TREES & THE LAW

BY JULIAN DUNSTER

Nuisance-trees and unreasonable interference of enjoyment

There are many instances where a tree growing near a boundary creates conditions on the other side of the boundary that are deemed unwanted, annoying or clearly damaging to the adjacent property owner. Typical examples are branches overhanging on to the neighbour's property, and roots growing across the boundary — heaving pathways, drives or foundations or plugging up drains.

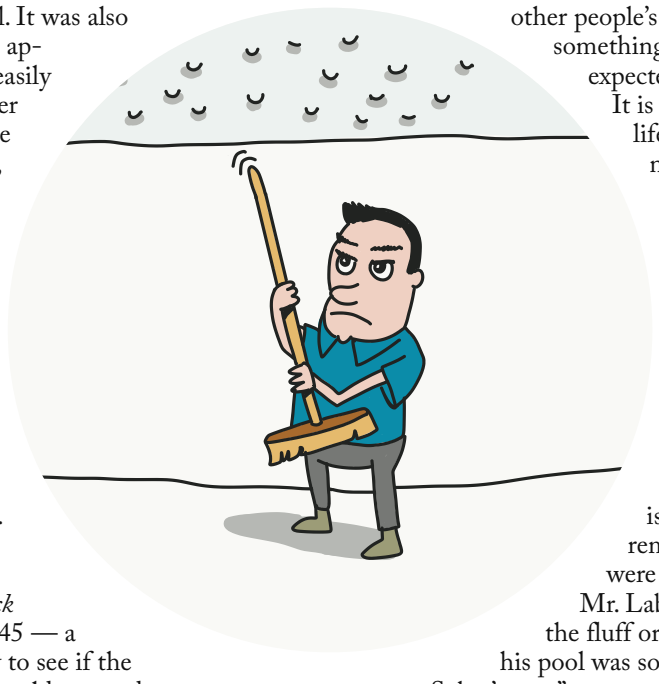
Nuisance is considered to be a common law tort. It is not concerned with fault, so much as it attempts to impose a sense of responsibility on the tree owner to restrict their tree from inflicting unreasonable interference on the neighbour such that they can no longer use or enjoy their land. There is considerable case law on the issue with the general principles well defined.

The Supreme Court of Canada, in Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation) 2013 SCC 13 noted, "The elements of a claim in private nuisance have often been expressed in terms of a two-part test of this nature: to support a claim in private nuisance, the interference with the owner's use or enjoyment of land must be both substantial and unreasonable. A substantial interference with property is one that is non-trivial. Where this threshold is met, the inquiry proceeds to the reasonableness analysis, which is concerned with whether the non-trivial interference was also unreasonable in all of the circumstances."

So, the two key issues are that the interference claimed must be proven to be substantial, and if that can be proven, it must then be shown to be unreasonable. If the claimed interference is not substantial it will, by default, not be found as unreasonable.

In *Gallant v. Dugard*, 2016 ONSC 731 Mr. Gallant claimed that the sound of walnuts falling on his roof from the neighbour's tree were a nuisance and interfered with his enjoyment of his property. He requested that the tree be removed to abate the nuisance. The judge noted that the duration of falling walnuts did not occur every year and even when it did, the duration was only for a few weeks at most. Consequently, the claimed interference was not substantial. It was also noted that the applicant could easily sleep in another room when the issue did arise, and that the walnut tree was on site when the house was purchased. The claim for nuisance was not proved and the case was dismissed.

Similar issues arise in *Sykes v. Labuick* 2014 SKPC 145 — a judicial review to see if the entire claim should proceed or not. Labuick claimed overhanging limbs and falling leaves damaged the swimming pool by clogging the filter as well as damaging the air conditioner. Sykes claimed the action was frivolous and vexatious and should be dismissed. The court noted that the nuisance was not proven, in part because Labuick could not prove the debris came from one particular tree. It could have come from several similar trees in the neighbourhood.



The judge wrote, "Even if Mr. Labuick could prove that the debris in his yard is solely from the Sykes' trees, this would not be sufficient. I am prepared to take judicial notice of the fact that communities such as Moose Jaw have trees; wind blows and blows all sorts of debris into other people's yards. This is something people are expected to live with. It is part of urban life. There is nothing in the pleadings to suggest that the burden on Mr. Labuick is greater than expected for the community he lives in. The issue is there is no remedy even if I were to accept that Mr. Labuick proved the fluff or debris in his pool was solely from the Sykes' trees."

The case was allowed to proceed but only on the claim for damage caused by overhanging branches invading Mr. Labuick's air space. The rest of the claim was denied.

It should also be noted that liability for damage caused by the alleged nuisance has to be provable. In *Pook v. Rowswell* 2005 SKPC 110 the plaintiff claimed the neighbour's overhanging tree branch had damaged the roof of his shed and sued for the sum of $378.43. At trial, several issues became clear. The shed roof had been leaking for many years before the overhanging branch was large enough to reach the roof, and the tenant had asked the plaintiff about the leaking shed roof on several occasions. Even so, the plaintiff had failed to undertake repairs even after knowing of the issue. The court noted that, *[15]* "A person is liable for a nuisance if that person: causes it; by neglect allows it to arise; or omits to remedy it within a reasonable time after becoming aware of it. The duty arises from three elements: actual or constructive knowledge of the hazard; foreseeability of the consequences of it; and the ability to abate it: C.E.D. (West. 3rd) 25-103 §49."

If the defendant had known of the damage being caused, and had failed to abate that damage, he would be liable for it. But it was up to the plaintiff to prove the damage and ensuing loss had been caused by the nuisance claimed — the overhanging branch. The evidence presented did not support that claim, therefore there was no nuisance and the claim failed.

Nuisance issues are also discussed in Freedman v. Cooper, (2015 ONSC 1373). "Generally speaking, whether the landowner's unreasonable use was intentional, negligent or innocent is of no consequence if the harm can be categorized as a nuisance. What is unreasonable reflects the ordinary usages of people living in society, and determining unreasonableness involves balancing competing rights of landowners."

In *Doucette v. Parent, [1996] O.J. No. 3493 (Gen. Div.)* the court noted

"The common element appears to be whether or not the defendant had, or ought to have had, knowledge regarding a potentially dangerous situation created by the defendant's trees vis -à-vis his neighbour. With respect to latent defects, a defendant is not liable in nuisance unless he/she fails to remedy it without undue delay when he/she becomes aware of it or with ordinary and reasonable care should become aware of it."

Finally, in *Black v. Zager* (1982), 18 Man.R. 22 (Man.Q.B.) it was noted, "It is common ground that an owner of land on which a tree grows is liable in nuisance at the suit of an owner of adjoining land if the roots or branches encroach on the adjoining land and cause damage."

In order to successfully make a claim in nuisance the lessons appear to be that:

i) The owner of the tree causing the nuisance will not be liable for latent damage if it is dealt with in a timely manner, once the owner becomes aware of it. That means that the owner of the tree needs to be clearly notified of the claimed nuisance.

ii) The owner may be liable for damage if the nuisance is proven to be substantial, not trivial. So, the nuisance must be beyond what might be ordinarily expected in a neighbourhood.

iii) The claimed nuisance causing substantial interference has to be proven to create an unreasonable condition for the neighbour.

Julian Dunster is not a lawyer and the above should not be construed as legal advice. If you have an issue requiring legal advice please consult a lawyer. The above is extracted from his forthcoming book Trees and the Law in Canada *which is scheduled for publication in the fall of 2017.*