

# A New Duty Not to Encroach

By Larry Bremner

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**M**r. Justice Festeryga has introduced the concept of negligence to trespass law in **Laker v. Henechowicz (1999), 21 RPR (3d) 163**. The Defendants removed an existing fence, installed a wading pool and erected a new fence which encroached onto the Plaintiffs' lands. The Plaintiffs sold their property and, because of the fence encroachment, they had to allow an abatement of \$10,000.00 in order to complete their sale. The Ontario Court of Justice (General Division) held that the Defendants had a duty not to encroach onto the Plaintiffs' property, that the Defendants had breached that duty and that they "knew or ought to have known that unlawful encroachment on the Plaintiffs'

property would detrimentally affect the value of the Plaintiffs' property". The Court awarded \$10,000.00 to the Plaintiffs.

Peter Marshall comments on the case and notes that it "is a novel decision that employs the duty - breach - damage analysis of negligence law to decide an encroaching fence dispute". He notes that there are 2 significant results in employing a negligence analysis:

a) in negligence cases money damages are assumed to be the appropriate remedy rather than an injunction requiring the encroachment removal (unless there is some reason that money damages would not be more appropriate); and

b) the negligence approach takes "rights

and liabilities that are ordinarily considered to run with the land (ie. the right to assert title and the liabilities associated with being the owner of encroaching land) and makes them personal as between the party who causes the encroachment and the party who ultimately suffers loss as a result."

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