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1973 CarswellOnt 360
Ontario Supreme Court

Gertsen v. Metropolitan Toronto (Municipality)

1973 CarswellOnt 360, 2 O.R. (2d) 1, 41 D.L.R. (3d) 646

Gertsen et al. v. Municipality of Metropolitan Toronto et al.

Lerner, J.

Judgment: August 21, 1973

Counsel: *L. Mandel*, for plaintiffs.
J.D. Holding, Q.C., for defendant, Municipality of Metropolitan Toronto.
J.H. Amys, Q.C., for defendant, Borough of York.

Subject: Environmental; Torts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Environmental law

II Liability for environmental harm
II.3 Strict liability (Rylands v. Fletcher)
II.3.b Fumes and smoke
II.3.b.i General principles

Torts

XVI Negligence
XVI.2 Duty and standard of care
XVI.2.b Standard of care

Headnote

Environmental Law --- Common law actions — Strict liability (Rylands v. Fletcher) — Fumes and smoke

Escape of gas from land-fill site — Whether non-natural user of land.

Organic matter used by defendant as land-fill generated methane gas which escaped into plaintiff's garage. The gas caused an explosion which seriously injured plaintiff and destroyed the garage. In an action for damages, held, plaintiff should succeed. The disposal of garbage by way of a land-fill project was a non-natural user of land in a heavily populated residential area. Although defendant had statutory authority to pass a by-law to acquire land for the purpose of disposing of garbage, the project was not carried on pursuant to that authority. Consequently, defendant could not rely on that as a defence.

Negligence --- Application of principles

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Standard of care.

Use of garbage for land-fill project -- Defendant knowing or ought to have known that decomposition of garbage would generate gas which would escape to adjoining land -- Failure to take steps to prevent escape of gas -- Failure to warn owners of adjoining lands of danger -- Conduct of defendant falling below standard established for protection of others from unreasonable risk -- Defendant liable in negligence for damage caused by explosion of escaped gas.

***Lerner, J.*:**

1 In this action the plaintiffs claim damages from both defendants as a result of an explosion caused by the escape of methane gas generated by buried garbage. This destroyed their detached garage, damaged their motor-car and caused bodily injury to the plaintiff Floris Gertsen.

2 The plaintiffs' house and lot, known for municipal purposes as 36 Avon Ave., York, is situate on the north side of the street. The back yard adjoins a large open area formerly a ravine and owned by the defendant, the Corporation of the Borough of York. In and about 1958-59, this ravine was filled in a land-fill scheme undertaken by the Municipality of Metropolitan Toronto with the approval and agreement of the Corporation of the Borough of York. It was known as the "Porter Avenue land-fill scheme". The land-fill consisted of household garbage mixed with earth as detailed later. This buried garbage generated the methane gas which escaped into the back yards on Avon Ave. and caused a fire in 1965 and the explosion (the subject-matter of this action) in the same garage in 1969.

3 For brevity and convenience, the first of the above-named defendants will continue to be referred to as "Metro" and the latter as "York".

4 On Friday, January 17, 1969, at approximately 9:40 a.m., the plaintiff Floris Gertsen entered his garage accompanied by his dog to use his car. He turned on the ignition and immediately an explosion occurred destroying the garage, damaging the motor-car and causing substantial injuries to his person. The damaged garage is shown in two photographs (ex. 11). The plaintiff upon entering the garage had noted no gas or other odours.

5 The Gertsens purchased the property from Lee Charles Capeling in 1967 and after the purchase, but before the transaction was completed, were advised by the vendor that he had experienced a problem of escaping gas that had been resolved by York.

6 Earlier Capeling had purchased the property in June, 1964, and on February 6, 1965, was seriously injured when he lit a cigarette in the same garage upon entering same to use his motor-car. In this instance, there was a flash fire causing burns to his body, face and hands, as a result of which he was incapacitated for three months (this match lighting fire was confirmed in the evidence of David Clough, a Metro official).

7 The garage was located at the back of the property with egress by the door facing north towards the land-filled area and was constructed after the ravine was filled. The building was prefabricated with a metal overhead door and partial cement floor which began at the door. At the rear of the garage the floor consisted of seven rows of house bricks laid flat instead of an impervious cement floor. These bricks would be a good conductor for escaping methane gas as appears from the evidence developed later herein.

8 Capeling advised Floris Gertsen that the problem was rectified when York excavated a trench in the laneway placing breather pipes in the soil to permit the gas to escape harmlessly into the atmosphere. This would make future fires impossible; that this method was also intended to intercept gas from the land-fill scheme located in the ravine north of the garage. This explanation resulted from Gertsen's inquiry which was occasioned in turn by Mrs. Gertsen relating

to her husband the information given her by the real estate agent about Capeling's fire. On his examination for discovery Gertsen testified (which I prefer to his evidence given at trial in that connection) that Capeling suggested that he always leave the garage door open or partially so.

9 It was suggested in cross-examination of Gertsen that "as a reasonable man", having been informed of these matters through the real estate agent and also directly from Capeling, he should have made further inquiries from York or "the gas company". If there is any liability upon the defendants or either of them, in my view, that liability is not affected by the question of whether or not the plaintiffs made the inquiries as suggested. Be that as it may, the plaintiffs made no further inquiries of anyone. On one occasion after purchasing the premises, Gertsen observed a man making tests of some description, of which he had no knowledge, at the pipe locations that were previously pointed out to him, protruding from the soil, by Capeling.

10 The co-plaintiff, Petronella Gertsen, was in their home when she heard "a big bang", looked out, observed that the garage had collapsed and her husband obviously suffering from substantial injury in the vicinity of the garage. She testified that her previous knowledge of the earlier fire (Capeling) had been given to her by the agent about two or three weeks before they moved into the house, but that he had never suggested not using the garage. She understood from his explanation to her that there had been difficulties with the gas (apparently, according to her understanding, gas supplied by the gas company), but that it had all been corrected. On occasions, she noted a mouldy smell in the back yard. The agent had told her that Capeling had some "gas problems" and had been burned; that she and her husband should know about this, but reassured her that it had been corrected because she recalls specifically asking him if that had been done. She did not think it necessary to call the gas company after this information, nor did she ever speak to her neighbours concerning these past events. She had repeated this conversation with the real estate agent to her husband including that Capeling had had problems with gas, but that the gas company had taken care of it. She was also aware of her husband's inquiry from Capeling concerning the same matter.

11 I now deal with the history and reasons for this garbage and land-fill scheme on the part of the defendants. Metro was created by the *Municipality of Metropolitan Toronto Act*, 1953 (Ont.), c. 73, s. 2 [now R.S.O. 1970, c. 295], and empowered by 1956, c. 53, s. 23, to pass by-laws regulating disposal of garbage of any kind on land of any area of a local municipality with the approval of the municipality involved.

12 Negotiations were carried on by a series of letters between Metro and York, all of which are part of ex. 23 beginning with a letter from York dated December 13, 1957, and culminating in a three-page letter from Metro dated June 30, 1958. This latter, I find, was a formal offer from Metro to undertake "a land improvement scheme in the area situated on the southeast of Porter Avenue and southwest of Avon Avenue". Several plans were filed as exhibits, but at this point it is only necessary to refer to exs. 10 and 34 which show the area generally in York where the ravine was situated and its relationship to the property of the plaintiffs and their neighbours on Avon Ave. This offer, though in letter form dated June 30, 1958, was explicit in what Metro proposed by way of fill and it is to be noted particularly that Metro proposed to construct a drainage system because of a stream or flow of water in the lower part of the ravine and per item No. 5 on the second page, "Selected refuse will be deposited, compacted in 5 foot layers and covered over with approximately 6 inches of clean earth every evening" (ex. 24, pp. 14-5). By letter dated July 16, 1958, Metro, apparently in response to an oral inquiry from York, amended the proposed method of filling by suggesting "in the conduct of this project we shall be pleased to deposit and compact fill material, using three foot lifts in lieu of the five foot previously mentioned. This procedure will be followed through the entire course of the work" (ex. 24, p. 17). Therefore, it is reasonable to assume that the potential risks of disposing of putrescent waste (household garbage) must have been in the minds of the necessary responsible servants of both defendants when the project was being contemplated.

13 Subsequently, York formally accepted the proposals of Metro as specifically referred to in Metro's letter of June 30th and July 16th and sent two letters dated July 22, and July 25, 1958, together with a copy of York Council's resolution

dated July 21, 1958 (ex. 24, pp. 19-22). The resolution contained an exception to the effect that the agreement from the standpoint of York was irrevocable unless there was default in the carrying out by Metro "of the terms and provisions set down in the said letters". Subsequently, the proposal of Metro in the letter of June 30, 1958, was referred to as "Executive Committee Report, No. 33" to Metro Council and adopted on July 29, 1958. There appears to have been no reference at that time to the amendment to the proposal as set out in the letter of July 16, 1958, from Metro to York changing the filling operation by reducing layers of garbage from five feet to three feet. However, none of the parties suggested, either in evidence or by argument, that any problem that subsequently occurred with respect to this land-fill was the result of failure to follow the three-foot fill and compacting procedures.

14 If any liability may have been created, the facts upon which it may be based (to be detailed later) stemmed from different considerations.

15 Colin Macdonald, a professional engineer, has been the Commissioner of Works for York since May, 1963, and prior thereto from 1956 to 1963 the "Roadway Engineer" which included building of roads, collection of garbage and other related duties. He testified that York, over a long period of time, had considered filling this ravine to provide park facilities and other useful public purposes. The land in the ravine area was wet where low-lying and, while subdivided, was poor land for housing or recreation. Some of the adjoining land-owners used some of the downward sloping parts of their back yards for desultory gardening.

16 Another real consideration for filling the ravine was the fact that the property owners on part of Avon Ave. could only make limited use of their back yards. These were the householders whose houses faced more or less southerly on Avon Ave. where this street ran, generally speaking, east and west in this particular area. These houses numbered for municipal purposes from Nos. 4 to 48 inclusive (even numbers) (see exs. 19 and 32), the former exhibit being a plan prepared by Metro for all affected by the existing ravine. All their yards declined more or less northerly into the ravine. Until this land-fill was completed, down through the years these householders had no access to their back yards for motor-cars or garages. According to Mr. Macdonald, this land-fill accelerated the intentions of York to level back yards of these several properties and to permit the construction on the filled land immediately to the north and adjoining their several properties, of a laneway entering from the southeasterly part of Avon Ave. Where it turned from the generally easterly direction mentioned previously in a north-east direction towards Porter Ave., which was north thereof and beyond the ravine in question. Obviously the filling of the sloping land at the back of the properties of each of these landowners or householders and the construction of the adjoining laneway would improve the use of their properties and enhance the values thereof.

17 From the outset, this project, in retrospect, which I find that both defendants now recognize, was improperly carried out and created the beginning of a problem that later gave rise to the damages sustained by these plaintiffs apart from any other factors. Unquestionably, the agreement between the defendants was to use garbage to fill the ravine owned by York. David Clough, a civil engineer and Director of Water Pollution Control in the Works Department of Metro, was one of those actively responsible for the project on behalf of his employer. This involvement is clearly stated in his evidence and the letters from Metro (part of exs. 23 and 24).

18 From ex. 32 and the evidence of Macdonald, I find as a fact that both defendants knew that not only was the ravine being filled with garbage in this project, but also the back yards of the lands of the property owners on the south side thereof whose lands fronted on Avon Ave. He attended at the site of the project from time to time and observed the work in progress. Clough stated "our contract was not to put fill on private land". Regardless of what the agreement may have been, the fact is that garbage was filled in the back yards from the top of the existing banks downward into the lands of the ravine owned by York. The boundary of York's ravine is marked with "X's" in green pencil on ex. 26 (which was identified as ex. 8 in the examination for discovery of Macdonald). The same exhibit, as appears from the endorsement thereon, was prepared by Metro's Department of Works on December 20, 1957, depicting the layout of the

completed project with a football field, running track, etc. It also shows on the south side thereof (towards the top of the plan) the bottom of "the existing slope" marked in a broken line and the "top of the existing bank" southerly above same also marked with a similar broken line. It appears obvious from this that the slope extended south and upwards into the private property of some of the owners of the land fronting on Avon Ave.

19 After and during the filling at the southerly part of the ravine as aforesaid, the laneway was completed by York and the owners of the abutting lands were then able to enjoy level back yards and ingress and egress by way of the laneway. I must infer that permits to construct garages and probably other buildings on the filled land were issued. This I assume from the pink-shaded oblong shapes intended to be areas where garages were constructed on the back of several properties after the fill was completed (ex. 19) and which plan also appeared as ex. 1 on the examination for discovery of Mr. Macdonald. Pertinent to this action is the application for such a building (ex. 20) by Max Gast, the owner of 36 Avon Ave. (now owned by the plaintiffs). His application indicates that he applied for a permit to build a frame, prefabricated garage on these lands designated as 36 Avon Ave. on May 9, 1961. There is attached to the application a sketch of the lands defining its boundaries and the locations of the house and the proposed garage. The latter was to be six feet from the laneway and I assume the permit was issued as No. 51837 which is a number noted on this exhibit.

20 In addition to Mr. Macdonald testifying that he was aware that garbage was being filled in the laneway area, I find that it had to be known to him and therefore to York that garbage fill was being used to fill the *downward sloping back yard* towards the proposed laneway. It must be assumed that Gast's application, ex. 20, for a building permit directed to the Inspector of Buildings of the Department of Works also constitutes knowledge on the part of the defendant York, at the risk of repetition, an application for a building permit sought and granted to erect a garage on similarly garbage-filled land only six feet from the laneway. In cross-examination, Mr. Macdonald, with some reluctance, admitted that these private lands were being filled even though he disapproved of the use of garbage fill on private property!

21 The project started in October, 1958, and was completed in November, 1959, according to Mr. Macdonald who kept a diary as part of the conduct of his office. According to Mr. Clough, a formal ceremony was carried out by Metro in which it turned over the end product to York on October 15, 1960, and a letter (ex. 24, p. 20) from F. C. Gardiner, Chairman of Metro, of even date is the record thereof.

22 The obviously beneficial results were that the private property owners on the south side of Avon Ave. enjoyed level land at the back of their lots abutting a laneway giving them access to their land which they never had before, and for York, a large, level park with a football field, running track, parkland and stadium bleachers, presumably for the use and enjoyment of students of Humber Collegiate Institute and the public generally. No one apparently considered the inherent danger lurking beneath and adjoining the field.

23 Going back in time, following the Capeling fire, the property owners adjoining the land-fill on Avon Ave. were instructed not to use their garages. They were required to park their motor vehicles on Avon Ave. in front of their homes as the result of which they received parking tickets from the local police. However, these tickets were cancelled upon being delivered to the designated police station until one occasion when Capeling attended and was advised by the sergeant in charge that the problem with respect to escaping gas had been resolved and that the residents in the area (including Capeling) could use their garages and that no further parking tickets would be cancelled. Not content with this, Capeling contacted York Township officials and, after some difficulty locating the proper person (whose name he could not recollect), this statement of the police was confirmed to him. Additionally, he requested written confirmation, which he was advised would be forthcoming, but never received same. He further testified that he related to Gertsen everything that had transpired and what he had been told by the York officials. Thereafter he used the garage continuously for one year after being told that it was safe so to do. However, he took the precaution of leaving the garage door fully open 10 to 15 minutes before starting his motor-car. The jalousie window on the (rear) south side of the garage (no door) was constantly left open because of his concern of another fire taking place. On cross-examination he confirmed that he had

been assured by York that the problem of escaping gas had been resolved. I was impressed with the witness, Capeling, and accept his evidence unreservedly.

24 Robert Green, residing at 38 Avon Ave. for the past 18 years and the next-door neighbour of Gertsen, testified that, while he had no garage nor parked his car in his back yard, no one had ever told him of gas escaping from this land-fill until the Gertsen explosion. He had observed venting pipes in the ground at the rear of his property adjoining the land-fill prior to the Gertsen explosion and on two or three occasions observed children, or young adults, igniting fires from the top of these vent pipes (from apparently escaping gas). Following these episodes he spoke to the local Fire Department on two occasions, who advised him that it was methane gas and would burn itself out. After the Gertsen explosion he was instructed not to park his car in his back yard and he would not be required to pay parking tickets for parking on Avon Ave. Immediately following the Gertsen explosion, further repairs were carried out by a large truck-drilling apparatus which drilled or dug large holes on four properties adjoining the laneway. Furthermore, all the garages were raised, a bedding system installed under them, then covered with concrete floors and vent pipes installed beside each garage at the north and south ends. The vents in the laneway are presently eight feet high with caps on the top of each. Each vent has a sticker attached to same warning that no work or digging shall be done without contacting Metro Works Department.

25 Martin Dolan, who has resided at 22 Avon Ave. for the past seven years, lives six houses removed from the plaintiffs' home. He was instructed by the Fire Department and Police Department of York, after the explosion in 1969, not to use his garage. He had received no instructions in connection with the escaping gas prior to that explosion. Not only was he not aware of escaping gas prior to the Gertsen explosion but no one had ever instructed him not to use his garage.

26 Eli Bishop of 24 Avon Ave., five houses from Gertsen's recollected both the Capeling fire and the Gertsen explosion. He had never been told about gas escaping, nor that he should not use his garage for a motor vehicle before the Gertsen explosion. He observed York employees testing the area for gas at least once a month. He used his garage for a year before venting pipes were installed by York and from time to time York personnel would test the area by putting tubes in the vertical venting pipes and apparently take readings. In the year that the Capeling fire occurred, a two-inch venting pipe was put in his driveway but no one ever returned to test that pipe. He observed other pipes in the laneway before the Gertsen episode, but does not recollect any inspection of same before the explosion.

27 James Clarke, who for the past two months has been technical advisor to the Canadian Gas Association and is a member of the Chemical Institute of Canada, has had substantial experience with problems of escaping gas. Prior to his present position he was in charge of the laboratory for Consumer's Gas Company of Toronto for 42 years, initially as a laboratory chemist and, in the latter years, as superintendent of all the laboratory services including the outside system of the Consumer's Gas Company in the Township of York. He attended at the Capeling fire at 36 Avon Ave. on February 8, 1965, and referred to his notes made at that time indicating that his inspection included making small drill holes in the ground; taking air samples in bottles; using combustible gas indicators; putting small tubes down the drill holes and aspirating contents which he took back to his laboratory for testing. A major portion of the samples so taken contained methane and carbon dioxide. He testified that anaerobic breakdown of protein, or vegetable matter, goes on during its decaying process, and this can take place without the presence of oxygen. Methane in pure form has no odour or colour and is otherwise non-toxic, contains no oxygen and is very explosive. The samples that he took on this first occasion (February 8, 1965) were explosive.

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The 1965 methane content was
Methane                  41%
Carbon dioxide           25.1%
Air and nitrogen         33.9%
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Total	100%

28 He returned to the scene of the explosion on January 20, 1969, and conducted the same tests as in 1965. His conclusions were the same, except that there was a slightly higher methane count *in the same garage*. His actual results for 1969 were:

Methane	46.36%
Carbon dioxide	30.01%
Air and nitrogen	23.63%
Total	100%

29 He further testified that the upper and lower range for methane gas to explode must not be less than 5% and, if over 50% non-explosive but inflammable. Any spark will ignite methane. He estimated the ground content of methane was 43% and there would be as low as 15% around the Gertsen car at the time of the explosion. Methane gas will migrate from the earth upward because it has one-half the weight of air, but if held down under pressure will move horizontally. Migration of methane gas is a common physical fact which was taught in his formal chemistry training, at least 42 years ago. In 1959 he learned that the decomposition of vegetable matter (which would be in the household garbage used in this fill) produced methane gas. He further testified that it was a known chemical fact, well known in the gas industry before 1959, that under pressure and heat, both of which factors would be present in this garbage land-fill, when so buried the garbage would be subject to bacterial action. It is fundamental scientific knowledge that methane gas is present where there is decaying vegetable matter.

30 In a letter following the 1965 Capeling fire and dated February 8, 1966 (ex. 24, p. 31), Mr. Clough detailed the minimum requirement for houses, multiple dwellings, industrial and commercial buildings with particular references to textbook information. He also quoted from the *Public Health Act*, R.S.O. 1960, c. 321, sch. B, para. 24 [now R.S.O. 1970, c. 377]:

> 24. No house shall be built upon any site, the soil of which has been made up of any refuse, unless the soil has been removed from the site and the site disinfected, or unless the soil has been covered with a layer of charcoal or ashes or covered with a layer of concrete at least six inches thick and of such additional thickness as may be requisite under the circumstances to *prevent the escape of gases into such proposed house*.
>
> (My emphasis.)

31 Technical niceties might conceivably exclude a prefabricated frame detached garage; nevertheless, it would even be warning or notice to someone less sanguine than York's Commissioner of Works, Building Inspector or Medical Officer of Health of the undesirability of allowing garages to be built on this garbage-filled land. If this observation is not tenable, surely after their experience with the Capeling fire and the information supplied by Metro thereafter, Mr. Clough's letter of February, 1966, York should have seen to it that the floors of and the garages themselves conformed to these requirements. The information contained in the letters of February 8, 1966, and February 13, 1967, and the verbatim quotation from the *Public Health Act* make it obvious that the floor of any garage, and particularly that of the plaintiff be made impervious.

32 The decision as to how much more could have been expected of Metro and when and where its liability ended might have been of little complexity but for the further direct and positive involvement by Metro from 1965 to 1969 in addition to its investigative activities to relieve the situation described above.

33 Ian McKerracher, employed by Metro since 1954 and Director of Refuse Disposal since 1958, after attending with Messrs. Clough and Griffiths, another Metro employee, on the Monday following the Capeling fire (Saturday) continued to check the area for escaping methane gas up to and including January 15, 1969 (two days before this explosion). He supervised tests by his staff and duly recorded in Metro records the gas samplings. His conclusions, immediately following the fire, were that gas was migrating from the fill site and in the areas where the garages were situate; that gas was migrating to those garage areas from the fill site because frost prevented its upward escape and the pressure of gas building up caused this migration to the private properties. Metro bored 110 holes which relieved the pressure and stopped the gas from migrating. All bore holes showed refuse at varying depths, some as near as 15 ft. to the surface of the ground. Most borings showed explosive gas when the drills were removed. All of this investigative and remedial work was done by Metro under Mr. McKerracher's supervision.

34 Exhibit 30, repeated in book-bound form (ex. 31), is the notes of the testing and conclusions of Mr. McKerracher and his staff in the spring of 1965 and, particularly in ex. 30, p. A thereof, they are up to and including January 15, 1969. In the course of this record as of February 2, 1965, there is shown "in addition, inside the garage at 36 Avon Avenue showed an explosive mixture of 30%. This was one week after Capeling's fire in the same garage and after the drilling of 18 bar holes".

35 Mr. McKerracher discussed with one Gregg, Building Inspector for York, the inadvisability of issuing more garage permits in the pertinent area and referred to this conversation in the letter of January 3, 1996 (ex. 24, p. 29). He was aware that garages were standing south of the trench, in danger and should be removed. Unfortunately, he never followed up his letter and warning. The vent pipes were monitored monthly and their locations as shown on ex. 32 prepared by Mr. McKerracher's staff in May, 1967, amply demonstrate their proximity with reference to the laneway and the several garage structures. Beside each hole marking on ex. 32 is shown readings ranging from 0 to 100. The Gertsen garage and nearest vent pipe are encircled in red on this exhibit and there can be seen 10 test holes in the vicinity of the Gertsen garage with five of them roughly surrounding same with readings indicating 100 — a sixth hole in the same area has an 80 reading and another further south toward the house shows an 80 reading and the balance of the holes show a reading of 0. Readings of anything more than 0 indicated that gas was escaping through the pipes from the underground in varying degrees up to 100.

36 Exhibit 31 contains the testings from February, 1965, up to and including January 15, 1969, at which time a reading in the vent pipe at the trench near Gertsen's garage was 20 which, according to Mr. McKerracher, meant 20% of the lower explosive limit. It is difficult to understand the complacency of the defendants four years after the corrections had been instituted. This is underlined by the fact that the explosion in the plaintiffs' garage was only two days after Mr. McKerracher's racher's Department had taken a testing as stated from the vent pipe in the trench near the Gertsen garage showing the 20% explosive limit. Also, particularly based on Mr. McKerracher's earlier evidence, one of the results of their *total* investigation over the whole period of time, showed garbage fill under the Gertsen garage! He confirmed that the bore holes which were deeper than the bar holes revealed garbage wherever they were taken; that the bore holes and trench relieved the pressure of gas, allowing it to escape and therefore protecting the houses but he was convinced by the winter of 1966 that the garages would not be similarly protected.

37 With the knowledge of gas still present in the area of the garages and particularly the garage of Gertsen and the fact that Metro had to know that garages were still there, not only was it open to them to ascertain whether the garages were being used, but I also find that it cannot be successfully argued that they could not know that they were being so

used. In all of the circumstances, the responsibility of Metro could not be said to have ended with the oral and written warnings of early 1966.

38 York's main defence to the plaintiffs' claim is that the original project to the point of completion and subsequent remedial work was carried out totally by Metro, clearly on the understanding that Metro was in control at all times and, if there was any negligence, it had to be that of Metro.

39 Mr. Macdonald at one time suggested to Mr. Gregg, York's Building Inspector, to use precaution when issuing building permits for garages which, in my view, only compounds the negligence of York. The inference that I draw from Mr. Macdonald's testimony is that he so instructed Mr. Gregg after receiving Metro's letter of January 3, 1966. He admitted to never having warned the property owners to move their garages, or the dangers of using them, notwithstanding the letters of January 3, February 8, 1966, and February 13, 1967 (ex. 24, pp. 29-34). When asked in cross-examination what advice or information he would have given Capeling if he had inquired directly, he stated that he did not know what he would have told Capeling with respect to the use of his garage. This is a remarkable answer, considering that after the fire Mr. Macdonald was aware that this situation was dangerous along a substantial part of the laneway; that it arose directly from the garbage-fill project and that he recognized the duty to warn those who might use garages in order to discourage them from so doing. His reason for not so doing (through his Department) was that he was satisfied that the Fire Department had notified these property owners. Liability arising from these omissions on the part of York can then be understood from his evidence which I quote: "This was not our baby, because Metro did the physical work and that is why we backed away from it ... If it was not their baby why did they come back and do the work" (*i.e.*, remedial repair work). Finally, he advised Messrs. Clough or Clark of Metro Works Department that York would not notify the property owners after the letter of January 3, 1966, even though he did not question the accuracy of the contents thereof. Therefore, York's position was that the trench and venting pipes having been completed as a remedial step "it was 99.9% effective" and "everyone assumed it was safe to use the garages".

40 The complaint of York against Metro includes the proposition that the garbage fill was permitted higher than the intended playing field and therefore "spilled over" onto the private lands where it was compacted with earth. Mr. Macdonald stated that he would not have allowed garbage fill to be put to the top of the slope (seen in ex. 26 and profile maps of ex. 29). However, there is no evidence that York ever complained to Metro of this encroachment upon private property, despite Mr. Macdonald's admission that he was on the site from time to time to see "by and large" that it was being carried out properly. He claims to have had no previous knowledge that putrescible garbage generated methane gas or that there might even be literature available on the subject. Nevertheless, York and he, particularly, had experience in garbage disposal before this project but he claimed that this project was supposed to be better than the methods previously used by York. Prior to this project, the filling of the ravine was in progress for about eight years prior to 1958 with ordinary fill consisting of earth, clay, sand and some rubble from basements, streets and sidewalk paving intended to eventually provide the owners with a laneway which they, by inference, had been seeking for some time.

41 Mr. Macdonald testified further that he was not aware that Capeling should have built his garage on an impervious base; nor did he propose this after Capeling's fire; that he did not know there was garbage under this particular private property and, in any event, would not have warned Capeling of any possible danger because the garage was not a concrete building. Furthermore, Macdonald did not deny Capeling's evidence that some York official advised him that he could return to using his garage.

42 With this factual chronology of the land-filled project and its consequences, I now examine the defences of the involved municipalities.

43 The defence of *volenti non fit injuria* alleged in paras. 4 and 11 respectively in the statements of defence of York and Metro is not supported by the evidence. I find as a fact that the plaintiffs had no information made available by

the defendants or anyone on their behalf, that a situation of escaping methane gas existed in their garage or in their land. Capeling's advice to them, rightly or wrongly, was to the contrary. Evidence was not forthcoming that the plaintiffs were aware of the risks attendant upon the use of the garage for the storage, stopping and starting of their automobile engines or that, knowing these risks, they accepted same and any consequences that might flow therefrom. This defence therefore fails.

44 Disposal of household garbage in urban communities has been a serious problem for many years. David Clough testified that Metro's responsibility was to find and operate means of disposal but not to collect garbage. At the commencement of the Porter Ave. land-fill project, Metro was operating incinerators and a land-fill scheme at Long Branch, Ontario. In or about 1957, sanitary land-fill schemes were popular. Previously, there had been such schemes as open dumping involving burning with side effects of odours, flying waste, smoke and rodents, all of which would discomfit the neighbouring populace. This latest scheme for disposal had become popular in the United States, involving filling low-lying land with layers of garbage — compacting same — and then covering with layers of earth compacted to seal same and so on from layer to layer. The completed land-fill was usually then used for recreational green belt area or recreational facilities. This method, basically, would control the undesirable side effects of open dumping referred to above.

45 Mr. Clough was aware before 1956 that putrescible material, part of household garbage, could generate methane gas and that this chemical fact was common knowledge to those dealing with these problems. Additionally, he was aware that in the process of garbage decomposition a number of gases are produced, including carbon dioxide, hydrogen sulphide and methane. His first letter to York in the earliest negotiating stages (ex. 24, p. 2) of January 8, 1958, stated: "to preclude complaints from adjacent residents" and obviously recognized potential problems. Most significant was his observation: "We are not *anticipating any appreciable generation* of methane gas because of the type of our operation" (the emphasis is mine).

46 With the knowledge that he had, and which must be imputed to Metro, this whole project can only be considered on the basis that Metro was prepared to take a calculated risk of generation and escape of a dangerously explosive and/or highly flammable substance — methane gas. I do not accept his explanation that Metro's research of the available technical information would not lead them to believe that there could be a problem (methane gas). The proof is that methane gas was generated and continued, at least on the evidence, for 10 years commencing with the project completion in 1959 to the plaintiffs' explosion in 1969. Furthermore, on the evidence of Mr. McKerracher, methane gas will continue to be generated for hundreds of years.

47 Immediately following the Capeling explosion, Mr. Clough and two other Metro employees, Ian McKerracher, referred to *supra*, and one Griffith, professional engineers, investigated the Capeling premises. The conclusion involved that which was within Mr. Clough's knowledge prior thereto as detailed above. Further, and specifically, they found that methane gas had seeped into the garage through the floor thereof, part of which was made of unmortared bricks, and that garages had been constructed on garbage-filled land.

48 It is difficult to understand how there could have been such lack of communication, planning or co-operation between Metro and York that: (a) the garbage fill was permitted to be carried out on private property — the back yards of the Avon Ave. residents; (b) the construction of garages was permitted on this fill, and (c) no precautionary measures or safeguards were taken from the escape of methane gas. There were no consultations between Metro and York as to where and how any garages should be constructed.

49 Following the Capeling fire, Metro, as a result of the investigation thereof, concluded methane gas could move laterally through areas not garbage-filled and, therefore, into garages not built on garbage-filled land; that in cold weather

frost would create an impervious cover which would cause the methane gas to follow the frost layer laterally and then generally rise through unfilled soil.

50 Metro took the initiative in the investigation and determined the remedial steps, some of which were carried out by York under Metro's supervision. Bar holes were driven into the ground in February and March, 1965, and followed in the same period by Metro digging bore holes on the south side of the lane in the back yard of the owners; some were as deep as 20 ft. and four and one-half inches in diameter. They were intended to be exploratory and to vent the below-ground garbage fill. The holes were then filled with three-quarter inch stone to allow gas to continue to escape. In October, 1965, a trench 950 ft. in length was built on the side of the laneway nearest to the private properties and filled with three-quarter inch crushed stone. At 100 ft. intervals 10-ft. lengths of pipe with slots in the sides for the purpose of collecting gas were driven into the trench to a depth of four feet, the remaining six feet above ground being intended to exhaust the migrating methane gas.

51 On the evidence of Mr. Clough, Metro was aware that these remedial steps gave no assurance that the existing garages on the rear of the private properties located on garbage-filled land, referred to earlier, would be safe from escaping gas. Metro, through Mr. Clough, was in contact with Mr. Macdonald of York Works Commission and advised him that this trench would not take care of the land south of the trench, *i.e.*, private property which had garbage beneath ground level. This evidence was corroborated by a letter written by Mr. McKerracher for Metro dated January 3, 1966, to Mr. Macdonald, which he admitted receiving and which stated, *inter alia*:

> Some garages at the rear of houses on Avon Avenue have been erected on the refuse fill and it is possible that escaping methane gas will continue to make the use of these structures unsafe. The owners of the garages should again be warned of the danger which exists and if possible, the structures should be removed. In our opinion, building should not be permitted on refuse filled ground. If new buildings are to be permitted in this general area they should be impervious to gas where contacting the ground and provided with continuous ventilation.

52 This letter was never acknowledged though received and, while I will deal with the matter later herein, it is timely to observe at this point that no one on behalf of York took any steps to implement the advice, warnings or suggestions which were so clearly delineated.

53 Metro continued to be concerned and, having learned that York Board of Education was proposing construction on the Porter Ave. side of the filled project, enlisted the services of Relf C. Carter of Engineering Science Inc. of New York to investigate this land-filled project (now completed) and other projects because of Metro's concern of explosive hazards. This concern is well documented in two letters dated February 8, 1966, and February 13, 1967, addressed by Metro to Colin Macdonald (referred to earlier, ex. 24, pp. 31-5 inclusive).

54 The plaintiffs allege that the defendants are liable on the basis of three propositions in law; (a) the rule in *Rylands v. Fletcher, infra*; (b) nuisance, and (c) negligence.

55 The modern doctrine of strict liability for the escape of dangerous substances has its beginnings in (a) above. Blackburn, J., in *Fletcher v. Rylands et al.* (1866), L.R. 1 Ex. 265 at p. 279; affirmed L.R. 3 H.L. 330, stated the rule which has been sometimes distinguished and sometimes restricted in its application:

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

56 This rule, if applicable on the facts of the case, makes liability absolute. The defendants by joint agreement brought putrescible organic matter on the lands of York as a means of disposing of same. This organic matter generated methane

gas, admittedly a dangerous substance in itself. The gas escaped onto the plaintiffs' land and caused them damage. *Prima facie* the defendants should be liable without proof of negligence: *Clerk and Lindsell on Torts*, 13th ed. (1969), p. 1481, *Read v. J. Lyons & Co., Ltd.*, [1947] A.C. 156 at p. 166. However, there are sometimes other considerations brought to bear which, if applicable, somewhat restrict the rule.

57 York argued that the work was under the control of Metro which would relieve it from liability. It has, however, been held that a defendant (York) cannot avail itself of the absence of negligence on its part and even of those over whom it has control. The owner (York) is charged with keeping a dangerous substance at its peril: *Dunn et al. v. Birmingham Canal Co.* (1872), L.R. 7 Q.B. 244 at p. 259.

58 Another submission of York is that waste disposal was a natural user of these lands. If the owner uses his land in the exercise of his ordinary rights, he incurs no liability under the rule if he injuries his neighbour: *Rylands v. Fletcher, per* Lord Cairns, pp. 338-9.

59 In *Rickards v. Lothian*, [1913] A.C. 263, the Privy Council withdrew a wide range of activities from the ambit of strict liability under this rule on the basis that it applied only to damage due to non-natural use of land. As an incident thereof, since the non-natural user thereof is an essential element of liability, the burden of proving it rests on the plaintiff: *Pett v. Sims Paving & Road Construction Co. Pty. Ltd.*, [1928] V.L.R. 247 at p. 255.

60 When the use of the element or thing which the law regards as the potential source of mischief is an accepted incident of some ordinary purpose to which land is reasonably applied by the occupier, the *prima facie* rule of absolute responsibility for the consequences of its escape must give way. In applying this qualification, the Courts have looked not only to the thing or activity in isolation, but also to the place and manner in which it is maintained and its relation to its surroundings. Time, place and circumstances, not excluding purpose, are most material. The distinction between natural and non-natural user is both relative and capable of adjustment to the changing patterns of social existence: Fleming, *Law of Torts*, 4th ed. (1971), p. 283.

> The distinction between natural and non-natural user has served the function principally of lending the rule in *Rylands v. Fletcher* a desirable degree of flexibility by enabling the courts to infuse notions of social and economic needs prevailing at a given time and place.... Yet caution should be observed lest the qualification be pushed too far. There is no merit, for example, in occasional suggestions to exempt all activities redounding to the "general benefit of the community", such as nationalized industries or even the manufacture of munitions in time of war. Not only is there no warrant in principle for prejudicing private rights by the facile plea of overriding public welfare, at least in the absence of statutory authorization, but many are the decisions which have attached strict liability to enterprises engaged in community services, such as public utilities and the like.

Fleming, p. 284.

61 I must now decide whether this garbage-fill project was natural or non-natural user of the land. I am emboldened by the statement of Lord Porter in *Read v. J. Lyons & Co., Ltd.*, at p. 176, where he states:

> Possibly a further requisite is that to bring the thing to the position in which it is found is to make a non-natural use of that place.... Manifestly these requirements must give rise to difficulty in applying the rule in individual cases and necessitate at least a decision as to what can be dangerous and what is a non-natural use.... For the present I need only say that each seems to be a question of fact subject to a ruling of the judge as to whether the particular object can be dangerous or the particular use can be non-natural, and in deciding this question I think that all the circumstances of the time and place and practice of mankind must be taken into consideration so that what might be regarded as dangerous or non-natural may vary according to those circumstances.

In the same case Viscount Simon stated at pp. 169-70:

> I think it not improper to put on record, with all due regard to the admission and dicta in that case, that if the question had hereafter to be decided whether the making of munitions in a factory at the Government's request in time of war for the purpose of helping to defeat the enemy is a "non-natural" use of land, adopted by the occupier "for his own purposes", it would *not seem to me* that the House would be bound by this authority to say that it was.

(The italics are mine.) That statement seems to have been provoked by the opinion of Lord Buckmaster in *Rainham Chemical Works, Ltd. (in Liquidation) et al. v. Belvedere Fish Guano Co., Ltd.*, [1921] 2 A.C. 465 at p. 471. Injuries had been sustained by the inspector in the factory of the defendants who were making munitions when an explosion occurred. Lord Buckmaster stated that the making of munitions was certainly not "the common and ordinary use of the land".

62 I take judicial notice, supported by the exhibits and all testimony, that this was a relatively small ravine surrounded by heavily populated urban areas. It was originally subdivided apparently for occupation by the citizenry but because of its difficult contours and a stream in the lower areas, it appears to me that it was not practicable for such use. This does not, however, in my view, alter the case and the fact that Metro was seeking garbage and waste disposal areas does not change the situation either. I find that the primary purpose for filling this ravine in this manner was a selfish and self-serving opportunity for Metro who held out a "carrot" to York that if this were permitted York would end up with a level area instead of an "eyesore" and also gain attractive facilities, at no expense. This, in my view, having regard to its location together with the known temporary and permanent problems caused by such a garbage-fill project, cannot be said to be supported by the "overriding public welfare" theory. The initial benefits were to Metro which was responsible for disposing of garbage, etc. and not to the general benefit of the community directly affected by this use, *i.e.*, the owners and occupiers of the surrounding land. They were the community that I must consider. Applying the propositions of time, place and circumstances and not excluding purpose, I find that this was a non-natural user of the land and, therefore, that exception to the rule of strict liability also fails.

63 The last exception to the rule, although only pleaded by Metro, would apply to both, if valid. In para. 3 of the Metro statement of defence, it is pleaded that the work was carried out "pursuant to statutory authority and without negligence". The former would be no defence if the latter were proven. The rule of strict liability is excepted if the defendants were carrying out the work pursuant to such authority. The defendants rely on the *Municipality of Metropolitan Toronto Act, 1953*, as amended by s. 23:

> 214*b*(1) The Metropolitan Corporation may pass by-laws for acquiring land and erecting, maintaining and operating buildings, structures and machinery thereon for the purposes of dumping and disposing of garbage, refuse and domestic or industrial waste of any kind and for regulating the dumping and disposing of garbage, refuse and domestic or industrial waste of any kind upon such land and for charging a fee therefor.
>
> (2) No by-law passed under subsection 1 shall be effective until approved by the council of the local municipality in which the land is to be acquired or the dumping and disposal operations are to be carried on.

The effective words on the peculiar facts of this issue being: "...may pass by-laws for acquiring land ... and for regulating the dumping and disposing of garbage, refuse and domestic or industrial waste of any kind upon such land and for charging a fee therefor." This project was not carried out pursuant to the statutory authority set out above, because Metro did not pass a by-law acquiring land for regulating the dumping and disposing of garbage, etc.

64 The application of Metro (ex. 24, pp. 14-6) did not request anything that could be construed as Metro "acquiring land". "Acquire" pursuant to the Shorter Oxford English Dictionary defines the word: "1. To gain or get as one's own (by

one's own exertions or qualities)", and "2. To receive, to come into possession of". Nowhere does the letter of June 30, 1958 (the application, as it has been referred to), seek to "acquire" the ravine. This document in the form of a letter states:

> I should be pleased if you would consider this letter an application from the Metropolitan Corporation to undertake a land improvement scheme...
>
> ...this department is only interested in filling the area with selected waste and providing an adequate earth cover leaving the decision with your Township as to the manner in which the surface is to be developed and the financing of this portion of the work.
>
> ...the Metropolitan Department of Works would be entirely responsible for the full fill operation, ensuring that the work is carried out to the complete satisfaction of your Municipality...

65 The letter then goes on to detail how the work would be done and completed, and the fees that would be charged for those using the project for dumping garbage. The latter part of the letter sets out the benefits that would accrue to York if it permit Metro to do the work.

66 In *Northwestern Utilities Ltd. v. London Guarantee & Accident Co.*, [1935] 3 W.W.R. 446, [1936] A.C. 108, 3 I.L.R. 1, [1935] 4 D.L.R. 737 (Alta. P.C.), the Privy Council strictly construed the Act under which the utility company sought an exception by reason of the statutory powers conferred upon it for the "location and construction" of high-pressure gas mains to include the word "maintain". The utility company's gas mains under the street leaked gas which escaped into a hotel, ignited and the hotel was destroyed by fire. The main defence was that the corporation of the municipality (Edmonton) was liable because the ground beneath the gas main collapsed when new sewage works were constructed beneath the gas main. The defence failed because the company was negligent in not foreseeing and guarding against the consequences to its gas mains by the city's sewage works construction. The pertinence of the judgment to the issues herein was the dictum of the committee to the argument raised in the appeal by the utility company that the absolute rule of *Rylands v. Fletcher* would be excepted because they were operating under statutory authority. Lord Wright at p. 743 stated:

> Where undertakers are acting under statutory powers it is a question of construction depending on the language of the statute, whether they are only liable for negligence or whether they remain subject to the strict and unqualified rule of *Fletcher v. Rylands*.

67 The statutory authority to which the utility company's franchise was carried out stated among other things. "'The company shall *locate and construct* its gas or water works or electric or telephone system ... so as not to endanger the public health or safety'" (emphasis mine). There was no allegation of negligence for defective location or construction and it fell to be decided whether the strict liability rule of *Rylands v. Fletcher* applied or they were excepted by the statutory authority under which they operated.

68 The committee refused to include "maintaining" their gas mains as being part of the absolute duty imposed on the company by the section of the statute. Lord Wright stated at pp. 743-4:

> Their Lordships cannot agree with that decision [*Raffan v. Canadian Western Natural Gas, Light, Heat & Power Co.* [1914], 8 W.W.R. 676] in so far as it is sought to read into s. 13 some such word as "maintain" in addition to the words actually expressed which are "locate and construct." Nor does it seem legitimate to read "locate and construct" as including something entirely different, that is "maintain:" "locate and construct" are words apt only to refer to the initial location or construction or to some new works...

Where a party attempts to rely upon statutory authority, the statute must be strictly construed and in the circumstances here this statutory authority did not constitute an exception to the rule of *Rylands v. Fletcher*. Metro was not *acquiring* this ravine.

69 The second branch of the plaintiffs' claims is founded in nuisance. The distinguishing aspect of nuisance as compared to negligence is that it looks to the harmful result rather than the kind of conduct giving rise to the tort. The essence of nuisance originally was the interference with the beneficial use of another person's land. If there is any basis for a claim on this branch of law, it has to be treated as a private nuisance, being the interference with an occupier's interest in the beneficial use of his land as opposed to a public nuisance which confers a right of action on anyone sustaining loss or damage although none of his rights and privileges in the use of his land have been invaded.

70 The interference must be substantial and unreasonable because the overriding guide is that there must be "give and take" in that the allegation of nuisance must have a regard for the comfort and convenience of others. It could hardly be supportable that a complaint of nuisance by reason of the escape of methane gas into the plaintiffs' property constitutes a disregard for the comfort and convenience of the community of York. Notwithstanding, I must give consideration whether this land-fill project was essential and unavoidable in this particular ravine. The best that can be said for the choice was its geographical convenience and the use to which the end product (park and athletic field) was to be put. Was the beneficial use of the adjoining land owners to be sacrificed in so doing? I think not.

71 The decisive factor here is the gravity of the harm to the plaintiffs and it is patent on the evidence that it was substantial and continues to have a potential similar danger to them. (One should compare the pointing of a running garden hose onto neighbouring land, which would be trespass, as against the building of a rain spout on a building from which the water eventually reaches the earth surface and flows upon neighbouring lands as being a nuisance. The first is direct infringement whereas the latter is consequential.) This was discussed *supra* in another context when considering natural and non-natural use of lands and I persist in the thread of the reasoning that on the facts of this case the interests of the property owners on Avon Ave. and particularly those of the plaintiffs in this action are overriding.

72 Another defence to nuisance is ignorance of the nuisance but on the facts of this case it is again obvious that this defence is not available, particularly after the Capeling fire and the cause of same discovered in the investigation immediately following its occurrence.

73 The duration of the generation and escape of methane gas is to be a continuous process for hundreds of years on the evidence of Ian McKerracher, which fact weighs heavily against any ameliorating circumstance in favour of the community welfare. The defendants cannot rely on the defence that they could not have *reasonably* anticipated the injurious consequences of their activity in constructing this project. There is abundant evidence that the defendants should have anticipated generation and escape of methane gas as a direct by-product of this garbage land-fill project.

74 As with the rule in *Rylands v. Fletcher*, statutory authority is an exception to liability for nuisance: *Pride of Derby and Derbyshire Angling Ass'n Ltd. et al. v. British Celanese Ltd. et al.*, [1953] 1 Ch. 149 at pp. 176, 189, 193. Where the particular activity or user of the land is authorized by statute and inevitably involves the creation of a nuisance, there is redress for damages unless every reasonable precaution was taken to avoid injurious consequences: *Vaughan v. Taff Vale R. Co.* (1880), 5 H. & N. 679, 157 E.R. 1351.

75 The burden of proving the inevitability of a nuisance lies on the defendants who may discharge it by showing that all reasonable care and skill in the light of contemporary knowledge has been observed in connection with the project: *Manchester Corporation v. Farnworth*, [1930] A.C. 171; *Portage la Prairie* (*City*) *v. British Columbia Pea Growers Ltd.*, [1966] S.C.R. 150, 54 W.W.R. 477, 54 D.L.R. (2d) 503. This onus would have been discharged if, after the Capeling fire (which made the nuisance an incontrovertible fact), the defendants had satisfied the onus by doing all the necessary

things to remove or alleviate the nuisance. Metro's remedial steps may have been useful but they were not adequately carried out, nor after completion adequately carried further when it knew that methane gas continued to be present at explosive levels at Gertsen's garage. "Contemporary knowledge" discussed earlier was available to be assimilated, if not already known, by the defendants before the project began and certainly after the Capeling fire.

76 Before leaving the exception to liability created by statutory authority, I must advert to the fact that York was not protected by the *Municipality of Metropolitan Toronto Amendment Act, 1956*, and the reasoning concerning the same statute as it relates to Metro, applies in nuisance as well, *Pride of Derby and Derbyshire Angling Ass'n Ltd. et al. v. British Celanese Ltd. et al.* My views of lack of statutory authority in the 1956 statute applicable to this case are reinforced by subsequent statutory history. The statutory authority of Metro was widened by 1966, c. 96, s. 10, which added Part IV-A to the *Municipality of Metropolitan Toronto Act*, R.S.O. 1960, c. 260, particularly s. 73(*a*)(2):

> 73(*a*)(2) The Metropolitan Corporation may *acquire* and *use* land within Metropolitan Toronto Planning Area ... for the dumping and disposing of waste...

(Emphasis is mine.) If "acquire" and "use" can be read disjunctively then Metro would not have to "acquire" land. However, this does not fall to be decided since the statute enacted in 1966 was after the event.

77 Another defence is that Metro should conceivably be considered an independent contractor. If the nuisance was created by Metro as an independent contractor, the liability of the owner (York) would depend on whether it could reasonably have foreseen that the work that it had instructed the independent contractor to undertake was likely to result in nuisance: *Clerk and Lindsell on Torts*, para. 1420. I have already found that this nuisance was or ought to have been foreseeable.

78 The plaintiffs are entitled to recover for whatever loss they have suffered as the proximate consequence of the defendants' wrongful acts or omissions. To force the defendant York to abate the nuisance by removing the garbage-fill would appear to be impractical and unrealistic. However, the continuing nuisance is substantial and no evidence was adduced by either defendant to prove that it has been abated to the extent that it does not interfere with the normal use of the rear portion of the back yard of the plaintiffs' land. They now have no garage, do not permit their children to play in the pertinent area and for practical purposes the northerly 60 ft. of a total depth of 190 ft. of their land (in the back yard) are not useable.

79 This nuisance and continuing nuisance constitute therefore an item of damage which I assess in the sum of $3,000.

80 The last branch of the plaintiffs' claims rests in negligence. It is impossible to formulate precise rules of conduct for all conceivable situations but a somewhat abstract definition would have to be — conduct falling below the standard established for the protection of others against unreasonable risk of harm. It would be redundant to review any of the evidence further but in order to provide further clarity to these reasons, I make the following findings of negligence after a brief recapitulation of some of the facts upon which they are based.

81 Metro undertook, pursuant to the agreement, to carry out the total garbage land-fill project without any assistance, technical or practical instructions or guidance from York. However, York was aware at all times of what was being done on the project both with respect to the defined land to be utilized and the trespass on the private lands of the adjoining owners. York made no objection. Metro had to know the same facts and filled private lands without authority. Both knew or ought to have known of the generation of methane gas as potential danger. Even if it is assumed that neither defendant knew any of these incriminating facts prior to the Capeling fire, they were both indisputably aware of them after the Capeling incident. Neither of them thereafter took adequate steps to prevent a reoccurrence of this event. That in itself constitutes acts of omission inconsistent with the obligation of a duty of care.

82 The negligence of both defendants was:

(a) The burying of garbage and other waste material on the lands of York when they knew or ought to have known that the decomposition of the materials would result in the production of methane gas which would seep into and constitute a hazard and danger to adjoining properties and their owners and particularly the plaintiffs;

(b) having buried garbage and other waste material as aforesaid, permitting the methane gas therefrom to escape into the adjoining property, particularly those of the plaintiffs;

(c) failing to take, adopt or construct the necessary physical precautions, structures or means to prevent the escape of the dangerous methane gas onto the adjoining lands;

(d) failing to adopt or consider or provide proper means of dispersing the gas safely into the atmosphere without causing damage to person or property, the adjoining land owners and particularly the plaintiffs;

(e) failing to inspect from time to time, and particularly after the Capeling fire, whether the remedial methods adopted were accomplishing the results intended to remove the dangers which they were aware had been created;

(f) failing to warn the adjoining property owners and particularly the plaintiffs of the potential danger if they used their garage or garages and informing them of that which was within the knowledge of the defendants for the alteration, improvement or reconstruction of such buildings in order to make them impervious to methane gas;

(g) the further negligence of York was that after having been warned orally and by letters from Metro of the potential danger to the plaintiffs and adjoining land owners, it failed to pass on the warnings to the parties concerned and in particular the plaintiffs, and

(h) York's further negligence was issuing permits to permit the abutting land owners of the ravine to construct garages and outbuildings on lands filled with garbage and waste.

83 Metro, in the course of the evidence and upon argument made by its counsel, argued strenuously that there was a duty upon the officials of York when an inquiry was made to it by Capeling, to be careful that the information imparted to him was fact. It will be recalled from his evidence, which I accepted, that he was specifically advised by some official that the problem of escaping gas which had originally caused the fire in his garage had been eliminated. It is now settled law that where there is a duty to be careful, negligent misrepresentation affords a cause of action: *Hedley Byrne & Co., Ltd. v. Heller & Partners Ltd.*, [1964] A.C. 465. It would be unrealistic not to find as fact that the officials of York Township were fully cognizant of the Capeling fire and the consequences and they owed a duty that whoever gave the information to Capeling be careful that such was accurate. This is best illustrated in the words of Lord Morris at p. 503 in the *Hedley Byrne* case:

> Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty or care will arise.

84 This principle was applied in the case of *Gadutsis v. Milne*, [1973] 2 O.R. 503, 34 D.L.R. (3d) 455 (H.C.). The plaintiffs made an application for a building permit which was issued to them to remodel certain premises into a restaurant in Toronto. Following the issue of the permit and the commencement of the work, it was discovered that this property had not been zoned for that purpose and that admittedly, a member of the staff of approximately 240 people in the pertinent municipal office had made a mistake when he permitted the issue of the permit. His Lordship held the municipality liable

and assessed damages in favour of the plaintiff. Apart from any other grounds in this judgment, upon which I find York liable, this negligent conduct would have been sufficient to find for the plaintiffs against York.

85 Based on this last proposition, the defendant Metro seeks to escape liability on the basis of *novus actus interveniens*. There is no single or precise test as to when and how this formula should be applied. Lord Wright in *The Oropesa*, [1943] P. 32 at p. 36, stated:

> These phrases ... only mean that there was not such a direct relationship between the act of negligence and the injury that the one can be treated as flowing directly from the other. Cases have been cited which show great difference of opinion on the true answer in the various circumstances to the question whether the damage was direct or too remote. I find it very difficult to formulate any precise and all-embracing rule. ...in dealing with the law of negligence it is possible to state general propositions, but when you come to apply those principles to determine whether there has been actionable negligence in any particular case, you must deal with the case on its facts.

86 On the facts in this case, there was a definite connection between the wrongdoing of both defendants and this intervening act of York's employee who gave the wrong information. When I evaluate the wrongdoing of the defendants and the remedial steps taken after the Capeling fire which I have already considered inadequate and the knowledge which I impute to both defendants, regardless of any representation to Capeling by said official, it is my opinion that this latter conduct should not be considered so unreasonable as to eclipse the original wrongdoing of the defendants in order to make this wrongful statement such as to come within the formula of *novus actus interveniens*. While it therefore does not relieve the defendant Metro, nevertheless it could have been a factor when considering the contributory negligence of the respective defendants. The *Negligence Act*, R.S.O. 1970, c. 296, s. 2(1), states as an exception to common law:

> 2(1) Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent...

87 I now turn to the personal injury claim. At the time of the explosion, the plaintiff, Floris Gertsen, was sitting behind the steering-wheel of his motor-car. The explosion was accompanied by a flash fire and his immediate injuries consisted of extensive burns to the face, back of each hand from wrist to tips of all fingers, perforation of the right ear drum resulting in some hemorrhage and a compression injury to the cervical spine at the level of C. 6-7. The burns blistered and were treated with ointment. He recovered from the whole of this disability in approximately three weeks.

88 Also, at the time of the explosion he only had 45% hearing in the left ear. As a result of the painful perforation of the right ear drum, in the explosion, his hearing deteriorated substantially to the point where he could not hear voices at a distance further than 10 to 12 ft. Prior to the explosion, he relied substantially upon his right ear for his hearing and, therefore, this injury to the right ear constituted a major disability which recovered to almost pre-explosion level approximately four to five months prior to the trial.

89 The main continuing disability is the injury to his neck, associated with severe headaches which, while decreasing, still continue to the present time. The neck injuries were treated conservatively for a substantial period of time and showed gradual improvement of the pain in the areas of the neck, shoulders and back and even as far down the back to the area between the shoulder blades. About the end of February, 1970, his condition appeared to deteriorate, demonstrated by increased pain and discomfort in his neck and the other areas already described to which was added a lack of feeling in his right hand.

90 He was referred to Dr. James Bateman, a specialist in orthopaedic surgery, by his family physician, Dr. A. Peters. Dr. Bateman examined him, found confirmation of the complaints and that there was restriction of cervical motion, tenderness in the cervical area, loss of sensation of the fourth and fifth fingers of the right hand (objective findings). He concluded that the patient had suffered a vertical type compression blow which could involve the nerve root at C. 6-7. By

reason of this likely involvement, he hospitalized Mr. Gertsen for investigation. A cervical myleogram was performed revealing a defect at C. 6-7, which protruded backward affecting the nerve. This opinion was supported by the fact that cervical home traction was previously prescribed by the plaintiff's personal physician and he opined that, while many patients improve by this conservative treatment, nevertheless the continuing radiating pain proved that the lesion was a continuing one — ongoing for two years and that there should be surgical intervention. As a result of his conclusions, with the consent of the plaintiff, a discotomy was done using bone from the iliac crest for the fusion.

91 For this surgery, the plaintiff was hospitalized on January 6, 1972, and discharged February 2nd, following which he wore a brace for 12 weeks to protect the site of fusion. On examination about October 25, 1972, there was a good range of motion of the neck but not fully in that there was not complete flexion and extension. The radiating pain had disappeared and the lack of sensation in the fingers had largely disappeared. Dr. Bateman further concluded that the nerve damage will completely regenerate with time although he still has some pain in his neck. He assessed his permanent impairment as being 15% of his whole body and that he will have permanent limitation of motion of the neck. He was satisfied that the disability in the neck was directly the result of the explosion and that the surgery was necessary to achieve improvement in his condition and that the continuing temporary and permanent disability are the natural and probable *sequelae* thereto. I also find that this plaintiff had pre-existing degenerative disc disease which was probably aggravated by his injury to his cervical spine.

92 The male plaintiff has a long history of indifferent health even prior to migrating to Canada from Holland in November, 1951. At the time of the explosion he was approximately 44 years, 6 ft. in height, weighing 230 lb. In Holland he suffered from mastoiditis and had undergone two left mastoidectomies in Holland in 1950 and another in Canada in 1953. This resulted in a 45% hearing disability in the left ear prior to this explosion in 1969. Over the years he had treatment of his left ear, the medical procedures being carried out to rid him of fluid. In any event, he relied mainly on his right ear for hearing prior to the explosion. He also suffered from polyps in the lower bowel. Following the explosion, in his many attendances on doctors, it was also determined that he suffered from pulmonary emphysema. In January, 1971, it was also determined that he had arterialsclerotic heart disease.

93 In February, 1969, while still plagued with his many physical problems from the explosion as well as other unrelated ailments, he had his remaining teeth, of which there were only 12 to 14, removed.

94 My observations of him in the trial were that he did not minimize his complaints. He was prepared to attribute his further loss of hearing, hemorrhoids and heart problems to this explosion, although his counsel was more realistic. However, after reading all of the medical reports filed as exs. 1 to 8 inclusive and directed at these particular phases of the complaints, I am satisfied that his measurable damages cannot be taken to relate to anything more than the injuries that I will recapitulate below. Much of his concern about his health will, expectedly, be resolved when this litigation is ended, and probably aided in no small way by the fact that his weight was reduced from 230 to 187 lbs. and his smoking habits restricted, both of which were the subject of medical comment in the medical exhibits filed. (Re smoking, see ex. 18, Dr. Barber's report at last paragraph, p. 2.)

95 His damages therefore are assessed for his initial injuries, including the burns to his face and hands, right ear injury from which I find he has recovered, the pain and discomfort in his neck, shoulders and hand due to his cervical injury. I also take into consideration the substantial pain, suffering, discomfort, inconvenience, loss of enjoyment of life in the period from the explosion until the date of the discotomy and the continuing permanent disability that he now has in the cervical area as fully described by Dr. Bateman in his oral testimony and report (ex. 6).

96 I also consider that he has a minimal permanent diminution of hearing ability in the right ear, also due to the explosion, which I find now as being "very near normal" (Dr. Barber's report). "The residual loss amounts to twenty

decibels and it is felt that this is close to or approximates the hearing loss he had prior to the explosion of 1969": Dr. Brydon Smith's report, November 24, 1972, ex. 4.

97 I therefore assess his general damage for injuries, the severity of the injuries, pain, suffering, past, present and continuing disabilities, inconvenience and attendant loss of enjoyment of life in the sum of $10,000.

98 The plaintiff, Mr. Gertsen, claimed loss of income in specific areas:

(a) actual loss of income due to inability to work;

(b) loss by reason of reduction in income because he cannot be employed as a bus operator and is therefore forced to be employed as a gate fare collector for the same employer at a lower rate of pay;

(c) that his sick benefits received should not be taken into account in computing his loss of income (The parties after the trial and before the decision of the Court of Appeal in *Boarelli v. Flannigan*, [1973] 3 O.R. 69, 36 D.L.R. (3d) 4 (C.A.)) was handed down on May 14, 1973, settled this issue by agreeing that any loss of income found by me should be reduced having regard to this item by $1,202. It therefore becomes unnecessary to deal with same);

(d) his future loss as set out in (b) above, and

(e) his lesser pension accruals, if any, due to lower earnings.

99 The plaintiff's case, if accepted *in toto*, would allow perfect compensation for loss of income without considering any of the contingencies. It hardly need be stated that this is not the correct approach notwithstanding that these items are in the main considered as special damages. To put it another way, he has not satisfied the burden of proof on the balance of probabilities that his alleged loss of income as claimed is fully recoverable.

100 Counsel for the plaintiffs, in a carefully prepared and able argument, tendered in evidence two documents supported by oral evidence and then subsequent argument that I should approach the special damages for loss of income as set out in these statements on one of three alternate approaches.

101 Exhibit 21 is a detailed comparison of the hourly rates earned by a bus operator and a gate fare collector commencing with the date he began duties as a gate fare collector on November 2, 1969. The difference in the hourly rate for each job classification ranges from 28¢ to 43¢ per hour from that date to July 1, 1974.

102 Exhibit 22 is a statement of the aggregate estimated loss of income computed for pay periods in which the rates of pay were constant. Each subsequent period is based on the increased hourly rates of pay. The whole computation is from January 19, 1969 (date of accident), to December 31, 1972. This computation shows the differences between what he earned in those periods and what he *could have earned* in the same periods. For those four years the difference or suggested loss is $22,392.40. This statement implies that the loss of time was all due to the accident and that the lesser earnings as a gate fare collector would not have occurred but that he would have always been a bus operator in this period, with no time loss for sickness, for personal reasons, injuries beyond his control as an operator, strikes or lock-outs in the organized labour bargaining units of other services or industries recognized by his union, and any other contingencies.

103 A third proposal by plaintiffs' counsel in the form of a statement not filed as an exhibit was a computation based on the differences between the gross earnings shown on his income tax returns of each of the years 1969 to 1972 inclusive (1972) being on an estimated basis because the "T4" form was not as yet available for 1972 from the employer) and those shown on his 1968 return. This amounted to an aggregate estimated loss of $14,001.76. The same reasoning as stated relative to the use of the method proposed by ex. 22 as to contingencies is also applicable to this approach.

104 I cannot accept any of these methods of computation because, as stated, they allow for no contingencies and do not satisfy the burden of proof in establishing a loss of income by special damages.

105 I have therefore assessed his loss of income in the three definitive periods that he was absent, on the evidence, from employment due to injuries related to this explosion, as follows:

1)	January 19 -- March 11, 1969, 7.6 weeks at 63.35 hours per week at $3.36 per hour	$1,617.66
2)	July 18, 1969 to November 2, 1969, 15 weeks, from which I deducted 24 days by reason of his hemorrhoid operation and convalescence during this same period, being, therefore, 9 weeks at 63.3 hours per week at $3.53 per hour	2,012.58
3)	December 31, 1971 to April 23, 1972 for a period of 16 weeks at 53 hours per week in his lesser position as a fare collector at $3.84 per hour	3,256.32
	Total	$6,886.56

106 I am not satisfied on the evidence that he would have continued as an operator of bus, surface or subway cars indefinitely. I take a realistic view of the matter of contingencies. If he, at some time, had to accept employment involving other than these specific tasks of employment, it conceivably would have been the result of his continued poor health which would, of course, not improve with age, and his continued obesity and smoking habits which apparently had a deleterious effect according to Dr. Barber's report of his health. On the balance of probabilities, I am allowing the differential in pay up to December 31, 1971 (an arbitrary date), which date-fixing, I must say, has satisfied none of the parties. Of this arbitrary cut-off date, I am grateful to counsel who worked out the amounts shown below as *mathematically* acceptable by them if not *in principle* and which I allow at $1,970.19. These figures are shown below as follows:

Difference Between Operator and Collector From Nov. 2/69 to Dec. 31/71, Minus Fifty-eight Days, Based on 63.35 Hrs. Per Week

1.	Nov. 2/69 to July 1/70 = 35 weeks X 63.35 hrs. = 2217.25 X .28cents; per hr.	$ 620.83
2.	July 1/70 to July 1/71 = 52 weeks X 63.35 hrs. = 3294.20 X .30cents; per hr.	988.26
3.	July 1/71 to Dec. 31/71 = 26 weeks X 63.35 hrs. = 1647.10 X .36cents; per hr.	592.96

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	Gross Total:		$2,202.05
Less:	8 wks. X 63.35 X .30cents;	= $152.04	
	plus		
	3 1/2 wks. X 63.35 X .36cents;=	79.82	231.86
		-------	---------
	Net Total:		$1,970.19

107 His loss of income has to be directly related to his absence from employment regardless of the reasons for such absences. It is therefore necessary to the best of my understanding of the evidence to allow for loss of income only those periods that he was absent because of the injuries and the periods of disability and convalescence related thereto. Care must be taken in fixing these periods but it is unnecessary to discuss the reasons since I previously dealt substantially with his physical and medical history as it relates to his employment. For example, the evidence of Bruce W. Henley, the supervisor of labour-accounting with his employer for some 19 years, indicated from his records that Mr. Gertsen was absent from work for a period of 40 days indicated as "sickness" commencing January 5, 1971, which was admitted by the plaintiff, through counsel, as being the result of his heart illness. During the rest of that year, from the same records, it is noted that he was absent 23 days recorded as "sick" or simply "leave". I must assume that "leave" must have been for his personal reasons not explained in the evidence.

108 In the result, therefore, I assess the loss of income at $8,856.75 less the $1,202.00 mentioned earlier, for a net amount of $7,654.75.

109 The other special damages were filed in a statement with supporting vouchers as ex. 12. No serious objection was taken to any of them other than the item claimed of $24 for parking violations from December 16, 1969, to November 9, 1971. I fail to see their relevance and they are accordingly disallowed, the balance being assessed at $4,897.76. In summary, therefore, the damages are as follows:

(a)	To both plaintiffs, damages for nuisance	$3,000.00
(b)	To Floris Gertsen, special damages per ex. 12	$3,804.46
(c)	To both plaintiffs, special damages to property, per ex. 12	$1,093.30
(d)	To Floris Gertsen, general damages for personal injuries	$10,000.00
(e)	To Floris Gertsen, damages for loss of earnings	$ 7,654.75

	Total	$25,552.51

110 Both defendants are liable for all the damages by reason of absolute liability under the rule in *Rylands v. Fletcher* and also in nuisance. As to *Rylands v. Fletcher* the law would appear to be that the occupier or a person who brings the dangerous substance on to the land is liable. As Lord Sumner stated in *Rainham Chemical Works, Ltd. (in Liquidation) et al. v. Belevedere Fish Guano Co., Ltd.*, [1921] 2 A.C. 465 at pp. 479-80.

> The dinitrophenol was lawfully brought on to the Range site and stored there by the company. They cannot escape any liability which otherwise attaches to them on storing it there merely because they have no tenancy or independent occupation of the land but use it thus by permission of the tenants or occupiers: *Eastern and South African Telegraph Co. v. Cape Town Tramways Cos.*, [1902] A.C. 381, 392; *Midwood v. Manchester Corporation*, [1905] 2 K.B. 597; *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.*, [1914] 3 K.B. 772. Accordingly, I think the appeal of the company fails.
>
> The other appellants, Messrs. Feldman and Partridge, clearly assented to the introduction and storing of the dinitrophenol and, until repayment of their advances to the company, they alone would benefit pecuniarily by the manufacture of picric acid from it. Furthermore, they were personally bound to the Minister of Munitions to receive his dinitrophenol at Rainham and use it in manufacturing picric acid, an obligation which, rightly or wrongly, they procured the Rainham Co. to discharge in lieu of themselves. If, then, they were occupiers of the Range site, I think they too would be liable on the principle of *Rylands v. Fletcher*, L.R. 3 H.L. 330. As occupiers they would be under a personal obligation to their neighbours not to let this non-natural user of the land, which they occupied, become a source of damage to them. This obligation it was for them to discharge and, whether they employed agents or independent contractors in connection with the matter, their own obligation persisted. Even if they actually employed nobody, but simply suffered others to manufacture upon the site which they nevertheless continued to occupy, I think they are still under liability to third parties, if what is thus allowed by them, upon the land which they occupy, causes damage.

In that case, the defendant company was only an agent of the individual defendants, who were tenants of the land. Both were held liable, the company because it brought the dangerous substance on the land and the individual defendants because they were the occupiers.

111 Similarly, in *J.P. Porter Co. v. Bell* (1954), 35 M.P.R. 13, [1955] 1 D.L.R. 62 (N.S. C.A.), MacDonald, J., speaking for the Nova Scotia Court of Appeal stated:

> The defendant, however, has set up two objections to this action as based on *Rylands v. Fletcher*: A. The defendant was not in occupation of the Seaward Defence Project; and B. its operations did not constitute "unnatural user" thereof, within the rule of strict liability. The short answer to the first objection is that the defendant entered into and remained in possession of that part of the Project on which the blasting occurred with the consent of the appropriate agent of the Crown, Defence Construction Ltd.; and the vibrations complained of resulted from its activities thereon pursuant to its contract to remove submarine rock. This is sufficient to satisfy the rule: *Northwestern Utilities Ltd. v. London Guarantee & Accident Co.*, supra, *Charing Cross Elec. Supply Co. v. Hydraulic Power Co.*, [1914] 3 K.B. 772; *Aikman v. George Mills & Co.*, [1934] O.R. 597, [1934] 4 D.L.R. 264 (H.C.); *Hoare & Co. v. McAlpine*, [1923] 1 Ch. 167. Similarly the defendant would be liable in terms of nuisance as the occupier or as the creator of a continuing nuisance whether the land was technically in its occupation or not: Salmond, p. 263; Winfield, p. 464; 24 Hals., 2nd ed., pp. 83-5.

112 Similarly, in nuisance a contractor may be liable. *Esso Petroleum Co., Ltd. v. Southport Corporation*, [1956] A.C. 218, was a case involving an oil tanker which had to jettison oil in order to avoid foundering. In his trial judgment, which was included in the House of Lords report, Devlin, J., stated at pp. 224-5:

> I think that it is convenient to begin by considering whether there is a cause of action in nuisance. It is clear that to give a cause of action for private nuisance the matter complained of must affect the property of the plaintiffs. But I know of no principle that it must emanate from land belonging to the defendant. Mr. Nelson cited *Cunard v. Antifyre Ltd.*, [1933] 1 K.B. 551, 49 T.L.R. 184, and I think that the statement of the principle is put there as clearly and concisely as it can be. Talbot J. said, [1933] 1 K.B. 557: "Private nuisances, at least in the vast majority of cases,

> are interferences for a substantial length of time by owners or occupiers of property with the use or enjoyment of neighbouring property; and it would manifestly be inconvenient and unreasonable if the right to complain of such interference extended beyond the occupier, or (in case of injury to the reversion) the owner, of such neighbouring property." It is clear from that statement of principle that the nuisance must affect the property of the plaintiff; and it is true that in the vast majority of cases it is likely to emanate from the neighbouring property of the defendant. But no statement of principle has been cited to me to show that the latter is a prerequisite to a cause of action; and I can see no reason why, if land or water belonging to the public, or waste land, is misused by the defendant, or if the defendant as a *licensee* or trespasser misuses someone else's land, he should not be liable for the creation of a nuisance in the same way as an adjoining occupier would be.

(Emphasis mine.) While this statement is *obiter* it is a clear indication that Devlin, J., one of England's most distinguished Judges, considered that someone other than an occupier might be liable for nuisance. The definition of nuisance by Talbot, J., in *Cunard et al. v. Antifyre, Ltd.*, [1933] 1 K.B. 551 at p. 557 (referred to by Devlin, J., above), was approved by Lord Wright in *Sedleigh-Denfield v. O'Callaghan*, [1940] A.C. 880 at p. 903.

113 The above-quoted *dictum* of Devlin, J., was followed by Veale, J., in *Halsey v. Esso Petroleum Co. Ltd.*, [1961] 1 W.L.R. 683 at pp. 699-700, where the defendant was found liable in nuisance for noise emanating from its trucks on a public highway.

114 In the recent case of *Newman et al. v. Conair Aviation Ltd. et al.* (1972), 33 D.L.R. (3d) 474, [1973] 1 W.W.R. 317, Wilson, C.J.S.C., commencing at p. 479 *et seq.* decided on the authorities therein cited that both the contractor and the occupier of the lands were jointly liable for damages suffered by reason of a nuisance. Savage had engaged the other defendant whose business was to spray insecticides by means of aircraft to spray his fields. The low flying aircraft of Conair frightened the plaintiffs and their horse and the spray extended on to the plaintiffs' lands causing some injury to the plaintiffs and their lands. The aircraft in question was being operated at the pertinent time by an employee of the aviation company.

115 There is therefore substantial authority for the proposition that someone in the position of a licensee or contractor could be liable in nuisance. This is especially so where the occupier and contractor were using the land for their mutual benefit in the instant case.

116 Having found both defendants liable on the three branches of law discussed *supra* in the result this may appear to be academic. In negligence the onus is upon the plaintiffs to prove their case, whereas under the other two heads of liability, the burden was upon the defendant.

117 Pursuant to the *Negligence Act* I find it impossible to determine in degrees or percentages the extent of the fault or negligence of each defendant because both were willing participants to the project; had their own special interests to be served by its completion; were fully aware of how the project was to be conducted or carried out; aware of or should have been aware of the dangerous by-product of the project; knew or ought to have known that there was encroachment on the plaintiffs' lands; knew of the remedial steps and that they were inadequate; York took insufficient steps to warn and protect the plaintiffs after the Capeling fire and Metro by its inspections knew or ought to have known that its instructions to York were not being implemented to protect the plaintiffs from further injuries after the Capeling episode. I therefore resort to s. 5 of the *Negligence Act* and find the defendants equally at fault.

118 There will therefore be judgment for the plaintiffs against both defendants accordingly for the damages set out above together with the costs of the action.

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