

Hon. Mr. Justice Clute says:

Appeal from the judgment of the Honourable the Chief Justice of the Exchequer, dated 29th January, 1918.

This action is brought for damages and an injunction for the negligent installation and maintenance of a system of sewerage in the City of Toronto and the negligent, defective and inadequate disposal of the same, whereby the plaintiff suffered special injury.

The defendant denies that they were guilty of negligence and plead statutory authority to do what is complained of.

The facts are fully set forth in the reasons for judgment of the Trial Judge.

In order to take care of the effluent of the sewage from the settling tanks, an outfall pipe was laid from the plant across the marsh to Lake Ontario, a distance of about one mile. This outfall pipe, except in case of emergency, was expected to take care of all the effluent from the tanks, but the Trial Judge found that it is of insufficient capacity and in consequence much of it passes by what is called "the storm overflow passage" into Ashbridge's Bay. This storm overflow passage was intended to meet emergencies, but owing to the insufficient capacity of the overflow pipe, it is obliged to receive continuously a part of the normal volume of effluent. Further, there are two serious breaks in the outfall pipe, and through them large quantities of sewage, instead of passing into the lake, escape into the bay, and there deposit much fecal matter, from which offensive gases escape into the atmosphere.

The defendants contend that they have statutory authority to establish and operate the plant, and that this action will not lie. They also contend that it is being operated with reasonable care in order to prevent nuisance, and if such is the case they are doing all that they are required to do.

The Trial Judge found that the nuisance is traceable, largely if not entirely, to the negligence of the defendants, whereby they have created a nuisance injurious to the plaintiff's property in the pleadings mentioned, the particulars of which are fully set forth in the reasons for judgment.

These findings are, in my opinion, fully supported by the evidence and justify the judgment pronounced against the defendants in this case.

It is quite clear that while the plant was intended to provide for the disposal of thirty-three millions of gallons per day, it is called upon for the disposal of forty-five millions of gallons per day. This caused the overflow and shortened the time allowed for settling.

The serious breakage in the outfall pipe has continued for a long time without any attempt to repair, and in this way a steady stream of sewage to an amount of a half-million gallons per day found its way into the bay, increasing the nuisance to a very considerable extent.

No excuse is offered for the city's failure to repair the break or to provide a sufficient outfall pipe to the lake.

This negligence is established quite apart from the statutory right claimed by the City, and the Judgment may well be supported on that ground, but the plaintiff denies that the city has a right in this case to rely upon any statutory authority, even if that would be an answer to the plaintiff's claim, for the reason that no by-law was passed to authorize the installation of the plant and that no approval for the plant as installed was obtained from the Board of Health. It is admitted by defendant's counsel that no by-law can be found.