IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Suzuki v. Munroe,*
2009 BCSC 1403

Date: 20091014
Docket: S107052
Registry: New Westminster

Between:

May Yuen Mui Ngan Suzuki and Kazuo Suzuki

Plaintiffs

And

Janice Munroe and Richard Munroe

Defendants

Corrected Judgment: The text of the judgment was corrected at paragraphs 77, 99, 106 and 107, where changes were made on November 5, 2009.

Before: The Honourable Mr. Justice Verhoeven

Reasons for Judgment

Counsel for the Plaintiffs:	R.K. Oliver
Counsel for the Defendants:	T. Yu
Place and Date of Trial:	New Westminster, B.C. September 21, 22, 23, 24, 25, 2009
Place and Date of Judgment:	New Westminster, B.C. October 14, 2009

I INTRODUCTION

[1] Mr. and Mrs. Suzuki claim that their neighbours Mr. and Mrs. Munroe have committed the tort of private nuisance. They say that the installation of a central air conditioning unit outside the Munroes' home and just a few feet away from the home of the Suzukis has created a nuisance as a result of noise. They also allege that the installation of a surveillance camera which overlooks the front yard, driveway and entrance to the Suzukis' home is a private nuisance in that it interferes with their privacy. They seek damages and an injunction.

[2] The Munroes deny that any nuisance was ever caused by them. They say the Suzukis are unduly sensitive. They say that the air conditioning unit was reasonably quiet when first installed, and has been made quieter through various modifications that they have voluntarily undertaken. They argue that central air conditioning appliances like the one they installed are common in the neighbourhood, and that their appliance complies with the relevant local bylaws. They say that the surveillance camera was installed in order to monitor the side area of their own home, and any view of the Suzukis' property taken in by the camera is minor and incidental, and does not cause any significant intrusion to the privacy of the Suzukis, and is not a nuisance in law.

II FACTUAL OVERVIEW

[3] The Suzukis and the Munroes reside as next door neighbours on Madrona Place, in the City of Coquitlam. The neighbourhood consists of single family homes built on medium sized lots in a residential suburban setting. The precise lot measurements were not given in evidence but Mrs. Munroe estimated the length of her property at about 155 or 160 feet. From the various plans and aerial photographs produced, the width of the property is about 55 feet. The Suzukis' property is a similar size. Both homes are moderately large, with several bedrooms on the upper floor, the main living space on the main floor, and a basement. Both have enclosed garages and driveways facing the street.

[4] Madrona Place is a cul de sac. There are minor arterial streets in the immediate vicinity but there are no major arterial thoroughfares or highways. There is no industry or commercial activity in the immediate area.

[5] The Suzuki and Munroe houses are situated quite close together. The distance between them is about 13 feet.

[6] Mrs. Suzuki is a retired postal worker. She retired in early 2005. Mr. Suzuki is a chemical engineer, who retired in October 2006. They purchased the property on Madrona Place in 1991 and had the house built in 1992.

[7] The Munroes moved into the property next door in or about 2000. Mrs. Munroe is a pharmacist. Mr. Munroe is a former police officer who took early retirement in 2004. He is a professional geologist who works as a consultant and business executive.

[8] The Munroes found their home to be uncomfortable in warm weather. It has poor ventilation. They decided to purchase and install a central air conditioning unit. They hired a reputable contractor. The contractor installed the unit in the optimal location which was the side of the house nearest the furnace. The Munroes say that the installer assured them that the air conditioning unit and its installation would comply with all applicable laws. The installer did not testify.

[9] The Suzuki master bedroom is located on the southeast corner of their home. One of the master bedroom windows faces Madrona Place, and there are two master bedroom windows on the easterly side of the house, facing the house owned by the Munroes. The head of the bed in the Suzukis' master bedroom is against the east exterior wall. There is a window on each side of the bed. Both of those windows open to the space between the two houses.

[10] The air conditioning unit was installed on Sunday, June 25, 2006. It was installed on the ground just outside the west side of the Munroe home, in the space between the two houses. The result is that the air conditioning unit is about 18 feet from the side bedroom windows of the Suzuki master bedroom which is on the upper

floor. The distance to the Suzukis' dining room, located on their first floor beneath the master bedroom, is less.

[11] The Suzukis have no central air conditioning and therefore rely on open windows for cooling and ventilation.

[12] Mr. and Mrs. Suzuki were out during the day on Sunday, June 25, 2006, the day of the air conditioning unit's installation. Upon returning they noticed the noise from the new air conditioning unit. Mrs. Suzuki was kept awake all night. Mr. Suzuki took refuge in a corner of the basement.

[13] The perceptions of the parties vary dramatically as to the noise level of the unit upon installation. Mrs. Suzuki testified that upon installation the air conditioner sounded "like a lawnmower" when operated. By contrast, Mr. Munroe said that he was shocked that Mrs. Suzuki found the air conditioner to be too loud. He thought that upon installation in 2006, even before modifications to make it quieter, it was already quiet, and was no louder than his refrigerator.

[14] On Monday, June 26, 2006, the day after installation, Mrs. Suzuki complained to the City of Coquitlam concerning the noise. Mrs. Suzuki also went to the Munroes' residence on June 26 and spoke with one of the Munroes' sons about the noise. According to her, the Munroes' son came with her back to the Suzukis' residence and listened to the noise. She says the son agreed that they would not operate the air conditioner after 9:00 p.m. After some days of compliance with this, however, on June 29 the air conditioner was operated until nearly midnight. Its operation started up again at 5:30 or 6:00 a.m. the next morning.

[15] The Munroes deny that their son was ever involved in discussions with the Suzukis concerning the air conditioner. The point is not material in view of the facts upon which there is agreement.

[16] On July 2, 2006, Mrs. Suzuki approached Mr. and Mrs. Munroe, who were outside their home. She said that their master bedroom was on the side of the house next to the air conditioner and that the noise of the air conditioner was preventing the

Suzukis from sleeping. The Munroes were not unsympathetic. They agreed to turn the air conditioner off at 9:00 p.m. and not to operate it prior to 7:00 a.m.

[17] In the conversation, Mrs. Suzuki says she suggested that the Munroes relocate the air conditioner to their back yard. She says that she told them that if they did so, they would be free to operate it 24 hours a day. Mrs. Suzuki said that Mrs. Munroe said that she would check with the contractor about the possibility of relocating the unit.

[18] Mrs. Munroe's version of this discussion is not substantially different. She agrees that she and her husband agreed not to operate the unit between the hours of 9:00 p.m. and 7:00 a.m. "as long as our house does not get too hot".

[19] However, beginning July 20, 2006, the air conditioner was operated more or less continuously for a period of about a week, during a period of very warm weather. Mrs. Suzuki could not sleep in her own bedroom and went to sleep in another room on the opposite side of the house. Mr. Suzuki continued to sleep in the basement.

[20] Pursuant to Mrs. Suzuki's complaint to the City of Coquitlam, a bylaw inspector attended and inspected the air conditioner on June 26, 2006, the date of the complaint. In the inspector's view, there was no infraction of the Coquitlam noise bylaw. She so advised Mrs. Suzuki by telephone later that day. Mrs. Suzuki was unaware that the inspector had in fact attended the premises before advising Mrs. Suzuki that there was no infraction of the bylaw. The Munroes place considerable reliance on the determination of the inspector.

[21] On July 8, 2006, Mr. Suzuki went to speak with Mr. and Mrs. Munroe. The conversation went badly. Mr. Suzuki complained about the noise of the air conditioner. He spoke to Mr. Munroe, while Mrs. Munroe was present. He asked that they move the air conditioning unit to a location on their property that did not bother the Suzukis, and to apply acoustic insulation to minimize the noise. Unfortunately, he also made reference to an unrelated matter. He referred to the existence of some

landscape ties located on the rear of the Suzuki property, which served as a retaining wall for some soil and, according to Mr. Munroe, a utility storm sewer drainage line running along the back of the Munroe property. Mr. Munroe considered this a grave threat to the safety of his family. He decided never to speak to him again. Mrs. Munroe felt the same way.

[22] The Suzukis engaged legal counsel who wrote to the Munroes on July 20, 2006. The letter from counsel noted the voluntary agreement of the Munroes to limit the operation of the air conditioner so that it did not operate between 9:00 p.m. and 7:00 a.m. Nonetheless, through their solicitors, the Suzukis took the position that the air conditioning unit remained a nuisance and they demanded that it be moved. The Munroes also retained legal counsel who took the position that the request of the Suzukis was unreasonable. The perceived threat to remove the landscape ties was noted. This threat was never repeated. I doubt if it was serious when it was made. It was never acted upon.

[23] The Suzukis repeatedly requested that the air conditioning unit be moved to another location on the Munroe property, or that the Munroes take steps to reduce its noise level to no more than 45 decibels. The Suzukis pointed to a City of Toronto bylaw setting out that standard for central air conditioning units. There are no local government bylaws in this region specifically dealing with air conditioning noise.

[24] While the Munroes did not agree to the applicability of the Toronto bylaw standard and maintained that the unit could not be moved, they made significant efforts to attenuate the noise. They installed a timer so that the unit would not operate outside of the agreed upon hours. They spoke with the installer of the unit, who installed a noise attenuating blanket on the inside of the unit at a cost of about $500. They say that the installer advised that moving the unit to another location on their property was not feasible. This advice was not proven in the evidence.

[25] Prior to the summer of 2007, Mr. Munroe constructed a wooden enclosure around the air conditioner, and lined it with sound-insulating materials. The

enclosure was constructed in the spring of 2007, prior to the first day of operation of the unit for 2007, which was May 30.

[26] Mr. Munroe has continued to, as he put it, “tinker” with the enclosure, in order to attempt to improve its sound-attenuating capabilities.

[27] He has modified it several times by, for example, altering or increasing the sound insulating materials inside the enclosure. He chose not to use concrete block because Mrs. Munroe thought it would be ugly, and he was of the view that construction of a permanent structure would be contrary to relevant bylaws. There is no evidence from the City of Coquitlam to this effect. He has been mindful of the need to retain proper ventilation for the unit. He has had no professional assistance or advice concerning the design of the enclosure. He has relied upon his own experience and skills as a professional geoscientist.

[28] Mrs. Suzuki has kept detailed and meticulous records relating to the operation of the air conditioning unit, including the hours of operation of the unit for each day since it was installed on June 25, 2006. She says that during 2006, the unit was operated for a total of 68 days, and on 17 occasions was used after 9:00 p.m. or before 7:00 a.m. On 10 occasions, it was operated for 24 hours. During 2007, the unit was operated for 73 days in total, and on 54 occasions, was operated after 9:00 p.m. or before 7:00 a.m. There was one day during 2007 when it was operated 24 hours. These facts were not challenged by the Munroes.

[29] The Suzukis obtained an interlocutory injunction on September 10, 2007. The order required that the air conditioning unit not be operated between 9:00 p.m. and 7:00 a.m. daily.

[30] As noted, on May 30, 2007, the unit was operated for the first time during that calendar year. Contrary to the then informal agreement made between the parties, the unit was operated well after 9:00 p.m. The Suzukis’ son, a medical doctor who ordinarily resides in Australia, was visiting his parents and staying with them in their home. At the request of Mrs. Suzuki he attended at the home of the Munroes to

complain about the air conditioner. An hour or so later Mrs. Suzuki attended at the front door of the Munroes' home herself. She says Mr. Munroe yelled at her and refused to turn off the air conditioner. Nonetheless the air conditioner was turned off sometime later that evening.

[31] During 2006, the Munroes installed a surveillance camera on the outside of their home. The camera is mounted on the side of their home between the two houses, and faces the Suzuki residence. It is directed at a forward angle, towards the air conditioning unit on the side of the residence. It has a very wide angle lens. The view from the camera takes in a portion of the Suzuki entrance, front yard and driveway. The Suzukis complained of this and have amended their Statement of Claim to add a claim of nuisance in relation to the surveillance camera.

III ISSUES

[32] The issues to be decided are as follows:

a) whether the Munroes have committed the tort of private nuisance through use and operation of the air conditioner, either in the past, or currently;

b) whether the operation of the surveillance camera constitutes a private nuisance;

c) if the tort of private nuisance is established, what is the appropriate remedy, and in particular:

1) the amount, if any, of monetary damages; and/or

2) whether an injunction should be granted, and if so, the terms thereof.

IV ANALYSIS

a) Whether the Munroes have committed the tort of private nuisance through use and operation of the air conditioner, either in the past, or currently

i) Legal principles

[33] A leading authority in British Columbia on the law of nuisance is *Royal Anne Hotel Co. Ltd. v. Village of Ashcroft* (1979), 95 D.L.R. (3d) 756. The judgment of the Court was delivered by McIntyre J.A. He noted at 759 that "The essence of the tort of nuisance is interference with the enjoyment of land. (Street, *Law of Torts*, at p. 212.)". He added at 759:

> That interference need not be accompanied by negligence. In nuisance one is concerned with the invasion of the interest in the land, in negligence one must consider the nature of the conduct complained of. Nuisances result frequently from intentional acts undertaken for lawful purposes. The most carefully designed industrial plant operated with the greatest care may well be or cause a nuisance, if for example effluent, smoke, fumes or noise invade the right of enjoyment of neighbouring land owners to an unreasonable degree ...

[34] McIntyre J.A. referred to the following proposition from H. Street, *The Law of Torts*, 4th ed. (London: Butterworths, 1968) at 215:

> A person then, may be said to have committed the tort of private nuisance *when he is held to be responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land or an interest in land where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable.*

[35] He added at 760-61:

> What is an unreasonable invasion of an interest in land? All circumstances must, of course, be considered in answering this question. What may be reasonable at one time or place may be completely unreasonable at another. It is certainly not every smell, whiff of smoke, sound of machinery or music which will entitle the indignant plaintiff to recover. It is impossible to lay down precise and detailed standards but the invasion must be substantial and serious and of such a nature that it is clear according to the accepted concepts of the day that it should be an actionable wrong. It has been said, see McLaren, "Nuisance in Canada", *supra*, that Canadian Judges have adopted the words of Knight Bruce, V.-C., in *Walter v. Selfe* (1851),

> 4 De G. & Sm. 315, [at p. 322], 64 E.R. 849, to the effect that actionability will result from an interference 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". These words were approved by Middleton, J., in the Ontario High Court in *Appleby v. Erie Tobacco Co.* (1910), 22 O.L.R. 533 at pp. 535-6. In reaching a conclusion, the Court must consider the nature of the act complained of and the nature of the injury suffered. Consideration must also be given to the character of the neighbourhood where the nuisance is alleged, the frequency of the occurrence of the nuisance, its duration, and many other factors which could be of significance in special circumstances. While an owner of land in a quiet residential district may well expect to be protected from the operation of a boiler factory on his neighbour's land, he may not be entitled to expect to prevent the boilermaker from pursuing his lawful calling when he seeks to put his residence in an industrial area next to the factory. The conflicting interests must be weighed and considered against all the circumstances. The social utility of the conduct complained of must be weighed against the significance of the injury caused and the value of the interest sought to be protected.

[36] The principles were also reviewed by the Supreme Court of Canada in *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181, at 1190 through 1192, and more recently in *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, at para. 77. There, the Court stated as follows (references omitted):

> At common law, nuisance is a field of liability that focuses on the harm suffered rather than on prohibited conduct. Nuisance is defined as unreasonable interference with the use of land. Whether the interference results from intentional, negligent or non-faulty conduct is of no consequence provided that the harm can be characterized as a nuisance. The interference must be intolerable to an ordinary person. This is assessed by considering factors such as the nature, severity and duration of the interference, the character of the neighbourhood, the sensitivity of the plaintiff's use and the utility of the activity. The interference must be substantial, which means that compensation will not be awarded for trivial annoyances.

[37] As can clearly be seen from the authorities, a nuisance may be created even where the activity complained of is otherwise lawful.

[38] In particular, compliance with local municipal bylaws does not mean that the activity complained of cannot be a nuisance: *Kenny v. Schuster Real Estate Co.* (1992), 10 B.C.A.C. 126 (C.A.).

[39] The invasion complained of must be substantial and serious, and it must be clearly unacceptable according to accepted concepts of the day.

[40] Negligence is not required to make out the tort of nuisance. The converse is also true: the existence of due care will afford no defence if the other ingredients of the tort are present.

ii) Discussion

[41] As previously noted, the subjective views of the parties as to the amount of noise created by the air conditioning unit are dramatically at odds. Even after installation of the noise-attenuating blanket and construction by Mr. Munroe of the enclosure, Mrs. Suzuki maintains that it still sounds like a kitchen fan on a high setting. Mr. Suzuki testified that initially the air conditioning unit sounded “like a table saw”. He said he was forced to move into a corner of the basement to sleep in order to get away from the noise. He conceded that he has sensitive hearing. With the modifications, the noise is louder than his limit of tolerance and affects his sleep. He continues to sleep in the basement when the air conditioning unit is operating.

[42] The Munroes maintain that the noise was minimal at all times and that their efforts to further reduce the noise have been neighbourly gestures carried out in order to accommodate their unduly sensitive neighbours.

[43] Mr. and Mrs. Suzuki both used to enjoy spending a lot of time in the garden. Mr. Suzuki used to spend 50% of his daytime leisure time in the garden. He now spends only as much time as is required in order to maintain the garden.

[44] The Suzukis contend that the noise has damaged Mrs. Suzuki’s health. In 2007, Mrs. Suzuki was referred by her family physician to a psychiatrist, Dr. Oduwole, who first saw her June 15, 2007.

[45] Dr. Oduwole noted that Mrs. Suzuki had no prior psychiatric problems. She had no prior history of emotional problems or difficulties with neighbours. Dr. Oduwole has seen Mrs. Suzuki in follow-up approximately 25 times since first seeing her June 15, 2007 and he continues to treat her currently. He has prescribed anti-depressant medication and sleep medication. Mrs. Suzuki continues to use both medications as needed. During the winter months, when the air conditioner is not

operating, she worries about the forthcoming air conditioning season. She describes her condition as being much better in the winter months (October through April) when the air conditioning unit is not operated.

[46] Dr. Oduwole noted that as of December 4, 2008, Mrs. Suzuki was completely preoccupied with the situation. He diagnosed a chronic stress disorder manifested by depression and anxiety, with poor sleep, agitation, tiredness, tremors, irritability, lack of enjoyment of her usual pleasures including her home, a sense of helplessness and hopelessness, anger that her hopefully happy retirement in her home has been made impossible, frustration and decreased energy.

[47] He stated that her condition was due to two factors; the noise pollution and effects on her health from that, and the chronic, intractable personal conflict with the neighbours.

[48] Dr. Oduwole gave a guarded prognosis, because the condition has become chronic.

[49] Mr. Suzuki has not been affected as severely as Mrs. Suzuki.

[50] Mr. Munroe testified that the conflict has become a consuming issue for their family. He points to Mrs. Suzuki's records of the operation of the air conditioner and suggests that Mrs. Suzuki is "stalking" them. The Suzukis complain of being watched by the Munroes' surveillance camera.

[51] The Munroes rely on the subjective evidence of several persons concerning the noise level from the air conditioner.

[52] Coquitlam's bylaw inspector, Susan Baldwin, attended the premises on June 26, 2006 in response to the complaint from Mrs. Suzuki. The notes she took on the occasion she attended indicate that the unit sounds "like a refrigeration unit and not a lawnmower". The notes state that "from the street the noise of a fan could be heard". At trial, she testified that she could barely hear the unit even when she was up close, within inches of it. It was on this basis that she advised Mrs. Suzuki that

she had no ground of complaint as there was no failure to comply with Coquitlam's noise bylaw.

[53] Ms. Baldwin did not confirm with the Munroes that the unit was in operation on the day that she attended. She did not advise either party of her presence. She had no sound meter, and is not qualified to test for sound scientifically. Her evidence as to the amount of noise made by the unit is inconsistent with the objective evidence concerning the noise level. At the time, the unit was unshielded by any noise attenuating materials and the manufacturer's rating for the unit is 74 decibels. I seriously doubt whether the unit was in fact operating when she attended.

[54] The Munroes' neighbour on the side opposite of the Suzukis is Jacqueline Ting. She testified that her home has a central air conditioning unit. Her neighbours have not complained about it. She attended the Munroe residence recently and thought that the unit, fully enclosed, made only a "little humming sound", and sounded like a fan. Another neighbour, David La Ballister, testified to similar effect.

[55] Mrs. Munroe testified that there are several homes with central air conditioners in the neighbourhood. The owners of the home behind the Munroes have a central air conditioner. That air conditioning unit is located at the rear of that neighbour's home. I note that the unit in question is located about 100 feet away from the Munroe home.

[56] There was no evidence provided concerning the measured sound levels from this or any other air conditioning units in the neighbourhood.

[57] The Munroes have maintained that moving the unit is not feasible. They rely on advice from the installer to that effect. As noted, no admissible evidence in this respect was led by them.

[58] On the evidence, after installing the noise blanket on the inside of the unit, the Munroes did not obtain any professional opinion as to steps that they could take to reduce or eliminate the noise from the air conditioner.

iii) Objective evidence of sound levels

[59] In August of 2006, the Suzukis hired a professional sound technician to take measurements of the sound levels emanating from the air conditioner and as experienced in the Suzukis' bedroom. He provided the Suzukis with a written report. The technician was not called to give evidence at the trial and therefore the report was excluded from evidence. After having the sound levels professionally determined, Mrs. Suzuki purchased her own hand-held sound measuring device and has taken numerous sound level measurements.

[60] According to her readings, noise from the air conditioner in 2009 inside her bedroom window was in the range of 51 to 53 decibels. She says the noise is much louder when the unit starts and stops, but it is impossible to measure that. She is not qualified to provide technical evidence and I cannot give that part of her evidence much weight.

[61] The Munroes retained a professional engineer, Mark Gaudet, to measure the sound levels in 2009. That is after installation of the sound-insulating blanket and construction of the enclosure by Mr. Munroe.

[62] The engineer testified that the appropriate measurement scale for noise in this regard is dB(A), which is decibels on the "A" scale. The "A" scale is designed to approximate the sensitivity of the human ear to sound. He observed that three decibels is widely accepted as the minimum needed for a subjective increase or decrease in sound level to be perceived. A ten decibel difference is generally accepted as equating to a perceived halving or doubling of the level of sound. In a free field, that is, absent structures which would reflect, deflect or screen sound, the decibel level is reduced by six decibels each time the distance from a point source is doubled. From this it can be seen, as we know from common experience, that the distance between the source of the noise and the listener is critical.

[63] Mr. Gaudet's consulting firm published a table which states in part as follows:

Common Noise Levels and Typical Reactions

Sound Source	Noise Level	Apparent Loudness	Typical Reaction
Highway traffic at 15 m	70	Base Reference	Telephone use difficult
Light car traffic at 15 m	60	1/2 as loud	Intrusive
Noisy office	50	1/4 as loud	Speech interference
Public library	40	1/8 as loud	Quiet

[64] Mr. Gaudet measured readings of about 50 dB(A) (decibels) over a 24-hour period on July 15 and 16, 2009. The measurement was taken by a microphone placed on a pole at the Munroes' property line between the two houses. The location of the microphone was about eight feet away from the Suzukis' bedroom window, and five feet away from the Munroes' home. He also measured the ambient noise level at that location. He testified that it averaged 45 dB(A) during the time period of measurement. The ambient noise level diminished to a level of 35 decibels at 2:00 a.m., and was in the range of 40 decibels or lower from midnight to 5:00 a.m. On this basis, therefore, the noise emanating from the air conditioner is about ten decibels or more above the ambient noise level from midnight to 5:00 a.m. During the daytime hours, the difference between the ambient noise level and the noise of the air conditioner is less than 10 decibels.

[65] Mr. Gaudet testified that the narrow space between the Suzuki and Munroe home acts as a sound alley, which reduces the sound attenuation that would otherwise occur, absent the structures.

[66] As noted the air conditioning unit installed by the Munroes is rated by the manufacturer at 74 decibels. It can therefore be seen that the combination of the noise reduction blanket, the sound enclosure constructed by Mr. Munroe, and the distance from the air conditioning unit to the microphone pick-up point utilized by Mr. Gaudet have reduced the amount of noise significantly, to approximately 50 decibels.

[67] Mr. Gaudet took further measurements on September 15, 2009. Fully enclosed, the noise level emanating from the air conditioning unit as measured at the property line was slightly higher at 51.8 decibels. With the enclosure completely removed, the noise level was 56.9 decibels.

iv) Noise standards

[68] There was very little evidence adduced as to objective standards for noise. The Suzukis have pointed to the "Guidelines for Community Noise" published by the World Health Organization ("W.H.O.").

[69] A "Fact Sheet" issued by the W.H.O. states:

> Noise can cause hearing impairment, interference with communications, disturb sleep, cause cardiovascular and psycho-physiological effects, reduce performance, and provoke annoyance responses and changes in social behaviour.

[70] The Fact Sheet indicates that the W.H.O.'s Guidelines for Community Noise was the outcome of a W.H.O. task force meeting in London, England, in March 1999. The W.H.O. Guidelines contain the following table:

Environment	**Critical health effect**	**Sound level dB(A)**	**Time hours**
Outdoor living areas	Annoyance	50 - 55	16
Indoor dwellings	Speech intelligibility	35	16
Bedrooms	Sleep disturbance	30	8
School classrooms	Disturbance of communication	35	During class
Industrial, commercial and traffic areas	Hearing impairment	70	24
Music through earphones	Hearing impairment	85	1
Ceremonies and entertainment	Hearing impairment	100	4

[71] W.H.O.'s Fact Sheet indicates that the Guidelines it has published offer recommendations to governments for implementation, such as extending and enforcing existing legislation and including community noise measurements in environmental impact assessments.

[72] In Dr. Oduwole's report of July 5, 2007, he referred to the W.H.O. Guidelines. He states:

> According to the WHO Guidelines for good sleep, sound levels should not exceed 30 decibels for continuous back ground noise and 45 decibels for individual noise event. (Birgitta Burglund et al 1995. Stockholm University and Karolinka Institute.)

[73] In Dr. Oduwole's July 13, 2009 report, he stated as follows:

> Noise pollution is environmental noise that is annoying, distracting and/or physically harmful. The Sources may be human, non human or machines.
>
> The effects can be immediate and can be accumulative. The immediate effect is annoyance and other negative affects like anger, helplessness and anxiety.
>
> The cumulative effects include problems with relationships.
>
> Problems with concentration and fatigue.
>
> Decreased working capacity.
>
> Physical health problems due to increased autonomic and hormonal activation such as hypertension, increased heart rates, irregular heart beat, sleep problems characterised by problems falling asleep, frequent awakenings, alterations in sleep stages especially a decrease in deep sleep and alteration in sleep depth.
>
> Emotional or mental health problems such as depression, anxiety, emotional stress, nervous complaints. Emotional instability, increased use of psychotropic medication as well as consumption of sleeping pills.
>
> The magnitude of these changes is determined by individual characteristics and they can be temporarily [sic] but they may also become more permanent with prolonged and continuous exposure.
>
> The effects can also be affected by the severity as well as the duration of exposure.
>
> Those who are most vulnerable are usually the ill, the depressed and the elderly.

[74] This evidence was not challenged.

[75] Another objective standard can be found in some local municipal bylaws.

[76] The bylaw of the City of Coquitlam regulating noise dates from 1982. It contains no objective standards. It defines noise as follows:

> "Noise" includes any loud outcry, clamour, shouting or movement, or any sound that is loud or harsh or undesirable.

[77] The bylaw prohibits such noise. The City of Coquitlam bylaw is of no help in assessing whether the noise emanating from the Munroes' air conditioning unit complies with community standards that might be evidenced by the local bylaw. The subjective nature of the Coquitlam bylaw and its vague and general terms helps explain why Coquitlam's inspector concluded that the Munroe air conditioner was not in breach of the bylaws.

[78] Other municipal bylaws contain objective standards. The Suzukis pointed to a bylaw of the City of Toronto. The Toronto bylaw specifically regulates installed air conditioning devices. The bylaw is somewhat technical but contains a standard of 45 decibels in what might be considered suburban environments, and 50 decibels in an urban environment.

[79] A number of bylaws in the metropolitan Vancouver area regulate noise by means of decibel levels. None refer specifically to air conditioners. The specific bylaw terms vary somewhat, but the bylaws of Vancouver, Burnaby, Richmond and Port Moody and several others in the Vancouver area all provide that in quiet residential areas of their respective municipalities, daytime noise is not to exceed 55 dB(A), and night time noise is not to exceed 45 dB(A). Several of the bylaws define daytime hours as between 7:00 a.m. and 10:00 p.m.

[80] I view these bylaws as providing at least some objective evidence of what is generally acceptable noise in this part of the Province of British Columbia, in quiet residential neighbourhoods, notwithstanding the fact that the particular community in which these parties reside, the City of Coquitlam, has not yet chosen to adopt a bylaw containing objective standards. The decibel levels set out in the bylaws are maximums, beyond which a party will be subject to prosecution under the bylaw. The decibel levels stipulated are of general application, and do not seek to provide appropriate guidelines for any specific location or circumstance.

[81] As compared to the standards set out in these bylaws, the noise from the Munroe air conditioner exceeds commonly accepted night time maximum noise level standards. However, the Munroe air conditioner, when fully enclosed, is within

commonly utilized maximum daytime standards. Without the enclosure, the Munroe air conditioner slightly exceeds maximum daytime noise standards.

[82] The specific circumstances in this case render noise made by either party in the narrow area between the two homes especially bothersome. Therefore, in my view the bylaw standards should be considered absolute maximums as to the level of continuous noise that the Suzukis should be required to tolerate in the circumstances applicable here.

v) Conclusion

[83] I can give little weight to the subjective descriptions of noise levels from any witness and rely instead on professionally-obtained noise level measurements.

[84] The Munroes did not consult with the Suzukis prior to installing the air conditioning unit just a few feet away from the Suzukis' property. This would have been neighbourly and prudent, but they were not obliged to do so. It appears that the Munroes and their installer paid little attention to the effect on the Suzukis' property of the installation of the air conditioner. The site of the air conditioner was chosen based upon what was optimal for the Munroe residence. The sound-insulating blanket was obtained later after a complaint was made. Mr. Munroe began exploring sound enclosures after the issue escalated further. The Munroes have never explored professional engineering solutions for the problem. It may well be that there would be no nuisance created had the unit been located at the rear of the Munroes' property as the Suzukis contend. The evidence does not allow me to make that determination.

[85] The Munroes point to the fact that central air conditioners are common in the neighbourhood. They say these are now everyday appliances. This is true. However, whether the noise from an air conditioner will cause a nuisance to one's neighbour is heavily dependent upon many specific factors including the precise site of the air conditioner, the model, the nature of the noise generated, the measures taken to

attenuate the noise, and the location of buildings on neighbouring properties, including where bedrooms and bedroom windows are situated.

[86] One of the factors to be considered in deciding whether a nuisance exists is the social utility of the activity complained of. Here, the air conditioning was installed by the Munroes in order to enhance the comfort of their own home. Their enhanced comfort should not come at the expense of significantly reduced comfort for their neighbours. Nor should the Suzukis be required to close up their windows and acquire an air conditioner in what might be considered self-defence.

[87] Mrs. Suzuki testified that she uses a portable air conditioning unit only when the temperature inside the master bedroom exceeds 30 degrees Celsius. She uses it as little as possible. It is a water-evaporative type appliance which she thought was more environmentally friendly.

[88] The law requires that the activity complained of must be objectively unreasonable in order to constitute an actionable nuisance. The Munroes argue that the Suzukis, and especially Mrs. Suzuki, are unduly sensitive.

[89] The Suzukis have maintained, from the beginning, that they would have no objection to the Munroes' air conditioner being operated 24 hours a day, if it were not located between the two houses, right next to the Suzukis' master bedroom.

[90] The Munroes operate an indoor portable air conditioner which exhausts through their bedroom window, in close proximity to the Suzuki bedroom window. Mrs. Suzuki indicates that she has no objection to that air conditioner, which does not bother her. The Suzukis are not bothered by the air conditioning unit in the home behind the Munroes, which is at a similar distance to the Suzuki home as it is to the Munroe home.

[91] Dr. Oduwole did not state in his evidence, or concede in cross-examination, that Mrs. Suzuki was unusually sensitive concerning noise.

[92] In my view, although Mrs. Suzuki may have become somewhat obsessed with the noise and the operation of the air conditioner, and the conflict with her neighbours, none of this means that the air conditioning noise is not objectively a nuisance. In my view, most people would consider an air conditioning unit operating in excess of 50 decibels only a few feet from one's bedroom window as being a serious and substantial interference with one's enjoyment of property.

[93] I am satisfied on all of the evidence that the Suzukis are not abnormally sensitive individuals and that the noise caused by the Munroe air conditioner is unreasonable, by objective standards.

[94] In all of the circumstances of the case, I conclude that the operation of the Munroe air conditioner has caused and is likely to continue to cause a nuisance for the Suzukis. Based on the objective evidence available, the noise emanating from the air conditioner is well above the existing night time ambient noise levels. It is above the levels set out in the various bylaws. When initially installed, the noise from the air conditioner must have been significantly higher. During the daytime, the noise level, with the unit fully enclosed, causes persistent noise, but at a level which is less than the maximums set out in the various bylaws.

[95] The Munroes have limited the operation of their air conditioner so that it does not operate between 9:00 p.m. and 7:00 a.m. Initially they did so by voluntary agreement. The court order that was later obtained has been substantially complied with. However, that interlocutory order will end when final judgment is obtained in this action. It is therefore be necessary to consider whether an injunction is needed in future.

b) Whether the operation of the surveillance camera constitutes an actionable private nuisance

[96] As noted, the Munroes installed a surveillance camera on the side of their house pointing toward the Suzuki property in or about July 2006. At trial they stated that the camera was for the purpose of monitoring the air conditioning unit and that

side of their home against vandalism. I took it that they were concerned about vandalism by the Suzukis. The Suzukis say that initially they were not concerned with the camera as they did not know the camera took in a view of their front steps, yard, and driveway. They became very concerned upon learning of this in 2008. In 2008 they amended their statement of claim to add a complaint about the surveillance camera. They seek a permanent injunction to remove or redirect the camera so that it does not observe their property and invade their privacy.

[97] The Munroes have declined to move the camera or to redirect it. They say the image from the camera takes in only a small part of the Suzuki property, which is barely discernable in the image seen. They do not deny that the view from the camera takes in a portion of the Suzuki property.

[98] A photographic image from the surveillance camera was produced at trial. The resolution shown in the printed photograph is so poor that one can hardly make out anything. However it is clear that the camera is directed in part so that it has a view of not only the air conditioner but also the Suzukis' entrance, front yard and driveway. If the resolution of the camera is as poor as the photograph presented at trial, I would see no purpose in having the camera at all. I do not accept that the resolution is as bad as the photograph I was shown. I infer that the camera is connected to an electronic monitor of some kind and that the picture on the screen of that monitor must be adequate to be of use.

[99] I have no doubt that a surveillance camera continuously observing the entrance areas to a neighbouring property, or any part thereof, in these circumstances, is an intolerable interference with the use and enjoyment of the neighbouring property. There is no reason the Munroes could not monitor the side of their home utilizing a camera positioned so that it takes in no part of the Suzuki property. No useful purpose of any kind is served by having the camera directed at any part of the Suzuki property. I am forced to conclude that the Munroes installed the camera and refused to remove or redirect it at least in part in order to provoke and annoy the Suzukis.

[100] Acts done with the intention of annoying a neighbour and actually causing annoyance will be a nuisance, although the same amount of annoyance would not be a nuisance if done in the ordinary and reasonable use of the property: A.M. Dugdale & M.A. Jones eds., *Clerk & Lindsell on Torts,* 19th ed. (London: Sweet & Maxwell, 2006) at 11782. In my view this is the natural corollary of the principle that the social utility of the activity complained of may be considered in deciding whether the activity is unreasonable. Activities designed to annoy one's neighbours and having little or no redeeming social utility are unreasonable and should be discouraged by the law.

[101] Mr. and Mrs. Suzuki have been very upset by the surveillance camera. Mr. Suzuki avoids being present on the part of his property taken in by the camera. The Suzukis feel that their comings and goings and those of their visitors are being monitored by their neighbours. This is a reasonable perception on their part.

[102] The installation of a surveillance camera overlooking a neighbouring property has been found to comprise an actionable nuisance in several cases: *Wasserman v. Hall,* 2009 BCSC 1318; *Lipiec v. Borsa*, 31 C.C.L.T. (2d) 294, [1996] O.J. No. 3819, (Ont.C.J.) (QL); and *Saelman v. Hill*, 20 R.P.R. (4th) 118, [2004] O.J. No. 2122 (Ont.S.C.J.) (QL). I find that the surveillance camera installed by the Munroes constitutes a nuisance.

c) If the tort of private nuisance is established, the appropriate remedy, and in particular: 1) monetary damages; and/or 2) injunction

[103] I have concluded that the Munroes have committed the tort of nuisance by the operation of the air conditioner and also by the installation and operation of the surveillance camera. These wrongs have caused considerable distress and suffering to Mr. and Mrs. Suzuki and therefore are entitled to damages and injunctive relief.

i) Damages

[104] As plaintiffs' counsel conceded in argument, the case is not really much about damages. The purpose of the proceedings is to eliminate the nuisance caused by

the Munroes. Nonetheless, an award of some damages as solace is justified in all of the circumstances.

[105] Mrs. Suzuki has suffered more than Mr. Suzuki has. The consequences for her have been noted in the evidence of Dr. Oduwole to which I have already made reference. She continues to be under medication currently.

[106] Dr. Oduwole noted that the chronic stress disorder from which Mrs. Suzuki has been suffering for now in excess of three years, stems from two factors, the air conditioning noise itself, and the conflict with the Munroes.

[107] The damage she has suffered is indivisible as between the two causes. The noise itself has been the major contributing factor. It is not necessary that the tortious conduct of the defendants be the sole cause of the injuries sustained. It is enough if the tortious conduct is a materially contributing cause of the injury. In such circumstances the defendants are liable for the whole loss. There is, therefore, no room for apportionment of the loss or reduction of the damages based upon the fact some of the injury results from the dispute itself rather than the nuisance; see *Athey v. Leonati*, [1996] 3 S.C.R. 458 at 467-468.

[108] I will award $4,000 to Mrs. Suzuki and $2,000 to Mr. Suzuki as damages for nuisance. If I were not granting an injunction, the damages awarded would be significantly higher.

ii) Injunctive relief

[109] An injunction is an equitable remedy, and therefore the granting of one is discretionary: R.J. Sharpe, *Injunctions and Specific Performance*, 3rd ed. (Aurora: Canada Law Book Inc., 2000) at para. 4.10, *Boggs v. Harrison*, 2009 BCSC 789 at para. 141.

[110] A number of factors are relevant in determining whether or not to grant an injunction. The inadequacy of damages is frequently considered, along with the nature of the plaintiff's injury and the balance of convenience between the parties:

Sharpe, *Injunctions and Specific Performance* at paras. 1.60-1.140, *Boggs* at para. 141, A.M. Linden & B. Feldthusen, *Canadian Tort Law*, 8th ed. (Markham: LexisNexis Canada Inc., 2006) at 594.

[111] In situations where the nuisance is likely to continue without the granting of the injunction, as is the case here once the interlocutory order ends and the Munroes are no longer enjoined from operating the air conditioner at night, the inadequacy of damages is easily satisfied: Linden & Feldthusen, *Canadian Tort Law* at 594.

[112] In terms of the damage to the plaintiffs, I have already found that the noise from the air conditioner has caused the Suzukis considerable distress and suffering: see para. 103 of these reasons. The distress is likely to continue if no injunction is granted.

[113] Regarding the balance of convenience, the harm to the plaintiffs is compared against the reasonableness of the efforts the defendants have made and could make to eliminate the nuisance caused by their air conditioner.

[114] I have confidence that it is technically feasible for the Munroes to enjoy central air conditioning in such a manner that it does not cause a nuisance at law to their neighbours. The evidence does not allow me to conclude that they adequately explored the option of moving the air conditioning unit to another location on their property where it might not cause a nuisance. As noted, there was no evidence that they have retained any technical or professional engineering expert who could explore solutions to reduce the noise of the air conditioner. There was evidence that quieter air conditioning units are now available on the market. The model installed by the Munroes is a Lennox XC13 which according to the manufacturer's literature has a sound rating of 74 decibels. The Suzukis have pointed to another appliance, a Lennox XP15 heat pump which is rated at 64 decibels. There was no evidence that this quieter appliance was available in 2006. It is now on the market. I am also confident that, Mr. Munroe's best efforts notwithstanding, a professionally designed

and constructed enclosure for the unit could well perform better than Mr. Munroe's enclosure.

[115] Mr. Munroe suggested the construction of a fixed enclosure would violate Coquitlam bylaws set-back requirements. There was no evidence that the City of Coquitlam would not allow such a solution to be implemented. Ultimately, the manner in which the Munroes choose to abate the nuisance is up to them. What the Suzukis are entitled to is an assurance that the nuisance will not continue in future.

[116] On the evidence, no objective standard is available to me concerning acceptable noise standards other than that which is reflected in the various bylaws.

[117] It is unfortunate that the City of Coquitlam has no applicable bylaw containing an objective standard. In my view, had such a bylaw existed, this lawsuit would have been unnecessary.

[118] Applying the same principles, I am satisfied that an injunction prohibiting the Munroes from employing the surveillance camera which monitors any part of the Suzuki property should be ordered. The existing security camera could perhaps be redirected so that it does not take in any part of the Suzuki property. It is impossible to know what view is taken in by the security camera unless one has access to the monitoring equipment inside the Munroes' home. In the circumstances, the Suzukis are entitled to receive some formal confirmation that the Munroes have complied with the injunction concerning the surveillance camera. The Munroes may seek to remove the existing camera, redirect it, or install other surveillance equipment. Again, how the Munroes choose to comply with the order and eliminate the nuisance is up to them. I will order that Mr. and Mrs. Munroe shall each execute a statutory declaration which will be delivered to the Suzukis and will confirm that they have complied with the order.

V CONCLUSIONS

[119] I order as follows:

a) the Munroes may not operate their air conditioner such that it causes sound beyond 55 dB(A) during the hours of 7:00 a.m. to 10:00 p.m., and 45 dB(A) during the remaining hours of the day, measured at any point along the Munroe-Suzuki property line;

b) the Munroes are prohibited from employing a surveillance camera which monitors any part of the Suzuki property;

c) Mr. and Mrs. Munroe shall each execute a statutory declaration which will be delivered to the Suzukis and will confirm that they have complied with the above order regarding the surveillance camera.

[120] Subject to submissions within 45 days concerning the potential effects of Rule 37B of the *Rules of Court*, the plaintiffs are entitled to their costs of this action.

[121] Both parties sought special costs. Special costs are usually awarded only in relation to misconduct in the course of litigation. There is no basis for an award of special costs in this case.

"The Honourable Mr. Justice Verhoeven"

M E M O R A N D U M

TO: The Parties and Legal Counsel

CC: All Legal Publishers

FROM: Superior Courts Judgment Office

DATE: November 5, 2009

RE: **Case Name: *Suzuki v. Munroe***
Neutral Citation: 2009 BCSC 1403
Docket: S107052
Registry: New Westminster

Please be advised that the attached Reasons for Judgment of Mr. Justice Verhoeven dated October 14, 2009 have been edited.

1. In the last line of paragraph 77, the word “beach” has been replaced with the word “breach”.

2. In paragraph 99, the structure of the last sentence has been changed from:

> I am forced to conclude that the Munroes installed the camera and refused, at least in part, to remove or redirect it in order to provoke and annoy the Suzukis.
>
> To:
>
> I am forced to conclude that the Munroes installed the camera and refused to remove or redirect it at least in part in order to provoke and annoy the Suzukis.

3. In the second line of paragraph 106, the word “steams” has been replaced with the word “stems”.

4. In paragraph 107, in the third line, the word “the” has been added in front of the words “sole cause”.

A copy of this memorandum and attached Reasons for Judgment will be placed in the court file. The original Reasons for Judgment which were previously distributed will be retained in the court file.

Please direct any inquiries to the Superior Courts Judgment Office at: scpublishing@courts.gov.bc.ca

“FV,J”