

Date: 20110221

Docket: 09/93

Citation: *Wm. L. Chafe and Son Limited v. Murphy*, 2011 NLCA 18

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

WM. L. CHAFE AND SON LIMITED

APPELLANT

AND:

GEORGE MURPHY AND IRENE
MURPHY

RESPONDENTS

Coram: Welsh, Mercer and Hoegg, JJ.A.

Court Appealed From: Supreme Court of Newfoundland & Labrador,
Trial Division (General), 200301T4414

Appeal Heard: November 17, 2010

Judgment Rendered: February 21, 2011

Reasons for Judgment by Mercer, J.A.

Concurred in by Welsh and Hoegg, JJ.A.

Counsel for the Appellant: John Dawson and John Taylor-Hood

Counsel for the Respondents: Stephen May and Mandy Woodland

Mercer, J.A.:

[1] This appeal considers the application of the law of negligence and nuisance to a claim in which losses were suffered when a fire originating in an electrical system spread from one commercial building to adjoining premises.

BACKGROUND

[2] The Appellant (Chafe) owned two interconnected buildings, civic numbers 328 and 330 on Water Street, St. John's from which it operated a clothing store. The Respondents (the Murphys) owned the building at 324 Water Street from which they operated a retail gift store. The Murphys had purchased the property in 1995. The Murphys did not have an electrical inspection of the property performed at the time of purchase or subsequently. The previous owner had considerable electrical work undertaken in 1982 by a qualified electrician.

[3] At approximately midnight on June 28, 2007 a fire occurred in the cellar or crawlspace area of the Murphys' property. The fire quickly spread to adjoining properties including the Chafe buildings which sustained extensive damage.

[4] Chafe sued the Murphys for losses and damages to its property, inventory and equipment and further claimed loss of revenue from business interruption. The Chafe's claim was stated to be based on negligence, nuisance and the strict liability principle established in **Rylands v. Fletcher**. In negligence Chafe alleged that the Murphys breached their duty of care to adjoining property owners to maintain the electrical system at their property in a safe and proper condition. Chafe further alleged that the spread of fire from the Murphys' property constituted a nuisance.

TRIAL DECISION

[5] The trial judge first addressed the evidence of various expert witnesses as to where the fire started and what caused it. He stated:

[5] All ... agreed that [the] fire started where electrical wires crossed over the top of a large beam in the crawlspace. ... Braidx is a type of wiring which came into common use in the middle of the twentieth century.

.....

... I am satisfied that a failure of the insulating wrapping or coating on this Braidx conductor compromised this insulative wrapping to the point whereby electricity flowing therein was able to arch or short circuit between the two wire strands. This short circuiting resulted in sparks, which ignited adjacent combustible material whence the fire propagated.

[6] It had been contended at trial by an expert witness called by Chafe that a failure to staple the Braidx conductors to the side of the floor joists in the manner required by the applicable electrical code caused the conductors to sag and then chafe in response to vibration within the Murphys' building. Such chafing was said to have caused the deterioration of the conductors' insulative coating which resulted in the fire. The trial judge reviewed the evidence in this regard, which included the allegation that the relevant electrical work performed in 1982 had not been inspected and approved by inspectors of the City of St. John's as required. The trial judge found that the City's permit and inspection requirements had been complied with in 1982. Considering the examination of the crawlspace which would have been integral to such inspection and considering other testimony that the fire itself may well have destroyed evidence that the conductors had been stapled the trial judge rejected the above contention of the expert witness called by Chafe respecting the cause of the fire. He stated:

[14] In summary, therefore, I am satisfied that the theory of the Plaintiff's expert, to the effect that the damage to the offending conductors which ultimately resulted in arching, sparks and fire was caused by the negligent installation of the offending conductor, has not been proven by the Plaintiff. In other words, while I know that a breach of the insulative wrapping of the Braidx wire caused the arching and the sparks, I do not know what caused the deterioration of that insulative wrapping. Mr. Edward Corbett, the master electrician whom I accepted as an expert in electrical causes of fire, postulated that there could have been several causes for the degradation of the insulation thereby causing the fire, including, (1) overloading of the circuits; (2) deterioration by age; (3) the possibility the wire was struck by a nail at some time; or (4) rats or other rodents gnawing on the covering. Due to the fact the wire only served to carry current to two standard light bulbs, I am satisfied overloading did not cause the fire. There was no evidence which supported the other possible factors outlined by Mr. Corbett as being the actual cause of the degradation of the insulative covering on the subject conductor.

[7] The trial judge turned to the further contention that the Murphys were negligent for having failed to inspect and/or replace defective wiring. He noted the evidence regarding inspection and further observed:

[15] ... Both George Murphy and Irene Murphy testified that after they purchased the building they experienced no problems with the electrical system of the building and it functioned normally.

[8] The trial judge later stated his finding on this evidence as follows:

[28] I am satisfied on the evidence that the Murphys had no indication of any deficiency in the electrical system of the building to cause them to be suspicious of its integrity and any danger that it might pose to themselves or to any adjoining property owners. I am satisfied that they were not even aware there was electrical wiring in the crawlspace of the building. ...

[9] The trial judge opened his review of the applicable law respecting the alleged negligence by reference to the following paragraph:

An occupier of premises is under a duty to take reasonable care to prevent damage to persons and property on adjoining premises. The harm may result from failure to repair his premises or from negligent conduct in the use of them.

Halsbury's Law of England, 4th ed., v. 33
(London: Butterworths, 1997) p. 460, para.
639

[10] The trial judge was not satisfied however that the case cited in **Halsbury** established that proposition and therefore proceeded to analyse whether Canadian law warranted the conclusion that a duty of care as alleged was owed by a property owner to adjoining property owners. He quoted extensively from authorities culminating in **Cooper v. Hobart**, [2001] 3 S.C.R. 537 which established the framework to determine whether a duty of care should be imposed in a new situation. In that case a two stage analysis – the **Anns** test – was required addressing the following questions: “(1) was the harm that occurred the reasonably foreseeable consequence of the defendant’s act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here?” **Cooper v. Hobart** – para. 30. The trial judge quoted the further direction given in **Cooper v. Hobart** respecting the second stage, namely:

[37] This brings us to the second stage of the **Anns** test. As the majority of this Court held in **Norsk**, at p. 1155, residual policy considerations fall to be considered here. These are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. Does the law already provide a

remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized? ...

[11] The trial judge observed that the second stage of the above test brought into consideration some of the same factors applicable to the determination of the standard of care, namely the balancing of the likelihood of harm and its gravity as against the purpose of the act causing the harm and the cost or burden to eliminate the hazard. He cited Linden, Allen M. and Feldthusen, Bruce, **Canadian Tort Law**, 8th ed. (Markham, Ont.: Butterworths, 2006) at 130. The trial judge continued as follows:

[24] ... This forces me to a consideration of the impact of finding, as the Plaintiff requests of the existence, a generalized duty on the part of property owners to inspect their electrical systems, presumably on some periodic basis in order to ensure that the electrical systems are not a hazard to cause fire, which fire would be injurious to adjoining properties which properties would broadly fall within the concept of a “neighbour” under the original **Donahue v. Stevenson** conception of the neighbour concept.

[25] I believe I can take judicial notice of the fact that most electrical wiring in residential and commercial buildings is not immediately exposed and open to view or easy inspection. Rather, it is buried in walls and behind other barriers and is not easily or cost effectively accessible for inspection. If the law were to impose a duty on a purchaser to inspect and replace defective wiring, what would be the impact upon the resale market for residential and commercial buildings? Would not a purchaser want to inspect all the wiring system in order to determine whether it needs to be repaired or upgraded prior to formulating his or her price offer for the building? Would not the owner of the building be concerned about damage to the building caused by an inspection which might ultimately determine that there is absolutely nothing wrong with the wiring? Who is to be liable for the costs of a reinstatement of the building necessitated by such an inspection?

[26] The Plaintiff additionally postulates that notwithstanding an inspection at the time of purchase there is a duty upon owners of properties to cause inspections of their electrical wiring to determine that there has not been some injury or deterioration to it likely to cause a fire hazard. How frequently is such an inspection to take place? Are there factors which give rise to an early duty to inspect or is the duty to inspect an absolute one?

[27] In my view, the cost implications of imposing a duty of regular inspection, regardless of the existence of any indicators of fault in the electrical system, would be an excessive imposition of cost upon existing owners or prospective owners wishing to inspect a property prior to the purchase of it. This has to be balanced against the chance or likelihood that harm will culminate and the gravity

or severity of the potential harm that will ensue, if the accident transpires. ... The impracticality of imposing a universal obligation to conduct full-blown electrical system inspections at the time of every sale of an existing property or periodically during the course of ownership of an existing property is clearly evident. The costs would be astronomical when balanced against the chance or a likelihood of electrically caused fire and the gravity or severity of the potential harm that would ensue, if the accident transpires. In my view, therefore, there is a valid policy reason, notwithstanding the fact that damage to adjoining properties by defective wiring in one's own property may be reasonably foreseeable, to deny a generalized liability where an electrically caused fire emanating [from] one's property spreads to another. ...

[12] Based on the foregoing, and the absence of evidence that the Murphys had any indication of deficiencies in the electrical system, and the lack of an electrical code requirement which would have caused discovery of the defective wires, the trial judge found no negligence on the part of the Murphys.

[13] With respect to the claim in nuisance the trial judge held that the definition of nuisance imported realization or awareness on the part of the alleged tortfeasor of the activities which gave rise to the nuisance. The trial judge was not satisfied that there was such awareness on the part of the Murphys and therefore was not satisfied that the tort of nuisance had been proven.

[14] The trial judge addressed the argument at trial that the Murphys should be held strictly liable for the damage to Chafe in accordance with the principle in **Rylands v. Fletcher**. That principle imposes strict liability if there is a non-natural use of land and an escape. The trial judge cited with approval the conclusion in **Canadian Tort Law** that ordinary activities are not considered to be non-natural under **Rylands v. Fletcher**. He noted that there was no escape of electrical current from the Murphy property and concluded that the principle in **Rylands v. Fletcher** was inapplicable.

[15] The trial judge filed additional reasons dismissing Chafe's claim for damages for business interruption.

APPEAL ISSUES

- (1) Did the trial judge err in his findings of fact including those respecting the allegations of improper installation of wiring, the lack of an electrical inspection by the City of St. John's and the Murphys' lack of knowledge of electrical deficiencies?

- (2) Did the trial judge err in law in failing to find that a property owner owes a duty of care to maintain the property's electrical system such that it does not pose a hazard to adjoining property owners?
- (3) Did the trial judge err in finding that the Murphys were not aware of any deficiencies with the electrical system and were therefore not liable in negligence for damages arising therefrom?
- (4) Did the trial judge err in his reference to public policy considerations in his evaluation of the law of negligence?
- (5) Did the trial judge err in finding that the Murphys were not liable in nuisance as they were not aware of any deficiencies with the electrical system?
- (6) Did the trial judge err in law and in fact in dismissing the claim for damages due to business interruption?

ANALYSIS

[16] This Court is bound by the standard of appellate review laid down by the Supreme Court of Canada, summarized recently by Cameron J.A. in **Cleary v. Courtney**, 2010 NLCA 46 as follows:

[15] The standards of review applied by this Court were discussed in **Ring v. Canada et al.**, 2010 NLCA 20, at para. 6:

The standard of review applied by an appellate court depends upon the nature of the matter being reviewed. A pure question of law is reviewed on a standard of correctness and an appellate court is free to replace the opinion of the trial judge with its own. Findings of fact, on the other hand, cannot be reversed unless the trial judge has made a palpable and overriding error. A determination of whether a legal standard was met involves the application of a legal standard to a set of facts which is a question of mixed fact and law. A question of mixed fact and law is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error in law and the applicable standard is correctness. These principles are well established: **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235.

Findings of credibility are part of the fact finding process and are subject to the same standard of review, as are inferences drawn from the facts. If inferences

drawn by the trial judge are reasonable, an appellate court should not intervene just because other inferences could also have been reasonably drawn: **H.L. v. Canada (Attorney General)**, 2005 SCC 25, [2005] 1 S.C.R. 401 at para. 74. ...

[17] In this case there was conflicting expert evidence respecting the manner of installation of the electrical wiring and its effect upon causation of the electrical fire. Consistent with the foregoing principles it is the trial judge who determined the weight to be given to such evidence in drawing inferences and making findings of fact. The trial judge may choose to accept or reject all or part of any expert evidence and such determination by the trial judge is entitled to deference unless there has been a palpable and overriding error. **Sports Villas Resort Inc., Re**, 2000 NFCA 11, (2000), 185 Nfld. & P.E.I.R. 281.

[18] I now turn to the issues on appeal.

FACTUAL FINDINGS

[19] Various factual findings of the trial judge were challenged on appeal. One such finding was that of lack of knowledge by the Murphys of the alleged electrical deficiencies on their property. There was a clear evidentiary basis for the trial judge's finding in this regard. Specifically there was no evidence cited that the Murphys were aware of any problems with the wiring. Nor was there any indication that the Murphys chose to be willfully ignorant of obvious problems. Whether there ought to have been inspections of the property is addressed below.

[20] The notice of appeal disputed the trial judge's dismissal of the contention of an expert called by Chafe which attributed the fire to negligent installation of the Braidx wiring in the crawlspace – see para. 6 above. It is clear however that the trial judge considered carefully the evidence of that expert. He chose not to accept that evidence in view of the evidence to the contrary proffered by other expert witnesses. The reasons for his conclusion were logical and coherent and must be sustained. Equally, the trial judge's finding that there had been an inspection performed by the City of St. John's in 1982 is a logical inference from the evidence of the electrician who performed the 1982 electrical upgrades and the expert witnesses who opined that the electrical utility would not have reconnected the service without an inspection and approval by the City.

[21] The trial judge's findings respecting the point of origin of the fire and its cause, being the deterioration of the insulative wrapping of the Braidx

wiring, were amply supported by the expert evidence and were not challenged on this appeal. The trial judge further found that the cause of the deterioration of the insulative wrapping had not been proven – see Trial Decision para. 14 as quoted in para. 6 above. That conclusion logically followed from the trial judge’s rejection of the contention of negligent installation and his acceptance of the evidence of the expert Edward Corbett. There is accordingly no palpable error in this regard.

[22] Counsel for Chafe further argued that the trial judge erred in his consideration of an inspection of the property one year prior to the Murphys’ acquisition inasmuch as the “inspection” was part of a property appraisal and was not conducted by a qualified electrical inspector. No copy of the appraisal was available at trial nor could the appraiser recall any details of his examination of the premises. As noted by the trial judge, the appraiser testified that he would have entered the area in question and would have advised the former owner of any electrical deficiencies he would have noted. I agree with counsel that such evidence is at best of limited weight. However there is no indication that the trial judge attached much significance to it. His stated reasons for dismissing the claims in negligence, nuisance and under the strict liability principle in **Rylands v. Fletcher** did not reference that evidence nor were they dependent upon acceptance of that evidence. There is no logical basis for disturbing the trial decision because of its limited reference to such evidence.

NEGLIGENCE

[23] To succeed in a claim based on negligence a plaintiff must establish that “a duty of care exists; there has been a breach of the duty of care; and damage has resulted from the breach”. **Ring v. Canada (Attorney-General)**, 2010 NLCA 20 at para. 50. The first step in the negligence analysis is to address whether a duty of care was owed by the alleged tortfeasor to the plaintiff. If a duty of care was owed it can only be discharged by the exercise of the standard of care required by the common law. **Baker v. Russell**, 2008 NLCA 51 at para. 20. The standard of care at common law is that which “would be expected of an ordinary, reasonable and prudent person in the same circumstances. **Ryan v. Victoria (City)**, [1999] 1 S.C.R. 201 at para. 28.

[24] The trial judge considered whether there existed a duty of care on the part of property owners to inspect their electrical systems. Applying the **Anns** test he ultimately concluded that overriding policy considerations

precluded recognition of that duty. With respect I cannot agree that application of the **Anns** test was warranted in addressing that issue. It was noted in **Cooper v. Hobart** and affirmed in **Childs v. Desormeaux**, 2006 SCC 18 that before engaging in the **Anns** analysis the Court must decide whether the case is within an established category in which the jurisprudence has already recognized a duty of care. The **Anns** analysis is only employed in novel situations. As stated in **Canadian Tort Law**:

In considering whether the duty being challenged is a novel one and subject to the new **Anns** analysis, it should first ... be determined whether it is in one of the categories that have been established or within a category analogous to an established category.... Analogous duties need not be tested by the new **Anns** formula either. Judges should not be narrow-minded but open-minded in the task of considering whether a truly new category or whether an analogous category is involved There are not that many imaginative new duty claims available. Most have been thought of before. It must also be remembered that not every new fact situation can be considered a new category of case. Duty is a general notion describing a class or type of case, not a particular fact situation. The minute details of impugned conduct is not the stuff of duty but the task of the breach analysis.

pp. 302-303

[25] In considering whether a proposed duty is within an established or analogous category the court is not restricted by the litigant's description of that duty. The court must decide whether the issue before it is truly the determination of whether there exists a certain broad duty covering a class of cases or whether it is in fact the ascertainment of the applicable standard of care, i.e., what would constitute the reasonable care required to discharge a recognized duty of care. In my view, the inspection of electrical systems or plumbing systems or a building's structural integrity are instances of what may be required in particular situations to prove that reasonable care was taken by a property owner to prevent damage to persons and property on adjoining premises. It is established at law that a property owner/occupier has a duty to take reasonable care to prevent such damage. **Halsbury's Law of England**, para. 9 above. That duty was affirmed in **Cunard and Wife v. Antifyre, Limited**, [1933] 1 K.B. 551 (Div. Ct.) in which, owing to the defendants' failure to repair, a piece of guttering fell through the glass roof of the plaintiffs' kitchen which projected beyond the back wall of the premises occupied by the defendants. Talbot J. held that the plaintiffs' claim did not lie in nuisance:

and that the plaintiff's true cause of action (if they have one) is for negligence, for failure by an occupier of property to take reasonable care that his property does not get into such a state as to be dangerous to adjoining property or persons lawfully thereon.

p. 557

[26] As authority for that proposition Talbot J. cited **Donoghue v. Stevenson**, [1932] A.C. 562 and **Le Lievre v. Gould**, [1893] 1 Q.B. 491 (C.A.) in which latter case the English Court of Appeal specifically affirmed the duty of a property owner to take due care not to do that which could injure nearby properties or persons.

[27] In addition to the foregoing line of cases which establish the general duty of property owners/occupiers to take reasonable care to prevent damage to adjoining properties there is a separate line of cases addressing liability for the escape of fire. See **Klar, Lewis N., Tort Law**, 4th ed. (Toronto: Carswell, 2008) at 635-639. The early common law imposed strict liability upon owner/occupiers for fire which escaped from their premises. That was mitigated in England by enactment of the **Fires Prevention (Metropolis) Act, 1774** (the Act) which excluded liability for fires which "accidentally begin". That Act does not cover a fire which begins or is spread by negligence. **H. & N. Emmanuel Ltd. v. Greater London Council et al.**, [1971] 2 All E.R. 835 (C.A.). There being no apparent local custom or practice to the contrary, the Act was part of the English law received in this jurisdiction as of 1832. See **Port Coquitlam v. Wilson**, [1923] S.C.R. 235 respecting the application of the Act in British Columbia. These authorities stand for the proposition that an owner/occupier is responsible for damages caused by the escape of fire if the fire is caused by his or her negligence and that the onus of proving negligence falls upon the plaintiff. See **Franks v. Sanderson**, [1988] 5 W.W.R. 113 (B.C.C.A.).

[28] It follows from the above-noted general authorities and those pertaining to the escape of fire that an owner/occupier does owe a duty to take reasonable care to prevent damage, and in particular, damage caused by fire, to persons and property on adjoining premises.

[29] Accordingly I now turn to the contentions that the Murphys omitted to do that which a reasonable person would have done in respect of the electrical system on their property.

[30] Reference was made to the St. John's Electrical By-Law, By-Law No. 1321 which provided:

20(1) It shall not be lawful to have any defective or hazardous electrical work or defective or hazardous electrical installation in any building in the City of St. John's.

There is no requirement or recommended procedure provided for periodic inspection of buildings in St. John's to ensure compliance. It is well established that contravention of a statute, and thereof a by-law, is not an independent basis for tort liability. In **The Queen (Can.) v. Saskatchewan Wheat Pool**, [1983] 1 S.C.R. 205 the Supreme Court of Canada rejected the view that breach of a statute constituted negligence *per se*, giving rise to absolute liability. The civil consequences of a breach of a statute are determined within the law of negligence. The statute would be relevant insofar as it indicates a standard of reasonable conduct:

Legislative standards are relevant to the common law standard of care, but the two are not necessarily co-extensive. The fact that a statute prescribes or prohibits certain activities may constitute evidence of reasonable conduct in a given situation, but it does not extinguish the underlying obligation of reasonableness.

Ryan v. Victoria (City) at para. 29. And see **Exploits Valley Air Services Ltd. v. College of the North Atlantic (Board of Governors)**, 2005 NLCA 54 at para. 26.

[31] A finding of negligence must be based on a failure to take reasonable care and therefore relates to the actual or constructive knowledge of the alleged tortfeasor prior to the fire. Reasonable care, the established standard in negligence is an objective standard – it is the care that would have been taken in the circumstances by a person of ordinary intelligence and prudence. A reasonable person will conduct himself or herself so as to prevent the creation of reasonably foreseeable risks of harm. **Resurffice Corp. v. Hanke**, 2007 S.C.C. 7. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. **Ryan v. Victoria (City)** at para. 28.

[32] Counsel for Chafe contended that the Murphys did not take reasonable care in that they failed to inspect their electrical system, though there was a reasonably foreseeable risk of harm. The evidence and findings of the trial judge however do not support the conclusion that the defect in the electrical

system causing the fire was reasonably foreseeable. The Murphys had continued the longstanding commercial use of the property. There was no evidence of prior problems with the electrical system and the trial judge specifically found that the Murphys had no indication of any deficiency in the electrical system.

[33] With respect to the potential for harm it must be borne in mind that the use of electric wiring for domestic or, as in this case, commercial use is an ordinary incident of modern life. In the absence of cause for concern the continued use of an existing electrical system cannot be regarded as inherently dangerous. See **Collingwood v. Home & Colonial Stores Ltd.**, [1936] 3 All E.R. 200 (C.A.) commenting on that aspect of the principle in **Rylands v. Fletcher**.

[34] Counsel for Chafe disputed the trial judge's determination respecting the costs of electrical inspections, and its effect upon the recognition of a duty of care. Cost implications are a factor in determining whether the standard of reasonable care was met. There was however no evidence cited respecting the costs of periodic inspections.

[35] It is often useful in determining whether a person's conduct was reasonable to have regard to evidence of general practice. In this case there was no evidence of general practice with respect to electrical inspections of commercial properties. As noted above there are no regulatory directions respecting periodic electrical inspections.

[36] Having regard to the foregoing it is my conclusion that in the circumstances of this case the Murphys did not breach the standard of care required by them.

NUISANCE

[37] In discussing the claim based in nuisance the trial judge cited including the following text passage:

Basically, what the courts are doing here is furnishing compensation to those whose use and enjoyment of private land or public rights is being interfered with by the unreasonable use of another's land.

(My underlining)

Canadian Tort Law, pp. 559-560

[38] The trial judge reasoned as follows:

[31] It is to be noted that an essential element of the tort of nuisance is that the tortfeasor's use of his own land must be unreasonable and must interfere with the use and enjoyment of the private land of another. The definition imports some sort of realization or awareness on the part of the tortfeasor of his activities which give rise to the nuisance. I am not satisfied in the case at hand that there was any such awareness on the part of the Defendants of any activities conducted by them on their own property which would or could cause a nuisance to the Chafe Property. I am therefore not satisfied that the tort of nuisance has been committed.

[39] Counsel for Chafe submits that awareness on the part of the alleged tortfeasor is not an essential element of nuisance and that it is solely the effect of the impugned conduct that is determinative. Counsel referred to **Pilgrim v. Milner** (1997), 155 Nfld. & P.E.I.R. 221 (NFCA) in support of that assertion. In deciding that case, which decided whether landowners had a right to water from a system owned by an adjacent property owner, it was unnecessary for this Court to discuss all aspects of the law of nuisance. Nevertheless the Court did comment on the nature of the impugned conduct as follows:

[24] ... But, there was no material damage to the land (the lots of the appellants), nor were noxious substances diverted to the land to interfere with the occupier's enjoyment of it. This case does not turn on whether the behaviour of Milner or of the appellants in their negotiations was reasonable. It cannot be an unreasonable interference with the use and enjoyment of land of the appellants to do what one has every legal right to do when it does not interfere with a right of the appellants - who had no right to the flow of water in the pipes.

[40] This comment confirms that, as referenced by the trial judge, the reasonableness of the use of land by the alleged tortfeasor is relevant in determining whether nuisance has been established. As stated by Klar:

the fact that the defendant's conduct is consistent with ordinary uses of land is a factor in determining whether it is a reasonable or unreasonable interference for the purpose of balancing conflicting uses.

p. 742, citing **270233 Ontario Ltd. v. Weall & Cullen Nurseries Ltd.** (1997), 41 C.C.L.T. (2d) 239 (Ont. C.A.)

To the same effect is **Canadian Tort Law** which states:

The ultimate question to be asked is whether the defendant is using the property reasonably having regard to the fact that the defendant has a neighbour.

p. 573

[41] The determination of whether certain conduct constitutes a nuisance therefore turns on the balancing of the interests of adjacent landowners having regard to the reasonableness of the impugned conduct. This was clearly stated by LaForest J. in **Tock v. St. John's Metropolitan Area Board**, [1989] 2 S.C.R. 181 as follows:

The assessment whether a given interference should be characterized as a nuisance turns on the question, simple to state but difficult to resolve, whether in the circumstances it is reasonable to deny compensation to the aggrieved party. The courts have traditionally approached this problem of reconciling conflicting uses of land with an eye to a standard based, in large part, on the formulations of Knight Bruce V.-C. in *Walter v. Selfe* (1851), 4 De G. & Sm. 315, 64 E.R. 849, and Bramwell B. in *Bamford v. Turnley* (1862), 3 B. & S. 66, 122 E.R. 27, at pp. 83-84 and at pp. 32-33 respectively. There it was observed that the very existence of organised society depended on a generous application of the principle of "give and take, live and let live". It was therefore appropriate to interpret as actionable nuisances only those inconveniences that materially interfere with ordinary comfort as defined according to the standards held by those of plain and sober tastes. In effect, the law would only intervene to shield persons from interferences to their enjoyment of property that were unreasonable in the light of all the circumstances.

p. 1191

And see **Pugliese v. Canada (National Capital Commission)** (1977) 3 C.C.L.T. 18 at pp. 51-52 (Ont. C.A.)

[42] In this case the reasonableness of the Murphys' conduct that falls to be considered is the use of their property's electrical system in operating a retail store in a retail district. Both the store operation and the related usage of the electrical system were long established and were not alleged to be unreasonable *per se*. There was no evidence of prior problems with the electrical system.

[43] In my view in order for ordinary conduct, such as the use of the electrical system in operating a store, to constitute a private nuisance a single isolated act causing damage should not be regarded as sufficient. See

Bolton v. Stone, [1949] 2 All E.R. 851 per Jenkins L.J.; **Alberta v. Hay**, [2002] 5 W.W.R. 653 at para. 82. In such circumstances a pattern of misfeasance or nonfeasance should be required – **Copithorne v. Transalta Utilities Corp.**, 2005 ABQB 169 – or the alleged tortfeasor should otherwise know or ought to have known that he or she was “causing or permitting a state of affairs from which damage is likely to result”. **Bolton v. Stone** at pp. 855-856. That was likewise the conclusion in **Nikka Overseas Agency v. Canada Trust Co. et al.** (1961), 31 D.L.R. (2d) 368 (B.C.S.C.) in which Lord J. discussed the earlier English decision in **Spicer v. Smee**, [1946] 1 All E.R. 489, a case cited by Counsel for Chafe. I agree with the conclusion of Lord J. that **Spicer v. Smee** is not in accordance with subsequent Canadian authority and that “if the defendant did not create the nuisance he must, if he is to be held responsible, have continued it, which I think means simply neglected to remedy it when he became or should have become aware of it” per Lord Wright in **Sedleigh-Denfield v. O’Callaghan**, [1940] A.C. 880 at p. 905.

[44] Accordingly, I conclude in the circumstances of this case that the trial judge did not err in dismissing the claim in nuisance.

DAMAGES

[45] As liability has not been established for the reasons stated above it is unnecessary to address the issue pertaining to damages.

SUMMARY

- 1) The trial judge made no palpable and overriding error in his findings of fact;
- 2) The trial judge erred in finding that a duty of care was not owed by the Murphys to adjoining property owners;
- 3) The Murphys did not breach the applicable standard of care;
- 4) The trial judge made no error in dismissing the claim in nuisance.

[46] Accordingly, the appeal is dismissed. The Murphys shall have their costs in this Court to be taxed on a party and party basis.

K.J. Mercer, J.A.

I concur:

B.G. Welsh, J.A.

I concur:

L.R. Hoegg, J.A.