruction that must be given to the jury so that they can determine whether the conduct of inaction is criminal. This Court has previously said that “intent must be determined by a consideration of the accused’s acts, conduct and words.” *State v. Raines*, 326 Md. 582, 591 (1992) (citing *Taylor v. State*, 238 Md. 424, 433 (1965)). “[S]ince intent is subjective...its presence must be shown by established facts which permit a proper inference of its existence.” *Raines*, 326 Md. at 591 (internal citations omitted). The conduct is the conduct. The subjective mens rea is merely the inferences that may be drawn from the objective conduct itself.

Therefore, legal duty manslaughter does not require evidence in addition to that of affirmative act gross negligence.

In *Schad v. Arizona*, 501 U.S. 624 (1991), the first-degree murder conviction out of Arizona treated murder as a unitary crime divided into two degrees, as does Maryland, regarding alternative *mentes reae* for first-degree murder: premeditated murder and felony murder. Both theories were advanced at trial. The Supreme Court plurality opinion held that a jury instruction did not require unanimous agreement on which *mens rea* the

defendant possessed, recognizing that in previous cases involving alternative ways of proving *actus reus* it has “never suggested that in returning general verdicts in such cases the jurors should be required to agree upon a single means of commission.” *Id.* at 631. Thus, there was no reason “why the rule that the jury need not agree as to mere means of satisfying the *actus reus* element of an offense should not apply equally to alternative means of satisfying the element of *mens rea*.” *Id.* at 632.

Schad was confirmed in *Richardson v. United States*, 526 U.S. 813 (1999), where the Supreme Court said that a jury “need not always decide unanimously which of several possible sets of underlying” facts “make up a particular element, say, which of several possible means the defendant used to commit an element of the crime”. *Id.* at 817.

In *Kouadio v. State*, 235 Md. App. 621, 628, 632 (2018), the Court of Special Appeals adopted the reasoning of *Schad* and *Crispino v. State*, 417 Md. 31, 47-49 (2010) (relying on *Schad*), to determine that a jury instruction that there were three possible intents that would suffice to constitute second-degree murder did not create three separate offenses, but rather, were just three alternative *mentes reae* of second-degree murder.

This Court should determine that the *Schad* and *Kouadio* applications apply equally to the two alternative *actus reae* and *mentes reae* means of commission and omission of involuntary manslaughter instructed in this case.

C. Legal Duty Manslaughter is a lesser-included offense of Depraved-Heart Murder, both generally, and specifically, as instructed in this case.

The Court of Special Appeals “acknowledge[d] the possibility that failure to perform a legal duty involuntary manslaughter could, in a proper case, elevate to depraved heart murder”. E. 47, n. 10.

It was previously determined by the Court of Special Appeals in *Simpkins v. State*, 88 Md. App. 607, 612-13, *cert. denied*, 328 Md. 94 (1992), *superseded by rule on other grounds in State v. Brown*, 464 Md. 237 (2019), that “if death is the direct consequence of the malicious omission of the performance of a duty...this is a case of murder. If the omission was not malicious, and arose from negligence only, it is a case of manslaughter.” (citing *Regina v. David Hughes*, 7 Cox C.C. 301, 169 E.R. 996 (1857)).

However, the intermediate court erroneously found in Beckwitt’s case that “the jury here was never provided with such an instruction” because the instruction for depraved-heart murder failed to include “legal duty” as an element of the offense. E. 47, n. 10, 78.

In the legal duty manslaughter instruction, the jury was instructed that if there was an employer-employee relationship, there was a “legal duty” to provide a safe workplace. E. 1525. The jury was further instructed that legal duty manslaughter was one of “two theories” of “the crime of involuntary manslaughter” and the jury was instructed that “[t]he defendant is charged with a crime of depraved heart murder, this charge [of depraved heart murder] includes second degree depraved heart murder and involuntary manslaughter.” E. 1524 (emphasis added). The jury was not instructed that the charge of depraved heart murder includes depraved heart murder and affirmative act gross negligence manslaughter,

but rather, that it includes “involuntary manslaughter” of which there are “two theories.” Moreover, the jury was not instructed that only affirmative act gross negligence manslaughter was a lesser-included offense of depraved heart murder.

Additionally, the jury was further instructed that “depraved heart murder is the killing of another person while acting with an extreme disregard for human life”, in which there is a “very high risk”. E. 1524, lines 10-14; E. 1524, lines 18-20. Whereas, with regards to the “two theories” of “involuntary manslaughter”, the jury was instructed that each require findings of “reckless disregard” and a “high risk”. E. 1524, lines 24-25 to E. 1525, lines 1-18.

Finally, as to the depraved heart murder instruction itself, the jury was instructed that it is the “defendant’s conduct” that must create a very high degree risk. E. 1524. This Court determined in *Kanavy v. State*, that “conduct” encompasses both acts and omissions, and therefore, includes the willful failure to perform a legal duty. 416 Md. at 9-11 (emphasis added).

The Court of Special Appeals determined that based upon the depraved heart murder conviction, “the jury necessarily found that appellant’s *conduct* satisfied the lesser ‘reckless disregard for human life’ required for gross negligence involuntary manslaughter.” E. 76 (emphasis added). But the intermediate court failed to recognize that conduct for gross negligence involuntary manslaughter encompasses both grossly negligent acts as well as grossly negligent omissions to perform a legal duty, and that both require that finding of “the lesser ‘reckless disregard for human life’”. Thus, the “trial court[‘s] instruct[ion] [to] the jury regarding second-degree depraved heart murder as the

most egregious form of criminal negligence,” E. 78, encompassed the lesser-included forms of “criminal negligence” of affirmative act gross negligence manslaughter and legal duty manslaughter. *See* LaFave, *Substantive Criminal Law*, 2 Subst. Crim. L. at § 15.4.

The jury moved upward in this case. It is likely that the jury in this case worked from the bottom up finding legal duty manslaughter, and then after further deliberation, convicted Beckwitt of depraved heart murder based upon a finding of a greater mens rea. In the manslaughter-murder context, “[p]roof of guilt moves upward, not downward.” *Criminal Homicide Law*, § 6.6, p. 141 (citing *In re Lakeysha P.*, 106 Md. App. 401, 440 (1995)). “The crime of involuntary manslaughter *vis-à-vis* depraved heart murder simply contains one less element...” which is the element of malice. *Criminal Homicide Law*, § 6.6, p. 141.

When “homicidal agency by omission is once established, both the presence of culpability and the level of culpability will then depend on the particular mens rea or other non-culpable mental state that attended the omission to act.” *Id.* § 1.9, p. 12-13.

In Beckwitt’s case, the homicidal agency by omission would have been established by the jury’s finding of legal duty manslaughter. Once that homicidal agency by omission was established, the level of culpability between legal duty manslaughter and depraved-heart murder would then just depend on the mens rea: a reckless disregard for human life versus an extreme disregard for human life.

The jury in this case “move[d] upward”, first “agree[ing]” on Beckwitt’s guilt to involuntary manslaughter, before coming to “an impass on” depraved-heart murder. E. 1656. The jury struggled to find the elevated mens rea for murder as evidenced by three

notes requesting examples or definitions of “extreme disregard” for depraved-heart murder asking: (i) “Could we be given an example...conscious of such risk, acted with extreme disregard of the life endangering consequences.” E. 1654; (ii) “Could we be provided with an example of Second Degree Depraved Heart Murder?” E. 1655; and (iii) “Would you please give us a definition of ‘extreme disregard’”. E. 1657.

This is not a case where the jury was instructed that if it reached a verdict on the greater charge of depraved heart murder, that it did not have to consider the lesser offense of involuntary manslaughter. *See State v. Frye*, 283 Md. 709, 723-24 (1978) (“In the normal situation where a defendant is charged both with a greater crime and with a lesser included offense, and where a guilty verdict with regard to the greater crime will result in a merger, the proper method of instructing the jurors is to advise them that if the verdict on the count charging the greater crime is guilty, then they should not consider the count charging the lesser crime.”).

Instead, based upon the jury notes received in this case, this Court knows that the jury considered the lesser-included offenses first. It would require total disregard of the State’s presentation of its case, to find that the legal duty manslaughter theory did not serve as the basis for the involuntary manslaughter conviction, and therefore, the depraved heart murder conviction in this case.

From the bill of particulars all the way up to the intermediate court’s opinion, the conduct in this case was classified by Beckwitt’s failure to provide adequate egress unobstructed by hoarding, failure to provide a reasonably safe work environment, failure to provide a smoke detector, and failure to reasonably respond to warnings of a fire risk.

See Bill of Particulars, E. 106; Motions for Judgment of Acquittal, E. 1261-1264; E. 1458; E. 1495-1496.

The State's closing argument is replete with examples of how the jury could convict Beckwitt of the charges based upon a breach of his legal duty to provide a safe workplace.

The prosecutor began:

[T]o have a safe working environment people need to be able to escape from a building, to be able to escape from a fire ...if all of the doors are blocked and the employer's blocked all the doors that that is a breach of the duty to keep the work place safe...So *when you're evaluating all of these ways to find culpability.*

E. 1534. (emphasis added).

The prosecutor then argued that the State "establish[ed] that there was an employer/employee relationship." E. 1534-1535. After arguing that the State had established this legal duty relationship, the State asked the jury "to keep that [employer-employee relationship] in mind *when you are evaluating all the risk taking behavior....*[t]hese are *all the things* that the State believes show beyond a reasonable doubt that the defendant engaged in, *in order to be liable for depraved heart murder or involuntary manslaughter.*" E. 1537-1538. (emphasis added).

The State pressed on, "[y]ou cannot be in charge of another person whether they're an employee or not in your house like that when they're in such a vulnerable position and not be responsive." E. 1542. If "someone's in your house under your employ and dependent on you, you've got to check out if they said oh there's smoke." E. 1543. Fixing the faulty power strip, "Is that a breach of his duty as an employer, I'll just unplug and plug it back

in[?]" E. 1548. Fixing such a failure is "expected to be in the control of the homeowner and especially in the control of the employer." T. E. 1549.

The prosecutor argued that Khafra was "so desperate to be employed and maintain his employment[.]" E. 1553.

The State faulted Beckwitt for not attending to the power outage immediately "especially as a reasonable employer should[.]" E. 1555. Your "employee" is not in charge of your circuit breaker. E. 1556.

The prosecutor concluded that "[t]he defendant engaged in *extreme risk taking behavior both as an employer and as any person and I ask you to find the defendant guilty of the charges.*" E. 1563 (emphasis added).

The prosecutor's closing arguments leave little doubt that the jury convicted Beckwitt not just of legal duty manslaughter for the involuntary manslaughter charge, but also of depraved heart murder based upon extreme disregard when it came to breaching a legal duty to maintain a safe workplace.

D. The general verdict returned in this case makes it such that this Court cannot be satisfied that the jury did not convict Beckwitt of legal duty manslaughter.

Assuming *arguendo* that the jury was unaffected by the State's entire closing argument about a breach of a duty to maintain a safe workplace and to provide adequate egress to an employee, this Court still cannot be certain that the jury relied upon affirmative acts, rather than omissions, to return the general verdict for the involuntary manslaughter conviction.

In fact, as discussed *supra*, the jury’s verdict as to the means of the offense may not even have been unanimous, even where the jury’s verdict was unanimous as to the offense itself. See *Crispino v. State*, 417 Md. 31, 49 (2010) (“While the jurors have to be unanimous with regard to each *element* of an offense, they need not be unanimous with regard to the *means* used by the defendant in committing the act.”); *Mathis v. United States*, 136 S.Ct. at 2261 (Alito, J., dissenting) (“[A]s long as the jury decides unanimously that the defendant broke into an occupied structure of whatever kind[,] the jury need not decide unanimously which particular means the defendant used to commit the crime.”).

The Court of Special Appeals’ reliance upon *Brooks v. State*, 314 Md. 585, 586-87 (1989) is misplaced. The intermediate court affirmed Beckwitt’s conviction for involuntary manslaughter on the grounds of “gross negligence involuntary manslaughter without deciding whether the evidence was sufficient to support failure to perform a legal duty involuntary manslaughter” and without deciding the validity of the legal duty manslaughter jury instruction. E. 75, 79, n. 21.

In *Brooks*, the charges of armed robbery and common law robbery were submitted to the jury. 314 Md. at 587. However, consistent with *Frye, supra*, the trial court instructed the jury that if it convicted Brooks of armed robbery, it need not consider common law robbery. *Id.*, n.2. The jury returned a verdict of guilty for armed robbery only. On appeal, this Court determined that the evidence was insufficient to convict Brooks of armed robbery because a toy plastic pistol is not a deadly weapon within the meaning of the armed robbery statute. *Id.* at 600. However, this Court did not order a new trial, finding that “[w]hen the jury convicted Brooks of armed robbery, it necessarily convicted him of simple

robbery as well.” *Id.* at 601. Thus, this Court directed that a verdict of guilty of robbery be entered.

In *Brooks*, there was only one lesser-included offense of armed robbery presented to the jury: simple robbery. In Beckwitt’s case there were two types of involuntary manslaughter presented to the jury: gross negligence manslaughter and legal duty manslaughter.

In *Brooks*, there was no allegation that the jury instructions for simple robbery were incorrect. By contrast, in Beckwitt’s case, as will be argued *infra*, Argument IV, the involuntary manslaughter instruction for legal duty manslaughter erroneously omitted essential instructions for the offense. Therefore, *Brooks* was unlike Beckwitt’s case which involves a general verdict upon which two alternative theories were introduced to the jury, one of which was improperly instructed.

When the *Brooks* Court relied on other cases that have stood for the proposition that when there is insufficient evidence to convict of a greater offense, appellate courts may reverse a conviction and enter judgment on a lesser-included offense, none of those other cases involved instances of two alternative lesser offenses, one of which was erroneously instructed.

For instance, in *United States v. Dickinson*, 706 F.2d 88 (2d Cir. 1983), relied upon by the *Brooks* Court, the *Dickinson* Court sustained the lesser-included offense after reversing the greater conviction because “the jury was properly charged by [the judge]”. *Id.* at 92-92.

In *State v. Grant*, 177 Conn. 140 (1979), relied upon in *Brooks*, the *Grant* Court sustained the lesser-included offense of third-degree burglary after reversing the greater conviction because the trial court “instructed the jury regarding the elements of burglary in the third degree” and “[t]he defendant raises no claim of error as to this or any other portion of the charge.” 177 Conn. at 147, n.6. Additionally, there were not multiple theories of third-degree burglary presented to the jury.

In *DeMarrias v. United States*, 453 F.2d 211 (8th Cir. 1972), not cited in *Brooks*, but applicable nonetheless, the Eighth Circuit Court of Appeals determined that the evidence was insufficient for second degree murder, but was sufficient for voluntary manslaughter and therefore remanded the voluntary manslaughter conviction for resentencing without ordering a new trial. However, in doing so, the Court noted that the jury was instructed on the elements of manslaughter and the approach was “appropriate here, particularly since none of the alleged errors would affect the validity of a manslaughter conviction.” *Id.* at 215. Furthermore, in *DeMarrias*, there was only one underlying theory of voluntary manslaughter.

By contrast to the aforementioned cases, in Beckwitt’s case, the errors in the legal duty manslaughter instruction, as discussed *infra*, Argument IV, do affect the validity of an involuntary manslaughter conviction. Gross negligence manslaughter was not the only theory instructed for involuntary manslaughter and therefore it is inappropriate to assume that the “jury necessarily” convicted Beckwitt of gross negligence manslaughter. E. 76.

An appellate court’s ability to affirm a lesser-included conviction after a greater conviction has been reversed for insufficiency is discretionary and not mandatory. As the

Dickinson case, relied upon by the *Brooks* Court, said, an “appellate court may” enter judgment on a lesser-included offense, but does not have to. *Brooks*, 314 Md. at 601 (citing *Dickinson*, 706 F.2d at 92-93). And it is only discretionary in circumstances where there is no challenge to the underlying offense.

Beckwitt’s case is an instance in which this Court should not enter judgment on involuntary manslaughter because of the potential that the jury convicted Beckwitt of legal duty involuntary manslaughter, rather than gross negligence involuntary manslaughter, and the legal duty manslaughter instruction was flawed.

The Supreme Court of the United States has said that in the case of a general verdict, as the involuntary manslaughter conviction was here, where a verdict has multiple possible grounds and one of the grounds is erroneous, reversal is required. *Stromberg v. California*, 283 U.S. 359, 367-68 (1931).

In Beckwitt’s case, the involuntary manslaughter conviction cannot stand just because one theory was properly instructed (grossly negligent act manslaughter) while the other theory was not (grossly negligent failure to perform a legal duty manslaughter).

It is actually far more likely that the jury convicted Beckwitt of legal duty manslaughter (and murder) than affirmative act gross negligence manslaughter (and murder). Like in *Stromberg*, “this is far from being a merely academic proposition, as it appears, upon an examination of the original record...that the State’s attorney upon the trial emphatically urged upon the jury that they could convict the appellant under” the breach of a legal duty theory. 283 U.S. at 368. It follows then, “from the manner in which

the case was sent to the jury” that if any of the involuntary manslaughter theories are invalid, the involuntary manslaughter conviction cannot be upheld. *Id.*

Similarly, in *State v. McLaughlin*, 621 A.2d 170 (R.I. 1993), the State put two theories of involuntary manslaughter to the jury: misdemeanor-manslaughter and criminal negligence manslaughter by failure to perform a legal duty. In the trial court’s instruction on criminal negligence, the trial court failed to give an instruction on legal duty which the Supreme Court of Rhode Island found was error. *Id.* at 176. Because the jury was given a general verdict, there was no way for the Court to know how the jury determined the defendant’s guilt, whether it was based upon the misdemeanor-manslaughter theory or the criminal negligence failure to perform a legal duty theory. *Id.* The State asserted that the conviction could stand because the evidence was legally sufficient under the misdemeanor-manslaughter theory. *Id.* The State relied upon *Griffin v. United States*, 502 U.S. 46 (1991). But the Supreme Court of Rhode Island wisely distinguished *McLaughlin* from *Griffin* because in *McLaughlin* the criminally-negligent manslaughter instruction in the absence of an instruction that a duty must exist was error, and because it was error as a matter of law, the conviction for involuntary manslaughter must be remanded for a new trial. *Id.* It was not, as in *Griffin*, where there were proper legal instructions given on both theories, and one theory had insufficient evidence while the other had sufficient evidence.

Similarly, in *State v. Brady*, 393 Md. 502 (2006), the jury was given an erroneous instruction on transferred intent and the defendant was convicted of attempted first degree murder. The State argued that the jury was properly instructed as to attempted first degree murder and that the evidence was sufficient for attempted first degree murder, thus the

erroneous jury instruction on transferred intent was not material. *Id.* at 509. This Court “reject[ed] the State’s arguments that, because the conviction was supportable on other grounds, the additional instruction did not prejudice Brady.” *Id.* See also *Christensen v. State*, 33 Md. App. 635, 643 (1976) (“[I]n our view, the jury may well have relied upon the [erroneous] ‘attempted assault’ portion of the count to bottom their verdict; and because we are unable to say that they did not do so, we are unable to conclude that the questionable language is surplusage.”).

Lest there be any doubt remaining, the intermediate court’s reliance on omissive conduct, further demonstrates that legal duty manslaughter was the likely theory upon which the jury convicted Beckwitt of involuntary manslaughter and depraved heart murder. The Court of Special Appeals found the existence of a legal duty relationship, determining that Petitioner “hired Khafra to dig tunnels below his basement”, E. 68; “pa[id] Khafra \$150 a day to dig tunnels underneath his home”, E. 58; and “[b]ut-for arranging to have Khafra work in a dangerous environment, Khafra would not have died.” E. 68. That court inadvertently found omissus rei, rather than actus rei, by determining the criminal conduct was based upon: (1) failure to provide adequate communication and/or response, E. 58; (2) failure to provide a safe workplace, E. 66; and (3) failure to provide adequate egress. E. 59. Similarly, that court determined that causation was based upon the omissive conduct of: (1) failure to provide adequate egress, E. 68-69; and (2) failure to provide safe workplace. E. 68.

In this case, there is a “reasonable probability” that the depraved-heart murder conviction and the involuntary manslaughter conviction were influenced by the failure to

provide a legal duty theory that was submitted to the jury, on an erroneous instruction. *See Morris v. Matthews*, 475 U.S. 237, 246-47 (1986). Therefore, an erroneous jury instruction on legal duty manslaughter would be “sufficient to undermine confidence in the outcome.” *Id.*

For all of the foregoing reasons, this Court must now consider Beckwitt’s challenge to the jury instruction on failure to perform a legal duty gross negligence involuntary manslaughter.

IV. The trial court committed reversible error by failing to instruct the essential elements of legal duty manslaughter, for which there is no pattern jury instruction.

A. Standard of Review

This Court assesses the propriety of a trial court’s jury instruction by looking at whether “(1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given.” *Dickey v. State*, 404 Md. 187, 197-98 (2008).

In this case, the jury instruction on legal duty manslaughter was not a correct statement of the law, and the content that should have been instructed was not fairly covered elsewhere in the instructions actually given.

Beckwitt anticipates that the State will assert that his arguments relating to the legal duty jury instruction were not preserved at trial, as the State argued before the Court of Special Appeals. The State is wrong.

Beckwitt filed Defendant’s Objections to the Court’s Proposed Jury Instructions in which Beckwitt objected to the non-pattern jury instruction for legal duty manslaughter

because “the Court’s instruction is not a complete and fair statement of the law regarding the legal duty described the by the Court.” E. 1673.

The Court’s instruction does not fairly state the law and is misleading when it states the State must prove that ‘by failing to perform a legal obligation, the defendant acted in a grossly negligent manner.’ This is not a correct statement, is confusing, and does not clearly instruct that the jury [must find] that the Defendant’s conduct must be grossly negligent – not just simply represent an alleged failure to perform a legal obligation.

E. 1673-1674.

Beckwitt argued that the Court’s instruction merely “tells the jury that if they find that there was a ‘legal obligation’ and that there was a failure to perform that ‘obligation’ and that failure caused the death of the victim, that the Defendant must be guilty.” E. 1674.

As argued at trial, the trial court’s instruction on legal duty manslaughter was not a complete statement of the law, did not fairly state the law, was misleading, and omitted essential elements, thereby permitting the jury to simply find Beckwitt guilty of legal duty manslaughter if there was a failure to perform a legal duty and death of the victim, without requiring the jury to determine whether the State proved that Beckwitt was aware of his legal duty, consciously disregarded that duty, was aware that his failure to perform his duty would be a high risk to the victim, and that a reasonable employer would not have disregarded his duty.

Assuming, *arguendo*, the issue was not preserved, this Court should exercise its discretion to consider this issue pursuant to Maryland Rules 4-325(e) and 8-131(a) and because (i) there is no pattern jury instruction for legal duty manslaughter, (ii) Maryland case law on the instruction is sparse and has not yet applied the elements to a charge of

involuntary manslaughter where a defendant has been charged with such an offense, (iii) the jury was incorrectly advised as to the essential elements of the offense; and (iv) the failure to instruct the essential elements of the offense materially impacted the rights of the defendant and the validity of the verdict.

[A]ppellate courts of this State have often recognized error in the trial judge's instructions, even when there has been no objection, if the error was likely to unduly influence the jury and thereby deprive the defendant of a fair trial. The premise for such appellate action is that a jury is able to follow the court's instructions when articulated fairly and impartially. It follows, therefore, that when the instructions are lacking in some vital detail or convey some prejudicial or confusing message, however inadvertently, the ability of the jury to discharge its duty of returning a true verdict based on the evidence is impaired.

State v. Brady, 393 Md. 502, 507 (2006) (internal citations omitted).

This Court “held previously that the accused is prejudiced when a trial court inaccurately supplies or omits, in a jury instruction, an element of a charged offense.” *Id.* at 509-10 (citing *Richmond v. State*, 330 Md. 223, 623 A.2d 630 (1993) (holding that plain error existed where trial court instruction on malicious wounding with intent to disable omitted a specific intent instruction); *Franklin v. State*, 319 Md. 116, 571 A.2d 1208 (1990) (holding that plain error existed where trial court instructed jury that a specific intent to kill was not required to establish assault with intent to murder); *Dawkins v. State*, 313 Md. 638, 547 A.2d 1041 (1988) (holding that plain error existed when the trial court omitted the essential element of knowledge from its instruction defining possession of a controlled substance)).

This Court also referenced a Court of Special Appeals case and federal appellate opinions that have used the same approach. *Brady*, 393 Md. at 510 (citing *Vincent v.*

State, 82 Md.App. 344, 571 A.2d 874 (1990) (instructing the jury that the offense of malicious shooting with intent to disable was a “crime of violence” that could be used as a predicate offense for the crime of use of a handgun in the commission of a crime of violence was plain error); *United States v. Perez*, 43 F.3d 1131 (7th Cir.1994) (holding that the district court's instruction to the jury on assault with intent to commit murder that it could convict without finding a subjective specific intent to kill, as long as it found reckless and wanton conduct, was plain error); *United States v. Stansfield*, 101 F.3d 909 (3rd Cir.1996) (holding that omission from a jury instruction of a substantial element was plain error)).

B. The Trial Court’s Instructions and Omissions

The trial court propounded the following non-pattern jury instruction for legal duty manslaughter which it posited to the jury as an alternative involuntary manslaughter theory to gross negligence manslaughter, included within the charge of depraved-heart murder:

Or alternative theory, either B or C, if you find that Askia Khafra and the defendant had an employer/employee relationship the defendant has a legal duty to provide his employee with a reasonably safe place in which to work.

In order to convict the defendant of involuntary manslaughter the State must prove that the victim, Askia Khafra, was employed by the defendant, that the defendant failed to perform his legal duty, that the defendant’s failure to perform the legal duty caused the death of the victim and that by failing to perform this legal duty defendant acted in a grossly negligent manner. Grossly negligent means that defendant, while aware of the risk, acted in a manner that created a high risk to and showed a reckless disregard for human life.

E. 1524-1525.

This instruction omitted essential elements of the offense of legal duty manslaughter because the trial court failed to instruct the jury that the State must prove beyond a reasonable doubt that:

1. The defendant was aware of his obligation to perform the legal duty;
2. The defendant was aware that his failure to perform his legal duty would create a high degree of risk to human life;
3. The defendant consciously disregarded his legal duty; and
4. A reasonable employer in the defendant's position would not have disregarded his legal duty.

C. Opinions by this Court, as well as authority from other sources, have identified these missing elements as ones that should be instructed before the jury can render a guilty verdict on conduct that is based upon a failure to perform a legal duty.

- 1. The jury must be instructed that the State is required to prove that the defendant was aware of his obligation to perform a legal duty.**

This Court had occasion to discuss what would be necessary in order for a defendant to be convicted of involuntary manslaughter by grossly negligent failure to perform a legal duty. In *State v. DiGennaro*, 415 Md. 551 (2010), the defendant was charged with and convicted of manslaughter by vehicle after the gravel he had spilled onto a public roadway caused the death of a motorist where the defendant, while under a duty to mark the gravel to notify other drivers, failed to do so. This Court reversed the defendant's conviction on the ground that failing to mark the gravel did not constitute "operating a motor vehicle" as was required by the manslaughter by vehicle statute. In its opinion, this Court noted that a person may be convicted of common law involuntary manslaughter on the basis that he "unintentionally cause[d] a death as a result of that person's grossly negligent failure to

perform a legal duty[.]” *Id.* at 565. However, in that case, “the crime of involuntary manslaughter by grossly negligent failure to perform a legal duty was not charged in the indictment.” *Id.* at 567.

Despite that, this Court still determined that:

To convict a defendant of involuntary manslaughter by grossly negligent failure to perform a legal duty, the State must prove beyond a reasonable doubt that (1) the victim's death was caused by the defendant's failure to perform a duty that the defendant had a legal obligation to perform, and (2) the defendant acted in a grossly negligent manner because the defendant (a) *was aware of his or her obligation to perform that duty*, and (b) was aware that his or her failure to perform that duty would create a high degree of risk to human life.

Id. at 566-67 (internal citations omitted) (emphasis added).

Similarly, in *State v. Kanavy*, 416 Md. 1 (2010), decided just 21 days after *DiGennaro*, this Court listed the same requirement of proof of awareness of an obligation to perform a legal duty in the context of a reckless endangerment charge based upon a willful failure to perform a legal duty. Although *Kanavy* was a reckless endangerment case, this Court recognized that a “reckless endangerment resulting in death will constitute either a grossly negligent involuntary manslaughter or a depraved-heart second-degree murder[.]” *Id.* at 9-10. This Court further determined that the “conduct” which supports a reckless endangerment charge may either be an affirmative act, or an omission, *i.e.*, the wilful failure to perform a legal duty. *Id.* at 10-11. In reviewing what the State would have to prove for a failure to perform a legal duty resulting in death, this Court determined that the State would have to prove beyond a reasonable doubt that:

(1) the Respondent owed a duty to obtain emergency medical care for the deceased,

- (2) *the Respondent was aware of his obligation to perform that duty,*
- (3) the Respondent knew that his failure to perform that duty would create a substantial risk of death or serious physical injury to the deceased,
- (4) under the circumstances, a reasonable employee of the Department of Juvenile Services in Respondent's position would not have disregarded his or her duty to (in the words of the indictments) “contact emergency services (9–1–1) in a timely manner,” and
- (5) the Respondent consciously disregarded his duty.

Id. at 12-13 (emphasis added).

Thus, the *DiGennaro* and *Kanavy* opinions both indicate that a prosecution based upon a failure to perform a legal duty resulting in death requires that the State prove beyond a reasonable doubt that the defendant was aware of his obligation to perform a legal duty.

In addition to Maryland precedent, Beckwitt has found two other States, instructing on common law involuntary manslaughter by a failure to perform a legal duty, that require the prosecution to prove that the defendant knew of or was aware of his legal duty before the jury can convict the defendant of legal duty manslaughter.

In *State v. Smith*, 65 Me. 257, 269 (1876), the Supreme Judicial Court of Maine approved the jury instruction given by the trial court as to legal duty manslaughter noting that the trial court “fully and correctly” apprised the jury of the law of legal duty manslaughter when the trial court instructed that the defendant, the husband of the victim, “was charged by law with the duty of rendering her proper support; *that if, knowing that duty*, he negligently omitted to perform it...and she died...that he is guilty of the crime of manslaughter.” *Id.* at 260 (emphasis added). The Supreme Judicial Court reviewed in detail

the elements that were required to be proven for legal duty manslaughter stating specifically that one of the elements “is one of fact, the *knowledge of the duty* on [the defendant’s] part.” *Id.* (emphasis added).

Similarly, in *People v. Giddings*, 169 Mich.App. 631, 426 N.W.2d 732 (1988), the Court of Appeals of Michigan discussed the elements necessary for the prosecutor to prove involuntary manslaughter based upon a defendant’s omission to perform a duty and determined that:

[T]he prosecutor was required to submit evidence indicating the existence of a legal duty, *defendants’ knowledge of the duty*, that defendants wilfully neglected or refused to perform said duty, that such failure was grossly negligent of human life, and that death was caused by defendants’ failure to perform their duty.

Id. at 634-35, 426 N.W.2d at 734 (emphasis added).

These cases demonstrate that a defendant cannot be guilty merely for failing to perform a legal duty in a grossly negligent manner resulting in death as was instructed in Beckwitt’s case. Rather, the State was required to prove that Beckwitt knew that he had a legal duty to maintain a reasonably safe workplace for Khafra.

2. The jury must be instructed that the State is required to prove that the defendant was aware that his failure to perform his legal duty would create a high degree of risk to human life.

In *DiGennaro*, this Court previously determined that to convict a defendant of involuntary manslaughter by grossly negligent failure to perform a legal duty, the State must prove beyond a reasonable doubt that the defendant “*was aware that his or her failure to perform that duty would create a high degree of risk to human life.*” *DiGennaro*, 415 Md. at 566-67 (emphasis added).

Likewise, in *Kanavy*, this Court determined that to convict a defendant of a failure to perform a legal duty resulting in death, the State would have to prove beyond a reasonable doubt that the defendant “*knew that his failure to perform that duty would create a substantial risk of death or serious physical injury to the deceased.*” *Kanavy*, 416 Md. at 12-13 (emphasis added).

Furthermore, Professor Aaronson’s jury instruction for grossly negligent omission to perform a legal duty also instructs that the State must prove beyond a reasonable doubt that the defendant “*was aware that [his] [her] failure to act created a high degree of risk to human life...*”¹ David Aaronson, *Maryland Criminal Jury Instructions and Commentary*, §5.54(B), pp. 948-949 (2016 ed.) (emphasis added). APP. 75-76. Professor Aaronson’s instruction further instruct that the standard for gross negligence is both subjective and objective, and for the subjective standard, “*the defendant must have known or been aware that [his] [her] failure to act created a high degree of risk to the life of [the victim]...*” *Id.* (emphasis added).

In Beckwitt’s case, the jury was never instructed that the State had to prove beyond a reasonable doubt that Beckwitt *knew of* or *was aware* that his *failure to perform his legal duty* or his *failure to act* created a high degree of risk to human life.

The only instruction given that mentioned the word “aware” was in the definition of gross negligence, the same definition that was given in the affirmative act gross negligence manslaughter instruction. The instruction merely told the jury that “[g]rossly negligent means that defendant, while aware of the risk acted in a manner that created a high risk to and showed a reckless disregard for human life.” E. 1525. This instruction

plainly references being aware of a risk – not being aware that a failure to perform a legal duty created the risk. Similarly, this instruction refers to *acting* in the face of the known risk, not *failing to act*.

3. The jury must be instructed that the State is required to prove that the defendant consciously disregarded his legal duty.

In *Kanavy*, this Court determined that the State had to prove beyond a reasonable doubt that the defendant “consciously disregarded his duty.” 416 Md. at 13.

Similarly, in *Giddings, supra*, the Court of Appeals of Michigan found that to prove involuntary manslaughter based upon a defendant’s omission to perform a duty, the prosecutor would have to prove that the “defendant[] wilfully neglected or refused to perform said duty[.]” 169 Mich.App. at 634-45.

In Beckwitt’s case, the jury was not instructed that the State had to prove this element beyond a reasonable doubt.

4. The jury must be instructed that the State is required to prove that a reasonable employer in the defendant’s position would not have disregarded his legal duty.

In *Kanavy, supra*, this Court determined that the State had to prove beyond a reasonable doubt that “under the circumstances, a reasonable employee...in [the defendant’s] position would not have disregarded his or her duty...” 416 Md. at 12-13.

In Beckwitt’s case, the jury was not instructed that the State had to prove the objective element, that a reasonable employer in the defendant’s position would not have disregarded his duty.

D. Failure to Instruct the Essential Elements of Legal Duty Manslaughter is Reversible Error.

At the time of Beckwitt's case, *DiGennaro* and *Kanavy* plainly set forth the elements that would be required to be proven if the State were pursuing a common law involuntary manslaughter conviction based upon the failure to perform a legal duty. The trial court's failure to instruct in conformance with those cases was clear error. The elements that were omitted were substantial and therefore constituted reversible error. *See State v. McLaughlin*, 621 A.2d 170, *supra*, Section III (reversing legal duty manslaughter instruction where jury was not properly instructed of the elements regarding legal duty).

As discussed, *supra*, Section III(D), in the case of a general verdict, as the involuntary manslaughter conviction was here, where a verdict has multiple possible grounds and one of the grounds is erroneous, reversal is required. *Stromberg*, 283 U.S. at 367-68. In Beckwitt's case, the failure to instruct the jury on the essential elements of legal duty manslaughter, means that the involuntary manslaughter cannot stand, especially in light of the way the facts surrounding the failure to perform a legal duty were argued to the jury by the prosecutor in this case. *See supra*, Section III(D).

SUMMARY AND CONCLUSION

For the foregoing reasons, Beckwitt respectfully requests that this Honorable Court find that the trial court lacked subject matter jurisdiction to enter a conviction and sentence on these common law offenses and vacate Beckwitt's conviction and sentence. Alternatively, Beckwitt requests that this Court find that Beckwitt's conviction for involuntary manslaughter was legally insufficient as a matter of law and therefore vacate

Beckwitt's conviction and sentence. At the very least, Beckwitt requests that this Court find that the trial court failed to properly instruct the essential elements of legal duty manslaughter, and that this Court reverse Beckwitt's involuntary manslaughter conviction, and remand for a new trial.

Respectfully submitted,

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Robert C. Bonsib

/s/ Megan E. Coleman
Megan E. Coleman

**CERTIFICATION OF WORD COUNT AND COMPLIANCE
WITH RULES 8-112 AND 8-503**

This Opening Brief contains 33,668 words which is more than permitted by Rule 8-503. Accompanying this Opening Brief is a motion requesting permission to file an Opening Brief that exceeds the word count.

This Opening Brief complies with the font, spacing, and type size requirements stated in Rule 8-112. It is printed in 13-point Times New Roman font.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of September, 2021, I electronically filed the Opening Brief, Appendix, and Record Extract using the MDEC System, and mailed two copies, postage prepaid to: Office of the Attorney General, Criminal Appeals Division, Assistant Attorney General Carrie J. Williams, 200 St. Paul Place, Suite 200, Baltimore, Maryland 21202.

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United States Code Annotated
Constitution of the United States
Annotated
Amendment V. Grand Jury; Double Jeopardy; Self-Incrimination; Due Process; Takings

U.S.C.A. Const. Amend. V

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy;
Self-Incrimination; Due Process of Law; Takings without Just Compensation

Currentness

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const. Amend. V--Grand Jury clause>

<USCA Const. Amend. V--Double Jeopardy clause>

<USCA Const. Amend. V--Self-Incrimination clause>

<USCA Const. Amend. V-- Due Process clause>

<USCA Const. Amend. V--Takings clause>

U.S.C.A. Const. Amend. V, USCA CONST Amend. V
Current through PL 117-36.

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United States Code Annotated
Constitution of the United States
Annotated

Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection;
Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

U.S.C.A. Const. Amend. XIV

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE
PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION;
DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Currentness

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

<Section 1 of this amendment is further displayed in separate documents according to subject matter,>

<see [USCA Const Amend. XIV, § 1-Citizens](#)>

<see [USCA Const Amend. XIV, § 1-Privileges](#)>

<see [USCA Const Amend. XIV, § 1-Due Proc](#)>

<see [USCA Const Amend. XIV, § 1-Equal Protect](#)>

<sections 2 to 5 of this amendment are displayed as separate documents,>

<see [USCA Const Amend. XIV, § 2](#),>

<see [USCA Const Amend. XIV, § 3](#),>

<see [USCA Const Amend. XIV, § 4](#),>

<see [USCA Const Amend. XIV, § 5](#),>

U.S.C.A. Const. Amend. XIV, USCA CONST Amend. XIV
Current through PL 117-36.

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Proposed Legislation

[West's Annotated Code of Maryland](#)
[Constitution of Maryland Adopted by Convention of 1867](#)
[Declaration of Rights](#)

MD Constitution, Declaration of Rights, Art. 5

Article 5. Application of common law and statutes of England; trial by jury

Effective: December 1, 2010

[Currentness](#)

(a)(1) That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law, and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity; and also of all Acts of Assembly in force on the first day of June, eighteen hundred and sixty-seven; except such as may have since expired, or may be inconsistent with the provisions of this Constitution; subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State. And the Inhabitants of Maryland are also entitled to all property derived to them from, or under the Charter granted by His Majesty Charles the First to Caecilius Calvert, Baron of Baltimore.

(2) Legislation may be enacted that limits the right to trial by jury in civil proceedings to those proceedings in which the amount in controversy exceeds \$15,000.

(b) The parties to any civil proceeding in which the right to a jury trial is preserved are entitled to a trial by jury of at least 6 jurors.

(c) That notwithstanding the Common Law of England, nothing in this Constitution prohibits trial by jury of less than 12 jurors in any civil proceeding in which the right to a jury trial is preserved.

Credits

[Acts 1992, c. 203, ratified Nov. 3, 1992](#); [Acts 1992, c. 204, ratified Nov. 3, 1992](#). Amended by [Acts 2006, c. 422, § 1, ratified Nov. 7, 2006](#); [Acts 2010, c. 480, § 1, ratified Nov. 2, 2010](#).

[Notes of Decisions \(418\)](#)

MD Constitution, Declaration of Rights, Art. 5, MD CONST DECL OF RIGHTS, Art. 5

Current through legislation effective March 24, 2021, from the 2021 Regular Session of the General Assembly.

West's Annotated Code of Maryland
Constitution of Maryland Adopted by Convention of 1867
Declaration of Rights

MD Constitution, Declaration of Rights, Art. 17

Article 17. Ex post facto laws; retrospective oaths

Currentness

That retrospective Laws, punishing acts committed before the existence of such Laws, and by them only declared criminal are oppressive, unjust and incompatible with liberty; wherefore, no ex post facto Law ought to be made; nor any retrospective oath or restriction be imposed, or required.

Notes of Decisions (52)

MD Constitution, Declaration of Rights, Art. 17, MD CONST DECL OF RIGHTS, Art. 17

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West's Annotated Code of Maryland
Constitution of Maryland Adopted by Convention of 1867
Declaration of Rights

MD Constitution, Declaration of Rights, Art. 21

Article 21. Right of accused; indictment; counsel; witnesses; speedy trial; jury

[Currentness](#)

That in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defence; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.

[Notes of Decisions \(1803\)](#)

MD Constitution, Declaration of Rights, Art. 21, MD CONST DECL OF RIGHTS, Art. 21

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West's Annotated Code of Maryland
Constitution of Maryland Adopted by Convention of 1867
Declaration of Rights

MD Constitution, Declaration of Rights, Art. 24

Article 24. Due process

Currentness

That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

Credits

Acts 1977, c. 681, ratified Nov. 7, 1978.

Notes of Decisions (1627)

MD Constitution, Declaration of Rights, Art. 24, MD CONST DECL OF RIGHTS, Art. 24

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Servants who through Negligence fire any House, &c. to forfeit 100l. or be sent to the Workhouse for 18 Monthr.

Houses to have Party Walls, &c. Provisions for pulling down Partition Walls. 21 Geo. 1. c. 28. No Mundillion or Cornish of Timber under the Eaves hereafter to be made in any new House, &c. This Clause extends not to Houses on London Bridge or the Thames. 7 Annæ, c. 17. § 7. 2.

Constables and Beadles to assist the Inhabitants, &c.

No Action to be prosecuted against any Person in whose House, &c. any Fire accidentally begins, &c. This Section made perpetual by 10 Annæ, c. 14. s. 1.

See 33 Geo. 2. c. 30. s. 23.

‘ III. And whereas Fires often happen by the Negligence and Carelessness of Servants;’ Be it therefore enacted by the Authority aforesaid, That if any menial or other Servant or Servants, through Negligence or Carelessness, shall fire or cause to be fired any Dwelling-house, or Out-house or Houses, such Servant or Servants being thereof lawfully convicted by the Oath of one or more credible Witnesses made before two or more of her Majesty’s Justices of the Peace, shall forfeit and pay the Sum of one hundred Pounds unto the Churchwardens of such Parish where such Fire shall happen, to be distributed amongst the Sufferers by such Fire, in such Proportions as to the said Churchwardens shall seem just; and in case of Default or Refusal to pay the same immediately after such Conviction, the same being lawfully demanded by the said Churchwardens, that then and in such Case such Servant or Servants shall, by Warrant under the Hand of two or more of her Majesty’s Justices of the Peace, be committed to some Workhouse, or House of Correction, as the said Justices shall think fit, for the Space of eighteen Months, there to be kept to hard Labour.

IV. And be it further enacted by the Authority aforesaid, That from and after the said first Day of May which shall be in the Year of our Lord one thousand seven hundred and eight, all and every House and Houses that shall be erected and built either upon old or new Foundations, in any Place or Places in and about the Cities of London and Westminster, or other Parishes or Places comprized within the Weekly Bills of Mortality, shall have Party Walls between House and House, wholly of Brick or Stone, and of two Bricks thick at the least, in the Cellar and Ground Stories, and thirteen Inches thick upwards from the Foundation quite through all the Stories of each House, and eighteen Inches above the Roof; and that no Mundillion or Cornish of Timber or Wood under the Eaves shall hereafter be made or suffered in any such new House or Houses, but that all front and rear Walls of every House and Houses shall be built of Brick or Stone, to be carried two Foot and an Half high above the Garret Floor, and coped with Stone or Brick; and if any new House or Houses shall, from and after the said first Day of May, be erected and built within the Places aforesaid, contrary to the true Intent and Meaning of this Act, that then the Owner of every such House, and Head Builder or Workmen, who undertake such Building or Work, shall each of them forfeit, lose, and pay for every such Default the Sum of fifty Pounds, to be equally divided, one Moiety to the Informer, and the other Moiety to the Poor of the Parish wherein such Building shall be erected; and to be levied by Warrant under the Hands and Seals of two or more of her Majesty’s Justices of the Peace within the Place where such Building shall be so erected, or where such Workmen shall inhabit, by Distress and Sale of the Offender’s Goods, upon due Conviction upon Oath, or upon the View of one or more of such Justices of the Peace, rendering the Overplus to the Owners, if any be; and for want of such Distress the Offender shall be imprisoned by Warrant from the said two Justices, who are hereby empowered and required to issue such Warrant, until Payment as aforesaid; and the Share of such Forfeitures appointed to go to the Poor, as aforesaid; to be paid into the Hands of the Churchwardens of such respective Parish where such Offence shall be committed, who are to give a Receipt for the same, and to be charged therewith, and accountable for the same, in like Manner as for other Monies which they shall receive for the Use of such Parish.

V. And be it further enacted, That upon the breaking out of any Fire within London or Westminster, all Constables and Beadles (upon Notice thereof), shall immediately repair to the Place where the said Fire shall happen, with their Staves, and other Badges of their Authority and be aiding and assisting, as well in the extinguishing the said Fires, and causing People to work at the Engines, as also in preventing Goods being stolen; and shall seize and apprehend all ill-disposed Persons that they shall find stealing or pilfering from the Inhabitants; as also that the said Constables and Beadles shall give their utmost Assistance to help the Inhabitants to remove their said Goods.

VI. And be it further enacted by the Authority aforesaid, That no Action, Suit, or Process whatsoever, shall be had, maintained, or prosecuted against any Person in whose House or Chamber any Fire shall, from and after the said first Day of May, accidentally begin, or any Recompence be made by such Person for any Damage suffered or occasioned thereby; any Law, Usage, or Custom to the contrary notwithstanding: And if any Action shall be brought for any Thing done in pursuance of this Act, the Defendant may plead the General Issue, and give this Act in Evidence; and in case the Plaintiff become nonsuit, or discontinue his Action or Suit, or if a Verdict pass against him, the Defendant shall recover Treble Costs.

VII. Provided, That nothing in this Act contained, shall extend to defeat or make void any Contract or Agreement made between Landlord and Tenant.

VIII. Provided always nevertheless, That so much of this Act as relates to the Indemnity of any Person in whose House or Chamber any Fire shall accidentally begin, shall continue for the Space of three Years, and from thence to the End of the next Session of Parliament, and no longer.

C A P. XXXII.

An Act for regulating the Qualifications of the Elections of the Governor, Deputy Governor, Directors, and Voters, of the Governor and Company of the Bank of England.

3 Annæ, c. 33.

‘ WHEREAS by an Act of Parliament made and passed in the fifth Year of her Majesty’s Reign, intituled, An Act for continuing the Duties upon Houses, to secure a yearly Fund for circulating Exchequer Bills, whereby a Sum not exceeding fifteen hundred thousand Pounds is intended to be raised for carrying on the War, and other her Majesty’s Occasions, it is provided and enacted, That it shall and may be lawful for the Governor and Company of the Bank of England, and their Successors, for the better circulating of the

C A P. XIV.

An Act for the reviving and continuing several Acts therein mentioned, for the preventing Mischiefs which may happen by Fire; for building and repairing County Gaols; for exempting Apothecaries from serving Parish and Ward Offices, and serving upon Juries; and relating to the returning of Jurors.

WHEREAS divers temporary Laws, which by Experience have been found useful and beneficial, are expired and near expiring, therefore for reviving and continuing the same, Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That the Clause herein after-mentioned in the Act made in the sixth Year of her present Majesty's Reign, intituled, *An Act for the better preventing Mischiefs that may happen by Fire, videlicet*; And be it further enacted by the Authority aforesaid, That no Action, Suit, or Process whatsoever, shall be had, maintained, or prosecuted against any Person in whose House or Chamber any Fire shall, from and after the said first Day of May, accidentally begin, or any Recompence be made by such Person for any Damage suffered or occasioned thereby; any Law, Usage, or Custom to the contrary notwithstanding: And if any Action shall be brought for any Thing done in pursuance of this Act, the Defendant may plead the General Issue, and give this Act in Evidence; and in case the Plaintiff become nonsuit, or discontinue his Action or Suit, or if a Verdict pass against him, the Defendant shall recover Treble Cost: Which Clause being made temporary, and being expired, shall be, and are hereby revived and made perpetual.

II. And be it further enacted by the Authority aforesaid, That the Act made in the eleventh and twelfth Years of the Reign of his late Majesty King WILLIAM the Third, intituled, *An Act to enable Justices of the Peace to build and repair Gaols in their respective Counties*, which was to continue for ten Years, being expired, shall be and is hereby revived and continued, and shall be in Force, from the first Day of May one thousand seven hundred and twelve, and from thence to the End of the next Session of Parliament.

III. And be it further enacted by the Authority aforesaid, That an Act made in the sixth and seventh Years of the Reign of his late Majesty King WILLIAM the Third, intituled, *An Act for exempting Apothecaries from serving the Offices of Constable, Scavenger, and other Parish and Ward Offices, and from serving upon Juries*, which Act was to continue for the Space of seven Years, and from thence to the End of the next Session of Parliament; which Act was by an Act made in the first Year of her present Majesty's Reign, intituled, *An Act for reviving the Act, intituled, 'An Act for exempting Apothecaries from serving the Offices of Constable, Scavenger, and other Parish and Ward Offices, and from serving upon Juries'*, continued for the Space of seven Years, and from thence to the End of the next Session of Parliament; which Act will expire at the End of the next Session of Parliament, after the eleventh Day of February one thousand seven hundred and twelve, shall be and remain in full Force from and after the Expiration thereof; for the Space of eleven Years; and from thence to the End of the next Session of Parliament.

IV. And whereas in an Act made in the fourth and fifth Years of the Reign of their late Majesties King WILLIAM and Queen MARY, intituled, *An Act for reviving, continuing, and explaining several Laws therein mentioned, which are expired and near expiring*, there are several good Clauses and Provisions relating to the returning of Jurors, which Clauses and Provisions were by the said Act to continue in Force for three Years, from the first of May one thousand six hundred ninety-three, and from thence to the End of the next Session of Parliament; which said Clauses and Provisions, were, by an Act made in the seventh and eighth Years of the late King WILLIAM the Third, intituled, *An Act for the Ease of Jurors, and better regulating of Juries*, continued for seven Years, from the first Day of May one thousand six hundred ninety-six, and from thence to the End of the next Session of Parliament, and no longer; which said last-mentioned Act was also to continue but for the said Term of seven Years, from the said first Day of May one thousand six hundred ninety-six, and to the End of the next Session of Parliament; but was by another Act made in the first Year of the Reign of her present Majesty, intituled, *An Act for continuing former Acts for exporting Leather, and for Ease of Jurors, and for reviving and making more effectual an Act relating to Vagrants*, continued further for seven Years from the Expiration thereof, and to the End of the next Session of Parliament: And whereas several other Clauses and Provisions, relating to the Returns and Service of Jurors, were made in another Act made in the Session of Parliament, held in the third and fourth Years of her present Majesty's Reign, intituled, *An Act for making perpetual an Act for the more easy Recovery of small Tithes; and also an Act for the more easy obtaining Partition of Lands in Coparcenary, Joint Tenancy, and Tenancy in common; and also for making more effectual and amending several Acts relating to the Return of Jurors*; and were only to continue in Force the Continuance of the said Act; all which Clauses, Provisions, and Act, are near expiring; Be it therefore enacted by the Authority aforesaid, That all the said Clauses, Provisions, and Act, shall be and are hereby continued, and shall be in Force from the Expiration thereof, for and during the Space of eleven Years, and from thence to the End of the next Session of Parliament.

V. And whereas by the said Act made in the seventh and eighth Years of the said King WILLIAM, it is enacted, That from and after the four and twentieth Day of June one thousand six hundred ninety-six, no Person shall be returned or summoned to serve upon any Jury of the Assizes, or general Gaol Delivery, to be holden for the County of York, or at any Sessions of the Peace to be holden for any Part thereof (the

6 Annæ, c. 37.
§ 6. revived and
made perpetual.

11 & 12 W. 3.
c. 19. continued
for seven Years,
&c. This Clause
is made perpetual
by 6 Geo. 1.
c. 19. § 2.
6 W. 3. c. 4.
continued by
1 Anne, stat. 2.
c. 11. further
continued for
11 Years, &c.
Made perpetual
9 Geo. 1. c. 8.

4 & 5 W. & M.
c. 24. fur-
ther continued
for 7 Years, by
9 Geo. 1. c. 2.
§ 2.
7 & 8 W. 3.
c. 32.

1 Anne,
stat. 2. c. 13.

3 & 4 Annæ,
c. 18.
1 Geo. 2. c. 25;
6 Geo. 2. c. 37.

7 & 8 W. 3.
c. 32. § 7.
explained.

from being impressed or liable to be compelled to go to Sea, or serve as Marines or as Soldiers on Land, their Names and Places of Abode being registered and entered with the Secretary or other Officer of the Admiralty Office.

Money insured
on Houses burnt
down, how to be
applied.

'XXXIV. And in order to deter and hinder ill-minded Persons from wilfully setting their House or Houses or other Buildings on Fire, with a View of gaining to themselves the Insurance-money, where- by the Lives and Fortunes of many Families may be lost or endangered;' be it further enacted by the Authority aforesaid, That it shall any may be lawful to and for the respective Governors or Directors of the several Insurance Offices within the Limits aforesaid, for insuring Houses or other Buildings against Loss by Fire, and they are hereby authorized and required, upon the Application and Request of any Person or Persons interested in or intitled unto any House or Houses, or other Buildings within the Limits by this Act prescribed, which hereafter shall or may be burnt down, demolished, or damaged by Fire, or upon any Grounds of Suspicion that the Owner or Owners, Occupier or Occupiers, or other Person or Persons, who shall have insured such House or Houses, or other Buildings, have been guilty of Fraud, or of wilful setting their House or Houses or other Buildings on Fire, to cause the Insurance-money to be laid out and expended, as far as the same will go, towards rebuilding, reinstating, or repairing such House or Houses or other Buildings so burnt down, demolished, or damaged by Fire, unless the Party or Parties claiming such Insurance-money shall, within Sixty Days next after his, her, or their Claim shall be adjusted, give a sufficient Security to the Governors or Directors of the Insurance Office where such House or Houses, or other Buildings are insured, that the same Insurance-money shall be laid out and expended as aforesaid, or unless the said Insurance-money shall be in that Time settled and disposed of to and amongst all the contending Parties, to the Satisfaction and Approbation of such Governors or Directors of such Insurance Office respectively.

Negligence in
Servants respect-
ing Fires, punish-
able by Fine
of 100l. or Im-
prisonment.

'XXXV. And whereas Fires often happen by the Negligence and Carelessness of Servants,' be it there- fore enacted by Authority aforesaid, That if any menial or other Servant or Servants, through Negli- gence or Carelessness, shall fire, or cause to be fired, any Dwelling-house, or Out-house or Houses or other Buildings, situate within the Limits aforesaid, such Servant or Servants, being thereof convict- ed by the Oath of One or more credible Witnesses, or Witnesses made before Two or more of His Ma- jesty's Justices of the Peace, shall forfeit and pay the Sum of One hundred Pounds unto the Church- wardens or Overseers of such Parish where such Fire shall happen, to be distributed amongst the Suf- fers by such Fire in such Proportions as to the said Churchwardens shall seem just: And in case of Default or Refusal to pay the same immediately after such Conviction, the same being lawfully demand- ed by the said Churchwardens; that then, and in such Case, such Servant or Servants shall, by Warrant under the Hands and Seals of Two or more of His Majesty's Justices of the Peace, be committed to the Common Gaol or House of Correction, as the said Justices shall think fit, for the Space of Eighteen Months there to be kept to hard Labour.

Constables and
Beadles, on No-
tice, to repair to
Places on Fire,
and what they
are to do.

XXXVI. And be it further enacted by the Authority aforesaid, That upon the breaking out of any Fire, within the Limits aforesaid, all Constables and Beadles, upon Notice thereof, shall immediatly repair to the Place where the said Fire shall happen, with their Staves and other Badges of their Autho- rity, and be aiding and assisting, as well in extinguishing the said Fires, and causing People to work at the Engines, as also in preventing Goods being stolen, and shall seize and apprehend all ill-disposed Persons that they shall find stealing or pilfering from the Inhabitants; as also that the said Constables and Beadles shall give their utmost Assistance to help the Inhabitants to remove their said Goods.

No Action to
lay against a Per-
son where the
Fire accidentally
begins.

XXXVII. And be it further enacted by the Authority aforesaid, That no Action, Suit, or Process whatever, shall be had, maintained, or prosecuted against any Person in whose House or Chamber any Fire shall, from and after the said Twenty-fourth Day of June, One thousand seven hundred and seventy-two, accidentally begin, nor shall any Recompence be made by such Person for any Damage suffered or occasioned thereby; any Law, Usage, or Custom to the Contrary notwithstanding: And in such Case, if any Action shall be brought, the Defendant may plead the General Issue, and give this Act, and the Special Matter in Evidence, at any Trial thereof to be had; and in case the Plaintiff shall become nonsuited, or discontinue his Action or Suit, or if a Verdict shall pass against him, the Defen- dant shall recover Treble Costs: Provided that nothing in this Act contained shall extend to defeat or make void any Contract or Agreement made between Landlord and Tenant.

Distress not un-
lawful for want
of Form, &c.

XXXVIII. And be it further enacted by the Authority aforesaid, That where any Distress shall be made for any Sum or Sums of Money to be recovered by virtue of this Act, the Distress itself shall not be deemed unlawful, nor the Party or Parties making the same be deemed a Trespasser or Trespassers, on account of any Defect or Want of Form in any Proceedings relating thereto; nor shall the Party or Parties be deemed a Trespasser or Trespassers *ab initio*, on account of any Irregularity which shall be af- terwards done by the Party or Parties making such Distress; but the Person or Persons aggrieved by such Irregularity may recover full Satisfaction for the special Damage by Action on the Case.

Plaintiff not to
recover if Tender
of sufficient A-
mends be made,
&c.

XXXIX. Provided always, and be it further enacted by the Authority aforesaid, That no Plaintiff or Plaintiffs shall recover in any Action, or for any such Irregularity, Trespass, or other Proceedings, if Tender of sufficient Amends shall be made by or on the Behalf of the Party or Parties who shall have committed, or caused to be committed, every or any such Irregularity, Trespass, or wrongful Proceeding before such Action brought; and in case no such Tender shall have been made, it shall and may be lawful for the Defendant or Defendants in any such Action, by Leave of the Court where such Action shall depend, at any Time before Issue joined, to pay into the Court such Sum of Money as he or they shall see fit; whereupon such Proceedings or Order and Judgment shall be had, made, or given, in and by such Court, as in other Actions when the Defendant is allowed to pay Money into Court.

'XL. And

Officers shall be accountable for the same, in like Manner as they are accountable for the Money by them collected for the Relief of the Poor, and shall be liable to the like Pains and Commitments for not accounting for the same, and to the like Distress and Penalties for not paying the Monies by them collected, levied, or received, and remaining in their Hands, as Overseers of the Poor are, by all or any of the Laws of this Land, liable to, for not accounting for, or not paying, Monies collected by virtue of any Rates for Relief of the Poor.

LXXXII. And whereas the several Offices for insuring Houses against Loss by Fire retain in their several Services, and give Coats and Badges, and other Rewards, unto Watermen, for their Service and Assistance in and towards extinguishing of Fire, and who are to be always ready when wanted, and are provided with various Sorts of Poles, Hooks, Hatchets, and several other Instruments and Things, at the Charge of the said respective Insurance Offices for the extinguishing of Fire; which Watermen so retained are, by Experience, found to venture much further, and to have Skill to give, and do give, at Fires happening within the Limits aforesaid greater Help than other Persons not used to come into Danger; be it further enacted by the Authority aforesaid, That the Watermen for the Time being so retained by, and belonging to, every such Insurance Office, within the Limits aforesaid, not exceeding thirty for each Office, shall be free from being impressed, or liable to be compelled, to go to Sea, or serve as Mariners, or as Soldiers on Land, their Names and Places of Abode being registered and entered with the Secretary, or other Officer of the Admiralty Office.

Watermen retained by Insurance Offices not to be impressed.

LXXXIII. And, in order to deter and hinder ill-minded Persons from wilfully setting their House or Houses, or other Buildings, on Fire, with a View of gaining to themselves the Insurance Money, whereby the Lives and Fortunes of many Families may be lost or endangered; be it further enacted by the Authority aforesaid, That it shall and may be lawful to and for the respective Governors or Directors of the several Insurance Offices for insuring Houses or other Buildings against Loss by Fire, and they are hereby authorized and required, upon the Request of any Person or Persons interested in or intitled unto any House or Houses, or other Buildings which may hereafter be burnt down, demolished, or damaged by Fire, or upon any Grounds of Suspicion that the Owner or Owners, Occupier or Occupiers, or other Person or Persons who shall have insured such House or Houses, or other Buildings, have been guilty of Fraud, or of wilfully setting their House or Houses, or other Buildings, on Fire, to cause the Insurance Money to be laid out and expended, as far as the same will go, towards rebuilding, reinstating, or repairing, such House or Houses, or other Buildings, so burnt down, demolished, or damaged by Fire; unless the Party or Parties claiming such Insurance Money shall, within sixty Days next after his, her, or their Claim is adjusted, give a sufficient Security to the Governors or Directors of the Insurance Office where such House or Houses, or other Buildings, are insured, that the same Insurance Money shall be laid out and expended as aforesaid; or unless the said Insurance Money shall be, in that Time, settled and disposed of to and amongst all the contending Parties, to the Satisfaction and Approbation of such Governors or Directors of such Insurance Office respectively.

Money insured on Houses burnt how to be applied.

LXXXIV. And whereas Fires often happen by the Negligence and Carelessness of Servants, be it therefore enacted by the Authority aforesaid, That if any menial, or other Servant or Servants, through Negligence or Carelessness, shall fire, or cause to be fired, any Dwelling-house, or Out-house or Houses, or other Buildings, whether within the Limits aforesaid or elsewhere, within the Kingdom of Great Britain, such Servant or Servants, being thereof lawfully convicted by the Oath of one or more credible Witnesses or Witnesses, made before two or more of his Majesty's Justices of the Peace, shall forfeit and pay the Sum of one hundred Pounds unto the Churchwardens or Overseers of such Parish where such Fire shall happen; to be distributed amongst the Sufferers by such Fire, in such Proportions, as to the said Churchwardens shall seem just: And in case of Default or Refusal to pay the same immediately after such Conviction, the same being lawfully demanded by the said Churchwardens; that then, and in such Case, such Servant or Servants shall, by Warrant under the Hands and Seals of two or more of his Majesty's Justices of the Peace, be committed to the common Gaol, or House of Correction, as the said Justices think fit, for the Space of eighteen Months, there to be kept to hard Labour.

Servants by Carelessness firing a House, to forfeit 100 l. or be imprisoned 18 Months.

LXXXV. And be it further enacted by the Authority aforesaid, That, upon the breaking out of any Fire within the Limits aforesaid, all Constables and Beadles, upon Notice thereof, shall immediately repair to the Place where the said Fire shall happen, with their Staves, and other Badges of their Authority; and shall be aiding and assisting, as well in extinguishing the said Fires, and causing People to work at the Engines, as also in preventing Goods being stolen; and shall seize and apprehend all ill-disposed Persons that they shall find stealing or pilfering from the Inhabitants; as also that the said Constables and Beadles shall give their utmost Assistance to help the Inhabitants to remove their Goods.

Constables and Beadles, on Notice, to repair to Buildings on fire.

LXXXVI. And be it further enacted by the Authority aforesaid, That no Action, Suit, or Process whatever, shall be had, maintained, or prosecuted, against any Person in whose House, Chamber, Stable, Barn, or other Building, or on whose Estate any Fire shall, after the said twenty-fourth Day of June, accidentally begin, nor shall any Recompence be made by such Person for any Damage suffered thereby; any Law, Usage, or Custom, to the contrary notwithstanding: And in such Case, if any Action be brought, the Defendant may plead the General Issue, and give this Act, and the special Matter in Evidence, at any Trial thereupon to be had; and in case the Plaintiff become nonsuited, or discontinue his Action or Suit, or if a Verdict pass against him, the Defendant shall recover Treble Costs; provided that no Contract or Agreement made between Landlord and Tenant shall be hereby defeated, or made void.

No Action to lie against a Person where the Fire accidentally begins.

LXXXVII. And be it further enacted by the Authority aforesaid, That where any Distress shall be made for any Sum or Sums of Money to be recovered by virtue of this Act, the Distress itself shall not be deemed unlawful, nor the Party or Parties making the same be deemed a Trespasser or Trespassers, on account of any Defect of Form in any Proceedings relating thereto; nor shall the Party or Parties be deemed a Trespasser or Trespassers *ab initio*, on account of any Irregularity afterwards done by the Party or Parties making

Distress not unlawful for want of Form, &c.

West's Annotated Code of Maryland
Public Safety (Refs & Annos)
Title 6. State Fire Prevention Commission and State Fire Marshal (Refs & Annos)
Subtitle 2. State Fire Prevention Commission (Refs & Annos)

MD Code, Public Safety, § 6-206
Formerly cited as MD CODE Art. 38A, § 3; MD CODE Art. 38A, § 4

§ 6-206. Regulations

Effective: July 1, 2019

[Currentness](#)

State Fire Prevention Code

(a)(1)(i) To protect life and property from the hazards of fire and explosion, the Commission shall adopt comprehensive regulations as a State Fire Prevention Code.

(ii) The State Fire Prevention Code shall comply with standard safe practice as embodied in widely recognized standards of good practice for fire prevention and fire protection.

(iii) The State Fire Prevention Code has the force and effect of law in the political subdivisions of the State.

(2)(i) Except as provided in subparagraph (ii) of this paragraph, the regulations adopted under this subsection do not apply to existing installations, plants, or equipment.

(ii) If the Commission determines that an installation, plant, or equipment is a hazard so inimicable to the public safety as to require correction, the regulations adopted under this subsection apply to the installation, plant, or equipment.

Fee schedule

(b)(1) The Commission shall adopt regulations to establish and administer a fee schedule for:

(i) reviewing building plans to ensure compliance with the State Fire Prevention Code; and

(ii) conducting inspections in accordance with Subtitle 3 of this title.

(2) The Commission shall review the fee schedule annually to ensure that the money collected at least covers the costs of administering plan review and conducting inspections.

(3) This subsection does not limit the authority of a local authority to establish a fee schedule for plan review and inspections conducted by the local authority.

Hearings

(c)(1) Before adopting a regulation, the Commission shall hold at least one public hearing on the proposed regulation.

(2)(i) The Commission shall publish notice of the hearing at least 15 days before the hearing in a newspaper of general circulation in the State.

(ii) At the same time, the Commission shall send a copy of the notice to each person who has filed a request for notification with the Commission.

(iii) The notice shall contain the time, place, and subject of the hearing and the place and times to examine the proposed regulation.

More stringent law governs

(d)(1) The State Fire Prevention Code establishes the minimum requirements to protect life and property from the hazards of fire and explosion.

(2) If a State or local law or regulation is more stringent than the State Fire Prevention Code, the more stringent law or regulation governs if the more stringent law or regulation is:

(i) not inconsistent with the State Fire Prevention Code; and

(ii) not contrary to recognized standards and good engineering practices.

(3) If there is a question whether a State or local law or regulation governs, the decision of the Commission determines:

(i) which law or regulation governs; and

(ii) whether State and local officials have complied with the State Fire Prevention Code.

Copies of State Fire Prevention Code

(e) The Commission shall make available for public information a copy of the State Fire Prevention Code, and any amendments to the State Fire Prevention Code, in each county courthouse in the State.

Credits

Added by Acts 2003, c. 5, § 2, eff. Oct. 1, 2003. Amended by Acts 2017, c. 175, § 1, eff. Oct. 1, 2017; Acts 2017, c. 176, § 1, eff. Oct. 1, 2017; Acts 2019, c. 430, § 1, eff. July 1, 2019.

Editors' Notes

LEGISLATIVE NOTES

Revisor's Note (Acts 2003, c. 5):

This section is new language derived without substantive change from former Art. 38A, §§ 3(a), (b), (c), (d), and (e) and 4(b).

Subsection (a)(1)(i) of this section is revised to require the Commission to adopt regulations as a State Fire Prevention Code. Consequently, the former power of the Commission to “promulgate, amend, and repeal” regulations is deleted as included in the requirement to “adopt” them. Also, the former requirement to promulgate regulations “by September 1, 1964” is deleted as obsolete.

In subsections (a)(1)(i) and (d)(1) of this section, the words “[t]o protect” are substituted for the former reference to “safeguarding” for clarity.

In subsection (a)(1)(iii) of this section, the former references to the “several counties” and “cities” are deleted as included in the general reference to the “political subdivisions of the State”.

In subsection (c)(1) of this section, the reference to “adopting a regulation” is substituted for the former reference to “promulgation, amendment, or repeal of any additional regulation” for consistency with terminology used throughout the revised articles of the Code. *See* Title 10, Subtitle 1 of the State Government Article. Consequently, the former references to the “amendment” and “repeal” of a regulation are deleted as included in the concept of “adopting” regulations. *See* SG § 10-101(g). Similarly, in subsection (c)(2)(iii) of this section, the former references to the “amendment” or “repealer” are deleted.

Also in subsection (c)(1) of this section, the former phrase “to be separately submitted” is deleted as implicit in the requirement to hold a hearing on the proposed regulation.

Subsection (c)(2)(i) and (ii) of this section is revised in the active voice to clarify that the Commission is responsible for publishing and sending notice of hearings on proposed regulations.

In subsection (c)(2)(ii) of this section, the former words “firm” and “corporation” are deleted as included in the defined term “person”. *See* § 1-101 of this article.

In subsection (d)(1), (2), and (3)(ii) of this section, the reference to the “State Fire Prevention Code” is substituted for the former references to the “regulations promulgated under this chapter”, “regulations promulgated under this article”, and “State fire regulations”, respectively, for clarity, consistency, and accuracy.

In subsection (d)(1) of this section, the former reference to the “interpretation and application” of the regulations is deleted as implicit in the statement that the State Fire Prevention Code establishes the minimum requirements to protect life and property.

In subsection (d)(2) of this section, the former reference to “impos[ing] higher standards” is deleted as included in the reference to the regulation being “more stringent”.

Former Art. 38A, § 4(a), which required the State Fire Prevention Commission to hold public hearings before the adoption of the State Fire Prevention Code in 1964, is deleted as obsolete.

Defined terms: “Commission” § 6-101

“Person” § 1-101

MD Code, Public Safety, § 6-206, MD PUBLIC SAFETY § 6-206
Current through Chapters 1 to 11 from the 2020 Regular Session of the General Assembly.

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West's Annotated Code of Maryland
Public Safety (Refs & Annos)
Title 6. State Fire Prevention Commission and State Fire Marshal (Refs & Annos)
Subtitle 3. State Fire Marshal (Refs & Annos)

MD Code, Public Safety, § 6-305
Formerly cited as MD CODE Art. 38A, § 7; MD CODE Art. 38A, § 8; MD CODE Art. 38A, § 33

§ 6-305. General powers and duties of State Fire Marshal

Effective: October 1, 2020

[Currentness](#)

Enforcement of laws, regulations, and requirements for installing sprinkler systems

(a) The State Fire Marshal shall enforce:

(1) all laws of the State that relate to:

(i) the prevention of fire;

(ii) the storage, sale, and use of explosives, combustibles, or other dangerous articles, in solid, liquid, or gaseous form;

(iii) the installation and maintenance of all kinds of equipment intended to control, detect, or extinguish fire;

(iv) the means and adequacy of exit, in case of fire, from buildings and all other places in which individuals work, live, or congregate, except buildings that are used solely as dwelling houses for no more than two families; and

(v) the suppression of arson;

(2) the regulations adopted by the Commission under Subtitle 2 of this title; and

(3) any requirements relating to the installation of automatic sprinkler systems in new one- and two-family dwellings.

Implementation of fire safety programs

(b) By delegation of authority vested in the Commission and within policy established by the Commission, the State Fire Marshal shall implement fire safety programs in the State to minimize fire hazards and disasters and loss of life and property from these causes, including:

- (1) the establishment and enforcement of fire safety practices throughout the State;
- (2) preventive inspection and correction activities;
- (3) coordination of fire safety programs with volunteer and career fire companies and other State agencies and political subdivisions exercising enforcement aspects; and
- (4) critical analysis and evaluation of State fire loss statistics to determine problems and solutions.

Assistance in fire prevention matters

(c) On request, the State Fire Marshal shall assist in fire prevention matters:

- (1) a chief of a fire company or department;
- (2) a legally designated fire marshal of a county or municipal corporation; or
- (3) a unit or agency of the State or a county or municipal corporation.

Fire safety and emergency evacuation procedures for State property

(d)(1) The State Fire Marshal, assistant State fire marshals, and special assistant State fire marshals shall develop for each property owned or leased by the State:

- (i) fire safety procedures, including fire drills at least quarterly; and
- (ii) emergency evacuation procedures.

(2) Information about fire safety and emergency evacuation procedures shall be available to all State employees on request.

(3) The State Fire Marshal shall require the State unit exercising control over the property owned or leased by the State to keep records of fire drills or other exercises that relate to fire safety and emergency evacuation procedures conducted in the property.

Issuance of permits and licenses

(e) The State Fire Marshal may issue permits and licenses as required under this article.

Disposal of hazardous devices and substances

(f) On request, the State Fire Marshal may assist police and fire authorities to dispose of hazardous devices and substances.

Credits

Added by Acts 2003, c. 5, § 2, eff. Oct. 1, 2003. Amended by Acts 2020, c. 334, § 1, eff. Oct. 1, 2020; Acts 2020, c. 335, § 1, eff. Oct. 1, 2020.

Editors' Notes

LEGISLATIVE NOTES

Revisor's Note (Acts 2003, c. 5):

This section is new language derived without substantive change from former Art. 38A, §§ 7(b), 8(a), (b), (c), (k), and (n), and the second sentence of § 33.

In subsection (a)(1)(iv) of this section, the word “solely” is substituted for the former word “wholly” as a better word choice.

Also in subsection (a)(1)(iv) of this section, the former phrases “from time to time” and “for any purpose”, which modified “live, work, or congregate”, are deleted as surplusage.

In subsection (b)(3) of this section, the reference to “career” fire companies is substituted for the former reference to “paid” fire companies for consistency with terminology used throughout this article.

In subsection (c)(1) of this section, the former reference to a “recognized” fire company or department is deleted as surplusage.

In the introductory language of subsection (d)(1) of this section, the reference to “special assistant State fire marshals” is substituted for the former reference to “special deputy fire marshals” for accuracy.

In subsection (d)(1)(ii) of this section, the former phrase “in case of an emergency”, which modified “emergency evacuation procedures”, is deleted as redundant.

In subsection (e) of this section, the reference to licenses and permits issued under “this article” is retained in the revision although the Public Safety Article includes provisions from articles other than former Article 38A. No substantive change results because the powers of the State Fire Marshal are the same under this article as under former Article 38A.

Defined terms: “Commission” § 6-101

“County” § 1-101

MD Code, Public Safety, § 6-305, MD PUBLIC SAFETY § 6-305

Current with legislation effective through July 1, 2021, from the 2021 Regular Session of the General Assembly. Some statute sections may be more current, see credits for details.

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West's Annotated Code of Maryland
Public Safety (Refs & Annos)
Title 6. State Fire Prevention Commission and State Fire Marshal (Refs & Annos)
Subtitle 3. State Fire Marshal (Refs & Annos)

MD Code, Public Safety, § 6-307
Formerly cited as MD CODE Art. 38A, § 8

§ 6-307. Inspections

Currentness

Duty to inspect public buildings

(a)(1) The State Fire Marshal shall inspect for fire exits and reasonable safety standards:

(i) all institutions owned by the State or a county or municipal corporation; and

(ii) all schools, theaters, churches, and other places of public assembly.

(2) The State Fire Marshal shall report the findings of an inspection and any recommendations to the individual in charge of the institution or other place that was inspected.

Authority to conduct inspections as necessary

(b)(1) This subsection does not apply to a building or premises actually occupied as a private dwelling.

(2) The State Fire Marshal may enter a building or premises within the jurisdiction of the State Fire Marshal at reasonable hours to conduct an inspection that the State Fire Marshal considers necessary under this subtitle.

Prior notice prohibited

(c) An individual, including an employee of the State Fire Marshal, may not give prior notice of an inspection authorized under this subtitle without the written approval of the State Fire Marshal or designee of the State Fire Marshal.

Inspection of place of employment

(d)(1) Subject to regulations adopted by the Commission, whenever the State Fire Marshal or designee of the State Fire Marshal inspects a place of employment, a representative of the employer and an authorized employee representative shall be given an opportunity to accompany the State Fire Marshal or designee during the inspection.

(2) If there is no authorized employee representative, the State Fire Marshal or designee shall consult with a reasonable number of employees about matters of safety and health in the place of employment.

Protection of trade secrets

(e)(1) In this subsection, “trade secret” means a confidential formula, pattern, device, or compilation of information that:

(i) is used in an employer's business;

(ii) gives the employer an opportunity to obtain an advantage over competitors who do not know or use the information; and

(iii) is known only to the employer and those employees to whom it is necessary to confide the information.

(2)(i) Except as provided in subparagraph (ii) of this paragraph, any information reported to or otherwise obtained by the State Fire Marshal or designee of the State Fire Marshal in connection with an inspection or proceeding under this subtitle that contains or might reveal a trade secret is confidential.

(ii) Information described in subparagraph (i) of this paragraph may be disclosed only:

1. to other officers or employees responsible for carrying out this subtitle; or

2. if relevant in a proceeding under this subtitle.

(3) In a proceeding under this subtitle, the State Fire Marshal, designee of the State Fire Marshal, or a court of competent jurisdiction, as applicable, shall issue appropriate orders to protect the confidentiality of a trade secret.

Credits

Added by [Acts 2003, c. 5, § 2, eff. Oct. 1, 2003](#).

Editors' Notes

LEGISLATIVE NOTES

Revisor's Note (Acts 2003, c. 5):

This section is new language derived without substantive change from former Art. 38A, § 8(d) and (e).

In subsection (a)(2) of this section, the reference to the “individual in charge of the institution or other place that was inspected” is substituted for the former reference to the “proper administrative head[s]” for clarity and to conform to current practice.

In subsection (b)(2) of this section, the reference to this “subtitle” is substituted for the former reference to this “article” for clarity and accuracy. Provisions that relate to inspections by the State Fire Marshal are revised in this subtitle.

The Public Safety Article Review Committee notes, for consideration by the General Assembly, that the General Assembly may wish to consider substituting a more widely used definition of the term “trade secret” for the definition used in subsection (e)(1) of this section. This definition was originally enacted in 1972 and predates the Uniform Trade Secrets Act, which was approved by the National Conference of Commissioners on Uniform State Laws in 1979 and amended in 1985. The uniform act has been adopted by 42 states. It was enacted in Maryland in 1989 and is codified in Title 11, Subtitle 12 of the Commercial Law Article.

“Trade secret” is defined in the Maryland Uniform Trade Secrets Act ([CL § 11-1201\(e\)](#)) as follows:

“Trade secret” means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

- (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
- (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Defined terms: “County” [§ 1-101](#)

“State” [§ 1-101](#)

MD Code, Public Safety, § 6-307, MD PUBLIC SAFETY § 6-307

Current with legislation effective through July 1, 2021, from the 2021 Regular Session of the General Assembly. Some statute sections may be more current, see credits for details.



KeyCite Yellow Flag - Negative Treatment

Proposed Legislation

West's Annotated Code of Maryland
Public Safety (Refs & Annos)
Title 9. Fire Protection and Prevention (Refs & Annos)
Subtitle 1. Smoke Detection Systems (Refs & Annos)

MD Code, Public Safety, § 9-106

§ 9-106. Enforcement of smoke alarm requirements

Effective: October 1, 2018

[Currentness](#)

In general

(a) Smoke alarm requirements shall be enforced by the State Fire Marshal, a county or municipal fire marshal, a fire chief, the Baltimore City Fire Department, or any other designated authority having jurisdiction.

Installation of required smoke alarms

(b)(1) The building permit applicant is responsible for the proper installation of required smoke alarms in residential occupancies constructed on or after July 1, 2013.

(2) If a building permit is not required, the general contractor shall bear the responsibility described in paragraph (1) of this subsection.

Installation, repair, maintenance, and replacement of alarms

(c) The landlord or property owner is responsible for the installation, repair, maintenance, and replacement of smoke alarms required by this subtitle.

Removal or tampering with alarms

(d) Occupants of a residential occupancy may not remove or tamper with a required smoke alarm or otherwise render the smoke alarm inoperative.

Testing smoke alarms

(e)(1) Testing of smoke alarms is the responsibility of the occupant of the residential unit.

(2)(i) A tenant shall notify the landlord in writing of the failure or malfunction of a required smoke alarm.

(ii) The written notification required under subparagraph (i) of this paragraph shall be delivered by certified mail, return receipt requested to the landlord, or by hand delivery to the landlord or the landlord's agent, at the address used for the payment of rent.

(iii) If the delivery of the notification is made by hand as described in subparagraph (ii) of this paragraph, the landlord or the landlord's agent shall provide to the tenant a written receipt for the delivery.

(iv) The landlord shall provide written acknowledgment of the notification and shall repair or replace the smoke alarm within 5 calendar days after the notification.

Alternate sources of power for alarms

(f)(1) If a residential unit does not contain alternating current (AC) primary electric power, battery operated smoke alarms or smoke alarm operation on an approved alternate source of power may be permitted.

(2) Battery operated smoke alarms shall be sealed, tamper resistant units incorporating a silence/hush button and using long-life batteries.

Combination with carbon monoxide detectors

(g) A smoke alarm may be combined with a carbon monoxide alarm if the device complies with:

(1) this subtitle;

(2) Title 12 of this article; and

(3) Underwriters Laboratories (UL) Standards 217 and 2034.

Credits

Added by Acts 2013, c. 594, § 1, eff. July 1, 2013; Acts 2013, c. 595, § 1, eff. July 1, 2013. Amended by Acts 2018, c. 484, § 1, eff. Oct. 1, 2018.

MD Code, Public Safety, § 9-106, MD PUBLIC SAFETY § 9-106

Current through Chapters 1 to 11 from the 2020 Regular Session of the General Assembly.

West's Annotated Code of Maryland

Public Safety (Refs & Annos)

Title 9. Fire Protection and Prevention (Refs & Annos)

Subtitle 8. Fire Inspections by Fire Departments of Counties and Municipal Corporations (Refs & Annos)

MD Code, Public Safety, § 9-803
Formerly cited as MD CODE Art. 48, § 181

§ 9-803. Fire inspections authorized

Currentness

In general

(a)(1) A fire official may inspect a building, structure, or other place under the jurisdiction of the fire official, except the interior of a private dwelling, where combustible material has been allowed to accumulate or where the fire official has reason to believe that combustible material has accumulated or may be accumulated.

(2) At any time and without liability for trespass, a fire official:

(i) may enter, at the fire official's own risk, a building, including a private dwelling, or on premises where a fire is burning, or where there is reasonable cause to believe a fire is burning, to extinguish the fire;

(ii) may enter, at the fire official's own risk, a building, including a private dwelling, or on premises near the scene of a fire to protect the building or premises or to extinguish the fire;

(iii) when responding to or operating at a fire or other emergency:

1. may order an individual to leave a building or place in the vicinity of the fire or other emergency to protect the individual from injury;

2. may order, after consultation with the senior railroad or transportation official present, a convoy, caravan, or train of vehicles, craft, or railway cars to be detached or uncoupled if the fire official determines that to do so is in the interest of safety of individuals or property; and

3. may enter a building that is in danger of the spread of fire to prevent a potential emergency, including an explosion, in the building; and

(iv) to maintain order in the vicinity of a fire or other emergency:

1. may direct the actions of firefighters at the fire or other emergency;
2. may keep bystanders or other individuals at a safe distance from the fire or other emergency and from fire equipment;
3. may facilitate the speedy movement and operation of fire-fighting equipment and firefighters; and
4. until the arrival of sufficient police officers, may direct traffic personally or have a subordinate do so to facilitate the movement of traffic.

Obstructing rescue squads prohibited

(b) Notwithstanding subsection (a) of this section, a fire official may not inhibit or obstruct members of rescue squads from performing their duties in the vicinity of a fire or other emergency.

Credits

Added by [Acts 2003, c. 5, § 2, eff. Oct. 1, 2003](#).

Editors' Notes

LEGISLATIVE NOTES

Revisor's Note (Acts 2003, c. 5):

This section is new language derived without substantive change from former Art. 48, § 181(a).

In subsection (a)(2)(ii) of this section, the former phrase “which is in progress in another building or premises” is deleted as surplusage.

In subsection (a)(2)(iii)1 and 2 and (iv)2 of this section, the reference to an “individual” is substituted for the former reference to a “person” because this provision covers human beings and not the other entities included in the defined term “person”. *See* [§ 1-101](#) of this article.

In subsection (a)(2)(iv)1 of this section, the reference to “firefighter” is substituted for former term “firemen” for gender neutrality.

In subsection (a)(2)(iv)4 of this section, the former reference to the authority to “control” traffic is deleted as included in the reference to the authority to “direct” traffic.

Defined terms: “Combustible material” [§ 9-801](#)

“Fire official” [§ 9-801](#)

MD Code, Public Safety, § 9-803, MD PUBLIC SAFETY § 9-803

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Title 29
DEPARTMENT OF STATE POLICE

Subtitle 06 FIRE PREVENTION COMMISSION

Chapter 01 Fire Prevention Code

Authority: Public Safety Article, §§6-206 and 6-501, Annotated Code of Maryland

.01 Title.

This chapter shall be known and may be cited as the State Fire Prevention Code.

.02 Purpose.

A. The purpose of this chapter is to establish minimum requirements that will provide a reasonable degree of fire prevention and control to safeguard life, property, or public welfare from:

- (1) The hazards of fire and explosion arising from the storage, handling, or use of substances, materials, or devices; and
- (2) Conditions hazardous to life, property, or public welfare in the use or occupancy of buildings, structures, sheds, tents, lots, or premises.

B. This chapter incorporates by reference NFPA 1 Fire Code (2015 Edition), except as amended in Regulations .08 and .09 of this chapter, and NFPA 101 Life Safety Code (2015 Edition), except as amended in Regulation .07 of this chapter. Certain requirements of the International Building Code as incorporated by reference by the Maryland Building Performance Standards are also adopted by incorporation by reference in Regulations .06—.16 of this chapter and are considered minimum standards.

C. The State Fire Prevention Commission recommends the use of the NFPA National Fire Codes or other nationally recognized standards in technical matters not specifically addressed by this chapter.

.03 Application and Scope.

A. This chapter applies to both new and existing buildings and conditions. In various sections there are specific provisions for existing buildings that may differ from those for new buildings. Unless otherwise noted, this chapter does not apply to facilities, equipment, structures, or installations that were existing or approved for construction or installation before the effective date of this chapter, except in those cases in which it is determined by the authority having jurisdiction (AHJ) that the existing situation constitutes a hazard so inimical to the public welfare and safety as to require correction. The requirements for existing buildings and conditions may be modified if their application clearly would be impractical in the judgment of the AHJ, but only if it is clearly evident that a reasonable degree of safety is provided. The State Fire Marshal or the legally appointed designee has the authority to make a determination of the applicability of this chapter to any building or condition in it, subject to the right of appeal to the State Fire Prevention Commission as prescribed in COMAR 29.06.02.

B. Repealed.

C. The provisions of this chapter do not apply in Baltimore City except to those buildings and conditions specifically prescribed in Public Safety Article, Title 6, Subtitle 4, Annotated Code of Maryland.

D. The provisions of this chapter do not apply to buildings used solely as dwelling houses for not more than two families as prescribed in Public Safety Article, Title 6, Subtitle 3, Annotated Code of Maryland.

.04 Enforcement.

A. Enforcement of this chapter is the responsibility of:

- (1) The State Fire Marshal;
- (2) A legally designated fire official of a county or municipal corporation of the State; or
- (3) Other persons legally appointed by the State Fire Marshal under Public Safety Article, Title 6, Subtitle 3, Annotated Code of Maryland.

B. The State Fire Marshal or the legally appointed designee may accept alternate methods of satisfying the intent of this chapter if the material, method, or work is at least the equivalent of that required by this chapter in quality, effectiveness, durability, and safety, and meets or exceeds the intent of the chapter.

C. If there are differing or conflicting requirements between this chapter and codes or standards adopted by incorporation by reference by this chapter, the State Fire Marshal or the legally appointed designee shall determine which requirements apply, subject to the right of appeal to the State Fire Prevention Commission.

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D. If Public Safety Article, Annotated Code of Maryland, or this chapter requires that a permit, license, or certificate of approval be obtained from the State Fire Marshal, it shall be obtained from the State Fire Marshal, or other appropriate authority, of the county, city, or incorporated town where the activity or equipment for which the permit, license, or certificate required is located.

E. A violation of this chapter is subject to the penalties set forth in the Public Safety Article, Annotated Code of Maryland.

.05 Definitions.

A. In this chapter, the following terms have the meanings indicated.

B. Terms Defined.

(1) "Authority having jurisdiction (AHJ)" means the State Fire Marshal or the legally appointed designee as prescribed in this chapter.

(2) "International Code Council (ICC)" means International Code Council, Inc., 500 New Jersey Avenue N.W., 6th Floor, Washington, DC 20001-2070.

(3) "Legally appointed designee" means those local or county officials specifically authorized under the Public Safety Article, Annotated Code of Maryland, to enforce the provisions of the State Fire Laws and State Fire Prevention Code.

(4) "New building or condition" means a building, structure, installation, plant, equipment, renovation, or condition:

(a) For which a building permit is issued on or after the effective date of this chapter;

(b) On which actual construction is started on or after the effective date of this chapter in a jurisdiction where a building permit is not required;

(c) Which represents a change from one occupancy classification to another on or after the effective date of this chapter;

or

(d) Which represents a situation, circumstance, or physical makeup of any structure, premise, or process that was commenced on or after the effective date of this chapter.

(5) "NFPA" means National Fire Protection Association, 1 Batterymarch Park, P.O. Box 9101, Quincy, MA 02269-9101.

.06 Incorporation by Reference.

A. In this chapter, the following documents are incorporated by reference, with the amendments specified in this chapter. Tentative interim amendments and supplements to these documents and to the codes and standards referenced in these documents are not included as part of this chapter unless specifically adopted by this chapter.

B. Documents Incorporated.

(1) NFPA 1 Fire Code (2015 Edition).

(2) NFPA 101 Life Safety Code (2015 Edition).

(3) International Building Code as incorporated by reference by the Maryland Building Performance Standards, which can be found under COMAR 05.02.01.02-1.

C. Incorporation by Reference Locations. The documents incorporated by reference in §B of this regulation are available for inspection in State depository libraries.

.07 National Fire Protection Association 101 Life Safety Code.

The NFPA 101 Life Safety Code (2015 Edition) is incorporated by reference, except for the following amendments:

A. Amend Section 2.2 to add the referenced publication NFPA 1124 Code for the Manufacturer, Transportation, Storage, and Retail Sales of Fireworks and Pyrotechnic Articles, 2006 edition.

B. Amend Subsection 3.3.62 to add the following Paragraph: 3.3.62.3 Bulkhead Door. A type of door assembly covering an opening in the ground providing direct access to a basement, the floor of which is not more than 8 feet below ground level. The door consists of a single rigid leaf or two overlapping rigid leaves or covers which need to be pushed or lifted upwards in order to be opened. A person, after opening the door, can walk up a series of steps to escape to the outside.

C. Amend Paragraph 3.3.142.1 and Subparagraphs 16.6.1.1.2 and 17.6.1.1.2 to delete "more than 3, but".

- D. Amend Paragraphs 3.3.190.4 and 6.1.4.1 to delete "four or more".
- E. Amend Paragraphs 3.3.190.12 and 6.1.9.1 to replace "four" with "six".
- F. Amend Subsection 4.5.8 and Paragraph 4.6.12.1 to delete "for compliance with the provisions of this Code".
- G. Amend Paragraph 4.6.12.3 to delete "by the Code".
- H. Amend Subsection 4.8.2 to add the following Paragraph: 4.8.2.4 Emergency action plans shall be maintained in a location approved by the AHJ.
- I. Amend Subparagraph 7.2.1.5.12 to replace "required" with "provided".
- J. Amend subparagraph 7.2.1.6.3 to replace "in Chapters 11 through 43" with "by the AHJ and Chapters 11 through 43".
- K. Amend Subparagraph 7.2.1.7.1 to delete "required to be".
- L. Amend Subparagraph 7.2.1.7.3 to delete "Required".
- M. Amend Paragraph 7.9.1.2 to replace "only" in the first sentence with ", but not be limited to,".
- N. Amend Paragraph 9.6.1.3 and Subsection 9.11.1 to delete "required by this Code".
- O. Amend Paragraph 9.6.2.6 to add the following: This paragraph does not permit the omission of manual fire alarm boxes in accordance with other provisions of this Subsection unless specifically permitted by Chapters 11 through 43.
- P. Amend Paragraph 9.7.1.1 to add the following Subparagraph: 9.7.1.1.1 for new ceiling installations, drop-out ceilings as referenced in NFPA 13, Subsection 8.15.15, shall be prohibited.
- Q. Amend Paragraph 11.8.3.1 to add "High-rise buildings do not include a structure or building used exclusively for open-air parking."
- R. Amend Paragraph 11.11.2.1 to add "or other approved testing standard approved by the State Fire Marshal".
- S. Amend Paragraphs 12.2.4.1 and 13.2.4.1 to add the following:
 - (1) Not less than two separate exits shall be provided on every story.
 - (2) Not less than two separate exits shall be accessible from every part of every story.
- T. Amend Paragraphs 14.7.2.3 and 15.7.2.3 to delete existing wording and replace with the following:

Fire emergency egress drills shall be conducted as follows:

 - (1) Not less than one fire emergency egress drill shall be conducted every month the facility is in session, unless the following criteria are met:
 - (a) In climates where the weather is severe, the monthly fire emergency egress drills shall be permitted to be deferred; and
 - (b) In educational occupancies which are:
 - (i) fully protected by an automatic sprinkler system, the total number of annual fire emergency egress drills shall be five, with a least two of the required drills conducted in the first four months of the school year; or
 - (ii) not fully protected by an automatic sprinkler system, the total number of annual fire emergency egress drills shall be eight, with at least three of the required drills conducted in the first four months of the school year.
 - (2) All occupants of the building shall participate in the fire emergency egress drill.
 - (3) One fire emergency egress drill, other than for educational occupancies that are open on a year-round basis, shall be required within the first 30 days of operation.
- U. Amend Subsections 16.1.1 and 17.1.1 to add the following Paragraphs: 16.1.1.9 and 17.1.1.9 Day-care centers providing day care for school-age children before or after school hours in a building which is in use as a public or private school are not required to meet the provisions of this chapter, but shall meet the provisions for educational occupancies.
- V. Amend Subparagraphs 16.2.11.1.1 and 17.2.11.1.1 to add the following item: (4) For grade floor windows the minimum net clear opening shall be permitted to be 5.0 square feet.

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- W. Amend Sub-subparagraphs 16.6.1.4.1.1 and 17.6.1.4.1.1 to delete "more than three, but" and replace "seven" with "nine".
- X. Amend Sub-subparagraphs 16.6.1.4.1.2 and 17.6.1.4.1.2 to replace "7" with "9".
- Y. Amend Subparagraphs 16.6.1.7.1 and 17.6.1.7.1 to replace "both" with "all" and Items(1) and (2) with the following Items:
- (1) The minimum staff-to-client ratio shall be not less than one staff member for up to eight clients, including the caretaker's own children incapable of self-preservation.
 - (2) There shall be not more than four clients incapable of self-preservation, including the caretaker's own children incapable of self-preservation.
 - (3) A staff-to-client ratio of at least one staff member to every two clients incapable of self-preservation shall be maintained at all times.
 - (4) The staff-to-client ratio shall be permitted to be modified by the authority having jurisdiction where safeguards in addition to those specified in this section are provided.
- Z. Amend Paragraphs 16.6.2.1 and 17.6.2.1 and Subparagraphs 16.6.2.4.5 and 17.6.2.4.5 to add the following: Bulkhead doors may not serve as a primary means of escape.
- AA. Amend Paragraphs 16.6.2.2 (Reserved) and 17.6.2.2 (Reserved) to add the following: SLIDING DOOR: For family day-care homes, a sliding door used as a required means of escape shall comply with the following conditions:
- (1) The sliding door shall have not more than one, easily operated, locking device that does not require special knowledge, effort, or tools to operate;
 - (2) There may not be draperies, screens, or storm doors that could impede egress;
 - (3) The sill or track height may not exceed 1/2 inch above the interior finish floor;
 - (4) The surface onto which exit is made shall be an all weather surface such as a deck, patio, or sidewalk;
 - (5) The floor level outside the door may be one step lower than the inside, but not more than 8 inches lower;
 - (6) The sliding door shall open to a clear open width of at least 28 inches;
 - (7) Before day-care use each day, the sliding door shall be unlocked and tested to the full required width to be sure it is operating properly, and the door shall be nonbinding and slide easily; and
 - (8) During periods of snow or freezing rain, door tracks shall be cleared out and the door opened periodically throughout the day in order to ensure proper operation.
- BB. Amend Paragraphs 16.6.2.3 (Reserved) and 17.6.2.3 (Reserved) to add the following:
- SPECIAL MEANS OF ESCAPE REQUIREMENTS: For family day-care homes, deadbolt locks shall be provided with approved interior latches, or these locks shall be of a captured key design from which the key cannot be removed from the interior side of the lock when the lock is in the locked position.
- CC. Amend Subparagraph 17.6.3.4.4 to delete "existing".
- DD. Amend Subparagraph 22.4.5.1.3 to delete "or 22.4.5.1.5".
- EE. Amend Subparagraphs 22.4.5.1.4(1) and 23.4.5.1.4(1) to replace "2 minutes" with "30 seconds".
- FF. Amend Subparagraphs 22.4.5.1.4(2) and 23.4.5.1.4(2) to replace "2-minute" with "30-second".
- GG. Delete Subparagraphs 22.4.5.1.5 and 23.4.5.1.5.
- HH. Delete Paragraphs 22.4.5.2 and 23.4.5.2.
- II. Amend Subparagraph 23.4.5.1.3 to delete "or 23.4.5.1.5".
- JJ. Amend Paragraph 24.1.1.2 to replace "three" with "five" and delete ", if any, accommodated in rented rooms".
- KK. Amend Subparagraphs 24.2.2.3.3, 32.2.2.3.1(3), and 33.2.2.3.1(3) to insert ", or not less than 5.0 square feet for grade floor windows" after "5.7 ft²".
- LL. Amend Paragraph 26.1.1.1 to replace "buildings" with "buildings that do not qualify as one- and two-family dwellings".
- MM. Amend Sub-subparagraph 33.3.3.4.8.1 to delete "33.3.3.4.8.2 and".

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NN. Delete Sub-subparagraph 33.3.3.4.8.2.

OO. Amend Table 42.2.5 to replace "50" with "75" and "15" with "23" for common path of travel for ordinary hazard storage occupancy not protected throughout by an approved, supervised automatic sprinkler system in accordance with 9.7.1.1(1).

PP. Amend Subparagraphs 42.3.4.1.2 and 42.3.4.1.3 to replace "Storage occupancies" with "Storage occupancies less than three stories".

QQ. Amend Sub-subparagraphs 42.8.3.4.1.1 and 42.8.3.4.1.3 to replace "Parking structures" with "Parking structures less than three stories".

.08 National Fire Protection Association 1 Fire Code.

The NFPA 1 Fire Code (2015 Edition) is incorporated by reference, except for the amendments in Regulation .09 of this chapter and the following amendments:

A. Amend Paragraph 1.7.12.2 to add the following sentence: The AHJ shall be authorized to require plans to bear the stamp of a registered design professional.

B. Delete Section 1.10. (See COMAR 29.06.02)

C. Delete Subsection 1.11.3.

D. Amend Subsection 1.12.1 to add the following Paragraph: 1.12.1.1 Permits, certificates, notices, approvals, or orders required by this code shall be governed by the policies and procedures of the AHJ.

E. Amend Paragraph 1.12.6.13 to replace "Permits shall" with "Permits may".

F. Amend Subsection 1.12.8 to replace "shall" with "may".

G. Amend Subsection 1.13.2 to delete "Mandatory." and replace "shall" with "may".

H. Delete Paragraphs 1.13.12.4 and 1.16.4.2.

I. Amend Section 2.2 to delete the referenced publication NFPA 5000 Building Construction and Safety Code, 2015 edition. Wherever NFPA 5000 is referenced, other than for extracted text, substitute the building code adopted by the AHJ. Delete the referenced publication NFPA 150 Standard on Fire and Life Safety in Animal Housing Facilities, 2013 edition. Add the referenced publication NFPA 1124 Code for the Manufacture, Transportation, Storage, and Retail Sales of Fireworks and Pyrotechnic Articles, 2006 edition.

J. Amend Section 3.3 to add the following Subsection. 3.3.278 Fireworks. Any composition or device for the purpose of producing a visible or audible effect for entertainment purposes by combustion, deflagration or detonation, and that meets the definition of Consumer Fireworks or Display Fireworks as set forth in NFPA 1124 Code for the Manufacture, Transportation, Storage, and Retail Sales of Fireworks and Pyrotechnic Articles, 2006 edition, and as referenced in Public Safety Article, §10-101, Annotated Code of Maryland.

K. Amend Subsection 3.3.14 to add the following Paragraph: 3.3.14.13 Consumer Fireworks Retail Sales Area. The portion of a consumer fireworks retail sales facility or store, including the immediately adjacent aisles, where consumer fireworks are located for the purpose of retail display and sale to the public.

L. Amend Paragraph 3.3.183.6 to delete "more than 3 but".

M. Amend Paragraphs 3.3.183.7 and 6.1.4.1 to delete "four or more".

N. Amend Paragraph 3.3.183.22 to replace "three" with "five" and delete ", if any, accommodated in rented rooms".

O. Amend Paragraphs 3.3.183.25 and 6.1.9.1 to replace "four" with "six".

P. Amend Paragraph 4.5.8.1 to delete "for compliance with the provisions of this Code".

Q. Amend Paragraph 4.5.8.3 to delete "by the Code".

R. Amend Subsection 10.1.2 to add "except as amended by COMAR 29.06.01.07, COMAR 29.06.01.08, and COMAR 29.06.01.09".

S. Amend Subsections 10.4.1 and 10.4.2 to replace "AHJ" with "AHJ or incident commander".

T. Amend Subsection 10.10.6.1 to replace "10 ft (3 m)" with "15 feet (4.6 meters)".

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U. Amend Subsection 10.11.1 to add the following Subparagraph and Paragraph:

10.11.1.1 Subject to the approval of the AHJ, individual suites within structures and rear exterior entrances and/or access from service corridors shall be clearly identified.

10.11.1.4 Where required by the AHJ, symbols in compliance with NFPA 170 Standard for Fire Safety and Emergency Symbols shall be used.

V. Amend Paragraphs 10.11.1.2 and 10.11.1.3 to replace "Address numbers" with "Premises identification".

W. Amend Subsection 10.13.1 to add the following new Paragraph: 10.13.1.2 The AHJ shall:

- (1) Approve the placement of a natural cut or balled tree;
- (2) Limit the number of natural cut or balled trees displayed; and
- (3) Order the removal of any tree if the tree poses a hazard to life or safety.

X. Amend Paragraph 10.13.1.1 to replace "Christmas" with "Unless otherwise approved by the AHJ, Christmas".

Y. Amend Paragraph 10.13.3.1 to replace "by the manufacturer" with "by a testing laboratory recognized by the Office of the State Fire Marshal".

Z. Amend Paragraph 10.13.9.1 to replace "½ in. (13 mm)" with two inches (50 millimeters) and add the following sentence: "A natural cut tree shall not exceed 10 feet (3 meters) in height, excluding the tree stand."

AA. Amend Subparagraph 10.14.11.2.6 to replace "any vehicles" with "any vehicles, buildings,".

BB. Amend Section 10.15 to add the following Subsection: 10.15.6 The AHJ shall have the authority to require that outdoor storage of any combustible material be enclosed by an approved fence or other protective enclosure to prevent unauthorized access.

CC. Amend Subsection 10.15.1 to replace "10 ft (3m)" with "15 feet (4.6 meters)" and "property line" with "property line, building, or adjacent pile of combustible material"; and add the following: The separation distance shall be allowed to be increased where the AHJ determines that a higher hazard to the adjoining property exists.

DD. Amend Subsection 10.15.5 to add "and shall not exceed 10,000 square feet in area".

EE. Amend Subsection 10.18.7 to replace "repaired" with "repaired on any balcony, under any overhanging portion, or".

FF. Amend Section 11.1 to add the following Subsection:

11.1.9 Clearance. A clear space of not less than 30 inches (762 millimeters) in width, 36 inches (914 millimeters) in depth, and 78 inches (1981 millimeters) in height shall be provided in front of electrical service equipment. Where the electrical service equipment is wider than 30 inches (762 millimeters), the clear space shall not be less than the width of the equipment. No storage of any materials shall be located within the designated clear space. Exception: Where other specialized dimensions are required or permitted by NFPA 70.

GG. Amend Paragraph 11.1.7.3 to add the following Subparagraph: 11.1.7.3.2 Doors to electrical control panel rooms shall be marked with a plainly visible and legible sign stating ELECTRICAL ROOM or similar approved wording in contrasting letters not less than one inch (25 millimeters) high and not less than ¼ inch (6.4 millimeters) in stroke width.

HH. Amend Paragraph 11.3.6.1 to add the following sentence: Keys for new elevators shall be cut to a uniform key code to comply with the Maryland State Elevator Code.

II. Amend Subsection 11.9.1 to replace "approved by the fire department" with "approved by the AHJ".

JJ. Amend Paragraph 13.3.1.2 to add the following Subparagraph: 13.3.1.2.1 For new ceiling installations, drop-out ceilings as referenced in NFPA 13, Subsection 8.15.15, shall be prohibited.

KK. Amend Paragraph 13.3.2.1 to add the following Subparagraph: 13.3.2.1.1 All new buildings shall be equipped with an automatic sprinkler system or other automatic fire suppression system where required by Section 903 of the International Building Code as incorporated by reference by the Maryland Building Performance Standards.

LL. Amend Paragraphs 13.3.3.1 and 13.3.3.2 to delete "installed in accordance with this Code".

MM. Amend Subsection 13.4.1 to add the following Subparagraph: 13.4.1.1.1 No fire pump component, including the pump, driver, or controller, shall be permitted to be installed in below-ground vaults or pits unless otherwise approved by the AHJ.

NN. Amend Subsection 13.6.1.2 to add ", unless otherwise permitted by the AHJ."

OO. Amend Sub-subparagraph 13.6.4.1.2.1 to replace "certified" with "licensed as required by the AHJ".

PP. Delete Sub-subparagraphs 13.6.4.1.2.1.1, 13.6.4.1.2.1.2, 13.6.4.1.2.1.3, 13.6.4.1.2.1.4, 13.6.4.1.2.1.5, 13.6.4.1.2.1.6.

QQ. Amend Sub-subparagraph 13.6.4.1.2.3 to replace "certified" with "licensed".

RR. Amend Sub-subparagraphs 13.7.2.28.1.2 and 13.7.2.28.1.3 to replace "Storage occupancies" with "Storage occupancies less than three stories".

SS. Amend Paragraph 14.13.1.2 to replace "only" in the first sentence with ", but not be limited to,".

TT. Amend Paragraphs 18.1.3.1 and 18.1.3.2 to replace "fire department" with "AHJ".

UU. Amend Subparagraph 18.2.3.2.1 to replace "exterior door" with "exterior door acceptable to the AHJ".

VV. Amend Subparagraph 20.2.4.2.3 to delete existing wording and replace with the following: Fire emergency egress drills shall be conducted as follows:

(1) Not less than one fire emergency egress drill shall be conducted every month the facility is in session, unless the following criteria are met:

(a) In climates where the weather is severe, the monthly fire emergency egress drills shall be permitted to be deferred; and

(b) In educational occupancies which are:

(i) Fully protected by an automatic sprinkler system, the total number of annual fire emergency egress drills shall be five, with a least two of the required drills conducted in the first four months of the school year; or

(ii) Not fully protected by an automatic sprinkler system, the total number of annual fire emergency egress drills shall be eight, with at least three of the required drills conducted in the first four months of the school year.

(2) All occupants of the building shall participate in the fire emergency egress drill.

(3) One fire emergency egress drill, other than for educational occupancies that are open on a year-round basis, shall be required within the first 30 days of operation.

WW. Amend Subparagraph 20.3.4.1.1 to delete "more than 3, but" and the ", " after "12".

XX. Amend Paragraph 25.2.2.1 to add "or other approved testing standard approved by the State Fire Marshal".

YY. Amend Subsection 26.1.5 to add the following Paragraphs:

26.1.5.2 When requested by the AHJ, a hazard assessment shall be conducted by a technically qualified person acceptable to the AHJ.

26.1.5.3 When requested by the AHJ, a list of hazardous materials used in each laboratory shall be provided. The list shall specify the chemical name, quantity and hazard class.

26.1.5.4 New laboratories or laboratories where the NFPA 45 laboratory hazard classification changes shall post an information placard near the main entrance to the laboratory. The placard shall state the building name or address, room number, NFPA 45 laboratory hazard classification, edition of NFPA 45, maximum allowable quantities of flammable liquids both inside a storage cabinet and open use, and maximum quantities of flammable gases permitted within the laboratory.

ZZ. Amend Chapter 26 to add the following Section and Subsection:

26.3 Construction

26.3.1 All laboratories, laboratory suites or laboratory units within the scope of NFPA 45, regardless of the laboratory hazard classification in NFPA 45, shall be separated by at least one-hour fire resistance rated construction from non-laboratory areas. If a higher fire resistance rating is required by Table 5.1.1 in NFPA 45 or the building code, the higher fire resistance rating shall be used. Rooms that are an incidental use to the lab shall be considered part of the laboratory for the purpose of this requirement and shall not require additional separation.

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AAA. Amend Subparagraph 31.3.6.2.2 to add the following item:

BBB. Amend Subparagraph 31.3.6.3.1 to delete existing wording and replace with the following: Piles shall not exceed 18 feet in height, 50 feet in width, and 350 feet in length. Piles shall be subdivided by fire lanes having at least 30 feet of clear space at the base of piles.

CCC. Delete Subparagraph 31.3.6.3.2 and Sub-subparagraphs 31.3.6.3.2.1, 31.3.6.3.2.2, and 31.3.6.3.2.3.

DDD. Amend Subsection 42.7.5 to add the following Paragraphs:

42.7.5.7 Management/owner officials or employees shall conduct daily site visits to ensure that all equipment is operating properly.

42.7.5.8 Regular equipment inspection and maintenance at the unattended self-service facility shall be conducted.

42.7.5.9 Fuel dispensing equipment shall comply with one of the following:

- (1) The amount of fuel being dispensed is limited in quantity by preprogrammed card; or
- (2) Dispensing devices shall be programmed or set to limit uninterrupted fuel delivery of not more than 25 gallons and shall require a manual action to resume continued delivery.

EEE. Amend Paragraph 42.7.5.5 to add the following: The following information shall be conspicuously posted in this area:

- (1) The exact address of the unattended self-service facility.
- (2) The telephone number of the owner or operator of the unattended self-service facility.

FFF. Amend Subsection 50.2.1 to add the following Paragraphs, Subparagraphs, and Sub-subparagraphs:

50.2.1.10 Commercial Outdoor Cooking Operations. These requirements apply to commercial outdoor cooking operations such as those that typically take place under a canopy or tent-type structure at fairs, festivals, and carnivals. This includes, but is not limited to, deep frying, sauteing, and grilling operations.

50.2.1.10.1 Tent and Canopy Requirements.

50.2.1.10.1.1 Tents or canopies where cooking equipment not protected in accordance with NFPA 96 is located shall not be occupied by the public and shall be separated from other tents, canopies, structures, or vehicles by a minimum of 10 ft. (3050 mm) unless otherwise approved by the AHJ.

50.2.1.10.1.2 All tent and canopy material shall comply with the flame resistance requirements of Subsection 25.2.2.

50.2.1.10.2 LP Gas Fuel Requirements.

50.2.1.10.2.1 LP gas tank size shall be limited to 60 pounds. The total amount of LP gas on site shall not exceed 60 pounds for each appliance that is rated not more than 80,000 btu/hr. and 120 pounds for each appliance rated more than 80,000 btu/hr.

50.2.1.10.2.2 Tanks shall be maintained in good physical condition and shall have a valid hydrostatic date stamp.

50.2.1.10.2.3 Tanks shall be secured in their upright position with a chain, strap, or other approved method that prevents the tank from tipping over.

50.2.1.10.2.4 Tanks shall be located so that they are not accessible to the public. LP gas tanks shall be located at least 5 feet from any cooking or heating equipment or any open flame device.

50.2.1.10.2.5 All LP gas equipment shall be properly maintained and comply with the requirements of NFPA 58.

50.2.1.10.2.6 Regulators. Single-stage regulators may not supply equipment that is rated more than 100,000 btu/hr. rating. Two-stage regulators shall be used with equipment that is rated more than 100,000 btu/hr.

50.2.1.10.3 General Safety Requirements.

50.2.1.10.3.1 All electrical cords shall be maintained in a safe condition and shall be secured to prevent damage.

50.2.1.10.3.2 Movable cooking equipment shall have wheels removed or shall be placed on blocks or otherwise secured to prevent movement of the appliance during operation.

50.2.1.10.3.3 Portable fire extinguishers shall be provided in accordance with NFPA 1, Section 13.6, and shall be specifically listed for such use.

.09 Fireworks and Explosive Materials.

The NFPA 1 Fire Code (2015 Edition) is incorporated by reference, except for the amendments in Regulation .08 of this chapter and the following amendments:

- A. Permits shall be required for the following:
- (1) Fireworks displays;
 - (2) Pyrotechnics before a proximate audience; and
 - (3) Flame effects before an audience.
- B. Amend Sections 65.2, 65.3, and 65.4 to add the following:
- (1) All applications for permits for display shall be filed at least 10 business days before the display is to be held.
 - (2) Under Public Safety Article, Title 10, Annotated Code of Maryland, the following requirements apply to public liability and property damage insurance:
 - (a) In order to meet the requirement of the statute, the State shall be named as an insured in the contract of insurance;
 - (b) Because the policy shall cover all damages to persons or property, a deductible form of coverage may not be accepted;
 - (c) The minimum amount of coverage that the State can accept on any display is \$25,000 for the injury of one person, \$50,000 for more than one person, and \$10,000 for property damage; and
 - (d) A duplicate policy or certificate of insurance shall be attached to the application.
 - (3) The policy or certificate shall provide that:
 - (a) The coverage may not be canceled without at least 30 days notice to the State Fire Marshal;
 - (b) The duplicate policy or certificate shall set forth all of the terms, conditions, endorsements, and riders which are or which will become part of the policy when issued;
 - (c) It is understood and agreed that limitations cannot be included in the policy which are not set forth in the duplicate policy or certificate of insurance which has been filed;
 - (d) If the policy is issued by an insurer authorized to do business in the State, it shall be validated by the signature of an agent licensed by the Maryland Insurance Administration to represent the insurer;
 - (e) If coverage is provided by an insurer who is not authorized to do business in the State, the duplicate policy or certificate of insurance shall be accompanied by a power of attorney or other satisfactory evidence that the person, firm, or corporation acting as agent in accepting the risk has authority to bind risks and issue policies for the insurer;
 - (f) The State Fire Marshal's Office specifically reserves the right to disapprove contracts issued by any authorized insurer if the Fire Marshal's Office determines the insurer is unsatisfactory; and
 - (g) If the policy issued by the unauthorized company is acceptable to the Fire Marshal's Office, it shall be registered and the registration fee and tax paid.
- C. Amend Section 65.2 to add the following subsection: 65.2.3 All storage of display fireworks shall comply with NFPA 1124, Code for the Manufacture, Transportation, Storage, and Retail Sales of Fireworks and Pyrotechnic Articles, 2006 edition.
- D. Amend Section 65.5 to add the following regarding the manufacture of fireworks:
- (1) A building containing hazardous mixes or items may not be located closer than 20 feet to the property line.
 - (2) In §C(3) of this regulation, the following terms have the meanings indicated:
 - (a) "Trainees" means employees undergoing initial training in a specific process for a period not to exceed 24 consecutive work hours.
 - (b) "Transients" means:
 - (i) Supervisors not regularly assigned to the area;
 - (ii) Bona fide government agency personnel engaged in official business; and

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(iii) Material-handling personnel actively engaged in the transfer of materials into or out of the area.

(3) The maximum number of workers, excluding one trainee and three transients, permitted in a building at one time shall be limited to one person per 100 square feet gross floor area or one person in buildings of less than 100 square feet gross floor area.

(4) The total amount of explosives or pyrotechnic composition including raw materials, material being processed, and finished products, that may be safely permitted in any building at a given time, shall be determined by the enforcement agency based upon the American Table of Distances for Storage of Explosives, without recognition for barricades. However, distances may not be less than those required by Public Safety Article, §10-204(a), Annotated Code of Maryland. The amount of explosives or other pyrotechnic composition may not exceed the amount necessary for production for 4 hours.

(5) Before beginning work, all fireworks plants shall submit for approval accurate scale plot plans of their premises to the State Fire Marshal of all proposed changes of location of any of the structures, fences, and gates.

E. Amend Section 65.5 to add the following Subsections:

65.5.2 The manufacture, transportation, or storage of fireworks shall comply with NFPA 1124, Code for the Manufacture, Transportation, Storage, and Retail Sales of Fireworks and Pyrotechnic Articles, 2006 edition.

65.5.3 Sale or use of fireworks shall comply with the following:

(1) Before the sale, offering for sale, or use within the State, of any sparkler, every manufacturer of sparklers shall submit sufficient samples for inspection to the State Fire Marshal, with a laboratory report from a certified testing laboratory affirming that the analysis of these sparklers showed that they contain no chlorates or perchlorates.

(2) All sparklers sold in the State shall be sold in boxes, and each box shall be clearly marked that the sparklers contain no chlorates or perchlorates.

(3) The manufacturer shall furnish the State Fire Marshal with a current list of wholesalers, jobbers, retailers, or retail outlets, who handle or supply sparklers, or maintain a list of wholesalers, jobbers, retailers, or retail outlets, subject to inspection by the State Fire Marshal.

F. Amend Subsection 65.9.1 reference to NFPA 495 as follows:

(1) Delete Sections 11.2 and 11.3.

(2) Amend Section 3.3 to add the following definition: Demolition. The explosive razing of any manmade structure or any part thereof that cannot be covered with overburden or blasting mats.

(3) Amend Section 4.4 to add the following new Subsection: 4.4.7 Each applicant for a Demolition Class D permit shall possess 5 years of experience in the field of demolition and shall pass the demolition examination as approved by the Office of the State Fire Marshal.

G. NOTE: The content of this regulation is extracted text from NFPA 1, 2012 edition, by permission. Copyright © 2012 NFPA.

Amend Chapter 65 to add the following:

65.10 Sale, Handling, and Storage of Consumer Fireworks.

65.10.1 Applicability.

65.10.1.1 General Requirements. Retail sales of consumer fireworks in both new and existing buildings, structures, and facilities shall comply with the requirements of this section unless otherwise indicated.

65.10.1.1.1 New Facilities.

65.10.1.1.1.1 For the purpose of applying the requirements of this section, the following consumer fireworks retail sales (CFRS) facilities and stores shall be considered to be new:

(1) Permanent CFRS facilities and stores that are not initially occupied until after the effective date of this Code, unless plans are submitted and accepted for review, plans have been approved for construction, or a building permit has been issued prior to the effective date of this Code;

(2) Permanent CFRS facilities and stores constructed prior to the effective date of this Code and in which the retail sales of consumer fireworks have not been conducted either seasonally or year-round within one year prior to the effective date of this Code; or

(3) Temporary CFRS facilities and stores.

65.10.1.1.1.2 In a store where the area of the retail sales floor occupied by the retail displays of consumer fireworks is increased after the effective date of this Code, such that the area exceeds the limits specified in 65.10.5.1.1(1), the building shall be considered to be a new CFRS facility.

65.10.1.1.2 Existing Facilities. For the purpose of applying the requirements of Section 65.10, CFRS facilities and stores not considered to be new as specified in 65.10.1.1.1 shall be considered to be existing.

65.10.1.1.3 Minimum Requirements. Existing life safety features that do not meet the requirements for new buildings but that exceed the requirements for existing buildings shall not be further diminished.

65.10.1.1.4 Modernization or Renovation. Any alteration or any installation of new equipment shall meet, as nearly as practicable, the requirements for new construction.

65.10.1.1.4.1 Only the altered, renovated, or modernized portion of an existing building, system, or individual component shall be required to meet the provisions of this Code that are applicable to new construction.

65.10.1.1.4.2 If the alteration, renovation, or modernization adversely impacts required life safety features, additional upgrading shall be required.

65.10.1.1.4.3 Except where another provision of this Code exempts a previously approved feature from a requirement, the resulting feature shall be not less than that required for existing buildings.

65.10.1.2 Facility Classification. The requirements of this section shall apply to the following:

(1) Permanent buildings and structures, including the following:

- (a) Stores; and
- (b) CFRS facilities.

(2) Temporary facilities, including the following:

- (a) CFRS stands;
- (b) Tents;
- (c) Canopies; or
- (d) Membrane structures.

65.10.2 Special Limits for Retail Sales of Consumer Fireworks.

65.10.2.1 Retail sales of consumer fireworks, including their related storage and display for sale of such fireworks, shall be in accordance with this Code.

65.10.2.2 Retail sales of consumer fireworks shall be limited to mercantile occupancies defined in 3.3.183.17 and NFPA 101.

65.10.2.3 Any building or structure used for the retail sales of consumer fireworks, including their related storage, shall comply with Section 20.12 and NFPA 101 for mercantile occupancies, except as provided in this Code.

65.10.2.4 Retail sales of display fireworks and pyrotechnic articles, including the related storage and display for sale of such fireworks and articles, shall be prohibited at a CFRS facility or store.

65.10.2.5 Retail sales of certain explosive devices prohibited by the Child Safety Act of 1966, including the related storage and display for sale of such devices, shall be prohibited at a CFRS facility or store.

65.10.2.6 The retail sales of pest control devices, including their related storage and display for sale, shall be prohibited at a CFRS facility or store.

65.10.2.7 The retail sales of fireworks that do not comply with the regulations of the U.S. Consumer Product Safety Commission as set forth in 16 CFR 1500 and 1507 and the regulations of the U.S. Department of Transportation as set forth in 49 CFR 100 to 178, including their related storage and display for sale, shall be prohibited.

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65.10.3 General Requirements for All Retail Sales.

65.10.3.1 Exempt Amounts.

65.10.3.1.1 The requirements of this section shall not apply to CFRS facilities or stores where the consumer fireworks are in packages and where the total quantity of consumer fireworks on hand does not exceed 125 pounds (net) (56.8 kilograms) of pyrotechnic composition or, in a building protected throughout with an approved automatic sprinkler system installed in accordance with Section 13.3 and NFPA 13, 250 pounds (net) (113.6 kilograms) of pyrotechnic composition.

65.10.3.1.2 Where the actual weight of the pyrotechnic composition of consumer fireworks is not known, 25 percent of the gross weight of the consumer fireworks, including packaging, shall be permitted to be used to determine the weight of the pyrotechnic composition.

65.10.3.2 Permits. Where required by state or local laws, ordinances, or regulations, a permit for the following shall be obtained:

(1) Construction, erection, or operation of the following:

(a) Permanent building or structure; or

(b) Temporary structure such as a stand, tent, or canopy used for the purpose of the retail display or sale of consumer fireworks to the public; and

(2) Storage of consumer fireworks in connection with the retail display or sale of consumer fireworks to the public.

65.10.3.3 Plans. Plans for facilities other than stands and tents shall include the following:

(a) Minimum distances from the following:

(i) Public ways;

(ii) Buildings;

(iii) Other CFRS facilities;

(iv) Motor vehicle fuel-dispensing station dispensers;

(v) Retail propane-dispensing station dispensers;

(vi) Flammable and combustible liquid aboveground tank storage; and

(vii) Flammable gas and flammable liquefied gas bulk aboveground storage and dispensing areas within 300 feet (91.5 meters) of the facility used for the retail sales of consumer fireworks;

(b) Vehicle access and parking areas;

(c) Location and type of portable fire extinguishers;

(d) Floor plan and layout of storage and displays to indicate compliance with this chapter and applicable state or local laws, ordinances, or regulations;

(e) Means of egress; and

(f) Construction details.

65.10.3.4 Fire Department Access. Any portion of an exterior wall of a building, sidewall of a tent, or other defined perimeter of a CFRS facility or store shall be accessible within 150 feet (45.7 meters) of a public way or an approved fire apparatus access.

65.10.3.5 Construction of Buildings and Structures. Consumer fireworks shall only be permitted to be sold at retail in any of the following buildings or structures, provided that any new building or structure does not exceed one story in height:

(1) Permanent buildings or structures constructed in accordance with the building code enforced by the AHJ;

(2) Tents, canopies, or temporary membrane structures complying with NFPA 102, Standard for Grandstands, Folding and Telescopic Seating, Tents, and Membrane Structures;

(3) Temporary structures constructed in accordance with this chapter;

(4) Temporary CFRS stands greater than 800 square feet (74 square meters) in area that also meet the requirements for a permanent structure; or

(5) Vehicles, such as vans, buses, trailers, recreational vehicles, motor homes, travel trailers, trucks, and automobiles, complying with the applicable requirements for CFRS stands.

65.10.3.6 An automatic sprinkler system designed and installed in accordance with Section 13.3 and NFPA 13 shall be provided throughout permanent CFRS facilities and stores in which CFRS are conducted in the following buildings:

- (1) New buildings greater than 6,000 square feet (557.2 square meters) in area; or
- (2) Existing buildings greater than 7,500 square feet (694 square meters) in area.

65.10.3.6.1 Door and window openings in the fire barrier wall shall be protected by self-closing fire doors or fixed fire windows having a fire protection rating of not less than one hour and shall be installed in accordance with Section 12.4 and NFPA 80, Standard for Fire Doors and Other Opening Protectives.

65.10.3.6.2 Any other openings or penetrations in the fire barrier wall shall be protected in accordance with NFPA 101.

65.10.3.6.3 Every CFRS facility and store shall have no fewer than two portable fire extinguishers with a minimum rating of 2A, at least one of which shall be of the pressurized water type.

65.10.3.7 Storage Rooms. Storage rooms containing consumer fireworks in a new permanent CFRS facility or store shall be protected with an automatic sprinkler system installed in accordance with Section 13.3 and NFPA 13 or separated from the retail sales area by a fire barrier having a fire resistance rating of not less than one hour.

65.10.3.8 Portable Fire Extinguishers.

65.10.3.8.1 Specification. Portable fire extinguishers shall be provided as required for extra (high) hazard occupancy in accordance with Section 13.6 and NFPA 10.

65.10.3.8.2 Extinguisher Type. Where more than one portable fire extinguisher is required, at least one fire extinguisher shall be of the multipurpose dry chemical type if the facility is provided with electrical power.

65.10.3.8.3 Location. Portable fire extinguishers for permanent consumer fireworks retail sales facilities and stores shall be located so that the maximum distance of travel required to reach an extinguisher from any point does not exceed 75 feet (23 meters), as specified in NFPA 10.

65.10.3.9 Fire Alarms. A fire alarm system shall be provided as required by Section 13.7 and NFPA 101.

65.10.3.10 Smoke Control.

65.10.3.10.1 Smoke and heat vents designed and installed in accordance with NFPA 204, Standard for Smoke and Heat Venting, shall be provided in the CFRS area of new permanent CFRS facilities or stores where the ceiling height is less than 10 feet (3.05 meters) and the travel distance to reach an exit is greater than 25 feet (7.6 meters).

65.10.3.10.2 The smoke and heat vents required by 65.10.3.10.1 shall be automatically activated by a smoke detection system installed throughout the CFRS area in accordance with NFPA 72.

65.10.3.11 No Smoking Signs.

65.10.3.11.1 Smoking shall not be permitted inside or within 50 feet (15.5 meters) of the CFRS area.

65.10.3.11.2 At least one sign that reads as follows, in letters at least two inches (51 millimeters) high on a contrasting background, shall be conspicuously posted at each entrance or within 10 feet (3.05 meters) of every aisle directly serving the CFRS area in a store: "FIREWORKS — NO SMOKING"

65.10.3.12 Distance from Bulk Dispensing and Bulk Storage.

65.10.3.12.1 CFRS facilities and stores shall not be located within 50 feet (15.2 meters) of the following:

- (1) Retail propane-dispensing station dispensers;
- (2) Aboveground storage tanks for flammable or combustible liquid, flammable gas, or flammable liquefied gas; or
- (3) Compressed natural gas-dispensing station dispensers.

65.10.3.12.2 New CFRS facilities and stores, existing CFRS stands and tents, and temporary CFRS facilities shall not be located within 50 feet (15.2 meters) of motor vehicle fuel-dispensing station dispensers.

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65.10.3.12.3 Existing CFRS facilities, other than CFRS stands, tents, and temporary facilities, and existing stores shall not be located within 25 feet (7.6 meters) of motor vehicle fuel-dispensing station dispensers.

65.10.3.12.4 Fuel tanks on vehicles or other motorized equipment shall not be considered bulk storage.

65.10.3.12.5 Fuel storage for generators shall be in accordance with 65.10.4.9.2.

65.10.3.12.6 CFRS areas and storage areas shall not be located within 300 feet (91.2 meters) of any aboveground bulk storage or bulk dispensing area for the following:

- (1) Flammable or combustible liquid;
- (2) Flammable gas; or
- (3) Flammable liquefied gas.

65.10.3.13 Fire Safety and Evacuation Plan. For a CFRS facility or store, an approved fire safety and evacuation plan shall be prepared in writing and maintained current.

65.10.3.14 Means of Egress.

65.10.3.14.1 Number of Exits.

65.10.3.14.1.1 The minimum number of exits provided from the retail sales area shall be not less than three or as determined in accordance with Chapter 14 and NFPA 101, whichever number is greater.

65.10.3.14.1.2 Required means of egress from the retail sales area shall not be allowed to pass through storage rooms.

65.10.3.14.2 Egress Travel Distance. Exits provided for the retail sales area of tents, membrane structures, canopies, and permanent CFRS facilities, including Class C stores, shall be located so that the maximum egress travel distance, measured from the most remote point to an exit along the natural and unobstructed path of egress travel, does not exceed 75 feet (22.9 meters).

65.10.3.14.3 Aisles. Aisles serving as a portion of the exit access in CFRS areas shall comply with this paragraph.

65.10.3.14.3.1 Aisle Width.

65.10.3.14.3.1.1 Aisles shall have a minimum clear width of 48 inches (1.2 meters).

65.10.3.14.3.1.2 The required width of aisles shall be maintained unobstructed at all times the facility is occupied by the public.

65.10.3.14.3.2 Aisle Arrangements.

65.10.3.14.3.2.1 Not less than one aisle shall be provided and arranged so that travel along the aisle leads directly to an exit.

65.10.3.14.3.2.2 Other required exits shall be located at, or within 10 feet (3.05 meters) of, the end of an aisle or a cross-aisle.

65.10.3.14.3.2.3 Aisles shall terminate at an exit, another aisle, or a cross-aisle.

65.10.3.14.3.2.4 Dead-end aisles shall be prohibited.

65.10.3.14.3.2.5 Where more than one aisle is provided, not less than one cross-aisle shall have an unobstructed connection with every aisle, other than cross-aisles.

65.10.3.14.3.2.6 Cross-aisle connections shall be provided for each aisle at intervals not greater than 50 feet (15.2 meters) as measured along the aisle.

65.10.3.14.3.2.7 Where cross-aisles are required, not less than one cross-aisle shall have at least one end terminate at, or within 10 feet (3.05 meters) of, an exit.

65.10.3.14.4 Doors and Doorways. Doors and doorways used in the means of egress shall comply with this paragraph.

65.10.3.14.4.1 Egress doors shall be not less than 36 inches (910 millimeters) in width (providing a minimum of 32 inches (813 millimeters) clear width).

65.10.3.14.4.2 Every egress door that has a latching device shall be provided with panic hardware complying with Chapter 14 and NFPA 101.

65.10.3.14.4.3 Means of egress doors shall be of the sidehinge swinging type and shall be arranged to swing in the direction of egress travel.

65.10.3.14.5 Exit Signs.

65.10.3.14.5.1 Exits shall be marked by an approved exit sign in accordance with Section 14.14 and NFPA 101.

65.10.3.14.5.2 Exit signs shall be required to be self-luminous or internally or externally illuminated.

65.10.3.14.6 Emergency Lighting.

65.10.3.14.6.1 The means of egress, including the exit discharge, shall be illuminated whenever the facility is occupied in accordance with Section 14.12 and NFPA 101.

65.10.3.14.6.2 Emergency lighting shall be provided for CFRS facilities and stores and shall comply with Section 14.13 and NFPA 101.

65.10.3.15 Retail Sales Displays.

65.10.3.15.1 General. The requirements of this section shall apply only to CFRS areas, unless otherwise specifically indicated.

65.10.3.15.2 Height of Sales Displays. To provide for visual access of the retail sales area by the employees and customers, partitions, counters, shelving, cases, and similar space dividers shall not exceed six feet (1.8 meters) in height above the floor surface inside the perimeter of the retail sales area.

65.10.3.15.2.1 Merchandise on display or located on shelves or counters or other fixtures shall not be displayed to a height greater than six feet (1.8 meters) above the floor surface within the CFRS area.

65.10.3.15.2.2 Where located along the perimeter of the consumer fireworks retail sales area, the maximum height of sales displays shall be limited to 12 feet (3.66 meters).

65.10.3.15.3 Flame Breaks.

65.10.3.15.3.1 Where continuous displays of consumer fireworks are located on shelving, cases, counters, and similar display fixtures, a flame break shall be provided so that the maximum distance between flame breaks does not exceed 16 feet (4.9 meters) where measured along the length of the display.

65.10.3.15.3.2 The flame break shall extend as follows:

(1) From the display surface to not less than six inches (150 millimeters) above the full height of the displayed merchandise or to the underside of the display surface directly above; and

(2) For the full depth of the displayed merchandise.

65.10.3.15.3.3 Where packaged fireworks merchandise is displayed on the same level as individual unpackaged fireworks devices, the flame break required in 65.10.3.15.3.1 shall not be required where both of the following criteria are met:

(1) The length of the display level containing individual unpackaged fireworks devices is interrupted by packaged fireworks merchandise, or open space, or any combination thereof, having a continuous length of not less than eight feet (2.4 meters); and

(2) The distance between flame breaks does not exceed 32 feet (9.8 meters).

65.10.3.15.3.4 Where a merchandise display level contains packaged fireworks merchandise, such merchandise shall be permitted to be displayed in a continuous length on the same level, where the display does not exceed 32 feet (9.8 meters) without the flame break required in 65.10.3.15.3.1.

65.10.3.15.3.5 An aisle having a minimum width of 48 inches (1.2 meters) shall be permitted to substitute for the flame break required in 65.10.3.15.3.1.

65.10.3.15.3.6 Where displays of merchandise face aisles that run along both long sides of the display fixtures or display surface, a flame break shall be installed lengthwise between the abutting display fixtures or along the approximate longitudinal centerline of the display surface so as to separate the merchandise facing one of the aisles from the merchandise that abuts it facing the other aisle.

65.10.3.15.3.7 Freestanding display racks, pallets, tables, or bins containing packaged fireworks merchandise shall be permitted without flame breaks, provided the dimensions of the area occupied by the fireworks merchandise do not exceed four feet (1.2 meters) in width, eight feet (2.4 meters) in length, and six feet (1.8 meters) in height, and the displayed fireworks merchandise is separated from other displays of merchandise by aisles having a minimum clear width of four feet (1.2 meters).

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65.10.3.15.3.8 Where both of the facing vertical surfaces of the abutting display fixtures are constructed of perforated hardboard panels not less than ¼ inch (6 millimeters) thick that are separated from each other by an open space not less than 1½ inches (38 millimeters) wide, a flame break specified in 65.10.3.15.3.6 shall not be required.

65.10.3.15.4 Shelving.

65.10.3.15.4.1 Shelving or other surfaces used to support fireworks display merchandise shall be permitted to have not more than 10 percent of the area of the shelf contain holes or other openings.

65.10.3.15.4.2 The 10 percent limitation on the area of holes or other openings in the shelf used to support fireworks display merchandise shall not be applicable under the following conditions:

(1) Where both of the facing vertical surfaces of the abutting display fixtures are constructed of perforated hardboard panels not less than ¼ inch (6 millimeters) thick and separated from each other by an open space not less than 1½ inches (38 millimeters) wide; or

(2) Where such merchandise is suspended from or fastened to the shelf or surface or is displayed as packaged merchandise on the surface or in bins.

65.10.3.15.4.3 Flame breaks and solid display surfaces shall not be required for packaged fireworks merchandise displayed in bins or display racks or on pallets or tables located at the end of a row of display fixtures where the following conditions are met:

(1) Such end displays are separated from the ends of the display fixtures by an open space not less than three inches (76 millimeters) wide;

(2) The fireworks merchandise occupies an area having dimensions not greater than the width of the end of the row of display fixtures and a depth not greater than 36 inches (910 millimeters); and

(3) The minimum required widths of the adjacent aisles are maintained, but in no case is the aisle width less than 48 inches (1.2 meters).

65.10.3.15.5 Covered Fuses.

65.10.3.15.5.1 Only consumer fireworks meeting the criteria for covered fuses as described in 65.10.3.15.5.2 shall be permitted where the retail sales of consumer fireworks are conducted.

65.10.3.15.5.2 A consumer fireworks device shall be considered as having a covered fuse if the fireworks device is contained within a packaged arrangement, container, or wrapper that is arranged and configured such that the fuse of the fireworks device cannot be touched directly by a person handling the fireworks without the person having to puncture or tear the packaging or wrapper, unseal or break open a package or container, or otherwise damage or destroy the packaging material, wrapping, or container within which the fireworks are contained.

65.10.3.15.6 Reserved.

65.10.3.15.7 Horizontal Barriers. Combustible materials and merchandise shall not be stored directly above the consumer fireworks in retail sales displays unless a horizontal barrier constructed of plywood at least 3/8 inch (9.5 millimeters) thick is installed directly above the consumer fireworks as follows:

(1) Barriers shall extend from rack face to rack face and shall be tight to the vertical barriers;

(2) Barriers shall be supported by horizontal rack members;

(3) Transverse vertical barriers constructed of plywood at least 3/8 inch (9.5 millimeters) thick shall be provided at the rack uprights extending from rack face to rack face; and

(4) For double-row racks, longitudinal vertical barriers constructed of plywood at least 3/8 inch (9.5 millimeters) thick shall be provided at the rack uprights in the center of the rack.

65.10.3.16 Electrical Equipment. All electrical wiring shall be in accordance with NFPA 70.

65.10.3.17 Heating Equipment.

65.10.3.17.1 Heating units shall be listed and shall be used in accordance with their listing.

65.10.3.17.2 Temporary heating sources shall have tip-over and temperature-overheat protection.

65.10.3.17.3 Open-flame and exposed-element heating devices shall be prohibited.

65.10.3.18 Portable Generators.

65.10.3.18.1 Class II and Class III combustible liquid generator fuel shall be limited to not more than five gallons (18.9 liters).

65.10.3.18.2 Portable generators shall be permitted to use Class I flammable liquids as fuel, provided the quantity of such fuel is limited to two gallons (7.6 liters).

65.10.3.19 Operations.

65.10.3.19.1 General. Means of egress, including but not limited to aisles, doors, and exit discharge, shall be clear at all times when the facility or the building is occupied.

65.10.3.19.2 Distances from Entrances and Exits.

65.10.3.19.2.1 No consumer fireworks shall be displayed for sale or stored within five feet (1.5 meters) of any public entrance in an enclosed building or structure.

65.10.3.19.2.2 No consumer fireworks shall be displayed for sale or stored within two feet (0.6 meters) of any exit or private entrance in an enclosed building or structure.

65.10.3.19.3 Security.

65.10.3.19.3.1 CFRS facilities and stores shall be secured when unoccupied and not open for business, unless fireworks are not kept in the facility during such times.

65.10.3.19.3.2 The fireworks displayed or stored in a CFRS facility or store shall be allowed to be removed and transferred to a temporary storage structure or location.

65.10.3.19.4 Fireworks shall not be ignited, discharged, or otherwise used within 300 feet (91.5 meters) of a CFRS facility or store.

65.10.3.20 Display and Handling. Not less than 50 percent of the available floor area within the retail sales area shall be open space that is unoccupied by retail displays and used only for aisles and cross-aisles.

65.10.3.21 Housekeeping.

65.10.3.21.1 CFRS areas and storage rooms shall be kept free of accumulations of debris and rubbish.

65.10.3.21.2 Any loose pyrotechnic composition shall be removed immediately.

65.10.3.21.3 Vacuum cleaners or other mechanical cleaning devices shall not be used. 65.10.3.21.4 Brooms, brushes, and dustpans used to sweep up any loose powder or dust shall be made of nonsparking materials.

65.10.3.21.5 Consumer fireworks devices that are damaged shall be removed and not offered for sale.

65.10.3.21.6 Damaged consumer fireworks shall be permitted to be returned to the dealer or shall be disposed of according to the manufacturer's instructions.

65.10.3.22 Training. All personnel handling consumer fireworks shall receive safety training related to the performance of their duties.

65.10.3.23 Under the Influence. Any person selling consumer fireworks shall not knowingly sell consumer fireworks to any person who is obviously under the influence of alcohol or drugs.

65.10.3.24 Records.

65.10.3.24.1 Records shall be maintained on available inventory on the premise.

65.10.3.24.2 Records shall be made available to the AHJ upon request.

65.10.4 Consumer Fireworks Retail Sales (CFRS) Facility Requirements.

65.10.4.1 Plan. Where required, plans for CFRS facilities shall be submitted to the AHJ with the permit application.

65.10.4.2 Site Plan. The site plan for tents shall show the location of the tent on the site and indicate the minimum separation distances required by 65.10.4.7.

65.10.4.3 Construction Materials. The following construction materials requirements shall apply to new permanent CFRS facilities in jurisdictions that have not adopted a local building code:

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(1) Buildings having an area up to and including 8,000 square feet (743 square meters) shall be permitted to be constructed of any approved construction materials; or

(2) Buildings having an area greater than 8,000 square feet (743 square meters) shall be constructed in accordance with one of the following:

(a) Buildings shall be constructed of noncombustible or limited-combustible materials; or

(b) Buildings with exterior walls having a fire resistance rating of not less than two hours shall be permitted to have the roof decking and its supporting structure and interior partitions constructed of combustible materials; and

(3) Roof coverings for any building shall have a minimum rating of Class C.

65.10.4.4 Multiple-Tenant Buildings.

65.10.4.4.1 Where new CFRS facilities are located in a building containing other tenants, the CFRS facility shall be separated from the other tenants by fire barriers having no openings and a fire resistance rating of not less than two hours.

65.10.4.4.2 Where the new CFRS facility is protected per Section 13.3 and NFPA 13, the fire resistance rating of the fire barrier required by 65.10.4.4.1 shall be permitted to be not less than one hour.

65.10.4.4.3 Any penetrations of the fire barrier shall be protected in accordance with NFPA 101. 65.10.4.5 Fire Protection.

65.10.4.5.1 Automatic Sprinkler System Alarm. Any waterflow alarm device shall be arranged to activate audible and visual alarms throughout the CFRS facility in accordance with Section 13.7 and NFPA 72.

65.10.4.5.2 Portable Fire Extinguishers. Portable fire extinguishers for temporary CFRS facilities shall be installed and located so that the maximum distance of travel required to reach an extinguisher from any point does not exceed 35 feet (10.6 meters).

65.10.4.5.3 Public Notification. In permanent CFRS facilities greater than 3,000 square feet (278.6 square meters) in area, a public address system or a means for manually activating audible and visible alarm indicating devices located throughout the facility in accordance with Section 13.7 and NFPA 72 shall be provided at a constantly attended location when the CFRS facility is occupied.

65.10.4.6 Site Requirements.

65.10.4.6.1 Clearance to Combustibles. The area located within 30 feet (9 meters) of a CFRS facility shall be kept free of accumulated dry grass, dry brush, and combustible debris.

65.10.4.6.2 Parking. No motor vehicle or trailer used for the storage of consumer fireworks shall be parked within 10 feet (3 meters) of a CFRS facility, except when delivering, loading, or unloading fireworks or other merchandise and materials used, stored, or displayed for sale in the facility.

65.10.4.6.3 Fireworks Discharge. At least one sign that reads as follows, in capital letters at least four inches (102 millimeters) high on a contrasting background, shall be conspicuously posted on the exterior of each side of the CFRS facility: "NO FIREWORKS DISCHARGE WITHIN 300 FEET"

65.10.4.7 Separation Distances.

65.10.4.7.1 Permanent Facilities.

65.10.4.7.1.1 New Facilities. New permanent consumer fireworks retail sales facilities shall be separated from adjacent permanent buildings and structures in accordance with Table 65.10.4.7.1.1.

Table 65.10.4.7.1.1 Separation Distances Between New Permanent Buildings and Structures

Separation Distances		Exterior Wall Fire Resistance Rating (hour)	Exterior Wall Opening Protection rating (hour)
Feet	Meters		
<10	<3.05	2	1 ½
≥10 to <60	≥3.05 to <18.3	1	¾
≥60	≥18.3	0	0

65.10.4.7.1.2 Existing Facilities. Existing permanent CFRS facilities shall be separated from adjacent permanent buildings and structures by not less than 10 feet (3.05 meters) or shall be separated by a wall with a one-hour fire resistance rating.

65.10.4.7.2 Temporary Facilities. Temporary CFRS facilities shall be located as specified in Table 65.10.4.7.2.

Table 65.10.4.7.2 Temporary CFRS Facilities — Minimum Separation Distances

	Buildings		Combustibles ^a		Tents ^b		Vehicle Parking		Stands ^c		Storage of Consumer Fireworks	
	feet	meters	feet	meters	feet	meters	feet	meters	feet	meters	feet	meters
Tents ^b	20	6.1	20	6.1	20	6.1	10	3.05	20	6.1	20	6.1
Stands ^c	20	6.1	10	3.05	20	6.1	10	3.05	5 ^d	1.5 ^d	20	6.1

^a The required clearances to combustibles shall also comply with 65.10.4.6.1.

^b Tents refers to temporary retail sales of consumer fireworks in tents, canopies, and membrane structures.

^c Stands refers to temporary CFRS stands.

^d Where stands are separated from each other by less than 20 feet (6.1 meters), the aggregate area of such stands shall not exceed 800 square feet (74 square meters).

65.10.4.8 Means of Egress.

65.10.4.8.1 General.

65.10.4.8.1.1 Means of egress in CFRS facilities shall comply with the applicable requirements of Chapter 14 and NFPA 101, as modified by 65.10.3.14 and 65.10.4.8.

65.10.4.8.1.2 Means of egress in tents and membrane structures used for retail sales of consumer fireworks shall also comply with NFPA 102, as modified by 65.10.3.14 and 65.10.4.8.

65.10.4.8.2 The evacuation plan shall be posted in a conspicuous location that is accessible to the public as well as to persons employed or otherwise working in the CFRS facility.

65.10.4.8.3 Exit signs shall not be required to be illuminated in tents that are not open for business after dusk.

65.10.4.8.4 Emergency lighting shall not be required in tents that are not open for business after dusk.

65.10.4.8.5 Exit openings from tents shall have a clear opening width of not less than 44 inches (1100 millimeters).

65.10.4.9 Source of Ignition.

65.10.4.9.1 Temporary Electrical Equipment. Battery powered equipment, electrical equipment, and electrical cords that are used in conjunction with a CFRS facility area shall be listed and shall be used in accordance with their listing.

65.10.4.9.1.1 Temporary wiring installed in a temporary structure, including tents and canopies, shall comply with NFPA 70.

65.10.4.9.1.2 Where temporary electrical conductors are placed on top of an outdoor surface to connect the permanent power source to the temporary CFRS facility's temporary electrical system, the conductors shall be provided with physical protection against damage caused by pedestrian or vehicular traffic.

65.10.4.9.2 Portable Generators.

65.10.4.9.2.1 Portable generators supplying power to CFRS facilities shall use only Class II or Class III combustible liquid fuels.

65.10.4.9.2.2 Portable generators shall be located not less than 20 feet (6.1 meters) from the CFRS facility.

65.10.4.9.2.3 Generator fuels shall be stored not less than 20 feet (6.1 meters) from the CFRS facility.

65.10.4.9.2.4 Where the generator fuel storage is located not less than 50 feet (15.2 meters) from the CFRS facility, the quantity of such fuel shall not be limited by 65.10.3.18.

65.10.4.9.3 Cooking Equipment.

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65.10.4.9.3.1 Cooking equipment of any type shall not be permitted within 20 feet (6.1 meters) of tents, canopies, or membrane structures used for the storage or sale of consumer fireworks.

65.10.4.9.3.2 Open flame cooking equipment of any type shall not be allowed within 50 feet (15.2 meters) of tents, canopies, or membrane structures used for the storage or sale of consumer fireworks.

65.10.4.10 Quantity Limitations. The floor area occupied by the retail displays of consumer fireworks in permanent CFRS facilities shall not exceed 40 percent of the available floor area within the retail sales area.

65.10.4.11 Flame Breaks. In CFRS facilities the longitudinal flame break required in 65.10.3.15.3.6 shall not be required where the display fixture or surface is adjacent to an aisle that is not used for public egress.

65.10.5 Stores.

65.10.5.1 General.

65.10.5.1.1 For the purpose of this chapter, stores in which retail sales of consumer fireworks are conducted shall not be considered CFRS facilities as defined in 3.3.72 where both of the following conditions exist:

(1) The area of the retail sales floor occupied by the retail displays of consumer fireworks does not exceed 25 percent of the area of the retail sales floor in the building or 600 square feet (55.5 square meters), whichever is less; and

(2) The consumer fireworks are displayed and sold in a manner approved by the AHJ and comply with the applicable provisions of this code, federal and state law, and local ordinances.

65.10.5.1.2 Consumer fireworks displayed for sale in stores shall comply with the following:

(1) Such fireworks shall be under the visual supervision of a store employee or other responsible party while the store is open to the public;

(2) Such fireworks shall be packaged fireworks merchandise; and

(3) Such fireworks shall be packaged and displayed for sale in a manner that will limit travel distance of ejected pyrotechnical components if ignition of the fireworks occurs.

65.10.5.2 Egress. Means of egress in stores shall comply with Chapter 14 and NFPA 101, unless otherwise specified in 65.10.3.14.

65.10.5.3 Storage Rooms. Storage rooms containing consumer fireworks in a new permanent store shall be protected with an automatic sprinkler system installed in accordance with Section 13.3 and NFPA 13 or separated from the retail sales area by a fire barrier having a fire resistance rating of not less than one hour.

65.10.5.3.1 Door and window openings in the fire barrier wall shall be protected by self-closing fire doors or fixed fire windows having a fire protection rating of not less than one hour and shall be installed in accordance with Section 12.4 and NFPA 80.

65.10.5.3.2 Any other openings or penetrations in the fire barrier wall shall be protected in accordance with NFPA 101.

65.10.5.4 Alarm Notification. In Class B stores, a public address system or a means for manually activating audible and visible alarm indicating devices located throughout the facility in accordance with Section 13.7 and NFPA 72 shall be provided at a constantly attended location when the store is occupied.

65.10.5.5 Flame breaks shall be allowed to be omitted in stores protected throughout with an automatic sprinkler system installed in accordance with Section 13.3 and NFPA 13.

65.10.6 Stands.

65.10.6.1 Site Plan. The site plan for stands shall show the location of the stand on the site and indicate the minimum separation distances required by 65.10.4.7.

65.10.6.2 Temporary Stands.

65.10.6.2.1 Portable Fire Extinguisher. Temporary CFRS stands of less than 200 square feet (18.6 square meters) shall be required to have only one portable fire extinguisher.

65.10.6.2.2 Fire Safety and Evacuation Plan. An approved fire safety and evacuation plan shall not be required for temporary CFRS stands.

65.10.6.2.3 Means of Egress.

65.10.6.2.3.1 Retail sales areas within temporary CFRS stands shall have a minimum of two exits.

65.10.6.2.3.2 Exits provided for temporary fireworks retail sales stands shall be located such that the maximum egress travel distance as measured from the most remote point to an exit along the natural and unobstructed path of egress travel does not exceed 35 feet (10.6 meters).

65.10.6.2.3.3 Customers shall not be permitted inside a temporary CFRS stand unless it complies with the means of egress requirements in 65.10.3.14.

65.10.6.2.3.4 Exit signs shall not be required to be illuminated in stands that are not open for business after dusk, or in temporary CFRS stands where the interior is not accessible to the public.

65.10.6.2.3.5 Emergency lighting shall not be required in stands that are not open for business after dusk or for temporary CFRS stands where the interior is not accessible to the public.

65.10.6.3 Minimum Separation Distances. Temporary CFRS stands shall be separated from adjacent buildings and structures in accordance with Table 65.10.4.7.2.

65.10.6.4 Stands Not Open to the Public.

65.10.6.4.1 Minimum Clear Width of Aisles. In temporary CFRS stands where the interior is not accessible to the public, the minimum clear width of the aisle shall be permitted to be not less than 28 inches (710 millimeters).

65.10.6.4.2 Egress Doors.

65.10.6.4.2.1 Egress doors provided for temporary CFRS stands where the interior is not accessible to the public shall be permitted to be not less than 28 inches (710 millimeters) in width.

65.10.6.4.2.2 For temporary CFRS stands where the interior is not accessible to the public, latching devices on doors shall be permitted without panic hardware.

65.10.6.4.3 Storage. In temporary CFRS stands where the interior is not accessible to the public, the maximum height of sales displays shall be limited to eight feet (2.44 meters).

65.10.6.4.4 Flame Breaks. Temporary CFRS stands where the interior is not accessible to the public shall not be required to comply with 65.10.3.15.3.

65.10.6.4.5 Covered Fuses.

65.10.6.4.5.1 Only consumer fireworks meeting the criteria for covered fuses as described in 65.10.3.15.5.2 shall be permitted where the retail sales of consumer fireworks are conducted.

65.10.6.4.6 Sales Display. The following shall apply to the sales display of consumer fireworks in temporary CFRS stands that do not allow access to the interior of the stand by the public:

(1) Consumer fireworks shall be displayed in a manner that prevents the fireworks from being handled by persons other than those operating, supervising, or working in the temporary CFRS stand; and

(2) The handling requirements of 65.10.6.4.6(1) shall not apply to packaged assortments, boxes, or similarly packaged containers of one or more items, regardless of type.

H. Amend Section 74.1 reference to NFPA 400 to delete Subsection 11.1.3.

.10 Control of Air Overpressure and Ground Vibration for Blasting Operations.

A. Control of Air Overpressure for Blasting Operations.

(1) This section applies to air overpressure effects as recorded at the location of a private dwelling, public building, school, church, and community or institutional building not owned or leased by the person conducting or contracting for the blasting operation.

(2) Written notification by e-mail or facsimile shall be provided to the Office of the State Fire Marshal Bomb Squad at least 24 hours prior to each blast. The name of company or contractor performing the blasting and the location, date, and approximate time shall be identified. The geographical coordinates (longitude and latitude) shall be provided.

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(3) Air overpressure from blasting shall be controlled so that the maximum allowable air overpressure at:

(a) An inhabited building, resulting from blasting operations, may not exceed 130 decibels peak when measured by an instrument having a flat frequency response, +/- 3 decibels, over a range of at least 6—200 hertz;

(b) A building not inhabited, resulting from blasting operations, may not exceed 140 decibels peak when measured by an instrument having a flat frequency response, +/- 3 decibels, over a range of at least 6—200 hertz.

(4) If requested by a property owner registering a complaint and considered necessary by the State Fire Marshal, measurements on three consecutive blasts, using approved instrumentation, shall be made near to the structure in question.

B. Control of Ground Vibration for Blasting Operations.

(1) This section provides for limiting ground vibrations at structures that are not owned or leased by the person conducting or contracting for the blasting operation. The requirements and monitoring methods of this section are intended to protect low rise structures including dwellings. Engineered structures may safely withstand higher vibration levels and, based on an approved engineering study, the State Fire Marshal may allow higher levels for engineered structures.

(2) When blasting operations, other than those conducted at a fixed site such as a quarry, are to be conducted within 200 feet of a pipe line or high voltage transmission line, the contractor shall take additional precautionary measures and shall notify the owner of the line, or the owner's agent, that blasting operations are intended.

(3) Methods. Each method described in §B(4)—(6) of this regulation, progressing from §B(4)—§B(6), has an increasing degree of sophistication and each can be implemented either by direction of the State Fire Marshal as a result of complaints or by the contractor to determine site specific vibration limits.

(4) Charge Weight Per Delay Dependent on Distance Method.

(a) When a seismograph is not used to record vibration effects, the explosive charge weight per delay, 8 milliseconds or greater, may not exceed the limits shown in Table A of this regulation. If charge weights per delay on any single delay period exceed 520 pounds, then ground vibration limits for structures shall comply with §B(5) or (6) of this regulation.

(b) Table A.

Distance Versus Weight of Explosives Method		
Distance to a Building		Weight of Explosive per Delay
Feet Over	Feet Not Over	Pounds
0 to 5		1/4
5 to 10		1/2
10 to 15		3/4
15 to 60		**
60 to 70		6
70 to 80		7-1/4
80 to 90		9
90 to 100		10-1/2
100 to 110		12
110 to 120		13-3/4
120 to 130		15-1/2
130 to 140		17-1/2
140 to 150		19-1/2

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Distance Versus Weight of Explosives Method		
Distance to a Building		Weight of Explosive per Delay
Feet Over	Feet Not Over	Pounds
150 to 160		21-1/2
160 to 170		23-1/4
170 to 180		25
180 to 190		28
190 to 200		30-1/2
200 to 220		34
220 to 240		39
240 to 250		42
250 to 260		45
260 to 280		49
280 to 300		55
300 to 325		61
325 to 350		69
350 to 375		79
375 to 400		85
00 to 450		98
450 to 500		115
500 to 550		135
550 to 600		155
600 to 650		175
650 to 700		195
700 to 750		220
750 to 800		240
800 to 850		263
850 to 900		288
900 to 950		313
950 to 1,000		340
1,000 to 1,100		375
1,100 to 1,200		435
1,200 to 1,300		493

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This table over 60 feet is based upon the formula: $W = D^{1.5}/90$

** 1/10 of a pound of explosive per foot of distance to a building.

(5) Monitoring Method. If a blaster determines that the charge weights per delay given in Table A are too conservative, the blaster may choose to monitor at the closest conventional structure each blast with an approved seismograph and meet the standard in §C(6) of this regulation. When starting to monitor at a new blasting operation with instrumentation, the initial blasts shall contain explosive charge weights per delay close to the limits established in Table A. From this point onwards the explosive charge weight per delay may be increased but the vibration levels detailed in §C(6) may not be exceeded.

(6) Peak Particle Velocity Dependent on Distance Method.

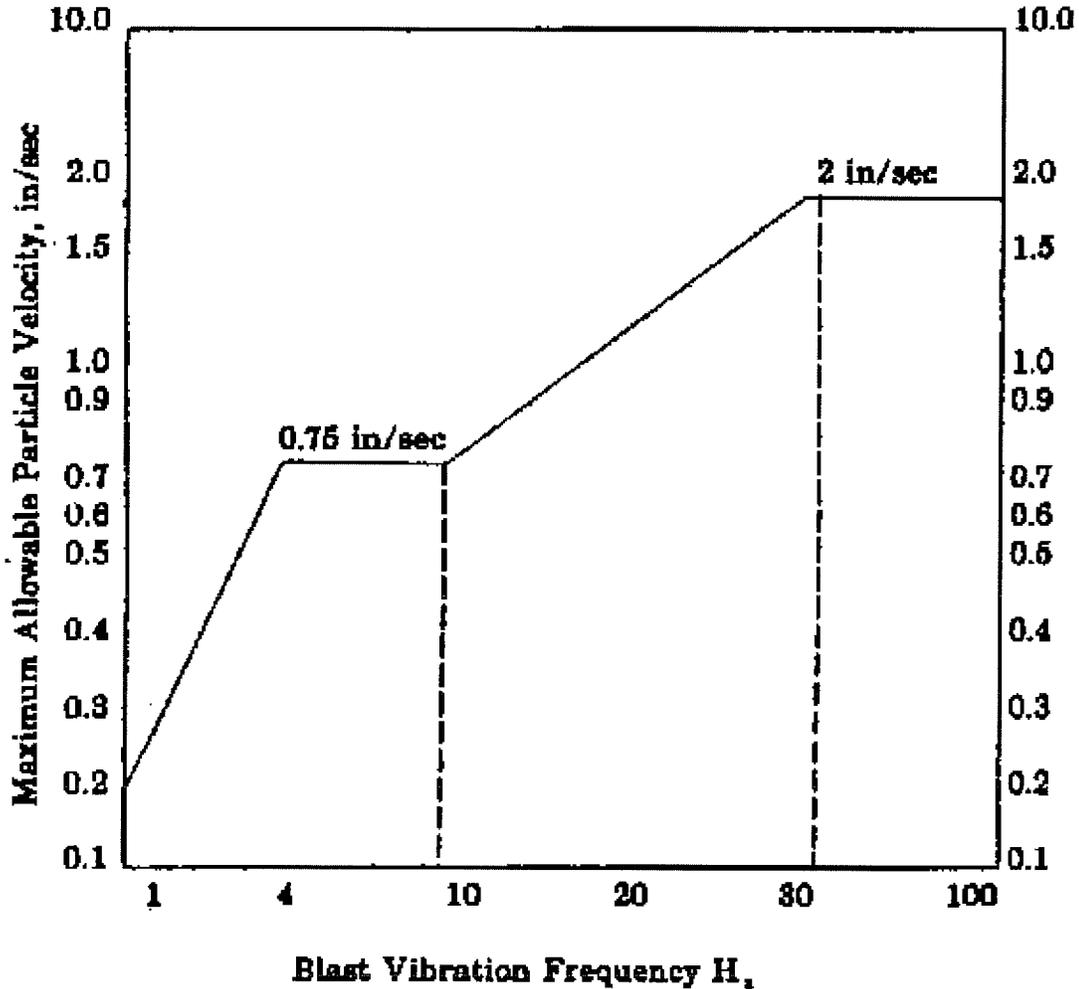
(a) In this subsection, "peak particle velocity" means the maximum component of the three mutually perpendicular components of motion as recorded at the closest structure not owned or leased by the person conducting the blasting.

(b) Table B.

Distance Versus Peak Particle Velocity Method		
Distance		Peak Particle Velocity of Any One Component*
Feet Over	Feet Not Over	Inches Per Second
0 to 100		2.00
100 to 500		1.50
500 to 1,000		1.00
over 1,000		0.75

* The instrument's transducer shall be firmly coupled to the ground.

(7) Particle Velocity Criteria Dependent on Frequency Content. The following chart provides continuously variable particle velocity criteria dependent on the frequency content of the ground motion. The method of analysis shall be approved by the State Fire Marshal and provide an analysis showing all the frequencies present within the 1—50 hertz range:



C. Instrumentation.

(1) A direct velocity recording seismograph capable of recording the continuous wave form of the three mutually perpendicular components of motions, in terms of particle velocity, shall be used. Each seismograph shall have a frequency response from 2 to 150 hertz or greater, and a velocity range from 0.0 to 2.0 inches per second or greater.

(2) All field seismographs shall be capable of internal dynamic calibration and shall be calibrated according to the manufacturers' specifications at least once per year.

(3) All seismographs shall be operated by competent individuals trained in the correct use of seismographs. Seismograph records shall be analyzed and interpreted by an independent third party approved by the State Fire Marshal.

D. Records.

(1) A record of each blast shall be kept. All records, including seismograph reports, shall be retained for at least 3 years, be available for inspection, and include the following items:

- (a) Name of company or contractor;

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- (b) Location, date, and time of blast. The geographical coordinates (longitude and latitude) shall be identified;
 - (c) Name, signature, and Social Security number of blaster in charge;
 - (d) Type of material blasted;
 - (e) Number of holes, burden, and spacing;
 - (f) Diameter and depth of holes;
 - (g) Type of explosives used;
 - (h) Total amount of explosives used;
 - (i) Maximum amount of explosives per delay period of 8 milliseconds or greater;
 - (j) Method of firing and type of circuit;
 - (k) Direction and distance in feet to nearest dwelling house, public building, school, church, and commercial or institutional building not owned or leased by the person conducting the blasting;
 - (l) Weather conditions including such factors as wind direction, etc.;
 - (m) Height or length of stemming;
 - (n) If mats or other protection to prevent fly rock were used;
 - (o) Type of detonators used and delay period used;
 - (p) Seismograph records including seismograph readings when required containing:
 - (i) Name and signature of the individual operating the seismograph,
 - (ii) Name of the individual analyzing the seismograph records, and
 - (iii) Seismograph reading; and
 - (q) The maximum number of holes per delay period of 8 milliseconds or greater.
- (2) The person taking the seismograph reading shall accurately indicate the exact location of the seismograph, if used, and shall also show the distance of the seismograph from the blast.

E. Liability Insurance for Explosives Handlers.

- (1) As provided in Public Safety Article, Title 11, Annotated Code of Maryland, proof of liability insurance shall be provided by an applicant for a license to:
- (a) Manufacture explosives;
 - (b) Engage in the business of dealing in explosives; or
 - (c) Possess any explosives other than for use in firearms.
- (2) The minimum amount of liability insurance required for licensing for the activities specified in §E(1) of this regulation is \$1,000,000.

.11 Portable Fire Extinguishers.

A. License to Service or Repair Portable Fire Extinguishers. A license shall be obtained from the State Fire Marshal's Office by every individual, firm, or corporation commercially servicing, repairing, filling, or refilling portable fire extinguishers, except fire departments.

B. Sale of Portable Fire Extinguishers.

(1) It is unlawful for a person, directly or through an agent, to sell or offer for sale in the State any make, type, or model of portable fire extinguisher, either new or used, unless the make, type, or model of extinguisher has been tested and listed by a testing laboratory accepted by the State Fire Marshal.

(2) An extinguisher is not approved even if it bears the label of an accepted testing laboratory if it contains any of the following liquids:

(a) Carbon tetrachloride, chlorobromomethane, azeotropic chloromethane, dibromodifluoromethane, 1,2-dibromo-2-chloro-1,2-trifluoroethane;

(b) 1,2-dibromo-2,2-difluoroethane, methyl bromide, ethylene dibromide;

(c) 1,2-dibromotetrafluoroethane, hydrogen bromide, methylene bromide, bromodifluoromethane, dichlorodifluoromethane; or

(d) Any other toxic or poisonous liquid.

.11-1 Nonwater-Based Fixed Fire Extinguishing Systems.

A license shall be obtained from the State Fire Marshal's Office by every individual, firm, or corporation commercially installing, servicing, or repairing nonwater-based fixed fire extinguishing systems.

.12 Repealed.

.13 Smoke Detectors for the Deaf or Hearing Impaired — Signs — Repealed.

.14 Sale and Use of Heaters and Stoves.

A. Gasoline Stoves. The sale or use of gasoline stoves or other similar fuel-burning cooking or heating appliances using Class I flammable liquids as defined in NFPA 1 Fire Code (2015 Edition) and NFPA 30 Flammable and Combustible Liquids Code (2015 Edition), is prohibited unless the appliance has been tested and listed by a testing laboratory accepted by the State Fire Marshal. The appliance shall be installed, operated, and maintained in a safe manner in accordance with the prescribed recommendation of the manufacturer and the conditions stated in the listing by the respective testing laboratory.

B. Unvented Portable Kerosene-Fired Heaters.

(1) The sale or use of unvented portable kerosene-fired heaters is permitted only if the heater or appliance meets the U.L. Subject 647 and bears the label of a testing laboratory accepted by the State Fire Marshal.

(2) The heaters shall only be used as permitted under Commercial Law Article, §14-1310, Annotated Code of Maryland.

(3) Each heater shall contain a warning label stating: "This device must not be operated while unattended". In addition, the heater shall contain the manufacturer's warning label required by Commercial Law Article, §14-1310, Annotated Code of Maryland.

.15 Sale or Use of Flame Retardant Chemicals.

An individual, firm, or corporation may not sell or offer for sale in the State any type of flame-retardant or flame-proofing compound, powder, or liquid, for fire-retardant purposes unless the product has been tested, listed, and bears the mark of a recognized testing laboratory accepted by the State Fire Marshal.

.16 Visual Obscuration Systems.

Visual obscuration systems associated with security or burglar alarm systems may not be permitted.

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Administrative History

Effective date: July 21, 1972

Regulations .01B, .13A, .15B, G, .16B, .18A, B, .22B, .23A—C, .26B, .29B—D, .33, .35B amended effective October 7, 1977 (4:21 Md. R. 1604)
Regulations .04—, .14, .16—35, and .41 amended effective August 30, 1982 (9:17 Md. R. 1709)
Regulation .14D adopted effective July 1, 1967
Regulations .15G, .16C, .18C, .22A, .29B, and .35B, E, F amended as an emergency provision effective February 23, 1978 (5:5 Md. R. 332); adopted permanently effective June 2, 1978 (5:11 Md. R. 885)
Regulation .16A amended effective April 9, 1984 (11:7 Md. R. 628)
Regulations .16B, .18A, E, .23, .26B, .29D amended effective May 14, 1975 (2:10 Md. R. 759)
Regulation .16B amended effective April 18, 1980 (7:8 Md. R. 772)
Regulation .23B amended effective August 22, 1980 (7:17 Md. R. 1672)
Regulation .26 amended effective December 7, 1981 (8:24 Md. R. 1936)
Regulation .30E adopted effective October 5, 1979 (6:20 Md. R. 1629); September 19, 1980 (7:19 Md. R. 1808)
Regulation .33 amended effective November 21, 1983 (10:23 Md. R. 2064)
Regulation .34 amended effective January 21, 1976 (3:2 Md. R. 87) and November 4, 1977 (4:23 Md. R. 1735)
Regulation .36 adopted effective April 27, 1977 (4:9 Md. R. 1719)
Regulation .36A, C amended effective October 7, 1977 (4:21 Md. R. 1604)
Regulation .37 adopted effective February 26, 1979 (6:4 Md. R. 227); amended effective October 5, 1979 (6:20 Md. R. 1629)
Regulation .37 (Cellulose and Foam Insulation) adopted as an emergency provision effective January 1, 1979 (6:1 Md. R. 15); emergency status withdrawn by AELR Committee for §B of this regulation effective February 1, 1979 (6:4 Md. R. 275); emergency status expired May 12, 1979 (Emergency provisions are temporary and not printed in COMAR)
Regulation .38 adopted effective October 5, 1979 (6:20 Md. R. 1629)
Regulation .39 adopted effective October 31, 1980 (7:22 Md. R. 2074)
Regulation .40 adopted effective July 20, 1981 (8:14 Md. R. 1228)
Regulation .41 adopted effective October 12, 1981 (8:20 Md. R. 1636)
Regulation .42 adopted effective January 17, 1983 (10:1 Md. R. 32)

Chapter revised effective May 6, 1985 (12:9 Md. R. 812)

Regulation .06A amended effective July 28, 1986 (13:15 Md. R. 1735); July 24, 1989 (16:14 Md. R. 1568)
Regulation .06O amended effective October 5, 1987 (14:20 Md. R. 2143)
Regulation .06R adopted effective October 1, 1985 (12:19 Md. R. 1849)
Regulation .06S adopted effective March 7, 1988 (15:5 Md. R. 622)
Regulation .07B amended effective January 23, 1989 (16:1 Md. R. 72)

Chapter revised effective May 11, 1992 (19:9 Md. R. 879)

Regulation .09B amended effective November 22, 1993 (20:23 Md. R. 1805)
Regulation .10 adopted effective November 22, 1993 (20:23 Md. R. 1805)

Chapter revised effective December 4, 1995 (22:24 Md. R. 1897)
COMAR 12.03.01 repealed effective January 14, 1999 (26:1 Md. R. 25)

Regulations .01—, .22 adopted effective January 14, 1999 (26:1 Md. R. 25)
Regulations .01—, .22 repealed effective August 6, 2001 (28:15 Md. R. 1400)

Regulations .01—, .17 adopted effective August 6, 2001 (28:15 Md. R. 1400)

Chapter revised effective August 1, 2004 (31:12 Md. R. 914)

Chapter revised effective January 1, 2007 (33:24 Md. R. 1907)

Regulation .02B amended effective January 1, 2010 (36:25 Md. R. 1956); January 1, 2013 (39:23 Md. R. 1533); January 1, 2016 (42:23 Md. R. 1436)
Regulation .03B repealed effective January 1, 2010 (36:25 Md. R. 1956)
Regulation .04D amended effective January 1, 2010 (36:25 Md. R. 1956)
Regulation .05B amended effective January 1, 2010 (36:25 Md. R. 1956)
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EXECUTIVE DEPARTMENT

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Maryland Register

Code of Maryland Regulations
(COMAR)

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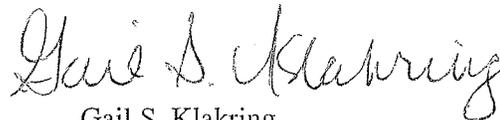
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Dear Librarian:

We have previously send you one copy of each of the documents named above. The documents were adopted in 42:23 Md. R. 1436 (November 13, 2015).

If you have any questions, please contact us.

Sincerely,



Gail S. Klakring
Senior Editor

29.06.01.06B



NFPA[®] 1 FIRE CODE



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NFPA® 1

Fire Code

2015 Edition

This edition of NFPA 1, *Fire Code*, was prepared by the Technical Committee on Fire Code and acted on by NFPA at its June Association Technical Meeting held June 9–12, 2014, in Las Vegas, NV. It was issued by the Standards Council on August 14, 2014, with an effective date of September 3, 2014, and supersedes all previous editions.

An extensive Tentative Interim Amendment (TIA), indicated by boxed notices at the appropriate areas within the document, was issued on August 14, 2014. This TIA implements Standards Council Decision D#14-1 to temporarily withdraw NFPA 1124 and end all NFPA standards development activities relating to the storage and retail sales of consumer fireworks. For further information, see Decision D#14-1 at <http://www.nfpa.org/sc2014>.

For further information on Tentative Interim Amendments, see Section 5 of the *Regulations Governing the Development of NFPA Standards*, available at <http://www.nfpa.org/regs>.

This edition of NFPA 1 was approved as an American National Standard on September 3, 2014.

Origin and Development of NFPA 1

This *Code* was originally developed as a result of the requests of many members of the National Fire Protection Association for a document covering all aspects of fire protection and prevention that used the other developed NFPA codes and standards. NFPA staff initiated this work in 1971 upon a directive from the NFPA Board of Directors.

The original code was written around a format that served as a guide for the development of a local fire prevention code. Prerogatives of local officials were excluded from the main text of the document but included within appendices as guidance for exercising desired prerogatives.

In the late 1980s, the Fire Marshals Association of North America undertook the task of developing a code that was more self-contained, adding administrative sections and extracting heavily from other NFPA codes and standards. The draft was submitted to the Fire Prevention Code Committee. The Committee examined changes in the built environment as it is affected by fire and incorporated significant portions of the *Life Safety Code*®. A special task group on hazardous materials examined technological changes in the handling, storage, and use of flammable and combustible materials. Chapters extracting hazardous material requirements placed a greater emphasis on protection of life and property from chemical products made and used in the environment. A major rewrite resulted in the 1992 edition of the *Fire Prevention Code*.

The 1997 edition updated the text extracted from other NFPA codes and standards and added compliance with additional NFPA codes and standards as part of the requirements of NFPA 1.

The 2000 edition of NFPA 1 was a complete revision that updated the text extracted from other NFPA codes and standards. Additional direct references from NFPA codes and standards that are essential to a code official's use of the document were added. The Committee also added a new section on performance-based design as a valuable tool for code officials and design professionals. NFPA 1 was restructured to be more functional with respect to administration, code enforcement, and regulatory adoption processes.

The 2003 edition of NFPA 1, *Uniform Fire Code*™, was a complete revision. It incorporated provisions from the Western Fire Chiefs, *Uniform Fire Code*™, under a partnership between NFPA and Western Fire Chiefs, while it updated and expanded the provisions extracted from other key NFPA codes and standards. To emphasize the partnership, the document was renamed NFPA 1, *Uniform Fire Code*™. The *Uniform Fire Code* is a trademark of the Western Fire Chiefs Association.

NFPA 1, *Uniform Fire Code*™, was restructured into parts to be more compatible with the regulatory adoption procedures, including administration and code enforcement, occupancies, processes, equipment, and hazardous materials provisions. The Committee included a newly expanded chapter on performance-based design as an enhanced tool for code officials and design professionals. Additional extracts and references from NFPA codes and standards that are essential to a code official's use of the document were added, bringing the number of

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2015
EDITION

NFPA 101[®]

LIFE SAFETY CODE[®]



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NFPA 101®

Life Safety Code

2015 Edition

This edition of NFPA 101®, *Life Safety Code*®, was prepared by the Technical Committees on Alternative Approaches to Life Safety, Assembly Occupancies, Board and Care Facilities, Building Service and Fire Protection Equipment, Detention and Correctional Occupancies, Educational and Day-Care Occupancies, Fire Protection Features, Fundamentals, Health Care Occupancies, Industrial, Storage, and Miscellaneous Occupancies, Interior Finish and Contents, Means of Egress, Mercantile and Business Occupancies, and Residential Occupancies, released by the Correlating Committee on Safety to Life, and acted on by NFPA at its June Association Technical Meeting held June 9–12, 2014, in Las Vegas, NV. It was issued by the Standards Council on August 14, 2014, with an effective date of September 3, 2014, and supersedes all previous editions.

Several Tentative Interim Amendments (TIAs), indicated by boxed notices at the appropriate areas within the document, were issued on August 14, 2014. These TIAs implement Standards Council Decision D#14-1 to temporarily withdraw NFPA 1124 and end all NFPA standards development activities relating to the storage and retail sales of consumer fireworks. For further information, see Decision D#14-1 at <http://www.nfpa.org/sc2014>.

Additional TIAs were issued on August 14, 2014, for NFPA 101 addressing topics other than consumer fireworks and similarly indicated by boxed notices at the appropriate areas within the document.

For further information on Tentative Interim Amendments, see Section 5 of the *Regulations Governing the Development of NFPA Standards*, available at <http://www.nfpa.org/regs>.

This edition of NFPA 101 was approved as an American National Standard on September 3, 2014.

Origin and Development of NFPA 101

The *Life Safety Code* had its origin in the work of the Committee on Safety to Life of the National Fire Protection Association, which was appointed in 1913. In 1912, a pamphlet titled *Exit Drills in Factories, Schools, Department Stores and Theaters* was published following its presentation by the late Committee member R. H. Newbern at the 1911 Annual Meeting of the Association. Although the pamphlet's publication antedated the organization of the Committee, it was considered a Committee publication.

For the first few years of its existence, the Committee on Safety to Life devoted its attention to a study of the notable fires involving loss of life and to analyzing the causes of this loss of life. This work led to the preparation of standards for the construction of stairways, fire escapes, and other egress routes for fire drills in various occupancies, and for the construction and arrangement of exit facilities for factories, schools, and other occupancies. These reports were adopted by the National Fire Protection Association and published in pamphlet form as *Outside Stairs for Fire Exits* (1916) and *Safeguarding Factory Workers from Fire* (1918). These pamphlets served as a groundwork for the present *Code*. These pamphlets were widely circulated and put into general use.

In 1921, the Committee on Safety to Life was enlarged to include representatives of certain interested groups not previously participating in the standard's development. The Committee then began to further develop and integrate previous Committee publications to provide a comprehensive guide to exits and related features of life safety from fire in all classes of occupancy. Known as the *Building Exits Code*, various drafts were published, circulated, and discussed over a period of years, and the first edition of the *Building Exits Code* was published by the National Fire Protection Association in 1927. Thereafter, the Committee continued its deliberations, adding new material on features not originally covered and revising various details in the light of fire experience and practical experience in the use of the *Code*. New editions were published in 1929, 1934, 1936, 1938, 1939, 1942, and 1946 to incorporate the amendments adopted by the National Fire Protection Association.

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Trial court's failure to grant a motion for judgment of acquittal on a charge of possession of cocaine with intent to distribute was not error that required a new trial on the distribution of cocaine charge as the charge of possession of cocaine with intent to distribute was not a "dead" count and was properly sent to the jury; defendant's unsupported claim that an appellate determination of evidentiary insufficiency to sustain a conviction of a charge that did not result in a conviction required a new trial on another charge that did result in a conviction was rejected. *Harris v. State*, 169 Md. App. 98, 899 A.2d 934, 2006 Md. App. LEXIS 71 (2006), cert. denied, 394 Md. 481, 906 A.2d 944 (2006).

Remand for new trial. — Practice of remanding for new trial after reversal for insufficiency of the evidence, rather than remanding for entry of a judgment of acquittal, is permissible. *Gray v. State*, 254 Md. 385, 255 A.2d 5 (1969), cert. denied, 397 U.S. 944, 90 S. Ct. 961, 25 L. Ed. 2d 126 (1970).

If the record before the Court of Special Appeals indicates that additional probative evidence of guilt can be adduced by the State at another trial necessitated by the insufficiency of the evidence, a new trial should be awarded after a reversal if the interests of justice appear to require it. If the record indicates that no additional probative evidence can be so adduced, the entry of a judgment of acquittal should be directed. If the Court of Special Appeals cannot determine from the record whether or not additional probative evidence can be produced on a retrial, and the interests of justice appear to require it, the Court should vacate the judgment and remand the case with directions to the trial court: (a) To hold a new trial if the State within a specified time can satisfy the court that it can produce additional probative evidence; or (b) to enter a judgment of acquittal if the State cannot preliminarily so satisfy the court. *Gray v. State*, 254 Md. 385, 255 A.2d 5 (1969), cert. denied, 397 U.S. 944, 90 S. Ct. 961, 25 L. Ed. 2d 126 (1970).

Rule 4-325. Instructions to the jury.

(a) **When given.** The court shall give instructions to the jury at the conclusion of all the evidence and before closing arguments and may supplement them at a later time when appropriate. In its discretion the court may also give opening and interim instructions.

(b) **Written requests.** The parties may file written requests for instructions at or before the close of the evidence and shall do so at any time fixed by the court.

(c) **How given.** The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. The court may give its instructions orally or, with the consent of the parties, in writing instead of orally. The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.

(d) **Reference to evidence.** In instructing the jury, the court may refer to or summarize the evidence in order to present clearly the issues to be decided. In that event, the court shall instruct the jury that it is the sole judge of the facts, the weight of the evidence, and the credibility of the witnesses.

(e) **Objection.** No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. Upon request of any party, the court shall receive objections out of the hearing of the jury. An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance

of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

(f) **Argument.** Nothing in this Rule precludes any party from arguing that the law applicable to the case is different from the law described in the instructions of the court stated not to be binding.

Source. — This Rule is derived as follows:

Section (a) is derived from former Rule 757 d.
Section (b) is derived from former Rule 757 a.
Section (c) is derived from former Rule 757 b.
Section (d) is derived from former Rule 757 c.
Section (e) is derived from former Rule 757 f and h.
Section (f) is derived from former Rule 757 g.

- I. General Consideration.
- II. Advisory Instructions.
- III. Instruction Request.
- IV. Refusal to Instruct.
- V. Objection.
- VI. Plain Error.
- VII. Particular Instructions.
 - A. General Consideration.
 - B. Evidence and Witnesses.
 - C. Defense of Self and Others; Resisting Arrest.

I. GENERAL CONSIDERATION.

Maryland Law Review. —

For note, "The Maryland Survey: 2001-2002: Recent Decisions: The Court of Appeals of Maryland: C. Clarifying the 'Fairly Covered' Component of Maryland Rule 4-325(c)," see 62 Md. L. Rev. 782 (2003).

For a recent decision, "The Court of Appeals of Maryland Digs v. State: A Not-So-Plain Error?," see 69 U. Md. L. Rev. 680 (2010).

University of Baltimore Law Review. — For note, "The New Maryland Rules of Criminal Procedure: Time Table for Lawyers," see 6 U. Balt. L. Rev. 241 (1977).

For note discussing the plain error rule and *State v. Hutchinson*, 287 Md. 198, 411 A.2d 1035 (1980), cited in the notes below, see 10 U. Balt. L. Rev. 362 (1981).

Purpose and design of Rule. — Purpose and design of this Rule is to correct errors while the opportunity to correct them still exists. Only thus is an error preserved for appellate review. *Vernon v. State*, 12 Md. App. 157, 277 A.2d 635 (1971).

It is not the purpose and design of this Rule to provide an avenue for a party to lay away ammunition in the arsenal of appeal. *Vernon v. State*, 12 Md. App. 157, 277 A.2d 635 (1971).

It is not the purpose and design of this Rule to provide an avenue for a party to lay away ammunition in the arsenal of appeal, but rather to correct errors while the opportunity to correct them still exists. *Medley v. State*, 52 Md. App. 225, 448 A.2d 363 (1982).

Rule is mandatory. — The word "shall" as employed in the Rule renders the Rule mandatory. *Binnie v. State*, 321 Md. 572, 583 A.2d 1037 (1991).

The requirements of section (c) of this Rule are mandatory. *Brooks v. State*, 104 Md. App. 203, 655 A.2d 1311 (1995), cert. denied, 339 Md. 641, 664 A.2d 885 (1995).

The word "shall" as employed in this Rule has been consistently construed to render the directions of the Rule mandatory. *Robertson v. State*, 112 Md. App. 366, 685 A.2d 805 (1996).

Purpose of jury instructions. — The main purpose of a jury instruction is to aid the jury in clearly understanding the case, to provide guidance for the jury's deliberations, and to help the jury arrive at a correct verdict. *Chambers v. State*, 337 Md. 44, 650 A.2d 727 (1994).

The main purpose of a jury instruction is to aid the jury in clearly understanding the case and considering the testimony, to provide guidance for the jury's deliberations by directing their attention to the legal principles that apply to and govern the facts in the case, and to ensure that the jury is informed of the law so that it can arrive at a fair and just verdict; accurate jury instructions are also

West's Annotated Code of Maryland
 Maryland Rules
 Title 8. Appellate Review in the Court of Appeals and Court of Special Appeals
 Chapter 100. General Provisions

MD Rules, Rule 8-131

RULE 8-131. SCOPE OF REVIEW

Currentness

(a) Generally. The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

(b) In Court of Appeals--Additional Limitations.

(1) *Prior Appellate Decision.* Unless otherwise provided by the order granting the writ of certiorari, in reviewing a decision rendered by the Court of Special Appeals or by a circuit court acting in an appellate capacity, the Court of Appeals ordinarily will consider only an issue that has been raised in the petition for certiorari or any cross-petition and that has been preserved for review by the Court of Appeals. Whenever an issue raised in a petition for certiorari or a cross-petition involves, either expressly or implicitly, the assertion that the trial court committed error, the Court of Appeals may consider whether the error was harmless or non-prejudicial even though the matter of harm or prejudice was not raised in the petition or in a cross-petition.

Committee note: The last sentence of subsection (b)(1) amends the holding of *Coleman v. State*, 281 Md. 538 (1977), and its progeny.

(2) *No Prior Appellate Decision.* Except as otherwise provided in Rule 8-304(c), when the Court of Appeals issues a writ of certiorari to review a case pending in the Court of Special Appeals before a decision has been rendered by that Court, the Court of Appeals will consider those issues that would have been cognizable by the Court of Special Appeals.

(c) Action Tried Without a Jury. When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

Cross reference: Rule 2-519.

(d) Interlocutory Order. On an appeal from a final judgment, an interlocutory order previously entered in the action is open to review by the Court unless an appeal has previously been taken from that order and decided on the merits by the Court.

(e) Order Denying Motion to Dismiss. An order denying a motion to dismiss for failure to state a claim upon which relief can be granted is reviewable only on appeal from the judgment.

Source: This Rule is derived as follows:

Section (a) is derived from former Rules 1085 and 885.

Section (b) is derived from former Rule 813.

Section (c) is derived from former Rules 1086 and 886.

Section (d) is derived from former Rules 1087 and 887.

Section (e) is derived from former Rule 1009.

Credits

[Adopted Nov. 19, 1987, eff. July 1, 1988. Amended April 5, 2005, eff. July 1, 2005.]

[Notes of Decisions \(467\)](#)

MD Rules, Rule 8-131, MD R A CT AND SPEC A Rule 8-131
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MARYLAND
CRIMINAL JURY
INSTRUCTIONS
AND
COMMENTARY

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David E. Aaronson

VOLUME 1

showed that the defendant had killed his wife and buried her in their residence's backyard twenty-one years earlier. The Court affirmed the trial court's holding that there was not "some evidence" in the record to generate a jury instruction that defendant was grossly negligent in causing the death of his wife other than one statement that there was a verbal argument. *Id.* at 586, 590, 104 A.3d at 981, 983.

An optional additional instruction has been provided when both second degree depraved heart murder and grossly negligent involuntary manslaughter are under consideration. In *Blackwell v. State*, 34 Md. App. 547, 369 A.2d 153 (1977), the Court noted the narrow line that separates depraved heart murder and grossly negligent involuntary manslaughter. The Court stated that it is not improper to charge both crimes and to submit both to the jury if the evidence is sufficient. A guilty verdict on both counts, however, would be inconsistent. Looking at current case law, the borderline is blurred. There is little distinction between the *mens rea* for grossly negligent involuntary manslaughter and the *mens rea* of depraved heart murder. Other than substituting "extreme disregard" for "wanton or reckless disregard," the *mens rea* is defined practically the same for both offenses. The distinction between an unreasonable risk, a high degree of risk, and a very high degree of risk are matters of degree, and there is no exact boundary line between each category. In describing the difficulty in articulating any legal criterion to accurately describe the difference between depraved heart murder and involuntary manslaughter, Judge Moylan likened the problem to defining pornography, stating that despite the difficulty in defining the difference, judges and juries will often "know it when [they] see it." *Pagotto v. State*, 127 Md. App. at 280 n.2, 732 A.2d at 928 (quoting Justice Stewart in *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S. Ct. 1676, 1683 (1964)). Thus, some have questioned whether this is a sound basis upon which to make the important distinction between murder and manslaughter. Wayne R. LaFare, *Criminal Law* 844 (5th ed. 2010). See Comment to § 5.52(B), Second Degree Murder: Depraved Heart Murder, *supra*, for a discussion of second degree depraved heart murder.

§ 5.54(B). Involuntary Manslaughter: Grossly Negligent Omission to Perform a Legal Duty

Involuntary manslaughter is defined as an unintentional killing of another person when a person, with a legal duty to act, aware of the high degree of risk to human life, fails to act and the failure to act is gross negligence.

In order for _____ (insert name of defendant) to be found guilty

of involuntary manslaughter, the State must prove beyond a reasonable doubt that:

- (1) _____ (*insert name of defendant*) failed to perform a duty for which [he] [she] had a legal obligation;
- (2) _____'s (*insert name of defendant*) failure to act caused the death of _____ (*insert name of victim*);
- (3) by failing to perform a legal obligation, _____ (*insert name of defendant*) acted in a grossly negligent manner at the time of the killing, that is, _____'s (*insert name of defendant*) failure to act created a high degree of risk to, and showed a reckless disregard for, the life _____ (*insert name of victim*); and,
- (4) _____ (*insert name of defendant*) was aware that [his] [her] failure to act created a high degree of risk to human life, that is, _____ (*insert name of defendant*) was conscious of the life endangering risk involved.

To establish the crime of involuntary manslaughter, you must find that the defendant's failure to act, for which [he] [she] had a legal obligation, was grossly negligent. The standard for gross negligence is higher than that for ordinary negligence. The standard is both subjective and objective. First, the defendant must have known or been aware that [his] [her] failure to act created a high degree of risk to the life of _____ (*insert name of victim*) and consciously disregarded that risk. Second, the risk involved must have been objectively substantial, amounting to a gross deviation from the standard of a reasonable, law-abiding person under similar circumstances. If the defendant's failure to act that resulted in death was due merely to simple negligence or carelessness, an honest error of judgment or an accident, then you must conclude that the defendant was not grossly negligent and you must find [him] [her] not guilty of involuntary manslaughter. Criminal liability cannot be based on mere carelessness or an accident, even if it results in injury or death to another.

[To convict the defendant of involuntary manslaughter, there must be a causal connection between the gross negligence and death, although it is not essential that the ultimate harm that resulted was foreseen or intended.]

COMMENT

Effective October 1, 2002, the Maryland General Assembly reorganized the various sections of the Maryland criminal code into a new

subject-based article. Manslaughter, which was previously codified under Md. Ann. Code, art. 27, § 387, can now be found under Md. Code Ann., Crim. Law § 2-207. The changes made in the new bill were designed to promote clarity; the Revisor's Note states that the new language is derived "without substantive change" from the former statute. Thus, the case law discussion and references in this Comment, based on former art. 27, § 387, are now assumed to apply to Crim. Law § 2-207.

For an omission to form the basis of an involuntary manslaughter conviction, the defendant must have had a legal obligation to perform the omitted act. *Dishman v. State*, 352 Md. 279, 291, 721 A.2d 699, 704 (1998). Further, the failure to act must constitute either gross negligence or be unlawful in itself. *Id.* Like the line separating the *mens rea* of depraved heart murder and lawful act manslaughter, the distinction between the *mens rea* for manslaughter based on failure to perform a legal duty and that of depraved heart murder based on failure to perform a legal duty is blurred. A criminally negligent omission will lead to an involuntary manslaughter conviction, but a malicious omission manifesting extreme indifference to human life will lead to a second degree murder conviction. LaFave, *Criminal Law* 844 (5th ed. 2010).

In the case of *Simpkins v. State*, 88 Md. App. 607, 596 A.2d 655 (1991), the Court discussed the difference between malicious omissions and grossly negligent omissions. In *Simpkins v. State*, the defendants were convicted of second degree murder for the death of their two-year-old daughter who died of starvation. On appeal, the defendants said the second degree murder conviction should not stand because the State failed to prove the defendants acted, or failed to act, with malice toward their daughter. The Court affirmed, stating that malice may be inferred from an act under circumstances manifesting extreme indifference to the value of human life. This is the depraved heart theory, the theory under which the State proceeded. Most cases prosecuted under a depraved heart theory involve affirmative conduct, for example, firing a gun into a crowd. But depraved heart murder has also been found in cases of malicious omission, including situations in which a parent has maliciously allowed a small child to die of exposure or of malnutrition and dehydration. Whether a parent neglecting his child is guilty of murder or manslaughter will depend on the circumstances. See also § 5.52(C), Second Degree Murder: Depraved Heart Murder—Omission of a Legal Duty, *supra*. See also Comment (A) to § 5.54(A) for a more general discussion of Involuntary Manslaughter.

The Maryland Court of Appeals cited Instruction and Comment to § 5.54(B) in *DiGennaro v. State*, 415 Md. 551, 3 A.3d 1201 (2010). The defendant in *DiGennaro* violated Md. Code Ann. Transp. § 24-106(e) by failing to remove or mark the gravel that spilled from his truck while he was driving, and his failure to do so subsequently resulted in the victim's death. The defendant was convicted of the Transp. § 24-106(e) violation and manslaughter by vehicle. *Id.* at 553, 3 A.3d at 1202. The Court of Special Appeals held that the failure to remove or mark the gravel did not constitute "operating" a motor vehicle under Crim. Law § 2-209 and reversed the defendant's conviction for manslaughter by vehicle. *Id.* at 562, 3 A.3d at 1207. The Court of Appeals affirmed, holding that the defendant could not be convicted of manslaughter by vehicle because it was not the defendant's grossly negligent operation of his vehicle, but his post-operation failure to take remedial action, that resulted in the victim's death. *Id.* at 564, 3 A.3d at 1208.

The Court noted, *in dictum*, however, that although the defendant could not have been convicted of manslaughter by vehicle, "it is [] well settled that a person who unintentionally causes a death as a result of that person's grossly negligent failure to perform a legal duty may be convicted of common law involuntary manslaughter." *Id.* at 565, 3 A.3d at 1209. Thus, the defendant could have been convicted of common law involuntary manslaughter upon proof beyond a reasonable doubt that (1) Transp. § 24-106(e) imposed upon him a duty to take appropriate remedial measures on behalf of other users of the highway; (2) he failed to perform that duty with reckless indifference to the issue of whether his inaction was endangering others; and (3) under the circumstances, that failure constituted gross negligence. *Id.* at 564, 3 A.3d at 1208-09. However, in *DiGennaro*, the crime of involuntary manslaughter by grossly negligent failure to perform a legal duty was not charged in the indictment. *Id.*

§ 5.54(C). Involuntary Manslaughter: Unlawful Act

Involuntary manslaughter is defined as the unlawful and unintentional killing of another person when there is no legal justification for the killing.

In order for _____ (*insert name of defendant*) to be found guilty of involuntary manslaughter, the State must prove beyond a reasonable doubt that:

- (1) _____ (*insert name of defendant*) [or another participant in the crime] committed or attempted to commit _____ (*insert unlawful act(s)*);

Reports

Office
Calvert County

A
REPORT
OF ALL SUCH

ENGLISH STATUTES

AS EXISTED AT THE TIME OF THE FIRST EMIGRATION OF THE PEOPLE
OF MARYLAND, AND WHICH BY EXPERIENCE HAVE BEEN
FOUND APPLICABLE TO THEIR

LOCAL AND OTHER CIRCUMSTANCES;

AND OF SUCH OTHERS AS HAVE SINCE BEEN MADE IN

ENGLAND OR GREAT-BRITAIN,

AND HAVE BEEN INTRODUCED, USED AND PRACTISED, BY THE

COURTS OF LAW OR EQUITY;

AND ALSO ALL SUCH PARTS OF THE SAME AS MAY BE PROPER TO BE INTRODUCED
AND INCORPORATED INTO THE BODY OF THE

STATUTE LAW OF THE STATE.

MADE ACCORDING TO THE DIRECTIONS OF THE LEGISLATURE,
BY WILLIAM KILTY, CHANCELLOR OF MARYLAND.

TO WHICH ARE PREFIXED,

AN INTRODUCTION

AND LISTS OF THE STATUTES WHICH HAD NOT BEEN FOUND
APPLICABLE TO THE CIRCUMSTANCES OF THE PEOPLE:

WITH FULL AND COMPLETE INDEXES.

PUBLISHED UNDER THE DIRECTIONS OF THE GOVERNOR AND COUNCIL,
PURSUANT TO A RESOLUTION OF THE GENERAL ASSEMBLY.

ANNAPOLIS:—PRINTED BY JEHU CHANDLER.

1811

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INTRODUCTION.

THE report which I have on my-part made to the legislature, according to a resolution of the last session, of the English statutes and those of Great-Britain, coming within the descriptions therein mentioned, will appear in the following lists and selections:

For the purpose of enabling the assembly to judge in the fullest manner as to the correctness of those selections, I have also added lists of the statutes which had not been found applicable to the circumstances of the people, so as to comprise the whole of the statutes, from Magna Charta to the 13th, George 3d, in the year 1773.

In pursuance of this plan, the left hand pages* will be found to contain the chapters and the titles of the statutes belonging to that class, with notes, stating the reasons, as to those which might otherwise appear doubtful, but leaving without any remark, those which from the titles appeared free from doubt.

A small variation has been made at the commencement of the year 1360, by giving only the general heads instead of the titles, for the reasons which are stated in a note thereon; and at the commencement of the year 1461, the heads of the statutes as they stand in Cay's abridgement, omitting those not inserted therein; and from the year 1760, omitting entirely those statutes which had not extended to the province.

In the right hand pages will be found, in the first column, the chapters and the titles of those statutes which I have considered as having been found applicable to the circumstances of the people in the province; and in order that they might be all presented to the view of the assembly, I have placed in the second column, those chapters which appeared to me not proper to be incorporated, with the reasons for my opinions on them.

The third column, comprises the statutes which either in the whole or in part, I have considered in the terms of the resolution, as proper to be introduced and incorporated into the body of the statute law of this state.

Separate lists are also added of the chapters and general heads of those statutes which did extend, but are not proper to be incorporated, and of the chapters and titles of those, which are considered proper to be incorporated; and full indexes are subjoined, by the last of which particularly, a judgment may be formed from the subjects that are therein embraced, of the statutes reported as proper to be incorporated with our laws.

The report thus made, has been grounded on a careful perusal and consideration of the statutes at large, and on an examination, as far as it was practicable, of the records of the former provincial court, and the legislative and executive proceedings of the government before the revolution, for which I have to acknowledge the assistance of the officers having respectively the custody of those documents.

With respect to the criminal statutes, (which before the making of the penitentiary law of the last session, were considered of the most importance,) the records have afforded the most conclusive evidence as to the usage and practice under them.

* In pursuance of the power given by the resolution of the last session, respecting alterations in the arrangement of the matter of the report of the statutes, it has been found advisable to depart from the mode originally adopted and herein referred to, of placing the several classes of statutes in opposite pages and columns, and to print them under separate divisions—the first, containing the titles of such statutes as had not extended to the province—the second, of those which had extended, but were not proper to be incorporated—and the third, of those which had extended and were proper to be continued.

In civil cases, it has been, from the nature of the proceedings, and the want of indexes pointing to the different subjects, more difficult to ascertain the grounds upon which my selections have been made; and although the record books have been frequently resorted to with success, I have had to consider, also, the nature of the subjects, and the law authorities thereon, and to refer to the usage and practice generally known in proof of the extension of many of the statutes.

The knowledge of what was the practice, must for want of books of reports necessarily depend in some degree on information, or what may be called tradition, which, when it could be obtained, I have availed myself of; and I have been furnished by the clerk of the court of appeals, with some cases which have not yet been reported.

I think it proper also to mention, that among the papers which were put into my hands, of the late John Duckett, Esq. who had projected some report on the English statutes, I found a copy of a letter from Samuel Chase, Esq. at present one of the judges of the supreme court of the United States, to the late judge Tilghman, in answer to some enquiries made by him on the subject, of which I have been informed several copies were distributed. The following part of that letter is here inserted: "It is a general principle, that the first settlers of Maryland brought with them all English statutes made before the charter, and in force at the time, which were applicable to the local and other circumstances of the province, and the courts of justice always decided the applicability of any statute, and of consequence its extension. I have understood that the judges under the old government laid it down as a general rule, that all statutes for the administration of justice, whether made before or since the charter, so far as they were applicable, should be adopted by them."

Several statutes, (to the number of forty) during both periods, are then particularly mentioned therein, as having extended, together with all the statutes relative to distresses for rent, and all the statutes respecting ejectments—as 4 Geo. 2, ch. 28—11 Geo. 2, ch. 19—with the observation, that other statutes had been received in our courts upon the general principle which had been suggested—which observation is verified by there being nearly two hundred statutes which are considered proper to be incorporated, and upwards of three hundred not proper to be incorporated, that had extended.

The particular statutes mentioned by Mr. Chase, are referred to, in the notes on them respectively.

It appears from an examination of the proceedings of the government, that the question as to the application and extension of the English statutes, was taken up at the first session of Assembly of which we have any record, and continued in various ways to be agitated, to a period so late as the year 1771. The views of the proprietors, and their adherents, having been to discourage the extension of those statutes, in order that their power of assenting to laws might become more important, and the country party having been unwilling that such statutes should be particularly enumerated, so as to limit the courts in their power of judging of the consistency of them with the good of the province: a power which was essential to the proper discharge of their duties, and which had been expressly given by several acts of Assembly.

There are three distinct modes by which the English statutes may have been in force in the province.

1. By the express declaration of the parliament.
2. By declarations contained in the provincial acts of Assembly.
3. By having been introduced and practised by the courts of law and equity, which is the most important in judging of those that are to be retained under the provision in the declaration of rights.

In the late case of "Whittington and Polk," in the general court, the following was a part of the opinion given: "None of the English statutes which passed anterior to the first emigration

INTRODUCTION.

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of the inhabitants of Maryland have been adopted by the constitution of Maryland, and incorporated with the laws, but such as have been found by experience applicable to our local and other circumstances; and it does not appear to the court, there can be any other safe criterion by which the applicability of such statutes to our local and other circumstances can be ascertained and established, but that of having been used and practised under in this state."

In the application of this criterion to the several statutes as passed in review, it must however be observed, that many statutes relating to rights and rules of property have been tacitly and without contest acquiesced in, and that many have been used and practised under without the sanction of any express decision of the courts. Several of the criminal statutes which would otherwise have remained in force, are stated as improper to be incorporated on account of the act of the last session, commonly called the penitentiary law. I am aware that by the 49th section, that act is suspended until after thirty days from the date of the proclamation which the governor, in certain events is directed to issue, but I have preferred the course of declaring those statutes affected by the said act, which it is presumed will soon go into operation, to that of stating the law in a manner which is likely to be so speedily and materially changed.

In the successive examinations of the report, several errors have been discovered and rectified. These corrections have occasioned erasures as to those parts* which are suffered to remain, as not being of any prejudice to the work; and a fair copy could not have been made within the time allowed for its completion.

November 12, 1810.

WILLIAM KILTY, *Chancellor.*

* It has been deemed proper to insert the introduction without any change; but it will of course be understood that the erasures spoken of, referred to the manuscript report, and do not affect the present publication.

A

REPORT

OF THE

BRITISH STATUTES.

English Statutes existing at the time of the first emigration of the people of this State, which have not been found, by experience, applicable to their circumstances.

Magna Charta, 9 Hen. 3d.—A. D. 1225.

STATUTES.

CHAP. 2. The relief of the king's tenant of full age.

CHAP. 3. The wardship of an heir within age.

CHAP. 4. No waste shall be made by a guardian in ward's lands.

CHAP. 5. Guardians shall maintain the inheritance of their wards—of bishoprics, &c.

CHAP. 6. Heirs shall be married without disparagement.

CHAP. 9. The liberties of London and other cities and towns confirmed.

CHAP. 10. None shall distrain for more service than is due.

CHAP. 11. Common pleas shall not follow the king's court.

CHAP. 12. Where, and before whom assises shall be taken—adjournment for difficulty.

NOTES.

CHAP. 2. This statute was rendered obsolete by 12 Car. 2, Ch. 24, but had not before that time been applicable to the province.

CHAP. 3. Same.

CHAP. 4. This statute appears to have related to the heirs spoken of in Ch's. 2 and 3, and is omitted in Cay's abridgment. See as to waste by guardians, 52 Hen. 3, Ch. 17.

CHAP. 5. This statute is said to be obsolete in England by 12 Car. 2, Ch. 24, so far as it relates to wardship by reason of tenure, and by 31 Hen. 8, Ch. 13, as to Abbeyes.

CHAP. 12. This statute, which related to assises of *novel disseisin* and *mort d'ancestor* was enforced and amended in England by several statutes.

The particular directions therein, would probably have been considered of a local nature, if this

B

STATUTES NOT FOUND APPLICABLE.

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4 Anne.—A. D. 1705.

STATUTES.	NOTES.
CHAP. 4. King, &c.	
CHAP. 6. Annuities.	
CHAP. 7. Ireland.	
CHAP. 12. Brandy, &c.	
CHAP. 13. Watermen.	
CHAP. 14. Charitable uses, &c.	
CHAP. 15. Fish.	
CHAP. 19. Seamen.—Watermen.	
CHAP. 20. Ships.	
CHAP. 21. Fish.	
CHAP. 22. Money.	
CHAP. 26. Ireland.	

5 Anne.—A. D. 1706.

STATUTES.	NOTES.
CHAP. 3. Blenheim house.	
CHAP. 4. Blenheim house.	
CHAP. 7. Yarmouth.	
CHAP. 8. An act for an union of the two kingdoms of England and Scotland.	CHAP. 8. This statute cannot be said, in any thing respecting the practice, to have extended to the province.
CHAP. 14. Game.	
CHAP. 17. Bone lace.	
CHAP. 18. Register.	
CHAP. 19. Annuities.—Stamps.	
CHAP. 20. Silk.	
CHAP. 24. First fruits.	
CHAP. 27. Wine.	
CHAP. 29. Corn.—Salt.	
CHAP. 30. Libraries.	
CHAP. 31. An act for the encouraging the discovery and apprehending of house breakers.	CHAP. 31. There is nothing to shew that this statute extended to the province.
CHAP. 34. Butchers.	

6 Anne.—A. D. 1707.

STATUTES.	NOTES.
CHAP. 3. East-India company.	

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- CHAP. 5. Annuities.
 CHAP. 6. Scotland.
 CHAP. 8. Drapery.
 CHAP. 9. Drapery.
 CHAP. 11. Annuities.
 CHAP. 12. Salt.
 CHAP. 14. Oaths.—Scotland.
 CHAP. 16. Brokers.—Spices.
 CHAP. 17. East India company.
 CHAP. 19. Cables.—Silk.
 CHAP. 21. Churches.—King.
 CHAP. 22. Bank,—Tobacco.
 CHAP. 23. Oaths.—Parliament.—Scotland.
 CHAP. 26. Customs.—Scotland.—Exchequer.
 CHAP. 27. First fruits.
 CHAP. 29. Highways.
 CHAP. 31. Fire.
 CHAP. 33. Cochineal.
 CHAP. 35. Register.

7 Anne.—A. D. 1708.

STATUTES.

NOTES.

- CHAP. 6. Butchers.
 CHAP. 7. Banks.—Funds.—Linen.
 CHAP. 8. Braziers.—Drugs.
 CHAP. 9. Paving, &c.
 CHAP. 10. Sewers.
 CHAP. 11. Scotland.—Salt.
 CHAP. 12. An act for preserving the privileges of ambassadors, and other public ministers of foreign princes and states.
 CHAP. 13. Drapery.
 CHAP. 14. Libraries.
 CHAP. 15. Scotland.—Exchequer.
 CHAP. 17. Fire.
 CHAP. 18. Advowsons.
 CHAP. 20. Register.
- CHAP. 12. For the occasion of this statute being made, see 1 Bl. Com. 255, and 3 Burrows, 1480.

10 *Anne*.—*A. D.* 1711.

STATUTES.	NOTES.
CHAP. 6. Fuel.	
CHAP. 7. Scotland, &c.	
CHAP. 11. Churches.	
CHAP. 14. Juries.—Continuance.	
CHAP. 15. Bankrupts.	
CHAP. 16. Drapery.	
CHAP. 17. Seamen.—Ships.	
CHAP. 18. Fee-farm rents.	
CHAP. 19. Books.—Excise.—Stamps, &c.	
CHAP. 21. Scotland.—Linen.	
CHAP. 23. Parliament.	
CHAP. 25. Militia.	
CHAP. 26. Excise.—Gold, &c.	
CHAP. 29. India goods.	
CHAP. 30. South Sea company.	
CHAP. 33. Scotland.—Judiciary.	

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12 *Anne, Stat. 1.*—*A. D.* 1713.

STATUTES.	NOTES.
CHAP. 2. Malt.—Stamps.	
CHAP. 4. York.	
CHAP. 6. Scotland.	
CHAP. 11. Bank.	
CHAP. 13. Soldiers.	
CHAP. 14. Coaches.	
CHAP. 16. Sail cloth.	
CHAP. 18. Copper ore.—Poor.	

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12 *Anne, Stat. 2.*—*A. D.* 1713.

STATUTES.	NOTES.
CHAP. 2. Salt.	
CHAP. 3. Bank.—Brandy.	
CHAP. 6. Mortuaries.	
CHAP. 9. Books, &c.—Duties.	

- CHAP. 11. Fortifications.
 CHAP. 12. Annuities.
 CHAP. 15. Coals.
 CHAP. 18. Exchequer, &c.
 CHAP. 19. Ships.
 CHAP. 20. Parliament.
 CHAP. 21. Exchequer.
 CHAP. 22. Militia.
 CHAP. 23. Exchequer.—Tallies.
 CHAP. 24. Militia.
 CHAP. 27. Fish.
 CHAP. 28. Brandy.

—o—o—o—

1 George 3.—A. D. 1760.

STATUTES.

NOTES.

- CHAP. 1. King.
 CHAP. 5. King.
 CHAP. 7. Excise.
 CHAP. 10. Tallow.
 CHAP. 13. Justices of peace.
 CHAP. 14. East India company.
 CHAP. 18. Exchequer.
 CHAP. 19. Funds.
 CHAP. 20. Exchequer.
 CHAP. 21. Scotland.—Game.
 CHAP. 23. Justices of both benches.

CHAP. 13. See the note on 18 George 2, Ch. 20.

N. B. From this period until the conclusion in 1773, the statutes which did not extend to the province being very numerous, and entirely on local subjects, are omitted.

The Canada Southern Ry. Co. v. Phelps, 1884 CanLII 54 (SCC), 14 SCR 132

Date: 1884-06-23

Citation: The Canada Southern Ry. Co. v. Phelps, 1884 CanLII 54 (SCC), 14 SCR 132, <<https://canlii.ca/t/ggxgp>>, retrieved on 2021-08-26

Supreme Court of Canada
Canada Southern Ry. Co. v. Phelps (1884) 14 SCR 132
Date: 1884-06-23

The Canada Southern Railway Company

Appellants

And

Martha Phelps

Respondent

Present—Sir W. J. Ritchie C.J., and Strong, Fournier, Henry and Gwynne JJ.

1884: Jan. 21; 1884: June 23.

ON APPEAL FROM THE QUEEN'S BENCH DIVISION OF THE HIGH COURT OF JUSTICE FOR ONTARIO.

Negligence—Damages—Fire communicated from premises of Company—14 Geo. 3 ch. 78 sec. 86 not applicable in cases of negligence.

In an action brought by P. against the appellants company for negligence on the part of the company in causing the destruction of P's. house and outbuildings by fire from one of their locomotives, it was proved that the freight shed of the company was first ignited by sparks from one of the company's engines passing the Chippewa station, and the fire extended to P's. premises. The following questions *inter alia*, were submitted to the jury, and the following answers given:—

Q. Was the fire occasioned by sparks from the locomotive? A. Yes.

Q. If so, was it caused by any want of care on the part of the company or its servants, which, under the circumstances, ought to have been exercised? A. Yes.

Q. If so, state in what respect; you think greater care ought to have been exercised? A. As it was a special train and on Sundays, when employees were not on duty, there should have been an extra hand on duty.

Q. Was the smoke stack furnished with as good apparatus for arresting sparks as was consistent with the efficient working of the engine? If you think the apparatus was defective, was it by reason of its not being the best kind, or because it was out of order? A. Out of order.

And P. obtained a verdict for \$800.

On motion to set aside the verdict, the Queen's Bench Division unanimously sustained the verdict.

On appeal to the Supreme Court, *Held*, affirming the judgment of the court below, Henry J. dissenting,—

1. That the questions were proper questions to put to the jury, and that there was sufficient evidence of negligence on the part of the appellants' servants to sustain the finding.

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2. If a railway company are guilty of default in the discharge of the duty of running their locomotives in a proper and reasonable manner, they are responsible for all damage which is the natural consequence of such default, whether such damage is occasioned by fire escaping from the engine coming directly in contact with and consuming the property of third persons, or is caused to the property of such third persons by a fire communicating thereto from the property of the railway company themselves, which had been ignited by fire escaping from the engine coming directly in contact therewith.
3. The statute 14 Geo. 3 ch. 78 sec. 86, which is an extension of 6 Anne ch. 31 secs. 6 and 7 is in force in the Province of Ontario as part of the law of England introduced by the Constitutional Act 31 Geo. 3 ch. 31, but has no application to protect a party from legal liability as a consequence of negligence.

Appeal, by consent of parties, under the 27th section of the Supreme and Exchequer Court Act, brought directly to the Supreme Court from a judgment of the Queen's Bench Division of the High Court of Justice for Ontario discharging an order *nisi* asking that a nonsuit should be entered or judgment for the defendants, or for a new trial upon grounds set forth in the order *nisi*.

The action was brought by the plaintiff in the Queen's Bench Division of the High Court of Justice for Ontario to recover damages for the loss of her buildings in the village of Chippewa, which were destroyed by fire on the 24th of July, 1881.

The plaintiff's statement of claim alleged that her buildings caught fire from a conflagration which was negligently allowed to spread from the defendant's buildings, namely, a freight house, owing to carelessness and negligence on the part of the defendants, and that these buildings of the defendants had been set fire to owing to the carelessness and negligence of the defendants, from a train passing over the railway of the defendants.

The fire spread and consumed a number of buildings in the village of Chippewa for the loss of which a

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number of actions were brought, in which it was agreed that the liability of the defendants should be determined by the result of this action.

The cause was tried before Mr. Justice Patterson and he put the following questions to the jury, which were answered as appears below:—

Q.—Was the fire occasioned by sparks from the locomotive? A—Yes.

Q.—If so, was it caused by any want of care on the part of the company or its servants, which, under the circumstances, ought to have been exercised? A—Yes.

Q.—If so, state in what respect you think greater care ought to have been exercised? A—As it was a special train and on Sunday, when employees were not on duty, there should have been an extra hand on duty.

Q.—Was the smoke-stack furnished with as good apparatus for arresting sparks as was consistent with the efficient working of the engine? If you think the apparatus was defective, was it by reason of its not being of the best kind, or because it was out of order? A—Out of order.

Q.—Was there anything in the working of the engine which, under the circumstances, was improper, and what was it? A—In our opinion should not have put on such a heavy pressure of steam, passing the freight house and other buildings, owing to the dry feather at that time.

Q.—Was the state of the freight house such as, under the circumstances, and with reasonable regard to safety from passing trains, ought to have been permitted? A—No.

Verdict for plaintiff, \$800,00.

The order *nisi* asking that a nonsuit should be entered, or judgment for the defendants or for a new trial was on the following grounds:—

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1. That there was no evidence given by the plaintiff, of legal evidence of negligence by the defendants upon any of the grounds of negligence relied upon by the plaintiff in support of the alleged liability of the defendants in this action.
2. That any damages shown, were too remote and not caused by any such negligence of the defendants, as they are in law liable for.
3. That by virtue of the Act 14, George III., ch. 78, sec. 86, the defendants are exempted from any liability to this action or
4. For a new trial upon the ground that the finding of the jury on the several questions submitted to them by the learned Judge, is contrary to law and evidence, and for the misdirection of the learned Judge in holding that there was legal evidence to support the same, and also to the weight of evidence at the said trial.

The evidence as to the carelessness and negligence of the defendants while running a special train passing their freight shed at Chippewa station, is reviewed in the judgment of Sir W. J. Ritchie C.J. hereinafter given.

H. Cameron Q.C. and *Kingsmill* for the appellants contended: 1st. That the defendants are exempted from liability by Act 14 Geo. 3 ch. 78 sec. 86, and cited in addition to cases reviewed in the judgments of the court *Richards v. Easto*[1]; *Dean v. McCarty*[2]; *McCallum v. G. T. R.*[3].

And 2nd. That defendants are not liable for loss caused to a building or property detached and removed at such a distance as the plaintiff's from the defendant's property, on which latter a fire accidentally originated which spread without negligence on the part of the defendants to the plaintiff's property.

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Ryan v. N. Y. Central Ry. Co.[4] is exactly in point. Also, *Pennsylvania R. R. Co. v. Kerr*[5].

3rd. There was no evidence given by the plaintiff of legal negligence.

Citing *inter alia* *Daniel v. Metropolitan R. R. Co.*[6]; *Williams v. G. W. Ry. Co.*[7]; *Hill v. O. S. & H. Ry. Co.*[8].

Bethune Q.C. for respondent, contended:

That the statute 14 Geo. III. ch. 78 sec. 86 did not apply.

That the appellants were liable in three ways:—

1st. That it was negligence to have had the freight shed in the state in which it was, owing to the dryness of the season and the close proximity of the track to the door, and that having negligently kindled fire in the freight house, the appellants were liable for its extension to the respondent's buildings.

2nd. That there was negligence in the construction of the screen of the smoke stack in question, because it was proved very clearly that a great shower of sparks came from the smoke stack and fell upon the platform, and that this could not have happened if the screen had been in proper order. The jury have found the screen was out of order, and the evidence of the witnesses amply sustains their finding.

3rd. That the locomotive was negligently managed in this, that there was great haste on the part of the engineer to get up speed rapidly, and that he worked the engine in such a way as to throw an unusual shower of sparks while passing the freight shed in question, which, owing to the dryness of the

season and other matters, was gross negligence, and so the appellants are liable for the improper management by the engineer on the occasion in question.

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The cases relied on by counsel are reviewed in the judgments of the court.

Sir W. J. RITCHIE C.J.—The following questions *inter alia* were put to the jury:—

Was the fire occasioned by sparks from defendant's locomotive? To which the jury answered. Yes. Then if so was it caused by any want of care on the part of the company or its servants, which under the circumstances ought to have been exercised? The jury answer. Yes. And being asked to state in what respect greater care ought to have been exercised, the jury say that as it was a special train on Sunday when employees were not on duty there should have been an extra hand on duty.

Then come crucial questions:—Was the smokestack furnished with as good apparatus for arresting sparks as was consistent with the efficient working of the engine? If you think the apparatus was defective, was it by reason of its not being of the best kind or because it was out of order? To which the jury answer. Out of order.

If there was evidence to support the first and last findings, viz:—That the fire was caused by the defendant's locomotive and that the apparatus of the smokestack for arresting sparks was out of order, the case against the defendants would be established.

I think the irresistible inference from the evidence clearly establishes that the fire in the shed was caused by sparks from the defendants' locomotive. There was nothing whatever to shake the evidence of the boys, present on the passing of the train; on the contrary all the surrounding circumstances confirm what they said, and the jury evidently believed their testimony, and no reasonable hypothesis has been suggested that the fire in the shed could have been ignited in any other way.

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If then the testimony of the boys is to be accepted as true, there was evidence from which negligence might be inferred proper to submit to the jury.

There was no motion for a non suit, which indicates that defendants assumed there was such evidence in plaintiff's case, but whatever question there may be as to that, the evidence drawn from the defendants' witnesses supplied any deficiency there may have been in the plaintiff's case.

Mr. Domville—recalled, says:

Q. This is established as the actual screen on the locomotive on the day in question; will you look at it and say what that screen represents in reference to your knowledge of the screens of locomotives used on the Great Western Road? A. Well, it is a fair ordinary screen; I would not consider it a first class One. I would think a screen with several holes in it like that, I would have darned it. I have seen better screens and I have seen a great deal worse. Of course it might have got worn after removing it; the cross wire.

Q. In regard to the general character of the screen, how would it compare in its mesh and general arrangement with the screens used by the Great Western? A. It would compare favourably with the screens we have been in the habit of using.

Q. Are there any other screens which would be different from this screen in coal burning locomotives? A. No. The wood burning screen is smaller. I would not have been afraid to run that screen on a train for a short time longer, even in its present state. I would not have condemned the screen for the state it is in now. Without darning, I mean, I would have run that another week rather than stop an engine, and then I would have taken the first opportunity of repairing it.

Q. Assuming that this screen was removed it was still worth repairing? A. Yes. There is quite enough substance in it which when repaired would answer it still. This would last at least another month, or perhaps five or six weeks.

Q. In connection with your duties, is there any particular reason why the actual condition of a screen like this should be examined into from time to time? A. We cannot afford to throw away screens, and we exercise due caution in having them darned from time to time. It is greater economy to repair them from time to time than to let them get in such a state that they are beyond repair. You might get a big hole in one side.

Q. A stitch in time saves nine? A. Yes, that would be the case with this.

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Q. They are expensive? A. Yes, that would cost about four dollars to put on an engine. It makes a considerable difference in the expense of running trains.

Q. And what is the ordinary duration of a screen like this? A. From two and a half to three months; and it depends on the material, whether it is really good or not, and as to whether the manufacturer has given you *bona fide* steel, or put some iron in. What we look for is steel. We pay steel price for it.

Cross-examined: Q. I suppose in very dry weather, when everything is ready to go off like tinder, you would probably be more careful about the meshes of the smoke stacks than in winter? A. We always are, and for that reason our practice to tell the forman to be careful in examining them. Especially in dry weather.

Q. I see some holes down there; that would emit a pretty large spark? A. Yes. A spark getting through that might set fire to a building in a very short time. Our cones for coal burning engines are as near as possible like that one on plan 4. Ours might possibly have a little more lip. The more lip you have to a cone the less likelihood there is of a spark being driven against the wire. If the whole force came against the wire, it would soon wear the netting through.

Q. Supposing the cone became displaced so that there was more action on this wire, it would be very much more likely to get through? A. Yes.

Q. Suppose you found a shower of sparks coming in such a manner that a bare-footed boy had to dance about to get away from them, would not that indicate there was an imperfect mesh? A. If the man had been firing with very small coal, and put it on in a hurry, he might get a shower of sparks like that.

Q. That shower would be dangerous if it fell on combustible material? A. No doubt. There would be a chance of a blow up if such sparks fell where there had been coal oil.

Q. Of course a driver in going past a freight house in a village ought to be more careful than in the open country? A. Well, I think a man might use a little caution in passing through stations and places like that.

Q. It would be a very hazardous thing to fire up with small coal in passing by such a place as this in question? A. I do not think a man should do it.

Q. Can you conceive a shower of sparks coming through a perfect mesh from any other cause than by firing in that way—throwing in small coal? A. Oh, a man might do it by throwing his engine over, and putting on steam in a hurry, and so lift the coal; it is quite possible he might do that. Or if an engine starting away with a train should slip a good deal it might throw such sparks.

Q. To do that would be dangerous in the proximity of a station?

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A. Well, that cannot be avoided sometimes in starting. He might do that while he was running, but I do not think any man would go to do that. If he did do that it would be very dangerous.

Q. So that the sparks could come from the defective netting and also from the defective netting and bad management, as well from one as from the other? A. Yes.

Q. Do you think you would undertake to run that covering the way it is now in a dry time? A. Yes, I think I would.

Q. You do not think you would be in great danger of burning the country up? A. There would be more danger than with a perfect netting, of course.

Charles K. Domville, sworn:

Q. What is your profession? A. Locomotive engineer.

Q. In what position are you now? A. I am locomotive superintendent of the Great Western. Division of the Grand Trunk Railway, and I have been for the last six and a half years locomotive superintendent of the Great Western Railway.

Q. Have you had experience prior to that, practical experience upon railways? A. Yes, I have had charge of the locomotive department of railways since 1851.

Q. Are you acquainted with the mode of construction of locomotive engines used upon Canadian railways? A. I am.

(P. AN PRODUCED, WHICH WAS AFTERWARDS MARKED AS EXHIBIT 4.)

Q. Perhaps you can give me some of the chief particulars; I have got here what is supposed to be a sort of section of the smoke-stack on the locomotive; what are the chief requisites of a smoke stack in connection especially with the ordinary and usual means which are used to prevent the emission of sparks through the firing up of locomotives? A. The principal things are as shown upon the drawing, the netting across the top and the cone in the centre. This netting is made of fine wire mesh; it is made of different sizes. There is very little difference in them, some people use larger wire than others, and the opening in some is less than others. That inverted cone is for the purpose of the sparks striking against it and returning them into the smoke-box, and it destroys them to such an extent that when sparks are emitted out, the fire is out of them, and they are very little when they do come out. The first result of the firing up is to drive the chief stream under that cone. That cone is so constructed that it carries the whole body with it at first; the whole of the sparks strike that at once. They strike the covering of the cone; there are an immense number of sparks get stuck in the netting and are returned into the smoke-box. The chief volume of sparks are arrested in their escape by the cone and then thrown back and fall into the smoke-box.

Q. And reach that in a much smaller condition that they were?

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A. Yes, very much smaller, the cone breaks the force of the volume which is emitted.

Q. And also breaks the different sparks into smaller portions? A. Yes, it has that effect. And then they are thrown back into the smoke-box, a great many of them rest there.

Q. What proportion rests there and are not carried off with the smoke? A. Sometimes there is a very large proportion there; it all depends upon the working of the engine. Those are cleaned out at the end of the journey below.

Q. Everything which is capable of passing through the screen goes off there in smoke, the small particles? A. Very small particles.

James H. Rushton, foreman of the boiler making at St. Thomas:

Q. What experience have you had in the making of these screens? A. About 12 years.

Q. Suppose you were perfectly satisfied that a shower of sparks, such as described by these little boys, you would think from that that there must be something wrong with the netting? A. If I saw them myself, I would.

Q. What would you think was wrong with the netting? A. I would think there were some holes in the netting. I should think there was not any netting there at all.

Q. Do you think the managing of the engine could have anything to do with that? A. It might.

Q. Do you think a man could get the fire so shaken up as to send out a shower of sparks like that, either by stirring up his fire or putting on steam? A. Oh, it might throw out a little more.

Q. That would be very dangerous in passing a station where everything was dry? A. Yes.

Q. And you think it would be dangerous to run with a netting that would throw out a shower of sparks as described by these boys? A. I should think so.

Q. You could have a netting to prevent sparks coming out such as described by these boys? A. Yes, if there was any netting at all I do not think sparks such as described by them could come out. If the holes were twice as big as they are now they would not even then get out in such a shower as the boys have described.

Wm. A. Short, master mechanic of the C. Southern railway:

Q. Suppose you found a shower of sparks coming out on the platform, burning boys' feet and going down their backs, and leaving black marks on the platform, would you think that extraordinary, or is that a usual thing? A. I have seen it. Some platforms have small charred marks on them. It might have been from defective netting in some other place.

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Q. If the netting was perfect you would not expect to find these indications on the platform? A. No. I was here when the boys gave their testimony.

Q. If what they said was true, it would indicate that there was something wrong in the netting? A. I did not hardly take so much stock in what the boys said this morning.

Q. Just assume that what the boys said was true; would you not infer from that that there was something faulty in the netting? A. I cannot say; I have answered you correctly every thing you have asked me.

Q. If you were on another railway what would you think if you saw what these boys did? A. When an engine is passing I never saw any red-hot sparks yet.

Q. Assume that you found the same quantity described by these boys as coming out of the pipe and dropping down, would you not infer from that that there was something faulty in the netting? A. I do not know; it is hardly a fair question I think.

Q. Could what the boys said be true if the netting was perfect? A, No sir, it could not be true.

Q. Of course it follows that if the boys' stories were true the netting could not be perfect? A. If the netting was perfect you could not get such a shower as that.

David Wright, locomotive foreman at Victoria:

Q. If you found a shower of sparks as described by these witnesses this morning would you not think there was something wrong with the netting? A. Most decidedly.

Q. Suppose the cone got a little put to one side? A. It would have a tendency to throw cinders on the opposite side. It would give more space on one side for sparks to go through.

Patterson Hall, engineer in charge of the locomotive:

Q. Is it part of your duty to examine the netting? A. Yes. I would not swear to a day or two when I examined it.

Do you remember whether the coal was ever thrown back so as to burn you while you were on the tender? A. I never felt anything of that sort.

Q. That would not be possible? A. Well, I suppose it would be.

Q. Do you think, with a good netting like this, that the fire would ever get through? A. I do not know. I never have been burned that way.

Q. If a shower of sparks came as to burn the boys' feet, what would you think? A. I would think there was fire?

Q. Would you think the netting was all right? A. Yes; well, I do not know.

Q. If fire enough came to burn their feet in that way, would you think the netting was all right? A. No, I would not

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Q. You would think it was all wrong? A. Yes.

The mass of sparks of the character of those described by the witnesses was, as proved by defendant's skilled witnesses, evidence that defendants had not adopted every precaution that science or practical experience would suggest to prevent injury, in other words, the screen was both insufficient, defective or not in proper working order or properly placed on the stack; that had the screen been in proper working order, no such quantity of sparks could have been emitted. The evidence of Short, master mechanic of the Canada Southern Railway, Domville, a locomotive engineer, Rushton, foreman of the boiler works, Wright locomotive foreman and Patterson Hall the engineer in charge on the occasion, all concur in the opinion that if there was such a shower of sparks as described by the boys, the netting could not have been perfect and there must have been something wrong with it.

If the fire in the freight shed was caused by the negligence of the defendants, they would be clearly liable for damages occasioned by the fire extending to plaintiff's building.

The appeal must therefore be dismissed with costs.

STRONG J.—The evidence of negligence was amply sufficient to warrant the judge who presided at the trial in leaving the case to the jury. The large shower of sparks which are proved to have been emitted from the smoke stack of the engine and the evidence as to the condition of the iron netting made the case a proper one for the consideration of the jury. It was argued however that the statute 14 Geo. 3. ch. 78, sec. 86 applied and exonerated the appellants from all liability, inasmuch as the fire was accidental and began on the appellants own property. That enactment is as follows:—

No action, suit or process shall be had, maintained or presented

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against any person in whose house, chamber, stable, barn or other building, or on whose estate, any fire shall accidentally begin, nor shall any recompense be made by such person for any damage suffered, thereby, any law, usage or custom to the contrary notwithstanding.

This provision which is an extension of 6 Anne, c. 31, sections 6 and 7, is, I have no doubt, in force in the Province of Ontario as part of the law of England, introduced by the Constitutional Act, 31 G. 3, ch. 31, but I am clear that it has no application whatever to protect a party from legal liability as a consequence of negligence. At common law a person who brings or originates on his land any dangerous element, such as fire or an accumulation of water, or any other thing which if it should escape may damage his neighbour, does so at his peril, negligence being in such cases entirely immaterial. This is shown by the case of *Fletcher v. Rylands*^[9], where persons who formed on their own land a large reservoir of water were held liable on this express ground for damage done to their neighbour by the escape of the water, though no negligence was proved; and *Jones v. Festiniog Railway Co.*^[10] proceeded upon the same principle, it being held that a company who had power to maintain and run a railway to be worked with horse power, no authority being given by statute to run steam engines, were liable at their peril and irrespective of negligence for damage caused by a locomotive which they had made use of.

Subsequently in the case of *Nichols v. Marsland*[11] the same principle was recognised, though an exception to it was also admitted in that case upon the facts there established of the escape of the water having been caused by *vis major*. The rule of the common law there held applicable to water would, but for the statute before referred to, be equally applicable to fire, and every person

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who might light a fire in his house for ordinary domestic purposes would but for that enactment be bound at his peril to keep it safely, and liable to his neighbour for any damage which it might cause him though no negligence could be imputed. It was only to mitigate this rule of law that the statute was passed, and it was not intended thereby to alter the law of liability for negligence. Two cases both of high authority establish this very distinctly, *Filliter v. Phippard*,[12]; and *Lord Canterbury v. Attorney General*[13]. In the first of these cases the plaintiff on proving negligence was held entitled to recover damages against the defendant on whose land the fire accidentally began, and in the second Lord Lyndhurst rejected the argument that the suppliant in a petition of right was disentitled to recover, because the damage caused to him by a fire beginning on the property of the Crown was shown to have been caused by accident, it being also shown that the fire arose from the negligence of the servants of the crown. In the fifth edition of Addison on Torts the learned editor, Mr. Justice Cave, recognizes these cases as having settled the law as to the effect of the statute, and I have found no authority and heard no argument which leads me to doubt for a moment that this is a sound conclusion.

In some of the United States, the qualification in the case of fire of the principle of liability before stated, which has been introduced by the statute in England seems to have been considered by the courts as applying at common law. The decisions which have adopted this common law relaxation of the general doctrine seem to rest it on the necessity which every one is under to keep and use fire, thus rendering it unreasonable as regards that element to enforce the strict duties which apply to other noxious things; and

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this view, by which the case of fire is treated as exceptional at common law, and irrespective of the statute, has also prevailed in the Province of Ontario as is established by the cases of *Dean v. McCarty*[14] and *Gillson v. North Grey Ry. Co.*[15].

It is sufficient, however, here to say, without pursuing the subject further, that neither the statute of George the III, nor the decisions introducing the restriction to the common law rule, in any way relieve persons from liability for their own negligence or from responsibility for the negligence of their servants.

It was further argued that the damage proved by the plaintiff was too remote, inasmuch as the fire was not communicated directly to the plaintiff's house but spread from the defendants' property to the houses of third persons from whence it reached the plaintiff's house. There are certainly American authorities sustaining the appellants' contention on this head, but no English case has been cited which would warrant such a proposition and the American cases are far from uniform. The courts which deny the liability in such a case seem to have been influenced by a regard to the serious consequences and enormous liability which a responsibility in damages under such circumstances might involve rather than on any so and principle of law. It seems to me that the well known case of *Scott v. Shepherd*[16], though the facts are not the same, is in principle directly in point and fully establishes the liability. The subject is discussed in the work of a very able contemporaneous American writer, Mr. Justice Cooley, in his treatise on Torts[17] and although we may not be permitted to cite his work as authority, yet I think a careful consideration of his reasoning will convince any one that the facts in question can have no influence on

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the question of liability and that the American cases which determine the opposite have no foundation in legal principle.

The case was fairly left to the jury, and the appellants have nothing to complain of either on the ground of the verdict being against the weight of evidence or as regards the amount of damages.

The appeal should be dismissed with costs.

FOURNIER J. concurred that the appeal should be dismissed with costs.

HENRY J.—In dealing with the circumstances of this case I may premise that the statute 14 Geo. 3, ch. 18, sec. 78, has, in my opinion, no bearing upon the present case; and I consider it therefore unprofitable and unnecessary to discuss the several, contradictory decisions given, and views expounded, in respect to it in England. I do not consider that it has any application to cases where damage has been done by fire produced by railway engines when passing through the country. The principles of law applicable to such cases have been so well ascertained and settled by the numerous decisions to be found in the reports in England, in the United States and in this country, that it is unnecessary to debate what has been so fully determined, and that in such a way, as to the leading principles, that they can hardly be misunderstood.

The acknowledged principle is that a railway company chartered by the legislature has the right to use its locomotive engines over its lines propelled by steam generated in the usual way; even although the use of the fire by which the motive power is produced is dangerous from its tendency to set fire to objects near to where the engines run; rapid combustion of the fuel is necessary to the production of the necessary motive power and that necessitates a strong draught in

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the smoke-stack or chimney. That strong draught carries with it partly consumed fuel, in a burning state, calculated to set fire to objects upon which it falls. To prevent such results means were found necessary, and have been adopted and applied for preventing, as far as possible, the sparks of burning fuel from being carried by the draft outside of the smokestack; and the principle established as applicable to the owners of railways and their liability in cases of damage by fire is, that if they were the ordinary and well known means for such prevention they are not answerable for any resulting damages. The points, then, necessary to be established in such cases are first, that the damage was caused by fire proceeding from the engine; and secondly, that the company was guilty of negligence either in not using the proper preventive appliances or in some other way in the management or working of the engine by which the damage was caused; and in some cases the question of contributory negligence on the part of the plaintiff.

The jury have found in this case, I will not say improperly, that the fire to the station house of the appellants was caused by sparks from the engine, nor, as it was I think a question of contradictory evidence, can their finding as to the question of negligence arising from the alleged defective state of the hood in the smokestack be set aside; but whether the appellants are answerable under the circumstances in this case is a question in my mind of no small difficulty. The fire did not spread to the house of the respondent, and it must have been ignited by sparks or burning wood having been carried by the wind across a part of the railway station and a street, a distance of over 100 feet. Railway companies have been held answerable for the ordinary consequences of the spread of the fire from their station houses or grounds, but can it be

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held that they would be answerable for damages resulting from the course that the wind held at the time the damage was caused? If answerable when the sparks should be carried 100 feet they would be equally answerable if they were carried half a mile, or any other greater or less distance, and set fire to and damaged property. If the principle is sound in its application to the one case, it is equally applicable to another, and where should the line be drawn? Railway companies may fairly be held to be bound to know the state of the immediate surrounding territory, and if a quantity of inflammable and combustible matter is on or contiguous to the line of railway, forming the means for ignition and spreading, they may be held bound to know it, and the natural consequences of a fire set to that matter, and to guard against it by the ordinary precautionary means; but I don't think they can be held answerable for an injury that is not the natural or consequential result. Suppose the case of an engine passing through a city, town or village, and sparks, negligently permitted to escape from the smoke stack, passing over several squares and buildings set fire to and burn a house beyond, would the owners of the engine be answerable for the damages resulting solely from the direction of the wind and other independent causes at the time? and if through and by means of frequent changes of wind, whole squares were burnt by the spreading of the fire from the house first set fire to, would the owners of the engine be answerable to the owners of all the houses situated on those squares? If answerable for the first house burnt, what would limit the liability to that one? A difficulty has arisen and has not yet been satisfactorily resolved as to the limit of responsibility where a fire spreads by the ignition of combustible matter along its track, but if the liability of the owners of the engine in the present case

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is adjudged, the difficulty will be immeasurably increased; and railway companies may be held answerable for the burning of half a city, town or village. In the case of buildings or other insurable property, it is unnecessary so to decide, as insurance is presumed to cover the bulk of such property, and the owners only taxed for the indemnity they obtain. It is, therefore, not so necessary by legal decision to seek other indemnities for them. I don't feel justified or willing to establish a principle having such important consequences and results. In the case of *Ryan v. The New York Central Ry. Co.*[18] the Court of Appeal of that State decided that, although negligence was proved, the company was not liable in a case wherein the fire commenced in burning some wood in one of the company's sheds, which was also destroyed, and from there by the force of a strong wind the fire was carried to, and consumed, the plaintiffs property, which was distant about 130 feet from the shed. The court holding that the plaintiff had no cause of action against the company, on the ground that the damage to the plaintiff was not the necessary or natural consequence, ordinarily to be anticipated from the negligence committed. That the plaintiff's injury was the remote and not proximate result of the fire in the shed, and too remote to give a cause of action.

In a subsequent case, however, *Webb v. The Rome Watertown Ogdensburg Ry. Co.*[19], the same court, composed partly of other judges, held that where coals were negligently dropped from the company's engine, which set fire to a tie, from which the fire spread to an accumulation of weeds, grass and rubbish lying on the road, and from those spread to a fence, and into plaintiff's woodland, and burnt and destroyed his trees, the plaintiff was entitled to recover.

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It will be observed that the latter case is plainly distinguishable from the other and from this one. In that case, through the negligence of the company, the means for the spreading of the fire on their own property existed, by which the fire spread to their fence, and thence into the land of the plaintiff. The spreading of the fire from the tie was therefore from a cause for which the company was held answerable. In this case it is not shown, that through the negligence of the appellants, the means for the spreading of the fire from the station-house to that of the respondent existed, In fact the opposite is shown; for there was no combustible matter shown to have existed by which the fire could spread to the barn and house of the respondent—there was an open space of over one hundred feet, formed by an angle of what is marked on the plan in evidence "First Cross Street," and nothing by which the fire could spread, and, therefore, no negligence could be imputed as to the spreading of the fire. In the case of *Ryan v. The New York Central Railway Company*[20] before referred to, the decision of the court was pronounced in an able judgment pronounced by Hunt J. on the question of proximate and remote damages, and illustrates his views by a supposed case which, with others, he puts. He says:—

So if an engineer upon a steamboat or locomotive, in passing the house of A, so carelessly manage its machinery that the coals and sparks from its fires fall upon and consume the house of A, the railway company or the steamboat proprietors are liable to pay the value of the property thus destroyed. Thus far the law is settled, and the principle is apparent. If, however, the fire communicates from the house of A to that of B, and that is destroyed, is the negligent party liable for his loss? And if it spreads thence to the house of C, and thence to the house of D, and thence consecutively through the other houses, until it reaches and consumes the house of Z, is the party liable to pay the damages sustained by these twenty-four sufferers? The Counsel for the plaintiff does not distinctly claim this, and I think it would not be seriously insisted

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that the sufferers could recover in such a case. Where, then, is the principle upon which A. recovers, and Z fails? Again he says: Without deciding upon the importance of this distinction, I prefer to place my opinion upon the ground that in one case, to wit, the destruction of the building upon which the sparks were thrown, by the negligent act of the party sought to be charged, the result was to have, been anticipated the moment the fire was communicated to the building, that its destruction was the ordinary and natural result of its being fired. In the second, third or twenty-fourth case as supposed, the destruction of the building is not a natural and expected result of the first firing. That a building upon which sparks and cinders fall should be destroyed, or seriously injured, must be expected; but that a fire should spread, and other buildings be consumed, is not a necessary or an usual result. That it is possible, and that it is not unfrequent, cannot be denied. The result, however, depends, not

upon an necessity of a further communication of the fire, but upon a concurrence of accidental circumstances. Such as the degree of heat, the state of the atmosphere, the condition and materials of the adjoining structures, and the direction of the wind. These are accidental and varying circumstances. The party has no control over them, and is not responsible for their effects.

My opinion, therefore, is, that this action cannot be sustained for the reason, that the damages incurred are not the immediate, but the remote, result of the negligence of the defendants. The immediate result was the destruction of their own wood and sheds; beyond that, it was remote.

In the case of *Pennsylvania Railroad Co. v. Kerr*^[21] in the Supreme Court of Pennsylvania the judgment of the court was delivered by Chief Justice Thomson. It was in an action to recover damages for the burning of goods in a tavern, leased by the plaintiff, and which was ignited and consumed, with its contents, by fire communicated from a building set on fire, by sparks from the defendants engine. He says:—

It has always been a matter of difficulty to determine judicially, the precise point at which pecuniary accountability, for the consequences of wrongful or injurious acts, is to cease. No rule has been sufficiently defined and general as to control in all cases. Yet there is a principle applicable to most cases of injury, which amounts to a limitation. It is embodied in the common law maxim, *causa proxima non remota spectatur*—the immediate, and not the remote cause, is to be considered.

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He then refers to an illustration of the rule to be found in *Parsons on Contracts*^[22] and refers to notes in the same volume at p. 180. He again says:—

It is certain that in almost every considerable disaster, the result of human agency and dereliction of duty, a train of consequences generally ensue and so ramify, as more or less, to affect the whole community. Indemnity cannot reach all these results, although parties suffer who are innocent of blame. This is one of the vicissitudes of organized society. Every one in it takes the risk of these vicissitudes.

Again:—

It is an occurrence undoubtedly frequent, that, by the careless use of matches, houses are set on fire. One adjoining is fired by the first, a third is by the second, and so on, it might be, for the length of a square or more. It is not in our experience that the first owner is liable to answer for all these consequences, and there is a good reason for it. The second and third houses in the case supposed were not burned by the direct action of the match; and who knows how many agencies might have contributed to produce the result. * * * * The question which gives force to the objection that the second or third result of the first cause is remote, is put by *Parsons*, vol. 2, 180, "did the cause alleged produce its effects without another cause intervening, or was it made to operate only through, or by means of, this intervening cause?" There might possibly be cases in which the cause of disaster, although seemingly removed from the original cause, are still incapable of distinct separation from it, and the rule suggested might be inapplicable.

He cites *Lowrie J. in Morrison v. Davis & Co.*^[23] in support of his views, who, in giving judgment in that case says:—

There are often very small faults, which are the occasion of the most serious and distressing consequences. Thus a momentary act of carelessness set fire to a little straw and that set fire to a house, and by an extraordinary concurrence of very dry weather and high winds, with this little fault, one third of a city (Pittsburgh) was destroyed. Would it be right that this small act of carelessness should be charged with the whole value of the property consumed?

Bigelow, in his list of overruled cases^[24] puts down the judgment in *Ryan v. New York Central Railway Company*^[25], as "denied" in *Kellogg v. Chicago &*

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N. R. Co.^[26] I have examined the latter case and find that although impliedly perhaps but not expressly the principle of remoteness is denied; and, as I read the judgment of the majority of the court—there

having been a decision of two to one—it is hardly even impliedly denied. The circumstances in the two cases were somewhat different. In the case of *Kellogg v. the Chicago Co.* the fire was caused by sparks from the engine which fell on dry grass on the defendant's grounds alongside of the track, and by means of combustible matter was carried to and consumed the plaintiff's stacks of hay, sheds and stables. It was therefore one continuous burning and in that respect different from the circumstances in the other case, and Chief Justice Dixon, who gave the majority judgment, appears to have decided it upon the fact that the fire was uninterrupted throughout, and he so treats it. He says:—

If when the cinder escapes through the air, the effect which it produces upon the first combustible substance against which it strikes is proximate, the effect must continue to be proximate as to everything which the fire consumes in its direct course.

The distinction drawn by the dissenting judge (Paine) between the result of a fire spreading, as it did in that case, and that of the effect of burning sparks carried by the wind a distance from the building first ignited to another which is consumed is applicable to this case. He says:—

It seems to me, that where it is negligently kindled, the destruction of whatever is in such a situation as to burn, by the mere force of the conflagration, without other intervening cause is the direct and proximate consequence of the negligence * * * But, where such a fire is kindled, and by reason of some other intervening cause, it is carried or driven to objects which it would not otherwise have reached, the destruction of such objects would fairly seem to be a remote consequence of the negligence. * * * Thus if a person should negligently set fire to a building in which powder was stored, and the explosion of the powder should throw fragments of the

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burning building to other buildings that would not otherwise have been reached and set them on fire; or, if an unusual gale of wind, should carry such fragments to a distance with the same result, the damage for the loss of such other buildings might justly be said to be remote.

When however the year after the judgment in that case was given, an application for a rehearing was made, in the judgment thereon given.

The law, as laid down in the *Ryan* and *Kerr* cases, was denied, and I will not go so far as to say, that the liability must necessarily in all cases be confined to the first object destroyed.

There have been and no doubt, there will be, cases where the destruction of a second building by fire communicated from the first, may be found to be the natural and consequential result—where the two are connected by combustible materials, forming part of the one or the other, so that under almost any circumstances the destruction of one must result in the destruction of the other, there can be little doubt that for the destruction of the second through the burning of the first, the party guilty of the negligent burning of the first should be held answerable for the loss of the second, the burning of which was the direct and natural result of the burning of the first. Such, however, is not the present case. If the wind at the time had been from an opposite or even slightly different quarter, the respondent's house would not have been burnt. The burning of it was, therefore, not alone the usual or natural result. The burning of the respondent's house was not necessarily, and would not have been in ordinary circumstances, the cause of the damage. It may be admitted that if the appellants' building had not been set fire to, the damage to the respondent's would not have been occasioned; but it must be also admitted that, but for the particular direction and force of the wind at the

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time, the damage would not have been done. Is, then, a party who negligently causes the destruction of his own or his neighbor's house answerable for, not an immediate or ordinary result, but one arising from a cause over which he had no control? If a fire thus caused is in the near vicinity of houses in every direction around it, which would be in no danger unless with the presence of a strong wind, is the party answerable for any one or more of them that the wind happens to carry sparks to? His liability in such a case would not arise from the natural effect of the original cause but from a *vis major*, which he would have no part in producing, and would he be answerable for the effect of the wind, at one time carrying the sparks to the house of A, and by a change of direction should subsequently carry other sparks from the first building on fire, in an opposite direction to the house of B? Could it be reasonably said that in

both cases the damage was the natural and consequential result, and if not in both how could it be said that it was so in either? And is it not the proper conclusion that both were attributable to the fortuitous direction and operation of the wind?

In *Pennsylvania Railroad Co. v. Hope*^[27] Chief Justice Agnew delivered the unanimous judgment of the court. It was a case of negligently leaving combustible materials on the railway ground, which ignited; and from which the fire spread to, and consumed the plaintiff's property. He says the question of the proximity of the result of a fire by which the plaintiff's property is destroyed is solely for the jury aided by proper instruction from the presiding judge. He canvasses the judgment in the case of the *Railroad Company v. Kerr* and sustains the law laid down in it, but distinguishes the two cases. He says:—

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As the case was placed before the mind of Chief Justice Thomson, there is no reason to doubt the correctness of his conclusion.

Again:—

From the very issue of the thing, the natural probability of a consequence, which ought to have been seen, is a matter of fact to be determined upon the evidence. Every case must depend upon its own circumstances.

Referring to *Railway Co. v. Kerr* and *Kellogg v. Chicago & N. W. Railway Co.*^[28], he says:—

That in the former the point was: that the burnings were distinct and separate, a series of events succeeding one another, while in that before him, there was but one burning. One continuous conflagration from the time the fire was set on the railroad, till the plaintiff's property was destroyed.

He, therefore, unreservedly approves of both judgments—the one deciding, that in the case of the distinct and separate burnings, the damages were remote; but in the case of the one continuous burning they were proximate.

I have referred to all the English cases and decisions that I could find likely to throw light on the difficulty presented in this case, but I could not find any decision upon the application of the rule of law applicable to a case like the present. Cases are reported, where the damages were occasioned by the setting fire to combustible materials found to have been negligently left on the railway grounds, by sparks from an engine and, the *spreading* of the fire therefrom, by one continuous conflagration to the properties consumed of the parties claiming damages; but there is no case that I can find where the distinction was drawn, between such cases and one in which damage was occasioned by sparks carried a distance by the wind, and doing damage. As far as I can discover, no case has been determined in England in which it has been decided that damage done, as in this case, was proximate or remote. Whether such damages are the natural, and

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ordinarily, to be expected, result is a question I believe not yet deliberately decided in England; and, as each case should be decided by its own circumstances, it becomes a question for a jury to resolve in each case. There are no doubt cases where a party may be answerable for such damages but they are not the usual ones. Several cases have been tried in the United States, where it was shown that one continuous fire, spreading from sparks from engines, by means of combustible matter on, and alongside of, the railways, consumed property, wherein the railway companies were held answerable. As to cases like the present, the decisions are not uniform and some of them were decided on the liability imposed by statutes, but, as far as I am capable of judging, the weight of authority favors the classing of the damages in such cases as remote.

It is necessary, however, according to the course adopted generally in England and in the courts in the United States, to submit to a jury, the question whether, under the circumstances in evidence, the burning complained of was the natural and ordinary result of the imputed negligence. My own opinion is, that, under the circumstances in this case, there was not a sufficient liability established by the evidence, to justify such a submission; and, still less, for the presiding judge, to withdraw the matter from the jury, as was done, as it appears to me, in this case.

In Pennsylvania Railroad Co. v. Hope[29] in 1876 it was expressly held by the Supreme Court of that State that such an issue was for the jury. The head note is as follows:—

Sparks from defendants engine fired a railroad tie, from which rubbish, left by the defendants on their road, was fired, communicated with plaintiffs fence next to the road, and spread over two fields, burned another fence, and standing timber 600 feet distant from the

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road.

Held; that the proximity of the cause was for the jury.

2nd. In such case, the jury must determine whether the facts constitute a continuous succession of events, so linked as to be a natural whole, or whether the chain is so broken as to become independent, and the final result cannot be said to be the natural and probable consequence of the negligence of the defendants.

3rd. The rule for determining what a proximate cause is, that the injury must be the natural and probable consequence of the negligence, and that it might and ought to have been foreseen under the circumstances.

4 *Pennsylvania Railroad Company v. Kerr*[30] distinguished.

The learned judge who presided at the trial put the following questions to the jury, which were answered as follows[31]:—

It will thus be seen that the questions and answers just quoted have reference only to the origin of the fire in the freight house of the appellants; and not, in the least degree, referring to the catching on fire of the respondents barn or house. The charge of the learned judge is not reported, and we are unable to judge how he charged in reference to the latter question, if he did so at all. I should judge from the nature of the questions and answers, that the question as to the natural and ordinary result was not in any way submitted. It is in my opinion a clear case of *non-direction* upon the vital issue to properly determine the case. Had it been a general verdict, without questions and answers, we might possibly assume—but that would perhaps be going too far—that all the necessary issues under the pleadings had been submitted to, and found by, the jury; but such was not the course adopted. The findings of the jury on the questions put to them, are alone insufficient upon which to found a judgment. They only refer to the setting fire to, and destruction of, the appellants property, but in no way refer to that of the respondent.

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In my opinion the appellants, as a question of law are not answerable to the respondent for the damage she complains of, but if I am wrong in that position, the liability should be ascertained by a jury, on issues properly submitted.

I think the verdict should be set aside and a judgment of non-suit entered or, under any circumstances, a new trial granted—with costs.

GWYNNE J.—I concur in the opinion that this appeal must be dismissed, but it is unnecessary, in my opinion to decide in this case whether it is an established legal proposition that a fire originating in negligence can never be a fire "beginning accidentally" within the meaning of 14 Geo. 3 c. 78 sec. 86; it is worthy of remark, however, that the observations of Lord Denman in support of this proposition, criticising the opinion to the contrary of Sir William Blackstone as expressed in his commentaries, and the observations of Lord Lyndhurst in Lord Canterbury's case[32], were unnecessary to the decision in *Filliter v. Phippard*,[33] and are therefore open to the same objections as, in the opinion of Lord Denman, were the observations of Lord Lyndhurst in Lord Canterbury's case. The judgment of *Filliter v. Phippard* is, by Lord Denman himself, rested upon the ground that a fire which was knowingly and intentionally lighted by the defendant could never be said to be a fire beginning accidentally within the meaning of the statute. Neither that case, therefore, nor that of *Vaughan v. Menlove*,[34] therein referred to, can, I think, as I have endeavoured to point out in *Jeffrey v. The Toronto, Grey & Bruce Ry. Co.*[35], be said to establish such a proposition; against it must be taken the opinion of Sir William Blackstone and the

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express decision of the learned judge Sir John B. Robinson C. J. in *Gaston v. Wald*[36] and the fact mentioned by Lord Lyndhurst in Lord Canterbury's case, that although cases of damage from the burning of houses by negligence have frequently occurred since the statute, no instance had ever occurred to his knowledge, nor can be found in the books, of an action having been brought to recover compensation for this species of injury, nor is there any trace of any such proceeding.

The fact that no trace can be found in the English courts of such an action having ever been brought is to my mind strong evidence that the proposition that a fire originating in negligence *can never be* a fire *beginning accidentally* within the meaning of the statute, is at variance with the general impression of the English mind professional and lay, and in the absence of any such action the rule of Lyttleton referred to in *the Attorney General v. Vernon*[37] may well apply, namely—"what never was never ought to be." When the point does directly arise it will be time enough to consider the foundation upon which the proposition can be, if it can be, supported, and to decide between the opinion of Sir Wm. Blackstone with the dictum of Lord Lyndhurst, though it was unnecessary to the decision of the case before him, supported by the considered judgment of Sir John B. Robinson C.J. on the one side, and the dictum of Lord Denman, which was also unnecessary to the decision of *Filliter v. Phippard*, on the other.

The statute of Geo. 3 referred to has however no application whatever, in my opinion, in actions like the present against railway companies for compensation for injury, alleged to have been occasioned to the plaintiff by negligence upon the part of the defendants and

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their servants, in the use by them of the dangerous element which they are by law authorised to use, but this non-application of the statute is not because a fire originating in negligence cannot be an accidental one within the meaning of the statute. The principle upon which the liability of railway companies in such cases rests, is, in my opinion, this; by the common law, apart from any statute, where a person for his own private purposes brings upon his premises an engine of an extremely dangerous and unruly character, such as a locomotive engine worked by the dangerous element of fire, which, if it should escape from the fire box, in which for the working of the engine it is contained, is calculated to do much mischief, he must keep that fire confined, so as to prevent its doing mischief at his peril: and if he does not do so he will be responsible for all damage which is the natural consequence of, and directly resulting from, its escape, unless he can excuse himself by showing either that the escape was owing to the plaintiff's fault, or was the consequence of a *vis major*, or the act of God; this I take to be the principle established by the House of Lords in *Rylands v. Fletcher*[38]. But the legislature having authorised the use of locomotive steam engines as a motive power, and having authorized the carrying the dangerous element of fire along the railways for impelling the locomotives, the common law is qualified, but conditionally only upon the persons, authorized so to use the fire using it in a proper and reasonable manner (such proper and reasonable manner being estimated relatively to the dangerous nature of the element and the combustible nature of the materials with which it is brought into proximity), and using all the appliances known to science, and taking all reasonable precautions to prevent the fire escaping and

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to prevent also combustible material upon their property becoming ignited by fire from the engine coming in contact therewith, and so extending into the property of a neighboring proprietor;—in fact conditional upon their adopting all such known appliances and precautions as may reasonably be required to prevent damage to the property of third persons near which the Railway passes, and if they are guilty of any default in the discharge of this duty they are responsible for all damage which is the natural consequence of such default, whether such damage is occasioned by fire escaping from the engine coming directly in contact with and consuming the property of such third persons, or is caused to the property of such third persons by fire communicated thereto from property of the railway company themselves which had been ignited by fire escaping from the engine coming directly in contact therewith[39].

We are of opinion (says Bramwell B. when delivering the judgment of the Court of Exchequer in *Vaughan v. Taff Vale Ry. Co.*)[40], that the statute[41] does not apply where the fire originates in the use of a dangerous instrument knowingly used by the owners or the land in which the fire breaks out.

And in that case in the Court of Exchequer Chamber[42] (while reversing the judgment of the Court of Exchequer upon the ground that as it was found as a fact that the defendants were guilty of no negligence no action lay), Cockburn C. J. states the principle upon which these actions rest thus:—

Although it may be true that if a person keeps an animal of known dangerous propensities or a dangerous instrument he will be responsible

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to those who are thereby injured, independently of negligence in the mode of dealing with the animal or using the instrument, yet when the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it is authorized and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence that if damage results from the use of such thing independently of negligence the party using it is not responsible.

And Blackburn J. says:—

Rex. v. Pease has settled that when the legislature has sanctioned the use of locomotive engines, there is no liability for injury caused by using them, so long as every precaution is taken consistent with their use.

The principle of liability then being, that unless every precaution is taken to prevent injury occurring from the fire in the locomotive engine, the party neglecting to take such precaution cannot claim the protection of the statute which authorizes the use of the engine, but is subject to the same liability as he would have been liable to at common law, apart from the statute, for such reason, the statute 14 Geo. 3rd ch. 78 has no application. This it will be observed, also, is the same point as is decided by the judgment in *Filliter v. Phippard*[43].

In these actions, therefore, against railway companies for compensation for damage occasioned by fire proceeding from their engines in the use of them as sanctioned by law the enquiry always is:—Have they complied with the condition subject to which alone the use of the fire, in the manner in which it is used by them, is authorized, and by compliance with which they can alone relieve themselves from liability? Have they used the destructive element under their control with that degree of care which was reasonably requisite, in view of the danger to be apprehended of inflicting injury and which the circumstances in each case called for? Negligence, as said by Willes J. in

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Vaughan v. Taff Vale Railway Co.[44], is the absence of care according to the circumstances. In this case the evidence clearly proved, and indeed upon this point there was no dispute, that the property of the plaintiff was set fire to by fire directly communicated to it proceeding from a freight shed of the defendants which was on fire and which was situate just across a street in the village of Chippewa, which separated the property of the defendants from that of the plaintiff, and there was abundant evidence to go to the jury upon the question, whether in point of fact this freight shed was or not set fire to, by sparks issuing from an engine of the defendants which had passed there immediately before the breaking out of the fire in the shed. The defendants' contention at the trial was that the smokestack of the particular engine had attached to it a perfect netting or screen to prevent sparks escaping. But there was evidence of the strongest character that a shower of sparks did in fact escape from the smoke stack precisely as the engine passed the shed, and fell on the platform all around about and upon and against the freight shed, and the witnesses of the defendant admitted that if this evidence was true the netting could not have been perfect, what they plainly intended to convey thereby being that, in their opinion, it was not true. The evidence upon this point however, if believed, was quite sufficient to justify the jury in finding, and they did believe it to be true, and accordingly found as a fact, that the freight shed was set fire to by sparks escaping from the smoke stack, and that those sparks escaped by reason of the apparatus for arresting sparks having been out of order; they also found that having regard to the dryness of the season the engine was taken past the freight shed, which was quite close to

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the track, under too heavy pressure of steam, such heavy pressure having the tendency to cause sparks to escape, and that the state in which the freight shed was (there having been evidence that its floor was saturated with oil and that the building itself, which was of wood, was very dry and inflammable) was not such a condition as having regard to its proximity to passing trains should have been permitted. That there was evidence to go to the jury upon all of these points, and which, if believed (and of its truth they were the sole judges), was sufficient to support these findings, cannot, I think, be doubted; it is therefore unnecessary to consider whether their finding that "as it was a special train and on Sunday when "employees were not on duty, there should have been "an extra hand on duty," if it stood alone, would be a sufficient finding of negligence to support a verdict in favor of the plaintiff.

The learned counsel for the appellants strongly contended that as the plaintiff's buildings were ignited, not by sparks proceeding directly from the engine and falling on the buildings of the plaintiff, but by fire proceeding from the freight shed, the damage so done to the plaintiffs property was too remote to justify a verdict against the defendants. In support of this contention he relied upon a case of *Ryan v. New York Central Ry. Co.* [45], decided in the Court of Appeals of New York in 1866, which certainly does appear to lay down very distinctly such a proposition. In that case the New York Central Railroad Company, by the negligent manner of conducting an engine, or by the defective condition of the engine, set fire to a quantity of wood in one of their own sheds; the fire consumed the wood shed and spread to, and consumed, the house of the plaintiff situate about 180 feet

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distant from the shed, and the court held that the plaintiff had no cause of action against the railroad company, on the ground that the plaintiff's injury was not the necessary or natural consequence of, nor the result ordinarily to be anticipated from, the negligence committed, that the plaintiff's injury was the remote and not the proximate result of the fire in the wood shed, and too remote to give a cause of action. In *Webb v. The Rome Watertown & Ogdensburg Ry. Co.* [46], however, the same court differently constituted in 1872, citing and relying upon *Vaughan v. Taff Vale Ry. Co.* [47] and *Smith v. London & S. W. Ry. Co.* [48], held that where coals were negligently dropped from an engine of the defendants which set fire to a tie, from which the fire was communicated to an accumulation of weeds, grass and rubbish, which lay on the side of the track, and thence spread to the fence and into plaintiff's woodland burning and destroying his trees, the plaintiff was entitled to recover. In the report of *Smith v. London & S. W. Ry. Co.* in the Common Pleas, there is something in the language of Brett J., who dissented from the majority of the court, which upon a cursory view appears also to give countenance to the appellants' contention. He says there [49]:—

I take the rule of law in these cases to be that which is laid down by Alderson B. in *Blyth v. Birmingham Waterworks Co.* [50], "negligence "is the omission to do something which a reasonable man' "guided upon those considerations which ordinarily regulate the "conduct of human affairs would do, or doing something which a "prudent and reasonable man would not do."

And again at p. 103:—

I quite agree that the defendants ought to have anticipated that sparks might be emitted from their engines, notwithstanding they are of the best construction and were worked without negligence, and that they might reasonably have anticipated that the rummage and hedge trimmings allowed to accumulate might be thereby set on

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fire. But I am of opinion that no reasonable man could have foreseen that the fire would consume the hedge and pass across the stubble field and so go to the plaintiff's cottage at the distance of 200 yards from the railway, crossing a road on its passage. It seems to me that no duty was cast upon the defendants in relation to the plaintiff's property, because it was not shown that the property was of such a nature and so situate that the defendants ought to have known that by permitting the rummage and hedge trimmings to remain on the banks of the railway they placed it in undue peril.

And again:—

I am of opinion as matter of fact that no reasonable man could suppose—or at least eight out of ten would fail to suppose—that if by any means the rummage and hedge trimmings on the side of the

railway were set on fire, the fire would extend to a stubble field adjoining and so proceed to a cottage at the distance before mentioned.

And he concludes thus:—

I think that the defendants cannot reasonably be held responsible for not having contemplated such an extraordinary combination of circumstances or such a result. For these reasons I am of opinion that there was no such evidence of negligence on their part as could properly be left to a jury.

Now, it is to be observed that these remarks of the learned judge as to the remoteness of the damage, and as to its not being reasonably (within the contemplation of a prudent and careful man,) such a natural consequence of the rummage and hedge trimmings being left where they were, as to make the leaving of them such negligence, as standing alone in the absence of any evidence whatever of negligence in the mode in which the fire was used and its escape guarded against, should render the defendants liable, are made by the learned judge to justify the conclusion at which he had arrived that no evidence of negligence proper to be left to a jury was produced. His remarks are not at all addressed to the consideration, whether: if there was evidence that the fire in the rummage and hedge trimmings had been occasioned by a negligent use of the fire carried in the locomotive, and by its being permitted to escape by reason of some negligent defect in the engine, or its

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screen, or of some other negligence in the conduct of the engine, the fact of the fire having been communicated to the plaintiff's property through the medium of the fire spreading from the rummage and hedge trimmings along the ground through the stubble field to the plaintiff's house and not by sparks emanating from the engine directly striking the plaintiff's house and setting fire to it, would make the injury to the plaintiff in such case to be too remote to constitute a cause of action. This distinction is plainly pointed out in the case when in the Exchequer Chamber^[51] where Channell B. says:

I quite agree that where there is no direct evidence of negligence the question what a reasonable man might foresee is of importance in considering, the question whether there is evidence for the jury of negligence or not, but if it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences whether he could have foreseen them or not.

And Blackburn J. who entertained doubts similar to those which had been entertained by Brett J. says:—

I also agree that what the defendants might reasonably anticipate is, as my Brother Channell has said, only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence.

And after stating the grounds of his doubts of their being sufficient evidence of negligence in that case, he says:—

I do not say that there is not much in what is said with respect to the trimmings being the cause of the injury and not the state of the hedge, but I doubt on this point and therefore doubt if there was evidence of negligence. If the negligence was once established it would be no answer that it did much more damage than was expected.

Now, in the case before us, there was, as I have already said, abundant evidence which, if believed, justifies the finding of the jury that the fire in the shed was occasioned by sparks emanating from the smokestack by reason of the apparatus for arresting sparks being out of order, and that the engine should

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not have been taken past the freight house in that dry season under such a heavy pressure of steam, and as it appears that the plaintiff's buildings were ignited and consumed by sparks conveyed from the burning freight shed, I am of opinion that the injury sustained by plaintiff is a damage naturally consequential upon and resulting from the defendants' negligence found by the jury, and for which the defendants are in law responsible.

I express no opinion upon the point as it does not arise upon this record: whether damage sustained by another person whose buildings may have been destroyed by fire proceeding from the plaintiff's burning buildings, or from an intermediate building of a third person, whose building had been ignited by fire, proceeding from the plaintiff's building, being carried by the wind to the property of the plaintiff would or not be too remote to constitute a good cause of action against the defendants? Whether or not in such case the negligence of the defendants could be said to be *causa causans* of such damage? It may be that there must be some point where, in a fire so spreading from house to house, the liability of the defendants ceases even though their negligence be the cause of the occurring of the first fire. In the case of a fire so spreading it may be that in the case of a building far removed from that in which the fire first broke out becoming ignited by fire, proceeding from an intermediate building, there may be some circumstances to be taken into consideration as constituting the *causa causans* of the damage, which would distinguish that case from that of the fire, as in the case before us, proceeding directly from the defendants' shed but such a point does not arise upon this record. It is stated it is true, in the appellants factum that a number of actions have been brought against the defendants and that it.

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has been agreed that the defendants liability in those actions shall be determined by the result of this present one. This circumstance however cannot authorize us to import into the consideration and determination of this case any facts not actually appearing in evidence in the case. It may be that the facts in the other cases are identical with those appearing in this case. It may be that in some of the other actions the facts are in some particulars different. How this may be we know not. To all cases similar in their facts to the present our judgment will of course, under the agreement referred to, naturally apply, and if the agreement affects cases, the facts of which may be materially different from those appearing in the present case, that is a matter over which we have no control and with which we cannot interfere.

Upon the facts, as they appear in the present case, I am of opinion that the damage of which the plaintiff complains is damage naturally consequential upon and resulting from the negligence of the defendants as found by the jury, and that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants: Crooks. Kingsmill & Catanach.

Solicitors for respondent: Rykert & Ingersoll.

[1] 15 M. & W. 251.

[2] 2 U. C. Q. B. 448.

[3] 31 U. C. C. P. 527.

[4] 35 N. Y. App. R. 210.

[5] 62 Penn. 353.

[6] L. R. 3 C. P. 222; s. c. L. R. 3 C. P. 594; s. c. L. R. 5 H. L. 56.

[7] L. R. 9 Ex. 161.

[8] 13 U. C. Q. B. 503.

[9] L. R. 3 Q. B. 733.

[10] L. R. 3 H. L. 330.

[11] 2 Ex. D. 1.

[12] 11 Q.B. 347.

[13] 1 Phi. 328.

[14] 2 U. C. Q. B. 448.

[15] 35 U. C. Q. B. 475.

[16] 2 W. Black p. 892; 1 Smith L. C. p. 466.

[17] P. 77.

[18] 35 N. Y. Rep. 210.

[19] 49 N. Y. Rep. 420.

[20] 35 N. Y. R. 210.

[21] 62 Penn, 353.

[22] 3 vol. p. 198.

[23] 8 Harris 171.

- [24] P. 437.
- [25] 35 N. Y. 210.
- [26] 26 Wis. 223-238.
- [27] 80 Penn. R. 373.
- [28] 26 Wis. 223.
- [29] 80 Penn. 373.
- [30] 12 P. F. Smith 353.
- [31] *Ubi supra* p. 134.
- [32] 1 Ph. 306.
- [33] 11 Q. B. 347.
- [34] 3 Bing N. C. 468.
- [35] 24 U. C. C. P. 276.
- [36] 9 U. C. Q. B. 586.
- [37] 1 Vernon 385.
- [38] L. R. 3 H. L. 330.
- [39] *Pigott v. Eastern Counties Ry. Co.*, 3 H. & N. 743; and in the Exchequer Chamber, 5 H. & N. 679; *Fremantle v. L. & N. W. Ry. Co.*, 10 C. B. N. S. 90; *Jones v. Festiniog Ry. Co.*, L. R. 3 Q. B. 737; *Smith v. L. & S. W. Ry. Co.*, L. R. 5 C. P. 98; and in the Exchequer Chamber, L. R. 6 C. P. 14.
- [40] 3 H. & N. 752.
- [41] 14 Geo. 3 c 78
- [42] 5 H. & N. 688.
- [43] *Ubi supra*.
- [44] 5 H. & N. 688.
- [45] 35 N. Y. Rep. 210.
- [46] 49 N. Y. R. 420.
- [47] 5 H. & N. 688.
- [48] L. R. 5 C. P. 98.
- [49] L. R. 5 C. V. at p. 102.
- [50] 11 Ex. at p. 784.
- [51] L. R. 6 C. P. 21.

Preamble

income of each child's contingent share (i) under the Conveyancing Act 1881, s 43(1), or (ii) under the inherent jurisdiction of the court. In *Bruin v Knott*, where the share of the infant there concerned was held to be contingent, it was decided that there was power to recoup under the section.

Bennett J: But does that section enable a trustee to recoup a guardian who has expended her own money in the past?

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Andrew Clark for the defendant: The position is that a trustee can recoup a guardian who has spent his own money, provided that the expenditure took place during a time when the section was applicable. But in this case, although the section applies now, it did not come into operation until 10 February 1936. Sub-s (3) of the section says that it is only to take effect when there is no contrary intention in the will, and in the circumstances of the case the section did not come into operation until 10 February 1936, when the trust for accumulation came to an end. Until that date the will limited the amount of maintenance to be paid to the children to £100 each per annum.

Bennett J: A direction that income shall be accumulated is not such a contrary intention.

Andrew Clark: A mere provision for accumulation would not be sufficient. But when there is an overriding trust for an accumulation, that is a prior interest and that does exclude the operation of the section; see *Re Alford, Hunt v Parry*. The first gift in this will is an overriding trust to accumulate the whole of the income which is not even to be divided into shares until after that trust is over. That trust to accumulate coupled with the provision to maintain to the extent of £100 each together amount to an expression of a contrary intention.

Bennett J: In *Re Alford* the plaintiff got his allowance.

Andrew Clark: But he was absolutely entitled after the termination of the trust for accumulation, whereas the plaintiffs here are only contingently entitled on their attaining 21, and there must have been some very special circumstances in that case: see p 387.

Bennett J referred to *Re Thatcher*.

Andrew Clark: That is quite a different case. There the trust was to accumulate the income of the infant's share, which is quite a different thing from a trust as here to accumulate the whole income of the fund. That is a prior trust.

On the first two questions in the summons in my submission this is not a case in which the court ought to interfere with proposed exercise of the trustee's discretion. He is desirous of exercising his power for advancement under the Conveyancing Act, and he is a man of experience in bringing up boys, having six sons of his own, and he was a great friend of the testator and of the plaintiffs' father.

Norwood in reply: The only contrary intention in the will applies to the whole settled fund. The contrary intention envisaged by the Conveyancing Act must be a contrary intention with regard to the infant's share.

W S Norwood for the plaintiffs.

Andrew Clark for the defendant.

15 October 1936. The following judgment was delivered.

BENNETT J. I am not prepared to make any order on this summons. I will make no order on the first question, and as regards the question added by amendment, I decide that under s 43 there is no power to ☞ **199** recoup the mother. The costs of all parties as between solicitor and client to be paid out of the accumulations of income.

Solicitors: *Richard Brooks & Son*, agents for *Owen Bailey & Hulme*, Huddersfield (for the plaintiffs); *Jaques & Co*, agents for *Armitage Sykes & Hinchcliffe*, Huddersfield (for the defendant).

C M Young Barrister.
[1936] 3 All ER 200

Collingwood v Home and Colonial Stores Ltd

TORTS; Nuisance

COURT OF APPEAL
LORD WRIGHT MR, ROMER LJ AND MACNAGHTEN J
20 OCTOBER 1936

Nuisance – Adjoining premises – Fire caused by fault in electric lighting circuit – Damage to adjoining premises by water – No negligence.

In premises adjoining those of the plaintiff a fire originated, due to some unknown defect in the electrical wiring. The plaintiff's premises were damaged by the water used for extinguishing the fire:—

Held – in the absence of any proof of negligence by the defendants in the installation or the maintenance of the electrical wiring, they were not liable in damages to the plaintiff. The doctrine of *Rylands v Fletcher* does not apply to the use of water, gas or electricity for ordinary domestic purposes, which must be distinguished from the handling of them in bulk in mains or reservoirs.

Notes

This case includes a full discussion of the question whether the doctrine of *Rylands v Fletcher* can be extended to the ordinary domestic use of electricity and a clear distinction is drawn between its domestic use and its transference in bulk along mains. The former use is held not to be within the doctrine since it is part of the ordinary user of property.

For the Doctrine of *Rylands v Fletcher*, see Halsbury (1st Edn), Vol 21, Nuisance, pp 525–530, paras 887–897, and for Cases see Digest, Vol 36, pp

Cases referred to

Filliter v Phippard (1847) 11 QB 347; 36 Digest 54, 334.

Rylands v Fletcher (1868) LR 3 HL 330; 36 Digest 187, 311.

Musgrove v Pandelis [1919] 2 KB 43; 36 Digest 54, 339.

Northwestern Utilities Ltd v London Guarantee & Accident Co [1936] AC 108; Digest Supp.

Green v Chelsea Waterworks Co (1894) 70 LT 547; 38 Digest 23, 125.

Rickards v Lothian [1913] AC 263; 36 Digest 194, 353.

Blake v Woolf [1898] 2 QB 426; 36 Digest 93, 615.

Midwood & Co Ltd v Manchester Corpn [1905] 2 KB 597; 20 Digest 212, 76.

Charing Cross Electricity Supply Co v Hydraulic Power Co [1914] 3 KB 772; 36 Digest 189, 315.

Appeal

Appeal from a judgment of Greaves-Lord J, delivered on 27 January 1936, dismissing with costs an action brought by the plaintiff in which he claimed damages for injury to his goods and business, caused by the negligence of the defendants in permitting a fire to break out upon their premises causing damage to the premises occupied by the plaintiff.

The plaintiff was the lessee of shop premises at 120, High Street, Barnet. His shop had two rooms over it and adjoined a cinema. On the other side of the cinema were the defendants' grocery stores. Above the cinema and the grocery stores was a flat occupied by the cinema manager. The grocery stores had a basement which was used as a storeroom and was connected with the shop by a lift. The defendants' premises were lighted by electric light for which current was supplied by the local undertaker. The leads entered the front of the basement, where the main switch was fixed, and the current was then carried to two pendant lights suspended from the ceiling, one a few feet from the main switch and the other a short distance from the hole in the floor of the shop through which the lift travelled. There was conflict of evidence on the method of wiring, but the learned judge found that the wiring was enclosed partly in lead cable and partly in wooden casing. He found some ground for saying that some of the wiring was ordinary black and red twin flex, which ran across the basement and from opposite the lift opening to the lamp near the main switch. Fire broke out about 7 am on 22 June 1934, in the basement and spread up to and destroyed the shop, the cinema, and the manager's flat; and the plaintiff's shop was so saturated with water that it was rendered unsafe and had to be rebuilt. The plaintiff claimed damages, alleging in his particulars that the fire was caused by the electric wiring in the basement of the defendants' grocery store being permitted to remain in a dangerous and defective condition after the defendants' manager had been warned by one Bryant, the captain of the local fire brigade, about June 1933, that the wiring was inefficient and dangerous. The defendants denied that a fire had broken out, and alternatively said that the fire began accidentally and without any negligence on the part of themselves, their servants or agents, and that they would rely on the Fires Prevention (Metropolis) Act 1774, s 86. The plaintiff also alleged, in further and better particulars, that the electric wiring in the cellar close to the lift consisted of flex tacked on to bare boards without any protective covering.

The learned judge in his judgment (reported in [1936] 1 All ER 74) concluded that the fire originated in the basement and was in some way connected with the electrical wiring. He found no proof of how the fire started and could not say whether it was the result of faulty wiring or of some conditions that caused a leakage of current. He was not satisfied that any warning had been given in 1933. Although there was some doubt whether the installation was in accordance with modern requirements, he could not find the omission to bring it up to date to be negligence, in view of the fact that public authorities made no requirement to that effect. Nor was there, he found, any evidence that any skilled person found the installation defective, although on at least two occasions since 1930 the wiring was tested by the usual tests employed by experts, namely, for short-circuits as between poles and for leakage anywhere in the system, and was found to be all right.

After reviewing the authorities he came to the conclusion that he must dismiss the action with costs. The plaintiff appealed.

H D Samuels KC and *G J Paull* for the plaintiff.

J G Trapnell KC and *H G Willmer* for the defendants.

Samuels KC: At common law a person on whose premises fire starts is responsible for damage caused by its spread. The Fires Prevention (Metropolis) Act 1774, s 86, removed liability for fire accidentally started but not for fire caused by negligence: *Filliter v Phippard*. In *Musgrove v Pandelis*, where fire broke out in the carburettor of a motor car and, through the negligence of a servant in failing to put it out, spread to adjoining premises, it was held that an occupier who brought a dangerous thing on to premises was not protected by the 1774 Act, and that a motor car was a dangerous thing. Electricity brought on to premises is equally likely to do damage if it is not kept in control. *Rickards'* case merely laid down that when land is used in the ordinary way and damage happens to adjoining property without negligence or default in the occupier, he is not liable within the rule in *Rylands v Fletcher*. In *Midwood & Co v Manchester Corporation* nuisance was held to have been committed when premises were blown up through the agency of electric lighting. In the present case the system of electric lighting used was an old and out-of-date one. If a person keeps upon his premises an old and out-of-date system of wiring, in the circumstances dangerous, he is just as guilty of negligence as if he had performed a negligent act. The 1774 Act does not protect the defendant if he has committed negligence, or if his liability is within the rule in *Rylands v Fletcher*. It was held in the *Northwestern Utilities* case that gas was a *Rylands v Fletcher* object, but that, if it escaped without negligence, the occupier was not liable. Electricity is not within the same principle as gas and water. It is known to be dangerous in itself; it gives no warning of its escape, and it only escapes through some defect in the installation. If it escapes, there is no defence under the Act or at common law. This case is covered by *Musgrove's* case and is *a fortiori*.

Trapnell KC was not called upon.

H D Samuels KC and *G J Paull* for the plaintiff.

J G Trapnell KC and *H G Willmer* for the defendants.

20 October 1936. The following judgments were delivered.

LORD WRIGHT MR. This is an appeal from a judgment of Greaves-Lord J, in a case of some interest, and in which Mr Samuels has very ably put his argument in favour of the appeal being allowed; but I am of opinion that the decision of the learned judge is not one which this court would be disposed to interfere with. So far as his findings of fact are concerned I want to make it quite clear that the practice of this court in non-jury cases will not be to attempt to re-try the issues of fact which the learned judge has decided, and, *prima facie*, his decision will be accepted by this court. That does not, of course, mean that the court will not fulfil its statutory duty to re-try the case, but it will always remember that the learned judge has had the benefit of seeing and hearing the witnesses, and where there is anything in the nature of technical evidence he has had the advantage of seeing and examining photographs and plans, and material of that sort, which cannot be dealt with in this court.

In the present case the question arises in this way. The defendants were occupiers of premises, 124, High Street, Barnet. There was a basement to

those premises, and above the basement was the ground floor, the front part of which was a shop, and behind the shop was the warehouse. The only access to the basement was down a rough sort of lift which came up into the warehouse. Above the warehouse and the shop, and without any connection from the ground floor to the first floor, there was a flat occupied by a gentleman who was employed in the adjoining cinema. The structure of the flat itself was somewhat flimsy. The plaintiff was the occupier of the premises, 120, High Street. There were, I think, some adjoining premises, and there were premises in between, but they may be disregarded for this purpose. The trouble was that one morning, I think a Sunday morning, at 7 o'clock, the gentleman who occupied the flat, and who was asleep along with his wife in the flat, was disturbed and discovered that the premises were on fire. He managed to escape with his wife, and the police appeared, and the fire brigade, and the fire was eventually got under; but it spread from the defendants' premises and the flat to the plaintiff's premises and did a certain amount of damage there, and it is in respect of that damage that the plaintiff brings his action.

In his pleadings he seeks to avoid the application of the Fires Prevention (Metropolis) Act 1774, s 86. That section provides in effect that no action shall be brought against any person in whose house, chamber, or other building any fire shall accidentally begin, any law, usage, or custom to the contrary notwithstanding. That Act, as is well known, changed the law, because before that Act if a fire spread from a man's premises and did damage to adjoining premises, he was liable in damage on the broad ground that it was his duty at his own peril to keep any fire that originated on his premises from spreading to and damaging his neighbour's premises. The protection of the section is limited by the word "accidentally." The meaning of that is discussed in *Filliter v Phippard*, where it was held that the section did not apply to a fire due to the negligence of the defendant or his servants. It may be in *203*: some cases a matter of some difficulty to reconcile the word "accidentally" with the idea that there should be no negligence. It is not, however, necessary to discuss that here. I shall refer a little later to another case in which some further qualification seems to have been imposed upon the effect of the statute; but for the moment I shall be content with stating the effect of that decision, which has always been regarded as a leading case.

Now, in the statement of claim the pleader, who was, of course, aware of the statutory protection, sought to evade it by anticipation. In para 4 of the statement of claim he says:

'The fire referred to in the last preceding paragraph was caused by the negligent acts or omissions of the defendants, their servants or agents,'

and in the particulars:

'The fire was caused by the electric wiring in the basement of the said premises occupied by the defendants being permitted to remain in a dangerous and defective condition after the defendants' manager had been warned by one Bryant, Captain of the Barnet fire brigade in or about the month of June, 1933, that the said wiring was inefficient and dangerous.'

Then some particulars of the alleged defect in the electric wiring are given a little later, and it was said that the warning was oral, and was orally given by John William Restall at the same time as it was given by Captain Bryant. That being the issue raised by the statement of claim, it is only necessary to refer to one paragraph in the defence, wherein the defendants said that the fire

'began accidentally and without any negligence on the part of themselves or their servants or agents, and they will if necessary rely on the Fires Prevention (Metropolis) Act, 1774, s. 86.'

The learned judge has dealt with the issues in his judgment, and he has found that the fire was accidental. Occurring, as it did, in the middle of the night, or in the very early hours of the morning, how it occurred can only be a matter of inference; but the learned judge finds that the fire must have started in the basement. It is a little curious. There were traces of a fire in the basement, and the lift had been burnt, and the underside of the floor of the lift, and the scorching along the wire in the basement also pointed to the basement as the place where the fire had originated. The learned judge comes to that conclusion, and he also finds that the fire was in some way connected with the electrical wiring, but he is not able to say precisely how the fire started. He goes on to find—I will read the short passages from the judgment, because they show conclusively and concisely what his conclusion of fact was. He says, at p 76:

'It may have been by a fusing of the wiring, but what caused the wire to fuse? Was it a result of faulty wiring, or of some conditions that caused a leakage of *204*: current in the basement? I am unable to say. It is said the wiring was defective and that a warning to that effect was given in 1933. [That relates to the pleadings.] I am not satisfied that any warning relating to the basement wiring was given in 1933. I am inclined to the view that there is some confusion by reason of the fact that a warning referring to some other matter was given in 1933, but that was confined to the warehouse and had long before been remedied. No other head of negligence is suggested, and although there is some doubt as to whether the installation was in accordance with the modern requirement, I cannot find the omission to bring it up to date to be negligence, in view of the fact that public authorities make no requirement to that effect. Nor is there any evidence that any skilled person found the installation defective, although on at least two occasions since 1930 the wiring was tested by the usual tests employed by experts, namely, for short circuits as between poles and for leakage anywhere in the system, and was found to be all right.'

The learned judge adds that a short-circuit might be caused by rats or by water escaping, and in other ways. His conclusion, therefore, is on the facts that the fire was an accidental fire.

Mr Samuels has drawn our attention, very properly, to the evidence; but it is quite impossible, in my opinion, to say that there was no evidence on which the learned judge could find as he did, or that his conclusions above set out are not reasonably justified by the evidence that there was before him. I accept, therefore, his conclusion that the fire was an accidental fire, and that no proof of negligence has been adduced to justify setting aside what the learned judge has decided in the passage which I have just quoted. Mr Samuels, however, has raised a point of somewhat general importance. His argument is that the statute does not apply in a case where the event has occurred by reason of the defendant doing some acts which bring the case within the well known rule in *Rylands v Fletcher*—a rule often referred to. His argument is that the statute does not protect the defendants, even if the fire was accidental, and even if there is no negligence, if in fact they have brought or maintained on their premises something which is, I was going to say a dangerous article within the ruling in that case; but I hesitate to use any adjective. So many adjectives have been used, and so many adjectives have been criticised, that I prefer not to run the risk of an erroneous or inadequate statement. But Mr Samuels has relied very strongly upon certain language used in *Musgrove v Pandelis*. In that case the fire originated in a motor car. The plaintiff occupied furnished rooms over a garage. Part of the garage was let to the defendant; his chauffeur started the engine of the motor car and for some reason, without negligence on his part, the petrol in the carburettor caught fire. That in itself would have done no harm; the fire would have burned out at once if the tap had been promptly turned off, but the servant did not do so; the fire spread, and eventually having burned the car in the garage, set fire to the plaintiffs rooms and furniture. It was sufficient ground for the particular decision that the fire, that is to *205*: say the substantial fire, which actually caused the damage, was not caused without negligence. The fire which caused the damage was that which flowed from the original innocuous fire spreading, through the fault of the chauffeur, to the petrol in the tank, and that

was clearly due to an act of negligence and, therefore, the protection of the statute did not apply. That was enough for the decision of the case. It was, however, said, I think by all three members of the Court of Appeal, that the state of the law before the earlier statute was that a man was liable at common law for damage done by fire originating on his own property, (i) by the mere escape of fire—that was the old rule; (ii) if the fire was caused by the negligence of himself or his servants, or by his own wilful act; and (iii) on the principle of *Rylands v Fletcher*. That having been laid down, the Court of Appeal proceeded to hold that the principle of *Rylands v Fletcher* would apply here. The view was expressed that the motor car was dangerous within that principle; it had been brought by the defendant upon his premises and, simply on that ground, the defendant was responsible for the fire which resulted, and was not within the protection of the statute. Well, I certainly have no desire to criticise in any way the actual decision in that case so far as it is based on the view that the real and substantial and destructive fire was the result of negligence. I confess, however, I find some difficulty about the other ground on which the decision was based, though, if it were necessary, I should follow the ruling of the Court of Appeal and apply it here if the case came within the scope of that ruling. But I do not think it does. I do not think for one thing that the ruling which was there applied to a motor car would necessarily in any event apply to the facts here of the defective electric wiring of these premises, and that would be enough. But in my judgment the principle of *Rylands v Fletcher* in any case does not apply to the position here. I am going to avoid anything like an affirmative statement of all that is covered by that famous case, and still less will I attempt to define the various qualifications which have been superimposed upon it, and which are illustrated in the most recent case on the point, the case of the *Northwestern Utilities Ltd v London Guarantee & Accident Company*. I will only quote from that, one passage, a quotation from the expressions of Lindley LJ, in *Green v Chelsea Waterworks Co*, at p 549, in respect to *Rylands v Fletcher*, in which he said:

‘That case is not to be extended beyond the legitimate principle on which the House of Lords decided it. If it were extended as far as strict logic might require, it would be a very oppressive decision.’

The particular limitation, which is all I want to refer to here, is this, that the principle does not apply to what may be described as the reasonable or ordinary use of premises. That qualification is very well illustrated by the decision of the Judicial Committee of the Privy Council ¶ 206 in *Rickards v Lothian*. There were many questions raised in that case, and I only want to refer to one particular matter which is dealt with in the report on p 280 and onwards. Lord Moulton there says, giving the judgment of the Privy Council:

‘It is not every use to which land is put that brings into play [the principle of *Fletcher v Rylands*]. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.’

Lord Moulton then referred to a decision of Wright J in *Blake v Wolf*, where the question was whether a leakage of water from the ordinary house pipe in the defendant’s premises brought into effect the principle of *Rylands v Fletcher*, and Wright J there said, at p 428:

‘The general rule as laid down in *Rylands v Fletcher* is that *prima facie* a person occupying land has an absolute right not to have his premises invaded by injurious matter, such as large quantities of water which his neighbour keeps upon his land. That general rule is, however, qualified by some exceptions, one of which is that, where a person is using his land in the ordinary way and damage happens to the adjoining property without any default or negligence on his part, no liability attaches to him. The bringing of water on to such premises as these and the maintaining a cistern in the usual way seems to me to be an ordinary and reasonable user of such premises as these were; and, therefore, if the water escapes without any negligence or default on the part of the person bringing the water in and owning the cistern, I do not think that he is liable for any damage that may ensue.’

Lord Moulton approved of that and he goes on to say later in his judgment at p 282:

‘In such matters as the domestic supply of water or gas it is essential that the mode of supply should be such as to permit ready access for the purpose of use, and hence it is impossible to guard against wilful mischief. Taps may be turned on, ball-cocks fastened open, supply pipes cut, and waste pipes blocked.’

I should prefer to add there, “and any of these pipes, either gas or water, might leak”—I was going to say automatically, but, “might leak without any apparent cause and without any negligence.” Lord Moulton goes on:

‘Against such acts no precaution can prevail. It would be wholly unreasonable to hold an occupier responsible for the consequences of such acts which he is powerless to prevent, when the provision of the supply is not only a reasonable act on his part but probably a duty. Such a doctrine would, for example, make a householder liable for the consequences of an explosion caused by a burglar breaking into his house during the night and leaving a gas tap open. There is, in their Lordships’ opinion, no support either in reason or authority for any such view of the liability of a landlord or occupier. In having on his premises such means of supply he is only using those premises in an ordinary and proper manner, and, although he is bound to exercise all reasonable care, he is not responsible for damage not due to his own default, whether that damage be caused by inevitable accident or the wrongful acts of third persons.’

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I think that these words apply precisely to the electric wiring which everybody, or most people, nowadays have in the houses which they occupy whether for domestic use, or for purposes of trade as the defendants did. There is nothing in the installations of such wiring which, to my mind, brings this case within the principle of *Rylands v Fletcher*. It is perfectly true that electricity, like gas and water, may be regarded from one point of view as a dangerous thing, and the principle of *Rylands v Fletcher* has been applied to persons who carry, in their property or in their mains, gas, water or electricity. It would be easy to give instances. I refer to one case of electricity—*Midwood & Co Ltd v Manchester Corporation*, and the case of water illustrated by the *Charing Cross Electricity Supply Company v Hydraulic Power Company*, and gas is illustrated by the *Northwestern Utilities* case, to which I have already referred. But in all these cases there was nothing comparable to the ordinary domestic installation of electric wiring for the ordinary comfort and convenience of life. In all these cases these dangerous things were being handled in bulk and in large quantities; they were being carried in mains, and, in the words in the *Northwestern Utilities Company* case, at p 118, “the gas”—or the other substances—“constitutes an extraordinary danger created by the appellants for their own purposes,” and it followed that they acted at their own peril. There was a carriage or an accumulation of the dangerous thing. These cases undoubtedly come within the principle of *Rylands v Fletcher*, but they seem to me to be very different in principle and in result from the case of the ordinary domestic pipes for gas or water or for wiring electricity, and on that ground I think that the argument which Mr Samuels has put forward so strenuously fails, and that the judgment of the learned judge should be upheld. That ground is that on which the judge himself put his decision, and I think he was right in doing so and, therefore, the appeal fails and should be dismissed with costs.

ROMER LJ. I agree with the judgment of Lord Wright MR, both as to his conclusion and the reasons that he has given for arriving at that conclusion.

I only desire to add this. I think at some time it will be desirable if the House of Lords would consider the case of *Musgrove v Pandelis*, so far as the decision in that case was based upon *Rylands v Fletcher*. Of course the rule in *Rylands v Fletcher*, as is well known, is a rule which relates to the escape from somebody's premises of a dangerous animal or thing brought by the owner upon those premises, and does not relate to a case like the present, or a case like the Court of Appeal had to deal with in *Musgrove v Pandelis*, where there had been an escape of nothing from the defendant's premises. But the rule in *Rylands v Fletcher*, as has frequently been pointed out, is based upon a much ~~208~~ wider principle, namely, the principle "*Sic utere tuo ut alienum non laedas*," and there is no doubt in *Musgrove's* case the Court of Appeal were referring to *Rylands v Fletcher* as being based upon that wider principle. But what will have to be considered is whether *Musgrove v Pandelis*, so far as it purports to be based on that larger principle, can be supported seeing that the decision involves these two propositions, (i) that a motor car is—I am quoting from the judgment of Bankes LJ, a dangerous thing to bring into a garage, and (ii) that the use of one's land for the purpose of erecting a garage and keeping a motor car there, is not an ordinary and proper user of the land—two propositions which, but for that authority, I should myself respectfully have doubted.

MACNAGHTEN J. I agree with both the judgments that have been delivered, and have nothing to add.

Appeal dismissed with costs.

Solicitors: *Lucien Fior* (for the appellant); *William Hurd & Son* (for the respondents).

Derek H Kitchin Esq Barrister.

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[1936] 3 All ER 210

Glamorgan County Council v Ayton

LOCAL GOVERNMENT

KING'S BENCH DIVISION
LORD HEWART LCJ, BRANSON AND DU PARCQ JJ
20 OCTOBER 1936

Local Government – Expenses – Members of council – “Expenses necessarily incurred in travelling” – Local Government Act 1933 (c 51), s 294(1).

The expenses permitted to be defrayed by a county council under the Local Government Act 1933, s 294(1), which provides that “a county council may defray any expenses necessarily incurred by members of the council in travelling to and from meetings of the council,” are limited to expenses of actual conveyance or transport and do not include expenses incurred by members for the purpose of bodily subsistence required by them by reason of absence from home on account of travelling to and attending meetings and returning therefrom.

Notes

This case is purely one of the construction of a statutory provision which provided for the expenses “incurred in travelling” of county councillors. It was attempted without success to make such expenses include “subsistence” expenses.

For the Local Government Act 1933, s 294(1), see Halsbury Complete Statutes of England, Vol 26, p 462. The London County Council (General Powers) Acts referred to, though local Acts, are included in Vol 11 of that work under the title, Metropolis.

Introduction

Special case stated by the Minister of Health under the Local Government Act 1933, s 229(3).

The finance committee of the appellant county council, by a minute of 10 September 1935, resolved to recommend that any of their members when attending meetings of the council or of its committees, might draw, in addition to travelling expenses, subsistence expenses at the rate of not more than 3s for five hours or over, and not more than 5s for nine hours or over. A number of members subsequently drew subsistence expenses amounting to £11 18s 0d. By direction of the Minister of Health, the district auditor, Mr W A Ayton, respondent to the appeal, held an extraordinary audit of the appellant council's accounts, for the period 1 April 1935, to 31 October 1935, and disallowed this amount, holding that the Local Government Act 1933, s 294(1) does not authorise the payment of such allowances. This subsection reads:

‘Subject to the provisions of this section, a county council may defray any expenses necessarily incurred by members of the council, or of any committee thereof to which this section applies, in travelling to and from meetings of the council or committee, or in travelling by direction of the council or committee for the purpose of carrying out any inspection necessary for the discharge of the functions of the council or committee.’

The council appealed to the Minister of Health under s 229(1) of the Act, which governs appeals from district auditors, and requested him to state a question of law in the form of a special case for the opinion ~~210~~ of the Divisional Court. The Minister, after setting out the facts, put the following questions:

‘(i) Whether among the expenses permitted by the Local Government Act, 1933, s. 294, to be defrayed by a county council are included

***506 Filliter v. Phippard**

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9 December 1847

(1847) 11 Queen's Bench Reports 347**116 E.R. 506**

1847

Analysis

Thursday, December 9th, 1847. Sect. 86 of the Building Act, 14 G. 3, c. 78, which enacts that no action shall be maintained against any person in whose house, or on whose estate, any fire shall “accidentally begin,” is not confined in its operation to those districts to which the limited clauses of the Act are restricted. It does not apply where a fire is produced by negligence: and, in that case, by the common law, an action lies against the party by whose negligence or that of his servants, a fire arises on his premises and damages the *507 property of another. It does not apply where the fire is lighted intentionally, and mischief happens to result.

[S. C. 17 L. J. Q. B. 89; 12 Jur. 202. Referred to, *Ex parte Gorely*, 1864, 4 De G. J. & S. 481.]

Case. The declaration stated that plaintiff, before and at the time of committing, &c., was lawfully possessed of a certain close of land, called, &c., situate and being in the parish of St. Martin, Wareham, in the county of Dorset, contiguous and next adjoining to a certain other close of land of defendant, called, &c., situate and being in the parish and county aforesaid, and then in the actual occupation and possession of defendant: and, during all the time aforesaid, plaintiff was also lawfully possessed of certain hedges, fences, gates and gate posts, to wit, &c., then respectively standing and being in and upon the aforesaid close of plaintiff, and of great value, &c.: and during all the time aforesaid, plaintiff was also lawfully possessed of certain trees, saplings, &c., to wit, &c., then respectively stand- [348] -ing, growing and being in and upon the aforesaid close of plaintiff, and of great

value, &c.: and thereupon it became and was the duty of defendant not to commit the grievances respectively hereinafter mentioned. Yet defendant, well knowing the premises, not regarding his said duty, but contriving, &c. to injure, &c. plaintiff, heretofore, to wit on, &c., wrongfully lighted and kept, and caused and procured to be lighted and kept, in and upon his said close (to wit upon that part of it called, &c.), a certain fire, in such a careless, negligent and improper manner, and at a time when, by reason of the then state of the wind and weather, it was dangerous and improper so to do, to wit on, &c., that, by and through the mere negligence, carelessness and improper conduct of defendant and his servants in that behalf, and for want of due and proper care and caution on his and their part, the said fire then, to wit on, &c., extended itself from and out of the said close of defendant to, into and upon the aforesaid close of plaintiff, and to, into, and upon the said hedges, &c. of plaintiff; and thereby the hedges, &c., respectively, of plaintiff, of the value aforesaid, then became ignited and caught fire, and were then respectively much burnt, damaged and destroyed; and, by means of the premises, the said close and property of plaintiff then became and was much disfigured, damaged and deteriorated in value. And, by means of the premises, plaintiff, in order to prevent the said fire from further extending and doing further and greater damage to his said close and property, was then forced and obliged to pay, and did then necessarily pay, &c., divers sums of money, amounting, &c., in and about extinguishing the said fire, and staying and preventing the further progress and extension thereof to [349] other parts of the said close and property of plaintiff. To the damage, &c.

The defendant pleaded three pleas, which led to issues of fact.

The cause was tried before Cresswell J., at the Dorsetshire Spring Assizes, 1847, when a verdict was found for the plaintiff.

In Easter term, 1847, Kinglake Serjt. obtained a rule nisi for arresting the judgment: and the Court ordered that the case should be put down in the special paper.

Barstow now shewed cause ¹. The declaration shews a good cause of action. The law is thus laid down by Blackstone, 1 Com. 431, “By the common law, if a servant kept his master's fire negligently, so that his neighbour's house was burned down thereby, an action lay against the

master; because this negligence happened in his service: otherwise, if the servant, going along the street with a torch, by negligence sets fire to a house; for there he is not in his master's immediate service; and must himself answer the damage personally. But now the common law is, in the former case, altered by statute 6 Ann. c. 3², which ordains (sect. 6) that no action shall be maintained against any in whose house or chamber any fire shall accidentally begin; for their own loss is sufficient punishment for their own or their servant's carelessness. But (sect. 3) if such fire happens through negligence of any servant (whose loss is com- [350] -monly very little) such servant shall forfeit 100*l.* to be distributed among the *508 sufferers; and, in default of payment, shall be committed to some workhouse and there kept to hard labour for eighteen months." Now, as to the common law, it was held, in *Vaughan v. Menlove* (3 New Ca. 468), that, if a party negligently construct a hay rick on the extremity of his land, and it take fire spontaneously, and his neighbour's house be thereby burnt, an action lies against him at the suit of the neighbour. In the argument of that case, as reported by Mr. Scott (4 Scott, 244, 248), reference was made to a case tried in Berkshire before Alderson J., where the same principle was taken for granted. As to stat. 6 Ann. c. 31, s. 6, Blackstone certainly assumes that the words "accidentally begin" include a case of fire caused by negligence, probably understanding the words as excluding only intention. This passage was the subject of comment in Lord Lyndhurst's judgment in *Viscount Canterbury v. The Attorney General* (Phillip's Ch. R. 306, 315). No direct decision was there given: and it is pointed out that the statutes were not referred to in either *Vaughan v. Menlove* (3 New Ca. 468; S. C. 4 Scott, 244), or the case there cited. Then stat. 14 G. 3, c. 78³, s. 86, enacts "That no action, suit, or process whatever, shall be had, maintained, or prosecuted against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall, after the said twenty-fourth day of June" (1774), "accidentally begin, nor shall any recompense be made by such person for any damage suffered thereby; any law, usage, or custom, to the contrary notwithstanding:" and the defendant is empowered to plead the general [351] issue, and is to have treble costs if the plaintiff be nonsuited, or discontinue, or have a verdict against him. The same question would arise here as upon stat. Ann. c. 31, s. 6, with respect to the words "accidentally begin." But, further, stat. 6 Ann. c. 31, s. 6, relates to "house or chamber" only. It is true that stat. 14 G. 3, c. 78, s. 86, introduces the words "on whose estate:" but this statute is the Building Act for London and the adjacent district,

and refers (sect. 1) to stat. 12 G. 3, c. 73, the previous Building Act, where there is a similar clause, sect. 37, as to "house or chamber" only. It seems to follow that the intention of the Legislature was to enforce these provisions in the districts only to which the Building Acts relate. Indeed, stat. 6 Ann. c. 31, seems to be confined to London and Westminster, and places within the bills of mortality. Here the property is not shewn to be within those districts: and the place is laid, without a videlicet, in Dorsetshire. It is true that, in the Building Acts, some of the clauses are expressly confined to places within the limits: but it cannot be inferred from this that a larger application was intended where the restriction is not expressed, especially in the case of statutes which have often been said to be inaccurately worded. Some stress may perhaps be laid on the language of sect. 84 of stat. 14 G. 3, c. 78, where the penalty is imposed on servants for fires occasioned by their carelessness "within the limits aforesaid, or elsewhere." But the application of sect. 85 is restricted to fires breaking out "within the limits aforesaid." And sect. 35 of stat. 12 G. 3, c. 73, restricts the penalty on servants in the same way, thus leading to the conclusion that a similar restriction was intended in sect. 3 of stat. 6 Ann. c. 13, where, nevertheless, no restriction is expressed, the words being "any dwelling house, or out-house or houses." [352] Taking these three Acts in *pari materiâ* together, it seems unsafe to give an unrestricted application to any one clause. Further, the fire, as described in the declaration, was not accidental in its origin. It was intentionally kindled, but did mischief through the negligence complained of. The materiality of the allegation of negligence appears from *Piggot v. The Eastern Counties Railway Company* (3 C. B. 229.) The negligence makes the defendant a wrongdoer.

Kinglake Serjt. and Stock, *contra*. Sect. 86 of stat. 14 G. 3, c. 78, is general in its application. The title of stat. 6 Ann. c. 31, "for the better preventing mischiefs that may happen by fire," is quite general: and it is not attempted to shew that sect. 6 of that Act contains any words suggesting a restriction. Where the provisions of stat. 14 G. 3, c. 78, are not meant to be general, an express restriction appears: and the clause (s. 37) in the Act 12 G. 3, c. 73, corresponding with sect. 86 of the later Act, is also quite general. In *Richards v. Easto* (15 M. & W. 244), Parke B., in delivering the judgment of the Court, said that stat. 14 G. 3, c. 78, "is not of a local and personal character only: some of the clauses affecting all the Queen's *509 subjects, as the 84th and 86th, relating to accidental fires; and the statute is, in that respect, public." As to the other point, if the

words “accidentally begin,” in sect. 86 of stat. 14 G. 3, c. 78, were not meant to include the case of negligence, the provision there, and in the earlier statutes, was unnecessary. Blackstone's opinion, that negligence is accidental in the statutable sense, is not overruled by *Vaughan v. Menlove* (3 New Ca. 468); for there, as Lord [353] Lyndhurst pointed out (1 Phil. Ch. C. 320), the statute was not referred to. It seems that sects. 84 and 86 were intended to punish the servant and relieve the master in the same case: the former expressly includes negligence; the latter, therefore, does so impliedly. *Piggot v. The Eastern Counties Railway Company* (3 C. B. 229), is inapplicable: the damage there arose from an engine in motion.

Barstow, in reply. In that case the engine was on the land of the defendants; so that the fire might be said to arise there. The language of Parke B., in *Richards v. Easto* (15 M. & W. 244), was used with reference to pleading the general issue under statute. Sect. 84 may perhaps be open to the remark made in the judgment: but not sect. 86, which is unnecessarily mentioned. That the statutes, excluding from liability cases of mere accident without negligence, were not superfluous, appears clearly from *Turberville v. Stamp* (1 Comyns's R. 32; 1 Salk. 13), where it was held that an action lay without shewing a special negligence.

Cur. adv. vult.

Lord Denman C.J., in this vacation (December 11th), delivered the judgment of the Court.

This was a motion in arrest of judgment, on a declaration stating (with some other particulars) that the plaintiff was possessed of a close in which certain hedges and gates were standing, and several trees growing; that the defendant was possessed of an adjoining close; and that the defendant made and kept a fire in his close in such a negligent manner, and at a time [354] when, by reason of the then state of the wind and weather, it was dangerous and improper so to do, that, through the negligence and improper conduct of himself and his servants, and for want of due care and caution, the said fire extended itself out of his close into plaintiff's, and the plaintiff's trees, hedges, fences, &c. were burnt and destroyed.

The ancient law, or rather custom of England, appears to have been, that a person in whose house a fire originated, which afterwards spread to his neighbour's property and destroyed it, must make good the loss. And it is well

established that, where the fire was occasioned by a servant's negligence, the owner, the master of the house where it began, is answerable for the consequences to the sufferer. And the case of *Turberville v. Stamp* (1 Comyns's R. 32; 1 Salk. 13), the last decided before stat. 6 Ann. c. 31, makes this plain, and declares the same principle where the fire originates in the defendant's close. The Act contemplates the probability of fires in cities and towns arising from three causes, the want of water, the imperfection of party walls, and the negligence of servants. The Act provided some means for supplying these material defects: but the third section was directed against the moral one, the carelessness or negligence of servants, which (it observes) often causes fires: and it imposes on the servant by whose negligence the fire may have been occasioned a fine of 100*l.*, to be distributed among the sufferers at the discretion of the churchwardens, or imprisonment for eighteen months in case of nonpayment. The clause, raising the same sum whatever the extent of suffering and the number of the sufferers, and inflicting the same penalty to whatever degree the neg- [355] -ligence may have been culpable, without any power to lower the fine or shorten the imprisonment, can scarcely be supposed to have undergone much consideration on the part of the Legislature. The most usual cause of fires was assumed to be the negligence of servants: and the enactment might operate to induce habits of caution in that important class. The same statute, in the sixth section, enacts that, after a day named, no action shall be maintained against any person in whose house or chamber any fire shall accidentally begin, nor shall any recompence be made by such person for any damage suffered or occasioned thereby.

Both provisions seem to have found favour with the Legislature; for both were re-enacted by stat. 12 G. 3, c. 73, and stat. 14 G. 3, c. 78⁴; the latter (s. 86), adding, *510 to the words “house or chamber,” “stable, barn, or other building;” and also the words “or on whose estate.”

No terms can be more comprehensive. We cannot doubt that Baron Parke, in *Richards v. Easto* (15 M. & W. 244), rightly viewed it as a general law. And, though the word “estate” is used in a sense very different from that which it bears in the language of the law, it clearly applies to land not built upon, and makes the owner of such land liable in the same manner as it had previously the owner of buildings.

The question then is upon the meaning and effect of the word “accidentally,” here applied to fire. And here a

very singular doubt has arisen from the mode in which this enactment is discussed by Sir William Blackstone in his Commentaries. The passage is introduced [356] by that learned writer incidentally, as an illustration of the principle on which masters are held responsible for the acts of their servants (1 Bla. Com. 431). “Upon this principle, by the common law, if a servant kept his master's fire negligently, so that his neighbour's house was burned down thereby, an action lay against the master; because this negligence happened in his service.” “But now” (he proceeds) “the common law is altered by statute 6 Ann. c. 3” (it should be c. 31; ss. 3, 6), “which ordains that no action shall be maintained against any, in whose house or chamber any fire shall accidentally begin; for their own loss is sufficient punishment for their own or their servant's carelessness.” This reason, by the way, is not stated in the Act of Parliament, and must be allowed to be very far from satisfactory; because the principle on which actions are maintainable is not the punishment of guilty persons, but compensation to innocent sufferers. Besides, making servants punishable for fires resulting from their negligence is no exemption of masters from responsibility for the same fault; for fires which accidentally begin are not fires produced by negligence.

It would, therefore, appear that Blackstone had drawn a conclusion from the enactment cited, which it by no means sustains. Lord Lyndhurst, however, has in some degree sanctioned by his high authority the inference thus drawn by Blackstone, in the remarks by which he prefaced his decision against Lord Canterbury's Petition of Right (1 Phil. Ch. R. 306). We must, however, observe that those remarks are wholly unnecessary for the decision to which he came, and indeed are stated rather as arguments with which that petitioner would have had to contend, [357] if his cause had come to a hearing on the merits, than as expressing a deliberate opinion.

It is true that in strictness, the word accidental may be employed in contradistinction to wilful, and so the same fire might both begin accidentally and be the result of

negligence. But it may equally mean a fire produced by mere chance, or incapable of being traced to any cause, and so would stand opposed to the negligence of either servants or masters. And, when we find it used in statutes which do not speak of wilful fires but make an important provision with respect to such as are accidental, and consider how great a change in the law would be effected, and how great encouragement would be given to that carelessness of which masters may be guilty as well as servants, we must say that we think the plaintiff's construction much the most reasonable of the two.

Lord Lyndhurst remarked on the absence of decisions on this point. Yet he mentions two cases, both surely entitled to great weight, one tried before Alderson J., in *Berks*, the other before Patteson J. in *Salop*, which latter was very fully discussed on a rule to shew cause, and decided by the whole Court of Common Pleas⁵. In both these cases a plaintiff recovered damages for a fire spreading to his corn from the defendant's field through the negligence of the defendant and his servants. His Lordship says that stat. 14 G. 3, c. 78, escaped notice on those occasions. But, if we ask how it came to be overlooked, since it would have furnished a complete and easy defence, the only answer can be the universal impression of the eminent lawyers, both [358] at the Bar and on the Bench, who took part in the argument and judgment, that the clause in the Building Act respecting accidental fires cannot apply to such as are produced by negligence.

It may be further observed, with reference to this doctrine, that the exemption given by this enactment cannot apply. Its words suppose the fire to begin accidentally on the estate of him from whose estate it spreads. Now this fire did not begin accidentally, but was knowingly lighted by the defendant himself.

Judgment for plaintiff.

Footnotes

- 1 Before Lord Denman C.J., Coleridge and Wightman Js. Patteson J. had gone to chambers. The case was heard as on a concilium; and the council opposing the rule had the reply; but two counsel were, by arrangement, permitted to be heard in support of the rule.
- 2 Sic; a mistake for 31.
- 3 Repealed in part, but sects. 84, 85 and 86 (among others) kept in force, by stat. 7 & 8 Vict. c. 84, sect. 1 and Sched. (A).

- 4 Sects. 84 and 86 are also retained without alteration by stat. 7 & 8 Vict. c. 84, s. 1, and Sched. (A).
- 5 *Vaughan v. Menlove*, 3 New Ca. 468.

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S. C.

HUNTER (APPELLANT) v. WALKER (RESPONDENT).

IN BANCO.
NELSON.*Accidental Fire—Negligence—Suus ignis—Metropolitan Building Act.*

1888.

Aug. 17;
Sept. 6.

RICHMOND, J.

There is no legal duty cast upon the owner of land upon which a fire originates to prevent it from spreading to the land of another, though he was present immediately after it was lighted and might have put it out, and though from the high wind blowing at the time it was probable the fire would spread. The English Common Law on the subject of fires applies to this colony.

The provisions of 14 Geo. III., c. 78 (the Metropolitan Building Act), relating to fires are applicable to bush fires in the colony.

Dougherty v. Smith (1), distinguished.

THIS was an appeal from the decision of the Resident Magistrate of the Collingwood district.

From the case stated it appeared that a fire commenced on the defendant's property, which spread, under the influence of a high wind, to the land of the plaintiff, where it did the damage complained of. The Resident Magistrate found that there was not sufficient evidence to show who actually lighted the fire, but that the defendant saw the fire immediately after it was lighted and whilst it was under control, and when from the high wind blowing he well knew that it would certainly spread if not checked, yet he took no steps whatever to put it out or assist the plaintiff after it had spread to his land, nor to save property. The Magistrate gave judgment for the plaintiff for £100 and costs. The defendant appealed.

Harley, for the appellant:—

The fire was accidental: *Filliter v. Phippard* (2), and therefore came within 14 Geo. 3. c. 78, which is of general application: *Richards v. Easto* (3). A person who brings any noxious thing on his land is liable for the consequence without negligence:

(1) N.Z. L. R., 5 S. C. 374.

(3) 15 L. J., Ex. 163; 15 M. &

(2) 11 Q. B. 357; 17 L. J., Q. B.

W. 244.

Rylands v. Fletcher (1), *Dougherty v. Smith* (2), but in this case the fire was accidental, and appellant, if not relieved by statute, had no duty cast upon him to put it out: *Batchelor v. Smith* (3),

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Fell :—

The Imperial statute does not apply to this colony any more than, as may be inferred from Chief Justice Stawell's judgment in *Batchelor v. Smith* (3), it does to Victoria. The fire was not accidental within the terms of the statute. The appellant saw it on his own land when he could have put it out, he did not do so, and made it *ignis suus*: *Tuberville v. Stamp* (4), for the consequences of which he was answerable. (Rolle's abr., action sur case B 1). Stawell, C.J., in *Batchelor v. Smith* (3), appears to have ignored the common law and left out of consideration the question of negligence, which is the "omitting to do something that a reasonable man would do, or the doing something which a reasonable man would not do, and an action may be brought if mischief is caused to a third party not intentionally," per Alderson. B. in *Blyth v. Birmingham Waterworks Company* (5), see also per Brett, M.R., in *Heaven v. Pender* (6).

RICHMOND, J. :—

The views of the Master of the Rolls do not seem to have been entirely approved by his brother Judges, and it may be questioned whether negligence ever arises unless a duty can first be shown.

Fell :—A person adopting a fire as his own undertakes the duty of looking after it, and must be held answerable if he neglects to do so, which brings the case within the decision of Prendergast, C.J., in *Dougherty v. Smith* (2), and without relying upon His Honor's *obiter dicta*.

Harley, in reply.

Cur. adv. vult.

(1) L. R., 3 H. L. 330; 37 L. J.,
Ex. 161; 19 L. T. 220.

(2) N.Z. L. R., 5 S. C. 374.

(3) 5 V. L. R., Law. 176.

(4) Lord Raym. 264.

(5) 25 L. J., Ex. 42; 11 Ex. 781.

(6) L. R., 11 Q. B. D. 503; 52
L. J., Q. B. 702; 49 L. T. 357.

S. C. September 6.—RICHMOND, J. :—

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In this case the appellant (defendant below) is sued for damage done by a fire which originated on his land, and was carried by a very high wind, across an intervening stream, to the land of the plaintiff. The defendant and his sons were the only persons seen on or near the spot on the morning when the fire broke out. The Magistrate finds, however, that there was no sufficient evidence that the fire was lighted by them, or any of them. The Magistrate is further of opinion that the defendant might have put out the fire when it first started, and that he took no reasonable steps to do so; although he well knew that if not checked in time it must be carried on to the land of the plaintiff. The question raised on this appeal is, whether there was any legal duty on the part of the defendant to prevent the fire from spreading to the land of the plaintiff.

No English or Colonial decision is directly in point except the case of *Batchelor v. Smith* (1), which is an authority in favour of the defendant.

The authority most relied upon by the plaintiff is 1 Rolle's Abr. 1; title "Action sur case." B. 1. "If my fire by misfortune burn the goods of another man he shall have an action on the case against me; 2 Hen. 4. 18. 2. If the fire light up suddenly in my house, I not knowing thereof, and burn my goods, and also the house of my neighbor, he shall have an action on the case against me; 42 Ass. 9, admit. But it seems it was adjudged that the action lay not in that case because it was *vi et armis*." On this passage it is to be remarked in the first place that the fire is supposed to be one kindled by the defendant. The words of the first paragraph are:—"si mon feue," and the second paragraph has the same meaning, although the words are "the fire." In the Latin of the writ the words would be "*suus ignis*." It is plain this is Rolle's meaning because, after citing the Year Book 2 Hen. 4. 18., to show that a man will be liable for damage done by a fire in his house caused by the carelessness of his servant, or guest, or any person entering his house by his leave or with his knowledge, he winds up with the following:—"But if a stranger

(1) 5 V. L. R., Law. 176.

against my will put fire in my house, whereby the house of my neighbour is burnt, no action lies against me,"—for which he again cites—2 Hen. 4. 18. The case referred to,—*Beaulieu v. Finglam*—was an action founded on the law and custom of the kingdom, "*quod quilibet ignem suum salvo et secure custodiat, et custodire teneatur, ne per ignem suum damnum aliquod vicinis suis ullo modo eveniat,*" and the authority for Rolle's first paragraph is what Thirning says—that "every man shall answer for *his* fire, which by misfortune burns the goods of another." "Some" (it is added) "were of opinion that the fire cannot be said to be 'his fire,' because a man cannot have property in fire; and that opinion is not allowed." As to Rolle's 2nd paragraph it is remarkable that it is not supported by the case cited (42 Ass. 9.) in which judgment was given for the defendant. The report is as follows:—"Item, a man sues a writ against another for the burning of his house *vi et armis*; who pleads "Not Guilty." And it was found by the verdict of the jury that the fire was lighted up suddenly in the house of the defendant, he knowing nothing, and burnt his goods, and also the house of the plaintiff. Wherefore upon this verdict it was adjudged that the plaintiff take nothing by his brief, but be amerced, &c." Rolle conjectures as I understand, that the ground of the judgment was that the action should have been on the case, instead of trespass *vi et armis*; There is however nothing to show that the plaintiff failed merely on the point of pleading. As to the case of *Beaulieu v. Finglam* (1), the ruling clearly proceeds on the assumption that the fire is kindled by the defendant, or by some other for whose act he is responsible, and it is therefore inapplicable to the present case.

For the same reason *Tuberville v. Stamp* (2) is no authority for the plaintiff; the fire in that case having been kindled in the defendant's field by his servant in the ordinary course of husbandry. It was objected that no action could be grounded on the custom, because a fire in a field could not be called "*ignis suus*;" for a man has no power over a fire in the field as he has over a fire in his house. To this it was answered according to the report in Lord Raymond that "a man ought to keep the fire in

(1) 2 Hen. 4. 418.

(2) Ld. Raym. 264; 1 Salk. 13;
12 Mod. 152; Carth. 425.

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his field as well from the doing of damage to his neighbour as if it were in his house, and it may be as well called 'suus' the one as the other, for the property of the materials makes the property of the fire." But it is plain the Court did not mean to lay down that a man is responsible for every fire on his property, for Holt, C.J., adds, "If a stranger sets fire to my house, and it burns my neighbour's house, no action will lie against me (which all the other Justices agreed)." And this is made still clearer by the Report in 12 Modern, where the reason of the decision is thus explained:—"The fire which a man makes in the fields is as much his fire as his fire in his house. It is made on his ground, with his materials, and by his order; and he must at his peril take care that it does not through his neglect injure his neighbour."

These are the principal authorities as to the law prior to the statute, 6 Anne c. 31. They leave it doubtful what would be the responsibility of the owner for damage done by a fire beginning on his property, the origin of which is not known. It seems to have been supposed that at common law the owner would be answerable for such fires, which may be properly called, so far as the owner is concerned, "accidental." The statute of Anne exonerates householders from responsibility in such cases, and 14 Geo. 3, c. 78, section 86, extends the immunity to land owners. The latter provision is inserted in a Building Act, the other provisions of which are limited to "the cities of London and Westminster and the liberties thereof, and other parishes within the weekly bills of mortality." But it is established by the dictum in *Richards v. Easto* (1), approved by the Court of Queen's Bench in *Filliter v. Phippard* (2); that the enactment of section 86 extends to the whole of Great Britain. It is assumed in *Dougherty v. Smith* (3), and I think properly assumed, that the English common law on the subject of fires applies to the colony. On this point I cannot agree with what is said by Chief Justice Stawell in *Batchelor v. Smith* (4). His Honor apparently considered that the "custom of the realm," upon which actions for damage by fire used to be grounded, is something local, which

(1) 15 L. T. Ex. 153; 15 M. & (3) N.Z. L. R., 5 S. C. 374.

W. 244.

(4) 5 V. L. R., Law. 176.

(2) 11 Q. B. 357; 17 L. J., Q. B. 89.

does not extend to a colony. But "custom of the realm" is a synonym for "common law." In *Beaulieu v. Finglam* (1), the Court tells Hornby, who was objecting that the custom had not been properly pleaded, "Pass over" (that is answer over), "for the common law of this realm is the common custom of the realm." See also the report of *Tuberville v. Stamp* (2); and the judgment of Brett, J., in *Nugent v. Smith* (3).

But if the common law as to fires is in force in this colony, it is in force subject to the statutory modification to which I have referred. And assuming that at common law the defendant would have been responsible in the present case, for which I do not find any satisfactory authority, I think it is correctly reasoned that he is entitled to the benefit of the statutory provision. There is nothing to show that the fire was caused by the act or neglect of the defendant, or of any person for whom he is answerable. The fire therefore should be regarded, quoad the defendant, as beginning accidentally. "Fires which accidentally begin are not fires produced by negligence:" *Filliter v. Phippard* (4). The protection given by the statute in cases of accidental fire is not made conditional upon the use of any kind of diligence to prevent the fire from spreading to the property of others; and a Court of law is not justified in inventing such a duty. It might or might not be desirable that such a duty should be imposed by law. There would be considerable difficulty in laying down any general rule upon the subject; but it is enough to say that under the law as it exists, there is, in my opinion, no such duty. So far I agree in the conclusion arrived at by the Supreme Court of Victoria in *Batchelor v. Smith* (5), which was a stronger case against the defendant than the present case, as it was averred that he had allowed the fire to continue burning for his own purposes. Here it is not necessary to go so far.

In *Dougherty v. Smith* (6), and in the Australian cases, *Sheehan v. Park* (7), and *Cotterel v. Allen* (8), the defendant had himself

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(1) 2 Hen. 4. 18.

(2) Carth. 425.

(3) L. R., 1 C. P. D. 19 at p. 23;
44 L. J., C. P. 697; 34 L. T.
827; 25 W. R. 117.

(4) 11 Q. B. 357; 17 L. J., Q. B. 89.

(5) 5 V. L. R., L., 176; 1 A. L. T. 12.

(6) N. Z. L. R., 5 S. C. 374.

(7) 8 V. L. R., L., 25; 3 A. L. T. 98.

(8) 16 S. A. L. R. 122.

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lighted the fire—which distinguishes all these cases. I do not understand that the Chief Justice in *Dougherty v. Smith* (3), meant to express an opinion upon the present question, which was not raised by the facts of that case. The appeal is allowed with £7 7s. costs.

Solicitor for the plaintiff: *A. Maginness*.

Solicitors for the defendant: *Adams & Kingdon*.

[Reported by C. Y. Fell, Esq., Nelson.]

THE PUBLIC TRUSTEE *v.* GARRETT AND ANOTHER.

S. C.
IN CHAMBERS.
AUCKLAND.
1888.
July 20.
GILLES, J.

Landlord and tenant—Distraint for rent—Goods of third party—Bill of sale.

The Public Trustee acting as trustee under a will, made an advance of certain moneys under an order of Court to an infant, out of a fund to which he was presumptively entitled under the will, such moneys to be expended in the purchase of stock, etc., for a farm of which the infant's mother was tenant. A declaration of trust was executed by the mother, by which she declared that she held the stock, etc., upon trust for the Public Trustee. These facts were known to the landlord at the time he granted the lease.

Held, That the stock, etc., was the property of the Public Trustee, and was not, therefore, liable to seizure under a distress for rent owing under the lease.

MOTION for injunction to restrain defendants from proceeding to sell certain goods under a distress for rent, and for an order that the bailiff should be directed to give up possession of them.

The Public Trustee held certain moneys in trust under the will of one M. A. Kennedy, deceased, for an infant son of Mary F. J. Budge, until he should attain the age of twenty-one. On the 22nd September, 1887, an order of the Court was obtained, in compliance with which the Public Trustee paid to Mary F. J. Budge, on account of her son, out of the fund to which he was presumptively entitled, the sum of £150, to be expended in the purchase of farming stock and implements, such sum to be secured to the Public Trustee by a bill of sale according to the terms of

(1) N.Z.L.R., 5 S.C. 374.

***840 Richards v. Easto**

Image 1 within document in PDF format.

21 February 1846

(1846) 15 Meeson and Welsby 244**153 E.R. 840**

1846

Analysis

[244] Feb. 21, 1846.—The Building Act, 14 Geo. 3, c. 78, was an act “of a local and personal nature,” and therefore the power given by the 100th section of that act, of pleading the general issue and giving the special matter in evidence, was taken away by the stat. 5 & 6 Vict. c. 97, s. 3.—The defence, that the venue in an action against a person for an act done in pursuance of the Building Act, 14 Geo. 3, c. 78, was not laid in Middlesex, pursuant to the 100th section of that act, is one which must be specially pleaded, and cannot be taken advantage of under not guilty.

[S. C. 3 D. & L. 515; 15 L. J. Ex. 163; 10 Jur. 695. Discussed, *Filliter v. Phippard*, 1847, 11 Q. B. 347. Applied, *Reg. v. London County Council*, [1893] 2 Q. B. 454.]

Trespass, for placing bricks, stones, and building materials upon the wall and close of the plaintiff. Plea, not guilty, by statute.

The cause came on for trial at the Kingston Spring Assizes, 1845, when the matter was referred to an arbitrator, with power to state any points of law for the decision of this Court.

The defence relied upon was, that the acts complained of were done in pursuance of the Building Act, 14 Geo. 3, c. 78. The arbitrator found, that the writ of summons was issued on the 14th of June, 1844, prior to the passing of the new Building Act, 7 & 8 Vict. c. 84; and that the venue was laid in Surrey. The houses of the plaintiff and the defendant adjoined to each other, being separated by a wall which had existed for several years; and the trespass consisted in

the defendant's having made an addition to each end of the wall by building upon it. The defendant, at the time of such addition, bonâ fide believed the wall to be a party-wall, and intended to comply with the provisions of the Building Act. The arbitrator found that the wall was not within the city of London, or the liberties thereof, but was situate within the county of Surrey, and within the district over which the provisions of the 14 Geo. 3, c. 78, extended; that the wall upon which the building took place was not a party fence wall, nor a wall in common between the plaintiff and the defendant, but was entirely standing on the land of the plaintiff, and was his wall exclusively. Before the commencement of the action, the plaintiff gave a notice of action sufficient to satisfy the provisions of the 100th section of the Building Act, and commenced his action within three calendar months after the trespass.

The questions raised for the opinion of this Court were, first, whether the stat. 5 & 6 Vict. c. 97, s. 3, or the 7 & 8 [245] Vict. c. 84, took away from the defendant the power of pleading not guilty by statute, under the stat. 14 Geo. 3, c. 78; secondly, supposing the Court to be of opinion that the above statutes did not take away the power of pleading not guilty, whether the defendant was entitled to the protection of the 14 Geo. 2, c. 78, by pleading not guilty, and giving the special matter in evidence, *841 although the wall built upon by the defendant was not a party-wall, or party fence wall, and under such plea to object that the venue was improperly laid in Surrey instead of Middlesex. If the Court should think that the above statutes, or either of them, had not taken away from the defendant the power of pleading not guilty, and giving the special matter in evidence, although the wall was not a party-wall or a party fence wall, then the verdict for the plaintiff was to be set aside, and a verdict entered for the defendant; but if the Court should think that the above statutes, or either of them, did take away from the defendant the power of pleading not guilty by statute, or that he was not entitled to the benefit of pleading the general issue, and giving the special matter in evidence, in consequence of the wall not being a party-wall or party fence wall, then the next question was, whether the defendant was entitled to avail himself of the objection, under the 14 Geo. 3, c. 78, s. 100, that the venue was laid in Surrey and not in Middlesex. If the Court should think, that, upon the common plea of not guilty, the defendant was entitled to avail himself of the objection of the venue, the verdict was to be entered for the defendant; but if the Court should think that the defendant was not able to avail himself of the objection, that the venue was laid in Surrey and not

in Middlesex, the verdict for the plaintiff was to stand, and the damages to be reduced to 40s.

The case was argued in Hilary Term, (January 19), by

Unthank, for the plaintiff. First, the London Building Act, 14 Geo. 3, c. 78, is an act “of a local and personal [246] nature,” and therefore the power of pleading the general issue, and of giving the special matter in evidence, which is given by the 100th section, was taken away by the stat. 5 & 6 Vict. c. 97, s. 3.¹ The distinction between general and special statutes is laid down by Lord Coke in *Holland's case* (4 Rep. 76 a.):—“Nota, reader, the rule of the law is, that of general statutes the Judges ought to take notice, although they be not pleaded; otherwise of special or particular statutes.” This is an act of the latter description, and one which, without the direction of the Legislature, the Courts will not take notice of. It is not the less so because it comprehends an extensive district. The Central Criminal Court Act, 4 & 5 Vict. c. 36, and the Metropolitan Police Act, 2 & 3 Vict. c. 47, embrace wide districts, but are not the less acts of a local and personal nature. In *Cock v. Gent* (12 M. & W. 234), an act for establishing a Court of Requests for Sandwich and its neighbourhood was held to be a public local and personal act, within the 5 & 6 Vict. c. 97, s. 3. [He then argued, that at all events, the 14 Geo. 3 was repealed by the new Building Act, 7 & 8 Vict. c. 84, s. 1; but the Court intimated a clear opinion that that act was not retrospective in its operation, and did not apply to actions previously commenced.]

Secondly, the statutory general issue having been taken away by the 5 & 6 Vict. c. 97, the question, whether the venue ought to have been laid in Middlesex, does not arise here, for such defence ought to have been specially pleaded. The plaintiff proves a trespass in the county of Surrey: what answer is there to that, under the general plea of not guilty? In *Boyes v. Hewetson* (2 Bing. N. C. 575; 2 Scott, 831), which was a local [247] action, the venue was laid in Middlesex, though the lands lay in Surrey; but as the locality did not appear on the face of the declaration, and no issue was raised upon it, it was held that the defendant was not on that ground entitled to a nonsuit. Here the declaration alleges a trespass in Surrey, and a trespass in that county is proved by the evidence. Suppose the objection had been, not wrong venue, but want of notice of action: could the defendant have availed himself of that under not guilty? He ought to have pleaded specially, that the act was not done under the authority of the Building Act. At common law, all

that would be traversed by the plea of not guilty would be the fact of the trespass, and the plaintiff's title to the close in which &c.; under the New Rules, which are of statutory force, the former only. The defendant's argument must go to the extent, that tender of amends before action brought could have been given in evidence on this record. *Davey v. Warne* (14 M. & W. 199) is on this point a direct authority for the plaintiff. The Court then called on *842

Martin, contra. First, the right given by the 14 Geo. 3, c. 78, s. 100, of pleading the general issue, and giving the special matter in evidence, is not taken away by the 5 & 6 Vict. c. 97, s. 3, for the former statute cannot be considered a local and personal act. *Holland's case* is not in point. Lord Coke was there discussing a different question; namely, what acts the judges were bound to take notice of, and what not. There is now no such distinction as between “general” and “special” statutes. The nature of the particular act must be taken with respect to its parliamentary meaning. This statute is printed and classed among the public acts. Probably it would be a special statute within Lord Coke's doctrine, but it is not therefore a local and personal act. It is published in the body of the statute- [248] -book, numbered with the Roman numerals, and preceded and followed by public acts. The same book tells you what is the meaning of “acts commonly called public local and personal” acts; namely, local and personal acts printed as such, and having a clause declaring them to be public acts, i.e. public, so as to be taken notice of without being specially pleaded. This clearly is not an act commonly called a public local and personal act. The following words of the 5 & 6 Vict. c. 97, “local and personal acts,” refer to such acts of the same nature as do not contain that clause; and the words “acts of a local and personal nature” are used in a still more limited sense, as divorce acts, &c. In *Cock v. Gent*, Gurney, B., says, “The statute applies to acts commonly called local and personal. This is printed as a local and personal act.” And Lord Abinger, C. B., says, “If the law takes no notice of such acts, you must refer to the parliamentary meaning.” [Parke, B. All that that case decided was, affirmatively, that a Court of Requests Act, printed among the local and personal acts, was within the repealing clause of the 5 & 6 Vict. c. 97.] If this be a local and personal act, so is the Central Criminal Court Act, which really outrages every principle of common sense. [Pollock, C. B. The statute as to the vend of coals in London is printed among the local and personal acts. Whether such acts are printed in one part of the statute-book or another, depends on whether certain fees are taken upon them or

not. But the 5 & 6 Vict. c. 97, intended to go beyond those commonly called local and personal acts, and to include all (whether passed before or since 1797, when the present division of the statutes was first made) which were of a local and personal nature.] This was an act passed for the benefit of the public generally, and operates on a very great extent of property; and the intention of the Legislature, as to the light in which it should be considered, is shewn by the concluding section.

Secondly, the fact, that the venue ought to have been laid [249] in Middlesex, need not be specially pleaded; for this is a matter collateral to the pleading, and to which, by the express words of the statute, the Judge is to give effect at the trial. There are but two classes of pleas,—traverses, and pleas in confession and avoidance. A defence of this nature would fall within neither class. The 100th section says, that “every such action or suit, the cause whereof shall arise in any part of the limits aforesaid out of the city of London, shall be laid and tried in the county of Middlesex, and not elsewhere.” That is a provision of which the Judge at the trial is to take notice, and to which he is to give effect. The Legislature has declared, that the laying of the venue in any other county shall be an answer to the action: and it is the duty of the Court to give effect to that declaration. Who is to judge whether due notice of action has been given, the Court or the jury? Surely the former. *Boyer v. Hewetson* is no authority to the contrary: no legislative enactment was there in question.

Unthank, in reply. The mere circumstance of a statute being printed among the public acts of Parliament does not go to prove that it is a general act. The stat. 14 Geo. 3, c. 52, for lighting Grosvenor-square, is printed among the public general acts, and has a clause declaring it to be a public act; yet it surely would not be contended that that is not an act of a local and personal nature. Many road and canal acts, also, are to be found printed among the public general acts. So, also, the 13 Geo. 3, c. 75, for enabling certain persons to dispose of some houses in London by way of lottery. The clause declaring it to be a public act has no effect in making it a general act: *Brett v. Beales* (Moo. & Mal. 421). The very title of the 14 Geo. 3, c. 78, and many of the clauses, (e.g. ss. 33 and 37), shew it to be of a local and personal nature. Then, as to the necessity of a special plea as to the [250] venue, it is incorrect to say that every special plea must necessarily be in confession and avoidance. The plea of the Statute of Limitations is an instance to the contrary: it goes to the remedy only, not to the right. [Parke, B. So

also, the plea that an attorney has not delivered a *843 signed bill.] The implied confession contained in such pleas is sufficient; as in this instance, that the acts were done under the authority of the Building Act. The provision of the 108th section, that, “if any such action or suit be laid in any other county or place then as aforesaid, than the jury shall find for the defendant or defendants therein,” means, that the Judge shall direct the jury so to find, when the defence is properly raised by plea. [He then argued, that this was not a case in which the defendant could be said to have acted in pursuance of the Building Act; that, for that purpose, the wall in question must be shewn to be a party-wall; whereas the wall, which was the subject of the trespass, was built on the plaintiff’s land, and belonged exclusively to him. On this point, he cited *Edge v. Parker* (8 B. & C. 697), *Knight v. Turquand* (2 M. & W. 101), *Cook v. Leonard* (6 B. & C. 351), and *Jones v. Gooday* (9 M. & W. 736).]

Cur. adv. vult.

The judgment of the Court was now delivered by

Parke, B. [Having stated the pleadings, and the facts set forth on the face of the award, he proceeded:—] The first question which the arbitrator refers to us is, whether the right of pleading the general issue, and giving the special matter in evidence, by the stat. 14 Geo. 3, c. 78, is taken away by the stat. 5 & 6 Vict. c. 97. We who heard the argument, my Lord Chief Baron, my Brother Platt, and myself, all agree that the right was taken away.

[251] That statute provides, in section 3, that so much of any clause or provision in any act or acts commonly called public local and personal, or local and personal, or in any acts of a local and personal nature, whereby any party or parties are entitled or permitted to plead the general issue only, and to give any special matter in evidence without specially pleading the same, shall be repealed. The act 14 Geo. 3, c. 78, was not an act commonly called public local and personal, for that designation did not take place till long after the statute passed. On the 1st May, 1797, the House of Lords resolved that the King’s printer should class the general statutes and special, the public local, and private, in separate volumes; and on the 8th May, 1801, there was a resolution of the House of Commons, agreed to by the House of Lords, that the general statutes, and the “public local and personal,” in each session, should be classed in separate volumes. The question, however,

is, whether the act does not fall under the description of an act of a local and personal nature. It seems singular that the new act, 7 & 8 Vict. c. 84, should not be classed amongst public local and personal acts, for it is confined in its operation to the district in and about the metropolis, with power to her Majesty to extend its limits. How this has happened cannot be explained, for it is clearly of a local and personal nature: local, as being confined to local limits; personal, as affecting particular descriptions of persons only, as distinguished from all the Queen's subjects. The 14 Geo. 3, c. 78, is of the same character in its general scope; and the only doubt that can be raised as to its being of a local and personal character, is, that it is not of a local and personal character only: some of the clauses affecting all the Queen's subjects, as the 84th and 86th, relating to accidental fires; and the statute is, in that respect, public. If the defence in an action arose out of either of those clauses, it would probably be held that the statutable plea was not taken away. But the defence in this case arises under that part of the [252] act which is not public; in all other respects then, so far as it relates to accidental fires, the act falls under the category of a statute of a local and personal nature; and we therefore all agree, that the statutable plea of the general issue, whereby to give the special matter in evidence, was taken away in this case.

The only remaining question, which, according to the finding of the arbitrator, becomes material, is, whether the non-compliance with the requisites of the stat. 14 Geo. 3, c. 78, could be given in evidence on the ordinary plea of not guilty.

Unless the privileges are meant by that statute to be available to the defendant, and a good defence without pleading, or independent of the form of the plea, as the want of an apothecary's certificate has been held to be, the

defendant cannot avail himself of that defence on a plea of not guilty, which merely denies the fact of a trespass having been committed. The case referred to by Mr. Martin (see 6 T. R. 243, a similar clause in the Sheffield Act), arising on the acts of the Court of Requests for the district of the Peak, was of the same character, and the defence was independent of the form of the plea. We think the meaning of the clause (the 100th) upon which the question arises, is, that, under the plea of not guilty given by the statute, the non-compliance with the terms prescribed should be a defence, but not generally, whatever the form of plea might be. The clause is as follows: [His Lordship read it:] —“The defendant may plead the general issue, and give the act and the special matter in evidence at any trial to be had thereupon.” The special matter which the defendant is permitted to give in evidence is all that the statute makes a defence; that is, either that the act was done by the authority of the statute, when the defence is complete; or that it was done in pursuance of it (in the sense [253] properly given by the decision to those words), in which case there will be a defence, if the defendant prove that there was a sufficient tender of amends, or that the place was within the statutable limits, and the venue is wrong; or unless the plaintiff prove that the action was commenced in due time, (which will *primâ facie* appear by the record), or that he gave a notice as required by the act. We think none of these defences are available, except under the statutable plea of not guilty; and the right of giving evidence of the special matter under that plea being taken away, the defendant must plead such matter specially, in order to avail himself of it. The rule must therefore be discharged.

Rule discharged.

Footnotes

- 1 Which repeals all clauses and provisions in any act or acts “commonly called public local and personal, or local and personal, or of a local and personal nature,” giving power to plead the general issue only, and to give any special matter in evidence under it.

153 E.R. 840

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*566 Solomons v R. Gertzenstein LD. and Others.



Negative Judicial Consideration

Court

Queen's Bench Division

Judgment Date

11 March 1954

Report Citation

[1951 S. No. 5061.]; [1954] 2 W.L.R. 823

[1954] 1 Q.B. 565



Queen's Bench Division

Lord Goddard C.J.

1954 Mar. 1, 2, 3, 11.

Metropolis—Fire—Precautions—Means of escape in case of fire—Failure to maintain means of escape in efficient working order—Employee of tenant injured in escaping from fire—Breach of statutory duty under [London Building Acts \(Amendment\) Act, 1939 \(c. xcvi\)](#)—Whether owners and receiver liable—Whether receiver "owner"—Fire caused by short circuit—Defence of accident—Statutory duty—Statute imposing penalty for breach—Statute for benefit of particular class of persons—Whether person injured by breach has right of action—[Fires Prevention \(Metropolis\) Act, 1774 \(14 Geo. 3, c. 78\), s. 86](#)—[London Building Acts \(Amendment\) Act, 1905 \(5 Edw. 7, c. ccix\)](#),

Statutory duty—Whether civil right created—Penalty. "Owner."

[Section 133 \(2\) of the London Building Acts \(Amendment\) Act, 1939](#), provides that "All means of escape in case of fire ... provided in pursuance of ... this Act or otherwise shall be kept and maintained in good condition and repair and in efficient working order by the owner of the building." Section 33 defines owner as meaning in Part V of the Act "the person for the time being receiving the rackrent of the premises whether on his own account or as agent or trustee ..." By section 148 contravention of, or failure to comply with, the provisions of section 133 is an offence for which a penalty is imposed.

A house in Soho was sublet to a number of tenants who carried on a variety of occupations, including manufacturing processes, on the premises, but control of the staircases and passages was retained by the landlords. The rents were collected and the property to a certain extent managed by a receiver who had been appointed in September, 1949, by a building society to whom the landlords had mortgaged their interest. In 1925 the London County Council had required the owners of the building to comply with section 12 of the London Building, Acts (Amendment) Act, 1905, which required that a trap-door with a fixed or hinged ladder, or other means of access to the roof be provided. In fact the building had a trap-door leading to the roof and an adequate ladder with hooks was provided, but it was seldom in position and was lying in a passage when, at about 7 p.m. on November 10, 1950, a fire started by a short circuit in the well of the staircase and caused to smoulder a stack of packing paper and cardboard cartons placed on a half landing by the first defendants, tenants occupying rooms on the first floor where they carried on a fur manufacturing business. A sheet of flame suddenly flared up the staircase well and the plaintiff, an employee of a tenant of a second floor room, who had gone to the top floor in search of water, received injuries while escaping through a window. In an action for damages for personal injuries in which the plaintiff alleged negligence

against the first defendants, the landlords and the receiver, and breach of section 133 of the Act of 1939 against the landlords and, as the "owner" of the building within the meaning of the section, the receiver:-

Held that (1) The fire had started accidentally, and therefore [section 86 of the Fires Prevention \(Metropolis\) Act, 1774](#) , provided a defence to all the defendants to the plaintiff's claim in negligence. Whether or not the stack of paper was responsible for the spread of the fire the business of the first defendants necessitated having a stack of wrapping paper, which was not highly inflammable, on hand, and they were not negligent in keeping it on the half landing.

[Collingwood v. Home and Colonial Stores Ltd. \(1936\) 53 T.L.R. 53; \[1936\] 3 All E.R. 200; 155 L.T. 550](#) followed.

(2) The failure to keep the ladder in position was a failure to keep the means of escape in good condition and efficient working *567 order and was, therefore, a breach of the statutory requirements of section 133 (2) of the Act of 1939.

(3) On the true construction of the Act, "owner" in section 133 bore the same meaning as in section 33 , and, therefore, the receiver, as the person receiving the rackrent and as the person deemed, by [section 109 of the Law of Property Act, 1925](#) , to be the agent of the mortgagor, was responsible for the consequences of the breach of statutory duty; so also were the landlords who were liable for his acts or defaults.

[Watts v. Battersea Borough Council \[1929\] 2 K.B. 63; 45 T.L.R. 224](#) applied.

(4) The precautions against fire required to be taken and maintained by the London Building Acts were for the benefit of persons working in the particular house in which the local authority required them to be provided, and were to be regarded in the same way as the precautions required to be taken for fencing machinery under the Factories Acts. The case was not therefore one in which the penalty imposed by the [London Building Acts \(Amendment\) Act, 1939](#) , was the only remedy for a breach, and the plaintiff accordingly had a cause of action and was entitled to recover damages against the landlords and the receiver.

[Groves v. Wimborne \(Lord\) \[1898\] 2 Q.B. 402; 14 T.L.R. 493](#) applied.

[Pasmore v. Oswaldtwistle Urban District Council \[1898\] A.C. 387; 14 T.L.R. 368](#) distinguished.

ACTION.

The plaintiff was employed by his brother-in-law who was the tenant of a room on the second floor of an old house in Soho where he carried on the business of a fur manufacturer. The house consisted of a basement, occupied by makers of musical instruments, a ground floor and three floors above. There were a number of tenants carrying on a variety of occupations, including manufacturing processes, in the building. It had a staircase, serving a series of half landings and landings, which was entirely separated from the back wall by a balustrade forming a fence between the landings and the back wall so that there was a well behind the staircase going up to the whole height of the house. The walls were panelled and on the first half landing, a few steps up from the hall, was an aperture in the wall, covered with a grid for ventilation behind which was an air shaft. Panelling was fitted round the grid and electric wires ran down the air shaft.

The space between the first half landing and the wall was covered with wire on which the first defendants, R. Gertzenstein Ltd., fur manufacturers, who were tenants of rooms on the first floor, had stacked wrapping paper and corrugated packing material. The second defendants, H. and S. Development Co. *568 Ld., were the landlords of the building, and had retained control of the staircase and passages. In 1949 they had mortgaged their interest to the Skipton Building Society who, in September, 1949, interest on the mortgage having fallen into arrear, appointed the third defendant, Joseph Edwards, receiver. Thenceforward the receiver by a member of his staff collected the rents and to a certain extent managed the property, visiting the premises from time to time and seeing that certain obligations under the landlords' covenant to keep the entrance and staircase clean and lighted were carried out.

On November 10, 1950, the plaintiff and his brother-in-law had stayed later than the other tenants. Shortly after 7 p.m. the plaintiff came out of the room on the second floor and found smoke ascending from the stack of paper on the first half landing which was on fire though not burning fiercely. He and his brother-in-law ran down with buckets of water and the plaintiff then went up to the lavatory on the top floor to fetch more water while his brother-in-law went to telephone to the fire brigade. A sheet of flame suddenly burst out, reaching the second and third floors. The plaintiff's brother-in-law received serious burns, while the plaintiff on the top floor, seeing that he could not descend the staircase, got out of a window opening on to the back of the house and tried to climb down a pipe. His arm caught in a junction of the pipe and he was suspended by his arm, breaking the bone, and remained in that position for some time before he was finally rescued by the fire brigade.

About February, 1925, the house was the subject of a notice served by the London County Council under section 12 of the London Building Acts (Amendment) Act, 1905, requiring the owners to comply with the section.¹ On the top floor there was a trap door leading to the roof, but, although an adequate ladder with hooks was provided and kept on the premises, it was seldom kept in position and at the time of the fire was lying in one of the passage ways on the top floor leading to the lavatories.

The plaintiff claimed damages alleging negligence against all three defendants, in particular he alleged that the second and third defendants had negligently permitted the accumulation of, and that the first defendants had negligently accumulated, a dangerous quantity of waste paper and highly inflammable material on the level of the first floor and that they had failed to inspect or maintain the electric wiring behind the panelling of the stairs.

*569

The plaintiff further alleged that the second defendants and also the third defendant, as the owner of the building within the meaning of the [London Building Acts \(Amendment\) Act, 1939](#), were, in failing to keep the ladder in its customary place, in breach of their statutory duty under section 133 (2) of the Act.²

The defendants denied liability.

Lord Hailsham Q.C. and John Perrett for the plaintiff. Even if the fire started accidentally within the meaning of [section 86 of the Fires Prevention \(Metropolis\) Act, 1774](#),³ its spread, which was the cause of the plaintiff's injuries, was due to the negligence of the first defendants in keeping, and of the second and third defendants in permitting them to keep, a quantity of highly inflammable material on the half landing. The Act therefore affords no defence: *Musgrove v. Pandelis*.⁴ [On this issue reference was made to *Filliter v. Phippard*⁵; *Collingwood v. Home and Colonial Stores Ltd.*⁶ and *Rylands v. Fletcher*.⁷]

*570

There was a clear breach of [section 133 \(2\) of the London Building Acts \(Amendment\) Act, 1939](#). That section imposes on the "owner" of the building a duty to keep the means of escape in efficient working order. Section 33 defines "owner" in Part V of the Act as the person for the time being receiving the rackrent of the premises. Section 133 contains an express reference back to Part V and both Part V and section 133 are concerned with means of escape in case of fire; "owner" must therefore bear the same meaning in section 133 as it does in Part V. A receiver is the person receiving or entitled to receive the rackrent of the property either on his own behalf or as a trustee, and it therefore follows that the third defendant was the owner of the building within section 133 and the person responsible for seeing that the statutory duty was carried out. Similar words in the [Public Health \(London\) Act, 1891](#), were held in *Watts v. Battersea Borough Council*⁸ to cover a solicitor receiving rents.

[LORD GODDARD C.J. If the third defendant is the owner under the Act, what is the position of the second defendants?]

They are the mortgagors vicariously responsible for the acts of the receiver as their agent: [section 109 \(2\) of the Law of Property Act, 1925](#). They are also liable as the occupiers of the staircase.

Marven Everett Q.C. and *Harry Lester* for the third defendant, on the issue of negligence referred to [Collingwood v. Home and Colonial Stores Ltd.](#)⁹

There was no breach of section 133. A trap-door and a ladder with hooks were provided.

[LORD GODDARD C.J. A fixed or hinged ladder was not provided.]

There was no obligation for the ladder to be fixed or hinged. The ladder here, together with the trap-door, came within the requirement "or other means of access to the roof." [Reference was made to section 37 (1) (iii) of the Act of 1939.] The only obligation under section 133 was to keep and maintain the mean of access to the roof in good condition; the section contains no reference to keeping a ladder in any particular place. The matter must be looked at from a practical point of view. A suitable ladder was provided, but it could be moved at any time by the tenants, and if they moved it the third defendant cannot be held responsible. In any event the plaintiff never looked for the ladder.

**571*

[LORD GODDARD C.J. He did exactly what anyone with a fire behind him might be expected to do.]

In this class of case it is necessary for the plaintiff to show that the damage was caused by the breach of duty; if there was such a breach the plaintiff has not established that the damage flowed from it.

The third defendant was not the "owner" of the building within the meaning of section 133. The prima facie function of a receiver is to receive rents and profits; his powers and duties are circumscribed by [section 109 of the Law of Property Act, 1925](#), and beyond that he has no duties. It would be remarkable if a receiver were responsible for the provision of means of escape; such a position would be unpracticable, and unless the Act says so in clear words he should not be so regarded. [Watts v. Battersea Borough Council](#)¹⁰ is not a helpful authority in the present case. The Act contemplates other meanings of "owner": see section 141.

Section 148 makes contravention of the provisions of the Act an offence for which a penalty is imposed. The purpose of the Act is for the better regulation of the community of greater London; it is a private Act and not for the benefit of any individual or class of individuals, and, therefore, a breach of duty under it does not give rise to a cause of action: see on this question, [Cutler v. Wandsworth Stadium Ltd.](#)¹¹

Lord Hailsham Q.C. in reply. The existence of a penalty clause is not conclusive that the civil right of action is taken away.

[LORD GODDARD C.J. If the London County Council requires owners to do something, does that create a duty so that an individual injured by a failure to perform that duty has a right of action?]

The precautions required to be taken are for the benefit of a class of persons - those in the building. A right of action has been held to have been taken away by a penalty clause where the obligation was for the benefit of the public generally: [Pasmore v. Oswaldtwistle Urban District Council.](#)¹² The principle applicable to the present case, however, is that in [Groves v. Wimborne \(Lord\)](#)¹³ to the effect that where an act is for the benefit of a class of persons and the penalty for a breach is not adequate compensation, there is a cause of action. [Reference **572* was also made to [Dawson & Co. v. Bingley Urban District Council.](#)¹⁴ [Britannic Merthyr Coal Co. Ltd. v. David](#)¹⁵ and [Butler \(or Black\) v. Fife Coal Co.](#)¹⁶] In [Monk v. Warbey](#)¹⁷ a severe penalty did not deprive the subject of a right of action. The decision in [Groves v. Wimborne \(Lord\)](#)¹⁸ was not based on a master and servant relationship: such cases are, on the authorities, in no special position: [Monk v. Warbey](#)¹⁹; [London Passenger Transport Board v. Upson.](#)²⁰ Under the Factory Acts a worker may have a right of action against a person who is not his employer. The fact that this is a private Act makes no difference: [Knapp v. Railway Executive.](#)²¹ Only in quite different types of cases has it been held that there was no cause of action, never where an Act was for the benefit of persons exposed to danger and they suffered physical damage as a result of a breach of its provisions.

[Reference was made to [Gorris v. Scott](#)²²; [Pasmore v. Oswaldtwistle Urban District Council](#)²³; [Cutler v. Wandsworth Stadium Ltd.](#)²⁴; [Biddle v. Truvox Engineering Co. Ltd.](#)²⁵; [Clarke and Wife v. Brims](#)²⁶; [Badham v. Lambs Ltd.](#)²⁷; [Phillips v. Britannia Hygienic Laundry Co. Ltd.](#)²⁸; and [Knapp v. Railway Executive.](#)²⁹]

The first and second defendants did not appear and were not represented.

Cur. adv. vult.

March 11. LORD GODDARD C.J.

read the following judgment: On the night of November 10, 1950, a disastrous fire occurred at 36, Gerrard Street, Soho, about 7 p.m. There were at the time three persons on the premises: a woman who was suffocated and lost her life, the plaintiff, who was badly injured in trying to escape, and his brother-in-law and employer, who sustained very severe burns. The plaintiff brings this action in respect of the injuries he sustained and I do not pretend that I have found the case otherwise than difficult both as to law and fact. Indeed, *573 the evidence was a great deal less precise than one would have wished, but perhaps this was inevitable and the time which has elapsed since the fire no doubt is to some extent responsible for this state of affairs.

[His Lordship stated the facts and continued:] Apart from any question of breach of statutory duty, it is necessary for the plaintiff to prove that the fire started or at least spread owing to negligence, otherwise Lord Hailsham conceded, rightly in my opinion, that the [Fires Prevention \(Metropolis\) Act, 1774](#), would afford a defence. The first thing, therefore, is to determine, if I can, how the fire started. The evidence is, as so often happens in cases of fire, nebulous, and I was invited by Mr. Everett to say that its origin is unexplained. I think, however, that the strong probability is that it was caused by a short circuit set up by the electric wires behind the panelling in the neighbourhood of the ventilator. But how that was caused is a very different matter.

[His Lordship considered the evidence given by the officers of the fire brigade and continued:] In my opinion it was a short circuit that set fire to the wood in the neighbourhood of the ventilator and that in turn set fire to the stack of paper. Pausing here, it does not appear that this paper ever burnt freely; no doubt it caused a lot of smoke, and I accept the evidence that there was some flame seen, but it was not that stack apparently that caused the sudden sheet of flame which caused the real damage here. The cause of that is obscure; the only explanation was that offered by the fire officers, that the heating of the paint and varnish caused an accumulation of gas which suddenly ignited and rushed upwards. However, I do not propose to deal further with this because I cannot hold that placing packing paper and cardboard cartons in this recess behind the balustrade was negligent. Business of the sort carried on by the first defendants necessitates having a stack of packing and wrapping material at hand. This material is not highly inflammable like loose tissue paper or shavings would be. It is common knowledge that it takes a good deal to get closely packed thick paper well alight, though it will smoulder. But in any case I cannot see how it can be negligent to store this paper in what was a convenient recess any more than it would be to store it in one of the rooms occupied by the first defendants. They had no reason to suppose that there was likely to be a short circuit which would fire the panelling in the immediate neighbourhood of the stack, which I may mention was never burnt through. On the evidence before me I am not prepared to find that the fire was caused by the *574 negligence of any of the defendants, and I hold that it was accidental and need only refer on this matter to [Collingwood v. Home and Colonial Stores Ltd.](#)³⁰

I now come to the allegation of breach of statutory duty, which affects both the second and third defendants. It is alleged that there was a breach of [section 133 of the London Building Acts \(Amendment\) Act, 1939](#), and it is necessary that I should deal with the evidence relating thereto. It seems that about February, 1925, which was long before either the second or third defendants had anything to do with the premises, a notice had been served by the London County Council under section 12 of London Building Acts (Amendment) Act, 1905), requiring the owners of the premises to comply with the section to the satisfaction of the district surveyor. The evidence on this point was given by an officer of the London County Council who had a note of the service of this notice, but no copy of it was produced. He said, however, that that was what the notice would require: that such work as was done was completed in April, 1925, and there was nothing to show that the district surveyor had not been satisfied. Under that section the county council could require that there should be a trap-door in a suitable position constructed in accordance with the provisions of the section, with a fixed or hinged step ladder leading to the roof or other proper means of access to the roof. It was not suggested by either side that there had ever been a fixed or hinged step ladder provided, but that there had been a ladder with hooks on it which could be fixed on to the trap-door. Having no other evidence than that which I have set out, I must assume that this was regarded by the district surveyor as an adequate means of access to the trap-door, and that he was satisfied with the latter. Another witness from the London County Council said that he had surveyed the property about six months before the fire and did so because the factory inspector had called the attention of the council to the premises. He had apparently prepared some survey drawings and he said in his evidence that at the time of his survey there was no ladder giving access to the trap-door. It seems almost inexplicable that a further notice was not served by the county council or some proceedings taken, but there was no evidence that any communication of any sort had been addressed to anyone calling attention to the absence of the ladder. In fact, I find that there was an adequate ladder with hooks provided and kept *575 on the premises, but the ladder was not always, and as I find, only seldom kept in position. It is now known that at the time of the

fire it was lying in one of the passageways leading to the lavatories. It is not altogether clear in which passageway it was, nor do I think that it matters. I am satisfied that it was not in position on the day of the fire.

The first thing to consider is who is responsible for the consequences, if any, of the disregard of the original requirements of the county council. By the time of the fire the relevant statute was the [London Building Acts \(Amendment\) Act, 1939](#). Part V of that Act has the cross-heading "Means of Escape in Case of Fire." An owner is defined by section 33 as meaning the person for the time being receiving the rackrent of the premises whether on his own account or as agent or trustee for any other person. The second defendants admit that they were the landlords of the premises at the material times. In fact they were the owners in equity, having mortgaged their interest to the Skipton Building Society in the year 1949, and on September 27, 1949, the building society appointed the third defendant to be receiver of the income and of the rents and profits of the premises. and at all material times thereafter he acted as receiver. There seems no escape, therefore, from the position that he was for the purposes of Part V of the Building Act the owner of the premises. By [section 109 \(2\) of the Law of Property Act, 1925](#), the receiver is deemed to be the agent of the mortgagor who is solely responsible for the receiver's acts or defaults unless the mortgage deed otherwise provides. Section 35 (1) of the Act of 1939 deals with protection against fire in old buildings, and this building is an old building within the meaning of the Act, and the section provides, among other things, that where an old building is a building in which more than 10 persons are normally employed at any one time above the first storey or on or above any storey which is at a greater height than 20 feet the council may at any time serve upon the owner of the building a notice requiring him to provide such means of escape as in the circumstances of the case can be reasonably required, and there is a proviso that the provisions of the subsection shall not apply to any building which has been provided with means of escape in accordance with, among other Acts, the Act of 1905, so long as such means of escape are properly maintained.

Section 133 is in Part XII of the Act, the cross-heading of which is "Miscellaneous." [His Lordship read section 133 (1) and (2) and continued:] I have already said that I am obliged *576 to hold that the receiver is the owner within the meaning of these sections, and it would be impossible to construe the word "owner" in section 133 in any way differently from the construction placed upon it by section 33 as the sections are both dealing with the same matter, namely, means of escape in case of fire.

That a receiver can be the owner is, I think, made clear by the reasoning in [Watts v. Battersea Borough Council](#).³¹ Moreover, in the present case, the third defendant did have some duty of management in the sense that it was his duty as representing the landlords and as the agent of the mortgagors to see that the staircase, landings and so forth were kept in good order and, as he told me, he would receive and deal with any complaints from the tenants. I am obliged to find that there had been a fairly consistent disregard of the escape precautions because I am quite satisfied that this ladder was not kept in position though it may have been up from time to time. It was certainly not in position on the night of the fire. If it had been, it is contrary to common sense to suppose that the plaintiff would not have used it and got out on to the roof, from which he might have been rescued with comparative ease, and the same applies to the unfortunate woman who lost her life. I dare say that if the plaintiff had searched about he might have found the ladder, but with the fire raging as it was, and we know the injuries that were inflicted upon his employer one floor down, it is too much to expect that a man will go hunting around to find a ladder and not make use of the first means of escape that occurs to him, hazardous though that means may have been.

The principal question that has been argued on this part of the case is whether the disregard of the statutory requirements, because on my findings neither safeguards nor means of escape were kept in good condition or efficient working order, gives a cause of action to the plaintiff or whether, as a penalty is provided in the Act, that is the only remedy which is available. On this point a large number of cases were cited, but I do not think it necessary to burden this judgment by setting all of them out. There are cases both ways, some giving a remedy by action, others holding that the only remedy is to prosecute for the penalty or to enforce the obligation in the particular manner prescribed by the Act. I will briefly, however, refer to [Pasmore v. Oswaldtwistle Urban District Council](#).³² where the Earl of Halsbury L.C.³³ quoted with approval what Lord Tenterden C.J. said *577 in [Doe v. Bridges](#)³⁴: "where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner," and Lord Macnaghten said³⁵: "Whether the general rule is to prevail, or an exception to the general rule is to be admitted, must depend on the scope and language of the Act which creates the obligation and on considerations of policy and convenience." It is worth noticing that that case dealt with the duty of a local authority to make sewers, and the decision was that that duty could not be enforced by an action for mandamus at the suit of a private person; the only remedy being a complaint to the local government board. That case, of course, deals with a wholly different state of affairs than we find in the present case, where obviously the precautions to be taken and maintained are for the benefit of the people who may be working in the particular house in which the local authority have required them to be provided. I can see no reason why these precautions are not to be regarded in exactly the same way as the precautions required to be taken for fencing machinery and so forth under the Factories Acts. A person injured by a disregard of the statutory requirements has a right of action although the factory owners are at the same time liable to a penalty. The reasoning in [Groves v. Wimborne \(Lord\)](#)

³⁶ always regarded as the leading case on this subject, seems to me to be eminently applicable to the present case. One of the factors which entitled the London County Council to call for adequate means of escape is the number of people working on the premises, and there can be no doubt that by reason of some of the work which was carried on there the premises fell within the definition of a factory under [section 151 of the Factories Act, 1937](#). I can see no reason, therefore, why a person injured because the means of escape were not maintained in proper working order should not have a cause of action. The principle which I would endeavour to state is that, where a duty imposed by the Act is intended for the benefit of the public generally, a right of action is not given to an individual who may suffer an injury from its breach, but where the duty is imposed for the benefit of a particular ascertainable class, such as workers in a building, anyone injured as a result of the breach has a right of action. It does not seem to me that it necessarily follows that if the London County Council required certain precautions to be taken *578 in such places of public resort as theatres or a stadium or large exhibition hall, that if a fire took place and persons were injured every one of them would have a cause of action. It is not necessary to decide this, but it seems to me there may be a considerable difference between the public who resort or are invited to resort to such places and workers in a building in which precautions are ordered to be taken for the benefit of those workers.

For these reasons I am of opinion that the plaintiff has a cause of action against the third defendant as the owner of the premises and also for what it is worth against the second defendants who are liable for his acts or defaults.

[His Lordship considered the evidence relating to damages and continued:] I think that in all the circumstances £750 is a fair sum to award as general damages. Special damages together with the loss of property amount to £650 and there will, therefore, be judgment for the plaintiff for £1,400.

Representation

Solicitors: Herbert Baron & Co. ; Spiro & Steele .

Judgment for the plaintiff. (J. F. L.)

Footnotes

¹ London Building Acts (Amendment) Act, 1905, s. 12 : "Means of access to roofs. (1) (A) Every ... existing building ... and (B) Every new building; shall ... be provided ... by the owner with either (a) A dormer window or a door opening ... on to the roof with proper access thereto; or (b) A trap door in a suitable position approved by the district surveyor ... and also with a fixed or hinged step ladder leading to the roof; or (c) Other proper means of access to the roof." [London Building Acts \(Amendment\) Act, 1939, s. 33](#) : "Means of Escape in Case of Fire - (1) In this Part of this Act ... 'owner' in relation to any premises means the person for the time being receiving the rackrent of the premises whether on his own account or as agent or trustee for any

other person. ..." S. 133 :
"(1) All arrangements and safeguards for lessening danger from fire provided in pursuance of the provisions of the London Building Acts ... shall be kept and maintained in good condition and repair and in efficient working order by the owner of the building. ...
(2) All means of escape in case of fire ... provided in pursuance ... of Part V ... or otherwise shall be kept and maintained in good condition and repair and in efficient working order by the owner of the building and no person shall do or permit or suffer to be done anything to impair the efficiency of any such means of escape. ..." S. 148 :
"(1) ... the acts or omissions specified ... shall be an offence against this Act ... (xxx) To contravene or fail to comply with the provisions of section 133 ... [penalty] £20 [for each day] £5."

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London Building Acts (Amendment) Act, 1905, s. 12 : "Means of access to roofs. (1) (A) Every ... existing building ... and (B) Every new building, shall ... be provided ... by the owner with either (a) A dormer window or a door opening ... on to the roof with proper access thereto; or (b) A trap door in a suitable position approved by the district surveyor ... and also with a fixed or hinged step ladder leading to the roof; or (c) Other proper means of access to the roof." [London Building Acts \(Amendment\) Act, 1939, s. 33](#) : "Means of Escape in Case of Fire - (1) In this Part of this Act ... 'owner' in relation to any premises means the person for the time being receiving the rackrent of the premises whether on his own account or as agent or trustee for any other person. ..." S. 133: "(1) All arrangements and safeguards for lessening danger from fire provided in pursuance of the provisions of the London Building Acts ... shall be kept and maintained in good condition and repair and in efficient working order by the owner of the building. ...
(2) All means of escape in case of fire ... provided in pursuance ... of Part V ... or otherwise shall be kept and maintained in good condition

and repair and in efficient working order by the owner of the building and no person shall do or permit or suffer to be done anything to impair the efficiency of any such means of escape. ..." S. 148: "(1) ... the acts or omissions specified ... shall be an offence against this Act...(xxx) To contravene or fail to comply with the provisions of section 133 ... [penalty] £20 [for each day] £5."

- 3 [Fires Prevention \(Metropolis\) Act, 1774, s. 86](#) : "... no action, suit or process whatever shall be had, maintained or prosecuted against any person in whose house ... or other building, ... any fire shall ... accidentally begin, nor shall any recompence be made by any such person for any damage suffered thereby. ..."
 4 [\[1919\] 2 Q.B. 43; 35 T.L.R. 299](#) .
 5 [\(1847\) 11 Q.B. 347](#) .
 6 [\(1936\) 53 T.L.R. 53; \[1936\] 3 All E.R. 200; 155 L.T. 550](#) .
 7 [\(1868\) L.R. 3 H.L. 330](#) .
 8 [\[1929\] 2 K.B. 63; 45 T.L.R. 224](#) .
 9 [\(1936\) 53 T.L.R. 53; \[1936\] 3 All E.R. 200](#) .
 10 [\[1929\] 2 K.B. 63](#) .
 11 [\[1949\] A.C. 398; 65 T.L.R. 170; \[1949\] 1 All E.R. 544](#) .
 12 [\[1898\] A.C. 387; 14 T.L.R. 368](#) .
 13 [\[1898\] 2 Q.B. 402; 14 T.L.R. 493](#) .
 14 [\[1911\] 2 K.B. 149; 27 T.L.R. 308](#) .
 15 [\[1910\] A.C. 74; 26 T.L.R. 164](#) .
 16 [\[1912\] A.C. 149; 28 T.L.R. 150](#) .
 17 [\[1935\] 1 K.B. 75; 51 T.L.R. 77](#) .
 18 [\[1898\] 2 Q.B. 402](#) .
 19 [\[1935\] 1 K.B. 75](#) .
 20 [\[1949\] A.C. 155; 65 T.L.R. 9; \[1948\] 1 All E.R. 60](#) .
 21 [\[1949\] 2 All E.R. 508](#) .
 22 [\(1874\) L.R. 9 Exch. 125](#) .
 23 [\[1898\] A.C. 387](#) .
 24 [\[1949\] A.C. 398](#) .
 25 [\[1952\] 1 K.B. 101; \[1951\] 2 T.L.R. 968; \[1951\] 2 All E.R. 835](#) .
 26 [\[1947\] K.B. 497; 63 T.L.R. 148; \[1947\] 1 All E.R. 242](#) .
 27 [\[1946\] K.B. 45; 61 T.L.R. 569; \[1946\] 2 All E.R. 295](#) .
 28 [\[1923\] 2 K.B. 832; 39 T.L.R. 530](#) .
 29 [\[1949\] 2 All E.R. 508](#) .
 30 [\(1936\) 53 T.L.R. 53; \[1936\] 3 All E.R. 200; 155 L.T. 550](#) .

31	[1929] 2 K.B. 63; 45 T.L.R. 224 .
32	[1898] A.C. 387; 14 T.L.R. 368 .
33	[1898] A.C. 387 , 394.
34	(1831) 1 B. & Ad. 847 , 859.
35	[1898] A.C. 387 , 397.
36	[1898] 2 Q.B. 402; 14 T.L.R. 493 .

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Mark Stannard (t/a Wyvern Tyres) v. Robert Raymond Harvey Gore

Case No: B2/2011/2377

Court of Appeal (Civil Division)

4 October 2012

[2012] EWCA Civ 1248

2012 WL 4050249

Before: Lord Justice Ward Lord Justice Etherton and Lord Justice Lewison

Date: 04/10/2012

Analysis

On Appeal from Worcester County Court

Mr Recorder Potts

0HR00229

Hearing date: 26th April 2012

Representation

- Jonathan Waite QC and Michele de Gregorio (instructed by DAC Beachcroft LLP) for the appellant.
- Philip Rainey QC and Nicholas Isaac (instructed by Beaumonts Solicitors) for the respondent.

Judgment

Lord Justice Ward:

Every law student is likely to remember how Mrs Donoghue suffered when a snail in a state of decomposition floated into her glass from the bottle of ginger beer manufactured by Mr Stevenson. Almost as memorable must be the case of Mr Ryland's reservoir bursting and flooding Mr Fletcher's colliery which gave rise to the rule we now know as Rylands v. Fletcher . Lest we cannot recall the iconic ruling by Blackburn J. on behalf of the Exchequer Chamber, here it is:

“We think that the true rule of law is, that the person who for his own purposes brings onto his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of vis major or the act of God; but as nothing of this sort is here, it is unnecessary to enquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is beaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any default of his own; but it seems reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law whether the things so brought be beasts, water or filth, or stench,” see *Fletcher v Rylands* (1866) LR 1 Ex 265 , 279/280.

Whilst entirely concurring with that opinion, Lord Cairns, the Lord Chancellor, added the gloss that the land should not be used “for any purpose which I may term non-natural use” see *Rylands v Fletcher* (1868) LR 3 H.L. 330 , 339.

Although *Donoghue v Stevenson* [1932] AC 562 has withstood the test of time, Lord Bingham of Cornhill was to say:

“Few cases in the law of tort or perhaps any other field are more familiar, or have attracted more academic and judicial discussion, than *Rylands v Fletcher* ”, see *Transco v Stockport MDC* [2004] 2 AC 1 at [3].

It was subjected to even more withering criticism by Mason C.J. and the majority of the High Court of Australia in *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at [18] (though it is fair to say that the criticisms were not entirely accepted by the House of Lords in *Transco*):

“Notwithstanding the many accolades which have been, and continue to be, lavished on Blackburn J's judgment ((see, e.g., Wigmore, (1894) 7 Harvard Law Review 315, 383, 441 at 454: “the master-mind of Mr Justice Blackburn”; Newark, “The Boundaries of Nuisance”, (1949) 65 LQR 480 at 487: “his great judgment”; Salmond and Heuston on the *Law of Torts*, 20th ed. (1992) at 314: “always been recognised as one of the masterpieces of the Law Reports”), that brief exposition of “the true rule of law” is largely bereft of current authority or validity if it be viewed, as it ordinarily is, as a statement of a comprehensive rule (see, e.g., *Jones v. Festiniog Railway Co.* (1868) LR 3 QB at 736 per Blackburn J: “the general rule of common law”.) Indeed, it has been all but obliterated by subsequent judicial explanations and qualifications. ...”

In *Transco* itself Lord Hoffmann did say at [39]:

“It is hard to escape the conclusion that the intellectual effort devoted to the rule by judges and writers over many years has brought forth a mouse.”

Now we have another occasion to labour. How, if at all, does the rule apply where the damage to the claimant's land is caused by the “escape” of a fire which raged through the defendant's premises, its ferocity fed by the eventual ignition of the large stack of tyres which he had brought onto his land on which he carried out the business of a motor vehicle tyre supplier and fitter. On 22nd August 2011 Mr Recorder Potts sitting in the Worcester County Court held that all the requirements of *Rylands v Fletcher* were satisfied and accordingly judgment for the claimant was

entered with damages to be assessed. The defendant now appeals.

The facts in a little more detail

The defendant carried on business as Wyvern Tyres supplying, fitting and balancing car and van tyres. The business was conducted at Unit 111 and 107a on the Holmer Trading Estate in Hereford. In the front part of the premises was the ramp and other pieces of equipment necessary for changing and fitting the tyres, vulcanising them and balancing them. To the side were two small offices. Along the length of the building to the rear were some six specially constructed racks for the storage of tyres. The Recorder found that the defendant “squeezed stock” into the room, some tyres being “haphazardly and untidily above the racks as well as on the racks themselves” and others were “piled high in ‘chimneys’”. The claimant's premises were behind the defendant's. Between them was a space used as a further area for the storage of new and part-worn tyres. There were no racks in this area and the tyres were simply piled high vertically in these “chimneys”, some of them being located along the wall which divided the claimant's premises from the defendant's. It was difficult to know how many tyres were held by the defendant but the Recorder was satisfied that at the material time about 3,000 tyres were stored in and outside the building.

Having heard the evidence of experienced former fire officers, the Recorder concluded that tyres have recognised particular characteristics so far as concerns fires and fire fighting as follows:

- “(a) They are not in themselves flammable, and in their normal state will not ignite unless there is sufficient flame or heat from another source.
- (b) Once however a primary fire has developed, and intensified it can produce sufficient heat or flame to ignite rubber composite tyres.
- (c) If tyres catch fire then combustion develops rapidly depending on the quantity of tyres present and how they are stored.
- (d) Once fire takes hold of tyres they are difficult to put out.”

A fire did break out at about 6.15 pm on 4th February 2008 some time after the defendant had secured the premises, set the alarms at 4.50 pm and left the site. It seems that the fire had started in the front workshop section and had quickly intensified. Such was its severity that ten pumping fire appliances attended at the scene with three other special vehicles, a command unit, Ariel ladder platform and water carrier. Once the fire took hold its intensity grew rapidly. By 19.55, just over an hour after the original attendance, the entire Wyvern Tyres unit was fully ablaze; it was already unlikely that the claimant's premises could be saved and priority was given, in vain it seems, to saving the adjoining units. Alas they were also totally destroyed and for safety reasons were reduced to rubble the following day. The Recorder made these findings:

“4. I am ... satisfied on the balance of probabilities that the fire originated in Wyvern's premises, and probably towards the front of the workshop area. From there it spread back into the workshop and tyre storage area, and to the side into the office and reception, and thence to the unit next door occupied by the double glazing business, and to the rear into Mr Gore's (the claimant's) premises which adjoined directly onto Wyvern's premises, the two being separated by what appears from Mr Gore's plan to be simply a single skin of brick.”

The Recorder accepted the evidence of the fire officer who attended the fire that the cause of the fire was “something occurring in the wiring and appliances within Wyvern's premises”. Thus he accepted that the primary source was “electrical”.

The Recorder asked whether the tyres made a difference. He held:

“15. In my judgment on the balance of probabilities they did. Something that stands out in this case in the descriptions of the fire by the witnesses, including fire officers, is its intensity and severity. ... This was a fire which spread with great rapidity and intensity. Indeed it was so aggressive that the Fire Service plainly had difficulty in bringing it under control, and could only do so some hours after they had first been called out and attended

and after they had been reinforced with further equipment and personnel.

16. While it is clear that tyres per se are not readily combustible and will not constitute a primary source of combustion, it is plain that they can catch fire from some other source as I have found to have existed in this case. Once the tyres were alight there was a huge problem for all concerned, including adjoining and neighbouring occupiers, because in the words of Mr Denton [the fire officer], “Once a fire takes hold of tyres they are difficult to put out”. That is what, on the balance of probabilities, I find happened in the instant case with consequences that are of course only too apparent.”

The judgment under appeal

The claim was brought both in negligence and in strict liability. The claim in negligence was rejected. The Recorder found, first, that the primary cause of the fire lay in the wiring or electrical appliances in Wyvern's premises but there was nothing to show that such a state of affairs was the result of a failure to maintain or keep in good order the electrical system itself or all those electrical appliances that were located within the premises, as opposed to something that might have arisen entirely by accident. He was satisfied that the machinery was regularly checked and that the electrical work had been competently carried out and checked a reasonable time before this fire started. Secondly he found that it was not reasonable to expect the defendant to invest in an automatic alarm system or sprinkler system and in any event even if he should have done so, there was no evidence to suggest that such systems would have been likely to have prevented the fire from spreading to the claimant's premises. The third allegation of storing the tyres without any adequate measures in place to prevent them catching fire or to minimise the chances of them catching fire was so vague and so lacking in specificity as to make it in practice impossible even to respond to it by way of defence other than by bare denial. There was no allegation and no evidence at all of what the defendant should or could have done to prevent the spread of fire that had undeniably broken out from reaching the tyres and thereby involving them in the conflagration. The claimant failed to prove that the defendant could have done

something in terms of the storage of the tyres that would have prevented their igniting at all or would have reduced the chances of them doing so. Any complaint of a breach of the [Regulatory Reform \(Fire Safety\) Order 2005](#) for the failure to take such general fire precautions as would ensure so far as was reasonably practicable the safety of any of the defendant's employees could not take the claimant's case further because there were no employees and in any event nothing in that statutory duty conferred any right of action in civil proceedings. The Recorder accordingly held that:

“... subject to the question of any Rylands v Fletcher liability, the failure of Mr Gore to establish to the satisfaction of the court any negligence on the part of Mr Stannard means that, apart from any Rylands v. Fletcher liability, he has the benefit of a defence under [section 86 of the Fires Prevention \(Metropolis\) Act 1774](#) on the basis that the fire was accidental.”

Strict liability under Rylands v Fletcher

In a careful judgment, the Recorder analysed the authorities presented to him. Dealing specifically with fires in connection with the rule in Rylands v Fletcher he observed how the [Fires Prevention \(Metropolis\) Act 1774](#) limited a defendant's liability to non-accidental fires but he added:

“Even then of course where a fire arose from something dangerous that the defendant had brought onto his land there could be nothing accidental about any fire that arose as a result, and what became the rule in Rylands v Fletcher continued to apply with full force, although of course it is the fire itself that is the dangerous thing that escapes the defendant's land, rather than whatever caused the fire to arise in the first place.”

As for Rylands v Fletcher he noted:

“The following well-known requirements to the rule in order that liability may be established:

(i) the defendant must bring onto his land something that is dangerous;

(ii) the danger must escape from the defendant's land to the claimant's land; and

(iii) the use to which the defendant had put his land must be “non-natural”.”

He concluded that “there was plainly an escape within the meaning of the Rylands v. Fletcher rule” and “liability therefore turns on whether or not Mr Stannard's activities on Wyvern's premises were dangerous and a non-natural use of his land.” The only relevant activity was the storage of tyres. They were not in themselves flammable and would not ignite unless there was a sufficient flame or heat source. It is, however, not impossible for tyres to catch fire as obviously happened here and if they do ignite they have a special fire risk quality. This is that once alight they may burn rapidly and intensively such that they are difficult to put out. Given the haphazard way a large number of tyres were stored there was an exceptionally high risk of damage to the claimant's premises if fire broke out. That was a foreseeable risk with the result that the defendant's activities in storing tyres in the numbers and ways that he did were dangerous within the meaning of the rule. As for non-natural use, the Recorder asked himself whether what the defendant did in storing and enlarging the tyre storage area for that purpose was out of the ordinary. Here the state of affairs created by the defendant was out of the ordinary. It was not normal and not routine, the standard of normality and routine being that of a tyre business storing tyres in an orderly fashion and in such numbers that are well within the capacity of its dedicated storage facilities. This was non-natural use. Consequently the requirements of the rule in Rylands v. Fletcher were established and judgment was entered for the claimant accordingly.

Discussion: the only question in this appeal

The appellant does not seek to challenge the findings of fact nor the dismissal of the claim in negligence. It is, however, submitted on the appellant's behalf that the Recorder erred in his application of the test for strict liability under the rule in Rylands v. Fletcher as applied to fire cases. I propose to deal first with what seems to me to be the established formulation of the rule in classic Rylands v. Fletcher cases, leaving for later consideration the question of whether there

is a special or different rule of a Rylands v. Fletcher kind to deal with damage caused by fire.

Classic Rylands v. Fletcher

I need not repeat Blackburn J's formulation and the gloss added to it by Lord Cairns as set out at the beginning of this judgment. The first significant clarification was made nearly 40 years later in [Rickards v Lothian \[1913\] AC 263](#), 280. There the Privy Council was concerned with property on the second floor of the premises which were damaged by the continuous overflow of water from a lavatory basin on the top floor caused by the water tank having been turned on full and the waste-pipe plugged through the malicious act of some person. The Privy Council were of the opinion that the case did not come within the principle of Rylands v Fletcher because the matters complained of took place through no fault or breach of duty on the defendants' part but were caused by a stranger over whom and at a spot where they had no control. Lord Moulton added at p. 279:

“But there is another ground upon which their Lordships are of opinion that the present case does not come within the principle laid down in Rylands v. Fletcher . It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.”

The Privy Council were of the opinion that the provision of a proper supply of water to the various parts of a house is not only reasonable, but has become, in accordance with prevailing sanitary views, an almost central feature of town life and it would be wholly unreasonable to hold an occupier responsible for the consequences of acts which he is powerless to prevent.

[Rainham Chemical Works Ltd v Belvedere Fish Guano Company Ltd \[1921\] 2 AC 465](#) is often cited but I confess that I find the jurisprudence on Rylands v Fletcher is hardly advanced by this case. At a time of war a process was invented whereby picric acid could be manufactured from dinitrophenol (DNP) and nitrate of soda. DNP had been used mainly for the manufacture of dyes, and it was a stable compound which did not explode easily. It was not in itself dangerous. Nitrate of soda was not an explosive but

wood or bags impregnated with moist nitrate of soda will, when dry, burn fiercely if ignited. A hot flame is needed to ignite it and when ignited, large quantities of DNP become a dangerous explosive. While neither DNP nor nitrate of soda was, in itself, dangerous, they became a source of danger if stored in quantities and in close proximity to one another. It was proved that it was due to that cause that a massive explosion took place which caused damage to neighbouring property. On the evidence the manufacture of picric acid from DNP and nitrate of soda might or might not be dangerous in its character, but in that case it was being manufactured under dangerous conditions, and those dangerous conditions caused the accident. Accordingly the principle of Rylands v. Fletcher became applicable. It was not, per Lord Carson, “seriously argued” that the defendant company was not liable for the damages caused by the explosion. Indeed it seems that before Scrutton LJ, the trial judge, it was admitted that the person in possession of the DNP was liable under the rule in Rylands v. Fletcher for the consequences of the explosion. Thus the real issue in the case was stated by Lord Buckmaster at p. 471 in these terms.

“Now, the foundation of the action was a claim based upon the familiar doctrine established by the case of Rylands v. Fletcher , which depends upon this — that even apart from negligence the use of land by one person in an exceptional manner that causes damage to another, and not necessarily an adjacent owner, is actionable: ... In the present case the use complained of was that for the purpose of making munitions, which was certainly not the common and ordinary use of the land, two substances, namely, nitrate of soda and dinitrophenol, were stored in close proximity, with the result that on a fire breaking out they exploded with terrific violence. It may be accepted that it was not known to either of the defendants that this danger existed, but that in itself affords no excuse, and the result is that the plaintiffs' cause of action is well founded and the only matter for determination is against whom the action should be brought.”

The disputed question was whether responsibility lay at the door of the defendant company or the personal defendants who had a licence from the inventor to manufacture the required picric acid. Whilst, therefore, that case bears some similarity to the case before us (large quantities of materials

which when once alight will cause damage to neighbouring property), there is little help on the principles to apply.

Another explosion at a time of war gave rise to [Read v. J. Lyons & Co Ltd \[1947\] AC 156](#). This was a claim by an inspector of munitions who was injured in the course of her duties while in a munitions factory operated by the respondents by the explosion of a high explosive shell during the process of manufacture. She failed because an essential condition of the application of the rule in *Rylands v. Fletcher* was the “escape” from the land of something likely to do mischief if it escaped. Here the injuries were caused on the premises of the defendant. Doubts were expressed, obiter, as to whether the action lay where the claim was for damages for personal injury as distinguished from damage to property. Once again, this case gives us little help.

[Cambridge Water Co v. Eastern Counties Leather Plc \[1994\] 2 AC 264](#) is a much more important authority. There a chlorinated solvent used by the leather manufacturer seeped into the water company's borehole resulting in the water becoming unfit for human consumption. Although the water company had abandoned its claim in nuisance and could only succeed on the basis of the rule in *Rylands v. Fletcher*, Lord Goff of Chieveley nonetheless considered it desirable to look at the nature of liability in both nuisance and *Rylands v. Fletcher*.

Comparing nuisance and the rule in *Rylands v. Fletcher* he said at p. 299:

“We are not concerned in the present case with the problem of personal injuries, but we are concerned with the scope of liability in nuisance and in *Rylands v. Fletcher*. In my opinion it is right to take as our starting point the fact that, as Professor Newark considered [in his seminal article on “The boundaries of nuisance” (1949) 65 L.Q.R. 480], *Rylands v. Fletcher* was indeed not regarded by Blackburn J. as a revolutionary decision: see, e.g., his observations in *Ross v. Fedden* (1872) 26 L.T. 966, 968. He believed himself not to be creating new law, but to be stating existing law, on the basis of existing authority; and, as is apparent from his judgment, he was concerned in particular with the situation where the defendant collects things upon his land which are likely to do mischief if they escape, in which event the defendant will be strictly liable for damage resulting from any such escape. It follows that the essential basis of liability was the collection by the defendant of

such things upon his land; and the consequence was a strict liability in the event of damage caused by their escape, even if the escape was an isolated event. Seen in its context, there is no reason to suppose that Blackburn J. intended to create a liability any more strict than that created by the law of nuisance; but even so he must have intended that, in the circumstances specified by him, there should be liability for damage resulting from an isolated escape.”

He questioned whether foreseeability of damage was a prerequisite for recovery of damages and said at p.302:

“... Blackburn J spoke of “anything *likely* to do mischief if it escapes”, and later he spoke of something “which he *knows* to be mischievous if it gets on his neighbour's [property],” and the liability to “answer for the natural *and anticipated* consequences.” Furthermore, time and time again he spoke of the strict liability imposed upon the defendant as being that he must keep the thing in at his peril; and, when referring to liability in actions for damage occasioned by animals, he referred, at p.282, to the established principle that “it is quite immaterial whether the escape is by negligence or not.” The general tenor of his statement of principle is therefore that knowledge, or at least the foreseeability of the risk, is a prerequisite of the recovery of damages under the principle; but that the principle is one of strict liability in the sense that the defendant may be held liable notwithstanding that he has exercised all due care to prevent the escape occurring.”

And at p. 306 he concluded:

“... it appears to me to be appropriate now to take the view that foreseeability of damage of the relevant type should be regarded as a prerequisite of liability in damages under the rule.”

In the result, since the plaintiffs were unable to establish that the pollution of their water supply by the solvent was foreseeable, the claim failed.

He considered that there was a striking similarity of function between the principle of reasonable user in nuisance (the principle of give and take as between neighbouring occupiers of land) and the principle of natural use in *Rylands v Fletcher*. As for the latter, he pointed out Lord Moulton's gloss in *Rickards v Lothian* and added at p. 308:

“Blackburn J.'s statement of the law was limited to things which are brought by the defendant onto his land, and so did not apply to things that were naturally upon the land. Furthermore, it is doubtful whether in the House of Lords in the same case Lord Cairns, to whom we owe the expression “non-natural use” of the land, was intending to expand the concept of natural use beyond that envisaged by Blackburn J. Even so, the law has long since departed from any such simple idea, redolent of a different age; and, at least since the advice of the Privy Council delivered by Lord Moulton in *Rickards v. Lothian* ..., natural use has been extended to embrace the ordinary use of land. ...

Rickards v. Lothian itself was concerned with a use of a domestic kind, viz. the overflow of water from a basin whose runaway had become blocked. But over the years the concept of natural use, in the sense of ordinary use, has been extended to embrace a wide variety of uses, including not only domestic uses but also recreational uses and even some industrial uses.

It is obvious that the expression “ordinary use of land” in Lord Moulton's statement of the law is one which is lacking in precision ... A particular doubt is introduced by Lord Moulton's alternative criterion — “or such a use as is proper for the general benefit of the community.” If these words are understood to refer to a local community, they can be given some content as intended to refer to such matters as, for example, the provision of services; indeed the same idea can, without too much difficulty, be extended to, for example, the provision of services to industrial premises, as in a business park or an industrial estate. But if the words are extended to embrace the wider interests of the local community or the general benefit of the community at large, it is difficult to see how the exception can be kept within reasonable bounds. ... I myself, however, do not feel able to accept that the creation of employment as such, even in a small industrial complex, is sufficient of

itself to establish a particular use as constituting a natural or ordinary use of land.”

He did not, however, think it necessary to attempt any redefinition of the concept of natural or ordinary use because the storage and use of chemicals by the defendant was “an almost classic case of non-natural use”, explaining at p. 309 that:

“It may well be that, now that it is recognised that foreseeability of harm of the relevant type is a prerequisite of liability in damages under the rule, the courts may feel less pressure to extend the concept of natural use to circumstances such as those in the present case; and in due course it may become easier to control this exception, and to ensure that it has a more recognisable basis of principle.”

Of even greater importance for the understanding of the current state of the law is [Transco Plc v Stockport MBC \[2003\] UKHL 61, \[2004\] 2 AC 1](#). Here water pipes laid by the council from their tower block of flats to the water main fractured and the resulting flood caused the collapse of an embankment on part of their land through which the claimant had the right to run its gas main. The collapse of the embankment caused damage to the gas main. Transco's main claim was that the council was liable without proof of negligence under the rule in *Rylands v. Fletcher*. It succeeded before the judge but was reversed by the Court of Appeal. Their Lordships were being asked to review and, if they thought it right to do so, to hold the rule in *Rylands v. Fletcher* no longer to be good law. They were being invited “to follow the trail blazed by the majority of the High Court of Australia in *Burnie Port Authority* (supra) by treating the rule in *Rylands v Fletcher* as absorbed by the principles of ordinary negligence.” Although Lord Bingham of Cornhill saw that there was “a theoretical attraction in bringing this somewhat anomalous ground of liability within the broad and familiar rules governing liability in negligence” he was unwilling “to suppress an instinctive resistance to treating a nuisance-based tort as if it were governed by the law of negligence.” So the rule remains the law of the land. But the speech of Lord Bingham is the latest and last word on the subject and bears close study.

Like Lord Goff he recognised that Blackburn J did not conceive himself to be laying down any new principle of law and at [3] he said:

“It seems likely, as persuasively contended by Professor Newark (“The Boundaries of Nuisance” (1949) 65 LQR 480, 487–488), that those who decided the case regarded it as one of nuisance, novel only to the extent that it sanctioned recovery where the interference by one occupier of land with the right or enjoyment of another was isolated and not persistent.”

Lord Bingham favoured retaining the rule but restating it so as to achieve as much certainty and clarity as is attainable, recognising that new factual situations are bound to arise posing difficult questions on the boundary of the rule, wherever that is drawn. His restatement was set out in paragraphs [9]-[11] of his speech. I extract these important observations:

“9. The rule in *Rylands v Fletcher* is a sub-species of nuisance, which is itself a tort based on the interference by one occupier of land with the right in or enjoyment of land by another occupier of land as such. From this simple proposition two consequences at once flow. First, as very clearly decided by the House in *Read v J Lyons & Co Ltd* ... no claim in nuisance or under the rule can arise if the events complained of take place wholly on the land of a single occupier. There must, in other words, be an escape from one tenement to another. Second, the claim cannot include a claim for death or personal injury, since such a claim does not relate to any right in or enjoyment of land. ...

10. It has from the beginning been a necessary condition of liability under the rule in *Rylands v Fletcher* that the thing which the defendant has brought on his land should be “something which ... will naturally do mischief if it escape out of his land” (LR 1 Ex 265, 279 per Blackburn J), “something dangerous ...”, “anything likely to do mischief if it escapes”, “something ... harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour’s” (p 280), “anything which, if it should escape, may cause damage to his neighbour” (LR 3 HL 330, 340, per Lord Cranworth). The practical problem is of course to decide whether in any given case the thing which has escaped satisfies this

mischief or danger test, a problem exacerbated by the fact that many things not ordinarily regarded as sources of mischief or danger may none the less be capable of proving to be such if they escape. I do not think this condition can be viewed in complete isolation from the non-natural user condition to which I shall shortly turn, but I think the cases decided by the House give a valuable pointer. ... Bearing in mind the historical origin of the rule, and also that its effect is to impose liability in the absence of negligence for an isolated occurrence, I do not think the mischief or danger test should be at all easily satisfied. It must be shown that the defendant has done something which he recognised, or judged by the standards appropriate at the relevant place and time, he ought reasonably to have recognised, as giving rise to an exceptionally high risk of danger or mischief if there should be an escape, however unlikely an escape may have been thought to be.

11. No ingredient of *Rylands v Fletcher* liability has provoked more discussion than the requirement of Blackburn J (LR 1 Ex 265, 280) that the thing brought on to the defendant’s land should be something “not naturally there”, an expression elaborated by Lord Cairns (LR 3 HL 330, 339) when he referred to the putting of land to a “non-natural use” ... Read literally, the expressions used by Blackburn J and Lord Cairns might be thought to exclude nothing which has reached the land otherwise than through operation of the laws of nature. But such an interpretation has been fairly described as “redolent of a different age” ([Cambridge Water \[1994\] 2 AC 264](#) , 308), and in *Read v J Lyons & Co Ltd* ... and *Cambridge Water* , at p 308, the House gave its imprimatur to Lord Moulton’s statement, giving the advice of the Privy Council in *Rickards v Lothian* ...

“... It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of land ...”

I think it clear that ordinary user is a preferable test to natural user, making it clear that the rule in *Rylands v Fletcher* is engaged only where the defendant’s use is shown to be extraordinary and unusual. This is not a test to be inflexibly applied: a use may be extraordinary and unusual at one time or in one place but not so at another time or in another place (although I would question whether, even in wartime, the manufacture of

explosives could ever be regarded as an ordinary user of land, as contemplated ... in *Read v J Lyons & Co Ltd* ...) I also doubt whether a test of reasonable user is helpful, since a user may well be quite out of the ordinary but not unreasonable, as was that of *Rylands*, *Rainham Chemical Works* or the tannery in *Cambridge Water*. Again, as it seems to me, the question is whether the defendant has done something which he recognises, or ought to recognise, as being quite out of the ordinary in the place and at the time when he does it. In answering that question, I respectfully think that little help is gained (and unnecessary confusion perhaps caused) by considering whether the use is proper for the general benefit of the community. ... An occupier of land who can show that another occupier of land has brought or kept on his land an exceptionally dangerous or mischievous thing in extraordinary or unusual circumstances is in my opinion entitled to recover compensation from that occupier for any damage caused to his property interest by the escape of that thing, subject to defences of Act of God or of a stranger, without the need to prove negligence.”

Lord Hoffmann agreed that the criterion of exceptional risk must be taken seriously and creates a high threshold for a claimant to surmount. Although giving reasons of their own, Lord Scott of Foscote and Lord Walker of Gestingthorpe agreed with Lord Bingham.

This is, therefore, the seminal authority for the test to be applied in a classic case of *Rylands v Fletcher*.

The proper approach I extract from those compelling authorities is this.

- (1) The defendant must be the owner or occupier of land.
- (2) He must bring or keep or collect an exceptionally dangerous or mischievous thing on his land.
- (3) He must have recognised or ought reasonably to have recognised, judged by the standards appropriate at the relevant place and time, that there is an exceptionally high risk of danger or mischief if that thing should escape, however unlikely an escape may have been thought to be.
- (4) His use of his land must, having regard to all the circumstances of time and place, be extraordinary and unusual.

- (5) The thing must escape from his property into or onto the property of another.
- (6) The escape must cause damage of a relevant kind to the rights and enjoyment of the claimant's land.
- (7) Damages for death or personal injury are not recoverable.
- (8) It is not necessary to establish the defendant's negligence but an Act of God or the act of a stranger will provide a defence.

If that is how the rule is to operate in any classic *Rylands v Fletcher* case, the next question is whether there is any other or some special rule for cases involving damage caused by the spread of fire.

Liability for damage caused by the spread of fire

Writing in the *Cambridge Law Journal* in 1931 that great master of the law of tort, Professor Percy Winfield, was driven to observe that there was a “somewhat confusing medley of remedies for the same wrong, which is traceable in the historical development of liability for the escape of fire,” see P.H. Winfield: *Nuisance as a Tort* (1931) 4 C.L.J. 189. He concluded at p. 206:

“The result seems to be that, at the present day, damage resulting from the unintentional escape of fire may be redressed by any of the following remedies:

- “(i) the old action of trespass on the case;
- (ii) an action of the *Rylands v Fletcher* type: query whether this has totally absorbed (i);
- (iii) an action for nuisance;
- (iv) an action for negligence.”

...”

This appeal concerns head (ii) only and although any views I may express about the others will be treated as obiter, it is necessary to have some overview of the whole confusing picture. I propose, however, to do no more than take a quick canter over what is undoubtedly tricky terrain. The bye-line

to A.S. Ogus' article "Vagaries in Liability for the Escape of Fire", (1969) C.L.J. 104 says it all:

"How great a matter a little fire kindleth." (General epistle of James iii.5)"

The old action of trespass on the case

The custom of the realm is that a person is liable for the damage caused by the escape of his fire – the *ignis suus* rule. By general custom of the realm the remedy for damage caused by the spread of fire was an action on the case *pur negligent garder son feu*. The declaration was in the form "whereas by the custom of England a man is bound to keep his fire *ignem suum* safe and secure lest by default of custody of it loss should fall upon his neighbours in any way, the defendant *tam negligenter ac improvide apud custodivit, quod pro defectu debitae custodiae* the fire spread and did damage ...".

The essential features are that (1) fire spreading from a person's land is his fire; (2) that person is under a duty to contain the fire; (3) if it escapes, he is liable for the damage that results; (4) "*negligenter*" was a pleader's adverb: it did not mean negligently in the sense we now use the word. To quote Winfield again (Winfield: The Myth of Absolute Liability), (1926) 42 L.Q.R. 37, 49:

"Exactly what it did mean must remain a matter of conjecture but it excluded liability when the fire spread or occurred (i) by the act of a stranger – a man was not liable for that, though he was for the act of his servant, his wife, his guest, or one entering his house with his leave or knowledge; (ii) by misadventure which, to anticipate a modern term, seems to be equivalent to inevitable accident, or something which by no care reasonable in the circumstances could have been avoided."

The earliest case on the subject is *Beaulieu v Finglam* (1401) B. & M. 557 where, as reported by Fifoot *History and Sources of the Common Law*, 1949, Markham J. said:

"A man is held to answer for the act of his servant or of his guest in such a case; for if my servant or my guest puts a candle by a wall and the candle falls into the straw and burns all my house and the house of my neighbour also, in this case I shall answer to my neighbour for his damage.

...

I shall answer to my neighbour for each person who enters my house by my leave or my knowledge, or is my guest through me or through my servant, if he does any act, as with a candle or aught else, whereby my neighbour's house is burnt. But if a man from outside my house and against my will starts a fire in the thatch of my house or elsewhere, whereby my house is burned and my neighbours' houses are burned as well, for this I shall not be held bound to them; for this cannot be said to be done by wrong on my part, but is against my will."

Moving forward nearly three centuries to *Turberville v Stamp*(1702) 12 Mod. 152, a fire started by the defendant in his field was held to be as much *ignis suus* as one lit in the house. Sir John Holt C.J. said:

"Every man must so use his own as not to injure another. The law is general; the fire which a man makes in the fields is as much his fire as his fire in the house; if it is made on the ground, with his materials, and by his order; and he must at his peril take care that he does not, through his neglect, injure his neighbour: if he kindle it at a proper time and place, and the violence of the wind carry it into his neighbour's ground, and prejudice him, this is fit to be given in evidence. But now here it is found to have been by his negligence; and it is the same as if it had been his house."

These were times when fires were a scourge. The Great Fire of London in 1666 had had a devastating impact on crowded urban living. Something had to be done. In 1707 the *Fires Prevention (Metropolis) Act* (6 and 31) was passed "for the better preventing the mischiefs that may happen by fire". Provision was made for improved safety,

for the control of fires and for penal sanctions on servants carelessly setting fire to houses. The Act was repealed but re-enacted, eventually as the [Fires Prevention \(Metropolis\) Act 1774, section 86](#) providing that:

“No action, suit, or process whatsoever shall be had, maintained, or prosecuted against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall accidentally begin, nor shall any recompense be made by such person for any damage suffered thereby, any law, usage or custom to the contrary notwithstanding.”

It may be that, as Sir William Holdsworth in his *History of England* vol. XI p. 607 speculates, by this time lawyers were beginning to think it anomalous that a man should be liable for fire damage not caused by his negligence. It may have been that Parliament was simply resolving any doubt there was as to whether fire spreading from a person's house was *ignis suus*. Another explanation is implicit in Lord Tenterden's judgment in *Becquet v MacCarthy* [1831] 2 B. & A.D. 951, 958:

“... By the law of this country before it was altered by the statute of 6 an. c.31, s.6, if a fire began on a man's own premises, by which those of his neighbour were injured, the latter, in an action brought for such an injury would not be bound in the first instance to show how the fire began but the presumption would be (unless it were shown to have originated from some external cause) that it arose from the neglect of some person in the house.”

Thus one can surmise that the purpose of this statute was to remove the presumption of negligence on the defendant's part and cast the burden of proving negligence on the plaintiff.

Curiously there seems to be little contemporaneous authority on what was meant by “accidentally”. Lord Lyndhurst flirted with the idea that accidentally was used as the antithesis of wilfully: see his obiter remarks in *Canterbury v A.-G.* (1843) 1 Phil. 306. The more informed view is expressed by Lord Denman C.J. in [Filliter v Phippard](#) (1847) 11 QB 347, 357:

“It is true that in strictness, the word accidental may be employed in contradistinction to wilful, and so the same fire might both begin accidentally and be the result of negligence. But it may equally mean that a fire produced by mere chance or incapable of being traced to any cause, and so would stand opposed to negligence of either servant or masters. And, when we find it used in statutes which do not speak of wilful fires but make important provision with respect to such as are accidental, and consider how great a change in the law would be effected, and how great encouragement would be given to that carelessness of which masters may be guilty as well as servants, we must say that we think the plaintiff's construction [accidental as opposed to negligent] much the most reasonable of the two.”

An action for negligence

By the nineteenth century a prototype of our modern claim in negligence was emerging. In [Vaughan v Menlove](#) (1837) 3 Bing N.C. 468 the defendant's haystack spontaneously combusted and it was alleged that he had “wrongfully negligently and improperly kept his haystack so that it became liable to ignite” and so be a danger to the claimant's property. The jury were left to consider the question of negligence and that direction was upheld. Tindal C.J. said:

“... But there is a rule of law which says you must so employ your own property as not to injure that of another; and according to that rule the defendant is liable for the consequences of its own neglect; and though the defendant did not himself light the fire yet mediately, he is as much the cause of it as if he had himself put a candle to the rick; for it is well known that hay will ferment and take fire if it be not carefully stacked.”

This was the age of the railways and much litigation followed. In [Aldridge v The Great Western Railway Company](#) (1841) 3 Man & G 515, Tindal C.J. held that Mr Aldridge had to show some carelessness on the railway company's part for the emission of the sparks from their engine which set fire to his crop. [Piggot v The Eastern Counties Railway Co](#) (1846) 3 CB 229 was another case

of sparks setting fire to the claimant's property. Tindal C.J. held that:

“The defendants are a company entrusted by the legislature with an agent of an extremely dangerous and unruly character for their own private and particular advantage. And the law requires of them that they shall, in the exercise of the rights and powers so conferred upon them, that on such precautions as may reasonably prevent damage to the property of third persons through or near which their railway passes. The evidence in this case was abundantly sufficient to show that the injury of which the plaintiff complains was caused by the emission of sparks, or particles of ignited coke, coming from one of the defendants' engines: and there was no proof of any precaution adopted by the company to avoid such a mischief. I therefore think the jury came to a right conclusion, in finding that the company was guilty of negligence, and that the injury complained of was the result of such negligence.”

We are seeing the emergence of a claim for negligence, the culmination of which in the nineteenth century was the well-known case in 1883 of [Heaven v Pender \(1882–1883\) 11 Q.B.D. 503](#) which had nothing to do with fire, but which is often thought to be the progenitor of the modern law.

Turning to more modern times, an example of the claim in negligence for fire damage is [Balfour v Barty-King \[1957\] 1 Q.B. 496](#) where an independent contractor negligently used his blow lamp to thaw frozen pipes and set fire to the combustible materials nearby. The fire spread to the claimant's property and destroyed it. The Court of Appeal held that the defendant was responsible for the negligence of the independent contractor. In [H&N Emanuel v GLC \[1971\] 2 All E.R. 835](#) the Court of Appeal held that an occupier was liable for the escape of fire caused by the negligence not only of his servant but also of his independent contractor and anyone else who was on his land with his leave and licence. The only occasion when the occupier would not be liable for negligence when the negligence is the negligence of a stranger.

An action in nuisance

The modern example of this is [Spicer v Smee \[1946\] 1 All E.R. 489](#) where the plaintiff's bungalow was completely

destroyed by a fire which originated in the defendant's bungalow owing to a defect in the electrical wiring. The wiring had been negligently installed by an independent contractor. Atkinson J. held that the state of wiring in the defendant's bungalow constituted a nuisance on her property for which she was liable. The [Fire Prevention \(Metropolis\) Act, 1774](#), did not afford her a defence since the fire was due to the negligence or nuisance created by the defendant or those for whom he was responsible.

An action of a Rylands v Fletcher type

One simply cannot say that there is no liability for fire damage under the Rylands v Fletcher rule because the very man who established the rule said there was: see Jones v Festiniog Railway Co (1868) L.R. 3 Q.B. 733. Lush J. who was also a member of the Exchequer Chamber in Rylands v Fletcher agreed with him. This was another case where the plaintiff's haystack had been fired by sparks from a railway engine. Blackburn J. held at p. 736:

“The general rule of common law is correctly given in Fletcher v Rylands, that when a man brings or uses a thing of a dangerous nature on his own land, he must keep it in at his own peril; for he is liable for the consequences if it escapes and does injury to his neighbour. Here the defendants were using a locomotive engine with no express Parliamentary powers making lawful that use, and they are therefore at common law bound to keep the engine from doing injury, and if sparks escape and cause damage, the defendants are liable for the consequences though no actual negligence be shown on their part.”

I can readily understand this decision as an example of Rylands v Fletcher. The dangerous thing which the defendant railway company brought onto their land was a steam engine which depended for its locomotion on the burning of coal, particles of which would be belched forth from its maw onto the haystack adjoining the railway line. Although the engine itself remained on the defendant's land the sparks, which were an essential part of the machine, escaped and the danger posed by such an escape was high and it was foreseeable.

It is not as easy to rationalise the decision in [Musgrove v Pandelis \[1919\] 2 KB 43](#) which remains for me, as for others, a troubling case. The defendant kept a car

in a garage below the rooms occupied by the plaintiff. The defendant's servant, one Coumis, set about moving the car which necessitated applying the pressure pump to the carburettor to start the engine. For some unexplained reason there was an explosion in the carburettor and the petrol in the carburettor took fire. Instead of immediately turning the tap off which, if done, would have led to the fire burning itself out harmlessly, Coumis delayed and the continued supply of petrol extended the fire until it enveloped the car and ultimately the plaintiff's premises and furniture.

It is far from clear how the claim was brought. From the report of the proceedings at first instance — see 1919 1 KB 314 — it would seem that the claim was brought to recover damages as a result of negligence. At p. 44/45 of the Court of Appeal hearing, we are told that:

“The action was tried before Lush J., who held that this enactment had no application to a case which fell, as in his view this case fell, within the principle of *Rylands v Fletcher*. Further he held that the fire which caused the damage did not begin accidentally, but as a result of the negligence of Coumis. He therefore gave judgment for the plaintiff.”

Bankes L.J. after stating the facts, proceeded as follows at p. 46:

“The plaintiff brought this action alleging that the fire was the result of Coumis's negligence. The negligence finally relied on was that he did not instantly turn off the petrol tap and so stop the further flow of petrol into the carburettor ... The defendant's main defence, apart from disputing the negligence, was founded on [s. 86 of the Fires Prevention \(Metropolis\) Act 1774](#), and the argument has been chiefly directed to the construction of that enactment. Lush J. took the view that the statute did not apply at all; and I agree. He also held that if that view was not correct, the fire which caused the accident did not accidentally begin within the meaning of the Act and there also I agree.”

If the claim was indeed a claim in negligence, then the finding that the defendant was vicariously liable for the

negligence of his servant would be the end of the matter. The defence under [s. 86](#) could not prevail in the light of that finding. There would be no need to consider *Rylands v Fletcher* and references to the rule could be treated as obiter. That would be one view of this case. Bankes L.J. went on however to consider whether [s. 86](#) provided a defence where the case fell within *Rylands v Fletcher*. He said at p. 47:

“*Rylands v Fletcher* is merely an illustration of that old principle [that a man must so use his own property as not to injure that of others], and in my opinion Lush J. was right in saying that this case, if it falls within that principle, is not within the protection of the statute.”

So Bankes L.J. continued:

“The question then, is whether this motor car, with its petrol tank full or partially filled with petrol, was a dangerous thing to bring into the garage within the principle of *Rylands v Fletcher*. ... I agree with Lush J. that this motor car was dangerous within that principle. The defendant brought it or caused it to be brought upon his premises and he is responsible for the fire which resulted, and is not within the protection of the statute.”

Warrington L.J. was of the same opinion. He held:

“If this motor car with the petrol in its tank was potentially dangerous, such as a man's own fire, then it was the defendant's duty to see that the potential danger did not become an actual danger causing damage to his neighbour. The Act of Geo. III is no protection against that liability.”

Duke L.J. also agreed. He held:

“I do not see how this case can be taken out of the principle of *Rylands v Fletcher* ... in the present case there is petrol which is easily convertible into an inflammable vapour; there was the apparatus for producing a spark,

and added to those there was a person supposed to control the combustion but inexperienced and unequal to the task. Taken together the presence of the petrol, and the production of the inflammable gas, all those combustibles together with the inexperience of the person placed in charge of them, it is impossible to say that this is not an instance of the principle laid down by Blackburn J.”

He agreed that the case was outside any possible protection of the Act of Geo. III.

Musgrove had not escaped judicial criticism. In [Collingwood v Home & Colonial Stores \[1936\] 3 All E.R. 200](#) , 205, Lord Wright M.R. said:

“It was sufficient ground for the particular decision that the fire, that is to say the substantial fire, which actually caused the damage, was not caused without negligence. The fire which caused the damage was that which flowed from the original innocuous fire spreading through the fault of the chauffeur to the petrol in the tank, and that was clearly due to an act of negligence, and therefore, the protection of the statute did not apply. That was enough for the decision of the case. ... That having been laid down, the Court of Appeal proceeded to hold that the principle of Rylands v Fletcher would apply here. ... Well, I certainly have no desire to criticise in any way the actual decision in that case so far as it is based on the view that the real and substantial and destructive fire was the result of negligence. I confess, however, I find some difficulty about the other ground on which the decision was based, though, if it were necessary, I should follow the ruling of the Court of Appeal and apply it here if the case came within the scope of that ruling. But I do not think it does.”

Romer L.J. said at p. 208:

“I think at sometime it will be desirable if the House of Lords would consider the case of Musgrove v Pandelis , so far as the decision in the case was based upon Rylands v Fletcher . Of course the rule in Rylands v Fletcher , as it is well known, is a rule which relates to the escape from somebody's premises of a dangerous animal or thing brought by the owner upon those premises, and does not relate to a case like the present, or a case like the Court

of Appeal had to deal with in Musgrove v Pandelis where there had been an escape of nothing from the defendant's premises ... But what will have to be considered is whether Musgrove v Pandelis ... can be supported seeing that the decision involves these two propositions, (i) that a motor car is – I am quoting from the judgment of Bankes L.J., a dangerous thing to bring into a garage and (ii) that the use of one's land for the purpose of erecting a garage and keeping a motor car there is not an ordinary and proper use of the land – two propositions which, but for that authority, I should myself respectfully have doubted.”

And I respectfully agree with them.

In [Balfour v Barty-King \[1957\] 1 Q.B. 496](#), the Court of Appeal did not think it necessary to consider the doctrine of Rylands v Fletcher as a separate head of liability though Lord Goddard C.J., giving the judgment of the Court, did add at p. 505:

“No doubt the doctrine of that case applies to fire, and is subject to the exception of the damage being caused by a stranger.”

McKenna J. was clearly perplexed by Musgrove's case pointing out in [Mason v Levy Auto Parts of England Ltd \[1967\] 2 Q.B. 530](#) , 542 that the car had not escaped from the land neither had the petrol in it but he felt it his duty to follow the case unless it had been overruled or unless the principle did not apply to the facts of his case.

So we come back to Transco . This was not a fire case and the crucial question is whether, when their Lordships were re-stating the Rylands v Fletcher rule, they were leaving aside fire damage as some special category outside the general rule they were propounding. I do not see how that can be inferred. The House was being invited to follow the High Court of Australia in Burnie Port Authority and treat the rule in Rylands v Fletcher as absorbed by the principle of ordinary negligence. Burnie Port Authority was a fire case. The High Court of Australia necessarily had to consider the escape of fire as a case within Rylands v Fletcher . In the course of work being carried out to the Port Authority's premises by independent contractors

employed by them, their welding activity resulted in sparks or molten metal falling on cartons containing highly inflammable polystyrene which caught fire. The ensuing conflagration damaged the claimant's premises and the adjoining premises. Their conclusion, as expressed by Mason C.J. giving the majority judgment at [43]:

“In these circumstances and subject only to the above-mentioned possible qualification in relation to liability in nuisance, the rule in Rylands v Fletcher with all its difficulties, uncertainties, qualifications and exceptions, should now be seen, for the purposes of the common law of this country, as absorbed by the principles of ordinary negligence.”

The House of Lords must have been aware that fire damage could be thought to be within the scope of Rylands v Fletcher. Moreover, Musgrove was cited to their Lordships though only Lord Walker of Gestingthorpe referred to it in his speech saying:

“107. The majority in Burnie Port Authority v General Jones Pty Ltd 120 ALR 42 commented that the scope of the Rylands v Fletcher principle has been progressively restricted from within and without. Both those observations are correct up to a point, but the process has not been entirely one-way traffic. Since the middle of the 19th century many activities which were once regarded as unusually dangerous (such as running railways, which no longer use steam locomotives fuelled by coal manually shovelled into the firebox) have become commonplace. Other activities unknown in the 19th century (including all those connected with the internal combustion engine) have come on the scene, being regarded first as dangerous innovations (see Musgrove v Pandelis ...) but now as basic necessities.”

I am bound to conclude, therefore, that when their Lordships laid down their guidance for the application of Rylands v Fletcher, they did not exclude cases of the escape of fire and the principles they espoused should be applied in fire cases as well as in other more classic examples of escaping dangerous things.

I feel bound for the reasons I have given to hold that in an appropriate case damage caused by fire emanating from an adjoining property can fall within the Rylands v Fletcher rule. The appropriate case is likely to be very rare, as Lord Bingham said in Transco :

“[5] ... Consideration of the reported English case law over the past 60 years suggests that few if any claimants have succeeded in reliance on the rule in Rylands v Fletcher alone.”

Lord Hoffmann said:

“[39] ... It is perhaps not surprising that counsel could not find a reported case since the second world war in which anyone had succeeded in a claim under the rule. It is hard to escape the conclusion that the intellectual effort devoted to the rule by judges and writers over many years has brought forth a mouse.”

Cases of fire damage are likely to be very difficult to bring within the rule because (1) it is the “thing” which had been brought onto the land which must escape, not the fire which was started or increased by the “thing”. (2) While fire may be a dangerous thing, the occasions when fire as such is brought onto the land may be limited to cases where the fire has been deliberately or negligently started by the occupier or one for whom he is responsible. Is this not a relic of the *ignis suus* rule? (3) In any event starting a fire on one's land may well be an ordinary use of the land.

As for Musgrove, I reluctantly cannot conclude that it was decided *per incuriam*. I might be prepared to say, if forced to do so, that since the core finding was of negligence, then the findings based on Rylands v Fletcher were obiter. I prefer, however, simply to treat Musgrove as a fact sensitive case. Liability must, as Lord Bingham has explained to us, always be judged in the light of prevailing conditions of time and place and Musgrove would most definitely not be decided today as it was nearly a century ago. *Musgrove* should, in my judgment, therefore simply be relegated to a footnote in the history of Rylands v Fletcher.

My conclusions on fire and the rule in Rylands v Fletcher

Fire cases and this appeal must be judged in accordance with the test to be derived from *Transco* which I have set out at [22] above. Applying those principles I reach the following conclusions:

- (1) The “thing” brought onto Wyvern's premises was a large stock of tyres.
- (2) Tyres, as such, are not exceptionally dangerous or mischievous.
- (3) There is no evidence that Mr Stannard recognised nor ought he reasonably to have recognised that there was an exceptionally high risk of danger or mischief if the tyres, as such, should escape.
- (4) The tyres did not escape. What escaped was the fire, the ferocity of which was stoked by the tyres which were burning on, and remained burning on, Wyvern's premises. The Recorder was wrong to conclude it was the escape of fire that brought the case within *Rylands v Fletcher* principles.
- (5) In any event, keeping a stock of tyres on the premises of a tyre-fitting business, even a very large stock, was not for the time and place an extraordinary or unusual use of the land. Here again the Recorder erred.
- (6) Therefore *Rylands v Fletcher* liability is not established and, no negligence having been proved, the claim must fail.
- (7) The moral of the story is taken from the speech of Lord Hoffman: make sure you have insurance cover for losses occasioned by fire on your premises.

I would therefore allow the appeal and dismiss the claimant's claim.

Lord Justice Etherton:

I pay tribute to the careful and comprehensive judgment of the Recorder. I nevertheless agree that this appeal should be allowed. It raises important points, but I can express my views quite briefly.

Firstly, in the light of the comprehensive review of the *Rylands v Fletcher* principle in [Transco plc v Stockport MBC \[2003\] UKHL 61, \[2004\] 2 AC 251](#), I do not consider that the facts of the present case satisfy the basic requirement of the *Rylands v Fletcher* principle that there must have been an escape of something which the

defendant has brought onto his or her land. Secondly, if there is a different requirement for so-called “fire” cases, where what has escaped from the defendant's land is fire generated from something that the defendant has brought onto his or her land, the principle still does not apply in the present case because tyres are not easily set alight and so do not pose any inherent danger of catching or causing fire. Thirdly, in any event, Mr Stannard's use of his property was not a non-natural use of his land for the purposes of the *Rylands v Fletcher* principle.

The classic statement of the strict liability principle by the Court of Exchequer Chamber in *Rylands v Fletcher* itself (at (1866) LR 1 Ex 265, 279) (approved by the House on Lords on appeal at (1868) LR 3HL 330 with the addition of the requirement of non-natural user) requires an escape from the defendant's land of something which he or she has brought there and which is likely to cause harm to the claimant if it escapes:

“We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief 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.”

It is obvious that the principle of strict liability, as stated there, requires modification if it is to apply where the escape is not of something which the defendant has brought onto his or her land, but is fire which has spread from things which were brought onto the land, and the fire was not deliberately or negligently started by the defendant.

As the cases show, it is necessary to modify the classic statement of the *Rylands v Fletcher* principle in a radical way in order to encompass such a situation, but there is no clear consensus as to how the principle should be restated. In some of the fire cases it was regarded as sufficient that the defendant brought onto his land something which was (at the time) considered inherently dangerous, such as a train (*Jones v The Festiniog Railway Company* 1868) LR QB 733) or a car (*Musgrove v Pandelis* [1919] 2 KB 43). In other cases, such as [Mason v Levy Auto Parts of England Ltd \[1967\] 2 QB 530](#), it was the particular danger presented by the flammable nature of the materials brought onto the

land by the defendant which was regarded as critical. The point was addressed by MacKenna J in Mason at page 542 as follows:

“If, for the rule in Musgrove's case to apply, there need be no escape of anything brought onto the defendant's land, what must be proved against him? There is, it seems to me, a choice of alternatives. The first would require the plaintiff to prove (1) that the defendant had brought something onto his land likely to do mischief if it escaped; (2) that he had done so in the course of a non-natural user of the land; and (3) that the thing had ignited and that the fire had spread. The second would be to hold the defendant liable if (1) he brought onto his land things likely to catch fire, and kept them there in such conditions that if they did ignite the fire would be likely to spread to the plaintiff's land; (2) he did so in the course of some non-natural use; and (3) the things ignited and the fire spread. The second test is, I think, the more reasonable one. To make the likelihood of damage if the thing escapes a criterion of liability, when the thing has not in fact escaped but has caught fire, would not be very sensible.”

That was the approach taken by HH Judge Coulson QC, sitting as a High Court Judge, in *LMS International Limited v Styrene Packaging and Insulation Limited* [2005] EWHC 2065 (TCC) 30 September 2005, in which he undertook an extensive analysis of the Rylands v Fletcher principle, with particular regard to the review by the [House of Lords in *Transco plc v Metropolitan Borough Council* \[2004\] 2 ACI](#) and the fire cases. He said as follows at [33]:

“In cases concerned with fire, the rule in Rylands v Fletcher requires two things. First, the defendant must have brought onto his land things which were likely to cause and/or catch fire, and kept them in such a condition that, if they ignited, the fire would be likely to spread to the claimant's land. To put it another way, those things must represent a recognisable risk to the owners of the adjoining land. Secondly, the actions on the part of the defendant must arise from a non-natural user of the defendant's land ...”

A different formulation is put forward by Mr Philip Rainey QC and Mr Nicholas Isaac on behalf of Mr Gore, namely that the relevant danger which must be established is that the things collected on the defendant's land are likely to cause or facilitate the escape of the fire. They approve the formulation of Judge Coulson in *LMS International* if his expression “cause fire” is understood as meaning “cause the fire which escapes and damages the neighbouring land”. In other words, they say the emphasis should not be on the danger posed by the flammability of the materials brought onto the defendant's land but on the danger posed by the role of the material in the escape of the fire from the defendant's land.

The lack of clarity and consensus as to the proper formulation of the Rylands v Fletcher principle in fire cases does not merely reflect poorly on a legal principle of strict liability 146 years after its first published judicial articulation. It calls into question whether the principle applies at all to fire cases. The Rylands v Fletcher principle was comprehensively reviewed by the House of Lords in *Transco*. That was not a fire case, but I consider that the reasoning and analysis of the House of Lords leave no scope for the application of the principle on the facts of the present case where there has been no escape of anything brought onto the defendant's land, but the escape is of fire, which was not created by the defendant.

The House of Lords in *Transco* had all the national, international and academic tools for a thorough review of the Rylands v Fletcher principle. They decided as a matter of policy to retain the principle, while restating it to achieve as much certainty and clarity as possible. As Lord Bingham said:

“8 There remains a third option, which I would myself favour: to retain the rule, while insisting upon its essential nature and purpose; and to restate it so as to achieve as much certainty and clarity as is attainable, recognising that new factual situations are bound to arise posing difficult questions on the boundary of the rule, wherever that is drawn.”

Lord Bingham, with whom Lord Scott and Lord Walker agreed, described the core aspects of the principle in paragraphs [10] and [11]. The latter paragraph addressed

the issue of non-natural user. The former identified, at the heart of the principle, the exceptional danger or mischief if there is an escape from the defendant's land. In describing that aspect, Lord Bingham said as follows:

“10 It has from the beginning been a necessary condition of liability under the rule in *Rylands v Fletcher* that the thing which the defendant has brought on his land should be “something which ... will naturally do mischief if it escape out of his land” (LR 1 Ex 265, 279 per Blackburn J), “something dangerous ...”, “anything likely to do mischief if it escapes”, “something ... harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's” (p 280), “anything which, if it should escape, may cause damage to his neighbour” (LR 3 HL 330, 340, per Lord Cranworth). The practical problem is of course to decide whether in any given case the thing which has escaped satisfies this mischief or danger test, a problem exacerbated by the fact that many things not ordinarily regarded as sources of mischief or danger may none the less be capable of proving to be such if they escape. I do not think this condition can be viewed in complete isolation from the non-natural user condition to which I shall shortly turn, but I think the cases decided by the House give a valuable pointer. In *Rylands v Fletcher* itself the courts were dealing with what Lord Cranworth (LR 3 HL 330, 342) called “a large accumulated mass of water” stored up in a reservoir, and I have touched on the historical context of the decision in paragraph 3(3) above. [Rainham Chemical Works \[1921\] 2 AC 465](#), 471, involved the storage of chemicals, for the purpose of making munitions, which “exploded with terrific violence”. In [Attorney General v Cory Bros & Co Ltd \[1921\] 1 AC 521](#), 525, 530, 534, 536, the landslide in question was of what counsel described as an “enormous mass of rubbish”, some 500,000 tons of mineral waste tipped on a steep hillside. In [Cambridge Water \[1994\] 2 AC 264](#) the industrial solvents being used by the tannery were bound to cause mischief in the event, unforeseen on the facts, that they percolated down to the water table. These cases are in sharp contrast with those arising out of escape from a domestic water supply (such as *Carstairs v Taylor* (1871) LR 6 Ex 217, *Ross v Fedden* (1872) 26 LT 966 or *Anderson v Oppenheimer* (1880) 5 QBD 602) which, although decided on other grounds, would seem to me to fail the mischief or danger test. Bearing in mind the historical origin of the rule, and also that its effect is to impose liability in the absence of negligence for an isolated occurrence, I do not think the mischief or danger test should

be at all easily satisfied. It must be shown that the defendant has done something which he recognised, or judged by the standards appropriate at the relevant place and time, he ought reasonably to have recognised, as giving rise to an exceptionally high risk of danger or mischief if there should be an escape, however unlikely an escape may have been thought to be.”

Lord Bingham summarised the *Rylands v Fletcher* principle most succinctly in paragraph [11] as follows:

“An occupier of land who can show that another occupier of land has brought or kept on his land an exceptionally dangerous or mischievous thing in extraordinary or unusual circumstances is in my opinion entitled to recover compensation from that occupier for any damage caused to his property interest by the escape of that thing, subject to defences of Act of God or of a stranger, without the need to prove negligence.”

Lord Hobhouse stated in paragraph [66] that “[t]he content of the rule has been clearly spelled out by Blackburn J [in *Rylands v Fletcher*]”. Lord Scott similarly said in paragraph [75] that the classical exposition of the rule was to be found in Blackburn J's judgment.

The various analyses in *Transco* all endorse the original formulation of the principle in the Court of Exchequer Chamber and in the House of Lords in *Rylands v Fletcher*. They make clear that the relevant mischief or danger is not something inherent in what is brought onto the defendant's land, for the principle may apply where what is brought onto the land is in itself harmless (such as water). The speeches in *Transco* make clear that the relevant mischief or danger lies in what will happen if there is an escape from the defendant's land of what has been brought onto the land. Accordingly, they leave no scope for the formulations in the previous fire cases, which required, as a condition of liability, that there was some inherent danger (irrespective of escape) in what the defendant has brought onto his or her land, whether by virtue of flammability (eg. *Mason*) or otherwise (eg. *Festiniog Railway Company and Musgrove*).

I do not consider that Transco can properly be regarded as leaving entirely open the possibility of a radically different formulation of the principle in fire cases. While it is true that not all the fire cases were cited in the speeches or, apparently, in submissions in the House of Lords in Transco, at least one of the leading fire cases, Musgrove, was cited (and indeed mentioned by Lord Walker at [107]). In any event, it is clear that the House of Lords in Transco was undertaking a comprehensive and definitive review of the Rylands v Fletcher principle in order to provide legal certainty. Leaving out of account a significant area of activity, without even mentioning that it was the intention to do so, would have been entirely inconsistent with that objective.

In those circumstances, and in the light of the emphasis in Transco and elsewhere that the Rylands v Fletcher principle should not be expanded further, I can see no scope for the application of the principle in the present case where there was no escape of the tyres which caught fire and the fire itself was not created by Mr Stannard.

If I am wrong about that, both principle and the weight of authority support the conclusion that the Rylands v Fletcher principle only applies to fire cases, where the fire has not been created by the defendant, if the fire has spread from materials brought onto the defendant's land and those materials pose a particularly high risk because they are likely to cause or catch fire and, if they do, such fire will be likely to spread to the claimant's property. If I am wrong on my first point about Transco, that was a correct summary of the law by Judge Coulson in LMS International, following the approach of MacKenna J in Mason. I, therefore, reject the gloss put on Judge Coulson's summary on behalf of Mr Gore. In a standard non-fire Rylands v Fletcher case the culpability of the defendant is the act of bringing something onto his or her land which it is foreseeable poses an exceptional risk of harm to the claimant if it escapes. The foreseeable risk is causally related to (1) the defendant's act in bringing something onto his or her land, and (2) the likely consequences if that same thing escapes. In a fire case, where the fire has not been created by the defendant, the culpability must, by analogy, be the act of the defendant in bringing onto his or her land something which poses a foreseeable risk to the defendant involving the creation of fire and its escape. There must be a causal connection between the defendant's act in bringing something onto his or her land and the foreseeable risk of harm to the defendant

in the event of an escape of fire. That causal connection can only be the inherent likelihood that what the defendant has brought onto his or her land will catch or cause fire and the fire will spread to the claimant's property. In the present case, the evidence was that tyres are not in themselves flammable and they are not easily set alight. The necessary link between the deliberate act of Mr Stannard (in bringing tyres onto his land) and the foreseeability of an exceptional risk of harm to Mr Gore in the event of an escape did not exist.

If that too is wrong, then I do not consider that it was open to the Recorder, in the light of the evidence, to conclude that Mr Stannard's use of his property was a non-natural use for the purposes of the Rylands v Fletcher principle. A non-natural use, in this context, is a use which is "extraordinary and unusual" and is a high threshold for a claimant to surmount: Transco at [11] (Lord Bingham) and [49] (Lord Hoffmann). It is a mixed question of fact and law. It would not be right to interfere with the Recorder's view unless it exceeded the generous ambit within which reasonable disagreement is possible. The Recorder reached his conclusion on non-natural use on the basis of the number of tyres relative to the size of Mr Stannard's premises and also the manner in which they were stored. That is, with respect, very far short of what would be required for a finding of extraordinary use such as to engage the Rylands v Fletcher principle. The commercial activity carried on by Mr Stannard as a motor vehicle tyre supplier was a perfectly ordinary and reasonable activity to be carried on in a light industrial estate. There was no evidence that the number of tyres and the method of their storage was out of the ordinary for similar premises carrying on that type of activity or that they posed a foreseeable or recognised danger. Indeed, as has been pointed out on behalf of Mr Stannard, any other conclusion would be inconsistent with the Recorder's rejection of Mr Gore's case in negligence. In those circumstances, it was not open to the Recorder to reach the conclusion that he did on this aspect.

For the sake of completeness, if I were wrong on all those points, I would uphold the Recorder's judgment in favour of Mr Gore. I would reject, both as a matter of precedent and principle, Mr Stannard's argument that [section 86 of the Fires Prevention \(Metropolis\) Act 1774](#) Act excludes liability under the Rylands v Fletcher principle. That point was directly addressed and decided by the Court of Appeal in Musgrove and so is binding on this Court. The alternative

basis for the decision in that case was that the relevant fire, for the purposes of [section 86](#) of the 1774 Act, was begun negligently and was outside the section for that reason. Nevertheless, the point that liability under *Rylands v Fletcher* is not exonerated by [section 86](#) forms part of ratio of the Court of Appeal.

That also seems to have been the view of the [Court of Appeal in *Collingwood v Home and Colonial Stores Ltd* \[1936\] 3 All ER 200](#) . In that case Lord Wright MR and Romer LJ, with both of whom Macnaghten J agreed, questioned the correctness of the decision in *Musgrove* insofar as it held that there was liability under the *Rylands v Fletcher* principle on the facts of that case, but neither of them said that they also doubted the conclusion in *Musgrove* that *Rylands v Fletcher* liability falls outside [section 86](#) of the 1774 Act.

In any event, that conclusion seems to me to be right in principle. It still remains a principle of statutory interpretation that, in cases of doubt, there is a presumption against interference with the common law: see generally Bennion on Statutory Interpretation (5th ed) section 269; Craies on Legislation (9th ed) 14.1.7 and 14.1.11. It is generally accepted that the word “accidentally” in [section 86](#) cannot be read without some qualification and that it does not, for example, embrace a fire begun or continued negligently: *Filliter v Phippart* (1847) 11 QB 437 at 357, [Balfour v Barty-King](#) [1957] 1 QB 496 , [Goldman v Hargrave](#) [1967] 1 AC 645 (PC) . In this limited context, in view of the classical declaratory theory of the common law (viz. judges merely expound and declare the existing law rather than create it), I do not consider that a particular problem to this approach is posed by the fact that *Rylands v Fletcher* was not decided until 1866, just as it has not been regarded as a problem for excluding negligently caused fires from [section 86](#) of the 1774 Act that it was not until the nineteenth century that negligence began to emerge as the substantive allegation in an action on the case. In any event, there are perfectly sound and rational grounds to conclude that [section 86](#) was enacted to clarify some limited areas of uncertainty in the customary law of *ignis suus* .

The factual and legal background to the enactment of [section 86](#) was examined by A.I. Ogus in the excellent and well-known scholarly article “Vagaries in Liability for The Escape of Fire” [1969] CLJ 104. He there set out three hypothetical situations in relation to *ignis suus* . He concludes that [section 86](#) was enacted to resolve the

uncertainty in the second and third of those situations, namely: (II) where the defendant has lit a candle in his house, and an exceptionally strong wind, or the act of a stranger, knocks the candle over setting the house alight, and the fire then spreads to the plaintiff's land; and (III) where the defendant has lit a bonfire in his field, and, as a result of an exceptionally high wind or the act of a stranger, sparks are blown onto a pile of leaves, which ignite, the fire spreading to the neighbour's property. I see no reason to disagree with Mr Ogus' analysis that the only object of [section 86](#) of the 1774 Act (and the equivalent provisions in its statutory predecessor (1707) 6 Anne c.31 x.6) was to resolve the doubts as to whether the defendant would be liable in those two particular situations.

Lord Justice Lewison:

I agree with Lord Justice Ward that the appeal must be allowed. However, I would go further in limiting the scope of strict liability in relation to fire. Let me explain.

We have all heard of the Great Fire of London in 1666. But it was one in a long series of devastating fires which were common in mediaeval and Tudor England. London was ravaged by fire many times during the twelfth and thirteenth centuries. Building codes dealing with fire prevention were promulgated in London as early as 1189. William Fitzstephen, writing in the twelfth century, wrote that “the only plagues of London are the immoderate drinking of fools and the frequency of fires.”

Fire was an equally serious hazard in other towns. The loss had to fall somewhere. These were the days before insurance. The custom of the common law of England laid the loss at the door of the person on whose property the fire had started. In *Beaulieu v Finglam* (1401) YB 2 Hen 4 f 18 pl 6 the custom was pleaded thus: “*quilibet de eodem regno ignem suum salvo et secure custodiat et custodire teneatur ne per ignem suum dampnum aliquod vicinis suis ullo modo eveniat*” . The plea went on to allege that “the defendant “*ignem suum improvide et negligenter custodivit*” . The custom is translated in Baker & Milsom *Sources of English Legal History: Private Law to 1750* p. 610 as follows: “everyone in the same realm should keep and is bound to keep his fire safely and securely so that no damage befall any of his neighbours in any wise through his fire”. The plea was that the defendant kept his fire “so negligently that for the want of due keeping of the aforesaid

fire” the plaintiff’s house was burned. Thirning CJ said “that a man should answer for his fire which by misfortune burns another’s goods”. Markham J said:

“A man is bound to answer for his servant’s act, as for his lodger’s act, in such a case. For if my servant or lodger puts a candle on a wall and the candle falls into the straw and burns the whole house and also my neighbour’s house, in this case I shall answer to my neighbour for the damage which he has suffered.”

He added:

“I shall answer to my neighbour for anyone who enters my house by my leave or with my knowledge, or is my guest or my servant’s guest, if he does something with a candle (or whatever) by which my neighbour’s house is burned. But if a man outside my house, against my will, sets fire to the thatch of my house or elsewhere, so that my house is burned and my neighbours’ houses are burned as well, I shall not be held bound to answer to them for it; since it cannot be said to be ill-doing on my part when it is against my will.”

In *Crogate v Morris* (1617) 1 B & G 197 the principle was pithily stated: “if my friend come and lie in my house, and set my neighbour’s house on fire, the action lieth against me.” Thus Rolle’s Abridgment was able to state:

“If fire (I know nothing of it) suddenly break out in my house and burn my goods, and also the house of my neighbour he shall have an action on the case against me.”

It is noticeable that the custom is that a man should keep “his fire” (*ignis suus*) safe and secure; and that the judges’ discussion is all about fires deliberately kindled (even in the case of a candle which is deliberately lit). The plea was that the fire had been kept “negligently”. It is clear that “negligently” was not used in the way in which that adverb is understood in the modern law of tort. What it signified

was that the defendant had failed to observe his legal duty to prevent his fire escaping and damaging others. Some of the subsequent cases are concerned with what counted as a man’s fire or “*ignis suus*”. That the custom was concerned with fires that had been deliberately kindled is borne out by the statement of the law in Comyn’s Digest: *Action on the Case for Negligence* (A6):

“An action lies, upon the general custom of the realm, against the master of a house if a fire be kindled there and consume the goods of another.”

In a case of 1582 (*Anon* (1582) Cro Eliz 10) the defendant fired a gun at a fowl. In so doing he set fire to his own and his neighbour’s house. The action was brought by way of action on the case. The court was of the view if the plaintiff “had counted on the custom of the realm as in [*Beaulieu v Finglam*] the action had not been well brought”. Although the court did not give reasons for this view, it was presumably because the fire was not deliberately kindled and was never within the defendant’s control (i.e. it was not his fire or “*ignis suus*”).

In *Turberville v Stamp* (1702) 12 Mod 152 the real question was whether the defendant was liable for a fire deliberately kindled in a field; in other words whether such a fire counted as his own (“*ignis suus*”). Sir John Holt justified the principle as follows:

“Every man must so use his own as not to injure another. The law is general; the fire which a man makes in the fields is as much his fire as his fire in his house; it is made on his ground, with his materials, and by his order; and he must at his peril take care that it does not, through his neglect, injure his neighbour: if he kindle it at a proper time and place, and the violence of the wind carry it into his neighbour’s ground, and prejudice him, this is fit to be given in evidence. But now here it is found to have been by his negligence; and it is the same as if it had been in his house.”

In a different report of the case in (1702) 1 Comyns 32 the judgment is summarised thus:

“The case was afterwards adjudged in favour of the plaintiff by the whole Court; for the action is as well for a fire kindled in the fields of the defendant as in his house, for it is the defendant's fire and kindled in his ground, and he ought to have the same care of a fire which he kindles in his field as of that which is made in his house, for the duty to take care of both is founded upon this maxim, *sic utere tuo ut non laedas alienum* ; but if the fire of the defendant by inevitable accident, by impetuous and sudden winds, and without the negligence of the defendant or his servants, (for whom he ought to be answerable) did set fire to the clothes of the plaintiff in his ground adjoining; the defendant shall have the advantage of this in evidence, and ought to be found not guilty. But here the verdict hath found negligence in the defendant. Therefore judgment for the plaintiff.”

The report in 1 Salk 13 is even more abbreviated. There are five important points to be made about this case. First, liability is based on the general principle that a man “must so use his own as not to injure another” (“*sic utere tuo ut alienum non laedas*”). Second, on the facts liability was established because of the finding of negligence. Third, liability would have been avoided if the fire had been kindled at a proper time and place. Thus fourth, it is at least possible that even the common law required a finding of negligence. But if that is wrong, then it is clear that a defendant had a good defence if the fire was caused by inevitable accident or by act of a stranger. Fifth, the custom was directed towards a fire that a person had deliberately kindled, but which had subsequently got out of control. This, in my judgment, is implicit in the requirement to plead “*ignis suus*” .

Even where liability is based on the principle *sic utere tuo ut alienum non laedas* a requirement of negligence is not necessarily excluded. In [Black v Christchurch Finance Co Ltd \[1894\] AC 48](#) Lord Shand, delivering the advice of the Privy Council said:

“The lighting of a fire on open bush land, where it may readily spread to adjoining property and cause serious damage, is an operation necessarily attended with great danger, and a proprietor who executes such an operation is bound to use all reasonable precautions to prevent the fire extending to his neighbour's property (*sic utere tuo at alienum non laedas*).”

In other words even where liability was founded on (or at least justified by) the maxim, liability was not absolute, but required the taking of all reasonable precautions.

In [H & N Emanuel Ltd v Greater London Council \[1971\] 2 All ER 835](#) (another case of a deliberately kindled fire) Lord Denning MR considered the scope of liability at common law. He said:

“After considering the cases, it is my opinion that the occupier of a house or land is liable for the escape of fire which is due to the negligence not only of his servants, but also of his independent contractors and of his guests, and of anyone who is there with his leave or licence. The only circumstances when the occupier is not liable for the negligence is when it is the negligence of a stranger. It was so held in a case in the Year Books 570 years ago, [Beaulieu v Finglam](#) , which is well translated by Mr Fifoot in his book on the History and Sources of the Common Law. The occupier is, therefore, liable for the negligence of an independent contractor, such as the man who comes in to repair the pipes and uses a blowlamp: see [Balfour v Barty-King](#) ; and of a guest who negligently drops a lighted match: see [Boulcott Golf Club Inc v Engelbrecht](#) . The occupier is liable because he is the occupier and responsible in that capacity for those who come by his leave and licence: see [Sturges v Hackett](#) . *But the occupier is not liable for the escape of fire which is not due to the negligence of anyone* . Sir John Holt himself said in [Tuberville v Stampe](#) that if a man is properly burning up weeds or stubble and, owing to an unforeseen wind-storm, without negligence, the fire is carried into his neighbour's ground, he is not liable. Again, if a haystack is properly built at a safe distance, and yet bursts into flames by spontaneous combustion, without negligence, the occupier is not liable. That is to be inferred from [Vaughan v Menlove](#) . So also if a fire starts without negligence owing to an unknown defect in the electric wiring: [Collingwood v Home and Colonial Stores Ltd](#) ; or a spark leaps out of the fireplace without negligence: [Sochacki v Sas](#) .” (Emphasis added)

Whatever the precise basis for liability analysed in modern terms, historically it was simply based on custom of the realm. As Lord Denning put it in *H & N Emanuel Ltd v Greater London Council* :

“There has been much discussion about the exact legal basis of liability for fire. The liability of the occupier can be said to be a strict liability in this sense that he is liable for the negligence not only of his servants but also of independent contractors and, indeed, of anyone except a ‘stranger’. By the same token it can be said to be a ‘vicarious liability’, because he is liable for the defaults of others as well as his own. It can also be said to be a liability under the principle of *Rylands v Fletcher* , because fire is undoubtedly a dangerous thing which is likely to do damage if it escapes. But I do not think it necessary to put it into any one of these three categories. *It goes back to the time when no such categories were thought of* . Suffice it to say that the extent of the liability is now well defined as I have stated it. The occupier is liable for the escape of fire which is due to the negligence of anyone other than a stranger.” (Emphasis added)

This is an important point. Liability in mediaeval law (at least when it was concerned with liability by custom) did not depend on proving that the defendant was negligent in the modern sense. Nor did it depend on proving that he was engaged in any particularly dangerous activity. As Sir William Holdsworth explains (*History of English Law* vol VIII p. 469):

“The form which this stricter liability took was not the form taken by the rule in *Rylands v Fletcher* , for that rule was then the general rule of civil liability.”

Apart from fire cases, others were also subject to strict liability by virtue of custom. One such category of people was the innkeeper who was liable by custom of the realm for the safe custody of the goods of his guests. This analogy was drawn on by counsel in *Turberville v Stamp* who is recorded as having argued:

“that this action ought not to be grounded upon the common customs of the realm; for this fire in the field cannot be called *ignis suus* , for a man has no power over a fire in the field, as he has over a fire in his house. And therefore this resembles the case of an inn-keeper, who must answer for any ill that happens to the goods of his guest, so long as they are in his house; but he is not answerable, if a horse be stolen out of his close.”

It was against this background that the first of the statutes restricting liability for fire damage was passed. This was the Act of 1707, s.6, which was originally temporary and applied to London only. According to Lord Denman CJ in *Filliter v Phippard* (1847) 11 QB 347 , a decision of the Court of King's Bench:

“The Act contemplates the probability of fires in cities and towns arising from three causes, the want of water, the imperfection of party walls, and the negligence of servants. The Act provided some means for supplying these material defects: but the third section was directed against the moral one, the carelessness or negligence of servants, which (it observes) often causes fires: and it imposes on the servant by whose negligence the fire may have been occasioned a fine of 100*l.*, to be distributed among the sufferers at the discretion of the churchwardens, or imprisonment for eighteen months in case of nonpayment. ... The most usual cause of fires was assumed to be the negligence of servants: and the enactment might operate to induce habits of caution in that important class. The same statute, in the sixth section, enacts that, after a day named, no action shall be maintained against any person in whose house or chamber any fire shall accidentally begin, nor shall any recompence be made by such person for any damage suffered or occasioned thereby.”

This was then re-enacted in 1772 and 1774, the last of the enactments remaining in force as [section 86 of the Fires Prevention \(Metropolis\) Act 1774](#) , which applies to the whole of England and Wales: *Richards v Easto* (1846) 15 M & W 246 , 251. [Section 86](#) provides:

“And ... no action, suit or process whatever shall be had, maintained or prosecuted against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall ... accidentally begin, nor shall any recompence be made by such person for any damage suffered thereby, any law, usage or custom to the contrary notwithstanding: ... provided that no contract or agreement made between landlord and tenant shall be hereby defeated or made void.”

It is important to emphasise the scope of the change effected by [section 86](#). Not only does it apply notwithstanding any *custom* to the contrary (which would include liability under the *ignis suus* principle), it also applies notwithstanding any *law* to the contrary. This would, as a matter of ordinary statutory construction, include any other route at common law to liability: (compare [McKillen v Maybourne Finance Ltd \[2012\] EWCA Civ 864](#)).

Contemporaneous commentators (Blackstone *Commentaries on the Laws of England* (10th edn, 1787) p 431 and Bacon *A New Abridgment of the Law* (5th edn, 1789) p 85) thought that the Act had so altered the law that even where a fire had been caused or allowed to spread by negligence no liability arose. This treated the word “accidentally” as having been used in contrast to “wilfully”. In *Viscount Canterbury v Attorney-General* (1843) 1 Phillips 306 Lord Lyndhurst LC at least flirted with this view, although it was not necessary for him to reach a decision.

[Vaughan v Menlove \(1837\) 3 Bing NC 468](#) was a case of a haystack that spontaneously combusted. The allegation against Menlove was that he had “wrongfully, negligently and improperly” kept his haystack “so likely and liable to ignite and take fire, and in a state and condition dangerous” to Vaughan's cottages. It is important to note that this was not a case of a fire that had been deliberately kindled. At trial Patteson J directed the jury to consider whether the fire had been occasioned by “gross negligence” on the part of Menlove. The argument for Menlove on appeal was that the jury should have been asked to consider whether Menlove had “acted bona fide to the best of his judgment”. The court rejected that argument and held that the case had

been rightly left to the jury on the question of negligence. Liability thus depended on negligence.

Viscount Canterbury v Attorney-General (1843) 1 Phillips 306 was a petition of right brought against the Crown by a former Speaker of the House of Commons whose possessions had been destroyed in the fire that swept through the Houses of Parliament in 1834 (and to which we owe Barry and Pugin's building). The argument for the Speaker was that the statute did not relieve against fires caused by negligence, contrary to the opinion that Blackstone had expressed in his *Commentaries*. The Attorney does not appear to have argued this point; because he succeeded on the ground that a petition of right did not lie for negligence on the part of the Sovereign or his servants.

In *Filliter v Phippard* Lord Denman CJ confirmed that Blackstone's view was wrong. The question was: what did the word “accidentally” mean in the context of [section 86](#)? He said:

“It is true that in strictness, the word accidental may be employed in contradistinction to wilful, and so the same fire might both begin accidentally and be the result of negligence. But it may equally mean a fire produced by mere chance, or incapable of being traced to any cause, and so would stand opposed to the negligence of either servants or masters. And, when we find it used in statutes which do not speak of wilful fires but make an important provision with respect to such as are accidental, and consider how great a change in the law would be effected, and how great encouragement would be given to that carelessness of which masters may be guilty as well as servants, we must say that we think the plaintiff's construction much the most reasonable of the two.”

Thus the court held that a fire that had begun by negligence did not attract the protection of [section 86](#). In *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 Mason CJ writing for the majority of the High Court of Australia described this decision as “surprising”. But it is too late to change that.

The railway age brought a new spate of litigation. Early locomotives were steam powered; and the steam was

generated by means of fires in the fire box of the locomotive, deliberately kindled. Sometimes, however, the fire in the locomotive could not be kept fully under control; or sparks from the fire were carried up the locomotive's chimney together with the steam.

In [Aldrige v The Great Western Railway Co \(1841\) 3 Man & G 515](#) the allegation was that sparks from the company's railway engine set light to the plaintiff's beans because the company carelessly managed their engine. Tindal CJ said:

“It is contended on the part of the defendants, that the plaintiff should be nonsuited; but I am not prepared to say that the fact of the engine emitting sparks may not amount to negligence. On the other hand I cannot say that a verdict ought to be entered for the plaintiff. I think that the special case should be withdrawn, and that the parties should go on to trial. To entitle the plaintiff to recover, he must either shew some carelessness by the defendants, or lay facts before the jury from which it may be inferred.”

Clearly liability was not strict but depended on negligence. In [Piggot v The Eastern Counties Railway Company \(1846\) 3 CB 229](#) sparks from the engine of a passing mail train set fire to the plaintiff's cart lodge. The claim against the railway company was that they “so carelessly, negligently, and unskilfully managed and conducted their said steam-carriage and steam-engine” that the plaintiff's cart house was set on fire. In other words the claim was framed in negligence. The point in the case was the admissibility of evidence; but Tindal CJ again described the legal principle as follows:

“The defendants are a company intrusted by the legislature with an agent of an extremely dangerous and unruly character, for their own private and particular advantage: and the law requires of them that they shall, in the exercise of the rights and powers so conferred upon them, adopt such precautions as may reasonably prevent damage to the property of third persons through or near which their railway passes. The evidence in this case was abundantly sufficient to shew that the injury of which the plaintiff complains was caused by the emission of sparks, or particles of ignited coke, coming from one of the defendants' engines; and there was no proof of any precaution adopted by the company to avoid such

a mischance. I therefore think the jury came to a right conclusion, in finding that the company were guilty of negligence, and that the injury complained of was the result of such negligence.”

Thus although the locomotive was regarded as “dangerous”, liability still turned on negligence. The underlying reason may be that the use of steam engines was authorised by statute, and that therefore negligence was the only route to liability, although this reason is not explicitly stated. The ground began to shift in [Vaughan v The Taff Vale Railway Company \(1858\) 3 H & N 743](#). This was another case of fire caused by sparks from the fire of a passing locomotive. Although the railway company had done everything that was practicable to the locomotives to make them safe, the railway embankment was covered with inflammable grass. It is probable that it was that which caught fire and from there the fire spread to the plaintiff's wood. The argument for the railway company was that they should not be liable if they had taken all reasonable care to prevent the fire. It was also argued that if the fire had started on the embankment and had spread from there to the plaintiff's wood, [section 86](#) protected them in the absence of negligence. As often happened in the nineteenth century the ultimate result turned on the pleadings. There were two counts alleged against the railway company. The first count alleged that they had negligently managed their locomotive and had failed to provide “the proper means for retaining the fire and igneous matter in the said locomotive whilst the same was being propelled along the railway”. The second count alleged that the railway company knew that there was a danger that the combustible material on the bank would ignite; and that they therefore had a duty “to preserve and keep the bank in such a state and condition that fire should not be occasioned by reason of the ashes, &c., falling and settling thereon from and out of the locomotives, and to take all necessary precautions to prevent any fire which might be occasioned from extending to, and burning the wood of the plaintiff”. The trial judge directed the jury that:

“... if, to serve his own purposes, a man does a dangerous thing, whether he takes precautions or not, and mischief ensues, he must bear the consequences: that running engines which cast forth sparks is a thing intrinsically dangerous, and that if a railway engine is used, which in spite of the utmost care and skill on the part of the Company

and their servants is dangerous, the owners must pay for any damage occasioned thereby”.

He also pointed out to the jury that the railway company could have kept the grass cut, or could have used gravel or sand to make a non-inflammable belt along the railway; and he asked them:

“... whether they did not think that there was inevitable negligence in the use of a dangerous thing calculated to do, and which did cause, mischief.”

The jury found for the plaintiff; and the railway company appealed. The judgment of the Court of Exchequer was given by Bramwell B (who had also been the trial judge). He said:

“The first question then is: Was there evidence for the jury? And, as they may have found on either count, was there evidence in support of each? Next: Was the evidence such as to warrant the strong opinion of the learned Judge?”

We are of opinion, on both these questions, in favour of the plaintiff. Here is confessedly the use of an instrument likely to produce damage, and producing it. This, according to general rules, would make the defendants liable. But two answers were suggested on their behalf. The first was, that if the fire originated on their own land they were protected by the 14 Geo. 3, c. 78, s. 86. But we are of opinion that the statute does not apply where the fire originates in the use of a dangerous instrument, knowingly used by the owner of the land in which the fire breaks out. It is impossible to suppose that the engine driver is liable to eighteen months imprisonment under section 84, and equally impossible to suppose there is no remedy against either master or servant, for what is a wrong by one or both. We are of opinion therefore that this answer fails.”

One difficulty with this case is that the jury may have found that there was negligence on the part of the railway company (which went to the second count); in which case it would have been clear that [section 86](#) would not have given the railway company a defence. But the reason that Bramwell B gave for the conclusion that the protection of the 1774 Act was excluded was that the fire was caused by the use of a dangerous instrument, *knowingly* used by the owner of the land. The dangerous instrument was the locomotive in which a fire was deliberately kindled and was burning in order to propel it. It is also noticeable that one of the ingredients of liability was that the instrument was “likely to produce damage”. The judgement was reversed by Court of Exchequer Chamber (1860) 5 H & N 679 on the ground that the use of the locomotive was authorised by Parliament and therefore that so far as the first count was concerned negligence had to be established. Since it was not clear whether the jury had found for the plaintiff on the first count or the second count, there would have to be a new trial. The point under [section 86](#) did not arise for decision.

In [Smith v The London and South Western Railway Company \(1869–70\) LR 5 CP 98](#) workmen, employed by a railway company in cutting the grass and trimming the hedges bordering the railway, placed the trimmings in heaps near the line, and allowed them to remain there for fourteen days, during very hot weather in the month of August. Fire from a passing engine ignited one of these heaps, and burned the hedge, and was carried by a high wind across a stubblefield and a public road, and burned the plaintiff's goods in a cottage about 200 yards away. The question was whether there was evidence of negligence to go before the jury. No one argued that the railway company was strictly liable. Bovill CJ said:

“I agree that the mere circumstance of the fire being caused by an engine of the company, is not enough to give a cause of action against them; but the plaintiff must shew some breach of duty on their part which occasioned the injury he complains of.”

This decision was upheld by the Court of Exchequer Chamber (1870–71) LR 6 CP 14, among whom was Blackburn J. But as in the case of [Vaughan v The Taff Vale Railway Company](#) the decision was based on the fact that

the company had been authorised by statute to use steam locomotives on the railway. Blackburn J said:

“I take it that, since the case of *Vaughan v Taff Vale Ry Co*, which was expressly affirmed in *Brand v Hammersmith Ry Co*, it is clear that when a railway company is authorized by their Act of parliament to run engines on their line, and that cannot be done without their emitting sparks, the company are not responsible for injuries arising therefrom, unless there is some evidence of negligence on their part.”

So we come to the famous case of *Rylands v Fletcher* (sub nom *Fletcher v Rylands* (1865–66) LR 1 Ex 265). In the Court of Exchequer Chamber the judges were referred in argument to section 86 of the 1774 Act and also to *Filliter v Phippard*. Neither found a place in the judgment. The well-known statement of principle formulated by Blackburn J was as follows:

“We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there

so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law whether the things so brought be beasts, or water, or filth, or stench.”

It is, to my mind, striking that despite all the examples that Blackburn J gave fire is not among them. He had already decided in *Smith v The London and South Western Railway Company* that strict liability at common law could be displaced by statute. In the light of the fact that the court had been referred in argument to 86 of the 1774 Act and also to *Filliter v Phippard*, he must have taken the view that section 86 had displaced strict liability; and accepted counsel's submission that:

“... the liability for fire is restricted to mischief arising from negligence...”

Let it be supposed, however, that he thought that fire was a dangerous thing, and intended that the principle he formulated would apply to it. We can then restate the principle thus:

“a person who for his own purposes brings on his lands and collects and keeps there [fire] must keep it in at his peril, and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape.”

The principle thus formulated is consistent only with a fire deliberately kindled. A fire that starts accidentally and which damages the place where it begins can hardly be said to have brought on to the land by the occupier “for his own purposes”. Nor in my judgment can he be said without straining language to have brought the fire onto the land at all. In *Read v J Lyons Ltd* [1947] AC 156 Viscount Simon said of Blackburn J's formulation:

“Blackburn J several times refers to the defendant's duty as being the duty of “keeping a thing in” at the defendant's peril and by “keeping in” he does not mean preventing an

explosive substance from exploding but preventing a thing which may inflict mischief from escaping from the area which the defendant occupies or controls.”

As is well-known the case went to the House of Lords (sub nom [Rylands v Fletcher \(1868\) LR 3 HL 330](#)). Neither [section 86](#) nor any fire case was referred to in the course of argument. Lord Cairns formulated the principle thus:

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

He then approved the formulation of Blackburn J in the court below. Lord Cranworth said:

“If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.”

Neither of their Lordships referred to fire. Nor does the way in which the principle is framed readily apply to fire unless the fire itself has deliberately been brought

on to the defendant's land. Lord Cairns referred to the use of the land “for the purpose of” introducing something dangerous. Likewise Lord Cranworth was clearly contemplating something dangerous deliberately brought onto or accumulated on the land. No consideration was given to how this principle might sit with [section 86](#) of the 1774 Act.

[Jones v Festiniog Railway \(1867–68\) LR 3 QB 733](#) was decided after [Fletcher v Rylands](#) in the Court of Exchequer Chamber and only a week or two before the appeal was heard in the House of Lords. The railway company ran steam locomotives on its railway. Although it had taken all reasonable precautions against the emission of sparks from the engine, nevertheless sparks from the engine set the plaintiff's haystack alight and burned down his barn. Blackburn and Lush JJ held that he was entitled to succeed. Blackburn J said:

“The general rule of common law is correctly given in [Fletcher v Rylands](#) , that when a man brings or uses a thing of a dangerous nature on his own land, he must keep it in at his own peril; and is liable for the consequences if it escapes and does injury to his neighbour. Here the defendants were using a locomotive engine with no express parliamentary powers making lawful that use, and they are therefore at common law bound to keep the engines from doing injury, and if the sparks escape and cause damage, the defendants are liable for the consequences, though no actual negligence be shewn on their part.”

The thing of the dangerous nature that the railway company had brought onto its land was the locomotive engine with the deliberately kindled fire. Lush J said:

“I can see nothing in this statute to licence the company to use locomotive engines. In the absence of this licence the company are left to their liabilities at common law: that is, if they use a highly dangerous machine, they must do so at the peril of the consequences if it cause injury to others.”

Again it is clear that the highly dangerous machine was the locomotive, and it was that dangerous thing that the

railway company had deliberately brought onto its land. No argument was addressed to the court about the possible effect of [section 86](#). Jones v Festiniog Railway was followed and applied in [Powell v Fall \(1879–80\) LR 5 QBD 597](#), a case of a steam powered traction engine on the highway. Sparks from the engine set fire to the plaintiff's haystack. Since the fire started on the highway, [section 86](#) could not have applied. The question for the court was:

“whether the owner of a locomotive engine propelled by steam along a public highway *using a fire for the purpose of generating the steam required* to propel such engine, ... and was managed and conducted with all reasonable care and without negligence, was liable to the plaintiffs for injury occasioning damage to a rick of hay standing on land adjoining the highway by sparks proceeding from such engine and firing the hay.” (Emphasis added)

Mellor J answered that question in the affirmative and his decision was upheld by the Court of Appeal. In the Court of Appeal it appears to have been conceded that an action lay at common law, and the only question was whether there was a statutory exemption. As Bramwell LJ put it:

“The plaintiffs are protected by the common law, and nothing adverse to their right to sue can be drawn from the statutes: the statutes do not make it lawful to damage property without paying for the injury.”

Modern formulations of the principle in *Rylands v Fletcher* also emphasise the voluntary act of the defendant in bringing the dangerous thing onto his land. They also emphasise that it is that dangerous thing that must escape before strict liability is engaged. In [Transco plc v Stockport MBC \[2003\] UKHL 61 \[2004\] 2 AC 1](#), 12 Lord Bingham ended his discussion by saying:

“An occupier of land who can show that another occupier of land has brought or kept on his land an exceptionally dangerous or mischievous thing in extraordinary or unusual circumstances is in my opinion entitled to recover compensation from that occupier for any damage caused to his property interest by the escape of that thing, subject to

defences of Act of God or of a stranger, without the need to prove negligence.”

Mr Rainey relied on the decision of the [House of Lords in Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd \[1921\] 2 AC 465](#). The case concerned an explosion in a munitions factory. The facts are by no means clear, but what seems to have happened is that a fire broke out in the factory and ignited sodium nitrate stored there. The sodium nitrate in turn produced a hot flame which caused dinitrophenol to explode. The claim was tried by Scrutton LJ who held that liability under the principle in *Rylands v Fletcher* had been established. His decision was upheld by both the Court of Appeal and the House of Lords. However, what was argued on appeal was not, in substance, the question of liability, but whether liability attached to the directors of the company personally. In *Read v J Lyons Ltd* Viscount Simon (169), Lord Macmillan (174) and Lord Uthwatt (187) all pointed this out; and Viscount Simon also said that liability had been conceded before Scrutton LJ sitting at first instance as the trial judge. In *Cambridge Water Co v Eastern Counties Leather Ltd [1994] AC 264*, 303–304 for much the same reasons Lord Goff also regarded *Rainham Chemical Works* as “fragile authority” on the scope of the principle. On the other hand in *Transco plc v Stockport MBC Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd* was regarded by the Law Lords as being a case that demonstrated the utility of retaining the principle in *Rylands v Fletcher*, although the implications of that case were not discussed. Since there was no discussion of the principle either in the Court of Appeal or in the House of Lords in *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd* I do not consider that it lays down any binding principle of law about the scope of the principle in *Rylands v Fletcher*, even though it may be regarded as a case which justifies retention of the principle. The manufacture of explosives may well be considered to be an inherently dangerous activity (even in wartime) sufficient to bring the principle into play. Thus the ingredients themselves are the dangerous things which have been deliberately brought onto the land. [Section 86](#) cannot apply, because it applies only to fires; not to explosions.

I come now to [Musgrove v Pandelis \[1919\] 2 KB 43](#). Mr Musgrove rented rooms above a domestic garage, in which

Mr Pandelis kept a car. Mr Pandelis sent his chauffeur, Mr Coumis, to clean the car. Mr Coumis had to move the car within the garage. For that purpose he went to the bonnet and turned on the petrol tap to allow the flow of petrol from the tank to the carburettor, and started the engine, when suddenly there was an explosion, and flames were seen to be coming from the carburettor. There was no woodwork within eighteen inches of the carburettor, and if Mr Coumis had immediately turned off the tap of the pipe leading from the petrol tank the petrol in the carburettor would have soon burnt out, and the fire would have been prevented from spreading. But instead of doing so Mr Coumis wasted his time in looking for a cloth which he failed to find. He then went to the bonnet to turn off the tap, but was too late, for owing to the continued flow of the petrol into the carburettor the fire had spread to the body of the car. The garage itself then caught fire and the whole building was burnt, including Mr Musgrove's rooms overhead, together with a quantity of furniture belonging to him. Mr Pandelis relied, among other defences, on [section 86](#). At first instance [1919] 1 KB 314 Lush J said:

“But, nevertheless, I am of opinion that the statute affords the defendant no protection; for though the fire in the carburettor was accidental in a popular sense, I do not think it was accidental in the sense in which that term is used in the statute. If a man brings on to his premises a dangerous thing which is liable to cause fire, such as a motor car with petrol in it, the carburettor of which is not unlikely to get on fire when the engine is started, and a fire results, though without any negligence on his part, he must be held liable, the statute notwithstanding, for the rule is that he must keep such a thing under control at his peril.”

The key point for him, therefore, was that the petrol was “liable to cause a fire” and “not unlikely to get on fire”. He also held that Mr Coumis was negligent in not immediately turning off the petrol tap. Lush J was upheld on appeal to this court. Each of the three Lords Justices gave judgments. Bankes LJ began by considering the state of the common law before liability for fire was restricted by statute. He said:

“A man was liable at common law for damage done by fire originating on his own property (1) for the mere escape of the fire; (2) if the fire was caused by the negligence of

himself or his servants, or by his own wilful act; (3) upon the principle of *Rylands v Fletcher*. This principle was not then known by that name, because *Rylands v Fletcher* was not then decided; but it was an existing principle of the common law as I shall show presently.”

Bankes LJ then referred to *Filliter v Phippard*. He said (correctly) that that case decided that a fire negligently begun was not protected by the statute; and posed the question:

“Why, if that is the law as to the second head of liability, should it be otherwise as to the third head, the liability on the principle of *Rylands v Fletcher*? If that liability existed, there is no reason why the statute should alter it and yet leave untouched the liability for fire caused by negligence or design. That the principle of *Rylands v Fletcher* existed long before that case was decided is plain. In *Vaughan v Menlove* Tindal CJ says: “There is a rule of law which says you must so enjoy your own property as not to injure that of another.” Park J says: “Although the facts in this case are new in specie, they fall within a principle long established, that a man must so use his own property as not to injure that of others.” *Rylands v Fletcher* is merely an illustration of that old principle, and in my opinion Lush J was right in saying that this case, if it falls within that principle, is not within the protection of the statute.”

In my judgment this reasoning is historically unsound. As McKenna J pointed out in [Mason v Levy Autoparts of England Ltd \[1967\] 2 QB 530](#) at common law there were not three separate routes to liability: there was only one. A householder was liable for the escape of his fire (*ignis suus*): no additional danger was needed to be proved. The liability was based on a custom of the realm and on no other principle. If the case was brought otherwise than on the custom of the realm (i.e. by action on the case) then negligence had to be proved. This view was shared by Holdsworth (whom I have already quoted) and by Lord Denning in *Emanuel* (whom I have also quoted). McKenna J said:

“There were not three heads of liability at common law but only one. A person from whose land a fire escaped was held liable to his neighbour unless he could prove that it had started or spread by the act of a stranger or of God. Filliter's case had given a special meaning to the words “accidental fire” used in the statute, holding that they did not include fires due to negligence, but covered only cases of “a fire produced by mere chance, or incapable of being traced to any cause.” But it does not follow, because that meaning may be given to “accidental,” that the statute does not cover cases of the Rylands v Fletcher kind where the occupier is held liable for the escape though no fault is proved against him. In such cases the fire may be “produced by mere chance” or may be “incapable of being traced to any cause.” Bankes LJ was making a distinction unknown to the common law, between “the mere escape of fire” (which was his first head) and its escape under Rylands v Fletcher conditions (which was his third), and was imputing an intention to the legislature of exempting from liability in the former case and not in the latter.”

Likewise in his article on Vagaries in Liability for the Escape of Fire (1969) CLJ 104 AI Ogus says of Bankes LJ's analysis:

“This is, without doubt, a distortion of the position at common law. It has already been seen that the modern concept of negligence did not exist before the nineteenth century. The argument on Rylands v Fletcher fares no better. Its origins are not to be found in the action on the case *pur negligent garder son feu*. Though similar in result, their bases are substantially different. The old form of action took as its starting point the escape of fire from the defendant's land. The plaintiff need then only show that it was *ignis suus* which caused damage to his property. Rylands v Fletcher, on the other hand, requires the accumulation on the defendant's land of “something likely to do mischief if it escapes. The former is an example of tortious liability based on “causal responsibility”. The latter is an example of strict liability attaching to the use of dangerous things. Nor is the quotation from Vaughan v Menlove of assistance. It was simply part of a discourse on the emerging concept of negligence, and in any case could apply equally well to the tort of nuisance.”

The Law Commission has also pointed out the fallacy in the reasoning. In their report on *Civil Liability for Dangerous Things and Activities* (1970) (Law Com No 32), Appendix para 18 they said:

“Indeed, it is difficult to escape a dilemma: if a liability of the Rylands v Fletcher type existed before its classic enunciation in the case from which it takes its name (as the Court of Appeal in fact argued in *Musgrove v Pandelis*) then the broad language of the statute, to which MacKenna, J, drew attention can hardly be ignored; if on the other hand it were suggested that the doctrine of Rylands v Fletcher grew up after the 1774 Act then its development was necessarily limited by the mandate of Parliament.”

Nor does the reference to the maxim that “a man must so use his own property as not to injure that of others” make good the reasoning. First, as shown by *Black v Christchurch Finance* (and as Ogus says) even where the maxim does apply it may require proof of negligence. Indeed that was the case in *Vaughan v Menlove* itself; where the debate was between an objective test of negligence on the one hand, and a more subjective test of acting in good faith. No question of strict liability arose in that case, despite reliance on the maxim. Thus in my judgment Bankes LJ misinterpreted what the court had decided in *Vaughan v Menlove*. Second, in so far as the custom was based on that maxim it was overridden by the statute. Even if it was not part of the *ignis suus* custom it was a “law” which the statute expressly disapplied. Third, later authority is inconsistent with Bankes LJ's proposition based on the maxim. Thus in *Emanuel Phillimore LJ* said:

“The LCC were undoubtedly occupiers of this land. They were sued in that capacity and they did not call any evidence to suggest otherwise. As such they owed a duty to their neighbours which is best described in the old Latin maxim: *sic utere tuo ut alienum non laedas*. As Markham J put it in *Beaulieu v Finglam* :

‘I shall answer to my neighbour for him who enters my house by my leave or knowledge whether he is guest to me or my servant, if either of them acts in such a way

with a candle or other things that my neighbour's house is burned.'

Since the [Fire Prevention \(Metropolis\) Act 1774](#) it is I think necessary to insert the word 'negligently' after the word 'acts'.

In my judgment what *Filliter v Phippard* decided was that "accidentally" meant "without negligence". The legislation must have been intended to change the common law, whether or not it was based on custom, otherwise Parliament would not have used the wide words that it did. On the footing that fires started by negligence did not attract the protection of [section 86](#), what change must Parliament have intended? The answer, in my judgment, must be that Parliament intended to abolish liability based simply on the proposition that a man "must so use his own as not to injure another", without proof of negligence. Whether liability arose because of custom or because of some other principle of common law does not matter. Both were overridden by [section 86](#). This is confirmed by *Emanuel*.

It follows from this that I disagree with the view expressed by Judge Thornton QC in *Johnson v BJW Property Developments Ltd* [2002] EWHC 1131 (TCC) [2002] 3 All ER 574 and by Judge Coulson QC in *LMS International Ltd v Styrene Packaging and Insulation Ltd* [2005] EWHC 2065 (TCC) that McKenna J was wrong in his appreciation of the common law, or in the effect of the 1774 Act.

As I have said, liability for fire was not the only form of strict liability imposed by custom of the realm. The liability of innkeepers was another such liability. In [Williams v Owen](#) [1955] 1 WLR 1293 Mr Williams left his car overnight in the hotel garage. A fire broke out and destroyed his car. Finmore J held that the strict liability of an innkeeper was limited to loss of his guest's goods rather than to their destruction. But he went on to deal with [section 86](#). He said:

"I think that this liability of the innkeeper was a custom of the realm. It is true it is embodied in common law rules, but then common law is the legal expression of custom, and it seems to me that that also would be an

answer in this particular case. I suppose that by 1774 the legislature had appreciated what Lord Goddard CJ laid down in *Sochacki v Sas*: "Everybody knows fires occur through accidents which happen without negligence on anybody's part." Parliament in 1774 apparently thought it right that they should make it plain that whatever customs or usages there were to the contrary, in this country a man should not be held to be responsible for a fire which occurred accidentally — which I take to mean "without negligence on his part."

Those are two points which I think would be enough to decide that there is in this case no absolute liability on the part of the innkeeper, first, because there was injury to the car and not theft or loss; and, secondly, because, in any event, as it was a fire the Act of 1774 would limit the liability of the innkeeper, so far as a fire is concerned."

In other words [section 86](#) overrode the custom. In my judgment this is plainly right because the Act expressly exempts a person from liability for accidental fires "any law, usage or custom to the contrary notwithstanding". This would include the custom of the realm upon which liability for "*ignem suum*" was based. The only question, then, is what Parliament meant by the word "accidentally"; and that had been decided by *Filliter v Phippard*.

In *Musgrove v Pandelis Bankes LJ* continued:

"The question then, is whether this motor car, with its petrol tank full or partially filled with petrol, was a dangerous thing to bring into the garage within the principle of *Rylands v Fletcher*? Mr. Hawke says a motor car is not a dangerous thing unless it is in such a condition that an accident is to be apprehended. But the expectation of danger is not the basis of the principle of *Rylands v Fletcher*. A thing may be dangerous although the danger is unexpected. I agree with Lush J that this motor car was dangerous within that principle. The defendant brought it, or caused it to be brought upon his premises, and he is responsible for the fire which resulted, and is not within the protection of the statute."

It will be recalled that the reason that Lush J thought the car was dangerous was that the petrol in its tank was “liable to cause a fire” and “not unlikely to get on fire”. Warrington LJ agreed on that point; and said:

“If this motor car with the petrol in its tank was potentially dangerous, such as a man's own fire, then it was the defendant's duty to see that the potential danger did not become an actual danger causing damage to his neighbour. The Act of Geo. 3 is no protection against that liability.”

However, both Bankes LJ and Warrington LJ went on to consider the question of negligence and both held that Lush J was right on that issue. That, as has subsequently been pointed out, is sufficient to support the decision itself. Duke LJ seems to me to have adopted a different line of reasoning. He said:

“I do not see how this case can be taken out of the principle of *Rylands v Fletcher*, which was thus stated by Lord Cairns LC in the very words of Blackburn J: “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.” He can excuse himself by showing that the escape was owing to the plaintiff's default or perhaps that it was the consequence of *vis major* or the act of God. In the present case there was petrol which was easily convertible into an inflammable vapour; there was the apparatus for producing a spark; and added to those there was a person supposed to control the combustion but inexperienced and unequal to the task. Taking together the presence of the petrol, and the production of the inflammable gas, or those combustibles together with the inexperience of the person placed in charge of them, it is impossible to say that this is not an instance of the principle laid down by Blackburn J.”

However, although he held that the principle of *Rylands v Fletcher* applied, he nevertheless went on to consider whether the fire was accidental for the purposes of [section 86](#). If he had thought that the application of *Rylands v Fletcher* was a complete answer that consideration would have been unnecessary. On that question he said:

“That would dispose of this case but for the defendant's contention that he is excused by [s. 86 of the Fires Prevention \(Metropolis\) Act, 1774](#). In my opinion the terms of that enactment fall far short of showing a definite intention to relieve a defendant in such a case as this. The actions against which the statute gives protection are in respect of fires which shall accidentally begin. I have the greatest doubt whether this fire began accidentally at any stage. If it was all one fire, it was begun not accidentally but intentionally. If progressive stages may be regarded it was not a fire which began accidentally without negligence at the stage when it became a conflagration involving goods and premises. The question may some day be discussed whether a fire, spreading from a domestic hearth, accidentally begins within the meaning of the Act, if such a fire should extend so as to involve the destruction of property or premises. I do not covet the task of the advocate who has to contend that it does. In the present case the fire, so far as it was a means of mischief, resulted from the negligent omission to turn off the petrol tap, an act which would have stopped the flow of petrol. All the witnesses who had any experience of such matters drew a distinction between fire in a carburettor, where the vapour can be instantly cut off, and such a fire as occurred in this case. The learned judge has found that this fire was due to negligence. I cannot disagree with him. Whatever may be the effect of the Act of Geo. 3 upon the nice questions that have been discussed, this case is outside any possible protection of that statute.”

This is, with all respect, a rather confused passage; but in my judgment the key finding here is that the spread of the fire was attributable to negligence.

Musgrove v Pandelis has been subsequently considered on a number of occasions. In *Job Edwards Ltd v Birmingham Navigation Proprietors [1924] 1 KB 341* rubbish was tipped on land belonging to a canal company and on adjoining land belonging to mine owners. The rubbish on the mine owners' land was found to be on fire, and the canal company feared that the fire might spread to their own land. Having called on the mine owners to extinguish the fire, the canal company entered the mine owners' land (by agreement) and put out the fire. The question was whether the mine owners were liable to contribute to the

cost. Bailhache J held that the mine owners had no duty to prevent the spread of the fire. He held that:

“... where a fire occurs through no fault of the landowner, without his knowledge, and, as in this case, on matter brought on his land without his knowledge and against his will, he is not responsible for the spreading of such a fire to the adjoining land, but the neighbour is entitled to go upon his land and prevent the fire from spreading.”

Thus the mine owners were not liable to contribute to the cost. The canal company appealed. Mr Vachell QC, for the canal company argued as follows:

“No doubt a person on whose estate any fire shall accidentally begin is exempted from liability by [s. 86 of the Fires Prevention \(Metropolis\) Act, 1774](#) , for damage caused by that fire; and it may be admitted that a fire accidentally began upon land belonging to the respondents. But the fire which caused or threatened to cause damage to the appellants' property was not the fire which accidentally began on the respondents' land, when it might have been extinguished quickly and easily, but the fire which was from May to October, 1920, allowed to increase and become formidable: *Musgrove v. Pandelis* .”

Bankes LJ gave the leading judgment. He began by considering the distinction between a public nuisance (which he said a land owner had a duty to abate) and a private nuisance (which he said gave rise to no such duty). He then turned to the custom relating to fire, and explained it thus:

“The case of fire has always been looked upon in our law as a somewhat exceptional case. It was no doubt the ancient law or custom of England that a person in whose house a fire originated which afterwards spread to his neighbour's property and destroyed it must make good the loss, but I do not consider that rule as opposed to the view I am putting forward in regard to liability for injury done by a private nuisance, as the ancient law no doubt considered a fire as a public nuisance owing to the danger of its spreading. The view of the law which I am taking does not touch a case

where the private nuisance has been caused, or allowed to continue, by any act or default on the part of the occupier of the land on which it exists.”

This is a quite different explanation of the custom to that which he gave in *Musgrove v Pandelis* . The other point that he considered was the defence under [section 86](#) . As to that he said:

“Mr Vachell contended that whatever may have been the cause of the original fire it ceased to be an accidental fire within the meaning of the statute when the plaintiffs were informed of it, and that within the reasoning of the decision in *Musgrove v Pandelis* the fire as from that date must be treated as a second and independent fire. I cannot draw any such inference from the facts of the present case. In *Musgrove v Pandelis* Lush J drew from the facts the inference that there were in substance either two fires, the first an accidental one which did no damage, and the second which was due to negligence and did the damage; or alternatively that there was only one fire within the meaning of the statute, and that was the one due to negligence. This Court agreed with the view of the learned judge, but the facts of that case are very special, and have in my opinion no bearing upon the case we are now dealing with.”

It seems clear from this passage that Bankes LJ himself did not regard *Musgrove v Pandelis* as applying to what might be called an ordinary case of spread of fire. Bankes LJ (with whom Astbury J agreed) held that the mine owners owed no duty to the canal company and hence dismissed the appeal. Scrutton LJ dissented. On the question of common law duty he said:

“There is a great deal to be said for the view that if a man finds a dangerous and artificial thing on his land, which he and those for whom he is responsible did not put there; if he knows that if left alone it will damage other persons; if by reasonable care he can render it harmless, as if by stamping on a fire just beginning from a trespasser's match he can extinguish it; that then if he does nothing, he has “permitted it to continue,” and become responsible for it.

This would base the liability on negligence, and not on the duty of insuring damage from a dangerous thing under *Rylands v Fletcher*. I appreciate that to get negligence you must have a duty to be careful, but I think on principle that a landowner has a duty to take reasonable care not to allow his land to remain a receptacle for a thing which may, if not rendered harmless, cause damage to his neighbours.”

This is a critical passage because it was subsequently approved by the [House of Lords in *Sedleigh-Denfield v O'Callaghan* \[1940\] AC 880](#) who disapproved the reasoning of the majority. As far as [section 86](#) was concerned, Scrutton LJ said:

“That statute (14 Geo. 3, c. 78, s. 86) provides that no action shall lie against any person in whose house or on whose estate “any fire shall accidentally begin.” This fire undoubtedly began accidentally so far as the landowner and his agents were concerned. It has been decided that the statutory restriction of the previous common law liability does not exclude liability for fires caused by negligence of the owner or persons for whom he is responsible, or by dangerous things for which the owner is responsible under the doctrine of *Rylands v Fletcher*. This leaves the difficult question — suppose the fire is caused by a trespasser, as if he throws down a match; and suppose the owner comes by immediately afterwards, sees the small fire, and could with no trouble extinguish it by stamping on it, but does not do so, so that the fire spreads and damages his neighbour, is he freed by the statute? He is then aware of a dangerous thing on his land which may damage his neighbour, and which by reasonable care he can prevent from damaging his neighbour, and he does nothing. I agree he is not an absolute insurer of that dangerous thing, for he did not himself create it, but I think on principle he is bound to take reasonable care of a dangerous thing which he knows to exist. Take the case of an ordinary house fire, where a coal leaps from the grate. If no one knows of the fire caused by the coal till it cannot be stopped, that fire may be within the protection of the statute, though Duke LJ doubted it in *Musgrove v Pandelis*. But suppose the owner sees it jump out, could extinguish it with a moment's trouble, and does not trouble to do so, could he plead the statute to protect him? In *Musgrove v Pandelis*, where the real danger arose from the fact that the defendant's servant negligently did not turn a tap to stop a supply of petrol to a fire, the Court treated the

fire as two fires; I should respectfully have thought that it was safer to say that the fire was continued by negligence, and that the cause of action was not for a fire accidentally begun, but for negligence in increasing such a fire.”

In [Collingwood v Home and Colonial Stores Ltd \[1936\] 3 All ER 200](#) Lord Wright MR also considered *Musgrove v Pandelis*. He said that the ground for decision, in so far as it was not based on negligence was one about which he had “some difficulty”; and Romer LJ pointed out that in that case there had not been an escape of anything such as to bring the principle of *Rylands v Fletcher* into play. Although he said that *Rylands v Fletcher* was based on a broader principle, he doubted the propositions on which the alternative ground rested. *Musgrove v Pandelis* was doubted again by Lord Porter in [Read v J Lyons & Co Ltd \[1947\] AC 156](#), 176, referring to Romer LJ's observations in *Collingwood v Home and Colonial Stores Ltd*. It was also regarded with scepticism by Lord Walker of Gestingthorpe in *Transco plc v Stockport MBC* (at 39).

In [H & N Emanuel Ltd v GLC \[1971\] 2 All ER 835](#) the fire in question had been deliberately started by workmen in order to burn rubbish on a demolition site. It spread to neighbouring land. The Court of Appeal based its decision entirely on the question of negligence. Bearing in mind that the fire had been deliberately started, *Rylands v Fletcher* would have provided a very short answer if the principle applied to a fire that spread accidentally. But instead the Court of Appeal discussed negligence extensively in the context of the statutory defence under [section 86](#). That approach is in my judgment quite inconsistent with *Musgrove v Pandelis*.

Charlesworth & Percy on Negligence say (para 13-112):

“An alternative ground for the decision in *Musgrove v Pandelis* was that the 1774 Act was no defence when the fire originated from a dangerous thing. This proposition has been criticised, but it was adopted and followed in *Mulholland & Tedd Ltd v Baker*. Since it is the fire which is the dangerous thing, whether it is caused by petrol, paraffin or anything else, and the object of the statute is to give protection against accidental fires, it is difficult to understand why the statute should not protect as much in one case as in the other. The presence of

inflammable matter on premises is important when the question of negligence is being considered, so that if there is no negligence and it is found that the fire is accidental, it is submitted that the statute is a defence to the occupier of the land on which it begins, whatever may be the origin of the fire.”

In my judgment *Musgrove v Pandelis* is wrong in so far as it describes the basis of the common law before the earliest of the fire statutes. It invents an unhistorical justification for the basis of the rule. That justification has been criticised by judges, by scholars and by the Law Commission. It is inconsistent with a subsequent decision of this court in *Emanuel*. For good measure, *Bankes LJ* himself said that it was decided on special facts; and, on the face of it, it is inconsistent with his own subsequent decision in *Job Edwards Ltd v Birmingham Navigation Proprietors*. In *Collingwood v Home and Colonial Stores Ltd* *Lord Wright MR* said that whatever it decided *Musgrove v Pandelis* did not apply to the case of a fire caused by an unknown defect in electrical wiring. This was also the view of the [Court of Appeal in *Stockport MBC v British Gas Plc* \[2001\] EWCA Civ 212](#) (whose decision was affirmed sub nom *Transco*). It misinterprets both *Vaughan v Menlove* and *Filliter v Phippard*, and wrongly distinguishes them. Moreover it misstates the principle in *Rylands v Fletcher*, unless it is confined to fires deliberately kindled (or deliberately brought on to land). That, too, was in effect decided by *Collingwood v Home and Colonial Stores Ltd* where *Lord Wright* considered whether *the electrical wiring* (which had been brought onto the land deliberately and where the fire started) rather than the fire fell within the principle in *Rylands v Fletcher*. *Musgrove v Pandelis* is clearly an extension of the principle in *Rylands v Fletcher* because the occupier did not bring the fire onto his land. This was also the view of the High Court of Australia in *Goldman v Hargrove* (1963) 110 CLR 40 (affirmed [1967] 1 AC 645) in which *Windeyer J* said that the principle in *Rylands v Fletcher* did not apply to the fire that started on Mr Goldman's land “simply because the respondent did not bring the fire upon his land, nor did he keep it there for any purpose of his own. It came there from the skies. And he did nothing to make its presence there more dangerous to his neighbours.” Lastly, having regard to the findings of fact made by *Lush J* at trial, the principle that *Bankes LJ*

formulated was unnecessary to the decision, and wider than the facts of the case warranted.

In *Cambridge Water Co v Eastern Counties Leather plc* *Lord Goff* warned against developing the principle in *Rylands v Fletcher* into a rule of strict liability for damage caused by ultra-hazardous operations; and that warning was repeated by *Lord Bingham* in *Transco plc v Stockport MBC*. In *Transco plc v Stockport MBC* the House of Lords were at pains to confine the scope of the principle to its proper ambit. *Lord Bingham* pointed out that it was a necessary condition of liability that the defendant had brought onto his land something which would be a source of mischief or danger if it escaped. That is not the case with a fire that is not deliberately kindled, because the defendant has not brought it onto his land. As I have already said he summarised his discussion by referring to a case in which an occupier of land “has brought or kept on his land an exceptionally dangerous or mischievous thing in extraordinary or unusual circumstances.” A fire that accidentally ignites cannot be described as that; and nothing else escapes. *Lord Scott* also said that the principle applied to:

“... cases where something or other, potentially dangerous, that the defendant has brought onto his land has escaped onto the plaintiff's land and there caused damage.”

He described the element of escape as “essential”. *Lord Bingham* also said that the use that the defendant made of his land would have to be “extraordinary and unusual” by reference to the time and place at which it was carried on before the principle would apply. This was plainly intended as a *narrowing* of the principle expounded in *Rylands v Fletcher*. In my judgment no *extension* of the principle in *Rylands v Fletcher* can now be justified in the light of the decisions of the House of Lords in *Cambridge Water Co v Eastern Counties Leather plc* and *Transco plc v Stockport MBC*. In my judgment *Musgrove v Pandelis* cannot stand with the subsequent decisions of the House of Lords, and it is in conflict with the subsequent decision of this court in *Emanuel*. It wrongly distinguishes two previous decisions of courts of co-ordinate jurisdiction. In those circumstances, in my judgment we are free to choose the correct path to follow: [Young v Bristol Aeroplane Co Ltd](#) [1944] KB 718, 729; [Starmark Enterprises Ltd v CPL](#)

[Holdings Ltd \[2001\] EWCA Civ 1252 \[2002\] Ch. 306](#) (§ 64, § 97). In my judgment *Musgrove v Pandelis* is unsound authority and should no longer be followed.

I turn then to the true scope of the defence under [section 86](#) of the Act. In [Collingwood v Home and Colonial Stores Ltd \[1936\] 3 All ER 200](#) Lord Wright MR said of the Act:

“That Act, as is well known, changed the law, because before that Act if a fire spread from a man's premises and did damage to adjoining premises, he was liable in damage on the broad ground that it was his duty at his own peril to keep any fire that originated on his premises from spreading to and damaging his neighbour's premises. The protection of the section is limited by the word “accidentally.” The meaning of that is discussed in *Filliter v Phippard*, where it was held that the section did not apply to a fire due to the negligence of the defendant or his servants.”

The fire in that case was caused by an unknown defect in the electrical wiring system. There was no negligence established in relation either to the installation or the maintenance of the electrical system. The initial ignition was thus accidental. Nor, it seems, was there any negligence in controlling the fire once it had started, with the result that the statutory defence succeeded. Indeed the case was all the more striking because the damage was caused by water which had been deliberately applied in an attempt to extinguish the fire. [Spicer v Smee \[1946\] 1 All ER 489](#) was another case of a fire starting in the electrical system. However, Atkinson J held that the wiring had been negligently installed; and that in that state the wiring was a nuisance. It was for that reason that the statutory defence failed. The decision itself can be justified on the basis that the wiring had been negligently installed. The finding of nuisance is, in my judgment, more questionable.

In *Emanuel*, immediately after the passage I have quoted from Lord Denning's judgment in which he said that at common law a person was not liable for fire which escaped without negligence, he added:

“All those cases are covered, if not by the common law, at any rate by the [Fire Prevention \(Metropolis\) Act 1774](#), which covers all cases where a fire began or spreads

by accident without negligence. But that Act does not cover a fire which begins or is spread by negligence: see *Filliter v Phippard*, *Musgrove v Pandelis* and *Goldman v Hargrave*.”

In the same case *Phillimore LJ* said:

“Since the [Fire Prevention \(Metropolis\) Act 1774](#) it is I think *necessary* to insert the word ‘negligently’ after the word ‘acts’.” (Emphasis added)

In [Sochacki v Sas \[1947\] 1 All ER 344](#) the plaintiff lit a fire in the domestic grate in his room and went out one afternoon leaving the fire alight. A spark jumped out of the fire and set fire to the floorboards. The fire spread to an adjoining room where it caused damage. Although there was neither a fireguard nor a fender, Lord Goddard said that no negligence was involved. He held that the principle in *Rylands v Fletcher* did not apply, because although the fire had been deliberately kindled, the kindling of the fire was an ordinary use of land. He continued:

“It is not the case of a fire starting on one owner's premises and spreading to the premises of an adjoining owner. If a fire is negligently or improperly started by a person on his land, as for instance, lighting a bonfire which spreads, he may be liable, not merely to an adjoining owner who suffers damage, but to any other person who suffers damage. If I happen to be on somebody else's land at a time when a fire spreads to that land and my motor car or property is destroyed, I have just as much right against the person who improperly allows the fire to escape from his land as the owner of the land on which I happen to be. I do not doubt that for a moment, but here the fire was being used by a man in a fireplace in his own room. There was an ordinary, natural, proper, everyday use of a fireplace in a room.”

There was no express discussion of [section 86](#), but it is plain that Lord Goddard decided the case on the basis of negligence alone.

In [Solomons v R. Gertzenstein Ltd \[1954\] 1 QB 565](#) a fire started as a result of an electrical short circuit. That set fire to some wood and in due course to a stack of paper. Lord Goddard held that [section 86](#) applied. He said:

“In my opinion it was a short circuit that set fire to the wood in the neighbourhood of the ventilator and that in turn set fire to the stack of paper. Pausing here, it does not appear that this paper ever burnt freely; no doubt it caused a lot of smoke, and I accept the evidence that there was some flame seen, but it was not that stack apparently that caused the sudden sheet of flame which caused the real damage here. The cause of that is obscure; the only explanation was that offered by the fire officers, that the heating of the paint and varnish caused an accumulation of gas which suddenly ignited and rushed upwards. However, I do not propose to deal further with this because I cannot hold that placing packing paper and cardboard cartons in this recess behind the balustrade was negligent. Business of the sort carried on by the first defendants necessitates having a stack of packing and wrapping material at hand. This material is not highly inflammable like loose tissue paper or shavings would be. It is common knowledge that it takes a good deal to get closely packed thick paper well alight, though it will smoulder. But in any case I cannot see how it can be negligent to store this paper in what was a convenient recess any more than it would be to store it in one of the rooms occupied by the first defendants. They had no reason to suppose that there was likely to be a short circuit which would fire the panelling in the immediate neighbourhood of the stack, which I may mention was never burnt through. On the evidence before me I am not prepared to find that the fire was caused by the negligence of any of the defendants, and I hold that it was accidental and need only refer on this matter to [Collingwood v Home and Colonial Stores Ltd](#).”

Thus Lord Goddard held that [section 86](#) applied where a fire accidentally began and set fire to material that was not readily inflammable; and that to store that material was not negligent. His process of reasoning was the same as that in [Sochacki v Sas](#). The case went to the Court of Appeal where Lord Goddard's decision was reversed; but on a completely different point.

However, where there is negligence liability attaches, even if the negligence in question is that of an independent contractor. This is shown by another decision of Lord Goddard, this time sitting in the [Court of Appeal, in Balfour v Barty-King \[1957\] 1 QB 496](#). In that case the fire started as the result of the negligent use of a blow torch by an independent contractor. The use of fire had, therefore, been deliberate. The argument for the successful plaintiff was that “If negligence be shown, it matters not against whom, the fire is not accidental.” Lord Goddard said:

“The precise meaning to be attached to “accidentally” has not been determined, but it is clear from these last two cited cases that where the fire is caused by negligence it is not to be regarded as accidental. Although there is a difference of opinion among eminent text writers whether at common law the liability was absolute or depended on negligence, at the present day it can safely be said that a person in whose house a fire is caused by negligence is liable if it spreads to that of his neighbour, and this is true whether the negligence is his own or that of his servant or his guest, but he is not liable if the fire is caused by a stranger.

Who, then, is a stranger? Clearly a trespasser would be in that category, but if a man is liable for the negligent act of his guest, it is, indeed, difficult to see why he is not liable for the act of a contractor whom he has invited to his house to do work on it, and who does the work in a negligent manner.”

I come now to the important case of [Goldman v Hargrave \[1967\] 1 AC 645](#). A tree on Mr Goldman's land was struck by lightning and caught fire. He cleared a space round the tree of combustible material, and arranged for the tree to be cut down. However, once it had been cut down instead of putting out the fire, he left it to burn itself out. Unfortunately it did not, and it spread to Mr Hargrave's land. The question was whether Mr Goldman was liable. The Privy Council held that that an occupier of land was under a general duty of care, in relation to hazards, whether natural or man-made, occurring on his land, to remove or reduce such hazards to his neighbour. The existence of the duty must be based on knowledge of the hazard, ability to foresee the consequences of not checking or removing it, and the ability to abate it; and the standard of care required

of the occupier is founded on what it was reasonable to expect of him in his circumstances. There are a number of important points that arise out of this case. First, the Privy Council rejected the argument that Mr Goldman had adopted the fire as his own “as *suus ignis* — and had made use of it for his own purpose or advantage.” In my judgment this encapsulates the principle of *ignis suus* that I have already discussed. It reinforces the proposition which I believe to be correct, namely that a fire that was never deliberately kindled fell outside the principle of *ignis suus*. In order to count as “*ignis suus*” the fire must have been made for the purpose or advantage of the occupier. Second, the case was not one in which the occupier had brought a source of danger (i.e. the fire) onto his land. This is equally consistent with the rationale of *Rylands v Fletcher*, viz. that an occupier of land has brought something dangerous onto his land *for his own purposes*. Third, the Privy Council held that in the case of fire there was no difference between a fire that started from natural causes and one that had been started by human agency. Lord Wilberforce put it thus:

“Their Lordships would first observe, with regard to the suggested distinction, that it is well designed to introduce confusion into the law. As regards many hazardous conditions arising on land, it is impossible to determine how they arose — particularly is this the case as regards fires. If they are caused by human agency, the agent, unless detected *in flagrante delicto*, is hardly likely to confess his fault. And is the occupier, when faced with the initial stages of a fire, to ask himself whether the fire is accidental or man-made before he can decide upon his duty? Is the neighbour whose property is damaged bound to prove the human origin of the fire? The proposition involves that if he cannot do so, however irresponsibly the occupier has acted, he must fail. But the distinction is not only inconvenient, it lacks, in their Lordships' view, any logical foundation.

Within the class of situations in which the occupier is himself without responsibility for the origin of the fire, one may ask in vain what relevant difference there is between a fire caused by a human agency, such as a trespasser, and one caused by act of God or nature. A difference in degree — as to the potency of the agency — one can see but none that is in principle relevant to the occupier's duty to act. It was suggested as a logical basis for the distinction that in the case of a hazard originating in an act of man, an occupier who fails to deal with it can be said to be using his land in a manner detrimental to his neighbour and so to be within

the classical field of responsibility in nuisance, whereas this cannot be said when the hazard originates without human action so long at least as the occupier merely abstains. The fallacy of this argument is that, as already explained, the basis of the occupier's liability lies not in the use of his land: in the absence of “adoption” there is no such use; but in the neglect of action in the face of something which may damage his neighbour. To this, the suggested distinction is irrelevant.”

It is important to note that this passage is directed to a case in which the occupier is without responsibility for the *origin* of the fire: that is to say the initial ignition. This is clear from the subsequent structure of the Privy Council's advice because Lord Wilberforce went on to consider the separate question of liability for the *spread* of the fire. Thus the Privy Council went on to consider whether, once the fire had started, there was a duty; and held that there was a duty to do what was reasonable in the circumstances to prevent the spread of the fire. This was precisely the approach of *Scrutton LJ* in the *Job Edwards* case. On the facts Mr Goldman was negligent in having left the fire to burn out, rather than extinguishing it. The last point in the case was whether Mr Goldman was entitled to rely on the statutory defence under [section 86](#) (which applies in some Australian states). On that question Lord Wilberforce said:

“The words “shall accidentally begin” are simple enough, but the simplicity is deceptive. Read literally they suggest that account need be taken of nothing except the origin of the fire and that given an accidental beginning, no supervening negligence or even deliberate act can deprive a defendant of the benefit of the statute. But further reflection suggests a doubt both because such a result seems capable of producing absurdity and injustice, and because of the inherent difficulty of saying what the expression “any fire” is intended to mean. A fire is an elusive entity; it is not a substance, but a changing state. The words “any fire” may refer to the whole continuous process of combustion from birth to death, in an Olympic sense, or reference may be to a particular stage in that process — when it passes from controlled combustion to uncontrolled conflagration. Fortunately, the Act has been considered judicially and, as one would expect, the process of interpretation has taken account of these considerations. In *Filliter v Phippard* Lord Denman explained the purpose of the earlier Act (6 Anne,

c. 31, s. 6) as being to remove the supposed common liability of a person “in whose house a fire originated which afterwards spread to his neighbour's property” and held that it did not apply to a fire caused deliberately or negligently. This was carried further in *Musgrove v Pandelis*, where a fire started accidentally in the carburettor of a car, but spread because the chauffeur negligently failed to turn off the petrol tap. The Court of Appeal held that the Act did not apply. Bankes LJ put it that the Act relieved an owner for a mere escape of fire from his premises but did not relieve him against a claim for damages for negligence. The fire which caused the damage was, he thought, not the spark which caused the initial ignition, but the raging fire which arose from the act of negligence. Their Lordships accept this interpretation: it makes sense of the statute, it accords with its antecedents, and it makes possible a reasonable application of it to the facts of the present case, that is to say, that the fire which damaged the respondents' property was that which arose on March 1 as the result of the negligence of the appellant. The statutory defence therefore fails.”

It will be noted that Lord Wilberforce treated *Musgrove v Pandelis* as having turned on negligence and refrained from endorsing any wider basis for defeating the statutory defence. The decision in *Goldman v Hargrave* can in my judgment be summarised thus:

- i) An occupier of land is not liable for the initial outbreak of fire, whether due to natural causes or human agency, unless he himself has brought the fire onto the land;
- ii) He has a duty to do what is reasonable to prevent the spread of the fire. If he fails to do what is reasonable to prevent the spread of fire he is negligent;
- iii) If he is negligent in preventing the spread of the fire the statutory defence under [section 86](#) will fail. If not, it will succeed.

The law as expounded in *Goldman v Hargrave* has since been accepted as being the law of England and Wales too: [Leakey v National Trust \[1980\] QB 485](#) ; [Bybrook Barn Centre v Kent CC \[2001\] BLR 55](#) .

I turn now to consider a short line of cases about fire that have developed since *Musgrove v Pandelis* . [E Hobbs](#)

[\(Farms\) Ltd v The Baxenden Chemical Co Ltd \[1992\] 1 Lloyd's Rep 54](#) was a case in which the use of a grinding machine in a barn emitted sparks that set combustible material alight. The fire spread to adjoining property. Sir Michael Ogden QC found that the contractor who operated the grinding machine had been negligent, with the result that the statutory defence under [section 86](#) failed. Since negligence was established, the decision is plainly correct. What he said about *Rylands v Fletcher* was therefore obiter. In [Johnson v BJW Property Developments Ltd \[2002\] 3 All ER 574](#) a fire was deliberately kindled in a domestic grate. It spread to adjoining property because a fire brick lining to the chimney had been negligently removed. As Judge Thornton QC put it:

“It follows that the defendant in this case is to be held vicariously liable for the damage caused by the escape of fire into and onto the claimant's premises since the fire only escaped and caused damage because of the negligent workmanship of the defendant's independent contractor for whom the defendant is to be held separately liable.”

I agree that on the facts found in that case, [section 86](#) was no defence. I do not, however, agree with Judge Thornton's more general observations on liability for the spread of fire.

I have already mentioned *Mason v Levy Autoparts of England Ltd* . McKenna J followed *Musgrove v Pandelis* with obvious reluctance. He recognised correctly that the principle of *Rylands v Fletcher* could not be directly applied to a case where the occupier had not brought the fire onto the land. Nothing that the occupier had brought on to the land had escaped. He therefore had to find a modified and extended version of the principle. The principle that he formulated was that an occupier of land was liable if:

“(1) he brought onto his land things likely to catch fire, and kept them there in such conditions that if they did ignite the fire would be likely to spread to the plaintiff's land; (2) he did so in the course of some non-natural use; and (3) the things ignited and the fire spread.”

This formulation has been followed in subsequent cases at first instance: see, for example *LMS International Ltd v Styrene Packaging and Insulation Ltd* [2005] EWHC 2065 (TCC); *Harooni v Rustins Ltd* [2011] EWHC 1632 (TCC).

The unfortunate result of *Musgrove v Pandelis* compelled McKenna J reluctantly to extend the principle of *Rylands v Fletcher*. It is equally unfortunate that in neither *Cambridge Water Co v Eastern County Leather Ltd* nor *Transco plc v Stockport MBC* did the House of Lords discuss the modified principle that had been applied to fire cases. But in the light of *Transco plc v Stockport MBC* the extension of the principle in *Mason v Levy Autoparts of England Ltd* was, in my judgment, a wrong turning in the law. No extension of the principle in *Rylands v Fletcher* can be justified. I would therefore overrule *Mason v Levy Autoparts of England Ltd*, a result that McKenna J would no doubt have welcomed.

Where a person brings combustible materials onto his land, he may well owe his neighbour a duty to take reasonable precautions to prevent their combustion or to take reasonable precautions to prevent the spread of fire. The principle was well put by Lord Macmillan in *Read v J Lyons Ltd*:

“Every activity in which man engages is fraught with some possible element of danger to others. Experience shows that even from acts apparently innocuous injury to others may result. The more dangerous the act the greater is the care that must be taken in performing it. This relates itself to the principle in the modern law of torts that liability exists only for consequences which a reasonable man would have foreseen. One who engages in obviously dangerous operations must be taken to know that if he does not take special precautions injury to others may very well result.... The sound view, in my opinion, is that the law in all cases exacts a degree of care commensurate with the risk created.”

In my judgment the law is as stated in *Goldman v Hargrave* at least as regards fires that have not been deliberately kindled. An occupier of land will not be liable to his neighbour for a fire that begins accidentally unless he is negligent in failing to prevent its spread. The general test of negligence may entail the taking of special precautions

where the use in question involves the accumulation or storage of inflammable or readily combustible materials. But that is a question of fact to be decided on a case by case basis. This conclusion is, I believe, also consistent with the subsequent decision of the [Privy Council in *Long Bee & Co v Ling Nam Rubber Works* \[1970\] 2 Lloyd's Rep 247](#).

It may be said that the retention of a special rule of liability in the case of fire is justified as a matter of policy. But in my judgment that route is barred by *Cambridge Water Co* and *Transco*.

In the present case the Recorder found that the primary source of the fire lay in the wiring of electrical appliances in Mr Stannard's unit. However, he also found that:

“... there is nothing to show that such a state of affairs was the result of failing to maintain or keep in good order the electrical system itself, of those electrical appliances that were located within Wyvern's premises, as opposed to something that may have arisen entirely by accident.”

He also found that there was no allegation or evidence about what (if anything) Mr Stannard should have done to prevent the spread of the fire from reaching the tyres, and thereby involving them in the conflagration. He thus concluded that, subject to the principle in *Rylands v Fletcher*, Mr Stannard made good his defence under [section 86](#). Having referred to a number of cases both on the principle in *Rylands v Fletcher* and the modified principle applied to fire cases, he concluded (§ 64):

“The only relevant activity was the storage of tyres. Was this dangerous within the *Rylands v Fletcher* rule, i.e. did it constitute a foreseeable and exceptional high risk of damage to Mr Gore's Premises? Tyres are not in themselves flammable, and will not ignite unless there is a sufficient flame or heat source. It is, however, not impossible for tyres to catch fire (as obviously happened here), and if they do ignite, they have a special fire risk quality. This is that once alight they may burn rapidly and intensively, such that they are difficult to put out.... If fire broke out there was an exceptionally high risk of damage to Mr Gore's Premises because of the rapidity and intensity of the fire that would be created by the tyres that Mr Stannard had stored on Wyvern's Premises.”

Although the Recorder said that he drew support from *Mason v Levy Autoparts of England Ltd* , in fact he went much further than that case. One of McKenna J's conditions for liability was that the occupier brought onto his land things that were *likely* to catch fire. This was also the view of Judge Coulson QC in *LMS International Ltd v Styrene Packaging and Insulation Ltd* and of Akenhead J in *Harooni v Rustins Ltd* . On the Recorder's findings the tyres were not likely to catch fire. Thus although the scope of *Rylands*

v Fletcher has been narrowed each time the highest courts have considered it, the Recorder in fact extended it beyond any previous expression of the principle. He imposed strict liability where it had not existed before. Accordingly, even if I am wrong in thinking that the extended principle in *Rylands v Fletcher* does not defeat a defence under [section 86](#) against liability for the consequences of a fire that starts and spreads without anyone's negligence, in my judgment the Recorder was wrong to hold Mr Stannard liable on the facts that he found.

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COLLATED BY

G. H. PICKERING,
Puisne Judge.

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ORIGINAL CIVIL.

 Before BARTH, C.J.

J. E. TORR *v.* J. G. DAVIDSON C C. $\frac{216}{1920}$ Nairobi.

Liability for fire, negligence accident a defence.

Held :—In the case of an accidental fire 14 Geo. III C. 78 Section 86 applies and affords a defence to common law liability.

Straw kept in a shed used for packing does not bring the case within the principle laid down by Rylands and Fletcher.

E. K. Figgis, K.C., for Plaintiff.

Macrae, Christie with him for Defendant.

The relevant facts and arguments appear sufficiently from the judgment.

JUDGMENT.—In this action the plaintiff, Mr. Torr, a baker and tea room proprietor of Nairobi, is claiming damages from Mr. Davidson, the defendant, to the extent of Rs. 20,000 for loss of stock and other property and to the extent of Rs. 5,000 in respect of loss of trade; the damage in both cases is alleged to have arisen from a fire which destroyed the plaintiff's bakery and store.

The defendant is the owner of a plot situated in Victoria Street, Nairobi, the position of which is described on the plans which have been exhibited; part of the plot was retained by the defendant including an area for storing packing cases and straw which were used for the purpose of packing goods. This area ran in front of some latrines and lock up stores also occupied by the defendant and was on the other sides surrounded by a fence of wooden railings about four feet high. The plaintiff occupied, *inter alia*, a closed in bakery with two doors opening on the passage which was between it and the plaintiff's fenced in area. Both the bakery passage and fenced in area together with the latrines and lock up stores of the defendant were under the same roof which sprang from corrugated iron walls some 11 feet or 12 feet in height.

The plaintiff occupied also another building which ran from the bakery, which with the defendant's fenced in area was at the Sanitary Lane end of the plot, to the Victoria Street end of the plot. This building was divided into three rooms used respectively by the plaintiff as a store, chocolate room and Goans quarters. Opposite it was another building, separated from the defendant's fenced in area by a small space occupied by two Indian carpenters who carried on the trade of furniture making therein.

The construction of the plaintiff's bakery and the area and buildings occupied by the defendant is shewn on the model Exhibit C. The plan of the plot and its buildings is shewn by Exhibit A.

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On the night of the 25th—26th May a fire broke out on the defendant's plot. The plaintiff alleges that it originated in the defendant's packing yard and that the defendant was negligent in allowing a quantity of loose straw and a number of packing cases to be about such yard and that it was due to such negligence that the fire occurred.

The result of the fire was to destroy all the buildings on the plot together with most of their contents.

I must first deal with the facts. The plaintiff alleges that the defendant's yard was full of straw and packing cases on the night of the fire and that the passage between the yard and his building was strewn with straw. There is some evidence that the attention of the Medical Officer of Health was drawn to the straw in March 1920. The only notice from that authority produced refers solely to the condition of the latrines and the passage way behind them, that is, a small passage between the defendant's buildings and Mr. Camping's plot and buildings. The plaintiff avers that there was sufficient straw in the defendant's yard to fill 4 Scotch carts and that the whole space of the yard was covered with boxes and straw leaving just sufficient floor space to get in and remove boxes. He further states that his men did not break firewood in the yard. So far as the plaintiff was aware the fire in his bakery was the only one on the premises.

The evidence for the defence is to the effect that only that part of the yard nearer Victoria Street was used for the packing cases and straw on the night of the fire. The defendant states that after the visit of the Medical Officer of Health, who suggested that the yard might be tidied up he gave instructions that it was to be cleared and that it was cleared by the straw being put inside the packing cases and the lids being put on them. Apart from that there was about a large armful of loose straw in the yard. The plaintiff's men, Mr. Davidson swears, were in the habit of breaking firewood in his yard.

Mr. Davidson's evidence as to the state of the yard is corroborated by Messrs. Ogilvie and R. H. Davidson. Mr. R. H. Davidson testifies to putting his motor-bicycle in the yard on the evening of the 25th May between 6.30 and 7 p.m. because it was raining heavily. No light was used he could see because the door of the bakery was open. No match was struck and the bottom part of the yard was clear so that he could push the bicycle in and leave it in the position marked on Exhibit A. Neither this witness nor his friend who went with him and left a push bicycle in the yard were smoking and no lamp was on the motor bicycle.

After a careful consideration of the evidence I find that there was not an excessive quantity of straw in the yard and that the cases, about a dozen in number were stacked at the top end of the yard. Now the evidence regarding the fire is as conflicting as the evidence regarding

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the yard and its state on the night of the fire. Mr. Campling would have the Court believe that "after the fire was almost over" he saw the plaintiff's bakery burning and that by that time the defendant's building was completely gutted. In his opinion the fire started in a building close up against his fence, *i.e.*, the defendant's building, and travelled up towards Victoria Street the carpenter's shop being burnt out before the bakery. As the whole of the defendant's premises and the plaintiff's bakery were under one roof it is difficult to imagine how one could be gutted and the other not. The bakery according to Mr. Campling occupied the attention of the firemen last. But Mr. Campling did not leave his yard until his buildings were safe except to move out motor cars and his observations on what happened must be discounted both by the fact that there was an iron wall of some 11 feet to 12 feet obscuring his vision from his yard and that his natural excitement and anxiety to save his own building and his motor cars prevented him from taking anything like a calm view of what was going on next door.

The askari's evidence does not carry matters much further, he alleged, apparently, that the carpenter's shop was the first building to go.

The Goan, Arouse, in examination in chief said that when he was awakened and came out he saw the defendant's premises burning and that he did not see any part of the bakery burning. In cross examination he said that when he came out he saw the bakery was on fire "That was my first view of the fire". In re-examination he said that the principal fire was in the building where the straw was. I don't think further comment on the reliability of this witness is needed.

The second Goan, Fernandes, admits being confused and nervous and his evidence is in my opinion valueless. He said in examination in chief that the straw had caught fire in the shed which I have throughout this judgment called the yard.

In cross examination he said the whole shed was burning including the rafters yet the roof according to him had fallen down when he arrived. The roof of the bakery had not fallen yet. As I have said before the same roof covers both premises. The witness who is not connected with either party either as a servant or contractor, *i.e.*, Mr. Darlington testifies that the bakery was the first building to go. He is in charge of the fire apparatus and he may possibly be expected to retain a more clear vision of what happened because it is his duty to do so. Mr. Darlington gave his evidence well and emphatically and he stated that when he got to the scene of the fire the bakery was well alight and that he did not see the fire at any other building. He went away for a hose and when he returned the fire had extended to the building next the bakery. It then spread to the cabinet maker's shop. This witness went to the lane on the B.E.A. Saw Mills side of the bakery and the plaintiff's case is that he could not possibly see which part of the building had really caught first from that position. He did not pass through the lane it was too hot but he did not see fire at any other building except the bakery and he could get a clear view of the buildings from Victoria Street.

The evidence of Sher Mohamed and Jilal Din, two tailors, is not of much importance other than as proof that the cabinet maker's shop was the last building to go. The hose was played on it and Camppling's building, Mr. Darlington swears, last.

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I am of opinion that on the evidence it has not been proved that the fire originated in the premises occupied by the defendant. There is evidence to shew that part of the straw in and part of the fence of the defendant's yard were not destroyed, in fact, the straw was used for packing on the next day. I am not concerned with the various suggestions made or inferred during the case as to how the fire might have arisen but in my judgment the evidence adduced for the defence as to the place of origin of the fire as borne out by the sequence in which the buildings were destroyed is more credible than the evidence on the same matter adduced by the plaintiff and I find as a fact that the fire began elsewhere than among the packing cases and straw in the defendant's yard or in the stores occupied by him. This finding disposes of the case but to deal with the whole matter before me I would state that assuming that the fire did start on the defendant's premises then such fire must be regarded as accidental as no negligence has been proved. The yard had been used for years for the storing of straw and packing cases and for packing goods. On the night of the fire it has been proved to my satisfaction that the yard was reasonably tidy. No evidence has been adduced of any negligence of the defendant causing the fire.

If the fire was accidental then 14 G. III C. 78 Section 86 affords a defence to any common law liability. It has been argued that this provision is not in fact of general application as it occurs in an act mainly of local application and therefore that it does not apply to the Colony. Section 86 of the Act has, however, been held by Baron Parke in *Richards and Easto*, 15 M. & W. 244, to affect "all the Queen's subjects" and the statute to be in that respect public.

This view of the section was adopted and approved by Lord Denman, C. J. Coleridge and Crighton, J.J. in *Filliter v. Phippard* 11 Q.B. 347.

The application of the Act to Scotland was discussed by Lord Watson in the *Westminster Fire Office v. Glasgow Provident Investment Society* 13 A.C. at 716 but there was no decision regarding the application of the Act or any part of it to England and in my opinion the view expressed by Baron Parke must still be considered as sound law.

With regard to the straw it was contended that its inflammable nature brought the case within *Rylands v. Fletcher*. I cannot agree with this view of the decision in that case. Even if there were ample evidence to shew that the yard had a large amount of loose straw in it—in fact, the credible evidence is to the contrary—then in my opinion this case would not be within the principle laid down in *Rylands v. Fletcher*. Straw is not a material which is dangerous *per se* and which can escape and do damage if not kept under proper control.

The action is dismissed with costs.

ASHTON *vers.* SHERMAN.[Disapproved, *Rogers v. Price*, 1829, 3 Y. & J. 37.]

S. C. Salk. 298. 12 Mod. 153. Holt 308. 11 Vin. 259, and a short state of the plea Carth. 430.

A plea by an executor that six judgments are recovered against him, each for 20l. and that he has only 10l. assets, is a confession of assets beyond the sums recovered by five of them. S. C. Comb. 444.

Debt upon bond against the defendant as administrator to Field. The defendant pleads six judgments against him on bonds in which Field was bound (*a*), ultra quae he has not assets. The plaintiff replies to four obtent' per fraudem; and as to the other two, that the defendant hath assets ultra them, et hoc petit quod inquiratur per patriam. The defendant demurs specially. Resolved that the replication is ill; for when the defendant pleads six judgments, he confesses by implication, that he hath assets over five; then when the plaintiff says, he has assets ultra two, and tenders an issue, if this issue should be admitted, it would chase the defendant to take an issue that would be against him, for in effect he has confessed the fact before; and a man cannot oblige another to an issue of fact which he has confessed before. And therefore per Holt Chief Justice, the case of *Croydon v. Atway*, 1 Rol. Abr. 802 10 Vin. 67. 2 Danv. Cont. 105, pl. 6, is not law as to this point. But if the plaintiff had said, that the defendant had assets ultra two judgments, et hoc paratus est verificare, although it ought to have been omitted, yet it should be but surplusage, and should not vitiate. But the better way is only to answer to such judgments, as he knows to be obtained by fraud; and if any of them are found for the plaintiff, he shall have judgment; because it would appear that the defendant hath assets, for by pleading six judgments, he confesses assets ultra five. And therefore Holt Chief Justice denied the case 1 Saund. 336, *Hancock v. Proude*, to be law. But all the Court were of opinion, that the replication was not double, according to 2 Saund. 48. But the Court gave leave to the plaintiff to amend his replication upon payment of costs (*b*).

(*a*) In Lill. Ent. 158, is an entry of pleadings between these parties about this time: but they differ materially from what Lord Raymond and the other reporters above enumerated represent to have been the pleadings in this particular cause.

(*b*) The smallest judgment was for 20l. and the defendant pleaded that he had only 10l. assets. Vide Carth. 430. Salk. 298.

[264] TURBERVILLE *vers.* STAMPE.[Referred to, *Crowhurst v. Amersham Burial Board*, 1878, 4 Ex. D. 11.]

S. C. Carth. 425 Com. 32. Salk. 13. Skinn. 681. 12 Mod. 151. Holt 9. Comb. 459. 1 Vin. 216, pl. 9. 2 Vin. 400, pl. 15. 5 Vin. 404, pl. 11. Pleadings vol. 3, 250.

Case on the custom of the realm lies against a man for damage done by a fire he has lighted in his field. D. acc. 1 Bl. Com. 431. Unless such damage was occasioned by the act of God. A master is responsible for all acts done by his servant in the course of his employment, though without particular directions. S. C. 15 Vin. 311, pl. 9. D. acc. 1 Bl. Com. 431. 2 Term Rep. 154.

Case grounded upon the common custom of the realm for negligently keeping his fire. The plaintiff declares that he was possessed of a close of heath, and that the defendant had another close of heath adjoining; that the defendant tam improvide et negligenter custodivit ignem suum, that it consumed the heath of the plaintiff. Not guilty pleaded. Verdict for the plaintiff. And Gould King's Serjeant moved in arrest of judgment that this action ought not to be grounded upon the common customs of the realm; for this fire in the field cannot be called ignis suus, for a man has no power over a fire in the field, as he has over a fire in his house. And therefore

this resembles the case of an inn-keeper, who must answer for any ill that happens to the goods of his guest, so long as they are in his house; but he is not answerable, if a horse be stolen out of his close. And in fact in this case the defendant's servant kindled this fire by way of husbandry, and a wind and tempest arose, and drove it into his neighbour's field; so that it was not any neglect in the defendant, but the act of God. Sed non allocatur. For per Curiam as to the matter of the tempest that appeared only upon the evidence, and (a) not upon the record, and therefore the King's Bench cannot take notice of it, but it was good evidence to excuse the defendant at the trial. Then as to the other matter, per Holt Chief Justice, Rokeby and Eyre Justices, a man ought to keep the fire in his field, as well from the doing of damage to his neighbour, as if it were in his house, and it may be as well called suus, the one as the other; for the property of the materials makes the property of the fire. And therefore this action is well grounded upon the common custom of the realm. But Turton Justice said, that these actions grounded upon the common custom had been extended very far. And therefore (by him) the plaintiff might have case for the special damage, but not grounded upon the general custom of the realm. But by the other justices judgment was given for the plaintiff. Note Mr. Northey for the plaintiff cited 40 Assia. pl. 9. Fitz. Issue 88. Double Plea 31. 28 Hen. 6, 37. 21 Hen. 6, 11 b. Rast. Entr. 8, and Old Entr. 219, where the declaration is general for negligently keeping his fire in such a parish, without specifying a particular house or ground. But Holt Chief Justice answered, that that was an antiquated entry. And (by him) if a stranger set fire to my house, and it burns my neighbour's house, no action will lie against me; which all the other justices agreed. But if (b) my servant throws dirt into the highway, I am indictable. So in this case if the defendant's servant kindled the fire in the way of husbandry and proper [265] for his employment, though he had no express command of his master, yet his master shall be liable to an action for damage done to another by the fire; for it shall be intended, that the servant had authority from his master, it being for his master's benefit.

(a) Vide ante, 232.

(b) D. acc. 1 Bl. Com. 431.

MOSELY *vers.* WARBURTON.

A fellowship of a college is no benefice, nor are the profits of it bona ecclesiastica. A bishop can sequester nothing but what an ecclesiastic has as a sole body. S. C. Salk. 321. Not what he has as member of an aggregate one. S. C. Salk. 321.

A *levari facias* issued to the Bishop of Chester, to require him to levy the debt upon the defendant de (a) bonis ecclesiasticis, Warburton being a fellow of Magdalen College. Upon which the bishop writes to the warden and fellows of the college, requiring them to pay the pension of Warburton to him. To which the warden and fellows answer, that they have not power to do it. Upon this a motion is made in B. R. on behalf of the Bishop of Chester, for advice of the Court, what the bishop ought to do. And per Holt Chief Justice, if a prebendary hath a sole body, the bishop upon a *levari facias de bonis ecclesiasticis* may sequester it; but if he hath but a body aggregate with the dean and chapter, he cannot sequester it. Then in this case the profits of the fellowship are but casual dividends, in which before division Warburton hath no interest, so that they do not make an estate; and it seems in this case Warburton is not clericus beneficiatus, and the bishop may return nulla bona ecclesiastica. And though the college hath the impropriation of a church, yet it belongs to the whole body, and not to one of them only. But the Court would not give a positive opinion, because the case did not come judicially before them.

(a) Vide 2 Bac. 360. Com. Ecclesiastical Persons. D. ed. 1780, vol. 3, p. 154, 155.

SPARKES *vers.* CROFTS.

A man sued as administrator generally, may plead that he is administrator durante minori ætate of J. S. only. S. C. Carth. 432. Comb. 465 APPL 192 20. But he