CPD-4U

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Litigator Education Programs

NUISANCES BY NEIGHBOUR
The Tort Law

Continuing
Professional Development
Seminar

Location: T.B.A.

Presenter: Scott McEachern

Date: T.B.A.

SPEAKER

Scott McEachern is a Durham College Alumni, a 2012 graduate of the two-year paralegal diploma program. Scott excelled as a student, garnering the Durham Region Chairman's Scholarship Award as well as earning recognition as the Highest-Ranking Graduate by finishing the paralegal program with a 4.96/5.00 GPA after completing all but one course with a 90% or higher grade (14 of 25 courses were completed at 95% or higher) and four were completed with a perfect 100% score).

Prior to paralegal studies, Scott was an insurance broker providing commercial risk management and insurance services with a specialty focus on the development of business insurance programs for various industry sectors. Key favourites involved the 'green trades' whereas Scott conceived and developed the GreenSure insurance plan for landscapers and the TreeSure insurance plan for arborists.

Over the years, Scott has contributed to various professional and community organizations serving as a director for Durham Deaf Services, Landscape Ontario Horticultural Trades Association, and the Sunrise Optimist Club. Scott also contributed to community as a volunteer for the Rotary Club of Port Perry and assistant to the Orono Leafs peewee boy's hockey team.

Scott is often found sharing knowledge via weblogs and as a guest speaker at many meetings and seminar conferences as well as community colleges. A quick Google search will reveal many previous articles written by Scott.

DISCUSSION OBJECTIVES:

1. To acquire an introductory understanding of the tort of private nuisance including the difficulty faced by the judiciary in balancing rights of competing interests;

2. _____

3. _____

4. _____

5. To gain knowledge and to become the best litigator that I can be.

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The information provided within this presentation is for general information purposes only and only begins to scratch the surface of the subject. Always seek and obtain an expert review with proper advice specific to individual circumstances from qualified professionals.

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The information herein is not, and could never be, complete.

INTRODUCTION

The law of 'nuisance' is often classed as falling within the field of tort law; however, some legal academics view nuisance as independent of tort law. Regardless, nuisance is viewed as very broad and historical.

Defining nuisance law, and the confines of what constitutes nuisance, is often very challenging. Doing so is even challenging for the judiciary. Recently, within the case of ***Desando v. Canadian Transit Company***, **2018 ONSC 1859**, the following was stated:

> [27] In the Law of Torts in Canada, 3d ed (Toronto: Carswell, 2010) by Gerald H.L. Fridman, Professor Fridman outlines the challenges courts are presented when "[t]he impossibility of providing a definition of nuisance for legal purposes has frequently been stated. Nuisance is a vague doctrine, very difficult to define accurately."
>
> [28] In Canadian Tort Law: Cases, Notes and Materials, 14th ed (Markham: LexisNexis Canada, 2014) by The Hon. Allen M. Linden, Lewis N. Klar, and Bruce Feldthusen, the authors open with an encapsulation:
>
> > Nuisance is a field of liability that describes a type of harm suffered by the plaintiff, rather than a type of objectionable conduct engaged in by the defendant. Public nuisance deals with the use and enjoyment of the general public's right to use and enjoy public areas such as rights of way. A private nuisance is a substantial interference with an occupier's use and enjoyment of land, an interference which is unreasonable in the circumstances. The "substantial" requirement eliminates consideration of trivial interferences. The "unreasonable" requirement is determined by a balancing exercise that considers factors such as the severity of the interference, the duration, the character of the neighbourhood, the sensitivity of the plaintiff and the utility of the defendant's conduct. . . . In the absence of physical

> damage, the so-called loss of amenity cases, the balancing exercise may be detailed and difficult.

Another very well articulated embodiment of what constitutes nuisance appeared in ***Milne v. Saltspring Island Rod and Gun Club***, **2014 BCSC 1088** were it was said:

> [42] The legal principles of nuisance are well established and uncontroversial. Nuisance is the unreasonable interference with a person's enjoyment of his or her land or physical damage to that land. Some judgments and texts refer to a requirement of the interference being serious, but logically that can be subsumed in the "unreasonable" analysis.
>
> [43] The difficulty in nuisance cases is applying the concept of reasonableness. Determining whether something is a nuisance always involves balancing the interests between the parties. The principle is stated succinctly in Clerk & Lindsell on Torts, 20th ed. (London: Thomson Reuters (Legal), 2010) at para. 20–10:
>
> > Question of degree In nuisance of the third kind, "the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves", there is no absolute standard to be applied. It is always a question of degree whether the interference with comfort or convenience is sufficiently serious to constitute a nuisance. The acts complained of as constituting the nuisance, such as noise, smells or vibration, will usually be lawful acts which only become wrongful from the circumstances under which they are performed, such as the time, place, extent or the manner of performance. In organised society everyone must put up with a certain amount of discomfort and annoyance caused by the legitimate activities of his neighbours. Ordinary domestic use of premises therefore cannot constitute a nuisance, even though interference with the enjoyment of neighbouring premises is caused, if that interference results solely from construction defects for which the defendant is not

> responsible. In attempting to fix the general standard of tolerance the vague maxim *sic utere tuo ut alienum non laedas* has been constantly invoked. But the maxim is of no use in deciding what is the permissible limit in inconvenience and annoyance between neighbours, and the courts in deciding whether an interference can amount to an actionable nuisance have to strike a balance between the right of the defendant to use his property for his own lawful enjoyment and the right of the claimant to the undisturbed enjoyment of his property. No precise or universal formula is possible, but a useful test is what is reasonable according to ordinary usages of mankind living in a particular society.

The essential aspects of nuisance appear as conduct or activity that constitutes as a substantial and unreasonable interference in the use and enjoyment of neighbouring lands. In respect of what is 'reasonable', the Supreme Court of Canada in ***Antrim Truck Centre Ltd. v. Ontario (Transportation)***, **[2013] 1 S.C.R. 594** stated:

> [29] The nature of the defendant's conduct is not, however, an irrelevant consideration. Where the conduct is either malicious or careless, that will be a significant factor in the reasonableness analysis: see, e.g., Linden and Feldthusen, at pp. 590-91; Fleming, at s. 21.110; Murphy and Witting, at p. 439. Moreover, where the defendant can establish that his or her conduct was reasonable, that can be a relevant consideration, particularly in cases where a claim is brought against a public authority. A finding of reasonable conduct will not, however, necessarily preclude a finding of liability. The editors of Fleming's The Law of Torts put this point well at s. 21.120:
>
> > . . . unreasonableness in nuisance relates primarily to the character and extent of the harm caused rather than that threatened. . . . [T]he "duty" not to expose one's neighbours to a nuisance is not necessarily discharged by exercising reasonable care or even all possible care. In that sense, therefore, liability is strict. At the same time, evidence that the defendant has taken all possible precaution to avoid harm

> is not immaterial, because it has a bearing on whether he subjected the plaintiff to an unreasonable interference, and is decisive in those cases where the offensive activity is carried on under statutory authority. . . . [I]n nuisance it is up to the defendant to exculpate himself, once a *prima facie* infringement has been established, for example, by proving that his own use was "natural" and not unreasonable.

Within the earlier case of ***St. Lawrence Cement v. Barrette***, **[2008] 3 S.C.R. 392** at paragraph 77, the Supreme Court stated:

> At common law, nuisance is a field of liabilty that focuses on the harm suffered rather than on prohibited conduct. Nuisance is defined as unreasonable interference with the use of land. Whether the interference results from intentional, negligent or non-faulty conduct is of no consequence provided that the harm can be characterized as a nuisance. The interference must be intolerable to an ordinary person. This is assessed by considering factors such as the nature, severity and duration of the interference, the character of the neighbourhood, the sensitivity of the plaintiff's use and the utility of the activity. The interference must be substantial, which means that compensation will not be awarded for trivial annoyances.

The Supreme Court also attempted to define the tort of nuisance in the case of ***St. Pierre v. Ontario (M.T.C.)***, **[1987] 1 S.C.R. 906** where it was stated at paragraph 10:

> The only basis for an action to recover damages in the circumstances of this case would be the tort of nuisance. Nuisance has been variously described. In this case both parties have suggested definitions and there seems to be little if any dispute between them on the general description of the concept of nuisance. Reference has already been made to the comprehensive definition in Fleming, The Law of Torts. I would add the definition expressed in Street, The Law of Torts (6th ed. 1976), at p. 219:

> A person, then, may be said to have committed the tort of private nuisance when he is held to be responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land or of an interest in land, where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable.
>
> I am far from suggesting that there are not other definitions, and I do not suggest that the categories of nuisance are or ought to be closed. The above definitions, however, cover the general concept and we must now seek to apply it in the circumstances of this case.

POSSIBLE CASE EXAMPLES

Accordingly, whereas nuisance law can be broadly interpreted, the possibilities for application of nuisance enables significant creativity. Cases may involve:

Pollutants

Smith v. Inco Limited, 2011 ONCA 628

Industrial Vibrations

340909 Ontario Ltd. v. Huron Steel Products, 1992 CanLII 7815

Music (loud bass);

Gordner v. 2384898 Ontario Limited, 2017 CanLII 9631

Noise

Suzuki v. Munroe, 2009 BCSC 1403 (air-conditioner)

Schuster Real Estate Co. v. Kenny, 1992 CanLII 1941 (fan)

Smoke or Fumes

Deumo v. Fitzpatrick, 2008 O.J. No. 3015

Dogs that Bark

Angerer v. Cuthbert, 2017 YKSC 54 (confirmed 2018 YKCA 1)

Harassing by Telephone

Motherwell v. Motherwell, 1976 ALTASCAD 155

Roadway Salting Operations

Schenk v. Ontario, [1987] 2 S.C.R. 289

Trees

Yates v. Fedirchuk, 2011 ONSC 5549 (roots);

Freedman v. Cooper, 2015 ONSC 1373 (branches);

Gallant v. Dugard, 2016 ONSC 7319 (walnuts), among other things.

Altered Water Runoff

Hammer v. Kirkpatrick, 2017 ONSC 7150

Grazing Horses

Northern Light Arabians v. Sapergia, 2011 SKPC 151

Sound from Racing

Banfai et al. v. Formula Fun Centre Inc. et al., 1984 CanLII 2198

Laing v. St. Thomas Dragway, 2005 CanLII 1501

Shot from Guns

Milne v. Saltspring Island Rod and Gun Club, 2014 BCSC 1088

Joyce v. Yorkton Gun Club Inc., 1990 CanLII 7493

Unnatural Soil Excavation Resulting in Structural Support Loss

Desjardin v. Blick, 2009 CanLII 13026

Intentional Harassment

Johnson v. Cline, 2017 ONSC 3916 (among others below)

LIABILITY NEARLY ABSOLUTE

It is also helpful to recognize that, *"... a nuisance may be created even where the activity complained of is otherwise lawful.*"; ***Suzuki*** at paragraph 37.

Furthermore, "... *compliance with local bylaws does not mean that the activity complained of cannot be a nuisance* ..."; ***Suzuki*** at paragraph 38 and where it was said, "*I must say that I know of no principle of law which stands for the proposition that an activity permitted by by-law cannot, as a matter of fact, amount to a nuisance.*"; ***Schuster***.

Of great significance is that, "*Negligence is not required to make out the tort of nuisance. The converse is also true: the existence of due care will afford no defence if the other ingredients of the tort are present.*"; ***Suzuki*** at paragraph 40; ***Gordner*** at paragraph 152. Accordingly, it seems that where an unreasonable interference in enjoyment of neighbouring property is found to exist, that liability will be found. Particularly notable, also per ***Suzuki*** at paragraph 86 is that, "*... enhanced comfort should not come at the expense of significantly reduced comfort for their neighbours. ...*" and that neighbours are without requirement to self-defend so to accommodate the inconvenience. Contrastingly, in ***Yates*** at paragraph 10, a duty to mitigate by incurring the cost of a root barrier to preclude invasive tree roots appears as potentially required by the courts whereas it was stated:

> My reasons graft a new principle onto the law of nuisance which imposes a duty on the plaintiff to demonstrate that practicable self-help remedies were not available or the nuisance not foreseeable at the time of the change of the use of her property …

Contributory Negligence

Contributory negligence does not play a significant part in the law of private nuisance; ***Pook v. Rowswell***, 2005 SKPC 110;

> [20] As I am unable to find that the nuisance caused the damage to the shed, it is unnecessary to decide this issue. The authorities indicate it is unclear when the defence of contributory negligence is available in a nuisance action. In cases of public nuisance,

> contributory negligence by a Plaintiff in failing to avoid an apparent danger does reduce the Plaintiff's recovery, as a careless plaintiff cannot improve his chance of recovery by suing in nuisance rather than negligence. However, contributory negligence does not play a significant part in the law of private nuisance. (See Linden, Canadian Tort Law, 5th Ed. (Toronto: Butterworths, 1993) at p. 529, adopted in Olausen v. Gravelbourg Credit Union (1996), 151 Sask. R. 177 (QB); Fleming, The Law of Torts, 5th Ed. (1977, The Law Book Company) at p. 426.)

Premises, type of land

The characterization of the neighbourhood, whether residential or commercial or industrial will assist the court in determining whether the conduct of the defendant unreasonably interferes with the use of the premises of the plaintiff. Typically, it is expected that, "The standard of comfort to be expected in a predominantly residential area differs from that of an industrial or commercial one"; ***Angerer*** (appeal) at paragraph 13 citing ***340909***.

There is also law to indicate that private nuisance may occur where conduct interfered with the enjoyment of premises other than land such as where the Toronto Harbour Police were found liable in nuisance for interfering with the enjoyment of recreational boating; ***Poole v. Ragen***, 1958 O.W.N. 77.

HARASSMENT BY NEIGHBOURS

Nuisance matters appearing unfortunately common are 'harassment by neighbours' cases. Frequent among these cases, it appears that an initial incident develops into a campaign of strife in retaliation for initial incident. As said in ***Lipiec v. Borsa***, [1996] O.J. No. 3819:

> 1 This is a tragic case, not because it is of any legal significance and not because it involves serious injury or damage to a party, it is tragic because for the past five years, the parties, who are adjoining

> homeowners at 27 and 29 Park View Gardens, Toronto, have been involved in a vicious, mean-spirited feud.
>
> 2 The issues in this lawsuit have consumed much of their time, energy, and of the joy which should be present in their lives, along with a great deal of their financial resources.

As for acceptance of nuisance law for application in matters involving harassment by neighbours there is an extensive body of cases covering the issue. Appearing strongly supportive is the case of ***Rathmann v. Rudka***, 2001 CarswellOnt 1206 where it was said at paragraph 20:

> … the case authorities cited by counsel for the plaintiffs show that the courts are giving monetary awards to persons subjected to neighbourly misconduct and who are affected by it. Much depends on the facts, but it does appear that if the court finds misconduct which causes even mild distress, then the court is prepared to grant an award of damages to compensate the aggrieved party. And perhaps this is the way it should be. … what can a person do when subjected to neighbourly misconduct be it, for example, regular loud playing of music … conduct which interferes with other persons right to privacy and their quiet use and enjoyment of their property. There is no recourse unless the courts are prepared to receive these complaints, and if necessary, extend the law of private nuisance to cover the realities of the present age, and attempt to assess damages as a deterrent. Should misconduct and the damaging effect thereof be proven, then a further deterrent might well be an award of costs on a solicitor and client basis. Such an award would act as both an encouragement and a deterrent to bringing frivolous actions.

Similarly, per ***Saelman v. Hill***, **2004 CanLII 9176**, offensive conduct which may consist of separately recognized or otherwise labelled wrongdoings manifest as nuisance whereas it was stated:

> [36] I am of the view that the tort of nuisance is made out in circumstances where a neighbour deliberately, significantly and

> unjustifiably interferes with another neighbour's enjoyment of his or her property. This type of conduct may be labelled as harassment, intimidation or invasion of privacy and in my view, are in essence manifestations of the well-established tort of nuisance.

Also of interest as per the ***Saelman*** case, it appears that in addition to owners of lands, the occupiers without a proprietary interest in the land but who are rightfully in possession of lands may bring action in the tort of nuisance whereas it was said:

> [38] It has been suggested in many of the older cases that for a plaintiff to succeed in nuisance, a proprietary interest in the subject property must be established. This would exclude the plaintiff Mr. Wuerch who resides with Mr. Saelman, as his partner, but without any ownership in the property. With due regard to the historical background to the tort of nuisance, the lawful occupation of a residential property should, as a matter of policy, be protected by the law of nuisance irrespective of whether a claimant can establish a proprietary interest.

Furthermore, and also per ***Saelman***, it appears that a series of incidents may be actionable despite the triviality or minor concern involving the incidents if each incident were viewed individually:

> [41] In summary, I find that the actions of the defendants, particularly Mrs. Hill, in the summer of 1999 through to the time when an injunction was granted by Belch J. on January 25, 2001 on agreed upon terms, constituted a campaign of harassment amounting to an actionable nuisance. Most of the incidents were minor and not individually actionable. However, taken collectively, the defendants' continued digging along the fence line, their channeling of water in order to destabilize the fence and distress the plaintiffs, the surveillance camera, floodlight, and no trespassing signs, the eavestroughing downspout directed onto the plaintiffs' driveway, the personal confrontations and threatening behavior initiated by Mrs. Hill, all contributed to a loss of enjoyment of

> plaintiffs' property. I find that an actionable nuisance has been established based on this unjustified harassment which the plaintiffs have been forced to endure.

INTENTIONAL ANNOYANCE

Significantly of importance with 'harassing neighbours' cases is that determining the reasonableness of social utility element is often far easier than in nuisance cases which seek to find a fair balance between lawful conduct. Whereas nuisance can, and frequently does, occur with unintentional inferences despite lawful conduct having a genuine purpose such as the nuisance of 'industrial vibrations' found in ***340909***, it is often plain and obvious in 'harassing neighbours' cases that the conduct in question is without a genuine purpose and that the conduct is engaged merely for the intention of annoying a neighbour. Where conduct is engaged merely to annoy, and is therefore without a social utility, the need to balance the social utility with the reasonableness of the conduct becomes moot; ***Suzuki*** at paragraph 100:

> Acts done with the intention of annoying a neighbour and actually causing annoyance will be a nuisance, although the same amount of annoyance would not be a nuisance if done in the ordinary and reasonable use of the property: A.M. Dugdale & M.A. Jones eds., Clerk & Lindsell on Torts, 19th ed. (London: Sweet & Maxwell, 2006) at 11782. In my view this is the natural corollary of the principle that the social utility of the activity complained of may be considered in deciding whether the activity is unreasonable. Activities designed to annoy one's neighbours and having little or no redeeming social utility are unreasonable and should be discouraged by the law.

What constitutes nuisance generally and what constitutes nuisance where there is 'intention of annoying' was also addressed in ***Boggs v. Harrison***, **2009 BCSC 789**:

> [23] The authorities make it clear that the interference complained of must be substantial, and far beyond mere inconvenience or minor discomfort. The test for determining whether the interference is unreasonable is an objective one, and requires proof that the interference is of a kind and extent that would not be tolerated by the ordinary occupier. The relevant factors to be considered include the kind and severity of the interference, the frequency and duration of the acts complained of, whether there was any legitimate objective for the defendants' conduct and whether the defendants' actions were intended to interfere with the plaintiffs.
>
> [24] To establish a cause of action in nuisance, the plaintiff does not have to prove that the defendant committed acts of interference with the intent to interfere with the plaintiff's use and enjoyment of his or her property. However, if such wrongful intent can be proved, that fact would strengthen the inference that the interference was unreasonable. The effect that wrongful intent can have in proof of nuisance is stated in this way in Clerk & Lindsell on Torts (2006) at 20-17:
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> > Acts done with the intention of annoying a neighbour and actually causing annoyance will be a nuisance, although the same amount of annoyance would not be a nuisance if done in the ordinary and reasonable use of the property. . . .

DAMAGES

Special

The cost to remedy or mitigate nuisances appears as commonly awarded. In ***Yates***, the cost to install barriers was suggested as a reasonable remedy for the nuisance caused by intruding tree roots.

In the 'harassment by neighbours' cases, costs to secure peace were compensable including the expense of surveillance camera equipment; ***Rathmann***, as well as the expense to install fencing; ***Saelman***.

General

Per ***Saelman*** at paragraph 44 and ***Johnson*** at paragraph 124, awards were assessed separately; firstly, as a sum intended to compensate for 'interference with residence' as well as a sum for mental distress. Furthermore, whereas the 'harassment by neighbours' causes reasonably expected distress, general damages are available without medical expert evidence or a need to establish a medically diagnosed psychiatric condition; ***Johnson*** at paragraph 123, ***Rathmann*** at paragraph 35.

In ***Fitzpatrick*** at paragraph 154, it was particularly noted that damages for nuisance by harassment that interferes with enjoyment of residence, whereas, "*... home is supposed to inspire feelings of comfort and safety, not fear and intrepidation ...*", deserve a premium. Where harassing conduct was particularly oppressive, spiteful, malicious, and prolonged, damages of $10,000 was awarded; ***Garrett v. Mikalachki***, 2000 CarswellOnt 1298 at paragraph 152.

Even in cases involving unintentional nuisance, such as the nuisance via grazing horses in ***Northern Light Arabians***, general damages were required to encourage preventative efforts.

Whereas general damages are difficult to assess, such are usually determined as an 'at-large' award in that a trial Judge is entitled to use guess work; ***Gordner*** at paragraph 196 while citing ***TMS Lighting Limited v. KJS Transport Inc.***, **2014 ONCA 1** at paragraph 61 :

> … A trial judge is entitled to do his or her best to assess the damages suffered by a plaintiff on the available evidence even where difficulties in the quantification of damages render a precise mathematical calculation of the plaintiffs loss uncertain or impossible. Mathematical exactitude in the calculation of damages is neither necessary nor realistic in many cases….

> … The distinction drawn in the various authorities, as I see it, is that where the assessment is difficult because of the nature of the damage proved, the difficulty of assessment is no grounds for refusing substantial damages even to the point of resorting to guesswork….

Aggravated

Per ***Gordner*** at paragraph 194, where the conduct of complained of continues after the defendant becomes aware of the interference or disturbance to the plaintiff and the defendant is without efforts to remedy, aggravated damages may be deserved:

> To address the claim for aggravated damages, I rely upon the decision of the Ontario Court of Appeal in *McIntyre v Grigg*, 2006 CanLII 37326. The court dealt with a huge jury award of damages witch included a separate award of $100,000 for Aggravated damages plus Punitive Damages of $100,000. On appeal, the court considered both of these latter two damage awards. Dealing with aggravated damages the court said at para. 50:
>
> > Aggravated damages are awarded when the reprehensible or outrageous nature of the defendants conduct causes a loss of dignity, humiliation, additional psychological injury, or harm to plaintiffs feelings… Aggravated damages are not awarded in addition to general damages, but the general damages are to be assessed "taking into account any aggravating features of the case and to that extent increasing the amount awarded".
>
> The evidence of the plaintiff and other resident witnesses from RWT satisfies the test just enunciated. I consider the defendant's long-term disregard of the comfort of its neighbours to be outrageous. The defendant received many, many complaints I have detailed above yet it failed or simply refused to contain the Harm for four years and more. Mr. Komsa sought no professional advice – he just searched on the internet and made an obviously uninformed decision about the type of insulation required. It might be said, as well, that

> the Report of Dr. Novak delivered in 2015 long before trial provided an opportunity for Lev3l to take proper steps to insulate to attenuate the Boom Boom Boom. Again, Lev3l failed to take any positive steps and the Harm continues as I write these Reasons. I assess aggravated damages at $10,000 which I will include as part of the damages award for the Nuisance.

Punitive

Per ***Fitzpatrick v. Orwin***, **2012 ONSC 3492** at paragraphs 160 to 174, a 'harassment by neighbours' case, which involved intentional conduct deemed reprehensible intimidation that went as far as the placing of a dead coyote upon a vehicle and the issuance of threats and insults, the reasoning for punitive damages was particularly well articulated as:

> [170] Commenting on punitive damages in the context of trespass, Aitken J. stated in *Pyper v. Crausen* (2008), 37 C.E.L.R. (3d) 257 (Ont. S.C.) at para.44 that:
>
> > Punitive damages may be awarded for trespass where the defendant's conduct is described as arrogant, callous, oppressive, arbitrary, fraudulent, high-handed, malicious, calculated, or some other similar term. They are reserved for situations where the defendant has shown a wanton disregard for the plaintiff's rights as property owner. (See examples in Remedies in Tort, supra, chapter 23, paras. 46-47.)
> >
> > In *Pyper*, no punitive damages were awarded since the trespass involved the misplacement of fallen stones onto a neighbour's fence.
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> [171] Unlike the facts in *Pyper*, supra, the actions taken by Mr. Fitzpatrick in the current case are exceptional, and warrant an award of punitive damages. He waged a reprehensible campaign of worry and intimidation against his elderly neighbours. Placing a dead coyote on a neighbour's vehicle is completely removed from the ordinary standard of decent, and neighbourly, behaviour. Such actions, alongside threatening Mr. O'Carroll and hurling insults at the Squires, must be explicitly denunciated.

[172] Damages were awarded for neighbourly misconduct in *Desjardins v. Blick*, [2009] O.J. No. 1234 (S.C.), where Kane J. granted $5,000 in punitive damages, at para.31. In Desjardins, the defendant neighbours mistakenly believed that their property had been encroached upon by their neighbour's garage. In response, they deliberately removed lateral support for this structure, causing damage. This behaviour escalated to taunts, fights, and the imbedding of devices to cause personal injury. Such belligerent behaviour is reminiscent of Mr. Fitzpatrick's threatening and distasteful actions.

[173] As well, in *Cantera*, supra at para. 65, Harvison-Young J. awarded $5,000 in punitive damages for a trespass case. She found that the defendants had acted knowingly, deliberately and wilfully when tearing down a fence that they had been advised was not on their property. This conduct was accepted as high-handed and arrogant enough to justify a punitive damages award.

[174] In *Desjardins*, supra, the neighbours believed that they were the victims of an encroachment on their property. This belief was unfounded, however it stands in stark contrast to Mr. Fitzpatrick's explicit knowledge that he was trespassing onto the property of the Squires when he removed the survey markers and when he caused the video camera to be detached and the dead coyote to be placed on the truck. In *Cantera*, the defendants chose to remove the fence when the plaintiffs were away from home. In contrast. Mr. Fitzpatrick took advantage of the opportunities he had to encounter the Squires in person, so that he could insult them. He also waited for Mr. Squires to emerge from his house so that he could relish in the shock and fear of seeing Mr. Squires discover the carcass. For these distinguishing reasons, I find that Mr. Fitzpatrick's conduct was considerably more egregious than in *Desjardins* and *Cantera*. I therefore award punitive damages of $20,000 against him. This sum shall be payable to the Squires jointly.

QUESTIONS:

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NOTES:

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