City of Campbellton v. *Gray's Velvet Ice Cream Ltd.*[1] — Liability of a Municipality in Nuisance for Property Damage Caused by Bursting of a Watermain.

CASE SUMMARY

Plaintiff ice cream manufacturer asserted claims in both negligence and nuisance after the flooding of its basement on four separate occasions caused extensive water damage to inventory. All of these incidents occurred during the course of the defendant city's involvement in a land reclamation project and construction of a Civic Centre on property at the rear of the plaintiff's premises. The trial judge found that the first flood, caused by the bursting of a city watermain, gave rise to an actionable nuisance for which the defendant, having failed to establish the defence of statutory authority, was liable. The other three floods, caused by blockage of an outfall drain, were all found to have resulted from the city's negligence.[2] On appeal, *held* affirmed. There is an actionable nuisance once damage sustained is adjudged an unreasonable interference with an occupier's use and enjoyment of his property. For a municipality to escape liability on the basis of statutory authority, it must establish that such nuisance was expressly or impliedly authorized by statute and was the inevitable consequence of that which the statute authorized and envisaged.

HISTORICAL BACKGROUND

Nuisance, as a legal concept, is peculiarly evasive of precise definition. It is trite law that the essence of the tort is an interference with another's beneficial use or enjoyment of his property. Difficulties arise, however, when one attempts to reconcile the variety of distinctly different senses in which the term has been employed. It may be factually descriptive of activity upon, or conditions of, the defendant's property. On the other hand, it may refer to harm or annoyance resulting from such activity or conditions. Neither of these meanings is particularly indicative of legal liability as that arises only upon a judicial determination of the existence of an "actionable nuisance".[3]

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[1](1981), 36 N.B.R. (2d) 288 (N.B.C.A.).

[2]This finding of negligence was not questioned on appeal.

[3]This problem of definition has been recognized and discussed by a number of leading authorities in the field of tort law. See, for instance: Fleming, *The Law of Torts*, (5th ed.), at 393-4, and Street, *The Law of Torts* (6th ed.) at 216.

The modern day tort of nuisance derives from the early thirteenth century assize of nuisance which developed as a remedy for interferences with privileges appurtenant to realty falling short of dispossession. This assize was replaced by an action on the case for nuisance in the early fifteenth century.[4] Developing contemporaneously was the private action for what was termed a "public nuisance", the essence of which was an interference with the exercise of common or public rights. The two actions, although both being categorized as "nuisance" were easily distinguishable by virtue of the fact that "public nuisance" did not require an interference with rights attaching to land.[5] It has been suggested that this growth pattern may, in fact, have contributed to contemporary difficulties in delineating the scope of nuisance. What was once the generic expression of "wrongful harm" developed into a catch-all for many varied and irreconciliable evils.[6]

Speaking in the broadest possible terms,

> "...all nuisances are caused by an act or omission, whereby a person is unlawfully annoyed, prejudiced or disturbed in the enjoyment of land; whether by physical damage to the land or by other interference with the enjoyment of the land or with his exercise of an easement, profit or other similar right to with his health, comfort or convenience as occupier of such land."[7]

The key word is "unlawfully". As was mentioned earlier, the nuisance must be actionable and to meet that criterion, it is essential that it be of a substantial and unreasonable nature.[8] The law of nuisance does not remedy each and every interference. Rather, it seeks to balance the competing interests of people exercising their property rights to the fullest extent. It demands of each of them a measure of flexibility.

Nuisance must also be distinguished from the tort concepts of trespass, negligence, and the rule in *Rylands* v. *Fletcher.*

Nuisance and trespass are complementary actions. The former relates to incorporeal property rights, the latter to protecting an occupier's right of exclusive possession. This distinction manifests itself in several important respects. An action for trespass can be maintained only where there has been an actual intrusion onto the property by some person or object. Nuisance, however, may be invoked where the intrusion is by a less tangible force such as smoke or noise.[9] As well, "trespass is actionable

[4] *Ibid.*, Fleming, at 394. See also: T.A. Street, *The Foundations of Legal Liability* Vol. I. (New York: Edward Thompson Co., 1906) at 212-3.

[5] *Ibid.*, Fleming, at 395.

[6] *Salmond on The Law of Torts* (17th ed.) at 50.

[7] *Ibid.*

[8] *Supra,* footnote 3, Fleming, at 401.

[9] *Ibid.*, at 400.

per se" whereas a nuisance is actionable only if it can be said to be unreasonable, and in most cases, if it results in "actual damage".[10]

Actions in nuisance and negligence differ in both substance and result. "In nuisance one is concerned with the invasion of the interest in the land, in negligence one must consider the nature of the conduct complained of."[11] It is quite possible for a party to be held liable in nuisance without there being any fault on his part. The essential requirement is merely that"[t]he interference must be unreasonable in the sense that the plaintiff should not be required to suffer it, not that the defendant failed to take appropriate care."[12] The plaintiff who frames his case in nuisance will also receive the benefit of a shifting burden of proof once he has established that this "actionable negligence" does exist. It is then up to the defendant to exculpate himself. This differs from a negligence case in that the defence of reasonable care is not available to answer a claim of unreasonable interference.[13]

Nuisance and negligence are often confused, perhaps for no other reason than that the two frequently appear as alternative arguments in the same case.[14] While one fact situation may give rise to both negligence and nuisance, it is not necessary to establish the former in imposing liability for creation of the latter.[15]

Perhaps more analogous to the tort of nuisance is the rule in *Rylands* v. *Fletcher*[16] which may be summarized as follows:

> "[a] person who, in the course of non-natural user of his land, is held to be responsible for the accumulation on it of anything likely to do harm if it escapes is liable for the interference with the use of the land of another which results from the escape of the thing from his land."[17]

This rule is distinguishable from negligence in the sense that liability may be imposed on the defendant for conduct which is of neither a

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[10]*Supra*, footnote 6, at 54. The exception to this requirement of actual damage is for interference with servitudes, i.e. a right-of-way.

[11]*Royal Anne Hotel Co. Ltd.* v. *Village of Ashcroft* (1979), 95 D.L.R. (3d) 756 (B.C.C.A.).

[12]J.P.S. McLaren, Annotation to *Royal Anne Hotel* v. *Ashcroft* (B.C.S.C.) (1976), 1 C.C.L.T. 299 at 300.

[13]*Ibid.*, at 301. See also *supra*, footnote 6 at 60.

[14]Brownridge J.A. in *Temple and Denton* v. *City of Melville* [1979] 6 W.W.R. 257 (Sask. C.A.) at 261 elaborates on this idea and expresses the opinion that parties are relying on the defence of statutory authority while the cases being cited as authorities are those which were really decided on the basis of negligence or the rule in *Rylands* v. *Fletcher* and not nuisance.

[15]*City of Portage La Prairie* v. *B. C. Pea Growers Ltd.* (1965), 54 D.L.R. (2d) 503 (S.C.C.) at 508.

[16](1868), L.R. 3 H.L. 330.

[17]*Supra*, footnote 3, Street, at 246.

negligent nor an intentional nature.[18] Its "affinity" with the law of nuisance, however, has been recognized for some time as is evidenced by Lord Simon's statement in *Read* v. *J. Lyons & Co., Ltd.* to the effect that the two ". . .might in most cases be invoked indifferently".[19] Still, these bodies of law are separated by the simple fact that there are circumstances in which liability may be founded on one but not the other.

The rule in *Rylands* v. *Fletcher* requires the "non-natural" use of land; such is not the case in nuisance. In fact, a "natural use" might be just one factor to be considered in the determination of whether the interference with the plaintiff's use of his property was unreasonable.[20] It would also appear that *Rylands* v. *Fletcher* is restricted to those situations where there has been a physical accumulation on and escape from the defendant's property. Nuisance, on the other hand, provides a remedy for injuries caused by intangibles such as noise.[21]

It is not difficult to see how a strict application of precedent might confuse the scope of *Rylands* v. *Fletcher* and that of nuisance when statements such as the following are made by the courts:

> ". . .I am of the opinion that the defendant is liable on the basis of nuisance, in that it collected, on its own lands and in its own sewerage system, quantities of water and sewerage and permitted such water and sewerage to be discharged onto the lands occupied by the plaintiff company."[22]

The liability is said to be founded in nuisance, whereas the rationale is that of *Rylands* v. *Fletcher.* A crucial point then is the actual basis of liability in nuisance — is it the law of property or the law of obligations?[23] It may well be a combination of the two in the sense that the law will impose liability in nuisance for interference with one's enjoyment of his property but will do so only when that interference is unreasonable. In other words, the test is an objective one, fastening liability on an ". . .interference beyond that which a land owner [or occupier] could reasonably be expected to tolerate."[24]

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[18]*Ibid.*

[19][1947] A.C. 156 at 183.

[20]*Supra,* footnote 3, Street, at 228.

[21]*Ibid.,* at 261.

[22]*Fairview Suede and Leather* v. *City of Dartmouth* (1979), 39 N.S.R. (2d) 290 (N.S.S.C., T.D.) at 306.

[23]This idea is discussed in relation to percolating waters in an interesting case comment by Philip Girard, "An Expedition to the Frontiers of Nuisance", (1980) 25 *McGill L.J.* 565-597.

[24]*Ibid.,* at 597. See also *Supra,* footnote 3, Street, at 226.

THE PRINCIPAL CASE

The principal case held the defendant city to be liable in nuisance for the water damage caused to the plaintiff's inventory. The first step in reaching such a decision was ascertaining the existence of an "unreasonable" interference with the plaintiff's use and enjoyment of its property. In making this determination, Stratton J.A. appears to have relied heavily on the decision of the British Columbia Court of Appeal in *Royal Anne Hotel Co. Ltd.* v. *Village of Ashcroft,* now on appeal to the Supreme Court of Canada.[25] Both cases provide a thorough overview of the law of nuisance as it now stands in Canada. It would appear that where actual physical damage occurs, the court will have little difficulty in deciding that the interference was unreasonable. This view is very much in line with the basic foundation of liability in nuisance which directs its attention not to the defendant's conduct but, to the ramifications for the plaintiff. In other words, if the interference was such that it could be said to be substantial and beyond that which could be reasonably tolerated, then an actionable nuisance has arisen.

Before making its final determination, the instant court was also called upon to deal with the defence of statutory authority pleaded by the defendant on the basis of s.7(1) of the *Municipalities Act.*[26] The section states that a municipality "may" provide various services to its inhabitants, including water. The availability of such a defence in a private nuisance action, where the enabling statute is but permissive in nature, was set out by the Supreme Court of Canada in *City of Portage La Prairie* v. *B. C. Pea Growers Ltd.*[27]. Martland J. concluded that:

> "...the appellant, having created a nuisance which caused damage to the respondent, is liable therefor, because that which is complained of as a nuisance was not expressly or impliedly authorized by the statute in accordance with which the lagoon was constructed, and was not the inevitable consequence of that which the statute authorized and contemplated."[28]

Applying this test, Stratton J.A., in the principal case, held the trial judge to be entirely correct in holding that the defendant city had failed to discharge the onus upon it. He went on to say such a finding was amply supported by the evidence on record.[29]

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[25](1979), 95 D.L.R. (3d) 756. Leave to appeal to the Supreme Court of Canada granted March 1, 1979, 8 C.C.L.T. 179n (B.C.C.A.). This case was also cited with approval in *Temple and Denton* v. *City of Melville, supra,* footnote 14, which involved flooding caused by breaking of a municipal watermain.

[26]R.S.N.B. 1973, c.M-22.

[27](1965), 54 D.L.R. (2d) 503 (S.C.C.).

[28]*Ibid.*, at 508.

[29]*Supra,* footnote 1, at 10.

ANALYSIS

The case is essentially a straight forward application of existing precedent.[30] It is, however, a valuable and useful judgment for a number of reasons. It provides a very thorough and up-to-date overview of the law of nuisance and the availability of the defence of statutory authority in Canada today. Of even greater import, this case reflects the substance of the tort of nuisance as a force quite distinct from negligence.[31] The substance of the tort of nuisance is the impact of the defendant's conduct and not the nature of the defendant's conduct. It also becomes patently obvious that a number of advantages accrue to the plaintiff who can found his action in nuisance rather than negligence, principally, the switching of the burden of proof to the defendant.

From a strictly practical point of view, this decision may mean that municipalities in the province will be called upon with increasing frequency to compensate citizens who suffer property damage as a result of broken watermains or sewerlines. The saving grace for municipalities may well lie in the fact that in the instant case, the city did not tender sufficient evidence to satisfy the court that ". . .there was no feasible way to provide a public water service and avoid the nuisance which occurred".[32] It may well be that the above quoted statement of Mr. Justice Stratton will be utilized as the test for municipal liability in nuisance in New Brunswick in the future. There is also the possibility that municipalities, anticipating the difficulties in discharging such a burden of proof, may press for legislative reform of the *Municipalities Act* so as to protect them from liability for nuisances created in the course of providing public services.[33]

The future utility of this judgment will depend, to a large extent, on the decision of the Supreme Court of Canada in the *Royal Anne Hotel* appeal. If the decision of the British Columbia Court of Appeal is affirmed, the present case should stand as a good precedent for some time to come.

KYMIL HOWE*

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[30]The court appears to have approved the three major decisions mentioned. Namely, *City of Portage La Prairie* v. *B.C. Pea Growers Ltd., supra,* footnote 15; *Royal Anne Hotel Ltd.* v. *Village of Ashcroft, supra,* footnote 11; and, *Temple and Denton* v. *City of Melville, supra,* footnote 14.

[31]Similar comments were made by J.P.S. McLaren in his annotation to the *Royal Anne Hotel* case, *supra,* footnote 12.

[32]*Supra,* footnote 29.

[33]It is interesting to note that such provisions have existed in the legislation of other provinces for quite some time. See for instance, the *Municipal Act,* R.S.B.C. 1960, c. 255, s.529.

*B.A. 1979 (Memorial University), LL.B. Candidate (U.N.B.).