**NOVA SCOTIA COURT OF APPEAL**
**Citation:** ***Halifax (Regional Municipality) v. Willis***,
2010 NSCA 76

**Date:** 20101014
**Docket:** CA 318258
**Registry:** Halifax

**Between:**

Halifax Regional Municipality

Appellant

v.

Allison Willis

Respondent

| | |
|---|---|
| **Judges:** | Oland, Beveridge and Farrar, JJ.A. |
| **Appeal Heard:** | May 27, 2010, in Halifax, Nova Scotia |
| **Held:** | Appeal dismissed per reasons for judgment of the Court. |
| **Counsel:** | Martin Ward, Q.C. and Karen E. MacDonald, for the appellant<br>David Grant, for the respondent |

**Reasons for judgment**:

## I. BACKGROUND:

[1] Mr. Willis is 72 years of age and has resided on Willis Lane in North Preston for his entire life.

[2] Halifax Regional Municipality (HRM) built a sewage treatment plant on Old Lookout Hill Road which is at the rear of Willis Lane. The plant was constructed in 1988 and replaced the pre-existing system that had been treating sewage in North Preston area since the 1960s.

[3] The plant is located at the rear of Mr. Willis' property, about 200 yards from his house. The treated effluent from the plant is discharged into Winder Lake which is approximately 450 yards from Mr. Willis' home.

[4] At the time of its construction the plant was the conventional method of treating sewage.

[5] In 1998, HRM decided to upgrade the plant. The decision to upgrade the plant was in no way related to the complaints of Mr. Willis which ultimately became the subject of this action.

[6] The upgrades to the plant were completed on March 16, 2007.

[7] Mr. Willis first detected odours from the plant approximately nine months after it first opened in 1988. After two years, the smell had become by his description, wretched. He testified the smell was consistent and almost always present. It was so bad he could not open the windows in his house.

[8] In March 2004, Mr. Willis made his first complaint to an employee of HRM. No one else in his neighbourhood had complained to HRM. The Department of the Environment never contacted HRM about the operation of the plant.

[9] Mr. Willis sued HRM in nuisance. The trial took place before Nova Scotia Supreme Court Justice Gerald R. P. Moir over two days in May 2009. He accepted the evidence of Mr. Willis and the witnesses who gave evidence on his behalf. The trial judge concluded that Mr. Willis and his family were subjected to odours from the plant more or less consistently during the 19-year period between 1988 and 2007. After the upgrades to the plant were completed in 2007, there were no further odours.

[10] The trial judge found the interference with Mr. Willis' use of his land to be substantial and unreasonable. Mr. Willis could not enjoy the countryside of his own farm and home, and was unable to participate in outdoor activities with his family. Further, the trial judge found his ability to enjoy his home was compromised frequently for those years and awarded him $55,000 in damages plus pre-judgment interest at 2.5% for 19 years, for a total of $ 81,125 together with costs and disbursements [reported at 2009 NSSC 244].

[11] For the reasons that follow, we dismiss the appeal with costs to the respondent and vary the judgment below to reflect the appropriate award of prejudgment interest.

## II. ISSUES:

[12] In summary, HRM raises the following issues:

1) whether the trial judge gave adequate consideration to the utility of the appellant's conduct;

2) whether the trial judge properly interpreted the defence of statutory authority;

3) whether the trial judge properly interpreted the defence of statutory immunity; and

4) whether the trial judge erred in law in his assessment of damages.

**Standard of Review:**

[13] The starting point on any appeal is to consider the standard on which a trial judge's decision should be reviewed.

[14] Our principal role is to ensure that the trial judge applied the correct legal principles to the facts in reaching a result. Where the question is a purely factual matter, significant respect is given to the findings of the trial judge. This Court will only intervene if there is an error in legal principle or a palpable and overriding error in findings of fact. At the risk of oversimplification, an appeal is not an opportunity for three judges to retry the case. **Children's Aid Society of Cape Breton-Victoria v. A.M.**, 2005 NSCA 58, at ¶ 26.

[15] On questions of law, the standard of review is correctness. Mixed questions of fact and law are reviewed on the palpable and overriding standard unless the alleged error of law can be isolated from the mixed question of fact and law. If it can, it will be reviewed on the correctness standard. **McPhee v. Gwynne-Timothy**, 2005 NSCA 80 at ¶ 33.

[16] HRM argues that all of its grounds of appeal are questions of law subject to a correctness standard.

[17] Its position on the standard of review is simply a bold statement with very little analysis as to why the standard is correctness. With respect, we disagree that the grounds of appeal are all questions of law. However, we will address the appropriate standard to be applied when addressing the individual grounds of appeal.

**Issue 1: Did the trial judge give adequate consideration to the utility of the appellant's conduct?**

[18] A claim in nuisance requires a balancing of competing interests. Where the interference arises from the provision of a service for the overall benefit of the public, as it does here, one of the interests for consideration is the social or public utility of the enterprise. Succinctly put, HRM argues the learned trial judge failed to give adequate consideration to the utility of HRM's conduct when determining

that the plant was a nuisance. It says the evidence establishes the plant was of great public utility and necessary for the community's overall well being.

[19] It argues that, although the trial judge correctly identified the factors necessary for the determination of a nuisance, he failed to give appropriate weight to the balancing of the competing interests.

[20] HRM suggested this is a pure question of law.

[21] We disagree.

[22] This ground of appeal, at best, raises a question of mixed fact and law. The trial judge was clearly applying a legal standard to the facts as he found them. Therefore, this ground of appeal will be reviewed on the palpable and overriding error standard.

[23] In the decision, the trial judge references the decision of the Ontario Superior Court of Justice in **Pyke v. Tri Gro Enterprises Ltd.**, [1999] O.J. No. 3217 (Q.L.), which sets out the principles of nuisance law in the context of obnoxious odours. Although he did not quote from the decision, he correctly summarized its principles.

[24] At ¶ 50 of the decision, immediately after citing **Pyke**, **supra**, the trial judge found:

> [50] Liability in nuisance is premised on a substantial and unreasonable interference with the use and enjoyment of land. Because the law attempts to strike a balance, not always a fine balance, between conflicting rights of use, the inquiry into reasonable use involves a broad assessment of the circumstances in which various factors are considered.

This is a correct statement of the law. The trial judge committed no error of law when instructing himself on the law to be applied to a claim in nuisance. HRM's argument is essentially that he failed to give appropriate weight to the utility of the plant when comparing it to the other factors to be considered and as such erred. As noted, the trial judge's determination, with respect to this ground of appeal, must be reviewed on the palpable and overriding error standard.

[25] At ¶ 57 the trial judge addressed the issue of the utility of the plant:

> [57] Without question, the defendant's operation of a sewage treatment plant at North Preston is of great public value. That factor cannot be allowed to totally eclipse Mr. Willis' rights. As will be seen in connection with the defence of statutory authority, the law of nuisance does not require that a person give up their property rights for the public good without compensation.

[26] HRM argued, because more time was spent discussing the first two factors – the type and severity of the harm, and the character of the locale – overemphasis was placed on the substantial personal discomfort to the respondent and resulted in a failure to "give much" weight to the utility of HRM's use of the property. In doing so, HRM says the trial judge erred.

[27] A review of the trial record and the trial judge's decision reveals that he was very much aware of the factors he had to consider in determining whether the sewage plant constituted a nuisance. He identified and weighed those factors and, only after doing so, determined that the sewage treatment plant substantially and unreasonably interfered with Mr. Willis' use of his property, thereby creating a nuisance.

[28] While the trial judge's written reasons on the first two factors are more extensive than on the third, it is clear that he turned his mind to the evidence of the utility of the plant and determined, despite its great public value, it did not trump Mr. Willis' right to enjoy his property. As emphasized earlier, it is not for us to re-weigh the evidence.

[29] In reaching this conclusion, the trial judge committed no palpable and overriding error. We dismiss this ground of appeal.

**Issue 2: Did the trial judge properly interpret the defence of statutory authority?**

[30] HRM argues that the trial judge erred in his interpretation and application of the defence of statutory authority. It says the odours from the plant were an inevitable consequence of a public work and, thereby, authorized by statute. This ground of appeal, in our view, raises two issues:

1. Did the trial judge identify the appropriate test to be applied in determining whether the defence of statutory authority was available to HRM?

This is a question of law and will be reviewed on the correctness standard.

2. If the trial judge correctly identified the test, did he err in failing to apply it to the facts of this case?

This is a question of mixed law and fact and will be reviewed on a palpable and overriding error standard.

The Appropriate Test

[31] In addressing whether the trial judge applied the appropriate test, at ¶ 60 and 61 the trial judge reviewed the authorities on the issue:

> [60] At para. 54 of *Ryan*, Justice Major writes for the court:
>
> > Statutory authority provides, at best, a narrow defence to nuisance. The traditional rule is that liability will not be imposed if an activity is authorized by statute and the defendant proves that the nuisance is the "inevitable result" or consequence of exercising that authority.
>
> [61] The court in *Ryan* (para. 55) adopted Justice Sopinka's statement of the defence at para. 94 of *Tock*:
>
> > The defendant must negative that there are alternate methods of carrying out the work. The mere fact that one is considerably less expensive will not avail. If only one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance. It is insufficient for the defendant to negative negligence. The standard is a higher one. While the defence gives rise to some factual difficulties, in view of the allocation of the burden of proof they will be resolved against the defendant.

[32] At ¶ 63, the trial judge concluded HRM had to prove, on a balance of probabilities, that "it was practically impossible to avoid the nuisance" in order to avail itself of this defence.

[33] The trial judge identified the appropriate legal test and as such did not err in identifying the test to be applied to the issue before him.

Application of the Test

[34] We now turn to the second question to determine whether he erred in the application of that test. In our view, he did not.

[35] The appellant focuses on the words of the trial judge in ¶ 64 where he held:

> [64] ... [HRM] did not prove that a system that avoided the kinds of odours to which Mr. Willis was subjected did not exist, or was practically impossible to install.

[36] HRM argues that the trial judge misstated the test and it did not have to prove that a system that avoided the kinds of odours to which the respondent was subjected did not exist or is practically impossible to install. Rather, it says, the defence of statutory authority only required the appellant to establish there was only one method of carrying out the work that was practically feasible and it was practically impossible to avoid the nuisance that arose from that method of carrying out the work.

[37] With respect, that is too nuanced an approach to the interpretation of the trial judge's decision. We find it difficult to accept the trial judge forgot the test which he had set out in the paragraph immediately preceding the impugned paragraph.

[38] We interpret the trial judge's reasons as following the test he set out in the previous paragraph, that is, HRM had to establish there was no alternative system that would avoid the odours, or establish it was practically impossible to avoid the nuisance.

[39] As the trial judge noted, HRM proved that the system used in North Preston, when installed in 1988, was conventional (¶ 64). However, it did not prove that it was the only practically feasible method at that time or that it was practically impossible to avoid the odours by the use of that system or any other system.

[40] In reaching this conclusion, the trial judge did not commit any palpable and overriding error. We dismiss this ground of appeal.

**Issue 3: Did the trial judge properly interpret the defence of statutory immunity?**

[41] Section 515(2) of the *Municipal Government Act*, S.N.S. 1998, c. 18 provides a defence of statutory immunity:

> 515(2) A municipality, village or inter-municipal corporation created pursuant to Section 60 is not liable for nuisance as a result of the construction or operation of a work, if the nuisance could not be avoided by any other practically feasible method of carrying out the work.

[42] The trial judge dismissed this ground of appeal for the same reasons he dismissed the defence of statutory authority.

[43] The argument of HRM with respect to this ground of appeal is identical to its argument with respect to statutory authority. It fails for the same reason that a defence of statutory authority fails.

[44] We dismiss this ground of appeal.

**Issue 4: Did the trial judge err in his assessment of damages ?**

[45] The standard of review with respect to an assessment of damages is well known. In **Saturley v. Lund**, 2008 NSCA 84, Roscoe J.A., for the court commented:

> [5] In **Port Hawkesbury (Town) v. Borcherdt Concrete Products Ltd.**, 2008 NSCA 17 at ¶ 59, this court confirmed that the standard of review on an appeal of an assessment of damages, is as set out in **2703203 Manitoba Inc. v. Parks**, [2007] N.S.J. No. 128, 2007 NSCA 36:
>
> > [76] We will not disturb a Trial Judge's award of damages unless it can be demonstrated that the judge applied a wrong principle of law or has set an amount so inordinately high or low as to be a wholly erroneous estimate. See, for example, **Toneguzzo-Norvell et al v. Savein et al** 1994 CanLII 106 (S.C.C.), (1994), 110 D.L.R. (4th) 289 (S.C.C.); **Campbell-MacIsaac v. Deveaux and Lombard**, 2004 NSCA 87 (CanLII), 2004 NSCA 87; **McPhee v. Gwynne-Timothy**, 2005 NSCA 80 (CanLII), 2005 NSCA 80; and **Ken Murphy Enterprises Ltd. v. Commercial Union Assurance**

> **Company of Canada**, [2005] N.S.J. No. 114, 2005 NSCA 53 (CanLII), 2005 NSCA 53.

[46] The appellant argues the trial judge erred in law in his assessment of damages because he:

(a) failed to take into account that the appellant was not aware of the existence of the alleged nuisance until 2004; and

(b) failed to take into account the respondent's failure to mitigate by not taking any action in a timely manner to address the alleged nuisance.

[47] For the reasons that follow, we would not give effect to these grounds of appeal. Both of these alleged errors arise from the undisputed fact that the respondent made no complaint to the appellant about the odours being generated by the sewage treatment plant until the spring of 2004. By then the appellant had already been aware for some years that the plant needed to be upgraded. These upgrades were not completed until March, 2007. In the meantime, the appellant took steps to try to abate the nuisance. It is implicit in the findings of the trial judge that these attempts to abate the nuisance from 2004 to 2007 were ineffective. We will now address the alleged errors in turn.

**a) Notice**

[48] At trial the appellant argued that if the municipality was unsuccessful in its reliance on its defenses of statutory authority and s.515( 2) of the *Municipal Government Act*, an award of damages should be nominal. This argument was inextricably linked to the attack on the reliability and credibility of the respondent's evidence concerning the length of time and the extent to which the odour actually impacted his use and enjoyment of his property. As part of that attack, the appellant quite naturally relied on the fact Mr. Willis made no complaint about the order until the spring of 2004 and that there were no complaints from any other resident. However, no legal principle or case law was referred to by the appellant in its pretrial or final submissions suggesting that an award of damages should be limited to that period when notice was first given to when the nuisance ceased. The appellant's argument at trial is best captured by the following submission (Appeal Book, p. 247):

> I will just comment briefly on quantum, My Lord. In the event that Your Lordship should find that Mr. Willis has established his claim of nuisance and that there is not a defence available to HRM be it through the MGA or statutory authority, I draw -- I have to reference the fact that Mr. Willis doesn't complain until the spring of 2004 about this odour.
>
> He says initially on his evidence on Direct that he noticed an odour I think seven or eight months in. Then he says on Cross-examination maybe it was '97/'94 or '97/'98. But the reality of it is you know if he -- I find it hard to believe I guess that he was experiencing an odour of that intensity for that long and that he doesn't complain until 2004.
>
> And so I think that if his action is allowed his damages should be limited to the period of time from the spring of 2004 when his complaints were first brought to the attention of the Department of Environment and to HRM up till the time of the upgrades in March of 2007.

[49] There is no need to recount in detail the evidence given by the respondent and his witnesses and that of the appellant's. The trial judge accurately set out the differences in their respective testimonies and made clear findings of fact. Amongst other things he found:

> [31] I find that there were various odours coming from the North Preston sewage treatment plant between the early 1990s and the last year:
>
> - several times a month a wretched stench was released into the air for periods of up to an hour
> - during heavy rains and spring run-off musty gases from inside the plant were forced outside
> - occasionally the rotating biological circulator had to be opened for repairs, and unpleasant odours were released
> - more probably than not, Winder Lake, with its solids and algae bloom produced bad odours, consistently if not constantly, at least in the good weather when it most matters.
>
> [32] I emphatically reject the municipality's submission that Mr. Willis, and his witnesses, were not truthful. I found Mr. Willis to be a credible gentleman, and I think he has suffered far worse than the municipality was prepared to recognize.

> . . .
>
> [43] I find that Mr. Willis, and his brother, friend, and other friends or family were disturbed by odours more or less consistently, at least during the good weather, when it most matters, and during heavy rains and spring run-offs. In short, I find that the plant was a nuisance.
>
> . . .
>
> [52] The interference with Mr. Willis' use of his land was substantial. For almost twenty years he frequently, not so constantly as he remembers but frequent enough to be described as consistent, could not enjoy the out-of-doors at his home and had to close his windows.

[50] This led him to conclude "I find that the odours from the sewage treatment plant substantially, and unreasonably, interfered with Mr. Willis' use of his home" (para. 58). No suggestion is made by the appellant that the trial judge committed any error in finding these facts nor in his conclusion that the appellants had committed a nuisance.

[51] With respect to assessment of damages the trial judge reasoned:

> [72] Mr. Willis' damages must attempt to restore him to the position he would have enjoyed had the tort not been committed, extremely difficult though it is to convert an intangible loss to money. He is entitled to an amount that would somehow allow him to purchase something that would give him a reward similar to the happiness of which he was deprived.
>
> [73] Ms. MacDonald suggests a nominal $5,000 with pre-judgment interest at 2.5% over the period of the nuisance, but that is premised on my rejection of Mr. Willis' evidence about the intensity and duration of odours.
>
> [74] Mr. Grant suggests $3,120 a year for a total of $53,040. While I do not agree with the method he follows, I do think that the result approximates fair restoration.
>
> [75] Mr. Willis will have judgment against the municipality for $55,000 plus simple interest over nineteen years at 2.5% a year, 5% halved to allow for the evenly accommodating loss. The total is $81,125.

[52] The appellant now argues that damages for the nuisance must be limited to the period of 2004 to 2007 on the basis that the cause of action did not arise until such time as the appellant had knowledge of the nuisance. In support for this proposition, the appellant relies on **Lee v. Shalom Branch # 178 Building Society**, 2001 BCSC 1760, [2001] B.C.J. No. 2671 (Q.L.) and **Wayen Diners Ltd. v. Hong Yick Tong Ltd.** (1987), 35 D.L.R. (4th) 722, [1987] B.C.J. No. 223 (B.C.S.C.). With respect, these cases do not support the appellant's argument in the circumstances of this case.

[53] In **Lee v. Shalom Branch # 178 Building Society** the parties were adjoining landowners. Heavy trucks traveled over the plaintiff's driveway. In 1996 the plaintiff became concerned about the deterioration of the driveway. Geotechnical engineers prepared a report which placed blame on the transverse cracks on root growth of trees located on the defendant's properties. The defendant admitted that the transverse cracks were caused by its trees. It took steps to remove the offending trees. Thereafter, there was no worsening of the cracks. Goepel J. dismissed the claim for damages in nuisance. In coming to this conclusion he relied on two lines of authority. He wrote:

> **15** The question that I must consider is whether or not the defendant can be liable in nuisance for damage that arose before they had knowledge of the nuisance. The statement of the relevant law is set out in J.G. Fleming, The Law of Torts, 9th ed. (Sydney: The Law Book Company Limited, 1998) at 477:
>
> > Merely being in occupation of land from which the nuisance emanates is no longer sufficient for liability. Despite earlier traces of a more rigorous standard, today an occupier is not an insurer. The keynote of his responsibility, redolent of negligence, has become knowledge or means of knowledge.
> >
> > Thus, whether the potential nuisance already burdened the land when he commenced occupation, or was created thereafter by an intruder or an act of nature like a tree set afire by lightning, responsibility devolves on him but not until he knows or by exercising reasonable care should have known of its existence and realised the hazard...
> >
> > Alternatively expressed in the esoteric idiom of nuisance, the occupier is liable only for "continuing" or "adopting" a nuisance. He 'continues' a nuisance, if with knowledge or presumed knowledge of its existence he fails to take reasonable means to bring it to an end, though with ample

> time to do so; he 'adopts' it if he makes any use of the erection, building, bank or artificial contrivance which constitutes the nuisance.

**16** In W.V.H. Rogers, Winfield and Jolowicz on Tort, 15th ed. (London: Sweet & Maxwell, 1998), the author discusses continuing and abating a nuisance and states at page 507:

> An occupier "continues" a **nuisance, for the creation of which he is not responsible**, if, once he knows or ought to know of its existence, he fails to take reasonable precautions to abate it and it is clear that he is not liable in damages if these conditions are not satisfied. [Emphasis added]

[54] Goepel J. also referred to **Leakey v. National Trust**, [1980] 1 All E.R. 17 where Megaw L.J. commented (p. 33):

> In any event I have no hesitation in preferring the later decision as stating the law as it now is, subject to the proviso that the duty arising from a nuisance which is **not brought about by human agency does not arise** unless and until the defendant has, or ought to have had, knowledge of the existence of the defect and the danger thereby created. [Emphasis added]

[55] These authorities clearly suggest that liability for a nuisance created by an act of nature or by a trespasser does not arise until the defendant knew or ought to have had knowledge of the problem. Whatever force such a principle may have, it does not extend to a nuisance that the defendant itself has created. Here the trial judge clearly found that the appellant had created the nuisance.

[56] In **Wayen Diners v. Hong Yick Tong Ltd.**, a water pipe belonging to the defendant leaked and caused damage to the plaintiff's premises. The pipe was buried under concrete in the defendant's basement. It was unaware of the leak. Oppal L.J.S.C. heard an application by way of stated case. The question framed was whether nuisance was a tort of absolute liability only requiring proof of water having escaped into the plaintiff's premises or is it a defence that the defendants were not aware of the leak and had no reasonable means of knowing of it. Oppal L.J.S.C. concluded that it is a defence to the tort of nuisance that the defendants were not aware, and did not have any reasonable knowledge, of the burst water pipe. Even if such a broad unqualified proposition were an unassailable principle of the law of nuisance, and we have some doubt that it is, it does not apply to these circumstances.

[57] Oppal L.J.S.C. relied on a number of authorities to conclude that the defendant was not liable. All dealt with situations where the nuisance was created by someone other than the defendant. One of the authorities he relied on was case of **Sedleigh-Denfield v. O'Callaghan**, [1940] A.C. 880. Oppal L.J.S.C. wrote:

> The Court approved and adopted the reasoning set out in the well-known case of Sedleigh-Denfield v. O'Callaghan and Others, [1940] A.C. 880 (H.L.). In that case a nuisance was created by a trespasser and the occupier of the land was held liable because he, with continued knowledge, adopted and continued the nuisance. At p. 904 Lord Wright stated as follows:
>
> > Though the rule has not been laid down by this House, it has I think been rightly established in the Court of Appeal that an occupier is not prima facie responsible for a nuisance created without his knowledge and consent. If he is to be liable a further condition is necessary, namely, that he had knowledge or means of knowledge, that he knew or should have known of the nuisance in time to correct it and obviate its mischievous effects. The liability for a nuisance is not, at least in modern law, a strict or absolute liability. **If the defendant by himself or those for whom he is responsible has created what constitutes a nuisance and if it causes damage, the difficulty now being considered does not arise**. But he may have taken over the nuisance, ready made as it were, when he acquired the property, or the nuisance may be due to a latent defect or to the act of a trespasser, or stranger. Then he is not liable unless he continued or adopted the nuisance, or, more accurately, did not without undue delay remedy it when he became aware of it, or with ordinary and reasonable care should have become aware of it. (D.L.R., p. 725) [Emphasis added]

After reviewing this, and other authorities, Oppal L.J.S.C. concluded:

> **From these authorities it would appear clear that if a person does not create a nuisance**, ignorance of the facts constituting the nuisance is an excuse unless he ought to have discovered the facts by use of reasonable cure. A common thread running through the authorities would be the presence or the lack of knowledge on the part of the defendant. (D.L.R., 726) [emphasis added]

[58] As noted earlier, whatever force the principle may have concerning lack of knowledge of a nuisance created by someone other than the defendant, it does not

extend to a nuisance that the defendant itself has created. Here the trial judge clearly found that the appellant had created the nuisance.

[59] The real complaint that the appellant now makes is that the respondent delayed in making a complaint. Hence it says it was not aware that the offensive odours being released by the sewage treatment plant were causing a nuisance and this should limit the respondent's remedy in damages to the three years following his first complaint. We disagree. That is not to say delay is not irrelevant. It has evidentiary value. If the claimed interference with enjoyment and use of property existed as now claimed, why did the plaintiff not say or do something about it. One could say he did not because it was of insufficient duration or intensity to amount to a nuisance. This is what the appellant argued at trial. The argument was not accepted by the trial judge.

[60] Delay can also open the door to possible defences of acquisition of the right to interfere with a neighbour's property by prescription (see Ruth E. Bilson, *The Canadian Law of Nuisance* (Toronto: Butterworths, 1991) at p. 110; Allen M. Linden & Bruce Feldhusen, *Canadian Tort Law*, 8th ed. (Toronto: LexisNexis Butterworths, 2006) at p. 590).

[61] Delay may also impact on the remedy a court grants. As Linden notes (p. 591):

> If the basis of the defendant's claim is unreasonable delay or *laches*, this is more likely to go to the question of substituting damages for an injunction rather than denying a remedy altogether. The view has also been expressed that the court will give credence to such an allegation only if there was something in the nature of fraud or unconscionable conduct on the part of the plaintiff.

See also Joseph A. Joyce & Howard C. Joyce, *Treatise on the Law Governing Nuisances* (Albany, N.Y.: Matthew Bender & Co., 1906) at paras. 58 and 485.

[62] In **Nestor v. Hayes Wheel Co.** (1924), 26 O.W.N. 129, [1926] O.J. No. 475 (Q.L.), Wright J. for the Supreme Court wrote (pp. 130-131):

> Where the nuisance interferes with the reasonable enjoyment of the person complaining and causes material discomfort, an injunction is, generally, the proper remedy: see Canada Paper Co. v. Brown (1922), 63 Can. S.C.R. 243; Stollmeyer v. Petroleum Development Co., [1918] A.C. 498, note. The

> authorities, however, recognise that in certain circumstances damages may and should be awarded in lieu of an injunction.
>
> Where the plaintiff has for a considerable time delayed the bringing of his action, he may be left to his remedy in damages: see Kerr on Injunctions, 5th ed., pp. 36, 37, 176. Acquiescence is also a ground for refusing an injunction: see Kerr, p. 672.
>
> Here the hammers were installed and put in operation in 1920, and, except for the interval mentioned, have been in continuous operation ever since, without, until recently, any complaint as to the noise. There was acquiescence on the plaintiff's part sufficient to deprive him of his remedy by injunction, but not to bar his claim for damages: Halsbury's Laws of England, vol. 17, para. 469, and cases cited; Garrett on Nuisances, 2nd ed., p. 575 et seq.; Kerr on Injunctions, p. 673 et seq.; Kine v. Jolly, [1905] 1 Ch. 480, 495.

[63] Before the trial judge, the appellant failed to support its submissions that the damages award should be limited to the period between the giving of notice and the ending of the nuisance. The authorities it presented to this Court do not stand for the proposition that the cause of action did not arise until it had knowledge of the nuisance, for the reasons explained above. The impact that delay can have on remedies such as an injunction are not applicable in this case, and delay does not bar a claim for damages. Accordingly, we dismiss this ground of appeal.

[64] Of course, delay to the extent of taking a claim outside the relevant statutory limit limitation period is of obvious import. In this context we note that s. 512 (1) of the **Municipal Government Act** was neither pleaded nor argued at trial or on appeal. It reads:

> 512 (1) For the purpose of the Limitation of Actions Act, the limitation period for an action or proceeding against a municipality or village, the council, a council member, a village commissioner, an officer or employee of a municipality or village or against any person acting under the authority of any of them, is twelve months.

[65] This would, normally in circumstances such as these, limit damages to one year preceding the commencement of the action. (See **Roberts v. Portage La Prairie (City)**, [1971] S.C.R. 481 and **Williams v. Mulgrave (Town)**, 2000 NSCA 24. However, the issue is not before us. It was not pleaded or argued at

trial, nor on appeal. We mention it only so that this decision is not interpreted as disagreeing with or distinguishing the above noted authorities.

**(b) Mitigation**

[66] The quantum the trial judge awarded Mr. Willis was for a period of 17 years, from shortly after the sewage treatment began operating in 1989 until the upgrades to it were completed in 2007 and the nuisance ended. HRM says the trial judge erred by failing to take into account what it refers to as the respondent's failure to mitigate by not taking any action in a timely manner to address the nuisance.

[67] The appellant's argument at trial was not based on mitigation. HRM did not plead mitigation in its defence. Mitigation was neither raised nor addressed before the trial judge. Generally, it is a sound proposition that a failure to mitigate should be pleaded in order for the plaintiff not to be taken by surprise (**Peterson v. Bannon** (1993), 107 D.L.R. (4th) 616, [1993] B.C.J. No. 2357 (C.A.)), but the issue of mitigation might be addressed, and a determination made by a trial judge, if full argument and evidence is presented before the court (see **Philip v. Smith**, 1996 BCCA 23). However, that is not the situation here. There was no evidence as to what the respondent could have done to address the nuisance to lessen its intensity or duration. Nor was there any evidence as to what the appellant could or would have done had the respondent complained earlier. Accordingly, we make no comment whatsoever regarding the application, if any, of mitigation or its effect, if any, in assessing damages in a case of this nature.

[68] There is, however, one aspect of the trial judge's decision on remedy that cannot stand. The trial judge awarded the respondent damages in the total amount of $55,000 for the nuisance he had to endure from the early 1990's to 2007. The trial judge then calculated prejudgment interest by using the rate of 5 % per year for 19 years (to 2009), but halving the rate to 2.5 % to take into account the fact that the respondent's loss accumulated over that period of time (para. 75). The prejudgment interest award was $26,125. With respect, in our opinion, the trial judge erred in making this award.

[69] The awarding of prejudgment interest is governed by s. 41 of the **Judicature Act**, R.S.N.S. 1989, c. 240. The relevant clauses are as follows:

> **41** In every proceeding commenced in the Court, law and equity shall be administered therein according to the following provisions:
>
> . . .
>
> (i) in any proceeding for the recovery of any debt or damages, the Court shall include in the sum for which judgment is to be given interest thereon at such rate as it thinks fit for the period between the date when the cause of action arose and the date of judgment after trial or after any subsequent appeal;
>
> . . .
>
> (k) the Court in its discretion may decline to award interest under clause (i) or may reduce the rate of interest or the period for which it is awarded if
>
> (i) interest is payable as of right by virtue of an agreement or otherwise by law,
>
> (ii) the claimant has not during the whole of the pre-judgment period been deprived of the use of money now being awarded, or
>
> (iii) the claimant has been responsible for undue delay in the litigation.

[70] In **Bush v. Air Canada** (1992), 109 N.S.R. (2d) 91(N.S.C.A.), Chipman J.A. (Hallett and Freeman, JJ.A., concurring) discussed these clauses at para. 38:

> It is to be observed that the trial judge is given a broad discretion in fixing the interest rate. Unlike the Legislation in some other provinces, no guidelines are given to the court for dealing with specific situations such as the treatment of pecuniary as opposed to non-pecuniary damages, or special damages as opposed to general damages. The Legislation does invite the court in exercising its discretion to consider generally the time period during which the plaintiff has been deprived of the use of the money. Undue delay in prosecuting the litigation is another factor which the trial judge may, in the exercise of the discretion, take into account in reducing the interest.

[71] This Court in **K.W. Robb & Associates Ltd. v. Wilson** (1998), 169 N.S.R. (2d) 201 articulated the circumstances under which it would be justified in interfering with a trial judge's discretionary award of prejudgment interest. Hallett J.A. (Hart and Pugsley JJ.A., concurring) stated at paragraph 49:

> This appeal on the interest issues is an appeal from the exercise of a discretionary power by a trial judge. It is trite to state that an appeal court will not interfere with the exercise of a discretionary power unless wrong principles of law have been applied or a patent injustice has resulted. Counsel for the respondent relies on the oft quoted statement from Justice Chipman's decision in Minkoff v. Poole & Lambert (1991), 101 N.S.R. (2d) 143 at p. 145:
>
> > At the outset, it is proper to remind ourselves that this court will not interfere with a discretionary order, especially an interlocutory one such as this, unless wrong principles of law have been applied or a patent injustice would result. The burden on the appellant is heavy: Exco Corporation Limited v. Nova Scotia Savings & Loan et al. (1983), 59 N.S.R. (2d) 331; 125 A.P.R. 331, at 333, and Nova Scotia (Attorney General) v. Morgentaler (1990), 96 N.S.R. (2d) 54, 253 A.P.R. 54, at 57.
> >
> > Under these headings of wrong principles of law and patent injustice an Appeal Court will override a discretionary order in a number of well-recognized situations. The simplest cases involve an obvious legal error. As well, there are cases where no weight or insufficient weight has been given to relevant circumstances, where all the facts are not brought to the attention of the judge or where the judge has misapprehended the facts. The importance and gravity of the matter and the consequences of the order, as where an interlocutory application results in the final disposition of a case, are always underlying considerations. The list is not exhaustive but it covers the most common instances of appellate court interference in discretionary matters. See Charles Osenton and Company v. Johnston (1941), 57 T.L.R. 515; Finlay v. Minister of Finance of Canada et al. (1990), 71 D.L.R. (4th) 422; and the decision of this court in Attorney General of Canada v. Foundation Company of Canada Limited et al. (S.C.A. No. 02272, as yet unreported).

In our opinion, the trial judge erred by failing to consider the factors that he was required to take into account by virtue of s. 41(1)(i) and (k) of the **Judicature Act**.

[72] Nuisance is a continuing tort, a new cause of action being created for each day it occurs (**Roberts v. Portage La Prairie (City), supra**). Interest was therefore not to be calculated as if the cause of action for the full amount of damage occurred in 1990. At a minimum some annual or other periodic assessment was required and then prejudgment interest awarded on those amounts. In addition, the trial judge failed to consider the failure of the respondent to make any claim asserting his rights for at least 14 years.

[73] Rather than remit the matter to the trial judge, this Court, as it did in **K.W. Robb & Associates Ltd. v. Wilson**, should determine the appropriate rate and amount of prejudgment interest. We see no basis to disturb the global award of $55,000 for damages assessed by the trial judge. Apart from the arguments detailed above, the appellant does not suggest otherwise. Taking into account the factors set out in the **Judicature Act**, we award prejudgment interest at the rate of 2.5% per annum from March 2007, when the nuisance ceased, to the date of judgment of August 14, 2009, which comes to $3,256.16 ($3.76l/day for 866 days).

[74] We therefore vary the judgment below to reflect an appropriate award of prejudgment interest but would otherwise dismiss the appeal with costs to the respondent of $2,500 inclusive of disbursements.

Oland, J.A.

Beveridge, J.A.

Farrar, J.A.