2014 ABCA 108
Alberta Court of Appeal

Windsor v. Canadian Pacific Railway

2014 CarswellAlta 395, 2014 ABCA 108, [2014] 5 W.W.R. 733, [2014] A.W.L.D. 2127, [2014] A.W.L.D. 2185, [2014] A.W.L.D. 2187, [2014] A.J. No. 256, 239 A.C.W.S. (3d) 613, 371 D.L.R. (4th) 339, 56 C.P.C. (7th) 107, 572 A.R. 317, 609 W.A.C. 317, 94 Alta. L.R. (5th) 301

David Windsor and Agnes Windsor, Respondents (Plaintiffs) and Canadian Pacific Railway Ltd., Appellant (Defendant)

Marina Paperny, Jack Watson, Frans Slatter JJ.A.

Heard: March 6, 2014
Judgment: March 19, 2014
Docket: Calgary Appeal 1301-0252-AC

Counsel: W.S. Klym, Q.C., for Respondents
J.E. Virtue, J.D. Sadovnick, for Appellant

Subject: Civil Practice and Procedure; Torts

Related Abridgment Classifications

Civil practice and procedure
XVIII Summary judgment
XVIII.5 Requirement to show no triable issue
Torts
XVI Negligence
XVI.6 Strict liability (rule in Rylands v. Fletcher)
XVI.6.a General principles
XVI.6.a.i Non-natural user of land
Torts
XVII Nuisance
XVII.6 Remedies
XVII.6.c Miscellaneous

Headnote

Civil practice and procedure --- Summary judgment — Requirement to show no triable issue

Defendant operated locomotive repair facility and degreasing solvent consisting mostly of Trichloroethylene (TCE) was used in facility for many years — Defendant discovered that TCE had leaked into groundwater that flowed underneath facility and had migrated into groundwater under portions of adjacent residential community — Defendant installed sub-slab depressurization systems under approximately 70 properties — Plaintiffs brought action based on negligence, nuisance, trespass and strict liability under doctrine in Rylands v. Fletcher (1868), and action was certified as class proceeding — Defendant applied to summarily dismiss portions of proceeding — Case management judge declined to dismiss claim based on strict liability under doctrine of Rylands v. Fletcher and claim for nuisance by class members with sub-slab depressurization systems but dismissed claim for nuisance by class members without sub-slab depressurization systems — Defendant appealed — Appeal allowed in part — Modern test for summary judgment was to examine existing record to see if disposition could be made that was fair and just to both parties — First part of test for liability under Rylands v. Fletcher required unusual use of land — There was no factual dispute about defendant's use of land and there was nothing special about use — Plaintiffs failed to raise genuine issue with respect to second part of test of whether defendant brought something onto land that was likely to do mischief if it escaped — Defendant's evidence that it was

not foreseeable that TCE would cause harm to neighbouring properties was uncontradicted — Disposal of TCE was not result of any accident or misadventure but was intentional part of operation of facility and third part of test was not met — As other parts of test were not met it, was not necessary to explore last part of test of proof of damage in order to conclude claim under Rylands v. Fletcher should be summarily dismissed — Claims in nuisance depended on proof of damage and nominal or trivial damages were not sufficient to support claim in nuisance — Case management judge did not err in allowing claim by owners of properties with sub-slab depressurization systems to proceed to trial because plaintiffs presented sufficient evidence to deflect summary dismissal application with respect to those properties and were entitled to take nuisance claims to trial — Test for summary dismissal was not met.

Torts --- Negligence — Strict liability (rule in Rylands v. Fletcher) — General principles — Non-natural user of land

Defendant operated locomotive repair facility and degreasing solvent consisting mostly of Trichloroethylene (TCE) was used in facility for many years — Defendant discovered that TCE had leaked into groundwater that flowed underneath facility and had migrated into groundwater under portions of adjacent residential community — Defendant installed sub-slab depressurization systems under approximately 70 properties — Plaintiffs brought action based on negligence, nuisance, trespass and strict liability under doctrine in Rylands v. Fletcher (1868), and action was certified as class proceeding — Defendant applied to summarily dismiss portions of proceeding — Case management judge declined to dismiss claim based on strict liability under doctrine of Rylands v. Fletcher and claim for nuisance by class members with sub-slab depressurization systems but dismissed claim for nuisance by class members without sub-slab depressurization systems — Defendant appealed — Appeal allowed in part — First part of test for liability under Rylands v. Fletcher required unusual use of land — There was no factual dispute about defendant's use of land and there was nothing special about use — Plaintiffs failed to raise genuine issue with respect to second part of test of whether defendant brought something onto land that was likely to do mischief if it escaped — Defendant's evidence that it was not foreseeable that TCE would cause harm to neighbouring properties was uncontradicted — Disposal of TCE was not result of any accident or misadventure but was intentional part of operation of facility and third part of test was not met — As other parts of test were not met it was not necessary to explore last part of test of proof of damage in order to conclude claim under Rylands v. Fletcher should be summarily dismissed.

Torts --- Nuisance — Remedies — Miscellaneous

Defendant operated locomotive repair facility and degreasing solvent consisting mostly of Trichloroethylene (TCE) was used in facility for many years — Defendant discovered that TCE had leaked into groundwater that flowed underneath facility and had migrated into groundwater under portions of adjacent residential community — Defendant installed sub-slab depressurization systems under approximately 70 properties — Plaintiffs brought action based on negligence, nuisance, trespass and strict liability under doctrine in Rylands v. Fletcher (1868), and action was certified as class proceeding — Defendant applied to summarily dismiss portions of proceeding — Case management judge declined to dismiss claim based on strict liability under doctrine of Rylands v. Fletcher and claim for nuisance by class members with sub-slab depressurization systems but dismissed claim for nuisance by class members without sub-slab depressurization systems — Defendant appealed — Appeal allowed in part — Claims in nuisance depended on proof of damage and nominal or trivial damages were not sufficient to support claim in nuisance — Case management judge did not err in allowing claim by owners of properties with sub-slab depressurization systems to proceed to trial because plaintiffs presented sufficient evidence to deflect summary dismissal application with respect to those properties and were entitled to take nuisance claims to trial — Test for summary dismissal was not met.

Table of Authorities

Cases considered:

Burnie Port Authority v. General Jones Pty. Ltd. (1994), 179 C.L.R. 520, [1994] 120 A.L.R. 42 (Australia H.C.) — considered

Combined Air Mechanical Services Inc. v. Flesch (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 2014 SCC 7, 27 C.L.R. (4th) 1, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 2014 CSC 7, (sub nom. *Hryniak v. Mauldin*) 366 D.L.R. (4th) 641 (S.C.C.) — followed

Knight v. Imperial Tobacco Canada Ltd. (2011), 2011 CarswellBC 1968, 2011 CarswellBC 1969, 2011 SCC 42, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.*) 419 N.R. 1, 86 C.C.L.T. (3d) 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.*) 335 D.L.R. (4th) 513, 21 B.C.L.R. (5th) 215, [2011] 11 W.W.R. 215, 25 Admin.

L.R. (5th) 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.*) 308 B.C.A.C. 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.*) 521 W.A.C. 1, 83 C.B.R. (5th) 169, [2011] 3 S.C.R. 45 (S.C.C.) — considered

MacQueen v. Sydney Steel Corp. (2013), 79 C.E.L.R. (3d) 20, 2013 CarswellNS 918, 2013 NSCA 143, 46 C.P.C. (7th) 280 (N.S. C.A.) — followed

Papaschase Indian Band No. 136 v. Canada (Attorney General) (2008), (sub nom. *Lameman v. Canada (Attorney General)*) 372 N.R. 239, [2008] 5 W.W.R. 195, 2008 CarswellAlta 398, 2008 CarswellAlta 399, 2008 SCC 14, [2008] 2 C.N.L.R. 295, 68 R.P.R. (4th) 59, 292 D.L.R. (4th) 49, (sub nom. *Canada (Attorney General) v. Lameman*) [2008] 1 S.C.R. 372, (sub nom. *Lameman v. Canada (Attorney General)*) 429 A.R. 26, (sub nom. *Lameman v. Canada (Attorney General)*) 421 W.A.C. 26, 86 Alta. L.R. (4th) 1 (S.C.C.) — considered

Rylands v. Fletcher (1868), [1861-73] All E.R. Rep. 1 at 12, 37 L.J. Exch. 161, 19 L.T. 220, 33 J.P. 70, L.R. 3 H.L. 330, [1868] UKHL 1 (U.K. H.L.) — followed

Smith v. Inco Ltd. (2011), 88 C.C.L.T. (3d) 1, 62 C.E.L.R. (3d) 93, 107 O.R. (3d) 321, 2011 ONCA 628, 2011 CarswellOnt 10141, 340 D.L.R. (4th) 602, 284 O.A.C. 13 (Ont. C.A.) — followed

Smith v. Inco Ltd. (2012), 2012 CarswellOnt 4932, 2012 CarswellOnt 4933, 300 O.A.C. 401 (note), [2012] 1 S.C.R. xii (note), 435 N.R. 392 (note) (S.C.C.) — referred to

Stobbe v. Paramount Investments Inc. (2013), 2013 ABCA 384, 2013 CarswellAlta 2483 (Alta. C.A.) — referred to

Tottrup v. Clearwater (Municipal District) No. 99 (2006), 68 Alta. L.R. (4th) 237, 391 W.A.C. 88, 401 A.R. 88, 2006 ABCA 380, 2006 CarswellAlta 1627 (Alta. C.A.) — referred to

Transco Plc v. Stockport Metropolitan Borough Council (2003), [2004] 2 A.C. 1, [2004] 1 All E.R. 589, [2003] UKHL 61 (U.K. H.L.) — considered

Windsor v. Canadian Pacific Railway (2006), 2006 CarswellAlta 633, [2006] 8 W.W.R. 672, 60 Alta. L.R. (4th) 56, 402 A.R. 162, 2006 ABQB 348, 26 C.P.C. (6th) 309, 22 C.E.L.R. (3d) 41 (Alta. Q.B.) — referred to

Windsor v. Canadian Pacific Railway (2007), 2007 ABCA 294, 2007 CarswellAlta 1262, 417 A.R. 200, 410 W.A.C. 200, 46 C.P.C. (6th) 39, 32 C.E.L.R. (3d) 194, 79 Alta. L.R. (4th) 244, [2007] 12 W.W.R. 5 (Alta. C.A.) — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010

R. 6.11(1)(g) — referred to

R. 7.3 — considered

R. 7.3(1)(b) — considered

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 20 — considered

APPEAL by facility owner from judgment declining to dismiss class action brought by plaintiff residents.

***Per curiam*:**

1 The appellant applied unsuccessfully to summarily dismiss certain portions of this class proceeding. It appeals, alleging errors in the assessment of the evidence, the statement of the legal tests, and the application of the test for summary dismissal.

Facts

2 The appellant has operated a locomotive repair facility known as the Ogden shops since the early 1900s. The shops were originally constructed outside the Calgary city limits, and are located in a heavily industrialized zone. The adjacent Ogden residential community came into existence because of the presence of the nearby Ogden shops (EKE A6). A degreasing solvent consisting mostly of Trichloroethylene (TCE) was used in the Ogden shops from the mid-1950s to the mid-1980s. In 1999, the appellant discovered that TCE had leaked into the groundwater that flowed underneath the Ogden shops, and had migrated into the groundwater under portions of the Ogden community (EKE A3).

3 Groundwater testing suggested that the TCE had migrated from the Ogden shops in a plume pattern. There are varying levels of TCE underneath the properties, which divided them roughly into two categories. The first category consisted of properties where the measurable amounts of TCE exceeded Health Canada thresholds. The appellant installed sub-slab depressurization systems under approximately 70 of these properties, which exhausted the TCE vapours and effectively reduced the TCE concentrations below the Health Canada thresholds. The second category consisted of properties with levels of TCE below the Health Canada thresholds without any remediation.

4 The Respondents brought an action for diminution in property values and losses of rental income allegedly caused by the presence of TCE in the groundwater flowing underneath their homes, intending to have it certified as a class proceeding on behalf of all similarly situated homeowners. Their action was based on negligence, nuisance, trespass and strict liability (under the doctrine in *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330 (U.K. H.L.)), and alleged the following damage:

> 15. As a result of the Defendant's conduct as aforesaid:
>
> a. The Plaintiffs' lands and those lands owned by all other Class Members were and are rendered unhealthy and much less fit for use and occupation as the residences of the Plaintiffs and their family and as residences of all other Class Members and their families, and are damaged as such;
>
> b. The Plaintiffs' lands and the lands owned by all other Class Members has a reduced value for the purposes of renting to third parties as a result of said damages;
>
> c. The value of the Plaintiffs' lands and the lands owned by all other Class Members has greatly diminished in value as a result of the exposure to the offensive and noxious matter including but not limited to TCE that escaped from the premises of the Defendant, and resulting damage to said premises caused to control the contamination.

The claim, as originally formulated, was therefore focussed on damage to the property itself, specifically diminution in value and reduced rental value, but also damage from being "much less fit for use and occupation".

5 The statement of claim was subsequently amended to make it clear that personal injury damages were not being claimed:

> 20. For the foregoing reasons, the Plaintiffs claim damages for losses in property values and diminished rental income from said properties as described in paragraph 15 herein. The Plaintiffs do not claim damages for physical injury or health problems.

We understand this was done because the individualized nature of the personal injury claims was possibly not suitable for certification.

6 The action was subsequently certified as a class proceeding: *Windsor v. Canadian Pacific Railway*, 2006 ABQB 348, 60 Alta. L.R. (4th) 56, 402 A.R. 162 (Alta. Q.B.), varied 2007 ABCA 294, 79 Alta. L.R. (4th) 244, 417 A.R. 200 (Alta. C.A.). The certification order described the relief being sought by the class as follows:

> 5. The relief sought by the Class is for damages, as alleged in paragraphs 15 and 20 of the Amended Statement of Claim, specifically for losses in property values, diminution of rental income from said property and all damages for modifications, alterations or additional expenses made or incurred to the property;

A number of common issues were stated relating to the appellant's liability for the presence of TCE in the groundwater.

7 The appellant then applied to summarily dismiss certain portions of the action:

(a) the strict liability claim by all class members, under the doctrine in *Rylands v Fletcher*;

(b) the claim in nuisance by class members with sub-slab depressurization systems in place; and

(c) the claim in nuisance by class members without sub-slab depressurization systems.

The respondents had conceded, before the application proceeded, that the claims in trespass should be dismissed. The appellant did not attempt to summarily dismiss the claims in negligence.

8 In unreported reasons the case management judge only granted a portion of the summary dismissal application:

(a) He declined to dismiss the claim based on strict liability, under the doctrine in *Rylands v Fletcher*, by any class member, holding that there were genuine issues for trial with respect to those claims. The case management judge concluded that it was admitted or beyond doubt that the TCE had "escaped" from the appellant's land. Even if some of the class members (specifically those in the second category of cases, who did not have sub-slab depressurization systems in place) could only prove nominal damages, that was sufficient to support this cause of action. With respect to the properties with sub-slab depressurization systems in place (i.e., those with readings initially over the Health Canada thresholds), he held that there was a triable issue as to whether those class members were entitled to general damages for interference with the enjoyment of property. Thus, there might be provable damages, even if there was no evidence on the record of any decrease in property values.

(b) He declined to dismiss the claim for nuisance by the class members with sub-slab depressurization systems in place, holding that there were genuine issues for trial with respect to those claims. He concluded that there was a triable issue with respect to whether the appellant's use of its land unreasonably interfered with the class members' use of their lands. Even though any interference had been substantially mitigated by the sub-slab depressurization systems, there was still an argument that there was sufficient interference to support liability in nuisance. He concluded that there was some evidence of damage resulting from loss of enjoyment or quiet enjoyment of the class members' lands, and from the very need for continuous mitigation.

(c) He granted the application and summarily dismissed the claim for nuisance by the class members without sub-slab depressurization systems in place. The case management judge concluded that any damage to these lands was trivial or nonexistent, and would not support a finding of nuisance. No cross-appeal was filed, so this aspect of the decision need not be discussed further.

The appellant subsequently appealed the first two components of the ruling.

Standard of Review

9 Questions of law are reviewed for correctness. That would include the definition of the legal components of the torts of nuisance and strict liability under *Rylands v. Fletcher*.

10 The legal test for summary dismissal is also subject to review for correctness. However, the case management judge's assessment of the facts, his application of the law to those facts, and the ultimate determination on whether summary dismissal is appropriate are entitled to deference: *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 7 (S.C.C.) at paras. 81-4; *Stobbe v. Paramount Investments Inc.*, 2013 ABCA 384 (Alta. C.A.) at para. 10.

The Test for Summary Judgment

11 Under the common law system, the default method for resolving disputes is the *viva voce* trial. Traditionally, interlocutory procedures that denied any party its "day in court" were strictly interpreted. When summary judgment procedures were first introduced, they were only considered appropriate when it was "plain and obvious", or "clear"

or "beyond doubt" that there was no issue that should or could be put to trial. Likewise, the procedure for striking proceedings that did not disclose a cause of action was narrowly applied.

12 Modern civil procedure has come to recognize that a full trial is not always the sensible and proportionate way to resolve disputes. In *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2008 SCC 14 (S.C.C.) at para. 10, [2008] 1 S.C.R. 372 (S.C.C.) the Supreme Court reacted to the traditional restrictive view by stating: "The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial." In *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 (S.C.C.) at para. 19, [2011] 3 S.C.R. 45 (S.C.C.) the Supreme Court made similar comments about striking pleadings: "The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial." The test is whether there is "a reasonable prospect that the claim will succeed", not whether it is "plain and obvious" that no claim is disclosed (paras. 17, 21).

13 This modern trend has now been confirmed in *Combined Air Mechanical Services Inc. v. Flesch*:

> 1 Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.
>
> 2 Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.
>
> 3 Summary judgment motions provide one such opportunity. ...
>
> 4 In interpreting these [new summary judgement] provisions, the Ontario Court of Appeal placed too high a premium on the "full appreciation" of evidence that can be gained at a conventional trial, given that such a trial is not a realistic alternative for most litigants. In my view, a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.
>
> 5 To that end, I conclude that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.

Summary judgment is now an appropriate procedure where there is no genuine issue requiring a trial:

> 49 There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

The modern test for summary judgment is therefore to examine the record to see if a disposition that is fair and just to both parties can be made on the existing record.

14 While *Combined Air Mechanical Services Inc. v. Flesch* applied Ontario R. 20, the principles stated in it are consistent with modern Alberta summary judgment practice as set out in Alberta R. 7.3:

> 7.3(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:
>
> (a) there is no defence to a claim or part of it;
>
> (b) there is no merit to a claim or part of it;
>
> (c) the only real issue is the amount to be awarded.

Ontario R. 20 and Alberta R. 7.3 are both procedures for resolving disputes *without* a trial (as compared with Alberta's summary trial procedure which is a form of trial). As in Ontario, *viva voce* evidence may exceptionally be allowed in chambers applications: R. 6.11(1)(g). New R. 7.3 calls for a more holistic analysis of whether the claim has "merit", and is not confined to the test of "a genuine issue for trial" found in the previous rules. Since one of the objectives of class proceedings is to provide affordable access to justice, these principles relating to summary judgment are applicable to the class procedure as well.

15 The theory that disputes eventually "went to trial" was always something of a legal fiction. Even when the court implied that a trial was called for, and declined to grant summary judgment, or declined to strike pleadings, it was well known that trials were a rarity. *Combined Air Mechanical Services Inc. v. Flesch* refers several times to the need for a change in culture. In other words, the myth of trial should no longer govern civil procedure. It should be recognized that interlocutory proceedings are primarily to "prepare an action for resolution", and only rarely do they actually involve "preparing an action for trial". Interlocutory decisions that can resolve a dispute in whole or in part should be made when the record permits a fair and just adjudication. *Combined Air Mechanical Services Inc. v. Flesch* rejected the ruling by the Ontario Court of Appeal to the effect that the old test for summary judgment should continue to apply even in the face of the newly amended Ontario rule.

16 The decision under appeal was delivered before *Combined Air Mechanical Services Inc. v. Flesch* was decided. As such, the case management judge used the traditional formulations of the summary judgment rule. On appeal it is appropriate to examine the summary dismissal application to see whether there is in fact any issue of "merit" that genuinely requires a trial. When the resolution of the dispute turns primarily on issues of law, summary judgment is often appropriate: *Tottrup v. Clearwater (Municipal District) No. 99*, 2006 ABCA 380 (Alta. C.A.) at para. 11, (2006), 68 Alta. L.R. (4th) 237 (Alta. C.A.). Trials are for determining facts, and the facts underlying this dispute are not seriously in issue.

Strict liability under *Rylands v. Fletcher*

17 The decision in *Rylands v. Fletcher* considered a number of previous decisions, and extracted a general principle that a landowner who allowed unusual dangerous substances to escape from his lands would be liable to his neighbours for any resulting damage. The liability under this principle is exceptional in that it is "strict"; liability is not dependent on a finding of negligence or other fault. The overall principle is consequently a narrow one, and efforts to expand this cause of action have been resisted: *Smith v. Inco Ltd.*, 2011 ONCA 628 (Ont. C.A.) at paras. 76-8, 85-7, 93, (2011), 107 O.R. (3d) 321 (Ont. C.A.), leave refused [2012] 1 S.C.R. xii (note) (S.C.C.). The traditional causes of action of trespass, negligence, and nuisance, combined with modern statutory forms of environmental liability are adequate to address most cases. The *Rylands v. Fletcher* cause of action has been abolished in Australia, but cautiously retained in England; compare *Burnie Port Authority v. General Jones Pty. Ltd.* (1994), 179 C.L.R. 520 (Australia H.C.) with *Transco Plc v. Stockport Metropolitan Borough Council* (2003), [2004] 2 A.C. 1 (U.K. H.L.).

18 *Inco* is at present the leading Canadian case on liability under the principle in *Rylands v. Fletcher*. It was followed in *MacQueen v. Sydney Steel Corp.*, 2013 NSCA 143 (N.S. C.A.) at para. 60, (2013), 46 C.P.C. (7th) 280 (N.S. C.A.), under motion for leave SCC # 35706. The requirements of the tort are:

(a) the defendant made an "extraordinary", "special" or "extra-hazardous" use of its land: *Inco Ltd.* at paras. 71, 79, 96; *MacQueen* at para. 68. While this portion of the test is factually based, whether a particular use qualifies as "special" is fundamentally a question of law. In the modern context, an important consideration is whether the use is consistent with the applicable planning laws: *Tock v St. John's Metropolitan Area Board*, [1989] 2 SCR 1181 at pp. 1189-90; *Inco* at para. 100. The test focusses on the overall use of the lands (here as a locomotive repair facility), not on discrete components of that use (i.e., the use of TCE): *Inco* at para. 95. The issue is not whether the use is unusual in the abstract, but whether the use is inappropriate to the place where it is maintained: *Inco* at paras. 91-2. It is not sufficient that the substance does not naturally occur on the lands: *Transco plc* at para. 11; *Inco* at para. 96. Merely because harm actually results does not justify a finding that the use was extra-hazardous: *Inco* at para. 80.

(b) the defendant brought on to its land something that was likely to do mischief if it escaped: *Inco* at para. 71.

(c) the substance in question in fact escaped: *Inco* at paras. 71, 82, 112-3; *MacQueen* at paras. 77-80. In this context "escape" has a technical meaning; it does not merely mean that the substance has migrated or moved from the defendant's land to the plaintiff's land. *Rylands v Fletcher* "aims not at all risks associated with carrying out an activity, but rather with the risk associated with the accidental and unintended consequences of engaging in an activity": *Inco* at para. 82.

(d) damage was caused to the plaintiff's property as a result of the escape. *Inco* at para. 71. A *Rylands v Fletcher* claim is not actionable *per se*, but is one of the torts which requires proof of damage before a cause of action is even established.

The appellant brought its summary judgment application based on an affidavit of one of its representatives, to the effect that this test had not been met. The respondents did not file an affidavit in response, but did rely on some other evidence that was on the record.

19 The first part of the test requires an unusual use of the lands. There is no factual dispute about the use that the appellant was making of its lands. The Ogden shops were being used to repair locomotives. There is nothing unreasonable about that use, because every railway obviously needs to have a facility to repair its rolling stock. The Ogden shops were at all times zoned for this type of industrial use; as in *Tock v. St. John's (City) Metropolitan Area Board* [1989 CarswellNfld 21 (S.C.C.)], the use was "appropriate to the place where it was maintained". There is also no evidence on this record to support a finding that in law there was anything "special" or "extra-hazardous" about the repair of locomotives, or the use of TCE in the process: *Inco* at para. 103. The fact that, over a decade after the use had ceased, the migration of the TCE was discovered does not alter the analysis. The respondents have failed to raise any genuine issue with respect to this portion of the test in *Rylands v. Fletcher*.

20 The respondents have also failed to raise a genuine issue with respect to the second part of the test. Whether the TCE was "likely to do mischief if it escaped" envisions at least some element of foreseeability: *Inco* at paras. 108-110, citing *Cambridge Water Co. v. Eastern Counties Leather Plc* (1993), [1994] 2 A.C. 264 (U.K. H.L.), at pp. 301-6. The appellant's representative deposed that TCE was used in accordance with best practices available at the time, and that its use was not known to possess the harmful qualities that later emerged. In about 1982 the appellant began receiving information that TCE was more harmful than previously suggested, and the use of TCE was discontinued (EKE A3, A7). It was not until 1999 that routine environmental testing disclosed the migration of the TCE into the Ogden community (EKE A3).

21 The appellant's evidence that it was not foreseeable that the migration of TCE would cause harm to neighboring lands is uncontradicted on this record. A party faced with an application for summary judgment must put its best foot forward, and present evidence to show sufficient "merit" to establish a genuine issue requiring a trial with respect to the outstanding issues: *Lameman* at para. 19. Speculating that evidence might be available at a trial is not sufficient to create a genuine issue requiring a trial.

22 The record also discloses that the third part of the test has not been met. A harmful substance does not "escape" within the meaning of the *Rylands v. Fletcher* rule unless the migration is a result of some sort of unintended mishap or accident. Migration of the substance that is a normal and intended consequence of the activity on the defendant's land is not sufficient. For example, in *Inco* the refinery had been discharging nickel oxide up its large smokestack for decades. This was neither unintended, nor any sort of accident or mishap, but was a known and natural consequence of operating a nickel refinery. This sort of release was not sufficient to meet the test: *Inco* at paras. 82, 95, 112-3. Liability would have to arise, if at all, from the law of nuisance or negligence.

23 The record is uncontradicted that the disposal of the TCE in the present case was also not a result of any sort of accident or misadventure, but rather it was an intentional part of the operation of the locomotive shops. The 1992 report of the appellant's Chief Engineer described the process as follows:

> The cleaning operations within the locomotive shop consist mainly of suspending the engines or engine parts in tanks of hot cleaning solutions....
>
> Before the erection of the Waste Water Treatment Plant in 1972, all waste solutions were flushed into the floor drain system which were then discharged to Ponding Area No. 3. Since 1972 general wastewater has been discharged to the Waste Water Treatment Plant, while waste oil sludge and chemical solutions from dip tanks were pumped out and disposed of by a contract waste management company. (EKE R3-4)

While by modern environmental standards this method of disposing of waste chemicals may seem surprising, the record is uncontradicted that at the time this was a part of the normal operations of the Ogden shops. The discharge of the substances into the settling pond, and the resultant migration of the TCE into the surrounding groundwater was a result (as in *Inco*) of deliberate conduct which was part of the repair process, and not as a result of any accident or misadventure. The respondents have failed to raise a genuine issue requiring a trial with respect to this part of the test.

24 The final part of the test under *Rylands v. Fletcher* is proof of damage. Since the other parts of the test were not met, it is not necessary to explore the issue of damages in order to conclude that summary judgment should have been granted on the *Rylands v. Fletcher* claim with respect to both categories of properties. However, since the issue of "damage" also overlaps with the nuisance claim, it must be examined for that purpose.

Nuisance and Proof of Damage

25 Claims in nuisance and under the *Rylands v. Fletcher* principle depend on proof of damage. Neither of them are torts where damage is presumed to flow, and the proof of actual, substantial damage is a component of these causes of action: *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)*, 2013 SCC 13 (S.C.C.) at para. 19, [2013] 1 S.C.R. 594 (S.C.C.). The reasons recognized that nominal or trivial damages were insufficient to support a claim in nuisance, but overlooked that the same requirement applies to a *Rylands v. Fletcher* claim.

26 The appellant argues that the nuisance claims should have been summarily dismissed, because there was no damage proven, or alternatively any damage was personal injury damage. Since the pleadings were specifically limited to property damage only, that form of damage was insufficient.

27 The oral reasons are unclear on the existence of damage. With respect to the *Rylands v. Fletcher* claim they held:

> [A] With respect to the damages component of that, there may be a distinction between the non SSD [sub-slab depressurization] and the SSD lands and the claimants and class. It may be that the non SSD claimants have nominal damages only — a dollar or some other amount — but there is damage in that sense because there has been a pollution of the class lands to some extent, or at least an arguable extent, and that forms at least a nominal damage. With respect to the SSD lands, which I'll talk about more in the next heading, there is more evidence, it appears, of general damages with respect to the interference with the enjoyment of property. [AR F47]

The "next heading" referred to is the discussion of nuisance, where it was held:

> [B] Proof of damage is an essential element, and in this case I find that there is no proof of damage that's been established as required with respect to either SSD or non SSD.
>
> [C] With respect to the property or rental values, the Plaintiff/Respondent has not met the Applicant's evidence with respect to that, and so I can ignore that, but it is arguable as to whether there are other damages that flow from the interference with the use and enjoyment for which there is some evidence.
>
> [D] And without getting into it, there's an affidavit of Ms. Windsor of headaches and related health issues. There's not a specific claim for health damages, but what is described there would go to the heading of loss of enjoyment and acceptable use and quiet enjoyment of one's property if not to the health issues, and I'll leave it at that.
>
> [E] I've already touched on the issue of whether there is damage to the property itself, and it is conceded, I think, that TCE within the lands is a damage. Have there been any losses as a result of that with respect to the non SSD properties for which there is no mitigation required? Any damage there, any damages as well would be trivial or nonexistent. Indeed, I'll go the next step and say that with respect to the non SSD, no damage has been quantified or proven to exist other than the state of some contamination....
>
> [F] In terms of the balance of reasonableness aspect of the arguments, again, we have to separate the non SSD from the SSD. I find that it's not completely unreasonable in these circumstances and all of the factors to be taken into account of some contamination with respect to the non SSD, but I find the opposite with respect to the SSD. It's the presence of the vapors in some of the SSD properties that adversely, directly or indirectly, along with the consequences and impacts of mitigation, that affect the use and enjoyment of land, and the very need for the mitigation is some proof of that. [AR F49-50]

Having concluded that the only evidence showed that any damage to the properties without sub-slab depressurization systems was at best trivial or nominal, the reasons went on to dismiss the nuisance claim with respect to them.

28 Paragraph [B] of the reasons would suggest a finding of "no damage", and would therefore appear to support the appellant's position. But that literal reading is inconsistent with what follows. In paragraph [B] the reasons appear to have only been saying that there was no evidence of loss in the real estate value of the properties. In other words, the respondents had not brought sufficient evidence to maintain their claims based on the type of damage referred to in paragraphs 15(b) and (c) of the statement of claim (*supra*, para. 4).

29 That appears to be the appropriate interpretation of paragraph [B], because of what is said in paragraph [C], which refers expressly to property and rental values. Further, paragraphs [A] and [C] refer in addition to "interference with the use and enjoyment" of the property, which is the other basis for damage to the property, pleaded in paragraph 15(a) of the statement of claim. That is also consistent with what is said in paragraphs [D] and [F]. The reasons appear to find that the very need to constantly mitigate the effects of the TCE through the sub-slab depressurization systems is itself a measurable form of non-trivial damage, and that the effect that the presence of TCE may have on the use and occupation of the lands (including health effects on the occupants) is further evidence of damage to the lands sufficient to preclude summary dismissal.

30 The appellant argues that there was an error in considering the health effects of TCE, because no personal injury damages are claimed. The reasons, however, merely say that the effect of TCE on the health of occupants is proof of damage to the lands themselves, arising from the impaired ability to use, occupy and enjoy the lands. Properly read, the reasons were not referring to any consequent personal injury damages, *per se*.

31 It follows that there was no error in law in the dismissal of the nuisance claim with respect to those properties without sub-slab depressurization systems, because that class of claimant had only shown nominal or trivial damages.

However, there was also no error in allowing the claim by the owners of properties *with* sub-slab depressurization systems to proceed to trial, because the respondents had demonstrated a genuine issue requiring a trial with respect to damage to that category of lands. Whether the test in *Antrim Truck Centre* has been met will have to be determined at trial. Having brought forward sufficient evidence to deflect the summary dismissal application with respect to properties *with* sub-slab depressurization systems, the respondents are entitled to take those nuisance claims to trial with respect to all aspects of damage to the property pleaded in paragraph 15 of the statement of claim.

Fresh Evidence

32 The respondents applied to introduce fresh evidence on appeal, which evidence suggests that there has been a diminution in property values as a result of the presence of TCE. Since it is possible to resolve this appeal without reference to that aspect of the damage claim, the application to introduce the fresh evidence is dismissed.

Summary and Conclusion

33 In summary, the appeal is allowed with respect to the *Rylands v. Fletcher* claims, and those claims are summarily dismissed. The respondents have failed to show a triable issue with respect to requirements of that claim, including (with respect to the properties without sub-slab depressurization systems) the requirement that damage be shown. However, the case management judge did not err in allowing the nuisance claim relating to properties *with* sub-slab depressurization systems to proceed to trial; the test for summary dismissal was not met with respect to those claims.

34 The costs of the summary dismissal application are remitted back to the case management judge for reconsideration in light of the changed outcome. The appellant is entitled to the assessed costs of the appeal and the application for fresh evidence.

Appeal allowed in part.