

Dock Dispute leads to Nuisance Claim and \$598,000 Costs Award

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After years of litigation, a dispute between neighbours of waterfront properties on Lake Simcoe led to a mandatory order requiring the removal of a dock, punitive damages of \$100,000, and a costs award totalling \$598,000: *Krieser v. Garber*, 2020 ONCA 699.

The Kriesers owned a waterfront property on Lake Simcoe, along with a 33-foot boat which they parked on marine rails that required a direct approach some distance from the shore.

In 2012, their neighbours, the Garbers, hired a contractor to build a large dock pursuant to a permit issued by what is now Ontario's Ministry of Natural Resources and Forestry ("MNR"). Under the permit, the Garbers' dock (which cost \$150,000) was to have been built at least 20 feet from, and parallel to, the projection of the property line into the lake between the Garber and Krieser properties. The permit application included Kriesers' consent to the installation of the dock as depicted therein.

The dock was not built in the manner described in the application. Instead, it angled towards the Kriesers' property, coming within three feet of the projected property line. Further, a shield of large, submerged boulders extended five feet across the projected property line, surrounding the Garber dock to protect it from winter ice.

Because of the submerged boulders, the Kriesers could no longer drive their boat directly into the marine rails. Mr. Krieser tried to manoeuvre around the new obstacles but concluded that it was too dangerous to dock. The Kriesers had to dock their boat at a local marina.

The Kriesers complained of the erroneously constructed dock to the MNR. In April 2014, the contractor pleaded guilty to the provincial offence of engaging in construction contrary to a permit granted under the *Public Lands Act*. The agreed statement of facts stated that the erroneous location of the dock was inadvertent. The contractor was fined \$4,500.

Litigation ensued shortly thereafter. The Kriesers alleged that the dock constituted a civil nuisance and sought a mandatory order requiring its removal. Prior to trial, the Kriesers made what the trial judge would later call the most generous offer to settle he had ever seen, namely that they would pay for the entire cost of removing and rebuilding the dock in the location depicted in the approved permit application. Their offer was not accepted by the Garbers.

After a two-week trial in 2018, Justice E.M. Morgan ruled that the Garbers' dock constituted a nuisance and ordered its removal. Ms. Krieser was awarded punitive damages in the amount of \$100,000, costs for the action of \$518,000 against the Garbers and the contractor jointly, and a further \$80,000 in costs solely against the Garbers.

In a [Decision](#) released in November 2020, the Ontario Court of Appeal found that Justice Morgan had correctly applied the test for a civil claim of nuisance and dismissed the Garbers' appeal.

To establish a claim in private nuisance, a plaintiff must prove interference with the use or enjoyment of their land which is both substantial (not a trivial annoyance) and unreasonable: *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 (CanLII), [2013] 1 SCR 594, at para. 19. This substantial and unreasonable test applies whether the nuisance is a physical injury to land or an interference with the amenities of the land. 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 (CanLII), [2008] 3 SCR 392, at para. 77.

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The Court of Appeal agreed with Justice Morgan's conclusion that the Garbers' dock deprived the Kriesers of an important amenity going to the use and enjoyment of their property. The dock impeded access and amounted to "a physical invasion" of the Kriesers' property. The harm to the Kriesers was the interference with their ability to use their boat, whether that was caused by the shield of boulders installed in conjunction with, and arguably part of, the dock, or the dock itself.

The construction of the dock was unreasonable, particularly since the contractor was convicted of a criminal offence for ignoring the approved plans and building the dock in the wrong place. Relevant factors included the "character of the neighbourhood" and weather conditions on Lake Simcoe. Expert evidence was filed to show that the changed approach to the Kriesers' docking system was unduly risky and beyond the expected capabilities of "a weekend cottager/boater." In response to the argument that the Kriesers could find an alternative route, Justice Morgan described the issue as follows:

[The] suggestion that Krieser approach from the west and steer around and through the underwater hazards is the equivalent of telling a driver to approach his or her driveway from an angle to which they are unaccustomed in order to avoid hazards placed in the street in front of their house. More than that, the hazards faced by Krieser are not analogous to surface potholes demarcated with orange pilons, but rather are akin to invisible sinkholes lurking beneath the veneer of the street.

The Court of Appeal agreed that the dock constituted a private nuisance.

The Court of Appeal also upheld the mandatory order requiring the removal of the dock. Injunctive relief is an ordinary remedy for a nuisance, whereas damages are typically awarded in lieu thereof only where a plaintiff is capable of being adequately compensated by a small money payment and where it would be oppressive to the defendant to grant an injunction: *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287 (C.A.). Courts have found it appropriate to issue an injunction or affirmative order where "a defendant has acted in reckless disregard of the plaintiff's rights or has through their conduct indicated an unwillingness to abate the nuisance: *Carley v. Willow Park Golf Course Ltd.*, 2002 ABQB 813 (CanLII). In the case at hand, Morgan J. observed that the Court should not adopt a position that effectively permits a defendant to purchase a license to interfere with a plaintiff's property rights. Anything short of requiring the removal of the dock would have been to reward the Garbers with an effective licence to continue with the nuisance they had created.

The Garbers argued that the order was unduly burdensome as Morgan J. failed to consider that if the dock were reconstructed in accordance with the permit, the water would be too shallow to dock their boat. However, the Court of Appeal stated that Morgan J. did not err by failing to specifically consider the non-financial burden to the Garbers of relocating the dock.

The Court of Appeal further agreed with Morgan J. that punitive damages of \$100,000 was an appropriate and proportionate amount to punish and denounce what the Garbers had done, and to deter similar conduct. Mr. Krieser had raised concerns about the partially constructed dock before it was completed. Instead of stopping construction, the Garbers had a lawyer write a letter arguing that the dock complied with the permit and pressed ahead. Further, they did not take any steps to remove the dock by the time of trial or the appeal even when it was clear that it contravened the permit. The protracted nature of the nuisance, and the failure to do anything to abate it once discovered, are relevant factors in awarding punitive damages: *Weenen v. Biadi*, 2017 ONCA 533, 84 R.P.R. (5th) 200, at para. 10.

However, the Court of Appeal found that Morgan J. erred in treating the contractor "as one" with the Garbers without assessing whether punitive damages were warranted against them separately. The contractor's position was fundamentally different from the Garbers. Once the dock was installed, the contractor could not move it without Garbers' approval. His evidence was that he would have done so. Accordingly, he was not liable for punitive damages.

Finally, the Court of Appeal upheld the costs awarded against the Garbers of \$518,000 for trial on a substantial indemnity basis and \$80,000 due to an adjournment requested by them: 2019 ONSC 3241. The trial lasted two weeks based on the Garbers' untenable positions and they fought the Kriesers' claim tooth and nail all the way, while rejecting the Kriesers' generous offer to pay for relocating the dock.

Conversely, with regard to the contractor, the Court of Appeal was satisfied that there was no basis for an award of substantial indemnity costs against him. The fact that the contractor did not build the dock in accordance with the permit and pleaded guilty to a criminal offence for that conduct did not mean that the contractor intended to create a nuisance, and he was entitled to defend the claim. Moreover, the contractor's position was different from the Garbers. He could not accept the Kriesers' offer to re-locate the dock without the Garbers' approval. His lack of success at trial did not make his conduct reprehensible, scandalous or outrageous. The contractor's responsibility for costs was reduced accordingly to \$108,000.

It has been said more than once that litigation is not for the faint of heart and this dispute is a textbook example of the consequences of maintaining an ultimately untenable position through six years of litigation to the end of a two-week trial. The Court of Appeal's decision is the culmination of an eight-year battle, and the



dock at issue will still have to be dismantled and moved. The costs ultimately incurred in litigating the location of the dock will have exceeded the original cost of the dock several times over.

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