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TAB 1

THE SIX-MINUTE Environmental Lawyer 2018

Tort Claims in *Huang v Fraser Hillary's Limited*

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cpd Continuing Professional Development

The Six-Minute Environmental Lawyer 2018: Tort Claims in *Huang v Fraser Hillary's Limited*

Huang v Fraser Hillary's Limited

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Introduction

The Ontario Court of Appeal's ("OCA") decision in *Huang v Fraser Hillary's Limited* ("*Huang*") is the latest significant contaminated land decision in a line of cases since *Tridan v Shell Canada.*[1] The OCA made new findings relating to the *Environmental Protection Act* ("EPA"), s. 99[2] and considered the classic environmental torts of strict liability under the doctrine of *Rylands v Fletcher*, trespass, negligence and nuisance. Liability was found in nuisance and statutory breach of EPA, s. 99. The OCA's affirmation of the award of damages based on the cost to remediate confirms that the Ontario courts are trending toward restoration costs as the appropriate measure of damages.

This paper features both Ontario Superior Court of Justice ("OCJ") and the OCA's key findings on environmental tort claims pleaded in *Huang*. This paper highlights why Mr. Huang succeeded in his claim for nuisance and why he failed to prove other torts. This paper does <u>not</u> focus on Mr. Huang's successful claim under EPA, s. 99 as other speakers will discuss EPA, s. 99.

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1 *Tridan v Shell Canada Products Ltd*, 2002 CanLII 20789, 57 OR (3d) 503, (Ont CA) [*Tridan*].
2 EPA RSO 1990, c E 19.

The Facts

Eddy Huang purchased 1263 Bank Street, Ottawa ("1263 Bank") in 1972 and 1255 Bank Street, Ottawa ("1255 Bank") in 1978. The properties have been rented.

Fraser Hillary's Limited ("FHL") owns 1235 Bank Street, Ottawa ("1235 Bank"). 1235 Bank is directly north of 1255 Bank; 1255 Bank is directly north of 1263 Bank.

From 1960 onwards, a dry cleaner, FHL, operated at 1235 Bank. David Hillary, the president and sole director of FHL, owns 36 Cameron Avenue ("36 Cameron"). 36 Cameron is adjacent to and immediately north east of 1235 Bank (See Appendix A).

In 2002, Mr. Huang arranged for a Phase I Environmental Site Assessment, which confirmed the likely presence of contamination. Mr. Huang then arranged for a Phase II Environmental Site Assessment, which established trichloroethylene ("TCE") contamination at both of Mr. Huang's properties at 1255 Bank and 1263 Bank.

Mr. Huang's claim focuses on the time period from 1960 to 1974 when spills of tetrachloroethylene ("PCE") and TCE were known to have occurred at the dry cleaning property at 1235 Bank. In 1974, a new dry-cleaning system was installed at 1235 Bank that nearly eliminated the possibility of spills.

Summary of Court Decisions

Mr. Huang claimed against FHL and Mr. Hillary (as the owner of 36 Cameron and not as a corporate director of FHL)[3] for: breach of statutory cause of action under EPA, s. 99, strict liability under the doctrine of *Rylands v Fletcher*, trespass, negligence and nuisance relating to PCE and TCE contamination.[4]

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[3] *Huang v Fraser Hillary's Limited*, 2017 ONSC 1500 at para 19, (CanLii) [*Huang*]; The authors wonder if the Trial Court and OCA decisions might have differed if Mr. Huang had claimed against Mr. Hillary in Mr. Hillary's capacity as a corporate director of FHL.

[4] *Huang*, *supra* note 2 at para 5.

The OCJ found FHL liable under EPA, s. 99 and for nuisance. The OCJ awarded Mr. Huang $1,632,500 for remediation costs and $201,726.71 for Mr. Huang's engineering costs incurred to the date of trial. The OCJ dismissed Mr. Huang's claims against FHL for strict liability, trespass and negligence.

The OCJ dismissed all of Mr. Huang's claims against Mr. Hillary as the owner of 36 Cameron.

FHL appealed on the grounds that the OCJ erred in finding FHL liable to Mr. Huang for damages under EPA, s. 99 and in nuisance.

Mr. Huang cross-appealed on the grounds that the OCJ erred in finding the defendants not liable in strict liability, trespass and negligence, and in dismissing all claims against Mr. Hillary. Mr. Huang also sought a higher award of damages for remediation costs, and an Order that FHL and Mr. Hillary implement contamination control and remedial measures at their lands.

The OCA dismissed both the appeal and cross-appeal (See Appendix B for a scorecard of the OCJ and OCA decisions in *Huang*).[5]

EPA Part X – Statutory Cause of Action – Liability Found

EPA, s. 99 lay nearly dormant for many years before the Court awarded damages based on s. 99 in *Midwest Properties Ltd v Thordarson* ("*Midwest*").[6] *Huang* is the latest case in what we anticipate will be a growing body of jurisprudence about s. 99.

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5 *Huang v Fraser Hillary's Limited*, 2018 ONCA 527 at para 49, (CanLii) [*Huang* Appeal Decision].
6 *Midwest Properties Ltd v Thordarson* 2015 ONCA 819, 128 OR (3d) 81 [*Midwest*].

At trial, FHL argued that it could not be found liable under EPA, s. 99 because this would constitute a *retrospective* application of the law. FHL highlighted that the spills occurred from 1960 to 1974, well before s. 99 was introduced in the legislation in 1979 and proclaimed in legal force in 1985.[7] The OCJ disagreed with FHL's arguments. The trial court found that s. 99 applied *prospectively* in *Huang* to permit compensation for spills that occurred prior to the section's enactment.[8]

Mr. Hillary argued that as a homeowner of 36 Cameron, he was not the owner or person that had charge or control of the pollutant before the first discharge.[9] The OCJ accepted this argument, and dismissed the EPA, s. 99 claim against Mr. Hillary.[10]

On appeal, FHL argued that the trial judge erred by retrospectively applying Part X of the EPA. The OCJ and OCA rejected this argument, and found that while the spills may have occurred before the enactment of EPA, s. 99, FHL's obligations under this section are ongoing and therefore prospective.[11]

Another author's conference paper sets out more detail about the retroactive application of EPA, s. 99.

Tort Liability

Mr. Huang's tort claim for strict liability, trespass, and negligence failed, while his claim for nuisance succeeded. This paper examines each tort claim in turn.

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7 *Huang*, *supra* note 2 at paras 78-79.
8 *Ibid* at para 82.
9 *Ibid* at para 103.
10 *Ibid* at para 109.
11 *Huang* Appeal Decision, *supra* note 5 at para 31.

Strict Liability - Dismissed

At trial, the Court dismissed Mr. Huang's claim for strict liability against both FHL and Mr. Hillary. The trial judge held that, similar to the situation in *Windsor v Canadian Pacific Railway*,[12] the use of PCE and TCE by the dry cleaner was not a "non-natural" or "special" use of 1235 Bank, and therefore the defendants could not be found liable in strict liability.[13] On appeal, the parties did not dispute the trial judge's findings on strict liability and the OCA did not comment on strict liability or on the non-natural use of the land as a dry cleaning business.

Trespass - Dismissed

The trial judge noted that the essential characteristics of trespass include voluntary, and direct physical intrusion onto a plaintiff's property.[14] The trial judge found that the PCE and TCE entered Mr. Huang's property indirectly. The contaminant entered into the ground at 1235 Bank Street, filtered down and was then carried to Mr. Huang's properties through the movement of groundwater.[15]

To support this finding, the trial judge relied on expert opinion evidence suggesting that the contaminant would have sunk into the ground at 1235 Bank, and spread by diffusion in groundwater.[16]

On appeal, Mr. Huang argued that the trial judge erred in finding FHL not liable for trespass. The OCA rejected this argument and confirmed the trial judge's finding that FHL is not liable in trespass. The OCA held that this finding of mixed fact and law was open for the trial judge to conclude.[17]

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12 *Windsor v Canadian Pacific Railway*, 2014 ABCA 108 (Alta CA).
13 Huang, *supra* note 2 at para 61.
14 *Ibid* at para 49.
15 *Ibid* at paras 52-55.
16 *Ibid* at para 54.
17 *Huang* Appeal Decision, *supra* note 5 at para 37.

Negligence - Dismissed

At trial, the OCJ dismissed the claim against FHL and Mr. Hillary for negligence because Mr. Huang failed to demonstrate causation.[18] To successfully prove negligence, a plaintiff must establish the following constituent elements: a duty of care, breach of the applicable standard of care, causation, foreseeability and damages.

The trial judge found that a duty of care existed for both FHL and Mr. Hillary;[19] however neither defendant breached the standard of care until about 2013.

PCE and TCE spills occurred between 1960 and 1974. These spills of dry cleaning solvent did not breach the applicable standard of care because the recommended method of disposal of the contaminants at the time was to pour the contaminants on the ground.[20]

From 2002 onwards, the trial judge found that FHL did not breach the applicable standard of care. The OCJ found that FHL took reasonable measures, "such as engaging experts and attempting and pursuing the various strategies recommended by their expert."[21]

From 2013 onwards, the trial judge found both FHL and Mr. Hillary failed to meet the applicable standard of care. The defendants failed to take reasonable steps to prevent or limit further harm to their neighbours.[22] However, the trial judge concluded that after 2013, Mr. Huang could not demonstrate any additional harm or loss suffered, resulting from the defendants' inaction.[23]

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18 *Huang*, *supra* note 2 at para 156.
19 *Ibid* at paras 158-159.
20 *Ibid* at paras 163-164.
21 *Ibid* at para 165.
22 *Ibid* at para 165.
23 *Ibid* at para 169.

The OCA upheld the trial judge's conclusion that neither FHL nor Mr. Hillary was liable in negligence. The OCA did not find any palpable and overriding error in the trial judge's finding of fact, and the OCA owed deference to the OCJ's decision.[24] The OCA held that it was logical for the trial judge to conclude that Mr. Huang did not establish causation "given that there had been no increase in contamination during the relevant time that would have any impact on the requirement for remediation or its associated costs."[25]

Nuisance – Liability Found

Mr. Huang's nuisance claim was the only successful tort cause of action in *Huang*. The trial judge found, and the OCA upheld, that FHL (but not Mr. Hillary) was liable in private nuisance.

The trial judge relied on the test for private nuisance as set out in *Antrim Truck Centre Ltd v Ontario (Transportation),*[26] *TMS Lighting Ltd v KJS Transport Inc*,[27] and *Smith v Inco Limited* ("*Smith v Inco*")[28].

To claim private nuisance, a plaintiff must establish that a defendant causes or allows either of the following:[29]

1 material physical damage to a plaintiff's property, or

2 substantial and unreasonable interference with the use or enjoyment of the plaintiff's land.

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[24] *Huang* Appeal Decision, *supra* note 5 at para 33.
[25] *Ibid* at para 35.
[26] *Antrim Truck Centre Ltd v Ontario (Transportation)*, 2013 SCC 13, 355 DLR (4th) 666 [*Antrim*].
[27] *TMS Lighting Ltd v KJS Transport Inc*, 2014 ONCA 1, 314 OAC 133 [*TMS*].
[28] *Smith v Inco Limited*, 2011 ONCA 628, 107 OR (3d) 321 [*Smith v Inco*].
[29] *Smith v Inco*, *supra* note 28 at para 33; *Huang*, *supra* note 2 at para 118.

In *Huang*, the OCJ did not delve deep into a material "physical damage" analysis, and the OCA did not consider material physical damage at all. This is in contrast to the Court's analysis in *Smith v Inco Limited* ("*Smith v Inco*"), where the OCA stated that "a mere chemical alteration in the content of soil, without more, does not amount to physical harm or damage to the property."[30] The OCA in *Smith v Inco* further clarified that physical harm or damage arises when the change in chemical composition has a detrimental effect on a plaintiff's land, or use rights associated with that land.

Regarding the second branch of a private nuisance claim, the interference must be non-trivial, and amount to more than "trifling interference."[31]

The trial judge found the interference in *Huang* was substantial and non-trivial for several reasons, including:[32]

- the concentrations of PCE and TCE in soil and groundwater are above the Ministry of Environment and Climate Change (now the Ministry of Environment, Conservation and Parks) standards
- PCE and TCE continue to migrate, and
- PCE and TCE may cause adverse effects to neighboring properties.

The OCJ also noted that Mr. Huang is unable to redevelop 1255 Bank or 1263 Bank until the properties are remediated, and the cost of remediation is significant, no matter the remediation option that Mr. Huang ultimately pursues.

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30 *Smith v Inco*, *supra* note 28 at para 55.
31 *Huang*, *supra* note 2 at para 119.
32 *Ibid* at para 125.

The trial judge found the interference to be unreasonable, and noted that unlike in *Smith v Inco*,[33] the Ministry of the Environment and Climate Change ("MOECC") was actively and significantly involved with the properties in *Huang*. Additionally, although the MOECC ordered FHL and Mr. Hillary to conduct further delineation work, FHL and Mr. Hillary did not comply with the Order. Finally, there was evidence that the MOECC was unlikely to approve a risk assessment for a site which has free phase product.[34]

FHL argued that any interference with the use of Mr. Huang's land was not unreasonable.[35] The trial judge disagreed, and found there was evidence to conclude that Mr. Huang could have developed his properties for mixed residential and commercial use, but-for the solvent contamination. In any event, the trial judge found that Mr. Huang could not develop his properties for any use until the properties are remediated.[36]

The trial judge declined to find Mr. Hillary liable in nuisance, emphasizing that Mr. Hillary did not own land abutting 1255 Bank or 1263 Bank. The trial judge cited *Hoffman v Monsanto Canada Inc.,*[37] and held that Mr. Hillary would have to have committed a wrongful act to be found liable for nuisance as a party who did not own abutting property.[38]

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33 *Smith v Inco*, *supra* note 28.
34 *Huang*, *supra* note 2 at para 128.
35 *Ibid* at para 134.
36 *Ibid* at paras 134-135.
37 *Hoffman v Monsanto Canada Inc*, 2005 SKQB 255, leave to appeal to SCC refused, [2007] SCCA No 347.
38 *Huang*, *supra* note 2 at para 147.

Additionally, Mr. Hillary was not liable for permitting a nuisance to continue as Mr. Hillary did not know about the contamination until after Mr. Huang's properties were already contaminated.[39] Mr. Huang also did not establish "that any inaction on the part of Mr. Hillary since becoming aware of the contamination…caused any of the substantial interference with [Mr. Huang's] properties".[40]

On appeal, FHL argued that the trial judge erred in finding FHL liable for nuisance. FHL asserted that foreseeability of harm is a constituent element of the tort of nuisance and the trial judge erred by failing to consider whether the environmental damage was reasonably foreseeable as part of his nuisance analysis.

The OCA rejected FHL's arguments and upheld the trial judge's finding that FHL is liable in nuisance. The OCA cited a lack of any binding Canadian legal authority that foreseeability is a constituent element of the tort of nuisance.[41] The OCA concluded that nuisance is useful for environmental prosecution claims, and "The addition of a foreseeability requirement blurs the distinction between negligence and nuisance."[42]

The OCA held that a foreseeability requirement would ultimately compromise the utility of the tort of nuisance, and ultimately rejected its application.

The OCA also held that the trial judge was right to find that Mr. Hillary was not liable in nuisance. Mr. Huang argued that the trial judge erred in finding that Mr. Hillary's failure to take remedial measures, since becoming aware of contamination on his property, did not cause substantial interference with Mr. Huang's properties.

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[39] Mr. Huang relied on *Schoeni et al v King et al*, 1943 CanLII 91 (ON SC) at p 490, [1943] OR 478 to argue that Mr. Hillary permitted a nuisance: "The occupant of property will be liable for a nuisance not created by him, and even though it has arisen without his own act or default, if he omits to remedy it within a reasonable time after he knows of its existence, or ought to have become aware of it."

[40] *Huang*, *supra* note 2 at para 149.

[41] *Huang* Appeal Decision, *supra* note 5 at para 22.

[42] *Ibid*.

The OCA held that the trial judge was right to find that Mr. Hillary's property is not the source of the contaminant, and afforded deference to the OCJ. The OCA found no error in the trial judge's conclusion that Mr. Huang was not liable in nuisance.

Damages

Counsel for Mr. Huang presented the OCJ with eight different remediation options for the Court's consideration. The OCJ considered each option, and ultimately decided to award damages based on an adjusted remedial option to reflect the properties' highest and best use, which is a commercial and residential mix.[43] The OCA afforded deference to the trial judge in his assessment of damages, and stated that appellate courts should only interfere with a damages award in limited situations.[44] The OCA found that the trial judge assessed damages after carefully considering the evidence before him, and was entitled to reject the damages options that he did not find suitable for the circumstances.[45]

Huang confirms that Ontario courts are trending toward awarding damages for restoration costs, which fully restores a tort claimant and emphasizes the importance of environmental protection and the "polluter pays" principle. This decision follows the OCA's decision in *Midwest*[46] where the court awarded damages based on environmental restoration costs, not diminution in property value. The OCA in *Midwest* recognized that "the restoration approach is superior, from an environmental perspective, to the diminution in value approach."[47] *Huang* follows in the footsteps of *Midwest* – both OCA decisions.

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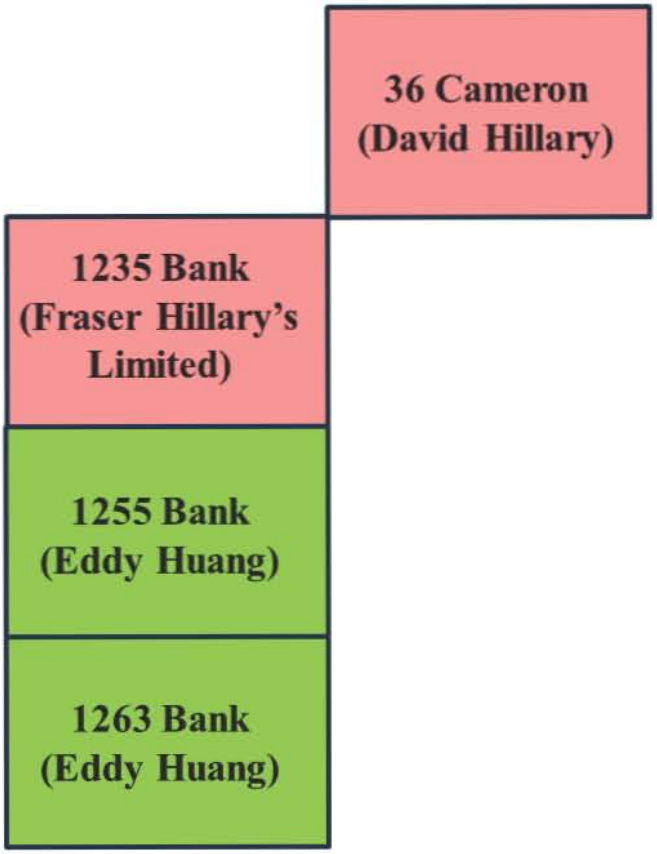
43 *Huang*, *supra* note 2 at paras 196-198.
44 *Huang* Appeal Decision, *supra* note 5 at para 45.
45 *Huang* Appeal Decision, *supra* note 5 at para 46.
46 *Midwest*, *supra* note 6.
47 *Ibid*, at para 62.

APPENDIX A: Relative Locations of Properties



APPENDIX B: OCJ and OCA Scorecard

	Fraser Hillary's Limited (FHL)		David Hillary (Private Property Owner)	
	Trial	Court of Appeal	Trial	Court of Appeal
EPA, s. 99	√	√	X	X
Strict Liability (*Rylands v. Fletcher*)	X	X	X	X
Trespass	X	X	X	X
Negligence	X	X	X	X
Nuisance (Private)	√	√	X	X
Damages	√	√	X	X

X = OCJ and OCA dismissed Mr. Huang's claim

√ = OCJ and OCA found for Mr. Huang

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