

THE ALLOCATION OF REMEDIES IN PRIVATE NUISANCE: AN EVALUATION OF THE JUDICIAL APPROACH TO AWARDING DAMAGES IN LIEU OF AN INJUNCTION

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The approach of the courts in allocating remedies in nuisance actions has remained little changed over the last one hundred years. This is somewhat surprising given changed perceptions of private property rights in our society over this period. I believe the time has come to re-evaluate the conventional methods used by the courts in making such decisions.

My paper will feature an assessment of the effectiveness of nuisance remedies, the validity of the criteria used for assigning these remedies and, in particular, an examination of the courts' use of the statutory discretion to grant damages in lieu of an injunction conferred by Lord Cairns' Act¹.

While Lord Cairns' Act has never been applied to nuisance in a New Zealand court, the use of this Act has produced interesting results, along with some comment, in other jurisdictions. I hope that my examination of the approach of overseas courts to awarding damages in lieu of an injunction may indicate the course our own courts should be advised to take if faced with such a case.

I INTRODUCTION

1. *What constitutes a legal nuisance?*

Authority suggests that a nuisance is actionable when the interference with the plaintiff's rights that it causes can be characterised as "unreasonable"². Knight Bruce V-C gave a good description of what was required for a nuisance to be unlawful in *Walter v. Selfe*³.

He held that the interference⁴ "must be substantial . . . and must materially interfere with the ordinary comfort of human existence . . . according to plain and sober and simple notions among the English people."

Thus, the reasonableness of a nuisance is dependant on the nature and extent of the harm, rather than the utility of the activity causing it or the quality of the defendant's conduct.

In deciding whether an interference is reasonable, locality may be considered⁵. However, if the harm is in the form of material damage rather than personal discomfort, a nuisance will be found to be unreasonable as a matter of course, subject to the *de minimis* principle⁶. The distinction between personal discomfort and material damage seems unjustifiable in principle. As a nuisance which interferes with the senses can cause a diminution in the value of a plaintiff's property as much as one which causes physical damage, the same considerations should apply in both cases⁷.

¹ The Chancery Amendment Act 1858.

² *Walter v. Selfe* (1851) 4 De G. & Sm. 315.

³ *Supra*.

⁴ *Supra* 322.

⁵ "What would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey *Sturges v. Bridgman* (1879) 11 Ch D. 852 per Thesiger L.J.

⁶ *St. Helens Smelting Co. v. Tipping* (1865) 11 H.L.C. 642.

⁷ See Ogus and Richardson, *Economics and the Environment: A Study of Private Nuisance* (1977) 36 C.L.J. 284, 299. The authors conclude that this distinction is unsupportable "since land values clearly reflect environmental amenities".

2. Remedies

The courts may remedy a nuisance by granting an injunction or damages, or both. As the injunction is an equitable remedy, the courts may exercise a discretion in deciding whether to grant it. In practice the courts will grant an injunction if damages are considered inadequate. In the case of a continuing nuisance common law damages are generally regarded as an unsatisfactory remedy because they can only be awarded for past loss. Thus, in such a situation the plaintiff would have to bring successive actions for the loss caused by the persisting nuisance if the court chose not to enjoin it. The claim of the plaintiff is only likely to be defeated in a claim for an injunction under the courts' traditional discretion if his or her actions offend normal equitable principles⁸. Broader considerations are unlikely to be taken into account⁹.

It may be that an injunction is not always an ideal remedy for a continuing nuisance. The courts have the opportunity of providing an alternative remedy to an injunction or common law damages. The Chancery Amendment Act 1858 (better known as Lord Cairns' Act) invests in the courts' power to grant future damages for a continuing nuisance in lieu of an injunction¹⁰.

I will now examine the extent to which the courts have been prepared to utilise the discretion conferred on them by Lord Cairns' Act to mitigate undesirable outcomes which can occur from an injunction being awarded in every instance involving a continuing nuisance.

II THE ROLE OF LORD CAIRNS' ACT IN NUISANCE

1. The Act¹¹

The Chancery Amendment Act of 1858 conferred upon the courts of Chancery the right to grant damages in lieu of an injunction or specific performance. The legislative intent behind the Act is far from clear. Primarily it would seem that the Act was passed to enhance the position of plaintiffs seeking the discretionary remedies of injunction and specific performance. It might happen, particularly when a plaintiff was asking for specific performance, that disentitling conduct on his behalf, or circumstances beyond his control, made such an award impossible. Before Lord Cairns' Act a plaintiff in such a situation would have to take his case before another court to press a claim for common law damages. The Act allowed a plaintiff requesting an equitable remedy to be awarded damages, where appropriate, without the time and expense of taking the action to a separate court. It may have been that the legislature envisaged that the Act had little useful application beyond enabling the Courts of Chancery to do "complete justice" in this way.

However, it was not long before the Act was applied with more novel consequences. In *Eastwood v. Lever*¹² damages were granted under the Act when equitable relief was refused on the grounds of acquiescence and delay and common law damages were unavailable. This decision was reached using

⁸ E.g. *Eastwood v. Lever* (1863) 4 De G.J. & S. 114.

⁹ See for example *A.G. v. Birmingham Corp.* (1959) 4 K. & J. 528 re public convenience. N.B.: the case preceded Lord Cairns' Act. Also *B.N.Z. v. Greenwood* [1984] 1 N.Z.L.R. 525.

¹⁰ *Leeds Industrial Co-operative Society v. Slack* [1924] A.C. 851, 853.

¹¹ See generally Jolowicz, *Damages in Equity — A Study of Lord Cairns' Act* (1975) 34 C.L.J. 224.

¹² (1863) 4 De G.J. & S. 114.

the supposition that Lord Cairns' Act conferred on the court the power to make an award of damages "in substitution" for full equitable relief, even if the amount of damages awarded was more than the plaintiff would have been entitled to at common law. Under this principle it was held by the House of Lords in *Leeds Industrial Co-Operative Society Ltd v. Slack*¹³

that the court could make an award for future damages in lieu of a *quia timet* injunction.

Although, as has been mentioned, the statutory discretion was granted to strengthen the position of plaintiffs, the courts' recognition of its unusual potential has meant the Act has assumed significance in the field of nuisance in attempts to apply it, or prevent its use, to prejudice plaintiffs' claims for injunctions. Given the nineteenth century courts' perception of property rights as sacrosanct, it is unlikely that Lord Cairns' Act was ever intended to be utilised in this way. However, before the turn of the century the potential of the Act for use as a tool by defendants in nuisance actions was recognised, if not welcomed, by the courts.

Lord Cairns' Act was repealed in 1883¹⁴ after the Judicature Acts conferred upon the courts the power to dispense both common law and equity. This could have been interpreted as removing the courts' power to award, under the Lord Cairns' Act, damages which could not be given at common law. Perhaps it was an indication that Parliament never intended to grant such a unique discretion and the Act was never meant to give the courts greater powers than those subsequently provided by the Judicature Acts.

Whatever the case, the Act's repeal has been virtually ignored. The repeal was described by Lord Esher in *Chapman Morsons and Co. v. Guardians of Auckland Union*¹⁵ as resulting from a misunderstanding. While arguably a fair assessment, his lordship's judgment fails to explain how the Act can still be recognised. However, without a doubt, Lord Cairns' Act remains part of our substantive law. The Act has been recognised as applying in this country in a number of cases¹⁶.

2. The Shelfer Test

Governing the discretion to grant damages in lieu of an injunction is the case of *Shelfer v. City of London Electric Lighting Co.*¹⁷. Here A.L. Smith L.J. laid down his "good working rule", consistently recognised as the authoritative judgment in this area.

The defendant operated a power station which created a nuisance in that the vibrations caused personal discomfort to the plaintiff and damaged his property. At first instance Kekewich J. applied Lord Cairns' Act, ordering an inquiry into damages instead of granting an injunction. On appeal A.L. Smith L.J. held that the discretion should only be exercised positively where the following four conditions were met:¹⁸

- (1) If the injury to the plaintiff's legal rights is small,
- (2) And is one which is capable of being estimated in money,

¹³ [1924] A.C. 851, 863.

¹⁴ The Statute Law Revision and Civil Procedure Act 1883.

¹⁵ (1889) 23 Q.B.D. 294, 299.

¹⁶ E.g. *Ryder v. Hall* (1905) 27 N.Z.L.R. 385; *Souster v. Epsom Plumbing Contractors Ltd* [1974] 2 N.Z.L.R. 515. (Both concern specific performance).

¹⁷ [1895] 1 Ch. 287.

¹⁸ At 322.

- (3) And is one which can be adequately compensated by a small money payment,
 (4) And the case is one in which it would be oppressive to the defendant to grant an injunction.”

The judgment suggests his lordship favoured granting equitable damages only where the court would be unable to award an injunction because of traditional equitable principles. Thus, he sought to restrict the exercise of the discretion to decisions that would benefit the plaintiff. Accordingly he spent little time discussing cases in which the defendant may be favoured by the exercise of the statutory discretion. However, he went to considerable lengths to indicate that there are cases in which, because of disentitling conduct by the defendant, the plaintiff would be granted an injunction, even though the criteria of the “good working rule” are met¹⁹.

Although the judgment has been treated with much reverence, it does not present itself as a classic of legal reasoning. A number of commentators have criticised its restrictiveness²⁰ and those who claim the decision is justified are rarely convincing²¹. This article will now examine the conditions of the *Shelfer* test in turn and consider the extent to which the test allows the public interest to be taken into account.

(a) If the injury to the plaintiff's legal rights is small

In accordance with the judicial view that individuals' property rights should be absolutely protected, A.L. Smith L.J. was not prepared to award damages in lieu of an injunction when the harm suffered by the plaintiff was “more than small”. The expression “injury to the plaintiff's legal rights” is somewhat oblique, but presumably refers to the extent of interference or damage that the nuisance causes to the plaintiff.

It is arguable that this criterion bears a close relationship to the test used in deciding whether a nuisance is actionable²². In *Walter v. Selfe* Knight Bruce V-C held that for a legal nuisance to exist the interference involved must be “substantial”. The requirement of substantial interference would appear to be little different from the concept of an injury to the plaintiff's legal rights being other than small. Effectively this means the courts are left with no discretion to use Lord Cairns' Act in this context²³. If an actionable nuisance

¹⁹ At 323.

²⁰ E.g. Tromans, Nuisance — Prevention or Payment? (1982) 41 C.L.J. 87. Also consider an about face by Jolowicz; in “Damages in Equity — A Study of Lord Cairns' Act” (supra) he concluded that “A.L. Smith L.J.'s ‘good working rule’ provides an excellent guide for the exercise of the discretion under Lord Cairns' Act”. However in a critique of The House of Lords' decision in *Allen v. Gulf Oil* [1981] 1 All E.R. 353 he argued that “it is high time that A.L. Smith L.J.'s judgment was reconsidered”: see (1981) 40 C.L.J. 226, 228.

²¹ E.g. Markesinis & Tettenborn, Cricket, Power Boat Racing & Nuisance (1981) N.L.J. 108, 110, note “[T]here are cases where the effects of granting an injunction would be so extreme or catastrophic that no one would advocate it, for instance when it would enforce the closure of a major industry. But such situations are likely to be few and need not concern us”. Yet such cases occur and the courts are still required to apply the conventional approach. The consequences of granting an injunction may be grave, e.g. *Bellew v. Cement Ltd* [1948] Ir R 61; *Canada Paper Co. v. Brown* (1922) 66 D.L.R. 287. When an injunction is declined in such a case it generally results in the plaintiff's being left without a remedy, e.g. *Allen v. Gulf Oil* (supra) and often affects changes in the substantive law of nuisance, e.g. *Harrison v. Southwark and Vauxhall Water C.* [1891] 2 Ch. 409.

²² Ante p.1.

²³ Hardie Boys J. in *B.N.Z. v. Greenwood* [1984] 1 N.Z.L.R. 525, 535, appears to accept this fact without going through the motions of the *Shelfer* test or mentioning Lord Cairns' Act (although he did refer to the right it confers of granting damages in lieu of an injunction).

exists it could be argued that, by definition, it must involve more than a small injury to the plaintiff's legal rights²⁴.

The requirement that the injury to the plaintiff's legal rights must be small if an award of equitable damages is to be granted is excessively constraining. It is unreasonable to examine the injury to the plaintiff's rights in isolation without regard to the effect an injunction would have on the defendant and the wider community.

“(b) And is one which is capable of being estimated in money”

A.L. Smith L.J. considered that, for an award of damages to be made in lieu of an injunction, the court must be able to assess the injury to the plaintiff's legal rights in monetary terms. He concluded he could not do so in the case before him. At first glance this requirement may seem a sensible one. However, it is pertinent to examine how he reached this finding of fact. He reasoned:²⁵

“... how are these injuries to be put into money, and upon what principle are these damages to be assessed so as to represent the continuing injury to the Plaintiff? To guess at them is not assessing them at all.

In order to constitute a real assessment it appears to me that the principle of purchasing the Plaintiff's interest in his lease for the unexpired term will have to be adopted as the basis upon which the assessment is to be made, and, as I have before stated, this is never sanctioned by the Court at the instance of a tortfeasor.”

His Lordship's reasoning is dubious. By using the unexpired term of the lease as a basis for the assessment the court could have calculated the harm in monetary terms. A figure could have been reached based on the extent to which the nuisance devalued the plaintiff's lease.

It would seem that the real justification for A.L. Smith L.J.'s conclusion was that any award of future damages would be tantamount to a compulsory purchase of the plaintiff's absolute right to have his property protected from unlawful interference (which none of the lords was prepared to accept)²⁶. This is, however, a different argument from that stated; that the injury must be “capable of being estimated in money”.

Whether there is any merit in this requirement depends on there being instances where the court could not make an assessment in damages of the harm caused by a nuisance.

In general the courts have been prepared to grant damages where they have considered that such a remedy is deserved, even when a means of calculating the award is not immediately obvious.

In *Bunclark v. Hertfordshire County Council*²⁷ an assessment of past damages was based on the figure by which a fair landlord would reduce the rent of the premises which had deteriorated as a result of the nuisance.

²⁴ Thus it is difficult to find an application of Lord Cairns' Act to deny an injunction in an English case involving physical damage. Cases where the Act has been applied in this way tend to involve either obstruction of light (e.g. *Leeds Industrial Co-operative Society v. Slack* (supra); *Kline v. Jolly* [1905] 1 Ch. 480, or minor trespass to land (e.g. *Behrens v. Richards* [1905] 2 Ch. 614). *Miller v. Jackson* [1977] 3 All E.R. 338 is anomalous and could be regarded as wrong in the light of *Kennaway v. Thompson* [1980] 3 All E.R. 329. At 234, 316.

²⁵ E.g. Lindley L.J.: “Expropriation, even for a money consideration, is only justified when Parliament has sanctioned it.”

²⁷ (1977) 243 E.G. 381; *Tromans*, supra 100.

In *Bone v. Seale*²⁸ a nuisance by smell was compensated for by using an analogy of an award for loss of the sense of smell in an injury case.

In a similar case of nuisance by smell in this country an award was made without using such a formula²⁹.

An indication of the approach likely to be taken by our courts in making awards for future damages can be found in the American case of *Boomer v. Atlantic Cement Co.*³⁰. An award was made on the basis of "servitude to the land" whereby the plaintiffs were compensated for the extent to which the economic value of their land was reduced by the nuisance.

Admittedly, a justification of this requirement of the Shelfer test may lie in the argument that such an award will not provide a complete remedy for plaintiffs not prepared to relocate immediately. This will be considered later in this paper.

In other areas of the law it can be seen that the courts are more readily compensating non-pecuniary loss for such conditions as distress and loss of enjoyment where damages are extremely difficult to quantify³¹. It would appear the courts are capable of assessing injury in monetary terms in almost any case. Indeed the court in *Shelfer* suggested, even if this requirement was not met, an award of damages could still be made if the plaintiff was not entitled to an injunction or was satisfied with damages alone³². Yet, if, as in that case, an injury supposedly cannot be assessed in monetary terms, it is difficult to see why it should make any difference whether the plaintiff or the defendant requests the remedy of damages in lieu of an injunction. This is further evidence of the court's policy of upholding the plaintiff's rights and suggests the judges would have found some basis for awarding damages if they thought such an award was merited.

As Bisson J. noted in *Colson v. Lockley Park*³³ awards of damages in nuisance cases are inevitably impressionistic. This is likely to be so regardless of any formula used. However, an injunction should not be issued merely because damages cannot be easily calculated where damages might offer a more effective and just remedy.

"(c) And is one which can be adequately compensated by a small money payment"

This probably adds little to the first requirement that the damage to the plaintiff's legal rights must be small. A.L. Smith L.J. considered that, even if the court was able to make an award by using the plaintiff's lease as a means of calculating the injury, such a payment would not be small³⁴. This requirement tends to preclude an award for future damages since an award made for a reduction in the value of the plaintiff's land is unlikely to fulfill this criterion. This condition seems to have been included for policy reasons and A.L. Smith L.J. did not attempt to vindicate it.

In a subsequent case Lord Macnaghten said of this requirement:³⁵

"I have some difficulty in following this rule. I rather doubt whether the

²⁸ [1975] 1 All E.R. 787; Tromans, *ibid*.

²⁹ *Colson v. Lockley Park*, A 72/80, 22 November 1985; see Todd [1986] N.Z.L.J. 31.

³⁰ 257 N.E. 2d 570 (1970).

³¹ E.g. in contract *Heywood v. Wellers* [1976] 1 All E.R. In tort *Stieller v. Porirua C.C.* [1986] 1 N.Z.L.R. 84, compensation for frustration in negligence.

³² Lindley, L.J. 817; A.L. Smith L.J. 322.

³³ *Supra*.

³⁴ At 234.

³⁵ *Colls v. Home and Colonial Stores Ltd* [1904] A.C. 179, 192.

amount of damages which may be supposed to be recoverable at law affords a satisfactory test.”

In principle there seems little to justify this condition and one would think it better to allow the courts to consider the substantial justice of a case rather than to have their discretion fettered by so arbitrary a requirement.

“(d) And the case is one in which it would be oppressive to the defendant to grant an injunction”

This is the only requirement of the *Shelfer* test which directly takes into account the position of the defendant. It probably involves two aspects. First the extent to which an injunction would adversely affect the defendant compared with the benefit it would provide the plaintiff, and secondly an assessment of the parties’ conduct.

Traditionally the courts have attached little weight to the first aspect as the judiciary has seen itself as champions of individuals’ property rights. Thus, in *Redland Bricks v. Morris*³⁶ Upjohn L.J. concluded:³⁷

“an argument on behalf of the tortfeasor, that this will be very costly to him . . . receives scant, if any, respect.”

Little attention is also accorded to the second aspect. For instance, in *Bellew v. Cement Ltd*³⁸ the plaintiff built a house near the defendant’s quarry after being warned not to do so by an employee of the defendant. He then had the defendant’s operation enjoined as a nuisance, jeopardising a major undertaking with many employees, at a time when cement was urgently needed for building and was in limited supply. There was no suggestion that the defendant had conducted its operations without due care, yet the majority of the court considered that the plaintiff was entitled to an injunction.

In *Cowper v. Laidlaw*³⁹ the plaintiff purchased his property in order to exploit his neighbour (who wished to redevelop his land) by claiming interference with his right to light. The court, applying *Shelfer*, held that the plaintiff’s conduct did not disentitle him to an injunction, and granted that remedy.

A.L. Smith L.J.’s fourth requirement can only be determinative if all the other grounds are established. However, as this is the only prerequisite which considers the justice of exercising the discretion, it should perhaps carry greater weight than the other elements of the *Shelfer* test. This would seem to be the conclusion of Lord Denning and Cumming-Bruce L.J. in *Miller v. Jackson*,⁴⁰ a case which cannot be readily reconciled with *Shelfer*. They conclude that, if an actionable nuisance existed, it was not just to deprive the village of an activity of high social utility (cricket) when the defendants’ conduct was beyond reproach and the plaintiff had “come to the nuisance”.

(e) Consideration of the public interest

In exercising their discretion to grant an injunction courts in most common law jurisdictions have consistently declined to take the public interest into account to justify denying the plaintiff this remedy⁴¹.

³⁶ [1970] A.C. 652.

³⁷ *Ibid* p.664.

³⁸ [1948] 1r R 61.

³⁹ [1903] 2 Ch. 337.

⁴⁰ [1977] 3 All E.R. 338.

⁴¹ Canada is an exception. For an example of the traditional approach consider *B.N.Z. v. Greenwood* *supra*, at 535. Hardie Boys J. held: “To the extent that this is an appeal to set the public interest ahead of the private interests of the plaintiffs, then I regret that authority requires me to close my ears to it”.

In *Bellew v. Cement Ltd* Murnaghan J. concluded⁴²

"I do not think that we are entitled to deprive Mr Bellew of his legal rights on some idea of public convenience."

Thus the court held the plaintiff was entitled to an injunction despite the fact that his award threatened the public interest.

Such an approach may have been justified before Lord Cairns' Act. However, the refusal of an injunction no longer leaves a plaintiff without a remedy. Therefore, there would seem to be merit in the courts' considering the public good in their discretion to grant damages in lieu of an injunction.

3. *The conventional approach: Kennaway v. Thompson*⁴³

This case provides a good example of a traditional English application of the *Shelfer* test. The facts were that a nuisance by noise was caused by motorboat racing on a lake near the plaintiff's home. At first instance Mais J. held that there was an actionable nuisance but declined to grant an injunction on the ground that it would be oppressive to do so. Instead he awarded fifteen thousand dollars in future damages. The decision was, perhaps, not surprising, as that it was given soon after *Miller v. Jackson*. However, the Court of Appeal rightly concluded that the facts of the case did not satisfy the *Shelfer* test.

Lawton L.J. held that the injury to the plaintiff's legal rights was not small. He also commented of the damage:⁴⁴

"(I)t is not capable of being estimated in terms of money save in the way the judge tried to make an estimate, namely by fixing a figure for the diminution to the value of the plaintiff's house because of the prospect of a continuing nuisance."

Lawton L.J. did not directly say why such an estimate would not be acceptable. However, he firmly denied the right of the court to expropriate property rights to protect the public interest.

The court distinguished *Miller v. Jackson* but not convincingly. Of Cumming-Bruce L.J.'s judgment, it was said:

"He thought that there were special circumstances which should inhibit a court of equity from granting the injunction claimed".

Lawton L.J. did not say what these special circumstances were, whether the court thought that Cumming-Bruce L.J. was right and, if so, whether equitable principles could be used to deny an injunction in the case at hand. Perhaps *Miller v. Jackson* is better treated as wrongly decided, as it is out of harmony with modern English nuisance law.

The approach of English courts to allocating remedies is well illustrated by a comment by Upjohn L.J. in *Redland Bricks v. Morris*. He concluded that while the proof of an actionable nuisance did not automatically entitle the plaintiff to an injunction, he is entitled to that remedy "as of course, which comes to the same thing"⁴⁶.

⁴² At 65.

⁴³ [1980] 3 All E.R. 329.

⁴⁴ At 332.

⁴⁵ At 333.

⁴⁶ *Supra*, 664.

III MEANS EMPLOYED IN MITIGATING THE CONSEQUENCES OF THE CONVENTIONAL APPROACH

1. *Injunctions suspended and/or on terms*⁴⁷

The harsh consequences which may result from immediately curtailing an activity which has been held to warrant enjoining may be alleviated to an extent by the court's suspending the injunction, or granting it on terms, or both.

Injunctions on terms are common and unobjectionable per se. They may be justified on the ground that an activity which creates a legal nuisance need not be totally stopped if it may be continued in a way that does not constitute a nuisance.

It is not unusual to postpone the operation of an injunction in a nuisance case. Injunctions have been suspended for as long as two years⁴⁸. A suspension may be allowed provided the defendant undertakes to pay for the damage in the interim period⁴⁹. However, generally no such undertaking is required. Either method seems to conflict with the principles which the courts claim govern them in their exercise of the discretion to award damages in lieu of an injunction. By suspending an injunction the court is, effectively, permitting the nuisance, if only temporarily. Requiring an undertaking by the defendant to make good the loss the nuisance causes to the plaintiff in the interim period surely represents a buying off of personal property rights, if only for a limited period. Suspension without such a provision means the plaintiff is liable to suffer uncompensated loss until the injunction takes effect.

In deciding whether to suspend an injunction courts accord greater respect to the defendant's case and to broader considerations such as public injunction. The courts are prepared to grant a suspension if an immediate injunction would be oppressive to the defendant and an injunction on terms would allow the nuisance to be reduced to an acceptable level without disrupting the defendant's operations any more than is necessary⁵⁰. In the *Pride of Derby*⁵¹ case Lord Denning, while holding that arguments of public convenience could not justify them denial of an injunction, concluded they were "strong reasons for suspending the injunction".

There seems no reason why different considerations should be used in cases involving suspending injunctions than in those concerning the use of Lord Cairns' Act, when, as I have suggested, the same principles apply. Often an injunction will be suspended for some time without providing the plaintiff with a remedy in the interim period. An award of equitable damages would allow the defendant to continue his activity but would avoid leaving the plaintiff without a remedy for a time.

2. *Finding no actionable nuisance*

Where a court realises that an injunction is, effectively, the only remedy available in a case, but perceives this as too drastic a measure, it may be tempted instead to hold that there is no actionable nuisance.

In *Bove v. Hannah Coke Corp.*⁵² a New York court was asked to enjoin

⁴⁷ Tromans, *supra*, 93.

⁴⁸ *Pride of Derby Case* [1953] 1 All E.R. 179.

⁴⁹ *Pennington v. Brinsop Coal Company* (1877) 5 Ch. D. 769.

⁵⁰ E.g. *Halsey v. Esso Petroleum*, *supra*, (injunction suspended for six weeks).

⁵¹ [1953] 1 All E.R. 179, 204.

⁵² 258 N.Y.S. 229 (1932).

a nuisance. The finding of a legal nuisance provided an absolute right to injunctive relief at this time in this jurisdiction. Yet issuing an injunction would have meant closing down a large manufacturer during the depression. Instead the court found on unsupportable grounds that no actionable nuisance existed.

A principle has developed that temporary building operations do not constitute a nuisance⁵³, thus preventing unreasonable results which could occur if such operations could be readily enjoined. Such a principle would be necessary if the only way of providing the plaintiff with relief was by stopping the building project. However, persons affected by a nuisance of this kind could be compensated with equitable damages; surely a better solution than leaving individuals to suffer loss from a prospective defendant's business venture.

Similarly the defence of statutory authority is used to absolve a defendant of what would otherwise be an actionable nuisance. In *Allen v. Gulf Oil*⁵⁴ the defence was used when the statutory wording considered evidence of no clear legislative intent to allow a nuisance. The real reason for the House of Lord's decision was that, as the judges considered that Lord Cairns' Act could not be applied, finding a nuisance would have meant closing down the operation, an outcome the court wished to avoid.

Better justice had been provided by the Court of Appeal in that case⁵⁵. There an award of damages in lieu of an injunction was made. Lord Denning convincingly argued that if Parliament intended to allow a nuisance to devalue individuals' land it was likely it also intended to provide compensation. Lord Cairns' Act allowed the court to do so.

It is unfortunate that the courts have failed to recognise the right to grant damages in lieu of an injunction as being essentially an area of policy and, as such, an area in serious need of reconsideration. This failure has led to courts making policy decisions in individual cases. Some of these decisions have had the effect of altering the substantive law of nuisance⁵⁶, while others cannot be justified on the principles by which they were purportedly decided⁵⁷. Generally these cases share the feature of failing to deliver complete justice.

IV RECOGNITION OF ECONOMIC CONSIDERATIONS IN NUISANCE LAW

1. *Economic approaches to solving nuisance disputes*

The last twenty years have witnessed a marked growth in economic analysis of the law by commentators. Nuisance law, involving the conflicting use of economic resources, lends itself to such analysis as much as any other field of the law. Traditionally the courts have eschewed even the use of broad economic considerations in nuisance disputes, as can be seen in their refusal to make serious allowance for defendants' interests or to consider the interests of third parties.

There is now, however, a movement among economic and legal commentators calling for legislative and judicial recognition of the value of new techniques in assessing the economic consequences of the available remedies in nuisance disputes and the consideration of those consequences.

⁵³ *Harrison v. Southwark and Vauxhall Water Co.* [1981] 2 Ch. 409, Vaughan Williams J. Applied in *Andrae v. Selfridge & Co. Ltd* [1938] Ch. 1.

⁵⁴ [1981] 1 All E.R. 353.

⁵⁵ [1979] 3 All E.R. 1009.

⁵⁶ See Tromans, *supra*, 105.

⁵⁷ E.g. *Allen v. Gulf Oil* (*supra*). One wonders whether, if the court in that case had decided *Shelfer*, they would have excused the defendants on the ground of statutory authority.

I will briefly examine some economic approaches to resolving nuisance disputes and consider whether the application of such methods could improve the law of nuisance.

Ronald Coase's article on social cost in the early 1960s⁵⁸ suggested that allocation of liability in nuisance cases was not as crucial as the judiciary and commentators might have thought. Coase reasoned that, even if an injunction was granted against a polluter, if his activity was of more value to him than the complainant's activity was to the complainant, he would bargain and buy off the injunction. Similarly, if an injunction was refused, the complainant could pay the polluter enough to make it worth his while to stop the nuisance. However, this analysis has its limitations. Even Coase recognised that the existence of transaction costs could mean that negotiating to buy off another's rights might not take place. Furthermore this model tends to assume rational and reasonable behaviour by litigants, whereas, in reality, one party might refuse to give up his rights regardless of their worth to him, or refrain from selling his rights in the hope of receiving an offer far in excess of their value. Because of this, initial allocation of liability may be important.

Calebrasi and Melamed⁵⁹ developed a model for allocating liability in nuisance cases, according to which, to obtain optimum economic efficiency, liability should be placed on the party in the best position to end the nuisance (the least cost abater), or if this is not known, on the party in the best position to negotiate a settlement (the best briber). According to this model it will only be efficient to enjoin a defendant when he is the least cost abater, or, in the absence of such knowledge, the best briber. However, this approach can, at best, only ensure results which are economically efficient *inter partes* and does not consider the effect of the nuisance on third parties.

Alternatively the courts can balance the social costs of the nuisance involved against the cost to its causer of abating the nuisance by ceasing the activity which creates it or carrying on the activity in such a way so as not to constitute a nuisance. Thus, only when the activity in question is detrimental to society will liability be imposed on the polluter⁶⁰.

Whether a method involving economic efficiency *inter partes* or referring to the wider community is adopted, a socially just decision cannot be guaranteed. In the former case, liability may be placed on the victim of a nuisance if he is the least cost abater. Using the latter approach a plaintiff may be denied a remedy if the activity causing the nuisance is considered to benefit society.

Our society does not advocate the placement of liability on the party in the best position to solve a problem regardless of the conduct of the parties involved. Similarly, we do not perceive as just the denial of minority rights in favour of the wider community.

Thus, it would seem, economic models do not offer a complete answer to solving nuisance disputes. However, they may provide the courts with a useful tool, particularly in deciding on a remedy after liability has been allocated. In effect the court would, while retaining the "polluter pays" principle, ensure the remedy given to the plaintiff is the most economically efficient one available.

⁵⁸ Coase, The Problem of Social Cost (1960) 3 Journal of Law and Economics, 1.

⁵⁹ Calabresi and Melamed, Property, Rules, Liability and Inalienability: One View of the Cathedral, (1972) 85 Harv. L.R. 1089.

⁶⁰ Michelman, Pollution as a tort (1981) 80 Yale L.J. 697.

Damages in a nuisance case represent an estimate of the detriment the defendant's activity is causing to the plaintiff. However, in the case of an injunction the harm to the defendant caused by granting the remedy may bear no relation to the injury the nuisance caused to the plaintiff. Generally, where a defendant has acted in good faith, damages will be the fairer remedy *inter partes*.

2. *The concept of relative detriment used in the United States*

Before 1970 the United States courts generally considered that proof of substantial damage in a nuisance case gave rise to an absolute right to an injunction. In *Boomer v. Atlantic Cement Co.* the New York State Court of Appeal altered this position when they declined to enjoin a cement works causing a nuisance to local residents on the ground that the detriment the activity caused the plaintiffs was less than that which the defendant would suffer if an injunction was granted. It concluded the plaintiff's relief should be limited to an award of damages for past and future loss.

The court was, in effect, utilising an economic analysis of the consequences of potential remedies to the parties to achieve what it perceived to be a more equitable result than the old law would have provided. In making its decision the court declined to take into account the interests of third parties. The control of pollution, it reasoned, was the province of the legislature, not the judiciary. Thus, to a large extent, the public interest was ignored.

In that case there was evidence to suggest the nuisance presented a health risk to the neighbouring community⁶¹. Given that the court's permitting of this nuisance could have allowed it to continue unabated perpetually, it could conceivably have been in the public interest to force the factory to close and make its workers redundant.

By merely giving account to relative hardship in allocating a remedy, it is possible the court in *Boomer* provided a less socially desirable remedy than an injunction. Few people would see justice in a decision which enables a socially undesirable activity to continue, giving a remedy only to the parties to the action, and allowing the nuisance unabated while harming the wider community.

It is difficult to accept that the preservation of the public interest is any less the domain of the courts than is the expropriation of property rights. Arguably the latter can only be justified if due consideration is given to the former.

V CONSIDERATION OF THE PUBLIC GOOD: THE CANADIAN EXPERIENCE

The Canadian judiciary is, in theory, governed by A.L. Smith L.J.'s "good working rule" in its use of Lord Cairns' Act, as much as its English counterpart. Yet in practice Canadian courts have rendered decisions which are difficult to reconcile with *Shelfer*. At times it would seem judges in that jurisdiction are prepared to ignore that precedent if the public interest sufficiently justifies it.

In *Black v. Canadian Copper Co.*⁶² a case involving a nuisance to residents by smoke from neighbouring nickel mines, Middleton J. had no qualms about

⁶¹ See Commentary N.Y. U.L.R. 1970, vol.45, 1919.

⁶² (1917) 12 O.W.N. 243.

expropriating individual property rights for the public good. He concluded:

⁶³ “If the mine should be prevented from operating the community could not exist at all . . . The Court ought not to destroy the mining industry — nickel is of great value to the world — even if a few farms are damaged or destroyed.”

Thus, an injunction was refused and damages granted instead.

*Bottom v. Ontario Tobacco Leaf Co.*⁶⁴ involved a nuisance by fumes from a tobacco processing factory, in circumstances where granting an injunction in favour of the solitary plaintiff could have put two hundred people out of work. A lower court held, against the evidence, that there was no actionable nuisance (as I have suggested, an unsatisfactory means of mitigating the harsh consequences of the conventional approach)⁶⁵.

The Ontario Court of Appeal found there was a legal nuisance, but limited the plaintiff’s remedy to damages under Lord Cairns’ Act.

MacDonnell J.A., like the rest of the court, failed to consider the *Shelfer* test properly. However, he did note:⁶⁶

“(I)t has been said these rules are more liberally construed in Canada than in England.”

Riddel, J.A. commented:⁶⁷

“The public good can never be absent from the mind of the court when dealing with a matter of discretion.”

A Canadian commentator described the approach of his judiciary to Lord Cairns’ Act in the following manner:⁶⁸

“The crucial factor will always be the balance of convenience and the courts will be astute to prevent their aid being used as an instrument of injustice or oppression.”

English courts have rarely demonstrated such perception. The *Shelfer* test is yet to be accepted in New Zealand law⁶⁹. In recent years our courts have reacted favourably to Canadian-initiated developments in the law⁷⁰. It may well be that our courts will opt for the flexible approach of the Canadian judiciary rather than the strict English method.

VI THE ARGUMENT FOR A NEW APPROACH

I will now consider whether the dangers inherent in a relaxation of the conventional approach towards the discretion to award damages in lieu of an injunction in nuisance cases outweigh the likely benefits of such a reform.

Arguments against a more flexible approach:

(a) The compulsory purchase of property rights by the courts is unacceptable.

⁶³ At 252.

⁶⁴ (1935) 2 D.L.R. 699.

⁶⁵ Ante p.10.

⁶⁶ At 703.

⁶⁷ At 700.

⁶⁸ A.M. Linden, *Canadian Tort Law*, 3rd ed., 322.

⁶⁹ Though it could be argued that Hardie Boys J. implicitly accepted it in *B.N.Z. v. Greenwood*, supra, at 535. Without applying the test he concluded: “It is clear that if an actionable nuisance of a continuing nature is established, the plaintiff is entitled to have the nuisance stopped, and not be paid off in damages, for that would result in the Court licensing his wrongdoing *Shelfer* . . .”

⁷⁰ See for example the N.Z.C.A.’s decisions of *Haywood v. Giordani* [1983] N.Z.L.R. 140 and *Brown v. Heathcote County Council* [1986] 1 N.Z.L.R. 76.

English judgments supporting the *Shelfer* test sometimes resemble litanies declaring that the courts cannot expropriate personal property rights without offering an explanation for this assumption. Generally such arguments are based on the belief that such action is undesirable. However, at times judges appear to conclude that there is something besides policy constraining the courts. This is untenable. Rights are expropriated by the courts in other contexts and there appears to be nothing preventing expropriation of property rights in nuisance. After all Parliament, through Lord Cairns' Act, conferred the necessary power on the judiciary. Thus, the real issue is not whether the courts are permitted compulsorily to purchase property rights by denying injunctive relief and instead awarding future damages. Clearly they may. The question is whether they should.

Other jurisdictions have rejected the absolutist approach to land rights. Recently two English writers concluded:⁷¹

"There appears to be no historical justification behind the attribution of absolute status to certain interests."

It is argued, often emotively, that acceptance of the courts' ability to award damages in lieu of an injunction in nuisance cases would jeopardise the position of the weak at the expense of those wealthy enough to pay for the right to commit a nuisance⁷². However, the conventional approach does not necessarily provide landowners with better protection than would an alternative approach. The drastic consequences that can result from the traditional means of dealing with nuisances may on occasion lead the courts to avoid applying it, thus, leaving the complainant without a remedy.

Furthermore, the current situation allows the law to be used as a tool of oppression and makes it difficult to decide whom the courts should be protecting⁷³. Nuisance involves a conflict of interests. The fact that one party is entitled to a remedy because of the other's activity does not mean that that activity is not legitimate and should not be allowed to continue. The courts, in their discretion to grant damages in lieu of an injunction, should endeavour to produce fair results, avoiding placing dogma above the substantial justice of cases.

(b) The interests considered should be limited to those of the competing parties.

This principle prevents consideration of the public interest in nuisance cases. It is argued that it is the legislature's place to decide where the public interest lies and it is not for the courts to make policy decisions. Yet, to an extent, most cases involve policy decisions. By denying open consideration of broader issues these policy decisions are disguised. The result is inconsistent and incomplete justice⁷⁴.

It is anomalous that, while in negligence a defendant may escape all liability on the ground that the risk he took was justified by the social utility of his

⁷¹ *Ogus and Richardson*, supra, 297.

⁷² Judicial examples are numerous, e.g. Lindley and A.L. Smith L.J.J. in *Shelfer* and Lawton L.J. in *Kennaway v. Thompson*. Fewer academics take this stance but see Markesinis & Tettenborn, supra.

⁷³ Tromans, supra, 105 gives the example of Luton Corporation having to pay \$86,500 to purchase private rights to allow them to operate their sewage works. The Armer Committee Report (1960) M.H.L.G. 173 concludes that "in a number of cases the right to an injunction has resulted in the expenditure of very large sums of money, much of it public, to preserve private rights of relatively small value". Also see *Cowper v. Laidlaw*, supra.

⁷⁴ E.g. *Allen v. Gulf Oil* (supra).

action⁷⁵, in nuisance the court will not allocate a different remedy although it is apparent that the defendant's activity benefits the wider community.

Furthermore, it is irrational to expect the legislature to pass laws covering any possible eventuality in private disputes and ensuring all future interests of the community are protected. It is unreasonable for the judiciary to blinker itself to broader questions of policy and sacrifice the public good in the name of principle.

(c) Equitable damages do not offer complete justice.

This proposition has been considered by neither the judiciary nor commentators. However, it is perhaps the best argument in favour of granting injunctions as of right in nuisance actions.

It is generally accepted that, in awarding damages in lieu of an injunction, the courts will assess the compensation according to the loss the nuisance causes to the economic value of the plaintiff's land. However, if the nuisance is by way of interference with the plaintiff's enjoyment, such an assessment provides a complete remedy only if the plaintiff immediately relocates. For, if he does not he must continue to endure the nuisance.

In order to illustrate this proposition one should consider a hypothetical case of two plaintiffs who are awarded future damages for a nuisance by smell. The first immediately relocates and is adequately compensated (arguably) by the damages given for the loss in the value of his property. The second landowner however, lives out his life on his nuisance-affected property. When he dies he leaves by will land which has been devalued by the continuing nuisance. While he was compensated for this loss, he received no remedy from the date of the award of damages for lifelong interference with enjoyment of his property.

However, a basis for providing complete relief is available if it is accepted that a plaintiff who relocates, following an award of permanent damages, is suffering a further loss by giving up his property. In the case of a continuing nuisance by interference with personal enjoyment, in addition to making an award for servitude to the land, the courts could give damages for the loss of enjoyment or distress which could be said to be bound to result from the plaintiff's remaining on his nuisance-affected land or relocating. The loss from either could be notionally regarded as being equal, meaning the court would not have to know what the plaintiff was going to do following its decision for it to be able to provide a complete remedy. Such an approach would arguably be appropriate, as the plaintiff inevitably faces this dilemma following the court's decision. Whichever option the plaintiff chooses, it could be said he suffers loss of enjoyment by losing the right to remain on his property protected from substantial interference.

(d) An award of damages for future loss will not encourage polluters to abate.

This is also an argument with some merit. Certainly once the defendant has paid damages he has effectively purchased the right to cause a nuisance, a fact which will not encourage him to take steps to lessen the nuisance. However, this should not necessarily be a fatal consideration where the court

⁷⁵ E.g. *Watt v. Hertz C.C.* [1954] 1 W.L.R. 835, where a fireman was injured when travelling in an improperly equipped vehicle. It was held that the social utility of the act justified the risk — a fact which must have been of small consolation to him. This could be seen as a court removing an individual's right to compensate for injury from being exposed to a foreseeable risk.

concludes that it is more desirable that a defendant be allowed to commit a nuisance than that his activity be enjoined.

It has been argued that a policy of charging polluters rather than enjoining them will cause them to take into account pollution, a factor which has previously been outside their costs, and make them more responsible in this area⁷⁶. However, under such a policy, polluters are only likely to endeavour to control their emissions to the extent to which the damages likely to ensue from an action against them exceed the cost of restricting the discharge. Thus, it may be that the threat of an injunction is likely to make polluters take account of their emissions. However, a reform of the conventional approach need not lead to a depreciation in the effectiveness of long term incentives for polluter responsibility. An award of damages in lieu of an injunction is discretionary and should depend on the causer of the nuisance making due effort to control pollution from his activity. The threat of an injunction would remain and should be imposed on defendants who have failed to act responsibly.

I would conclude that none of the arguments against granting damages in lieu of an injunction are so weighty as to preclude the courts from employing that remedy where it would offer a more just award than an injunction.

VII A NEW TEST FOR THE STATUTORY DISCRETION

If the courts were to reject the *Shelfer* test it is likely that they would develop new rules to govern the exercise of Lord Cairns' Act. Would it be possible to develop a test satisfactorily limiting the use of the statutory discretion, without denying its use altogether, (as A.L. Smith L.J.'s good working rule has effectively done) by allowing Lord Cairns' Act to be used flexibly, without allowing the courts' arbitrary resort to the remedy of equitable damages? While commentators have called for the courts to permit a genuine discretion to award damages in lieu of an injunction⁷⁷, none has suggested a framework for its use.

Most would accept that, in the absence of a good reason to the contrary, a plaintiff should be entitled to have any unlawful interference with his land terminated. Therefore, I consider it is still appropriate to limit the courts' ability to grant damages in lieu of an injunction.

I would propose that an injunction be granted unless an award of future damages for nuisance would be in the public interest and not oppressive to either party to the action. In determining this question the courts should have regard to:

- (i) the effect the remedies would have on the parties to the action,
- (ii) the effect of the remedies on third parties,
- (iii) the extent to which an award of damages would allow the plaintiff to abate the nuisance, and
- (iv) the conduct of the parties to the action.

None of these considerations would be decisive. Generally, if all the other factors were neutral, one consideration militating against an injunction would be sufficient to justify an award of equitable damages.

If the loss the defendant would suffer from an injunction being granted was out of proportion to that which the plaintiff was suffering, consideration

⁷⁶ Tromans, *supra*, 105.

⁷⁷ E.g. Jolowicz (*supra*) and Todd (*supra*).

(i) would favour award of damages. Similarly, if third parties would suffer more from the granting of an injunction then they would from its refusal (ii) would favour damages.

If the plaintiff was “the least cost abater” and an award of damages would allow him to abate the nuisance, consideration (iii) would support an award of damages.

The first three factors are, to a large extent, economic considerations. As long as adequate justice can be provided, the reaching of economically efficient decisions is in the public interest. These criteria would promote such decisions.

The fourth factor is essentially a traditional equitable consideration. The conduct of the parties may mean that a remedy which might otherwise have been inappropriate should be given in order, either to accord a just decision, or to ensure that, in the public interest, such conduct is discouraged, or both.

Where considerations favoured different remedies the court would have to weigh all the factors in order to come to a decision. Consider two situations:

(i) A case with facts equivalent to *Bellew v. Cement Ltd*⁷⁸

Is the plaintiff entitled to an injunction? The first consideration of relative detriment clearly favours an award of damages. The defendant clearly has more to lose than the plaintiff has to gain from the award of an injunction.

The second aspect the court would be required to examine also suggests an injunction would be inappropriate. The community has much to lose from the activities being enjoined.

The third consideration, however, favours the plaintiff, as there is little he can do to abate the nuisance.

Finally, the conduct of the defendant would not require that an injunction be awarded to do justice to the plaintiff and act as a warning to others. The plaintiff knowingly “came to the nuisance” and in some jurisdictions would not be entitled to a remedy.

In this case it is almost certain an injunction would be denied and future damages awarded instead, as such an outcome would be in the public interest and not oppressive to either party.

(ii) A hypothetical case with facts parallel to those in *B.N.Z. v. Greenwood*⁷⁹

The plaintiff’s employees are affected by glare from the defendant’s building. In *B.N.Z. v. Greenwood* Hardie Boys J. concluded, that while there was no question of granting damages in lieu of an injunction⁸⁰, there would be no actionable nuisance if the defendant provided the plaintiff with blinds. A similar result could be reached using the new test for awarding damages in lieu of an injunction.

The relative detriment a decision could have on the parties is probably not significantly different. Although in *B.N.Z. v. Greenwood* the defendant sought to argue public interest, there is little third party interest in this case, as the parties to the action are the only ones who would be directly affected by the court’s decision. The conduct of the defendant was not disintitling. The plaintiff’s grievance is bona fide. Thus, three of the factors are essentially neutral and would not alone justify an award of equitable damages.

However, by installing blinds the plaintiff could abate the nuisance. This

⁷⁸ The facts are stated ante p.7.

⁷⁹ [1984] 1 N.Z.L.R. 525.

⁸⁰ Indeed Hardie Boys J. appeared to conclude that such an award could never be made where the plaintiff sought an injunction and there was proof of an actionable nuisance: see p.535.

being so, it would be unreasonable to force the defendant to make a major alteration to his building when such a simple and inexpensive alternative exists. An award of future damages (enabling the plaintiff to abate the nuisance if he wishes) would be equitable, for, as I have concluded, other things being equal, an economically efficient decision is not only fairer *inter partes* than a decision which is not, but is in the public interest.

An approach such as the one outlined here, giving the judiciary a wide discretion to award damages in lieu of an injunction and governed by broad considerations, merits examination. It would offer the courts greater flexibility, giving them the opportunity to deliver decisions, which are more equitable *inter partes* and more socially desirable than current decisions, by taking into account considerations of economic efficiency without ignoring the real justice of each case.

VIII CONCLUSION

In the case of conflicting interests, if one type of interest is overprotected, others' interests will inevitably be prejudiced. This has occurred in nuisance where the judiciary has attributed absolute status to the right of individuals to quiet enjoyment of their land to the detriment of the right of individuals to use land as they wish and of the public interest.

The judiciary has gone too far in protecting individual property rights, to the extent that, in certain situations, legal principles require the courts to deliver socially undesirable decisions. The area is effectively one of policy. It must be asked whether it is good policy to continue to uphold property rights as absolute.

Shelfer is a case without compelling reasoning. The test it produced is an anachronism. In a number of cases courts have recognised that it is against public policy to grant injunctions in every case of nuisance. However, this realisation has not been given effect through direct reform. Instead the courts have given decisions which have adversely altered the substantive law and/or cannot be justified on their facts. Moreover, these decisions do not provide the justice which an application of Lord Cairns' Act could achieve.

There is insufficient justification for continuing the policy of automatically granting an injunction upon proof of an actionable nuisance. Where it offers the more just remedy an award of damages should be made in lieu of an injunction.

I would conclude that the experience of overseas jurisdictions suggest that courts should be able to give effect to their discretion to grant damages in lieu of an injunction. Our own courts should be wary of the consequences of pursuing too inflexible an approach.