Ellen Smith (plaintiff/respondent) v. Inco Limited (defendant/appellant)
(C52491; 2011 ONCA 628)

Indexed As: Smith v. Inco Ltd.

Ontario Court of Appeal
Doherty and MacFarland, JJ.A., and Hoy, J.(ad hoc)
October 7, 2011.

Summary:

The plaintiff class representative pursued a class action on behalf of all residential property owners in a defined area in the City of Port Colborne, alleging that emissions from a nickel refinery, owned by Inco Ltd., contaminated the soil on many neighbouring properties with high levels of nickel. The plaintiff further alleged that the negative publicity and public disclosures regarding nickel contamination of the soil in Port Colborne, from and after September 2000, negatively affected the values of class members' properties.

The Ontario Superior Court, in a decision reported [2010] O.T.C. Uned. 3790, allowed the action. The trial judge found that the soil on the class members' properties contained nickel particles placed in the soil as a result of emissions generated by Inco's nickel refinery over a 66-year period prior to 1985. The trial judge further held that beginning in 2000, concerns about the levels of nickel in the soil caused widespread public concern and adversely affected the appreciation in the value of the properties after September 2000. The trial judge held that Inco was liable in private nuisance and under strict liability (i.e., Rylands v. Fletcher) for that loss. He fixed damages at $36 million. He rejected a claim for punitive damages. Inco Ltd. appealed, raising the following issues:

> "i. Did the trial judge err in holding that the discharge of the nickel particles by Inco on to the property of the class members constituted an actionable nuisance?
>
> "ii. Did the trial judge err in holding that Inco was liable for the discharge of the nickel particles under the rule established in Rylands v. Fletcher?
>
> "iii. Did the trial judge err in holding that the claimants had established a diminution in value of their properties after September 2000?
>
> "iv. Did the trial judge err in holding that assuming there was a diminution in the value of the properties after September 2000, that diminution was caused by the discharge of nickel particles on to the land?
>
> "v. Did the trial judge err in failing to hold that the claim was time barred under s. 45(1)(g) of the Limitations Act?"

The Ontario Court of Appeal allowed the appeal, set aside the judgment below and dismissed the action. The court held that the claimants failed to establish Inco's liability under either private nuisance or the rule in Rylands v. Fletcher. Alternatively, and assuming the elements of either or both causes of action were made out, the claimants failed to establish any damages. Given the court's disposition on issues i, ii and iii, it did not need to address the causation issue or the limitation period argument. The court, however, did consider one aspect of the trial judge's analysis of the applicability of the limitation period as it had potential application to other class action claims in which limitation period defences were raised.

Practice - Topic 210.6

Persons who can sue and be sued - Individuals and corporations - Status or standing - Class actions - Limitation of actions - Residential property owners in Port Colborne (City) commenced a class action, alleging that emissions from Inco Ltd.'s nickel refinery prior to 1985, contaminated their soil - The trial judge, in ruling in favour of the claimants as a class on a limitations (discoverability) issue, concluded that prior to 1990, "most property owners" would not have been aware, and ought not to have been aware, of the potential effect of the contamination on their property values - The Ontario Court of Appeal stated that if the evidence did not establish that all class members were not aware or and ought not to have been aware of the material facts, then the application of the Limitations Act to the claims was an individual and not a common issue - It was an error to treat the limitation period as running from the date when a majority, even an overwhelming majority, of the class members knew or ought to have known the material facts in issue - See paragraphs 162 to 165.

Torts - Topic 1007

Nuisance - General principles and definitions - Private nuisance defined - Residential property owners in Port Colborne (City) commenced a class action (private nuisance), alleging that emissions from Inco Ltd.'s nickel refinery prior to 1985, contaminated their soil, and that public concerns regarding the nickel contamination, from and after September 2000, negatively affected their property values - The trial judge allowed the action - Inco appealed - The Ontario Court of Appeal held that the trial judge erred in his approach and analysis of the private nuisance issue and in finding that the nickel particles in the soil caused actual, substantial and physical damage to the claimants' land - The court stated that "... actual, substantial, physical damage to the land in the context of this case refers to nickel levels that at least posed some risk to the health or wellbeing of the residents of those properties. Evidence that the existence of the nickel particles in the soil generated concerns about potential health risks does not, in our view, amount to evidence that the presence of the particles in the soil caused actual, substantial harm or damage to the property. The claimants failed to establish actual, substantial, physical damage to their properties as a result of the nickel particles becoming part of the soil. Without actual, substantial, physical harm, the nuisance claim as framed by the claimants could not succeed" - See paragraphs 33 to 67.

Torts - Topic 1007

Nuisance - General principles and definitions - Private nuisance defined - The Ontario

Court of Appeal noted that in St. Pierre v. Ontario (SCC 1987), the court accepted as a working definition of private nuisance, the definition found in Street on Torts: "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 of an interest in land, where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable" - See paragraph 42.

Torts - Topic 1010

Nuisance - General principles and definitions - Type of injury or damage required - The Ontario Court of Appeal stated that "... while all nuisance is a tort against land predicated on an indirect interference with the plaintiff's property rights, that interference can take two quite different forms. The interference may be in the nature of 'physical injury to land' or it may take the form of substantial interference with the plaintiff's use or enjoyment of his or her land ..." - The court noted that the latter form of nuisance was sometimes described as "amenity nuisance" - See paragraph 43.

Torts - Topic 1010

Nuisance - General principles and definitions - Type of injury or damage required - The Ontario Court of Appeal stated that in the past, "The courts have taken a somewhat different approach to nuisance claims predicated on physical damage to property and those claims based on amenity or non-physical nuisance. Where amenity nuisance is alleged, the reasonableness of the interference with the plaintiff's property is measured by balancing certain competing factors, including the nature of the interference and the character of the locale in which that interference occurred. Where the nuisance is said to have produced physical damage to land, that damage is taken as an unreasonable interference without the balancing of competing factors ..." - See paragraph 45 - The court noted that while there was some relatively recent dicta suggesting that there might be some role for the balancing of competing factors where the nuisance took the form of actual physical damage to the land, it was not necessary to decide that issue in this case - See paragraph 48.

Torts - Topic 1010

Nuisance - General principles and definitions - Type of injury or damage required - The Ontario Court of Appeal discussed what kind of harm to land would suffice to establish nuisance based on physical damage to property - The court noted that in St. Helen's Smelting Co. v. Tipping (1865), the House of Lords referred to "material injury to the property" and to "circumstances the immediate result of which is sensible injury to the value of the property - The court stated that the requirement of "material injury to property" referred to in St. Helen's was satisfied where the actions of the defendant indirectly caused damage to the plaintiff's land that could be properly characterized as material, actual and readily ascertainable - See paragraph 49.

Torts - Topic 1010

Nuisance - General principles and definitions - Type of injury or damage required - The Ontario Court of Appeal held that to establish nuisance based on physical damage to

property, the actions of the defendant had to have indirectly caused damage to the plaintiff's land that could be properly characterized as material, actual and readily ascertainable - The court stated that "Material damage refers to damage that is substantial in the sense that it is more than trivial ... Actual damage refers to damage that has occurred and is not merely potential damage that may or may not occur at some future point ... Damage that is readily ascertainable refers to damage that can be observed or measured and is not so minimal or incremental as to be unnoticeable as it occurs. We do agree, however, with counsel for the claimants that the damage may be readily ascertainable even if it is not visible to the naked eye and does not produce some visibly noticeable change in the property ..." - See paragraphs 49 and 50.

Torts - Topic 1010

Nuisance - General principles and definitions - Type of injury or damage required - The Ontario Court of Appeal stated that "Where the nuisance is said to flow from the physical harm to land caused by the contamination of that land, the claimants must show that the alleged contaminant in the soil had some detrimental effect on the land or its use by its owners" - See paragraph 57.

Torts - Topic 1010

Nuisance - General principles and definitions - Type of injury or damage required - [See first **Torts - Topic 1007**].

Torts - Topic 1255

Nuisance - Plant emissions - [See first **Torts - Topic 1007**].

Torts - Topic 1270

Nuisance - Particular nuisances - General - Soil contamination - [See first **Torts - Topic 1007**].

Torts - Topic 2004

Strict liability - General - Application of rule in Rylands v. Fletcher - Residential property owners in Port Colborne (City) commenced a class action (strict liability), alleging that emissions from Inco Ltd.'s nickel refinery prior to 1985, contaminated their soil, and that public concerns regarding the nickel contamination, from and after September 2000, negatively affected their property values - The Ontario Court of Appeal dismissed the claim - The claimants failed to establish that Inco's operation of its refinery was a non-natural use its property, one of the prerequisites for operation of the rule - See paragraphs 94 to 105 and 114.

Torts - Topic 2004

Strict liability - General - Application of rule in Rylands v. Fletcher - The Ontario Court of Appeal stated that "The rule in Rylands v. Fletcher imposes strict liability for damages caused to a plaintiff's property (and probably, in Canada, for personal damages) by the escape from the defendant's property of a substance 'likely to cause mischief'. The exact reach of the rule and the justification for its continued existence as a basis of liability apart from negligence, private nuisance and statutory liability have been matters of

controversy in some jurisdictions ... In Canada, Rylands v. Fletcher has gone largely unnoticed in appellate courts in recent years. However, in 1989 in Tock, the Supreme Court of Canada unanimously recognized Rylands v. Fletcher as continuing to provide a basis for liability distinct from liability for private nuisance or negligence" - See paragraph 68.

Torts - Topic 2004

Strict liability - General - Application of rule in Rylands v. Fletcher - The Ontario Court of Appeal referred to the four prerequisites to the operation of the rule in Rylands v. Fletcher: "the defendant made a 'non-natural' or 'special' use of his land; the defendant brought on to his land something that was likely to do mischief if it escaped; the substance in question in fact escaped; and damage was caused to the plaintiff's property as a result of the escape" - See paragraph 71.

Torts - Topic 2004

Strict liability - General - Application of rule in Rylands v. Fletcher - The Ontario Court of Appeal noted that Linden and Feldthusen in their "Canadian Tort Law" texts discussed an emerging theory respecting strict liability for abnormally dangerous activities which was considerably broader than the strict liability rule under Rylands v. Fletcher - "Under their theory, it is not necessary that the dangerous substance 'escape' from the defendant's property or that the use of the defendant's land be characterized as 'special' or 'non-natural'. Strict liability flows entirely from the nature of the activity conducted by the defendant. Linden and Feldthusen acknowledge that the theory of strict liability they present goes beyond Rylands v. Fletcher. According to them, support for their theory 'lies hidden in the cases waiting to be openly embraced by Canadian courts'..." - The Ontario Court of Appeal stated that "We do not accept that strict liability based exclusively on the 'extra hazardous' nature of the defendant's conduct is or should be part of the common law in this province" - The court thereafter outlined its reasons for reaching its conclusion that the strict liability rule in Rylands v. Fletcher should not be expanded in this manner - See paragraphs 75 to 78 and 82 to 93.

Torts - Topic 2004

Strict liability - General - Application of rule in Rylands v. Fletcher - Residential property owners in Port Colborne (City) commenced a class action (strict liability), alleging that emissions from Inco Ltd.'s nickel refinery prior to 1985, contaminated their soil, and that public concerns regarding the nickel contamination, from and after September 2000, negatively affected their property values - The trial judge allowed the action, relying on the theory of strict liability set out in certain literature that where an entity engaged in potentially hazardous activity it assumed the risk of any damages caused by that activity, even if the other prerequisites for application of the rule were not established - Inco appealed - The Ontario Court of Appeal allowed the appeal - The court refused to expand strict liability under the banner of Rylands v. Fletcher to damages flowing from all hazardous activities - The prerequisites to the operation fo the rule still applied - In any event, even if strict liability for ultra hazardous activities, either as a freestanding basis for liability or a modification of Rylands v. Fletcher, were part of the law in Ontario, the claimants failed to prove that Inco's refinery constituted an "extra hazardous" activity -

See paragraphs 75 to 81.

Torts - Topic 2004

Strict liability - General - Application of rule in Rylands v. Fletcher - The Ontario Court of Appeal noted that one of the prerequisites to the application of the rule in Rylands v. Fletcher was that the defendant have made a "non-natural" use of his land - The court stated that "... If the characterization of a use as a non-natural one was ever tied solely to whether the substance was found naturally on the property, it has long since ceased to depend on the answer to that single question. It may be that something found naturally on the property cannot attract liability under Rylands v. Fletcher. It is not, however, the law that anything that is not found naturally on the property can be subject to strict liability under Rylands v. Fletcher if it escapes and causes damage. The disconnect between things found in nature on the property and the potential application of Rylands v. Fletcher is so complete that the House of Lords has abandoned the use of the phrase 'non-natural use' as misleading in favour of the phrase 'ordinary use': Transco [2004] ..." - See paragraph 96.

Torts - Topic 2004

Strict liability - General - Application of rule in Rylands v. Fletcher - The Ontario Court of Appeal noted that one of the prerequisites to the application of the rule in Rylands v. Fletcher was that the defendant have made a "non-natural" use of his land - The court stated that "... the distinction between natural and non-natural use cannot be made exclusively by reference to the origin of the substance in issue. To decide whether a use is a non-natural one, the court must have regard to the place where the use is made, the time when the use is made, and the manner of the use. Planning legislation and other government regulations controlling where, when and how activities can be carried out will be relevant considerations in assessing whether a particular use is a non-natural use in the sense that it is a use that is not ordinary" - See paragraph 97.

Torts - Topic 2004

Strict liability - General - Application of rule in Rylands v. Fletcher - Residential property owners in Port Colborne (City) commenced a class action (strict liability), alleging that emissions from Inco Ltd.'s nickel refinery prior to 1985, contaminated their soil, and that public concerns regarding the nickel contamination, from and after September 2000, negatively affected their property values - Inco had asserted in its factum that foreseeability was a requirement under Rylands v. Fletcher - The Ontario Court of Appeal dismissed the action on grounds unrelated to foreseeability - However, the court noted that the issue of whether foreseeability of damages was an element of liability under Rylands v. Fletcher was an important jurisprudential question - While declining to decide that issue in the absence of full argument, the court opined that while there was no reason to require foreseeability of the escape, there were compelling reasons to require foreseeability of the kind of damages alleged to have been suffered by the plaintiffs in this case - See paragraphs 106 to 110.

Torts - Topic 2004

Strict liability - General - Application of rule in Rylands v. Fletcher - The Ontario Court of Appeal stated that the escape component of the rule in Rylands v. Fletcher was not

limited to a single isolated escape - The court stated that "In some situations, the danger posed by the escape rests in the repeated and cumulative effect of the movement of a substance from the defendant's property to the property of others. The escape may go on for months or even years and the damage may not be caused until the accumulation of the escaping substance reaches certain destinations or accumulations. Assuming the other Rylands v. Fletcher requirements are established, we see no reason to distinguish between a one-time escape and continuous or multiple event escapes which produce the same kind of damages ..." - See paragraph 111.

Torts - Topic 2004

Strict liability - General - Application of rule in Rylands v. Fletcher - The Ontario Court of Appeal stated that "... the Rylands v. Fletcher paradigm involves an unnatural use of the defendant's property and some kind of mishap or accident that results in damage. The application of Rylands v. Fletcher to consequences that are the intended result of the activity undertaken by the defendant has been doubted ... We, too, doubt its application. It is one thing to impose strict liability for mishaps that occur in the course of the conduct of an unnatural or unusual activity. It is quite another to impose strict liability for the intended consequence of an activity that is carried out in a reasonable manner and in accordance with all applicable rules and regulations" - See paragraphs 112 and 113.

Torts - Topic 2095

Strict liability - Dangerous things or activities - General principles - [See fourth and fifth **Torts - Topic 2004**].

Cases Noticed:

Rylands v. Fletcher (1866), L.R. 1 Ex. 265 (Exch.), affd. (1868), L.R. 3 H.L. 330, consd. [para. 1].

Royal Anne Hotel Co. v. Ashcroft (Village) (1979), 95 D.L.R.(3d) 756 (B.C.C.A.), refd to. [para. 39].

Antrim Truck Centre Ltd. v. Ontario (Minister of Transportation), [2011] O.A.C. TBEd. JN.005; 106 O.R.(3d) 81 (C.A.), refd to. [para. 40].

Walker v. McKinnon Industries Ltd., [1949] O.R. 549 (H.C.), affd. [1950] 3 D.L.R. 159 (Ont. C.A.), affd. [1951] 3 D.L.R. 577 (P.C.), refd to. [para. 41].

Hunter v. Canary Wharf Ltd., [1997] 2 All E.R. 426 (H.L.), refd to. [para. 41].

St. Pierre v. Ontario (Minister of Transportation and Communications), [1987] 1 S.C.R. 906; 75 N.R. 291; 22 O.A.C. 63, refd to. [para. 42].

St. Helens Smelting Co. v. Tipping (1865), 11 H.L.C. 642, refd to. [para. 45].

Russell Transport Ltd. v. Ontario Malleable Iron Co., [1952] O.R. 621 (H.C.), dist. [para. 47].

Walker v. Pioneer Construction Co. (1967) Ltd. (1975), 8 O.R.(2d) 35 (H.C.), refd to. [para. 47].

Schenck v. Ontario; Rokeby v. Ontario (1981), 34 O.R.(2d) 595 (H.C.), affd. (1984), 49 O.R.(2d) 556 (C.A.), affd. [1987] 2 S.C.R. 289; 79 N.R. 317; 23 O.A.C. 82, refd to. [para. 47].

Kent v. Dominion Steel and Coal Corp. (1964), 49 D.L.R.(2d) 241 (Nfld. C.A.), refd to. [para. 47].

Tock and Tock v. St. John's Metropolitan Area Board, [1989] 2 S.C.R. 1181; 104 N.R. 241; 82 Nfld. & P.E.I.R. 181; 257 A.P.R. 181, refd to. [para. 48].
Salvin v. North Brancepeth Coal Co. (1874), L.R. 9 Ch. App. 705, refd to. [para. 49].
Barrette et al. v. St. Lawrence Cement Inc. et al., [2008] 3 S.C.R. 392; 382 N.R. 105; 2008 SCC 64, refd to. [para. 50].
Gaunt v. Fynney (1872), L.R. 8 Ch. App. 8, refd to. [para. 50].
Tridan Developments Ltd. et al. v. Shell Canada Products Ltd. (2002), 154 O.A.C. 1; 57 O.R.(3d) 503 (C.A.), refd to. [para. 54].
Cambridge Water Co. v. Eastern Counties Leather plc, [1994] 2 A.C. 264; 162 N.R. 301 (H.L.), refd to. [para. 65].
Transco plc v. Stockport Metropolitan Borough Council, [2004] 2 A.C. 1; 2003 UKHL 61 (H.L.), refd to. [para. 68].
Burnie Port Authority v. General Jones Pty. Ltd. (1994), 179 C.L.R. 520 (Aust. H.C.), refd to. [para. 68].
Rickards v. Lothian, [1913] A.C. 263 (P.C.), refd to. [para. 69].
Read v. Lyons (J.) and Co., [1947] A.C. 156 (H.L.), refd to. [para. 86].
Gertsen v. Metropolitan Toronto (Municipality) (1973), 2 O.R.(2d) 1 (H.C.), refd to. [para. 95].
North York (City) v. Kert Chemical Industries Inc. (1985), 33 C.C.L.T. 184 (Ont. H.C.), refd to. [para. 112].
Malhab v. Diffusion Métromédia CMR inc. et al., [2011] 1 S.C.R. 214; 412 N.R. 1; 2011 SCC 9, refd to. [para. 164].
Hislop et al. v. Canada (Attorney General) (2009), 248 O.A.C. 205; 95 O.R.(3d) 81 (C.A.), refd to. [para. 164].
Pearson v. Inco Ltd. et al. (2005), 205 O.A.C. 30; 78 O.R.(3d) 641 (C.A.), refd to. [para. 165].

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Klar, Lewis N., Tort Law (4th Ed. 2008), p. 628 [para. 112].
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Linden, Allen M., and Feldthusen, Bruce, Canadian Tort Law (8th Ed. 2006), pp. 540, 541 [para. 76].
Linden, Allen M., and Feldthusen, Bruce, Canadian Tort Law (9th Ed. 2011), p. 556 [para. 77].
Murphy, John, Street on Torts (12th Ed. 2007), pp. 419 [para. 41]; 420 [paras. 40, 41]; 421 [para. 41]; 429 [para. 43]; 431, 435 [para. 40].
Murphy, John, The Merits of Rylands v. Fletcher (2004), 24 Oxford J. Legal Stud. 643, generally [para. 68]; p. 649 [para. 46].
Newark, F.H., The Boundaries of Nuisance (1949), 65 Law Q. Rev. 480, generally [para. 41].
Nolan, Donal, The Distinctiveness of Rylands v. Fletcher (2005), 121 Law Q. Rev. 421, pp. 447, 448, 449 [para. 86].
Pun, Gregory S., and Hall, Margaret I., The Law of Nuisance in Canada (2010), pp. 55,

56, 57 [para. 41]; 69, 70, 71 [para. 43]; 71, fn. 55 [para. 47]; 85 [para. 57]; 113 [para. 71]; 132, 137 [paras. 82, 112].

Street, Harry, The Law of Torts (6th Ed. 1976), p. 219 [para. 42].

Waite, Andrew, Deconstructing the Rule in Rylands v. Fletcher (2006), 18 J. Envtl. L. 423, generally [para. 69].

Williams, David W., Non-Natural Use of Land (1973), 32 Cambridge L.J. 310, pp. 314 to 321 [para. 95].

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Alan J. Lenczner, Q.C., Larry P. Lowenstein, Laura K. Fric, and Lauren Tomasich, for the defendant/appellant;

Kirk M. Baert, Celeste Poltak, Eric K. Gillespie, David Rosenfeld and Julia Croome, for the plaintiff/respondent.

This appeal was heard on May 9 to 2, 2011, before Doherty and MacFarland, JJ.A., and Hoy, J.(ad hoc), of the Ontario Court of Appeal. The following reasons were released by the court on October 7, 2011.

Appeal allowed.

Editor: Elizabeth M.A. Turgeon

Torts - Topic 1010

Nuisance - General principles and definitions - Type of injury or damage required - Residential property owners in Port Colborne (City) commenced a class action (private nuisance), alleging that emissions from Inco Ltd.'s nickel refinery prior to 1985, contaminated their soil, and that public concerns regarding the nickel contamination, from and after September 2000, negatively affected their property values - The trial judge allowed the action - Inco appealed - The Ontario Court of Appeal held that the trial judge erred in his approach and analysis of the private nuisance issue and in finding that the nickel particles in the soil caused actual, substantial and physical damage to the claimants' land - The court stated that "... actual, substantial, physical damage to the land in the context of this case refers to nickel levels that at least posed some risk to the health or wellbeing of the residents of those properties. Evidence that the existence of the nickel particles in the soil generated concerns about potential health risks does not, in our view, amount to evidence that the presence of the particles in the soil caused actual, substantial harm or damage to the property. The claimants failed to establish actual, substantial, physical damage to their properties as a result of the nickel particles becoming part of the soil. Without actual, substantial, physical harm, the nuisance claim as framed by the claimants could not succeed" - See paragraphs 33 to 67.

Torts - Topic 1255

Nuisance - Plant emissions - Residential property owners in Port Colborne (City) commenced a class action (private nuisance), alleging that emissions from Inco Ltd.'s nickel refinery prior to 1985, contaminated their soil, and that public concerns regarding

the nickel contamination, from and after September 2000, negatively affected their property values - The trial judge allowed the action - Inco appealed - The Ontario Court of Appeal held that the trial judge erred in his approach and analysis of the private nuisance issue and in finding that the nickel particles in the soil caused actual, substantial and physical damage to the claimants' land - The court stated that "... actual, substantial, physical damage to the land in the context of this case refers to nickel levels that at least posed some risk to the health or wellbeing of the residents of those properties. Evidence that the existence of the nickel particles in the soil generated concerns about potential health risks does not, in our view, amount to evidence that the presence of the particles in the soil caused actual, substantial harm or damage to the property. The claimants failed to establish actual, substantial, physical damage to their properties as a result of the nickel particles becoming part of the soil. Without actual, substantial, physical harm, the nuisance claim as framed by the claimants could not succeed" - See paragraphs 33 to 67.

Torts - Topic 1270

Nuisance - Particular nuisances - General - Soil contamination - Residential property owners in Port Colborne (City) commenced a class action (private nuisance), alleging that emissions from Inco Ltd.'s nickel refinery prior to 1985, contaminated their soil, and that public concerns regarding the nickel contamination, from and after September 2000, negatively affected their property values - The trial judge allowed the action - Inco appealed - The Ontario Court of Appeal held that the trial judge erred in his approach and analysis of the private nuisance issue and in finding that the nickel particles in the soil caused actual, substantial and physical damage to the claimants' land - The court stated that "... actual, substantial, physical damage to the land in the context of this case refers to nickel levels that at least posed some risk to the health or wellbeing of the residents of those properties. Evidence that the existence of the nickel particles in the soil generated concerns about potential health risks does not, in our view, amount to evidence that the presence of the particles in the soil caused actual, substantial harm or damage to the property. The claimants failed to establish actual, substantial, physical damage to their properties as a result of the nickel particles becoming part of the soil. Without actual, substantial, physical harm, the nuisance claim as framed by the claimants could not succeed" - See paragraphs 33 to 67.

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Torts - Topic 2095

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