

THE EFFICACY OF LIABILITY UNDER THE RULE IN
RYLANDS v FLETCHER
IN CONSTRUCTION INDUSTRY IN MALAYSIA

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DEDICATION

Dedication to those who are very special to my heart especially
[My husband, Ahmad Zukhairi, my kids, Fahmi, Fauzan, Farishah, Mother, Ishah Harun,
my family in law especially my Father in law, Prof. Datuk Dr. Khairul Anuar]
and my classmates,

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Alhamdulillah, thank you so much to Allah S.W.T finally I successfully finished my thesis.

Thanks a million to my supervisor [Prof. Madya Dr Rosli Bin Addul Rashid] for the help and educate me throughout the development of my thesis. Thank you very much also to En Jamaluddin Yaakob, Dr. Maizon Bte Hashim, other lectures and friends who are giving me ideas, advice during the progress of my thesis until finish. Only Allah can pay back all those good things you have done to me. Hopefully with all the knowledge I have gained can be used for the future thoughts. InsyAllah.

ABSTRACT

Rylands v Fletcher is under the law of torts which regulates at common law of activities affecting individual rights in or over real property and protects public rights. *Rylands v Fletcher* is a classic case in United Kingdom, which handling cases of environmental liability and practicing strict liability. It is quite popular because it functions as a mechanism of environmental protection. In Malaysia the application of the rule of *Rylands v Fletcher* was developed more than three decades ago and the rule has been applied in a number of cases. Recently the function of the rule since its inception has been progressively deteriorate and restricted in its application from within and the area in which it applied to oblige liability gradually diminished. The enormous issue can be lifted up under this research is, should a Malaysian court continue to apply the rule in *Rylands v Fletcher* without amendment to the requirements of the liability, because the capability of the liability of the rule originally is not adequate to familiarize with the growing figure of damages and to speed up the court case. The objectives of this research are to determine the environmental cases in Malaysia and the associated issues and to determine the applicability of *Rylands v Fletcher* in environmental cases in Malaysian Construction Industry. The scope of the research is focus on Malaysian cases only where have been tested from the court held from the year of 1960 until 2006. The findings of this research suggested that with the rising figure of environmental cases in Construction Industry therefore, need to speed up the court cases to lessen the burden of the plaintiff in order for them to secure some kind of monetary compensation for damages to people's belongings and with this approach the polluters will definitely be answerable for all damages. To speed up the court case another finding suggested that need some modification to the rule to make it more effective. Applicability of the rule of *Rylands v Fletcher* in Malaysia with the new version of additional ingredient that is 'foreseeability'. With this new addition as an essential component of liability to the rule of *Rylands v Fletcher*, the judges, lawyers, legal skills and proficiency would perform the theory of strict liability in the expanding figure of environmental cases in order to guarantee that those cases are appropriately developed in court without any offensive interruption.

ABSTRAK

Rylands v Fletcher adalah di bawah undang-undang tort dimana ianya mengatur undang-undang aktiviti berkenanan dengan melindungi hak hartanah perseorangan dan juga melindungi hak awam. *Rylands v Fletcher* adalah kes klasik yang berasal dari United Kingdom yang bertujuan menangani kes-kes berkaitan; tanggungjawab terhadap persekitaran dan mengamalkan 'strict liability'. Kemasyuharan *Rylands v Fletcher* disebabkan, peranannya sebagai mekanisme untuk melindungi alam persekitaran. Di Malaysia, *Rylands v Fletcher* telah berkembang sejak tiga abad yang lalu dan ia telah melaksanakan banyak kes. Dewasa ini didapati semenjak undang-undang ini diperkenalkan, penggunaannya dan limitasi semakin berkurangan. Oleh itu, isu yang boleh ditimbulkan dari penyelidikan ini ialah, adakah mahkamah Malaysia harus meneruskan penggunaan undang-undang Ryland v Fletcher tanpa adanya sebarang perubahan ke atas syarat-syaratnya yang disebabkan, undang-undang sediaada (asal) tidak mencukupi, berhadapan dengan pelbagai situasi di mana bertambahnya kes yang berkaitan dengan alam sekitar dan mempercepatkan kes untuk diselenggarakan di mahkamah. Maka objektif dari penyelidikan ini ialah untuk menentukan kes-kes yang berkaitan dengan alam sekitar di tapak pembinaan dan menentukan sejauh mana *Rylands v Fletcher* berjaya diadaptasikan di mahkamah Malaysia,. Skop penyelidikan ini bertumpukan di atas kajian kes-kes terhad yang berlaku di Malaysia sahaja yang telah mendapat keputusan mahkamah dari tahun 1960 hingga 2006. Hasil kajian ini mendapati bahawa dengan pertambahan kes-kes alam persekitaran di tapak pembinaan, maka untuk mempercepatkan kes-kes di mahkamah dan untuk mengurangkan beban pihak plaintif adalah perlu. Dengan itu ia dapat menjamin agar gantirugi dalam bentuk wang ringgit dapat diberikan ke atas kerugian bagi pihak terbabit. Manakala bagi pihak yang bersalah akan dapat didakwa sewajarnya. Maka pembaikan undang-undang *Rylands v Fletcher* perlu dibaiki supaya ia lebih berkesan bagi mempercepatkan lagi kes-kes di mahkamah yang berkaitan dengan masalah alam sekitar. Dengan versi baru undang-undang *Rylands v Fletcher* iaitu 'foreseeability' para hakim, peguam pihak professional akan dapat mempercepatkan lagi kes-kes ini di mahkamah tanpa sebarang kelewatan dan dapat mengurangkan jumlah kes-kes alam persekitaran di mana ianya juga dikategorikan sebagai salah satu jenayah.

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<i>Anderson v. Oppenheimer</i>	(1880) 5 QBD 602
<i>Batang Kali estates Sdn Bhd v Romani Bte Adbul Aziz</i>	[1995] 3 MLJ 104
<i>Baurer, Love Canal: Common Law Approaches to a Modern Tragedy, 11 Env'tl. L.N.W.U.</i>	133 (1980).
<i>Benning v Wong</i>	(1969) 122 CLR
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LIST OF ABBREVIATION

ACOH	Asian Conference on the Occupational Health
ALR	Australia Law Article
ALRJ	Australia Law Journal
BOWECS	Building Operations and Work of Engineering Construction Safety
CIDB	Construction Industry Development Board
CLJ	Construction Law Journal
EPA	Environmental Protection Act
GDP	Growth Development Percentage
JKR	Jabatan Kerja Raya
MLJ	Malayan Law Journal
MLJA	Malayan Law Journal Article
NGO	Non Government Organization
OSHA	Occupational Safety Health Act
PAM	Persatuan Arkitek Malaysia
PFI	Private Financing Initiative
SKWAK	Skim Kumpulan Wang Amanah Kontraktor

CHAPTER 1

INTRODUCTION

1.1 Background of Research

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

negligence under the rule in *Rylands v Fletcher*.¹ The rule seems to be very helpful in environmental cases, where damage is the result of escape of dangerous substances².

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

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

¹ (1868) LR 3 HL 330

² Dr Abdul Haseeb Ansari, Environmental Protection through Law of Torts: A Critical Appraisal. The Malayan Law Journal Articles 2000 Volume 4 [2000] 4 MLJ lxxxix; [2000] 4 MLJA 81 Pg 2

³ Lynette Taye Key Features of the Town and Country Planning (Amendment) Act 2001 -- An Analysis of the Impact of the Recent Key Amendments to the Town and Country Planning Act 1976. The Malayan Law Journal Articles 2002 Volume 4 [2002] 4 MLJ lxxv; [2002] 4 MLJA 65.pg 1

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

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

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

Obviously development have cause damage to the environment that is why there is a need to have a proper development of law that could help in solving the situation and prosecute the offender. Right now the most important thing is the provision of the framework to apply the rule of *Rylands v Fletcher* up to the standard of the situation as what exactly happen in Malaysia.

Another problem arise in the construction industry is various use of activities rather than to protect the land. Here, obviously shows a lot of disputes in terms of overuse and abuse of land. The damages from construction site activities would be on environmental cases which are dealing with landslide, flood and pollution of water ways, drain, river, air pollution and silting would definitely have close relationship with liability under the rule of *Rylands v Fletcher*. Since there are many occasions where construction causes much damages to the environment it shows that the rule of *Rylands v Fletcher* is quite applicable because it functions as a mechanism of environmental protection. It should be noted that this rule differs from the law of negligence and nuisance because it imposes strict liability if something brought onto land or collected there escapes.

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

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

⁴ Hoon Wee Thim v Pacific Tin Consolidated Corporation[1966] 2 MLJ 240,

⁵ Chan Shick Chin, Liability Under The Rule In *Rylands V Fletcher* In Malaysia, The Malayan Law Journal Articles 2003 Volume 3[2003] 3 MLJ i; [2003] 3 MLJA 1

⁶ [2003] 1 CLJ 12 CA

A case under the rule of *Rylands v Fletcher* usually involves adjoining occupiers of land. Generally, for liability to attach to a defendant, he must have an interest either by way of ownership or occupation of land. In Abdul Rahman⁷ case the court held that:

*“The defendant was not the owner of the land but he was in occupation on an implied licence from the government to work on the land and therefore in possession of the land and thus was in effective control of the land for the purpose of grounding an action against him”.*⁸

From the statement above it shows that liability under the rule of *Rylands v Fletcher* is very useful and have good connection and the rule seems helpful in Construction Industry especially in environmental cases because it can secure some kind of monetary compensation for damages to people’s property. It is easy to use the rule because this approach the polluters will definitely be answerable for all damages. This is true especially, if we look at the increasing number of damages related to environmental pollution cases, flooding, erosion and accident involved negligence of the workers and many others which actually resulted from construction area. One of the examples is in the case of *Steven Phoa Cheng Loon & Ors v Highland Properties Sdn Bhd & Ors*⁹

What actually happen here is, after exercising more than three decades here in Malaysia, suddenly in the year of 2000¹⁰, in the case of *Steven Phoa*,¹¹ the High Court made a pronouncement to shift in judicial approach to *Rylands v Fletcher* type

⁷ Abdul Rahman Bin Che Ngah & Ors v Puteh Bin Samat [1978] 1 MLJ 225

⁸ [1978] 1 MLJ 225

⁹ [2000] 4 MLJ 200

¹⁰ Chan Shick Chin, Liability Under The Rule In *Rylands V Fletcher* In Malaysia, The Malayan Law Journal Articles 2003 Volume 3, p1

¹¹ Stev op.cit. at 809.en Phoa Cheng Loon & Ors v Highland Properties Sdn Bhd & Ors [2000] 4 MLJ 200.

situations.¹² It shows that there is somehow some adjustment needed to adapt with the new situation. To justify the rule is not an easy job as the rule has been a standard of the law of tort in Malaysia for several decades so the rule cannot be abolished without comprehensive appraisal.¹³

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

After the case of *Steven Phoa* it is found out, that the popularity of the liability under the rule of *Rylands v Fletcher* is getting less. It could be liability under the rule of *Rylands v Fletcher* is no longer strict so people refuse to use *Rylands v Fletcher*. They rather choose negligence and nuisance, even though they need to prove the defendant's negligence. Actually scope of the risk of liability under the rule of *Rylands v Fletcher* is broader than negligence liability. Another reason why it is no longer popular could be, since the rule is too old to follow since it was decided in 1868 and until now there is no modification has been amended to the rule. Moreover, could be not suitable to be referring to compare to the new situation. This could be seen from the case of *Chung Khiaw Bank*¹⁴. We must do something in order to bring back the rule as it is one of the most well known common law practice in the law of tort and to maintain the special

¹² Chan Shick Chin, Liability Under The Rule In *Rylands V Fletcher* In Malaysia, The Malayan Law Journal Articles 2003 Volume 3, p 1

¹³ Chan Shick Chin, Liability Under The Rule In *Rylands V Fletcher* In Malaysia, The Malayan Law Journal Articles 2003 Volume 3, p 2[2000] 4 MLJ 200

¹⁴ *Chung Khiaw Bank Ltd v Hotel Rasa Sayang* [1990] 1 CLJ 675

criteria of strict liability. The question is what are the criteria should be added to make it stricter.¹⁵

As what we can see, this rule of *Rylands v Fletcher* has undergone changes in recent years in the common law practicing countries. Starting with England, the House of Lords in *Cambridge Water Co Ltd v Eastern Counties Leather plc*¹⁶ has added to this principle the necessity to prove that the defendant could have reasonably foresee the thing might, if escape, cause damage to the plaintiff.¹⁷ That means foreseeability is an additional ingredient to be added to the rule to make it more effective.

In Australia, in the leading case of *Burnie Port Authority v General Jones Pty Ltd*¹⁸, the High Court after describe in this rule of *Rylands* had been absorbed into the ordinary law of negligence with all the requirements of duty of care, tests of reasonableness of care, foreseeability, proximity, and considerations of contributory negligence withall its difficulties, uncertainty, qualifications and exception completely discarded it as an independent cause of action.¹⁹ Here it shows that the rule does no longer exist since it has been part of the negligence.²⁰

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

¹⁵ Chan Shick Chin, Liability Under The Rule In *Rylands V Fletcher* In Malaysia, The Malayan Law Journal Articles 2003 Volume 3, [2000] 4 MLJ 200, p 4

¹⁶ [1994] 1 All ER 53 HL

¹⁷ The Harvard Environmental Law Review 2000

¹⁸ (1994) 120 ALR 42

¹⁹ AD And SM Mclean PTY LTD v Meech

²⁰ *Burnie Port Authority V General Jones Pty. Limited* (1994) 179 CLR 520 (1994) Aust Torts Reports 81-264, (1994) 120 ALR 42, (1994) 68 ALJR 331 F.C. 94/011

Steven Phoa can justify the requirements of the rule in *Rylands v Fletcher* in Malaysia under construction industry to make it stricter.

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

1.2 Problem Statement

The big issue that can be raised up under this research is, should a Malaysian court sustain to apply the rule in *Rylands v Fletcher* without adjustment to the requirements of the liability, because the capacity of the responsibility of the rule originally is not wide enough to get used to the rising number of damages and to speed up the court case. Also to cope with the complicated cases dealing with the environmental issues in construction industry. At the same time judges and lawyers in Malaysia actually lack of legal skills and expertise in environmental cases in order to ensure that those cases are properly settled in court without any delay and to reduce the total number of environmental cases²¹ which also considered as a crime.

²¹ Dr Mohd Bakri Ishak, Common Law Approaches For Environmental Management In Malaysia And Its Application In The Developed Jurisdiction,

1.3. Literature Review

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

1. To abandon it in total and deal with them under the tort of negligence , like post *Burnie* ²²in Australia or Scotland.
2. To extend the scope of the rule to cover all ultra-hazardous activities, but this was said to be the role of Parliament rather than the courts.²³
3. To retain the rule and state the principles to achieve greater clarity for future application.²⁴ It was specified that the rule was ‘a sub-species of nuisance’²⁵ thus
 - (i) there must be two occupations of land involved²⁶ and (ii) there could be no claim for death or personal injury, it being a land based tort reliant upon, and relating to, interests in land. These natural consequences of the link with nuisance were
 - (ii) reinforced by reference to *Cambridge Water* and *Hunter v Canary Wharf Limited* [1997].²⁷ It must be pointed out that the Human Rights Act may well, in time, prohibit this traditional and important characteristic of nuisance (and, by extension, *Rylands* on the ‘sub-species of nuisance’ construction)²⁸ in allowing those without proprietary interests an equal right of claim.²⁹

²² *Burnie Port Authority V General Jones Pty. Limited* (1994) 179 CLR 520 (1994)

²³ [2003] UKHL 61 at para. 7.

²⁴ [2003] UKHL 61 at para. 8.

²⁵ [2003] UKHL 61 at para. 9.

²⁶ *Read v Lyons* [1947].

²⁷ *Shiffman v Order of St John of Jerusalem* [1936] 1 All ER 5575 and *Miles v Forest Rock Granite Co. (Leicestershire) Limited* (1918) 34 TLR 500.

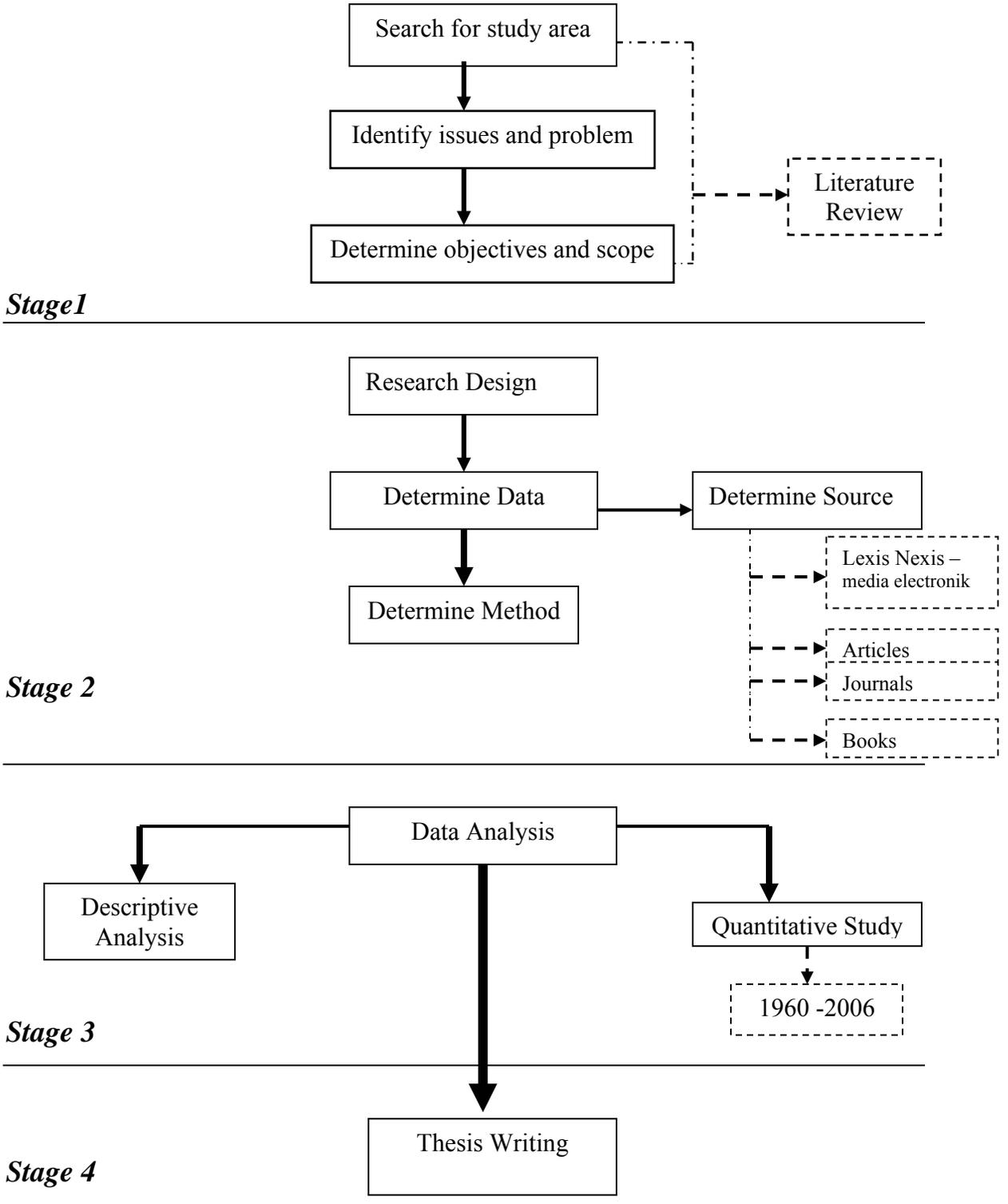
²⁸ *Marcic v Thames Water Utilities Limited* [2002] UKHL66, *Hatton v United Kingdom* [2002] 1 FCR 732

²⁹ *Marcic* [2002] QB 929

1.4. Objectives

- 1- To determine the environmental cases in Malaysia and the associated issues.
- 2- To determine the applicability of *Rylands v Fletcher* in environmental cases in Malaysian Construction either cannot be applicable, partly applicable, applicable with certain addition or provide new law.

1.5 Overall Methodology and strategic analysis



1.5.1 Research Methodology

1.5.1.1 Stage 1- Development of research proposal.

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

1.5.1.2 Stage 2- Research Design and Data Collection.

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

1.5.1.3 Stage 3- Analysis.

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

1.5.1.4 Stage 4

Compilation of the data and witting.

1.6 Scope of study

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

1.7 Organization of the Chapters

- Chapter 1** Discuss the background of the study in the area of Construction Industry in Malaysia focus on environmental cases. Summarize how the development and application and suitability of the rule of *Rylands v Fletcher* in Malaysia. Clearly stated the problem statement, objective, methodology, scope of study and organization of the chapters
- Chapter 2** Briefly discuss Malaysian Construction Industry and its legislation requirements related to the rule of *Rylands v Fletcher*. There are also discussions regarding the need to analyze the liability of the rule as to standardize it comparing to the new and complicated environmental issue in construction industry.
- Chapter 3** Briefly discuss about liability. Type of liability under tort and contract. How the liabilities arise and the professional duties and responsibilities of Building Professionals which demanded by the law and to be more knowledgeable and understanding of legal principles and rules regarding their specific liability.
- Chapter 4** Introduction of the rule of *Rylands v Fletcher* and briefly discuss the judgement and requirements of the rule. The most important is what actually make the case as the leading case in the strict liability. Briefly explain regarding type of liability under the rule and the structure of it.
- Chapter 5** Introduce the development of *Rylands v Fletcher* in the whole world. Why some countries are still practicing the rule and some have abandoned it. In this study there are two specific case law had been choose to be analyzing to see the development of the rule of *Rylands v Fletcher*. A key

factor of the specific case law based on the most popular case practicing the rule and the most receiving critique around the world. In this chapter there will be a framework of the comparison of the original rule requirements to the other two major common law jurisdictions with their requirements to observe the development of the case law as to refer and to highlight to the new situations occurs.

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

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

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