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Hundreds of walnuts: Just annoying, or a nuisance?

Lawyers sometimes describe cases as being like a law school problem. Sometimes that means that the case raises difficult and complicated questions of law and fact that are nearly impossible to resolve. And sometimes it means that the case raises an obscure issue that seems more like a dispute between property owners in 19th century England. *Gallant v Dugard* squarely falls into the latter category.

The parties in that case were neighbours. On their property line was a large black walnut tree. That tree produced nuts—in some years several hundred nuts—that fell onto both neighbours' properties. While the applicant attempted to prune the tree as much as possible to reduce the annual shower of nuts, he could not entirely eliminate the problem. This caused the applicant significant irritation.

The applicant then brought an application for either an injunction requiring the respondent to remove the tree, or for an order allowing the applicant to remove the tree and requiring the respondents to contribute half the cost.

The applicant's claim was based on the tort of nuisance, which allows one person to sue another for damages or an injunction where the other party's conduct substantially interferes with the first party's use or enjoyment of his property. While nuisance is often one of the first things that law students learn in law school, it has been largely superseded by land use planning regimes. However, the tort remains available to parties who can establish that another person has substantially interfered with their property rights.

Unfortunately for the applicant, the Court found that there was no such substantial interference here.

The Court described that there were two issues that it had to consider: first, whether the interference with the applicant's use or enjoyment of his property was substantial; and second, if so, whether the interference was unreasonable. In this case, it concluded that neither of those conditions was met.

The Court noted that the evidence was that nuts only fell for an average of four weeks per year. While the applicant complained that the nuts fell onto a portion of his roof that was immediately over the room where he slept, the Court held that it would not be

a substantial interference to the applicant's property rights if he slept in a different room during that four week period.

The character of the community was also significant to the Court. As the Court held, the applicant chose to purchase a house in an area that was heavily populated by trees. Both the town and the residents took pride in and wanted to preserve the trees. In those circumstances, any interference caused by the falling nuts was not unreasonable.

The Court's decision highlights that when seeking an injunction to address some potential irritant, property owners must carefully consider both the degree of interference and character of their community in assessing the seriousness of that irritant. Minor inconveniences must be tolerated, while major annoyances can become actionable nuisances. Unfortunately, the line between the two will almost always be vague, and it will seldom be clear how many nuts must fall from a tree before the tree rises from annoying to legally actionable.