IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Hoyt v. Loew, 2008 NSSC 29

Date: 20080130
Docket: S.K. 187793
Registry: Kentville

Between:

Russell Fraser Hoyt and **Sandra P. Hoyt**

Plaintiff

v.

Raymond W. Loew, **Janet Ann Loew** and **Donald Blenus**

Defendant

Judge:	The Honourable Justice Gregory M. Warner
Heard:	November 23rd, 26th, 27th, and 28th, 2007 at Kentville, Nova Scotia
Counsel:	Jonathan Cuming, Solicitor for the Plaintiffs Russell F. Hoyt and Sandra P. Hoyt Christopher Manning, Solicitor for the Defendants Raymond W. Loew and Janet Ann Loew David Proudfoot, Solicitor for the Defendant Donald Blenus

By the Court:

A. Issues

[1] Did the construction of a woods road and culvert by the Defendant Blenus on the Defendants' (Loews) land above and near the Plaintiffs' pond cause a nuisance or wrongfully interfere with their riparian rights? If so, which Defendants are liable, and what are the damages?

[2] Did Hoyt assault Blenus, and, if so, what are the damages?

B. Background

[3] The Hoyt and Loew lands are on the side of the North Mountain at Blomidon, Kings County, Nova Scotia, overlooking the Minas Basin. These beautiful hillside fields and woodland were formerly part of the farm property of Emmerson Woolaver.

[4] In 1995 Russell Hoyt (a retiring RCMP officer who had grown up on a farm) and his wife drove by the property, instantly fell in love with it, and searched out the owner for the purpose buying part of it on which to build a retirement home. They purchased 25 acres from an 80 acre property. They started keeping cattle on the land while living nearby and planning their residence. Early in 2002 they divided the lot into two parcels - a 5 acre house lot and a 20 acre farm lot - and built their residence on the house lot.

[5] In 1997, Raymond Loew, a retired finance/investment industry executive living in Massachusetts, and his wife, Janet Loew, purchased the remaining 55 acres. Their lands was situate above or up the North Mountain from the Hoyts' land, adjoining it on the north and west. They commenced construction of a residence in 1999. They hired Emmerson Woolaver, the former owner, to cut the timber for their residence from the west side or back of their lot, and hired their house contractor, Donald Blenus (who was also an excavation contractor), to build a woods road to enable Woolaver to haul the timber off the mountain. Part of the road crossed a steep gulch running down the mountain near the Hoyts' north line and pond. The contractor built up the road across the gulch and placed a culvert

across the road approximately 6 feet above the original ground level. This created a dam and a small pond on the uphill side of the woods road.

[6] The Hoyts claim that construction of the road, culvert and pond had the effect of disrupting a natural watercourse, and in particular:

a) disturbed the natural ground level, causing silt and erosion to ruin the quality of their pond;

b) cut off a natural spring that provided a continuous supply of good water to their pond; and

c) cut off the seasonal snow runoff and rainwater that ran down the mountain into their pond.

[7] In August 1999, Mr. Hoyt complained to a Nova Scotia Department of Environment inspector. After checking the site, the inspector advised the Loews that the road crossed a watercourse, was built without a permit, and was in contravention of provincial regulations. As remedial action, he initially directed the removal of the "dams" built at 2 places in the road, and the lowering of the culverts to ground level, in a manner approved by his department.

[8] When no remedial action had been taken, a summary offence ticket was issued to Mr. Loew. In October, 2001, Mr. Loew plead guilty to failing to obtain approval for a designated activity. At the same time a "Ministerial Order" was issued requiring the Loews to submit for approval a remediation plan prepared by professional engineers, and to carry out that plan at their cost.

[9] Alexander Dewar of Hiltz and Seamone Co. Ltd., the professional engineers retained by the Loews, prepared and submitted a remediation plan to the department. It was approved by the department on November 19th, 2001, and eventually completed by Mr. Blenus between July and September 2002. This work returned the Loews' property to its former natural condition and satisfied the requirements of the Department of Environment.

[10] On November 27th, 2001, Mr. Blenus arrived on the Loew property for the purpose of removing the culvert and the Loews' pond in accordance with a remediation plan prepared by engineers and approved by the department. As part

of this work Mr. Blenus began pumping clear water from the Loews' pond downhill towards the Plaintiffs' pond, in accordance with the department's directions. Russell Hoyt, unaware that Blenus' actions were in accordance with the department's directions, confronted, and (Blenus claimed) assaulted Mr. Blenus. Afraid for his safety, Mr. Blenus immediately stopped work, left the site, and did not return until persuaded to do so by the Loews' engineers in the summer of 2002.

[11] Meanwhile, between December 2001 and February 2002, Russell Hoyt brought a powerline into his property, drilled a well, and installed a watering system in his cattle barn to replace the natural water supply which until that time had been supplied by gravity through a buried pipe from the pond.

[12] Later in the spring this powerline was used to supply power to the residence being constructed by the Hoyts on their house lot. For reasons not understood by the Court, the Hoyts drilled a second well on the house lot close to the first well drilled in December 2001 to supply water to their residence.

[13] The Plaintiffs claim damages of approximately $18,500.00 as the net cost of the powerline, well, and barn water system , incurred to replace the water formerly supplied by gravity from the pond to the barn, plus $5,000.00 for the cost of electricity to operate the well pump and watering bowls, plus general damages ($10,000.00), prejudgment interest, and costs.

[14] The Loews state that they relied upon Mr. Blenus to obtain any permits required in respect of construction of the woods road, and were not aware of, and did not authorize, the construction of the road and culvert in a manner that would create a dam and pond in contravention of the regulations of the Department of Environment. They claim that, to the extent any damage was caused to the Plaintiff, Mr. Blenus alone is liable.

[15] Mr. Blenus claims that he consulted regularly with, and obtained the approval of , the Loews in respect of his work. He acknowledged that the culvert placed on the road was at a height which required a permit (but only a foot or two too high), but denied that the road and culvert caused any harm or damage to the Hoyts.

[16] Both Messrs. Blenus and Loew state that the gulch which the woods road traversed was not a watercourse with defined boundaries, and was not spring-fed;

rather, rainwater and seasonal snow runoff running down the mountain were the only sources of water in existence where Loews' woods road and culvert were placed. To the extent that there was a temporary interruption of the Plaintiffs' water to Hoyts' pond, the interruption was trifling and temporary, and not actionable. They claim that Russell Hoyt's own conduct - the assault on Mr. Blenus when he attempted to carry out the department's remediation order on November 27th, 2001 - interfered with the Defendants' remediation of any interference or nuisance, and was the cause of any subsequent loss or damage; that is, but for Hoyt's assault, which frightened Blenus from returning to complete the remediation, the subsequent expenditures for a drilled well and powerline to create a supply of water to the cattle barn would have been unnecessary. They further claim that the expenditures on the powerline, well, and water supply were excessive and unreasonable - that is, were not reasonable mitigation of the temporary minimal interference with the quantity or quality of any water that ran into Hoyts' pond, and that their construction resulted in "betterment" of the Hoyts' property.

[17] When the original action was commenced in April 2002, the Plaintiffs sought an injunction and damages for interference with riparian rights. The action was amended to add a claim in nuisance. Since the obstructions were removed by September 2002, the request for an injunction was not pursued at trial.

C. First Issue - Interference with riparian rights and Nuisance

C.1 Plaintiff's Position on the Law

[18] The Plaintiffs treat the two causes of action (interference with riparian rights and nuisance) separately. Counsel cites **Lockwood v. Brentwood Park Investments Ltd.** (1970), 1 N.S.R. (2d) 669 (N.S.C.A.) for the law respecting interference with riparian rights. From **Lockwood** he abstracts the test to be met by the Plaintiffs as follows:

1. the Defendants interfered with the quantity and/or quality of the water flowing across the Plaintiff's lands;

2. the interference was more than a trivial interference;

3. the use of the water by the Defendant was an unreasonable use of the water, having regard to the nature of the locality and riparian tenement; and

4. the interference to the Plaintiff's riparian right cause him to suffer injury and damage.

[19] This is a slight restatement of Paragraph 21 in **Lockwood** were Dubinsky J. wrote:

> "the plaintiff must satisfy the Court that the defendants have wrongfully interfered with the flow of water, that the diminution of the flow has been substantial, that the plaintiff has suffered thereby and that the use of the water made by the defendants has been unreasonable. He must also show that the damage which he has suffered is not of a mere trivial nature."

[20] For the law on nuisance, the Plaintiffs cite Paragraph 30 in **Markesteyn v. R.**, 2000 CarswellNat 1960 (F.C.T.D.). In that case the Prothonotary denied an application to strike a claim based on negligence, nuisance and interference with riparian rights.

[21] Plaintiff's counsel then recites what it says are the relevant factors in assessing claims in nuisance as including:

1. the nature of the locality;

2. the reasonableness of the Defendants' land use;

3. the Defendants' intention, knowledge and foresight;

4. the intensity and duration of the interference; and,

5. the Plaintiffs' sensitivity.

[22] With respect to second factor, counsel submits that definition of reasonableness used in negligence law in respect to the standard of care, is not

applicable; rather the test is that stated by McIntyre, J. at Paragraphs 8 and 10 in **Royal Anne Hotel Co. v. Ashcroft Village**, 1997 Carswell B.C. 657 (B.C.C.A.).

[23] With respect to the third factor, counsel cites **Cambridge Water Co. v. Eastern Counties Leather Plc.** (1994) 2 A.C.264 (H.L.) for the position that foresight of the possible harm, regardless of an innocent intent, is a factor in nuisance claims.

[24] With respect to the fourth factor, counsel cites **Atwell v. Knights** [1967] 1 O.R. 419 (H.C.) and submits that nuisances are, for the most part, interferences for a substantial length of time as opposed to those of a passing or trifling annoyance.

[25] With respect to the fifth factor, counsel cites **Poole & Poole v. Ragen** [1958] O.W.N. 77 (H.C.) and submits that the relevant sensitivity is that of the "average reasonable man", not that of a person of abnormal sensitivity.

C.2 Loews' position on the Law

[26] With respect to the riparian rights interference claim, counsel cites **MacEachern v. McKenna**, 2006 Carswell NS 264 (N.S.S.C.), and the case law referred to and relied upon by Justice Goodfellow in that decision; that is **Lockwood** (*supra*), and **Loring v. Brightwood Golf & Country Club Ltd.** (1997) 8 N.S.R. (2d) 431 (N.S.C.A.), for the propositions that:

a) riparian rights are not absolute rights to the enjoyment of water; and,

b) riparian rights apply only to bodies of water in watercourses, not to areas of occasional run off from precipitation.

[27] Respecting the nuisance claim, counsel quotes from an early edition of Allen M. Linden's text, *Canadian Tort Law*, to the effect that nuisance describes a type of harm (unreasonable interference with enjoyment of land), not a type of conduct. Counsel cites **Palmer *et al* v. The Nova Scotia Forest Industries** (1983) 60 N.S.R. (2d) 271 (N.S.S.C.) for the requirement that the harm be more than a trifling interference with the Plaintiffs' enjoyment of their lands.

C.3 Contractor's Position on the Law

[28] Counsel for the contractor, Donald Blenus, appears to treat the claim for interference with the Plaintiffs' riparian rights under the heading, and as part of his analysis of, the law of nuisance. He relies upon Linden's text, and Justice Nunn's analysis in **Palmer**, for the legal description of nuisance, and in particular a private nuisance, as an environmental tort that protects against interferences with the enjoyment of property that are unreasonable in all of the circumstances. Unreasonableness relates "primarily to the character and extent of the harm actually caused" and not the foreseeability of harm to which a reasonable person would not expose others. Liability for the tort of nuisance is strict, and not based on reasonable care or foresight.

[29] Counsel submits that the Plaintiffs must prove that the Defendants caused an unreasonable interference with the use and enjoyment of the Plaintiffs' land; if the Plaintiffs do, the Defendants carry the burden of proving that the use of their land was reasonable.

[30] The Plaintiffs must prove actual damage from substantial interference. Mere sentimental, speculative or trifling damage or damage that is temporary or fleeting does not found a claim in nuisance (**Palmer** Paragraph 528). Nuisance is a continuing wrong - a state of affairs that repeatedly causes interference with the Plaintiffs' use or enjoyment of their land.

[31] Finally counsel quotes from Linden's text for the following point:

> "The court will also consider the "physical milieu" in which the alleged nuisance exists in order to determine the appropriate standard of tolerance against which to measure the interference."

[32] Counsel cites three other Nova Scotia decisions (in addition to **Palmer**) as relevant to the analysis of the law of nuisance and damages arising therefrom:

1. **Smith v. Richardson** (1978) 23 N.S.R. (2d) 407 (N.S.S.C.)

2. **George v. Floyd and Van Gestel** (1974) 6 N.S.R. (2d) 299 (N.S.C.A.)

3. **Corkum v. Lohnes** (1980) 28 N.S.R. (2d) 417 (N.S.S.C.)

C.4 The Law

[33] The origins of the two causes of action - interference with riparian rights and nuisance - differ, but the application of the law in the context of surface water (that is, the assessment of the relevant factors) so overlap that, for all practical purposes, different outcomes on liability are a rare exception.

[34] The entitlement to protection from interference with riparian rights and from nuisance necessarily involve a overview of their respective origins. Interference with riparian rights has its roots in property law and is restricted to actions respecting the use and enjoyment of water. It purports to deal with unreasonable conduct and the consequential damages to property. Nuisance with its roots in tort law is in one sense much broader - it deals with public and private consequences of any kind of conduct - but in another sense is narrower because it concerns a type of harm suffered, and not a kind of conduct that is forbidden.

[35] In the end the overlap, created in part by the word "unreasonable" which is found in both causes of action, mandates an analysis of factors, in the context of a single set of circumstances, that are relevant to both causes of action.

[36] For the law on riparian rights, I have relied upon the following texts, in addition to the cases cited by counsel:

a) *Principles of Property Law*, by Bruce Ziff, Third Edition (2000; Carswell), Chapter 1 (Part 4) and Chapter 3 (Parts 2 and 3);

b) *Anger & Honsberger Law of Real Property*, by Anne Warner La Forest, Third Edition (Canada Law Book; looseleaf to March 2007), Chapter 19 by the Honourable Gerard La Forest; and,

c) *Nova Scotia Real Property Practice Manual*, by C. W. MacIntosh Q.C. (Butterworths; looseleaf to Release 53, August 2007), Chapter 15.

[37] For the law respecting nuisance, I have relied upon the following texts, in addition to the cases cited by the counsel:

a) *Canadian Tort Law*, by Allen M. Linden and Bruce Feldthusen, Eighth Edition (Butterworths; 2006), Chapter 15; and,

b) *Remedies in Tort*, edited by Linda D. Rainaldi (Carswell; looseleaf to release 4 in 2007), Chapter 17 by Ann Cunningham.

C.4.1 Interference with Riparian Rights

[38] As Ziff notes, no exhaustive list of what constitutes property or the indisputable core of what must be contained within the bundle of property rights exists. Property law performs a host of functions. It is not a static concept but rather in a constant state of flux. Two styles of judicial treatment exist to assess claims to property and related entitlements. First is the "attributes" approach which involves the sometimes circular analysis of attributing core characteristics to property and property rights, and the second is the "functional" approach, a policy-based analysis which "recognizes that property is not an contextual entity that demands conceptual purity but a purposive concept, to be used to meet social needs" (page 40). And at page 44, "Property law serves not only as a means of determining the objects of ownership, it also allocates entitlements . . .The law balances the conflicting claims of property owners. . . the law of property provides protection, through the criminal and civil law, against wrongful action by persons with no entitlements. . ."

[39] One of the usufractuary entitlements of the owners of land abutting water is a right of access to water and the right to prevent flooding, collectively known as riparian rights. A riparian owner may take unlimited amounts of water for "ordinary uses" (including domestic needs and animal husbandry). For extraordinary purposes the use of the water is permitted but limited in order to conserve water for downstream riparian owners - both in respect of quantity and quality.

[40] Ziff writes at Page 101 that the common law rule deals with the entitlement of the downstream owners to receive the natural flow of the stream, and whether the extraction of water unreasonably interferes with the downstream owners' rights.

[41] In some jurisdictions, legislation has altered the common law. For example, Part 3 of Alberta's *Water Act* sets out the rights to divert water; in particular Section 21 modifies the common law right to use water for household purposes and Section 1(1)(x) defines "household purposes".

[42] Nova Scotia does not have legislation similar to the *Water Act* in Alberta that specifically and explicitly modifies the common law. On its face, Section 103 of the *Environment Act*, S.N.S. 1994-95, C. 1 vests all rights to ownership of watercourses and to possession and use of water (defined as including "all ground water") in the Crown. No party to this action presented evidence, or argued, that the common law has been abrogated by the *Environment Act* and in particular by Section 103.

[43] MacIntosh writes at Page 15-51 in his text that Section 103 refers only to rights acquired by prescription. La Forest, in Chapter 19:40, takes the approach, based on the strong presumption that statutes are generally interpreted so as not to interfere with property rights, that common law riparian rights are not abrogated unless expressly or by necessary implication. From this, and the absence of argument to the contrary by the parties, I assume for the purposes of this decision that the Act has not abrogated the common law.

[44] La Forest writes that water rights fall into three categories: common law riparian rights (c.19:20), rights respecting surface and ground water (c.19:60 and 19:70 respectively), and rights acquired by easements (c.19:50). He notes that the common law has made marked distinctions between the rules applicable to water depending on the way which water is found in nature. One major distinction is between watercourses - in which water "flows in a fairly regular manner in channels between banks that are more or less defined", and surface and ground waters - where "accumulations and flows of water not sufficiently large, defined or permanent to constitute a water course". The addition, by amendment to the definition of a "watercourse" in Nova Scotia's *Environment Act*, of "all ground water", may have expanded the common law definition, and therefore make the difference noted by La Forest less critical, if not irrelevant, to Nova Scotia cases.

First category - common law riparian rights

[45] La Forest classifies riparian rights under six headings; MacIntosh classifies them under eight headings. The differences do not affect this decision as three aspects of riparian rights are relevant to the subject matter of this action. They are:

a) rights respecting the flow of water;

b) rights respecting the quality of the water; and,

c) rights respecting the use of water.

A 4th category described by both writers is the right of drainage. With regards to that 4th right, La Forest writes that owners of land adjoining a stream may drain their lands into the stream even though this may affect the flow downstream, but the right must be exercised reasonably. The extent to which a land owner must be concerned with the effects produced downstream by such drainage is therefore dependent upon all the facts.

[46] With regards to the right respecting the flow of water, La Forest writes:

> "The first is the right to have the water flow to the land as it has been accustomed to flow, substantially undiminished in quantity and quality, subject to the rights of other riparian owners to use the water . . . A riparian owner is entitled to have the water flow down the stream to their land along its regular channel. Anyone who diverts the water from its regular course may be constrained from so doing without proof of damage . . . Diversion is, however, permitted if confined to the land of the person who diverts it, but the diversion must not affect the flow of water downstream. A use of water may not alter the flow downstream, but may affect the nature of the flow by altering the times when the river will flow, increasing or decreasing the rate of flow, or otherwise. (Emphasis added) In strictness, this affects the principle that a riparian owner is entitled to have the water flow to their land in the manner in which it has been accustomed to flow, but the courts have made clear that a riparian owner is entitled to the reasonable use of water in a stream on or adjoining their land and they recognize that the owner, in making such use, must in many cases of necessity affect the flow downstream even if the lower riparian owner does suffer appreciable injury. It should be added that a riparian

owner may incur liability not only under the duties imposed under the regime of riparian rights, but also under the more general principles of law such as negligence, nuisance and the rule in **Rylands and Horrocks v. Fletcher**." (19:20.40)

[47] With respect to the right respecting the quality of water, La Forest writes:

"At common law riparian owners are entitled to have water reach their lands substantially undiminished in quality. Even in the absence of damage, therefore, they have an action against anyone who pollutes or otherwise materially alters the character of the water" (19:20.60)

[48] With regard to the right respecting the uses of water, La Forest writes:

"The extent of their rights depends on whether the use may be classified as an ordinary or an extraordinary use. Ordinary use comprises the use of water for drinking purposes, watering stock and other domestic purposes such as washing. A riparian owner may, in making use of the water for ordinary uses . . . completely exhaust the supply without liability to the lower riparian owner. A riparian owner may also may use of the water for extraordinary purposes. What amounts to an extraordinary purpose will depend on the general conditions in the area and the uses to which the stream has previously been put, *e.g.* running a mill or irrigation. A person who uses water for extraordinary purposes is subject to the principles . . . that the water must be restored to the stream substantially undiminished in quantity and quality. . . . If, for example, a riparian owner dams a stream, the stream's flow will periodically be interrupted. For injury so caused the owner is liable if, having regard to all the circumstances, such action was unreasonable. (Emphasis added) . . ." (19:20.70)

[49] MacIntosh, citing similar but in particular Nova Scotia case law, makes the same analysis in chapters 15.7 D, E, F and G.

Second category - rights relating to surface and ground water

[50] These rights are described in MacIntosh's text at Chapter 15.6, where he defines three categories of above-ground water:

a) permanent ponds and lakes;

b) flowing water; and,

c) surface water.

[51] He describes water falling from the heavens to the surface of the earth, so long as it does not flow in a defined watercourse, as property of the owner of the soil where it falls. That person may deal with it as he or she pleases. If, however, that water reaches a natural channel or watercourse, then the considerations discussed in the first category apply.

[52] LaForest deals with this issue in Chapter 19.60. He describes the flow of surface water under the "natural drainage principle" which recognizes that higher land may drain onto lower land through the forces of nature without giving a cause of action for injury resulting from that flow to the owner of the lower land. On the other hand, subject to any prescriptive rights, owners of higher land have no right at common law to have their land drain naturally onto the lower land so a lower landowner may repel the water. Similarly, a lower landowner is not entitled to the continuous flow of surface water. At common law, the mere passage of time will never confer upon a higher landowner an absolute right to demand that their land continue to be drained through the lower land, or upon a lower landowner a right to demand that they continue to receive the flow.

[53] La Forest also states that surface water may be appropriated by the owner of the land without incurring liability to the land owners on whose land the water has previously flowed or would have flowed to, if it had not been appropriated. The right to appropriate surface water may be exercised regardless of any reliance by a lower landowner upon the use of the water for irrigation or other purposes.

[54] La Forest writes:

> "liability for the diversion of surface water is restricted to the extent that the diversion constitutes an interference beyond that which would be caused in any event by the natural flow of the water, but the onus

> of proof that it does not constitute such an interference is on the person causing the diversion.
>
> While the common law prohibits owners of land from draining in such a way as to interfere with their neighbours' enjoyment of land, land owners may drain their land into existing streams or rivers but this must be done reasonably. A land owner who fails to act reasonably and causes a natural watercourse to overflow may be liable to an action by riparian owners thereby injured." (19:60.20)

C.4.2 Nuisance

[55] The tort of nuisance is derived from the Latin word for annoyance, inconvenience or hurt. Nuisance can be public or private. Both began as crimes. Public nuisances are still crimes, for which a private right to sue was recognized in the 16th century. Since the 13th century private nuisances have permitted claims for damages by persons for injury to their lands from things done on nearby lands.

[56] Private nuisances have come to be defined as the unreasonable interference with the use and enjoyment of land. The interference may be of an almost unlimited variety. The legal definition is somewhat convoluted because of the wide variety of situations to which this field of liability has been applied. It does not describe a particular type of conduct. Its unifying element lies in the general kind of harm caused.

[57] Interestingly the Honourable Gerard La Forest, the author of the description of riparian rights in *Anger & Honsberger*, in his role as a Justice of the Supreme Court of Canada, defined what constitutes a private nuisance in **Took v. St. John's Metropolitan Area Board** [1989] 2 S.C.R. 1181, beginning at paragraph 62. His analysis of the nature of nuisance (but not his application of the law of nuisance to a public body acting under statutory authority) was accepted in two concurring judgments. He wrote that the very existence of organized society depends on a generous application 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 of the circumstances." (Paragraph 63)
>
> ". . . . . Courts circumscribe the ambit of nuisance by looking to the nature of the locality in question and asking whether the ordinary and reasonable resident of that locality would view the disturbance as a substantial interference with the enjoyment of land. Among the criteria employed to limit nuisance's ambit were considerations based on the severity of the harm, the character of the neighbourhood, the utility of the defendant's conduct, and the question whether the plaintiff displayed abnormal sensitivity." (Paragraph 64)

[58] The presence of actual physical damage to property would lead a court to quickly conclude that the interference did constitute a substantial and unreasonable interference with the enjoyment of property (Paragraph 65). This analysis is the same as that made by the court in **Markesteyn**.

[59] In balancing the gravity of the harm against the utility of the Defendants' conduct to arrive at a determination of "unreasonable interference", Linden first examined the "harm" element under three categories (type and severity of interference, character of the locale and sensitivity of the Plaintiff's use), and the "conduct" element in the context of the object of the activity and the Defendant's attitude to his/her neighbours.

[60] As to the type and severity of harm, he wrote that it must be substantial. Whether it is serious, and therefore actionable, is not always easy to determine. He cites from the *Restatement of Torts* as follows:

> "Life in organized society and especially in populous communities involves an unavoidable clash of personal interests. Practically all human activities, unless carried on in a wilderness, interfere to some extent with others and involve some risk of interference, and these interferences range from trifling annoyance to serious harms . . . the law of torts does not attempt to impose liability or shift the loss in every case where one persons conduct has some detrimental effect on another. Liability is imposed only in those cases where the harm or

> risk to one is greater than he ought to be required to bear under the circumstances."

[61] Citing *Salmond on Torts*, Linden further wrote "that the type of harm caused by the escape, the gravity of that harm, and the frequency of its occurrence are each relevant (but not conclusive) factors in determining whether the Defendant has maintained on his premises a state of affairs which is a potential nuisance."

[62] Linden described the application of the law to the facts as being an attempt at a tolerable balance between competing interests of landowners each invoking the privilege to exploit the resources and enjoy the amenities of his property.

[63] Linden noted that, although in general the character of the area dictates the expected tolerance level, limits are placed on how far this protection will extend; severe damage, even in a "poor" locale, may constitute a nuisance.

[64] Under the category of "abnormal sensitivity", Linden made the straight-forward statement that if the Plaintiff's use of property, or his/her own make-up, is abnormally sensitive, recovery for nuisance may be denied. This follows because the standard employed in determining whether the Defendants' activity is an unreasonable interference is an objective one, governed with reference to the reactions of normal persons in the particular locality.

[65] Under the "conduct" element, Linden wrote that it is not a requirement to prove that the conduct was negligent or intentional. Fault is not a necessary element. As applied to nuisances, the word "reasonable" relates primarily to the character and extent of the harm actually caused. With one exception, nuisance liability is strict liability and does not involve the notion of foreseeable harm. Linden writes:

> "Thus, in nuisance, the Defendant may make reasonable use of property in such a way that a neighbour may be adversely affected, whereas, in negligence, if the Defendant has a duty to protect persons such as the Plaintiff from the risk of injury of a particular type, liability will attach where a Defendant ought to have foreseen such injury resulting as a consequence of conduct. Further, in nuisance, once the interference is shown, the onus rests on the Defendant to establish reasonable user."

[66] The one exception relates to the Defendant's intention. If the character of the Defendant's conduct is malicious, acts which are otherwise acceptable and reasonable may cease to be defensible on the basis of "reasonable user".

[67] Finally, courts are permitted to consider the importance of that activity and the value of that activity in the community in which it is occurring, in determining whether the conduct is reasonable or unreasonable.

C.5 Analysis

[68] The Plaintiffs allege that the dam created where the Loew's road crossed the gulch above their pond cut off a natural spring that provided a continuous flow of water to their pond.

[69] This was not established, on a balance of probabilities, by either their witnesses or through cross-examination of the Defendants' witnesses.

[70] Sheldon Stone, the Department of Environment inspector, testified that he had been lead to understand that the flowage to the Plaintiffs' pond had been sealed off by the dam. He had never visited the site before the dam was constructed and noted that until an October 2000 visit he had seen water flowing into the pond from the Loew's land. He further acknowledged that he was not qualified to determine, or to give an opinion, on the nature of the flowage.

[71] He acknowledged that he caused the contractor to excavate holes in the ground while the remediation work was going on in 2002 - without finding evidence of a natural spring - but did not recall asking that the holes be dug for the purpose of finding a spring. He did not recall if Mr. Hoyt had ever pointed out the location of where he thought a spring may be. He made a note during an inspection on August 30th, 2002 that the "owner states original spring was in against mountain and flowed intermittently". Mr. Loew, the owner of that property, testified that there was no spring in the area and was not examined or cross-examined respecting Stone's note. The court's conclusion was that Mr Loew was not familiar enough with that area before construction of the woods road to make any such statement.

[72] Ivan Rand, aged 67, a farmer and woodman called by the Plaintiff, met the Hoyts and first visited the property after the Hoyts had purchased it and when they were constructing a cattle barn. He saw the Hoyts' barn and directed them to another farm where water was piped by gravity from a hillside spring to water cattle. This generated the idea for the Hoyts' gravity-fed water pipe from the pond to the barn. When shown photographs of the Hoyts' pond, he described the water as having a little more algae and colour, and having more stale water then when he saw it before 1999. The flow of water to the barn, when he first saw it, was "a pretty good little flow". He gave no evidence about the source of water to the pond. In cross examination he acknowledged that in 1999, 2000 and 2001, weather conditions in the area were "quite dry". His farm had no pond; he watered his cattle by way of a spring-fed stream, which stream continued to flow but with less water downstream. He stated that when he was at the Hoyts' farm in the summer 3 or 4 years ago, there was no running water at the pond. Mr. Rand was not asked to clarify this timeframe; on its face, he would be referring to the summer of 2003 or 2004, a year or two after the Loews' dam had been removed, and the land remediated.

[73] Russell Hoyt first saw the property and the pond in 1995 and built the cattle barn in 1996. He stated that the water flowed continuously into the pond and he constructed a buried gravity-fed water line from the pond to his barn; the water flowed continuously (the overflow was directed back into a brook at the back of the barn). Because of the continuous flow of water, Mr. Hoyt believed his pond was spring fed. He gave no direct evidence as to the actual existence of a spring in the gulch over which the Defendant Blenus constructed the woods road in August 1999. Mr. Hoyt did not notice a lot of change to his pond in the six months following construction of the woods road, but from the spring of 2000 the level and quality of water in the pond decreased until the fall of 2001 when the pond looked as shown in the photographs at page 1, Exhibit 6, Tab 22. They show algae on the surface and a drop in the water level, and Mr. Hoyt says more cattails.

[74] Raymond Loew, who was by self admission not particularly familiar with the land, never saw a spring of any kind.

[75] Alexander Dewar, the civil engineer retained by the Loews to prepare the remediation plan in accordance with the Ministerial Order began work in November 2001 and continued until the remediation was completed to the satisfaction of the Department of Environment in September 2002. He described

what a spring was. In his report and oral evidence he stated that he found no evidence of a spring in that area. He acknowledged that springs can be buried by activity like that carried out by Blenus, but even so spring water eventually finds it way to the surface and resumes running.

[76] Donald Blenus specifically denied the existence of a spring in the area where he constructed the woods road.

[77] Emmerson Woolaver, a long-time beef farmer, whose father built the Hoyts' pond in the mid-1970s, stated that the pond was not spring-fed, but received water from the North Mountain runoff. He had seen the pond be dryer at some times than others. He attributed the lower water level and algae to the very dry summer weather conditions beginning about that time. He noted that irrigation was not an issue with farmers before then, but became so at this time. When asked about algae as shown on the photographs, he said it was common in late summer and would not adversely affect cattle.

[78] Arthur Woolaver, another life-long beef farmer and brother of Emmerson, had built the Hoyt pond with his father in 1975-76. The Court was particularly impressed by Arthur Woolaver whose evidence was given in a straight-forward, objective, clear and natural manner. While the Court is always cognizant of the dangers of assessing credibility on the basis of demeanour, I accept his evidence as reliable in preference to any contradictory evidence. Arthur Woolaver had the best knowledge of the condition of the land and the pond before it was purchased by Mr. Hoyt. He testified that the pond was built as a fish pond and not as a source of water for cattle. He described the ground at the bottom of the gulch where the pond was dug as not being a swamp. He recalls the pond being dug in the summer and being full of water by the next spring. He noted that the pond was deep but not big and held its water fairly well. When shown photographs of the pond, he described the decrease in the water level in the pond (so as to have no overflow) as natural and something that would happen from August on. He said that growth (bushes) around the pond had to be cleared regularly but grew back. When shown photos of the algae, he said that algae just naturally grows in the summer, along the edges of the pond, and was not a concern for cattle drinking the water. He stated that 1999 was the driest year he had ever farmed and that the next two years were not quite as dry. He, like many area farmers, had to drill a well for water for cattle for the first time in 2000 because the streams and ponds had gone dry.

[79] The Court accepts the evidence that the years 1999, 2000 and 2001 were extremely dry summers in the Annapolis Valley. Mr. Hoyt was not familiar with the history of the pond before 1995 and his experience with the pond in the three (3) years before 1999 does not establish on a balance of probability that the lowering of the water level in his pond in 1999, and the formation of algae, and the growth of cattails would not, but for the construction of the woods road on the Loew's land, have occurred in any event.

[80] In summary, the Plaintiffs have failed to prove that the pond was spring-fed, or that the pond's water level decreased due to the construction of the woods road as opposed to the very dry summer weather conditions of 1999 to 2001.

[81] If the Hoyts' pond was not fed by spring water as claimed by Mr. Hoyt, what was the nature of the water that fed his pond?

[82] From all of the evidence of all the witnesses, the Court is satisfied that the water that flowed into the Hoyts' pond was rainwater and water runoff from melting snow that flowed down the side of the North Mountain immediately behind the pond, as described by Mr. Dewar in his report and orally.

[83] The Court is satisfied that there were two (2) consequences on the Hoyt pond from the construction of the woods road across the gulch immediately above the Hoyt's pond:

> 1. The first was that the construction of the road and the placement of a culvert about five (5) feet to six (6) feet above the ground level on the upper side of the woods road caused water to accumulate in the Loews' pond, thereby delaying water from reaching the Hoyt pond. I accept the evidence and calculations of Mr. Dewar that in an ordinary rain this would hold up the running of water into the Hoyts' well by less than one (1) day and in a heavier rain by less than a half day. Once water accumulated in the Loews' pond (covering approximately one-quarter of an acre), the flow would continue in the normal course downhill to the Hoyt pond. Of course, after the roadway and dam were removed in accordance with the Ministerial Order, the run off of rain and snow-melt would resume its normal pre-1999 flow.

> 2. The second consequence, which is obvious from the photographs and a matter of common sense, is that the construction of the woods road and pond caused ground-cover to be removed thereby causing erosion and silt to run downstream into the Hoyt pond. This adversely affected the clarity and quality of water in the Hoyt pond, and the condition of the pond itself.

[84] In summary, the Court accepts that the construction of the woods road above the Hoyt pond and the placing of the culvert five (5) or six (6) feet above the natural ground level created a delay of between one half day and one day in the flow of water to the Hoyt pond whenever it rained, and that as a result of the construction the ground surface was exposed to erosion resulting in some silting of the Hoyt pond.

[85] Applying the legal principles enumerated in this decision, the Court is not satisfied that the Plaintiff has proved on a balance of probabilities that the quantity of water in his pond was more than trivially harmed by the construction of the woods road. The Court is satisfied from the evidence and the photographs that the construction of the woods road did adversely affect the quality of the water in the Hoyt pond. This effect was more than trifling. It was significant or substantial for the period for which the Defendants are liable. The construction of the woods road was not an unreasonable use by the Loews of their land. The failure to do so in a manner that would prevent silt and runoff from erosion caused by exposing the ground surface, especially on steep slopes so close to the Hoyts' pond, was an unreasonable act. The gravity of the harm to the Hoyts' pond exceeded the utility of the Defendants' conduct.

Who is liable?

[86] The Loews submit that Donald Blenus was an independent contractor, for whose torts they are not liable. They cite no case law or texts. Mr. Blenus submits that he was their agent, but in any event, if he was an independent contractor, the characterization of him as such is not determinative of the issue of whether they are jointly liable with him for any unreasonable interference or harm. He cites passages from texts on contract law by Cheshire & Fifoot, and Waddams, and from Michaud v. LaForest Ltd. (1970) 2 N.B.R.(2d) 646 (NBCA).

[87] Mr. Loew says that he did not know and did not authorize Donald Blenus, an independent contractor, to construct the woods road in the manner that caused the culvert over the gulch to be over five (5) or six (6) feet above ground level.

[88] Emmerson Woolaver testified that it was he, when walking on the land with Raymond Loew for the purpose of showing where he would cut the logs for Loews' house and where they would be brought out, who came up with, and discussed with Mr. Loew, the idea of making a pond where the woods road crossed the gulch. Furthermore, as he was cutting logs, and Mr. Blenus was extending the woods road to haul them out, he had weekly or bi-weekly calls from Mr. Loew (who was at his home in Massechuetts) about how the cutting of logs and the road construction was coming along, and he kept him up to date.

[89] Mr. Blenus stated that Mr. Loew called and asked him to work with Emmerson Woolaver in building the woods road, and requested that he put in a culvert to make a small pond. Thereafter he worked on extending the road up the mountain as and when Mr. Woolaver contacted him. He acknowledged that he was aware that Mr. Loew relied on him, "as the local expert", to ensure that he had any necessary permits and carried out the work lawfully. He acknowledged that he placed the culvert slightly higher (by a foot or two) than he should have. No permit was, he believed, needed if the culvert was not higher off the ground than 1.5 meters.

[90] The Court is satisfied that the Loews as Defendants knew, and were kept informed of, what Mr. Blenus was doing. The Loews were the owners of the property upon which the work as being done.

[91] In chapter 17 of *Remedies in Tort*, paragraph 100, Ann Cullingham writes that an occupier may be liable for the actions of an independent contractor where the contracted work by its nature clearly involves the risk of damage to others. At page 581, Linden/Feldthusen write that nuisance lies not only against those who actually cause it, but against those who inherit the situation and permit it to continue.

[92] While they did not supervise the work of Mr. Blenus, he was their agent and they are jointly liable with Donald Blenus for the consequences to the Hoyts. If I am wrong and the Loews were generally unaware of what Blenus was doing, the

Loews allowed the nuisance to continue after the department advised of the harm, and did nothing for three years; this makes them jointly liable.

What are the damages?

[93] By December 2001, the Plaintiffs' claim that the water in their pond had ceased to be adequate, both in quality and quantity, to water their cattle.

[94] In December 2001 and January 2002 they caused a power line to be extended by Nova Scotia power to the back of their lot near the pond, drilled a well near the pond, and connected the well to two (2) watering bowls, placed in the barn and the courtyard of the barn for the purpose of watering their cattle. They claim this cost was a reasonable and necessary consequence of the Defendants' unlawful conduct and the harm caused to their water supply. In his closing address, Plaintiffs' counsel acknowledged that the original claim of about $23,000 for this work should be reduced to $18,500 by reason of the fact that most of the power line extension was necessary in any event because of the construction of the residence that occurred on the lot in 2002. The Plaintiffs' claim also included $5,000 towards the cost of electricity to operate the pump used to supply water from the "barn" well to the barn and the watering bowls. They submit that prior to the damage to the pond, there was no need for electricity as the continuous water system supplying from the pond was gravity fed, by a buried pipe to the barn, and they had no need for electricity in the barn otherwise.

[95] The Defendants' state that the expense incurred was:

(a) unnecessary;

(b) not reasonably incurred; and,

(c) created an improvement to the Plaintiffs' property.

[96] With respect to the first paragraph (unnecessary) they claim that in November 2001 Donald Blenus attended on the Loews' property to effect the remediation plan that had been ordered by the Minister in charge of the Department of Environment, which plan had been prepared by civil engineers in early November and approved by the Minister on or about November 19th, 2001,

and the cause of any harm to the pond would have ceased. The Defendants correctly note that the first step in the remediation plan approved by the Minister was to cause the clean water in the Loews' "pond" to be pumped out of the pond downstream towards the Hoyt pond. Subsequent steps would involve pumping the remaining dirty water onto the Loews' fields in a manner so as to not cause it to run downstream, to create silt barriers and other environmentally mandated measures (such as for example the laying of straw) so that any remaining pumped waters and surface water runoff would not flow downstream, and finally to cause the "dam" to be removed and the ground brought back as nearly as possible to its natural state.

[97] On November 27th, 2001 Mr. Blenus was alone on the Loews' property effecting the first step: that is, causing the clear water from the pond to be pumped downstream towards the Hoyt pond in accordance with the directions of the Department of Environment. Blenus and Hoyt had two (2) encounters on the Loews' property that day. Where their descriptions of the encounters differ, I accept the description given by Donald Blenus.

[98] Mr. Blenus had set up a pump at the Loews' pond and was draining clear water through a hose downstream. He left to get additional fuel. When he returned Mr. Hoyt was standing over the pump. Mr. Blenus told Mr. Hoyt that what he was doing was what the Ministerial Order directed that he do and further advised Mr. Hoyt that he was trespassing (as a result of the ongoing dispute Mr. Hoyt had been given notice not to trespass on the Loew property). Mr. Blenus called the police. Mr. Hoyt thereupon returned to his own property.

[99] Shortly afterwards, Mr. Blenus saw Mr. Hoyt return to his property, walk or run quickly up the hill towards Mr. Blenus, taking off his jacket as he did. Because of the prior confrontation he immediately called 911 as he feared for his safety. He was aware that Mr. Hoyt had been in the RCMP for 28 years, 18 of which was as a plain clothes officer. I accept Mr. Blenus' evidence that Mr. Hoyt said to Mr. Blenus words to the effect: "Don't f... with me, I make people like you disappear". At that point Blenus heard police sirens, Hoyt retreated to the barn on his own property, and Blenus made a statement to the police following which the police attended at the barn, arrested Hoyt and charged him with criminal assault. Mr. Hoyt was subsequently tried and acquitted of criminal assault. Blenus left the site and he testified that, "fearing for his safety", he did not return until he was persuaded by the Loews and their civil engineer in the summer of 2002 to return

and complete the job. In the interim the Loews had unsuccessfully approached at least one other contractor to effect the remediation work, and he refused because of the potential trouble with Mr. Hoyt. Mr. Blenus stated that he made sure that he was never therafter at the Loews' property alone.

[100] Whether or not the actions of Mr. Hoyt amounted to a civil (tort) assault (which is dealt with in the next section of this decision), I am satisfied that, but for Hoyt's aggressive and unreasonable conduct towards Blenus on November 27th, 2001, whatever effects the construction of the dam in August 1999 had on the Hoyt pond, the remediation plan, prepared by Hiltz & Seamone, approved by the Department of Environment, would have returned the Loews' land in an environmental safe manner, to its natural state and would have ended any ongoing deleterious effect on the Hoyt pond.

[101] In other words, the Plaintiffs would not have had to undertake the expense of bringing power lines to the barn, drilling the "barn" well, and incurring the other expenditures incurred from late December 2001 to February 2002 to obtain an alternative water supply for the cattle.

[102] The Hoyts' claim that the quality of water deteriorated so as to make the pond water unsafe for drinking by their cattle. Mr. Hoyt testified that he believed that some of his cattle may have had abortions as a result of consuming stagnate pond water. In his documents was a letter from farm consultants (AgraPoint) which letter states that there "could conceivably be a connection" between the stagnate pond water and abortions. The letter suggests that Mr. Hoyt should test his herd in respect of this concern. Surprisingly no evidence was tendered at the trial of any testing of the pond water or testing of the cattle to corroborate the claimed consequences of the consumption of stagnate pond water upon cattle. The Court notes that, contrary to Mr. Hoyt's evidence, Emmerson and Arthur Woolaver, longtime beef farmers in the area, whose evidence the Court accepted as straight-forward and honest, stated otherwise. The Court suspects that it may be a matter of the degree of stagnation of pond water that could affect cattle's health. There was no reliable evidence before the Court that the quality of the water in the Hoyt pond had reached the point that it would adversely affect the cattle's health.

[103] Notwithstanding this conclusion, the Court accepts that the erosion resulting from the construction of the dam and the resulting siltation, that

accumulated in the Hoyt pond after August 1999 until November 2001, harmed the quality of the pond's water, and necessitated some remedial work on the pond itself. The Defendants' evidence was that ponds naturally fill in and have to be dug out on a periodic basis. Their evidence was that the years 1999, 2000 and 2001 were exceptionally dry years in the Annapolis Valley and that many farmers had their ponds and brooks run dry and had to either dig out their ponds, or dig new ponds, or create irrigation systems in order to continue farming. While this appears so, it does not detract from the contribution of the construction of the dam to the water quality and siltation in the Hoyts' pond.

[104] At the risk of repetition, the Plaintiffs have not discharged the burden of establishing on a balance of probabilities that their pond was spring fed, and I am satisfied that the unusually dry weather conditions in the Annapolis Valley in the years 1999 to 2001 would have had some adverse effect upon the Hoyt pond as it did on other ponds and streams in the area; however, a review of the photographs and the evidence as whole satisfies me that the construction of the woods road exposed the soil around the Loews' dam and pond in such a manner as to cause siltation to flow down into the Hoyt pond and to adversely affect the quality of the water and the condition of the Hoyts' pond.

[105] I have already concluded that any adverse effect on the quality or quantity of water caused by the Loews' wood road would have been remediated in late November 2001 but for the unreasonable interference by Mr. Hoyt in the work being carried out by Mr. Blenus. The expenditures by the Plaintiffs after that date were unnecessary, and the cause of their harm would, but for Mr. Hoyt's interference, been remedied.

[106] Mr. Hoyt stated that the only purpose for drilling the "barn" well and bringing power to the well was to provide water for two (2) watering bowls for his cattle. Shortly after bringing power lines to the back of the Hoyt's lot, the Hoyts began construction of their impressive residence. They needed the power line extension to provide a temporary entrance to enable the contractors to build their residence, and upon completion to provide electricity to the residence.

[107] Mr. Hoyt marked on Exhibit 3 a second well drilled near the residence and at a spot that was close to the first or "barn" well. Exhibit 6, Tab 5 shows that the second "house" well was completed on June 8th, 2002, and that it was tested and rated to provide 25 gallons of water per minute. No explanation was given as

to why two separate wells, one for the house and one for the barn, were necessary. Electricity and water to the barn was said to be solely for the two (2) watering bowls; the demand for electricity and water at the barn was minimal. Any other use for electricity (lights or electric plugs or otherwise) had no relationship to the harm caused to the Hoyts' pond or any conduct of the Defendants.

[108] The onus is on the Plaintiffs to show that their expenditure was reasonable in light of the harm caused by, or attributed to, the Defendants. The Plaintiff has not established the necessity of two wells in close proximity to each other - one for two (2) watering bowls in the barn and a separate one for their residence.

[109] Therefore, separate and apart from the events of November 27th, 2001 and whether or not the expenditures by the Hoyts after November on the "barn" well were necessary, the Court finds that the construction of two drilled wells in close proximity to each other in the circumstances of this case was unnecessary. It cannot reasonably be attributed to the conduct of, or any harm caused by, the Defendants. The Plaintiffs needed power for the construction of their residence (which construction commenced early in 2002) and they needed well water for their completed residence by the summer of 2002.

[110] Because of these conclusions it is not necessary to consider the issue of "betterment" raised by the Defendants. If it was necessary, it is a matter of common sense that the provision of electricity to the barns, and a dependable water supply, not dependant on the extreme weather conditions such as experienced in 1999-2001, made the Plaintiffs' property, which the listed for sale for $1.2 million dollars in September 2006, more valuable.

[111] For the above reason, I find that the special damage claim of $18,500.00 for the cost of bringing in the power, drilling the "barn" well and the ancillary expenses and the $5,000.00 claimed for electrical costs to operate the barn well are not attributable to any interference with riparian rights or nuisance by the Defendants.

[112] As noted above, I accept that the actions of the Defendants in constructing the road caused erosion and the continuous siltation of the Hoyts' pond. This is corroborated by the photographs in evidence. I accept that in addition to the very dry weather conditions in the year 1999, 2000 and 2001, siltation contributed to the

filling in of the Hoyt pond, the lowering of the water level, the stagnate water, and the increase of the growth of algae.

[113] It was not unreasonable for the Loews to cause Blenus to construct the woods road where they did. It was unreasonable to do so without providing protection from erosion and siltation, of the kind subsequently required by the Department of Environment and effected in carrying out the remediation work.

[114] In nuisance, the Court is required to balance the harm caused by the Defendants' actions with utility of their conduct. The harm caused by the erosion and siltation, until Mr. Hoyt's unreasonable interference with the Defendants' remediation work on November 27th, 2001, was substantial and ongoing for over 3 years; that is, more than "a trifling annoyance". The harm was unnecessary and unreasonable. Current case law as to the quantum of general damages for similar types of interference with riparian rights or nuisance was not cited. Dated cases cited included:

(a) **Smith** v. **Richardson** (1977) 23 N.S.R. (2d) 407 (N.S.S.C.). In that case Justice Jones awarded $1,500 general damages against a service station owner for pollution of a well by waste water for above four (4) years.

(b) **Corkum** v. **Lohnes** (1997) 38 N.S.R. (2d) 417 (N.S.S.C.). In this case Justice Burchell awarded $1,000 general damages against a logger whose activities caused mud to pollute a brook that was the source of the Plaintiff's well water, temporarily (for one (1) year) ruining the Plaintiff's well.

(c) **Haynes** v. **Frank Foley Ltd.**, 1982 CarswellNfld. 91 (Nfld.S.C.). In this case a builder pumped water from excavations onto neighbouring residential lands resulting in intermittent flooding for more than a year. Each of the adjacent land owners was awarded $1,000 in general damages.

(d) **Segal** v. **Derrick Golf & Winter Club**, 1977 CarswellAlta 213 (AQB). In this case, golf balls from the Defendant golf course continuous landed on the Plaintiffs' residential property over four (4) years and interfered with their enjoyment and use of their property. In addition to enjoining the Defendant from further nuisance, the Court awarded general damages for $3,000.

(e) **Schneider** v. **Royal Wayne Motel Ltd.**, 1995 CarswellAlta 74 (AProvCt). In this case, golf balls from the Defendant course continuously landed on two adjacent residential properties causing nuisance. The golf club was enjoined from further nuisance, and general damages of $3,000 and $1,000 respectively were awarded for two years of nuisance.

[115] The assessment of general damages is not a precise science. The Plaintiffs' use of their pond was adversely affected as to the quality of the water, and the condition of the pond. The situation was significant and not merely trifling and continued over three (3) years. Most of the cases cited were 30 years old. I award the Plaintiffs **Five Thousand ($5,000) Dollars**, as general damages for the unreasonable manner in which the Defendants constructed the woods road and the resultant harm on the quality of the water running into the Plaintiffs' pond, and the deliterious effect on the pond's condition. The period for which the damages are awarded is to the end of November 2001.

D. Second Issue - Civil Assault

D.1 The Law

[116] An assault in tort law is not the same as in criminal law. In criminal law, an assault is the intention application of force to another person, or an attempt or a threat to apply force to another person. In tort law a battery occurs when a person intentionally causes a harmful or offensive contact with another person. (See Linden, Eighth Edition, Page 43). In tort law an assault is the intentional creation of apprehension of imminent harmful or offensive contact. Linden describes it, at Page 46, as protecting freedom from fear of being physically interfered with. Counsel for Mr. Hoyt, referencing Page 47 of the same text, submitted that frightening or threatening someone does not constitute an assault unless the event feared is imminent (that is, not at some future time).

D.2 Analysis

[117] I accept Mr. Blenus' evidence as to the events of November 27th, 2001 over those of Mr. Hoyt where they conflict.

[118] Mr. Hoyt wrongfully believed that Mr. Blenus was further polluting Mr. Hoyt's pond when he saw water being pumped out of the Loew pond into the stream running into the Hoyt pond. He did not realize, and when Mr. Blenus advised him to the contrary, likely did not believe, that Blenus was simply pumping out the clean water into the watercourse as directed by the Department of Environment and set forth in the remediation plan approved by them. Mr. Hoyt left when he was told that he was trespassing. Shortly afterwards he returned. When he returned, Mr. Blenus observed him moving quickly up the hill towards him, and taking his jacket off as he came up the hill. Because of the history of conflict surrounding this project, and aware that Mr. Hoyt had been an experienced plain-clothed RCMP officer, who, by his physical appearance was obviously in very good shape and capable of inflicting physical harm, he was instantly fearful. Angry words were exchanged between them and I accept that Mr. Hoyt was furious when he said to Mr. Blenus words to the effect: "Don't f... with me, I make people like you disappear". I find that this words, in the context of Mr. Hoyt's related conduct, his obvious ability to carry out the threat, and the circumstances existing on that day, reasonably caused Mr. Blenus to fear imminent harm.

[119] While the words themselves do not express a time-frame in which the harm might occur, I accept that, in the context of the events of November 27th, 2001, the threats were of impending harm that could happen at any time.

[120] In my view, in the context of the events of that day and the background, Mr. Hoyt's words and actions constitute a civil assault.

[121] The evidence does not however support the full consequences claimed by Mr. Blenus to have flowed from the threat. I accept that Mr. Blenus was in shock, as any reasonable person in his position would have been. If the trauma was as significant and long-lasting as represented by Mr. Blenus, one would expect that he might have consulted a medical professional and the claimed impact may have been mitigated or, at least, corroborated by medical evidence as to his ongoing state of mind. There is no such evidence.

[122] In addition, Mr. Blenus spoke of subsequent encounters with Mr. Hoyt, and, in particular, an encounter a bar (which he says that Ms. Hoyt broke up). His description of these encounters is not consistent with the claimed ongoing trauma. Mr. Loew testified as to an occasion when he was in the presence of Mr. Hoyt and Mr. Blenus during which each of them appeared to be "giving as good as he got".

I accept that, as a consequence of the civil assault, Mr. Blenus had sufficient fear to stop the remediation work commenced on November 27th, 2001, and to make the decision that it was not worth the risk of harm to return to the Loews' property to finish the job, and that he had to be convinced to return to the job site after the Loews had unsuccessfully attempted to have at least one other contractor undertake the remediation work. I accept that, out of fear of possible physical harm, he actually and reasonably determined that he would always have other people present when he worked on the Loews' property.

[123] Counsel for Mr. Blenus referred the Court to **Henderson** v. **Nataluk** (2001), 152 Man.R. (2d) 197 (MQB), and **Babineau** v. **Snodgrass** [1986] N.B.J. 951(NBQB). In the former, the Court awarded general and aggravated damages of $13,000 for an assault and a battery of far greater proportions and with far greater consequences than occurred in this case. In the latter, the Court awarded general damages of $200.

[124] The Court has reviewed the case summaries and some of the decisions referred to in *Goldsmith's Damages for Personal Injury and Death in Canada* (Looseleaf, Carswell) for a overview for the kinds of awards made for shock and psychological trauma connected to accidents, threats or assaults and batteries. The awards vary widely. There is no range.

[125] While not directly relevant to the claim for damages for assault, the self-inflicted financial consequences to the Hoyts by reason of Mr. Hoyt's conduct on that day are significant, in light of my determination that his interference was the reason that the remediation was not carried out at that time.

[126] Based on the totality of the evidence, damages for the assault are assessed in the amount of **One Thousand ($1,000) Dollars**.

Costs

[127] Costs are in the discretion of the Court so long as that discretion is exercised in a judicial and fair manner. Costs usually go to the successful party. In this case there was no successful party. The Plaintiff claimed special damages and general damages of more than six times the eventual award. Much of the trial was taken up with the reasonableness (that is, quantum) of the Plaintiffs' claimed damages. The

Defendants have unsuccessfully denied liability. The Court found no ongoing liability but found that for a three (3) year period that the Defendants caused harm to the Plaintiffs, and acted unreasonably. The Defendants have been found jointly liable. Mr. Hoyt unsuccessfully defended the assault claim, but Mr. Blenus was unsuccessful in the claimed consequences.

[128] Unless a party, after release of this decision, can prove that he/they made a formal written offer of settlement pursuant to Civil Procedure Rule 41A, the effect of which was more favourable to the other party or parties than this decision, the Court is inclined not to award costs to any party.

[129] I will hear the parties on prejudgment interest, if they cannot agree.

J.