1984 CarswellNfld 262
Newfoundland District Court

O'Brien v. Newfoundland Light & Power Co.

1984 CarswellNfld 262, 150 A.P.R. 30, 51 Nfld. & P.E.I.R. 30

O'Brien and O'Brien v. Newfoundland Light and Power Company Limited

Adams, C.J.D.C.

Judgment: October 11, 1984
Docket: None given.

Counsel: Claude Sheppard, for the plaintiffs
Stanley Marshall, for the defendant

Subject: Property; 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.1 Nuisance
II.1.b Liability in particular cases
II.1.b.iii Water pollution
II.1.b.iii.A General principles

Environmental law

II Liability for environmental harm
II.3 Strict liability (Rylands v. Fletcher)
II.3.e Miscellaneous

Headnote

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

Well contaminated by creosote.

Defendant constructing penstock made of creosote-soaked wood on land adjacent to plaintiffs' property -- Plaintiffs' well contaminated by creosote -- Defendant conducting tests showing no creosote in plaintiffs' water -- Plaintiffs conducting two separate sets of tests showing creosote contamination -- Plaintiffs suing defendant -- Judgment for plaintiffs -- Defendant's use of land not natural use -- Defendant allowing creosote to escape and contaminate plaintiffs' water -- Absence of negligence not bar to plaintiffs' claim -- Defendant strictly liable -- Pre-existing poor quality of plaintiffs' water irrelevant to claim.

Environmental Law --- Common law actions — Nuisance — Liability in particular cases — Water pollution

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Defendant constructing penstock made of creosote-soaked wood on land adjacent to plaintiffs' property -- Plaintiffs' well contaminated by creosote -- Defendant conducting tests showing no creosote in plaintiffs' water -- Plaintiffs conducting two separate sets of tests showing creosote contamination -- Plaintiffs suing defendant -- Judgment for plaintiffs -- Defendant liable in nuisance -- Defendant allowing creosote to escape and contaminate plaintiffs' water -- Absence of negligence not bar to plaintiffs' claim -- Pre-existing poor quality of plaintiffs' water irrelevant to claim.

***Adams, C.J.D.C.*:**

1 In this action the plaintiffs seek the restoration or replacement of a surface well on their property to provide an adequate potable water supply to their dwelling house. They allege that the surface well on their property which was the source of their domestic water supply became contaminated by the seepage of creosote from a wooden penstock or pipe line constructed by the defendant on land adjacent to their land. They also allege that the water drained from their well and they were deprived of an adequate supply of water. They based their claim on negligence and nuisance and claimed special and general damages.

2 The defendant denied that it had been negligent in the construction of the penstock or that creosote from the penstock had seeped or migrated to the plaintiffs' well thereby creating a nuisance.

3 The defendant owned a penstock or pipeline through which water was directed and flowed from Topsail Pond to its electricity generating station situate at Topsail, Conception Bay South, about one mile from the plaintiffs' property. The penstock was constructed of wood planks bound together in the form of a pipe by metal hoops. In May, 1981, the defendant dismantled the penstock and replaced it with a new one of similar design in the same general location as the old one. The wood planks comprising the new penstock were impregnated or treated with creosote as a preservative. The new penstock was completed in November, 1981.

4 The plaintiffs' dwelling house and land is situate along the eastern bank of Topsail River near Topsail Pond. In the vicinity of their property the penstock is buried in a trench running through a strip of land six meters wide and sixty-seven meters long which they sold to the defendant for the purpose of placing it on that site. That strip of land is situate on the west side of the plaintiffs' house near the east bank of the river; the plaintiffs' retained a narrow strip of land between Topsail River and the land they sold to the defendant. Their well is situate on the north side of their house about 40 feet easterly from the penstock, it is approximately 8 feet deep and the normal depth of water in it ranges from 3 to 4 feet. The pipe through which water is drawn from the well to their house lies underground and on entering the well it extends down to about one foot from its bottom. According to the testimony of Ralph Wiseman, the plaintiffs' son-in-law, the elevation of the land on which the penstock is situate is about 13 feet lower than the elevation of the site of the well. The first plaintiff said the difference in elevation is 8 or 9 feet.

5 Until the plaintiffs' water supply was interrupted their well also served as the water supply to their son's house situate a short distance south of their house. Their son had a well on his property but it was not in use as a water supply. On June 20, 1976, the plaintiffs conveyed the southern portion of their property to their son, Alphonsus O'Brien, Jr., and the latter converted a building on that section of the land to his residence. Alphonsus O'Brien Jr. did not register his deed of conveyance. The land which the plaintiffs purported to sell to the defendant included a portion of their son's land but they did not inform the defendant of that fact.

6 In the meantime, while negotiations were proceeding between the parties concerning the sale and purchase of a portion of the plaintiffs' land work on dismantling the old penstock and preparation of the site for the new one commenced. Ultimately, on July 31, 1981, the plaintiffs executed the deed of conveyance of the land which their solicitor forwarded to the defendant under cover of a letter of the same date. That letter stated in part:

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> Although no formal record of our negotiations with your Mr. Charles Adams exist, it is my understanding, based upon our verbal communications, that in addition to the foregoing documentation, the following items were agreed upon:
>
> (1) Newfoundland Light and Power Co. Ltd. intends to bury the penstock and grade the area affected so that it will revert to its original contour;
>
> (2) That at this time, the penstock area will not be fenced; and
>
> (3) That Newfoundland Light & Power Co. Ltd. will take all reasonable steps and precautions to insure that while construction and blasting are carried out in the penstock area, the residence and adjacent surface well of Alphonsus O'Brien will be protected and if damage to the house or drainage of the well takes place, that Newfoundland Light & Power Co. Ltd. will rectify same and put it back in its original condition.
>
> We trust the foregoing attitude reflects our discussions with Mr. Adams, but please do not hesitate to contact me if you wish to discuss this matter further.

The letter was not acknowledged by the defendant. It was admitted in evidence by consent (exhibit No. 3).

7 It was maintained for the plaintiffs that the defendant failed to fulfill the understanding they, through their solicitor, had gained from Charles Adams, an employee of the defendant and, by its failure to acknowledge the letter or repudiate the three clauses contained in paragraph 2, in particular, clause 3 of that paragraph, the defendant agreed to restore the well if drainage occurred during blasting operations and construction of the penstock.

8 In his testimony the first plaintiff said the well served as their water supply for forty years and during that time the water level remained constant between 3 and 4 feet deep. It had never gone dry. Once each year he "bailed out" the water and cleaned the well, including the rock lining the well. Although he did not have a bacteriological test performed on the water in forty years he said the quality was good. His family used it for drinking and all other household purposes without ill effects and in time of drought he provided his neighbours with drinking water. When their son established his home next door in 1978 he, too, used the water from that well for all his family needs.

9 The first plaintiff said after the defendant commenced blasting behind their house the depth of water in their well receded to about one foot and there was insufficient water to fulfill their needs. He did not know when the level dropped but it occurred within "a matter of days" after the blasting commenced. He complained to the defendant and it arranged for daily delivery of water to their property to replenish the well but each day the water drained or receded to the level of one foot. They discontinued using the well. The defendant then installed a 200 gallon tank outside their house and it was connected to the internal water system of the house. The tank was installed at the request of the first plaintiff. The defendant filled the tank each day until March, 1982, when it refused to supply any more water. In the meantime the first plaintiff said he observed an oily film on the surface of the water in the well and he did not reconnect the pipe from that well to the house. He refrained from doing so because of the oily film on the water which he asserted was creosote. He said it did not smell like creosote, the smell "was rotten".

10 The first plaintiff's evidence is uncertain as to when he first observed the oily film on the water in the well.

11 The first plaintiff said their son, Alphonsus O'Brien Jr., had a well on his property which was not in use. That well became contaminated and the defendant caused an artesian well to be drilled on their son's property from which the latter drew his water supply. The plaintiffs also connected their house to that artesian well and they had been using it as their source of water ever since. The first plaintiff was present on their son's property when drilling of the artesian well commenced. He said he requested the defendant to provide them with an artesian well but he "never got no satisfaction".

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12 Ralph Wiseman said he did not know when the oily film was first observed on the water in the well. He said "it could be anywhere from January to March", 1982. Its presence on the water was reported to the defendant and the plaintiffs were informed that tests had been performed on the water at the instigation of the defendant which proved "negative". It was suggested at that time that the plaintiffs ought to have the water tested themselves and that was done July, 1982. The sample for testing was taken by a person from the Public Health Inspection Services of the Department of Health for Newfoundland. Wiseman said the report on that test indicated that the water was contaminated by phenol, a component of creosote.

13 An analysis of a sample of water taken from the plaintiffs' well was performed by the Environmental Chemistry Section of the Division of Clinical Chemistry, Victoria General Hospital, Halifax, Nova Scotia. The analysis revealed that the sample contained 0.008 mg/l of phenols. The sample was received by that Institution on June 14, 1982, and the analysis was completed on June 24, 1982. The analysis was performed at the request of the Public Health Inspection Division of the Department of Health for Newfoundland. The text of a letter from the District Manager of that Division to the plaintiffs, dated July 8, 1982, enclosing the results of the analysis states:

> Enclosed are the results of the analysis carried out on your well water. These results show that your water contains 0.008 mg/l of phenolics, the main component of creosote. This level is four times the accepted level for phenolics which is 0.002 mg/l.

Wiseman said the report related to the test to which he referred. The letter and the report were admitted in evidence by consent (exhibit No. 4).

14 Ralph Wiseman said he submitted another sample of water from the plaintiffs' well for analysis at the Water Analysis Facility of Memorial University of Newfoundland shortly before the trial of this matter but a report on the analysis had not been received at that time. At a subsequent hearing the analytical results of that sample dated December 14, 1983, was admitted in evidence by consent (exhibit No. 11). The report indicates that the sample was taken from the bottom of the well and it contained less than 0.15 mg/l of creosote.

15 As to the loss of water from the well Wiseman said "problems" in that respect developed in September or October, 1981, and the water never returned to its former level after that. At the date of the hearing he said the depth of water in the well was about 3 feet. He recalled the defendant filling the well from time to time but it would not retain the water. Shortly before Christmas, 1981, the defendant installed a fibreglass tank for the plaintiffs and made regular deliveries of water to keep it filled. In March, 1982, the defendant discontinued its water delivery. Wiseman said several other home owners in the area encountered problems with their wells about the same time and the plaintiffs and the defendant provided them with artesian wells, including the plaintiffs' son.

16 Alphonsus O'Brien, Jr., said he moved into a building next door to his parents house in November, 1978. It had previously been a shop which his parents conveyed to him together with a parcel of land. He renovated the building as his residence. He received his water supply from his parents well through an underground pipe from their well to his house. He dug a new well on his land near his house which he intended to use as his source of water. He completed the excavation of the well about three months before the defendant commenced working in the area. It was about 11 feet deep and the water rose in it to a depth of 6 feet. His employment as a fisherman required frequent absence from home and he did not have an opportunity to connect the well to his house. Sometime in September, 1981, when he was about to connect the well he observed an oily film on the water. He complained to the defendant and it had the water tested. He did not see a report of the test. Ultimately, the defendant offered him a cash settlement which he refused. He demanded a new well and in April, 1982, the defendant provided him with an artesian well at no cost to him. He selected the location for the artesian well. He said he did not discuss the site for the new well with his father before drilling began nor did the

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defendant indicate a desire to place the well between their two houses. He said the defendant did not suggest that the two houses be connected to the one artesian well.

17 A next door neighbour of the plaintiffs, Anastasia Murphy, said her well was situate in the basement of her house. It was 8 feet deep and the average depth of water was 4 and half feet to 5 feet. Sometime after the defendant commenced blasting in the area the well went dry. She reported the matter to the defendant and it arranged deliveries of water to her house. In the meantime the level of water in her well rose to its normal depth. In November, 1981, at the request of the defendant she recommenced drawing her water supply from the well and the defendant discontinued its delivery of water to her. The quality of the water in the well was good. On January 1, 1982, the well once again went dry. She reported it to the defendant but it "did not do that much" for her. Ultimately sufficient water returned to the well for toilet flushing but she was compelled to obtain drinking water from a neighbour and do her laundering elsewhere. In April, 1982, the defendant provided her with an artesian well at its cost.

18 Aldo Giogrande, an electrical engineer employed by the defendant as manager of stations and commissioning said the demolition of the old penstock and the construction of the new one was carried out under his general supervision. He said the old one was dismantled in May, 1981, and site preparations for the new penstock in the region of the plaintiffs' property commenced on June 22, 1981. Blasting in that area commenced on August 17th and continued throughout September. During that period none of the wood for the new penstock was on the site. The wood was not brought to the site until mid-October when construction of the penstock began in that area. The penstock was completed about one month later in mid-November.

19 In the meantime, on August 25th and 26th four residents in the area complained to the defendant that their wells had gone dry. The plaintiffs were not amongst that group. Arrangements were made to supply them with water by daily deliveries. Giogrande said none of these people complained of creosote in their wells. About ten days later, during the first week of September, another group of four residents, including the plaintiffs, reported that their wells had gone dry. As with the first group, there was no report of creosote in the wells. Aldo Giogrande said at that time none of the materials impregnated with creosote had been delivered to the site. Shortly after receipt of the complaints from the second group Giogrande said he went to the area and personally inspected the wells. He recalled inspecting the wells of both the plaintiffs and their son. The plaintiffs' well was covered and situate outside their house. When the cover was removed he observed an oily film on the surface of the water and there were some leaves and a branch of a small tree in the well. He did not measure the depth of water in the well. During that visit he observed that the well of Alphonsus O'Brien, Jr., was not covered. He did not see an oily film on the water in that well nor did he notice any foreign matter in it. Arrangements were made for the delivery of water to these complainants. Later the defendant supplied the complainants (including the plaintiffs) with fibreglass tanks for the reception and storage of water. Giogrande said these tanks were supplied "to be a good neighbour".

20 On November 13, 1981, the wells of the complainants were checked by the defendant to determine the depth of water in each of them. The water in the plaintiffs' well was 2'3" deep at that time. They were checked again on November 30th and the water in the plaintiffs' well was 4'6" deep. On the same day, November 30th, the plaintiffs complained that there was creosote in their well. Giogrande said that was the first date on which the presence of creosote in well water was reported to the defendant.

21 On December 1, 1981, the defendant commenced cleaning and scrubbing wells in the area and on December 7th samples of water were taken from them and submitted to the Newfoundland and Labrador Public Health Laboratory for bacteriological analysis. The tests of the sample taken from the plaintiffs' well revealed that it contained 35 coliform bacteria per 100 ML and one faecal coliform per 100 ML. The water was classified as "unsatisfactory" with the caution that it was potentially dangerous to health and should not be consumed without boiling or chlorination. The printed form on which the analysis is reported contains the following statement:

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> The water sample is tested for 'coliforms' in order to detect the possibility of contamination with bacteria from human or animal excreta.

22 The plaintiffs' well was subjected to further cleaning by the defendant and on December 14th another sample of water taken from it was submitted to the same laboratory for bacteriological testing. As the result of that test the water was again classified as "unsatisfactory". It revealed the presence of 69 coliform bacterial per 100 ML but there were no faecal coliform in that sample. Samples were also taken from the well on the property of Alphonsus O'Brien, Jr., on the same date and in each instance the water from that source was classified as unsatisfactory because of the presence of coliform bacteria and faecal bacteria. The bacteriological analyses of the various samples were admitted in evidence by consent (exhibit No. 10).

23 Early in January, 1982, the defendant submitted samples of water taken from the wells of four complainants to a testing laboratory in Quebec to determine if they contained creosote. Two samples were taken from each well, one from the top of the well and one at the bottom; these included samples from the plaintiff's well and samples from the well of their son. The tests were performed by Technitrol Canada Ltd., a company which operates testing laboratories in Dorval, Quebec. The sample taken from the top of the plaintiffs' well was broken in transit and only the sample from the bottom of their well was analyzed. The test report from Technitrol Canada Ltd. dated January 7, 1982, (exhibit No. 10) states:

> On January 5, 1982, we received in our laboratory five (5) samples of water in glass bottles. Three other samples had been broken in transit. We were asked to analyze these samples to obtain information regarding a possible contamination by creosote.
>
> You will find attached a copy of a monograph describing the substance creosote (the Merck Index, 9th Edition). Creosote is a mixture of different types of phenols. To evaluate the presence of creosote we carried out analyses on the five samples for their respective contents of total phenols. The methodology used was that contained in 'Standards Methods for the Examination of Water and Waste Water', 14th Edition, 1975, (Parts 510.A and 510.B).
>
> The results of the analyses were as follows:

Sample Identification	PHENOLS, ppb{*}
1. Mr. Philpott (Bottom of well)	None detected (less than 1 ppb)
2. A. O'Brien (Sr.) (Bottom of well)	None detected (less than 1 ppb)
3. A. O'Brien (Jr.) Bottom of well	10.9
4. T. O'Brien Top of well	21.8
5. A. O'Brien Top of well	33.9

> The current drinking water standards state 'no phenol' present as an objective and the acceptable limit as being 2 ppb.
> {*}Note: ppb = part per billion; one one-thousandth

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of a ppm (part per million).

Giogrande said because no creosote was detected in the sample from the plaintiffs' well it was deemed unnecessary to submit another sample of that water to Technitrol Canada Ltd. for testing. However, additional samples were submitted to that company in respect of the two wells in which creosote was detected, namely the well of Alphonsus O'Brien Jr., and Terrance O'Brien, both of whom were ultimately provided with artesian wells by the defendant. The sample from the well of Mr. Philpott (referred to in the Technitrol report above) contained no phenols and it was reconnected to his house by the defendant but the plaintiffs refused to have their well reconnected.

24 Aldo Giogrande said in March 1, 1982, a final test was performed at the request of the defendant on a sample of water from the plaintiffs' well. The test was performed at the Water Analysis Facility of Memorial University of Newfoundland. The defendant provided the analysis facility with a sample of creosote which had been scraped off the penstock for the purpose of the test. It also submitted samples of water taken from five wells which included the well of the plaintiffs, their son and those of A. Reid, T. O'Brien and M. Philpott. The properties of the water samples were analyzed in relation to the creosote samples and none of the properties of that type of creosote was found in either of the water samples. The report of that analysis states:

> Samples were extracted into solvent, concentrated and subjected to capillary gas chromatographic analysis. No responses were found in samples 3850-3854 corresponding to those in the creosote sample 3849.

The sample of creosote had been ascribed code number 3849 at the testing laboratory and the water samples were individually code numbered 3850 - 3854 inclusive. The sample from the plaintiffs' well was identified by code number 3851. The analyses report was admitted in evidence by consent (exhibit No. 10).

25 Aldo Giogrande said the defendant provided artesian wells for three residents of the area, one of whom was the son of the plaintiffs, Alphonsus O'Brien, Jr. He said the defendant decided to "give wells to those people where tests showed traces of creosote and to those people where water did not return". He said the plaintiffs did not meet either of these criteria and the defendant declined to provide them with a new well. Subsequently, the plaintiffs commenced this action.

26 Giogrande said he was aware of several attempts by the defendant to settle the issue between the parties which failed. The final attempt occurred on November 14, 1983, when the defendant made the following proposal by letter of that date:

> In briefly reviewing the facts relating to this matter, it would appear that expert witnesses may have to be called to present evidence on the results of chemical analysis. To avoid this expense we are prepared to make your client a take it or leave it offer of five hundred dollars ($500.00) to settle the claim. In the alternative we are prepared to have a final test done to determine whether the level of creosote in your client's well exceeds the acceptable level. This test would be conducted by an impartial third party after the well had been thoroughly cleaned. If the level of creosote exceeds the acceptable level, Newfoundland Light & Power Co. Limited would pay 80% of the cost of having a new well drilled. If the creosote level was within the acceptable limit, your clients would discontinue their action and pay for the costs of the test.
>
> This offer is open to acceptance until 4:00 p.m. on Friday, the 18th of November. Please advise me of your clients' decision as soon as possible.

The plaintiffs did not accept that proposal. The letter was submitted in evidence by consent of both counsel at the trial of the matter (exhibit No. 7).

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27 No evidence was adduced for the plaintiffs to substantiate the allegation of negligence either in the excavation and blasting for the new penstock or in its construction and I find that there was no negligence on the part of the defendant in the execution of that work.

28 I find also that the loss or drainage of water from the plaintiffs' well was a temporary interruption of their source of supply. In my view the evidence establishes that the water in the well returned to its normal level of three to four feet by the natural process of percolation. It is not necessary to dwell on that aspect of the plaintiffs' claim because it has been long established in law that no person has a proprietary right in water percolating below the surface of his land. In the case of *Jackson et al. v. Drury Construction Co. Ltd.*, [1974] 4 O.R. (2d) 735, to which I was referred by Counsel for the plaintiffs, Dubin, J.A., of the Ontario Court of Appeal said at p. 736:

> It has been authoritatively held that no one has at any time a propriety right in water percolating below the surface of the earth and under his own land, and a neighbour, even through spite or ill-will, has a right to divert or appropriate the percolating water upon and below his own premises and thereby deprive his neighbour of it. I do not think, however, that the principle is applicable to a case of contaminating the source.

See also *Connery et al. v. Government of Manitoba* (1970), 15 D.L.R.(3d) 303; approved on appeal (1971), 21 D.L.R. (3d) 234.

29 Clearly the plaintiffs have no claim in law against the defendant arising out of the interruption or loss of their water supply as the result of the defendant's activities on its land. It is equally clear on the authorities that the principle stated by Dubin, J.A., in *Jackson et al. v. Drury Construction Co. Ltd.*, supra, and by Matas, J., (as he then was), in *Connery v. Government of Manitoba*, at pp. 309-310, supra does not apply to the contamination or pollution of percolating water. Contamination of one's water supply percolating through his land is actionable against the author of the contamination. I shall return to that aspect of the plaintiffs' case below.

30 I am satisfied also that in the context of the plaintiffs' claim it is no comfort or advantage to the defendant that bacteriological tests indicated their water supply was unsatisfactory for human consumption without some precaution such as boiling or chlorination. Unquestionably the quality of the water was poor, and there is no evidence of precautionary measures, but the inescapable fact remains that the plaintiffs used the water for all their needs, human consumption and otherwise. That they chose to consume water already containing levels of coliform bacteria in excess of acceptable drinking water standards does not excuse the introduction into the water of a different contaminant in quantities unacceptable for human consumption. In my opinion, and I so find, the results of the bacteriological tests performed on water from the plaintiffs' well are immaterial to their claim against the defendant.

31 I shall now consider the question of the contamination of the plaintiffs' well by creosote. It was argued for the plaintiffs that under the principle of strict liability flowing from the long standing case of *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330, the defendant is liable to the plaintiffs. Their counsel maintained that the defendant's use of its land is not a natural use and the escape of any harmful substance from the land occurs at the peril of the defendant. He maintained also that the defendant is liable to the plaintiffs in nuisance from its works on the land.

32 It is firmly established that pollution of one's water supply constitutes a nuisance. See *Connery v. Government of Manitoba*, supra, p. 310. It is also a principle of law that the absence of negligence is not a defence to an action founded on *Rylands v. Fletcher* or in nuisance. See *Jackson et al. v. Drury Construction Co. Ltd.*, supra, p. 740; *City of Portage La Prairie v. B.C. Pea Growers Ltd.* (1965), 54 D.L.R.(2d) 503; also *Royal Anne Hotel Co. Ltd. v. Village of Ashcroft*; *Saito et al. v. Village of Ash croft* (1979), 95 D.L.R.(3d) 756 (B.C.C.A.), wherein McIntyre, J.A., of the British Columbia Court of Appeal (as he then was), said at pp. 759-760:

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> As has been said: 'The essence of the tort of nuisance is interference with the enjoyment of land'. (Street, **Law of Torts**, at p. 212). That interference need not be accompanied by negligence. In nuisance one is concerned with the invasion of the interest in the land, in negligence one must consider the nature of the conduct complained of. Nuisances result frequently from intentional acts undertaken for lawful purposes. The most carefully designed industrial plant operated with the greatest care may well be or cause a nuisance, if for example effluent, smoke, fumes or noise invade the right of enjoyment of neighbouring landowners to an unreasonable degree: see Lord Mayor, ***Aldermen & Citizens of City of Manchester v. Farnworth***, [1930] A.C. 171, and ***Walker v. McKinnon Industries Ltd.***, [1949] 4 D.L.R. 739, [1949] O.R. 549 [affirmed [1950] 3 D.L.R. 159, [1950] O.W.N. 309; affirmed [1951] 3 D.L.R. 577], as examples.
>
> When then can it be said that the tort of nuisance has been committed? A helpful proposition is advanced by the learned author of Street, **Law of Tort**, at p. 215 in these terms:
>
> > A person, then, may be said to have committed the tort of private nuisance when he is held to be responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land or an interest in the land where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable.
>
> This proposition stated in a variety of ways has been accepted generally in the authorities.

Clearly the absence of negligence is not a bar to the plaintiffs' claim.

33 I accept the plaintiffs' contention that the defendant's use of its land is not a natural use. The defendant has impeded the natural flow of Topsail River near the plaintiffs' property and constructed a gate house through which the flow of water is directed and regulated through a penstock impregnated with creosote as a preservative of the wood and buried in a trench on land adjacent to the plaintiffs' land. The work is not naturally on the land and there is no question in my mind that the creosote preservative covering the penstock is a potentially dangerous substance. Applying the principle of strict liability enunciated in *Rylands v. Fletcher*, supra, the defendant is under a duty of strict liability to keep the penstock and all its components, including the creosote preservative, under control. If there is an escape from the confines of the defendant's property it must bear the consequences.

34 The headnote in *Rylands v. Fletcher* is as follows:

> Where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner of its use, though mischief shall thereby be occasioned to his neighbour, he will not be liable in damages. But if he brings upon his land anything which would not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned.

Stated more briefly Lord Cranworth said at p. 340 of the report of his judgment in that historic case:

> If a person brings, or accumulates, on his land anything which, if he should escape, may cause damage to his neighbour, does so at his peril.

35 In my opinion the plaintiffs have established that the water percolating through the soil on their land into their well is contaminated by creosote. The tests performed at the Victoria General Hospital, Halifax, on June 24, 1982, and at the Water Analysis Facility of Memorial University of Newfoundland on December 14, 1983, support that finding (exhibit No. 4 & 11). The question, then, is: Was there an escape or seepage of creosote from the property of the defendant to the adjoining land of the plaintiffs which entered or came in contact with the water percolating through the soil into their well thereby contaminating their water supply?

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36 There is no evidence that the oily film observed by Aldo Giogrande on the surface of the water in the plaintiffs' well early in September, 1981, was creosote. Creosote is a derivative of wood (see the *Merck Index*, 9th Edition, p. 334 (exhibit No. 10) and *Webster's New Collegiate Dictionary*, 1981, p. 266), but in my view the leaves from trees and the twig or small branch of a tree which he observed in the well at that time do not, by their mere presence there, support an inference that the oily film was creosote and the leaves and the twigs were probable sources of that substance. Other evidence would be necessary to support such a finding. Moreover, there was no complaint at that time that there was creosote in the water. I am not convinced, therefore, that there was creosote in the well before the defendant commenced construction of the penstock on the adjoining property in mid-October.

37 It also appears to be clear on the analysis of water from the plaintiffs' well made on January 7, 1982, by Technitrol Canada Ltd. that there was no creosote in the water at or near the bottom of the well. Unfortunately, the sample of water taken at the top was lost through breakage of the vial and no test was performed in that region of the well. It is equally clear that the test performed at the Memorial University of Newfoundland on March 1, 1982, reveals that there was no creosote in the water corresponding to the sample taken from the defendant's penstock. It is not clear from that report (exhibit No. 10) if there was creosote present in the sample of water tested or if there was no creosote present at all. It is unfortunate that the chemist who performed that test was not called to testify on his report. In my view such direct oral testimony would have been helpful in this matter. I take a similar view with respect to the other laboratory tests for creosote. Notwithstanding that, on the basis of the laboratory report of March 1, 1982, I am satisfied that there was no creosote in the sample of water from the plaintiffs' well corresponding to the creosote which was applied to the wood comprising the defendant's penstock. On the other hand, the two subsequent tests performed at the instigation of the plaintiffs on June 24, 1982, and December 14, 1983, clearly establishes the presence of creosote in the water in quantitites exceeding the acceptable limit for human consumption, the latter test showing an increased quantity over the former. I am not convinced that the defendant's test of March 1, 1982, leads to a conclusion that the creosote revealed in those subsequent tests did not migrate from the defendant's penstock. The creosote which coated and impregnated the wood in the penstock constituted a new and substantial source of that substance fairly close to the plaintiffs' well and in my opinion it is probable that a quantity of the creosote migrated through the soil or in some manner made contact with and contaminated the water entering the plaintiffs' well.

38 As I have found, the plaintiffs have established that their well was contaminated by the introduction of creosote to their water supply. The defendant constructed a substantial work on its property nearby coated and impregnated with creosote. In my opinion the test of March 1, 1982, relied on by the defendant, does not answer the plaintiffs allegation that the presence of creosote revealed by subsequent chemical analyses of the water from their well originated from the defendant's penstock. In my opinion the defendant has not refuted the plaintiffs' allegation.

39 I am satisfied on the balance of probabilities that there was an escape of creosote which the defendant brought to its land adjacent to the plaintiff's land and by means of migration of the creosote or other contact with the water percolating through the soil to the plaintiffs' well their water supply became contaminated. On the authority of the principle enunciated in *Rylands v. Fletcher*, supra, I find that the defendant is responsible for the contamination of the water supply and is liable to the plaintiffs in damages.

40 I am also satisfied that the contamination of the well constitutes nuisance against the plaintiffs and they are entitled to abatement of that nuisance.

41 It was argued for the defendant that in the event of finding of liability against it the plaintiffs have been adequately compensated by the substitution of a well owned by Alphonsus O'Brien Jr., with an artesian well. Prior to the contamination of the plaintiffs' well they and their son jointly used one well and both families have since been drawing their supply from the one artesian well supplied by the defendant. I do not intend to dwell at length on that

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argument. The evidence unequivocally establishes that the defendant dealt independently with Alphonsus O'Brien Jr., in relation to the contamination of his well and that the artesian well it caused to be drilled was clearly in substitution of his well and not that of the plaintiffs. It is equally clear and unequivocal that the defendant dealt independently with the plaintiffs in relation to their well and the obligation to replace their well should be no less than the obligation the defendant considered it had to replace the well of Alphonsus O'Brien Jr., or those wells of the other two residents who received new wells. The fact that the defendant was under an impression (created by the plaintiffs) that all the land on which both houses stood was owned by the plaintiffs does not change its legal obligation to them to replace their well. The defendant dealt with the plaintiffs' son in relation to his well, notwithstanding that it was not being used as a source of water, and it replaced it for him with an artesian well. They owe no less an obligation to the plaintiffs in relation to their well, it was an amenity on their land owned by them and used by them and they are entitled to its replacement.

42 It was also maintained for the defendant that a surface well similar to the well at present on the plaintiffs' property would be an adequate replacement of their water supply. The defendant submitted that such a well would cost about $650.00. I do not accept that argument. The extent of the creosote in the soil or the point of its introduction to the water percolating through the soil is unknown. The plaintiffs' property is relatively small and there is little space on which to dig another surface well which would be more remote from and less exposed or susceptible to the risk of contamination from the penstock. In my opinion the only type of well providing reasonable safety from such contamination on that land is an artesian well and, in my view, the plaintiffs are entitled to receive such a well.

43 The plaintiffs tendered in evidence an estimate of the cost of drilling an artesian well. The drilling would cost $14.00 per foot and the casing $15.00 per foot. The drilling company would not estimate a total cost for that work because of the uncertainty of the depth to be drilled. It did, however, estimate that the casing would be required to a maximum of thirty feet. The installation of a pump and accessories, including mechanical and electrical services, was estimated at $1500.00 to $2000.00. Except for the monetary range for these items no other details were provided in that estimate (exhibit No. RW1 & RW2).

44 The defendant submitted a detailed account of its actual expenditures for the artesian wells it provided for three residents of the area, including the well drilled for the plaintiffs' son. The well drilled for Alphonsus O'Brien Jr., is 200 feet deep and the cost of drilling it was $2905.15; the other costs related to that well, namely, mechanical and electrical services, grounding panel, excavating, backfilling and cutting pipe cost $1444.00 for a total price of $4345.15. The well drilled for one Murphy is 130 feet deep and cost $2046.80 to drill. The other related costs amounted to $1355.00 for a total cost of $3401.80. The third well, which was drilled for T. O'Brien, to a depth of 70 feet cost $1296.80 and the related costs, excluding electrical services and grounding panel which were not required, amounted to $925.00 for a total cost of $2221.80. The defendant averaged the cost of drilling each well and providing related material and services at $3322.92. These wells were provided in the spring of 1982 (exhibit No. AG1).

45 In my opinion it is not practical to ascribe an average cost as a determinant of special damages in the circumstances of this case. The average cost is approximately $1000.00 less than the actual cost of drilling the well on the property of Alphonsus O'Brien Jr., which is quite close to the plaintiffs' property. Furthermore, there is a substantial difference between the depth of the well on his property and the other two artesian wells which were drilled. In my view it is reasonable to assume that an artesian well drilled on the plaintiffs property would have to be drilled approximately to the same depth as the artesian well on their son's land and require the same accessories and services. That well is 200 feet deep and the total cost was $4345.15 in April, 1982.

46 Taking into account increased costs since April, 1982, it appears to me that an artesian well complete with accessories and services to deliver water to the plaintiffs' house can be provided for approximately $4800.00. However, because of the uncertainty of the depth of drilling which may be required I am reluctant to award a fixed amount to the plaintiffs by way of special damages. Accordingly, the plaintiffs shall be entitled to recover from the defendant the actual cost

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of drilling an artesian well on their property and delivering water to their home. The actual cost shall include the cost of drilling, casing, providing mechanical and electrical appliances and services, pipe, excavating and backfilling where necessary. In the event the parties cannot agree on the actual cost of providing the artesian well and related material and services capable of delivering water to the plaintiffs' home leave is granted to either party to apply after the installation of the well for an assessment of the actual cost of the well.

47 With respect to general damages I am quite satisfied on the evidence that the defendant acted promptly and reasonably to provide the plaintiffs with an alternate supply of water from September, 1981 to March, 1982. There was some disruption and inconvenience to the plaintiffs between March, 1982, when the defendant ceased to supply water and the date on which the plaintiffs commenced to draw their water supply from their son's well. In my opinion the disruption and inconvenience, while troublesome, was not great. Accordingly, I award the plaintiffs $250.00 by way of general damages.

48 In the result I find that the water percolating through the soil on the plaintiffs' property into their well was contaminated by the escape of creosote from the penstock on the defendant's property. I find also that the contamination of the well constitutes a nuisance to the plaintiffs and they are entitled to have that nuisance abated. The plaintiffs shall recover from the defendant the actual cost of providing an artesian well on their property complete with mechanical and electrical services sufficient to deliver water to their home. In the event of failure to agree on the actual cost of providing such a well, mechanical, electrical and other related services and material leave is granted to either party to apply for an assessment of the actual cost of the artesian well after its completion on the plaintiffs' property. The plaintiff shall also recover $250.00 from the defendant as general damages for disruption of the water supply and inconvenience. The plaintiffs shall also have costs against the defendant with one counsel fee for both plaintiffs. Let judgment be entered accordingly.

Judgment for plaintiffs.

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