

STICKS AND CARROTS: *RYLANDS V FLETCHER*, CSR, AND ACCOUNTABILITY FOR ENVIRONMENTAL HARM IN COMMON LAW JURISDICTIONS

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*The Government of Canada is attaching unprecedented importance to corporate social responsibility (CSR) initiatives in connection with inherently risky Canadian extractive operations abroad. After surveying the inadequacy of CSR as a substitute for host state legal regulation, which is generally lacking, this paper highlights the potential of tort law, and specifically the rule in *Rylands v Fletcher*, to ground foreign plaintiffs' claims for environmental harm arising out of Canadian-owned extractive operations. Given the necessarily transnational context in which such actions would play out, this paper offers a private international law blueprint for Canada's judicial branch to embrace a "hard" role complementing the "soft," CSR-focused approach of the executive branch.*

*Le gouvernement du Canada accorde une importance sans précédent aux initiatives des entreprises canadiennes en matière de responsabilité sociale (RSE) dans le cadre de leurs opérations à l'étranger d'extraction intrinsèquement hasardeuses. Après avoir constaté l'insuffisance de la RSE comme alternative aux carences de la réglementation juridique de l'État hôte, le présent article souligne le potentiel intéressant de la responsabilité délictuelle, et plus spécifiquement de la règle formulée dans l'arrêt *Rylands c. Fletcher*. Cela permettrait en effet de justifier les réclamations de plaignants étrangers pour des dommages à l'environnement résultant d'opérations d'extraction d'une société canadienne. Compte tenu du contexte nécessairement transnational dans lequel ces opérations sont réalisées, cet article propose que soit appliqué par les tribunaux canadiens un modèle de droit international privé afin d'encourager un rôle plus « sévère » des tribunaux en complément au rôle plus « docile », adopté par le pouvoir exécutif à l'égard de la RSE.*

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1. Introduction

Corporate social responsibility has been defined as “voluntary activities undertaken by a company to operate in an economic[ally], social[ly] and environmentally sustainable manner.”¹ Enshrined in Canada’s Corporate Social Responsibility (CSR) Strategy for the far-flung international extractive sector, CSR initiatives by Canadian companies abroad benefit from significant federal funding.² Yet CSR’s so-called soft law or voluntarist approach has significant limitations, leaving an important complementary role for hard law in holding companies to account.³ Hard law in the form of government regulation is unlikely to do so where regulatory regimes are weak, as regrettably they are in many foreign investment host states. Rather, the form of hard law best placed to reinforce CSR in common law developing countries is the private law of tort. In connection with environmental risk posed by extractive operations, the tort created by the nineteenth century decision *Rylands v Fletcher*⁴ has particular relevance.

The rule in *Rylands*, under which liability attaches to risk rather than fault, has been adopted and applied in connection with land contamination claims from oil fields in Nigeria to nickel refineries in Ontario. Notwithstanding the contemporary judicial tendency to narrow its ambit, a reinvigorated *Rylands* could usefully serve as a “stick” in contrast to the “carrot” of environmental CSR initiatives. To optimize *Rylands*’ efficacy in the transnational context, where limited liability and separate corporate personality are the “greatest legal obstacle[s] to multi-national accountability” for environmental harm in host states,⁵ multi-national

¹ Government of Canada, “Corporate Social Responsibility” *Foreign Affairs and International Trade Canada* (2009), online: <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/csr.aspx>>.

² Government of Canada, “Building the Canadian Advantage: A Corporate Social Responsibility Strategy for the Canadian International Extractive Sector” (Foreign Affairs and International Trade Canada, 2009), online: <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/csr-strategie-rse-strategie.aspx?lang=eng>>. See also “Minister Oda announces initiatives to increase the benefits of natural resource management for people in Africa and South America” (Canadian International Development Agency, 2011), online: <<http://www.acdi-cida.gc.ca/acdi-cida/ACDI-CIDA.nsf/eng/CAR-929105317-KGD>>.

³ Radu Mares, “Global Corporate Social Responsibility, Human Rights and Law: An Interactive Regulatory Perspective on the Voluntary-Mandatory Dichotomy” (2010) 1:2 *Transnat’l Legal Theory* 221 at 239, 244.

⁴ [1868] UKHL 1 [*Rylands*].

⁵ Jennifer A Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (England: Cambridge University Press, 2006) at 26.

companies' home state judiciaries must be prepared either to exercise jurisdiction over claims arising abroad or to enforce foreign judgments resulting therefrom.

2. *The Limitations of CSR*

Elements of civil society and at least one international organization are on record as expressing skepticism, not to say suspicion, of CSR initiatives. Some commentators denounce CSR as an abdication by states in furtherance of a broader neoliberal agenda.⁶ This criticism appears intertwined with a view that the concept of soft law is a contradiction in terms; that law is either hard or it is not law at all.⁷ It is further assumed that the protection afforded by hard law to personal and property interests is linked with notions of dignity and humanity which states are duty-bound to protect.⁸ Such critiques of CSR arguably do not have to be pursued further, since CSR's failure to endow persons with legal rights and recourse fatally undermines the entire concept.⁹

A more cynical perspective regards voluntary codes of corporate conduct as marketing exercises that attract more or less commitment depending upon the public relations gains companies stand to derive from compliance.¹⁰ This same preoccupation with a firm or industry's reputation may result, at times, in "narrowly philanthropic gestures"¹¹ that fleetingly capture local attention but fail to make enduring change:

PR needs may, for instance, prioritize media-friendly projects such as donating medical equipment or helping to construct a new hospital, rather than slow local capacity-building or the training of village nurses ...¹²

⁶ *Ibid* at 223; see also Halina Ward, *Public Sector Roles in Strengthening Corporate Social Responsibility: Taking Stock* (Washington, DC: World Bank, 2004) at 7 ("the voluntary CSR practices of private enterprises are not and cannot be an effective substitute for good governance").

⁷ See e.g. Jan Klabbers, "The Redundancy of Soft Law" (1996) 65 *Nordic J Int'l L* 167 at 168.

⁸ Bede Nwete, "Corporate Social Responsibility and Transparency in the Development of Energy and Mining Projects in Emerging Markets: Is Soft Law the Answer?" (2007) 8 *German LJ* 311 at 315, 338.

⁹ *Ibid* at 332.

¹⁰ Sean D Murphy, "Taking Multinational Corporate Codes of Conduct to the Next Level" (2004-2005) 43 *Colum J Transnat'l L* 389 at 421.

¹¹ Jędrzej Frynas, "The False Developmental Promise of Corporate Social Responsibility: Evidence from Multinational Oil Companies" (2005) 81 *Int'l Aff* 581 at 586) [Frynas, "False Developmental Promise"]; see also Nwete, *supra* note 8 at 313 (noting a blurring between CSR and "philanthropy").

¹² *Ibid* at 585; see also Murphy, *supra* note 10 at 421.

On this view, being absorbed in reputational considerations, companies may undertake a willfully superficial assessment of the needs of those intended to benefit from CSR initiatives, resulting in interventions that are ill-suited to local needs. Misdirected initiatives may equally result from the capture of companies engaged in CSR by government officials or customary leaders intent on channelling CSR expenditures towards pet projects that further their narrow interests but not the larger needs of the beneficiary population.¹³

Even so, a project of limited long-term utility resulting from less than meaningful community input arguably represents more of a contribution than some firms make, particularly those subject to industry-wide CSR codes which are said to be susceptible to free-riding by companies that benefit from an enhanced industry-wide reputation without actually altering their own firm's environmental policies.¹⁴ A further tactical use of CSR initiatives is seen resulting from the absence of clear compliance standards, potentially facilitating misrepresentation of the extent and impact of a company's CSR interventions. This risk, of so-called "whitewashing," is understandably aggravated where compliance with a CSR initiative is subject to self-reporting rather than independent assessment or monitoring.¹⁵

These critiques reflect a certain cynicism. But even where companies undertake good faith efforts at CSR, they encounter a vague, imprecise concept.¹⁶ The range and breadth of CSR initiatives has the potential to confuse even the best-intentioned firm, which, absent clear guidelines or discernible standards by which to measure success, may find that its initiatives are implemented in piecemeal or otherwise inadequate fashion, and fall correspondingly short of the intended result.¹⁷ Equally, it has been suggested that businesses embarking on CSR initiatives without a clear framework are apt to make commitments and undertake projects that exceed their technical or financial capacity.¹⁸ In this scenario, CSR-engaged companies as well as beneficiary communities stand to lose.

¹³ Frynas, "False Developmental Promise," *ibid* at 583, 593.

¹⁴ Mares, *supra* note 3 at 238-9.

¹⁵ *Ibid*.

¹⁶ Michael Blowfield and Jędrzej Frynas, "Setting New Agendas: Critical Perspectives on Corporate Social Responsibility in the Developing World" (2005) 81 *Int'l Aff* 499 at 503, 506.

¹⁷ Nwete, *supra* note 8 at 330; Frynas, "False Developmental Promise," *supra* note 11 at 581.

¹⁸ Ward, *supra* note 6 at 7.

By contrast, tort law avoids many of the above pitfalls by clearly assigning risk associated with environmentally hazardous operations from the outset and, depending on the particular tort, reducing the scope for corporate discretion in complying with standards of conduct.¹⁹ The prospect of lawsuits by, and enforceable awards to, adjacent land occupiers will tend to influence a company's decision about whether and where to locate an operation and, having done so, to incentivize responsible handling and disposal of hazardous materials.²⁰ CSR's animating concern for companies' reputations – at any rate according to the commentators canvassed above – hints at just how damaging a finding of environmental tort liability might be to a multi-national company,²¹ even if made against a distant, locally-incorporated subsidiary. In a world of globalized information and increasingly engaged consumers, arguably this holds true whether or not the multi-national parent can ever be held liable, or enforced against, in its home jurisdiction, a question to which this paper will return below.

In this vein, it is important to remember that tort has purposes beyond pecuniary compensation. The American *Restatement*, for instance, lists no fewer than three other objectives of tort liability:²²

- (b) to determine rights;
- (c) to punish wrongdoers and deter wrongful conduct; and
- (d) to vindicate parties and deter retaliation or violent and unlawful self-help.

Vindication of the rights of a developing-world plaintiff, with even nominal damages awarded against the locally-incorporated subsidiary, risks significant reputational harm to a global brand. Against this backdrop, tort maintains a role for itself in internalizing the true reputational, if not financial, costs of a multi-national company's operations.²³

¹⁹ Mares, *supra* note 3 at 226, 244.

²⁰ Omobolaji Adewale, "Rylands v. Fletcher and the Nigerian Petroleum Industry" (1987) 8&9 JPPL 37, 55; Mares, *supra* note 3 at 225. *Cf.* Christopher A Whytock and Cassandra B Robertson, "Forum non conveniens and the Enforcement of Foreign Judgments" (2011) 111 Colum L Rev 1444 at 1490 (noting that where foreign judgments are unlikely to be enforced in tortfeasors' home states, "potential tort liability becomes a less effective deterrent to harmful conduct").

²¹ Accord Zerk, *supra* note 5 at 25.

²² Restatement (Second) of Torts, § 901.

²³ Accord M Eroglu, *Multinational Enterprises and Tort Liabilities* (Northampton: Edward Elgar Publishing, 2008) at 41, 79.

3. *The Merits of Tort Law Relative to Regulatory Law*

If it is accepted that hard law can and should be brought to bear in reinforcing the soft law of CSR,²⁴ the private law of tort, with its subtle but well-established regulatory role, is one of two options that present themselves. The other is public law, or “direct regulation” originating with the legislative or executive branches.²⁵ Public and private law approaches to environmental protection are themselves complementary.²⁶ But a public law approach, though having the advantages of prescriptive scope and resources for enforcement, may not be pragmatic in developing states intent on luring foreign investment. Consider, for example, the praise heaped on the oil industry by a (presumably impartial) Nigerian commentator:

The importance of oil to the nation can never be over-emphasised. The economic derivation has been highly beneficial to the Nigerian communities. Many villages in the oil producing states have benefited from petroleum operations.²⁷

And consider further how reluctant Nigerian officials are likely to be to regulate an industry adulated by constituents in this way. Such officials will in fact be highly susceptible to capture by domestic and foreign interests favouring non-regulation or selective regulation.²⁸ That this phenomenon is acknowledged even in the developed home states of multinational parent companies²⁹ makes it all the more probable that authorities in developing countries, desperate for revenue generated by foreign investment, will assume a weak bargaining position relative to investors.³⁰ This phenomenon underlies the widely-discussed “race to the bottom” among host state regulatory standards and the corollary preference for industry-led soft law regimes.³¹

²⁴ Mares, *supra* note 3 at 224; Adewale, *supra* note 20 at 49. See also Ward, *supra* note 6 at 7 (“Public sector regulatory and enforcement capacity plays a critically important role in underpinning CSR.”).

²⁵ Whytock and Robertson, *supra* note 20 at 1489-90.

²⁶ *Ibid* at 1489 (noting that “litigation is just one mechanism that seeks the “optimal degree” of risk and safety in the marketplace”).

²⁷ Adewale, *supra* note 20 at 41.

²⁸ *Ibid* at 56.

²⁹ WVH Rogers, *Winfield & Jolowicz on Tort*, 18th ed (London: Sweet & Maxwell, 2010) at 699 (noting the potential in the UK for “commercial or political pressure on the government of the day” to thwart regulatory efforts) [*Winfield*].

³⁰ Zerk, *supra* note 5 at 47; Adewale, *supra* note 20 at 37, 46.

³¹ Nwete, *supra* note 8 at 320, 329; Zerk, *ibid* at 33.

While not insensitive to the economic ramifications of judgments in environmental claims,³² unelected judges are less likely to have any stake in a regulatory race to the bottom as, increasingly even in a country like Nigeria, their priorities are said to depart from those of political elites.³³ And just as judges are less likely to engage in a race to the bottom, they provide cover for executive and legislative officials not to do so, either. This can be seen by analogy with the international trade context, where it has been asserted:

Negotiation theory suggests that in certain conditions, we could expect the EU to use some of its institutional flaws strategically in order to gain concessions from, or avoid, making concessions to, its negotiating opponent...having one's hands tied internally can be useful for extracting concessions externally.³⁴

If the EU's heterogeneity works to its advantage in trade negotiations, so might that of an individual developing state, by virtue of the separation of powers, in negotiations concerning foreign investment. An independent judiciary, willing to draw on common law on behalf of citizens, relieves to some extent government officials of the responsibility to develop meaningful environmental protections – and of the power to bargain away such protections – by taking the matter out of their hands. Along these lines the House of Lords has impliedly recognized a role for judicial development of common law principles where meaningful legislative steps are not taken to hold polluting companies to account.³⁵ Of course, what is true for judges in the host state of an environmentally risky investment is also true for judges in the home state of the multi-national parent company. Their role in wielding the common law to either take jurisdiction over a *Rylands* claim arising abroad or, more probably, to enforce foreign judgments resulting from *Rylands* claims against the parent company, is examined below.

³² See e.g. *Boomer v Atlantic Cement Co* 26 NY2d 219 (NY 1970) (declining to issue an injunction against a cement plant because doing so would be economically ruinous to the local community, but awarding damages).

³³ Jędrzej Frynas, *Oil in Nigeria: Conflict and Litigation Between Oil Companies and Village Communities* (London: LIT/Transaction, 2000) at 222 [Frynas, *Oil in Nigeria*].

³⁴ Andrew T Guzman and Joost Pauwelyn, *International Trade Law* (Alphen an den Rhin, the Netherlands: Wolters Kluwer, 2011) at 69.

³⁵ *Cambridge Water Company Ltd v Eastern Counties Leather Plc*, [1994] Env LR 105, 126 (read *a contrario*: “given that so much well-informed and carefully structured legislation is now being put in place for this purpose, there is less need for the courts to develop a common law principle to achieve the same end.”) [*Cambridge Water*].

4. *The Merits of Rylands v Fletcher*

Having shown that private law has a continued role to play in connection with environmental wrongdoing by corporate defendants, one tort stands out as potentially more significant than the rest. The rule in *Rylands v Fletcher* has proved to be “particularly useful” in connection with environmental harm, despite, or perhaps because of, its unusual specificity among torts:³⁶

We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.³⁷

Rylands arose out of a lawsuit between two nineteenth century neighbours, one of whom constructed a water reservoir on his land. Preparatory excavations had revealed old, blocked shafts that, unbeknownst to the defendant, and in such a way as would be unforeseeable to a person exercising reasonable care, were connected to a mine still in use under the plaintiff’s land. When the defendant’s reservoir was filled, the plaintiff’s mine flooded. Though the defendant was found not to have been negligent, he was held liable under the case’s eponymous rule.³⁸

These seemingly pedestrian facts gave rise to a signal moment in the history of tort. The traditional rule of negligence-based liability, governing ordinary risks associated with ordinary activities, was supplemented by a rule of strict liability, governing exceptional risk associated with unusual activities.³⁹ Risk was substituted for fault as the determinative element.⁴⁰ Some commentators trace this innovation back to the law of negligence, as a temporal variation in the point at which foreseeability of harm is assessed: from the time of the immediately injurious conduct to the time that the risky operation was initiated.⁴¹ Others regard *Rylands* as an elaboration of the law of nuisance in situations where the escape is “isolated” rather than continuous,⁴² reflecting the fact that *Rylands*, like

³⁶ Richard Lindgren, “The New Toxic Torts” Canadian Environmental Law Association (2000), online: http://s.cela.ca/files/uploads/toxic_torts.pdf at 10.

³⁷ *Rylands v Fletcher* (1866), LR 1 Ex 265, 279-80 [*Rylands Ex*].

³⁸ *Rylands*, *supra* note 4.

³⁹ Allen M Linden and Bruce Feldthusen, *Canada Tort Law*, 8th ed (Markham, Ont.: LexisNexis Butterworths, 2006) at 540; *Winfield*, *supra* note 29 at 695.

⁴⁰ *Winfield*, *supra* note 28 at 693 (noting that “liability under the rule is strict in the sense that it relieves the claimant of the burden of showing fault.”).

⁴¹ Linden and Feldthusen, *supra* note 39 at 542; *Winfield*, *ibid* at 695.

⁴² *Cambridge Water*, *supra* note 35 at 124.

nuisance, is concerned with damage to property rather than persons.⁴³ Still others regard the tort as *sui generis*.⁴⁴

Such theoretical debates are beyond the scope of this paper, although they serve as a useful point of departure in examining *Rylands*. An emphasis on risk associated with a defendant's operations, rather than fault in a defendant's conduct, is highly relevant to transnational corporate accountability given the "excessive risk-taking" that is a hallmark of locally-incorporated subsidiaries of multi-national parent companies.⁴⁵ Equally clear is the particular relevance of *Rylands* where those risks are environmental in nature. This is exemplified by the rule's historical application to contamination of land by, among other things,⁴⁶

- creosote
- petroleum
- chlorinated solvents
- herbicide
- colliery spoil
- manure contaminants
- fire.

Of special interest in a transnational context is the invocation of *Rylands* in the courts of Nigeria,⁴⁷ where extensive oil and gas activity by domestic and multinational companies, with little monitoring or regulation by Nigerian authorities, has had deleterious effects on human, plant and animal life on land and in water.⁴⁸ Apart from oil spills, like that from a Shell terminal in 1979 which leaked 560,000 barrels into surrounding occupied swampland, and which continued to occur at a rate of several hundred barrels per year as of the 1990s, the region's refineries regularly released liquid and solid waste containing oil residue.⁴⁹ One consequence of this has been a line of decisions in the high courts of Ughelli and Bori states, applying *Rylands* to impose liability on locally incorporated Shell subsidiaries for damage done by escaping oil to fish ponds, drinking wells, and, in one case, to a "juju shrine."⁵⁰

⁴³ Winfield, *supra* note 29 at 698.

⁴⁴ *Ibid* at 695.

⁴⁵ Eroglu, *supra* note 23 at 79.

⁴⁶ Lindgren, *supra* note 36 at 11; Winfield, *supra* note 29 at 700.

⁴⁷ Adewale, *supra* note 20 at 37.

⁴⁸ Nwete, *supra* note 8 at 318.

⁴⁹ Frynas, "False Developmental Promise," *supra* note 11 at 594-95.

⁵⁰ Adewale, *supra* note 20 at 39 (citing *Edhemowe v Shell BP Nigeria Limited*, Suit No. UHC 12/70 (unreported) Ughelli High Court, 29 February 1971, and *Chief Otuku and Ors v Shell BP*, Suit No. BHC/83 (unreported) Bori High Court, 15 January 1985).

From a plaintiff's perspective, the great advantage of strict liability as articulated in *Rylands* is that it obviates the need to prove fault on the part of the defendant. Evidentiary burdens have been identified as a fatal flaw in many negligence claims, particularly where they concern highly "technical" operations of a defendant and are brought by resource-scarce plaintiffs before resource-starved judiciaries.⁵¹

5. *The Elements of Rylands*

Having examined *Rylands*' potential value to claims for environmental harm in the developing world, this paper now turns to address the elements which must be made out in a *Rylands* action. This will be done critically, with an eye to their unrealized potential.

Liability under *Rylands* depends upon four criteria being satisfied. The defendant must have made a *non-natural use* of her land; the defendant must have brought onto that land something *likely to do mischief if it escaped*; that thing must have *escaped* onto the plaintiff's land; and *damage* to the plaintiff's land must have resulted. Since the latter two elements are fact-contingent and, in an abstract sense, mostly non-contentious, only the former two will be discussed here. As a preliminary matter, it should be noted that the distinction between non-natural use and mischief in the event of escape is by no means a clear one: both elements necessarily inform the assessment of the risk associated with a defendant's operation, which is the central concern under *Rylands*.⁵² Nonetheless these will be addressed as separate elements, consistent with the way in which they are applied by courts throughout the common law world.

A) *Non-natural Use of Land*

A consensus has inexplicably emerged among scholars and judges that the non-natural use requirement did not appear in the first-instance decision in *Rylands*, by the Court of Exchequer, and was only added on appeal by Lord Cairns.⁵³ The implication is that the House of Lords was attempting to narrow what it perceived as the overbroad scope of the rule, excerpted above, when it held:

⁵¹ Adewale, *ibid* at 48, 50.

⁵² Winfield, *supra* note 29 at 701.

⁵³ See e.g. Winfield, *supra* note 29 at 708 ("We have already noted that Blackburn J. in the Court of Exchequer Chamber made no mention of this requirement."); *Smith v Inco*, 2011 ONCA 628 at para 69, 107 OR (3d) 321 ("Lord Cairns introduced the concept of "non-natural use" of property as a precondition to the imposition of strict liability.") [*Inco*].

[I]f the Defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a *non-natural use*, for the purpose of introducing into the close that which in its natural condition was not in or upon it ... 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.⁵⁴

In fact, the decision of the Court of Exchequer continued beyond the rule, holding:

The person whose ... mine is flooded by the water from his neighbour's reservoir ... is damnified without any fault of his own and it seems but reasonable and just that the neighbour, who has brought something on his own property which was *not naturally there* ... [and] which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues.⁵⁵

Apart from the linguistic similarities between the two decisions, there is a substantive parallel in their reasoning in so far as liability is said not to attach to things naturally on the land.⁵⁶ On the facts of *Rylands*, both courts distinguished between the natural accumulation of water due to, say, rainfall, and the unnatural accumulation of water by the defendant's construction of a reservoir.⁵⁷ There is also the inescapable reality that the House of Lords fully concurred in the decision of the Court of Exchequer. Accordingly, it is suggested that non-natural use was a criterion of the *Rylands* rule at every stage of its gestation, rather than a handicap inflicted on it shortly after birth.

Nonetheless, the consensus view has informed subsequent interpretations of *Rylands*, so that the non-natural use requirement has grounded increasingly restrictive applications of the rule. Faced with an ambiguous term which might refer broadly to artificial uses, as in those not "formed by nature," or narrowly to uses that are abnormal or unusual, the preference has been for a narrow construction of non-natural use.⁵⁸ This is the regrettable attitude of the American Law Institute, drawing on US decisions that themselves invoked *Rylands* in imposing strict liability: no matter how significant the associated risk, an activity is said by the

⁵⁴ *Rylands*, *supra* note 4 at 338-39 [emphasis added].

⁵⁵ *Rylands Ex*, *supra* note 37 at 279-80 [emphasis added].

⁵⁶ *Winfield*, *supra* note 29 at 695 (Blackburn J "had clearly intended the rule to apply only to things collected by the defendant as opposed to things naturally on the land and it may be that Lord Cairns meant nothing more by non-natural use.").

⁵⁷ Frank C Woodside III *et al*, "Why Absolute Liability under *Rylands v. Fletcher* is Absolutely Wrong!" (2003) 29 U Dayton L Rev 1 at 5.

⁵⁸ Adewale, *supra* note 20 at 38. See also *Winfield*, *supra* note 29 at 696.

Restatement not to be subject to strict liability if it is a “matter of common usage.”⁵⁹ Although criticized as turning *Rylands* on its head, given the commonality of water reservoirs in nineteenth century England,⁶⁰ similar reasoning pervades the leading contemporary Canadian decision on point.

In *Smith v Inco Limited*, the Ontario Court of Appeal reversed a trial court ruling that had awarded C\$36 million in compensation to a class of plaintiffs whose properties were contaminated by particles emitted from an adjacent nickel refinery. Without any negligence by the defendants, the value of the plaintiffs’ properties – not all of which were immediately adjacent to the defendant’s operation – had allegedly been reduced on account of widespread public concern about the particles’ health effects.

Whereas the trial court adopted a broad approach to non-natural use, qualifying the defendant’s operation as such “because it brought the nickel on to the property,” the appellate court arguably over-corrected by stressing the refinery’s vicinity:

The evidence suggests that Inco operated a refinery in a heavily industrialized part of the city in a manner that was ordinary and usual ... In our view, the claimants failed to establish that Inco’s operation of its refinery was a non-natural use of its property.⁶¹

This narrowing of non-natural use has been criticized by Canadian commentators.⁶² Nothing inherent in the original language of *Rylands*, as articulated at either instance, requires such a restrictive construction. English courts have attempted to turn back what is perceived as an unprincipled, contingent narrowing of non-natural use. The House of Lords, in *Cambridge Water Co v Eastern Counties Leather*, held that “storage of substantial quantities of chemicals on industrial premises should be regarded as an almost classic case of non-natural use”—and this despite the premises’ location within an industrial community.⁶³

Amid this transnational back-and-forth, Nigerian courts find themselves cast in the unusual role of progressive trailblazers, hewing closer to the reasoning of the Ontario trial court in *Inco*, and of the House

⁵⁹ Woodside, *supra* note 57 at 5, 23.

⁶⁰ Keith Hylton, “The Theory of Tort Doctrine and the Restatement (Third) of Torts” (2001) 54 Vand L Rev 1413, 1435 (noting that “the most recent *Restatement* effort to codify the *Rylands* doctrine might have led to a different result if applied in the *Rylands* case.”).

⁶¹ *Inco*, *supra* note 53 at paras 96, 103.

⁶² Michael S Hebert and Cheryl G McCluckie, “Court of Appeal on *Smith v. Inco: Rylands v. Fletcher* Revisited,” Ontario Bar Association 21:2 (December 2011) at 3, online: <http://www.oba.org/En/Environmental/newsletter_en/v21n1.aspx>.

⁶³ *Cambridge Water*, *supra* note 35 at 130.

of Lords in *Cambridge Water*, as they broadly construe non-natural use in respect of all stages of oil processing, from pipeline to storage tank to waste pit:

By digging the pit and burying the crude oil unburnt, they had gathered a non-natural user. The crude oil which was passed through the pipelines could not naturally had [sic] been there...It is not a natural user of land but was brought in there by the acts of the defendant.⁶⁴

Even if courts in developing common law countries were to construe non-natural use narrowly, following the appellate decision in *Inco* or the American *Restatement*, certain characteristics of such countries might nonetheless give *Rylands* wider practical effect. This is true of developing countries' less sophisticated land-use planning regimes, for example, which may inadequately segregate industrial and residential uses, and their higher prevalence of subsistence lifestyles. In this respect, it has been said of Nigeria that

As the oil producing states are usually riverine areas, oil spill contaminates their water which is their [residents'] main source of survival and makes infertile the little land they have.⁶⁵

On balance, it is suggested that nothing in the articulation or subsequent interpretation of *Rylands*' non-natural use requirement impedes the rule's application to land contamination by industrial operations in common law developing countries.

B) Likely to do Mischief in the Event of Escape

The second criterion for liability under *Rylands* has generated less contention than that of non-natural use. The requirement that damage be foreseeable in the event of escape of the thing brought onto the defendant's land has been variously phrased, even by the Court of Exchequer in *Rylands* itself. Having insisted, in the rule excerpted above, that the thing be "likely to do mischief if it escapes," the Court elsewhere phrased the rule as: "[T]he person who has brought on his land and kept there *something dangerous*, and failed to keep it in, is responsible for all the

⁶⁴ Adewale, *supra* note 20 at 39-40 (citing *Chief Otuku and Ors v Shell BP UHC* 12/70 (unreported) Ughelli High Court (29 Feb. 1971) at 20-21). See also *Umudje & Awajene (for themselves and on behalf of the Enenurhie Community) v Shell BP* [1976] 9-11 SC 155 (Sup Ct Nigeria) ("The appellants are therefore liable under the rule in *Rylands v Fletcher*, for damages arising from the escape of oil-waste from the oil pit.").

⁶⁵ Adewale, *ibid* at 43 (citing *Chief Otuku and Ors v Shell BP*).

natural consequences of its escape.”⁶⁶ While the two formulations cannot seriously be regarded as differing in substance or rigour, given their articulation by the same court in a single judgment, the latter phrasing, with its explicit reference to danger, has found favour throughout the common law world.

Thus, in the United States, the *Third Restatement* extends strict liability for land damage inflicted through escape of an “*abnormally dangerous*” use which creates a “highly significant risk of physical harm even when reasonable care is exercised.”⁶⁷ And in Nigeria, the risk associated with the oil industry has been attributed not to a greater propensity for carelessness or fault but to the fact that “petroleum operation itself is *inherently dangerous*.”⁶⁸ Similar variations in wording have been observed in Canadian applications of *Rylands*.⁶⁹ Whatever the phrasing used, courts concur that the danger, or mischief, which must be likely is not the escape itself – such a requirement would border on fault and arguably fold *Rylands* into negligence – but rather the damage attendant on that escape.⁷⁰

C) Defences to Liability under *Rylands*

Dangers that might be qualified as extreme generally do not count among the “normal risks” to which members of a community can be said to have consented and, which, in turn, fall to be regulated under negligence law.⁷¹ Accordingly, though available where a *Rylands* plaintiff “voluntarily encounters” the risk associated with the defendant’s operation,⁷² the defence of consent will likely have limited bearing.

Rylands has always been associated with a related but much broader defence, namely “common benefit” of the inherently dangerous activity. Some commentators have endeavoured to expand this defence with respect to large-scale industrial activities such as oil refining:

[P]etroleum operation is for the benefit of Nigerians. This is attested to by the improvement in the social and economic life of the people brought about by the

⁶⁶ *Rylands Ex*, *supra* note 37 at 279 [emphasis added].

⁶⁷ Woodside, *supra* note 57 at 19 (citing *Restatement (Third) of Torts* § 20(b)).

⁶⁸ Adewale, *supra* note 20 at 42.

⁶⁹ Linden and Feldthusen, *supra* note 39 at 542.

⁷⁰ Winfield, *supra* note 29 at 701.

⁷¹ Linden and Feldthusen, *supra* note 39 at 541.

⁷² Woodside, *supra* note 57 at 29.

revenue generated by oil...The plaintiff being a citizen of Nigeria, the operation is also for his own purpose.⁷³

This construction distorts the exception. No matter how desirable it may be to increase employment, including through extractive operations, the mere fact that an activity does so will not shield it from liability under *Rylands*.⁷⁴ Such is the understanding in Ontario:

While Inco's refinery no doubt brought significant economic benefit to Port Colborne, Inco did not operate its refinery for the general benefit of the community...The incidental benefit to the community flowing from the operation of the Inco refinery does not bring it within the phrase "for the general benefit of the community."⁷⁵

The defence of common benefit having been narrowed in this way, the only remaining defence generally available to defendants in a *Rylands* action is where the harmful escape results from an intervening cause or force majeure.⁷⁶ This is only fair to defendants, but the general scarcity of *Rylands* defences is arguably appropriate given the capacity of exceptionally risky operations to procure liability insurance.⁷⁷

6. *Rylands in Transnational Context*

It has been shown how, with reinterpretation of the element of non-natural use so as to bring *Rylands* into line with its historical application in England and its contemporary application elsewhere, common law judiciaries have at their disposal a means to ensure accountability for environmental harm arising from extractive operations⁷⁸ even in the face of weak regulators and self-interested corporations. This paper now turns to examine *Rylands*' potential in concretely transnational terms, highlighting the role of multi-nationals' home state courts in ensuring its optimization.

⁷³ Adewale, *supra* note 20 at 45, 46.

⁷⁴ *Cambridge Water*, *supra* note 35 at para 130 ("I myself, however, do not feel able to accept that the creation of employment as such, even in a small industrial complex, is sufficient of itself to establish a particular use as constituting a natural or ordinary use of land.").

⁷⁵ *Inco*, *supra* note 53 at para 104.

⁷⁶ *Winfield*, *supra* note 29 at 709, 712.

⁷⁷ *Transco Plc v Stockport Metropolitan Borough Council*, [2003] UKHL 61, [2004] Env LR 24 at 460.

⁷⁸ Linden and Feldthusen, *supra* note 39 at 544 ("The concept lies hidden in the cases, waiting to be discovered. If it is reoriented in the way suggested, one could forecast that the future of *Rylands v Fletcher* will be one of steady growth and service to society, and not one of decay and ultimate eclipse.").

What is envisioned, for discussion's sake, is an action by Nigerian plaintiffs whose land is contaminated by escape from an adjacent extractive operation through no fault of the operator, a Nigerian-incorporated subsidiary of a multi-national parent company based in the US, UK or Canada. In this scenario it may be that the non-compensatory effects of tort awards, including reputational harm to a global brand, are all that the plaintiffs seek. Alternatively, if the plaintiffs are intent on receiving full compensation, they may obtain this from the locally-incorporated subsidiary on account of the circumscribed nature of a *Rylands* action: plaintiffs' land must be adjacent to – or, following the logic of Ontario's *Inco* decision, in the general vicinity of – the defendant's operation, and only harm to land is eligible for compensation.⁷⁹ Damages will therefore tend to be less significant than those awarded for negligence.

That said, damages may still exceed the value of the local subsidiary's assets. In such cases full recovery by the plaintiffs will depend upon holding the multi-national parent company itself to account. Possible mechanisms for doing so may be offered by analogy between *Rylands* and negligence actions, which occur comparatively frequently on a transnational basis. Chief among these is a lawsuit against the multi-national parent company in its home state, and, should those courts exercise jurisdiction over the matter, the establishment of either derivative or direct liability of the parent company for harm caused by a harmful escape from its foreign investment.

The first jurisdictional hurdle is easily overcome. The multi-national company's home state courts would have jurisdiction *simpliciter* over a *Rylands* suit arising out of Nigeria by virtue of the defendant multi-national's presence in its home state.⁸⁰ The second hurdle is more challenging, as the defendant attempts to stay *exercise* of that jurisdiction. One ground on which a stay might be sought derives from the *Moçambique* rule of the House of Lords, to the effect that jurisdiction must be declined over actions “for trespass, nuisance and other rights” concerning land situated abroad.⁸¹ A *Rylands* action necessarily concerns land, in this case abroad; however, this argument is properly doomed to fail

⁷⁹ *C.f. Inco*, *supra* note 53 at para 68 (noting that *Rylands* “imposes strict liability for damages caused to a plaintiff's property (and probably, in Canada, for personal damages)”).

⁸⁰ *Club Resorts Ltd v Van Breda*, [2012] 1 SCR 572 at para 86; see also Peter Nygh, “The Liability of Multinational Corporations for the Torts of Their Subsidiaries” (2002) 3 European Business Organization Law Review 1 at 5 (“There will, of course, not be any problem in establishing primary jurisdiction over a parent company that is incorporated and has its principal office within the jurisdiction.”).

⁸¹ Nygh, *ibid* at 6. The designation is drawn from the decision of the House of Lords in *British South Africa Co v Companhia de Moçambique* [1893] AC 602.

where the *Moçambique* rule has been overridden or fallen into abeyance with respect to claims not involving land title, as in the US, England and seemingly in Canada.⁸²

A multi-national parent company's effort to have proceedings stayed is likely to fare better under the *forum non conveniens* doctrine. Unlike the jurisdiction *simpliciter* analysis, *forum non conveniens* is an exercise in judicial discretion with the overall purpose of ensuring that jurisdiction is exercised in the most appropriate or most convenient forum having regard to the situation of the individual parties.⁸³ As a discretionary device, the *forum non conveniens* analysis is by definition not subject to hard and fast rules, though this has not impeded its "remarkably uniform" development across common law judiciaries.⁸⁴ Relevant factors include such practical considerations as residence of parties and witnesses, applicable law, and location of evidence.⁸⁵ In our hypothetical scenario, the multi-national defendant could be expected to argue that the action is more substantially connected to Nigeria, as the *situs* of the tort, and that the Nigerian courts therefore are a clearly more appropriate forum.⁸⁶ The foreign *situs* of a tort is undoubtedly a compelling factor in determining the most appropriate jurisdiction for claims arising out of that tort.

On the other hand, the *forum non conveniens* analysis is not blind to substantive implications of either staying or exercising jurisdiction. In Canada, fairness to the parties is a "guiding element" in determining the more appropriate forum,⁸⁷ and the "loss of juridical advantage" to plaintiffs counts among the relevant factors.⁸⁸ To this end, regard is had to the efficiency, fairness and sophistication of courts in the alternative forum.⁸⁹ The standard by which their "adequacy" is measured may be more or less lenient,⁹⁰ and in any case judiciaries in foreign investment

⁸² *Ibid* at 7; *Godley v Cole* (1988), 39 CPC (2d) 162 (Ont Dist Ct).

⁸³ Jean-Gabriel Castel, "The Uncertainty Factor in Canadian Private International Law" (2007) 52 McGill LJ 555, 562; Whytock and Robertson, *supra* note 20 at 1481.

⁸⁴ *Amchem Products Inc v BC (WCB)*, [1993] 1 SCR 897 at 921-22 [*Amchem*].

⁸⁵ Whytock and Robertson, *supra* note 20 at 1461.

⁸⁶ Supported by the comments of Nygh, *supra* note 80 at 5.

⁸⁷ *Hunt v T&N PLC*, [1993] 4 SCR 289 at 313.

⁸⁸ *Amchem*, *supra* note 84 at 919.

⁸⁹ Nygh, *supra* note 80 at 5 (noting that "English courts have refused to decline jurisdiction on grounds of *forum non conveniens* where the alternative forum was a country with inadequate or no provision for legal aid or where legal services generally were underdeveloped."); see also Whytock and Robertson, *supra* note 20 at 1457.

⁹⁰ Whytock and Robertson, *ibid* at 1450; see also *Spiliada Maritime Corp v Cansulex Ltd*, [1987] AC 460 at 478 (requiring plaintiffs in English courts to establish "objectively by cogent evidence" that justice will be denied in the more appropriate forum if a stay of proceedings is to be avoided.)

host states are seen to be increasingly receptive to plaintiffs.⁹¹ Nonetheless, real concern remains about the efficiency and technical capacity of courts in some developing countries,⁹² and their neutrality may be suspect where the country's development depends heavily upon the defendant's economic activity.⁹³

Additionally, there is the question of enforceability of any judgment eventually awarded in the host state against the defendant multi-national company.⁹⁴ Unenforceability should weigh heavily against a stay of proceedings in the defendant's home state insofar as the *forum non conveniens* doctrine seeks precisely to avoid inconvenient, inefficient litigation – including subsequent proceedings to enforce foreign awards against a defendant.⁹⁵ The weight given to the question of enforceability might be increased on account of the important interest of environmental protection; in this vein, restrictive application of the *forum non conveniens* doctrine has been called for where transnational litigation arises out of human rights violations.⁹⁶ The more fundamental or universal the interest at stake, the more important it is that *forum non conveniens* not become a way for transnational defendants to avoid their obligations.⁹⁷ Nor is this perspective lost on the Supreme Court of Canada, which has called for the opening of courts to resolve “disputes arising in other jurisdictions consistent with the interests and internal values of the forum state.”⁹⁸

Notwithstanding these considerations, were the multi-national defendant's home state courts to stay exercise of their jurisdiction, plaintiffs would have to attempt to establish jurisdiction over the parent company in the courts of the subsidiary's host state. Substantively, this may not represent a disadvantage in view of the particular historical success of *Rylands* claims in Nigeria.⁹⁹ The challenge to plaintiffs here would be to make out presence of the multi-national parent company – and

⁹¹ Whytock and Robertson, *ibid* at 1448-49; Frynas, *Oil in Nigeria*, *supra* note 33 at 221-22.

⁹² Nwete, *supra* note 8 at 332; Nygh, *supra* note 80 at 4.

⁹³ Nygh, *ibid* at 4.

⁹⁴ Whytock and Robertson, *supra* note 20 at 1496.

⁹⁵ *Ibid* at 1495.

⁹⁶ Paul R Dubinsky, “Human Rights Law Meets Private Law Harmonization: The Coming Conflict” (2005) 30 Yale Int'l L J 211 at 302 (noting how some judiciaries, in order “to enable domestic litigation of a core group of grave international human rights violations,” have refused “to dismiss such suits on *forum non conveniens* grounds”).

⁹⁷ Whytock and Robertson, *supra* note 20 at 1494.

⁹⁸ *Tolofson v Jensen*, [1994] 3 SCR 1022, 1047 [*Tolofson*].

⁹⁹ *C.f.* Nygh, *supra* note 80 at 4 (“Local law and practice may be less favourable to plaintiffs ... than the law and practice that prevails at the seat of the parent corporation.”).

ultimately its derivative liability – on the basis of control over, or involvement in, the local extractive operation.¹⁰⁰ Reasoning by analogy with transnational lawsuits in negligence, this could be achieved by demonstrating a “highly integrated” corporate decision-making structure as between parent company and local subsidiary.¹⁰¹ Alternatively, direct liability of the parent might follow from control over its subsidiary’s “hazardous” operations combined with real or constructive knowledge of their “substantial risk to ... neighbours.”¹⁰² Such an emphasis upon hazard and risk to adjacent land occupiers is strongly redolent of *Rylands*, and would seem to support an extension of strict liability to multi-national parents on at least as strong a basis as negligence liability. That this liability theory relies on a notional duty of care between foreign parent company and local neighbours need not confine it to negligence actions: as noted above, some scholars compellingly regard *Rylands* as a derivation of negligence, in which foreseeability of harm is assessed upon beginning operations rather than at the time of injurious conduct.

In the event Nigerian adjudicative jurisdiction were to be established over a multi-national defendant, and the parent company found liable under *Rylands* for a harmful escape from its locally-incorporated extractive operation, Nigerian courts would still lack enforcement jurisdiction over the parent company’s assets.¹⁰³ For an effective remedy, plaintiffs would have to seek enforcement of the judgment in the parent company’s home state. Where the defendant’s home state courts have previously stayed jurisdiction on *forum non conveniens* grounds, leading to litigation on the merits in Nigeria, the possibility of a “transnational access to justice gap” presents itself should the Nigerian judgment not be enforced in the defendant’s home state.¹⁰⁴ Such a gap is a particular danger in the US, where the adequacy of foreign courts is assessed at the enforcement stage against a far more rigorous standard for fairness and impartiality than at the *forum non conveniens* stage.¹⁰⁵ The danger is less pronounced in Canada, with its liberal standard for enforcement of foreign judgments intended to “accommodate the movement of people, wealth and skills across state lines.”¹⁰⁶ Defences to enforcement, such as natural justice or public policy

¹⁰⁰ *Ibid* at 3.

¹⁰¹ *Ibid* at 9.

¹⁰² *Ibid* at 15.

¹⁰³ Accord Whytock and Robertson, *supra* note 20 at 1463.

¹⁰⁴ *Ibid* at 1472, 1482.

¹⁰⁵ *Ibid* at 1470..

¹⁰⁶ Tolofson, *supra* note 98 at 1047; see also Joost Blom, “Private International Law in a Globalizing Age: the Quiet Canadian Revolution” (2002) 4 YB Private Int’l L 83, 114.

considerations, are correspondingly restrained:¹⁰⁷ the Ontario Court of Appeal has even enforced a foreign judgment against a Canadian parent company for land contamination by its US subsidiary where the defendant's liability was based upon regulatory rather than private law¹⁰⁸ – ordinarily a sure basis for denying enforcement of foreign judgments. In short, Canadian courts' comity-minded approach to private international law is comparatively well-placed to ensure access to justice in transnational litigation arising out of land contamination abroad.¹⁰⁹

7. Conclusion

Concern for the environment has placed it at or near the top of the public agenda in contemporary world affairs. As observed by the Supreme Court of Canada:

The protection of the environment has become one of the major challenges of our time. To respond to this challenge, governments and international organizations have been engaged in the creation of a wide variety of legislative schemes and administrative structures.¹¹⁰

The very emergence and embrace of transnational CSR, as exemplified by Canada's CSR Strategy for the International Extractive Sector, affirms growing concern for environmental protection and the related objective of holding multi-national companies to account for contamination by operations in developing states. As discussed above, however, corporate self-interest tends to undermine CSR's effectiveness, while the Supreme Court's confidence in legislative responses is arguably misplaced in so far as law-makers in many states face strong disincentives to the regulation of multi-nationals' activities.

In common law jurisdictions, therefore, it may fall to the judiciary and the private law of tort to give voice to societal values in respect of multi-national companies engaging in environmentally hazardous operations. This is a familiar position for tort law to find itself in, having long led the

¹⁰⁷ Blom, *ibid* at 97.

¹⁰⁸ *Ibid* at 99 (citing *United States of America v Ivey* (1996), 30 OR (3d) 370 (CA)).

¹⁰⁹ Accord Dubinsky, *supra* note 96 at 302 (noting that some courts are "more readily recognizing transnational human rights judgments than other kinds of foreign judgments").

¹¹⁰ *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, 16; see also *Cambridge Water*, *supra* note 35 at 126 ("The protection and preservation of the environment is now perceived as being of crucial importance to the future of mankind ...").

law's adaptation to changing needs including in the arena of environmental protection.¹¹¹ The strict liability of *Rylands v Fletcher* may be especially useful in this regard, provided multi-nationals' home state courts stand ready to exercise jurisdiction over, or enforce judgments resulting from, *Rylands* actions that arise abroad.

¹¹¹ See e.g. *British Columbia v Canadian Forest Products Ltd*, [2004] 2 SCR 74, at 142 ("there is no reason to neglect the potential of the common law, if developed in a principled and incremental fashion, to assist in the realization of the fundamental value of environmental protection"); see also Frynas, *Oil in Nigeria*, *supra* note 33 at 222.