CITATION: Baumann v. Capello, 2024 ONSC 357
COURT FILE NO.: CV-18-77889
DATE: 2024/01/16

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
ROLF BAUMANN Plaintiff	J.F. Lalonde, for the Plaintiff
– and –	
GREGORY CAPELLO and 1693876 ONTARIO INC. Defendants	Michael Rappaport, for the Defendants
	HEARD: June 5-9, 2023

REASONS FOR JUDGMENT

REES J.

Overview

[1] This action arises from a dispute about neighbouring residential properties. The plaintiff, Mr. Rolf Baumann, says that the defendant Mr. Gregory Capello built his property in a way that is causing water and debris to migrate onto Mr. Baumann's property. In September 2020, Mr. Capello transferred ownership of his property to the defendant 1693876 Ontario Inc. ('876). Mr. Baumann says the problem is ongoing.

[2] Mr. Baumann brings this action by way of simplified procedure under Rule 76 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, against the defendants for nuisance and for the tort in *Rylands v. Fletcher*.

[3] Mr. Baumann seeks compensatory and punitive damages, and a permanent or mandatory injunction to stop the ongoing harm.

[4] For the reasons below, I find that the defendants have caused a nuisance to Mr. Baumann. I award Mr. Baumann compensatory damages and a mandatory injunction. I do not, however, award punitive damages, as this would be disproportionate given the injunctive relief.

Background Facts

[5] Mr. Baumann has been in the real estate and construction business since 1990. He is a general contractor. Through his company he engages in project management, renovation, design and builds.

[6] Mr. Baumann is the registered owner of the property at 281 Kirchoffer Avenue. He bought the property in 2002 to develop it. At the time, it contained a single-family dwelling. He constructed a semi-detached dwelling with two units on the property. He lived in one unit and rented out 281 Kirchoffer. In May 2023, Mr. Baumann and his family moved into 281 Kirchoffer because he could not longer rent it out given the continued water infiltration into its basement.

[7] Mr. Capello has been in the construction business since 1987. He has renovated several residential properties over the years. He has also worked in new construction, managing the development process. He characterizes himself as more of a property manager, though he also engages in infill construction.

[8] Mr. Capello bought 283 Kirchoffer Avenue in 2011. At the time, it contained a single-family dwelling. He constructed a semi-detached dwelling with two units on the property, which are now 283 and 285 Kirchoffer. He built 283 Kirchoffer between the autumn of 2017 and the spring of 2019. In September 2020, he transferred 283 Kirchoffer to ‘876 for one dollar. Mr. Capello is the sole director and shareholder of ‘876.

Procedural History

[9] This was a simplified trial under Rule 76. Most of the evidence-in-chief was presented through affidavits. When asked, I allowed counsel to supplement the affidavits through focused oral evidence. The witnesses were then cross-examined by the party opposite.

Issues

[10] The action raises the following issues:

1. Are the defendants liable in nuisance?
2. Are the defendants liable for the tort in *Rylands v. Fletcher*?
3. If the answer to Issues 1 or 2 (or both) is yes, what damages did Mr. Baumann suffer?
4. Should punitive damages be awarded against the defendants?

5. Should a permanent or mandatory injunction be made against the defendants?

[11] I will address each issue in turn.

Issue 1: Are the defendants liable in nuisance?

[12] Mr. Baumann alleges that the defendants have caused an ongoing nuisance which has damaged his property.

The law of nuisance

[13] A nuisance is an interference with a plaintiff's use or enjoyment of land that is both substantial and unreasonable: *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)*, 2013 SCC 13, [2013] 1 S.C.R. 594, at para. 19. The focus is on the harm suffered rather than fault or the nature of the conduct giving rise to the harm: *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392, at para. 77.

[14] It is a two-part test. First, a substantial interference is one that is non-trivial: *Antrim*, at para. 19. It must be more than a slight annoyance or trifling interference: *Antrim*, at para. 22. Second, an unreasonable interference is one where the gravity of the harm to the plaintiff's property outweighs the utility of the defendants' conduct in all the circumstances: *Antrim*, at para. 26. The same test applies whether or not there has been actual physical damage or interference with the health, comfort or convenience of the owner or occupier: *Antrim*, at para. 23.

[15] The onus lies on the plaintiff to prove that the defendant caused a substantial and unreasonable interference with the plaintiff's property. *But for* the defendants' acts or omissions, would the damage to or interference with the plaintiff's property have occurred? See *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181. On these facts, I need not decide whether the material contribution test applies in nuisance.

Did the defendants cause the interference with the plaintiff's property?

[16] Mr. Baumann contends that Mr. Capello caused the migration of water, sand, sediment and silt onto 281 Kirchoffer because of the way the Mr. Capello built 283 Kirchoffer. By contrast, Mr. Capello contends that Mr. Baumann experienced water infiltration before he built 283 Kirchoffer. He also contends that the water infiltration in 281 Kirchoffer is due to Mr. Baumann having built under the water table and due to him lacking a sump pump, and because 281 Kirchoffer is poorly maintained.

Was there water infiltration and debris from 283 Kirchoffer to 281 Kirchoffer?

(a) The water and debris originated from the defendants' property

[17] Mr. Baumann provided ample evidence of water infiltration and debris migration from 283 Kirchoffer to 281 Kirchoffer since May 2018 through his affidavit evidence, contemporaneous

photographic evidence, and contemporaneous city inspection reports. His evidence was also supported by his civil engineering expert, a city inspector, and the surveyor retained by both the plaintiff and the defendant over the years. Taken together, I found this evidence to be compelling. Mr. Baumann's evidence in relation to causation was not undermined on cross-examination. (I return below to the question of whether 281 Kirchoffer had previously experienced water infiltration. But, as discussed below, that does not determine the cause of the interference complained of in this action.)

[18] Mr. Capello applied for a building permit for the semi-detached units at 283 and 285 Kirchoffer in 2014. Though opposed to certain design requirements requested by the city, Mr. Capello ultimately agreed and finalized the plans for the buildings in 2017 because he was concerned about certain upcoming bylaw changes. He felt pressured to do so because the city was delaying approval and he was worried about missing the deadline.

[19] Despite having agreed to these requirements, Mr. Capello had no intention of abiding by them. He intended to build the property as he saw fit and seek a variance after 283 Kirchoffer was built. He departed from the city-approved plans in four important ways.

[20] First, he changed the slope of the roof on 283 Kirchoffer. Rather than sloping to the front, as approved, he built the roof so that it sloped to the side facing Mr. Baumann's property.

[21] Second, he changed the placement of the scuppers and downpipes. The building plan approved by the city required the roof scuppers and downpipes to be placed at the front and back of the building. Instead, Mr. Capello installed the scuppers on the sides of the building, and six downpipes on the side adjoining 281 Kirchoffer. Mr. Capello also installed a horizontal PVC pipe at ground level next to the foundation of 283 Kirchoffer into which six downpipes were inserted. All of the rainwater accumulating on the roof is diverted to the side of 283 Kirchoffer, into the six downspouts. Mr. Baumann's evidence, which I accept, is that water overflowed the PVC pipe. Mr. Baumann's evidence was not undermined on cross-examination. His evidence is supported by photographic evidence from August 2019.

[22] Third, Mr. Capello did not build the required retaining wall and maintain the approved grading. The 2017 grading plan, approved by the city, contemplates that Mr. Capello would construct a retaining wall along the property line between 283 Kirchoffer and 281 Kirchoffer. The retaining wall was to be over a meter at its highest point, and it was to be set 0.15 metre clear of the property line on Mr. Capello's property. Given the wall's proposed height, it was necessary for the wall to be engineered.

[23] Mr. Capello built a retaining wall that was too low and that did not achieve the correct front to back slope. He also built it on the property line rather than 0.15 metre back on his property. Finally, he did not build an engineered retaining wall, as required, but simply put in a timber wall.

[24] Finally, the finished grade on the portion of Mr. Capello's property next to Mr. Baumann's was required to be 1.5 percent, back to front. But Mr. Capello did not grade his property as

required. The contemporaneous inspection reports show that Mr. Capello did not maintain the required grading. Mr. Capello also admitted on cross-examination that he had not maintained the 1.5 percent grade for the side yard as required by the approved grading plan. Raising the grade to the approved slope was part of the work he was undertaking during trial.

[25] I pause here to note that the city-approved plans do not dispose of the question of causation. They are, however, a part of the overall evidence that I have considered.

[26] The weight of the expert evidence supports the view that the way 283 Kirchoffer had been constructed is causing the migration of water and debris onto Mr. Baumann's property, rather than the water originating from 281 Kirchoffer.

[27] The plaintiff called an expert in civil engineering, Mr. Wojciech Remisz. Mr. Remisz has been practicing as a professional engineer for 50 years, nearly 40 of those years in Ontario. Over this time, he has developed considerable experience with building projects in Canada. He is a licensed Professional Engineer and is a Designated Consulting Engineer in Ontario. He is also a Fellow of the Canadian Society for Civil Engineering. I found Mr. Remisz's opinion evidence to be coherent, clear, and compelling. In my view, he genuinely wished to help the court understand the cause for the migration of water and debris, and the most appropriate solution. The defendant's cross-examination did not diminish the weight of Mr. Remisz's opinion evidence.

[28] Having reviewed relevant underlying documents and having visited the site twice, Mr. Remisz opined that Mr. Capello's installation of the six downpipes on the side of 283 Kirchoffer, next to 281 Kirchoffer, is causing the migration of water and debris onto Mr. Baumann's property. He explained that water coming down the six downpipes is collected from a large roof area. The water has a large volume, is concentrated, and falls under gravity pressure. The volume and pressure push the water into the horizontal PVC drainage pipe, which Mr. Capello installed. Where the downpipes connect to the PVC drainage pipe, the horizontal drainpipes may spill over and saturate the backfill under pressure. This, in turn, pushes sand from 283 Kirchoffer to 281 Kirchoffer. This opinion evidence supports Mr. Baumann's observations regarding the overflow from the PVC pipe.

[29] Mr. Remisz also opined that the problem is not only the landscaping at 283 Kirchoffer and the height of the timber retaining wall, but mainly all six downpipes facing 281 Kirchoffer. In his view, modifying the landscaping at 283 Kirchoffer will have only a negligible effect on overall water problems. Rather, it is essential that the six downpipes be eliminated. Only this would eliminate the migration of water onto Mr. Baumann's property, in his opinion.

[30] As discussed, I found Mr. Remisz's opinion evidence to be compelling. It is also well supported by common sense and the construction plan approved by the city.

[31] The defendants called Mr. Mohammed Nayef as a participant expert witness. Besides providing opinion evidence, he was retained by Mr. Capello to undertake remediation to the landscaping of 283 Kirchoffer during the trial. (I will return to the ongoing work below.)

[32] Mr. Nayef opined that storm water from the roof of 283 Kirchoffer was and can continue to be effectively directed from the roof to the front of the property, towards the street. He opined that there were several deficiencies at 281 Kirchoffer. He also opined that a one metre retaining wall was not needed to achieve the necessary grade.

[33] Mr. Nayef received his Bachelor of Engineering in 2014 and received his designation as a professional engineer only in 2021. Between 2014 and 2021 he was an engineer in training. He only began practicing as a professional engineer in 2022. His most recent work from February 2023 was on an as-needed-basis. He also has his own consultancy, which provides planning and construction work.

[34] I qualified Mr. Nayef as an expert in civil engineering based on his professional accreditation. Mr. Remisz, however, was vastly more experienced that Mr. Nayef and provided a more coherent opinion. Accordingly, I place greater weight on Mr. Remisz's opinion evidence.

[35] Further, there were significant problems with Mr. Nayef's evidence. He swore four versions of his affidavit. Three were sworn *during the week of trial*. None of Mr. Nayef's affidavits were served within the timeframes required by the pretrial management order. In fact, an updated version was tendered on the morning Mr. Nayef gave evidence, on June 9. Mr. Baumann's counsel had not had time to properly review the June 9 version of the affidavit. Out of fairness to Mr. Baumann, I refused to receive the June 9 version of Mr. Nayef's affidavit on the day of trial. Instead, I received into evidence the June 8 version of Mr. Nayef's affidavit, which counsel for Mr. Baumann had reviewed, and allowed the defendants to lead any additional evidence from Mr. Nayef orally, so that Mr. Baumann's objections could be dealt with case-by-case.

[36] Mr. Baumann alleged that Mr. Capello had breached the witness exclusion order by discussing the evidence given at trial with Mr. Nayef. It was acknowledged by counsel for the defendants that Mr. Capello had communicated with Mr. Nayef during the trial. Mr. Nayef testified that Mr. Capello provided Mr. Nayef detailed accounts regarding each day's trial evidence.

[37] At the beginning of the trial, the plaintiff requested a general witness exclusion order and specifically asked to exclude Mr. Nayef. The defendants did not oppose this order. Even though expert witnesses are routinely exempted from witness exclusion orders, the defendants did not ask for an exception for Mr. Nayef. I therefore granted a blanket witness exclusion order. Mr. Capello was present when I made the order.

[38] I find that Mr. Capello breached the witness exclusion order. And it became clear on the cross-examination of Mr. Nayef that Mr. Capello had a heavy hand in shaping Mr. Nayef's evidence. Mr. Nayef testified that Mr. Capello had discussed the four sworn versions of his affidavit with him and "we came up with the best solution together". This significantly undermined the value of Mr. Nayef's opinion evidence.

[39] All this leads me to prefer Mr. Remisz's opinion over Mr. Nayef's. I derived greater assistance from Mr. Remisz's opinion and it is more consistent with the underlying evidence.

(b) The plaintiff did not establish that Mr. Capello removed a preexisting stone retaining wall

[40] Mr. Baumann alleges that Mr. Capello removed a preexisting stone retaining wall between their properties. Mr. Capello denies this and says that Mr. Baumann removed the preexisting wall. This issue generated more heat than light at trial.

[41] I find that Mr. Baumann has not established that Mr. Capello removed the preexisting stone retaining wall. The stone wall was not included on the 2017 survey of 283 Kirchoffer. But I also find that there is no evidence that Mr. Baumann removed the wall.

[42] Ultimately, the evidence about the preexisting retaining wall is not probative of causation. Mr. Capello built a house on a site that in 2017 had no retaining wall. The approved plan required him to build a retaining wall. He did not. Quite apart from that, he also did not maintain the necessary grade and he installed all the downpipes on the side of 283 Kirchoffer that abuts Mr. Baumann's property. All these things, taken together, have caused the migration of water and debris.

[43] The defendants contended that the water infiltration and debris migration was not caused by Mr. Capello's property, but originated on Mr. Baumann's property. The defendants advanced three arguments, in this regard. First, they say that the water infiltration was a preexisting problem. Second, the defendants argue that the water infiltration is due to Mr. Baumann's property being built below the water table and lacking a sump pump. Finally, the defendants argue that the water infiltration is due to Mr. Baumann's property being poorly maintained. I will examine each contention in turn.

(c) Did water infiltration occur before Mr. Capello built 283 Kirchoffer?

[44] Mr. Baumann's evidence was that he had no issues with water infiltration or debris before Mr. Capello constructed the infill construction at 283 Kirchoffer. His evidence was that his property started experiencing water and debris migration issues from May 2018 onwards, while Mr. Capello was building 283 Kirchoffer, and that the problem is ongoing.

[45] On cross-examination, Mr. Baumann was confronted with a letter from him to the Committee of Adjustments, dated August 15, 2011. In that letter, he opposed Mr. Capello's application to build a duplex on 283-285 Kirchoffer. Mr. Baumann wrote that the current building on the land acquired by Mr. Capello causes the basements and yards to flood during the spring runoff and during substantial rains. Mr. Baumann could not recall the letter. The letter bears the stamp of the City of Ottawa's Committee of Adjustments. Mr. Baumann admits having emailed the Committee of Adjustments, which refers to that letter. In light of this, I conclude that Mr. Baumann did write and send the letter.

[46] On the strength of Mr. Baumann's statement in the August 15, 2011 letter, I find that the basement in 281 Kirchoffer flooded during the spring runoff and during substantial rains before Mr. Capello build the new construction on 283 Kirchoffer.

[47] This does not dispose of the causation issue, however. It can logically and causally *both* be true that: (1) the previous construction on 283 Kirchoffer was causing water migration and infiltration to 281 Kirchoffer; *and* (2) the new construction on 283 Kirchoffer has been causing water migration and infiltration to 281 Kirchoffer. The real question is what caused the water infiltration since May 2018? If, as the evidence establishes, the defendants caused the water migration complained of, they can be liable in nuisance.

(d) Was 281 Kirchoffer built below the water table and does it lack a sump pump?

[48] The defendants allege that Mr. Baumann excavated his property below the water table.

[49] Mr. Capello's evidence was that in 2009, while he visited another property for sale at 287 Kirchoffer, the plaintiff excavated the properties at 279 and 281 Kirchoffer below the water table, exposing his foundation to possible flooding. Mr. Capello's claims in his evidence that Mr. Baumann told him that it cost $50,000 to remove additional bedrock to excavate a deeper foundation but that he would have two semi-detached units with four levels of living space. He also claims having seen a pool of water covering the footings of 281 Kirchoffer in 2009. Mr. Capello suggested that he could find no evidence that Mr. Baumann's property at 281 Kirchoffer had a sump pump.

[50] On cross-examination, Mr. Capello claimed that he spoke with Mr. Baumann in 2009, when he visited the property for sale at 287 Kirchoffer. He also claimed that he made his assessment that Mr. Baumann's property had been excavated below the water table while cycling by when the property was being built.

[51] Taken together, I found Mr. Capello's evidence on these points to be unpersuasive.

[52] Mr. Capello's account was not particularly coherent, and it was unsupported by any objective evidence corroborating his assertions. For instance, he did not offer any evidence of approved plans, building permits and inspection reports in relation to 281 Kirchoffer, which would be available from the City of Ottawa. What is more, neither his affidavit nor his evidence on cross-examination provided supporting details about the conversation he claimed to have with Mr. Baumann or his observations of the excavation at 281 Kirchoffer being below the water table.

[53] By contrast, Mr. Baumann's evidence was that the plans and designs for his property did not call for the building to be built below the water table. His evidence was that his plans were submitted to and approved by the City of Ottawa. His evidence was that the property was built in accordance with these plans and was not built under the water table. His evidence was that the property passed city inspections and an occupancy permit was issued. This evidence was not disturbed on cross-examination. I find that Mr. Baumann's evidence was both credible and reliable: it is more coherent and detailed. Although the plans and approvals were not in evidence, Mr. Capello had the burden of proving this allegation.

[54] Further, Mr. Capello's suggestion that there is no sump pump at 281 Kirchoffer was convincingly contradicted by Mr. Baumann, who was in a better position to know, and who provided photographic evidence of a sump pump.

[55] I find that 281 Kirchoffer was excavated and built above the water table and it has a sump pump.

(e) Was the water infiltration caused by 281 Kirchoffer being poorly maintained?

[56] The defendants argued that the water infiltration occurred because 281 Kirchoffer was not properly maintained. I found this contention unconvincing and contradicted by the contemporaneous photographic evidence and city inspection reports.

[57] Mr. Baumann's property is generally well-maintained, though there were some minor issues regarding his maintenance of downspouts, window wells, and grading. I find that these issues could not have been the source of the water infiltration and debris migration.

(f) Conclusion

[58] Mr. Baumann has established that but for the manner in which 283 Kirchoffer was constructed by Mr. Capello, the water and debris would not have migrated onto his property. Based on all the evidence, I find that the location of the six downspouts, the inadequate grading, and the inadequate retaining wall have—in combination—caused the interference with Mr. Baumann's property.

What caused Mr. Baumann's fence to collapse?

[59] In 2006, Mr. Baumann built a cedar fence on his property, adjacent to Mr. Capello's property. It was built close to a cedar hedge on Mr. Capello's property. When Mr. Capello removed the hedge in 2017, a portion of Mr. Baumann's cedar fence collapsed.

[60] Mr. Baumann argues that Mr. Capello caused the collapse of the fence. Mr. Capello argues that Mr. Baumann did not properly secure the fence with concrete footings. He also alleges that Mr. Baumann built the fence into the hedge's root system.

[61] I find that but for Mr. Capello's removal of the hedge, Mr. Baumann's fence would not have collapsed. Mr. Capello's allegation that there were no concrete footings was undermined in cross-examination through contemporaneous photographic evidence. I also accept Mr. Baumann's evidence that there were concrete footings. Thus, I find that Mr. Baumann's fence was secured to concrete footings.

[62] I also reject Mr. Capello's argument about the fence having been built too close to the roots. Mr. Baumann was building on his property, as he had a right to do. Mr. Capello caused the damage to the fence when he removed the hedge and destabilized the ground around the fence.

Is the interference substantial?

[63] I have no difficulty finding that the interference with Mr. Baumann's property is more than trivial. Water has seeped into the basement of 281 Kirchoffer and debris regularly washes onto his property. Mr. Capello also caused a portion of Mr. Baumann's cedar fence to collapse. These interferences are more than a slight annoyance or trifling interference.

Is the interference unreasonable?

[64] Similarly, I have no difficulty finding that the interference with Mr. Baumann's property is unreasonable. As for the water and debris migration, there is no public benefit to the interference. Mr. Capello could have readily avoided the interference by abiding by the approved construction and grading of 283 Kirchoffer. From the outset, he simply had other ideas and disregarded the effect of his construction and grading on his neighbour. Further, I find that it was not reasonable for Mr. Capello to remove the hedge in a way that it destabilized Mr. Baumann's fence. While it was not unreasonable for Mr. Capello to remove the hedge, he could have taken less invasive measures with respect to the root system and digging into the surrounding soil. The approved plan did not call for him to build the retaining wall on the property line; it was to be set back.

Conclusion

[65] Accordingly, I find the defendants liable in nuisance.

Issue 2: Are the defendants liable for the tort in *Rylands v. Fletcher*?

[66] Given I have concluded that the defendants are liable in nuisance, I need not decide whether the defendants are also liable for the tort in *Rylands v. Fletcher*.

Issue 3: What damages did Mr. Baumann suffer?

[67] In nuisance actions, damages are intended to compensate for past harm and an injunction may be granted to stop an ongoing harm: *Rintoul v. Drummond*, 2022 ONSC 998, at para. 19, citing *Pyke v. Tri Gro Enterprises Ltd.* (1999), 101 O.T.C. 241 (S.C.), at para. 24. Both remedies may be ordered.

[68] I will first address the compensatory damage claim. Mr. Baumann seeks damages to make him whole for the cost of repairs to his property. He also seeks general damages for inconvenience and loss of enjoyment.

Cost of repairs to Mr. Baumann's property

[69] Following the damage to his property in May 2018, Mr. Baumann's insurer assessed the damage at $48,133.86. The insurance policy provided that there was a $10,000 deductible. Mr. Baumann's insurance paid him $38,133.86 to repair his fence and walkway. This is amply supported by Mr. Baumann's evidence and the contractor estimates. There is some dispute about

whether it is necessary to remove the walkway to repair the fence. I prefer the evidence of Mr. Baumann, and records filed in the insurance claim, over Mr. Nayef's evidence.

[70] At the close of trial, Mr. Baumann chose to advance a claim of $10,000, being the deductible he could not recover from his insurer.

[71] I am satisfied that Mr. Capello, who was the owner of 283 Kirchoffer at the time, caused Mr. Baumann a loss of $10,000. I therefore award Mr. Baumann $10,000 in special damages, as against Mr. Capello.

[72] The defendants argued that Mr. Baumann failed to adequately mitigate his damages. In support of this, they point to the fact he received an insurance payment and did not make repairs with it. Mr. Baumann testified on cross-examination, however, that the insurance adjuster advised him that the insurer would not pay for repairs to the basement until the ongoing water infiltration from 283 Kirchoffer was addressed. Thus, the amounts paid by the insurer did not include a payment for repairs to Mr. Baumann's basement.

[73] There is no merit to the defendants' argument. The defendants have failed to prove that Mr. Baumann did not adequately mitigate his damages. Given the migration of water and debris onto his property was ongoing, it was reasonable for Mr. Baumann to wait for these issues to be remediated before repairing the damage.

General damages

[74] A plaintiff may recover general damages in a nuisance action: see e.g., *Pyke*; *Rintoul*. Factors that may inform the assessment of general damages include:

a. The frequency, degree, and duration of the interference;

b. The effect of the nuisance on the health and comfort of the plaintiff while on the land;

c. The effect of the nuisance on the plaintiff's enjoyment of the land; and

d. The effect of the nuisance on the plaintiff's activities on the land.

[75] I derive these factors from *Pyke*, at para. 20. Although *Pyke* involved claims by a group of plaintiffs who had been impacted by offensive odours from a neighbouring mushroom farm over five years, I see no reason similar factors cannot apply more broadly to general damages for a nuisance.

[76] Mr. Baumann seeks general damages of $60,000 for loss of enjoyment of the property, which he says is the equivalent of $10,000 per year.

[77] I have considered general damages awards in other nuisance cases, including flooding and water damage cases. The plaintiff referred me to *Weenen v. Biadi*, 2017 ONCA 533, 84 R.P.R. (5th) 200. In that case, the trial judge awarded the plaintiff $250,000 for loss of use and enjoyment of his land and buildings. This award was upheld on appeal. However, the interference was far more serious in *Weenen* than is the case here. It also lasted 12 years and the plaintiff suffered significantly. There was evidence of "stress; depression; sleep troubles; relationship difficulties; worry for his spouse …; fear that leads him to frequently monitor security cameras; increased alcohol consumption; and lost earning opportunities": *Weenen v. Biadi*, 2015 ONSC 6832, at para. 175. Mr. Baumann has not provided similar evidence here.

[78] I have also considered other flooding and water damage cases. For example, in *Foley v. Parry Sound (Town)*, [1995] O.J. No. 435 (Gen. Div.), the plaintiff was awarded $3,000 for general damages arising from a flooded basement. Adjusted for today's dollars, that was an award of around $5,400. But the defendant in that case was not liable for much of the flooding. The nuisance also did not occur over several years, as is the case here.

[79] In *Dankiewicz v. Sullivan*, 2011 ONSC 3485, the defendant was responsible for flooding of the plaintiff's backyard because he had regraded his property causing water to drain from his yard into the plaintiff's backyard. The plaintiff was awarded $5,000 in general damages for the distress, inconvenience and interference with her enjoyment of her land. This award is about $6,560 in today's dollars. In *Dankiewicz*, the issue arose in 2007 and recurred. But water migration into a backyard is less serious than into a basement. See also *Ivall (Balkwill) v. Aguiar* (2007), 86 O.R. (3d) 111 (S.C.).

[80] Here, Mr. Baumann's uncontroverted evidence was that he had to deal with water and debris infiltration virtually every time it had rained or snowed since 2017. His evidence was that he was constantly shovelling silt and sediment off his walkway, checking the basement for flooding, and monitoring the property. This would have been time he would otherwise have spent with his sons, pursuing his own business dealings, or personal pastimes.

[81] Until relatively recently, Mr. Baumann rented out the property. In May 2023, he moved into it. To be clear, he is not seeking any damages for lost rental income or lost opportunity, nor do I award him any. Further, I have no evidence before me about the time he lost to pursue his own business dealings, and I do not award him any damages for this.

[82] I accept Mr. Baumann's evidence that the defendants have caused him significant stress and worry. The interference with the property has been persistent when it rains and during the spring thaw. I also accept that the defendants have caused him to lose time with his sons and time he would otherwise have devoted to personal pastimes. By trial, the stress and loss of enjoyment has been ongoing for over five years.

[83] Thus, I award Mr. Baumann $9,000 in general damages against Mr. Capello and $11,000 in general damages against '876. This reflects the principle that each non-concurrent tortfeasor is

only liable for the damage he or it has caused. The apportionment is based on the respective periods of ownership during the time relevant to the nuisance.

Issue 4: Should punitive damages be awarded against the defendants?

[84] Mr. Baumann also seeks $100,000 in punitive damage against the defendants. He sought $50,000 in "punitive and aggravated damages", at para. 1(e) of his amended statement of claim, but he particularized the claim for punitive damages in the amount of $25,000 at para. 34. At the close of trial, he sought leave to increase the amended claim for punitive damages to $100,000.

[85] Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency": *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at p. 1208; *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, at para. 36. The plaintiff must establish that a defendant's conduct represents a marked departure from ordinary standards of decent behaviour.

[86] The goals of punitive damages are retribution, deterrence, and denunciation, rather than compensation: *Whiten*, at paras. 36, 43. They can be awarded only in exceptional cases and with restraint: *Whiten*, at para. 69.

[87] The award of punitive damages must be rational: "the court should relate the facts of the particular case to the underlying purposes of punitive damages and ask itself how, *in particular*, an award would further one or other of the objectives of the law, and what is the lowest award that would serve the purpose, i.e., because any higher award would be irrational" (emphasis in original): *Whiten*, at para. 71.

[88] The amount of the award also needs to be proportional: the "overall award, that is to say compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objectives for which the punitive damages are awarded": *Whiten*, at para. 74.

[89] Punitive damages are available in nuisance cases: *Krieser v. Garber*, 2020 ONCA 699, 70 C.C.L.T. (4th) 40.

[90] Mr. Capello's conduct has been deeply troubling. From the outset, he deliberately departed from the plans he submitted, which were approved by the city. There is good reason for the city to impose certain design and grading requirements on homebuilders. One reason for these requirements is to avoid water damage to neighbouring property. But Mr. Capello never had any intention of abiding by the plans he submitted. He acted with a remarkable lack of concern for his neighbour. Although he took certain half measures following the earlier migration of water and debris from 283 Kirchoffer to 281 Kirchoffer, he was unwilling to acknowledge and remedy the main source of the problem: the six downspouts he installed along the wall of 283 Kirchoffer facing Mr. Baumann's property.

[91] Mr. Capello persisted despite an order of non-compliance from the city. He also did not take adequate remedial measures in response to two interim orders of this court. I find that the water and debris migration persisted despite the half-measures Mr. Capello took over the years.

[92] To be sure, Mr. Capello has experienced significant health issues. He was in a cycling accident in 2012, which caused a mild traumatic brain injury. But I am unpersuaded that his injury caused him to intentionally disregard the approved plans. His departure from the plans he submitted to the city was planned and deliberate: he never intended to abide by them. He simply acceded to the city's design requirements so that he could get on with building as he saw fit. He says he did so on the advice of his surveying company. Even if this were so, Mr. Capello is responsible.

[93] Mr. Capello also developed gastrointestinal issues in August 2017, and was diagnosed in April 2019 with a serious cancer. He underwent treatment through 2019 and early 2020. In March 2020, he contracted COVID-19 due to his weakened immune system. Fortunately, the treatment was successful and Mr. Capello's prognosis is now good. I am sympathetic to Mr. Capello's health issues between 2019 and 2020. I accept that his cancer diagnosis and treatment, and subsequent COVID, impacted on his response to the ongoing water and debris migration issues.

[94] Different considerations pull in different directions. On the one hand, Mr. Capello's initial conduct in deliberately departing from the approved design and installing six downpipes on the side of his property next to Mr. Baumann's property markedly departs from ordinary standards of decent behaviour. Homebuilders ought to be deterred from deliberately gaming building permits and disregarding the interests of their neighbours. A punitive damages award would also serve as appropriate denunciation. Mr. Capello's failure to take adequate remedial measures in response to two interim orders of this court is just as deserving of deterrence and denunciation.

[95] On the other hand, some of the delay in remedying the problem can be attributed to Mr. Capello's cancer diagnosis and treatment, and subsequent COVID.

[96] Ultimately, it would be disproportionate to award punitive damages given that, as discussed below, I am issuing a mandatory injunction. This order will require '876 and Mr. Capello, as the sole shareholder and director of '876, to incur the expense of further construction. It would be disproportionate to award punitive damages on top of this. This tips the balance against awarding punitive damages.

[97] Therefore, I decline to award punitive damages.

Issue 5: Should a permanent or mandatory injunction be made against the defendants?

[98] As a threshold issue, the defendants argued at the beginning of trial that injunctive relief is unavailable in simplified proceedings under Rule 76. I disagreed and provided oral reasons at trial. A written version of those reasons is reported at 2024 ONSC 335. The defendants argued at the opening of the trial that this court lacks jurisdiction to issue injunctive relief because it was the same issue dealt with under the *Provincial Offences Act*, R.S.O. 1990, c P. 33 and that is within

the exclusive jurisdiction of the Ontario Court of Justice. The defendants wisely abandoned this argument in closing submissions, so I need not consider it here.

[99] Permanent injunctions are available to stop an ongoing nuisance: *Pyke*, at para. 24; *Keryluk v. Lamarche* (2006), 51 R.P.R. (4th) 129; *Rintoul*, at para. 19: *Armstrong et al. v. Penny et al.*, 2023 ONSC 2843, at para. 78.

[100] The seriousness of the interference with the plaintiff's property rights must be balanced against the hardship to the defendants that would result from an injunction in the circumstances: *Nippa v. C.H. Lewis (Lucan) Ltd.* (1991), 82 D.L.R. (4th) 417 (Ont. Gen. Div.), aff'd 82 D.L.R. (4th) 417 at 431 (Ont. C.A.).

[101] I am satisfied that the balance of convenience favours granting a permanent injunction to stop the ongoing nuisance. As discussed, I have found a substantial interference with Mr. Baumann's property from the water and debris migration. There is water infiltration into his basement. The interference is ongoing. Although Mr. Capello took certain half-measures over the years to abate the nuisance, these were ineffectual and did not address the main problem: the placement of the downpipes. Nor did he maintain an adequate grade and he did not build an adequate retaining wall. The hardship on '876 of an injunction is outweighed by the interference with Mr. Baumann's property rights.

[102] In closing submissions, the defendants cautioned against vague or uncertain terms, if I were to order a permanent injunction. They argued that the terms had to be sufficiently precise so that they would know how to comply. They also invited the court to engage in ongoing supervision of the remedial work.

[103] There needs to be finality to this action. I decline the defendants' invitation for the court to supervise the remedial work. But I agree that the terms of the injunction need to be clear.

[104] A mandatory injunction is one which directs a defendant to undertake some positive action. In this, they are different from the usual type of injunctive relief, which prohibits certain specified act. Mandatory orders are granted sparingly and cautiously: *1711811 Ontario Ltd. (AdLine) v. Buckley Insurance Brokers Ltd.*, 2014 ONCA 125, at para. 57. Courts may issue a mandatory order where a defendant has acted in reckless disregard of the plaintiff's rights or has, through his or her conduct, indicated an unwillingness to abate the nuisance: *Krieser*, at para. 75. Courts may thus make mandatory orders where it is necessary to specify the manner of compliance.

[105] Here, given the specific cause of the nuisance – the combination of Mr. Capello's placement of the downpipes, the inadequate grading, and the inadequate retaining wall – the distinction between a prohibitory and mandatory order is illusory. Either order would require Mr. Capello to take positive steps to abate the nuisance. As has been observed by Lord Hoffman in another context, "arguments over whether the injunction should be classified as prohibitive or mandatory are barren": *National Commercial Bank Jamaica Ltd. v. Olint Corp Ltd. (Jamaica)*, [2009] UKPC 16, at para. 20. The real issue is "what the practical consequences of the actual

injunction are likely to be": *National Commercial Bank Jamaica Ltd*., at para. 20. See also G. S. Pun, M.I. Hall, and I.M. Knapp, *The Law of Nuisance*, 2d ed, (Toronto: LexisNexis), at §§ 6.48-6.49.

[106] Further, on the record before me, it is in the interests of justice and finality for the court to specify the manner of compliance. As discussed, Mr. Capello's conduct markedly departs from ordinary standards of decent behaviour. He was reckless towards Mr. Baumann. Mr. Capello failed to abate the nuisance despite the interim orders of the court. He remains the directing mind of '876, as acknowledged by the defendants' counsel at trial. Taken together, this calls for the specific directions of a mandatory injunction.

[107] I pause here to observe that the defendants raced to complete remedial work during the week of the trial. Mr. Nayef explained that he had been retained during the trial to do the following:

a. Add a permeable barrier to the current retaining wall, even though he says it's not necessary;

b. Achieve the 1.5 percent grading on 283 Kirchoffer;

c. Lay stone on top of a drain pipe along the retaining wall to direct water to the front of 283 Kirchoffer; and

d. Connect the six downspouts with proper connections to a common drain, and lay the drain at grade, to divert the roof water to the driveway.

[108] The defendants have not persuaded me that Mr. Nayef's remedial work will abate the nuisance. Most importantly, it leaves in place the six downpipes – the main source of the interference. Mr. Nayef's remedial work also does not erect a retaining wall of sufficient height.

[109] Thus, I order '876 to do the following:

a. Remove the six downpipes from the side of 283 Kirchoffer next to 281 Kirchoffer;

b. Install scuppers and downpipes at the front and back of 283 Kirchoffer, according to the city-approved plans;

c. Maintain a grade of 1.5 percent, according to the city-approved plans;

d. Build a retaining wall, according to the city-approved plans; and

e. Ensure that water from 283 Kirchoffer does not drain towards 281 Kirchoffer.

[110] This must be done in compliance with any applicable statutory requirements, including city bylaws.

[111] The mandatory injunction is appropriately directed to the current owner of 281 Kirchoffer, the defendant ‘876.

Disposition

[112] I grant judgment to the plaintiff. Mr. Capello is liable to pay the plaintiff $19,000 in damages within 30 days of this judgment. ‘876 is liable to pay the plaintiff $11,000 in damages within 30 days of this judgment. I also grant a mandatory injunction against ‘876.

[113] If the parties cannot agree on costs, they can each make written submissions to me of no more than 1,000 words, accompanied by bills of costs and any Rule 49 offers, within two weeks of the release of these reasons for judgment.

Justice Owen Rees

Released: 16 January 2024

CITATION: Baumann v. Capello, 2024 ONSC 357
COURT FILE NO.: CV-18-77889
DATE: 2024/01/16

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ROLF BAUMANN

Plaintiff

– and –

GREGORY CAPELLO and 1693876 ONTARIO INC.

Defendants

REASONS FOR JUDGMENT

Justice Owen Rees

Released: 16 January, 2024