CHAPTER 1

INTRODUCTION

1.1 Background of Research

Liability under this topic is actually focused on the environmental liability in the construction industry which aims at making the perpetrator of environmental damage or the polluter to pay for remedying the damage that he has caused. Liability for environmental damage is an important part of any developed legal system. This study actually looks at the potential liabilities of owners, contractor and occupiers of land for damages caused to neighboring land under the common law, due to escapes from the defendant’s land of things with a known potential to cause damage, be that escape of chemicals, water and fire. The particular area of discussion is liability in the absence of
negligence under the rule in *Rylands v Fletcher*. ¹ The rule seems to be very helpful in environmental cases, where damage is the result of escape of dangerous substances².

All this while, Malaysia has been overwhelmed by the occurrence of indiscriminate development, which, at best, resulted in redundancy and visually unpleasant construction activities and, at worst, caused overcrowding, squeezing out of open spaces and environmental degradation, with affiliated effects on public well-being and health. In recent years, the uptrend in the occurrence of floods in urban areas and pollution of our water resources arising from land-use related causes amongst other signs of environmental degeneration, serve to highlight the harshness of the problems of poor development planning, disregard of planning laws and inadequate policing of developers.³

The origin of the problem lies in the lack of coordination of planning policies within and amongst States and between the Federal and State governments. At the same time in adherence of planning authorities and developers to important development strategies, required by town and country planning laws to be taken into consideration in the formulation of planning policies and the dull enforcement of planning laws in general.

¹ (1868) LR 3 HL 330
For example in 2006 at Bukit Kepong Johor, where from the construction area leads to soil erosion and pollution and problems to the surrounding neighborhood. Another example in 2006 at Taman Desa Jaya in Kuala Lumpur where at the construction site, four tombs were damaged by the soil erosion. This actually happen because of the slope built by the developer of the housing project was too near to the cemetery.

Moreover in 2006 residents living in fear at Fortuna Court Condominium in Taman OUG, Selangor because of the development project is carried out and the slopes have left exposed. This actually started since commencing of the work with no proper drainage at the construction site that will lead to flooding and instability of the slopes that will cause erosion.

Another example of environmental disaster or misshape as in Fraser Hill is second only to Cameron Highlands. In March 1994 a landslip caused the collapse of part of Pines Resort, a 96-unit apartment block built on a slope. In 1995 alone, about 38 cases of erosion occurred over the 40km of road in Fraser's Hill. The most well known to date was the 1996 landslides along the road to Fraser's Hill. One of Fraser's Hill's most famous attractions, the Jeriau waterfall, is silted and muddy as a result of the development of a 140-ha golf course and resort by the Malaysian General Investment Corporation Berhad (Magic). The resort's 138-unit apartment block has drastically changed the natural skyline.

Obviously development have cause damage to the environment that is why there is a need to have a proper development of law that could help in solving the situation and prosecute the offender. Right now the most important thing is the provision of the framework to apply the rule of *Rylands v Fletcher* up to the standard of the situation as what exactly happen in Malaysia.
Another problem arise in the construction industry is various use of activities rather than to protect the land. Here, obviously shows a lot of disputes in terms of overuse and abuse of land. The damages from construction site activities would be on environmental cases which are dealing with landslide, flood and pollution of water ways, drain, river, air pollution and silting would definitely have close relationship with liability under the rule of *Rylands v Fletcher*. Since there are many occasions where construction causes much damages to the environment it shows that the rule of *Rylands v Fletcher* is quite applicable because it functions as a mechanism of environmental protection. It should be noted that this rule differs from the law of negligence and nuisance because it imposes strict liability if something brought onto land or collected there escapes.

The applicability of the rule of *Rylands v Fletcher* in Malaysia itself actually was settled more than three decades ago and the rule has been applied in a number of cases. One of the examples of using the rule is in the case of Hoon Wee Thim⁴ In this case even though Act of God is part of the rule in *Rylands v Fletcher* but since the cause is by the same wrong so personal injuries are not covered. Only special damages will be award for example funeral services for the drowned person caused by the flood and the loss of animals during the flood. ⁵

Another example is in the case of Milik perusahan Sdn Bhd v Kembang Masyur Sdn Bhd⁶. Here the defendant has damaged the land belong to Milik Perusahaan, by some activities. It would be the defendant’s fault because his land is higher than the appallant’s land. Since all the requirements to fill the rule is satisfied so the court only assess the damages.

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⁴ Hoon Wee Thim v Pacific Tin Consolidated Corporation[1966] 2 MLJ 240,
⁶ [2003] 1 CLJ 12 CA
A case under the rule of *Rylands v Fletcher* usually involves adjoining occupiers of land. Generally, for liability to attach to a defendant, he must have an interest either by way of ownership or occupation of land. In Abdul Rahman’s case the court held that:

“The defendant was not the owner of the land but he was in occupation on an implied licence from the government to work on the land and therefore in possession of the land and thus was in effective control of the land for the purpose of grounding an action against him”.

From the statement above it shows that liability under the rule of *Rylands v Fletcher* is very useful and have good connection and the rule seems helpful in Construction Industry especially in environmental cases because it can secure some kind of monetary compensation for damages to people’s property. It is easy to use the rule because this approach the polluters will definitely be answerable for all damages. This is true especially, if we look at the increasing number of damages related to environmental pollution cases, flooding, erosion and accident involved negligence of the workers and many others which actually resulted from construction area. One of the examples is in the case of *Steven Phoa Cheng Loon & Ors v Highland Properties Sdn Bhd & Ors*.

What actually happen here is, after exercising more than three decades here in Malaysia, suddenly in the year of 2000, in the case of *Steven Phoa*, the High Court made a pronouncement to shift in judicial approach to *Rylands v Fletcher* type

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8. [1978] 1 MLJ 225
9. [2000] 4 MLJ 200
situations. It shows that there is somehow some adjustment needed to adapt with the new situation. To justify the rule is not an easy job as the rule has been a standard of the law of tort in Malaysia for several decades so the rule cannot be abolished without comprehensive appraisal.

The case of Steven Phoa went on appeal but the issue of the rule of Rylands v Fletcher, supposedly must be referring to, but was not referred at all in the judgment of the Court of Appeal. They only based its decision on tort of negligence and nuisance. This is when our court realized that the need to change something in our law especially in the leading case of Rylands v Fletcher to be the same judicial approach as what exactly happening to other parts of the world.

After the case of Steven Phoa it is found out, that the popularity of the liability under the rule of Rylands v Fletcher is getting less. It could be liability under the rule of Rylands v Fletcher is no longer strict so people refuse to use Rylands v Fletcher. They rather choose negligence and nuisance, even though they need to prove the defendant’s negligence. Actually scope of the risk of liability under the rule of Rylands v Fletcher is broader than negligence liability. Another reason why it is no longer popular could be, since the rule is too old to follow since it was decided in 1868 and until now there is no modification has been amended to the rule. Moreover, could be not suitable to be referring to compare to the new situation. This could be seen from the case of Chung Khiaw Bank. We must do something in order to bring back the rule as it is one of the most well known common law practice in the law of tort and to maintain the special

12 Chan Shick Chin, Liability Under The Rule In Rylands V Fletcher In Malaysia, The Malayan Law Journal Articles 2003 Volume 3, p 1
14 Chung Khiaw Bank Ltd v Hotel Rasa Sayang [1990] 1 CLJ 675
criteria of strict liability. The question is what are the criteria should be added to make it stricter.  

As what we can see, this rule of *Rylands v Fletcher* has undergone changes in recent years in the common law practicing countries. Starting with England, the House of Lords in *Cambridge Water Co Ltd v Eastern Counties Leather plc* has added to this principle the necessity to prove that the defendant could have reasonably foresee the thing might, if escape, cause damage to the plaintiff. That means foreseeability is an additional ingredient to be added to the rule to make it more effective.

In Australia, in the leading case of *Burnie Port Authority v General Jones Pty Ltd*, the High Court after describe in this rule of Rylands had been absorbed into the ordinary law of negligence with all the requirements of duty of care, tests of reasonableness of care, foreseeability, proximity, and considerations of contributory negligence with all its difficulties, uncertainty, qualifications and exception completely discarded it as an independent cause of action. Here it shows that the rule does no longer exist since it has been part of the negligence.

As from the above statement obviously shows to take consideration as to study the changes in the law of tort of both countries that is in England and Australia to determine whether the changes that has undergone six years earlier than the case of

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16 [1994] 1 All ER 53 HL
17 The Harvard Environmental Law Review 2000
18 (1994) 120 ALR 42
19 AD And SM Mclean PTY LTD v Meech
Steven Phoa can justify the requirements of the rule in Rylands v Fletcher in Malaysia under construction industry to make it stricter.

From the statement above, it is obvious that the application of the rule since its inceptions been progressively weekend and confined in its application from within and the area in which it applied to impose liability progressively diminished. Why such thing should happen because the scope of tort in Rylands v Fletcher liability is tremendously wide. Furthermore, the judges in this country should prefer to practice the principle of strict liability as stated in Ryland v Fletchers as discussed above. As a matter of facts, by using these approach polluters will definitely be answerable for all damages as mentioned by Blackburn J in Ryland v Fletcher.

1.2 Problem Statement

The big issue can be raise up under this research is, should a Malaysian court sustain to apply the rule in Rylands v Fletcher without adjustment to the requirements of the liability, because the capacity of the responsibility of the rule originally is not wide enough to get used to the rising number of damages and to speed up the court case. Also to cope with the complicated cases dealing with the environmental issues in construction industry. At the same time judges and lawyers in Malaysia actually lack of legal skills and expertise in environmental cases in order to ensure that those cases are properly settled in court without any delay and to reduce the total number of environmental cases\textsuperscript{21} which also considered as a crime.

\textsuperscript{21} Dr Mohd Bakri Ishak, Common Law Approaches For Environmental Management In Malaysia And Its Application In The Developed Jurisdiction,
1.3. Literature Review

To determine which appear to be more appropriate in the use of the rule of *Ryland v Fletcher* to be used in the Malaysian Construction Industry, there are three opportunities to be considered

1. To abandon it in total and deal with them under the tort of negligence, like post *Burnie*22 in Australia or Scotland.
2. To extend the scope of the rule to cover all ultra-hazardous activities, but this was said to be the role of Parliament rather than the courts.23
3. To retain the rule and state the principles to achieve greater clarity for future application.24 It was specified that the rule was ‘a sub-species of nuisance’25 thus

(i) there must be two occupations of land involved26 and (ii) there could be no claim for death or personal injury, it being a land based tort reliant upon, and relating to, interests in land. These natural consequences of the link with nuisance were

(ii) reinforced by reference to *Cambridge Water* and *Hunter v Canary Wharf Limited* [1997].27 It must be pointed out that the Human Rights Act may well, in time, prohibit this traditional and important characteristic of nuisance (and, by extension, *Rylands* on the ‘sub-species of nuisance’ construction)28 in allowing those without proprietary interests an equal right of claim.29

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26 Read v Lyons [1947].
27 Shiffman v Order of St John of Jerusalem [1936] 1 All ER 5575 and *Miles v Forest Rock Granite Co. (Leicestershire) Limited* (1918) 34 TLR 500.
29 Marcic [2002] QB 929
1.4. Objectives

1- To determine the environmental cases in Malaysia and the associated issues.

2- To determine the applicability of *Rylands v Fletcher* in environmental cases in Malaysian Construction either cannot be applicable, partly applicable, applicable with certain addition or provide new law.
1.5 Overall Methodology and strategic analysis

**Stage 1**
- Research Design
- Determine Method
- Determine Data
- Determine Source

**Stage 2**
- Lexis Nexis – media electronik
- Articles
- Journals
- Books

**Stage 3**
- Data Analysis
- Descriptive Analysis
- Quantitative Study
- 1960 -2006

**Stage 4**
- Thesis Writing
1.5.1 Research Methodology

1.5.1.1 Stage 1- Development of research proposal.
Search for study area focus on topic concentrating about case law. After confidently getting the topic must rise out and identify the issues and problem. To support the issues and problem there will be lots of reading through unlimited literature review which can be done but most of it must be close related to the topic selected. From here objective and scope about the topic has finally been determine.

1.5.1.2 Stage 2- Research Design and Data Collection.
How to design the research is by first of all to determine the data. There are primary secular and secondary secular. The primary is considered as a personal data and the secondary is determined by another source. Sources that have been gone through here are from media electronic which is Lexis Nexis, articles, journals, books and discussion with friends. To determine methods, documentary analyses have been choosing.

1.5.1.3 Stage 3- Analysis.
Data analysis been collected by descriptive analysis, which is collection of case law that related to environmental cases in construction industry. And quantitative methods which is the range of the cases been judge from 1970 until the year of 2000.

1.5.1.4 Stage 4
Compilation of the data and witting.
1.6 Scope of study

1. Construction Industry of Development Board - CIDB
2. Environmental Protection Agency - EPA
3. Persatuan Arkitek Malaysia - PAM
4. Jabatan Kerja Raya - JKR
5. Occupational Safety and Health Act, 1994 ('OSHA' 1994)
6. Malaysian case law from 1960 to 2006
7. Four option to be determine to choose which is applicable to the environmental cases in construction industry in Malaysia under the rule of *Rylands v Fletcher*
   i) Cannot be applicable
   ii) Partly applicable
   iii) Applicable with additive
   iv) New law
1.7 Organization of the Chapters

Chapter 1: Discuss the background of the study in the area of Construction Industry in Malaysia focus on environmental cases. Summarize how the development and application and suitability of the rule of Rylands v Fletcher in Malaysia. Clearly stated the problem statement, objective, methodology, scope of study and organization of the chapters.

Chapter 2: Briefly discuss Malaysian Construction Industry and its legislation requirements related to the rule of Rylands v Fletcher. There are also discussions regarding the need to analyze the liability of the rule as to standardize it comparing to the new and complicated environmental issue in construction industry.

Chapter 3: Briefly discuss about liability. Type of liability under tort and contract. How the liabilities arise and the professional duties and responsibilities of Building Professionals which demanded by the law and to be more knowledgeable and understanding of legal principles and rules regarding their specific liability.

Chapter 4: Introduction of the rule of Rylands v Fletcher and briefly discuss the judgement and requirements of the rule. The most important is what actually make the case as the leading case in the strict liability. Briefly explain regarding type of liability under the rule and the structure of it.

Chapter 5: Introduce the development of Rylands v Fletcher in the whole world. Why some countries are still practicing the rule and some have abandoned it. In this study there are two specific case law had been choose to be analyzing to see the development of the rule of Rylands v Fletcher. A key
factor of the specific case law based on the most popular case practicing the rule and the most receiving critique around the world. In this chapter there will be a framework of the comparison of the original rule requirements to the other two major common law jurisdictions with their requirements to observe the development of the case law as to refer and to highlight to the new situations occurs.

Chapter 6  
The purpose of the analysis is to identify the development of the environmental cases occurs here in Malaysia. There will be an evaluation of the cases here in Malaysia under *Rylands v Fletcher*, case of Burnie and case of Cambridge.

Chapter 7  
How the applicability of the rule of Rylands v Fletcher in Malaysia. There are analyses about fifteen case law to be tested related to the liability of the rule of *Rylands v Fletcher* to find out whether our courts permits its application and acceptable by the nation. Here, there would also some recommendations to choose from to do some modifications to the rule as the liability of the original rule is not wide enough to cater with the most current challenging issues.

Chapter 8  
Conclusion to the whole study would show how the rule of *Rylands v Fletcher* plays important role in helping the environmentalist facing the current issue in Construction Industry. At the same time judges and lawyers in Malaysia would be full equip with legal skills and expertise in environmental cases in order to ensure that those cases are properly settled in court without any improper delay. The new addition in principle of law based on liability might also be benefit to a few more parties such as Building Professionals, Local Authority and others for their future development.
CHAPTER 2

MALAYSIAN CONSTRUCTION INDUSTRY

2.1 Introduction

This chapter will feature how constructions industries in Malaysia develop. There are also brief explanations regarding latest infrastructure development of the country under Ninth Malaysian plan (2006-2010) and how construction industry plays important part in helping to increase Malaysian economy. All the body that regulate the legislative and responsible person in charge will also stated in this chapter as to make sure that environmental issues are settle within the scope of study.
2.2 Construction in Malaysia

The construction sector is one of the important sectors of the Malaysian economy since the rapid development of the sector has contributed towards the national economic growth and it provides economic opportunities for related industries and businesses. Malaysia could be regarded as an exemplary model among ASEAN nations. For the past thirty years Malaysia has pursued industrialization and has modernized production methods through proactive policies to persuade foreign investment. By these means Malaysia has achieved sustained economic growth. In particular, during the decade since 1988, economic growth continued at a remarkable annual rate of nearly 8 percent. Following the Asian currency and economic crisis which began in 1997, Malaysia experienced negative growth in 1998 for the first time in thirteen years. However, it has already weathered the worst of the crisis by adopting its own capital and foreign exchange controls and is expected to regain positive growth in fiscal 1999.

Today, Malaysia is the 18th largest export nation worldwide. Malaysia’s total trade during the first eight months of 2006 was RM 699.96 billion, an increase of 12.3% compared to the corresponding period of the previous year. Exports during the period expanded by 11.8% to RM 383.89 billion, while total imports grew by 12.9% to RM 316.07 billion. Trade surplus for 2006 amounted to RM 67.81 billion. Exports increased due to higher exports in electrical and electronics (E&E) products as well as chemicals and chemical products. Imports increased mainly due to the demand for E & E and machinery, appliances and parts. During the period of January to September 2006, a total of 771 projects, with investment amounting to RM 35.20 billion were approved in the manufacturing sector. Out of the RM 35.20 billion approved, domestic investment amounted to RM 21.33 billion and foreign investment to RM 13.87 billion. Out of the
771 projects approved, 67.82% (RM 23.87 billion) were new projects and 32.18% (RM 11.24 billion) were expansion/diversification projects.\textsuperscript{30}

**2.2.1 Construction Industry**

The Malaysian construction industry is generally separated into two areas. One area is general construction, which comprises residential construction, non-residential construction and civil engineering construction. The second area is special trade works, which comprises activities of metal works, electrical works, plumbing, sewerage and sanitary works, refrigeration and air-conditioning works, painting works, carpentry, tiling and flooring works and glass works. \textsuperscript{31}

The construction industry makes up an important part of the Malaysian economy: Although relatively small, it is extensively linked with many other parts of the economy, in particular with related industries such as those for basic metal products and electrical machinery. So construction industry can be described as some kind of an economic engine for Malaysia.

Even though construction industry helps a lot in the raising and developing the country economy but it is also contribute impact to the environment. Developments in each State and local authority area have frequently taken place on a stand-alone basis, with emphasis on local needs and objectives. Critical development strategies addressing the need for environmental protection and sustainable development frequently take a back seat due to other more important economic priorities and/or legislative mandates of

\textsuperscript{30} Malaysian-German Chamber of Commerce, Market Watch 2007 – The Construction Sector.ver 1
\textsuperscript{31} Malaysian-German Chamber of Commerce, Market Watch 2007 – The Construction Sector pg 2
each Federal/State government ministry, agency and local authority. No intention of facilitating the streamlining and proper coordination of development policies within the nation nor effectively ensured compliance with its provisions, particularly the requirement to have regard to environmental factors in preparation of development plans or approval of planning applications. That is why the property excess at State level provoked the Cabinet to proclaim that, among other interim measures, major development projects must be referred to the Federal Town and Country Planning Department as to ensure that all development in the construction industry run smoothly.\textsuperscript{32}

With this provision it helps to reduce the causes of environmental damages and to improve on urban, rural planning and to strengthen the government's role with respect to land management, utilization and development and buildings.\textsuperscript{33} In addition, to look through over the infrastructure projects, utilities and new townships, projects on agriculture land, in forests especially water catchments areas, wetlands, hill slopes with a gradient of 25 degrees or more, coastal areas, islands, tourist areas and conservation zones. From here it will overcome the problems of property overhang, overlapping facilities and environmental degradation and to ensure a better physical living environment for all Malaysians.

Since construction is the main focus area under the Ninth Malaysian Plan it has been announced in March 2006. that Malaysian government plans to spend MYR220bn (US$60bn) on development over the next five years. Moreover, the government’s announcement to introduce a private financing initiative (PFI) and increase opportunities


\textsuperscript{33} By Datuk Dr Ting Chew Peh, Housing and Local Government Minister at the time in the NST on 2 September1999.
for private-sector participation in infrastructure and utilities development under the Ninth Malaysian Plan is also expected to translate into construction industry growth in the coming years. Malaysia is ranked sixth among 14 peers chosen from the Asian region on its Asia Business Environment Rankings. The value of the Malaysian construction industry is forecast at about US$6.67bn in 2011, contributing around 2.73% to GDP.

Environmental awareness also building up with the 9th Malaysian Plan. The Malaysian Government has placed further emphasis on preventive measures to mitigate and minimize negative environmental effects at source for example the construction area which actually worsens soil erosion. The past decade of rapid economic growth and industrialization has caused serious environmental challenges in Malaysia. The most prominent at the moment are considered being air, noise, smoke, dust pollution flood and erosion from construction industry, solid waste management, ensuring long-term sustainability of the water supply and sewerage services industry and overall improvements of energy efficiency to re-establish a clean Malaysia. The most important to cater with the problem with the environment is to make sure the parties involved who actually damage the environment pay for the damages. As what exactly happened in Rylands v Fletcher. Here we must be well equipping with the legislation and to ensure that our law provide the principle to deal with the environmental issues.\textsuperscript{34}

The Malaysian Construction Industry and Development Board (CIDB) was set up to enhance the quality and skills of the construction industry. Over the years, CIDB had collected billions of dollars of levy from contractors (0.25% of contract sum for each contract exceeding $500,000), and include $250 from each worker who are required to be registered with CIDB However, over the two decades, what had been achieved is that CIDB has become a joint venture partner of some construction entities and are procuring

\textsuperscript{34} Environmental/Environmental Affairs - Malaysia - Economic aspirations in conflict with democratic expectations and environmental concerns - free Suite101 course.htm pg 5
projects in India and Sri Lanka. They are now scoping into Vietnam and Cambodia. But the industry is still plagued by poor quality, poor workmanship, poor safety and health environment and practices and project failures. Here obviously show that Malaysian Construction Industry Development Board or the local authority is facing a big problem. They are actually lack of professional duties and responsibility of building professionals.35

2.2.2 Professional duties in Construction Industry

Building Professionals are require to consider the vicinity of the site as well as the site itself in assessing safety-particularly in regard to adjacent hillslopes. They cannot hide behind limited scopes of engagement. These are a matter between themselves and their employer, but the scope of their duty owed to persons likely to be affected by their services is not so limited. Building Professionals also require to ensure that others engaged to do work likely to affect the structures they have been engaged to design/supervise are competent and will carry out their work in a workmanlike manner.

If Building Professionals hold themselves out to have expertise in a particular area when they are unqualified, their conduct will be measured against the ordinarily competent qualified practitioner of such expertise. Building Professionals must ensure the law is followed, reporting to the authorities if necessary if their clients break the law, even at the risk of being discharged by their client.36

35 Environmental\Environmental Affairs - Malaysia - Economic aspirations in conflict with democratic expectations and environmental concerns - free Suite101 course.htm pg 6
36 Liability in Highland Tower
2.2.3 Environmental Damages and Construction Industry

By the year 2020 Malaysia is expected to reach industrialized nation status. The current situation is characterized by rapid urbanization and industrial activities; these will increasingly have an impact on the environment that serves both as the source of raw materials for development and also as a "sink" for pollutants. The federal and local governments, industry, non-governmental organizations (NGOs), and consumers have to act collectively to ensure that development takes place in a sustainable manner. The utilization of natural resources must be well planned.\(^{37}\)

In the urban case of Kuala Lumpur, the most crucial natural resource is land. Indeed urbanization poses a major concern. The rapid development of urban Kuala Lumpur is imposing significant pressure on the natural resources and environmental capacity. In an urban environment, per capita resource consumption and waste production is comparatively high compared with the rural environment. That trend will ultimately have serious adverse effects on the life support system, including land, water and air, on which humans depend for survival, and aesthetic values such as green parcels of land, natural terrain and pristine ecosystems that can enhance the quality of life and mental health of its inhabitants.\(^{38}\)

In a simple word, those who live in town or close to the factories or at the construction site or at the development area have to expect a dirtier, smellier environment compared to those who live in the countryside. Under this doctrine, in terms of environmental protection, those areas, which need the greatest degree of control, are

\(^{37}\)Environmental Affairs - Malaysia - Economic aspirations in conflict with democratic expectations and environmental concerns - free Suite101 course.htm pg 1

\(^{38}\)Environmental Affairs - Malaysia - Economic aspirations in conflict with democratic expectations and environmental concerns - free Suite101 course.htm pg 2
often the same as those to which the most damage may occur before an action may be taken. It is significant to note that the accumulation of polluting substances, either be dust, noise or fumes, actually raises the degree of annoyance\textsuperscript{39}

Pollution, in the legal sense, simply means the addition of, or doing something to the environment, which changes its natural qualities. \textsuperscript{40} Since the purpose of pollution control in the law is to prevent the infliction of annoyance on others, and not to protect the environment per se, it will be obvious that not every change in the natural qualities of water, air or land is actionable at law as an act of pollution. And, it must be noted that, in general, there will be no liability in nuisance unless an act of pollution produces some 'sensible' or 'material' injury or affects the reasonable enjoyment of property.

Apart from reduce renewable and non-renewable natural resources, development also promotes environmental degradation in the form of flash floods, landslides, mud flows, soil erosion, siltation and sedimentation of rivers, unmanageable waste production and water scarcity. It is therefore very important for a fast-developing country such as Malaysia to protect, conserve and utilize its natural resources in a sustainable manner for the sake of future generations.\textsuperscript{41}

For a natural resource driven economy like in Malaysia, environmental factors are of critical importance for development. Malaysia is one of the 12 countries in the world identified as a “mega diversity” region. Today there are serious concerns that Malaysia could loose the “mega” prefix as a downward environmental trend is now in full swing.

\textsuperscript{39} St Helen's Smelting Co v Tipping (1865) 11 HL Cas 642 p 178
\textsuperscript{40} Young v Bankier Distillery (1893) AC 691 at p 698.
\textsuperscript{41} Environmental Affairs - Malaysia - Economic aspirations in conflict with democratic expectations and environmental concerns - free Suite101 course.htm pg 4
2.3 Legislative bodies in Construction Industry in Malaysia

Legislative bodies which are directly liable for damage to environment in the construction industries are Construction Industry Development Board or CIDB, Persatuan Arkitek Malaysia or PAM, and Environmental Protection Act or EPA, Town and Country Planning (Amendment) Act 2001, Jabatan Kerja Raya or JKR, Occupational Safety and Health Act, 1994 or OSHA and Factories and Machinery Act, 1967. All this bodies are under government control under the law of Malaysia.

2.3.1 Construction Industry Development Board (CIDB)

CIDB as a statutory body established by the Malaysian Federal Government back in 1994. CIDB Malaysia was established as a regulated body entrusted with full responsibilities.

The responsibilities are,

- Coordinating the needs and wants of the Industry
- Planning the direction of the Industry
- Addressing the pertinent issues and problems faced by the Industry including environmental protection.
- Making recommendations in the formulation of policies for the Industry

Since her inception, CIDB Malaysia has taken various significant and effective steps as well as initiatives that are geared towards the enhancement of the Malaysian Construction Industry. In the long run, CIDB's endeavors to assist the Construction
Sector to attain the level of a captive global player, in the course of undertaking efforts to prepare Industry Players to excel in their project delivery. In particular, the roles and responsibilities of CIDB Malaysia include:

- Carrying out all activities in respect of the Construction Industry
- Awarding certificates of proficiency
- Establishing, expanding, promoting the establishment or expansion of companies, corporations or other bodies to carry out activities which related to environmental activities, deemed requisite, advantageous or convenient for or in connection with the performance of its functions
- Providing financial assistance in the form of loans or otherwise, to persons engaged in the Construction Industry for the purpose of promoting the Industry and providing any guarantees on their behalf
- Imposing fees or any other charges as deemed fit for giving effect to any of its functions or powers
- Receiving commission or payments in consideration of any services that may be rendered

2.3.2 Persatuan Arkitek Malaysia (PAM)

PAM is a private professional body duly registered with the Registrar of Societies as required by the Laws of Malaysia, with its own constitution and set of by-laws to regulate its activities. It is the coming together of the like minded professionals to foster and further the practice of Architecture.

42http://www.cidb.gov.my
2.3.2.1 Role of PAM

PAM’s role is to assist and advise the government, local authority for example Drainage, Irrigation Department to make sure no pollution occur under environmental protection. Others are private or public bodies on questions relating to the art and science of building, in regard of environmental comfort. The development of property and on Town Planning and the design and construction of public works generally.

In order to make the organization run smoothly must obtain and diffuse among the members information on matters affecting the profession and to compile, print, sell, lend, publish, issue or distribute the proceedings and reports of the Institute or any papers, periodicals, books, circulars and other literary undertakings or any extracts there from as may seem conducive to any of these objectives. To make sure public aware of the latest information regarding latest issues brought up by any institution for example in environmental issues on how to deal with the issues.

PAM also must provide facilities for interchange with other associations carrying on similar work or with governments, local authorities; educational and scientific bodies engaged in research on matters relating to the work, theory or practice of architecture or allied subjects.43

2.3.3 Environmental Protection Act (EPA)

43 http://www.pam.gov.my
The function is to monitor all baselines studies for air, water, noise prior to the earthwork for data comparison during future monitoring.

2.3.3.1 To identify and justify sampling stations for air, water and noise.

All effluent discharge point must be identified and reported. Frequency must be monitor and sampling method for air, water and noise will be collected.

Significant impact and pollution control measures to identify the significant impacts due to the project implementation followed by specifics control measures such as exact location for proposed silt trap, to identify high erosion, risk slopes and proposed control measures in protecting the slopes, air pollution control measures etc.

Suitable waste treatment system of air, noise, pollution control equipment need to be identified and summary of equipment operation procedure needs to be presented. Abandonment plan need to be prepared in the case of project is delayed.  

2.3.4 Jabatan Kerja Raya (JKR)

Jabatan Kerja Raya is responsible for planning, design and build infrastructure project for example road, government building, airport jetty and product related to engineering and finally consultation for any technical thing for government.

44 http://www.epa.gov.my
JKR also must ensure all the infrastructure work up to the standard, function able, safe, from environmental problem and comfortable according to MS ISO 9001:2000 and state public facilities, give technical advice to government agency To upgrade and expand construction industrial.

All the project must be completed within the time frame which been agreed by both parties. At the same time all payment must be complete within fourteen day working days. To settle all application regarding loan to Skim Kumpulan Wang Amanah Kontraktor (SKWAK) within thirty day working days.45

2.3.5 Occupational Safety and Health Act, 1994 (OSHA)

The current fundamental legislation which deals with matters relating to safety of workers in the Malaysian construction industry is the Occupational Safety and Health Act, 1994 ('OSHA' 1994) and the Factories and Machinery Act, 1967 ('FMA 1967'). The Occupational Safety and Health Act, 1994 is the enabling measure which superimposes the Factory and Machinery Act, 1967 and it was enacted to become the specific act to govern safety and health of workers in Malaysian industries.46 Before the coming into force of the OSHA 1994, the FMA 1967 caters mostly on the safety, health and welfare aspects of the operation in the factories, which are mostly on the manufacturing operations to prevent from environmental hazard.

2.3.6 Factories and Machinery Act, 1967

45 http://www.jkr.gov.my
Provisions of the FMA 1967 have been applicable to the construction industry since the Act 1967 defined ‘factory’ to include ‘building operation’ and ‘works of engineering construction’ provided that they are undertaken or carried on by way of trade for the purposes of gain or incidentally to any business so carried on. Therefore, all operations and safety requirements at the building construction and works of engineering construction must comply with the FMA 1967 and the Regulations made there under.

The Regulations under the FMA 1967 which specifically regulate activities in the construction industry and detailing the manner in which the activities in the construction works could be carried out safely is the Factories and Machinery (Building Operations and Works of Engineering Construction)(Safety) Regulations 1986 (‘BOWECS’). Thus, the Regulations are structured in a form of detailed provisions that mostly outline every method or step of carrying out the construction activities, and the Regulations are presented in a form of a long list of legal provisions that govern those activities.

OSHA 1994 is expected to become the driving force for a gradual change in the mindsets of employers and workers to improve their attitudes towards occupational safety and health, and at the same time, to create an everlasting new culture, i.e. the safe and healthy work culture, amongst the people. However, despite the number of industrial

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47 (Section 2, FMA 1967)
48 (Section 3, FMA 1967).
49 (Section 3, FMA 1967)
50 Factories and Machinery (Revocation of Exemption) Order 2000
51 (Reg 4, BOWECS Regulations1986)
injuries at construction sites has remained high, the provisions contained in the occupational safety legislation are found to be inadequate and do not sufficiently cover the modern industrial practices in the construction industry.\textsuperscript{54}

Due to all the damages from the construction activities, efforts will be undertaken for example, to reduce flood hazards, land slides, erosion, siltation at the development area especially in the Klang Valley as well as other critical development hazard areas throughout the country with the implementation of both structural measures such as the construction of flood retention ponds, river improvement works and flood diversions as well as non-structural measures such as land use controls and integrated flood forecasting, warning and response systems, retaining wall, provision of special structural design to improve the critical condition of the land. Infrastructure and utilities development will be undertaken through the coordinated efforts of ministries and agencies during the 9\textsuperscript{th} Malaysia Plan (2006-2010)

2.4 Conclusion

Malaysian Construction Industry is not firm according to the research above. This can be seeing clearly through the report from CIDB. How can the environmental issue which related to the construction industry be solving if the authority itself are not responsible with their duties. The victims from the construction industry impact, if it is not comply with its provisions, particularly the requirements to have regard to environmental factors in preparation of development plans or approval of planning applications can refer to Town and Country Planning (Amendment) Act 2001. There are also some other area that need to be upgrade regarding knowledge and development of the professional in charge so that the rules of the law can be developed so that any cases that concern to the environmental issues under construction industry could be solve immediately and person in charge knows where to refer to.
CHAPTER 3-

TYPES OF LIABILITY

3.1 Introduction

This topic merely covers what is the bottom line under actual liability in law perspective and the type of liability that concern the environmental cases. In this chapter also mention what is the procedure to measure the damages under both liabilities. Liability under *Rylands v Fletcher* and liability of contractor also widely touch.
3.2 Definition of Liability

Liability is a situation in which a person is liable in tort or contract and is therefore responsible to pay compensation for any damage incurred. The law provides that any person who causes injury to another person or another's property is liable for the act or omission that caused the damage. Why should someone opt for an action in tort and not one in contract, a tort action would help someone who would otherwise find it difficult to sustain a claim because there was no contractual privity between him and the person who had caused the injury.

Therefore, the law of tort fills the gap where contract law is unable to. As such, a person has a remedy available, where otherwise he would have none. It is important to distinguish between contractual and tortious liability as the differences may affect: the standard of care against which the professional's work will be tested; the type of damage for which the professional is liable; and the period during which a claim against the professional can be made.  

3.2.1 Contract

Most formal relationships between organizations in the construction industry are governed by contracts. A professional who designs work for others to construct must use reasonable skill and care whereas a contractor, carrying out the same design and also constructing the work, is regarded as in a similar position to a provider of goods and is generally under an obligation to ensure that the works are fit for their intended purpose.

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55 ICE Legal Note Liability of Professionals for Defects, pg 1
Thus, unless the contract otherwise provides, a contractor who undertakes a design and construct project would be liable to the employer for breach of contract if the works turn out to be unfit for their intended purpose however much skill and care the contractor may have used. But the professional who the contractor employed to do the design will usually only be under an obligation to use reasonable skill and care with the result that the professional's liability to the contractor may not be the same as the contractor's liability to the employer.\textsuperscript{56}

\subsection*{3.2.2 Tort}

Liability to other persons can arise under the law of tort which is that branch of the law that imposes on us a duty of care towards those who we can reasonably foresee might be affected by our acts or omissions.

Tortious liability can result from trespass to land, to goods or to the person, from nuisance, from dangerous premises or chattels, from the escape of fire or other noxious things as in the rule of \textit{Rylands v Fletcher} and in many other ways. However, the tort most likely to lead to legal action against the professional for defects of the construction.\textsuperscript{57}

\subsection*{3.2.3 The Measure of Damages}

\textsuperscript{56} ICE Legal Note Liability of Professionals for Defects, pg 1
\textsuperscript{57} ICE Legal Note Liability of Professionals for Defects, pg 2
Damages are assessed differently in contract and in tort. In contract, damages are intended to put the claimant in the position he would have been in if the contract had been properly performed. In tort, damages are intended to put the claimant in the position he would have been in had the act or omission not occurred.

In contract liability the recoverable damages are those flowing naturally from the breach, and those that it may reasonably be supposed the parties were aware at the time they made the contract would be the likely consequence of such a breach.

In tort liability, the cost of making good damage caused by the defect, or loss of market value, may be recoverable depending upon the circumstances, but (other than for negligent mis-statement) there must be actual physical damage to property (other than the defective property itself) or injury to people. A claimant cannot (other than possibly for negligent mis-statements) recover for what is known as economic loss, that is the cost of putting right a defect where there had been no damage to other property or injury to people.  

3.3 Liability under the rule of *Rylands v Fletcher*

The actual functions of the liability under the rule of *Rylands v Fletcher* originally is as a mechanism of environmental protection primarily through the control of competing uses of land rather than the protection of the environment. This concept has been in the system of common law which was developed from the time of Norman Conquest where they actually attempt to cope with new disputes over use and abuse of

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58 ICE Legal Note Liability of Professionals for Defects, pg 3
land. As the system developed, it incidentally became a mechanism for environmental protection where an action in tort under the liability of the doctrine of the rule in *Rylands v Fletcher* can allowed a plaintiff the means by which to protect or secure some kind of monetary compensation for damage to his or her property.59

3.3.1 Contractor’s liability.

The general rule regarding construction site injuries is that the immediate employer retains responsibility for its own employees’ job safety. However, a general contractor may be liable for injuries suffered by employees other than its own where:

- the contractor retains supervisory authority over the job site;
- the accident occurs in a common work area;
- the danger is readily observable and avoidable; or
- there is a high risk of injury to a significant number of workers.

In addition, a general contractor may be liable for harm to a third party caused by the work of an independent contractor or the contractor’s employees if that work involves an inherently dangerous activity. Indemnification provisions are frequently used to shift the responsibility for worksite liability claims from owners to contractors or from contractors downstream to subcontractors and suppliers.60

3.4 Standard of care

59 Filev1442, Civil Liability, pg 66
60 Bodman, Longley & Dahling LLP Premier Edition Spring 2003
Where a duty of care arises under the ordinary law of negligence, the standard of care exacted is that which is reasonable in the circumstances. It has been emphasized in many cases that the degree of care under that standard necessarily varies with the risk involved and that the risk involved includes both the magnitude of the risk of an accident happening and the seriousness of the potential damage if an accident should occur. Even where a dangerous substance or a dangerous activity or a kind which might attract the rule in *Rylands v Fletcher* is involved.

The standard of care remains that which is reasonable in the circumstances, that which a reasonably careful man would exercise in the circumstances. In the case of such substances or activities, however, a reasonably prudent person would exercise a higher degree of care. Indeed, depending upon the magnitude of the danger, the standard of 'reasonable care' may involve 'a degree of diligence so stringent as to amount practically to a guarantee of safety'.

### 3.5 Conclusion

Liability under the rule of *Rylands v Fletcher* is so strict but allowed a plaintiff by which to protect or secure some kind of monetary compensation for the damages of the property. If all the requirements under the doctrine, as what will discuss later in Chapter 4 are satisfied, the defendant are obligated in law or equity; responsible; chargeable; answerable. They are able to be held accountable for the actions or results that have occurred under his responsibility, and his jurisdiction or area.
CHAPTER 4

RULE IN THE CASE OF RYLANDS V FLETCHER

4.1 Introduction

This is a classic case in United Kingdom, involving cases of environmental liability. In this chapter it briefly describe about how the case develop until it become an English legal leading case which first applied the doctrine of strict liability. There is a diagram which clearly show the section of the two site. Also reported here is the full explanation of the judge decision. There is also explanation regarding important requirements needed by the application under the rule, liability of the rule which concentrated under strict liability been explained in detail as well.
4.2 Rylands v Fletcher

Mr Rylands was a mill owner who employed independent contractors to construct a reservoir on his land in order to provide water power for his mill. When the reservoir was filled with water, the water seeped through some disused shafts and passages and flooded a mine belonging to Mr Fletcher. Mr Fletcher sued Mr Rylands for the resulting damages.

Case citation LR 3 HL 330 is a landmark English legal case in which the Court of the Exchequer Chamber first applied the doctrine of strict liability for inherently dangerous activities. Initially the case is concerned with the escape of water onto neighbouring land. Later the case involved the escape of all manner of wastes and materials, extending outwards to a broad range of inherently dangerous activities considered essential to modern life.

The key points arising in the Rylands case were that:

- the contractor was competent;
- there was no negligence on the part of the client;
- there was a ‘non natural’ use of land;
- there was an escape of matter; and
- the escape resulted in damage.

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61 John Rylands (1801 - 1888)
62 A steam powered mill with around 600 looms - Manchester City News, 8th April 1865
63 Filev1442, Civil Liability, pg 62
Diagram of the rule of Rylands v Fletcher

![Diagram](image)

Figure 4A

4.2.1 Case of Rylands v Fletcher

John Rylands constructed a reservoir on land he was renting to supply water to his steam powered textile mill. Thomas Fletcher operated mines in the area and had tunnelled up to old disused mines which were under the new reservoir. Both were renting land from Lord Wilton and both were lawful users of their land. Rylands employed independent contractors and engineers to do the work of building the reservoir which was completed in December 1860. The lands were in Lancashire, in an area known for its mines. While excavating the construction site, the contractors came across some disused mine shafts which had been loosely filled with marl and soil. No attempt was made to seal them. In fact, the shafts led via a series of interconnected shafts and tunnels into Fletcher's mines and land. Water from the mill's reservoir flooded into Fletcher's mines on 11 December

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64 Filev1442, Civil Liability, pg 62
Fletcher sued Rylands. There had been no excessive rains or local floods.

He can excuse himself by showing 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."65

The House of Lords upheld the principles expounded by Blackburn J:

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

4.2.1.1 In Court, the Judge decision

The case went through four Courts of increasing status, starting in the local Court of Liverpool Assizes (Summer Session) in 1861.

The Liverpool Court found in favour of the Plaintiff Fletcher on the basis of trespass and nuisance. Actions in the torts of nuisance and trespass were only available to those with a legal interest in land. Rylands successfully gained an order for the matter to

65 http://en.wikipedia.org/wiki/Rylands_v._Fletcher#column-one
be heard by the Court of Exchequer before three judges where the previous decision was overturned with two judges deciding for the Defendant Rylands. The decision was based on trespass requiring direct human involvement in the invasion of an interest (the quiet enjoyment of land), which required intent or negligence, and Rylands had been engaged in a reasonable and lawful act, with no ill-intent or negligence, and there was no nuisance as there is nothing offensive to the senses about water. Some legal commentators interpret this as a case of the victim being the one to bear the cost of the accident.\(^6\)

Fletcher took the matter to the Court of Appeal being the Exchequer Chamber of six judges. The decision was overturned in favour of the appellant Fletcher. Justice Colin Blackburn spoke on behalf of all the judges and said,

"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 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 exits here, it is unnecessary to inquire what excuse would be sufficient."

This ruling relied on the liability for damages to land available through the tort of cattle trespass and the tort of nuisance, as well as the in scienter action, injury by a domesticated animal known to have a disposition to injure.

\(^6\) [http://en.wikipedia.org/wiki/Rylands_v._Fletcher#column-one](http://en.wikipedia.org/wiki/Rylands_v._Fletcher#column-one)
Rylands appealed to the House of Lords which dismissed the appeal and agreed with the determination for Fletcher. Lord Cairns, in speaking for the House of Lords, stated their agreement of the rule stated above by Justice Blackburn, but added a further limitation on liability, which is that the land from which the escape occurs must have been modified in a way which would be considered non-natural, unusual or inappropriate.

The torts being argued in the case were torts relating to the enjoyment of land, available to land owners (and lawful land users), and the most available outcomes from judgment were injunctions to stop the activity and / or payment of damages for injury to land. Damages for personal injury, or economic injury are other legal developments.

The issue before the Court was whether the doctrine of strict liability could be applied to inherently dangerous activities in the same way is was applied in nuisance and cattle trespass. Trespass was considered not to be an available cause of action as this requires a direct invasion of an interest (land, goods or person) by a person, and by 1860, for trespass to succeed, there was the need to prove culpability in the form of negligence or wilful intent. Fletcher argued that the doctrine of strict liability should be applied, that the peaceful enjoyment (ie interest) in his land had been invaded and Rylands should be liable for the damages caused by his inherently dangerous activity (that is, collecting a dangerous amount of water on his land which then "escaped" into the mine). Rylands argued that he was acting reasonably and lawfully on his land and thus should not be held responsible for a simple accident.\(^{67}\)

\(^{67}\) [http://en.wikipedia.org/wiki/Rylands_v._Fletcher#column-one](http://en.wikipedia.org/wiki/Rylands_v._Fletcher#column-one)
4.2.2 The requirement of the rule of *Rylands v Fletcher*

This landmark case is a form of guide rule in connection with liability for damages to adjacent land. Though, the rule of *Rylands v Fletcher* for application, negligence need not to be proven, but several requirements must be satisfied.

**The requirements are**

1. *The defendant brought something onto his land*

   In law, there is a difference between things that grow or occur naturally on the land, and those that are accumulated there artificially by the defendant. For example, rocks and thistles naturally occur on land. However, the defendants in *Rylands v Fletcher* brought water onto the land.

2. *Non-natural use of the land*

   In the House of Lords, Lord Cairns LC, laid down the requirement that there must be a non-natural use of the land. An example is:

   *Mason v Levy Auto Parts Ltd*[^68]. The Ds stored flammable material on their land. It ignited and fire spread to neighboring property. The Ds were held liable as the storage of the materials amounted to a non-natural use of the land.

3. *Something likely to do mischief*

   The thing brought onto the land must be something likely to do mischief if it escapes. In such a situation the defendant keeps it in at his peril.

[^68]: [1967] 2 All ER 62
4. Escape

There must be an escape of the dangerous substance from the defendant's land.

*Read v Lyons Ltd* 69. The P worked in a munitions factory. There was an explosion and she was injured. There was no evidence of negligence by the employers. As the explosion occurred on the Ds premises, there was no escape from their property and therefore no liability in *Rylands v Fletcher*. 70

4.3 Type of liability under the rule of *Rylands v Fletcher*

The type of liability is itself a very sensitive matter. There are two options, fault-based liability or strict liability, each of which has its own advantages. Strict liability seems to be more appropriate for damage resulting from activities which are regarded as hazardous, while fault-based liability can be applied to damage to biodiversity caused by a non-hazardous activity. The party liable under an environmental liability regime should be the person performing the activity.

It is difficult to evaluate damage caused to biodiversity and this has to be done taking account of the cost of restoration or the cost of alternative solutions if restoration is not possible. Polluters must be required to pay damages or compensation for depollution or rehabilitation. If the polluter is unable to repair the damage as a whole for economic or technical reasons, the value of the unrestored damage should be spent on comparable projects. Insurability is important to ensure that the objectives of an environmental liability regime are attained. At the moment, there is no widespread

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69 [1946] 2 All ER 471
70 www.lawteacher.net/Tort/Rylands
coverage of environmental damage risks, but progress has been made in some parts of the financial markets specialising in this area.⁷¹

4.3.1 Strict Liability

The rules of strict liability are designed largely to protect innocent third parties or innocent bystanders. This classification cannot be accorded to the plaintiff who voluntarily comes into contact with or approaches the defendant’s animal or activity in order to secure some benefit which contact or proximity to the animal or the activity provides. Such a plaintiff incurs injury because the plaintiff, in order to derive some benefit, has deliberately come within the range of danger entailed by the defendant’s animal or activity.⁷²

4.3.1.1 The Structure of Strict Liability

The structure of strict liability doctrine fits uneasily with the logic of the efficiency norm. Strict liability doctrines fix spheres of injurer responsibility and victim freedom in ways that seem unlikely to induce optimal joint precautions, and they pin full responsibility for accidental harms on one of the acts or activities whose collision engenders those harms. Prescriptive economic analysis generally seeks to induce the optimal combination of injurer and victim precautions, and insists that injurers and victims are jointly responsible, generally speaking, for the accidental harms that acts or activities occasion.⁷³

⁷¹ Absolutely Liability Vol 29:1.pg 30
⁷² Absolutely Liability Vol 29:1.pg 33
Not only do strict liability doctrines, both in their "enterprise" and "traditional" forms, seem indifferent to the pursuit of efficiency, but strict liability case law appears to justify its articulation of duties by appealing directly to arguments about the legitimate boundaries of victim freedom and the fair reach of injurer responsibility. Injurer responsibility is predicated on the belief that it is legitimate to hold actors accountable for risks that they impose voluntarily and for their own benefit. Victim freedom is predicated on the belief that, within certain domains, persons may do what they wish with their persons and their property. That freedom includes the freedom not to take precautions for the protection of themselves and their property, even when so doing will prevent an accident at the lowest possible cost.

For example, the argument that those who choose to impose certain risks and presumably benefit from their imposition may fairly be held accountable for harms issuing from such risks is implicit in Bushey and explicit in other leading cases. Lubin v. Iowa City 74 invokes this argument to justify imposing strict liability on a waterworks for accidents arising out of a cost-justified decision to leave water pipes in place until they break:

It is neither just nor reasonable that [a] city ... can deliberately and intentionally plan to leave a water main underground beyond inspection and maintenance until a break occurs and escape liability. A city or corporation so operating knows that eventually a break will occur, water will escape and in all probability flow onto the premises of another with resulting damage... The risks from such a method of operation should be borne by the water supplier who is in a position to spread the cost among the consumers who are in fact the true beneficiaries of this practice and of the resulting savings in

74 N.W.2d 765 (Iowa 1964
inspection and maintenance costs. When the expected and inevitable occurs, they should bear the loss and not the unfortunate individual whose property is damaged.  

The conviction that people may do as they wish with their persons and their property so long as they do not violate the rights of others is illustrated by Marshall v. Ranne, a decision upholding a plaintiff's right to recover for personal injuries inflicted by his neighbor's vicious hog. Although the plaintiff was aware of the hog's viciousness and the dangers it presented - indeed, he had called that viciousness to his neighbor's attention - he took no steps to prevent the hog's entry onto his property, took no precautions to disable it in the event of its entry, and did not curtail his own activity to minimize the risks of harm to himself. In concluding that the plaintiff had not assumed the risk of the injury that befell him, the court had this to say:

“He had only a choice of evils, both of which were wrongfully imposed upon him by the defendant. He could remain a prisoner inside his own house or he could take the risk of reaching his car before defendant's hog attacked him. Plaintiff could have remained inside his house, but in doing so, he would have surrendered his legal right to proceed over his own property to his car so he could return to his home in Dallas. The latter alternative was forced upon him against his will and was a choice he was not legally required to accept... The dilemma which defendant forced upon plaintiff was that of facing the danger or surrendering his rights with respect to his own real property, and that was not, as a matter of law the voluntary choice to which the law entitled him.”

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75 N.W.2d at 770
76 S.W.2d255 (Tex. 1974)
77 Rose-Ackerman, supra note 26
78 S.W.2d at 260. Marshall is consistent with prevailing doctrine. See Restatement (Second) of Torts 496E (1965); W. Page Keeton et al., Prosser & Keeton on the Law of Torts, 490-91 (5th ed. 1984).
The phrase strict liability is refers to liability for engaging in ultra hazardous or abnormally dangerous activities. This form of liability is arguably derived from *Rylands v. Fletcher*. American courts have extended the Rylands rationale to such categories as blasting, crop dusting, hazardous waste disposal, pile driving, chemical storage, and various other uncommon, but dangerous, activities. Some call this type of liability as absolute liability.

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

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

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85 See Restatement (Second) of Torts §§ 519-520, 520(d) (1977).
86 Id. at §§ 519-520(a) & (b).
87 See infra text accompanying notes 67-70.
Justice Lemmon referred to this category of tort liability as "absolute liability." Why use that phrase? Unlike negligence case or a strict liability in action case, in a Rylands-type case there is no risk/utility balance undertaken at the case-specific level. Generally, if the activity is one which exposes the defendant to Rylands-type liability, he or she is liable despite the fact that the social utility of the activity may outweigh its risk. The activity presents a reasonable risk of harm but the defendant is still liable. The risk from blasting in order to build a new dam may be valued at $900,000, the utility at $2,000,000. Utility is greater than risk but the defendant would nevertheless be found liable under an absolute liability theory.

In any absolute liability case, balancing is necessarily involved; however, that balancing usually takes place at the activity level. Should one who engages in this reasonable, but dangerous, activity pay the damages she causes even though she has acted reasonably? Justice Lemmon decides whether or not, given the policies at stake, it is appropriate to impose Rylands-type liability upon the activity in question. Once a court determines an activity is within (or without) the scope of Rylands absolute liability, it, in effect, creates a categorical rule. Trial courts do not subsequently engage in a risk balance at the case specific level. Consistently, the interpretation provides that whether an activity is abnormally dangerous is for the court to decide. It is, Justice Lemmon suppose, a question of law. To the contrary, strict liability requires a case-specific determination

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89 Kent, 418 So. 2d at 498. Prosser, Wade & Schwartz state: Strict liability is "founded upon a policy of the law that imposes upon the law that imposes upon anyone who for his own purposes creates an abnormal risk of harm to his neighbors, the responsibility of relieving against that harm when it does in fact occur. The defendant's enterprise, in other words, is required to pay its way by compensating for the harm it causes because of its special, abnormal and dangerous character." Restatement (Second) of Torts § 519 comment d (1977). The liability "is applicable to an activity that is carried on with all reasonable care, and that is of such utility that the risk which is involved in it cannot be regarded as so great or so unreasonable as to make it negligence merely to carry on the activity at all." Id. at § 520, comment b. Observe also that the decision of whether an activity is subject to strict liability is for the court, not the jury. Id. Prosser, Wade & Schwartz, supra note 51, at 687 n.7.

90 Restatement (Second) of Torts § 520 comment b (1977).


92 Restatement (Second) of Torts § 520 comment 1 (1977).
that risk outweighs utility, and, whether risk outweighs utility in a strict liability case,\textsuperscript{93} as in a negligence case, is a question for the jury.\textsuperscript{94}

It is important to note there are defenses to absolute liability. For instance, determining whether or not the risk is within the scope of the defendant's absolute liability is always an issue.\textsuperscript{95} Phrased differently, proximate cause or scope of duty is still an issue. No doubt, many readers will recall the series of cases involving mother minks who ate their babies because of the noise produced by blasting.\textsuperscript{96} Many courts have held that such a risk was not within the scope of risks for which they imposed absolute liability on the blasting defendant,\textsuperscript{97} therefore, the defendant was not liable. Furthermore, Justice Lemmon pointed out that in cases imposing liability for engaging in an ultrahazardous activity, the defendant is "almost invariably the sole cause of the damage and the victim seldom has the ability to protect him. No decisions have placed in this category any activities in which the victim or a third person can reasonably be expected to be a contributing factor in the causation of damages with any degree of frequency."\textsuperscript{98} However, the point is clear -- scope of duty and/or legal cause is a defense in an absolute liability case.

\textsuperscript{93} See \textit{Spivey v. Super Valu}, 575 So. 2d 876 (La. App. 2d Cir. 1991).
\textsuperscript{94} L. Green, Judge and Jury (1930).
\textsuperscript{95} The Restatement provides: "This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous." \textit{Restatement (Second) of Torts} § 519 (2) (1977).
\textsuperscript{96} See, e.g., \textit{Foster v. Preston Mill Co.}, 44 Wash. 2d 440, 268 P.2d 645 (1954) (risk of minks eating their babies as a result of nervousness caused by blasting not within the risk for which the defendant is absolutely liable). Accord, \textit{Gronn v. Rogers Constr., Inc.}, 221 Or. 226, 350 P.2d 1086 (1960); \textit{Madsen v. East Jordan Irrigation Co.}, 101 Utah 552, 125 P.2d 794 (1942).
\textsuperscript{97} See, e.g., \textit{Foster}, 44 Wash. 2d 440, 268 P.2d 645.
\textsuperscript{98} \textit{Kent v. Gulf States Utils. Co.}, 418 So. 2d 493, 499 n.8 (La. 1982). The law in other states has not been so limited. For instance, there is a famous case involving a military installation in Alaska where dynamite was stored. Some vandals broke in, stole dynamite, then blew up the storage area causing damage to nearby residences. The court imposed absolute liability. \textit{Yukon Equip. Inc. v. Fireman's Fund Ins.}, 585 P.2d 1206 (Alaska 1978). Compare \textit{Bridges v. The Kentucky Stone Co.}, 425 N.E.2d 125 (Ind. 1981) (Webb stole dynamite from defendant and three weeks later, over 100 miles away, blew up plaintiff's home killing one son and injuring Bridges and another son).
Additionally, one recent Louisiana court has found that comparative negligence is a defense to an absolute liability claim. Whatever the merits of that conclusion, it at least shows that there are defenses to absolute liability. Rylands, its progeny, its Louisiana kin, and the Restatement provisions dealing with this type of liability are not what it call strict liability. Strict liability involves a case specific risk/utility balance at the individual case level; absolute liability does not.

4.5 Conclusion

Liability is strict; it is imposed irrespective of whether or not reasonable care was taken to avoid the escape. The duty is non delegable. One cannot escape liability for the escape on the ground even though they had employed a competent contractor to place and confine the matters in the position from which it escaped. Anyone who suffer damage to property or arguably, personal injury because of the escape, irrespective of whether or not they occupy the land can sue in Rylands v Fletcher.

99 Pelt v. City of DeRidder, 553 So. 2d 1097, 1099 (La. App. 3d Cir. 1989). One will note that the court referred to the case as a strict liability case, id. at 1098, but it fits under my taxonomy as an absolute liability case. It arose under La. Civ. Code art. 667
CHAPTER 5

DEVELOPMENT OF THE RULE OF RYLANDS V FLETCHER

5.1 Introduction

There is a brief explanation that concern to the development of the rule around the world. Also there are extensive sequential reviews of some of the major applications of Rylands v Fletcher around the world. Briefly discuss regarding the actual rule and application of Ryland v Fletcher in Malaysia.

Here also stated as well two well-known cases decided based on the reputation and finally become the leading case in that country which is in England and in Australia. Finally there is a comparison of the rule between the original rule, as in England and in Australia.
5.2 Development of *Rylands v Fletcher* in the world

The rule of *Rylands v Fletcher* under Justice Blackburn’s statement was cited in cases in both England and the USA soon after the judgment in 1868. In England in the case of *Nichols v Marsland*\(^{100}\) was distinguished, as where a large ornamental pools flooded following a period of extreme rainfall. It was held that it was not the act of keeping the pools which lead to the escape of water, rather the *vis major* of the rainfall. That the flood could not reasonably have been anticipated was a key factor in the argument. An issue closed examined and clarified in 1994 with the *Cambridge Water*\(^ {101}\) case.

In line with the general confusion and inconsistent application of principle, *Nichols v Marsland*\(^ {102}\) was doubted by the House of Lords in *Greenock Corporation v Caledonia Railway* .\(^ {103}\) Greenock Corporation built a concrete paddling pool for children in the bed of a stream, obstructing the natural flow of the stream. It was held that extraordinary rainfall did not absolve the corporation from responsibility and that they were liable in damages for its overflow onto neighboring land. In *Box v Jubb* \(^ {104}\) a case also involving a reservoir, the overflow was attributable to a third party. As the defendants had no means of anticipating or controlling this, the act of a stranger was held to be as good a defense as *vis major* or act of God - again distinguishing *Rylands v Fletcher* in that it was not the act of accumulating and holding water that was the cause of the damage.

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\(^{100}\) (1876) 2 LR 1,  
\(^{101}\) [1994] 2 WLR 53.  
\(^{102}\) (1876) 2 LR 1,  
\(^{103}\) [1917] AC 556.  
\(^{104}\) (1879) 4 LR 76. 9
Against this legal environment, common law principles were not the concern they might otherwise have been. Following *Rylands* a number of cases were either, as seen above, distinguished or appeared to ignore the ruling altogether. Per Simpson\textsuperscript{105} : ‘… three cases,\textsuperscript{106} together with *Rylands v Fletcher* itself, reflect the inability of the English judicial system of the period to produce any coherent scheme of civil liability for dangerous public and private works.’

In addition to a lack of coherence between the cases, the *River Wear* case\textsuperscript{107} also indicated a willingness of the courts to ignore strict liability set out in private legislative clauses (such as had operated in the Bilberry dam disaster). In the *River Wear* case, section 74 of the Harbours, Docks and Piers Clauses Act 1847 provided that ‘… the owner of every vessel … shall be answerable to the undertakers for any damage done by such vessel to the harbor, dock or pier, or the quays or works …’ Despite this clear provision the House of Lords ruled against strict liability. To add further confusion, the judgment is a case study in the difficulties surrounding the doctrine of judicial precedent and extracting a meaningful *ratio decidendi*. One judge found there was no liability due to act of God, one felt there could be no liability without fault or negligence (despite the 1847 Act), one assigned no liability as there was no one on board the ship and: ‘What Lord Blackburn thought must remain obscure; his opinion was quite incoherent.’\textsuperscript{108}

### 5.2.1 A broad chronological review of some of the major applications.

\textsuperscript{105} 1984
\textsuperscript{106} The Directors of the Hammersmith and City Railway Company v Brand (1869) LR 4 HL 171, *River Wear Commissioners v Adamson* (1876) 1 QBD 546, (1877) 2 App. Cas. 743, and *Nichols v Marsland* (1876) 2 LR 1, Ex.D
\textsuperscript{107} (1876).
\textsuperscript{108} Simpson, 1984.
The attempted of the applications of the rule of *Rylands v Fletcher* will actually help to clarify both Blackburn J’s original statement, the modern interpretation thereof and arguments doubting the very existence of the rule:

The following are the examples of the cases.

*Rickards v Lothian*[^1] expanded on the element of ‘likely’ mischief where Lord Moulton reviewed the point that the use of land must be ‘special use bringing with it increased danger to others’ and ‘not merely … the ordinary use of land’.[^2] In this case a blocked basin in a block of flats which overflowed was held not to come within the rule in *Rylands v Fletcher*.

*Read v Lyons*[^3] clarified the fact that there must be an ‘escape’ to land in occupation by someone other than the defendant. When the plaintiff was injured by an explosion from a shell in a munitions factory in 1942, as both the explosion and the injury took place on the defendant’s land it was outside the rule. The House of Lords indicated that there was no general principle of strict liability for ultra-hazardous activities, outside *Rylands v Fletcher* or negligence.

*Cambridge Water Co. v Eastern Counties Leather plc*[^4] involved the gradual seepage of chemical solvents from a tannery into the water course, with no suggestion of negligence and, given the state of the knowledge at the time, no foreseeability of the hazard. The court held that *Rylands v Fletcher* could not apply in the absence of a

[^1]: [1913] AC 263.
[^4]: [1994] 2 WLR 53
foreseeable danger - i.e. a tempered form of strict liability. Importantly, the court concluded that if foreseeability is a requirement of nuisance then must it also be a mandatory requirement under Rylands v Fletcher if Rylands is based on nuisance, rather than being a distinct principle. Professor Newark argued that Rylands was simply an application of nuisance, as Justice Blackburn appeared to think in 1866 when he drew on nuisance cases in his reasoning.

Transco plc v Stockport Metropolitan Borough Council concerned the collapse of the utility company’s embankment due to a gradual leakage from the water supply serving 66 flats. Although the quantity of water was considerable and the damage extensive it was held that there had been no extraordinary or unusual use of land in that the water supplies were domestic, albeit many multiples of domestic supply.

The level of discussion over many years on the questions of non-natural user was reviewed with ‘ordinary’ and, conversely, ‘extraordinary’ and ‘unusual’ being the preferred terms. Interestingly, ‘reasonable’ was found not to be helpful. The Rickards v Lothian ‘general benefit to the community’ idea was gently and tactfully dispensed with. LMS International Ltd v Styrene Packaging and Insulation Ltd, a case heard recently in the Technology and Construction Court, is valuable in its clear and thoughtful consideration of Rylands v Fletcher and subsequent cases on the rule. Unusually,

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113 Taflen, Darlith ‘Environmental Liability : the common law.’ Cardiff University, undated. 
114 (1949) 65 Law Quarterly Review, 480. 
118 [2003] UKHL 61 at para. 11 
although not, of course, uniquely, the case involved the spread of fire, arising from the storage of inflammable chemicals, from the defendants’ property to the claimants’. Coulson, J notes that both cases and texts had long indicated that fire (other than in domestic grates and fireplaces) was a ‘dangerous thing’ and where use of land was non-natural, open to a *Rylands v Fletcher* claim.

In summary of the position on fire, the court noted that the common law had long given strict liability where fire spread from one occupier’s land to another’s, the Fire Prevention (Metropolis) Act 1774 providing a defense where the fire had started accidentally. In some fire cases it was argued that to allow the claimant to succeed under *Rylands v Fletcher*, i.e. no fault liability, was incompatible with the 1774 Act defense. Coulson J agreed with Thornton, J in *Johnson v BJW Property*: *Rylands v Fletcher* only applies in cases of hazardous / non-natural use of land - forseeability of potential danger is required which would include any occurrence of fire beyond simple ‘accident’, consequently.

In the analysis of the recent cases, Coulson, J comments on Lord Hoffman’s statement in *Transco* that no claimant had successfully relied on the rule in *Rylands v Fletcher* since World War II (which is simply wrong) to the effect that Lord Hoffman, and counsel in *Transco* must have been confining their trawl to water cases rather than *Rylands* cases in general, going on to cite two cases which mounted successful claims based on *Rylands v Fletcher* : *Balfour v Barty-King* [1957] and *E Hobbs (Farms) Limited v Baxenden Chemical Co. Limited* [1992]. Whilst finding that, on the facts, negligence

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121 For example, *Johnson v BJW Property* [2002] All ER 574.
124 [2005] EWHC 2065,
125 [2002] All ER 574
and nuisance were in evidence, Coulson J also found, as a distinct point, that the claim in *Rylands v Fletcher* had been made out ‘Indeed, it seems to him that this is the sort of case to which, even in its modern, restricted form, the rule should plainly and obviously apply.’

### 5.3 Rule in *Rylands v Fletcher*

The rule in *Rylands v Fletcher*, as indicated by Blackburn J, is unambiguously an instance of strict liability. According to him:

> '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 ...'  

Strict liability does not mean absolute liability. Initially it was thought that the rule refers to collecting and storing dangerous things, or the things, which are not inherently dangerous, are considered dangerous at the time and place and the practice of mankind. Nevertheless, it is not so limited in its scope. It applies even to non-dangerous things. The liability under this rule is owed to the whole world, but damages can be claimed only when damage has been suffered.

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126 Rylands v Fletcher (1868) LR 330 (HL).
127 Read v Lyons [1947] AC 156
128 It may be noted that in the case, in which the rule was evolved, damage was caused by water.
129 Woon Tan Kan, op cit, at p 273.
The rule seems to be very helpful in environmental cases, where damage is the result of escape of dangerous substances, but the later additions to the rule has greatly restricted the scope of the rule. Lord Cairns of the House of Lords added an additional element to the rule, namely the necessity of 'non-natural use' of the land by the defendant.\textsuperscript{130} If we interpret the expression to the fact that the defendant must bring onto his land some thing, which was not present upon it in its natural state, the scope of the tortuous remedy is tremendously widened.\textsuperscript{131} But this is not the case.

The expression has been given a different meaning. It means unusual, extraordinary or outlandish use of land. Thus, in \textit{Read v Lyons} \textsuperscript{132} it has been suggested that in the manufacture of ammunitions during war time, storage of explosives is not a non-natural use of the land. This legal regime will not provide protection to the victims of industrial accidents, however big it is. The victims will have to resort to the tort of negligence, which has its own technicalities. The opinion here is that if courts are serious to extend a remedy to the accident victims, they should take a liberal view while interpreting this requirement of the rule.

Contrary to this, in Scotland in the case of \textit{R HM Bakeries (Scotland) Ltd v Strathclyde Regional Council} \textsuperscript{133} the House of Lords said that the rule in \textit{Ryland v Fletcher} was not authoritative in Scotland. Liability there is fault-based liability (known as 'culpa').\textsuperscript{134} The rule is applicable in cases of dangerous things or activities, which in all circumstances demand a very high standard of care. Thus, in Scotland the rule is applied in very exceptional situations.

\textsuperscript{130} (1868) LR 330 (HL) at p 338.
\textsuperscript{131} Michael Brown, 'Nuisance, Strict Liability and Environmental Hazards', [1994] Env Liability, p 105
\textsuperscript{132} [1947] AC 156
\textsuperscript{133} [1985] SLT 214
\textsuperscript{134} Community System of Civil Liability'[1994] Env Liability p 1.
In Spain the strict liability rule is applied in a different form. The Supreme Court of the country in environmental pollution cases, such as fires, damage caused by certain gases or dust and poisoning of waters resulting in various types of damage, burden of proving were shifted to the defendants; they had to prove that they were not negligent. In some cases, where more than one person was involved, the court resorted to pseudo strict liability, instead of giving benefit of the doubt to identifying the exact source of pollution.\(^{135}\)

Thus, it is evident that in some other European countries, the strict liability rule has been the basis for awarding damages in environmental pollution cases. There, it has been applied in a rather wider range of cast.

It is significant to note that there have been notable cases of 'failure to warn' leading to environmental damage. In the case of *Barnes v Irwell Valley Water Board*, it was decided that there was a common law duty of care on a water company to warn consumers of potentially dangerous properties of water supplied and therefore these damages were recoverable in negligence.

Generally, in principle the liability of regulatory bodies or public authority and its officers in tort must be the same as that of a private person. Fundamentally, the authority is responsible or liable for the acts of its own officers or staffs, when they are acting in pursuit of their duties on its behalf, and have acted within the scope or area of those duties.\(^{136}\) However, due to the nature of public authority's or body's statutory power and duties, the scope of its liability may be limited.\(^{137}\)

\(^{135}\) Ibid.
\(^{137}\) *Stovin v Wise* [1996] AC 923
In addition, the courts commonly will not intend to impose a duty of care on a public authority or regulatory body if this would tend to discourage them from, or inconsistent with, the due performance of their statutory duties.\textsuperscript{138}

It is very significant to note that under the breach of a statutory duty, claimants or plaintiffs usually or commonly seek to allege that an action for damages will arise whenever a regulatory body or public authority has acted in breach of its statutory duties. However, it should be noted that in most of the cases the careless exercise of a statutory function (in the absence of negligence) would not be enough or sufficient to find a course of action.\textsuperscript{139}

In \textit{Abdul Ghani bin Hamid v Abdul Nasir bin Abdul Jabbar & Anor} \textsuperscript{140}, the judge expressed that the defendants' statutory duty was considered absolute. In his words:

\textit{“Once it has been proved that a particular statutory duty has not been performed, it becomes actionable without having to prove any lack of care or diligence on the part of the person on whom the duty is imposed. What matters are simply to show the non-performance is in itself negligence on the part of that person.”}

It is also important to note that an action for breach of statutory duty comes within the category of negligence. In the case of \textit{Parimala a/l Muthusamy & Ors v Projek Lebuhraya Utara Selatan},\textsuperscript{141} the High Court found that the defendant had committed a breach of statutory duty. In this case, the court explained that the statutory duty involves

\textsuperscript{138} \textit{Welton v North Cornwall DC} [1997] 1 WLR 570
\textsuperscript{139} David Wooley QC et al. \textit{Op cit} p 743.
\textsuperscript{140} [1995] 4 MLJ 182.
\textsuperscript{141} [1997] 5 MLJ 488.
the notion of taking care not to injure another and an action for breach of statutory duty appears within the category of negligence...

A public authority, whether doing an act which is its duty to do, or doing an act which it is merely empowered to do, must in doing the act, do it without negligence, or, as it is put in some of the cases, must not do it carelessly or improperly.

It should also be noted that the UK statute law and EEC law impose a lot of duties on environmental matters. For example, in some situations where a person has suffered damage in consequence of a breach of such a duty the law affords civil remedy to that person. However, in some instances, this is not applicable. In fact, in drafting the statute the legislator sometimes, obviously, states that a breach of the statutory duty will confer a civil remedy, and sometimes obviously states that it will not. For example, s 12 of the Nuclear Installation Act 1965 provides a right for compensation where any damage or injury has been caused by a breach of statutory duty under the Act.

It is also significant to note that the ambit of the provision relating to damage to property has recently been considered by Gatehouse J in *Merlin v British Nuclear Fuels plc*, where in this case the plaintiffs discovered that their house had been contaminated with radio nuclides emanating from the defendants nuclear reprocessing plant at Sellafield. Indeed, they decided to move because of the health risk. Furthermore, s 7(1) of the above Act imposes a statutory duty on the defendants to secure that no occurrence involving nuclear matter or emission of radiation caused injury to anybody or damages to any property or land.  

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143 *Ibid*, p 129
So far as the rule in *Rylands v Fletcher* is concerned, in Malaysia there is no deviation from the English position. For example, in *Hoon Wee Thim v Pacific Tin Consolidated Corporation* \(^{144}\) the court discussed the rule in the context of 'act of God' as an exception and without deviating from the English law said that the rainfall should not be an exception. Likewise, in *Hiap Lee v Weng Lok Mining Co Ltd* \(^{145}\) where water had escaped from one land to another land causing damage to the other land, the Privy Council said, 'As Lord Simons pointed out in *Read v Lyans* ..\(^{146}\). The rule is closely connected with the law of nuisance and in many cases liability can be established differently under either head.'

On the basis of the views taken by Lord Goff and Lord Cairns and their further application in cases, it can be said that the rule in *Rylands v Fletcher* is of least help in pollution cases. It may not be a tool for abatement and control of environmental pollution only when the courts do not ease up the rigors appended to it in the form of 'non-natural user' and 'foreseeability'.

In Canada the two requirements have generated confusion. \(^{147}\) The need therefore is to develop a new regime for strict liability, particularly in respect of pollution hazards. In this regime various activities should be listed. Likewise, certain substances should also be specified. The liability in the substance-based approach should depend on the quantity as well as the quality of a listed substance. In this approach greater emphasis should be given on the quantity. So far as the possible defenses are concerned, the courts have developed them sufficiently enough, but for achieving a greater degree of justice,

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\(^{144}\) [1966] 2 224 (PC).
\(^{145}\) [1974] 2 MLJ 1 (PC).
\(^{146}\) [1947] AC 156
the need is to bring about flexibility in them. It will be better if liabilities are incorporated in suitable statutes. 148

Malaysian also could take the same procedure in order to upgrade the rule if it is really worth to practice it. There should also be provision for compulsory third party insurance. 149 Article 12 of the Convention on Civil Liability for Damage Resulting From Activities Dangerous to the Environment, along the same line, why not our law also provides that each party 'shall ensure that where appropriate, taking due account of the risks of the activity, operators conducting on its territory be required to participate in a financial security scheme or to have and maintain a financial guarantee up to a certain limit.' 150

5.3.1 Development of the rule Rylands v Fletcher – Specific in England

Case of Cambridge Water Co. V. Eastern Counties Leather Plc151

The applicability of the rule of Rylands v Fletcher emerged in Cambridge Water Company 152 case. This case has practically eroded the distinction between the rule of strict liability and private nuisance. It has been made a subspecies of nuisance. In this

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148 The Merchant Shipping (Oil Pollution) Act 1994 of Malaysia and Nuclear Installation Act 1965 of England can be quoted as examples.
149 (Report on Civil Liability and Compensation for Personal Injury, 1978 Cmmd 7054
150 Mj Bowman, 'The Convention On Civil Liability For Damage Resulting From Activities Dangerous To The Environment' [1994] Env Liability 11
152 [1994] 2 WIR 53
case, at the court of first instance, the question in issue was whether or not solvents used at the defendants' tannery were substances not naturally there so as to involve strict liability under the rule in *Rylands v Fletcher*. It was held that the defendant was not liable.

The Court of Appeal held that the active release was not covered under strict liability and that the issue was whether there could be liability for interference with a landowner's right to ground water where pollution was not reasonably foreseeable. Indeed, it seems plain that the prime object was to assimilate the rule in *Rylands v Fletcher* into the mainstream of the law of nuisance as far as possible. It was judged to be contrary to common justice for a defendant to be held liable in nuisance for damage of a type which he could not have foreseen, and foreseeability was therefore held to be a prerequisite of liability in the tort of nuisance, as it is in negligence.

This view has further narrowed down the applicability of the rule in pollution cases. This has also shaken its existence separate from the tort of nuisance. Plainly there have been remarkably few examples of successful reliance upon the rule in recent times, and it is clear from the overall tenor of Lord Goff's speech that his inclination was to deprive the rule of independent vitality by reassimilating it into the general body of the law of nuisance.

**5.3.1.1 The Facts of Cambridge Water**
Cambridge Water Company, a licensed supplier of water to the town and University of Cambridge, purchased a borehole for the extraction of groundwater in 1976. \(^{153}\) Prior to the purchase, the groundwater from that borehole was tested and determined to be "wholesome water suitable for public supply purposes." \(^{154}\) Cambridge Water proceeded to build a new pumping station at the borehole, which came online in 1979. \(^{155}\) Subsequent tests on the water from that borehole were conducted from 1979 to 1983, and continued to indicate that the water was "wholesome." \(^{156}\)

However, in 1985, the UK Department of the Environment, in response to a European Directive, \(^{157}\) issued regulations such that "drinking water containing more than 1 [mu] g/litre of TCE [trichloroethylene] or PCE [perchloroethene] would not be regarded as 'wholesome' water . . . ." \(^{158}\) Tests of water supplied by Cambridge Water revealed PCE concentrations of 38.5 [mu] g/liter. \(^{159}\) Investigations further revealed that water from the borehole was carrying the PCE, prompting removal of the borehole from service in 1983 and investment by Cambridge Water in a new water supply. \(^{160}\) An "exhaustive" geological survey revealed that Eastern Counties Leather was the source of the contamination. \(^{161}\)

Eastern Counties Leather, a leather manufacturer dating back to 1879, used chlorinated solvents to degrease pelts as part of the tanning process beginning in the 1950s. \(^{162}\) Specifically, PCE was used until 1991 in amounts varying between 50,000

\(^{153}\) Cambridge Water, 1 All E.R. at 64.

\(^{154}\) Id.

\(^{155}\) See id

\(^{156}\) See id

\(^{157}\) European Community Directive 80/778/EEC

\(^{158}\) Cambridge Water, 1 All E.R. at 65.

\(^{159}\) See id

\(^{160}\) See id. at 65-66

\(^{161}\) See id. at 65

\(^{162}\) See id. at 63.
and 100,000 liters per year. Prior to 1976, the solvent was introduced into the pelt-cleaning machines through the unenclosed dumping of 40-gallon drums of solvent using a fork-lift truck. Although there was no direct evidence of PCE spilling at Eastern Counties Leather, it was postulated that spillage had occurred through the unenclosed dumping process. Despite PCE's tendency to evaporate, the geological survey experts concluded that PCE had permeated through the concrete floor of Eastern Counties Leather and had migrated vertically down through the chalk aquifer below Eastern Counties Leather's premises. The survey experts also determined that PCE had collected in "pools" within the chalk and was slowly seeping into the groundwater to be carried down the aquifer in the direction of Cambridge Water's borehole 1.3 miles away. Thus, Cambridge Water concluded that this plume of PCE was responsible for the contamination of the borehole, though it was not clear when the PCE had first reached the borehole.

5.3.1.1.1 Endorsement of the "Foreseeability" Test

The House of Lords, in Cambridge Water, ultimately concluded that "it would . . . lead to a more coherent body of common law principles if the rule [in Rylands] were to be regarded essentially as an extension of the law of nuisance." Cambridge Water effectively holds that "Rylands v. Fletcher was not a separate cause of action in its own right, but was, in fact, a specific application of the law of nuisance." Following Cambridge Water, establishing foreseeability becomes fundamental to establishing liability under the rule in Rylands v. Fletcher.

163 See Cambridge Water, 1 All E.R. at 64.
164 See id.
165 See id.
166 See id. at 65-66
167 See id. at 63
168 See Cambridge Water, 1 All E.R. at 63.
169 1 All E.R. at 76.
170 Birtles, supra note 19, at 103, 104
In reaching his decision, Lord Goff first examined the "close relationship between nuisance and the rule in *Rylands v. Fletcher . . ." 171 He found striking similarities in the "reasonable user" requirement in nuisance and the "non-natural use" principle in the rule in *Rylands v. Fletcher*. 172 He analyzed the role of foreseeability of damage in nuisance law:

> Here . . . it is still the law that the fact that the defendant has taken all reasonable care will not of itself exonerate him from liability, the relevant control mechanism being found within the principle of reasonable user. But it by no means follows that the defendant should be held liable for damage of a type which he could not reasonably foresee; and the development of the law of negligence in the past sixty years points strongly towards [sic] a requirement that such foreseeability should be a prerequisite of liability in damages for nuisance, as it is of liability in negligence. 173

Thus, the House of Lords surmised that "foreseeability of damage of the relevant type was a condition precedent for liability." 174 Lord Goff then considered the appropriateness of foreseeability under the strict liability rule in *Rylands v. Fletcher*.

Typically, the rule in *Rylands v. Fletcher* has been understood to mean that the plaintiff does not have to prove fault or foreseeability to prove liability. 175 However, Lord Goff's interpretation departs from this understanding. Rather than looking simply to the historical interpretation of the *Rylands* case, Lord Goff looked to Justice Blackburn's

171 *Cambridge Water, 1 All E.R. at 69*
172 See id. at 71.
173 Id. at 71-72.
174 Birtles, supra note 19, at 104
175 See PUGH & DAY, supra note 12, at 112
opinion in *Fletcher v. Rylands*, which was affirmed by the House of Lords. 176 The Lords noted that the basis for strict liability under the rule in *Rylands v. Fletcher* comes from Justice Blackburn's conclusion 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 own peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape”. 177

However, as noted by Lord Goff, in that same passage Justice Blackburn also "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 to his neighbour's [property],' and the liability to 'answer for the natural and anticipated consequences.'" 178 This leads Lord Goff to observe that:

The general tenor of [Justice Blackburn's] statement of principle is therefore that knowledge, or at least 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 from occurring. 179

176 See Cambridge Water, 1 All E.R. at 72.
177 Id. at 72-73 (quoting Fletcher v. Rylands, [1866] L.R. 1 Ex. 265 (Ex. Ch.) (Blackburn, J.)).
178 Id. at73.
179 Id. at74
Thus, Lord Goff concludes that it is "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 *Rylands v. Fletcher*]."  

This qualification certainly weakens the threat of strict liability, particularly for historic contamination.

In addition to determining that foreseeability was a prerequisite to liability under *Rylands v. Fletcher*, the House of Lords also considered whether *Rylands v. Fletcher* should be "treated as a developing principle of strict liability from which can be derived a general rule of strict liability for damage caused by ultra-hazardous operations . . . ."  

Lord Goff noted the development of such a regime in the United States "as can be seen from § 519 of the Restatement of Torts (2d) vol 3 (1977)."  

He concluded that the House of Lords decision in *Read v. J. Lyons & Co.* effectively limited the application of *Rylands v. Fletcher* to injuries "caused by an escape from land under the control of the defendant." Finally, rather than developing a separate strict liability principle for ultrahazardous activities out of *Rylands v. Fletcher*, the House of Lords effectively reincorporated it back into the law of nuisance: "It would moreover lead to a more coherent body of common law principles if the rule were to be regarded essentially as an extension of the law of nuisance to cases of isolated escapes from land.

Having completed its restructuring of the rule in *Rylands v. Fletcher*, the House of Lords turned to the facts of *Cambridge Water*. Lord Goff noted that at the time the

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180 Id. at 76
182 Id. Lord Goff also noted that creation of such a regime
183 2 All E.R. 471 (1946)
184 Cambridge Water, 1 All E.R. at 76.
spillages were occurring, PCE "would have been expected to evaporate rapidly in the air, and would not have been expected to seep through the floor of the building into the soil below." 185

Thus, "when [Eastern Counties Leather] created the conditions which have ultimately led to the present state of affairs . . . it could not possibly have foreseen that damage of the type now complained of might be caused thereby." 186 Lord Goff concluded that since Eastern Counties Leather "could not at the relevant time reasonably have foreseen that the damage in question might occur, the claim of [Cambridge Water] for damages under the rule in *Rylands v. Fletcher* must fail." 187

5.3.1.1.2 The Implications of Foreseeability

The introduction of a foreseeability requirement in *Cambridge Water* effectively "dealt a body blow to hopes of the development of a doctrine of historic pollution with liability being imposed for past acts of contamination only subsequently discovered to have deleterious consequences . . . ." 188 *Cambridge Water* presented a "classic case" of "historic pollution," yet Lord Goff was "keen to distance the courts from pressure to develop current common law forms of action to meet new political demands for increasingly stringent environmental protection." 189 Speaking for the House of Lords,

185 Id. at 64
186 Id. at 77
187 Id. at 78
Lord Goff stated that "as a general rule, it is more appropriate for strict liability in respect of operations of high risk to be imposed by Parliament, than by the courts." 190

Although Lord Goff insisted that it was Parliament's role to make policy for addressing contaminated lands and other historic pollution, 191 some have described Cambridge Water as a policy-based "judicial attempt to avoid the imposition of a retrospective standard in relation to 'historic' pollution by requiring that foreseeability of harm must be judged at the time when the offending activity took place and not in the light of later knowledge of the adverse environmental effects." 192

In other words, the Lords made a policy decision to avoid opening a can of worms that could result in a flood of litigation over past activities. 193 The Lords may have, in fact, had misgivings similar to those of Justice Kennedy, the trial judge in Cambridge Water, when he wrote:

There must be many areas within England and Wales where activities long ceased still have their impact on the environment, and where the perception of such impact depends on knowledge and standards which have been gained or imposed in more recent times. If it is right as a matter of public policy that those who were responsible for those activities, or their successors, should now be under a duty to undo that impact (or pay damages if a cure is impractical), that must be a matter for Parliament. The common law will not undertake such a retrospective inquiry. 194

190 Cambridge Water, 1 All E.R. at 76
191 See Cambridge Water, 1 All E.R. at 76.
Indeed, Lord Goff does echo this sentiment when he writes:

“I wish to add that the present case may be regarded as one of what is nowadays called historic pollution, in the sense that the relevant occurrence (the seepage of PCE through the floor of [Eastern Counties Leather’s] premises) took place before the relevant legislation came into force; and it appears that, under the current philosophy it is not envisaged that statutory liability should be imposed for historic pollution . . . . If so, it would be strange if liability for such pollution were to arise under a principle of common law.”

In response, critics have decried this decision as an affront to the so called "polluter pays principle." One commentator observed that by "declining to follow the path of strict liability [in Cambridge Water] . . . it is the victim, rather than the polluter, who ends up paying the costs of pollution." Another reported that the British environmental lobby sees the decision as a "backward step." Indeed, the House of Lords decision resulted in flashy headlines in the British legal press such as: "A Polluters Charter," "Does Only the Careless Polluter Pay?" "Polluter Doesn't Pay?" and "No Liability for Historic Pollution." However, the decision is worthy of closer inspection.

195 Cambridge Water, 1 All E.R. at 77-78
197 Howarth & Ball, supra note 80, at 2
199 Id.
201 Michael Broughton, Polluter Doesn't Pay?, EST. GAZETTE, Jan. 8, 1994, at 97
The polluter pays principle has been heralded as "a morally attractive principle, which nobody could deny to be a 'fair' principle." Nevertheless, there are other competing values that are not to be ignored. As one commentator put it:

To recite the [Polluter Pays Principle] and to argue that Cambridge Water is in breach of it seems to miss the point. The decision needs to be understood in the context of UK law, rather than by comparison with a vague slogan which does not advance the debate at all. Leaving the UK Government with the last word, even it has observed that 'in the complex modern world, it is not enough to say the polluter must pay.'

Applied retroactively, the polluter pays principle raises serious questions of moral fairness and economic efficiency. The House of Lords deemed, under the common law at least, that the harm caused by a polluter should have been foreseeable in order for the polluter to be required to bear the costs of remediation. This decision is not, as some have claimed, a polluter's charter, nor does it "negates" the polluter pays principle. In fact, the decision reinforces the idea that the polluter who knew or should have known of the consequences should pay. It provides "no defense in a civil action for a present day polluter" claiming that "he did not know, or could not foresee, the contaminating potential of spillage of a hazardous chemical . . . ." Surely this is not a total rejection of the polluter pays principle.

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203 Vandekerckhove, supra note 84, at 261
204 Sykes, supra note 8, at 23 (emphasis added).
205 See Cambridge Water Co. v. Eastern Counties Leather plc, 1 All E.R. 53, 76 (H.L. 1994
206 See Reid, supra note 86, at 7
207 Howarth & Ball, supra note 80, at 2.
Further, "companies may still be found liable for pollution resulting from their operations causing damage to third parties if the environmental hazard or damage was foreseeable at the time the incident occurred." Therefore, the foreseeability defense is less likely to protect more recent activities, and more likely to reduce litigation over pollution from the remote past, refocusing litigation that does proceed on whether the harm was, in fact, foreseeable.

5.3.2 Development of the rule in Rylands v Fletcher - Specific in Australia

*Case of Burnie Port Authority v General Jones Pty Ltd*

This case was a major development in modern law and has influenced many subsequent rulings. The changes in negligence law as a field of torts has incorporated the Rylands rule. In Australia the case of, *Burnie Port Authority v General Jones Pty Ltd* held that the rule in Rylands had been absorbed into the ordinary law of negligence with all the requirements of duty of care, tests of reasonableness of care, foreseeability, proximity, and considerations of contributory negligence.

In *Burnie*, Mason CJ, Deane, Dawson, Toohey and Gaudron JJ said,

"The result of the development of the modern law of negligence has been that ordinary negligence has encompassed and overlain the territory in which the rule in Rylands v Fletcher operates. Any case in which an owner or occupier brings onto premises or collects or keeps a “dangerous substance” in the course of non-natural use..."
of the land will inevitably fall within a category of case in which a relationship of proximity under ordinary negligence principles will exist between owner and occupier and someone whose person or property is at risk of physical injury or damage in the event of the “escape” of the substance.\textsuperscript{212}

### 5.3.2.1 History of the case

General Jones Pty. Limited ("General"), suffered damage when a very large quantity of frozen vegetables which it owned was ruined by a fire which destroyed a building owned by the appellant, the Burnie Port Authority ("the Authority"), at Burnie in Tasmania. The frozen vegetables were stored in three cold rooms in the building. General occupied the cold rooms and an office area pursuant to an agreement with the Authority. The rest of the building, including the area between the ceiling and roof, remained under the occupation of the Authority. At the time of the fire, work was being carried out to extend the building and install further cold storage facilities in the extension. The original building in which the vegetables were stored was known as "Stage 1" and the uncompleted extension was known as "Stage 2".\textsuperscript{213}

The Authority had not engaged a head contractor in relation to the work involved in erecting and equipping Stage 2. Through employees, it affected part of that work itself, including clearance of the site, the pouring of the concrete foundations and the design of the steel work. Other work involved in Stage 2, including the erection of the steel frame and the installation of electrical and refrigeration equipment was entrusted

\textsuperscript{212} Ad And Sm Mclean Pty Ltd v MEECH 2005 VSCA 305 44 M.V.R. 546 Motor Vehicle Report

to independent contractors. One of those independent contractors was Wildridge and Sinclair Pty. Limited ("W. and S.").

The work contracted to W. and S. included the installation of the additional refrigeration in Stage 2. It involved considerable welding and the use of a large quantity of expanded polystyrene (EPS) which is an insulating material. While EPS contains retardant chemicals to inhibit ignition, it can be set alight if brought into sustained contact with a flame or burning substance. Once ignited, the substance dissolves into a liquid fire which burns with extraordinary ferocity, at a rate which increases in geometric progression.

The EPS to be used by W. and S. was marketed under the commercial name of "Isolite" and was contained in approximately thirty cardboard cartons which were, to the knowledge of the Authority, stacked together in an area or "void" under the roof of Stage 2 ("the roof void") in close vicinity to where W. and S. would, again to the knowledge of the Authority, be carrying out extensive welding activities.

Obviously, it was essential that care be exercised to ensure that sparks or molten liquid from those welding activities did not ignite the cardboard of one of the stacked containers. If that happened, the likelihood was that the Isolite in that container would ignite with the result that the whole of the Isolite would become an uncontrollable conflagration.

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It is common ground that, at relevant times, the Authority was itself in occupation of Stage 2, including the roof void. The Authority took no steps to avoid the risk of conflagration which unguarded welding activities in the vicinity of the cartons of Isolite involved. On the findings of the learned trial judge, employees of W. and S. carried out the welding activities in such a negligent fashion that sparks or molten metal fell upon one or more of the cartons containing the Isolite.

The cardboard was set alight and the Isolite itself commenced to burn fiercely. The conflagration spread from the roof void to the whole of Stage 2 and most of Stage 1, including those parts of the original building containing the cold rooms occupied by General. Within minutes of the commencement of the fire, the whole complex was engulfed in flames.215

**5.3.2.2 Judge held**

The judgment of the case as follow.

His Honour held that W. and S.'s liability resulted from the application of the ordinary principles of the law of negligence and from the application of a special rule relating to an occupier's liability for damage caused by the escape of fire from his premises. His Honour held that the Authority's liability resulted from the application of the ignis suus rule. As between the Authority and W. and S., his Honour found that the Authority was, by reason of W. and S.'s negligence, entitled to be indemnified by W. and

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S. in respect of any damages which it paid to General. The Authority's and W. and S.'s third party claims against Olympic were dismissed.

In this Court, General has argued that it is entitled to maintain the judgment in its favor on each of three distinct grounds, namely, (i) the ignis suus principle; (ii) *Rylands v. Fletcher* liability; and (iii) ordinary or *Donoghue v. Stevenson* negligence. A fourth ground, ordinary nuisance was raised in General's written outline of argument but was abandoned in the course of oral argument. For its part, the Authority, while denying any liability to General, has not challenged the findings in the courts below to the effect that General sustained substantial damage caused by the spread of fire from premises occupied by the Authority (Stage 2 and the residue of Stage 1) to the premises occupied by General (the cold rooms) and that the fire was caused by negligence on the part of the Authority's independent contractor in carrying out unguarded welding operations on the premises occupied by the Authority in the close vicinity of the stacked cardboard cartons of Isolite. 217

On that approach, the effect of our conclusion that no special rule survives in our common law is that those English statutes and their Australian equivalents can be generally treated by the courts of this country as no longer applicable. In any event, the effect of the confinement by past decisions of the scope of those statutes is that they are inapplicable to General's claim to the extent that it is based on the rule in *Rylands v. Fletcher* or ordinary negligence.

216 (1932) Ac 562.)
If the problems of the rule in *Rylands v. Fletcher* were confined to the uncertainties of its content and application, it would be necessary for the courts to continue their so far spectacularly unsatisfactory efforts to resolve them. The problems are not, however, so confined. From within, the broadening of Blackburn J's exception of things "naturally there", which would seem to have been used in the sense of without human intervention, into an exception of "natural", "ordinary" or not "special" use has reduced the scope of the rule to the stage where a majority of the House of Lords in *Read v. J Lyons* 218 could indicate a view that, in the circumstances of that case, the use of land for the obviously dangerous activity of manufacturing high-explosive shells may have been outside the scope of the rule.

From without, ordinary negligence has progressively assumed dominion in the general territory of tortious liability for unintended physical damage, including the area in which the rule in *Rylands v. Fletcher* once held sway. Ultimately, as will be seen, the resolution of this case largely turns upon a consideration of the present relationship between ordinary negligence and the rule in *Rylands v. Fletcher*. A starting point of that consideration is an understanding of the role played by the conception of proximity in the development of the unified modern law of negligence.

### 5.3.2.2.1 Negligence

*Rylands v Fletcher* was decided by the Court of Exchequer Chamber some seventeen years before Lord Esher (then Brett MR), in *Heaven v. Pender* 219, formulated the general or larger 220 - proposition which constituted the first step in the perception of a coherent jurisprudence of common law negligence. Almost half a century later, the

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218 (1947) AC at 169-170, 174, 186-187
219 (1883) 11 QBD 503
House of Lords in *Donoghue v. Stevenson* \(^{221}\) effectively completed the process. The judgment of Brett MR in *Heaven v. Pender* and the speech of Lord Atkin in *Donoghue v. Stevenson* were both concerned with identifying a general unifying proposition which explained why a duty to take care to avoid injury to another had been recognized in past cases in the courts.

Essentially, the methodology of both was identical: the identification of a general proposition which selected "recognized cases suggest, and which is, therefore, to be deduced from *Donoghue v. Stevenson* and the confirmation of the validity of the proposition by ascertaining that no obvious case can be stated in which the liability must be admitted to exist, and which yet is not within this proposition"\(^{222}\); and see Donoghue v Stevenson.\(^{223}\)

The "larger proposition" formulated by Brett MR in *Heaven v. Pender* was one of foreseeability \(^{224}\) "Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."\(^{225}\)

### 5.3.2.2.2.1 Ordinary negligence and the rule in *Rylands v. Fletcher*

\(^{220}\) ibid. at 509
\(^{221}\) (1932) AC 562.
\(^{222}\) (1883) 11 QBD at 509-510
\(^{223}\) (1932) AC 562.
\(^{224}\) (1883) 11 QBD at 509
\(^{225}\) (1883) 11 QBD 503
It would seem that, in England, recoverable damages under the rule in *Rylands v. Fletcher* may still be confined to compensation for damage to property sustained by the owner or occupier of neighboring land on to which the dangerous thing passes and does damage.

The main control of recoverable damages under the rule is the requirement that the damage be related to the qualities or circumstances which bring the case within the rule of *Fletcher v. Rylands* 226: "damage which is the natural consequence of (the) escape"; Fleming, 227. In the context of the other requirements of the rule. In particular, Blackburn J's "which he knows to be mischievous" as developed by subsequent authority, that control closely corresponds with ordinary negligence's insistence that actionable damage be foreseeable as in *Benning v. Wong* 228; see also Salmond and Heuston 229 and The Law of Torts in New Zealand, 230

The rule in *Rylands v. Fletcher* has never been seen as exclusively governing the liability of an occupier of land in respect of injury caused by the escape of a dangerous substance.

For example see, *Carstairs v. Taylor* 231; *Ross v. Fedden* 232; *Anderson v. Oppenheimer* 233; *Rickards v. Lothian* 234; *Torette House Pty. Ltd. v. Berkman* 235; *Hargrave v. Goldman* 236. In that, the rule can be contrasted with the old special rules

226 (1866) LR 1 Ex at 279
227 op.cit. at 329
228 (1969) 122 CLR at 320
229 op.cit. at 324-325
231 (1871) LR 6 Ex 217
232 (1872) LR 7 QB 661
233 (1880) 5 QBD 602
234 (1913) 16 CLR 387
235 62 CLR 637
236 (1963) 110 CLR 40.
defining the liability of an occupier of premises for damage sustained by a visitor on the premises which were traditionally seen as excluding the application of more general principles. The result of the development of the modern law of negligence has been that ordinary negligence has encompassed and overlain the territory in which the rule in *Rylands v. Fletcher* operates.

Any case in which an owner or occupier brings onto premises or collects or keeps a "dangerous substance" in the course of a "non-natural use" of the land will inevitably fall within a category of case in which a relationship of proximity under ordinary negligence principles will exist between owner or occupier and someone whose person or property is at risk of physical injury or damage in the event of the "escape" of the substance. Indeed, so much was made clear in *Donoghue v. Stevenson* itself where Lord Atkin referred to "the cases dealing with duties where the thing is dangerous", as illustrating "the general principle" which he had formulated.

Some of the considerations favoring an affirmative answer to that question have already been identified: the fact that, unlike the old rule regulating an occupier's liability to a visitor, the rule in *Rylands v. Fletcher* has never been seen as an exclusive determinant of liability with the result that ordinary negligence has overlain the whole area in which the rule operates; the uncertainties about the content of the rule, including the quite unacceptable uncertainty of the requirement of "non-natural", "special" or "not ordinary" use; the difficulties in its application; and the reluctance of the courts to accept and apply it.

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237 See, e.g., Commissioner for Railways v. Quinlan (1964) AC 1054.).
238 (1932) AC at 595-596; see also, at 611-612 per Lord Macmillan.)
The main argument supporting the preservation of the rule in *Rylands v. Fletcher* as a discrete or independent area of the law of torts is the argument that the rule cannot be accommodated within the principles of ordinary negligence without denying liability in cases where it would otherwise exist. In considering that argument, it is appropriate to accept a broad or expansive view of the kind of substance or activity which may come within the reach of the rule.

Accordingly the rule seems to extend to the introduction or retention of any dangerous substance or the carrying out of any dangerous activity upon or within property under the occupation or control of the defendant.

Inevitably, the past adjustments and qualifications of the rule in *Rylands v. Fletcher* to reflect aspects of the law of ordinary negligence have greatly reduced the likelihood that *Rylands v. Fletcher* liability will exist in a case where liability would not exist under the principles of negligence. Liability under the rule is still theoretically seen as "strict liability" in the sense that it can arise without personal fault whereas liability in negligence is fault liability, that is to say, liability flowing from breach of a duty owed by the defendant to the plaintiff. 239

The judicial transformation of Blackburn J's requirement of "not naturally there" into a test of "special" and "not ordinary" use and the expanded defences to a *Rylands v. Fletcher* claim have, as has been seen, deprived that perception of underlying antithesis of some of its theoretical validity and most of its practical significance. However, as Professor Thayer indicated in a posthumous article published in the Harvard Law Review

in 1916 the final answer to any argument based on that perceived theoretical contrast lies in ordinary negligence's concepts of a "non-delegable" duty and a variable standard of care.

5.3.2.2.2 The "non-delegable" duty

As was pointed out in the majority judgment in *Cook v. Cook*, the more detailed definition of the objective standard of care (under the ordinary law of negligence) for the purposes of a particular category of case must necessarily depend upon the identification of the relationship of proximity which is the touchstone and control of the relevant category." It has long been recognized that there are certain categories of case in which a duty to take reasonable care to avoid a foreseeable risk of injury to another will not be discharged merely by the employment of a qualified and ostensibly competent independent contractor.

In those categories of case, the nature of the relationship of proximity gives rise to a duty of care of a special and "more stringent" kind, namely a "duty to ensure that reasonable care is taken". Put differently, the requirement of reasonable care in those categories of case extends to seeing that care is taken. One of the classic statements of the scope of such a duty of care remains that of Lord Blackburn in *Hughes v. Percival* that duty went as far as to require (the defendant) to see that reasonable skill and care were exercised in those operations ...

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242 (1986) 162 CLR at 382.
244 (1883) 8 App Cas 443 at 446.)
If such a duty was cast upon the defendant he could not get rid of responsibility by delegating the performance of it to a third person. He was at liberty to employ such a third person to fulfill the duty which cast on himself ... but the defendant still remained subject to that duty, and liable for the consequences if it was not fulfilled. The relationship of proximity which exists, for the purposes of ordinary negligence, between a plaintiff and a defendant in circumstances which would prima facie attract the rule in *Rylands v. Fletcher* is characterized by such a central element of control and by such special dependence and vulnerability.

It follows that the relationship of proximity which exists in the category of case into which *Rylands v. Fletcher* circumstances fall contains the central element of control which generates, in other categories of case, a special "personal" or "non-delegable" duty of care under the ordinary law of negligence. It is also supported by considerations of utility: "the practical advantage of being conveniently workable, of supplying a spur to effective care in the choice of contractors, and in pointing the victim to a defendant who is easily discoverable and probably financially responsible" 245

Where a duty of care arises under the ordinary law of negligence, the standard of care exacted is that which is reasonable in the circumstances. It has been emphasized in many cases that the degree of care under that standard necessarily varies with the risk involved and that the risk involved includes both the magnitude of the risk of an accident happening and the seriousness of the potential damage if an accident should occur.

### 5.4 Comparison of the rules.

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245 p.cit. at 809.
Comparison of the original rule of *Rylands v Fletcher* with a case in England – *(Cambridge Water v Eastern Counties Leather)* and a case in Australia – *(Burnie Port Authority v General Jones Pty Ltd)*
<table>
<thead>
<tr>
<th>Original Rule</th>
<th>England</th>
<th>Australia</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Rylands v Fletcher</em></td>
<td><em>Cambridge Water v Eastern Counties Leather</em></td>
<td><em>Burnie Port Authority v General Jones Pty Ltd</em></td>
</tr>
</tbody>
</table>
| Even though, for the rule to apply negligence need not to be proved, but several requirements must be satisfied. | Here the rule in *Rylands v Fletcher* should be treated as an extension of the law of nuisance applicable to isolated escapes.  

The rule, subject to this decision, remains a part of the common law of England and it still appears to be the case that a person may be liable under the rule even though neither he nor anyone else has been guilty of negligence in allowing the escape. | The absorption by the ordinary principles of negligence, that makes the rule in *Rylands v Fletcher* been abolished in Australia because consider as an outdated principle of law.  

<table>
<thead>
<tr>
<th>The requirements are</th>
<th>Issue raise up in the case in England</th>
<th>Issue raise up in the case in Australia</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. <em>The defendant brought something onto</em></td>
<td>1. The linkage of the rule and the tort of</td>
<td>1. The law of negligence has, since</td>
</tr>
</tbody>
</table>
In law, there is a difference between things that grow or occur naturally on the land, and those that are accumulated there artificially by the defendant. For example, rocks and thistles naturally occur on land. However, the defendants in Rylands v Fletcher brought water onto the land.

2. Non-natural use of the land

In the House of Lords, Lord Cairns LC, laid down the requirement that there must be a non-natural use of the land.

3. Something likely to do mischief

The thing brought onto the land must be something likely to do mischief if it escapes. In such a situation the defendant nuisance clearly suggest that the rule has no legitimacy as a remedy for persons other than land occupiers, this being the position in the case of liability for private nuisance

2. There was no nuisance where the acts committed by the defendants did not involve their use of their land even though they affected the claimants' enjoyment of theirs.

3. The view that damages for personal injury could be recovered under the rule in Rylands v Fletcher, ie without proof of negligence

4. Now that liability is limited by the concept of foreseeability, there would appear to be no need for a separate determination of whether the thing which escapes is dangerous in itself;

5. As a tort of nuisance, once the wrong act
keeps it in at his peril.

4. Escape

There must be an escape of the dangerous substance from the defendant's land.

complained of is proven, the burden shifts to the defendant to raise a defense.

It has been approved here that we cannot go on using torts devised hundreds of years ago to meet the more complex problems which confront our modern society. The proposal must pass on to the lawmaker. The decision itself, however, has been defended as being fair on the ground that land occupiers, are liable to an increase in their legal duties. It seems not unfair to expect that in relation to activities carried on by them on their land that they be subject to a duty that is higher than that forced upon non-occupiers, strict liability as different to fault-based liability respectively.

The decision actually was based on an extended applicability of doctrine of non-delegable duty of care where it holds a defendant liable in negligence where he has neither been personally negligent nor vicariously liable. The scope of this non-delegable duty category is wider than that covered by the rule in *Rylands v Fletcher* in that it extends to dangerous activities as well as dangerous substances and further there is no limitation to 'non-natural' use of land.

| Table 5A Comparison of the original rule of *Rylands v Fletcher* with a case in England and a case in Australia |
|---|---|---|
| keeps it in at his peril. | complained of is proven, the burden shifts to the defendant to raise a defense. | The decision actually was based on an extended applicability of doctrine of non-delegable duty of care where it holds a defendant liable in negligence where he has neither been personally negligent nor vicariously liable. The scope of this non-delegable duty category is wider than that covered by the rule in *Rylands v Fletcher* in that it extends to dangerous activities as well as dangerous substances and further there is no limitation to 'non-natural' use of land. |
5.4.1 Summary of Table 5-A

By comparing the original rule with the other two it shows that, in the history of its development, strict liability under the rule of *Ryland v Fletcher* had never been extended outside the field of situations arising from land use. The rule somehow was certainly not strict in so far as defenses which by and large closely correspond to several in the law of negligence were available to defeat its application. On the other hand liability was strict in the sense that no negligence was required to be proved against the defendant.

It clearly shows that the result of the other two judicial decision, that the *Rylands v Fletcher* doctrine of strict liability has been poor of much of its strictness in the first case of *Cambridge Water v Eastern Counties Leather*. It should be treated where the extension of the law of nuisance applicable to isolated escapes. In doing so it merely clarifies, and does not change, the existing law. The rule, subject to this decision, remains a part of the common law of England and it still appears to be the case that a person may be liable under the rule even though neither he nor anyone else has been guilty of negligence in allowing the escape.

Upon the second case of *Burnie Port Authority v General Jones Pty Ltd* the strictness is unnecessary altogether where actually having been absorbed by the ordinary principles of negligence, the rule in *Rylands v Fletcher* has for all practical purposes been abolished in Australia or as what in the second case. The absorption of what is seen as an outdated principle of law by an ascendant one is not without precedent in the development of the Australian common law.

Here obviously show that the original rule is lacking some substance. to coup with new situation. Additional ingredient should be added up to the original rule to be more
effective for example foreseeability or non delegable duty.

5.5 Conclusion

An intelligent approach must be study to take into account of its purpose, in the environmental cases here in Malaysia and must be prepared to test the law critically in the light of its purpose. To that end, a brief consideration of the development of the law up to the date when *Rylands* was decided will be helpful in throughout this study.
6.1 Introduction

The purpose of the analysis is to identify the development of the environmental cases occurred in Malaysia. There will be an evaluation of the cases here in Malaysia where the grounds of deed under the rule of Rylands v Fletcher which adjudicated in the lead by the court and those which are decided by the highest court of the two major common law jurisdiction. There are in the case of Burnie (negligence) and Cambridge (nuisance) as what been referred to in Chapter four.
6.2 Tabulation of the environmental cases in Malaysia

There is a tabulation of the environmental cases under construction industry in Malaysia, parties involved, elements originate the cause, Court held and category of tort engaged. The judgment of the court in each case is point out under one or more of the three torts as shown in Table 6.2A
<table>
<thead>
<tr>
<th>Malaysian Cases under R v F</th>
<th>Parties</th>
<th>Element</th>
<th>Court</th>
<th>Type of Tort</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Plaintiff</td>
<td>Defendant</td>
<td>Water</td>
<td>Fire</td>
</tr>
<tr>
<td>1 Sheikh Amin [1974] 2 MLJ 125</td>
<td>Owner</td>
<td>Tenant</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>2 Abdul Rahman [1978] 2 MLJ 225</td>
<td>Owner</td>
<td>Contractor</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>3 Lembaga Kemajuan [1997] 2 MLJ 783</td>
<td>Owner</td>
<td>Workers</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>4 Seong Fatt (1984) 1 MLJ 286</td>
<td>Contractor</td>
<td>Neighbor</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>5 Abdul Hamid [1991] 1 AMR 637</td>
<td>Owner</td>
<td>Contractor</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>6 Hiap Lee [1974] 2 MLJ 1 PC</td>
<td>Owner</td>
<td>Contractor</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>7 Steven Phoa [2000] 4 MLJ 200</td>
<td>Resident</td>
<td>Local Authority</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>-----</td>
<td>-------------------------------</td>
<td>------</td>
<td>------------</td>
<td>---------------</td>
</tr>
<tr>
<td>8</td>
<td>Kris Angsana</td>
<td>2007</td>
<td>5 MLJ 13</td>
<td>Developer</td>
</tr>
<tr>
<td>9</td>
<td>Milik Perusahaan</td>
<td>2003</td>
<td>1.C LJ 12</td>
<td>Neighbor</td>
</tr>
<tr>
<td>10</td>
<td>Chan Jen Chiat</td>
<td>1994</td>
<td>3 MLJ 495</td>
<td>Owner</td>
</tr>
<tr>
<td>11</td>
<td>Lim Teck Kong</td>
<td>2006</td>
<td>3 MLJ 213</td>
<td>Owner</td>
</tr>
<tr>
<td>12</td>
<td>Teh Khem</td>
<td>1995</td>
<td>2 MLJ 663</td>
<td>Owner</td>
</tr>
<tr>
<td>13</td>
<td>Muthusamy</td>
<td>1979</td>
<td>2 MLJ 271</td>
<td>Contractor</td>
</tr>
<tr>
<td>14</td>
<td>Chan Yee</td>
<td>1978</td>
<td>2 MLJ 41</td>
<td>Resident</td>
</tr>
<tr>
<td>15</td>
<td>Mc Gowen</td>
<td>1966</td>
<td>1 MLJ 1</td>
<td>Owner</td>
</tr>
</tbody>
</table>

Table 6 2A Cases involves Environmental Issues in Construction Industry Malaysia.
6.2.1 Summary of the table 6-2A

**Column 1: Malaysian Cases under R v F**

From the cases and the year listed above it clearly shows the percentage increase regarding cases involving environmental issues. For example in 1970’s the cases involving environmental cases are more than 1960’s, then the numbers are shrinking in 1980’s. The reason is because the economy at that time is about to expand so less project under construction industry. Afterward in 1990’s and all the way to 2006 the construction industry started to blooming again because Malaysian government has implement a lot of arrangement for the country as what been stated in the Ninth Malaysian Plan and has been discussed earlier in Chapter 2.

**Column 2: Parties**

From the table above as in column 2, the relationship of plaintiff and defendant commonly between the owner of the site or property and contractor. Contractor is among the important key player involved in this scenario. It proves that contractor plays important role in construction industry. Once they formulate error, they ought to be some difficulty arises. At this juncture it shows that liability of contractor actually is broad towards construction industry but between contractor and third party doesn’t have any contract. It means there is no contractual issue, but yet the case can bring into action, just resembling in the case of *Rylands v Fletcher*, which has been discussed in Chapter four.
Column 3: Elements

Among the four elements engaged in the cases listed above, it shows that water element dominated the most. This element is similar to what actually turn out in the case of Rylands v Fletcher under non natural use. Here it illustrate how relevant is the rule of Rylands v Fletcher here in Malaysia can be applied. For other elements stated above for example fire, earth and air are not the popular elements which involving in the construction industry. Normally water is the most that that will damage the building.

Column 4: Judgement

In the court judgment normally the wrong doers are concerning the defendants. In this analysis the common party engage are contractors. They are in the wrong because of neglectful. Since their fault of bearing out all the requirements under the rule in Rylands v Fletcher, so the application of the rule is practical.

Column 5: Type of tort

Under type of tort, it seems like the plaintiffs have succeeded dominated the principle of Rylands v Fletcher compared to other type of torts. At the same time also, some of the cases where defendant was found liable for damages not only under Rylands v Fletcher but on the grounds of other torts, for example either negligence or nuisance. For example in the case of Seong Fatt the defendants were found to raise level of land which divert a natural stream so sudden flood on that area during heavy rain. The duty of care that necessarily occurs from an action in this country lying on to heavy rainfall is understandable and the defendants would very likely have been found negligent as well.
Certainly, the court reveals that the defendant was found liable for the flood not only under the principle of *Rylands v Fletcher* but on the ground of negligence also. Comparing the three torts it seems that nuisance dominate the most.

### 6.3 Conclusion

From the analysis the conclusion that can be achieved is that the development of the environmental cases here in Malaysia is very encouraging. The increasing number of cases apparently due to the Malaysian economic blooming that provide growing number of projects under construction industry. Now evidently shown that contractor holds the most responsible duty and they are also the one most legally responsible for most of the damages.

On the above analysis also, shown that the local cases which have applied the rule of *Rylands v Fletcher* were also determined on the source of either negligence or nuisance or could rationally have been so assured. There is visibly a significant degree of having common characteristics between *Rylands v Fletcher* on one hand and negligence and nuisance on the other. It is especially so in the case of nuisance. Noticeably our law doesn’t provide specific rules and regulation to solve the issue on how to handle problems under environmental cases.

In the analysis also stated as regards water is the element that attracts most of the damages for example flooding, landslide, erosion and others. At this point without a doubt shows close related to the principle of the rule of *Rylands v Fletcher*. 
CHAPTER 7

THE APPLICABILITY OF THE RULE OF *RYLANDS V FLETCHER* IN MALAYSIA

7.1 Introduction

The rule of *Rylands v Fletcher* has been used in Malaysia actually more than three decades ago. Comparing to other countries such as in England and in Australia has clearly shows that the developments of the rule have changed the requirements of the original rule of the law in *Rylands v Fletcher*. The modified rules from those countries either accept the original requirement with additional ingredient or modified the original rule totally. It depends on the circumstances required at that time.

It is fair to consider the procedure of the test to the cases in Malaysia so there would be a clear statement regarding how far the rule could be distinguish and the
applicability of the rule here in Malaysia. At the same time from here there is a solution for the rule to be applied and to recognize the status of the rule in Malaysia. Moreover from here there is a future direction of the law whether it is better indicated as below.

Previously in Chapter one, there are four alternatives to be look through to decide what is the resolution that can be accomplish at the end of the study.

1. To abandon it and deal with cases in negligence alone, as in the case of *Burnie* \(^{246}\)
2. To extend the scope of the rule to cover all ultra-hazardous activities. \(^{247}\)
3. To retain the rule and state the principles to achieve greater clarity for future application. This will reinforced by reference to *Cambridge*
4. To propose new law.

7.2 A brief investigation of the Malaysian case law under environmental issues related to the rule of *Rylands v Fletcher*.

It would be encouraging to inspect fifteen numbers of local cases in which a grounds of action under the rule in *Rylands v Fletcher* which was judge by the courts.

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\(^{246}\) Burnie Port Authority V General Jones Pty. Limited (1994) 179 CLR 520 (1994)

\(^{247}\) [2003] UKHL 61 at para. 7.
Table 7.2A Rules of Rylands v Fletcher in Environmental cases in Malaysia.
7.2.1 Summary of the table 7 2A

The analysis shows that the applicability of the rule of *Rylands v Fletcher* here in Malaysia is somehow very hazy. In order to accomplish the objective in this analysis there are four alternatives to be look through which have been mentioned earlier in chapter one what to decide for the resolution that can be achieve at the end of the analysis.

Alternative one (Cannot be applicable)

From the result of the analysis, if it were *to abandon* it and deal with cases in negligence alone, it will create more uncertainty. There are two issues arise here, one is to propose variable standard of care by its very nature extremely inconsistent. Secondly, it has been said that the case of *Burnie* has thrown the law on non-delegable duty into much misunderstanding and a caution character. As in Malaysian law it is not comfortable with the formulation of non-delegable duty at the same time it is also not in the law of Malaysia. Finally, and asserting the absorption of Rylands into the law of negligence would promote certainty in the law, this has been seriously doubted on the ground that it has simply substitute one set of uncertainties with another.

Alternative two (Partly applicable)

If it were to *extend the scope* of the rule as to cover all ultra-hazardous activities, as from the result of the analysis, it shows that by extension of nuisance must bear in mind that though the dissimilarity between *Rylands v Fletcher* and nuisance is not easy to
describe, but the differences do exist. In the case of *Cambridge Water* the alarm has been said that the reasonable user analyze in nuisance could be associate with the non-natural user requirement in *Rylands v Fletcher*. Parting the way open for nuisance would be overwhelm by those same difficulties that have badly affect the rule as a result of the unclear and uncertainties of the non-natural use requirement. In Malaysia there is hardly any legislation that provides for civil liability for such problem This legislative emptiness is perhaps a sufficiently logical argument at least for the preservation of the rule.

**Alternative three (Applicable with additional ingredient)**

As in the analysis above the provision *to retain* the rule and state the principles to achieve greater transparency for future prospect application is one good idea. The concept of foreseeability has been accepted and applied in the local law in respect of causes of action arising from negligence The magnitude of the damage, if it ever arose, was clearly foreseeable.

Thus, responsibility and compensation are both governed by the rule of rational consideration what has to be measured is whether any specific item of damage in respect of which the plaintiffs' claim is such that at the time of the act called in question the defendants ought to have foreseen the probability of it.

Similarly, foreseeability is also part of our law as a requirement in actions arising from nuisance Given the already intimate relationship between the two, the infusion of foreseeability into the principle of *Rylands v Fletcher* into our law, as an additional ingredient of liability, as is required in nuisance, is a good step that could be argued
against with much clear thought, proper or idealistic to the fault theory of tortious liability aside.

**Alternative four (New law)**

To propose a *new law* is going to take an extensive procedure as it will lengthy the time. By having a quick look at the problem facing by plaintiff in this chapter it seems that they need assured category of law that could assist to work out the problem immediately. Clearly it is not importance to propose a new law.

As to accomplish the conclusion in objective two, what has been revealed in the analysis is that the applicability of the rule of *Rylands v Fletcher* in environmental cases in Malaysian Construction Industry can only be suitable with additional requirement. The rule of *Rylands v Fletcher* alone cannot stand by its own. The rule which has been analyzed in fifteen cases, demonstrates that it need additional requirement in most of the issues.

**7.3 Conclusion**

From the four alternatives it looks like resolution number three seems very close application to the issue of the research, this actually involve acceptance of foreseeability as an essential ingredient of liability in the rule of *Rylands v Fletcher* category of cases. The rule of *Rylands v Fletcher* independently cannot survive by its own. There is no indication in the preceding argument that such recognition will diverge with any feature of any case law. Following the case of *Cambridge Water* would ensure that to continue to be part of the mainstream of the English common law. On the other hand, taking the
pathway anger by the case of *Burnie* will require receiving of legal principles centered on the explanation of non-delegable duty as in the Australian courts. With all the thoughtfulness run through in this analysis, it seems to bear the case of *Cambridge Water* as being able to fit together better with the law in Malaysia as it remains.

Recognition of foreseeability of damage as a fundamental component of liability in the recuperation of damages under the rule of *Rylands v Fletcher* might help in solving the problems of environmental cases in the construction industry.
CHAPTER 8

CONCLUSION AND RECOMMENDATIONS

8.1 Introduction

*Rylands v Fletcher* pursues precisely what a common law principle performs. The dilemma is it is no longer strict. It should be developed or turn into stricter to offer for liability in respect of such environmental cases especially what been facing here in Malaysia. On the contrary, given that so much well knowledgeable and cautiously structured legislation is now being put in place for this purpose, there is less need for the courts to widen a common law principle to accomplish the same conclusion, and it well is objectionable that they should do so.
Environmental pollution is disturbing the people and their properties in many ways. To meet this ordeal, precise legislation is should be through. Some legislation award for payment of damages too. But the legislation does not render the law of tort to be inappropriate for manipulative environmental pollution.

It will be therefore a good implication that in view of the rapid increase in the environmental damage, the courts should make efforts to ease up the accessibility of a tortious remedy in favor of those who endure from polluting activities causes from construction industry. This will be possible only when the right to use in the form of procedure and exceptions attach to the relevant torts are eased up to the most possible scope. Further suggestion could be that in land contamination cases, disease under certain conditions should be treated separately for an award of damages.

Throughout the analysis there are quite a few numbers of solutions which has been test to find out the solution for the problem. Finally after the analysis, the direction of the rule of *Rylands v Fletcher* still can be practice in Malaysia, with some modification.

What has been discovered in the analysis is that the applicability of the rule of *Rylands v Fletcher* in environmental cases in Malaysian Construction Industry can only be suitable with additive. The rule of *Rylands v Fletcher* alone cannot stand on its own. The rule which has been analyzed in fifteen cases, demonstrates that it need additive in most of the issues. From the four alternatives it looks like resolution number three seems very close application to the issue, this actually involve acceptance of foreseeableability of damage as an essential component of liability in the *Rylands v Fletcher* category of cases.
The changes in the law of tort of both countries that is in England and Australia actually give good impression to the whole world to determine the justification on the requirements of the rule in *Rylands v Fletcher* to make it stricter.

From the analysis above, it is apparent that the application of the rule ever since its inception has been gradually deteriorating and restraining in its request from within and the region in which it functional to enforce liability progressively lessen. Plaintiffs rather use negligence even though they must proof the fault of the defendant. From the research it shows that the scope of tort in the rule of *Rylands v Fletcher’s* liability is actually tremendously wide but it actually missing some ingredient. With the additional requirements to the rule the judges, lawyers, legal skills and expertise should prefer to practice the principle of strict liability as stated in *Ryland v Fletcher* in environmental cases in order to ensure that those cases are properly settled in court without any improper delay and to reduce the total number of environmental cases which also considered as a crime.

Advantages of using the rule of *Rylands v Fletcher* compare to other tort for example in the law of nuisance, to establish the proof of actual damage needed or required. Normally torts of nuisance are failed because most of individual do not have the time to involve in litigation and fear of confrontations. The fees are costly and only few people knew or concern to individual right. Moreover, they are afraid to show proof. It is obvious the best to fight under environmental cases is *Rylands v Fletcher* because of strict liability and with the new modification that just establish after the study.

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248 Dr Mohd Bakri Ishak, Common Law Approaches For Environmental Management In Malaysia And Its Application In The Developed Jurisdiction,
In the law of trespass, the rule never had been properly developed in environmental cases. The rule generally link between the directness of an act and impossible to establish. The rule usually got direct interferes with propriety right without lawful excuse.

For the next type of tort, is law of negligence, which is dealing with wrong way of carrying out activities. In this type of tort there must be some sort of fault of the defendant. Negligence is suitable, if law of nuisance and trespass is unavailable. In order to use law of negligence, it must establish duty to care who is owe by defendant to plaintiff; defendant had breech the duty and foreseeable damage cause by the breech. Therefore it shows that to delegate the duty is very wide. The scope of this non-delegable duty category is wider than that covered by the rule in *Rylands v Fletcher* in that it extends to dangerous activities as well as dangerous substances and further there is no limitation to 'non-natural' use of land. The majority's approach possesses not inconsiderable capacity for uncertainty, especially if the imposition or otherwise of the non-delegable duty is to be largely dependent upon the actual facts of each individual case. That is the reason why this non delegable duty is not one of the ingredients that could be adds to the rule.

**8.2 Finding**

Finding that could be set up in this study is as
8.2.1 Objective one

The development of the environmental cases here in Malaysia is very convincing. The escalating figure of cases apparently due to the Malaysian economic blooming that supply rising number of projects under construction industry. Hopefully with the new additional requirements to the rule of *Rylands v Fletcher* the judges, lawyers, legal skills and proficiency would perform the theory of strict liability in the expanding figure of environmental cases in order to guarantee that those cases are appropriately developed in court without any offensive interruption and if possible to lessen the entire number of environmental case which are also deliberate as a crime.

8.2.2 Objective two

The applicability of the rule of *Rylands v Fletcher* in environmental cases in Malaysian Construction Industry can only be appropriate with additional ingredients. The rule of *Rylands v Fletcher* independently cannot survive by its own. Recognition of foreseeability of damage as a fundamental component of liability in the recuperation of damages under the rule of *Rylands v Fletcher* might help in solving the problems of environmental cases in the construction industry.

8.3 Recommendation

Recommendations are given to environmental practitioners should use common law methodology in making any claim on compensation associated with environmental damage. Indeed, it is also recommended that judges and lawyers in Malaysia to advance
their legal ability and knowledge in environmental law in order to guarantee that those cases are well developed in court without any inappropriate interruption and it may lessen the total number of environmental cases.

Moreover, it is fully recommended that the judges in this country should favor to perform the principle of strict liability as stated in *Ryland v Fletcher* as discussed above. As a result, by using this approach polluters will certainly be accountable for all damages as mentioned by Blackburn J in *Ryland v Fletcher*.

This study recommended that in Malaysia the government should in particular set up a special court dealing with environmental cases, thus, it can cut time constrain and at the same time the judges may specifically focus on environmental issues.
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The Harvard Environmental Law Review 2000