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Origins of Strict Liability for Abnormally Dangerous Activities in the United States, *Rylands v. Fletcher* and a General Clause of Strict Liability in the UK

Maria Lubomira Kubica

***Abstract*—**The paper reveals the birth and evolution of the British precedent *Rylands v. Fletcher* that, once adopted on the other side of the Ocean (in United States), gave rise to a general clause of liability for abnormally dangerous activities recognized by the §20 of the American Restatements of the Law Third, Liability for Physical and Emotional Harm. The main goal of the paper was to analyze the development of the legal doctrine and of the case law posterior to the precedent together with the intent of the British judicature to leapfrog from the traditional rule contained in *Rylands v. Fletcher* to a general clause similar to that introduced in the United States and recently also on the European level. As it is well known, within the scope of tort law two different initiatives compete with the aim of harmonizing the European laws: European Group on Tort Law with its Principles of European Tort Law (hereinafter PETL) in which article 5:101 sets forth a general clause for strict liability for abnormally dangerous activities and Study Group on European Civil Code with its Common Frame of Reference (CFR) which promotes rather ad hoc model of listing out determined cases of strict liability. Very narrow application scope of the art. 5:101 PETL, restricted only to abnormally dangerous activities, stays in opposition to very broad spectrum of strict liability cases governed by the CFR. The former is a perfect example of a general clause that offers a minimum and basic standard, possibly acceptable also in those countries in which, like in the United Kingdom, this regime of liability is completely marginalized.

***Keywords*—**Dangerous activities, general clause, risk, strict liability.

I. Introduction

ACCORDING to the historical interpretation of American Tort Law, the 19th century and the beginning of the 20th are dominated by fault liability, the latter having had its ground in the pro-industrial doctrine of *laissez-fair*. The birth and the following popularization of strict liability for abnormally dangerous activities in the United States, and, as a consequence of it, formulation of the general clause set up in § 20 of the Restatement of Law, Third, Torts [1] considered almost unanimously as related to the reception of the well-known Rylands v. Fletcher [1, Com. to the § 20, let. d,]. Although the decision was adopted in Great Britain as early as in the 60s of the 19th century (1868), its reception on the New Continent, according to the American traditional legal doctrine, didn't take place until the middle of the 20th century. This interpretation is the opinion of the majority of American scholars [2]-[6]. There are some voices, however, that point out the first set of precedent's rejections was nothing more than an instrument in the hands of those of the *époque* who, clearly against strict liability, in order to subsidize emerging industry manipulated facts using them as a strong argument in favor of the historical domination of fault principle [7]. In between supporters of negligence theory, however, one could find also those who didn't fear to recognize at least some areas of strict liability. The most significant is Oliver Wendell HOLMES, a prominent member of the American Judiciary, who as early as 1873 acknowledged imposition of strict liability in cases of *extra-hazardous employments,* as recognized in *Rylands v. Fletcher* [8]. Fruit of a long evolution, the rule embodied in [1, § 20] has its antecedents in [101, §519-520] and [100, §519-520). The original denomination "ultra-hazardous activities" used by the former, and afterwards substituted in the *Restatement Second of Tort* by "abnormally dangerous activities", has a clear connection with the formulation of rule elaborated in his time by Oliver Wendell Holmes [1, The Reporters Note to the com. d].

Maria Lubomira Kubica is with the Universidad Pablo de Olavide, Spain (e-mail: mlkub1@upo.es).

II. Rylands v. Fletcher (1868) [9]

John Rylands was a successful entrepreneur [21, pp. 214-216], [22] who, in order to supply his mill with steam from extra water sources, employed independent constructors to build a reservoir (There is an abundant literature about the *Rylands v. Fletcher* reception in both, United Kingdom and United States, as well as about its later interpretation [7], [10]-[26]). He did not know, however, that before, beneath the place he selected for the construction, existed a mine. Its abandoned passages were connecting with an adjoining active mine, leased by Thomas Fletcher [27]. In 1860 water escaped from the reservoir through an inactive shaft, penetrating interconnected mines and forcing Fletcher to withdraw from his business permanently [21, pp. 241-242].

Fletcher proceeded only against Rylands. The case was originally referred to an arbitrator. During the process, however, the arbitrator sought the opinion of the *Court of Exchequer* [21, p.243]. He found negligent independent contractors and not the defendant. The former, however, had not been sued by Fletcher. It was on this base that his doubt if the plaintiff was entitled to recover arose. The first instance court, after having analyzed if the three possibly proceeding in those instances Torts could apply (here trespass, negligence and nuisance), by a majority of 2 to 1, did not find for the plaintiff [28]. The party in charge of the construction of the reservoir, contracted by Rylands was negligent, but the

English Common Law rules binding at that time imposed liability on the employer only for the negligence of his employees. As a consequence, Rylands could not be held liable for the fault of the independent contractors. (It was eleven years later when the precedent Bower v. Peate sustained for the first time that in some circumstances the employer can be held liable also for the negligence of those contracted independently [29]). The reason why Fletcher didn't sue the contractors jointly with Rylands is unknown [27]. (For more details on the old rule of employers' liability in the United States see [30, p. 480]. The same rule applies nowadays, however there has been many exceptions established, in between which "activities with a danger inherent" is one of them. See between others [31, p. 666.]) The dissent from the court's decision mentioned above belongs to Baron Bramwell, who as the only one from the members of the court found for the plaintiff on the basis of both, trespass and nuisance, declaring no negligence needed to be prove in both of the cases [9, p. 744.]. Fletcher appealed successfully to the *Exchequer Chamber*. The court entered judgment in his favor, sustaining Baron Bramwell's veto from the *Court of Exchequer*. In the ruling Justice Blackburn pronounced an expansive basis for liability, beyond limits established in trespass, negligence and nuisance:

> *We think that the rule of law is that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff´s default or, perhaps, that the escape was a consequence of* vis mayor*, or the act of God* [32].

Setting forth basis for what later was to be called in the United States strict liability for abnormally dangerous activities, Blackburn distinguished between what is "naturally there [on the land]", with the intention to exclude from the application of the rule agriculture and mining [32, p. 280]. Without making reference to any of the three torts mentioned above, Blackburn created an original rule, deducing it from the already existing types of strict liability [19], [33]. See, however, [17, pp. 557-571], and [34] for whom the Blackburn's rule constitutes the extension only of the tort of nuisance:

> *The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or his mine is flooded by the water of his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or his habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works is damnified without any fault on his own; and it seems but reasonable and just that the neighbour that has brought something on his own property, which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows it's mischievous if it gets on his neighbour's should be obliged to make good to the damage which ensues if he not succeed in confining to his own property. But for his act in bringing it there no mischief could have occurred, and it seems but just that he should at his peril keep it there so no mischief may occurred, or answer for the natural or anticipated consequences. And upon authority, this we think is established to be the law whether the things so brought be beasts, or water, or filth, or stenches* [32, p. 280]

The case was appealed. The House of Lords sustained the ruling of the Court of Exchequer. Positions of two distinguished members of the British highest court deserve special attention; the same two which later gave reason for ever so many complications in the subsequent interpretation of the case: Lord Cranworth's and Lord Cairns's. The former gave his support to the rule established by Justice Blackburn while the latter, having also ruled in favor of Fletcher, established his own standard. According to the rule introduced by Cranworth:

> *In considering whether a Defendant is liable to a Plaintiff for damage which Plaintiff may sustain, the question in general is not whether the Defendant has acted with due care and caution, but whether his act has occasioned the damage… The doctrine is founded on good sense. For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound* sic uti suo ut non laedat alienum [35].

Cairns relied on narrower grounds than the broad statement of Cranworth [29, p. 545], distinguishing between "non-natural" and "natural use of the land" (the latter has been referred to as one which for any purpose . . . might in the ordinary course of the enjoyment of the land be used [35]"). As a consequence, harm caused by the "non-natural use of the land", as an exception from the general principle of fault liability, has been made subject to strict liability [1, Com. to the § 20, let. d], [19, p. 92]:

> *On the other hand, if the Defendants not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural conditions was not in or upon it, for the purpose of introducing water either above or below ground…, - and if in consequence of their doing so… the water came to escape and to pass off into the close of the Plaintiff, then it appears to me that that which the Defendants were doing they were doing at their own peril; and, if in the course of their doing it, the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the Plaintiff and injuring the Plaintiff, then for the consequence of that, in my opinion, the Defendants would be liable* [35].

Under "non-natural use of the land" Cairns understood that this describes a use that causes harm with higher probability than a use that could be expected in the course of the normal enjoyment of the land [7, p. 338] See also [10]-[26]. When applying the term to the case, Cairns, instead of placing emphasis on the water escape, underlined the abnormal and inappropriate character of the reservoir constructed by the

defendant in a typical mining area [29, p. 545]. It is questionable whether the non-natural use of land constituted a new standard introduced by Lord Cairns, or is just a simple paraphrase of the expression "what is not there [on the land] naturally", used by Lord Blackburn [19, p. 87]. The truth is that none of those expressions was used by Lord Cranworth.

Different designation that were given later to the "non-natural use of the land" are due not only to comparative study of the two positions mentioned above, here Blackburn-Cranworth one and the one of Cairns, but also to the ambiguity of the term introduced by the latter, and to the subsequent interpretation of to *Rylands v. Fletcher* by British case-law [1]. As accurately pointed out by the legal doctrine, British courts accepted the distinction between "natural" and "non-natural use of land" as part of the law; at the same time, however, they faced real problems with determining what natural and non-natural use meant [23, p. 391]. As a consequence, at least three different meanings can be found for the latter [1, Comment to the § 20, let. d], here:

1. one that departs from a state of nature or, in other words, the one that results from the fact that the defendant has introduced artificially in his land a new and dangerous agent (See NEWARK relating to Lord Cairns formula, which, he believed, was not an additional requirement to the one established by Blackuburn J. [17, p. 560]. For the "artificial" as synonymous to "non-natural", and "primitive" to "natural" see [36]),
2. one that is uncommon or unusual (This alternative criterion is deemed to be introduced by Lord Moulton in *Rickards v. Lothian*. According to it rather different meaning is given to the "natural use of land", it being something ordinary and usual, even if it is artificial. See [37]),
3. one that is unreasonable or inappropriate in light of the local circumstances. From this concept the assumption was made that no objective test exists according to which it could be determined which use of land could be considered as non-natural one. The classification of the use as natural or non-natural will depend on time and place in which the distinction is employed (In this sense [33, p. 378], referring to Lord Porter in [36, at 176] and [37, p. 615]. This meaning seems to have been confirmed in [38]).

Finally, the British Common Law system found itself immersed in another interpretational problem as to what could be consider as "non-natural use of the land". It was pointed out that the distinction "non-natural"/"natural" use of land has been compared in some occasions with the one of "dangerous"/ "non-dangerous" things. According to fleming, objects that fall under the *Rylands v. Fletcher* rule cannot be limited to "inherently dangerous things", to which, instead of strict liability, a very stringent duty of care applies [33 p. 380], [37, p. 609], [23, p. 386]. As a consequence, two requirements are imposed on the former: 1. for it to be likely to escape, and 2. in doing so, to entail exceptional peril to others (See analysis by [23, pp. 382-385]). As an example, water, gas and electricity under *Rylands v. Fletcher* would normally qualify as perfectly usual objects. For strict liability to apply, all of them will have to attach to an extraordinary use of land, and, as such, should be considered as dangerous *in the circumstances* (In this sense [33, p. 382], accepting existing *status quo*. See, however, [24, p. 429] for whom Blackburn J's idea was to "escape from the straightjacket of nuisance and to blossom into a true doctrine of strict liability for dangerous things").

It can be affirmed also that the meaning given to non-natural use of the land and, consequently, the global interpretation given to the precedent in the United Kingdom, on the one hand, and in the United States, on the other, started to evolve in different directions. In both countries, however, the importance of the complex socio-economic context in which the precedent had been born, has been underlined and a stress put on it as a factor which, not only supplied the discussion in several theories that emerged to explain the precedent itself, but also as the one that answers the question on why it was finally adopted in the United States and practically sentenced to disuse in the United Kingdom [37, p. 609]. On the topic see also [7], [22], [13, pp. 298-326], [15, pp. 266-292], [41], [42], [33, p. 376]). Therefore, while in North America the "non-natural use of land" evolved in what is now commonly termed "abnormally dangerous activities", an important determinant of the general clause established in the Restatements broad interpretation given at the beginning to *Rylands v. Fletcher* by the British judiciary yet as time passed the interpretation narrowed [37, pp. 608-609]. According to the British interpretation mentioned above, the defendant was held liable when causing a damage to the other with a thing or activity unduly dangerous and inappropriate to the place in which it is maintained, in the light of the character of that place and its surroundings [29, p.548]. See also [20, p. 134-149].

III. Rylands v. Fletcher and Feasibility of a General Clause in the United Kingdom

A. Rickards v. Lothian

Chronological review of the most important landmark cases that follow *Fletcher v. Ryland* starts with *Rickards v. Lothian* [43] from 1913. The claimant ran a business on the second floor of a building owned by the defendant, who was leasing different parts of it to business tenants. The outflow from a wash-basin on the top floor of premises was maliciously blocked by a third party and the tap left running, with the result that damage was caused to claimant's stock on a floor below. The latter brought an action based on *Rylands v. Fletcher* but the precedent was inapplicable because the provision of a domestic water supply to the premises was held to be a wholly ordinary use of the land. *Rickards* is well known above all for the controversy it caused as to the exact scope of the "natural use of land" to which of strict liability is inapplicable. It was discussed if the latter covered only the natural accumulation of water and the like or extended also to artificial accumulation for the purpose of "ordinary" or "natural" use [33, p. 377-378]. As a consequence, the

interpretation given to "non-natural use of land" by *Rickards* was:

> "*It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community* [43, *at 280 per* Lord Moulton]."

In this way, Lord Moulton's rule narrowed the range of activities to which liability from *Rylands v. Fletcher* applied [33, p. 378]. And if after *Rickards v. Lothian* there was still any hope and enthusiasm for development of a general theory of strict liability for ultra-hazardous activities, it soon died away with the subsequent judgments of House of Lords.

B. Read v. Lyons

In the year 1947, *Read v. J. Lyons & Co. Ltd.* [36] was decided, in which the rule from *Rylands v. Fletcher was* restricted only to the cases in which *dangerous substances escape from the land under the defendant's control*. In the case, the plaintiff employed by the Ministry of Supply during war as an inspector of munitions, was injured as a consequence of the explosion in a munitions factory owned by the defendant. No ground for liability was been found based on *Rylands v. Fletcher*. The court decided the harm didn't result from any escape, because when the accident occurred the victim was inside the defendant's premises. In this way the argument that the escape could mean not only escape from the defendant's land but also escape of a thing from the defendant's control, ever since has been rejected by the court, putting an end to any extension of the rule through this gate [37, p. 612].

Lord Macmillan held also the case did not fall under the rule in *Rylands v. Fletcher* since the latter applied only to mutual duties of adjoining landowners [36, at 173, agreed to by Lord Uthwatt, at 186] and had nothing to do with personal injuries [36, at 173], to which the rule of negligence applied [36, at 170-171]. And, finally, while *Read v. J. Lyons & Co.* was being decided in the Court of Appeal, Lord Justice Scott declared that the liability for ultra-hazardous activities contained in §§ 519-520 of the American First Restatement of Law was not in conformity with English law [36, at 255ff.]. He suggested the Coal Mines and Factories Acts were a clear evidence of absence of a general principle of strict liability in British *Common Law* and imposed an additional restriction to the rule according to which *Rylands v. Fletcher* did not apply to accidents occurring inside the defendant's land or premises. Any extension of the rule, in his opinion, should be subject to legislative power, and not to judicature [46]. Two years later the very same idea seems to have been expressed by Lord Macmillan, again in *Read v. Lyons*, this time in the House of Lords when he affirmed:

> *It was suggested that some operations are so intrinsically dangerous that no degree of care however scrupulous can prevent the occurrence of accidents and that those who choose for their own ends to carry on such operations ought to be held to do so at their peril. If this were so, many industries would have a serious liability imposed on them. Should it be thought that this is a reasonable liability to impose in the public interest it is for Parliament so to enact. In my opinion it is not the present law of England* [36, at 172-173].

The cited statement gave rise to the conclusion that in light of the rapid increase in the social-welfare legislation, the British judiciary considered itself inappropriate to augment the scope of legal protection, which as a consequence was left to Parliament [47], [48]. At this point of the precedent's evolution it can be said that very few, if any, points in the long-lasting, vague and complex discussion over the controversial *Rylands v. Fletcher* were clear. No agreement existed on why the rule was developed, and what was the formula, for the collectively deciding House of Lord also at this occasion did not speak with one voice. Finally, divergent opinions were born as to what the author of each formulation (Blackburn, Cairns, Cranworth) meant and what the decision was aimed for. Since the precedent was decided until the famous *Read v. Lyons*, the position of the English judiciary reminds very much the one of Alice in Wonderland when asking the Cheshire Cat:

> *"Would you tell me, please, which way I ought to walk from here?"*
>
> *"That depends good deal on where you want to get to", said the Cat.*
>
> *"I don't much care where-" said Alice.*
>
> *"Then it doesn't matter which way you walk", said the Cat.*
>
> *so long as I get Somewhere," Alice added as an explanation.*
>
> *"Oh, you're sure to do that," said the Cat, "if you only walk long enough* [49]."

As a consequence, *Read v. Lyons* passed to the history of British jurisprudence as the one through which the apostles of the fault principle won their most decisive battle [37, p. 625]. It did receive, however, also some criticism. According to John Fleming, for instance, "the most damaging effect of the decision in *Read v. Lyons* was that it prematurely stunted the development of a general theory of strict liability for ultra-hazardous activities [33, p. 341]." There is a particular point that should be noted at this stage. Until the decision in *LMS International*, [50] the common opinion was that since *Read v. Lyons* English law "stopped walking", in part probably because it didn't have it clear where exactly to "get to". It was affirmed by a majority of scholars [16, p. 662] and Lord Hoffman in *Transco* that almost fifty years had passed since *Rylands v. Fletcher* in silence, without any precedent dealing with the liability based upon the rule having been decided either by the House of Lords or by the Privy Council. As we will see later, however, the assumption appeared to be erroneous. A closer look at the cases from the period mentioned above discloses several precedents based on *Rylands v. Fletcher* [51]-[54], some of them successful and very relevant. To this effect, a comment was made by Justice Coulson in *LMS International*, according to which Lord Hoffman and counsel in *Transco* must have been confining

their research to water cases rather than to *Rylands* cases in general, missing in that way some rulings and erroneously stating there were not any. Nevertheless, it is also fair to say that the discovery of a very few decisions over period of fifty years, is not such a significant number of cases as would drastically change the perception of the precedent's lack of authority. Finally, for the purpose of this research, it was considered as more desirable to resign at this point from a strictly chronological exposition, with the approval date of each precedent as a determining factor, in favor of the, also chronological, but more coherent "impact approach". Thus, the relevant cases confirmed by *LMS International Ltd,* ignored before the latter has been decided, will be presented at the end of this chapter, together with the last landmark case which put light on them.

As to the scarce use which was confined to *Rylands v. Fletcher* over the period between 1940s and 1990s, it is not clear as to what factors the situation was due. In between the most commonly cited, one can find complexity, uncertainty provoked by lack of clarity of the rule, expansion of both the law of nuisance and the law of negligence and, finally, growing importance of the insurance of premises, which became more common not only for commercial, but also private owners [16, p. 662].

C. Cambridge Water

The apparent silence over *Rylands v. Fletcher* was broken for the first time in the year 1994, by two landmark cases. And as history likes to repeat itself, again different use was found for the precedent in different Common Law systems, although under the common denominator of simplifying existing law. In Great Britain, *Cambridge Water* [55] was decided, declaring *Rylands v. Fletcher* to be a branch of nuisance law. In exchange, the Australian Highest Court, in *Burnie Port Authority v. General Jones Pty Ltd.* [56] announced the rule had been absorbed by the law of negligence.

As to *Cambridge Water* [55], the court imposed a limitation based on "controlling mechanism [37, p. 613]" to constrain an extensive interpretation of the rule contained in *Rylands v. Fletcher*. The defendant, involved in the process of tanning leathers, kept on his land during long period of time large quantities of chemical substances. The solvents used by him seeped through the tannery floor to the soil below, through it to the water, reaching in the end the plaintiff's borehole a mile away from where water was being extracted for drinking purposes. The latter got polluted to an extent that it failed to satisfy minimum health requirements, forcing, as a consequence, the plaintiff to find alternative water supplies. The defendant was sued on alternative bases under negligence, nuisance and *Rylands v. Fletcher*. The Court of Appeal, after allowing the appeal on bases of nuisance and *Rylands v. Fletcher*, declared for plaintiff in respect of nuisance and rejected the claim under *Rylands v. Fletcher*. In the House of Lords both bases for liability were dismissed. In respect of *Rylands v. Fletcher*, the appeal has been declined on the base that the harm suffered as a result of the escape was not foreseeable [55, at 79].

Although again in *Cambridge Water* the question whether the rule in *Rylands v. Fletcher* should:

> *…be treated as a developing principle of strict liability for damage caused by ultra-hazardous operations, on the basis of which persons conducting such operations may properly be held strictly liable for the extraordinary risk to others involved in such operations* [55, at 306].

has been posed, the House of Lord declared finally that the liability adopted in *Rylands v. Fletcher* constitutes a branch of nuisance. On this matter, Lord GOFF stated: "it would … lead to a more coherent body of common law principle if the rule [in *Rylands v. Fletcher*] were to be regarded essentially as an extension of the law of nuisance" [55, at 299, 304 and 306].

The principal difference between one and the other was to be found in the fact that *Rylands v. Fletcher* applied to isolated cases of harm, while the latter referred rather to ongoing harm. Lord Goff's statement rests in large part on Newark's well-known article, cited in the decision at least five times, in which the author defends the thesis that the rule in *Rylands v. Fletcher* derives from the law of private nuisance (In this sense, he points out that Blackburn in his judgment refers to one previous nuisance case, see [59]). It was three years later in [60] where the doctrine that nuisance is a tort against land had been established. See [1, Comment to the § 20, let. d]. Accepting this point of view Lord Goff established the doctrine according to which the defendant in cases based on *Rylands v. Fletcher* is normally a land occupier involved in activities related to that land, meanwhile plaintiff is the one who suffers harm in neighboring land. To this effect, [61] has been cited as the authority that established the foreseeability requirement for nuisance (the case relied on public nuisance precisely) [55, at 300-301]. For comment on the foreseeability requirement, see also [62]. Given the origin of the rule in *Rylands v. Fletcher* and the settled requirement of foreseeability for nuisance, Lord Goff found it necessary to extend forseeability also to the application of *Rylands v. Fletcher*. As a consequence, in spite of the fact the court found a typical example of the non-natural use of the land, no liability arose because the damage caused (contamination resulted from the leakage) was unforeseeable [38, at 32(c) and 64]. In this way, an extra requirement in the form of "foreseeability" (also called *principle of remoteness of the damage*) has been set (see the critic of the foreseeability requirement in [63]), satisfaction of which ever since is required in British law together with three others: 1.non-natural use of land, 2 accumulation and 3. escape of the thing from the defendant's land [55, at 309] (Compare with the "common usage" exception to the rule from the [1, § 20, b, 2] and from [64, art. 5:101, 2, b]). Therefore, for strict liability to apply fulfillment of the four conditions mentioned above is compulsory.

It was declared also by Lord Goff, that the mere fact that the use is common in the tanning industry *cannot be enough* to bring it within the scope of the "natural use of land", which excludes the application of *Rylands v. Fletcher* [55, at 309]. The same was said for the assumption that because Sawston was a small industrial community, tanning should be

considered worthy of support and encouragement. This declaration seems to be in accordance with [1, §20], which retreated from the previous formulation of the *Restatement Second,* according to which in determining whether the activity is abnormally dangerous the extent to which its value to the community is outweighed by its dangerous was to be considered. See [65]. As stated in [1, com. k to § 20] "…the point that the activity provides substantial value or utility is of little direct relevance to the question whether the activity should properly bear strict liability. To be sure, activities that are common for purposes of Subsection (b)(2) may tend to be activities that produce substantial value. Accordingly, because of their commonness, many valuable activities will be properly found not to be abnormally dangerous. Even so, it is their commonness rather than their value that directly pertains to the strict-liability issue.". In this way, the exception in shape of "use proper for the general benefit of the community", exempting from liability under the rule in *Rylands v. Fletcher* as established in *Rickards v. Lothian,* has been deemed not valid and the scope of the precedent broadened [55, at 305].

As to reasons why the development of a general clause, similar to that in the United States, was denied in *Cambridge Water*, Lord Goff decided it was, first of all, incompatible with the decision in *Read v. Lyons & Co Ltd.* Meanwhile according to the latter the rule from *Rylands v. Fletcher* applied only to injury caused by an escape from the land under the defendant's control, the North-American rule applied to all damage resulting from ultra hazardous operations [66]. Secondly, a reference was made to the Law Commission's Report on Civil Liability for Dangerous Things and Activities, where doubt was expressed as to the correct application of any general clause of strict liability for "especially dangerous" or "ultra hazardous" activities given all possible uncertainties and practical difficulties attached to so generally a defined concept [55, at 305]. As a consequence, basing its decision on prudential reasons, the House of Lords preferred not to enter the territory previously abandoned by the legislative power [55, at 305]. (In favor of this solution also [67]. For a critic of the strict liability being imposed in each case by *ad hoc* legislation see [68]). Finally, it was affirmed that strict liability for activities with high risk inherent, as a general rule, should be imposed by the Parliament rather than by courts. To the effect, legislation was considered to be an apter instrument for identification of relevant activities and for laying down precise criteria for the incidence and scope of such liability [38, at 61]. (A summary of the case can be found in [69]. See also notes by [10, pp. 273-276] and [11, pp. 388-392]).

D. Transco plc v. Stockport Metropolitan Borough Council

In 2003 Transco plc (formerly: British Gas) had sued the council responsible for the maintenance of the pipe work supplying water to a block of flats for repairs of £93,681.55 underneath one of its pipes in Brinnington giving rise to *Transco plc v. Stockport Metropolitan Borough Council* [38]. The case concerned the collapse of a utility company's embankment due to a gradual leakage from the water supply serving a tower block of 66 flats. As a result, the claimant's gas pipe ran collapsed, the latter being required to undertake urgent repairs in order to ensure that the gas pipe would not crack. The first instance court decided for claimant (Transco), but the claim was dismissed on both appeals on the ground that no extraordinary or unusual use of land occurred since the water supplies were domestic [45, p. 686], [70, p. 11]. As a consequence, the House of Lords reached the conclusion that the provision of water to a block of flats, by means of a connecting pipe from the water main, though capable of causing damage in the event of an escape, did not amount to the creation of a special hazard constituting an extraordinary use of land.

The case opened the opportunity to decide upon the future of *Rylands v. Fletcher*. Having three choices of "where to get", namely 1. to follow the path chosen by the Australian Supreme Court in *Burnie and Port* and to put an end to the existence of the independent rule; 2. to extend the rule to a general principle of strict liability for abnormally dangerous substances or activities or; 3. to confirm the existing *status quo* trying at the same time to give to the components of the rule as much clarity as possible, the House of Lords chose the third option. To justify the decision of not absorbing the precedent into the negligence principle, the court stated:

1. There is a category of case, however small, in which it is just to impose liability without fault. An example is Cambridge Water if the damage had been foreseeable.
2. Strict liabilities have been created by statute against the backdrop of the existing common law. Examples are section 209 of the Water Industry Act 1991, which imposes strict liability on water undertakers, and Schedule 2 to the Reservoirs Act 1975, which assumes strict liability in the circumstances of *Rylands v. Fletcher*.
3. "Stop-go" is generally a bad approach to legal development. The House of Lords, therefore, preferred to follow the lead taken in Cambridge Water.
4. Although replacing Rylands v. Fletcher with fault liability would approximate the law of England and Wales with the one of Scotland (which has not adopted the rule), it would widen the gap between it and the law in France and Germany. In both of those countries, strict liability regimes exist for disputes involving land [38, at 6].

It seems appropriate in this context to draw attention of the reader to the following matter. Although the House of Lords preferred to abstain from any significant step-forward as to the strict liability, and the traditional approach to the rule was sustained in the case, it is also noteworthy that for the first time [93] emphasis was made on the European laws' convergence, which thereby seemed to be considered as an important factor to have in mind when stating the law. (On the change in English approach towards harmonization of European laws see [71]). As to the reference made by their Lordships to strict liability regimes for disputes involving land in France and in Germany, most of the European civil codes include a norm on the liability for the collapse of buildings. In this sense, strict liability was introduced directly by art. 1386 of Belgian Civil Code, art. 2053 of Italian Civil Code, art.

1386 of French Civil Code, art. 58 of Swiss *Obligationenrecht* and art. 434 of Polish Civil Code. (For more details see, [72]). On liability for dangerous buildings and land in European jurisdictions see also [73]. Apart from the narrowly formulated strict liability for the ruin of a building, the French Civil Code includes also famous art. 1384. A very broad interpretation given to the latter by the court led to a general clause of strict liability for the guardian of a thing for its active role in causing damage. The rule does not require neither defectiveness nor dangerousness of the thing, and the only allowed defences are the absence of an active role in the causation, the defence of not being the *guardian* or the one of an external, unexpected and uncontrollable cause [39, pp. 130 and 132], [40, pp. 49-56]. Although whenever the thing was stationary at the time of accident, or independently of being in movement or not, did not come into the contact with the victim, an extra condition was required by the court, requiring the thing standing in an "abnormal position" or "behaving abnormally". See [39, p. 129]. It is also noteworthy, that founded on the art. 1382 of the French Civil Code, a judge-made strict liability for nuisance has been elaborated, according to which the owner or the occupier of a land is held liable for all use of land or activities carried out on land when they constitute an abnormal degree of inconvenience for the neighbors (so called *trouble de voisinage*) [39, p. 134], [40, pp. 392-393].

As to the general clause, on the European level liability for dangerous (business) activities can be found in the art. 2050 of the Italian *Codice Civile* and in the art. 493 § 2 of the Portuguese Civil Code [74, p.404]. Both of the provisions are founded on a presumption of fault, nevertheless the duty of care to take precautionary measures has been interpreted so strictly in both cases that the defendant can escape liability only when the harm has its cause in an act of the victim or a third party, or in another cause beyond his control. The risk determining the activity as dangerous can result from the magnitude of harm caused by the accident or from the fact that the occurrence of the accident is very likely [74, p. 404] and [75, pp. 212-213]. Other exponents of risk based liability can be found in the case law of the Austrian *Oberste Gerichtshof* (OGH), which through analogous application of existing rules developed the "*Gefährliche Betrieb*" (dangerous operations) doctrine. The main principle of the doctrine has been well summarized in the OGH's decision from 1973: "According to the case-law, the specific statutory extended liability of undertakings in respect of specific operational risks may in principle be analogously extended to all dangerous operations; no one who operates such an undertaking may transfer the risk that that type of operation may cause damage to the body, life, or property of members of the public, but must compensate for such harm even where no fault can be shown on his part or that of his employees" [78]. (English translation by [73, p. 384, no. 353]). Austria seems to be one of the fewest, together with Denmark and Finland, Members of the European Union which permits, though cautiously, the analogous application of strict liabilities by courts. In rest of the countries courts are not allowed to proclaim strict liabilities in case of luck of any specific legal regulation. See [67, pp. 630-631], [76], [77] and [74, p.403]. An attempt to introduce a general clause of strict liability for ultra hazardous activities has been made also in Switzerland. Swiss Codification Commission under presidency of Prof. Pierre Widmer introduced a provision similar to this from the American Restatement in the art. 50 of the Swiss Draft Reform Bill on the Law of Non-Contractual Liability. According to the latter: "1) One who carries on a particularly dangerous activity for risk is liable for compensation of any damage resulting from the realization of the characteristic risk inherent to this activity, even if such activity is tolerated by legal order. 2) An activity is deemed to be particularly dangerous if, by its nature or by the nature of substances, instruments or energies used thereto, it is prone to cause frequent or serious damage, notwithstanding all care which can be expected from a person specialized in this field; such assumption is justified, in particular, where another statute already provides a special liability for comparable risk. 3) Special provisions governing the liability for a specific characteristic risk are reserved." (English translation by Pierre Widmer [79]). 21st of January of 2009, however, the Draft on the Reform and Unification of Swiss Tort Law has been finally rejected by the Swiss *Conseil federal*. (More information on the project is available on the website of Swiss Department of Justice and Police, see [80]. See also [81]). And, finally, a general clause option has been chosen likewise by the European Group on Tort Law that in the art. 5:501 of the *Principles of European Tort Law* introduces literally exactly the same wording of the liability for abnormally dangerous activities as the one foreseen in the §20 of the American Restatement of the Law (Third).

As to the extension of the rule to the general clause of strict liability for abnormally dangerous things or activities, the *Cambridge Water* decision was sustained. Imposition of strict liability in respect of operations of high risk has been left for the Parliament [38, at 7 and 41 per Lord Bingham of Cornhill and Lord Hoffmann, respectively]. There is an interesting remark to be made at this point, however. In spite of the clear negative as to the extension of the rule from *Rylands v. Fletcher* to the general clause mentioned above, some consistencies with the latter can be found. It is precisely in *Transco* [38, at 64] where, through Lord Moulton's rule from *Rickards v. Lothian* and some other language of Lord Goff in *Cambridge Water*, the mischief or danger test has been subtly introduced into the notion of the "non-natural use of the land" [38, at 10]. Whichever motive guided the House of Lords' decision, be it the one of not completely closing the gate for the future, or be it congruency between the case-law and statutes' rationale, it declared:

> *Bearing in mind the historical origin of the rule, and also that its effect is to impose liability in the absence of negligence for an isolated occurrence, I do think the mischief or danger test should be at all easily satisfied. It must be shown that the defendant has done something which he recognized, or judged by the standards appropriate at the relevant place and time, he ought reasonably to have recognized, as giving rise to an*

exceptionally high risk of danger or mischief if there should be an escape, however unlikely an escape may have been thought to be [38, at 10 *per* Lord Bingham].

...It is thus the creation of a recognizable risk to other landowners which is an essential constituent of the tort and the liability of the defendant. But once such a risk has been created, the liability for the foreseeable consequences of failure to control and confine it is strict [38, at 64 *per* Lord Hobhouse].

Finally, much time has been dedicated to the revision of the term "non-natural user of the land". Meanwhile the risk/danger factor has been accepted as a denominator of the "non-natural user" almost unanimously by all Lords [38, *at 11 per* Lord Bingham, at 44 *per* Lord Hoffmann, at 64 *per* Lord Hobhouse and *at 103 per* Lord Walker] in *Transco*, three different standards have been established as to the concept globally considered.

As first, departing from the broad statement of Balckburn J and of Lord Cranworth, Lord Bingham declared that the requirement of Blackburn J that the thing brought on to the defendant's land should be something "not naturally there" shouldn't be interpreted as excluding anything that has reached the land otherwise than through operation of the laws of nature [38, at 11]. After making reference to Lord Moulton's statement from *Rickards v. Lothian* ("it must be some special use bringing with it increased danger to others") he affirmed that "ordinary", and, conversely, "extraordinary" and "unusual" were preferable terms to "natural" and "non-natural" (user of land) [38, at 10 *per* Lord Bingham]. This meaning given to the "natural use" would be consistent with "common usage" exclusion of strict liability for abnormally dangerous activities as established in [1, §20] and in [64, art. 5:101]. See also [1, com. J to the §20]. On the other hand, meaning given to the "non-natural use of land" by Lord Bingham appears to be equivalent to "the one that creates an increased risk". As a result, the rule elaborated by Lord Binghan took the following shape:

"An occupier of the land who can show that another occupier of land has brought or kept on his land an exceptionally dangerous or mischievous thing in extraordinary or unusual circumstances is in my opinion entitled to recover compensation from that occupier for any damage caused to his property interest by the escape of that thing, subject to defences of Act of God or of a stranger, without the need to prove negligence" [38, at 11].

It was argued by some that the "exceptional risk" as introduced by Lord Bingham has been set as a condition separate from the "non-natural use of land", even though not completely isolated from the latter. Accordingly, since the mischief or danger test has been attached by his Lordship to the escape of the thing, the "extraordinary and unusual" use isolated from the risk factor will mean "very uncommon" [11, pp. 389-390]. It is true that throughout the Lord Bingham's ruling a great emphasis was made on dangerous or mischievous *thing* rather than on the use, which could and gave later on rise to subsequent interpretation by the legal doctrine. Such a formulation would imply, if ever to be developed, a possible general clause for dangerous things rather than activities. (In favor of this solution between legal scholars [57, p. 705, no. 15-10], [82] and apparently [45, p. 679].) Critic to Lord Bingham's principle was posed by [16, p. 466, n. 6]. It is also true that after declaring that mischief or danger test cannot be viewed in complete isolation from the "non-natural user", Lord Bingham turned to analyze Lord Moulton's statement from *Rickards v. Lothian,* according to which "it must be some special use bringing with it increased *danger*" [38, at 11]. One cannot with all certainty agree, therefore, with the statement that the risk factor is out of relevance for the user concept by Lord Bingham.

The same meaning was given to "non-natural use" by Lord Hoffman (here emphasis was made, in contrast, on *use*, not on the thing) when he declared that the question of what is a natural use of land or, (the converse) a use creating an increased risk, must be judged by contemporary standards (therefore, "non-natural use" = the one giving rise to an increased danger) [38, at 44]. Accordingly, he identified two features of the nowadays society: 1. statutory regulations and 2. property insurance, which he considered relevant when establishing the *two step test for "non-natural user of the land"*. According to the latter, it is necessary, first, to examine the extension of statutory regulations in question in order to verify if they cover a particular form of escape. Their existence and applicability render immaterial the one of *Rylands v. Fletcher*. In this sense, the test formulated by Lord Hoffmann would be in accordance with the formulation of the art. 5:101 of the *European Principles of Tort Law* which in its para.4 states: "This Article (on strict liability for abnormally dangerous activities) does not apply to an activity which is specifically subjected to strict liability by any other provision of these Principles or any other national law or international convention." The second step, given that *Rylands v. Fletcher* concerns only damage to property, consists in taking into account the insurance position:

"A useful guide in deciding whether the risk has been created by a "non-natural" user of land is therefore to ask whether the damage which eventuated was something against which the occupier could reasonably be expected to insure himself. Property insurance is relatively cheap and accessible; in my opinion people should be encouraged to insure their own property rather than to seek to transfer the risk to others by means of litigation, with the heavy transactional costs which that involves [38, at 46]*."*

As a consequence, since most property can be insured against external risks, non-natural use should be understood as one that creates risks against which most people would not be expected (or able) to insure, which, he considered, was not the case in *Transco* (for critic of this position see [83] y [84]).

The third standard, established by Lord Hobhouse, is rather different from the previously discussed ones in two senses at least. First, whereas the Lordship affirmed that liability in *Rylands v. Fletcher* arises from the dangerous use of land and the risk concept remains relevant for the case [38, at 57], he

declared at the same time the danger factor not being sufficient. By saying that natural features of the land do not satisfy the criterion of "non-natural use of land", even if they constitute a danger for the adjoining landowners, he gave to the concept meaning rejected previously by Lord Bingham and Lord Hoffmann

> *The main focus of unnecessary confusion has been the phrase "which was not naturally there" (Blackburn J) and "natural/non-natural user" (Lord Cairns LC). What they were referring to was the creation or preservation of the dangerous user by bringing something dangerous onto the land or keeping it there, This was how Lord Porter read it in his speech in Read v Lyons / Co Ltd [1947] AC 156. It involves some positive use of the land by the landowner, created or continued by landowner. Natural features of the land do not satisfy this criterion even if they constitute a danger to adjoining landowners, for example, rivers which are liable to flood. This does not involve the inquiry into the ever changing features of any landscape but should direct the focus onto what the occupier has himself done-what* ***thing*** *he has brought onto his land. Similarly, the presence of natural vegetation on the land, or the normal use of the land in the course of agriculture does not as such bring the rule into operation. Any risk involved, for example the spread of fire, are not ones which, without more, call for the imposition of any risk based liability;…there will not be duty of care simply to protect one's neighbor from natural hazards* [38, at 63].

And second, Lord Hobhouse disagreed with the last part of Lord Hoffmann's two step formula on the insurability of the property, applying exactly opposite reasoning, according to which it is the creator of the risk that should bear the burden of taking out insurance:

> *Thirdly it is argued that the risk of property damage is "insurable", just as is public liability. It is then said that, since insurers are likely to be real parties behind the litigation, the rule has become unnecessary. This is unsound argument for a number of reasons... The economic burden of insuring against the risk must be borne by he who creates it and has control of it. Further the magnitude of the burden will depend upon who ultimately has to bear the loss: the rule provides the answer to this. The argument that insurance makes the rule unnecessary is no more valid than saying that, because some people can afford to and sensibly do take out comprehensive car insurance, no driver should be civilly liable for his negligent driving. It is unprincipled to abrogate for all citizens a legal right merely because it may be unnecessary as between major corporations* [38, at 60].

Finally, having in mind principles established in *Cambridge Water* and *Hunter v. Canary,* their Lordships confirmed the decision in *Read v. Lyons* by following the path that damages for personal injuries are not recoverable under the rule in *Rylands v. Fletcher* [38, at 9 and 35 *per* Lords Bingham and Hoffmann, respectively]. As to the latter, however, it has been pointed out that not only the exclusion was lucking historical background (The principle by virtue of which personal injuries are not recoverable under *Rylands v. Fletcher*, as established in *Read v. Lyons* is deemed to be inconsistent with several previous precedents [85]-[87]), and, authorities after *Read v. Lyons* to the contrary could be found [88], [89], but also some harbingers appeared as to the possibility of this traditional and important characteristic of nuisance (and, thus, also of *Rylands v. Fletcher)* being prohibited by virtue of the Human Rights Act [90]. This point has been raised in the Court of Appeal in *Marcic v. Thames Water Utilities Limited* [91] without later being pursued in the House of Lords. In the case, the claimant's property was regularly flooded as a result of the failure of the defendant to carry out drainage works which would have prevented the accident. The case was considered to fall under the law of nuisance, from one side, and under both, the art. 8 Act on Right to Respect for Private and Family Life and the art. 1 of the first Protocol on Peaceful Enjoyment of One's Possession of the mentioned Human Rights Act, on the other. The Appeal Court (statement confirmed by the House of Lord) deemed common law damages to be sufficient remedy in this case precisely. Nevertheless, some possible future implications for nuisance (and what follows, to *Rylands v. Fletcher*) were made evident at the same time. It is precisely sec. 8 which constitutes a neuralgic point in the discussion. According to this section, breach of the Act empowers the court to grant relief or remedy, including damages, as it sees fit. Therefore, the suggestion was made that the Act will have some indirect and considerable influence on the common law. It was affirmed to the effect, that since there is no need for the courts to apply directly the remedies provided by the Act for its breach, each time the case will rely upon the common law under which no specific tort remedy will be foreseen, the Act will begin to come into its own [70, p. 11], [37, pp. 440-441], [92]. The doctrine derived from *Rylands v. Fletcher*, in shape it started to take from *Read v. Lyons,* here as a special category of liability for exceptionally hazardous activities *related to land*, has been criticized also by a part of the legal doctrine as indefensible, given that by its virtue proprietary interests enjoy greater protection than personal ones. (See for Great Britain [47, p. 400] and [57, p. 697], for United States [93] and for Canada [94]). One cannot but agree with the opinion that it seems at least surprising in the XXI century that the bodily integrity and life enjoy lesser protection than proprietary interests, however appealing may seem the coherency argument posed by the orthodox trend. It sounds even odder when placed in European perspective (see, for instance, art, art. 2:102 of the *European Principles of Tort Law*, which places body integrity and life on the top of the list of protected interests) and taken into account historical reasons which possibly led to the adoption of the rule (disasters horrifying due to the loss of life above all).

When it comes to type of damage recoverable under the precedent, it was also suggested, although this time not in *Transco*, that pure economic loss might be recoverable under *Rylands* if it was a sufficiently direct result of the escape [95]. In this case, never the less, again the problem of the precedent

being a tort related to land arises.

Transco has been criticized by those willing to see in the precedent a broader rule of strict liability. And one cannot deny truth to the argument that the equating non-natural with non-ordinary use significantly limits the range of uses that is subject to strict liability under actual interpretation given to *Rylands v Fletcher*. The same was said for the additionally added "hurdle" in shape of risk, from that moment on plainly established extra denominator of non-natural use of land. Nevertheless, other interpretations will be attended here for it seems to the author feasible that some light could be also put on this gloomily received decision. Therefore, while "extraordinary" or "unusual" use, in the sense of the one which creates extraordinary risk, at first glance can be seen as limiting when attached to land, it could possibly be perceived at the same time as a first step in preparing the ground for the broader use to be finally given to *Rylands v. Fletcher*, if the precedent is ever to "escape from the straightjacket of nuisance". Thus if as a next step we eliminate from the rule formulated by Lord Bingham all elements that relate to land, the extraordinary or unusual use definition achieved will, perhaps, be more comparable with the one of abnormally dangerous activities from the Restatement Third. The meaning given to the non-natural use by Lord Hobhouse, in exchange, underlines in double way the precedent's relation to land Torts when transmitting "never forget, only what is not natural to land, and furthermore dangerous". The latter, in fact, has long since been the orthodox approach to non-natural user.

E. LMS International Ltd. v. Styrene Packing and Insulation Ltd.

More recently, *LMS International Ltd v. Styrene Packing and Insulation Ltd* [2005] [50] has been decided in Technology and Construction Court. In the case fire started on the upper floor, in one unit of a factory, occupied by the Defendant's company involved in the production process of some inflammable materials stored there. The fire broke out while one of the employees of the Defendant was cutting the materials with a hot wire machine, and spread quickly into two other units, leased and occupied by LMS International. The claim was brought against Defendant (Styrene Packing and Insulation) by the LMS and by the owners of the two units affected by the fire for the damage caused to their machinery, plant and stock and for business interruption (LMS), and for building re-instatement costs and lost rent (the owners) [50, para.1-3]. The claim was based principally on the rule from *Rylands v. Fletcher*, and alternatively, on the law of negligence and nuisance [50, at para. 7].

In the ruling Judge Peter Coulson recalled earlier "fire cases" relied on *Rylands v. Fletcher* and previously omitted in *Transco* [96]–[99], from which and some other authorities commented above, a clear summary of relevant principles has been delivered.

The court declared:

> *"…in cases with fire, the rule in* Rylands v. Fletcher *requires two things. First, the defendant must have brought onto his land things which were likely to cause and/or catch fire, and kept them in such a condition that, if they ignited, the fire would be likely to spread to the claimant's land (*Mason*)* [97]. *To put it another way, those things must represent a recognizable risk to the owners of the adjoining land (*Tesco per *Lords Bingham and Hoffmann). Secondly, the actions on the part of the defendant must arise from a non-natural user of the defendant's land (*Mason *and* Transco per *Lord Hobhouse* [38, at 6]*)* [50, at 33a].

In *Mason* the two stage test was exactly the following one: "first, whether the things brought onto the land were likely to catch fire and, if they did, whether the fire was likely to spread to the adjoining land; and secondly, whether such things were done in the course of a non-natural user of the land". [97, at 70c *per* Lord MacKenna].

This principle, said to be taken by Judge Coulson from both, *Mason* and *Tesco*, requires some explanation. Meanwhile in *Mason,* MacKenna J applied a two-stages test, he did not refer expressively to risk as an essential component of the "non-natural user of the land". The risk, especially emphasized in *Tesco,* could be, nevertheless, easily deduced from the first-stage formulation. Taking into account that risk of sufficient magnitude for the non-natural use in *LMS International* deemed to be the risk of polystyrene stored on the premises catching fire and the fire spreading to adjoining premises, it was doubted by some [45, p. 696] that the approach used in the case was at all correct. Difficulties were found with acknowledging the difference between the "non-natural use of land" and the formula of the first stage of the principle cited above, as in both cases, according to Lunney and Oliphant, the same matter was addressed--the risk of fire that was created by the defendant's use. This would be the case if we had considered the "non-natural use of land" in the meaning given to it by Lord Bingham, especially. More feasible seems, however, that Judge Coulson uses in the precedent the formula by Lord Hobhouse, according to which risk constitutes only one and not sufficient element of the "non- natural use of land", precisely because "natural features of the land do not satisfy this criterion even if they constitute a danger to adjoining landowners." Those natural/ not-natural features are probably addressed in the second stage of the principle from *LMS International*. The fire in the case was classified as a thing [50, at 31].

Consequently, Judge Coulson admitted that the rule in *Rylands v. Fletcher* was restricted in recent years, but at the same time its complete abolition was twice avoided in *Cambridge Water* and *Transco* [50, at 33b]. As to Lord Hoffmann's two-step test from *Transco,* Judge Coulson declared that "non-natural user" should be considered by reference to contemporary standards. As a result, the existence of statutory regulations relating to the storage of the dangerous thing(s) may preclude the operation of the rule in a particular case. It was underlined, however, that the second step, here the existence of insurance, may be a relevant factor, although it was said at the same time to be a matter on which the House of Lords emphatically disagreed [50, 33c]. The reference was made again to *Mason* and *Hobbs* [98], where the storage of

inflammable materials was held sufficient to trigger the rule in *Rylands v. Fletcher* [50, at 33d]. And finally, the following rule was established:

> *Fire is plainly dangerous. Therefore, if the escape of fire from A's land to B's land was the (foreseeable) result of the storage of dangerous things that comprised a non-natural user of land by A, then subject to the qualifications set out above, A is prima facie liable to B under the rule in* Rylands v. Fletcher [50, at 33e].

F. Colour Quest Ltd and Others v Total Downstream UK plc

And finally, eagerly expected as the one that could possibly change the fate of *Rylands v. Fletcher,* placing it again under the microscope [37, p.629], *Colour Quest Ltd and others v Total Downstream UK plc* [58] has not introduced much novelty on the matter. The future of the precedent was not even on the spot of the discussion in the High Court, Queen's Division Bench of England and Wales. Consent as a defence to *Rylands v. Fletcher* and relation between the latter and nuisance were the two primary issues addressed in the case.

The facts of the case ranged over the largest peacetime explosion ever to have occurred in Europe. The event took place at the Buncefield Depot in Hertfordshire, where a huge fuel tank farm was located. Used by a number of big oil companies such as Total, Chevron, BP and Shell, it was provided with petrol, aviation fuel and diesel by a pipeline. On Sunday, 11th of December 2005 a vapor cloud, developed from the spillage of some 300 tons of petrol from a storage tank, got ignited, causing a massive explosion. Damage estimated at £750 million resulted to the Buncefield site itself, as well as to commercial businesses and residential properties outside of the depot.

As to the relation between *Rylands v. Fletcher* and nuisance, the court stated:

> *"…nuisance is dependent on establishing unreasonable user giving rise to a foreseeable escape whilst Rylands v. Fletcher is concerned with non-natural or extraordinary user leading to an escape whether foreseeable or not* [58, at 411]*."*
>
> *"In considering the authorities it has to be borne in mind that there will be cases in which it may not matter which cause of action is pursued . . . Equally there will be circumstances (perhaps in particular with an isolated occurrence) where liability can only be made good if at all under* Rylands v. Fletcher. *Thus whilst repeated escapes might be readily foreseeable an isolated escape may be less so. So also the relevant escape may be attributable to an extraordinary but not unreasonable user* [58, at 412]*".*

Based on previous authorities [44, at 697] and [38, at para. 27 *per* Lord Hoffman] an affirmation that there can be a liability for an isolated escape also in cases of private nuisance has been made by the High Court [58, at 421]. Therefore, if the case will not be appealed and the rule reconsidered in the last instance in the Supreme Court of the United Kingdom, long since and well established orthodoxy in *Rylands v. Fletcher* also this time will not leave the place to any other "progressive" solution.

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