

A Case for Golf Season
Private Nuisance: Sammut v. Islington Golf Club &

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The recent Superior Court decision in *Sammut v Islington Golf Club* [2005] O.J. 2674 is an interesting example of how the tort of private nuisance can apply when the use of land by one property owner interferes in the enjoyment of neighbouring lands.

The Islington Golf Club was built in 1923 and is a historic 18 hole course designed by Stanley Thompson. Mr. Thompson was, arguably, Canada's finest golf course designer designing many of the finest golf courses around the world. The Islington Golf Course has operated without significant difficulty from or to its neighbours from 1923. In 1999 the Sammuts build a house immediately northeast of the third hole tee box on the Islington Golf Course. The green is immediately to the northwest of the Sammuts' property. Unsurprisingly, at least for one who has played golf, the Sammuts' property was repeatedly hit by fast moving golf balls from the third hole tee. The Sammuts complained and sought a permanent injunction which would stop the Islington Golf Course from allowing such errant golf balls invading the Sammuts' property. The golf course argued that the Sammuts, in building the property where they did, consented to the golf balls being shot onto their property and certainly there is a superficial attractiveness to such an argument. On the face of it, it would seem that someone building a house by a tee box might expect to have golf balls shot onto their property. Certainly, when golf course communities are built, it is common place for purchasers of properties to look carefully at the layout of the golf course to determine whether or not errant balls will cause a problem. In any event, the Court in this case, found that there was no basis for finding an implied consent and ruled that private nuisance applied. It is unclear whether the Court considered pre-existing property use, although such would probably not apply in a case where projectiles were invading neighbouring lands. The Court's decision was hopeful that some rectification of the problem could be made without a major redesign of the third hole but nevertheless granted an injunction restraining the playing of golf on the third hole in such a day as to allow golf balls to interfere with the Sammuts' property. The most salient passages of the Decision follow.

20. Private nuisance deals with interference with an occupier's interest in the beneficial use and enjoyment of his land (see G.H.L. Fridman, *The Law of Torts in Canada*, Carswell (2nd ed.) p. 167).

21. In order to consider whether a private nuisance exists, it is often necessary to undertake a balancing and comparison of competing interests. As was observed by the Ontario Court of Appeal in *Pugliese et al. v. National Capital Commission et al.* (1977), 17 O.R. (2d) 129:

In determining whether nuisance exists, it is not sufficient to ask whether an occupier has made a reasonable use of his own property. One must ask whether his conduct is reasonable considering the fact that he has a neighbour. As Lord Wright pointed out in *Sedleigh-Denfield v. O'Callaghan et al.*, [1940] A.C. 880 at p. 903:

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. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly, in a particular society.

22. It must be noted that this case is not one where a property owner adjacent to a golf green or fairway is complaining about, and seeking an injunction against, the occasional golf shot being softly

lobbed or dribbling into his yard during the course of play. This case concerns IGC's operation of its third hole and the placement of the tee box in such a way and at such an angle and distance as to result in the persistent barrage of high-speed golf balls, referred to in the evidence as "screamers", into the Sammuts' home and surrounding garden area.

23. IGC appears to take the position that the Sammuts have somehow consented to this problem by having had the nerve to build their home adjacent to the golf course. I do not agree with that proposition. Although it might be reasonable to suggest that the Sammuts should not be allowed impose a drastic remedy upon IGC and its members as a consequence of the occasional errant golf ball, I cannot see any basis for the conclusion that they have ever consented to endure a problem of this nature or magnitude.

24. IGC is a private club. Although the evidence reveals that it has endeavoured to be respectful of its neighbours and has allowed them to walk on the property when not in use or in the off-season, it is not a public park and does not attract, in my view, the same degree of regard to the public interest as did, for instance the Linz Cricket Club of Burnopfield, County Durham from the English Court of Appeal in its decision in *Miller et al. v. Jackson et al.*, [1977] Q.B. 966. In that case, moreover, a nuisance was established but the proper remedy was considered to be money damages rather than an injunction.

25. Findings of private nuisance have been made in similar or analogous circumstances to these (see; *Cartez v. Willow Park Golf Course Ltd.*, [2002] A.J. No. 1174 (Alta. Q.B.); *Segal v. Derrick Golf & Winter Club* (1977), D.L.R. (3d) 746 (Alta. S.C. Trial Div.); *Wilson v. Fawcett*, [1979] O.J. No. 526 (O.H.J.) and the decision of Stewart, J. of May 27, 1970 referred to therein).

26. I am of the view that the barrage of golf balls to which the Sammuts are being subjected constitutes a private nuisance for which the IGC should be held responsible. IGC has created the problem and has allowed it to continue.

Remedy

27. The Sammuts' real concern is not for substantial money damages. The cost of repair of the damages to their property is relatively modest. They want the problem rectified by an injunction. The issue of damages is secondary to that.

28. I am of the opinion that IGC is liable for the cost of repairs of the property damage sustained by the Sammuts due to its negligence as determined above. On the evidence and the estimates of repair costs provided, I assess damages for the cost of repair to broken or cracked windows, damaged eavestroughs, fascia board, panels and the chimney and replacement of the steel garage doors to be \$9,000.00.

29. With respect to damages for the past private nuisance for which IGC is responsible, I observe that damages in instances such as these have been assessed within a fairly modest range. Not surprisingly, plaintiffs have primarily sought an end to the nuisance, rather than substantial money damages. Accordingly, in all of these circumstances and in light of the inconvenience and annoyance described by the Sammuts in their evidence, I assess damages for past nuisance in the sum of \$5,000.00.

30. For the reasons outlined above, I consider that the Sammuts are entitled to injunctive relief to put a stop to the continuation of the nuisance. As a result, I order the following:

(a) IGC is hereby enjoined from allowing its members or their guests from playing golf on the third hole of its 18-hole golf course in any way that results in the hitting or traversing of the Sammuts' adjacent property at 6 Fairway Road in the City of Toronto by hard-driven golf balls.

(b) The effect of the order contained in (a) above is to be suspended for a period of two weeks from the date of release of this decision to permit IGC to review its available options to remedy the nuisance and to implement such necessary action or course modifications as are required to comply with this order.

31. I do not consider that it is for the Court to determine which of the various options available to remedy the problem and stop the ongoing nuisance is to be preferred or implemented by IGC. I express the expectation, however, that a solution will be found which will not require a wholesale redesign of the third hole but instead will employ larger and more effective screening, landscaping and perhaps a re-positioning of the third-hole tee-boxes to produce the desired result.

** This article is intended to provide general information and is not specific legal advice.
If you have a legal problem, you should not rely on this article alone but should speak to a lawyer.
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