1980 CarswellNS 390
Nova Scotia Supreme Court (Trial Division)

Metson v. R.W. DeWolfe Ltd.

1980 CarswellNS 390, 10 C.E.L.R. 109, 117 D.L.R. (3d) 278, 14 C.C.L.T. 216, 43 N.S.R. (2d) 221, 5 A.C.W.S. (2d) 477, 81 A.P.R. 221

Metson and Metson v. R.W. DeWolfe Limited

Richard, J.

Heard: May 30, 1980
Judgment: October 9, 1980
Docket: S.K. 839

Counsel: *Walter O. Newton*, for the plaintiffs
David B. Ritcey, for the defendant

Subject: Torts; Environmental

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.a General principles

***Richard, J.*:**

1 This is an action for damages resulting from the alleged contamination of a well on the plaintiffs' property. It is alleged that the contamination was caused by a flow of heavily polluted surface water from the lands of the defendant.

2 The plaintiff, Graham Metson, is a writer and painter and his wife, Cheryl, is a professional photographer. In June of 1976 the Metsons purchased a one and one-half acre of land from a Mrs. Sanford. The land contained a dwelling house and an old barn. The domestic water supply was provided by a deep-dug well close to the northern boundary line of the property. Mr. Metson stated that the quality of the water supply was an important consideration in the decision to purchase the Sanford property. He said the well had a copious supply of clear clean water. Such a supply of water was essential to Mrs. Metson for the operation of her photographic darkroom and film developing laboratory. Mrs. Metson specializes in archival photography, the processing of which requires a consistent flow of high quality water. She said the water in the well on the property met her requirements quite satisfactorily.

3 The defendant company is in the horticultural business in the Annapolis Valley with its headquarters in Wolfville. Owen DeWolfe is the president of the company and he said that the principal business is growing apples, although the company also sells agricultural machinery and maintains a herd of between two hundred and three hundred beef cattle. The company operates numerous orchards in the Annapolis Valley and has a substantial quantity of pasture land. In 1971, the defendant purchased a fifty-five acre lot of land from Mrs. Sanford in the North Medford area. This comprised all of the "Sanford Farm" with the exception of the home lot, which was retained by Mrs. Sanford and subsequently sold to the plaintiffs.

4 Mr. DeWolfe said that it was the practice of the company to "top dress" its pasture lands every two or three years. Top dressing means that the land is fertilized with animal manure and Mr. DeWolfe says this is normal agricultural practice. Wayne Schofield is farm manager for the defendant company. He said that since the purchase of the Sanford farm it had been "top dressed" at least three times. In January of 1979, Schofield put about six three-ton loads of manure on the Sanford Farm lands. These lands are adjacent to and to the north of the Metson property.

5 From the exhibits, it is clear that the principal topographical feature of the lands is a slight rise to the north from the Metson property. Therefore, the natural flow of surface water would be in a southerly direction toward the lands of the plaintiffs.

6 It is clear that January, 1979, was an extremely cold month. As a result, the ground was heavily frosted. This frost was advantageous to the defendant since it permitted taking heavy farm machinery onto the land for the purpose of top dressing without the danger of such equipment becoming mired or bogged down. It was precisely for this reason that the defendant took advantage of the weather to top dress the Sanford Farm lands. During February of 1979 the Metsons had occasion to be absent from their home for a weekend (Friday through Sunday evening). Mr. Metson said the weather during that weekend consisted of very heavy rain which he described as "monsoon weather". On his return to the residence on Sunday evening, Mr. Metson noticed that a ditch adjacent to the driveway was full of thick brown foam and foul-smelling foaming water. The same brown foam and water was seeping around the cover of the well. On checking inside the home, Mr. Metson noticed an overwhelming smell of manure in all of the water lines in the house. The water was brown, very odorous with pieces of fine matter in it.

7 On Monday morning Mr. Metson inspected the outside of his house and traced the brown foam north to the boundary separating his land from that of the defendant. He noticed that the defendant's property was covered with manure which had obviously been spread by machine. He concluded that the condition of his domestic water was caused by the run off from the defendant's land of a mixture of surface water and manure.

8 Dr. Ronald Martin is a Microbiologist employed by the Provincial Department of Health. He gave evidence as to testing of water samples by the Department. The normal method of testing the potability of water is to establish a coliform count. Coliform is material which comes from the bowel of either man or animal. The *Canadian Drinking Water Code* calls for a coliform count of less than 1 in order for the water to be acceptable for drinking purposes. As a result of laboratory tests done at Halifax, a lab report (Exhibit 5) was issued under the direction of Dr. Ronald Martin. Exhibit 5 is a report on a water sample which was taken from the Metson well. The report issued on March 26, 1979, showed a coliform count of 300. Dr. Martin described this sample as being beyond any reasonable limit. He also stated this reading would be consistent with the presence of manure in a well.

9 I am satisfied and find as a fact that the contamination of the plaintiffs' water supply was due solely to the run off from the defendant's land of a mixture of surface water and manure. I accept the evidence of the plaintiffs that the rain over the weekend in question was unusually heavy and that the weather in the preceding weeks was extremely cold. However, I am satisfied and so find that the heavy rain or the extreme cold (or a combination thereof) were not that unusual or unforeseeable as to constitute an Act of God or "force majeure".

10 It seems to me that this factual situation is a classic application of the long established principle set out in *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330. The parties in that case were adjacent landowners. The defendants were owners of a mill and they proposed to construct a reservoir on the surface of the land over an area where there were certain old and abandoned mine shafts and passages. The plaintiff operated a mine and works immediately adjacent to the plaintiff's land. The weight of the reservoir with water proved too great for the land and the water in the reservoir broke through the mine shafts and passed eventually into the workings of the plaintiff, causing considerable damage.

11 Cranworth, L.J., states the rule in the following terms at p. 340:

> If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.
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> In considering whether a defendant is liable to a plaintiff for damage which the plaintiff may have sustained, *the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage*. (emphasis mine)

12 In the recent British Columbia case of *Royal Anne Hotel Co. Ltd. v. Corporation of the Village of Ashcroft et al.* (1979), 8 C.C.L.T. 179, McIntyre, J.A. (as he then was), after reviewing the authorities, made the following observation at p. 186.

> In my opinion, the rationale for the law of nuisance in modern times, whatever its historical origins may have been, is the provision of a means of reconciling certain conflicting interests in connection with the use of land, even where the conflict does not result from negligent conduct. It protects against the unreasonable invasion of interests in land.

13 The present case is not that sort of situation dealt with by our Appeal Division in *Loring v. Brightwood Golf and Country Club Ltd.* (1974), 8 N.S.R.(2d) 431. That case dealt merely with the flow of surface water. In the *Loring* case, MacKeigan, C.J.N.S., after an exhaustive review of the authorities on the law of nuisance, stated at p. 452:

> Fleming thus accepts, as I respectfully do, that the principle exempting owners from liability for natural flow of surface water is too well trenched in our law to be dislodged or affected by general statements, albeit pronounced by the highest authority, laid down in quite different circumstances. I am, respectfully, not convinced that the *Goldman* case or any principles or urban planning in Canada in the twentieth century require the owner of vacant urban land to take positive steps to ensure that surface water on his land does not run off to the possible injury of his neighbour, so long as he does nothing materially to increase or change the direction of the flow.

14 Had the plaintiffs in the present case complained merely of the flow of natural surface water onto their land, they would have come clearly under the rule as enunciated by the learned Chief Justice in the *Loring* case, *supra*. However, with the addition of the deleterious material (*i.e.* manure), the case comes clearly within the ambit of the rule in *Rylands v. Fletcher (supra)* and the defendant must answer to the plaintiffs for damages without consideration of the question of negligence.

15 Counsel for the defendant contended that the "top dressing" of agricultural land is an act of normal husbandry and, therefore, liability for any damage as a result thereof must be based on negligence. In support of that proposition the defendant relied on two Alberta cases: *Lickoch et al. v. Madu et al.*, 34 D.L.R.(3d) 569, and *Zaruk et al. v. Schroderus et al.*, 71 D.L.R.(3d) 216. Both of those cases were founded on nuisance. In each case farmers were burning off dried grass and weeds and grass stubble. The smoke from the fires severely impaired normal visibility on an adjoining highway

resulting in the collision of several automobiles. Bowen, J., in the *Zaruk* case, *supra*, commented upon the law of nuisance in Alberta as follows:

> The law in Alberta, with regard to nuisance and negligence in similar circumstances, has been set out in *Lickoch et al. v. Madu et al.* (1973), 34 D.L.R.(3d) 569; [1973] 2 W.W.R. 127. The act of the farmer in that case in setting the fire was deemed to be an act of normal husbandry as are the actions of the farmer here. Cairns, J.A., in giving the judgment of the court states at p. 578:
>
> > If therefore the fire which was started constituted an act of normal husbandry and was conducted without negligence it would constitute an answer to claim for nuisance and the authorities cited on the law of nuisance have no application to this case. The crux of the whole matter depends on whether the acts of Wegner constituted normal husbandry. If they do he is exonerated at least in this province except for negligence, and therefore this must be considered.

And again at p. 581 and over to p. 582:

> The principle as I have indicated before is that a person kindling a fire on his own property in the course of normal husbandry is only liable for damages if negligence can be proven, and therefore, in such a case there was no action in nuisance available, and to sum up here as I have stated, the smoke in question that caused the damage was an incident of or an integral part of the fire in question and the acts of the defendant in dealing with the fire were acts conducted in the ordinary course of farming and were therefore acts of normal husbandry, and as no negligence has been found attributable to the defendant, Wegner, he is not liable for the damage which ensued.
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> These principles clearly take acts done in the course of normal husbandry out of the general law of nuisance.

16 It is noteworthy that neither the *Lickoch* or the *Zaruk* cases was the rule in *Rylands v. Fletcher* considered. It may well be that the Alberta courts felt that there were compelling social and economic reasons in that jurisdiction to refrain from applying the rule in cases such as the two considered above. On the other hand, since neither Alberta case even considered the *Rylands and Fletcher* rule one may speculate that the courts felt that it had no applicability to situations involving the presence of smoke on an adjoining public highway.

17 I know of no case in Nova Scotia where the application of the rule in *Rylands v. Fletcher* has been in any way modified or eroded for considerations of normal agricultural husbandry. In my view, the rule in *Rylands v. Fletcher* was and still is a very pragmatic and reasonable resolution of the inevitable conflicts and competing interests of adjoining property owners. If the applicability of the rule is to be changed in this jurisdiction, in my view it should be done by a higher court.

18 I shall now deal with the question of damages. As a result of the pollution, the plaintiffs were unable to use their domestic water supply derived from the polluted well. For several months they were required to carry water from their neighbour's property to satisfy their own domestic requirements. This constituted a very considerable inconvenience for a rather protracted period of time. Mr. Metson stated that it took about an hour a day to transport the required amount of water.

19 The plaintiffs decided to abandon the well and ordered a well driller to come on the land and bore a new deep well. This well was drilled some twenty feet from the residence, which necessitated the excavation of a trench from the well head to the house to accommodate the water lines. Because of the frost and the weather conditions, the plaintiffs were not able to complete the installation of the new well until early May, 1979. Mr. Metson said that the total cost of the installation, including excavation and plumbing, was $2,056.98. He said that it was necessary for him to borrow these funds from the bank at an interest rate of sixteen per cent.

20 It is the contention of the defendant that the installation of the deep well was an unnecessary expense and therefore the defendant should not be called upon to pay for it. I disagree. The plaintiffs had no way of knowing that the water in the polluted well could be restored to a potable condition. Also, the plaintiffs needed an immediate and ample water supply, both for domestic purposes and for use in the photography lab. In viewing all the circumstances, I cannot conclude that the plaintiff's action was in any way unreasonable.

21 The defendant also contends that the bored or drilled well increased the value of the plaintiff's property and therefore gives the plaintiffs a benefit for which the defendant should not have to pay. There is no evidence establishing that the value of the plaintiffs' property has been increased as a result of the installation of the drilled well. This may only become apparent if the property was placed for sale and, again, there is no evidence that the plaintiffs have any intention of disposing of their property.

22 Cheryl Metson claims damages for loss of income from her photography business from the time the well was contaminated until the drilled well was placed in operation. Mrs. Metson may well have suffered some inconvenience and loss of income but there is little or no evidence to substantiate this. In cross-examination, she said that although she was prevented from doing things during that period, that nothing was left over or left undone - her projects were completed. I therefore decline to award damages for loss of income.

23 The plaintiffs are entitled to general damages for the great inconvenience caused to them as a result of this incident. Viewing all of the circumstances, I assess general damages at $2,000.00. Accordingly, the plaintiffs shall have judgment against the defendant in the amount of $4,056.98 plus their costs of this action to be taxed.

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