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Legal Doctrine on *Rylands v. Fletcher*: One more time on Feasibility of a General Clause of Strict Liability in the UK

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***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*—**Abnormally dangerous activities, general clause, *Rylands v. Fletcher*, strict liability.

I. Introduction

THERE are several methods to implement strict liability. Its imposition may come from the hand of the legislator, in which case it can be done by way of enumeration of individual cases by law (in code or in special statutes) (*enumerationsprinzip*), or through a general clause of strict liability. The imposition of liability without fault can be also brought about by the case law: via analogous application of the existing law in comparable cases not regulated by legislation or through the use of so called “palliative records” or instruments “objectifying” fault liability.

When it comes to the imposition of strict liability by the legislative power, many European countries, including Spain, have opted for the system of introduction of this liability by an *ad hoc* regulation, case by case. The general clauses of strict liability have been registered in the Hungarian, Turkish, Italian (although disagreement exists whether it is really the principle of strict liability or rather the liability based on fault with the reversed burden of proof) and French legal system, which includes a very extensive and unique clause when compared with European standards for the deed of things. The creation of a general clause of strict liability based on the special danger has also been debated in Germany, Austria and Switzerland. Efforts to introduce it in these countries were offset in the latter two, which included such clauses in their respective draft reform of the civil liability law. Similar intent, to leapfrog from the rule included in *Rylands v. Fletcher* to a general clause of strict liability for dangerous activities, was attempted at some point by the British Common Law. When precedent *Rylands v Fletcher* is concerned, although the House of Lords in *Transco* formally rejected the possibility of extending the rule to the general clause of strict liability for abnormally dangerous activities and things, entrusting its possible introduction to the legislator, the establishment of the "test of danger or mischief" and the subsequent declaration of the Lord Bingham according to which the "natural" and "non-natural use" should be interpreted respectively as "ordinary" and "extraordinary" or "unusual" sets the ideal bases for the possible conceptualization of a general rule of strict liability by British case law in the near future. For the moment this conception, however, stumbled with conservative and traditionalist spirit of the old House of Lords, nowadays the Supreme Court, which did not allow it to go out from the framework of the tort of nuisance and to detach the rule from its most limiting element in form of "use of land". At the same time, nevertheless, the birth and the following popularization of strict liability for abnormally dangerous activities on the other side of the Ocean, 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] is considered almost unanimously as related to the reception of the well-known *Rylands v. Fletcher* [1, com. To the § 20, let. d]. Finally, the question of whether the principle of fault liability should be supplemented by a general rule of strict liability has also attracted some attention, although for the moment quite limited, of Spanish scholars.

Both models: general clause of strict liability and enumeration system poses advantages and disadvantages, and it is difficult to state with certainty which one is more desirable in terms of national legislative policy. The main differences between one and the other that enclose the most important advantages and disadvantages of both models concern flexibility, equal treatment of similar cases and

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significant capacity of adjustment to the changing socio-economic reality of the general clause in front of the rigidity and tendency to create gaps arising from delays or inactivity of the legislature as well as lack of consistency in the imposition of strict liability characteristic for the model of normative enumeration of cases of liability without fault. The flexibility of the general clause, however, affects negatively legal certainty, offered, in exchange, by the model of the *ad hoc* imposition of strict liability by the law. The solution to this problem came from scholars specialized in Comparative Law who suggested, as a suitable measure for solving the most imminent shortcomings of both systems, a merger of both models in improved clause which, meanwhile flexible and formed in general terms, would include a non-exhausting catalog of examples of activities subject to the rule of strict liability. This is, in summary, what concerns the aforementioned national legislative policy. The problem, however, acquires also another dimension, the discussion reaching finally European levels. In this sense, the juxtaposition between the two models mentioned above gains additional importance in view of the solution opted for by the two competing groups of scientists inclined to promote the harmonization of European laws in the field of civil liability. As a consequence, the Study Group on a European Civil Code in its Draft Common Frame of Reference adopts the enumeration of individual cases of strict liability; meanwhile, the Principles of European Tort Law of the European Group on Tort Law introduce a general clause of strict liability for abnormally dangerous activities.

Both models have their pros and cons also from the point of view of Comparative Law and harmonization of laws. Hence, it is considered that a more detailed regulation which in addition also covers more specific issues can serve as a further guidance. This advantage, however, has a high price in the form of inflexibility; more precise regulations not only adapt with difficulties to the socio-economic changes, but are also reluctant to adjust to the new national context, exposing themselves to a repulsion by the legal system in question. Abstract rules, apart from the aforementioned elasticity, give greater consistency and coherence to the matter they apply to, and although they can lead, at least in principle and in some respects to divergent solutions, there is no such a threat of them being rejected because of its ability to adjust, for instance, to the domestic case law policy [2].

II. *Rylands vs. Fletcher* (1868) [3]

John Rylands was a successful entrepreneur [4, p. 214-16], [5] who, in order to supply his mill with steam from extra water sources, employed independent constructors to build a reservoir. 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 [6, at 740]. In 1860 water escaped from the reservoir through an inactive shaft, penetrating interconnected mines and forcing Fletcher to withdraw from his business permanently [4, p. 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*. According to Simpson it was a purpose of this procedure to give the award of the arbitrator the status of a court judgment [4, p. 243]. The arbitrator 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 [7, p. 774]. 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, 1876, 1 Q.B.D. 321* sustained for the first time that in some circumstances the employer can be held liable also for the negligence of those contracted independently [8, p. 545]. The reason why Fletcher didn't sue the contractors jointly with Rylands is unknown [7, p. 774]. 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 [7, p. 744].

The *Common Law*, as opposed to the Civil Law, recognizes different types of so called Torts. Negligence, trespass and nuisance are only some of them [8, p. 617].

In 1891, the *American and British Encyclopedia of Law* defined nuisance as the tort that is "applied to that class of wrongs that arise from the unreasonable, un warrantable, or unlawful use by a person of his own property, real or personal, or from its own improper, indecent or unlawful personal conduct, working an obstruction of or injury to the right of another or of the public, and producing such an annoyance, inconvenience, discomfort or hurt, that the law will presume a consequent damage" [9, p. 924]. The latter is probably a perfect example of one of those definitions used in old judicial rulings described by Dobbs [10, p. 1320] as broad, without any meaning and with confusing terminology, which probably gave also ground to the following, well-known Prosser's statement: "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'" [8, p. 616]. Today within the tort of nuisance globally considered, public and private nuisance constitutes perfectly distinguished categories, enabling better understanding of the institution and a more coherent and precise description of each of the two torts [10, p. 1320-1321]. For the purpose of this work, private nuisance is understood as "an unlawful interference with the use or enjoyment of the land by other person or with another right over this land, or with any other related to it." [10, p. 1321], [11, p. 648, n.14.4], [12, p. 509]. Defined in those terms, the tort rather than focusing on the

defendant's conduct, centers on the type of damage suffered by the victim [10, p. 1321], [8, p. 622]. It can take the form of land encroachment on the neighbor's land, direct physical injury to the land, or interference with the enjoyment of the land [11, p. 648]. Very often mistaken with the tort of trespass [10, p. 1320], nowadays the tort of private nuisance is associated above all with protection of environment, addressing different types of pollution or harm provoked by smells and offensive noises [11, p. 639].

Between different types of trespass, here trespass to goods, to persons and to the land, only the latter is to be considered here, providing it was precisely its application pondered in *Rylands v. Fletcher*. Therefore, trespass to land means any direct interference with land in the possession of another [11, p. 619], [10, p. 95] and which may take the form of entering the land or part of it, or of remaining there after the withdrawal of permission, or of dispossessing the occupant [12, p. 495], or intentionally putting something (water, chemicals etc.) on the land of another. And finally, the tort of negligence can be associated with what in the Continental system is traditionally called the fault principle (What in the Continental System is known as "intent" (*dolus*), and what according to *a minore ad maius* reasoning is part of the fault principle, in the Common Law system constitutes an independent Tort.). As a consequence, by virtue of American Tort law will be liable who negligently causes harm to a person or to the property of other [10, p. 257]. The reason for the described trichotomy of torts (here nuisance, trespass and negligence) finds its ground probably in the fact that the North America's courts have not recognized the existence of a general duty not to cause harm negligently to anybody till the year 1850, when the famous decision *Brown v. Kendall* [13] has been passed, the implications of which were not visible even much longer after [10, p. 266]. In Great Britain, the same effect has been recognized for the *Donoghue v. Stevenson* [14] For the evolution of the tort of negligence and its transformation into the general basis for tort liability in Great Britain, [15]. Before the decisions mentioned above have been decided, the tort of negligence applied only to specific and determined situations [12, p. 114], constituting a part of so called the old writ system. The latter is characterized by rigidly distinguished forms of actions (torts) detached from general principles of liability. Considering the problem from the Continental Law point of view, nowadays some of the mentioned Torts might be perceived as doubled, overlapped one with the other. [12, p. 527] speaks about well-established practice in the last 60 years for the Tort of Negligence to act as an intruder in front of other torts. In the same vein, another research is done by [16 p. 243]. As to this question, in Great Britain, for instance, after *Cambridge Water* [17], by virtue of which recovery for damage in the case of nuisance was ruled by the principle of "unreasonable user", some British authors gave way to the statement that *Rylands v. Fletcher* has much from the fault principle [12, p. 526-528 and 617] In similar vein [18, p. 376]. Also [11, p. 659-6649] has done a similar research. Historically speaking, it was a common practice among the courts to decide in cases of trespass and nuisance sometimes based on subjective and at other times on objective criterion of imputation. The debate on whether only one criterion of imputation is to be applied in case of both torts, and if a case, which from the two of them: subjective or objective one, seems not to be resolved even today [12, p. 526]. In the year 1979 the American *Restatement of the Law, Second, Torts*, trying to put order in the existing North American jurisprudence [19, p. 669], distinguished in its §822(b) between the intentional tort of private nuisance, subject to strict liability, and the unintentional one, in a framework in which strict liability applied in cases of abnormally dangerous activities while negligence provided the rule in the rest of the cases [20, §822(b)], [1, let. C), § 20] and [19, p. 680-682]. (The set "intentional tort" against "strict liability" for a mind formed on the Continental System can seem at least surprising for contradictory, the term "intent" being invariably associated with dolus (*Vorsatz* in German). The Common Law system distinguishes between an intentional (voluntary) act and an intent to cause a damage; from which only the latter would be equivalent to *dolus*.) [19, p. 670] and [10, p. 1324-1325]. On the complexity of the meaning intentional and unintentional in the British Common Law system, and on the doctrinal evolution in Intentional Torts' field in Great Britain [21, p. 206-207]. The distinction between intentional and unintentional tort, and the same regulation as to the criterion of imputation applied to both types of tort, has been maintained in *the Restatement* for the tort of trespass [20, §165 and 158], [19, p. 670]. The original tendency to decide in cases of land-related Torts according to strict liability [19, p. 669], as well as the controversy on which criterion of imputation to apply to trespass and nuisance, could have been the reason behind the famous Baron Bramwell's differing statement of law, which on appeal gave rise to what has been known since than on as the *Rylands v. Fletcher's* rule.

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 B, 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* [22, p. 279].

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 [22, 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 [23, p. 90] who

mentions in this sense cattle trespass, invasion by filth from a privy considered by Blackburn as trespass, fumes and noisome vapor qualified as nuisance and strict liability of the keeper of an animal (scienter action) [18, p. 376]. See, however, [24, p. 557- 571] and [25, p. 480-490] 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 occur, 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* [22, 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 [26, p. 338].

Cairns relied on narrower grounds than the broad statement of Cranworth [8, 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 [26, p. 338]"). 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, § 20, let. d] and [23, 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* [26, p. 338].

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 [27, p. 338]. 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 [8, 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 [23, 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 [28, p. 391]. As a consequence, at least three different meanings can be found for the latter [1, § 20, let. d], here:

1. One that departs from a state of nature [24, p. 560], 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 [24, p. 560],
2. One that is uncommon or unusual (This alternative criterion is deemed to be introduced by Lord Moulton in Rickards v. Lothian) [12, 614],
3. One that is unreasonable or inappropriate in light of the local circumstances (Significance given to the term "non-natural use of land" in Read J. Lyons & Co. Ltd. [1947] AC 156, at 176 per Lord Porter). 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 [18, p. 378] referring to Lord PORTER in Read v. J. Lyons & Co. Ltd. AC 156, 176 and [12, p. 615].

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 (Compare with the art. 1384 subs.1 of the French Civil Code imposing liability for damage caused by deeds of the things within one's keeping, which hence has been developed by French jurisprudence into a general clause of strict liability [29, p. 127, 130 and 132] and [30, p. 49-55]), 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 [18, p. 380], [12, p. 609], [28, 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 [28, p. 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 [18, p. 382]. See, however, [31, p. 429] for whom Blackburns 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 [12, p. 609]. On the socio-economical context and its influence on the adoption of *Rylands v. Fletcher* in the United States, [4], [18, p. 376], [27], [32], [33], [34, p. 109], [35]. 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 [1, §20-24], broad interpretation given at the beginning to *Rylands v. Fletcher* by the British judiciary (according to the latter, 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 [8, p. 548] and [36], yet as time passed the interpretation narrowed [12, p. 608-609].

III. British Legal Doctrine on *Rylands v. Fletcher*

Since *Water Cambridge* has been decided, years have passed, and neither clarity nor certainty seems to have been achieved on the matter. Instead the question "Can we do without *Rylands v. Fletcher*" has been posed by some [37, p. 656ff]. Development and the following increasing importance of the general principle of fault, as well as fully established, as it seems, practice of imposing strict liability through the written law of statutes (see, in England [38]-[45] detail analysis of statutory strict liabilities in [46]), convinced one sector of British legal doctrine to the idea of *Rylands v. Fletcher* being "an anachronistic relic of a primitive legal system" [23, p. 82], the decision which "ought to be confined to the graveyard of legal history" [37, p. 661] or a "dead letter" [47, p. 99]. Nevertheless, the rule still finds its loyal supporters, mainly between those scholars who, departing from the precedent, promote the existence of a general clause of strict liability in version of: 1. enterprise liability [23] or 2. liability for dangerous things [31]. (The idea of enterprise liability as derived from *Rylands v. Fletcher* seems to be actually promoted also by John Murphy. The latter, rather in terms of legal policy than as an interpretation given to the precedent based on the reasons behind the ruling of each of the Justices distinguished in the case. He seems also to limit so interpreted rule only to environmental protection of individuals for the harm caused by escapes from the polluting heavyweight industry [37, p. 659, 665-666, 669]). As a consequence, the precedent that throughout the last century and a half attracted so many controversies still divides legal scholars of contemporary England. It can be said also to have given rise to two (with certain qualifications) main trends as to origins of the rule and its future application and perspective [23, p. 82], orthodox and modernist one (terminology introduced by the author in reference to modernist and orthodox trend in North American jurisprudence. For the background, [48] has done some relevant research as well as "new orthodoxy" denomination as used by [49].

According to the orthodox view (by some called also "Offshoot Theory", [49, p. 426-432] Lord Blackburn was not conscious of the fact he was extending existing law in any way [24], [25], [50] and *Rylands v. Fletcher* constituted the application or extension of an existing cause of action (nuisance) [24, p. 557-571]. The only novelty of the rule in *Rylands v. Fletcher* was the decision that "an isolated escape was actionable," [25, p. 488] and the confirmation of the principle that negligence was not an element of nuisance [25, p. 487-488] (The author argued that nuisance as a tort to land became distorted as it was extended to embrace claims for personal injuries. From this fact, an erroneous presumption has been made that liability which should have arisen only under the law of negligence was allowed under the law of nuisance, historically subject to strict liability.). As such, the rule should not be justified on account of "magnitude of danger, coupled with the difficulty of proving negligence" [50] but rather on the nature of plaintiff's land interest that was invaded. Therefore, the precedent cannot be extended beyond the case of neighboring occupiers (critic of this approach [51], p. 391) and, as a tort to property interests, excludes the possibility of recovery for personal injury [25, p. 487-488]. Consistent with this theory is Newark's view that the "natural use of land" refers to things naturally on the land and not artificially created [24, p. 560]. Finally, within the

orthodoxy strict liability is seen as a "relic from the previous époque" in front of the newly established and generalized rule of fault (Orthodoxy, besides Newark, seems to be represented also by [52]. Partly in favor [31]. This view is generally accepted by the judicial body of the United Kingdom, [53, p. 183], [54, p. 304], [55, p. 9, 35, 39, 47 and 52], [56, p. 950] and [57, para. 411-421]. Against this so called "New Orthodoxy" only sporadic voices between English jurisprudence exists [58], [59]. The orthodox approach has found its criticism [18, p. 383-384], [49, p. 426-440], [28, p. 392], [37, p.644-656], [60, p.195] and votes in favor, also in the United States [61].

For the modernists, *Rylands v. Fletcher* gave birth to a new principle of strict liability. According to them, from among those who contributed to the creation of the rule, Baron Bramwell is seen as an instinctive visionary, who anticipated, born in the following century, a theory of enterprise liability. The assumption was made based on Baron Bramwell's judgments in [62] where he declared the plaintiff's interests were not to be scarified for the promotion of the public good. As a consequence, according to Bramwell, the defendant's activity could be "legalized" on his payment of compensation. What was not allowed, by contrary, is to let the plaintiff's loss to go uncompensated. It was affirmed, however, that no notion of enterprise liability had been mentioned by Bramwell in *Rylands* itself and it is not very clear why. (For the loss-distribution version of enterprise liability, Bramwell's judgment from 1876 in [63]. For those and other accounts of enterprise liability in Bramwell's decisions, [23, p. 109-113], [64, p. 174], [65, p. 2044-2052], [66, p. 246-287], [55, at 29 per Lord Hoffman]. On the other hand, Justice Blackburn is considered as the one who formed consciously a new principle by its derivation from a number of previously existing strict liabilities ([23, p. 86] and [18, p. 367]. The view that the liability under *Rylands v. Fletcher* derives from the older notions of strict liability is shared by Donald Nolan and David Ibbetson, [49, p. 430] and [68, p. 57-63] The appearance of a new broader rule of strict liability was announced in his time also by Sir Percy Winfield, "…the rule in *Rylands v. Fletcher* has been taken as the starting-point of a wider liability than any preceding it." [67, p. 193] and [11, p. 695].). The latter was possible due to the British legal system's ongoing transition from the old writ system to the system of fact-pleading based on substantive justice with general grounds of liability [23, p. 86], for the support of this thesis [60], [69, p. 234], [70, p. 67-69]. Or, better said, this is the direction in which *Rylands v. Fletcher* was supposed to evolve. Instead, it resulted in what was to be later called by some "the Dog that Didn't Bark" [23, p. 114]. The same author acknowledges the enterprise liability as derived from *Rylands v. Fletcher* was pushed further into the sidelines and never took hold in the English Common Law [23, p. 119-120]. This is the reason why, according to this sector of English legal opinion, a general rule of strict liability from *Rylands v. Fletcher*, founded on the theory of enterprise liability and placed in the context of a now historically-acknowledged, universal principle of fault should be redefined as to its role in a new legal world without the old forms of action [23, p. 86]. (Apart of Ken Oliphant, the idea of enterprise liability as derived from *Rylands v. Fletcher* is promoted also by John Murphy. The latter, bases his claim in terms of legal policy than as an interpretation given to the precedent based on the reasons behind the ruling of each of the Justices distinguished in the case. He seems also to limit this rule to protection of individuals for the harm caused by escapes from the polluting heavyweight industry, [37, p. 659, 665-666, 669]. Compare, however, the proposed solution enterprise liability-strict liability with the art. 4:202 of the Principles of European Tort Law where the latter is based on fault with the reversal of the burden of proving fault. According to the latter "A person pursuing a lasting enterprise for economic or professional purposes who uses auxiliaries or technical equipment is liable for any harm caused by a defect of such enterprise or of its output unless he proves that he has conformed to the required standard of conduct." This provision is said to be in line with the current debate in the United States, where the discussion on which criterion of imputation to apply in the field of enterprise liability is apparently shifting towards the fault regime again. n. 1 to the comm. to the art. 4:202 and the bibliography cited there is relevant here.

The two opposed poles, here the general rule of strict liability, on the one hand, and *Rylands v. Fletcher*- a branch of nuisance, on the other, seeking a compromise, gave way finally to a third, alternative option [31]. Thus, there are two different rules, instead of one, contained in the precedent: the wide and the narrow one. The latter finds its origins in the rule formulated by Lord Cairns and as such overlaps with the orthodox view on *Rylands v. Fletcher*. The precedent is a genre of nuisance that applies to cases between neighbors for the escape of something that is not naturally on the defendant's land and that adversely affects the claimant's enjoyment of his land [31]. By contrast, the wide rule, deduced from the Blackburn J statement and later followed by Lord Cranworth in the House of Lords, reflects one of the subspecies of the modernists' view. According to Andrew Waite it is attached to the liability for the escape of dangerous things from the defendant's land or control (That *Rylands v. Fletcher* could have evolved into a comprehensive theory of strict liability for escaping things is also the view of [12, p. 608].). In this way both rules share a common core, which consists of the overlapping circle of the wide rule and the law of nuisance. Therefore, while the narrow rule would refer exclusively to the escapes of dangerous things from the defendant's land and premises, the wide one would cover also those instances where the dangerous thing escapes from the defendant's control [31, p. 427]. In this way we come back to the debate on whether the distinction between "natural/ "non-natural" use of the land is or is not a mirror reflection of the one between "dangerous/"non-dangerous things." This time, however, the distinction is made between things dangerous *per se* and dangerous in relation to foreseeable types of damage; only the latter attracting the strict liability rule in *Rylands v. Fletcher* [31, p. 435] In similar vein, [37, p. 467]. Since the narrow rule coincides with the already examined orthodox

view on *Rylands v. Fletcher* and there is no need for its further analysis here, more attention will be placed upon the wider principle. According to Andrew Waite some judges and writers failed to appreciate this distinction. Yet, in Read v. *Lyons,* the wide rule has been acknowledged although in the end rejected [53, p. 167 and speeches per Lord Macmillan p. 173, Lord Porter p. 178, Lord Simons p. 181 and Lord Uthwatt p. 185]. Therefore, derived from Blackburn's formulation, combining several old causes of action such as nuisance and various forms of liability for animals (Cattle trespass and liability for dangerous animals) on which its author relied upon above all, the wide rule allows compensation for personal injury and is not restricted to damage to the plaintiff's enjoyment of land [31, p. 428-429]. Accordingly, there will be some incidents of the rule (controlling mechanism established by the case-law, as exposed above) to which the wide rule will not apply. As a consequence, the elements of dangerous thing [31, p. 432] and foreseeability [31, p. 435], as well as all defenses [31, p. 436-437] to the claim will be common for both principles, "non-natural user" and damage to the claimant's interest in land will apply only to the narrow one [31, p. 433 and 436], and finally, escape will be treated differently in each case, meaning escape from the control of the defendant under the wide rule and escape from the land under the narrow [31, p. 436]. Therefore, although the rule still constitutes a live and valid part of the English law for the British judiciary (as pointed out by Lord Hobhouse: "The only way it could be rendered obsolete is by a compulsory strict public liability insurance scheme for all persons using their land for dangerous purposes. [47, at 56]. In words of Lord Walker, in exchange: "[i]ts scope for operation has no doubt been restricted… by the growth of statutory regulation of hazardous activities, on the one hand, and the continuing development of the law of negligence, on the other. But it would be premature to conclude that the principle is for practical purposes obsolete [47, at 99].), for the moment all attempts to develop a general doctrine out of *Rylands v. Fletcher* in the United Kingdom have failed [10, p. 952] and the application of *Rylands* has been confined by English courts only to the narrow context [27, p. 356]. The former in spite of the fact that, as pointed out by Fleming [18, p. 383], from the regulation enacted in Great Britain before 1944, on liability of an owner of a dangerous animal, liability of employers for independent contractors for damage caused in the performance of dangerous operations [71]-[73] and liability for inherently dangerous chattels (which as a matter of fact is not strict, but the standard of care required in those types of cases is so high that it almost amount to "a guaranty of safety" [18, p. 383], a promise of unifying existing elements into one general rule of law for dangerous operation could have been deduced.

Critics of the existing *status quo* include such experienced tort commentators as Fleming [18, p. 383], Rogers [11, p. 695 and 699] and Deakin/Johnston/Markesinis [12, p. 625-626]. All of them favor a general clause for ultra-hazardous activities (more recently in favor of converting Rylands v. Fletcher in modern discrete tort detached from nuisance, in shape of general clause for hazardous materials and activities founded on fairness reasons [74, p. 276]. Final comments on the precedent, however, even among those who principally favored an "American solution" betray some air of pessimism as to the future role of *Rylands v. Fletcher* in making a path for a generally defined principle of strict liability [12, p. 625-626], [18, p. 383], [37, p. 466]. Some, describing the actual situation in terms of "common law fatigue" expect the solution to come rather from the legislative power [31, p.442] (as a possible suggestion, but rather doubting [12, p. 626]). The question as to the way in which strict liability should be implemented (generally defined by Common Law, generally defined by statute, or through *ad hoc* subject-specific statutes) seems for the moment open [12, p. 626]. As it was also underlined above, some modest changes in attitude towards European harmonization can be perceived, the latter not only in judicial circles but also between legal scholars (for legal doctrine favorably positioned towards the harmonization see between others [12, p. 624-629], as a consequence bringing an expectation of the next boost to come from the European scene [12, p. 629].

IV. Factors behind the Adoption of *Rylands v. Fletcher* in the USA

In his analysis of the factors that influenced American courts when turning away in certain cases from the traditional rule of fault liability and adopting strict liability based on *Rylands v. Fletcher,* Shugerman refers to a classic study on the origins of the English Civil War by Lawrence Stone [75]. Stone classifies the causes of events in three categories:

1. *Preconditions*- that give place to determined long-term trends (in its majority of social and economic character),
2. *Precipitants*- that give origins to the short-term trends (of political and economic nature),
3. *Triggers*- particular events that spark the end result [75, p. 3-22].

Understood in that way, preconditions and precipitants prepare the ground for the appearance of the event in question. However, those that in reality constitute the immediate reason for the specific event to occur in specific way at a specific time are triggers. Different authors suggest that several different factors might have a bearing on the adoption of *Rylands v. Fletcher* in the United States. They point out that:

1. A determined number of American courts intended to protect residential zones against the risk of industrialization during the period of fast urbanization,
2. Courts were adopting or rejecting *Rylands v. Fletcher* in part in response to the economic cycles: the rejection period corresponds with the depression of 1870s, when American courts tended or were more prone to subsidize the industry. The corresponding industrial boom of the 80s and principles of 90s of the XIX century, in exchange, coincides with the wave of acceptance of the precedent.
3. From the political point of view, the acceptance of *Rylands v. Fletcher* has been associated with the increase of populism and with the emerging legislative agreement on the necessity to make industry subject to normative regulation. As a result of the latter, the *Sherman Antitrust*

Act of 1890 was enacted.

4. According to the so-called *top-down academy centered* theory it was the *Restatement of Torts* from the year 1938, by virtue of which liability for ultra-hazardous activities was imposed that overcame the previous opposition of North American courts [76] and gave way to the application of the famous *Rylands v. Fletcher* [27, p. 342].
5. And finally, as a decisive factor Shugerman mentions a series of disasters caused by accidents in the reservoir's sector, as well as several floods that took place during the 1880s and 1890s (Similar thesis on bursting dams in Great Britain has been posed over 15 years before by [4] after the catastrophes from 1852 at Holmfirth in Yorkshire and from 1864 in Sheffield. In favor of the theory [23, p. 114-115]. It was recognized by Lord Hoffman in [47, at 600] and questioned, by Garry Schwartz, in [77, p. 236-238].), among which the *Johnstown Flood* of 1889 [27, p. 333-336] was the most transcendent one.

In May of 1889 in the Appalachian Mountains, a dam owned by a club that belonged to financial elite collapsed as a consequence of a storm, releasing 20,000,000 tons of water that swooped down on the valley at a speed of 100 miles per hour (160 km per hour). The flood destroyed completely the city of Johnstown, causing the death of 2000 people and damage to the property of approximately 17 million dollars. The huge interest of the press and its horrific reports on the death and destruction of Johnstown made the catastrophe one of the most devastating in the minds of Americans. The mass media, treated the disaster transcendence, which was only overcome by the assassination of Abraham Lincoln. Not only the press articles, but also several books about the flood that appeared on the market through the following two years after the catastrophe, raised popular sympathy and a public anger towards the South Fork Club and its rich members. In spite of the fact that the commission of the County detected the negligence of the club in the construction and conservation of the dam, and in spite of the fact that the press with such a fervor was asking for justice, all the claims against the club were rejected [78]-[80], placing the public attention on insufficiency and abuses of the traditional negligence rules. Two months after the Johnstown flood a prestigious law journal, the American Law Review, published a note on how devastating might be the water force, in which the question about sufficiency of the rule based on fault was posed, and the conclusion was reached that the application of negligence regime might lead in some cases to clear abuses [81, p. 643-648]. It included also a statement made by several of the most prestigious lawyers of that time, who named *Rylands v. Fletcher* as "the best answer which has ever yet been given" to the problem and who pointed out that "it has been, in terms, adopted by several American courts, though denied by some." [81, p. 647].

Following again the author's analysis, two factors are preconditions- the undoubted prestige of British precedents in the United States (in our case the one of *Rylands v. Fletcher*) and the industrialization followed by the fast urbanization. As precipitants, the author mentions economic cycles and the increasing domination of industry on one side, and populism and political reform on the other. Finally, disasters in dams' sector and floods in the 1880's and 1890's have been qualified by him as triggers [27, p. 346-347].

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