Case Name:
Lisoway v. Springfield Hog Ranch Ltd.

Between
Michael Lisoway, and Caroline Lisoway,
plaintiffs, and
Springfield Hog Ranch Ltd., defendant

[1975] M.J. No. 188

Manitoba Court of Queen's Bench
Wilson J.

November 24, 1975.
(36 paras.)

Counsel:
D.R. Orchard, for the plaintiffs.
G.H. Lockwood, Q.C., for the defendant.

¶ 1 WILSON J.:— Plaintiffs sue in nuisance, claiming that smells, effluvia, and other noisome accompaniments to defendant's hog-farming operation next door have invaded enjoyment of their own home end its environments beyond tolerable levels. Defendant hardly denies the offensive odours but protests that all reasonable steps were taken to avoid these smells, that they occur infrequently, and that in any event plaintiffs are guilty of laches and must be taken to have acquiesced in their situation.

¶ 2 In 1958 plaintiff husband and wife bought a 20-acre parcel of land fronting on the east side of Deacon Road in the Bird's Hill area of the Rural Municipality of Springfield, some ten miles in a straight line distant, and within thirty minutes' driving time, from downtown Winnipeg. Defendant's hog farm, also fronting on Deacon Road, is the property immediately adjacent to the south and distant about 400 feet from plaintiffs' residence. Location of the two properties is shown on the aerial photograph Ex. 3, and the coloured photograph, Ex. 4, excellently depicts plaintiffs' blue-roofed premises and defendant's large hog barn and adjoining sewage lagoons, as they stood during the times material to this action.

¶ 3 Plaintiff Michael Lisoway is not a farmer. He is a salesman; and plaintiffs' purchase was made with a view to developing the improvements standing on the ground at that time to the point where today, the result of a good deal of work and significant investments of cash, plaintiffs and their children occupy the dwelling house and garden area shown and described in the appraisal report, Ex. 23. The estimated value "if the hog farm operation were non-existent" was put at $43,500.00, the appraiser considering that "basically, if a willing purchaser were found to whom the hog farm operation was not offensive there very likely would be no loss in value: However the likelihood of this

happening is remote, and the problem would be to find a purchaser who would put up with the odours at any price."

¶ 4 From the language of his report, the appraiser must have relied to a considerable degree upon information told to him by plaintiffs themselves. Even so, the premises upon which this witness proceeded were not inconsistent with other evidence in the case, and there was no contradiction from the defendant.

¶ 5 But the mere fact that one man's property suffers in value because of the nature of a neighbouring property constructed or business carried on by another will not, without more, support suit by the former against the latter; Miller v. Krawitz, [1931] 1 W.W.R. 577 at p. 579. Plaintiffs' right to relief must depend upon demonstration that defendant's hog farm is indeed a nuisance, a legal concept not easily defined with exactitude. "The truest dictum in the books is that of Erle, C.J. when he said that the answer to the question, What is a nuisance? is 'immersed in undefined uncertainty'"; Linden, Studies in Canadian Tort Law, 1968 p. 320.

¶ 6 To the learned editor of Salmond on Torts (16d) p. 51, private nuisances (as sued here) are "interferences for a substantial length of time by owners or occupiers of property with the use or enjoyment of the neighbouring property", with authorities cited. And where - again as here - plaintiffs' complaint comes down to discomfort or inconvenience occasioned by the defendant's operations, judges have repeatedly cautioned themselves in terms analogous to the remarks of Knight B. Bruce, V.C. in Walter v. Selfe (1851) 4 DeG. 6 Sm. 315: "Ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people?"

¶ 7 And, (continuing from Salmond, supra, at p. 57): "There may often be difficulty in defining precisely what degree of smell or noise or vibration amounts to a nuisance, but the court will look at the substance of the matter, and be 'slow to repose on the easy pillow of uncertainty.' The standard of comfortable living which is thus to be taken as the test of a nuisance is not a single universal standard for all times and places, but a variable standard differing in different localities. The question in every case is not whether the individual plaintiff suffers what he regards as substantial discomfort or inconvenience, but whether the average man who resides in that locality would take the same view of the matter. He who dislikes the noise of traffic must not set up his abode in the heart of a great city. He who loves peace and quiet must not live in a locality devoted to the business of making boilers or steamships."

¶ 8 A corollary, of course, is that one accustomed only to the atmosphere of a downtown or residential metropolitan area cannot be heard overly to complain if, choosing abruptly to move to a rural district in which animal raising is a common practice, the smells are sharply different. "There is no doubt that the nature of the occupancy of a locality may be a large factor in deciding whether the carrying on of

certain trades there would or would not create a nuisance" Richards, J. in McKenzie v. Kayler (1905) 15 Man. R. 660 at p. 664.

¶ 9 In a case for personal injury, the defendant must take the plaintiff as he finds him, and it is no answer that another plaintiff similarly treated would have suffered little harm, perhaps none at all. Not so in nuisance, where the defendant is entitled to succeed if the evidence satisfies the Court that the plaintiff is abnormally sensitive, and demands of his neighbours a renunciation of their own rights tantamount to obeisance to the dictates of the plaintiff. The complaint must be reasonable, in which case the defendant's evidence must show that for his part he, too, is acting reasonably in the use made of his land, taking into account the whole of the circumstances touching the respective positions of the contestant.

¶ 10 In the simple language adopted by Salmond, p. 63, "a rule of give and take, and live and let live". For (ibid) "a balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with", in which context reasonableness is a two-sided affair: it is not enough to ask if the defendant has acted reasonably; it must be asked if he has acted reasonably having regard to the fact that he has a neighbour. For "if a man creates a nuisance he cannot say that he is acting reasonably. The two things are self-contradictory"; Kekewich, J. in Atty-Gen. v. Cole (1901) 2 Ch. 205, p. 207.

¶ 11 In this sense, as pointed out by McRuer, C.J.H.C. in Russell Transport et al v. The Ontario Malleable Iron Company, [1952] O.R. 621, at p. 629, '"Reasonable' as used in the law of nuisance must be distinguished from its use elsewhere in the law of tort, and especially as it is used in negligence actions. 'In negligence, assuming that the duty to take care has been established, the vital question is 'Did the defendant take reasonable care?' But in nuisance the defendant is not necessarily quit of liability even if he has taken reasonable care. It is true that the result of a long chain of decisions is that unreasonableness is a main ingredient of liability for nuisance. But here 'reasonable' means something more than merely 'taking proper care'. It signifies what is legally right between the parties, taking into account all the circumstances of the case, and some of these circumstances are often such as a man on the Clapham omnibus could not fully appreciate." So that it is no defence that all possible care and skill was used to prevent the operation complained of from amounting to a nuisance, if nuisance in fact it is. The right to enjoy one's property free from nuisance is an incident of possession independent of the care or want of care of those whose is the nuisance, and does not require proof of negligence; City of Portage la Prairie v. B. C. Pea Growers Ltd., [1966] S.C.R. 150.

¶ 12 Nor is it an answer that defendant's operation is within the applicable zoning regulations; Maker v. Davanne Holdings Ltd., [1954] O.R. 935; or, as in Zegroo v. Johnston, 26 OWR 25, that defendant's business was expressly authorized by resolution of the city council. Indeed, if in fact what is done gives rise to a nuisance, the defendant may not plead the authority of a statute under which the operation is carried on, unless the nuisance was expressly or impliedly permitted by the legislation, or was the inevitable

consequence of that which the statute authorized and contemplated; City of Portage la Prairie, supra, p. 156.

¶ 13 The essential question, Was there a nuisance? is a question of fact, dependent upon the demonstration of a sensible interference with the ordinary comfort of the plaintiffs, this in turn to be tested by the standards of reasonable people living in the area.

¶ 14 Incorporated in 1961, defendant company is the creature of Leo Clement, with nominal shares held by his wife and son. Prior to 1965 Clement's associate in the Company was one Aaga Christensen, upon whose familiarity with the industry Clement relied when the hog farm was first established in 1951. Although raised on a farm, Clement had no experience with pigs on this scale; whatever grasp Christensen had of the business related to his association with hog farms in his native Denmark.

¶ 15 In 1961, then, they bought a 58-acre tract of land adjoining plaintiffs' property. What was there was razed, and in 1962 a barn was erected, 350 ft. by 44 ft., extended another 70 ft. five years later. Ancillary to this basic structure are grain bins, machine sheds, a garage, and three sewage lagoons, all as shown in the aerial photograph and pictures earlier mentioned, and in greater detail on the sketch, Ex. 25. Surface area for each of the first two lagoons is 300 ft. by 75 ft., and for the third 150 ft. by 75 ft; as built, the lagoons are 6 ft. deep, enough to allow a generous addition of ordinary water to the sewage content. Remainder of defendant's land, perhaps 50 acres, is used to produce field crops.

¶ 16 Defendant is not concerned with breeding its own sows. Rather, it buys weanling pigs, which are fed and cared for entirely within the barn until ready for market. Initially designed and operated for a population of 1,200 animals, when the barn was enlarged this was increased to 2,000, for an annual "turnover" of 4,000 pigs to market - a sizeable operation indeed, and one which generated a large volume of animal waste.

¶ 17 Originally flushed to connecting points within the barn, and later - perhaps since 1969, - drained through the slotted floor then installed, this sewage is delivered to the lagoons, where it was expected the combination of sunlight and the action of organisms developed within the lagoon content would destroy, or at least reduce to tolerable levels, the otherwise offensive nature of the material so impounded.

¶ 18 Seemingly pig waste has a particularly unpleasant smell, more so during the time when the animals were being fed digested garbage perfectly acceptable for the purpose, and delivered with the approval and superintendence of the proper government agency - but a foodstuff nonetheless which increased the liquid content of fecal discharge, which in turn heightened the odour level.

¶ 19 From time to time, and at least annually, the lagoons were drained and the material so drawn off applied as fertilizer to defendant's crop land, to which it is delivered through a plastic hose system.

¶ 20 Unfortunately, the arrangement for defendant's lagoons and soil absorption failed as a means to change the unpleasant nature of the sewage drained from the barn. Indeed the expert witnesses called by the opposing parties, Dr. Sparling for the plaintiffs and Dr. Schulte for the defendant, were in agreement that, given the size of the operation, defendant's lagoon system could not be effective for that purpose, and that to introduce the necessary improvements to make it operational to that end would in effect require reconstruction of the hog farm. And see, too, inadequacies of the lagoon system noted in the reports written by Dr. Sparling himself, Ex. 20, the Public Health Inspector Yourchek, Ex. 19, the provincial Agricultural Engineer Hudek, Ex. 26, and by the University of Illinois College of. Agriculture, Ex. 21. Whatever favourable comments might be wrung from Dr. Schulte's somewhat neutral report, Ex. 37, disappeared with his viva voce evidence before me.

¶ 21 For purposes of this action, then, the surface areas of those three large ponds, as in effect they are, were a source of odours which, barely acceptable at the best of times, were disastrously offensive in times of high humidity or when the water surface was disturbed by, say, wind effect, or when this fecal matter was drained away, to lie upon the land until so much as had not disappeared by evaporation sank or was ploughed into the soil.

¶ 22 Defendant does not deny the existence of these smells, nor their disagreeable nature. It argues, however, that there is none, or very little, during the winter months, when the lagoons are frozen over and the barn tightly shut, and that for the rest of the year it would expect serious protest only during the few weeks of spring thaw, or during periods of high humidity. Apart from that, the hog ranch would be noticeable only by the animal smells to be expected with any sizeable livestock operation, and then only to those nearby.

¶ 23 But, protest plaintiffs, that is exactly their position, within five hundred feet of an operation which defendant's own witness, Dr. Schulte, said ought not to be carried on within one-half mile of the nearest residence. And, they point out, wintertime in Manitoba is not associated with outdoor living, so that freedom from smells during this period is small recompense for what occurs from early spring to late fall, when plaintiffs' enjoyment of their home and the welcome they can offer to such guests as choose to come must be tempered by the requirement to remain indoors, on the hottest of days, with windows tightly closed. Nor, because of the air intake associated with its use, could any relief be had from the air-conditioner tried as a relief.

¶ 24 Laundry had to be done again, because of the absorption of odours by the damp material. Butter and other absorptive foodstuffs were spoiled; pleasures of the garden or other outdoor relaxation which plaintiffs had in view when they bought their home and indeed enjoyed until the establishment of defendant's neighbouring hog farm were sharply reduced. And, of course, far from being the source of pride and place of relaxation for themselves and friends or business associates (which latter was of some importance to Mr. Lisoway) their home became an embarrassment and their plight inescapable because of the absence of a market for sale, unless they were prepared to

abandon a good part of their investment. True, plaintiffs' daughter has bought a site on her parents' land, where a foundation was built for a house, whose eventual construction however depends upon the outcome of these proceedings.

¶ 25 Plaintiffs described, too, the activities of rats, unnoticed before commencement of defendant's operation; a large increase in the number of flies; and contamination of the water carried in the municipal ditch bordering Deacon Road, carrying drainage from the direction of defendant's property past plaintiffs' house.

¶ 26 As to these complaints there was no evidence that the incidence or habits of rats was out of the ordinary for a rural area, where of course there are other farms with livestock operations. And while the ditch was badly contaminated at times when the lagoons burst or overflowed, there is no reason to expect this to recur. No doubt there are more flies about than if the hog farm did not exist; there was no evidence however that they seriously menaced the routine life of the plaintiffs, and defendant is doing what might reasonably be expected of it to control the fly population. Indeed, there was no real evidence to suggest that, odours apart, defendant's operation was not properly managed, as testified witnesses representing the suppliers of animal foods, the federal "Health of Animals" inspection service, pesticide control, and the rival hog marketer whose farm supplied defendant's weanlings.

¶ 27 So then, plaintiffs' principal quarrel with defendant's operation concerns the unbearable stench which emanates therefrom. Do the plaintiffs complain unreasonably, and too late? Upon first learning of the proposed hog farm, plaintiffs protested to their local councillor and obtained signatures to a petition presented to the municipal council, where the signatories were advised the matter was within the control of the then Metropolitan Winnipeg Council. A solicitor (since deceased) was engaged to represent plaintiffs' interests in this last arena, but in any event the "Application For Building Permit" Ex. 7 (seemingly all that was required to commence operations) was approved, and defendant's operation began an earlier noted. By 1964, plaintiffs were ready to quit the area, but could find no buyers for their property. Mrs. Lisoway, employed part-time in the Elmhurst Golf Club some miles distant, claimed the smell spread that far, and indeed the president of Elmhurst gave evidence against continuance of defendant's operation when, in 1971, the matter reached the Clean Environment Commission, first established of course with S.M. 1968 cap. 7.

¶ 28 Before that avenue was opened, plaintiffs had repeatedly complained to the local health unit, to their councillor, and before the full municipal council. Basing their appeal on the impact of the neighbouring "piggery" plaintiffs successfully appealed their 1968 assessment, Ex. 6, as did their neighbours Witiw, Byskal, Spark and Stupak, Exs. 15 to 18. Mrs. Davidson, the municipal secretary, and councillor Deneyer told of the many complainants and the frequency of their protests touching the offence - the nuisance - worked by the smells from defendant's hog farm.

¶ 29 In 1971 a full scale hearing came on before the Clean Environment Commission, attended by plaintiffs and their neighbours. On May 4th, after a two-day enquiry into the

case, the Commission issued its "interim licence" Ex. 10, calling upon the defendant after one year to reduce its animal population from the then 2,000 head to not more than 800, and no later than thirty months after May 4th, 1971 to "eliminate" the lagoon system of waste disposal. Defendant's appeal to the Municipal Board in February 1972 was dismissed, Ex. 33.

¶ 30 From all this, no reasonable doubt can be entertained that, at least down do May 4, 1971, after due enquiry by the body charged on that behalf and full opportunity given to correct any errors in that inquest, defendant's operation was found to be offensive and therefore a nuisance, and its arrangements for sewage disposal were condemned.

¶ 31 No matter that, in planning and building as it did, defendant relied on such information as was available at the time, namely the no-doubt sincere and honest effort by Clement's then associate Christensen to apply what knowledge he had, and the visits by both men to similar operations in the United States. Clement admitted he did not fully understand what was told to him on those occasions, and in any event could not now recall it. He agreed, too, that no enquiries were made of the Provincial or Federal Departments of Agriculture, or of the University or any other school for assistance in planning the control of sewage in the volumes obviously to be expected of an operation of this size.

¶ 32 Nor, apparently, was any thought given to the introduction of the proposed hog farm into a district which, though zoned "A" (the significance of which was nowhere dealt with in the evidence) was nevertheless an area which already showed signs of appealing as "commuter" territory for folk minded to live on the fringe of the metropolitan area itself. Defendant's principal witness, Clement, admitted that if the initial application had to be made anew, he would have no hope that the operation would be allowed, at least not at that location.

¶ 33 Whatever cheer plaintiffs could take from the ruling of the Clean Environment Commission and the Municipal Board was short-lived. Following dismissal of its appeal, defendant was encouraged to expect amendment of the Clean Environment Act, whereby rulings of the sort here relevant would be subject to ministerial interference, Ex. 11. Nothing was done to enforce the order of the Commission, and in due course, in October 1973, Order-in-Council No. 1107 was passed, Ex. 14, to free defendant from the irksome curbs imposed by the interim licence, the recitals stating in part that "the present state of scientific knowledge concerning the control of odours from livestock operations is insufficient to formulate specific limits for odours other than on an arbitrary basis".

¶ 34 However that may be, plaintiffs and others so affected, not sharing the economic advantages of defendant's operation, are not required meekly to suffer the environmental disadvantages likewise thereto associated, pending resolution of the uncertainties of scientific knowledge. Plaintiffs' rights may not be overborne by the social utility of defendant's operation; McKie v. K.V.P. Company Limited, [1948] O.R. 398, where McRuer, C.J.H.C., appealed to the dictum of Lord Blanesburgh in The City of Manchester v. Farnworth, [1930] A.C. 171, at p. 203: "In my view, if I were to consider

and give effect to an argument based on the defendant's economic position in the community, or its financial interests, I would in effect be giving to it a veritable power of expropriation of the common law rights of the riparian owners, without compensation."

¶ 35 In the absence of specific authority for its continuance - and there is none here - one of the "specific limits" for any odour is the frequency and acceptability of its appeal to a not overly sensitive nose. In the instant case I must endorse plaintiffs' reluctance to accept their state of affairs, and defendant must pay damages for what occurred, due regard being had to the "Limitation of Actions Act" and to the fact that, since commencement of this action, defendant has sharply curtailed its operations and in August of 1974 sold the farm, subject inter alia to "Clean Environment approval to be able to operate as a hog ranch", Ex. 29. Plaintiffs chose not to add the new owner as a party, so that the consequence of the change of ownership (if in fact this occurs) is yet to be seen.

¶ 36 Having regard to the foregoing, and to the periods of odour-free operation, by way of compensation drawn to the date of this judgment find damages against the defendant in the sum of $10,000. Plaintiffs are entitled to an injunction restricting the defendant from continuing or resuming its hog ranch so as to cause a nuisance to the plaintiffs by reason of offensive odours, the operation of this injunction to be postponed for a period of eight months from the date of entry of judgment, so as to allow the defendant time and opportunity to abate the nuisance; Mascievich v. Anderson (1949) 57 Man. R. 570; Miller v. Krawitz, [1931] 1 W.W.R. 577. Plaintiffs will have their costs.

WILSON J.

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