**Court File No. 02/7499**

**IN THE SUPERIOR COURT OF JUSTICE**

B E T W E E N:

BRENDA DEUMO and DAVID DEUMO

Plaintiffs

and

TRAVERS FITZPATRICK and VALERIE FITZPATRICK

Defendants

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**R E A S O N S  F O R  J U D G M E N T**

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BY THE HONOURABLE MR. JUSTICE J. RAMSAY
on the 28th day of February, 2008, at HAMILTON, Ontario

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APPEARANCES:

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| L.A. Frapporti | Counsel for the Plaintiffs |
| P.A. Mahoney | Counsel for the Defendants |

THURSDAY, 28 FEBRUARY, 2008

**REASONS FOR JUDGMENT**

RAMSAY, J. (ORALLY):

The plaintiffs are a married couple who are suing their next door neighbours, another married couple, for nuisance and other torts in connection with smoke from a wood stove operated by the defendant, Mr. Fitzpatrick and permitted by Mrs. Fitzpatrick, the other occupier of the property. The plaintiffs' case is that Mr. Fitzpatrick caused and Mrs. Fitzpatrick permitted repeated improper burning that caused excessive smoke to invade the plaintiffs' yard and home.

The approach that the courts take to nuisance is set out in a quotation from Supreme Court of Canada authority that is itself quoted within internal quotations in the Court of Appeal's judgment in *Mandrake Management Consultants v. T.T.C.*, (1993), 102 D.L.R. (4th) at page 12. The quotation is as follows:

> Life in organized society and especially in populous communities involves an unavoidable clash of individual interests. Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyances to serious harms. It is

> an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together. The very existence of organized society depends upon the principle of 'give and take, live and let live,' and therefore the law of torts does not attempt to impose liability or shift the loss in every case in which one person's conduct has some detrimental effect on another. Liability...is imposed only in those cases in which the harm or risk to one is greater than he ought to be required to bear under the circumstances, at least without compensation.

Mr. Justice Galligan then goes on to set out the factors that a court ought to weigh in determining a claim of nuisance:

a) the nature of the locality in question;
b) the severity of the harm;
c) the sensitivity of the plaintiff; and
d) the utility of the defendant's conduct.

On the defendant's evidence, he used the stove in question at least 67 times between January, 1999 and January, 2003. In my view that is sufficient to make out the tort of nuisance if the smoke was excessive in the sense of unreasonably harmful to the neighbours. On the defendant's evidence, he

continued to use the wood stove after receiving the letters of September, 2000, to let him know that the neighbours were upset about the smoke. Also on his evidence after January, 2001 when the Town of Pelham asked him to restrict his burning to the period from November 1st to April 15 every year, he used the stove in January and February of 2001, in March, late June, August 22, November 16, 30 and December 14 of 2002, and January 18 and 24 to 26 of 2003. As we see, he did not choose to comply with the Town's request. He burned in August, 2002 in the heat of summer. He also confirms the plaintiffs' account of burning in the days preceding the injunction application all night and all day, all weekend. I do not accept that this was the only burning he did. On the evidence of the other witnesses to whom I shall refer, I find that he burned at least twice as much as he says he did.

Cathy Robb, a nurse, says that from 1999 to April, 2001 excessive smoke came from the chimney of the defendants' garage. It was acrid and visible and it lingered in the backyards. She had to close her windows. She had to take her grandchildren to the school to play because the children could not play in the yard. She had a number of respiratory complaints that she associates with the smoke; one of them deteriorated to pneumonia. She had no desire to testify in this lawsuit and is fearful of the defendant. She had heard about the incident in

1994 when he deposited rock salt on the plaintiffs' property and caused $6,500 damage.

She has no motivation, in my view, to exaggerate her observations. She still notices odours, even after the defendant stopped burning in 2003, but she does not claim to have seen visible smoke since then. As a result, I do not think that this detracts from her reliability as a witness and I accept her account of the events before 2003.

Elko Merk says that he experienced smoke from the defendants' chimney in the period from 1999 to 2003. It was a dark colour and it blanketed his whole backyard. It smelled like a paper mill at times, a caustic soda type smell as opposed to a creosote smell. When the smoke was bad he could not open his windows. Some of his family had allergies and asthma and they were adversely affected by the smoke. I find that the defendant, on occasion, burned substances other than clean wood.

Captain Merk, a lake pilot, preferred not to confront the defendants as he 'gets enough of that at work'. He preferred to put up with the smoke. Also he found the defendants quite pleasant and had nothing against them, but he was prepared to sign a letter stating his observations with respect to smoke. He had no motivation, in my view, to exaggerate his observations and he did not.

The fire chief attended the defendants' home on three occasions. On two of them he saw an unreasonable amount of smoke. It was caused by banking off the stove, that is, depriving the fuel of sufficient oxygen. This causes a long-lasting, cool, smoky fire. Chief McLeod described it as extremely heavy smoke that was held close to the ground by the trees, like the smoke that we see in the photographs.

Photographs taken of the smoke in 1999 and 2002 show the plaintiffs' backyard full of smoke. To me, it looks like a London fog. The photograph of the defendants' chimney resembles nothing so much as the stack of a 19th century coal fired train engine. The plaintiffs have described the smoke. Mrs. Deumo's diary was filed as an exhibit and it also referred to the smoke.

I have some reservations about the plaintiffs' evidence. In the case of Mrs. Deumo she often appeared defensive, argumentative and resistant to acknowledge the obvious. Mr. Deumo was, to me, a much better witness but I find his evidence about burning after January, 2003 to be bizarre and it colours my assessment of his credibility as a whole to some extent. But their evidence on the main aspect of the case is supported by the neighbours and the fire chief and the photographs and even to a certain extent by the defendant himself. I should say that my reservations about the

plaintiffs' credibility are about reliability rather than honesty and I think Mrs. Deumo has been pushed into a certain amount of emotional disturbance by the stress of the nuisance and the litigation. Mr. Deumo honestly believes that the nuisance continued after January, 2003. He is no doubt affected by his wife's position, but he is mistaken on this point.

I do not think I can rely on Mrs. Deumo's diary. It is a self-serving document and reading it does not leave me with the sort of confidence I should have in evidence that I would rely on. I think it wiser to restrict myself to the viva voce evidence of the plaintiffs to the extent that it is confirmed by the evidence of other witnesses, except as I shall note later in connection with the physical effects of the smoke.

I reject both defendants' contention that the smoke was not problematic. It was as obvious to them as it was to everybody else. Mrs. Bacolini was not in a position to contradict this or to be of any assistance on the issues of what happened before January, 2003. She was not around enough.

The evidence of the defendants is contradicted not only by the plaintiffs but by the neighbours, the fire chief, the photographs, and it simply cannot stand with that evidence, as a matter of common sense.

I find that from 1999 to January, 2003 the defendant, Mr. Fitzpatrick, caused and the defendant, Mrs. Fitzpatrick, permitted wood to be burned in the wood stove in the garage on the property. The burning was frequent. It occurred winter and summer. To the defendants' knowledge it caused heavy, acrid and obvious smoke to blanket the plaintiffs' backyard.

The consequences for the plaintiffs' normal enjoyment of the property and the potential health risks were known to the defendants and were ignored by them. For the period in question the plaintiffs were entirely unable to enjoy their property other than using it simply for shelter. They could not go into the yard or leave their windows open, unless the defendant did not happen to be burning at the moment. Several of the trees on the plaintiffs' property that were usually in line with the smoke died. I conclude that the smoke killed them.

The plaintiffs bought their home for $99,000 in 1987. It is a modest but nice house on a large, treed property 75 by 290 feet. Use of the yard was a very important feature to both plaintiffs, especially Mrs. Deumo.

The smoke caused Mrs. Deumo some pain and suffering by aggravating her existing sensitivities. These symptoms were reported to health caregivers

contemporaneously and for that reason I accept her evidence and her husband's evidence about their complaints at the time. I find that they had these symptoms.

I find that they both suffered physically from the smoke. You do not have to be a doctor to draw that conclusion but without medical evidence in both cases I cannot say to what extent. I really think in any event that the pain and suffering was part of the annoyance and loss of use and enjoyment of the property and any relief on account of that should be subsumed in that head. The symptoms were not of the most serious, although they were certainly long lasting and annoying and disconcerting. They would not add much money to the claim but they are part of the loss of use and enjoyment of the property. There may well be long term risks from second hand smoke but the plaintiff was not in a position to prove that.

The Deumos were substantially deprived of the use of a valuable property. I am not in a position to put a dollar value on their property at present but as a matter of common experience one can say without fear of contradiction that such a property would be worth several times its 1987 value.

Applying the law to the facts as I have found them, I say this:

a) The locality in question is a low density residential neighbourhood consisting of houses on large wooded lots where many people would expect to spend a great deal of time outdoors and everyone would expect to spend some time outdoors.

b) The harm was severe enough to deprive the neighbours of the ability to stay outdoors in their yards or to go to the house and leave the windows open. It even caused them some disturbance when the windows were closed. It was a severe interference with the use and enjoyment of the property.

c) The plaintiffs are not unusually sensitive with respect to the use of their yard or their house. Mrs. Deumo is sensitive to irritants such as smoke. Mr. Deumo is not sensitive to irritants such as smoke beyond what one would expect normally. The smoke was such as to bother someone who is not unusually sensitive.

d) There is no utility in the defendant heating his garage by burning wood as opposed to using any other method available to him.

The defendant's persistent insouciance towards the well-being and property rights of his neighbours demonstrate that it is necessary to maintain the injunction. He testified in cross-examination that even knowing what he knows now he still wants to burn and I frankly found that astonishing. I think his self-absorption on this particular issue is

remarkable and very unfortunate. I have no doubt that if the injunction is lifted he will continue to burn. He will continue to burn carelessly, incompetently and offensively and to the extent of damaging his neighbours, and he won't care.

The acts of the defendant, Travers Fitzpatrick, which were permitted by Valerie Fitzpatrick were reckless, destructive, persistent, pervasive and heedless of their neighbours' physical integrity and property rights. The decision to burn all day and all night all weekend between the adjournment of the motion for an interim injunction and the hearing of that motion was nothing less than contumelious. In my view, punitive damages are appropriate.

I have endorsed as follows:

> For oral reasons given and recorded this day, judgment for the plaintiffs jointly. General damages, $80,000. Punitive damages, $20,000. Total $100,000. Prejudgment interest from August 23rd, 2002.

As to costs, Mr. Frapporti, do you want to do it in writing or do you want to come back tomorrow? I could actually squeeze you in tomorrow. It is up to you.

MR. FRAPPORTI: I would prefer to do it tomorrow, Your Honour.

THE COURT: What?

MR. FRAPPORTI: I would prefer to do it tomorrow, Your Honour.

THE COURT: Why don't you come at 11 o'clock, then? Is that convenient for you, Mr. Mahoney?

MR. MAHONEY: Yes, Your Honour.

THE COURT: All right. I do have another motion. It may or may not go, but I will make room for you at 11 O'clock tomorrow.

**COURT ADJOURNED**

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**Form 2**

**Certificate of Transcript**

**Evidence Act, subsection 5(2)**

I, Tricia Reed, certify that this document is a true and accurate transcript of the recording of Deumo v. Fitzpatrick, in the Superior Court of Justice held at 45 Main Street East, Hamilton, Ontario, taken from Recording Nos. 708-69/08 and 708-70/08 which have been certified in Form 1.

March 5, 2008 .....

(Signature of Authorized Person)

Transcript ordered: February 28, 2008
Transcript completed: March 5, 2008
Ordering party notified: March 5, 2008